1980

The Minnesota Supreme Court: 1979

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Notes

The Minnesota Supreme Court: 1979

This Note reviews decisions of the Minnesota Supreme Court in 1979 that had a significant impact on Minnesota law. Traditional, broad categories of substantive law, such as Criminal Law and Procedure and Torts, are included, as well as more narrowly defined categories, such as Marriage Dissolution and Public Employees. Because of the wide range of topics covered, however, certain traditional categories, such as constitutional law and evidence, are treated throughout the Note rather than in a single section. The decisions have been evaluated by considering both the issues settled and the new questions raised. The commentaries contained in this Note are necessarily concise and consider only one or two issues. Of course, many undoubtedly important developments have been omitted, but those omissions have permitted greater critical analysis of the decisions reviewed.

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I. CIVIL RIGHTS

A. ANTINEPOTISM RULES

In Kraft, Inc. v. State,1 the Kraft corporation denied full-time employment to several of its part-time employees because they were married to persons already employed by the firm.2 Kraft's antinepotism rule permitted only one member of an immediate family3 to be employed full-time at a Kraft facility. The part-time employees charged that to the extent this rule implicated the husband-wife relationship, it discriminated on the basis of "marital status" in violation of the Minnesota Human Rights Act (MHRA).4 The issue for the court was whether the MHRA's marital status provision refers simply to one's personal status or whether it encompasses both personal status and the identity of one's spouse. The Minnesota Supreme Court adopted the latter definition, holding that antinepotism rules, insofar as they apply to the spousal relationship, constitute marital status discrimination and are impermissible except when demonstrably based on a "compelling and overriding bona fide occupational qualification."5

1. 284 N.W.2d 386 (Minn. 1979).
2. For a discussion of other civil rights cases decided in 1979, see note 20 infra.
3. The rule defined immediate family as father, mother, husband, wife, son, daughter, stepson, stepdaughter, brother, sister, and in-laws. 284 N.W.2d at 387.
4. MINN. STAT. §§ 363.01-.14 (1978 & Supp. 1979). Section 363.03(1) of the Minnesota Statutes provides in part: "Except when based on a bona fide occupational qualification, it is an unfair employment practice: ... (2) For an employer, because of . . . marital status . . . , (c) to discriminate against a person with respect to his hire, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment." MINN. STAT. § 363.03(1) (1978).
5. 284 N.W.2d at 387. The court suggested that the result it reached was intended by the legislature. It also expressed the fear that antinepotism rules
The court’s broad interpretation of the MHRA’s marital status provision appears unwarranted. Although the part-time employees in this case could have obtained full-time jobs from Kraft if they had not been married to full-time employees who worked in the same facility, it was not the status of the part-time employees as married persons that caused the problem. Rather, the problem was attributable to the occupational status of the part-time employees’ spouses.

Antinepotism rules are generally based on the sound experience of employers, not on employers’ unfair stereotypes that are the proper object of antidiscrimination law. Moreover, antinepotism rules focus on the type of employee relationships—brother-sister, parent-child, or husband-wife—that can conflict with legitimate company interests. It therefore seems unlikely that the legislature intended the MHRA’s marital status provision to undermine the application of antinepotism rules that discriminate on the basis of the occupational status of spouses. Because a common business concern underlies the proscription of all forms of nepotism in employment relationships, if the legislature had intended to totally eliminate no-spouse rules, such intent would have more logically been manifested in a complete ban on antinepotism rules, rather than in an implicit ban on such rules only as they apply to spouses.

Even though some no-spouse rules might be without ra-
barring the employment of spouses would create economic pressures leading couples “to forsake the marital union and live together in violation of Minn. Stat. § 609.34 [thereby undermining] the preferred status enjoyed by the institution of marriage.” 284 N.W.2d at 388. It is curious that the court would proffer an argument based on the “preferred status” of the marital union when the statute at issue expressly prohibits such a preference. Moreover, the logical solution to such economic pressures is not a broad proscription of all spousal antinepotism rules, but the enactment of specially designed administrative regulations applicable to “one-company” towns in which such pressures are most likely to occur.

6. In Yuhas v. Libbey-Owens-Ford Co., 562 F.2d 496 (7th Cir. 1977), the defendant’s no-spouse rule was found presumptively invalid as sex discrimination because plaintiffs showed that the rule disproportionately affected women. The court held the presumption rebutted, however, because the defendants showed that it was supported by sound business reasons.

tional basis, the test adopted in *Kraft* for evaluating these rules is far too stringent since it sanctions only those spousal antinepotism rules that are supported by "compelling and overriding" business necessities. Although some rules can survive this level of scrutiny, the problem is that the test prohibits antinepotism rules that are based on sound, but not necessarily compelling, business considerations. A better test would permit any antinepotism rule—regardless of the type of family relationship implicated—unless it was not reasonably related to sound business considerations. If the court does not modify the test announced in *Kraft*, the Department of Human Rights should promulgate regulations prohibiting antinepotism rules based on spousal relationship, but allowing less narrowly focused antinepotism rules so long as they are reasonably related to legitimate business considerations.

B. **Affectional Preference**

In *Big Brothers, Inc. v. Minneapolis Commission on Civil Rights*, the Minnesota Supreme Court considered the rights of homosexuals who apply to serve as volunteer "big brothers." The plaintiff alleged that certain practices followed by the Big Brothers organization violated a Minneapolis ordinance banning discrimination based on "affectional preference." The practices that were challenged included Big Brothers' pol-

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8. One example might be a rule barring spouses from working for a large company even though their job-settings and career paths are wholly unrelated.
9. 284 N.W.2d at 388.
10. The court stated that "[m]ere business convenience is insufficient" to support antinepotism rules. *Id.* Yet such convenience could be a sound business consideration in some settings. For example, many small partnerships—including law firms—adopt antinepotism hiring rules to avoid disharmony and the appearance of favoritism since subjective criteria are essential elements of the hiring decision. Antinepotism rules preclude these issues from arising. Since many firms do not adopt such rules, however, it is doubtful that this purpose can be characterized as "compelling and overriding."
11. The amended rule at *Kraft*, for example, allows current full-time employees to marry but prohibits spouses from supervising each other and from working on the same shift or in the same department or elsewhere when there is a conflict between the spouses' interest and that of the company. The court noted this new rule without comment. *Id.* at 387 n.1.
12. 284 N.W.2d 823 (Minn. 1979).
13. The Big Brothers organization matches fatherless young boys with adult male volunteers who act as surrogate fathers.
14. The ordinance on which the plaintiff based his claim was section 945.030(A)(5) of the Minneapolis Code of Ordinances. See 284 N.W.2d at 825 n.1. Both the current version of the ordinance, MINNEAPOLIS CODE OF ORDINANCES § 139.40(h) (1978), and the version on which the plaintiff based his claim are reprinted in *Big Brothers*. See 284 N.W.2d at 826 n.6.
icy of inquiring into the sexual preference of applicants and of informing mothers of the result of the inquiry only if the applicant expressed a homosexual preference. The court held that both the inquiry and the selective communication of responses are permissible under the ordinance. The court upheld the inquiry because it was related to matters of legitimate interest to mothers and was not expressly prohibited by the ordinance. The court reasoned that the practice of calling a mother's attention only to those applicants who reveal a homosexual preference was not "actual discrimination" because Big Brothers also alerted mothers to applicants having other atypical traits.15

The court's resolution of the discrimination issue not only is ill-considered,16 but appears to conflict with the definition of discrimination provided in the ordinance. Under the ordinance, "unequal treatment" of a protected class constitutes discrimination.17 In the Big Brothers organization, homosexuals and heterosexuals are clearly accorded unequal treatment: only homosexual applicants have their sexual preference disclosed to mothers. Moreover, the sole basis for this unequal treatment is the homosexual status of the applicants—a protected status under the ordinance.18 Thus, Big Brothers' policy of selectively disclosing affectional preferences is plainly discriminatory within the meaning of the Minneapolis ordinance.

The hearing examiner had concluded that for the inquiry into affectional preference to be proper, Big Brothers must inform mothers of the responses of all applicants. This solution meets the informational needs of mothers without discriminating among applicants. Alternatively, the court could have acknowledged that the selective communication policy was discriminatory but could have approved it based on the special facts of the case. This outcome was possible because all parties conceded that the mother was ultimately free to discriminate among applicants on any basis. Thus, the court could have characterized Big Brothers' selective communication policy as

15. The court noted that Big Brothers calls special attention to applicants having criminal records. 284 N.W.2d at 827.
16. In essence, the court has deemed the unequal treatment of homosexuals to be nondiscriminatory because Big Brothers also treats other "atypical" groups—such as convicts—unequally. This suggests that the unequal treatment of blacks would be nondiscriminatory so long as other atypical groups—such as chicanos—were subject to the same unequal treatment.
17. "[D]iscrimination' includes any . . . policy or practice, which results in the unequal treatment, separation or segregation of . . . a class protected by this title." MINNEAPOLIS CODE OF ORDINANCES § 139.20(g) (1976).
18. See note 14 supra and accompanying text.
simply facilitating the mother's right to discriminate. When "unequal treatment" merely facilitates permissible discrimination, the "facilitation" itself is not illegal.\footnote{19} The court in \textit{Big Brothers} was probably influenced by the fact that society has not yet afforded homosexuals the same support against discrimination that it has afforded racial minorities and other protected classes. Yet it is precisely for this reason that it would have been better for the court to acknowledge the discrimination and either eliminate it—as the hearing examiner recommended—or approve it based on a rationale, such as facilitation, that helps delineate the boundaries of impermissible discrimination.\footnote{20}

\section{II. CONFLICTS OF LAW}

An activity giving rise to litigation must have more than a "slight" relationship to the forum state if the forum is to apply its own law.\footnote{1} In \textit{Hague v. Allstate Insurance Co.},\footnote{2} the Minne-

\footnote{19}. This notion of "facilitative discrimination" is implicit in much of the antidiscrimination law. In the employment setting, for example, inquiry into a protected area, such as marital status, is generally banned unless related to a bona fide occupational qualification. \textit{See}, \textit{e.g.}, \textit{Phillips v. Martin Marietta Corp.}, 400 U.S. 542, 544 (1971) (per curiam). Although such an inquiry is harmless on its face, it is restricted because it can only facilitate subsequent, impermissible discrimination. To approve the Big Brothers' selective communication policy based on this "mere facilitation" rationale, a court would have to read this concept into the discrimination ordinance. The alternative taken by the court in Big Brothers, on the other hand, was to "read out" of the ordinance an important definition of discrimination. \textit{See} text accompanying notes 17-18 \textit{supra}.

\footnote{20}. Two other significant civil rights cases were decided in 1979. In \textit{Kaster v. Independent School Dist. No. 625}, 284 N.W.2d 362 (Minn. 1979), the Minnesota Supreme Court held that the repeated failure of a school district to promote a highly qualified Jewish teacher to an administrative position was sufficient to establish a prima facie case of discrimination. This ruling is significant because applicants for administrative positions are usually evaluated on the basis of subjective criteria under which employers can camouflage discriminatory practices.

In \textit{Lewis v. Ford Motor Co.}, 282 N.W.2d 874 (Minn. 1979), an applicant who had been denied full-time employment because he had experienced asthma as a child charged the defendant with employment discrimination based on physical disability. Although the complaint was brought under the St. Paul Human Rights Ordinance, Ford asserted a defense under section 363.02(5) of the Minnesota Statutes, which allows a company to refuse employment when an applicant's disability would pose a "serious threat" to his own health or safety. \textit{Minn. Stat.} § 363.02(5) (1978). The court held that Ford could assert the statutory defense, but remanded the case for further fact-finding on the nature of the disability. The court's ruling appears to require employers to show that there is a \textit{current} risk to the applicant's health in order to successfully invoke the defense.


\footnote{2}. 289 N.W.2d 43 (Minn. 1979), \textit{cert. granted}, 48 U.S.L.W. 3535 (1980).
sota Supreme Court applied Minnesota law, which allows "stacking" of insurance claims, to a suit arising out of a fatal highway accident that occurred in Wisconsin. Wisconsin law does not permit stacking. All persons involved in the accident, as well as the plaintiff, who was not involved, were Wisconsin residents. Moreover, all three of the decedent's insurance policies were written in Wisconsin. Minnesota's "contact" with the controversy was created when, after the accident, the plaintiff moved to Minnesota.

To resolve choice of law questions, Minnesota courts employ a test that requires them to consider five factors: (1) predictability of results; (2) maintenance of interstate and international order; (3) simplification of the judicial task; (4) advancement of the forum's governmental interests; and (5) application of the better rule of law. In Hague, the court found the first three factors of this test inapplicable. But since stacking would result in the plaintiff receiving a greater award, the court found that the application of Minnesota law would serve the forum's governmental interests by "keeping [the plaintiff] off welfare rolls and enabling [her] to meet financial obligations." The most important factor in the court's decision to apply Minnesota law, however, was its belief that Minnesota's stacking rule was simply a better rule of law than Wisconsin's no-stacking rule.

3. In Van Tassel v. Horace Mann Mut. Ins. Co., 296 Minn. 181, 207 N.W.2d 348 (1973), the court held that an insured who had paid premiums on more than one policy could "stack" the benefits of those policies, multiplying his award. In Hague, the plaintiff's decedent was killed while riding on an uninsured motorcycle. The decedent owned three automobiles, each carrying uninsured motorist coverage of $15,000. By "stacking" these claims, the plaintiff could receive up to $45,000.


5. The court also cited certain less compelling contacts: (1) the decedent had been employed in Minnesota for 15 years; and (2) the defendant conducted business in Minnesota. 289 N.W.2d at 46-47. These types of "contacts," however, normally bear on the jurisdictional rather than the choice of law issue. The court also noted that Minnesota had a number of "interests" in the controversy: (1) the state's policy of compensating injured plaintiffs to the maximum extent of their injuries; and (2) the state's interest in the administration of estates. Id. at 47. But these interests are not the types of contacts that help determine the constitutional choice of law issue; rather, they simply guide the court in its use of discretion once the constitutional issue has been resolved. See notes 12-14 infra and accompanying text.


7. 289 N.W.2d at 49.
It was reasonable for the court to assess Minnesota's compensatory interest in the controversy at the time of the litigation rather than at the time of the accident, because Minnesota was the plaintiff's current domicile and would have to support her if she was unable to collect adequate compensation. The problem with this approach, however, is that if courts attach too much significance to events unrelated to the controversy, such as a subsequent change in domicile, they will encourage forum-shopping.\(^8\) Thus, in auto-accident cases most courts consider post-accident events, if at all, only to the extent that the events occur in a forum state that already has significant contacts with the controversy.\(^9\) Similarly, the "better rule of law" rationale employed by the court in *Hague* is usually applied only in cases in which the activities leading to the controversy are in themselves sufficient to establish minimum contacts with the forum state.\(^10\) The *Hague* court's liberal application of Minnesota's choice of law test was possible only because the court broke from precedent requiring the existence of some specific contact other than an after-the-fact change of domicile.

Choice of law cases actually raise two issues. One is constitutional: does the forum state have sufficient contacts with the activities leading to the controversy to justify the application of its own law?\(^11\) The second issue is discretionary: assuming that minimum contacts do exist, should the forum state

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\(^8\) There is also a danger that courts might use such trivial contacts to justify resorting to "forum preference among substantive rules." Leflar, *supra* note 6, at 287. Professor Leflar points out that although rules preference is generally within constitutional bounds, it may indicate the forum state's lack of respect for the laws of the nonforum state. Such disrespect raises issues of federalism and comity. See id.


\(^12\) See cases cited in note 1 *supra*. This inquiry is similar to that engaged in by courts when deciding personal jurisdiction questions. See cases cited in note 17 infra. Of course, one distinguishing factor is that domicile in the forum state at the time of suit is normally conclusive of the jurisdictional question but not of the choice of law question.
apply its own law? The factors relied on in Hague—Minnesota's interest in victim compensation and its "better" rule of law—apply only to the second issue.\(^{13}\) They are reasons for applying Minnesota law, assuming that minimum contacts exist, but they are not in themselves contacts that link state law to the controversy.\(^{14}\) For the Hague court, the contact giving Minnesota the opportunity to apply its own law was that the plaintiff moved to Minnesota before bringing suit.\(^{15}\) In a similar fact situation, however, the United States Supreme Court has ruled that such a contact is "without significance" on the constitutional level.\(^{16}\) Recently, the minimum contacts concept has been developed more fully in personal jurisdiction cases.\(^{17}\) In these cases, the Court has emphasized that fairness to the parties is a crucial factor and has used the minimum contacts doctrine to ensure that "states through their courts do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system."\(^{18}\)

In choice of law cases, these constitutional considerations mean that courts should, as a matter of due process, provide some minimum protection for the defendant's reasonable expectation that a controversy will be tried according to the law of a state having some nontrivial contact with the activities underlying the controversy.\(^{19}\) Such contacts should include something more than a unilateral act of the plaintiff that is virtually

\(^{13}\) The choice of state law test used in Hague was meant to apply only if constitutional or federal law did not preclude its use. See Leflar, supra note 6, at 270-71 & n.20.

\(^{14}\) Nevertheless, the court in Hague seemed to believe that the factors in the choice of law test actually constitute "contacts" for the purpose of due process analysis. See 287 N.W.2d at 49 (discussion of factors four and five).

\(^{15}\) But see note 5 supra.


\(^{17}\) See, e.g., Shaffer v. Heitner, 433 U.S. 186 (1977). In World-Wide Volkswagen Corp. v. Woodson, 100 S. Ct. 559 (1980), the Court emphasized the existence of identifiable contacts between the controversy and the forum quite apart from the theoretical interests the state may have in the outcome of the case. See id. at 565-66.

