

From the Bench

The Hon. Gary S. Stein^{*}

Justice Pollock and I were colleagues for more than fifteen of his distinguished twenty-year tenure as an Associate Justice of the New Jersey Supreme Court. He was a gracious and delightful colleague, renowned for his quick wit, engaging manner, uninhibited personal telephone calls in our presence to his beloved Penny, and a voracious appetite for the court's conference room staple — the peanut butter and jelly sandwich on a roll.

His relaxed style at the court's conferences tended to downplay his careful and conscientious attention to details, nuances, and, most of all, the institutional implications of our most difficult cases. His primary focus was always on the long-term effect of our decisions, their reconciliation with the most thoughtful and current scholarship on the issue, and their implications for the public and other branches of government. He was an "institutionally minded judge" in the best sense of the term. His concerns transcended the immediate interests of the litigants and encompassed an extensive overview of every case that is so essential to the art of judging. Justice Pollock never failed to see the forest, even as he attended to the trees.

In every court term, members have a variety of opinion-writing assignments, some obviously more demanding than others. Justice Pollock's opinions were consistently clear, crisp, thoughtful, and persuasive. From my own perspective, I thought his most inspired work was done when he was writing at the frontiers of the law, challenged by novel issues that required the court to reconcile and accommodate competing strains of public policy. A few shining examples from his voluminous opinion portfolio are illustrative.

Early in his tenure, Justice Pollock authored the court's opinion in *O'Keeffe v. Snyder*,¹ a challenging case involving a replevin action filed by the noted artist Georgia O'Keeffe to recover from the defendant three paintings that allegedly had been stolen from a New York City gallery in 1946, some thirty-four years prior. The defendant

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¹ 83 N.J. 478, 416 A.2d 862 (1980).

contended that he was a purchaser for value, had acquired good title by adverse possession, and that the statute of limitations barred O'Keeffe's action. The New Jersey Superior Court, Appellate Division ruled in favor of O'Keeffe, concluding that the paintings were stolen, the defenses of expiration of the statute of limitations and title by adverse possession were identical and, further, that the defendant had not proved the elements of adverse possession. Writing for the New Jersey Supreme Court, Justice Pollock concluded that the statute of limitations, rather than the doctrine of adverse possession, provided a more appropriate basis for resolving the competing claims of title by both the artist and the art dealer. Justice Pollock supported that conclusion with the following observations about the problems affecting title to great works of art:

The limited record before us provides a brief glimpse into the arcane world of sales of art, where paintings worth vast sums of money sometimes are bought without inquiry about their provenance. There does not appear to be a reasonably available method for an owner of art to record the ownership or theft of paintings. Similarly, there are no reasonable means readily available to a purchaser to ascertain the provenance of a painting. It may be time for the art world to establish a means by which a good faith purchaser may reasonably obtain the provenance of a painting. An efficient registry of original works of art might better serve the interests of artists, owners of art, and bona fide purchasers than the law of adverse possession with all of its uncertainties. Although we cannot mandate the initiation of a registration system, we can develop a rule for the commencement and running of the statute of limitations that is more responsive to the needs of the art world than the doctrine of adverse possession.

We are persuaded that the introduction of equitable considerations through the discovery rule provides a more satisfactory response than the doctrine of adverse possession. The discovery rule shifts the emphasis from the conduct of the possessor to the conduct of the owner. The focus of the inquiry will no longer be whether the possessor has met the tests of adverse possession, but whether the owner has acted with due diligence in pursuing his or her personal property.²

Another early example of Justice Pollock's ability to resolve competing strains of legal theory is illustrated by his opinion in *Pierce v. Ortho Pharmaceutical Corp.*³ The plaintiff in *Pierce* was a medical

² *Id.* at 497, 416 A.2d at 872 (citation omitted).

