Torts

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INTRODUCTION

In selecting the materials for this survey the authors solicited opinions from practitioners in the field and professors of tort law in the law schools of our state. It was felt that in this way, by cooperative effort and concurrence of opinion, greater emphasis might be placed upon the more "active areas" of Florida tort law. The response was gratifying indeed.

The cases covered in the following pages are limited in number, constituting somewhat less than half of those which sounded in tort before the Supreme Court of Florida during the survey period. As in past surveys, we have eliminated those cases which dealt primarily with Workmen's Compensation, Master-Servant, Damages, Evidence, and Procedure. In addition, a large number of cases which consisted of little more than a review of fact determinations and which added nothing new to the existing body of substantive tort principles were omitted. By narrowing the selection, our aim was to provide a higher degree of subjective analysis, where warranted, within available limitations of time and space.

In classifying our research and making a topical breakdown, we endeavored to conform to traditional academic subdivisions as nearly as possible. However, as was stated by our predecessors, "when troubles come they come not single file but in battalions . . . ." For this reason and because of the far-reaching importance of certain key decisions some deviations were felt necessary. Special emphasis was placed on the subsection under negligence dealing with statutory problems and a separate section was

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1. The materials used in this survey were selected from Volumes 80 through 95, Southern Reporter, Second Series; Volume 11, Miami Law Quarterly; Volume 9, University of Florida Law Review and various sections of the 1955 and 1957 Florida Statutes cited throughout the article. Also included was one case, Kernan v. American Dredging Co. 78 Sup.Ct. 394 (1958) from the United States Reporter in the section on Federal Statutes—Jones Act.

2. The authors would like to express their gratitude to all who rendered aid in compiling the materials for this survey. We especially wish to acknowledge the aid given by Mr. Sam Daniels, with the law firm of Nichols, Gaither, Green, Frates & Beckham, Miami, Florida; Professor George H. Pickar, University of Miami School of Law and Professor Leonard S. Powers and Professor Hayford O. Enwall, University of Florida College of Law.


set up concerning extension of liability. The balance of the section on negligence is broad in scope and covers a multitude of problems. Intentional torts received but cursory treatment; actions in this area were few and, with an exception or two, were of little consequence.

The material in this article is arranged in the following order:

I. NEGLIGENCE

A. Degree of Care — General
   (1) Same — Business Invitee or Mere Licensee
   (2) Same — Discovered Trespasser

B. Proximate Cause

C. Res Ipsa Loquitur

D. Physician and Surgeons — Malpractice

E. Last Clear Chance

F. Release of Liability

G. Damages

H. Imputed Negligence

I. Nuisance

J. Statutory Problems
   (1) Wrongful Death Statutes
   (2) Guest Statute
   (3) Federal Statutes — Federal Employer's Liability Act
       Same — Jones Act
   (4) Release — Covenant not to sue — Joint-tortfeasors

II. EXTENSION OF LIABILITY

A. Parent and Child

B. Manufacturers' Liability

C. Municipal Tort Liability

III. INTENTIONAL Torts

A. Malicious Prosecution

B. Libel and Slander

C. Assault and False Imprisonment

D. Privacy

E. Fraud
I. NEGLIGENCE

A. Degree of Care—General

Not infrequently motions for dismissal were voiced in the circuit courts of Florida during the past two years. Many were granted upon the ground that the pleader failed to allege a sufficiently high degree of negligence for liability to attach. These cases arose in various ways, but it is interesting to note, that a majority of the appeals turned on the question of whether the plaintiff was a "business invitee" or a "mere licensee." Because of the frequency of these cases, the authors have decided to further subdivide this section.

1. Same—Business Invitee or Licensee

Although no cases of note were found during this period where the Supreme Court of Florida defined what degree of care is owed to a business invitee, it is clear that the only duty owed to a mere licensee is to refrain from gross negligence. In other words, a licensee is only entitled to a slight degree of care.

Illustrative of the cases which turn on this point is *Steinberg v. Irwin Operating Company.* The Plaintiff entered a hotel for the purpose of visiting a registered guest. After calling at the hotel desk and discovering that the guest was not there, the plaintiff ventured to the hotel T.V. room and from there to the movie room. The floor between the movie room, which was dark except for the illumination coming from the projector, was recessed four inches from the floor in the T.V. room. Not noticing the recess, plaintiff fell and was injured. The trial court granted a summary judgment for the defendant. On appeal, the court affirmed the ruling on the ground that plaintiff was a "mere licensee." The court said:

We are of the view that one entering a hotel to communicate with a registered guest is entitled to receive and enjoy the same degree of care applicable to business invitees. However, the invitation to enter the hotel to visit a guest extends only to appropriate usage of the means of ingress and egress, such as, the lobby, elevator, hallways and room area rented to the guest. When the plaintiff ventured off on her own to sightsee, her status as an implied invitee ended. Thus, the plaintiff was precluded from recovery since no gross negligence was proved.

Another case, *Eisen v. Sportogs, Incorporated,* involved another typical situation, that is: a visit to a store. In the particular fact situation the store was operated as a "one man corporation" by the plaintiff's son, and

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5. 90 So.2d 460 (Fla. 1956).
6. Id. at 461.
7. 87 So.2d 44 (Fla. 1956).
the primary purpose of the plaintiff's visit was to voluntarily deliver a package to the plaintiff's husband, who was an employee on duty at defendant-son's store. After delivering the package, which was needed in her husband's work, the plaintiff ventured off to the store's lobby to visit a restroom, tripped on a loose rug on the stairway and was injured. The supreme court held that it was doubtful that the plaintiff had been an invitee at all, and that even if she had been, once she ventured off to the restroom she was a "mere licensee." Recovery was denied on a claim of ordinary negligence.

A third, though less typical type of case involving the invitee-licensee question, was *Boca Raton v. Mattef.* The plaintiff-widow sought to recover for the wrongful death of her husband who fell from a water tower which he had offered to paint for the city. The city council had accepted the offer upon condition that the decedent communicate with the city attorney and execute a contract "to protect the Town's interest" before proceeding with the work. In disregard of this condition, the decedent proceeded to the tower, and with the help of the superintendent of the town's water plant, hoisted his equipment and commenced working. The supreme court affirmed the entry of judgment on the verdict which found that the decedent was a "mere licensee." The rationale used a process of elimination. First the court determined that the decedent was not a business invitee since he failed to meet the condition precedent and since the water plant superintendent did not have charge of the tower nor authority to invite. But the court reasoned, even though the superintendent could not authorize entrance to the tower as an invitee, the decedent was not a trespasser since an agent of the city knew of his presence and did not stop the entrance. Hence, the decedent as "one whose presence on the property of another is tolerated or permitted but not invited," was a "mere licensee."

As was pointed out in the opening remarks to this section, there were no cases found during this period which defined the degree of care owed to a business invitee. In view of the traditional relationships of innkeeper-guest and carrier-passenger, it would be dangerous to establish one fixed degree of care which would attach whenever the label "business invitee" is applied. Apparently, this is not the case under existing Florida law as was said in a previous decision:

8. 91 So.2d 644 (Fla. 1956).
9. Id. at 648.
10. Southern Express Co. v. Williamson, 66 Fla. 286, 63 So. 433 (1913).