\(^{18}\) World-Wide Volkswagen Corp. v. Woodson, 100 S. Ct. 559, 564 (1980).

\(^{19}\) The court in Hague stated that since automobiles travel from state to state, insurers accept the risk that they might be held liable under a stacking law, regardless of where the policy was written. 289 N.W.2d at 50 (on rehearing). This oversimplifies the issue; insurance companies accept the risk that they may be liable under stacking statutes when there are sufficient contacts between the stacking forum and the accident giving rise to the claim. As an actuarial matter, however, insurance companies are entitled to expect that some accidents will evince no contacts with a stacking forum and that liability will be less for these accidents. See generally Johnson v. Johnson, 107 N.H. 30, 33, 216 A.2d 781, 783 (1966).
unrelated to the underlying activities. Moreover, it is unfair for a state to apply its own law to a controversy with which it has almost no significant contacts, because doing so may undermine the law of another state by subtly encouraging forum-shopping. In the extreme case, this unfairness reaches constitutional dimensions. The activities underlying the controversy in *Hague* bear such a trifling relation to Minnesota that the application of Minnesota law offends due process: it is unfair to the defendant and unnecessarily derogates the law of Wisconsin. Since the threshold constitutional test has not been met, it is immaterial that Minnesota has some governmental interest in the outcome or that the Minnesota rule is a "better" rule.

III. CRIMINAL LAW AND PROCEDURE

A. FOURTH AMENDMENT—SEARCH AND SEIZURE

1. *Automobile Searches*

Under the automobile exception to the fourth amendment warrant requirement, a police officer has sufficient probable cause to conduct a warrantless search of an automobile if he has a reasonable belief that the vehicle contains articles that he is entitled to seize. In *State v. Gallagher*, the Minnesota Supreme Court upheld a warrantless search of an automobile that had been stopped for speeding, applying the "totality of the circumstances" test for probable cause. According to the


21. See note 19 supra.


2. 275 N.W.2d 803 (Minn. 1979).

3. Id. at 804. After the defendant and his passenger had gotten out of the car, the officer asked the defendant for permission to inspect a brown paper bag lying on the front seat of the car. The defendant refused and the officer then "informed defendant that he was under arrest and that [the officer] could search the vehicle." Id. at 805. An officer has no authority to search an automobile simply because he has arrested one of its occupants. Chimel v. California, 395 U.S. 752, 762-64 (1969). Nevertheless, the defendant's passenger handed the bag over to the officer. Only after observing that the bag contained marijuana did the officer inform the defendant and his passenger of their *Miranda* rights. The defendant subsequently was convicted of possession of a controlled substance and sentenced to a term of not more than three years. 275 N.W.2d at 805.
court, the driver's immediate exit from the car, the awkward attempts of his passenger to conceal a brown paper bag, and the "glassy stares" of both occupants of the car combined to establish sufficient probable cause for the search.

It is questionable whether there was probable cause in Gallagher since probable cause cannot be established by furtive gestures alone. Although other minor factors may have been present in Gallagher, these factors were probably insufficient to create a reasonable belief that the automobile contained articles the officer was entitled to seize. If the totality of circumstances test is to deter abusive or discriminatory police conduct, it must be applied more rigorously. For example, in State v. Charley, the court appropriately found probable cause to search the defendant's automobile after it had been stopped for a traffic violation, because the defendant's furtive gestures were coupled with other incriminating circumstances. In Charley, the police had observed the defendant and a teenager making an exchange in a parking lot known for drug transactions. The officer followed the defendant's car, noticing that it was "weaving erratically." After being stopped by the officer, the defendant, while getting out of his car, made a "furtive movement" as if placing something under the car seat. The officer

4. The court recognized that the defendant's immediate exit might have been purely innocent and conceded that, standing alone, such conduct could not justify a thorough search. The court, however, would permit an officer to take a cursory look into a vehicle under such circumstances. 275 N.W.2d at 807. But see People v. Superior Court, 3 Cal. 3d 807, 827-28, 478 P.2d 449, 462-63, 91 Cal. Rptr. 729, 742-43 (1970).

5. The arresting officer testified that he observed "wide" stares. From this testimony the trial court concluded that both the defendant and his passenger exhibited "glassy stares." 275 N.W.2d at 808.

6. Id. The trial court had based its finding of probable cause not only on these three factors but also on the passenger's inability to state her destination. Id. at 806.


8. See Project, Marijuana Laws: An Empirical Study of Enforcement and Administration in Los Angeles County, 15 U.C.L.A. L. Rev. 1499 (1968). "A large percentage of the arrests for marijuana possession results from the stopping of automobiles for minor traffic violations." Id. at 1533. Suggesting that probable cause may be "written in" as an afterthought, the authors add, "The suspicion that this does occur is heightened by the almost total uniformity of the arrest reports. The traffic officer appears to be aware that if he tailors his report to a certain style with certain facts, he will almost certainly have it accepted by the court." Id. at 1534 n.95, quoted in People v. Superior Court, 3 Cal. 3d 807, 827 n.13, 478 P.2d 449, 463 n.13, 91 Cal. Rptr. 729, 742 n.13 (1970).

9. 278 N.W.2d 517 (Minn. 1979).
then observed that the defendant had trouble walking and that his speech was slurred.\textsuperscript{10} The officer in \textit{Charley} had specific knowledge linking the defendant to evidence of a possible crime, but the officer in \textit{Gallagher} "had no more than a suspicion that the bag [in the defendant's car] contained contraband."\textsuperscript{11} If courts were to require prosecutors to establish probable cause by showing both deliberate furtive actions by the defendant and specific knowledge on the part of the officer linking the defendant to evidence of a crime,\textsuperscript{12} they would remove the incentive for officers to use "furtive movements" as a subterfuge for conducting searches based on nothing more than a hunch. The test for probable cause must be this demanding if it is to effectuate the fourth amendment guarantee against unreasonable searches and seizures.\textsuperscript{13}

2. The Exclusionary Rule

Two 1979 decisions, \textit{State v. Hodges}\textsuperscript{14} and \textit{State v. Olsen},\textsuperscript{15} considered the admissibility of evidence tainted by an illegal search. In both cases the court, by admitting evidence obtained in warrantless searches, reduced the effectiveness of the exclusionary rule as a deterrent of police misconduct.

In \textit{Hodges}, the sublessor entered the defendant sublessee's warehouse to discuss some financial matters with him.\textsuperscript{16} Because he did not find the defendant there, the sublessor recorded the license plate number of one of the many dismantled trucks in the warehouse and went to the police, hoping that they would run a license check to help locate the defendant. Upon hearing a description of the dismantled trucks, two police

\begin{flushleft}
\textsuperscript{10} \textit{Id.} at 518-19.
\textsuperscript{11} \textit{State v. Gallagher, 275 N.W.2d at 809 (Wahl, J., dissenting).}
\textsuperscript{12} \textit{See Sibron v. New York, 392 U.S. 40, 66-67 (1968).}
\textsuperscript{13} In 1979, the Minnesota Supreme Court upheld a number of warrantless vehicle searches when illegal objects were in plain view of the police. \textit{See State v. Tungland, 281 N.W.2d 646 (Minn. 1979); State v. Yaeger, 277 N.W.2d 405 (Minn. 1979); State v. Johnson, 277 N.W.2d 346 (Minn. 1979). The court also upheld a warrantless search when the police discovered that the defendant, who had been involved in an accident and had asked them to tow his car, had been identified by a victim as her assailant. \textit{See State v. Waters, 276 N.W.2d 34 (Minn. 1979).}
\textsuperscript{14} 287 N.W.2d 413 (Minn. 1979).
\textsuperscript{15} 282 N.W.2d 528 (Minn. 1979).
\textsuperscript{16} 287 N.W.2d at 415. The check that the defendant had given the sublessor for the first month's rent was not honored by the bank. The sublessor went to the warehouse to inform the defendant of the bad check and to collect the next month's rent. The sublessor had a key to the defendant's warehouse and had reserved the right to enter the premises at any reasonable time. \textit{Id.} at 414.
\end{flushleft}
detectives accompanied the sublessor to the warehouse, recorded license plate and serial numbers from the vehicles inside, and confirmed that several were stolen. A short time later, the defendant arrived at the warehouse and the police arrested him. A search warrant was obtained after the defendant's arrest.17

In Olsen, police went to the scene of a fire after fire fighters had reported seeing marijuana seeds and ether on the premises. Before obtaining a search warrant, one of the police officers searched the defendant's garage and examined the items that had attracted the fire fighters' attention. More than four hours later, the officer returned with a warrant and seized "controlled substances, weapons, devices for measuring and packaging controlled substances, laboratory equipment, and chemicals."18

In both Hodges and Olsen, the Minnesota Supreme Court found the warrantless searches illegal, since neither search was justified by exigent circumstances.19 The court refused, however, to suppress the evidence obtained20 because in each case warrants could have been issued based upon information available prior to the illegal search.21 Although the court was understandably reluctant to exclude reliable physical evidence,22 these decisions implicitly sanction warrantless searches in situations in which there is sufficient information and time to obtain a warrant before the search. In this respect, the decisions are at odds with the deterrence rationale of the exclusionary rule.23 In cases such as Hodges and Olsen, police do not signifi-

17. Id. at 415.
18. 282 N.W.2d at 530.
19. 287 N.W.2d at 415; 282 N.W.2d at 532.
20. 287 N.W.2d at 415-16; 282 N.W.2d at 532.
21. 287 N.W.2d at 415-16; 282 N.W.2d at 532. In Olsen, the court characterized the information illegally obtained by the officers as cumulative to that obtained by the fire fighters and fire investigators who were legally on the premises. 282 N.W.2d at 532 (citing State v. Sorenson, 270 Minn. 186, 200-01, 134 N.W.2d 115, 125 (1965)). The Sorenson case relied on in Olsen, however, is arguably inapplicable since it dealt with the quantum of evidence necessary to support a conviction, not the quantum necessary to establish cumulative information for probable cause.
22. In both Hodges and Olsen, the illegally obtained evidence was "primary" evidence of the crime, and its exclusion would probably have resulted in the reversal of the defendants' convictions. Compare Clough v. State, 92 Nev. 603, 555 P.2d 840 (1976) (court applied exception to exclusionary rule to save primary evidence) with State v. Crossen, 21 Or. App. 835, 536 P.2d 1263 (1975) (court refused to apply exception to exclusionary rule to save primary evidence).
23. See, e.g., Note, The Inevitable Discovery Exception to the Constitutional Exclusionary Rules, 74 COLUM. L. REV. 88, 99 (1974); Comment, Fruit of the Poi-
cantly "benefit" from their illegal conduct since they would have had little trouble obtaining search warrants legitimizing their actions. By removing the certainty that illegally obtained evidence will be inadmissible, courts encourage police to proceed without a warrant whenever it is inconvenient to obtain one. Such unjustified invasions of privacy could be prevented if courts would apply the exclusionary rule more strictly, at least until an alternative is found.

3. Searches of Attorneys' Offices

In O'Connor v. Johnson, the Minnesota Supreme Court examined the validity of a warrant authorizing the search of an attorney's office for documents belonging to one of the attorney's clients. As part of a liquor license investigation, the police had obtained a search warrant to seize certain business records of the attorney's client. The attorney challenged the warrant but the trial court ordered him to produce all of the records listed in the warrant except those that constituted his work-product. In granting the attorney's petition for a writ of prohibition to quash the search warrant, the Minnesota Supreme Court distinguished several recent United States Supreme Court decisions and held that under the Minnesota Constitution a warrant is "unreasonable and, therefore, invalid when the attorney is not suspected of criminal wrongdoing and there is no threat that the documents sought will be de-

24. 287 N.W.2d 400 (Minn. 1979).
25. The court noted that in this case there was no claim of wrongdoing by the attorney, as in Andresen v. Maryland, 427 U.S. 463 (1976), and that the person under investigation was not urging a fifth amendment claim against a third-party summons directing his attorney to produce documents for the L.R.S., as in Fisher v. United States, 425 U.S. 391 (1976), and Couch v. United States, 409 U.S. 322 (1973). See 287 N.W.2d at 402. The court also distinguished Zurcher v. Stanford Daily, 436 U.S. 547 (1978), in which the United States Supreme Court upheld a warrant authorizing the search of a newspaper office because the newspaper had announced its policy of destroying documents that might aid in the prosecution of protesters. See 287 N.W.2d at 405. There is no evidence that the attorney in O'Connor had any intention of destroying the documents in question; he would have been subject to professional discipline if he had destroyed them. See id. at 405. See also ABA Code of Professional Responsibility DR. 7-102(A)(3) (1978).
26. MN. CONST. art. I, § 10. Although article I, section 10 is identical to the fourth amendment of the United States Constitution, the court relied on the state constitution, presumably to insulate its decision from the United States Supreme Court's tendency to condone searches of innocent third parties. See note 25 supra.
This result is commendable, since the alternative procedure—obtaining a subpoena duces tecum—\(^28\) is more appropriate when attorney-client relationships are implicated. Even the most particularly drawn warrant threatens the confidentiality of client files\(^29\) as well as the attorney-client privilege,\(^30\) the work product immunity,\(^31\) and the right of criminal defendants to counsel.\(^32\) Because attorneys have a special obligation to the legal system,\(^33\) they have a strong incentive to honor the order as completely as possible. Although the subpoena procedure may slightly delay prosecutors, the inconvenience it creates is outweighed by the societal interests it protects.\(^34\)

\(^27\) 287 N.W.2d at 405.

\(^28\) In a criminal proceeding, a subpoena may be issued to require production of documents before a grand jury or before a court. See Minn. R. Crim. P. 22.01-.02. A subpoena carries much less potential for invasion of protected privacy rights than a warrant because the enforcement of a subpoena can be challenged in an adversary proceeding. In addition, a subpoena allows the person in possession to produce the requested documents without having to endure an unnecessary, intrusive search of a specified area. See Zurcher v. Stanford Daily, 436 U.S. 547, 560-63 (1978); Falk, Are Law Offices Safe?, 6 Barrister 17, 17-18 (1979).

\(^29\) If the attorney in O'Connor had not been present to guide the police, the police would have had to "rifle through" the attorney's files to satisfy the warrant. 287 N.W.2d at 404.

\(^30\) See McCormick's Handbook of the Law of Evidence §§ 87-97 (2d ed. 1972) [hereinafter cited as McCormick]. Cf. Minn. Stat. § 595.02(2) (1978) (without consent of client, attorney cannot be examined regarding communications made to him by the client or advice he has given to client). See also ABA Code of Professional Responsibility EC 4-1, DR 4-101 (1978).

\(^31\) See Hickman v. Taylor, 329 U.S. 495 (1947). Under Minn. R. Crim. P. 9.02(3), an attorney's work-product is immune from discovery in criminal actions. See also McCormick, supra note 30, § 97. In civil actions, it is discoverable "only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by some other means." Minn. R. Civ. P. 26.02(3). See also McCormick, supra, § 96.


\(^33\) See 287 N.W.2d at 405 ("Attorneys are required by statute, the Code of Professional Responsibility, and the oath of admission to the bar to preserve and protect the judicial process.").

B. FIFTH AMENDMENT—PRIVILEGE AGAINST SELF-INFRINGEMENT

1. Non-Compliance with Subpoena Duces Tecum

The fifth amendment privilege against self-incrimination prohibits the state from compelling a person to testify against himself or to produce incriminating evidence in a testimonial manner. In State v. Alexander, the Minnesota Supreme Court held that a municipal court order, which directed the defendants to retain "intact and in its entirety" an allegedly obscene film and to produce the film at a probable cause hearing, violated the fifth amendment. By obeying the order, the court reasoned, the defendants would admit that the film was in their possession or control and that it was in fact the film described in the court's order. The court dismissed the argument that the state would not rely on the act of production to prove possession or control, noting that if such were the case the state "should have been willing to give defendants immunity from use of any evidence obtained by producing the film, except that pertaining to the question of obscenity." Alexander is consistent with the fifth amendment premise that the state bears the burden of proving its case against a criminal defendant. No United States Supreme Court opinion has considered the precise issue raised in Alexander, but the Court has recognized that "[t]he act of producing evidence in response to a subpoena . . . has communicative aspects of its own," and may be both "testimonial" and "incriminating." Although, in Alexander, police officers had already viewed the film at the defendant's theater, the court was correct in characterizing compelled production of the film at a probable cause

36. 281 N.W.2d 349 (Minn. 1979).
37. Id. at 350. In Minnesota, an allegedly obscene film cannot be seized unless there has been a prior adversary hearing at which it is established that the state has probable cause to believe the film is obscene. City of Duluth v. Wendling, 306 Minn. 384, 390, 237 N.W.2d 79, 83 (1975). To find probable cause, however, the magistrate need not view the film. Id. at 389, 237 N.W.2d at 83.
38. By complying with the subpoena, the defendants might, for evidentiary purposes, authenticate the film as the one described in the subpoena. See United States v. Beattie, 541 F.2d 329, 331 (2d Cir. 1976).
39. 281 N.W.2d at 352.
hearing as testimonial.\textsuperscript{42} And, because exhibiting obscene films is illegal,\textsuperscript{43} this "testimony" would clearly be incriminating. By affirming only that portion of the trial court's order that required the defendants to retain the film intact for trial,\textsuperscript{44} the court struck a fair balance between the state's interest in prosecuting obscenity and the respect the state "must accord to the dignity and integrity of its citizens."\textsuperscript{45}

2. Voluntary Confession

The fifth amendment prohibits the use of a defendant's confession\textsuperscript{46} as evidence against him if the confession was given involuntarily.\textsuperscript{47} In \textit{State v. Orscanin},\textsuperscript{48} the Minnesota Supreme Court held that an eighteen-year-old defendant had given his confession voluntarily, even though he had been confined for six days in close quarters\textsuperscript{49} before making the confession. The majority found that the situation was not coercive enough to render the defendant's statements involuntary as a matter of law.\textsuperscript{50}

The court's analysis in \textit{Orscanin} is unpersuasive. Although the defendant was legally detained,\textsuperscript{51} the environment was certainly coercive.\textsuperscript{52} During his six-day confinement, he was al-
allowed to see no one except his parole officer and was given the impression, in his single conversation with the officer, that he would be treated as a juvenile if he cooperated with the police. In addition, the defendant was taken out of isolation soon after he confessed. This evidence suggests that the defendant’s confession was not voluntary, but rather the result of his coercive confinement, a misunderstanding about his status as an adult, and his lack of contact with an attorney, family, or friends. To protect against self-incrimination, a court must be satisfied that a defendant’s confession was voluntarily given. In view of the evidence presented, the court’s conclusion that Orscanin’s confession was voluntary is suspect. It is irrelevant here that the truth-seeking aspect of criminal prosecution sometimes outweighs the necessity for suppressing confessions when only a technical violation of the fifth amendment has occurred—psychological coercion, such as that in Orscanin, is more than a technical violation.

