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Torts

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The probate court, on the authority of In re *Johanson's Estate*,[15] concluded that the proceeds passing to the present decedent had been taxed in the estate of the husband and were exempt from being taxed as passing to the children. The supreme court set aside a portion of the order approving the final report and decree of distribution with the instruction to recompute the tax, and declared that the reasoning for the holding in the *Johanson* case, *supra*, did not apply to exempt insurance proceeds.

In the *Johanson* case, the state claimed that the amount listed as an exemption in the estate of the second decedent should have been reduced by the amount of the exemption allowed to Class A beneficiaries in the estate of the first decedent. The court, however, held that the entire amount of the estate, including the exemptions was considered in determining the amount of the tax for each bracket in Class A and thus no portion of the estate had escaped taxation.

The effect of the decision in the *Johanson* case would seem to have been abrogated by the recent statutory enactment[16] which provides that "the proportion of deduction chargeable against and any exemption allowed against the property previously taxed in the estate of the prior decedent" must be excluded from that portion of the property previously taxed. In the *Gagan* case the court declared that the exemption allowed to the estate of the first decedent had no part in determining the amount of inheritance tax. The court thus reached a result intended by the subsequent 1953 amendment.[17]

GUST A. LEDAKIS

TORTS

Wanton Misconduct—Contributory Negligence not a Defense. Contributory negligence is not a defense to wanton misconduct. The first clear statement of this rule in Washington was pronounced recently in *Adkinson v. Seattle*.[1] The defendant, in the course of sewer and water main construction, left, on a highway, a pile of dirt three to six feet high which entirely covered one side of the heavily traveled arterial, with no barriers and no more than three flare pots, on a dark and rainy night. The plantiff's decedent was speeding when he struck it.

Wanton misconduct is a middle ground between wilful misconduct and negligence. A wanton act is one performed with a reckless in-

[15] 38 Wn. 2d 492, 230 P. 2d 614 (1951).
[16] L. 1953, c. 137, § 1. See Harsch, *Taxation*, 28 WASH. L. REV. 197 (1953).
[17] *Supra*, note 16.
[1] 42 Wn.2d 676, 258 P.2d 461 (1953).

difference to the clear probability than injurious consequences will result; it implies indifference as to whether an act will injure another in the face of a high degree of probability that it will. Wanton misconduct differs from negligence only as a matter of degree, but this difference of degree is so marked as to amount to a substantially different kind of conduct, i.e. conduct more closely akin to wilfulness than to negligence. Nevertheless, distinguishing between wanton misconduct and negligence has proved difficult in practice.[2] The existence of wanton misconduct is a jury question.

Res Ipsa Loquitur[3] in Malpractice Suits. Before an operation on his vocal cords by the defendant, the plaintiff possessed a "perfectly fine and normal" voice. After the operation his voice was hoarse, low-pitched, and difficult to understand. The court held that *res ipsa loquitur* was not applicable.[4]

In malpractice suits, *res ipsa loquitur* can be applied only when the *cause* of the injury is clear to a *layman*. Where the cause of the injury is a matter for expert opinion, *res ipsa loquitur* is inapplicable. Although any layman could detect the bad condition of plaintiff's voice, the cause was not within the certain knowledge of laymen, and therefore, remained a medical question.

Although this is the first clear statement, by the Washington court, of the limit upon use of *res ipsa loquitur* in malpractice suits, it is consistent with previous Washington cases. Washington has permitted use of *res ipsa loquitur* where it is clear even to a layman that the cause of the injury was the negligence of the defendant.[5] On the other hand, Washington has consistently held that negligence on the part of a physician or surgeon cannot be inferred merely from a bad result.[6]

[2] Wittstruck v. Lee, 62 S.D. 290, 252 N.W. 874, 92 A.L.R. 1361 (1934). The South Dakota court overruled Carlson v. Johnke, 57 S.D. 544, 234 N.W. 25, 72 A.L.R. 1352 (1931), in which they had held, only three years before, that contributory negligence was not a defense to wanton misconduct; reasoning was that, although academically acceptable, the rule in practice had resulted in the importation into South Dakota law of the doctrine of comparative negligence. The Washington court cited the cases, but apparently was not impressed by the difficulty found by the South Dakota court.