Where a person . . . invites a member of the public into his . . . place of business, he . . . owes such a person a duty with respect to his safety which may vary with the circumstances of each case . . . In any event there is a duty to have the place of business in a
reasonably safe condition. And the care required depends upon the circumstances of each case.\textsuperscript{11}

The case of Edwards v. Jacksonville Coach Company\textsuperscript{12} concerned the degree of care owed to a passenger by a common carrier, and although the language of the decision does not make reference to an "invitee," it would seem clear that the plaintiff-passenger was a business invitee. There the plaintiff, a 67 year old 210 pound passenger with one arm in a cast, was injured while debarking from a bus standing 18 to 24 inches from the curb when her dress was caught in a prematurely closed rear door. The plaintiff attempted to debark from the front door, which was open and clear, but was ordered to exit from the rear door which was so arranged as to require the use of the passenger's hands in holding the door open. In affirming recovery for the plaintiff, the supreme court said that due to the high degree of care traditionally owed in a carrier passenger relationship, the driver was required to take notice of the plaintiff's infirmities.\textsuperscript{13}

2. \textsc{Same — Discovered Trespasser}

An interesting case, Byers v. Gunn,\textsuperscript{14} which was noted in the University of Florida Law Review,\textsuperscript{15} arose out of a teen-age frolic. After being refused a ride by the defendant's teen-aged daughter, the plaintiff and three other boys seated themselves on the front fenders of defendant's car. Notwithstanding the position of the plaintiff, the daughter accelerated the car to a speed in excess of fifteen miles per hour and then applied the brakes in a manner so sudden as to throw the plaintiff to the ground and injure him. Defendant pleaded that the plaintiff was a mere trespasser and appealed an adverse ruling. The supreme court held that notwithstanding the plaintiff's status as a trespasser, a reasonable and ordinary degree of care was owed to him since his presence was discovered by and known to the driver. It would seem that Florida has adopted a general rule that ordinary care is owed to discovered trespassers. It is interesting to note that other jurisdictions which base the degree of care on the relationships of trespasser, licensee, invitee, etc. . . . have achieved the same result as in the instant case by holding that failure to exercise ordinary care upon discovery of peril imminent to a trespasser constitutes gross negligence in itself.\textsuperscript{16} Of course, the difference is semantic but the rationale is more consistent with the language customarily employed.

\textsuperscript{11} See also, Rubey v. William Morris Inc., 66 So.2d 218 (Fla. 1953); Goldin v. Lipkind, 49 So.2d 539 (1950); and Haile v. Mason Hotel and Invest. Co., 71 Fla. 469, 71 So. 540 (1916) which establish that an ordinary degree of care is owed to "hotel-business invitees."
\textsuperscript{12} 88 So.2d 543 (Fla. 1956).
\textsuperscript{13} See also, Loftin v. Florida Cities Bus Co., 159 Fla. 514, 32 So.2d 166 (1947); Tampa Electric Co. v. Fleischaker, 152 Fla. 701, 12 So.2d 901 (1943); and Florida R.R. v. Dorsey, 59 Fla. 260, 52 So. 963 (1910).
\textsuperscript{14} 81 So.2d 723 (Fla. 1955).
\textsuperscript{15} Case Comment, 9 U. FLA. L. REV. 106 (1956).
\textsuperscript{16} Id. at 107.
B. Proximate Cause

The authors selected two cases dealing with proximate cause decided by the Florida Supreme Court during the survey period. In *Johnson v. Pike*, an action against the defendant, a supermarket, was brought for injury sustained by an infant. The defendants operated a parking lot in conjunction with their business and located on this lot was a merry-go-round which apparently was there to entertain the customer's children. The plaintiff, a six year old, was driven to the store by his adult brother-in-law. The brother-in-law stopped the car in the lot apparently with the intent of letting the plaintiff out to go to the merry-go-round. When the child alighted he ran around the back of the car and was struck by a slow moving automobile. The complaint alleged that the parking lot was not supervised, and that it should have been since the location of the merry-go-round attracted children; it was free; and the defendants should have known that because of these facts, children of immature age would be subjected to certain dangers; i.e., cars. The lower court gave judgment for the plaintiff and the supreme court reversed. The general rule is that owners of parking lots must keep their premises in a reasonably safe condition for the intended use. It is also a matter of common knowledge that customers of supermarkets are often accompanied by their children and that the use of such a parking facility must contemplate the presence of children. However, the court further stated that it has heretofore held that there is nothing inherently dangerous about a parking lot. In the instant case, the plaintiff's contended that the defendant's failure to supervise the parking lot and the movement of the cars was the proximate cause of the plaintiff's injuries. The court reasoned that the cause was the plaintiff's impulsive dartings in front of a slow moving vehicle. The plaintiffs have the burden of showing the breach of some duty owed by the defendants to the plaintiff before the breach of this duty could be termed the proximate cause of the injury.

The other case involving proximate cause was that of *Brightwell v. Beem*. The evidence was as follows: the plaintiff, a fifteen year old girl, dived off a dock at a private amusement part and struck the bottom so as to sever her spinal cord and became permanently crippled. The witnesses stated that in diving, the plaintiff's foot slipped or became twisted in such a fashion so that her body entered the water in a distorted position. The water was two feet below the dock and three and one-half feet in depth. The defendant contended that this was the proximate cause of the plaintiff's injury and also that the dock was not intended for diving and that a "no diving" sign was posted. (No evidence appeared in the record to show that such a sign existed.) It also appeared that on the day that plaintiff's

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17. 87 So.2d 410 (Fla. 1956).
18. 90 So.2d 320 (Fla. 1956).
injury occurred, the dock was being heavily used for diving by other paying customers and this appeared to be known by the defendant. The trial court directed a verdict for the defendant and on appeal the supreme court reversed, holding that the question of proximate cause and contributory negligence should have gone to the jury.

C. Res Ipsa Loquitur

In the case of *Burkett v. Panama City Coca-Cola Bottling Company*, the doctrine of *res ipsa loquitur* was held to be inapplicable. In this case the plaintiff had purchased a crate of Coca-Cola from a retail store. The crate was placed in the plaintiff's automobile and driven approximately two miles over a dirt road to the point of destination. As the plaintiff was taking the bottles from the car, one exploded in his hand. The trial court granted the defendant's motion for summary judgment which was affirmed by the supreme court. The court held that in cases involving the doctrine of *res ipsa loquitur*, the plaintiff must make an affirmative showing that after the bottle left the control of the bottling company it was not subjected to outside forces, and no reasonable inference could be drawn, showing the outside forces to be the cause of the explosion. In the instant case, it appeared from the evidence, that several of the bottles had fallen to the floor during the journey, thus exposing them to “extraneous harmful influences,” hence prohibiting a claim based upon *res ipsa loquitur* against the manufacturer.

D. Physicians and Surgeons — Malpractice

In this field, the authors have selected three cases decided by the Florida Supreme Court during the survey period. The first case is that of *Baldor v. Rogers*.

Here the doctor had been treating the plaintiff for lip cancer by “shots.” As the treatment continued the cancer spread and became somewhat worse. Finally, the doctor discharged the plaintiff without making further medical arrangements. The jury returned a verdict for the plaintiff on the ground that the doctor should have known the treatment was of no avail and he breached his duty to the plaintiff by failing to tell him of the situation and that the only hope of recovery lay in other types of treatment. The supreme court reversed upon the grounds that the treatment used by the doctor was sanctioned by the American Medical Association as were other treatments and to approve the verdict would be close to determining as a matter of law that some treatment, other than the one used, was the right one. Justice Terrell and Drew dissented, reasoning that there was sufficient evidence to go to the jury, for them to determine if the treatment should have been ceased and also if the doctor had breached a duty in abandoning the plaintiff without first making other medical arrangements.

19. 93 So.2d 580 (Fla. 1957).
20. 81 So.2d 658 (Fla. 1955).
arrangements. Subsequently on rehearing, the lower court verdict was affirmed, adopting the reason of the dissenting opinion of Justices Terrell and Drew.

The second interesting case was that of *Hine v. Fox*.21 A doctor, while removing moles from the face of the plaintiff with an electric cautery instrument, burned the neck and upper part of her body as a result of the dislocation of the blade from the instrument. The trial court entered judgment for the defendant and the supreme court affirmed. The complaint of the plaintiff alleged that the electric cautery was a dangerous instrument and that the doctor had known or should have known that it was mechanically defective and that it was under the exclusive control and management of the doctor and his servants. The defendant's answer denied liability, alleging that the instrument was factory assembled; the blade was an integral part thereof and not replaceable; that any defect was not detectable by the defendant and if there was any liability, it would rest upon the manufacturer of the instrument. Part of the defendant's testimony was that at the time the blade became dislocated, it dropped onto a towel placed around the neck of the plaintiff and that in their joint effort to remove it, the burns occurred. Hence, the court had to determine whether the doctrine of *res ipsa loquitur* was applicable, to make a prima facie case of negligence against the doctor. The court stated that in charges of malpractice against a professional man, negligence is not presumed, but must be proved. The court had previously held the doctrine of *res ipsa loquitur* not applicable in malpractice cases against surgeons where negligence was charged in the diagnosis or treatment of the patient.22 The reason negligence will never be presumed in such cases is not the money alone, but because of the character and reputation of the person involved. The court further stated that aside from diagnosis and treatment, the majority rule in regard to instruments, is that the doctrine of *res ipsa loquitur* is not applicable to the breaking of instruments used by the doctor during operations.28

The case of *Stauf v. Holden*24 appeared to be an exceptionally interesting one to the authors. In this case the charge to the jury was as follows: "In a case against a physician for malpractice, the professional character and reputation of the physician is the more important matter at stake, and hence he should not be condemned by evidence that does not point to his negligence."25 Upon this charge the jury returned a verdict for the plaintiff and the supreme court reversed, holding the charge was misleading and reversible error.