The court in Orscanin distinguished State v. Weekes, 312 Minn. 1, 250 N.W.2d 590 (1977) (confession obtained after defendant had been confined for 34 hours was involuntary because defendant was not arrested and was interrogated repeatedly during his confinement). See 283 N.W.2d at 901. *See also* Minn. R. Crim. P. 4.02(5).

53. 283 N.W.2d at 899-900. The parole officer, who had spoken with the police before speaking to the defendant, urged the defendant to be honest with the court and discussed the possibility of placing the defendant in a half-way house. The defendant testified that from his conversation with the parole officer he inferred that his case would be processed through the juvenile system.

54. *Id.* at 900.

55. *Cf.* State v. Biron, 266 Minn. 272, 282, 123 N.W.2d 392, 399 (1963) (confession of 18-year-old, on parole at the time of his arrest, held involuntary because police statements "could only have had the effect of implanting in the defendant's mind the hope that he would be treated as a juvenile offender or that in any event the charge against him might ultimately be disposed of on the basis of a lesser charge").


57. *See generally* Kamisar, *What is an “Involuntary” Confession? Some Comments on Inbau and Reid’s Criminal Interrogation and Confessions*, 17 Rutgers L. Rev. 728 (1963). Under the “police methods” test, which does not go to the inherent believability of a confession, the United States Supreme Court has reversed convictions when the evidence included a confession obtained after extended detention and unrelenting interrogation. *See* Harris v. South Carolina, 338 U.S. 68 (1949); Turner v. Pennsylvania, 338 U.S. 62 (1949); Watts v. Indiana, 338 U.S. 49 (1949). *See also* 18 U.S.C. § 3501 (1976). Although unrelenting interrogation was not a factor in Orscanin, the defendant’s near-juvenile status and the extended solitary confinement undoubtedly combined to exert similar psychological pressures on him.

C. ADMISSIBILITY OF PRIOR CRIMES

1. Impeachment

Evidence that a witness has been convicted of a "veracity-related" crime, whether a felony or a misdemeanor, can be introduced to impeach the credibility of the witness. Evidence that the witness has been convicted of any other type of felony may be introduced only if the trial judge finds that the probative value of the evidence outweighs its prejudicial effect. In State v. Brouillette, the Minnesota Supreme Court upheld a lower court ruling that if the defendant, who was accused of fourth-degree criminal sexual conduct, took the stand on his own behalf, the prosecution could impeach his testimony with evidence of the defendant's previous conviction for third-degree criminal sexual conduct. The defendant never took the stand. The court assumed that had the defendant taken the stand, a cautionary instruction to the jury that it consider the prior conviction only insofar as it relates to the defendant's veracity could have protected the defendant from prejudice.

In Minnesota, prosecutors once had absolute discretion to introduce evidence of prior convictions to impeach defendants who had taken the stand on their own behalf. This rule often severely prejudiced defendants in the presentation of their cases, even though trial courts were obliged to instruct jurors that prior convictions could be considered only insofar as they

59. MINN. R. EVID. 609(a)(2). Veracity-related crimes are those such as fraud that involve "dishonesty or false statement." See McCormick, supra note 30, § 43, at 89-90. See also F.R. Evid. 609, Conference Report.

60. MINN. R. EVID. 609(a)(1).

61. 286 N.W.2d 702 (Minn. 1979).

62. The incident giving rise to the prosecution in Brouillette occurred eight days after the defendant was released from a county jail where he had been serving time for the earlier sexual offense. Id. at 705 n.4.

63. See City of St. Paul v. DiBucci, 304 Minn. 97, 99-100, 229 N.W.2d 507, 508 (1975). The rule was intended to aid the jury in seeing "the whole person." Id. at 100, 229 N.W.2d at 508. However, for cases holding that the introduction of evidence of past conviction is prejudicial even when its introduction is permitted by statute, see State v. Stewart, 297 Minn. 57, 209 N.W.2d 913 (1973); State v. West, 285 Minn. 188, 173 N.W.2d 468 (1969).

64. The fear of opening his past record might deter a defendant from even taking the stand. In this situation, not only is the defendant prejudiced by the adverse inference drawn by the trier of fact who must speculate as to why the defendant did not take the stand, but the jury is deprived of testimony that it should hear if it is to find the truth. See United States v. Ortiz, 553 F.2d 782, 785 (2d Cir.) (Mansfield, J., dissenting), cert. denied, 434 U.S. 897 (1977); State v. Wakefield, 278 N.W.2d 307, 309 (Minn. 1979). On the issue of prejudice, see State v. West, 285 Minn. 188, 173 N.W.2d 468 (1969); Fed. R. Evid. 609, Report of Senate Comm. on the Judiciary; McCormick, supra note 30, § 43, at 89-90; id. at 11 (Supp. 1978).
related to the witness' credibility. Thus, when Minnesota adopted new rules of evidence in 1977, it placed an additional obligation on trial courts—the obligation to determine whether admitting evidence of a prior conviction for a crime only indirectly related to veracity would produce results that are more probative than prejudicial.

In most cases, this test should be easy to apply. An exception is the Brouillette-type case, in which the prior crime is of recent vintage and of strikingly similar nature to the crime before the court. It is here that evidence of the prior crime is both highly probative and highly prejudicial. In such close cases, when the balance clearly favors neither probative value nor prejudicial effect, the reviewing court should not circumvent the difficult weighing task by falling back on the hollow cautionary instruction rationale. This only encourages lower courts to do the same when faced with difficult evidentiary problems. The Minnesota Supreme Court has already delineated the factors that courts must use when weighing probative value against prejudicial effect. The court should have applied only these factors to the evidence at issue in Brouillette and ignored whatever speculative salutary effect a cautionary instruction might have.

2. Crimes for Which the Defendant Has Been Acquitted

In State v. Wakefield, a case involving rape, the Minnesota Supreme Court reversed a trial court's decision to admit evidence that the defendant had once before been charged with


66. Brouillette had been out of jail for only eight days when the sexual misconduct in question occurred. The more recent a prior conviction, the less likely the offender is to have been rehabilitated. See generally McCormick, supra note 30, § 43, at 11 n.60.3 (Supp. 1978). Also, in Brouillette, it was basically the word of the accuser against that of the accused. When the accused's credibility is the central issue in a case, evidence that he has been recently convicted of a similar crime undercuts his credibility insofar as he is denying culpability for the crime before the trier of fact. See United States v. Ortiz, 553 F.2d 782, 785 (2d Cir.), cert. denied, 434 U.S. 867 (1977).

67. If the prior conviction was for a crime of a nature similar to the one before the court, its introduction may invite the jury to infer the defendant's guilt rather than to simply call into question his veracity as a witness. See United States v. Hayes, 553 F.2d 824, 828 (2d Cir.), cert. denied, 434 U.S. 867 (1977).

68. See State v. Jones, 271 N.W.2d 534, 538 (Minn. 1978). The factors are: (1) the impeachment value of the prior conviction; (2) the date of conviction and the defendant's subsequent history; (3) the similarity of the past crime to the charged crime; (4) the importance of the defendant's testimony; and (5) the centrality of the credibility issue. Id.

69. 278 N.W.2d 307 (Minn. 1979).
and acquitted of rape. Overruling State v. Lucken, the court reasoned that it would be "fundamentally unfair" to force the defendant repeatedly to contest the previous charge.

Although the rule adopted in Wakefield is not yet followed by a majority of jurisdictions, it clearly represents the more reasoned approach because it respects the basic tenet of our judicial system that upon acquittal the matter of a criminal charge is closed. The prejudicial effect of introducing evidence that the defendant has in the past been charged with a similar offense is great, while the probative value of such evidence is slight because there is no way of discovering why the jury acquitted him of the charge.

D. Shackling Defendants

In State v. Stewart, the defendant appealed from a conviction for first-degree murder, alleging that he was denied a fair trial because the trial judge ordered that the defendant be shackled to his chair during voir dire and trial. Basing its decision on a psychiatric report which had indicated that the defendant might "become vocal or get out of order in court," a threatening letter that the defendant had sent to the prosecu-

70. 129 Minn. 402, 152 N.W. 769 (1915). In Lucken, evidence of prior criminal charges was admitted at the defendant's trial because the law did not require its exclusion and because it was unclear whether the defendant had been acquitted.

71. 278 N.W.2d at 309. The court emphasized that "[i]n the eyes of the law the acquitted defendant is to be treated as innocent and in the interests of fairness and finality made no more to answer for his alleged crime." Id. at 308. See Wingate v. Wainwright, 464 F.2d 209, 215 (5th Cir. 1972).

72. See Annot., 86 A.L.R.2d 1132, 1135-36, 1146-47 (1962) (majority has adopted rule that defendant's acquittal of another offense does not render evidence of that offense inadmissible).


74. See State v. Burton, 281 N.W.2d 195, 198-99 (Minn. 1979) (reversible error for court to admit evidence of prior robbery charge of which defendant had been acquitted). But see State v. Matteson, 287 N.W.2d 408, 411 (Minn. 1979) (court admitted evidence of prior sexual conduct of defendant and victim in trial on charges of third-degree sexual assault).

75. 276 N.W.2d 51 (Minn. 1979).

76. Id. at 55-56. The Minnesota Rules of Criminal Procedure provide that any time the court determines that there is reason to doubt the defendant's competency, a psychiatrist or psychologist must be appointed "to examine the defendant and to report to the court on his mental condition." Minn. R. Crim. P. 20.01(2) (3). The defendant had requested such a report. 276 N.W.2d at 55.

77. 276 N.W.2d at 56-57. The report also indicated that the defendant may have been suicidal, but that he was not mentally ill. Id.
tor, and the seriousness of the offense, the Supreme Court upheld the trial judge's actions.

Although a trial judge is given discretion to decide when physical restraint of a defendant is necessary, shackling should be used rarely because the specter of a defendant in shackles will seriously prejudice him in the eyes of the jury. Shackling has been criticized even if imposed after a defendant has disrupted court proceedings, and it is "virtually unheard of when the defendant has committed no overt disruptive act in open court." In Stewart, the defendant not only had informed the court that he wished to cooperate, but also had cooperated when taken to the doctor without restraint several days before trial. On these facts, it seems unfairly prejudicial to shackle the defendant when there was only the possibility of hostility and disruption. The court should have reversed and remanded for a new trial.

E. JUVENILES

1. Right to Cross-Examine Witnesses at a Dispositional Hearing

The procedural protections accorded juveniles at the dispositional stage of juvenile proceedings were examined in In re G.S.J.'s Welfare. Counsel for the juvenile had sought to cross-examine the youth's probation officer, but the referee refused to swear the officer as a witness. The referee did, however, allow counsel to submit cross-examination questions to the court. On appeal, the Supreme Court held that section 260.155(6) of the Minnesota Statutes grants juveniles the right

78. See id. at 56, 59. The defendant later wrote a letter of apology to the prosecutor, and personally apologized to him in court. Id.
79. Id. at 62 (first-degree murder).
80. See note 81 infra.
82. 276 N.W.2d at 63 (Otis, J., dissenting).
84. 281 N.W.2d 511 (Minn. 1979).
85. This statute, which governs hearings under the Juvenile Court Act, provides: "The minor and his parent, guardian, or custodian are entitled to be heard, to present evidence material to the case, and to cross-examine witnesses appearing at the hearing." MINN. STAT. § 260.155(6) (1978). See also MINN. JUV. CT. R. 6-4 (1980).
to cross-examine witnesses, but concluded that because of the informal nature of juvenile proceedings, the procedure adopted by the referee in G.S.J. was sufficient.

Although the concurring justices argued that no statutory right to cross-examine exists, the majority's statutory analysis is more persuasive. Moreover, the right to cross-examine should be available to juveniles as a general policy matter because of the similarities between juvenile court dispositions and criminal court adjudications. Nonetheless, because the informal nature of juvenile court proceedings puts emphasis on determining what action would best serve the interests of the child, the court in G.S.J. correctly held that a juvenile's right to cross-examine need not be coextensive with those granted in criminal trials.


87. 281 N.W.2d at 514. The court affirmed the juvenile's transfer to Red Wing Training School, reasoning that "[c]ounsel for the juvenile having declined to exercise the right [to cross-examination] granted by the referee cannot now assert that the juvenile was denied his statutory right of informal cross-examination." Id.

88. Since section 260.181(2) of the Minnesota Statutes, which deals expressly with dispositional hearings, accords the juvenile no right to cross-examine, Minn. Stat. § 260.181(2) (1978), the justices found that no statutory right existed. Section 260.155, however, applies to juvenile hearings in general, except where specifically limited. See Minn. Stat. § 260.155 (1978). Nothing in subdivision 6 indicates that dispositional hearings are excluded from the section's coverage. Moreover, rule 6-3 of the Minnesota Juvenile Court Rules specifically provides that "[a]ll dispositional hearings before the juvenile court shall be conducted in accordance with [Minn. Stat.] § 260.155." Minn. Juv. Ct. R. 6-3 (1980). Although the state juvenile court rules do not apply in Hennepin County, where this case arose, they do indicate the intended scope of section 260.155.


90. The court noted in dicta that, although it did not have to consider whether a constitutional right to cross-examination existed, the method proposed by the referee would comport with any such right that did exist. 281 N.W.2d at 514. The United States Supreme Court has ruled that juveniles have the right to cross-examine at the adjudicatory stage of juvenile proceedings, see In re Gault, 387 U.S. 1, 56-57 (1967), but has explicitly declined to decide the question for dispositional hearings. Id. at 27. See In re Winship, 397 U.S. 358, 359, 366 (1970). The Court's reluctance to resolve this issue reflects its awareness of the impracticality of having witnesses testify to the type of information contained in a probation report in open court subject to cross-examination. See Williams v. New York, 337 U.S. 241, 250 (1949). Lower courts have thus found no due process violation when cross-examination has been denied. See, e.g., In re Meek, 236 N.W.2d 284, 289-90 (Iowa 1975); In re Josephine M., 384 N.Y.S.2d 794, 53 A.D.2d 540 (1976). But see In re Milton P., 358 N.Y.S.2d 78, 79, 45 A.D.2d 1010, 1011 (1974) (court erred in overruling demand for right to cross-examine the psychologist who testified at juvenile's dispositional hearing). See also In-
2. Juvenile Standard of Care

In In Re S.W.T.,91 the Supreme Court refused to employ an adult standard of care for determining whether two twelve-year-old boys, who had killed a man by carelessly firing a rifle, were guilty of criminally negligent manslaughter. The juvenile court applied an adult standard and found the boys delinquent.92 The Supreme Court reversed, holding that the boys should have been held only to a standard of "conduct and appreciation of risk reasonably to be expected from an ordinary and reasonably prudent juvenile of a similar age."93

In a 1961 case in which civil negligence was charged, Dellwo v. Pearson,94 the Supreme Court found that a juvenile who caused injury with a "dangerous instrumentality" should be held to an adult standard of care.95 The court in S.W.T. refused to apply the Dellwo standard in juvenile delinquency proceedings because of the different policies that underlie adjudications of civil and criminal culpability. In finding civil liability in Dellwo, the court had been primarily concerned with the equities of the blameless victim: its goal was to facilitate recovery. The juvenile justice system, however, is not designed to ensure victim compensation. Rather, it seeks only to identify—for assistance or punishment96—those juveniles who have deviated

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91. 277 N.W.2d 507 (Minn. 1979).
92. The juvenile court stated: "While children are normally held to a different standard of care than adults by reason of their infantile status, nevertheless in dealing with matters of extreme danger to the general public such as guns, children are held to the adult standard of care as a measure of protection for other persons." 277 N.W.2d at 513-14.
93. Id. at 514. The court said consideration should also be given to "factors such as mental retardation, emotional disturbances, etc., which would reduce the juvenile's mental or emotional age below his chronological age." Id. at 514 n.5.
94. 259 Minn. 452, 107 N.W.2d 859 (1961).
95. See id. at 458-59, 107 N.W.2d at 863; RESTATEMENT (SECOND) OF TORTS § 283A, Comment c at 16 (1965) (adult standard of care applies where child engages in activity normally undertaken only by adults and requiring adult qualifications).
96. Traditionally, the juvenile justice system has attempted to enhance the welfare of offenders through rehabilitation and treatment. See MINN. STAT. § 260.011(2) (1978); Note, Basic Rights for Juveniles in Juvenile Proceedings Under the Minnesota Juvenile Court Rules: A Response to Gault, 54 MINN. L. REV. 335, 335 n.3 (1969). In recent years, however, the lack of success in this respect has led to a greater emphasis on "retribution, condemnation, deterrence, [and] incapacitation . . . in the disposition of juvenile offenders." The Supreme Court of California, 1968-1969, 58 CALIF. L. REV. 80, 249 (1970) (quoting
from the norms set by society for children of their age. Only a standard of care based upon age can accomplish this purpose; otherwise, significant punishments might be imposed on children who have done nothing more than act their age.

