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Torts

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TORTS

SAM DANIELS*

INTRODUCTION**

This survey is written to help lawyers find cases in point. The emphasis is on facts rather than theory. It took nine years to fill the first seventeen volumes of the Southern Reporter, whereas the last seventeen volumes were produced in only two years. Even the specialist has difficulty keeping abreast in his limited field. With these thoughts in mind, the material covered is outlined as follows:

I. AUTOMOBILE CASES

A. The Dangerous Instrumentality Doctrine
B. The Guest Statute
C. Care Required of Motorists
   1. Intersection Accidents
   2. Rear-End Collisions
   3. Pedestrians—Last Clear Chance
   4. Other Negligent Operation
   5. Contributory Negligence

II. STATUTORY LIABILITY

A. Dog Owner's Liability
B. Railroad Operation
C. Jones and Federal Employers' Liability Acts

III. COMMON LAW NEGLIGENCE ACTIONS

A. Landlord and Tenant
B. Common Carriers
C. Distribution of Electricity
D. Doctor—Patient
E. Manufacturers and Suppliers
F. Invitees, Licensees and Trespassers
G. Care Owed Invitees
   1. Injuries Not Involving Falls
   2. Slip, Trip and Fall

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**The material surveyed attempts to include all significant state and federal decisions from August of 1957 to August of 1959 which dealt with Florida tort law.
H. Master-Servant
I. Warranty
J. Defenses in Common Law Cases
   1. CONTRIBUTORY NEGLIGENCE
   2. ASSUMPTION OF RISK
   3. RELEASE
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K. Res Ipsa Loquitur
L. Damages

IV. Other Common Law Torts
I. Automobile Cases

A. The Dangerous Instrumentality Doctrine

The dangerous instrumentality doctrine produced ten decisions and some extremely important holdings. In the Leonard litigation, it was held that a U-Drive-It Company could not escape responsibility by a contractual prohibition against use of the automobile by anyone other than the lessee. In affirming the district court’s opinion, the supreme court held:

On the fundamental issue, the simple but sound statement of the district court can be unequivocally endorsed:

“When this defendant turns over an automobile to another for a price, he in actuality intrusts that automobile to the renter for all ordinary purposes for which an automobile is rented. The fact that the owner had a private contract or secret agreement with the renter cannot make such restrictions a bar to the rights of the public. The restrictions agreed upon do not change the fact that the automobile was being used with the owner’s consent. Nor does it appear that the car was not being used for the purpose for which it was rented i.e., the pleasure, convenience or business of the renter...”

Another U-Drive-It restriction was held invalid in a case when the rental contract prohibited removal of the vehicle from the State of Georgia; the contract provision was held to be no defense when the vehicle was taken to Florida.

The doctrine became a two-edged sword in Weber v. Porco. The supreme court squarely held that the driver’s negligence is imputed to the owner in the owner’s action against a third party. Negligence of the driver-husband was held imputable to the owner-wife who was a passenger. The court was quick to point out that negligence was not

3. 100 So.2d 146 (Fla. 1958), followed in Gulick v. Whitaker, 102 So.2d 847 (Fla. App. 1958).
imputed "merely because of the relationship of husband and wife," but was imputed "because she owns the automobile and permits him to drive it."

A number of cases dealt with the question of who is liable under the doctrine. The doctrine imposes liability on the "owner" of the vehicle and on "non-owners" having dominion and control over the vehicle.

The leading decision on the control issue is Re-mark Chemical Co. v. Ross. An employee owned an automobile and turned it in to the employer-corporation which thereafter paid the upkeep and operating expenses and exercised dominion and control over it. The corporation lent the automobile to another employee who had an accident on the way to work. A jury finding of company responsibility was affirmed on appeal with a succinct holding that:

One who has possession, and the dominion and control of an automobile, even though not the record owner thereof, will be liable for injury caused by the negligence of another person using the automobile with the knowledge and consent of the person having such dominion and control over the vehicle.

On the ownership question, a person is not an "owner" even though the registered title is in his name, if the vehicle was sold before the accident. Under common law sales principles which determine the issue, the intent of the parties as to when title passed is the "cardinal factor" and "delivery of the goods is of the greatest importance, as evincing an intention to pass title."

Three cases applied these common law sales principles. In the McAfee case, defendant left his automobile at a filling station with instructions to sell it for $450 or $500. While the defendant was on vacation, Lowery drove the automobile for one day and took it the next day after giving the filling station operator a $200 deposit. The station operator told Lowery he would have defendant contact him when he returned. The accident happened before contact was made. The defendant testified he considered the automobile to be Lowery's when the $200 was paid; whereas, Lowery testified he had not decided to buy the automobile and was still testing it. On this conflicting evidence, a jury finding of a sale by the defendant before the accident was affirmed on appeal.

In Barnett v. Butler, the defendant held registered title to an automobile which he turned over to an employee under a "rather loose" oral agreement whereby $8.00 a week was to be deducted from the employee's wages until the purchase price was paid. The accident occurred while

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5. McAfee v. Killingsworth, 98 So.2d 738, 740 (Fla. 1957).
6. Ibid.
7. 112 So.2d 907 (Fla. App. 1959).
this agreement was in effect. The trial judge denied discovery as to whether the defendant carried liability insurance on the automobile; refused to admit evidence that defendant did carry insurance; and directed a verdict for the defendant on the ground that, as a matter of law, there was a sale before the accident. The case was reversed with holdings that evidence as to the defendant's liability insurance was admissible and that this evidence coupled with other facts in the case created a jury question.

In one case, the jury finding of a sale to a new automobile dealer was reversed with a holding that as a matter of law title did not pass before the accident. Murphy took a used automobile to a new automobile dealer and made a contract to trade his automobile in on a new one. The contract stated that it was subject to approval by the dealer and that the order was not valid unless the required financing could be obtained. Murphy then took the used automobile home and had an accident before the financing was obtained.

In another case, the registered title holder attempted to prove she merely took title to help her minor nephew obtain financing, and that the minor paid for, operated and maintained the automobile. The aunt admittedly obtained insurance on the automobile and complied with the Virginia Automobile Assigned Risk Plan. The trial judge refused to admit the proffered "non-ownership" evidence and held the aunt liable as a matter of law. The case was affirmed on the ground that the aunt had "ownership in a sufficient degree to justify the court in declining to submit the matter to a jury."  

In Lambert v. Johnson, it was held that when there was a completed sale before the accident, the mere fact that the dealer's license tag remained on the automobile did not preclude a summary judgment in the dealer's favor.

B. The Guest Statute

The Guest Statute denies innocent victims any recovery for negligently inflicted injuries. This result is contrary to common law concepts of right and justice, and the unmistakable judicial trend is to water down the statute as much as possible. The decisions defining gross negligence and deciding who are guests clearly illustrate this process.

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10. Id. at 386.
13. "Since, therefore, Section 320.59 is a restriction on and in derogation of a common law right, such statute may be extended only so far as a strict construction of the language of the statute makes it imperative." Summersett v. Linkroum, 44 So.2d 662, 664 (Fla. 1950).
What is Gross Negligence?

Justice Drew's painstaking opinion in Carraway v. Revell, delineates and defines the degrees of negligence in Florida and attempts to give the bench and bar as much guidance as is possible in such a nebulous area. The opinion places gross negligence as the middle ground between simple and culpable negligence. While Baron Rolfe could remark that gross negligence is merely negligence "with the addition of vituperative epithet," he was not faced with a legislative command to divide Gaul into three parts.

Eight opinions decided gross negligence questions. Gross negligence was held a jury question in six of the eight cases. Of the six cases, three involved drivers who ran into parked automobiles; two involved failure to negotiate curves; and one involved losing control of an automobile while entering an arterial highway from a private road. Of the drivers who escaped liability, one released the emergency brake while the automobile was in reverse, and the other entered an intersection against a blinking red light. No attempt will be made to describe the facts of these cases because "Every act of commission or omission which concerns the accident must be considered. . . ."

Who Are Guests?

The Guest Statute requires proof of gross negligence by those "transported by the owner or operator of a motor vehicle as his guest or passenger without payment for such transportation." Each of the italicized words gave rise to litigation.

The word "transported" was interpreted in Kaplan v. Taub, and in LaRue v. Hoffman. In Kaplan it was held that a plaintiff was a transported guest when she had her hand on the handle of an open automobile door and was about to enter the front seat. In LaRue, the plaintiff was ruled a transported guest when she had alighted from the automobile and was standing with both feet on the ground when hit by an open door as the automobile went backwards.

