Denver Law Review

Volume 35 | Issue 1 Article 9

May 2021

One Year Review of Torts

Eugene S. Hames

William J. Madden

ONE YEAR REVIEW OF TORTS

By EUGENE S. HAMES AND WILLIAM J. MADDEN
Mr. Hames is a partner and Mr. Madden an associate in the Denver firm Wood, Ris and Hames.

During the period of January 1, 1957, to December 31, 1957, a considerable number of cases involving tort questions were decided by the Colorado Supreme Court. In this article we have selected those cases which involve unusual factual situations or unusual legal problems not heretofore decided or well established in this jurisdiction. We have also tried, insofar as possible, to classify the cases according to subject matter or type of action. Other cases, which have not been deemed significant enough for extended discussion have been footnoted and a few have been omitted entirely.

WORKMEN'S COMPENSATION

In *Western Casualty and Surety Co. v. Swort*,[1] a truck driver, who had turned the wheel of his truck over to an incompetent non-employee, was held entitled to receive the benefits of compensation for injuries received when the truck collided with another vehicle. The supreme court, two justices dissenting, held that his injuries arose out of and in the course of his employment, although the employer had refused to hire the non-employee because he did not have an operator's license. The only Colorado case relied upon by the majority is *Whiteside v. Harvey*,[2] in which the court found the employer liable for injuries to a third person caused by the negligence of a non-employee driver, applying the constructive identity doctrine. The dissenting opinion comments on the inapplicability of the *Whiteside* case and cites several cases which would have supported a contrary ruling. The issues involved in the two cases are not similar. In the *Whiteside* case the third party could recover only if the employer on some theory was accountable for the negligence of the non-employed driver. In the *Swort* case the issue was simply whether the claimant had so abandoned the work he was hired to do that he was no longer engaged in his employment.

In *Vanadium Corp. v. Sargent*,[3] seven questions were decided by the supreme court, three of which are important enough to be discussed here. The first question was whether there was sufficient evidence of causative aggravation of a pre-existing injury to uphold the award of compensation. In upholding the award the court stated that evidence of accident coupled with medical testimony that the accident described "probably" caused present disability and aggravation of pre-existing injury is sufficient. Second, the court held that the claimant's failure to follow the statutory procedure[4] in selecting a private physician did not bar recovery of compensation benefits but did bar recovery of the expenses of the doctor selected by the employee. The employer, who had directed the employee to a certain physician, gave the claimant permission to change doctors, which the claimant did. The court stated that while the *employer* waived any objection he might have had, he could not waive the right of the Commission nor of the insurer to demand

[1] 134 Colo. 421, 306 P.2d 661 (1957).
[2] 124 Colo. 561, 239 P.2d 989 (1951).
[3] 307 P.2d 454 (Colo. 1957).
[4] Colo. Rev. Stat. Ann. § 31-12-12 (1953).

statutory compliance. Third, the court found it was not error to refuse the employer's and the insurer's right to cross-examine a doctor, who had submitted a medical report to the Commission, on the basis that there was no statement in the record that the Commission had admitted or considered the report. It is interesting, however, to note that the statute quoted in the opinion,[5] gives any party the right of cross-examination, if any *ex parte* evidence is received by the Commission.

In *Industrial Commission v. Colorado Fuel and Iron Corp.*,[6] claimant, in the course of his employment was sitting on an *I* beam, eighteen feet above the ground when he suffered cerebral thrombosis. He fell, suffering burns to his hand and paralysis, resulting in total permanent disability. A final award of the referee which was sustained by the Commission was for total disability. Both the referee and the Commission found that the degree of disability resulting from the fall and burns was fifteen percent as a working unit, which superimposed on the claimant's pre-existing infirmity, had rendered him permanently and totally disabled. The referee found that paralysis was due to thrombosis, which was not caused by any condition of his employment, and that this paralysis rendered him permanently disabled. The district court set the award aside, claiming there was evidence to sustain it. On appeal, the cause was reversed and remanded with instructions to the district court to return the case to the commission with instructions to enter an award for fifteen percent total disability. The instructions seem inconsistent with the remark of the court that: "There is no evidence that the fall was caused by any condition of the employment or by overwork or over-exertion in the performance of work. . . ."[7] Perhaps the inconsistency can be explained, however, by the court's reference to the doctrine that an injury is compensable if the worker is subjected to unusual risk due to the position in which he has to work.

