When we started law school, we were given much advice from second and third year students. "Get the Emanuel for Torts...Don’t plan to go away for the holidays - you’ll need the time to study for mid-terms...start your outlines during the Thanksgiving break...don’t ignore your outside life...try to do something unrelated to law once in a while."

For many of us, our outside life has taken second place and it does seem everything we do is related to law or law school, with our creative outlets few and far between. Our houses are littered with unfinished briefs on the dining room table, a Nutshell on the nightstand and a copy of Student Lawyer under the TV Guide.

In the fall of 1967, a few industrious Duquesne University law students satisfied the need for something creative in their lives by publishing the first issue of Juris. Volume I Issue 1 was sixteen newspaper pages of campus activities, feature articles and interviews with distinguished faculty and alumni. As we present the first issue of Volume 25, we congratulate and thank those students who realized twenty-five years ago that law school can be more than three or four years of academic study.

Juris has become a well-respected fixture in the law school community. Our reach also extends beyond the walls of the law school into the homes and offices of approximately four thousand alumni. The letters from these readers, along with the awards given Juris by the Law Student Division of the American Bar Association, tell us Juris is well-respected in the legal community in general. The staff of Volume 25 is honored to carry on this admirable tradition.

Although no academic credit is given for participation on Juris, the willing response to our request for help is indicative of a wealth of talent and drive in the student body. The magazine which you hold in your hand only exists through the hard work performed by the staff listed on the following page. Juris represents a team effort involving writing, editing, taking photos, typing articles on computer disk, drawing pictures, securing purchase orders, choosing type styles...The list can go on.

This first issue of Volume 25 features an intense look at the effect of strict products liability on the quest for an AIDS vaccine. We also survey other important topics including the conflict between Pennsylvania’s hunters and the Game Commission, the role of the Law School Admission Test in candidate selection, and the “gag order” on speech in judicial elections.

In each issue of Juris in this Silver Anniversary year, we will reflect upon the changes Duquesne University School of Law has seen since the inception of Juris in 1967. This issue features the thoughts of Dean John Sciullo, one of the faculty advisors of Volume I.
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AB INITIO—Twenty-five years of Juris

From the Beginning

When the first issue of Juris rolled off the presses in the fall of 1967, Professor John J. Sciullo was keeping a watchful eye. Along with the other Faculty Moderators Professors Patrick J. Basial and Ronald R. Davenport, Professor Sciullo welcomed the new publication to the law school community.

Joining the faculty of Duquesne University School of Law as an Assistant Professor in 1964, John J. Sciullo was named Dean of the Law School in 1982. Dean Sciullo is eminently qualified to comment on the history of Juris, having served as an advisor to the magazine staff from 1967 until 1982.

"The idea of Juris was born because we thought there should have been another publication that went out to our alumni and friends that said something about Duquesne the law school. We didn’t want a traditional alumni newsletter - we wanted something which would show what the students were doing, maybe what the alumni were doing. We didn’t know if it would work out, but we thought for sure we needed something like that."

Juris has always maintained an autonomous spirit, said Dean Sciullo. "The editors at that time said they wanted to control the format with faculty input when they had a question or problem....Faculty was all in support of the thing. The first editors worked out of little offices, nooks in the hallway - they had nothing, no phones, maybe one manual typewriter." Nevertheless, Dean Sciullo is not surprised to see Juris still in existence. "I would have been more surprised to see it fallen by the wayside. Juris is one of the few things that students do because they want to do it. They want to demonstrate that they can take on the responsibility of representing the law school and the university. Twenty-five years of history has demonstrated that they do a good job."

"The thing that is surprising about it is how (Juris) has been done with such professionalism...not only in the formal part of the publication, but in the articles and in the respect that they’ve gained from fellow classmates and alumni. This professionalism has continued. Juris does allow students to say a variety of things, it’s a publication that well represents the law school throughout the community."

In the next issue of Juris, an interview with J. William McLaugherty, the Editor-in-Chief of Volume I.

The first cover of Juris from September 1967, featuring Rockwell Hall, the home of the law school at that time.
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Dinner Honors Graduates

The annual Senior Dinner was held Friday, June 7, 1991 at the Fox Chapel Yacht Club. Needless to say, the atmosphere was mixed with exuberance for the completion of school, and apprehension of the impending Bar Exam. Numerous awards were handed out through the evening. All presidents of the various student organizations, as well as the editors-in-chief for the school publications received plaques for their distinguished service. Officers and editorial boards of these groups, as well as competitors and board members of trial and appellate moot court, received certificates. There was also an issuing of 10 “Order of the Barristers” awards. This is a nationwide program, by which regional level participants in trial and appellate moot courts, as well as those who served on the respective boards, have the opportunity to be selected for the award. Finally, the “Distinguished Student Award” was presented at the dinner. The student who receives this award is selected at a faculty meeting, and considerations including the student’s works which bring to light the many positive attributes of Duquesne Law School are taken into account. The recipient of this year’s “Distinguished Student Award” was the 1990-1991 Editor-in-Chief of Juris, Steve Zoffer.

Appellate and Trial Moot Court Challenges Students

The mandatory second year day, third year evening Appellate Moot Court Course is in full swing. This one credit course requires that the students, acting in the capacity as counsel for appellant or appellee, draft a brief on an issue which has not been decided by the U.S. Supreme Court (thus giving no decisive case to either party). Students then go before a 3 judge panel, comprised of students, attorneys and/or judges, to present a 20 minute oral argument in support of their brief. They receive either a pass or fail grade on both parts, and are encouraged to compete in the optional appellate moot court competition later in the school year.

Also approaching is the Trial Moot Court competition for third year day and fourth year evening students. The preliminary round runs October 22 through 24, at the City County Building, with the finalists arguing November 13 and 14.

Preate Sees Need for “Selfless” Attorneys

Graduation of the Duquesne Law School Class of 1991 commenced June 9, at 11:00 a.m. at the A.J. Palumbo Center. The guest speaker was State Attorney General Ernest D. Preate, Jr., who spoke regarding public sector law, and the need for attorneys to be more selfless in their pursuit of a legal career. Duquesne University President John E. Murray, Jr. also spoke to the graduating class. A well attended reception held at Mellon Hall followed the graduation ceremony.

Orientation Welcomes New Students

Orientation for the entering first year students took place September 3 and 7 at the Law School. On September 3, the students had the opportunity to read a case as a group, viewed a mock classroom to better grasp the structure they would soon be a part of, and finally convened at the Student Union for welcoming remarks and a reception. The speakers were the Orientation Program Chairperson, Professor Kellen McClendon, Dean John J. Sciullo and President John E. Murray, Jr.

The orientation continued September 7, after the first year students had the opportunity to experience their first few days of classes. The students were introduced to numerous student organizations at the Law School, and discussed the subject of managing their lives beyond the classroom. The students also covered numerous academic considerations such as study techniques, texts and study aids, along with a demonstration of the art of briefing cases. Finally, students were invited to an informal reception co-sponsored by SBA, Juris and Law Review.
Bhandari, Ruane, Wright Join Duquesne Faculty

There are some new faces in the faculty at the Law School this year. Duquesne welcomes three professors. Jagdeep Bhandari is teaching Law and Economics in the fall, and International Business Regulation in the spring. He is a graduate of Duquesne Law School, and also holds a Ph.D. in Economics and a Masters Degree in International and Comparative Law. Professor Bhandari previously worked as an economist for the International Monetary Fund in Washington D.C., and as professor of Economics at West Virginia University. Thomas P. Ruane is a visiting professor teaching Tax I in the fall, and is also an alumnus of Duquesne Law School. He is on leave from Loyola University School of Law in New Orleans. Prior to his employment with Loyola, he was a trial attorney for the U.S. Department of Justice in both the Antitrust and Tax Divisions. Susan L. Wright is a visiting professor who is co-teaching Contracts with Professor John E. Murray for both the spring and fall semesters. She is a graduate of Harvard Law School and a Professor at Temple University School of Law. Duquesne students are proud to have such qualified and distinguished individuals as a part of their school faculty.

YEA! and BOO!

YEA! to the Duquesne Law School Administration for facilitating students both in their pre-registration and in their sanity by issuing the exam schedule for the upcoming year in the packet of pre-registration materials!

BOO! to the Duquesne University Administration for issuing too many parking permits. Now students are out of a place to park as well as the money used to purchase the permit!

BOO! to the Law School's unpredictable temperature, which leaves the student guessing from day to day (and even room to room) as to what type of clothes to wear (bikini or parka)?!

YEA! to the Duquesne Law School Alumni Association for sponsoring yet another year of the Speaker's Forum, bringing interesting speakers and topics to the Law School campus!

YEA! to the Law School for fixing the front steps, we all feel a little safer!

BOO! to the economy, which is making employment prospects for the deeply in debt graduating students dismal!

On Campus—Tammy Rhodes, Senior Editor
It is 3:45 P.M. The fatigue begins to set in as you hike back to your truck. The many miles of walking, coupled with the freezing temperatures, have taken their toll. Fellow hunters are sparsely scattered throughout the woods. You notice a few of the lucky ones, boastful and content with the day's success. Others, less fortunate, are perhaps a little frustrated, but hopeful of another day.

The heater works wonders on the slow drive to town. In the back of your mind are thoughts of a hot meal and a warm comfortable bed. As you approach the main road, about a mile from home, a man wearing blue jeans and an orange coat signals you to stop. The man states that he is a deputy Game Commission officer and would like to search your vehicle for game law violations. Should you allow the inspection? Deny permission and risk criminal prosecution? What are your rights?

The Game and Wildlife Code addresses these issues. The Code serves to protect one of Pennsylvania's most valuable natural resources — its wildlife. The Pennsylvania Game Commission plays a crucial role in the enforcement of the Code. The Game Commission is statutorily empowered to "protect, propagate, manage and preserve the game or wildlife of this Commonwealth and to enforce, by proper actions and proceedings, the laws of this Commonwealth relating thereto." This is a burdensome task which can often be overwhelming. Problems range from controlling wildlife population levels to catching poachers. As such, the Game Commission has been given considerable latitude in enforcing game laws. Game Commission officers are empowered to, *inter alia*:

(6) Stop and inspect or search at any time, without warrant, any means of transportation within this Commonwealth. Any officer who stops any means of transportation shall be in uniform and present a badge or other means of official identification and state the purpose of the inspection or search.

(7) Inspect and examine or search, at any time or place, any person or means of transportation or its attachment or occupants or any clothing worn by any person, or any bag, clothing or container when the officer presents official identification and states the purpose of the inspection or search.

(8) Inspect or examine or search, at any time, without warrant, any camp, tent, cabin, trailer or any means of transportation or its attachment being used when the officer presents official identification to the person in charge and states the purpose of the inspection or search.

The only apparent restriction placed on Game Commission officers is that they must be in uniform, wear a badge, and state the purpose of the inspection. These requirements have generally been strictly enforced. In Commonwealth v. Savage, a deputy Game Commission officer approached two individuals in a vehicle. The individuals appeared to be unloading their guns as the deputy approached. They refused to submit to an inspection by the officer, which is a game law violation. However, they were exonerated because the deputy was not in uniform, nor did he wear a badge.

Claringly absent from this statute is the degree of suspicion needed by Game Commission officers before a search can
be conducted. The statute does not require a Game Commission officer to have any suspicion whatsoever that a game law violation has occurred in order to conduct a search. "In fact, the statute on its face gives broader powers to game officers than the powers granted to police officers to conduct searches and seizures." However, Game Commission officers have a much narrower jurisdiction than traditional police. The Game Commission officer's search powers are limited by subject matter and territorial confines. Even so, the statute places a great deal of authority in the hands of individual Game Commission officers. The Pennsylvania courts have addressed these seemingly unrestricted search powers possessed by Game Commission officers.

