5-1-1956

Torts

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This memorandum continues the survey of tort cases begun initially by Anderson and Smith[1] and follows, generally, their outline. Our delineation specifically eliminates any consideration of the cases on Workmen's Compensation; avoids those on damages; and allows only an incidental glimpse of procedure. Nevertheless, the necessity to review the interpretation, application, and enforcement of tort principles required the Supreme Court of Florida to write opinions in some two hundred cases[2] in the brief period since the prior survey. Even so, one is hard pressed to find much that is important, not to say new, and it is not intended here simply to count cases in which the Court has been compelled to repeat, almost monotonously, basic and well established principles. Only a few citations are needed to serve as memory refreshers. Further, most of the cases in which the Court had to pass on the sufficiency of the evidence justifiably can be ignored.

The Intentional Torts

With the daily newspapers continually filled with stories of violent crimes, and lesser unlawful physical activities, it is nothing less than amazing that there have been no cases involving the physical contact torts, and very few cases involving any of the other intentional torts, to reach the Supreme Court.

False Arrest and False Imprisonment

The significant development was not provided by the Court but by the Florida Legislature. Throughout the long, everlasting search for, and continual testing of, equitable and yet practicable rules of conduct, the trend of philosophical advancement has required the progression to be from rigid to flexible; from rules that needed no interpretation to rules which require considerable interpretation plus enlightened application and enforcement. "Thou shall not . . ."[3] was direct, straightforward, and unequivocable. While, on the other hand, the later rule that has been called "Golden"[4] is subject to varying individual interpretation. The simple language of the rule is an affirmative mandate commanding positive action by one party regardless of the interests or desires of the other party, and without consideration of any of the various rights with which the common law endows him. At this point the objection usually begins, "But the

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1. 8 Miami L.Q. 477 (1954).
2. The cases surveyed are reported in Volumes 68 through 79 of the Southern Reporter, Second Series.
3. Exodus XX.
4. St. Matthews VII, 12.

rule means . . . ." thereby proving the only proposition advanced here: interpretation is required.

The Florida Legislature had this problem, among others, before it while considering a change in the policy relating to false arrest and false imprisonment, and decided to add an additional complicating factor. The Statute[5] as now enacted provides that merchants and their employees may take into custody, and reasonably detain, without incurring any civil or criminal liability, persons whom they have *probable cause* to believe have unlawfully taken goods offered for sale. Of course, *probable cause* is not a new concept, and courts and juries have often had to interpret facts and circumstances in order to determine whether, in their opinion if not in others', probable cause existed. But this legislative action is a step in the direction of flexibility and more uncertainty for the members of the general public.

Admitting that merchants are plagued by shoplifters, and that that kind of thievery is a serious problem involving considerable loss, how far should merchants be permitted, in order to prevent a theft, to invade the rights of those they invite into their stores to inspect, examine, test, use, and develop a possessory interest in their property? If, as the invitee leaves he feels a hand, inevitably heavy, on his shoulder and hears the dreaded "You are under arrest!" with all the attendant embarrassment, inconvenience, and consequent invasion of privacy; and, if it should be determined that nothing had been unlawfully taken, is the whole incident to be minimized and terminated with the charming generality that "I had probable cause"?

Perhaps, as a practical matter, the merchants are not likely to change their methods in view of this liberalization of their right to arrest, nor is the public likely to realize there has been a change in the law which, theoretically, requires a more careful appearance of detachment in their individual conduct. When everything is fine, friendly, and frictionless there is hardly any need for stated principles, but when relationships are difficult the rules should be clear and permit as little difference of opinion as possible. Principles should not be easily changed to accommodate particular interests.

Laymen, and some uneducated lawyers, have frequently criticized the common law as being protective of property as opposed to individual rights, it apparently being difficult for them to understand the concept that it is the right of the individual, even though a property owner, and not the object itself which is given the protection of the law. The Legislature balanced this right against the rights of the invitees, and legislated in favor of the rights of the owner of the property.

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5. Laws of Fla., c. 29668 (1955).

