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# Torts

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# TORTS*

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## I. NEGLIGENCE

### A. *Doctor-Patient*

A doctor's duty to his patient consists of diagnosis and treatment in accordance with the standards of other practitioners in the community. Medical malpractice suits are usually so complex and the "issues [so] involved . . . that the answers are not susceptible of summary adjudication but require a full exploration by a trial."[1] In *Lab v. Hall*,[2] the plaintiff alleged that her doctor was negligent in prescribing a drug to induce labor without consulting an obstetrician who might have advised a contrary course of conduct. Summary judgment was held not to be appro-

* The decisions surveyed in this article appear in volumes 200 through 226 of the Southern Reporter, Second Series.

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1. Lab v. Hall, 200 So.2d 556, 558 (Fla. 4th Dist. 1967).
2. 200 So.2d 556 (Fla. 4th Dist. 1967).

priate in view of the plaintiff's conflicting affidavit and deposition. Yet, one could expect an opposite result if a plaintiff's case rested on "common knowledge" rather than medical testimony as to whether there was negligence in not taking an X-ray.[3]

The doctrine of *res ipsa loquitur* is frequently used in cases involving malpractice. An inference of negligence arises in favor of the plaintiff if he proves that (1) the instrument causing the injury was in the sole control of the defendant, (2) in a proper course of events the injury would not have happened in the absence of negligence, and (3) the plaintiff was not contributorily negligent.[4] Thus, *res ipsa* was properly applied when it was proved that the only way the plaintiff, who had entered the defendant hospital for diagnostic tests, would have become infected was in the absence of sterility.[5]

A doctor is not an insurer of the success of his treatment. Thus, in *Lane v. Cohen*,[6] when the defendant performed a vasectomy on the plaintiff and the plaintiff's wife thereafter became pregnant, summary judgment for the defendant was granted.[7]

If a young child enters a hospital for eye surgery, and leaves with extensive injuries to her arms, a question for jury cognizance is present.[8] It could be found that the hospital was negligent in either fastening the restraining boards too tightly or in failing to prevent the child from struggling against the boards.

The functions and duties of the nurse and doctor were the base of the controversy in a recent missing sponge case.[9] When the plaintiff's gall bladder operation was completed, his abdomen contained a sponge. The nurse had been counting the sponges. If the doctor had been counting the sponges, it would have been negligence per se.[10] The issue was whether the nurse was a borrowed servant of the doctor or a continuing hospital employee. Since the court found that sponge counting was a ministerial function rather than a professional duty of the doctor, the hospital, not the doctor, was held accountable.

An interesting problem of classification confronted the Fourth District Court of Appeal in *O'Grady v. Wickman*.[11] After the two-year statute of limitations on assault and battery actions had run, the plaintiff sued two doctors, alleging lack of informed consent. The court held that the gravamen of the complaint was malpractice and thus, the longer negligence statute of limitations would apply.

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3. Halifax Hosp. Dist. v. Davis, 201 So.2d 257 (Fla. 1st Dist. 1967).
4. Anderson v. Sarasota County Public Hosp. Bd., 214 So.2d 655 (Fla. 2d Dist. 1968).
5. Southern Fla. Sanitarium & Hosp., Inc. v. Hodge, 215 So.2d 753 (Fla. 3d Dist. 1968).
6. 201 So.2d 804 (Fla. 3d Dist. 1967).
7. A cynic might suggest that a hidden issue of proximate cause is what motivated the court to decide in this manner.
8. Moore v. Halifax Hosp. Dist., 202 So.2d 568 (Fla. 1st Dist. 1967).
9. Buzon v. Mercy Hosp., Inc., 203 So.2d 11 (Fla. 3d Dist. 1967).
10. Smith v. Zeagler, 116 Fla. 628, 157 So. 328 (1934).
11. 213 So.2d 321 (Fla. 4th Dist. 1968).

### B. *Manufacturers and Suppliers*

*Royal v. Black and Decker Manufacturing Co.*,[12] is a restatement of the Florida position on products liability. A widow brought a wrongful death action alleging that her husband was electrocuted while plugging a drill, manufactured by the defendant, into an extension cord. The complaint, the court held, failed to state a claim upon which relief could be granted since there was no allegation that the drill or plug was either unreasonably dangerous or defective. A manufacturer is not yet an insurer for all injuries caused by his products. The court invoked the words of Justice Traynor:

> [S]trict liability in tort is to be imposed upon the manufacturer . . . when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being.[13]

In *Noonan v. Buick Co.*,[14] the plaintiff's three-year-old son made a sudden lunge for the steering wheel. The car veered to the right and started to skid. The front seat catapulted forward, causing an accident. The defense that such a result was not a foreseeable consequence of the negligence was rejected by the court.

The defense of contributory negligence prevailed in *Martin v. Plymouth Cordage Co.*[15] A purchaser of insecticide brought a negligence action against the seller because the bags contained a substance harmful to his plants. The bags, however, had a bold warning of their contents on the label which the court said the plaintiff or his agent should have read before spreading the insecticide.

In *Zunck v. Gulf Oil Corp.*,[16] the plaintiff was injured by exploding gas. The plaintiff, who could not detect the leak in the stove because the gas was not odorized, lit a match which resulted in a conflagration. The court granted summary judgment to the manufacturer and wholesaler on the issue of their negligence but held the retailer liable since he was aware of the condition of the gas and failed in his duty to odorize it. The manufacturer and wholesaler had no such duty to odorize.

### C. *Business Invitees, Licensees, and the Attractive-Nuisance Doctrine*

Although an occupier of land is not an insurer of the safety of persons on his property,[17] he may, nevertheless, be held liable for injuries sustained by others while on the premises. Such liability will depend

12. 205 So.2d 307 (Fla. 3d Dist. 1967).
13. *Id.* at 309, *quoting* Greenman v. Yuba Power Prod., Inc., 59 Cal.2d 57, 60, 377 P.2d 897, 900 (1963), 27 Cal. Rptr. 697, 700 (1962).
14. 211 So.2d 54 (Fla. 3d Dist. 1968).
15. 209 So.2d 481 (Fla. 1st Dist. 1968).
16. 224 So.2d 386 (Fla. 1st Dist. 1969).
17. Partelow v. Edgar, 219 So.2d 72 (Fla. 4th Dist. 1969); Maas Bros., Inc. v. Bishop, 204 So.2d 16 (Fla. 2d Dist. 1967).

largely upon the reasons and circumstances surrounding the injured party's presence and the degree to which the dangerous condition involved in the injury manifested itself. Upon these findings of fact, the court will determine as a matter of law the relationship of the parties, the duty involved, and the standard of care owed by the person in possession to inspect the premises and warn the plaintiff of the potential dangers lurking thereupon.[18]

The duty owed to a business invitee by an occupier of land is to exercise reasonable care to keep his premises in a reasonably safe condition and to warn those who come upon the property of all defects known or discoverable through the exercise of reasonable care.[19] Thus, in *Maas Bros. Inc. v. Bishop*,[20] the Second District Court of Appeal held that the plaintiff was not required to prove that the stair on which she slipped was improperly constructed, but need only show that a slippery metal strip on the store's stair was a latent defect of which the store owner either knew or should have known in the exercise of reasonable care.

In *Mai Kai, Inc. v. Colucci*, the Florida Supreme Court held that a restaurant owner was not liable for a latent defect on the premises where the defect could not have been discovered by reasonable care.[21] An owner must use reasonable care in maintaining the premises in a safe condition, but, if the defect was not discoverable by a reasonable inspection, there could be no negligence upon the owner's part.[22]

In some cases, it may not be the apparent nature of the condition itself that is at issue but rather, the degree of danger inherent in the condition. In the third district case of *Rist v. Northside Center, Inc.*,[23] the defective physical condition was open and obvious, but the danger was not. The plaintiff was an employee of an independent contractor with whom the defendant had a contract for the painting of a light standard tower in a shopping center. The plaintiff was injured by a windblown uninsulated power line. The injured employee claimed that the defendant owner failed to warn him of the latent or concealed dangerous condition created by the close proximity of the power line, thereby violating the standard of care owed to him as a business invitee. The court agreed:

> We think . . . that there is a distinction between a condition which is so openly and obviously dangerous that any reasonable person must recognize it as dangerous and a condition which is open and obvious but which a reasonable person might not be able to recognize as dangerous. Such a distinction

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18. *See* W. PROSSER, TORTS §§ 59-61 (3d ed. 1964) (hereinafter cited as PROSSER).

