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Torts

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TORTS

DUANE ANDERSON* and J. ALLEN SMITH**

This article relies on some 140 cases that arose in Florida during the past two years;¹ they are presumably all of that period that can be readily recognized as (1) sounding in tort and (2) turning, for purposes of the decision, on substantive tort principles. Two conclusions stand foremost: one is that when troubles come they come not single file but in battalions, with the result that the Florida Supreme Court finds it necessary to give much of its time to cases that differ factually somewhat but that add little of interest to existing doctrine;² consequently, this article does not attempt to analyze separately each reported decision; the second is that a tort still has to be defined negatively as not a contract,³ with a result that in prohibiting complete coverage to writers, the scope of tort liability permits them a dangerously wide range of selection and an uncontrolled degree of discretion. These notes, then, consciously leave out such matters as subterranean water rights,⁴ significant problems of evidence and procedure that may, in litigation be of more importance than the substantive tort law, and, the half dozen or so cases on public and private nuisance that lodge chiefly in equity.⁵

The material for this article is divided into the following three main topics and sub-topics:

THE INTENTIONAL TORTS

- I. Assault and Battery
- II. Conversion
- III. False Imprisonment
- IV. Malicious Prosecution
- V. Defamation

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1. The cases covered are reported in Volumes 58 through 67 Southern Reporter 2nd Series.

2. Some ten or more cases merely sustained the findings of the jury, e.g., *Loftin v. Nixon*, 53 So.2d 823 (Fla. 1951); *Bulmer v. Strawn*, 53 So.2d 315 (Fla. 1951); *Atlantic Coast Line R. v. Smith*, 53 So.2d 301 (Fla. 1951).

3. For a trenchant analysis of tort liability see COHEN & COHEN, *READINGS IN JURISPRUDENCE* 196 (1st ed. 1951).

4. *Labruzzo v. Atlantic Dredging & Const. Co.*, 54 So.2d 673 (Fla. 1951).

5. *State v. Franklin Press*, 61 So.2d 508 (Fla. 1952) (sports sheet held not a nuisance); *McCloskey v. Martin*, 56 So.2d 916 (Fla. 1952) (sign blocking restaurant constitutes a nuisance); *State v. Miami*, 53 So.2d 636 (Fla. 1951) (garbage disposal plant not a nuisance); *Reaver v. Martin Theatres of Florida*, 52 So.2d 682 (Fla. 1951) (drive-in next to airport not a nuisance); *Burnett v. Rushton*, 52 So.2d 645 (Fla. 1951) (noisy neighbors constituted a nuisance).

THE NEGLIGENCE CASES

- I. The Meaning and Proof of Negligence
 - Duty and Reasonable Care
 - Proximate Cause
 - Foreseeability
 - Attractive Nuisance
 - Res Ipsa Loquitur
- II. Contributory Fault and Defenses
 - Contributory Negligence
 - Assumption of Risk
 - Imputed Negligence
 - Last Clear Chance
- III. Vicarious Liability
- IV. Statutory Problems
 - Workmen's Compensation
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 - The Jones Act
 - Railroad Statutes
- V. A Study in Slip and Fall
- VI. Contract or Tort

GOVERNMENTAL IMMUNITY AND COROLLARY RULES

THE INTENTIONAL TORTS

The intentional torts, as distinct from the negligent torts, were represented during the period under survey by approximately a dozen cases, almost half of which involved the torts of defamation, libel and slander.

I. Assault and Battery

The ancient torts of assault and battery arose in only one situation:⁶ a county judge struck a disabled veteran after the veteran called the judge a liar. Justice Terrell in an interesting concurring opinion took judicial notice that name-calling has "long been a part of the fighting folklore of the rural South" but deprecated violent reaction to it by a judicial officer.⁷ The veteran recovered damages, since in the absence of a statute, as in Mississippi,⁸ words are not an adequate provocation for a battery. Nor did the court clothe the judge with any immunity as a result of his judicial position, such as he might have enjoyed in a case of false imprisonment or slander.⁹ The most interesting feature of the case is the broad base

6. *Anderson v. Maddox*, 65 So.2d 299 (Fla. 1953).

7. *Id.* at 301.

8. *Miss. CODE ANN.* § 1059 (1942).

9. *E.g.*, *Rush v. Buckley*, 100 Me. 322, 61 Atl. 774 (1905) (false imprisonment);

provided by the court for the assessment of damages. Once the tort is established, damages for actual physical harm become possibly a minor item; embarrassment, humiliation, and degradation each may take its toll, and the court expressly declares punitive damages appropriate to the verdict.¹⁰

II. Conversion

The one complaint in conversion was denied by the court, which disposed of the case on property principles of abandonment.¹¹ There were no cases in trespass to personal property or of simple trespass to land.

III. False Imprisonment

In false imprisonment, the court, in one case, allowed a plaintiff to recover punitive damages from a municipal judge, who with imputed knowledge that he exceeded his jurisdiction, nevertheless ordered the rearrest of the plaintiff who was free on writ of habeas corpus.¹² This allowance of punitive damages is difficult to reconcile with the older and leading case in Florida on false imprisonment, *Winn & Lovett v. Archer*.¹³ There, the court upheld compensatory damages but rejected punitive damages, even though the defendant, through a servant, locked up the plaintiff, an elderly woman, in a small room and subjected her to false charges, verbal abuse, and marked humiliation. The difference lies in a broader interpretation of the word malice now given by the court. Now the court construes malice as "a wrongful act without reasonable excuse"¹⁴ and not as behavior based on anger or vindictiveness. In a second and final case during the two-year period just past, the court rejected a claim in false imprisonment in a situation where the sheriff and his deputies acted under color of office and without actual knowledge.¹⁵

IV. Malicious Prosecution

Despite the adage that actions for malicious prosecution are not favored in law, the judges, in the three cases before them, awarded

Irwin v. Ashurst, 158 Ore. 61, 74 P.2d 1127 (1938) (defamation); see also *Karelas v. Baldwin*, 237 App. Div. 265, 261 N.Y. Supp. 518 (2d Dep't 1932).

10. In reversing the lower court in *Anderson v. Maddox*, 65 So.2d 299, 301 (Fla. 1953) Justice Thomas said:

We think the appellant was entitled to a determination by a jury of his actual damages, and, if he proved to the jury's satisfaction, to have the jury fix the amount of punitive damages as well.

11. *Howard v. Sharlin*, 61 So.2d 181 (Fla. 1952).

12. *Farish v. Smoot*, 58 So.2d 534 (Fla. 1952) (Roberts, J. dissenting); Comment, 6 FLA. L. REV. 259 (1953). See also Florida Synopsis, 7 MIAMI L.Q. 564 (1953).

13. 126 Fla. 308, 171 So. 214 (1936); *but see* *Setzer v. Tyre*, 126 Fla. 139, 140, 171 So. 224, 225 (1936), which allowed punitive damages where plaintiff was not only falsely imprisoned but also beaten.

14. *Farish v. Smoot*, 58 So.2d 534, 538 (Fla. 1952).

