William Mitchell Opinion – Volume 10, No. 2, May 1967

EDITORS - James Prochnow, James Ullyot, Steve Van Drake.

PHOTOGRAPHERS - Steve Van Drake.

STAFF WRITERS - Paul Buegler, Joseph Daly, Mr. and Mrs. Craig Gagnon, William Glew, Doris Huspeni, Lee LaBore, Rita Lukes, John Monroe, Hugh Plunkett m, Gerald Randall.

LEGAL WRITERS - Robert Ahl, John Hirte and Hugh Plunkett III.

The William Mitchell Opinion is published bi-annually by the college's Student Bar Association.

Bruised, Battered, Satchel Lives On

By PAUL BUEGLER, Staff Writer

A regular scene at William Mitchell is Prof. Johnson arriving for class carrying a battered and bruised satchel bulging with tattered and torn notes, briefs, and memoranda.

Students suspect that this quaint satchel must have a long and nostalgic history for surely Prof. Johnson is sufficiently well heeled to afford a brief case of more modern vintage.

The history is not as long as you might think, but it is nostalgic and it involves two men who have given much of their lives to legal education generally and our law school particularly.

The Prof. Johnson referred to above could be either Gordon A. Johnson who teaches equity or his father Andrew N. Johnson, President of the William Mitchell College of Law Board of Trustees. These two men have perpetuated the satchel's existence for 33 years.

It symbolizes their combined 68 years of service to legal education. The story begins when Prof. Andrew Johnson started teaching contracts at one of our predecessor schools in 1917. By 1934 he had become one of the Twin Cities' leading attorneys and received a beautiful leather satchel as a gift from his wife. At first he used it for trial work. By 1938, however, he used it only for carrying law school materials to class and as a storage container between his trips to the downtown Minneapolis night law school.

It was 1949 when Prof. Gordon Johnson joined the faculty as an occasional substitute for his father and began to share the satchel.

He became sole possessor in 1952 when, as Dean of the Minneapolis-Minnesota College of Law, Andrew Johnson retired from teaching and became active in bringing about the consolidation that created William Mitchell College of Law.

Prof. Gordon Johnson says the satchel's zipper gave out in 1953 and the last thread fell off one of the handles in 1961. While he maintains the satchel is only 33 years old there are those who doubt it. Prof. Green, for example, considers that "incredible", and Prof. Fitzgerald maintains the satchel was brought here from the "old country" during the Nineteenth Century.

Whatever credence one can give these remarks, Dean Heidenreich is certainly correct when he says "even back in 1957 we didn't think it would make it through the year!"

There is only one explanation why Prof. Gordon Johnson continues to use the satchel. In his words, "I have, naturally, developed a great attachment to it and though it is not a luck charm, I wouldn't feel right without it."

Why is this story told? We just simply thought you would like to be aware that this tattered satchel symbolizes 50 years of service to our school, that it reflects the hard work and devotion of two men who only remark "we are proud of William Mitchell College of Law and proud to have been a part of its progress."

(It is interesting to note President Andrew Johnson has never received pay during his 50 years of service.)

So the next time you see the frayed and worn satchel pictured above with Prof. Gordon Johnson let it remind you William Mitchell College of Law is a better school because of that worn satchel and because of the years of service it symbolizes.

Image

Photograph of leather satchel full of books with caption: The Zipper Ripped

Image

Students help pack time worn satchels. From left, James Lethert, Mike LaBaron, Al Vanasek, Lee LaBore and Prof. Gordon Johnson.

June 12 at St. Thomas – 50 Seniors To Hear Noted Court Justice

By GERALD RANDALL, Staff Writer

Chief Justice James T. Harrison of the Montana Supreme Court is the class of 1967's commencement speaker, the Dean has announced. Commencement is slated for Monday, June 12 at 8 p. m. in the St. Thomas Armory.

At that time an honorary Doctor of Laws (L.L.D.) degree will be conferred upon Chief Justice Harrison by the William Mitchell Board of Trustees.

Invocation will be given by Dr. Jacob C. Krebs, father of Calvin Krebs, a graduating senior.

Fifty seniors are expected to receive degrees; 45 are candidates for the Juris Doctor (J.D.) degree and five are for the degree Bachelor of Laws (L.L.D.).

The class was small at its inception, numbering only 102 students.

It is the smallest graduating class in some time and is expected to be the smallest for some time in the future.

Degrees with honors will be granted to those seniors in the upper 10 per cent of the class.

Chief Justice Harrison has been in the law all his life. A North Dakota native, he is a 1926 graduate of the St. Paul College of Law, one of the schools consolidated into the William Mitchell College of Law.

After receiving his L.L.B. and being admitted to the Minnesota Bar, he returned to North Dakota where he was admitted to the bar of that state and practiced in Minot until 1928.

He then went to Glasgow, Montana, where he was court reporter from 1929 until 1938; he was then admitted to the Montana Bar in 1930.

From 1938 until 1957 he practiced in Malta, Montana, during which he served as city attorney of Malta 1940-48, county attorney of Phillips County, Montana, 1948-52 and as chairman of the Montana State Board of Pardons 1955-56.

In 1957 he was elected Chief Justice of the Montana Supreme Court and has been re-elected twice since then, the last time without opposition.

Chief Justice Harrison has an honorary degree from the Montana School of Mines and is a member of the Masons. He has three children, one of whom is presently living in Minneapolis.

In an interview with Chief Justice Harrison he mentioned that he had the opportunity to visit William Mitchell in the fall of 1965, he referred to it as “a beautiful school” and “a far cry from what we went through.”

He sees the night law school as having a mission of definite importance, one which is more vital today then ever before. The Chief Justice pointed out that had it not been for the evening law school he would never have been able to have earned his law degree.

Candidates for degrees are: Bruce L. Anderson, Charles W. Anderson, James J. Boyd, Joseph E. Cartwright, Robert W. Casey, Bruce W. Christopherson, Richard J. Chrysler, Clement J. Commers, James E. Conway (L.L.B.), Ellen Dresselhuis, Dennis L. Ehlers, Clyde E. Eklund, Ronald E. Erickson, Lee L. Fossum.

Robert J. Goggins, Webster A. Hart, Duane R. Harves, Kenneth G. Heimbach, Jr., John D. Hirte, Anthony W. Karambelas, James R. Keating, Fredrick W. Keiser, Jr., Calvin J. Krebs, James S. Lane III, David S. McClung, John C. McLaughlin, Patrick M. McShane.

William T. Malchow, Richard J. Marchek, Jack A. Mitchell, Patrick D. Moren, Robert E. Mountain, Richard M. Olson (L.L.B.), Richard R. O’Reskie.

David L. Peterson, James A. Phillips, John E. Regan, Kaye S. Reishus, Thomas P. Schiltz, Craig E. Scholle (L.L.B.), David J. Simecek, Thomas W. Strahan, James P. Sundquist, Charles M. Tilden, Edward C. Tischleder (L.L.B.) Gerald M. Tyler, Rosalie E. Wahl, Bradley L. Winch.

Image

Justice Harrison

Former Journalist – New Con Law Prof Brings Best of Two Worlds: Yale and Harvard

By HUGH V. PLUNKETT III, Staff Writer

Arthur Hellman, former journalist, Yale law grad and clerk to Assoc. Justice James C. Otis of the Minnesota Supreme Court, joins the Mitchell faculty next fall, the Dean has announced.

Hellman, an assistant professor, came to the Twin Cities from New York, received his Bachelor of Arts degree from Harvard University, was graduated magna cum laude, his Bachelor of Laws from Yale.

At Yale, Hellman was an advisor to both the moot court (appellate advocacy) and Barristers Union (trial court techniques) programs.

Before entering law school, Hellman aspired to a journalism career. At Harvard he was editor-in-chief of a political magazine and a member of the editorial board of the Crimson.

His endeavors in journalism run the gamut form copy boy at the New York Times to city editor of a small-town daily in upstate New York.

The courses Hellman will teach include constitutional law, local government and labor law. He is especially interested in labor law, since he has worked at the National Labor Relations Board with assistant general counsel Elihu Platt, who is the uncredited author of many important board decisions.

Hellman indicated that he was also involved in an enterprise which had constitutional law overtones.

At Yale he established a film society which "made money faster than we could spend it."

"We showed everything from old Westerns to Chaplain comedies, but it was our avant-garde movies that drew the largest crowds," he said.

Hellman recalls that, "the avant-garde films were scheduled to be shown a few weeks after the Supreme Court's decision in Ginzberg, which held that the courts could consider advertising in determining whether the Federal obscenity statute had been violated.

"We thought it would be embarrassing if we were arrested, so our posters just stated, 'New American Cinema' and listed the films and their makers.

"The undergraduates must have been up on their movie reviews, though, because they nearly broke through the doors to get in.

"I should add that film enthusiasts who came to see new film techniques also said that we'd selected and arranged our films very well."

Image

Arthur Hellman

Arthur Stewart Resigns From Mitchell Board

Arthur A. Stewart, 79, retired as member and vice president of the Board of Trustees, William Mitchell, in April after many years of active service.

He will, however, remain a member of the corporation.

He is succeeded by James E. Kelley, long-standing member of the corporation who also becomes vice president of the board.

