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Torts -- 1964 Tennessee Survey

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As usual, the Tennessee appellate courts decided a considerable number of tort cases last year, covering a wide variety of problems. There were no striking new developments. In fact, the two decisions which were awaited by the profession with the greatest interest, *Kyker v. General Motors Corporation*[1] and *Texas Tunneling Co. v. City of Chattanooga*,[2] tend to slow down some modern developments. In the *Kyker* case, it was indicated that manufacturers are not yet strictly liable in Tennessee, at least on warranty grounds, without privity of contract. In the *Texas Tunneling* case, a federal court undertaking to apply Tennessee law placed definite restrictions on liability for a merely negligent misrepresentation. Both of these decisions were regarded with satisfaction by the conservative minded; and in view of the fact that almost all of the new developments in tort law during the past decade have been to the advantage of plaintiffs, it may well be that the defendants are entitled to at least a temporary breathing spell in the areas involved in these two decisions.

I. NEGLIGENCE

A. *The Standard of Care*

1. *Protection of Golf Shelter from Lightning.*—A novel fact situation was presented in *Davis v. Country Club, Inc.*[3] While the plaintiff, a girl of fourteen, was playing on the defendants' golf course, a storm arose, and she and her companion went to a weather shelter near one of the greens. A bolt of lightning struck the shelter causing serious injuries to the plaintiff. It was claimed that the defendants were negligent in locating the shelter on high ground, with the result that it was more exposed to lightning, and in failing to provide lightning protection equipment for the shelter thus located.

The jury awarded 25,000 dollars to the girl, and an equal amount to her father for expenses and loss of services, but the trial court set aside these awards and directed verdicts for the defendants. This action was affirmed, on the ground that there was no sufficient evidence of negligence. In support of this conclusion the court observed that the bare possibility of harm was not enough to require the defendants to take precautions, and that the condition complained of must be "dangerous according to common experience." There was testimony that lightning is somewhat more likely to strike an object on ground higher than the surrounding area, but on this point it was concluded,

1. 381 S.W.2d 884 (Tenn. 1964). See text accompanying notes 52-59 *infra*.
2. 329 F.2d 402 (6th Cir. 1964). See text accompanying notes 65-71 *infra*.
3. 381 S.W.2d 308 (Tenn. App. E.S. 1964), 32 TENN. L. REV. 329 (1965).

> Admitting that the possibility of the weather shelter being struck by lightning, because of its location, was more than an 'average' hazard, it would still be very remote as shown by the infrequency of lightning striking the innumerable objects meeting the test of being in the open and being higher than the surrounding ground.

While it is clear that the defendants owed the girl on the golf course a duty of due care, as an invitee,[4] this duty is violated only when there is failure to guard against events reasonably to be anticipated.[5] As remarked in an early Tennessee case, "Negligence consists in a failure to provide against the ordinary occurrences of life, and the fact that the provision made . . . is insufficient against an event such as might happen once in a lifetime . . . does not make out a case of actionable negligence."[6]

2. *Malpractice—Some Risks Permitted Without Advice to Patient.*— In a malpractice case, *Ball v. Mallinkrodt Chemical Works*,[7] it appeared that plaintiff had high blood pressure, and that when she failed to respond to treatment, her physician recommended a translumbar aortogram to determine whether the pressure was being caused by a partial blockage of the renal arteries leading to the kidneys. The defendant, a vascular surgeon, was called on to perform this test, which involves forcing a contrast agent into the aorta, by means of a needle thrust into its outer wall. Immediately after this test was performed, the plaintiff suffered great pain, followed by permanent paralysis in one leg. There was evidence that these injuries were caused by the escape of some of the contrast agent into arteries feeding the spinal cord. There also was testimony that other less toxic contrast agents were available. Suit was brought against both the surgeon and the manufacturer of the contrast agent.

The jury found for both defendants, and the plaintiff complained on appeal of various instructions and jury findings. First, it was held that the jury properly could find that there was no negligence by the surgeon in his choice of contrast agent, even though the one chosen was more dangerous than the others, since this agent permitted the taking of better X-rays, and ordinarily was selected for that reason by at least one-half of the surgeons performing aortograms. It was observed that "where the treatment or procedure is one of choice among competent physicians a physician cannot be held guilty of malpractice in selecting the one which, according to his best judgment, is best suited to the patient's needs."

4. Annot., 82 A.L.R.2d 1176, 1185 (1962).
5. PROSSER, TORTS § 31, at 149 (3d ed. 1964).
6. Illinois Central Ry. v Nichols, 173 Tenn. 602, 613, 118 S.W.2d 213, 217 (1937).
7. 381 S.W.2d 563 (Tenn. App. E.S. 1964).

The plaintiff further claimed that the surgeon was negligent in refusing to advise a patient of the danger of the test, since it appeared that in about one percent of the cases serious injuries might result no matter how skillful and careful the surgeon might be. The appellate court approved an instruction that while the physician may not minimize the dangers of a procedure to obtain the patient's consent, he is not under any definite duty, "to explain every risk attendant upon any surgical procedure or operation, no matter how remote," since this "may well result in alarming a patient who is already unduly apprehensive and who may, as a result, refuse to undertake the surgery as to which there is, in fact, minimal risk."

With reference to the manufacturer of the contrast agent, it was held that the trial court properly ruled that the drug was not misbranded even though it was referred to as "low toxicity." It was observed that toxicity is a relative term, and the court concluded, "We can not say that the brochure was false and misleading when it is remembered that it was strictly a prescription drug, used only by skilled surgeons."

3. *Keys Left In Ignition—No Liability when Vehicle Left on Private Land.*—In *Young v. Costner-Eagleton Motors, Inc.*,[8] the court again was faced with the problem of determining the liability of a car owner who leaves his car unlocked and unattended, with the result that a thief steals the car and then injures the plaintiff by his negligent driving. In this new case the owner was a motor company, and the car was left "either with the switch open or with a key in the switch" on the defendant's private parking lot, where the public was invited to inspect the vehicles offered for sale. In holding that a demurrer to a complaint against the car owner was properly sustained, the court indicated that its earlier holding in *Justus v. Wood*,[9] involving a car left unlocked on a public street in violation of a statute was based on the violation of the statute[10] with its stated purpose "to promote highway safety." Furthermore, the denial of *certiorari* in the later case of *Teague v. Pritchard*,[11] was interpreted in the present case as "approving the rule of absolute non-liability in the absence of an ordinance or statute." The court pointed out that many thousands of cars are parked by motor companies for the purpose of sale on private lots, and concluded that a rule permitting the jury to find liability in this situation would be impractical.

