RECENT CASES

Federal Jurisdiction—

APPLICATION OF ERIE RULE PERMITS FEDERAL COURT TO DISREGARD STATE HOLDING IN FAVOR OF SUBSEQUENT DICTUM

Plaintiff, employed in Mississippi, was injured by the shattering of a machine part used in his employment. The part was manufactured by defendant, a Rhode Island corporation, and purchased by plaintiff's employer. In a negligence action instituted against the manufacturer in the Federal District Court for Rhode Island, judgment was rendered for defendant on the ground that under Mississippi law lack of privity between a manufacturer and an injured party bars the latter from recovery for negligent manufacture. The court of appeals reversed. Admitting that in 1928 the Supreme Court of Mississippi had held that privity between manufacturer and injured is a necessary element to recovery in a negligence action,[1] the court, nonetheless, concluded that the decision had "lost its persuasive force" as an indication of the present state of the law of Mississippi. Relying on the fact that the requirement of privity has since been abandoned in most other jurisdictions[2] and that in 1954 the Supreme Court of Mississippi indicated by way of dictum its "awareness of the modern rule,"[3] the court inferred that Mississippi is "prepared to reconsider and revise the rule it applied" in the 1928 decision. Therefore, it held that privity of contract between the user and manufacturer is no longer required in Mississippi to permit recovery for an injury incurred through the use of a negligently manufactured product. *Mason v. American Emery Wheel Works,* 241 F.2d 906 (1st Cir. 1957), *cert. denied,* 26 U.S.L. WEEK 3110 (U.S. Oct. 15, 1957) (No. 155).

A federal district court, asserting jurisdiction solely by virtue of diversity of citizenship, is required by the rule of *Erie R.R. v. Tompkins*[4] to apply the substantive law of the state in which it sits[5] in order that the

1. Ford Motor Co. v. Myers, 151 Miss. 73, 78, 117 So. 362, 363 (1928).

2. MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916), first formulated the modern rule. This rule has since been followed almost universally in American courts. Carter v. Yardley & Co., 319 Mass. 92, 103, 64 N.E.2d 693 (1946); SMITH & PROSSER, TORTS 890 (2d ed. 1957); Seavey, *Mr. Justice Cardozo and the Law of Torts,* 39 COLUM. L. REV. 20, 24-29, 52 HARV. L. REV. 372, 376-81, 48 YALE L.J. 390, 394-99 (1939); See RESTATEMENT, TORTS § 395 (1934).

3. E. I. Du Pont de Nemours & Co. v. Ladner, 221 Miss. 378, 399, 73 So. 2d 249, 254 (1954).

4. 304 U.S. 64 (1938).

5. Since the trial court was sitting in Rhode Island, the *Erie* doctrine requires the court to apply the Rhode Island conflict of laws rule. Klaxon v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941). Under this rule Mississippi law governed the instant

outcome of litigation will not vary with litigants' choice of either a federal or a state forum.[6] To effectuate this policy, the federal courts have formulated guides for ascertaining state law. In the absence of a state holding on point, the federal courts have attempted to reach decisions on the basis of an estimate of what the highest state court would decide were the case before that body.[7] In such a situation the courts have considered state dictum,[8] remaining free to reject it[9] if other considerations of the kind which the local bar and inferior state courts would rely upon[10] point to the likelihood that the highest state court would not follow its own dictum.[11] State holdings, however, normally determine state law. If the highest court of a state has squarely ruled on the issue, the federal courts have followed that ruling.[12] Between conflicting holdings, the most recent governs.[13] Where the only indication of state law is a holding of an intermediate state court, that holding controls even though the federal court considers it clearly erroneous.[14] At least one federal court has ruled that even though subsequent state holdings on analogous issues seem to indicate a departure from a rule established by a square holding of a state supreme court, the prior holding must be followed.[15] The Supreme Court has

case. For a discussion of the problem raised by the fact that Mississippi law is applied only because of the Rhode Island conflict of laws rule see note 25 *infra*. See generally Wolkin, *Conflict of Laws in the Federal Courts*, 3 SYRACUSE L. REV. 47 (1951); Note, 41 COLUM. L. REV. 1403 (1941); Note, 68 HARV. L. REV. 1212 (1955).

The *Erie* rule is subject to limitation in cases which involve the operation of a congressional program. See Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797, 799 (1957).

6. See, *e.g.*, Bernhardt v. Polygraphic Co., 350 U.S. 198, 204 (1956), quoting with approval Guaranty Trust Co. v. New York, 326 U.S. 99, 109 (1945); United States v. Standard Oil Co., 332 U.S. 301, 307 (1947). A second reason for the *Erie* rule, that for federal courts not to follow state law would be unconstitutional as a federal invasion of areas reserved to the states by the Constitution, has been considered only secondarily by the courts as a factor when determining state law. The constitutional basis of *Erie* is treated at length in Kurland, *Mr. Justice Frankfurter, The Supreme Court and the Erie Doctrine in Diversity Cases*, 67 YALE L.J. 187, 188-204 (1957). For discussion of the policy behind *Erie* see Clark, *State Law in the Federal Courts*, 55 YALE L.J. 267, 278 (1946); Corbin, *The Laws of the Several States*, 50 Yale L.J. 762 (1941); Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489 (1954); Mishkin, *supra* note 5, at 860; Note, 48 COLUM. L. REV. 575 (1948); Note, 59 HARV. L. REV. 1299 (1947).

