Torts

Thomas L. Ford

Follow this and additional works at: http://repository.law.miami.edu/umlr

Recommended Citation

Thomas L. Ford, Torts, 18 U. Miami L. Rev. 854 (1964)
Available at: http://repository.law.miami.edu/umlr/vol18/iss4/5
TORTS

THOMAS L. FORD*

In order to insure continuity, the author has endeavored to follow the pattern established by previous survey articles. The emphasis once again is placed upon factual patterns and procedural problems rather than upon analytical comparisons of the cases, except in cases of patent conflict.1

I. AUTOMOBILE CASES .................................................... 854
   A. The Dangerous Instrumentality Doctrine .................................. 854
   B. The Guest Statute .................................................... 857
   C. Care Required of Motorists ........................................... 861
      1. INTERSECTION ACCIDENTS ........................................ 861
      2. REAR-END COLLISIONS ........................................... 862
      3. PEDESTRIANS ..................................................... 864
      4. LAST CLEAR CHANCE ............................................. 867
      5. CONTRIBUTORY NEGLIGENCE ...................................... 869
   II. STATUTORY LIABILITY ................................................... 871
      A. Statutes Affecting the Right to Maintain an Action .................. 871
      B. Federal Employer’s Liability Act .................................. 872
      C. Railroad Operation ................................................ 872
   III. COMMON LAW NEGLIGENCE ACTIONS ..................................... 875
      A. Landlord and Tenant ............................................... 875
      B. Distribution of Gas and Electricity ................................ 877
      C. Doctor-Patient .................................................. 878
      D. Manufacturers and Suppliers ...................................... 879
      E. Invitees, Licensees and Trespassers ................................ 880
         1. INJURIES INVOLVING FALLS ................................... 880
         2. INJURIES NOT INVOLVING FALLS ................................ 881
      F. Master-Servant .................................................. 881
      G. Defenses in Common Law Cases ....................................... 882
         1. CONTRIBUTORY NEGLIGENCE .................................... 882
         2. IMMUNITY ...................................................... 882
      H. Res Ipsa Loquitur ................................................ 882
      I. Damages ............................................................ 882
   IV. OTHER COMMON LAW TORTS .............................................. 883
      A. In General ............................................................ 883
      B. Libel and Slander ................................................ 886
      C. Malicious Prosecution and False Arrest ............................ 886
   V. LEGISLATION ............................................................ 887

I. AUTOMOBILE CASES

A. The Dangerous Instrumentality Doctrine

The Florida dangerous instrumentality doctrine was borrowed from the law of agency and adapted to tort law. Liability is imposed upon

* Member of Florida Bar; formerly Managing Editor of the University of Miami Law Review (Vol. XVIII).
1. The material covered is from the cases reported in the Southern Reporter, second series, volumes 133 through 155 and in the Federal Reporter, second series, volumes 294 through 322.

854
the owner of an automobile or other vehicle for injuries which occur as
the result of the negligent operation of the vehicle by anyone who operates
it with the owner's consent or authorization.

In Fry v. Robinson Printers, Inc., the defendant owner left his auto-
mobile at a service station for minor repairs and servicing. The plaintiff
was injured when the car was negligently operated by a fellow employee
as he attempted to guide the vehicle onto a grease rack. A summary judg-
ment entered in favor of the defendant was affirmed. Since both employ-
ees were engaged in servicing the automobile, the owner of the automobile
was not liable solely by reason of ownership for its negligent operation
by one employee resulting in injury to another.

Illegal use of a dealer's tag was held to be insufficient in itself to ex-
tend liability to the dealer. The dealer furnished one of its tags to a sales-
man for his unrestricted use on a demonstrator which was owned by
the salesman. After the salesman had left a company Christmas party and
while he was delivering Christmas presents to friends, an accident oc-
curred, in which the plaintiff's wife and child were killed. In affirming a
summary judgment entered in favor of the dealer, the court held that
the salesman was not within the scope of his employment at the time
the accident occurred and the plaintiff's contention that the dealer was
stopped to deny ownership was rejected. Extension of liability predi-
cated upon illegal use of a dealer's tag was held to be a matter of legis-
latitude concern.

In Florida, by statute, the owner of a motor vehicle is presumed li-

2. 155. So.2d 645 (Fla. 2d Dist. 1963). The defendant-appellee-operator testified that upon
the plaintiffs' signal to stop he put his foot on the brake but it slipped off and hit the gas
pedal. The car then lurched forward, jumped the safety barrier on the lift and struck the
plaintiff, pinning him against some oil cans.


4. "[T]he real issue confronting the trial judge was whether or not McGraw while
operating his automobile had abandoned the business of his master and was at the time
pursuing his own personal mission. We agree with the trial judge . . . . [I]t is undisputed
that McGraw left his employer's place of business and from that time was going on
a frolic of his own. . . . "Id. at 490.

5. "...the law of this jurisdiction imposes liability upon the owner of an automobile
either by virtue of actual ownership of same, or by facts and circumstances precluding one
exercising such dominion over the vehicle from denying ownership." Id. at 492. The plain-
tiff contended that the facts that McGraw was required to purchase a new automobile,
that the demonstrators were sold to salesman at cost (and with very favorable finance plans
not available to the general public), and that the salesman was given unrestricted use of the
automobile in question." Id. at 492.

6. See Fla. Stat. § 320.13 (1963), which provides that dealers' tags are lawfully usable
on "motor vehicles owned by the dealer to whom such tag was issued" and while being
operated in connection with such dealers' business. Wolfe v. City of Miami, 103 Fla. 774,
137 So. 892 (1931); Lambert v. Johnson, 109 So.2d 187 (Fla. 1st Dist. 1959) (Use of
dealers' tags does not per se render the licensee liable in tort).
able for the negligent acts of a driver upon proof by the plaintiff of the defendant's ownership of the vehicle and the identification of the driver of the vehicle. The presumption is rebuttable and vanishes when uncontradicted evidence shows that the driver was operating the vehicle without the owner's consent. In *Hudson v. Smith*, the plaintiff elected to place the driver-employee of the defendant on the stand to prove up the presumption. The driver's testimony showed that he was not authorized to use the truck in question and actually had been refused permission to use the truck. On appeal, a directed verdict for the defendant owner was affirmed, since the driver's testimony rebutted the effect of the statutory presumption and left the plaintiff without proof as to the authority of the driver to use his employer's truck at the time the accident occurred.

In *Stettler v. Huggins*, the defendant owners entrusted their automobile to one John Felton Dean and authorized him to drive it from Richmond, Virginia, to Miami. After arrival the car was involved in an accident with the plaintiff's automobile. The driver was thrown from the car, rendered unconscious and remained in that condition until some time after hospitalization. The plaintiff attempted to introduce evidence to establish the identity of the driver by way of a Florida driver's license found in the driver's wallet by the investigating officer at the scene of the accident. The license was issued to a John Felton Dean. Hospital records were also proffered to show that the driver was admitted and carried on the records as "John Dean." The trial court sustained the defendant's objection to the admission of the evidence and directed a verdict for the defendant owners on the ground that the plaintiff had failed to show that the driver of the defendant's car was the man to whom the vehicle was entrusted. On appeal the decision was reversed and remanded for a new trial on the grounds, *inter alia*, that any uncertainty as to identifying evidence and the method of identification goes to the weight of the evidence rather than to its admissibility.

In a case of first impression, the federal court of appeals for the fifth circuit held that the Florida dangerous instrumentality doctrine was applicable only in a tort action, and not in an action ex contractu.

9. 135 So.2d 450 (Fla. 2d Dist. 1961).
10. "Q. But it (the trunk) hadn't been entrusted to you to take home? A. Oh, no, no sir." (Emphasis added.) Id. at 451.
11. 134 So.2d 534 (Fla. 3d Dist. 1961).
12. Evidence offered on an issue of identity ... to be admissible, need not in itself constitute clear or irrefutable proof. Any fact which in the course of ordinary affairs tends to satisfy a person of average judgment as to the identity of an individual is admissible as evidence bearing on that issue. Of course ... a driver's license could be stolen ... forged or altered ... But a driver's license ... generally is regarded as reliable evidence of ... identity in everyday business transactions ... Id. at 535.
The plaintiffs were injured in an accident in Georgia between their car and a truck owned by the defendant and leased to a Florida corporation. The plaintiffs first brought suit in a state court in Florida against the lessee's driver and the lessor. The suit was dismissed as to the lessor because he could not be a party under Georgia law and as to the lessee's driver on the ground that the action was barred by the Georgia statute of limitations. The plaintiffs then filed suit in the federal district court in Florida alleging an action in tort and contract. The complaint was dismissed on the grounds that the action, although alleging grounds in contract was one which sounded in tort and was barred by the Georgia statute of limitations. The plaintiffs sought to recover in contract under the Florida dangerous instrumentality doctrine on the basis that they were third party beneficiaries of the rental contract. The court rejected this theory, holding that "the dangerous instrumentality doctrine has been applied only in tort actions by the Florida Supreme Court and it is not within our province to hold that this doctrine is also applicable to civil actions brought under contracts . . . ."

A "tow-motor" was held to be a motor vehicle and the doctrine properly applied in *Eagle Stevedores, Inc. v. Thomas.*

B. The Guest Statute

The significant cases under the guest statute relate primarily to the sufficiency of allegations of fact in the complaint to constitute gross negligence and a determination of the status of the plaintiff as a guest.

In *Leibowitz v. Franklin,* the complaint alleged that the plaintiff suffered injuries when the car in which she was riding was the offending vehicle in a rear end collision. A judgment entered upon a motion to dismiss, plus the plaintiff's refusal to plead further, was affirmed on the grounds that the allegations of fact were inadequate to state a cause of action.

---

14. Heilmann v. Wilson, 129 So.2d 725 (Fla. 1st Dist.) cert. denied, 135 So.2d 741 (Fla. 1961).
16. Plaintiff relied upon a Connecticut decision, *Levy v. Daniels U-Drive Auto Renting Co., Inc.*, 188 Conn. 333, 143 Atl. 163 (1928), which held that a Connecticut statute imposing liability upon any person renting or leasing a motor vehicle to another for damage to persons or property while so rented or leased, followed the vehicle wherever it was driven and the statute was applicable in an accident which occurred outside the state of Connecticut.
18. 145 So.2d 551 (Fla. 3d Dist. 1962).
20. 136 So.2d 260 (Fla. 2d Dist. 1961).
21. Gross negligence: that degree of negligence which lies in the area between ordinary negligence and willful and wanton misconduct; that course of conduct which a reasonable and prudent man would know would probably and most likely result in injury to persons or property; that course of conduct such that the likelihood of injury to other persons or property is known by the actor to be imminent or clear and present. *Carraway v. Revell, 116 So.2d 16, 22, 23* (Fla. 1959).
In a similar case involving a rear end collision, the passenger alleged in an amended complaint that the defendant drove at an excessive rate of speed at a time when the streets had become inundated by a torrential rain exceeding six inches.\(^2\) As a result, the defendant knew or should have known that the brakes of the vehicle were wet and inoperative.\(^2\) The trial court dismissed the complaint on the ground that it failed to allege sufficient facts to constitute gross negligence. On appeal, the case was reversed and remanded for trial. The appellate court held that when it appears that the question of whether the complaint states a cause of action under the guest statute is a close one on which honest men could differ, the case should be submitted to a jury.\(^2\)

In *Fleming v. Smart*,\(^2\) the parties were proceeding in the defendant's car from a cafe to a church sale. Enroute, the plaintiff was driving and stopped to assist a stalled motorist. Both went to the rear of the defendant's car. The defendant then entered his car, started it, and through some unexplained maneuver, caused it to back up and strike the plaintiff, breaking both of his legs. Since the plaintiff did not allege gross negligence, a summary judgment for the defendant was affirmed. The plaintiff was clearly a guest and the injuries occurred before the contemplated trip was completed.

