The Minnesota Supreme Court 1965-1966

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The Minnesota Supreme Court

1965-1966

The Minnesota Supreme Court Note comprehensively surveys significant decisions of the 1965-1966 term. The decisions selected were thought to represent new developments in Minnesota law or otherwise to be of interest to members of the Minnesota Bar. The results reached by the court are analyzed and evaluated in terms of their effect upon Minnesota law and are frequently compared with the law of other jurisdictions. While the decisions are discussed individually, they are arranged according to the principal legal issue considered; this arrangement, however, is merely one of convenience, since many of the cases involve issues from several areas of the law.

Constitutional Law: Accused Need Not Submit to Pre-trial Exam by Prosecution Psychiatrists

Anticipating a defense of temporary insanity to a charge of first degree murder, the state sought and obtained a court order directing defendant to submit to a pre-trial psychiatric examination. Defendant petitioned the Minnesota Supreme Court for a writ of prohibition restraining enforcement of the order. The court held that by compelling defendant to submit to a psychiatric examination the order violated his privileges against self-incrimination as guaranteed by the federal and the Minnesota constitutions. The court found further that, absent a statutory grant of authority, trial courts lack power to enter an order permitting the state to administer such a psychiatric examination, without the consent of the defendant. *State v. Olson*, 143 N.W.2d 69 (Minn. 1966).

The privilege against self-incrimination grew out of popular opposition to the inquisitorial practices of the English ecclesiastical and common law courts during the Seventeenth Century.  

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1. U.S. CONST. amend. V.
2. MINN. CONST. art. 1, § 7.
The privilege was later recognized by the Colonies and today is
guaranteed by the fifth amendment to the federal constitution
and the constitutions of most states.4

Aside from the area of police interrogation, the United
States Supreme Court has established no formal test to govern
the determination of whether a given extraction of evidence falls
within the proscription of the fifth amendment. The privilege
against self-incrimination is the right to remain silent unless the
defendant chooses to speak “in the unfettered exercise of his
own will.”5 The privilege is violated only by acts of compulsion.6
A witness or defendant is protected only from extractions of evi-
dence from his knowledge which “might tend to show” a crime7
or could support a conviction8 or subject him to fines and for-
feitures.9 Within these confines, the Court has urged a broad
and liberal construction of the privilege,10 and has urged the
states to adopt prosecution discovery procedures which will not
infringe upon individual rights.11

Neither the Minnesota nor the federal constitutional pro-
hibition has been construed to extend to extractions of physical
evidence unless the means of extraction is “shocking to the con-
science.”12 Such extractions of physical evidence are distinguish-
able from compelled psychiatric examinations which are extrac-
tions of knowledge and psychological evidence from the mind of
the defendant.13 However, several courts have rejected this dis-
tinction and held a compulsory psychiatric examination not
violative of the privilege.14 Other courts have concluded simi-
larly on the ground that a valid psychiatric diagnosis can be
made without compelling the defendant to speak to the state

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4. Inbau, Self-Incrimination 3-5 (1950); 8 Wigmore § 2250; see Morgan, supra note 3, at 1-23.
7. Id. at 564.
13. See Green v. State, 222 Ark. 308, 312, 259 S.W.2d 142, 143-44 (1953). “The boundary line is where not just affirmative participation
is essential but defendant’s knowledge is extracted from him against his will.” 8 Wigmore § 2265, at 400.
psychiatrist. It has been held in other jurisdictions that, since the defense of insanity is not a constitutional right but merely a privilege granted by the state, pleading or proving insanity can be conditioned upon defendant's cooperation with the state psychiatrist. The defendant is thus sometimes said to have waived his privilege against self-incrimination by raising the insanity defense.

The Minnesota Supreme Court found the threat of striking the insanity defense constitutionally prohibited. The court argued that the principal constitutional defect of the compulsory psychiatric examination lay in the possibility that evidence obtained through such an examination may be misapplied by the jury. It assumed that a valid psychiatric examination must include an interview between the defendant and the state psychiatrist, and foresaw that in the course of such an interview the accused may make inculpatory statements about his actions at the time of the crime alleged. If these statements were, in any part, the basis for the psychiatrist's expert opinion, they would be admissible on the issue of insanity. However, the privilege against self-incrimination prevents this compelled testimony from being considered by the jury in determining guilt. The court found instructions from the bench directing the jury not to apply such testimony to the issue of guilt insufficient to remedy the danger.

17. Wis. Stat. § 957.27(2) (1965).
20. The jury will hear all evidence as to insanity since the constitutional right to trial by jury extends to the issue of insanity. State v. Brown, 12 Minn. 448, 451 (1868); Bonfati v. State, 2 Minn. 99, 105-09 (1859); 1 WHARTON § 28; see State v. Simenson, 195 Minn. 258, 263-64, 262 N.W. 638, 641 (1935); State v. Hanley, 34 Minn. 430, 433, 26 N.W. 337, 338 (1886); State v. Gut, 13 Minn. 341, 359 (1866); 2 WHARTON § 532, at 378.
The court in Olson held the compulsory psychiatric examination forbidden on the additional ground that the trial court did not have the inherent power to order such an examination without specific statutory authorization. Other courts have not been so inhibited. Such power has been found in custom or in administrative convenience and by analogy to the common law power to aid indigents, to inquire into defendant's competence for trial, or to shape court rules which implement broad statutory power.

The Minnesota court's call for a legislative basis for such power seems most reasonable. By finding an inherent power, the many problems raised by the compelled psychiatric examination would remain inadequately resolved. Clearly a legislative solution is required to define the proper nature and scope of the examination, to devise effective methods to prevent jury misuse of psychiatric testimony, and to insure a uniformity of approach.

The reliance of the court on the problem of jury error suggests that a statute permitting compelled psychiatric examinations could be drawn without transgressing upon the constitutional prohibition. If compulsory examinations were absolutely proscribed, criminal defendants could fully prepare their own psychiatric evidence while blocking effective discovery of their condition by the prosecution. Furthermore, modern policies underlying the self-incrimination privilege do not apply to the compulsory psychiatric examination.

27. The Olson court stated first that a mid-trial compulsory examination would be permitted, later indicated that no compulsion should be permitted, and concluded with a negative inference that compulsion could be authorized only by legislation. State v. Olson, 143 N.W.2d 69, 72, 74, 75 (Minn. 1966).
28. The policies accepted as valid by Wigmore are inapplicable. There is no danger that the examination will be used to establish probable cause for arrest since it takes place after arrest. The danger of encouraging lazy police methods is negated since a psychiatric examination is the only scientific method available for discovery of sanity evidence. See Inbau, Self-Incrimination 6-7 (1949); 8 Wigmore § 2252. Compelled psychiatric exams may not be unreliable. Compare MacDonald, Psychiatry and the Criminal 47, 65-71 (1958); Menninger, A
However, a legislative solution to the problem will satisfy constitutional requirements only if it contains provisions effectively protecting individual rights. Some courts have suggested that the defendant be allowed to have a tape recorder or his lawyer or psychiatrist present and that the use of drugs and shock treatment be forbidden. It has also been suggested that the scope of the interview be limited to the mental state of the defendant at the time of the crime and the time of the interview, that the transcript of the interview be withheld from the prosecution until the defendant asserts the insanity defense, and that use of the defendant's statements to the psychiatrist as clues or as links in a chain of evidence be prohibited.

None of these safeguards, however, meets the principal danger seen by the Minnesota court—the practical inability of the jury to apply psychiatric testimony solely to the issue of guilt. This danger could be overcome by not allowing the examining psychiatrist to testify as to statements made by the defendant concerning the crime. However, insofar as those statements form, in any part, the basis for the psychiatrist's expert opinion, such a solution would cause an undesirable, and perhaps unconstitutional, change in the rules governing expert testimony. It would diminish the jury's ability to base its decision on inferences drawn from the details underlying the expert opinion. The expert opinion would tend to become conclusory. The jury would have little on which it could base its choice between conflicting opinions.

Some jurisdictions have taken a novel approach to the insanity defense by providing a bifurcated trial procedure. Colorado has a statutory procedure whereby the insanity defense can be tried first to a separate jury at the trial judge's discretion.  

30. Id. at 28, 210 A.2d at 775; see State v. Mulrine, 183 A.2d 831 (Del. Super. 1962).
32. Ibid.
33. Ibid.
35. 1964 Wis. L. Rev. 671, 682.
In California the guilt issue is tried first and, if the defendant is found guilty, his insanity defense is then tried before the same or a different jury. Such a procedure eliminates the danger of jury misuse without imposing limitations tending to render the examining psychiatrist's testimony ineffective. If combined with mechanisms designed to remedy the other problems presented by the compulsory psychiatric examination, this solution could effectively serve the interest of society favoring prosecution discovery of the insanity defense without infringing upon the rights of the accused.

The conclusions of State v. Olson are harmonious with the stronger protections afforded the accused by recent Supreme Court decisions expanding the scope of the privilege against self-incrimination. Certainly some of society's interest in discovery of facts necessary for law enforcement is sacrificed to the need to provide the accused with an effective guarantee against the use of compelled testimony in determining his guilt. However, short of the ideal resolution—a procedural change serving both interests—the rights of the accused are correctly held paramount.

Constitutional Law: County Reapportionment in Minnesota

Plaintiffs, voters of Olmsted County, brought suit to invalidate two districting plans adopted by the county board for

try both issues to the same jury made a compulsory exam a violation of self-incrimination privilege.

37. Cal. Penal Code § 1026. The objections to this solution are that it will not allow the prosecution discovery of defendant's mental state when full insanity is not a defense, and it will double the time and cost involved.

38. Absent such a procedural change, the defendant's tactical advantage could be partially offset by changing his burden of proof of insanity from the present fair preponderance of the evidence to proof beyond a reasonable doubt.


1. Plan I, adopted July 10, 1963, divided the population as follows:
   - First District: 19,182
   - Second District: 21,481
   - Third District: 8,708
   - Fourth District: 9,230
   - Fifth District: 6,931

Plan II, a slight modification of Plan I, was adopted while suit was pending.
use in the election of county commissioners. In compliance with statutory requirements, the plans limited the city of Rochester, containing sixty-two per cent of the county population, to two out of the five commissioner districts. The trial court held the plans invalid. On appeal, the Minnesota Supreme Court affirmed unanimously, holding that the population disparity among the commissioner districts violated the equal protection clause of the federal constitution.\(^3\) \textit{Hanlon v. Towey}, 142 N.W.2d 741 (Minn. 1966).

Prior to the redefinition of reapportionment standards in \textit{Baker v. Carr}\(^4\) and \textit{Reynolds v. Sims}\(^5\), the courts varied in their willingness to strike down local government reapportionment plans. Several state courts ruled that the county is merely an administrative subdivision of the state, wholly under the control of the legislature. Thus, county apportionment could not be subject to judicial review.\(^6\) Other state courts, however, recognized the right of the courts to set aside improper county apportionment. But the scope of judicial review was limited. These courts held that since, under their statutes, apportionment of local election districts was a discretionary function of the designated local officials, election districting could be invalidated only by showing that local officials had no rational basis for the disparities.\(^7\)

\(^2\) Each county shall be divided into as many districts . . . as it has members of the board. . . . [S]uch districts shall . . . contain as nearly as practicable an equal population. Counties may be redistricted by the county board after each state or federal census, except that no county shall . . . redistrict so that any city of the second, third or fourth class shall be in more than two commissioner districts in any one county.\textit{Minn. Stat.} § 375.02 (1965). (Emphasis added.)

\(^3\) The court in addition relied on \textit{Minn. Const.} art. 1, § 2: No member of this State shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers.

\(^4\) 369 U.S. 186 (1962).


In Minnesota, prior to Baker v. Carr, apportionment of county election districts was clearly subject to judicial review. From an early date, county election districts were required by statute to contain "as nearly as practicable equal population." However, the Minnesota Supreme Court interpreted the statute to mean that the board of commissioners had broad discretion in effecting equal population and only abuse of that discretion would invalidate any redistricting plan.

However, the validity of these older state decisions has become suspect. In a series of recent cases, the United States Supreme Court has ruled that the equal protection clause requires that congressional and legislative election districts be apportioned according to the principle of "one man, one vote." In a related case concerning city election policies the Supreme Court, while recognizing that the state in exercising power wholly within its interest is immune from judicial review, reiterated that this power could not be used to circumvent federally protected rights.

The general conclusion drawn from these two lines of cases is that county residents have a constitutional right to equally populated election districts. While the functions of the county government may be wholly under the control of the state legislature, its exclusive power, through the county board, to prescribe redistricting standards can not be used to abridge federal rights.

13. In addition one case implied that the "one man, one vote" principle was applicable to any elected legislative body whether state or local in nature. Reynolds v. Sims, 377 U.S. 553 (1964).
Based on this analysis many courts have struck down county districting plans that vary from the “one man, one vote” principle. However, not all courts have accepted the newer position. Some courts, while accepting the applicability of the “one man, one vote” principle, have enumerated factors which distinguish state and local apportionment standards.


16. Deviations based on ratio between largest and smallest commissioner election districts:

Approved
Griffin v. Board of Supervisors of the County of Monterey, 60 Cal. 2d 751, 388 P.2d 888 (1964).
Butler v. Board of County Commissioners Muskogee County, 413 P.2d 552 (Okla. 1966).

Disapproved
Ellis v. Mayor and City Council of Baltimore, 234 F. Supp. 945 (D.C. Md. 1964), aff’d, 352 F.2d 123 (4th Cir. 1965).
Hanlon v. Towey, 142 N.W.2d 741 (Minn. 1966).

17. See, e.g., Davis v. Dusch, XXIV Nat’l Municipal League, Court Decisions on Legislative Apportionment 143 (E.D. Va. 1966); Simon v. Lafayette Parish Police Jury, 226 F. Supp. 301 (W.D. La. 1964) (must consider which portion of the population is more affected by factors such as property taxes, drainage, roads, etc.); Griffin v. Board of Supervisors of the County of Monterey, 60 Cal. 2d 751, 388 P.2d 888 (1964).
courts still employ the "abuse of discretion" test. A diminishing minority of the state courts continue to argue that the county is completely under the control of the state legislature. These courts refuse to review the validity of any county districting plan until the Supreme Court specifically recognizes that "one man, one vote" applies to local units.

The main difficulty in the cases applying the "one man, one vote" principle to local units appears to be in translating the constitutional principle into appropriate standards and procedures that reflect the peculiar structure and functions which differentiate local from state and federal units. The leading case appears to be Ellis v. Mayor and City Council of Baltimore, involving a city council redistricting plan, employing a very precise application of the "one man, one vote" principle by demanding virtually mathematical exactness in determining equality. The court refused to recognize that any factors justified a variation between district sizes.

In the instant case, the Minnesota court, relying on Ellis, struck down a districting plan with a 2.76 to 1 largest-smallest district variance. The court carefully limited its holding to a statement that the "one man, one vote" principle applies to county government units. No mention is made of why a simi-

21. Ellis recognized only two methods of reapportionment: elections at large and strict redistricting and/or strict reapportionment. In addition, Ellis specifically rejected any plan based on registered voters, striking down a 1.61-1 variation based on voter registration.
22. Although not argued by counsel, the opinion suggests it could have been argued that since the legislature has the prerogative of providing for either the election or the appointment of the county board, any voting procedure would be permissible. However, the opinion goes on to point out that, although the court acknowledges the right of the legislature to appoint the county board, once the legislature provides for an election of the board, that election is governed by the applicable constitutional principles.
lar result could not have been reached under the statute.\textsuperscript{23} In addition, there is little discussion of what, if any, factors may be considered in deviating from the "one man, one vote" standard.

Arguably, however, the numerical variation standards and procedural modifications applied at the county level must be different from those applied at the state level. Most counties, unlike the city in the \textit{Ellis} case, have power to deal primarily with problems affecting only the rural section of its population.\textsuperscript{24} The division of governmental services, taxation, and functions between the county and the metropolitan area within the county may not be congenial to equalizing voting power under state legislative reapportionment standards.\textsuperscript{25}

The court in \textit{Hanlon} was not unmindful of the problems that could result from its decision. The court recognized that redistricting a county upon population alone could result in unfair domination by the metropolitan majority and submerge the "greater interest" of the rural minority.\textsuperscript{26} In fact, the majority

\begin{itemize}
\item \textsuperscript{23} See note \textsuperscript{2} supra.
\item \textsuperscript{25} Moreover, in view of the differences between county and state governments, there are additional considerations applicable to county districting which can justify a departure from equality of population. County governments perform a number of important functions for unincorporated areas which are ordinarily performed entirely or in large part by city governments in incorporated areas. Among these functions are police and fire protection, park and recreation services, street construction and maintenance, and the adoption and enforcement of local police measures such as those concerning sanitation, zoning, and the licensing of businesses.
\item \textsuperscript{26} \textit{Griffin v. Board of Supervisors of the County of Monterey}, 60 Cal. 2d 751, 756, 388 P.2d 888, 891 (1964). (Emphasis added.)
\item \textsuperscript{2} \textit{142 N.W.2d} at 747.
\end{itemize}
opinion offered a suggested solution to this problem:

Conceivably, in exercising those powers which necessarily may affect the interest of some residents more than others, a unanimous or four-fifths vote of the county board may justifiably be required without running afoul of federal constitutional requirements.27

This is, indeed, a disturbing suggestion. From a practical point of view, it would be difficult to determine which actions would require a four-fifths or unanimous vote. Unless situations calling for this procedure were carefully enumerated by the legislature, each action taken by the county board would involve a conflict between rural and metropolitan representatives as to whether a unanimous or four-fifths vote was needed. Constitutionally, it is difficult to believe that such a procedure would be acceptable. Although the districts would be equally apportioned, such a voting procedure would, in effect, vest a veto power in the hands of a minority rural interest.28 Thirty-eight per cent of the population electing three out of five commissioners does not seem significantly different from thirty-eight per cent of the population electing two out of five commissioners with a veto over any decisions adopted by the majority. This system could result in just as great a dilution of voting power as the present system. In fact, such a system could result in an even greater dilution since, under the present system, all three rural commissioners must act in concert to accomplish their objective. Under the court's proposal, one commissioner, representing an even smaller minority, could frustrate the majority position. Although the plan would be true to the "one man, one vote" principle in terms of population variance, it would defeat

27. Id. at 747 n.19. (Emphasis added.)

28. Under the present system, the smallest number of voters that can elect a majority of the board is:

<table>
<thead>
<tr>
<th>District</th>
<th>Votes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Third</td>
<td>8,708</td>
</tr>
<tr>
<td>Fourth</td>
<td>9,230</td>
</tr>
<tr>
<td>Fifth</td>
<td>6,931</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>24,869</strong></td>
</tr>
</tbody>
</table>

If the districts were all equal in population, 13,107 voters would reside in each district. Under a unanimous voting procedure, 13,107 could elect a commissioner capable of vetoing board actions. Under a four-fifths procedure 26,214 voters would be able to frustrate the majority. Although this latter figure is a slight numerical improvement over the present divisions, this improvement is not significant and certainly still constitutionally objectionable. The plan suggested by the court would mean that the rural representatives could no longer impose their will on the commissioners representing the metropolitan area. However, with the presence of a veto power, this change would seem to have little or no constitutional significance.
the very purpose for which such a plan was conceived.29

A recent case involving reapportionment of a city council demonstrates another technique which attempts to establish equality of voting power while maintaining a voice in the rural minority.30 Approving a plan providing for eleven councilmen to be elected at large, four from the city as a whole and one from each of seven boroughs, the court stated that:

The principal and adequate reason for providing for the election of one councilman from each borough is to assure that there will be members of the City Council with some general knowledge of rural problems to the end that this heterogeneous city will be able to give due consideration to questions presented throughout the entire area . . . .