14. 116 So.2d 16 (Fla. 1959).
16. Klem's, Inc. v. Cline, 105 So.2d 881 (Fla. 1958); Farrey v. Bettendorf, 96 So.2d 889 (Fla. 1957); Hall v. Hughey, 104 So.2d 849 (Fla. App. 1958).
22. 104 So.2d 882 (Fla. App. 1958).
In a well reasoned opinion, the Supreme Court of Wisconsin held that an airplane is not a "motor vehicle" within the meaning of the Florida statute and that the statute does not apply to guests in airplanes.\textsuperscript{24}

The opinion in \textit{Andrews v. Kirk}\textsuperscript{25} has become a classic. The passenger, fearing for her safety because of improper driving, demanded to be let out of the automobile. The driver refused and thereafter failed to negotiate a curve. The plaintiff's status on these facts was a question of first impression in Florida. The opinion carefully analyzes every authority and idea involved in the problem and holds that plaintiff's status as a guest terminated after the refusal to let her out of the automobile. The opinion's precision and refinement should guide the profession in the whole area of creation and termination of the guest relationship where volition and consent are involved.

Three cases involved the question of "payment." While a money payment will satisfy the statute, the payment may take many other forms. As stated in \textit{Sullivan v. Stock}:\textsuperscript{26}

\begin{quote}
. . . the guest statute does not apply when the transportation is solely for the benefit of the owner or operator or mutual benefit of the passenger and the owner or operator of the car; nor can the guest statute be invoked in commercial transactions. . . .
\end{quote}

In applying these principles, the \textit{Sullivan} case held that one was not a guest when he was riding with another to help the latter obtain a loan. In \textit{Montana v. Gorp},\textsuperscript{27} a groom riding in a truck to care for his employer's horse was held not to be a guest in an action against the defendant carrier.

\textit{Miller v. Morse Auto Rentals}\textsuperscript{28} involved a complex situation. A worked at home making pastries for B. At B's request, C, an agent of B, took A shopping for pastry ingredients in an automobile rented from D. C had an accident on the way back from the grocery. A sued C and D and was held not to be a guest of either.

\textit{Farrey v. Bettendorf}\textsuperscript{29} was the only case dealing with the school child exception. It held that a high school student on the way home from a night basketball game at the school's gymnasium was not within the proviso "... that nothing in this section shall apply to school children or other students being transported to or from schools or places of learning in this state."

C. Care Required of Motorists

Automobile accidents provoked extensive litigation and relatively little law. Although the basic rules of the road are prescribed by statutes and

\begin{itemize}
\item Gridley v. Cardenas, 3 Wis.2d. 623, 89 N.W.2d 286 (1958).
\item 106 So.2d 110 (Fla. App. 1958).
\item 98 So.2d 507, 510 (Fla. App. 1957).
\item 108 So.2d 64 (Fla. App. 1959).
\item 108 So.2d 204 (Fla. App. 1938).
\item 96 So.2d 889 (Fla. 1957).
\end{itemize}
ordinances, there are some important common law concepts at work on the highway.

1. INTERSECTION ACCIDENTS

Intersections are either marked or unmarked. As to the latter, the "rules" normally give the right-of-way to the first to enter, or the automobile on the right on simultaneous entry. The only unmarked intersection case involved entry of both automobiles at 25 m.p.h. with neither driver seeing the other until the instant before an almost dead-center collision. The trial judge was affirmed in finding both drivers at fault and reversed for not allowing the infant passengers of one to recover from the driver of the other.

The marked intersections produced a rash of litigation and an amazingly large number of reversals. Trial judges were reversed in ten out of fifteen cases where opinions were written. Eight of the ten reversals were obtained by plaintiffs. Seven of the plaintiffs' eight reversals resulted from refusals to let the jury decide the case, and the eighth was obtained for refusal to set a defendant's jury verdict aside when plaintiff was stopped at a light and hit broadside by the defendant.

Plaintiffs' verdicts were reversed in two cases. In one it was held improper to charge on last clear chance in an oil truck-fire truck collision at a controlled intersection. In the other, a summary judgment for plaintiff was reversed when lie was speeding on a through street and hit defendants who had stopped at a stop sign and then entered the intersection.

32. LeFante v. Miami Air Conditioning Co., 111 So.2d 725 (Fla. App. 1959) (plaintiff making left turn, hit the defendant on wrong side of road); Ringler v. McVeigh, 109 So.2d 606 (Fla. App. 1959) (jitney passenger on through street, defendant ran stop sign); Vibon v. McCormick, 109 So.2d 400 (Fla. App. 1959) (passenger in automobile that entered against red blinker, hit by speeding defendant that entered on yellow blinker); Mason v. Remick, 107 So.2d 38 (Fla. App. 1958) (plaintiff on favored street did not look in defendant's direction, defendant ran a yield right-of-way sign); Erlacher v. Leonard Bros. Transfer, 106 So.2d 201 (Fla. App. 1958) (plaintiff stopped for stop sign, then pulled into intersection and stopped again, hit by truck that was passing an automobile in a no-passing zone); Robbins v. Grace, 103 So.2d 658 (Fla. App. 1958) (plaintiff on through street, defendant ran a stop sign); Bryant v. City of Tampa, 100 So.2d 665 (Fla. App. 1958) (plaintiffs were passengers in an automobile which entered against a blinking red light, hit by a speeding police automobile which entered on a blinking yellow light).
34. Lee County Oil Co. v. Marshall, 98 So.2d 510 (Fla. App. 1957), cert. denied, 101 So.2d 819 (Fla. 1958).
35. Weber v. Porco, 100 So.2d 146 (Fla. 1958).
Of the five intersection affirmances, one involved affirmance of a plaintiff’s verdict, and four involved approval of directed verdicts for defendants.

Since nine out of sixteen intersection cases were reversed because trial judges refused to let the juries decide them, Mr. Chief Justice Thomas’ observations in *Jacksonville Coach Company v. Royal* bear repeating:

Crossing collisions usually happen in circumstances that are confusing because of the uncertainty of the testimony of witnesses who see them, even though all may conscientiously report what they think they saw. The present case is not unlike scores of them that have reached this court. We cannot undertake to put ourselves in the places of the jurors who decided that the appellant’s driver was negligent. The case was typically one for a jury and we refrain from disturbing the judgment despite the plausibility of the argument of appellant’s counsel.

Those looking for jury instruction material will find that the last two years produced good statements on the favored motorist’s right to assume that others will obey traffic control devices, and that “a stop sign is a proclamation of danger putting a duty on an approaching driver to stop and look.”

2. REAR-END COLLISIONS

Rear-end collisions produce relatively little liability litigation. The stopped driver is usually as innocent as the striking driver is negligent. Under *McNulty v. Cusack*, the plaintiff is entitled to a directed verdict unless the defendant comes forward with a satisfactory explanation for failure to have his vehicle under control.

3. PEDESTRIANS—LAST CLEAR CHANCE

Every pedestrian case during the last two years was held to present issues for jury determination. Nine cases raised liability questions and

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36. *Jacksonville Coach Co. v. Royal*, 97 So.2d 190 (Fla. 1957).
37. *Spadaro v. Palmisano*, 109 So.2d 418 (Fla. App. 1959) (defendant driving lawfully on arterial highway, plaintiff passenger in automobile that entered against stop sign); *Stolmaker v. Bowmen*, 100 So.2d 659 (Fla. App. 1958) (facts not stated); *Tackett v. Hartack*, 98 So.2d 896 (Fla. App. 1957) (plaintiff ran red light); *Gilmer v. Rubin*, 98 So.2d 367 (Fla. App. 1957) (plaintiff hit by left-turning truck, no evidence introduced as to truck driver’s conduct except fact that he made a left turn).
resulted in affirmance of five jury verdicts, reversal of three directed verdicts, and reversal of one grant of a new trial.

When children are involved, the usual pedestrian law applied to adults has little, if any, application. The various right-of-way ordinances and "reciprocal rights" concepts give way to the increased protection which the law affords children. The guiding force in this area, as in countless others, is the logic and humanity of Mr. Justice Terrell. His classic statement in Miami Paper Co. v. Johnston, was quoted and applied in both Budgen v. Brady and Coast Cities Coaches v. Donat. In the Budgen case the court said:

... The holding of our Supreme Court in Miami Paper Company v. Johnston is indicative of the foregoing duty as applied to children. In its well reasoned opinion by Mr. Justice Terrell, the Court said: 'It is a matter of common knowledge that small children are erratic and unpredictable, that they are liable to take off at any time and in any direction with no concern whatever for their own safety. The drivers of motor vehicles are charged with knowledge of their behavior and are expected to govern themselves accordingly when parking or driving about school grounds, recreation parks, residential communities, trailer parks, and other places inhabited by or frequented by children. They are expected to anticipate children about such places and whether or not they exercise reasonable care in doing so is a question for the jury!' (Emphasis supplied.) This duty would appear doubly imperative when, as in the instant case, the motorist leaves a public thorough-fare and drives onto the private property of another...