³ 84 N.J. 58, 417 A.2d 505 (1980).

doctor who was an employee-at-will of a pharmaceutical company. The doctor's employment was terminated after she refused to continue a research project that she regarded as medically unethical. Her claim for damages against the employer required the court to determine whether it should adopt an exception to the long-standing common-law rule allowing an employer to discharge an at-will employee without cause. Although concluding that the plaintiff had not demonstrated any basis for relief under the specific facts of her action, Justice Pollock, writing for the court, concluded:

The interests of employees, employers, and the public lead to the conclusion that the common law of New Jersey should limit the right of an employer to fire an employee at will

We hold that an employee has a cause of action for wrongful discharge when the discharge is contrary to a clear mandate of public policy. The sources of public policy include legislation; administrative rules, regulations or decisions; and judicial decisions. In certain instances, a professional code of ethics may contain an expression of public policy.⁴

Balancing the interest of employees in job security against the independent right of employers to choose their own work force, Justice Pollock observed:

Employees will be secure in knowing that their jobs are safe if they exercise their rights in accordance with a clear mandate of public policy. On the other hand, employers will know that unless they act contrary to public policy, they may discharge employees at will for any reason. Finally, our holding protects the interest of the public in stability of employment and in the elimination of frivolous lawsuits.⁵

One of Justice Pollock's landmark opinions was filed in the case of *Spring Motors Distributors, Inc. v. Ford Motor Co.*⁶ The issue in *Spring Motors* concerned the right of a commercial buyer to recover for economic losses resulting from the purchase of defective goods. Specifically, the issue was whether the buyer's cause of action was restricted to remedies under the Uniform Commercial Code or whether the buyer could also maintain a cause of action under state law on the theory of negligence or strict liability. The distinction was critical because the plaintiff had filed the action beyond the four-year period permitted by the Uniform Commercial Code, but within the six-year period applicable to state tort actions. Justice Pollock

⁴ *Id.* at 71-72, 417 A.2d at 512.

⁵ *Id.* at 73, 417 A.2d at 512.

⁶ 98 N.J. 555, 489 A.2d 660 (1985).

emphasized the significance of the issue presented by highlighting the conflict between the standards imposed by the Uniform Commercial Code and the doctrine imposing strict liability on a manufacturer responsible for introducing a flawed product into the stream of commerce:

As the preceding cases demonstrate, the U.C.C. rules pertaining to the sale of goods overlap the doctrine of strict liability for placing a defective product in the stream of commerce. One reason for the overlap is that strict liability, in this regard, evolved from implied warranties of fitness and merchantability under the U.C.C. and its predecessor, the Uniform Sales Act. Those warranties originated as a matter of social policy to compensate consumers who sustained personal injuries from defective food. Neither the ALI, which published the Restatement (Second) of Torts, nor the permanent editorial board of the U.C.C., which operates as a joint project of the ALI and the Commissioners on Uniform State Laws, has undertaken to resolve the overlap between strict liability as declared in section 402A and the breach of warranty provisions under the U.C.C.⁷

Justice Pollock concluded that the plaintiff, a sophisticated commercial buyer, should be restricted to the cause of action afforded by the Uniform Commercial Code. Evidencing his commitment to the principle that courts should generally defer to the policy choices made by the legislative branch of government, Justice Pollock wrote:

Delineation of the boundary between strict liability and the U.C.C. requires appreciation not only of the policy considerations underlying both sets of principles, but also of the role of the Legislature as a coordinate branch of government. By enacting the U.C.C., the Legislature adopted a carefully-conceived system of rights and remedies to govern commercial transactions. Allowing Spring Motors to recover from Ford under tort principles would dislocate major provisions of the Code. For example, application of tort principles would obviate the statutory requirement that a buyer give notice of a breach of warranty . . . and would deprive the seller of the ability to exclude or limit its liability In sum, the U.C.C. represents a comprehensive statutory scheme that satisfies the needs of the world of commerce, and courts should pause before extending judicial doctrines that might dislocate the legislative structure.⁸

One of Justice Pollock's more recent opinions, *Snyder v. American*

⁷ *Id.* at 570, 489 A.2d at 667-68 (citations omitted).

⁸ *Id.* at 577, 489 A.2d at 671.

Ass'n of Blood Banks,⁹ concerned the liability of a trade association that sets nationwide standards for blood banks to a transfusion recipient who contracted Acquired Immune Deficiency Syndrome (AIDS) after receiving blood contaminated with Human Immunodeficiency Virus (HIV). The plaintiff's claim against the American Association of Blood Banks (AABB) was based on recommendations promulgated by an AIDS task force organized by the Centers for Disease Control that recommended blood banks conduct surrogate testing to prevent blood from high-risk donors from entering the blood supply. The AABB resisted the recommendation, contending that surrogate testing and direct questioning of donors would be too costly and would lead to the rejection of too much blood.

