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Torts

by *John A. Gorfinkel**

“Torts” has become a convenient label for a wide variety of wrongs redressed through civil litigation. During the year being reviewed, the California courts touched on almost every conceivable phase of this subject. However, the space allotted does not permit even a cursory treatment of all the decisions that might be regarded as pertinent or significant. The discussion which follows is therefore limited and, in so limiting it, we have tried to emphasize those areas where the decisions indicate either that change may be taking place, or is needed.

Medical Malpractice and Res Ipsa Loquitur

One of the most significant developments has been the increasing approval of *res ipsa loquitur* instructions in medical

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malpractice cases. Two decisions, *Clark v. Gibbons*¹ and *Tomei v. Henning*,² are particularly important. In order to appreciate their potential, some review of the earlier cases is necessary.

In a medical malpractice case, negligence consists of failure to possess or use the degree of care and skill common to the medical profession in the geographic area.³ This standard was long regarded as a matter requiring expert testimony; the common knowledge of the jury could not furnish the standard and could not permit an inference of negligence from an unfortunate or unsatisfactory result.⁴ Accordingly, *res ipsa loquitur* had no place in such cases.

The first applications of *res ipsa loquitur* to medical malpractice were in cases where the injury affected a part of the body remote from and unconnected with the area of treatment, or resulted from the presence of a foreign body in the operative area. Classical instances were the burn from a hot water bottle,⁵ the traumatic injury to a shoulder during an abdominal operation,⁶ and the surgical sponge left in the patient's abdomen after an operation.⁷ In such cases, one of the elements necessary for *res ipsa loquitur* was present—the resulting injury was of such a nature that it could be said, in the light of ordinary experience and without the intervention of expert testimony, that it was more probably than not the result of someone's negligence. But when the injury occurred during a procedure or course of treatment administered by several persons, the other element, that it was more probably than not the negligence of any particular defendant, was absent. *Ybarra v. Spangard*⁸ had held, however, that this did not preclude the application of the doctrine;

1. 66 Cal.2d 399, 58 Cal. Rptr. 125, 426 P.2d 525 (1967).

2. 67 Cal.2d 318, 62 Cal. Rptr. 9, 431 P.2d 633 (1967).

3. See, e.g., *Sinz v. Owens*, 33 Cal.2d 749, 205 P.2d 3, 8 A.L.R.2d 757 (1949).

4. 38 Cal. Jur.2d *Physicians, etc.* § 96 (1957).

5. See, e.g., *Trindle v. Wheeler*, 23 Cal.2d 330, 143 P.2d 932 (1943); *Tim-*

brell v. Suburban Hosp., 4 Cal.2d 68, 47 P.2d 737 (1935).

6. *Ybarra v. Spangard*, 25 Cal.2d 486, 154 P.2d 687, 162 A.L.R. 1258 (1944).

7. See 38 Cal. Jur.2d, *Physicians, etc.* § 98 at 728, 730 and cases cited therein.

8. 25 Cal.2d 486, 154 P.2d 687, 162 A.L.R. 1258 (1944).

if the patient, because of his condition during the treatment, could not determine when, or at whose hands, the injury was received, the burden of initial explanation was placed on the defendants. *Ybarra* was followed by *Leonard v. Watsonville Community Hospital*⁹ and the doctrine was established that if an inference of negligence could be drawn from the fact of injury during an operation, then every person having control over the patient's body or the instrumentality causing the injury during the period involved was called upon to meet that inference by explanation of his conduct.

The next step, and the one involved in the current cases, is the extension of *res ipsa loquitur* to injuries of such a nature that common experience does not furnish a guide. Here the landmark is *Quintal v. Laurel Grove Hospital*.¹⁰ In *Quintal* the patient suffered a cardiac arrest during the administration of a general anaesthetic. Common knowledge alone could supply no basis for an inference of want of care on anyone's part. Medical experts testified that cardiac arrest, although a rare occurrence, was a known and calculated risk of giving a general anaesthetic, that it seldom occurred when due care was used, but when it did occur it could not be said that it was more likely than not the result of negligence. There was also some evidence of specific acts indicating want of due care on the part of the attending doctors. Given this state of the record, a sharply divided court approved the giving of a conditional *res ipsa loquitur* instruction. This *conditional* form of the instruction permitted the jury to apply *res ipsa loquitur* if it found that the injury was one that would not have occurred but for someone's negligence; in effect the jury first determined whether there was a basis for the application of *res ipsa loquitur*, and if it found such a basis, applied the doctrine. Twice during the year under review, the supreme court again considered this specific problem.

In *Clark v. Gibbons*,¹¹ the defendants were the attending surgeon and anaesthesiologist. The operation was for the

9. 47 Cal.2d 509, 305 P.2d 36 (1956).

11. 66 Cal.2d 399, 58 Cal. Rptr. 125,

10. 62 Cal.2d 154, 41 Cal. Rptr. 577, 426 P.2d 525 (1967).

397 P.2d 161 (1964).

reduction of a severe ankle fracture. The anaesthetic wore off prior to the completion of the operation, the operation was prematurely terminated and plaintiff, as a result, sustained permanent limitation in the ankle. The court's opinion recites testimony from which the jury could have found specific acts of negligence. The surgeon and anaesthesiologist had not communicated with each other concerning the anticipated length of the operation; the former estimated a procedure of two to three hours while the latter assumed the operation would last two hours and administered a spinal anaesthetic capable, in a *normal* patient, of lasting two hours, plus or minus fifteen minutes. The anaesthetic wore off in about one hour. There was evidence that, at the point the original anaesthetic wore off, further anaesthesia could have been given without harm to the patient. There was testimony that in any spinal anaesthetic there is inherent risk, even when due care is used, that the anaesthesia will not last as long as contemplated due to peculiarities in the physical condition of the patient, but there was also testimony that if proper care were used, the anaesthetic should not wear off before completion of the operation.

It seems clear, from the testimony narrated by the court, that the jury could have found specific acts of negligence from the failure of the team to communicate, from the failure to administer an anaesthetic adequate for the procedures contemplated, or from the decision to terminate rather than extend the anaesthetic. But the problem before the supreme court was that the trial court had given the conditional instruction of *res ipsa loquitur*.

A majority of four justices, in an opinion by Justice Peters, affirmed;¹² the Chief Justice and Justice Tobriner concurred in the result in separate opinions differing substantially from each other and from the majority; and Justice McComb dissented. The majority relied primarily on the *Quintal* decision and approved the giving of the conditional instruction in these words:

12. The Justices concurring in the majority opinion were Associate Justices Justice Peek; Associate Justice Sullivan Mosk and Burke and Retired Associate did not sit.

Thus, we recognized in *Quintal* that proof that when due care is exercised an injury rarely occurs, *accompanied by other evidence indicating negligence*, may be sufficient to warrant an instruction on conditional *res ipsa loquitur*. . . . This is particularly true where, as in *Quintal* and in the present case, the injury occurred as the result of a normal procedure such as the administration of an anesthetic, rather than from a complex operation. . . .

The likelihood of a negligent cause is increased if the low incidence of accidents when due care is used is combined with proof of specific acts of negligence of a type which could have caused the occurrence complained of. When those two facts are proved, the likelihood of a negligent cause may be sufficiently great that the jury may properly conclude that the accident was more probably than not the result of someone's negligence.¹³

The logic of this approach seems strained. It permits the addition of two separate factors to produce a third which is not necessarily the sum of the two. The happening of the event is one factor; assuming that such an event does not normally occur when due care is used, the event, standing alone, does not warrant the giving of the instruction. The evidence concerning specific acts which could be found to be a failure to exercise due care is the other factor; these events, standing alone, justify a finding of negligence but do not warrant the giving of the instruction. How, then, does the combination of the two permit the jury to infer negligence from a cause other than the specific acts of the defendants? This may be tested by posing a hypothetical situation, based on facts only slightly different from *Clark v. Gibbons*. Would the court have approved the giving of a *res ipsa loquitur* instruction if the defendants in that case had agreed upon the approximate length of the operation as three hours and then, although the anaesthetic administered was

13. 66 Cal.2d at 412, 413, 58 Cal. Rptr. at 134, 426 P.2d at 534 (emphasis added).

normally adequate for the anticipated time, were forced to terminate the operation when it wore off prematurely because of an explainable (i. e., the patient was atypical) cause? The facts thus assumed would negative the indicia of specific acts of negligence recited in the majority opinion, but the other aspect of that opinion—"the low incidence of accidents when due care is used"—would remain. If this latter factor alone is sufficient to warrant the giving of the instruction in a case of this character, the criticisms of those not joining in the majority opinion seems justified. Their view, briefly stated, was that conceding that the premature wearing-off of the anaesthetic was a rare occurrence, the instruction could not be justified unless there was something to show that when it does occur it is more probably than not the result of negligence on the part of some member of the surgical team. The use of evidence of other possibly negligent conduct to reinforce the reliance on *res ipsa loquitur* was cogently criticized by the Chief Justice:

Nor does evidence of specific acts of negligence justify an inference of negligence based on *res ipsa loquitur*, for the inferences the jury may reasonably draw from the happening of the accident alone obviously cannot be determined by evidence of the defendant's conduct.¹⁴

The most challenging approach to the problem was that suggested by Justice Tobriner in his concurring opinion. He carefully established the unreliability of a statistical approach to the use of *res ipsa loquitur* in this class of case, and urged that such cases not be forced into the mold of negligence and fault, with concomitant straining of doctrine and stigmatizing of practitioners:

If public policy demands that defendants be held responsible for unexplained accidents without a reasoned finding of fault, such responsibility should be fixed openly and uniformly, not under the guise of negligence and at the discretion of a jury. . . .

