

1-1-1976

Torts

Phyllis Kovolick

Follow this and additional works at: <https://repository.law.miami.edu/umlr>

Recommended Citation

Phyllis Kovolick, *Torts*, 30 U. Miami L. Rev. 357 (1976)

Available at: <https://repository.law.miami.edu/umlr/vol30/iss2/4>

This Article is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

TORTS*

PHYLLIS KOVOLICK**

I.	COMPARATIVE NEGLIGENCE	358
A.	<i>Introduction</i>	358
B.	<i>Effects on Defenses</i>	360
C.	<i>Joint Tortfeasors</i>	363
D.	<i>Conclusion</i>	365
II.	NEGLIGENCE	365
A.	<i>Doctor—Patient</i>	365
1.	COMMON LAW	365
2.	MALPRACTICE ACT	366
B.	<i>Manufacturers and Suppliers</i>	367
C.	<i>Owners and Occupiers of Land</i>	371
1.	CLASSIFICATION OF VISITORS	371
2.	LIABILITY OF INDEPENDENT CONTRACTORS	373
3.	ACTIVE OR PASSIVE NEGLIGENCE	375
4.	SLIPS AND FALLS	375
5.	FORESEEABLE ACTS OF THIRD PARTIES	376
D.	<i>Violation of Statute or Ordinance</i>	377
E.	<i>Building Contractors and Architects</i>	378
F.	<i>Husband and Wife</i>	379
III.	AUTOMOBILES	379
A.	<i>The Dangerous Instrumentality Doctrine</i>	379
B.	<i>The Guest Statute</i>	380
C.	<i>No-Fault Law</i>	381
IV.	LIABILITY FOR ANIMALS	384
A.	<i>Dogs</i>	384
B.	<i>Trespassing Cattle</i>	385
C.	<i>Wild Animals</i>	386
V.	INTENTIONAL TORTS	386
A.	<i>Malicious Prosecution</i>	386
B.	<i>Defamation: Libel and Slander</i>	387
C.	<i>Conversion</i>	390
VI.	NUISANCE	391
VII.	DAMAGES	392
VIII.	GOVERNMENTAL TORT LIABILITY	394
A.	<i>Sovereign Immunity</i>	394
B.	<i>Municipal Corporations</i>	396
IX.	THE NEW WRONGFUL DEATH ACT	398

* The decisions surveyed in this article appear in volumes 281 through 318 of the Southern Reporter, Second Series. In addition, the survey covers laws enacted by the 1974 and 1975 sessions of the Florida legislature.

** Former member Editorial Board, *University of Miami Law Review*; member of the Florida Bar, Clerk to United States Dist. Ct., S.D. Fla.

During the past three years, Florida tort law has undergone significant changes. The adoption of no fault insurance¹ and a new wrongful death act,² as well as modifications in the liability of manufacturers,³ sellers,⁴ landowners⁵ and independent contractors,⁶ have all changed the complexion of tort actions to varying degrees. Without a doubt, however, the most significant development has been the adoption of comparative negligence.⁷

I. COMPARATIVE NEGLIGENCE

A. Introduction

In the historic case of *Hoffman v. Jones*,⁸ the Supreme Court of Florida ushered in a new era for the majority of practitioners in the state by adopting comparative negligence⁹ as the rule of law in all tort cases.¹⁰

The concept of comparative negligence is not new in the United States; it has long been deeply rooted in various aspects of the law. Statutes such as the Federal Employer's Liability Act,¹¹ the Jones

1. See text section III,C *infra*.

2. See text section IX *infra*.

3. See text section II,B *infra*.

4. *Id.*

5. See text section II,C *infra*.

6. These changes, among others, are treated in the text below.

7. See text section I *infra*.

8. 280 So. 2d 431 (Fla. 1973).

9. The court provided that the comparative negligence rule is applicable to all cases reaching trial after July 10, 1973, even if the action itself was commenced before that time, and to all cases on appeal at the time of its decision in which the question of comparative negligence had been properly and appropriately raised, even if the trial or lower court rendered its judgment prior to *Hoffman*. *Id.* at 440.

To study the application of this mandate by the district courts of appeal, see *Williams v. Seaboard Airline R.R.*, 283 So. 2d 33 (Fla. 1973) (comparative negligence applicable where that standard has been applied by the trial court prior to *Hoffman*; *Thornton v. Elliot*, 288 So. 2d 254 (Fla. 1973) (issue of comparative negligence held to have been raised in the trial court); *Hartley v. Florida E. Coast Ry.*, 299 So. 2d 108 (Fla. 4th Dist. 1974) (comparative negligence not applicable when not raised at the trial court level); *Grant v. Red Lobster Inns of America, Inc.*, 292 So. 2d 372 (Fla. 4th Dist.), *cert. denied*, 298 So. 2d 166 (Fla. 1974), (plaintiff's request for a jury instruction on comparative negligence held sufficient to have raised the issue at the trial level); *Horace Mann Ins. Co. v. Reed*, 299 So. 2d 60 (Fla. 1st Dist. 1974) (objections to a jury instruction on comparative negligence held sufficient to have raised the issue at the trial court level).

10. For a more in depth treatment of this topic, see Timmons & Silvis, *Pure Comparative Negligence in Florida: A New Adventure in the Common Law*, 28 U. MIAMI L. REV. 737 (1974) [hereinafter cited as Timmons & Silvis].

11. 45 U.S.C. § 51-60 (1970).

Act¹² and the old Florida Railroad Statute,¹³ have provided for some form of comparative negligence in specific areas. In addition, a majority of states have presently adopted some form of the doctrine as a general rule in all tort cases.¹⁴

Under *Hoffman*, Florida has joined the small minority of states which follow the so-called "pure form" of comparative negligence,¹⁵ under which damages are apportioned purely according to fault, so that the plaintiff may recover even if he is "more negligent" than the defendant. Likewise, the defendant will not be barred from recovery against the plaintiff on a counterclaim, so that under a set-off, the plaintiff may end up owing the defendant money.¹⁶ Thus, under the pure form of comparative negligence, the plaintiff and the single defendant, as a counterclaimant, are both in the same position in the sense that neither will be barred from recovery for the other's negligence, regardless of how great is his own.

This situation is in contrast to the "modified form" of comparative negligence followed by the great majority of jurisdictions, in which a party may recover only when his negligence is "not as great" as that of the other party or in other words, when he is less than 50 percent negligent.¹⁷

While comparative negligence will have no effect on the form of the counterclaim, it will clearly proliferate its use. Recognizing this and the fact that every party will be entitled to a verdict under comparative negligence, the *Hoffman* opinion provided that

[i]n such event the Court should enter one judgment in favor of the party receiving the larger verdict, the amount of which should be the difference between the two verdicts. . . . in keeping with the long recognized principles of "set off" in contract litigation.¹⁸

12. 46 U.S.C. § 766 (1970).

13. FLA. STAT. § 768.06 (1973).

14. Timmons & Silvis, *supra* note 10, at 739.

15. *Id.*

16. If, for example, the plaintiff suffered damages of \$10,000 and was only 10 percent negligent, while the defendant, who was 90 percent negligent, suffered \$100,000 in damages, the plaintiff would receive a verdict for \$9,000 (\$10,000 less 10 percent of \$10,000) but would end up having a judgment of \$1,000 entered against him, because the defendant would be entitled to a \$10,000 setoff (\$100,000 less 90 percent of \$100,000).

17. While this protects the plaintiff from counterclaims by a defendant whose negligence is greater, it suffers the inequity of barring a plaintiff who is 50 percent negligent from any recovery whatsoever, while allowing the plaintiff who is 49 percent negligent recovery of 51 percent of his damages.

18. 280 So. 2d at 439.

Comparative negligence in Florida, however, is still in an evolving state. Although *Hoffman* laid a broad framework, several important questions relating to its application were left open by the supreme court, which chose not to answer these questions until they are actually raised and adequately presented.¹⁹ The court also noted that an extensive body of case law already exists in Florida dealing with the application of comparative negligence under the old Railroad Statute²⁰ "much of . . . [which] will be applicable under the [new] comparative negligence rule. . . ."²¹ In addition, it was also pointed out that

[t]he answers to many of the problems will be obvious in light of the purposes for which we adopt the rule stated above: . . . [t]o allow a jury to apportion fault as it sees fit between negligent parties . . . [and] [t]o apportion the total damages resulting from the loss or injury according to the proportionate fault of each party.²²

B. *Effects on Defenses*

Perhaps the most significant of these unanswered questions related to the effect that the adoption of comparative negligence would have on the defense of assumption of risk. Although *Hoffman* made it clear that contributory negligence would no longer act as a total bar to a plaintiff's recovery,²³ but instead merely reduce his damages in proportion to his fault,²⁴ the court expressly declined to decide whether the defense of assumption of risk would be similarly

19. *Id.*

20. FLA. STAT. § 768.06 (1973). This statute provided that

[n]o person shall recover damages from a railroad company for injury to himself or to his property, where the same is done by his consent, or is caused by his own negligence. If the plaintiff and the agents of the company are both at fault, the former may recover, but the amount of recovery shall be such a proportion of the entire damages sustained, as the defendant's negligence bears to the combined negligence of both the plaintiff and the defendant.

Although this statute was declared unconstitutional in 1965 on equal protection and due process grounds in *Georgia S. & Fla. Ry. v. Seven-up Bottling Co.*, 175 So. 2d 39 (Fla. 1965), it was the source of a voluminous body of case law on comparative negligence.

21. 280 So. 2d at 439.

22. *Id.*

23. *Id.* at 438.

24. From the time of *Louisville & N.R.R. v. Tniestra*, 21 Fla. 700 (1886), until *Hoffman*, contributory negligence was a total bar to recovery. Under *Hoffman*, the availability of the defense was not changed, but merely its effect. The defendant will still raise the issue of the plaintiff's negligence as a defense.

affected.²⁵ Since *Hoffman*, however, the Third and Fourth District Courts of Appeal have been presented with this question and have reached directly conflicting conclusions.

In *Dorta v. Blackburn*,²⁶ the Third District concluded that, despite the adoption of comparative negligence in *Hoffman*, the supreme court still appeared to recognize assumption of risk, and thus held the defense to be a complete bar to recovery.²⁷ The articulation of its reasoning by the court was very limited, consisting in substance of a notation that other jurisdictions with comparative negligence still recognized assumption of risk as a valid defense. In addition, a reference was made to *Issen v. Licenberg*,²⁸ a previous Third District decision in which the court had held that the doctrine of no contribution among joint tortfeasors had survived *Hoffman*. *Issen*, however, has since been reversed by the Supreme Court of Florida on the grounds that it was inconsistent with the principles of *Hoffman*.²⁹

An opposite and sounder conclusion was reached by the Fourth District in *Rea v. Leadership Housing, Inc.*³⁰ In *Rea*, the court held that the distinction between assumption of risk and contributory negligence was a distinction without a difference³¹ so that assumption of risk as a defense was merged with the doctrine of comparative negligence and was, thus, similarly not a total bar to recovery.³²

Despite the supreme court's general reference to the old Railroad Statute, this source presents no insight into the ultimate resolution of the conflict, because it has no body of case law dealing specifically with the question of assumption of risk. The explanation for this lack of cases lies in the language of the statute, which bars recovery of damages by a person for injury "where the same is done by his consent. . . ."³³ Since assumption of risk involves consent to a *risk* which is different from the statutory language of consent to an *injury*, assumption of risk cases did not arise. In addition, the

25. 280 So. 2d at 439.

26. 302 So. 2d 450 (Fla. 3d Dist. 1974).

27. *Id.* at 451.

28. 293 So. 2d at 778.

29. 318 So. 2d 386 (Fla. 1975), *rev'g* 293 So. 2d 777 (Fla. 3d Dist. 1974).

30. 312 So. 2d 818 (Fla. 4th Dist. 1975).

31. *Id.* at 821.

32. *Id.* at 823.

33. Fla. Laws 1887, ch. 3744, §§ 1-2 [1887] (declared unconstitutional in 1965). See note 20 *supra*.

case law on consent to injury under the Railroad Statute is sparse and provides no insights into the status of assumption of risk under the comparative negligence doctrine.

Reference to Florida common law treatment of the two defenses and the experiences of other comparative negligence jurisdictions clearly supports the position taken by the Fourth District in giving the defense a comparative effect. The Florida case law prior to *Hoffman* has had little occasion to probe deeply into the nature of assumption of risk and has consequently characterized it simply as an extension of contributory negligence differing only in degree.³⁴ Thus, the giving of a comparative effect to contributory negligence under *Hoffman* should mandate the same treatment for assumption of risk as well.