After meticulously describing the evidence in the record relating to the AABB's argument that it owed no duty to persons who received contaminated blood, Justice Pollock concluded that the AABB did owe the plaintiff a duty of care. Justice Pollock explained:

We recognize, moreover, that the development of tests for infectious diseases often follows an indistinct path fraught with uncertainty, debate, trial and error, and even failure. At some point in the process, however, participants should recognize that they have enough information to act responsibly and that the failure to act would be irresponsible. Professional associations concerned with matters of public health are not fraternal organizations that exist solely for the benefit of their members. Playing a vital role in the protection of health, these associations are inescapably imbued with a public interest. The associations' commitment to public health should not immunize them from liability for the negligent discharge of their obligations. Nor should the associations enjoy immunity when they stubbornly reject persuasive evidence, unreasonably prolong the debate, and fail to inform their constituents of threats to the public health.¹⁰

In addition, Justice Pollock rejected the contention that the AABB's nonprofit status entitled it to an absolute or qualified immunity. Justice Pollock wrote:

The record reveals that the AABB led the charge against direct questioning of donors and surrogate testing. Viewed most favorably to the AABB, the evidence suggests that it was concerned that such questioning and testing would be of limited effectiveness and could diminish the supply of blood and blood products. A less favorable view suggests that the AABB resisted surrogate testing because it did not want to suffer the added

⁹ 144 N.J. 269, 676 A.2d 1036 (1996).

¹⁰ *Id.* at 306, 676 A.2d at 1055.

inconvenience and costs of such testing. In assessing the role of governmental and private decisionmakers involved with donor screening, the Committee concluded "that it was reasonable to require blood banks to implement these two screening procedures [screening male donors for a history of sexual activity with other males and screening donated blood for the anti-HBc antibody] in January 1983."

On the record, the jury could have concluded that the AABB in 1984 unreasonably resisted recognizing that blood transmits HIV. That resistance led the AABB to sacrifice an uncontaminated supply of blood for one that was contaminated, but more readily available. The jury could have found that if the AABB had not been so intransigent, its members . . . would have instituted surrogate testing. Further, the jury could have found that if [this particular blood bank] had instituted surrogate testing, it would have rejected [the unit containing the contaminated blood]. Rejecting that unit could have prevented the transfusion of contaminated blood to William Snyder. It could have saved his health and his life. Against this background, we believe that the imposition of liability on the AABB is both fair and reasonable.¹¹

In *Ivaldi v. Ivaldi*,¹² another controversy with tremendous competing policy interests, Justice Pollock addressed the issue whether the Uniform Child Custody Jurisdiction Act (Act) should apply to a jurisdictional dispute between a citizen of New Jersey and a citizen of Morocco relating to the custody of their minor child. The child's parents were married in Morocco in 1992 and thereafter resided in France, Morocco, and, commencing in 1994, in New Jersey. A daughter was born to the couple in France in 1993. In 1995, the parents separated and entered into a comprehensive separation agreement that provided the mother with physical custody of the child. The agreement further provided that the mother would reside in either France or Morocco and allow the father twelve weeks of visitation each year. After the agreement was signed, the mother and child moved to Morocco, where the mother filed an action for divorce and child custody in the courts of Morocco. Immediately thereafter the father filed suit in New Jersey, seeking sole custody. The New Jersey Superior Court, Chancery Division, Family Part, concluded that the Act did not apply to disputes between foreign countries and states of the United States, and that New Jersey had subject-matter jurisdiction based on the child's substantial contacts with New Jersey. The lower court ordered the mother to return the

¹¹ *Id.* at 307, 676 A.2d at 1055 (alteration in original) (citation omitted).

¹² 147 N.J. 190, 685 A.2d 1319 (1996).

child to the United States and temporarily awarded the father sole custody, thus restraining the mother from proceeding with her custody action in Morocco.