Query: Does not this case appear to be out of line with the aforementioned *Hine* case? There the court stated that negligence should not...

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21. 89 So.2d 13 (Fla. 1956).
22. Id. at 15; see also, *Foster v. Thornton*, 125 Fla. 699, 170 So. 459 (1936).
23. Id. at 16.
24. 94 So.2d 361 (Fla. 1957).
25. Id. at 362.
be presumed against a physician as his character and reputation were more important than the money which might be recovered. The authors cannot see why the above charge was misleading, if the decision in the Hine case is the correct law in Florida. If it is, then should not the jury be made aware of it through the judge’s instructions?

E. Last Clear Chance

In the case of Wodford v. Atlantic Company, an action was brought for wrongful death. The plaintiff’s decedent had parked his automobile along side the highway. The decedent was standing safely beside his automobile as a truck was approaching and at the time the truck was about even with the decedent, he opened the door of his automobile. The truck struck the door, causing the death of the decedent. The plaintiff contended that the doctrine of last clear chance was applicable and that it was error for the lower court to refuse to charge the jury on the application of the doctrine. The judgment was for the defendant, and the supreme court reversed, holding that the judge should have charged the jury on last clear chance, in that it was certain that if the defendant had veered from his course, the accident would have been avoided. Associate Justice Dickinson dissented, in that it appeared to him that the part of the truck which struck the door of the decedent’s automobile, was behind the cab. Hence, the doctrine would not be applicable as the driver could not have possibly avoided the accident, since if the truck was that far past the automobile of the decedent, the driver of the truck could safely assume that the person would not do anything to cause himself injury. To hold otherwise would make a motorist an insurer of every pedestrian on or off the road.

F. Release of Liability

The case of Russell v. Martin, was selected to be noted by the authors, not such much because there was a question of negligence involved, but because of the agreement which devolved around the tort itself. The plaintiff brought an action against the railroad for the death of his minor son; the accident occurring on a private crossing. The railroad denied negligence and also averred that there was an agreement entered into between the plaintiff and the defendant, that in return for Russell’s use of the private crossing he had agreed to indemnify and save harmless the railroad, and further that he, the plaintiff, would use the crossing at his own risk. The trial court entered judgment for the defendant and the supreme court affirmed, holding that the plaintiff’s contention, that the agreement was against public policy, was of no merit. In its opinion the court stated, “ordinarily a common carrier’s contract to save itself harmless from its negligence when acting as a common carrier is ineffective, but it is not so when acting

26. 86 So.2d 440 (Fla. 1956).
27. 88 So.2d 315 (Fla. 1956).
in its private capacity.”28 Such agreements in other jurisdictions have been held not to contravene public policy and as Justice Terrell so adroitly put it, “Public policy is a fickle concept.”29

Query: although other jurisdictions have held such agreements not to contravene public policy, may one person sign away the rights of others? To pose the question in a different way, would the outcome have been different if the minor had only been injured and brought an action for damages?

G. Damages

In Braddock v. Seaboard Airline Railroad,30 the court was presented, inter alia, with the question of reduction of damages. The exact question had not heretofore been decided by the supreme court. The father brought an action for the loss of his son’s leg. The jury returned a verdict for the son of $248,439.00 and $6,500.00 for the father. After the verdict the trial court ruled there must be a remittitur of $123,431.05 of the judgment for the son, or if no remittitur, then a new trial. The remittitur was based upon the son’s future earnings. The supreme court reversed. The question was — is the present worth rule, admittedly applicable to future pecuniary loss, also applicable to future pain and inconvenience? The weight of authority is against reduction of damages for future pain and suffering. Although the question had not previously been decided, the court stated:

Thus, although the question before us was not expressly ruled upon, the suggestion is strong that the problem of mathematical reduction to present value does not attend the determination of damages for future pain, suffering, and inconvenience. And we think such suggestion is consistent with our considered view of the question present here, and accords with the weight of authority in this country.31

Hence, it may be fairly presumed that the Florida law is now against reduction of damages regarding future pain and suffering.

H. Imputed Negligence

It is believed by the authors that the case of Ward v. Baskin,32 is one case that all practicing attorneys should become familiar with. Here the plaintiff instituted the action against the defendant as the next of friend of his minor child and in his individual capacity, for the injuries sustained by the minor, resulting from the alleged negligent operation of the defendant’s automobile. The jury returned a verdict for the child, and against the father. The father appealed, and the supreme court reversed. The

28. Id. at 317.
29. Ibid.
30. 80 So.2d 662 (Fla. 1955).
31. Id. at 667.
32. 94 So.2d 859 (Fla. 1957).
appellant contended that the trial judge committed error in instructing the
jury that contributory negligence of the mother would bar the father's
action in his individual capacity. The court held that the mere relationship
of husband and wife was not a sufficient basis upon which to impute to
either spouse, the negligence of the other. The appellee relied upon the
Klepper v. Breslin decision, in his contention that the judge's charge to
the jury was correct. The court, in the instant case, took this opportunity
to distinguish this case from the facts as they were in the Klepper case,
as much confusion had arisen out of that decision. In the Klepper case,
the father brought the action under the Wrongful Death Statute and it was
held that the wife's contributory negligence was a bar to the husband's
recovery. "The peculiarity consists in the provision that when suing for the
wrongful death of a minor child, the father is authorized to recover damages
not only for the loss of services but also for the mental pain and suffering
of himself and his wife. We emphasized that the damage award under the
statute was an indivisible one." In distinguishing the two cases, it should
be noted that in the Ward case, the action was not under the Wrongful
Death Statute, but rather for injury to the child. Associate Justice Parks
dissenting on the ground that the wife and husband have a joint responsi-
bility in the care and custody of the children, and while the husband is
away earning the family's living, this in itself should not release him from
this responsibility.

Although the dissent in the Ward case is of much merit, those
practicing law in Florida will do well to keep the aforementioned distinction
in mind.

I. Nuisance

In Lawrence v. Eastern Air Lines the plaintiff brought an action
against the defendant airline for damages, claiming that the airline in
substantially raising the elevation of its land without providing adequate
drainage, had changed the natural flow of surface waters so that they
settled on an injured plaintiff's property. Defendant contended, among other
allegations, that the plaintiff had acquired his property after the elevation
and paving of the airline's property. The supreme court held that the fact
of "coming to a nuisance" is no defense.

Although this view is in accord with the majority of jurisdictions, it
was wisely criticized by the University of Florida Law Review, where the
author felt more thorough treatment should have been given to this case of
first impression in view of industrial expansion. It was suggested that "the
test of reasonableness, considering priority of occupation along with all

33. 83 So.2d 587 (Fla. 1955); See, Case Comment, 9 U. Fla. L. Rev. 230
(1956).
34. See note 32 supra at 860.
35. 81 So.2d 632 (Fla. 1955).
other factors, offers a more satisfactory approach to a solution of the conflicting interests in expanding communities."\textsuperscript{37}

J. STATUTORY PROBLEMS

(1) Wrongful Death Statutes.—The cases discussed in this section of the survey deal primarily with problems presented by issues concerning the operation or interpretation of the Wrongful Death Statutes. Other cases where action was brought to recover for a wrongful death, but in which the issues were of a more general interest, are classified under other sections.

The common law did not provide a remedy for wrongful death,\textsuperscript{38} yet the statutory history of the actions in Florida dates back to 1883.\textsuperscript{39} In view of this long history, it was surprising to find several important cases of first impression decided by the Florida Supreme Court during this survey period.

