Torts

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I. AUTOMOBILE CASES ...................................................... 820
   A. The Dangerous Instrumentality Doctrine ........................................ 820
   B. The Guest Statute ................................................... 822
   C. Care Required of Motorists ............................................ 824
      1. REAR END COLLISIONS .............................................. 824
      2. VIOLATION OF TRAFFIC LAW ................................................ 825
   D. Defenses ............................................................ 827
      1. CONTRIBUTORY NEGLIGENCE ............................................ 827
      2. LAST CLEAR CHANCE ............................................. 828
      3. OTHER DEFENSES .................................................. 830
II. STATUTORY LIABILITY .................................................... 833
   A. Statutes Affecting the Right to Maintain an Action ...................... 833
   B. Federal Employer's Liability Act ..................................... 835
   C. Railroad Operation ................................................... 836
III. COMMON LAW NEGLIGENCE ACTIONS ....................................... 836
   A. Landlord and Tenant ................................................ 836
   B. Doctor-Patient ...................................................... 837
   C. Manufacturers and Suppliers ......................................... 839
   D. Invitees, Licensees and Trespassers .................................... 845
      1. INJURIES INVOLVING FALLS ........................................... 845
      2. INJURIES NOT INVOLVING FALLS ..................................... 846
   E. Master-Servant ...................................................... 848
   F. Defenses ............................................................ 849
      1. CONTRIBUTORY NEGLIGENCE ............................................ 849
      2. IMMUNITY ........................................................... 850
   G. Res Ipsa Loquitur ................................................... 853
IV. INTENTIONAL TORTS ...................................................... 853
   A. Invasion of Privacy .................................................. 853
   B. Malicious Prosecution ................................................ 854
   C. Conversion .......................................................... 854
   D. Libel and Slander .................................................... 856
V. DAMAGES ............................................................... 857
VI. NUISANCE ............................................................... 859
VII. LEGISLATION ........................................................... 859

I. AUTOMOBILE CASES

A. The Dangerous Instrumentality Doctrine

Prior Florida decisions appear to subscribe to the rule that the dangerous instrumentality doctrine will not be applied to render the owner of a dangerous instrumentality, who consents, either expressly or impliedly, to its use by another, liable to third persons injured as a result of the negligence of the person in whose care the instrumentality was entrusted. The applicability of this doctrine to automobiles was recognized for the first time in Florida in Southern Cotton Oil Co. v. Anderson, 80 Fla. 441, 86 So. 629 (1920).

2. In Lingefelt v. Hanner, 125 So.2d 325 (Fla. 3d Dist. 1960), the defendant automobile owner was not held liable for the acts of the thief, even though the defendant left the keys...
owner of an automobile liable in a situation where a thief has stolen the automobile and has operated it in negligent manner causing injury to the plaintiff. However, in Tillman Chevrolet Co. v. Moore, the appellate court, in a slightly different factual situation, reached a contrary conclusion. In that case, the defendant automobile dealer lent an automobile to Wills, for the limited purpose of driving it a distance of twelve blocks. Wills then absconded with the vehicle and entrusted its operation to a hitchhiker who collided with the plaintiff. In affirming that the defendant was vicariously liable under the dangerous instrumentality doctrine, the appellate court rejected the defendant dealer's argument that the chain of causation between his act of lending the car and the plaintiff's injuries had been broken by Wills' subsequent acts of stealing the automobile and entrusting its operation to a hitchhiker. The court reasoned that the defendant dealer consented in the first instance to the use of the automobile by Wills, and thus distinguished the case from similar prior Florida decisions.

Application of the dangerous instrumentality doctrine is predicated upon the "consent" of the owner. Under certain circumstances, the consent of the owner will be implied. An illustration of this latter proposition was found in Anchor Hocking Glass Corp. v. Allen. In that case, the defendant truck owner parked his truck with the keys in the ignition in such a manner as to block the only exit from a manufacturing plant. From this manner of parking, the appellate court held that a jury could properly conclude that the defendant impliedly consented that a third person attempting to leave through the plant exit could move the truck out of the way. The court rejected the defendant's contention that his implied consent extended only to third persons qualified to drive the particular model truck owned by him.

In the absence of express or implied consent, the dangerous instrumentality doctrine is inapplicable to the automobile owner. Therefore the unauthorized use of a company truck by an employee will not visit liability upon the employer for damages occasioned by the negligent operation of the truck by the employee.

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Where an automobile owner delivers his automobile into the possession of a service station operator for repairs, and the car is driven by a third person while in the service station operator's custody, the owner is not liable under the dangerous instrumentality doctrine for the negligent operation by that third person. This result was obtained in *Petitte v. Welch.* The court's rationale was that the dangerous instrumentality doctrine is based upon the concept of respondeat superior, and when it affirmatively appears that the automobile was not driven by an agent or servant of the owner, the doctrine is not applicable.

### B. The Guest Statute

The significant decisions arising under the Florida guest statute during the period encompassed in this survey involved situations where the guest statute was held to be inapplicable to the plaintiff passenger.

In *Rodriguez v. Gomez,* the plaintiff-appellant brought an action against the driver and against the owner for injuries he sustained when the automobile, in which he was a passenger, was involved in a collision. Depositions and interrogatories indicated that the plaintiff's sole purpose for being in the automobile was to ride to work with the defendant and then return the car to the defendant's home. The record further established that this motivating purpose resulted in a tangible benefit to the defendant. The trial court, in granting summary judgment for the defendant, held that the guest statute was applicable and therefore, absent a showing of gross negligence, the plaintiff could not recover. The appellate court reversed and in doing so held that the guest statute is not applicable where the motivating purpose of the transportation is solely for the benefit of the owner or operator, or where the motivating purpose is beneficial to both the owner or operator and the passenger.

The minor plaintiff passenger in *Nordone v. Richardson* was a student at Miami-Dade Junior College. The plaintiff brought an action for

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8. 167 So.2d 20 (Fla. 3d Dist. 1964), accord, Fry v. Robinson Printers, Inc., 155 So.2d 645 (Fla. 2d Dist. 1963).


Liability to guest or passenger. No person transported by the owner or operator of a motor vehicle as his guest or passenger, without payment for such transportation, shall have a cause of action for damages against such owner or operator for injury, death or loss, in case of accident, unless such accident shall have been caused by the gross negligence or willful and wanton misconduct of the owner or operator of such motor vehicle, and unless such gross negligence or willful and wanton misconduct was the proximate cause of the injury, death or loss for which the action is brought; provided, that the question or issue of negligence, gross negligence, and willful or wanton misconduct, and the question of proximate cause, and the issue or question of assumed risk, shall in all such cases be solely for the jury; provided that nothing in this section shall apply to school children or other students being transported to or from schools or places of learning in this state.

10. 175 So.2d 579 (Fla. 3d Dist. 1965).

11. Accord, Hertz Rental Co. v. Pitts, 174 So.2d 437 (Fla. 1st Dist. 1965) (The sole motivating purpose for the plaintiff's presence in the automobile was to care for the driver's sick wife.).

12. 168 So.2d 550 (Fla. 3d Dist. 1964).
TORTS

damages sustained when the defendant, who was transporting the plaintiff to the plaintiff's home, became involved in a collision. The trial court granted summary judgment for the defendant holding that the plaintiff failed to show gross negligence, and therefore was precluded from recovery by the guest statute. On appeal, the court held that a state supported junior college was a "place of learning" and that the plaintiff, who was taking a course of instruction at that institution, was a "student" within the meaning of the express exception to the application of the statute. The court concluded that the statute was not applicable to the plaintiff and that he would recover on a showing of simple negligence.

In another case, the plaintiff appellant was a student at the University of South Florida. The plaintiff alleged in his complaint that he was a passenger in an automobile driven by the defendant and that the defendant was transporting him from the school to the home of his brother where he was going to spend the weekend. The plaintiff further alleged that he was injured as a result of the defendant's simple negligence. One of the questions submitted to the jury was whether or not the plaintiff came within the guest statute exception. The Third District Court of Appeal, in reversing a jury verdict for the defendant, held, on the basis of Nordone, that it was error to submit the question of the plaintiff's status under the guest statute to the jury. The court stated that the record clearly indicated that the plaintiff was within the exception.

A plaintiff passenger must show gross negligence on the part of the defendant driver so that his claim will not be barred by the guest statute. Ordinarily, the question of gross negligence is for the jury. However, in Webster v. Kemp, the Third District Court of Appeal, in affirming a summary judgment for the defendant, held that the defendant's knowledge of a defect in the automobile and his excessive speed constituted gross negligence. A student, who is being transported from an extracurricular activity—a basketball game—held at a high school, does not fall within the statutory exception. Farrey v. Bettendorf, 96 So.2d 889 (Fla. 1957).

13. Supra note 9. A student, who is being transported from an extracurricular activity—a basketball game—held at a high school, does not fall within the statutory exception.
15. Nordone v. Richardson, 168 So.2d 550 (Fla. 3d Dist. 1964). In this case discussed supra in the text, the court expressly left open the question of whether a plaintiff over twenty-one could come within the guest statute exception. However, in Weiss v. Ballagh, supra note 14, the court made no mention of the limitation, and from the decision it is not certain that the plaintiff student who was afforded the benefit of the statutory exception, was a minor. It could therefore be argued that the Weiss decision answered the question left open in Nordone.
16. Carraway v. Revell, 116 So.2d 16 (Fla. 1959). The court defined gross negligence as: [T]hat course of conduct which a reasonable and prudent man would know would probably and most likely result in injury to persons or property. To put it another way, if the course of conduct is such that the likelihood of injury to other persons or property is known by the actor to be imminent or 'clear and present' that negligence is gross, whereas other negligence would be simple negligence. Id. at 22-23.
18. 156 So.2d 669 (Fla. 3d Dist. 1963).
19. The defect in the automobile was its tendency to "fish tail."
20. The defendant was travelling at a speed of from seventy-five to eighty miles per hour.
tuted simple negligence as a matter of law, and therefore recovery under
the guest statute would be denied. The Supreme Court of Florida granted
certiorari\(^2\) and, in quashing the district court's opinion and remand-
ing for further proceedings, held that where speed and a known defect,
directly related to the occurrence, combine to proximately cause an injury,
the question of whether or not these factors constitute gross negligence
is for the jury.\(^2\)

C. Care Required of Motorists

1. REAR-END COLLISIONS

In *Greyhound Corp. v. Ford*,\(^3\) the defendant-appellant's bus struck
the rear of plaintiff's automobile. At the trial, both parties introduced
evidence on the issue of negligence. The trial court instructed the jury
that the defendant was presumed to be negligent and that it was for
them to determine whether or not this presumption had been explained
away by the facts and circumstances introduced into evidence. On ap-
peal, the court reversed and remanded, holding that such an instruction
was erroneous. The court stated that the rule was:

that a presumption of negligence arises from a rear-end colli-
sion which 1., requires defendant to go forward with the evi-
dence. . . . 2., is a rebuttable presumption . . . and 3., is a naked
presumption which is dissipated upon the introduction of evi-
dence reflecting due care. . . .\(^4\)

However, where a defendant attempts to rebut the presumption of
negligence arising from a rear-end collision, by introducing evidence that
does not go directly to the issue of negligence, it is for the jury to deter-
mine whether or not the presumption has been rebutted. This conclu-
sion was arrived at in *Stark v. Vasquez*\(^2\) where the defendant attempted
to explain away the presumption by stating that she did everything she
could to avoid hitting the automobile in front of her, and just did not
know why her car did not stop.

When the defendant introduces evidence to explain away the pre-
sumption of negligence which arises from a rear-end collision, and, from
the evidence introduced, a jury could properly infer the fact of "no
negligence," then in such a case, the defendant has successfully carried
his burden of explanation and the presumption is dissipated. This rule

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22. If the defect is unknown to the defendant, or if the defect is not related to the oc-
currence, the rule would not apply. Similarly if the known defect does not combine with
speed, the rule is not applicable. The combination of the two factors raises the jury question.
23. 157 So.2d 427 (Fla. 2d Dist. 1963). *Accord*, Baker v. Deeks, 176 So.2d 108 (Fla. 2d
Dist. 1965).
25. 168 So.2d 140 (Fla. 1964), *quashing* 155 So.2d 905 (Fla. 3d Dist. 1963). *Accord*,
TORTS was applied in *Gulle v. Boggs*, where the defendant struck the rear of the plaintiff's automobile which was lawfully stopped at a traffic light. The defendant introduced evidence that his brakes failed to operate thereby rendering the accident unavoidable. The evidence was conflicting as to whether the defendant's brakes were in operating order. The Third District Court of Appeal reversed a judgment entered on a jury verdict for the defendant, and ordered that a verdict be directed for the plaintiff because the defendant's explanation was legally insufficient to rebut the presumption of negligence. The Supreme Court of Florida reversed and remanded, stating:

The presumption provides a prima facie case which shifts to the defendant the burden to go forward with the evidence to contradict or rebut the fact presumed. When the defendant produces evidence which fairly and reasonably tends to show that the real fact is not as presumed, then the impact of 'the presumption is dissipated.' Whether the ultimate fact has been established must then be decided by the jury from all the evidence before it without the aid of the presumption.