19. Belflower v. Risher, 206 So.2d 256 (Fla. 4th Dist. 1968); Maas Bros. Inc. v. Bishop, 204 So.2d 16 (Fla. 2d Dist. 1967).

20. 204 So.2d 16 (Fla. 2d Dist. 1967).

21. 205 So.2d 291 (Fla. 1967); *accord*, Washington Ave. Food Center Inc. v. Modlin, 205 So.2d 295 (Fla. 1967), *rev'g*, 178 So.2d 596 (Fla. 3d Dist. 1965).

22. *Id.*

23. 210 So.2d 483 (Fla. 3d Dist. 1968).

> is particularly applicable to conditions surrounding the use of electricity. . . .[24]

The special obligation toward a business invitee exists only while he is within the particular area where he would reasonably be expected to go.[25] In *Dunlop v. Reynolds*,[26] the status of a business invitee changed to that of a licensee when the plaintiff overstepped the reasonably foreseeable bounds of the area of invitation. The customer was granted permission to use a telephone in a beauty shop. In using the phone, the customer stepped into a space between the wall and desk where the telephone was placed, an area *not* provided for customers and where it could not be reasonably foreseen that customers would go even if they were to use the telephone. After using the telephone, the plaintiff tripped and fell over the telephone wire. The beauty shop was not held liable.[27]

An invitee is normally considered to be one who enters upon the premises of another for purposes connected with the business of the owner or occupant of the premises,[28] whereas a licensee is broadly defined as a person who enters upon the property of another for his own convenience, benefit, or pleasure.[29] When a person is a social guest of another, the relation between the parties is that of licensor and licensee, and this relationship is not destroyed by the fact that the injury sustained resulted from factors other than the condition of the property.[30] The duty owed to the licensee is to refrain from wanton negligence or willful misconduct which would injure the licensee and to refrain from intentionally exposing the licensee to danger.[31] There must, however, be actual knowledge of the danger by the occupier of the land combined with knowledge that the licensee is about to be confronted with such danger.[32] It does not matter whether the condition that caused the injury was a natural or an artificial one. If the host had actual knowledge of the condition and realized that the condition involved an unreasonable risk

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24. *Id.* at 485; *cf.* Simon v. Tampa Electric Co., 202 So.2d 209 (Fla. 2d Dist. 1967), wherein the court stated that the generation and distribution of electrical energy is highly dangerous to life and property, and the law requires electric companies to conform to a higher degree of care in order to protect others against unnecessary risks.

25. PROSSER § 61, at 401.

26. 204 So.2d 754 (Fla. 2d Dist. 1967).

27. The holding of the case must be viewed strictly in light of the particular facts. The question of reasonableness in regard to determining the boundaries of the area of invitation must always be decided by reference to the physical attributes of the property as controlling areas an invitee might reasonably be led to believe are open to him as part of the invitation. *See* PROSSER § 61, at 401.

28. City of Boca Raton v. Mattef, 91 So.2d 644 (Fla. 1956).

29. Stewart v. Texas Co., 67 So.2d 653, 654 (Fla. 1953).

30. Rauschbaum v. Goldstein, 204 So.2d 897 (Fla. 4th Dist. 1967); Gale v. Tuerk, 200 So.2d 261 (Fla. 4th Dist. 1967); *see* Maxymow v. Lake Maggiore Baptist Church, 212 So.2d 792 (Fla. 2d Dist. 1968).

31. Pinson v. Barlow, 209 So.2d 722 (Fla. 2d Dist. 1968); Gale v. Tuerk, 200 So.2d 261 (Fla. 4th Dist. 1967).

32. City of Boca Raton v. Mattef, 91 So.2d 644 (Fla. 1956); Rauschbaum v. Goldstein, 204 So.2d 897 (Fla. 4th Dist. 1967).

to his guest, and if the host had reason to believe that the guest, in the exercise of reasonable care, would not discover or realize the risk, the host is liable.[33]

A ten-year-old boy was injured on the premises of a church when he fell from a canopy while playing hide-and-seek with members of his youth group. The Second District Court of Appeal held that the boy did not have the status of an invitee since he was not on the premises for the purpose of transacting business with the owner but was there by implied invitation as a licensee.[34] The complaint also failed to state a claim upon which relief could be granted under the doctrine of attractive nuisance since there was no allegation that the canopy from which the boy fell constituted a trap or latent danger. To constitute an attractive nuisance, "the condition maintained by the defendant must be attractive to children and the condition must be so inherently dangerous as to constitute a trap."[35]

In *Petterson v. Concrete Construction, Inc.*,[36] the Fourth District Court of Appeal granted leave to amend a complaint which alleged that an eleven-year-old boy entered a construction site, found some .22 caliber cartridges which were used to help drive screws into concrete walls, took some of the cartridges home with him, and was injured the next day when one exploded. The court stated that the condition which caused the child's injury does not have to be that which attracted the child to the premises. The Florida Supreme Court, however, held that the child had ceased to be an invitee when he left the premises and that his act of exploding the cartridge upon his own premises afterwards was too remote to permit recovery.[37]

In regard to trespassing children, the Second District Court of Appeal has in part followed the Restatement of Torts[38] by setting forth four primary conditions for liability:

> [A] condition constitutes an attractive nuisance if (1) the place where the condition is maintained is one upon which the possessor knows or should know that children are likely to trespass; (2) the condition is one of which the possessor is or should be aware and one which he realizes or should realize involves an unreasonable risk of death or serious bodily harm to such children; (3) the children because of their youth do not discover the condition or do not realize the risk involved in intermeddling with it; (4) the utility to the possessor is slight as compared with the risk attached thereto.[39]

33. Rauschbaum v. Goldstein, 204 So.2d 897 (Fla. 4th Dist. 1967).
34. Maxymow v. Lake Maggiore Baptist Church, 212 So.2d 792 (Fla. 2d Dist. 1968).
35. *Id.* at 794.
36. 202 So.2d 191 (Fla. 4th Dist. 1967).
37. Concrete Constr. Inc. v. Petterson, 216 So.2d 221 (Fla. 1968).
38. *See* RESTATEMENT (SECOND) OF TORTS § 339 (1966).
39. Jackson v. Whitmire Constr. Co., 202 So.2d 861, 862 (Fla. 2d Dist. 1967); *accord*, Ridgewood Groves Inc. v. Dowell, 189 So.2d 188 (Fla. 2d Dist. 1966).

Such conditions appear to relate exclusively to artificial conditions of the land rather than natural conditions by virtue of the qualitative requirement that "[a] condition cannot be deemed to involve an unreasonable risk of death or serious bodily harm to children unless it inherently presents a hidden and unusual element of danger in such a way as to constitute a trap for them."[40] In a later case[41] in the same district, a wrongful death action was dismissed because the complaint did not allege the presence of an *unnatural* or *unusual* element of danger of a type and nature necessary to invoke the attractive nuisance doctrine.[42]

### D. *The Family*

According to the Florida Statutes, if one under the age of 18 applies for a Florida driver's license, the application must be signed by either a parent or guardian of the applicant.[43] In signing the application, the parent or guardian not only gives his permission for the minor to drive but also accepts full financial responsibility for the minor's driving.[44] In other words, any negligence of the minor driver is imputed to the one who signed the application for him. The purpose of the statute is to insure the financial responsibility of all those who drive. In *Gracie v. Deming*,[45] the statute was interpreted to apply regardless of whether the child is single or married. Marriage subsequent to the application (and before the accident) did not absolve the father of the financial responsibility for the accident, since the negligence involved was imputed to him by virtue of his acquiescence to his daughter's driving and by his signing of her application for a driver's license.

