

10-1-1971

Torts

Walter H. Beckham Jr.
University of Miami School of Law

Susan G. Chopin

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



Part of the [Law Commons](#)

Recommended Citation

Walter H. Beckham Jr. and Susan G. Chopin, *Torts*, 26 U. Miami L. Rev. 128 (1971)
Available at: <https://repository.law.miami.edu/umlr/vol26/iss1/5>

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

TORTS*

WALTER H. BECKHAM, JR.** AND SUSAN G. CHOPIN***

I. NEGLIGENCE	128
A. <i>Doctor-Patient</i>	128
B. <i>Manufacturers and Suppliers</i>	129
C. <i>Business Invitees, Licensees, and the Attractive Nuisance Doctrine</i>	130
D. <i>Landlord-Tenant</i>	132
E. <i>The Family</i>	133
F. <i>Master-Servant</i>	133
G. <i>Independent Contractors</i>	134
H. <i>Carriers</i>	134
I. <i>Automobiles</i>	135
1. THE DANGEROUS INSTRUMENTALITY DOCTRINE	135
2. THE GUEST STATUTE	136
J. <i>Defenses</i>	137
1. CONTRIBUTORY NEGLIGENCE	137
2. ASSUMPTION OF THE RISK	138
3. GOVERNMENTAL IMMUNITY	138
K. <i>Wrongful Death and Survival Actions</i>	138
II. STRICT LIABILITY: ANIMALS	139
A. <i>Dogs</i>	139
B. <i>Trespassing Cattle</i>	140
III. INTENTIONAL TORTS	140
A. <i>Assault and Battery</i>	140
B. <i>Fraud and Misrepresentation</i>	141
C. <i>Libel</i>	142
D. <i>Mental Distress</i>	143
E. <i>Interference with the Contractual Relations of Others</i>	143
IV. NUISANCES	144
V. DAMAGES	145

I. NEGLIGENCE

A. *Doctor-Patient*

A doctor owes a duty to his patient and, in some cases, to the patient's family to exercise his calling competently. In *Hofmann v. Blackmon*,¹ a two-year-old girl sued her father's physician for negligently failing to diagnose her father's condition as tuberculosis. She also sued for injuries sustained when she contracted tuberculosis from her father which, she contended, would not have occurred had the doctor warned the members of the immediate family of the father's disease. The executrix of the physician's estate maintained that the doctor owed no duty to the minor child, and even if the doctor was obligated to apprise the family of the patient's contagious disease, there was no dereliction of duty since

* The decisions surveyed in this article appear in volumes 227 through 249 of the Southern Reporter, Second Series.

** Professor of Law, University of Miami School of Law.

*** Senior Associate Editor, University of Miami Law Review; Student Instructor, Freshman Research & Writing.

1. 241 So.2d 752 (Fla. 4th Dist. 1970).

the doctor had no knowledge of the existence of tuberculosis. The court rejected this defense, and held that it is incumbent on the physician to inform the immediate family living with the patient of the presence and dangers of the patient's contagious disease so that the family members may prevent their own contamination. This duty to inform exists notwithstanding the negligence of the physician in failing to discover the contagious disease.²

If a woman employs a surgeon to sterilize her and subsequent to the operation she becomes pregnant and delivers a healthy baby, the birth of the baby does not bar the plaintiff's suit. It is arguable that the maintenance of such a suit would be contrary to public policy. The court also noted that, if the cause of action depended on whether a healthy baby was born, a dilatory defendant might, by delaying litigation for nine months, thwart recovery entirely, thus forcing a plaintiff to bring suit immediately or at least before delivery. Thus, while the birth of a healthy baby might mitigate damages, it does not bar recovery in an action for negligent sterilization.³

B. *Manufacturers and Suppliers*

Florida prides itself on being "a member of the advance patrol in scanning"⁴ the development of implied warranties since the demise of the privity requirement in *MacPherson v. Buick Motor Co.*⁵ Indicative of this trend, a relatively recent Florida decision held that not only may an action be brought against a manufacturer absent privity of contract, but also that a disclaimer of warranty by a manufacturer who was not a "seller" does not prevent recovery under an implied warranty.⁶ The Uniform Commercial Code, adopted in Florida in 1965, effective in 1967, provides, however, that a seller may disclaim an implied warranty of merchantability by *express* language.⁷

In *Ford Motor Co. v. Pittman*,⁸ a suit by the buyer of a Ford car equipped with a defective electrical wiring system, the manufacturer's written warranty contained an express disclaimer of any implied warranty. Ford relied on the disclaimer of warranty of the Code to defeat the buyer's recovery. The court, however, held that the manufacturer was not a "seller" to the ultimate consumer under the Code, and therefore, could not rely on the Code's disclaimer provisions to escape lia-

2. The negligence of a physician is usually determined by expert testimony. However, where the alleged negligent act is the application or administration of approved medical treatment, expert testimony is not always necessary to the jury's determination. *Furnari v. Lurie*, 242 So.2d 742 (Fla. 4th Dist. 1971).

3. *Jackson v. Anderson*, 230 So.2d 503 (Fla. 2d Dist. 1970).

4. *Ford Motor Co. v. Pittman*, 227 So.2d 246, 248 (Fla. 1st Dist. 1969).

5. 217 N.Y. 382, 111 N.E. 1050 (1916).

6. *Manheim v. Ford Motor Co.*, 201 So.2d 440, 441 (Fla. 1967).

7. FLA. STAT. § 672.316 (1969).

8. 227 So.2d 246 (Fla. 1st Dist. 1969).

bility.⁹ In so doing, the court evaded resolution of the apparent disparity between Florida case law and the UCC. The court emphasized that the conflict should be resolved by the legislature and that it refused to become "the operator of the guillotine"¹⁰ in eliminating implied warranty recovery from Florida law.

