University of Miami Law Review

Volume 16 | Number 4 Article 3

7-1-1962

Torts

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TORTS

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INTRODUCTION

This *Survey* is written to help lawyers find cases in point. The emphasis is on facts rather than on theory. Where doubt arose as to whether a case should be included the decision has been in favor of inclusion, although the subject might well include areas other than the law of torts. The material covered is found in twenty-one volumes of the Southern Reporter and twenty-five volumes of the Federal Reporter.[1] Even a specialist in tort law could experience difficulty in keeping abreast of this volume of cases.

The material covered is outlined as follows:[2]

I. AUTOMOBILE CASES

A. *The Dangerous Instrumentality Doctrine*
B. *The Guest Statute*
C. *Care Required of Motorists*

1. INTERSECTION ACCIDENTS
2. REAR-END COLLISIONS
3. PEDESTRIANS
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II. STATUTORY LIABILITY

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D. *Federal Tort Claims Act*

III. COMMON LAW NEGLIGENCE ACTIONS

A. *Landlord and Tenant*
B. *Common Carriers*
C. *Distribution of Electricity*
D. *Doctor - Patient*

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* Associate Editor of the *University of Miami Law Review* (Vol. XVII).
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1. August 1959 through August 1961.
2. The authors in the main have followed the outline and imitated the style of

I. AUTOMOBILE CASES

A. *The Dangerous Instrumentality Doctrine*

Florida's adaptation of the dangerous instrumentality doctrine to automobile law imposes liability upon an automobile owner for injuries to third persons resulting from the negligence of anyone operating the automobile with the owner's authorization. Liability has been extended in the past to one who had possession and dominion and control over the vehicle;[3] while recovery has been denied from a holder of the registered title who sold the automobile before the accident.[4] During this survey period the majority of cases under the doctrine have been concerned with who is an "owner."

In *Cox Motor Co. v. Faber*[5] a purchaser executed a preliminary contract, made a down payment and took possession of a car from a dealer. A month later, after having paid one installment, the purchaser negligently injured the plaintiff. In an action against the dealer, the plaintiff relied upon a

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Daniels, *Torts, Fourth Survey of Fla. Law*, 14 U. MIAMI L. REV. 602 (1960). In the preparation of the article we have had the helpful comments of Mr. Sam Powers, Member of the Florida Bar and Mr. Thomas A. Wills, Professor of Law, University of Miami.

3. Re-Mark Chem. Co. v. Ross, 101 So.2d 163 (Fla. App. 1958).
4. McAfee v. Killingsworth, 98 So.2d 738 (Fla. 1957).
5. 113 So.2d 771 (Fla. App. 1959). Followed in Hicks v. Land, 117 So.2d 11 (Fla. App.), *cert. denied*, 120 So.2d 617 (Fla. 1960).

clause in the contract to purchase which stated that the purchaser acquired no right, title or interest in the property until the property was delivered to him and either the full purchase price was paid or a satisfactory deferred payment agreement was executed. The trial court found that ownership remained in the dealer in the absence of any showing that the purchase price had been paid or a deferred payment plan executed. The appellate court reversed, holding that the effect of the clause was only to reserve legal title in the dealer. Beneficial interest lay in the purchaser, who was the owner in respect to tort liability.

A purchaser in another case[6] signed a "Used Car Order," under the terms of which he was permitted to cancel the order at his option. He tested the car for one day and returned it as unsuitable. The dealer's salesman persuaded him to test the car for two more days, in which period the purchaser collided with the plaintiff. A judgment against the dealer was affirmed, the issue of ownership under the circumstances having been properly submitted to the jury.

A summary judgment for the defendant was held to have been error when the evidence showed that the defendant had orally agreed to sell a car to a friend, and that the friend had used the car for six months without payment and returned it to the defendant shortly after an accident with the plaintiff. The question of beneficial ownership was for the jury.[7]

The opinion in *Martin v. Lloyd Motor Co.*[8] thoroughly reviews Florida law in regard to bailees and lessees of motor vehicles. An owner delivered his automobile to a dealer to sell for him with an agreement that prospective purchasers could test-drive the car. An interested customer negligently killed the plaintiff's decedent. The complaint against the bailee-dealer was dismissed on the ground that there was no allegation that the bailment was made for mutual benefit or profit, that the alleged negligence of the bailee was gross or that he acted in bad faith. In reversing on appeal, the court applied the standard of "possession and dominion and control" to hold that the dangerous instrumentality doctrine is applicable to a bailee who permits a third person to drive the automobile, whether the bailment is gratuitous, for hire or for mutual benefit. The bailee's liability is not dependent upon a showing of bad faith or gross negligence.

When an owner of a car becomes liable under the doctrine for the negligence of an employee of one to whom the owner has bailed the car, the owner is entitled to indemnity from the bailee-employer.[9] A husband, who was the manager of a corporation, drove his wife's car to work and

6. Fricker v. Lester, 114 So.2d 694 (Fla. App. 1959).
7. Register v. Redding, 126 So.2d 289 (Fla. App. 1961).
8. 119 So.2d 413 (Fla. App. 1960).
9. Hutchins v. Frank E. Campbell, Inc., 123 So.2d 273 (Fla. App. 1960).

loaned it to an employee, who injured the plaintiff. The cross-claim of the defendant wife was upheld against the defendant corporation.

The question of authorization by the owner was disputed in *Blanford v. Nourse.*[10] A highway patrolman arrived at the scene of a minor accident, decided the defendant was intoxicated, and took the driver's seat of the defendant's car to drive him to a patrol station. The plaintiff was injured while the patrolman was at the wheel. No liability attached to the defendant-owner under the doctrine, since there was an absence of consent. The evidence showed that the owner believed he had no alternative but to permit the patrolman to drive.

Hale v. Adams[11] raised points of first impression under both the dangerous instrumentality doctrine and the guest statute.[12] The owner was riding in his car, which was being driven by his daughter. After a negligent collision, the owner's complaint in a suit for personal injury brought against his daughter was dismissed on the ground that the negligence of the operator was imputed to the owner. The case was reversed on appeal and the rule announced that the dangerous instrumentality doctrine has no application in an action by the owner against the negligent operator. The doctrine finds its basis in respondeat superior with a principal-agent relationship existing between the owner and the operator. Negligence of an agent cannot be imputed to a principal in an action by the principal against the agent.

Shattuck v. Mullen,[13] involving a collision between two aircraft, appears to have extended the doctrine to impose liability upon the owner of a private airplane for the negligence of the operator. Suit was brought by one pilot against the pilot of the second plane and its owner. Although the single issue raised on appeal by both defendants was the applicability of a jury charge on last clear chance,[14] the court considered an airplane to be as much a dangerous instrumentality as an automobile for the purpose of applying the doctrine of last clear chance.

B. *The Guest Statute*

The majority of cases involving Florida's guest statute[15] have turned on the question of whether the defendant's conduct has constituted gross negligence. The guidelines furnished by the supreme court in *Carraway v. Revell*[16] successfully eliminated much previous uncertainty in defining the degree of negligence required under the statute. Consequently, recent deci-

10. 120 So.2d 830 (Fla. App. 1960).
11. 117 So.2d 524 (Fla. App. 1960).
12. FLA. STAT. § 320.59 (1961). See text accompanying note 29 *infra.*
13. 115 So.2d 597 (Fla. App. 1959), *cert. denied,* 119 So.2d 791 (Fla. 1960), 15 U. MIAMI L. REV. 214 (1960).
14. See text accompanying note 77 *infra.*
15. FLA. STAT. § 320.59 (1961).
16. 116 So.2d 16 (Fla. 1959).

sions have been concerned primarily with the sufficiency of the plaintiff's evidence to meet the *Carraway* standards of gross negligence.[17] On retrial of the *Carraway* case, a finding of gross negligence was warranted by evidence showing that an automobile driver knew a tire was worn smooth and presented more than just a possibility of blow out.[18]

In *Farrey v. Bettendorf*,[19] when a minor driver of a motor scooter failed to keep a lookout ahead and his passenger was injured, a jury question was raised as to whether the conduct amounted to a conscious indifference to consequences or a mere momentary lapse.

In six cases recovery was denied when the plaintiff either failed to raise a question of material fact as to gross negligence,[20] or failed to state a cause of action.[21] Three of these cases involved cars running off the road. In *White v. Godwin*[22] the defendant swerved off the highway to avoid an oncoming car in the same lane, and turned over in attempting to re-enter the highway. The proximate cause of the injury was held to be the defendant's act of attempting to maneuver back on the road, and there was no evidence that this course of conduct would have caused a reasonable and prudent man to know that it would most likely result in injury to the plaintiff. Similarly, there was no gross negligence when lack of familiarity with a new power steering system caused the defendant in *Godwin v. Ringley*[23] to veer into the path of a truck while trying to get back on the road. A count in gross negligence was held properly dismissed in *Wilson v. Eagle*,[24] in which the car overturned after striking a soft shoulder. Although the count contained allegations that the car was traveling sixty to sixty-five miles per hour on a wet highway, that defendant had previously run off the road and that the plaintiff had warned the defendant, the court found the complaint deficient in failing to allege where the defendant had

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17. Gross negligence: that degree of negligence which lies in the area between ordinary negligence and wilful and wanton misconduct; that course of conduct which a reasonable and prudent man would know would probably and most likely result in injury to persons or property; that course of conduct such that the likelihood of injury to other persons or property is known by the actor to be imminent or clear and present. Carraway v. Revell, 116 So.2d 16, 22, 23 (Fla. 1959).

18. Revell v. Carraway, 124 So.2d 874 (Fla. App. 1960).

19. 123 So.2d 558 (Fla. App. 1960). The evidence was held sufficient to go to the jury in Reynolds v. Aument, 133 So.2d 562 (Fla. App.), *cert. denied*, 135 So.2d 743 (Fla. 1961) (excessive speed coupled with other facts); Douglass v. Galvin, 130 So.2d 282 (Fla. App. 1961) (excessive speed coupled with other facts); Mahoney v. La Russo, 120 So.2d 660 (Fla. App. 1960) (no facts stated).

20. Watts v. Smith, 133 So.2d 569 (Fla. App. 1961) (no facts stated); Godwin v. Ringley, 126 So.2d 163 (Fla. App. 1961); White v. Godwin, 124 So.2d 525 (Fla. App. 1960); Messina v. Zuber, 116 So.2d 780 (Fla. App. 1960) (no facts stated); Dye v. Freeman, 116 So.2d 647 (Fla. App. 1959) (brakes applied as soon as driver realized car ahead was stopped).

21. Wilson v. Eagle, 120 So.2d 207 (Fla. App. 1960).

22. 124 So.2d 525 (Fla. App. 1960).

23. 126 So.2d 163 (Fla. App. 1961).

24. 120 So.2d 207 (Fla. App. 1960).

previously run off the highway and in failing to indicate that the defendant was aware of the danger of the soft shoulder.

The question of contributory negligence under the statute was presented in one Fifth Circuit case.[25] After a judgment for the plaintiff, a new trial was granted on the basis of evidence tending to show that the parties had been drinking together. The court held that it was error to have removed the defense of contributory negligence from the jury's consideration since, under Florida law, a recovery may not be had under the guest statute by a passenger who voluntarily rides with one who is not a safe driver by reason of having imbibed too much.

The guest statute has been held not to apply to a passenger who is transported solely for the benefit of the owner or operator, or for the mutual benefit of the passenger and the owner or operator.[26] In determining the question of mutual benefit when one businessman drove another to a restaurant during an intermission in a conference, the court held that the passenger was a guest within the statute.[27] Neither the fact that business was resumed after dinner nor the fact that "shop talk" took place during dinner changed the social nature of the trip. However, mutual benefit existed when the operator of a car transported the plaintiff to obtain a loan in connection with a business matter in which both parties had an interest.[28]

The *Hale v. Adams*[29] litigation reappeared in the appellate court after the owner-passenger failed to establish a prima facie showing of gross negligence and was denied permission to amend his allegation to ordinary negligence. The majority of the court, in reversing, considered their earlier opinion to have held collaterally that the owner-passenger could recover under proof of ordinary negligence. In a special concurrence[30] Chief Judge Carroll was unable to reach this conclusion, which he believed would oppose the principle of the guest statute by permitting an owner, who happened to be a passenger, to recover against a driver for simple negligence, while other passengers in the same car would be required to prove gross negligence or wilful and wanton misconduct. He reasoned that the question of gross negligence should have gone to the jury under instructions concerning the plaintiff's status as a guest or passenger under the statute.

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25. Mascarenas v. Johnson, 280 F.2d 49 (5th Cir. 1960).

26. Sullivan v. Stock, 98 So.2d 507 (Fla. App. 1957).

27. Berne v. Peterson, 113 So.2d 718 (Fla. App. 1959), *cert. denied*, 117 So.2d 843 (Fla. 1960).

28. Tillman v. McLeod, 124 So.2d 135 (Fla. App. 1960).

29. 138 So.2d 761 (Fla. App. 1962) (action by owner-passenger against his daughter-driver). For earlier history see Hale v. Adams, 117 So.2d 524 (Fla. App. 1960) and text accompanying note 11 *supra*.

30. 138 So.2d at 763.

