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Torts

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The tax saving was produced because the specific legatees were Class B and C beneficiaries, while the residuary legatee was a Class A beneficiary. Charging federal taxes against the gross specific bequests resulted in smaller net bequests to which the state inheritance tax could be applied. The net residuary estate, on the other hand, was larger because the deduction for the payment of the federal taxes had been taken from the respective specific bequests. Since the inheritance tax rates for Class B and C beneficiaries are considerably more than those for Class A beneficiaries, the end result is a successfully executed plan for inheritance tax diminution.

Caveat: An amendment to the inheritance tax code, Wash. Sess. Laws 1957, c. 280, § 3, is currently being held in abeyance by Referendum No. 30. If this referendum is defeated and the amendment goes into effect, the deduction for payment of federal estate taxes will no longer be available. Thus, the tax saving plan outlined above would be ineffective.

Business and Occupation Tax—Frozen Food Processing as "Manufacturing." In *Stokely-Van Camp v. State,* 50 Wn.2d 492, 312 P.2d 816 (1957), the Washington supreme court was called upon to determine whether the state tax commission, by a recent ruling, properly classified the processing and freezing of foods as manufacturing for purposes of the state occupation tax. The court sustained the action of the commission by applying the definition of "manufacturing" set out in RCW 82.04.120. This definition requires that the activity in question result in "...a new, different or useful article of tangible personal property or substance of trade or commerce." Under this test, the canning of food products had been classified as "manufacturing" for some time. The court stated that, by similarly classifying the processing and freezing of foods, the commission was only recognizing the existence and growth of a new type of manufacturing.

The court reconciled the *Stokely* case with two recent Federal circuit court decisions (holding that the processing and freezing of certain foods was not manufacturing) by showing that the federal cases involved merely a determination for the I.C.C. in a carrier dispute and that in those cases the circuit courts did not have a specific statutory definition to apply.

TORTS

Strict Liability Disguised in Terms of Negligence. In *LeMaster v. Chandler*[1] the Washington supreme court made an unusual application of tort liability to a defendant common carrier. The result of the case is a holding of strict liability, disguised in terms of negligence law. Unfortunately, the negligence reasoning was not in accord with accepted tort law, and the disguise is easily uncovered.

The plaintiff was the owner of a truck loaded with apples, which was parked twenty-five feet from the bow of the defendant's ferry prior to a crossing of the Columbia River. The driver, who remained in the truck, neglected to put it in gear or to set the brakes. The defendant's employee neglected to block the wheels of the truck. During the crossing the truck rolled off the ferry with the driver still in the

[1] 50 Wn.2d 71, 309 P.2d 384 (1957).

cab. The plaintiff brought action to recover for damage to the truck and for loss of the apples. The trial court found the defendant negligent but held that the contributory negligence of the plaintiff barred recovery. On appeal the court reversed, holding that the defendant, as a common carrier, had a duty to anticipate that the plaintiff would negligently fail to provide for his own safety, and that failure to comply with this duty by providing the proper safeguards rendered the defendant liable. The court further said that the contributory negligence of the plaintiff was not a bar because it was the very thing which the defendant owed a duty to guard against. Consequently it was not *the* proximate cause of the plaintiff's loss. The case was remanded for a new trial limited to the issue of damages.

Even though a defendant may have the duty to anticipate negligence on the part of a plaintiff, a breach of that duty should not result in *liability,* as the Washington court found, but should result *only* in a finding of *negligence.*[2] The plaintiff's contributory negligence should bar recovery absent a showing of reckless conduct on the defendant's part.

Contributory negligence on the part of a plaintiff bars recovery in this state when it is *a* proximate cause of the accident.[3] The supreme court in the instant case, however, seemed to believe that either the negligence of the plaintiff or the defendant must be *the* proximate cause of the accident. The court stated that to hold that the acts of the driver were *the* proximate cause of the loss would place the responsibility of keeping vehicles on the ferry upon the driver and thus detract from the burden which the law casts upon common carriers.