An interesting question as to "who" or "what" constitutes a minor child was before the Florida Supreme Court in *Stokes v. Liberty Mutual Insurance Co.*[46] The question presented was whether a parent has a cause of action under the Wrongful Death to Minors Act[47] for a stillborn child resulting from a prenatal injury. It was stipulated by both sides that the issue of the fetus would not be material in the case; however, even if the fetus had been viable, the court reasoned that the action would have failed since an unborn child is not considered a minor child under the statute.[48]

40. Jackson v. Whitmire Constr. Co., 202 So.2d 861, 863 (Fla. 2d Dist. 1967).

41. Hendershot v. Kapok Tree Inn, Inc., 203 So.2d 628 (Fla. 2d Dist. 1967).

42. A two-year-old boy drowned in defendant's artificial pond, which was filled with dark, murky water creating an illusion of shallowness. The pond had banks which sloped gradually down to the water's edge, and a small island in the center. It was filled with live ducks. There was a bright red fire truck with a bell on the opposite shore. Shade trees, shrubs, and flowers were in and about the island and adjacent to the pond, and a high fence completely enclosed the garden except for an eighteen-foot gap. *Id.*

43. FLA. STAT. § 322.09 (1967).

44. *Id.*

45. 213 So.2d 294 (Fla. 2d Dist. 1968).

46. 213 So.2d 695 (Fla. 1968).

47. FLA. STAT. § 768.03 (1967).

48. Stokes v. Liberty Mut. Ins. Co., 213 So.2d 695 (Fla. 1968).

In *Denault v. Denault*, it was held that parental immunity would bar an action for negligence when an unemancipated child attempted to sue the mother for injuries sustained in an automobile collision.[49]

The traditional, common-law view concerning antenuptial rights in tort action between husband and wife was followed in *Bencomo v. Bencomo*.[50] After a divorce, the ex-wife was not permitted to maintain an action against the ex-husband for any injury she sustained from her husband before the marriage. Under the so-called "Unity Doctrine", as applied by the court, one spouse cannot sue the other because of the common-law view of marriage that the two are but one.[51] A well-considered dissent stressed that recovery for intentional physical attacks should be permitted on the ground that the peace and harmony of the home has been damaged to such an extent that there is no danger that it will be further impaired by the action.[52]

Although the Federal District Court for the Northern District of Florida applied the law of the *Bencomo* case in *Gaston v. Pittman*,[53] after the Fifth Circuit certified the question to the Florida Supreme Court,[54] the holding was reversed.[55] The Florida Supreme Court stated:

> In summary, we hold that the injured woman having become vested with a cause of action against the tortfeasor, the subsequent marriage to the tortfeasor did not extinguish the "cause of action," but merely abated the woman's capacity to sue. This "right of action" was abated only during the existence of the marriage. Upon divorce the procedural bar was lifted. In other words, under Florida law a divorced woman can maintain an action against her former husband for a tort committed by him prior to their marriage.[56]

### E. *Master-Servant*

If a nightclub owner employs an armed guard to protect his establishment and allows him to drink on the job, knowing the "bouncer's" propensity for violence and disorderly conduct, there is a jury question as to whether patrons are negligently imperiled.[57]

Whether the activities of a servant are within or without the scope of his employment is often ambiguous. The First District Court of Appeal has held that while an employee is going to work or is on his way home from work, he is not within the course of his employment; but if his home

49. 220 So.2d 27 (Fla. 4th Dist. 1969).
50. 200 So.2d 171 (Fla. 1967).
51. *See* Note, 23 U. MIAMI L. REV. 626 (1969).
52. Bencomo v. Bencomo, 200 So.2d 171, 176 (Fla. 1967) (dissenting opinion).
53. 285 F. Supp. 645 (N.D. Fla. 1968).
54. Gaston v. Pittman, 405 F.2d 869 (5th Cir. 1969).
55. Gaston v. Pittman, 413 F.2d 1031 (5th Cir. 1969).
56. Gaston v. Pittman, 224 So.2d 326, 328-29 (Fla. 1969).
57. Sixty-Six, Inc. v. Finley, 224 So.2d 381 (Fla. 3d Dist. 1969).

is also his office, then any errands that he must run to the main office are within the scope of his employment.[58]

### F. *Carriers*

A high degree of care is demanded of common carriers. They are responsible for the slightest negligence, however, they are not insurers of the persons with whom they deal.[59] Therefore, if a carrier is struck by a car which has run a red light, there is still a jury question as to whether the driver of the carrier was negligent in not keeping a proper lookout.[60]

### G. *Automobiles*

#### 1. THE DANGEROUS INSTRUMENTALITY DOCTRINE

Florida is the only jurisdiction which has extended the dangerous instrumentality doctrine to owners of motor vehicles.[61] As set forth in the leading case of *Southern Cotton Oil Co. v. Anderson*,[62] the owner of a motor vehicle, the use of which involves a high degree of risk, is liable for injuries caused by the negligent operation of his vehicle by anyone who operates it with his express or implied consent. Although critics have difficulty with the wisdom in such a position,[63] the doctrine stands as firmly in Florida decisions today as it did almost forty years ago.[64]

In *Powell v. Henry*,[65] the court sought to define what vehicles should be included as dangerous instrumentalities. A trailer, the court held, is not a dangerous instrumentality because it is not self-propelled and depends on an outside force for locomotion. Since the decision encompasses all "self-propelled"[66] vehicles, the door is now open to the inclusion of "go-carts," and other relatively innocuous items which would not logically be within the scheme of *Southern Cotton Oil*.[67]

*Powell* also dealt with the recurring problem of the conditions under which an owner may be absolved from this form of vicarious liability. Although the license tag registration bears the name of a party defendant, he is entitled to summary judgment if pretrial discovery conclusively demonstrates that the actual owner is another party.[68]

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58. Southern Life & Health Ins. Co. v. Smith, 218 So.2d 784 (Fla. 1st Dist. 1969).

59. *See* Reinhard, *Torts*, 22 U MIAMI L. REV. 367, 377 nn.72-78 (1967) and accompanying text.

60. Whitman v. Red Top Sedan Serv., Inc., 218 So.2d 213 (Fla. 3d Dist. 1969).

61. *See* PROSSER § 69 at 479 n.73.

62. 80 Fla. 441, 86 So. 629 (1920).

63. *See, e.g.*, PROSSER § 69 at 479.

64. *See, e.g.*, Thomas v. Atlantic Assoc., Inc., 226 So.2d 100 (Fla. 1969) *rev'g.* 212 So.2d 920 (Fla. 3d Dist. 1968).

65. 224 So.2d 730 (Fla. 2d Dist. 1969).

66. *Id.* at 732. The court drew its conclusion from the language of FLA. STAT. § 317.011 (21) (1967), which defines motor vehicles.

67. *See* note 63 *supra* and accompanying text.

68. Powell v. Henry, 224 So.2d 730, 732 (Fla. 2d Dist. 1969).

In *Thomas v. Atlantic*,[69] the issue was whether the agent of the owner had consented to the use of the owner's car.[70] Reversing the trial court and the district court of appeal, the supreme court held that a jury could reasonably find evidence of consent, or, in the alternative, negligence, where the user of the company car habitually and noticably left his car keys in one spot, thus inducing his thirteen-year-old daughter to put the car to her own use.[71]

Moreover, the owner is not exculpated from liability although his agent, in using the motor vehicle, goes beyond the scope of his authority. Thus, when a dealership allowed its salesmen to drive newly traded-in cars back to the showroom or garage and the negligent act occurred at 4:30 A.M., clearly outside the intended use, the owner was still responsible.[72] Nor was any relief afforded the defendant-employer of the right-minded truck driver who, thinking he was too inebriated to drive, had a friend drive the defendant's truck that found its way into a collision.[73]

The doctrine has also been applied to overcome a defense of lack of privity. Illustrative of this is a situation where a crane, operated by the subcontractor, injured the landowner. In an action by the landowner against his contractor, the plaintiff recovered despite the allegations that there was no privity between him and the defendant.[74]

### 2. THE GUEST STATUTE

Under the Florida guest statute,[75] the constitutionality of which was recently upheld,[76] the recovery of a guest who is injured as a result of the driver's negligence is contingent upon his ability to prove the driver's negligence to be gross. Generally defined as conduct most probably and likely to result in injury,[77] gross negligence has been found when the defendant drove through a yield sign without stopping or looking,[78] when the driver took his eyes off the road to look at the passenger,[79] when the driver crossing a median strip failed to heed the passenger's screams of an approaching car,[80] and when the defendant, under the influence of a few beers and over the warnings of his passengers, plowed

69. 226 So.2d 100 (Fla. 1969).