This conclusion is strengthened by the decisions of other comparative negligence jurisdictions. States which have given the defense a comparative effect, including California, Minnesota, Washington and Wisconsin, have based their decision chiefly on the purposes underlying their comparative negligence doctrines.³⁵ In this connection, the purposes under which the comparative negligence rule for Florida was adopted were:

- (1) [t]o allow a jury to apportion fault as it sees fit between negligent parties whose negligence was part of the legal and proximate cause of any loss of injury; and
- (2) [t]o apportion the total damages resulting from the loss or injury according to the proportionate fault of each party.³⁶

As pointed out in *Rea*,³⁷ these purposes, especially the second, would be best served by the merger of assumption of risk with comparative negligence.

States which have retained assumption of risk as a complete defense include Arkansas, Georgia, Mississippi, Nebraska and South Dakota.³⁸ Their decisions have been based generally on an analysis of the difference between assumption of risk and contributory negligence, equating the former with consent to incur a risk and the latter with fault.³⁹ By emphasizing that the purpose of compara-

34. Timmons & Silvis, *supra* note 10 at 772-75.

35. V. SCHWARTZ, *COMPARATIVE NEGLIGENCE*, 167-72, (1974), 3-4 (Supp. 1975) [hereinafter cited as SCHWARTZ].

36. 280 So. 2d at 439.

37. 312 So. 2d at 823.

38. SCHWARTZ, *supra* note 35, at 161-62.

39. *Id.* at 161-65.

tive negligence is to apportion fault, these states have left assumption of risk, based on consent to incur a risk, outside the realm of comparative negligence.⁴⁰

Therefore, because Florida courts have never maintained a rigid distinction between assumption of risk and contributory negligence, preferring instead to recognize assumption of risk as merely an extension of contributory negligence,⁴¹ a radical change in analysis would have been necessary to apply the rationale of these states recognizing assumption of risk as a complete defense.

Neither is it certain as to what effect the adoption of comparative negligence will have on other defenses. Although *Hoffman* expressly abolished the doctrine of last clear chance,⁴² it remained silent in regards to other judicially created doctrines which had been developed in response to the harshness of contributory negligence's total bar to a plaintiff's recovery. The adoption of comparative negligence would properly remove the need for these artificial doctrines, which then would become merely "factors" to be weighed by the jury in apportioning fault.

It is apparent from *Hoffman*, however, that comparative negligence will have no effect upon the defenses of "no negligence" and "lack of proximate cause," because the court's opinion made it clear that there can be no apportionment of fault where there is no fault on one side.⁴³

C. Joint Tortfeasors

Although declining to decide the fate of Florida's common law "no contribution rule" under comparative negligence in *Hoffman v. Jones*,⁴⁴ the Supreme Court of Florida subsequently adopted the doctrine of contribution among joint tortfeasors in *Issen v. Licenberg*,⁴⁵ following the legislature's statutory recognition⁴⁶ of the same principle during the pendency of the *Issen* appeal.

40. *Id.*

41. See note 31 *supra* and accompanying text.

42. 280 So. 2d at 438. Nevertheless, this is not to say that a defendant's last clear chance to avoid injuring a plaintiff will not be taken into account as one factor in deciding the ultimate question of negligence, even if the doctrine is not used by name.

43. *Id.*

44. 280 So. 2d 431 (Fla. 1973).

45. 318 So. 2d 386 (Fla. 1975), *rev'g* 293 So. 2d 777 (Fla. 3d Dist. 1974).

46. FLA. STAT. § 768.31 (1975). The Act became effective June 13, 1975 and applies to all causes of action pending at the time of its passage in which the right of contribution among joint tortfeasors is involved and to cases thereafter filed.

In *Issen*, the plaintiff, having been involved in a collision, sued both the driver of the vehicle in which she was a passenger and the other driver. The jury, through the use of special interrogatories, determined that plaintiff's driver was 15 percent at fault and that the other driver was 85 percent at fault in causing the collision. The trial judge certified the question of whether it was proper to apportion the fault between the tortfeasors to the Third District Court of Appeal. The appellate court answered the question in the negative, noting that *Hoffman* had not affected the common law rule of no contribution among joint tortfeasors in Florida.⁴⁷

The supreme court, after granting conflict certiorari on the ground that there was a conflict between *Issen* and its own decision in *Hoffman*,⁴⁸ adopted the contribution rule by reasoning that:

[t]here is no equitable justification for recognizing the right of the plaintiff to seek recovery on the basis of apportionment of fault while denying the right of fault allocation as between negligent defendants.⁴⁹

Nevertheless, although the court apparently would have relied upon its *Hoffman* rationale to adopt the rule of contribution among joint tortfeasors, when implementing the rule the court deemed itself bound to ignore this framework of analysis. The *Hoffman* rationale would have required the formulation of tortfeasors' shares by their percentage of fault, but instead, the court followed the pro rata formula required by the newly passed Uniform Contribution Among Joint Tortfeasors Act,⁵⁰ which is inconsistent with the court's rationale in *Hoffman*.

The Act retains the joint and several liability of joint tortfeasors in regards to the plaintiff but requires contribution on a pro rata basis to the extent that the tortfeasor has paid in excess of his pro rata share.⁵¹ Moreover, in determining the pro rata share, the Act specifies that the relative degree of fault shall not be considered.⁵² Thus, the only determination that now needs to be made is the

47. 293 So. 2d 777 (Fla. 3d Dist. 1974). *Accord*, *Rader v. Variety Children's Hosp.*, 293 So. 2d 778 (Fla. 3d Dist. 1974).

48. It is difficult to find a conflict between the two cases since *Hoffman* left open the question while *Issen* offered an answer. It is apparent that the court was now ready to answer its own question and saw such an opportunity.

49. 318 So. 2d at 391.

50. FLA. STAT. § 768.31(2)(b) (1975).

51. *Id.*

52. FLA. STAT. § 768.31(3)(c) (1975).

degree of fault between the plaintiff on one hand and the joint tortfeasors jointly on the other, with the joint tortfeasors sharing damages on a pro rata basis despite their relative degree of fault in relation to one another.

D. Conclusion

Although many questions left unanswered by *Hoffman* have been answered during the survey period, it will take many years for a body of case law to develop in order to fill in all the gaps. Nevertheless, regardless of the present uncertainty in many areas and the hidden dangers posed to the unwary, the adoption of comparative negligence has had the welcome effect of providing "a more equitable system of determining liability and a more socially desirable method of loss distribution."⁵³

II. NEGLIGENCE

A. Doctor-Patient

1. COMMON LAW

Although expert testimony is ordinarily essential to support an action for malpractice, Florida juries have in the past been permitted to determine liability without such testimony in certain cases. This has occurred in those cases based upon negligence in administering an approved medical treatment as distinguished from actions based upon an incorrect diagnosis or the adoption of the wrong method of treatment.⁵⁴ This rule was reaffirmed during the survey period by the Second District Court of Appeals in *Pierce v. Smith*.⁵⁵ *Pierce*, a doctor aware of Smith's prior history of bleeding, performed a bilateral vasectomy and allowed him to leave the office while he was still bleeding. When Smith returned two days later in a swollen condition and still bleeding, the doctor only recommended application of ice packs and prescribed an antibiotic. The court held that expert testimony for the plaintiff was not necessary and that the jury had the right to conclude that under the circumstances the doctor had failed to take appropriate precautions to control the bleeding.

53. 280 So. 2d at 437.

54. *Atkins v. Humes*, 110 So. 2d 663 (Fla. 1959); *Furnari v. Lurie*, 242 So. 2d 742 (Fla. 4th Dist. 1971).

55. 301 So. 2d 805 (Fla. 2d Dist. 1974).

The Third Circuit Court of Appeals further bolstered the jury's role by holding that a medical expert may not invade the jury's province of determining the ultimate issue of proximate cause by testifying that the injurious result was *in fact* occasioned by a particular cause.⁵⁶ Thus, the court limited an expert to testifying that the alleged malpractice *could* have occasioned the result.⁵⁷

2. MALPRACTICE ACT

In an effort to meet the outcry over rising medical malpractice insurance rates, the Florida legislature passed the Medical Malpractice Reform Act of 1975.⁵⁸ The Act took effect July 1, 1975⁵⁹ and promises to produce both drastic changes and widespread controversy in the tort law surrounding the doctor-patient relationship.

The Malpractice Act inserts a mediation panel, consisting of one lawyer, one doctor, and one circuit judge,⁶⁰ between the plaintiff and the circuit court by requiring that all malpractice claims be submitted to such a panel for a determination of the issue of liability.⁶¹ If there is a finding of liability, the parties may agree to use the panel for assistance in assessing damages.⁶²

Either party may also reject the decision of the mediation panel and force the claim into the circuit court.⁶³ If this occurs, however, the Malpractice Act provides that the findings of the mediation panel will be admissible in evidence⁶⁴ and that the doctor's insurer may not be joined as a co-defendant nor even be mentioned during

56. *Hernandez v. Clinica Pasteur, Inc.*, 293 So. 2d 747 (Fla. 3d Dist. 1974).

57. 293 So. 2d at 749. The hospital was found liable for the acts of its unlicensed resident and supervising physician who failed to administer an electrocardiogram when told that decedent was suffering chest and stomach pain and instead advised him to go home and do exercises. Decedent followed their instructions, suffered severe pains, and returned to the hospital where an electrocardiograph was taken, showing myocardial infarction. There was expert testimony at trial that the exercise decedent was directed to take would increase the damage to a patient suffering from a myocardial infarction.

58. Fla. Laws 1975, ch. 75-9.

59. Fla. Laws 1975, ch. 75-9, § 17.

60. FLA. STAT. § 768.133(1) (1975), *created by* Fla. Laws 1975, ch. 75-9, § 5(1).

61. FLA. STAT. § 768.133(2) (1975). The Malpractice Act provides for full discovery procedures in preparation for the mediation panel hearing. FLA. STAT. § 768.133(5) (1975). The hearing itself is a full evidentiary proceeding, complete with presentation of witnesses and opening and closing statements, but without strict adherence to the rules of procedure and evidence.

62. FLA. STAT. § 768.133(9) (1975).

63. FLA. STAT. § 768.133(10) (1975).

64. FLA. STAT. § 768.133(11) (1975).

the trial.⁶⁵ This latter consequence is certain to raise a constitutional attack on the Malpractice Act in light of the Supreme Court's holding in *Shingleton v. Bussey*⁶⁶ that joinder is a procedural issue and under the Florida Constitution,⁶⁷ the determination of procedural issues is solely within the province of the courts.

Further changes are made in the insurance structure of medical malpractice actions. The Act establishes a joint underwriting fund composed of all the casualty insurers in the state. Any claim in excess of \$100,000 must be made jointly against the individual defendant and the insurance fund, with the fund absorbing any verdict in excess of \$100,000.⁶⁸

The Act also changes the statute of limitations in medical malpractice actions from two years after the cause of action is (or should have been) discovered, to an absolute maximum of four years, regardless of time of discovery.⁶⁹ In addition it codifies the law of informed consent⁷⁰ and makes provisions for the discipline of physicians by the State Board of Medical Examiners.⁷¹

Several aspects of the Malpractice Act, in addition to the previously discussed joinder provisions, also promise to produce considerable controversy. The Act does not require the defendant-doctor to submit to the panel, but rather requires the plaintiff-patient to go through the mediation panel as a condition precedent to instituting an action at law. The provision changing the statute of limitations will also result in further debate due to the unavoidable delay in discovery of some malpractice claims, as will the entire concept of restructuring court proceedings in light of the Florida constitutional guarantee⁷² to every citizen of access to the courts for redress of any injury, requiring justice to be administered without sale, denial, or delay.

B. *Manufacturers and Suppliers*

During the survey period, contrasting decisions had the effect

65. FLA. STAT. § 768.133(10) (1975).

66. 223 So. 2d 713 (Fla. 1969).

67. FLA. CONST. art. I, § 4.

68. FLA. STAT. § 627.353 (1975), created by Fla. Laws 1975, ch. 75-9, § 15.

69. FLA. STAT. § 95.11(4) (1975), amended by Fla. Laws 1975, ch. 75-9, § 7.

70. FLA. STAT. § 768.132 (1975), created by Fla. Laws 1975, ch. 75-9, § 11.

71. FLA. STAT. § 458.120(5) (1975), created by Fla. Laws 1975, ch. 75-9, § 12 and FLA. STAT. § 458.120(6) (1975), amended by Fla. Laws 1975, ch. 75-9, § 12.