2. VIOLATION OF TRAFFIC LAW

A violation of a traffic law is not negligence per se. A statement by the trial court that a violation of a traffic ordinance creates a presumption of negligence is erroneous because a violation of an ordinance is merely prima facie evidence of negligence, which evidence may be overcome by proof of the circumstances surrounding the violation.

In *Michalski v. Peaslee*, the plaintiff-appellant was speeding at the time of the collision. The trial court, in granting summary judgment for the defendant, held that the plaintiff was negligent as a matter of law, and that his negligence proximately contributed to the collision. The appellate court reversed and remanded, holding that where reasonable men could differ, the question of whether or not a violation of a traffic law was a proximate cause of the accident is for the jury to decide.

In *Haislet v. Crowley*, the appellate court was indirectly faced
with the problem of a violation of a statute. In that case the defendant-appellant was the driver of the first stopping automobile. She applied her brakes, thereby activating her brake signal lamps, and came to a complete stop at an intersection which was controlled by a continuous green traffic light. The plaintiff, who was following immediately behind her, screeched to a stop and just missed colliding with the defendant's automobile. A third automobile following immediately behind the plaintiff's was unable to stop, and therefore struck the rear of the plaintiff's automobile and drove it into the rear of the defendant's automobile. Two city ordinances were introduced into evidence and provided in effect that no one shall stop without first giving the driver in the rear an appropriate hand or brake lamp signal. The trial court instructed the jury that a motorist who makes a sudden stop without first ascertaining that such a stop can be made with reasonable safety to other users of the highway, may be found negligent. The jury returned a verdict for the plaintiff. The appellate court reversed and remanded holding that the use of the word "ascertaining" in the instruction, when taken in conjunction with the rest of the instruction, placed a higher duty upon the defendant than the law imposes. The court then proceeded to define the duty owed by the first stopping motorist to those motorists behind him as the duty to give an "appropriate" signal prior to stopping or suddenly decreasing speed. The court further stated that even though the defendant has given a signal, it is for the jury to decide whether or not the signal was "appropriate" in point of time under the circumstances.

Another statutory construction problem confronted the appellate court in *Eichols v. Frey*. In this case, the plaintiff, who was riding a bicycle, made a left turn in front of the defendant's automobile, and the collision resulted. The trial court gave an instruction to the jury on sec-

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34. The appellate court considered that the ordinances involved in the case were substantially identical to the following statutes:

**FLA. STAT. § 317.371(3) (1963).**

No person shall stop or suddenly decrease the speed of a vehicle without first giving an appropriate signal in the manner provided herein to the driver of any vehicle immediately to the rear, when there is opportunity to give such signal.

**FLA. STAT. § 317.381(1) (1963).**

The signals herein required shall be given either by means of the hand and arm or by signal lamp or a signal device.

35. The jury was instructed that:

The law does not allow a motorist to make a sudden stop on a street or highway without first ascertaining whether he can do so without endangering the safety of other users of the highway. The fact that a motorist does make a sudden stop without first ascertaining whether he can do so without endangering the safety of other users of the highway may form the basis of finding of negligence on the part of such driver. Haislet v. Crowley, 170 So.2d 88, 92 (Fla. 2d Dist. 1964).

(Emphasis added.)

36. The law referred to by the court was the two ordinances involved in the case. The ordinances were substantially identical to the statutes quoted supra note 34.

37. 173 So.2d 771 (Fla. 2d Dist. 1965).
tion 317.37 of the Florida Statutes\textsuperscript{38} which provides that all vehicles must give an appropriate signal for the last one hundred feet prior to turning. The appellate court, in reversing a judgment entered on a jury verdict for the defendant, held that a bicycle is not a "vehicle" within the meaning of chapter 317 and that it was therefore error to give the instruction on section 317.37.

D. Defenses

1. CONTRIBUTORY NEGLIGENCE

In \textit{Wynne v. Adside},\textsuperscript{39} the father of an eight-year-old girl obtained a jury verdict in a wrongful death action which occurred when the defendant's tractor-trailer struck and killed the child. The appellate court, in reversing final judgment for the plaintiff-father, held that it was error not to charge the jury that the contributory negligence of the custodian of the deceased child is imputed to the father.\textsuperscript{40}

In a case of first impression\textsuperscript{41} involving an issue of imputed negligence, the plaintiff-appellee brought a wrongful death action based upon a collision between the defendant's train and a truck in which her deceased husband was a passenger. The decedent was the company supervisor of the driver of the truck. The trial court instructed the jury, in effect, that the negligence of the driver is not imputed to the passenger, and therefore even if the driver had been negligent, the plaintiff would still be entitled to recover.\textsuperscript{42} On appeal, the issue in the case was whether the relationship of employee supervisor-passenger to employee-driver was such as to impute the negligence of the driver to the passenger.\textsuperscript{43}

\begin{footnotesize}
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\item 38. FLA. STAT. § 317.37 (1961) is identical to FLA. STAT. § 317.371 (1963) which provides: (2) A signal of intention to turn right or left shall be given continuously during not less than the last one hundred feet traveled by the vehicle before turning.
\item 39. 163 So.2d 760 (Fla. 1st Dist. 1964).
\item 40. In Klepper v. Breslin, 83 So.2d 587 (Fla. 1955), the court concluded that: Where a father institutes an action for the wrongful death of a minor child it is proper, if the facts so justify, as in the case before us, to assert against the father the defense of contributory negligence grounded upon the negligent acts or failure to act of the wife and mother of which the father has knowledge or should have had knowledge. \textit{Id.} at 593.
\item 41. Georgia So. & Fla. Ry. v. Shiver, 172 So.2d 639 (Fla. 1st Dist. 1965).
\item 42. The instruction which was approved by the appellate court is set out in the text of the opinion at 172 So.2d 639, 640 (Fla. 1st Dist. 1965).
\item 43. After a review of Florida decisions involving imputed negligence, the court stated that the general rule was that the negligence of the driver will not be imputed to the passenger. However, the court went on to note that this rule is subject to exceptions: The exceptions occur when the passenger has authority or control over the driver of the vehicle 1. by imposing his will on the driver to see that the vehicle is properly driven, 2. where such authority or control exists by virtue of the relationship of agency or joint enterprise between the driver and passenger, or 3. where the passenger-guest knows or should know that the driver is not exercising that degree of care essential to the passenger's safety so that the law imposes a duty upon the passenger to warn, protest, or take other action suitable to the circumstances of the case, and the passenger fails in this duty although he has sufficient time and opportunity to give the warning or to protest prior to the accident and realizes that intervention is necessary for his own safety. Georgia So. & Fla. Ry. v. Shiver, 172 So.2d 639, 641 (Fla. 1st Dist. 1965).
\end{itemize}
\end{footnotesize}
The court, in affirming judgment for the plaintiff, resolved the issue by stating that servants of different grades or degrees of authority are fellow servants, and that the negligence of a servant-driver will not be imputed to a fellow servant-passenger. 

Raydel, Ltd. v. Medcalfe involved two issues, one as to the applicability of the guest statute, the other, imputed negligence. The plaintiff-appellee and her husband were domestic servants. They bargained for, and received as a part of their compensation, the use of their employer's automobile. The plaintiff, who could not drive, was injured while a passenger in the automobile which was negligently driven by her husband. Plaintiff recovered a 90,000 dollar jury verdict against her employer as owner of the automobile. The appellate court affirmed the judgment for plaintiff, holding that the guest statute was properly held to be inapplicable by the trial court, and that the negligence of the husband driver was not imputable to the wife passenger.

2. LAST CLEAR CHANCE

The doctrine of last clear chance is not available to relieve a party of liability for his own negligence unless both the plaintiff and the defendant have been guilty of successive acts of negligence. Nor, is the doctrine available where the plaintiff fails to prove that the defendant had the last opportunity to avoid the injury. This latter conclusion was arrived

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46. 162 So.2d 910 (Fla. 3d Dist. 1964).
47. Accord, the court stated the issue of imputed negligence to be: "Whether the wife as joint entrustee is barred in an action against the owner because the driver is one who drives with her consent," Raydel, Ltd. v. Medcalfe, 162 So.2d 910, 913 (Fla. 3d Dist. 1964).
48. The doctrine of last clear chance was formulated early at the common law in mitigation of the harsh rule that contributory negligence is a complete bar to recovery. Davies v. Mann, 10 M. & W. 546, 152 Eng. Rep. 588 (Ex. 1842). For an informative article, see Last Clear Chance Doctrine in Florida, 17 U. Miami L. Rev. 582 (1963).

The elements that must be present before the last clear chance doctrine may be invoked in Florida are as follows:

1) The injured party must have come into a position of peril;
2) The injuring party must know, or through the exercise of ordinary care should have known that the injured party was in a position of peril and;
3) The injuring party must know or through the exercise of ordinary care should have known that the injured party who was in a position of peril could not through the exercise of reasonable care extract himself from his position or that the injured party would not avail himself of the opportunities open to him to do so;
4) The injuring party must then have the opportunity through the exercise of reasonable care to avoid the injury and;
5) The injuring party must fail to exercise that reasonable care necessary to avoid the injury.

The above elements were concisely stated in James v. Keene, 133 So.2d 297 (Fla. 1961). Ordinarily the doctrine is invoked by a plaintiff who was contributorily negligent, but in Florida it appears to be equally available to the defendant. Miami Beach Ry. v. Dohme, 131 Fla. 171, 179 So. 166 (1938); Kenegson v. Gerard, 164 So.2d 204 (Fla. 1964) (dictum).
at in *Wilde v. Kelly*,50 where the plaintiff-appellant was contributorily negligent in walking through two lanes of stopped traffic, into a third lane of moving traffic and within forty-five feet of the defendant’s lawfully moving automobile.

In *Purdue v. Vogelsang*,51 the plaintiff-appellant was struck by the defendant’s automobile when she was just “a step or two” across a forty feet wide two-way traffic street. The plaintiff did not see the defendant’s automobile until it struck her. The defendant testified that he did not see the plaintiff until she was “a step or two” into the lane in which he was driving, and that at this time he was from sixty to seventy feet away from her. The defendant testified further, that he applied his brakes and skidded straight into the plaintiff. An eye witness testified that he first saw the plaintiff starting across the street when the defendant was from eighty to one hundred and thirty feet from the plaintiff. The appellate court, in reversing a final judgment entered on a directed verdict for the defendant, held that the last clear chance doctrine was applicable. The court stated that when the defendant first saw the plaintiff, she was in a position of peril, at that point the defendant knew or should have known that the plaintiff would not or could not escape from it, and therefore the defendant failed to avail himself of the last opportunity to avoid the accident, *i.e.*, by turning to the left or to the right.

In *Connolly v. Steakley*,52 the plaintiff-appellant was a seventy-eight-year-old woman. After looking in both directions, she started across the street, but did not thereafter look in either direction. The defendant first saw the plaintiff when she was from five to seven feet from the edge of the street which was thirty feet wide. After turning to the left and applying his brakes, the defendant struck the plaintiff near the center of the street. On appeal, a judgment for the defendant was affirmed. The appellate court rejected the plaintiff’s argument that an instruction on last clear chance would have been proper. The court reasoned that the doctrine was not available to the plaintiff because she was not in a position of peril when the defendant saw her.53

The appellate court in *Kravitz v. Morse Auto Rentals, Inc.*,54 held that it was reversible error for a trial judge to refuse to give an instruction on last clear chance where it is reasonable to infer from the facts that the defendant “should have seen” the plaintiff’s perilous position in time to avoid the injury.