15. *Warren v. Hall*, 66 So.2d 230 (Fla. 1953).

substantial damages to all plaintiffs. The cases involved unjust prosecution for forgery and larceny.¹⁶ Other than suggesting a trend toward easier recovery, the opinions indicate no major doctrinal changes. In determining fair damages, however, the court clearly approved a basis that takes into consideration the ability of the defendant to pay. To this end, Justice Mathews states: "A verdict of \$1,000 against a man with a small amount of property, or against a man who earns his living 'by the sweat of his brow' may be severe punishment, while the same amount of damages against a man worth a quarter of a million dollars would be no punishment."¹⁷ The court further pointed up the atavistic overcalls that intentional torts still show of their criminal-law past by awarding punitive damages as a concomitant to recovery. The court helpfully re-outlined the five text-book elements of the offense: (1) the instigation of the criminal proceeding by the defendant; (2) its termination in favor of the plaintiff; (3) the exercise of malice by the defendant; (4) want of probable cause for the prosecution; and (5) damages.¹⁸ Elements (3) and (4) remain difficult to define precisely, and, as might be expected, two of the three defendants presented as their chief defense semantic exercises within the framework of "probable cause" and "malice." Since the court allows the jury to accept or reject these elements, it is probable that they are, in effect, one and the same to be deduced from the behavior of the defendants.¹⁹

V. Defamation

The past two years evidenced considerable activity in the area of defamation though no case appeared at all to test the related right of privacy,²⁰ and in conformity with standard doctrine, the court held it libelous for one to falsely accuse a merchant, in writing, for refusing to pay his bills.²¹ In a second case the court went further to hold that words broadcast over the radio are actionable if the natural result is to impute hatred to another or to prejudice him in his occupation.²² In still another case involving numerous unseemly statements by members of a group concerning a fellow member, the court discussed the difference between

16. Killen v. Olsen, 59 So.2d 524 (Fla. 1952) (two Justices dissenting) (larceny); Maiborne v. Kuntz, 56 So.2d 720 (Fla. 1952) (larceny); Glass v. Parrish, 51 So.2d 717 (Fla. 1951) (forgery).

17. Maiborne v. Kuntz, 56 So.2d 720, 722 (Fla. 1952).

18. Glass v. Parrish, 51 So.2d 717 (Fla. 1951). See also Ward v. Allen, 152 Fla. 82, 11 So.2d 193 (1942); Duval Jewelry Co. v. Smith, 107 Fla. 717, 136 So. 878 (1931). See also Florida Synopsis, 3 MIAMI L.Q. 292 (1949).

19. See Perez v. Rodriguez, 155 Fla. 501, 20 So.2d 654 (1945) (one Justice dissenting).

20. The leading Florida case concerning the right of privacy, Cason v. Baskin, 155 Fla. 198, 20 So.2d 243 (1944) established the right and recognized the new tort but seems in practice to have precluded any substantial recovery.

21. Hartley & Parker, Inc. v. Copeland, 51 So.2d 789 (Fla. 1951).

22. Richard v. Gray, 62 So.2d 597 (Fla. 1953). See Berry & Goodrich, *Political Defamation: Radio's Dilemma*, 1 FLA. L. REV. 343 (1948); Note, 3 MIAMI L.Q. 312 (1949).

mere insult which is not actionable, and slander;²³ it further indicated the necessity in some instances to prove special damages as distinct from those situations that, being slanderous per se, are actionable without a showing of special damages.²⁴ A neat defense appeared in *Campbell v. Jacksonville Kennel Club, Inc.*,²⁵ a case that also pointed up the distinction between slander per quod and slander per se. One set of words, classified as slander per se, failed to constitute a cause of action, since the words were said to a joint adventurer only and not published; the second set, classified as slanderous per quod, though published, were not shown to have caused special damage.

The final case, *Miami Herald Pub. Co. v. Brown*,²⁶ construed a Florida statute²⁷ that is basically a piece of special legislation limiting the liability of newspapers, hence considerably altering the common law. Urged to construe the words "actual damages" to mean "special damages" and to preclude recovery by libelled parties who must rest on general damages alone, the court refused to go so far and held that the statute did not change the common law to such an extent, and that "actual damages" meant "general damages." However, the court denied recovery in the premises and the opinion is probably not definitive of the issue.²⁸

THE NEGLIGENCE CASES

Despite the occasional importance of intentional torts, the more important field of litigation lies in the law of negligence. Since the theoretical framework of this branch of the law is copiously treated in textbooks, the following discussion is limited to the principal factual situations that arose and the particular doctrines that received emphasis by the court in deciding these recent cases.

I. The Meaning and Proof of Negligence

Duty and reasonable care.—At the outset, of course, there is no negligence, and no recovery, if the defendant (1) owes no duty to the

23. *Loeb v. Geronemus*, 66 So.2d 241 (Fla. 1953); See Comment, *Distinction Between Insult and Slander Per Quod*, 3 FLA. L. REV. 133 (1950).

24. The meaning of the term libel per se is not thoroughly clear in the Florida decisions and the federal case of *Caldwell v. Crowell-Collier Pub. Co.*, 161 F.2d 333 (5th Cir. 1947) reflects this uncertainty. Technically all libellous words are actionable per se; it is only in slander that categorization becomes necessary and then the term slander per se becomes meaningful to indicate those narrow and few instances in which special damages need not be shown. See generally, PROSSER, LAW OF TORTS 793-809 (1941).

25. 66 So.2d 495 (Fla. 1953).

26. 66 So.2d 679 (Fla. 1953).

27. FLA. STAT. § 770.02 (1951).

28. For another important example of special help, this time judicial, for the organs of the press, see *Layne v. Tribune Co.*, 108 Fla. 177, 146 So. 234 (1933), which according to SHULMAN & JAMES, CASES ON TORTS 1011 (1942) probably represents a lone position. The *Tribune Co.* case was cited with approval in *Hartley & Parker Inc. v. Copeland*, 51 So.2d 789 (Fla. 1951).

plaintiff or (2) if, admitting the existence of a duty, the defendant acts reasonably, properly, and prudently in the premises. Several recent cases are useful examples of these two aspects of a fundamental problem. In *Richmond v. Florida Power & Light Co.*,²⁹ the court upheld a summary judgment for the power company on the theory that the company owed no duty to a kite flyer, who was shocked by unguarded wires, to insulate the wires or post warning signs. The case includes a good discussion by Mr. Justice Thomas on the social utility of the act, on the one hand, as opposed to the risk involved, on the other. The court could have treated the case in the more usual method of admitting a duty to the public on the part of the power company by allowing the trial court or jury to decide whether the power company used reasonable care.³⁰ The court also, in another case, followed the traditional common law view that a tortfeasor owes no duty to a wife for her loss of consortium occasioned by the tortfeasor's breach of duty to her husband.³¹

The concept of duty was further developed in a case involving injuries to a cab passenger who followed the driver of the cab to observe the changing of a tire and who was struck by a passing vehicle.³² The court sustained a directed verdict for the defendant cab company. Apparently, had it been shown that the plaintiff was so drunk as not to be in control of his actions, the cab company would then have owed a duty to the defendant to supervise his behavior.