[2] A duty to anticipate negligent conduct is normally applied only in the cases where the defendant actor creates a situation which involves an unreasonable risk of harm to another because of the expectable negligent conduct of a third party. *See* Neering v. Illinois Central R.R., 383 Ill. 366, 50 N.E.2d 497 (1943).

RESTATEMENT, TORTS, § 290, comment (b) states: "if the known or knowable peculiarities of even a small percentage of human beings or of a particular individual or class of individuals are such as to lead the actor to realize the chance of eccentric and improper action, he is required to take this into account if serious harm to a legally important interest is likely to result from such eccentric action and his own conduct has not such a preeminent social utility as to justify the serious character of the risk involved therein. This is often expressed by the statement that in such case the actor is bound to anticipate and provide against the negligent or intentional misconduct of the other or a third person."

The question of negligence is resolved by weighing the utility of the actor's conduct against the extent of the chance of harm, the value of the interest to be protected, and the extent of harm likely to be caused. It would seem that comment (b) above is taking these factors into consideration in arriving at the conclusion reached. The duty of anticipating another's negligence would therefore go only to determining the issue of negligence not liability.

[3] Everest v. Riecken, 26 Wn.2d 542, 174 P.2d 762 (1946); Kingwell v. Hart, 45 Wn.2d 401, 275 P.2d 413 (1954).

The facts of the case, as well as the decisions of both the trial and the supreme court, clearly show that both parties were negligent. Once negligence of the plaintiff is found, it need by only *a* proximate and contributing cause of the resulting accident to bar the plaintiff's recovery. It need not be *the sole proximate cause.*[4] The whole theory of contributory negligence is that the negligence of both parties has contributed to the resulting injury, and thus neither should be allowed to recover. Clearly, the accident was in fact caused by the negligence of both parties. The result was within the scope of the risk created by the negligent conduct of both the plaintiff and the defendant. Accordingly, contributory negligence should have barred recovery unless the plaintiff was able to find another avenue of escape. The opinion of the court indicates that an avenue could be found in the doctrine of last clear chance.

Normally, if the last clear chance doctrine is to apply, the plaintiff must show that he was in an inescapable position of peril brought about by his own negligence, and that the defendant, in the exercise of reasonable care, had a last clear chance to avoid the accident. The defendant must, however, have a last *clear* chance, not merely a last possible chance.

There are four fact situations in which the last clear chance doctrine has normally been applied.[5] The facts of this case do not conform

[4] The reasoning of the court is faulty in determining that the plaintiff's negligence did not here contribute to the cause of the accident. Had the plaintiff been driving a bus loaded with school children and his conduct had been identical to that of the driver in the instant case, it seems inconceivable that the plaintiff bus company would have been found not liable in a wrongful death or survival action brought on behalf of one of the children.

Cases which are analogous to this situation are those where there are joint tortfeasors who through their negligence have each contributed to the accident. In these cases each tortfeasor is totally responsible, provided his negligence is found to have contributed substantially to the injury. *See* Mitchell v. Rogers, 37 Wn.2d 630, 225 P.2d 1074 (1950).

[5] The four categories are listed in 2 HARPER AND JAMES, LAW OF TORTS § 22.13 (1956). They are substantially as follows:

(1) Plaintiff is in peril and unable to escape, and defendant knows of plaintiff's peril and realizes or has reason to realize his danger, and defendant thereafter could have avoided the injury by exercising reasonable care.

(2) Plaintiff is in peril and unable to escape, and defendant although not discovering this position of plaintiff would have discovered and appreciated it in time to avoid the accident had he exercised reasonable care.

(3) Plaintiff is not helpless but merely inattentive, and defendant knows or has reason to know of this inattention, and thereafter by exercising reasonable care could have avoided the accident.

(4) Where both defendant and plaintiff are negligently inattentive, but defendant, had he been exercising reasonable care, would have realized plaintiff's position in time to avoid the injury.