¹⁴ 66 Cal.2d at 422, 58 Cal. Rptr. at 141, 426 P.2d at 541.

I must conclude that, in this limited category of cases, the attempt to fix liability exclusively in terms of traditional notions of fault has outlived its utility. Once it appears that an unexplained surgical accident has caused an unexpected injury, no useful end is advanced by rehearsing the ancient ritual of assessing blame.¹⁵

Five months after *Clark v. Gibbons*, in *Tomei v. Henning*¹⁶ the supreme court, in a unanimous opinion by the Chief Justice, reversed the trial court for failing to give a conditional *res ipsa loquitur* instruction in a medical malpractice case. This rather quick shift from disagreement and dissent to uniformity and harmony bespeaks either a substantial difference in facts between the two cases, or a substantial change in attitude on the part of those who did not join with the majority in *Clark v. Gibbons*.

It is difficult to find a substantial basis for factual differentiation. In *Tomei* the defendant, a surgeon, accidentally sutured plaintiff's right ureter in two places during a hysterectomy. This was not discovered for four days; corrective surgery failed and plaintiff's right kidney had to be removed. Medical experts testified that there is considerable risk involving the ureters during a hysterectomy, that surgeons try to stay away from them, that the urinary tract can be damaged no matter how careful the surgeon's actions, and that there are procedures, before closing the abdomen, for testing the condition of the ureters. The court's opinion was brief. It held that the conditional *res ipsa loquitur* instruction should have been given since the medical testimony afforded reasonable support for an inference of negligence.

But this result appears to be the same "boot-strapping" technique so severely criticized by the Chief Justice in *Clark v. Gibbons*. The medical testimony was such that the jury could have found specific acts of negligence, either in tying off the ureter in two places, or in closing the abdominal cavity without using any technique to determine the condition of the ureters. Nevertheless the jury had returned a verdict

¹⁵. 66 Cal.2d at 416, 421, 58 Cal. Rptr. at 137, 140, 426 P.2d at 537, 540. ¹⁶. 67 Cal.2d 318, 62 Cal. Rptr. 9, 431 P.2d 633 (1967).

in the defendant's favor. Under these circumstances, defendant's counsel contended that any *res ipsa loquitur* instruction would have been superfluous. His argument was that the evidence had pointed to particular conduct and had characterized it as potentially negligent; if the jury did not find negligence on that basis, how could it conceivably have used the same testimony as a basis to infer negligence under the *res ipsa loquitur* instruction? Counsel's argument seemed unassailable, but not so, said the court:

We do not believe, however, that a *res ipsa loquitur* instruction would have been superfluous in this case. It would have focused consideration on the inferences that could be drawn from the happening of the accident itself as distinct from the inferences that could be drawn from the evidence of the specific procedures available to a surgeon to avoid suturing a ureter or to discover such suturing in time to correct it before closing the wound. . . . Properly instructed, the jury could pursue the answer to that question along two distinct routes. It could ask what did defendant do or fail to do that might have caused the accident. Under a *res ipsa loquitur* instruction . . . [the jury] could ask whether it is more likely than not that when such an accident occurs, the surgeon was negligent. . . . Had the instruction been given, however, the jury might reasonably have concluded that regardless of how the accident happened or how it could have been avoided, its happening alone supported an inference of negligence.¹⁷

Under the facts of this particular case, the court is saying that even though the testimony of the medical experts did not convince the jury that the surgeon failed to use reasonable care when he accidentally sutured the ureter, or when he closed the abdomen without checking the ureters, the jury could still find on some other undisclosed basis that the surgeon would not have sutured the ureter if he had used reason-

17. 67 Cal.2d at 322, 62 Cal. Rptr. at 12, 431 P.2d at 636.

able care. And this, it is submitted, is the very proposition that Justice Tobriner protested against so strenuously in his concurring opinion in *Clark*, and to which the Chief Justice objected in that case and in his dissent in *Quintal*. There seems no valid basis for distinction between *Clark* and *Tomei*. The unanimity in *Tomei* can be explained only as an acceptance by the entire court of the majority opinions in *Quintal* and in *Clark*. But the concurring opinion of Justice Tobriner still, it is submitted, rings true. This is not *res ipsa loquitur* and it is not negligence; it is public policy placing the obligation of explanation on the defense and permitting the jury, in its almost uncontrolled discretion, to impose liability if there is any evidence of negligence plus any indication of an unusual or rare occurrence.

What is Harm—Liability for Unwanted Pregnancy

*Custodio v. Bauer*¹⁸ is the first California case to consider whether an unwanted pregnancy is a legally cognizable harm. Plaintiffs were husband and wife, and the parents of nine children. Defendants had performed a sterilization operation on the plaintiff wife but within a year thereafter she again became pregnant. The complaint stated several causes of action, including counts for negligence in performance of the operation, negligence in failing to apprise plaintiffs of the possible ineffectiveness thereof, negligent and intentional misrepresentation as to the efficacy of the operation, and breach of contract.

The trial court sustained defendants' demurrers without leave to amend; the court of appeal reversed, holding that each of the several counts contained allegations sufficient to state a cause of action.¹⁹ The opinion is particularly significant in holding that statements as to the effect of an operation, while matters of opinion, may be sufficient for an action in deceit or negligent misrepresentation, and for the view that an express agreement to perform a sterilization operation may place the surgeon in the position of a warrantor.²⁰

^{18.} 251 Cal. App.2d 303, 59 Cal. Rptr. 463 (1967). remedies were not considered at this stage of the case.

^{19.} Possible problems of election of ^{20.} Since the case, in its present

The immediate thrust of the opinion is two-fold. The first is that sterilization, for personal as well as therapeutic purposes, does not offend public policy and therefore an action may be maintained for an ineffective operation.

The second is more far-reaching. Having determined that causes of action were stated, the court considered the question of the "harm" for which damages could be recovered. Since these questions arose under the pleadings, the court was understandably reluctant, in advance of any evidence on the issues of liability and damages, to be specific on the items for which recovery could be had. However, some fairly clear guidelines were indicated. Thus the court approved the propriety of damages for the costs of the unsuccessful operation and for any physical or mental suffering or complications that might result from the operation or the unwanted pregnancy. The court also included in the area of compensable damage, any loss that the present members of the family would sustain in having the care, love, and support of the parents spread over a larger number. To the extent that such loss could be economically measured, it should, said the court, be compensable.

Plaintiffs had also requested damages for the rearing of the child. The court did not deal directly with this issue which raises the most perplexing problems of public policy, liability and damages. Since it is hardly arguable that a child in our society is anything other than an economic liability to his family, should the expenses of his upbringing be treated any differently from the expenses of his birth? To what extent should the economic status of the family be considered? Or the benefit conferred on the family in love and companionship? Is the direction that the law may take to be inferred from the growing social acceptance of contraception as a means to economic betterment of the family unit? If we accept the principle that a family may be better off, emotionally and financially, if it remains small, then perhaps our courts are prepared to hold that a child who is

posture, is concerned with allegations and not with facts, it would appear premature to comment on the evidence

necessary to establish either a misrepresentation or a warranty or breach of contract claim.

conceived after an operation intended to limit the size of the family is a legally cognizable “harm” and the doctor, if negligent, may be held liable for the economic and social “detriment” thereby caused the other members of the family.