One major exception to the guest statute occurs when the motivating purpose of the transportation is the mutual benefit of the parties or for the sole benefit of the owner or driver.\(^2\) The benefit, however, must be real and not remote, vague, or incidental.\(^2\)

In *England v. Stauffer*,\(^2\) the plaintiff was thrown from the rear of a pick-up truck due to the driver's negligence. At the time, the parties were engaged in supervising the coaching of their club's drill team. The plaintiff contended that the drill team, at certain times, participated in fund raising activities for charitable purposes and that this fact established a sufficient mutual interest to take the case out of the statute.\(^2\)

---

22. Martin v. Clum, 142 So.2d 149 (Fla. 3d Dist. 1962).
23. The circumstances of each case determine whether the operator of an automobile is guilty of gross negligence or wanton and willful misconduct as contemplated by the guest statute. Every act of commission or omission which concerns the accident must be considered and the course of conduct complained of must be of such character that the operator of the automobile knew or should have known that it would place others in danger of injury. Hall v. Hughey, 104 So.2d 849, 851 (Fla. 2d Dist. 1958). See also Koger v. Hollahan, 144 Fla. 779, 198 So. 685 (1940); see also Dexter v. Green, 55 So.2d 548 (Fla. 1951).
24. See Thompson v. Bennett, 42 So.2d 583 (Fla. 1949).
25. 153 So.2d 748 (Fla. 3d Dist. 1963). See also Fishback v. Yale, 85 So.2d 142 (Fla. 1955).
27. "A remote, vague, or incidental benefit is not sufficient. Nor ... where ... [the] journey or ride is for purposes of companionship, pleasure, social amenities, hospitality, and the like." Id. at 510.
28. 145 So.2d 545 (Fla. 3d Dist. 1962).
29. The particular parade being rehearsed was not for a charitable purpose.
A summary judgment for the defendant was affirmed. Stressing the point that each case must be determined on its own facts, the court held that "the mutual interests which the parties may have had in serving as members of an organization which on other occasions raised charity funds did not . . . produce for the . . . driver tangible benefits sufficient to bring the plaintiff within the claimed exception to the guest statute."\(^{30}\)

Similarly, no sole or mutual benefit was found in *Travis v. Blackmon*,\(^ {31}\) in which the plaintiff-passenger was injured while en route to a cemetery after, at the defendant's request, he gratuitously read the obituary of a decedent at a funeral home.\(^ {32}\) The nature of the service performed was held to be merely a social amenity or gesture of hospitality and thus insufficient to remove plaintiff from the status of a guest.

In *Bramble v. Garris*,\(^ {33}\) the plaintiff's husband was killed when the automobile driven by the defendant ran a stop sign and was struck by a trailer truck. Both the driver and the passenger were officers and stockholders of a close corporation and were making a periodic inspection trip to the corporate offices. A summary judgment for the defendant was reversed, since an issue of fact existed as to whether a business relationship and purpose existed which was sufficient to take the case outside the statute.

Another major exception to the guest statute is the commercial passenger.\(^ {34}\) The fact that a guest agrees to pay a share of the expenses, however, is not necessarily construed as compensation or payment for services; rather, it is usually considered a mere act of courtesy.

In *Minnick v. Keene*,\(^ {35}\) the dismissal by the trial court was affirmed when the court held that a complaint which merely alleged the defendant's agreement to take the plaintiff on a trip in consideration of plaintiff's paying certain expenses was insufficient to allege a non-guest status. Thus the plaintiff's remedy, if any, was under the guest statute, to which she declined to resort by failing to amend her complaint.

Similarly, in *McGowan v. Wilson*,\(^ {36}\) the fact that two carpenters agreed to take a trip in search of employment and that it was assumed

\(^{30}\) Supra note 28, at 549.

\(^{31}\) 155 So.2d 698 (Fla. 1st Dist. 1963).

\(^{32}\) The decedent was the defendant's niece and the plaintiff's beautician.

\(^{33}\) 144 So.2d 324 (Fla. 2d Dist. 1962). See also Sproule v. Nelson, 81 So.2d 478 (Fla. 1955); Handsel v. Handsel, 72 So.2d 813 (Fla. 1954); Perry v. Mershon, 149 Fla. 351, 5 So.2d 694 (1942); Tillman v. McLeod, 124 So.2d 135 (Fla. 2d Dist. 1960); Sullivan v. Stock, 98 So.2d 507 (Fla. 2d Dist. 1957). But see, Berne v. Peterson, 113 So.2d 718 (Fla. 3d Dist. 1959). See generally: 59 A.L.R. 336 (1929); 4 BLASHFIELD, CYCLOPEDIA OF AUTOMOBILE LAW AND PROCEDURE, 2291-92 (1935).

\(^{34}\) Yokom v. Rodriguez, 41 So.2d 446 (Fla. 1949); McDougald v. Couey, 150 Fla. 748, 9 So.2d 187 (1942).

\(^{35}\) 139 So.2d 172 (Fla. 2d Dist. 1962).

\(^{36}\) 154 So.2d 331 (Fla. 3d Dist. 1963).
from previous trips that the plaintiff would pay his fair share of expenses was not sufficient to establish the mutual benefit exception to the guest statute. "[T]he trip was made at the plaintiff's suggestion and for his own benefit. While the defendant also benefited . . . this benefit was only incidental, remote, and vague."37

In another case,38 the court thoroughly reviewed the issue of the sufficiency of the evidence upon which to base an instruction to the jury on "unavoidable accident."39 The plaintiff's wife was killed when the car in which she was riding with a friend crossed over into the opposite travel lane into the path of an oncoming vehicle. The defendant testified that she was traveling at a speed of about thirty-five to forty miles per hour. As the traffic in front of her came to a stop, she applied her brakes, started skidding, felt a pull to the left and then skidded over into the opposite lane. No evidence was introduced to prove that any mechanical failure caused the jerk or pull to the left, and other witnesses estimated the defendant's speed at sixty to sixty-five miles per hour. The trial court instructed the jury on the theory of unavoidable accident. A verdict was rendered for the defendant. In reversing and remanding the case for a new trial, the appellate court reasoned that in order for the jury to conclude that the death resulted from an unavoidable accident it would have been necessary to indulge in the inference that the pull or jerk of the vehicle to the left was the result of an unknown cause over which the defendant had no control, and in the further inference that this resulted in an uncontrollable skid. "[T]he jury cannot base inference upon inference in order to arrive at a conclusion of fact. While negligence, as well as the manner in which an accident occurred, may be inferred from known or established facts . . . the ultimate conclusion cannot be conjectured from other inferences."40 Thus, the giving of such an instruction was prejudicial error in that it tended to mislead and confuse the jury.

In Perdue v. Watson, the plaintiff missed his flight to Sarasota. He then met the defendant in the airport bar and upon learning that the latter was driving to Sarasota, offered him ten dollars for transportation to that city. En route, the defendant driver negligentlydrove over a severe dip in the road, causing an injury to the plaintiff's neck and back. There-

37. Id. at 333.
38. Sirmons v. Pittman, 138 So.2d 765 (Fla. 1st Dist. 1962).
39. The doctrine of unavoidable accident is applicable only when under some theory of the case the injury does not result from the negligence of either party. The casualty must be produced by some unavoidable cause. It is actually somewhat of a misnomer, since in such a case the element of proximate cause is lacking in that there is no causal relationship between the acts and the damages sustained. E.g., Carr v. Boyd, 123 Colo. 350, 229 P.2d 659 (1951); Iacino v. Brown, 121 Colo. 450, 217 P.2d 266 (1950); Harper v. Hall, 76 Ga. 441, 46 S.E.2d 201 (1948); Kelly v. Employers Cas. Co., 202 Okla. 437, 214 P.2d 925 (1950); Bailey v. Woodrum Truck Lines, 36 S.W.2d 1090 (Tex. Civ. App. 1930), aff'd, 57 S.W.2d 92 (Tex. Com. App. 1933). For a general discussion of the doctrine, see 10C Blashfield, Automob. Law and Practice, § 6698 (1935).
40. Supra note 38, at 770.
after, they stopped at a gas station at which time the plaintiff gave the defendant five dollars. The defendant testified that he never accepted money for transportation and did not remember discussing any agreed price for it. In affirming a judgment for the plaintiff, the court held that the facts were sufficient to submit the case to the jury on an issue of ordinary negligence. Since the parties were strangers and the journey was not for the purpose of companionship, pleasure or social amenities, the plaintiff's testimony was sufficient "for the jury to find . . . a contracted relationship for transportation . . ."\(^{41}\)

C. Care Required of Motorists

1. INTERSECTION ACCIDENTS

Intersection accidents usually involve some degree of negligence on the part of both parties to the accident. Thus, contributory negligence generally bars recovery in this type of case. Four judgments for defendants were affirmed\(^{42}\) and one plaintiff's judgment was reversed and remanded for a new trial.\(^{43}\)

In addition to the normal issues concerning negligence, intersection accident cases raised some interesting evidentiary issues and one rather unorthodox procedural issue.