70. The court framed the issue as whether there was a "breach of custody amounting to a species of conversion or theft." *Id.* at 102.

71. Thomas v. Atlantic Assoc., Inc., 226 So.2d 100 (Fla. 1969), *rev'g*, 212 So.2d 920 (Fla. 3d Dist. 1968).

72. Whalen v. Hill, 219 So.2d 727 (Fla. 3d Dist. 1969).

73. Ivey v. National Fisheries, Inc., 215 So.2d 74 (Fla. 3d Dist. 1968).

74. Channel v. Musselman Steel Fabricators, Inc., 224 So.2d 320 (Fla. 1969).

75. FLA. STAT. § 320.59 (1967).

76. Hillock v. Heilman, 201 So.2d 544 (Fla. 1967).

77. Lockridge v. Dial, 208 So.2d 662 (Fla. 4th Dist. 1968); *accord*, Blodgett v. Glatz, 218 So.2d 512 (Fla. 3d Dist. 1969). *See also* PROSSER § 34 at 187 ("extreme departure from the ordinary standard of care").

78. Bochiaro v. Bochiaro, 212 So.2d 882 (Fla. 4th Dist. 1968).

79. Hellwig v. Holmquist, 203 So.2d 209 (Fla. 4th Dist. 1967).

80. Blodgett v. Glatz, 218 So.2d 512 (Fla. 3d Dist. 1969).

into a stopped car.[81] Excessive speeding alone, however, would not permit recovery.[82]

A plaintiff may fall outside the ambit of the guest statute for a number of reasons. If he pays his way, he is not considered to be a guest,[83] but this exception is not met if the passenger merely contributes to expenses.[84]

Another ground for an exception was presented in *Reyes v. Parsons*.[85] The plaintiff, an employee of the defendant's beauty shop, accompanied the owner to a hair-styling convention and was injured when the car ran off the road during a heavy rain. The plaintiff claimed she was not a guest in the statutory sense because the trip was for the mutual benefit of herself and her employer-driver in that the purpose of the trip was to improve her job skills. The court rejected the argument, however, because "the benefit sought to be conferred on the owner or operator as the inducement for transportation was [not] real or tangible,"[86] but was "too remote, vague, or incidental to be legally sufficient to remove plaintiff . . . from the guest . . . statute."[87] Protection of this statute also extends to gratuitous agents and those who are reimbursed for the trip by the injured party's employer.[88]

By its own language, the statute does not cover "school children or other students being transported to or from schools or places of learning within the state."[89] This, of course, is limited only to students on authorized school activities or in transit to or from school.[90]

Although not physically within the confines of the car when injured, a party might still be classified as a guest. In *Thomas v. Newsome*,[91] the plaintiff was helping the defendant, a fishing companion, put his boat back on its hitch when it slipped and pinned the plaintiff to a pole. Recovery was denied because "the defendant's allegedly negligent act was performed in the course of carrying out the gratuitous undertaking he had assumed."[92]

### 3. REQUISITES OF CARE

In rear-end collisions, there is a strong presumption that the person driving the vehicle which struck from behind was negligent.[93] The effect

81. Walker v. Moser, 201 So.2d 609 (Fla. 4th Dist. 1967).
82. Hodges v. Helm, 207 So.2d 318 (Fla. 3d Dist. 1968).
83. Felts v. Evans, 219 So.2d 721 (Fla. 1st Dist. 1969).
84. Lockridge v. Dial, 208 So.2d 662 (Fla. 4th Dist. 1968).
85. 226 So.2d 43 (Fla. 4th Dist. 1969).
86. *Id.* at 45.
87. *Id.*
88. Cocoris v. Smith, 221 So.2d 13 (Fla. 1st Dist. 1969).
89. FLA. STAT. § 320.59 (1967).
90. *See* Reinhard, *Torts*, 22 U. MIAMI L. REV. 367, 370 n.22 (1967) (Florida Survey) and accompanying text.
91. 211 So.2d 46 (Fla. 4th Dist. 1968).
92. *Id.* at 47.
93. Frazier v. Ross, 225 So.2d 451 (Fla. 4th Dist. 1969); Stephens v. Dictenmueller, 207 So.2d 718 (Fla. 4th Dist. 1968).

of this presumption is to shift the burden of going forward with the evidence to the defendant, which, if the defendant so proceeds, leaves the ultimate question of negligence for the jury. The defendant carried her burden in *Frazier v. Ross*.[94] She demonstrated to the jury's satisfaction that the accident occurred because the plaintiff's car was protruding three feet beyond the median onto which it suddenly came to rest, and traffic conditions precluded going around it or stopping in time.

Another case might serve as a warning to future litigants who want to buttress their lawsuits with physical evidence of the collision.[95] After she was struck by a car while travelling in the left lane of a four-lane highway, the defendant allowed her car to remain at the point of impact so that the details of the collision would not be forgotten. Unfortunately, another car came by and she was hit again. Rejecting the defense of lack of proximate cause, the court held that as long as the car was operable the driver had a duty to get it out of the traffic's way. They noted epigrammatically that "[t]he preservation of life is more important than the preservation of evidence."[96]

*Urton v. Redwing Carriers, Inc.*[97] highlights a further standard by which Florida motorists must abide, to wit: the range of vision rule. The driver of a car is under a duty to operate his vehicle in such a manner as to be able to control his car within his range of vision, regardless of the time of day. Not considered to be a rule of law, it is a

> rule of the road which, along with similar rules, the courts have recognized and employed as a commonly accepted standard of reasonableness, as distinguished from a standard of conduct, against which to measure the actions of a driver of a motor vehicle in the light of his paramount duty to exercise due care.[98]

The effect of not classifying the range of vision rule as a "rule of law" is that it is not a proper subject for jury instructions.[99]

In a case where a fourteen-year-old child on a motor scooter was struck by the defendant's automobile, the Florida Supreme Court was confronted with the question of what standard of care should be demanded of a minor.[100] It was decided that his participation in an adult activity required that he be treated as an adult.

Courts also exact a high degree of care from railroads. In *Seaboard Airline R.R. Co. v. Hawes*,[101] the passenger in a car collided with a

94. 225 So.2d 451 (Fla. 4th Dist. 1969).

95. Lydick v. Chance, 214 So.2d 885 (Fla. 2d Dist. 1968).

96. *Id.* at 886. This result is consistent with FLA. STAT. § 317.081 (1967) which obligates those involved in accidents to stop at the scene but "without obstructing traffic more than is necessary."

97. 200 So.2d 859 (Fla. 2d Dist. 1967), *aff'd*, 207 So.2d 273 (Fla. 1968).

98. *Id.* at 861.

99. Frazier v. Ross, 225 So.2d 451 (Fla. 4th Dist. 1969).

100. Medina v. McAllister, 202 So.2d 755 (Fla. 1967).

101. 208 So.2d 634 (Fla. 2d Dist. 1968).

train was allowed recovery because the railroad crossing was partially obscured by a tree and some surrounding buildings; in the court's view, this condition required better warning for oncoming cars than yellow stripes on the highway and traditional "cross-buck" signs.

Violation of a statute normally creates prima facie evidence of negligence.[102] Under Florida Statutes sections 588.14 and .15, however, a formidable barrier is placed before the injured plaintiff who sues the livestock owner who negligently permitted his stock to be on a highway. Florida courts refuse to raise an inference of negligence on the part of the defendant once the plaintiff proves that the defendant's animals were loose. The plaintiff has the virtually impossible burden of coming forward with some evidence that there was negligence on the part of the defendant, in allowing his livestock to remain unattended.[103]

## H. *Defenses*

### 1. CONTRIBUTORY NEGLIGENCE

When a married woman is injured due to the negligence of another, two causes of action arise: one in favor of the wife for her pain and suffering; and one in favor of the husband for his loss of consortium, services and medical expenses. The majority of jurisdictions, including Florida,[104] hold that if the husband is contributorily negligent in an accident in which his wife is injured, his recovery is barred, although his wife may recover from the driver of the other car. In *Dixon v. Wright*,[105] the fourth district was asked to adopt the minority view under which the husband's recovery follows the wife's.[106] Although the court thought the minority position to be better reasoned, it felt constrained to follow precedent.