It may well be that too great a burden would be placed on motor

8. 379 S.W.2d 785 (Tenn. 1964), 31 TENN. L. REV. 545 (1964).
9. 209 Tenn. 55, 348 S.W.2d 332 (1961); 29 TENN. L. REV. 468 (1962).
10. TENN. CODE ANN. § 59-863 (1956).
11. 38 Tenn. App. 686, 279 S.W.2d 706 (1954), 24 TENN. L. REV. 395 (1956).

companies by requiring them to keep their cars locked in this situation to avoid the risk of liability. It may be questionable, however, whether the line should always be drawn at the point where a statute or ordinance is involved. If a car is left with the keys in the ignition on private land adjoining a tavern in an area frequented by criminals, or next to a high school with a serious delinquency problem, and the thief runs over some one in the excitement of his get-away, it is not clear that the plaintiff should be faced with a rule of absolute non-liability. In general, even criminal actions do not place a result outside the risk if a jury could find that a result was foreseeable.[12] It may be that the court should examine into each case to determine whether or not there is a foreseeability issue for the jury, even though no statute or ordinance is involved. In that connection the jury could take into consideration not only the character of the neighborhood, but the period of time intervening between the theft and the accident and other facts ordinarily considered in determining whether or not the harmful result is within the risk created by the defendant.[13] In support, however, of a general rule of non-liability, it may be said that even where theft of the unlocked car is foreseeable, there may not be sufficient foreseeability that the thief will drive negligently, even in the excitement of his escape.

B. *Particular Relationships*

1. *Duty of Landlord as to Undisclosed Dangerous Condition.*—In *McGuffey v. Dotley*,[14] there was an application of the Tennessee rule that a landlord must make some inspection of the premises. There the plaintiff was injured when one of the front steps of his rented premises gave way. It appeared that the step had been eaten about half way through, from the underside, by termites. This damage could have been discovered by stooping and looking into the open space under the steps. The landlord's agent had briefly inspected the premises about eight months earlier, prior to the beginning of the plaintiff's tenancy, but had not discovered the danger. A paper boy who used the steps about that time said he had noticed that a few of the treads seemed a little weak.

Under these circumstances, it was held that the issues of negligence and contributory negligence were properly left to the jury. It was pointed out that under *Pulaski Housing Authority v. Smith*,[15] the landlord was under a duty to use reasonable care to discover dangerous

12. RESTATEMENT, TORTS § 447-48 (1934); PROSSER, *op. cit. supra* note 5, § 51 at 311.

13. See Beene v. Cook, 43 Tenn. App. 692, 701, 311 S.W.2d 596, 600 (1957).

14. 381 S.W.2d 585 (Tenn. App. E.S. 1964).

15. 39 Tenn. App. 213, 282 S.W.2d 213 (1955).

defects. The court distinguished an earlier termite case, *Glassman v. Martin*,[16] where a verdict was directed for the defendant on the ground that there the damage could have been discovered only by punching the wood with a screwdriver or ice pick, while in the present case, the defects could have been discovered by looking in the open area underneath the stairs, and there was some evidence that the treads were noticeably weak.

Since the tenant was under a duty to use due care, it was urged that if the landlord was negligent, the tenant likewise was guilty of contributory negligence under the rule developed in *Willcox v. Hines*.[17] However, the court let the issue go to the jury, since the landlord may have been more capable than the tenant of realizing the risk from a discovered or discoverable condition.

2. *Railroads*—(a) *Duty to Trespasser—Highway Machine Extending Over Track.*—An unusual railroad accident was involved in *Belcher v. Tennessee Central Ry. Co.*[18] The plaintiff was excavating a trench across the highway, using for this purpose a tractor with a backhoe on one end and a bucket on the other. At this point the highway ran quite near the railroad track, and a few feet to the west, it crossed the tracks. There was difficulty in seeing a train approaching from the west because of a curve in the track, and because of undergrowth between the track and highway. A train from the west struck the backhoe and turned the tractor over, with resulting injuries to the plaintiff.

It was alleged that the train was being operated at a dangerous rate of speed; that the electric signals at the crossing did not operate so as to give the plaintiff notice of the approaching train; that the train was being operated without proper care; and that the trainmen had failed to observe the requirements of the Railway Precautions Act with reference to keeping a lookout and the duty when "any obstruction appears on road" to sound the alarm whistle and make every effort to stop.

It was held on appeal that a demurrer was wrongfully sustained and that the declaration stated a cause of action for negligence both under the common law and under the statute. With reference to the fact that the plaintiff was a trespasser, it was pointed out that even under the common law the railroad was under a duty of due care to trespassers, and that this duty involved keeping a reasonable lookout to see whatever could be seen by a person of good eyesight, and to make

16. 196 Tenn. 595, 269 S.W. 908 (1954).

17. 100 Tenn. 538, 46 S.W. 297 (1898). See also Noel, *Landlord's Tort Liability in Tennessee*, 30 TENN. L. REV. 368, 379 (1963).

18. 377 S.W.2d 928 (Tenn. 1964).

the utmost endeavor to prevent a collision with any obstruction discovered.[19] With reference to the Railway Precautions Act,[20] it was found that the allegations were sufficient to state a violation of the provisions requiring a lookout, and of the duty, when any obstruction should appear, to sound the alarm whistle and employ all means to stop the train.

Since the statute now makes contributory negligence a defense,[21] the defendant asserted that the declaration showed on its face that plaintiff was guilty of contributory negligence. On this point the court held that an issue for the jury was present. While under some circumstances, it might be contributory negligence as a matter of law to proceed over the track in the face of an on-coming train, here the poor visibility toward the west and the failure of the signal devices at the cross-way to give the plaintiff the expected notice may have been sufficient to prevent the plaintiff's conduct from being unreasonable.

(b) *Evidence of Negligence and of Contributory Negligence.*— In *Wallace v. Louisville and Nashville R.R.*[22] a truck driver was killed when a locomotive coming at about forty-five miles per hour struck the cab of his truck. The crossing was at the crest of a hill, so that the tracks could not be seen by the driver until he was close to the top of the hill. Visibility of trains coming from the west was to some extent obscured by buildings, bushes, and saplings. There was conflicting testimony as to whether the driver, who lived 120 miles away, but had worked nearby, was familiar with the crossing.

It was held that a directed verdict was properly denied. While speed alone was said not to be enough to establish negligence on the part of the defendant, the court found that "a high and dangerous rate of speed in combination with a blind and dangerous crossing presented a question of fact to be determined by the jury." With reference to contributory negligence, it was found that decedent ordinarily would be required to stop, look and listen for trains, but this rule applied only "if he knew or in the exercise of ordinary care should have known of the crossing." Since it could be found from the evidence that he was not aware of the crossing, for adequate reasons, this matter also was properly submitted to the jury.

C. *Determination of Cause in Fact in Malpractice Action*

The case of *Crowe v. Provost*,[23] illustrates some of the plaintiff's

19. Chattanooga Station Co. v. Harper, 138 Tenn. 562, 579, 199 S.W. 394, 398 (1917).
20. TENN. CODE ANN. §§ 65-1208 to -1209 (Supp. 1959).
21. Noel, *Torts—1959 Tennessee Survey*, 12 VAND. L. REV. 1350, 1361-63 (1959).
22. 332 F.2d 97 (6th Cir. 1964).
23. 374 S.W.2d 645 (Tenn. App. M.S. 1963), 31 TENN. L. REV. 531 (1964).

problems of proof in a malpractice case, and how in some situations these may be overcome without the necessity of expert testimony by a fellow-physician. There a child of twenty-two months was brought to the defendant's office and was given antibiotics without inquiry or testing as to hypersensitivity. Shortly afterward the child became seriously ill and lapsed into unconsciousness. He was brought back to the physician's office while the doctor was home for lunch and a practical nurse was in charge. After telephoning to the doctor that the child was not much worse, and thus leading him to decide not to return until after lunch, the nurse herself left the child with only the receptionist in charge. A few minutes later the child vomited and the receptionist raised him to an upright position, but when that action seemed to shorten his breath, she laid the child down on its back on the treatment table, although vomit and phlegm continued to run out of its nose. The child died shortly before the doctor and nurse returned to the office, and the plaintiff claimed that it died from aspiration of its own vomitus.

