Recent Decisions

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CONSTITUTIONAL LAW—FREE SPEECH—USE OF LOUD SPEAKERS ON PUBLIC STREETS.—Commonwealth v. Jacobs, ... Mass. ..., 129 N.E.2d 620 (1955). An ordinance of the city of Quincy, Massachusetts, provided that "no person shall publicly address the people on or passing over any public street" without having first obtained a license to do so from the board of license commissioners of the city. The defendant, who was under hire by a labor union, disregarded this ordinance and operated a sound truck on the public streets of Quincy from which he played a record urging listeners not to buy the products of a company with which the union was in dispute. He was convicted of violating the ordinance. The Supreme Judicial Court of Massachusetts reversed the conviction and held the ordinance unconstitutional on its face. The invalidity of the ordinance lay in the fact that it was a "complete and indiscriminate prohibition of all public address on all public streets or grounds without a previous permit." 129 N.E.2d at 621.

This case presents once again the problem of when a municipality may validly regulate the use of sound trucks or loud speakers on public streets without violating federal or state constitutional guarantees of freedom of speech.

It is well-settled that the right of a citizen to use public streets is not absolute and unrestricted but may be directed and controlled in the interest of the common good. Cox v. New Hampshire, 312 U.S. 569 (1940). This principal was reiterated by Justice Roberts when, speaking for the United States Supreme Court in Cantwell v. Connecticut, 310 U.S. 296, 308 (1940) (dictum), he said:

When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious. (Emphasis added.)

However, an ordinance which provided that it was within the unconditional discretionary power of one individual to determine whether a license shall be given for use of a loud speaker on the public streets was held to be unconstitutional on its face. Saia v. New York, 334 U.S. 558 (1948). In this case the ordinance stipulated that no one could use a loud speaker on any street or in any public place where the purpose of the loud speaker was to attract the attention of the passing public unless the chief of police had first issued a license for its use. The Supreme Court, in a five-to-four decision, held that the ordinance was invalid because it
failed to provide any standards or other criteria to guide the chief of police in exercising his discretion.

A year later, however, where an ordinance prohibited the use of sound equipment making “loud and raucous noises” on the public streets, it was upheld by the Supreme Court. *Kovacs v. Cooper*, 336 U.S. 77 (1949). Here, three Justices were of the opinion that the ordinance was valid because its apparent design and intent was to prevent “loud and raucous noises” from conflicting with the peace and quiet of the citizens while engaging in their normal activities. The ordinance was not intended to suppress any individual’s right of free speech. Mr. Justice Frankfurter concurred because he thought the Supreme Court could not devise terms on which sound trucks should be allowed to operate, but that it was a function of the legislatures to decide whether sound trucks interfere with the peace and quiet and to legislate accordingly. Mr. Justice Jackson also concurred stating that even an absolute prohibition of sound equipment from the public streets would be valid. Three dissenting Justices were of the opinion that the *Saia* case required the striking down of the ordinance on the ground that it flatly prohibited the use of loud speakers on public streets.

The line between the *Saia* and *Kovacs* cases is apparently the presence or absence of a standard by which the discretion of the licensing official is limited. State courts passing on the subject have upheld a variety of ordinances, distinguishing them from the unlimited discretion condemned in the *Saia* case and analogizing them to the reasonable standard in the *Kovacs* case.

An ordinance that designated specific streets from which sound trucks and amplifying devices were barred was held constitutional in *Commonwealth v. Geuss*, 168 Pa. Super. 22, 76 A.2d 500 (1950), aff'd per curiam, 368 Pa. 290, 76 A.2d 553 (1951), appeal dismissed, 342 U.S. 912 (1952). In this instance the ordinance provided that sound trucks could not be used on certain busy streets, all but two of which were occupied almost exclusively by business enterprises. The court held the ordinance valid because its obvious sole intent was to lessen traffic hazards which would result from the presence of a sound truck within the congested area.

An ordinance that required a permit or license be obtained before using sound equipment on the public streets and provided standards which set forth the conditions under which a permit or license would be issued, was held valid in *Haggerty v. Kings County*, 117 Cal. App. 2d 470, 256 P.2d 393 (1953). In this case the ordinance provided that a permit to use loud speakers on the public streets would be issued unless evidence is presented
to the licensing board of a clear and present danger that the granting of the permit would obstruct the orderly movement of traffic upon the public highways or the granting of the permit would invade the rights of privacy, or threaten the overthrow by force of the lawfully established government. The enumeration of specific standards resulted in the constitutionality of the ordinance.

In the *Geuss* case and the *Haggerty* case, the ordinances' language was pitched in permissive terms, excepting certain situations from permissible use of sound amplifying equipment. They seemingly do not militate against proper free speech. A few cases, where the language of the ordinances becomes more ambiguous, have still held the statutes constitutional by virtue of a "standard" found by the courts. In *State ex rel. Nicholas v. Headley*, 48 So. 2d 80 (Fla. 1950), an ordinance which prohibited the operation on the public streets of any vehicle upon which any mechanical or sound making device is to be used for the purpose of attracting attention, except where the vehicle is to be used in a parade, was held valid. Here a political candidate was arrested for operating a vehicle in which was installed a loud speaking device through which he broadcast a speech urging voters to support him. The court held the ordinance valid and followed the reasoning used in *Kovacs v. Cooper*, that "the 'loud noises' emanating from the amplifier 'constituted a traffic hazard endangering the safety of motorists operating upon the streets.'” 48 So. 2d at 81-82.

Where the ordinance makes unlawful the transmission of "any loud and raucous noise upon or from any public highway or public thoroughfare or from any aircraft of any kind whatsoever,” it has been held valid. *Haggerty v. Associated Farmers of California, Inc.*, 44 Cal. 2d 60, 279 P.2d 734 (1955). Representatives of a labor union were arrested for caravanning along public highways adjacent to farms and using loud speakers to attract the farmers’ attention. Because the ordinance defined what was meant by “loud and raucous noise” and was directed toward safeguarding the traveling public by elimination of any distraction that might constitute a hazard to people using the highways, the court upheld the ordinance.

An ordinance which prohibited the operation of any vehicle equipped with a loud speaker or public address system upon the streets of the city by any person, firm, or corporation was held valid in *Brinkman v. Gainesville*, 83 Ga. App. 508, 64 S.E.2d 344 (1951). The defendant was arrested for using a loud speaker to broadcast recorded sermons as he drove through the town. In upholding the ordinance, the court was primarily influenced by
the decision rendered in *Kovacs v. Cooper*. The court stated that the intention of the ordinance was to prohibit loud noises which interfered with the constitutional rights of other citizens on the public streets, and for this reason was not an unlawful restraint of free speech.

In view of the line which decisions have recognized between the *Saia* and *Kovacs* cases, it is submitted that the court in the instant case correctly declared the ordinance void. On the one hand is the interest of protecting free discourse and the promulgation of ideas. On the other hand, there is the power of states to balance conflicting interests through legislation. Flat prohibition of speech is clearly unconstitutional. But regulation of the modes and means of speech is not denied the states if reasonable standards of control are used. The ordinance in the instant case prohibited all use of loud speakers and sound amplifiers on all public streets without first obtaining a permit. In effect, it could have amounted to an absolute prohibition of all public address in public places.