72. FLA. CONST. art. I, § 21.

of both increasing and decreasing manufacturers' and suppliers' exposure to products liability suits.

The doctrine of *res ipsa loquitur*, an old aid to plaintiffs in personal injury actions bottomed on warranty theories, was limited in a recent exploding bottle case based upon negligence and breach of implied warranty for injuries sustained.⁷³ Plaintiff removed a 28-ounce bottle of Coca-Cola from her refrigerator and it exploded, injuring her foot. The evidence showed that plaintiff did not "bump" the bottle at the time it was removed from the refrigerator, nor did the bottle encounter any sudden temperature changes.

Although the court reviewed previous Florida exploding bottle cases in which bottlers had been found liable under the application of *res ipsa* even though the bottle causing the injury was not in its possession or control at the time of the accident,⁷⁴ it nevertheless held that the plaintiff's case had failed to meet the tests for imposition of liability either on the theory of negligence or that of implied warranty, because there was no evidence of what had happened to the bottle while in the retailer's possession.⁷⁵ The majority opinion prompted a strong dissent which termed the proof requirement unrealistic since it placed a "well nigh impossible burden on the plaintiff."⁷⁶ The dissent also called attention to the trend of modern decisions removing some of these strict requirements as proof.

A contrasting relaxation of proof requirements was shown in *McCarthy v. Florida Ladder Co.*⁷⁷ Here the plaintiff sued under the theory of implied warranty, for injuries allegedly caused by a defective ladder.⁷⁸ The ladder disappeared by the time of trial and the

73. *Coca-Cola Bottling Co. v. Clark*, 299 So. 2d 78 (Fla. 1st Dist.), *petition for cert. dismissed*, 301 So. 2d 100 (Fla. 1974).

74. *E.g.*, *Groves v. Florida Coca-Cola Bottling Co.*, 40 So. 2d 128 (Fla. 1949). Compare *Hughes v. Miami Coca-Cola Bottling Co.*, 155 Fla. 299, 19 So. 2d 862 (1944), where direct proof of negligence was held to be necessary if plaintiff shows no unusual atmospheric or temperature change or improper handling after the bottle has left possession of bottler.

75. [T]here must be proof, in order for an injured purchaser to recover from the bottler in cases where the product was purchased from an intermediate retailer, that the product "was not handled improperly from the time it left the possession of the bottler up to the time of the explosion."
299 So. 2d at 82.

76. 299 So. 2d at 84. The dissent's reliance upon *Canada Dry Bottling Co. v. Shaw*, 118 So. 2d 840 (Fla. 2d Dist. 1960), in which an implied warranty theory was applied to a bottle as well as its contents seems misplaced, however, for in *Shaw* there was evidence of damage to the bottle which was present when it was filled and capped, whereas in the instant case the bottle was not admitted into evidence and no such defect was shown.

77. 295 So. 2d 707 (Fla. 2d Dist. 1974).

78. Uniform Commercial Code § 2-318, FLA. STAT. § 672.2-318 (1973), expands warranty

judge granted defendant's motion for summary judgment. In reversing the summary judgment, the Second District said, "[t]here is no rule of law which holds that proof of a defective product cannot be established by parol testimony."⁷⁹ The court, in effect, held that it is not necessary to prove a specific defect, but rather that a defect may be inferred from the fact that a new product performs in such a manner as to preclude any other reasonable inference which would suggest that the product was not defective. Such an interpretation may very well open the door for a deluge of cases where examination of the "missing item" might readily show no defect.

Manufacturers were further exposed to liability by the adoption of the doctrine of "crashworthiness," when the Third District Court of Appeal held that an automobile manufacturer's liability extended to a defect which caused injury to a user as a result of a collision, even though the defect was not a cause of the collision.⁸⁰ The plaintiff's decedent, a passenger in the rear seat, was thrown against the front seat which had slid forward after the collision, exposing the sharp edges of the rail on which the seat was mounted. When the passenger fell to the floor, her head hit the rail and she suffered injuries which ultimately caused her death. The court stated that the issue of proximate cause was to be resolved by the jury⁸¹ and accordingly reversed the order dismissing the plaintiff's complaint.

The liability of sellers for the negligent construction and design of their products was extended in *Keller v. Eagle Army-Navy Department Stores, Inc.*⁸² so as to be commensurate with that of manufacturers of products which, although not dangerous instrumentalities per se, are rendered inherently dangerous by their defects. The court's holding was based squarely on Restatement (Second) of

liability by providing that

[a] seller's warranty whether express or implied extends to . . . an employee, servant or agent of his buyer if it is reasonable to expect that such person may use, . . . the goods and who is injured in person by breach of the warranty.

Thus, plaintiff, who was an employee of the ladder's purchaser, had a cause of action for breach of implied warranty under Uniform Commercial Code § 2-314, FLA. STAT. § 672.2-314 (1973).

79. 295 So. 2d at 709.

80. *Evancho v. Thiel*, 297 So. 2d 40 (Fla. 3d Dist. 1974). For an in depth analysis of the doctrine of crashworthiness, see Rossman & Bramnick, *The Crashworthiness Doctrine—A Search For a Rational Answer in Florida*, 29 U. MIAMI L. REV. 70 (1974).

81. 297 So. 2d at 44.

82. 291 So. 2d 58 (Fla. 4th Dist. 1974).

Torts § 402A⁸³ which subjects a seller to liability for physical harm caused to an ultimate user.

The case arose when a combination torch and mosquito repellent device exploded, severely burning a minor guest of the purchaser. The torch had been lit and handled properly, and the explosion occurred when it was raised and inclined after being in operation for half an hour. There was expert testimony that the can was improperly constructed and that improper design and negligent construction of the torch resulted in a gaseous state which caused the explosion.

Although Florida law had previously held a manufacturer strictly liable for the negligent construction or design of a product made inherently dangerous by such a negligent defect even though the article was not a dangerous instrumentality per se, *Keller* is the first Florida decision to hold a mere seller strictly liable for such defects. While the injury here was sustained by a user, rather than by the purchaser, the court nevertheless recognized the public policy of protecting the consuming public in stating that it

[s]eems entirely reasonable to allow recovery against the seller of such an article under the same circumstances and conditions. . . .

Since the seller, by marketing the potentially dangerous product for use and consumption and by inducement and promotion encourages the use of these products he sells, he undertakes a certain and special responsibility towards the consuming public who may be injured by it.⁸⁴

Liability for breach of warranty does not extend to suppliers and sellers of blood under Florida Statutes section 672.316(5),⁸⁵ un-

83. RESTATEMENT (SECOND) OF TORTS § 402A (1965) provides:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although (a) the seller has exercised all possible care in the preparation and sale of his product, and (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

84. 291 So. 2d at 61.

85. FLA. STAT. § 672.2-316(5) (1973) provides that the procurement, processing, storage, distribution, or use of whole blood, plasma,

less it is possible to detect or remove the defect causing the impurity, thus making the real basis for such a cause of action a negligent rendition of services.⁸⁶ Noting that there can be a breach of warranty only where a sale is involved, the First District Court of Appeal concluded that the legislature had created a hybrid form of warranty in making a concept ordinarily cognizable only in the law of sales applicable to the law of negligence.⁸⁷ Thus, the adoption of Florida Statutes section 672.316-(5), as apparently properly construed by the First District, reverses the trend of recent cases⁸⁸ considering the supply of blood a sale to which warranty theory would apply.

C. Owners and Occupiers of Land

1. CLASSIFICATION OF VISITORS

Prior to the landmark decision of *Post v. Lunney*,⁸⁹ it was often difficult for a plaintiff to recover for injuries which he suffered on the premises of another, because the standard of care required of the landowner varied depending upon whether one was held to be a trespasser, licensee or invitee. In order to receive the higher standard of care⁹⁰ accorded to an invitee, it was necessary for the plain-

blood products, and blood derivatives for the purpose of injecting or transfusing the same, or any of them, into the human body for any purpose whatsoever is declared to be the rendering of a service by any person participating therein and does not constitute a sale, whether or not any consideration is given therefore, and the implied warranties of merchantability and fitness for a particular purpose shall not be applicable as to a defect that cannot be detected or removed by reasonable use of scientific procedures or techniques.

86. *Williamson v. Memorial Hosp.*, 307 So. 2d 199 (Fla. 1st Dist. 1975).

87. *Id.* at 201.

88. See *Mercy Hosp., Inc. v. Benitez*, 257 So. 2d 51 (Fla. 3d Dist. 1972). Earlier Florida cases had distinguished between the liability of commercial blood banks and hospitals, holding only the former liable under warranty theory. *Russell v. Community Blood Bank, Inc.*, 185 So. 2d 749 (Fla. 2d Dist. 1966), *modified*, 196 So. 2d 115 (Fla. 1967); *Hoder v. Sayet*, 196 So. 2d 205 (Fla. 3d Dist. 1967). In *Benitez*, the court found a hospital liable under warranty theory by analogizing it to a commercial blood bank, holding that the transaction was a sale and not a service.

89. 261 So. 2d 146 (Fla. 1972), *discharging cert. from* 248 So. 2d 504 (Fla. 4th Dist. 1971).

90. The higher standard of care due an invitee was stated in *McNulty v. Hyrley*, 97 So. 2d 185, 187, (Fla. 1957) as follows:

The owner or occupant owes an invitee the duty of keeping the premises in a reasonably safe condition, and . . . to guard against subjecting such person to damages of which the owner or occupant is cognizant or might reasonably have foreseen.

tiff to be on the landowner's premises for the "mutual economic benefit" of the parties.⁹¹

In *Lunney*, the Supreme Court of Florida replaced this "economic" or "mutual benefit" requirement with the "invitation test" set forth in Restatement (Second) of Torts § 332. Under this test, any person who comes upon property of another for the purpose for which it is held open to the public is to be considered an invitee without regard to whether there is any business benefit to either party.⁹²

This "invitee" category was further enlarged by the supreme court to include "invited social guests" in *Wood v. Camp*,⁹³ thereby eliminating the distinction between invitations to the public at large and to particular individuals. The court refused, however, to eliminate the category of uninvited licensees—those who come upon another's premises solely for their own convenience without either express or implied invitation—noting that, although there was an overlap between such licensees and trespassers, there were "narrow distinctions" which justified the retention of the two classes.⁹⁴

Still another category—the invited licensee—appears to have been recognized by the subsequent Fourth District decision in *Christie v. Anchorage Yacht Haven*⁹⁵ in which the plaintiff sued a landowner for injuries sustained when he was knocked from his bicycle by a dog running loose on the defendant's property. In reversing a directed verdict for the defendant, the court held that a jury could reasonably find plaintiff to be a licensee because there was evidence that persons, regularly and with the implied permission of the owner, used the path which plaintiff was on when attacked and that the defendant, therefore, had the duty to warn unwary licensees of the dangerous propensities of the dog.

91. The "mutual economic benefit" test was also stated in *McNulty v. Hyrley*, 97 So. 2d 185, 188 (court's emphasis) as:

[w]hether the injured person . . . had present business relations with the owner of the premises which would render his presence of mutual aid to both. . . . *In the absence of some relation which inures to the mutual benefit of the two or to that of the owner, no invitation can be implied, and the injured person must be regarded as a mere licensee.*

92. 261 So. 2d 146, 148 (Fla. 1972), adopting RESTATEMENT (SECOND) OF TORTS § 332 (1965).

93. 284 So. 2d 691 (Fla. 1973), modifying *sub nom.* *Camp v. Gulf Counties Gas Co.*, 265 So. 2d 730 (Fla. 2d Dist. 1972).

94. *Id.* at 695.

95. 287 So. 2d 359 (Fla. 4th Dist. 1973).

This approach was seemingly rejected by the Second District, in *Libby v. West Coast Rock Co.*⁹⁶ Here the property involved had been used for mining years before and contained rock pits, but no warning signs. Although it was used *regularly, frequently and consistently* as a "lovers' lane," the court rejected the argument that the defendant had impliedly invited the citizens of the area to come upon the property. Moreover, although the court actually considered plaintiff's decedent to be a trespasser, it would not accept the argument that a landowner, who knows of the continued use of the property by trespassers, is held to have knowledge of the particular trespasser's presence and is thus under a duty to warn of known dangers not open to ordinary observation. Instead, the court found it "more appropriate to elevate the status of a trespasser who is injured on the land to that of [uninvited] licensee."⁹⁷ The court then went on to hold that, even if a water-filled pit with steep sides is a dangerous condition, the landowner can reasonably contemplate that it will be readily seen⁹⁸ and thus affirmed the trial court's dismissal of plaintiff's complaint for failure to state a cause of action.