50. 160 So.2d 713 (Fla. 3d Dist. 1964); accord, Nackman v. Miessen, 168 So.2d 711 (Fla. 3d Dist. 1964).
51. 166 So.2d 902 (Fla. 2d Dist. 1964).
52. 165 So.2d 784 (Fla. 2d Dist. 1964).
53. Compare Purdue v. Vogelsang, 166 So.2d 902 (Fla. 2d Dist. 1964), with Connolly v. Steakley, 165 So.2d 784 (Fla. 2d Dist. 1964).
54. 166 So.2d 619 (Fla. 3d Dist. 1964).
3. OTHER DEFENSES

The Supreme Court of Florida,55 in quashing an opinion by the Second District Court of Appeal,56 held that where there is evidence from which it can be inferred that the defendant did not see the minor child which he struck until the child ran into the road in front of his truck, the defendant is entitled to an instruction on the "sudden emergency doctrine." It is then for the jury to determine whether or not the defendant had been negligent.57

A sudden unforeseeable loss of consciousness while driving an automobile is a complete defense to an action by an injured plaintiff.58 However, in Goodis v. Finkelstein,59 where the defendant-driver had knowledge of the prior condition and that it would probably and most likely result in injury to others if she drove, the appellate court properly held that the defense of loss of consciousness was not available and therefore affirmed a jury verdict for the plaintiff passenger.

A novel question of pleading the defense of sudden unforeseeable loss of consciousness arose in Tropical Exterminators, Inc. v. Murray.60 The defendant-appellant in his answer generally denied negligence. However, in a deposition the defendant indicated that he suffered a sudden loss of consciousness. The trial court entered summary judgment for the plaintiff on the issue of liability. The defendant contended on appeal that sudden unforeseeable loss of consciousness is not one of the affirmative defenses that must be specifically pleaded,61 and could therefore sufficiently be put in issue by a general denial. The majority of the Second District Court of Appeal agreed with the defendant's position and therefore reversed and remanded the case. However, Associate Judge Driver, in his dissenting opinion,62 pointed out that the defense of sudden

56. Fowler v. Midstate Hauling Co., 162 So.2d 278 (Fla. 2d Dist. 1964), cert. granted, 176 So.2d 87 (Fla. 1965).
57. A correct statement of the sudden emergency doctrine may be found in the following jury instruction:
Where the operator of a motor vehicle by a sudden emergency not due to his own negligence, is placed in a position of imminent danger and has insufficient time to determine with certainty the best course to pursue, he is not held to the same accuracy of judgment as is required under ordinary circumstances, and if he pursues a course of action to avoid an accident such as a person of ordinary prudence placed in a like position might choose, he is not guilty of negligence even though he did not adopt the wisest choice. Midstate Hauling Co. v. Fowler, 176 So.2d 87, 88 (Fla. 1965) (approved by implication).
58. Baker v. Hausman, 68 So.2d 572 (Fla. 1953); Malcom v. Patrick, 147 So.2d 188 (Fla. 2d Dist. 1962) (An excellent review of prior Florida decisions dealing with loss of consciousness.).
59. 174 So.2d 600 (Fla. 3d Dist. 1965).
60. 171 So.2d 432 (Fla. 2d Dist. 1965).
61. Fla. R. Civ. P. 1.8(d) provides that certain enumerated defenses must be specifically pleaded. Sudden loss of consciousness is not one of the enumerated defenses.
62. Tropical Exterminators, Inc. v. Murray, 171 So.2d 432, 434 (Fla. 2d Dist. 1965) (dissenting opinion).
unforeseeable loss of consciousness goes beyond a general denial and in fact constitutes a matter of avoidance on the issue of negligence and must be specifically pleaded.

A defendant may be negligent, but unless his negligence is the proximate cause of the plaintiff's injury, he will not be liable. In *City of St. Petersburg v. Shannon*, a case of first impression, the appellate court was confronted with a unique factual situation which presented an issue of proximate cause. In that case the plaintiff-appellant, who was driving a police car, was injured when he lost control of his vehicle after it struck a curb during a high speed pursuit of the defendant, a traffic law violator. The trial court dismissed the plaintiff's amended complaint holding that the defendant's conduct was not the proximate cause of the plaintiff's injuries and that the striking of the curb by the police vehicle was an intervening efficient cause. The Second District Court of Appeal was of the opinion that the issue was whether a defendant who has violated various traffic laws and seeks to avoid arrest is liable for injuries sustained by the pursuing police officer and for property damage suffered by the city when the police car is wrecked during the high speed chase. The court held that the issue must be answered in the affirmative and therefore the plaintiff's complaint should not have been dismissed.

Another case involving proximate cause was *Ellingson v. Willis*. In that case, the defendant negligently collided with the plaintiff's automobile. As a result of the collision, the two automobiles blocked the highway. The plaintiff's wife and child had debarked from the car, and were on their way off the highway, when they were struck by a third car. On appeal, the defendant-appellant argued that the negligence of the driver of the third car was an intervening, independent cause of the deaths of the plaintiff's wife and minor child. In other words, the defendant argued that his negligence was not the proximate cause. The court, in affirming a judgment for the plaintiff, rejected the defendant's contentions, and held that a jury could have lawfully concluded that the defendant's negligence was one, if not the sole proximate cause, of the second collision and the deaths.

In *Atlantic Coast Line R.R. v. Ponds*, the defendant-appellant argued that its negligence in failing to sound a warning at a rail crossing was not the proximate cause of the death of the plaintiff's husband. The decedent had been a passenger in a truck. The driver of the truck saw

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63. Cone v. Inter County Tel & Tel Co., 40 So.2d 148 (1949).
65. 170 So.2d 311 (Fla. 1st Dist. 1964). This case is illustrative of the rule that the chain of causation between the defendant's negligent conduct and the plaintiff's injury is not broken by an intervening act of a third person where the intervening act or cause is foreseeable.
66. 156 So.2d 781 (Fla. 2d Dist. 1963).
the train approaching in time to have stopped, but instead he negligently misjudged the efficiency of his brakes and struck the train. The appellate court held that the trial court erred in not granting the defendant's motion for a directed verdict because, absent proof that the negligence of the truck driver was foreseeable, the defendant could not be charged with foresight. The court concluded that, because the negligence of the truck driver was not reasonably foreseeable, it constituted an intervening independent efficient cause and was therefore the sole proximate cause of the collision.

In Reed v. Black Caesar's Forge Gourmet Restaurant, Inc., the plaintiff-appellant brought an action for the wrongful death of her husband. In her complaint, she alleged that her deceased husband drove to the defendant's restaurant, turned the keys to his automobile over to the defendant's servant, and then became obviously intoxicated. It was further alleged that the defendant, by returning the automobile keys to the obviously intoxicated decedent, breached a duty; namely, the duty to refuse to return an automobile to an intoxicated customer. A further allegation was, that as a result of the breach of this duty, the deceased drove his automobile into Biscayne Bay and was drowned. A second count in the complaint alleged that the defendant, as an inducement to his customers, undertook the service of transporting intoxicated patrons to their homes. The plaintiff alleged that the undertaking gave rise to a duty to use reasonable care in transporting intoxicated patrons to their homes, and that the defendant breached this duty. A third count contained allegations to the effect that the defendant, by his act of returning the deceased's car keys, aided and abetted the deceased in violating two Florida Statutes which prohibit driving while intoxicated, and therefore the defendant's conduct was negligence per se. The Third District Court of Appeal, in affirming the dismissal of the complaint for failure to state a cause of action, took the position in respect to the first count that the defendant's act of returning the car keys was not the proximate cause of the deceased's death

because the death of the plaintiff's husband was the result of his own negligence or his own voluntary act of rendering himself incapable of driving a car rather than the remote act of the defendant in dispensing the liquor, or delivering the ignition keys and possession of the automobile.

67. 165 So.2d 787 (Fla. 3d Dist. 1964).
The court held that the second count failed to state a cause of action because the plaintiff failed to allege that the decedent relied upon the defendant's undertaking. The third count was declared by the court to be fatal because assuming, arguendo, the validity of appellant's contention, still no right of action would arise in this case since the plaintiff would be barred as a matter of law by the same negligence that is sought to be imputed to the defendant. 71

II. STATUTORY LIABILITY

A. Statutes Affecting the Right to Maintain an Action

The Florida statutes 72 providing for a cause of action in the case of a wrongful death set the stage for three recent appellate court decisions.

In Guarniere v. Henderson, 78 the First District Court of Appeal was requested to answer the following certified question: Whether the father of a twenty-year-old girl, who had been married for sixteen months prior to her death, could maintain an action under section 768.03 of the Florida Statutes for his daughter's wrongful death in an automobile collision. The court answered the question in the negative, holding that the marriage of the minor daughter changed her status for the purposes of section 768.03 to that of an "adult." Therefore her father could not maintain an action for her wrongful death.

The plaintiff-appellee in Young v. Garcia 74 instituted a suit for damages under section 768.02 of the Florida Statutes. The plaintiff and the decedent had lived together as man and wife in Puerto Rico. They were never ceremonially married, although they did intend to marry eventually. The plaintiff's domicile was in Puerto Rico, and she and the decedent never lived together in Florida. She alleged, in the alternative, three theories in support of her standing under the statute to maintain the wrongful death action: 1) that she was the widow of the decedent; 2) that she was bringing the action for the children of the deceased; and 3) that she and the children were bringing the action as dependents of the decedent. The trial court held as a matter of law that the plaintiff had standing. The appellate court, in reversing and remanding, stated

72. FLA. STAT. § 768.01 (1963) defines the right of action in wrongful death cases.
73. 171 So.2d 617 (Fla. 1st Dist. 1965).
74. 172 So.2d 243 (Fla. 3d Dist. 1965) (a case of first impression).
that ordinarily the law to be applied in wrongful death actions is the law of the place where the wrongful death occurred. However, the court noted that there was a split of authority on the question of what law should be applied to determine whether a plaintiff has standing to maintain a wrongful death action. The court avoided aligning itself on either side of this question by holding that under either choice of law, the plaintiff was not the widow of the decedent. The court reasoned that the plaintiff could not be considered the widow of the decedent under Puerto Rican law because Puerto Rico does not recognize common law marriages. Turning to Florida law, the court reasoned that the plaintiff could not be the widow, because assuming arguendo that the plaintiff and the decedent did live together in Florida there could be no common law marriage because the plaintiff and the decedent intended to marry at some future date. The only question that remained for the court was whether the children of the decedent could maintain the wrongful death action. On this issue, the court held that the "children" named in the statute were intended by the legislature to be the legitimate children of the decedent, and therefore directed that on remand, the trial court should decide on the children's right to maintain the suit by determining their legitimacy by application of the law of the father's domicile, which was Puerto Rico.

In another case, the plaintiff and his wife were driving in their station wagon when the defendant-appellant's automobile collided with them. The plaintiff's wife died as a direct result of the collision. The plaintiff instituted an action for her wrongful death under sections 768.01 and 768.02 of the Florida Statutes, seeking to recover damages for loss of his wife's services, for loss of her society, affection and consortium, and also for funeral expenses. The plaintiff had judgment in that suit. The plaintiff then instituted the present suit, in common law negligence, seeking to recover damages that he personally sustained and also damages for injury to his automobile. After a judgment for the plaintiff in this second suit, the defendant argued on appeal that the plaintiff's cause of action arose from the same tortious act that was the subject of the prior suit, and therefore, that the plaintiff had unlawfully split his cause of action by not claiming all his damages in the first suit brought under the wrongful death act. The appellate court rejected this argument, and in affirming judgment for the plaintiff, held that the plaintiff had two causes of action arising out of the same tortious act—one statutory and one common law—and failure to join them did not constitute splitting of a cause of action.

75. Bowie v. Reynolds, 161 So.2d 882 (Fla. 1st Dist. 1964).
76. It is interesting to note in regard to compensation for funeral expenses that in Doby v. Griffin, 171 So.2d 404 (Fla. 2d Dist. 1965), the court held that funeral and burial expenses may not be recovered in an action brought under the survival statute—Fla. Stat. § 45.11 (1963).
The plaintiff-appellant in *Josephson v. Sweet* was injured by the defendant’s dog. The injury was inflicted “other than by biting.” The trial court granted summary judgment for the defendant, and in so doing, held that since section 767.04 of the Florida Statutes superseded and repealed section 767.01, the plaintiff was therefore relegated to the common law where he could not recover because he failed to allege that the defendant owner had knowledge of the dog’s vicious propensities. The Third District Court of Appeal, in reversing and remanding, held that the trial court erred in requiring that the plaintiff allege that the owner had prior knowledge of the dog’s vicious nature. The court reasoned that section 767.04 only superseded section 767.01 in dog bite cases. The court concluded that since this was not a dog bite case, section 767.01 would therefore be applicable and the defendant would therefore be liable irrespective of his knowledge of the dog’s vicious propensities. The Supreme Court of Florida affirmed the appellate court’s decision and candidly stated that they were receding from the obiter dictum which had served as the basis of the trial court’s decision.