In Commonwealth v. Palm, a deputy Game Commission officer passed a speeding van as he was investigating the sounds of gunshots. Upon discovering evidence of a deer killed out of season, the deputy summoned a District Game Protector. The two officers then proceeded to stop the van which was driven by Palm. Observing blood on the hands of Palm, the officers conducted a search of the van. The Pennsylvania Supreme Court held this to be a valid stop by the officers. In so doing, the court disregarded the statute and held that a condition precedent to the exercise of such power by game protectors is the existence of reasonable suspicion to stop a vehicle and probable cause to search it. The court stated that "as an intermediate response when a game protector can demonstrate articulable facts and rational inferences from the facts, which indicate that such a stop is appropriate." The Palm court based its decision on the historic case of Terry v. Ohio which addressed the constitutionality of search and seizure. The Palm decision held Game Commission officers' authority to conduct searches to the same Fourth Amendment standards that apply to traditional police. The Palm decision has sparked a heated debate. Game Commission sympathizers believe that the Palm court has crippled the Game Commission by, in effect, rewriting the statute. Proponents of the statutorily prescribed search powers for Game Commission officers argue that these officers need very broad powers if they are to be effective. This is primarily true in the effort to stop poaching. The court in Commonwealth v. Heist eloquently identified the problem facing the Game Commission officer. "Ordinarily, a poacher doesn't illegally shoot game, but it, throw it on the hood of his car and drive off — any self respecting poacher knows that he better hide the illegal game and come back on another night..." To hold that Game Commission officers need reasonable suspicion/probable cause before a search can be conducted would mean that the officer would actually have to see the bird or animal being shot or trapped. This is especially difficult since each Game Commission officer covers approximately 350 square acres. Thus, Game Commission sympathizers would like to see a reversal of the Palm decision and a lifting of the reasonable suspicion/probable cause restrictions placed on Game Commission officers. Conversely, civil libertarians oppose the unrestricted search powers granted by the statute. Arguably, the weight of authority is on their side. There are approximately 122 - 150 Game Commission officers in the state of Pennsylvania. Each is required to complete a nine month training program at the Game Commission Training School. This includes some instruction in law enforcement principles and methods. In addition, there are roughly 1200 deputy Game Commission officers throughout the state. The deputies are only required to complete a four day orientation and training program. It is difficult to see how such a limited training curriculum would warrant giving these individuals unrestricted search powers. This is particularly true for the large number of deputy officers. By requiring these officers to be held to a reasonable suspicion/probable cause standard, the private citizen is afforded at least some protection from intrusions into expectations of privacy.

The Superior Court summed up the debate when it stated in Palm that "...it must be emphasized that any stop involves a balancing, on the one hand, of the interest of private citizens in being free from unreasonable searches and seizures with, on the other hand, the social interests in providing for the enforcement of the law..." The balance struck in this instance, however, is not so much the enforcement of the law as it is the preservation of one of Pennsylvania's most precious resources — its wildlife.

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Mike Alfieri is a second year day student with a B.S. in Biology and Education.
American law schools are opening their doors to a diversified student population of many backgrounds and many goals. Gone are the days of homogeneity when the fortunate scions of aristocratic families waltzed into law schools as a matter of right. Today's law student could come from any walk of life. Intelligence, enthusiasm and motivation have replaced social position as a stepping stone to a law degree. Two major factors have emerged in modern times to ensure that law schools' newfound celebration of diversity continues, regardless of social or economic conditions: financial aid and the Law School Admissions Test. Both factors level the playing field somewhat, so that the economically disadvantaged can aspire to the same legal degree that formerly belonged only to the wealthy or the exceptionally lucky.

Most law schools now find themselves faced with the difficult prospect of evaluating candidates with a myriad of backgrounds and past academic achievements. Added to this difficult process is an unprecedented number of applicants. This past year, 95,000 applicants flooded 175 American law schools with 329,400 applications, a 7.8% increase in the number of applicants and a 10.4% increase in the number of total applications over the prior year.

This vast sea of hopeful lawyers is not elitist; the schools that saw the largest increase in applications, a 26.2% increase, had Law School Admissions Test (LSAT) mean scores of 31-33 compared with only a 3.6% increase to schools with LSAT means above 40.

Evaluating the potential academic success of so many applicants requires the efficient use of all available criteria, along with a great deal of fortitude. The LSAT is a ubiquitous admission tool that has engendered a degree of dissenion among admissions officers, law school students, and those excluded from admission. June, 1991, saw the first administration of a brand new LSAT, one designed to focus more clearly on the attributes necessary for the study of law. Due to the LSAT's reformulation, this seems to be an appropriate time to take a detailed look at this standardized test that, to a great degree, determines who becomes the lawyer of tomorrow.

With all the data, criticism and conjecture surrounding the LSAT, it is important to remember that the LSAT is a double-edged sword: stunning test scores may encourage the best and the brightest to apply for admission to elite law schools, while a low score could discourage an equally bright student, enriched by unusual life experiences, from applying to any law school. The admissions process is governed just as much by the self-selection of students as by the school's admission decisions.

Prior to the 1920's, law school admission was the result of the combination of social status, wealth and motivation. It rapidly became apparent that pedigreed scions were not all adaptive to the mastery of law. As the schools wrestled with high student failure rates, many seriously entertained thoughts of an admissions test.

West Publishing Company published an early aptitude test in 1925, developed by Dean M.L. Ferson of the University of North Carolina Law School and Professor G.D. Stoddard, a psychologist. This Ferson-Stoddard test was used by some of the law schools and was revised three times. During the same period, Yale Law School began using an aptitude test developed by Professor A.B. Crawford, but the school maintained that the test was not the exclusive standard for student admission.

Citing the need to evaluate the aptitude of post World War II applicants, who came from many diverse backgrounds, several law schools met with representatives of the College Entrance Examination Board, and its parent, Educations Testing Service, to develop the Law School Admission Test. The first LSAT was not the result of discrete inquiry into the erudite minds of the day's pre-eminent legal scholars. It was, in fact, a combination of the Pepsi-Cola Scholarship Test and tests used by the United States Navy, and was used as a law school admission test for only two years.

Over the next twenty-four years, the LSAT was modified twelve times, either through content or timing revisions. The focus of the testing was to evaluate an applicant's ability to successfully complete the first year study of law. The question of the test's statistical validity was always present, either as a gentle murmur meandering through admissions offices, or as a bellicose tirade rising from the lips of those who were required to pay for the dubious privilege of being examined on esoteric subjects by an arcane organization. The LSAT was not a panacea for admissions offices inundated with applications.

Taking matters into their own hands, law schools began to combine applicant's LSAT scores and undergraduate grade point averages to arrive at an "admissions index." Theoretically, the index assigns equal weight to an individual's demonstrated academic ability and performance on the LSAT. The admissions offices now had what they hoped was a valid number that could be used to compare applicants who had similar backgrounds and life experiences. This simple solution immediately highlighted a glaring inadequacy of the LSAT scoring system: The LSAT score scale was 200-800, allowing candidates to earn any
one of 601 scores. Minute variations between two applicants’ LSAT scores could produce disparate admissions decisions even though the applicants’ undergraduate grade-point averages (GPAs) were identical. In order to remedy this problem, the 1982 version of the LSAT adopted a much more compressed scale, having only 41 score break-points on a scale of 10-50.6 It was later modified to a 10-48 scale, reducing the number of score break-points to 39.7 The 1982 version also introduced the writing sample, which offered the admissions officers a non-statistical evaluative tool. The next several years were relatively uneventful, with only minor revisions cropping up here and there.

Legal educators accepted the domino of the predictive value and statistical validity of the LSAT, albeit with some hesitation, perhaps because there were few useful alternative quantitative methods available to evaluate law school candidates when all other factors seemed equal. But, beginning in 1989, the LSAT’s captive audience grew restless, then downright hostile. Something seemed amiss as reported scores suddenly jumped higher, while applicants’ GPAs dropped.8 Was the emperor wearing no clothes?

There was a noticeable upward trend in LSAT scores in tests administered after the 1986-1987 testing sessions.9 The real surprise, however, came in 1989 when 800 of 103,000 LSAT scores were perfect 48’s, in contrast with 210 in the previous year. 3600 candidates scored a 45 or better in 1989, compared with 2000 in 1988.10 Using 1989-1990 test results, the students who entered law school in the fall of 1990 were geniuses: there were 999 perfect 48’s, and 4300 candidates scored above 45.11

How would this upward trend affect a particular law school admissions office? The University of Chicago, ranked third on the U.S. News and World Report Survey of the leading American law schools, (April 29, 1991)12 had to digest the following anomaly: As of January 1, 1990, 21.6% of its applicants boasted LSAT scores of 46 to 48. Only 10.2% were in that lofty range the year before. Curiously, the percentage of applicants who had attained undergraduate GPA’s of 3.75 or higher actually dropped, from 22.6% in 1989 to 20.9% in 1990.13

The Law School Admission Council postulates that the Class of 1993 just could have been smarter than their predecessors, according to Stephen Luebke, an assistant vice-president for test development.14 How then, does one explain the GPA decline?

Verification of the trend in discrepancy between the LSAT score and GPA comes from the Law School Admission Council itself. The Law School Admission Test/Law School Data Assembly Service Information Book, 1987-1988 lists the correlations in 1986 between LSAT scores combined with undergraduate GPA’s and first year law grades as ranging from .33 to .71.15 The Information Book for 1991-1992 lists the range of the same correlations in 1989 as .31 to .67.16 It may be assumed that the correlations for the magical year of 1990 are eagerly awaited in many admissions offices.

Some possible explanations have been offered for the rising LSAT scores. One is certainly free to assume that current test-takers have more upstarts than those who took the LSAT before 1988. “I know this seems counter-intuitive, but when test-takers are very able, they are frequently able to earn higher scores on a more difficult test than on an easier test,” is the explanation offered by Linda Wightman, a Law School Admission Council vice-president of test development and research.17

The more skeptical observer may point an accusatory finger at the more than 40% of the test-takers who take LSAT preparation courses like gladiators girding for battle. Anxious law school hopefuls are seeking shelter from the storm at preparatory ports of hope in record numbers. College Bound, Inc., a Plantation, Florida company that offers courses and guidance services to aid students applying to undergraduate and graduate schools, is an example of the explosive growth of companies offering preparation courses for the LSAT and other admission examinations.18

“The company tries to set up facilities in at least ‘moderately affluent’ communities with large student populations” according to Richard M. Lilly, an analyst with JW Charles.19 In 1990, College Bound’s sales were up 282% and projected growth for fiscal 1991’s sales is 245%.20

Another possible reason for the sudden emergence of genius among law-school applicants is a test modification that occurred in June of 1989. Prior versions of the test contained 120 questions; the new version had only 97-98 questions. The Issues and Facts section was removed,21 along with a section that had not been counted toward the LSAT score. This modified version was 30 minutes shorter22 than previous 1982 test version progeny. Of course, the most skeptical of all, the harbinger of doom, discounted most of

from it, reason critically, and analyze and evaluate the reasoning and argument of others.”27

The April-May issue of the LSAC/LASAS cautions admissions officers on their use of the new LSAT: “...because the changes reflected in the revised test will result in somewhat different measurement of law study, scores at the same percentile rank on the different versions of the test will not have the same meaning.”28
The new test has a different scoring scale, and measures applicants' abilities differently from the old test. Admissions officers are therefore in the ironic position of being forced to rely on other, more ancient indices of academic potential, such as undergraduate grades and life experiences, at the very moment they are handed a brand new, state-of-the-art LSAT. Until law schools become familiar with the new LSAT, the schools are being warned that: "Comfortable assumptions about the meaning of the test scores and indices will not apply to candidates who have scores on the 120 to 180 scale, and other information in applicant files will assume added importance." The administrators of the LSAT have steadfastly maintained that the one and only purpose of the LSAT is to assess an applicant's ability to successfully study law. Nonetheless, the LSAT has been offered by some as an indicator of other abilities, or disabilities, despite disclaimers by the originators of the test.

It is not a very well kept secret that some law firm recruiters often ask law students how they scored on the LSAT. Students are taken aback by the innuendo that a half-taker passing rates for those with LSAT scores in the 26-29 range was 33%, in the 30-33 range, 46%, and in the over-34 range, 80%. After weighing pros and cons of using a standardized test to evaluate the potential academic success of a law school applicant, the nagging question remains: How valid is the LSAT as a predictor of first-year law school grades? In 1989, a study of 167 LSAC-member law schools was conducted. The correlation between LSAT scores and first year grades ranged from 0.15 to 0.62, with a median of .43 (1.00 is a perfect correlation). Those familiar with less heady numbers know that a coin toss ranks higher on a probability scale — a .50.

Why require so many to suffer through such an arduous process? Dr. James M. Dabbs at Georgia State University is currently developing an arguably superior quantitative tool. He had 50 trial lawyers chew Extra Sugarless Gum and then expectorate into a plastic vial. He expects to find that litigators have high levels of testosterone; a scientific test that bypasses the Law School Admission Council completely. There is one drawback: The process does not exactly vault one into an exclusive circle...this same attribute is found among "juvenile delinquents, substance abusers, rapists and dropouts" as well as lawyers. Maybe it just needs a little work.

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Deborah Jugan is a fourth year evening student. She works for the District Attorney of Allegheny County.
Toward Freedom of Speech in Judicial Elections

The judicial candidate is on the campaign trail, and has just finished a rousing speech. Departing the podium to the cheers and chants of the crowd, he has obviously made an impression on the minds of those persons who will decide his fate on election day. The speech, which presented views on such germane issues as mandatory sentencing, the constitutionality of sobriety checkpoints under state law, and the candidate’s opinion concerning recently enacted abortion legislation, gave its hearers something to consider in making their choice to fill the next seat on the intermediate appellate court. It allowed those other than the candidate’s inner circle to understand his judicial philosophy and interpretational style, giving them a basis to compare his merits to those of his opponents.

In the weeks following the speech the candidate is called aside by an unelected board and advised to “conform his conduct” or risk disqualification to hold judicial office. Undaunted, the candidate continues to exercise his right to free expression and ultimately wins the election. Thereafter he is investigated by the board, whose recommendations to the Supreme Court prompt the issuance of an order barring the justice-elect from taking office.