Any reasonable possibility of contributory negligence must be submitted to the jury. In *Wisdom v. Nichels*,[107] both the plaintiff and defendant violated traffic ordinances. Since each of these violations presented prima facie case of negligence, it was for the jury to decide which violation was the proximate cause of the accident.[108]

In *Crowley v. Kreiger*,[109] the plaintiff collided with the defendant, who suddenly appeared in plaintiff's lane of travel. The court not only refused to raise a presumption of negligence against the defendant, but

102. Jones v. Florida E. Coast R.R., 220 So.2d 922 (Fla. 4th Dist. 1969).

103. Beaver v. Howerton, 223 So.2d 62 (Fla. 2d Dist. 1969).

104. *See* Seaboard Airline Ry. v. Watson, 94 Fla. 571, 113 So. 716 (1927).

105. 214 So.2d 787 (Fla. 4th Dist. 1968).

106. The leading case is Patusco v. Prince Macaroni, Inc., 50 N.J. 365, 235 A.2d 465 (1967).

107. 212 So.2d 652 (Fla. 4th Dist. 1968).

108. *See also* Davis v. Goodall, 202 So.2d 623 (Fla. 2d Dist. 1967). The plaintiff's car was struck from behind on a rainy street, but there was a conflict as to whether the plaintiff was guilty of contributory negligence for stopping short behind a green light or whether the defendant was following too closely.

109. 217 So.2d 583 (Fla. 4th Dist. 1969).

suggested that one is contributorily negligent in not keeping "a lookout in the direction in which he [is] traveling."[110]

Traditionally, a principal has been held liable for his agent's negligence. The negligence of the agent is said to be imputed to the principal, and distance between the two of them is no defense.[111] When a child drowned due to lack of supervision on the part of the mother and the defendant, the father was precluded from recovering for the child's wrongful death because of the contributory negligence of the mother. The father claimed that he neither knew nor should have known of the mother's negligence because he was out of the country at the time; therefore, the mother's contributory negligence should not be imputed to him. Despite the apparent injustice, the court was not moved to reject this longstanding rule and held for the defendant.[112]

Absentmindedness will not excuse contributory negligence. The plaintiff was working late while maintenance personnel were cleaning up the office. The plaintiff had observed and stepped across a puddle of water in the doorway a number of times before he slipped and injured himself. The court held that the plaintiff was contributorily negligent as a matter of law, notwithstanding the fact that he may have forgotten momentarily about the water on the floor because his mind was on his work.[113]

### 2. LAST CLEAR CHANCE

The doctrine of last clear chance is applied to mitigate the harshness of contributory negligence when the plaintiff can prove that the defendant was aware of the peril into which the plaintiff was unknowingly placed as a result of his own contributory negligence, and that the defendant could have, but failed, to avoid the accident. When a child was struck by a school bus going ten to fifteen miles per hour in a thirty-mile zone, and the evidence was uncertain as to the location of the child prior to the accident, or how she got to the point of impact, an instruction on last clear chance was properly denied.[114]

In *Perdue v. Copeland*,[115] the plaintiff's decedent had gone through a red light and was struck by the defendant, who was speeding through an intersection on a green light. The court refused to apply the doctrine of last chance for two reasons: First, the doctrine does not apply in a situation such as this where the negligence of the imperiled person continues until the time of the accident and is a contributing cause thereof.

110. *Id.* at 584.
111. Martinez v. Rodriguez, 215 So.2d 305 (Fla. 1968).
112. *Id.*
113. Stueber v. Maintenance, Inc., 205 So.2d 305 (Fla. 4th Dist. 1968).
114. Bethel Apostolic Temple v. Wiggin, 200 So.2d 797 (Fla. 1967), *following the leading Florida Case*, Connolly v. Steakley, 197 So.2d 524 (Fla. 1967). *Accord*, Berman Leasing Co. v. Price, 223 So.2d 362 (Fla. 3d Dist. 1969); Williamson v. Guerra, 208 So.2d 302 (Fla. 1st Dist. 1968).
115. 220 So.2d 617 (Fla. 1969).

Second, there was no evidence that the defendant had knowledge of the situation or time to extricate himself from it.[116]

Since railroads are no longer governed by the comparative negligence rule,[117] they may, as may other litigants, avail themselves of the defense of contributory negligence or become subject to the doctrine of last clear chance. Thus, *Sanders v. Florida East Coast Railway Co.*[118] held that the doctrine was appropriately applied when a conductor seeing a truck going slowly toward the tracks, with a driver unaware of the impending danger, failed to reduce the train's speed in time to prevent injury.

### 3. SUDDEN EMERGENCY DOCTRINE

The sudden emergency doctrine is available to a defendant if he can establish the following four elements: (1) that an emergency actually or apparently existed; (2) that he did not contribute to the perilous situation; (3) that alternative courses of action were unavailable; and (4) that the course of action pursued was reasonable under the circumstances.[119]

If the driver of a car is forced to swerve off the highway onto the shoulder to avoid an accident, his conduct is proper as a matter of law under the doctrine; however, a question of negligence is presented for the jury if he comes back off the shoulder and hits the plaintiff broadside.[120]

Courts often find themselves giving instructions on the doctrine of sudden emergency as an alternative finding for the jury. In one case,[121] a truck driver, as he rounded a curve, was confronted with a car on the wrong side of the road. He applied the brakes and blew the horn, but the vehicles collided head-on. An instruction combining the doctrines of sudden emergency and unavoidable accident[122] was upheld over the appellant's contention that an instruction on unavoidable accident is only proper where there is no question of negligence, on the ground that the jury is the ultimate finder of fact. In a similar case,[123] where a ten-year-old child ran in front of the defendant's truck, the court upheld a cautiously framed instruction that would have entitled the defendant to benefit from the doctrine of sudden emergency had the jury taken into

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116. For another case refusing to allow an instruction on last clear chance on the same ground, see Rouse v. Florida E. Coast Ry., 220 So.2d 632 (Fla. 3d Dist. 1969), where the trainman saw the plaintiff's truck on the tracks when it was five hundred feet away but lacked the ability to bring the train to a halt within that distance.

117. *See* Georgia So. & Fla. Ry. v. Seven-Up Bottling Co., 175 So.2d 39 (Fla. 1965).

118. 216 So.2d 49 (Fla. 4th Dist. 1968).

119. Kreigar v. Crowley, 182 So.2d 20 (Fla. 2d Dist. 1965).

120. Dixon v. Thompson, 217 So.2d 887 (Fla. 1st Dist. 1969).

121. Scott v. Barfield, 202 So.2d 590 (Fla. 4th Dist. 1967).

122. An unavoidable accident is one which reasonable diligence on the part of all concerned could not have prevented. *See* Retty v. Troy, 188 So.2d 568 (Fla. 2d Dist. 1966).

123. Gullinese v. Fountain, 209 So.2d 694 (Fla. 2d Dist. 1968).

account that he was also to be charged with being aware of the erratic behavior of children.