[3] For comment on application and effect of Res Ipsa Loquitur in Washington, see 27 WASH. L. REV. 147 (1952).

[4] Nelson v. Murphy, 42 Wn.2d 737, 258 P.2d 472 (1953).

[5] Olsen v. Weitz, 37 Wn.2d 70, 221 P.2d 537 (1950); Helland v. Bridenstine, 55 Wash. 470, 104 Pac. 626 (1909). Both cases involved a broken bone so improperly joined that it was apparent to a layman's eye. Wharton v. Warner, 75 Wash. 470, 135 Pac. 235 (1913), a twelve-inch spring left in patient's uterus. Cornwell v. Sleicher, 119 Wash. 573, 205 Pac. 1959 (1922), patient infected with gonorrhea as result of defendant using an unsterilized instrument.

[6] Derr v. Bonney, 38 Wn.2d 678, 231 P.2d 637 (1951); Crouch v. Wyckoff, 6 Wn.2d 273, 197 P.2d 339 (1940); Lorenz v. Booth, 84 Wash. 550, 145 Pac. 31 (1915); Hollis v. Ahlquist, 142 Wash. 333, 251 Pac. 871 (1927).

Building Codes—Retroactive Effect—Standard of Care. Where a building code contains a clear indication that it is to apply to buildings constructed prior to its enactment, the court will give it that effect. This was the rule pronounced by the Washington court as they upheld a finding of negligence for the violation of a building code enacted *subsequent* to the construction of defendant's building.[7] The court found the intent of the code clear, explaining, "This opinion is impelled not only by the broad, all inclusive language, employed i.e., *'all stairways'* and *'all buildings,'* but from the stated object of the code and the guide for its construction that its *'provisions shall in every instance be held to be the minimum requirements adopted for the promotion of the public health, safety, comfort or welfare'.*"[8] The necessary conclusion is that building owners subject to the Seattle building code or codes of similar wording may no longer rest secure in the age of their structures, but must meet the standard of care required by the most recent code enactment.

JOHN PIPER

Person Repairing Disabled Car on Highway—Standard of Care. Recent Washington Supreme Court decisions would indicate that an individual standing upon the highway for the purpose of repairing a disabled automobile is a pedestrian within the meaning of RCW 46.60.290.

In the case of *Gooschin v. Ladd,*[9] the court had held that the duty of a pedestrian did not apply to one who is standing upon the highway for the purpose of repairing a disabled automobile. This decision, however, was based upon an interpretation of an earlier statute which fixed the duty of a pedestrian, but did not define what a pedestrian was.[10] RCW 46.60.290, passed in 1937, was held to extend to all persons afoot upon the highways.[11]

The effect of the later statute upon the status of one afoot on the highway for the purpose of repairing an automobile was presented in *Bergstrom v. Ove.*[12] The car in which the plaintiff was riding had slid off the right hand side of the road, and while engaged in an attempt to

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[7] Fay v. Allied Stores Corp., 143 Wash. Dec. 473, 262 P.2d 189 (1953).
[8] *Id.* at 476, 262 P.2d at 191.
[9] 177 Wash. 625, 33 P.2d 653 (1934).
[10] L. 1927, c. 309, § 41.
[11] Nylund v. Johnston, 19 Wn.2d 163, 141 P.2d 863 (1943).
[12] 39 Wn.2d 78, 234 P.2d 548 (1951).

push the car back onto the highway, the plaintiff was struck by the car of the defendant. The court held that an instruction that it was the duty of a pedestrian to proceed upon the sidewalk where one is provided, otherwise to proceed upon the left hand side of the roadway, and upon meeting an oncoming vehicle to step to the left and clear of the highway, was a correct instruction upon the duty of the plaintiff. In this opinion, the court while not specifically overruling *Gooschin v. Ladd* indicated that it was no longer controlling due to the change in statute.