The mere presence of the plaintiff in the dog owner’s home as a guest does not amount to an assumption of the risk of an injury “other than by biting” under section 767.01 of the Florida Statutes, unless the plaintiff has reason to believe, based upon the dog’s prior actions, that her continued presence would probably result in injury from the dog.

**B. Federal Employer’s Liability Act**

Aside from two cases dealing with the degree of proof and the degree of negligence necessary to maintain an action under the Federal Employer’s Liability Act, the only other case worthy of mention is *Florida East Coast Ry. v. Hardee*. In that case the plaintiff-appellee was in—

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1966] **TORTS** 835

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77. 173 So.2d 463 (Fla. 3d Dist.), aff'd, 173 So.2d 444 (Fla. 1965).
78. Section 767.01 of the Florida Statutes was enacted in 1901 and imposed liability on dog owners for "any damage done by their dogs" to certain animals, "or to persons." In 1959 the legislature enacted section 767.04 which imposed liability on dog owners for damages resulting from bites. In 1951 the Florida Supreme Court decided Romfh v. Berman, 56 So.2d 127 (Fla. 1951), and enunciated therein obiter dictum to the effect that the subsequent enactment of section 767.04 repealed and superseded section 767.01.
79. Fla. Stat. §§ 767.01, 767.04 (1963) have abrogated the common law to the extent that recovery can be had under either section irrespective of the owner's knowledge of the dog's vicious propensities.
80. Sweet v. Josephson, 173 So.2d 444 (Fla. 1965).
81. The obiter dictum referred to by the court was announced in Romfh v. Berman, 56 So.2d 127, 128 (Fla. 1951) (dictum). See note 78 supra.
82. Sweet v. Josephson, supra note 80, at 446.
83. Knapp v. Ball, 175 So.2d 808 (Fla. 3d Dist. 1965).
84. Southern Ry. v. Wood, 175 So.2d 812 (Fla. 1st Dist. 1965) (substantially less than in other actions).
85. Seaboard Air Line R.R. v. Cain, 175 So.2d 561 (Fla. 3d Dist. 1965) (the degree is small).
86. 162 So.2d 704 (Fla. 3d Dist. 1964).
jured when he alighted from a moving train onto a right-of-way which was in a hazardous condition. On appeal from a final judgment entered pursuant to a jury verdict for the plaintiff, the defendant raised two points. The defendant-appellant's first contention was that it was error to instruct the jury that violation by the railroad of a safety rule or regulation of the Florida Railroad & Public Utilities Commission was prima facie evidence of negligence. The defendant's second contention was that it was error to refuse to admit the Smith-Griffin Railroad Employee's Work Life Expectancy tables into evidence. The appellate court, in reversing and remanding, held that the safety rule was properly admitted into evidence, but the instruction to the jury that "violation of this rule constituted prima facie evidence of negligence on the part of the railroad was error." As to the second point, the court held that the "tables" should be admitted into evidence where the injury was of a permanent nature.

C. Railroad Operation

A catastrophic, but not unwarranted blow, befell the Florida comparative negligence statute in Georgia So. & Fla. Ry. v. Seven-Up Bottling Co. In that case, the defendant-appellant railway successfully contended on direct appeal to the Supreme Court of Florida that "times have changed; that a statute which is valid when enacted may become invalid by changes in the conditions to which it applies." The court took judicial notice of the fact that railroads must compete with motorized transportation and concluded that it would be unfair to continue to adhere to the former rationale that railroads could absorb the financial burden imposed by the statute into their rate structure. The court, therefore, agreed with the defendant and held that the statute,

although perhaps valid when enacted, has now become a discriminatory and burdensome exercise of the police power because of changed conditions; and that it is, therefore, invalid under the due process and equal protection clauses of the federal constitution and Section 12, Declaration of Rights, Florida Constitution. ... 91

III. COMMON LAW NEGLIGENCE ACTIONS

A. Landlord and Tenant

There were only three landlord and tenant cases of any significance decided during the period surveyed. In the first case a jury could have

87. Florida East Coast Ry. v. Hardee, 162 So.2d 704, 704 (Fla. 3d Dist., 1964).
88. FLA. STAT. § 768.06 (1963).
89. 175 So.2d 39 (Fla. 1965).
91. Id. at 42.
lawfully concluded that the defendant-landlord was liable to his tenant for a conversion of the tenant's chattels, after the landlord removed the chattels from a shed on the leased premises and stored them in his warehouse while he proceeded to tear down the shed.92

In *Ardell v. Milner,* a dentist sought to recover damages for an unlawful eviction by his landlord. One of the items claimed was damage for loss of patients. The appellate court held that this was a proper element of damages to be considered by the jury in an action against the landlord.

A question of a landlord's liability for the negligence of his independent contractor arose in *Ross v. Heitner.*94 The tenant's complaint alleged that the landlord's independent contractor, an exterminating company, was negligent in using certain chemicals and as a result an inherently dangerous condition was created. The complaint further alleged that the landlord's failure to warn the plaintiff of the dangerous condition was the proximate cause of his injuries. The appellate court held that the complaint should not have been dismissed because the allegations brought the case within the rule that "a landlord's duty is non-delegable as to inherently dangerous work of an employed independent contractor."95

**B. Doctor-Patient**

In *Le Jeune Rd. Hosp., Inc. v. Watson,* a mother took her eleven-year-old son to the defendant-appellant's hospital, upon the advice of her doctor, to have the boy's appendix removed. The hospital undressed him, examined him, and gave him medication. After about two hours, because the mother was unable to pay two hundred dollars in cash, the boy was required to leave the hospital. In an action for wrongful discharge, the boy recovered compensatory damages, and the mother was awarded punitive damages.97 The appellate court, in this first impression case, held that a private hospital must respond for any damages suffered by a patient who has been wrongfully discharged. The court noted that the general rule is that a private hospital is under no duty to admit patients, and may refuse admission for any reason, or for no reason at all. However, the court found this rule to be inapplicable on the facts of

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92. S.S. Jacobs Co. v. Weyrick, 164 So.2d 246 (Fla. 1st Dist. 1964).
93. 166 So.2d 714 (Fla. 3d Dist. 1964).
94. 156 So.2d 869 (Fla. 3d Dist. 1963).
95. Ross v. Heitner, 156 So.2d 869, 870 (Fla. 3d Dist. 1963). The general rule is that the person employing the independent contractor is not liable to third persons injured by the independent contractor's negligence.
96. 171 So.2d 202 (Fla. 3d Dist. 1965); Note, 19 U. MIAMI L. REV. 652 (1965).
97. The boy was awarded $5,000 compensatory damages by the jury and his mother was awarded $10,000 punitive damages. The appellate court affirmed the award of compensatory damages, but reversed a judgment for the mother entered for punitive damages because the jury did not first award compensatory damages to the mother. Therefore an award of punitive damages to the mother was improper.
the instant case because "the hospital employees conducted themselves in such manner as to leave no doubt that the boy was not only physically admitted, but legally admitted to the hospital." On the issue of when an "admission" occurs, the court stated that the "question of what acts constitute an admission to a hospital vary with the circumstances . . . but failure to fill out admission forms "cannot be the criterion for determining admission." In concluding that there had been an admission, the court took cognizance of the fact that "the hospital had initiated care and treatment of this patient and had taken further steps than those necessary to determine whether or not they were going to admit him."

The plaintiff-appellant in *Trotter v. Hewett* brought a negligence action against a dentist to recover damages for a broken jaw bone resulting from the dentist's attempted removal of an impacted wisdom tooth. An affidavit by another dentist stated that the x-rays taken by the defendant were inadequate for a reasonably prudent dentist about to undertake the extraction. The trial court entered summary judgment for the dentist. On appeal, the court reversed, and held that it was for the jury to determine whether or not the failure to take proper x-rays was negligence, and whether or not such negligence was the proximate cause of the injury. The court did note, however, that the broken jaw bone, the injurious result, was not sufficient to raise an inference of negligence, nor was it sufficient to invoke the doctrine of res ipsa loquitur.

An issue of informed consent was raised and resolved in *Bowers v. Talmage*. In that case, the parents of a nine-year-old boy brought a malpractice suit against a doctor who recommended that the boy undergo a dangerous exploratory surgical operation. The doctor suggested the operation because there was some doubt as to whether the child's condition was organic or emotional. As a result of the operation, which was performed by a surgeon, the boy was partially paralyzed. The appellate court reversed a judgment entered on a directed verdict for the defendant doctor, and remanded the case for trial, holding that there was an issue of fact which should have been submitted to the jury; namely, whether the doctor obtained the informed consent of the parents. The court stated the rule that unless the person consenting to the operation is made to know the dangers or degree of danger attendant upon the operation, his

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99. Ibid.
100. Ibid.
101. Ibid.
102. 163 So.2d 510 (Fla. 3d Dist. 1964).
103. 159 So.2d 888 (Fla. 3d Dist. 1964).
104. The appellate court noted that in three per cent of the cases in which the operation—an arteriogram—is performed, death or paralysis is known to result.
105. The court stated that the surgeon, who performed the operation, was entitled to proceed on the basis that informed consent was obtained by the defendant doctor.
“consent” is ineffectual. The court defined the duty of the physician as the duty to adequately inform the person whose consent must be sought and obtained of the dangers to be anticipated as a result of the operation.\textsuperscript{108}

In another case,\textsuperscript{107} the appellate court affirmed judgments entered on jury verdicts in favor of a husband and wife in an action against an orthopedic surgeon for negligence and trespass founded upon the surgeon’s failure to obtain informed consent. The husband and wife then brought a second action, this time, against the internist who had been engaged by them to take charge of the case. However, judgment in that action was entered in favor of the defendant internist. On appeal,\textsuperscript{108} the issue was whether Dr. Harris, the internist, was also to be held liable, with the orthopedic surgeon, for failure to obtain informed consent.\textsuperscript{109} The court affirmed the judgment entered in favor of the internist, and in so doing resolved the issue thusly:

The fact that Dr. Harris was asked to “take charge” did not make him responsible for the selection of the surgical processes used by the orthopedic surgeon, as the facts show the determination and selection of those were made by the surgeon. The authorities relied on by appellants as to the necessity for consent and informed consent to an operation are not applicable as to Dr. Harris, who did not choose and advise the surgical processes to be used by the orthopedic surgeon.\textsuperscript{110}

C. Manufacturers and Suppliers

Products liability law is a relatively young, but rapidly expanding, area of tort law. This is especially true in Florida. However, the courts, in their apparent haste to augment the expansion, have created a state of confusion. It may be many years before one will be able to sit down and disentangle these multifarious decisions which are best characterized by their irreconcilability. Therefore, the cases in this section will be given a slightly extended treatment in the hope that this survey will not add impetus to the disconformity.

At the outset, it should be pointed out that Florida has adopted the Uniform Commercial Code. The Code which contains several sections dealing exclusively with warranties\textsuperscript{111} will become effective on January 1, 1966.

\begin{itemize}
\item \textsuperscript{106} For a fuller discussion of this case and its significance to Florida law, see Note, 18 U. MIAMI L. REV. 967 (1964).
\item \textsuperscript{107} Russell v. Harwick, 166 So.2d 904 (Fla. 3d Dist. 1964).
\item \textsuperscript{108} Harwick v. Harris, 166 So.2d 912 (Fla. 3d Dist. 1964).
\item \textsuperscript{109} Compare Bowers v. Talmage, 159 So.2d 888 (Fla. 3d Dist. 1963) (doctor “in charge” liable—surgone not liable) \textit{with} Russell v. Harwick, 166 So.2d 904 (Fla. 3d Dist. 1964) (surgeon liable) \textit{and} Harwick v. Harris, 166 So.2d 912 (Fla. 3d Dist. 1964) (doctor “in charge” not liable).
\item \textsuperscript{110} Harwick v. Harris, \textit{supra} note 108, at 913.
\item \textsuperscript{111} FLA. STAT. §§ 672.2-313—672.2-318 (1965).
\end{itemize}
1967. Unfortunately, further discussion of the Code at this time, aside from being premature, is impractical because of the nature and scope of this article. However, attention will be drawn to sections of the Code which parallel the surveyed cases.