It was conceded that the defendant nurse was negligent in the course of her employment by defendant in leaving the unconscious child, and the principal issue was whether or not this negligence caused the death of the child. The nurse herself, together with a registered nurse who was testifying for the plaintiff, said that the child should not have been laid on its back, and that the child could die from aspiration of its vomitus. The defendant physician, however, and a number of other physicians who testified in his behalf, stated that the child died from an overwhelming virus infection, although they admitted that a person could die from aspiration of vomitus.

Under these circumstances it was held that the jury could find for the plaintiff on the causation issue. The court stated that the weight of the expert testimony was for the jury, and cited with approval a statement that in some circumstances where the "harmful results are sufficiently obvious as to lie within common knowledge, a verdict can be supported without expert testimony." Doubtless the decision would have been different if the causation issue had related to distinctly technical matters, where a jury would be acting without substantial evidence if its verdict was not supported by some medical testimony.

It was further found that while the plaintiff's argument to the jury "that doctors will rally to the defense of a fellow doctor in a malpractice suit" may have been improper, this did not sufficiently affect the result to justify a reversal.

II. Contributory Negligence

A. *Violation of Statute—Remote Contributory Negligence*

1. *Pedestrian Crossing Highway.*—In *Templeton v. Quarles*,[24] a pedestrian was killed when hurrying across a three-lane highway a few miles south of a small town. It was night, but a few buildings at this point on the road had neon signs which lighted up the highway. The road was straight for about a quarter of a mile to the south, to the bottom of a hill. The defendant driver, coming up this hill, struck with his right front fender the pedestrian who had almost completed the crossing. The body was thrown about 118 feet and the defendant's car laid down skid marks, starting near the point of impact, of about 96 feet in length. The jury, after appropriate instructions concerning negligence and contributory negligence, proximate and remote, returned a verdict for the plaintiff, with the additional statement that both the driver and the pedestrian were found to be negligent.

On appeal, it was held that the jury verdict had been properly accepted as meaning that the jury found only remote contributory negligence on the part of the pedestrian. It was urged that the pedestrian was guilty of proximate contributory negligence as a matter of law in view of his violation of the statute which requires a pedestrian crossing a road where there is no crosswalk or intersection to yield the right of way to all vehicles. It was held, however, that whether or not under all the circumstances the decedent was guilty of proximate contributory negligence was a question for the jury. It was stated in that connection that the pedestrian's failure to keep an adequate lookout "may constitute negligence per se, but it will not necessarily do so under all circumstances."

Apparently, the duty to yield the right-of-way does not in all cases involve the duty to discover the oncoming vehicle before starting to cross the road, or if the vehicle is discovered, the duty in all cases to estimate correctly the speed of the driver; or if such duties exist, the decision indicates that the jury can find that the pedestrian's failure to perform them in a particular case has contributed only remotely to the accident. In connection with defendant's driving it was held that his excessive speed could be inferred from the skid marks and from the distance which the pedestrian's body was thrown by the impact with the car.

Cases of this type suggest the desirability of a comparative negligence statute, even though a use of the remote contributory negligence rule may enable courts and juries to reach about the same result in an indirect way.

24. 274 S.W.2d 654 (Tenn. App. M.S. 1963).

2. *Cyclist Entering Highway from Driveway.*—In another case the court, by use of flexible proximate causation concepts, avoided the harshness of the rule that contributory negligence is a complete bar to recovery, even though both parties have contributed substantially to the plaintiff's injury. In this case, *Lowe v. Irvin*,[25] the plaintiff, a boy of nine, was injured when he rode his bicycle from a private drive onto the highway and collided with the defendant's automobile. It was clear that the plaintiff had violated the statutes giving the right of way in this situation to the motorist on the highway.[26] There also was testimony indicating that the driver of the car had violated the reckless driving statute,[27] acting in willful or wanton disregard of the safety of others by not keeping a lookout. He admitted after the collision, "I didn't see him until we had done hit." The physical conditions at the scene were such that the motorist could have seen the boy, apparently in time to avoid him, if he had been looking ahead.

Under these circumstances the trial judge directed a verdict for the defendant. This action was reversed on the ground that "even though both parties be violating the law, it is still a question for the jury to determine what *the* proximate cause of the collision resulting in the injury was, and the violation of which one constituted the proximate cause, applying the proper rule relating to contributory negligence of a remote nature." (Italics added.)

Since one immediate cause of the accident was the plaintiff's failure to yield the right of way as required by statute, the trial judge apparently considered that this was a case for application of the rule that "a plaintiff who has violated a legislative enactment designed to prevent a certain type of dangerous situation is barred from recovery for a harm caused by a violation of the statute, if . . . . the harm was sustained by reason of a situation of that type."[28] The unwillingness of the appellate courts to apply that rule in this case seems based to a considerable extent on the youthfulness of the plaintiff, for there are references to the instincts and impulses of youngsters and the court finds "this young child so badly hurt, practically incapable of being guilty of negligence." The decision is not actually based, however, on the ground that the boy was not negligent in violating the statute. Nor was there any finding that the motorist, although apparently he violated the statute against reckless driving, was guilty of such gross or wanton negligence that ordinary contribu-

25. 373 S.W.2d 623 (Tenn. App. E.S. 1963), 32 TENN. L. REV. 333 (1965).

26. TENN. CODE ANN. §§ 59-828 to -831 (1956).

27. TENN. CODE ANN. § 59-858 (1956).

28. RESTATEMENT (SECOND), TORTS § 469 (1964). See also Wade, *Torts—1961 Tennessee Survey*, 15 VAND. L. REV. 952, 954 (1962).

tory negligence would not bar the action.[29] The decision is placed on the ground that a jury could find that the negligence of the defendant was the only proximate cause of the accident.

The principal authority for this handling of the matter was the earlier decision in *Adams v. Brown*,[30] where the accident occurred as the plaintiff was attempting to pass the defendant's truck at a rural intersection in violation of a statute.[31] The collision occurred when the defendant, in violation of another statute,[32] made a left turn at the intersection without giving the required signal and without making sure that the turn could be safely executed. The court there permitted the jury to find that the negligence of the truck driver was the sole proximate cause of the accident.