In the most recent case, *Ralston v. Veesey*,[13] the duty of a pedestrian was imposed upon the plaintiff who had stopped upon the right hand side of the roadway in order to pump up a tire. The court, in holding that the trial court did not err in instructing that the plaintiff was subject to the duty of a pedestrian, cited both the *Bergstrom* case and the case of *Myers v. West Coast Fast Freight*.[14] The *Myers* case is doubtful authority as the failure of the plaintiff to discharge the duty of a pedestrian was not an issue upon appeal, and the instruction of the trial court became the rule of the case.

Assuming the rule to be established that an individual standing upon the highway while repairing an automobile is a pedestrian, the next question is the weight which is to be given to the violation of a pedestrian statute by the plaintiff. In this regard there appears to be some confusion. The court in *Discharger v. Seattle*[15] held that it was error for the trial court to instruct that violation of a Seattle City Ordinance was negligence *per se*. The court pointed out that the plaintiff was entitled to an instruction that such violation was not negligence if it would have been impractical or impossible for the plaintiff not to have violated the ordinance. The problem of a contributory negligence in such a situation was held to be a matter of fact for the jury.

In the later *Bergstrom* case, the court held that the defendant was entitled to an instruction that if the plaintiff had violated RCW 46.60.290 this would be negligence in and of itself. In *Ralston v. Veesey* the instruction upon the status of the plaintiff did not impose negligence *per se* as in the *Bergstrom* case, but did impose a greater degree of care because of the right of way given to automobiles, and a duty to maintain a constant lookout to avoid danger.

It is submitted that the instruction given in the *Ralston* case is pre-

[13] 143 Wash. Dec. 69, 260 P.2d 324 (1953).
[14] 42 Wn.2d 524, 256 P.2d 840 (1953).
[15] 25 Wn.2d 306, 171 P.2d 205 (1946).

ferable to the instruction to which the defendant was held to be entitled in the *Bergstrom* case. The imposition upon the plaintiff of the duty of a pedestrian, coupled with an instruction that if this statutory duty were not discharged the plaintiff was negligent as a matter of law, would constitute an almost insurmountable hurdle to recovery. The rigor of this rule can be overcome, as it was in the *Discharger* case, by allowing the jury to consider the reasonableness of the statute violation as viewed from a consideration of *all* of the factors surrounding the accident.

Libel—Conditional Privilege. The case of *Ward v. Painters' Local Union No. 300*[16] presents an interesting problem concerning the scope of a conditional privilege in a libel action. The plaintiff was the financial secretary of the defendant Union. The defendant published an alleged schedule of shortages showing a comparison of the expenditures made during the time that the plaintiff was in office with the expenditures for a comparable period during which the office was managed by trustees. The court held that the matter published was libelous *per se* as it tended to harm the plaintiff in his occupation, but that the publication was subject to a conditional privilege in that the members of the Union had a common interest in the subject matter.[17] The question in the case then became one of scope of the privilege. The court pointed out that the scope of the privilege could be exceeded either by malice on the part of the publisher, or by the publishing of the question of malice, the court held that the trial court had erred in not instructing the jury to consider the good faith of the publisher. In regard to the publishing of the matter to other than union members, the court pointed out that the scope of the privilege would be exceeded if the schedule were mailed to other than union members, the court pointed out that the scope of the privilege would be exceeded if the schedule were mailed to other than union members, or if the *actual mimeographing and mailing of the schedule were done by persons not members or employees of the union.* It would therefore appear that one having a conditional privilege acts at his peril when he has libelous material mimeographed or mailed by other than those having a common interest in the material published. Certainly this interpretation places a severe limitation upon the effective application of the conditional privilege in the State of Washington.

[16] 41 Wn.2d 859, 252 P.2d 253 (1953).
[17] Bass v. Mathews, 69 Wash. 214, 124 Pac. 384 (1912).