Stewart, is a retired judge of Ramsey county district court, who remains active, trying a few cases through special arrangement. A 1908 graduate of the St. Paul College of Law, he taught evidence at his alma mater for several years and at William Mitchell when it was formed.

Kelley, a St. Paul attorney, recently endowed the school with a torts chair – by the Margaret H. and James E. Kelley Foundation, Inc. He was graduated from the St. Paul College of Law in 1917.

There are eight members on the board, all of whom are members of the 30-man corporation.

The corporation – completely made up of lawyers – reviews the school's operations.

The board, on the other hand, makes key policy and management decisions.

EDITORIALS

Push for Civil Rights?

Despite the myriad of non sequiturs that are hurled constantly against the Supreme Court one justifiable conclusion is that the policy of the Court will soon undergo a change. On February 28, Ramsey Clark assumed the duties as U.S. Attorney General; within hours, Associate Justice Tom C. Clark made public an October 3, 1966 letter to the Chief Justice wherein he announced his intention to retire if his son was appointed to the vacant post. That date with retirement, unfortunately, is near.

Unfortunate because a rationale that represents a substantial segment of America will also be retiring. Although Justice Clark has been facetiously compared to a ''shrinking violet'' in First Amendment fields during the course of battle, the conservative "doctrine" he espoused was healthy. His loss will undoubtedly up et the 5-4 "balance" currently on the Court, and, barring unforeseen changes and developments, the crossover possibility will be, at least temporarily, shelved. The significance of this impending change will be felt in various areas. The recent case of Adderley v. Florida exemplifies this.

There, a First Amendment case in a civil rights setting, the conservative minority captured Justice Black and perhaps, as some have suggested, the civil right movement received a minor setback. Although only time will tell the effect of the Adderley decision, we do not think it is an illusion to say that if the decision had been rendered on November 14, 1967, the result would probably have been different. Although the basic legislation in the civil rights area has been constitutionally approved, until now, the possibility has always loomed that the decision could be tapped of their vitality. That cannot now happen.

To realize concretely the present situation on the Bench, it only has to be realized that one-sixth of all the decisions rendered during this Term have been in a 5-4. ratio. Of these eight, Justice Clark, oddly enough, has been in the majority seven times. Thus, individual right and national security may be given new faces also.

Accompanying the retirement of Justice Clark, is the traditional apprehensive national speculation on whom the specific appointee will be. Professional journals, Time, and law students mull over the possibilities. Former Justice Felix Frankfurter once commented on whether a man changes when he takes the chair: "If he is any good he does." Despite his dogmatic assertion and living testimony, we think he overstated the actual situation.

The future course of an appointee's conduct, generally, isn't quite in the state of limbo as Frankfurter stated. Mr. Justice Fortas is a primary example. Whoever is appointed, Freeman, Fowler, Ribicoff, Marshall or some lower judicial figure, he will possess the inherent characteristics of the present political clime.

The next few years will be extremely interesting; four besides Clark are soon to fall.

Jailhouse Revisited

Illustration of balance scale with four US Supreme Court Justices seated on each scale pan. Beam sign reads, “5-4 balance,” and Justice Tom Clark is jumping down from the scale pan on left. Opinion Cartoon by Jerry Fearing.

Summer Seminars Suggested lo Supplement Course Work

Do you want more than a ticket to the bar exam?

More than a core legal education, restricted to basics except for a couple of electives in the fourth year?

If you do – and don't want to bear the pain of taking extra work for credit – then maybe you'll agree with us, that some additional courses could be made available to the student through a system of summer seminars offered to third and fourth year students.

There are many forms which such a seminar could take. We suggest one conducted in two parts. The first, forming the core of the course, would consist of weekly discussion sessions with an instructor over a period of 4 to 6 weeks. The sessions could be held either during the day or in the evening.

The second part, supplementing the course work of the first, would be a series of lectures in the general area of the seminar given by lawyers or law professors recognized as experts in the subject.

Although the two-part system would be the most satisfactory as each part would complement and expand the other, there are other forms which would be worthwhile.

For example, the seminar could be offered without including in it the lecture series.

We believe a summer seminar would give the student who wanted it an excellent means of extending his understanding and knowledge of the law beyond the necessarily limited scope of our law school curriculum.

Law Day: A Suit Not A Settlement

Abraham Affidavit, chairman of your continuous committee to stir up more litigation, has devised a new approach to the celebration of Law Day U.S.A.

He proposes a longer observance, Law Week U.S.A., with each day set aside for a special purpose.

The first day would be Take a Crook to Lunch Day, for example. Other suggestions are Take Your Neighbor to Court Day, Sue Daddy Day (in recognition of the continuing erosion of the family immunity doctrine) and Say It With a Summons Day. Further nominations are invited.

Dicta by the Dean – Practice, Criticism Needed To Improve Student Writing

Inability to write well is a problem which burdens many law school graduates.

It is a problem not only for the graduate but for the law school itself. The National Conference of Bar Examiners at its August, 1967 meeting will confront the question: with whom rests the responsibility of correcting the problem?

The assumption implicit in this question is there are a substantial number of law school graduates who cannot adequately express their thought in understandable terms. The problem is not peculiar to law

schools; other professional and graduate schools find that their students and graduates are not well trained in the art of expressing thoughts in writing.

The problem for law schools, however, is more serious than for other professional and graduate schools. The lawyer's means of doing business is through verbal and written communication. While the lawyer need not be a sparkling orator he must be able to communicate his ideas to his clients, to members of the bench, to members of administrative agencies, and to other lawyers clearly, concisely and effectively. If he his not adept in this respect, his effectiveness will be greatly diminished.

Periodically the professional and graduate schools publicly chide undergraduate schools for their failure to properly train their students in basic fundamentals of the English language.

The colleges in turn criticize the high schools for their failure to teach fundamentals. The question at the moment is not really so much one of with whom the responsibility for the correction of this problem lies as one of how the problem can be corrected in the law schools.

The problem as it stands is one that can be dealt with only in the law schools. If high schools and colleges were to immediately revamp basic English programs to provide a firm foundation in fundamentals of the English language, the effect of this change would not reach the law schools for several years.

The fact is that law schools will be faced with the problem in different ways. Some have given an English test to entering students and have required students who have fallen below a certain level to take specially provided courses which stress fundamentals of writing.

However, the basic problem is not one of lack of knowledge of fundamentals. In most cases the fundamentals have been learned or can be learned with a minimum of effort.

The key is in practice and criticism, both criticism from others and self-criticism. The worst writing appears in examination answers which the student writes under pressure and with little chance for revision or editing. If he is compelled, under close supervision, to review and rewrite his work, he is capable of producing a much better product.

Many students do not have the opportunity to review and re-write under supervision before they reach law school because many college courses do not require the submission of high-quality written work. Objective tests are common and papers are seldom required. Moreover, when such work is required it is not often subjected to the cold, objective scrutiny of an instructor before the final draft is prepared.

At William Mitchell, we have wrestled with this problem for some time. We hope that by providing close personal supervision in the courses in legal writing and legal drafting we will alleviate the problem by compelling the student to review and criticize his own work and to re-write it again and again.

The use of lawyers as "readers" will immeasurably strengthen the program in this regard. In addition to this we are trying to expand the number of small seminar courses available to students and to require in those courses high quality written papers.

We hope that these changes will have a salutary effect on the writing ability of the students in general and their performance in bar examinations in particular.

Of course no one knows how effective a particular teaching method will be until it has been in use for some time and until a representative sample of participants in the program is available; however, the increasing stress on high quality written work makes it imperative we do our best to require form each student in each year a representative sample of his best and most carefully written work.

It is this goal towards which we are striving. Our program presents special problems in this area because the key to this approach is time.

As we work with the program each year, changes will be made and experiments tried, altered, adapted and abandoned. This will be done so we will be able to provide our students with most effective and practical education possible.

Wm. Mitchell Students 'Lobby,' Draft Bills To Revise Erroneous Minnesota Statutes

By JAMES ULLYOT, Staff Writer

"In many ways we have been lobbyists.

"But that description is somewhat misleading since we have represented no special interest group. Our aim has been for our bills to pass on their own merits, not because of any personal gain or self-interest."

Jack Mitchell (no relation to William), fourth year student and chairman of the law improvement subcommittee, for almost a year now, has worked on a full-time basis with the nine other William Mitchell students in this year's pilot legislative program.

The committee aims to provide service to the legal profession in Minnesota. It helps state legislators revise ambiguous laws or introduce new ones.

Mitchell's salary and, for that matter, the whole program were largely made possible by a $5,000 grant from the Council on Education in Professional Responsibility (affiliated with the American Association of Law Schools). The nine other members receive $2 each research hour, paid by the Minnesota Senate law Improvement Subcommittee.

Asst. Prof. and state Sen. Jack Davies, Liberal-District 42, last spring enlisted volunteers, all third and fourth year students. The theory was students could gain educationally from the experience while also serving a useful function at relatively little expense to the legislature.

Third and fourth year student were chosen because two years of law school were thought a minimum requirement. Mitchell took an office in the school library.

After helping to form the group, Davies dissociated himself to remove identification with himself and his party.

Fourth year students besides Mitchell are John Hirte, James Lae III, and Thomas Strahan. Third year students are Jerrold Hartke, James Hoolihan, William Muske Jr., Hugh Plunkett, Thomas Spence and Rodger Squires.