Defamation

There is one case which has evoked such widespread interest and comment that it can not be passed without notice here. "Don't let that man speak. I know him and he is communist." That statement at a public meeting before fifteen hundred persons formed the basis of a complaint which the Court found stated a cause of action, explaining:

> To charge that one is a member of the Communist Party which has as its object the overthrow of the Government of the United States and of Florida by force or violence and the abolishment of free speech, free assembly and freedom of religion, which is the compete antithesis of the American constitutional form of government, and that the methods used by such Communist Party include treachery, deceit, infiltration into governmental and other institutions, espionage, sabotage, and terrorism, necessarily causes injury to the person spoken of in his social, official and business relations of life. Such words hold him up to scorn, contempt and ridicule, causing such person to be shunned by his neighbors, and in effect charges such person with being a traitor to his country and with being a member of an organization with a primary purpose of the destruction by force or violence of the very Government which protects him.
>
> It is difficult for us to conceive of any words or charge which would be more slanderous per se than the words used in this case, at the time and place and under the circumstances set forth . . . .[6]

Absolute privilege. The Court had occasion to extend the rule of absolute privilege of statements made in judicial proceedings to defamatory words published in the course of a quasi-judicial hearing before the State Insurance Commissioner;[7] and to confirm the privilege for the members of the grand jury.[8]

Limitations. The Court determined that the two year statute of limitations applicable to actions for libel and slander was equally applicable to actions for slander of title for the malicious disparagement and impairment of the vendibility of title to real property.[9]

Negligence Cases

During the period since the prior survey, the tort cases involving a consideration of negligence maintained their large numerical majority over those of the intentional torts. Nevertheless, none can be called a landmark, and only a few are of sufficient interest to be discussed.

Duty. "For every wrong there is a remedy, but the remedy must be sought against the negligent party." The owner of a building is not necessarily subjected to liability simply because the person happened to

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6. Joopanenko v. Gavagan, 67 So.2d 434 (Fla. 1953).
7. Robertson v. Industrial Ins. Co., 75 So.2d 198 (Fla. 1954).
8. Ruon v. Shaw, 77 So.2d 455 (Fla. 1955).
9. Old Plantation Corp. v. Maule Ind., 68 So.2d 180 (Fla. 1953).

be in the building at the time of an injury. The Court said that the owner of the building did not have a duty to anticipate an injury which resulted to an invitee when a mother conveyed her child, in a stroller, down an escalator.[10] So, too, the owner and operator of a gasoline filling station through which many people walked for a short cut, was said to owe no duty to an injured licensee "except not to harm him wilfully or wantonly, or to set traps for him, or to expose him to danger recklessly or wantonly." And, grease left carelessly on the areaway was not a violation of any duty.[11]

Notice. "To be liable, the creator of a dangerous condition must know about and be responsible for his creation." In a suit by a woman customer in a super market who was injured when she slipped and fell, the trial court erred in not charging that the defendant must have actual or constructive notice of the slippery condition to be liable.[12]

Attractive nuisance. The Florida Legislature took notice of the appalling number of children who had been entombed in old ice boxes. Beside making it unlawful to abandon any such containers which can not be opened from the inside, and providing for a fine and imprisonment, the Legislature specifically declared all such containers to be attractive nuisances to children.[13]

Res ipsa loquitur. "Negligence will not be presumed, it must be proven, but when direct proof is wanting and such circumstances are shown as to leave no conclusion except that the defendant was at fault, a prima facie case may arise justifying the application of the res ipsa loquitur doctrine. One who proves specific negligence may not avail himself of the doctrine."[14] Further, in an action for damages caused by an exploding beverage bottle, it was held incumbent on the plaintiff to show there had been no injury to the bottle sufficient to cause the explosion from improper or careless handling after it had left the custody of the bottler before the doctrine of re ipsa loquitur would be applicable.[15]

Contributory negligence. "It is the duty of all persons to observe ordinary care for their own safety,"[16] and forgetfulness of a known danger is contributory negligence in itself, where it is not consistent with the exercise of ordinary care. A prudent person does not proceed in the dark in an unknown place when there is no pressing emergency to do so and when a clear opportunity exists to return to a safe place. So, a paying guest in a hotel who entered a dark hallway knowing of the existence of a stairway descending from the hall, but, nevertheless, proceeded and, attempting to