It was not possible in the present case to employ the last clear chance doctrine, even under the more liberal application of that rule, for here the plaintiff cyclist's disability until the time of the accident was caused by his continued inattention rather than by any physical helplessness. Under these circumstances, it is generally held, in all except a few jurisdictions, that the plaintiff is not entitled to the benefit of the last clear chance doctrine unless the defendant actually discovers the plaintiff's perilous inattention, although there may well be a duty to discover a plaintiff who is physically helpless.[33]

In the absence of a comparative negligence doctrine, it is fortunate that cases of the present sort may still be sent to the jury, when the negligence of the defendant seems considerably more grave than that of the plaintiff, under instructions that they may find that the plaintiff's contributory fault was not a proximate cause of the accident, even though the connection in time and space is quite close and the statute was designed to prevent the general kind of action involved. Perhaps a simpler way to handle the problem of a statutory violation by the plaintiff would be to say that this violation may, rather than must, be regarded as negligence per se, depending on all the circumstances of the particular case.[34] This approach likewise permits the needed flexibility in handling cases like the present one and *Adams v. Brown*.[35]

3. *Motorist Entering Highway Without Right of Way.*—In *Hobbs v. Livesay*,[36] the plaintiff drove into an intersection and collided with an automobile owned by one of the defendants and driven by

29. See 19 TENN. L. REV. 795 (1947).
30. 37 Tenn. App. 258, 262 S.W.2d 79 (1953).
31. TENN. CODE § 2686(C) (1932).
32. TENN. CODE § 2682(C),(D)(1),(2),(6) (1932).
33. See 25 TENN. L. REV. 515 (1958); 23 TENN. L. REV. 916 (1955).
34. SEE RESTATEMENT (SECOND), TORTS § 286 (Tent. Draft No. 4, 1959), § 569(2) (Tent. Draft No. 9, 1963).
35. See Noel, *Torts—1962 Tennessee Survey*, 16 VAND. L. REV. 881, 899-900 (1963).
36. 372 S.W.2d 199 (Tenn. App. E.S. 1963), *cert. denied*, July 15, 1963.

the other, his son. The defendants' car was on the plaintiff's right, with the result that the defendants had the right of way.[37] The defendants' car, however, was being driven without lights after it had become dark enough so that lights were required.

It was contended that the plaintiff was guilty of proximate contributory negligence as a matter of law in failing to yield the right of way, chiefly on the authority of *Smith v. Murphy*.[38] In the present case, however, the court observed that the jury had found that the defendants' car, in approaching the intersection without lights, had led the plaintiff to believe that he would encounter no other vehicle in the intersection. This circumstance was enough to make the case one for the jury on the issue of contributory negligence.

Likewise, in *Arnett v. Fuston*,[39] recovery was allowed against a driver who under ordinary circumstances would have had the right of way. There a pick-up truck driven by the defendant collided at an intersection with a car in which the decedent was a passenger. The pick-up truck had the right of way, but there was evidence that the truck had rammed the car in which the decedent was riding with sufficient force to cave in one side and bulge out the other, almost completely demolishing the car. In returning a verdict for 30,000 dollars against the defendant the jury added, "punitive damages of from one to five years in prison."

The court held that the jury could infer from the evidence that the truck was being driven "at considerable speed" across the intersection, and that the driver was intoxicated. It was further held that the addition to the verdict recommending imprisonment was not sufficient indication of passion or prejudice to require a setting aside of the verdict, and that this addition was properly disregarded as surplusage.

B. *Imputed Contributory Negligence*

1. *Wife's Negligence Imputed to Husband Where Agency Present.*— The case of *Southern Railway Co. v. Butts*,[40] illustrates a natural reluctance on the part of a jury to apply the fictitious doctrine of imputed negligence. There a wife was driving her husband home from work in a station wagon owned by the husband. The wagon was struck by a train at a crossing and both husband and wife were injured. The defendant asked for an instruction that if the husband owned the station wagon, and was in it while being driven by the wife, then any negligence on the part of wife-driver was imputable to the

37. See TENN. CODE ANN. § 59-828 (1956).
38. 48 Tenn. App. 299, 346 S.W.2d 276 (1960).
39. 378 S.W.2d 425 (Tenn. App. M.S. 1963).
40. 379 S.W.2d 794 (Tenn. 1964).

husband. This instruction was refused. The jury found for the husband and against the wife, evidently deciding that the defendant railroad was negligent, that the wife-driver likewise was negligent, and barred by her contributory fault.

Under these circumstances a new trial was ordered on the ground that the verdicts were inconsistent. It was held that the requested instruction about imputing the negligence of the husband to the wife should have been given. Even under the instructions that were given, since there was no evidence to rebut the presumption of control by owner of station wagon, it was stated that the jury could not properly have found for the husband unless it found the wife free from contributory negligence. The decision thus applies the established rule that negligence is imputed from an agent to a principal, for reasons which remain obscure, although negligence will not be imputed from spouse to spouse merely because of the marital relationship.[41]

2. *Negligence of one Parent of Deceased Imputed to Other.*—Imputed contributory negligence also was involved in a death action, *Smith v. Henson.*[42] There a young mother was working at defendant's home and at the time taking care of her own young children, a girl of three and a boy of two. Defendant asked her to drive his car home from the office, and to then wash and clean the car. This involved parking the vehicle on a steep driveway, since the defendant's home was situated on a high hill overlooking a river. Shortly after parking the car, she looked at it, saw that her children had entered it, and also, that the vehicle was starting to roll down the hill. Vain efforts were made to stop the car, and when it crashed, the small girl was killed and the boy was seriously injured.

Demurrers to actions for the death of the girl and for the injury to the boy were sustained. One basis for the decision was that the negligence of the mother in failing to park the car securely was the only proximate cause of the accident. In that connection, it was not considered significant that the defendant had entrusted his car to an unlicensed driver, for on that point the court followed the prevailing rule that "the mere fact an individual is unlicensed does not render the owner of the automobile liable for the negligence of a borrower where such fact has no causal connection with the injury or damage." This rule seemed particularly appropriate in a situation where the car was not actually being driven at the time of the accident, although it had been carelessly parked shortly before.

41. Knoxville Ry. & Light Co. v. Vanglider, 132 Tenn. 487, 178 S.W. 117 (1915); Henniss, *Imputed Contributory Negligence,* 26 TENN. L. REV. 531, 540, 547 (1959).
42. 381 S.W.2d 892 (Tenn. 1964).

With reference to the suit by the injured boy, it was pointed out that if the defendant's liability was predicated on the negligence of his servant, the mother, the defendant would be entitled to indemnity from her as his servant, with the result that the recovery by the child would be of no benefit to the mother. In any event, as the opinion points out, it "has also long been the rule in this State that a minor may not recover damages against a principal because of the negligence of acts of the parent of a minor, which parent at the time was acting as the agent of the principal."