Although these two cases present basically the same person—one of a class of people who regularly and with knowledge of the landowner comes upon the landowner's property for his own purposes—two districts have classified this person differently. One has termed such visitors invited licensees who, although apparently not elevated to the status of an invitee, are entitled to a warning by a landowner of dangers which the visitor cannot be reasonably expected to discover and of which the landowner is aware. The other has classified these same people as uninvited licensees who are entitled to no more care than an undiscovered trespasser.

2. LIABILITY OF INDEPENDENT CONTRACTORS

The liability of a landowner to all classes of persons injured on his land was extended to an independent contractor using the land in *Improved Benevolent & Protected Order of Elks of the World*,

96. 308 So. 2d 602 (Fla. 2d Dist. 1975).

97. *Id.* at 604.

98. *Id.* It should be noted, however, that in so doing, the appellate court improperly passed upon a question of fact because for the purposes of the motion to dismiss, all of the plaintiff's well-pleaded allegations (to wit, that the landowner should have reasonably foreseen that the pit would not be seen) should have been deemed true.

*Inc. v. Delano.*⁹⁹ Delano was injured at a picnic hosted and catered by defendant Kay Smith Catering held on the premises of defendant Elks. She slipped in a hole while walking across the lawn. The two defendants had entered into a concession agreement whereby Kay Smith was given permission to hold the event on the premises and in turn was charged with the duty of supervising and cleaning the inside building area to be used by the guests. The defendant Elks Club was responsible for maintaining the outside picnic grounds, presumably a continuing responsibility as owner of the premises.

The caterer discovered that the picnic grounds were not in a "suitable condition" and informed the Elks' manager of this fact. Neither defendant remedied the defective condition. The court properly held plaintiff to be "at the very least" a licensee by means of implied invitation and thus the Elks Club, as owner of the premises, was held liable for failing to discharge its duty to warn plaintiff of any dangers of which it was aware. The Third District Court of Appeal went on to extend prior case law by further holding that the independent contractor, Kay Smith, was jointly liable with the owner of the premises for plaintiff's injuries. It based its holding on the fact that, although Kay Smith was not expressly responsible for maintenance of the outside premises, it was aware of the "defect" in the property which caused plaintiff's injury. Thus, liability appears to have been imposed solely because of that knowledge.¹⁰⁰

This extension of liability appears to run afoul of the reasonable man standard heretofore in force in Florida. It imposed a landowner's duty upon a "visiting" independent contractor unfortunate enough to discover, and thus to have knowledge of, a dangerous condition which the landowner fails to correct, even though the contractor has no control over the premises. The independent contractor's liability should be measured in terms of what is reasonable in light of its position as an independent contractor, not by what would be reasonable for a landowner. Therefore, because Kay Smith had no responsibility to maintain the outside premises, its course of action in informing defendant Elks of the dangerous condition should have been considered reasonable under the circumstances.

99. 308 So. 2d 615 (Fla. 3d Dist. 1975).

100. The trial court had directed a verdict for defendant Kay Smith because it had construed the concession agreement to impose responsibility upon that defendant only for those operations over which it personally exercised control; to wit, the inside building area.

3. ACTIVE OR PASSIVE NEGLIGENCE

In *Hix v. Billen*,¹⁰¹ distinction was made, as to a landowner's liability, between injuries caused by the landowner's active negligence and those caused by the condition of the premises. The Supreme Court of Florida held that the distinctions in duty owed by the owner of premises to invitees relates only to the condition or use of the landowner's premises and not to injuries caused by the active conduct or affirmative negligence of the landowner, in which case the general elements of a negligence action are applicable.

This distinction was ignored by the First District, however, in *Phillips v. Phillips*.¹⁰² In *Phillips*, a grandson who was injured while attending a barbeque at his grandfather's home, sued his grandfather alleging that the latter's act of carelessly and negligently using gasoline in an open fire in his presence caused his injuries. Although the allegations were directed at the defendant's affirmative acts rather than at the condition of the premises, the court relied on *Wood v. Camp*¹⁰³ to classify the plaintiff as an invited social guest entitled to the standard of reasonable care, rather than treating the case under general elements of negligence.

4. SLIPS AND FALLS

"Slip and fall" cases provide constant examination of the circumstances under which it is claimed that the required duty of care is breached. The general rule was restated by the Supreme Court of Florida in *Montgomery v. Florida Jitney Jungle Stores, Inc.*¹⁰⁴ where it was held that an owner of premises will not be liable if the record fails to show either how the condition was created, the length of time the condition existed, or that the store owner was responsible for the condition, unless it can be shown that the dangerous condition existed for a sufficient length of time to charge defendant with constructive notice.¹⁰⁵

101. 284 So. 2d 209 (Fla. 1973), *denying cert. from* 260 So. 2d 284 (Fla. 4th Dist. 1972). This case overruled *Cochran v. Abercrombie*, 118 So. 2d 636 (Fla. 2d Dist. 1960) and similar past holdings inconsistent with the view adopted by the court.

102. 287 So. 2d 149 (Fla. 1st Dist. 1973).

103. 284 So. 2d 691 (Fla. 1973).

104. 281 So. 2d 302 (Fla. 1973).

105. See *Winn-Dixie Montgomery, Inc. v. Petterson*, 291 So. 2d 666 (Fla. 1st Dist. 1974), holding that where an owner has no actual or constructive notice of a dangerous condition, liability cannot attach, particularly when the dangerous condition is traceable to acts of persons other than its employees.

Moreover, either circumstantial or direct evidence was held to be sufficient by the Third District in *Marlowe v. Food Fair Stores of Florida, Inc.*¹⁰⁶ to give rise to the inference that a foreign substance which caused plaintiff to fall had been on the floor sufficient time to charge the store with constructive knowledge of its presence.¹⁰⁷

Despite its holding in *Marlowe*, however, the District Court of Appeal, Third District, refused to draw any inferences concerning breach of duty in a case which offered direct evidence of a dangerous condition created by hotel employees. In *Wirt v. Fountainbleau Hotel Corp.*,¹⁰⁸ the court held that the evidence only supported a finding that an accident had occurred, despite unrebutted testimony that plaintiff had been forced to walk through water placed in her path by hotel employees who hosed the area and that she had fallen on chipped steps as she descended a staircase. Although plaintiff did not know exactly what made her fall, she testified that she thought it was a combination of her wet shoes and the chipped stairs. Therefore, in holding as it did, the court departed from its own well-established rule that all reasonable inferences should be drawn from the evidence.

5. FORESEEABLE ACTS OF THIRD PARTIES

A landowner's liability is not limited to injuries resulting from hidden defects or acts of negligence on his premises, but also includes those resulting from the foreseeable intentional torts of third persons.¹⁰⁹ Thus, during the survey period, a hotel owner was held to owe his guests the duty of exercising reasonable care for their physical safety, whether in their rooms or in common areas,¹¹⁰ and a store owner was held to have a duty to exercise the same care to

106. 284 So. 2d 490 (Fla. 3d Dist. 1973), *cert. denied*, 291 So. 2d 205 (Fla. 1974).

107. A customer was given permission to use the store's toilet facilities, located one flight of stairs above the store, and slipped while descending. Although plaintiff testified that she thought she had stepped on a piece of banana, there was no direct evidence regarding what she slipped on or how long it had been there.

108. 306 So. 2d 547 (Fla. 3d Dist. 1974).

109. *Sparks v. Ober*, 192 So. 2d 81 (Fla. 3rd Dist. 1966).

110. *Phillips Petroleum Co. v. Dorn*, 292 So. 2d 429 (Fla. 4th Dist. 1974). In plaintiff's action for injuries received when beaten and robbed by assailants hiding in his hotel room, the court held that a hotel owner only owes its invitees the duty of exercising reasonable care for their safety and not a higher standard.

protect its patrons from muggings while in a store-owned parking lot.¹¹¹

D. Violation of Statute or Ordinance

The supreme court resolved the often-disputed effect of a statutory violation in *de Jesus v. Seaboard Coast Line R.R.*¹¹² during the last survey period.¹¹³ In *de Jesus*, the court held that such violations constituted only prima facie evidence of negligence except where the statute imposes strict liability¹¹⁴ or is intended to protect a particular class of persons from a particular type of injury.¹¹⁵ The court reaffirmed its position that violations of child labor laws¹¹⁶ fall within the former exception, so that a guilty employer will be deemed negligent per se in a suit by a minor even though there is no causal relation between the violation of the statute and the injury.¹¹⁷ Therefore, an employer who failed to obtain a special certification of employment for a minor as required by statute¹¹⁸ was liable as a matter of law for injuries to a child while in the course and scope of employment, even though the employer's failure to obey the statute was clearly not the proximate cause of the minor's injury.¹¹⁹

The violation of a statute requiring the bottoms and sides of swimming pools to be light in color¹²⁰ did not constitute negligence per se in an action for the drowning death of plaintiff's decedent in

111. *Rothart v. Jordan Marsh Co.*, 305 So. 2d 255 (Fla. 3d Dist. 1974). Plaintiff store patron was held to have stated a cause of action against store owners for injuries received from a mugging in the store's covered parking lot.

112. 281 So. 2d 198 (Fla. 1973).

113. For a complete discussion of the case, see Beckham & Esquiroz, *Torts, 1974 Survey of Florida Law*, 28 U. MIAMI L. REV. 662, 669-71 (1974); 28 U. MIAMI L. REV. 719 (1974).

114. Statutes which impose "strict liability" are those statutes designed to protect a particular class of persons from their inability to protect themselves. 281 So. 2d at 201.

115. In such cases, the plaintiff must be a member of the class of persons that the statute was intended to protect, the injury must be of the type that the statute was designed to prevent and the violation of the statute must be the proximate cause of the injury. *Id.*

116. FLA. STAT. §§ 450.011 *et. seq.* (1971).

117. *Sloan v. Coit Int'l, Inc.*, 292 So. 2d 15 (Fla. 1974).

118. FLA. STAT. § 450.111(2) (1973) provides that

[n]o minor between twelve and sixteen years of age shall be employed, permitted or suffered to work in any gainful occupation, except in domestic service in private homes, in farmwork, or . . . during the hours when the public schools are not in session, unless the person . . . employing such minor shall procure and keep on file at the place of the minor's employment, a special certificate of employment. . . .

119. *Sloan v. Coit Int'l, Inc.*, 292 So. 2d 15 (Fla. 1974).

120. FLA. STAT. § 514.02 (1973) and FLA. ADMIN. CODE § 10D-5.07 (1975).

a pool with a mural painted on the bottom.¹²¹ Since the purpose of the statute was not the protection of a class of persons, but rather the promotion of sanitation, health and cleanliness, the court concluded that a person who could not see the bottom of the pool when he dove in was not intended to be protected.

E. *Building Contractors and Architects*

A road contractor owes motorists the duty to maintain a highway under construction in a reasonably safe condition for drivers who are vigilant to observe obstructions incident to its work. Thus a cause of action was stated against a contractor by a taxi cab driver who had collided with a raised portion of a draw-bridge while the bridge was under construction.¹²²

The contractor is liable only for his negligence, however; thus a failure to show that he created the defect will relieve him of liability, such as where the plaintiff fails to prove that a stop sign whose absence led to an accident was removed by the defendant contractor.¹²³

The Supreme Court of Florida afforded contractors a further measure of relief at the expense of architects by holding the latter liable for those financial damages suffered by contractors if proximately caused by the architect's negligent design or preparation of plan, despite a lack of privity.¹²⁴ This merely added still one more exception to an already exception-riddled rule.

Although recognizing that the lack of privity had traditionally barred such claims, except where a third party plaintiff had sustained personal injury so that the case could be viewed under products liability theory, the court noted that the requirement of privity had been overcome in the developing concept of tort liability under the *MacPherson v. Buick Motor Co.*¹²⁵ line of cases. In so holding, the court relied on *United States ex rel Los Angeles Testing Laboratory v. Rogers & Rogers*,¹²⁶ a federal district court decision in which

121. *Kelly v. Koppers Co.*, 293 So. 2d 763 (Fla. 3d Dist. 1974), *cert. denied*, 302 So. 2d 415 (Fla. 1974).