The doctrine of implied warranty imposes upon the manufacturer and retailer the duty to assure that the item is reasonably fit for its ordinary uses and purposes.¹¹ However, if the defect is discoverable by simple observation by those familiar with the special type of equipment, no warranty will be implied.¹² Therefore, if plaintiff's employees had examined the item and found no flaws, plaintiff may not recover under implied warranty.¹³

C. *Business Invitees, Licensees, and the Attractive Nuisance Doctrine*

A retail establishment owes a duty to its invitees to exercise reasonable care in the maintenance of its premises.¹⁴ Whether a particular plaintiff is an "invitee" is determined by one of three tests; namely, the "economic or mutual benefit test," the "invitation test," or the "reasonable care under the circumstances test."¹⁵

Under the first, the "economic" or "mutual benefit" test, the affirmative duty to use reasonable care is imposed upon the proprietor only if he receives some economic advantage in return. Therefore, it is the purpose of the visit rather than the fact that an invitation was given which determines the existence of the duty.¹⁶ Until recently, Florida had consistently utilized the economic benefit test.¹⁷ When this test was applied in cases where there had been no material or commercial benefit to the business occupier, the plaintiff failed to attain the status of invitee.¹⁸

Under the second test, that of "invitation," the owner, by opening his doors to the public and inviting their trade, impliedly warrants that the premises are safe for the public's use. While the invitation test *may* be based on an economic benefit to an owner, such a benefit is not essen-

9. *Id.* at 249.

10. *Id.*

11. *Fletcher Co. v. Melroe Mfg. Co.*, 238 So.2d 142 (Fla. 1st Dist. 1970) (faulty fuel system of front-end loader).

12. *See Green v. American Tobacco Co.*, 154 So.2d 169 (Fla. 1963).

13. *Fletcher v. Melroe Mfg. Co.*, 238 So.2d 142, 147 (Fla. 1st Dist. 1970).

14. W. PROSSER, *LAW OF TORTS* § 61 (4th ed. 1971) [hereinafter cited as PROSSER].

15. *Lunney v. Post*, 248 So.2d 504 (Fla. 4th Dist. 1971), *noted in* 25 U. MIAMI L. REV. 771 (1971). The third test was mentioned in the *Post* case but has never been adopted in Florida. It is called the "non-test" and involves nothing more than the "broad test of reasonable care under the circumstances" to determine who is an invitee. *Id.* at 507.

16. PROSSER, *supra* note 14, at § 61.

17. *See, e.g., McNulty v. Hurley*, 97 So.2d 185 (Fla. 1957).

18. *See, e.g., Broad Street Christian Church v. Carrington*, 234 So.2d 732 (Fla. 2d Dist. 1970), in which the plaintiff was injured while attending her grandson's ordination at the church. The activity was held to be "socio-religious," and because the church was not benefited economically, plaintiff was not an invitee. *Id.* at 733.

tial. Rather, the invitation theory permits individuals to achieve invitee status even though they were, for example, merely browsing in the store or using its rest room with no intention of making a purchase. The "invitation" test answers the many complaints lodged against the economic benefit test since allegation and proof of an intended purchase are not required.

In *Smith v. Montgomery Ward & Co.*,¹⁹ the Fourth District Court of Appeal rejected the economic benefit test in favor of the invitation test. In *Smith*, the plaintiff entered the department store with the intention of looking at and perhaps buying some shrubbery. A fence display in the store fell against plaintiff and knocked him down, causing the injuries for which he subsequently sued. The defendant, Montgomery Ward, asserted that plaintiff was not an invitee since he had not definitely intended to make a purchase. The court, however, disagreed, and held that through its advertising, a store seeks to attract customers to the premises, even though it cannot expect everyone entering to buy. Thus, the people responding have been "invited" by the store owner and are, therefore, invitees, notwithstanding their lack of intent to purchase.

In another Fourth District decision, the court again applied the invitation-invitee test.²⁰ In the *Lunney* case, Mrs. Merriweather Post gratuitously offered her home to be used in a garden club tour. Plaintiff paid five dollars for a ticket from the club. While passing through the home, plaintiff slipped on a sheet of vinyl material which Mrs. Post had installed to protect her valuable oriental rugs. Clearly, plaintiff was not a social guest. Also, Mrs. Post had not received any economic benefit from plaintiff's visit. However, plaintiff had entered to tour the premises after having bought a ticket for that purpose. The *Lunney* court, restating its position in *Smith*, held the plaintiff to be an invitee of Mrs. Post under the invitation test. The court added, however, that if forced to reconcile its holding with Florida precedent, plaintiff could be found to be an invitee under the economic benefit test.²¹ Both the minority and majority suggested that the question be certified to the Florida Supreme Court as one of great public interest.

A proprietor, though under a duty of reasonable care, is not liable for injuries resulting from dangers of which he was not aware and which he could not have discovered with reasonable care. Also excluded are those dangers which the invitee could have reasonably anticipated or discovered himself. If a business invitee is knocked down by an escaping shoplifter, the owner of the store is not liable to the invitee since such an event was not reasonably foreseeable.²² On the other hand, an owner of a bar, whose agent knew of the dangerous propensities of one of the

19. 232 So.2d 195 (Fla. 4th Dist. 1970) [hereinafter cited as *Smith*].

20. *Lunney v. Post*, 248 So.2d 504 (Fla. 4th Dist. 1971), noted in 25 U. MIAMI L. REV. 771 (1971).

21. *Id.* at 507.

22. *Graham v. Great Atlantic & Pacific Tea Co.*, 240 So.2d 157 (Fla. 4th Dist. 1970).

bar's customers, is liable for injuries to a business invitee who was attacked by the customer.²³

A homeowner, like a proprietor, is not an insurer of the safety of his guests.²⁴ Rather, the homeowner owes a duty to a guest-licensee to refrain from wanton negligence or wilful misconduct which would injure the guest. In addition, there may be a duty to warn of a defect or condition known to the host, but not obvious to the licensee. In *LeBase v. Britz*,²⁵ an eight-year-old was an evening visitor at defendant's home. While playing in the backyard, the child ran into a needle point plant and was permanently blinded in one eye. The trial court held, as a matter of law, that there was no negligence on the part of the homeowner. The decision was reversed on appeal. If the homeowner: 1) knows of a danger on his premises; 2) which involves an unreasonable risk of harm; 3) which will not be realized by the guest, the homeowner must "make the condition reasonably safe, or . . . warn the guest of the condition and the risk involved therein."²⁶

In *Sparks v. Casselberry Gardens, Inc.*,²⁷ a father brought an attractive nuisance suit for the death of his minor son. The fourteen-year-old boy, accompanied by his friend, had entered the defendant landowner's property and had begun to dig a tunnel. Evidence disclosed that the boys had discussed the dangers inherent in such a project and had used boards as a safeguard against a possible cave-in. The landowner was not held liable. The court stated that to invoke the attractive nuisance doctrine to permit recovery for a trespassing child's injuries, the condition on the land must not only be attractive to the child and involve a serious risk of harm to him, but must also present a danger which is unappreciated by the child. Because the boys knew and appreciated the risk involved, there could be no recovery.