The fictional scenario just described would seem typical of the “freedom” of speech one would expect to find in a totalitarian Eastern Bloc country, where years of repression are just now beginning to be redressed. Yet it’s a situation which could potentially occur today under the laws of the Commonwealth of Pennsylvania.

Restrictions Codified

Judicial elections in Pennsylvania are governed by a set of regulations promulgated by the Pennsylvania Supreme Court and codified at Title 204 of the Pennsylvania Code. The regulations cover all aspects of campaigns, from fundraising matters to political advertisements, and are applicable to attorneys through bar membership and to non-lawyer district justice candidates by implication.

The pertinent sections of the Pennsylvania Code are similar to those found in other jurisdictions:

The faithful and proper performance of his duties if elected being material, a candidate may discuss his qualifications and the qualifications of his opponent. He may pledge the faithful and proper performance of his duties, but should make no other promises of conduct in office. He should not state his views on disputed legal or political issues.\(^1\)

There should be no references to ethnic groups, religions, sex, political or other issues, which tend to stir up the emotions or impugn the candidate’s capabilities for functioning impartially and without bias.\(^2\)

While the regulations are laudable in principle, they go beyond the reach necessary to ensure dignified judicial campaign practices by banning significant forms of expression necessary to present a candidate’s views to the voters.

Enforcement

Violations of these regulations are investigated by the Judicial Inquiry and Review Board (JIRB), a nine-member appointed group whose composition is established by the Pennsylvania Constitution.\(^3\) The JIRB is responsible for investigating alleged violations of the standards of conduct for members of the Pennsylvania Bar, Title 204 PA Code, and making disciplinary recommendations to the Supreme Court for action where necessary. In relation to the conduct of judicial elections, the Board has authority, inter alia, to investigate allegations of speeches, statements, or other public expressions which may violate the proscriptions against free speech contained in the Code.

In the case of trial and appellate court candidates (who must necessarily be members of the bar), the JIRB may “in appropriate circumstances” recommend to the Supreme Court that sanctions be imposed ranging from a reprimand up to and including suspension. While the Board lacks the authority to order the removal of an “offending” candidate’s name from the ballot (a virtual impossibility due to the procedural delays built into the system versus the relatively short length of a campaign), the potential consequence
could be suspension from the practice of law, which would, in the case of a winning candidate, prevent him from taking office. In district justice races, the JIRB has no actual authority over non-attorney candidates during the campaign. If the alleged offender loses the election the matter is dropped. A “catch 22” situation occurs when a non-attorney candidate allegedly violates the Code and wins the election. When this occurs the individual comes under the Board's jurisdiction and could be precluded from taking office.

Constitutional Questions

Those familiar with basic constitutional law concepts feel secure that freedom of expression is protected by the First Amendment. Such freedom is not absolute, as it is recognized that certain persons properly lose a degree of latitude in exercising this freedom due to anti-social purposes or conduct related to the speech. Where speech is to be exercised for any other purpose, however, there is no proper reason for limiting its scope in a free society.

In the arena of democracy, unrestricted freedom of speech is necessary so that both the candidates and the electorate can realize the full benefits of liberty which are guaranteed to citizens in a free society. Where a regulation goes as far as to restrict speech because of its content, there is a strong presumption that the regulation is unconstitutional. Any limitation on a candidate's right to freely express himself carries with it a corollary restriction on the right of citizens to freely receive information.

The constitutionality of regulations on campaign speech has never been challenged in Pennsylvania. The regulations have not proven to be a point for criticism by candidates, and the possible reasons could make for an interesting socio-political examination beyond the scope of this article. It is important to observe that the situation differs markedly elsewhere.

A recent decision in the U.S. District Court for the Northern District of Florida held unconstitutional that state's rules prohibiting statements of opinion during judicial campaigns. The rules had been challenged by a candidate for judicial office in Citrus County, Florida, who desired to attack the incumbent's record and discuss relevant disputed issues. The plaintiffs requested a preliminary injunction preventing the enforcement of Canon 7(B)(1)(c) against them, on the grounds that the restrictions therein violated their constitutional rights to freedom of speech contained in the First and Fourteenth Amendments.

The wording of the Florida restrictive Canon, similar to that of Pennsylvania's regulations, prohibited the candidate from engaging in any public discussion of “disputed legal and political issues.” The issues raised by the plaintiffs included the limitation on the right of free expression by a candidate, as well as the right of the public to freely receive information about judicial candidates.

The court began its analysis by pointing out that states need not treat judicial candidates the same as candidates for other elective offices. The different function of the judiciary and its independence from partisan politics, as well as the requirement that attorneys adhere to rigid professional ethics standards, may require abstention from that which otherwise would be constitutionally protected behavior. In expressing its rationale, the court stated:

“A person does not surrender his constitutional right to freedom of speech when he becomes a candidate for judicial office. A state cannot require so much. ...[I]t must recognize the candidates' right to make campaign speeches and the concomitant right of the public to be informed about the judicial candidates.”

The court's analysis focused on the overbreadth of the proscriptions contained in the Canon. Specifically, the court reasoned that it restricted virtually every type of speech with the exception of background information. Liking the restrictions on the free flow of information in campaigns to the prior restrictions on attorney advertising, the court expressed its belief that such were products of the state's underestimation of the public's ability to place the information in its proper perspective. Since the defendant did not demonstrate that the Canon was the least restrictive means for protecting a compelling state interest, and since other requisite formalities for issuance of a temporary injunction were met, the district court enjoined enforcement of those restrictions relating to public comment on legal and political issues.

Present Effects

The fact that Pennsylvania's judicial candidates have not challenged the constitutionality of such regulations does not ameliorate their negative effects on the judicial selection process. An informed electorate is essential to the effective functioning of a representative democracy, and while the judicial branch cannot be placed on par with the partisan legislative and executive branches in the same sense of the word “representative”, it is still a branch selected by the citizens to carry on a crucial part of the governing function. Today, as much as at any point in our history, the decisions of trial and appellate jurists effect a wide variety of issues touching the lives of everyone, from routine minor civil and criminal matters in Common Pleas, to fundamental matters of constitutional rights in appellate forums. It is therefore ludicrous and counter-productive to force voters to make their selection without knowing the candidate's views on critical issues.

Banning discussion of controversial topics by judicial candidates, though a seemingly minor point of technical regulation designed to preserve dignity and integrity in elections, has a nefarious ripple effect which presents profound socio-legal questions to the scholar of judicial administration.

One obvious effect of the ban is the limitation on the right of free expression by those persons desiring to become a candidate for judicial office. While the Federal Constitutional right to free speech may be limited in certain circumstances for the common good, those situations are generally delineated by a proposed usage of speech which would be contrary to civility and government stability. Such restrictions have never been applied to peaceful political discourse. In fact, such expression has traditionally enjoyed a greater latitude than ordinary or commercial speech.

To limit a prospective candidate's public remarks to non-controversial issues is to effectively deny him the right to present his views to the electorate in a personal manner which distinguishes him from his opponents. To require a civic minded attorney to decide between the free exercise of his First Amendment rights and the pursuit of judicial office is to place an undue burden on the latter activity. The right to hold public office and the right to free expression are not mutually exclusive.
For those candidates who loathe public exposure and criticism of their judicial philosophy and governing beliefs, the
regulations provide a convenient security blanket under which they can hide. The
game can be played actively, as with the
candidate remarking that he'd like to
comment on a particular matter, "but is
prohibited from doing so by judicial cam-
paign rules". In the alternative, a can-
didate can passively remain silent, knowing
that the specter of the rules are a sufficient
deterrent to prevent his opponents from
publicly taking him to task.

A correlative result of the ban is the
denial of the electorate's right to receive
information vitally necessary to their intel-
ligent exercise of the franchise. Regardless
of whether you consider the judiciary apolitical, each judicial candidate naturally
possesses certain views and opinions on
controversial issues with which he'll be
faced after ascending to the bench. How
he will decide these issues will have a direct
bearing on the lives and freedom of those
asked to elect him. Yet as an operative
result of the regulations, voters are pro-
hibited from freely receiving candidates’
opinions on controversial issues. With such
a paucity of free information, how are
voters to know where a particular candidate
stands on issues critical to their future? The
ban on discussion denies the electorate the
ability to make an informed choice in
judicial elections.

Witness the scrutiny given by the Senate
to the views of Justice Thomas during
hearings on his appointment to the U.S.
Supreme Court. Of prime interest were his
views on controversial issues he will face as
a Justice. Why should the electorate be
forced to settle for less than complete
information? The practice of legislative
examination of judicial appointees while
simultaneously forcing the electorate to
make their decisions in an information
vacuum is to make a mockery of the judi-
cicial election process. The resulting apathy
serves as logically faulty support, powerfully
presented to apathetic citizens, to further
the agenda of those who would elimi-
nate judicial elections in favor of an
appointment system.

With the electorate forced to labor un-
der this system of non-information there
should be little surprise that a malaise has
infected the public's perception of judicial
elections. This has resulted in a degree of
voter indifference so acute that calls are
heard from many quarters to “reform” the
system by substituting “merit” based ap-
pointments, thus effectively denying the
voters what little measure of informed
choice exists under the present system.
Such calls are not heard in regard to the
elections of officers in the two other
branches of government; legislative and
executive branch candidates are not
hampered in their freedom of expression
as are judicial hopefuls.

Surely no one suggests preventing a
genubatorial or legislative candidate from
speaking out on auto insurance, tort re-
form, and other issues which may come
before him for decision. Quite the
contrary, such candidates are expected to
engage in robust discussion. As opposed
to an information barrier, open discussion
could enhance interest in judicial races and
help to conform the judiciary’s inter-
pretational philosophy to that of the
majority of voters.

The most serious effect of the present
practice is the toll exacted on good state
government by the continued election of
candidates to both trial and appellate
benches without regard to their views on
crucial issues. Those elected will inherently
carry with them a personal philosophy
which will be reflected in their opinions.
Yet those who elect them will do so with-
out knowing their stance on important
issues. Such a practice is logically counter-
productive to the functioning of any branch
of government, and serves to fuel a lack of
faith and respect in our basic institutions.
One need only note the intense question-
ing of Supreme Court nominee Clarence
Thomas if they have any doubt about the
significance of a judicial candidate's views
on controversial issues.

True Reform

Reformists in state government have
called for the substitution of merit appoint-
ment for the present popular election sys-
tem. This alternative is offered as a remedy
for present statewide contests in which
voters do not really know or understand
for whom they are voting.

A better proposal would be to give vot-
ers the same opportunity to make intelli-
 gent choices in electing statewide justices
as exists in non-judicial races. Careful
amendment of the regulations to eliminate
the ban on candidate comments on con-
 troversial legal issues would allow candi-
dates to give voters an idea of their posi-
tions on pertinent issues, and return a
measure of real choice to such contests.
The most direct routes to this goal are via
pressure applied by lawyers' professional
associations to a change in the regulations
through amendment, and for attorney-
candidates to bring suit to enjoin the en-
forcement of present regulations.

The continued viability of popular elec-
tion of Pennsylvania jurists rests on the
bar's awareness of the present restriction
on candidate's public expressions and its
effects on the selection process. Only then
can the attorneys of today and tomorrow
understand the hidden issue causing voter
apathy and work towards true reform in
judicial selection.12

References

1. 204 Pa Code Sec 39.2 (b). Qualifica-
tions. (Emphasis added.)
2. 204 Pa Code Sec 39.3. Campaign
methods. (Emphasis added.)
3. Pa Const, Art V, §24. For powers and
procedures see 42 Pa Cons Stat Ann §
4. US Const, Amend I.
5. To use an oft quoted example, as
Justice Holmes pointed out in his
aphorism, the First Amendment does
not protect the right to shout “fire” in
a crowded theater if there is no fire.
Schenck v United States, 249 US 47,
52, (1919).
7. ACLU of Florida v The Florida Bar, 774
FSupp 1094 (ND Fla 1990).
8. Id.
9. Id.
10. Id.
11. For example, examine the greater
protection accorded comments re-
garding public and political figures in
the context of defamatory speech in
New York Times v Sullivan, 376 US 254,
(1964).
12. Nothing in this article is intended to
deny the propriety of other restrictions
currently in force regulating judicial
campaign finances, partisan political
activities, fundraising, etc. Such limi-
tations, unlike those on speech, are
necessary to curb the perception of
political or other improper bias among
the judiciary, without striking at the
heart of Constitutional liberties, good
government, and informed voter
choice.

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Equal Footing

In The Workplace

The Reasonable Woman Standard

During the past several decades, millions of women have participated in a never-ending struggle to gain social acceptance and equality in the workplace. Initially, their struggle centered upon getting equal employment opportunities. Later, their struggle focused on opportunities for advancement and other important issues such as maternity leave. Although today these problems still remain in the forefront of their struggle for equality, resolving the problem of sexual harassment has recently gained significant attention in the women's movement for equality in the workplace. The decision of some courts to adopt a reasonable woman standard in determining sexual harassment claims may prove to be a promising development in women's quest for social acceptance and equality in the workplace.