C. *Care Required of Motorists*

1. INTERSECTION ACCIDENTS

More often than not in an intersection collision, some lack of due care can be attributed to both parties. Contributory negligence by the plaintiff was responsible for a top-heavy number of trial court judgments favoring the defendant (fifteen out of seventeen). Eleven defendant judgments were affirmed.[31] Grounds for the four reversals were failure to allow questions to go to the jury,[32] error in applying the principles of law applicable to contributory negligence [33] and omitting to charge on the duty of a driver to obey a stop sign.[34]

The plaintiff in *Riles v. Hege*[35] was proceeding at thirty miles per hour on a main thoroughfare and struck the defendant crossing from the right on an unmarked side street. The defendant, who was moving at five to ten miles per hour, testified that a late afternoon sun was directly in his eyes. The affirmance of a directed verdict for the defendant produced a strong dissent based upon the contention that the evidence tending to overweigh the prima facie case (created by failure to yield to a vehicle on the right) should have been considered by the jury.[36]

The doctrine of sudden emergency was reviewed thoroughly in *Hormovitis v. Mut. Lumber Co.*[37] When the brakes of plaintiff's truck failed

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31. Riles v. Hege, 133 So.2d 84 (Fla. App. 1961), *cert. denied*, 138 So.2d 334 (Fla. 1962) (directed verdict based on contributory negligence); Sahlsten v. Leach, 133 So.2d 83 (Fla. App. 1961) (jury verdict on question of which car entered unmarked intersection first); Garrison v. Hertz Corp., 129 So.2d 452 (Fla. App. 1961) (jury verdict when defendant stopped, then proceeded and was hit by plaintiff); Raven v. Coates, 125 So.2d 770 (Fla. App.), *cert. denied*, 138 So.2d 339 (Fla. 1961) (complaint against city for failure to maintain stop sign dismissed); Hormovitis v. Mut. Lumber Co., 120 So.2d 42 (Fla. App.), *cert. denied*, 123 So.2d 676 (Fla. 1960) (summary judgment when plaintiff's truck ran through stop street as brakes failed); Lunsford v. Laite, 116 So.2d 797 (Fla. App. 1959), *cert. denied*, 120 So.2d 616 (Fla. 1960) (jury verdict, no facts stated); Cosens v. Weaver, 115 So.2d 455 (Fla. App. 1959) (jury verdict when cars approached at right angles and defendant turned in same direction that plaintiff was proceeding); Driscoll v. Morris, 114 So.2d 314 (Fla. App. 1959) (jury verdict on conflicting testimony as to whether defendant stopped at controlled intersection); Kramer v. Landau, 113 So.2d 756 (Fla. App. 1959) (summary judgment on evidence that plaintiff's driver ran stop sign); McWhorter v. Curby, 113 So.2d 566 (Fla. App. 1959) (no cause of action in allegation that railroad was negligent in obstructing drivers' view with standing freight car); Kniskern v. Railway Express Agency, Inc., 113 So.2d 563 (Fla. App. 1959) (directed verdict when plaintiff proceeded through green light despite defendant's truck blocking intersection).

32. Verducci v. Plasse, 121 So.2d 37 (Fla. App. 1960) (trial court considered plaintiff's testimony incredible); Mele v. Summers, 113 So.2d 254 (Fla. App. 1959) (plaintiff thought he had time to cross ahead of defendant).

33. Barr v. Mizrahi, 124 So.2d 508 (Fla. App. 1960) (plaintiff not contributorily negligent as matter of law when he looked but failed to see defendant).

34. Allen v. Rucks, 121 So.2d 167 (Fla. App.), *cert. denied*, 125 So.2d 877 (Fla. 1960) (trial judge failed to instruct jury regarding duty of defendant to obey a stop sign).

35. 133 So.2d 84 (Fla. App. 1961), *cert. denied*, 138 So.2d 334 (Fla. 1962).

36. *Id.* at 87.

37. 120 So.2d 42 (Fla. App.), *cert. denied*, 123 So.2d 676 (Fla. 1960).

at a stop street and the driver ran up on the center island of the crossing highway, the defendant was held to have acted reasonably in an emergency, even though he swerved into the plaintiff's truck in an effort to avoid it.

The City of Hialeah was joined as a defendant in *Raven v. Coates*[38] on a theory of negligence in failing to replace a stop sign. In affirming a dismissal of the complaint,[39] the court doubted that any casual relation could be shown between the damages and the absence of the sign, even if the city were otherwise liable, since a person using a street is under a duty to exercise his faculties to discover and avoid dangers.

Of the two affirmed plaintiffs' judgments, *Kuhn v. Telford*[40] illustrates the nice distinctions which must be drawn frequently in collision cases. Testimony indicated that the plaintiff was traveling between twenty and thirty-five miles per hour in a twenty-five mile per hour zone, and conflicted as to whether or not the defendant stopped at the crossing stop street. On appeal from a second trial, a directed verdict for the plaintiff was reversed unanimously on the ground of contributory negligence. The trial court was affirmed on rehearing[41] with the rationale that, from the fact that the plaintiff was struck in the side and toward the rear, any slight speeding by the plaintiff could not have proximately contributed to the accident.

2. REAR-END COLLISIONS

Appellate reversals in six out of eight rear-end collision cases indicate that a particularly fine line often exists between evidence requiring a directed verdict for the litigant associated with the leading car and evidence entitling his adversary to reach the jury.

The commonplace rear-end collision involves the plaintiff stopped at a traffic signal as the defendant strikes the rear of the plaintiff's car. The obligation imposed upon a motor vehicle operator to maintain control of his vehicle at all times, commensurate with the circumstances, has resulted in the rule re-enunciated in *Bellere v. Madsen*:[42]

> [W]here a defendant runs into the rear of plaintiff's car while plaintiff is stopped for a traffic light or at an intersection, there is a presumption of negligence of the defendant on which the plaintiff would be entitled to recover in the absence of an explanation by the defendant.

The *Bellere* defendant had been moving in a chain of cars approaching a red light and testified that his attention was diverted temporarily by

38. 125 So.2d 770 (Fla. App.), *cert. denied*, 138 So.2d 339 (Fla. 1961).
39. See text accompanying note 231 *infra*.
40. 115 So.2d 36 (Fla. App. 1959), *cert. denied*, 117 So.2d 843 (Fla. 1960).
41. *Id.* at 39.
42. 114 So.2d 619, 621 (Fla. 1959).

concern for the proximity of a pedestrian on the roadside. A judgment for the defendant was reversed when the court held that he was not entitled to a charge on the theory of "sudden emergency" under circumstances in which his own negligence contributed to the creation of the emergency.

Two other typical cases also resulted in reversals. The driver's explanation in *Pensacola Transit Co. v. Denton*[43] that his brakes failed was held sufficient to raise a question for the jury as to whether he had overcome the presumption of negligence against him. But testimony in *Kimenker v. Greater Miami Car Rental, Inc.*[44] that the driver had to swerve to avoid a bus pulling out from the curb did not overcome the presumption, and the plaintiff was entitled to a directed verdict.

Jury questions were presented under three factual situations in which the leading vehicles were stopped for reasons other than a traffic signal. Judgments on verdicts were affirmed in two of these cases, one in favor of the plaintiff,[45] the other in favor of the defendant.[46] In the third case a summary judgment for the defendant was reversed when conflicting testimony raised questions which should have been determined by a jury.[47]

The plaintiff in *Cook v. Mason*[48] was partially blinded by the headlights of an approaching car. The defendant relied upon the range of vision rule,[49] which imposes a duty upon a driver blinded by oncoming lights to use reasonable care, even to the extent of stopping, to avoid injury to anyone who might be ahead of him. The rule was held not to establish negligence as a matter of law in the event of accident, but merely to set forth the duty of the driver to be considered under the circumstances by the jury.

Summary judgments for defendants suffered reversals in the two litigations evolving from rear-end collisions when both vehicles were in motion. The plaintiff motorcycle driver's evidence raised a question of fact in *Rianhard v. Rice*;[50] and the existence of a sudden emergency in *Gertler v. Peterson*,[51] rebutting the presumption of negligence against a following driver, was a matter for jury determination.

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43. 119 So.2d 296 (Fla. App. 1960).
44. 115 So.2d 191 (Fla. App. 1959), *cert. denied*, 119 So.2d 293 (Fla. 1960).
45. Cook v. Mason, 133 So.2d 428 (Fla. App. 1961), *cert. denied*, 138 So.2d 332 (Fla. 1962) (although trailer was off the highway, rear wheels extended three feet into road and were struck by plaintiff).
46. Staicer v. Hall, 130 So.2d 113 (Fla. App. 1961) (plaintiff started in response to traffic officer's signal, then stopped when light turned red).
47. Dubov v. Ropes, 124 So.2d 34 (Fla. App. 1960) (defendant stopped station wagon in highway to retrieve twelve-foot pole which had fallen out).
48. 133 So.2d 428 (Fla. App. 1961).
49. Mathers v. Botsford, 86 Fla. 40, 42, 97 So. 282 (1923).
50. 119 So.2d 730 (Fla. App.), *cert. denied*, 123 So.2d 676 (Fla. 1960) (motorcycle struck by passing truck).
51. 116 So.2d 778 (Fla. App. 1960) (defendant shifted lanes, crossing ahead of plaintiff).

3. PEDESTRIANS

Notwithstanding the high degree of care which must be exercised by a motorist in any area where children may be anticipated, a child has a reciprocal duty, commensurate with his age, intelligence and experience, to look for traffic before entering a roadway. When a child rushes into the side of a passing vehicle, the evidence usually warrants a decision for the defendant without the need for a determination of facts by the jury. In two cases of this nature, a directed verdict[52] and a summary judgment[53] were both affirmed.

Even when the child enters the path of the vehicle, contributory negligence may be found as a matter of law. In *Riedel v. Driscoll*[54] a girl of fourteen, after leaving a bus, stepped in front of an approaching automobile on a heavily traveled street. The driver was exceeding the twenty-five mile per hour speed limit by five to eight miles per hour, and her brakes were partially defective. A judgment on a jury verdict for the plaintiff was reversed for a new trial,[55] the court finding that contributory negligence had been established by the overwhelming weight of the evidence.

However, in a case[56] involving a child struck in a marked cross walk, a judgment on a verdict for the defendant was reversed for error in an instruction which, in effect, made the plaintiff guilty of contributory negligence if she failed to determine that her path was safe before entering the street. Although a county ordinance which provided a right of way to a pedestrian in a cross walk did not confer an absolute right of way, it combined with plaintiff's testimony to furnish evidence from which the jury could have drawn conclusions of fact sufficient to have established the plaintiff's case.

One pedestrian case[57] centered around the thirty mile per hour speed limit[58] in a residence district.[59] A thirteen year old boy was struck near the entrance of a trailer park by a car traveling forty-five to fifty miles per hour. The trailer park contained two houses and twenty-one occupied

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52. Jackson v. Haney, 124 So.2d 719 (Fla. App. 1960).

53. Griffis v. Du Bow, 114 So.2d 207 (Fla. App. 1959). Followed in Bailey v. Keene, 122 So.2d 498 (Fla. App. 1960), in which a defendant's summary judgment was affirmed, although the facts do not indicate the manner of contact between the plaintiff and the automobile.

54. 124 So.2d 42 (Fla. App. 1960).

55. On retrial defendant's motion for summary judgment was denied. Petition for certiorari was dismissed in Riedel v. Driscoll, 127 So.2d 924 (Fla. App. 1961).

56. Zadan v. Cohen, 127 So.2d 466 (Fla. App.), *cert. denied*, 133 So.2d 322 (Fla. 1961).

57. Vissers v. Jordan, 131 So.2d 754 (Fla. App. 1961).

58. FLA. STAT. § 317.22 (1961).

59. FLA. STAT. § 317.01(19) (1961): "RESIDENCE DISTRICT. The territory contiguous to, and including, a highway not comprising a business district when the property on such highway, for a distance of three hundred feet or more, is in the main improved with residence or residences and buildings in use for business."

trailers, and covered a road frontage of 330 feet. The trial court refused to permit the jury to determine whether the area was a residence district within the statute. In reversing a judgment for the defendant, the appellate court noted the rule announced in *Gordon v. Cozart*[60] that if the evidence is conflicting as to the number and extent of the residences the question is for the jury, and proceeded to hold: "When, as here, the number and location of the residences is not in dispute but reasonable men may differ as to whether the inferences warrant the conclusion that the district is 'in the main' residential, the question is also for the jury."[61]

Nash Miami Motors, Inc. v. Ellsworth[62] brought into issue the concept of privileged information in an accident report.[63] The defendant gave information to a special police investigator subsequent to having given information to another officer at the time of the accident for the purpose of preparing an accident report. The trial court permitted the information given to the second investigator to be introduced into evidence. Judgment for the plaintiff was reversed with the holding that the subsequent information was privileged equally with the statements provided for the official accident report. For a statement to be privileged as an accident report, it is not necessary that it be given to the investigating officer, be given at the scene of accident, or be used in a subsequently filed report of the accident.[64]

With the exception of *Manganelli v. Covington*[65] and *Blanford v. Nourse*,[66] the remaining pedestrian cases involved the doctrine of last clear chance, and are discussed in the succeeding subsection.

4. LAST CLEAR CHANCE

Possibly no facet of automobile law lends itself to more uncertainty than the doctrine of last clear chance. As stated by Mr. Justice Thornal in the *James v. Keene*[67] opinion, "the rule itself is not so complicated as is the variety of factual situations which have produced the necessity for considering the applicability of the rule to particular cases."

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60. 110 So.2d 75 (Fla. App.), *cert. denied*, 114 So.2d 6 (Fla. 1959).
61. 131 So.2d at 755.
62. 129 So.2d 704 (Fla. App. 1961).
63. FLA. STAT. § 317.17 (1961).
64. Based upon FLA. STAT. § 317.13(2) (1961): "The department may require any driver of a vehicle involved in an accident, of which report must be made as provided in this section, to file supplemental reports, whenever the original report is insufficient in the opinion of the department, and may require witnesses of accidents to render reports to the department."
65. 114 So.2d 320 (Fla. App. 1959). An involuntary nonsuit was affirmed. The evidence could not support a finding of negligence when the plaintiff was struck first by another car and thrown into the path of the defendant's vehicle.
66. 120 So.2d 830 (Fla. App. 1960). An involuntary nonsuit was affirmed. No negligence was shown when the defendant driver was not aware of a mechanical defect which caused a car to move in reverse when the gear shift was placed in the forward drive position. See text accompanying note 10 *supra*.
67. 133 So.2d 297, 299 (Fla. 1961), *quashing* 121 So.2d 186 (Fla. App. 1960).

From the same opinion the elements which, under Florida law, must be present to invoke the doctrine are: (1) that the injured party has already come into a position of peril; (2) that the injuring party then or thereafter becomes, or in the exercise of ordinary prudence ought to have become, aware not only of that fact, but also that the party in peril either reasonably cannot escape from it, or apparently will not avail himself of opportunities open to him for doing so; (3) that the injuring party subsequently has the opportunity by the exercise of reasonable care to save the other from harm; and (4) that he fails to exercise such care.

The purpose of the doctrine is to protect a plaintiff from an unjust application of the rule of contributory negligence. A corollary has prevailed in some opinions to the effect that the doctrine is not applicable if the plaintiff's negligence continues up to the time of the injury.[68] Strict adherence to this concept would appear to bar recovery by any imperiled plaintiff who remains inattentive to his own safety, a result not borne out by the cases.