D. Landlord-Tenant

The District Court of Appeal, Third District, in the landmark case of *Smith v. Jung*,²⁸ held that a landlord who fails to have rescue equipment and a lifeguard available may be liable to a member of a tenant's family who drowns in the apartment house pool. The decision is an extension of the lifeguard requirement for private and public pools operated for profit. It was the first case in Florida, as well as in the United States, reaching this result.

23. *A Trysting Place, Inc. v. Kelly*, 245 So.2d 875 (Fla. 3d Dist. 1971). The holding illustrates the rule that the owner must protect his invitees from acts of third persons which he has cause to anticipate. See *Johnson v. Hatoum*, 239 So.2d 22 (Fla. 4th Dist. 1970) (run-away auto).

24. PROSSER, *supra* note 14, at § 60.

25. 240 So.2d 819 (Fla. 4th Dist. 1970).

26. *LeBase v. Britz*, 240 So.2d 819, 820 (Fla. 4th Dist. 1970), quoting from *Goldberg v. Straus*, 45 So.2d 883, 885 (Fla. 1950). (Emphasis supplied by *LeBase* court omitted.)

27. 227 So.2d 686 (Fla. 4th Dist. 1969).

28. 241 So.2d 874, 878 (Fla. 3d Dist. 1970), noted in 25 U. MIAMI L. REV 496 (1971).

E. *The Family*

Florida, like many other states, continues to cling to the doctrine of family immunity, denying a right of action in tort among members of a family.²⁹ In *Orefice v. Albert*,³⁰ a wrongful death and survivorship action was brought by the mother for the death of her son who was killed as a result of the negligence of his father who was co-owner and pilot of an airplane which crashed. The named defendant was the non-family co-owner of the airplane who, plaintiff conceded, was not actively negligent. The court noted that the inter-family immunity rule precluded litigation by the son's estate against the father. An action, however, could be maintained against the non-family co-owner.³¹ The mother's wrongful death claim against this co-owner was rejected, however, since the husband's negligence was imputed to the wife.³²

The Supreme Court of Florida recently held that a wife has a cause of action for loss of consortium against a third person who negligently injures her husband.³³ Since the action is derivative, the wife may recover only if the husband has a cause of action against the same third party. In so holding, the court rejected the outmoded common law rule in favor of the policy established by recent constitutional and statutory provisions as well as judicial decisions which prohibit discrimination on the basis of sex.

F. *Master-Servant*

The general rule is that a master is accountable for the torts of his servant only when the tort is committed as part of the servant's duties or within the course of the servant's employment. An exception to this general rule is found in the Restatement of Torts. This exception imposes a duty upon the master to control the conduct of his servant, even when a tort is committed without the course of employment, when it can be shown that

(a) the employee is engaging in or shows a propensity to engage in conduct that is in its nature dangerous to members of the general public; (b) the employer has notice that the employee is acting or in all probability will act in a manner dangerous to other persons; (c) the employer has the ability to control the employee such as to substantially reduce the probability of harm to other persons; and (d) the other person must in fact have been injured by an act of the employee which could rea-

29. *Orefice v. Albert*, 237 So.2d 142 (Fla. 1970).

30. *Id.*

31. The liability of the defendant was predicated upon his co-ownership of the airplane, a dangerous instrumentality. *Id.* at 146.

32. *Id.* at 145. The boy was in his father's custody at the time of the accident with the consent and knowledge of the mother. There was, therefore, a "sufficient community of interest" to impute the father's negligence to the mother.

33. *Gates v. Foley*, 247 So.2d 40 (Fla. 1971).

sonably have been anticipated by the employer and which by exercising due diligence and authority over the employee the employer might reasonably have prevented.³⁴

In *McArthur Jersey Farm Dairy, Inc. v. Burke*,³⁵ a minor employee was known to be a reckless driver. At the time of the accident, the employee had finished work and was driving his father's car when the car struck the plaintiff on the property of the defendant employer. The minor clearly was not acting within the course or scope of his employment. Nevertheless, liability bottomed on the theory incorporated by the Restatement was imposed upon the employer since he had knowledge of the employee's propensity for wild driving and made no attempt to safeguard against it.

G. *Independent Contractors*

Ordinarily, an owner of property is not responsible for the negligence of an independent contractor. A traditional exception to this rule is where the independent contractor is occupied in an inherently dangerous activity. Although a gun is a dangerous instrumentality, a property owner is not vicariously liable for the harm caused by the discharge of a gun by a security guard employed by the owner to protect his property. It is the activity and not the incidents thereof which determines the exception to the rule. The guarding of property is a lawful activity which is not inherently dangerous.³⁶ However, even where the owner engages the independent contractor to perform work which is inherently dangerous, the owner is not liable for injuries to the contractor's employee caused by the dangerous instrumentality, absent negligence on the owner's part, if the instrumentality was operated negligently by another employee of the independent contractor.³⁷

H. *Carriers*

A brick thrown through the glass panel of the folding door of a bus ricocheted and hit plaintiff, a fare-paying passenger. In her lawsuit, plaintiff alleged that the municipally operated bus company negligently failed to foresee the possibility of such an injury and prevent against it by installing impenetrable glass windows. In addition, plaintiff proffered evidence of prior rock-throwing incidents. In response, the defendant bus company urged that since it complied with the minimum safety regulations required by the Florida Statutes, it had satisfied its duty. The court, relying on the well-tested principle that the common carrier must exhibit the highest degree of care for the safety of its passengers, held that com-

34. *McArthur Jersey Farm Dairy, Inc. v. Burke*, 240 So.2d 198, 201 (Fla. 4th Dist. 1970), *construing* RESTATEMENT (SECOND) OF TORTS § 317 (1965).

35. 240 So.2d 198 (Fla. 4th Dist. 1970).

36. *Brien v. 18925 Collins Ave. Corp.*, 233 So.2d 847 (Fla. 3d Dist. 1970).