In Wagner v. Mars, Inc.,\textsuperscript{112} the plaintiff-purchaser sought to recover damages from the manufacturer for an alleged breach of an implied warranty of fitness for use. The complaint alleged that the plaintiff purchased a candy bar manufactured by the defendant and completely sealed in a paper wrapper. It was further alleged that concealed within the candy bar were several steel pins, one of which pierced the plaintiff's tongue when she bit into it. The trial court dismissed the complaint and held that an implied warranty of fitness for use does not extend to food-stuffs packaged solely in a paper wrapper. The Second District Court of Appeal, in reversing and remanding, held that there is an implied warranty that food items in their original container are fit for the use or purpose for which they were offered for sale and sold, and that one who is injured by foreign substances contained therein which were unknown to him may maintain an action against the retailer or the manufacturer for breach of this implied warranty. This implied warranty was held by the court to apply to candy bars in sealed paper wrappers.

The plaintiff-appellant in Renninger v. Foremost Dairies, Inc.,\textsuperscript{113} was injured when a one gallon glass bottle of milk she had lifted from a supermarket dairy counter fell apart and landed on her foot. She brought an action against the defendant-dairy based upon a breach of an implied warranty. She alleged that the bottle was not reasonably fit for the use intended. A jury returned a verdict for the plaintiff, but the trial court entered an order granting a new trial to the dairy. On appeal, the defendant-dairy argued that its liability as supplier of the bottle was terminated once the bottle was delivered to the store, since the defect in the bottle could have been caused by a store employee's or by a customer's handling of it. The appellate court, in reversing the order granting the new trial, stated that an implied warranty of fitness for the use intended extends to milk bottles and that a defendant may not avail itself of the theory that a store employee or another customer, by moving the bottles, caused the defect because to accept this theory would be to accept the proposition that a supplier may use a package so fragile that anticipated use is likely to create a dangerous condition.\textsuperscript{114}

The question in the first Green v. American Tobacco Co.\textsuperscript{115} case

\textsuperscript{112} 166 So.2d 673 (Fla. 2d Dist. 1964).
\textsuperscript{113} 171 So.2d 602 (Fla. 3d Dist. 1965).
\textsuperscript{114} Renninger v. Foremost Dairies, Inc., 171 So.2d 602, 604 (Fla. 3d Dist. 1965).
\textsuperscript{115} 304 F.2d 70, modified on rehearing 304 F.2d 85 (5th Cir. 1962), rev'd, 325 F.2d 673 (5th Cir. 1963).
involved the accuracy of certain jury instructions. In that case the plaintiff’s decedent, Edwin Green, had started smoking Lucky Strike cigarettes in 1924 or 1925. He smoked from one to three packs of cigarettes per day. His doctor informed him in 1956 that he had contracted lung cancer. In 1958, Green died. The plaintiffs’ case, in which they sought to recover damages incurred as a result of Green’s smoking the defendant’s cigarettes, went to the jury on two theories, negligence and breach of implied warranty. The trial court instructed the jury in part that the cigarette manufacturer’s implied warranty of fitness for human consumption does not extend to harmful substances of which the manufacturer was unaware, and of which, by the exercise of human skill and foresight, he could not have become aware. The jury returned a general verdict for the defendant and answers to four interrogatories. The answers to three of the interrogatories were to the effect that Green had contracted lung cancer by smoking the defendant’s cigarettes, and that the lung cancer was the cause of his death. By their “no” answer to the fourth interrogatory, the jury determined that the defendant could not have known, by a reasonable application of human foresight, that a smoker, such as decedent Green, would contract lung cancer from smoking Lucky Strike cigarettes. On appeal, the Fifth Circuit Court of Appeal, after an extensive review of Florida implied warranty decisions, affirmed the judgment for the defendant and rejected the plaintiff’s contention that the knowledge of the defect was immaterial because the manufacturer was strictly liable for a breach of an implied warranty.

The Fifth Circuit Court of Appeal did, however, grant the petition for rehearing by certifying the question to the Florida Supreme Court.\textsuperscript{116} The Supreme Court of Florida,\textsuperscript{117} answering the question\textsuperscript{118} in the affirmative, held that “a manufacturer’s or seller’s actual knowledge or opportunity for knowledge is wholly irrelevant to his liability on the theory of implied warranty....”\textsuperscript{119}

Upon receipt of the affirmative answer to the certified question, the Fifth Circuit Court of Appeal, in the second \textit{Green v. American Tobacco Co.}\textsuperscript{120} case, reversed and remanded the case for a new trial on the ground that the trial court erred in instructing the jury that a cigarette manufac-

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\textsuperscript{116} Green v. American Tobacco Co., 304 F.2d 85 (5th Cir. 1962).
\textsuperscript{118} The certified question was as follows: Does the law of Florida impose on a manufacturer and distributor of cigarettes absolute liability, as for breach of implied warranty, for death caused by using such cigarettes, when the defendant manufacturer and distributor could not, by the reasonable application of human skill and foresight, have known that users of such cigarettes would be endangered, by the inhalation of the main stream smoke from such cigarettes, of contracting cancer of the lung? \textit{Id.} at 170.
\textsuperscript{119} Green v. American Tobacco Co., 154 So.2d 169, 170 (Fla. 1963).
\textsuperscript{120} Green v. American Tobacco Co., 325 F.2d 673 (5th Cir. 1963).
turer's implied warranty of fitness for human consumption was dependent upon his knowledge of the harmful substance. 121

In *King v. Douglas Aircraft Co.*,122 the wives of four passengers on a Braniff Airline’s plane brought a wrongful death action against the manufacturer of the airplane and against the manufacturer of one of the component parts, the engine. The complaint alleged negligence and breach of an implied warranty in “that the equipment was of merchantable quality and reasonably fit for the use intended.”123 The Braniff plane crashed after a fire in one of its engines. It was alleged that the fire was caused by a fatigue crack in the combustion chamber of the engine which had been in use for three-thousand hours. In opposition to a motion for summary judgment by the manufacturer of the airplane, the plaintiffs filed an affidavit of an aeronautical engineer which stated that the design of the engine was faulty. The Third District Court of Appeal reversed a summary judgment for the manufacturer of the airplane and held that the plaintiffs had alleged sufficient facts, which if proved to a jury’s satisfaction, could have given rise to liability under the negligence theory and under the implied warranty theory.

The plaintiff-appellant in *Arcade Steam Laundry v. Bass*124 alleged that he purchased a hot water tank in reliance upon representations made by the seller that such tanks were suitable for laundry use. The complaint also alleged that the tank was unfit for the purpose and use for which it was intended. The Second District Court of Appeal reversed a judgment dismissing the complaint and held that where a buyer purchases goods for a known purpose, the law implies a warranty that they will be fit for the particular use and purpose intended.

This implied warranty of fitness for the particular use intended by the buyer applies to plastic pipe purchased and installed in a lawn sprinkling system.125

An employee of the purchaser of a machine which was not reasonably fit for the use or purpose intended may maintain an action against the manufacturer for breach of an implied warranty, even though there was an absence of privity, as long as he was “one of those reasonably

121. The *Green* case is only one of the history making cigarette warranty cases. E.g., Pritchard v. Liggett & Meyers Tobacco Co., 350 F.2d 479 (3d Cir. 1965); Lartigue v. R.J. Reynolds Tobacco Co., 317 F.2d 19 (5th Cir. 1963). See generally RESTATEMENT (SECOND), TORTS § 402A (1965); Comment, *Cigarettes and Vaccine: Unforeseeable Risks in Manufacturer's Liability Under Implied Warranty*, 63 COLUM. L. REV. 515 (1963); 7 NACCA NEWS LETTER 121-22 (May 1964).

122. 159 So.2d 108 (Fla. 3d Dist. 1963).


124. 159 So.2d 915 (Fla. 2d Dist. 1964). See FLA. STAT. § 672.2-314 (1965).

125. Wisner v. Goodyear Tire & Rubber Co., 167 So.2d 254 (Fla. 2d Dist. 1964). The fact that the pipe lasted for six years is not determinative as a matter of law that the pipe was reasonably fit for the use intended.
intended to use the machine, and that when the injury occurred, the machine was being used generally in the manner intended.\textsuperscript{126}

The trial court in \textit{Sperry Rand Corp. v. Industrial Supply Corp.}\textsuperscript{127} found that there had been a breach of an implied warranty of fitness for a disclosed particular purpose by the seller of an electronic computer and therefore declared a recision of the contract of sale\textsuperscript{128} and ordered the defendant-seller to refund the purchase price. The contract of sale contained an express warranty clause and an integration clause.\textsuperscript{129} The seller argued on appeal that the effect of the express warranty provision was to exclude any implied warranty, and that the integration clause also prevented any warranty from being implied. The Fifth Circuit Court of Appeal rejected both arguments and held that an express warranty clause will not exclude an implied warranty which is not inconsistent with the express warranty. The court held that an integration clause, unless it explicitly excludes implied warranties, will not prevent the implication of a warranty because an implied warranty of fitness for a known intended use arises independently of the contract of sale and will not be excluded unless it is inconsistent with the written terms of the contract.\textsuperscript{130}

An unusual factual situation presented itself in \textit{American Can Co. v. Horlamus Corp.}\textsuperscript{131} There, the plaintiff-bakery had entered into a contract with a bread company whereby the bakery agreed to sell its entire output of canned bread to the bread company and the bread company, among other things, agreed to furnish the cans. Thereafter, the bread company entered into a sales contract for the purchase of the cans from the defendant-can company. This contract between the bread company and the defendant-can company contained an express warranty clause and a disclaimer or limitation of liability clause.\textsuperscript{132} The bread company directed

\textsuperscript{126} Vandercook & Son, Inc. v. Thorpe, 344 F.2d 930, 931 (5th Cir. 1965). See \textit{Fla. Stat.} § 672.2-318 (1965).
\textsuperscript{127} 337 F.2d 363 (5th Cir. 1964).
\textsuperscript{128} The contract of sale was entered into by the Florida corporation buyer in New York. Therefore there was a conflicts of law issue as to what state law should be applied in an action for recision of the contract for breach of an implied warranty. The appellate court held that Florida law should be applied and not New York law which was applied by the trial court.
\textsuperscript{129} ***All containers sold under this agreement are warranted by the supplier against faulty workmanship and defective materials, but such containers are covered by no other warranties, either express or implied. The supplier shall be liable to the buyer for breach of the express warranty set forth in this paragraph, but the supplier shall not otherwise be liable to any claimant, either in tort or in contract,
that the purchased cans be delivered to the plaintiff. While the plaintiff was in the process of filling the second shipment of cans with bread, it was discovered that the cans were defective. The plaintiff notified the bread company of the defects. The bread company, pursuant to its contract with the defendant, entered into an agreement releasing the defendant from all claims after the defendant had complied with the express warranty clause. The plaintiff, however, brought an action against the defendant-can company alleging breach of an implied warranty, and sought to recover for operating loss expenses and loss of production profits caused by the defective cans. The trial court excluded the contract of sale containing the limitation of liability clause from the evidence sought to be introduced by the defendant-can company, and held, as a matter of law, that the defendant was liable. On appeal, the defendant argued that the limitation of liability clause was binding upon the plaintiff-bakery, and that any claim the bakery might have had against it was extinguished by the release executed by the bread company in favor of the defendant. The Fifth Circuit Court of Appeal reversed the judgment for the plaintiff and held that a limitation of liability or disclaimer is valid and enforceable in Florida against the ultimate consumer, and it was therefore binding upon the plaintiff-bakery. The court left unanswered the question of the validity of the release and its effect upon the plaintiff’s right to maintain an action for breach of the warranties contained in the contract. The court did state, however, that whether there was an agency relationship between the plaintiff and the bread company and whether this relationship was known to the defendant can company “would be determinative of whether or not this was a situation in which a release by an undisclosed agent was binding on the principal.