### 4. ASSUMPTION OF THE RISK

The Fourth District Court of Appeals set forth the traditional elements of the defense of assumption of the risk in a case where a child drowned in a pool when his arm became stuck in a drain.[124] The father asserted that the drain had been negligently designed. On the issue of assumption of the risk, the court stated:

> [V]oluntary exposure is the bedrock upon which the doctrine of assumed risk rests. There must be actual knowledge of the condition which creates the peril . . . and there must be appreciation of the danger, at the time one voluntarily exposes himself to such risk. A subjective standard applies.[125]

### 5. PROXIMATE CAUSE AND NEGLIGENCE

One of the primary elements which must be established in an action for negligence is the showing that the defendant's negligent action was in fact the proximate cause of the plaintiff's injury. To constitute proximate cause, there must be such a natural, direct, and continuous sequence between the negligent act and the injury that it can be reasonably said that, but for the act, the injury would not have occurred.[126] A person who is without fault may recover for an injury which results in a direct, natural sequence from a negligent act of another as long as there is no intervention by an independent, efficient cause.[127] Such an intervening cause must be independent and efficient in the sense that it was not set in motion by the initial wrong.[128]

When two boys play "catch" with a football, it is a natural and probable result that the intended receiver will follow the flight of the ball. Thus, when the ball was thrown towards the plaintiff and the intended receiver collided with the plaintiff, the passer was also held liable for the injury. The intended receiver was not an efficient, independent intervening cause.[129]

Before the issue of proximate cause is resolved in a case, the court should first establish whether a negligent act was committed. In determining the latter, the court must first decide whether the defendant owed a *duty* to the plaintiff. The test which has most frequently been applied by the courts is that of "forseeability." Unfortunately, the same test has often been prescribed by the courts to determine whether the negligent act was the *proximate cause* of the plaintiff's injury. Con-

124. Henry v. Britt, 220 So.2d 917 (Fla. 4th Dist. 1969).
125. *Id.* at 919.
126. Sardell v. Malanio, 202 So.2d 746 (Fla. 1967).
127. *Id.*
128. *Id.*
129. *Id.*

sequently, these two distinct elements of a cause of action for negligence are frequently and hopelessly interwoven and confused.[130]

A case in point is *Langevin v. Gray Drug Stores, Inc. of Miami.*[131] A boy received injuries from a home-made bomb which was constructed and discharged by another youngster who bought the materials from the drug store. The trial court dismissed the father's complaint alleging negligence on the part of the drug store, with prejudice for failure to state a cause of action. In affirming, the district court maintained that it was not foreseeable that if one sells potassium nitrate to a minor, he would use it to make a bomb. Although the end result was a fair one, the court used the terms "negligent act" and "proximate cause" interchangeably; hence, whether foreseeability attached to the element of proximate cause or to the element of a negligent act is not clear. The court first announced, "[i]t is axiomatic that the consequences of a *negligent act* must be those natural and probable injuries, which are *foreseeable* by reasonable men, in order to state a valid cause of action sounding in tort."[132] In later summarizing, the court stated, "[i]n the instant case, the . . . complaint fails to directly allege, or to present such facts which could lead to the inference, that the defendant's negligence was the *proximate cause* of those natural and probable injuries which would have been reasonably *foreseeable* by the defendants."[133]

In *Courtney v. American Oil Co.*,[134] it was held that the intentional ignition of gasoline by one of two boys was not a foreseeable consequence of the sale of gas to the boys for use in a model airplane; hence, the sale of the gasoline was not the proximate cause of the injuries.[135] In referring to proximate cause, the court pronounced, "the concept of proximate cause has at least two functions. One is to require a causal connection between an alleged act of negligence and a result for which damages are sought. The other is to limit the liability of the alleged wrongdoer for the consequences of his negligence."[136] The interesting aspect of the case is the fact that there was a *directed verdict* for the defendant. As in the *Langevin* case, the end result was reasonable, but the decision was by the court and the issue of proximate cause was not allowed to go to the jury. Although the issue of proximate cause is normally a question of fact for the jury, the court stated that the act "was so clearly not a foreseeable

130. *See* Green, *Are Negligence and "Proximate" Cause Determined By the Same Test?—Texas Decisions Analyzed*, 1 TEXAS L. REV. 243 (1923).

131. 216 So.2d 70 (Fla. 3d Dist. 1968).

132. *Id.* at 71 (emphasis added).

133. *Id.* at 72 (emphasis added).

134. 220 So.2d 675 (Fla. 4th Dist. 1969).

135. In setting forth its standard as to what is foreseeable, the court stated:
Liability of a negligent actor usually extends only to the . . . foreseeable consequences of his negligence. Such consequences are defined as those which are of a type that happen so frequently from the commission of the type of act in question that, in the field of human experience, the same type of consequences may be expected again from the same type of act. *Id.* at 677-78.

136. *Id.* at 677.

consequence that the trial court was correct in deciding the issue of proximate cause as a matter of law."[137]

In reversing the granting of a motion for summary judgment in *Brandeis v. Felcher*,[138] the court held that the issue of causation was a question of fact for the jury. As some youngsters walked along a sidewalk, they passed a chain-link fence enclosing a yard where two German shepherds were mating. The dogs saw the children and charged the fence. The children were frightened and ran into the street where the plaintiff's son was fatally injured by an oncoming automobile. The court held that a jury should determine whether the damage to the decedent was "done by" the dogs within the meaning of section 767.01 of the Florida Statutes.[139] In discussing the issue of causation, the court spoke in terms other than "foreseeability,"

> Professor Green suggests that the question is, in essence, a simple quantitative one—whether the defendant's conduct was a *material, appreciative*, or *substantial* factor in producing the plaintiff's injuries. If so, that is *enough* to enable the jury to find causation in fact.[140]

In holding that the issue of negligence was for the jury, the court, in *McDermott v. McClain*,[141] stated that

> [l]iability of a negligent person is not predicated upon his ability to foresee the exact series of events which culminates in injury to another. Liability is predicated, rather, upon the ability of a negligent person to foresee that his wrongful conduct might result in the type of harm which did in fact take place.[142]

It is difficult to tell whether the court was speaking in terms of *duty* or in terms of *proximate cause*.[143] The Third District Court of Appeal provided the best summation of the concept of proximate cause in dictum in *Mozer v. Semenza*.[144]

> It is notorious that proximate cause is in most cases what the courts will it to be and that it is at best a theory under which the courts justify liability or shield from liability those that the courts find should not in reason and logic be responsible for a given result.[145]

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137. *Id.* at 678.

138. 211 So.2d 606 (Fla. 3d Dist. 1968).

139. "Owners of dogs shall be liable for any damage done by their dogs to sheep or other domestic animals or livestock, or to persons." FLA. STAT. § 767.01 (1967).

140. 211 So.2d at 608; *see* Note, 23 U. MIAMI L. REV. 848 (1969).

141. 220 So.2d 394 (Fla. 3d Dist. 1969).

142. *Id.* at 396; *see* note, 156 *infra*.

143. It appears, however, to be more of a determination of duty than of causation. But *cf.* Fowler v. City of Gainesville, 213 So.2d 38 (Fla. 1st Dist. 1968), where the main issue hinged upon an independent intervening cause, a question of causation rather than duty.

144. 117 So.2d 880 (Fla. 3d Dist. 1965).

145. *Id.* at 883.

These words are consistent with a slight trend of the Florida decisions away from the application of a foreseeability test (which smacks of both *duty* and *causation*) and towards the application of a rational, common-sense approach to the issue of causation. This trend is manifested to some degree by *Sardell*, *Brandeis*, and, to a certain extent, *McDermott*, which cites the *Mozer* case.

### 6. DUTY AND MUNICIPAL IMMUNITY

The question of duty was directly at issue in *Modlin v. City of Miami Beach*.[146] The plaintiff sought to recover from the city for the negligence of the city's building inspector in his failure to discover a patent defect in the construction of a commercial building. As a consequence of the defect, an overhead storage mezzanine collapsed, crushing a business invitee. The court held that a public officer is not personally liable for negligent acts committed while acting within the scope of his official duties unless he owes a "special duty" to the person injured which is different in kind from that owed generally to the public. Remoteness and foreseeability were not at issue; the case revolved around the concept of to whom a duty might be owed.