37. *Chrisly v. Florida Power Corp.*, 232 So.2d 744 (Fla. 1st Dist. 1970).

pliance with minimum safety regulations does not necessarily mean that the carrier has met its high standard of care.³⁸ The injury was foreseeable, and because proper windows could have averted the injury, the bus company was held liable.³⁹

I. *Automobiles*

1. THE DANGEROUS INSTRUMENTALITY DOCTRINE

A dangerous instrumentality is, by its nature, reasonably certain to place life and limb in peril when negligently constructed or operated.⁴⁰ Florida applies the dangerous instrumentality doctrine to the owners of automobiles.⁴¹ If the owner entrusts his car to another, the owner will be ipso facto liable for injuries resulting from the negligent operation of the automobile.⁴² The owner's liability is vicarious and arises from the principle of imputed negligence.⁴³

Whether the injured party may recover a judgment from the car's operator after the owner of the car has paid a judgment into the registry of the court raises the question of whether the owner and operator are joint tortfeasors. In *Geraldi v. Carlisle*,⁴⁴ the plaintiff, after having sued and recovered a judgment from the owner of the automobile, brought suit against the car's operator. Since the owner had paid his judgment into the court registry as required under the statute,⁴⁵ the defendant operator argued that the judgment had been satisfied, thus prohibiting recovery by the plaintiff against the operator. The operator's argument was that under the doctrine of principal and agent, the owner could recover from the operator any damages which the owner suffered as a result of the accident.⁴⁶ This recovery would be impermissible if the owner and operator were joint tortfeasors since Florida forbids tortfeasors seeking contribution from one another.⁴⁷ The court rejected defendant's contention. The rule established by the court is that for purposes of a suit by the owner against the operator, the driver's negligence is not imputed to the owner; however, in a suit by the third party, the negligence of the driver will be imputed to the owner. Inasmuch as the present action was brought by the injured third party, the owner and

38. *Homan v. County of Dade*, 248 So.2d 235 (Fla. 3d Dist. 1971).

39. *Id.* at 237. The court rejected the city's argument that the action of the brick thrower was a superseding cause because such an intervening cause was a foreseeable event.

40. *See Matthews v. Lawnlite Co.*, 88 So.2d 299, 301 (Fla. 1956).

41. *Southern Cotton Oil Co. v. Anderson*, 80 Fla. 441, 86 So. 629 (1920).

42. *Id.*

43. *Id.*

44. 232 So.2d 36 (Fla. 1st Dist. 1969) [hereinafter cited as *Geraldi*].

45. FLA. STAT. § 55.141 (1969). Under the statute, payment of the judgment by one tortfeasor, when the plaintiff does not accept payment, does not constitute satisfaction of the judgment as to preclude a subsequent suit by the plaintiff against the joint tortfeasor. *Geraldi*, *supra* note 44, at 40.

46. 1 FLA. JUR. *Agency* § 58 (1955).

47. *Kellenberger v. Widener*, 159 So.2d 267 (Fla. 2d Dist. 1963).

operator are tortfeasors, jointly and severally liable to the injured person.⁴⁸

2. THE GUEST STATUTE

At common law, the owner of a motor vehicle owed an invited guest the duty of reasonable care.⁴⁹ In many states, including Florida,⁵⁰ the common law rule has been abrogated by the enactment of guest statutes. Such statutes are designed to relieve an owner of liability in instances where a guest-passenger is injured as a result of the ordinary negligence of the owner.

Under the guest statute, the owner's liability to his guest is limited to actions involving gross negligence, which, although an uncertain term, is distinguishable from other types of negligence. Gross negligence is more than simple negligence, and is often equated with willful and wanton negligence. There is, however, a difference between the two.⁵¹ Willful and wanton misconduct connotes a deliberate and intentional wrong, while gross negligence suggests a course of conduct "likely to result in grave injury when [sic] in the face of a clear and present danger of which the alleged tort-feasor is aware."⁵²

The question of who is a "guest" within the contemplation of the statute has often been posed. In *Parson v. Reyes*,⁵³ the defendant, a shareholder in a beauty parlor corporation, drove plaintiff, a beauty operator employed in the salon, to a beauty convention. Plaintiff sued for injuries received in a collision, alleging that she was not a guest under the statute since the purpose of attending the convention was to improve her skills, which in turn, would ultimately benefit the corporation. The Florida Supreme Court agreed.

One important element in determining whether a person is a guest within the meaning of the guest statute is the identity of the person or persons advantaged by the transportation. If, in its direct operation, it confers a benefit only on the person to whom the ride is given, and no benefits, other than such as are incidental to hospitality, companionship, or the like, upon the person extending the invitation, the passenger is a guest within the statute. However, if the transportation tends to the promotion of mutual interests of both the passenger and the driver and operates for their mutual benefit or if it is primarily for the

48. *Geraldi*, *supra* note 44, at 41.

49. PROSSER, *supra* note 14, at § 56.

50. FLA. STAT. § 320.59 (1969). The statute, being in derogation of the common law, has been strictly construed. *See Parson v. Reyes*, 238 So.2d 561 (Fla. 1970).

51. *Glaab v. Caudill*, 236 So.2d 180 (Fla. 2d Dist. 1970).

52. *Id.* at 185.

53. 238 So.2d 561 (Fla. 1970). *See Engels and Freeman, Torts, 1967-1969 Survey of Florida Law*, 24 U. MIAMI L. REV. 617, 627 (1970) for a discussion of the district court opinion.

attainment of some objective or purpose of the operator, the passenger is not a guest within the meaning of the statute.⁵⁴

Consequently, because some benefit accrued to both the plaintiff passenger and defendant operator, the passenger was not a guest; therefore, she was not required to prove gross negligence to recover.

Before a passenger can be labelled a guest, the passenger must have accepted an invitation.⁵⁵ Thus, an infant, legally incapable of exercising the judgment factor involved in assenting to a ride, does not come within the terms of the guest statute.⁵⁶ Similarly, an owner needs no invitation; thus if an owner is a passenger in a vehicle driven by another, the statute does not apply.⁵⁷

J. Defenses

1. CONTRIBUTORY NEGLIGENCE

The question of contributory negligence in cases involving children often presents complex issues. Whether a child has the capacity to know and appreciate the dangers of his own conduct depends on the age of the child and on his individual level of maturity. Accordingly, uniform standards of conduct, such as those applied to achieve objective equality in cases involving adults, are inappropriate.