Of these four categories, Washington and the majority of courts have adopted the first three. Very few jurisdictions have accepted the fourth.

with any of these categories. Instead, this case falls within that line of cases in which the defendant, because of his prior negligence, did not in fact have an opportunity to avoid injury to a negligent plaintiff at the critical moment. The great majority of cases refuse to hold the defendant liable in this instance. A leading case, which takes the opposite position, is *British Columbia Electric R.R. Co. v. Loach.*[6] The doctrine of this case has been rejected as recently as 1955 by the Washington court.[7] The basic reasoning of the *Loach* rule is that where the defendant has so incapacitated himself by his prior negligence that he is unable to avail himself of the last clear chance, he will nevertheless be regarded as having had the last chance. This rule produces harsh results unon a defendant by removing the bar of contributory negligence. The rule has been used by courts when the defendant was the owner of a dangerous instrumentality such as a train or other carrier difficult to control. In these instances it would seem that courts felt the risk-bearing loss was more appropriately shifted to the defendant.

The Virginia case of *Cheasapeake Ferry Co. v. Cummings*[8] provided the basic support for the decision of the Washington court in the instant case. However, the Virginia case in turn relied upon the *Loach* case, which the Washington court had previously rejected. Thus the unusual situation is presented in which an authority expressly rejected obtains approval and is given controlling effect by indirection.[9]

The Washington court, by allowing recovery in this case, would

[6] 1 A.C. 719 (1916). This case and its doctrine have been criticised by various writers. *See* PROSSER, LAW OF TORTS § 52 (2d.ed. 1955); Bohlen, 66 U. OF PA. L. REV. 73 (1917); RESTATEMENT, TORTS § 479, comment f (1934). The doctrine is peculiarly adaptable to the Missouri humanitarian doctrine, which few American courts have seen fit to follow. *See* Krause v. Pictcairn, 350 Mo. 339, 167 S.W.2d 74 (1942); Becker, *The Humanitarian Doctrine*, 3 Mo. L. REV. 392 (1938).

[7] Stokes v. Johnstone, 47 Wn.2d 323, 287 P.2d 472 (1955). This case cited with approval RESTATEMENT, TORTS § 479, comment f as follows: "If the defendant after discovering the plaintiff's peril, does all that can reasonably be expected of him, the fact that his efforts are defeated by antecedent lack of preparation or a previous course of negligent conduct is not sufficient to make him liable. All that is required of him is that he use carefully his then available ability."

[8] 158 Va. 33, 164 S.E. 281, 82 A.L.R. 790 (1932).

[9] The Cummings case is further distinguishable because the trial court there had found the plaintiff was not contributorily negligent and the appellate court affirmed. The trial court in the instant case found the plaintiff was contributorily negligent and the supreme court reversed. The Virginia court was unwilling to find the plaintiff contributorily negligent as a matter of law. The Washington court found the plaintiff was not contributorily negligent as a matter of law. There is a vast difference between the two positions. The discussion in the Cummings case on last clear chance and proximate causation would seem to be dictum since the court was unwilling to overrule the trial court on the issue of plaintiff's contributory negligence.

seem to be accepting the theory of the *Loach* case. Possibly, however, the quotation from the *Loach* case in the opinion can be dismissed as dictum since the court had ruled the plaintiff's contributory negligence was not *the* proximate cause of the accident. Hopefully, the court, as well as the bar, will place the latter construction upon the court's quotation from the case. The rule, if accepted by the Washington court, is not supported by logic or on the basis of fault. The only justification for the rule is that, as between the litigating parties, the defendant is better able to withstand the loss. The decision demonstrates how fully negligence concepts can be expanded both logically and illogically in order to compensate a party plaintiff. Harper and James, in their recent treatise on tort law,[10] point out that in the years to come we may expect many results which do not fit the logic of fault at all but make sense only in terms of compensation. It would seem that the Washington court has arrived at those years to come with their decision in the instant case.