Wrongful death actions in this state are covered by the first three sections of Chapter 768 of the Florida Statutes. The wording of these sections, viewed against the chronology of their adoption, indicates that they compose not one but two separate and distinct wrongful death statutes, each creating a wholly different remedial right. Sections 768.01 and 768.02 in concert are treated by the courts as allowing an action for the wrongful death of any person in favor of a surviving spouse, their minor children, other dependents or the decedent's estate in the alternative and in that order. This is not an action for pain and suffering or other losses of the decedent but rather for loss occasioned by the untimely death of the decedent which inheres to the particular member of one of the enumerated classes of beneficiaries who is bringing the action. In the words of the Florida Supreme Court, it is "an entirely new cause of action, in an entirely new right, for the recovery of damages suffered by them [the beneficiaries], not the decedent, as a consequence of the wrongful invasion of their legal right by the tortfeasor."\textsuperscript{40}

The second wrongful death statute in Florida is covered by section 768.03 which allows an action to be brought by a father, or in the alternative a mother, for the wrongful death of his minor children. The elements of damages which may be recovered under this section are for (1) the loss of services of the minor child and (2) the mental pain and suffering of the parent (or both parents).

For purposes of clarification, the first wrongful death statute composed of sections 768.01 and 768.02 will be referred to throughout this survey as the "Adult Statute," although conceivably an action could be maintained

\textsuperscript{37} Id. at 230.
\textsuperscript{39} See, Brailsford v. Campbell, 89 So.2d 241,242 (Fla. 1956).
\textsuperscript{40} Ake v. Bimbaum, 156 Fla. 735, 25 So.2d 213 (1946).
under these sections by the estate of a deceased minor orphan, and the second wrongful death statute composed of section 768.03 will be referred to as the "Minor Statute."

With this background we now turn to an examination of the recent cases. The first case of note, Shiver v. Sessions, falls under the "Adult Statute." Mr. Sessions shot his wife and then took his own life. His step-children thereafter brought an action against his estate for the wrongful death of their mother. Defendant's counsel contended that in order for a plaintiff to succeed under this statute it is necessary that the alleged wrongful act or conduct be "such as would, if death had not ensued, have entitled the party injured thereby to maintain an action . . . and to recover damages in respect thereof." Counsel then argued that if Mrs. Sessions had survived, she could not have sued her husband in tort because of the established rule that neither a husband nor a wife can maintain an action against the other for torts committed upon them. Accepting these two propositions, the trial judge dismissed the children's complaint. On appeal, the supreme court reversed holding that since the children were suing as beneficiaries under the statute on a new cause of action for a violation of their right and that since the wife's disability to sue is personal to her and does not inhere to the tort itself, it should not inhere to her children in their action. The court further concurred in the reasoning of several other states which held that since the immunity of coverture is retained in modern times to preserve marital harmony, and the need for marital harmony ceases with the death of a spouse, the immunity should not inhere to a third person; and the fact that a wrongful death action is independent and arises only upon death is ample justification itself for not barring suit because of personal relationships between the decedent and the tort-feasor.

In a companion case, Sullivan v. Sessions, where the action was brought on the same facts by the estate of Mrs. Sessions, recovery was denied on the theory that although Mrs. Sessions' disability was personal to her and does not inhere to the tort itself, the administratrix of her estate was her personal representative who "stands in her shoes."

Broadly stated the issue in the Sessions cases was: may an action be maintained for wrongful death under this statute that could not have been brought had the decedent lived? The answer would seem to be that such action can be maintained so long as it is not brought by the decedent's estate. Does this holding conflict with the wording of section 768.01 which requires that the wrongful act or misconduct be "such as would,

41. 80 So.2d 905 (Fla. 1955); Case Comment, 9 U. Fla. L. Rev. 110 (1956).
42. Fla. Stat. § 768.01 (1957).
43. Corren v. Corren, 47 So.2d 774 (Fla. 1950).
45. 80 So.2d 706 (Fla. 1955).
if death had not ensued, have entitled the party injured thereby to maintain an action . . .”?

It is submitted that it does not. A reasonable interpretation of the statute, in view of social policy to provide for the dependents of persons who meet their death at the hands of a tort-feasor, is that the nature of the wrongful act or conduct must be tortious when measured by the traditional rules that make up the body of our substantive tort law. The limitation of the statutory provision is not on the right to sue, but goes to the cause itself. It is the alleged misconduct of the defendant, apart from any disabilities or immunities of the parties to sue or be sued, which must constitute a traditional substantive tort.

It is often said by our courts that the Wrongful Death Statutes create a new cause of action. What is a cause of action? One definition might be that it is a course of misconduct directed toward a person or property for which the law provides a remedy. It is the misconduct alone which constitutes the cause of the action. It is the allowance of a remedy which constitutes the action. These matters are separate and distinct. Both the misconduct and the right to redress constitute what is commonly referred to in our jurisprudence as a “cause of action.” In this sense it is clear that our Wrongful Death Statutes do not create a new cause of action, for they do not prescribe any new course of conduct or misconduct or cause for an action—the courts must look to our substantive tort principles to determine what constitutes misconduct under the statute. The statutes do, however, prescribe a new remedy and enumerate certain new elements of damages. In the Sessions cases the misconduct was the willful shooting of a human being. Such behavior has always been considered misconduct in our society whether the injury results in death or not. These statutes provide a new remedy based on a violation of “the right which the family of the deceased had to the companionship, services or support of the decedent, coupled with the expectancy of a participation in the

46. See note 40 supra.

47. There are several traditional definitions of what constitutes a cause of action which may be found in Clark, Code Pleadings § 19, (2d Ed. 1947) none of which are wholly identical which the view setforth by the authors of this survey. It is believed that any action must be based on the violation of a substantive duty, but this alone will not permit the recovering of damages—a right to sue is sometimes wanting. It is a simple matter in drafting legislation or writing decisions or in defining legal concepts to make reference to such illusive terms as rights, duties, privileges, immunities, substantive, primary etc. . . . Apart from a fact pattern or a course of conduct, however these are meaningless abstract terms which tend more to cause confusion than to aid in solving problems. It is only after a person acts or behaves that one injured thereby goes to court and alleges misconduct. The court, judge and jury, must then examine the fact of such behavior and determine if it constitutes legal misconduct. In making this determination they must look beyond a statute allowing recovery for wrongful death—unless it spells out what it is that makes the death wrongful instead of merely naming parties who can recover after the issue of wrongfulness is decided. It is in this sense—when examining statutory actions and/or statutes altering causes—that the authors feel it is important for the court to clearly distinguish between the elements of a “cause of action” and not in the pleadings sense, where the issue centers on the sufficiency of the complaint or declaration. Both contexts are important but the problem in these cases is not one of procedural law.
TORTS

It would then seem that the present status of Florida law in regard to these statutes is: (1) that in determining whether or not there is a cause for an action, the courts will look to the substantive tort law as it exists at common law, or as modified by the legislature, and (2) in determining whether the particular plaintiff before them has a remedy, and what his elements of damages may be, the courts will look to the Wrongful Death Statute. In short, in looking for a tort they will look to the act and not the actors—in looking for a remedy they will look to the remedial statutes. In the opinion of the authors such practice would be sound and in conformity with the views of our society.