An implied warranty of fitness or merchantability is not applicable to a retail druggist so as to render him strictly liable to a purchaser for the harmful effects caused by unadulterated drugs dispensed by him on a doctor’s prescription. Nor is an implied warranty of fitness or mer-

or any claim relating to the containers sold under this agreement. In no event shall the supplier’s liability exceed the cost to the buyer of the defective containers and any materials packed in them. American Can Co. v. Horlamus Corp., 341 F.2d 730, 731 (5th Cir. 1965).

133. Cf. Rozen v. Chrysler Corp., 142 So.2d 735 (Fla. 3d Dist. 1962).


135. McLeod v. W. S. Merrell Co., 174 So.2d 736 (Fla. 1965), affirming 167 So.2d 901 (Fla. 3d Dist. 1964). The Supreme Court of Florida in rejecting a theory of strict liability stated:

[T]he rights of the consumer can be preserved, and the responsibilities of the retail prescription druggist can be imposed, under the concept that a druggist who sells a prescription warrants that (1) he will compound the drug prescribed; (2) he has used due and proper care in filling the prescription (failure of which might also give rise to an action in negligence); (3) the proper methods were used in the compounding process; (4) the drug has not been infected with some adulterating foreign substance. Id. at 739.
chantability applicable to an engineer who prepared defective plans or designs.136

D. Invitees, Licensees and Trespassers

1. INJURIES INVOLVING FALLS

The recent slip and fall cases involving defendant supermarkets were disposed of by the appellate courts on the basis that the defendant did not have time to warn of, or remove the foreign substance from the floor,137 or on the basis that there was no evidence that the defendant had actual or constructive knowledge of the existence of the foreign substance on the floor.138 However, in one case,139 where there was no direct evidence as to how long a green bean had been on the floor, the appellate court stated that

evidence that no inspection had been made during a particular period of time prior to an accident may warrant an inference that the dangerous condition existed long enough so that the exercise of reasonable care would have resulted in discovery.140

Knowledge of the dangerous condition was an issue in Miami Shores Village v. Lingler.141 In that case, the plaintiff fell over exposed reinforcing rods protruding onto the sidewalk from a concrete parking bumper. The defendant city had placed the bumper in the street which occupied the same level as the sidewalk. There was evidence that the bumper was discolored and very badly weathered. The appellate court, in affirming a jury verdict for the plaintiff, stated that the evidence was insufficient to establish that the city had notice that the bumper protruded onto the sidewalk, but the evidence was sufficient to establish that the city had ample time to be put on notice that a dangerous condition existed. The court concluded that the city was liable because by allowing the bumper to remain in its deteriorated condition, a dangerous condition was permitted to exist, and by permitting this condition to exist, the city created an unreasonable risk that the bumper would be moved onto the sidewalk and become a hazard to persons travelling thereon.142

137. Publix Supermarkets, Inc. v. Heiser, 156 So.2d 540 (Fla. 2d Dist. 1963) (mayonnaise on floor for ninety seconds).
138. Grand Union Supermarkets, Inc. v. Griffin, 156 So.2d 788 (Fla. 3d Dist. 1963) (fruit pit with a piece of fruit attached). Accord, Lewis v. Rogers, 164 So.2d 864 (Fla. 1st Dist. 1964) (vegetable substance).
140. Id. at 591. (Emphasis added.)
141. 157 So.2d 716 (Fla. 3d Dist. 1963).
142. The court stated: [T]he risk reasonably to be foreseen included the possibility that the bumper, left readily accessible to automobiles being parked, would be moved about and become a hazard to persons on the adjoining sidewalk. Miami Shores Village v. Lingler, 157 So.2d 716, 717 (Fla. 3d Dist. 1963).
In another slip and fall case,\textsuperscript{143} the appellate court held that it was reversible error to admit into evidence proof of subsequent repairs on the issue of the defendant's negligence in failing to repair the prior defective condition.

In \textit{Grall v. Risden},\textsuperscript{144} the plaintiff-appellee tripped over a tie-rod which was used to support a canopy over the entrance to the defendant's restaurant. The appellate court in reversing a summary judgment for the plaintiff, held that the duty owed to an invitee is to warn of latent defects, but where the defect is obvious and could have been seen by one exercising due care, the plaintiff's failure to look constitutes contributory negligence as a matter of law.\textsuperscript{145}

But where a plaintiff-invitee trips over a dress rack left in an aisle of the defendant's store, she is entitled to have her case submitted to the jury on the issues of negligence and contributory negligence.\textsuperscript{146}

\section*{2. INJURIES NOT INVOLVING FALLS}

An inspection by a painter was held sufficient to relieve a store owner from liability for injuries sustained by the plaintiff when an overhead air conditioning duct fell upon her while she was shopping.\textsuperscript{147}

A business invitee who walks through a glass door is not chargeable with actual knowledge of the door merely because it was capable of being seen had the invitee looked.\textsuperscript{148} Rather, the invitee is held, in such a case, only to that standard of care that an ordinary reasonable person would exercise under the same circumstances as confronted the invitee at the time he walked through the door.\textsuperscript{149}

There is no duty to warn a licensee of an entrance way almost entirely surrounded by glass.\textsuperscript{150}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{143} City of Niceville v. Hardy, 160 So.2d 535 (Fla. 1st Dist. 1964) (defective water meter box).
\item \textsuperscript{144} 167 So.2d 610 (Fla. 2d Dist. 1964), \textit{cert. denied}, 174 So.2d 736 (Fla. 1965).
\item \textsuperscript{145} \textit{Compare} Grall v. Risden, 167 So.2d 610 (Fla. 2d Dist. 1964) \textit{with} Isenberg v. Ortona Park Recreational Center, Inc., 160 So.2d 132 (Fla. 1st Dist. 1964) \textit{and} Conwell v. Zayre of Miami, Inc., 161 So.2d 537 (Fla. 3d Dist. 1964). \textit{Cf.} Milby v. Pace Pontiac, Inc., 176 So.2d 554 (Fla. 2d Dist. 1965) where an invitee tripped and fell over a step down into the defendant's building. She alleged that she looked but did not see the defect. The court stated:
\begin{quote}
Whether the plaintiff was exercising due care and whether the defendant owed a duty to warn is not determined by deciding that the object was "latent" or "patent." The "latency" or "patency" of the condition and the defendant's duty to warn is determined by asking the question: Would a reasonable and prudent person, exercising due care, have observed the object? \textit{Id.} at 557.
\end{quote}
\item \textsuperscript{146} Conwell v. Zayre of Miami, Inc., 161 So.2d 537 (Fla. 3d Dist. 1964).
\item \textsuperscript{147} Nutt v. James City, Inc., 162 So.2d 700 (Fla. 3d Dist. 1964) (inspection two months prior to accident).
\item \textsuperscript{148} Isenberg v. Ortona Park Recreational Center, Inc., 160 So.2d 120 (Fla. 1st Dist. 1964). \textit{Accord}, Peppermint Twist, Inc. v. Wright, 169 So.2d 330 (Fla. 3d Dist. 1964) (no markings on door).
\item \textsuperscript{149} \textit{Ibid.}
\item \textsuperscript{150} Jensen v. Grace Lutheran Church, 163 So.2d 782 (Fla. 2d Dist. 1964).
\end{enumerate}
\end{footnotesize}
Two decisions involved the question of the landowner's duty to the employees of an independent contractor working in the vicinity of overhead energized electrical power lines. The courts in both cases held that the landowner's duty is to warn his business invitees of the dangerous condition, but that duty does not arise unless the landowner has superior knowledge. The landowners in neither case had superior knowledge.

A motel owner owes a duty to his guests not to furnish overheated water. To his visitors, a motel owner owes a duty to construct his shuffleboard courts so that they are free from traps.

A plaintiff's status upon the land can change. However, a minor visiting the defendant's construction site is a licensee and his status does not change to that of an invitee merely because an employee, not authorized to seek help, requests the minor to assist him in moving some sheetrock.

The usual test used to determine the plaintiff's status on the land is the benefit test. That is, if the relationship between the plaintiff and the defendant is beneficial to the defendant, or to both the plaintiff and the defendant, the plaintiff is regarded as an invitee. In the absence of a benefit to the defendant, the plaintiff is a licensee. This test, however, has been qualified in the case of a social guest. This qualification is illustrated by the rule that a social guest's status as a licensee is not changed to that of an invitee merely because he performs some incidental service that is beneficial to the defendant. Therefore, in determining the status of an injured plaintiff who entered the land as a social guest there is a problem of whether at the time of the injury the plaintiff was a social guest performing a service incidental to his visit, or whether the status of the plaintiff has changed to that of an invitee because he conferred a benefit upon the owner.

This problem of the changing status of a social guest arose in Brant v. Matlin. In that case, the plaintiff entered upon the land as a social

151. Quinnelly v. Southern Maid Syrup Co., 164 So.2d 240 (Fla. 2d Dist. 1964) (crane boom came in contact with wires); Somers v. Meyers, 171 So.2d 598 (Fla. 1st Dist. 1965) (dump truck touched wires).
152. Accord, Waters v. Rockana Carriers, Inc., 171 So.2d 57 (Fla. 1st Dist. 1965) (truck owner's duty to business invitees).
153. Black v. Heininger, 163 So.2d 3 (Fla. 2d Dist. 1964) (scalding water in shower).
154. Miceli v. Lifter, 161 So.2d 253 (Fla. 3d Dist. 1964) (piece of two by four painted black).
155. McNulty v. Hurley, 97 So.2d 185 (Fla. 1957) (parishioner attending church is a licensee).
157. Supra note 155.
160. 172 So.2d 902 (Fla. 3d Dist. 1965).
guest in order to attend a Bar Mitzvah. However, after the "social event" was over, the defendant requested the plaintiff to remain on the land and take care of the defendant's children, while the defendant and his wife went on a vacation. The plaintiff was injured while taking care of the children. The Third District Court of Appeal, affirming that the plaintiff was an invitee, originated what might properly be denominated the "but for" test, which is to be applied to determine the changing status of a social guest. The test applied by the court is suggested in the following language:

But for this service performed, would the plaintiff have left the premises and removed himself from the danger created by the defendant-land owner's negligence. If the answer is no, then the services performed can be considered incidental to the social visit, and the plaintiff would be properly classified as a licensee. On the other hand, if the answer is yes, then the services performed are not merely incidental to the social visit, and the plaintiff must be accorded the status of an invitee.161

A minor who has been warned by his father of the danger of his presence around or near the defendant's steam roller, is a wilful trespasser and is subject to the same standard of care owed by a defendant162 to a trespassing adult.163

The attractive nuisance doctrine was not available to a minor who was injured by a shopping cart, because the presence of the shopping cart did not constitute an inherently dangerous condition.164 Nor was the attractive nuisance doctrine available to the parents of a minor who was electrocuted at the top of defendant's electric pole, because an electric pole, even though a means of climbing it was provided, is not an attractive nuisance as a matter of law.165

E. Master-Servant

Where an employer undertakes to steady a shaky stepladder upon which his employee is standing, he is under a duty to continue the service until the employee is no longer in a hazardous position.166

An employer is not negligent for hiring an employee with criminal

161. Brant v. Matlin, 172 So.2d 902, 904 (Fla. 3d Dist. 1965).
162. The standard of care owed to a trespasser is to refrain from wilfully or wantonly
inflicting injury.
did not warrant an application of the attractive nuisance doctrine.
164. Borden v. Sakolsky, 175 So.2d 209 (Fla. 3d Dist. 1965).
165. Tampa Elec. Co. v. Lariscy, 166 So.2d 227 (Fla. 2d Dist. 1964). For a correct
statement of the attractive nuisance doctrine see the jury instructions of the trial court
quoted at 228-29.
166. Cox v. Wagner, 162 So.2d 527 (Fla. 3d Dist. 1964).
propensities, unless the employee exhibited his true character prior to the commission of the criminal act.\(^{167}\)

When a maitre d' follows a customer, who has refused to pay for his meal, out of his employer's restaurant and into a motel next door, and he there commits an assault and battery upon the customer, it is for the jury to determine whether or not the employee was acting within the scope of his employment when the intentional tort was committed.\(^{168}\)

In *Florida Power & Light Co. v. Price*,\(^{169}\) the defendant, who was the owner of a dangerous instrumentality, hired an independent contractor to energize a new electrical distribution system. The plaintiff was an employee of the independent contractor and was injured due to the negligence of a fellow employee. The plaintiff alleged that the defendant was liable for his injuries under the dangerous instrumentality\(^{170}\) and dangerous work doctrines.\(^{171}\) The Supreme Court of Florida, in a rather nebulous opinion, held that the dangerous instrumentality doctrine and the dangerous work doctrine will not render an owner who employs an independent contractor liable to an injured employee of the independent contractor.