122. *Zilber Cab Co. v. Capeletti Bros.*, 303 So. 2d 360 (Fla. 3d Dist. 1974).

123. *Garcia v. L. C. Morris, Inc.*, 306 So. 2d 545 (Fla. 3d Dist. 1974).

124. *A. R. Moyer, Inc. v. Graham*, 285 So. 2d 397 (Fla. 1973). The question was originally certified to the Supreme Court of Florida by the Fifth Circuit Court of Appeals, 443 F.2d 434 (5th Cir. 1971). For a final disposition of the case, see 492 F.2d 797 (5th Cir. 1974).

125. 217 N.Y. 382, 111 N.E. 1050 (1916).

126. 161 F. Supp. 132 (S.D. Cal. 1958).

a cause of action was held to have been stated against an architect under contract to the United States government by a contractor who sustained economic damages when concrete approved by the architect and used in the project by the contractor, failed. Liability was based on the control held by the architect over the construction project.

F. *Husband and Wife*

Florida's adherence to the interspousal immunity doctrine, under which one spouse is immune to liability for torts committed against the other during the course of their marriage even where the parties are no longer married at the time of the action, was reaffirmed by the District Court of Appeal, Fourth District, in *Heaton v. Heaton*.¹²⁷ Although noting that the doctrine of interspousal immunity has been abolished in the majority of jurisdictions and that Florida, in retaining it, is now in the minority, the district court nonetheless deferred to the Florida Supreme Court's affirmation of the doctrine in *Bencomo v. Bencomo*.¹²⁸

Inroads were made, however, into the doctrine by the District Court of Appeal, Third District, in holding that, if the defense of interspousal immunity is not affirmatively pleaded, it will be considered waived, unless there is "a strong showing of the unavailability of knowledge of the substance of the defense," in which case it may be asserted after the cause has been set for trial.¹²⁹

III. AUTOMOBILES

A. *The Dangerous Instrumentality Doctrine*

The dangerous instrumentality doctrine, under which the owner of a motor vehicle is held liable for its negligent operation by a driver using the vehicle with the owner's permission,¹³⁰ was expanded by the Fourth District with its rejection of the contention that the doctrine only applied to vehicles operated on public streets.¹³¹ Stating that the characterization of a dangerous instru-

127. 304 So. 2d 516 (Fla. 4th Dist. 1974).

128. 200 So. 2d 171 (Fla. 1967), *cert. denied*, 389 U.S. 970 (1967). Here, too, the parties were divorced at the time of the action.

129. *DeGuido v. DeGuido*, 308 So. 2d 609, 611 (Fla. 3d Dist. 1975).

130. This doctrine originated in *Southern Cotton Oil Co. v. Anderson*, 80 Fla. 441, 86 So. 629 (1920).

131. *Reid v. Associated Eng'r, Inc.*, 295 So. 2d 125 (Fla. 4th Dist. 1974).

mentality does not change depending on where it is operated,¹³² the court held that the owner of a vehicle who lent it to an employee would be liable for any injuries caused by the negligence of the employee in failing to prevent his child from putting the truck into gear while parked in the employee's front yard.¹³³ The case was remanded to the trial court to determine whether the employee was, in fact, negligent.

Liability under the dangerous instrumentality doctrine was held not to extend to punitive damages in *Waldron v. Kirkland*,¹³⁴ where a stepfather was sued for injuries caused by his stepson who, unknown to the stepfather, drove the family car under the influence of liquor. The court reasoned that since the doctrine was premised upon the theory of compensating a victim, the imposition of punitive damages upon one without fault and only vicariously liable was not within its scope.

The Second District also refused to extend the dangerous instrumentality doctrine to the owners of horses, where a minor, riding his friend's horse with permission, ran into an automobile and injured plaintiff, a passenger.¹³⁵

B. *The Guest Statute*

Following repeal of the Guest Statute,¹³⁶ under which a motor vehicle "guest"¹³⁷ was precluded from recovery against its driver in the absence of the latter's gross negligence or willful and wanton misconduct, passengers became entitled to recovery for the simple negligence of their drivers even though the accidents¹³⁸ and original

132. *Id.* at 128.

133. It is interesting to note that the injured plaintiff was the child's mother and the employee's wife. Thus, the husband's employer was vicariously liable to the plaintiff-wife, even though the primary tort-feasor, the husband-employee, was insulated from liability under the interspousal immunity doctrine. For further discussion of this doctrine see section II, F, *supra*.

134. 281 So. 2d 70 (Fla. 2d Dist. 1973).

135. *Moessinger v. Johnson*, 292 So. 2d 606 (Fla. 2d Dist. 1974). The issue of whether the owner was independently negligent in failing to ascertain the competence of the rider was not raised at trial. *Id.* at 608.

136. FLA. STAT. § 320.59 (1971), *repealed*, Fla. Laws 1972, ch. 72-1, § 1.

137. FLA. STAT. § 320.59 (1971) had excluded both passengers paying for their transportation and school children on their way to school (or places of learning), from the operation of the statute and therefore implicitly defines a guest as any other passenger in a motor vehicle.

138. *Ingerson v. State Farm Mut. Auto. Ins. Co.*, 272 So. 2d 862 (Fla. 3d Dist. 1973); *Arick v. McTague*, 292 So. 2d 31 (Fla. 1st Dist. 1973); *Summerlin v. Tramill*, 290 So. 2d 53 (Fla. 1973).

trials¹³⁹ occurred before the repeal.

A cause of action was thus held by the Fourth District to have been stated in *Carr v. Crosby Builders Supply Company*,¹⁴⁰ where the action was brought and tried while the statute was still in effect and the plaintiff failed to prove either the gross negligence or willful and wanton misconduct of the operator. By the time of appeal, however, the statute had been repealed and thus the appellate court, deciding the case in accordance with the law at the time of appeal, held it sufficient to allege only simple negligence in order to state a cause of action.

The District Court of Appeal, First District, reached the same result in *Arick v. McTague*,¹⁴¹ in which the accident occurred while the statute was still in effect, and where entry of summary judgment followed the repeal. Plaintiff alleged both simple and gross negligence and the trial court, finding neither gross negligence nor any exception to the guest statute, granted summary judgment in favor of defendants. The appellate court based its reversal on *Ingerson v. State Farm Mutual Automobile Insurance Co.*¹⁴² which had been tried ten days after repeal of the statute and had held it error for the trial judge to charge the jury that the plaintiff would be required to prove gross negligence.

C. No-Fault Law

The Florida Automobile Repairs Reform Act¹⁴³ provided for the tort immunity of negligent parties in motor vehicle accidents falling under certain declared thresholds,¹⁴⁴ directed insurers to compensate their own insureds for both personal and property injuries without regard to fault¹⁴⁵ and raised the minimum required

139. *Carr v. Crosby Builders Supply Co.*, 283 So. 2d 60 (Fla. 4th Dist. 1973).

140. *Id.*

141. 292 So. 2d 31 (Fla. 1st Dist. 1973).

142. 272 So. 2d 862 (Fla. 3d Dist. 1973). The *Gingersen* court had also stated that the rule of simple negligence would apply even if a change occurred in the law after judgment but during the pendency of a direct appeal therefrom.

143. FLA. STAT. §§ 627.730-.741 (1973) [hereinafter referred to as the No-Fault Act].

144. A tort suit is still allowed under the No-Fault Act if the plaintiff's medical expenses for personal injury exceed \$1,000 or if a permanent injury or death results. FLA. STAT. § 627.737(2) (1973). These thresholds also apply to derivative claims; thus, where an injured child suffers no permanent injury and its parents do not incur medical expenses in excess of \$1,000, neither may bring suit. *Marquez v. Mederos*, 307 So. 2d 873 (Fla. 3d Dist. 1975).

145. FLA. STAT. § 627.731 (1973) states that

the purpose of [the No-Fault Act] is to require medical, surgical, funeral and

insurance coverage of all state drivers.¹⁴⁶

Constitutional challenges to the No-Fault Act commenced almost immediately.¹⁴⁷ In *Kluger v. White*,¹⁴⁸ the property damage section of the Act,¹⁴⁹ which did not make property coverage mandatory but which barred actions by car owners choosing not to elect such coverage unless their claims exceeded \$550, was successfully attacked on the ground that it violated the Florida Constitution,¹⁵⁰ because it deprived such car owners of a remedy without providing a substitute.

Kluger, who maintained only liability insurance on her car, had damages well exceeding the threshold but, since repair costs in excess of a vehicle's fair market value are not recoverable, potential recovery was limited to \$250, the fair market value of the car. Despite the legality of her failure to purchase property damage insurance, Kluger was denied the right to sue to recover the costs of repairing her car and was therefore left remediless. The failure on the part of the legislature to provide a reasonable alternative to protect the rights of such car owners who chose not to purchase property coverage and who suffered damages below the \$550 threshold, and the failure to show an "overpowering public necessity" for abrogating the common law right to sue in tort, resulted in the supreme court's declaration of the section's unconstitutionality under article I, Section 21 of the Florida Constitution.¹⁵¹

The next attack assailed section 627.737, which denies recovery for pain and suffering under the Act, thereby limiting the recovery of such damages to situations where the threshold requirements¹⁵² are met and the plaintiff sues in tort outside the Act. This attack

disability insurance benefits to be provided without regard to fault . . . and, with respect to motor vehicle accidents, a limitation on the right to claim damages for pain, suffering, mental anguish and inconvenience.

146. FLA. STAT. § 627.733 (1973). The required protection must comply with the provisions of the "Financial Responsibility Law," FLA. STAT. § 324.021(7) (1973) which (as amended to become effective July 1, 1975) calls for minimum insurance protection in the amount of \$15,000 for bodily injury or death per person, \$30,000 per accident, and \$5,000 for property damage.

147. Similar attacks were mounted in Illinois. *Grace v. Howlett*, 51 Ill.2d 478, 283 N.E.2d 474 (1972) (held unconstitutional in its entirety).

148. 281 So. 2d 1 (Fla. 1973).

149. FLA. STAT. § 627.738 (1971).

150. FLA. CONST. art. I, § 21 provides that "[t]he court shall be open to every person for redress of any injury. . . ."

151. 281 So. 2d at 4 (Fla. 1973).

152. See note 144 *supra* and accompanying text.

was rejected, however, in *Lasky v. State Farm Insurance Co.*¹⁵³ by the Supreme Court of Florida which held that the personal injury aspects of the No-Fault Act, with one exception, were constitutional. Unlike the property damage section found unconstitutional in *Kluger* because of the legislature's failure to provide a reasonable alternative to the barred action in tort, the personal injury section provided such an alternative because it required all motor vehicle owners to carry a minimum level of insurance.¹⁵⁴ Thus, injured insureds who cannot recover damages for pain and suffering because they fail to meet the threshold criteria are still afforded prompt recovery of their out-of-pocket losses regardless of fault.¹⁵⁵

The plaintiff did, however, prevail in having the alternative threshold test of section 627.737(2) struck down as a denial of equal protection.¹⁵⁶ That section had allowed suit, absent medical expenses in excess of \$1,000, permanent injury or death, if

. . . the injury or disease consists in whole or in part of . . . a fracture to a weight-bearing bone, [or] a compound, comminuted, displaced or compressed fracture. . . .¹⁵⁷

The determination of whether the threshold requirements are met, thereby allowing an action in tort, is a question of fact for the jury, rather than one of law for the trial court as held in *Allstate Insurance Company v. Ruiz*.¹⁵⁸ Defendant had raised plaintiff's failure to qualify under the Act as an affirmative defense to plaintiff's tort action based on an allegation of permanent injury, but the trial judge ruled as a matter of law that plaintiff had met the threshold requirements for suit and therefore did not instruct the jury upon the issue of whether plaintiff's suit was barred. In order to expedite the case, the judge submitted an interrogatory to the jury, asking whether the plaintiff was permanently injured. Although the jury returned a verdict for plaintiff, it found no permanent injury. On

153. 296 So. 2d 9 (Fla. 1974).

154. FLA. STAT. § 627.733(3) (1973) requires each owner to have either (a) insurance complying with the "Financial Responsibility Law," (FLA. STAT. ch. 324), or (b) any other method approved by the department of insurance and affording the equivalent of an insurance policy.

155. FLA. STAT. § 627.736 (1973). The insurance companies are required to pay, *inter alia*, medical, hospital, disability, and death benefits within 30 days of receiving written notice of a covered loss and the amount thereof. *See also* FLA. STAT. § 627.733 (1973).

