Volume 4
Issue 3 *Survey of Southwestern Law for 1949*

Article 16

1950

Torts

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TORTS

ARKANSAS GUEST STATUTES—WILFUL NEGLIGENCE OF HOST

The provisions of the Arkansas Automobile Guest Statutes[1] deny recovery to a person riding with the owner or driver of an automobile as a guest unless, under Act 61, such vehicle "was wilfully and wantonly operated in disregard of the rights of the other," or, under Act 179, "such injury shall have been caused by the willful misconduct of such owner or operator."

Whether or not gross negligence of the driver would satisfy the wording of this statute was decided in the negative in *Cooper v. Calico*.[2] The Arkansas court held as a matter of law that the host was not guilty of "wilfully or wantonly" operating the car, or of "willful misconduct" where the evidence showed that the accident occurred when his car rolled back on the highway from a "drive in" while he was attempting to shift gears and was there struck by an oncoming car. There was evidence that he had done some drinking earlier in the evening. The driver's failure to stop and look in both directions before placing his car and guests in a perilous position was, of course, held to be negligence, but the court strictly construed the wording of the Guest Statutes and said that when suit is brought thereunder, even gross negligence is not enough. "There must be a wilfullness, a wantonness, and indifferent abandonment in respect of consequences, applicable alike to self and guests,"[3] and in order to be wilfully negligent a person must know that his intentional act will naturally or probably result in injury.

The court left a loophole to take care of a situation in which there is substantial evidence that the driver was intoxicated. It said that if such had been the case, the jury could find constructive intent to do things that naturally flow from intoxication. Thus,

[1] Ark. Acts 1935, chs. 61 and 179; ARK. STAT. 1947 ANN. §§ 75-913—75-915.
[2] 214 Ark. 853, 218 S. W. 2d. 723 (1949).
[3] 218 S. W. 2d. at 727.

a negligent act caused by intoxication may be willful negligence and may satisfy the statute.

It is to be noted that the opinion treats willful negligence and willful misconduct as the same. From this it would seem that the misconduct must, at least, be such as to amount to negligence. The dissenting opinion criticized this treatment and pointed out that the statutes do not say "negligence," but refer to the conduct of the driver. The dissenter took the view that it is willful misconduct to drive shortly after drinking even the least bit of intoxicant, and without further showing the jury could find the necessary willful misconduct.

From the standpoint of reasonableness the majority view seems to be the more desirable. The dissent would allow an ardently "dry" jury to find a driver guilty of willful misconduct for driving after imbibing the least sip of wine, even though there be no showing whatsoever that it affected him the slightest physically or mentally. Whereas, the rule of the majority which requires the driver to be intoxicated, and that the acts of negligence must flow from this intoxication, is a less nebulous guide to the jurors' discretion and will cause the decision to rest on the facts of each case rather than the attitudes and opinions of the jurors in regard to intoxicants.

Res Ipsa Loquitur in Beverage Bottle Explosion Cases (Oklahoma)

In *Canada Dry Ginger Ale v. Fisher*[4] the Oklahoma Supreme Court was presented with the question whether or not to extend the doctrine of res ipsa loquitur to a case in which a beverage bottle exploded and caused injury.

Plaintiff, a drug store clerk, while cleaning up, picked up four Canada Dry bottles, one of which exploded injuring him. He sued defendant bottler for damages, relying entirely on res ipsa loquitur to establish negligence. There was no testimony as to what treatment the bottle received, or by whom it was handled

[4] ——Okla.——, 201 P. 2d. 245 (1949).

from the time it left defendant's possession until it was received by the plaintiff. There was testimony that it had been handled properly since reaching the drug store.

The court stated its adopted rule of res ipsa loquitur as being a rule of evidence only. For the rule to be applicable the injury had to be of such character as, in the light of ordinary experience, to be without explanation, except on the theory of negligence; and the thing causing the injury must have been under the control of defendant or his servants at the time.

In the course of the opinion the court recognized that the rule had been extended to beverage bottle explosion cases in other jurisdictions. But an affirmative showing was necessary that from the time the bottle left the defendant's possession all persons handling the bottle were free from fault and the condition of the bottle and its contents had not been changed up to the time of the explosion.[5]

This extension of the general rule was adopted by the Oklahoma court. But since the plaintiff in the instant case had introduced no evidence as to how the bottle was handled from the time it left the possession of defendant until it arrived at the drug store, the evidence was not sufficient to establish defendant's negligence.