F. **Defenses**

1. **CONTRIBUTORY NEGLIGENCE**

When the State of Florida, which is entitled to sovereign immunity, brings a negligence action to recover damages for destruction of its radio tower, the defendant may properly assert the affirmative defense that the State was contributorily negligent.\(^{172}\)

The distraction rule\(^{173}\) is applicable where a plaintiff knew about a defective condition, but was distracted by a *sufficient cause* so that he momentarily forgot about the dangerous condition that was responsible for his injury. When the distraction rule is applicable, the question of

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167. *Davis v. Major Oil Co.*, 164 So.2d 558 (Fla. 3d Dist. 1964). The employee shot the plaintiff after an argument over the use of a pay telephone on the defendant-employer's premises.

168. *Columbia By the Sea, Inc. v. Petty*, 157 So.2d 190 (Fla. 2d Dist. 1963).


170. For a correct statement of the doctrine see note 1 *supra*.

171. The inherently dangerous work doctrine renders an employer of an independent contractor liable to injured third persons for his failure to take proper precautions to prevent injuries to such third persons when the work contracted to be performed is inherently dangerous. This doctrine is an exception to the common law rule that an employer is not liable to third persons when the work causing the injury is performed by an independent contractor. *Prosser, Torts*, § 70, at 480, 484 (3d ed. 1964).

172. *Department of Public Safety v. Parker*, 161 So.2d 886 (Fla. 1st Dist. 1964) (apparently a case of first impression).

the plaintiff's contributory negligence is for the jury. However, it is for the court to determine whether the circumstances in the case were a sufficient cause to warrant the plaintiff's distraction. Therefore, where the court determined that the plaintiff's duties in unloading a defective truck were not a sufficient cause to warrant his distraction, the plaintiff was contributorily negligent as a matter of law.

2. IMMUNITY

The Florida Supreme Court took a gargantuan step toward abolition of municipal tort immunity in Hargrove v. Town of Cocoa Beach when they abolished municipal immunity for negligent torts committed by municipal employees acting within the scope of their employment. After Hargrove, however, a number of cases posed the question of whether a municipality was liable for the intentional torts of its employees committed within the scope of their employment. The Third District Court of Appeal was confronted with this question in Simpson v. City of Miami and held the municipality liable on the basis that the principles announced in the Hargrove decision were equally applicable to intentional torts. There were, however, decisions by the First and Second District Courts of Appeal to the contrary.

Because of the existing conflicts, and the great public interest in the question of municipal liability for intentional torts, the Supreme Court of Florida took jurisdiction, and in discharging the writ, approved the decision arrived at by the Third District Court in Simpson v. City of Miami. The Court held that the Third District Court was eminently correct in imposing liability on a municipal corporation for intentional torts committed by its employees within the scope of their employment.

175. Tomlinson v. Wilson & Toomer Fertilizer Co., 165 So.2d 801 (Fla. 2d Dist. 1964).
176. Ibid.
177. 96 So.2d 130 (Fla. 1957). Hargrove imposed liability upon municipalities for the negligent torts of their employees committed within the scope of their employment. The decision abolished the distinction between governmental and proprietary functions of a municipality, and instead predicated liability upon the doctrine of respondeat superior. See Municipal Liability for Police Torts: An Analysis of a Strand of American Legal History, 17 U. Miami L. Rev. 475 (1963).
178. 155 So.2d 829 (Fla. 3d Dist. 1963), aff'd, 172 So.2d 435 (Fla. 1965).
179. E.g., Rose v. City of Ft. Lauderdale, 163 So.2d 889 (Fla. 2d Dist. 1964), cert. granted, 172 So.2d 440 (Fla. 1965); Middleton v. City of Ft. Walton Beach, 113 So.2d 431 (Fla. 1st Dist. 1959).
180. Middleton v. City of Ft. Walton Beach, 113 So.2d 431 (Fla. 1st Dist. 1959); Simpson v. City of Miami, 155 So.2d 829 (Fla. 3d Dist. 1963).
182. 155 So.2d 829 (Fla. 3d Dist. 1963), aff'd, 172 So.2d 435 (Fla. 1965).
Even with municipal immunity in tort actions abrogated, there is still a drawback to the successful maintenance of a tort action against a municipality. This drawback is evident where a municipality has an ordinance or charter provision that requires written notice of the claim within a certain length of time after the injury occurs. These ordinances are valid and are not violative of the equal protection clause of the constitution. Compliance with the ordinance or charter provision is a condition precedent to the maintenance of an action on the tort claim, therefore the complaint must contain an allegation of compliance, otherwise it will be defective. However, substantial compliance with the notice requirement of the charter or ordinance has been held sufficient to estop the city from asserting that the notice was not in the form required by the statute. Even where there is not compliance with the written notice requirement, a city will be held to have waived the notice requirement or will be held to be estopped to assert failure to give written notice where the city had actual notice, investigated the accident, and following the investigation initiated such action in relation to the injured party as would lead a reasonable person to assume that further notice was unnecessary or would cause the injured party to act or fail to act to his detriment. Estoppel to assert the defense of failure to give notice has also been applied where the plaintiff erroneously notified the director of the department of water and sewers instead of the city attorney as required by the city charter.

Another problem arising in relation to written notice to the municipality was suggested in Nicholson v. City of St. Petersburg. In that case the plaintiff proceeded on a contract theory to recover for her personal injuries sustained while riding on a city bus. The statute provided that written notice of the personal injury be served upon the city manager. The plaintiff did not comply with the statute. The issue pre-

183. See Hargrove v. Town of Cocoa Beach, 96 So.2d 130 (Fla. 1957) (negligent torts); City of Miami v. Simpson, 172 So.2d 435 (Fla. 1965) (intentional torts).
184. McCann v. City of Lake Wales, 144 So.2d 505 (Fla. 1962).
185. Butts v. Dade County, 174 So.2d 782 (Fla. 3d Dist. 1965).
186. City of Miami Beach v. O'Hara, 166 So.2d 598 (Fla. 3d Dist. 1964).
187. Finneran v. City of Lake Worth, 152 So.2d 501 (Fla. 2d Dist. 1963).
188. Rabonowitz v. Town of Bay Harbor Islands, 178 So.2d 9 (Fla. 1965), quashing 168 So.2d 583 (Fla. 3d Dist. 1964); Tillman v. City of Pompano Beach, 100 So.2d 53 (Fla. 1957).
189. Brooks v. City of Miami, 161 So.2d 675 (Fla. 3d Dist. 1964).
190. 163 So.2d 775 (Fla. 2d Dist. 1964). See Butts v. Dade County, 174 So.2d 782 (Fla. 3d Dist. 1965).
191. Fla. Laws 1937, ch. 18896 § 1, at 1635 provides:
From and after the passage of this Act no suit shall be instituted or maintained against the City of St. Petersburg, Florida for damages arising out of any personal injury unless written notice of such claim or injury is within sixty days from the date of receiving alleged injury, given to the City Manager of the City of St. Petersburg with specifications as to the time and place of said alleged injury. (Emphasis added.)
sented, therefore, was whether a plaintiff must give the statutory notice when proceeding against a municipality to recover for personal injuries caused by the alleged violation of a contractual obligation. Finding no Florida precedent, the Second District Court of Appeal, in holding that notice in such a case would be required, stated: "[T]he fact that the person injured is suing under a contract theory rather than a tort theory should make no difference so long as the ordinance simply specifies that notice shall be given 'for damages arising out of any personal injury.'" 192

At this point it should be mentioned that in 1965 the legislature adopted Florida Statute section 95.241, which prescribes a uniform type of notice that must be given to the municipality before an action can be maintained for the alleged tort. Section 95.241(1) requires that the claimant serve written notice upon certain enumerated municipal or city officials within 90 days after the occurrence or discovery of the injury. This section is applicable only if the injury is caused by the municipality's negligent maintenance of any public sidewalk, pavement, street, bridge, or other improved realty owned or maintained by the municipality. If the claimant fails to comply with this section, but alleges that the city or municipality had actual notice, then according to section 95.241(1), the injured party must show, as a matter of law, that the municipality has not been prejudiced by the failure to give the requisite written notice. In any other tort action against a municipality, written notice of the claim is not, according to section 95.241(2), a condition precedent to the maintenance of the action. Any ordinance or municipal charter provision which conflicts with this statute is declared invalid by section 95.241(4).

In Waters v. Ray, 193 a question of the immunity of a municipal judge had to be decided after the judge ordered the plaintiff arrested for failure to have a proper driver's license. The defendant-judge argued that he was immune to liability in the plaintiff's action for false imprisonment. In rejecting this argument, the appellate court stated that the presence or absence of jurisdiction determines the question of the immunity of a judicial officer. 194 The court therefore held that the judge was liable for

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193. 167 So.2d 326 (Fla. 1st Dist. 1964).
194. The court stated:
Immunity from, or liability for, acts done by a person while acting in a judicial capacity depends upon the existence or nonexistence of jurisdiction. The general rule is if there is jurisdiction no matter how erroneous the decision of the judge may be, no personal liability attaches to him so long as he acts within the scope of his jurisdiction and in a judicial capacity. On the other hand if he acts wholly without jurisdiction his judicial office can afford him no protection. It is well settled that where a judicial officer causes the arrest or detention of a person in a proceeding in which he is acting wholly without jurisdiction, he may be held liable for false imprisonment, for even honesty of purpose cannot justify a clear usurpation of power. Waters v. Ray, 167 So.2d 326, 329 (Fla. 1st Dist. 1964).
the false imprisonment because he acted without jurisdiction when he arrested the plaintiff for the non-existent crime.\textsuperscript{195}

G. Res Ipsa Loquitur

Res ipsa loquitur is not applicable in Florida to infer that the defendant's negligence was the cause of a fire of unknown origin.\textsuperscript{196} However, res ipsa loquitur is applicable to raise an inference of negligence and call forth the defendant to explain\textsuperscript{197} how the accident occurred when

1. the instrumentality involved was within the exclusive control of the defendant at the time of the injury, both as to operation and inspection;
2. the injury was not the result of any voluntary action or contribution on the part of the plaintiff;
3. the accident would not have occurred had the defendant used due care.\textsuperscript{198}

The above elements, requisite for the application of res ipsa loquitur, were found by the appellate court to be present in \textit{Stanek v. Houston},\textsuperscript{199} where the defendant's tractor trailer crashed into a restaurant and injured the plaintiff. The defendant-driver had crossed a railroad track at thirty-five miles per hour, about three hundred feet north of the point of impact. The defendant-driver applied the brakes, but the tractor-trailer went off the road, struck a parked car, and then crashed into the building. The plaintiff who was working inside was injured. The driver, who had driven the truck extensively was unable to explain how the accident occurred, but he did testify that "the steering wheel felt like it done come free." The defendant-owner testified that he knew nothing about any mechanical defects in the truck. There was no other evidence as to how the collision occurred. The trial court directed a verdict for the defendant at the close of the plaintiff's case. The Second District Court of Appeal reversed the judgment for the defendant, and held that res ipsa loquitur was applicable to call forth the defendant to explain why he was not responsible for the accident.

IV. INTENTIONAL TORTS

A. Invasion of Privacy

The inclusion of a person's name on a primary election ballot without his consent is an invasion of his right to privacy.\textsuperscript{200}

\textsuperscript{195} The court found that the judge acted without jurisdiction because there was no law that a person must have a driver's license, and therefore the arrest was a nullity.
\textsuperscript{196} Sharon v. Luten, 165 So.2d 806 (Fla. 1st Dist. 1964).
\textsuperscript{197} Res ipsa loquitur is a rule of evidence and does not shift the burden of proof. It merely imposes a duty upon the defendant to come forth and explain the accident.
\textsuperscript{198} Stanek v. Houston, 165 So.2d 825, 827 (Fla. 2d Dist. 1964).
\textsuperscript{199} 165 So.2d 825 (Fla. 2d Dist. 1964).
\textsuperscript{200} Battaglia v. Adams, 164 So.2d 195 (Fla. 1964) (dicta) (a case of first impression).
The Second District Court of Appeal, in a case of first impression, indicated that a plaintiff, who is also a plaintiff in a personal injury suit, could maintain a separate cause of action for invasion of privacy based upon the defendant’s investigation into the authenticity of the plaintiff’s personal injury claim. The court did state however, that the plaintiff in a personal injury suit must expect some investigation of her claim, and that the unintentional exposure of the defendant’s private investigator would not give rise to liability for invasion of privacy.