In addition to the policy distinction, the statutory *mens rea* requirement for criminally negligent manslaughter—that the actor "consciously takes chances of causing death or great bodily harm to another"—seems to require that the standard of care used be based upon the child's age. Because of the difficulty of ascertaining actual state of mind, to determine whether a child was conscious of the potential for harm he created, his conduct must be measured against that of a model actor. The model actor must be as similar to the child as possible for the comparison to have any meaning.

F. DRIVING WHILE INTOXICATED

1. Unconscious Driver's Implied Consent to Chemical Testing

To facilitate evidence-gathering in Driving While Intoxicated (DWI) cases, the legislature enacted an implied consent statute under which a driver is deemed to consent to blood testing unless he expressly refuses the test (in which case his license is revoked for six months). When police request a
test specimen and the driver does not consent to give one voluntarily, the police must advise the driver of his rights under the statute before his implied consent becomes operative. In State v. Wiehle, the defendant was arrested on suspicion of DWI and the arresting officers informed him that he would be taken to the police station for chemical testing. Wiehle, the defendant, neither objected nor consented. The officers, however, never gave Wiehle the "implied consent advisory" required by the statute. While on the way to the police station, Wiehle lost consciousness and was instead taken to a hospital where, at the direction of the arresting officers, a blood sample was drawn from him. The supreme court decided that the results of the blood sample could be used against Wiehle in a license revocation proceeding even though the blood was taken from him while he was unconscious. The court reasoned that "[s]ince Wiehle's physical condition precluded him from refusing the test, . . . his [implied] consent remained continuous."

The holding in Wiehle—that one who has impliedly consented to chemical testing continues to consent after becoming unconscious—is sensible, but it begs the question whether prior to Wiehle's becoming unconscious the conduct of the arresting officers had vitiated his implied consent. The court avoided this problem by framing the issue as "whether the test results of a blood sample taken from an unconscious person may be used in a license revocation proceeding even though

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103. If the driver consents to the test, the voluntary consent standard controls, see Minn. Stat. § 169.121 (1978), rather than the implied consent standard, see Minn. Stat. § 169.123 (1978), and there is no need to give the implied consent advisory. State v. Rossow, 310 Minn. 399, 401-02, 247 N.W.2d 398, 400 (1976).

104. State v. LaTondress, 310 Minn. 403, 404, 247 N.W.2d 401, 401 (1976) (by implication).

105. 287 N.W.2d 416 (Minn. 1979).

106. The implied consent advisory in effect when Wiehle was arrested provided that:

At the time the peace officer requests such chemical test specimen, he shall inform the arrested person that his right to drive may be revoked or denied if he refuses to permit the test and that he has the right to have additional tests made by a person of his own choosing.


107. 287 N.W.2d at 419. See also State v. Hart, 289 N.W.2d 478, 478 (Minn. 1979); State v. Hauge, Finance & Com., Nov. 30, 1979, at 7, col. 2 (Minn. Nov. 30, 1979).

108. 287 N.W.2d at 419. The court also found that the unobtrusive nature of the search, the existence of probable cause, and the need to preserve evidence justified the manner in which the blood sample was taken. Id. at 418. See also State v. Oevering, 268 N.W.2d 68, 72-74 (Minn. 1978).
the advisory information contained in the implied consent law was not given to the unconscious person." A driver consents implicitly to blood testing if he is unconscious continuously from the moment of his arrest to the time that blood must be extracted if it is to retain evidentiary value. Wiehle is distinguishable, however, since the driver was conscious when he was arrested and told that testing would be done, and he remained conscious for some time thereafter.

A better rule would require that for implied consent to remain operative, an arrested driver who is informed that testing will be done must contemporaneously be given his advisory. Under this standard, Wiehle's implied consent to testing would

109. 287 N.W.2d at 417 (emphasis added).
110. See State v. Hart, 289 N.W.2d 478, 478 (Minn. 1979) (driver lost control of motorcycle and was rendered unconscious during police chase); State v. Smith, No. 3000725 (Hennepin County Ct. Dec. 15, 1977) (memorandum) (driver unconscious when police arrived at scene of accident), reprinted in Brief for Respondent at RA-6, State v. Wiehle, 287 N.W.2d 416 (Minn. 1979); accord, People v. McGroder, 81 Misc. 2d 1081, 367 N.Y.S.2d 714 (Webster Town Ct., Monroe County 1975); Scales v. State, 64 Wis. 2d 485, 219 N.W.2d 286 (1974).
111. The statute requires that the implied consent advisory must be given "[a]t the time a chemical test specimen is requested." MINN. STAT. § 169.123(2)(b) (1978). Although this will often be the time immediately preceding extraction, see, e.g., State v. Hauge, Finance & Com., Nov. 30, 1979, at 7, col. 2 (Minn. Nov. 30, 1979) (extraction occurred once police officer reached emergency room of hospital and read implied consent advisory to defendant), it might also refer to the time when an arresting officer first seeks a driver's consent to chemical testing. See, e.g., Prideaux v. State, 310 Minn. 405, 406-07, 247 N.W.2d 385, 387 (1976) (implied consent advisory read to driver immediately upon arrest even though he was to be brought to hospital for testing).

Prideaux held that "any person who is required to decide whether he will submit to a chemical test . . . shall have the right to consult with a lawyer of his own choosing before making that decision, provided that such a consultation does not unreasonably delay the administration of the test." Id. at 421, 247 N.W.2d at 394. The holding of Prideaux has been incorporated into the implied consent advisory now in effect. See MINN. STAT. § 169.123(2)(b)(3) (1978). The court in Prideaux also noted that the "public policy behind . . . provisions for counsel [is] to secure for the person in custody an immediate right to communicate with counsel concerning the impending proceedings against him." 310 Minn. at 419, 247 N.W.2d at 393 (emphasis added). Since the chemical testing process is a "proceeding," see id., the "immediate" right to counsel should mature as soon as the driver becomes aware that such a proceeding is "impending"—that is, when he is first informed that chemical testing will be done.

Of course, both Prideaux and section 169.123 of the Minnesota Statutes imply another strong reason for courts, to require that the advisory be given at the same time as the intent to test is revealed. The mandated right to consult counsel is limited; it does not exist if its exercise would unreasonably delay administration of the test. Thus, by delaying the advisory, an officer may effectively vitiate the driver's right to consult counsel since the later a driver learns of this right, the more likely it is that by exercising it he will unreasonably delay administration of the test.
have been extinguished and obviously could not have con-

The court's decision to analyze the advisory information is-

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112. See Brief for Appellant at 2, Brief for Respondent at 2, State v. Wiehle,
287 N.W.2d 416 (Minn. 1979).
113. Apparently conceding that the police did not have to read the advisory
at the time they announced their intent to test, the appellant argued that al-
though blood could be extracted from an unconscious person, it need not be
tested until the person regains consciousness and is given the advisory. In fact,
Wiehle's blood sample was frozen for two days before being tested. See Brief
for Appellant at 7-9, State v. Wiehle, 287 N.W.2d 416 (Minn. 1979).
114. The current version of the statute provides that a suspected inebriate
must be advised:

(1) that if testing is refused, the person's right to drive will be revoked
for a period of six months; and
(2) that if a test is taken and the results indicate that the person is
under the influence of alcohol or a controlled substance, the person
will be subject to criminal penalties and the person's right to drive may
be revoked for a period of 90 days; and
(3) that the person has a right to consult with an attorney but that this
right is limited to the extent that it cannot unreasonably delay admin-
istration of the test or the person will be deemed to have refused the
test; and
(4) that after submitting to testing, the person has the right to have ad-
ditional tests made by a person of his own choosing.

115. Id. § 169.121(3). In another significant 1979 DWI case, McIntee v. State,
279 N.W.2d 817 (Minn. 1979), the court held that a person whose license has
been revoked for DWI is entitled to a driver's license reinstatement hearing
under the provisions of section 171.19 of the Minnesota Statutes even though he
had waived his right to a prerevocation hearing under the implied consent law.
courts to stay fines and criminal penalties if the defendant undergoes treatment for chemical dependency. In *Novak v. Kirby*, the supreme court held that trial courts may stay the revocation of a driver's license to encourage treatment for alcoholism. The court reasoned that since it had previously characterized license revocation as a criminal penalty, the stay provision applied to revocations as well as to the more traditional criminal sanctions. In addition, the court determined that by enacting a statute that requires courts to give consideration to alcohol problem assessments of convicted DWI defendants, "the legislature granted the courts additional authority to assume a more treatment-oriented posture."  

The court's emphasis on rehabilitation and treatment is commendable, since punishment of drunken drivers is usually ineffective. The rehabilitative approach benefits individuals by forcing them to deal with their drinking problems and serves the community by reducing the number of problem drinkers on the highways. Nevertheless, the statute authorizing stays arguably applies only to fines and imprisonment. Moreover, the staying of fines and prison sentences should alone provide sufficient incentive for defendants convicted of DWI to undergo treatment. Staying driver's license revocations is not only an overly broad incentive for treatment, but it permits individuals with histories of drunken driving to continue endangering the public safety. Thus, the interests of the

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117. 287 N.W.2d 621 (Minn. 1979).
118. Id. at 623. The defendant in *Novak* was sentenced to imprisonment and fined, and his driver's license was revoked. In view of the alcohol assessment report, however, the municipal court stayed execution of all three sanctions. The Commissioner of Public Safety nevertheless revoked the defendant's driver's license pursuant to section 171.17(2) of the Minnesota statutes. 287 N.W.2d at 622.
119. See *State v. Mulvihill*, 303 Minn. 361, 368, 227 N.W.2d 813, 817 (1975) (license revocation "is automatically imposed as a *criminal* penalty upon conviction of a § 169.121 violation") (emphasis in original).
120. Act of April 13, 1976, ch. 298, § 1, 1976 Minn. Laws 1112 (current version at MINN. STAT. § 169.126 (1978)).
121. 287 N.W.2d at 623.
123. The dissent in *Novak* contended that the legislature intended the revocation of drivers' licenses to be "an automatic administrative function" that cannot be stayed by the courts. 287 N.W.2d at 624 (Otis, J., dissenting).
124. Cf. *Cramton, supra* note 122, at 999 (it is necessary "to minimize use of the criminal law and concentrate on civil regulatory approaches with loss of license as the ultimate penalty").
community would have been better served by a ruling that trial courts may stay fines and imprisonment, but not driver's license revocations.

IV. ENVIRONMENT

In 1979, the Minnesota Supreme Court decided the constitutionality of two legislative attempts to control solid waste pollution, and interpreted the "historical resources" provision of the Minnesota Environmental Rights Act. Although environmentalists may take issue with certain aspects of these decisions, on balance, the court demonstrated a concern for environmental protection and preservation.

A. SOLID WASTE MANAGEMENT

1. The Package Review Act

The Package Review Act empowers the Minnesota Pollution Control Agency (MPCA) to review innovations in product packaging so that packaging refuse will not contribute to the state's solid waste pollution problem. In Can Manufacturer's Institute, Inc. v. State, the Minnesota Supreme Court rejected a commerce clause challenge to both the Act and a number of regulations enacted by the MPCA in furtherance of the Act. The court limited the impact of the regulations, however, by finding that they serve only as "guidelines," by specifying that the MPCA must give notice to manufacturers before reviewing their packages, and by broadly interpreting the reach of the Act's grandfather clause. The grandfather clause exempts from review any package sold at retail prior to passage of the Act.

It is well established that a state statute or regulation violates the commerce clause if the "burden it imposes on [interstate] commerce is clearly excessive in relation to the putative local benefits" it confers. Courts have developed two methods for making this comparison. The traditional method is a bal-

1. For a brief discussion of other environmental cases decided in 1979, see note 33 infra.
2. MINN. STAT. § 116F.06 (1978). The Act provides that the Minnesota Pollution Control Agency must review all new or modified containers entering Minnesota markets.
3. 289 N.W.2d 416 (Minn. 1979).
4. See id. at 424-26.
ancing test: the burden on interstate commerce is "weighed" against the local benefits generated.\textsuperscript{7} A less demanding test is used, however, when the regulation at issue is a safety statute.\textsuperscript{8} Courts then ask whether the regulatory scheme promotes a legitimate state objective and, if so, whether the regulation's effect on the specific interest to which it is addressed is "illusory."\textsuperscript{9} The court in \textit{Can Manufacturer's Institute (CMI)} employed the latter test, concluding that the environmental-protection objective promoted by the Act is not only legitimate, but compelling, and that the effect of the regulations on the specific interest addressed by the Act—statewide solid waste management—is not illusory.

Although the \textit{CMI} court noted that the Package Review Act satisfies the traditional commerce clause balancing test,\textsuperscript{10} it based its holding on the more easily satisfied safety regulation test. To justify this result, the court stated, without further explanation, that the "environmental interests in this case clearly involve compelling state interests reasonably analogous to [those protected by] safety regulations."\textsuperscript{11} This nexus is not as close as the court suggests, however, since the cases it cites all concern regulations designed to safeguard persons against immediate threats of physical harm.\textsuperscript{12} By choosing the safety regulation test, the court has signaled that commerce clause challenges to environmental legislation will have little chance of success in state courts.

The unsatisfying aspect of \textit{CMI} is the court's interpretation of the grandfather clause as exempting from regulation all packages sold at retail prior to the effective date of the Act, May 25, 1973, even if the contents of the package have been changed substantially since that time. This ruling unwisely curtails the authority of the MPCA. The appropriateness of particular packaging materials depends on the product that the

\textsuperscript{10} 289 N.W.2d at 421-22.
\textsuperscript{11} Id. at 421. See generally \textit{Note, State Environmental Protection Legislation and the Commerce Clause}, 87 \textit{Harv. L. Rev.} 1762 (1974).
package contains. A package that has been used for years to market one item may be wholly unacceptable for marketing a different item. Furthermore, the grandfather clause does not represent a legislative judgment that all packages sold at retail before May 25, 1973, are environmentally sound. The clause obviously was intended to shield from unnecessary economic hardship those manufacturers who had invested considerable capital in producing a package before there existed any mechanism by which they might determine whether the state considered the package environmentally deleterious. It is unlikely that the legislature intended the clause to insulate manufacturers who further diversify the use of such packaging after discovering that the state considers it environmentally offensive. The legislature should therefore amend the grandfather clause so that it does not exempt packages whose contents have been changed substantially since the statutory cut-off date.

2. Ban on Plastic Nonrefillable Milk Cartons

In *Clover Leaf Creamery Co. v. State*, the Minnesota Supreme Court decided that a statute banning plastic (but not paper) nonrefillable milk cartons violated the equal protection clause of the United States Constitution. Reasoning that plastic containers are no more environmentally damaging than paper ones and that a ban on plastic nonrefillable containers would not necessarily increase the use of refillable containers, the majority held that there was no rational basis for the classification established by the statute.

The United States Supreme Court has established that a classification created for economic regulatory purposes violates equal protection only if it "rests on grounds wholly irrelevant to the achievement of the State's objective." Moreover, the Court has consistently held that states may take a "one step at a time" approach to regulating local problems: "States are ac-

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14. See id. For example, it may be environmentally acceptable to market tennis balls in metal cans, but unacceptable to seal potato chips in such containers.
15. 289 N.W.2d 79 (Minn. 1979), cert. granted, 48 U.S.L.W. 3625 (1980).
corded wide latitude in the regulation of their local economies [and] may implement . . . regulations that only partially ame-
liorate a perceived evil . . . deferring complete elimination of
the evil to future regulations.”17

Given this doctrinal backdrop, it is clear that the Minnesota
Supreme Court exceeded its authority in Clover Leaf. The ban
on nonrefillable plastic milk containers was not “wholly irrele-
vant” to state environmental objectives; rather, it was a logical
step toward promoting environmentally sound milk contain-
ers—those that can be refilled.18 The legislature banned plastic
nonrefillables to prevent the dairy industry from making the
expensive conversion away from paper nonrefillables. Once
the conversion has occurred, the difficulty of legislating a re-
turn to the use of refillables would substantially increase.19
Thus, the prohibition of plastic nonrefillables was a legitimate
step in the state's long-term policy of solid waste management.

The Clover Leaf court reasoned that the statute was not a
step toward ameliorating a perceived evil since the “evidence is
conclusive that paper containers are not environmentally supe-
rior to plastic nonfillables.”20 In other words, the court found
the statute irrational because its benefits would not manifest
themselves immediately. The Clover Leaf reasoning does not
demonstrate that the ban on plastic nonrefillables is arbitrary
or irrational. Rather it reveals that the court simply disagreed
with a value judgment made by the legislature21—that the pos-

Katzenbach v. Morgan, 384 U.S. 641, 657 (1966); Williamson v. Lee Optical Co.,

18. See Remarks of Senators Spear and Luther, Full Senate Floor Discus-
sion, 70th Minnesota Legislature (May 20, 1977), quoted in 289 N.W.2d at 88
(Wahl, J., dissenting). Senator Spear commented:

It is true that our alternative now is not a returnable system in terms
of milk bottles. Hopefully we are eventually going to be able to move
to that kind of system, but we are never going to move to a returnable
system so long as we allow another nonreturnable system with all the
investment and all of the vested interest that is going to involve to be-
gin.