An alternative basis for liability in this case, by which the above misconstructions of negligence law could have been avoided, would have been to hold the defendant common carrier strictly liable as an insurer. The liability of a common carrier for *goods* lost or damaged in transit is that of an *insurer* unless the loss is occasioned by an act of God, public enemy, or the wilful default of the shipper.[11] The standard of care required of a carrier in Washington toward *a passenger* is the highest degree of care consistent with the practical operation of the business.[12] Since the action involved in the instant case was for the recovery of damages to property, the court might well have imposed an insurer's standard rather than the standard of care which is owed to a passenger.[13]

However, in order to impose strict liability as an insurer against the defendant on these facts, the court would have been required to reject an exception which some courts have engrafted on to the strict liability at least in ferryman cases. This exception is that when the goods

[10] 2 HARPER & JAMES, LAW OF TORTS § 16.12 (1956).

[11] 9 AM. JUR., *Carriers* § 661; Bean v. Hinson, (Tex.Civ.Sup.), 235 S.W. 327 (1921). The Washington court has not explicitly adopted this rule although a number of cases speak of "common law liability" in the carrier situation. *See* Fisher v. Northern Pac. R.R. Co., 49 Wash. 28, 94 Pac. 1073 (1908); Lagomarsino v. Pacific, 100 Wash. 105. 170 Pac. 368 (1918).

[12] McLain v. Easley, 146 Wash. 377, 262 Pac. 975 (1928); Wood v. Washington Navigation Co., 1 Wn.2d 324, 95 P.2d 1019 (1939).

[13] If the Washington court is following a rule that a common carrier is charged with the same degree of care as to goods transported as it is to a passenger, it has failed to announce this change. Liability as an insurer is the general rule with respect to goods.

remain under the control of the shipper, the strict liability rule is not applicable and the ordinary rules of negligence apply.[14] The better rule, in line with the common law basis of a carrier's strict liability, would be an adoption of this exception.[15] The courts are, however, divided on its adoption and our court would not be required to follow those who apply it.[16] This alternative basis of strict liability, coupled with a rejection of the exception, would place upon the defendant in the instant case the liability of an insurer of the plaintiff's apples and truck. The result reached would be the same result of strict liability which the court reached in the instant case, without the distortion of rules of negligence.

The Washington court, by reaching liability through negligence, has refused to apply strict liability as such when its application, under the facts, seems to have been appropriate. The court chose instead to hide the strict liability behind a negligence disguise. The same technique seems to have been used in another recent Washington case where the court used the disguise of *res ipsa loquitur*.[17] This practice is not desirable. If it were discontinued, the law would be less prone to encourage litigation and more likely to encourage prompt settlement of proper claims.

False Imprisonment—Arrest Without a Warrant in Misdemeanor Cases. In *Sennett v. Zimmerman*[1] the Washington supreme court has perpetuated an error committed in an earlier case[2] involving arrest

[14] Mercer v. Christiana Ferry Co., 34 Del. 490, 155 Atl. 596, 82 A.L.R. 798 (1930). If the exception were applied, contributory negligence would bar recovery unless the direct cause of the loss was the omission of the ferryman, *after becoming aware of the owner's negligence*, to use a proper degree of care to avoid the consequences of such negligence. *See* 22 AM. JUR., *Ferries* § 48.

[15] Mercer v. Christiana Ferry Co., 34 Del. 490, 155 Atl. 596, 82 A.L.R. 798 (1930). The policy reasons of collusion with robbers and difficulty of proof of negligence which lay behind the insurer's liability at common law are not applicable when the control of the goods remains with the shipper.

[16] 22 AM. JUR., *Ferries* § 43; 81 A.L.R. 819. A rejection of the exception would not be difficult to justify, especially in the instant case. Normally a carrier to bring himself within one of the exceptions of act of God, default of shipper, or act of public enemy must demonstrate that he was free from any negligence which contributed to the accident. There seems to be no reason why this rule should not be the same where the shipper accompanies the goods. Also there are difficult problems of proof as to when the goods have been transferred to the possession and control of the carrier. This is especially true where the shipper sends along an employee merely for the purpose of caring for the shipped goods.

[17] Kind v. City of Seattle, 50 Wn.2d 485, 312 P.2d 811 (1957).

[1] 50 Wn.2d 649, 314 P.2d 414 (1957).