A pedestrian in the *James* case was struck while crossing a four-lane boulevard at 8:00 p.m. She did not see the defendant's car prior to the impact. Although visibility was good and the defendant was driving well within the speed limit, she failed to observe the plaintiff until it was too late to avoid striking her. A witness, who had been driving parallel to the defendant in the adjacent lane, testified that the plaintiff had been visible for several hundred feet. He had remarked to his wife that there was a lady who was going to get hit. The district court of appeal held that a charge on last clear chance had been properly denied. The plaintiff's own contributory negligence had continued until the time of the injurious act; and, when both plaintiff and defendant were inattentive, neither had the last clear chance to avoid the accident. In quashing this decision the supreme court held only that the factual situation presented a question for the jury pursuant to an appropriate instruction by the trial judge. The tenor of the opinion disapproved of the lower court's conclusion that an impasse had been reached through the mutual inattentiveness of the parties, precluding an instruction on last clear chance. In view of the lower court's finding that the plaintiff had been visible for several hundred feet, facts sufficient to satisfy each of the elements of the doctrine could reasonably have been determined.

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68. *E.g.*, Falnes v. Kaplan, 101 So.2d 377, 380 (Fla. 1958): "Falnes had not been put in any position of danger from which he could not extricate himself and his negligence had not ceased. To terminate his own negligence he had but to step aside when he became aware of the approaching vehicle . . . ." Edwards v. Donaldson, 103 So.2d 256, 259 (Fla. App. 1958): "In applying the doctrine of last clear chance to a set of facts we much concern ourselves initially with the premise that in order to invoke such a doctrine it is necessary that there must be competent substantial evidence clearly indicating that the prior negligence of the plaintiff in placing himself in a perilous position had terminated or culminated and from which the exercise of ordinary care on his part would not thereafter extricate him."

Douglas v. Hackney,[69] decided the same day as *James*, went the other way. A pedestrian was struck and killed in the act of crossing a busy thoroughfare at night. The defendant testified that he did not see the deceased prior to impact. There were no witnesses and no evidence of negligence on the part of the defendant. The supreme court found no basis for a charge on last clear chance when there was no factual support for a jury inference that the driver saw, or reasonably should have seen, the deceased in sufficient time to avoid striking him.

Trial courts erred in three remaining cases involving pedestrians by excluding expert testimony as to the time required for the plaintiff to cross the defendant's range of vision when the question before the jury was whether the defendant had a reasonable opportunity to avoid striking the plaintiff;[70] by denying an instruction on the doctrine when the defendant had seen the plaintiff at a distance of sixty to seventy feet before impact;[71] and by failing to submit the case to the jury under a charge of last clear chance when the defendant's car created skid marks for seventy feet.[72]

The applicability of the doctrine was brought into question in an automobile-bus collision[73] and in litigation resulting from a driver's swerving off the road to avoid a car turning in his immediate path.[74] In *Holdsworth v. Crews*[75] the plaintiff and defendant were approaching each other from opposite directions on a two-lane road. The plaintiff's speed was seventy-five to eighty-five miles per hour; the defendant was moving slowly in preparation for a left turn. The defendant testified that he saw the plaintiff's car and did not think that he had time to turn in front of it. Nevertheless, he commenced his turn, crossing partially into the plaintiff's lane. The plaintiff, swerving off the road to avoid the defendant, struck a tree. The trial court granted the plaintiff's motion for a new trial on the ground of failure to instruct the jury on last clear chance. On appeal, the decision was affirmed.

With the exception of one California case,[76] *Shattuck v. Mullen*[77] appears to be the only instance of the application of the last clear chance doctrine to aircraft. Two light planes collided just above the ground. The plaintiff was descending to land on a runway crossing the one from which the defendant was taking off. Neither party saw the other until the instant

69. 133 So.2d 301 (Fla. 1961), *discharging cert. in* 121 So.2d 804 (Fla. App. 1960).
70. Mathews v. Carlson, 130 So.2d 625 (Fla. App. 1961).
71. Hodell v. Snyder, 122 So.2d 36 (Fla. App. 1960).
72. Huff v. Belcastro, 127 So.2d 476 (Fla. App. 1961).
73. King v. Jacksonville Coach Co., 122 So.2d 480 (Fla. App. 1960) (charge properly given; no facts of the collision stated).
74. Holdsworth v. Crews, 129 So.2d 153 (Fla. App.), *cert. denied*, 135 So.2d 743 (Fla. 1961).
75. *Ibid.*
76. Ebrite v. Crawford, 5 P.2d 686 (Cal. App. 1931), *aff'd*, 215 Cal. 724, 12 P.2d 937 (1932).
77. 115 So.2d 597 (Fla. App. 1959), *cert. denied*, 119 So.2d 791 (Fla. 1960).

before the collision. Judgment on a jury verdict for the plaintiff was reversed for error in charging on last clear chance when the evidence showed that the plaintiff and the defendant had equal opportunities to discover each other, and the defendant took evasive action as soon as she saw the other plane. However, the doctrine was found to be applicable to aircraft, in a proper case, in the same manner in which it has been applied to automobile operation.

5. OTHER NEGLIGENT OPERATION

Among a small number of miscellaneous type accidents giving rise to appellate opinions, there were three head-on collisions. While no significant tort law was developed, summary judgments in favor of the defendants were reversed in all three cases, each turning on an interesting question of admissible evidence.

In *Day v. Stickle*[78] the plaintiff attempted to testify concerning his observations of the movements of the other car as it had approached on the highway. The evidence was rejected by the trial court on the ground that because the other driver had been killed, the proffered testimony was barred under the dead man's statute.[79] This ruling proved to be reversible error. The plaintiff's observations of the other car did not constitute a "transaction" between the plaintiff and the deceased operator within the meaning of the statute.

Reversed also was a directed verdict for a defendant in a traffic lane who struck the rear of the plaintiff's car after it had backed partially from a diagonal parking space.[80] The evidence was sufficient to require that it be submitted to a jury. A reversal on certiorari in favor of the plaintiff, in a case growing out of a collision between an overtaken truck and an overtaking truck, was concerned solely with error in refusing evidence.[81]

An exceptional action was maintained in *Halavin v. Tamiami Trail Tours, Inc.*[82] The plaintiff lost control of a car and house trailer, which turned over, as the alleged result of suction created by the negligent operation of defendant's tractor-trailer while passing the plaintiff's vehicle at high speed. There was no physical contact. Admitting an extremely close question, the court reversed a summary judgment for the defendant, holding that the

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78. 113 So.2d 559 (Fla. App.), *cert. denied*, 115 So.2d 414 (Fla. 1959). The two other head-on collision cases were Sconyer v. Scheper, 119 So.2d 408 (Fla. App.), *cert. denied*, 120 So.2d 618 (Fla. 1960) (experts differed on competency of minor witness severely injured by collision) and Tarkoff v. Schmunk, 117 So.2d 442 (Fla. App. 1959) (physician's testimony that deceased driver suffered stroke prior to collision was opinion only).

79. FLA. STAT. § 90.05 (1961).

80. Belden v. Lynch, 126 So.2d 578 (Fla. App. 1961).

81. Hendrick v. Strazzulla, 135 So.2d 1 (Fla. 1961), *quashing* 125 So.2d 589 (Fla. App. 1960).

82. 124 So.2d 746 (Fla. App. 1960).

evidence was of sufficient competence and substance to justify a lawful inference by a jury that the negligence of the defendant proximately caused the plaintiff's injuries.

The owner parked his automobile on a city street and left the ignition unlocked in violation of city and county ordinances. A third party took the car without authority and negligently injured the plaintiff. A dismissal of the complaint against the owner was affirmed[83] on the ground that the defendant's negligence was not the proximate cause of the injury. In following the majority view in this case of first impression in Florida, the court noted that a wilful, malicious or criminal act, as a general rule, breaks the chain of causation.

A fortiori, a plaintiff whose husband was killed by a car thief suffered an adverse judgment on the pleadings in an action against the car owner when no statute or ordinance prohibited leaving ignition keys in an automobile.[84]

6. CONTRIBUTORY NEGLIGENCE

Contributory negligence, as a major issue in most automobile cases, has necessarily been mentioned in previous subsections. The following discussion is confined primarily to those cases which have not been identified earlier.

Two cars, each proceeding at approximately fifteen miles per hour, collided at an intersection. The plaintiff testified that he looked to left and right but did not see the defendant, who came out of a cross street. A jury verdict for the plaintiff was set aside by the trial court, and judgment entered for the defendant, the plaintiff being held guilty of contributory negligence as a matter of law. The appellate court reversed[85] for misapplication of the rule of contributory negligence, quoting from *Nelson v. Ziegler*:[86]

> The correct rule applicable to the defense of contributory negligence is that only in those cases where negligence of a plaintiff proximately contributes to the cause of his own injury and damage will such negligence bar recovery. A plaintiff can be guilty of *some* negligence but unless it is negligence that proximately contributed to causing the injury, then the negligence of the defendant, if established, remains the proximate cause and despite the fact that the plaintiff is guilty of some negligence, the defendant can still be held liable.

A similar result obtained in *Alessi v. Farkas*,[87] when the plaintiff was

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83. Lingefelt v. Hanner, 125 So.2d 325 (Fla. App. 1960), 15 U. MIAMI L. REV. 440 (1961).
84. Bryant v. Atlantic Car Rental, Inc., 127 So.2d 910 (Fla. App. 1961).
85. Barr v. Mizrahi, 124 So.2d 508 (Fla. App. 1960).
86. 89 So.2d 780, 782 (Fla. 1956).
87. 118 So.2d 658 (Fla. App. 1960). *But see*, Owen v. Marvin Indus., Inc., 118 So.2d 673 (Fla. App.), *cert. denied*, 123 So.2d 674 (Fla. 1960) (defendant's summary judgment affirmed; plaintiff held guilty of contributory negligence as matter of law).

driving through a residential district and was struck by the defendant backing out of a private drive. The court pointed out that contributory negligence is normally a jury question. When the jury had the opportunity to weigh the evidence, it was error to set aside the verdict and find the plaintiff guilty of contributory negligence as a matter of law.

An automobile passenger was injured and brought action against the driver of the second car.[88] The court reversed a directed verdict for the defendant and reiterated the rule that it is not necessary that the driver of the car in which the passenger is riding be found free from negligence. If negligence of the two drivers combines to produce and proximately cause the result, the passenger can recover from the driver and owner of the second car.

An exception to this rule was illustrated in *Smart v. Masker*.[89] The injured passenger again brought action against the driver of the second car. Although both drivers were negligent, the driver of the plaintiff's car had been drinking and had driven on the wrong side of the road prior to the accident. These facts were known by the plaintiff. Judgment for the plaintiff was reversed. The trial court was held to have erred in striking the defense of contributory negligence; for, when a passenger knows or should have known that the driver is not exercising that degree of care compatible with the safety of the passenger, failure to warn, protest or make a reasonable attempt to leave the car will constitute contributory negligence, barring the passenger's right to recovery.

The driver's tragedy of plunging into a canal and drowning was a common aspect of two cases. In *General Portland Cement Co. v. Walker*[90] the deceased was backing his truck at night on a lighted company road. A section of the road caved in, and the truck fell into a canal. There were no witnesses to the accident. The plaintiff alleged failure to maintain the road in proper condition. The court affirmed a judgment on a jury verdict for the plaintiff, noting that although a motorist backing when he cannot see behind him and there is no one present to guide him is guilty of contributory negligence, the road in this instance was lighted and the deceased was familiar with the road. Nothing justified a ruling of contributory negligence as a matter of law. The deceased in *City of Hialeah v. Revels*[91] had one or two beers and started to drive home. He was found two months later in a canal. The suit against the city was based upon failure to mark or barricade the area between the canal and the road. Judgment on a

88. Abrams v. Gresham, 131 So.2d 207 (Fla. App. 1961).
89. 113 So.2d 414 (Fla. App. 1959). Followed in the connected case of Smart v. Harris, 113 So.2d 418 (Fla. App. 1959).
90. 293 F.2d 294 (5th Cir. 1961).
91. 123 So.2d 400 (Fla. App. 1960), *cert. denied*, 129 So.2d 141 (Fla. 1961).

verdict for the plaintiff was affirmed, the question of contributory negligence having been properly decided by the jury.

II. Statutory Liability

The liability of owners of dogs is importantly affected by applicable Florida statutes.[92] Several cases involving dog owners liability were noted under the last *Survey*, but were noticeable by reason of their absence during the period of the present *Survey*. This may indicate either that dogs are better trained or that people are more careful.

Overconcentration on the common law concepts may lead to failure to note the existence or the significance of applicable statutes and ordinances. Statutes may not only affect the substantive law, but also may prevent the maintenance of an action.

A. *Statutes Affecting the Right to Maintain an Action*

The Third District Court of Appeal, in response to a certified question, held that Florida follows the common law rule on the nonassignability of a personal injury claim, and, absent statutory authority permitting the waiver or the assignment of the right to bring an action under the wrongful death statute,[93] the right of action could not be waived or assigned in favor of a person in an inferior class by a person occupying a superior position.[94] The same court held that a compensation carrier, required under the Federal Longshoreman's and Harbor Worker's Compensation Act[95] to pay benefits to a surviving widow, could maintain an action since the federal statute provided for such an assignment and took precedence over state law.[96]

Plaintiff and her husband were injured when the automobile in which they were riding struck two black angus cows at night.[97] The husband subsequently died. The court directed a verdict for the defendants since the fact that cows were running at large on the highway did not justify an inference that the owners had violated the Warren Act.[98] Liability under

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92. Fla. Stat. §§ 767.01, .04 (1961).
93. Fla. Stat. § 768.02 (1961).
94. Clar v. Dade County, 116 So.2d 34 (Fla. App. 1959). The question which the circuit court considered to be without precedent in Florida was: "May the right of action for wrongful death conferred by the statute (§ 768.02, Fla. Stat., F.S.A.) upon a minor child of the deceased, be waived or assigned to the Administrator?" *Id.* at 35.
95. 33 U.S.C. § 933(b) (1958). "Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person."
96. United States Fid. & Guar. Co. v. Reed Constr. Corp., 132 So.2d 626 (Fla. App. 1961). The complaint sought damages under Fla. Stat. § 768.02 (1961).
97. Gordon v. Sutherland, 131 So.2d 520 (Fla. App.), *cert. denied*, 135 So.2d 742 (Fla. 1961).
98. Fla. Stat. §§ 588.14-.15 (1961).

the act is limited to an owner who *intentionally, wilfully, carelessly or negligently* suffers or permits livestock to run at large or stray upon the public roads.