[T]he history—past and present—of the area and population now comprising the City of Virginia Beach demonstrates the compelling need, at least during an appreciable transition period, for knowledge of rural problems . . . .

However, such a plan is of dubious value. Assuming each district to be unequally populated, as would necessarily be the case in a county such as Olmsted, the nomination of candidates by each district could be constitutionally objectionable. In addition, the final decision as to which nominee to elect still would be completely in the hands of the metropolitan voters.

Essentially, the push for county reapportionment points up the even larger difficulties in the county government system. Malapportionment, in this instance, is merely indicative of the need for wholesale examination of governmental structure on the local level so as to make that structure more reflective of the wants and needs of a vastly changing population.32 The need for consolidation of the county-city functions combined with the increasing federal-county and state-county relationships

29. In counties like Olmsted, an at large election system without procedural modifications could completely submerge the voice of the rural minority. Sixty-two per cent of the population divided into five districts would put over twelve per cent in each district. Thirty-eight per cent divided into five districts would put over seven per cent in each district. Conceivably, the city majority could elect all five commissioners.

31. Id. at 147. The holding is based on Reed v. Mann, 237 F. Supp. 22 (N.D. Ga. 1964) (commissioners may be required to reside in districts, although elected at large).
32. See generally U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, ALTERNATIVE APPROACHES TO GOVERNMENTAL REORGANIZATION IN METROPOLITAN AREAS (1962); U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, GOVERNMENTAL STRUCTURE, ORGANIZATION, AND PLANNING IN METROPOLITAN AREAS (1961).
results in the county, or a modification of it, evolving as an important unit of local government. The county government unit is not now equipped to play such an important role.

The county in most states is thoroughly strait-jacketed by constitutional provisions. County officers are characteristically named in the constitution, county boundaries have constitutional protections, relatively few states permit a free choice of optional forms of county government and fewer permit the adoption of locally drawn "home rule" charters. The county continues to be considered primarily in its traditional role as an instrumentality of the state even though in urban areas it increasingly assumes the responsibility for providing municipal-type services. Structural changes in county government are important as significant demonstrations of efforts to require counties to do a different job in a different governmental environment.

The preceding comments are not intended to dispute the validity or necessity of bringing county commissioner election districts within the requirements of the equal protection clause. No attempt is made to argue that the county is an administrative unit and thus outside of the "elected legislative body" test suggested by Reynolds. Nor is it contended that, because the Supreme Court has not applied the principle to local governments, the application is bad. These comments are intended to argue for a workable transitional program for applying the "one man, one vote" principle to county governments in Minnesota. Implicit in this argument is the need for providing the county boards with the tools for effecting proper reapportionment as part of an overall reorganization of the county-city relationship. From the court, this demands a formulation of constitutional standards that reflect the peculiar nature of the county governmental unit. From the legislature, it demands statutory changes to allow the county board to integrate, consolidate, and streamline its functioning to meet the demands of the growing metropolitan areas. Finally, from the county boards, it demands a

34. Cassella, Metropolitan Government, II CONSTITUTIONAL ASPECTS OF STATE-LOCAL RELATIONSHIPS 4, Citizens Research Council of Michigan (1961) cited in 1962 ADVISORY COMM'N REPORT, op. cit. supra note 32, at 41. In this connection, it must be noted that reapportionment and reorganization are inseparable. Reapportionment, by itself, will not equip the county government to capably answer the needs of its diverse population.
36. In order to meet new functional demands, legislation must be enacted to authorize counties and municipalities to take mutual and co-ordinated actions to consolidate the present duplication of power and
co-ordination of proper reapportionment and suitable reorganization measures so as to reach a balance between the demands of the rural minority and the increasing metropolitan majority.

Constitutional Law: Implied Consent To Search and Seizure in Home of Accused

After identifying the accused's wife as the victim of a brutal murder, police entered the accused's home—the scene of the crime—and without a warrant made an immediate search of the premises. A second search occurred approximately one hour after the police initially entered the house. During this more thorough search, the police removed certain items which led to apprehension of the killer and corroboration of his testimony, which was a major portion of the prosecution's evidence against the accused. The accused appealed his conviction of first degree murder, posing as error, inter alia, that evidence procured from the second search of the scene of the crime should have been suppressed as the product of an unlawful search and seizure. The Minnesota Supreme Court affirmed the conviction and held the challenged evidence admissible as the product of a lawful search and seizure. State v. Thompson, 139 N.W.2d 490 (Minn. 1966).

In the leading cases of Mapp v. Ohio¹ and Ker v. California,² the United States Supreme Court held that the exclusionary rules of evidence applicable in federal criminal prosecution involving illegal searches and seizures also apply to state prosecutions, and that the "reasonableness" of searches and seizures conducted by state authorities is to be decided according to federal constitutional standards.³ Thus evidence obtained from the search of an accused's dwelling without a warrant is generally inadmissible unless incident to a lawful arrest.⁴ An exception to

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³. The majority held that federal constitutional standards are to be applied in judging admissibility of evidence in state actions. Id. at 33.
⁴. See Carroll v. United States, 267 U.S. 132 (1925); Johnson v.
this rule is the "exceptional circumstances" doctrine under which police may make an immediate search of the premises to prevent destruction of evidence or to protect life.\(^5\) Further, constitutional protection against unreasonable searches may be waived by consent to a search\(^6\) or by an invitation to conduct a search.\(^7\) The Supreme Court, however, has not spoken directly to the questions of what is an "unreasonable" search in the Mapp-Ker context or what constitutes consent to a search.

Although in most cases consent to search is given prior to or contemporaneously with a search, a California decision held that consent, given after a search was conducted, ratified and legalized the search.\(^8\) Consent must be positively established\(^9\) and must be unequivocal and specific.\(^10\) In some jurisdictions immunity is not waived by one who neither objects nor consents to a search,\(^11\) since a citizen is not required to perform any

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6. Judd v. United States, 190 F.2d 649 (D.C. Cir. 1951); Campbell v. United States, 151 F.2d 605 (6th Cir. 1945); United States v. Shules, 65 F.2d 780 (2d Cir. 1933); DeLapp v. United States, 53 F.2d 627 (8th Cir.), cert. denied, 284 U.S. 684 (1931).

7. See United States v. Thomson, 113 F.2d 643 (7th Cir. 1940); Milyonico v. United States, 53 F.2d 937 (7th Cir. 1931), cert. denied, 286 U.S. 551 (1932); Gant v. State, 114 Fla. 23, 152 So. 710 (1934).

In City of St. Paul v. Stovall, 225 Minn. 309, 30 N.W.2d 638 (1948), the court sustained a search of the home of an accused after he had invited and made no attempt to stop a search by officers who had disclosed the nature of the complaint.

8. People v. Allen, 298 P.2d 714 (Cal. Dist. Ct. App. 1956). But see Hamel v. State, 317 P.2d 285 (Okla. Crim. 1957), where officers without a warrant peered through the transom of a hotel room and saw contraband lying on the bed. They then requested the accused, a hotel clerk, to open the door, saying he need not do so and that they would post a guard and obtain a warrant if he refused. The court held that his acquiescence was not consent and the search, which was illegal from the beginning, could not be ratified even by a valid consent. In dictum the court said that once the officers had peered into the room, even a valid warrant obtained later would not render the evidence admissible.


10. Karwicki v. United States, 55 F.2d 225 (4th Cir. 1932). See also Note, 113 U. Pa. L. Rsv. 260 (1965), which notes that courts will often indulge every reasonable presumption against waiver of fundamental constitutional rights and will not "presume acquiescence."

affirmative act to retain his constitutional protections.\textsuperscript{12} Thus peaceful submission to a search is neither consent nor an invitation,\textsuperscript{13} but is merely a demonstration of willingness to submit to the inherent authority of the law.\textsuperscript{14}

Although Minnesota adheres to the general rule that a search of a house without a warrant is illegal unless incident to a lawful arrest,\textsuperscript{15} the standards employed to determine the validity of waivers of the constitutional safeguard against unreasonable searches and seizures are not clear.\textsuperscript{16} The Minnesota court upheld a search of the accused's automobile arising from what

\begin{itemize}
\item \textsuperscript{12} Dade v. State, 188 Okla. 677, 112 P.2d 1102 (1941); State v. Warfield, 184 Wis. 56, 198 N.W. 854 (1924).
\item \textsuperscript{13} See United States v. Pollack, 64 F. Supp. 554 (D.N.J. 1946). In United States v. Sully, 56 F. Supp. 942, 944 (S.D.N.Y. 1944), the court stated: "[W]aiver must be by the defendant himself and also purely voluntary on his part. . . . Acquiescence in the search, without clear consent, or mere submission in an orderly way to the actions of the federal agents, is not a waiver." Bull v. Armstrong, 254 Ala. 390, 48 So. 2d 467 (1950), held that, where one permits a search of his premises under an apparently valid search warrant, his permission is not construed as a freely given invitation to search.
\item In State v. Harris, 265 Minn. 260, 121 N.W.2d 327, cert. denied, 375 U.S. 867 (1963), the Minnesota court said it was a question of fact whether the accused had consented to a search rather than merely having submitted to police authority. Accord, Blackburn v. State, 145 Tex. Crim. 384, 168 S.W.2d 662 (1943).
\item \textsuperscript{15} DUNNELL, MINNESOTA DIGEST Searches & Seizures § 8708a, citing Agnello v. United States, 269 U.S. 20 (1925). No Minnesota Supreme Court cases are there cited, and none have been found; but two cases employing this rule have arisen in the Minnesota federal district court. Wida v. United States, 52 F.2d 424 (8th Cir. 1931); Kroska v. United States, 51 F.2d 330 (8th Cir. 1931).
\item \textsuperscript{16} The situation is no better in the area of standards for determining reasonableness of searches and seizures. "[T]he issue of reasonableness of a search and seizure is one of fact and depends upon the particular circumstances of each case." State v. Kinderman, 271 Minn. 405, 411, 136 N.W.2d 577, 582 (1965). And in State v. Sorenson, 270 Minn. 186, 134 N.W.2d 115 (1965), the court merely recognized that the fourth amendment does not condemn all searchers, but only those which are unreasonable. No specific guidelines, however, were advanced by either decision. The court had offered little assistance in its earlier decision of State v. Ryan, 156 Minn. 186, 194 N.W. 396 (1923), wherein it was stated that whether searches and seizures are unreasonable depends upon the character of the articles procured and circumstances under which they are obtained. See United States v. Rabinowitz, 339 U.S. 56 (1950); State v. Gebhard, 272 Minn. 336, 137 N.W.2d 168 (1965).}
\end{itemize}
police considered to be suspicious behavior where the accused had not objected to the search. The burden of proving lack of consent was placed upon the defendant who had not denied that he consented to a search and did not claim duress or coercion.\(^{17}\) In a decision rendered shortly thereafter, however, the court stated: "It is, of course, true that the consent must be freely given without any coercion or threats and that any claim of waiver of constitutional rights must be viewed with caution."\(^{18}\) This latter expression implies that consent must be affirmatively expressed and that the burden of proving a waiver is to be cast upon the party claiming consent.

In the instant case, the court overtly based its holding upon the accused's authorization of the second search,\(^{19}\) relying primarily upon his generally cooperative attitude and his failure to object to that search.\(^{20}\) However, reasonableness of the search may have been a second, though implicit, ground for the decision. Since several passages of the opinion emphasized the needs of the investigative process,\(^{21}\) the court was perhaps motivated at least in part by the difficulties an opposite conclusion would have

\(^{17}\) State v. Harris, 265 Minn. 260, 121 N.W.2d 327, cert. denied, 375 U.S. 867 (1963). The court in the instant case properly distinguished Harris as dealing with search of an automobile on the basis of the traditional distinction between searches of homes and searches of moveable objects. 139 N.W.2d at 508. An automobile can be removed from the jurisdiction during the time necessary to procure a warrant; a building cannot. See Henry v. United States, 361 U.S. 98, 104 (1959); Carroll v. United States, 267 U.S. 132, 153 (1925). The distinction, however, is open to criticism for its failure to account for the opportunity of the occupant of a building to destroy vital evidence before the police are able to procure a warrant.

\(^{18}\) For a contrary view on the burden of proof to show presence or lack of consent, see People v. Kaigler, 368 Mich. 281, 294, 118 N.W.2d 406, 413 (1962) (requiring the prosecution to present "clear and positive testimony").


\(^{20}\) "We think the evidence here sufficiently shows authorization of the search by the one entitled to object to it so that it cannot be said that the search and seizure were unreasonable." 139 N.W.2d at 507.

\(^{21}\) While at the hospital to which his wife had been taken, the accused, during a conversation with the detective in charge of the investigation, said that robbery might have been the motive for the attack on his wife and suggested that police search the basement of his home for a large sum of money he said was kept there. 139 N.W.2d at 500. In its discussion of search and seizure, however, the court did not mention the accused's suggestion that the police search his home. Further, when informed of the searches of his home, the accused voiced no objection, but "on the contrary showed every indication of his desire to assist in the apprehension of the perpetrator of the crime." Id. at 504.
imposed upon the investigation of crime. Thus the opinion
argued that to require a warrant in a case such as this might
prove an impossible impediment to the solution of crime.
Finally, it is possible that the court was influenced by the
accused's experience as a criminal lawyer for it is a fair infer-
ence that he was entirely aware of his constitutional rights.

The court ignored the fact that the accused's "consent" was
given after the search was begun. The opinion implied that,
since the accused initially assumed the role of bereaved husband
by cooperating with the investigation, he would have had to
consent to the search had the police requested it; therefore his
consent may be presumed. Thus it appears the court implicitly
ruled that a consent given after initiation or even after comple-
tion of a search ratifies the search, without analyzing the impli-
cations of such a determination. However, if peaceful submis-
sion to a search upon request denotes merely a willingness to

22. The police officers ought to be given an opportunity to
investigate a crime; and where the occupant of the premises
permits a search . . . he should not thereafter be permitted to
claim that objects found . . . should be suppressed as the pro-
duct of an unlawful search and seizure. Permitting the offi-
cers to make a search without a warrant at a time when the
occupant of the premises is not even suspected of the crime
lulls them into security. Thereafter excluding the objects
obtained . . . is obviously unfair. . . .
139 N.W.2d at 508.

Taking charge of the building in which a serious crime has been
committed until an exhaustive search can be completed, as was done in
the instant case, is apparently standard police practice in St. Paul. Tele-
phone conversation with Ramsey County Attorney, October 11, 1966;
139 N.W.2d at 506. Memo on file at the Minnesota Law Review. Of course, in most cases
the owner of a home in which such a crime has occurred would have no
objection to turning it over for a thorough examination.

For a helpful discussion of the permissible scope of an on-the-scene
investigation, see State v. Rees, 139 N.W.2d 406 (1966). See also

23. 139 N.W.2d at 506. Following the language of the fourth
amendment, Minn. Stat. § 626.08 (1965) requires the property to be
seized to be particularly described if a warrant is to be obtained. Since
at the time of the search in the instant case, the officers did not know
what items would be seized, under a strict interpretation of the statute
they probably could not have obtained a warrant. The court emphasized
that the search in question was crucial to discovery of the perpetrators
of the crime. 139 N.W.2d at 506-07. Thus it is reasonable to infer that
if a warrant is a precondition to a constitutional search and a warrant
could not have been procured, the guilty party or parties might never
have been found.

24. Again, no reference to this factor was made in the discussion
of search and seizure. Its only mention was in the statement of the case
at the beginning of the opinion. 139 N.W.2d at 495.
25. Id. at 508.
bow to apparent legal authority rather than consent, peaceful acquiescence to a search already in progress certainly cannot denote more. If anything, coercion of the accused would be more severe in the latter case, since he would be required to take affirmative steps—protests to the police search party—or his constitutional rights would be waived.

Unfortunately, a rationale of "consent" to validate searches in the absence of a warrant appears to be an inadequate vehicle for deciding the constitutionality of a search and seizure in view of the competing interests involved: solution of crime and preservation of an individual's right to privacy and security in his person, house, papers and effects. If the question of whether consent has been "freely given" is to be determined with fairness to the rights of the accused, the circumstances of each case should receive consideration in preference to excessive reliance upon automatic indices of consent. Investigating officers and often the courts would therefore be confronted with a number of intertwined, intricate questions which probe the hidden depths of the thoughts and emotions of the persons from whom consent to search must be obtained. The police would therefore be confronted with a dilemma: if their request to search is denied, search is precluded; but even if an apparent consent is given, evidence obtained from the search may be inadmissible if a court disagrees with the determination of the police that consent was "freely" given. Thus, depending upon how it is applied, a consent rationale would either sacrifice the interests of the individual to the use of rigid rules or cause searches to be a hazardous technique because of uncertainty as to their legality. And if the rationale were not applied consistently, neither interest would adequately be served.

It would appear the competing interests could better be accommodated by employing a rationale of reasonableness. Since an immediate search of the scene of a crime may be crucial to

26. See note 13 supra, and accompanying text.
27. See Boyd v. United States, 116 U.S. 616 (1885).
28. See note 23 supra.
29. See text accompanying note 18 supra.
30. The following are indicative of the questions which should be posed in considering the total circumstances underlying an alleged "consent": whether the person from whom "consent" was allegedly obtained was emotionally capable of giving an affirmative consent of his own free will; if so, whether that person was aware of and understood his constitutional right to object to the search; and if so, whether any actions of the police, even their request to conduct the search, operated in any way to coerce that individual into consenting to the search.
its solution, to require a warrant in all such cases would unduly impede the investigative function.\textsuperscript{31} A search without a warrant or consent which is limited to the “scene” of a violent crime should be considered reasonable if conducted immediately after commission of the crime.\textsuperscript{32} The police could then conduct a search with the confidence that, within fairly well defined limitations of time and area, legality of the search and admissibility of evidence obtained therefrom would not be open to question. In this context, there should be a distinct preference for society’s interest in solving crimes as against the individual’s interest in noninterference with his privacy. This choice between values is warranted in view of the serious threats such criminal conduct poses to the security of society.

However, subject to established exceptions other than consent, the interest of the individual should be protected by requiring the police to obtain warrants to conduct searches in all other cases. Although the police are equally hampered by a requirement to secure warrants to search scenes of nonviolent crimes, such crimes do not pose as serious a threat to society as do crimes of violence. And society’s interest would not appear to outweigh the interest of the individual under these circumstances.

The instant case may stand for the proposition that whenever one “consents” to a search of his property, whether before or after the fact, the fruits of that search are admissible in evidence against him. At the very least, the decision will require a citizen to object immediately upon discovering the police in the process of searching his home, or risk that any evidence discovered in the search may be used against him due to his “consent” to the search. Nothing would seem more contrary to the spirit of the fourth amendment or less in keeping with the holdings of \textit{Mapp} and \textit{Ker}. Thus, whatever is thought of the result of the instant case, the rationale leading to it is unsatisfactory, and the implications of the court’s language are unduly

\textsuperscript{31} See note 22 supra.

\textsuperscript{32} This presumption should be applied to a general search of the entire premises. \textit{Contra}, State v. Hoyt, 21 Wis. 2d 310, 124 N.W.2d 47 (1963), rev’d on other grounds, 21 Wis. 2d 284, 128 N.W.2d 645 (1964). The court there upheld admission of evidence obtained in the room in which the body of the victim was found, but evidence found in another room was excluded because it was the product of a general search which was illegal in the absence of a warrant. This view would appear unduly restrictive, however, in view of the difficulty of obtaining a warrant in cases in which investigating officers cannot specify precisely what items they seek.
broad. Instead of relying on the consent theory, the court would have been on firmer ground had it chosen to rely upon the reasonableness of the search as part of an immediate investigation of the scene of a crime of violence. This approach would have sustained the search in the instant case, while leaving ample room for police investigative processes, but without creating the potential dangers inherent in the approach used.