In *Industrial Commission v. London and Lancashire Indemnity Co.*[8] the plaintiff's husband was found lying, seriously injured, on the employer's premises at 5:30 p. m. A window on the fourth floor was open, all lights in the employer's seven-story building were off, except one on the first floor and all other windows were closed and bolted. Decedent's normal working hours had been 8:00 a. m. to 4:30 p. m. The widow and son, plaintiffs, sought workmen's compensation alleging that the injury and resulting death "arose out of" and "in the course of" his employment. The employer contended the workman had committed suicide. The Commisison, in granting the award, found that the defendant had failed to establish by *conclusive* evidence that the decedent had committed suicide. The district court reversed the Commission and on appeal the reversal was affirmed. The supreme court reiterated that the claimant is burdened with proving that (1) an accident occurred and that it (2) arose out of, and (3) in the course of the decedent's employment. The court further stated that there was nothing in the compensation act which creates a statutory presumption of accident in unwitnessed events resulting in a workman's injury or death and that, while there is a presumption against suicide, it is not an evidentiary substitute for (2) and (3) above.

In the case of *State Compensation Ins. Fund v. Industrial Commis-*

[5] Id. § 81-14-3.
[6] 310 P.2d 717 (Colo. 1957).
[7] Id. at 719.
[8] 311 P.2d 705 (Colo. 1957).

sion,[9] the plaintiff's husband died as a result of injuries received while playing football for Fort Lewis A. & M. The decedent had been working part time at a filling station when he enrolled in school, but quit this work for work at the college having different hours but equivalent pay, so that he could play football. An award of compensation by the Commission was reversed on appeal. The court held there was no evidence that the decedent's job was the consideration for his playing football; therefore, there was no contract to play. If there was no evidence of a contract, there was no employer-employee relationship upon which compensation could be granted. The court distinguished *University of Denver v. Nemeth*[10] on the grounds that in the latter case there was direct evidence presented that the claimant's job was the consideration for his football playing.

In *Industrial Commission v. Newton Lumber & Mfg. Co.*[11] claimant suffered an injury which arose out of and in the course of his employment. After the employee had been hospitalized for some time, the employer filed his first report of the accident and the carrier filed its denial; but the notice of the carrier's denial was never received by the employee due to a mistake made by the employer. The employee finally filed his claim more than six months after the injury.[12] The supreme court reinstated the award, which had been vacated by the district court

[9] 314 P.2d 288 (Colo. 1957).
[10] 127 Colo. 385, 257 P.2d 423 (1957).
[11] 314 P.2d 297 (Colo. 1957).
[12] Colo. Rev. Stat. Ann. § 81-13-5 (1953) provides that the right to compensation shall be barred unless a notice claiming compensation is filed within six months after the injury.

finding that the claimant had established a reasonable excuse for the late filing. The court stated that since the employer was aware of the injury and knew the details of the claimant's hospitalization, the employer was not prejudiced by the late filing of the claim. The court reaffirmed the rule that the burden of proving prejudice was upon the employer.

The next two cases are treated together as they both involve claims allegedly based upon over-exertion. In *Industrial Commission v. Havens,*[13] the claimant's husband, a truck driver, helped unload the contents of his truck at its destination. The work took four hours and involved *unusually heavy exertion* for him. During this work period, the decedent's leg was injured when a hand car broke loose and hit him. He continued working, apparently recovering. After lunch, he started on his way in the truck. Ten minutes later he was found dead. *No medical examination* of his body was made although the coroner certified the death was caused by "coronary occlusion." The decedent had no history of heart disease. The claimant introduced *no* medical evidence that *over-exertion* causes coronary occlusion. Defendants, appealing from the district court's award which set aside the Commission's denial of award, based their ground for reversal solely on this last point. The award was affirmed on appeal. First, it should be noted that the referee *judicially noticed* that a coronary occlusion does not usually result from *over-exertion.* The court stated that if the facts are undisputed, the entire question is one of law for the court and that the court was not bound by the Commission's conclusion. Second, the court, while admitting that the causal connection between coronary occlusion and exertion had to be established, held that medical testimony was not necessary, if the claimant shows "circumstances establishing a reasonable connection between the over-exertion . . . and the subsequent death by heart failure."[13a] A concurring opinion summarized the majority's holding by quoting from other cases, which from timely sequence of events, creates a presumption of permissible inference of causation, which the employer must rebut. The dissent by three members of the court would have denied compensation, on the basis that there was no evidence offered to establish that the claimant's death was caused by over-exertion.