In *Miami Paper Co. v. Johnston*,³³ the court conceded the duty of a truck driver toward children who might be playing in the streets and directed its attention instead to whether the truck driver had exercised reasonable care. The court concluded that the question was one for the determination of a jury and upheld its findings of negligence.

Proximate cause.—The court in *Eli Witt Cigar & Tobacco Co. v. Matatics*³⁴ had before it the problem of proximate cause, that is, to what extent is the defendant liable once a duty and breach of duty are proved. In that case the plaintiff had been injured by the defendant's automobile. Some three weeks later the plaintiff in climbing to an attic was seized with a dizzy spell, fell, and received additional injuries. The court, citing

29. 58 So.2d 687 (Fla. 1952).

30. See *Hardware Mut. Cas. Co. v. Tampa Elec. Co.*, 60 So.2d 179 (Fla. 1952). *MORRIS, TORRES* 139 (1953). The standard of care, with notable exceptions chiefly involving common carriers and special statutes, remains constant; that which an ordinary, reasonable and prudent person similarly situated would exercise; it is the factual situation that varies. *F.E.C. News Co. v. Pearce*, 58 So.2d 843 (Fla. 1952). Cf. *Atlantic Coast Line R.R. v. Smith*, 53 So.2d 301 (Fla. 1951).

31. *Ripley v. Ewell*, 61 So.2d 420 (Fla. 1952) (Mr. Justice Terrell dissented); accord, *Smith v. Nicholas Bldg. Co.*, 93 Ohio St. 101, 112 N.E. 204 (1915).

32. *Swilley v. Economy Cab Co. of Jacksonville*, 56 So.2d 914 (Fla. 1951); Cf. *Middleton v. Whitridge*, 213 N.Y. 499, 108 N.E. 192 (1915).

33. 58 So.2d 869 (Fla. 1952) (Mr. Justice Thomas dissented). Factually the case was a close one. The driver properly took a number of precautions but failed to look in front of the truck where a child was playing.

34. 55 So.2d 549 (Fla. 1951).

the Restatement of Torts,³⁵ held the defendant liable for all the additional injuries on the grounds that they arose as a direct consequence of the earlier tort.

Foreseeability.—The notion that defendants are liable to plaintiffs only for foreseeable consequences of the tortious act, is, of course, well recognized and was made famous by Cardozo's opinion in *Palsgraf v. Long Island R. R. Co.*³⁶ The problem arose in *Railway Express Agency v. Brabham*,³⁷ in a decision that divided the court four to three³⁸ and remains, perhaps, as the most intriguing case of the period from a theoretical viewpoint. It deserves an article by itself but can be mentioned only briefly here. A driver of a truck ran over two cardboard boxes in a street; assuming that he could have avoided hitting the boxes through the exercise of reasonable care, the additional point arises as to his liability for the death of and injuries to children playing within the boxes. Could he have foreseen the risk involved in his negligent act? More narrowly, could he have foreseen the class of liability such as personal injury as opposed to property damage, that would arise? And, is not the problem merely a circumlocution for the question: was there any duty at all? The court felt that the jury should answer the question, and, as might be thought, separate juries disagreed.

Attractive Nuisance.—It is generally understood that land owners do not owe a duty in negligence to injured trespassers, but this defense is not always available if the trespassers are children. The court recently considered two cases in which plaintiffs unsuccessfully sought to recover under the doctrine of attractive nuisance.³⁹ In *Johns v. Clay Electrical Co-op Ass'n*,⁴⁰ the court denied recovery when a trespassing child was injured by electricity from wires covered by the foliage of a holly tree. In dissent, Justices Terrell and Chapman felt that the red berries constituted a perfect attraction for rural youth and that the landowner should be responsible for injuries or death resulting to boys at play within the branches.⁴¹ And in a different setting the court, without dissent, affirmed a summary judgment in favor of a defendant water company in whose sand-banked pool a child had drowned.⁴²

35. § 460 (1934).

36. 248 N.Y. 339, 162 N.E. 99 (1928).

37. 62 So.2d 715 (Fla. 1952).

38. Justices Sebring, Thomas and Mathews dissented.

39. The leading American case is generally said to be *Keffe v. Milwaukee & St. Paul Ry.*, 21 Minn. 207, 18 Am. Rep. 393 (1875). See also RESTATEMENT, TORTS § 339 (1934).

40. 50 So.2d 710 (Fla. 1951).

41. Cf. ROBERT FROST, COLLECTED POEMS, *Birches* (1939).

42. *Lomas v. West Palm Beach Water Co.*, 57 So.2d 881 (Fla. 1952). This decision affirmed the rules in *Allen v. McDonald*, 42 So.2d 706 (Fla. 1949) and depended in part on the fairly remote setting of the pool, its grading, and other features eliminating the notion of a trap. Cf. Mr. Justice Holmes view in *United Zinc & Chemical Co. v. Britt*, 258 U.S. 268 (1921), now generally discarded. See also Florida Synopsis, 7 MIAMI L.Q. 90 (1952).

Res Ipsa Loquitur.—Litigants argued in five cases that the rule of *res ipsa loquitur* should be applied in aid of proving negligence on the part of the defendants. The court, however, invoked the rule in one situation only: a patient in a hospital was burned, and the court allowed the presumption of negligence to arise against the hospital.⁴³ The major difficulty to a successful application of the rule is the requirement that the defendant have sole and exclusive use of the instrumentality that causes the injury.⁴⁴ The judges tend to find this element lacking. Thus, in *Schott v. Pancoast Properties*⁴⁵ a plaintiff was hit by a screen that fell from a hotel window. The owners of the hotel avoided the application of *res ipsa loquitur* by showing that the window cleaners were independent contractors.⁴⁶ The court also refused to apply the doctrine in the case where the plaintiff was injured by a fan that may or may not have been turned on in his presence⁴⁷ and in a case involving a passenger who was injured when a bus stopped abruptly.⁴⁸

II. Contributory Fault and Defenses

Contributory negligence.—Once negligence is shown, the most frequent defense is contributory negligence. Certain conduct, the court says, amounts to contributory negligence as a matter of law. This has included such acts as diving into an empty swimming pool,⁴⁹ walking into a scaffold in a lighted hall,⁵⁰ stumbling over the edge of an elevator raised four inches above the floor level,⁵¹ and colliding at high speed with a parked vehicle.⁵² In other cases, very difficult to distinguish factually, the court holds in substance that the injured person's negligence was the sole proximate cause

43. *West Coast Hospital Ass'n v. Webb*, 52 So.2d 803 (Fla. 1951). Previously the court had held *res ipsa loquitur* inapplicable in an action against a physician for negligent treatment of a patient. *Grubbs v. McShane*, 144 Fla. 505, 198 So. 208 (1940); *Foster v. Thornton*, 125 Fla. 699, 170 So. 459 (1936). In *Wilson v. Lee Memorial Hospital*, 65 So.2d 40 (Fla. 1953), the court said that the hospital would be liable for a negligent operation during which a sponge was sewed into the stomach of a charity patient provided that the jury found the nurses and surgeons to be agents of the hospital.