42. Mangan v. Amos, 98 So.2d 340 (Fla. 1957) (defendant's verdict affirmed; contributory negligence for jury where plaintiff started to cross on amber light, became "rattled," ran in front of one car and finally jumped for curb and in front of defendant's automobile); Noll v. Byonick, 108 So.2d 67 (Fla. App. 1959) (affirmed as to liability without stating facts; new trial on damages only); Coast Cities Coaches v. Donat, 106 So.2d 593 (Fla. App. 1958) (plaintiff's verdict affirmed; child in front of school bus run over as bus started up after letting other children out); Budgen v. Brady, 103 So.2d 672 (Fla. App.), cert. denied, 105 So.2d 793 (Fla. 1958) (plaintiff's verdict affirmed; defendant turning around at dead-end, hit child in private driveway); Stegemann v. Hite, 96 So.2d 595 (Fla. App. 1957) (plaintiff's verdict affirmed, facts not given).

43. Rosenfeld v. Knowlton, 110 So.2d 90 (Fla. App. 1959) (directed verdict for plaintiff reversed; discussed infra with last clear chance cases); Arnold v. Stewart, 101 So.2d 61 (Fla. App. 1958) (directed verdict for defendant reversed; plaintiff jaywalking, was twenty-one feet into street when hit by motorcyclist); Sinitz v. Shapiro, 100 So.2d 458 (Fla. App. 1958) (directed verdict for defendant reversed; plaintiff on curb hit by backing truck).

44. Wells v. Pope, 104 So.2d 858 (Fla. App. 1958) (new trial for defendant reversed; driver hit child at uncontrolled intersection, evidence of speed and driver knew children in area).


46. 58 So.2d 869, 870 (Fla. 1952).

47. 103 So.2d 672, 675 (Fla. App. 1958).

Last Clear Chance

Eight of the ten last clear chance opinions involved pedestrians. Three of the decisions involved nighttime pedestrians hit from behind while walking parallel to and on the edge of the road. All three cases held the doctrine inapplicable. The moral of these cases seems to be “Safety is just a step away.” However, pedestrians crossing the street may soon find themselves at a driver’s mercy. In Rosenfeld v. Knowlton, the trial judge directed a verdict for the plaintiff on the ground that the defendant, as a matter of law, had a last clear chance. The plaintiff was crossing at night and had proceeded eight or nine feet when hit. The case was reversed on appeal with a holding that last clear chance was a jury question.

In Florida the doctrine does not require defendant’s actual knowledge of plaintiff’s position of peril. Facts allowing an inference that the driver “should have known” require submission of the issue to the jury. As always, the problem comes in deciding what facts will support inferences that the driver knew or should have known of plaintiff’s peril and thereafter had an opportunity to avoid the accident. The standard for resolving the issue is well stated in Radtke v. Loud:

Where findings of fact compatible with the doctrine of last clear chance are within the range of those permissible to be made by the jury on the evidence, the court’s charge should explain the doctrine and authorize its consideration and application by the jury dependent upon their findings establishing applicability.

In applying the standard, the Radtke case went on to hold the trial court erred in not charging on the doctrine when a school patrolman directing traffic at an intersection was hit by defendant who knew plaintiff was there and saw him step backwards into defendant’s lane of travel.

In several cases it was held that there was no evidence to warrant a charge on the doctrine. Lee County Oil Company v. Marshall involved a reversal for giving the charge in a fire truck-oil truck intersection collision. The plaintiff was a fireman riding on the tail gate of the fire truck and was not chargeable with contributory negligence. In addition, there was no evidence that the oil truck driver could have seen the fire truck in

51. 110 So.2d 90 (Fla. App. 1959).
52. E.g., Springer v. Morris, 74 So.2d 781 (Fla. 1954); Wawner v. Shell’s Stone Studio, 74 So.2d 574 (Fla. 1954); Royal Kitchen Cabinet Corp. v. Palcic, 111 So.2d 42 (Fla. App. 1959).
53. 98 So.2d 891, 894 (Fla. App. 1957).
54. 98 So.2d 510 (Fla. App. 1957), cert. denied, 101 So.2d 819 (Fla. 1958).
time to avoid the accident. In Gordon v. Cozart, the giving of the charge was reversed where a nighttime pedestrian was “scurrying” across a highway in a fog and was hit by defendant. The court found no evidence that “defendant did see, or with the employment of due care, should have seen the decedent in time to avoid the accident.” In O’Neal v. Lahnala, it was held proper to refuse a last clear chance charge where the plaintiff suddenly left a position of safety at the edge of the road and took two or three quick steps into the path of the defendant’s automobile.

In the Palcic case, the doctrine was applied when the driver said he did not, but the evidence showed he could have seen a child bicyclist near the edge of the roadway. The opinion states that the last clear chance doctrine is not an “exception” to general contributory doctrine, “but rather permits a recovery based upon defendant’s (later) negligence being the proximate cause of the injury.”

4. OTHER NEGLIGENT OPERATION

While intersections and pedestrians accounted for most of the automobile decisions, there were a number of cases involving miscellaneous phases of automobile law.

Negligent parking was involved in two cases and produced two reversals for refusal to let the jury decide the negligence and proximate cause issues.

Negligence in passing was also involved in two cases. In one, a truck made a left turn as an automobile tried to pass it. The jury found for the truck driver defendant and against both the husband and wife in the automobile. The trial judge was reversed for granting the wife passenger a new trial since there was evidence to support a finding that the truck driver had signaled his intention to turn for about 500 feet.

In the other passing case, a passenger sued his speeding driver who hit a truck improperly turning left from the right lane. The jury found for plaintiff and the trial judge granted a new trial, believing he erred in refusing to charge that the defendant was not liable if the truck had made an improper turn. The granting of the new trial was reversed with a good analysis of concurrent negligence and the fact that there can be more than one proximate cause of an accident.

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55. 110 So.2d 75 (Fla. App.), cert. denied, 114 So.2d 6 (Fla. 1959).
56. 253 F.2d 663 (5th Cir. 1958).
58. Farrey v. Bettendorf, 96 So.2d 889 (Fla. 1957) (motor scooter ran into rear of parked automobile; scooter passenger sued owner of automobile parked more than twelve inches from curb; summary judgment for automobile owner reversed); Mazak v. Rowe, 112 So.2d 57 (Fla. App. 1959) (suit by passenger in automobile that ran into city trash truck illegally parked in intersection; judgment on pleadings for city reversed).
60. De La Concha v. Pinero, 104 So.2d 25 (Fla. 1958).
In *Good v. Ozer*,\(^6^1\) the defendant suddenly pulled out from a parked position and into the side of plaintiff's automobile which was proceeding in a lane adjacent to a row of parked automobiles. A directed verdict for the defendant was reversed with a good discussion of the "very high degree of care" owed by parked motorists pulling into the flow of traffic and the "helpless" plight of those moving in the stream of traffic.

*Jacksonville Journal Company v. Gilreath*\(^6^2\) involved a panel truck driver carrying three teen-aged paper boys. It was dark and the truck was partitioned so that the driver could not see the boys. At the time of the accident the plaintiff was trying to reinsert a loose tail gate pin. The truck started up suddenly without any warning and threw plaintiff to the pavement. A jury verdict for the plaintiff was affirmed with an opinion emphasizing the duty of care owed to a "lively group of youngsters."

There were two accidents involving defective streets. In one,\(^6^3\) the plaintiff was held contributorily negligent when he hit an elevated manhole which he saw twenty-five feet away. The plaintiff knew the street was under repair "but elected to risk driving over" the manhole. In the other accident, a passenger's verdict against a road contractor was affirmed when the contractor had failed to give adequate warning of an eight inch drop off.\(^6^4\)

On the question of speed limits, *Gordon v. Cozart*\(^6^5\) is an extremely important decision. The state statute\(^6^6\) sets a 25 m.p.h. limit in a "business or residence district." These terms are defined as follows:

**Business District**\(^6^7\)

The territory contiguous to, and including, a highway when fifty per cent or more of the frontage thereon, for a distance of three hundred feet or more, is occupied by buildings in use for business.

**Residence District**\(^6^8\)

The territory contiguous to, and including, a highway not comprising a business district when the property on such highway, for a distance of three hundred feet or more, is in the main improved with residence or residences and buildings in use for business.

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61. 100 So.2d 204 (Fla. App. 1958).
62. 104 So.2d 865 (Fla. App. 1958).
64. M. J. Carroll Contracting Co. v. Pine, 103 So.2d 685 (Fla. App. 1958). The driver in this accident recovered a verdict which was affirmed with an additional holding that contributory negligence was also a jury question. M. J. Carroll Contracting Co. v. Brown, 104 So.2d 470 (Fla. App. 1958).
65. 110 So.2d 75 (Fla. App.), cert. denied, 114 So.2d 6 (Fla. 1959).
The issue in the Gordon case was whether the area was a residence district or open highway. The case noted that 50% of the frontage must be occupied by buildings in use for business to constitute a business district; whereas the "residence district" definition does not refer to frontage and substitutes "in the main" for 50%. The evidence was conflicting as to the number and location of the buildings and dwellings and the speed limit issue was held properly submitted to the jury.