[2] Coles v. McNamara, 131 Wash. 377, 230 Pac. 430 (1924); 136 Wash. 624, 241 Pac. 1 (1925).

without a warrant in misdemeanor cases. The court has thus made it clear that a police officer is now privileged to make an arrest without a warrant for *any* misdemeanor which he *reasonably believes* is being committed in his presence. This rule is practically the antithesis of the common law rule and points out the need in this state for a statutory codification of the privilege of arrest without a warrant in both felony and misdemeanor cases.[3]

The plaintiff in this case was arrested, on an accusation of shoplifting, by the defendant's store detective, who was also a deputized city police officer. He was tried and acquitted on a charge of petit larceny and brought this action for false imprisonment. The trial court rendered judgment for the plaintiff. On appeal, the issue was whether probable cause to believe that a misdemeanor is being committed in the presence of an officer is sufficient to allow the officer to arrest an innocent person without a warrant. The supreme court reversed the trial court and remanded the case with directions to give an instruction on the issue of probable cause. A petition for rehearing was denied.[4]

The common law rule of arrest was that a police officer had the privilege to arrest for a misdemeanor which amounted to a breach of the peace and which was committed in his presence.[5] This rule was partially abrogated in Washington in *State v. Dietz*,[6] which held that the right to arrest existed even though the misdemeanor committed in the officer's presence was not a breach of the peace. This seems to have been the first case in any jurisdiction to make this direct holding without statutory support. The case was supported by what one author[7] believes was dictum in *Carroll v. U.S.*[8] This modification is in line with statutory law of other states on the subject.[9] These statutes, however, limit the privilege to serious misdemeanors, not to *any* misdemeanor.

Sennett v. Zimmerman reiterates the rule of *State v. Dietz*,[10] and

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[3] See for example the following typical arrest statutes: CAL. PEN CODE. § 836 (1951); IDAHO PEN. CODE ANN. § 19-603 (1948); GA. CODE. ANN. § 27-207 (1953); ARIZ. CODE ANN. § 44-124 (1939); OHIO GEN. CODE ANN. § 13432-1 (1939). For other applicable code provisions adopted prior to 1954, see 33 N.C.L. REV. 17, footnotes 19 through 26.

[4] 151 Wash. Dec. 260 (1957).

[5] RESTATEMENT, TORTS § 121, comment e (1934).

[6] 136 Wash. 228, 239 Pac. 386 (1925).

[7] Bohlen and Shulman, *Arrest With and Without a Warrant*, 75 U. OF PA. L. REV. 485 (1927).

[8] 267 U.S. 137 (1925).

[9] Supra, note 2.

[10] 136 Wash. 228, 239 Pac. 386 (1925).

further modifies the common law rule. As stated above, under the rule of this case, the officer may arrest for a misdemeanor without a warrant when he has reasonable cause to believe that a misdemeanor is being committed in his presence. In support of the modification, the court cited *Coles v. McNamara.*[11] In that case the plaintiff's action was also for false imprisonment. The trial court rendered judgment for the plaintiff and on appeal the case was remanded for a new trial.[12] The court, relying on *White v. Jensen,*[13] held that the jury should have been instructed on the issue of whether the defendant had reasonable cause for believing and did believe the plaintiff committed the offense charged.[14] The court's reliance on *White v. Jensen*[15] was erroneous. That case involved an arrest for a felony and not a misdemeanor, and had correctly stated the common law rule of arrest for a felony. The *Jensen* case was also distinguishable because a John Doe warrant had been issued, which would make the arrest privileged if the officer reasonably believed the person arrested was the person intended under the description in the warrant.[16] These points, if brought to the court's attention in the instant case, would have been sufficient to put the court on notice of the weakness of *Coles v. McNamara* as a precedent.