The court seems to have treated this as a case of first impression, in that it says the doctrine is "sought to be extended, as has been done in some jurisdictions, and, as so extended, applied."[6] However, it appears that this same court has previously extended the doctrine and applied it to a beer bottle explosion case in *Soter v. Griesedieck Western Brewery Co.*[7] Prior to the *Soter* case, the same court's rule of decision was that the doctrine of res ipsa loquitur could not be invoked unless the instrumentality was in

[5] Payne v. Rome Coca Cola Bottling Co., 10 Ga. App. 762, 73 S. E. 1077 (1912); Benkendorfer v. Garrett, 143 S. W. 2d. 1020 (Tex. Civ. App. 1940), *writ of error dism. judgm. cor.*

[6] *Supra* note 4, at 246.

[7] 200 Okla. 302, 193 P. 2d. 575 (1948).

the exclusive control of defendant at the time of the explosion.[8] But the court in the *Soter* case created an exception to the general rule when it quoted and adopted language in *Hughs v. Miami Coca Cola Bottling Co.*[9] The language was to the effect that res ipsa loquitur will be applied to beverage bottle explosion cases and the bottler will be held liable "even though the agency causing the injury was not in his possession or control at the time of the accident," but only after "an affirmative showing on the part of the plaintiff that after the bottle left the possession of the bottler it was not subjected to any unusual atmospheric changes or changes in temperature, or that it was not handled improperly up to the time of the explosion."

True, the defendant in the *Soter* case was a manufacturer of beer, and the defendant in the instant case was a bottler of sparkling water. Nevertheless, the court in the *Soter* case stated at the outset that the liability of the defendant would be treated as being the same as that of a bottler of "soft drinks."

Therefore, if the instant case added anything to the *Soter* case, it could only be to settle once and for all that the extended doctrine applies to a carbonated beverage.

Contributory Negligence—Standard of Care for An Eleven-Year Old Girl (Texas)

An 11-year-old girl crossing a busy street on a green light was struck and injured by a bus turning left on the green light. There was evidence that she was an intelligent girl, aware of the dangers of traffic and learned in safety rules.[10]

On the issue of her contributory negligence the trial court instructed the jury to measure her conduct by that of a person of ordinary prudence under the same or similar circumstances. She objected to this instruction and requested that her conduct be measured by the standard of care which "would have been exer-

[8] Texas Co. v. Jamison, 191 Okla. 283, 129 P. 2d. 85 (1942).

[9] 155 Fla. 299, 19 So. 2d. 862, 864 (1944).

[10] Dallas Ry. & Terminal Co. v. Rogers, 147 Tex. 617, 218 S. W. 2d. 456 (1949).

cised by an ordinarily prudent person of like age, intelligence, experience and capacity under the same or similar circumstances."[11] This was denied, and judgment was for defendant because of the jury finding that plantiff was guilty of contributory negligence. On writ of error to the Texas Supreme Court, *held*, affirming the court of civil appeals, plaintiff's objections should have been sustained and the definitions requested should have been given.

It is well settled in Texas that a child of tender years is not bound to exercise the same degree of care for its own safety as an adult.[12] The defendant recognized this rule and said that the requested definition would be correct—but only if there was evidence that the child was under a handicap in intelligence or understanding. In other words, defendant said that an 11-year-old girl would ordinarily use just as much care as an adult, unless she was mentally slow.

This contention was correctly dispensed with by the court as being contrary to human experience. From this holding it seems clear that a child's duty of care can never be the same as that of an adult regardless of education and experience. The law recognizes that impulsive, reckless youth disappears only with age.

There seem to be three age groups for determining contributory negligence: the *adult*, who is required to exercise the degree of care of an ordinary prudent person under the same or similar circumstances; the *child*, who is required to exercise the degree of care of an ordinary prudent person of like age, intelligence, experience and capacity under the same or similar circumstances; and the *very young child*, who is conclusively presumed to be incapable of contributory negligence.

Texas has not set arbitrary ages at which a person passes from one group to another. Of course, when a child is of very tender years, it is the court's duty to declare it to be incapable of con-

[11] *Id.* at 621, 218 S. W. 2d. at 458.

[12] Houston & T. C. Ry. Co. v. Boozer, 70 Tex. 530, 8 S. W. 119 (1888).

tributory neglience. But in a close case, the problem can be worked out by submitting to the jury the question whether the child's age, ability to know of the dangers involved, and discretion to avoid them are equal in the aggregate to those of an ordinary adult. If the jury so finds, then the *adult* degree of care will be used. If not, it follows that the *child's* degree of care will be applied.[13]

CONTRIBUTION AND INDEMNITY AS BETWEEN JOINT TORTFEASORS (TEXAS)

In *Austin Road Co. v. Pope*[14] the court allowed contribution between joint tort feasors. The Austin Road Company, a general contracting company, was engaged in constructing a road. Pope and Jackson were sub-contractors on the project. Pope, while backing a truck, struck and injured Jackson. Jackson sued Pope, and Pope filed a cross action against Austin Road Company. Jackson recovered judgment in the trial court against both Pope and the Austin Road Company as joint tortfeasors, and Pope was allowed a full recovery on his cross action against the Austin Road Company. The court of civil appeals and the supreme court agreed that the judgment should be modified so as to allow Pope contribution as to one-half of the judgment from the Austin Road Company.