In Collins v. Farley,\(^{44}\) an automobile accident was held to be a "transaction" within the meaning of the dead man's statute.\(^{45}\) The plaintiff offered evidence concerning the actions of the deceased driver which was admitted over the defendant-administrator's objection. After an extensive review of the applicability of similar statues in other jurisdictions,\(^{46}\) the appellate court reversed and remanded the case for a new trial, holding that, "we are not unmindful that the word 'transaction' has been strictly construed."\(^{47}\) Nevertheless, both drivers' actions are so closely related

\(^{41}\) 144 So.2d 840, 841 (Fla. 2d Dist. 1962).
\(^{42}\) Cash v. Gates, 151 So.2d 838 (Fla. 2d Dist. 1963), Pope v. Kay, 146 So.2d 621 (Fla. 3d Dist. 1962), Couey v. Miles, 136 So.2d 252 (Fla. 2d Dist. 1962), and Kowalczyk v. Brudder, 134 So.2d 532 (Fla. 3d Dist. 1961).
\(^{43}\) New Deal Cab Co., v. Meyer, 139 So.2d 189 (Fla. 1st Dist. 1962).
\(^{44}\) 137 So.2d 31 (Fla. 3d Dist. 1962).
\(^{45}\) Fla. Stat. § 90.05 (1963).
\(^{46}\) To the effect that an automobile accident is not a "transaction" within meaning of the dead man's statute, see Rankin v. Morgan, 193 Ark. 751, 102 S.W.2d 552 (1937); Turbot v. Repp, 247 Iowa 69, 72 N.W.2d 565 (1955); Shaneybrook v. Blizzard, 209 Md. 304, 121 A.2d 218 (1956). Contra: Southern Natural Gas Co. v. Davidson, 225 Ala. 171, 142 So. 63 (1932); Countryman v. Sullivan, 344 Ill. App. 371, 100 N.E.2d 799 (1951); In re Mueller's Estate, 166 Neb. 376, 89 N.W.2d 137 (1958). See generally Jones, Evidence § 773 (5th ed. 1958).
\(^{47}\) "The word 'transaction' as used in the Statute was construed by the Supreme Court of Florida, to encompass every variety of affairs which can form the subject of negotiation, interviews or actions between two persons. . ." Holliday v. McKinne, 22 Fla. 153 (1886); Chapin v. Mitchell, 44 Fla. 225, 32 So. 875 (1902); Embrey v. Southern Gas & Electric Corp., 63 So.2d 258 (Fla. 1953), Collins, supra note 44, at 35, citing Day v.
and connected with the accident that their courses and movements constitute a "variety of affair which [is] ... the subject of action between two persons." In ruling on an ancillary issue, the appellate court held that the authentic copies of the plaintiff's income tax returns should have been admitted in evidence on cross-examination for the purpose of impeaching the plaintiff's testimony as to his earnings before the accident.

In another intersection case, testimony that the defendant had run two red lights within 3,500 feet of the intersection where the collision occurred was held to be relevant to show a course of conduct pertinent to the circumstances of the collision. Its admission was not such an abuse of the trial court's discretion as to require a reversal.

A directed verdict for the plaintiff was affirmed in Garris v. Roberson, even though a motion to strike the defendant's plea of contributory negligence was granted. The court reasoned that while the "procedure employed by the court was unorthodox," it was "at most only a harmlessly erroneous procedural method of arriving at a proper result."

2. REAR-END COLLISIONS

A typical rear-end collision case, in which a party who has stopped for a traffic signal or at an intersection is struck in the rear, raises a presumption of negligence on the part of the operator of the offending vehicle. The major difficulty encountered in this type of case is the determination by the trial court of the quantum of evidence necessary either to rebut the presumption, thus presenting a question of fact for the jury, or to determine whether the plaintiff is entitled to a directed verdict on the issue of liability.

In Vasquez v. Stark, the defendant testified that when she applied her brakes two car lengths from the plaintiff, they locked, causing her

Stickle, 113 So.2d 559, 563 (1959), to the effect that the dead man's statute does not apply to two guests in an automobile.

49. See also, e.g., MacCurdy v. United States, 246 F.2d 67 (5th Cir. 1957), affirming, 143 F. Supp. 60 (N.D. Fla. 1956); Melville v. State, 155 F.2d 440 (4th Cir. 1956); Jennings v. Arata, 83 Cal. App. 2d 143, 188 P.2d 298 (1948); Baynard v. Liberman, 139 So.2d 485 (Fla. 2d Dist. 1962).
50. But see Le Fevre v. Bear, 113 So.2d 390 (Fla. 2d Dist. 1959) (Evidence of indulgence in intoxicating beverages not admissible).
51. 146 So.2d 388 (Fla. 2d Dist. 1962).
52. Fla. R. Civ. P. 1.11(f).
53. Supra note 51, at 389.
54. Where a defendant runs into the rear of the plaintiff's car while the plaintiff is stopped for a traffic light or at an intersection, there is a presumption of negligence on which the plaintiff would be entitled to recover in the absence of an explanation by the defendant. Bellere v. Madsen, 114 So.2d 619, 621 (Fla. 1959).
55. 155 So.2d 905 (Fla. 3d Dist. 1963). See also Kimenker v. Greater Miami Car Rental, Inc., 115 So.2d 191 (Fla. 1959); Sheehan v. Allred, 146 So.2d 760 (Fla. 1st Dist. 1962).
vehicle to skid on the wet pavement and strike the plaintiff's car in the rear. A verdict and judgment for the defendant was reversed. The defendant's explanation was not sufficient to rebut the presumption and the plaintiff was entitled to a directed verdict on the issue of liability and to a new trial on the issue of damages.

In a similar fact pattern, the defendant testified that she applied her brakes within two or three car lengths of the plaintiff, that the brakes "grabbed" momentarily, and then failed completely. Additional testimony by mechanical experts was to the effect that the brakes were defective due to a pin-hole rupture in the main hydraulic brake line. A verdict for the defendant was affirmed on the grounds that the defendant's explanation was sufficient to establish a question of fact for the jury.

In an intersection rear-end collision, a judgment for the defendant was affirmed. Both cars were proceeding through the intersection after being stopped for a red light. The plaintiff testified he stopped in the middle of the intersection because a police car was entering from his right. The defendant testified he was distracted by the flashing red light of the police car and did not see the plaintiff stop until it was too late to avoid the collision. The police officer testified he had stopped for the red light some eight or ten seconds before the collision. The court held that the issues of the negligence of both parties were properly left to the jury.

A jury verdict for the defendant was reversed in a case involving a rear-end collision when both vehicles were in motion. In Central Truck Lines, Inc., v. Rogers, the lead truck slowed down from forty miles per hour to an estimated six to twelve miles per hour while approaching a railroad crossing. The defendant's truck passed an intermediate truck, cut back into the right lane and struck the rear of the lead truck. The trial court instructed the jury "that the law of Florida does not require any vehicle to come to a stop at a grade railroad crossing except passenger buses, school buses and vehicles carrying explosive substances . . ." The appellate court reasoned, therefore, that the only basis upon which the jury could have arrived at its verdict was to find that the plaintiff's

56. Guelli v. Kraus, 145 So.2d 900 (Fla. 2d Dist. 1962).
57. The rupture was caused by "condensation of moisture inside the steel brake line, producing rust corrosion inside the line, which would not be apparent from visual outside inspection. The corrosion caused the brake line to fail under pressure of the application of the brakes." Id. at 902.
58. See also Pensacola Transit Co. v. Denton, 119 So.2d 296 (Fla. 1st Dist. 1960) (Driver's testimony that brakes simply did not function sufficient to raise jury question).
59. Gordon v. May, 149 So.2d 394 (Fla. 2d Dist. 1963).
60. 140 So.2d 130 (Fla. 1st Dist. 1962).
61. Id. at 131. See FLA. STAT. § 317.451 (1963). The court stressed the point that while the statute applies only to buses and vehicles carrying explosives andflammables, "it does, however, suggest a standard of care for others to follow and cannot . . . be construed as imposing a duty on other drivers not to slow down or stop . . ."
driver was negligent in decelerating his speed at the crossing and that such deceleration was the proximate cause of the collision. In granting a judgment non obstante verdicto, the court held that persons entering railroad crossings must exercise a high degree of care and a motorist who prudently slows down or stops for a railroad crossing is not guilty of negligence.

A sudden stop in moving traffic often results in an additional type of rear-end collision. In reversing a judgment for the plaintiff entered on a directed verdict as to liability, the appellate court held that conflicting testimony as to whether the stop had been sudden or slow and gradual was a question of fact for the jury. In another case, a judgment for the defendant was affirmed. The issue of the plaintiff's contributory negligence for failure, in violation of a city ordinance, to give a hand signal when stopping, was held to have been determined properly as a jury question.

3. PEDESTRIANS

The rights and responsibilities of motorists and pedestrians in the use of highways are reciprocal, and both most exercise ordinary care under the existing circumstances. The most significant number of reversals occurred in cases involving minor pedestrians under the age of ten years, in which the trial court did not allow the question of negligence to go to the jury.

In Sheehan v. Frith, a three-year-old was struck while crossing a one-way street in the middle of the block. Conflicting testimony was given concerning the speed at which the boy was walking and whether the driver came to a slow and gradual, or fast, panic stop with a squeal of brakes. A judgment entered on a directed verdict for the defendant

62. In Atlantic Coast Line R.R. Co. v. Walker, 113 So.2d 420, 422 (Fla. 1st Dist. 1959), the court said: "The settled law of Florida requires a person approaching a grade crossing to look and listen for oncoming trains, and to stop if what he sees indicates that it would be dangerous to proceed further."

63. The accident occurred on a dark but clear night on a four lane highway with a dividing strip. The plaintiff's driver began applying his brakes and flashing a caution signal over 500 yards north of the crossing.

64. Miller v. Griffin, 154 So.2d 333 (Fla. 3d Dist. 1963). See also Jeskey v. Yellow Cab Co., Inc., 136 So.2d 376 (Fla. 3d Dist. 1962) (directed verdict for plaintiff upheld where plaintiff made a sudden stop to avoid a car which cut in front of him); Staier v. Hall, 130 So.2d 113 (Fla. 2d Dist. 1961) (issues raised by conflicting testimony properly left to jury).


66. King v. Griner, 60 So.2d 177, 178 (Fla. 1952).

67. 138 So.2d 76 (Fla. 3d Dist. 1962).

68. The defendant testified that the boy was trotting, but a witness testified that the boy was walking slowly. Id. at 77.