7. Mutual Beneficial Health & Acc. Ass'n v. Cohen, 194 F.2d 232, 241 (8th Cir. 1952); Cooper v. American Airlines, Inc., 149 F.2d 355, 359 (2d Cir. 1945).

8. Mutual Beneficial Health & Acc. Ass'n v. Cohen, *supra* note 7.

9. Anderson v. Linton, 178 F.2d 304 (7th Cir. 1949); United States v. Curtiss Aeroplane Co., 50 F. Supp. 477 (S.D.N.Y. 1943); Bank of Cal. v. American Fruit Growers, 41 F. Supp. 967, 975 (E.D. Wash. 1941).

10. West v. American Tel. & Tel Co., 311 U.S. 223, 236 (1940).

11. But for two courts that felt bound by dictum see Standard Acc. Ins. Co. v. Roberts, 132 F.2d 794 (8th Cir. 1942); Handley v. City of Hope, 137 F. Supp. 442 (W.D. Ark. 1956).

12. Vandenbark v. Owens-Illinois Glass Co., 311 U.S. 538, 543 (1941).

13. Janeway v. Artusse, 159 F.2d 261 (10th Cir. 1947). *But compare* Layne-Western Co. v. Buchanan County, 85 F.2d 343, 348 (8th Cir. 1936) *with* Sabine Lumber Co. v. Broderick, 88 F.2d 586, 588 (5th Cir.), *cert. denied*, 302 U.S. 711 (1937).

14. Fidelity Union Trust Co. v. Field, 311 U.S. 169 (1940).

15. Grand Trunk W. Ry. v. H. W. Nelson Co., 118 F.2d 252 (6th Cir. 1941).

stated by way of dictum, however, that a state holding need not be followed when the federal court can say "with some assurance" that the holding would not be followed in the future,[16] or when there is "persuasive data" that the highest court of the state would decide otherwise.[17] The instant case is the first to squarely hold that dictum contrary to a specific holding can be relied upon as being indicative of the existing state law.[18]

To reach its conclusion that Mississippi was prepared to overrule its doctrine of privity of contract, only two factors were considered by the instant court.[19] In light of the fact that the court, sitting in Rhode Island, did not have the familiarity with the trends of Mississippi law and practice as would a court sitting in that state,[20] a wider inquiry into the question might well have been profitable and could have led to a different result. Ignored by the court were the facts that at the time of its 1928 decision the *MacPherson v. Buick Motor Co.*[21] case, upon which the "modern rule" was based, was then twelve years old; that in 1940 as well as in 1956 the 1928 decision was cited and an opportunity to overrule was ignored;[22] that Mississippi apparently is slow to overrule holdings and attaches little importance to dictum;[23] and that the dictum relied upon was referring only to a narrow application of the rule of privity, not directly covering the situation in the instant case.[24]

16. Meredith v. Winter Haven, 320 U.S. 228 (1943) (dictum).

17. West v. American Tel. & Tel Co., 311 U.S. 223, 237 (1940) (dictum).

18. What constitutes such "persuasive data" has heretofore been left largely undefined. *But see* Bloomfield Village Drainage Dist. v. Keefe, 119 F.2d 157 (6th Cir.), *cert. denied,* 314 U.S. 649 (1941) (holding ignored due to subsequent change in the state constitution); Wells v. Kansas Life Ins. Co., 46 F. Supp. 754, 757-58 (D.N.D. 1942) (state court holding ignored on grounds that the twenty years subsequent to the decision had brought about material changes in air transportation, rendering it no longer "unsafe"), *aff'd on alternative grounds,* 133 F.2d 224 (8th Cir. 1943).

19. See text at notes 2-3 *supra.*

20. That the Supreme Court considers this an important element see Bernhardt v. Polygraphic Co., 350 U.S. 198, 204-05 (1956) (dictum) and cases cited therein.

21. 217 N.Y. 382, 111 N.E. 1050 (1916).

22. Gordy v. Pan Am. Petroleum Corp., 188 Miss. 313, 331, 193 So. 29, 34 (1940).

23. See Ensminger v. Ensminger, 222 Miss. 799, 806, 77 So. 2d 308, 310 (1955); White v. Williams, 159 Miss. 732, 739, 132 So. 573 (1931); State v. Tingle, 103 Miss. 672, 678, 60 So. 728, 729 (1913), quoted with approval in Deer Island Fish & Oyster Co. v. First Nat'l Bank, 166 Miss. 162, 173, 146 So. 116, 119 (1933). *But see* Saucier v. Life & Cas. Ins. Co., 189 Miss. 693, 704, 198 So. 625, 629 (1940).

24. The dictum relied upon by the instant court was taken from a case materially different in its fact situation from the instant case. There the plaintiff was arguing that an exception to the requirement of privity which permits Mississippi consumers to recover damages from manufacturers for personal injuries incurred by eating contaminated food should be extended to permit recovery for property damages incurred when poisonous animal food injured a dairy herd. This dictum read, ". . . The principle seems now to be well established by the decisions of many courts that a person who has had no direct contractual relations with a manufacturer may nevertheless recover from such manufacturer for damages to property caused by the negligence of the manufacturer in the same manner that such remote vendee or other third person can recover for personal injuries. . . ." But, the dictum continues, ". . . However it is not necessary for us to undertake to determine at this time whether or not the rule of legal liability applied by our own court in the cases involving manufacturers of food and beverages intended for human consumption should be applied in cases involving manufacturers of animal foods. . . ." E. I. Du Pont De Nemours & Co. v. Ladner, 221 Miss. 378, 399-400, 73 So. 2d 249, 254 (1954).