Negligence—Problems of Duty and Causation

It is traditional “black-letter” law that before an actor can be held liable for the consequences of careless conduct, his conduct must have “caused” the injury. And it is also “black-letter” law that the problems of “causation” present two separate questions, cause in fact, and scope of liability for the more remote or less likely consequences of the actor’s conduct, sometimes called “proximate cause.” Unfortunately, the language of causation in California decisions has been replete with confusion between “cause in fact” and “proximate cause.” This in turn has tended to prevent a clear analysis of what “proximate cause” is or should be. During the past year, several cases were decided in which one or both issues were presented with the mixed result that in some decisions cause in fact and proximate cause were used interchangeably, to add to the confusion,¹ while in other decisions courts avoided the ambiguous language of causation and carefully analyzed the problem in terms of the scope of duty and the nature of the risk created by the actor’s conduct.

It is hoped that the analysis and discussion that follow, by focusing attention on these matters, may help in clearing away a part of the semantic jungle that covers a good part of this subject.

Cause in Fact—“Proximate Cause” Misused

“Cause in fact” should be used to refer to that act or event, without which the result would not have followed. Unless it can be said that “but for” the act of the defendant the

1. On the credit side, a brief acknowledgment to the court of appeal opinion in *Waller v. Southern Pacific Co.* (54 Cal. Rptr. 421, 427, 3d Dist., 11/1/66, vacated on other grounds, 66 Cal.2d 201, 57 Cal. Rptr. 353, 424 P.2d 937) for its clear and concise statement

of the distinction between cause in fact and proximate cause. See also *Fuller v. Standard Stations, Inc.*, 250 Cal. App.2d 687, 58 Cal. Rptr. 792 (1967), discussed *infra* under *Duty to Whom and Nature of Risk*.

Torts

result would not have followed, or alternatively, that the act of the defendant was a substantial factor in producing the result, cause in fact is not established. Assume a safety order requiring a full stop, prior to entering the crossing, by all trains crossing highways at grade from industrial sidings. A 100-car freight train, loaded with gravel, enters the crossing without coming to a full stop. It has violated the law and such violation will, in most jurisdictions, be treated as negligence per se; but if a motorist runs into the 100th car of that train, it can hardly be said that the train's failure to stop had anything to do with the collision. Thus the violation is not a cause in fact. On the other hand, proximate cause, correctly used, must initially assume that the defendant's act was a cause in fact, and then proceed to determine whether the defendant should be held liable for the particular consequences of the act. The distinction between cause in fact and proximate cause is thus essentially between a *factual* concept, and a *legal* concept. A defendant leaves his automobile unattended, with the keys in the car and the motor running; a juvenile delinquent borrows the car and in his ensuing joyride injures the plaintiff. The defendant's conduct is a substantial factor, a cause in fact, a setting in motion of the chain of events leading to injury. Whether he should be held liable is a policy consideration, usually subsumed under the rubric "proximate cause" although sometimes treated as a question of the scope of the duty owed by the defendant to the injured party or whether the eventual harm was within the risk created by the defendant's act. If the foregoing seems unduly elementary, its justification lies in the three decisions about to be discussed.

In *DeArmond v. Southern Pacific Co.*,² plaintiffs were guests in a motor vehicle and sued the railroad for injuries received in a grade crossing collision between the motor vehicle and defendant's train. The negligence of the driver of the motor vehicle was conceded. The trial court, sitting without a jury, found that the driver's negligence was the "sole proximate cause" of the accident. Plaintiffs appealed,

2. 253 Cal. App.2d 732, 61 Cal. Rptr. 844 (1967).

claiming that the railroad was also negligent in that it had failed to sound the whistle at the precise distance required by statute. The evidence indicated that numerous signals and warnings had been given and that a wigwag crossing signal, with red light, was in continuous operation from the time when the driver was still more than 200 feet from the crossing. Under these circumstances, the appellate court viewed the trial court's findings as in effect holding that if there were a violation of statute, such violation was not the "proximate" cause of plaintiff's injuries. There is no doubt about the correctness of the result. If the driver did not see the train's headlight and the red light and the flashing wigwag, and did not hear a warning bell and a whistle, all when he still had ample time to stop, then the failure to blow a whistle a few feet further back from the crossing could not have changed the result. Hence the failure to sound the whistle at the precise point required by law was not a substantial or any factor in producing the end result. The error lies in the injection of that ubiquitous adjective "proximate" into the opinion where it does not belong.

In *Hazelwood v. Gordon*,³ plaintiff fell down a flight of steps. It was claimed that the stairs did not conform to applicable safety ordinances, but apparently the only defects which existed were the absence of a handrail and the odd width of the *bottom* tread. But plaintiff lost her balance on the *top* step. To quote the court: "The violations of ordinances she alleged pertained to the hand-rail and to lower steps. . . . Such testimony supports findings both of lack of *proximate* cause for appellant's injuries, and of her contributory negligence."⁴ It is clear, from the court's narration, that whatever defects there were had nothing to do with plaintiff's injuries; had the stairs been constructed strictly in accord with code and safety requirements, the fall and injuries would have been the same. It is equally clear, that if there were any connection, *in fact*, between the defect in the stairs and plaintiff's fall, then the injuries were within the risk to be guarded against, and the defect would have

3. 253 Cal. App.2d 216, 61 Cal. Rptr. 115 (1967).

4. 253 Cal. App.2d at 219, 61 Cal. Rptr. at 117 (emphasis added).

Torts
been both the cause in fact and the proximate cause of the injuries. Again, the result is sound, the adjective “proximate” misplaced.

In *Espinoza v. Rossini*,⁵ plaintiff was riding *on*, and not *in*, a motor vehicle in a manner that may have been in violation of Vehicle Code section 21712. The evidence indicated that he would have been injured to the same extent had he been riding in the vehicle. “[W]hether this negligence,” said the court, “contributed as a *proximate* cause to his injury was a question of fact for the jury to decide.”⁶ Once again the word “proximate” is misused and its use is confusing. The issue was whether plaintiff’s conduct, if negligent, was a factor in causing his injury, and this was an issue of cause in fact and not proximate cause.

Proximate Cause, So-called, and Nature and Scope of Duty

Given an act that is careless and a resulting injury to a plaintiff, the issue may then arise whether the actor should be held liable for injury of this type or to this particular plaintiff. Frequently the problem arises because of the activities of other parties operating in the interval between defendant’s conduct and plaintiff’s injury, and the terms “intervening” and “supervening” cause are used. Sometimes the problem arises without any third-party activity, but the result is an unforeseeable type of harm or an injury to an unforeseeable plaintiff.

These are the problems usually subsumed under the concept of proximate cause; while that term is not inherently meaningful or helpful, if it is to be used at all it should be limited to that concept.

Several cases considered problems of this type during the year; these cases are significant both in their approach to the problem and in the results reached.

In their approach to the problem of scope of liability, several decisions abandoned the language of proximate cause and analyzed the issues in terms of the person or class of

5. 247 Cal. App.2d 40, 55 Cal. Rptr. 205 (1966).

6. 247 Cal. App.2d at 49, 55 Cal. Rptr. at 211 (emphasis added).

persons to whom the duty was owed, the nature of the risk created by the actor's conduct and whether the harm that resulted was within the risk created.

The most significant of these decisions is that of the California Supreme Court in *Schwartz v. Helms Bakery Limited*.⁷ The plaintiff, a minor child, ran across the street to buy a doughnut from defendant's bakery truck and was injured by a passing motorist. Defendant claimed insulation from any negligence on its part on the theory that the act of the passing motorist was the proximate cause of the injury. The court refused to get into the semantic difficulties of proximate cause. It viewed the problem "as one of determining the nature of the duty and the scope of the risk of the negligent conduct"⁸ and cited with approval from Harper and James:

In a concrete situation an act or omission is negligent because it carries an undue threat of harm from some more or less specific kind of risk. . . . [A] professional generation ago the 'cause' reasoning was used almost exclusively. But the problem is not one of cause in any meaningful sense and the scope of the risk analysis has been gaining favor in recent years with both courts and commentators.⁹

This clear expression of the distinction between finding the defendant's conduct factually connected with plaintiff's injury and determining that the defendant is legally responsible for the consequence may serve to lead lower courts and counsel into a more accurate use of cause in fact and proximate cause. But even more significant is the approach taken by treating what has traditionally been regarded as "proximate cause" as a problem of duty and not of cause. By so doing, the issue becomes one of *law* for the court to declare and not one of fact for the speculation of the jury. As applied to the *Helms* situation, once the court had determined that the itinerant street vendor owed a duty of care towards the

7. 67 Cal.2d 228, 60 Cal. Rptr. 510, 430 P.2d 68 (1967).

8. 67 Cal.2d at —, 60 Cal. Rptr. at 516, 430 P.2d at 74.