In Wallace v. Taxicabs of Tampa, Inc., the court had to determine whether a local ordinance prohibiting passing at intersections applied to a four-laned street. The opinion analyzed the cases from many jurisdictions and reached the sensible conclusion that such passing is proper. Both the Wallace opinion and the cases collected therein note that a contrary ruling would bring traffic to a standstill and defeat the whole purpose of multi-lane highways.

5. CONTRIBUTORY NEGLIGENCE

There were a number of decisions involving contributory negligence issues peculiar to automobile cases. The conduct of a reasonably prudent passenger was explored in Huffman v. Peek. The rule that a passenger can trust the vigilance and skill of his driver until on notice to the contrary was reaffirmed with a holding that the issue was for the jury on the facts.

The Radtke case held the trial judge erred in failing to charge on the "street worker" doctrine. Those required to work in the street must be judged by a more relaxed standard of care than those merely using the streets for travel. The plaintiff was a school patrolman directing traffic at an intersection.

On the question of imputed contributory negligence, the only persons penalized for another's conduct were automobile owners who were charged with their drivers' negligence. Absent ownership or a joint enterprise, negligence of a driver is not imputed to a passenger; negligence of a husband is not imputed to his wife; and negligence of a father is not imputed to his children. The Bryant case discusses the joint enterprise doctrine at length and notes that there is no joint enterprise unless there is both a common purpose and common control of the car.

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69. 112 So.2d 574 (Fla. App. 1959).
70. 102 So.2d 641 (Fla. App. 1958).
71. Plaintiff's nineteen year old son-in-law ran into the rear of a parked truck while going too fast in heavy fog and smoke.
72. 98 So.2d 891 (Fla. App. 1957).
73. Weber v. Porco, 100 So.2d 146 (Fla. 1958); followed in Gulick v. Whitaker, 102 So.2d 847 (Fla. App. 1958).
74. M. J. Carroll Contracting Co. v. Pine, 103 So.2d 685 (Fla. App. 1958); Bryant v. City of Tampa, 100 So.2d 665 (Fla. App. 1958).
75. Jordan Furniture Co. v. Goggans, 101 So.2d 114 (Fla. 1958).
77. See note 74 supra.
II. Statutory Liability

Lawyers are so imbued with common law concepts in the personal injury area that they are prone to overlook the existence or significance of applicable statutes or ordinances. The importance of such legislation is shown in Tamiami Gun Shop v. Klein. The defendant sold a rifle to a boy under seventeen. While the minor was riding in a car, the car hit a hole in the road; the rifle accidentally discharged, and the boy’s thumb and hand were injured. The boy sued the defendant gun shop and obtained a summary judgment on liability which was affirmed on appeal. Sale of a rifle to a minor under seventeen violated both a state statute and a local ordinance and the court held the sale constituted negligence as a matter of law. Likewise, the sale was held the proximate cause of the injury as a matter of law. Finally, it was held that contributory negligence was no defense in the case.

The extent of Klein’s future application remains to be seen. It is the writer’s belief that the law announced only applies to legislation designed to protect those the legislature has found unable to exercise adequate care for themselves. The opinion, as written, expressly so limits the holding.

In addition to the Klein case, statutory liability issues also arose in cases involving dog owners, railroad operation, and the Jones and Federal Employers’ Liability Acts.

A. Dog Owner’s Liability

Sections 767.01 and 767.04 of the Florida Statutes deal with dog owner’s liability. The latter section only applies to dog bite cases and provides that “provocation” is a defense. The former section is not limited to dog bite cases and imposes liability on dog owners “for any damage done by their dogs.” However, the section is silent as to what, if any, defenses are available. In Vandercar v. David, the plaintiff was knocked down by a dog and the case was governed by section 767.01. The court held that under section 767.01 the defendant may defend by showing that the plaintiff “unnecessarily and voluntarily puts himself in the way to be hurt, knowing the probable consequences.”

In Knight v. Burghduff, the plaintiff was bitten by a dog while lawfully on the owner’s property. The owner was held liable under section 767.04 for failing to have a “bad dog” sign on the premises even though the plaintiff had actual knowledge that the dog was vicious.
B. Railroad Operation

Railroad crossing accidents under sections 768.05 - 768.06 of the Florida Statutes were involved in nine cases. In one, judgment against the railroad was reversed because of jury instructions requiring the railroad to prove itself free from negligence. In the other eight cases, liability was held a jury question seven times, and in one case it was held that the railroad was entitled to a directed verdict.

The Cutchins case decided an important issue. Under section 768.06, comparative negligence is substituted for contributory negligence in actions against a railroad; but contributory negligence is a complete defense as to individual railroad employees joined as defendants. Consequently, a jury can find against the railroad and for the railroad employee even though the railroad's liability is based exclusively on the employee's negligence.

In the Branham case, the plaintiff was urinating between two cars in a railroad yard when the engineer backed a train from a third of a mile away. The plaintiff lost both legs and recovered a verdict under the law requiring railroads to exercise reasonable care towards persons whose presence is foreseeable. The accident occurred near a path and "the general public had walked through, in and about the yard for many years." The railroad gave no warning of the movement and had no employee at the rear of the train.
C. Jones and Federal Employers' Liability Acts

The Jones\(^89\) and Federal Employers' Liability\(^90\) Acts produced considerable litigation in the Florida courts. There were six FELA cases. Five\(^91\) dealt with the judge-jury relation and produced five holdings that the railroad's liability was a jury question under the liberal federal rule of liability if "employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought."\(^92\)

One case\(^93\) held that the provisions of the Railway Labor Act [45 U.S.C. Sec. 151 et seq.] precluded the plaintiff from claiming that the railroad was negligent in requiring him to submit to a "field test" for the alleged purpose of determining his physical fitness.

In the only case under the Jones Act\(^94\) it was held that a Cuban injured in Jamaican waters on a Panamanian ship was not a "seaman" within the meaning of the Act although the shipping articles were signed in Miami.

III. Common Law Negligence Actions

A major portion of common law negligence litigation centers around the duty of care owed plaintiff by defendant. The relationship between the parties often controls the outcome of the case. For this reason, the common law cases are collected according to the relationships involved.

A. Landlord and Tenant

Landlord and tenant law is built around "exceptions" to the general rule of no landlord liability after a lease of the premises. However, it is questionable which covers the most territory—the exceptions or the rule.

The supreme court's decision in Propper v. Kesner\(^95\) deals with two important exceptions and is a masterpiece of fine legal writing and thinking. A tenant, having trouble with a gas stove, reported the difficulty to the landlord in accordance with the landlord's instructions to do so. The landlord told the tenant the stove was in good condition which proved not to be

\(^{91}\) Jacksonville Terminal Co. v. Misak, 102 So.2d 295 (Fla. 1958) (switchman hit by train of cars; co-employee improperly gave engineer signal to move train); Atlantic Coast Line R. R. Co. v. Barrett, 101 So.2d 37 (Fla. 1958) (car inspector hurt during switching operation; cars kicked back too fast); Martin v. Tindell, 98 So.2d 473 (Fla. 1957), cert. denied, 355 U.S. 959 (1958) (slip and fall in tavern car aisle; wet from leaky air conditioner); Combs v. Atlantic Coast Line R. R. Co., 112 So.2d 855 (Fla. App. 1959) (facts not stated); Connor v. Butler, 109 So.2d 183 (Fla. App.), rev'd, 361 U.S. 29 (1959), opinion on remand, 116 So.2d 454 (Fla. App. 1959) (hose cutter hit on hand by falling door of platform steps on passenger car).
\(^{93}\) Butler v. Smith, 104 So.2d 868 (Fla. App. 1958).
\(^{95}\) 104 So.2d 1 (Fla. 1958).
the case as it exploded two minutes after it was lit. A directed verdict for the landlord was reversed on two grounds, one of which was a question of first impression in Florida. The case squarely holds that a landlord’s negligent failure to repair as promised creates liability for injuries caused by such nonperformance. Negligence in making repairs has always been considered a basis of liability, but the Propper case is the first case imposing liability for nonfeasance.

The Propper case also contains a holding that liability was a jury question because of evidence that the landlord reserved control over the gas stove. The basic reason for the rule of non-liability is that the landlord surrenders control and the ability to repair when the leasing occurs. When control is retained, liability is retained along with it.

In City of Daytona Beach v. Baker an exploding water tank injured a beauty contestant in defendant’s auditorium which had been leased to a civic group for the “Miss Florida” contest. The court found no evidence that the defendant had reserved control over the auditorium or the water tank which was a stage prop.

In Roth v. Flom the court apparently held that a social visitor of a tenant is a licensee as to the landlord. The injury occurred during a fall on a sidewalk which apparently was under the landlord’s control. This holding has little logic and virtually no authority to support it. The Restatement of Torts requires landlords to exercise reasonable care towards guests of tenants as to any injuries occurring on a part of the premises retained in the lessor’s control. The Roth case appears to hold contrary to the overwhelming weight of authority in this country and cites no cases in point to support its conclusion. The case probably will not stand up under attack since the court was apparently unaware of the multitude of authority to the contrary.