Last summer the committee faced its first challenge: to contact legislators, lawyers and judges for suggested projects. Mitchell made formal presentations at the Minnesota state County Attorneys' Association of Municipal Judges. Individuals were also approached at the State Bar Association convention. The "Bench and Bar" state legal journal even published an article soliciting ideas.

Nevertheless, “There was no great groundswell of response,” Mitchell said. The lack of a precedent for the student group in either the legislature or law schools in Minnesota contributed to the slow start.

Besides, 1966 was an off-year for the legislature.

The biggest boost came after letters were sent to each member of the 1965 House and Senate judiciary committees. Several useful ideas for projects and leads to judges and lawyers resulted. The program was finally off the ground.

Some suggestions were better than others. In several instances extensive research became necessary simply to screen the most practicable and significant projects. Each student chose one or two key issues that particularly interested him. By fall the committee had about 15 bills slated for the year.

Among these was a bill to extend service of process to nonresident individuals. Sen. Wayne Popham, Conservative-District 35, among others had recommended the project. It came as a particularly welcome challenge to the group because it meant proposing a bill for a new law rather than for the revision of an existing statute. Since the implications for Minnesota procedural law would be far-reaching, the bill has been the group’s most publicized. Hirte did most of the research with assistance from Spence and Mitchell.

(This and most other bills were introduced and in committee or passed in only one branch of the legislature when this story was written.)

Field interviews, in addition to library work, kept the research rigorous and practical. For Muske interviews to draft a bill to provide a definition of a “prostitute” took him into the operations of the Minneapolis morals squad. In most of the projects, statutes of other states and pertinent federal laws were studied, as well as the 1963 Criminal Code and various court cases. The students also considered different courtroom implications of alternative bills on the same subject.

Throughout, teamwork keyed their conduct. The committee often met as a group and staged self-criticism sessions, hotly debating issues. The group insisted on unanimous approval of bills sent to legislators and their committees.

When Muske suggested that any definition of a prostitute would create more problems than it would solve, the committee shelved attempts to draft a bill.

The decision illustrates the students’ law improvement subcommittee’s concern that it be judged not by the quantity but by the quality of the measures it manages in the legislature.

Drafting individual bills meant following a uniform style and meeting other mechanical requirements. All bills were submitted to the Revisor of Statutes Office in the Capitol for official acceptance with regard to the mechanical details.

A lengthy memorandum accompanied each bill submitted by the students. Its purpose was to provide legislators with detailed background on such matters as the circumstances warranting change, pertinent cases at law, and possible future problems which should be questioned. Discussion of pros and cons minimized bias in each memorandum and helped legislators see many sides of an issue.

In many ways, the memoranda represent one of the most important aspects of the work of the law improvement subcommittee.

They were not required. (Lobbyists rarely submit them with bills they draft.) Moreover, the memoranda called for a lot of extra work. But thoroughness set a high standard for the researchers and assured a rewarding personal experience while increasing chances of a bill's acceptance.

Rep. Joseph T. O'Neill, Conservative-District 47B, a member of the House judiciary committee, introduced a bill worked on by Muske to permit county treasurers to accept negotiable paper in lieu of cash for taxes

In an interview, O'Neill noted, "Muske and Mitchell did a real fine job with a real complex problem. Their research and especially the memorandum they gave us were excellent and very helpful." He said he hopes the program will be continued in future years.

Selecting legislators like O'Neill to "author" (introduce and promote) the bills has hardly been a simple matter. The students have carefully chosen a variety of legislators to avoid identification with particular individuals or parties. A certain amount of selling has been required to enlist a prospective author's support. In has been necessary to reach numerous legislators each time since a bill is usually introduced by principal and at least two co-authors in each legislative branch.

It has been important to select legislators who are members of either the House or Senate committee where the bills predictably will be referred for hearings after initial introduction.

Finally, for each bill the students have paid some attention to having two Conservatives and one Liberal in each branch for greater chances of success in the Conservative dominated legislature.

"Selecting authors for our bills has been a very strategic matter," Mitchell added.

Mitchell and the students working on each bill have been appearing at the numerous committee hearings, presenting bills and answering questions. Sometimes this has meant as many as six appearances for a particular bill.

(The state legislature meets for 120 days every other (odd-numbered) year. Nearly 2,000 bills will have been introduced in each branch during this session ending May 22.)

As the final day grows nearer, the pace of activity quickens and an increasing number of bills turn from committee for final House or Senate action. So, too, the law improvement subcommittee's bills will move more rapidly in the last month.

Bills in addition to those already mentioned include (student researcher's name in parenthesis): a bill to repeal the state law prohibiting campaigning on election day, to be consistent with the recent Mills v. Alabama U.S. Supreme Court decision (Hoolihan); two bills to make statutes conform to the 1963 Criminal Code (Squires); and a bill to amend the statute regarding the reporting of cases of child abuse (Strahan).

Others include bills amending statutes relating first to prohibitions of double prosecutions and second to fees charges for foreclosures of mortgages (Plunkett); a bill to amend the statute relating to fees charged for publication of legal notices (Hartke); a bill to resolve an ambiguity in the statute regarding annexations without a hearing before the Municipal Commission (Lane); and a bill to establish to absolute effect the various types of resolutions passed by the legislature (Spence).

Looking back over the year, Mitchell praised the other members of the committee for their devoted efforts and thoughtful work. “These guys – not I – should be given the credit. “They have really worked hard and done an outstanding job.”

Mitchell added he and the others had gained immense respect for the legislators. “Most people have no idea how busy, how thorough and yet how efficient and productive they are.”

Because the legislature will not meet next year, there will be no law improvement subcommittee until possibly the summer of 1968. Two key questions: whether another will be formed at that time, and if so, whether the committee will be expanded to include University of Minnesota law students?

These judgements and others will be made later with the help of a comprehensive summary including recommendations to be assembled by the students after exams.

Mitchell points out that “one of our aims has been to lay the groundwork and make it a little easier for future committees.”

In general, “I think we have been able to show the legislature that our function is worthwhile,” Mitchell said.

“All of use are grateful for this greatly educational experience of seeing how bills became enacted into laws,” he added.

Image

Jack Mitchell 'lobbies' for a non-resident service bill in a senate subcommittee hearing. Sen. Jack Davies, Board of Trustees, William Mitchell registrar, takes notes in foreground. Jack Mitchell is one of 15 students engaged in a full-scale legislative battle to push their own bills through the legislature. Turn to page 3 for story.

Image

Mitchell’s lobbyists at a posed brainstorming session are from left, front row, Prof. Jack Davies, Tom Strahan, Jack Mitchell, John Hirte, Pat Costelo and Hugh Plunkett III; back row, William Muske, James Lane, Gerald Hartke, James W. Hoolihan and Thomas Spence.

Law in Flux: Recovery for Fright

(article contains footnotes)

By John Hirte

About the Author

John Hirte is a senior living in St. Paul with his wife and two children. He was graduated from the University of Minnesota with a history major in 1963 and is a Minnesota state supreme court clerk for Justice Peterson. He also worked as a casualty claims adjuster for the St. Paul Fire-Marine Ins. Co., St. Paul claims office, for three years.

Fright in literary compositions is a tool an author strategically employs to stimulate the emotions of a reader and heighten the effect of the printed word.

In tort litigation fright caused by negligence has frustrated the legal reasoning of a number of courts who have been called upon to determine whether it is actionable when not accompanied by physical

impact. In considering this question, New Jersey has recently decided that fright is actionable if it produces substantial injuries or sickness to a person who was placed in fear of his safety by the defendant's negligence. The decision overruled a doctrine that bad prevailed for sixty five years in New Jersey's case law.

The Supreme Court of New Jersey, in the 1965 decision of Falzone V. Busch,1 determined that injuries resulting from fright without impact should be compensated if the fright proximately resulted from the defendant's negligence. The plaintiff in this case, a middle aged woman, barely escaped being struck by the defendant's automobile after it negligently struck and injured her husband. The plaintiff alleged that the fright she suffered led to a subsequent illness requiring medical attention, and she sought recovery of her damages on the grounds the defendant's negligence jeopardizing her safety caused her fright and her illness.

The trial court in granting a summary judgment for the defendant relied on a doctrine stated in 1900 by the New Jersey decision of Ward V. West Jersey & Seashore R. Co.2 The Ward decision held that injuries resulting from fright were compensable only if accompanied by physical impact. This decision, limited to cases involving negligence, had been recognized as the rule until Mrs. Falzone decided to appeal to test the reasoning of a doctrine which denied her a remedy.

In reconsidering the Ward holding, the New Jersey court examined the origin of the "impact" requirement and traced its effect in New Jersey and in the law of other jurisdictions. It reviewed the reasons supporting the holding and rejected them on the grounds they were "no longer tenable, and it is questionable if they ever were."3

The facts in Ward were similar to those in the Falzone case. The plaintiff, trapped on a railroad crossing by the defendant's negligence, was not struck by the approaching train but was so frightened by it that subsequent illness resulted. In arriving at the determination that "impact" must accompany the fright to form a cause of action, the New Jersey court adopted the view expressed in 1888 by the English legal system when the case of Victorian Railways Commissioners V. Coultas4 was decided by the English Privy Council.

The Coultas case, with facts identical to those in Ward, was decided in the defendant's favor when the court unanimously held that a contemporaneous impact must accompany the fright to form a cause of action.