9. 67 Cal.2d at 236 n. 9, 60 Cal. Rptr. at 516 n. 9, 430 P.2d at 74 n. 9.

Foots

prospective purchaser, and this duty encompassed the duty of protection against the perils of traffic, then the jury role on this issue is limited to determining whether the vendor used reasonable care under the circumstances.

Equally perceptive analyses of the issue of proximate cause appear in *Custodio v. Bauer*¹⁰ and *Fuller v. Standard Stations, Inc.*¹¹ In *Custodio*, as discussed above, plaintiffs, husband and wife, sued for medical malpractice when a sterilization operation, performed on the wife by the defendants, did not produce the desired result. Defendants contended that the "damage, if any, suffered by plaintiffs, or either of them, were not the proximate result of any breach of duty on their part because of the intervening sexual relations between the parents."¹² The court's answer was brief:

The general test of whether an independent intervening act, which actively operates to produce an injury, breaks the chain of causation is the foreseeability of that act. . . . It is difficult to conceive how the very act the consequences of which the operation was designed to forestall, can be considered unforeseeable.¹³

In *Fuller v. Standard Stations, Inc.*, the issue was the liability of a vendor of gasoline to an intoxicated motorist who subsequently seriously injured plaintiff. The opinion contains an excellent analysis of the problem:

Current judicial analysis considers the outer boundaries of negligence liability in terms of duty of care rather than proximate causation. The imposition of a duty of care and its extension to the expectable conduct of third persons is largely a question of law for the court. Where existence of a duty is brought into question, its affirmation rests in part upon social policy factors, in part upon an inquiry whether the actor's conduct involves a foreseeable risk to persons in the plaintiff's situation. [Cites] In the consideration of a general

¹⁰. 251 Cal. App.2d 303, 59 Cal. Rptr. 463 (1967).

¹¹. 250 Cal. App.2d 687, 58 Cal. Rptr. 792 (1967).

182 CAL LAW 1967

¹². 251 Cal. App.2d at 316, 59 Cal. Rptr. at 472.

¹³. 251 Cal. App.2d at 316-317, 59 Cal. Rptr. at 472.

demurrer or motion for nonsuit in a negligence action, the dispositive issue is usually the legal question of duty, not the fact question of proximate cause. [Cites] This Court observed in *Raymond v. Paradise Unified School Dist.*, *supra* (p. 6) [218 Cal. App.2d —, 31 Cal.Rptr. p. 850]: Divergent results are possible and judicial disagreements arise by approaching negligence determinations through the gateway of duty, on the one hand, or proximate causation on the other.

When the facts at hand are approached as a duty of care problem, there may be justification for a rule imposing liability on a service station operator who sells gasoline to a recognizably intoxicated motorist. The operator is negligent as to persons beyond his vision when his conduct creates a recognizable risk of harm to them. [Cites] The element of foreseeability offers no problem. There is no freak accident here, no extraordinary combination of events culminating in an unforeseeable injury. [Cites] Supplying motive power to a drunk driver involves a recognizable, indeed obvious, danger to other motorists and pedestrians. The assumption of foreseeability for pleading purposes does not prevent the defendant from presenting evidence that it did not know or have reason to believe that the customer was drunk and that it acted as a reasonably prudent person. Given the foreseeability of harm to the injured plaintiff, the inquiry then centers on the array of policy factors which justify affirmation or denial of the duty.¹⁴

Duty to Whom and Nature of Risk

The decisions just discussed are clearing the way for more accurate analysis of the problems involved. By avoiding the proximate cause approach, discussion of “duty” and “risk to whom” supplant the question-begging technique of leaving it all up to the jury. Accordingly, further consideration must be given some of the decisions just mentioned, as well as

¹⁴ 250 Cal. App.2d at 691–692, 58 Cal. Rptr. at 794–795.

others not previously discussed, for their analysis of the scope of duty and the extent of risk created by a breach of duty.

In *Schwartz v. Helms Bakery Limited*,¹⁵ the plaintiff, a four-year-old child, was struck by a passing motorist when the child ran across a street to purchase a doughnut from defendant's sales truck. The driver of the truck operated a retail route, selling pastries in residential areas. The plaintiff had approached the truck a few minutes before the accident, to ask the driver to wait while he went home for some money. The driver knew where the child lived and told him that he would meet him later, up the street.

While the truck was parked near plaintiff's house, but on the opposite side of the street, the child ran out from behind a parked car and was hit. The defendant noticed the child about to run out into the street, but before he could call out a warning the accident had occurred. At the trial, defendant's motion for nonsuit was granted. The supreme court reversed.

The precise question of a street vendor's liability for injuries sustained by a minor patron from *surrounding* traffic had not been previously decided in California, although several other jurisdictions have dealt with the problem.¹⁶ The elements common to these cases are: (1) a defendant vendor who conducts his business in the streets; (2) a product that appeals to children and a dispensing vehicle that is intended to attract children by means of bells, whistles or distinctive coloring; and (3) a plaintiff injured by a third party while approaching or leaving defendant's vehicle.

The supreme court held that there were two bases on which defendants owed a duty of care to the plaintiff. The first was that in undertaking to direct the child by arranging a future rendezvous the defendant driver entered into a legal relationship with him, thereby voluntarily assuming a duty of reasonable care toward him.¹⁷

15. 67 Cal.2d 228, 60 Cal. Rptr. 510, 430 P.2d 68 (1967).

16. See 74 A.L.R.2d 1050 for a discussion of the cases and authorities.

17. See Prosser, TORTS, 3d ed., § 54, at 339-343. Liability predicated on a

voluntary assumption of duty based on affirmative conduct is a familiar concept. In view of the element of express direction present in this case, liability based on this ground seems clear.

But the typical street-vendor situation involves no such direct control, and it is the second basis of liability suggested by the court that will probably prove more significant in future cases. By soliciting plaintiff's business, said the court, defendant entered into an invitor-invitee relationship with him and as such, the invitor owed a duty to the plaintiff to exercise reasonable care for his safety while on the "premises." The "premises" or area of invitation was said to be greater than the defendant's immediate property and to include the street and immediate environs over which the invitee might pass.¹⁸

While basing liability on assumption of duty or solicitation, the supreme court also cited with approval and discussed three cases from other jurisdictions¹⁹ which, although reaching the same result, had based liability on much broader grounds of public policy and the duty owed children in general. It seems significant that the element of direct control and solicitation present in the *Schwartz* case are not apparent in the three cases cited, but rather, the tenor of these decisions seems to be that: "The responsibility of one who knowingly provokes into action the natural recklessness of irresponsible children ought surely be proportionate to the degree of danger he thereby creates."²⁰

In *Fuller v. Standard Stations, Inc.*,¹ plaintiffs sought to recover when injured by the negligence of an intoxicated motorist to whom defendant had sold gasoline. Heretofore, this problem has usually arisen with dram shops or bars who sold to an intoxicated person. Earlier California cases had refused to impose liability on the dram shop operator, holding that no common-law duty could be imposed to exercise care to avoid harm to such remote plaintiffs,² and sug-

18. The court cited *Kopfinger v. Grand Central Public Market*, 60 Cal.2d 852, 37 Cal. Rptr. 65, 389 P.2d 529 (1964) and *Ross v. Kirby*, 251 Cal. App. 2d 267, 59 Cal. Rptr. 601 (1967); see also Prosser, *TORTS*, 3d ed., § 61 at 401-03. Cf. the discussion, *infra*, of *Ross v. Kirby*.

19. *Landers v. French's Ice Cream Co.*, 98 Ga. App. 317, 106 S.E.2d 325,

74 A.L.R.2d 1050 (1958); *Mackey v. Spradlin*, 397 S.W.2d 33 (Ky. App., 1965); *Jacobs v. Draper*, 274 Minn. 110, 142 N.W.2d 628 (1966).

20. *Mackey v. Spradlin*, 397 S.W.2d at 37 (Ky. App., 1965).

1. 250 Cal. App.2d 687, 58 Cal. Rptr. 792 (1967).

2. See cases cited in *Fuller*, 250 Cal. App.2d 687, 58 Cal. Rptr. 792 *et seq.*

gested that relief, if any were to be afforded, was a matter for the legislature. *Fuller* is a case of first impression in California on the sale of gasoline to an intoxicated motorist.³ The court was unable to distinguish it from the earlier dram shop cases and bowed, it seemed a bit reluctantly, to precedent and held that plaintiffs had not stated a cause of action against defendant. The opinion's analysis of the problem was a perceptive one. By approaching the issue as a problem of duty and nature of risk created, it avoided the pitfalls of proximate cause. The act of selling gasoline to an obviously intoxicated motorist, said the court, created a foreseeable risk of harm to other persons situated as plaintiffs were. Whether there might be policy considerations militating against the imposition of responsibility was not considered, since the court regarded the ultimate issue foreclosed by the earlier supreme court decisions in the dram shop cases. The entire opinion seemed to be an open invitation to the supreme court to grant a hearing and reconsider the matter; the invitation was not accepted and we must assume that the issue of liability for such sales, whether by service stations or liquor establishments, is currently foreclosed unless and until the law is changed by the legislature.

