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Torts

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TORTS*

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I. AUTOMOBILE CASES

A. *The Dangerous Instrumentality Doctrine*

Pursuant to the Florida dangerous instrumentality doctrine,[1] liability is imposed upon the owner of a motor vehicle for injuries resulting from the negligent operation of his vehicle by anyone who operates it with his express or implied consent.[2]

Whether the owner may be relieved of liability under the doctrine in certain circumstances is still a problem under the Florida decisions.[3] This

* The decisions surveyed in this article have been reported in the Southern Reporter, second series, volumes 177 through 199.

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1. The doctrine was first articulated in Southern Cotton Oil Co. v. Anderson, 80 Fla. 441, 86 So. 629 (1920).

2. Hankerson v. Wilcox, 173 So.2d 747 (Fla. 3d Dist. 1965).

3. Note, 21 U. MIAMI L. REV. 491 (1966).

problem was the sole issue in *Pearson v. St. Paul Fire & Marine Ins. Co.*[4] The defendant-corporation allowed its employee to possess and use its car. The defendant-driver, a brother-in-law of the employee, took the keys to the car without his brother-in-law's knowledge or consent.[5] The trial court granted a summary judgment for the defendant-corporation. The plaintiff appealed and the appellate court held that the taking of the keys amounted to a species of conversion or theft which relieved the owner of the vicarious liability imposed upon him by the doctrine.[6]

Another exception to the application of the dangerous instrumentality doctrine involves the independent contractor.[7] In *Patrick v. Faircloth Buick Co.*[8] the defendant-owner took her automobile to the defendant-company to be serviced. An employee of the company drove the owner home and, upon returning to the company's premises, injured the plaintiff. The Second District Court of Appeal affirmed a summary judgment for the defendant-owner. The court reasoned that since the dangerous instrumentality doctrine is predicated on the theory of *respondeat superior*,[9] when it affirmatively appears that the driver is not the owner's servant or agent, the doctrine is not applicable.[10] In *Patrick* the driver was merely an independent contractor.

The Florida Supreme Court held that an employer who owned and entrusted a car to his employees, who were husband and wife, was not liable for the wife's injuries caused by the negligent driving of her husband.[11] The court found that there existed a joint right and mutuality of control; the husband's negligence was imputed to the wife.[12]

The vicarious liability imposed upon the owner of a dangerous instrumentality is primarily for the protection of the public. In *Smith v. Ryder Truck Rentals*[13] the plaintiff-employee was injured by a fellow employee driving a vehicle leased by their employer from the defendant-lessor. The lessor was absolved from liability. The basis of the court's decision was that public policy does not require the plaintiff to be protected

4. 187 So.2d 343 (Fla. 1st Dist. 1966).

5. Had he asked, he probably could have gotten the car with the express consent of his brother-in-law.

6. Susco Car Rental Sys. v. Leonard, 112 So.2d 832 (Fla. 1959) (dictum). *Contra*, Tillman Chevrolet Co. v. Moore, 175 So.2d 794 (Fla. 1st Dist. 1965).

7. *Cf.* Florida Power & Light Co. v. Price, 170 So.2d 293 (Fla. 1964), *rev'g* 159 So.2d 654 (Fla. 2d Dist. 1963) (dealing with injury to a fellow-servant and a suit involving the dangerous instrumentality and dangerous work doctrines.)

8. 185 So.2d 522 (Fla. 2d Dist. 1966).

9. Heddendorf v. Joyce, 178 So.2d 126 (Fla. 2d Dist. 1965).

10. *Accord*, Pettite v. Welch, 167 So.2d 20 (Fla. 3d Dist. 1964); Fry v. Robinson Printers, Inc., 155 So.2d 645 (Fla. 2d Dist. 1963).

11. Raydel, Ltd. v. Medcalfe, 178 So.2d 569 (Fla. 1965). *rev'g* Raydel, Ltd. v. Medcalfe, 162 So.2d 910 (Fla. 3d Dist. 1964).

12. Since the wife was also negligent, she cannot sue and impute that negligence to the owner; *cf.* Hale v. Adams, 117 So.2d 524 (Fla. 1st Dist. 1960) (principal-agent).

13. 182 So.2d 422 (Fla. 1966).

by the dangerous instrumentality doctrine when he already has the protection of workman's compensation insurance provided by his employer. Such insurance was held to immunize both the employer and the lessor from suit by the injured employee.

B. *The Guest Statute*[14]

A determination of the plaintiff's status is important, for if he is a guest he must prove the defendant was guilty of gross negligence,[15] rather than ordinary negligence.

One major exception to the guest statute is that the passenger who pays for transportation does not fall within the statute. However, payment for transportation does not conclusively remove one from the guest statute. In *Pooton v. Berutich*[16] the husband of the decedent sued the driver and owner of the vehicle in which his wife was a passenger. The court entered a summary judgment against the husband because of his failure to prove that the driver was guilty of gross negligence. The district court of appeal affirmed and held that although the decendent shared expenses with the driver, this was merely an act of courtesy, not a payment for services, since they were related by blood.

A second major exception to the guest statute is that, when the purpose of the transportation is for the mutual benefit of the parties or for the sole benefit of the owner or driver, the statute is not applicable.[17] This is generally a question for the jury. In *Gibson v. Hageman*,[18] the plaintiff-landlord, a passenger in a car driven by the defendant-tenant, was injured while they were going to have an extra key made for the tenant's room. The court reversed a partial summary judgment for defendant, holding that the issue as to whose benefit the trip was for was a jury question.

When an employee is being transported by his employer pursuant to the employment agreement, the employee is not a guest within the statute as the transportation is for the mutual benefit of both parties.[19]

In *Goodson v. Lorey*[20] a father sued his daughter for injuries while he was a passenger in a car driven by her, alleging that she was guilty of

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14. FLA. STAT. § 320.59 (1963).

15. Gross negligence is conduct which a reasonable man would know is *most likely* to result in injury to others. Carraway v. Revell, 116 So.2d 16 (Fla. 1959).

16. 199 So.2d 139 (Fla. 2d Dist. 1967).

17. Rollins Leasing Corp. v. Lovette, 198 So.2d 865 (Fla. 1st Dist. 1967). In Sullivan v. Stock, 98 So.2d 507, 510 (Fla. 2d Dist. 1957), the court stated:

> A remote, vague, or incidental benefit is not sufficient. Nor . . . where . . . [the] journey or ride is for purposes of companionship, pleasure, social amenities, hospitality and the like.

18. 179 So.2d 894 (Fla. 3d Dist. 1965).

19. Pribil v. Aitken, 184 So.2d 720 (Fla. 3d Dist. 1966).

20. 182 So.2d 34 (Fla. 3d Dist. 1966).

ordinary negligence. The daughter had a restricted license and could not drive unless an adult was present. The trial court entered a directed verdict for the daughter, since there was no proof that she was grossly negligent. In upholding the entry of the directed verdict, the appellate court concluded that the act of the father in accompanying his daughter on a shopping trip was a gratuitous gesture of hospitality, and, as such, he was a guest within the purview of the statute.

A third major exception to the statute is that it does not apply "to school children or other students being transported to or from schools or places of learning in this state."[21] But students who are on an unauthorized excursion and are cutting classes do not fall within the exception to the statute. If they are injured as passengers and sue the driver, they must allege and prove gross negligence.[22]

In *Heddendorf v. Joyce*[23] The Second District Court of Appeal held that the owner of an automobile is not a "guest" while riding in his own car, which is being driven by another.[24]

C. *Care Required of Motorists*

1. REAR-END COLLISIONS

In rear-end automobile accidents, the law presumes that the following-driver is guilty of negligence.[25] The presumption establishes a prima facie case which shifts the burden of proof to the defendant, requiring him to go forward with the evidence to contradict or rebut the presumption of negligence.

These general principles of the law were exemplified in *Ritter v. Brengle*.[26] Plaintiff instituted a suit for damages arising out of a rear-end collision. During the course of the trial, a police officer testified that: (1) the defendant struck the plaintiff in the rear, and (2) the plaintiff's vehicle was in its proper place on the highway. However, the trial court entered a summary judgment for the defendant. The appellate court reversed. The court noted that since the plaintiff was in the lead-vehicle, he is presumed to have used due care for his own safety. Moreover, the defendant did not introduce any evidence to contradict the presumptions that the plaintiff exercised due care and that he, the following-driver, was negligent.

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21. FLA. STAT. § 320.59 (1963).

22. Barber v. Majestic Wood Prod., Inc., 195 So.2d 593 (Fla. 1st Dist. 1967); *accord*, Farrey v. Bettendorf, 96 So.2d 889 (Fla. 1957) (students being transported to an extracurricular activity—a basketball game); Croxton v. Skoglund, 151 So.2d 24 (Fla. 2d Dist. 1963); *cf.* Moore v. Schortinghouse, 189 So.2d 377 (Fla. 3d Dist. 1966) (a church camp meeting, even for educational purposes, does not fall within the stated exception).