The court noted that no prior decision, English or American, supported recovery for fright without impact, and the presiding judge commented that, "Their Lordships decline to establish such a precedent."5 The objections set forth in the opinion were that injuries could be easily feigned or imagined if no impact was required, and also that injuries resulting from fright could not be considered a consequence of ordinary negligence.6

The reasoning of the Coultas case was quickly adopted in the United States and it was assimilated by the New York Court of Appeals in 1896 when it decided the case of Mitchell V. Rochester Ry. Co.7 The plaintiff in Mitchell was a pregnant woman who miscarried when the defendant's team of horses almost ran her over. Medical testimony was presented to show that her illness was the result of the fright she received, but the court held that impact must accompany fright. The court reasoned that fright alone could not serve as a cause of action, and therefore a defendant cannot be held responsible for the

consequences of the fright. 8 ''The nervous disease, blindness or miscarriage that results from fright merely show the degree of fright, or the extent of the damages. The right of action must still depend upon the question whether a recovery may be had for fright."9

In denying a cause of action based upon fright the court reiterated the reasoning expressed by the English court in Coultas, and it expressed an additional consideration of its own. The New York court not only felt that injuries could be easily feigned without detection, but that any damages would have to rest upon conjecture or speculation. A "flood of litigation" would result, and to allow such fictitious claims "would be contrary to public policy."10 The court ruled that a personal injury must accompany the fright if it is to be considered, and the court held that damages from fright alone were too remote to justify recovery.

With the background set by the Coultas and Mitchell cases, it is not surprising that Ward was decided in the defendant's favor by the New Jersey court. The court said, "Physical suffering is not the probable or natural consequence of fright, in a person of ordinary physical and mental vigor." 11 It ruled that damages based on fright alone are too remote to be compensated. The court decided that a person should be responsible for the probable consequences of his negligent acts, but qualified this by saying a negligent actor has the right to assume that the persons his actions might affect would be of "average strength, both of mind and body."12

Quoting at length from the Mitchell decision, the New Jersey court repeated the fear that feigned or imaginary claims would "flood" the courts, and it warned that "a wide field would be opened for unrighteous or speculative claims."13 The court stated that public policy required it to bold such injury claims were nonactionable.14

In reaching its decision, the Ward court distinguished the cases where fright accompanied a personal injury from those where fright alone gave rise to an illness or injury. The court noted that it was settled by Traction Co. V. Lambertson15 that a jury was entitled to consider mental agitation when fixing damages in cases where physical injury was suffered. Fright alone was no cause of action, reasoned the court in Ward, and it did not feel that illness resulting subsequent to the fright should support a recovery. The court assumed that the state bar members agreed with its view from the fact that no similar cause of action had ever come forth out of "the mass of suits" crowding the courtrooms."16 This assumption appears to be the only reason produced by the New Jersey court to support its decision in Ward.

The Ward decision was construed by the courts and members of the New Jersey bar as setting up a requirement that physical impact must accompany fright if recovery is sought. The court, for its own convenience, denied a remedy it felt would foster fraudulent claims. In support of the court's decision, it must be noted that the medical profession at the turn of the century had not progressed to the stage where it could definitely show a causal connection between fright and physical effects produced within a body by fright. In the absence of medical knowledge to support an attack on the Ward decision, the New Jersey bar concentrated on attacking and reducing the significance of the physical impact requirement.

The case of Tuttle V. Atlantic City R.R.,17 decided one year after Ward, was the first attack on the new requirement of impact. The plaintiff, a passerby who was frightened when the defendant's railway car jumped the track and started toward her, started running to escape the peril. Injured when she fell in

her effort to escape, the court allowed her to recover for both her fright and the injury. In justifying this recovery, the court stated:

That if the defendant, by negligence puts the plaintiff under a reasonable apprehension of personal physical injury, and plaintiff, in a reasonable effort to escape, sustains physical injury, a right of action arises to recover for the physical injury and the mental disorder naturally incident to its occurrence.18

The decision could be interpreted to mean that fright damages are recoverable without impact if the frightened party suffers some physical injury, but sixty-four years were to elapse before the court so held in the Falzone case. The Tuttle decision again stated Ward's view that fright alone is not compensable,19 but the Tuttle decision created an eroding influence on the impact doctrine.

The court's confidence in the doctrine requiring impact is to be seriously questioned when the case of Porter V. Delaware, L. & W. R. Co.20 is considered. This case, decided six years after Ward, held that dust settling on a plaintiff's eyes and neck constituted a sufficient “impact" to justify recovery for fright damages. The plaintiff, a pedestrian on a public highway, was frightened when an adjacent railroad bridge collapsed. The plaintiff alleged she suffered eye and nervous disorders from the fright and dust of the crash. The defendant contended no injury occurred. The court affirmed the lower court verdict for the plaintiff, but affirmance was conditioned on the reduction of damages awarded as the evidence did not support the original damage verdict. The court stated that Ward precluded damages based solely on fright, and it distinguished the two cases on the grounds that Porter had suffered an impact (the dust) along with her fright. "(S)he received physical injuries, and all the resultant effects to her system, due to the accident, are recoverable."21

The "sound" legal principles set forth in Ward precluding recovery were cast in a dubious position by the legal reasoning that emerged in the twentieth century. Medical advances, social changes, and new legal concepts were causing many jurisdictions to reverse their thoughts on the recovery of damages based on fright without impact. The earlier view, expressed in an 1861 case22 by Lord Wenselydale, that "mental pain or anxiety the law cannot value, and does not pretend to redress when the unlawful act complained of causes that alone," was being ignored by a number of courts. They felt mental distress and the injuries resulting therefrom should be compensated if they resulted from the defendant's negligence.

The expansion of medical knowledge about emotional disturbance and physical injury has been a key factor influencing the courts to allow recovery for injuries or illness resulting from fright. The rule requiring impact was formulated at a time when medical knowledge was unsettled in its view of the body relationships. Emotions were held to be separate from the physical body, and it was commonly believed that they were distinct insofar as interdependent effects were concerned.23 Research and practice in the field of psychosomatic medicine (dealing with physical disorders brought on by emotional distress) has shown that the body and mind are interdependent, and one medical authority has estimated that fifty per cent of illnesses being treated today are the products of the emotions.24 This medical knowledge has provided evidence that will support a cause of action, and changing social and legal concepts are providing the cause of action.

Modern legal reasoning bas been directed toward providing a remedy for a wrong wherever a situation is presented that merits recovery. In the field of negligence this reasoning is steadily increasing the amount of actionable claims, and courts of today are recognizing that recovery for injuries resulting

from fright alone are proper if a legal duty owed to the plaintiff is breached by the defendant's negligent act that produced the fright. In deciding Falzone V. Busch the New Jersey Supreme Court joined the majority of American courts that have adopted this liberal view.25

In adopting the majority view, the New Jersey court rejected the view that physical injuries could not be brought on by mental distress or fright, and it paid heed to the medical knowledge that bas established that physical injury or sickness can be the possible and probable result of fright in some cases.26 The court reviewed other state decisions and the various law review articles supporting a cause of action for injuries resulting from fright, and it noted that the Porter case reduced the impact requirement to "inconsequential or slight significance. "27

The court dismissed, with little discussion, the Ward contention that the absence of suits demonstrated the bar's concurrence with the rule of no liability. The court merely noted that "the common law would have atrophied hundreds of years ago if it had continued to deny relief in cases of first impression."28

Stare decisis is of limited application in the field of torts, declared the court, as stability and predictability are not as crucial in torts as they are in contract or property law.29

As few torts are committed in reliance on an established doctrine the practicality of this view cannot be denied.

The Falzone court also noted that the "flood of litigation" feared by the Mitchell and Ward courts failed to materialize in the jurisdictions allowing recovery for fright without impact, and it criticized this reason on the grounds it denied meritorious relief in favor of the convenience of the court. The court commented that an expression of the judicial system, and not a decrease in the availability of justice, was the proper remedy.30

The ability of the judicial system to see through the fraudulent claims brought before it was another consideration the New Jersey court relied on when in abandoned the "impact" necessity. The court noted that the trier of fact may have a somewhat heavier burden under the new holding, but " . . . a court should not deny recovery for a type of wrong which may result in serious harm because some people may institute fraudulent actions."31 The existence and extent of injuries is a matter of proof in any action, and the emasculated impact necessity was regarded as a poor method of preventing fraudulent claims. The difficulty in proving the automobile "whiplash" injury (an injury where impact is always present) is constantly being met by the courts today, and when it abandoned the impact requirement the New Jersey court undoubtably considered the jury's ability to establish the truth of this.

In answer to Ward's contention that damages would be conjectural and speculative, it must be remembered that similar damage situations have existed since 1348 when the tavern keeper's wife was allowed damages for the fright she suffered when an irate patron swung a hatchet at her.32 Juries have been awarding damages in intentional tort actions for a long period of time, and they should encounter little difficulty in assessing for injuries which result from fright produced by negligence.

Under the Falzone decision, it is necessary for the plaintiff to show that he suffered "substantial injury or sickness and that the injury or sickness was a consequence of the fright he suffered.33 This burden of proof should, if it is proved, aid a jury to make an intelligent assessment of damages.