Mallow v. Tucker, Sadler & Bennett,⁴ involved a more traditional form of the "duty to whom" problem. A firm of architects had prepared plans and specifications for an excavation and failed to delineate the presence of an underground high-voltage line. A workman on the job was electrocuted when he came into contact with the line. The evidence supported the conclusion that the defendants had not exercised due care in the preparation of the plans and specifications. It was held that their duty to do so extended to decedent as a person who "foreseeably and with reasonable certainty may be injured"⁵ as a result.

3. Cf. *Gonzalez v. Derrington*, 56 Cal.2d 130, 14 Cal. Rptr. 1, 363 P.2d 1 (1961), sale of gasoline in violation of a municipal ordinance to persons who used it to set a fire resulting in injury to one person and death to three others.

4. 245 Cal. App.2d 700, 54 Cal. Rptr. 174 (1967).

5. 245 Cal. App.2d at 703, 54 Cal. Rptr. at 176.

Finally, attention is called to *Burgess v. Conejo Valley Development Company*,⁶ pending in the supreme court on grant of hearing after decision by the Court of Appeal for the Second District. Its potential impact, economically as well as on legal concepts, is great. It involves a suit brought by home owners in a tract against the developers and the lending institution which financed the developers, for damages arising out of the alleged faulty construction by the developers. The gravamen of the action was the existence of a duty on the part of the lending institution to exercise reasonable care for the protection of the purchasers, with respect to financing and controlling the developers. Since the case is now under consideration, further comment would be improper.

The Guest Law

Three cases demonstrated the weaknesses and inadequacies of California's Guest Law. So far as pertinent to this discussion, that act applies to any person "who as a guest accepts a ride in any vehicle upon a *highway*" and is injured "*during the ride.*"⁷

In *O'Donnell v. Mullaney*,⁸ the parties were attending a picnic. Part of the trip was on a public road and part on a private road. The passenger was killed while the car was being operated on the private road. The supreme court unanimously held that the Guest Law did not apply since "highway" means "public roadway."

In *Trigg v. Smith*⁹ and *Campbell v. Adams*,¹⁰ the courts of appeal were confronted with cases of injuries to passengers incurred while they were in the process of alighting from the vehicle at the end of the journey. In *Trigg*, the passenger was moving across the front seat in order to get out on the driver's

6. The Court of Appeal's opinion was reported in 253 A.C.A. 186, 61 Cal. Rptr. 333 (1967); the supreme court granted a hearing on 10/5/67; the case was on the calendar for oral argument in April 1968.

7. Cal. Vehicle Code § 17158 (emphasis added).

8. 66 Cal. 2d 994, 59 Cal. Rptr. 840, 429 P.2d 160 (1967).

9. 246 Cal. App.2d 510, 54 Cal. Rptr. 858 (1966).

10. 250 Cal. App.2d 756, 59 Cal. Rptr. 63 (1967).

side; in *Campbell*, the passenger had opened the door and had one foot outside the car. *Trigg* was held to be a guest as a matter of law. *Campbell's* status was held to be a question of fact for the jury.

There is no point in reviewing the *O'Donnell* decision on the issues of statutory construction involved, or the *Trigg* and *Campbell* cases and their predecessors¹¹ on the matter of the precise point in space or time when the "ride" ends and the "passenger" is no longer a "guest." The short answer is that it is difficult to find any rational basis for these distinctions.¹² Every rationale¹³ invoked for the justification of a guest statute is applicable to the passenger who is injured on a private road leading to a picnic area, or on the grounds of a supermarket, motel or summer resort, or even in the owner's private driveway. If a literal reading of the statute requires differences in result when such differences cannot be justified, the statute needs amendment. And similarly, if "during the ride" is going to produce hair-splitting distinctions based on whether the motor is running, or more of the passenger's body is outside, rather than inside, the vehicle,¹⁴ or whether the parties might reasonably consider the journey at an end,¹⁵ some better language should be found to describe the temporal and spatial limits of the guest statute.

11. See cases cited in *Trigg*, 246 Cal. App.2d at 513-514, 54 Cal. Rptr. at 861 and in *Campbell*, 250 Cal. App.2d at 759-763, 59 Cal. Rptr. at 66-68.

12. Unless it be the apparent antipathy of the courts to guest statutes and their determination to limit them by application of the doctrine of strict construction; see *Prager v. Israel*, 15 Cal.2d at 93, 98 P.2d at 731 (1940), quoted with approval in *O'Donnell v. Mullaney*, 66 Cal.2d at 997, 59 Cal. Rptr. at 842, 429 P.2d at 162.

13. For an exposition of the standard rationales of possible collusion between passenger and driver, and of ingratitude

for hospitality, see *Harper and James, The Law of Torts*, § 16.15 at 961.

14. Note particularly the court's review of the evidence in *Campbell v. Adams*, 250 Cal. App.2d at 764, 59 Cal. Rptr. at 69: "The record discloses that plaintiff testified that at the time of the accident about one-half of the left side of his seat and leg remained in the car, that more of his body was out of the car than inside it, and that his right foot was on the ground with most of the weight of his body upon that foot."

15. *Campbell v. Adams*, 250 Cal. App.2d at 765-766, 59 Cal. Rptr. at 70.

Vicarious Liability

*Poncher v. Brackett*¹⁶ involved a suit against the grandparents of a minor child for injuries inflicted by the child.¹⁷ The complaint alleged the dangerous propensities of the child, knowledge thereof by the defendants, and failure on their part adequately to control or supervise the child. Prior decisions¹⁸ had sustained the parents' liability in such circumstances, but this is apparently the first case in California to consider the responsibility of a more remote relative. The trial court sustained a demurrer without leave to amend. On appeal from the ensuing judgment of dismissal, the appellate court reversed, holding that one count in the complaint, which alleged that defendants "voluntarily and gratuitously assumed and accepted custody and control"¹⁹ of the minor, stated a cause of action. As the court viewed it, "The ability to control the child, rather than the relationship as such, is the basis for a finding of liability,"²⁰ whether the defendant be parent, more remote kin or, apparently, no kin at all.¹

*Hamilton v. Dick*² is another case of first impression. It involved the termination of the liability imposed by Vehicle Code section 17707³ on the parent who had signed a minor's application for a driver's license. Vehicle Code section 17711

16. 246 Cal. App.2d 769, 55 Cal. Rptr. 59 (1966).

17. We anticipate the criticism that this is not true vicarious liability and that defendants are being held for their own fault. We agree; the case appears in this subsection for convenience.

18. See particularly *Ellis v. D'Angelo*, 116 Cal. App.2d 310, 253 P.2d 675 (1953).

19. 246 Cal. App.2d at 770 n. 1, 55 Cal. Rptr. at 60 n. 1.

20. 246 Cal. App.2d at 772, 55 Cal. Rptr. at 61.

1. In this respect, it is significant that the court relied on RESTATEMENT (SECOND) OF TORTS § 319 which is applicable to "one who takes charge" and not on § 316, dealing with parental duty.

2. 254 Cal. App.2d 131, 61 Cal. Rptr. 894 (1967).

3. § 17707 of the Vehicle Code provides: "Any civil liability of a minor arising out of his driving a motor vehicle upon a highway during his minority is hereby imposed upon the person who signed and verified the application of the minor for a license and the person shall be jointly and severally liable with the minor for any damages proximately resulting from the negligence or willful misconduct of the minor in driving a motor vehicle, . . ." (254 Cal. App. 2d at 132 n. 1, 61 Cal. Rptr. at 895 n. 1). A minor substitution of terms was made in this section in 1967. It did not, however, affect the substance of the section. See Cal. Stats. 1967, ch. 702, § 9.

Torts

provides that the signer may be relieved from such liability by applying for and actually obtaining cancellation of the minor's license by the Department of Motor Vehicles. In the instant case, the defendant had not applied for cancellation, but the Department, on its own initiative, had revoked the minor's license for a series of vehicle offenses. Such revocation, it was held, had effectively terminated the minor's driving privileges and this in turn terminated the signer's liability without his being required to apply for a cancellation under section 17711. One word of caution is in order; this limitation is expressly restricted to a total revocation of the minor's license and a suspension or other restriction limited in time will not absolve the signer from liability even though the driving takes place during the period of suspension.