Criminal Law: Habeas Corpus Available Even Though Petitioner May Not Be Entitled to Immediate Release From Prison

Petitioner was sentenced to an indeterminate term of ten to eighty years on his plea of guilty to the crime of first-degree robbery. The usual five to forty year sentence for first-degree robbery was doubled because of a prior felony conviction. Subsequent to the expiration of the appeal period, petitioner sought a writ of habeas corpus alleging that the prior conviction was obtained in violation of his federal constitutional right to counsel. The lower court denied the petition holding it premature since Holm had not yet served the maximum sentence for the underlying offense. On appeal, the Minnesota Supreme Court found the petition not premature and held that habeas corpus was available to provide the convicted prisoner with a hearing to determine the alleged denial of his federal constitutional rights. State ex rel. Holm v. Tahash, 139 N.W.2d 161 (Minn. 1966).

The historical function of the writ of habeas corpus was to obtain the speedy and immediate release of those illegally imprisoned. From this premise the Minnesota court developed the prematurity doctrine, requiring a prisoner to serve the maximum time of the valid indeterminate sentence before a habeas

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3. State ex rel. Carmody v. Reed, 132 Minn. 295, 156 N.W. 127 (1916), appears to be the origin of the prematurity concept in Minnesota.
4. There was at one time some question whether the prematurity doctrine required the petitioner to serve the maximum or minimum sentence. See State ex rel. Adams v. Rigg, 252 Minn. 283, 89 N.W.2d 898 (1958); State ex rel. Richter v. Swenson, 241 Minn. 414, 63 N.W.2d 265, cert. denied, 347 U.S. 979 (1954). In State ex rel. Flynn v. Rigg, 256 Minn. 304, 312, 98 N.W.2d 79, 85-86 (1959), this ambiguity was rather
corpus hearing on a challenged prior conviction could be granted. For example, in the instant case the prematurity rule would deny the habeas corpus remedy to the petitioner until he had served forty years of his sentence because, if the prior conviction had not been considered, petitioner could have been given a maximum sentence of forty years for the crime of which he was convicted.

The court suggested several reasons the instant petition should not be held premature. If the claim is proven, the case will be remanded for re-sentencing the petitioner. On such remand the maximum sentence imposed may be less than forty years. Since petitioner has served ten years, he may have already served beyond the time he would receive in re-sentencing.

It was further reasoned that failure to relieve petitioner from his present sentence may adversely affect his parole opportunities by causing the parole authority to grant hearings to petitioner less frequently. In Minnesota, every inmate appears at a parole hearing at least once every three years, and hearings may be granted at shorter intervals in the discretion of the parole authority. While such discretionary hearings are usually granted primarily on the basis of an evaluation of the prisoner's behavior and the nature of his crime, the policy of the parole authority to base its determinations upon the totality of the prisoner's record would seem to demand that a prior conviction also be considered. Certainly the fact that the sentence presently being served was increased because of a prior conviction would have some affect upon the decision to grant or deny parole. It is notable that Holm was paroled immediately after the decision in the instant case.

artificially resolved: "[H]e must have served as a minimum the maximum term of the sentence which is free from objection . . . ."

5. State ex rel. Nelson v. Tahash, 265 Minn. 330, 121 N.W.2d 584 (1963); State ex rel. Flynn v. Rigg, supra note 4.

The prematurity rule is also allied with the concept of mootness. If the petitioner is not entitled to immediate release even if he proves his claim, the case is moot. Any judicial inquiry would be advisory and therefore beyond the case or controversy scope of Art. III § 2 of the United States Constitution. See 46 B.U.L. Rev. 269, 271 (1966).

6. This argument demands that a hearing be available at any time subsequent to the expiration of the time for appeal from the conviction. In Minnesota any prisoner, not serving a life sentence, may be released by the parole authority at any time. Minn. Stat. § 609.12 (1965).

7. Ibid.

8. On February 28, 1966, the district court noted that Holm had been paroled and accepted Lappegard, Commissioner of Corrections of the State of Minnesota, as a substitute for respondent Tahash. The court heard Holm's claims and found that he had been denied the right to
The court also found support for its decision in the evidentiary advantage of an early hearing. If Holm were required to serve forty years before he could obtain a hearing, crucial witnesses would be dead or their recollection dulled by the passage of time, and most records relating to the issues raised by the petition would be lost or destroyed. The testimony of the petitioner may be the only evidence then available. The unavailability of evidence could make the burden resting upon the state to establish the validity of the prior conviction difficult or impossible to sustain.

However, the predominant concern reflected by the Holm decision is the desire to preserve state authority over criminal matters. The court noted the broad scope of post-conviction procedures in the federal courts and found that federal courts often grant hearings in situations falling within the strict application of the prematurity concept. Thus, by eliminating the prematurity rule, Holm makes another step in the line of Minnesota cases extending the writ of habeas corpus to meet the broadening of the remedy in federal courts.

Consistency between state and federal post-conviction pro-
cedures serves both state and federal interests. Such harmony allows the states to retain a greater control over the administration of their criminal laws and will tend to avoid the conflict between local and national power arising from assertions of federal constitutional rights. It may also reduce relitigation of identical factual issues. Further, consideration of a larger number of post-conviction petitions by the state courts will substantially relieve the onerous work load now falling on the federal court system.

However, a judicial expansion of post-conviction procedures is not without disadvantage. By freeing the common law writs from their traditional restrictions, the distinctions between the several historical remedies tend to become vague and indefinite. The scope of available procedures may become broader than is necessary to adequately protect the rights of the petitioner. It was probably for these reasons that the Holm court urged a legislative enactment governing post-conviction relief. A statutory solution could provide a single procedure to replace present indefinite and multitudinous post-conviction remedies. Such a statute could fully protect federal constitutional rights, eliminate procedural complexities, and limit the burden of the state courts to those cases demanding relief.

These purposes could be accomplished either by federal legislation or by a state statute providing a post-conviction procedure. While the need for identity of state and federal procedures would probably be better served by a federal enactment, a state statute would have the advantage of continuing the separate spheres of state and federal government.

16. The court prefaced its holding: "[P]ending enactment of a post-conviction procedure statute which will meet constitutional requirements, habeas corpus is available . . . ." 139 N.W.2d at 164.
17. See 9B UNIFORM LAWS ANNOTATED 541 (Prefatory Note 1966).
18. See Desmond, supra note 14, at 1168.
Criminal Law: Increased Liberality in Admitting Evidence of Other Sexual Offenses Conditioned on Prior Disclosure by Prosecution

During trial of the accused for indecent assault\(^1\) the prosecution was permitted to elicit testimony that the accused had engaged in dissimilar criminal sexual conduct with the prosecutrix and others. The Minnesota Supreme Court ruled that such evidence, although establishing commission of an offense of a different type from that charged, was sufficiently similar to be admissible. However, the court reversed the conviction, \textit{holding} that in this and all future cases\(^2\) the accused must be forewarned of those additional criminal offenses the prosecution intends to raise at trial.\(^3\) \textit{State v. Spreigl}, 272 Minn. 488, 139 N.W. 2d 167 (1966).

The question of admissibility of other offenses\(^4\) into evidence illustrates the much discussed problem of balancing the right of an accused to a fair trial against the interest of society in preventing and punishing criminal conduct. If evidence of all other criminal conduct by an accused were admissible, he would probably be seriously prejudiced.\(^5\) A tendency to convict may arise, based not upon proven guilt of the crime charged, but upon a belief the accused has committed other unpunished crimes for which he should be incarcerated, regardless of his present guilt.\(^6\) Furthermore, the jury may infer that because the

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1. \textit{Minn. Stat.} § 617.08 (1965).
3. This novel approach had previously arisen only in a single dictum. See \textit{State v. Jensen}, 70 Ore. 156, 140 Pac. 740 (1914). Offenses within the immediate episode of the crime charged, offenses for which the accused has been previously prosecuted, and offenses which are introduced to rebut the accused's evidence of good character, however, are exempt from such disclosure. 272 Minn. at 497, 139 N.W.2d at 173.
4. Offenses, which are allegations for which an accused has not been penalized, should be distinguished from convictions, which are findings of guilt by courts of law for which punishment is imposed.
6. 1 \textit{Wigmore, Evidence} § 57 (3d ed. 1940).
accused committed additional crimes, he also committed the crime for which he is being tried. This prejudicial effect is even more alarming considering the degree of proof necessary to infer commission of other offenses. Although guilt of the crime charged must be proven beyond a reasonable doubt, evidence establishing other crimes need not be so conclusive. Therefore, the accused might be convicted of the crime charged because of his involvement in other crimes, notwithstanding a reasonable doubt as to his participation in those crimes. The accused is also disadvantaged because of surprise and confusion arising from a mass of collateral issues. The prosecution, on the other hand, often must rely upon evidence of the accused's other criminal activities if guilt of the crime in issue is to be established. Thus highly probative evidence which incidentally established the accused's participation in other crimes may well be of critical importance to the prosecution's case.

Until the latter half of the nineteenth century, most courts balanced these competing interests by admitting evidence tending to establish additional criminal conduct of the accused, necessary to the prosecution's case, if it was relevant to issues other than the accused's propensity toward criminal conduct, and did not create an unreasonable potential for bias. This inclusionary rule advanced the interests both of society and the accused. Additional criminal activity of an accused could be used to establish necessary elements of guilt, but such evidence could not be used solely for the prejudicial purpose of illustrating criminal propensities.

The inclusionary rule, however, has been replaced in most

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7. See Note, 70 Yale L.J. 763-64 (1961).
9. Since the decision in Spreigl, the Minnesota Supreme Court has indicated a willingness to accept almost any evidence of criminal conduct. See State v. Drews, 144 N.W.2d 251, 255-56 (Minn. 1966).
11. 1 WIGMORE, EVIDENCE § 29a (3d ed. 1940).
12. For an excellent example of the need of such evidence see United States v. Lindsay, 227 F.2d 113 (5th Cir. 1955), cert. denied, 350 U.S. 1008 (1956).
14. For the reasons behind this change, see Stone, The Rule of Exclusion of Similar Fact Evidence: America, 51 Harv. L. Rev. 988, 1035 (1938).
jurisdictions by an exclusionary rule, under which, unless specifically excepted, evidence of participation in crimes other than that charged is inadmissible. Although both rules are addressed to the same purpose, the exclusionary rule approach leads to significant disadvantages for both the prosecution and the accused. Because courts tend to consider the rule and its exceptions as a predetermined index of relevancy, rulings concerning admissibility of evidence of additional offenses are based upon an automatic categorization rather than upon consideration of the special circumstances in specific cases. The results are that highly probative and relevant evidence is often inadmissible because not within an exception to the rule, whereas irrelevant and prejudicial evidence to which an exception applies is often admitted. The policy behind the exclusionary rule is therefore frustrated, since evidence relevant only to prove the accused’s propensity to commit crime is brought before the trier of fact. Some commentators argue the rule can nevertheless operate successfully if its exceptions are discreetly applied. Most, however, believing such a pragmatic test illusory, recommend returning to the inclusionary rule.

Because Minnesota follows the exclusionary rule, evidence of other offenses has been admitted to prove facts not in issue, and rarely has the prejudice to the accused been balanced against the necessity of such evidence to the prosecution’s case.

15. The inclusionary rule is now in force only in federal courts and a small but growing minority of state courts. Note, 70 YALE L.J. 763, 767 (1961).

16. The list of exceptions varies among jurisdictions, but evidence is normally admitted to show: (1) res gestae; (2) common scheme or plan; (3) unusual and distinctive method; (4) identity; (5) passion for illicit sexual relations with the accuser; (6) scienter; (7) motive; (8) specific intent; or (9) purpose to avoid punishment. Note, 70 YALE L.J. 763, 767 (1961); see McCormick, EVIDENCE § 157 (1954).


22. See authorities, note 5 supra.


25. See State v. Sorenson, 270 Minn. 186, 134 N.W.2d 115 (1965); State v. Elli, 267 Minn. 185, 125 N.W.2d 738 (1964); State v. Fitchette, 88 Minn. 145, 92 N. W. 527 (1902).
The Minnesota Supreme Court has relinquished its ability to correct these abuses by delegating the duty to balance the competing interests and to determine admissibility of such evidence to trial courts, while refusing to reverse the exercise of such discretion unless clearly abused.

In prosecutions for sexual offenses, courts have been extremely liberal in allowing evidence of additional criminal conduct to be used at trial. Evidence of similar illicit sexual acts with the prosecutrix is generally admissible to show the relationship of the parties, as evidence of the intent with which the act in question was committed, and to indicate lust for a particular person. A small minority of jurisdictions admit evidence of similar illicit sexual acts with other persons, and an even smaller minority admit different types of such illicit acts with other persons. By randomly admitting such acts the latter line of decisions allows unrelated sexual offenses to be introduced to prove the accused's propensity to commit sexual crimes, thus frustrating the purpose of the exclusionary rule.

This unique attitude in the area of sexual offenses is based upon a belief that sex criminals have a greater recidivist rate than those guilty of other offenses. Recent statistical inquiries, however, tend to disprove this theory. Furthermore, most courts indicate little cognizance of the probability that recidivism among sexual offenders varies with the nature of the crime. Even more unwarranted is the notion that it is more probable that a sexual offender will commit a sexual offense unrelated to those he has previously committed than that one who has previously committed a nonsexual offense will commit a sexual crime. Thus it would appear the only valid basis for admitting

27. See, e.g., State v. DePauw, 246 Minn. 91, 74 N.W.2d 297 (1955).
30. See, e.g., State v. DePauw, 246 Minn. 91, 74 N.W.2d 297 (1955); Bridges v. State, 247 Wis. 350, 19 N.W.2d 529 (1945).
32. See 40 Minn. L. Rev. 694, 702 (1956).
33. Gregg, supra note 5, at 233.
34. On the basis of social science data, it appears certain that perversions, such as homosexuality and exhibitionism, may be highly repetitive. Others, such as child molestation, may involve a majority of offenders who are not repeaters. Still others tend to be isolated events. See Gregg, supra note 5, at 231.
such evidence in the area of sexual offenses and not in other areas of criminal conduct is society's abhorrence of sexual crimes.\textsuperscript{36}

Minnesota is among the minority which admits evidence of similar sexual offenses with persons other than the prosecutrix.\textsuperscript{37} In the instant case the court expanded the scope of admissibility to include evidence of sexual offenses unrelated to that for which the accused was prosecuted. Without the aid of scientific or statistical observations\textsuperscript{38} and notwithstanding a difference between the two types of conduct involved,\textsuperscript{39} the court held them sufficiently similar to warrant admitting evidence of one at a trial for the other. The court based this holding upon the dubious ground of recidivism, despite acknowledging that its validity has been seriously questioned.\textsuperscript{40} Due to the tenuity of this theory of recidivism, a better alternative would be to require the prosecution to introduce reliable evidence of sufficient similarity between the offenses in question and an interrelated recidivist rate in order to justify admission of such potentially prejudicial evidence.

By eliminating the element of surprise through requiring pretrial disclosure of prior criminal conduct, the Minnesota Supreme Court has substantially reduced the prejudicial effect of this evidence. Although many feel surprise is merely an incidental cause of prejudice,\textsuperscript{41} it is probable that prior knowledge of additional crimes to be introduced at trial will permit able defense counsel to mitigate the prejudicial effects of such evidence through vigorous cross-examination. However, because admission of irrelevant evidence of additional offenses is possible under the exclusionary rule, Minnesota's new requirement

\textsuperscript{36} See Gregg, supra note 5, at 234.

\textsuperscript{37} See State v. Arradondo, 260 Minn. 512, 110 N.W.2d 469 (1961); note 30 supra and accompanying text. A treatise on Minnesota criminal procedure has included sexual crimes as an exception to the exclusionary rule. Jones, Minnesota Criminal Procedure 78 (2d ed. 1964).

\textsuperscript{38} See 272 Minn. at 493, 139 N.W.2d at 170. The only statistics before the court were those of the accused, indicating that the two types of illicit sexual conduct involved in the case were "diametrically opposed." Brief for Appellant, p. 12.

\textsuperscript{39} 272 Minn. at 493, 139 N.W.2d at 170.

\textsuperscript{40} Ibid.

of disclosure will not always be adequate to eliminate danger of severe prejudice. The policy of providing the accused a fair trial, which was impliedly adopted by Spreigl, would therefore appear to call for adoption of the inclusionary rule, under which relevancy of such evidence is to be determined in accordance with the nature of individual cases.

By requiring disclosure of evidence concerning additional offenses, Spreigl furthers Minnesota's judicial willingness to initiate rules of pretrial discovery. At common law the prosecution was not required to disclose any information, whether as a matter of course or upon request. It was thought that pretrial disclosure would encourage perjury and would give the accused an unwarranted advantage, since the accused's right not to divulge incriminating information prevented pretrial discovery by the prosecution. Until recently these arguments were sufficiently persuasive to prevent pretrial criminal discovery. With the expanding rights of the accused, however, many courts have begun to abandon the common law rule prohibiting discovery in favor of granting the accused greater opportunity to prepare his case.

Pretrial discovery serves to protect the accused from surprise and, more important, to permit successful preparation of the accused's case in order to insure him a fair trial. When

42. 6 Wigmore, Evidence § 1859g (3d ed. 1940).
45. State v. Axilrod, 248 Minn. 204, 79 N.W.2d 677 (1956), cert. denied, 353 U.S. 938 (1957). A few limited rights of the accused to information before trial, however, arose from constitution or statute. See 6 Wigmore, Evidence § 1851 (3d ed. 1940).
47. See Fletcher, Pretrial Discovery in State Criminal Cases, 12 Stan. L. Rev. 293 (1960); Krantz, Pretrial Discovery in Criminal Cases: A Necessity for Fair and Impartial Justice, 42 Neb. L. Rev. 127, 146-52 (1963). Although pretrial disclosure of the prosecution's case is not a constitutional right of the accused, the United States Supreme Court has recommended and condoned it. See Cicenia v. Lagay, 357 U.S. 504 (1958); Leland v. Oregon, 343 U.S. 790 (1952); Jencks v. United States, 353 U.S. 697 (1957). This favorable attitude has been instrumental in causing state courts to begin to liberalize criminal discovery. Fletcher, supra at 303-04. In addition, refutation by legal scholars of the alleged difficulties with pretrial discovery at criminal law has persuaded courts to re-evaluate the policies behind their actions. See Fletcher, supra at 312; Louisell, Criminal Discovery: Dilemma Real or Apparent?, 49 Calif. L. Rev. 56, 59 (1961).
49. Louisell, supra note 47, at 82.
these goals have been pursued, courts have tended to implement
discovery through procedural rules, while legislatures have utilized
evidentiary rules.50 Unless accompanied by liberal pre-
trial writs, procedural rules of discovery are quite cumbersome
and seldom useful.51 Unfortunately, however, even pretrial
writs have proved to be of little value because of procedural
restrictions upon their issuance.52 The accused is therefore often
to rely only upon an appeal after judgment of guilt, subject to the nearly insurmountable obstacle of proving that
denial of discovery constituted prejudicial error. An accused is
not presented with such difficulties if pretrial discovery is
based upon an evidentiary rule, which renders inadmissible any
evidence subject to discovery which the prosecution has failed
to provide the accused.53 The evidentiary rule, however, permits
discovery only of that admissible evidence which the prosecution
intends to introduce at trial.54 Such a restriction operates to
impede the accused's preparation for trial by withholding facts
critical to his case, though not themselves admissible into evidence.55

Since Minnesota has followed the common law rule against
discovery,56 the only effective way to become apprised of the

50. See MINN. STAT. § 630.18(2) (1965) (evidentiary rule requiring
disclosure of names of witnesses); Traynor, Ground Lost and Found in
Criminal Discovery, 39 N.Y.U.L. Rev. 228, 245 (1964) (procedural rules
of criminal discovery initiated by California courts).

