Vanderbilt Law Review

Volume 12
Issue 4 *Issue 4 - October 1959*

Article 24

10-1959

Torts--1959 Tennessee Survey

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TORTS—1959 TENNESSEE SURVEY

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As usual, a considerable number of cases involving tort law were decided during the survey period. One of the decisions involves a point of first impression in this state, the matter of whether an unborn child comes within the scope of the wrongful death statute. A number of the decisions serve to clarify existing rules, or to carry these rules a step further in applying them to new situations. There were also some significant statutory developments, including the changes in the Railroad Precautions Act.

I. NEGLIGENCE

1. The Standard of Care and Contributory Fault.—Several cases during the survey period bring out the process of determining negligence and contributory fault. One of these is *Pieraccini v. Crenshaw*,[1] where the plaintiff was injured standing on the lobby floor of

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1. 321 S.W.2d 546 (1959).

a roller skating rink. The lobby which surrounded the rink was raised above the skating area and separated from it by an iron railing. The plaintiff had her skates on and fell when she was bumped from behind by another patron. Her injuries resulted from striking a concrete urn for waste which was situated near the wall and about fifteen feet outside of the skating area. The supreme court held, reversing the court of appeals, that there was no evidence that the physical arrangement of the premises created any unreasonable risk of harm.

It would seem that an urn near the wall might be as likely to break the fall of a skater falling in the lobby as to cause injury. It might have been helpful, however, to know whether urns of this type are commonly used in skating rinks, near places where persons may be standing on skates, as well as in the lobbies of theatres and the like. If so, the defendant would be aided by the presumption that customary care is ordinary prudence.

With reference to the risk of being knocked down by another skater, it seems clear that the plaintiff assumed this risk while she was on the skating floor. Did she also assume it while on the raised lobby? The court decided she did, and it may well be that this risk is assumed in any part of the establishment where the patrons in fact wear their skates, as they did in this lobby. If it had been apparent that the person who knocked down the plaintiff had previously been acting so as to give the defendant an opportunity to learn of a risk he was creating, the defendant would have been liable for failure to control a reckless skater. As the court remarks, however, there was no evidence that the person who collided with the plaintiff had been acting in such a manner as to create an unusual risk.

Another business premises case which illustrates the standard of care as set by the courts is *Bell v. F. W. Woolworth Co.*[2] It is well established that an owner or possessor of business premises owes a duty of due care to make them safe for customers.[3] This rule frequently is applied where the defendant himself has made the premises unsafe, as where the floor is waxed or polished in such a manner as to be slippery. The *Bell* case deals with the situation where the dangerous condition has not been created by the defendant himself, but is due to an obstacle or substance dropped on the floor by another customer. The plaintiff had started to descend the stairs to make a purchase in the basement when she fell, and there was evidence that her fall was caused by a slippery wrapper with ice cream on it lo-

2. 316 S.W.2d 34 (Tenn. App. W.S. 1957).

3. City Specialty Stores v. Bonner, 252 F.2d 501 (6th Cir. 1958), discussed in Wade, *Torts—1958 Tennessee Survey*, 11 VAND. L. REV. 1399, 1400, 1406 (1958).

cated on the stairway. There was no evidence as to how long the wrapper had been there, or that any quantity of paper or other debris was customarily allowed to accumulate on the steps.

Since there was no proof that the defendant had noticed or should have noticed that the wrapper had been deposited on the steps, the court of appeals held that the verdict was properly directed for the defendant. It seems to be well settled that where the dangerous obstruction or substance on the floor is not traceable to the defendant himself, the defendant is not liable where he has no actual notice, unless the condition has existed for such a length of time that the defendant should have known about it.[4] As the court remarks in the present case, "it was not the duty of the defendant to have some person to trail along in front of every customer that may have started to use the steps to brush any foreign matter from before them. Such requirement would be unreasonable . . . . The defendant is required only to use reasonable care."[5]

Since no negligence was found, the issue of contributory fault was not reached. Doubtless contributory negligence could have been found from the plaintiff's failure to observe the wrapper on the stairway, but it is of course difficult to convince a jury that a customer should do much in the way of looking out for obstructions on the floor or stairway of store premises.

In a different type of case, *Overstreet v. Norman*,[6] the defendant employer had transported the plaintiff, a bean picker, to the field where she was to work. The floor of the truck used for this purpose was about four feet above the ground and had no step to enable the riders to get in and out. An inverted basket was placed at the rear of the truck for the plaintiff to use as a step. As she put her foot on the basket it turned, and the plaintiff fell and was injured.