The New Jersey Superior Court, Appellate Division, reversed, concluding that the lower court did not have subject-matter jurisdiction over the parties and that the Act was inapplicable because its focus was on jurisdictional conflict between courts of different states, not between courts of different countries. Writing for the New Jersey Supreme Court, Justice Pollock pragmatically explained why the Act should be construed to apply to international child custody disputes:

Judicial recognition of foreign custody decrees comports with the reality that nations are drawing closer together. Information, capital, and goods daily cross international boundaries. People likewise travel regularly from country to country. National boundaries no longer prevent people from meeting or marrying. Sometimes those marriages will end in divorce and custody disputes. International child-custody actions have become part of a global society.

With increasing frequency, state courts may confront custody disputes arising from families comprised of citizens of different countries. When resolving those disputes, a court may harbor doubts about the law of another country, particularly when that country's legal system, culture, religion, and language differ from ours. Notwithstanding those doubts, the courts of another country may provide a more convenient forum for determining custody.

....

. . . [T]he Legislature has extended the Act's policies to the determination of jurisdictional questions in international custody cases. Those policies include the importance of the identification of the "home state" and the need to avoid jurisdictional conflicts.

....

Our holding conforms also with a proposed revision of the UCCJA, entitled the Uniform Child Custody Jurisdiction and Enforcement Act ("the UCCJEA"), which is under consideration by the National Conference of Commissioners on Uniform State Laws. The proposed UCCJEA explicitly states that all of its provisions apply to child custody proceedings of other countries, including the jurisdictional determination of home-state priority. In sum, we conclude that the Legislature intended the Act to

apply to international child-custody litigation.¹³

A final illustration of Justice Pollock's fascination with the frontiers of legal doctrine occurred during his last term, in the case of *A. v. B.*¹⁴ The unique factual setting in that case involved a law firm that jointly represented a husband and wife in drafting wills that devised their respective estates to each other. The wills also contained provisions creating the possibility that the issue of each spouse ultimately would acquire the property of the decedent spouse. Unknown to the firm or the wife, the husband recently had fathered an illegitimate child. Prior to the execution of the couple's wills, the illegitimate child's mother retained the same law firm to institute a paternity action against the husband. A clerical error prevented the firm's computers from ascertaining the existence of the conflict of interest and resulted in the firm's representation of the child's mother in a paternity action while simultaneously representing the husband and wife in the estate-planning matter. When the conflict was revealed, the law firm withdrew from representation of the mother in the paternity action. The law firm then sought to disclose to the wife that the husband had an illegitimate child. The husband sued to restrain the disclosure of this information.

Justice Pollock's opinion noted that the case concerned the conflict between two fundamental obligations of lawyers: the duty of confidentiality, Rules of Professional Conduct (RPC) 1.6(a), and the duty to inform clients of material facts, RPC 1.4(b). The conflict arises from a law firm's joint representation of two clients whose interests initially were, but now no longer are, compatible.¹⁵

Justice Pollock's comprehensive opinion for the court reviewed all the pertinent authorities, including the forthcoming Restatement (Third) of the Law Governing Lawyers and the recommendations of the American College of Trust and Estate Counsel. His meticulous review of the relevant authorities and commentary supported the court's conclusion that the law firm should be permitted to inform the wife of the existence, but not the identity, of the husband's illegitimate child. Justice Pollock opined:

The law firm learned of the husband's paternity of the child through the mother's disclosure before the institution of the paternity suit. It does not seek to disclose the identity of the mother or the child. Given the wife's need for the information

¹³ *Id.* at 200-03, 685 A.2d at 1324-25 (citations and footnote omitted).

¹⁴ 158 N.J. 51, 726 A.2d 924 (1999).

¹⁵ *Id.* at 56, 726 A.2d at 926.

and the law firm's right to disclose it, the disclosure of the child's existence to the wife constitutes an exceptional case with "compelling reason clearly and convincingly shown."¹⁶

What the foregoing opinions by Justice Pollock have in common is that each involved perplexing legal issues, the resolution of which demanded a careful balancing of competing policy considerations. In addition, the cases involved questions at the frontiers of the law that had not previously been addressed by courts or commentators with any degree of conclusiveness. Justice Pollock always thrived on such challenges and brought his broad perspective and institutional insights to the New Jersey Supreme Court's most difficult cases. His unique ability as a judge to resolve doctrinal conflicts and nudge the law in the right direction was one of his special gifts, as well as one of his enduring legacies as a member of our court.

¹⁶ *Id.* at 67, 726 A.2d at 932.