See also American Can Co. v. Oregon Liquor Control Comm'n, 15 Or. App. 618,
644-47, 517 P.2d 691, 704 (1974) (court found classification requiring mandatory
deposit on all beverage containers rationally related to goal of diminishing the
amount of solid waste and litter, even though other nonregulated containers
also created solid waste); Note, American Can: Judicial Response to Oregon's

19. See 289 N.W.2d at 86.

20. Id.

21. Justice Wahl noted in her dissent, “[I]t is not for this court ‘to judge
the wisdom or desirability of legislative determinations’ in this area of eco-
nomic regulation.” Id. at 88 (quoting City of New Orleans v. Dukes, 427 U.S.
sibility of future environmental benefits justifies the imposition of certain immediate economic burdens. But judging a statute which arguably confers a long-term benefit to be irrational simply because it will have no instantaneous salutary effect is precisely the type of second-guessing that courts reviewing the constitutionality of economic regulations have long avoided.

B. THE MINNESOTA ENVIRONMENTAL RIGHTS ACT: HISTORICAL RESOURCES

In order to establish a prima facie right to an injunction under the Minnesota Environmental Rights Act (MERA), a plaintiff must show (1) that a “protectable natural resource” exists, and (2) that the activity to be enjoined would result in the “pollution, impairment, or destruction” of that resource. MERA’s definition of natural resources includes “historical resources.” In State by Powderly v. Erickson, the Minnesota Supreme Court decided that MERA’s historic resources provision protected a pair of delapidated row houses which the owner had sought to demolish. In determining that the row houses were of sufficient historical significance to constitute “protected” resources, the court relied on the federal historic preservation criteria and on the expert testimony of the Director of the Minnesota Historical Society.

Although structurally sound, the row houses were vacant and had been vandalized, because of their condition, they posed a threat to public safety. Nevertheless, the court enjoined the owner from demolishing the row houses because he had not shown that renovation was an imprudent or unfeasible alternative. Because the court had no power to force the defendant to renovate the row houses, it recommended that the

24. 285 N.W.2d 84 (Minn. 1979).
25. Id. at 87-88 (citing 36 C.F.R. § 800.10(a) (1978)).
26. See 285 N.W.2d at 88.
27. Under MERA, defendants who do not rebut the plaintiff’s prima facie case, see text accompanying note 22 supra, can avoid an injunction only by proving that (1) he has no feasible and prudent alternative and (2) the conduct at issue promotes the general health, safety, and welfare. See Minn. Stat. § 116B.04 (1978). There was testimony that the row houses were structurally sound and that there was grant money available to renovate them. The court noted that if renovated, the row houses could easily be rented because the rental market in Red Wing is “tight.” 285 N.W.2d at 89.
city of Red Wing, in which they were located, condemn them.28

The curious aspect of Powderly is the court's assertion that demolition cannot be enjoined indefinitely if Red Wing refuses to condemn and the defendant refuses to renovate the row houses.29 It is difficult to see how granting a permanent injunction would differ functionally from having a government agency designate the row houses as an historic landmark, yet landmark preservation schemes have been held constitutional.30 The implication of the Powderly opinion is that a permanent injunction would constitute a taking.31 But earlier in the opinion the court had concluded that the prevention of demolition was not a taking because the units had potential economic value as renovated living units.32 Thus, Powderly leaves unanswered the question whether a taking occurs if a court enjoins an owner from demolishing a historical resource that in its current state is of no economic value, and the owner refuses to make the investment necessary to give the property value when the court has deemed such an investment to be a "feasible" alternative.33

28. See 285 N.W.2d at 90-91.
29. See id. at 90. MERA explicitly empowers courts to issue permanent injunctions. See MINN. STAT. § 116B.07 (1978).
31. The court observed that "where control . . . of property is for the benefit of the many, it makes sense that the cost of the control . . . should be borne by all of the taxpayers and not fall on the few directly affected." 285 N.W.2d at 90-91. See Armstrong v. United States, 364 U.S. 40, 49 (1960); State v. Johnson, 265 A.2d 711, 716 (Me. 1970).
32. 285 N.W.2d at 80.
33. In another MERA decision, the court held by implication that the productive use of farmland—that is, farming—is not a protected resource. See State v. Minnkota Power Coop., Inc., 281 N.W.2d 372 (Minn. 1979). In Minnkota, the court was not presented with the issue whether farmland is a protected natural resource under MERA. In an earlier case, County of Freeborn v. Bryson, 297 Minn. 218, 210 N.W.2d 290 (1973), the court implied that farmland is a less important natural resource than marshland, but the question whether farmland is a protected resource remains open.

The court also handed down its first major decision on the preservation of wild and scenic rivers. See County of Pine v. State, 280 N.W.2d 625 (Minn. 1979). In County of Pine, the court upheld the constitutionality of the Kettle River Wild and Scenic Rivers Ordinance, Minn. Reg. N.R. 2300, 6 Minn. Code of Agency Rules § 1 (1975), finding it to be authorized by the Wild and Scenic Rivers Act, MINN. STAT. § 104.31-40 (1978). The court determined that the Ordinance was a valid exercise of the state's police power, noting that its underlying purpose of improving aesthetics was legitimate and that it also promoted traditional zoning objectives. See 280 N.W.2d at 629-30.
V. INSURANCE

In 1979, the Minnesota Supreme Court increased the notice requirements for the termination of insurance binders and expanded the scope of an insurer’s duty to defend third-party suits.1

A. TERMINATION OF BINDERS

Absent statutory schemes,2 insurance binders3 normally terminate at the expiration of a term specified in the contract,4 at the time the insured receives notice that a formal policy has been issued,5 or at the end of a reasonable time.6 In Ives v.

1. The Minnesota Supreme Court’s tendency to favor the insured party is illustrated by two other 1979 cases not discussed in text. In McEwen v. State Farm Ins. Co., 281 N.W.2d 843 (Minn. 1979), the court held invalid State Farm’s elective procedure for “relating back” the initiation date of an insurance policy when payment is made late. The court held that the plaintiff had insurance coverage because the six-month effective period of his policy was determined not to begin until the date that the late payment was made. In Engel v. Redwood County Farmers Mut. Ins. Co., 281 N.W.2d 331 (Minn. 1979), the court extended the definition of “hostile fire” to include fires that burn at their normal rate and in their proper place but for a substantially longer period of time than expected.


3. A “binder” is a temporary contract for insurance, see, e.g., Indiana Mut. Cas. Co. v. Pratt, 177 Minn. 36, 38, 224 N.W. 253, 254 (1929), that binds the issuing company to pay insurance should a loss occur pending action upon the application and actual issuance of a policy. The purpose of a binder is to provide temporary insurance pending an inquiry by the insurer as to the character of the risk and to take the place of a policy until the latter can be issued.


6. See, e.g., Eastern Shore of Va. Fire Ins. Co. v. Kellam, 159 Va. 93, 165 S.E. 637, 640 (1932). See 9 G. COUCH, supra note 2, § 39:211, at 565-66. It is unclear whether Minnesota follows the reasonable time termination rule. In Rommel v. New Brunswick Fire Ins. Co., 214 Minn. 251, 264, 8 N.W.2d 28, 35 (1943), the Minnesota Supreme Court held that an “oral contract for present insurance” was in force more than six months after its formation because notice of termination had not been communicated to the insured. Cf. Fintel v. Tri-State Ins. Co., 281 N.W.2d 875 (Minn. 1979) (binder effective until insured is notified of its termination when written clause terminating binder in 30 days was modified by an oral agreement that binder would continue until policy was accepted or application was rejected).
Sunfish Sign Co., the plaintiff, president of Sunfish Sign, sought workers' compensation benefits for injuries he received in a work-related accident that occurred in June 1975. On September 12, 1974, Sunfish Sign had procured a binder for several types of insurance, including workers' compensation. The binder expressly stated that it would terminate in thirty days. Within the thirty-day period, policies were formalized for the other types of insurance specified in the binder, but no workers' compensation policy was issued. The Minnesota Supreme Court concluded that the binder covered Ives at the time of his accident, holding that "insurance coverage provided by a binder [remains] in effect past its stated termination date [when] not terminated in accordance with the notice provisions of [section 176.185(1) of the Minnesota Statutes]."

Section 176.185(1) requires insurers to give thirty-days written notice to the insured and the Commissioner of Labor and Industry before terminating or cancelling a workers' compensation policy. Although section 176.185 makes no reference to binders, the court in Ives dismissed the insurer's contention that a written binder is not a "policy" within the meaning of the statute. The court reasoned that the legislature's intent to provide continuous compensation coverage to workers requires that the statute be read "as pertaining to all contracts for workers' compensation insurance, whether evidenced by a formal contract or a binder."

The court acknowledged that the binder termination requirement of Ives might create administrative difficulties for insurance companies, but concluded that the benefits resulting from continuous coverage were overriding. It is questionable, however, whether such benefits actually outweigh the difficul-

7. 275 N.W.2d 41 (Minn. 1979).
8. The parties stipulated that the reason for failure to formalize the workers' compensation policy would not be argued on appeal, and the court did not consider the issue. See id. at 42.
9. Id. at 41 (quoting Workers' Compensation Court of Appeals).
10. Workers' compensation insurance is viewed as so essential that "although it arises from a contract between the employer and the carrier, it creates a sort of insured status in the employee which comes to have virtually an independent existence." 4 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 92.20, at 17-3 to 17-4 (1976). The ultimate objective of the workers' compensation system is to ensure that employees have adequate benefits available to them. Id. § 92.20, at 17-4. See also Oster v. Riley, 276 Minn. 274, 150 N.W.2d 43 (1967); Nehring v. Bast, 258 Minn. 193, 202, 103 N.W.2d 368, 375 (1960).
11. 275 N.W.2d at 44.
12. See id.
13. It should be noted that in Minnesota an employee receives compensation from a special compensation fund if his employer is uninsured. See Minn.
ties created by the termination requirement. In *Ives*, strict compliance with the statute would have required the insurance company to send notice both to the insured and to the Commissioner of Labor and Industry on the day the binder was issued. Moreover, if taken literally, *Ives* might also require that insurance companies, to avoid liability under workers' compensation binders that by their own terms have expired long ago, to send out notice of termination for every workers' compensation binder they have ever issued. Furthermore, by extending insurance policy notice requirements to binders, the court has raised the possibility that it may apply other insurance policy requirements, such as good cause termination, to binders. The legislature should therefore act to clarify the binder issue and eliminate the potential for liability brought about by the *Ives* decision.

B. **Duty to Defend Third-Party Suits**

In *Lanoue v. Fireman's Fund American Insurance Co.*, the insured, Lanoue, owned a neighborhood grocery store in which he employed O'Brien, a minor. O'Brien took some beer from the store's cooler and a bottle of whiskey from Lanoue's locked office and delivered these beverages to another minor, Anderson. After becoming intoxicated from consuming some of the liquor, Anderson was involved in a one-car automobile accident. Anderson's parents sued Lanoue, alleging a dramshop violation—a cause of action not covered by either of Lanoue's insurance policies. When Lanoue tendered defense of the suit to his insurance companies, both refused to defend even

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14. The statute does not require the insurer to file notice of coverage until 10 days after the policy is issued. *See* MN. STAT. § 176.185(1) (Supp. 1979). Thus, if the statute is applied to binders with 30-day termination dates, insurers must file notice of termination before they are required to file notice of the existence of the binder. Moreover, it is doubtful that an employer's awareness of an impending termination will be heightened by his receiving notice of termination on the same day the binder is issued, at least in cases such as *Ives* in which the binder contains an identical notice of termination.

15. Although it is unlikely that courts would allow this result, the absence of a reasonable time termination rule in Minnesota, *see* note 6 supra, certainly makes it possible.

16. For example, if the liberal wording in *Ives* were applied to Minnesota's automobile insurance statutes, an insurer might be required to give 60-days notice, along with a statement of good cause, before terminating a common automobile insurance binder. *See* MN. STAT. § 65B.17 (Supp. 1979).

17. 278 N.W.2d 49 (Minn. 1979).

18. Lanoue carried both business and homeowner's insurance.
though they were aware of the facts surrounding the incident. Lanoue then brought an action for declaratory judgment to determine whether his insurance companies had a duty to defend. Shortly before trial on the declaratory judgment action, however, Anderson's parents amended their complaint to include allegations of negligence. Both insurance companies offered to defend the negligence claim, and the trial court concluded that neither insurance company had a duty to defend the initial dramshop action and that Lanoue could not collect attorney's fees in the declaratory judgment action.

The Minnesota Supreme Court reversed, holding that the insurance companies had a duty to defend Lanoue against the dramshop complaint because the companies were aware that the facts established a potential negligence claim, which would be covered by the policies. The court further held that Lanoue could recover attorney's fees in the declaratory judgment action.

Under the most widely accepted rule, an insurance company has a duty to defend if the allegations in the complaint against the insured unambiguously support recovery under the coverage of the policy. In Minnesota, however, the duty to defend is broader, extending to situations in which the insurer has knowledge of facts that arguably bring the cause of action within the coverage of the policy even though the complaint fails to allege such facts. The court in Lanoue acknowledged that neither of the insured's policies covered dramshop claims, but emphasized that the insurers must nevertheless prove that, due to policy exclusions, no duty to defend existed.

19. See 278 N.W.2d at 54.
20. Id. at 55.
whether alleged in the complaint or not, had to fall within policy exclusions in order for the companies to avoid their duty to defend. Concluding that the companies had failed to meet their burden of proof on this point, the court entered judgment for the cost of the defense of the dramship claim.

Since a negligence claim was eventually asserted in Lanoue, the facts known to the companies apart from the original complaint arguably established coverage under their policies. The court strained the Minnesota rule to its limits, however, when it found that the facts eventually alleged in the negligence claim were included in the coverage of both policies. It was certainly unreasonable to expect an insurance company to have anticipated a negligence claim based on theft of beer from the store’s cooler and liquor from Lanoue’s locked office. Apparently, the Lanoue court’s objective was to introduce a method for spreading the cost of litigation in liability suits. As a result, it appears that in Minnesota, liability insurers must now base their rates on the assumption that they must defend any suit that does not fall exactly within the exclusion categories of their liability policies.

The Lanoue court’s second holding—permitting the recovery of attorney’s fees in declaratory actions brought to determine an insurer’s duty to defend—clarifies a previously unsettled point of law. Generally, a court may grant attorney’s fees only when fees have been contracted for or are mandated by statute. In a 1966 decision, Morrison v. Swenson, the court created an exception to this rule for declaratory actions

24. See 278 N.W.2d at 53.
25. Lanoue’s homeowner policy excluded coverage of damage arising on “other premises,” and was plainly drafted to avoid liability for accidents arising beyond the confines of Lanoue’s home. None of the alcohol stolen from Lanoue had any connection with his home.
26. Justice Sheran characterized the negligence claim as “farfetched.” 278 N.W.2d at 56 (Sheran, C.J., dissenting).
27. In previous cases applying the Minnesota rule, only twice did the court find a duty to defend on facts outside the complaint. See F.D. Chapman Co. v. Glen Falls Ins. Co., 297 Minn. 406, 211 N.W.2d 871 (1973); Crum v. Anchor Cas. Co., 264 Minn. 378, 119 N.W.2d 703 (1963). In each of the cases, the existence of the claim was clear. The Lanoue court’s willingness to require an insurance company to defend on the basis of arguably excludable facts resembles the position taken by the California Supreme Court in Gray v. Zurich, 65 Cal. 2d 263, 419 P.2d 168, 54 Cal. Rptr. 104 (1966). In Gray, the court used a “potential for liability” test. The court admitted that the test could not be overcome unless the policy had terminated or the claim involved intentional tort conduct. See Note, The Insurer’s Duty to Defend Made Absolute: Gray v. Zurich, 14 U.C.L.A. L. Rev. 1328, 1330-37 (1967).
28. See 278 N.W.2d at 54.
29. 274 Minn. 127, 142 N.W.2d 649 (1966).
brought to determine an insurer's defense duty. Later decisions limited this exception to such an extent, however, that the United States Court of Appeals for the Eighth Circuit subsequently overruled *Morrison* in *Western Casualty & Surety Co. v. Polar Panel Co.* The court in *Lanoue* expressly repudiated the *Western Casualty* decision and reinstated the *Morrison* exception. The *Lanoue* court's conclusion that the refusal to allow attorney's fees under these circumstances constitutes deprivation of a contract right is persuasive.

VI. MARRIAGE DISSOLUTION

A. ALCOHOLISM EXCEPTION TO NO-FAULT DIVORCE

Under Minnesota's no-fault divorce law, a court must grant a request for marriage dissolution if it finds that there has been an "irretrievable breakdown" of the marital relationship. In *Hagerty v. Hagerty*, the Minnesota Supreme Court held that there can be an "irretrievable breakdown" of the marital relationship based primarily on one spouse's alcoholism, even though alcoholism is a treatable disease. The court recognized that there were "compelling arguments" in favor of requiring alcoholism treatment before granting a dissolution, but emphasized that Minnesota's marriage dissolution law does not require courts affirmatively to encourage reconciliation. According to the court, the determination of whether a marital breakdown is irretrievable must be premised on the existing state of the marriage.