It was held that a jury could find that the defendant failed to use due care to furnish a safe place and safe appliances for work. Evidence of a custom to have a step at the rear of the truck was admitted as tending to prove the standard of conduct of reasonable men. It was further held that the risk was not obvious, and that a jury could find that the plaintiff did not assume a realized risk, and was not guilty of contributory negligence. In view of the nondelegable nature of the duty to furnish a safe place to work and safe appliances, the court further held that any negligence of fellow servants in placing

4. Phillips v. Harvey Co., 196 Tenn. 174, 264 S.W.2d 810 (1954); Gargaro v. Kroger Grocery & Baking Co., 22 Tenn. App. 70, 118 S.W.2d 561 (1938); see also the recent Annotation, *Liability of Proprietor of Store, Office, or Similar Business Premises for Injury from Fall Due to Presence of Obstacle Placed or Dropped on Floor*, 61 A.L.R. 2d 110 (1958).

5. Bell v. F. W. Woolworth Co., *supra* note 2, at 40.

6. 314 S.W.2d 47 (Tenn. App. M.S. 1957).

the basket would be only a contributing factor, and would not relieve the defendant of liability for his own negligence.

2. Sidewalk Defects.—The standard of care in a particular situation, the condition of sidewalks, is brought out in the recent case of *Henry v. City of Nashville.*[7] It is well settled that a city is liable for negligent maintenance of its sidewalks,[8] but there is a tendency on the part of some courts, including those of Tennessee, to hold that there is no negligence as a matter of law in the case of minor defects.[9] The general pattern of these earlier decisions was followed in the *Henry* case. There a corpulent woman weighing 237 pounds heard a siren, looked up, stepped into a depression in the walk without seeing it, and fell. The depression was caused by the wearing or breaking of the concrete surface. It was about a foot square, "varying in depth from nothing to 1½ or 2 inches."

The court relied on a number of earlier Tennessee sidewalk decisions in which it had been held that there was no negligence as a matter of law. In one of these the defect, involving one block raised above an adjacent one, was 2½ inches in height,[10] and in another one block was 2 inches higher than the other.[11] In the present case the court said: "The test is the degree of danger, or the possibility of injury, from the defect. Of course, anything that in fact causes harm is to some degree dangerous; but to impose liability, the thing must be dangerous according to common experience. According to common experience, such slight defects as the one here involved are not so dangerous that harm may reasonably be expected to result from them."[12] It seems clear that perfection should not be required in the maintenance of sidewalks, and this decision of the court of appeals clearly is supported by earlier decisions of the supreme court.

It may be that the most recent of these earlier decisions, not mentioned in the present case, *City of Memphis v. Dush,*[13] goes too far in taking the case from the jury. There it was held, reversing the court of appeals, that a verdict should be directed for the defendant in the case of a defect from three and one-half to four inches high caused by a tree root projecting under the sidewalk. Perhaps reasonable men might differ as to whether or not an unreasonable risk was created in that case. As stated in the present decision, how-

7. 318 S.W.2d 567 (Tenn. App. M.S. 1958).
8. 63 C.J.S. *Municipal Corporation* § 794 (1950).
9. City of Memphis v. Dush, 199 Tenn. 653, 288 S.W.2d 713 (1956), 24 TENN. L. REV. 1047 (1957).
10. City of Memphis v. McCrady, 174 Tenn. 162, 124 S.W.2d 248 (1939).
11. Rye v. City of Nashville, 25 Tenn. App. 326, 156 S.W.2d 460 (1941).
12. Henry v. City of Nashville, *supra* note 7, at 568.
13. 199 Tenn. 653, 288 S.W.2d 713 (1956), 24 TENN. L. REV. 1047 (1957).

ever, "the question of whether the defect is actionable is to be determined not alone from its height or depth, but from all the circumstances."[14] Apparently there were no circumstances to make the rather shallow depression involved in the *Henry* case dangerous.

3. Assured Clear Distance Rule.—There was a case reported during the survey period, *Thompson v. Jarrett*,[15] which illustrates the waning importance of the assured clear distance rule. This is the rule that a motorist must not operate his car at so great a speed that he cannot stop within the distance between his automobile and a discernable object appearing within his path,[16] under which the court undertakes to set the standard of care required in this situation. The plaintiff, while driving at from fifty to fifty-five miles per hour at night, saw a car approaching from the other direction and dimmed his lights. Subsequently the plaintiff saw the defendant's truck parked in his lane, apparently without rear lights. He started to pull around the truck, but concluded that he did not have time to pass and remained in his own lane. When braking caused his car to slide into the left lane, he released the brakes, and hit the rear of the truck at a sufficient speed to result in a serious accident.