10. Heps v. Burdine's, 69 So.2d 340 (Fla. 1954).
11. Bruno v. Seigel, 73 So.2d 674 (Fla. 1954).
12. Carls Markets v. Meyer, 69 So.2d 789 (Fla. 1953).
13. Laws of Fla., c. 29707 (1955).
14. Roth v. Dade County, 71 So.2d 169 (Fla. 1954) citing specifically as the leading case in which the doctrine of res ipsa loquitur was discussed at length and the circumstances under which it will be applied defined, West Coast Hospital Ass'n v. Webb, 52 So.2d 803 (Fla. 1951).
15. Miami Coca-Cola Bottling Co. v. Reisinger, 68 So.2d 589 (Fla. 1953).
16. Brant v. VanZandt, 77 So.2d 858 (Fla. 1955).

find the light switch, plunged down the stairway, was guilty of contributory negligence as a matter of law.[17]

Automobiles

Such a high percentage of the cases reviewed for this survey involve parties who were using automobiles so as to attract particular notice. Apparently, the automobile is here to stay, and, just as obviously, we have not yet learned to adequately cope with it. Never before in history has the public been so deluged with signs, warnings, and threats relating to a limited number of laws and regulations; never before has there been such a tremendous enforcement effort; and, probably, never before has there been such universal violation.

Judicial notice. The Court had occasion to say that "it is common knowledge that motorists now traverse the highways all times of the day and night," and that even in rural areas freight trains are not expected to block the highway at two o'clock in the morning unprotected by adequate warning lights.[18]

Negligence. It is possible that a driver may be guilty of gross negligence if he insists on driving while he is ill or weak, depending upon the degree of illness, or if he has a premonition of a stroke. However, in the particular case before the Court the complaint was held insufficient. Negligence will not generally be imputed to one who suddenly suffers an attack or stroke, which results in loss of consciousness, and causes an injury.[19]

Rules. Proximate cause, assumption of risk, res ipsa loquitur, last clear chance, sudden emergency, and contributory negligence were all brought into the Court under various circumstances and with varying results, but none of the cases were outstanding. For example, the Court had occasion to say that the last clear chance doctrine is founded upon the actual or implied knowledge of the defendant, when he attempts to set up the negligent conduct of the plaintiff as a bar under a plea of contributory negligence. No liability is predicable when the injured person's knowledge, actual or implied, of the danger causing the injury either surpassed or even equaled that of the defendant when the peril arose, as a pedestrian crossing a busy boulevard at night.[20] Nor can one depend upon the theory of sudden emergency when his own negligent running of a red stop light brings such emergency into existence.[21]

Vicarious liability. The Court reaffirmed the absolute responsibility of the owner of an automobile for the negligence of those who operate it

17. *Ibid.*
18. Atlantic C. L. Ry. v. Johnston, 74 So.2d 689 (Fla. 1954).
19. Baker v. Hausman, 68 So.2d 572 (Fla. 1953).
20. Springer v. Morris, 74 So.2d 781 (Fla. 1954).
21. Seitner v. Clevenger, 68 So.2d 396 (Fla. 1953).

under his license, with his express or implied knowledge and consent. Such owner will not be permitted to refute the relationship, implied in law, which makes him liable. A study of the origin and application of the doctrine of vicarious liability shows that it is based squarely upon the doctrine of *respondeat superior* and arises from a principal and agent relationship implied in law. As far as the use of automobiles is concerned, the doctrine is not limited to situations where the strict relationship of master and servant exists, but the owner always stands in the relation of superior to those whom he voluntarily permits to use his car. Under this strict doctrine, a passenger in the car, who was injured because of the negligence of the driver who had borrowed the car for a purely personal purpose, could recover from the owner even though the passenger could not recover from the driver because of the marital relationship existing between them.[22]