This rule is sensible when it is the nonalcoholic spouse...
who claims that the marriage is irretrievable. In *Hagerty*, however, it was the nonalcoholic spouse who claimed that the marriage could be saved. Since alcoholism is treatable, it might have been more sensible for the court to estop the alcoholic spouse from claiming that his alcoholism had caused an irretrievable breakdown of the marriage—at least until he had undergone treatment unsuccessfully.\(^5\) But rather than create a distinction based on which of the spouses claimed that the marriage was irretrievable, the court simply refused to recognize an alcoholism exception. Although such an exception would have encouraged marital stability and alcoholism treatment, the court's decision in *Hagerty* cannot really be criticized. If the court had recognized an alcoholism exception, it would have reintroduced the problems that the legislature had intended to eliminate through no-fault divorce: adversarial dissolution proceedings with parties fitting themselves into judicially defined categories.\(^6\)

**B. Reduction in Alimony Due to Meretricious Relationship**

In *Abbott v. Abbott*,\(^7\) the Minnesota Supreme Court considered whether a meretricious relationship\(^8\) that produced a positive change in the economic circumstances of the party receiving alimony justifies a reduction in alimony. After paying alimony of $500 per month for ten years, Lowell Abbott petitioned the court for modification of his obligation because his former wife was living with and being partially supported by another man.\(^9\) The trial court reduced the alimony, citing both the substantial change in economic circumstances and the existence of a meretricious relationship.

In an earlier decision, *Sieber v. Sieber*,\(^10\) the court had ruled that the existence of a meretricious relationship does not justify termination of alimony\(^11\) except to the extent that the

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5. Prior to the dissolution hearing, Mrs. Hagerty sought and was refused an order dismissing the dissolution petition unless her husband sought alcoholism treatment within six months. *See* 281 N.W.2d at 387.

6. *See* id. at 389.

7. 282 N.W.2d 561 (Minn. 1979).

8. A meretricious relationship is one based on sexual conduct that has traditionally been considered immoral. *See* Sieber v. Sieber, 258 N.W.2d 754, 757 (Minn. 1977).

9. *See* 282 N.W.2d at 564. Abbott's former wife had sold the home that she was awarded in the divorce settlement and had purchased another one jointly with her new sexual partner.

10. 258 N.W.2d 754 (Minn. 1977).

11. While some older decisions held that sexual misconduct is a factor in
relationship "improve[s] an ex-spouse's economic well-being."\textsuperscript{12} In Abbott, the court found that the meretricious relationship resulted in reduced heating, tax, and mortgage expenses for Abbott's former wife, and "support[ed] a finding of a substantial change in [her] financial circumstances."\textsuperscript{13} Abbott illustrates that the protection seemingly given meretricious relationships in Sieber will seldom be applicable in fact. Because a meretricious relationship will almost always improve the economic circumstances of the party receiving alimony, the mere existence of such a relationship will justify some reduction in alimony. This result is consistent with the purposes underlying alimony, since need is a primary element in the determination of alimony.\textsuperscript{14}

VII. PROPERTY

In 1979, the Minnesota Supreme Court decided two cases that demonstrate its willingness to go beyond the narrow confines of common law property doctrines.\textsuperscript{1}

determining whether the court should modify alimony, none of them ruled that postdivorce sexual misconduct per se justifies modification. See id. at 758.

12. Id. Cf. H. CLARK, LAW OF DOMESTIC RELATIONS § 14.9(6) (1968) ("if she is living with another man and being supported by him, she should be no more entitled to continue receiving alimony than if she had remarried"). Maintenance awards are subject to modification by the court upon a showing of material change of circumstances. MINN. STAT. § 518.64(2) (1978); see Kerr v. Kerr, 309 Minn. 124, 243 N.W.2d 313 (1976).

13. 282 N.W.2d at 565. Despite the urging of the trial court, see Appellant's Brief and Appendix app., at A-22 to -29, Abbott v. Abbott, 282 N.W.2d 561 (Minn. 1979), the Minnesota Supreme Court refused to overrule Sieber, reasoning that alimony is a substitute for the husband's obligation to support his wife and should terminate only in the case of legal remarriage. See 282 N.W.2d at 565-66. This position is logically consistent with no-fault marriage dissolution, in which marital misconduct is not a factor in determining maintenance awards and property dispositions. MINN. STAT. §§ 518.552(2), .58 (Supp. 1979). The result is disturbing, however, since it encourages cohabitation rather than marriage. The legislature should therefore consider a statutorily imposed presumption that voluntary cohabitation produces a decreased need for support. See, e.g., CAL. CIV. CODE § 4801.5(a) (West Supp. 1979); GA. CODE ANN. § 30-220(b) (Supp. 1979); N.Y. DOM. REL. LAW § 248 (McKinney 1977).

14. See Cooper v. Cooper, 296 Minn. 247, 252, 214 N.W.2d 682, 686 (1974) ("the needs of the wife as well as the income of the husband are to be taken into consideration in awarding alimony"); MINN. STAT. §§ 518.54-55 (1978 & Supp. 1979).

1. In another 1979 case dealing with real property, the supreme court decided that under section 505.14 of the Minnesota Statutes, a property owner may petition to have a restrictive covenant removed from his land. Batinich v. Harvey, 277 N.W.2d 355 (Minn. 1979). Section 505.14 provides that a "district court may vacate or alter all, or any part of [a] plat, and adjudge the title to all streets, alleys, and public grounds to be in the persons entitled thereto." MINN. STAT. § 505.14 (1978). The covenant in Batinich had nothing to do with the plat
A. LAND SALES CONTRACTS: SPECIFIC PERFORMANCE

Courts ordinarily grant the remedy of specific performance when a contract to convey real estate is breached by the grantor.\(^2\) Trial courts, however, may deny specific performance if it will produce unconscionable or inequitable results.\(^3\) In *Hilton v. Nelsen*,\(^4\) the Minnesota Supreme Court declined to order specific performance when there had been a breach of a contract to sell farmland to an investor. Employing the totality of circumstances test, the court noted four factors that justified the lower court's decision not to grant the remedy: the purchaser intended to rent the property to a third person rather than farm or homestead it himself;\(^5\) the contract contained elements of unfairness and overreaching;\(^6\) the seller had misunderstood the basic terms of the contract;\(^7\) and, at the time of the action, legal and equitable title to the property was held by a third party.\(^8\)

Although the court limited its decision "to the narrow facts presented,"\(^9\) *Hilton* represents an expansion of the equitable exception to the rule of specific performance of land contracts. Rather than mechanically assuming that the parcel of land was "unique," the court utilized a more functional approach, exam-

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or the location of public grounds and alleys. Rather, it restricted the land in question to residential uses. The court acknowledged that section 505.14 was not intended to be used to remove restrictive covenants. 277 N.W.2d at 358.

2. The traditional justification for this practice is based on the assumption that land is a unique, not fungible, commodity. Therefore, the remedy at law, damages, is inadequate. *See generally* Gethsemane Lutheran Church v. Zacho, 258 Minn. 438, 443, 104 N.W.2d 645, 648 (1960); 5A A. Corbin, *Corbin on Contracts* § 1143 (1964); Restatement of Contracts § 360 (1932).

3. *See, e.g.*, Boulevard Plaza Corp. v. Campbell, 254 Minn. 123, 136, 94 N.W.2d 273, 284 (1959); Twin City Bldg. & Loan Ass'n v. Johnson, 194 Minn. 1, 7, 259 N.W. 551, 553 (1935).

4. 283 N.W.2d 877 (Minn. 1979).

5. *Id.* at 881.

6. *Id.* The court found three elements of unfairness: the contract did not provide mutuality of remedy, it allowed unilateral termination by the purchaser, and its terms unreasonably delayed payment of principal. *Id.* at 881-82. *See also* Peterson v. Johnson Nut Co., 204 Minn. 300, 308, 283 N.W. 561, 567 (1939) (mutuality of remedy and performance are elements to be considered in determining whether contract should be specifically enforced).

7. 283 N.W.2d at 882-83. This factor has not always been considered determinative by the court. *See Gethsemane Lutheran Church v. Zacho, 258 Minn. 438, 442, 104 N.W.2d 645, 648 (1960) (unilateral mistake normally insufficient to support denial of specific performance).*

8. 283 N.W.2d at 883.

9. *Id.* The court also stated, "We do not mean to suggest that any one of the factors discussed above is necessarily sufficient to render specific performance inequitable. Considering them together, however, we feel compelled to the decision we have reached." *Id.*
ining the facts to determine whether specific performance was necessary. The court found that equitable considerations justified the result in *Hilton*. More important, however, was the court's explicit recognition that in certain circumstances, parcels of land are fungible. The court noted that "any equivalent parcel of Minnesota farmland would [have served the purchaser's] investment purposes" and that damages would therefore adequately compensate him. This aspect of *Hilton* goes beyond the traditional equitable exception to the specific performance rule because the court explicitly diminished the weight accorded the uniqueness rationale. Thus, the *Hilton* decision might indicate that the court is now prepared to recognize a new exception based primarily on the defendant's showing that there are available to the plaintiff a reasonable number of "equivalent" parcels of land—in other words, that the remedy at law is adequate.

B. ADJOINING LANDOWNERS: ENCROACHMENT

Courts normally refuse to condone any landowner conduct that encroaches upon the property of an adjacent landowner.

10. *See* text accompanying notes 5-8 *supra*. *See also* Boulevard Plaza Corp. v. Campbell, 254 Minn. 123, 135-36, 94 N.W.2d 273, 283 (1959) (specific performance of contract for the sale of farmland denied when "laches, lack of good faith, and nonperformance on the part of the plaintiff" were present).

11. 283 N.W.2d at 881.

12. Id. at 883-84. A minority of jurisdictions will only award damages when the purchaser bought the land for speculation or has already resold it to another person. *See generally* note 14 *infra*.

13. The traditional formulation of the equitable exception to specific performance does not in strict logic diminish the force of the uniqueness rationale. Rather, it simply recognizes that in certain circumstances the actual equities of the seller may be so compelling that they outweigh even the theoretical equities of the purchaser arising out of the uniqueness of the land. By suggesting a situation in which it will give "less weight" to the theoretical equities of the purchaser, *see* 283 N.W.2d at 881, the court in *Hilton* may have implied that in this type of situation it will sanction the denial of specific performance even if the seller's actual equities are not particularly compelling.


15. *See* McKee v. Fields, 187 Or. 323, 326, 210 P.2d 115, 116 (1949). *See gener-
In *Olson v. Lindberg*, the defendant inadvertently constructed his home so that it extended four feet onto the land of the plaintiff. The plaintiff sought an injunction requiring removal of the encroaching structure or, in the alternative, damages for lost use of his land. Although either remedy was appropriate under existing law, the Minnesota Supreme Court affirmed the lower court’s order requiring the plaintiff to sell the affected property to the defendant for its reasonable value.

The court in *Olson* acted wisely in denying the injunction because the encroachment was inadvertent and the damages to the plaintiff were far less than the cost of removing the encroaching structure. By forcing the plaintiff to sell his land, however, the court may have established an undesirable precedent. *Olson* permits a landowner to acquire adjacent land because he negligently constructed an encroaching structure. Further expansion of the remedy granted in *Olson* would amount to the judicial creation of a private right of eminent domain and, since it would inure to the benefit of negligent parties, it might significantly diminish the incentive for persons to exercise due care in discerning property boundaries before building permanent structures. If ordering removal of an en-

16. 286 N.W.2d 692 (Minn. 1979).
18. See 286 N.W.2d at 692. The value of the land was set at $1,000. Id. The court also affirmed the trial court’s award of an additional $1,500 in expert witness fees, noting that it was in excess of the customary fee but appeared to further compensate the plaintiffs and was “wholly proper.” Id. at 693.
19. Other courts have recognized that a distinction should be made between willful and inadvertent encroachments. See generally 1 Am. Jur. 2d, supra note 15, § 134.
20. The land encroached upon was swamp land, and the plaintiff’s attorney admitted that the actual damage was small and therefore suggested that the court award equitable damages in lieu of an injunction or actual damages. See Letter from C. Douglas Norberg to Judge C. Luther Eckman (May 12, 1978) (copy on file with the Minnesota Law Review). Other courts have recognized the difficulties with granting an injunction when the value of the affected property is much lower than the cost of removing the encroachment. See Easter v. Dundalk Holding Co., 233 Md. 174, 179, 195 A.2d 682, 685 (1963) (damages are appropriate remedy when cost of removing encroachment is greater than diminution in market value of land encroached upon); Zerr v. Heceta Lodge No. 111, 269 Or. 174, 186, 523 P.2d 1018, 1024 (1974) (injunction denied when there was little damage to plaintiff and it would have worked great hardship on defendant). See generally D. Dobbs, Handbook of the Law of Remedies § 5.6, at 356 (1973).
croaching structure would be unjust, the appropriate remedy is to award a rental fee for an easement or equitable damages in lieu of an injunction.23

VIII. PUBLIC EMPLOYEES

A. BINDING ARBITRATION

In 1979, the Minnesota Supreme Court twice interpreted the binding arbitration provisions1 of Minnesota's Public Employment Labor Relations Act (PELRA).2 Both decisions address the issue of whether a legislative body can modify binding arbitration awards made to public employees.

_City of Richfield v. Local 1215, International Association of Fire Fighters_,3 involved contract negotiations between a municipality and its fire fighters. When the negotiations reached an impasse, the fire fighters petitioned for submission of the dispute to binding arbitration under PELRA.4 After the arbitration panel made its award, the municipality brought suit challenging PELRA's compulsory binding arbitration provisions as an unconstitutional delegation of legislative authority. The Minnesota Supreme Court upheld the provisions as a proper delegation of legislative power5 because they contain


1. _MINN. STAT._ §§ 179.68-.72 (1978). Under the Minnesota Public Employment Labor Relations Act, the Bureau of Mediation Services certifies when an impasse in labor negotiations has been reached. _Id._ § 179.69(3). If an impasse has been reached and the employees involved are not "essential," _see id._ § 179.63(11), the employer may submit the dispute to binding arbitration. _Id._ § 179.69(3). If, however, the employer refuses to submit the disputed issue to binding arbitration, or after accepting arbitration, the employer rejects the arbitrator's decision, PELRA grants non-essential employees the right to strike. _Id._ § 179.64(7). If the employees are "essential," _see id._ § 179.63(11), binding arbitration is compulsory when requested by either party. Since essential employees, unlike non-essential employees, can force the employer to accept arbitration, essential employees are not permitted to strike. _See id._ § 179.64(1), (7).


3. 276 N.W.2d 42 (Minn. 1979).

4. Fire fighters are essential employees under PELRA, _see MINN. STAT._ § 179.63(11) (1978), and may demand binding arbitration. _See note 1 supra._

5. The court relied on _Lee v. Delmont_, 228 Minn. 101, 36 N.W.2d 530 (1949),
numerous restrictions and policy statements that limit the discretion of arbitrators. Moreover, the court found that the policies underlying the binding arbitration provisions are more compelling than the interest that municipalities have in retaining final control over wage settlements with their employees. In addition, the court in Richfield specifically rejected a proposal that would have required local governments to approve PELRA arbitration awards.

In contrast to the reasoning it displayed in Richfield, the court in Minnesota Education Association (MEA) v. State concluded that the state's interest in exercising final control over arbitration awards made to state employees is of paramount importance. The MEA litigation arose after salary negotiations between the state-employed faculty of Minnesota's community colleges and the State Commissioner of Personnel in determining the scope of valid delegations. See 276 N.W.2d at 45. In Lee, the court held that the legislature may delegate powers that are not purely legislative and "which it might properly, but cannot conveniently or advantageously, do itself." 228 Minn. at 112-13, 36 N.W.2d at 538. Thus, even broad discretionary powers can be delegated if the law "furnishes a reasonably clear policy or standard of action which controls and guides the administrative officers." Id. See Fairview Hosp. Ass'n v. Public Bldg. Serv. Local 113, 241 Minn. 523, 64 N.W.2d 16 (1954). But see Campbell, Salt Lake City v. International Association of Firefighters: A Responsive Analysis and Proposal for Public Sector Bargaining in Utah, 1977 UTAH L. REV. 457 (analyzing a Utah case that struck down a statute similar to PELRA as an unconstitutional delegation of legislative authority).

6. The purpose of the non-delegation doctrine is to prevent administrators from having unguided and uncontrolled discretionary power. See generally 1 K. Davis, ADMINISTRATIVE LAW TREATISE § 3, at 206 (2d ed. 1978). The court found the discretion of arbitrators to be sufficiently limited by PELRA's provisions requiring that an impasse be reached, Minn. Stat. § 179.69(3) (1978); that the jurisdiction of arbitration be limited to specific issues, id. § 179.72(7); that the arbitrators consider the financial impact of an award on the community, id.; and that the arbitrators' decision not violate any city ordinance or charter provision, id. The court also noted that arbitration awards are subject to judicial review. See 276 N.W.2d at 46-47.

7. See 276 N.W.2d at 46.

8. See id. at 46.


10. See id. at 918-19.

11. Community college faculty are non-essential employees under PELRA. See note 1 supra.

During the 1980 session, the legislature enacted several amendments to PELRA that affect the way in which non-essential employees' right to strike matures. Act of Apr. 24, 1980, ch. 617, 1980 Minn. Sess. Law Serv. 1365 (West).

reached an impasse. The parties submitted the dispute to binding arbitration under PELRA. After the arbitration panel made its award, the legislature reduced the wage “agreement” component of the award. The faculty brought suit challenging the legislature’s action both as an unfair labor practice and as a violation of equal protection. The Minnesota Supreme Court held that PELRA authorizes the legislature to review arbitration awards made to state employees and that such review does not deny state employees equal protection even though arbitration awards made to employees of local governments are not subject to similar review.13

As interpreted in *Richfield* and *MEA*, PELRA’s binding arbitration provisions require local governments to comply with awards made to their employees but permit the legislature to reject or modify awards made to state employees. Although this result is consistent with the language of PELRA,14 the reasoning employed by the court in these cases is inconsistent. Furthermore, the result in *MEA* could undermine the good faith bargaining process that PELRA was intended to establish for negotiations between the state and its employees.