The common law rule denied contribution among joint tort feasors.[15] This rule has very generally been modified either by legislation or by judicial pronouncement.[16] TEX. REV. CIV. STAT. (Vernon, 1948) art. 2212 provides for contribution among solvent joint tort feasors who are in *pari delicto*. The case under discussion appears to fall well within the letter and spirit of the statute.

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[13] Cook v. Houston Direct Navigation Co., 76 Tex. 353, 13 S. W. 475 (1890).

[14] ———Tex.———, 216 S. W. 2d. 563 (1949).

[15] Merryweather v. Nixan, 8 T. R. 186 (1799).

[16] Standard Oil Co. v. Robins Dry Dock & Repair Co., 32 F. 2d. 182 (C.C.A. 2nd, 1929); Horrabin v. City of Des Moines, 198 Iowa 549, 199 N. W. 988 (1924); *see* Note, 30 Mich. L. Rev. 804 (1932).

In the recent case of *Humble Oil and Ref. Co. v. Martin*[17] the Supreme Court of Texas in a 5 to 3 decision held that Humble was entitled to indemnity, as distinguished from contribution, although Humble was a joint tortfeasor. The defendant, Mrs. Love, drove her car into Humble's station and left it in the driveway after asking permission to do so. The car rolled under force of gravity across the street and struck and injured plaintiff Martin. Martin brought suit against Humble and Mrs. Love and recovered a joint and several judgment. The trial court gave Mrs. Love judgment over against Humble for whatever she had to pay Martin. The court of civil appeals affirmed after reforming the judgment to eliminate the judgment over in favor of Mrs. Love. The Supreme Court affirmed but reformed the judgment so as to allow Humble judgment over against Mrs. Love for any amount it was forced to pay. The findings of the trial court were, among others, that Humble was negligent; that this negligence was a proximate cause but not the sole cause of the plaintiff's injury; that Mrs. Love was also negligent and that her negligence was a proximate cause but not the sole cause of the injury.

The prevailing opinion cites *Austin Road Co. v. Pope*[18] as authority for allowing Humble indemnity. The court distinguished the results in the two cases: in the *Pope* case the two defendants were equally at fault and had breached a duty to the plaintiff only; in the *Humble* case Mrs. Love breached a duty to the public and to the Humble Company, while the Humble Company breached its duty to the public only. Thus, the court considered that Mrs. Love was more at fault than the Humble Company and should indemnify the company.

The dissenting justices thought that the negligence of the Humble Company was equal in degree to, if not greater than, that of Mrs. Love; hence, Mrs. Love should be liable at most for contribution, since the defendants were in *pari delicto*.

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[17] ——Tex.——, 222 S. W. 2d. 995 (1949).

[18] *Supra.*

The principle embodied in the expression "*in pari delicto*," is a useful one. It enables a court to distribute the burden among joint tortfeasors who are equally at fault. It also enables a court to impose the entire burden on a joint tortfeasor where his fault is definitely greater than that of the other tortfeasor. It is doubtful, however, if the latter policy was served in the *Humble* case. The dissenting opinion is on firm ground in arguing for contribution where the fault of the defendants is substantially equal.

JOINT TORTFEASOR: SATISFACTION AGAINST ONE AS A BAR TO FURTHER ACTION (OKLAHOMA)

In *Sykes v. Wright*,[19] a recent Oklahoma case, Mrs. Sykes sued a motor carrier and its insurer for the wrongful death of her husband. Her husband was an engineer on the Santa Fe railroad. He was killed when the train and a truck of the defendant came into collision. Plaintiff brought suit against the railroad in Texas. The case was settled when it came to trial. The court entered the settlement agreement into the journal, expressly reserving to the plaintiff the right to sue the joint tortfeasor. Plaintiff then went to Oklahoma and brought suit against Wright. Wright pleaded the Texas judgment in bar to the plaintiff's right of action.

The Oklahoma court held that the judgment was a complete bar to the plaintiff's cause of action. The court reasoned that the Texas judgment was on the merits and was res judicata.

The holding in the instant case is consistent with previous Oklahoma decisions.[20] The precise point has not been decided in Texas, but the indications are that a contrary result would be reached.[21]

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[19] ——Okla.——, 205 P. 2d. 1156 (1949).

[20] Cases are cited in Eberle v. Sinclair Prairie Oil Co., 120 F. 2d. 746, 749 (C.C.A. 10th, 1941).

[21] Robertson v. Trammell, 83 S. W. 258 (Tex. Civ. App. 1904), *writ of error refused; see* Note, 28 Tex. L. Rev. 599 (1950).