44. For the traditional statements see *Yarbrough v. Ball U-Drive System*, 48 So.2d 82 (Fla. 1950).

45. 57 So.2d 431 (Fla. 1952).

46. *But see Stuyvesant Corp. v. Stahl*, 62 So.2d 18 (Fla. 1952) where by virtue of apparent authority an independent contractor bound a hotel by his actions.

47. *Frash v. Sarres*, 60 So.2d 924 (Fla. 1952).

48. *Tampa Transit Lines v. Corbin*, 62 So.2d 10 (Fla. 1952). See also *Laughlin v. Loftin*, 62 So.2d 745 (Fla. 1952) (to which two Justices dissented; and to which Justice Terrell felt that *res ipsa loquitur* was applicable).

49. *Ryan v. Unity, Inc.*, 55 So.2d 117 (Fla. 1951).

50. *Breau v. Whitmore*, 59 So.2d. 748 (Fla. 1952).

51. *MacMillan v. Insurance Exchange Bldg. Inc.*, 58 So.2d 163 (1952).

52. *Petroleum Carrier Corp. v. Robbins*, 52 So.2d 666 (Fla. 1951).

The contributory negligence of a plaintiff who stepped backward from a walkway across a culvert was so flagrant that it appeared on the face of the declaration. *Faulk v. Parrish*, 58 So.2d 523 (Fla. 1952).

of the accident.⁵³ Plaintiffs who had this type of difficulty include one who walked into a glass door,⁵⁴ one who fell while walking down a hotel stairway which was pitch black as the result of an unavoidable power failure,⁵⁵ and one who stumbled over a box in an aisle of a supermarket.⁵⁶ While there is, of course, a theoretical difference in these two lines of cases, the result is the same for the unrewarded plaintiff. Certainly in a majority of cases, however, the court holds that the question of contributory negligence is for the jury. Typical questions of this sort are: whether an experienced caddy should have seen a golf ball which struck him,⁵⁷ whether a fruit-picker who was electrocuted should have seen power wires strung above a tree in which he was working⁵⁸ and whether a sickly, obese woman who fell while standing in a bus should have boarded it knowing that no seat was available.⁵⁹

Assumption of risk.—The defense of assumption of risk arose twice and in each instance barred recovery. A mail carrier loaded mail on a moving train and in turning away stepped on a rock which caused him to fall under the train. He knew of the rock ballast along the track, and he knew that the train would make an extended stop in a few moments. Under the circumstances, by attempting to load the moving train he "assumed the risk."⁶⁰ A tenant of an apartment building renewed her lease monthly over an extended period knowing that water collected on an inside stairway each time it rained. Assumption of risk was one reason given by the court for denying a claim for injuries suffered on the wet stairs.⁶¹ Implied in a third case is the notion that the guest who rides in an automobile with a drunk driver may assume the risk.⁶²

Imputed negligence.—Imputed negligence was a complete defense in

53. *E.g.*, *Gonet v. Evans*, 66 So.2d 53 (Fla. 1953); *Embrey v. Southern Gas & Electric Corp.*, 63 So.2d 258 (Fla. 1953). Cf. *Richmond v. Florida Power & Light Co.*, 58 So.2d 687 (Fla. 1952).

54. *Pettigrew v. Nite-Cap, Inc.*, 63 So.2d 492 (Fla. 1953).

55. *Feigen v. Sokolsky*, 65 So.2d 769 (Fla. 1953). After a prior trial of this same case the court reversed a plaintiff's verdict because the court below had failed to give a charge on contributory negligence. Apparently evidence of contributory negligence was much stronger at the second trial. *Sokolsky v. Feigen* 49 So.2d 88 (Fla. 1950).

56. *Frederich's Market v. Knox*, 66 So.2d 251 (Fla. 1953). Cf. *Loftin v. Bryan*, 63 So.2d 310 (Fla. 1953) and *Miami v. Fuller*, 54 So.2d 198 (Fla. 1951), automobile cases in which the court held that the sole proximate cause of the accident was the negligence of the drivers of the cars in which the plaintiffs were passengers.

57. *Miller v. Rollings*, 56 So.2d 137 (Fla. 1951).

58. *Hardware Mut. Cas. Co. v. Tampa Elec. Co.* 60 So.2d 179 (Fla. 1952).

59. *Miami Transit Co. v. Scott*, 58 So.2d 542 (Fla. 1952). See also *Rodi v. Florida Greyhound Lines, Inc.*, 62 So.2d 355 (Fla. 1952); *Smith v. Cobb*, 61 So.2d 379 (Fla. 1952); *Mortz v. Kruger*, 58 So.2d 160 (Fla. 1952).

60. *Atlantic Coast Line R.R. v. Savary*, 64 So.2d 562 (Fla. 1953).

61. *Atlantic Terrace Co. v. Rosen*, 56 So.2d 444 (Fla. 1952). Also see note 7 *supra*.

62. *Hurly v. Carter*, 63 So.2d 192 (Fla. 1953). Also a person who is bitten by a dog assumes the risk if the owner has posted a sign, *Romfh v. Berman*, 56 So.2d 127 (Fla. 1951).

an action by a passenger of an automobile.⁶³ After deciding that the driver's negligence was the sole proximate cause of a collision with a train, the court held that the driver's negligence could be imputed to the passenger because they had spent the evening together on a wild drinking party. An ingenious argument for imputed negligence was also advanced by counsel for the defendant in a suit brought by a Puerto Rican husband and wife. It was said that the negligence of the husband driver should be imputed to the wife because the car in which they were riding was jointly owned under Puerto Rican law, a community property jurisdiction, where negligence is imputed by virtue of the relationship. This argument was successfully rebutted by urging the law of the forum.⁶⁴

Last clear chance.—Despite a showing that the plaintiff was contributorily negligent, he has of course the final opportunity to recover on the basis that the defendant had the last clear chance. The doctrine is applied rather sparingly in Florida.⁶⁵ During the last two years the court discussed the issue in five cases and in two cases⁶⁶ permitted recovery by plaintiffs. Both of these cases involved negligent drivers who ran into trains, and in both instances the court agreed that there was evidence that the engineers could have avoided the accident by doing some act, such as sounding the horn, since in each, the engineers saw the approaching vehicles. In *Miami Transit Co. v. Goff*,⁶⁷ the court held that a bus driver did all he could under the circumstances of inclement weather to avoid the oncoming accident, and the justices consequently found that a charge of last clear chance was inappropriate for the jury.⁶⁸

III. Vicarious Liability

There were two significant decisions treating the problem of whether the driver of a vehicle was operating it with the owner's permission so as to permit the plaintiff to invoke the dangerous instrumentality doctrine and then make the owners liable in damages. In one case⁶⁹ the court

63. *Loftin v. Bryan*, 63 So.2d 310 (Fla. 1953).

64. *Astor Electric Service v. Cabrera*, 62 So.2d 759 (Fla. 1952).

65. See for a general discussion of this problem, Steinhardt & Simon, *Florida's Last Clear Chance Doctrine*, 7 MIAMI L.Q. 457 (1953).