Edward N. Denn

*Criminal Law—Conspiracy—Husband and Wife Can Form Conspiracy.*—*Thompson v. United States*, 227 F.2d 671 (5th Cir. 1955). The defendants, husband and wife, were charged with conspiring with others to violate the White Slave Traffic Act, 18 U.S.C. §§ 2421-24 (1952), popularly known as the Mann Act. Their activities consisted of the unlawful transportation in interstate commerce of a woman for immoral purposes. The defendants contended that they could not be convicted of conspiracy because they were a single legal entity and there was no substantial evidence of the participation of any third parties. They were found guilty in the district court.

The question on appeal was whether, in view of the common law rule that a husband and wife were a single legal entity, the defendants could be guilty of a conspiracy. The Court of Appeals for the Fifth Circuit stated that, since most states by Married Women's Acts had severed the common law unity of husband and wife, the fiction should not be carried over to the present statute and husband and wife can be guilty of a conspiracy. The court agreed with the opinion in *Johnson v. United States*, 157 F.2d 209 (D.C. Cir. 1946), that there was no good reason why the law should not recognize the separation of husband and wife and their ability to conspire. However, the decision of the district court was reversed because certain evidence had been improperly admitted.
To find a husband and wife guilty of conspiracy the courts must abrogate a well established common law principle. This principle was well stated in the case of *People v. Miller*, 82 Cal. 107, 22 Pac. 934 (1889), where the conviction of a husband and wife for conspiracy was reversed on the basis of the common law single entity rule. Conspiracy, reasoned the court, requires two or more persons. The indictment recited that defendants were man and wife and therefore did not charge a crime. This common law principle was so well established in some courts that in reversing a conviction of a husband and wife for conspiracy the court said in *Dawson v. United States*, 10 F.2d 106, 108 (9th Cir.), *cert. denied*, 271 U.S. 687 (1926), "... a rule so well established and so generally recognized by the modern authorities should not be judicially repealed."

The fiction that a husband and wife are a legal entity and cannot be convicted of conspiracy together was held to be valid in cases extending up to recent years. In *Gros v. United States*, 138 F.2d 261 (9th Cir. 1943), the court reaffirmed the rule and reversed a conviction of a husband and wife for conspiracy. In *United States v. Shaddix*, 43 F. Supp. 330 (S.D. Miss. 1942), the common law rule was the basis for sustaining a demurrer to an indictment charging a husband and his wife with conspiracy.

One of the first instances where the common law rule was criticized appeared as dictum in a Texas case. The court said that under the Texas penal code no exceptions were made as to a wife not being capable of conspiring with her husband to commit crime. It also stated that in view of the emancipation of women they should be considered as separate legal entities. *Smith v. State*, 48 Tex. Crim. 233, 89 S.W. 817, 821 (1905).

The first case to categorically reject the common law rule of conjugal unity as a defense to conspiracy was *Dalton v. People*, 68 Colo. 44, 189 Pac. 37 (1920). In this case the defendant brought error in the instructions of the lower court when it said he could be convicted of conspiracy with his wife alone. The Supreme Court of Colorado affirmed the lower court's instructions as being proper and also stated that the Married Women's Acts of Colorado had removed the reason for the common law rule. The old rule was discordant with the present policy of Colorado law.

A similar argument for the modern rule was presented by the prosecution in *People v. MacMullen*, 134 Cal. App. 81, 24 P.2d 794 (1933), but it was rejected by the court because there had been no express statutory repeal of the old common law rule.

The federal courts have accepted the modern trend of finding a husband and wife capable of conspiracy without any statutory changes or provisions. This opinion was first enunciated in *John-
son v. United States, 157 F.2d 209 (D.C. Cir. 1946), where the court ruled that the relation of husband and wife did not prevent them from conspiring to commit an offense. Other courts have circumvented the common law rule without expressly repudiating it. In Jones v. Monson, 137 Wis. 478, 119 N.W. 179 (1909), the court said that since the conspiracy was not the principal part of the charge, a husband and wife could be convicted as charged.

The trend of these cases allowing a conviction of husband and wife for conspiracy has been in line with the law in many other areas involving husband and wife. With the wife’s emancipation she has been given the right to sue, in her own name, her husband or her husband’s estate. Roberts v. Roberts, 185 N.C. 566, 118 S.E. 9 (1923); Franklin v. Wills, 217 F.2d 899 (6th Cir. 1954). It has been held that marital relations have no effect on property contracts between husband and wife. See Crossley v. Crossley, 97 Cal. App. 2d 627, 218 P.2d 132 (1950). Married Women’s Acts have removed most of the barriers preventing the conviction of a husband and wife for conspiracy by giving the wife a separate legal existence equivalent to that of any other person in view of the law.

The Supreme Court of Illinois approached the problem in a realistic manner and gave many reasons for following the modern rule in People v. Martin, 4 Ill. 2d 105, 122 N.E.2d 245, 246 (1954):

The fiction was based upon the disability of the wife to own separate property at common law, and her lack of capacity to maintain a legal action independently of her husband. . . . Married women may now own their separate property, and they may now sue and be sued in their own right. . . . No relevant reason which might have supported the asserted common-law rule exists today.


The principal case, in holding that a husband and wife may be guilty of conspiracy, seems to be in line with modern authority. The trend of the courts has been to base more decisions on the theory that women have been emancipated and to disregard the common law fiction that a husband and wife are a single legal entity and incapable of conspiracy. In criminal cases the courts have been slow to cast aside the protection afforded the wife under the common law but the principal case demonstrates that even these barriers are giving way in the light of changing times. This view assumes the more reasonable position that for the interest and protection of society as a whole, it is better to punish a criminal offender than to preserve an outmoded common law fiction.

Ray F. Drexler
DOMESTIC RELATIONS—DIVORCE—WIFE CANNOT RESTRAIN HUSBAND FROM GETTING DIVORCE IN FOREIGN COUNTRY.—Rosenbaum v. Rosenbaum... N.Y. ..., 130 N.E.2d 902 (1955). The plaintiff, a resident and domiciliary of New York, sought to enjoin her husband, who also resided and was domiciled in New York, from proceeding with the prosecution of an action for divorce commenced by him in Mexico. The defendant instituted the divorce action within one day, appearing in Mexico solely to sign the divorce papers; he returned to New York the next day. A motion for a temporary injunction was filed by the plaintiff. The defendant moved to dismiss the complaint. The supreme court denied the plaintiff’s motion and dismissed the complaint upon defendant’s motion. The plaintiff appealed and the appellate division reversed the orders of the lower court, granting the injunction with leave to defendant to appeal.

In granting leave to appeal the appellate division certified to the court of appeals the question whether or not under the circumstances of this case, one spouse could enjoin the other from proceeding with a divorce action in a foreign country.

The court of appeals held that the plaintiff was not entitled to an injunction, since she had an adequate remedy at law in an action for a declaratory judgment whenever her status as defendant’s wife was put in doubt. Further, the expenses of the action for the declaratory judgment could be assessed against the defendant. The court said there was no need to go to Mexico to defend the divorce action there. The court stated that under the principles of comity it had the power to deny validity to the judgments of foreign countries for policy reasons. Hence even if defendant sought recognition of his Mexican divorce in the courts of New York, the courts could deny the validity of the divorce decree and refuse to recognize it.