The apparent contradiction between *Richfield* and *MEA*—that the state has a strong fiscal interest in controlling the wages of its employees while local governments have no similar interest—can be reconciled by examining the different role that the state played in each case. In *Richfield*, the legislature was acting as a regulator of general employment practices; in *MEA*, the state was acting as an employer. The state has delegated to arbitrators its power to regulate the wages of local government employees, but has chosen to retain the power to regulate the wages of its own employees.

Even though these two cases can be reconciled, the *MEA* decision undermines the policies supporting binding arbitra-

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12. Section 179.74(5) of the Minnesota Statutes requires that “agreements” establishing wage and fringe benefits be submitted to the legislature. The plaintiffs in *MEA* argued that in their case there was no “agreement” since binding arbitration occurred only after failure to agree. Under this analysis, only negotiated settlements could be submitted to the legislature for approval or modification. The court dismissed this argument. *See* 282 N.W.2d at 917-18.

13. *See* 282 N.W.2d at 919.

14. PELRA mandates binding arbitration for local governments, MINN. STAT. § 179.68(2)(9) (1978), but allows the state legislature to review arbitration awards made to state employees, *id.* § 179.74(5).
tion between the state and its employees. The opportunity for binding arbitration ensures that should the parties reach an impasse, the dispute will be resolved expeditiously without a strike or interruption of services. If the legislature can override binding arbitration awards, non-essential employees will be unlikely to compromise during the negotiation process since they could face even further cuts by the legislature. Thus, arbitrators might be faced with parties' taking highly polarized positions. Moreover, the parties might not negotiate in good faith, and this would delay the prompt and fair settlement of disputes. Non-essential employees may even forgo voluntary binding arbitration altogether if the process continually proves to be nothing more than an inconsequential prelude to unilateral settlement of wage disputes by the legislature. Therefore, the MEA decision could increase the threat of illegal strikes despite PELRA's express purpose of avoiding such strikes.

It seems incongruous to treat employees differently depending on whether they are employed by local or state governments. Because arbitrators are required to consider the financial impact of their decision on the community, binding arbitration is unlikely to harm the state any more than it would harm local government units. Because of the policies underlying binding arbitration and the similarity of the impact it would have on state and local governments, the legislature should either accept the final nature of binding arbitration awards made to state employees or develop a different mechanism for resolving contract disputes that would apply equally to both state and local employees.

15. PELRA mandates good faith bargaining: "Meet and negotiate' means the performance of the mutual obligations of public employers and the exclusive representatives of public employees to meet at reasonable times . . . with the good faith intent of entering into an agreement with respect to terms and conditions of employment . . . ." Minn. Stat. § 179.63(16) (1978) (emphasis added). For policy arguments against third-party binding arbitration for public employees, see Summers, Public Employee Bargaining: A Political Perspective, 83 Yale L.J. 1156, 1188-89, 1200 (1974).

16. See Note, supra note 2, at 174.

17. Cf. Lentz, supra note 11, at 90 (author argues that this impasse problem inheres in "final offer" bargaining approach).

18. Cf. Note, supra note 2, at 174 (discussion of factors that tend to undercut the strike-avoidance policy of PELRA).

19. See Minn. Stat. § 179.72(7) (1978). Arbitrators are also required to meet minimum professional standards. Id. § 179.72(5).


21. The Minnesota Supreme Court decided two other PELRA cases in
Duty to Warn: Obvious Dangers

There is normally no duty to warn persons of dangers that are known or should be obvious to them. A duty to warn may exist, however, when a party has special knowledge of a hazard or has a special relationship with the injured party, regardless of whether the injured party failed to protect himself from an obvious hazard. In Parks v. Allis-Chalmers Corp., a products liability suit, the plaintiff lost part of his right arm while manually unclogging a forage harvester without first shutting off the power. Because clogging is a normal occurrence in the use of such machinery and can be corrected only by hand, the manufacturer posted several warnings on the harvester admonishing operators to shut off power before reaching into the machine. None of these warnings elaborated on the precise nature of the danger facing someone who attempted to unclog a harvester while the power was still on. Although the plaintiff had disregarded the warnings, the jury found the defendant manufacturer fifty-one percent negligent.

The Minnesota Supreme Court affirmed, holding that a jury could find the warnings inadequate because they did not detail the particular manner in which injuries might occur. The

2. Traditionally recognized “special relations” include carrier and passenger, innkeeper and guest, husband and wife, and parent and child. See id. § 56, at 341-42.
3. 289 N.W.2d 456 (Minn. 1979).
4. The harvester’s internal operating components consisted of such intrinsically dangerous devices as moving feed rollers, gathering chains, and cutting knives, all of which operated at high speed. On the access door to the feed rollers, where clogs normally occur, there was a sign warning operators to “KEEP AWAY FROM ROLLS UNLESS POWER IS OFF.” Another sign warned operators to be careful to disconnect power before unclogging, and to keep hands, feet, and clothing away from power-driven parts. Id. at 458.
5. “There was no [warning] that if the power was not disconnected as instructed, manual unclogging presented the danger that a surge in the speed of the rollers could yank a stalk so fast that a human could not release it in time to avoid injury.” Id. at 460.

1979. In Hennepin County Court Employees Group v. Public Employment Relations Bd., 274 N.W.2d 492 (Minn. 1979), the court held clerical workers in the court system to be “essential employees” under section 179.63(11) of the Minnesota Statutes because they “are indispensable to the prompt and orderly functioning of the judicial system.” 274 N.W.2d at 495. In State Employees Local 66 v. St. Louis County Bd. of Comm’rs, 281 N.W.2d 166 (Minn. 1979), the court held that a contract dispute could not be settled through a grievance procedure until a court had determined which of two competing unions was the exclusive bargaining agent of the employee organization.
court reasoned that the manufacturer should have known that, to save time, some users would not shut off the power while unclogging the machine. Because this improper use was foreseeable, the court concluded that the manufacturer should have taken every precaution to discourage it, including the posting of a specific warning explaining the manner in which injury might occur.

The Parks rule—that warnings must state with specificity the consequences of improper product use—is borrowed from the warning-defect cases in which courts have used the specificity requirement to encourage changes in product design. The theory of these cases is that a manufacturer will alter the design of its machine to remove the danger rather than make its warnings more explicit and adversely affect the product's marketability. The availability of an alternative design, however, was not emphasized in the Parks opinion. The court evidently realized that the limited protection offered by the alternative design would have rendered reliance on the alternative design theory questionable. Parks is therefore anomalous because the court employed the specificity requirement even though the danger was obvious and there was no demonstrably safer design to which the manufacturer could shift.

Minnesota has not clearly defined the point at which a manufacturer's duty to warn ceases and an individual's responsibility to avoid obvious dangers begins. By requiring the manufacturer of a machine to post highly specific warnings regarding obvious dangers even though no safer design is available, the court has imposed a severe burden, tantamount to strict liability, on machine manufacturers. If the Parks court wished merely to effectuate efficient risk spreading, it should

6. Clogs occur with some frequency, and unclogging the harvester with the power off takes approximately five to ten minutes longer than with the power on. See id. at 458.


8. There was evidence that the manufacturer could have installed a mechanical interlock device that shuts off the power when the roller chute is opened while the power is on. The manufacturer failed to incorporate this device, believing that, to save time, users would simply disconnect it. See 289 N.W.2d at 459 & n.3.

9. Other states have refused to recognize a duty to warn when the injured plaintiff was aware of the danger. See cases cited in Noel, Product Defective Because of Inadequate Directions or Warnings, 23 Sw. L.J. 256, 273 n.103 (1969). See generally Comment, 63 MINN. L. REV. 995, 997 & n.11, 999 & n.18 (1979).
have resorted to a more appropriate vehicle than the duty to warn doctrine.

B. DUTY TO CONTROL OR SUPERVISE

Persons who because of some special relationship\(^{10}\) are able to control or supervise the conduct of another must exercise reasonable care to prevent the person over whom they have control from injuring third parties.\(^{11}\) In *Larson v. Independent School District No. 314*,\(^{12}\) the Minnesota Supreme Court refused to absolve a school principal from liability for injuries sustained by a student who was severely injured while performing a gymnastic exercise for an inexperienced physical education teacher.\(^{13}\) According to the court, the principal's duty to exercise care in supervising the school's physical education curriculum justified holding him liable for the plaintiff's injuries. To reach this result, the court concluded that a school principal's duty to plan and develop course curricula is a ministerial rather than a discretionary duty.\(^{14}\)

By characterizing the principal's curriculum supervising duties as ministerial, the *Larson* court extended the "negligent supervision" doctrine beyond its appropriate boundaries. The

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10. *See note 2 supra.*
11. One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm. RESTATEMENT (SECOND) OF TORTS § 319 (1965). *See also id.* § 315.
12. 289 N.W.2d 112 (Minn. 1979).
13. The instructor, who had taught only nine classes before the accident, had not adequately prepared the student for the exercise. The jury found the instructor ninety percent and the principal ten percent negligent; damages in excess of one million dollars were assessed. *See id.* at 115-16.
14. Under Minnesota common law, state officials may be held liable in the performance of ministerial but not discretionary duties. *See Papenhausen v. Schoen*, 268 N.W.2d 565, 571 (Minn. 1978); *Susla v. State*, 311 Minn. 166, 175, 247 N.W.2d 907, 912 (1976); *cf. Minn. Stat. § 466.03(6) (1978)* (holding municipalities exempt from suits in which claim is based on performance of or failure to perform a discretionary function). While the discretionary-ministerial dichotomy is often enigmatic, it is true as a general proposition that the discretionary acts exception has greater application to decisions made on the executive or planning level than to those made on the operational level. *See Hansen v. City of St. Paul*, 298 Minn. 205, 211-12, 214 N.W.2d 346, 350 (1974); *cf. Dalehite v. United States*, 346 U.S. 15, 35-36 (1953) (construing discretionary acts exception to Federal Tort Claims Act, 28 U.S.C. § 2680(a) (1976)). The imprecision of the discretionary acts doctrine serves a purpose; it enables courts to shield public officials and bodies from inappropriate liability. Thus, the decision whether to designate a function discretionary or ministerial should be made on the basis of sound policy considerations, not by recourse to the hollow definitions courts have assigned to the terms.
proper scope of the duty to supervise is illustrated by two other Minnesota cases decided in 1979: *Quinn v. Winkel's, Inc.*\(^{15}\) and *Rum River Lumber Co. v. State.*\(^{16}\) In *Quinn*, the court held that a barkeeper owes a duty to his patrons to prevent individuals whom he knows to be of violent disposition\(^{17}\) from entering the bar. Similarly, in *Rum River*, the court held that a state hospital must exercise due care to prevent patients who are known to be violent\(^{18}\) from escaping. In both cases, the court concluded that the injuries resulting from the negligent supervision were foreseeable\(^{19}\) because the defendant had control over one "whom [it] knows or should know to be likely to cause bodily harm to others if not controlled."\(^{20}\)

There was no evidence in *Larson* indicating that the new physical education teacher was "likely to cause bodily harm" to his students unless supervised by the principal. Indeed, the instructor had a teaching certificate in physical education and the principal should have been able to presume the instructor's competence until intervening circumstances rendered such confidence unjustified. Moreover, the principal's duties with respect to the physical education curriculum were on the planning rather than the operational (ministerial) level.\(^{21}\)

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15. 279 N.W.2d 65 (Minn. 1979). The plaintiffs in *Quinn* were patrons of the defendant's bar who were injured when another patron became violent.

16. 282 N.W.2d 882 (Minn. 1979). The plaintiff in *Rum River* was a lumber yard whose inventory was damaged by a fire that had been set by an escaped inmate of the Anoka State Hospital. The inmate escaped from a security ward with a pass key he had taken from an unlocked office.

17. The individual who shot and injured the plaintiffs in *Quinn* was a frequent customer of the defendant's bar, and there was evidence that the individual's violent nature was known to the bar employees. 279 N.W.2d at 67.

18. In the two months preceding the patient's escape, he "kicked a female patient, broke electrical outlets and radiators, threw chairs [and other] objects, . . . threatened the staff, . . . stole a visitor's car, [and] escaped three times, committing a burglary on the last escape." 222 N.W.2d at 883.

19. In *Rum River*, the specific harm caused by the escaped plaintiff—setting fire to a privately owned lumberyard—was not foreseeable because he had never exhibited pyromaniacal tendencies while under the hospital's supervision. The court held, however, that the patient's violent nature, see note 18 *supra*, should have made the hospital aware of the general threat of harm his escape would pose. 222 N.W.2d at 884.


21. The plaintiffs in *Larson* had introduced into evidence a "curriculum bulletin" that prescribed a certain course of study for secondary school physical education classes. The court noted, however, that the bulletin was simply a guideline and did not impose any affirmative duties on the defendants. 289 N.W.2d at 118. The court also observed: "There was neither a regulation nor a rule which made the Superintendent [who delegated his supervisory duties to the school's principal] personally responsible for ensuring that the provisions
reasons, the court should have shielded the principal in *Larson* by deeming as discretionary his failure to supervise the minute details of the physical education curriculum. Courts in other jurisdictions have taken this approach.\(^{22}\)

The dissent's argument that this decision will cause "an abundance of caution" and unduly restrain expert teaching professionals is well founded. The decision appears to require school principals to participate in the planning of certain courses of instruction\(^{23}\) whenever they are taken over by inexperienced teachers. Apart from the strain this is likely to cause between teachers and school administrators, *Larson* will adversely affect the ability of principals to perform their other administrative duties. The increasing degree of responsibility expected of schools with respect to the safe and orderly education of students\(^{24}\) is not a sufficient justification for burdening school principals with a duty to supervise the minute details of instructional plans.

of [the curriculum bulletin] were followed." *Id.* at 119. It seems therefore that supervising the physical education curriculum should not be considered a ministerial duty; the Minnesota Supreme Court has defined a ministerial duty as "one in which nothing is left to discretion . . ., a simple, definite duty arising under and because of stated conditions and imposed by law," Cook v. Trivot-ten, 200 Minn. 221, 224, 274 N.W. 165, 167 (1937) (emphasis added).


23. The court’s holding that the jury could properly find the principal liable was based on evidence that the principal “did not actively participate in developing or administering the physical education curriculum” and did not give the new, inexperienced teacher even “minimal guidance.” 289 N.W.2d at 117. Implicit in the *Larson* court’s rationale is that there is an inherent potential for bodily harm in the physical education regimen. Under this reasoning, a school principal would have a duty to participate actively in the development of curricula for any course of study in which there inheres a foreseeable risk of bodily harm. These probably include shop courses (danger of machinery accidents), chemistry courses (danger of chemical burns and poisoning), and even home economics classes (danger of accidents involving knives, kitchen appliances, and stoves). Moreover, it appears that a principal will have to oversee closely the transition of faculty in such courses of study.

C. Assumption of Duty by a Governmental Unit

As a general rule, one who assumes a duty must exercise reasonable care when performing it.25 Traditionally, governmental bodies were protected from liability for the negligent performance of assumed duties by the doctrine of sovereign immunity,26 but that doctrine has been abrogated in Minnesota.27 Governmental bodies are now protected from liability in many situations by the "public duty" doctrine. Under this doctrine, a governmental body owes no duty of care to individual members of the public if its performance of an assumed duty is intended to benefit the public at large.28 When, on the other hand, a governmental body assumes a duty whose performance is intended to benefit a specific class of individuals, it may be liable under the "special duty" doctrine for failing to perform the duty with reasonable care.29

The case of Walsh v. Pagra Air Taxi, Inc.30 illustrates the special duty doctrine. In Walsh, liability was imposed on the defendant, a private contractor operating a municipal airport, for negligently failing to extinguish a fire that destroyed the plaintiff's airplane. The court held that although the municipality had no affirmative duty to assist in the preservation of private property, it had assumed the duty to provide fire protection to a specific class of individuals: users of the municipal airport. Thus, the private contractor who had undertaken the municipality's fire-fighting duties was found liable. The willingness of the court to find a specific class of beneficiaries in Walsh may have been due to the fact that liability would be imposed on a private rather than public entity.

That the court may be reluctant to find a special duty if liability will fall on a public body is the implicit message of two

27. See Act of May 22, 1963, ch. 798, § 2, 1963 Minn. Laws 1402 (current version at Minn. Stat. § 466.02 (1973)).
29. "It is somewhat unfortunate that the terms 'public' duty and 'special' duty have been used, inasmuch as they give the misleading impression that the distinction applies only to governmental tortfeasors. Perhaps 'no duty' and 'assumed' duty would be more appropriate." Cracraft v. City of St. Louis Park, 279 N.W.2d 801, 806 (Minn. 1979).
30. 282 N.W.2d 567 (Minn. 1979).
other 1979 cases: *Cracraft v. City of St. Louis Park* and *Perkins v. National Railroad Passenger Corp.* The plaintiff in *Cracraft* alleged that the city fire inspector had negligently failed to discover a violation of the municipal fire ordinance while inspecting a loading dock at the plaintiff's high school. Approximately forty-five days after the inspection, a drum of duplicating fluid stored on the dock exploded, severely injuring the plaintiff. The court held that even though the municipality had enacted an ordinance requiring itself to make fire code inspections, it did not owe a duty to any specific individual to conduct these inspections with due care. The court, however, could have found that the municipality assumed the duty to inspect for fire code violations to benefit a specific class—the users of buildings located in the municipality.