69. The driver testified he made a panic stop, jamming on his brakes so hard that the engine stalled. One witness, 25 feet away, said the car came to a slow gradual stop with no squeal of brakes and another, 100 feet away, that the car came to a fast panic stop, with the squeal of brakes. Id. at 78.
was reversed, the court holding that "conflicting evidence should be submitted to the jury whose function it is to weigh and evaluate the evidence . . ."\(^{70}\)

A seven year-old was struck when he jumped from the back of a horse-drawn wagon to retrieve a toy which he had dropped.\(^{71}\) Conflicting testimony was given with respect to the defendant's speed and whether the point of impact occurred over the center line of the highway and on the side upon which the wagon was traveling. A new trial was granted on the grounds that the evidence was sufficient to establish a prima facie case of negligence.\(^{72}\)

Summary judgments for the defendants were reversed in two cases. In *Bermudez v. Jenkins*,\(^{78}\) an eight year-old was struck as he darted into a street while attempting to flee from an irate homeowner. The homeowner had mistakenly believed that the plaintiff was one of several culprits who had been stealing her oranges, and while shouting and waving a hula hoop, she advanced upon the child. The court held that the question of the child's contributory negligence was one of fact for the jury.\(^{74}\)

Similarly, a defendant's deposition which merely stated that she was driving slowly and did not see the child until she was right on top of the car, was held to be insufficient to support a summary judgment.\(^{75}\)

Judgments entered on directed verdicts for the defendants were affirmed, however, in two cases involved sixteen year-old plaintiffs. In one case,\(^{76}\) the plaintiff was crossing a four lane highway with a girl friend. The defendant driver was traveling north within the speed limit and in the right hand lane. The plaintiff's companion darted across the left northbound lane and into the path of defendant's car in the right northbound lane. In attempting to avoid the first girl the defendant swerved to the

\(^{70}\) Id. at 77.
\(^{71}\) Massaline v. Rich, 137 So.2d 10 (Fla. 1st Dist. 1962).
\(^{72}\) The appeal was from a judgment of non-suit, taken after the trial judge announced his intention to grant the defendant's motion for a directed verdict at the conclusion of the plaintiff's case. *Ibid.*
\(^{73}\) 144 So.2d 859 (Fla. 3d Dist. 1962).
\(^{74}\) "The standard of conduct imposed upon a child is only such care and prudence as could be reasonably expected of a child of its age and intelligence. . . . When a case is close on issues of . . . contributory negligence doubt should always be resolved in favor of a jury trial." *Ibid.* at 860-861. See also *Bess v. 17545 Collins Ave., Inc.*, 98 So.2d 490 (Fla. 1957); *City of Jacksonville v. Stokes*, 74 So.2d 278 (Fla. 1954); *Quinn v. I. C. Helmly Furniture Co.*, 141 So.2d 302 (Fla. 3d Dist. 1962); *Holmes v. Forty-Five Twenty-Five, Inc.*, 133 So.2d 651 (Fla. 3d Dist. 1961).
\(^{75}\) Smith v. Musso, 151 So.2d 475 (Fla. 2d Dist. 1963).
\(^{76}\) It is elemental that the movant at all times carries the burden of clearly and unequivocally establishing the right to summary judgment, and that it cannot be granted if there exists any controverted issues of material fact or if the proofs supporting the motion fail to overcome every theory upon which, under the pleadings, the adversary's position might be sustained. . . . *Posey v. Pensacola Tractor and Equipment Co.*, 138 So.2d 777, 779 (Fla. 1st Dist. 1962).
\(^{76}\) Green v. Loudermilk, 146 So.2d 601 (Fla. 2d Dist. 1962).
left, partly into the left lane and in so doing, struck the plaintiff who had started across, stopped, and then moved forward again, into the diverted path of the defendant's automobile.

The other case involved a sixteen year-old boy who was struck while attempting to cross a limited access causeway at the end of a bridge. He testified that he saw the defendant's vehicle and that he misjudged its speed. In affirming, the court held that "where the plaintiff's own testimony is sufficient to show that he contributed proximately to . . . [the] injuries . . . sustained and in the absence of showing of negligence on the part of the defendant, the trial court will not . . . have erred in directing a verdict."78

The defense of loss of consciousness while driving was extensively reviewed in Malcolm v. Patrick.80 The plaintiff was struck from behind when the defendant's automobile, operated by his minor son, ran up on a sidewalk. The defense asserted was that the son suffered a loss of consciousness or blackout which caused him to lose control of the vehicle.81 Expert testimony established that the son suffered from petit mal epilepsy, but was in conflict as to whether it existed prior to the accident. The trial judge instructed the jury that "a driver who suffers a sudden loss of consciousness . . . is not guilty of negligence unless . . . prior to such loss . . . he knew or . . . should have known that he might suffer a loss of consciousness."82 A verdict for the plaintiff was set aside by the trial court and a new trial granted on the grounds that the portion of the charge dealing with premonition was erroneous. On appeal, the order was reversed and the case remanded for reinstatement of the verdict. The court held that the charge was correct and that "to establish such a defense the defendant has the burden of proving, first, a sudden physical or mental incapacity, and second, the unanticipatable and unforeseen nature of such incapacity.

In two other pedestrian cases, an issue arose concerning the admissibility of information contained in an accident report—one in a jurisdictional and the other in a substantive context.

In Ellsworth v. Nash Miami Motors, Inc.,83 the supreme court classi-
fied a lower court decision reversing a judgment for the plaintiff on the grounds that information given to a special investigator was entitled to a privilege the same as that of the information provided in the official accident report, as a case of first impression. Therefore, the court was without jurisdiction to review the case by writ of certiorari.

In the second case, the plaintiff was interviewed in the hospital by an investigating officer. The officer was permitted to testify as to the plaintiff’s statements, on the theory that only those statements made to investigators by drivers are privileged. The appellate court rejected this interpretation, holding that the admission was improper. While the statute does not specifically require a pedestrian involved in an accident to make a report, if he does, his statements come within the cloak of immunity.

4. LAST CLEAR CHANCE

The doctrine of last clear chance is designed to insulate a plaintiff from the harshness of the rule of contributory negligence. The trial judge’s problem, however, in determining exactly which factual situations require the application of the doctrine, is reflected in five cases which were reversed either for applying the doctrine or for failing to do so.

In Delevis v. Troyer, the plaintiff’s vehicle was struck on the left rear fender as he proceeded to make a left turn on a two lane highway. The defendant at the time was attempting to pass in the left lane. A summary judgment was entered for the defendant on the grounds that the plaintiff’s

---

84. Nash Miami Motors, Inc. v. Ellsworth, 129 So.2d 704 (Fla. 3d Dist. 1961).
85. Fla. Stat. § 317.13 (1963) requires reports of accidents and provides that supplemental reports may be required when necessary.
86. Fla. Stat. §§ 317.17 (1963) provides that except for certain limited exceptions, all accident reports shall be confidential and no report shall be used as evidence in any trial.
87. Fla. Const. art. V, § 4, provides: “The Supreme Court may review by certiorari any decision of a district court of appeal that effects a class of constitutional or state officers, or that passes upon a question certified by the district court of appeal to be of great public interest or that is in direct conflict with a decision of another district court of appeal or of the supreme court. . . .”
88. Williams v. Scott, 153 So.2d 18 (Fla. 2d Dist. 1963).
89. The officer testified only that he definitely recalled that “she [plaintiff] did not know what color the light was.” Id. at 19.
91. The elements, under Florida law, necessary to invoke the doctrine were re-stated in James v. Keene, 133 So.2d 297, 299 (Fla. 1961):
(1) . . . the injured party has already come into a position of peril; (2) . . . the injuring party then or thereafter becomes, or in the exercise of ordinary prudence ought to have become aware not only of that fact, but also that the party in peril either reasonably cannot escape from it, or apparently will not avail himself of opportunities open to him for doing so; (3) . . . the injuring party subsequently has the opportunity by the exercise of reasonable care to save the other from harm; and (4) . . . he fails to exercise such care.
See also Parker v. Perfection Cooperative Dairies, 102 So.2d 645 (Fla. 2d Dist. 1958).
92. 142 So.2d 783 (Fla. 2d Dist. 1962).
failure to give a left turn signal constituted contributory negligence as a matter of law and was sufficient to bar recovery. On appeal the case was reversed, the court holding that violation of a traffic law$^93$ is not negligence per se, but only prima facie negligence,$^94$ and that an issue under the doctrine of the last clear chance well could have been pertinent.

New trials were granted in two wrongful death actions for failure of the trial court to apply the doctrine. The plaintiff's deceased husband was fishing from a causeway draw bridge when struck and killed by the defendant's truck. The driver testified that he must have seen the fishermen, but that he was not paying any attention to them because he was watching the traffic. Such facts were sufficient to justify an instruction on last clear chance.$^95$ In the other case,$^96$ a rider was killed when his horse was struck by a dump truck. Testimony indicated that the horse and rider were perpendicular to the highway, with the horse's feet on the shoulder of the road but with his hind quarter projecting a few feet over the curb into the highway.$^97$ The driver saw the rider approximately 400 or 500 yards ahead of him but did not reduce his speed until the point of impact. Upon a review of all the evidence, the court held that although there was no question but that the jury would have been warranted in returning a verdict for the defendant, the plaintiff was entitled to have the factual issue determined by the jury under proper instructions on the doctrine of last clear chance.$^98$

A classic example$^99$ of a fact pattern warranting the application of the doctrine was presented in *Golden v. Harrell*,$^{100}$ in which the defendant's trailer truck ran out of gas in the middle of a hill at night. In attempting to roll backwards off the highway, the driver jackknifed the trailer, completely blocking the highway approximately 600 feet below the crest of the hill. The driver had no flares, fuses or reflectors available. Other

---

$^93$ FLA. STAT. § 317.37 (1963) requires a motorist to give a turn signal within the last one-hundred feet traveled prior to turning.

$^94$ Gudath v. Culp Lumber Co., 81 So.2d 742 (Fla. 1955); Clark v. Sumner, 72 So.2d 375 (Fla. 1954); C. W. Zaring & Co. v. Dennis, 155 Fla. 150, 19 So.2d 701 (1944); Allen v. Hooper, 126 Fla. 458, 171 So. 513 (1937). See also, Morrison v. C. J. Jones Lumber Co., 126 So.2d 895 (Fla. 2d Dist. 1961).

$^95$ Wasserman v. Miller, 143 So.2d 210 (Fla. 3d Dist. 1962).

$^96$ Baker v. Stolley, 155 So.2d 809 (Fla. 1st Dist. 1963).

$^97$ The horse had only one small bruise on his right rear rump. The rider was thrown into the truck and suffered two crushed legs and severe head injuries, resulting in his death twenty-six days later.

$^98$ Supra note 96, at 813-14.

$^99$ The classic example of the doctrine of last clear chance exists when a plaintiff, through his negligence, has placed himself in a position of peril from which he cannot extricate himself. In this situation, the plaintiff can recover despite his negligence if the defendant, after he knew or should have known of the plaintiff's peril, and by the exercise of ordinary care had the last clear chance to avoid injuring the plaintiff, but failed to do so. See Shattuck v. Mullen, 115 So.2d 597 (Fla. 2d Dist. 1959); and also Miami Beach R. Co. v. Dohne, 131 Fla. 171, 179 So. 166 (1938); Merchant's Transp. Co. v. Daniel, 109 Fla. 496, 149 So. 401 (1933).

$^{100}$ 147 So.2d 350 (Fla. 2d Dist. 1962).
TORTS

motorists stopped to assist him and one stationed himself near the crest of the hill to warn oncoming traffic of the blockade. The plaintiffs, driver and passenger, although flagged down by the volunteer motorist at the crest of the hill, proceeded past him without reducing their speed and crashed into the truck. Judgments entered for the defendants on the original complaint and counterclaim were affirmed, the court holding that with respect to the counterclaim, it was proper for the trial judge to instruct the jury upon the doctrine of last clear chance.