Courts of equity have traditionally been reluctant to interfere in controversies growing out of merely domestic relations and will ordinarily leave the parties to their remedies at law. Blanton v. Blanton, 163 Ga. 361, 136 S.E. 141, 142 (1926) (dictum). It is within the discretion of the court to enjoin the judicial proceedings of a foreign state or country, but there must be a clear showing that it would be inequitable, unfair and unjust to permit the prosecution of the suit in the foreign jurisdiction. 2 Story, Equity Jurisprudence § 1292 (14th ed. 1918). The question involves the exercise of jurisdiction, not the existence of it. The authority of the court rests on the power of the state to compel its citizens to respect its laws, even beyond its territorial limits; the decree of the court is directed to the party and not to the tribunal where the suit is pending. 2 Story, Equity Jurisprudence § 1224 (14th ed. 1918).
The problem before a court of equity as to the exercise of the power of injunctive relief arises where a presumption of validity exists in favor of a divorce decree. The full faith and credit clause of the federal constitution, U. S. Const. art. IV, § 1, requires that full faith and credit be given to sister-state divorce decrees, obtained within the requirements of due process, by a spouse who had acquired domicile under the laws of that sister-state. Williams v. North Carolina, 317 U.S. 287 (1942).

Certainly if decrees of a state altering the marital status of its domiciliaries are not valid throughout the Union even though the requirements of procedural due process are wholly met, a rule would be fostered which could not help but bring "considerable disaster to innocent persons"... 317 U.S. at 301.

However, in Williams v. North Carolina, 325 U.S. 226 (1944), it was subsequently decided that a state may deny the validity of a divorce judgment of a sister-state on a finding that there was no domicile which warranted the exercise of jurisdiction in granting the divorce:

In short, the decree of divorce is a conclusive adjudication of everything except the jurisdictional facts upon which it is founded, and domicile is a jurisdictional fact. To permit the necessary finding of domicile by one State to foreclose all States in the protection of their social institutions would be intolerable. 325 U.S. at 232.

The New York courts have been particularly active in litigation on the right of a spouse to enjoin the procurement of a divorce in a foreign jurisdiction. In Hammer v. Hammer, 303 N.Y. 481, 104 N.E.2d 864 (1952), and Garvin v. Garvin, 302 N.Y. 96, 96 N.E.2d 721 (1951), the New York Court of Appeals was presented with the question of whether a wife was entitled to enjoin her husband from prosecuting a divorce action within the jurisdictional boundaries of the United States, where both parties were residents of New York. In each case, it was decided that injunctive relief should be given to the wife. The courts considered the prima-facie value of a sister-state judgment under the full faith and credit clause, a fact not applicable to the principal case, as requiring the granting of injunctive relief.

The full faith and credit clause is not applicable to divorces secured in foreign countries. Caldwell v. Caldwell, 298 N.Y. 146, 81 N.E.2d 60, 62 (1948) (dictum). The problem is whether a court will recognize the decree under principles of comity. See Golden v. Golden, 41 N.M. 356, 68 P.2d 928 (1937). A court, therefore, should be able to balance the equities of the parties and determine whether or not an injunction should be granted to restrain the prosecution of a foreign divorce suit.
The New York Court of Appeals in the principal case was of the opinion that there was no need for an injunction since an action for a declaratory judgment would fully satisfy the necessity for judicial relief. The wisdom of such a decision may be considered in reference to *Niver v. Niver*, 200 Misc. 993, 111 N.Y.S.2d 889 (1951), where a husband went to Mexico and in one day performed all the necessary steps to receive a divorce in that jurisdiction. He then returned to his residence in New York. A few months later he married another woman in Maryland. His first wife was granted a declaratory judgment voiding the Mexican divorce, but it was still found necessary to grant her an injunction preventing the husband from procuring an out-of-state divorce in the future. Though the future validity of this decision will be affected by the principal case, it shows that, contrary to the opinion of the majority in the instant case, a declaratory judgment alone may not provide full and adequate relief.

It was stated in dictum in the case at bar that the Mexican divorce, if granted, would be a clear legal nullity. This reasoning was founded on the fact that the plaintiff alleged no jurisdiction existed in the Mexican court, and the defendant admitted this allegation by his motion to dismiss. The dissenting opinion pointed out that the lack of jurisdiction of the Mexican court could be assumed to be true only in this action, and that in a suit for a declaratory judgment the plaintiff would have the burden of proving that the defendant was not domiciled in Mexico at the time of the decree. *DeYoung v. DeYoung*, 27 Cal.2d 521, 165 P.2d 457 (1946). Some Mexican divorces have been accorded recognition by a failure to sustain this burden of proof of fraud. *Galloway v. Galloway*, 116 Cal. App. 478, 2 P.2d 842 (1931).

In the absence of a federal statute concerning the recognition of divorces obtained in foreign countries, or in the absence of the exercise of the treaty making power, only state law—case law and statutes—can govern. It is submitted that the courts cannot effectively regulate foreign country divorce decrees unless they make free use of injunctive relief. In absence of such a use, a litigant may evade the laws of his domicile, as by contracting a second marriage valid in the foreign jurisdiction. An aggrieved party will be subjected to humiliation, doubt as to marital status, worry, annoyance, and injury to her good name. Strict and technical requirements of the law should give way where inequity and fraud are involved.

*Matthew J. Moran*
Evidence — Hearsay — Admissibility of Hospital Records as to Cause of Accident. — Williams v. Alexander, 309 N.Y. 283, 129 N.E.2d 417 (1955). The plaintiff brought this action to recover for injuries sustained when he was struck by defendant’s automobile at an intersection. At the trial plaintiff testified that defendant’s car approached the intersection, and without diminishing speed, ran into him. The defendant testified that he came to a full stop at the intersection, but that another car struck his from behind forcing his car forward and upon plaintiff. During the course of the trial plaintiff introduced as evidence those portions of a hospital record relating to the diagnosis and treatment of his injuries. To corrobate his testimony, defendant offered as evidence the remainder of the hospital record which plaintiff had put in evidence. The portion of the record defendant offered contained a notation that plaintiff had stated to the examining physician that, “he was crossing the street and an automobile ran into another automobile that was at a standstill, causing this car (standstill) to run into him.” The plaintiff denied having made this statement and the examining physician was not called as a witness. The court admitted this portion of the record over plaintiff’s objection that it contained hearsay. The trial court’s judgment for defendant was affirmed on appeal. Plaintiff now appeals to the court of appeals.

The issue presented to the court of appeals for the first time was whether or not the entries in the hospital record relating to the cause of the accident were admissible under N.Y. Civ. Prac. Act § 374-a, which permits entries in a record “made in the regular course of any business” to be admitted into evidence. The court, in a four-to-three decision, reversed and granted a new trial. The majority ruled that the entry was not “germane to diagnosis or treatment” and therefore not made in the regular course of the hospital’s business. The minority was of the opinion that by first introducing part of the record, the plaintiff vouched for the accuracy and authenticity of the whole record and was bound by it. Further, the entry was an “admission against interest” and admissible even in the absence of the statute.

At present, the federal government and over three-fourths of the states have enacted statutes similar to section 374-a of the New York Practice Act regulating the admission of business records into evidence. 5 Wigmore, Evidence §§ 1519, 1520 (3d ed. 1940). The purpose of these statutes is to liberalize the strict common law rules relating to the admission of business records into evidence by eliminating the requirement that all parties who participated in the making of the record be produced, if at all possible, as witnesses, and requiring only that the records and
entries be kept in the regular course of business. It is reasoned that where the records are made in the regular course of business, and their accuracy is relied upon in conducting the business, there is a circumstantial probability that they are trustworthy. *Shaffer v. Seas Shipping Co.*, 127 F. Supp. 384 (E.D. Pa. 1954), aff'd, 218 F.2d 442 (3d Cir.), cert. denied, 348 U.S. 973 (1955); *Melton v. St. Louis Pub. Serv. Co.*, 363 Mo. 474, 251 S.W.2d 663 (1952); *Johnson v. Lutz*, 253 N.Y. 124, 170 N.E. 517, 518 (1930) (dictum); *Weis v. Weis*, 147 Ohio St. 416, 72 N.E.2d 245, 250 (1947) (dictum).