Title VII of the Civil Rights Act of 1964 as amended by 42 USC 2000e-2(1), makes it "an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin." Obviously, the purpose of Title VII was, in part, to prohibit employers from discriminating against women by denying them equal employment opportunities or compensation, conditions and/or privileges of employment. Initially, however, Title VII did not protect women from sexual harassment in the workplace. Many women, consequently, had no cause of action under Title VII when they were subjected to hostile working environments.

In June, 1986, the United States Supreme Court in Meritor Savings Bank v Vinson, expanded the scope of Title VII by holding that sexual harassment is a form of sexual discrimination. Therefore, the victim of sexual harassment could now establish a cause of action under Title VII that might warrant a remedy.

The Meritor court also noted that a cause of action for sexual discrimination in violation of Title VII may be based on two distinct forms of sexual harassment: (1) quid pro quo sexual harassment, the most obvious form of sexual harassment, which usually involves "demands of sexual contact as a condition of employment or advancement"; and (2) hostile environment sexual harassment, the least perceptible form of sexual harassment, which may range from sexual touching or demands to sexual comments and epithets to the mere circulation of pornography.

The Supreme Court's decision that a sexual harassment claim was actionable as a violation of Title VII was without a doubt a landmark decision. However, the Meritor decision also fostered a new problem, that is: How was the court going to determine the guidelines and standards for defining what specific conduct would create a sexually hostile environment?

The Equal Employment Opportunity Commission (EEOC), an agency created in 1964 by Title VII of the 1964 Civil Rights Act for the purpose of promoting action programs that would effectuate equal employment opportunities, set guidelines describing hostile environment harassment as "conduct which has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." Judicially, the Ninth Circuit Court, in Jordan v Clark, announced that a hostile environment existed when an employee could show (1) that he or she was subjected to sexual advances, requests for sexual favors or other verbal or physical conduct of a sexual nature; (2) that the conduct was unwelcome; and (3) that the conduct was sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. Confusion and uncertainty still persisted as to what specific "severe and pervasive" conduct would "unreasonably" create an "intimidating, hostile, or offensive environment".

Most courts granted recovery in only the narrow band of cases where sexual contact or repeated sexual demands had occurred—i.e., quid pro quo sexual harassment cases. Conversely, few courts allowed recovery in hostile environment sexual harassment cases where "lewd comments, inquiries or jokes; the use of sexual epithets; and the prominent display of pornographic materials" were the basis of the claim. For instance, in Jones v Flagship Int'l, the court held that "two requests for sexual contact plus one incident involving bare-breasted mermaids used as table decorations for a company party were insufficiently pervasive to create a hostile environment". In Highlander v KFC Natl. Management Co., the court held that "one instance of fondling the plaintiff's breasts and buttocks and one verbal proposition by two different managers were not sufficient to establish a hostile environment". In Scott v Sears Roebuck & Co., the court held that "being repeatedly propositioned and winked at by a supervisor, slapped on the buttocks by her coworkers, and getting the response, 'what will I get for it?' when asking for assistance did not constitute an environment sufficiently hostile". Finally, in Rabidue v Osceola Refining, the court held that a sexually hostile environment did not exist where the workplace contained posters of naked and partially dressed women and where a male employee customarily called women "whores", and other vulgarisms.

On many occasions, the courts in these hostile environment type sexual harassment cases dismissed the victim's claim merely on some testimony by the female-plaintiff that she did not want to bring immediate action because she did not want to make a "big stink about it" or because it was "not that big of a deal". By taking this approach, these courts were failing to take
into account the perception of the female victim and "understand her reluctance to make waves" in the male-dominated workplace. This approach was therefore "running the risk of reinforcing the prevailing discriminatory practices of the male-dominated workplace." 12

Kathryn Abrams, in her 1989 Vanderbilt Law Review article entitled, Gender Discrimination and the Transformation of Workplace Norms, urges that the courts adopt an adjudicative approach that would consider the female-plaintiff's perspective. She enunciates the importance of re-thinking sexual harassment for the simple reason that "men regard conduct in the workplace, ranging from sexual demands to sexual innuendos, differently than women do." 13 This difference results from at least two factors. First, since women are relative newcomers to many types of work, many may occupy entry-level positions of an occupation. These circumstances may produce feelings of low self-esteem or inferiority. Sexual advances or innuendos, consequently, may be construed by women as judgments about their ability to succeed. Secondly, because women, in general, have greater physical vulnerability and have been raised in a society where rape and sexual assaults have reached unprecedented levels, many women may have good cause to be wary of sexual encounters. 14 Abrams contends, therefore, that these factors must be understood and accounted for before the courts can effectively adjudicate sexual harassment claims. Consequently, she proposes a "revised approach" that would emphasize the victim's perspective.

Citing the Abram's article, the Ninth Circuit Court in Ellison v Brady, became one of the first courts to adopt the reasonable woman standard in determining sexual harassment claims. In Ellison, a female plaintiff brought suit against a male co-worker who had written her numerous bizarre love letters, pestered her with unnecessary questions and hung around her desk requesting lunch dates. In reversing summary judgment for the defendant, the court held that a female plaintiff states a prima facie case of hostile environment sexual harassment when she alleges conduct which a reasonable woman would consider sufficiently severe or pervasive to alter conditions of employment and create an abusive working environment. Such a gender-conscious standard, the court concluded, would not establish a higher level of protection for women than men, but rather enable women "to participate in the workplace on an equal footing with men." 15

Although the new standard might someday establish "equal footing" in the workplace, some judges argue that there are several problems with adopting such a standard. First, asking judges and jurors, many of whom are men, to apply a reasonable woman standard might be unfeasible. Simply stated, a reasonable woman standard would require a man to see with and/or through the eyes of a woman. Although the male judge or juror and the female victim would "see" the same conduct or occurrences, the man's experiences might prevent him from "seeing" the events and circumstances from the woman's perception, viewpoint, or experience. This cultural problem can be best exemplified and understood given the expert testimony in a recent Eleventh Circuit Court decision: The testimony revealed almost "flip-flop attitudes" when both men and women were asked what their response would be to being sexually approached in the workplace. Approximately two-thirds of the men said that they would be flattered and only fifteen percent said they would feel insulted. For the women, the proportions were reversed. 16

There is no denying that there are perceptual differences between men and women as to what constitutes sexual harassment. These differences have developed over many years out of cultural norms and will continue to exist in the future. However, in the long run both men and women must learn what conduct offends the "reasonable person of the other sex" 17 so that this gap in perception might one day be abridged.

Another problem some judges have with a reasonable woman standard is that, since the standard examines primarily the victim's perspective, a well-intentioned compliment on the part of a man employee might be interpreted by the female employee as a sexual remark or advance and, therefore, form the basis of a cause of action.

Undoubtedly, under the new standard, there might be an occasion where certain conduct, such as compliments, may be classified as unlawful sexual harassment even though the harasser did not intend or realize that his conduct was creating a hostile environment. However, mere traditional compliments would have to be very "pervasive" in order to create a hostile working environment. And, if the "traditional compliments" were that pervasive, it might be questionable whether or not the compliments were ever really well-intentioned.

Whatever the case, no standard is foolproof—especially standards that are being newly developed. The reasonable woman standard is no exception. To be successful, the reasonable woman standard will have to be adaptable to the changes in the views of the reasonable woman. For now, the new reasonable woman standard is a progressive step in the struggle by women to destroy the outmoded norms of the "male" workplace and stabilize themselves in the workplace on equal footing.

References
1. 42 USC 2000(e)-2(1).
4. 29 CFR 1604. 11(a)(3).
5. Jordan v Clark, 847 F2d 1368, 1373 (9th Cir 1988), see also Henson v City of Dundee, 682 F2d 897 (11th Cir 1982).
6. Abrams at 1199.
7. Id., Jones v Flagship Int'l, 793 F2d 714 (5th Cir 1986).
8. Id. at 1200, Highlander v KFC Management Co., 805 F2d 644 (6th Cir 1986).
11. Highlander v KFC National Management Co., 805 F2d at 646.
14. Id. at 1205.
15. Ellison v Brady, 924 F2d 871, 879 (9th Cir 1991).
17. Ellison v Brady, 924 F2d at 889.

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Strict Product Liability’s Comment k: Safety Device or Roadblock to an AIDS Vaccine?

"Potentially ‘the most devastating infectious disease the world has ever known’."¹ This description of the worldwide AIDS outlook becomes even more grim when quantified by World Health Organization statistics: Over 1 million people in the world contracted AIDS since 1981. A worldwide survey of the situation reveals that approximately 8-10 million adults are presently infected with HIV and, to date, approximately 1 million children have been born infected. The number of victims is growing, and by the year 2000, approximately 40 million worldwide are predicted to contract this fatal illness.²

The outbreak of this disease in 1981 sent science and medicine searching for answers. Several drugs are being developed to relieve post-infection symptoms; still a need exists for a generalized vaccination of the entire population to prevent its spread. Currently no effective vaccination is available to prevent AIDS.

Natural roadblocks encountered by scientists in the development of a vaccine pose immediate problems for the legal world. For instance, regarding the development of a vaccine for the prevention of AIDS: (1) Vaccines are hard to test and there are no suitable animal models; (2) Infrequent side effects of a vaccine become identifiable only after widespread use; (3) There is a chance of incurring the disease from the vaccine which it is intended to prevent.³ Such problems involved in vaccine development and implementation are disincentives to manufacturers and tend to send insurance companies running. These problems make the AIDS vaccine commercially unattractive to manufacturers wary of blanket imposition of strict liability.

An analogy to the AIDS situation may be illustrated by the following statistics relating to current vaccines: One out of 312,500 doses of pertussis (DPT) vaccine may cause brain damage, and one out of 32 million doses of polio vaccine results in paralysis.⁴ The law requires each individual who attends school in the United States to be vaccinated.⁵ Yet, as of 1984, only one manufacturer, Merck, Sharp & Dohme, has continued to produce measles and mumps vaccines, and presently there is only one manufacturer of DPT vaccine.⁶ Such a decrease in the number of producers is attributable to enormous litigation costs. In 1984 alone, $9.8 million in manufacturing costs were not reimbursed by insurance.⁷ Insurance companies are often unwilling to underwrite such unpredictable risks, even in the case of childhood vaccines. In response to the attempt to treat modern-day disease, the legal system must address whether manufacturers of vaccines and/or other new developments in the field of drugs should held strictly liable for resultant consumer injuries.

The Law of Products Liability

Fundamental to any products liability action is conclusive showing by the plaintiff that a product is defective, or dangerous to an extent beyond that which would be contemplated by the ordinary consumer with the common knowledge as to its characteristics.⁸ Traditionally, products are classified as “defective” in one of three ways: (1) manufacturing defect; (2) design defect; and (3) failure to warn.⁹ Manufacturing products liability cases, however, which concern drugs and/or vaccines involve widespread risks and, consequently, do not fit neatly into one of these categories.

Termed “generic nondesign risks” by Professor Joseph A. Page of Georgetown University Law School, certain toxic product risks are inherent in the nature of the product regardless of its design. Such risks (e.g. unforeseen adverse drug reactions in a certain percentage of the population) cannot be eliminated, given the current state of technical knowledge, without withdrawing the product from the market.¹⁰ Among risks considered to be “generic” are the risks of cancer from smoking and side effects of caffeine ingestion. The legal profession must respond to these generic product risks created by new scientific developments; product liability law in this area must be fashioned to promote optimal protection of all parties.

The generally accepted standard of strict liability of sellers/manufacturers of products for physical harm is set forth in Section 402A of the Restatement (Second) of Torts (hereinafter “Restatement”). This section imputes liability to a seller of a “defective product unreasonably dangerous”, if (1) the seller is engaged in the business of selling such a product, and (2) it reaches the consumer without substantial change in the condition in which it is sold. The rule applies regardless of the care used by the seller, with no privity requirement.

The crux of the modern legal debate as to whether a strict liability standard should be applied in the field of drugs is Comment k of the Restatement. This comment provides an exception for unavoidably unsafe products, or beneficial products incapable under present technical knowledge of being made completely safe for their intended and ordinary use. Comment k provides in pertinent part:

There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. These are especially common in the field of drugs...[such as] the vaccine for the Pasteur treatment of rabies... Such a product, properly prepared, and accompanied by proper directions and warn-
ing, is not defective, nor is it unreasonably dangerous ... It is also true of manufacturers of new or experimental drugs as to which, because of lack of time and opportunity for sufficient medical experience, there can be no assurance of safety, or perhaps even purity of ingredients, but such experience as there is justifies the marketing and use of the drug notwithstanding a medically recognizable risk. The seller of such products, ... with the qualification that [the products] are properly prepared and marketed, [with] proper warning [given] ... is not to be held strictly liable for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known, but apparently reasonable risk.