Apart from the question of whether or not the particular factors considered here were indicative of a change in Mississippi law, the problem presented by the instant case is whether in determining state law a federal court can best effectuate the policy of uniformity of decision required by the *Erie* doctrine by considering state holdings as conclusive of state law.[25] In those cases in which the state court would decide in accordance with its dictum, strict following of state holdings would result in a situation in which a litigant in a state court would have his case decided in accordance with the later dictum and a litigant in the federal court would have his case, involving the same issue, decided upon the contrary holding.[26] Thus the result would be determined by the litigant's choice between a state and a federal court and might well result in forum-shopping. These are precisely the evils sought to be cured by the *Erie* rule. But by attempting to determine state law not on the basis of what the state court has done in the past but rather on the basis of what it would do were the issue presently before it, the court replaces certainty and ease of administration of the *Erie* doctrine with a measure of uncertainty. Since, as pointed out by the concurring opinion of the instant case, it will be extremely difficult to ascertain precisely how convincing dicta or other considerations must be in order to justify a conclusion that they are indicative of state law, the use of such considerations could lead the federal court to an incorrect determination as often as it leads it to the correct one.[27] Moreover, it involves the risk of providing a tempting method by which a federal court can ignore harsh or unpopular state doctrines. The use of considerable restraint by the federal courts will, however, greatly minimize these dangers and avoid a serious erosion of the *Erie* doctrine. Since the hostility on the part of the lower federal judges which first greeted the *Erie* rule has largely been dissipated, it is likely that there is less need for mechanical rules to bind the federal trial courts in their application of the *Erie* rule than was the case in the years immediately following the *Erie* decision.[28] Thus the rule

25. State uniformity of result between the federal court and the Rhode Island court is the desired result. See note 5 *supra*. The proper inquiry of the instant court should have been to ascertain what factors the Rhode Island Supreme Court would have considered, were this case before it, in attempting to find what factors the Mississippi Supreme Court would have considered with regard to overruling its previous holding. This added complexity was ignored by the instant court which treated the problem as being one of finding Mississippi law. For the purpose of this comment, too, this complicating factor is generally ignored. However, the very fact that the *Erie* doctrine creates a situation in which to have uniformity of decisions a court must predict not merely what a second court will do, but what another court will predict that a third court will do, supports the conclusion reached in text at notes 25-27 and 31 *infra* that mechanical rules for ascertaining state law will not always give the desired result, and much reliance must be placed upon the sound discretion of the federal judge applying the *Erie* rule.

26. For a case in which slavish following of state holdings by an able judge led to the wrong result see Vogel v. Northern Assurance Co., 219 F.2d 409 (3rd Cir. 1955). For a case showing that this ruling on Pennsylvania law was erroneous see Insurance Co. v. Alberstadt, 383 Pa. 556, 561-62, 119 A.2d 83, 86 (1956).

27. See note 26 *supra*.

28. Kurland, *Mr. Justice Frankfurter, The Supreme Court and the Erie Doctrine in Diversity Cases*, 67 YALE L.J. 187, 214 (1957). Indeed, Professor Kurland sees in recent decisions an incipient trend away from the mechanical rules of ascertaining state law.

of the instant case, applied with caution, would seem desirable. The infinite combinations of factors present in an individual case make the formulation of precise rules for applying the doctrine of the instant case impossible. Since the most accurate indications as to whether a state court will reverse or follow its prior holding are undoubtedly those which come from the state court itself, rather than those which are external to it, one or more of these normally should be present before a holding is disregarded. Among these considerations are dicta and decisions on closely related issues. Whether these dicta and related holdings are sufficiently persuasive will be a function of, first, the similarity of the facts and issues involved and the vigor with which they are expressed and, second, the extent to which they are supported by such external factors as changes in economic, social, or technological conditions which render the prior holding obsolete, widespread reversal of the rule by other jurisdictions, statutory or constitutional revision, or the tendency of the state court to follow specific authorities.[29] As the Supreme Court has held, however, the mere unsoundness of the prior holding or the fact that another holding would be desirable may not be considered.[30] In the final analysis the conclusiveness of these factors must be determined on a case by case basis and rest upon the sound discretion of the federal judge.[31]

Insurance—

FILING BY AUTOMOBILE INSURANCE COMPANY OF STATEMENT OF COVERAGE UNDER SAFETY RESPONSIBILITY LAW BINDS COMPANY TO LIABILITY TO FULL EXTENT OF THE POLICY

An operator of an automobile repair business, Smith, used the garage of Lea to repair a vehicle. While returning to his own garage in the vehicle Smith collided with another car, injuring plaintiffs. Lea, believing that he might become involved in liability, informed his insurer, defendant Aetna Casualty and Surety Company, of the accident. Aetna conducted an investigation and concluded that their policy did not cover the accident. However, an Aetna employee, acting within her authority, erroneously filed a form "SR-21" under the Wisconsin Safety Responsibility Law with the commissioner of motor vehicles stating that the Aetna policy covered the automobile owner and driver in the accident. When suit was begun by the injured parties, Lea was dismissed from the action, but his insurer,

29. See note 18 *supra.*

30. Fidelity Union Trust Co. v. Field, 311 U.S. 169 (1940); West v. American Tel. & Tel. Co., 311 U.S. 223, 238 (1940).

31. For three courts that considered at great length the factors which determine state law see Stentor Elec. Mfg. Co. v. Klaxon Co., 125 F.2d 820, 823 (3d Cir. 1942); Pomerantz v. Clark, 101 F. Supp. 341 (D. Mass. 1951); United States v. Curtiss Aeroplane Co., 50 F. Supp. 477, 485-86 (S.D.N.Y. 1943).