The decedent was killed in an automobile accident by the negligence of the defendant. He was survived by his widow and by two minor children who lived with his ex-wife. The widow brought an action under the wrongful death act. However, her claim was settled and the action dismissed. The widow then attempted to bring an action on behalf of the minor children. It was held that no action could be maintained by the children if there was a widow living, even though the children were by a former marriage and were not compensated for the loss of the father.[99]

It was held that a father could not maintain an action in tort against an unemancipated minor child for the death of another minor child.[100] The court, in deciding the case, pointed out that statutory emancipation[101] was not alleged and the record was devoid of any showing of a complete severance of the filial tie.

A wife commenced an action against her husband *after* their marriage for personal injuries received *before* their marriage. The plaintiff wife argued that the dismissal of her action deprived her of her constitutional right to sue her husband for the pre-nuptial tort. The court held that the cause of action was not cancelled or purged by the marriage, but the right was merely abated or suspended by the marriage.[102] The wife's only remedy in this situation would seem to be to divorce her husband.

B. *Jones and Federal Employers' Liability Acts*

The Jones[103] and Federal Employers' Liability Acts[104] continued to produce considerable litigation in the Florida and federal courts. In *Gaymon v. Quinn Menhaden Fisheries, Inc.*,[105] a seaman disappeared from a fishing

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99. Randolph v. Clack, 113 So.2d 270 (Fla. App. 1959).

100. Meehan v. Meehan, 133 So.2d 776 (Fla. App. 1961). Russell v. Meehan, 141 So.2d 332 (Fla. App. 1962) was an action by the administrator of the estate of the deceased minor. The court concluded that while the nominal plaintiff was the administrator of the estate of the minor decedent, the decedent's father was the real party in interest as the decedent's heir at law. The court held that the facts sufficiently established a defense in the nature of estoppel by judgment. "To hold otherwise would do violence to the *rationale* of the rule that a parent or his representative cannot maintain an action in tort against an unemancipated minor child, that *rationale* being 'the necessity for the encouragement of family unity and the maintenance of family discipline.'" *Id.* at 333.

101. FLA. STAT. § 62.23 (1961).

102. Amendola v. Amendola, 121 So.2d 805 (Fla. App. 1960). For a different view as to the right of the wife to sue her husband for an antenuptial tort, see the dissenting view of Roberts, J. in Amendola v. Amendola, 118 So.2d 13, 14 (Fla. 1960). The supreme court transferred the appeal to the district court because of lack of jurisdiction.

103. 46 U.S.C. § 688 (1958).

104. 45 U.S.C. §§ 51-60 (1958).

105. 118 So.2d 42 (Fla. App. 1960).

boat tied up in port and the drowned body was found two days later. The boat was not equipped with toilet facilities for the crew and it was customary for them to relieve themselves over the side of the boat, suspending themselves in space outside the boat by holding to its top railing. The court took judicial notice of the risk involved and reversed a summary judgment entered for the employer. The court pointed out that a relevant decision of the United States Supreme Court was not available to the trial court at the time the judgment was entered. In *Connor v. Butler*,[106] as in *Gaymon*, the plaintiff did not know *how* or *why* the accident occurred. It now seems settled law that under the Jones Act and the Federal Employers' Liability Act it is not necessary to show that the employer's negligence was the proximate cause of the injury or death complained of, but that it is sufficient to establish a jury question simply by showing some negligence on the part of the employer, coupled by direct or circumstantial evidence to the injury or death of an employee.

Under certain circumstances the fact that a vessel is under-manned may be found to constitute unseaworthiness or negligence under the Jones Act. In reversing the lower court the opinion in *Fribley v. Bebe, Inc.*[107] pointed out the very liberal standards established by the United States Supreme Court[108] and recognized by the Florida Supreme Court[109] concerning the minimal quantum of proof necessary to uphold a jury verdict under the Jones Act and FELA.

There were six FELA cases during the period surveyed.[110] Two produced holdings that the railroad's liability was a jury question under the liberal federal rule of liability if employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought.[111] A widow instituted suit under the FELA on behalf of herself and five children aged ten, twelve, fifteen, sixteen and twenty.[112] The verdict was returned for 150,000 dollars (50,000 for the widow and 20,000

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106. 361 U.S. 29 (1959). "The proofs were sufficient to submit to the jury the question whether employer negligence played a part in producing the petitioner's injury." *Ibid.*

107. 121 So.2d 446 (Fla. App. 1960).

108. Connor v. Butler, 361 U.S. 29 (1959).

109. Atlantic Coast Line R.R. v. Barrett, 101 So.2d 37 (Fla. 1958).

110. Martin v. Atlantic Coast Line R.R., 289 F.2d 414 (5th Cir. 1961) (damages); Tate v. Jacksonville Terminal Co., 127 So.2d 702 (Fla. App. 1961) (Railroad Retirement Board entitled to reimbursement out of the employee's judgment for benefits paid him); Atlantic Coast Line R.R. v. Ganey, 125 So.2d 576 (Fla. App. 1960), 15 U. MIAMI L. REV. 420 (1961). In the *Ganey* case the court held that "absent legislative authority, where a cause of action accrues to one in the State of Florida, and he correctly elects the venue of his action in accordance with the appropriate venue statute, a motion to dismiss or to transfer the action to another court or jurisdiction within this state, for purposes of trial convenience, is unauthorized . . . ." *Id.* at 580.

111. McCloskey v. Louisville & N.R.R., 122 So.2d 481, 484 (Fla. App. 1960); Butler v. Gay, 118 So.2d 572, 573 (Fla. App.), *cert denied*, 122 So.2d 189 (Fla. 1960).

112. Butler v. Williams, 133 So.2d 109 (Fla. App. 1961).

for each child). The court remanded to the circuit court with directions to enter an appropriate remittitur as to the children or in the alternative to grant a new trial on the question of damages. The court pointed out that

> Giving the children the most favorable benefit of the jury's compensation to them, by leaving undisturbed the allocation of $20,000 to the youngest . . . excessiveness became clear when $20,000 was allowed to Wendell who would attain his majority in a little more than one year.[113]

The court held that a verdict in an FELA action is susceptible to a remittitur order when tried in a state court.

C. *Railroad Operation*

Railroad crossing accidents were involved in nine cases. In one[114] a judgment was reversed because the verdict was clearly contrary to the manifest weight of the evidence. In a second trial of the case the plaintiff announced that she had no additional evidence which would tend to establish the railroad's liability, and the court entered summary judgment for the railroad. This was affirmed on appeal.[115]

Discussion of the "presumption statute"[116] in counsel's opening argument[117] and the reading of the statute to the jury as part of the court's charge[118] were held to be prejudical error. In five of the other seven cases, liability was held to be a jury question.[119] In one case it was held that the railroad was entitled to a directed verdict[120] and in another the application of the standing train doctrine[121] in a case in which a motorist crashed into a moving train resulted in the affirmance of a summary judgment for the railroad.

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113. *Id.* at 110
114. Atlantic Coast Line R.R. v. Walker, 113 So.2d 420 (Fla. App. 1959).
115. Walker v. Atlantic Coast Line R.R., 121 So.2d 713 (Fla. App. 1960).
116. FLA. STAT. § 768.05 (1961).
117. Butler v. MacDougal, 120 So.2d 832 (Fla. App.), *cert. denied*, 125 So.2d 873 (Fla. 1960).
118. Atlantic Coast Line R.R. v. Walker, 113 So.2d 420 (Fla. App. 1959).
119. Tyus v. Apalachicola No. R.R., 130 So.2d 580 (Fla. 1961) (conflict as to whether signals given); Butler v. Phily, 133 So.2d 337 (Fla. App. 1961) (failure to give adequate warning of train's approach and to maintain unobstructed view of right of way); Weeks v. Atlantic Coast Line R.R., 132 So.2d 315 (Fla. App. 1961) (flagman at crossing waved red flag although gates and signal lights at crossing not in operation); Jones v. Atlantic Coast Line R.R., 117 So.2d 234 (Fla. App. 1960); Atlantic Coast Line R.R. v. Hogan, 114 So.2d 29 (Fla. App.), *cert. denied*, 115 So.2d 414 (Fla. 1959).
120. O'Keefe v. Butler, 126 So.2d 764 (Fla. App. 1961) (unobstructed view of the track). The court pointed out that any other conclusion would impose a "stop, look and listen" burden on the train at all crossings. *Id.* at 767.
121. Massey v. Seaboard Air Line R.R., 132 So.2d 469 (Fla. App. 1961). The standing train doctrine may be expressed as: "The train remaining stationary on the crossing, ipso facto, could not be the proximate cause of the injury, but the proximate cause was the driving of the car into the freight train while it was standing on the crossing, or the plaintiff's own negligence." Clark v. Atlantic Coast Line R.R., 141 Fla. 155, 158, 192 So. 621, 623 (1939).

In *Louisville & N.R.R. v. Adams*[122] the plaintiff was injured when the car in which she was riding derailed as a result of a broken rail. The railroad introduced evidence as to the frequency of inspection by electronic testing devices and expert testimony as to the frequency of inspection on other railroads. In holding the railroad liable for the highest degree of care for the safety of its passengers, the federal court applied Florida law that "evidence of custom is not conclusive proof of diligence."[123] In another action the court approved a summary judgment for the plaintiffs on the issue of liability when passengers were injured in a derailment accident.[124]

In the *Bowe v. Butler*[125] case, the plaintiff was injured when a string of boxcars was "kicked" against the box car in which he was working. The court concluded that when flying switch activities are conducted in a switching yard, it places a duty on the railroad to make a strong showing of due care. In reversing the court pointed out that contributory negligence, under the comparative negligence rule, did not bar the plaintiff from a verdict, but may reduce the amount of his recovery.[126]

In another accident occurring during switching operations, the plaintiff was injured as he was walking to work at night through the yards.[127] "No Trespassing" signs were posted prominently about the yards, yet the plaintiff testified that he had taken this route for about a year without seeing any of the signs. Although there were no witnesses to the accident, the court reversed a summary judgment for the defendant. The court pointed out that the moving party must establish the *true* factual picture and thereby remove any serious doubt as to the existence of any genuine issue of material fact to satisfy the burden of showing the absence of a genuine issue of material fact.[128]

Plaintiff's husband was found dead on the tracks in a Miami yard where private citizens frequently crossed through and among the trains. It was assumed by all parties that he had been passing under a train when the train moved without warning. In reversing a judgment on a jury verdict for the plaintiff, the court held that the decedent had placed himself in a position of peril in which his discovery was nearly impossible and no ordinary warning would have availed him.[129]

In *Apalachicola No. R.R. v. Tyus*[130] the district court reversed the

122. 292 F.2d 153 (5th Cir. 1961).
123. *Id.* at 155.
124. Butler v. Borowsky, 120 So.2d 656 (Fla. App. 1960).
125. 133 So.2d 347 (Fla. App. 1961).
126. *Id.* at 354.
127. McCutcheon v. Seaboard Air Line R.R., 133 So.2d 660 (Fla. App. 1961).
128. *Id.* at 662.
129. Butler v. Barr, 114 So.2d 700 (Fla. App.), *cert. denied*, 116 So.2d 775 (Fla. 1959).
130. 114 So.2d 33 (Fla. App. 1959), *quashed*, 130 So.2d 580 (Fla. 1961).

judgment in the trial court for the plaintiff and remanded the cause with directions that a judgment be entered for the defendant railroad. The court pointed out that

> As to whether a proper warning was given, all of the defendant's and most of the plaintiff's witnesses testified that the whistle was blown at least a few seconds before the accident. The witnesses who attempted to establish that the whistle was not blown testified merely that they 'didn't hear it blow.'[131]

In reversing the district court and reinstating the judgment of the trial court, the supreme court pointed out that the statement in the opinion must be given the connotation that *some* of the witnesses testified to the contrary and the resolution of the question was properly for the jury.[132] The case may be a classic in demonstrating the extent to which plaintiff's counsel can go in closing remarks to the jury in railroad cases.[133]

D. *Federal Tort Claims Act*

A landmark case under the Federal Tort Claims Act[134] involved the alleged negligence of the Government in an unsuccessful attempt to rescue the crew of a vessel.[135] As the asserted tort occurred more than a marine league from shore, the applicable remedy for the wrongful death was the Death on the High Seas Act.[136] The Government in its brief argued

> This case is the first one in which a district court has held the United States liable for the *failure* of its employees *to reach a vessel in distress in time* to save her crew. Indeed, . . . this case is the first in which *any* person has been held liable merely for *failing to arrive* at the scene of a vessel marooned in a storm *in time to rescue* her crew.[137]

The court held the Government liable when the failure was due to the negligence of Government operators ashore in reporting the location of the distressed vessel and in directing vessels to the location.

III. COMMON LAW NEGLIGENCE ACTIONS

Since the relationship between the parties often controls the outcome of the case, the common law cases are collected according to the relationships

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131. *Id.* at 36.
132. Tyus v. Apalachicola No. R.R., 130 So.2d 580 (Fla. 1961).
133. See dissenting opinion of O'Connell, J., *id. at* 588.
134. 28 U.S.C. §§ 1346, 1402, 1504, 2110, 2401, 2411, 2412, 2671-80 (1958).
135. United States v. Gavagan, 280 F.2d 319 (5th Cir. 1960), *cert. denied*, 364 U.S. 933 (1961).
136. 46 U.S.C. §§ 761-68 (1958).
137. 280 F.2d at 321.

involved where possible. It will be obvious that the major portion of the litigation has centered around the duty of care owed to the plaintiff by the defendant. Several new categories have been added because of the large number of cases or the importance of the litigation in question.

A. *Landlord and Tenant*

In a case of first impression, the lessors agreed to repair the roof of the leased premises although under no obligation to do so under the terms of the lease. While the repairs were being made, by an independent contractor hired by the lessor, rain came through the roof and damaged the plaintiff's property stored in the building. Plaintiff sued the lessors for failure to exercise proper control over the contractor. In reversing the lower court's dismissal of the action, the court held that a lessor who gratuitously undertakes to make repairs on leased premises may not absolve himself from liability by employing an independent contractor.[138] The case has been criticized because the court has made the landlord an insurer for everything done by the contractor within the scope of his employment.[139]

An employee of the tenant-operator of a filling station brought an action for personal injuries sustained when the safety flaps on a grease rack failed. An automobile rolled off the rack and crushed the plaintiff's head. The plaintiff recovered a judgment for 150,000 dollars against the oil company which leased the premises to the plaintiff's employer and furnished the grease rack under terms of an "equipment loan agreement." In affirming the judgment the court held that there was sufficient evidence to support the jury's determination that the oil company had undertaken to maintain the grease rack in a reasonably safe condition.[140] The court found that the case involved a bailment rather than a lease of the rack, but that the same legal principles governed. The defendant oil company invoked the rule that a lessor is not liable for injuries to one on premises in possession of a lessee unless the condition causing injury is a violation of law, is a pre-existing defect in construction, is inherently dangerous, or unless the lessor undertakes to keep the premises in repair. The plaintiff did not challenge the rule, but rather relied upon the undertaking to keep in repair.[141]

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138. Easton v. Weir, 125 So.2d 115 (Fla. App. 1960), *cert. denied*, 129 So.2d 141 (Fla. 1961).