96. This holding is following in Wallace v. Schrier, 107 So.2d 754 (Fla. App. 1958) (promise and failure to repair defective linoleum on kitchen floor); Wiley v. Dow, 107 So.2d 166 (Fla. App. 1958) (promise and failure to repair rotten steps); cf. Perlman v. Kruger, 104 So.2d 609 (Fla. App. 1958) (tenant assumed risk of falling plaster but opinion touches on failure to repair and control of overhead plumbing); The Propper rule was recognized but held inapplicable in Moore v. O’Connor, 106 So.2d 606 (Fla. App. 1958), where there was a duty to repair but no negligence in not discovering rotten banister.

97. E.g., Felshin v. Sir, 149 Fla. 218, 5 So.2d 600 (1942).

98. The tenants were told not to attempt repairs but to report all defects to the landlord. In addition, the tenant in question was instructed as to how to light the burner. The same law was applied in Baum v. Freeman, 103 So.2d 654 (Fla. App. 1958), when the tenant’s wife fell when a rug slipped on a terrazzo floor. There was no allegation of the landlord’s reservation of control and an order dismissing the complaint was affirmed.

99. 98 So.2d 804 (Fla. App. 1957), cert. denied, 105 So.2d 364 (Fla. 1958).

100. 105 So.2d 179 (Fla. App. 1958).

101. RESTATEMENT, Torts § 360 (1934). Common passageways, like that involved in Buck v. Hardy, 106 So.2d 428 (Fla. App. 1958), are necessarily retained in the landlord’s control for the use of all tenants.

B. Common Carriers

The relationship of common carrier and passenger calls into play some of the highest duties of care which exist at common law. The passenger has practically nothing to say about operation of the vehicle, and carrier accidents usually do not involve contributory negligence as a defense. This fact coupled with the rule that carriers must exercise the highest degree of care requires a verdict for the passenger against someone in most motor vehicle accident cases.

When a taxi or jitney passenger is injured in a collision and sues all the vehicles involved, he is entitled to a charge that he must recover a verdict from someone and it is up to the jury to decide which of the defendants are liable. In Beers v. Diamond Cabs, a slow moving taxi and a fast moving truck collided at an unmarked and unobstructed intersection. The truck was the vehicle on the right and the cab entered the intersection first. A directed verdict for the taxi company and against the passenger was reversed with a statement that "plaintiff only had to prove a slight breach from the highest degree of care to raise a prima facie case."

One case held a carrier "owes the same high degree of care to passengers when entering or leaving the vehicle as when being transported therein." And, in another decision, the rule that an alighting passenger must exercise reasonable care for her own safety was recognized, but the case was reversed for charging on contributory negligence when there was no evidence of any.

C. Distribution of Electricity

Electrical injury cases warrant separate classification because of the high degree of care imposed on those dealing with electricity. In addition, electrical cases often involve experts testifying in a world of their own.

The Willis case contains an important holding that compliance by a defendant with the minimum standards of "the National Electrical Safety Code is a factor which may be considered by a jury in determining the issue of negligence, but it is not in itself a defense to the action." The case reversed a plaintiff's verdict for lack of evidence as to how or why the accident occurred.

103. New Deal Cab Co. v. Stubbins, 90 So.2d 614 (Fla. 1956); Ringler v. McVeigh, 109 So.2d 606 (Fla. App. 1959).
104. 104 So.2d 388 (Fla. App. 1958). The extent to which carriers must foresee and guard against improper conduct of others is graphically illustrated in Bullock v. Tamiami Trail Tours, Inc., 266 F.2d 326 (5th Cir. 1959).
106. Thomason v. Miami Transit Co., 100 So.2d 620 (Fla. 1958) (bus driver closed manually operated door on alighting passenger).
107. E.g., Richmond v. Florida Power & Light Co., 58 So.2d 687 (Fla. 1952); Escambia County Electric Light & Power Co. v. Sutherland, 61 Fla. 167, 55 So. 83 (1911).
in what manner plaintiff received the electrical shock which injured him. On the negligence issue, the opinion contains an excellent discussion of a power company's duty to maintain uninsulated wires at heights which take into account the use of the property below. Maintenance of wires twenty-four feet above farm land where 20-40 foot lengths of irrigation pipe are sometimes raised in the air was held to create a jury question as to negligence.

On the issue of height, it was held in one case\(^{109}\) that maintenance of high tension wires at an unspecified height over water at Tavernier Creek was not, as a matter of law, negligence which was a proximate cause of injury to a fishing mate who raised aluminum outriggers into them.

In *Bell v. Florida Power & Light Company*,\(^{110}\) a construction worker was killed when a crane contacted a power line. A directed verdict for defendants was reversed because of a failure to de-energize the line as promised.

In another crane-power line case,\(^{111}\) a summary judgment for the power company was reversed when a bucket-man was burned while pouring concrete on the top of a wall. The power line was about a foot outside the power company's easement and there was opinion evidence that this was a departure from sound electrical engineering practice.

### D. Doctor-Patient

Doctor-patient litigation involves special problems. On the one hand, a doctor is probably hurt more by being sued than anyone else. On the other hand, medical ineptness can cause death or extreme injury to persons who can expect virtually no help from the medical profession in proving a case which often requires expert medical testimony.

Florida law now requires a doctor to defend on his conduct rather than his reputation. It is reversible error to charge the jury that a doctor's reputation is at stake in a malpractice case.\(^{112}\)

There were a number of important decisions on the question of when the plaintiff needs expert testimony to get to the jury. When the issue is one of proper diagnosis or acceptable method of treatment, expert testimony is usually required since lay jurors are not qualified to judge such matters.\(^{113}\) On the other hand, the expert testimony requirement


\(^{110}\) 106 So.2d 224 (Fla. App. 1958), cert. discharged, 113 So.2d 697 (Fla. 1959).


\(^{112}\) Stauf v. Holden, 94 So.2d 361 (Fla. 1957).

\(^{113}\) Crovella v. Cochrane, 102 So.2d 307 (Fla. App. 1958) (summary judgment for obstetrician affirmed; failure to diagnose pregnancy; no expert testimony that doctor failed to follow accepted diagnostic methods). Compare, however, Bourgeois v. Dade County, 99 So.2d 575 (Fla. 1957), where an unconscious man died of broken ribs which punctured his chest cavity after the police and hospital diagnosed him as a drunk and "deposited" him on a jail cot with no medical treatment. A directed verdict for defendant hospital was reversed.
is relaxed substantially when the question is negligence "in the application or administration of an approved medical treatment." The Atkins case\textsuperscript{114} drew this distinction and reversed a summary judgment when there was evidence that a child developed a Volkmann's Contracture (claw hand) from negligence in improperly applying a plaster cast to a broken arm and negligence in failing to bi-valve the cast after "classic warnings" that it was necessary. The case also stated that expert testimony was not needed on the causation issue.

The supreme court's reversal of the Second District Court of Appeal in the Atkins case also casts considerable doubt on the validity of two other Second District opinions. Both decisions\textsuperscript{115} found no liability against hospitals as a matter of law when elderly patients suffering from heart attacks were left unattended and without bed-rails. These opinions proceed on the assumption that only experts can establish the need for bed-rails, and the Atkins case points strongly in the other direction.

In Dohr v. Smith,\textsuperscript{116} a patient who had undergone a gastic resection was found to have a false tooth in her right bronchus. The tooth was knocked there by an anesthetist using a laryngoscope. It was held that expert testimony was unnecessary as to the anesthetist's negligence and a directed verdict for her was reversed. The surgeon involved and the hospital were held free from fault. Mr. Justice Terrell's dissent as to the surgeon's exoneration has considerable merit since the surgeon knew of the missing tooth, knew the patient had a cough, suggested no x-rays, and told the patient not to worry about it. However, the majority held that expert testimony was required to evaluate the surgeon's conduct and there was none.

A doctor's duty of care was stated as follows in Crovella v. Cochrane:\textsuperscript{117}

There is no fixed criterion by which to mark the dividing line between the degree of care that must be exercised by those who engage as specialists in the several branches or fields of medicine as compared to the general practitioners. Neither insures the correctness of his diagnosis. Generally, it is the duty of each to apply to the diagnosis and treatment of his patient the skills, means, and methods that are recognized as necessary to be followed in the particular case according to the standards of those who are qualified by training and experience to perform similar services in the community.

There were two decisions involving unauthorized treatment and in both it was held that the evidence was for the jury on a theory of "assault"

\textsuperscript{114} Atkins v. Humes, 110 So.2d 663 (Fla. 1959), reversing the Second District Court of Appeal's decision in 107 So.2d 253 (Fla. App. 1958).