Loss of Consortium—Wife has no Action. Can the wife of an individual covered by Workmen's Compensation recover in a tort action for loss of consortium caused by the negligence of her husband's employer? No, answered the Washington Supreme Court in *Ash v. S. S. Mullen, Inc.*[18]

Although there existed at common law a right of action which could be brought by the husband,[19] no action for loss of consortium could be maintained by the wife. RCW 26.16.160 removed civil disabilities imposed upon a wife which are not imposed upon the husband. This statute, however, was interpreted to mean only that a wife could bring no action in her own name without joining her husband in cases where a right of action existed at common law. It did not, in the court's opinion, confer upon the wife any new rights of action.[20] This decision has introduced a note of confusion into the law applicable to this point due to its apparent contradiction of an earlier case which allowed a wife to recover in an alienation of affection action for loss of her husband's consortium. In *Beach v. Brown*,[21] the court held that the removal of the wife's civil disabilities, removed the common law denial of her right to maintain an action in tort for loss of consortium.

EUGENE H. SAGE

Liability of Charitable Non-Profit Hospitals to Paying Patients. Held, in *Pierce v. Yakima Valley Memorial Hospital Ass'n.*, 143 Wash. Dec. 148, 260 P.2d 765 (1953), "It is our opinion that a charitable non-profit hospital should no longer be held immune from liability for injuries to paying patients caused by the negligence of employees of the hospital. Our previous decisions holding to the contrary are hereby overruled." The case is noted at 12 U. OF CIN. L. REV. 489 (1953). 42 GEO. L. J. 166 (1953), 32 TEXAS L. REV. 476 (1954). See Comment, 16 WASH. L. REV. 245 (1941).

Negligence—Duty of a Favored Driver at an Uncontrolled Intersection. Three cases were decided under the right of way statute. RCW 46.60.150. *Massengale v. Svangren*, 41 Wn.2d 758, 252 P.2d 317 (1953), involved a collision between two automobiles approaching an intersection at approximately the same time and speed. The court asserted that the favored driver "had the right to assume" that the disfavored driver would observe him and yield the right of way. The opinion refused to "decide whether the favored driver had a duty to look to his left." However, in the later case of *Bos v. Default*, 42 Wn.2d 641, 257 P.2d 775 (1953), the court indicated that the favored driver would have a duty to observe an automobile approaching from the left which had already entered the intersection. A further limitation upon the *Massengale* doctrine was indicated in *Sebastian v. Rayment*, 42 Wn.2d 108, 254 P.2d 456 (1953). Here, the trial court found speeding on the part of the favored driver at the time of the collision

[18] 143 Wash. Dec. 319, 261 P.2d 118 (1953).
[19] Lansburg & Bros. v. Clark, 127 F.2d 331 (C.A. D.C. 1942).
[20] *Accord* Sheard v. Oregon Electric Co., 137 Ore. 341, 2 P.2d 916 (1931); Howard v. Verdigris Valley Electric Co-op., 201 Okla. 504, 207 P.2d 784 (1949).
[21] 20 Wash. 266, 55 Pac. 46 (1898).

to be contributory negligence. The Supreme Court sustained this finding, though the dissent noted that there was nothing in the record to indicate that the excessive speed of the favored driver contributed to the collision. Comparison of these cases would seem to indicate that the favored driver at an uncontrolled, non-arterial intersection is under no duty to maintain a lookout for a disfavored driver who has not preceeded the favored driver into the intersection. It would also appear that speeding upon the part of the favored driver will act strongly as a bar to recovery. The questions raised are discussed in Comment, 29 WASH. L. REV. 73 (1954).

Host-Guest Statute—Promise to Pay for Transportation. *McUne v. Fuqua*, 42 Wn.2d 65, 253 P.2d 632 (1953), was an action for injuries sustained while the plaintiff was a passenger in the car of the defendant. The issue presented was whether a mere promise to pay for the transportation was sufficient to constitute the plaintiff a paying passenger rather than a guest under RCW 46.08.080. The court, adopting the analysis presented in Richards, *Another Decade Under the Guest Statute*, 24 WASH. L. REV. 101 (1949), held that if the expectation of benefit motivates the furnishing of transportation, the host-guest statute does not apply.