139. 15 U. MIAMI L. REV. 412 (1961).

140. Standard Oil Co. v. Foster, 280 F.2d 912 (5th Cir. 1960).

141. *Id.* at 914. For other cases see Robinson v. Foland, 124 So.2d 512 (Fla. App. 1960) (appeal dismissed where appellant failed to include record on appeal and court held that under such circumstances reversible error could not be demonstrated); Meyer v. Pitzele, 122 So.2d 228 (Fla. App. 1960) (Indiana law applied); Duchaine v. Grosco Realty, Inc., 121 So.2d 679 (Fla. App. 1960). *Duchaine* involved the breach of the terms of a lease in a shopping center. Although it was assumed that the acts complained of did constitute breaches of covenants of the lease, the plaintiffs could present no evidence to establish that they had sustained loss or damage.

B. *Common Carriers*

It is a well established rule of law that once the relationship of carrier and passenger is established, it will not ordinarily terminate until the passenger has safely alighted at his destination. When a cab passenger, who had temporarily alighted from the cab, was shot by the cab driver in an argument over the driver's refusal to transport him to his original destination, it was held to be a question of fact as to whether the passenger-carrier relationship had ended.[142]

Greyhound Corp. v. Morgan[143] involved a runaway boy who was placed upon a bus in Georgia for return to his parents in Miami. It appeared from the evidence that the boy had opened a bus window and jumped from the bus. The bus driver had looked back several times in the course of the trip to check on the boy. The court, in directing a verdict for the carrier, held that in guarding a passenger from injury which is not usual or incident to ordinary travel, a carrier is held only to the use of reasonable care.

A passenger was injured on board ship when descending from the upper bunk in a cabin. There was no evidence that the ladder was defective by design or otherwise and it did not collapse. The court reversed a verdict for the plaintiff and held that while a carrier under law is required to exercise the highest degree of care for the safety of its passengers, this duty does not extend to the point of making the carrier an insurer of the safety of its passengers.[144] The testimony of a partially blind passenger, injured when he walked into a bus door, was sufficient to condemn his conduct as the negligence which proximately caused his injury.[145] But when a passenger's mental or physical weakness is apparent, or is brought to the attention of the carrier, the high degree of care or caution ordinarily imposed on carriers requires it to take notice of the passenger's disability and provide accordingly.[146]

In *Blackman v. Miami Transit Co.*,[147] a passenger who was sitting on a longitudinal seat fell over or was thrown forward and struck his head against a metal bar when the bus stopped. The trial court directed a verdict for the bus company. The Third District Court of Appeal held that testimony that the bus was going faster than usual coupled with testimony that it stopped suddenly or quickly was not sufficient evidence of negligence to require the trial judge to submit the case to the jury and, in the absence of showing the reason or circumstances of the bus stopping, the evidence

142. Henderson v. Tarver, 123 So.2d 369 (Fla. App. 1960).
143. 118 So.2d 245 (Fla. App.), *appeal dismissed*, 122 So.2d 402 (Fla. 1960).
144. McCormick Shipping Corp. v. Warner, 129 So.2d 448 (Fla. App. 1961).
145. Towle v. Greyhound Corp., 132 So.2d 798 (Fla. App. 1961).
146. Sumpter v. Tamiami Trail Tours, Inc., 123 So.2d 732 (Fla. App. 1960).
147. 125 So.2d 128 (Fla. App. 1960).

did not make out a prima facie case of liability. In the case of *Jacksonville Coach Co. v. Rivers*,[148] the supreme court quashed a decision of the First District Court of Appeal on virtually identical facts as in the *Blackman* case, but with a contrary holding. As a result of these cases it is evident that the passenger must make out a prima facie case of negligence before it is incumbent upon the carrier to offer evidence pertaining to the circumstances surrounding the stop so as to negate negligence.

Upon a showing that goods are received by a carrier in good order and are delivered to the consignee in bad order, a presumption arises that the damage was caused by negligence of the carrier.[149] Liability in this instance of shipment of lettuce in interstate commerce was controlled by federal statutes[150] under which a carrier is liable only for negligence.

C. *Distribution of Electricity*

> The generation and distribution of electrical energy is highly dangerous to life and property. Electricity, the basic commodity of a power company, coursing invisibly through the quiet of uninsulated high tension wires, of itself sounds no warning as to its lethal nature. . . . [T]hose who operate such a facility have the obligation to exercise care and vigilance in proportion to the peril involved.[151]

The above statement indicates the extent of the obligation placed upon power companies and justifies the segregation of cases involving electrical injury.

The defendant power company knew that a crane, stored upon its premises, would be moved under high tension wires. No warning was issued, no signs were placed at the scene, no safety man was present at the time of the accident and the wires had not been de-energized. Decedent was electrocuted while holding a cable attached to the crane as the crane boom touched the high tension wires. Upon these facts it was held that a prima facie case of negligence had been made out by plaintiff.[152] The case was remanded for trial as to issues of contributory negligence.

In another accident in which plaintiff's decedent was electrocuted when the boom of a crane touched a power line, the cases hinged upon whether the power company had knowledge of construction work of such

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148. No. 31,655, Fla., July 13, 1962, *quashing* 134 So.2d 869 (Fla. App. 1961). The supreme court permitted the filing of amicus curiae briefs in the *Rivers* case by the attorneys representing the defendant bus company in the *Blackman* case, which indicates the importance of the opinion.

149. Martin v. E. A. McCabe & Co., 113 So.2d 879 (Fla. App. 1959).

150. 49 U.S.C. §§ 20(11) - (12) (1958).

151. Ahearn v. Florida Power & Light Co., 129 So.2d 457, 461 (Fla. App. 1961).

152. Ahearn v. Florida Power & Light Co., 129 So.2d 457 (Fla. App. 1961); see same case 113 So.2d 751 (Fla. App. 1959), 118 So.2d 21 (Fla. 1960), remanded on procedural grounds.

a nature that use of a crane could be expected and also questions as to notice of newly energized wires. Both the contractor[153] and the power company[154] were held liable, although there was evidence that the decedent knew that the lines had been completed and energized.

In *City of Mount Dora v. Voorhees*[155] an employee of an independent contractor engaged by the city to remove overhead power lines was killed when the old lines came in contact with energized lines. Although there was evidence of negligent control of the operation by the city superintendent of utilities in directing the operation, the court upheld judgment for the city upon the basis that there was not sufficient evidence to support the contention that he assumed detailed direction of the servant of the independent contractor. The opinion seems to apply a different standard of duty to de-energize the lines or to give warning to a city than is applied in the power company cases; the opinion relies heavily upon the independent contractor relationship and ignores as a controlling factor the high duty of care placed upon those who distribute electricity.

In another power company case the court charged the jury, "if you find the death of the deceased . . . was due solely to an *accident*, your verdict should be for the defendant."[156] While the court did not consider the charge tantamount to a charge on an unavoidable accident, it was considered reversible error because the several definitions of the word "accident" tend to confuse the jury and are frequently taken to mean that if the act was not intentional the plaintiff cannot recover.

D. *Doctor - Patient*

The decisions in this area developed no new law although they involved the unusual situations typical of doctor-patient relationships. One dentist had the misfortune to be sued in two actions. In the first suit[157] he was charged with wrongfully removing the plaintiff's false teeth from her mouth for the purpose of exacting (extracting?) from the plaintiff the balance of the fee due him, and keeping the teeth for a period of hours. In reversing a summary judgment for the defendant because of unresolved questions of fact, the court observed the plaintiff might better have brought the action under a count of trespass to the person. In a second action[158] the same dentist was sued for negligent treatment. The court held that there was no need for expert testimony to inform the jury that for a dentist, while

153. L. E. Myers Co. v. Barrs, 127 So.2d 895 (Fla. App. 1961).
154. Florida Power & Light Co. v. Barrs, 127 So.2d 896 (Fla. App. 1961).
155. 115 So.2d 586 (Fla. App. 1959), *cert. denied*, 119 So.2d 293 (Fla. 1960).
156. McCollum v. Florida Power & Light Co., 125 So.2d 754 (Fla. App. 1961).
157. Marans v. Stang, 124 So.2d 891 (Fla. App. 1960).
158. Merola v. Stang, 130 So.2d 119 (Fla. App. 1961).

using a drill on a tooth, to slice through a patient's face to the point of the chin was not the accepted method or procedure in grinding a tooth and could be found to be negligence.

Brown v. Swindal,[159] an action based upon alleged negligence in the extraction of a patient's tooth, involved the important question as to expert testimony being required in malpractice actions. The general rule is that, except in rare cases, neither the court nor the jury should be permitted to decide arbitrarily what is or is not a proper diagnosis or an acceptable method of treatment of a human ailment.[160] Since the plaintiff offered no expert testimony and the defendant testified that the extraction was performed and the treatment was administered in the usual manner, the court approved a directed verdict in defendant's favor. The court refused to find this one of the rare cases justifying an exception to the rule.

Bir v. Foster[161] was an action for injuries resulting from unnecessary surgery. Plaintiff alleged negligence in an examination and diagnosis of tumors on the uterus at a time when she was actually pregnant, as disclosed by the subsequent operation. The court held that the complaint stated a cause of action on the theory that the physicians could have ascertained the identity of the malady, that surgery constituted improper treatment, and that neither physician performed the examination or used methods of diagnosis usually approved and practiced by other members of the medical profession in the community possessing average skill, learning and judgment.

The court reversed a verdict for a defendant-physician because of the charge that in an action for malpractice the professional character and reputation of the physician was the most important matter at stake.[162]

Two actions were brought against hospitals. One action,[163] brought by a charity patient in a county hospital, was dismissed upon the basis that the county was immune from liability. Another action[164] was brought against a hospital for negligently failing to provide adequate supervision for a new born baby, which allegedly strangled on mucus, causing extensive injuries. Although the defendant introduced evidence of due care and the plaintiff presented no contrary evidence, the court held that a hospital

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159. 121 So.2d 38 (Fla. App. 1960).
160. Atkins v. Humes, 110 So.2d 663, 666 (Fla. 1959).
161. 123 So.2d 279 (Fla. App. 1960).
162. Zaretsky v. Jacobson, 126 So.2d 757 (Fla. App. 1961). For previous history see 99 So.2d 730 (Fla. App. 1958); 114 So.2d 447 (Fla. App. 1959), *quashed*, 118 So.2d 787 (Fla. 1960). Florida law requires a doctor to defend on his conduct rather than his reputation. Stauf v. Holden, 94 So.2d 361 (Fla. 1957). For other malpractice actions see Levin v. Rosenblum, 133 So.2d 577 (Fla. App. 1961) (summary judgment affirmed); Olschefsky v. Fischer, 123 So.2d 751 (Fla. App. 1960).
163. Smith v. Duval County Welfare Bd., 118 So.2d 98 (Fla. App. 1960).
164. Sprick v. North Shore Hosp., Inc., 121 So.2d 682 (Fla. App.), *cert. denied*, 123 So.2d 675 (Fla. 1960).

is bound to exercise toward a patient such reasonable care as his known condition may require, and it remained for the jury to decide whether the hospital had exercised proper care under the circumstances.

E. *Manufacturers and Suppliers*

In *Walker v. National Gun Traders, Inc.*,[165] action was brought for injuries sustained by the minor plaintiff when an allegedly defective revolver, which the defendant had sold to a third person, discharged. A spur had been filed off the safety notch and the defect was not visible or apparent. The court held that the complaint stated a cause of action and reversed a summary judgment for the defendant. The decision rested squarely on the opinion in *Tampa Drug Co. v. Wait*,[166] which determined that the duty of a distributor of an inherently dangerous commodity extends to the reasonable foreseeability of injury that might result from the use of the commodity. The court pointed out that the distributor of an inherently dangerous commodity such as a second hand revolver has a duty to those members of the public who may be injured by the ordinary use of the product.[167]

The care commensurate with the use of a dangerous agency was held to be applicable in a situation in which a gas company sold, installed and repaired a gas range.[168]

F. *Invitees, Licensees and Trespassers*

An engineer, with the help of a friend, was removing the bilge pump from a cruiser. Before removing the pump it was decided to pump water out of the bilge. When the pump was started an explosion occurred, fatally injuring the friend. It was held that, although performing a minor service for a friend, the decedent was a licensee and not an invitee.[169] This action, brought in admiralty, involved two other applications of Florida law. The court declined to adopt the "active" and "passive" negligence theories as to licensees since Florida has declined to do so, pointing out that it is the minority view. Had the decedent survived, the injury would have been governed by admiralty law even though the accident occurred on navigable waters within the state; the widow could not bring an action other than under the Florida wrongful death statute,[170] and could not recover under it because of the characterization of the decedent as a

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165. 116 So.2d 792 (Fla. App. 1960).
166. 103 So.2d 603 (Fla. 1958).
167. 116 So.2d at 793.
168. Russell v. Jacksonville Gas Corp., 117 So.2d 29 (Fla. App. 1960).
169. Emerson v. Holloway Concrete Prods. Co., 282 F.2d 271 (5th Cir. 1960), *cert. denied*, 364 U.S. 941 (1961). For connected case see 293 F.2d 474 (5th Cir. 1961).
170. FLA. STAT. §§ 768.01-.02 (1961).

licensee. The dissenting justice vigorously criticizes the court's interpretation of the Florida statute.[171] Both the majority and the dissenting justices felt obliged to quote Dean Prosser:

> The result was that it was more profitable to kill the plaintiff than to scratch him, and that the most grievous of all injuries left the bereaved family of the victim, who frequently were destitute, without remedy.[172]

Cochran v. Abercrombie,[173] a case of first impression, again involved a visitor assisting his host. This court also refused to adopt the distinction between "active" and "passive" negligence. The court noted that incidental motives of a social guest will not alter his status from a licensee to that of invitee.