23. 178 So.2d 126 (Fla. 2d Dist. 1965).

24. *Accord*, Hale v. Adams, 117 So.2d 524 (Fla. 1st Dist. 1960).

25. Busbee v. Quarrier, 172 So.2d 17 (Fla. 1st Dist. 1965).

26. 185 So.2d 7 (Fla. 2d Dist. 1966).

The presumption dissipates once the defendant produces evidence which negates it. When the presumption is overcome, the ultimate fact of whether the defendant was negligent is a question for the jury, but the jury's decision should be without the aid of the presumption. This result was obtained in *Shaw v. York*[27] wherein the First District Court of Appeal stated that it was error for the trial court to instruct the jury concerning the presumption of negligence, because the defendant had introduced testimony which rebutted the presumption. However, the judgment for the plaintiff was upheld as the erroneous charge was rendered harmless by other jury charges.

Notwithstanding all that has been stated, the lead driver also owes the following driver certain duties. In *Holmes v. Surfus*[28] the trial court charged the jury that the following driver must anticipate that the vehicle ahead of him might change lanes. The plaintiff was the following driver and the charge implied that: (1) the defendant had changed lanes, and (2) the plaintiff was negligent. The appellate court, in reversing a judgment for the defendant, pointed out that the lead driver owes a duty to the driver in the rear to use the road in a normal fashion.[29] Therefore the lead driver must give an appropriate signal before stopping or turning.[30] Moreover, if the lead driver suddenly changes lanes, such action will constitute negligence only if it places another in a position of peril. In *Holmes* no evidence was introduced to prove that the defendant had changed lanes or, if he had, that it placed the plaintiff, the following driver, in a position of peril. Therefore the charge was erroneous.

2. VIOLATION OF TRAFFIC LAW

In Florida the violation of a traffic ordinance is prima facie evidence of negligence. However, the presumption may be overcome, depending on the circumstances which surround the violation.[31]

In *Speight v. Fort Walton Beach*[32] the plaintiff-appellant had proceeded through an intersection where the traffic light was in her favor, and collided with the defendant's vehicle. The trial court granted a summary judgment for the defendant and held that since he had obeyed the instructions of a police officer in entering the intersection, he was not negligent. The appellate court affirmed stating: "Suffice it to say that the

27. 187 So.2d 397 (Fla. 1st Dist. 1966); *Accord*, Gulle v. Boggs, 174 So.2d 26 (Fla. 1965), *quashing* 162 So.2d 286 (Fla. 3d Dist. 1964); Keyser v. Brunette, 188 So.2d 840 (Fla. 2d Dist. 1966).

28. 194 So.2d 283 (Fla. 2d Dist. 1967).

29. *Accord*, Gosma v. Adams, 102 Fla. 305, 135 So. 806 (1931).

30. Haislet v. Crowley, 170 So.2d 88 (Fla. 2d Dist. 1964).

31. Gudath v. Culp Lumber Co., 81 So.2d 742 (Fla. 1955); Clark v. Sumner, 72 So.2d 375 (Fla. 1954); McNulty v. Garvey, 189 So.2d 234 (Fla. 3d Dist. 1966); Delevis v. Troyer, 142 So.2d 783 (Fla. 2d Dist. 1962); Morrison v. C.J. Jones Lumber Co., 126 So.2d 895 (Fla. 2d Dist. 1961).

32. 180 So.2d 385 (Fla. 1st Dist. 1965).

foregoing factual situation presents a classic illustration for the proper utilization of the summary judgment rule."[33]

In *Sims v. Apperson Chemicals, Inc.*[34] the plaintiff sued for personal injuries sustained in a collision with the defendant's parked vehicle. The plaintiff argued that since the defendant's vehicle was parked in violation of a city ordinance, the defendant was negligent.[35] The appellate court found that the ordinance had no application to the facts and affirmed the entry of a directed verdict for the defendant. However, the court did note that even if the statute had applied, the defendant would not be liable without a showing that such negligence was the proximate cause of the plaintiff's injuries. The court stated: "[T]he [defendant's] truck was an *immobile instrumentality that presented a patent situation* and not an 'operating, efficient, or proximate cause' . . . ."[36]

A statutory construction problem was presented to the court in *Hagan v. Knobloch.*[37] The trial court, over the plaintiff's objection, charged the jury that a violation of a statute requiring pedestrians to walk on the left side of the road facing traffic constituted negligence.[38] The appellate court reversed, basing its decision on a latter section of the statute which provided that the statute in question did not create any new right of action.[39] Therefore, the court reasoned, a violation of the statute would not constitute negligence.

D. *Defenses*

1. CONTRIBUTORY NEGLIGENCE

In a case of first impression involving an issue of contributory negligence, the plaintiff-appellee instituted a guest passenger action.[40] The trial court struck the defendant's defense that the plaintiff-passenger was guilty of contributory negligence in failing to fasten and use the seat belts in the car. The First District Court of Appeal affirmed a judgment for the plaintiff. The court noted that the plaintiff's failure to fasten her seatbelt

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33. *Id.* at 387.

34. 185 So.2d 179 (Fla. 1st Dist. 1966).

35. The ordinance in question provided that no vehicle should be parked on any paved street for the night unless disabled.

36. 185 So.2d 179, 182 (Fla. 1st Dist. 1966). *Bue see* Williams v. Hawkins, 192 So.2d 326 (Fla. 1st Dist. 1966) where the court held that the violation of a state statute similar to the ordinance involved in *Sims* might be sufficient to establish negligence.

37. 186 So.2d 525 (Fla. 1st Dist. 1966).

38. FLA. STAT. § 317.01001(3) (1964) provides:

> Where sidewalks are not provided any pedestrian walking along and upon a highway, shall when practicable, walk only on the shoulder on the left side of the roadway . . . .

39. FLA. STAT. § 317.01001(15) (1964). In Smith v. Johnson, 187 So.2d 655 (Fla. 2d Dist. 1966) the court noted that to construe the pedestrian statute otherwise would violate the general rule that motorists and pedestrians have reciprocal rights on highways and that neither has a paramount right over the other.

40. Brown v. Kendrick, 192 So.2d 49 (Fla. 1st Dist. 1966).

could not have proximately contributed to the occurrence of the accident. The court stated:

> It may be that after further research by various safety committees, the law may be changed to require the use of seatbelts and to affix some element of negligence for failure to use same. This is not the law today and it is not within the province of this court to legislate on the subject.[41]

In *Gavel v. Girton*[42] the defendant-driver raised the defense of contributory negligence on the part of his guest passenger.[43] The plaintiff testified that the defendant was driving too fast for the conditions and that the accident did not occur until three miles after the plaintiff realized his own safety was in danger. In affirming a directed verdict for the defendant the court held that although the plaintiff did not have to leave the car on a late foggy night to relieve himself of contributory negligence, nevertheless, he should have made a reasonable attempt to protect himself.[44]

In *Foulk v. Perkins*[45] the plaintiff's decedent was killed while repairing a disabled truck on his employer's premises, when another truck went off the road and backed into the front of the vehicle upon which plaintiff's decedent was working. In the subsequent action for wrongful death the trial court directed a verdict for the plaintiff on the issue of contributory negligence. This action was affirmed, for there had been no evidence to overcome the presumption that the decedent had been exercising due care. Moreover, there was no evidence to prove that the decedent realized he was in danger, and it is not contributory negligence to fail to look out for danger when there is no reason to apprehend any.

2. LAST CLEAR CHANCE

Under the doctrine of last clear chance, one who has negligently placed himself in a position of peril may still recover from the defendant if he can prove that the defendant failed to use reasonable care to avoid the accident after he discovered the plaintiff's perilous position. This is in accord with the general rule that liability is imposed on the person who commits the last negligent act proximately causing the injury. By committing the last negligent act the defendant renders all other acts remote. His

41. *Id.* at 51.

42. 183 So.2d 10 (Fla. 2d Dist. 1966).

43. A guest in an automobile who is in danger has a duty to protest when it reasonably appears that his own safety is threatened. He must warn the driver, protest or take other action suitable to the circumstances. If he fails to do so he is guilty of contributory negligence. Bessett v. Hackett, 66 So.2d 694 (Fla. 1953); Georgia So. & Fla. Ry. v. Shiver, 172 So.2d 639 (Fla. 1st Dist. 1965).

44. *Accord*, Kaplan v. Wolff, 198 So.2d 103 (Fla. 3d Dist. 1967); Florida East Coast Ry. v. Keilen, 183 So.2d 547 (Fla. 3d Dist. 1966); Morse Auto Rentals v. Papandrea, 180 So.2d 351 (Fla. 3d Dist. 1965).