There was evidence to support a finding that the truck was illegally parked on the paved portion of the highway, and that the defendant was negligent. It was urged, however, on behalf of the defendant, that under the assured clear distance rule the plaintiff was guilty of contributory negligence as a matter of law. The court of appeals rejected this contention, stating: "The testimony of the plaintiff strongly indicates some character of contributory negligence on his part, but reasonable men could easily differ or disagree on the question of proximate cause, which is a function for determination by the jurors."[17] This decision illustrates how difficult it has been in recent cases to induce the court to apply the assured clear distance rule. This seems wise, for as pointed out in one recent case, the emergencies and hazards of present day automobile travel are so varied that "no arbitrary or universal definition of the circumstances which will render the rule inapplicable is possible."[18] The present case seems a somewhat stronger one for the rule, however, than some of the other recent ones where its application has been rejected, as where the parked vehicle is near the crest of a hill[19] or the plain-

14. Henry v. City of Nashville, *supra* note 7, at 568.
15. 315 S.W.2d 537 (Tenn. App. W.S. 1957).
16. Faulk v. McPherson, 27 Tenn. App. 506, 182 S.W.2d 130 (1943).
17. Thompson v. Jarrett, *supra* note 15, at 550.
18. Main St. Transfer & Storage Co. v. Smith, 166 Tenn. 482, 493, 63 S.W.2d 665, 668 (1933).
19. Main St. Transfer & Storage Co. v. Smith, *supra* note 18.

tiff is rounding a curve.[20] The rule still is recognized, however, in Tennessee and doubtless would be applied to obstacles resulting from human behavior "which should be expected, such as, for instance, a slow horse-drawn wagon or a vehicle proceeding properly on the highway in the same direction as that in which the motorist is proceeding."[21] The jury in the *Thompson* case evidently thought, as did the court, that the plaintiff was partly to blame for it asked for instructions if the plaintiff was partly to blame, and after instructions about remote contributory negligence as operating to reduce damages, awarded only $2000 for serious injuries.

4. Contributory Negligence.—The case of *Cheek v. Fuller*[22] involved a plaintiff who accepted a ride with a defendant, who while intoxicated lost control of the car and crashed into a post. The jury found that the plaintiff was guilty of contributory negligence in that she "did know or reasonably should have known that the defendant was drinking and under the influence of an intoxicant." On appeal it was assigned as error that the court had refused to charge the jury that if the defendant was guilty of gross, willful or wanton negligence in driving while intoxicated, the plaintiff should not be barred by ordinary contributory negligence. The only answer given to this point in an opinion affirming the judgment is that in the case of *Schwartz v. Johnson*[23] it was held that drunken driving did not amount to "willful negligence." It has, however, been clearly held that driving while drunk is at least gross negligence.[24] Consequently, it would seem that the requested instruction should have been given, since in general the contributory negligence of the plaintiff is not a bar where the defendant has been guilty of gross negligence.[25]

On its facts the decision may be fair enough, for there was considerable evidence that the plaintiff herself was intoxicated, and she also may have been guilty of gross negligence, or may have assumed the risk of gross negligence on the part of the defendant. In general, if the plaintiff has been guilty of gross or wanton negligence this offsets the defendant's negligence of the same character.[26] Furthermore, the *Schwartz* decision seems to support the general proposition that a drunken passenger is barred by contributory fault from recovery where a drunken driver wrecks the car. If, however, as apparently

20. Halfacre v. Hart, 192 Tenn. 342, 241 S.W.2d 421 (1951).
21. Halfacre v. Hart, *supra* note 20, at 346, 22 TENN. L. REV. 435 (1952).
22. 322 S.W.2d 233 (Tenn. App. E.S. 1958).
23. 152 Tenn. 586, 280 S.W. 32 (1925), Annot., 47 A.L.R. 323 (1927).
24. Rice Bros. Auto Co. v. Ely, 27 Tenn. App. 81, 178 S.W.2d 88 (1943).
25. Wylie v. Green River Lumber Co., 8 Tenn. App. 373 (1928), 19 TENN. L. REV. 795, 797 (1947).
26. Hinkle v. Minneapolis, A. & C. R. Ry. Co., 162 Minn. 112, 202 N.W. 340 (1925), Annot., 41 A.L.R. 1377 (1926).

was found by the jury, the plaintiff was guilty only of ordinary contributory negligence in failing to detect the intoxication of the defendant, or in riding with him, the result may be questionable.