Aetna, was required to go to trial on the theory that an automobile liability insurance company can be held liable on its policy if, after the company has investigated the facts, an SR-21 indicating coverage is voluntarily and intentionally filed by one authorized to do so. At trial judgments for plaintiffs were entered against Aetna which were appealed on the ground that its policy did not cover the driver of the car, Smith. The Wisconsin Supreme Court affirmed, holding that "the legal effect of filing an SR-21, under such circumstances, [for the purpose of complying with the Safety Responsibility Law] is to conclusively certify that under the facts then existing, its policy insured both the named owner and the named operator of the particular vehicle described. . . ." [1] and that therefore Aetna irrevocably and conclusively admitted coverage of Smith to the extent of the amount indicated in its policy. *Laughnan v. Aetna Cas. and Surety Co.*, 1 Wis. 2d 113, 83 N.W.2d 747 (1957).

In a large number of motor vehicle accidents injured parties are left without adequate compensation because the tortfeasor is judgment proof.[2] In an attempt to alleviate this problem, without abandonment of a compensation system based upon fault, over forty jurisdictions have enacted financial responsibility laws.[3] The Safety Responsibility section of the Wisconsin Vehicle Code is typical of many of these statutes. It provides that the driving privileges of both the operator and the owner of an automobile involved in an accident will be suspended unless security can be posted or the operator or owner has in effect an automobile liability policy applicable to the accident with a minimum coverage of specified amounts to guarantee a source of compensation for injuries sustained if liability is found.[4] Under the insurance commissioner's rules issued pursuant to the statute an insurance company is required to give official notice of such insurance coverage to the state authorities by filing a form SR-21, which may not be withdrawn after thirty days have elapsed.[5] The instant decision is the most recent in a series of Wisconsin cases considering what effect the filing of a form SR-21 has upon the company's liability under its policy. In an earlier stage of the instant litigation, it was determined that a filing indicating coverage of the owner and driver of a vehicle involved in an accident is at least an admission against interest and admissible in evidence as such.[6] Subsequently, *Behringer v. State Farm Mut. Automobile Ins. Co.*[7] held that the filing of an SR-21 could become conclusive on the issue

1. Instant case at 131, 83 N.W.2d at 757.
2. See Netherton, *Highway Safety Under Differing Types of Liability Legislation*, 15 OHIO ST. L.J. 110 (1954).
3. See Grad, *Recent Developments in Automobile Accident Compensation*, 50 COLUM. L. REV. 300, 307 n.24 (1950); Miller, *SR-21, Notice or Contract*, 24 INS. COUNSEL J. 130 (April 1957); Vorys, *A Short Survey of Laws Designed To Exclude the Financially Irresponsible Driver From the Highway*, 15 OHIO ST. L.J. 101, 102 n.3 (1954). WIS. STAT. ANN. §§ 85.09-.16 (1951), since re-enacted in WIS. LEG. SERV. §§ 344.01-.51 (West 1957).
4. WIS. LEG. SERV. § 344.15(1) (West 1957).
5. Laughnan v. Griffiths, 271 Wis. 247, 257, 258, 73 N.W.2d 587, 593 (1955).
6. Laughnan v. Griffiths, 271 Wis. 247, 73 N.W.2d 587 (1955).
7. 275 Wis. 586, 82 N.W.2d 915 (1957).

of liability under the policy if, after investigating the facts, the insurance company, acting through a duly authorized agent or employee, had voluntarily filed an SR-21 form admitting coverage with the intent to be bound thereby. The requisite intent to be bound previously had been refined to mean that the SR-21 was filed with intent to comply with the statute.[8] Under this doctrine the filing of an SR-21 has been held not to preclude an insurance company from asserting an exclusion clause defense against the insured,[9] but it does prevent the assertion of such a defense against a third party claimant.[10] Finally, the instant case further held that if liability is established, it is to the full extent of the insurance policy described in the form, rather than only to the extent of the prescribed statutory minimum. In other jurisdictions the filing of an SR-21 has not been given the same binding effect. In Iowa [11] and Maryland,[12] insurance companies which filed an SR-21 under similar statutes have not been precluded from raising a later defense to liability on the ground of fraud in the procurement of the policy. A Kentucky court [13] declared that filing of an SR-21 by an insurance company does not change the established law regarding defenses to liability on the ground of failure of the insured to cooperate with the insurer.

The relevant section of the Wisconsin statute provides that "Neither the report required . . . nor the security filed as provided in this section shall be referred to in any way, nor be evidence of the negligence or due care of either party. . . .This subsection shall not be construed as excluding a notice of insurance [an SR-21] from being admissible in evidence where it would otherwise be material and admissible under the rules of evidence." [14] This section clearly supports the earlier determination that a filing of coverage is an admission against interest.[15] But if this were the extent of the legal effect of filing, the insurance company would not be prevented from introducing evidence that the form was filed by mistake, neutralizing the effect of the admission.[16] Instead, the Wisconsin court has deemed filing conclusive, stating that it would be improper for the jury to consider rebutting evidence except on the narrower issues of whether the facts were investigated prior to filing; whether the person filing had

8. Prisuda v. General Cas. Co., 272 Wis. 41, 74 N.W.2d 777 (1956).

9. Pulvermacher v. Sharp, 275 Wis. 371, 82 N.W.2d 163 (1957).

10. Behringer v. State Farm Mut. Ins. Co., 275 Wis. 586, 82 N.W.2d 915 (1957).

11. Hoosier Cas. Co. v. Fox, 102 F. Supp. 214 (N.D. Iowa 1952).

12. State Farm Mut. Automobile Ins. Co. v. West, 149 F. Supp 289 (D. Md. 1957).

13. Strode v. Commercial Cas. Ins. Co., 102 F. Supp. 240 (W.D. Ky. 1952).

14. WIS. STAT. ANN. § 85.09(11) (1951). Substantially the same provision was enacted in WIS. LEG. SERV. § 344.21 (West 1957).