The imputed negligence doctrine was used as an additional grounds for denial of recovery in the wrongful death action. With reference to recovery for the benefit of the mother, the court stated that this would not be permitted when her own negligence contributed proximately to the death. It was further stated, on the authority of *Nichols v. Nashville Housing Authority*,[43] that "contributory negligence of one parent of a child wrongfully killed, is imputable to the other so as to preclude recovery by or for the benefit of the parents, or either of them in an action for the death of the child." It might be added that the rule of the *Nichols* case is a controversial one.[44]

C. *Risk of Obvious Dangers Assumed*

1. *Private Hospital with Risks Apparent to Nurse.*—The close relationship between the defense of voluntary assumption of risk and the plaintiff's failure to prove negligence is evident in *Pearce v. Canady*.[45] There the plaintiff, a practical nurse, was employed at defendants' hospital. Her patient was variously described as suffering from a "bizarre neurological difficulty" and as "getting over a drunk." After the patient insisted on going without aid to the bathroom, the plaintiff heard him call in a weak voice and found him leaning against the wall in the hallway just outside his room. After calling in vain for other assistance, the plaintiff undertook to help the patient, a man weighing about 185 pounds, although she herself was quite small. While "walking" the patient to his bed, her leg twisted from under her and in the resulting fall her leg was broken just below the knee.

The plaintiff asserted that a duty of due care was owed her as an invitee, and that there was negligence in failing to provide enough orderlies to render needed assistance in an emergency, and in other

43. 187 Tenn. 683, 216 S.W.2d 694 (1949).

44. *Cf.* Note, 2 VAND. L. REV. 722 (1949), concluding that the *Nichols* decision "has much to justify it." See HARPER & JAMES, TORTS § 23.8, at 1283 (1956), stating that rulings like that in the *Nichols* case "are altogether indefensible, and are being increasingly rejected." See also Henniss, *Imputed Contributory Negligence*, 26 TENN. L. REV. 531, 541-45 (1959).

45. 373 S.W.2d 617 (Tenn. App. E.S. 1963).

respects, such as in the failure to have a bathroom near the patient's room. In reversing a judgment for 5000 dollars against the defendants, the court of appeals found that there was no sufficient evidence of negligence or proximate causation. In any event, however, the court considered that the plaintiff must be held to have assumed the risk of this accident, since any dangers present were known or were apparent to her. On this point the court stated that the owner of premises "is not liable for injuries sustained from dangers that are obvious, reasonably apparent or as well known to the invitee as to the owner . . . . The invitee assumes all normal or obvious risks attendant on the use of the premises."

While it may be that some of the alleged risks were not subjectively realized and assumed by the plaintiff, the decision still may be rested on the related ground that there was no sufficient evidence of causal negligence on the part of the defendants, in view of the fairly obvious nature of the alleged dangers. On this point the court stated that the only duty owed the plaintiff "was that of furnishing a safe place to work and of warning her of any danger not known or apparent to the plaintiff," and it was concluded that this duty had not been violated. The decision illustrates how in its primary sense the term assumption of risk "is only the counterpart of the defendant's lack of duty to protect the plaintiff from that risk."[46]

There does not seem to have been any contributory negligence in this case, for it was not unreasonable for the plaintiff to agree to work for a few days in a hospital with some apparent dangers, and for the same reason it is doubtful whether there was any unreasonable assumption of risk. The case seems different in this respect from *Peters v. Tennessee Central Railway*,[47] where the plaintiff consented to face a hazardous condition for a period of six or seven years. If, however, there was no breach of duty toward the plaintiff, the absence of contributory fault is immaterial.

2. *Premises where Condition but not Danger Obvious.*—In *Ballinger v. I. V. Sutphin Co.*,[48] the plaintiff was a demurrage clerk employed by an agency of the railroads to examine freight cars on sidings, ascertaining whether they were loaded or empty and whether demurrage charges were due by reason of prolonged possession of the car. While walking around a car on the defendant's land, after a rainy night, he slipped and fell, breaking his hip. There was testimony that the land was muddy, and that slick green moss formed in places where the water had formed.

46. Fleming, *Assumption of Risk*, 61 YALE L.J. 141 (1952).
47. 179 Tenn. 509, 167 S.W.2d 973 (1942).
48. 332 F.2d 436 (6th Cir. 1964).

The court first found that the plaintiff was an invitee toward whom there was a duty of due care, since he was on the premises with reference to a matter of mutual business interest and came within the definition of a business guest as "a person who is invited or permitted to enter or remain on land in the possession of another for a purpose directly or indirectly connected with the business dealings between them."[49] Consequently, there was a duty toward the plaintiff to keep the premises in safe condition, and the main issue was whether or not the plaintiff was guilty of contributory negligence as a matter of law. In upholding the refusal of the trial court to so charge, the court noted that while the presence of the mud may have been obvious, there was no evidence that the plaintiff was aware of the additional risk from the slick moss which had been permitted to grow up where water was allowed to stand. The case was therefore distinguishable from one where the plaintiff was completely familiar with the dangerous conditions which caused the fall. If the fall had occurred simply on account of the mud, it would seem that the plaintiff still might not be guilty of contributory fault, since it was his duty to examine the cars in wet as well as in clear weather; but it then might have been difficult to establish that the defendant's premises were unreasonably dangerous, if walking in this area was infrequent.

III. PRODUCTS LIABILITY

A. *Manufacturer Not Liable in Warranty Without Privity.*—Perhaps the decision of greatest interest during the survey period was *Kyker v. General Motors Corp.*,[50] which cleared up, to some extent at least, the confusion created by the denial of certiorari in *General Motors v. Dodson.*[51] In the *Dodson* case a lady who had purchased an Oldsmobile from an authorized dealer, Kemp, was injured when the brakes suddenly locked. She sued the manufacturer for breach of express and implied warranty and recovered. The verdict for the plaintiff was upheld on the grounds that "the jury could have found that General Motors was the actual person with whom the plaintiffs were dealing, and Kemp was a conduit or subterfuge by which General Motors tried to exempt itself from liability to the consumers who are the plaintiffs." On a petition to re-hear, further consideration was given to the point that there may in fact, have been no privity between General Motors and the plaintiff. The court concluded, however, that the practical effect of the automobile sales plan was

49. RESTATEMENT, TORTS § 332 (1934). This section was cited and applied by the court.

50. *Supra* note 1.

51. 47 Tenn. App. 438, 338 S.W.2d 655 (1960).

that "General Motors gave the warranty to the ultimate consumer" even though "General Motors dealt only with its dealers and never with the purchasers who are in fact the beneficiaries of the warranty."

It was possible to interpret the *Dodson* case restrictively because of evidence that the manufacturer had actual knowledge that the plaintiff's car "was dangerously defective in its braking system" and failed to warn the plaintiff of this danger. Under that view the case simply reaffirms the settled principal that a manufacturer is liable for misrepresentation without privity of contract if he sells a product with actual knowledge of a dangerous defect.[52] In fact, however, the court went on to use language characteristic of modern decisions dispensing with privity in warranty cases generally, at least where the manufacturer has engaged in wide-spread advertising. It was stated in that connection that such advertisements made to the ultimate consumer "form a part of the warranty which General Motors gives the ultimate consumers." This language led many to think that the *Dodson* case was intended to impose on manufacturers a strict liability to remote users or consumers of their products, on warranty grounds.[53]

In the *Kyker* case, the supreme court itself gives the *Dodson* case this interpretation, stating that it was there held that the sales act "created an implied warranty from the manufacturer to the consumer, in a situation where the manufacturer was not the plaintiff's vendor." In the *Kyker* decision, however, the court goes on to say that this holding represents an erroneous construction of the sales act, and concludes, "we do not think the provisions of the Uniform Sales of Goods Act were ever intended to, or should, define the rights, remedies and liabilities of a purchaser as against a manufacturer who is not his immediate vendor or a party to the contract of sale." Consequently the recent federal decision in *Berry v. American Cyanamid*,[54] seems correct in concluding "that Tennessee has not abolished the requirement of privity" in warranty cases.