Assumption of Risk and Contributory Fault

*Grey v. Fibreboard Paper Products Co.*⁴ considered the perennial problem of the admixture of the defenses of assumption of risk and contributory fault. Plaintiff, a machinist, was repairing a paper cutting machine in defendant's plant while the machine was in operation. He was injured when his hand was caught in the moving rollers. The case was tried before the court, sitting with a jury, and verdict was for plaintiff. Both parties had requested instructions on contributory and assumption of risk. The court instructed on contributory fault, but not on assumption of risk.

The supreme court held that the evidence was sufficient to permit a finding of assumption of risk and therefore the requested instructions should have been given. However, the failure so to instruct was found not to be prejudicial, since "the 'assumption of risk' here involved is but a variant of contributory negligence. . . ."⁵ To reach this result, the court apparently assumed that assumption of risk would be applicable to plaintiff if, and only if, he were found to have *unreasonably* proceeded in a situation where he knew or should have known and appreciated the risk involved. But

4. 65 Cal.2d 240, 53 Cal. Rptr. 545, 418 P.2d 153 (1966).

5. 65 Cal.2d at 246, 53 Cal. Rptr. at 548, 418 P.2d at 156.

traditionally, assumption of risk has included conduct that was reasonable under the circumstances, conduct that a reasonably prudent person, considerate of his own affairs, and with full knowledge of the situation and its alternatives, might engage in.⁶ Plaintiff was a man with thirty years' experience in working on heavy machinery of this type. Part of the repairs consisted in smoothing the rollers by holding an emery cloth against them while they were in operation. Plaintiff declined the assistance of one of defendant's employees (who could have stood by to stop the machinery, if necessary), saying that the job could be better performed by one man. Under these circumstances, it would appear that plaintiff acted reasonably, but it would also appear that he acted with full knowledge of the risk and the other choices available to him. Under past formulations, this would seem to present a case of assumption of risk, and not contributory fault.⁷ The entire opinion leaves the reader in doubt whether the supreme court has (1) abandoned the traditional view of assumption of risk; (2) decided the traditional view could not apply under the particular facts of the case; or (3) simply concluded that if a jury did not find for defendant on contributory fault, it would not have found for it on assumption of risk. Until there is further word from the supreme court on assumption of risk and its relation to contributory fault, one should proceed with caution in citing the *Grey* case.

Owners and Occupiers of Land

The year under review was memorable; there were no "attractive nuisance" cases⁸ and the decisions involving owners and occupiers of land were few, with only two meriting passing notice.

In *Anderson v. Anderson*,⁹ the trial court had granted a nonsuit on plaintiff's opening statement. That statement was

6. See PROSSER ON TORTS, 3d ed., § 67 at 451. analogy; see *Schwartz v. Helms Bakery Limited*, 67 Cal.2d 228, 60 Cal. Rptr. 510, 430 P.2d 68 (1967), discussed *supra*.

7. See PROSSER ON TORTS, 3d ed., § 67 at 451.

8. The term appears to have been used in only one case, and then only by 9. 251 Cal. App.2d 409, 59 Cal. Rptr. 342 (1967).

to the effect that plaintiff visited defendant's home, at the latter's invitation, to use the swimming pool. The pool had been constructed by defendant and had a submerged ledge, the existence of which was not known to plaintiff and was not readily visible from the surface. Plaintiff was not warned of the ledge, and was seriously injured when he dove into the pool. The Court of Appeal, Fourth District, reversed, holding that the opening statement stated a case of possible liability. The opinion sets forth an extremely narrow basis for liability, although the fact situation would clearly bring the case within the rule of section 342 of the *Restatement of Torts*.¹⁰ The court referred to earlier decisions and questioned whether the rule of section 342 was law in California. It concluded that "a determination of this appeal does not require the application of the *bald* declaration of the *Restatement* rule."¹¹ The court considered plaintiff's argument that the submerged ledge was a "trap," but decided that the theory of a "trap" was limited to spring guns, steel traps, and the like deliberately set by the landowner, and concluded: "The lack of definiteness in the application of the term to any other situation makes its use argumentative and unsatisfactory. We shall not engage in argument as to whether the condition of the swimming pool constituted a trap."¹² The court disposed of the claim of defendant's "active negligence" by limiting that concept to activity after plaintiff's arrival.

Liability was predicated, however, on a duty to warn the plaintiff, under the particular circumstances set forth in the opening statement. Those circumstances, as set forth in the

10. The court quoted § 342 of the RESTATEMENT (SECOND) OF TORTS as follows: "A possessor of land is subject to liability for bodily harm caused to gratuitous licensees by a natural or artificial condition thereon if, but only if, he

"(a) knows of the condition and realizes that it involves an unreasonable risk to them and has reason to believe that they will not discover the condition or realize the risk, and

"(b) invites or permits them to enter

or remain upon the land, without exercising reasonable care

"(i) to make the condition reasonably safe, or

"(ii) to warn them of the condition and the risk involved therein." (251 Cal. App.2d at 411-412, 59 Cal. Rptr. at 344).

11. 251 Cal. App.2d at 412, 59 Cal. Rptr. at 344 (emphasis added).

12. 251 Cal. App.2d at 412, 59 Cal. Rptr. at 344.

opinion, were that: the owner created or maintained the dangerous condition; the invitation was extended to the specific use of the part of the land on which the condition existed; the presence of the dangerous condition was not apparent because of conditions brought about by the occupier of the land; and the hazard was encountered while making use of the land for the specific purpose intended.¹³

As thus stated, the distinctions between the court's formulation and the *Restatement* may be subtle, but they are significant in three respects. First, the owner must create or maintain the hazardous condition; apparently there would be no liability for a natural condition without some affirmative action equivalent to "maintaining."¹⁴ Next, the owner must invite use of that specific portion of the premises on which the hazard exists and for the purpose made dangerous thereby; a general invitation does not suffice. Finally, because of the owner's activity, the hazard must not be apparent; a hazard which is not apparent because of natural conditions *not* brought about by the owner does not subject him to liability.

The law has long been plagued by ultra-fine distinctions in the matter of the duty owed by owners and occupiers of land, both to persons on the premises and those using an adjacent way. The tendency to formulate rules in terms of refinements of the duty owed rather than in terms of a simple duty to act as a reasonable prudent person under the circumstances¹⁵ has multiplied distinctions. The present case with its refinements on the refinements of the *Restatement* rule seems an unfortunate further proliferation of such distinctions.

In *Ross v. Kirby*,¹⁶ the duty owed by a landowner to a business invitee was held to extend to abutting city property, a public parking lot, used by defendants' patrons for parking and easy access to defendants' premises. The scope of the

13. 251 Cal. App.2d at 413, 59 Cal. Rptr. at 345.

14. See *King v. Lennen*, 53 Cal.2d 340, 1 Cal. Rptr. 665, 348 P.2d 98 (1959); Prosser, *Trespassing Children*, 47 Cal. L. Rev. 427, 466 (1959).

15. See *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 3 L.Ed.2d 550, 79 S.Ct. 406 (1959).

16. 251 Cal. App.2d 267, 59 Cal. Rptr. 601 (1967).

Torts

decision is unclear and leaves open for conjecture and future development several possibilities. The hazard was a "berm" or ledge, constructed by the city on the edge of the parking lot, but on the city's side of the dividing line. It had originally been painted white to enhance its visibility, but after approximately six months the paint had worn off, inferentially, said the court, from the foot traffic to and from defendants' premises. Two cases, *Kopfinger v. Grand Central Public Market*¹⁷ and *Johnston v. De La Guerra Properties, Inc.*,¹⁸ were cited to support the decision. However neither would seem to justify the decision. In *Kopfinger*, a patron of a market slipped on debris on the sidewalk; that debris had resulted from defendant's use of the sidewalk for meat deliveries to its market. In *Johnston*, the occupier of the land had affirmatively acted to assume and exercise control over the area outside the premises on which the hazard existed. The most that can be said, with respect to the activities of defendants in *Ross v. Kirby*, was that their back door faced on the parking lot, an awning extended almost the entire distance from the back door to the property line and thus an invitation was extended to patrons to enter from the parking lot.

The opinion leaves several questions unsettled. First is the court's indication that defendants should have painted the berm or otherwise acted to increase its visibility. But does a property owner have a right, let alone a duty, to enter on adjacent city property and maintain it? And would the same suggestion have been made if the city had not originally painted the berm?