*Perkins* was an action for wrongful death brought by the survivors of a man killed by a train at a railroad crossing. More than a year before the accident, the town in which the crossing was located sent a formal petition to the Minnesota Public Safety Commission (PSC) requesting a determination of the need for gates and train speed limits at the crossing. After receiving such a petition, the PSC is required by statute to hold a public hearing in the community and decide the issues raised within six months. No public hearing was ever held. On the plaintiff's claim that the PSC was negligent in failing to hold a public hearing, the court held that the time limits contained in the statute are not mandatory and that the PSC owed no duty to the decedent beyond what it owed to the general public. The court could have held that upon receiving the petition, the PSC owed a special duty to the users of the railroad crossing to hold hearings on and determine the gate and speed limit issues within six months.

The public duty doctrine is invoked to protect governmental bodies from what courts fear might be a potentially "crush-

31. 279 N.W.2d 801 (Minn. 1979).
32. 289 N.W.2d 462 (Minn. 1979).
33. In his deposition, the fire inspector stated that the container was not on the dock at the time of his inspection, see 279 N.W.2d at 803, but this issue of fact was not germane to the defendant's motion for summary judgment on the legal issue whether the defendant even owed a duty of care to the plaintiff. 34. *Id.* at 806.
35. The court seemed to imply that it would have found the existence of such a special duty had there been evidence that members of the special class placed "reasonable reliance" on the inspection results. *See id.* at 805-07 & n.8 (quoting *RESTATEMENT (SECOND) OF TORTS* § 324A (1965)).
37. *See* 289 N.W.2d at 467-68.
ing burden” of tort liability. If this burden materialized, governmental entities would be discouraged from undertaking important functions that otherwise will not be performed.38 This fear, however, is unfounded. The argument that tort liability will impose a crushing burden on governmental entities was obviously rejected by the legislature when it abrogated the sovereign immunity doctrine.39 Moreover, the legislature has now placed statutory limits on recoveries against public bodies.40 Finally, it is the justifiable expectation of the public that government employees will act with reasonable care. The Cracraft dissent properly labeled the public duty-special duty distinction artificial41 to the extent that it applies to public inspections, because a negligent inspection increases the risk of harm to individuals who rely upon its having been properly performed.42 Cracraft and Perkins therefore represent overly strict formulations of duty.43

D. CONTRIBUTION: COMMON LIABILITY RULE

In cases in which there are multiple defendants, the “common liability” rule holds that no defendant can be made to contribute to a damage award unless its personal liability to the plaintiff has been established.44 In Hart v. Cessna Aircraft Co.,45 the widow of a man killed in an airplane crash sued the airplane’s manufacturer, Cessna, after having failed to recover in an earlier suit against the owner-pilot. Cessna filed a third-party complaint for contribution against the owner-pilot. The

38. See Note, supra note 26, at 317-20.
39. See 279 N.W.2d at 811 (Kelly, J., dissenting). See also Antieau, Statutory Expansion of Municipal Tort Liability, 4 St. Louis U.L.J. 341 (1957); Borchard, Governmental Liability in Tort, 34 Yale L.J. 129 (1924); Note, supra note 26, at 344-49.
41. 279 N.W.2d at 808-09 (Kelly, J., dissenting). See note 29 supra.
42. If there is a definable class that relies to its detriment on the government’s performing an assumed duty, then the public duty defense should not apply. See Restatement (Second) of Torts § 324A(2) (1965), quoted in Cracraft v. City of St. Louis Park, 279 N.W.2d 801, 807 (Minn. 1979). The Perkins case presents an especially good example of such reliance since the PSC was the only body that the townspeople could turn to for the desired safety installations.
43. For a more realistic formulation of duty, see Isler v. Burman, 305 Minn. 288, 232 N.W.2d 818 (1975) (church that undertook to inspect land for dangerous conditions prior to church activity assumed duty of adequate inspection).
44. See Spitzack v. Schumacher, 308 Minn. 143, 147, 241 N.W.2d 641, 644 (1976). See also Lines v. Ryan, 272 N.W.2d 896 (Minn. 1978); Frey v. Snelgrove, 269 N.W.2d 918 (Minn. 1977); American Motorists Ins. Co. v. Vigien, 213 Minn. 120, 5 N.W.2d 397 (1942).
45. 276 N.W.2d 166 (Minn. 1979).
trial court granted summary judgment against Cessna's claim for contribution and the supreme court affirmed, holding that since the owner-pilot had already been adjudged nonnegligent, he could not be made to contribute to a subsequent judgment against Cessna. The court also held that Cessna was liable for only the portion of the plaintiff's damages attributable to Cessna's negligence.

The Hart decision makes it clear that, despite apparent inconsistencies in recent decisions, the supreme court will take a uniform approach to contribution: only defendants of proven culpability will be forced to contribute. This clarification was made necessary by the 1977 case of Lambertson v. Cincinnati Corp., in which the court ordered contribution even though, as a matter of law, there was no common liability. In Lambertson, a worker was injured due to the negligence of both his employer and a tool manufacturer. The employer had no liability at law because its exclusive obligation was to pay the statutory compensation award. Nonetheless, the court ordered contribution by the employer on equitable grounds, stating that contribution "should be utilized to achieve fairness on particular facts, unfettered by outworn technical concepts like common liability."

The decision to order contribution in Lambertson was no doubt prompted by the fact that both defendants were actually culpable. The Hart court refused to extend the Lambertson equitable exception to a situation in which the party from whom contribution was sought had already been adjudicated nonnegligent.

The Hart court also recognized the inequity of forcing Cessna to pay all of the plaintiff's damages if the jury in the second case found some of the damages attributable to the nonparty owner-pilot. To correct this problem, the court lim-

46. See id. at 169.
47. See id. at 170.
48. 257 N.W.2d 679 (Minn. 1977).
50. 257 N.W.2d at 688.
51. In an earlier opinion, Anderson v. Gabrielson, 267 Minn. 176, 180 n.9, 126 N.W.2d 239, 242 n.9 (1964), the court noted that inequitable results might occur under the common liability rule if separate lawsuits were involved. The concern was that the defendant in the second suit might be held liable for the full amount of the plaintiff's damages simply because that defendant had not been aware of and was unable to intervene in the first suit in which the other defendant was exonerated.
ited the damages for which Cessna was liable to the portion of total damages that the jury found attributable to Cessna. This solution may lead to longer, more complex trials since to ensure full recovery plaintiffs will have to join all possible defendants. Of course, Hart’s incentive to consolidate claims will promote judicial economy and help courts avoid inconsistent results. In addition, despite its failure to clarify when equitable considerations justify departing from the common liability rule, Hart is consistent with comparative fault theory because it ensures that no party will be sued twice or forced to pay more than its fair share of a damage award.

E. LIQUOR VENDOR LIABILITY

Minnesota law prohibits the sale of alcoholic beverages to persons who are “obviously intoxicated.” In Seeley v. Sobczak, a wrongful death action in which damages were sought from a liquor vendor for serving a person who was later killed in an auto accident, the supreme court was asked to determine whether scientific evidence of the decedent’s extraordinarily high blood alcohol level could establish obvious intoxication as a matter of law. Two expert witnesses had testified that anyone with a blood alcohol level in excess of .2 of one percent “would exhibit signs of intoxication to a reasonable person.” At the time of his death, the decedent had a blood alcohol level of .269 of one percent. There were witnesses, however, who testified that on the night in question the decedent had not appeared intoxicated. The court held that under these circumstances the scientific evidence presented did not establish conclusively that the decedent’s intoxication was obvious.

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52. Although the Hart decision resolves the dual suit problem, see note 51 supra, it gives little guidance concerning the specific limits of the Lambertson exception.


55. 281 N.W.2d 368 (Minn. 1979).

56. This “percentage” refers to the number of grams of alcohol per 100 milliliters of blood. See Minn. Stat. § 169.01(61) (1978). In Minnesota, a blood alcohol level of .1 of one percent is conclusive evidence of intoxication for the charge of driving while intoxicated. Id. § 169.121(1)(d).

57. 281 N.W.2d at 370.

58. See note 56 supra.

59. 281 N.W.2d at 371. The court also ruled that section 340.14(1)(a) of the Minnesota Statutes provides the exclusive remedy for illegal sales of intoxicants in Minnesota, superseding all common law negligence claims. See Fitzer v. Bloom, 253 N.W.2d 395, 403 (Minn. 1977).
The emphasis that the court in Seeley placed on the statutory term "obvious" indicates that to establish the defendant’s culpability, the plaintiff would have had to prove that the decedent’s intoxication was apparent upon a cursory visual inspection. The unsatisfying aspect of the case is that the scientific evidence offered by the plaintiff established that the decedent had consumed the equivalent of eighteen one-ounce drinks of eighty proof liquor. The pattern of consumption that could reasonably be inferred from this evidence should have rendered the decedent obviously intoxicated, at least to the vendor who served him, regardless of outward appearance. The court’s refusal to construe liberally the duty of care that liquor vendors owe their patrons runs counter to the growing national concern over alcohol abuse. Had the court deemed the scientific evidence conclusive proof of “obvious” intoxication, or had it simply found the evidence indicative of a pattern of consumption rendering intoxication obvious to the vendor who

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60. For years, the Civil Damage Act (current version at Minn. Stat. § 340.14 (1978)) made persons responsible for serving liquor to persons “obviously intoxicated.” A 1967 amendment removed the obvious intoxication language. See Act of Feb. 24, 1967, ch. 19, § 10, 1967 Minn. Laws 54, 72. At this point, the court began to use the “intoxicated person” standard of section 340.73(1) of the Minnesota statutes. Under this standard, the court held that liquor vendors must take “affirmative steps” to ascertain whether a vendee is “obviously” intoxicated. See Mjos v. Howard Lake, 287 Minn. 427, 435, 178 N.W.2d 862, 867 (1970). In 1971, the legislature again amended the Civil Damage Act, reinserting the obvious intoxication requirement. See Act of May 13, 1971, ch. 264, § 1, 1971 Minn. Laws 476. The Seeley court correctly read this legislative history as an indication that the affirmative duty to ascertain intoxication imposed by Mjos did not apply to actions brought under section 340.14(1)(a) of the Minnesota Statutes. Accordingly, it employed the standard for obvious intoxication that had prevailed prior to the 1967 amendment of the Civil Damages Act. See Strand v. Village of Watson, 245 Minn. 414, 422, 72 N.W.2d 609, 615 (1955), discussed in note 61 infra.

61. This is the standard employed in Strand v. Village of Watson, 245 Minn. 414, 72 N.W.2d 609 (1955) (differentiating between “obviously intoxicated” for the purposes of the Civil Damages Act and “under the influence” for the purposes of a driving while intoxicated charge). The court in Strand observed that a person is obviously intoxicated to such an extent that the seller, using his usual and reasonable powers of observation, sees or should see that the buyer is intoxicated. In other words, there must be such outward manifestation of intoxication that a person using his reasonable powers of observation can see or should see that such person has become intoxicated. Id. at 422, 72 N.W.2d at 615.

62. See 281 N.W.2d at 372 (Otis, J., concurring). Justice Otis' special concurrence indicates that there may be situations when a liquor vendor has constructive notice that a customer is obviously intoxicated despite the customer’s outward appearance.

63. See, e.g., Novak v. Kirby, 287 N.W.2d 621 (Minn. 1979), discussed at page 1210 supra.
served the decedent, the result would have been to decrease the monetary incentive for liquor vendors to continue serving patrons who have already consumed unreasonable amounts of alcohol.

X. UNEMPLOYMENT COMPENSATION

A. VOLUNTARY TERMINATION

Minnesota law prohibits the disbursement of unemployment benefits to persons who have quit their jobs voluntarily.¹ Previous Minnesota decisions have analyzed the termination issue in terms of agency theory, characterizing a termination as "voluntary" if it resulted either directly or indirectly from an employee's delegation of his decision-making ability.² In 1979, the Minnesota Supreme Court reaffirmed its commitment to this broad view of what constitutes "voluntary" termination. The court classified three different types of terminations as voluntary: terminations resulting from a seniority provision in a collective bargaining agreement in Stawikowski v. Collins Electric Construction Co.;³ a specific termination date in an employment contract in Loftis v. Legionville School Safety Patrol Training Center;⁴ and a contract that offered only provisional employment in Commissioner of Minnesota Department of Economic Security v. City of Duluth.⁵ The disturbing aspect of these three decisions is that the court ruled the terminations "voluntary" even though the employees had no choice in the matter.

The disqualified employees in these cases had urged the court to interpret the term "voluntary" more narrowly to in-

¹. See Minn. Stat. § 268.09(1)(1) (1978) (individual is disqualified from receiving unemployment compensation if he has "voluntarily and without good cause attributable to the employer discontinued his employment").

². This has become known as the "constructive voluntary quit rule." See Anson v. Fisher Amusement Corp., 254 Minn. 93, 98, 93 N.W.2d 815, 819 (1958); Bergseth v. Zinmaster Baking Co., 252 Minn. 63, 66, 89 N.W.2d 172, 174 (1958); Johnson v. LaGrange Shoe Corp., 244 Minn. 354, 361, 70 N.W.2d 335, 340 (1955); Jackson v. Minneapolis-Honeywell Regulator Co., 234 Minn. 52, 57-60, 47 N.W.2d 449, 452-53 (1951).

³. 289 N.W.2d 390, 395 (Minn. 1979). Stawikowski has now been legislatively overruled. See Act of May 24, 1979, ch. 181, § 11, 1979 Minn. Laws 272 (amending Minn. Stat. § 268.09(1) (1978)).


clude only terminations in which the "decision whether to go or to stay lay at the time with the worker alone." In 1976, the court had indicated that it might adopt this narrower standard if presented with an appropriate case. Nevertheless, when the opportunity arose, the court refused to adopt the standard, and instead asked the legislature to consider revising the statute. The court chose this path for two reasons. First, it stated that judicial reformulation of the voluntariness standard would result in an unwarranted financial obligation for employers because the increase in terminations deemed involuntary would cause unemployment compensation taxes to rise. Second, the court considered the legislature the more appropriate body for determining the proper function of the benefits disqualification clause.


9. Stawikowski v. Collins Elec. Constr. Co., 289 N.W.2d at 393. Funds for unemployment compensation are derived from payroll taxes levied on employers. The rate paid by an employer is determined by adding its minimum rate to its "experience ratio." Minn. Stat. § 268.06(8) (1978). The experience ratio is a function of the number of persons chargeable to the employer's account who are receiving benefits. See id. § 268.06(5), (6) (1978). The experience ratio, in effect, penalizes employers for failing to stabilize employment. For this reason, the concept of employer fault has become part of the unemployment compensation calculation. By emphasizing the effect of termination on the employer's tax rate, courts have shifted the function of the disqualification issue from "limiting benefits to workers unemployed through no fault of their own to limiting payments to cases where the employer is at fault." Simrell, Employer Fault vs. General Welfare as the Basis of Unemployment Compensation, 55 Yale L.J. 181, 184 (1945) (quoting Letter from A.J. Altmeyer to War Mobilization Director Byrnes (June 2, 1944), reprinted in 90 Cong. Rec. 6841-42 (1944)). For a critique of the experience rating system and the concept of employer fault, see Arnold, Experience Rating, 55 Yale L.J. 218 (1945); Schmidt, Experience Rating and Unemployment Compensation, 55 Yale L.J. 242 (1945); Simrell, supra.

The court should have discarded its interpretation of voluntary termination.11 A standard based on the employee's intent at the time of the termination would better reflect both the realities of modern job markets and the goals underlying unemployment compensation.12 Under the court's interpretation of voluntary termination, a person who, in order to obtain work, contractually delegates his decision-making ability concerning termination will be denied unemployment compensation if that delegation later results in the termination of his job. This anomalous result occurs even though at the time of his termination the employee is willing and able to continue working. If the legislature does not revise the voluntariness standard as the court has suggested, the court should itself reform this unfair rule of law.

ration from employment by reason of its temporary nature or for inability to pass a test or for inability to meet performance standards necessary for continuation of employment shall not be deemed voluntary.” Id. at 427. The amended version of section 268.09(1) does not explicitly reject the application of agency theory to issues of voluntary separation. It therefore seems that the legislature has left to the discretion of the court the decision whether to continue applying agency theory to fact situations not covered by the amendment. Loftis and City of Duluth have since been reheard and overruled. See Loftis v. Legionville School Safety Patrol Training Center, Finance & Commerce, June 20, 1980, at 2, col. 1 (Minn. June 20, 1980); Commissioner of Minn. Dept' of Economic Security v. City of Duluth, Finance & Commerce, June 20, 1980, at 1, col. 2 (Minn. June 20, 1980). In both opinions, the court, instead of discarding the constructive voluntary quit rule, see note 2 supra, simply stated that it would not “expand” the rule to cover discharges based on the temporary nature of the employment. Thus, the constructive voluntary quit rule remains a part of Minnesota's unemployment compensation law, but the legislature appears to have checked the tendency of the court to expand the rule's coverage.

11. See note 10 supra.

12. For a thoughtful series of articles on the purpose of unemployment compensation and the meaning of involuntary unemployment, see Symposium, Eligibility and Disqualification for Benefits, 55 YALE L.J. 117 (1945).