15. Laughnan v. Griffiths, 271 Wis. 247, 259, 73 N.W.2d 587, 594 (1955).

16. Comment, 40 MARQ. L. REV. 241, 243 (1956). In commenting on Laughnan v. Griffiths, *supra* note 15, the student editor observed that ". . . admissions are merely evidence, which may be weak or strong depending upon the circumstances of the case, and as such may be rebutted by the party against whom they were used. . . ." (citing Levandowski v. Studey, 249 Wis. 421, 25 N.W.2d 59 (1946)).

authority to file the form; and whether the form was filed with intent to comply with the statute.[17]

This development cannot, except by a strained construction, be traced to the statute. Earlier suggestions that it might be based on notions of waiver, estoppel, or contract liability had been criticized[18] and were expressly denied by the Wisconsin court.[19] The Wisconsin decisions can probably best be understood as a frank judicial attempt to extend the protection afforded by the statute to motor vehicle accident victims. The statute attempts, by requiring the uninsured motorist who has been involved in an accident to post security or lose his registration and operating privileges, to induce motorists to secure liability insurance. But insurance is not compulsory, and an accident victim has no effective recourse against the judgment-proof tortfeasor who has not procured insurance. By holding the company bound by its SR-21, at least some plaintiffs are recompensed who otherwise might not be.

Although the humanitarian impulse to compensate injured persons by extension of the contractual liability of insurance companies on their policies is understandable,[20] concomitant effects of the Wisconsin development may offset the benefit to the individual plaintiffs aided by it. An immediate result of making the filing of an SR-21 binding as to coverage will be to encourage insurance companies to make more thorough and thereby more costly and time-consuming investigations prior to filing. Higher administrative costs pressure, of course, toward higher premiums. Of greater moment, when the liability of insurers on each policy is broadened, the higher risk of loss, though shifted to the insurers in the first instance, is ultimately passed on to policyholders in the form of higher insurance premiums. Unless liability insurance is made compulsory, premiums will result in discouraging the purchase of insurance, especially in the lower economic groups, which are most likely to be judgment proof. The advantage to certain plaintiffs of extending coverage must therefore be balanced against the reduced number of motorists who will purchase insurance

17. See note 6 *supra.*

18. The theory of estoppel is insufficient to create liability on the part of the insurance company because the injured party did not rely on the filing of the SR-21. Though the state authorities relied on the filing, in that they did not suspend the driving privileges of the owner and the driver of the vehicle, because an SR-21 was filed, this reliance in no way affected the injured party. Since the insurance company did not intentionally relinquish known rights, it can not be said that the insurance company waived any rights by the filing of the SR-21. See Hoosier Cas. Co. v. Fox, 102 F. Supp. 214 (N.D. Iowa 1952); Bjork, *The Legal Effect of "Finding" the SR-21,* 26 WISCONSIN BAR BULLETIN 21 (June 1953). Regarding the problem of the filing of an SR-21 creating a change in the contractual relationship of the insurer and insured, see Miller, *SR-21 Notice or Contract,* 24 INS. COUNSEL J. 130 (April 1957).

19. Prisuda v. General Cas. Co., 1 Wis. 2d 166, 83 N.W.2d 739 (1957).

20. This trend is illustrated in recent years by the substitution of direct insurance for indemnity policies, addition of extended coverage provisions in liability policies, enactment of safety and financial responsibility statutes of the Wisconsin type, a compulsory liability insurance statute in Massachusetts, and the Saskatchewan Automobile Insurance Act which insures against bodily injury in automobile accidents regardless of fault through the use of a state insurance fund. These developments are fully described in Grad, *supra* note 3.

at higher rates, a development contrary to the statutory design. This decision is a complex one, involving many social and economic considerations, perhaps better suited for legislative than judicial determination. The argument may be made that if the legislature is dissatisfied with the judicial innovation it may alter the result. However, legislative inertia weighs against such a possibility. It would seem proper, accordingly, that the courts refrain from engrafting such doctrines on the safety responsibility laws as Wisconsin courts have.