In rejecting the physical impact requirement, a requirement which one authority feels "is almost certainly destined for ultimate extinction,”34 the New Jersey court noted that case authority cited for support by the Ward court has been overruled in past years. Coultas, the English "grandfather" decision relied on by Ward, was overruled in 1901 by Dulieu v. White & Sons.34A New York's Mitchell holding hand a much longer duration, surviving until 1961, when it was rejected by Battala v. State.35

By abandoning the impact requirement, the New Jersey court adopted the viewpoint that Minnesota courts have followed since 1892 when the case of Purcell v. St. Paul City Railway36 was decided. The plaintiff in this case was a pregnant woman who miscarried when the defendant's cable car on which she was riding narrowly escaped a collision. The opinion, by Justice Otis, sets forth the rule:

If the negligence of a carrier places a passenger in a position of such imminent peril as to cause fright, and the fright causes nervous convulsions and illness, the negligence is the proximate cause of the injury, and the injury is one for which an action may be brought.37

The court's syllabus also stated that the injured party is entitled to recover the full extent of his damages without regard to his prior physical condition.38 These views are similar to those of the 1965 Falzone decision.

It is interesting to note that the Minnesota court had little difficulty in determining that fright could produce physical injuries. The Purcell court stated:

The body and mind operate reciprocally on each other. Physical injury or illness sometimes causes mental disease, a mental shock or disturbance sometimes causes injury or illness of body, especially the nervous system.39

This is the relationship that had given the Ward court some difficulty before it determined that "physical suffering is not the probable or natural result of fright."40 Falone v. Busch changed this outlook, and both Minnesota and New Jersey now agree that injuries or sickness resulting from fright without impact are compensable if the plaintiff was placed into a position where he had reasonable fear for his safety.

Recovery for fright alone has never been allowed in Minnesota or New Jersey in unintentional tort cases. The necessity of a resulting injury or sickness has been steadily insisted upon, and the remaining American courts agree on this requirement.

Minnesota expressed this view in Purcell,41 and it was recently reiterated in the case of State Farm Mutual Ins. Co. v. Village of Isle.42 New Jersey, because of Ward's requirement of physical impact, expressed this view in 1900, and the rule still stands under the Falzone decision. New Jersey, by the reasoning of Falone, still requires substantial injury or sickness for the plaintiff to recover.

Minnesota and New Jersey also concur today in their treatment of actions based on the plaintiff's fright at seeing a third person injured through a defendant's negligence. Both states hold that no cause of action exists for recovery of such damages. New Jersey established its view by the Ward decision's impact requirement, and this view has been continued by Falzone's holding that the plaintiff has to be put in fear of his safety by the defendant's negligence. Minnesota, in the 1902 decision of Sanderson V. Northern Pacific R. Co.,44 held that "there can be no recovery for fright which results in physical injuries . . . unless the fright is the proximate result of a legal wrong against the plaintiff by the defendant."45 This view is adhered to by the majority of the American courts today.46

One of the arguments often presented against the abandonment of the "impact" requirement is the possibility of vexations litigation where the defendant is unaware of the alleged incident involving fright. The New Jersey court recognized this problem, and felt this consideration should not be sufficient to bar a meritorious claim. The court stated that the trial judge should exercise his discretion in this respect and charge the jury that an undue delay in notifying the defendant of the incident may weigh heavily in determining the truth of the plaintiff's claim.47 This fear is a present and alarming one, and the most reasonable remedy against it is the strict enforcement of the rule requiring the plaintiff to prove his case by a fair preponderance of the evidence.

The doctrine requiring physical impact has fallen into a minority position that is withering rapidly.

New Jersey has recognized this by the Falone decision, and a cause of action once denied on the grounds of "public policy" has now come into existence by the dictates of modern "public policy." It is conceivable that future cases will allow recovery for fright. alone in negligence cases, and many states are reconsidering their denials of the action based on the fright the plaintiff suffers when a third person's life is endangered by the defendant's negligence. It may take some time to change the present viewpoints, but, in the words of the New Jersey court. "The rule of stare decisions is limited in the field of torts."48

Footnotes

1. 45 N.J. 559, 14A.2d 12 (1965).

2. 65 N.J.L. 383, 47A.561 (1900).

3. 45 N.J. at 561, 214A.2d at 14.

4. 13 App. Cas. 222 (1888).

5. Id. at 226.

6. Ibid.

7. 151 N.Y. 107, 45 N.E. 354 (1896).

8. Ibid.

9. Ibid.

10. Id. at 108, 45 N.E. at 355.

11. 65 N.J.L. at 384 47A.2d at 562.

12. Ibid.

13. Ibid.

14. Ibid.

15. 60 N.J.L. 457, 38A.684 (1897).

16. 65 N.J.L. at 384, 47A. at 562.

17. 66 N.J.L. 327, 49A.450 (1901).

18. Id. at 328 49A. at 451.

19. Ibid.

20. 73 N.J.L. 405, 63 A. 860 (1906).

21. Ibid.

22. Lynch V. Knight, 9 H.L. Cas. 557 (1861).

23. Annot., 64 A.L.R. 2d 103 (1951).

24. Heron, Psychology and You, 202 (1959).

25. Prosser, Torts §37, 177 (2nd. Ed., 1955).

26. 45 N.J. at 561 214A.2d at 14.

27. Id. at 562, 214A.2d at 15.

28. Ibid.

29. Id. at 564, 214A.2d at 17.

30. Id. at 563, 214A.2d at 16.

31. Ibid.

32. I de S et. ux. V. W de S, Y.B. 22 Edw. III, F. 99, Pl. 60 (1348).

33. 45. N.J. at 564, 214A.2d at 17.

34A. 2 K.B. 669 (1901).

35. 10 N.Y. 2d 237, 219 N.Y.S. 2d 34, 176 N.E. 2d 729 (1961).

36. 48 Minn. 134, 50 N.W. 1034 (1892).

37. Ibid.

38. Ibid.

39. Ibid.

40. 65 N.J.L. at 384, 4 A. at 562.

41. 48 Minn. at 134, 50 N. W. at 1034.

42. 265 Minn. 360, 122 N. W. 2d 36 (1963).

43. 45 N.J. at 564, 214 A.2d at 17.

44. 88 Minn. 162, 92 N. W. 542 (1902).

45. Ibid.

46. Prosser, Torts §37, 176 (2nd Ed. 1955).

47. 45 N.J. at 564, 214 A.2d at 17.

48. Id. at 559, 214 A.2d at 12.

Unmasking of Informer

Law Note

(article contains footnotes)

By Robert Ahl

Following a tip from an unidentified informer, George McCray was arrested and indicted in Chicago for possession of narcotics.

McCray was granted a hearing to consider his demands for suppression of the obtained evidence. At that hearing, both arresting officers testified as to the reliability of the informer and, subsequently, the motion to suppress was denied. The Illinois Supreme Court affirmed his conviction and the U.S. Supreme Court granted certiorari to consider McCray's claim that the evidence was acquired via an unconstitutional search and seizure. The Court denied the petitioner's claim and held: neither the Due Process clause of the Fourteenth Amendment nor the Sixth Amendment required the police to disclose the name of the informer when the issue of probable cause was at issue. McCray v. Illinois, 35 U.S.L.W. 4261 (U.S. March 20, 1967).

The informer's privilege is, in reality, the privilege of the government to withhold from disclosure the identity of persons who furnish information of violations of crime.1

Prior to McCray, the status of the informers privilege had been determined on evidentiary rather than constitutional grounds. It is hardly surprising, therefore, to find considerable variation in the application of the privilege. The decisions fall into two broad categories: either the absolute recognition of the privilege, or the recognition of the privilege subject to certain exceptions and limitations.

Some early federal cases, proceeded on the theory that the privilege of nondisclosure is absolute in a situation where the legality (probable cause) of an arrest or search without a warrant is an issue. In Segurola v. United States,2 the court held that refusal to require a police officer on cross-examination to give the name of the person from whom he obtained information leading to the search was not prejudicial. Another example of the absolute privilege in the federal courts is McInes v. United States,3 a prosecution for possession and transportation of intoxicating liquor in violation of the National Prohibition Act. The defendant was arrested after the officer found liquor in his car. The court did not require that the name of the informant be disclosed, the rule being that sound public policy forbids exposing informers to possible evil consequences.

The informers privilege, at present, appears to be absolute in Texas. In Bridges v. State,4 the Texas Criminal Court of Appeals held that an officer is not required to reveal the name of the person from whom he receives information upon which he bases his right to arrest or search upon probable cause. Subsequent Texas cases accepted the rule enunciated in Bridges as absolute.5

By the weight of authority, however, it is recognized that the privilege of non-disclosure of an informer's identity is subject to exceptions and limitations. In the federal jurisdiction, it has been slowly recognized that the fundamental requirements of fairness may require disclosure.

In United States v. Blich,6 the federal district court decided officers making searches and seizures of automobiles for transportation of liquor without a warrant must, to establish probable cause, describe every element of the case: “This rule reasonably includes the source of their information, so that the court may determine whether, under all circumstances, a case of probably cause has been established.”7

Scher v. United States,8 added the exception that when the identity of the informant is essential to the defense as, for example, where this turns upon an officer’s good faith, the general rule forbidding such disclosure will be abrogated.