Hospital records come within the provisions of these statutes and have been held to be admissible to show such things as the physician's diagnosis of the patient's condition, the treatment given, and the progress shown, for these matters are clearly within the scope of the hospital's business. *People v. Kohlmeyer*, 284 N.Y. 366, 31 N.E.2d 490 (1940). Accord, *New York Life Ins. Co. v. Taylor*, 147 F.2d 297, 303 (D.C. Cir. 1945) (dictum), aff'd, 158 F.2d 328 (D.C. Cir. 1946); *Wickman v. Bohle*, 173 Md. 694, 196 Atl. 326, 329 (1938). A problem is presented, however, where that portion of the hospital record which describes the cause of the patient's injury is attempted to be put into evidence under these statutes. The question then arises whether this portion of the record was made in the regular course of the hospital's business. If the entry relating to the cause of the injury was essential to the diagnosis and treatment of the patient, it is made in the regular course of the hospital's business and is therefore admissible. *D'Amato v. Johnston*, 140 Conn. 54, 97 A.2d 893 (1953).

In *Commonwealth v. Harris*, 351 Pa. 325, 41 A.2d 688 (1945), where a negro was on trial for murder, a hospital record containing a statement of the deceased that he was shot by an unknown white man was held inadmissible. The reason given was that this entry was not “. . . pathologically germane to the physical or mental condition which caused the patient to come to the hospital for treatment.” It was none of the doctor's “. . . professional 'business' who shot the patient.” 41 A.2d at 691. Thus the record was not made in the regular course of the physician's business.

*Green v. City of Cleveland*, 150 Ohio St. 441, 83 N.E.2d 63 (1948), also excluded the hospital record. The plaintiff claimed that as she was attempting to get off defendant's streetcar, it prematurely started and then suddenly stopped, causing her to fall and be injured. An entry in the hospital record that the plaintiff stated she “fell of streetcar, caught heel” was not admitted because it was not of “. . . observable facts or events incident to the treatment” of the plaintiff. 83 N.E.2d at 65. The Missouri
Supreme Court applied this test to the entry, "he states that he walked into the front corner of a moving streetcar... ." and held it to be admissible. The court was of the opinion that the test did not limit the entry to "observable facts" in the sense that they had to be visual. If the entry indicated "how the plaintiff was injured" it was admissible even though it indicated the cause of the accident. *Melton v. St. Louis Pub. Serv. Co.*, 363 Mo. 474, 251 S.W.2d 663, 666 (1952). Under such a test, it seems that every entry describing the cause of the accident would be admissible.

In *Watts v. Delaware Coach Co.*, 5 Terry 283, 58 A.2d 689 (1948), the plaintiff alleged that his ankle was injured when defendant's bus driver closed the bus door on it. The court admitted the hospital record entry which stated: "patient states he twisted ankle while walking along street," on the ground that it was "... so related to the complaint or injury involved as to facilitate prompt and intelligent diagnosis and treatment." 58 A.2d at 695.

In *Shaffer v. Seas Shipping Co.*, 127 F. Supp. 384 (E.D. Pa. 1954), aff'd, 218 F.2d 442 (3d Cir.), cert. denied, 348 U.S. 973 (1955), it was stated that how the injury occurred and what caused it is usually important in diagnosing and treating the injury, and that this is evident from the fact that the patient's account of his injury is almost always recorded. While recognizing that there might be some cases where this would not be true, the court stated that it was not its function to draw the line.

Only one case seems to be in accord with the dissenting opinion in the instant case. In that case, *Fischer v. City of New York*, 207 Misc. 528, 138 N.Y.S.2d 754 (Sup. Ct. 1955), a seventy-eight year old woman was seriously injured when she fell while walking on a public sidewalk. Much evidence tended to show that her fall was caused by her tripping in a hole in the sidewalk. She told the physician who examined her, however, that she had slipped on a banana peel. This he recorded in the hospital record. There were no witnesses to the accident, but at the trial, the woman testified that her fall was caused by the hole in the sidewalk. She later died and her husband sued for medical expenses and loss of services. The court ruled that the entry was admissible under the New York statute as an admission against interest, even if it was not made in the course of business. In this case, unlike the instant case, the examining physician was produced as a witness and testified as to the entry. This case, however, was decided prior to the decision in the instant case and its present validity is doubtful.

The majority view in the principal case seems to present the better view. The basis for admitting hospital records under §
374-a of the New York Practice Act is the circumstantial probability of trustworthiness which is present in the record because of the fact that the record is relied upon in treating the patient. Entries which are not essential to the proper diagnosis and treatment of the patient are not endowed with this probability and are therefore subject to all the objections and evils surrounding hearsay evidence. To render a party bound by the untrustworthy entry because he makes use of the trustworthy entries is to defeat the purpose and intendment of the statute. On the whole, the record in these instances should be treated as severable, as was done in the instant case.

Vernon O. Teofan

Gambling — Machines and Devices — Pinball Machines as Gaming Machines Per Se. — Crystal Amusement Corp. v. Northrop, 19 Conn. Sup. 498, 118 A.2d 467 (1955). A pinball machine was sold and delivered to the defendant by the plaintiff. This machine had a “free play” feature; the machine would register scores established by the player and upon the attainment of certain scores would automatically award additional rights to play the machine without the further deposit of coins. There was no money discharged by the machine, nor any tokens, merchandise, etc. The plaintiff-vendor seeks to recover the contracted price; defendant, a store keeper, did not dispute the sale nor any of its terms but rather claimed that the use of the machine by his customers would have violated the law concerning gambling. Defendant claimed that since the subject matter of the sale when put to use would have been illegal, the contract is unenforceable.

Conceding the unenforceability of the agreement if the subject matter or the use of it were illegal, the court considered whether this free play pinball machine was a gambling device prohibited by the Connecticut statutes. Conn. Gen. Stat. §§ 8655, 8656 (1949). The court saw a similarity between the Connecticut statutes and a corresponding statute of the District of Columbia, D.C. Code Ann. § 22-1504 (1951), and followed the opinion of Washington Coin Mach. Ass’n v. Callahan, 142 F.2d 97 (D.C. Cir. 1944), in declaring that a pinball machine of the type described was not a gambling machine within the purview of the statute.

Gambling was not an unlawful activity at early English common law. 8 The Complete Statutes of England 1104 (1929); Clark & Marshall, Crimes 698 (5th ed. 1952). Statutes restricting gambling by the regulation and prohibition of this activity be-
gan to be common by the first half of the nineteenth century in both England and the United States. Ludwig & Hughes, *Bingo, Morality and the Criminal Law*, 1 Catholic Law 8, 13 (1955). Since the laws concerning gambling are statutory, the determination of whether a machine or device is illegal as a gambling machine is a matter of statutory construction. See *State v. Waite*, 156 Kan. 143, 131 P.2d 708, 148 A.L.R. 874 (1942).