51. Thus, if the trial court denies pretrial discovery, the accused
can either seek a writ of prohibition or mandamus or appeal an adverse
judgment upon trial. Use of the former confronts an appellate court only
with the question whether the accused has adhered to the procedural
requirements necessary to grant the motion. See Note, 38 So. CAL. L. Rev.
251, 262-63 (1965). An appeal on the merits, however, presents the
questions whether the accused was prejudiced by the denial of discovery
and whether there was prejudicial error in light of the entire proceed-
ings in the lower court. Id. at 262-64.

52. It has been said that pretrial writs in California are ineffective
because of procedural difficulties. Id. at 257-61. This difficulty would
also hinder development in Minnesota of a criminal discovery system
based primarily upon writs of prohibition. See JONES, MINNESOTA CRIM-
INAL PROCEDURE 164 (2d ed. 1964).

53. Under this rule an appellate court would be confronted only
with the question whether the accused objected properly to the admission
of such undisclosed evidence. Prejudice should not have to be shown.

54. See Louisell, supra note 47, at 66.

55. For example, hearsay evidence, though itself inadmissible, often
leads to admissible evidence which could be critical to the accused's
case. See Traynor, supra note 48, at 757-58.

56. State v. Axilrod, 246 Minn. 204, 79 N.W.2d 677 (1956). The
legislature, however, has enacted a few limited rules of pretrial dis-
prosecution's case prior to trial has been to rely upon informal procedures or tactics which, although not intended to elicit information from the prosecution, often require disclosure of the prosecution's witnesses and an outline of its case. State v. Spreigl is the second case in which the Supreme Court has required the prosecution to disclose information to the defendant prior to trial. If the prosecution wishes to introduce evidence concerning a criminal offense other than that charged, it must notify the accused prior to trial. This requirement should prove beneficial to the accused and to the prosecution. Since counsel for the accused will realize the nature of the evidence with which he will be confronted, his cross examination will be more effective, and consequently the severe prejudice heretofore experienced in this area will be substantially mitigated. On the other hand, the prosecution will be benefited because of expediency in prosecuting criminal actions. If the accused and his counsel are fully aware of the prosecution's evidence of prior

covery. Minn. Stat. § 630.18(2) (1965) (lists of witnesses before a grand jury); Minn. Stat. § 611.033 (1965) (statements or confessions made prior to trial). Although these statutes operate as rules of evidence, requiring disclosure as a matter of course, they have been strictly construed so as to provide little assistance to an accused. See State v. Drews, 144 N.W.2d 251 (Minn. 1966).

57. Thus counsel for the accused often requests disclosure of the prosecution's case. If the prosecution thinks it has a strong case, the request may be honored in the hope of persuading counsel for the accused to urge his client to plead guilty. Louisell, supra note 47, at 59. Adoption of pretrial criminal discovery has been urged because it will save substantial expenses of trial by causing more pleas of guilty. Note, 35 U. Cin. L. Rev. 195, 204 (1966).

58. Minn. Stat. § 629.50 (1965) provides for a preliminary hearing to decide whether an offense has been committed and whether there is probable cause to believe the accused guilty thereof. Defense attorneys, however, often use the hearing to discover the witness and evidence the prosecution intends to use at trial, since the prosecution must bring forth proof tending to show commission of the crime by the accused.

59. One week prior to Spreigl, the court ruled that the prosecution must inform the defendant before trial of any evidence to be introduced at trial which may raise evidentiary questions regarding search and seizure or confessions. State ex. rel. Rasmussen v. Tahash, 272 Minn. 539, 141 N.W.2d 3 (1966). Read in conjunction with the instant case, Tahash suggests the court's amenability to expansion of pretrial criminal discovery. Reliance on this development has prompted substantial pretrial disclosure to defendants by the Hennepin County Attorney's office. See Scott, Criminal Pre-trial Discovery Procedure comes to Minnesota, 34 Hennepin Lawyer 134 (1966).

60. Since the decision in Spreigl, the court has held that after a witness has testified at trial for the prosecution, the accused must be supplied a copy of any previous statement the witness has made to the prosecution which conforms to the standards of the Jencks Act, 18 U.S.C. § 3500 (1965). State v. Grunau, 141 N.W.2d 815 (Minn. 1966).
criminal conduct, a plea of guilty as charged is more likely to result. And some of the inevitable trial calendar congestion should be reduced.\(^{61}\)

Despite the progressive attitude towards criminal discovery demonstrated by Spreigl,\(^{62}\) an expanded and more effective system of pretrial discovery in criminal cases is warranted. Discovery can be implemented far more effectively through procedural rather than evidentiary rules. These rules could be supplemented by a liberal system of pretrial writs through which to appeal adverse determinations without having to establish prejudicial error at a trial on the merits. Such an effective system of pretrial discovery would serve the interests of both the accused and the prosecution. The accused would receive greater assurance of receiving a fair trial, and the prosecution would be able to enforce criminal laws more expeditiously.

### Insurance: Excess Insurer’s Liability for Defense Costs

Plaintiff, primary automobile liability insurer, after settling a case for substantially less than its policy limits,\(^{1}\) sought to recover from defendant, excess liability insurer, one-half the expenses and attorney’s fees incurred in defending the insured. The complaint in the original accident case sought damages in excess of the primary coverage. Each insurer had a provision in its policy requiring it to defend the insured, but the excess insurer refused to participate in the defense. Defendant appealed the trial court’s judgment for plaintiff, contending that its contractual obligation to defend the insured was enforceable only by the insured, not by a stranger to the contract. The Minnesota Supreme Court reversed, holding that the excess insurer has an obligation to pay one-half the expenses and attorney’s fees only when the actual recovery is for more than the primary insurer’s policy limits, regardless of whether the original complaint sought damages in excess of the primary insurer’s limits. *American Sur. Co. v. State Farm Mut. Auto. Ins. Co.*, 142 N.W.2d 304 (Minn. 1966).

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\(^{62}\) Fortunately, the court did not believe criminal discovery to be a legislative function. Because legislative constituents do not believe liberality towards criminals to be necessary, the legislature has failed to provide effective sanctions for criminal discovery.

\(^{1}\) The litigation against the insured wherein the dispute between primary and excess insurers arose is reported in Rahja v. Current, 264 Minn. 465, 119 N.W.2d 699 (1963).
It is clear that an insurer who issues a policy which includes a defense provision is contractually obligated to defend an insured if a complaint states a claim within the coverage of the policy against the insured, even if the claim ultimately proves groundless, or is only partially within the coverage of the policy. However, since an insured will often be protected by more than one insurer, it must be determined which insurer will bear the expense of defending the insured. In some jurisdictions the incidence of the financial burden of defense depends upon resolution of the conflict which arises when two insurers cover a single risk and include “other insurance” clauses in their policies which purport to limit their coverage when the risk is also covered under another policy. For example, one policy may provide that if there is other insurance, the two policies are prorated according to their liability limits, while another policy may provide that it will indemnify the insured only for amounts in excess of coverage by other insurance.


5. The most frequent example of this occurs when an auto operator is covered by his policy's "substitute vehicle" provision, and is also an additional insured under the "omnibus clause" of the owner's policy.

6. If the insured has other insurance against a loss covered by this policy, the company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the declaration bears to the total applicable limit of liability of all valid and collectible insurance against such loss.


7. If the insured has other valid and collectible insurance against a loss covered by this policy, the insurance under this policy shall be excess insurance with respect to such loss but shall apply only in the amount by which the applicable limit of liability stated in the declarations exceeds the total applicable limits of liability of such other insurance.

Thus, in those jurisdictions, if an insured is covered by two policies, one with a pro rata clause and the other with an excess clause, the insurer who provides for pro rata coverage becomes the primary insurer. The other insurer becomes the excess insurer, with an obligation to pay only if the injured party recovers a judgment in excess of the primary insurer’s liability limits. Since the obligation to defend arises if there is a potential obligation to indemnify, the excess insurer must contribute to the cost of the insured’s defense only if the amount recovered against the insured exceeds the primary insurer’s policy limits. Presumably, the measure of liability is an equal division of the total cost of defense.

In other jurisdictions, however, when two “other insurance” clauses conflict, the clauses are ignored, the liability is prorated according to the respective policy limits, and the cost of defense is similarly prorated.

A third group of jurisdictions does not resolve the conflict over liability for the costs of defense by determining liability for a judgment against the insured. Instead, the nature of the insurer’s contractual obligation to defend determines this liability. The obligation to defend is generally defined according to either of two distinct views, each of which leads to a different result. Under one view since the duty to defend is distinct from the duty to respond to a judgment, both insurers are obligated to defend the insured when a complaint seeks damages which would implicate both of them. Under this view, a primary in-


10. See cases cited note 9 supra.


surer is entitled to recover a portion of the costs of defense from an excess insurer, even if the amount of the judgment against the insured is less than the primary insurer's liability limits.\(^\text{13}\) The other view, which also focuses on the obligation to defend, maintains that the obligation to defend runs only between the insured and the insurer. Thus, if one insurer defends an action, it cannot recover from the other, irrespective of whether or not the other insurer is forced to pay the judgment.\(^\text{14}\)

On facts similar to those of the instant case, the Minnesota Supreme Court held the complaint initially filed against an insured resolved this dilemma.\(^\text{15}\) When the complaint sought damages which would implicate both insurers they would have to split the cost of defense. Thus, liability for the expense of defending the insured arose from the obligation to defend as determined by the complaint. Without discussion of this approach, however, the court in the instant case shifted its position by basing the burden of paying the cost of the insured's defense upon the obligation to satisfy a judgment against the insured. Of primary importance to the court was the lack of contractual agreement between the insurers which would give the primary insurer a right to demand participation in the defense of the insured by the excess insurer or to recover compensation because of its nonperformance.\(^\text{16}\) In stating that no contractual obligation existed to make one insurer accountable to the other

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\(^{15}\) Eicher v. Universal Underwriters, 250 Minn. 7, 83 N.W.2d 895 (1957).

\(^{16}\) A third party beneficiary may not enforce a contract or recover for the breach thereof, unless it appears from the terms and accompanying circumstances that the promisee's purpose for entering into the contractual agreement was to confer a benefit upon that third person. Where the promisee intends primarily to benefit himself by entering into a contract, as with automobile insurance, and a third person is only indirectly benefited thereby, such third person is deemed to be an incidental beneficiary with no right to enforce the contract. See 4 CORBIN, CONTRACTS § 778C (1951); GRIMM, CONTRACTS § 238 (2d ed. 1965); SIMPSON, CONTRACTS § 117 (2d ed. 1965); RESTATEMENT, CONTRACTS § 133 (1932).
for a breach of its independent obligation to the insured, the court appeared to view the obligations of defending an insured and paying for that defense as separate obligations exclusively between an insurer and its insured.

Suggested in the court's opinion are two policy considerations. One is skepticism of the validity of monetary claims made by aggrieved parties against insureds. Since the excess insurer's refusal to defend may have been prompted by its independent investigation of the accident from which it might have concluded that the damage suffered was not as great as that alleged, the court may have wanted to give this estimate of damage as much weight as the estimate in the complaint.\(^\text{17}\) Another apparent concern was preservation of an excess insurer's option to refuse to defend and pay any excess judgment plus one-half the attorney's fees, rather than to incur the expense of retaining counsel to represent its insured.\(^\text{18}\)

Several arguments can be advanced to show that the decision in the instant case is more reasonable than a rationale based upon either the inherent nature of an insurer's obligation to defend or the damages alleged in the complaint. While the obligations to defend and to respond to a judgment are separate in the sense that they require an insurer to perform wholly different functions, they are closely related functions in the sense that the duty to defend depends entirely upon an initial potential liability to satisfy a judgment.\(^\text{19}\) Implicit in the duty to defend in the single insurer situation is the duty to pay for that defense. In the primary-excess insurer situation, however, it appears reasonable to shift the excess insurer's duty to pay for the insured's defense from the situation of potential liability to that of actual liability, without depriving the insured of defense counsel. In so doing, the relationship of the duties to defend and to satisfy a judgment against the insured can be preserved by predicking the obligation to pay defense costs upon a precedent actual obligation to respond for damages against the insured.

In addition, the practical considerations underlying a ration-

\(^{17}\) 142 N.W.2d at 306.

\(^{18}\) Ibid.

\(^{19}\) "The two [obligation to defend and obligation to respond to a judgment] are, of course, related in the sense that if the occurrence set forth in the plaintiff's claim is one for which . . . there would be no liability under the policy to pay the claim, no duty to defend ever arose." American Fid. & Cas. Co. v. Penn. Threshermen & Farmers' Mut. Cas. Ins. Co., 280 F.2d 453, 458 (5th Cir. 1960).
ale based on the nature of the obligation to defend are absent in the primary-excess insurer situation. In the situation involving a single insurer, in order to avoid or to minimize liability, an insurer desires control of the insured's defense at an early date. This procedure also protects the insured; if he had to wait until a final verdict on the claim against him to ascertain whether he had a right to representation, the rationale behind defense provisions would be undermined, and the protection for which an insured pays a heavy premium would be essentially denied. In a situation where two insurers are potentially implicated, however, by waiting until the ultimate recovery is known in order to ascertain the excess insurer's obligation for the expenses of defense, neither has the insured been denied counsel, since the primary insurer has a duty to defend based upon the pleadings, nor has an unreasonable risk of monetary liability been imposed upon the excess insurer, since the primary insurer can best protect its own self-interest by minimizing the judgment against its insured.

Finally, if the primary insurer refused to defend, and the excess insurer either settles the action for less than the primary insurer's policy limits or is successful in defending the claim, liability for the costs of defending the insured must be allocated. If such liability is based upon the nature of the obligation to defend, the excess insurer would have to bear the cost of defense.20 Certainly such a rule would not encourage an excess insurer to defend an insured upon default of the primary insurer, when by refusing to defend, thus forcing the insured to look to a third person for his defense, the excess insurer could decrease its chances of incurring liability.21 If such liability is based upon liability to satisfy a judgment against the insured, however, the excess insurer could recover its costs of defending from the primary insurer.22 Such a rule would encourage an excess insurer to defend the insured if the primary insurer defaults, since the excess insurer would be liable for a judgment against the insured and expenses of defending only if the recovery exceeds the primary policy limits.

Although the court did not consider the issue of contribution, it is clear from an examination of Minnesota case law that

20. See cases cited note 14 supra.

21. This result necessarily follows even in those jurisdictions where the obligation to defend is viewed as personal and separate, since the excess insurer may escape liability if the insured decides to pursue only the primary insurer for its breach of duty.

22. See note 9 supra.
the lower court's holding could not be affirmed on this theory. It is settled that contribution is allowable only where there is joint liability or a common obligation. Each insurer's obligation to defend its insured is derived from a separate contractual agreement, and where separate instruments which create a similar obligation have been involved, Minnesota courts have not considered this to be a "common obligation" for the purpose of invoking the principle of contribution.

In the instant case the court also rejected the primary insurer's argument that it was entitled to subrogation against the excess insurer for its refusal to defend the insured. Subrogation can be either conventional or legal. The former deals with contractual rights, while the latter deals with the notion of fair play requiring the burden of ultimate payment to fall upon the party who bears the greater obligation. "It is well settled that the right of subrogation does not obtain in favor of one who discharges a debt in the performance of his own obligation, nor where the equities are equal." Thus, to recover by way of legal subrogation a superior equity must be shown. Since the obligation to defend an insured is separate and distinct from the obligation to pay a judgment against him, if each of two insurers has an obligation to defend, the equities are at best equal. Consequently, no right of recovery in the instant case could be justified on the principle of legal subrogation. Moreover, conventional subrogation did not afford the primary insurer in the instant case a remedy through recovery under the subrogation clause in its policy.

23. See, e.g., County of Dodge v. Martin, 271 Minn. 489, 136 N.W.2d 652 (1965); Koenigs v. Travis, 246 Minn. 466, 75 N.W.2d 478 (1956); London Guar. & Acc. Co. v. Smith, 242 Minn. 211, 64 N.W.2d 781 (1954); Lunderberg v. Bierman, 241 Minn. 349, 63 N.W.2d 355 (1954).
28. See Amick v. Columbia Cas. Co., 101 F.2d 984 (8th Cir. 1939).
acquire no greater rights than are possessed by its insured, no right to subrogation exists regarding an excess insurer’s obligation to defend if the insured is without rights against the excess insurer. Because the insured in the instant case had not been damaged by the excess insurer’s breach of its obligation to defend, due to the primary insurer’s similar obligation, the insured and therefore the primary insurer were totally without rights against the excess insurer.

The practical implications of the instant case should be beneficial to an insured. A primary insurer will be eager to defend in order to minimize its liability, but should it refuse to defend, the excess insurer will be motivated to take up the defense in order to avoid an excess judgment and the resultant sharing of expenses of defending the insured.

Judicial Review: New Prospective Overruling Technique Applied

Plaintiff, a parent of defendant, brought an action for injuries sustained in an automobile accident. The trial court granted plaintiff’s motion to strike the defense of intrafamily tort immunity. The supreme court affirmed holding that the defense of intrafamily tort immunity was not available to a child sued by his parent in the case at bar and in all future cases involving claims arising after the filing of the instant opinion. *Ball v. Ball*, 273 Minn. 419, 142 N.W.2d 66 (1966).

Traditionally decisions overruling common law precedents have been given retroactive effect. Retroactive application of overruling decisions was thought to follow from the Blackstonian premise that the courts find rather than make law and, therefore, that a discarded precedent was never the law but merely erroneous evidence of it. However, in this century such retro-


32. 142 N.W.2d at 306.