Workmen's Compensation—

JOINT LIABILITY FOR COMPENSATION AWARD HELD TO BE APPORTIONABLE BY WAGES PAID BY THE JOINT EMPLOYERS

Claimant was employed as a night watchman by two companies, Regent Development Corporation and Butterly & Green, to guard their proximate properties. He received a weekly wage of thirty dollars from Regent and fifty dollars from Butterly, the greater portion of his duties apparently having to do with the premises of the latter. While on the Butterly premises he was injured. The Workmen's Compensation Board, after finding that the injury arose out of his joint employment, divided liability for compensation equally between the two employers. The appellate division affirmed,[1] over Regent's contention that the award should be apportioned according to the proportion the wages paid by each bore to the total wages received. The Court of Appeals, however, one judge dissenting,[2] accepted Regent's position and reversed the determination that the award should

1. Hunt v. Regent Development Corp., 1 App. Div. 2d 862, 148 N.Y.S.2d 794 (3d Dep't 1956).

2. Instant case at 135, 143 N.E.2d at 894. The dissenting judge relied on Sargent v. A. B. Knowlson Co., 224 Mich. 686, 195 N.W. 810 (1923), where a board decision dividing liability for compensation equally among eleven employers of a night watchman was affirmed, but the only issues before the court were whether or not the employee was an independent contractor and whether the employer upon whose premises he was killed should alone be liable. See note 5 *infra*. In addition, ten of the eleven employers had paid the decedent equal wages. A later case in which the Michigan Supreme Court held that the fact that the amount of compensation is gauged by the amount of earnings "would *necessitate* separate awards if the respective employers paid unlike amounts for the services of the employee" casts additional doubt upon the authority of *Sargent* for equal division. Wing v. Clark, 286 Mich. 343, 349, 282 N.W. 170, 173 (1938). (Emphasis added.) See also Garman v. Cambria Title, Sav. & Trust Co., 88 Pa. Super. 525 (1926), wherein the court affirmed an equal-division award between two employers. The complaining party there, however, had paid the employee more than one-half of his total wages and the court stated, "*As the deceased received the greater portion of his wages from the appellant,* it is not in a position to complain of an order requiring it to pay fifty per cent of the amount of compensation to the plaintiff." *Id.* at 529. (Emphasis added.)

be equally divided.[3] *Hunt v. Regent Development Corp.*, 3 N.Y.2d 133, 143 N.E.2d 892 (1957).

Several employers will be held jointly liable for a worker's injury under the various Workmen's Compensation Acts in three classes of cases: (1) joint employment, of which the instant case is representative and which arises either where there was concerted hiring by more than one employer[4] (*e.g.*, A and B, owning adjacent warehouses, agree to hire a single watchman to divide his time guarding both premises[5]) or where the claimant at the time of injury was doing work for two or more employers who hired him under separate contracts of employment to perform separate work for each[6] (*e.g.*, a salesman hired by A and B independently of one another is injured while traveling to an exhibition where, under the terms of both contracts, he was to display samples); (2) cases where a present injury is in part attributable to a condition arising out of an earlier employment[7] (*e.g.*, a worker's hip fracture is found attributable in part to a fracture of the same hip suffered six months earlier under a different employment; and (3) cases involving a general-special employment relationship.[8]

In a number of states explicit statutory provisions in the Workmen's Compensation Acts govern the distribution of liability where several employers are held liable for the injury of a worker in their joint employ.

3. Prior New York cases support the instant court's ruling that the amount of compensation chargeable to joint employers should be related to the portion of the total wage paid by each. In Stevens v. Hull Grummond & Co., 249 App. Div. 870, 292 N.Y. Supp. 768 (3d Dep't), *modified*, 274 N.Y. 227, 8 N.E. 2d 498 (1937), the appellate division affirmed an award requiring the claimant's two joint employers, who had paid him weekly wages of eighteen dollars and two dollars and fifty cents respectively, each to pay one half of the compensation for an injury occurring in their joint service. The Court of Appeals reversed and ordered apportionment upon the basis of the proportion the wages paid by each bore to the claimant's total wage, citing the earlier case of Jacobi v. Supreme Junior Coat Co., 268 N.Y. 654, 198 N.E. 541 (1935), as controlling. In *Jacobi* a salesman was injured in an automobile collision while carrying display samples for two employers. The Court of Appeals affirmed the board's 60/40 apportionment of liability based upon wages. *Cf.* Cyrus v. Modart Constr. Co., 283 App. Div. 757, 128 N.Y.S.2d 115 (3d Dep't 1954), where the appellate division affirmed an equal division of compensation liability between two joint employers in a case involving an employment relationship similar to that in the instant case. This decision, however, has little reference to the propriety of an equal division in the instant case since the employers there each had paid the injured employee thirty dollars weekly, and the court cited *Jacobi* and *Stevens* with approval.

4. See Sargent v. A. B. Knowlson Co., 224 Mich. 686, 195 N.W. 810 (1923); Cyrus v. Modart Constr. Co., 285 App. Div. 757, 128 N.Y.S.2d 115 (3d Dep't 1954).

5. In some jurisdictions, liability for compensation in cases of joint employment is placed solely upon the employer on whose property the claimant was injured. See Western Metal Supply Co. v. Pillsbury, 172 Cal. 407, 156 Pac. 491 (1916); Murphy Supply Co. v. Industrial Comm'n, 206 Wis. 210, 239 N.W. 420 (1931), 16 MARQ. L. REV. 219 (1932). This rule has been sharply criticized. See, *e.g.*, 11 CALIF. L. REV. 213 (1923).

6. See Press Publishing Co. v. Industrial Acc. Comm'n, 190 Cal. 114, 210 Pac. 820 (1922); Jacobi v. Supreme Junior Coat Co., 268 N.Y. 654, 198 N.E. 541 (1935).

7. *E.g.*, Anderson v. Babcock & Wilcox Co., 256 N.Y. 146, 175 N.E. 654 (1931).

8. See Dennison v. Peckham Road Corp., 295 N.Y. 457, 68 N.E.2d 440 (1946); Johnston v. International Freighting Corp., 274 App. Div. 728, 87 N.Y.S.2d 297 (3d Dep't 1949).