Secondly, there is the broader question of how far the court will extend a duty to maintain an adjacent public parking lot. Is this decision predicated on the fact that the berm was on the dividing line and may have been designed to protect defendants' property from water drainage?¹⁹ Would the same doctrine be applied to low barriers within the parking lot designed to keep cars in their respective lanes, or to an

17. 60 Cal.2d 852, 37 Cal. Rptr. 65, 389 P.2d 529 (1964).

18. 28 Cal.2d 394, 170 P.2d 5 (1946).

19. 251 Cal. App.2d at 270-271, 59 Cal. Rptr. at 604.

accumulation of oil resulting from cars parked by defendants' patrons?

Strict Liability

California courts have not been reluctant to impose strict liability on persons engaged in hazardous activities.²⁰ *Smith v. Lockheed Propulsion Co.*¹ adhered to that policy and held defendant liable for damages to plaintiff's structure caused by seismic vibrations from the static firing of a rocket motor. The court took the position that strict liability should be imposed, as a matter of policy, to allocate the risk of loss from a hazardous activity to the person who can administer the loss so that it will ultimately be borne by the public. The court recognized that the doctrine does not automatically subject the actor to liability without regard to place or circumstances, but found that risk of harm to plaintiff's property should have been anticipated since defendant's property bordered plaintiff's on three sides.

The court also considered defendant's claim for immunity, since the activity was pursuant to government contract. The court assumed that the United States would have been immune, under the *Dalehite*² decision, but held that the defendant as contractor did not share that immunity.³ Two grounds were advanced for denying immunity. The first was that the selection of the test site, the construction of the installation and the manner of testing had not been specified by the government, but were left to the contractor. The second was that the court, following the *Muskopf*⁴ decision, regarded any extension of the doctrine of sovereign immunity as contrary to the existing policy of the State of California. Still

20. The leading cases are *Luthringer v. Moore*, 31 Cal.2d 489, 190 P.2d 1 (1948) and *Green v. General Petroleum Corp.*, 205 Cal. 328, 270 P. 952, 60 A.L.R. 475 (1928).

1. 247 Cal. App.2d 774, 56 Cal. Rptr. 128 (1967).

2. *Dalehite v. United States*, 346 U.S. 15, 97 L.Ed. 1427, 73 S.Ct. 956 (1953).

3. "The question whether the contractor shares the immunity of the United States probably presents a federal question. . . . Our research has failed to reveal any federal cases on this issue. . . ." 247 Cal. App.2d at 787 n. 5, 56 Cal. Rptr. at 139 n. 6.

4. *Muskopf v. Corning Hosp. Dist.*, 55 Cal.2d 211, 11 Cal. Rptr. 89, 359 P. 2d 457 (1961).

to be determined is whether the United States Government, either as a matter of inherent federal supremacy or as a matter of contractual or legislative policy, will assert a claim of immunity on behalf of its contractors in similar cases.

Emotional Distress—Negligent and Intentional

Two cases considered significant aspects of the right to recover for the infliction of emotional distress or disturbance; neither is a wholly satisfactory resolution of the problem presented.

In *Vanoni v. Western Airlines*,⁵ the claim was for *negligent* infliction of emotional distress. The basis of plaintiff's complaint was the negligent operation by defendant of an airplane, causing plaintiffs as passengers to believe there was mechanical trouble which might cause the plane to crash. Each plaintiff alleged that, as a result, he sustained "grievous mental suffering, anguish and anxiety and *suffered severe shock to his nerves and nervous system and suffered other injuries. . . .*"⁶ The trial court entered judgment of dismissal after sustaining a general demurrer without leave to amend. The court of appeal reversed, holding the complaint stated a cause of action.

The decision recognized that *Amaya v. Home Ice*⁷ had established the "no impact" rule in California, permitting recovery for fright or shock due to defendant's negligent conduct, without the necessity of establishing a physical impact on plaintiff. But the court then concluded that in cases of *negligent*⁸ conduct "there can be no recovery for emotional distress or mental suffering unaccompanied by physical harm."⁹ However, in the instant case, the court stated

5. 247 Cal. App.2d 793, 56 Cal. Rptr. 115 (1967).

6. 247 Cal. App.2d at 794, 56 Cal. Rptr. at 116.

7. *Amaya v. Home Ice, Fuel & Supply Co.*, 59 Cal.2d 295, 29 Cal. Rptr. 33, 379 P.2d 513 (1963).

8. *Cf.* on intentional infliction of emotional disturbance, *State Rubbish*

Collectors Assoc. v. Siliznoff, 38 Cal.2d 330, 240 P.2d 282 (1952), indicating recovery may be had without proof of physical harm, but nonetheless noting that the injured party had suffered nausea as well as fright.

9. 247 Cal. App.2d at 795, 56 Cal. Rptr. at 116.

that such physical harm had been adequately alleged, and quoted from *Sloane v. Southern California Ry.*, decided in 1896, to the effect “that a nervous shock or paroxysm, or a disturbance of the nervous system, is distinct from mental anguish, and falls within the physiological, rather than the psychological, branch of the human organism.”¹⁰

It is rather surprising to find a court relying on the judiciary rather than the medical profession, and more particularly, in view of the growth of medical knowledge in recent times, on a decision rendered in 1896, for the determination of what are physiological and what are psychological disturbances of the human organism. Furthermore, it is extremely questionable whether the purported distinction is at all meaningful. It is generally accepted medical knowledge that every emotional disturbance has some physiological effects¹¹ and, conversely, many physiological effects may be due primarily to emotional disturbances.¹² To suggest that there is some clear line of demarcation between the two, or between nervous disturbances and emotional disturbances, is to inject into the law a dichotomy without a scientific foundation. In addition, taking the opinion as written, all that is required is that pleader and witnesses be cautious in their choice of words so that some scintilla of physical harm is pleaded and proven.¹³ Finally, one well may ask whether, if this distinction is to be followed, any purpose is served by a legal doctrine that seeks to dichotomize between physiological and psychological injuries, between an injury to the body and an injury to the emotional system (whatever that may be), and denies recovery for the latter.

The other case in this area was *Spackman v. Good*,¹⁴ a suit for *intentional* infliction of emotional disturbance. The suit

¹⁰. 111 Cal. at 680, 44 P. at 322 (1896).

¹¹. See, generally, Dunbar, *EMOTIONS AND BODILY CHANGES* (4th ed. 1954), and C. Wahl, *NEW DIMENSIONS IN PSYCHOSOMATIC MEDICINE* (1964).

¹². See, generally, C. Best, and N. Taylor, *THE PHYSIOLOGICAL BASIS OF MEDICAL PRACTICE* (7th ed. 1961); and

T. Harrison, *PRINCIPLES OF INTERNAL MEDICINE* (5th ed. 1966).

¹³. As witness the statement in the *Siliznoff* opinion, that the aggrieved party “because of the fright . . . became ill and vomited several times.” (38 Cal.2d at 335, 240 P.2d at 284.)

¹⁴. 245 Cal. App.2d 518, 54 Cal. Rptr. 78 (1966).

Torts

was brought by the guardian of two minor children, based on the alleged outrageous conduct of defendant towards the children resulting in their becoming psychopathic. The conduct involved was narrated over several pages of the court's opinion; it cannot even be summarized without unduly extending the discussion. Suffice to say, it consisted of a course of conduct on defendant's part that led to his plea of guilty on the charge of contributing to the delinquency of one of the plaintiffs and to his subsequent commitment for observation as a sexual psychopath. The trial resulted in a verdict for the plaintiffs. On appeal from the judgment on the verdict, the court of appeal reversed, with directions to enter judgment for the defendant on the grounds that:

The evidence is not sufficient to establish defendant's misconduct was the cause of plaintiffs' mental state, that defendant acted with intent to cause this condition, or that his action was of such a nature he should have anticipated it was likely to cause that condition. In light of these conclusions, the order denying defendant's motion for judgment notwithstanding the verdict was error.¹⁵

The result, as thus stated, presents several distinct problems; first is the defendant's "intent." Here it seems the court applied an erroneous test. Even if the defendant did not act with the intent of causing plaintiff to become a psychopathic personality, it seems clear that any adult would have realized that conduct of the type described in the court's opinion was "substantially certain"¹⁶ to cause serious emotional distress or disturbance to either a fifteen-year-old girl or a thirteen-year-old boy, and the substantial certainty test satisfies the intent requirement.¹⁷

15. 245 Cal. App.2d at 534, 54 Cal. Rptr. at 88.

16. "The word 'intent' is used throughout the Restatement of this Subject to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are sub-

stantially certain to result from it." RESTATEMENT OF TORTS (SECOND) § 8A.