1. For a discussion of this aspect of the case see 51 MINN. L. REV. 370 (1966).


3. 1 BLACKSTONE’S COMMENTARIES 69-70. See generally, BLACK, JUDICIAL PRECEDENTS 689-99 (1912); SALMOND, JURISPRUDENCE 170 (2d ed. 1907).
activity has often been limited in situations where reliance on
the prior law⁴ or the need for stability⁵ has been found to out-
weigh the desirability of a prompt and complete overturning
of an erroneous rule of law. An overruling decision is wholly
prospective if the newly announced rule is applied only to fact
situations accruing after the filing of the instant opinion.⁶
Many jurisdictions, believing that a wholly prospective limitation
would discourage litigation of erroneous precedents,⁷ apply the
new rule to the case at bar although otherwise prospectively.⁸

In Spanel v. Mounds View School Dist. No. 621⁹ and Jeruzal
v. Jeruzal,¹⁰ the Minnesota court adopted a unique method of
prospective overruling by postponing the effective date of the
new rule until the end of the following legislative session.¹¹ By
delaying application of the new rule beyond the date of the over-
ruling decision, persons who have relied on the prior law are
given an opportunity to accommodate the new rule and hold
themselves harmless from their reliance.¹² However, the refer-

4. Reliance on prior decisions is the chief rationale advanced to
justify prospective overruling. Auerbach, Garrison, Hurst & Mermin,
The Legal Process 175 (1961); Littlefield, Stare Decisis, Prospective
OVERRULING, and Judicial Legislation in the Context of Sovereign
Immunity, 9 St. Louis L.J. 55, 79 (1984); Note, 60 Harv. L. Rev. 437, 440
(1947).
5. See Currier, Time and Change in Judge-Made Law: Prospective
OVERRULING, 51 Va. L. Rev. 201 (1965). Stability is best protected when
precedent is not overruled. Id. at 235-36. However, given an over-
ruling, stability is affected less if there is a prospective limitation. Id.
at 240.
(1932). Mishkin, Forward: The High Court, The Great Writ, and Due
Process of Time and Law, 79 Harv. L. Rev. 56, 70 n.47 (1965); Note, 46
Iowa L. Rev. 600, 614 (1961).
7. Commentators have argued that this fear is exaggerated.
Auerbach, Garrison, Hurst & Mermin, The Legal Process 177 (1961);
Currier, supra note 5, at 215; see Note, 60 Harv. L. Rev. 437, 440 (1960).
8. E.g., Molitor v. Kaneland Community Unit Dist. No. 302, 18 Ill.
2d 11, 163 N.E.2d 89 (1959). However, the Molitor technique may be
subject to constitutional questions. See 14 Syracuse L. Rev. 53, 58-59
(1962).
9. 264 Minn. 279, 118 N.W.2d 795 (1962).
10. 269 Minn. 183, 130 N.W.2d 473 (1964).
12. See Peck, The Role of the Courts and Legislatures in the Re-
ence to the legislative session by Spanel and Jeruzal suggests that the technique was adopted by the court primarily as a means of reconciling the respective roles of the court and legislature in the area of law reform. Postponement of the effective date of the new rule beyond the following legislative session will eliminate the hardship and inconvenience caused by the application of an interim rule between the date of the overruling decision and the enactment of legislation concerning the matter. It will also preserve the status quo pending legislative consideration.

By applying the new rule to the case at bar, Balts departs from the strong statements of the court in prior decisions adopting a wholly prospective technique. Such a technique places the plaintiff in an unduly advantageous position for no other reason than he has raised the issue being decided. The possibility that litigation of erroneous precedents would be discouraged by a wholly prospective overruling does not seem an adequate justification. A wholly prospective limitation could be applied consistently against institutional litigants without discouraging litigation incentive. Similarly, unless it is consistently applied, a wholly prospective limitation will not discourage noninstitutional litigants.

The Balts court found a prospective limitation upon its decision demanded by reliance on the prior law. However, it is doubtful whether reliance justifies the application of a prospective technique to the case. Since most parent-child tort claims arise from the operation of automobiles, the tort-feasor would normally be indemnified for any retroactively acquired liability by a general liability insurance policy. In such cases, defendants not having such coverage would not be prejudiced since they presumably would not have had such coverage in any event. If they had been concerned about potential liability, possible liability to third parties presumably would have prompted them to purchase general liability insurance.

Thus only the insurer has relied to his detriment. However,
there are factors mitigating this hardship. A general liability policy may be viewed, in part, as insurance against overruling. Furthermore, since the insurer can spread the risk subsequently, retroactive application of an overruling decision against an insurer will not create a substantial hardship. Finally, the reliance of the insurer upon the prior law may be minimal. There is some suggestion that legal principles are not a substantial consideration in determining insurance premiums.

Under the instant facts, the prospective limitation may have been applied to reduce the possibility of legislative opposition to the substance of the new rule. Insurance interests will certainly object to the rule announced in Balts for much the same reasons that they advocate guest statutes and inter spousal tort immunity. If the decision had not been limited prospectively and the legislature viewed the retroactive application of the new rule to operate unfairly, the possibility of a legislative reaction to the substance of the holding would be heightened. Although the reliance argument in this case is unpersuasive, the possibility that it may be accepted as valid by the legislature may justify a prospective limitation.

However, to the extent the court was prompted by considerations relating to a legislative reaction, Balts represents a departure from the overruling method used in Spanel and Jeruzal. Since rationales advanced for the Spanel-Jeruzal technique relate to accommodating the legislative reaction to a new rule, the court, by implication, has abandoned the unique method of prospective overruling in favor of a more orthodox technique.

19. See Dunham, Modern Real Estate Transactions, 762 n.39 (2d ed. 1958); Currier, supra note 5, at 245.
22. 51 Minn. L. Rev. 79, 89-90 (1966).
23. See Mishkin, supra note 6.
Local Government: State Pre-emption Invalidates Municipal Licensing

Plaintiff, an electrical contracting firm, operated its business under a master electrician's license issued by the state. Defendant municipality enacted an ordinance requiring electrical contractors to obtain a municipal license before performing electrical work within its jurisdiction. Plaintiff paid the fifteen dollar fee for the municipal license under protest and sued to recover the license fee and to enjoin the municipality from requiring licenses in the future. The lower court held the ordinance valid. The Minnesota Supreme Court reversed, holding the state had pre-empted the field of licensing electrical contractors and, therefore, that the ordinance was invalid. Minnetonka Elec. Co. v. Village of Golden Valley, 273 Minn. 301, 141 N.W.2d 138 (1966).

In Minnesota, municipalities have no inherent powers but possess only those powers expressly conferred by the state or implied as necessary to implement express grants of power. Power to regulate local business activities has been implied from the general welfare clause of municipal charters and empowering statutes. Generally, the power to license has been found to be within the power to regulate and extends to permit a municipality, in the exercise of its police power, to regulate by license any trade or business which may injuriously affect the public health, morals, safety, convenience or welfare.

However, there are substantial limitations upon the licensing power of a municipality. A municipality has been held powerless to regulate recreational boating on the ground that such activity is not local in character but requires a state-wide uni-

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2. Village of Brooklyn Center v. Rippen, 255 Minn. 334, 96 N.W.2d 585 (1959); Tousley v. Leach, 180 Minn. 293, 230 N.W. 788 (1930); Yokley, Municipal Corporations § 521(b) (1965); see State ex rel. Childs v. Darrow, 65 Minn. 419, 67 N.W. 1012 (1896); Harrington v. Town of Plainview, 27 Minn. 224, 6 N.W. 777 (1880). See also Bernick v. City of Little Falls, 191 Minn. 128, 253 N.W. 369 (1934).
3. The regulatory power implied from a general welfare clause of a municipal charter is not limited to businesses and trades specifically enumerated in the charter, but allows a city council to reach new situations as they arise. E.g., State ex rel. Remick v. Clousing, 205 Minn. 296, 285 N.W. 711 (1939) (plasterers); State v. Morrow, 175 Minn. 386, 221 N.W. 4 (1928) (parking lots); Crescent Oil Co. v. City of Minneapolis, 175 Minn. 276, 221 N.W. 6 (1923) (gasoline filling stations).
formity of regulation. Since a municipality cannot levy taxes without legislative authorization, municipal licensing provisions have also been invalidated when the fee exacted is so excessive as to constitute a revenue measure. Finally, a municipality may not enact regulatory or licensing provisions which conflict with state legislation. Nevertheless, it has seldom been found that the mere existence of a state statute precludes nonconflicting municipal regulation. In \textit{Minnetonka} the court first answered the question whether state licensing statutes pre-empt the field, precluding all municipal measures licensing the same activity.

The court could reasonably have avoided this issue by finding the license fee to be a tax. Since the only prerequisites to the issuance of a license by defendant municipality were possession of a state master electrician’s license and payment of the

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6. Park v. City of Duluth, 134 Minn. 296, 159 N.W. 627 (1916); Davidson v. County Comm’rs of Ramsey County, 18 Minn. 432 (1872); Cover v. Town of Baytown, 12 Minn. 124 (1866); see International Harvester Co. v. State, 200 Minn. 242, 274 N.W. 217 (1937).
7. E.g., Lyons v. City of Minneapolis, 241 Minn. 439, 63 N.W.2d 585 (1954); Minneapolis St. Ry. v. City of Minneapolis, 236 Minn. 109, 52 N.W.2d 120 (1952); State v. Labo’s Direct Serv., 232 Minn. 175, 44 N.W. 2d 233 (1950). The license fee must be reasonable and intended to cover only the expense of issuing the license, services of the officers, and other direct or indirect expenses imposed or incurred. See Lyons v. City of Minneapolis, supra; Minneapolis St. Ry. v. City of Minneapolis, supra.
8. A municipal ordinance “cannot authorize what a statute forbids or forbid what a statute expressly permits, but it may supplement a statute or cover an authorized field of local legislation unoccupied by general legislation.” Power v. Nordstrom, 150 Minn. 228, 232, 184 N.W. 967, 969 (1921).
9. But see State v. Hoben, 256 Minn. 436, 98 N.W.2d 813 (1959), where defendant was arrested for driving while intoxicated in violation of a municipal ordinance. State law required municipalities to adopt traffic ordinances providing penalties identical to those of the corresponding state statute. The court found that procedures as well as penalties should be uniform throughout the state, and held that procedural application of this ordinance had to comply with the state statutory privilege of a jury trial. See also City of St. Paul v. Ulmer, 261 Minn. 178, 111 N.W.2d 612 (1961).
10. Other state courts are divided on the question. See 3 \textsc{Anteau}, \textsc{Municipal Corporation Law} § 24.07 (1966); 9 \textsc{McQuillin}, \textsc{Municipal Corporations} § 26.23a (3d ed. rev. 1965); 3 \textsc{Yokley}, \textsc{Municipal Corporations} § 522 (1965).
11. Most of the authorities relied upon by the court rested on this ground rather than a finding of state pre-emption. See Wilkie v. City of Chicago, 188 Ill. 444, 58 N.E. 1004 (1900); 9 \textsc{McQuillin}, op. cit. supra note 10, § 26.24.
license fee,\textsuperscript{12} the licensing ordinance served no apparent regulatory function but was essentially a revenue raising measure. While no Minnesota case has held absence of regulatory purpose to be grounds for invalidating a municipal license, application of the established criteria, requiring a determination whether the license fee is excessive and exhorbitant,\textsuperscript{13} would seem to lead to this result. Certainly the determination of the reasonableness of the license fee must be made with reference to the costs of the regulatory function served. If there is no regulatory function even a nominal fee should be found excessive.

A judicial determination of state pre-emption is based on a conclusion that the intent of the legislature was to preclude municipal licenses.\textsuperscript{14} Such an intent has occasionally been found explicit in the language of state statutes.\textsuperscript{15} Due to the lack of recorded legislative history, extrinsic evidence of legislative intent is seldom available.\textsuperscript{16} In the instant case, defendant municipality argued that legislation expressly prohibiting municipal licensing of plumbers\textsuperscript{17} and detectives\textsuperscript{18} constituted a recognition of the implied power of municipalities to license activities licensed by the state and showed an intent that other state licensing statutes should not be pre-emptive.\textsuperscript{19} However, because

\begin{itemize}
  \item \textsuperscript{12} Municipal licenses are rarely revoked or denied to an applicant possessing a valid state license. See Letter from Clyde Jodell, Administrative Assistant, Department of Inspections, City of Minneapolis, to author, July 13, 1966.
  \item \textsuperscript{13} See Minneapolis St. Ry. v. City of Minneapolis, 236 Minn. 109, 52 N.W.2d 120 (1952) ($100 license fee per streetcar invalid); State v. Labo's Direct Serv., 232 Minn. 175, 44 N.W.2d 823 (1950) ($35 license fee per gasoline filling station plus $10 for each pump in excess of one invalid); Crescent Oil Co. v. City of Minneapolis, 177 Minn. 539, 225 N.W. 904 (1929) ($100 license fee per gasoline filling station invalid); City of Mankato v. Fowler, 32 Minn. 364, 20 N.W. 361 (1884) ($300 license fee for auctioneer invalid).
  \item \textsuperscript{16} Finley, \textit{Book Review}, 24 Ind. L.J. 328, 330 (1949).
  \item \textsuperscript{17} Minn. Stat. § 326.38 (1965).
  \item \textsuperscript{18} Minn. Stat. § 326.331 (1965).
  \item \textsuperscript{19} Brief for Respondent, p. 9. The lower court adopted this reasoning in holding that the state had not pre-empted the field of licensing electrical contractors.
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the several statutes concerning the regulation and licensing of trades and businesses were enacted by different legislatures, it is not unlikely that the lack of prohibiting language in many of these statutes is the result of a failure to consider the problem of potential municipal licensing provisions.\textsuperscript{20} Thus, the court's conclusion that the limited extrinsic evidence available was inconclusive appears valid.

Upon failure of extrinsic evidence, courts have made a determination of legislative intent on several theories. Some have implied an intent that municipal power be denied from the mere existence of a state licensing statute,\textsuperscript{21} finding that a licensee of the state was intended to be given authority to conduct the activity throughout the state without local interference.\textsuperscript{22} Others have imputed an intent that there should be state-wide uniformity of regulation in the area.\textsuperscript{23}

The determination whether the doctrine of state pre-emption is properly invoked appears to be made according to the same criteria under both theories. The need for uniform state regulation is weighed against the needs of local governments to satisfy the particular requirements of their communities.\textsuperscript{24}

In the instant case the court did not balance these interests but merely found no significant local need for the power to

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\item \textsuperscript{21} Some jurisdictions, however, find concurrent licensing power to exist in such situations. Atwater v. City of Sarasota, 38 So. 2d 681 (Fla. Sup. Ct. 1949); Town of Cicero v. Wellander, 35 Ill. App. 2d 456, 183 N.E.2d 40 (1962); City of Chicago v. Michalowski, 318 Ill. App. 533, 48 N.E.2d 541 (1943); State ex rel. City of Bozeman, 68 Mont. 435, 219 Pac. 810 (1923); see Austin v. City of Seattle, 176 Wash. 654, 30 P.2d 646 (1934).
\item \textsuperscript{22} Agnew v. City of Culver City, 51 Cal. 2d 474, 334 P.2d 571 (1959); Agnew v. City of Los Angeles, 51 Cal. 2d 1, 330 P.2d 385 (1958). Some courts, in holding that state licenses permit businesses to be conducted anywhere in the state, confuse pre-emption with conflict by declaring municipal licenses of the business void as being in conflict with the state licensing. Beard v. City of Atlanta, 91 Ga. App. 584, 86 S.E.2d 672 (1955); Pape v. Westerdale, 254 Iowa 1556, 121 N.W.2d 159 (1963); Trimble v. City of Topeka, 147 Kan. 111, 75 P.2d 241 (1938); C. L. Maier Co. v. City of Canton, 94 Ohio L. Abs. 434, 201 N.E.2d 609 (C.P. 1964); Auxter v. City of Toledo, 173 Ohio St. 444, 183 N.E.2d 920 (1962).
\item \textsuperscript{24} See 50 Calif. L. Rev. 740 (1962); 49 Calif. L. Rev. 331 (1961); 10 U.C.L.A.L. Rev. 440 (1963). See generally Montgomery, State Pre-Emption and Local Legislation, 4 Santa Clara Law. 188 (1964); 72 Harv. L. Rev. 737 (1959).\
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license. The court stated that municipal powers to regulate building construction, to prescribe requirements for electrical work, and to inspect the quality of electrical installations were sufficient to protect local interests. While the court did not discuss the need for state-wide uniformity, such a need does exist. Commercial activities not confined within city or county boundaries could be substantially affected by a lack of uniformity. Flat license fees imposed by municipalities require individuals engaging in occupations which extend beyond municipal boundaries to bear a greater burden than those carrying on their business within a single municipality. Thus, such fees have a discriminatory effect upon intercity business and tend to restrain interstate commerce. The expenses of municipal regulation could be funded proportionately and fairly by increasing building permit fees.

Because the court makes no reference to the need for uniformity, the Minnetonka opinion could be read as denying municipalities the power to license whenever there is no significant local need for such power and state licensing legislation does not expressly grant concurrent power to the municipalities. However, in a subsequent case, Mangold Midwest Co. v. Village of Richfield, the Minnesota court stated that its decision in Minnetonka was based upon a balancing of state and local interests. The predominant consideration set forth in Mangold is whether the additional local regulation would have an adverse effect upon the general populace of the state.

It has been argued that the doctrine of state pre-emption should be applied to exclude municipal ordinances only in the clearest cases. Others have asserted that, absent a specific

26. It could be argued that while the municipal license was not so used in the instant case, the municipality should not be denied the power to use a local licensing requirement to provide a protection for its citizens beyond that created by state regulation.
27. See 49 Calif. L. Rev. 331 (1961); see also 1 Antieau, Municipal Corporation Law § 5.22 (1966); Blease, supra note 14. See generally 72 Ham. L. Rev. 737 (1959).
28. The reliance of the court upon State ex rel. Sheldon v. City of Wheeling, 146 W. Va. 691, 122 S.E.2d 427 (1964), which held municipalities powerless to license plumbers, tends to support this conclusion.
29. 143 N.W.2d 813 (1966).
30. 1 Antieau, Municipal Corporation Law § 5.22 (1966); 20 U. Cinc. L. Rev. 400, 406 (1951). See generally Montgomery, supra note 24; 7 U.C.L.A.L. Rev. 102 (1960). Some writers have concluded that the doctrine of pre-emption should not be discarded, but that the policy considerations which motivate their decisions should be clearly explained.
expression of legislative intent, municipal ordinances should never be found pre-empted by state legislation. However, since there is not a sufficient political pressure within municipal government to adequately protect state interests, the courts are the only means by which those interests may be vindicated when the legislature has not expressly set forth its intent. Therefore, the doctrine of state pre-emption can serve a useful function in this area. Its limits, however, should be clearly stated so that municipalities are not foreclosed from enacting necessary regulatory measures which do not substantially interfere with state interests.

Property: Possessory Exception of the Marketable Title Act Narrowly Applied to Easements

Plaintiff, property owner, and its bus station tenant sought to enjoin defendant from interfering with the tenant's use of an alley right of way over a portion of defendant's property adjoining plaintiff's tract. This right of way easement had been acquired in 1883 by a former owner in plaintiff's chain of title. Subsequently, the dominant and servient tracts were transferred several times, the real estate description in each conveyancing instrument including the easement. The defendant asserted that plaintiffs had lost their claim on the property because they failed to record the incumbrance as required by the Minnesota Marketable Title Act. The plaintiffs, however, claimed to have


1. MINN. STAT. § 541.023(1) (1965).

As against a claim of title based upon a source of title, which source has been of record at least 40 years, no action affecting the possession or title of any real estate shall be commenced by a person, partnership, corporation, state, or any political division thereof, after January 1, 1948, to enforce any right, claim, interest, incumbrance or lien founded upon any instrument, event or transaction which was executed or occurred more than 40 years prior to the commencement of such action unless within 40 years after such execution or occurrence there has been recorded in the office of the register of deeds or filed in the office of the register of titles in the county in which the real estate affected is situated, a notice sworn to by the claimant or his agent or attorney setting forth the name of the claimant, a description of the real estate affected and of the instrument, event or transaction on which such claim is founded, and stating whether the right, claim, interest, incumbrance or lien is mature or immature.
made sufficient use of the easement to qualify for the act's possessor exception.² Plaintiffs' witnesses testified that between 1936 and 1950 the alley in question was used by the tenant's package customers to park when there was no room at the curb. However, plaintiffs produced no package customers who ever had used or been instructed to use it, and witnesses who worked in nearby stores testified that they never saw any such parking. The Minnesota Supreme Court affirmed the trial court's denial of the injunction, holding that the possession required to preserve a claim and avoid the act's presumption of abandonment³ must be "open and exclusive, unequivocal, notorious and unambiguous." Caroga Realty v. Tapper, 143 N.W.2d 218 (Minn. 1966).