Typical of these is the Delaware statute which provides that ": . . . such employers shall contribute to the payment of . . . compensation in proportion to their wage liability to such employee. . . ." [9] In the majority of states, however, express statutory provisions relative to this issue are absent, and the solution must be sought from general provisions governing the determination of compensation benefits. The New York statute is representative of this group, providing only that ". . . the average weekly wages of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation or death benefits. . . ." [10] With this type of statute, the compensation board initially, and subsequently the court, must determine whether the general award provision relates only to the aggregate amount of compensation to which the *employee* is entitled, or whether it also determines that the responsibility of each *employer* is to be measured in terms of the wages he paid the claimant at the time of injury. Closely related is the problem of the degree of discretion, if any, lodged in the compensation board to vary the award formula. In a number of cases, including the instant case, the courts have either specifically found the general provision to apply to both the aggregate amount of compensation and the division of liability among employers jointly liable, or at least have reached the same result by dividing liability for compensation among the employers according to the proportion the wages paid by each bore to the total wages received.[11] In other cases the courts have impliedly rejected the applicability of the general provision by dividing the award equally among the employers without regard to the proportion of the total wage paid by each.[12] In still other cases it has merely been determined that the employers were jointly liable, thus permitting the claimant to proceed against any one of the employers for the full amount.[13] As to the discretion of the compensation board, in a few states the board, in the

9. DEL. CODE ANN. tit. 19, § 2354 (1953). See also GA. CODE ANN. tit. 114, § 419 (1947); LA. REV. STAT. ANN. tit. 23, § 1031 (1951), Hatch v. Kilpatrick, 142 So. 203 (La. App. 1932); TENN. CODE ANN. § 6882 (Williams 1941), Riverside Mill Co. v. Parsons, 176 Tenn. 381, 141 S.W.2d 895 (1940).

10. N.Y. WORKMEN'S COMP. LAW § 14.

11. See Butler v. Industrial Comm'n, 50 Ariz. 516, 73 P.2d 703 (1937) (joint employment); Hartford Acc. & Indemnity Co. v. Industrial Acc. Comm'n, 202 Cal. 688, 262 Pac. 309 (1927) (joint employment); Press Publishing Co. v. Industrial Acc. Comm'n, 190 Cal. 114, 210 Pac. 820 (1922) (joint employment); Wing v. Clark Equipment Co., 286 Mich. 343, 282 N.W. 170 (1938) (general-special employment); Stevens v. Hull Grumond & Co., 274 N.Y. 227, 8 N.E.2d 498 (1937) (joint employment); Jacobi v. Supreme Junior Coat Co., 268 N.Y. 654, 198 N.E. 541 (1935) (joint employment). See also 11 CALIF. L. REV. 213 (1923); 51 HARV. L. REV. 941 (1938).

12. See Sargent v. A. B. Knowlson Co., 224 Mich. 686, 195 N.W. 810 (1923) (joint employment); Dennison v. Peckham Road Corp., 295 N.Y. 457, 68 N.E.2d 440 (1956) (general-special employment); Anderson v. Babcock & Wilcox Co., 256 N.Y. 146, 175 N.E. 654 (1931) (pre-existing condition contributing to a later injury); Garman v. Cambria Title, Sav. & Trust Co., 88 Pa. Super. 525 (1926); *cf.* American Stevedores Co. v. Industrial Comm'n, 408 Ill. 445, 97 N.E.2d 329 (1951) (general-special employment).

13. See Standard Acc. Ins. Co. v. Industrial Acc. Comm'n, 123 Cal. App. 443, 11 P.2d 401 (1932) (joint employment); Frederick A. Stresenreuter, Inc. v. Industrial Comm'n, 322 Ill. 187, 152 N.E. 548 (1926) (joint employment); Rice v. Keystone View Co., 210 Minn. 227, 297 N.W. 841 (1941) (joint employment).

absence of express statutory authority, has been held to have no power to make a determination of the proportionate responsibility of employers held jointly liable.[14] Usually, however, much discretion is left to the board in matters relative to the payment of claims,[15] and it is generally accepted that it has power to apportion an award among several employers when, in its discretion, such action seems appropriate. The relevant provision of the New York statute governing the discretion of the board provides that "the board shall have full power and authority to determine all questions in relation to the payment of claims presented to it for compensation under the provisions of this chapter. . . . The decision of the board shall be final as to all questions of fact, and, except as provided in section twenty-three (which sets out the procedure for appeal to the appellate division, third department), as to all questions of law. . . ." [16] Apparently, the instant court found that this discretion did not extend to the point of permitting the board to vary the award formula in cases of joint liability arising from joint employment. It ruled as a matter of law that responsibility for the award should rest on each employer according to his proportion of the worker's total wages.[17] Cases from other jurisdictions also indicate that notwithstanding the absence of explicit statutory provisions the discretion of the board is not unlimited in matters of apportionment. It has been held, for example, that in a case involving an injury attributable in part to a condition resulting from an earlier employment the board can not arbitrarily fix the liability of each employer but must proportion it according to his respective responsibility.[18]

A rule visiting responsibility among employers held jointly liable for an employee's injury in proportion to the risks to the employee and the benefit deriving to the employer inherent in each employment would seem preferable to one which arbitrarily divides liability equally. That this is the policy underlying the Workmen's Compensation Acts is indicated by the provisions measuring compensation payments in terms of wages [19] and, more particularly, by the section in the New York act which provides that in cases of occupational diseases attributable to several successive employ-

14. See Sechler v. Pastore, 103 Colo. 139, 84 P.2d 61 (1938) (general-special employment); Johnson v. Mortenson, 110 Conn. 221, 147 Atl. 705 (1929) (general-special employment).