The origins of Comment k lie in a proposal at a 1961 American Law Institute (ALI) meeting that all prescription drugs should be specifically excluded from 402A. The widespread judicial adoption of 402A completed the demise of warranty cases involving products for internal human consumption, thus eliminating plaintiff's burden of establishing privity. Dean Prosser suggested a better case could be made for excluding “relatively new, experimental, and uncertain drugs, of which there are a great many on the market.”

Comment k has been criticized for its apparent ambiguity (i.e., the section initially speaks of both prescription drugs or those requiring FDA approval and experimental drugs and concludes with drugs “properly prepared and marketed”), but the plain meaning does reveal that exemption is not automatic. To justify an exemption from strict liability under Comment k, three factors must be established: (1) Utility of product outweighs risk; (2) Benefits of the product cannot be achieved in a safer way; and (3) Risk is unavoidable with respect to present degree of knowledge. The granting of a Comment k exemption focuses on the product itself and does not preclude manufacturer liability under negligence (if the exercise of reasonable care would have uncovered the hazard) and/or failure-to-warn principles.

Common Law Treatment of Comment k
The changing face of products liability law from primarily a negligence standard to a strict liability standard is marked by a California Supreme Court decision, Escola v Coca Cola Bottling Co. Escola involved an injury resulting from a manufacturing defect - an exploding soda bottle.

In an oft-cited concurring opinion, Justice Roger Traynor suggests that a manufacturer should be held absolutely liable, if, in placing a product on the market, (1) it knew the product was to be used without inspection and (2) it proved to have a defect that caused the injury. Justice Traynor expands the basis of liability to include strict liability positing that public policy demands the adoption of such a standard to most effectively reduce the hazards to life and health. The risk of injury can be insured by the manufacturer and distributed to the public as a cost of doing business.

The intuitive words of Traynor have contributed greatly to the protection of those injured by defective products in general. Within the realm of drugs and medical research, however, such legal innovation becomes a catch-22: The adoption of such a consumer protection policy stifles research by laboratories and manufacturers unable to bear the possible liability costs. The result is a decrease in new - and possibly lifesaving - medical treatments to prevent and/or decelerate the devastating effects of major diseases. Such progress is the only hope for a person who is HIV-positive.

Recently a leading California Supreme Court case, Brown v Superior Court, addressed the need for a modification of product liability law with regard to the manufacturers of prescription drugs. In Brown, Plaintiffs instituted an action against manufacturers of the prescription drug diethylstilbestrol (DES), a synthetic estrogen used to prevent miscarriages, for alleged injuries due to in utero exposure. The Supreme Court of California held Comment k to be applicable to all prescription drugs, with manufacturers only liable on a negligence standard. As public policy reasons for blanket adoption of the comment, Brown cited the public interest in the “development, availability, and reasonable price of drugs”. In addition, Brown was one of the first cases to speak of rising insurance costs and a corresponding rise in consumer costs in its disposition of the case. Such factors result in a decrease in the availability of possibly lifesaving or necessary treatments. For example, according to E.R. Squibb & Sons, Inc., Benedictin, the only antiseptic drug available for pregnant women, was withdrawn from sale in 1983 because the cost of insurance almost equalled the gross income from the sale of the drug. Its removal from the market came only after a 300% increase in price.

However, to suggest that there is a blanket solution to the problem of drug manufacturer liability as presented in Brown is to close one's eyes to the reality of conflicting judicial treatment of the problem. The Fifth Circuit Court, in the controversial case Reyes v Wyeth Laboratories, suggested that the costs of even unavoidable injuries are best borne by the manufacturer acting as an insurer for vaccinees.

Perhaps a more reasonable balance between Brown and Reyes is established by the Supreme Court of Idaho in Toner v Lederle Laboratories. Toner holds that vaccines are not “unavoidably unsafe” products per se under a Comment k analysis, and such determination must be made on a case by case basis. The Court
explained that the notion of automatically applying Comment k to all prescription drugs is contrary to the plain meaning of the comment, which refers to "some" and "many" drugs or products "common" to the field of drugs. The Court favored the application of the risk-utility analysis referred to in Comment k (i.e., "Lack of time and opportunity for sufficient medical experience ... there can be no assurance or safety, or perhaps even purity of ingredients, but such experience as there is justifies the manufacturing and use ... notwithstanding a medically recognizable risk...").

The adoption of Comment k which is unequivocally favorable to deep-pocket defendants facing juries which are influenced by severely injured plaintiffs has been the general trend in an overwhelming majority of jurisdictions.

Policy Arguments for the Adoption of Strict Liability Standard

Although strict liability regarding drugs is not the general standard applied today, many legal scholars continue to support such a standard in order to make manufacturers answerable for product-related harm for which negligence provides no remedy. The failure to eliminate or to warn against risks would render the manufacturer liable, even though such changes may be technologically infeasible.

Another rationale for strict liability adoption is that of accident avoidance. Holding manufacturers strictly liable would spur safety research that may reveal hidden dangers. It is often difficult for plaintiffs to prove negligence of the manufacturer under the doctrine of res ipsa loquitur ("the thing speaks for itself"). Such difficulty arises when distinguishing between adverse effects which are purely drug-related and those indirectly caused by the conduct of the manufacturer. The litigation process cannot feasibly address scientific research problems and thus speculation results concerning scientific "knowability".

Moreover, adoption of manufacturer strict liability would result in loss spreading to the party best able to accomplish such task, since generic risks endanger every user of the product.

In addition, some scholars who favor the consumer expectation test (a product is defectively dangerous if it is dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchased it with knowledge common to the community as to the product's characteristics) believe that a strict liability standard provides the sole assurance of protection against risks which do not often surface until after a high degree of exposure. Manufacturers convey to the public a sense of product safety through the use of mass advertising and marketing. If consumers are unable to foresee such risks, they are unable to insure themselves and absorb resulting costs.

A final argument which encompasses all of the above and describes the modern crisis is perhaps best summed up by Professors John E. Montgomery and David G. Owen: "Consumers no longer have the ability to protect themselves adequately from defective products due to the vast number and complexity of products which must be 'consumed' in order to function in modern society."

Policy Arguments for the Adoption of Comment k, Precluding Strict Liability

Perhaps a more farsighted approach to the products liability problem in this field involves the adoption of Comment k, as demonstrated by many state courts of highest jurisdiction. In attempting to tackle modern day epidemics, such as AIDS, scientists are often working in unknown and unpredictable areas. In order to develop possible lifesaving vaccines, for example, there is a point at which results of basic research must be implemented by actual trial testing. In this way, the legal community would be leaving open an option offering hope to terminally ill patients who have no viable alternatives.

Additionally, as stated before, adoption of a strict liability policy would lead to a lack of availability and increase in cost of drugs distributed to the entire population such as the DPT vaccine.

Finally, many legal scholars support a Toner "middle of the road" approach - treatment of such liability on a case by case basis. The fact that the scope of Comment k is often debated supports this position.

Solutions to the Product Liability Crisis

Determining the standard of liability for manufacturers of drugs has also become an issue of federal concern in light of increasing civil litigation. The National Childhood Vaccine Injury Act, passed in 1986, creates a program to provide a more efficient and less costly alternative to civil lawsuits. The program, the first federal no-fault system for handling claims arising from injuries caused by vaccines, could be the liability prototype for future vaccines such as an AIDS preventative.

The program does not protect a manufacturer against liability on negligence or failure-to-warn principles. The program's aim is to lessen the overloaded court system while lowering manufacturers' insurance costs and protecting vaccine supplies.

Vaccine recipients must adjudicate claims through this federal compensation program before filing a civil action in courts. Compensation may be awarded if the court finds that the vaccinee suffered injury in accordance with a Vaccine Injury Table (listing injuries and conditions resulting from the various childhood vaccines as well as a period of onset necessary for compensation). Rejection of this statutory award limits any subsequent action. A manufacturer will not be held liable for any unavoidable side effects of a properly prepared vaccine with proper warnings.

Generally, the program has succeeded thus far. After a last minute flood of claims due in part to lack of publicity by federal health officials, President Bush extended the Fall 1990 deadline for filing pre-1988 claims until January 31, 1991. As a result of the program, lawsuits against manufacturers have declined from 253 in 1986 to 47 in 1990. According to the Center for Disease Control, DPT prices have stabilized since the program's inception. Although this program provides one possible solution, it is not definitive: The $400 million program has been overwhelmed by over 3,000 claims, and the funds are draining quickly. So far the program has paid out $74 million in 145 cases.
Several additional solutions have been proposed in response to the growing product liability crisis: (1) federal recovery limitations placed on state courts; (2) federal grants/incentive programs to manufacturers pursuing medical and developmental research; and (3) total governmental assumption of liability in emergency situations.

Meanwhile, progress is being made by scientists conducting AIDS research, and many anticipate a working vaccine in humans by the year 2000. Jonas Salk, inventor of the first polio vaccine, has focused on a post-infection immunization strategy for controlling AIDS, which has been approved by the FDA for human studies.

The arrival of the new decade poses tremendous challenges for scholars in both the scientific and legal fields, as they try to establish a delicate balance between protection of both personal rights and technological innovation for the common good. It is only through cooperation between experts in both the scientific and legal fields that progress can be made on both frontiers.

References


3. Rosenfeld, Jurimetrics at 191.


6. Rosenfeld, Jurimetrics at 196. **Note-Statistics consistent with 1977 U.S. Govt. interagency task force estimate that 1 out of 6 manufacturers had eliminated at least 1 product line as a result of liability concerns.

7. Id at 196. **See also Johnson v American Cyanamid Co., 239 Kan.279, 118 P2d 1318 allowing $10 million award for paralysis from contact polio due to vaccine injury.

8. Restatement (Second) of Torts § 402A comment i (1965).


11. 44 States have adopted some form of strict liability based on s.402A. **See Beasley, J., Products Liability & the Unreasonably Dangerous Requirement xii-xiii, 97-100(1981) as cited in Rosenfeld, Jurimetrics.


13. Id.


16. Id, at 11.

17. 132 Chemical Week 14 (June 12, 1983).

18. Reyes v Wyeth Laboratories, 498 F2d 1264, 1266 (5th Cir 1974).


20. Restatement (Second) of Torts §402A Comment k.


22. Page, NYU L Rev at 867.


28. Id.

29. Rosenfeld, Jurimetrics at 197.

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Photos by T. Papadakos
Winning Strategies

Hack Wilson, a hard hitting outfielder for the Brooklyn Dodgers baseball team in the 1930's, was a great player. However, he had a serious problem: He enjoyed life in the "fast lane," often embarking on legendary drinking exploits. He was an infamous "partygoer" who would stay out the entire night, crawl into the team's hotel at the break of dawn, grab a couple of hours sleep, and get to the ballpark barely in time for the afternoon game.

Such exploits greatly distressed Wilson's manager, Max Carey. At the next team meeting, Carey spent time attempting to persuade the team players about the evils of alcohol. To prove his point, he stood beside a table on which he had set two glasses and a plate of live worms. One glass was filled with water, the other with gin, Wilson's favorite drink. With a dramatic flourish, Carey first dropped a worm into the glass of water. It wriggled contentedly. Next, Carey plunged a worm into the gin. It immediately stiffened and died.

A murmur escaped from those players obviously impressed with the manager's demonstration. However, Wilson was not among those affected. In fact he did not even seem interested. Carey waited a few seconds, hoping for some delayed reaction from the wayward slugger. When none came, he prompted, "Do you follow my reasoning, Wilson?" "Sure, skipper," answered Wilson. "It proves that if you drink gin you'll never get worms!"

Although this anecdote does not feature an attorney as the advocate, the lesson that can be learned from it is also significant to the legal persuader. That lesson is simply: No matter how strong your evidence, you will not be a very persuasive speaker unless listeners understand your message.

A lawyer is a professional speaker. Talking is how an attorney makes his living, whether in trial, arguing before an appellate court, advising a client, or conferring with a colleague. Every time you speak in your capacity as a lawyer, you are making a professional presentation. The success of that presentation will depend immensely on your ability to effectively communicate your message. The following are basic practices often employed by effective advocates.

Connect With Your Audience

As a persuasive speaker, you must convince your audience that your side or point of view is the best available answer to the dilemma posed. You do not persuade listeners by assaulting their values, "talking down" to them, or forgetting their presence. This will only antagonize your audience; it puts them on the defensive and makes them resist your arguments. You must show respect for your listeners and attempt to obtain a common ground with them.

Vince Baginski, an attorney from Pittsburgh, explains: "Be as personable and down to earth as your can. Be [each jury member's] friend or next door neighbor." Attorney Baginski has practiced both criminal and civil law for the past seventeen years and has done a considerable amount of trial work. Mr. Baginski indicated that gaining common ground is especially important at the start of a persuasive argument. You should try to relate to the jury. More often than not, most people sitting on the jury would rather be someplace else. This makes persuading a jury even more difficult because the members' minds are often thinking about what they would rather be doing. Therefore, if you can establish a common bond with the audience and get them nodding their heads in agreement, they will be much more receptive to your ultimate proposal. One of the most effective bonds a lawyer can point to is the very reason for everyone being in the courtroom that day—to right a wrong.