In an effort to remedy what has been termed the "crisis in conveyancing,"⁴ many states have enacted marketable title acts.⁵ As land titles grew older and the number of transactions increased, real estate transfers became slow, inefficient and expensive⁶ due to the increasing number of ancient, technical and seemingly insignificant defects in many chains of title.⁷ Title examiners were confronted with the dilemma of avoiding "fly-specking" and prolonged suits to quiet title, while at the same time safeguarding their clients.

The Minnesota Marketable Title Act, enacted in an attempt to insure that "ancient records shall not fetter the marketability of real estate,"⁸ requires that certain interests in real estate be

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2. MINN. STAT. § 541.023(6) (1965). "This section shall not . . . bar the rights of any person, partnership or corporation in possession of real estate . . . ."

3. MINN. STAT. § 541.023(5) (1965). "Any claimant under any instrument, event or transaction barred by the provisions of this section shall be conclusively presumed to have abandoned all right, claim, interest, incumbrance or lien based upon such instrument, event or transaction . . . ."


7. See Brehmer, Limitation of Actions Affecting Title to Real Estate, 30 MINN. L. REV. 23, 25-26 (1946); Mahoney, Comments on Minnesota Laws, 1943, Chapter 529, Relating to Limitations of Action Affecting Title to Real Estate, 30 MINN. L. REV. 32 (1946).

8. MINN. STAT. § 541.023(5) (1965). See Wichelman v. Messner,
recorded within a statutory period to preserve a right of action on them and to escape the act's conclusive presumption of abandonment. The act contains an exception in favor of those in possession of real estate, added primarily to insure the constitutionality of the act, but also included to protect persons who fail to record their claims. Thus, the interests of possessors are protected without prejudicing the rights of prospective purchasers because possession is clear evidence of the possessor's claim.

250 Minn. 88, 83 N.W.2d 800 (1957). There has been some question whether the act accomplishes its avowed purpose. It has been criticized for not specifically stating whether a notice of claim once recorded preserves the claim indefinitely, even beyond the forty year period of the statute. Basye, Clearing Land Titles § 176, at 279 (1953). This alleged defect may not be present at all if subdivision 4 of the act, which provides that the notice of claim shall be discharged in the same manner as its pendens notices, incorporates by reference the provisions of Minnesota Statutes § 557.021 (1965) limiting the effective duration of a lis pendens notice to ten years. See Note, 33 Minn. L. Rev. 54, 60–62 (1949). See generally Simes & Taylor, op. cit. supra note 5, at 335.

A survey of prominent Minnesota practitioners showed that most were willing to rely on the act in some if not all of their title examination opinions. See A.B.A. Section of Real Property, Probate and Trust Law 95, 102–05 (Proceedings 1956). Therefore, it seems that the act had beneficial but limited effect even before it passed its first rigorous constitutional and interpretive test before the court.

9. See note 3 supra.
10. There are other exceptions in favor of the United States Government, railroads and other public service corporations on land received under congressional or legislative grants, and educational and religious corporations. Minn. Stat. § 541.023(6) (1965).
11. Various courts have repeatedly held that it is a denial of due process for a state legislature to compel one who is in possession of land to resort to legal proceedings within a given period or lose his interest in the land. This doctrine originated in Groesbeck v. Seeley, 13 Mich. 329 (1865), and was popularized in Cooley, Constitutional Limitations 365 (1st ed. 1868). It has been approved by the Minnesota court numerous times. See, e.g., Hammond v. Hatfield, 192 Minn. 259, 261, 256 N.W. 94, 95 (1934). See generally Aigler, Constitutionality of Marketable Title Acts, 50 Mich. L. Rev. 185, 192 (1951); Brehmer, supra note 7, at 29; Annot., 7 A.L.R.2d 1366 (1949). It was probably wise to include the possessory exception in the act. See 38 Minn. L. Rev. 285, 286 (1954). However, it is arguable that its inclusion should not have been necessary at all since the doctrine arose out of the early courts' hostility to tax titles not marketable title acts, and since the act does not require the possessor to go to court within a given time to preserve his rights, but only to record his claim. See American Land Co. v. Zeiss, 219 U.S. 47, at 60 (1911); Simes & Taylor, op. cit. supra note 5, at 257.
12. See Tulane, Title to Real Property—Thirty Year Limitation Statute, 1942 Wis. L. Rev. 258, 264.
In B. W. & Leo Harris Co. v. City of Hastings, applying the possessory standard required to constitute constructive notice under the real estate recording acts to the Marketable Title Act, the court stated that such possession “must be present, actual, open and exclusive and must be inconsistent with the title of the person who is protected by this section. It cannot be equivocal or ambiguous but must be of a character which would put a prudent person on inquiry.” However, this case did not involve an easement.

The application of marketable title acts to easements presents difficult policy problems since easements may serve highly useful purposes yet are likely to go unrecorded because their owners are not actively and continuously concerned with them. Thus, there is some doubt whether marketable title acts should apply to easements. While several states either exclude certain easements, or make specific provision for them, the Minnesota act is completely silent on the subject. The court first dealt with the application of the Minnesota act and its possessory exception to easements in Wichelman v. Messner. In an attempt to quiet concern over the act’s application to certain limited interests in real estate, the court, assuming that the act applied to easements, stated:

§ 330.15 (1957), which permits a late recording if no prior purchaser is prejudiced. See 38 Minn. L. Rev. 285, 286 (1954).
15. Id. at 49, 59 N.W.2d at 816-17.
16. See Payne, supra note 4, at 231.
17. See Tulane, supra note 12, at 265.
20. 250 Minn. 88, 83 N.W.2d 800, 41 Minn. L. Rev. 232 (1957) (dictum).
21. The amicus curiae brief in support of the petition for rehearing specifically mentioned leases, mortgages, remainder interests, and party wall agreements, but strangely omitted easements. The court, however, included easements in its discussion of the act’s effect on limited interests in real estate.
22. This assumption may not have been absolutely necessary, but it had been made before, though not by the court. See Baste, Clearing Land Titles § 178, at 278 (1953).
Possession obviously means actual occupancy or use of part or all of the real property. Such actual (or constructive) occupancy or use is itself notice of a claim or interest which has not been abandoned or become nominal. Thus... right-of-way easements which are manifested by actual use or 'occupancy' (consistent with the nature of the easement created) are protected even if the requirement of filing notice is not met.

Thus the court, assumed that the act's possessory exception applied to easements. Arguably, however, the possessory exception should not apply since an easement is a non possessory interest. The exclusion of easements from the exception may be justified: (1) if the legislature deliberately phrased it so as to exclude nonpossessory interests; or, (2) if it is mere surplusage unnecessarily inserted to preserve the act's constitutionality.

However, the court concluded that the possessory exception was included because possession or actual use and occupancy provides ample notice of a present claim. Consequently, there was no reason not to apply it to nonpossessory interests such as easements. While the standard of possession set forth in Wichelman was pure dictum, it was later adopted in United Parking Stations, Inc. v. Calvary Temple, holding: "Only right-of-way easements 'which are manifested by actual use or occupancy' are protected if the requirement of filing notice is not met. This right-of-way easement was not 'manifested by actual use or occupancy,' as the testimony clearly shows, and was therefore not protected.

In Caroga Realty, the concurring opinion sought to base the court's decision on the accepted Wichelman standard of possession, although the plaintiffs could not have prevailed even under this standard. However, the majority chose to apply the stricter Harris standard. In doing so, they seem to have gone astray in several important respects.

First, the majority failed to consider the obvious, fundamental difference between the "possession" of an interest in fee as discussed in Harris and the "possession" of a right of way easement. An easement is an incorporeal hereditament, a mere right of the owner of the dominant tract to use a portion of the servient tract for a limited, special purpose not inconsistent with the general property interest in the owner of the servient tract.

Thus, an easement is incapable by its very nature of being pos-

23. 250 Minn. 88, 103, 83 N.W.2d 800, 814 (1957).
24. See note 11 supra.
25. 257 Minn. 273, 101 N.W.2d 208 (1960).
26. Id. at 277, 101 N.W.2d at 211.
27. 143 N.W.2d 218, 226.
29. Warner v. Rogers, 23 Minn. 34, 37 (1876).
sessed, possession of the servient tract remaining in its owner.\textsuperscript{30} Rather, an easement can only be used or occupied consistently with the limited and special purpose for which it was created,\textsuperscript{31} as the court in Wichelman clearly recognized.

Second, from the standpoint of constructive notice, the strictness of the Harris standard is understandable since the claim asserted by the city to the tract in question in that case was for the fee simple title, allegedly secured by adverse possession which occurred fifty years before the commencement of the suit. It would have been contrary to the central purpose of the act to allow so tenuous a claim to prevail in the absence of either recordation or absolute, unequivocal, and continuous possession. There would not even have been an ancient record, discoverable by meticulous title examination, but only an ancient, virtually undiscoverable possession standing in the way of marketability. Given the inclusion of the easement in the real estate descriptions in the conveyances of both the dominant and servient tracts in Caroga Realty, the court did not need to apply the strict Harris standard to protect prospective purchasers, since even a cursory title examination, extending back forty years, would have provided notice of plaintiffs’ claim.\textsuperscript{32} Nonetheless, the court refused to create an exception to the literal provisions of the act.\textsuperscript{33}

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\item \textsuperscript{30} See Petition of Burnquist, 220 Minn. 48, 19 N.W.2d 394 (1945).
\item \textsuperscript{31} “An easement is an interest in land in the possession of another which (a) entitles the owner of such interest to a limited use or enjoyment of the land in which the interest exists. . . .” Restatement, Property § 450 (1944). (Emphasis added). See Petition of Burnquist, 220 Minn. 48, 55, 19 N.W.2d 394, 398 (1945) (quoting Restatement).
\item \textsuperscript{32} “A purchaser is charged with constructive notice of anything appearing in any part of the deeds or instruments forming the chain of title . . . which is of such a nature that it would amount to actual notice, if brought directly to his knowledge . . . .” Patton, Titles § 348 (1st ed. 1938). See Smith v. Lockwood, 100 Minn. 221, 110 N.W. 980 (1907); Basye, Clearing Land Titles § 138 (1953).
\item \textsuperscript{33} The court again refused to adopt this doctrine of notice by recital in United Parking Stations, Inc. v. Calvary Temple, holding that once an interest is destroyed by operation of the act, any reference to it in subsequent conveyances is merely for the protection of the prudent seller and cannot revive the interest. 257 Minn. 273, 101 N.W.2d 208 (1960). The court recognized that this doctrine is in direct conflict with the fundamental purpose of the recording provisions of the act, since those interests which the legislature sought to destroy are given life and those persons presumably protected by the act are faced with new burdens of search. See Jones, The New Jersey Recording Act—A Study of Its Policy, 12 Rutgers L. Rev. 328 (1958). Several state acts have dealt with this doctrine. The Michigan act specifically provides that the holder of the unbroken chain of title holds subject to interests contained in any instrument forming part of that chain, Mich. Stat. Ann. § 26.1271 (1953), while the Colorado act provides that such recitals are binding
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Third, it is obvious that more ancient interests which fetter the marketability of title would be destroyed if the act included no possessory exception. If it was included "merely [as] insurance against possible unconstitutionality",34 a very narrow interpretation of it would probably be justified. However, if it was included because possession consistent with the nature of the interest possessed is sufficient notice of the possessor's claim to obviate the necessity of recordation, the majority's use of the narrow Harris definition seems unjustified. The majority pays lip-service to the origins of the Harris standard in constructive notice cases, but ignores the fact that none of these involved easements. Normally, a prospective purchaser of the servient tract is charged with notice of any visible and open easement.35 Even the Wichelman definition is much stricter than this in that it requires an actual, visible use of the open and visible easement to preserve the interest. It provides all the notice any prospective purchaser should need of the existence of the user's claim, while eliminating ancient, dormant interests.

Finally, the majority's analysis is hampered by overemphasis of adverse possession considerations. Whether this is a result of the adverse possession elements of the Harris case, the arguments of plaintiffs' counsel concerning Merrick v. Schleuder,36 or the similarities between the requirements of adverse possession and possession sufficient to give constructive notice of a claim,37 it only confuses the issue. Given the constructive notice aspects of the requirements for securing title to land by adverse possession, a discussion of adverse possession in relation to easements might have been helpful, but it certainly should not have been controlling. To gain ownership of an easement by

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34. 38 Minn. L. Rev. 285, 287 (1954).
36. 179 Minn. 228, 228 N.W. 755 (1930). Plaintiffs' counsel cited Merrick in an unsuccessful attempt to show that the use of an alley by an adjoining land owner and his customers are acts constituting adverse possession and therefore should also constitute constructive notice of a claim. Caroga Realty v. Tapper, 143 N.W.2d 218, 225 (Minn. 1966).
37. Possession of a fee to be adverse and ripen into title must be open, hostile, continuous, actual, and exclusive. Newport v. Taylor, 225 Minn. 299, 303-04, 30 N.W.2d 588, 591 (1948). One of the prime reasons for these strict criteria is to insure that the owner has ample opportunity to discover the adverse possession and take steps to preserve his interest. Therefore, these criteria are quite similar to the constructive notice criteria of the Harris standard.

prescription, one's use of the easement must be open, visible, continuous, unmolested, and under claim of right. It seems unnecessary to require as much or more to protect an existing easement than is required to secure a new one by prescription, as the majority has done.

The majority's interpretation of the Minnesota Marketable Title Act endangers all easements which by source and age come within the act's provisions. The only safe course of action for any owner of such a limited easement is to record it. Under the majority's view, possession of a limited right of way easement sufficient to satisfy the act's possessory exception is virtually impossible since the maintenance of a continuous, visible, open, exclusive, unequivocal, notorious, and unambiguous use of an alley right of way is inconsistent with its normal, limited use as an access route to the dominant tract. Since plaintiffs in Caroga Realty were unable to establish any actual or visible use of the alley during the required period, a decision in favor of the defendant was inevitable. It remains to be seen whether the court will continue to apply the Harris standard when faced with a case in which the claimants were making an actual, visible use of the easement, or whether, confronted by the almost conclusive facts of Caroga Realty, the majority simply overstated its possessory standard.

Torts: Nonnegligent Participant Liable for Creation of Hazard

Defendant, a wrecker driver, pushed a stalled automobile onto a crossover of a divided four-lane highway during the night. The vehicles were stopped when a second vehicle approached in the inside lane and collided with the stalled automobile. The two vehicles, both without lights, remained on the highway; the wrecker remained on the crossover. Defendant wrecker driver switched on the wrecker's lights, secured a flare from a passerby, requested another to call the highway patrol, and walked down the roadway to warn oncoming traffic. He was approxi-

38. Prescription is analogous to adverse possession, but is based on the fiction of lost grant. See Romans v. Nadler, 217 Minn. 174, 14 N.W. 2d 482 (1944).
40. The owner of such an easement would have an even more serious problem if the statutory period for recording his claim has passed because there is no provision for late recording.
mately four hundred feet below the accident when he was passed by a third vehicle. The driver of the latter saw the wrecker's flashing signal but failed to understand it; he claimed he did not see any other warning. Plaintiff, on the scene to offer assistance, was injured when the third vehicle collided with the first two. Four to five minutes elapsed between the two collisions. At trial, all three drivers and the wrecker operator were held liable to plaintiff. The Minnesota Supreme Court affirmed, holding that defendant wrecker driver, as a non-negligent participant in creating a dangerous condition on the highway, had a common law duty to use reasonable care to correct the situation and to warn others of the danger, and that the third driver's negligence was not a superseding cause. *Zylka v. Leikvoll*, 144 N.W.2d 358 (Minn. 1966).

Generally, one who by his own negligence creates a hazardous condition has an absolute duty to give adequate warning of its presence or to correct it promptly. If the dangerous condition results in injury to another, the actor's liability is based on his original negligence rather than on the nonexistence or inadequacy of the warning.

When a nonnegligent actor creates a dangerous condition, his duty is to use reasonable care to warn others or correct the situation. The supporting cases, with one exception, involve

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1. Oncoming traffic was confronted with the following: the wrecker's lights, consisting of a red dome blinker light on top of the cab, one flashing red light on each side of the cab, amber clearance lights and red rear parking lights; a 2-cell flashlight and lighted flare carried by the wrecker driver and situated 400 feet below the accident; the flashing clearance lights and parking lights on a truck belonging to plaintiff's uncle, parked on the side of the highway 400 feet below the accident. The third driver saw only the blinking dome light, which he thought might have been a police patrol car.

2. See *Prosser, Torts* § 54, at 338 (3d ed. 1964); *Restatement (Second), Torts* § 321, comment a (1965).

3. See *Restatement (Second), Torts* § 437 (1965). In view of the answers to the interrogatories finding them negligent in the original collision, the drivers of the first and second vehicles would be liable to plaintiff under this law, although in the instant case the trial court imposed on them only the duty to use reasonable care. 144 N.W.2d at 367.

4. See, e.g., *Hardy v. Brooks*, 103 Ga. App. 124, 118 S.E.2d 492 (1961) (cow killed on roadway); *Simonsen v. Thorin*, 120 Neb. 684, 234 N.W. 628 (1931) (trolley pole across street); *Montgomery v. National Convoy & Trucking Co.*, 186 S.C. 167, 195 S.E. 247 (1938) (trucks jackknifed on slippery hill); *Prosser, Torts* § 54 (3d ed. 1964); *Restatement (Second), Torts* § 321 (1965). *But see Buchanan v. Rose*, 138 Tex. 390, 159 S.W.2d 109 (1942), where a bridge broke under the weight of defendant's truck; the court recognized the duty to warn but refused to impose it on defendant since the bridge had been defective and thus the situation was not created by defendant's own act.
obstructions on the highway.\textsuperscript{6} The duty imposed has been “to take such precautions as would reasonably be calculated to prevent injury.”\textsuperscript{7} Consequently, the liability of the nonnegligent actor, as distinguished from that of the negligent actor, has been predicated upon lack of due care in taking precautions to warn.

However, circumstances may justify the failure of a nonnegligent actor to warn of a hazard he has created.\textsuperscript{8} In Wedel v. Johnson\textsuperscript{9} defendant, without fault, collided with a horse and subsequently failed to post a warning. There was no liability for this failure because the defendant had suffered serious injuries requiring immediate medical attention and was therefore unable to remove the condition or warn others.

\textsuperscript{5} Hollinbeck v. Downey, 261 Minn. 481, 113 N.W.2d 9 (1962). Plaintiff, shagging golf balls on a driving range, was injured by defendant’s lofted ball. The court stated that defendant had a duty to warn or to refrain from acting if he knew or should have known that plaintiff was in a zone of danger. The case seems distinguishable in that defendant’s duty was to refrain from acting rather than to nullify the effect of a prior act.

\textsuperscript{6} Highways are public thoroughfares, available as a matter of right to vehicular traffic. Minn. Stat. § 169.01(29) (1965). This right of use would seem to give rise to the duty on one who creates an obstruction to traffic to warn others of its existence. Minn. Stat. § 169.75(5) (1965), requiring the use of flares to signal the presence of a disabled truck, was found to state the measure of due care as to any vehicles stopped on the highway in Olson v. Neubauer, 211 Minn. 218, 300 N.W. 613 (1941). Highways involve special care: “While only ordinary care is required, it must be commensurate with the danger. The hazard in the nighttime on a traffic artery . . . is great.” Brown v. Murphy Transfer & Storage Co., 190 Minn. 81, 84, 251 N.W. 5, 7 (1933). See Simonsen v. Thorin, 120 Neb. 684, 234 N.W. 628 (1931), where the court relied upon statutory law to impose the duty, based on the total failure of defendant to take any precautions to warn oncoming traffic.