The most significant recent case in the field of contributory negligence of children is *Swindell v. Hellkamp*.⁵⁸ In *Swindell* a four-year-seven-month-old girl, unmindful of her mother's warnings, darted out into the street and was hit by defendant's car. At trial, an instruction was given that the question of contributory negligence was a factual determination to be made by the jury. Plaintiff objected to this instruction and moved for a directed verdict on the question of contributory negligence, asserting that a child of that age could not, as a matter of law, be guilty of contributory negligence. The motion was denied. The Fourth District Court of Appeal affirmed the trial court, but certified the question to the supreme court as one of great public interest. The supreme court held that a child under six years of age is conclusively presumed to be incapable of contributory negligence. This rule was predicated upon the common law rule that a child under seven years of age is incapable of perpetrating a crime. The age modification—six years instead of seven—was based on the court's opinion that "a child must learn individual safety at an early age but social consciousness comes at a somewhat later age."⁵⁹

54. 238 So.2d 561, 563-64 (Fla. 1970).

55. *Cook v. Theriot*, 249 So.2d 457, 458 (Fla. 1st Dist. 1971) (four-year-old child) [hereinafter cited as *Cook*], citing *Andrews v. Kirk*, 106 So.2d 110 (Fla. 3d Dist. 1958).

56. *Cook*, *supra* note 55, at 458.

57. *Bukspan v. Flaks*, 228 So.2d 432 (Fla. 3d Dist. 1969).

58. 242 So.2d 708 (Fla. 1970) [hereinafter cited as *Swindell*].

59. *Id.* at 709. *Accord*, *Moore v. Vandoren*, 248 So.2d 679 (Fla. 4th Dist. 1971), wherein

2. ASSUMPTION OF THE RISK

In *Brevard County v. Jacks*,⁶⁰ the administrator of the estate of a mentally retarded eighteen-year-old girl brought suit against the county for damages resulting from the girl's drowning death in a man-made lake owned and operated by the county as a recreational facility. The deceased had a history of epileptic seizures. A buoy line, though usually present to separate the deep from the shallow end, was not in place on the day of the accident. The county contended that the girl died as a result of an epileptic seizure, and that by entering the lake with knowledge of her disability, she had assumed the risk. The court stated that to establish assumption of the risk, in addition to voluntary exposure to the risk, the defendant must demonstrate that the plaintiff *appreciated* the danger involved. Having failed to establish that the mentally retarded girl understood the nature of her act, the county's defense was held to be without merit.

3. GOVERNMENTAL IMMUNITY

Following an accident at a marked intersection, plaintiff sued the other driver, his insurer, and also Dade County. In his complaint, plaintiff alleged that the accident would not have occurred were it not for the county's negligent construction and design of the stop sign at that intersection. The circuit court dismissed the complaint and plaintiff appealed. The Third District Court of Appeal held that Dade County was a "metropolitan county," a political subdivision of the state, and therefore, the sovereign immunity doctrine precluded suit against it. The court also refused to adopt plaintiff's exception to the sovereign immunity doctrine which permits suits against a city for "negligent nuisances."⁶¹

K. *Wrongful Death and Survival Actions*

The child's right to sue for the wrongful death of a parent is determined at the time of the parent's death.⁶² In a case of first impression in Florida,⁶³ the Fourth District Court of Appeal held that a child, who at the time of his natural parents' death was legally adopted, could not maintain a suit under the Florida Wrongful Death Statute⁶⁴ for the death

a jury charge on the defense of contributory negligence of a four-year-nine-month-old pedestrian struck by defendant was reversible error on the basis of *Swindell*, *supra* note 58. See also *Campbell v. Washington*, 240 So.2d 340 (Fla. 1st Dist. 1970), where the court applied the Alabama rule that a child between seven and fourteen-years-old *may* be contributorily negligent upon a showing that he possesses the discretion, intelligence, and sensitivity to danger possessed by an ordinary child of fourteen years of age.

60. 238 So.2d 156 (Fla. 4th Dist. 1970).

61. *Schmauss v. Snoll*, 245 So.2d 112 (Fla. 3d Dist. 1971). Of course, even where the city may be sued, legal and proximate cause must still be shown. See *Elliot v. City of Lake City*, 230 So.2d 161 (Fla. 1st Dist. 1969) (wrongful death).

62. *Florida Power & Light Co. v. Bridgeman*, 133 Fla. 195, 182 So. 911 (1938).

63. *Powell v. Gessner*, 231 So.2d 50 (Fla. 4th Dist. 1970) [hereinafter cited as *Powell*].

64. FLA. STAT. §§ 768.01 and 768.02 (1969).

of his natural parents through the negligence of another. The adoption decree had the effect of completely severing "every legal and moral tie which theretofore existed between the child and its natural parent or parents,"⁶⁵ and therefore, the child had no legal right to sue.

The mother of an illegitimate child, however, may recover for the death of her child under the Wrongful Death Statute.⁶⁶ The rationale underlying the rule is believed sound. The mother of the illegitimate child ordinarily cares for the child and suffers a loss with the child's death. The same usually does not hold true of the father of the illegitimate child. Therefore, while the mother of an illegitimate child may recover under the statute, the father may not.⁶⁷

II. STRICT LIABILITY: ANIMALS

A. *Dogs*

Section 767.04 of the Florida Statutes (1969) imposes absolute liability upon the owner of a dog which bites a person who is in a public place or who is lawfully on the property of the dog's owner. However, the owner is not responsible if he: 1) prominently displays a "Bad Dog" sign; or 2) the person bitten "mischievously or carelessly provoke[s] or aggravate[s] the dog inflicting such damage."⁶⁸

In *Carroll v. Moxley*,⁶⁹ the supreme court dealt with the first of these two exculpatory provisions. Plaintiff entered her mother's hardware store and was bitten by her mother's german shepherd. Beside the counter in the store was a gate with a sign reading, "Beware of Dog" and "Keep Out". Suit was brought relying on both Florida Statute section 767.04 (1969) and the common law as a basis for recovery. The trial judge, in granting defendant's motion for summary judgment, ruled that the statute abrogated the common law, and that since a "Bad Dog" sign had been posted, there was no basis for liability. The supreme court reversed, emphasizing that the posting of such a sign does not alone satisfy the statute. The sign must be prominently displayed and easily readable so as to put a person on notice of the risk. Whether a particular sign meets this requisite is a factual question which must be determined from the circumstances in each case. It is evident, though, that a sign not

65. *Powell*, *supra* note 63, at 51, *relying on* *Levy v. Louisiana*, 391 U.S. 68, 72 (1968).

66. *City of West Palm Beach v. Cowart*, 241 So.2d 748 (Fla. 4th Dist. 1970).

67. *Id.* at 752. In arriving at this decision, the court relied on the case of *Hadley v. City of Tallahassee*, 67 Fla. 435, 65 So. 545 (1914), which noted that the 1906 Wrongful Death Statute legally recognized the mother of a bastard child but not the father.