66. *Poindexter v. Seaboard Air Line R.R.*, 56 So.2d 905 (Fla. 1951); *Seaboard Air Line R.R. v. Martin*, 66 So.2d 509 (Fla. 1951). But see *Motherhead v. Atlantic Coast Line R.R.*, 64 So.2d 266 (Fla. 1953), a per curiam opinion without discussion except for Mr. Justice Drew's dissenting opinion.

67. 66 So.2d 487 (Fla. 1953).

68. See also *State v. North Miami*, 58 So.2d 552 (Fla. 1952). But see *Panama City Transit Co. v. DuVernog*, 33 So.2d 48 (Fla. 1948). A federal court in interpreting Florida law also refused to apply the doctrine on the basis that the defendant did not have ample time to avoid the accident. *Humphries v. Boersma*, 190 F.2d 843 (5th Cir. 1951). These cases indicate, as Judge Russell states it, that "proximate cause," "sole negligence," "contributory negligence," "concurring negligence," and "last clear chance" are not absolutes.

69. *Sykes v. Babijuce Corp.*, 63 So.2d 65 (Fla. 1953).

affirmed a directed verdict for the defendant based on lack of permission. The driver, employed as a night watchman, had no authority to remove vehicles from the defendant's premises, although he could move them about the parking lot when necessary. He had no driver's license, had been refused employment as a truck driver and at the time of the accident he was driving one of the defendant's trucks on a personal mission. In the other case,⁷⁰ custody of a truck was given to the driver for the purpose of transporting a working crew. He was allowed to keep the truck at home, but it was to be used only for hauling the crew. When the accident occurred apparently he was on a personal mission, contrary to instructions. The holding of the court that permission to use in the first instance is not voided by instructions limiting the use, represents a continuation of the broad interpretation of permission announced in *Lynch v. Walker*.⁷¹

Two other cases were decided involving the question of ownership. In its search for solvent defendants, the court indicates a willingness to stretch the ownership concept as far as it has stretched the concept of permission. For example, the lessor and the lessee of a truck were both held liable for an accident, since the court found that each had sufficient title or dominion to make each responsible to injured parties.⁷²

Occasionally it is difficult to ascertain when title passes to an automobile and when one person relinquishes dominion to another. The court has stated that these problems will be determined by common law rules and not simply by reading the Motor Vehicle Law⁷³ which provides specific means for transferring vehicle titles.⁷⁴

Vicarious liability was urged in other than dangerous instrumentality cases. A Miami Beach hotel was held liable for damages to an individual injured by an employee of a doorman, despite a showing that the doorman was an independent contractor.⁷⁵

IV. Statutory Problems

Workmen's compensation.—In *Smith v. Arnold*⁷⁶ the court held that an employer who hires minors in violation of the Child Labor Law⁷⁷ cannot limit his liability within the scope of the Workmen's Compensation Act,⁷⁸

70. *Chase & Co. v. Benefield*, 64 So.2d 922 (Fla. 1953).

71. 159 Fla. 188, 31 So.2d 268 (1947). See Note, 5 FLA. L. REV. 412 (1952).

72. *Wilson v. Burke*, 53 So.2d 319 (Fla. 1951). The court said that those liable are those "... who exerted such dominion over the truck as to be responsible for damage caused by it."

73. FLA. STAT. § 319.22 (1953).

74. *Razz v. Hurd*, 60 So.2d 673 (Fla. 1952).

75. *Stuyvesant Corp. v. Stahl*, 62 So.2d 18 (Fla. 1952). But see *Schott v. Pancoast Properties*, 57 So.2d 431 (Fla. 1952).

76. 60 So.2d 281 (Fla. 1952).

77. FLA. STAT. c. 450 (1953).

78. FLA. STAT. c. 440 (1953).

if the minor dies and an action for his death is brought under the Death by Wrongful Act Statute.⁷⁹ The result, though possibly desirable, depended somewhat on a play on words:

It therefore follows as a matter of legislative intent that the Legislature in using the words 'whether lawfully or unlawfully employed' had reference only to minors who could be lawfully employed.⁸⁰

This decision seems to give minors, who under no circumstances could be lawfully employed, an election to file a claim for workmen's compensation or to sue at law,⁸¹ despite the theory of the Workmen's Compensation Act. However, in the case of a minor, lawfully employed, who is killed on the job, the court interpreted the act to preclude the decedent's father from the right of an action under the Death by Wrongful Act Statute to recover damages for mental pain and suffering.⁸²

The Workmen's Compensation Act was further interpreted in *Fidelity Casualty Co. of New York v. Bedingfield*⁸³ to allow an injured employee to bring his suit against a tortfeasor, not his employer, without bringing the suit also for the use and benefit of the employer's insurance carrier. Further, the employer is not entitled to intervene as a party plaintiff. The remedy of the carrier is, of course, to file a claim in the suit for an appropriate lien.

Death By Wrongful Act Statute.—Although several cases arose within the scope of the Death by Wrongful Act Statute,⁸⁴ the only important interpretation of the Act itself occurred in *Whitely v. Webb's City*,⁸⁵ which construed the act to preclude actions arising ex contractu. The legislature, however, amended the act thereafter to include both actions in tort and contract.

The Guest Statute.—The Florida Guest Statute⁸⁶ received the attention of the court in five cases. These opinions continued the interpretation that the terms in the statute "gross negligence" and "wilful or wanton misconduct" are synonymous.⁸⁷ It is still a problem to predict whether

79. FLA. STAT. § 768.01 (1953).

80. *Smith v. Arnold*, 60 So.2d 281, 282 (Fla. 1952).

81. *But see* a different interpretation in 7 *MIAMI L.Q.* 278 (1953).

82. *Howze v. Lykes Bros.*, 64 So.2d 277 (1953).

83. 60 So.2d 489 (Fla. 1952), 7 *MIAMI L.Q.* 272 (1953).

84. FLA. STAT. § 768.01 (1953). For typical cases not involving problems of construction see *Horton v. Louisville & Nashville R.R.*, 61 So.2d 406 (Fla. 1952); *Atlantic Coast Line R.R. v. Cary*, 57 So.2d 10 (Fla. 1953).

85. 55 So.2d 730 (Fla. 1953).