Another responsibility of an advocate in connecting with the audience is watching the listeners' faces for feedback and responding to the messages they are sending. For instance, if you see signs of confusion, repeat or rephrase the point you or your witness just made. If you see signs of distraction or lack of attention, talk louder, become more animated, or even shout. Remember that your goal is to get your ideas and arguments across.

Project An Image Of Credibility

Over the years, researchers have determined that a speaker's credibility is generally affected by two factors:
In The Courtroom

Competence (how an audience regards a speaker's intelligence and knowledge of the subject) and character (how an audience regards a speaker's sincerity, trustworthiness, and concern for the well-being of the audience). The more favorably a judge or jury views your competence and character, the more likely they are to accept what you say. Your credibility as an attorney will vary with each judge and jury as well as among individuals within the jury. This variance occurs because credibility is an attitude. Therefore, your objective is to change the attitudes of those judges and members of the jury who perceive you as having low credibility.

As a starting point in building credibility you should present your strongest argument first and then proceed to weaker arguments. Mr. Baginski calls this approach "Starting with your best foot forward." This "anticlimax" approach (as opposed to the "climax" order of presentation, where you save your strongest argument until last) is more effective if your listeners are opposed to your point of view. This tactic grabs the attention of the audience and establishes your competence from the outset.

Additionally, although your credibility is a function of your competence as an attorney, you should avoid trying to use your "lawyer-like" jargon. Big words may impress the jury, but if a member cannot understand what the words mean, you will have lost your chance to convey your message. Therefore, you should choose other strategies to convey that you are knowledgeable. For example, making and keeping eye contact while speaking will help you to appear more believable.

James W. McElhaney, Professor of Trial Practice and Advocacy at Case Western Reserve University School of Law, emphasizes that one of the best ways to let your audience know that you are a competent lawyer is to make sure what you discuss is true. "Talk only about what you know. Whenever you try to fake it, little verbal and non-verbal clues will give you away." In addition, do not improvise your entire argument to the court. Prepare for your argument and show that you have organized your presentation. A productive way to accomplish this is to "signpost." Signposts are very brief statements that indicate where you are in your argument. Always provide a preview of what you will be discussing in the introduction and highlight these points as you come to them in your presentation. Such a practice enables your listeners to follow the flow of your argument much more easily and establishes that your presentation is well planned.

Have Something To Say

Harry S Truman once said about politicians: "Those long-winded birds. They're all the same. The less they have to say, the longer it takes them to say it." The same statement could be said about many other speakers—especially lawyers. Some attorneys tend to be redundant, making the same point over and over. Frequently, this results from lack of anything better to say. Albeit, a certain amount of repetition is necessary to ensure that the speaker's main points will not be misinterpreted; there is little need, however, to hammer home the same point with redundancy. People who tend to ramble are perceived as incompetent or unsure of themselves. At the very least, such a speaker creates the impression that his point is extremely weak since he is spending so much time trying to explain and justify it (not to mention that it can be torture to sit through a long-winded attorney's presentation, especially for a jury member who only wants to get out of the courtroom.)

Thus, to be an effective advocate you must economize your use of language. Your rule of thumb should be: Have something to say, say it, and sit down. When you have finished with your argument, simply stop. According to Professor McElhaney, "Afterthoughts, recapitations, repetitive exhortations, and the dismal trailing off by the speaker who is not certain he has finished cost more than whatever they add. Better to leave them thinking they want more than knowing they have had too much." "On the other hand," Attorney Baginski adds, "if you have something to say, don't let yourself be cut off." He cautions that this must be accomplished tactfully, but you owe it to your client not to be rushed on significant points.
Keep It Simple

It has been said that "the art of simplicity is not only knowing how everything fits together, but also in knowing what can safely be discarded." Generally, lawyers seem to have difficulty in determining what can be left out of their presentation. Attorney Baginski proposes that the following elements can usually be discarded without mishap in the courtroom: Big words, length, and technical discussions of the existing law.

First, Mr. Baginski warns that "the [fewer] big words used, the better." Instead of using vocabulary that only lawyers seem to understand, you should keep it simple. You should be conversational. Talk to your audience as you would talk to someone you bumped into on the street. If you need to use big words or phrases, pin them down for your listeners—explain and define them in common sense terms.

In addition to keeping your argument simple, you should also keep it short. If there is no need for a lengthy discourse, address the issue and move on. Mr. Baginski explains, "I've always been told that the average attention span is relatively short— as short as twenty minutes—so you need to keep your argument brief or at least repeat your main contentions throughout a long argument. Through repetition, your point may reach someone who missed it the first time it was offered because the listener was not paying attention."

Finally, Mr. Baginski suggests that instead of engaging in a technical discussion of what the existing law is, you should explain the same laws in every day terms. Good examples and analogies are extremely helpful here—particularly if you can find one that the average person might encounter in his or her own life.

"In my experience, juries don't decide cases based on the law because, often, they don't understand it or weren't listening. To me, they seem to decide cases based on their gut reactions and out of a sense of fairness. That's why it's important to relate to them, to appeal to their emotions instead of discussing the technical aspects of the law." After all, the jury is probably expecting episodes like "L.A. Law" or "Equal Justice" in the courtroom. Why disappoint them?

Conclusion

In conclusion, effective advocates often employ the above tactics or variations of these tactics in attempting to persuade their audiences. These suggestions are only recommended guidelines and need not be adhered to strictly. Instead, these guidelines should be used strategically in attempts to get your message across. Remember, as an advocate, it is not your audience's responsibility to understand you. It is your job to make yourself understood.

References

3. Vincent Baginski is a solo practitioner, primarily practicing in Allegheny County, Pittsburgh, Pennsylvania. A graduate from Duquesne University School of Law, he has practiced approximately seventeen years in both civil and criminal law. Information for this article was obtained through an interview with this researcher on September 19, 1991.
4. Id.
6. Id.
11. Id.
12. McElhaney, 77 ABA J at 77.
13. Id.

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"This is the last train. If we don't catch this one, we'll never get there." The Paraguayan lawyer was speaking figuratively, and the analogy was particularly appropriate. Asunción's railroad station, built in 1853, was one of the first in South America, and, though now a national landmark, it continues to be a working depot. (One of its steam locomotives is still driven by a wood-fired engine.) But the lawyer was not concerned about railroads; he was speaking of democracy. Since Paraguay became independent in 1811, its history has been one of continuous dictatorship, unrelieved by democratic interludes. Perhaps it is the country's geopolitical position—landlocked and surrounded by large and powerful neighbors—that required Paraguay to depend too much on its army, and obscured the distinction between national defense and civil government. The small but impressive Pantheon of Heroes is a military chapel, and the House of National Culture is a military museum. The field marshals and generals whose political misdeeds are acknowledged with regret are nevertheless national heroes. But things have been changing.

At midnight, February 2-3, 1989, the thirty-four year dictatorship of General Alfredo Stroessner (who, quite properly, is not regarded as a hero) was ended in a short but bloody uprising. The leader of the coup, General Andrés Rodriguez, promised to work to establish constitutional democracy. The promise itself was not extraordinary; such assurances are boilerplate employed by all generals who stage coups in Latin America. But in Paraguay the promise was taken seriously by both the people and the provisional government, and the past two years have been characterized by an orderly transition to self-government. Members of both houses of Congress have been chosen in free elections. General Rodríguez, himself elected president, has promised to leave office when his term expires in 1993. In May and June of this year, for the first time in the country's history, municipal mayors were chosen by popular vote. The press is now free, and, in the words of one Paraguayan, "It is learning to be critical."
Taking Democracy Seriously:
Costa Rica And Paraguay, 1991

There is universal recognition that if the transition to democracy is to be complete and enduring, the country must have a new constitution. The current document, promulgated in 1967 at the direction of Stroessner, was designed to facilitate the old dictatorship. The document provides that judges shall be appointed by the president for terms that coincide with that of the president himself; the president, in his discretion, may prorogue or dissolve the Congress; and important categories of laws may be enacted by Congress only pursuant to presidential initiative. During the Stroessner years, the country was usually under a state of siege, which meant that the president could, and often did, imprison or expel his political enemies.

June, 1991 was an exciting time to be introduced to Paraguay. The city of Asunción inaugurated its first elected mayor. The statute was promulgated providing for the election on December 1 of the delegates who will write the country's new constitution. The newspapers were full of articles with titles such as, "What kind of constitution do we want?" Discussion groups which for years had pretended to be interested only in free trade or historic preservation were openly sponsoring workshops and seminars on voter registration, proportional representation, and judicial review. Fortunately, my schedule brought me in touch with many of the people and institutions most deeply involved in the effort to establish constitutional government: lawyers, professors, law students, volunteers in civic and community-development organizations, and the Senators and Deputies of the Joint Congressional Committee on Constitutional Affairs.

I had come to Paraguay from Costa Rica, and the similarities were as striking as the contrasts. Both countries are small, in area and population. Both were isolated at the time...
Before the advent of workers' compensation in industrial America, an injured employee had to bring suit against his employer and be able to overcome obstacles such as the burden of proving his employer's negligence and the common law defenses of contributory negligence, assumption of risk, and the fellow servant rule. These barriers to recovery proved so difficult to overcome, that injured employees usually recovered little or nothing after lengthy litigation and costly attorney fees.

The system weighed heavily in favor of employers, and thus workers' compensation was implemented to balance the scales. Disabled workers could quickly recover remuneration for their injuries. At the same time, businesses could avoid frequent and costly litigation and shift the cost of employee injuries to the consumers.

Today, workers' compensation covers ninety percent of all workers in the United States. Each state sets up its own system by statute. Workers' compensation operates on a basis of mutual exchange - while the employee receives compensation payments for injuries arising out of his employment, he relinquishes his right to a cause of action in tort against his employer. The system is designed to be fair and efficient for both employers and employees.

Despite its benefits, the workers' compensation system suffers from abuses when the employer and/or insurer unjustly deny or attempt to deny benefits to employees injured in the course of their employment. This malicious conduct must be addressed for workers' compensation to continue to operate fairly and efficiently.

One of these abuses occurs when employer/insurers arbitrarily cut off an injured employee's benefits. In Coleman v American Universal Insurance Company, the insurer, knowing plaintiff's inability to work, unreasonably cut off his compensation payments on at least three occasions. The plaintiff had medical reports verifying his injury, permitted all physical examinations, and submitted all the appropriate reports. Although the insurer had no reason to terminate the plaintiff's payments of workers' compensation benefits, the payments stopped on three separate occasions without any explanation. When payments are arbitrarily terminated, injured employees who are unable to work suddenly find themselves deprived of their livelihood and only means of support without knowing the reason. This magnifies the pain and suffering the worker is already enduring.

Sometimes insurers will resort to verbal misrepresentation to defeat a worker's claim. In Stafford v Westchester Fire Insurance Co. of NY, Inc., an employer/insurer intentionally and maliciously misled an injured employee, discouraging him from exercising his right to compensation. The employer/insurer also delayed and withheld payments even though the claimant clearly was injured in the course of his employment. Although an insurer must discuss compensation with a claimant, intentional misrepresentation during those discussions undermines the goal of fairness in workers' compensation, leading to a forfeiture of the very rights the system was designed to confer upon injured employees.

Other insurers have committed abuses in their investigation of compensation claims. When the plaintiff in Unruh v Truck Insurance Exchange filed a claim, the insurer's investigator befriended the plaintiff and deceived her as to his capacity and intentions. As the investigator and the plaintiff became friends, the investigator's partner secretly filmed their activities to determine the validity of her claim for benefits. Taking the plaintiff to Disneyland, the insurer's agent enticed her to engage in activities and even violently shook a rope-and-barrel bridge upon which she was standing, aggravating her injuries. Since she believed the investigator to be honest and had become emotionally interested in him, the plaintiff suffered a physical and mental breakdown upon learning of the deceit practiced upon her by the insurer's agent during his investigation. Although an investigation is a necessary part of workers' compensation claims, it
must not be carried beyond the boundaries of reasonableness.

One cannot pinpoint the exact reason employer/insurer abuses occurred in these cases. Some may withhold payments and conduct abusive investigations intending to prove a suspicious claim false. Some may simply be attempting to cut costs. For whatever reasons, insurers will continue these abuses and carry the exclusive remedy provision of workers' compensation acts as a shield unless some solutions are proposed.

One possible solution to the problem lies within the workers' compensation acts themselves. While most acts provide penalties for late payment of benefits, these provisions are only designed to cover inexcusable delays due to poor management or deficient administration. In addition, the penalty payment may be for a small amount or go to the state and thus will provide no assistance to the party injured by the delay - the person whose means of support has suddenly been cut off. More effective provisions within the workers' compensation acts are necessary to control these abuses.