156. 296 So. 2d at 20.

157. FLA. STAT. § 627.737(2) (1971).

158. 305 So. 2d 275 (Fla. 3d Dist. 1974).

appeal, the defendant contended that the plaintiff was not entitled to the verdict as the jury had determined the factual issue against him. The plaintiff defended the trial judge's initial determination by relying on *Lasky v. State Farm Insurance Co.*¹⁵⁹ and argued that once the determination is made, the trial should not be frustrated by submitting the question to the jury. The District Court of Appeal, Third District, properly found that *Lasky* did not authorize the determination of the factual question by the court to the exclusion of the jury and held the matter to be one of fact for the jury to decide.

IV. LIABILITY FOR ANIMALS

A. Dogs

The Florida "Dog Bite Statute,"¹⁶⁰ which imposes strict liability upon owners for dog bites¹⁶¹ as well as "liability for any damage done by their dogs to . . . domestic animals or livestock, or to persons . . .,"¹⁶² was broadly construed by the District Court of Appeal, Third District. An owner was held to be strictly liable for his Great Dane which ran into the street causing the plaintiff to lose control of his car in an attempt to avoid the animal and, as a result, to crash into a telephone pole.¹⁶³ By reading these two sections together to find strict liability under the general damage section of the statute for injuries not caused by dog bites, the court restricted an owner's defenses under this section to provocation of the dog and lack of proximate cause.¹⁶⁴

An alternative theory of liability was found by the Fourth District, which refused to apply the "Dog Bite Statute" to a landowner who allowed an employee's dog to run loose on its property, but nevertheless held that the landowner would be liable under general tort law if: (1) he had knowledge of the dangerous condition caused by the unrestrained German Shepherd; (2) the plaintiff had implied

159. 296 So. 2d 9 (Fla. 1974). The reliance appears misplaced, as the question of who determines whether a plaintiff has met the threshold requirements for suit was not before the *Lasky* court.

160. FLA. STAT. §§ 767.01-.04 (1973).

161. FLA. STAT. § 767.04 (1973). An owner may avoid such liability only where his dog has been provoked by the victim or where he posts a "Bad Dog" sign on his premises.

162. FLA. STAT. § 767.01 (1973).

163. *Allstate Ins. Co. v. Greenstein*, 308 So. 2d 561 (Fla. 3d Dist. 1975).

164. *Id.* at 563. The court relied on the finding that there was some affirmative action on the part of the dog and that this action proximately caused plaintiff's injuries.

permission to be on defendant's property; and (3) the dangerous condition created by the dog could not have been reasonably discovered by the plaintiff.¹⁶⁵

B. *Trespassing Cattle*

The constitutionality of the Warren Act,¹⁶⁶ which replaced the common law strict liability of livestock owners for damages caused by their trespassing cattle with statutory liability which is invoked only where such owner intentionally or negligently allows its livestock to stray upon a public road, was attacked as a denial of equal protection in *Selby v. Bullock*.¹⁶⁷ Plaintiff contended that since there was no distinction between persons injured by virtue of the presence of dogs upon public roads and persons injured by cattle upon the same roads, the statute should be stricken because it created an unconstitutional discrimination. The court relied upon the legislature's expression of policy as promoting the livestock industry to uphold the new standard of negligence imposed upon the owner of straying livestock while continuing to hold dog owners strictly liable for injuries caused by their animals. The court went on to point out that where a statute applies equally and uniformly to all persons similarly situated (here the class of persons injured by cattle), the constitutional requirements relating to equal protection are satisfied.

Justice Ervin dissented, stating that "[t]he Warren Act was intended to prohibit per se cattle from trespassing on public roads."¹⁶⁸ For this reason, he felt that the doctrine of *res ipsa loquitur* should be applicable and that even if the technical prerequisites of *res ipsa* are not satisfied, negligence should be inferred as a matter of law.¹⁶⁹

165. *Christie v. Anchorage Yacht Haven, Inc.*, 287 So. 2d 359 (Fla. 4th Dist. 1973). For a full discussion of a landowner's duty to various classes of visitors on his premises, see notes 89-98 *supra* and accompanying text.

166. FLA. STAT. § 588.15 (1973) provides that

[e]very owner of livestock who intentionally, wilfully, carelessly or negligently suffers or permits such livestock to run at large upon or stray upon the public roads of this state shall be liable in damages for all injury and property damage sustained by any person by reason thereof.

167. 287 So. 2d 18 (Fla. 1973).

168. *Id.* at 23. The dissent refers the reader to *de Jesus v. Seaboard Coast Line R.R.*, 281 So. 2d 198 (Fla. 1973), discussed at note 112, *supra*.

169. *Id.*

C. *Wild Animals*

A plaintiff is barred from recovery against the owners of wild or abnormally dangerous domestic animals only if he intentionally and unreasonably subjects himself to risk of harm by such animals.¹⁷⁰ In all other cases the strict liability doctrine applies to the owner or keeper of a wild animal and the plaintiff is not required to allege specific acts of negligence on the part of the defendant.¹⁷¹ Thus, when defendant kept his snake collection on public display in an unlocked box at his service station and the plaintiff was bitten by a rattlesnake when he put his hand into the box, defendant was found liable. The plaintiff's allegation that he did not realize the dangers involved when he put his hand in the unlocked box containing the snake collection was held sufficient to state a cause of action under the theory of strict liability.¹⁷²

V. INTENTIONAL TORTS

A. *Malicious Prosecution*

In order to sustain an action for malicious prosecution a plaintiff must show: (1) commencement or continuance of an original civil or criminal judicial proceeding; (2) its legal causation by the present defendant against the plaintiff; (3) its bona fide termination in favor of the plaintiff; (4) the absence of probable cause for such prosecution; (5) the presence of malice; and (6) resulting damage to the plaintiff.¹⁷³

Under the "reasonable man standard," an absence of proximate cause may be found where defendant fails to investigate adequately and it would appear to a reasonably cautious man that further investigation is necessary before instituting a proceeding. Thus, a directed verdict for defendant was held improper where

170. RESTATEMENT (SECOND) OF TORTS § 484 (1965) has been adopted in Florida by *Issacs v. Powell*, 267 So. 2d 864 (Fla. 2d Dist. 1972), which provides that

(1) A plaintiff is not barred from recovery by his failure to exercise reasonable care to observe the propinquity of a wild animal or an abnormally dangerous domestic animal or to avoid harm to his person, land or chattels threatened by it.

(2) A plaintiff is barred from recovery by intentionally and unreasonably subjecting himself to the risk that a wild animal or an abnormally dangerous domestic animal will do harm to his person, land or chattels.

171. *Accord*, *Hall v. Richardo*, 297 So. 2d 849 (Fla. 3d Dist. 1974).

172. *Keyser v. Phillips Petroleum Co.*, 287 So. 2d 364 (Fla. 2d Dist. 1973).

173. *Kelly v. Millers of Orlando, Inc.*, 294 So. 2d 704 (Fla. 4th Dist. 1974).

plaintiff, a man in the waste paper collection business, had sued a store for malicious prosecution. The store, without making an investigation, had pressed charges against him for theft after he removed a box containing waste paper and concealed clothing from a store-room in which his wife worked.¹⁷⁴ The court pointed out that an investigation could have been quickly and easily conducted and would have revealed that his wife had little or no opportunity to place the clothing in the trash box.

Moreover, satisfaction of the malice element does not require proof of actual malicious intent, but may be satisfied by legal malice which may be implied or inferred from defendant's conduct or from a lack of proximate cause.¹⁷⁵ Thus, a jury verdict granting both compensatory and punitive damages was reinstated when the Supreme Court of Florida held that an award of punitive damages in an action for malicious prosecution was supported by proof of *legal* malice as opposed to proof of spite or ill-will. The court cautioned that while such legal malice will be sufficient to support an award of compensatory damages, it *may not* be sufficient to imply the malice necessary for punitive damages.¹⁷⁶

A lack of probable cause, however, will not be found merely by the ultimate discharge of the defendant.¹⁷⁷ Probable cause to institute civil or criminal action does not require that one need be certain of its outcome, but only that there be

[r]easonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense with which he is charged.¹⁷⁸

Therefore, the mere termination of criminal proceedings in one's favor will be insufficient to support an action for malicious prosecution where the plaintiff is discharged because the identifying witness does not appear at trial.

B. *Defamation: Libel and Slander*

Communication or publication is an essential element in all defamation cases and such communication may take many forms.

174. *Id.*

175. *Adams v. Whitfield*, 290 So. 2d 49, 51 (Fla. 1974).

176. *Id.* at 51-52.

177. *Davis v. 7-Eleven Food Stores, Inc.*, 294 So. 2d 111 (Fla. 1st Dist. 1974).

178. 294 So. 2d at 112, quoting *Dunnivant v. State*, 46 So. 2d 871, 874 (Fla. 1950).

A letter to a "consumer action" column was considered sufficient publication in *Tyler v. Garris*¹⁷⁹ to state a cause of action for libel against the purchaser of a boat from a marina owner, who later wrote such a letter accusing the marina owner of selling a stolen boat, operating an unscrupulous firm and wrongfully depriving him of \$750.

Malice, another essential element of libel, is presumed as a matter of law and need not be specially proved where a published defamatory falsehood is without privilege and libelous per se, ruled the Supreme Court of Florida in the continuing saga of *Firestone v. Time, Inc.*¹⁸⁰ Suit was commenced after Time Magazine refused to print a retraction requested by Mrs. Firestone¹⁸¹ of a news item which incorrectly stated that she had been divorced¹⁸² on grounds of adultery.

The trial court had submitted to the jury the question of malice or reckless disregard on the part of the publisher; this issue was found in favor of Mrs. Firestone. The supreme court pointed out that, without a privilege, the article was libelous per se¹⁸³ so that malice did not have to be shown.¹⁸⁴ In restating the jury verdict for plaintiff, the court concluded that

[a] careful examination of the final decree prior to publication would have clearly demonstrated that the divorce had been granted on the grounds of extreme cruelty, and thus the wife would have been saved the humiliation of being accused of adultery in a nationwide magazine. This is a flagrant example of "journalistic negligence."^{185**}

179. 292 So. 2d 427 (Fla. 4th Dist. 1974).

180. 305 So. 2d 172, 177 (Fla. 1974), cert. granted, 95 S. Ct. 1557 (1975). The history of the case is detailed in Beckham & Esquiroz, *Torts, Survey of Florida Law*, 28 U. MIAMI L. REV. 662, 696-98 (1974).

181. FLA. STAT. § 770.71 (1973) requires written notice specifying the offending statements to be served upon the defendant as a condition precedent to bringing a libel action against a newspaper or periodical.

182. Time's argument that the item was within the protected ambit given to publications of judicial proceedings was rejected because that qualified privilege is available only if the reports are fair, impartial and accurate. 305 So. 2d at 177.

183. The false accusation that a woman is guilty of adultery is libelous per se. 305 So. 2d at 175. It also imputes that one has committed a criminal offense. See FLA. STAT. § 798.01 (1973).

184. 305 So. 2d at 176.

185. *Id.* at 178.

** After the writing of this survey but prior to printing, the United States Supreme Court vacated and remanded *Time, Inc. v. Firestone*, 96 S. Ct. 958 (1976). The case was remanded

A publication's liability for libel was further expanded in *Helton v. United Press International*,¹⁸⁶ in which Florida adopted the newest restriction on the doctrine of *New York Times v. Sullivan*¹⁸⁷ as mandated by the United States Supreme Court in *Gertz v. Welch*.¹⁸⁸ Under *Gertz*, the privilege created by *Sullivan* was held not to apply in a defamation action by a citizen who is neither a public official nor a public figure, because in such cases the first amendment does not require a plaintiff to prove either knowledge of falsity or reckless disregard of the truth on the part of the defendant. Accordingly, the District Court of Appeal, First District, noting that plaintiff Helton was not a public official nor a public figure, applied the *Gertz* standard in holding that the plaintiff need not prove the pre-*Gertz* requisites of either knowledge of falsity or reckless disregard for the truth by the defendant.¹⁸⁹ In accordance with *Gertz*, however, the plaintiff was limited to compensatory damages for injury to his reputation, since knowledge of the falsity or reckless disregard for the truth by the defendant are still held to be essential elements for punitive damages.