In cases in which both parties are mutually inattentive and thus unaware of each other until the moment of impact, the courts appear to be unable to draw a line of demarcation which will preclude an instruction on last clear chance.¹ The probability, rather than the mere possibility, that the defendant had an opportunity to observe the plight of the plaintiff seems to be the objective criterion employed to determine whether application of the doctrine is warranted. However, the application of the standard to each factual pattern remains a problem. In two pedestrian cases² in which both plaintiffs were clearly visible and could have been seen had the defendant exercised ordinary care, the appellate court held that the doctrine was properly applied. However, in Gilman v. Rupert,³ a pedestrian, while standing in an empty parking space, was struck by the defendant's automobile which was being backed into the space; the refusal of the trial judge to instruct the jury on last clear chance was upheld. By exercising reasonable care, both parties could have avoided the accident at any time up to the actual impact; consequently, if the plaintiff has an opportunity to extricate himself and fails to do so, his contributory negligence can not be overcome.

5. CONTRIBUTORY NEGLIGENCE

Because of the severity of the rule of contributory negligence, appellate courts are reluctant to affirm any lower court decision unless it is based upon a properly instructed jury verdict.

In Sterling v. Hawkesworth,⁴ the plaintiff alleged that his injury

¹. James v. Keene, 133 So.2d 297 (Fla. 1961), quashing 121 So.2d 186 (Fla. 3d Dist. 1960). The supreme court impliedly rejected the lower court's holding that mutual inattentiveness of the parties precluded an instruction on last clear chance. The plaintiff had been visible for several hundred feet, but the defendant testified she did not see her until too late to avoid impact. But see Douglas v. Hackney, 133 So.2d 301 (Fla. 1961). There the only evidence was the driver's testimony that he did not see the plaintiff prior to striking him at night on a busy thoroughfare; the supreme court found no basis in the facts for a charge on last clear chance.

². Greenfield v. Frantz, 144 So.2d 878 (Fla. 3d Dist. 1962) (pedestrian crossing well lighted street at night); Whitten v. Erny, 152 So.2d 510 (Fla. 2d Dist. 1963) (motorist over 150 feet away when plaintiff started across street).

³. 145 So.2d 746 (Fla. 2d Dist. 1962); accord, Wawner v. Sellic Stone Studio, 74 So.2d 574 (Fla. 1954); Lindsay v. Thomas, 128 Fla. 293, 174 So. 418 (1937). As to the duty of the trial judge upon request for instruction in last clear chance, see Yousko v. Vogt, 63 So.2d 193 (Fla. 1953).

⁴. 139 So.2d 740 (Fla. 3d Dist. 1962).
was caused by the defendant's reckless conduct. The trial court granted the plaintiff's motion for a directed verdict on the issue of liability. On appeal, the case was reversed and remanded for a new trial. The appellate court held that under the evidence "the trial judge abused his discretion in taking from the jury the question of contributory negligence or assumption of the risk."

However, in *C. J. Jones Lumber Co. Inc. v. Morrison,* the plaintiff was injured and her child killed in a virtual head-on collision with a trailer truck. The accident occurred at night on a road which was under construction. There was conflicting testimony as to the width of the road and whether the truck's clearance lights were on. The plaintiff testified that initially, upon observing the truck when it was one-half mile away, she thought it was a motorcycle because she saw only one headlight. Thereafter, while traveling at a speed of thirty-five miles per hour, she failed to see the vehicle again or to realize that it was a truck until it was only six feet away, because she kept her eyes on the road and not on the approaching vehicle. Although both of the truck's headlights burned on high beam, only the right one burned on low beam. The truck driver testified that he had switched his lights from low to high beam because the plaintiff would not dim her headlights, and that he slowed to a speed of fifteen miles per hour until he reached a point fifty feet from the plaintiff. Realizing that a collision was imminent, the truck driver decreased his speed to five miles per hour and veered slightly to the right. The left front of the plaintiff's vehicle struck the left side of the truck. Testimony by the investigating officer was to the effect that the point of impact was eight feet and two inches across and into the defendant's lane of travel. In reversing a judgment for the plaintiff, the appellate court held that upon a:

> careful review of the entire record . . . bearing in mind it is the province of the jury to determine disputed questions of fact . . . we are compelled to the conclusion that . . . there is reasonable ground to conclude that the jury acted through sympathy, passion, [and] prejudice . . . and it is our duty to grant a new trial.

Similarly, a judgment *non obstante verditco* was reversed and rein-

---

105. "[A] plaintiff's contributory negligence does not bar recovery for harm caused by the defendant's reckless disregard for the plaintiff's safety." *Id.* at 741. But a plaintiff may be barred from recovery for such action if, knowing of the defendant's reckless misconduct, and the danger involved, the plaintiff recklessly exposes himself to it. See 2 *Restatement, Torts* § 482 (1934).

106. 154 So.2d 721 (Fla. 2d Dist. 1963).


statement of the jury verdict was ordered in Rofer v. Jensen. In Rofer, the plaintiff motorcyclist struck the oncoming defendant's automobile, which was stopped in the center lane preparing to make a left turn. The testimony was in conflict as to whether the lights of both vehicles were on, and whether the defendant's vehicle was only a foot or two, or as much as halfway across the center line. Relying upon the range of vision rule, the trial judge determined that the plaintiff was guilty of contributory negligence. The appellate court held that "while it is true that under the facts . . . [the] plaintiff may have been guilty of contributory negligence, this was a question of fact for . . . the jury and . . . not . . . a question of law. It was therefore erroneous for the trial court to set aside the verdict . . . ." 

II. STATUTORY LIABILITY

A. Statutes Affecting the Right to Maintain an Action

In Davis v. Shiappacossee, the sale of intoxicating liquors to a minor in violation of a statute was held to be negligence per se. The vendor was liable for the death of the plaintiff's sixteen-year-old son. The sale was made at a drive-in liquor store and the accident occurred six hours later when the boy, under the influence of the liquor, lost control of his vehicle. The accident was held to be reasonably foreseeable and the proximate result of the vendor's negligence.

In Williams v. Youngblood, the plaintiff's son lost his eye as a result of a BB shot by another child. In an action against the child's father, a jury verdict for the plaintiff was reversed. The statute, in providing a penalty for an adult who permits a child for whose welfare he is responsible and who is under the age of sixteen to use or possess a BB gun outside of the adult's supervision and presence, was intended as a criminal measure and designed to protect the public generally. It does not impose vicarious liability, and in order to recover, the plaintiff must show that the adult was negligent.

The Florida wrongful death act creates a cause of action cognizable in both the Florida and federal courts, for the death of any person caused

109. 141 So.2d 791 (Fla. 2d Dist. 1962).
110. One whose vision is obscured has a duty to exercise care under the circumstances and to stop if necessary, and the operator of an automobile must be able to stop within his range of vision, both during the day and at night time. See Cruse v. Wilson, 92 So.2d 270 (Fla. 1957); Macasphalt Corp. v. Murphy, 67 So.2d 438 (Fla. 1953).
112. 155 So.2d 365 (Fla. 1963), reversing, 145 So.2d 758 (Fla. 2d Dist. 1962). Accord, Tamiami Gun Shop v. Klein, 109 So.2d 189 (Fla. 3d Dist. 1959) (Sale of gun to minor).
114. 152 So.2d 530 (Fla. 1st Dist. 1963).
by the negligent operation of a vessel if the death occurs within the ter-
torial waters of Florida.\textsuperscript{116}

\textbf{B. Federal Employer's Liability Act}

New trials were ordered in two suits by employees under the FELA.\textsuperscript{117} In one case admission into evidence of a city ordinance regulating the speed of trains coupled with a jury charge that its violation was prima facie negligence was held to be reversible error.\textsuperscript{118} The act is the para-
mount law governing the liability of a railroad to its employees while the carrier is engaged in interstate commerce.\textsuperscript{119} Therefore, "no state statute, law or other enactment can enlarge or contract the operation of the act and the rights and obligations arising thereunder."\textsuperscript{120}

In the other case,\textsuperscript{121} after a verdict was rendered for the defendant, the trial court ordered a new trial because of its error in recalling and instructing the jury in accordance with the usual instructions as to proximate cause given in common law cases. Such action was not in abuse of discretion, in view of the extent to which the concept of proximate cause has been modified under the federal act.\textsuperscript{122}

If the basis of a suit under the FELA is the fraudulent procurement of a settlement, tender of the proceeds of such settlement is a condition precedent to maintenance of the action.\textsuperscript{123}

\textbf{C. Railroad Operation}

The Village of Miami Shores was held\textsuperscript{124} not responsible for requiring a railroad properly to maintain a crossing\textsuperscript{125} within its boundaries when the county had designated the street on which the crossing was located as an arterial highway, and had assumed the duty of supervising the physical condition of the street on either side of the crossing.

In two cases involving suits by railroad employees against their employer, judgments for the employees were affirmed. In one,\textsuperscript{126} the

\begin{itemize}
  \item 118. Florida East Coast Ry. v. Pollack, 154 So.2d 346 (Fla. 3d Dist. 1963).
  \item 119. Louisville & N. R. Co. v. Rhoda, 73 Fla. 12, 74 So. 19 (1917).
  \item 121. Florida East Coast Ry. v. Pierce, 142 So.2d 121 (Fla. 3d Dist. 1962).
  \item 122. The railroad's liability under the liberal federal interpretation is a jury question if the employer's negligence was even the slightest cause of the injury. \textit{E.g.}, Connor v. Butler, 361 U.S. 29 (1959); Atlantic Coast Line R.R. v. Barrett, 101 So.2d 37 (Fla. 1958); McCloskey v. Louisville & Nashville R.R. Co., 122 So.2d 481 (Fla. 1st Dist. 1960); Butler v. Gay, 118 So.2d 572 (Fla. 3d Dist. 1959).
  \item 123. Overstreet v. Atlantic Coast Line R.R., 152 So.2d 188 (Fla. 1st Dist. 1963).
  \item 124. Melville v. Miami Shores, 155 So.2d 739 (Fla. 3d Dist. 1963).
  \item 125. FLA. STAT. § 357.01 (1963).
  \item 126. Florida East Coast Ry. v. Booth, 148 So.2d 536 (Fla. 3d Dist. 1963).
\end{itemize}
plaintiff trainman was injured by flying glass when a rock thrown at
the train shattered a window. The defendant contended that the special
pass used by the employee was a gratuity and, thus, the conditions printed
on the back of the pass—that the user assumed all risks of travel and that
the railroad should not be considered a common carrier or liable to the
user for negligence—barred his recovery. The appellate court affirmed the
ruling of the trial court in holding that since the pass was issued pursuant
to a union contract requirement, it was issued for a consideration, thereby
rendering ineffective the provisions which limited the defendant’s liability.

In the other case, the failure of the trial court to give a requested
jury charge that was proper and applicable was not reversible error where
its substance or subject was covered in other charges given by the court
or where the failure to give it was not shown to be prejudicial.

In *Louisville & Nashville R.R. Co. v. Flourney*, a jury charge as
to the statutory presumption of a railroad’s liability was held to be
reversible error since the defendant railroad had offered evidence tending
to prove that its agents had exercised all ordinary and reasonable care
and diligence under the circumstances.