45. 181 So.2d 704 (Fla. 2d Dist. 1966).

act becomes immediate, proximate and therefore actionable.[46] However, the defendant must still realize or have reason to believe that the plaintiff is unaware of his perilious position and that he, the defendant, by taking appropriate action, can avoid the accident.[47]

A recent opinion by The Third District Court of Appeal has gone far in clarifying when the doctrine of last clear chance is applicable.[48] The plaintiff was riding his bicycle next to the center line and was unaware of the defendant's vehicle. The trial court granted a new trial after a verdict for the plaintiff on the basis that the instruction on last clear chance was erroneously given because the plaintiff was not in a perilous position until he actually moved into the defendant's lane. The appellate court reversed. The court stated:

> However, a review of decisions on this point reveals that a plaintiff *may already be in a position of peril even though he is not directly in the path of the defendant's oncoming vehicle.*[49] (emphasis added).

In another significant decision the Supreme Court of Florida[50] held that the doctrine of last clear chance will not apply when the plaintiff's negligence continues right up until the instant of the injury and the defendant is not aware of the plaintiff's perilous position, but could have been, had he exercised due care.[51]

3. OTHER DEFENSES

In a case of first impression, the Third District Court of Appeal held that the rule that the standard of care imposed upon minors differs from the standard placed on adults will not apply when a minor is operating a motor vehicle.[52] The court concluded that the normal rule would only apply when minors engage in activities befitting their age. The court stated:

> A minor of an age sufficient to be granted a motor vehicle operator's license, regular or restricted, who assumes the re-

46. Davis v. Cuesta, 146 Fla. 471, 1 So.2d 475 (1941).

47. Miami Transit Co. v. Goff, 66 So.2d 487 (Fla. 1953). In Rodriquez v. Haller, 177 So.2d 519 (Fla. 3d Dist. 1965) the court held that a refusal to instruct the jury on the doctrine of last clear chance was proper in absence of evidence *clearly* showing that the defendant had a reasonable opportunity to save the plaintiff from harm.

48. Thornton v. Fishbein, 185 So.2d 774 (Fla. 3d Dist. 1966).

49. *Id.* at 777; accord, State *ex rel.* Rosanblam v. Shain, 349 Mo. 27, 159 S.W.2d 582 (1941); *cf.* Whitten v. Erny, 152 So.2d 510 (Fla. 2d Dist. 1963).

50. Morse Auto Rentals Inc. v. Kravitz, 197 So.2d 817 (Fla. 1967), *quashing* 166 So.2d 619 (Fla. 3d Dist. 1964).

51. For an exhaustive but sound analysis of the doctrine of last clear chance, the reader is referred to Connolly v. Steakley, 197 So.2d 524 (Fla. 1967) in which Justice O'Connell wrote a piercing concurring opinion as to the current status of the doctrine in Florida. Although Justice O'Connell heartedly adopts the position taken in *Morse*, he feels that a comparative negligence statute would be a sounder approach to the problem.

52. Medina v. McAllister, 196 So.2d 773 (Fla. 3d Dist. 1967), *aff'd*, 202 So.2d 755 (Fla. 1967).

> sponsibility for operation of a potentially dangerous instrumentality such as a motor vehicle, should be held to assume responsibility for care and safety in the light of adult standards . . .[53]

In *City of Miami v. Horne*[54] a police officer had stopped a motorist for speeding when the motorist suddenly fled the scene. The officer pursued, and the motorist, who was driving at an excessive rate of speed, collided with another vehicle and killed the other driver. The plaintiff commenced a wrongful death action against the city. The trial court held as a matter of law that the officer's actions were not the proximate cause of the injury and entered a summary judgment for the city. The district court of appeal reversed, and certified the question to the Florida Supreme Court. The supreme court reversed and held that:

> The rule governing the conduct of police in pursuit of an escaping offender is that he must operate his car with *due care,* and in doing so, he is not responsible for the acts of the offender. Although pursuit may contribute to the reckless driving of the pursued, the officer is *not obliged to allow him to escape.*[55] (emphasis added).

Whether an act constituted the proximate cause of the plaintiff's injuries was the issue before the court in *Broome v. Budget Rent-A-Car Inc.*[56] In *Broome* the plaintiff sued the driver and the company-owner for injuries sustained when the driver "jiggled" the car's gear shift to start the car, and the car shot back injuring the plaintiff. The trial court entered a judgment notwithstanding the verdict for the company-owner, even though the company-owner knew the gear shift had to be "jiggled" to be activated. The rationale of the trial court was that under the foreseeability test[57] of proximate cause one had to prove that the *particular* act which occurred had happened before causing the *particular* injury. The appellate court rejected this rationale and pointed out that under the foreseeability test if some *general* act causing some *general* injury was foreseeable, the problem of proximate cause would be satisfied.

In order to benefit from the sudden emergency doctrine, the party involved must prove that: (1) a claimed emergency actually or apparently existed; (2) he did not create or contribute to the perilous situation; (3) alternative courses of action were available; and (4) the course of action pursued was reasonable and prudent under the circumstances.[58] Beyond this the doctrine has been held to be inapplicable, absent some

53. *Id.* at 774.

54. 198 So.2d 10 (Fla. 1967), *rev'g* 190 So.2d 409 (Fla. 3d Dist. 1967).

55. *Id.* at 13.

56. 182 So.2d 26 (Fla. 1st Dist. 1966).

57. Would the defendant, acting as a prudent or reasonably cautious man, foresee some injury or damage to the plaintiff?

58. Krelger v. Crowley, 182 So.2d (Fla. 2d Dist. 1965).

proof that the party was guilty of any actionable negligence after the emergency arose.[59]

II. WRONGFUL DEATH ACTIONS

The First District Court of Appeal has held[60] that a husband whose negligence or contributory negligence causes or contributes to the death of his wife does not forfeit his right to sue under the wrongful death statute.[61] The appellate court affirmed the dismissal of a wrongful death action brought by the husband's step-children against the husband and the defendant-railroad. The appellate court said:

> The clear intimation here is that the principle in question (one should not be allowed to profit from an unlawful act) ought to come into play only when there is an intentional act designed to cause death . . . . Any idea that mere negligence should be treated as the equivalent of such an intentional act is repugnant to our judicial sense.[62]

In *Jordan v. Jordan*[63] the appellate court denied a husband the right to intervene in the wife's suit for wrongful death of their minor son.[64] The court held that when the parents are divorced pursuant to a final decree and the mother has custody of the child, only she may sue for the wrongful death of the child.

The Florida Supreme Court has completely changed the law regarding the recovery of funeral and burial expenses in wrongful death actions.[65] The court held that funeral and burial expenses are to be recovered by the representative of the decedent's estate under the Florida Survival Statute.[66] Prior to this decision the representative could only recover for these expenses under the wrongful death statute, if they were pleaded as special damages.[67] The court reasoned that the right to recover funeral expenses should inure to the estate, since the estate is liable for such expenses.

In another case of first impression, the appellate court granted a new trial in a wrongful death action when the trial judge struck the claim for loss of the financial support the deceased husband would have provided the minor children.[68] The court stated:

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59. Elwood v. Peters, 182 So.2d 281 (Fla. 1st Dist. 1966).

60. Strickland v. Atlantic Coast Line R.R., 194 So.2d 69 (Fla. 1st Dist. 1967).

61. FLA. STAT. § 768.01 (1963).

62. 194 So.2d 69, 71 (Fla. 1st Dist. 1967).

63. 187 So.2d 68 (Fla. 3d Dist. 1966).

64. FLA. STAT. § 768.03 (1963). For a decision discussing the damages recoverable under FLA. STAT. § 768.03 (1963), see Gresham v. Courson, 177 So.2d 33 (Fla. 1st Dist. 1965).

65. Sinclair Ref. Co. v. Butler, 190 So.2d 313 (Fla. 1966). The court receded from Ellis v. Brown, 77 So.2d 585 (Fla. 1954) and Int'l Shoe Co. v. Hewitt, 123 Fla. 587, 167 So. 7 (1936); Doby v. Griffin, 171 So.2d 404 (Fla. 2d Dist. 1965) (overruled).