An unsuccessful candidate for re-election to the Key West Commission in 1971 was, however, definitely within the public official category.¹⁹⁰ Thus, a newspaper sued by the candidate for publishing advertisements which were alleged to be libelous¹⁹¹ was protected by the *New York Times* doctrine absent a showing that the publication was made with actual malice or that the publisher "en-

because no finding of fault on the part of Time, Inc., in its publication of the defamatory material was ever found by a Florida trial or appellate court as required by *Gertz v. Robert Welch, Inc.*, note 188 *infra*.

The court held that Mrs. Firestone was not a "public figure" within the framework of analysis discussed in *Gertz*, therefore Time, Inc., did not fall within the protection enunciated in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), as extended by *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). The court also held that the *New York Times* privilege does not automatically extend to all reports of judicial proceedings.

186. 303 So. 2d 650 (Fla. 1st Dist. 1974).

187. 376 U.S. 254 (1964). The *Times* doctrine requires that a showing of actual malice—knowledge that the communication is false or reckless disregard of its truth or falsity—be made under the first amendment in a libel action by a public official. The Court's subsequent decision in *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), further extended this qualified privilege to "public figures."

188. 418 U.S. 323 (1974).

189. 303 So. 2d at 651.

190. *Menendez v. Key West Newspaper Corp.*, 293 So. 2d 751 (Fla. 3d Dist. 1974).

191. The advertisements charged that Menendez was apparently un-American and that he displayed pro-Castro Communist allegiance.

tertained serious doubt" with respect to the truth of the publication.¹⁹²

C. Conversion

Conversion, the intentional exercise over a chattel of dominion or control which seriously interferes with the right of another to control it,¹⁹³ was extended to include towing companies which insist upon being paid towing and storage charges before returning a car to its owner, where the company has acted at the request of a private citizen, such as an apartment manager.¹⁹⁴ Under such circumstances, the towing company acquires no lien on the car for towing and storage charges because there is no agreement with the owner and no statute creating such a lien,¹⁹⁵ and therefore, if the company refuses to return the car to its owner upon his demand, it will be liable for conversion.¹⁹⁶ The towing company's argument that the owner should have paid the charges to mitigate damages and then filed suit was rejected because

[w]here property has been converted an attempt to plead and prove a qualified return in mitigation of the damages is not permissible, since one who wrongfully converts personalty should not be allowed to state a condition with which the owner of the property is bound to comply in order to have the property returned to him.¹⁹⁷

Nor can a defendant escape liability for conversion by offering substitute property for that agreed upon under contract. In *Hanna v. American International Land Corp.*,¹⁹⁸ a vendee entered into a land sales contract for two waterfront lots. After all payments were made, the vendor declined to offer the agreed-upon deed, but instead offered substitute lots. Upon discovering that his lots were an integral part of a golf course, the vendee brought suit seeking both

192. 293 So. 2d at 752.

193. RESTATEMENT (SECOND) OF TORTS § 222 A (1) (1965).

194. *Murrell v. Trio Towing Service, Inc.*, 294 So.2d 331 (Fla. 3d Dist. 1974).

195. Nor is there a common law lien on an automobile for towing and storage. A statutory lien would be created, however, if the car were towed pursuant to a police request, under FLA. STAT. § 85.031 (1973).

196. 294 So. 2d at 333 n.3. The court noted that the towing company must look to the apartment owner for compensation, who presumably will then bring an action against the car owner for trespass.

197. *Id.* at 333, quoting 89 C.J.S. *Trover & Conversion* § 186 (1955).

198. 289 So. 2d 756 (Fla. 2d Dist. 1974).

compensatory and punitive damages for breach of contract based upon defendant's willful conversion of the lots. The District Court of Appeal, Second District, reversed the trial court's striking of plaintiff's claim for punitive damages and held that such damages are proper where acts constituting a breach of contract also amount to an independent cause of action in tort.

At the end of the survey period, the Fourth District rendered a decision¹⁹⁹ which removed conversion from the ambit of Florida Statutes, section 768.041(1) which provides that

[a] release or covenant not to sue as to one (1) tort-feasor for *property damage* to, personal injury of, or the wrongful death of *any person* shall not operate to release or discharge the liability of any other tort-feasor who may be liable for the same tort or death. (emphasis added)

The court reasoned that the words "for property damage to, personal injury of, or the wrongful death of any person" were placed in the statute as words of limitation because the legislature had not intended to abolish entirely the common law rule that a release of one joint tort-feasor acted as a discharge of all the others; thus, the common law rule would continue to prevail as to all cases not within these expressed limitations. Therefore, the court concluded that since conversion is a wrongful deprivation of property and not merely damage to or depreciation of the property, it did not come within the meaning of "damage to property of any person" within the statute.²⁰⁰

This reasoning was attacked by a strong dissent which argued that when one person converts another's property, the latter has in fact suffered injury to his property. Citing numerous cases where the term "injury to property" has included conversion in various contexts, the dissent concluded that the terms "damage" and "injury" are synonymous. Thus, there was no valid reason or intent on the part of the legislature to exclude conversion from the operation of the statute.²⁰¹

VI. NUISANCE

Nuisances may be either public or private. As a rule, a public

199. *Sun First Nat'l Bank v. Batchelor*, 308 So. 2d 649 (Fla. 4th Dist. 1975).

200. *Id.* at 652.

201. *Id.* at 653.

nuisance affects the public at large and violates public rights or causes damage to the public generally. A private nuisance, on the other hand, is an interference with an individual's use and enjoyment of property.²⁰²

At the end of the survey period, the Supreme Court of Florida reaffirmed its adherence to the common law rule that an action to abate a public nuisance may be brought by a private individual, only when such an individual has suffered some special injury, different from that suffered by the public at large.²⁰³ The State, acting through the attorney general, may generally bring such an action even though the specific condition being attacked is not enumerated under the heading of a nuisance within the state statutes.²⁰⁴

An industrially created nuisance is not privileged from attack merely because there is no known technological or economically feasible method of abating the nuisance short of stopping the activity. Thus, in *St. Regis Paper Co. v. Pollution Control Board*,²⁰⁵ which involved a Pollution Control Board order declaring the defendant company guilty of violating the Florida Administrative Code by discharging materials into the affected waters "producing color . . . in such degree as to create a nuisance,"²⁰⁶ the court rejected the company's argument that there could be no finding of nuisance inasmuch as no known economically feasible method to eliminate the color-causing materials existed.

VII. DAMAGES

The purpose of awarding punitive damages to an injured party is to punish the wrongdoer, rather than to compensate the injured party.²⁰⁷ Thus, the Third District has held that exemplary damages are not recoverable as part of a parent's derivative claim based upon injury to a minor.²⁰⁸ Surprisingly, however, the First District has allowed the recovery of such damages where defendant's liability was based purely on the theory of respondeat superior,²⁰⁹ even

202. 23 FLA. JUR. *Nuisances* § 6 (1959).

203. *United States Steel Corp. v. Save Sand Key, Inc.*, 303 So. 2d 9 (Fla. 1974), *rev'g* 281 So. 2d 572 (Fla. 3d Dist. 1973).

204. *State ex rel. Shevin v. Morgan*, 289 So. 2d 782 (Fla. 2d Dist. 1974).

205. 298 So. 2d 217 (Fla. 1st Dist. 1974).

206. 298 So. 2d at 218.

207. *Travelers Ins. Co. v. Odoms*, 306 So. 2d 207 (Fla. 1st Dist. 1975).

208. *City Stores Co. v. Langer*, 308 So. 2d 621 (Fla. 3d Dist. 1975).

209. *Elyria-Lorain Broadcasting Co. v. National Communications Indus., Inc.*, 300 So.

though this theory of liability is founded upon the principle of compensation, rather than of punishment.

The major difficulty faced by the courts as regards punitive damages has been the determination of the amount of the award. Although a verdict for nominal damages has been considered sufficient to support a verdict for punitive damages,²¹⁰ a split of authority presently exists as regards the relationship between the two amounts.²¹¹ During the survey period, the Third District adopted the rule that while it is within the jury's province to fix the award, the sum should bear some reasonable relation to the compensatory damages award.²¹²

An essential element of proving a case in intentional tort where punitive damages are recoverable is malice; however,

deliberate violence or oppression are not prerequisites for assessment of exemplary damages . . . where the wrongful act is such as to imply malice, or when from great indifference to persons, property or rights of others malice is imputable to the wrongdoer.²¹³

In such cases it is thus error for a punitive damage award to be set aside on the basis that there is no evidence of actual malice.²¹⁴

The same theory applies to an award of punitive damages based upon gross negligence. There is an affinity between gross negligence and wanton and willful misconduct sufficient to support an award of punitive damages.²¹⁵

Analogously, the fact that the plaintiff is found to have suffered no compensatory damages will not bar his right to receive punitive damages in an action for slander per se²¹⁶ because

2d 716 (Fla. 1st Dist. 1974). The amount of punitive damages was limited by the court, however, because of the nature of liability.

210. *Id.*

211. *Compare* Hutchinson v. Lott, 110 So. 2d 442 (Fla. 1st Dist. 1959) with Scalise v. National Util. Serv., 120 F.2d 938 (5th Cir. 1941) and Ging v. American Liberty Ins. Co., 293 F. Supp. 756 (N.D. Fla. 1968), *rev'd on other grounds*, 423 F.2d 115 (5th Cir. 1970).

212. Air Line Employees Ass'n Int'l v. Turner, 291 So. 2d 670 (Fla. 3d Dist. 1974). Award of \$175,000 in punitive damages was reversed where the plaintiff only received a verdict of \$3,000 in compensatory damages.

213. Adams v. Whitfield, 290 So. 2d 49, 51 (Fla. 1974), quoting Wrains v. Rose, 175 So. 2d 75, 79 (Fla. 2d Dist. 1965).

214. *Id.*

215. LaFleur v. Castlewood Int'l Corp., 294 So. 2d 21 (Fla. 3d Dist. 1974).

216. Saunders Hardware Five & Ten, Inc. v. Low, 307 So. 2d 893 (Fla. 3d Dist. 1974).

the requirement of a showing of actual damages as a basis of an award of exemplary damages is satisfied by the presumption of injury which arises from a showing of libel or slander that is actionable per se.²¹⁷

Moreover, the purpose of punitive damages is not to compensate, but to deter by punishment.²¹⁸

Closely related to the award of punitive damages is the allowance of recovery for the intentional infliction of emotional distress. In *World Insurance Co. v. Wright*,²¹⁹ the plaintiff was held to have stated a cause of action for such damages against his insurer whose actions, including attempts to "buy up" the policy, reflected such bad faith as to justify damages for the intentional infliction of mental distress. It is interesting to note that in *Wright*, only a two-party insurance contract was involved. Florida courts have generally limited the award of punitive damages in actions based on insurance contracts to three-party situations, finding the insurer's failure to settle with the third party a breach of its fiduciary duty.²²⁰ Thus, if this restriction on punitive damages is to remain, *Wright* may present an alternative method for insureds to recover those "intangible" damages which *in fact* are part of punitive damages, even though punitive damages are not recoverable.

VIII. GOVERNMENTAL TORT LIABILITY

A. *Sovereign Immunity*

The Florida legislature delivered a damaging blow to the doctrine of sovereign immunity by enacting a tort claims act during its 1973 session, which partially waived sovereign immunity in actions against the state and its agencies and subdivisions.²²¹ Defining the term "subdivisions" to include municipalities,²²² the act provides that:

217. *Id.* at 894.

218. *Id.*

219. 308 So. 2d 612 (Fla. 1st Dist. 1975).

220. *See, e.g., Baxter v. Royal Indem. Co.*, 285 So. 2d 652 (Fla. 1st Dist. 1973).

221. The waiver under the act only applies to actions against the executive departments accruing on or after July 1, 1974 and to actions against all other agencies and subdivisions of the state accruing on or after January 1, 1975. FLA. STAT. § 768.30 (Supp. 1974).

222. FLA. STAT. § 768.28(2) (Supp. 1974) defines subdivisions to include "the executive departments, the legislature, the judicial branch and the independent establishments of the state; counties and municipalities and corporations acting primarily as instrumentalities or agencies of the state, counties or municipalities."