This doctrine of *respondeat superior* extends entirely through a bailment for hire where the contract does not contain any restrictions on loaning the car, so that there is an implied consent for an acquaintance of the bailee to use it. The owner was, therefore, liable for the injury to a pedestrian struck by the car while being driven by the acquaintance of the bailee.[23] On the other hand, in another suit based on these same facts, the Court held that proof of actual ownership of the car causing the injury is not indispensable to recovery, saying that, "the misfortune of the injured person should not depend entirely upon the repository of the legal title; nor is recovery dependent upon perfection of title in a given person." Accordingly, a bailee has sufficient title to be responsible for injuries caused by the one to whom he entrusted the car.[24]

Procedure

Although the procedural problems are generally without the scope of this memorandum, the mentioning of a few points, if only briefly, is irresistible.

Service of Process upon Minors. In a tort action for injuries caused by a minor,[25] the parents being joined, service of process was secured by serving the infant's mother as guardian and the person in whose care and custody the minor was at the time of the service of process. The Court held that this was insufficient to give jurisdiction of the minor as not being in full compliance with the requirements of the Florida Statute which provides in part:

> The courts of this states shall obtain jurisdiction of minors . . . by *further* serving the writ or summons upon the guardian ad litem

22. May v. Palm Beach Chem. Co., 77 So.2d 468 (Fla. 1955).
23. Fleming v. Alter, 69 So.2d 185 (Fla. 1954).
24. Frankel v. Fleming, 69 So.2d 887 (Fla. 1954).
25. Gissen v. Goodwill, 74 So.2d 86 (Fla. 1954).

thereafter appointed by the court to represent said minor. (Italics added).[26]

Limitations. Ordinarily, the statute of limitations attaches at once where an injury, however slight, is sustained in consequence of the wrongful act of another and the law affords a remedy therefor. However, where the plaintiff received an overdose of x-ray treatment but was aware of nothing indicating an injury, the statute of limitations did not commence to run until the plaintiff was first put upon notice that she had sustained an injury or had reason to believe that her right of action had accrued.[27]

Trial. The Court must have had difficulty repressing a smile when it found it necessary to hold that an opening statement to the jury is no basis on which to grant a directed verdict;[28] and, of course, the Court has repeatedly held that a summary judgment should be entered where there is no genuine issue as to any material fact,[29] with all doubts being resolved against the granting of summary judgments.[30] In a suit arising out of an automobile accident, the defendant was not entitled to a summary judgment where affidavits on the defendant's ownership of the car, which caused the damage, were in conflict.[31]

Appeal. In a personal injury suit arising out of a collision between a bicycle and a semi-trailer van, a police officer, who was not an eyewitness to, but who investigated, the accident, testified to his conclusion as to who did what at the scene of the accident and gave his opinion that the plaintiff was at fault. No objection was made to the question, "Who do you believe was at fault?", nor was any motion made to strike his answer. Again, it is well settled that the Supreme Court may not consider any grounds of objections to admissibility of the evidence which were not specifically made in the trial court.[32]

Conclusion

Even a rapid summary survey of the cases reviewed for this memorandum compels the conclusion that the Supreme Court is required to devote far too much of its time to cases which do not warrant consideration by such a high tribunal. The Court is reviewing elementary procedural problems and simple applications of legal principles to factual situations when the rights of the parties involved in the cases could be well protected by an intermediate appellate court. This article must conclude, as it began, with the observation that the Court is burdened with cases in which it is compelled to repeat, almost monotonously, the basic, well established principles of law. It appears doubtful that the Court has sufficient time to adequately consider the few cases which really require mature, experienced reflection, deliberation and decision.

26. Fla. Stat. § 47.23 (1953).
27. Miami v. Brooks, 70 So.2d 306 (Fla. 1954).
28. Van Hoven v. Burk, 71 So.2d 158 (Fla. 1954).
29. Fields v. Quillian, 74 So.2d 230 (Fla. 1954).
30. Fouts v. H. F. C., 75 So.2d 772 (Fla. 1954).
31. Johnson v. Studstill, 71 So.2d 251 (Fla. 1954).
32. Lineberger v. Domino Canning Co., 68 So.2d 357 (Fla. 1953).