Keeping in mind that in general usage a "cause of action" consists of (1) a course of misconduct and (2) a remedy for injuries received therefrom, we turn to an examination of a subsequent Florida case, Brailsford v. Campbell which falls under the "Minor Statute." In that case an eighteen year old minor was killed while riding as a guest in the defendant's automobile. An action was brought by the decedent's mother in two counts alleging simple negligence in the first and gross negligence in the second. The trial judge, upon defendant's motion, dismissed the first count on the ground that the Florida Guest Statute, which requires that gross negligence be proven to find liability against a host-driver of an automobile, was applicable and barred recovery on the claim of simple negligence. On appeal, this ruling was affirmed in a three to two decision. In the majority opinion, Mr. Justice Terrell stated: "we do not construe the Guest Statute as applying to actions only by the injured guest or to 'derivative' actions. . . . The Guest Statute in express terms applies to "a cause of action for damages . . . for injury, death or loss . . . ." This statement that the Guest Statute applies to a cause of action is in conformity with the practice of looking to the act and not the actors, or parties before the court, in determining the existence of a tort. It is said that there are three types of guest statues. The first type limits the guest's right of recovery, the second limits the liability of the owner or operator and the third precludes the guest or his survivor from bringing an action in the absence of gross negligence. It is submitted, however, that despite the wording of the particular statutes the policy underlying them all is to afford the benefit of limited liability to owners or operators of automobiles who gratuitously transport passengers. In other words, the legislature has imposed a limitation on the substantive tort itself by modifying what would constitute legal misconduct toward a guest in an automobile. The limitation, though it may

49. 89 So.2d 241 (Fla. 1956).
51. Id. at 242.
be expressed as a immunity to suit or a limitation on the right to sue, goes
to the cause itself and does not merely alter the remedy.

The dissenting opinion in the Brailsford case found conflict in subject-
ning the right of action for the death of a minor to the proof of gross
negligence under the Guest Statute. If, however, in looking for the tort
under the Wrongful Death Statute, it is seen that the alleged wrongful
act was a course of conduct which does not constitute tortious misconduct
under the common law as modified by the legislature the seeming conflict
disappears. These decisions give a remedial effect to the Wrongful Death
Statutes and a substantive effect to the Guest Statute—the former creating
a right of action, the latter limiting a cause of action.

The final case of note in a wrongful death action, Parker v. Jackson-
ville53 was brought by a widow under the “Adult Statute.” The defendant
city raised a twelve month statute of limitations54 which provided that “No
action shall be brought against any city . . . for any negligent or wrongful
injury or damage to person or property unless brought within 12
months . . . ” as a defense. The widow appealed a ruling that this
limitation barred her action and contended that such actions remain subject
to the two year limitation on “An action arising upon account of an act
causing a wrongful death.”55 The supreme court reversed the ruling and
held that the twelve month limitation afforded to cities was not applicable
to actions for wrongful death. The court said, “We do not interpret [this
limitation] as applying to all actions for damages, of whatever kind, against
the city; it applies to ‘negligent or wrongful’—that is, tortious—conduct
which injures a person or damages his property.”56 This holding was not
without precedent. In Marsh v. Miami57 in 1935 the supreme court held
that a charter provision limiting actions arising out of tort did not bar
actions for wrongful death. There the court said, “A tort action and an
action for wrongful death are not synonymous, nor are they interchange-
able.”

Thus it would seem that an action for wrongful death is not a tort in
Florida; it is undoubtedly not a contract nor a crime either. Perhaps it is
considered a statutory action and nothing more—a misfit in the traditional
scheme of classification. But what it is called is not important so long as
the court does not lose sight of the fact that it is a wrongful death and
that the character of its wrongfulness must be measured by substantive tort
principles.

Perhaps there is some practical policy consideration in withholding
immunity from suit from a city for an additional year when the right of

53. 82 So.2d 131 (Fla. 1955).
56. See, Cristiani v. Saratoga, 65 So.2d 878 (Fla. 1953).
57. 119 Fla. 123,124, 160 So. 893,894 (1935).
action rests with a widow, after the city's wrongful conduct has culminated in a death, than when the right rests with the injured party themselves. And perhaps the choice of the wording "wrongful injury to person or property" as used by the legislature was intended to mean physical injury to a physical person or physical property and not legal injury to a legal person or their legal property. Whatever the reason may be, if indeed one exists, there would be less confusion in this area of law if the courts would at least admit that an action for wrongful death is in the nature of a tort or is a tort and find other justification for allowing the longer period of limitation.

(2) Guest Statutes.—Several cases of note were decided concerning the Florida Guest Statute68 which were cases of first impression.

*Fishback v. Yale*69 presented the question of whether a person who is injured while outside of a vehicle, but who had received free transportation therein, was considered a guest and required to prove gross negligence for his injury. In *Fishback* the plaintiff was being transported to a hunting lodge in the defendant's automobile. Upon reaching the entrance to a private road leading to the lodge building, which building was the plaintiff's ultimate destination, the plaintiff stepped out of the automobile and walked in front of it to open a gate. The defendant's automobile negligently lurched forward and crushed the plaintiff's leg against a gate post. Plaintiff was denied recovery for failing to prove gross negligence. In affirming this decision the supreme court pointed out that the Florida Statute referred to a "person transported" instead of a person injured during a ride60 and construed this to limit liability not only during a ride, but during the entire undertaking of receiving free transportation. The answer to the question presented, then, would seem to be that the guest relationship continues whether or not the guest is physically positioned in or outside of the automobile and is not terminated until the entire undertaking is completed. This decision is in accord with other jurisdictions having similar statutes to Florida's.61

In *Roberts v. Braynon*69 the plaintiff had been visiting from New York and had been a social guest in the defendant's home. On the day of the accident the plaintiff, the defendant and the defendant's two minor children drove toward town for the dual purpose of securing an airline reservation for the plaintiff to return home and allowing the defendant to stop at his laundry. Prior to leaving the defendant's home, it was agreed that the plaintiff would remain in the car and watch the children while the defendant was in the laundry. When the defendant raised the guest statute as a

58. FLA. STAT. § 320.59 (1957).
59. 85 So.2d 142 (Fla. 1955).
60. See, Case Comment, 9 U. FLA. L. REV. 235,236 (1956).
61. Ibid; for an interesting casenote discussing the various types of guest statutes see, Note, 11 MIAMI L.Q. 149 (1956).
62. 90 So.2d 623 (Fla. 1956).
defense to the plaintiff's claim of ordinary negligence, the plaintiff contended that the trip was a "joint venture," not a guest-host relationship, and therefore the statute should not apply. The alleged consideration was watching the children in return for transportation. A dismissal of the complaint without prejudice was affirmed on appeal. The court held that the social relationship of house guest carried throughout the occurrence and that the mutual favors were of a hospitable character rather than as a legal consideration.

The final case of Bolick v. Sperry was brought under the guest statute and a verdict was rendered for the guest on proving that one of the defendants had pleaded guilty to a criminal charge of reckless driving based on the same accident. On appeal, the verdict was set aside on the ground that whereas mere speeding could violate the penal act, it could not as a matter of law constitute gross negligence under the Guest Statute. It is difficult to conceive that speeding, presumably at any speed, at any time and at any place, could never be found by reasonable men to constitute gross negligence. Or does the standard that these questions are matters of fact for a jury, unless reasonable men could not disagree upon them, not apply to cases under the Florida Guest Statute?

(3) Federal Statutes—Federal Employer's Liability Act.—The authors selected two cases dealing with the Federal Employer's Liability Act during the survey period, one on the basis that it was appealed to the United States Supreme Court and the other because it dealt with the Statute of Limitations. In the first case, Seaboard Airline Railroad v. Strickland, a railroad employee brought an action against the company for injuries sustained while working beneath a railroad car. The lower court entered judgment for the employee and the Florida Supreme Court reversed. The plaintiff contended that the defendant had not provided him with a safe place to work. The court held that the Federal Employer's Liability Act does not make the railroad company an insurer, as the basis of liability is proof of negligence. In the instant case, the court found an absence of probative facts to support the judgment. Since there was a federal question involved, it was taken on certiorari to the United States Supreme Court, which reversed by merely citing the case of Bailey v. Central Vermont Railroad which held that the employee has federally created rights and the proof of negligence is to be a question for the jury.

63. See also: Yokons v. Rodriguez, 41 So.2d 446 (Fla. 1949); McDougal v. Covey, 150 Fla. 748, 9 So.2d 187 (1942); But see Perry v. Mershon, 149 Fla. 351, 5 So.2d 694 (1942) where watching defendant's children in the car was held to be consideration since the plaintiff was a regular nurse and governess for the children.
64. 88 So.2d 495 (Fla. 1956).
65. For an interesting case involving the Guest Statute see, Bailsford v. Campbell in the Wrongful Death Statute section of this survey, page 483.
66. 80 So.2d 914 (Fla. 1955).
The other case is that of *Seaboard Air Line Railroad v. Ford* which dealt with the question as to when the statute of limitations will commence to run. The decision of the court was that where an employee contracts an occupational disease, the statute of limitations under the Federal Employer's Liability Act, does not begin to run until the employee "knows or should have known that the disease was occupational in origin, even though diagnosis of the exact cause has not yet been made."  