Subsequent to the *Modlin* case, the Second District Court of Appeal was faced with a similar issue. In *City of Tampa v. Davis*,[147] negligence was alleged against the city for its failure to properly replace a stop sign which had been knocked down in an accident three days before the plaintiff was involved in a collision at that intersection. The court followed *Modlin* and reinforced *Hargrove v. Town of Cocoa Beach*[148]:

> [I]n the light of *Modlin*, a municipality is liable in tort, under the doctrine of respondeat superior, when its agent or employee commits a tort in the performance, or by the nonperformance, of an executive (or administrative) duty within the scope of a governmental function, *only when such tort is committed against one with whom the agent or employee is in privity, or with whom he is dealing or is otherwise in contact in a direct transaction or confrontation.*[149]

### 7. SOVEREIGN IMMUNITY

The Florida Legislature recently enacted Florida Statutes section 768.15 (1969),[150] which became effective July 1, 1969. It provides for the waiver of sovereign immunity by the state and its political subdivisions for certain torts committed by their employees and officers. Punitive damages are not authorized. However, the waiver of immunity

146. 201 So.2d 70 (Fla. 1967).
147. 226 So.2d 450 (Fla. 2d Dist. 1969).
148. 96 So.2d 130 (Fla. 1957).
149. City of Tampa v. Davis, 226 So.2d 450, 454 (Fla. 2d Dist. 1969).
150. Fla. Laws 1969, ch. 69-116.

is only on a temporary basis since the Legislature also subsequently repealed the statute effective July 1, 1970.[151]

Only general acts of the legislature can waive sovereign immunity.[152] In *Arnold v. Shumpen*,[153] the plaintiff was killed in an automobile accident caused by a traffic light malfunction. A Florida statute allowed counties to purchase indemnification insurance,[154] and the plaintiff argued that the purchase of such insurance was incompatible with the concept of sovereign immunity and the county should therefore be estopped from asserting the defense of sovereign immunity. The Florida Supreme Court held that because the statute was not intended to allow the county to insure itself against traffic light failures and because he act involved was a special act, rather than a general act, the county could not waive the sovereign immunity.

### I. *Wrongful Death and Survival Actions*

*Atlas Properties, Inc. v. Didich*[155] is a case of first impression that finally puts to rest the question of whether a right to recover punitive damages survives the injured party after his death. The plaintiff's daughter drowned when her arm became caught in an uncovered drain in the apartment house pool. The defendant owned and operated the apartment house. It was brought out at trial that, among other things, the defendant knowingly ignored the law requiring a lifeguard to be stationed at the pool and chose to cut expenses rather than fix the exposed drain about which he had been warned repeatedly.[156] The girl's father sought compensatory damages under the wrongful death statute[157] and compensatory and punitive damages under the survival statute.[158] The jury awarded $40,000 in compensatory damages and $35,000 in punitive relief. The Third District Court of Appeal rejected the petitioner's argument that the legislative intent as well as precedent precluded such recovery. The supreme court held that it was not only intended that punitive relief be allowed under the survival statute, but that it would be anomalous to provide otherwise:

> It is difficult to accept reasoning that envisions a person be punished only for his malicious and reckless actions when they maim another but not for these same despicable actions when they kill the victim. . . . The statute speaks plainly on its face and really needs no interpretation. If a victim could have brought the action before his death, then his personal represen-

151. Fla. Laws 1969, ch. 69-357.
152. FLA. CONST. art. III, § 22 (1968).
153. 217 So.2d 116 (1968).
154. FLA. STAT. § 455.06 (1963).
155. 226 So.2d 684 (Fla. 1969).
156. These facts appear in the district court opinion, 213 So.2d 278 (Fla. 3d Dist. 1968).
157. FLA. STAT. § 768.03 (1965).
158. FLA. STAT. § 45.11 (1965), which is now FLA. STAT. § 46.021 (1967).

tative should be allowed to do so after his death. Thus, punitive damages should survive.[159]

## II. Intentional Torts

### A. *Assault and Battery*

Due to the personal nature of the offense and the requisite element of intent which must be established to prove a claim for assault and battery, it has been held by the Third District Court of Appeal that one is not liable for the intentional tort of his partner unless the tort was committed within the scope of the partnership agreement or done at his direction or with his approval.[160]

In *McDonald v. Ford*,[161] the complaint was dismissed for failure to state a cause of action when a girl sued on a theory of negligence for an injury she received while struggling to get away from her boyfriend's amorous advances. The theory of the action should have been assault and battery rather than negligence.

### B. *False Imprisonment*

An interesting case arose when two men were arrested for disorderly conduct and for allegedly swindling a cashier out of $36.00 at a dog track. Neither of the alleged misdemeanors was committed in the presence of the arresting officer. The court held that the action for false imprisonment could be maintained even though there was no actual incarceration because mere detention in an office is a sufficient restriction upon freedom of movement to warrant recovery.[162] The dog track owner was not allowed the benefit of Florida Statutes section 811.022, which allows merchants to detain persons of whom there is probable cause to suspect theft. The basis of the court's decision was that a dog track owner is not considered to be a merchant for purposes of the statute.[163]

### C. *Malicious Prosecution and Libel*

In an action by a former sheriff against a newspaper for malicious prosecution, the court held that testimony given in a judicial proceeding is privileged and that such privilege extends even to a newspaper reporter who allegedly gave false information to a grand jury.[164] Since testimony before a grand jury is privileged, it cannot be used as a basis for an action for libel or slander.[165]

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159. Atlas Properties, Inc. v. Didich, 226 So.2d 684, 688 (Fla. 1969).
160. Soden v. Starkman, 218 So.2d 763 (Fla. 3d Dist. 1969).
161. 223 So.2d 555 (Fla. 2d Dist. 1969).
162. Washington County Kennel Club, Inc. v. Edge, 216 So.2d 512 (Fla. 1st Dist. 1968).
163. *Id.*
164. Buchanan v. Miami Herald Publishing Co., 206 So.2d 465 (Fla. 3d Dist. 1968).
165. *Id.*

A similar privilege was extended to a doctor who testified against the plaintiff when she was the subject of a competency hearing. The doctor had stated that the plaintiff was badly in need of psychiatric examination, and his testimony was held to be privileged as an evidentiary matter.[166] Even though the plaintiff was found to be competent, such a finding by itself was not sufficient to show a lack of probable cause for making the statements.[167] Beyond the realm of the public policy reasons for extending such a privilege, there are safeguards in a judicial proceeding to insure that the truth is told,[168] *e.g.*, the penalty of perjury.

A publication is libelous per se if, when it is considered alone without innuendo, it tends to subject one to hatred, distrust, ridicule, contempt, disgrace, or tends to injure him in his trade or profession.[169] Yet, in order to successfully maintain an action for libel and slander, the plaintiff must show that the charges were published with malice[170] and that a demand had been made for a retraction of the objectionable article.[171]

### D. *Fraud and Misrepresentation*

The seller maintained to the buyer that there were no termites in the building; however, the contrary proved to be true. Usually, if the buyer has an opportunity to inspect, but does not do so the words "*caveat emptor*" come back to haunt him when he attempts to sue the seller. If it is alleged however, that the vendor concealed what the plaintiff otherwise would have found on inspection, then a cause of action for misrepresentation exists, based on that concealment.[172]

A similar result was achieved in a case involving the sale of a corporation. The buyer must fend for himself in separating fact from opinion, and an allegation by the buyer that the seller's activities somehow prevented him from finding out the truth is necessary to maintain a cause of action for misrepresentation.[173]

## III. NUISANCES

A private nuisance is one that violates only private rights and results in damages to one or more persons rather than to the public generally.[174] In determining whether the defendant's use of his land results in an unreasonable interference with the use and enjoyment of

166. Bencomo v. Morgan, 210 So.2d 236 (Fla. 3d Dist. 1968).

167. *See* Krest v. Nathanson, 216 So.2d 233 (Fla. 4th Dist. 1968); Liabos v. Harman, 215 So.3d 487 (Fla. 2d Dist. 1968); Sponder v. Brickman, 214 So.2d 613 (Fla. 3d Dist. 1968).

168. *See* Hawkins v. Bay County Publishers, Inc., 216 So.2d 767 (Fla. 1st Dist. 1968).

169. Harwood v. Bush, 223 So.2d 359 (Fla. 4th Dist. 1969).

170. *Id.*; Burris v. Morton F. Plant Hosp., 204 So.2d 521 (Fla. 2d Dist. 1967).