The various statutes on the topic of gambling machines are seen to stand in close relation when considered within the framework of the traditional elements of gambling: (1) consideration, (2) chance, and (3) reward or prize. *State v. One "Jack and Jill" Pinball Machine*, 224 S.W.2d 854, 860 (Mo. App. 1949); *Kraus v. City of Cleveland*, 135 Ohio St. 43, 19 N.E.2d 159 (1939). The first element merely consists of the risking of money or something of value on the outcome of the game. The second element is a requirement that the outcome depend upon the operation of chance rather than skill; it is not necessary that the result depend entirely upon chance; it is enough that chance be the dominating factor. See Annot., 135 A.L.R. 104 (1941). The third element is a requirement that some return may accrue to the player of the game, resulting from the operation of chance.

Statutes vary considerably in the degree to which these elements are made explicit. An Indiana statute which defines gambling machines, *Ind. Ann. Stat.* § 10-2327 (Burns 1942), clearly embodies all three elements. On the other hand, a corresponding statute of Iowa, *Iowa Code Ann.* § 726.5 (1950), employs far more general language, leaving considerable latitude to the courts in determination of what type machines are within the statute.

There are apparently no decisions which center on the first element, consideration.

As to the second requirement there is little question that chance is the dominant element as opposed to skill in the operation of pinball machines. *State v. Coats*, 158 Ore. 122, 74 P.2d 1102, 1106 (1938). Some courts have taken notice that although long experience may develop some skill in the operation of pinball machines, chance still remains as the dominant element. *State ex rel. Dussault v. Kilburn*, 111 Mont. 400, 109 P.2d 1113 (1941); *State v. Coats*, supra. The uniformity of holdings that the dominant element in the play of pinball machines is chance shows that whatever variation does exist in statutes on the chance element has little effect on ultimate results.

The statutory descriptions of that which constitutes a reward or prize, the third element of gambling, are at great variance. A return, by way of reward or prize, may be "merchandise . . .
articles of value, checks, or tokens . . . exchangeable for money or any other thing of value," CAL. PEN. CODE § 330a (Deering 1949); CONN. GEN. STAT. §§ 8655, 8656 (1949); "thing of value," N.Y. PEN. LAW § 982; "money or other property of value" or "other valuable thing," PA. STAT. ANN. tit. 18, §§ 4603, 4605 (Purdon 1945).

Increasing the differences among the jurisdictions on the question of what is a sufficient return to satisfy the element of prize are the variations put upon construction of the statutes by the courts. The decisions, however, are uniform in two respects: (1) pinball machines are held to be gambling machines within the statutes if they discharge anything tangible such as money or tokens; it makes no difference whether the tokens are for purposes of replay or for exchanging for merchandise, State ex rel. Dussault v. Kilburn, 111 Mont. 400, 109 P.2d 1113 (1941); Kraus v. City of Cleveland, 135 Ohio St. 43, 19 N.E.2d 159 (1939); (2) pinball machines are held to be gambling machines within the statutes if the player receives from someone, such as the proprietor of the place where the machine is kept, merchandise or money according to an established score or the number of free games registered, although nothing is discharged by the machine itself. Sparks v. State, 48 Ga. 498, 173 S.E. 216 (1934); In re Sutton, 148 Pa. Super. 101, 24 A.2d 756 (1942).

The sharp difference of opinion as to whether the pinball machines are gambling machines is found in the situation where the machine does not discharge anything and there is no evidence that the player of the machine is paid off on the basis of an established score or the number of games won, but rather the machine itself registers the number of free plays and automatically adjusts so that the player may take advantage of the free plays without further deposit of coins. Except for a few jurisdictions, the statutes do not expressly mention whether such machines are illegal; the determination is left to the courts. New York prohibits by statute this kind of free play machine. N.Y. PEN. LAW § 982. The court in People v. Gravenhorst, 32 N.Y.S.2d 760, 775 (1942), ignored the free play feature of the machine and held that the machine was within the statute since amusement is a thing of value when applied to devices of this type; in other words, the court reached its decision without relying on the special clause of the statute which brings free play machines within its scope. Among the jurisdictions whose courts have considered whether free play machines are within the statutes where the statutes do not expressly mention free play machines, the cases indicate that the majority holding is that free plays as an award for successful operation of the pinball machines do not constitute property,
valuable things, articles of value, etc. Washington Coin Mach. Ass'n v. Callahan, 142 F.2d 97 (D.C. Cir. 1944); Gayer v. Whelan, 59 Cal. App. 2d 255, 138 P.2d 763 (1943); State v. One "Jack and Jill" Pinball Machine, 224 S.W.2d 854 (Mo. App. 1949). The principal case comes within this authority. This means that the third element of gambling is not satisfied and the machines are not in themselves gambling machines. Contra, State v. Wiley, 232 Iowa 443, 3 N.W.2d 620 (1942); Giomi v. Chase, 47 N.M. 22, 132 P.2d 715 (1942).

Recent legislative action in at least two states has contravened judicial opinion that machines which award only free plays are gambling machines. People v. One Pinball Machine, 316 Ill. App. 161, 44 N.E.2d 950 (1942). The statute in effect at the time of that case was ILL. ANN. STAT. c. 38, § 342 (Smith-Hurd 1935). The amendment of 1953 expressly excludes machines which reward the player with the “right to replay.” ILL. ANN. STAT. c. 38, § 342 (Smith-Hurd Supp. 1955). The South Carolina legislature, in 1949, amended the statute concerning slot machines to exempt “nonpayout pin tables with free play feature,” S.C. Code § 5-621 (1952). The often quoted case of Alexander v. Hunnicutt, 196 S.C. 364, 13 S.E.2d 630 (1941), which held that the machines were gambling machines under S.C. Code § 1301-A (1932), would ostensibly have been decided differently under the amended statute.

Analysis of problems similar to that posed by the principal case is facilitated by an understanding of the elements of gambling and an awareness of the variant ways in which the statutes incorporate these elements. The reasons for the conflicting decisions may well be, and it is so indicated by the opinions, that the courts are attaching varying weights to the interests of social policy in opposition to gambling and interests in favor of construing penal statutes strictly. These interests conflict on the narrow ground marked out by the principal case.

Eugene F. Waye

Physicians and Surgeons—Professional Misconduct—Fee Splitting as Grounds for Revocation of License.—Forziati v. Board of Registration in Medicine, . . . Mass. . . . ., 128 N.E.2d 789 (1955). This case involves a suit for a declaratory decree as to the jurisdiction of the Massachusetts Board of Registration in Medicine to revoke the license of a registered physician for acts amounting to gross misconduct in the practice of his profession. The plaintiff was engaged in a conspiracy with an attorney at law in which the plaintiff solicited patients who came to him
to employ the attorney to prosecute their personal injury claims. After the patient paid the plaintiff for his medical services, the attorney paid him in cash sums representing the difference between the amount of the medical bill and one half of the combined medical and legal fees. In this way the doctor and the attorney received the same fee in each case regardless of the relative amount of services performed by each of them. The board enumerated 138 instances of this form of fee splitting with a "kickback" in excess of $8,000 received by the doctor. The Board was authorized by statute to revoke a physician’s license if it was found that he was guilty of "gross misconduct in the practice of his profession.”

The court was called upon to determine whether the plaintiff's fee splitting operations constituted "gross misconduct" within the meaning of the statute. After concluding that these actions of the plaintiff conflicted with his moral obligations as a physician, the court entered a final decree to the effect that the Board could proceed against the plaintiff on his being charged with gross misconduct in the practice of his profession because of his fee splitting activities.