Although the doctrine of stare decisis lends support to the court's opinion in the instant case, the author believes the court should have overruled *Coles v. McNamara* because of the obvious error committed by the court in that case. The court then could have followed the earlier decision in *Mitchell v. Hughes,*[17] which held that an officer may not arrest for a misdemeanor without a warrant, on information *or suspicion,* unless the misdemeanor was *actually committed* in his presence.[18] This case was distinguished by the court in the *Sennett* case on

[11] 131 Wash. 377, 230 Pac. 162 (1924); 136 Wash. 624, 241 Pac. 1 (1925).
[12] 131 Wash. 377, 230 Pac. 162 (1924).
[13] 81 Wash. 435, 142 Pac. 1140 (1914).
[14] On remand judgment was for the defendant and on appeal the court affirmed, 136 Wash. 624, 241 Pac. 1 (1925). The court said the instruction on the issue of reasonable cause conformed to the law of the case as settled on the former appeal. It should be noted that the first appeal was the case which actually made the holding the court relied on in the instant case. The second appeal merely affirmed an instruction which had become the law of the case. The court in the instant case, however, cited the second appeal as their authority. If the court had read the first opinion carefully, a different result may have been reached.
[15] 81 Wash. 435, 142 Pac. 1140 (1914).
[16] RESTATEMENT, TORTS § 125(a), comment g (1934).
[17] 104 Wash. 231, 176 Pac. 26 (1918).
[18] Mitchell v. Hughes, 104 Wash. 231, 176 Pac. 26 (1918), was not discussed in the McNamara case. The rule has been reiterated in two other cases cited in the opinion of the instant case. State v. Gibbons, 118 Wash. 171, 203 Pac. 390 (1922), and Tacoma v. Houston, 27 Wn.2d 215, 177 P.2d 886 (1947). The authority of the Mitchell case in these latter cases is questionable in that they were not actions for false arrest.

the basis that the officer was relying on information received from a third person and that the conduct which gave rise to the belief that an offense was being committed did not take place in the officer's presence. Why this particular fact is a relevant distinction was not explained by the court. Also, a careful reading of the opinion will show that the conduct for which the arrest was made did take place in the presence of the arresting officer. Furthermore, the rule in the *Mitchell* case was that the arrest could not be made on information *or suspicion* unless the misdemeanor was *actually committed* in the officer's presence.

The rule is not supported by *Garske v. U.S.*,[19] cited by the court in their opinion. That case is not in point as it did not involve an action for false arrest. The defendant had been convicted of the crime for which he was arrested and was appealing on the ground that the evidence was inadmissible. The case is authority only for the proposition that evidence obtained by an officer, who arrests without a warrant a guilty person who he reasonably believes is committing a misdemeanor, is admissible against that person in a criminal prosecution. It does not state the rule that reasonable belief is a defense to an action for false arrest of an innocent person. At best, it is weak dictum in support of the rule applied in the instant case.[20]

The only decisions in other states supporting this case are those wherein the legislature has abrogated some of the common law rules by statute.[21] The rule has some justification as a modern view of the law of arrest,[22] because otherwise officers would be reluctant to make arrests for fear that they would be liable for having made an honest and reasonable mistake.[23] This factor must, however, be weighed against the infringement on individuals' rights. Also, a misdemeanor is often not so serious that fear of escape, pending issuance of a warrant, is as manifest as in the felony cases. There are certain misdemeanors involving the violation of a municipal ordinance or administrative ruling which are not even remotely connected with the breach

[19] 1 F.2d 620 (8th Cir. 1924).

[20] The author was unable to find any federal cases directly in point with the decision of the Washington court. See, Anderson v. Sager, 173 F.2d 794 (8th Cir. 1949), where the arrest was held to have been made without probable cause.

[21] Ryan v. Conover, 59 Ohio App. 361, 18 N.E.2d 277 (1938); Hill v. Day, 168 Kan. 604, 215 P.2d 219 (1950); Cave v. Cooley, 48 N.M. 478, 152 P.2d 886 (1944). See also cases cited in Brief of Appellant #34080, p. 43-44.

[22] Uniform Arrest Law, 28 VA. L. REV. 315 (1942).

[23] 50 Wn.2d 649, 314 P.2d 414, 416 (1957).

of the peace requirement at common law. The rule, as stated by the court, would extend the privilege to these minor misdemeanors.

