Some courts say the manufacture of impure foods makes the manufacturer *prima facie* negligent. *Rozumailski* v. *Philadelphia Coca Cola Bottling Co.*, 269 Pa. 114, 145 Atl. 700 (1929); *Campbell Soup Co.* v. *Davis*, 207 N.C. 256, 175 S.E. 743 (1934). Others call a proper case for the application of the *res ipsa loquitur* doctrine. *Collins Baking Co.* v. *Savage*, 227 Ala. 408, 150 So. 336 (1933); *Gainesville Coca Cola Bottling Co.* v. Stewart, 51 Ga. App. 102, 179 S.E. 734 (1935); *contra*, *Enloe* v. *Coca Cola Bottling Co.*, 208 N.C. 305, 180 S.E. 582 (1935). Although these aids favor the injured parties, they are not adequate for full protection. The manufacturer still avoids the liability by rebutting the presumptions. This he is unable to do when sued upon implied warranty in the states where a contractual relationship is not required. The risk is thus placed upon the person best able to avoid the injury—the manufacturer.

The dictum in the *Canton Provision case*, *supra*, must not be underestimated, for the Supreme Court overruled the appellate court which expressly held the Provision Co. liable upon the authority of the *Trizzino case*, *supra*. One cannot deny that the *Trizzino* case is in step with the advance of the modern economic and manufacturing world of today and should be supported. The Supreme Court of Ohio should seriously consider such contentions when called upon to decide the merits of the dictum in the *Canton Provision Co. case*, requiring privity of contract between consumer and manufacturer of unwholesome food and the *Trizzino case* dispensing with such requirement.

HARRY A. GOLDMAN

TORTS

VIOLATION OF MOTOR VEHICLE LAWS BY MOTORCYCLE POLICEMAN — NEGLIGENCE PER SE — EXPRESS AND IMPLIED EXEMPTION

Plaintiff, a motorcycle policeman in the city of Toledo, while in pursuit of a violator of the speed laws was injured in a collision with the defendant's automobile. Plaintiff was operating his cycle at the speed of 65 miles per hour and crashed into the defendant when the latter made a left-hand turn at an intersection without signalling, as required by a city ordinance. The court charged the jury that if the plaintiff were found to be exceeding the speed limit prescribed by Ohio General Code, Section 12603 and Ordinance 4034 of the City of Toledo, Section 45, relating to speed limits, such violation constituted

negligence per se and barred his recovery. Judges Zimmerman and Day dissented. *Swaboda* v. *Brown,* 129 Ohio St. 512, 2 O.O. 516, 196 N.E. 274 (1935).

In the case of *Keevil* v. *Ponsford* (Tex. Civ. App.), 173 S.W. 518 (1915), the court, in holding against recovery in a similar case, stated that where no specific exemption had been provided for in the statute, the courts could not engraft one; but that it must be done by the legislative body. To provide against the result reached in this and the principal case, traffic regulations frequently provide in express terms that both fire and police department vehicles shall be exempt from speed limits imposed upon other motor vehicles. In some instances such a provision has been made by statute: *Hampton* v. *Joyce* (Tex. Civ. App.), 80 S.W. (2nd.) 1066 (1935); *Heimer* v. *Salisbury,* 108 Conn. 180, 142 A. 749 (1928); *Byers* v. *Spicer,* 116 Cal. 219, 2 P. (2nd) 479 (1931); *Swift* v. *Payne,* 223 Ala. 25, 134 So. 626 (1931); *Dowler* v. *Johnston,* 225 N.Y. 39, 121 N.E. 487, 3 A.L.R. 146 (1918). In other cases embodied in an ordinance: *Vandel* v. *Saunders,* 85 N.H. 143, 155 A. 193 (1931); *Clark* v. *Wilson,* 108 Wash. 127, 183 P. 103 (1919); *Miner* v. *Rembt,* 164 N.Y.S. 945, 178 App. Div. 173 (1917); *Hubert* v. *Granzow,* 131 Minn. 361, 155 N.W. 204, Ann. Cas. 1917D, 563 (1915); *Ex parte Snowden,* 12 Cal. App. 521, 107 Pac. 724 (1910). An ordinance adopting speed regulations is not invalid because it exempts such vehicles from its operation. *Ex parte Snowden, supra.* The exemption of such vehicles, when in the exercise of duty, is applicable only under such circumstances, and not when in use on the street for any other purpose, as where a policeman is on his way home to lunch, *Swift* v. *Payne, supra;* or going to investigate a civil accident, *Spencer* v. *Schiffman,* 119 Cal. App. 746, 7 P. (2nd) 361 (1932); or a fireman testing a fire truck, *Opocensky* v. *South Omaha,* 101 Neb. 336, 163 N.W. 325, L.R.A. 1917E, 1170 (1917); or on a tour of inspection of fire houses, *Dowler* v. *Johnston, supra.*

Considerable difficulty arises, however, as to the applicability of regulations of the character under consideration to public officials, and the apparatus under their control, where no express exemption is contained in the act. Apart from any express grant of privilege in these respects, it is usually considered, by reason of the necessities of the situation and in the absence of a clear legislative intent to the contrary, that policemen are, when enforcing the law, exempt from traffic regulations such as those fixing the speed limit. *Lilly* v. *W. Va.,* 29 Fed. (2nd) 61, 64 C.C.A. 4 (1928); *Koger* v. *Keller,* 120 Kans., 196, 342 P. 294 (1926); *Hogle* v. *City of Minneapolis,* 193 Minn. 326, 258 N.W.