It is well settled that the power of certain state boards to regulate the granting of licenses to practice medicine, and the power to revoke for proper cause licenses already granted, is an exercise of the police power of the state. *State ex rel. Lentine v. State Bd. of Health*, 334 Mo. 220, 65 S.W.2d 943, 949 (1933) (dictum). And while there are several decisions holding that moral turpitude is grounds for revoking a physician's license, *Du Vall v. Board of Medical Examiners*, 49 Ariz. 329, 66 P.2d 1026 (1937); *Brainard v. Board of Medical Examiners*, 68 Cal. App. 2d 591, 157 P.2d 7 (1945); *Hartman v. Board of Chiropractic Examiners*, 20 Cal. App. 2d 76, 66 P.2d 705 (1937), this discussion will be confined to those situations involving gross misconduct or dishonorable conduct in the practice of the profession as grounds for barring a physician from his practice.

In *State ex rel. Lentine v. State Bd. of Health, supra*, a licensed physician and surgeon participated in a conspiracy to procure, by corruption and bribery, licenses for six or seven men to practice medicine in the State of Illinois. These men could not qualify to practice medicine under the laws of that state. The relator was a licensed physician in Missouri and the state board of health revoked his license because of his participation in the conspiracy. The Missouri statute authorized the board to revoke the license of a physician and surgeon if he was a person of "bad moral character" or guilty of "unprofessional or dishonorable conduct." The court held that the use of these general terms did not render
the statute unenforceable for indefiniteness. Interpreting these statutory terms to refer to conduct which in common judgment is deemed unprofessional and dishonorable, the court affirmed the action of the board.

In *State Bd. v. Ferry*, 172 Pa. Super. 372, 94 A.2d 121 (1953), the defendant physician was charged with aiding and abetting unlicensed persons in the practice of medicine. The defendant hired an assistant who had no license to practice medicine, but he nevertheless allowed him to examine patients, prescribe treatment, and charge fees for his services. The state board of medical education and licensure was authorized by statute to revoke the right to practice medicine upon proof of grossly unethical practice. Noting that the legislature had not said what it meant by “grossly unethical practice” the court stated that it was similar to unprofessional conduct. The court concluded that defendant’s conduct in aiding an unlicensed person in the illegal practice of medicine was “grossly unethical practice” within the meaning of the statute, and on that basis affirmed the revocation of his license.

In the case of *In re Walker’s License*, 210 Minn. 337, 300 N.W. 800 (1941), a veterinarian’s license was revoked on the ground that he had allowed his professional name to be used by another not licensed as a veterinarian. The statute provided for revocation of a license for “gross moral or professional misconduct.” The state board of veterinary medical examiners held that the veterinarian was guilty of gross professional misconduct. This conclusion was upheld by the court. In construing the words “gross moral or professional misconduct,” the court stated that this involved conduct which in “common judgment” was dishonorable. 300 N.W. at 801.

In *Lieberman v. State Bd. of Examiners*, 130 Conn. 344, 34 A.2d 213 (1943), the plaintiff was employed as an optometrist, receiving a commission on all optical goods sold in his employer’s store. If the patients purchased their spectacles in the store no fee for optometrical service was charged, but if a patient did not purchase his spectacles in the store the optometrist charged a fee and turned it over to the store. The advertising of the optometrical services was done in such a way as to mislead the public regarding the nature of the relationship between the optometrist and the store. The statute regulating optometrists authorized the board of examiners to revoke a license for “unprofessional conduct.” The board had revoked plaintiff’s license on this and other grounds. The court sustained the board on the basis that the advertising scheme rendered plaintiff guilty of unprofessional conduct.

Another case involving a licensed optometrist is *Sanchick v. State Bd. of Examiners*, 342 Mich. 555, 70 N.W.2d 757 (1955). There an optometrist employed a “capper” or “steerer” to obtain
business for him. The statute provided that the board of examiners could revoke an optometrist’s license for “grossly unprofessional, unethical and dishonest conduct of a character likely to deceive the public.” The board determined that petitioner’s activities came within the express prohibition of that part of the statute defining unprofessional and dishonest conduct as including the employment of a “capper” or “steerer.” This determination was upheld by the court against an argument that the terms of the statute quoted above were too indefinite. The court stated that the terms “unprofessional” and “dishonest” were expressly defined to include petitioner’s activities, and further since these actions were unprofessional and dishonest they must be “unethical” by any standard of ethics.

In *Bell v. Board of Regents*, 295 N.Y. 101, 65 N.E.2d 184 (1946), a licensed dentist employed a layman as an agent to obtain patients for him. The agent was paid on a commission basis. The board suspended the dentist’s license for one year under a statute providing that the license of a practitioner of dentistry may be revoked, suspended or annulled, for “unprofessional conduct.” The court stated that it was a matter of common knowledge that the activities of the dentist involved here were unprofessional. Upon this basis, the board’s determination was confirmed.

From the cases which have been set forth above, it would seem that what the courts require of physicians, veterinarians, optometrists, dentists and others of similar professional calibre in dealing with their patients or clients, is simply honesty and fairness. So far as fee-splitting practices are concerned, such as in the principal case, the writer was unable to find any other instance where the propriety of this specific type of activity has been passed upon by the courts. The medical profession itself recognizes that billing procedures which tend to induce physicians to split fees with non-physicians are unethical. *Principles of Medical Ethics of the American Medical Association* § 6 (1955).

In view of the position taken by the American Medical Association on the matter of fee-splitting, and the requirement of the courts that physicians conduct themselves with strict fairness and honesty in dealing with their patients, it is submitted that the plaintiff in the instant case was rightly barred from the further practice of his profession.

*David J. Eardley*
TORTS — FAMILY RELATIONS — CHILD HAS CLAIM UPON WHICH RELIEF MAY BE GRANTED AS A RESULT OF NEGLIGENT INJURY TO PARENT. — Scruggs v. Meredith, 134 F. Supp. 868 (D. Hawaii 1955). The plaintiff's mother was negligently injured by defendant. Plaintiffs, the five minor children of the injured person, brought this action for loss of "support, maintenance, education, nurture, care, training, attention, acts of kindness, comfort, and solace," which they allegedly suffered as a proximate result of the injury to their mother. Defendant moved to dismiss the complaint on the ground that it did not state a claim upon which relief could be granted.

The court, therefore, was presented with the question whether a minor child has a claim for damages against one who negligently injures the child's parent. After tracing the development of the growth of the protection of family interests in the Hawaiian courts from 1860, and recognizing that damages from the loss of parental care, training, guidance, etc., up until this time had only been recovered in cases arising under the wrongful death statute, the court nevertheless stated that "... the cause of action is not founded upon the degree or quantity of loss. Rather is it premised upon an invasion of a right." 134 F. Supp. at 871. Denying the defendant's motion to dismiss, the court held that the complaint stated a claim upon which relief could be granted.