\textsuperscript{8} The majority did not discuss the wrecker driver’s actions in relation to the four to five minute interval between the two collisions; however, the dissent persuasively argued that the wrecker driver was confronted with an emergency situation and consequently his failure to adequately warn is excused. 144 N.W.2d at 368. The emergency doctrine recognizes that reasonable care is to be measured by a consideration of the existing circumstances. See Prosser, Torts § 33 (3d ed. 1964). The doctrine is inapplicable where the actor has created the emergency through his own negligence but, as the court indicated in Wedel v. Johnson, 196 Minn. 170, 264 N.W. 689 (1936), it has been applicable where the defendant is without fault. Logically, it would appear that the doctrine would be equally applicable to excuse the nonnegligent wrecker driver in this case.

\textsuperscript{9} 196 Minn. 170, 264 N.W. 689 (1936). This seems to be the only Minnesota case recognizing this duty.
Unlike an actor, a mere bystander, regardless of his knowledge of another’s imminent peril, has no obligation to aid or to warn, but must not affirmatively increase the peril. If the bystander chooses to act, thereby inducing others to rely upon him, he must act with reasonable care.

In the instant case, the court described the wrecker driver as a “participant” without defining this term, and imposed upon him the duty of the nonnegligent actor to use reasonable care to warn of the hazard. If indeed the wrecker driver was a nonnegligent creator of the hazard, then the duty was correctly applied. However, the issue now becomes what the court means by the use of the term participant. An analysis of prior case law indicates that the participant as used here may be distinguished from the “actor” on the basis of control. In the past, the actor has had control over the forces creating the hazard—e.g., as in Montgomery v. National Convoy & Trucking, the ability to stop and steer a vehicle—albeit he has been found to be without fault in the way in which he created the hazard. This requisite control apparently has been dispensed with by the court in this case. The wrecker driver lacked any ability to control the first automobile, except as to the initial impetus. The jury exonerated the wrecker driver from any negligence in that part of the accident, and the court stated that the vehicle had not been “pushed ahead against [its] brakes” by the wrecker. Clearly, the wrecker driver lacked the ability to brake the pushed vehicle in order to avoid the collision.

Arguably, since the wrecker driver was not at fault and not in control of the forces creating the hazard, he was a mere volunteer and had no affirmative duty to undertake to warn. Of course, if the wrecker driver were found to be a volunteer,

11. See Depue v. Flatau, 100 Minn. 299, 111 N.W. 1 (1907); 5 Minn. L. Rev. 398 (1921); cf. Mazey v. Loveland, 133 Minn. 210, 158 N.W. 44 (1916).
14. 144 N.W.2d at 361. On the issue of control see, e.g., Szyperski v. Swift & Co., 198 Minn. 154, 269 N.W. 401 (1936) (brief time when towed vehicle was able to act independently); Hanks v. Landert, 37 Wash. 2d 293, 223 P.2d 443 (1950) (driver of towed vehicle had control of steering). See also Bakken v. Lewis, 223 Minn. 329, 26 N.W.2d 478 (1947).
he might have been found liable on the theory that he under-
took to warn other traffic and failed to do so properly.\(^{15}\) It
seems apparent from the circumstances that the drivers of the
first two vehicles did rely on the wrecker driver to fulfill this
function, and it would seem that he was peculiarly equipped to
do so. However, the court expressly refused to consider the
wrecker driver's contention that he was a volunteer,\(^{16}\) since at
trial he neither contended he was a volunteer nor made objec-
tion to the court's instructions which did not mention the duties
or status of a volunteer.\(^{17}\)

The court based the application of the duty of the nonnegli-
gent actor to a noncontrolling participant on the existence of
the prior contact between the wrecker and the stalled automo-
obile. No further definition of participant or explanation for the
imposition of the duty to warn appears in the opinion, unless it
may be inferred that the duty arises from the fact that the
nonnegligent party was a wrecker driver, therefore experienced
in the handling of problems at the scene of an accident. There
is considerable language in the opinion to the effect that the
wrecker driver was specially equipped and skilled to fulfill this
duty. Nevertheless, there is nothing specific in the opinion to
prevent the application of the same duty to warn to a person not
a member of the service industry.

\(^{15}\) See authorities cited note 12 supra.

\(^{16}\) The court felt that the wrecker driver was not a volunteer,
suggesting that maybe a joint venture existed between the first driver
and the wrecker operator. 144 N.W.2d at 367. Under Minnesota law, a
joint venture involves both an equal right to voice control and a common
Minn. 1962); Murphy v. Keating, 204 Minn. 269, 283 N.W. 389 (1939).
In Note, 20 Minn. L. Rev. 401 (1936), the author suggests that control is
the central factor in a finding of joint venture, that the doctrine of im-
puted negligence on this basis is not favored, and that the requirements
are generally strictly construed. See cases cited note 14 supra.
Certainly the common purpose existed in this case; but in a fact situation like
this one, where the stalled vehicle is being pushed and fails to stop in
time, it seems clear that the wrecker driver lacks the ability to exercise
equal control. Finally, if a joint venture could be shown, the duty here
would arise not because of the wrecker driver's participation, but be-
cause the other driver's negligence is imputed to him, and the absolute
duty of a negligent actor is imposed.

\(^{17}\) If counsel fails to make timely and adequate objection, the trial
court's charge to the jury becomes the law of the case and binding upon
the court. Minn. R. Civ. P. 51. Errors in the instruction with respect
to fundamental law or controlling principle may be assigned for the first
time in a motion for new trial. Ibid. Fundamental error may consist in
instructions clearly contrary to recognized public policy or positive
statute. See, e.g., Anderson v. Mid-Motors, Inc., 256 Minn. 157, 98 N.W.2d
188 (1959).
A comparable situation would be where the driver of the stalled vehicle negligently steers into oncoming traffic. Assuming a finding that the driver of the pushing vehicle is without fault, the holding of this case nevertheless imposes on him the duty to warn. There may be considerable justification for such a holding where the pusher is in the business of cleaning up highway collisions, but a considerable hardship may result when the pushing vehicle is driven by an unknowing, unequipped neighbor. It seems clear, however, that the holding of the instant case would not impose the duty to warn on a mere passenger, since the term participant, by definition, involves at least a minimum activity.

There is an obvious utility in imposing the duty to remedy a dangerous condition on those who have created it. But the court seemed to indicate a willingness to impose the duty however tenuous one's relation to the creation of the hazard. For the holding of the case to have further application, the court must resolve two questions: first, what is the nature of the participation which will impose the duty; and second, once the duty is imposed, will the circumstances in which the participant found himself be considered in deciding whether the duty has been fulfilled. Perhaps the court is imposing a higher standard of care on the members of the vehicle service industry.

The second major issue before the court was whether, as a matter of law, the third driver's negligence constituted an intervening, efficient cause. One's negligence is the proximate cause of an injury if the injury is one which follows from the negligent act or omission in unbroken sequence without a superseding cause. An intervening force sufficient to insulate the first actor from liability must occur after the original negligence.

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18. The Restatement defines an intervening force as "one which actively operates in producing harm to another after the actor's negligent act or omission has been committed." Restatement (Second), Torts § 441 (1965). A superseding cause "is an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about." Restatement (Second), Torts § 440 (1965). The Minnesota court evidently uses "efficient intervening cause" as a synonym for superseding cause. The following discussion will use the terms as defined by the Restatement.


20. See Tandeski v. Barnard, 265 Minn. 339, 121 N.W.2d 708 (1963);
and operate independently of the situation created by that negligence.\(^2\) A normal intervening force, for example, an instinctive response to the condition created or a foreseeable force, is within the scope of the original actor's liability.\(^2\) Where, however, a third actor, fully aware of the circumstances, has the time and ability to make a conscious choice of action, his choice is considered an independently operating force which insulates the original actor from liability.\(^2\)

The prevailing Minnesota rule as to superseding cause was first stated in Medved v. Doolittle\(^2\) where the driver of an automobile, aware of a truck in his lane of traffic, failed to avoid that truck:

Where a second actor has become aware of the existence of a potential danger created by the negligence of an original tort-feasor, and thereafter, by an independent act of negligence, brings about an accident, the first tort-feasor is relieved of liability, because the condition created by him was merely a circumstance of the accident and not its proximate cause. Where, however, the second actor does not become apprised of such danger until his own negligence, added to that of the existing perilous condition, has made the accident inevitable, the negligent acts of the two tort-feasors are contributing causes and proximate factors in the happening of the accident and impose liability upon both of the guilty parties.\(^2\)

Thelen v. Spilman, 251 Minn. 89, 86 N.W.2d 700 (1957); Lee v. Lee, 248 Minn. 496, 80 N.W.2d 529 (1957).

21. See Henjum v. Bok, 261 Minn. 74, 110 N.W.2d 461 (1961). "The test usually applied is this: Has an independent responsible agent intervened between the first wrongdoer and the plaintiff and the continuous sequence of events been interrupted or turned aside so as to produce a result which would not otherwise have followed? If so, the original wrongdoer ceases to be responsible." Childs v. Standard Oil Co., 149 Minn. 166, 170, 182 N.W. 1000, 1002 (1921).

22. Restatement (Second), Torts §§ 442A, 442B, 443, 447 (1965). The intervening negligence of another is not a superseding cause if the original actor should have realized that a third person might so act, that the act of that third person is not highly extraordinary, or that the intervening act is a normal consequence of the condition created by the original actor.


25. 220 Minn. 352, at 360, 19 N.W.2d 788, at 792. The rule was adopted verbatim from Kline v. Moyer, 325 Pa. 357, 191 Atl. 43, (1937). In Kline, a truck had been negligently parked on the highway by defendant. The second defendant drove to the left side of the highway to avoid the parked truck and collided with plaintiff. The event took place at night; the parked truck was unlighted. Verdict was obtained against both defendants. The trial court granted a judgment notwithstanding the verdict to the defendant trucker. On appeal, new trial was
Prior to the *Medved* decision, the court reached the same decision on substantially the same facts by merely denying the existence of any causal connection between the "standing" and the collision: "Its presence was known to all; it created no surprise; it did not obstruct a view of the traffic."\(^{26}\)

 Defendants in the instant case relied on the *Medved* rule, contending that the third driver's failure to see several warnings and ignoring the one he did see was an independent act of negligence. The court distinguished between the two cases on the ground that in *Medved*, the driver of the car had "full and actual knowledge of the hazard . . . but failed to respond properly"\(^{27}\) while in the instant case the third driver did not have actual knowledge of the obstruction. However, he was apprised of an obstruction of some kind on the highway while time remained in which he might have slowed sufficiently to avoid the collision. He testified at trial that he knew the meaning of a flashing red light, yet he continued to travel at substantially the same speed for approximately one-half mile until he collided with the standing automobile. His failure to respond properly to the flashing signal seems to involve the same elements of negligence as that held to be superseding cause in *Medved*.\(^{28}\)

 The *Medved* rule has been criticized for this seemingly arbitrary distinction between a negligent failure to see as foreseeable, hence concurrent negligence, and negligent failure to respond properly to what has been seen as independent, hence superseding negligence.\(^{29}\) For this reason, the doctrine as originally applied was limited to those situations where it clearly ap-

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26. Geisen v. Luce, 185 Minn. 479, 485, 242 N.W. 8, 11 (1932). The fact situation was almost identical with that of the Kline case.
27. 143 N.W.2d at 365.
28. The difference between the so-called chain-of-event cases and *Medved* is that in the former the second actor . . . through his own negligence failed to see the standing automobile in time to get his car under control and avert the accident, or else failed to see it at all, and thus became committed to a situation which made the accident inevitable; while in cases like *Medved* the second actor saw the standing automobile in time to avoid a collision and could have done so by the exercise of reasonable care, but did not do so.
29. Eldredge, Culpable Intervention as Superseding Cause, 86 U. Pa. L. Rev. 121 (1937). The theory has also been criticized for the reason that there may be some policy excusing the last actor from liability. Prosser, Torris § 49 (3d ed. 1964); Morris, supra note 19.
peared as a matter of fact that the last actor did have the time and ability to avoid a collision.\textsuperscript{30} The present case seems to confirm that limitation upon the application of the doctrine in Minnesota, with the addition of another: the last actor must have actual knowledge of the nature of the obstruction ahead of him. Thus, it would appear that the case applies a stricter definition of independent and superseding cause than has previously been applied in automobile collision cases.

The additional limitation is one which has been needed in this area of the law, for the first actor's negligence has clearly remained a substantial factor in producing the injury and he should not be relieved from liability unless the last actor has acted in blatant disregard of all the circumstances.

Torts: Parent Allowed Recovery From Unemancipated Child

Plaintiff, injured in a two car collision in Wisconsin while a passenger in her unemancipated son's car, sued both her son and the other driver for negligence. The defendant son pleaded intrafamily immunity and moved for summary judgment on that basis. The motion was denied and the defense struck from his answer. On appeal, the Minnesota Supreme Court held that under Minnesota law\textsuperscript{1} the intrafamily immunity doctrine is not a valid defense in actions brought by the parent to recover damages for a tort committed by the child. \textit{Balts v. Balts}, 142 N.W.2d 66 (Minn. 1966).

Based originally upon the policy that intrafamily litigation would disrupt family harmony and interfere with the exercise


\textsuperscript{1} Although all parties were Minnesota residents, Wisconsin was the situs of the tort. In determining the applicable law, the court applied the "center of gravity rule" contained in \textit{Restatement (Second), Conflict of Laws} § 390(g) (Tent. Draft No. 8, 1963) (domiciliary state to apply its own substantive law on questions of intrafamily immunity). See \textit{Mertz v. Mertz}, 271 N.Y. 466, 3 N.E.2d 597 (1936) (domicile state has a legitimate interest in matters of the family relationship). See also Lawe's North Wilkesboro Hardware, Inc. v. Fidelity Mut. Life Ins. Co., 319 F.2d 469 (4th Cir. 1963); \textit{Griffith v. United Air Lines}, Inc., 416 Pa. 1, 203 A.2d 796 (1964). For Minnesota development in this area see \textit{Schmidt v. Driscoll Hotel, Inc.}, 250 Minn. 376, 82 N.W.2d 365 (1957); \textit{Kyle v. Kyle}, 210 Minn. 204, 297 N.W. 744 (1941).
of parental rights and duties, the intrafamily immunity doctrine has been applied consistently in both child-parent and parent-child suits. However, the doctrine has been criticized by text writers as unrealistic, and judicial dissatisfaction has produced numerous exceptions. Thus, the doctrine has been held inapplicable when the tortfeasor was acting in a business capacity, when either party died prior to suit, or when the tort was will-

2. Other reasons sometimes advanced to justify immunity have been: (1) possibility of tortfeasor's succession to the award; (2) analogy to husband-wife immunity; (3) analogy to sovereign immunity; (4) the criminal law sufficiently protects the child; (5) depleting the family exchequer. All rationales have been effectively discredited by the commentators. See, e.g., McCurdy, Torts Between Persons in Domestic Relations, 43 Harv. L. Rev. 1030 (1930); McCurdy, Torts Between Parent and Child, 5 Vill. L. Rev. 521 (1960); Sanford, Personal Torts Within the Family, 9 Vand. L. Rev. 823 (1956), and cases discussed therein.

3. Hewelette v. George, 68 Miss. 703, 9 So. 885 (1891), held an unemancipated child could not recover damages for a parent's willful tort, but cited no authority for its holding. The Hewelette decision was quickly followed in two other jurisdictions. McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664 (1903); Roller v. Roller, 37 Wash. 242, 79 Pac. 788 (1905). But see Gould v. Christianson, 10 Fed. Cas. 857 (No. 5636) (D.C.N.Y. 1836); Nelson v. Johnson, 18 Neb. 180, 24 N.W. 730 (1885); Lander v. Seaver, 32 Vt. 114 (1859) which lend support for liability at least where the tort was willful or involved gross negligence or neglect. See generally Annot., 19 A.L.R.2d 423 (1951).

4. E.g., Schneider v. Schneider, 160 Md. 18, 152 Atl. 498 (1930). See Annot., 60 A.L.R.2d 1284 (1951), and articles cited note 5 supra. One jurisdiction dissented. Wells v. Wells, 48 S.W.2d 109 (Kansas City Ct. App. 1932). However, Wells was based on a misinterpretation of Dix v. Martin, 171 Mo. App. 266, 157 S.W. 133 (1913), and subsequently has been limited to apply only when the tort is willful. Baker v. Baker, 363 Mo. 318, 263 S.W.2d 29 (1953).

5. See, e.g., 1 Harper & James, Torts 649 (1956); Prosser, Torts 677 (2d ed. 1955); 15 Minn. L. Rev. 126, 127 (1931); 26-27 NACCA L.J. 151 (1961). The major criticism is based on the insurance factor. The practical effect of insurance is to eliminate the necessity of family members being true adverse parties at trial and the economic effects upon the family of a money judgment.

6. See, e.g., Trevorarton v. Trevorarton, 151 Colo. 418, 378 P.2d 640 (1963); Borst v. Borst, 41 Wash. 2d 642, 251 P.2d 149 (1952); Lusk v. Lusk, 113 W. Va. 17, 166 S.E. 538 (1932), on the rationale the tort was committed outside the area of family interaction.

7. See, e.g., Harlan Nat'l Bank v. Gross, 346 S.W.2d 482 (Ky. 1961); Dean v. Smith, 211 A.2d 410 (N.H. 1965); Minkin v. Minkin, 336 Pa. 49, 7 A.2d 461 (1939); Logan v. Reaves, 203 Tenn. 631, 354 S.W.2d 789 (1962),
Three jurisdictions have abrogated the doctrine in negligence cases.\footnote{8}

The parental immunity rule was assumed without discussion or citation of authority by the Minnesota Supreme Court in \textit{Taubert v. Taubert}.\footnote{10} Later decisions followed \textit{Taubert}, declaring that insurance coverage did not alter the rule\footnote{11} and that any change must come from the legislature.\footnote{12} Not until \textit{London Guar. & Acc. Co. v. Smith}\footnote{13} did the court feel that the application of the parental immunity doctrine necessitated even a statement of the policy behind the rule: "[S]ound public policy forbids such actions as being inimical to the preservation of domestic tranquility and parental discipline. . . ."\footnote{14}

However, the Minnesota Supreme Court also has limited the scope of the intrafamily immunity doctrine. The reasoning and language of \textit{London Guar. & Acc. Co. v. Smith}\footnote{15} suggest that the immunity applies only to cases involving mere negligence, as contrasted to cases involving wilful torts.\footnote{16}

In addition, it has been held that the death of either litigant in an interspousal suit eliminates immunity, since there is no longer a need to protect the extinct marital relationship.\footnote{17} Sim-

\begin{footnotesize}

\begin{enumerate}
\item See, e.g., Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955); Dunlap v. Dunlap, 84 N.H. 352, 150 Atl. 905 (1930); Cowgill v. Brock, 189 Ore. 282, 218 P.2d 445 (1950), on the belief family harmony is already disrupted due to the willful nature of the tort.
\item Alaska and New Hampshire have rejected the doctrine in either the parent-child or child-parent context, Frost v. Frost, Alaska Sup. Ct. (3d Dist. 1963); Gaudreau v. Gaudreau, 215 A.2d 695 (N.H. 1965), and it can be presumed that they will follow the lead of Wisconsin in applying it in both contexts. Ertl v. Ertl, 30 Wis. 2d 372, 141 N.W.2d 208 (1966); Goller v. White, 20 Wis. 2d 402, 122 N.W.2d 193 (1963).
\item 103 Minn. 247, 114 N.W. 763 (1908).
\item E.g., Lund v. Olson, 183 Minn. 515, 237 N.W. 188 (1931).
\item 242 Minn. 211, 64 N.W.2d 781 (1954).
\item Id. at 214, 64 N.W.2d at 784.
\item 242 Minn. 211, 64 N.W.2d 781 (1954).
\item Id. at 214, 64 N.W.2d at 783 n.3.
\end{enumerate}

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ilarly, since death of the parent or child removes the policy reasons behind parent-child immunity, elimination of the immunity should follow. Further, the court has been unwilling to extend the doctrine to bar suits where the beneficiary of a judgment would be barred in a direct action.18 Nevertheless, the court generally continued to recognize intrafamily immunity in simple negligence cases. However, the child immunity situation had not been litigated in Minnesota, although one South Dakota case,19 relying entirely on Minnesota's rule in the child-parent context, found Minnesota law to conform to the majority rule. The instant case did not repudiate the policy of promoting family harmony. Rather, it made the affirmative finding that where a wrong is committed sufficient to warrant recovery were the parties strangers, the policy of promoting family harmony would best be served by allowing recovery.20

In response to the contention that elimination of the child immunity rule would encourage collusive suits, the court concluded that the injustice of denying recovery far outweighed the danger of collusion. The court pointed to the lack of evidence that jurisdictions which have eliminated interspousal immunity or do not have guest statutes have been flooded with collusive suits.21 Furthermore, to allow danger of collusion to determine a substantive rule of law would be unwarranted; established judicial techniques are capable of protecting against such abuse.