66. FLA. STAT. § 45.11 (1963).

67. Lithgow v. Hamilton, 69 So.2d 776 (Fla. 1954).

68. Slaughter v. Cook, 195 So.2d 6 (Fla. 2d Dist. 1967).

> . . . since the loss of the husband's care and support of the children devolved that duty on the mother . . . [it] is a portion of the damages she sustained in the death of the father. . . .[69]

The case of *Atlantic Coast Line R.R. v. Braz*[70] presented an interesting question. A husband sued for the wrongful death of his wife and recovered a judgment including an award for the loss of services which his wife had performed for the family corporation. The appellate court ordered a remittitur of that part of the judgment, and the supreme court reversed, holding that so long as the corporation involved was a wholly family owned corporation operated by the husband, the jury could consider the value of future services lost to that business.[71]

III. CARRIERS

Generally, common carriers owe their passengers the highest degree of care consistent with the practical operation of the vehicle. This duty is violated by the slightest negligence. The carrier will only be excused upon a showing that it was confronted by an emergency.[72] Hence if the defendant's testimony negates the existence of any emergency, and an unexcusable swerve caused the plaintiff to be injured, a jury question as to the carrier's negligence exists.[73]

In a case of first impression the Third District Court of Appeal held that a railroad employee who is allowed to sleep aboard a train is not a "passenger" who is owed the highest degree of care by the railroad-carrier.[74] The court stated that since the employee occupied the car pursuant to his employment and not for the *primary purpose* of journeying from one point to another, he did not enjoy the status of a passenger.[75]

In *Florida East Coast Ry. v. Edwards*,[76] the Florida Supreme Court held that the statute[77] which establishes a presumption of negligence in accidents involving railroads is unconstitutional. The reasons were the same as in *Georgia So. & Fla. Ry. v. Seven-Up Bottling Co.*,[78] wherein the comparative negligence statute[79] was invalidated because the court concluded the statute placed an undue financial burden on railroads.

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69. *Id.* at 7. *See also* Director General of Railroads v. Into, 83 Fla. 377, 91 So. 269 (1922).

70. 196 So.2d 109 (Fla. 1967), *overruling* 182 So.2d 491 (Fla. 3d Dist. 1966).

71. *Id.* at 110.

72. Jacksonville Coach Co. v. Rivers, 144 So.2d 308 (Fla. 1962).

73. Jacobs v. Harlem Cab Inc., 183 So.2d 552 (Fla. 3d Dist. 1966).

74. Maultsby v. Atlantic Coast Line R.R., 188 So.2d 561 (Fla. 3d Dist. 1966).

75. *Accord,* Robert v. Chicago & R.I. R.R., 99 F. Supp. 895 (D. Minn. 1951).

76. 197 So.2d 293 (Fla. 1967).

77. FLA. STAT. § 768.05 (1963).

78. 175 So.2d 39 (Fla. 1965); Jarvis, *Torts, Survey of Florida Law*, 20 U. MIAMI L. REV. 820, 836 (1966).

79. FLA. STAT. § 768.06 (1963).

IV. COMMON LAW NEGLIGENCE ACTIONS

A. *Landlord and Tenant*

In a case of first impression, the Third District Court of Appeal held that a landlord may be liable for injuries caused to a tenant's child when the child falls through a defective screen which the landlord failed to repair.[80] Under the common law, in the absence of an agreement to the contrary, the landlord was not under a duty to repair the premises.[81] However, in the instant case, the landlord had indicated orally that repairs would be made. Therefore, the court held, a jury could find that there existed a contract to repair the defective screen. The appellate court also noted that there is a split of authority on whether defective screening plus the landlord's knowledge of the defect and his duty to repair constitute proximate cause. In the instant case, the appellate court chose to align Florida with those jurisdictions which hold that the above circumstances sufficiently constitute proximate cause.[82]

In *Drum v. Pure Oil Co.*[83] the court was faced with a novel argument concerning the landlord's liability for injuries to third parties. The plaintiff sued for personal injuries sustained when he slipped on a slick area of the defendant-lessor's gas station. The plaintiff argued that since the tenancy was a month to month tenancy and the plaintiff slipped on the first day of the month, the defendant-lessor should be liable under the general rule that a landlord is liable for injuries to third parties if the injury is due to a condition on the premises at the beginning of the tenancy which constitutes a nuisance or a vioation of the law. The appellate court rejected the argument on the basis that in Florida, pursuant to legislative enactment, a month to month tenancy is *continuous* unless terminated.[84]

B. *Doctor-Patient*[85]

An issue of informed consent was before the court in *Ditlow v. Kaplan.*[86] The action was brought against the defendant-doctor based on his failure to secure the plaintiff-patient's informed consent[87] for a diagnostic operation. The plaintiff admitted signing a general consent form. The trial court entered a directed verdict for the defendant. The appellate court affirmed. The court indicated that the issue of whether the doctor

80. McKenzie v. Atlantic Manor Inc., 181 So.2d 554 (Fla. 3d Dist. 1965).

81. Eaton v. Weir, 125 So.2d 115 (Fla. 2d Dist. 1960).

82. *See, e.g.*, Gould v. DeBeeve, 330 F.2d 826 (D.C. Cir. 1964).

83. 184 So.2d 196 (Fla. 4th Dist. 1966).

84. FLA. STAT. § 83.03 (1905).

85. *See* Holl v. Talcott, 191 So.2d 40 (Fla. 1966) dealing with the propriety of granting summary judgments in malpractice and negligence cases.

86. 181 So.2d 226 (Fla. 3d Dist. 1965).

87. *Informed* consent means to advise the patient as to the specific risks inherent in the operation or treatment he is to undergo.

had sufficiently informed his patient depended on whether he conformed to what a reasonable medical practitioner in the community would have done.[88] However, since the plaintiff had offered no evidence as to what was the practice of other doctors in the community, the plaintiff was in no position to complain that he was not given sufficient information regarding the risks involved.[89]

In *Levy v. Kirk*[90] the trial court entered a summary judgment for the defendant-doctor. The trial record contained no expert testimony, but it did reveal that the defendant-doctor had failed to observe the plaintiff's decedent or review the results of the tests he had prescribed for plaintiff's decedent upon having him admitted to the hospital. In reversing the summary judgment the appellate court held that whether the defendant had abandoned the patient and whether the abandonment proximately caused plaintiff's decendent's death were questions for the jury. In so ruling the court applied the general rule that expert testimony is not required in a malpractice case when a jury could decide the issues from their common knowledge and experience.[91]

C. *Manufacturers and Suppliers*

There were numerous significant decisions during the period surveyed regarding the law of products liability. The *Uniform Commercial Code,* recently adopted in Florida, contains several sections dealing exclusively with warranties.[92] Due to the nature of this article, a comprehensive and detailed examination of those sections, and their effect on Florida law is impractical. However, brief comments will be made when pertinent.

In *Foley v. Weaver Drugs, Inc.*[93] the plaintiff sued the retailer and the manufacturer based on negligence and breach of an implied warranty of fitness and merchantability. The injuries sustained were caused by a defective bottle containing reducing pills. The counts as to the defendant-retailer were dismissed by the trial court and affirmed by the district court of appeal. The supreme court held that a retailer is not liable on an implied warranty theory for defects in the containers even if they contain foodstuffs or items for intimate bodily use. The court noted that other than foodstuffs and articles for intimate bodily use, the retailer will not be liable unless there is a breach of an implied warranty of fitness for a

88. Bowers v. Talmage, 159 So.2d 888 (Fla. 3d Dist. 1963); Note, 18 U. MIAMI L. REV. 967 (1964).

89. *Cf.* Visingardi v. Tirone, 193 So.2d 601 (Fla. 1966).

90. 187 So.2d 401 (Fla. 3d Dist. 1966).

91. *Accord,* Russell v. Hardwick, 182 So.2d 241 (Fla. 1966) (holding that the propriety of applying certain medical procedures is a question for the jury to consider and it may be established by lay testimony); Dohr v. Smith, 104 So.2d 29, 32 (Fla. 1958).

92. FLA. STAT. §§ 672.2-313 to-318 (1965).

93. 177 So.2d 221 (Fla. 1965). The court disapproved the decision of Canada Dry Bottling Co. v. Shaw, 118 So.2d 840 (Fla. 2d Dist. 1960).

particular purpose.[94] The *Uniform Commercial Code* may dictate a contrary result. Under section 672.2-314 of the Florida Statutes[95] any seller, including a manufacturer or retailer, who is "a merchant with respect to goods of that kind" warrants their merchantability. Included within the warranties created by the statute is the implied warranty of fitness for ordinary purposes. Apparently, *Foley* would then be overruled by the statute.

The Supreme Court of Florida[96] has held that privity of contract is no longer required in a products liability case against a *manufacturer*,[97] even though the product is admittedly neither a dangerous instrumentality nor a foodstuff.[98] It is important to note that a retailer is not liable even if privity exists.[99]

The Fourth District Court of Appeal, in a case involving the explosion of a gas tank, held that the bailor-owner did not warrant its reasonable fitness to the bailee.[100] The basis of the decision was that a mere bailor or lessor is not liable for breach of warranty.[101] As to the claim of several bystanders who were also injured as a result of the explosion, the court held that only users of the product or ultimate consumers could claim the benefit of a warranty.[102]

The Florida Supreme Court has held that the transfer of blood by a blood bank is a sale and not a service.[103] Therefore, an action for implied warranty would lie against the blood bank because it was performing a sale rather than a service when the blood given for a transfusion contained serum hepatitis. However, the supreme court did quash that portion of the district court of appeal opinion relating to whether there was a known way to determine if blood contains serum hepatitis.[104]

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94. The court in *Foley* stated:

> We are not persuaded that considerations of public policy require us to extend to food containers the "implied warranty" liability of retailers as to the food contained therein; on the contrary, we are of the opinion that it would be unreasonably burdensome to extend liability in this respect. 177 So.2d 221, 229 (Fla. 1965).