This decision represents another step in the continuing development of the Anglo-American law of family relations. The common law has always recognized in the husband a right to recover for the loss of the consortium of his wife. 3 BLACKSTONE, COMMENTARIES 140. The wife's right to sue for loss of consortium of the husband has not been as fully recognized. Today, a majority of the courts take the view that a wife may only recover in cases of intentional or malicious alienation of the husband's affections, Fleming v. Fisk, 87 F.2d 747 (D. C. Cir. 1936); or in cases of criminal conversation, Knighten v. McClain, 227 N.C. 682, 44 S.E.2d 79 (1947). In 1950, the Court of Appeals for the District of Columbia Circuit granted recovery to a wife for loss of consortium which was the result of a negligent injury to her husband. Hitaffer v. Argonne Co., 183 F.2d 811 (D.C. Cir.), cert. denied, 340 U.S. 852 (1950). Recovery was awarded even though the court was "... not unaware of the unanimity of authority elsewhere denying the wife recovery. ..." 183 F.2d at 812. The Hitaffer case was instrumental in setting the stage for the decision in the principal case; for as one writer so aptly stated, the case showed a "... positive inclination of the appellate courts to expand the common law according to a changing society and a new attitude toward the relative position of members of the family." 2
St. Louis U.L.J. 305, 308 (1953).

Scholars in the field of domestic relations have long recognized certain interests in children arising out of the family relationship and have advocated protection of these interests by the courts. Dean Pound, in a discussion on the subject, Individual Interests in the Domestic Relations, 14 Mich. L. Rev. 177, 185 (1916), stated:

[The child] has an interest in the society and affection of the parent, at least while he remains in the household. But the law has done little to secure these interests. At common law there are no legal rights which protect them.

Professor Green has also made mention of the same deficiency in the law. Green, Relational Interests, 29 Ill. L. Rev. 460, 484 (1934). See also Prosser, Torts 696 (2d ed. 1955). Until recent years these interests have been protected judicially only through legislation. 39 Am. Jur., Parent and Child § 71 (1939). This legislation, in the form of wrongful death statutes, Clark v. Prime, 18 N.J. Misc. 226, 12 A.2d 635 (1940), workmen's compensation statutes, Silver King Coalit. Mines Co. v. Industrial Comm'n, 101 Utah 12, 116 P.2d 771 (1941), and civil damage acts, Hughes v. State ex rel. Sutton, 50 Ind. App. 617, 98 N.E. 839 (1912), has been very valuable to the child, for in suits arising under these statutes the courts have consistently taken into consideration the child's loss of parental comfort, society, nurture, training, etc., when setting the amount of damages. Dowell, Inc. v. Jowers, 166 F.2d 214, 220 (5th Cir.), cert. denied, 334 U.S. 832 (1948); St. Louis & N.A. Ry. v. Mathis, 76 Ark. 184, 91 S.W. 763 (1906); Clark v. Prime, supra; Carter v. West Jersey & S. Ry., 76 N.J.L. 602, 71 Atl. 253 (1908). Since the decision of Daily v. Parker, 152 F.2d 174 (7th Cir. 1945), a small minority of jurisdictions have allowed the child to recover for loss of parental care, nurture, etc., resulting from the alienation of a parent's affections. See Note, 32 B.U.L. Rev. 82 (1952).

The writer has found only three other instances in which the problem in the principal case has come before the courts. Eschenbach v. Benjamin, 195 Minn. 378, 263 N.W. 154 (1935), was probably the first case involving this problem. There the wife and three minor children sued for damages for the negligent injury of the husband-father in an automobile accident. Defendants demurred to the cause of action. The demurrer was sustained. In Hill v. Sibley Memorial Hospital, 108 F. Supp. 739 (D.D.C. 1952), a daughter sued for her loss of comfort, aid, kindness, and assistance which she sustained as a result of negligent injury to her mother. Defendant moved to dismiss the complaint and his motion was granted. Arizona considered the problem in Jeune v.
Del E. Webb Const. Co., 77 Ariz. 226, 269 P.2d 723 (1954). The husband-father was negligently injured. The wife sued for her loss of consortium and, as the child's next friend, for the child's loss of support, education, parental comfort, etc. The state supreme court affirmed a summary judgment in favor of the defendant.

In refusing to recognize a cause of action in the child for his loss of nurture, training, etc., as a result of a negligent injury to the parent, the courts have given six principal reasons as governing their decisions. The case of Eschenbach v. Benjamin, supra, sets out three of these reasons. The court in that case expressed a fear of the possibility that double damages would be awarded in a suit in which a parent sues for his injuries and the child sues for loss of care, nurture, etc. It also stated that the action could not lie because the child's loss is an indirect result of the negligent act causing the injury to the parent. Thirdly, it submitted that if such recovery were allowed, each minor child would have a cause of action, all of which actions would be based on a single tort.

Careful consideration of these arguments seems to reveal weaknesses in all of them. The threat of double damages has been overcome in cases in which the wife has recovered for her loss of consortium as a result of the negligent injury to her husband, Hitaffer v. Argonne Co., supra, 183 F.2d at 819, where the court said insofar as the wife's damage corresponded to the husband's damages, her recovery would be relatively reduced. It seems as though the child's damages for loss of care, nurture, etc., could be treated similarly to those recovered by the wife in consortium cases. Admitting the court's second argument that the child's loss is an indirect result of the negligent act, can it be validly argued that such a loss is not a probable consequence of the negligence, or that the negligence was not an appreciable cause of the damage to the child? It seems not. The third argument, regarding the possibility of a large number of suits arising from a single tort, seems to have been countered by one writer who said, "... if the child really should have a cause of action, the existence of similar ones ought not to prevent his recovery." 39 Calif. L. Rev. 294, 298 (1951).

In Hill v. Sibley Memorial Hospital, supra, two more theories which have been advanced to defeat this cause of action were set out. One of the main factors the court in that case relied upon was the fact that such a cause of action had never before been allowed. But the court seemingly contradicted itself by stating that the novelty of an action in itself is not sufficient to prevent recovery. 108 F. Supp. at 740. The court's second argument was
that a lower court should be cautious in laying down a completely new rule. The court said this even though it conceded that "when a child loses the love and companionship of a parent, it is deprived of something that is indeed valuable and precious." 108 F. Supp. at 741. And the court further admitted that on the basis of natural justice it was difficult for it to "... reach the conclusion that this type of an action will not lie." Ibid. It seems that in the face of a definite and recognized need for a rule, the court's caution should be superseded by its duty to give redress for the wrong.

The court in Jeune v. Del E. Well Const. Co., supra, set forth another reason for not allowing the child's cause of action for loss of parental affection, etc., by expressing the belief that any cause of action for personal injury to the parent rests with the parent for all resulting damage. This rule seems questionable when it is recognized that the child in these cases is suing in his own right for an injury to an interest peculiar to himself. See Pound, Individual Interests in the Domestic Relations, 14 Mich. L. Rev. 177, 185-86 (1916).

If one admits that the child has a legally protected interest in parental affections, comfort, nurture, etc., the doctrine ubi jus ibi remedium, where there is a right there is a remedy, which is firmly embedded in Anglo-American legal theory, seems to demand that the child should be allowed to recover damages when this interest is infringed. The Hawaiian court by recognizing the child's claim in the principal case has severed its former ties with precedent in cases of this nature, but not without good cause. It is submitted that the importance of this case derives from the fact that the court has recognized this interest on the part of the child at a time when the negative attitude toward it has not yet had an opportunity to become too firmly entrenched in the thinking of the American courts. It is not to be assumed that other courts will immediately align themselves with the Hawaiian court in their consideration of this problem. The transition, if and when it does come, will necessarily be a slow one, for:

[Judges] must go with the main body not with the advance guard, and with the main body only when it has attained reasonably fixed and settled conceptions. . . . When we reflect how fundamental is the shifting from the older idea of the end of the legal order to the newer . . . how completely the change goes to the root of everything the courts do, we must recognize how futile it is to expect the courts to adjust our whole legal system to it over night. (Emphasis added.) Pound, The Spirit of the Common Law 191 (1921).