The court also rejected the argument that elimination of child immunity would lead to litigation for actionable torts of insignificant consequences or non-toritious indiscretions of children on the basis that family members are not prone to stir up serious discord over minor torts. Further, litigation expenses for minor injuries would diminish recovery so as to make suit unprofitable, and lawyers would be unwilling to prosecute such actions on a contingent fee basis. Finally, the good sense of juries, judges, and lawyers is a sufficient check on suits brought by parents over trivial matters.22

Although insurance should not create liability where none

20. 142 N.W.2d at 74. Balts only eliminates immunity for negligence, since the Minnesota court had previously expressed willingness to eliminate immunity for willful torts. See London Guar. & Acc. Co. v. Smith, 242 Minn. 211, 64 N.W.2d 781 (1954).
21. 142 N.W.2d at 73.
22. See ibid.
previously existed, the instant court's conclusion was strongly influenced by its view of the practical effect of its decision—compensation in most cases would be paid by insurance carriers. Allowing suits when there is insurance will promote harmony since a third party bears the economic burden of the judgment and the family members are not true adversaries at trial. However, harmony may not be best promoted by allowing such suits in the absence of insurance coverage. Family members will become true adversaries at trial, and the economic effect of the money judgment will be felt within the family unit. The court rejected this argument by noting the discord was created by the commission of the tort rather than the suit. Although it must be conceded that some discord was already present, to say that discord resulted from the tort is to beg the question of whether allowing such suits would promote further discord or would serve to promote a reconciliation by righting the wrong. Attaching legal blame to the negligent family member may tend to promote further discord rather than to encourage forgiveness by the injured party. Allowing the negligent family member to make reparation on his own would be best since a true reconciliation cannot exist when recovery is pursuant to a judicially ordered payment of money. On the other hand, it is just to allow an injured party compensation, and if the negligent family member will not voluntarily make reparation, it would seem the existing discord would not be aggravated by allowing recovery. Practically, the situations where a parent would sue absent insurance coverage are few. Serious intrafamily torts involving negligence are very infrequently committed except during use of


24. The ruling was made prospective except as to the case at hand; immunity was to be applied to torts committed prior to the date of the decision. 142 N.W.2d at 75. On prospective overruling, see generally Note, Prospective-Prospective Overruling, 51 Minn. L. Rev. 79 (1966). Prospective application will allow insurance companies time to evaluate their future policy.

There are three alternatives open: (1) raise liability rates generally; (2) exclude family members from coverage entirely, refusing to insure the risk; or (3) provide a separate liability policy insuring only family members. It is not clear whether the latter alternatives would be allowed in view of the court's reliance on insurance to remove the possibility of family discord.

25. The number of situations covered by insurance may increase if householders' liability policies are held to cover family members for injuries occurring on the family premises as a result of the negligence of another family member.
the family automobile. Further, since a child is not held to the same standard of care as an adult, acts which would constitute actionable negligence are few, and even then most children are not financially able to respond in damages. Even if the above considerations should lead to retention of child immunity in particular situations, it will be time enough to consider them when squarely presented to the court.

Of particular importance in the instant case is that abrogation of the parent-child immunity rule removes injustices in the area of contribution. A prerequisite to contribution is that the injured party must be able to recover from both tortfeasors. Therefore, a person compelled to pay damages could not recover contribution from a co-tortfeasor if the latter would be immune in a direct suit by the injured party. Thus, the effect of the immunity rules was to unjustly thrust the burden of compensation upon one tortfeasor. Further, where a tortfeasor injured a member of his family while driving a car owned by a nonfamily member, the Safety Responsibility Act would impose liability on a person committing no act of negligence. Because of intra-family immunity, the owner had no right to contribution from the person actually committing the negligent act. Clearly Balts will eliminate many of these injustices where a child is a co-tortfeasor.

Moreover, the reasoning of Balts will have a profound impact on the heretofore well-settled interspousal immunity rule. Since the Married Woman's Property Act removed the common law fiction of the legal identity of husband and wife upon which the rule was originally premised, the sole justification for the rule has been that such suits would promote marital discord. The determination in Balts that harmony in the home is best accomplished by allowing recovery for personal torts compels a

26. See Koenigs v. Travis, 246 Minn. 466, 75 N.W.2d 478 (1956).
29. The rule that one spouse is immune from suit by the other for torts committed during coverture has long been established. See, e.g., Drake v. Drake, 145 Minn. 388, 177 N.W. 624 (1920); Strom v. Strom, 98 Minn. 427, 107 N.W. 1047 (1906). The rule was extended in Woltman v. Woltman, 153 Minn. 217, 189 N.W. 1022 (1922), to cover torts committed prior to the solemnization of the marriage. See Koenigs v. Travis, 246 Minn. 466, 75 N.W.2d 478 (1956).
re-examination of the interspousal immunity rule.\textsuperscript{32}

Since \textit{Batts} eliminates any argument that intrafamily suits will disrupt harmony, it appears that parental immunity should also be eliminated but with certain qualifications. Parental suits involve the additional consideration that they may interfere with maintenance of parental discipline, authority, and respect which are indispensible to harmonious family relations.\textsuperscript{33} In \textit{Goller v. White},\textsuperscript{34} the Wisconsin court eliminated parental immunity; however, provisions were made to leave parental rights and duties intact by retaining immunity where a parent is acting as disciplinarian or is performing discretionary duties of parenthood, such as providing food, clothing, or other necessities. Clear retaining immunity in these situations protects against interference with parental rights and duties. In the child-parent context, it appears the Wisconsin approach is the best method to implement the policies announced in \textit{Batts}.

Although the court specifically reserved its decision in the husband-wife and child-parent contexts,\textsuperscript{34} its approach indicates, at the very least, a willingness to examine the policy behind the intrafamily immunity rules and to assess their validity in light of

\textsuperscript{32} One Minnesota District Court decision, \textit{Mosier v. Tarasar}, 4th Jud. Dist., File No. 604245, August 15, 1966, abrogated interspousal immunity for personal torts committed before solemnization of the marriage. The judge felt \textit{Batts} required him to re-examine the policy behind the immunity and to assess its validity in light of the policy announced in \textit{Batts}. He found the determination that harmony will best be promoted by allowing recovery to be equally applicable to the situation before him. However, this decision may be reversed if the case is appealed and the prospective application of \textit{Batts} is found controlling. See note 24 supra.

\textsuperscript{33} See authorities cited note 2 supra.

\textsuperscript{34} 20 Wis. 2d 402, 122 N.W.2d 193 (1963), 1964 Wis. L. Rev. 714. Immunity should, of course, not be a shield for excessive punishment, maltreatment, or gross neglect of the child. See 1964 Wis. L. Rev. 714, 718, for a discussion on the bounds of the Wisconsin rule.

\textsuperscript{35} 142 N.W.2d at 75. The full import of \textit{Batts} can be evaluated only by considering the court's alternative for allowing recovery. The child in \textit{Batts} had been emancipated after the tort but prior to suit. There has never been any doubt a parent could sue his child for a tort committed after his emancipation, see Annot., 60 A.L.R.2d 1292 (1951), because it is no longer necessary to protect the family relationship. Thus, it should follow that the emancipation of \textit{Batts} eliminated the immunity. This argument was presented to the court in the briefs and at oral argument; recovery being urged on this ground. Brief of Respondent, pp. 13-18, citing \textit{Logan v. Reaves}, 209 Tenn. 631, 354 S.W.2d 789 (1962) for authority. Significantly, however, the court refused to so limit the immunity. Instead, the court examined the policy considerations present in the parent-child context and found them to favor allowing recovery even in cases of simple negligence.
of our modern society. In view of the reasoning of Baltz, such an examination can only result in elimination of most intra-family immunity in Minnesota.

Torts: Servant’s Contributory Negligence
Not Imputed to Master

Plaintiff, passenger in a truck owned by him and driven by his employee acting within the scope of his employment, sued to recover damages for injury to himself and to his truck caused by a collision with a truck driven by the defendant’s employee. Since both drivers were found negligent, the plaintiff’s claim for relief was denied because the contributory negligence of his employee was imputed to the plaintiff. The Minnesota Supreme Court reversed, holding that in automobile negligence cases contributory negligence of a servant will not be imputed to his faultless master to bar recovery from a negligent third party. Weber v. Stokely-Van Camp, Inc., 144 N.W.2d 540 (Minn. 1966).

Vicarious liability renders the faultless principal of an agency relationship liable for the torts of his agent committed while acting within that agency. Such liability is commonly justified as a socially desirable distribution of risk and as a device to provide financially responsible indemnitors for damages sustained by third parties. Likewise, if a sufficient relationship of agency exists to render the principal liable for the torts of his agent, the contributory negligence of the agent will also be imputed to the principal. Although this well established principle lends symmetry to the law of agency, it is merely a fictional relic derived from the original justifications of vicarious liability premised upon the principal’s right to control his agent or the identity between principal and agent. However, since contributory negligence operates as a bar to recovery from another negligent party, imputed contributory negligence, unlike vicarious lia-

1. See 4 BLASHFIELD, CYCLOPEDIA OF AUTOMOBILE LAW AND PRACTICE, § 2494 (perm. ed. 1946); 2 HARPER & JAMES, TORTS ch. 23 (1956); PROSSER, TORTS § 68 (3d ed. 1964); see also, e.g., RESTATEMENT (SECOND), AGENCY § 220 (1958); Douglas, Vicarious Liability and Administration of Risk, 38 YALE L.J. 584 (1929); Ferson, Basis for Master’s Liability and Principal’s Liability to Third Persons, 4 VAND. L. REV. 260 (1951); James, Vicarious Liability, 28 TUL. L. REV. 161 (1954).

2. See Molden v. Minneapolis, St.P. & S.S.M. Ry., 160 Minn. 471, 200 N.W. 740 (1924); PROSSER, TORTS § 68 (3d ed. 1964); RESTATEMENT (SECOND), AGENCY § 220 (1958); RESTATEMENT (SECOND), TORTS § 485 (1965).
bility, cannot be said to be a risk spreading device. Moreover, because imputed contributory negligence bars recovery by parties who are personally without fault, this "both-ways" rule of agency has been the subject of extensive criticism.\(^3\)

Although the doctrine of imputed contributory negligence was briefly extended to a number of relationships other than agency, it was met with such general disfavor that it again became confined to agency and a few family relationships.\(^4\) For example, there was a rule that the negligence of a driver would be imputed to a mere passenger,\(^5\) but this rule disappeared due to a distinction drawn between a mere passenger and a passenger having a right of control over his agent driver.\(^6\)

The advent of the automobile caused an increase in the number of injuries which, because of unsatisfied judgments, were left uncompensated.\(^7\) As other jurisdictions, Minnesota was plagued with numerous automobile negligence claims against defendants who were financially unable to discharge their adjudicated liability. To remedy this situation, Minnesota's Safety Responsibility Act\(^8\) created a statutory agency under which a bailee

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4. Minnesota rejected the doctrine of imputing negligence of a driver to a passenger in *Koplitz v. City of St. Paul*, 86 Minn. 373, 90 N.W. 794 (1902). However, Minnesota was one of a number of states to adopt the family purpose doctrine. *Kayser v. Van Nest*, 125 Minn. 277, 146 N.W. 1091 (1914). The contributory negligence of one spouse was at one time imputed to the other. See *Prosser, Torts* § 116 (3d ed. 1964). Because of the Married Women's Property Acts, however, the rule was discarded. See, e.g., *Olson v. Kennedy Trading Co.*, 199 Minn. 493, 272 N.W. 381 (1937); *Minn. Stat. §§ 519.03, .05* (1965). In *Fitzgerald v. St. Paul, M. & M. Ry.*, 29 Minn. 336, 13 N.W. 168 (1882), Minnesota imputed the contributory negligence of a parent to a child, but that decision was overruled in *Mattson v. Minnesota & N. Wis. Ry.*, 95 Minn. 477, 104 N.W. 443 (1905).


7. See *Corstvet, The Uncompensated Accident and Its Consequences*, 3 LAW & CONTEMP. PROBS. 466 (1936).

of an automobile who operates it with the permission of the owner-bailor\(^9\) becomes the agent of the owner-bailor in regard to the consequences of negligent operation. This artificial agency relationship was intended to provide a more reliable source of compensation for injuries caused by negligent operation of automobiles. Following the apparent intent of the legislature and the interpretation of a similar New York statute,\(^10\) the Minnesota court held that notwithstanding the language of the statute and the “both-ways” rule, under the Safety Responsibility Act the contributory negligence of a bailee of an automobile would not be imputed to a bailor who was not himself at fault.\(^11\)

The status of imputed contributory negligence under the Minnesota Safety Responsibility Act is typical of Minnesota’s recent judicial response to that doctrine. Prior to the instant case, the court limited application of the doctrine to the agency relationships of master-servant\(^12\) and joint enterprise,\(^13\) and to claims for loss of services,\(^14\) consortium, or medical expenses of a person who has been contributorily negligent.

In a far reaching decision, the court in the instant case examined the validity of the doctrine of imputed contributory negligence as applied to the master-servant relationship. Noting the rejection of the doctrine under the Safety Responsibility Act,\(^15\) the court found no sound reason to reach a contrary result

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13. See, e.g., Frankle v. Twedt, 234 Minn. 42, 47 N.W.2d 482 (1951); see also Restatement (Second), Torts § 486 (1965).

14. See, e.g., Kokesh v. Price, 136 Minn. 304, 161 N.W. 715 (1917); see also Restatement (Second), Torts § 489 (1965).

15. See note 11 supra.
when the relationship in question was that of master-servant.\textsuperscript{10} The court's approval and reliance upon the rejection of imputed contributory negligency under the Safety Responsibility Act appear to be justified. Since vicarious liability of both bailors and masters exists to ensure compensation of parties injured through no fault of their own, imputation of contributory negligence to an injured bailor or master not himself at fault would appear to be the antithesis of that policy.\textsuperscript{17} Not only would a faultless party be denied recovery for his damages from a negligent third party, but the party whose negligence contributed to those damages would escape liability.

The court also re-examined and rejected the validity of the master's theoretical right of control over his servant often advanced to justify the doctrine of imputed contributory negligence. Although that justification may have had some validity in the pre-automobile era when the right of control could be effectively exercised by a master riding with his servant, the court found the right of control to be an absurd fiction in cases involving the modern automobile.\textsuperscript{18} Even if a master is a passenger in a motor vehicle, there would appear to be no effective way to exert his right of control over the manner in which it is operated by his servant. On the contrary, any attempt by a passenger to control the movement of a vehicle may well constitute negligence on the part of the passenger.\textsuperscript{19} If a master is not riding in his vehicle, it would be impossible to exert any actual control whatsoever over its operation.

Future application of the instant case may affect other relationships to which the doctrine of imputed contributory negligence is presently applied. For example, under the relationship of joint enterprise, which is based upon a theory similar to that\textsuperscript{16} 144 N.W.2d at 544.

\textsuperscript{17} The authorities are in agreement that the reasons for vicarious liability do not justify or logically uphold imputation of another's negligence to a faultless party. See, e.g., Gregory, \textit{Vicarious Responsibility and Contributory Negligence}, 41 \textit{Yale L.J.} 831 (1931); Note, 17 \textit{Cornell L.Q.} 158 (1931); Note, 34 \textit{Minn. L. Rev.} 57 (1950); Note, 21 \textit{Minn. L. Rev.} 823 (1937).

\textsuperscript{18} 144 N.W.2d at 545.

\textsuperscript{19} See Frankle v. Twedt, 234 Minn. 42, 49, 47 N.W.2d 482, 487 (1951); Jenks v. Veeber Contracting Co., 177 Misc. 240, 30 N.Y.S.2d 278 (1941). \textit{Restatement (Second), Torts} § 495 (1965) sets out a general test to determine whether a passenger has in fact been personally negligent. Minnesota has long used a test similar to this. See Finley v. Chicago, M. & St. P. Ry., 71 Minn. 471, 74 N.W. 174 (1898).
of partnership,\textsuperscript{20} each joint venturer is held to have an equal right of control over the enterprise. Thus, the driver of an automobile is considered the servant of his joint venturer, and both the negligence and contributory negligence of the former is imputed to the latter.\textsuperscript{21} Because a joint enterprise is held to arise in informal situations, and is used primarily to bar recovery by injured passengers,\textsuperscript{22} the doctrine of imputed contributory negligence in the context of joint enterprise has been strongly criticized.\textsuperscript{23} Since joint enterprise would appear to involve the same considerations as the master-servant relationship, if the Minnesota court were confronted with the question of imputed contributory negligence in this context, it may feel bound to abrogate the doctrine on the authority of the instant case.\textsuperscript{24}

Even though the court in the instant case concluded that the doctrine of imputed contributory negligence is totally without logical foundation, the abrogation of that doctrine was limited to automobile cases. It is unfortunate that this forward step was taken with such hesitation. Since the court recognized that there may be other situations in which the doctrine should be abrogated, however, the instant case may signify the complete abandonment of imputed contributory negligence in Minnesota.

\textsuperscript{20} See Kokesh v. Price, 136 Minn. 304, at 309, 161 N.W. 715, at 717 (1917).
\textsuperscript{21} See Prosser, Torts § 71 at 494 (1964).
\textsuperscript{22} Ibid.
\textsuperscript{23} See Mechem, The Law of Joint Adventures, 15 Minn. L. Rev. 644 (1931); Rollison, The "Joint Enterprise" in the Law of Imputed Negligence, 6 Notre Dame Law. 172 (1931); Weintraub, The Joint Enterprise Doctrine in Automobile Law, 16 Cornell L.Q. 320 (1931); Note, 20 Minn. L. Rev. 401 (1938).
\textsuperscript{24} Another example is application of the doctrine of imputed contributory negligence to claims for loss of services, consortium, or for medical expenses. Restatement (Second), Torts §§ 493-94 (1965). The effect of the instant case upon these situations, however, is uncertain since the derivative nature of these claims under Minnesota law could be a basis for distinguishing them.