86. FLA. STAT. § 320.59 (1953).

87. *DeWald v. Quamstrom*, 60 So.2d 919 (Fla. 1952); *Dexter v. Green*, 55 So.2d 548 (Fla. 1951). The former cases indicating a brief period of inconsistency in the definition of these words are reviewed in 4 *FLA. L. REV.* 79 (1951). The two terms are connected by the word "or," which the court has definitely ruled as conjunctive, making the two phrases synonymous; *Cormier v. Williams*, 148 Fla. 201, 4 So.2d 525 (1941).

a particular set of facts indicates the necessary quantum of negligence or irrational behavior on the part of defendants to permit plaintiffs to bring successful causes of action. The court, notwithstanding the mandate of the statute that the determination of sufficient negligence in these cases is a matter for the jury, painstakingly considers each situation under its authority, as in non-statutory cases, to review findings of fact to accord with relevant principles of law.⁸⁸

The problem remains more than one of matching the current case with past adjudications. Fewer than forty cases constitute the body of *stare decisis*; thus, it is to be expected that new facts will continue to arise for the court to characterize, on the one hand, as negligent situations, precluding recovery for the plaintiff and, on the other, as gross-negligent situations, permitting recovery.⁸⁹

In *Bryan v. Bryan*⁹⁰ the plaintiff failed to recover from a driver who fell asleep but who had not been drinking and whose conduct had satisfied the guest up until the moment of the accident.⁹¹ But the court held in a later case that a drunken driver can defend a suit successfully by invoking the doctrines of contributory negligence and assumption of risk.⁹² If the guest warns a speeding driver, the court indicated that recovery is more likely,⁹³ even though speed alone, without warning, falls short of constituting gross negligence.⁹⁴

The most debatable case in the group involved an action brought by a plaintiff against a deceased driver who, though he had looked south, failed to look north before making a turn. The court in permitting the guest to recover stated that the question was properly for the jury whose findings should not be disturbed.⁹⁵ Failure, then, to look must be contrasted with misjudgment of a situation.⁹⁶

The Jones Act.—Of passing importance is the one case the court interpreted under the Jones Act.⁹⁷ The question was essentially whether a member of the crew of a dredge engaged in filling land is a seaman within the scope of the Act. The court found upon an examination of

88. See *Nelson v. McMillion*, 151 Fla. 847, 10 So.2d 565 (1942); *Cormier v. Williams*, 148 Fla. 201, 4 So.2d 525 (1941); 4 FLA. L. REV. 79, 85 (1951).

89. See generally Middleton, *Judicial Review of Findings of Fact in Florida*, 3 FLA. L. REV. 281 (1950); Fla. Synopsis, 7 MIAMI L.Q. 90 (1952).

90. 59 So.2d 513 (Fla. 1952).

91. Cf. *Wismer v. Marx*, 289 Mich. 38, 286 N.W. 149 (1939) (plaintiff could not recover even though driver fell asleep twice at the wheel).

92. *Henry v. Carter*, 63 So.2d 192 (Fla. 1953).

93. *Dexter v. Green*, 55 So.2d 548 (Fla. 1951).

94. *Ayers v. Morgan*, 42 So.2d 2 (Fla. 1949); *Leslie v. West*, 38 So.2d 821 (Fla. 1949).

95. *Motes v. Prosby*, 65 So.2d 478 (Fla. 1953).

96. *Juhasz v. Barton*, 146 Fla. 484, 1 So.2d 476 (1941); *Koger v. Hollahan*, 144 Fla. 779, 198 So. 685 (1940).

97. 46 U.S.C. § 688.

the facts that the plaintiff was not engaged in aiding navigation and was not entitled to this special relief.⁹⁸

Railroad statutes.—Several cases were decided applying miscellaneous doctrines peculiar to railroads and their operation. In an action under the Federal Employers' Liability Act for injuries resulting from a boiler explosion, the court approved a jury finding that the sole proximate cause of the accident was the negligence of the plaintiff engineer who was operating the boiler. Two justices dissented, contending that there was evidence of negligence sufficient to entitle the plaintiff to a verdict as a matter of law in view of the absolute duty imposed on the railroad by the Federal Safety Appliance Act.⁹⁹ The court reversed a verdict in favor of another railroad employee who struck his head on a gutter as he climbed the side of a freight car after being given a "hurry up" order. The clearance provided was admittedly inadequate; but since the workman knew of this condition, the court decided that his negligence was the sole proximate cause of the accident.¹⁰⁰ This decision indicates that the Florida Supreme Court construes this type of case more conservatively than the United States Supreme Court currently advocates.¹⁰¹

The presumption¹⁰² and comparative negligence¹⁰³ statutes were applied for the benefit of the plaintiff in a suit resulting from a collision between a boy on a motor bike and a standing train. The defendant unsuccessfully contended that the statutes are applicable only to moving trains.¹⁰⁴

V. A Study in Slip and Fall

The court considered a series of cases involving the problem presented when an individual falls or otherwise injures himself because of a structural

98. *Covington v. Standard Dredging Corp.*, 61 So.2d 644 (Fla. 1952).

99. *Laughlin v. Loftin*, 62 So.2d 745 (Fla. 1952), *cert. denied*, 74 Sup. Ct. 22 (1953).

100. *Loftin v. Joyner*, 60 So.2d 154 (Fla. 1952).

101. See DeParcq, *A Decade of Progress Under the Federal Employers' Liability Act*, 18 LAW AND CONTEMP. PROB. 257 (1953). In *Seaboard Air Line R.R. v. Hardee*, 54 So.2d 809 (Fla. 1951) the evidence was sufficient to submit to a jury and a verdict for the workman was affirmed.

102. FLA. STAT. § 768.05 (1953).

103. FLA. STAT. § 768.06 (1953).

104. *Hofon v. Louisville & Nashville R.R.*, 61 So.2d 406 (Fla. 1952); Florida Synopsis, 7 MIAMI L.Q. 413 (1953). In another crossing accident case, the court appropriately held that the "standing train" doctrine does not apply so as to eliminate liability while the train is in fact moving and arrives at the crossing only moments before the plaintiff's automobile. *Goff v. Atlantic Coast Line R.R.*, 53 So.2d 777 (Fla. 1951). Cf. *Loftin v. Bryan*, 63 So.2d 310 (Fla. 1953). And the court ruled that the question of whether a "sudden emergency" resulting from an automobile on the track necessitated a hurried stop which caused injury to a passenger was properly submitted to a jury. *Loftin v. Anderson*, 66 So.2d 470 (Fla. 1953). In the only decision found involving loss of baggage the court applied the generally accepted rule that unless the railroad has exclusive control of baggage the duty owed is reasonable care instead of the usual duty owed by a common carrier. *Chafin v. Atlantic Coast Line R.R.*, 58 So.2d 185 (1952).

condition or because of foreign matter under foot. For want of a more descriptive generic term these are called the slip and fall cases, and though they involve doctrines applicable to other type situations, they can conveniently be treated separately.

The traditional view is that the proprietor of a public place is liable for injuries resulting from falls on foreign matter when it is shown 1) that the owner created the condition; 2) that the owner knew of the condition; or 3) that the condition had existed for a sufficient length of time so that the owner, in the exercise of reasonable care, should have discovered it. The last of these elements has received considerable recent attention.

*Kraver v. Edelson*¹⁰⁵ is an example of an attempt by a plaintiff to predicate liability on notice to the defendant, merely by virtue of passage of time. The court, however, decided that a trampled cigar butt which caused the plaintiff to fall and which had been in a hotel entrance for only ten minutes did not alone show sufficient evidence of negligence to submit the issue to a jury.