17. The opinion, in n. 4, 245 Cal. App.2d at 530, 54 Cal. Rptr. at 85, refers to various substitutes for "intent" such as reckless or wilful disregard of the consequences, knowledge by a rea-

Second is the matter of causation. Here it seems the court placed an impossible burden on plaintiffs. There was evidence by a psychiatrist and a psychologist that plaintiffs were emotionally disturbed and had sustained what was termed "sex trauma" during a period of time that coincided with defendant's activities. There were other forces operative during the same period, including a contested divorce between the plaintiffs' parents. The court concluded, as a matter of law, that there was insufficient proof of causal connection, since plaintiffs' condition could have been produced by forces other than defendant's conduct. It is submitted that in this regard the court was in error. When two forces are operative, the actor who is responsible for one of those forces does not escape liability, if his conduct is sufficient to produce the result, merely by showing that another force *might* have produced the result.¹⁸

Finally, there is the question of the court's approach to the entire problem presented by the *Spackman* case. This was a case based on intentional and not negligent infliction of emotional disturbance and hence, even under the narrow limitations of prior decisions, recovery could be had for "psychological" or "psychopathic" injuries without proof of "physiological" harm. This the court recognized,¹⁹ but it seems to have nullified that recognition by its deep-seated

sonable person that the result would follow, and others. The court simply concluded that the proven misconduct of defendant was not such as the actor would recognize as likely to cause emotional distress or disturbance. But query, was this so clear that the court, as a matter of law, should override the jury verdict?

18. *Cf.* the historic case of *Summers v. Tice*, 33 Cal.2d 80, 199 P.2d 1, 5 A.L.R.2d 91 (1948), holding both defendants liable when they simultaneously fired shots, only one of which struck plaintiff. A closely analogous case, *Orser v. Vierra*, 252 Cal. App.2d —, 60 Cal. Rptr. 708 (1967), applied the same

reasoning when defendants were alternately firing the same weapon and decedent was killed at some time during the period of shooting. And finally a most interesting case on cause in fact, *State of Maryland v. Manor Real Estate, etc.*, 176 F.2d 414 (4th Cir. [1949]), where decedent contracted typhoid while a resident of a housing development and the presence of rats which *might* have been carriers of infected fleas which *might* have transmitted the disease was regarded as sufficient proof of causal connection.

19. 245 Cal. App.2d at 528-529, 54 Cal. Rptr. at 84-85.

Torts

scepticism with respect to proof of causal connection when “no organic injury was present.”²⁰

The result is that although the paths followed are different, both courts were concerned with the distinction between the physical and psychological and were reluctant to permit recovery for injuries to the personality as distinguished from injuries to the person. This, it is submitted, is the use of Nineteenth Century medical concepts in a Twentieth Century setting.

Malicious Prosecution and Abuse of Process

*Meadows v. Bakersfield Savings & Loan Association*¹ was an action for abuse of process arising out of the alleged wrongful recordation of a notice of default and election to sell under a security deed of trust. No claim of slander of title was made. A nonsuit was granted and affirmed on appeal, the court holding that the notice in question did not constitute “process”. The opinion stated:

[T]he essence of the tort ‘abuse of process’ lies in the misuse of the power of the *court*; it is an act done in the name of the court and under its authority for the purpose of perpetrating an injustice. Since defendant took no action pursuant to authority of court, directly or by ancillary proceedings, no *judicial* process was abused . . . we find no case extending the definition of ‘process’ to a proceeding that in nowise emanates from or rests upon the authority or jurisdiction of a court.²

This language once again raises the question of the scope of abuse of process in California. An earlier decision, *Tran-china v. Arcinas*,³ allowed an action for abuse of process when the defendant, as lessor, had procured an eviction certificate from the rent control authorities on the claim that he intended to occupy the premises himself, then brought eviction proceedings, obtained a writ of possession and re-rented

20. 245 Cal. App.2d at 528, 54 Cal. Rptr. at 84.

1. 250 Cal. App.2d 749, 59 Cal. Rptr. 34 (1967).

2. 250 Cal. App.2d at 753, 59 Cal. Rptr. at 37 (emphasis added).

3. 78 Cal. App.2d 522, 178 P.2d 65 (1947).

the premises at a higher rental. The opinion was carefully limited, holding that the process that was abused was the writ of possession and not the eviction certificate.

It is submitted that this approach is unduly restrictive. The *Restatement*⁴ and the text writers⁵ speak of this tort as an abuse of *legal* process. And the process of the law would have been no less perverted in *Trachina* if the lessee had vacated, either after being served with the eviction certificate or after judgment in the action, without awaiting the issuing of a writ of possession.

In the *Meadows* case, the recordation of the notice of breach and election to sell could have caused the loss of the legal title just as effectively as a mortgage foreclosure suit, or could have been used (as was alleged) to coerce plaintiff into paying more than plaintiff asserted was due.

It may be that it is unnecessary, as the court suggests, to extend the action for abuse of process to the *Meadows* situation, since plaintiff could have been fully protected through an action for breach of contract. However, a broader question remains. This opinion, as have prior ones, by continuing to limit the action to the abuse of *judicial* process, precludes recovery for abuse of administrative process,⁶ and this limitation, it is suggested, is neither desirable nor necessary. The present rule should be replaced by a doctrine allowing recovery for abuse of at least any *legal* process.

Defamation

When will a statement, clearly defamatory on its face, be limited by the circumstances surrounding its publication? This question was raised in *Arno v. Stewart*,⁷ where the plaintiff, an entertainer, was introduced on defendant's television program as a member of the Mafia. The uncontra-

4. RESTATEMENT (SECOND) OF TORTS § 682.

5. See, e.g., Harper & James, THE LAW OF TORTS, § 4.9 at 330, and particularly at 332.

6. It should be noted that an action for the analogous tort of malicious pros-

ecution will lie when the proceedings are before an administrative agency; see RESTATEMENT (SECOND) OF TORTS § 680; Harper & James, THE LAW OF TORTS § 4.10 at 332, 333.

7. 245 Cal. App.2d 955, 54 Cal. Rptr. 392 (1966).

dicted evidence was that the statement was made in a friendly and joking manner. At the trial the plaintiff requested a jury instruction that would have established the defamatory nature of the statement as a matter of law. This was refused, and from an adverse judgment plaintiff appealed.

The Court of Appeal of the First District (Division One) conceded that an *unqualified* accusation of membership in the Mafia would probably be defamatory on its face, either as imputing the commission of a crime or injuring plaintiff in his business or profession,⁸ but held that the statement could be qualified by the jocular manner in which it was uttered.

The fact that a defamer intends his statement to be a joke will not necessarily shield him from liability; humor and ridicule are common vehicles for defamation.⁹ There must, however, be a defamatory meaning conveyed, and the question of humor is germane to the issue of whether the audience understood the statement to be in jest and therefore non-defamatory.¹⁰ In judging the effect of a communication, the context and surrounding circumstances must be considered.¹¹ These were held to be matters for the jury which could reasonably find this non-defamatory if the audience had recognized it as a joke.

A second defamation case decided by the same court, *Cameron v. Wernick*,¹² indicates the breadth of the definition of defamation and the extent to which it may include almost any language which, upon its face, has the tendency to injure a man's reputation, either generally or with respect to his occupation.

The alleged defamation in the *Cameron* case appeared in a magazine article which attributed to plaintiff, an author,

8. Cal. Civ. Code § 46; *White v. Valenta*, 234 Cal. App.2d 243, 44 Cal. Rptr. 241, 13 A.L.R.3d 1271 (1965).

9. Prosser, *TORTS*, 3d ed., §§ 106, 759, 760. The classic case is that of the gentleman rider and the Camel cigarette ad: *Burton v. Crowell Publishing Co.*, 82 F.2d 154 (2d Cir. 1936).

10. Prosser, *TORTS*, 3d ed., §§ 106, 763, 764.

11. See, e.g., *Bettner v Holt*, 70 Cal. 270, 11 P. 713 (1886).

12. 251 Cal. App.2d 890, 60 Cal. Rptr. 102 (1967).

the statement “I can’t be the only man in this country with an eye for a fast buck”; and asserted that he reported one set of sales figures of his book to his collaborators while giving a different figure to the press. Defendant’s demurrer was sustained at the trial. The court of appeal reversed, holding that both of the complained-of statements were capable of conveying a defamatory meaning. The phrase “eye for a fast buck” had uncomplimentary overtones, suggestive of unscrupulous business practices, and the claimed disparity in the sales reports could reasonably be understood as charging plaintiff with dishonesty, either to the press or to his collaborators, and if to the latter, a further inference of dishonesty might reasonably be drawn.

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