In *Bennett v. Durango Furniture Mart,*[14] an opinion written by one of the justices who dissented in the *Havens* case, the court held that whether the death of the employee resulted from over-exertion was a question to be decided by the referee, and that since the evidence was such that reasonable men could draw different inferences, the referee's ruling should not be disturbed. The majority distinguished the *Havens* case on a factual basis. Apparently the test as to whether there is over-exertion is whether the claimant or the decedent customarily exerted himself in his employment in the same manner that he did at the time of his injury or death. If he was exerting himself in the customary way, then there is no over-exertion.

---

[13] 314 P.2d 698 (Colo. 1957).
[13a] Id. at 702.
[14] 10 Colo. Bar Ass'n Adv. Sh. 118 (1957).

In the case of *Cain v. Industrial Commission*,[15] the claimant petitioned the Commission to reopen his case, in which he had originally been awarded compensation, because he felt his disability had increased resulting in a change of condition. His doctor advised against additional surgery, although he did find an increase in disability. The employer's doctor felt that exploratory surgery was necessary to determine (1) what should be done and (2) whether *any* of claimant's disability was actually attributable to his original injury. The claimant refused the employer's demand that he submit to exploratory surgery, although he had co-operated in the past. The supreme court reversed the district court's denial of additional compensation. The court held that exploratory surgery was not contemplated under the applicable statute[16] because such surgery was not necessarily free of unusual risks and was not calculated to *effect a cure*.

Jacobson v. Doan,[17] decided that a workman, suing at common law for injuries resulting from the negligence of employees of the workman's special employer, was entitled to recover an amount not exceeding $10,000;[18] that the subrogee insurance carrier, which paid compensation and medical expenses for the general employer, was entitled to a compensation refund only; and, that the "right of control" test determined whether the servant was "loaned" to the special employer. The court held that a defense based on the fellow servant doctrine was taken away by statute.[19] If the special employer and the employee were both under workmen's compensation and this had been established at the trial, the defense that the injuries were caused by a fellow servant would have been available.[20]

GUEST STATUTE

In *Haller v. Gross*,[21] the plaintiff, a nineteen-year-old girl, while riding as a guest in a car driven by the defendant, was injured. For several hours prior to the accident she had freely participated in a drinking party with the defendant driver and admitted that both she and the driver were intoxicated at the commencement of the ill-fated trip. She complained of the driving, but although she had several opportunities to get out of the car, did not do so. The supreme court in reversing the trial court's denial of the defendant's motion for directed verdict at the close of the plaintiff's case, held that the plaintiff had assumed the risk as a matter of law. The court stated that although the plaintiff was a minor, she had the usual and ordinary faculties of an adult, which included knowing the effect of intoxication on a driver. The court approved an instruction offered by the defendant which set forth the defendant's theory that the plaintiff had assumed the risk of injury and was contributorily negligent.

The case of *Valdez v. Sams*,[22] made no mention that it involved the guest statute, but it did involve the question of wilful and wanton disregard of the rights of others, so we include it here. This is a case of

---

15 315 P.2d 823 (Colo. 1957).
16 Colo. Rev. Stat. Ann. § 81-12-12 (1953).
17 10 Colo. Bar Ass'n Adv. Sh. 108 (1957).
18 Colo. Rev. Stat. Ann. § 80-6-4 (1953).
19 Colo. Rev. Stat. Ann. § 80-6-1 (1953).
20 Colo. Rev. Stat. Ann. § 81-3-3 (1953).
21 309 P.2d 598 (Colo. 1957).
22 307 P.2d 189 (Colo. 1957).

first impression in Colorado. The plaintiff had obtained a default judgment against the defendant based upon a complaint, which alleged wanton, wilful and reckless disregard of the rights of others. The plaintiff presented no evidence at the hearing on the default judgment on the issue of wanton and reckless disregard. In the meantime, the defendant had obtained a discharge in bankruptcy. The supreme court held that the discharge was effective as against the judgment. The court held that you must (1) present evidence of wantonness and recklessness, and (2) the trial court must make a specific finding of recklessness before such a judgment will not be discharged in bankruptcy.

The importance of *Noakes v. Gaiser,* [23] is that the case leaves two legal areas open to speculation. The case was affirmed on appeal by operation of law since the court was equally divided. The justices who affirmed wrote no opinion. Only two dissenting opinions were reported. In the first, Judge Holland indicates that "wilful and wanton conduct," as used in the automobile guest statute, is not actually "negligence." If this were to become the opinion of the majority of the court, would contributory negligence and assumption of risk be good defenses to wilful and wanton conduct? In the second, Judge Frantz, while admitting that, "The overwhelming weight of authority sustains this type of legislation (guest statute) on the theory that it finds sanction in the proper exercise of the police power," argues persuasively that the guest statute is unconstitutional. Is it possible that this dissenting opinion, may, at some time in the future, become the opinion of the majority of the court?