In the extremely important decision of Raviaro v. United States,9 the question of the informer participant was dealt with. In this case, the Supreme Court held that the lower court had committed reversible error by permitting the government to withhold disclosure of the identity of the informer when the informer was an active participant in the crime and the guilt or innocence of the defendant was at stake. However, the court’s language in Roviaro seemed to indicate that disclosure may not be limited to those cases where the informer is a participant: “Whether a proper balance renders non-disclosure erroneous must depend upon the particular circumstances of each case, taking into consideration the crime charged, the possible defense, the possible significance of the informer’s testimony and other relevant factors.”10 The language tends to indicate that the fact that the informer is a participant in the crime charged would be only one relevant factor, and disclosure would be required where the informer did not actually participate if “the contents of his communication are relevant and helpful to the defense of an accused, or are essential to a fair determination of the cause.”11 It should be noted here that while the McCray opinion limits Roviaro on other very important grounds, it does not limit it to a participating informer. This should further dilute an already weak distinction between participating and non-participating informers.

The Supreme Court in Roviaro, although not dealing with a probable cause issue, indicated that under certain circumstances disclosure of the informer’s identity in this area is required. After Roviaro, most of the federal circuit courts applied the dictum, holding it to be reversible error if the name of the alleged informant, upon whose tip probably cause for the defendant’s arrest was based, was not divulged.12 The dictum was also applied in some important state decisions.13

It is on this point that the McCray opinion limits Roviaro: “The Roviaro case involved the informer’s privilege, not at a preliminary bearing to determine probable cause for an arrest or search, but at the trial itself where the issue was the fundamental one of innocence or guilt…What Roviaro thus makes clear is that this court was unwilling to impose any absolute rule requiring disclosure of an informant’s identity even in formulating evidentiary rules for federal criminal trials. Much less has the court ever approached the formulation of a federal evidentiary rule of compulsory disclosure where the issue is the preliminary one of probable cause, and guilt or innocence is not at stake.”14

The impact that the above language will have on the federal courts is uncertain. It remains to be seen how many, if any, of the federal circuits requiring identity of the informer in determining probably cause will alter their positions in light of McCray.

The most significant aspect of McCray is its determination of the constitutional question regarding the informer’s privilege. Here the court relies heavily on the reasoning of the New Jersey Supreme Court as expressed by Chief Justice Weintraub in State v. Burnett: “We must remember that we are not dealing

with the trial of the criminal charge itself. There the need for a truthful verdict outweighs society's need for the informer privilege. The Fourth Amendment is served if a judicial mind passes upon the existence of probable cause…If the magistrate doubts the credibility of the affiant, he may require that the informant be identified or even produced…It should rest with the judge who hears the motion to suppress to decide whether he needs disclosure in order to decide whether the officer is a believable witness."15

Thus, the effect of McCray on the state courts seem predictable. They are left free to formulate rules of evidence regarding probable cause, at least subject to the exception that all of the circumstances, including the good faith belief of the officers in the informant's reliability, be divulged for judicial determination. Whether McCray will be extended to include recognition of the informer's privilege, as qualified above, when guilt or innocence at trial is the issue, is left undetermined. In an attack on a state conviction, following a trial in which disclosure was denied, the Supreme Court might hold the denial of the informant's identity to be so unfair as to violate the defendant's Fourteenth Amendment right to a fair trial.

Also left unanswered to whether the absolute informer's privilege, as applied by the Texas courts,16 would stand the test of the Fourth and Fourteenth Amendments.

The most probable result is that the majority of courts, both state and federal, rather than adhering to any rigid formula, will take each case as it comes, balancing the defendant's right in each against the government's interest in concealing the informant's identity.

Items to be weighed will include the nature of the crime as well as the nature of the defense, the credibility of the affiant, and the possible significance of the informant's testimony. This flexible approach is the most persuasive as it takes proper recognition of the public's legitimate interest in effective law enforcement without significant diminution of the Fourth Amendment.

Footnotes

McCray v. Illinois, 35 U.S.L.W. 4261 (U.S. Mar. 20, 1967).

McCray v. Illinois, 33 Ill. 2d 66, 210 N.E. 2d. 161 (1965).

People v. Durr, 28 Ill. 2d. 308. 192 N.E. 2d 379 (1963).

35 U.S.L.W. 4261 (U.S. Mar. 20. 1967).

1. Roviaro v. United States, 353 U.S. 5459 (1957).

2. Segurola v. United States, 275 U.S. 106 (1927).

3. McInes v. United States, 62.F.2d 180 (1932).

4. Bridges v. State. 166 Tex. Crim. 566, 316 SW 2d 757 (1958).

5. Arredondo v. State, 168 Tex. Crim. 110, 324 SW 2d 217 (1959).

6. United States v. Blich, 45 F. 2d 627 (D. Wyo. 1930).

7. Id. at 629.

8. Scher v. United States, 305 U.S. 251 (1938).

9. Roviaro v. United States, 353 U.S. 53 (1957).

10. Id. at 62.

11. Id. at 60.

12. Gutterman, The Informer Privilege, 58 J. Crim. L. C. & P. S. 32, 42 & n. 85 (1967).

13. Priestly v. Superior Court, City and County of San Francisco, 50 Cal 2d 812, 330 P 2d 39 (1958).

14. 35 U.S.L.W. 4261, 4263 (U.S. Mar. 20, 1967).

State v. Burnett 42 N.J. 377, 201 A 2d 39 (1964).

15. 35 U.S.L.W. 4261, 4263 (U.S. Mar. 20, 1967).

16. Bridges v. State. 166 Tex. Crim. 566, 316 S.W. 2d 757 (1958).

Women's 'Frat' Meets At 'U'

Alpha Epsilon Psi Chapter of the Phi Delta Delta legal fraternity entertained women law students and practicing women attorneys at an afternoon April 1 tea in the ladies' lounge of the Campus Club, University of Minnesota.

Rita Lukes and Doris Huspeni were student guests from William Mitchell.

Jean J. McVetty, practicing attorney from Minneapolis, spoke briefly about the organization's purpose.

Violet Sollie, president, Olga Garthur and Eleanor Kestermann were co-hostesses.

Members of the fraternity at William Mitchell include Ellen Dressehius and Dorothy Juenemann. Rosalie Wahl, who recently completed graduation requirements, is also a member.

Law Wives Foster Fashion

By Mrs. Craig Gagnon, Staff Writer

The William Mitchell Law Wives, with a paid membership of 110, held their last meeting of the year May 3, concluding by far the most successful year in their short history.

Thanks to a good group of hard-working, enthusiastic wives, more scholarships than ever before will be awarded by the Law Wives.

Our major fund raising project, the sale of “La Petite Slurps,” furry little heads with big eyes, was a much greater success than we had imagined. Mrs. Dennis Letourneau, in charge of the project, reports that the total amount raised was $1,660.

Two fund raising events were held; the dance in December, at which we raised $300, and the style show, also at the Thunderbird Motel, held in March. With the help of many creative and ambitious law wives, Mrs. Bruce Nemver, the chairman, did a most commendable job of making this an enjoyable afternoon. 409 law wives and friends attended the luncheon and show put on by Young Quinlan-

Rothchild, with Mrs. Florence Liemandt, their fashion coordinator, commenting on garments modeled by law wives.

We made about $150 on this event.

Next year 10 $200 scholarships will be awarded to husbands of law wives who have paid their dues.

This year eight students received $200 scholarships from last year's law wives group.

Each year the Law Wives undertake a charity project. This year we made a $25 donation to the Home of the Good Shepherd in St. Paul.

Senior Award Night is June 9. Mrs. Gerald Regnier is in charge of arrangements. This event is part of the commencement activities and is put on by the junior wives for the seniors, their wives and parents.

Election of new officers for next year will be held at the May meeting. This will be preceded by a pot luck supper, a somewhat traditional event started when we were compiling recipes for the Law Wives Cookbook two years ago.

Mrs. Clem Commers deserves commendation for enlisting speakers to entertain, inform, and/or demonstrate at each meeting.

Also, Mrs. Keith Hanzel did an excellent job on securing juries for each Moot Court.

Image

Playing the fashion game as models for the law wives fashion show-luncheon from left are Mrs. John Jacobson and Mrs. Julius Gernes, both of Roseville.

ABA Against Electoral College

Major actions of the American Bar Association's House of delegates at its midyear February meeting in Houston included: Endorsement, by a three to one vote, of an ABA Commission's proposal to abolish the electoral college and elect the nation's president and vice president by direct popular vote.

Authorization of a special committee to study and recommend reforms in bar discipline.

Referral for further study of a proposal for congressional limits on state and local government powers to tax interstate commerce.

Mitchell No Longer 'Visitor' To ALSA Circuit Conference

By CRAIG W. GAGNON, Staff Writer

Thanks to the five-man William Mitchell delegation to the March 17-18 American Law Student Association, Eighth Circuit Convention in Columbia, Missouri, Mitchell is no longer “just a visitor to ALSA conferences.”

That’s what G. Richard Fox, president of ALSA, wrote Dean Douglas R. Heidenreich after Bill Sommerness was narrowly defeated for national vice-president on the sixth ballot.

“This alone attests to the impression on the William Mitchell delegation gave the other voting delegates,” said Fox. “Those of us who backed and voted for Bill were impressed not only by his winning personality but also by his obvious desire and the desire of all your delegates to involve William Mitchell in circuit affairs,” he added.