Plaintiff, who was assisting a friend who had rented a room in a hotel in bringing articles into the hotel, was an invitee of the hotel and not a licensee.[174] The invitee status of the guest in the hotel or of the guest of the guest is not dependent upon whether the rent is fixed by the day, by the month, or by the year, and it is not material in determining the status of a guest of a hotel guest whether the latter is referred to as "guest" or "tenant."[175]

A stablehand at a race track, injured when a race horse bolted, was held to be an invitee of the track, although not in the track's employ, since his duties were connected with the track's business.[176] It was held to be reversible error to instruct as a mattter of law that a business invitor is under no duty to light a parking lot which is open to use by his invitees.[177] It was also held that a landlord is under a duty to warn a licensee of any dangerous condition known to him, but not as to latent defects.[178]

The "attractive nuisance" doctrine was involved in three cases. In the absence of any allegation that a swimming pool constituted a trap or latent danger, the complaint failed to constitute a cause of action.[179] In another suit a nine-year-old child was injured when a bundle of roof trusses, delivered by the defendant contractor to defendant builder's building site, fell and

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171. 282 F.2d at 278.
172. *Id.* at 274, 278; PROSSER, TORTS 710 (2d ed. 1955).
173. 118 So.2d 636 (Fla. App. 1960).
174. Ortner v. Linch, 128 So.2d 152 (Fla. App. 1960), *cert. denied*, 138 So.2d 340 (Fla. 1961).
175. *Ibid.*
176. Gulf Stream Park Racing Ass'n v. Miller, 119 So.2d 749 (Fla. App.), *cert. denied*, 125 So.2d 872 (Fla. 1960).
177. Reed v. Ingham, 125 So.2d 301 (Fla. App. 1960).
178. Tomei v. Center, 116 So.2d 251 (Fla. App. 1959), *cert. denied*, 120 So.2d 616 (Fla. 1960).
179. Banks v. Mason, 132 So.2d 219 (Fla. App.), *cert. denied*, 136 So.2d 348 (Fla. 1961).

broke the child's leg.[180] The court held that Florida still adheres to the rule of nonliability of the delivering contractor, although the more modern view holds the contractor liable for foreseeable harm caused by his negligence. The builder's liability was considered to be a jury question.

A twelve-year-old minor was injured by the action of another minor who threw slaked lime into his eye as they were playing around a house under construction. The court indicated an intent to direct a verdict for the defendant contractor because the house rather than the mortar box constituted the attractive nuisance, and the event which caused the injury was not foreseeable. The plaintiff took a nonsuit and appealed. The district court held that the materials and tools around a construction site could be considered part of the attractive nuisance presented by the house itself, and that questions of foreseeability were for the jury.[181] The court also pointed out that the doctrine may be applicable to a general contractor who has overall charge of construction even though the instrumentality may have been left accessible by a subcontractor.

G. *Care Owed Invitees*

Injuries to invitees continued to produce a large number of cases. Although the bulk of the cases involved falls, there were a number of cases involving other types of accidents, including several unique factual situations.

1. INJURIES NOT INVOLVING FALLS

A patron in a theater, being escorted to the lobby by the manager upon suspicion of being a child molester, broke away from the manager and brushed past the plaintiff knocking her against a seat and onto the floor. A jury verdict for the plaintiff was reversed, the court holding that knowledge that a person may be a child molester is not knowledge that he could become violent, nor is it sufficient knowledge from which defendant's employees could have reasonably anticipated violence which would or might result in injury to another person.[182]

The operator of a drive-in food store permitted automobiles to park perpendicular to the front of the store and had not erected a barrier or curb in front of the store. A motorist "drove in" injuring the plaintiff. The court held that the store operator had breached no duty to the plaintiff and that the accident was not foreseeable.[183]

An innkeeper must inspect premises newly opened for occupancy to

180. Baader v. Looby, 126 So.2d 745 (Fla. App. 1961).
181. Fouraker v. Mullis, 120 So.2d 808 (Fla. App.), *cert. denied*, 123 So.2d 674 (Fla. 1960).
182. Wometco Theatres Corp. v. Rath, 123 So.2d 472 (Fla. App. 1960).
183. Schatz v. 7-Eleven, Inc., 128 So.2d 901 (Fla. App. 1961).

determine whether they meet the requirement that an innkeeper provide business invitees with a reasonably safe place for their sojourn. Whether reasonable inspection would have revealed a defect in a chair was held to be a jury question. The failure of the chair to support the first occupant of a hotel room newly opened for occupancy warranted an inference that the chair was defective.[184] Another plaintiff was injured when she sat on a canvas stool to try on a pair of shoes. Again it was held to be a jury question as to whether the plaintiff could reasonably assume that the stool was for customers' use, *whether she was an invitee in relation to the stool* and whether inspection of the stool was negligently performed.[185] A patron suing store owners for injuries received when a can of wax fell from a shelf onto her leg had the burden of proving that the store owners created the dangerous condition and had actual knowledge or should have known of the condition.[186]

2. SLIP, TRIP AND FALL

Twenty cases involved the duty owed falling plaintiffs. The cases split eleven to nine in favor of trial by jury. One opinion of the Second District Court of Appeal includes a sharp criticism of summary judgments in cases involving negligence and contributory negligence and is well worth reading.[187]

In *Food Fair Stores, Inc. v. Trusell*[188] the court cast doubt upon the opinion in *Pogue v. Great Atl. & Pac. Tea Co.*,[189] decided by the Fifth Circuit Court of Appeals in 1957. The court concluded that Florida decisions were interpreted much more broadly in the direction of "storekeeper liability" than was justified. It was further pointed out that the federal court in *Pogue* laid aside and declined to follow the rule of the Florida courts regarding inferences based on circumstantial evidence. In *Trusell* a customer fell in a store, apparently as a result of slipping on a piece of lettuce; no one knew how the lettuce happened to be on the floor, how long it had been there or who placed it there. In quashing the decision of the district court, the opinion pointed out that

> It is apparent that a jury could not reach a conclusion imposing liability . . . without indulging in the prohibited mental gymnastics of constructing one inference upon another inference in a situation where, admittedly, the initial inference was not justified to the exclusion of all other reasonable inferences.[190]

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184. Schneider v. K.S.B. Realty & Investing Corp., 128 So.2d 398 (Fla. App. 1961).
185. Harvey v. Maistrosky, 114 So.2d 810 (Fla. App. 1959).
186. Food Fair Stores, Inc. v. Spinelli, 122 So.2d 41 (Fla. App. 1960).
187. Perry v. Broward Drug & Surgical Supply, Inc., 131 So.2d 763 (Fla. App. 1961).
188. 131 So.2d 730 (Fla.), *quashing* 122 So.2d 616 (Fla. App. 1960).
189. 242 F.2d 575 (5th Cir. 1957).
190. 131 So.2d at 733.

An architect's deposition that the stairs at a dog track were not constructed in accordance with good architectural practice and created a dangerous condition was the basis for reversal of a summary judgment for the defendant.[191] A customer's statement that she "guessed" the tripod over which she tripped was clearly visible did not justify a summary judgment in another action.[192]

H. *Master - Servant*

The degree to which workmen's compensation has superseded most of the common law master-servant litigation is well illustrated in *Grice v. Suwannee Lumber Mfg. Co.*,[193] in which an employee lost a testicle in the course of employment when a block of wood flew from a machine. The employee accepted benefits under the act[194] and brought an action at law against the employer alleging negligence. The court held that by accepting benefits of the act the employee relinquished his common law right to compensation for those elements of damages that normally flow from the injury but, having no relationship to earning capacity, are not compensable under the act. The fact that in a particular case *the injury suffered does not in fact result in a loss or diminution of earning capacity is immaterial.*

During the course of a robbery attempt in a service station the plaintiff, employed as an attendant, was assaulted, shot and wounded. *Held*, danger of injury to an employee from an unlawful or criminal act of a stranger is not a danger from which the employer ordinarily would incur liability in the discharge of his duty to furnish a safe place to work for his employees; nor is the employer ordinarily under a legal duty to protect his employees from unlawful assaults by strangers.[195]

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191. Majeske v. Palm Beach Kennel Club, 117 So.2d 531 (Fla. App. 1959), *cert. denied*, 122 So.2d 408 (Fla. 1960).

192. Purdon v. Cohen, 126 So.2d 575 (Fla. App. 1961). For other slip, trip and fall cases see Holmes v. Forty-Five Twenty-Five, Inc., 133 So.2d 651 (Fla. App. 1961); Hanson v. Shell's City, Inc., 133 So.2d 573 (Fla. App. 1961); Tawell v. Sternwheeler Co., 133 So.2d 461 (Fla. App. 1961); Jung Gwong v. Tampa Hotels, Inc., 132 So.2d 232 (Fla. App. 1961); Perry v. Broward Drug & Surgical Supply, Inc., 131 So.2d 763 (Fla. App. 1961); City of Pompano Beach v. Edwards, 129 So.2d 144 (Fla. App. 1961); Caldwell v. Gulf Beach Club, Inc., 127 So.2d 480 (Fla. App. 1961); Kuebler v. Volusia Jai Alai, Inc., 126 So.2d 163 (Fla. App. 1960), *cert. denied*, 131 So.2d 201 (Fla. 1961); Reed v. Ingham, 125 So.2d 301 (Fla. App. 1960); Shapiro v. Woolworth, 120 So.2d 806 (Fla. App. 1960); Sammons v. Food Fair Stores, Inc., 118 So.2d 231 (Fla. App. 1960); Fendrick v. Faeges, 117 So.2d 858 (Fla. App. 1960); Sinopoli v. Courshon, 116 So.2d 659 (Fla. App. 1959); Castillo v. Baker's Shoe Stores, Inc., 115 So.2d 427 (Fla. App. 1959); City of Tampa v. Johnson, 114 So.2d 807 (Fla. App. 1959); North Am. Co. v. Landahl, 113 So.2d 588 (Fla. App. 1959); *writ discharged*, 118 So.2d 215 (Fla. 1960); Food Fair Stores v. Moroni, 113 So.2d 275 (Fla. App. 1958), *cert. denied*, 115 So.2d 414 (Fla. 1959).

193. 113 So.2d 742 (Fla. App. 1959).

194. FLA. STAT. ch. 440 (1961).

195. Murray v. Osenton, 126 So.2d 603 (Fla. App. 1961).

Defendant hotel made arrangements for the rental to the plaintiff of a boat for bone fishing. In rough water the plaintiff was thrown into the air and fell, breaking his back. The hotel's and boat operator's denial of the existence of any agency relationship was not conclusive under Florida law; the public may rely upon real or apparent agency relationship unless, in the case of apparent authority, the circumstances are such as to put one on inquiry.[196] In another case issues of implied and express authority of the driver of an automobile were held to be for the jury.[197]

Plaintiff fell in semi-darkness at an area where defendant's newsboys picked up bundles of papers, which were customarily tied with wire loops, by reason of her foot becoming entangled in such a loop. There was evidence which would support an inference that newsboys had been careless in removing the loops in the past, and that the loop in question was the wire of the defendant. The case concluded that the newsboys were independent contractors; however, the complaint came under one of the exceptions to the rule as to nonliability of independent contractors, which arises when the employer gains knowledge of a dangerous situation created by the independent contractor and fails to halt the operation or correct it.[198] Similarly, a duty imposed by ordinance cannot be delegated to an independent contractor.[199] The contractual responsibility of a general contractor to an owner cannot be delegated to a third person in such manner as to relieve the general contractor for a violation of his duty.[200]

When construction is undertaken without a general contractor, and independent contractors are engaged to perform portions of the work, an employee of one contractor, if injured in the course of his work by another independent contractor or his employee, may bring suit against the latter independent contractor and is not required to resort to workmen's compensation.[201] Interference or meddling by an owner with a contractor's employees may result in the exercise of control over employees sufficient to impose liability on the owner.[202]

I. *Warranty*

Although the court indicated that the case was not one of first impres-

196. Seaboard Properties, Inc. v. Bunchman, 278 F.2d 679 (5th Cir. 1960).
197. Jacobi v. Claude Nolan, Inc., 122 So.2d 783 (Fla. App. 1960).
198. Peairs v. Florida Publishing Co., 132 So.2d 561 (Fla. App. 1961).
199. Mastrandrea v. J. Mann, Inc., 128 So.2d 146 (Fla. App.), *cert. denied*, 133 So.2d 320 (Fla. 1961); connected case, Mastrandrea v. Mann, 128 So.2d 201 (Fla. App. 1961).
200. Mills v. Krauss, 114 So.2d 817 (Fla. App. 1959), *cert. denied*, 119 So.2d 293 (Fla. 1960).
201. Floyd v. Flash Welding Co., 127 So.2d 129 (Fla. App.), *cert. denied*, 133 So.2d 643 (Fla. 1961); Cromer v. Thomas, 124 So.2d 36 (Fla. App. 1960), *writ discharged*, 135 So.2d 420 (Fla. 1961).
202. City of Mount Dora v. Voorhees, 115 So.2d 586 (Fla. App. 1959), *cert. denied*, 119 So.2d 293 (Fla. 1960).

sion, the opinion in *Canada Dry Bottling Co. v. Shaw*[203] is written in language clearly indicating the contrary. The plaintiff was injured in opening a bottle of soda. Evidence appeared that the bottle had been damaged under the cap before the time the bottle had last been filled. The bottling company and the retailer were held liable on the theory of implied warranty of fitness of the bottle for use.

In a claim for damages to a crop from the use of fertilizer, the defendant interposed the defense of limitations imposed under the Fertilizer Inspection Act.[204] The court held that the remedy provided under the act is a cumulative remedy, not an exclusive one; the common law remedy remains.[205]

The injured employee of a purchaser of a riding lawnmower brought an action against the retailer for injuries received when the frame collapsed as a result of metal fatigue occasioned by a latent defect.[206] The court held that the injured user of the commodity, which was not a foodstuff or a dangerous instrumentality, was not in privity with the retailer, and to recover for injuries he had to bring an action for negligence, which would require allegations and proof of fault. The court concluded that the decision of the court of appeal was correct in reversing a judgment for the plaintiff, but that the reasoning advanced in the opinion was wrong. In reaching this decision the court pointed out that the riding lawnmower involved could not be classified under any possible dangerous instrumentality exception to the privity requirement in a suit against the retailer based upon an implied warranty.