Defendants Severally Liable—Plaintiff Must Apportion Damage. In *Mass v. Perkins*, 42 Wn.2d 38, 253 P.2d 427 (1953), he plaintiff sought damages for seepage from the property of the defendants. Each of the two defendants owned land adjacent to the land of the plaintiff. The trial court dismissed the action when the plaintiff was unable to show what portion of the total damage was caused by each of the defendants. This was affirmed. Unless the defendants have a common design, or are acting in concert, they are severally liable and the plaintiff must show the share of damage caused by each. A seemingly more satisfactory rule appears in *S & C Clothing Co. v. United States Trucking Corp.*, 215 N.Y.S. 349 (1926). The case was decided under N.Y. CIV. PRAC. ACT. § 213 (repealed by L. 1949, c. 247) which established that where doubt existed as to which of two defendants caused damage, plaintiff could join both in an action. Once liability was established, the burden of apportioning damages was placed upon the defendants.

Negligence—Scope of Risk—Liability of School District. *McLeod v. Grant County School Dist.*, 42 Wn.2d 316, 252 P.2d 369 (1953), was an action brought on behalf of a twelve year old girl, raped during a noon recess in a small room adjoining the school gymnasium. The noon hour was supervised, but at the time of the act, the teacher in charge was not present. The trial court's action in sustaining a demurrer was held to be error. The court pointed out that the question was not whether this specific harm could have been foreseen, but whether the harm fell within a general field of danger which should have been anticipated. The question of negligence was for the jury. The case is discussed under *Municipal Corporations*, p. 137 *supra*.

Negligence—Duty to Inspect—Discharge by Contract. In *Reeder v. Western Gas & Power Co.*, 42 Wn.2d 542, 255 P.2d 825 (1953), plaintiff installed his own gas pipes. The defendant gas company installed its tanks. Plaintiff signed an agreement that the gas company had no duty to inspect. The company acquired knowledge of facts from which it should have known that there was a danger of an explosion. There was an explosion. *Held:* The installer of a dangerous substance has a duty to inspect customer installed pipes when he has knowledge of facts which indicate that a serious danger exists. Public policy prevents him from contracting this duty away when he has knowledge of such facts.

Contributory Negligence—To Look is Not to See. In *Hines v. Neuner*, 42 Wn.2d 116, 253 P.2d 945 (1953), where a pedestrian stumbled over a tow rope stretched

across a crosswalk between the automobiles of the defendants, an instruction was given as follows: "In the eyes of the law, a person will not be heard to say that he did not see an object which he plainly could have seen had he looked. The situation from a legal point of view is the same as though he had looked and seen the object. When the law requires a person to look, it places upon such person the duty of seeing and observing." The instruction was held prejudicial error as indicating to the jury that it is contributory negligence, under all circumstances, to fail to perceive that which is discoverable by the use of one's senses, and in effect took the question of contributory negligence from the jury.

TRUSTS

Support Trust—Claims of Children and Divorced Wife of Beneficiary. *Seattle First National Bank v. Crosby*[1] is a case of first impression in Washington on the problems involved in support trusts. The testamentary trust provided that the trustee should pay over such part of the income as might be necessary or required for the education, support and maintenance of the beneficiary, the son of the testatrix, until he attained the age of thirty-five years at which time the beneficiary was to receive the corpus plus accumulated income. The will further provided that should the beneficiary die before reaching the age of thirty-five, his heirs at law would receive his share. After the death of the testatrix the beneficiary married and had two children. Subsequently, his wife obtained a divorce. A property settlement agreement was incorporated in the interlocutory decree of divorce under which the beneficiary promised to make monthly payments to the wife for her own support and for the support of the children until distribution of the trust and to secure this obligation the beneficiary assigned to the wife his interest in the trust income. The beneficiary also assigned stated percentages of his interest in the trust corpus to his wife individually and to her and aonther as trustees for his children. The trustee sought a declaratory judgment of the effect of the assignment and the claims of the divorced wife and children. It was held that the trustee had no duty nor right to comply with the assignment of the income to the wife, this being a trust for support from income only and the beneficiary having no interest in the income which he could assign. The court further held that the intention of the testatrix as evidenced by the terms of the will was that reasonable support be provided not only for her son, the beneficiary, but also for his family and that the children's right to support existed irrespective of any assignment of income. The trustee was therefore instructed to pay from the

[1] 42 Wn.2d 234, 254 P.2d 732, noted in 52 MICH. L. REV. 622 (1953).