\textsuperscript{116} 104 So.2d 29 (Fla. 1958).

\textsuperscript{117} 102 So.2d 307, 311 (Fla. App. 1958).
or trespass to the person as distinguished from malpractice. In one, an appendectomy was performed under an unauthorized spinal anesthetic. The doctor was held liable for paralysis of one leg caused by the spinal anesthetic. The case contains a fine treatment of the law on implied consent and collects the authorities dealing with a doctor's rights in an emergency when consent cannot be obtained. The case was followed in a subsequent decision when a patient went in for a hernia operation and an unauthorized aortagram was performed with resulting paralysis of the lower extremities.

On the statute of limitations issue, it was held in Manning v. Serrano that a plaintiff has four years in which to sue for malpractice sounding in tort, and that section 95.11(5)(c) of the Florida Statutes allowing three years only applies if the complaint sounds in contract.

E. Manufacturers and Suppliers

A great moving force in the common law is man's inner conviction that one who negligently injures the innocent should pay for the damages caused. Man's sense of justice revolts at any rule producing a contrary result. The early rules insulating manufacturers and contractors from liability have not withstood the passage of time.

Florida made significant advances in this field in the past two years. Each step was guided by these inner convictions of right and justice. Floridians can take a full measure of pride in the superb opinions of Justices Drew and Thomal in the Slavin and Wait cases.

In the Slavin case, a wash basin came loose from the wall and injured a motel guest because of a latent defect in installation. The motel owner was held not liable because of no evidence of negligence in failing to discover the defect. The plumbing contractor's liability was held to present a jury question. The ancient rule absolving contractors from liability after completion was subjected to careful analysis and then rejected in important respects. Since the rule was bottomed on shifting responsibility to the owner, the opinion rejects the rule when latent defects not-discoverable by the owner are involved. The opinion likewise rejects the requirement of an "inherently dangerous" condition. Under Slavin, the innocent victim recovers from the owner when the owner is at fault and from the contractor when the owner is blameless. As the opinion aptly observes:

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120. An aortagram is described in the opinion as a "highly technical and dangerous operation" where a large needle is inserted "into the skin at the tip of one of the appellant's ribs for the purpose of entering the aorta." Zaretzky v. Jacobson, supra note 119 at 731.
121. 97 So.2d 688 (Fla. 1957).
123. Tampa Drug Co. v. Wait, 103 So.2d 603 (Fla. 1958).
To hold otherwise would result necessarily in the anomaly of fault without liability and wrong without a remedy, contrary not only to our sense of justice but directly conflicting with the express mandate of the Florida Constitution, Declaration of Rights, Section 4, F.S.A., that 'every person for any injury done him *** shall have remedy ***'...

In the Wait case, the plaintiff's husband died after inhaling carbon tetrachloride fumes while cleaning floors. The defendant drug company sold and distributed the carbon tetrachloride. A jury finding of negligence because of inadequate warning of the product's extreme dangers was affirmed. The opinion contains a full discussion of a distributor's liability for negligence and of the duty to warn according to the dangers involved. The requirement of privity as a basis for tort liability is expressly rejected.

In Rawls v. Ziegler, the court divided 4-3 on an issue regarding foreseeability of intervening forces but was in substantial agreement on some important products liability questions. There was agreement on the principle that an independent contractor who does work according to plans and specifications supplied is not liable unless the plans are so obviously dangerous that no reasonable man would follow them. Likewise, there was substantial agreement that a supplier (truck dealer selling truck with specially modified body) was under the same duty of care as a manufacturer irrespective of any privity.

F. Invitees, Licensees and Trespassers

When plaintiff is injured on defendant's property, the purpose and circumstances of the entry determine the defendant's common law duty of care. The entire scope of the problem is examined in McNulty v. Hurley which holds that a parishioner attending mass is a licensee. The opinion establishes a "benefit" to defendant as the dividing line between invitees and licensees and reasons that one engaged in worship benefits only himself. Dicta in the opinion states that a financial contribution would not alter the plaintiff's status as it is the giver -who benefits thereby.

The principles established in the McNulty case were applied in Wallace v. Boca Raton Properties where it was held that a sportswriter covering a golf tournament was an invitee of the tournament sponsor since his presence was for the mutual benefit of both parties.

In the Lancaster case, the plaintiff was a guest in a car which entered defendant's private driveway by mistake and collided with defendant's

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125. 107 So.2d 601 (Fla. 1958).
126. 97 So.2d 185 (Fla. 1957).
automobile. The plaintiff was held to be a licensee or a trespasser with no right of recovery in either event.

The liability of swimming pool owners was considered in Adler v. Copeland. A five-year old girl drowned in the defendant's pool. The girl was playing with defendant's children and defendant had given the child a toy to play with. It was held that the child was a licensee, but a directed verdict for the defendant was reversed with a holding that a jury could find willful and wanton negligence when defendant left the home after telling the children not to go near the pool. The case turns on the amount of care required and the dangers involved with children of tender years.

The Adler case also has a holding concerning the "attractive nuisance doctrine." Under this doctrine, a duty of reasonable care is owed to children attracted to the premises by conditions which present unusual elements of danger not appreciated by them. The case holds that a fenced in swimming pool with no hidden dangers does not come within the doctrine.

There were three other attractive nuisance cases. In two, recoveries were affirmed in rockpit drowning cases involving unusual elements of danger. In the third, a building under construction was held not to come within the doctrine on the facts.

C. Care Owed Invitees

Injuries to invitees produced more litigation than any other type of case. While the bulk of the cases involved falls, there were a number of cases involving other types of accidents.

1. INJURIES NOT INVOLVING FALLS

A defendant owes invitees on his premises a duty of reasonable care for their safety and protection. In applying this rule, the evidence was held to create jury questions when: a motel guest was swimming and hit by a boy thrown in the pool during horseplay; a boy lost control of a scooter because of loose gravel and holes on the approach to a supermarket parking lot; a man was hit by a golf scoreboard blown over by wind; a hotel guest walked through an unmarked glass

129. 105 So.2d 594 (Fla. App. 1958).
130. Larnel Builders v. Martin, 105 So.2d 580 (Fla. App. 1958), cert. discharged, 110 So.2d 649 (Fla. 1959); Ansin v. Thurston, 98 So.2d 87 (Fla. App. 1957), cert. denied, 101 So.2d 808 (Fla. 1958).
A boy, whose parents were looking at a model home, walked into a glass door; a woman was knocked down by a crowd rushing in a store during a sale after defendant opened the doors and shouted “GO”; a caddy was hit by a golf ball; and a movie goer was injured when a lady’s lounge chair collapsed.

The evidence was held insufficient to go to the jury when: a motel guest sat in a chair which had a rusty nail exposed; a man walked through a glass panel adjacent to a door and a shopper was hit by a swinging door marked “Caution! Door Swings Out” opened by persons unknown.

The Shields case deserves comment. The accident occurred on the shoulder of a road on an approach to the defendant’s property. It was held that a defendant must not only use due care to provide safe premises, but also, the duty may extend to “approaches to the premises” which are open to invitees and so located as to invite their use.

The Mosqueda case is also important since it discusses the special and higher duty of care owed by amusement operators. While they are not insurers, they owe “a higher degree of diligence than is required of stores, banks, and other places of business.”

2. SLIP, TRIP AND FALL

There were thirty cases where defendants owed falling plaintiffs a duty of reasonable care. The cases split 17-13 in favor of trial by jury.

The fall cases “fall” into three categories—defects created by defendant’s active conduct, defects arising from disrepair, and defective conditions created by third persons. The defendant’s notice of the defect is not an issue in the first case, but is an issue in the latter two. Placing each case in the proper category may not be as simple as it seems.

135. Harold Corp. v. Herzberg, 110 So.2d. 683 (Fla. App.), cert. denied, 114 So.2d 790 (Fla. 1959).
141. Stone v. Hotel Seville, 104 So.2d 847 (Fla. App. 158).
143. See note 133 supra.
144. See note 139 supra.
145. See note 139 supra at 65.
146. E.g., Pogue v. Great Atl. & Pac. Tea Co., 242 F.2d 575 (5th Cir. 1957).
Of the thirteen cases that did not go to the jury, there were four failures to prove notice,\textsuperscript{147} four failures to prove negligence,\textsuperscript{148} and five showings of contributory negligence.\textsuperscript{149}

Of the seventeen cases which presented jury questions, five involved disrepair,\textsuperscript{150} ten involved conditions created by defendant,\textsuperscript{151} one involved notice of a foreign substance,\textsuperscript{152} and one involved the combined conduct of a supermarket and its customers.\textsuperscript{153}

H. Master-Servant

Workmen’s Compensation supersedes most of the common law master-servant litigation. However, questions still arise when third persons sue the master.