The legislature in this state has shown no inclination to change the common law privilege of arrest without a warrant. Perhaps this is because the court has been so willing to modify the rules without legislative authorization. This is in spite of the fact that the role of changing common law rules, when necessary to meet the change in times, is normally left with the legislative branch of government. Although the extension of the privilege on the particular facts of this case may be justified, it is believed that the duty to substitute a modern law of arrest for the common law rules rests upon the legislative branch rather than the judicial branch exercising their "legislative functions."

The problem of determining in what circumstances and for what crimes police officers should have the authority to make arrests on their own initiative, without a warrant from an official of the judicial branch of government, is difficult. It requires the consideration of many factors which are important in keeping the processes for the administration of justice properly balanced as between the rights of the individual and the needs of the state.[24] The rule which the court has stated is entirely too broad in scope. The rule would encompass every misdemeanor; many in which the rights of the individual would far outweigh the needs of the state to arrest without a warrant. Because of the nature of the problem, it is submitted that detailed, specific rules and statutory regulation are required. The legislative process is much better equipped than the judiciary to state a law of arrest which can be appropriately adapted to the varying fact situations of cases presented to the court. The court may find the present rule difficult to apply when a case, not properly calling for arrest without a warrant, is presented to them. CHARLES J. MCMURCHIE

Liability Without Fault and Res Ipsa Loquitur. *Kind v. City of Seattle,* 50 Wn.2d 485, 312 P.2d 811 (1957), was an action to recover for damage to property flooded by water from a burst water main owned and operated by the defendant. The cause of the break was unknown, but an investigation, not completed at the time of the trial, indicated due care on the part of the defendant. The trial court found that the defendant was not negligent, but was liable without fault. The trial judge's memorandum decision indicated the court would have applied res ipsa loquitur except that it had misconstrued the doctrine by a belief that plaintiff's prima facie case was not sufficient evidence to get the case to the jury.

HELD: On appeal, affirmed. The court refused to decide whether the case called

[24] Machen, *Arrest Without a Warrant in Misdemeanor Cases,* 33 N.C.L. REV. 17 (1954).

for an application of liability without fault under the rule of *Rylands v. Fletcher*, 3 H.L. 330 (1868), since they believed the decision could be affirmed by applying res ipsa loquitur. Although the defendant's investigation indicated due care, this was insufficient to overcome plaintiff's prima facie case.

The majority, by applying res ipsa loquitur when the trial court had found liability without fault, does not seem to have recognized that the two doctrines usually rest on opposing grounds: one that accidents do not normally occur unless the defendant was negligent, and the other that accidents will occur even if all due care is exercised.

In line with the Washington court's position that legal control, rather than actual control, is sufficient for an application of res ipsa loquitur (see 32 WASH. L. REV. 133), the record seems to justify the court's holding. However, the case did present facts which called for a square holding on the rule of *Rylands v. Fletcher*. If the court had met that issue, they could have clarified an area of law which is now open to conjecture and which may prove to be the subject of much future litigation.

Termination of Passenger-Carrier Relationship. In *Peterson v. City of Seattle*, 151 Wash. Dec. 166, 316 P.2d 904 (1957), the plaintiff, a passenger on defendant's bus, was required to leave the bus when it was unable to climb a hill in the snow. The plaintiff, while walking from the bus around a parked car to the sidewalk, slipped and fell. This action was brought to recover for the injuries sustained. Judgment was for the plaintiff and defendant appealed.

HELD: Affirmed. The defendant carrier, in the exercise of the highest degree of care consistent with the practical operation of the business, should have escorted the plaintiff to a place of safety. At this point the passenger-carrier relationship would have terminated. When the passenger was discharged in an unsafe place, the relationship was not terminated until the passenger, in the exercise of ordinary care, had a reasonable opportunity to reach a place of safety. Because the defendant was negligent and the passenger-carrier relationship had not terminated, the city was liable.

The case is one of first impression in Washington. The holding is consistent with the high degree of care with which courts are inclined to charge common carriers, and was supported by decisions in other jurisdictions.