The convention topic was “Civil Disobedience” and featured Georgia legislator, Julian Bond, as its keynote speaker.

The Mitchell delegation included Web Hart, Sommerness, Clem Commers, Jim Sundquist, and Jerry Holmay. Sommerness, Hart, and Commers presented a panel discussion on night law schools.

Regans? Would You Believe 4 of Them?

John Regan, a William Mitchell senior, represents the third generation in his family to attend the St. Paul and William Mitchell colleges of law.

He is the third John Regan and the fourth family member in a sequence by his grandfather, John Regan, a 1907 graduate of the St. Paul College of Law.

His uncle, John Regan, and his father, Robert Regan, represented the second generation as 1932 and 1933 graduates, respectively.

The family tradition may continue next year with the enrollment of Michael Regan, brother of John ’67, who has applied for admission.

Robert Regan serves on the board of governors of the Minnesota Bar Association. He practices in the same law firm in Mankato his father started in 1910, now Regan, Regan and Kroon.

ALSA is holding its national convention in Hawaii this year. Hart indicates that present S.B.A. plans include sending a William Mitchell representative to this convention, also.

The S.B.A. sponsored trip to the Stillwater state prison in February; 35 students braved some miserable weather to make the tour but there was general agreement the trip was well worth it.

The chief prison psychologist and chief guard escorted the group through the prison and frankly discussed various aspects of prison problems in response to student questioning at the completion of the tour.

Web Hart, S.B.A. president, felt the trip was a valuable educational experience and plans are being made for more trips of this nature in the future.

An historic “first annual second semester smoker” was also sponsored by the S.B.A. A large number of instructors and students turned out for the beer, dogs and chips event. Hart said the smoker should be carried forward as an annual event because of the greater opportunity it gives the students to get to know their instructors. Hart indicated “the smoker accomplished this objective very well.”

Hart pointed out that part of the reason the S.B.A. has been able to enlarge the scope of its activities has been because of the additional revenue created by the new canteen equipment that the S.B.A. installed in the smoking lounge. A portion of the profits go to the S.B.A.

56 Brothers Brave Cold To Hear Justice Tom Clark

Fifty-six brothers representing the six chapters in District V braved sub-zero cold to attend the recent Conclave held in Minneapolis February 24-25.

James Tuzinkski, student district justice and co-chairman of the Conclave said that this was a record turnout for a district Conclave in this area.

Hosts, Pierce Butler Chapter from William Mitchell with 30 attending led the way, followed by Corliss Chapter from the University of North Dakota, Grand Forks with 14.

A smoker for all of the brothers in attendance got things started Friday evening. Saturday was devoted to a full schedule of speeches, chapter reports, and workshops. Butler Chapter put on a pre-breakfast model initiation, as the initiated two new active member, Thomas O’Meara and Roger Squires. Breakfast speakers were Dean Douglas R. Heidenreich, who spoke on “The Law School and Phi Alpha Delta” and Keith M. Stidd, Minneapolis city attorney who spoke on “The Lawyer in Municipal Government.”

The highlight of the Conclave was a telephone call address from Brother Tom C. Clark, Justice of the U.S. Supreme Court and Supreme Vice Justice of PAD. Introduced by Supreme Justice Robert Redding, Justice Clark congratulated the brothers in attendance for their fine turn out and then deftly fielded a question regarding recent decisions in the criminal law area posed by Brother Lee LaBore of Butler Chapter.

Judge Leslie L. Anderson, of the Minnesota District Court spoke to the delegates at lunch on the topic “Federal Court Problems and State Court Relationships to Them.” At the afternoon session the delegates voted to hold the 1968 District V Conclave in Des Moines, Iowa with Cold Chapter at Drake University as host Chapter.

New student district officers were elected with installation at the evening banquet. The new officers are: Robert Alvine, Cole Chapter, justice; Don Bell, Hammond Chapter, vice justice; James Lethert, Butler Chapter, clerk; Don Neiman, Cole Chapter, treasurer; Gene Anderson, Corliss Chapter, marshall.

Pierce Butler Chapter which planned and arranged for the Conclave was led by brothers: James J. Tuzinski and John S. Monroe, Jr., co-chairman; Paul W. Buegler, program; Craig W. Gagnon, alumni; James M. Riley, arrangements; Thomas P. Kane, finance; Don I. Bryme, publicity; and Larry Jorgenson, chapter contact.

Image

Grant Hubbard, justice, Butler chapter, enjoys a tale told by Dean Douglas R. Heidenreich, one of the Saturday morning speakers. From left, Hubbard, Russell Maring, Corliss, Heidenreich and Mills Williams, Hammond.

Work Comp Quandary Resolved By Court

Law Note

(article contains footnotes)

It is not uncommon for a condition of permanent partial disability to progress to a state where it becomes total incapacity. In the field of Workmen's Compensation this raises a significant question: Should a prior award for permanent partial disability be credited against a later award for permanent total disability?

The Minnesota Supreme Court was first confronted with this question in Durant v. Butler Brothers.1 The court ruled that an award for permanent partial disability cannot be credited against a later award for permanent total disability where it is not established that the payments overlapped.

Some state legislatures have specifically provided that a prior award for permanent partial disability must be credited against a later award for permanent total disability2 while other state legislatures have taken the opposite view.3 The Minnesota legislature has expressed no view on the question, unless its silence can be construed as nonacquiescence in the credit.4

Rather than straining the limits of judicial construction to find some legislative intent in the conspicuous absence of any provision allowing the type of credit that was sought in Durant, the court determined that the "Minnesota legislature has left open the question of crediting prior compensation awards against a subsequent award for permanent total disability ***].5

With a few exceptions,6 the general rule in most jurisdictions is that a prior compensation award will not be credited against a later award for a change of condition unless the awards overlap.7

In State Highway Dept. v. Crossland,8 a later award for permanent partial disability overlapped an earlier award for temporary total disability. The Oklahoma court remanded the case and held that it was unauthorized duplication to grant, "compensation for total disability for a period which overlapped, or began before the end of the period for which such maximum compensation was awarded."9

The rule adopted in Durant is very similar to the holding in Crossland. The Minnesota court held that: "Rather than crediting all compensation benefits previously paid against compensation payable under a subsequent award based on a change of condition *** only the overlapping compensation payments should in any even be credited under the present provisions of the Workmen's Compensation Act."10

The schedule of payments in the Minnesota Workmen's Compensation Act11 provides compensation based on a percentage of the employee's pre-injury wage which is paid over a specified number of weeks. The court's decision in Durant finds support in the view that the weekly compensation payments under these anatomical schedules are related to loss of earning capacity.

Another approach which has gained support is that the right to compensation for permanent partial disability to a specific member of the body is measured by the extent of the injury without considering

the degree of disability or the extent of incapacity.12 In Beane v. Vermont Marble Co.18 the Vermont court indicated that compensation for scheduled injuries are fixed by the schedule of payments and went on to state that: “[R]ecovery may be had without regard to the fact that the wages of the injured employee are the same as, or higher than, they were prior to the injury. The same rule applies in cases where the usefulness of a member is permanently impaired although not entirely lost.”14

The payment of compensation for a scheduled injury is based on a conclusive presumption of loss of earning capacity rather than the injured employee’s actual wage-loss experience.15

The significant factor is that permanent disability, partial or total, is based on a presumption that it will last for the life of the employee. A change of condition from a state of permanent partial disability to permanent total disability indicates that the partial disability was merely an intermediate rather than permanent condition. Compensation based on permanent disability is excessive if the disability is only intermediate.

An employer who fully compensates an employee for permanent partial disability would receive a credit where the employee is subsequently found to be permanently totally disabled as a result of the same accident. The employee would be allowed to retain a percentage of the first award represented by the period of time he was partially disabled divided by his life expectancy measured from the date that he was found to have become permanently partially disabled. The balance of the first award would be credited against the subsequent award for permanent total disability.16

Footnotes

1. 148 N. W. 2d 152 (Minn. 1967).

2. Idaho Code, §72-310(c) (1961) provides that, "In case the total disability begins after a period of partial disability, the period of partial disability shall be deducted from such total period of 400 weeks.”

3. Fla. Stat. §440.28 (1965) provides that where a prior award or compensation is increased or decreased, “Such new order shall not affect any compensation previously paid ***.”

4 See. Leisy v. Hardin, 135 U.S. 100 (1890).

5. Id. at 156.

6. See. e.g. Endicott v. Potlatch Forests Inc. 69 Idaho 450, 208 P. 2d 803 (1949); held, prior awards must be deducted without regard to whether they overlapped the later award. See, also, McCall v. Potlatch Forests, Inc. 69 Idaho 410, 208 P. 2d 799 (1949). The result in Endicott is predicated upon the requirement of Idaho Code. §72-310 (c) (1961), supra, note 4.

7. See Dunlap v. State Compensation Director, 149 W. Va. 266, 140 S. E. 2d 448 (1965); Phelps Dodge Corp., Copper Queen Branch, v. Industrial Comm., 1 Ariz. App. 70, 399 P. 2d 691 (1965) Smitty's Coffee Shop v. Florida Industrial Comm. 86 So. 2d 268 (Fla. 1965). Smitty's Coffee Shop v Florida Industrial Comm. 86 So. 2d 268 (Fla. 1965).

8. 391 P. 2d 801 (Okla. 1964).