Cf. McBurnette v. Playground Equip. Corp., 137 So.2d 563 (Fla. 1962). *See* Annot., 81 A.L.R.2d 229 (1962).

95. FLA. STAT. § 672.2-314 (1965).

96. Lily-Tulip Cup Corp. v. Bernstein, 181 So.2d 641 (Fla. 1966) *aff'g* Bernstein v. Lily-Tulip Cup Corp., 177 So.2d 362 (Fla. 3d Dist. 1965).

97. *Accord*, Power Ski, Inc. v. Allied Chem. Corp., 188 So.2d 13 (Fla. 3d Dist. 1966). *Cf.* Engel v. Lawyers Co-operative Publishing Co., 198 So.2d 93 (Fla. 3d Dist. 1967).

98. In *Lily* the plaintiff was burned because of a defective paper cup manufactured by the defendant.

99. Foley v. Weaver Drugs, Inc., 177 So.2d 221 (Fla. 1965).

100. Fort Pierce Gas Co. v. Toombs, 193 So.2d 669 (Fla. 4th Dist. 1966).

101. Brookshire v. Fla. Bendix Co., 153 So.2d 55 (Fla. 3d Dist. 1963).

102. Fort Pierce Gas Co. v. Toombs, 193 So.2d 669, 672 (Fla. 4th Dist. 1966).

103. Community Blood Bank, Inc. v. Russell, 196 So.2d 115 (Fla. 1967), *aff'g*, Russell v. Community Blood Bank, Inc., 185 So.2d 749 (Fla. 2d Dist. 1966). *See* Note, 21 U. MIAMI L. REV. 479 (1966).

104. This question was partly resolved in Hoder v. Sayet, 196 So.2d 205 (Fla. 3d Dist. 1967). The court in *Hoder* found that although there may be no way to eliminate or even

In *Enix v. Diamond T. Sales & Service Co.*[105] the appellate court reversed a summary judgment entered for the seller in a warranty suit involving the sale of a *used* tractor. The court held that Florida case law makes no distinction between new or used articles with regard to the existence of an implied warranty of fitness for a particular purpose.[106] Moreover, here the buyer averred that the seller warranted the tractor both orally and by letter. Since this raised an issue of fact as to the existence of the warranty, summary judgment was precluded.[107]

D. *Invitees, Licensees and Trespassers*

1. INJURIES INVOLVING FALLS

The Second District Court of Appeal has held that the owner of land is not liable for injuries caused by the natural condition of the land.[108] However, the owner will be held liable if he has interfered with the natural condition of the land. Therefore when the plaintiff was injured by slipping on the *natural* sand abutting the owner's driveway, the owner was not guilty of actionable negligence.

The plaintiff's status was at issue in *Country Club v. McHale*.[109] The plaintiff, a society reporter, who was given a complimentary membership to the defendant's club, instituted a "slip-and-fall" action after she slipped on a waxed floor. The basis of the club's defense was that the plaintiff was a licensee. The appellate court, in affirming a jury verdict for the plaintiff, stated that the mere fact that no pecuniary benefit inured to the club did not of itself indicate that the plaintiff was a licensee. The membership was extended to plaintiff with the expectation that the club would receive favorable publicity which in itself was a benefit to the defendant-club. Therefore, the plaintiff was an invitee.[110]

In *Ladenson v. Eder*[111] the supreme court held that when a licensee slipped and fell on a terrazzo floor, a jury question was presented. The

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detect the hepatitis once the blood has been taken, a jury could find that the risk could be greatly minimized through careful screening of donors. The Third District also held that the hospital, although *not* liable on the basis of implied warranty, could be liable for negligence in selecting a particular blood bank as its supplier.

105. 188 So.2d 48 (Fla. 2d Dist. 1966).

106. *Contra*, McDonald v. Sanders, 103 Fla. 93, 137 So. 122 (1931) (dictum).

107. *Cf.* Keating v. DeArment, 193 So.2d 694 (Fla. 2d Dist. 1967) (the court held that with respect to second-hand articles of personal property, the general rule is that there is no implied warranty as to condition, fitness, or quality).

108. Gifford v. Galaxie Homes Inc., 194 So.2d 25 (Fla. 2d Dist. 1967).

109. 188 So.2d 405 (Fla. 3d Dist. 1966).

110. Since the plaintiff's presence benefitted the club, her status was that of an invitee, and the degree of care owed is to keep the premises in a reasonably safe condition. However, had the plaintiff been a licensee—present for her *own* benefit—the degree of care owed is slight and is merely to refrain from wanton negligence or willful misconduct.

111. 195 So.2d 211 (Fla. 1967), *quashing* Eder v. Ladenson, 186 So.2d 835 (Fla. 4th Dist. 1966).

district court of appeal had affirmed a summary judgment for the defendant based on the court's finding that in Florida it is common knowledge that terrazzo floors are often slippery,[112] and therefore the plaintiff was contributorily negligent. In reversing the district court of appeal, the supreme court was of the opinion that a person falling on a slippery terrazzo floor is not guilty of contributory negligence as a *matter of law,* without proof that the plaintiff has some *actual* knowledge of the dangerous condition.

The Second District Court of Appeal affirmed a summary judgment for the defendant when the plaintiff was injured while descending a step-down in a store aisle which he forgot about when examining some merchandise.[113] The appellate court found that since the floor levels were of different colors and one had to go up the steps before coming down, the injuries were caused by the plaintiff's own negligence in failing to observe the hazard.

In *Beebe v. Kaplan*[114] the plaintiff, a maid, was injured when she tripped and fell on a known *hazard.* The injury occurred when the defendant-employer told the plaintiff to hurry to get some candles when a fuse blew during a party. The trial court entered a summary judgment for the defendant-employer, and the appellate court reversed. The general rule is that when a person enters a dark area with knowledge of a hazard and is injured by the known hazard, the person is guilty of con-contributory negligence.[115] However, in the instant case, the appellate court found that the facts fell within an exception to the general rule. The exception is that a plaintiff will be excused from exercising ordinary care for her own safety if she is proceeding in a hurry at the specific direction of her employer, causing her attention to be distracted.

Maritime law and its applicability in a suit brought when the plaintiff was injured in a fall from a houseboat was the issue before the court in *Judy v. Belk.*[116] The plaintiff, a social guest, was injured while attempting to disembark from the defendant's houseboat. The evidence before the court indicated that both parties were negligent. The trial court entered a summary judgment for the defendant, but the appellate court reversed. The appellate court held that under maritime law the boat owner owes his social guest the duty to provide reasonable security of life and limb including provision for a reasonable means of disembarkation. Moreover, in maritime law the contributory negligence of the plaintiff, if any,

112. If it is common knowledge that the floors are slippery, then the licensee is aware of the danger and need not be warned. Goldberg v. Straus, 45 So.2d 883 (Fla. 1950).

113. Van Horn v. Food Services Equip., Inc., 177 So.2d 528 (Fla. 2d Dist. 1965); *cf.* Murdoch v. City of Jacksonville Beach, 197 So.2d 845 (Fla. 1st Dist. 1967).

114. 177 So.2d 869 (Fla. 3d Dist. 1965).

115. Brant v. Van Zandt, 77 So.2d 858 (Fla. 1954).

116. 181 So.2d 694 (Fla. 3d Dist. 1966).

would not bar recovery, but would merely reduce the amount of damages.[117]

2. INJURIES NOT INVOLVING FALLS

The duty owed to a licensee is to refrain from wanton negligence or willful misconduct, and to warn him of known defects. However, there must be knowledge of the danger by the owner combined with knowledge that the licensee is about to be confronted with the danger.[118] In a case of first impression[119] a Florida court has held that a fireman fighting a fire is a licensee and is owed the aforementioned duties.[120] Therefore, the fact that a building was not properly equipped with automatic sprinklers and was not properly constructed did not render the owner liable for the fireman's death caused by smoke inhalation. The occurrence of fires is wholly unpredictable and thus precludes warning firemen of defective conditions.