In the next decision involving the problem, Mr. Justice Terrell re-examined and repudiated notice as a basis of liability in cases involving supermarkets.¹⁰⁶ The plaintiff in that case fell on a string bean. There was no testimony as to how long the bean had been on the floor and none as to how it got there. There was testimony, however, that the bin was constructed in such a way that it was likely that beans would fall on the floor when the bin was full. The court decided that the facts were sufficient to warrant submitting the question of negligence to the jury. Three justices dissented, and Mr. Justice Terrell wrote a special concurring opinion in which no one joined. In that opinion he asserts the view that notice to the defendant founded on a time interval which he calls the "reasonable care rule" should not be the basis for liability in cases involving super markets. Rather, he would submit to the jury the question of whether it was unreasonable under the circumstances for the defendant to allow the particular substance to be on the floor, even without evidence as to how the offending object got on the floor or of how long it had been there. Such a rule had already been adopted by the court in a case involving a bottle at a race track, but its application had been expressly limited to ". . . a place of amusement like a race track where patrons go by the thousands on invitation of the proprietors, and are permitted to purchase and drink bottled beverages of different kinds and set the empty bottles anywhere they may find space to place them . . ." ¹⁰⁷

105. 55 So.2d 179 (Fla. 1951).

106. *Carls Markets v. De Feo*, 55 So.2d 182 (Fla. 1951).

107. *Wells v. Palm Beach Kennel Club*, 160 Fla. 502, 35 So.2d 720 (1948). One plaintiff who fell on a rock at the Hialeah race course might have had the benefit of the *Wells* doctrine had she not entered a special gate by using a press pass. Actually

Many thought that this view represented the opinion of a majority of the court.¹⁰⁸ In subsequent decisions, however, the court clearly indicated its intention to predicate liability on notice based on a time interval. The notice rule was reviewed in detail in *Carls Markets v. Meyer*.¹⁰⁹ Two allegations of negligence were made in the complaint in that case: the defendant had caused a slippery mass to be placed on the floor; or the substance had remained on the floor for such a length of time that the defendant knew or should have known about it. The trial court refused to instruct the jury to the effect that if they did not find that the foreign matter had been placed on the floor by the defendant's employees then they must find, in order to fix liability on the defendant, that it had been present for a sufficient length of time so that the defendant in the exercise of reasonable care could have discovered it. Refusal to give this charge, the court held, was reversible error. Mr. Justice Terrell's prior concurring opinion on which the plaintiff relied was courteously rejected:

We are impelled to point out, with profound deference to the author, that the opinion from which appellees generously quote was a special concurring opinion of one member of the Court in which no other member joined.

Meanwhile the justices decided other cases involving injuries by falls. These cases turned on issues other than notice. In a suit against a landlord, the court denied recovery to a tenant who slipped on a rubber mat located on an outside stairway which was wet from rain.¹¹⁰ Since the plaintiff had used the stairway many times, knew that it was wet, and knew that the mat was not fastened down, the court held that the sole proximate cause of the accident was the plaintiff's negligence, especially since there was a dry stairway available at another part of the building. Another tenant had a similar experience, finding that each time it rained, water collected on an inside common stairway of an apartment building because of a broken window; but nevertheless she continued to renew her lease monthly for several years. On the day she was injured the water was there as usual, but this time she fell when she stepped in it. The court reversed a jury verdict in her favor and ruled that under the circumstances she had assumed the risk, again, since there was another stairway

she was not a member of the press which made her a trespasser to whom the track did not owe the duty of reasonable care. *Satin v. Hialeah Race Course*, 65 So.2d 475 (Fla. 1953).

108. *Messner v. Webb's City*, 62 So.2d 66 (Fla. 1953). Store owner not liable to one who fell on a nail since there was no evidence as to length of time nail had been on the floor. Mr. Justice Terrell concurred. Apparently he is willing to extend the race track rule only to supermarkets not superdrug stores. *Marks v. Carls Markets*, 62 So.2d 739 (Fla. 1952) (directed verdict for defendant affirmed on substantially the same facts as the *De Feo* case). See also Myers, *Causation and Common Sense*, 5 MIAMI L.Q. 238 (1950).

109. 69 So.2d 789 (Fla. 1953).

110. *Gonet v. Evans*, 66 So.2d 53 (Fla. 1953).

available.¹¹¹ In a third decision, involving a mishap on a wet surface, the court ruled that water splashed by bathers on a walkway near a swimming pool is a necessary incident to the operation of a pool and does not give a cause of action to one who slips on the wet walk.¹¹²

Injuries caused by objects which might be expected in public places brought about several other opinions in favor of the defendant. It is not evidence of negligence, the court decided, to have a large mat in the entrance to a cafeteria. The danger, if any, should have been obvious to the one who tripped on the edge of it.¹¹³ In a similar case approval was given to the dismissal of a complaint which alleged that a fall was caused by a three-inch drop in the floor just inside the door of an automobile showroom.¹¹⁴ In another recent supermarket case, the plaintiff's "failure to fend for herself" rather than the defendant's negligence, caused her to trip over a small box in the aisle of the store.¹¹⁵

The court did find evidence of negligence, however, in an action against the owner when one who had rented a beach cottage walked off a bulkhead and fell to the ground while on a stroll toward the beach at night.¹¹⁶ A dangerous condition giving a cause of action was also found in a case involving a hotel guest. The guest fell on a rolled-up bath mat in an inadequately lighted room which she had just rented.¹¹⁷

VI. Contract or Tort

Throughout the country the courts increasingly hold that vendors of defective goods are liable to their purchasers, remote consumers, and other third parties.¹¹⁸ This result is accomplished by the use of the implied warranty theory, the Uniform Sales Act, by stretching the law of negligence, and by employing other technical devices. Florida remains abreast of this modern trend without benefit of the Uniform Sales Act; to do so, requires the court to reflect both tort and contract influences.¹¹⁹ For example, it was recently held that disappointed purchasers of watermelon seed are allowed to recover when they discover that what they planted did not in fact produce the variety of watermelon advertised, and these purchasers

111. *Atlantic Terrace Co. v. Rosen*, 56 So.2d 444 (Fla. 1952).

112. *Andrews v. Narber*, 59 So.2d 869 (Fla. 1952).

113. *Earley v. Morrison Cafeteria Co.*, 61 So.2d 477 (Fla. 1952).

114. *Bowles v. Elkes Pontiac Co.*, 63 So.2d 769 (Fla. 1952).

115. *Frederich's Market v. Knox*, 66 So.2d 251 (Fla. 1953).

116. *Mertz v. Krueger*, 58 So.2d 160 (Fla. 1952).

117. *Rubey v. William Morris, Inc.*, 66 So.2d 218 (Fla. 1953).

118. For an excellent recent article on this problem see Keeton, *Rights of Disappointed Purchasers*, 32 TEXAS L. REV. 1 (1953).