15. See, *e.g.*, text at note 16 *infra*.

16. N.Y. WORKMEN'S COMP. LAW § 20.

17. Instant case at 135, 143 N.E.2d at 894. Compare the dissenting opinion in the instant case at 136, 143 N.E.2d at 895: "Where, as here, no rule of law controls, the question as to whether to apportion equally or otherwise is one of fact or equity, dependent on the circumstances of each case."

18. Dunbar Fuel Co. v. Cassidy, 100 N.H. 397, 128 A.2d 904 (1957). See also Butler v. Industrial Comm'n, 50 Ariz. 516, 73 P.2d 703 (1937), a case where the board had found neither of two employers liable for an injury which arose during transit between two jobs. On appeal the court held that this was a proper case for joint liability and apportioned responsibility for payments according to relative wages. The court went on to declare that "and since the full day's wage is paid by the two separate employers, perhaps in varying proportions according to the value of the work actually done for each, it is but right that the compensation should be proportionate to the wages paid by each." *Id.* at 525, 73 P.2d at 706.

19. N.Y. WORKMEN'S COMP. LAW § 14.

ments the liability for the total compensation shall be apportioned among the respective employers according to the time such employee was employed in their service.[20] It is for this reason that the rule of apportionment announced in the instant case appears justifiable, for wages would seem to reflect the benefit-risk elements inherent in employment with sufficient regularity to justify their use as a standard for determining the relative responsibility of joint employers.[21] By determining that this rule of apportionment should be applied as a matter of law in all cases of joint employment the instant court denied the board discretion in this matter. This would seem proper since to permit the board to hear evidence and decide whether or not in each particular case wages reasonably reflect the benefit-risk elements and, if not, apply a different standard to distribute liability would, in light of the few cases which might justify this inquiry, unduly interfere with the timely administration of the act. However, were the principle of the instant case to be extended beyond its factual context, *i.e.*, joint employment, to demand that compensation liability be apportioned according to wages in all cases of joint liability, for example, in cases of general-special employment, it might be subject to criticism, for the employee in those cases does not perform separate work for each employer—rather his performance of a single and inseparable job is beneficial to two separate employers. Thus, even if separate wages were paid by the two employers, they would not reflect a variance in the risk involved in two separate jobs, for only one job is performed. Nor would they be a reliable measure of the respective benefit to the employers—rather they would normally be an element of the price bargained for between the general and special employer. To illustrate, whether A rents B a truck and lends him a driver with the understanding that B pay the driver's salary, or whether A demands a greater price to cover both the truck rental and the wages of the driver, which he agrees to pay himself, the respective

20. "The total compensation due shall be recoverable from the employer who last employed the employee in the employment to the nature of which the disease was due and in which it was contracted. If, however, such disease was contracted while such employee was in the employment of a prior employer, the employer who is made liable for the total compensation as provided by this section, may appeal to the board for an apportionment of such compensation. . . . Such apportionment shall be proportioned to the time such employee was employed in the service of such employers. . . ." N.Y. WORKMEN'S COMP. LAW § 44.

21. For an interesting early case where the New York industrial commission ordered an apportionment of compensation based upon proportionate wages, see Sayres v. Ogdensburg Power & Light Co., 8 N.Y. Dep't R. 393 (1915). A number of firms, individuals and corporations were compelled by law to repair a dam on a stream, the water power rights being owned by them jointly. By court decree three referees were appointed to carry out the work to be done, their salary to be paid by the owners affected in proportion to the extent of their water rights. It was held that all owners were jointly liable for compensation by reason of the accidental death of a workman employed by the referees, and that the amount payable by each employer was proportionate to the amount of his water right in the stream where the dam was to be built.

The New York cases recognize the board's power to make an equal division of liability for compensation payments among several employers held jointly liable in cases of general-special employment relations and cases invoving an injury attributable in part to an earlier injury in a previous employment. See cases cited at note 8 *supra*. But these situations do not involve considerations present in the instant case. See analysis at p. 937.

benefit deriving to the two employers would appear constant. Moreover, in many cases of this nature only one employer pays the claimant's wages, and thus even if it were found that the injury arose in the course of employment for both employers, the rule as extended would preclude any division of liability.

It would seem that since the wages paid by the employers in a general-special employment relationship do not reflect the benefit-risk elements inherent in the respective employments, a prima facie equal division of liability in these cases is appropriate in the absence of extenuating circumstances. But the board should have authority to deviate from this general rule under certain circumstances, *e.g.*, where the injury is causally related to one employer. Thus, if the general employer rents a truck and driver to the special employer and the driver is injured in an accident occasioned by the defective condition of the truck, the general employer should be made to bear the total cost of compensation payments, because, while one major purpose of the Workmen's Compensation Acts is to provide the worker relief for all injuries arising out of the industries covered, it can not be assumed that the framers thereby intended to remove any elements of deterrence which might tend to avoid industrial accidents. Similarly, the rule announced in the instant case should not be applied to cases of joint liability involving an injury attributable in part to a condition resulting from an earlier employment, for wages paid under a prior employment would appear to have little, if any, applicability in determining responsibility for a subsequent injury. Rather, liability should be visited upon the prior employer to the extent that the earlier injury contributed to the later injury. If the rule announced is limited to its factual context it would appear capable of practical administration and consonant with the underlying philosophy of the Workmen's Compensation Acts.