In *Adams v. Florida East Coast Ry.*,[121] the plaintiff sued for injuries sustained in an automobile-train collision with the defendant-railroad. The plaintiff was on the railroad tracks despite the fact that barriers and reflectors indicated that the place of the accident was not a crossing. The trial court entered a judgment notwithstanding the verdict for the defendant which the appellate court upheld. The appellate court found that a person on railroad tracks at points other than an established crossing is a trespasser. The sole duty owed to such a trespasser is not to harm him willfully or wantonly, or to set traps or recklessly expose him to danger. Therefore, when the plaintiff in the instant case merely alleged that the train's speed, which was within allowable limits, caused the accident, this was insufficient to hold the defendant-railroad liable.

The Florida Supreme Court[122] held that a restaurant owner would not be liable for a latent defect on the premises if the defect could not have been discovered by reasonable care.[123] The court pointed out that the oft-stated rule that the owner has a *non-delegable* duty to keep its premises reasonably safe could not be used to impose liability without fault. The court stated:

The duty to exercise that reasonable care is non delegable in the

117. For, in a maritime action, the comparative negligence doctrine is applied; *accord*, Cashell v. Hart, 143 So.2d 559 (Fla. 2d Dist. 1962).

118. City of Boca Raton v. Mattef, 91 So.2d 644 (Fla. 1956); Goldberg v. Straus, 45 So.2d 883 (Fla. 1950); Freeman v. Hallevue, Inc., 179 So.2d 859 (Fla. 3d Dist. 1965).

119. Romedy v. Johnston, 193 So.2d 487 (Fla. 1st Dist. 1967).

120. *Contra*, Fred Howland, Inc. v. Morris, 143 Fla. 189, 196 So. 472 (1940) (dictum); Meiers v. Fred Koch Brewery, 229 N.Y. 10, 127 N.E. 491 (1920).

121. 179 So.2d 374 (Fla. 3d Dist. 1965).

122. *Accord*, Mai Kai, Inc. v. Colucci, 205 So.2d 291 (Fla. 1967) (involving a restaurant owner).

123. *Accord*, Washington Ave. Food Center Inc. v. Modlin, 205 So.2d 295 (Fla. 1967) *revg*, 178 So.2d 596 (Fla. 3d Dist. 1965) (decision as to store owner reversed).

> sense that a contract for its performance by another will not necessarily eliminate an owner's responsibility. The duty however remains one of due care or reasonable care in preventing or correcting an unsafe condition, as opposed to absolute liability for a contractors negligence.[124]

In *Idzi v. Hobbs* a minor child sued for injuries sustained while playing in a trash fire on the defendant's land.[125] The district court of appeal affirmed a directed verdict for the defendant upon a finding that the minor realized the risk involved since his father had instructed him about the danger of fire.[126] The supreme court reversed holding that it is the child's *appreciation* of the danger and not mere *knowledge* of the danger which bars recovery under the attractive nuisance doctrine. If the child is too young or not impressed enough to forego the hazard and realize the risks involved, the defendant may not be relieved of liability.

The attractive nuisance doctrine discussed above is subject to certain modifications. Generally, the doctrine will only apply to a condition which constitutes a trap or an inherently dangerous condition.[127] In *Switzer v. Dye*[128] the court held that a pier five feet above water which had a depth of five feet did not constitute an unusual risk to a twelve year old child.[129]

The duty owed by an amusement park owner was at issue in *Ramadan v. Crowell.*[130] The plaintiff, a twelve-year-old child, was injured by a concrete block which fell on her when she attempted to scale a wall in the dressing room of a public pool. The child attempted to climb the wall when she thought the door to the dressing room was stuck. The appellate court reversed the verdict for the plaintiff. The duty of an amusement owner is to provide and maintain the facilities in a reasonably safe condition for the purposes to which they are adapted and apparently designed to be used. The appellate court reasoned that the purpose of the wall was privacy, not an object to be climbed, and absolved the owner from liability.[131]

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124. *Supra*, Mai Kai, Inc. v. Colucci, 205 So.2d 291, 293 (Fla. 1967).

125. 186 So.2d 20 (Fla. 1966), *rev'g*, Idzi v. Hobbs, 176 So.2d 606 (Fla. 1st Dist. 1965).

126. In order for the doctrine of attractive nuisance to apply it must be shown that:

(1) The place where the condition is maintained is one into which the possessor knows or should know that such children are likely to trespass.

(2) The possessor knows or should know the condition involves an unreasonable risk to harm such children.

(3) The children because of their youth do not discover the condition or realize the risk.

(4) The utility to the possessor of maintaining the condition is slight as compared to the risk to young children involved therein.

Ridgewood Groves, Inc. v. Dowell, 189 So.2d 188 (Fla. 2d Dist. 1966); 7-11 Inc. v. Mercier, 184 So.2d 523 (Fla. 4th Dist. 1966).

127. Carter v. Livesay Window Co., 73 So.2d 411 (Fla. 1954).

128. 177 So.2d 539 (Fla. 1st Dist. 1965).

129. *Accord*, Johnson v. Williams, 192 So.2d 339 (Fla. 1st Dist. 1966) (involving a stretched wire four feet above the ground).

130. 192 So.2d 525 (Fla. 2d Dist. 1966).

131. *Id.* at 528.

E. *Parent-Child*

Generally, a parent, simply because of his paternity, is not liable for the acts of his child. However, a parent may become liable for the acts of the child if:

(1) the parent entrusts the child with an instrumentality which becomes dangerous in the hands of a child.[132]
(2) the child is the parent's servant or agent.
(3) the parent knows of or consents to the wrongful act of the child.
(4) the parent fails to control the child when the parent knows or should know that others will be endangered.[133]

These principles were involved in *Seabrook v. Taylor*.[134] The plaintiff sued for damages from gunshot wounds inflicted by the defendants' child. The defendants had placed the gun in a place easily accessible to the child. The appellate court affirmed a verdict for the plaintiff, pointing out that although the case did not fall within one of the four categories noted above, the parents could still be held liable. The four categories are not "catch-all" exceptions and the parents' liability could still be decided on the broad basis of whether the parent was negligent. The court held that since the parents had placed a dangerous instrumentality in a place easily accessible to their child, a jury could find them guilty of negligence.

F. *Master-Servant*

In *Parmerter v. Osteopathic Gen. Hosp.*[135] the plaintiff sued the defendant-hospital for the negligent conduct of its employee. Evidence introduced at the trial showed that the plaintiff was under the direct supervision of her private doctor, that the defendant-hospital worked under the physician's orders, and that all treatment was rendered by the physician. The trial court entered a summary judgment for the defendant which the appellate court reversed. The appellate court noted that a hospital is liable for the negligence of an intern except when the intern is under the exclusive control of the treating physician. The question as to who is responsible depends on under whose control and direction the intern is working. This is generally a question for the jury especially when, as in the instant case, there was no evidence to show that the intern was not the hospital's agent or servant.

Whether the employee's negligent act was in the course of his employment was at issue in *Sands v. Ivy Liquors, Inc.*[136] The employee, manager of the defendant-owner's store, was horseplaying with two cus-

132. In Bullock v. Armstrong, 180 So.2d 479 (Fla. 2d Dist. 1965) the court held a question for the jury existed whether this exception was applicable to a parent who entrusted a five-year-old child with a stroller.
133. Gissen v. Goodwill, 80 So.2d 701 (Fla. 1955).
134. 199 So.2d 315 (Fla. 4th Dist. 1967).
135. 196 So.2d 505 (Fla. 3d Dist. 1967).
136. 192 So.2d 775 (Fla. 3d Dist. 1966).

tomers while holding a gun, and accidentally shot the plaintiff. The trial court entered a directed verdict for the defendant-owner. In reversing the action of the trial court, the appellate court held that an employer is liable for the negligent act of his employee, if the act is in the furtherance of the employer's business, even if forbidden. The court concluded that a jury might have found that the "horseplay" on the part of the employee was part of his duties to socialize with the customers, and therefore within the course of his employment.

When a complaint merely alleges that the employee's act was "in the course of her employment," without alleging that the act was necessary to carry out the employee's duties or pursuant to the employer's instructions, the complaint fails to state a cause of action against the master.[137]

In *Modlin v. City of Miami Beach*[138] the plaintiff sued the defendant-city for personal injuries sustained when a poorly constructed store mezzanine fell on the plaintiff. The complaint against the city alleged the negligent performance of an inspection of construction, with the resulting failure to discover the defect in the mezzanine. The trial court entered a summary judgment for the city which was upheld. The Florida Supreme Court held that the city was not immune from suit because the "inspection" constitutes an enforcement of the building code which is the task of an executive, not a judicial, quasi-judicial, legislative or quasi-legislative body.[139] Moreover, the city's liability would be dependent on the theory of respondant superior. The court held the inspector was not liable since he owed no duty to the plaintiff. It is only when a *public officer* owes a duty to a *specific party*, as opposed to the *general public*, and the specific party has a special and direct interest in the performance of that duty, that the public officer's negligence will render the city liable.[140] Therefore, in the instant case, since the "servant-public officer" was not liable, neither was the "master-city."