The most comprehensive solution to the problem is the Model Act drafted by the National Association of Insurance Commissioners. This Model Act, which has been adopted by thirty-four states, generally prohibits unfair or deceptive practices such as (a) refusing to pay claims without conducting a reasonable investigation based on all available information, (b) failing to adopt and implement reasonable standards for prompt investigation of claims, (c) failing to try, in good faith, to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear, and (d) trying to settle claims for less than a reasonable person would believe he or she was entitled to by reference to written or oral advertising material. However, even this Model Act is deficient in providing a complete remedy. The act fails to provide a penalty for causing a disabled worker to suffer, as occurred in the Coleman and Unruh cases, severe emotional distress.

The alternative used by the courts in Coleman, Stafford and Unruh involves creating an exception to the exclusive remedy provision of workers' compensation when the insurer engages in intentional or willful misconduct. The exception permits an employee to bring an action for intentional infliction of emotional distress or for the new tort of bad faith. The bad faith claim is premised upon every insurer's duty to act reasonably and in good faith. The duty is violated when the insurer "maliciously and without probable cause or unreasonably and in bad faith withholds payment in an attempt to deprive an insured of benefits under the policy."

In Coleman and Unruh, a blanket exclusive immunity remedy would have completely protected the insurers despite their outrageous and malicious conduct. At the same time, the injured parties would have potentially suffered severe emotional distress and financial hardship. Allowing the employee to sue the compensation carrier for intentional misconduct gives him an alternative when workers' compensation fails.

The problem is that not every state offers all of the above alternatives to injured workers. Sixteen states have not yet adopted the Model Act. Only four states allow claims for intentional infliction of emotional distress, some states - including Pennsylvania - still do not.

...a legitimately injured individual has suffered great physical and emotional distress and received no compensation...the courts and/or legislatures must address this issue.

To effectively correct the deficiencies of the workers' compensation system, each of the above alternatives must be available to every employee under workers' compensation. Consider the following scenario. An employee, with two children, seriously injures his back within the scope of his employment and is unable to work. The employee's spouse is not able to work while caring for the injured employee and other family members. Suddenly, the employee's compensation payments are withheld and the insurer continuously pressures him to return to work, resulting in emotional distress. The workers' compensation act in this employee's jurisdiction either does not apply to his situation or its penalty provisions do not affect his employer. The court then dismisses his action for intentional infliction of emotional distress because it concludes the exclusive remedy provision applies. All our injured worker is now left with an action for bad faith, and the court does not recognize such an action. In this situation, a legitimately injured individual has suffered great physical and emotional distress and received no compensation. A lack of options gives the employer a virtual license to inflict harm on another. Because such abuses cannot be tolerated, the courts and/or legislatures must address this issue.

Although courts obviously cannot allow a separate action for intentional misconduct on every delay of payment, blatant abuses such as arbitrarily cutting off payments, intentionally misleading injured workers, and conducting deceitful and malicious investigations must be deterred. Courts must be especially sensitive to allowing a separate action when the insurer's intentional misconduct results in severe emotional distress and physical harm. Immunity from suit in such cases excuses intentional harm to another person and may even result in encouraging willful misconduct. The separate action exception for intentional or willful misconduct by an employer/insurer will place a check on this intentional misconduct and thus reinforce the fairness and efficiency of workers' compensation.

References

7. Schecter, supra.

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United Artists Theatre Circuit, Inc. v City of Philadelphia

In United Artists Theater Circuit, Inc. v City of Philadelphia, the Pennsylvania Supreme Court continued its recent tendency to protect private property rights against attempts by local government to enhance the aesthetic quality of urban life. In doing so, the court granted greater property rights under the Pennsylvania Constitution than has the United States Supreme Court under the federal constitution. The result is surprising in light of the specific recognition in the Pennsylvania Constitution of the public's right to preservation of the "esthetic values of the environment."

In United Artists, the court, in an opinion by Justice Larsen, held that the historic designation of the Boyd Theater in Philadelphia without the consent of the owner "amount[s] to an unconstitutional taking in violation of Article I, Section 10 of the Pennsylvania Constitution." In effect, Philadelphia must either abandon the historic designation of this property without the owner's consent or must pay just compensation.

The structure of the opinion is relatively simple. Justice Larsen first noted the extreme restrictions that historic designation placed on this property, including an observation by counsel that "the owner would be legally obligated to obtain permission from the [Philadelphia Historical] Commission to move a mirror from one wall to another." The opinion also recounted the affirmative duty imposed on the owner, enforced by criminal penalties, to preserve the designated building in good repair and in the style mandated by the Commission. The opinion then interpreted Article I, Section 10, the just compensation clause of the Pennsylvania Constitution, as requiring compensation when a particular property owner is forced to assume a burden that benefits the public at large. Justice Larsen concluded that historic designation of this property did precisely that. The opinion ends with a strong endorsement of the traditional rights of private property, including the observation from an earlier dissent by Justice Larsen that "[a] man's home and property used to be his castle."

United Artists is noteworthy in numerous respects. For one thing, as Justice Larsen implicitly acknowledged by citing the dissent, the United States Supreme Court more or less upheld historic designation as not per se a taking in Penn Central Transp. Co. v New York City, 438 US 104 (1978). Although Justice Larsen explained that the result in United Artists rests entirely on the Pennsylvania Constitution, he did not cite any previous case in which the interpretation of Article I, Section 10 had differed from that of the takings clause in the Fifth Amendment to the U. S. Constitution. Counsel should now exercise caution in relying on federal precedent in future just compensation cases. Another surprising aspect of the opinion is the court's willingness to decide the case in the abstract, without regard to either how historic designation had actually affected the value of the property or what changes in the property the owner actually wished to make. Not only did the Commission have the authority to allow changes in the property, a hardship provision even allowed demolition of historically designated buildings upon a showing of extreme financial need. Apparently the owner had not attempted to utilize any of these provisions.

The most surprising aspect of United Artists is the court's indifference to Article I, Section 27 of the Pennsylvania Constitution—the environmental protection provision. The Commission argued that the furtherance of esthetic, historical and cultural values embodied in the historic preservation process constituted a valid exercise of the police power, which presumably would render the designation a non-taking at least in the absence of overwhelming economic loss. Justice Larsen's response, citing 1954 and 1982 Pennsylvania Supreme Court cases, was that the promotion of esthetic objectives could "never constitute an exercise of the police power."

This restatement of Pennsylvania law simply ignored Article I, Section 27's commitment to "preservation of the . . . scenic, historic and esthetic values of the environment." It may be that Section 27 does not apply to the human environment, but such an interpretation was not broached by Justice Larsen and would be inconsistent with past application of Section 27. Instead, Section 27 was simply noted without discussion.

United Artists is not the first time the Pennsylvania Supreme Court has protected the rights of private property against government regulation that would be upheld by most other state and federal courts. In January 1991, in Pa. Northwestern Distributors, Inc. v The Zoning Hearing Board of Moon Township, the court, again by Justice Larsen, struck down an ordinance that would have amortized a non-conforming use—the sort of amortization statute that, depending upon the time limit, has been almost universally upheld. And beyond these holdings, the Pennsylvania courts have from time to time struck down taxes and regulations that would not have raised serious issues before federal and other state courts. Without an express or theoretical statement, the Pennsylvania courts are interpreting the State Constitution as a powerful protection for property and business interests. Counsel for such interests, most of whom are aware that the federal courts have been exceedingly hostile to constitutional challenges by business during the past fifty years, should now look to the Pennsylvania Constitution for relief from government regulation.

In terms of historic designation itself, United Artists does not necessarily foreclose all such government action. Designation with consent of the owner, such as in Pennsylvania's Historic Preservation Act, was favorably cited in the opinion. Historic designation of an entire district, even without unanimous consent of owners, is not necessarily foreclosed by the opinion, which condemned the "singling out [of] the Boyd Theater" as akin to forbidden "'spot zoning.'" District-wide historic designation would answer this particular objection. Finally, designation of individual properties is not itself foreclosed. A local government may pay compensation that arguably need reflect not the total value of the property.
the property involved, but simply the economic loss, if any, occasioned by inclusion of the property on the historic registry.

It may even be that, despite broad language, the outcome in United Artists will not apply to other historic designation ordinances. United Artists represented the court’s response to what it considered an extreme governmental control of private property. As Justice Larsen’s opinion notes, and as Justice Cappy’s concurrence emphasizes, the court condemned the extension of rather extreme government control even to the interior of a structure. But a historic designation ordinance might limit control to exteriors, or might give greater leeway to the property owner than did Philadelphia. Whether a less invasive historic designation ordinance would similarly run afoul of Article I, Section 10 is not certain and is an issue that should be raised by local historic preservation groups and officials.

Editor’s note: A petition for rehearing was granted by the Pennsylvania Supreme Court. Thus, the issues involved in the case have not been adjudicated to their finality.

References
2. Id. Lexis at 11
3. Id. Lexis at 10, (quoting Cass Plumbing & Heating Co. v PPG Industries, Inc., 488 Pa. 564, 412 A2d 1376, 1377 (1980) (Larsen J., dissenting). Justice Larsen also voiced concern in United Artists about the amalgamation of government functions present in the historic designation process. This concern may be significant in other administrative law contexts.
4. In fact, Section 27 was not clearly noted. In what may be the ultimate judicial Freudian slip, footnote 9 of the opinion, referring to the Commission’s argument that the protection of esthetic values is “explicitly embodied in the Pennsylvania Constitution” cites Article I, Section 10, the takings clause, rather than the obviously intended Article I, Section 27. Justice Larsen may be telling us, subconsciously, that Section 27 does not matter in light of Section 10.

Professor Bruce Ledewitz teaches a course in Pennsylvania Constitutional Law and is widely published in that field.

Most of us who have pursued a career in law have avoided taxation due to our dislike of working with numbers. However, any attorney who intends to venture into general practice must have at least a cursory knowledge of local tax laws in order to advise private, municipal and business clients.

This article is intended to give to the lawyer as well as the law student an overview of the realm of local taxation in Pennsylvania. While this article will focus on Pennsylvania local tax law, the general principles and administration are applicable throughout the United States. As always, the lawyer should consult local statutes before advising clients on matters of local taxation to understand the peculiarities of each state’s enabling legislation and the ordinances and resolutions enacted by municipalities and school districts. Throughout the decade of the 80’s and now the 90’s, the federal government’s policy towards decentralization of governmental services and the manner in which these services are distributed and more importantly how they are paid for, has generated a dire need for the private attorney to be acquainted with the laws related to local taxation.

Traditionally, local taxes in the United States have been based on property or real estate tax. In 1988, according to the Pennsylvania Department of Community Affairs, the real estate tax accounted for 40% of all local tax revenues. This empirical data indicates that the real estate tax still occupies a position of financial prominence at the local level and requires the practicing attorney to be familiar with the legal ramifications and idiosyncrasies of real estate tax administration. Since the measure of wealth has shifted from real estate to earned and unearned income, the thrust of local government taxation has attempted to move towards more modern and diversified sources of revenue in order to increase municipal coffers.

These local taxes include earned income, occupation, occupational privilege, deed transfer, per capita, business privilege and mercantile taxes. Each of these types of taxes are provided for under various state enabling legislation and requires local municipalities to enact local ordinances and resolution in order to levy the taxes in the local jurisdiction. In Pennsylvania, the Local Tax Enabling Act is Act 511 of 1965 and grants express authority to local governments to levy taxes within maximum rates established by the legislature of the Commonwealth.

Real Estate Taxes

The real estate tax at the local level is based on assessments of individual parcels of property in the County where the property is located. The assessment figure is established by the County Department of Property and Assessments. The three most popular methods utilized in developing these assessments are market value, comparable properties and replacement cost. In each county this assessment ratio is different and must follow guidelines established by the State Tax Equalization Board.

For example, in Allegheny County, each parcel of property is assessed by dividing the market value of the property by 25%. This assessment ratio is then utilized by the county, the municipality and the school district in which the property is located in developing its tax millage.
A practical example of how this process is implemented is as follows: Jones purchases Parcel A for $100,000 and records the deed in the Recorder of Deeds Office. The County Assessment Office receives this information and establishes the assessment of Parcel A as $25,000. This information is compiled each year by the Assessment Department and is placed in an alphabetized tax blotter, which details the property owner, the market value, the assessment, the legal definition and other information relating to the responsible financial institution required to pay the taxes.

Legal aid is frequently needed in many areas involving the real estate tax. These include title searches, assessment appeals, sheriff sales, tax verification notices and dealing with tax claim bureaus.

The Borough of Emsworth has a current tax millage of 29 mills for all real estate. This means that, for every $100.00 of tax assessment, $2.90 is levied by that municipality. In our example, Parcel A would be taxed at $25,000 (the assessed valuation) multiplied by the tax millage rate of 29, or $725.00. It is important to note that only three local governmental units tax real estate: the county, the municipality and the school district in which the property is located. In addition, the City of Pittsburgh sets a different real estate tax millage for land and buildings.