While the *Kyker* case makes it clear that the remote purchaser cannot recover against the manufacturer on warranty grounds, it says nothing as to whether or not strict liability might be imposed upon the direct tort theory adopted in *Greenman v. Yuba Products, Inc.*,[55] and by the American Law Institute.[56] There are a number of recent de-

52. Burkett v. Studebaker Bros. Mfg. Co., 126 Tenn. 467, 150 S.W. 421 (1912); 1 HURSH, AMERICAN LAW OF PRODUCTS LIABILITY § 6.64, at 116 (Supp. 1964).

53. See, *e.g.*, PROSSER, TORTS, *op. cit. supra* note 5, § 97 at 675, 677. I FRUMER & FRIEDMAN, PRODUCTS LIABILITY § 16.04(2)(IX), at 416 (1960, Supp. 1964).

54. 341 F.2d 14 (6th Cir. 1965).

55. 59 Cal. 2d 57, 377 P.2d 897 (1963).

56. RESTATEMENT (SECOND), TORTS (Tent. Draft No. 10, 1964).

cisions, other than the *Greenman* case, which have taken this position.[57] Since about half of the states have imposed strict liability without privity on manufacturers on one ground or another during recent years,[58] it is quite possible that the Tennessee court may in an appropriate case take this position, particularly with reference to manufacturers of food or drink, or of products for intimate bodily use, where decisions of longer standing from other jurisdictions support the imposition of liability without fault on the manufacturer.[59]

B. *Contaminated Beverage—Res Ipsa Not Applied*

In *Phipps v. Carmichael*,[60] the courts were presented with another case in a long series based on harm from contaminated beverage bottles. In this most recent decision, it appeared that cases of soft drinks were delivered by the defendant bottling company to the home of one Nimms about twice a week. The home was surrounded by a six foot fence, with a locked gate, to which Mrs. Nimms had the key. Some time later Nimms took the bottles and placed them in a barrel. The barrel was placed in the back end of Nimm's bus, where it remained until the next day, except when Nimms himself opened the barrel to put in some ice.

While Nimms was transporting cotton pickers in his bus he sold drinks to the workers, who carried their own lunches. When the plaintiff purchased the bottle in question, Nimms uncapped it. As the plaintiff was drinking the beverage, her daughter noticed a foreign object in the bottle, which on examination looked like a hair pin. The plaintiff drank no more from the bottle, but later in the day became nauseated and, "upon her return home that evening became even sicker."

Suit was brought for 10,000 dollars against the bottler on negligence grounds, and after a second trial a verdict was directed for the defendant. This action was confirmed on the authority of *Coca-Cola Bottling Works v. Sullivan*.[61] The court referred to the requirement laid down in that case that negligence could not be presumed unless the plaintiff introduced not only some evidence of lack of tampering,

57. See, *e.g.*, Greeno v. Clark Equip. Co., 237 F. Supp. 427 (N.D. Ind. 1965); Putnam v. Erie City Mfg. Co., 338 F.2d 911 (5th Cir. 1964); Deveny v. Rheem Mfg. Co., 319 F.2d 124 (2d Cir. 1963); Goldberg v. Kollsman Instrument Corp. 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963). See also Noel, *Strict Liability of Manufacturers*, 50 A.B.A.J. 446 (1946).

58. See Noel, *Products Liability of Retailers and Manufacturers in Tennessee*, 32 TENN. L. REV. 207, 208 (1965); See Wade, *Strict Tort Liability of Manufacturers*, 19 S.W. L.J. 5, 12 (1965).

59. See PROSSER, TORTS § 97, at 675 (3d ed. 1964).

60. 376 S.W.2d 499 (Tenn. App. W.S. 1963), 32 TENN. L. REV. 341 (1965).

61. 178 Tenn. 405, 158 S.W.2d 721 (1942).

but enough to make it appear "by a clear preponderance of the evidence that there has been no such divided or intervening control of the bottle as to afford any reasonable opportunity for it or its contents to have been tampered with by another after it left the possession or control of the defendant or its agents." In the present case the court thought that this high standard of proof had not been met because the bottles may have been tampered with while on Nimm's back porch. While the gate was usually locked, and Mrs. Nimms had the key, the failure of Mrs. Nimms to testify as to whether or not there were opportunities for tampering was regarded as significant.

In response to an argument that the requirements of the *Sullivan* case had been somewhat relaxed by later decisions, the court concluded, "The *Sullivan* case is still the law of Tennessee, and this court is bound by it." While there has been some tendency to relax the standard of proof in explosion cases,[62] the present decision indicates that in contamination cases the standard of proof still is quite strict, notwithstanding the decision in *Coca-Cola Bottling Works, Inc. v. Glab*,[63] the only recent contamination case in which the court has allowed the jury to find negligence.

The claim in the present case, where the plantiff did not actually swallow the hair pin, does not seem a particularly strong one, and it is not surprising that the court was unwilling to relax the standard of proof in this situation. As has been pointed out, the court is more concerned with problems of tampering and of fraudulent and exaggerated claims in the foreign substance cases, than in the explosion ones, where injury is unquestionably due to the explosion, and often is quite serious.[64]

IV. Misrepresentation—Restriction of Liability for Negligence

The case of *Texas Tunneling Co. v. City of Chattanooga*,[65] was considered two years ago in this survey.[66] The basic complaint was that the defendants, a firm of engineers, by their negligence in preparing some drawings for the city, had misled the plaintiff. These drawings

62. See Canada Dry Bottling Co. v. Mason, CCH Food, Drug & Cosmetics L. Rep. ¶¶ 22,621, 23,607 (Tenn. App. 1959), *cert. denied*; 27 Tenn. L. Rev. 622 (1960). See also Noel, *supra* note 58, at 232.

63. CCH Food, Drug & Cosmetics L. Rep. ¶ 22,475 (Tenn. App. 1956), *cert. denied*, Mar. 8, 1957, 28 Tenn. L. Rev. 444 (1959).

64. See Wade, *Torts—1957 Tennessee Survey*, 10 Vand. L. Rev. 1221, 1218 n.18 (1957). As there suggested, "when plaintiff's 'injury' is doubtful the requirement in the *Sullivan* case may still be imposed."

65. 329 F.2d 402 (6th Cir. 1964).