George A. Patterson
TORTS—FEDERAL TORT CLAIMS ACT—TEST FOR DETERMINING LIABILITY OF THE FEDERAL GOVERNMENT TO PRIVATE INDIVIDUALS. —Indian Towing Co. v. United States, 350 U. S. 61 (1955). Petitioners sought recovery under the Federal Tort Claims Act, 28 U.S.C. § 2671 (1952), for damages alleged to have been caused by the negligence of the United States Coast Guard in the operation of a lighthouse. A tug, owned by petitioner, towing a barge went aground, and sea water wetted and damaged the cargo. Petitioner alleged that the grounding of the tug was due solely to improper functioning of the light which was caused by the negligence of the Coast Guard in failing to check the lighting system and in failing to make proper and regular examinations and repairs. The court of appeals affirmed the district court's dismissal of the case on the ground that the Government had not consented to be sued in the manner in which this suit was brought. The Supreme Court of the United States affirmed the judgment of the court of appeals, but a petition for rehearing was granted.

Upon rehearing, the Supreme Court was presented with the problem of determining the extent of liability of the Federal Government under the Federal Tort Claims Act, supra. Congress provided, in 28 U.S.C. § 2674 (1952), that, "the United States shall be liable ... in the same manner and to the same extent as a private individual under like circumstances ..." In the instant case, the operation of a lighthouse is confined exclusively to the federal government unless a private individual obtains authority to do so from the Coast Guard, as provided for in 14 U.S.C. § 83 (1952).

The Government's contention that the language of the Tort Claims Act imposing liability "... in the same manner and to the same extent as a private individual under like circumstances ..." must be read as excluding liability in the performance of activities which private persons do not perform was accepted by the court of appeals. The Supreme Court reversed the court of appeals and remanded the case for further proceedings. The Court said that the test of liability under the act was not "the presence or absence of identical private activity" but whether a private person would be liable had he committed the same act.

It is established that the United States is liable for the tortious acts of its agents that occur within a particular jurisdiction if a private individual would be liable for a similar act committed within the same jurisdiction. 28 U.S.C. § 2674 (1952). However, in the principal case, the Court was not concerned with an act that may also be committed by a private individual, but rather with an act that ordinarily a private individual cannot perform.

In Cerri v. United States, 80 F. Supp. 831 (N.D. Cal. 1948), an
innocent bystander in San Francisco was injured by a stray bullet discharged by a United States Army military policeman. The Government denied liability because under California law a municipality is not liable for the tortious acts of police officers committed while acting in the line of duty. In rejecting this argument, the court advanced the following explanation of the liability intended to be imposed upon the Government by the Federal Tort Claims Act, 80 F. Supp. at 833:

The defense that this act does not apply to those cases wherein the negligence occurred during the exercise of a sovereign power of the United States, if heeded, would create a twilight zone of governmental activities in which the consent given by this statute could not be applied. Too numerous are the affairs of a purely governmental or sovereign nature, prohibited to or not duplicated by the activities of private individuals, to consider this to be the intent of Congress. Certainly, the statute itself makes no distinction between governmental activities of a sovereign nature and those of a proprietary nature. . . .

The court interpreted the act as imposing liability upon the United States for injury to private individuals resulting from the discharge of either "governmental" functions or "proprietary" functions, though the same tortious conduct would not render a municipality liable within the particular jurisdiction where the incident occurred. Thus, because Congress in the Federal Tort Claims Act has consented to treatment of the federal government as a private person and not as a municipality when negligent acts of federal employees result in injury to private persons, the division in municipal law between "governmental" and "proprietary" activities of the sovereign has no place in establishing the liability of the federal government under the act.

The distinction between "governmental" and "proprietary" functions was also rejected in Somerset Seafood Co. v. United States, 193 F.2d 631 (4th Cir. 1951). A vessel owned by the plaintiff was stranded on a wrecked battleship which had been sunk by the United States. The United States had failed to mark the sunken ship. The court adopted a liberal interpretation of the act in rejecting the contention of the Government that it was not intended to impose liability on the United States for damages arising out of the exercise of "governmental" functions.

Mid-Central Fish Co. v. United States, 112 F. Supp. 792 (W.D. Mo. 1953), involved the dissemination of weather information. Though the claim was dismissed, one of the grounds being because there was no duty to promulgate the weather information for the benefit of a private citizen, the court nevertheless opined that the distinction between "governmental" and "proprietary" functions was erroneous. 112 F. Supp. at 795 (dictum). There-
fore if the federal government undertook a duty for the benefit of a particular group, as in the case under discussion, liability would follow for a negligent performance thereof. And upon appeal, 210 F.2d 263 (8th Cir. 1954), the dismissal was affirmed as the court further reasoned that because of the statute, 33 U.S.C. § 702c (1952), which declared that no liability shall attach upon the United States for damage arising from flood waters, the Federal Tort Claims Act was not controlling for it did not expressly repeal such statute. The court thereby decided that if the federal government was exempt from liability by another statute, the terms of the Federal Tort Claims Act would not apply in attempting to fasten liability upon the United States regardless of the "governmental" or "proprietary" nature of the activity.

The performance of the duty of operating a lighthouse in the instant case could be performed by a private individual only if authorized by the United States Coast Guard, 14 U.S.C. § 83 (1952). A somewhat similar situation is found in Eastern Air Lines Inc. v. Union Trust Co., 221 F.2d 62 (D.C. Cir. 1955). There two planes collided while attempting to land at a controlled public airport owned by the United States. The court held the United States liable for damages and stated that though few private persons choose to construct and operate an airport, there is no reason why a private individual or corporation could not construct an airport and operate a control tower manned by its own operators certified by the Civil Aeronautics Administration. In such a case, the individual or corporation would be liable for the negligence of privately employed tower operators. And even if the Government should attempt to relieve itself from liability by contract for the negligent operation of the airport, the existence of such a contract is no defense to an action against the airport. Air Transport Associates, Inc. v. United States, 221 F.2d 467 (9th Cir. 1955). In that case the plaintiff, upon landing at the airfield at night and according to instructions from the airport control tower, collided with a truck that was stalled on the runway. The court held there was no distinction between proprietary and sovereign functions under the Federal Tort Claims Act, and that because the airport was a public service, the exculpatory clause was contrary to the public policy of those jurisdictions in which the contract was to operate and therefore invalid.

Justice Jackson, dissenting in Dalehite v. United States, 346 U.S. 15, 47 (1953), said that the purpose of the act in question is to compensate those who are victims of negligent conduct in the performance of various governmental activities; to hold otherwise would result in the Court sanctioning the negligent ope-
ration of governmental activities and permit the Government to perform its activities with indifference toward the rights of the private citizen.

In interpreting the provision of the act "... to the same extent as a private individual under like circumstances...,” the Supreme Court in the instant case devised the test of whether a private individual would be liable had he performed the same act and rejected the argument of the Government that the provision must be read as excluding liability in the performance of activities which private persons do not perform. It is submitted that the distinction between "governmental" and "proprietary" functions should be immaterial in fixing liability upon the United States under this particular act. Rather the courts should concern themselves with ascertaining whether an individual person would be liable for the same act. Hence it is felt that the test of liability propounded by the Court is the only correct one.

John F. Chmiel