The supreme court decided in *Green v. Jones,*[24] that a two-year-old child was, as a matter of law, incapable of becoming a guest in an automobile driven by another. Concluding that the applicability of the guest statute[25] depended upon the presence of two factors, namely, express or implied invitation and formal acceptance, the court judicially noticed that the child was not capable of accepting an invitation.

Automobile v. Railroad

Buchholz v. Union Pacific R.R.[26] is a case in which the plaintiff's father was killed when he drove the plaintiff's truck onto a railroad track and was struck by the defendant's train. The father's view of the track and train was severely limited by obstructions. There was evidence that a signal light was not working properly, although the father had stopped before driving upon the track. The supreme court affirmed the trial court's direction of a verdict in favor of the defendant railroad on both the plaintiff's claim and the defendant railroad's counterclaim. The majority imposed a high degree of care on the part of the driver of an automobile when he approaches a railroad track, especially when the view of the track is obstructed, possibly necessitating that the driver get out of the car and look up the track if he is not sure. The dissenting opinion pointed out that if there was a duty imposed upon the plaintiff, there was an equal duty imposed upon the defendant railroad company since the defendant knew that a sixty-mile an hour train passing over heavily travelled highways through a small town creates a dangerous situation.

---

[23] 315 P.2d 183 (Colo. 1957).
[24] 10 Colo. Bar Ass'n Adv. Sh. 113 (1957).
[25] Colo. Rev. Stat. Ann. § 13-9-1 (1953).
[26] 311 P.2d 717 (Colo. 1957).

In *Union Pacific R.R. v. Cogburn*,[27] the plaintiff's automobile, with its lights on, plunged headlong into the side of a box car blocking a highway crossing at night. The train to which the boxcar was connected had blocked the highway for some time. The supreme court reversed the trial court and directed a verdict in favor of the defendant, because the plaintiff was contributorily negligent as a matter of law. The court aligned itself with those courts which have held that the length of time a train blocks a crossing is not determinative of the railroad's negligence and further stated that there was no excuse in the law for not being able to see a boxcar blocking a highway, *unless* conditions are so deceptive that one cannot see a train at night by the aid of normal headlights. The court reiterated and affirmed the "assured vision rule," stated in *Ridenour v. Diffee*,[28] that it is negligence, as a matter of law, to drive an automobile at such speed that it is not possible to stop within the distance illuminated by headlights.[29]

AUTO v. AUTO[30]

In *Jacobsen v. McGinness*[31] the supreme court held that a person driving fifty miles an hour who enters a cloud of dust created by a vehicle moving ahead in the same direction is guilty of negligence as a matter of law, if he ends up on the wrong side of the road and collides with another car.

Kendall Transport v. Jungck[32] severely limited the application of *Bennett v. Hall*,[33] a case in which the court had held that the plaintiff on a through highway was guilty of contributory negligence as a matter of law, by stating:

> "That decision was by a divided court with two judges not participating, and the result there obtained, to say the least, strained to the utmost the generally accepted rule that this court will not disturb the findings of court or jury on the question of . . . contributory negligence."[34]

This decision is sound in view of the harshness of the earlier case.

AUTO v. PEDESTRIAN

Only two points raised in *Judd v. Aragon*[35] need to be commented on. First, the court adopted section 479 of the *Restatement of Torts*, in its entirety, on the doctrine of last clear chance. Second, the court stated that, "Defendant's headlights were on low beam, as required by law." But, in *Union Pacific R.R. v. Cogburn*, the court stated:

"There was no law requiring plaintiff to have his headlights focused

---

27 315 P.2d 209 (Colo. 1957).
28 133 Colo. 467, 297 P.2d 280 (1956).
29 Colo. Rev. Stat. Ann. § 13-4-98 (1953) provides that headlights should illuminate 350 feet on high beam and 100 feet on low beam.
30 See Peterson v. Kessler, 308 P.2d 610 (Colo. 1957) (holding that it is a question of fact whether a fellow who admits visibility is "nil" and who runs into another party is guilty of negligence); Jacobsen v. McGinness, discussed infra, which apparently holds that such conduct is negligence as a matter of law; Smith v. Brase, 309 P.2d 1006 (Colo. 1957), which holds that an instruction on the emergency doctrine, to be correct, must exclude emergencies created by the negligence of the person confronted with the emergency.
31 311 P.2d 696 (Colo. 1957).
32 316 P.2d 1052 (Colo. 1957).
33 132 Colo. 419, 290 P.2d 241 (1955).
34 316 P.2d at 1053.
35 316 P.2d 250 (Colo. 1957).

low, common sense would dictate that under the conditions as he described them, his lights should have been bright."[36]

Dennis v. Johnson[37] held that a pedestrian jay walking across a street was guilty of negligence as a matter of law. Only one previous Colorado case, *Fabling v. Jones*,[38] has so held. The court further held that an instruction of last clear chance could not be given to a jury unless "subsequent" negligence of the defendant be shown, *i.e.*, negligence which follows the plaintiff's negligence in placing himself in inextricable peril.