McBurnette v. Playground Equip. Corp.[207] involved an action by a three-year-old child for injuries received in playing on playground equipment purchased by the child's father. The district court applied the rule advanced in *Carter v. Hector Supply Co.*,[208] just discussed, and sustained a motion to dismiss against the retailer. The supreme court quashed the action of the district court on the basis that common sense requires the presumption that one in the position of the minor plaintiff in this cause is a naturally intended and reasonably contemplated beneficiary of the warranty of fitness for use or merchantability implied by law, and as such he stands in the shoes of the purchaser in enforcing the warranty. It is obvious that the close family relationship here was controlling, but the question remains as to how close that relationship must be. An even more

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203. 118 So.2d 840 (Fla. App. 1960).
204. FLA. STAT. ch. 576 (1961).
205. Platt v. Kenco Chem. Co., 132 So.2d 27 (Fla. App. 1961).
206. Carter v. Hector Supply Co., 128 So.2d 390 (Fla. 1961). For prior history see 122 So.2d 22 (Fla. App. 1960).
207. 137 So.2d 563 (Fla. 1962), *modifying* 130 So.2d 117 (Fla. App. 1961).
208. 108 So.2d 390 (Fla. 1961).

important question should be answered by the court; did the school board which purchased the lawnmowers in *Carter* expect its employees to ride them, or did the school board members intend to mow the school grounds?

The father of a deceased minor brought an action against the supplier of a housecoat which, when worn by the minor, had been consumed by flame causing the minor's death.[209] The court held that the Florida wrongful death act[210] provides for a right of action thereunder *ex contractu*, but that the death of minors act[211] does not so provide.[212]

J. *Defenses in Common Law Cases*

1. CONTRIBUTORY NEGLIGENCE

The decisions involving the defense of contributory negligence continue to present troublesome problems of interpretation and the courts incline to holdings that the question is for the jury. Under certain circumstances the plaintiff is held guilty of contributory negligence as a matter of law, the question turning upon the knowledge of the plaintiff or whether the plaintiff (usually in trip and fall cases) should have seen the defect.[213]

The so-called "distraction rule" was accepted in the case of *Deane v. Johnston*.[214] In *Bashaw v. Dyke*[215] the court distinguished the *Deane* case upon the basis that the plainiff there was not attempting to handle the object in question, whereas in *Bashaw* the plaintiff was attempting to move the object which caused the injury. The opinion points out that *Deane* is the *only* case in Florida applying the rule.[216]

Visibility alone does not settle the issue of contributory negligence in every case of slipping on a floor or encountering any stationary object.[217] The question is always whether the plaintiff used due care for his own safety, taking into account all the circumstances, of which the visibility of the object is an important one, but still only one of the circumstances.

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209. Latimer v. Sears Roebuck & Co., 285 F.2d 152 (5th Cir. 1960).
210. FLA. STAT. § 768.01(2) (1961).
211. FLA. STAT. § 768.03 (1961).
212. For other warranty cases see Posey v. Ford Motor Co., 128 So.2d 149 (Fla. App. 1961), prior history 125 So.2d 108 (Fla. App. 1960), subsequent history 138 So.2d 777 (Fla. App. 1962), connected case 138 So.2d 781 (Fla. App. 1962); Florida Nursery & Landscape Co. v. Nally, 127 So.2d 700 (Fla. App. 1961); Russell v. Jacksonville Gas Corp., 117 So.2d 29 (Fla. App. 1960); Walker v. National Gun Traders, Inc., 116 So.2d 792 (Fla. App. 1960). For a recent survey of manufacturer's liability see Noel, *Manufacturer's Negligence of Design or Directions for Use of a Product*, 71 YALE L.J. 816 (1962).
213. Tweedale v. City of St. Petersburg, 125 So.2d 920 (Fla. App. 1961); Garring v. King Cole Northshore Hotel, Inc., 122 So.2d 207 (Fla. App. 1960).
214. 104 So.2d 3 (Fla. 1958). The case holds that contributory negligence is a jury question when attention is diverted from a known danger by a sufficient cause.
215. 122 So.2d 507 (Fla. App. 1960), 15 U. MIAMI L. REV. 424 (1961).
216. *Id.* at 511.
217. Purdon v. Cohen, 126 So.2d 575 (Fla. App. 1961).

The decision in *Biltmore Terrace Associates v. Kegan*[218] is an important one as to the duty of care of resorts providing bathing facilities. The court pointed out that one who stood on a wall at the beach could clearly observe that it was located at the edge of the ocean. To require a warning to bathers under such circumstances would be as ludicrous as requiring a sign on the top of an office building reading "don't jump off here."[219]

Plaintiffs, husband and wife, left their three-year-old child in the care of the child's grandmother. A contractor had left an unguarded ditch in front of the plaintiff's home. The child, allowed to play in the vicinity of the ditch by the grandmother, fell into the ditch and drowned. A summary judgment for the defendant was reversed.[220] The court concluded that since there was evidence of negligence on the part of the defendant, the plaintiffs would not be barred from recovery unless a jury found: "(a) contributory negligence; (b) attributable to the plaintiffs; and (c) proximately contributing to the death of the child."[221]

2. ASSUMPTION OF RISK

An employee's assumption of risk is suspended by the employer's promise, made in response to the employee's complaint, to repair a defective piece of machinery. In addition, an exception to the rule of assumption of risk is that an employee does not assume the risk of injury incident to his employment if the action causing the injury is done under the command of the employer.[222]

A stablehand, experienced with horses and aware of the excitable nature of young race horses, was injured when a horse bolted over the rail at a track. The plaintiff had assumed the risk by taking a position along the rail, knowing the danger involved; in addition the court held that the plaintiff was contributorily negligent in turning his back on the race.[223]

3. IMMUNITY

Florida, in the landmark case of *Hargrove v. Town of Cocoa Beach*,[224] rejected the rule of municipal immunity from some torts arising out of governmental functions. Further developments in this area will continue as the courts interpret different factual patterns and complaints based upon them.

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218. 130 So.2d 631 (Fla. App. 1961).
219. *Id.* at 634.
220. Smith v. City of Daytona Beach, 121 So.2d 440 (Fla. App. 1960).
221. *Id.* at 442.
222. Prescott v. Erwin, 133 So.2d 332 (Fla. App. 1961).
223. Gulf Stream Park Racing Ass'n v. Miller, 119 So.2d 749 (Fla. App.), *cert. denied*, 125 So.2d 872 (Fla. 1960). For another aspect of the case, see the text accompanying note 176 *supra*.
224. 96 So.2d 130 (Fla. 1957).

A city was held not liable for loss by fire based upon claims that it was negligent in allowing firemen to improperly use water from fire truck tank for purposes other than fire fighting, and that the firemen were not properly trained.[225] In this case the court pointed out that the complaint did not allege the negligence of a municipal employee, but concerned the failure to properly provide a city service.

The *Hargrove* decision did not have the effect of extending the liability of state agencies beyond that expressly waived by Florida statutes.[226] County boards of public instruction are agencies of the state and as such are clothed with the same degree of immunity from suit as is the state.[227] The only relief that can be given in this area is legislative change in the immunities now prevailing.

The *Hargrove* decision does not affect the liability of a municipality in the exercise of legislative or judicial, or quasi-legislative or quasi-judicial functions.[228] In the absence of a contrary governing statute, the right of recovery for damages from fire spreading from another's premises is dependent upon the existence of negligence in the fire's origin, negligence in controlling it, or negligence through failure to furnish means for extinguishment.[229]

The immunity of a state agency from liability extends to immunity from liability for negligence resulting in injury to a charity patient in a hospital operated by a county; a paying patient in a county hospital is entitled to the same redress as a patient in a private hospital.[230] The court in this case distinguished a county from a municipality.

Raven v. Coates,[231] another attempt to enlarge the *Hargrove* doctrine, was an action by a motorist against a city for personal injuries sustained in an intersectional collision, allegedly caused by failure of the city to maintain a stop sign at the intersection. The court had held in *Hewitt v. Venable*[232] that the negligent manual operation of a traffic control signal was within the scope of *Hargrove*. In refusing to extend the liability of the

225. Steinhardt v. Town of North Bay Village, 132 So.2d 764 (Fla. App. 1961).
226. Moreno v. Aldrich, 113 So.2d 406 (Fla. App. 1959).
227. Buck v. McLean, 115 So.2d 764 (Fla. App. 1959).
228. Middleton v. City of Fort Walton Beach, 113 So.2d 431 (Fla. App. 1959), 14 U. MIAMI L. REV. 634 (1960).
229. Bush v. City of Dania, 121 So.2d 169 (Fla. App. 1960). Damages were alleged to have been caused from fires started by sparks and embers borne by high winds from a municipal dump fire. The court held that negligence will not be presumed and must be proved by the party asserting it.
230. Smith v. Duval County Welfare Bd., 118 So.2d 98 (Fla. App. 1960).
231. 125 So.2d 770 (Fla. App.), *cert. denied*, 138 So.2d 339 (Fla. 1961).
232. 109 So.2d 185 (Fla. App. 1959). For other municipal immunity cases see Calbeck v. Town of South Pasadena, 128 So.2d 138 (Fla. App. 1961); Town of Mount Dora v. Bryant, 128 So.2d 4 (Fla. App. 1961); City of Coral Gables v. Giblin, 127 So.2d 914 (Fla. App. 1961); Tweedale v. City of St. Petersburg, 125 So.2d 920 (Fla. App. 1961).

city, the court pointed out in *Raven* that the placing of a policeman or a traffic control device at a particular intersection is a matter of judgment by city officers. The court added that even if the plaintiff's theory of liability were otherwise sound, the causal relation between the lack of a stop sign and the damages was more than doubtful in view of the fact that a person using a street is required to exercise his faculties to discover and avoid all dangers.

K. *Res Ipsa Loquitur*

The res ipsa cases were limited to two during the period of the *Survey*. A plaintiff, injured when playing cards in a card room of a hotel in which he was a guest by a portion of the ceiling falling upon him, was entitled to the benefit of the doctrine.[233] Another judgment for the plaintiff, injured by a sign which fell from a building under repair by a general contractor as he was standing on a sidewalk, was sustained by the same rule of evidence.[234]

L. *Damages*

Most of the tort actions dealing with the question of damages involved the usual questions of excessive and inadequate damages. One plaintiff, winning on the question of liability, but dissatisfied with the damages awarded, was likened to the "general who won the battle but at such cost he ultimately lost the war."[235] Another plaintiff had her damages assessed at "None Dollars."[236]

In a case apparently of first impression the following charge was upheld:

> You are instructed that any award made to Plaintiff as damages in this case, if any is made, is not subject to federal or state income taxes, and you should not consider such taxes in fixing the amount of any award made Plaintiff, if any you make.[237]

Wise v. Carter[238] illustrates the principle of apportionment of damages in a situation where the plaintiff had been injured in one accident and

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233. Kadushin v. Philmac Realty Corp., 128 So.2d 400 (Fla. App. 1961).
234. W. J. Kiely & Co. v. Dickey, 124 So.2d 731 (Fla. App. 1960).
235. Heyman v. Fusco, 132 So.2d 216, 217 (Fla. App. 1961).
236. Carroll v. Hertz Corp., 132 So.2d 624, 625 (Fla. App.), *cert. denied*, 138 So.2d 333 (Fla. 1962). See also Clark v. Russo, 133 So.2d 764 (Fla. App. 1961) (excessive damages for whiplash injury); Goldstein v. Walters, 126 So.2d 759 (Fla. App. 1961) (loss of earning capacity of housewife); Thieneman v. Cameron, 126 So.2d 170 (Fla. App. 1961) (loss to husband for medical bills); Griffin v. Standley, 123 So.2d 55 (Fla. App. 1960) (excessive damages for whiplash injury); Mow v. F. P. Sadowski Corp., 122 So.2d 46 (Fla. App. 1960); Weiss v. Goldman, 120 So.2d 812 (Fla. App. 1960) (damages not covering out-of-pocket expenses); Aylesworth v. London, 119 So.2d 816 (Fla. App. 1960); Gunn v. Filer, 117 So.2d 247 (Fla. App. 1960); Utley v. Southern Metal Prods. Co., 116 So.2d 28 (Fla. App. 1959).
237. Poirier v. Shireman, 129 So.2d 439, 442 (Fla. App. 1961), 16 U. MIAMI L. REV. 126 (1961).
238. 119 So.2d 40 (Fla. App. 1960).

subsequently injured by the defendant. The jury should apportion damages, if they can do so, but if there can be no apportionment then the defendant is liable for the entire damages.

A plaintiff seeking to recover damages for pain and suffering before death has the burden of proving the period of time that the decedent was conscious of pain.[239]

A nuisance that will be abated by injunction does not provide the basis for damages for future harm.[240] Loss of use of a truck as a business vehicle does not justify the addition of special damages for loss of use for pleasure purposes.[241]

The instruction to his seventeen-year-old sister to run over the plaintiff justified the award of punitive damages in an action by an ex-wife against her former husband.[242] A defendant, while driving in the daytime, suffered a sudden illness in which he "blacked out." His car went out of control, leaped the curb and injured the plaintiff who was a pedestrian on the sidewalk. The withdrawal of punitive damages from the jury's consideration was upheld since the defendant's medical history was not such as to necessarily give him a "premonition or warning of his condition."[243]

The "golden rule" argument to the jury by the plaintiff's counsel is improper and constitutes ground for reversal.[244]

Justification for the entry of a remittitur should be ascertainable from the record.[245] Except in rare and special circumstances, as where an error in calculation occurs, Florida is without precedent for the proposition that an additur may be imposed.[246]

IV. Other Common Law Torts

An unusual number of tort cases, not related to personal injury negligence actions, were encountered during a survey of the cases.

Burch v. Strange[247] represents a case of first impression in a trespass action. The court found no cases discussing the liability of a person for acts of trespass committed by an independent contractor and applied the same general principles as in a negligence action.

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239. Morrison v. C. J. Jones Lumber Co., 126 So.2d 895 (Fla. App. 1961).
240. A. & P. Food Stores, Inc. v. Kornstein, 121 So.2d 701 (Fla. App. 1960).
241. City of Alachua v. Swilley, 118 So.2d 88 (Fla. App. 1960).
242. Sauer v. Sauer, 128 So.2d 761 (Fla. App. 1961).
243. Williams v. Frohock, 114 So.2d 221, 223 (Fla. App. 1961).
244. Bullock v. Branch, 130 So.2d 74 (Fla. App. 1961), 16 U. Miami L. Rev. 120 (1961).
245. Price v. Jordan, 115 So.2d 444 (Fla. App. 1959).
246. Wohlfiel v. Morris, 122 So.2d 235 (Fla. App. 1960); Sarvis v. Folsom, 114 So.2d 490 (Fla. App. 1959).
247. 126 So.2d 898 (Fla. App. 1961).