For a wife's standing to sue for the wrongful death of her allegedly common law husband, see *Williams v. Dade County*, 237 So.2d 776 (Fla. 3d Dist. 1970).

68. FLA. STAT. § 767.04 (1969).

69. 241 So.2d 681 (Fla. 1970). The case came to the supreme court on a writ of certiorari. Petitioner claimed the statute violated the constitutional provisions allowing for redress of injury. Although the court held that the statute was constitutional, it actually enlarged dog bite protection since it eliminated the common law requirement of scienter by the owner.

prominently displayed and not easily readable will not relieve a dog owner from liability.⁷⁰

B. *Trespassing Cattle*

The common law of England required the owner of cattle "to keep them contained at peril or suffer damages for trespass. . . ."⁷¹ In an effort to encourage and protect its growing stock-raising industry, Florida provided by statute in 1823 that an owner was not liable for the trespass of his stock onto the property of another.⁷² This "open range" provision was repealed in 1949,⁷³ leaving open the question of what rule Florida would apply in a case involving trespassing cattle.

In just such a case, *Rockow v. Hendry*,⁷⁴ the defendant cattleowner argued that the common law rule had never been in force in Florida prior to enactment of the open range statute, and therefore, there was no exigency to apply it now. The court, in response, delineated the history of common law animal trespass in Florida and found that common law liability did exist prior to the enactment of the open range law. Therefore, with the repeal of the open range statute, the common law rule was reinstated rendering the defendant strictly liable for the trespass of his cattle.⁷⁵

III. INTENTIONAL TORTS

A. *Assault and Battery*

Provocation, such as verbal abuse, does not justify an assault.⁷⁶ While provocation by the plaintiff does not mitigate compensatory damages it may, however, mitigate punitive damages.⁷⁷ In an action against a servant and his master for the servant's assault, it is not reversible error for the court to award compensatory damages against each defendant, but punitive damages against only the employer. The sanction of punitive damages is used to punish the tortfeasor, but it is not meant to render the tortfeasor bankrupt. If the servant will be bankrupted by the amount of money damages imposed upon him, the jury in its discretion, may assess punitive damages upon only the more financially secure master.⁷⁸

70. *Id.* at 683.

71. *Rockow v. Hendry*, 230 So.2d 717 (Fla. 2d Dist. 1970).

72. FLA. STAT. §§ 588.02-.06 (1941), formerly REV. STAT. § 875 (1892).

73. FLA. LAWS 1949, ch. 25357, § 9, repealing FLA. STAT. §§ 588.02-.06 (1941).

74. 230 So.2d 717 (Fla. 2d Dist. 1970).

75. *Id.* The decision was limited to areas of law where the Warren Act, FLA. STAT. §§ 588.12-.25 (1969), and special legislation do not apply.

76. *Austin v. U-Tote-M of Broward*, 241 So.2d 186 (Fla. 4th Dist. 1970).

77. *Brown v. Palmer*, 245 So.2d 860 (Fla. 1971), quashing 233 So.2d 459 (Fla. 1st Dist. 1970).

78. *Joab, Inc. v. Thrall*, 245 So.2d 291, 293 (Fla. 3d Dist. 1971).

B. *Fraud and Misrepresentation*

Justifiable reliance is one of the essential elements in an action for fraud.⁷⁹ In *Tippett v. Frank*,⁸⁰ the trial court entered summary judgment against the defendant second mortgagee in a foreclosure suit. The defendant appealed, urging that the defense of fraudulent representations had presented questions of fact precluding the granting of a summary judgment. The district court affirmed, holding that the defense of fraud raised in the answer was legally insufficient in that there was no allegation that the defendant relied upon the representation.

Until recently, the quantum of proof for fraud was determined by whether the action was brought at law or in equity.⁸¹ At law, the common law tort of deceit required only a *preponderance of the evidence*, i.e., the greater weight of the evidence. In equity, however, a stricter standard was imposed, and fraud had to be proven by *clear and convincing evidence*. Since the merger of law and equity, the Florida rule has been that a preponderance or greater weight of the evidence is necessary to establish fraud, regardless of whether the action is at law or in equity.⁸²

Traditionally, one of two tests has been utilized to determine the measure of damages in an action for fraud and deceit. The test used by the majority of jurisdictions, the "benefit of the bargain" rule, awards the plaintiff what he would have obtained had the defendant's representations

79. The essential elements for a cause of action for fraud are:

(1) a false statement of fact; (2) known by the defendant to be false at the time it was made; (3) made for the purpose of inducing the plaintiff to act in reliance thereon; (4) action by plaintiff in reliance on the correctness of the representation; and (5) resulting damage to the plaintiff.

Poliakoff v. National Emblem Ins. Co., 249 So.2d 477, 478 (Fla. 3d Dist. 1971) (sale of insurance policy falsely represented to be non-cancellable). As regards a claim for false statement of fact of a future occurrence, a plaintiff must allege that the representation was "made without any intention of performing it, or made with the positive intention not to perform it . . ." *Bernard Marko & Assoc., Inc. v. Steele*, 230 So.2d 42, 44 (Fla. 3d Dist. 1970) (sale by corporation of its equipment; fraudulent representation as to encumbrances on items), *quoting* *Home Seeker's Realty Co. v. Menear*, 102 Fla. 7, 135 So. 402 (1931).

Reliance is not justifiable where the information is equally available to both parties. *Abbate v. Nolan*, 228 So.2d 433 (Fla. 4th Dist. 1969) (obtaining monies by fraud). ("His knowledge was practically as great as that of the appellant." *Id.* at 436). *See also* *Lisbon Holding & Inv. Co. v. Village Apts., Inc.*, 237 So.2d 197 (Fla. 3d Dist. 1970) (quality and condition of real estate) ("[The] seller had reasonable opportunity for inspection prior to purchase." *Id.* at 199). For the same principle, *see* *Finney v. Frost*, 228 So.2d 617 (Fla. 4th Dist. 1969) (fraud by yacht broker in selling boat). ("Either party could have learned of the status of the bills by a phone call." *Id.* at 618.)

A causal connection between the fraud and resulting damage must be alleged by the plaintiff in his complaint. *See, e.g.,* *MacDonald v. American Oil Co.*, 248 So.2d 231 (Fla. 3d Dist. 1971), in which the plaintiff, an automobile accident victim, sued the seller of recapped tires who represented them as "used" for injuries caused by the blowout.