**Same—Jones Act.**—Although the case about to be discussed is not a Florida case and was decided subsequent to the survey period, the authors feel that it is of such importance, that it should be included. In *Kernan v. American Dredging Company* suit was brought by the administrator of the estate of a seaman who lost his life on board a tug, while towing a scow. The tug caught fire when an open flame kerosene lamp on the deck of the scow ignited inflammable vapors lying above an extensive accumulation of petroleum products spread over the surface of the river. The trial court, *inter alia*, found the defendant had violated a navigation rule promulgated by the Commandant of the United States Coast Guard. The trial court also found that the vapor would not have been ignited if the lamp had been carried at the required height. Hence, the question presented was whether the violation of the statute, which dealt with navigation, imposed liability upon the defendant for the seaman's death. The trial court found that it did not and this was confirmed by the court of appeals. On certiorari, the Supreme Court reversed and remanded. The Court first cited cases involving claims under the Federal Employer's Liability Act, which have all held that a violation of the Safety Appliances Act or the Boiler Inspection Acts creates liability irrespective of negligence. Hence, the court was faced with the problem of whether, in the absence of any showing of negligence, the Jones Act, which in terms incorporates the provisions of the Federal Employer's Liability Act, permits recovery for the death of a seaman resulting from a violation of a statutory duty. Both the Federal Employer's Liability Act and the Jones Act impose upon the employer the duty of paying damages when an injury to the worker is caused in whole or in part, by the employer's fault. The lower courts applied the general tort doctrine which limits recovery only where the injury is one which the statute was designed to prevent. However, the decision stated that the Court had repeatedly refused to apply such a limiting doctrine on cases arising out of the Federal Employer's Liability Act. The majority also pointed

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68. 92 So.2d 160 (Fla. 1955).  
69. 45 U.S.C. § 51 et seq.  
70. See note 68 supra at 165.  
72. 33 CFR § 80.16 (h). "The white light shall be carried not less than 8 feet above the surface of the water..." The Commandant is empowered by 30 Stat. 102 (1897), as amended, 33 U.S.C. § 157 (1952), to establish rules "as to the lights to be carried... as he... (may deem necessary for safety)..." This section was established, *inter alia*, for the prevention of collisions.
out that although most of the cases cited which delimited the general tort doctrine involved violations of the Safety Appliance Act or the Boiler Inspection Acts; there was no particular relationship between them and the Federal Employer's Liability Act, and that it was not the nature of the acts violated which is the controlling consideration, but rather the basis of liability is the Federal Employer's Liability Act itself. The majority reasoned that the deceased seaman in the instant case, was in a position anologous to that of railroad workers, and the principles governing cases concerning them should apply here. There was a very strong dissenting opinion by Justices Harlan, Frankfurter, Burton and Whittaker. The minority believed that in the passing of the Safety Appliance Act and the Boiler Inspection Acts it was the intent of Congress to provide special treatment to employees injured by violation of these acts. The dissent relied heavily upon the words, "any statute enacted for the safety of employees,"73 which referred to the two acts, and that there was no absolute liability attached to the violations of any statute (meaning any other statute). In the instant case, it nowhere appears that Congress had the intention of affording additional rights to seamen, but on the contrary, the purpose of the statute was simply to prevent collisions.

It should also be noted that Justice Frankfurter wrote a memorandum explaining why he participated in the dissenting opinion. Justice Frankfurter has refrained, for almost a decade, from participating in the substantive disposition of cases arising under the Federal Employer's Liability Act and the Jones Act. However, in this case he considered that it was his duty to participate, since it dealt with a construction of a statute of nationwide importance.

It is submitted that the majority has applied an ultra liberal construction to a violation of a statutory duty. The question of concern now is, how far is this doctrine going to be extended and in what fields may it next be applied?

(4) Release or covenant not to sue—Joint Tort-feasors. "A release or covenant not to sue as to one tort-feasor for property damage to, personal injury of, or the wrongful death of any person shall not operate to release or discharge the liability of any other tort-feasor who may be liable for the same tort or death."74

This section was added to the Florida Statutes during the last legislative session and is of considerable importance, in that it abrogates the common law in regard to releases. The common law approach as to covenants not to sue is that the plaintiff does not surrender his cause of action, but merely agrees that he will not enforce it, and becomes liable for an equivalent amount of damages if he does. This covenant does not discharge other

tort-feasors. On the other hand a release discharges all tort-feasors. A minority of jurisdictions subscribe to the view, that in the absence of a statute to the contrary, such a release does not operate as a discharge.\textsuperscript{78} Prior to the enactment of the aforementioned statute, Florida subscribed to the majority view. In the case of \textit{Martin v. Burney}\textsuperscript{76} the court held that the release of one point tort-feasor is the release of all. In the case of \textit{Miller v. Panossian},\textsuperscript{77} the court held that where the plaintiff executed an instrument styled, “Covenant not to sue,” in favor of one joint tort-feasor, this did not operate to discharge the others. In the case of \textit{Atlantic Coast Line v. Boone},\textsuperscript{78} the court made clear the distinctions between a release and a covenant not to sue. In Florida, a release discharges all tort-feasors, \textit{even though} the parties stipulated that the release of one shall not discharge the others. “The key to the whole problem is that the injured party, if he desires merely to execute a covenant not to sue, should make the covenant with and for the benefit of the particular joint tort-feasor only.”\textsuperscript{79} “A release is an outright cancellation or discharge of the entire obligation as to one or all of the alleged joint wrongdoers. A covenant not to sue recognizes that the obligation or liability continues, but the injured party agrees not to assert any rights grounded thereon against a particular covenantee.”\textsuperscript{80} However, now that Florida has enacted a statute abrogating the common law release and placing it in the same category as a covenant not to sue, it may be supposed that Florida attorneys will no longer be plagued with this problem, although the authors did not find any cases interpreting the statute.

II. EXTENSION OF LIABILITY

A. Parent and Child

There was very little activity in this field in the past two years. There was, however, one interesting case decided by the Florida Supreme Court regarding the parents’ liability for the torts committed by their offspring. In \textit{Gissin v. Goodwill},\textsuperscript{81} a case of first impression in Florida, the supreme court upheld a lower court decision which was adverse to the plaintiff. A hotel employee was injured by the child of the guests at the hotel. The complaint in essence, read as follows: that Geraldine Goodwill, eight years of age, did intentionally and maliciously slam a door on the hand of the plaintiff with such force as to cause the severance of one finger. The complaint also stated that the parents were negligent in failing to restrain the child, whom they knew to have dangerous tendencies etc., and

\begin{itemize}
  \item \textsuperscript{75} \textit{Prosser, Torts} p. 245 (2d ed. 1955).
  \item \textsuperscript{76} 34 So.2d 36 (Fla. 1948).
  \item \textsuperscript{77} 88 So.2d 749 (Fla. 1956).
  \item \textsuperscript{78} 85 So.2d 834 (Fla. 1956).
  \item \textsuperscript{79} \textit{Id.} at 843.
  \item \textsuperscript{80} \textit{Ibid.}
  \item \textsuperscript{81} 80 So.2d 701 (Fla. 1955).
\end{itemize}
also that Geraldine had committed other wanton and malicious acts upon
other guests, i.e., striking them. The court, in its opinion, cited cases from
other jurisdictions and in synthesizing these cases came to the conclusion
that all of them had one common denominator; that being the assessment
of liability only where it appeared the child had the habit of doing the
particular wrongful act complained of. In applying this criterion, the supreme
court reasoned that the instant case did not have this “common denominator”
in as much as it did not appear that Geraldine was in the habit of slamming
doors on other people. Although this appears to be the weight of authority,
the result is a rather inequitable one. While the parent, in this state, is
not liable for the torts of his minor because of the mere fact of paternity,
nevertheless, it would appear, that if it is plainly shown by the facts, that
the child was actually possessed of vicious tendencies and the parents knew
or should have known of them, then liability should attach, even though
the specific wrongful conduct was not known to be habitual.