5. *Remote Contributory Negligence.*—The issue of remote contributory negligence arose in *Atlantic Coast Line R.R. v. Smith.*[27] A car driven by one of the plaintiffs failed to make a sharp curve located at the entrance to a narrow bridge over the defendant's railroad tracks. There was evidence that the approach to the bridge, which the railroad was under a duty to make safe, was in fact dangerous. There also was evidence that the plaintiffs and the others in the car had consumed large quantities of beer. Under these circumstances the jury returned a verdict for the plaintiffs, but indicated to the court that "it considered both parties negligent, but that the negligence of defendant was greater."[28] The judge thereupon charged the jury that the plaintiffs would be barred by any proximate contributory negligence, however slight, but that if the plaintiffs' negligence "did not constitute the direct and proximate cause of the accident, but was remote in point of time and contributed only remotely to the accident, there could be a recovery but that the damages would be mitigated."[29]

After this instruction the jury returned verdicts for the plaintiffs in exactly the same amounts. It was held that the omission to charge originally concerning remote contributory negligence was not reversible error, and that the final verdicts were not invalidated because they were for the same amounts as originally reported. The court stated in this connection: "The jury in its original allowance evidently considered that Bobbie Smith was guilty only of remote contributory negligence. . . . The size of the awards demonstrates that damages were mitigated in the first announcement of the verdict."[30]

This case presents a problem, for in its first verdict the jury reported that both parties were negligent, although the negligence of the defendant was greater, without any finding, apparently, that the plaintiffs' negligence was not proximate. When told that proximate contributory negligence, however slight, would be a bar, they found that plaintiffs' negligence was not proximate. The jury seems to have been inclined to find whatever was legally necessary to return verdicts for the plaintiffs in an amount diminished by their own fault. The decision shows how in substance the plaintiff is apt to secure the benefit of a comparative negligence rule, under the guise of the

27. 264 F.2d 428 (6th Cir. 1959).
28. *Id.* at 432.
29. *Ibid.*
30. *Ibid.*

remote contributory negligence rule, even though, as the court points out, "The doctrine of comparative negligence does not obtain in Tennessee."[31] This decision, like the one in *Smith v. Steele*,[32] where a plaintiff who apparently suffered considerable injuries recovered only $550 from a negligent defendant, indicates how unpredictable are the results at which a jury may arrive under the remote contributory negligence rule.

6. Imputed Negligence.—Under the doctrine of imputed negligence the plaintiff is denied recovery because the negligence of some third party is fictitiously imputed to him. The imputation ordinarily is based on the fact that there is an agency, a joint enterprise, or some other relationship between the parties. This doctrine was applied to defeat the plaintiff's recovery in *Shelton v. Williams*.[33] There a boy of twelve was riding in a milk truck driven by his father when the truck collided with a car driven by the defendant's son. An action for the wrongful death of the boy was brought on behalf of his father and of his mother. At the trial it was found that the accident was proximately caused by the negligence of both drivers, and the trial judge charged that under these circumstances the verdict should be for the defendant. The court of appeals reversed, on the ground that one of the beneficiaries, the boy's mother, was not guilty of any negligence and should recover. The supreme court, however, reinstated the judgment of the trial court. It was held, under the authority of an earlier decision, *Nichols v. Nashville Housing Authority*,[34] that the negligence of the father should be imputed to the mother and that she should be denied any recovery. To support this conclusion the court stated: "To permit a recovery by the absent spouse in such cases is against the public policy of this State."[35]

It is well established that actual contributory negligence on the part of the beneficiary of a wrongful death action, as well as negligence on the part of the decedent, defeats recovery.[36] It is not clear why this is so, for the cause of action which is barred is not that of the beneficiary, but of the decedent. Where there are several beneficiaries, however, the negligence of one does not bar the recovery of the others, except where the doctrine of imputed negligence is applied, and it is difficult to see what public policy is served by fictitiously imputing the negligence of the husband to the innocent

31. *Ibid.*
32. 313 S.W.2d 495 (Tenn. App. W.S. 1956).
33. 321 S.W.2d 807 (Tenn. 1959).
34. 187 Tenn. 683, 216 S.W.2d 694 (1949).
35. Shelton v. Williams, *supra* note 33, at 809.
36. Nichols v. Nashville Housing Authority, *supra* note 34.

wife in order to defeat her recovery under the wrongful death act.[37]