G. *Defenses*

1. ASSUMPTION OF RISK

Generally, one who voluntarily assumes the risk of being injured by a known danger is precluded from recovery. The two elements needed to invoke the doctrine are voluntary exposure of oneself to danger, plus knowledge and appreciation of danger.[141] These principles were involved in *Conroy v. Briley*.[142] The plaintiff, a tenant, sued for damages sustained in a fall on a common stairway which had no handrail. The appellate

137. Nettles v. Thornton, 198 So.2d 44 (Fla. 1st Dist. 1967).
138. 201 So.2d 70 (Fla. 1967).
139. Hargrove v. Town of Cocoa Beach, 96 So.2d 130 (Fla. 1957).
140. First Nat'l Bank v. Filer, 107 Fla. 526, 145 So. 204 (1933).
141. Bartholf v. Baker, 71 So.2d 480 (Fla. 1954).
142. 191 So.2d 601 (Fla. 1st Dist. 1966).

court approved the action of the trial judge in striking the defense of assumption of the risk. In the apartment building, the stairway involved was the only mode of ingress and egress. The appellate court concurred with the trial court's reasoning that since the stairway was the only one available, the plaintiff had no alternative and could not be said to have *voluntarily* assumed the risk.

In *Sonnenborn v. Gartrell*[143] the plaintiff, a domestic servant, was injured in a fall from a kitchen stool. The plaintiff's duties required her to use the stool while doing her work. The plaintiff had told the defendant-employer that she thought the stool was weak, but the defendant had allayed the plaintiff's fear by stating that she had just used the stool and had found it to be sturdy. The district court of appeal affirmed the trial court's action of striking the defense of assumption of the risk, and reasoned that since the plaintiff's misgivings had been allayed, the plaintiff could not have "appreciated the danger." However, the supreme court reversed and held the defense raised was still a question for the jury, although the court approved the law stated in the appellate court opinion.[144]

In *Watson v. Drew*,[145] an electric company lineman sued for injuries after he was thrown to the ground from the pole on which he was working. The defendant, driving a truck with a boom, had struck the pole with the boom. The appellate court held that the jury instruction on assumption of the risk was error, because the plaintiff could not assume the risk of the defendant's negligence which was a new element of danger. The plaintiff had a right to be where he was and when he ascended the pole, the defendant's negligence was not a *known* hazard to which he voluntarily exposed himself.[146]

2. OTHER DEFENSES

Whether a fire started by an arsonist or the hotel owner's failure to have the requisite safety features was the efficient proximate cause of a guest's injuries was the central issue in *Mozer v. Semenza*.[147] The appellate court held that the hotel owner's duty to maintain reasonably safe premises includes the duty to guard against the risk of fire. Therefore the arsonist's act was not an independent intervening cause.

In another case[148] involving the issue of proximate cause, the Florida

143. 179 So.2d 385 (Fla. 3d Dist. 1965).
144. Sonnenborn v. Gartrell, 189 So.2d 621 (Fla. 1966).
145. 197 So.2d 53 (Fla. 4th Dist. 1967).
146. The court stated:
> An injured party does not assume the risk of a new element of danger introduced into the scene by way of the defendant's ensuing negligence. *Id.* at 55.

Accord, American Cooperage Co. v. Clemons, 364 S.W.2d 705 (Tex. Civ. App. 1963).
147. 177 So.2d 880 (Fla. 3d Dist. 1965).
148. Sardell v. Malanio, 202 So.2d 746 (Fla. 1967).

Supreme Court held that the defendant who threw a football to a third party who ran into the plaintiff while trying to catch the ball may be liable for the plaintiff's injuries. The court held that since the defendant had *set in motion* the act of the third party whose attempt to catch the ball caused the plaintiff's injuries, the act of the third party was *not* an efficient intervening cause.

The case of *Sparks v. Ober*[149] also involved the issue of proximate cause. Two patrons in the defendant's tavern had an altercation. One departed, stating that he would return with a gun to kill the other. Upon his return with a gun he accidentally shot the plaintiff's decedent. The trial court dismissed the suit against the tavern owner who had heard the "brawler" state that he would return with a gun. In reversing the action of the trial court, the court of appeal held that it could not be said as a matter of law that the danger to the deceased was not foreseeable. Since the bartender had heard the threat, he should have at least warned the other patrons. Therefore, the question should have been resolved by a jury.

The First District Court of Appeal held that the mere fact that a hole in the floor is obvious does not preclude a suit by a party who fell as a result of the hole.[150] The court noted that the visibility of the hole was merely one factor to consider in weighing whether the plaintiff exercised due care for his own safety.

In order to maintain an action against a municipality, ordinarily one must comply with the statutory "notice of claim" requirement of such municipalities, and failure to do so may preclude one from maintaining his action.[151] However, even if there is no compliance, the municipality may be estopped from asserting the failure to give notice as a defense. This result was obtained in *Rabinowitz v. Town of Bay Harbor Islands*.[152] The Florida Supreme Court held that the municipality was estopped from benefitting from its notice statute. The court held that when the city officials are aware of the claim, investigate it, and lead the claimant to believe that filing of notice is unnecessary, then the filing of such notice is waived.[153]

V. INTENTIONAL TORTS

A. *Malicious Prosecution*

In order to sustain an action for malicious prosecution, the plaintiff must prove: (1) the commencement or continuance of original criminal

149. 192 So.2d 81 (Fla. 3d Dist. 1966).

150. Pensacola Greyhound Racing, Inc. v. Williams, 193 So.2d 628 (Fla. 1st Dist. 1967); *accord*, City of Jacksonville v. Stokes, 74 So.2d 278 (Fla. 1954).

151. Butts v. Dade County, 174 So.2d 782 (Fla. 3d Dist. 1965).

152. 178 So.2d 9 (Fla. 1965), *quashing* 168 So.2d 583 (Fla. 3d Dist. 1964); *accord*, Carpenter v. City of St. Petersburg, 167 So.2d 772 (Fla. 2d Dist. 1964).

153. 178 So.2d 9, 13 (Fla. 1965).

or civil proceedings; (2) its legal causation by the present defendant against the plaintiff; (3) its bona fide termination in favor of the present plaintiff; (4) the absence of probable cause;[154] (5) malice; and (6) damages.[155]

In a malicious prosecution action, the defendant may not claim immunity on the ground that the charges in the primary action were barred by the statute of limitations, even if the bar was evident on the face of the warrants and affidavits.[156] The damage to the plaintiff accrues when he is maliciously arrested, regardless of whether or not the process is valid.[157] However, the dismissal of a charge because the defendant's agents fail to appear and prosecute is not a "bona fide termination" and a subsequent action for malicious prosecution cannot be sustained.[158]

B. *Interference with Contract*

The elements needed to establish a tortious interference with a business or a contractual relationship are: (1) the existence of a business or contractual relationship under which the plaintiff has legal rights; (2) the attempt to secure an advantage by fraud, wherein the defendant induces the plaintiff's business associate to act in a way which destroys the relationship; and (3) damage to the plaintiff.[159]

In *Mead Corp. v. Mason*[160] the court held that both a seller and a purchaser can be liable for intentionally interfering with a plaintiff-real estate broker's advantageous business relationship. Thus when the plaintiff-broker brings the seller and purchaser together, but the parties enter into a contract which specifically excludes the broker, the action may be sustained.

In a case of first impression the Third District Court of Appeal held that an action in tort would lie for a tortious interference with an expected bequest.[161] The court noted that in order for the plaintiff to prevail he would have to prove that the testator had a fixed intention to make a bequest in the plaintiff's favor and that it was highly probable that the

154. Probable cause has been defined as whether there is 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. Clements v. Eastern Air Lines, Inc., 183 So.2d 264 (Fla. 3d Dist. 1966).

155. Iowa Mut. Ins. Co. v. Gulf Heating & Refrigeration Co., 184 So.2d 705 (Fla. 2d Dist. 1966); Community Nat. Bank v. Burt, 183 So.2d 731 (Fla. 3d Dist. 1966).

156. De Benedictis v. Califano, 181 So.2d 742 (Fla. 1st Dist. 1966).

157. Tobey v. Orr, 92 Fla. 964, 111 So. 110 (1926).

158. Freedman v. Crabro Motors, Inc., 199 So.2d 745 (Fla. 3d Dist. 1967).

159. Moss v. Sperry, 140 Fla. 301, 191 So. 531 (1939); Retzky v. J.A. Cantor Assoc. Inc., 192 So.2d 24 (Fla. 3d Dist. 1966); John B. Reid & Assoc., Inc. v. Jimenez, 181 So.2d 575 (Fla. 3d Dist. 1965) (the action was sustained when the defendant set up a corporation which he represented as thriving, but which was merely a shell to purchase preperty directly from the seller to avoid paying the plaintiff broker a commission).