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In the process of closing a property for a client, a title search would be incomplete if the attorney failed to insure that all real estate taxes were paid to the date of closing. The attorney customarily requests a tax verification notice from each of the three taxing bodies for a period of no less than the last four years. These are obtained from the local tax collector and the county treasurer. Further investigation by the attorney requires that he check the records of tax liens older than four years either in the prothonotary’s office or the tax claim bureau in Pennsylvania. In all counties throughout the Commonwealth, with the exception of Philadelphia and Allegheny Counties, the county tax claim bureau coordinates all collection of delinquent municipal, school, and county taxes.

Assessment appeals require the expertise of an attorney who is familiar with the process of maneuvering through the county bureaucracy. Assessment appeals begin with the attorney completing the standardized form which details the property in question in regard to the legal description, current assessment, the market value the owner is requesting and the rationale for the change of assessment. It is essential that all time tables be met in returning the assessment appeal form to the property assessment department.

The next step involves the preparation of the tax appeal hearing by the attorney. In many instances, a real estate appraiser or tax accountant must justify the reduction in the assessment, particularly in areas relating to commercial, industrial, and multi-family real estate properties. At the hearing, which is conducted by the county assessment board, a board of usually three hearing officers and the particular assessor assigned to that geographical area of the county take testimony of the aggrieved property owner through the attorney. A decision is usually rendered within 90 days. If a reduction in assessment is granted, an official change order is sent to each of the three taxing bodies so that real estate taxes can be adjusted. If the property owner is not satisfied with the results of the hearing, he may file suit under the civil division of the Court of Common Pleas in Pennsylvania.

In a sheriff sale, any one of the three taxing bodies may institute the process. The sheriff sale should not be confused with a mortgage foreclosure. A sheriff sale is a generic term which is employed for a number of purposes including a mortgage foreclosure. The creation of a judgment, and for recouping delinquent real estate taxes. A mortgage foreclosure is a private civil law action to recoup past due mortgage payments by the mortgagor.

As a property owner becomes delinquent in paying his real estate taxes, a tax lien is placed on the property at the appropriate records office, usually the prothonotary. In general, the sheriff sale is begun by giving notice to all interested parties that taxes are due on the property. If the taxpayer fails to make arrangements to pay these delinquent taxes, the process begins. A title examination is done on the property by the governmental body initiating the sale. The property is advertised in a local paper with a minimum fixed price plus legal fees and costs of the sheriff sale. An open public auction is conducted with the property being sold to the highest bidder above the so-called upset price. All proceeds received over and above the encumbrances are given to the original property owner. A sheriff’s deed is then recorded by the new property owner to complete the chain of title.

**Earned Income Taxes**

The earned income or wage tax is a personal income tax levied by the local municipality and school district on residents of the community. Philadelphia is the exception to this rule, where nonresidents who work in the confines of the County are subject to the tax as well. According to Pennsylvania Department of Community Affairs data, the earned income tax, in 1988, represented nearly 25% of local municipal revenue. Generally the rate is 1% and the tax is based on gross earnings from wages, salaries, commissions and net profits from business. In Home Rule jurisdictions, the rate of the tax is permitted by law to go beyond the 1% rate. Payments must be made quarterly by taxpayers based on actual or estimated earnings. A final reconciliation statement must be filed by the taxpayer by April 15 of each year.

The law also permits the wages of a spouse to be attached for another spouse’s delinquent taxes.

Under Act 511, Section 13, persons who fail to file returns and make payments may be subject to wage attachments, rent sequestration, civil judgments, and criminal and civil procedures (Actions of Assumpsit)
before the District Justice. In each of these actions, an attorney may be needed by the taxpayer. Failure to file a return with documentation of earnings is a criminal act which may subject the taxpayer to a maximum fine of $500.00 and a 30-day jail sentence. These punitive actions are applicable for all the taxes levied under Action 511. Should a taxpayer file a return and fail to pay the tax, he is subject to a civil action before the District Justice. There are no statutes of limitation for these penalties in cases of failure to file a return, fraud, or where an employer has deducted the tax and failed to remit the taxes to the Tax Collector. There is a six-year statute of limitations for returns that are filed which indicate the taxpayers' income is underestimated by 25% or more.

A wage attachment or garnishment procedure is an order allowed under Act 511 by which the tax collector directs the employer of the delinquent taxpayer to deduct the delinquent taxes and reasonable costs from the compensation of the employee. The law also permits the wages of a spouse to be attached for another spouse's delinquent taxes.

Attorneys may be helpful in guiding taxpayers through the hearing process at the District Justice level and acting as an agent for the taxpayer for developing partial payment plans with the tax collector. When taxes exceed $4,000, the case is adjudicated at the Common Pleas Court level or before a three member panel of attorneys at civil arbitration.

Occupational Privilege Taxes

The occupational privilege tax is the $10.00 tax levied by municipalities and school districts on all persons working within their jurisdiction. The tax is usually deducted from the compensation of the employee by the employer, although self-employed persons must pay the tax as well. Recent trends in Pennsylvania tax reform circles have been either to advocate abolishing the tax or to raise the level of the tax to compensate local municipalities for services rendered to non-resident workers.

Employers commonly need the services of an attorney when disputes occur between municipalities in cases where the situs of the company is in question, or when employers have failed to deduct the tax and forward it to the appropriate jurisdiction. Individuals are rarely prosecuted for failure to pay the tax unless they are self-employed. This is largely due to the cost of prosecution and the low amount reaped for the tax.

Per Capita Taxes

Per Capita Taxes or "head taxes" are a flat rate annual tax of $15.00 and are assessed upon all persons 18 years of age and older ($5.00 by the municipality and $10.00 by the school district). In a 1988 survey of municipalities by the Economy League, the per capita tax yielded only 1% of the entire budget of local municipalities.

In most instances, legal action is taken against the individual for failure to pay these taxes in conjunction with the earned income tax, due to costs of prosecution and the low return to the municipality and school district.

Deed Transfer Tax

The Deed Transfer Tax is the tax imposed upon all transfers of real property within the municipality where the property is located. The tax is customarily paid in equal proportions by the grantor and grantee.

Generally, the deed transfer tax is escrowed at closing by the attorney and is paid at the County Recorder of Deeds Office. The Recorder of Deeds collects the tax for the state, municipalities, and school districts, and remits the tax to them less the commission for collection. In Pennsylvania, the tax is imposed by the state, the municipality and the school district. The rate of the tax is generally 1% of the consideration to the State and 1% of the
consideration split between the municipality and school district. In Home Rule jurisdictions, the rate may be imposed above the 1% level. For instance, in the City of Pittsburgh, the tax rate for a property sold at $100,000 would be 1% to the state or $1,000, 1/2% to the City or $500,00 and 1-1/2% to the School Board or $1,500.00. It is important that the attorney check the rate of taxation with the Recorder of Deeds Office prior to the closing in order to escrow the proper amount due on the sale of the property.

The deed transfer tax has a number of exemptions that all attorneys should be aware of for the benefit of their client. For example, transfers between former spouses, grandparent and grandchild, parent and child, to nonprofit housing and industrial development corporation, in sheriff sale to mortgage holders and transfers between siblings are usually tax exempt.

In many instances, a transfer occurs that requires an explanation to the governing bodies as to why the full amount of the tax is not being paid. In these cases, a realty transfer tax statement of value must accompany the recording instrument to detail the reasons why less taxes are being paid. Should the state or the other governing bodies question the statement of value, a redetermination notice will be sent to the grantee for additional tax monies. An attorney familiar with real estate law is vital in assisting a client in the process of justifying exemptions and in explaining the technical reasons for the reduced tax payments.

Occasion Taxes
The occupation tax is authorized under the Local Tax Enabling Act and is levied on residents of the municipality, 18 years of age and older, with incomes over $5,000.00 annually, based on a flat rate or on a millage applied against the assessed value of the particular occupation.

Occupation taxes are not income taxes although the categories of the tax reflect the economic potential of the occupation. For example, doctors and lawyers are generally assessed at the top of the occupation scale based on their potential earning power. The tax is based solely on occupations that are usually classified into groups. The tax is most prominent in the central and eastern regions of Pennsylvania and is levied in greater proportion by school districts to enhance tax collections due to low real estate tax assessments in rural communities.

In recent years, there has been a great deal of litigation in respect to the occupation tax due to the high millages imposed by municipalities and school districts. To date, the courts have upheld the tax where the taxpayer has failed in his burden of proof to show the tax to be unreasonable.

Mercantile Taxes
The mercantile tax is levied on gross receipts of anyone generally engaged in the sale of goods, wares and merchandise for the privilege of doing business within the jurisdiction of the municipality or school district. The Local Tax Enabling Act authorizes imposition of mercantile taxes subject to a limit of one mill on wholesale and one and one-half mills on retail vendors. However, the City of Pittsburgh is the exception, where the limit is one mill on wholesale and two mills on retail businesses. There are a number of common exclusions and deductions for the mercantile tax.

Litigation with respect to mercantile taxes is related to the situs of the business, whether the business is wholesale or retail in nature, whether the business is a manufacturer, and whether the business is non-profit. Because the tax is based on gross income, regardless of profits, the tax has been the basis of constant criticism and litigation by the business community.

Business Privilege Taxes
The business privilege tax is similar to the mercantile tax but is much broader in scope. Business, under the Local Tax Enabling Act, is defined as any activity, trade

business or profession carried on for gain or profit, but not limited to sale of merchandise or the performance of services. The venture in order to be taxable must have a substantial nexus within the taxing jurisdiction. The tax is based upon gross revenue with the exception of a deduction for the return of capital. Manufacturing is outside the scope of the taxing authority under the Local Tax Enabling Act. A well organized local ordinance for business privilege taxes can also encompass the mercantile tax.

The types of legal problems under the business privilege tax are essentially the same as the mercantile tax, except the problems are compounded due to the extended scope of the tax.

In many areas throughout the Commonwealth, local governments levy other types of taxes. These include amusement, parking, institution and service privilege, personal property taxes, and special purpose taxes. Each of these taxes reaches another source of revenue for local governments in order to meet the special needs of their specific jurisdiction.

To prepare for solving problems related to local taxation, begin by reading and understanding state enabling laws, local ordinances and resolutions, policies and procedures of local tax offices. Consult local tax administrators for input and assistance. Further detailed information on local taxes can also be obtained by attending local seminars given by the bar association, tax collectors associations and the board of realtors.

Michael F. Marmo is a third year evening student at the Duquesne School of Law and the Deputy Recorder of Deeds of Allegheny County. Mr. Marmo earned his Bachelor's degree in Political Science and Masters Degree in Public Administration from the University of Pittsburgh.
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On Money—

H.G. Wells had the idea that the fall of the Roman Empire was caused by the helter-skelter development of the world's first large-scale money economy. Parties to legal actions in classical Athens had to speak for themselves, but paid advocates were common in Rome and so troublesome that the Republic and the Caesars repeatedly thought it necessary to set ceilings on legal fees. There's a mention in Tacitus of a man who fell on his sword when he learned that the advocate to whom he'd paid 10,000 gold pieces was in collusion with the other side. Maybe H.G. was right.

Before then, when you wanted something that someone else had, you had to trade something you had for it. So if you wanted a fireplace poker, you had to find something the blacksmith wanted, and swap. All of this took time, and everything was out in the open, so everyone would have had a chance to think about what they were doing before they did it. Then along comes stuff that'll fit in your pocket, that everyone wants and will accept in trade for anything. A trade can take place immediately, in the time it takes you to count out the money.

If you don't think that money is strange and maybe a little dangerous, think about this: in a barter society, how could people bribe Congressmen? Let's say $50,000 is a good price for a Congressman. How could you deliver $50,000 worth of unmarked stuff in a battered suitcase to an inconspicuous location? If $50,000 worth of unmarked cows had suddenly appeared in the possession of a Roman Senator, don't you think someone would have noticed, and maybe asked some questions? There would have been more than a "paper trail" to follow! Either bartered-for Senators came cheaper than cash-and-carry Congressmen, or bribery was less common before money came down the pike.

I might've fared better then. But I am not alone in my ignorance. In the past year or so, the government of Pennsylvania lost a billion dollars. They spent it somewhere, and probably got something in exchange for it, but they never had it to begin with, and didn't mean to spend it. When asked to explain, the best they could do was, "Oops!" So if I'm an idiot for losing my bank card and my checkbook, and for driving around on a wobbly wheel, what would you call these people? Overachievers?

Money's the idiot. I'd be satisfied if I could handle it just well enough to keep my tires and my checkbook balanced. And I'd be more than satisfied if certain other people could do the same.

I didn't tell my friend any of this, because I hadn't thought it through yet. And I won't tell her now, because it won't do her any good. That $2500 in legal fees isn't theory or idiocy to her. It's her apartment, her telephone, her food. To the lawyer, that $2500 is reward for services rendered. But there's something odd about a thing that represents three or four months' living expenses to one person...and a few hours work to another. There's no intuitive, common sense explanation. A theory is required. And it seems to me that in trying to make sense out of money, there's just about as much idiocy as there is theory. It's a good thing I don't own a sword - I rent, you know, and my landlord would probably deduct the cost of carpet cleaning from the security deposit.

C.J. Rapp is a second year day student. He doesn't know why.
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