In *Florida East Coast Ry. v. Schweida*, the plaintiff’s automobile
stalled upon a heavily traveled crossing just before the crossing signals
began to operate. Evidence as to whether the train’s speed was excessive
in view of the character of the crossing, the location of tripping devices
to activate the warning signals and gates, and the failure to apply the
emergency brakes was held to present a proper question of fact as to the
railroad’s negligence for the jury to determine.

Similarly, evidence that the railroad had allowed brush to grow upon
its right of way so that the driver’s view was obscured, plus the train’s
excessive speed, and evidence of the plaintiff’s negligence was held to be
a proper question for the jury, especially in view of the applicability of
the comparative negligence rule.

In *Florida East Coast Ry. v. Soper*, two deaf-mutes were killed in
a crossing accident. The only warning device employed was the usual
crossbuck sign. A curve in the track made it impossible for the train crew
to see the crossing until it was approximately 600 feet away. In addition,
a thick growth of vegetation and trees located off the railroad right of
way prevented either party from seeing the other until within fifteen or
twenty feet from the crossing. The train approached the crossing with its

---

127. Florida East Coast Ry. v. Lawler, 151 So.2d 852 (Fla. 3d Dist. 1963).
128. 136 So.2d 32 ( Fla. 1st Dist. 1961).
131. 151 So.2d 665 (Fla. 3d Dist. 1963).
132. Florida East Coast Ry. v. Haywood, 145 So.2d 533 (Fla. 3d Dist. 1962).
133. 146 So.2d 605 (Fla. 3d Dist. 1962).
whistle blowing, bells ringing and lights on. The evidence was in conflict as to the speed of the train. In affirming a judgment for the plaintiffs, the court held that the degree of care required of a railroad is variable and dependent upon the circumstances of a particular case and the danger existing at a particular crossing. The court pointed out that in Atlantic Coast Line R.R. v. Smith,134 it was held that, "it may not always be enough to blow the whistle and ring the bell...where the tracks...are in a congested area...[and] vision is obstructed...."136

In two other crossing accidents, conflicting evidence as to whether the approaching train gave adequate warning signals was held to present a question of fact for the jury. In one case,136 a judgment on a jury verdict for the plaintiff was affirmed, and in the other137 a judgment non obstante veredito entered by the trial court in favor of the defendant was reversed with directions to reinstate the jury verdict for the plaintiff.

In another case,138 a lumber yard worker walked directly into the path of a train in spite of the fact that the train's whistle was blowing and its bell was ringing. In affirming a judgment entered on a directed verdict for the defendant, the court held that "the plaintiff neglected to observe the most elementary duty of care imposed upon him to protect himself from an obvious hazard...."139 His failure to do so...[in conjunction with] the care that was exercised by the railroad, supports the finding that...[his] death was caused solely by his own negligence."140

Similarly, in another crossing case,141 the plaintiff's negligence was held to be the sole proximate cause of his injuries. The issue as to whether there were lighted fuses on either side of the tracks at the time of the collision was held to be insufficient to prevent the entry of a summary judgment for the defendant. The plaintiff was driving a fifty foot, thirty-four wheel trailer truck.142 The accident occurred on a foggy morning and the evidence showed he was traveling at a reckless speed and should have been acquainted with the crossing, since he had traveled the same route for six months.

134. 53 So.2d 301 (Fla. 1951).
135. Id. at 302.
136. Florida East Coast Ry. v. Ross, 151 So.2d 32 (Fla. 3d Dist. 1963).
137. Ely v. Atlantic Coast Line R.R., 138 So.2d 521 (Fla. 2d Dist. 1962). The plaintiff and several witnesses testified that they did not see or hear any warning signals. The defendant's witnesses testified that regular warnings were given by bell, whistle, and lights.
139. Witnesses testified that the plaintiff walked at a steady gait and never looked in the direction of the train.
140. Supra note 138, at 12.
141. McDonald v. Atlantic Coast Line R.R., 155 So.2d 625 (Fla. 3d Dist. 1963).
142. The truck laid down 192 feet of skid marks and the impact overturned one railroad car and derailed two others. The load of sod on the trailer was thrown over the railroad cars and landed on the highway on the opposite side of the tracks.
III. COMMON LAW NEGLIGENCE ACTIONS

A. Landlord and Tenant

Although during the period surveyed no significant changes occurred in the law in this area, some interesting factual patterns were presented.

The issue of liability for a latent defect\textsuperscript{143} was presented in two cases. In \textit{Zubowicz v. Warnock},\textsuperscript{144} the plaintiff-lessee was injured when a concrete slab at the rear door of his premises gave way as he entered the store. He had never noticed anything wrong with the concrete prior to the accident, but it was evident after the accident that the earth beneath the slab had eroded. In affirming a directed verdict for the defendant, the court held that since the defect may or may not have been in existence at the inception of the lease, the lessee, "being the occupant of the premises, was in as good or better position to know of such defect . . ."\textsuperscript{145} as the landlord.

In \textit{Feldman v. Jacobs},\textsuperscript{146} however, a dismissal with prejudice was reversed when the plaintiff alleged that she was injured when she stepped into a hole in a threshold of her apartment which was concealed by wall to wall carpeting, and that the defect was known to the lessor and was not discoverable by the plaintiff by reasonable inspection.

Summary judgments for the defendant-landlords were affirmed in three cases. In \textit{Lipnick v. Sabal Palm Apartments, Inc.},\textsuperscript{147} the court held that the landlord was not responsible for the control of motor vehicle traffic adjacent to an area in an apartment house complex designated for children. The court held that the failure to control such traffic afforded no basis for liability for injuries sustained by a tenant’s infant when she was struck by an automobile some forty feet from the play area.

No recovery was allowed against the landlord for injuries which occurred when the plaintiff-tenant fell over a pipe protruding from a city sidewalk adjacent to a common passageway to the apartment house.\textsuperscript{148} Similarly, when the defect complained of was known to the plaintiff and had existed during the entire period of his tenancy, the plaintiff was guilty of contributory negligence as a matter of law.\textsuperscript{149}

\textsuperscript{143} To impose liability upon a lessor for a latent defect, the lessee must plead and prove that the defect 1) was known to the lessor; 2) was not known to the lessee, nor discoverable by him on a reasonable inspection; and 3) it was not disclosed by the lessor to the lessee and injury resulted therefrom. \textit{Wilensky v. Perell}, 72 So.2d 278 (Fla. 1954); \textit{Butler v. Maney}, 146 Fla. 33, 200 So. 226 (Fla. 1941).

\textsuperscript{144} 149 So.2d 890 (Fla. 2d Dist. 1963).

\textsuperscript{145} \textit{Id.} at 891.

\textsuperscript{146} 148 So.2d 540 (Fla. 3d Dist. 1963).

\textsuperscript{147} 151 So.2d 866 (Fla. 3d Dist. 1963).

\textsuperscript{148} \textit{Pentecost v. Ansan Corp.}, 136 So.2d 667 (Fla. 3d Dist. 1962).

\textsuperscript{149} \textit{Crosier v. Joseph Abraham Ford Co.}, 150 So.2d 499 (Fla. 3d Dist. 1963) (missing tile in floor of common shower stall); \textit{Joskowitz v. Holtman}, 134 So.2d 265 (Fla. 3d Dist. 1961) (overlapping carpet runner in apartment hallway).
In two cases, slips and falls caused by foreign substances on the floors of grocery stores resulted in judgments for the defendants. In one, the plaintiff slipped and fell on a grape. The storekeeper was held not liable in the absence of evidence showing how the substance came to be on the floor, how long it had been there, and whether it had been dropped on the floor by an employee or a customer. Similarly, an interval of five seconds from the time a jar of baby food fell from one customer's cart and broke on the floor to the plaintiff's fall was insufficient to prove that the storekeeper was liable for maintaining a dangerous condition or for failure to warn the plaintiff of the hazard. Conversely, however, a summary judgment for a defendant hotel was reversed where the plaintiff alleged that her fall was caused by the raised edge of a large rug in the hotel lobby.

In Sadowsky v. Levine, the plaintiff was injured as the result of a defective rubber mat placed in a common hallway of an apartment building. In affirming the trial court's dismissal of the complaint, the court held that in the absence of a specific allegation of the lessor's knowledge of the dangerous condition and of facts to establish the period of time during which the condition existed in order to show that the landlord had an opportunity to discover the defect, the complaint was defective.

In another case involving a defective mat, a judgment for the plaintiff was affirmed on the grounds that a jury question was properly presented as to whether the landlord was negligent in permitting dirt to accumulate under a mat on a tile floor.

A landlord who has undertaken to keep leased premises in repair may be liable to third persons if he has actual or constructive notice of a defect. In Goldstein v. Great Atlantic & Pacific Tea Co., the plaintiff was injured when she tripped over a metal reinforcing rod which protruded from a concrete car stop in the store parking lot. A judgment for the defendant-owner was affirmed when the plaintiff failed to prove either knowledge on the part of the landlord or circumstances from which notice might be implied.

A summary judgment in favor of the landlord was reversed, however, in Berlin v. Southgate Corp. The plaintiff, a guest of one of the tenants,
was injured when she tripped over an aluminum framing installed in the hallway of the building. The appellate court held that since the plaintiff had used the hallway many times on previous occasions, a material issue of fact was presented as to whether the owner and contractor were negligent in failing to warn of the installation of the framing pursuant to installing a glass panel and door in the hallway.

In another case, the terrazzo floor of a stall shower had been treated with a commercial solvent which, if not completely removed after cleansing, dried to form an invisible film which became very slippery when wet. The plaintiff testified that after adjusting the water temperature and without moving, her feet slipped out from under her. A judgment non obstante verdicto for the defendant was reversed and reinstatement of the jury verdict for the plaintiff was ordered. The court held that a jury question is presented when evidence shows 'that there was an invisible substance on the floor which caused the person to fall, notwithstanding the fact that under Florida law a party who, without explanation, slips on a floor, may not recover.'

B. Distribution of Gas and Electricity

The distribution of gas and electricity has been classified as an activity highly dangerous to life and property and a distributor thereof must exercise a degree of care commensurate with the dangerous character of its product. This duty extends not only to the distributor's customers, but also to those members of the public who might be injured as a result of the distribution.

In Farber v. Houston Corp., a gas explosion occurred in a bathroom in the plaintiff's store. The store did not have gas service but other tenants of the building did. In some manner, gas had leaked into the store and the bathroom. When the plaintiff turned on the light, a spark ignited the accumulated gas and the explosion occurred. The defense's assertion was that investigation had disclosed a leak under the pavement in front of the store, which had been caused by a crack in the pipeline. The trial court refused to admit testimony relating to the company's knowledge of prior gas leaks in its system and directed a verdict for the defendant. On appeal, the case was reversed and remanded. The court held that evidence tending to show knowledge or notice of seepage or gas leaks was clearly relevant and raised a jury question as to whether the company "as the purveyor of a dangerous commodity, exercised that degree of care commensurate with such known danger."
In *Kerben v. Florida Power & Light Co.*, the plaintiff was burned severely when a fifteen-foot television antenna touched a live uninsulated power line as he lowered the antenna over a parapet wall from the roof of a building. The power lines were about three feet below the roof level and ten feet away from the side of the building. A summary judgment for the defendant company was affirmed on the ground that the plaintiff was contributorily negligent as a matter of law.