B. Manufacturer's Liability

There was one case decided during the period of the survey that the
authors felt should be noted. That was the case of Matthews v. Lawnite
Company.82 The plaintiff sued the manufacturer of lawn chairs. The injury
occurred as follows: the plaintiff while inspecting the manufacturer's
product on display in a retail store sat in the chair to “try it out.” As the
plaintiff sat down, his hand protruded over the front of one of the arm-
rests, and the movement of a mechanical part of the chair, completely
severed one of the plaintiff's fingers. There was nothing to indicate to the
plaintiff that beneath the armrest there were moving metal parts, so
constructed that they would amputate the occupant's fingers “with the ease
that one chips a choice flower with pruning shears.” The lower court entered
judgment for the defendant and the supreme court reversed. The court stated
that it had several times departed from the old common law rule that
denied recovery to innocent third party purchasers from a retailer because
of the absence of privity. In these cases the court held the manufacturer
liable on an implied warranty, as for example, where food in sealed con-
tainers was the subject of litigation, qualifying this by stating that the
implied warranty only protects against a usual or apparent use of the subject
matter, and not against the careless use of a dangerous mechanism. The
court found that a lawn chair was not a “dangerous instrument.” However,
the moving parts of the chair were completely concealed from the plaintiff,
and as essential parts thereof, were inherently dangerous. The court also
made the observation that the modern trend today is to abandon the old
common law rule, and to allow recovery, although there is no privity of
contract. It was not too clear to the authors whether the court reversed

82. 88 So.2d 299 (Fla. 1956).
on the grounds of a breach of an implied warranty, or whether there had been a breach of duty to the expectant users of the product by the concealment of the "inherently dangerous" moving parts of the chair, so as to base the recovery upon the manufacturer's negligence.

C. Municipal Tort Liability

With the exception of the three cases which will be subsequently noted, this area of tort law was very inactive. The first case of any consequence is that of Rabin v. Lake Worth Drainage District.83 A landowner brought an action for damages against the drainage district, alleging that due to the district's spraying of a canal with certain chemicals, in order to destroy water hyacinths, that the land-owner suffered crop retardation. The lower court entered judgment for the drainage district which was affirmed by the supreme court. The decision cited cases from other jurisdictions dealing with drainage districts, those decisions holding the districts to be governmental agencies, upon which no tort liability would attach, "there being no specific statutory provision to modify the general rule of non-liability." In support of these holdings, a prior Florida case was cited, Arundel Corporation v. Griffin,84 which the court further stated, harmonizes with the decisions from other jurisdictions. The court made a further observation stating:

If the doors of the court must now be opened to appellant they should have, by the same token, been required to be opened in the many cases reaching this court where cities and towns were held not liable despite the merits of the plaintiff's claims.85

For this observation the court cited Wilford v. Jacksonville Beach86 which held:

Whatever the law may be elsewhere, it has long been established in this jurisdiction that a municipal corporation is not liable for the tortious acts of its police officers committed as incident to the exercise of a purely governmental function. (Emphasis added)

The court posed another very interesting question, that being: if the appellant had obtained a judgment, how would he go about collecting it? Since the financial support of the drainage district is obtained only through assessments made upon the various parcels of land according to the benefits derived, then any judgment obtained against the district would have to be paid upon the theory that by the commission of the tort the lands in the district were benefited. It is submitted that this is a good question. Justice Thornal concurred specially, in that he thought the drainage district should be thought of as more nearly like a municipality than a state agency. Also

83. 82 So.2d 353 (Fla. 1955).
84. 89 Fla. 128, 103 So. 422 (1925).
85. Rabin v. Lake Worth Drainage Dist. 82 So.2d 353, 355 (Fla. 1955).
86. 79 So.2d 516 (Fla. 1955).
the General Drainage District Act\textsuperscript{87} authorizes the levying of taxes only for specified purposes, and the taxing powers of the board of supervisors cannot be exercised for any other purpose.

The next case, although not directly related to tort liability, was that of \textit{Buck v. Hallendale}\textsuperscript{88} which dealt with conditions precedent in bringing a suit against the city. The charter required that notice of any tort claim against the city must be filed with the city commission with such reasonable specifications as to time, place and witnesses as would enable the city to investigate the matter. The plaintiff's attorney merely addressed a letter to the mayor stating his client would sue, which contained no further information. The supreme court was of the opinion that the plaintiff did not substantially comply with the charter requirement and affirmed the lower court's summary judgment for the defendant. It appears that although there was no substantial compliance, the city had actual knowledge of the pending suit and did in fact investigate the matter. The majority, however, reasoned that although there was actual notice, this still did not cure the defect. There were three justices dissenting, on the ground that Hallendale is a small town, and although only the mayor had been notified, this constituted notice to the commission. Also, the minority placed much importance on the fact that the city had actual notice, and did in fact conduct an investigation. It is submitted that the better reasoned view is that of the minority. It would appear that the city waived full compliance of the charter requirement, by its conduct in investigating the matter and then proceeding to trial. Since the city had actual notice of the accident and knowledge of the details, then how could the city be heard to complain that there had not been a \textit{substantial} compliance, where the only logical reason for the requirement is to give the city time to \textit{investigate} and prepare its defense?

The last but certainly not the least of the three cases is \textit{Hargrove v. Cocoa Beach},\textsuperscript{89} which could be termed the leading case in the United States in the field of municipal tort law. The case involved a widow, suing the city for the wrongful death of her husband, who died as a result of suffocation by smoke, after being locked in the town jail and left unattended by the jailer. The lower court granted the dismissal of the complaint, upon the ground that the city is immune from liability for the wrongful acts of its police officers. The supreme court reversed, citing \textit{Tallahassee v. Fortune}\textsuperscript{90} as the original Florida precedent. This case held that where one suffers a personal injury, proximately resulting from negligence of an employee of the municipality, the individual is entitled to damages for the wrongdoing. However, cases subsequent to this decision did not follow the precedent. Was it because of a misinterpretation of the decision, or did the courts

\textsuperscript{87} FLA. STAT. c. 298 (1957).
\textsuperscript{88} 85 So. 2d 825 (Fla. 1956).
\textsuperscript{89} 96 So. 2d 130 (Fla. 1957).
\textsuperscript{90} 3 Fla. 19 (1850).
just not like it and decided to ignore it? It is submitted that neither of these are the reasons, but that in fact, the case had been entirely overlooked.

It is submitted that in this respect, the Florida Supreme Court decision shows a progressive attitude toward this age old problem of municipal immunity in respect to the so called "governmental functions." It would be needless to cite authority for the proposition that the almost universal rule is that municipalities are not liable for the torts committed by its officers or agents while in the performance of governmental functions. Hence, it would appear that Florida stands alone, or at least with a very small minority of jurisdictions, in holding to the contrary.

The majority view appears to stem from the old adage, "the king can do no wrong." This doctrine of municipal tort immunity has become firmly entrenched in our jurisprudence. The case of Russell v. Devon County has been regarded as the first case establishing the fundamental principle that a political subdivision of the state is not liable for the acts committed by its officers or agents while in the performance of some governmental function. Although this doctrine has been criticized by judges as well as legal scholars, the courts have still seen fit not to overthrow it. The main difficulty lies in determining what functions are governmental and those that are proprietary. Because of this distinction, the decisions have been somewhat anomalous to say the least, and in some instances, because of the inequities encompassed in permitting the immunity, the courts have done everything in their power to circumvent the effect of the doctrine. The question which remains to be answered is whether, by the Hargrove decision, Florida has in effect abolished these distinctions in toto. It is submitted that this approach would be more in keeping with our concepts of justice as embodied in our democratic system of government.

Query: If the Hargrove case had been decided prior to the Rabin case, would the outcome of the Rabin case have been different? Assuming for the moment that it would have been, then by the reasoning of the court as to the collectibility of the judgment, how would this have been dealt with? Also, by the reasoning of Justice Thornal, how would his interpretation of the General Drainage Act be reconciled with the judgment rendered against the district?

III. INTENTIONAL TORTS

Although there was very little activity in this field of tort law, there were, however, several cases of interest which the authors felt should be noted.