Libel Per Se. In the recent case of *Spangler v. Glover*, 50 Wn.2d 473, 313 P.2d 354 (1957), the court considered the question of libel per se. Defendant-appellant Glover, an officer of a labor union, was under attack and a recall movement was under way. His supporters caused to be published a pamphlet which was the basis of the instant action. The plaintiffs-respondents were not named in the document but the jury found on adequate evidence that they were the persons referred to. The lower court rendered a judgment in favor of each of the two plaintiffs in the amount of $1,500 each. On appeal the defendant attempted to center the argument around the question of whether the statements were directed at the plaintiffs personally or were merely attacks on the prior accusations made by the plaintiffs. The defendant argued that prior to the publication in question, the plaintiffs had published a petition for Glover's recall, in which it was implied that Glover had communistic leanings. The defendant complained that the court was requiring him to show the truth of his statement that the plantiffs told a slanderous lie, which would entail a showing that, for example, the defendant was *not* a Communist—obviously a task which was nearly impossible. The minority of the court accepted this argument, but the majority passed it over, and said that other statements in the publication, having been made in a predominately union locality, were damaging enough to constitute libel per se.

Guest Statute—Applicability to Accidents on Private Roads. The recent case of *Becket v. Hutchinson*, 49 Wn.2d 888, 308 P.2d 235 (1957), involved the question of

whether the 1937 Washington Host-Guest Statute had repealed the 1933 Washington Host-Guest Statute.

The litigation arose from an accident in which the plaintiff was injured while riding in the defendant's car. The accident had occurred while the car was being driven along a private road. In plaintiff's subsequent negligence action, verdict and judgment were rendered in favor of the defendant upon the ground that the 1933 Host-Guest Statute precluded plaintiff from recovering. Plaintiff appealed, contending (1) the 1937 Host-Guest Statute was applicable only to accidents occurring upon public highways; (2) the 1937 statute impliedly repealed the 1933 statute which admittedly had applied to accidents occurring upon private roads; (3) therefore, no statute conferred upon defendant an immunity from suit.

HELD: Judgment for defendant affirmed. The court reasoned that if the 1937 act *did* apply only to public highway accidents (an issue not decided by the court), then it did not repeal the 1933 act by implication since the 1933 act clearly applied to private road accidents. The 1933 act was not clearly inconsistent with the coverage of the 1937 act. Moreover, the 1937 act did not explicitly repeal the 1933 act. Consequently, the instructions to the jury, which had been based upon the 1933 act, were not erroneous even if plaintiff's construction of the 1937 act were adopted.

This decision presents the possibility that the 1937 Act (as amended by Laws of 1957, c. 132, § 1; RCW 46.08.080) subsequently may be held to apply only to public highway accidents, while the 1933 act applies to private road accidents. The result of such a construction of the two acts would be that the rules concerning immunity *vel non*, and evidence requirements, which are applicable to public highway accidents, would be considerably different from those applicable to private road accidents.

TRUSTS

Resulting Trusts—Purchase Money Paid by Resulting Trustee as Loan to Beneficiary. In *Mading v. McPhaden*[1] the defendant McPhaden, a partner in a money-lending partnership, has been acting as Mading's agent in an attempt to purchase certain real estate. The negotiations had reached an apparent stalemate when, unknown to Mading, the vendors informed McPhaden that the asking price was down $5,000.00. McPhaden immediately bought at the lower price in his own name and reconveyed at a higher price to Mading—keeping the $5,000.00 as "profit." The consideration paid by McPhaden had been in two equal parts: (1) a note from Mading to the vendor, secured by a mortgage on the subject real estate, and (2) a check drawn on McPhaden's partnership account, but held by the court to be part of a loan from McPhaden to Mading. Mading sued to recover the "profit" on theories that included resulting and constructive trusts. On appeal the supreme court, reversing the lower court, held that there had been error in not raising the resulting trust. The conclusion then followed that if Mading became the beneficial owner at the time

[1] 50 Wn.2d 48, 308 P.2d 963 (1957).