\textsuperscript{147} Goldman v. Hollywood Beach Co., 244 F.2d 413 (5th Cir. 1957) (grease in driveway from unknown sources and for unknown period of time); City of Miami v. Lewis, 112 So.2d 268 (Fla. App. 1959) (holes in sidewalk for unknown length of time); Food Fair Stores of Fla., Inc. v. Patty, 109 So.2d 5 (Fla. 1959), reversing 101 So.2d 881 (Fla. App. 1958) (green bean from sources unknown); City of Jacksonville v. Hampton, 108 So.2d 768 (Fla. App. 1959) (steps in disrepair unknown length of time).

\textsuperscript{148} City of Miami v. Wolff, 112 So.2d 270 (Fla. App.), cert. denied, 115 So.2d 415 (Fla. App. 1959) (uneven section of sidewalk); Nielsen v. City of Sarasota, 110 So.2d 417 (Fla. App. 1959) (court discharged reluctantly), 117 So.2d 731 (Fla. 1960) (fall through space in bleacher for unknown reason); Commercial Credit Corp. v. Varin, 108 So.2d 638 (Fla. App. 1959) (skidding and falling for unknown reasons); Winer v. Waln, Inc., 105 So.2d 976 (Fla. App. 1958) (alleged negligent construction in using fine ground terrazzo).

\textsuperscript{149} Cooney v. Panama City, 165 F. Supp. 381 (N.D. Fla. 1958) (daylight trip on raised curb); Leveridge v. Lapidus, 105 So.2d 207 (Fla. App. 1958) (waitress slipped on known wet floor); Andrews v. Goetz, 104 So.2d 653 (Fla. App. 1958) (trip over broken concrete in broad daylight, plaintiff knew of defect); Kagan v. Eisenstadt, 98 So.2d 370 (Fla. App. 1957) (fall into open stairwell—previously warned about in unfinished building); Jacobs v. Claughton, 97 So.2d 53 (Fla. App. 1957) (fall over telephone pole in broad daylight).

\textsuperscript{150} Banks v. City of Tampa, 112 So.2d 888 (Fla. App. 1959) (sidewalk defect); Warring v. Winn-Dixie Stores, 105 So.2d 915 (Fla. App. 1958) (holes in paved parking lot path); Schutzer v. City of Miami, 105 So.2d 492 (Fla. App. 1958) (crack in sidewalk); City of Miami v. Lawson, 104 So.2d 600 (Fla. App. 1958) (pothole in street); Victor Hotel Owners v. Sperling, 104 So.2d 120 (Fla. App. 1958) (defect in hotel lobby carpet).

\textsuperscript{151} Deane v. Johnston, 104 So.2d 3 (Fla. 1958) (weighing scales on sidewalk); Bess v. 17545 Collins Ave., 98 So.2d 490 (Fla. 1957) (pipe protruding 1½ inches in motel walkway); Montgomery Ward & Co. v. Rosencquist, 112 So.2d 885 (Fla. App. 1959) (drop-off at store entrance); Singleton v. City of Jacksonville, 107 So.2d 47 (Fla. App. 1958) (no guardrail on part of walkway walkway); Shell’s Super Store v. Parker, 103 So.2d 884 (Fla. App.), cert. denied, 106 So.2d 199 (Fla. 1958) (apple box in supermarket aisle); Sunday v. Ikenson, 103 So.2d 669 (Fla. App. 1958) (trip on leg of sidewalk display table just after turning a corner); Saunders v. Kaplan, 101 So.2d 181 (Fla. App. 1958) (dance floor wet after defendant squeegeed it); Durden v. Drametz, 99 So.2d 716 (Fla. App. 1958) (too much wax on dance floor); Millar v. Tropical Cables Corp., 99 So.2d 589 (Fla. App. 1958) (improperly constructed ramp and platform at race track); Fouts v. Margules, 98 So.2d 394 (Fla. App. 1957) (trip over hollywood bed frame in store).

\textsuperscript{152} Food Fair Stores of Fla., Inc. v. Vallarelli, 101 So.2d 161 (Fla. App.), cert. denied, 104 So.2d 595 (Fla. 1958) (grape on supermarket floor).

\textsuperscript{153} Pogue v. Great Atl. & Pac. Tea Co., 242 F.2d 575 (5th Cir. 1957).
The employer of an independent contractor is normally not liable for the latter's negligence. In *Van Engers v. Hickory House*, the rule was recognized that an independent contractor may be so clothed with apparent authority to act for the employer that the latter is liable for the contractor's negligence.

The "loaned servant" doctrine was involved in *Davis v. Riggle*. Davis owned a truck being driven by his employee. Wheel trouble brought Riggle to the scene with a wrecker. Davis' employee helped Riggle by steering the truck while Riggle was towing it. Davis sued Riggle for damage to the truck which overturned during the towing process. The case holds that if Davis' employee was subject to Riggle's "authority and instruction" at the time of the accident, the employee's negligence would make Riggle liable to Davis.

In *King v. Young*, it was held that the defendant was not liable for a truck driver's negligence when his only connection with the case was that of a transportation broker.

One negligence case involved a scope of employment issue. It was held that plaintiff's injuries were caused by the acts of an off-duty employee and hence the employer was not liable.

I. Warranty

The entire Florida warranty law is ably treated in a recent law review article.

The three warranty cases decided during the survey period indicate a growing area for imposition of absolute liability. In one case, the "rule of absolute liability of implied warranty" was imposed on a soft drink bottler selling an impure product. The court refused to require proof from plaintiff that there was no tampering or opportunity for tampering after the bottle left the plant.

In another case, electrical cable for underground use proved useless. The contractor replaced it and then sued the wholesaler and manufacturer involved. Both defendants were liable to the plaintiff for breach of implied warranty and the wholesaler recovered on its cross-claim against the manufacturer. The case squarely held that privity between the contractor and manufacturer was unnecessary.

155. 105 So.2d 600 (Fla. App. 1958).
156. 107 So.2d 751 (Fla. App. 1958).
159. Miami Coca Cola Bottling Co. v. Todd, 101 So.2d 34 (Fla. 1958).
In a Fifth Circuit decision,161 it was held that even under a warranty theory, one who rents a car must prove negligence to recover against the rental agency for injuries caused by mechanical defects.

J. Defenses in Common Law Cases

The defenses to common law actions have been considered throughout this article in the factual context of various types of cases. However, there are a number of decisions pronouncing holdings of broad general application.

1. Contributory Negligence

Deane v. Johnston162 is an important decision which reviews the entire body of law concerning nuisance and contributory negligence and holds the defense available when the nuisance is intentionally created but there is no intent to injure another. "Intent" as here used "means the actor acts for the purpose of causing an invasion of another's interest or knows that such invasion is resulting, or is substantially certain to result, from his conduct. It is not enough that the act itself is intentionally done."163 Although there is considerable authority to the contrary, the Deane case is based on reasoning and theory which is virtually unanswerable. The opinion will unquestionably influence the growth of the law throughout the country. In Deane, the plaintiff tripped over sidewalk weighing scales. Although she knew the scales were there, her contributory negligence was held a jury question under the "distraction rule." Her attention was diverted when her employer called to her, and she was also looking at traffic and a traffic light. The case holds that contributory negligence is a jury question when attention is diverted from a known danger by a sufficient cause.164

In Schweikert v. Palm Beach Speedway,165 the court reaffirmed the rule that until placed on notice to the contrary, invitees have a right to assume that reasonable care has been exercised for their safety and that "the general public is not required to be extra careful to look for dangers while walking on the premises."

2. Assumption of Risk

The difference between contributory negligence and assumption of risk is the subject of much debate. Generally speaking, what is involved is the difference between standing behind a mule and pulling its tail.166

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161. Clarkson v. Hertz Corp., 266 F.2d 948 (5th Cir. 1959).
162. 104 So.2d 3, 65 A.L.R.2d 957 (Fla. 1958).
163. Id. at 8, 65 A.L.R.2d at 963.
164. Sinitz v. Shapiro, 100 So.2d 458 (Fla. App. 1958), reaches the same conclusion.
165. 100 So.2d 804 (Fla. 1958). Accord, Wallace v. Boca Raton Properties, 99 So.2d 637, 640 (Fla. App. 1958) (plaintiff "was not required to inspect or look out for danger in circumstances where he had no reason to expect it").
166. "Some courts have stated that assumption of risk is a mental condition of willingness, whereas contributory negligence is more a matter of conduct." Byers v. Gunn, 81 So.2d 723, 727 (Fla. 1955).
Assumption of risk usually is not applicable unless there is a contractual relationship between the parties, although it is sometimes applied to certain "spontaneous acts" of the plaintiff. The defense was discussed in two landlord-tenant cases. In one, it was held a jury question when the tenant lit a gas stove after reporting trouble to the landlord and receiving the landlord's assurance that it was in good condition. In the other, it was held that the tenant assumed the risk of injury from falling plaster when he knew of the condition and "voluntarily chose to remain exposed to it."