A directed verdict for the defendant was reversed, however, in *Guhman v. Florida Power & Light Co.*, in which the plaintiff was injured when the crane he was operating came in contact with a live power line.

C. Doctor-Patient

The effect of the "locality rule" upon a doctor's liability for malpractice was the crucial issue in two cases. As a result of those decisions, the rule now appears to be losing much of its significance in Florida law.

In the usual case, the rule is invoked to bar a plaintiff from using experts from another community to establish malpractice in his community. In *Couch v. Hutchison*, however, the rule was invoked against the defendant, an osteopathic orthopedic surgeon. He had performed a spinal fusion upon the plaintiff by means of surgical screws, in accordance with the method of his school of medicine. The plaintiff became dissatisfied with the results of the operation and sought other medical aid. A second operation was performed by a medical orthopedic surgeon. The screws were removed and the fusion accomplished by means of live bone grafts. The plaintiff used as experts three medical orthopedic surgeons from the west coast area of Florida. Although all three agreed that a spinal fusion was necessary, they disagreed with the method employed by the defendant, who was the only osteopathic orthopedic surgeon practicing in the area. The only other qualified witness was in Miami and was not available at the time of the trial. The defendant sought to introduce the evidence of a doctor from the Philadelphia College of Osteopathy that the operation had been performed properly in accordance with the method of spinal fusion which the defendant had been taught at the school. Objections to the expert's testimony was sustained by the trial court on the grounds that the witness was not licensed to practice medicine in Florida and was not familiar with orthopedic standards which prevail in St. Petersburg and similar surrounding communities. In reversing a judgment for the plaintiff,

---

161. 134 So.2d 280 (Fla. 3d Dist. 1961).
162. 139 So.2d 749 (Fla. 3d Dist. 1963); see Ahearn v. Florida Power & Light Co., 129 So.2d 457 (Fla. 2d Dist. 1961); Florida Power & Light Co. v. Barrs, 127 So.2d 896 (Fla. 3d Dist. 1961); McCollum v. Florida Power & Light Co., 125 So.2d 754 (Fla. 3d Dist. 1961); Bell v. Florida Power & Light Co., 106 So.2d 224 (Fla. 3d Dist. 1958).
163. The "locality rule" in a malpractice case is applied to confine expert medical testimony to that which can be given by doctors who practice in the same community.
164. 135 So.2d 18 (Fla. 2d Dist. 1961).
the appellate court noted that the reasons for the locality rule have, for the most part, disappeared with the advent of modern transportation and communication facilities and that its function is to define a minimum or average standard of reasonable care required of a practitioner. By applying it in the instant case, the defendant was deprived of any expert testimony concerning the approved standards of his school. Therefore, the court held, “whatever may be the ultimate place of the locality rule in our juridical system . . . it can not be used to exclude evidence of the defendant’s . . . qualifications with respect to the school in which he was trained.”

The same issue arose again in its normal context in a case in which the plaintiffs offered to present the expert testimony of a Miami physician to show negligence in the procedures used in an operation performed by a West Palm Beach physician. The testimony was rejected on the grounds of the locality rule and a summary judgment was entered for the defendant. In reversing and remanding the case for trial, the court again noted that the modern trend was toward expansion of the rule to include the testimony of medical experts from the same or similar locality. The court then took judicial notice of the fact that Miami is a community at least similar to West Palm Beach. Thus, the locality rule appears to be losing all significance except in those cases occurring in remote areas which differ significantly from the more populated urban and suburban communities.

In Michaels v. Spiers, the court held that affidavits by lay persons and a copy of hospital records submitted on behalf of the plaintiff were sufficient to preclude a summary judgment. A material issue of fact was presented as to whether the trauma of initial injury, or the cast applied by the defendant physician caused gangrene and the resultant amputation of the plaintiff’s leg.

D. Manufacturers and Suppliers

The privity requirement necessary to maintain an action of implied warranty was the predominant issue involved in McBurnette v. Playground Equipment Corp. The plaintiff’s father, on behalf of his three

165. Id. at 23.
166. Cook v. Lichtblau, 144 So.2d 312 (Fla. 3d Dist. 1962).
168. 144 So.2d 312 (Fla. 3d Dist. 1962).
169. “One who is not in privity with a retailer has no action against him for breach of an implied warranty.” Carter v. Hector Supply Co., 128 So.2d 390, 393 (Fla. 1961) (concurring opinion) (no liability to employee of purchaser for injuries caused by latent defect in a riding sulky).
170. 137 So.2d 563 (Fla. 1963), affirming, 130 So.2d 117 (Fla. 3d Dist. 1961).
year old child and on his own behalf, sought to recover damages for the loss of the child's finger when it was cut by the sharp edge of playground equipment which the father had purchased. The complaint, based upon negligence and implied warranty, was dismissed for failure to state a cause of action. The district court of appeal reversed in part on the grounds that the complaint was sufficient to state a cause of action in negligence. The supreme court reversed, holding that although privity in an implied warranty action against a retailer still is required in Florida, the instant case constituted one of the exceptions to the rule. When the plaintiff is a "naturally intended and reasonably contemplated beneficiary of the warranty of fitness for use or merchantability implied by law,... he stands in the shoes of the purchaser in enforcing the warranty."

A judgment for the manufacturer was affirmed in Morton v. Hardwick Stove Co., in which the plaintiff was injured when a gas stove in her apartment exploded. Evidence of experiments performed on the stove by the plaintiff’s expert was held properly to have been excluded by the trial court because of the great dissimilarity between the pressure used at the point of explosion and the pressure used in the plaintiff’s experiments.

E. Invitees, Licensees and Trespassers

1. Injuries Involving Falls

In a case of first impression, a person visiting a patient in a hospital was classified as an invitee, and the court affirmed a judgment for the plaintiff for injuries sustained at night when she stepped into a large pothole in the defendant’s driveway.

Similarly, a pedestrian who is forced by the actions of the landowner to deviate from his proper course in using a sidewalk and to use the

---

171. Id. at 566. The Uniform Commercial Code provides in section 2-318 that seller's warranties cover any person who is in the family or household of the buyer, if it is reasonable to expect that such person may use, consume, or be affected by the goods. E.g., Chapman v. Brown, 195 F. Supp. 78 (D. Hawaii 1961) (niece burned by inflammable hula skirt purchased by her aunt); Lindroth v. Walgreen Co., 329 Ill. App. 105, 67 N.E.2d 595 (1946) (infant injured by a vaporizer purchased by his mother); Twombly v. Fuller Brush Co., 221 Md. 476, 158 A.2d 110 (1960) (husband injured by spot remover purchased by wife); Blessington v. McCrory Stores Corp., 305 N.Y. 140, 111 N.E.2d 421 (1953) (child burned by inflammable cowboy suit).

172. 138 So.2d 807 (Fla. 2d Dist. 1962).

173. The pressure used in the experiments to locate leaks was five to six times as great as that used in the apartment gas service. See Hisler v. State, 52 Fla. 30, 42 So. 692 (1906); Huff v. Belcastro, 127 So.2d 476 (Fla. 3d Dist. 1961); 2 Jones, Evidence 867 (5th ed. 1958).


abutting land is an implied invitee. The defendant service station owner had blocked the sidewalk with a parked truck and the plaintiff, while walking around the truck, slipped and fell on a patch of oil on the defendant’s property.

On the other hand, a pedestrian who tripped over a weighing machine which was placed approximately three inches from the public sidewalk in front of defendant’s store was held to be a licensee, and a summary judgment for the defendant was affirmed. The dissenting opinion appears to be more in accord with modern tort law in its statement that:

Where the premises adjoin a sidewalk or are so connected with it to indicate a public use, the possessor . . . must use reasonable care to see that there is no danger to those who through inadvertence or misleading demarcations, find themselves upon such property.

2. INJURIES NOT INVOLVING FALLS

In Canner v. Blank, a thirteen year-old girl was injured when she walked through a sliding glass door in a model home which she and her parents were inspecting. The three panel sliding glass door which separated the living room from the patio area bore no marking or decals. In reversing a summary judgment for the defendant, the court held that a jury question was presented as to the negligence of the defendant.

A homeowner was held liable for injuries sustained by his guest when the latter stepped into a hole on the defendant’s front lawn which had been dug by the defendant’s children.

F. Master-Servant

In a negligence action brought by an employee, an employer who rejects the Florida Workmen’s Compensation Law is precluded from defending the suit by asserting the common law defenses of assumption of the risk, contributory negligence or the fellow servant rule. However, if the employer was completely free of the negligence which caused or contributed to employee’s injury, or if the injury resulted solely from the employee’s own negligence, he is not entitled to recover.

176. Sandford v. Firestone Tire and Rubber Co., 139 So.2d 916 (Fla. 2d Dist. 1962).
177. Schroeder v. Grables Bakery, Inc., 149 So.2d 564 (Fla. 3d Dist. 1963). “It does not appear that public policy requires establishing a rule in Florida that property owners are liable for reasonably foreseeable injuries to the traveling public who may stray from an adjacent public way since to do so would in effect extend the same rule of liability to the trespasser and the licensee as is not extended to invitees.” Id. at 565. (Emphasis added.)
178. Id. at 565.
179. 152 So.2d 193 (Fla. 3d Dist. 1963).
182. FLA. STAT. § 440.06 (1963).
G. Defenses in Common Law Cases

1. CONTRIBUTORY NEGLIGENCE

A summary judgment based on the "two course doctrine" was reversed when the record failed to indicate that the defendant knew or should have known by the use of ordinary care that the course chosen by him was likely to cause injury.

Contributory negligence is a proper defense in those cases in which the defendant's negligence consists of a violation of a statute that is not designed to protect a class of persons from their inability to exercise care for their own protection.

A father's contributory negligence bars his recovery of damages for mental pain and suffering and loss of the child's services under the Florida wrongful death of minors act.

2. IMMUNITY

Local acts which require written notice within a specified time limit as a condition precedent to tort claims against a municipality are valid and not in violation of the equal protection provision of the constitution.

H. Res Ipsa Loquitur

The applicability of the doctrine was rejected in two cases. The first involved a plaintiff whose arm was severely injured when a coin-operated washing machine started as she was loading it. The second case involved a plaintiff who lost an eye when struck by a pebble thrown up by the rear wheels of a truck in a parking lot.

I. Damages

The majority of cases involving the issue of damages dealt with the usual questions of excessive or inadequate damages.

When one has notice or knowledge of a physical ailment that necessitates the use of drugs which may impair his power to control or operate a motor vehicle, he is guilty of negligence to an extreme degree.