171. FLA. STAT. § 770.01 (1967).

172. Beagle v. Bagwell, 215 So.2d 24 (Fla. 1st Dist. 1968).

173. Evans v. Gray, 215 So.2d 40 (Fla. 3d Dist. 1968).

174. Nitram Chem., Inc. v. Parker, 200 So.2d 220 (Fla. 2d Dist. 1967).

the plantiff's land, the jury must take into consideration the location and surroundings of the land and the effect of the use of the land upon an ordinary, reasonable man.[175]

When one landowner erected a chain-link fence with metal slats to keep children out and to maintain privacy, the First District Court of Appeal held that no spite or malice was established to justify ordering an abatement as a private nuisance.[176] The fact that there were other such fences in the neighborhood and that the plaintiff still had a view of the water weighed heavily in the court's dismissal of the complaint.

Generally, in order to maintain an action for a public nuisance, it is not necessary that the entire community be affected, provided that the nuisance interferes with the exercise of a public right.[177] Thus, unsanitary multiple dwellings may very well come within the domain of the public interest. In *Sawyer v. Robbins*,[178] a tenant sought to enjoin a landlord from maintaining an apartment without proper water heating facilities on the basis that it constitued a public nuisance. The Third District Court of Appeal held that there was no showing of a public nuisance in the case; the court noted, however, in the future, there may be violations on the minimum standard housing codes that would constitute a public nuisance.[179]

## IV. DAMAGES

### A. *Loss of Use*

In a case of first impression in Florida, the Second District Court of Appeal held that damages could be collected for the loss of use of a pleasure vehicle.[180] Although the plaintiff neither rented a car as a replacement while her's was being repaired nor incurred any transportation expenses during the period that her car was unavailable, damages awarded to the plaintiff in an amount approximating the rental value of a substitute car were held to be a reasonable indication of the loss-of-use value, although not necessarily the conclusive measure of the damage.[181] Not at issue in the instant case was the question of whether such damages are in the nature of general damages or special damages.[182]

### B. *Special Damages*

Usually, a claim for special damages is sufficient if it notifies the defendant of the nature of the special damages claimed.[183] In a private

175. *Id.* at 231.
176. Walden v. Van Harlingen, 220 So.2d 670 (Fla. 1st Dist. 1969).
177. *See* PROSSER § 89 at 605.
178. 213 So.2d 515 (Fla. 3d Dist. 1968).
179. *Id.*
180. Meakin v. Dreier, 209 So.2d 252 (Fla. 2d Dist. 1968).
181. *See* Note, 23 U. MIAMI L. REV. 237 (1968).
182. It can be inferred that damages for loss of use must be specifically pleaded in Florida; *see* City of Alachua v. Swilley, 118 So.2d 88 (Fla. 1st Dist. 1960).
183. Augustine v. Southern Bell Tel. & Tel. Co., 91 So.2d 320 (Fla. 1956); Arcade

nuisance case, loss-of-use value or loss-of-rental value is a measure of the damages recoverable for an injury to the property itself.[184] Special damages compensate a different kind of injury:

> In addition to the damages resulting from the depreciation, rental or use value of the property, the plaintiff may recover such special or incidental damages as he may be able to prove, *i.e.*, annoyances, discomfort, inconveniences, or sickness. This is true whether the injury is permanent or temporary. . . .[185]

If the plaintiff wants special damages, he must specifically plead them as such.[186] When the plaintiff sued for damages to his building caused by negligent driving at a neighboring construction site, it was held that damages for a heart attack and for physical inconveniences are in the nature of special damages which must be specifically pled.[187]

In *Speight v. Kirby*,[188] letters were written by a real estate broker to the Federal Housing Administration claiming that another broker was guilty of fraud, violations of FHA regulations, improper practices, and unethical business deals. It was held by the court that when there was a definite showing of a reduction in income due to the defendant's letters, the plaintiff's alleged speculative loss of profits was properly before the jury as an element of damages.[189]

### C. *Aggravation of Preexisting Injury*

One must take the plaintiff as he finds him. When a preexisting condition is aggravated by the defendant's negligence, the defendant may be held responsible for the entire condition.[190] The plaintiff was recovering from Parkinson's Disease and was almost well enough to return to work when he was involved in an accident with the defendant. After the accident, the plaintiff began to uncontrollably shake more than he ever had before the accident, and the defendant was held liable for the entire condition.[191]

A similar result was reached in a recent slip-and-fall case. The fall in a supermarket aggravated a preexisting condition. The court held to be proper an instruction to the jury to the effect that if the part of the injury caused by the fall could not be distinctly separated from the

Steam Laundry v. Bass, 159 So.2d 915 (Fla. 2d Dist. 1964). *See* FED. R. CIV. P. 9(g); FLA. R. CIV. P. 1.120(g).

184. Nitram Chems., Inc. v. Parker, 200 So.2d 220 (Fla. 2d Dist. 1967).

185. *Id.* at 225.

186. Bialkowicz v. Pan American Condominium No. 3, Inc., 215 So.2d 767 (Fla. 3d Dist. 1968). *See* FED. R. CIV. P. 9(g); FLA. R. CIV. P. 1.120(g).

187. Bailkowicz v. Pan American Condominium No. 3, Inc., 215 So.2d 767 (Fla. 3d Dist. 1968).

188. 204 So.2d 543 (Fla. 1st Dist. 1967).

189. *See* McCall v. Sherbill, 68 So.2d 362 (Fla. 1953). In Florida, damages must be relatively certain in nature and certain as to the cause from which they arise in order to be recoverable.

190. Hollie v. Radcliffe, 200 So.2d 616 (Fla. 1st Dist. 1967).

191. *Id.*

entire condition as a whole, damages may properly be awarded for the entire condition.[192]

### D. *Punitive Damages*

The plaintiff's right to recover punitive damages is directly dependent upon his right to recover compensatory damages. When the right to recover compensatory damages no longer exists, because of compromise or settlement, then the claim for punitive damages must be dismissed.[193] The purpose of such dismissal is based on the rule prohibiting the splitting of a cause of action.[194] The plaintiff in *Stephenson v. Collins*[195] asked for both compensatory and punitive damages when the defendant, allegedly driving under the influence of alcohol at 90 m.p.h. on a dark night without proper lighting on the wrong side of a hilly road, collided with the plaintiff who was driving a motorcycle. The issue of compensatory damages was settled by mutual agreement between the parties, the issue of punitive damages was left for the court to decide. The court dismissed the claim for punitive damages. In his dissent,[196] Justice Rawls stated that he did not believe that the cause of action was split. If the plaintiff can adequately prove his case and if the jury should find that the defendant's negligence was the proximate cause of the actual injuries to the plaintiff, then in the view of Justice Rawls, the court should decide the issue of punitive damages. The rule states only that actual damages must be shown or proved. "It does not specifically require an actual award *by the jury* for compensatory damages as a prerequisite to an award for punitive damages."[197]

### E. *Remittitur*

A trial court's entry of remittitur reducing a verdict of $1,000 to $100 was affirmed by the Third District Court of Appeal in a case where a veterinarian negligently treated and later disposed of a pet dog.[198]

In another case decided by the same court, it was held that an award of $1.5 million was not excessive for a thirty-five-year-old mother of three children with a life expectancy of 35.2 years who was required to be bedridden for an indefinite period of time and who would require an indefinite amount of medical care.[199]

An award of $50,000 for both plaintiffs was ordered reduced to $5,000 and $7,500 when the court found that the award bore no reasonable relationship to the damages resulting from false imprisonment.[200]

192. Winn-Dixie Stores, Inc. v. Nafe, 222 So.2d 765 (Fla. 3d Dist. 1969).
193. Stephenson v. Collins, 210 So.2d 733 (Fla. 1st Dist. 1968).
194. *See* Rosenthal v. Scott, 150 So.2d 433 (Fla. 1963); Mims v. Reid, 98 So.2d 498 (Fla. 1957).
195. 210 So.2d 733 (Fla. 1st Dist. 1968).
196. *Id.* at 737-38.
197. *Id.* at 738.
198. Levine v. Knowles, 218 So.2d 217 (Fla. 3d Dist. 1969).
199. Talcott v. Hall, 224 So.2d 420 (Fla. 3d Dist. 1969).
200. Washington County Kennel Club, Inc. v. Edge, 216 So.2d 512 (Fla. 1st Dist. 1968).