In Brady v. Kane, the court held that while a member of a golf foursome may assume "certain obvious and ordinary risks of the sport," he does not assume risks resulting from "improper and unauthorized negligent action of another player."

3. Release

In 1957, Section 54.28 of the Florida Statutes was enacted. The statute abolishes the common law rule that release of one joint tortfeasor releases all other joint tortfeasors. Provision is made to deduct any prior settlement from any verdict obtained and provides that the fact of such a settlement "shall not be made known to the jury."

The statute applies to malicious prosecution actions and should apply to any settlement after the effective date of the statute although the accident occurred prior thereto. The effect of a contract is normally determined by the law in effect when it is made.

In one FELA case, a woman signed a release of all claims on payment of her property damage, thinking she was unhurt in the accident. It was held that the "mistake of fact" issue presented a jury question when the plaintiff subsequently discovered she was injured. However, unexpected consequences from known injuries will not invalidate a release.

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167. Byers v. Gunn, supra note 166.
170. 111 So.2d 472 (Fla. App. 1959).
175. 107 So.2d 272 (Fla. App.), cert. denied, 114 So.2d 439 (Fla. 1959).
4. IMMUNITY

The abolition of municipal immunity in the *Hargrove* case\(^{177}\) produced one of the greatest opinions ever written in this State. Here again, a rule which shields a wrongdoer and denies the innocent a recovery could not survive in a modern democracy.

The *Hargrove* opinion makes it very clear that "legislative or judicial, or quasi-legislative, or quasi-judicial" immunity issues involve different considerations and are not affected by the decision.

The aftermath of *Hargrove* has produced cases holding no immunity in the municipal operation of traffic control signals;\(^ {178}\) no immunity of a city for the torts of its police officers under the doctrine of *respondeat superior*;\(^ {179}\) and a holding that the Florida State Turnpike Authority is a state agency immune from suit.\(^ {180}\)

5. MUNICIPAL NOTICE PROVISIONS

Florida municipalities commonly require written notice of an accident within 30 or 60 days. Some municipalities have gone so far as to require suit within 30 days.\(^ {181}\) The rank injustice caused by these provisions continued during the last two years. However, there were several decisions which tempered the law to avoid gross miscarriages of justice.

In *Tillman* v. *City of Pompano Beach*,\(^ {182}\) the court divided 4-3 in holding the city estopped to raise a 30 day notice provision. A city truck ran into the rear of plaintiff's automobile. The city had immediate actual notice of the accident; the city officials to whom written notice was to be given conducted an investigation; and an agent of the city assured plaintiff that the city was liable and discussed settlement on that basis.

The *O'Connor* case\(^ {183}\) is the perfect illustration of the monstrous results which municipal notice provisions can cause. Plaintiff was injured on a city bus. Failure to bring suit within 30 days was held fatal though an insurance adjustor for the city's insurance company went to the hospital and told the injured woman not to get a lawyer "as that would delay a settlement."

The *Monchek*\(^ {184}\) case shows that difference in wording can lead to different results in notice provision cases. The charter provision involved required reasonable specifications "as would enable the city officials to investigate the matter." The minor plaintiff was injured on a city lot where sewer

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182. 96 So.2d 130 (Fla. 1957).
183. See note 181 supra.
pipe was stored. After the accident the police investigated the accident, took photographs and filed a detailed written report. These facts, coupled with a letter to the proper official stating the child was hurt on the day in question, was held sufficient compliance with the provision. The opinion also holds the city waived any technical defects in the written notice because the city attorney's reply to the plaintiff's letter indicated a desire to deal with the case on the merits.

K. Res Ipsa Loquitur

The res ipsa cases produced one important holding and a number of decisions finding the doctrine inapplicable to particular facts.

In the McCrea case, it was held that one is not precluded from relying on res ipsa merely because he introduces evidence of specific acts of negligence attributable to defendant. However, the supreme court's opinion discharging certiorari indicates that the contrary is true when the evidence reveals all the facts and circumstances surrounding the injury and establishes the precise cause of the accident.

Factually, the doctrine was held inapplicable in cases when: a rental automobile suddenly developed power brake trouble and the rental agency was sued; a chair collapsed due to a latent defect; a protruding object from a railroad car hit a parked automobile; and where a glass door fell for unexplained reasons a half a day after installation.

L. Damages

Most of the cases dealing with personal injury damage law involved nothing more than the usual excessive and inadequate damage arguments in particular cases. However, there were two decisions involving the elements of damages in death actions and a case involving emotional distress.

In the Donat case, parents sued under section 768.03 of the Florida Statutes for the wrongful death of a child. The death reduced the father to a mental incompetent and this was held a proper item for consideration in awarding damages for the “mental pain and suffering of the parent” under the statute.

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185. South Florida Hospital Corp. v. McCrea, 112 So.2d 393 (Fla. App. 1959), cert. discharged with opinion, 118 So.2d 25 (Fla. 1960).
186. Clarkson v. Hertz Corp., 266 F.2d 948 (5th Cir. 1959).
188. Martin v. Powell, 101 So.2d 610 (Fla. App.), cert. denied, 104 So.2d 596 (Fla. 1958).
190. 106 So.2d 593 (Fla. App. 1958).
In *Fowlkes v. Sinnamon*, the court assumed for the sake of argument that punitive damages were recoverable in a survival action pursuant to section 45.11 of the Florida Statutes. The court then held that compensatory damages must be shown as a predicate for the allowance of punitive damages.

In the *Slocum* case, a shopper suffered emotional distress and a heart attack after defendant’s employee said “...you stink to me.” It was alleged that the utterance was malicious or with intent to inflict emotional disturbance. It was held that no cause of action was alleged because under an objective standard the language was not actionable. What rule would be followed in Florida when the words were “objectively” abusive was left open for future determination.

IV. OTHER COMMON LAW TORTS

There were very few tort cases that were not personal injury negligence actions.

In *Lingard v. Kiraly*, an action was brought by a discharged employee to recover for tortious interference with his employment contract. The opinion recognized the individual’s right “to pursue his employment free from malicious interference,” but found no evidence that defendant’s conduct caused plaintiff’s discharge.

The *Dicas* case involved trespass and assault by a loan company employee. The trial court granted the loan company a summary judgment on the theory that the acts were outside the scope of employment. On appeal, the judgment was reversed with a holding that the test is whether the employer could be supposed, from the nature of the employment “to have authorized or expected the servant to do” the acts in question. An important factor in the case was the fact that the conduct “was for business reasons, not personal.”

Scope of employment was also the issue in the *Burquest* case when railroad employees, in burning weeds on the right of way, also burned off plaintiff’s land without permission. The issue was held a jury question in spite of the fact that defendant would not have allowed the conduct had it known of it. The case turns on the fact that the purpose of the conduct was to further the railroad’s business.

191. 97 So.2d 626 (Fla. App. 1957), cert. denied with opinion, 101 So.2d 375 (Fla. 1958).
193. 110 So.2d 715 (Fla. App. 1959).
In *Hutchinson v. Lott*, the court discusses the question of excessive force in effecting an arrest. The case defines necessary force as that which an ordinary prudent and intelligent person, with the knowledge and in the situation of the arresting officer, would deem necessary.

There were two malicious prosecution actions. Both stand for the proposition that defendant’s reliance on advice of counsel or the judgment of a public prosecutor is not conclusive on the probable cause issue if defendant does not make a full and fair disclosure of the facts to such persons.

Libel and slander litigation produced three decisions on questions of privilege. It was held that malice is a prerequisite to recovery when a publication is qualifiedly privileged; that all communications or publications regarding the requirements or administration of the unemployment compensation law are absolutely privileged under section 443.16 (3) of the Florida Statutes; and that a union business agent has no qualified privilege when he makes disparaging remarks to plaintiff’s employer regarding plaintiff’s ability as a plumber.

V. CONCLUSION

This survey includes 186 decisions from Florida appellate courts. Nearly half (89) were written by the Third District Court of Appeal. The Second and First Districts wrote 38 and 19 opinions respectively. The Supreme Court accounted for the remaining 40 cases, nearly all of which were filed before the district courts were created. Over one third of the cases (66 out of 186) involved reversals for failure to submit jury questions to the jury.

It seems apparent that immediate steps must be taken to relieve the vastly disproportionate workload cast on the Third District Court of Appeal. With three judges, it wrote 89 tort opinions as against 57 tort opinions for the other six judges in the First and Second Districts. The Supreme Court no longer has jurisdiction in most tort cases and a great log jam in the Third District seems inevitable. When one considers that the Third District has produced nearly an opinion a week in the tort field alone, to say nothing of the cases decided without opinions or in other fields, its need for additional judges is crystal clear. Judicial delay is the only alternative.

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196. 110 So.2d 442 (Fla. App.), cert. denied, 115 So.2d 415 (Fla. 1959).
200. Teare v. Local 295, 98 So.2d 79 (Fla. 1957).