66. See discussion of the district court opinion, 204 F. Supp. 821 (E.D. Tenn. 1926), in Noel, *supra* note 35, at 881, 890, 905-07, where the facts are more completely stated. See also 16 Vand. L. Rev. 266 (1962).

were used, as was intended, by contractors in making bids for some work, and by the plaintiff subcontractor, who agreed to dig a sewer through a hill. The drawings purported to include the results of a number of test borings, but with regard to two of the borings near the center of the hill, the drawings omitted to give results showing an unusual amount of rock at these points. As a result of these omissions the plaintiff believed that the work could be done in about half the time it actually took, and that the cost would be some $17,730 less than the expense in fact incurred. The plaintiff was allowed by the trial court to recover damages from the negligent engineers, even though no intentional falsehood was involved.

This holding was reversed by the court of appeals, which concluded that "up to now the Tennessee Courts have not extended the reach of tort claims for fraud and deceit to embrace such a suit as is involved here" and that "to impose liability would require this Court to fashion a rule not yet adopted in Tennessee." The appellate court found confirmation for this opinion in the case of *Howell v. Betts*,[67] rendered by the Tennessee Supreme Court, after the trial court's decision, although that case has been considered by commentators as "not inconsistent" with the trial court's opinion and not "restrictive of its holding."[68]

In fact, the opinion of *Howell v. Betts* seems definitely to accept the view that there is a duty of due care, without privity of contract, not only with reference to personal injury and property damage, but with reference to intangible interests. The court there stated that "such a duty and consequent liability have been imposed on a defendant in favor of a plaintiff not in privity where the risk of harm from negligent performance of a contract was to an intangible interest of such plaintiff." In support of this proposition the court cited the leading case allowing recovery for negligent misrepresentation, *Glanzer v. Shepard*,[69] which definitely supports recovery when information is negligently supplied for the guidance of a class of persons, even though there was no intent to deceive, and even though the particular plaintiff is not known to the defendant. Recovery was denied in *Howell v. Betts* only because the carelessly prepared survey on which the plaintiff relied in purchasing land had been prepared for a former owner back in 1934. Under these circumstances the court concluded that the liability could not be extended to "an

67. 211 Tenn. 134, 362 S.W.2d 924 (1962).

68. See Wade, *Torts—1963 Tennessee Survey*, 17 VAND. L. REV. 1173-74 (1964). See also Susano, *The Action of Deceit in Tennessee*, 30 TENN. L. REV. 624, 634 (1963), stating, "The holding in the Texas Tunnelling Co. case was accepted by implication in the subsequent case of Howell v. Betts, [211 Tenn. 134, 362 S.W.2d 924 (1962).]."

69. 233 N.Y. 236, 135 N.E. 275 (1922); RESTATEMENT, TORTS § 552 (1934).

unforeseeable and remote purchaser 24 years after the survey" without extending liability to "all purchasers to the end of time." In that connection the court cited *Ultramares Corp. v. Touche*,[70] which holds that a balance sheet negligently prepared by accountants for use in a wide variety of transactions should not lead to "liability in an indeterminate amount for an indeterminate time to an indeterminate class."

It would seem that the facts in the *Texas Tunneling* case resemble those in *Glanzer v. Shepard* more closely than those in the *Ultramares* case or in *Howell v. Betts*. The parties in the present case had in mind a definite and limited class of persons, the bidders for a particular contract, who would within a short time rely on the drawings. There could be only one successful bidder for the tunnelling work, and the amount of that bidder's loss would be limited to the cost involved in removing the rock which the defendants negligently failed to indicate on their drawings. The opinion in the *Ultramares* case was not based on the fact that the defendant's accountants did not know the name of the persons to whom the balance sheet would be shown, but on the fact that the balance sheet was to be used in a wide variety of transactions. As indicated in the *Restatement of Torts*,[71] which approves the district court opinion in the *Texas Tunneling* case in illustration 5, a requirement that the plaintiff be identified and known to the defendant seems too narrow.

It is believed that the general tenor not only of *Howell v. Betts*, but of earlier Tennessee cases gives at least as much support to the negligence rule followed by the district judge as to the traditional one applied by the court of appeals. While the final decision receives some support from the fact that the information furnished was not "guaranteed" and the bidders were referred to further plans on file in the engineer's office, it appears that there was no objection to the district judge's finding that the plaintiff was not guilty of contributory negligence, and the appellate court does not undertake to set aside that finding.

Although the defendants prevailed in this case, it is evident that the law in this area is in a developing state and that engineers and others in the business of supplying information cannot indefinitely expect others to pick up the bill for losses caused by their mistakes, or those of their unidentified employees. Despite this decision the refuge for careless incompetence gradually is becoming less secure.

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70. 255 N.Y. 170, 174 N.E. 441 (1931).

71. RESTATEMENT (SECOND), TORTS 552 (Tent. Draft No. 11, 1962).

V. DEFAMATION

A. *Slander per se—Charge of Crime*

The case of *Dunneback v. Williams*[72] deals with an accusation of crime as slander per se, and illustrates that in this jurisdiction the charge must be quite specific if it is to be actionable on that ground. It appeared that the mayor of Mount Pleasant, at a regular meeting of the board of commissioners, made the statement, after failing to find something in the minutes of the city, that the plaintiff, the city manager, should be dismissed. When the city manager asked why he should be dismissed, the defendant replied, "For taking a page from the minute book, altering the minutes and for lying." It was alleged that these words charged a felony under the criminal statutes.[73]

Two defenses were asserted: (1) that the words were absolutely privileged because spoken at a regular meeting of the board of commissioners by the mayor in the course of a legislative proceeding; and (2) that there was no charge of a criminal offense, with the result that the words were not actionable in the absence of proof of special damages.

In upholding a demurrer to the declaration the court restricted its consideration to the second defense, involving the charge of crime.[74] In that connection the court pointed out that the removal of material from the minute book was made felonious only if this was done "with intent to injure or defraud." It was then held that no charge of this crime had been made because the "words spoken by the defendant do not state with what intent the plaintiff was charged with taking a page from the minute book or altering the minntes." The earlier cases on this matter indicate that the words spoken need not state the charge with all the precision of an indictment; it is enough that the bystander reasonably understands the words as definitely charging the plaintiff with the commission of a crime,[75] and this is the generally accepted rule.[76] More recently, however, the courts in this jurisdiction have required that the accusation of crime be quite specific.[77]

With reference to the privilege point, it ordinarily is held that a statement made during the proceedings of subordinate legislative bodies, such as a municipal council, are only conditionally privileged.

72. 381 S.W.2d 909 (Tenn. 1964).

73. TENN. CODE ANN. §§ 39-1942, 39-4207 (1956).

74. It may be recalled that Tennessee follows the rule that the crime charged must be one which is both indictable and involves moral turpitude. Smith v. Smith, 34 Tenn. 473 (1854).

75. *Ibid.;* Tompkins v. Wisener, 33 Tenn. 458 (1853).

76. PROSSER, *op. cit. supra* note 59, § 107 at 774.

77. Smith v. Fielding, 205 Tenn. 313, 326 S.W.2d 476 (1959), 27 TENN. L. REV. 435 (1960); Cheatham v. Patterson, 125 Tenn. 437, 145 S.W. 159 (1911).