> Where the trespass is done by an independent contractor, the other party is not liable for it when it is not authorized in any way by the contract unless such other party controls the work or authorizes the specific act.[248]

A mortgagee has no such title to or possession of the mortgaged premises as to be able to maintain an action for damages arising out of alleged trespasses.[249] Another investment company's agent, the premises having been sold under a contract for deed, went to the plaintiff's house after a default in payments, entered it through a window, and took possession of the premises. The defendant was held liable in trespass.[250]

A corporation doing work for the United States Navy had been paid for its services; the Navy, through administrative error, paid for the work a second time. The assertion by the defendant of title to the drafts following his refusal to return them upon request could amount to conversion.[251] The operation of a water-ski school can constitute a private nuisance as to other riparian lake owners.[252] Commercial activities adjacent to homes may also constitute a private nuisance provided owners show peculiar injury and damage different in kind from that suffered by the community at large.[253] The additional expense to a water company and city in discharging sewage effluent into a creek rather than into landlocked lakes surrounded by the plaintiff's property was no excuse or justification for the discharge into the lakes and constituted a private nuisance and continuing trespass.[254]

Fraud is a subtle thing requiring full explanation of the facts and circumstances of the alleged wrong to determine if they collectively constitute fraud. Summary judgments and directed verdicts in such cases should be rare. "[T]he law does not define fraud; it needs no definition; it is as old as falsehood and as versable as human ingenuity. . . . Whether fraud has been committed ordinarily requires the determination of questions of

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248. *Id.* at 900.

249. Allstate Fin. Corp. v. Zimmerman, 272 F.2d 323 (5th Cir. 1959); connected case, 296 F.2d 797 (5th Cir. 1959).

250. Mid-State Inv. Corp. v. O'Steen, 133 So.2d 455 (Fla. App.), *cert. denied*, 136 So.2d 349 (Fla. 1961); see 16 U. MIAMI L. REV. 493 (1962) for discussion of the case on other points of law. For other trespass cases see Hattaway v. Florida Power & Light Co., 133 So.2d 101 (Fla. App. 1961); Overstreet v. Lamb, 128 So.2d 897 (Fla. App. 1961); Leonard v. Nat Harrison Associates, 122 So.2d 432 (Fla. App. 1960). The *Leonard* opinion contains a classical discussion of the distinction between trespass and trespass on the case by Chief Judge Allen. For subsequent history of the *Leonard* case see 126 So.2d 615 (Fla. App. 1961) and 137 So.2d 18 (Fla. App. 1961).

251. United States v. Goodman, 287 F.2d 871 (5th Cir. 1961).

252. Florio v. State, 119 So.2d 305 (Fla. App. 1960). The action by riparian lake owners was brought under FLA. STAT. §§ 64.11, 823.01, .05 (1961).

253. A. & P. Food Stores, Inc. v. Kornstein, 121 So.2d 701 (Fla. App. 1960) (supermarket operations involving noise from air conditioning units, delivery trucks in early morning hours and odor from decayed vegetables); Hale v. Monroe Zeder, Inc., 117 So.2d 426 (Fla. App. 1960) (floodlights, noise from loudspeakers, and noise from unloading early in morning).

254. North Dade Water Co. v. Adken Land Co., 130 So.2d 895 (Fla. App. 1961).

fact by the jury, if the case is one tried by jury, or by the court if the case is tried without a jury."[255]

Illustrations of the diversity of tort actions are numerous. Several actions were brought on the theory of unfair competition and the use of trademarks,[256] and one case involved an injunction against the disclosure of trade secrets by a former employee.[257] Two cases involved the interference with contract rights.[258] Another complaint alleged the violation of plaintiff's civil rights.[259] Negligent delay in issuing insurance[260] and negligent loss of an employer's money were also the foundations for tort actions.[261] The shooting of a prowling college student resulted in an action for wrongful death.[262]

Florida is one of the few states recognizing the right of privacy, although with limitations. A newspaper published the following statement: "Wanna hear a sexy telephone voice? Call . . . and ask for Louise."[263] Apparently Louise was called, for she brought an action against the newspaper. The court concluded that employment in a business office was insufficient to render plaintiff a public personage and discussed the standards to be applied in determining the right to privacy.[264] The invasion of the right to privacy may entitle one to compensatory damages and not punitive damages.[265]

A widow brought an action against a funeral home for mental pain and anguish allegedly caused by the funeral home's action in embalming the body of a widow's husband without her permission. In upholding a summary judgment for the defendant the court noted that the facts in the case did not meet the test of malice essential and that

> in an action founded purely in tort in order for recovery to be

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255. Massey-Ferguson, Inc. v. Bent Equip. Co., 283 F.2d 12, 15 (5th Cir. 1960); *accord*, Alepgo Corp. v. Pozin, 114 So.2d 645 (Fla. App. 1959), *cert. denied*, 117 So.2d 842 (Fla. 1960). For other fraud cases see Kaminsky v. Wye, 132 So.2d 44 (Fla. App. 1961); Rogers v. Riddle, 128 So.2d 409 (Fla. App. 1961); Prescott v. Kreher, 123 So.2d 721 (Fla. App. 1960); Popper v. Havana Publications, Inc., 122 So.2d 247 (Fla. App. 1960), 15 U. MIAMI L. REV. 330 (1961); Nelson v. Cravero Constructors, Inc., 117 So.2d 764 (Fla. App. 1960); Beck v. Barnett Nat'l Bank, 117 So.2d 45 (Fla. App. 1960).

256. Miami Credit Bureau, Inc. v. Credit Bureau, Inc., 276 F.2d 565 (5th Cir. 1960); Cameron v. Miami Ventilated Awning Mfg. Co., 122 So.2d 582 (Fla. App. 1960); Stagg Shop of Miami, Inc. v. Moss, 120 So.2d 39 (Fla. App. 1960).

257. Fountain v. Hudson Cush-N-Foam Corp., 122 So.2d 232 (Fla. App. 1960).

258. Miami Laundry Co. v. Sanitary Linen Serv. Co., 131 So.2d 519 (Fla. App.), *cert. denied*, 133 So.2d 325 (Fla. 1961); Steffan v. Zemes, 124 So.2d 495 (Fla. App. 1960).

259. Ball v. Yarborough, 281 F.2d 789 (5th Cir. 1960).

260. Rosin v. Peninsular Life Ins. Co., 116 So.2d 798 (Fla. App. 1960).

261. Meyer v. L. P. Evans Motors, Inc., 132 So.2d 19 (Fla. App. 1961); for previous history see 119 So.2d 301 (Fla. App. 1960).

262. Carbone v. Coblentz, 132 So.2d 629 (Fla. App. 1961).

263. Harms v. Miami Daily News, Inc., 127 So.2d 715, 716 (Fla. App. 1961).

264. *Id.* at 718.

265. Thompson v. City of Jacksonville, 130 So.2d 105 (Fla. App. 1961). The case contains an important discussion of the liability of municipal corporations.

> effected for damages resulting from mental pain and anguish unconnected with physical injury, the wrongful act must be such as to reasonably imply malice or such that, from the entire want of care or attention to duty or great indifference to the person, property, or rights of others, such malice would be imputed as would justify assessment of exemplary or punitive damages.[266]

A. *Libel and Slander*

Miami Herald Publishing Co. v. Brautigam[267] involved a libel action against a newspaper publisher by a state's attorney. The initial appeal was transferred by the district court to the supreme court on the ground that "inherent in the judgment appealed from there was the construction of controlling provisions of the Florida and Federal Constitutions guaranteeing freedom of the press."[268] The supreme court remanded the case to the district court after concluding that it lacked jurisdiction, and the unauthorized exercise of jurisdiction would set a precedent requiring the court to accept appeals as a matter of right in all libel trials.[269] On remand the district court affirmed the action of the trial court, which had rendered a judgment for the plaintiff for 25,000 dollars compensatory damages and 75,000 dollars punitive damages. The court, in an able discussion of the law, concluded that the press, while guaranteed the right to publish the truth supported by good motives, has no right to publish falsehoods to the injury of others.

> The great majority of American courts hold that no comment can be fair if it is based on misstatements of fact. . . . We concur in this view and align ourselves with the majority. The appellant urges that we reverse the trial court and adopt a rule by which corrupt or dishonorable motives may be imputed to others *where such imputations are warranted by the facts.* Such a construction of the defense of fair comment has been accepted in England and a minority of American courts. . . . It is our opinion that the better view supports the holding that the defense does not embrace the right to falsely impute one's motives, want of loyalty or misconduct in office.[270]

A court will take judicial notice of the fact that headlines appearing in the newspapers are written by a member of the staff of the newspaper and they are generally not a part of the dispatches from the recognized news agencies.[271] When the headline, written by a newspaper editor for a news

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266. Kimple v. Riedel, 133 So.2d 437, 439 (Fla. App. 1961).
267. 127 So.2d 718 (Fla. App. 1961), *cert. denied*, 135 So.2d 718 (Fla.), *cert. denied*, 369 U.S. 821 (1962).
268. 121 So.2d 431 (Fla. 1960).
269. *Id.* at 432.
270. 127 So.2d at 723. Carroll, J., dissented in a well reasoned opinion on the admission of evidence and the giving of a charge concerning fair comment.
271. MacGregor v. Miami Herald Publishing Co., 119 So.2d 85 (Fla. App. 1960).

item which had been released by a news agency, extends beyond the context of the article reproduced from the news gathering agency, adding to or subtracting from the article so that the headline in itself could become libelous, then the newspaper would not be protected.[272] The court concluded that the headline in question followed the news item and that the case was not affected by sections 770.01 and 770.02 of the Florida Statutes.[273]

The oral statement that the plaintiff was a"deadbeat and not an honest person" was held to be slanderous per se.[274] A complaint setting out such statements was sufficient to state a cause of action even without an allegation as to the plaintiff's trade or business when the complaint alleged that the plaintiff had been damaged in her personal, social, official and business relations.[275]

B. *Malicious Prosecution and False Arrest*

The public policy aspects involved in actions for malicious prosecution and false arrest are obvious, particularly when law enforcement officers are involved. Citizens must be given some protection against the irresponsible institution against them of criminal proceedings by other persons, even law enforcement officers. On the other hand, law enforcement and the protection of society from crime would likely be adversely affected if law enforcement agents were subject to liability in damages for simple negligence in the performance of their duties if the citizens they charge with crime should not be convicted.

Malicious prosecution and false arrest are often involved in the same case; during the period of the *Survey* eleven actions arose involving one or both categories.

Wilson v. O'Neal[276] is a case of first impression in this country. The plaintiff brought a *negligence* action and sought to recover damages from a State Beverage Department employee for careless performance of duty and failure to make due inquiry before charging the plaintiff with a crime by causing the issuance of an arrest warrant. The court held that there is no legally recognized cause of action in negligence for improperly causing the issuance of an arrest warrant. The action of malicious prosecution is the remedy available to protect persons from unjustifiable litigation. The gist of the action is the concurrence of

(1) The commencement or continuance of an original civil or

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272. *Id.* at 88.
273. FLA. STAT. §§ 770.01, .02 (1961).
274. Carter v. Sterling Fin. Co., 132 So.2d 430 (Fla. App. 1961).
275. *Id.* at 432.
276. 118 So.2d 101 (Fla. App.), *cert. dismissed*, 122 So.2d 403 (Fla.), *appeal dismissed*, 123 So.2d 677 (Fla. 1960), *cert. denied*, 365 U.S. 850 (1961), 15 U. MIAMI L. REV. 101 (1960).

> criminal judicial proceeding; (2) Its legal causation by the present defendant against plaintiff who was defendant in the original proceeding; (3) Its bona fide termination in favor of the present plaintiff; (4) The absence of probable cause for such proceedings; (5) The presence of malice therein; (6) Damage conforming to legal standards resulting to plaintiff. If any one of these elements is lacking, the result is fatal to the action.[277]

Actions may arise against municipalities[278] or against corporations and private citizens.[279] A conviction in a lower court, even though reversed in a higher court, unless the conviction was obtained by fraud, perjury, or other corrupt means, is a good defense to the action.[280] Florida Statute section 811.022[281] provides exemptions from false arrest in shoplifting cases.[282]

V. LEGISLATION

Only minor action of interest to the field of tort was taken by the legislature at the last session. Perhaps the most important measure was the provision[283] requiring that every automobile liability policy delivered or issued for delivery in the state with respect to vehicles registered in the state shall contain an uninsured motorist endorsement covering bodily liability within the minimum limits prescribed by the financial responsibility law.[284] The statute provides that any insured named in the policy may reject the coverage.[285]

Natural guardians' authority to settle or compromise tort claims of minor children was increased from one hundred dollars to five hundred dollars.[286] Notice provisions affecting tort actions against municipal corporations are provided in another amendment.[287]

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277. *Id.* at 104.

278. Gordon v. City of Belle Glade, 132 So.2d 449 (Fla. App. 1961); Calbeck v. Town of South Pasadena, 128 So.2d 138 (Fla. App. 1961); City of Coral Gables v. Giblin, 127 So.2d 914 (Fla. App. 1961) (liability of city for arrest outside of city by police officers); City of Miami v. Albro, 120 So.2d 23 (Fla. App. 1960); Middleton v. City of Fort Walton Beach, 113 So.2d 431 (Fla. App. 1959), 14 U. MIAMI L. REV. 634 (1960).

279. Dickey v. Kaiser Aluminum & Chem. Sales, Inc., 286 F.2d 137 (5th Cir. 1960); Rothstein v. Jackson's of Coral Gables, Inc., 133 So.2d 331 (Fla. App. 1961); Kern v. Modernage Furniture Corp., 125 So.2d 893 (Fla. App.), *writ discharged*, 135 So.2d 715 (Fla. 1961); Tieder v. Wood, 122 So.2d 490 (Fla. App. 1960); Williams v. Confidential Credit Corp., 114 So.2d 718 (Fla. App. 1959).

280. Gordon v. City of Belle Glade, 132 So.2d 449 (Fla. App. 1961).

281. FLA. STAT. § 811.022 (1961).

282. Rothstein v. Jackson's of Coral Gables, Inc., 133 So.2d 331 (Fla. App. 1961) (the detention must be in a reasonable manner and for a reasonable length of time).

283. FLA. STAT. § 627.0851(1) (1961).

284. FLA. STAT. ch. 324 (1961).

285. For an excellent discussion of the uninsured motorist coverage provisions see 14 U. FLA. L. REV. 455 (1962).

286. FLA. STAT. § 744.13(2) (1961).

287. FLA. STAT. § 95.241 (1961).