184. The doctrine holds that one having a choice between two courses of conduct is contributorily negligent as a matter of law in pursuing a course which is dangerous rather than one which is safe where the ordinary prudent person would not have so chosen.
186. Richardson v. Fountain, 154 So.2d 709 (Fla. 2d Dist. 1963).
188. FLA. STAT. § 768.03 (1963).
189. McCann v. City of Lake Wales, 144 So.2d 505 (Fla. 1962).
if he operates a vehicle while under the influence of these drugs. In such a case, punitive damages presents a proper question for the jury.\textsuperscript{192}

In a case of first impression,\textsuperscript{9} the furnishing of hospital and medical services to a serviceman without an obligation to repay them was held to be a proper element of damages. Medical benefits received from a governmental agency are now included within the "collateral source rule,"\textsuperscript{194} recognized with respect to insurance.

An administrator may recover for the loss of the prospective estate of a minor.\textsuperscript{195} The proper measure of damages is the present worth of the decedent's life to an estimated prospective estate that he or she probably would have earned and saved after reaching majority and during life expectancy.\textsuperscript{196} An award of $20,000 dollars for the death of an eight year-old girl was held excessive when the only evidence relating to the decedent's prospects of accumulating an estate was testimony by her mother that she was physically attractive.\textsuperscript{197} In determining the value of such a prospective estate, the jury does not have an arbitrary discretion, but must reasonably base its determination upon the decedent's age, mental capacity, sex, health, intelligence, status and other factors which affect a fair judgment as to life expectancy, earning and saving capacity.

A bailee-for-hire, whose negligent operation of an automobile results in an action by a third party against the bailor, is required to indemnify the bailor for reasonable attorney's fees expended in defense of the action as part of the damages assessed against the bailor.\textsuperscript{198}

IV. Other Common Law Torts

A. In General

In an action for fraud and deceit in which the plaintiff paid money to one defendant for an interest in a corporation which subsequently became bankrupt, and all representations were made by the defendant to whom the money was paid, the plaintiff could not recover for fraud from another defendant who had made no representations.\textsuperscript{199}

\begin{itemize}
\item 192. Busser v. Sabatasso, 143 So.2d 532 (Fla. 3d Dist. 1962) (Defendant was taking medication for a heart condition).
\item 193. Paradis v. Thomas, 150 So.2d 457 (Fla. 2d Dist. 1963).
\item 194. E.g., Finley P. Smith, Inc. v. Schectman, 132 So.2d 460 (Fla. 2d Dist. 1961). See also, Sainsbury v. Pennsylvania Greyhound Lines, Inc., 183 F.2d 548 (4th Cir. 1950); Burke v. Byrd, 188 F. Supp. 384 (N.D. Fla. 1960); 15 AM. JUR. DAMAGES § 198 (1938); 25 C.J.S. DAMAGES § 99 (1941); RESTATEMENT, TORTS §§ 920, 924 (1938).
\item 195. FLA. STAT. 768.01-2 (1963).
\item 196. Florida East Coast R.R. v. Hayes, 67 Fla. 101, 64 So. 504 (1914).
\item 197. Burch v. Gilbert, 148 So.2d 289 (Fla. 1st Dist. 1963). See also Hooper Constr. Co. v. Drake, 73 So.2d 279 (Fla. 1954) ($20,000 excessive for death of five year old); Miami Dairy Farm, Inc. v. Tinsley, 115 Fla. 650, 155 So. 850 (1934) ($3,000 excessive for a 10 year-old).
\item 198. Fontainbleau Hotel Corp. v. Postol, 142 So.2d 299 (Fla. 3d Dist. 1962).
\item 199. Goodman v. Strassburg, 139 So.2d 163 (Fla. 3d Dist. 1962).
\end{itemize}
In *Ramel v. Chasebrook Constr. Co.*, the plaintiff purchased a new home from the defendant. Shortly thereafter, the pool and patio began to pull away from the foundation and the walls of the house developed large cracks and bulges. Testimony was introduced at the trial by an engineer-employee of the defendant to the effect that because the land was mucky, he had advised his employer to utilize pilings prior to the construction of the house, but that action pursuant to his advice was neglected by the defendant-builder. The trial court directed a verdict in favor of the defendant-builder. On appeal, the case was reversed and remanded for a new trial. The court held that upon the facts and testimony, a statement by the builder that the house was well constructed was not an expression of mere opinion or sales talk, but rather constituted an actionable misrepresentation since the defect was a latent one and the defendant had superior knowledge, which imposed upon him the duty to disclose the soil conditions.

In *Santiesteban v. Goodyear Tire & Rubber Co.*, the federal district court held that under Florida law, the undue harassment of a debtor may give rise to an action for invasion of privacy. The plaintiff had purchased from the defendant four new tires and tubes on the installment plan and was current in his payments. Without complaint or notice to the plaintiff, the defendant removed all the tires and tubes from the vehicle while it was located at the plaintiff's place of employment, a country club parking lot. The vehicle was left standing on the rims of its wheels in full view of fellow employees and country club members. The court distinguished the Florida case of *Cason v. Baskin*, which in a dictum stated that the right to privacy was not violated by oral communication, on the grounds that the acts in the instant case amounted to a demonstrative publication which was sufficiently communicated to a large number of persons.

In *Gleason v. Title Guar. Co.*, a title examiner was held liable for

---


201. 306 F.2d 9 (5th Cir. 1962).


203. Florida recognizes the right of privacy as a distinct tort. Cason v. Baskin, 155 Fla. 198, 20 So.2d 243 (1944), aff’d on rehearing, 159 Fla. 31, 30 So.2d 635 (1947).

204. Ibid.

205. 300 F.2d 813 (5th Cir. 1962).
damages when various mortgages which he certified as first mortgages, proved to be subordinate to other mortgages. In defense, the attorney asserted the local custom of relying upon telephone information from an abstract company, rather than examining the public records or a written abstract. The court reasoned that while custom provides an important indication of what constitutes reasonable care or negligence, all customs are not good customs. "Lawyers have no prescriptive right to make knowingly false statements in the name of custom. 'No degree of antiquity can give sanction to a usage bad in itself.'" 206

In N.A.A.C.P. v. Webb's City Inc., 207 the court upheld an injunction against civil rights demonstrations, picketing and inducing a customer boycott. The court weighed the plaintiff's interest in its business against the defendants' interest in advancing their social objectives of ending segregation and discrimination. The defendants' interests were held insufficient to overcome the interest of the plaintiff.

A summary judgment in favor of an attorney-defendant in a malpractice suit was reversed. The attorney's negligence was held to raise a genuine issue of material fact since the record did not show conclusively that the personal injury suit, dismissed with prejudice, would have been lost regardless of the alleged negligence. 208

A bowler was severely injured when he was struck on the head with a bowling ball by a fellow bowler when the former " kidded" him about his game. A summary judgment in favor of the bowling alley was reversed on the ground that an issue of material fact was raised as to whether the defendant knew or should have known of the tendency of the bowler to assault other patrons while engaged in competitive bowling. 209

Publication by a newspaper of progress docket entries which reflected the plaintiff's judicial commitment for addiction to narcotics, constituted an unlawful invasion of privacy under section 398.18(1) of the Florida statutes. 210

206. Id. at 814, citing Leach v. Three of the Kings Messengers, 19 How. St. Trials 1027 (1725).
207. 152 So.2d 179 (Fla. 2d Dist. 1963); Note, 18 U. Miami L. Rev. 488 (1963).
208. Suritz v. Kelner, 134 So.2d 259 (Fla. 3d Dist. 1961).
209. Nance v. Ball, 134 So.2d 35 (Fla. 2d Dist. 1961). As to the duty of a business establishment to exercise reasonable care to maintain the premises in a safe condition and to guard against subjecting patrons to dangers known or which reasonably might have been foreseen, see McNulty v. Hurley, 97 So.2d 185 (Fla. 1957); Gordon v. Hotel Seville, 105 So.2d 175 (Fla. 3d Dist. 1958).
210. The statute provides for voluntary commitment for treatment of narcotic addicts, and that all records shall be open to inspection only to the person named or his counsel or narcotic officers. See also Fla. Stat. § 794.03 (1963), which prohibits publication of the name of any female who is raped or assaulted with an intent to commit rape and Fla. Stat. § 72.27 (1963) which requires the clerks to index adoption proceedings only in the names of the petitioners.
B. Libel and Slander

A complaint alleging that a newspaper editorial which charged by innuendo and inference that a city commissioner, by hiring incompetent workers for city jobs was in effect cheating the taxpayers, was held sufficient to allege libel per se. Conversely, a news story relating to an alleged seizure by the Internal Revenue of a councilman’s pay checks in order to satisfy liens was held not libelous per se and the complaint was properly dismissed.

Allegations in a complaint that the defendant had communicated statements to newspaper reporters which were later published, that the plaintiff was “just about the most dishonest person I know,” that the plaintiff was “foul-mouthed,” and “that the plaintiff had been ‘dishonest’ in giving testimony before a Florida legislative committee,” were sufficient to state a cause of action.

C. Malicious Prosecution and False Arrest

In a case of first impression, a complaint alleging the malicious prosecution of a malicious prosecution suit was held sufficient to state a cause of action.

A judgment for the defendant-city in a false arrest case was affirmed in Giblin v. City of Coral Gables. The supreme court held that when a police officer stops a motorist, an apprehension is effected which is sufficient to be considered an arrest. Thus, the subsequent recapture of the plaintiff outside the corporate limits of the city was proper under section 901.22 of the Florida statutes, authorizing an officer to take a party into custody if pursuant to immediate pursuit.

In Fisher v. Maas Brothers, Inc., the plaintiff was convicted in a municipal court on a worthless check charge. Within an hour, the trial judge recalled the plaintiff and dismissed the charge. The initial conviction was held to raise a presumption of probable cause sufficient to preclude a suit for malicious prosecution.

213. Fiore v. Rogero, 144 So.2d 99, 100 (Fla. 2d Dist. 1962).
214. Hopke v. O’Byrne, 148 So.2d 755 (Fla. 1st Dist. 1963). The essential elements of a suit for malicious prosecution are as follows:

(1) The commencement or continuance of an original criminal or civil 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 proceeding. (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. Id. at 756 citing Tatum Bros. v. Watson, 92 Fla. 278, 109 So. 623 (1926).
215. 149 So.2d 561 (Fla. 1963), affirming, 127 So.2d 914 (Fla. 3d Dist. 1962).
216. 149 So.2d 910 (Fla. 2d Dist. 1963). The action of a committing magistrate in binding over a party raises a presumption of probable cause in Florida. Gallucci v. Milavico, 100 So.2d 375 (Fla. 1958). This rule is contrary to other authorities.
In the only significant legislation during the survey period, the Florida wrongful death of minors act was amended to include actions ex contractu as well as ex delicto.\textsuperscript{217}

\textsuperscript{217} Fla. Stat. § 168.03 (1963).