80. 238 So.2d 671 (Fla. 3d Dist. 1970).

81. *Matthews v. Matthews*, 133 So.2d 91, 94 (Fla. 2d Dist. 1961). *See also* FLA. CONST., art. V, § 6.

82. *Rigot v. Bucci*, 245 So.2d 51 (Fla. 1971), *overruling* *Thomas v. Pennsylvania Threshermen & Farmer's Mut. Ins. Co.*, 167 So.2d 10 (Fla. 2d Dist. 1964).

been true. The minority follows the "out of pocket" rule, which gives the plaintiff only what he has actually lost. Florida permits the use of either rule in a fraud action "in order to do such justice as the circumstances may demand."⁸³

C. Libel

Libel is a tort against reputation. Thus, communication or publication of the libel is indispensable to liability. If the defendant merely mails the allegedly libelous letter to the plaintiff's agent-attorney, it is tantamount to the defendant mailing the letter to the plaintiff. Therefore, the requisite communication to a third party has not occurred, and no action will lie.⁸⁴

In *New York Times v. Sullivan*,⁸⁵ the United States Supreme Court, in order to insure freedom of expression in matters of public interest, created a constitutional privilege which protected misstatements of fact or opinion concerning the official conduct of public officials. The privilege can be overcome only by a showing of actual malice, *i.e.*, that the statements were knowingly false or made in reckless disregard of their truth or falsity.

Florida invoked the *New York Times* rule in the case of *Bishop v. Wometco Enterprises, Inc.*⁸⁶ An investigator, employed by the city, made factually erroneous statements at a public hearing concerning alleged inequitable assessments by the local tax assessor's office. The investigator named Wometco Enterprises as having received preferential treatment. In a series of editorials broadcast over its television station, Wometco countered with the allegation that the investigator had intentionally or negligently made the untruthful statement. The investigator sued Wometco for libel. The court held that since the investigator was employed by the city, he was a "public official" under the rule of *New York Times v. Sullivan*, and therefore, the investigator had to demonstrate actual malice by Wometco in order to recover for libel. While the editorials might have embraced inconsistencies, inconsistencies alone were insufficient under the *New York Times* rule.

The actual malice test also extends to defamation of persons classified as "public figures."⁸⁷ In *Gibson v. Maloney*,⁸⁸ the president of the local telephone company in Port St. Joe, Florida, addressed the Apalachicola Rotary Club on the topic of the physical development of the area. The president observed that telephone service expansion had occurred everywhere except in Apalachicola, and he attributed this fact to

83. *DuPuis v. 79th St. Hotel, Inc.*, 231 So.2d 532, 536 (Fla. 3d Dist. 1970), involving false representations by a husband and wife to induce the sale of their hotel.

84. *Maine v. Allstate Ins. Co.*, 240 So.2d 857 (Fla. 4th Dist. 1970).

85. 376 U.S. 254 (1964) [hereinafter cited as *New York Times*].

86. 235 So.2d 759 (Fla. 3d Dist. 1970).

87. *Curtis Pub. Co. v. Butts*, 388 U.S. 130 (1967).

88. 231 So.2d 823 (Fla. 1970), *cert. denied*, 398 U.S. 951 (1970).

statements made by a local Apalachicola newspaper which had sought to arouse public indignation against persons who controlled the telephone company. Maloney, the publisher and editor of the Apalachicola Times, sued Gibson and the St. Joseph Telephone and Telegraph Company for slander and libel and was awarded \$15,000 by the trial court. The District Court of Appeal, First District, affirmed.⁸⁹ On certiorari, the supreme court reversed. By virtue of his articles, Maloney had made himself a public figure and "a part of the passing scene,"⁹⁰ so that a statement made about him was "fair comment"⁹¹ on a public matter. The publisher, therefore, was required to establish actual malice. Since he was unable to do so, the libel suit failed.

D. *Mental Distress*

In *Sacco v. Eagle Finance Corp.*,⁹² the Third District Court of Appeal held, *inter alia*, that an allegation of intentional infliction of emotional distress, in and of itself, was insufficient to state a cause of action. Citing *Slocum v. Food Fair Stores*⁹³ and *Kirksey v. Jernigan*,⁹⁴ the Third District held that in order to state a cause of action for emotional or mental distress, some other intentional tort must be coupled with the mental distress claim. In addition, not all mental disturbance is compensable. For instance, no recovery is allowed for wounded feelings. In *Sacco*, a suit against a collection agency for its attempt to collect a debt of the plaintiff's daughter was dismissed because the complaint failed to aver another intentional or malicious tort and proffered nothing more than a case of gross insult.

E. *Interference with the Contractual Relations of Others*

The intentional and unjustified interference with a contractual relationship constitutes a tort in Florida.⁹⁵ If the defendant induces one of the parties to a contract to breach that contract, to the injury of the other contracting party the injured party may sue the defendant wrongdoer. While malice is a necessary element of the tort, malice will be implied when the court finds that the defendant intentionally caused economic harm to the plaintiff. The elements of this tort are:

89. *Maloney v. Gibson*, 214 So.2d 89 (Fla. 1st Dist. 1968).

90. *Gibson v. Maloney*, 231 So.2d 823, 824 (Fla. 1970).

91. *Id.* at 824. See also *Hauser v. Urchisien*, 231 So.2d 6 (Fla. 1970); *Time, Inc. v. Firestone*, 254 So.2d 386 (Fla. 4th Dist. 1971).

92. 234 So.2d 406 (Fla. 3d Dist. 1970) (also involving trespass and invasion of privacy) [hereinafter cited as *Sacco*]. See also *Miller v. Mutual of Omaha Ins. Co.*, 235 So.2d 33 (Fla. 1st Dist. 1970) (insurance agent taking policy without permission), wherein the evidence presented a question of fact for intentional infliction of severe emotional distress.

93. 100 So.2d 396 (Fla. 1958).

94. 45 So.2d 188 (Fla. 1950).

95. *Franklin v. Brown*, 159 So.2d 893 (Fla. 1st Dist. 1964).