[a]ctions of law against the state or any of its agencies or subdivisions to recover damages in tort . . . for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of his office or employment under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant in accordance with the general laws of this state, may be prosecuted subject to the limitations specified in this act.²²³

The limitations specified in the act do, however, preserve the doctrine of sovereign immunity to a noticeable extent. The act exempts the state and its subdivisions from punitive damages and further limits liability to \$50,000 per claimant and \$100,000 per incident,²²⁴ unless the governmental entity carries liability insurance covering the injuries in excess of these amounts, in which case its liability limitation will be co-extensive with its insurance coverage.²²⁵

Moreover, implicit in the wording of the statute is the apparent further limitation that a state or its subdivisions may only be held liable for torts committed within the exercise of ministerial, executive or administrative functions, because the act only waives immunity in "circumstances in which . . . a private person would be liable."²²⁶ Under the common law of Florida, a private individual cannot be held liable for torts committed in the exercise of judicial, quasi-judicial, legislative or quasi-legislative functions.²²⁷

The tort claims act also limits the *personal* liability of officers or employees of the state or its subdivision while acting within the scope of their employment, to actions committed either in bad faith or in willful and wanton disregard of human rights and safety.²²⁸

With the exception of the existence of this implicit limitation to torts arising from governmental functions, the effect of the act

223. FLA. STAT. § 768.28(1) (Supp. 1974).

224. FLA. STAT. § 768.28(5) (Supp. 1974).

225. FLA. STAT. § 768.28(10) (Supp. 1974).

226. FLA. STAT. § 768.28(1) (Supp. 1974).

227. *Allen v. Secor*, 195 So. 2d 586 (Fla. 2d Dist. 1967), *Hough v. Amato*, 260 So. 2d 537 (Fla. 1st Dist. 1972). Although it might be argued that the tort liability of a private individual is not coextensive with that of a public official, *Modlin v. City of Miami Beach*, 201 So. 2d 70 (Fla. 1967), a private individual could never exercise legislative, quasi-legislative, judicial, or quasi-judicial functions except as a public official.

228. FLA. STAT. § 768.28(9) (Supp. 1974).

upon the state and its agencies is fairly clear.²²⁹ Its effect upon the tort liability of municipal corporations, however, is not as clear. Prior to the act, judicial decisions had limited a municipal corporation's shield of sovereign immunity to torts resulting from the exercise of its legislative, quasi-legislative, judicial or quasi-judicial functions, *without* the \$50,000/\$100,000 limit created by the tort claims act.²³⁰ The unanswered question, therefore, arises as to whether the act effectively modifies the partial common law abrogation by returning a degree of sovereign immunity to municipalities. Although no appellate court has answered this question, the wording of the statute would appear to require an affirmative answer because of its failure to distinguish between the state and municipal corporations, merely defining the latter as a subdivision of the former.²³¹

B. *Municipal Corporations*

Despite the partial judicial waiver of sovereign immunity of municipal corporations prior to the tort claims act, pre-act cases arising during the survey period demonstrate that a municipality's liability is not as broad as might be imagined.

The question of whether a police officer who injures another with his service revolver while "off-duty" acted within the scope of his employment was held to be a question for the jury in *Gardner v. Saunders*.²³² Saunders, a policeman, had just gone off duty and had settled himself in a local bar with a drink when an altercation erupted. As a result, Saunders shot the plaintiff with his service revolver, which he was required by city regulation to carry at all times.²³³ The Second District reasoned that "such regulations carry with them a reasonable presumption that he might be in a position

229. Prior to the passage of the tort claims act, FLA. STAT. § 455.06 (1957) provided that state agencies could purchase liability insurance for certain risks and that sovereign immunity would be waived to the extent of its insurance for covered injuries.

230. In *Hargrove v. Town of Cocoa Beach*, 96 So. 2d 130 (Fla. 1957), the Supreme Court of Florida held that when an individual suffers a direct personal injury, proximately caused by the negligence of a municipal employee while acting within the scope of his employment, the injured individual may maintain an action against the municipality for redress. *City of Miami v. Simpson*, 172 So. 2d 437 (Fla. 1965) expanded *Hargrove* to include intentional torts committed by municipal employees acting within the scope of their employment.

231. See note 222 *supra*.

232. 281 So. 2d 392 (Fla. 2d Dist. 1973).

233. The reasoning behind this regulation was that a policeman is always on duty, even though he is periodically relieved from the routine performance of it. *Id.* at 393.

to use his revolver even though he may not be in uniform and be nominally off duty."²³⁴ Therefore, when such a presumption is possible, the question of whether he was acting within the scope of his employment is to be decided by the jury.

In a large city, where the police department must utilize a limited amount of manpower to perform a multitude of functions and where congested traffic and street construction is omnipresent, it was held to be unreasonable to hold the city accountable for all traffic accidents where an officer is not assigned to direct traffic around or through the congestion and/or obstruction.²³⁵

The plaintiff's decedent had died as a result of an intersectional collision caused by a visual obstruction resulting from the parking of two vehicles in the middle of the street by the telephone company. During the first day of the obstruction, the city had assigned a policeman to direct traffic at the intersection, but on the day of the accident no officer was so assigned.

In rejecting the plaintiff's claim against the city, the District of Court of Appeal, Third District, held that

[t]he dispatching of a traffic patrolman to this intersection was a matter of judgment on the part of the city and the city has the right to determine the strategy for deployment of its police powers, and sovereign authorities ought to be left free to exercise their discretion without worry over allegations of negligence.²³⁶

A further limitation of liability was found in *Moore v. City of St. Petersburg*,²³⁷ in which the Second District held that to recover for damages caused by faulty municipal construction, the plaintiff must establish that the city was placed on actual notice of the alleged defect or that the alleged defect existed for such a long period of time that the city had constructive notice of it. The court also went on to hold further that the construction of a sewage disposal system was a governmental function "as opposed to a 'corporate or proprietary' function, such as street and sidewalk maintenance. . . ."²³⁸ Thus the city was protected by sovereign immunity from liability for injuries caused to the plaintiff by a defect in such

234. *Id.*

235. *Hernandez v. City of Miami*, 305 So. 2d 277 (Fla. 3d Dist. 1974).

236. *Id.* at 27; see *Wong v. City of Miami*, 237 So. 2d 132 (Fla. 1970).

237. 281 So. 2d 549 (Fla. 2d Dist. 1973).

238. *Id.* at 550.

construction in the absence of direct confrontation between its employees and the plaintiff.²³⁹

IX. THE NEW WRONGFUL DEATH ACT

The adoption of the new Florida Wrongful Death Act²⁴⁰ raised the serious question of whether the separate survival action²⁴¹ was also rendered inoperative in those instances where an action for wrongful death could be brought under the new Act.²⁴²

Relying upon the provision in the new Act that [w]hen a personal injury to the decedent results in his death, no action for the personal injury shall survive, and any action pending at the time of death shall abate,²⁴³

the Supreme Court of Florida held that no separate statutory survival action for personal injuries resulting in death can survive the decedent; such an action is, therefore, barred by the new Act.²⁴⁴ The court also noted that the damages formerly recoverable under the survival statute have been generally incorporated into the new Act²⁴⁵ except that damages for the decedent's pain and suffering have been replaced by damages for the survivor's pain and suffering.²⁴⁶

Thus, under section 768.21 of the new Act, each specified survivor may recover for (1) loss of past and future support and services, (2) loss of companionship and protection, and (3) his or her *own* mental pain and suffering from the date of the injury. The personal representatives of the estate may recover further for medical and funeral expenses and lost earnings, damages that would have been formerly recoverable under the survivor statute.

The supreme court's ruling, however, does not bar actions under the survival statute for causes of action which the decedent

239. See also *City of Tampa v. Davis*, 226 So. 2d 450 (Fla. 2d Dist. 1969); *Mathews v. City of Tampa*, 227 So. 2d 211 (Fla. 2d Dist. 1969).

240. FLA. STAT. §§ 768.16-.27 (1973), hereinafter referred to as the new Act, *repealing* FLA. STAT. § 768.01-.03 (1971) (hereinafter referred to as the old Act.)

241. The survival action is provided for by FLA. STAT. § 46.021 (1973):

No cause of action dies with the person. All causes of action survive and may be commenced, prosecuted and defended in the name of the person prescribed by law.

242. See *W. Beckham & M. Esquiroz, Torts*, 28 U. MIAMI L. REV. 662, 690-91 (1974).

243. FLA. STAT. § 768.20 (1973).

244. *Martin v. United Security Servs., Inc.*, 314 So. 2d 765 (1975).

245. See § 768.21(6) (1973).

246. See § 768.21(4) (1973).

may have brought prior to his death unrelated to the injury causing his death.²⁴⁷ This means that personal injury actions arising from occurrences other than the death-causing event shall survive, since these actions are not incorporated under the Wrongful Death Act. Damages for the pain and suffering of the decedent arising from other such occurrences would also seem to be recoverable, since the action would be brought under the survival statute rather than under the Wrongful Death Act.

The adoption of the new Act was also held not to bar a claim for punitive damages where the decedent's death was caused by the willful and wanton conduct of the defendant and where one or more of the elements of compensatory damages recoverable under the Wrongful Death Act is established. The court did limit recovery of punitive damages, however, by allowing only one such award for each death so that each survivor is not entitled to an individual claim for punitive damages.²⁴⁸ The court reasoned that section 768.20, which provided for the abatement of actions for personal injuries resulting in death, was not repugnant to the recovery of punitive damages. Public policy required that a tortfeasor be punished for his reckless and malicious acts when he kills his victim as well as when the victim is only injured.

In *McKibben v. Mallory*,²⁴⁹ the Supreme Court of Florida rejected the contention that a cause of action would not lie for a wrongful death occurring prior to July 7, 1972, because the legislature had provided that the new Act would not apply to deaths occurring before the effective date of the new Act and that the old Act would be repealed when the new Act took effect.²⁵⁰ The defendants had argued that this resulted in the abolition and dissipation of any cause of action for wrongful death when the death occurred prior to July 7, 1972, unless the right had been reduced to judgment.

The court concluded, however, that the legislature did not intend to abrogate causes of action for deaths occurring prior to July 7, 1972, but rather intended that the new Act would apply to deaths occurring subsequent to the effective date and the old Act would continue to apply to deaths occurring prior to that date, thus creat-

247. 314 So. 2d at 770 n.18.

248. *Id.* at 771-72; *Pan American Bank of Sarasota v. Langan*, 315 So. 2d 216 (Fla. 2d Dist. 1975).

249. 293 So. 2d 48 (Fla. 1974).

250. FLA. STAT. § 768.27 (Supp. 1972).

ing a cohesive and uninterrupted scheme for the handling of wrongful death actions.

The terms "lineal descendent" and "person" were also defined for purposes of the new Act during the survey period by district court decisions rejecting unwarranted extensions of the scope of the Act.

In *Bassett v. Merlin, Inc.*²⁵¹ the Third District held that the parents of a deceased adult are ascendants and therefore cannot be considered "lineal descendants" within the meaning of section 768.21 (6)(a), which provides that if the decedent's survivors include a surviving spouse or lineal descendants, loss of net accumulations beyond death reduced to present value may be recovered for the decedent's estate. The court pointed out that a descendant is one who proceeds from the body of another, such as a child or grandchild, while an ascendant is a person with whom one is related in the ascending line, such as a parent or grandparent.

In *Davis v. Simpson*,²⁵² the term "person," as used within the new Act, was held not to include a full term, viable, but yet unborn fetus. Without becoming entangled in an analysis of when life begins, the court simply relied upon the retention of the word "person"²⁵³ in the new Act. It decided that since the legislature was aware of the court's past construction of that term in the old Act to include only a live born child,²⁵⁴ its failure to change the word "person" demonstrated that there was no intent on the part of the legislature to create a cause of action under the new Act for an unborn fetus.

An innovative variation of the wrongful death action—the wrongful birth—was attempted by three children and their parents when a fourth child was born following the performance of a vasectomy on the father.²⁵⁵

The court rejected this claim, however, by stating that the "concept of a cause of action in children for a 'wrongful birth' is without foundation in either law or logic."²⁵⁶

251. 304 So. 2d 543 (Fla. 3d Dist. 1974).

252. 313 So. 2d 796 (Fla. 1st Dist. 1975).

253. Compare FLA. STAT. § 768.01 (1971) with § 768.19 (1973).

254. *Staker v. Liberty Mut. Ins. Co.*, 213 So. 2d 695 (Fla. 1968).

255. *Aronoff v. Snider*, 292 So. 2d 418 (Fla. 2d Dist. 1974). For a treatment of wrongful birth actions in other states, see *Troppe v. Scarf*, 31 Mich. App. 240, 187 N.W.2d 511 (1971).

256. 292 So. 2d at 419.