119. For the contract theory see Jennings, *The Implied Warranty Theory of Liability Recently Adopted in Florida*, 28 FLA. L.J. 46 (1954); Comment, 3 FLA. L. REV. 380 (1950); for the problem of *res ipsa loquitur* see Comment, 1 FLA. L. REV. 470 (1948).

can go against remote vendors even in the absence of priority of contract.¹²⁰ However, in *Lambert v. Sistrunk*¹²¹ the court refused recovery for injuries to a purchaser of a stepladder, since any defect in the ladder was patent at the time of purchase, and the seller made no representations beyond normal shop talk. Conversely, a purchaser of a Coca-Cola recovered against the manufacturer for injuries resulting from a foreign substance in the bottle¹²² on the theory, in this instance, of implied warranty, rather than negligence. The distinction between tort and contract became of more than academic interest in *Whitley v. Webb's City*¹²³ where the court construed the Death by Wrongful Act Statute to preclude the survival of actions ex contractu. The legislature has, however, amended the statute to include both tort and contract actions.¹²⁴

GOVERNMENTAL IMMUNITY AND COROLLARY RULES

In a series of recent cases the Florida Supreme Court reconsidered the severely criticised doctrine of municipal immunity in tort through which courts permit cities to escape financial responsibility for wrongful acts committed by them in a governmental capacity as distinct from a corporate capacity.¹²⁵ The first case in the recent series arose when a plaintiff sought damages from a city as a result of an alleged beating by municipal officers.¹²⁶ The judge denied recovery on the theory that the acts of policemen are governmental, and that cities are immune from liability even though the policemen as individuals may be liable. Mr. Justice Hobson, however, in a searching concurring opinion questioned the rationale of the theory and stated that the time had come to abandon the governmental-corporate dichotomy. Justices Terrell and Roberts dissented from the majority holding. In a second case, the court divided four to three and denied a wife the right to recover for the wrongful death of her husband, who, as a prisoner, perished in flames when the city jail burned.¹²⁷ Despite this sharp division, the possibility is slight that the

120. *Corneli Seed Co. v. Ferguson*, 64 So.2d 162 (Fla. 1953); *Haskins v. Jackson Grain Co.*, 63 So.2d 514 (Fla. 1953). Cf. *First Nat. Bank in Tarpon Springs v. Bliss*, 56 So.2d 922 (Fla. 1952).

121. 58 So.2d 434 (Fla. 1952).

122. *Florida Coca-Cola Bottling Co. v. Jordan*, 62 So.2d 910 (Fla. 1953). The court relied on the leading Florida case of *Blanton v. Cudahy Packing Co.*, 154 Fla. 872, 19 So.2d 313 (1944); See also *Smith v. Burdine's*, 144 Fla. 500, 198 So. 223 (1940).

123. 55 So.2d 730 (Fla. 1951).

124. FLA. STAT. § 768.01 (1953).

125. For a review of this problem see Price & Smith, *Municipal Tort Liability: A Continual Enigma*, 6 FLA. L. REV. 330 (1953).

126. *Miami v. Bethel*, 65 So.2d 34 (Fla. 1953). This case moreover involves a serious civil liberties problem in that it denies a substantial remedy for an invaded right. Cf. the dissenting opinion of Justice Murphy in *Wolf v. Colorado*, 338 U.S. 25, 48 (1949).

127. *Williams v. Green Cove Springs*, 65 So.2d 56 (Fla. 1953).

court in the future will decide to treat municipal corporations exactly as it treats private corporations; for in *Britt v. Ocala*¹²⁸ the court reaffirmed its position regarding municipal immunity and denied the right of an injured person to recover from a city whose employees took him into custody but deprived him of proper care.

The problem then remains one of defining which functions are corporate and which are proprietary, and happily the court describes most functions as corporate: the care of streets, sidewalks, bridges; the operation of public utilities, drainage systems, hospitals, airports, parks, swimming pools, and bathing beaches.¹²⁹ Of course, in these cases the normal defenses to tort liability available to private corporations and individuals remain available to municipalities.¹³⁰ In addition, municipalities continue to obtain an advantage in the special thirty, sixty, and ninety-day provisions for notice that are found in the city charters,¹³¹ and the court is construing these provisions with strictness. For example, in *Miami Springs v. Lassiter*,¹³² the court held that the notice requirement was not met when the plaintiff gave an unsigned statement to the city's liability insurance adjuster, and in still another case the court held insufficient a notice that set out the time of the accident but did not mention the place.¹³³ Finally, the cities continue to obtain special consideration from at least a brace of statutes: the one-year statute of limitations¹³⁴ and the statute making certain roads the responsibility of the State Road Department and not of the city.¹³⁵

As would be expected, in order to overcome the rigors of these developments that limit municipal liability, the court has manipulated the legal concepts to grant relief to plaintiffs in especially aggravated cases. Thus, in two cases the judges stated that the causes of action sounded in

128. 65 So.2d 753 (Fla. 1953).

129. E.g., *Mullis v. Miami*, 60 So.2d 174 (Fla. 1952) (woman stepped into a hole in the street); *Daytona Beach v. Humphreys*, 53 So.2d 871 (Fla. 1951) (woman tripped in hole in sidewalk).

130. *Miami v. Fuller*, 54 So.2d 198 (Fla. 1951) (car pitched over bulkhead through driver's negligence).

131. Specific form of the notice varies from city to city. That of St. Petersburg may be taken as typical. Fla. Spec. Laws 1937, c. 18896, provides:

. . . no suit shall be instituted or maintained against the City of St. Petersburg, Florida, for damages arising out of any personal injury unless written notice of such claim or injury is within sixty days from the date of receiving alleged injury, given to the City Manager of the City of St. Petersburg with specifications as to the time and place of said alleged injury.

132. 60 So.2d 774 (Fla. 1952) (three justices dissented).

133. *Oliver v. St. Petersburg*, 65 So.2d 71 (Fla. 1953) (three justices dissented).

134. FLA. STAT. § 95.24 (1951). In *Christian v. Sarasota* the court held that the Statute of Limitations barred an action, even though the plaintiff did not discover the injuries complained of until eighteen months after the accident.

135. *Leialoba v. Jacksonville*, 64 So.2d 924 (Fla. 1953) held that where by statute the State Road Department is responsible for maintenance of a road, the city is thereby relieved. See FLA. STAT. § 341.64 (1953). However, in *Gay v. Southern Builders, Inc.*, 66 So.2d 499 (Fla. 1953) the court showed a desire to permit injured parties to recover from the state by a decision that placed an action or contract rather than in tort.

contract rather than in tort with the consequence that the cities were liable in damages.¹³⁶ Despite the traditional concept that the state and its subdivisions, the counties, are completely immune from tort liability,¹³⁷ our Supreme Court has permitted recovery by a plaintiff in a case arising from a hospital operated by a county.¹³⁸ The legislature continues to add statutes that permit counties, through insurance plans, to meet the reasonable expectations of injured persons, especially school children.¹³⁹

136. *Golf v. Ft. Lauderdale*, 65 So.2d 1 (Fla. 1953); *Holbrook v. Sarasota*, 58 So.2d 862 (Fla. 1952).

137. *Bragg v. Board of Public Instr'n*, 160 Fla. 590, 36 So.2d 222 (1948); *Keggin v. Hillsborough County*, 71 Fla. 356, 71 So. 272 (1916).

138. *Suwanee County Hospital Corp. v. Golden*, 56 So.2d 911 (Fla. 1952).

139. Fla. Laws 1953, c. 28205, 28220.