MALPRACTICE[39]

In *Beadles v. Metayka*[40] the plaintiff was placed on an operating table in the defendant's hospital and defendant anesthetist had rendered plaintiff unconscious. The plaintiff was propped on his side by a hospital orderly at the order of the surgeon and he promptly fell off the table when all parties had their backs turned. Judgments against the surgeon and in favor of the defendant anesthetist and hospital were affirmed on appeal. The court held (1) that the surgeon's responsibility begins when he *first asserts control* in the operating room which point may be somewhat flexible in time, but if he does assert control over a hospital orderly, the surgeon is liable for his negligence and not the hospital; and (2) the negligence of an anesthetist is a question of fact for the jury, although the court admitted that under prevalent practice, an anesthetist has a duty to make chart entries and of necessity this diverts attention from the patient. Whether the anesthetist was an independent contractor was left undecided.

MISCELLANEOUS CASES

New Brantner Extension Ditch Co. v. Ferguson[41] holds that before a person who builds a dam can be liable for damage caused by its overflow, he must be shown to have been negligent. Unless there is a distinction between a dam and a reservoir, this case has apparently overruled the absolute liability doctrine of *Fletcher v. Rylands*[42] which had been followed in several early Colorado cases.[43]

In *City of Boulder v. Burns*[44] plaintiff sustained injuries when she fell, outside of the city limits, into a pit maintained for a water meter

---

36 315 P.2d at 216.

37 317 P.2d 890 (Colo. 1957).

38 180 Colo. 144, 114 P.2d 1100 (1941); cf. Pueblo Transportation Company v. Moylan, 123 Colo. 207, 226 P.2d 806 (1951).

39 Davis v. Bonebrake, 313 P.2d 982 (Colo. 1957), involved a fact situation in which a sponge or similar material was left in the abdomen of the plaintiff after an operation. An important procedural dispute arose between the majority and dissenting opinion. The upshot of the majority opinion is that there are times when fraud need not be plead with particularity, although seemingly required by Rule 9 of the Colorado Rules of Civil Procedure.

40 311 P.2d 711, 34 DICTA 351 (Colo. 1957).

41 307 P.2d 479 (Colo. 1957).

42 3 H. & C. 774, 159 Eng. Rep. 737, rev'd L.R. 1 Ex. 265, aff'd, L.R. 3 H.L. 330.

43 Canon City and Cripple Creek R.R. v. Oxtoby, 45 Colo. 214, 100 Pac. 1127 (1908), Garnett Ditch and Reservoir Co. v. Sampson, 48 Colo. 285, 110 Pac. 79 (1910) and Sylvester v. Jerome, 19 Colo. 128, 34 Pac. 760 (1893).

44 313 P.2d 712 (Colo. 1957).

box. There was a lid over the box which was slightly awry, but the lid and ground were covered with snow. She knew where the pit was, but did not know the lid would tip when stepped on. The supreme court affirmed the judgment in her favor and against the city. The court held that the plaintiff was not negligent because she did not know that the lid would tip, but more important, the court felt that even if she had known the lid would tip, the question of her negligence would have been for the jury. The court also stated that the reasonableness of plaintiff's choice of paths is a jury question. It should also be noted that the city was considered to have had actual notice of the defect since the city had constructed the pit and lid.

In *Brighton v. DeGregorio*[45] the court attempted to straighten out some of the confusion which arises in the attempted applications of the doctrine of *res ipsa loquitur*. The case involved a broken float pin on a toilet. In upholding the trial court's dismissal of the plaintiff's complaint, the supreme court held that the doctrine of *res ipsa loquitur* is not applicable in a situation in which two equal and opposite inferences may be drawn. In other words, an inference of negligence on the one hand, or an inference of reasonable conduct on the other. To apply the doctrine to the instant case, the court felt was incorrect because one could infer either that the defendant should have prevented the pin from breaking or that the defendant could not have reasonably foreseen such an occurrence.

[45] 314 P.2d 276 (Colo. 1957).