9. Id. at 807.

10. 148 N.W. 2d at 157.

11. Supra note 14.

12. See 2 Larson, Workmen's Compensation Law. §57.10 at 3 (1961 ed.); 11 Schneider, Workmen's Compensation Text, §2322 at 565 (perm. ed.).

13. 115 Vt. 142, 52 A. 2d 784 (1947).

14. Id. at 144, 52 A. 2d at 784.

15. See 2 Larson, op. cit. supra, note 17, §58.10 at 43.

16. With all due deference to the human qualities of the law, this rule may be expressed as an algebraic equation for the purpose of clarity. Assuming that:

x = period of time elapsed between the finding of permanent partial disability and the finding of permanent total disability.

y = life expectancy of the employee from the date he is found to have become permanently partially disabled.

a = total amount of compensation under the first award.

b = total amount of compensation the employee is entitled to under the first award.

Thus:

x/y x a/1 = b

a-b = credit allowed employer against subsequent award.

WM Surveys Bail System

A team of William Mitchell students, directed by Professor Bill Danforth will soon begin a survey of the bail system in Ramsey county.

The survey will be conducted in cooperation with the Ramsey county district and the municipal court of Saint Paul.

The aim of the survey will be to assemble information to show the present operation of the bail system in Ramsey county, and suggest whether persons accused of a crime might sometimes be released on their own recognizance, without being required to post bail.

In recent years some members of the legal profession have come to believe the bail system in the United States imposes an unnecessary and discriminatory burden on the poor.

The suggestion of this group is many an accused is as effectively held within the jurisdiction of the court by the ties of home, family and employment, as by a bail bond furnished to the court.

The Manhattan bail project has successfully employed a system of releasing an accused on his own recognizance when investigation shows he is settled in the community and does not have a record of prior offenses.

The survey to be conducted in Ramsey county will be directed toward gathering information which will enable the courts to determine whether such a system would work here.

Information will be gathered by interviewing judges of the district and municipal courts, attorneys in the county attorney's office, and by obtaining statistical data from the clerks of court.

The information obtained will be studies and organized by the survey team, and then submitted to the judges in Ramsey county, assisting them in evaluating the operation of the bail system.

Funds of $3,000 for the survey will be provided by Legal Assistance of Ramsey County, Inc., which in turn receives a large portion of its funds from the federal Office of Economic Opportunity.

New Classes as Electives For Seniors Next Year

By Doris Huspeni, Staff Writer

In furtherance of William Mitchell's goal of greater flexibility and more course variety, several electives will be open to fourth year students next year. Dean Heidenreich will again offer a jurisprudence course. This small, discussion-type class, tentatively scheduled for first semester, concentrates on the writings of legal philosophers.

Prof. Armour will, for the third consecutive year, conduct an estate planning seminar, scheduled for second semester. This class, limited to 15 students, deals with the application of principles learned in income-gift-and estate-tax classes, as well as with trusts and wills.

Included in the new offerings next year will be a government contracts course by Prof. Lauck. This elective, open to fourth year students, will be offered first semester. According to Dean Heidenreich, plans are also underway to reinstate the workmen's compensation course as a senior class elective next year. And an insurance course is also being considered as a long-range possibility.

News of Our Alumni

1954

William J. Corrick announced that Rolf T. Nelson has joined him as partner in the firm of Corrick, Miller, Meyer and Nelson. Nelson is a member of the Minnesota House of Representatives, representing Robbinsdale-Golden Valley district 31B.

1960

Theodore J. Collins and David O'Connor, both 1960 Mitchell grads, have formed a partnership along with Sidney A. Abramson in St. Paul. O'Connor was in private practice with a law firm in St. Paul prior to the new partnership.

Collins was a city prosecutor for St. Paul as well as a private practitioner. The third partner, Abramson, is a special assistant U.S. District Attorney charged with prosecuting the American Allied case; prior to formation of the partnership, he was first assistant U.S. District Attorney for Minnesota.

1962

Charles L. Langer has resigned his post as business administrator of the Metropolitan Mosquito Control District to enter private law practice.

Langer has been with the district more than nine years, since its inception in 1958, installing and maintaining all business and accounting procedures.

He previously served as controller for the G.M. Steward Lumber Co., Mpls., controller treasurer for the Pappin Construction Co., Great Falls, Montana, and controller – registrar for a unit of the University of Montana.

Langer received a B.B.A. degree from the University of Minnesota in 1946, he has also been an instructor at Mitchell since graduation.

He joined John W. Terpstra and Richard A. Merril April 1. The new firm is Terpstra, Merril and Langer.

1963

Floyd B. Olson and Lawrence A. Lundgren announce they have joined the firm of Newman, Olson and Lundgren, Mpls.

1963

James F. Nelson has been named a partner of W.A. Winter in Greenwood. Nelson purchased the interest of the late Philip B. Rolig. The firm will be known as Winter and Nelson.

1965

Robert F. Collins has been appointed assistant public defender for Dakota county. He also recently became a partner in the firm of Thuet and Todd, South St. Paul.

1965

Alan W. Falconer is now associated with the firm of Wagner and Johnston, Falconer was formerly with Honeywell, Inc., credit and legal departments.

1966

Ronald E. Orchard has opened a private office in West St. Paul.

1966

Lew Schwartz has become a partner in the firm, Bard, MacEachron, Braddock, Bartz and Schwartz, Mpls.

He worked previously as an associate of the firm. Schwartz holds a B.E. degree from the University of Minnesota and a Juris Doctor from Mitchell. He also became registered as a patent agent, entitled to practice patent law in 1964, and became a registered patent attorney in 1966 after being admitted to practice before the Supreme Court of Minnesota.

Images

Theodore J. Collins

David O'Connor

Charles L. Langer

Lew Schwartz

Students Vital to OEO Legal Services

Law students are the most important segment of the legal profession as far as the Office of Economic Opportunity Legal Services Program is concerned, according to that federal agency's director, Earl Johnson.

Johnson's remarks were addressed to the December American Law Student Association Conference on the Role of the Law Student in Extending legal Services to the Poor held in Chicago, Illinois.

The new ideas, the new concepts and the new changes in the law are largely attributable to the new blood that has come into the legal aid movement through this program, Johnson told the delegates from nearly 20 midwestern law schools at the ALSA conference.

Advice Clinics Aid Poor, Led by 35 Attorneys

By Lee Labore, Staff Writer

Are the poor denied competent legal advice?

No longer in Minneapolis, because a group of 35 attorneys have joined to establish Legal Advice Clinics, a non-profit professional corporation which aims to provide free legal counsel to those who would not otherwise be able to afford it.

The organization received its charter and acceptance from the Hennepin county bar association in 1966 and has set up four legal offices in key poverty pockets in the mill city.

The program is patterned after similar organizations in Chicago and Boston. It is made up primarily by young graduate attorneys, members of some of the finest firms in Minneapolis.

Each attorney works about two hours a month – from 6:30 to 8:30 p.m., usually in settlement houses.

Why the legal advice clinics?

Peter Weiss, chairman of the board, a corporate and business law estates attorney said: "My association with legal advice clinics awards me an opportunity to get experience in domestic relations, creditors and debtors remedies, landlord and tenant problems, minor contract problems and criminal law cases which are areas of the law seldom experienced by myself and fellow members; in addition, we as a group feel the legal profession has a professional responsibility to increase the availability of legal advice to the poor."

According to the department of Health Education and Welfare, about 20 percent of our population is said to live in poverty – that is, one man in five is without income sufficient to support minimum daily needs. Although the percentage may not be as high in our area, there are still many who qualify as "poor" and who do not understand the law may be at their disposal as well as at the hands of the more affluent.

The poor feel their very lives depend upon statute after statute, agency after agency, unemployment compensation, relief, social security, veterans benefits and food stamps.

So perhaps it's understandable why a poor man who gets conned into buying a lemon of a used car is outraged at a law which permits the finance company holding his note to repossess upon his default and even sue him for deficiency.

It is perfectly true through the Legal Aid Society in Minneapolis and through the public defenders office, many lawyers serve the poor with extraordinary dedication and effort – but with pay – and countless other attorneys in private practice give hours of legal assistance at little or no charge.

Yet all these instances of dedication cannot reach the masses of poor and as a result most attorneys are considered high brows who only cater to the elite.

The 35 attorneys hope to create a legal half-way house for the poor.

The less privileged can take their legal problems to these men who ask for personal information and then conduct a private interview to pin down the legal problem.

Why a limited operation?

Participating attorneys couldn’t possibly start a program of legal aid which would undermine to any appreciable extent their full-time obligations to their firms and clients. That’s why they moved in the part-time direction, acting primarily as a referral help-answer-the easy-issue service.

Cases requiring court action or continual attention are always screened and referred to the Legal Aid Society, the Hennepin County Attorneys Referral Service or other appropriate agencies, e.g., welfare or public defender.

Frequently the attorneys will not only call ahead to the agency to arrange as favorable a reception as possible for the client but will keep in touch with both client and agency until final disposition.

When necessary, suitable telephone calls and followup letter are made in behalf of clients.

Image

MITCHELL MEN clerking for Minnesota state supreme court justices, are from left, Mike Murphy, second year, Hugh Plunkett III, third, Dave Peterson and John Hirte, fourth year. Apparently "justice" Hirte is unimpressed by his cohorts' arguments.