It is considered that these proceedings are not within the policy underlying the absolute immunity attached to federal and state legislative proceedings, and that members of these subordinate bodies are sufficiently protected if they are exempted from liability for statements made in good faith, without malice.[78]

B. *Libel per se—Defamation of a Corporation*

The case of *Electric Furnace Corp. v. Deering Milliken Research Corp.*[79] brings out some basic points about the law of libel. It was there found that the trial court had correctly instructed the jury as follows: "Where the defamatory nature of the writing does not appear upon the face of the writing, but rather appears only when all of the surrounding circumstances are known, it is said to be libel per quod as distinguished from liable per se, and in such cases damages are not presumed by must be proven before the plaintiff can recover."[80] It was further found to have been properly stated by the trial judge that for defamation of a corporation the false statement "must reflect in a defamatory manner upon the conduct, management, or financial condition of the corporation."

A judgment for the plaintiff for 6240 dollars compensatory damages and 125,000 dollars punitive damages was, however, set aside on appeal, and the case remanded for a new trial, because of error in the computation of damages. There was confusion between loss of gross receipts and loss of profits, and even to the extent that loss of profits was shown, there was no sufficient evidence that this loss was due to the defamation rather than to apprehension by customers that they might become involved in a patent dispute properly referred to by the defendant in the defamatory letter. Since there was no sufficient proof as to compensatory damages, the award of punitive damages also had to be set aside, for the reason that punitive damages cannot be allowed in an action for libel per quod unless there is proof of special damage.

VI. Miscellaneous

A. *Malicious Prosecution*

There is a close relation between the torts of malicious prosecution and defamation, for when criminal or even civil proceedings are initiated against a person, it is evident that this is likely to affect his reputation. Both the similarity between these actions, and an essential difference between them is brought out in the recent case of *Ryerson v.*

78. Prosser, *op. cit. supra* note 59, § 109 at 801.
79. 325 F.2d 761 (6th Cir. 1963).
80. See also Paine, *Defamation—Libel Per Se Doctrine,* 30 Tenn. L. Rev. 466 (1963).

American Surety Co.[81] There it was alleged that the defendant had instituted a civil action against the plaintiff, a Certified Public Accountant; that the action had terminated in the plaintiff's favor; that it was brought maliciously, without probable cause; and that as a result of the lawsuit the plaintiff incurred certain expenses and "suffered injury to his professional reputation as a C.P.A." Plaintiff further alleged that the slightest investigation would have revealed that the allegations made against him in the original suit were not true.

The defendant demurred to the declaration on the ground that the statements complained of were made about the plaintiff in the course of a judicial proceeding, and, so long as relevant to the proceeding, were absolutely privileged. The trial judge sustained the demurrer, but was reversed because the suit was not for defamation, but for malicious prosecution. As the court points out, the plaintiff's action was not based on false statements made about him, but on the improper initiation of a lawsuit. The plaintiff's allegations that certain statements made about him were false and defamatory were made simply "in order to help make out an element of his action, *e.g.*, malice or lack of probable cause; but the false statements would only be evidence of the element sought to be shown."

The opinion incidentally brings out that Tennessee, ever since the decision in *Lipscomb v. Shofner*,[82] has followed the modern rule that an action for malicious prosecution may be brought for wrongful initiation of an ordinary civil suit. In such a case, however, as distinguished from one based on malicious institution of a criminal prosecution, no damages will be presumed, and the plaintiff must establish damages in excess of the costs recoverable in the original action.[83]

B. *Trespass—Removal of Lateral Support*

In *Morris v. Ostertag*,[84] the purchaser of a plot in a subdivision was allowed recovery for harm caused by the excavation of adjoining land for the purpose of building a road, even though the deed showed the purchased lot to be bounded by a street. The court stated that "the right of a landowner to have his soil sustained by that adjacent to it is an absolute right." It was found that there could be recovery "without proving negligence or want of skill," and whether the removal of support was by an adjoining landowner, or by someone else. A defense that the harm was done by an independent contractor was unsuccessful

81. 213 Tenn. 182, 373 S.W.2d 436 (1963).

82. 96 Tenn. 112, 33 S.W. 818 (1896).

83. *Ibid.*; PROSSER, *op. cit. supra* note 59, § 114 at 875.

84. 376 S.W.2d 720 (Tenn. App. M.S. 1963).

for the reason that defendant, who employed the contractor, had directed the removal of the lateral support, and the injury to the paintiff's land was a direct and probable consequence of the work the contractor was instructed to perform.

C. *Damages—Remittur—No Instruction as to Non-taxibility of Award*

In *Dixie Feed & Seed Co. v. Byrd*,[85] the principal questions were whether the trial judge correctly refused to instruct the jury that any recovery by the plaintiff would not be subject to federal income taxes, and whether a verdict for 380,000 dollars, considerably higher than any before rendered in this state, was excessive.

As to the income tax point, the court decided, in this case of first impression, to follow the majority view that the tax exemption is not to be considered by the jury. One reason for this decision was that the contrary view tends to nullify the tax benefit apparently intended by Congress in exempting from taxation, damages for personal injuries. Furthermore, if account were taken of taxes this "would inject into the already difficult and complicated computation of such damages factors which change from time to time, such as the rate of taxation and the number of plaintiff's exemptions, and allow juries to indulge in speculation and conjecture in arriving at the amount to be deducted."

This conclusion is in harmony with the collateral source rule, which also was applied in this case. Under that rule the defendant may not show payments of wages or sick benefits made to the plaintiff during his incapacity, since these do not relate to the loss of ability to earn for which the plaintiff must be compensated. It is evident that tax deductions also are not directly related to the actual loss of earning power.

With reference to the amount of the verdict, the court considered the extent of the injuries, which involved paralysis from the navel down, with the resulting loss of ability to control kidney and bowel action, and loss of sexual powers. The plaintiff was fifty-nine years old and earned 6000 dollars a year. In suggesting a remittur to 290,000 dollars, the court was influenced by the fact that the estimated costs for nursing, 191,736 dollars, were figured on the assumption that the continuous services of a practical nurse would be needed, while in fact, the attendant would simply have to be on call, and would not have to be a practical nurse.

It was pointed out that in view of the plaintiff's paralysis the pain would not be commensurate with the other elements of damage. The court also may have been influenced by the fact that apparently

85. 376 S.W.2d 745 (Tenn. App. E.S. 1963), 31 TENN. L. REV. 514 (1964).

there was no attempt to discount the face amount of the various items of recovery. At age fifty-nine it may be that even the amount to which the judgment was reduced, after deduction of attorney's fees and expenses, still might supply the plaintiff with a substantial annuity.[86]

The court did not emphasize that the verdict was in excess of any heretofore approved. This seems wise in view of the diminished purchasing power of money and the seriousness of the injuries. About the only test to guide the courts in this area is that the verdict will not be disturbed "unless it is plainly so unreasonable as to shock the judicial conscience."[87]

86. See the annuity table set forth in 1 TENN. CODE ANN. 1153, 1157 (1956).
87. Yellow Cab Co. v. Pewitt, 44 Tenn. App. 572, 584, 316 S.W.2d 17, 22 (1958).