- (1) the existence of a business relationship under which the plaintiff has legal rights,
- (2) an intentional and unjustified interference with that relationship by the defendant,
- (3) damage to the plaintiff as a result of the breach of the business relationship.⁹⁶

IV. NUISANCES

Occasionally, to protect the interests of the community and its land-owners, a court or legislature will designate something to be an "absolute" nuisance or a nuisance "per se." In essence, one who creates or maintains a nuisance per se on his land will be liable for that nuisance, even though no negligence was involved in its creation.⁹⁷ However, "[n]othing which is legal in its inception is a nuisance per se. To be [such] . . . it must appear that it is a nuisance at all times under all circumstances, regardless of location and surrounding."⁹⁸ A sewage treatment plant is not a nuisance per se; however, it may become a nuisance if other facts and circumstances make it one.⁹⁹

The Florida Statutes provide that one who maintains, owns, or leases a building which tends to annoy the community or injure its health "shall be deemed guilty of maintaining a nuisance."¹⁰⁰ When such a nuisance exists, an enabling statute¹⁰¹ allows any citizen of the county where the nuisance is located to sue in the name of the state to enjoin the continuance of the nuisance.

In a suit brought pursuant to Florida Statute section 823.05 (1969), tenants alleged that their apartment building constituted a public nuisance. The defendant-landlord argued that the tenants' complaint was insufficient because it failed to allege that the community at large, as opposed to the individual tenants, was adversely affected by the condition. The court noted, however, that the plaintiffs were suing in the name of the state, and in addition, had alleged the existence of serious health dangers which would constitute a danger to the entire community. Even though the plaintiffs were individual tenants, they were, nevertheless, members of the public and could therefore bring suit under the statute to enjoin the landlord and to abate the public nuisance on the apartment house premises.¹⁰²

96. *Symon v. J. Rolfe Davis, Inc.*, 245 So.2d 278, 280 (Fla. 4th Dist. 1971), holding there was no interference by subsequent tenants of shopping center with contract between agent and shopping center developer.

97. *PROSSER*, *supra* note 14, at § 90.

98. *Larson v. Village of Lava Hot Springs*, 88 Idaho 64, 72, 396 P.2d 471, 475 (1964), *quoted in* *AIA Mobile Home Park, Inc. v. Brevard Co.*, 246 So.2d 126, 129 (Fla. 4th Dist. 1971).

99. *AIA Mobile Home Park, Inc. v. Brevard Co.*, 246 So.2d 126 (Fla. 4th Dist. 1971).

100. FLA. STAT. § 823.05 (1969).

101. FLA. STAT. § 60.05 (1969).

102. *State ex rel. Brown v. Sussman*, 235 So.2d 46 (Fla. 3d Dist. 1970), wherein a

In a pollution case, the City of Coral Gables argued that the City of Miami's incinerator constituted both a public and a private nuisance.¹⁰³ As a defense, the City of Miami argued that there were several sources of pollution in the county worse than its own. The court refused to accept such an argument. If the court had accepted the argument no pollution suit would ever have a chance of success.¹⁰⁴ The court added that while violation of a local pollution control ordinance was not, in and of itself, sufficient to establish a nuisance, evidence of such a violation was admissible in determining whether a nuisance did, in fact, exist.¹⁰⁵

V. DAMAGES

The question of adequacy of damages for the prospective estate of a deceased child was considered by the Supreme Court of Florida in *Laskey v. Smith*.¹⁰⁶ In the plaintiff-administrator's action for the death of her two-year-old daughter, the jury returned a verdict of \$31,200. The trial judge allowed plaintiff to choose the alternative of accepting a remittitur of \$21,200 or accepting a new trial.¹⁰⁷ Plaintiff appealed, and the district court of appeal reversed the order of the trial judge.¹⁰⁸ Petition for certiorari was granted by the supreme court on the basis of an alleged conflict between the district court decision and prior Florida cases.¹⁰⁹

The Supreme Court of Florida held that the trial judge may review a verdict, but "[h]is setting aside a verdict must be supported by the record . . . or by findings reasonably amenable to judicial review."¹¹⁰ While no proof of the child's prospective estate had been offered at trial, the court reasoned that the prospective estate of a child is, at best, a question of speculation and conjecture. Therefore, because of the lack

public nuisance was created by improper sewage disposal, the presence of vermin and rodents, and improper trash removal. The court also noted that punishment for violation of a law does not constitute a bar against an action for enjoining a public nuisance. *Id.* at 48.

103. *City of Miami v. City of Coral Gables*, 233 So.2d 7 (Fla. 3d Dist. 1970).

104. *Id.* at 10.

105. *Id.* at 11.

106. 239 So.2d 13 (Fla. 1970).

107. The acceptance of a remittitur by the trial court is an alternative to the granting of a new trial on the issue of damages. *Love Realty Corp. v. O'Brien*, 162 So.2d 532 (Fla. 2d Dist. 1964). Thus, an order granting a new trial on the issue of damages only if the plaintiff files a remittitur may be an abuse of the trial judge's discretion. *Stopko v. Farrington*, 235 So.2d 28 (Fla. 4th Dist. 1970). Of course, if the verdict is grossly excessive and based only on speculation, there is no abuse of discretion in refusing to order acceptance of the remittitur as an alternative to the granting of a new trial. *Materials of Miami, Inc. v. Matthews*, 227 So.2d 524 (Fla. 3d Dist. 1969).

108. *Smith v. Laskey*, 222 So.2d 773 (Fla. 4th Dist. 1969).

109. *Laskey v. Smith*, 239 So.2d 13, 14 (Fla. 1970). The cases allegedly in conflict were: *Gresham v. Courson*, 177 So.2d 33 (Fla. 1st Dist. 1965) and *Burch v. Gilbert*, 148 So.2d 289 (Fla. 1st Dist. 1963). The court held that while *Burch* presented a conflict with *Laskey*, *Gresham* did not.

110. *Laskey v. Smith*, 239 So.2d 13, 14 (Fla. 1970).

of evidence concerning the value of the child's prospective estate, the trial court's finding that the jury's verdict was excessive could not be sustained. While the verdict might have raised "a judicial eyebrow [it] should [not] shock the judicial conscience."¹¹¹

111. *Id.* Several other appellate cases refused to overturn the jury's verdict: *McNair v. Continental Ins. Co.*, 245 So.2d 634 (Fla. 1st Dist. 1971) (\$2,500 for wrongful death of 22-month-old child, including mother's subsequent pain and suffering); *Durett v. Davidson*, 239 So.2d 46 (Fla. 2d Dist. 1970) (\$10,000 to 78-year-old plaintiff in auto accident not excessive); *Chandler Leasing Corp. v. Gibson*, 227 So.2d 889 (Fla. 3d Dist. 1969) (\$78,000 for plaintiff husband in negligence suit).