160. 191 So.2d 592 (Fla. 3d Dist. 1966).

161. Allen v. Leybourne, 190 So.2d 825 (Fla. 3d Dist. 1966).

intention would have been consummated but for the wrongful act of the defendant.[162] It is important to note that the plaintiff need not prove the existence of a valid contract in order to recover.

C. *Libel and Slander*

In *McNayr v. Kelly*[163] the Florida Supreme Court held that statements made by an executive county official in connection with his office are absolutely privileged from actions for libel or slander. Thus statements by the Dade County Manager to the Board of County Commissioners regarding a former Dade County sheriff could afford no basis for a libel or slander action.[164]

In *Gates v. Utsey*[165] the plaintiff sued for slander and disparagement of title. The plaintiff alleged that the defendant's agent delivered a false deed to the defendant and that the defendant refused to quitclaim the land to the plaintiff, which inhibited the plaintiff from selling to a third party. The trial court dismissed the plaintiff's complaint because of his failure to allege that the defendant falsely, wilfully and maliciously had the false deed recorded. The appellate court reversed, holding that in order to sustain the action it need not be shown that the defendant actually knew the deed was a forgery when it was recorded. Malice merely means a lack of legal justification and will be presumed if the disparagement is false. However, should the defense be based on an asserted privilege, the plaintiff would have to prove actual or genuine malice.[166]

The mere fact that a plaintiff alleges that he does not like the manner in which an article is written, does not afford the basis for a sufficient complaint, without showing that the article was defamatory.[167]

VI. DAMAGES[168]

In a case of first impression the Second District Court of Appeal has held that an insurer is not liable for the punitive damages its insured becomes legally obligated to pay.[169] The court's decision was based on

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162. *Id.* at 829.

163. 184 So.2d 428 (Fla. 1966), *rev'g* Kelly v. McNayr, 175 So.2d 568 (Fla. 3d Dist. 1965).

164. For decisions holding that the absolute privilege will also extend to city officials, see Bauer v. City of Gulfport, 195 So.2d 571 (Fla. 2d Dist. 1967) (city councilman) and Saxon v. Knowles, 185 So.2d 195 (Fla. 4th Dist. 1966).

165. 177 So.2d 486 (Fla. 1st Dist. 1965).

166. 3 RESTATEMENT OF TORTS §§ 624, 625 (1938). In order to recover punitive damages, the plaintiff must prove malice in fact. Brown v. Fawcett Publications, Inc., 196 So.2d 465 (Fla. 2d Dist. 1967).

167. Kurtrell & Co. v. Miami Tribune, Inc., 193 So.2d 471 (Fla. 3d Dist. 1967).

168. For decisions involving the damages recoverable in a wrongful death action see section II *supra*.

169. Nicholson v. American Fire & Cas. Ins. Co., 177 So.2d 52 (Fla. 2d Dist. 1965).

the principle that punitive damages are awarded as a deterrent.[170] Therefore, stated the court:

> . . . to allow drivers . . . to shift the responsibility for this type of penalty to an insurance company contravenes the public policy of the state.[171]

In another case of first impression a Florida court has allowed a claim for damages for mental pain and anguish unaccompanied by any physical injury.[172] The court held that such damages, although not appropriate in a negligence action, are appropriate in an action arising solely in tort where malice and indifference to another's rights are alleged.[173] In the instant case the defendant made statements to the plaintiff, a minor child, concerning her mother's adultery with the intent to shame and shock the young child.

The Third District Court of Appeal has allowed recovery for special damages for the loss of use of machinery which was totally destroyed.[174] Prior to this decision such a claim had only been allowed for property which had been partially destroyed.[175]

In *Winn-Dixie Stores, Inc. v. Holmes*[176] the court allowed the plaintiff, a married woman, to recover for her future medical bills, since the evidence sufficiently established that she would be responsible for them. Usually, the husband will join in his wife's suit to recover for the loss of her companionship and service and for the medical expense incurred in her behalf.[177]

In *Salvador v. Munoz*[178] the defendant appealed from a verdict for the plaintiff, alleging that the court's instruction on recovering damages for permanent injury was error. The appellate court affirmed and held that the plaintiff's testimony of continuing pain and inability to work was sufficient to justify the jury instruction even though it was uncorroborated by any medical testimony.

When a jury returns a verdict for the plaintiff-wife in a personal injury action, but fails to award damages for the husband's derivative claim, a new trial should be granted.[179] For, at the very least, the verdict

170. Smith v. Bagwell, 19 Fla. 117 (1882); Sauer v. Sauer, 128 So.2d 761 (Fla. 2d Dist. 1961).

171. 177 So.2d 52, 54 (Fla. 2d Dist. 1965).

172. Korbin v. Berlin, 177 So.2d 551 (Fla. 3d Dist. 1965).

173. *See* Slocum v. Food Fair Stores, Inc., 100 So.2d 396 (Fla. 1958).

174. Wajay Bakery, Inc. v. Carolina Freight Carriers Corp., 177 So.2d 544 (Fla. 3d Dist. 1965).

175. Airtech Service, Inc. v. MacDonald Constr. Co., 150 So.2d 465 (Fla. 3d Dist. 1963).

176. 190 So.2d 19 (Fla. 1st Dist. 1966).

177. Busby v. Winn & Lovett Miami, Inc., 80 So.2d 675 (Fla. 1955).

178. 193 So.2d 442 (Fla. 3d Dist. 1966).

179. Correll v. Elkins, 195 So.2d 27 (Fla. 1st Dist. 1967); Fejer v. Whitehall Laboratories, Inc., 182 So.2d 438 (Fla. 3d Dist. 1966).

indicates that the jury patently failed to consider all the elements of damages involved, especially when the plaintiff-wife had not sought any compensation for her medical expenses.

In *Levine v. Knowles*[180] the plaintiff sued the defendant for maliciously and wilfully cremating his dog. The appellate court allowed the recovery of compensatory and punitive damages. The court held that a dog owner can sue for the intrinsic value of his dog, wrongfully destroyed, in the same manner as he would sue for any other property wrongfully destroyed. Moreover, if the act was done in a willful and malicious manner, punitive damages may be recovered.

The Fourth District Court of Appeal has held that the mere use of descriptive words to label an act as "willful and malicious" is insufficient to state a cause of action for punitive damages.[181] In order to recover for punitive damages, the plaintiff must allege some general facts of fraud, malice, gross negligence or oppression.[182]

In *Bonvento v. Board of Public Instruction*[183] the Florida Supreme Court held that a claim bill appropriating money from school board funds for an injured student was not violative of the Florida Constitution, which prohibits using school funds for other than "school purposes."[184] The student had been injured in a physical education class. The court reasoned that since school funds may be used to repair damaged school equipment, they could be used to repair a damaged body.

VII. NUISANCES

In order to determine whether an act constitutes a nuisance, the test is:

> Was the act or use a reasonable exercise of the dominion which the owner of property has by virtue of his ownership over his property having regard to all interests affected, his own and those of his neighbors, and having in view also, public policy.[185]

In *Central Hardware Co. v. Stampler*[186] the plaintiff tripped over a vinyl mat placed on a public sidewalk by a retail store owner. A judgment for the plaintiff was affirmed, even though the "nuisance" was found on city property. The court held that if an abutting owner creates a servitude upon a sidewalk which is an addition to the general use the public may make of the sidewalk, he is bound to maintain the sidewalk so it will

180. 197 So.2d 329 (Fla. 3d Dist. 1967).
181. Rice v. Clement, 184 So.2d 678 (Fla. 4th Dist. 1966).
182. Winn & Lovett Grocery Co. v. Archer, 126 Fla. 308, 171 So.2d 214 (1936).
183. 194 So.2d 605 (Fla. 1967).
184. FLA. CONST. art. XII, § 13.
185. Mercer v. Brown, 190 So.2d 610, 611 (Fla. 1st Dist. 1966).
186. 180 So.2d 205 (Fla. 3d Dist. 1965).

not become a nuisance. If he fails to do so, he may be liable to persons injured thereby.

VIII. LEGISLATION

The Florida Legislature has passed a bill which, to a limited degree, lowers the barrier of the state's sovereign immunity from suit.[187] The new statute provides that if the state, its agencies or subdivisions initiates a suit in tort, such action shall constitute a waiver of sovereign immunity. This waiver only allows the defendant to *counterclaim* for any damages arising out of the same transaction or occurrence.

The reader's attention is also called to the new jury instruction forms which have been approved by the Florida Supreme Court.[188]

187. Fla. Laws 1967, ch. 67-2204. The act became effective on September 1, 1967.
188. *In re* Standard Jury Instructions, 198 So.2d 319 (Fla. 1967).