B. Malicious Prosecution

Where there is probable cause for the sheriff to issue a search warrant, and the warrant is lawfully acted upon, a plaintiff may not sue in tort for false imprisonment and malicious prosecution, even though the plaintiff was discharged at a preliminary hearing.

It is for the court to say what facts or circumstances constitute probable cause, but it is for the jury to determine whether or not the facts or circumstances were as alleged. And from the fact of probable cause, the jury may infer the element of malice. However, probable cause and “advice of counsel” are affirmative defenses to a malicious prosecution suit based upon action taken by the defendant for alleged zoning violations by the plaintiff.

C. Conversion

The defendant-appellants in Goodrich v. Malowney secretly had themselves appointed as trustees of the plaintiff’s stock. At a secret stockholder’s meeting they voted plaintiff’s shares of stock and thereby voted plaintiff out of the office of president of the corporation. The plaintiff demanded the return of the stock but the defendants refused.

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202. The elements requisite for the successful maintenance of a malicious prosecution suit are as follows:
   (1) The commencement or continuance of an original civil or 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. Wilson v. O'Neal, 118 So.2d 101, 104 (Fla. 1st Dist. 1960). Accord, Hopke v. O'Byrne, 148 So.2d 755 (Fla. 1st Dist. 1963).
203. Sanchez v. Buchanan, 175 So.2d 50 (Fla. 3d Dist. 1965).
204. Wagner v. Smith, 174 So.2d 447 (Fla. 2d Dist. 1965).
205. Azrikan v. O'Brien, 173 So.2d 711 (Fla. 3d Dist. 1965).
207. 157 So.2d 829 (Fla. 2d Dist. 1963).
Second District Court of Appeal, in affirming an award of compensatory and punitive damages for the plaintiff, held that the unauthorized act of voting the stock was an act of dominion wrongfully asserted over the property belonging to the plaintiff and was inconsistent with his ownership of it. The court concluded by holding that the plaintiff's demand for the return of the stock, and the defendant's refusal to do so, conclusively established the conversion.

In a case of first impression, Adjmi fraudulently obtained two hundred thousand dollars worth of governmental bearer bonds from the plaintiff. Adjmi turned the bonds over to the defendant for collection. The defendant redeemed the bonds and turned the proceeds over to Adjmi who then absconded. The Third District Court of Appeal, in affirming that the plaintiff had failed to state a cause of action, held that an agent of the converter of a negotiable instrument is not liable to the plaintiff for the conversion. This holding is in accord with the position espoused in the Restatement of Agency and clearly represents an exception to the general rule that the agent of the converter is liable for the conversion.

In another very significant case of first impression, the plaintiff-appellant was the holder of a first mortgage on a power-brake which had been in the defendant's possession. The plaintiff alleged in her complaint that the defendant violated two penal statutes which forbade the removal of a mortgaged chattel from the county without the permission of the mortgagee. The plaintiff demanded compensatory and punitive damages. The trial court dismissed the complaint for failure to state a cause of action apparently holding that violation of the penal statutes did not give rise to a civil cause of action. The Third District Court of Appeal, in an opinion reversing the dismissal, reasoned that the plaintiff was the person intended by the legislature to be protected by the statutes and therefore the statutes must be construed to impose a duty upon the defendant not to injure the plaintiff. The court concluded that a breach of this duty as evidenced by the alleged violation of the statutes, gave rise to a cause of action. The court, however, was careful to point out that this case did not involve a violation of a penal statute as evidence of negligence, but rather it involved a violation of a penal statute as amounting to an intentional tort.

209. RESTATEMENT (SECOND), AGENCY § 349(g) (1958).
210. The case is significant because the plaintiff as mortgagee with no right to immediate possession could not maintain an action for conversion.
211. Rosenberg v. Ryder Leasing, Inc., 168 So.2d 678 (Fla. 3d Dist. 1964).
212. FLA. STAT. §§ 818.01, 818.03 (1963).
213. The court also stated that punitive damages could be recovered because one of the requisite elements for a violation of the statutes was that the removal of the mortgaged chattel had to be with the intent to defeat the plaintiff's rights therein.
D. Libel and Slander

In a case of first impression, the Second District Court of Appeal was confronted by an issue of a newspaper's qualified privilege to publish the contents of an official police report of a current investigation into the alleged commission of a crime. The articles published by the defendant-newspaper were held by the trial court to be libel per se because they imputed to the plaintiff the commission of a crime. The defendant asserted the affirmative defense of qualified privilege. The appellate court in affirming a judgment for the plaintiff, held that a newspaper's qualified privilege permits publication of matters about which the public has a right to be informed, and that these matters include: (1) open violations of the law; (2) public misconduct which would justify police interference; and (3) matters connected with investigations or prosecutions for alleged crimes. The court stated that the newspaper's qualified privilege permits publication of these matters "even though the publication may reflect on the actors and tend to bring them into public dis- grace or contempt." The court, however, did hold that a basic requirement for the invocation of the defense of qualified privilege is that the article must have been fair, accurate and published without malice. In the instant case, the court rejected the defendant's claim of qualified privilege because the article, as published, imputed the commission of a crime to the plaintiff when in fact the plaintiff had never been charged with a crime. The court concluded therefore that the article could not be deemed fair and accurate.

The plaintiff-appellant, in another case of first impression, was a former Dade County Sheriff. He brought an action for libel against the former County Manager. The plaintiff alleged in his complaint that the defendant read a defamatory statement which explained the reason for his dismissal from office by the defendant to the members of the Board of County Commissioners. The plaintiff further alleged that at the time of the publication of the libel, the Board was neither investigating, nor inquiring, nor had they requested the report from the defendant. The trial court granted the defendant's motion to dismiss, holding as a matter of law that the defendant had an absolute privilege to communicate and publish the alleged libel. The appellate court viewed the issue as whether an executive county official was to be afforded an absolute privilege in regard to defamatory publications made in connection with his office. The court held that on the facts of the case, the issue had to be answered in the negative. In reversing and remanding, the court did note,
however, that the doctrine of qualified privilege was applicable. On certiorari to the Florida Supreme Court, the district court's opinion was quashed. The supreme court held that

executive officials of government are absolutely privileged as to defamatory publications made in connection with the performance of the duties and responsibilities of their office. . . .

In a per curiam opinion, the Fifth Circuit Court of Appeal affirmed a summary judgment for the defendant granted in an action by the plaintiff (for only punitive damages) wherein he had alleged that he was a holder of a credit card issued by the defendant and that the defendant erroneously included his name on a list of persons whose credit had been cancelled causing him to be refused credit at a restaurant, and that inclusion of his name on the list was libel per se.

V. DAMAGES

The Florida Supreme Court in Fisher v. City of Miami held that punitive damages may not be assessed against a municipality in an action where the municipality has been found vicariously liable for the intentional torts of its employees.

In Lehman v. Spencer Ladd's, Inc., the Supreme Court of Florida approved the Second District Court of Appeal's decision that in a case where there are joint tortfeasors, evidence of the financial worth of each defendant shall be admissible on the issue of punitive damages. However, the court went even further than mere approval of the appellate court's opinion by declaring:

[I]n all cases tried after the effective date of this opinion, and in which the element of punitive damages against joint tort-
feasors is an issue for determination, a special or separate verdict shall be used for the assessment of punitive damages against each tortfeasor. Verdicts for compensatory damages shall continue as at present to be joint and several. Judgments shall be entered in accord with the verdicts rendered. 228

The jury in City of Hialeah v. Hutchins 227 returned a verdict against the defendant-police officer and against the defendant-city which was vicariously liable under the doctrine of respondeat superior for the assault and battery committed by the officer. Compensatory damages in the amount of 1,227.25 dollars were assessed against the police officer. The defendant city's assessment of compensatory damages was over 32,000 dollars. On appeal, the court held that the trial court erred in entering judgment on the verdicts for the reason that a verdict for compensatory damages against one joint tortfeasor establishes the extent of the liability of both. The court concluded therefore that the disproportionate verdicts could not stand.

In Elowsky v. Gulf Power Co., 228 the First District Court of Appeal held that loss of ornamental value of a tree that had been wrongfully cut down by the defendant was a proper item of damages in a trespass action. 229

A recovery of 1,000 dollars by the plaintiff dog owner in an action against a kennel owner for the loss of the plaintiff's "blue blood" German Shepherd was upheld by the appellate court in Wertman v. Tipping. 230 The court stated that the damages in such a case extend to the value of any special usefulness that the dog might have had and includes services that the dog performed for the owner.

The Supreme Court of Florida in La Porte v. Associated Independents, Inc., 231 held that the plaintiff's mental anguish suffered as a result of the defendant's malicious killing of her dog was compensable, even though the plaintiff did not witness the actual killing.

In Shaw v. Puleo, 232 the jury rejected the expert testimony of a physician in regard to the plaintiff's whiplash injury, which was of the type not detectable by casual observation, and awarded the plaintiff "none" damages. The physician's testimony had not been contradicted by any other medical testimony. The Supreme Court of Florida, in

227. 166 So.2d 607 (Fla. 3d Dist. 1964).
228. 172 So.2d 643 (Fla. 1st Dist. 1965).
229. Compare Nilsson v. Hiscox, 158 So.2d 799 (Fla. 1st Dist. 1963) which was an action for trespass and conversion of trees.
230. 166 So.2d 666 (Fla. 1st Dist. 1964).
231. 163 So.2d 267 (Fla. 1964), reversing 158 So.2d 557 (Fla. 2d Dist. 1963); Note, Recovery for Mental Anguish Caused by Malicious Destruction of Pet Dog, 19 U. MIAMI L. REV. 307 (1964).
232. 159 So.2d 641 (Fla. 1964).
reversing an order granting the plaintiff a new trial, held that a jury may reject expert medical testimony even though the facts attested to are not within the ordinary experience of the jurors. The court stated that the jury is free to determine the credibility of such testimony and to decide the weight to be ascribed to it in the face of conflicting lay evidence.

VI. NUISANCE

The plaintiff-appellant in Corbett v. Eastern Air Lines, Inc.,233 owned a restaurant which adjoined a municipal airport. The jet airplanes belonging to the four defendant-commercial airlines warmed up, took off, and landed on a runway near the plaintiff’s restaurant. Essentially the plaintiff’s complaint, which demanded damages, sounded like an action for the maintenance of a private nuisance, but there was also an allegation of inverse condemnation. In affirming the trial court’s dismissal of the complaint for failure to state a cause of action, the appellate court viewed the appeal as a question of “a landowner’s rights in the jet age.”234 The appellate court found the complaint fatal in so far as it alleged the existence of a private nuisance because it did not allege sufficient facts to bring the case within the rule that the invasion claimed to be a nuisance must be unreasonable, unwarranted, or unlawful. The court evidenced a very liberal attitude in this regard when it stated that

people who establish a business on property adjoining an airport do so with the knowledge that changes and improvements are being, and will continue to be, made in aircraft using the airport, requiring different flight patterns and different procedures in warm-up, take-off, and landing in the interest of the safety of the human lives aboard the planes . . . .235

Turning to the allegation of inverse condemnation, the appellate court, on the basis of Griggs v. Alleghany County,236 held that the owner or operator of the airport would perhaps be liable for inversely condemning the plaintiff’s property, but that the defendant-commercial airlines who merely used the airport would definitely not be liable under this theory.237

VII. LEGISLATION

The Florida Legislature, in 1965, followed the precedent set by many other state legislatures by adopting a “Good Samaritan” act.238 The act,239 which is effective as of July 1, 1965, applies to any person, including a

233. 166 So.2d 196 (Fla. 1st Dist. 1964).
235. Id. at 202.
236. 369 U.S. 84 (1962).
238. E.g., TEXAS STAT. ANN. art. 1a (Vernon Supp. 1961); CAL. BUSINESS AND PRO-
    FESSIONS § 2144 (Deering 1937).
239. FLA. STAT. § 768.13 (1965).
physician, who in good faith renders emergency care or treatment at the scene of an accident without the objection of the victim. The effect of the act is to absolve or insulate the Good Samaritan from any civil liability which might arise as a result of such care provided that he acted as an ordinary reasonably prudent man would have acted under the same or similar circumstances.