721 (1935); *Edberg* v. *Johnson*, 149 Minn. 395, 184 N.W. 12, 21 N.C.C.A. 871 (1921); *State* v. *Gorham*, 110 Wash. 330, 188 P. 457, 9 A.L.R. 365 (1920); *Crosby* v. *Donaldson*, 95 Fla. 365, 116 So. 231 (1928). Some jurisdictions are to be found, however, which, in accord with the principal case, have held against such implied exemption. *Keevil* v. *Ponsford, supra* (since changed by statute); *Foster* v. *Bauer*, 173 Wisc. 231, 180 N.W. 817 (1921); *Hudson* v. *Carton*, 37 Ga. App. 634, 141 S.W. 222 (1928). Some courts have held that although it may be lawful for a police officer to travel at a speed in excess of the limit fixed for general traffic, he is not thereby relieved of the duty of exercising due care in the operation of his motor vehicle, *Brown* v. *Wilmington*, 27 Del. 492, 90 A. 44 (1914); *Edberg* v. *Johnson, supra*. The standard is such care as a prudent man would exercise in the discharge of official duties of a like nature, under like circumstances, *Edberg* v. *Johnson, supra; Brown* v. *Wilmington, supra*. Without express exemption, firemen, too, have been excluded from the operation of the speed regulations, *Toledo Ry. & Light Co.* v. *Ward, Admx.*, 2 Ohio C.C. (NS) 256, 15 C.D. 399 (1903), which was overruled by the principal case; *Balthaser* v. *Pacific Electric Ry. Co.*, 187 Cal. 302, 202 P. 37, 19 A.L.R. 452; *Kansas City* v. *McDonal*, 60 Kans. 481, 57 P. 123, 45 L.R.A. 429, 6 Am. Neg. Rep. 67 (1899); *Goeres* v. *Goeres*, 124 Neb. 720, 248 N.W. 75 (1933); *McCarthy* v. *Mason*, 171 A. 256, (Me., 1934). The fact, though, that a fire department is either expressly or impliedly exempt from the operation of traffic regulations does not relieve the operator of such vehicle from the same general duty of exercising due care even in answering emergency calls, *Farrell* v. *Fire Ins. Salvage Co.*, 189 App. Div. 795, 179 N.Y.S. 477 (1919), although in determining what is due care on the part of the operator of such vehicle, his right to assume that others will recognize and respect his superior rights on the street is an element to be taken into consideration. *Warren* v. *Mendenhall*, 77 Minn. 145, 79 N.W. 661 (1899).

Not only have the courts interpreted the motor vehicle laws to exclude from their operation police and firemen, but in *State* v. *Burton*, 41 R.I. 303, L.R.A. 1918F 559, 103 A. 962 (1918), it was held that a member of the United States Naval Reserve Force, on duty as a dispatch driver, was not amenable to the laws of the state while on his way to deliver a message, at the command of his superior officer, which that officer deemed urgent. The case rested on the principle of public necessity and convenience. It has been considered, too, that an implied exception to the requirements of traffic regulations exists in favor of

ambulances in emergency cases. *Boggs* v. *Jewel Tea Co.*, 266 Pa. 428, 109 A. 666 (1920); *Syck* v. *Duluth St. Ry. Co.*, 146 Minn. 118, 177 N.W. 944 (1920), *dictum*.

The conflict in those states where there is no provision for exemption seems to be based on whether the letter of the statute, rather than its spirit, is to control. Judge Zimmerman predicated his dissent in the principal case on the fact that it is hardly reasonable that a legislative body, in passing a statute or ordinance designed to suppress reckless driving, intended to restrict officers in the speed they might find necessary to use in arresting a violator of such statute or ordinance. He stated that a motorcycle policeman would be seriously handicapped in the performance of his duty to arrest speed violators, if he were held to an observance of speed and other traffic regulations, and if his violations thereof were to be denoted as negligence. In *Edberg* v. *Johnson*, *supra*, the court stated: "It would be an affront to the intelligence of the legislature to hold that, in enacting a statute designed to stop speeding, it intended to restrict peace officers to the prescribed speed limits when in pursuit of violators of the statute." The decision in the principal case, based on the strict letter of the statute, seems contrary to public convenience and necessity. But so long as the Ohio Courts adhere to their present position, the easiest way out of the situation seems to lie in amending the appropriate statutes and ordinances to provide for the exemption sought.

HARRY L. BROWN

VIOLATION OF STATUTE AS NEGLIGENCE PER SE — PROXIMATE CAUSE

The wagon of plaintiff's decedent was backed up to a platform of a cider mill on the north side of the highway in such a manner that the horses were standing on the highway with their heads and feet at or near the north curb line. It was at night and decedent's wagon had no lights. However, the highway was illuminated by lights of the cider mill. Defendant, proceeding westerly, negligently ran into the lead horse knocking him on the decedent who received injuries from which he later died. Held: that it was a question for the jury whether decedent's negligence, if any, was a contributory cause of the injury. *Miller* v. *Trummer, Admx.*, 50 Ohio App. 446, 198 N.E. 492, 2 Ohio Op. 118, 19 Abs. 130, Ohio Bar (Nov. 25, 1935).

Section 12614-3 of Motor Vehicles Chapter provides, "It shall be the duty of every person who operates, drives, or has upon any . . .