91. 100 Eng. Rep. 359 (1798).
A. MALICIOUS PROSECUTION

In the cast of Goldstein v. Sabella,93 a case of first impression, the facts were as follows: in a prior suit Sabella (landlord) brought eviction proceedings against Goldstein (tenant). In that action judgment was entered for Sabella, but on appeal was reversed by the circuit court. Thereafter Goldstein brought this action against Sabella for malicious prosecution. The complaint alleged the lack of probable cause in the prior action. The complaint was dismissed, and the dismissal was affirmed by the supreme court. There are three views dealing with the effect of a judgment of conviction, on the question of probable cause for instituting a prosecution. (1) it is conclusive; (2) it is conclusive unless obtained through corrupt means; and (3) it is only prima facie evidence which may be rebutted. Probable cause had previously been defined by the court in the case of Dunnavant v. State94 as follows:

A reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense with which he is charged.

In the instant case, the fact that the judgment was subsequently reversed does not effect such determination, unless it can be shown that the judgment was obtained through fraud, perjury, or other corrupt means. Hence, the court adopted the second view, which as stated by the court, is the weight of authority in this country.

B. LIBEL AND SLANDER

In Walsh v. Miami Herald,95 the court was faced with the question, as to whether a certain newspaper article was actionable per se. The lower court dismissed the complaint, and on the appeal the supreme court reversed. The plaintiff was a Miami Beach policeman. The newspaper article stated in part that, “Miami Beach policemen can and often do, make laughingstocks of themselves when they testify in court. Oka acts, when he’s on the bench, as though he puts ‘little’ or no reliance in the testimony of Beach policemen...Such seemed his attitude September 24 when an arresting officer, John Walsh, offered testimony exactly opposite his own report on an accident.”96 After publication of this article, notice was sent to the paper to retract and the defendant refused to do so. The court took notice of the fact that due to the volume of news being printed, that it is subject to errors, and since a retraction could have been made, in the instant case, and was refused, then the state-

93. 88 So.2d 910 (Fla. 1956).
94. 46 So.2d 871, 874 (Fla. 1950).
95. 80 So.2d 669 (Fla. 1955).
96. Id. at 670. For a more complete report of the article see same page.
ment could not be considered an error. The court held it to be libelous per se if “it tends to subject one to distrust, ridicule, contempt, or disgrace, or tends to injure one in his trade or profession.”

In the case of Adams v. News-Journal Corporation, the same problem was again dealt with by the court, and in this instance the newspaper article was held not to be libelous per se. Subsequent to this suit the plaintiff’s client was about to make charges in a municipal court, after an arrest which he had evidently resisted. The plaintiff was an attorney and in this capacity applied to the circuit court for a writ of prohibition which was made absolute. The supreme court affirmed. The newspaper took issue with the plaintiff’s conduct, and in a lengthy article, parts of which are quoted herein, “THERE IS A LIMIT...” DECENT CITIZENS believe there should be a limit to the accusations which a defense attorney should be allowed to make against law abiding persons, including law enforcement officers, in any move to protect his client. Attorney Adams made grave accusations against some of our police officers in his zeal to save his client...” The question involved in the instant case, is whether to plaintiff’s standing had been injured or whether, as a result of the article he might have been held up to hatred, distrust, and so forth. “We will undertake to interpret the editor’s phraseology ‘as the common mind would understand it’.” After reviewing the article at some length, the court concluded that it only constituted a criticism, and although by the use of our “common mind” it can be seen that the plaintiff could be somewhat “irked,” it is clear from the record which would make it libelous per se. It is to be noted, however, that there were three justices dissenting. Quoting from Justice Hobson, “With the emphasis upon moral fitness and public obligation which the profession demands, it follows that to ascribe unethical conduct to a lawyer is to inpugn his fitness to practice his profession.” Justice Roberts in his dissenting opinion reasoned that the case should be reversed under the authority of the Walsh case. It is noteworthy that Justice Roberts dissented in the Walsh case, holding the article not to be libelous per se.

It is submitted by the authors that while there have been many nice rules promulgated by the courts as to what constitutes libel or slander, it is readily apparent that at best, these are broad guiding principles which are to be applied to the peculiar facts of each case, and by the exercise of the courts’ value judgment the decision is then brought about.

97. Id. at 671.
98. 84 So.2d 549 (Fla. 1955).
99. Id. at 550. For entire article see same page.
100. Loeb v. Ceronemus, 66 So.2d 241, 245 (Fla. 1953).
101. See note 93 supra at 553.
102. See note 90 supra.
C. Assault and False Imprisonment

In Holley v. Kelley, the defendant assaulted the plaintiff with a shotgun, upon defendant's land. The evidence was in conflict as to the plaintiff's purpose on the land and his refusal to leave when so requested by the defendant. Judgment was entered for the plaintiff and on appeal the supreme court held it to be reversible error for refusing to give instructions that "if a trespasser upon the land of another refuses to depart upon request, the owner is authorized to use reasonable and appropriate means to eject the trespasser from his premises." It should perhaps be explained why the authors noted such a case as this one. It is indeed, a rarity, that today, such an elementary question would be presented to the Florida Supreme Court. In the minds of the authors, this is likened to a revisitation of the doctrine of acceptance under Adams v. Lindsell.

D. Privacy

There was a very interesting case decided by the supreme court on the right of privacy, during the survey period. In the case of Jacova v. Southern Radio and Television Company the plaintiff was standing at a cigar counter in a hotel lobby when confronted by police officers during a gambling raid. The plaintiff's picture was subsequently displayed on "Renick's Reports," but was not described or referred to on the audio portion of the telecast as a gambler. The trial court granted a motion for summary judgment for the defendants, and the supreme court affirmed. The court held that the plaintiff's right of privacy was not impaired since he became an actor in a newsworthy event under impartial reporting and had no right of privacy in comparison to the public interest even though the TV film was "canned." Since the object of the film was to portray "today's news today," time did not allow for the editing of the film based on an investigation as to the plaintiff's role in the episode.

It is submitted by the authors that this case reflects a balancing of the interests, and from the facts the decision was a sensible one. Although it is not the intention of the authors to debate the pro's and con's of the balancing of such interests, it is asserted that modern man must learn to inhibit his sensitivity in this era when everyone's business appears to be the business of everyone else.

E. Fraud (false representation)

Potakar v. Hurtak presented the age old problem of false representation. The plaintiff purchased a restaurant from the defendant. The defendant had stated that the business had a weekly net profit of a certain amount.

103. 91 So.2d 862 (Fla. 1957).
104. 83 So.2d 34 (Fla. 1955).
105. 82 So.2d 502 (Fla. 1955).
The plaintiff claimed that he had relied upon this representation, which later appeared to be false. The lower court dismissed the complaint and on appeal was affirmed, the court reasoning that even if the defendant's representation was false, the plaintiff had no right to rely thereon without first making diligent inquiry.

This case was followed by another interesting case dealing with false representation. In the case of *Board of Public Instruction v. Everett W. Martin and Son, Incorporated,* the facts were as follows: the defendant (contractor) was alleged to have misrepresented to the plaintiff the amount paid for substituted building materials. It appears that the defendant substituted a different type of jalousie in the construction of a school building with the consent of the plaintiff. The defendant, however, paid less for the substituted jalousies than was reported to the plaintiffs, and the suit was brought to recover the difference. The lower court entered judgment for the defendants and on appeal the supreme court reversed. The court cited American Jurisprudence, "Fraud and Deceit," which states the rule as followed at the present time in practically all American jurisdiction is "that one to whom a positive, distinct, and definite representation has been made, is entitled to rely on such representation and need not make further inquiry concerning the particular facts involved." Cases were also cited from other jurisdictions stating the same rule. The court further stated: "We are of the opinion that in this case, it was not the duty of the Board's architects to investigate the cost of the substituted material purchased by the contractor." The court mentioned, in passing, the case of *Potakar v. Hurtak* wherein the plaintiff's attempt to rescind the contract upon the ground of misrepresentation, the court held that the plaintiff must make a diligent inquiry into the facts presented and gave judgment for the defendant.

106. 97 So.2d 21 (Fla. 1957).
108. Id. at 27.
109. See note 104 supra.