The doctrine of imputed negligence was wisely rejected in another case during the survey period, *Archie v. Yates*.[38] There the plaintiff was riding in a car owned by his father and driven by his companion, the defendant. The defendant negligently ran into a mule on the highway, and the plaintiff was injured. The defendant was regarded as the plaintiff's agent in driving the car, and the court of appeals imputed the negligence of the defendant to the plaintiff. The supreme court reversed, allowing the plaintiff to recover. It is well settled that the negligence of the agent will be imputed to the principal, where the principal is suing a negligent third party, although this rule has been much criticized.[39] As the supreme court's opinion in this case points out, however, where the action is by the principal against the agent himself, only a minority of courts impute the negligence of the agent to the principal. The decision in this case clearly aligns the Tennessee courts, after some earlier dicta to the contrary, with the prevailing view that the fiction of imputed negligence will not be applied in the situation where the action is between members of the principal-agency or joint-venture relationship.[40]

It might be added in connection with imputed negligence that the statute imputing the negligence of a driver under eighteen to the person who signed his application for a permit or license has been amended. The imputation now extends to any "violation of any motor vehicle law of this state or any municipality thereof," as well as to the "negligence or wilful misconduct" covered in the earlier act.[41]

II. PARTICULAR RELATIONSHIPS

1. Possessors and Occupiers of Land.—The drowning of a seven-year-old boy in a muddy drainage ditch led to some difficult questions with reference to the duty owed to an infant licensee. When the boy attempted to cross the ditch a bank caved in and he fell into deep water where he was drowned. Suit was brought against the city, against the landowner who contracted for the filling job which resulted in the ditch, and against the contractor. The administrator asserted liability on grounds of common law negligence, the play-

37. See Comment, *Imputed Contributory Negligence*, 26 TENN. L. REV. 531, 544-45 (1959).

38. 325 S.W.2d 519 (Tenn. 1959).

39. See Comment, *Imputed Contributory Negligence*, 26 TENN. L. REV. 531, 547 (1959); 12 TENN. L. REV. 214 (1934).

40. See also Hamilton v. Peoples, 38 Tenn. App. 385, 274 S.W.2d 630 (1954), 23 TENN. L. REV. 1076 (1955).

41. See TENN. CODE ANN. § 59-704(d) (Supp. 1959).

ground rule, and the attractive nuisance doctrine. The court, however, sustained a demurrer to the complaint.[42]

With reference to common law negligence the court assumed that the plaintiff was a licensee rather than a trespasser, but stated that ordinarily a possessor of land is not under any duty to arrange his property so as to make it safe for a licensee, his only duty being to give timely warning of danger and to do no act which might result in a wilful injury. The court considered that the duty to warn a licensee arises only where it appears that the licensee is using a well defined path, pointing out that in the cases on which the plaintiff relied there was such a path.[43] While it is clear that more precautions are required where the licensee uses a path to the danger, the duty to warn would seem to be present whenever the possessor of the land knows of an unreasonable danger to licensees.[44] In view of the fact that the depth of the muddy water would not be apparent to a child of seven, who might also fail to realize the insecure character of the bank, it may be that a duty to warn should have been found in this case, at least with reference to child licensees.

The court found that the playground doctrine was not applicable because of the lack of actual knowledge on the part of the possessor of the land that the premises were being used as a playground. The Tennessee decisions applying the playground doctrine do in fact seem to require that the possessor of the land actually know that children are accustomed to play on the land.[45] It should be noted, however, that the case which the court cites for this proposition contains a dictum to the effect that the doctrine applies where "the landowner knows or, by the exercise of reasonable care, should know that children of immature years are habitually trespassing upon his land to use it as a playground . . . ."[46]

With reference to the attractive nuisance doctrine the opinion points out that in the past this doctrine has not been applied to ordinary pools or ponds by the Tennessee courts, on account of the obvious nature of the danger.[47] This is the generally accepted view,

42. Birdsong v. City of Chattanooga, 319 S.W.2d 233 (Tenn. 1958), 26 TENN. L. REV. 572 (1959).

43. Harrison v. Southern Ry. Co., 31 Tenn. App. 377, 215 S.W.2d 31 (1948); Westborne Coal Co. v. Willoughby, 133 Tenn. 257, 266, 180 S.W. 322, 325 (1915); Williams v. City of Nashville, 106 Tenn. 533, 63 S.W. 231 (1901).

44. 2 HARPER & JAMES, TORTS 1471-73 (1956).

45. Williams v. Town of Morristown, 189 Tenn. 124, 222 S.W.2d 607 (1949); Anderson v. Peters, 22 Tenn. App. 563, 568, 124 S.W.2d 717, 720 (1938); see 16 TENN. L. REV. 251, 252 (1940).

46. Gatlinburg Const. Co. v. McKenney, 37 Tenn. App. 343, 348, 263 S.W.2d 765, 767 (1953).

47. Cooper v. Overton, 102 Tenn. 211, 52 S.W. 183 (1899); City of Memphis v. Trice, 13 Tenn. App. 607 (1931). See also Noel, *The Attractive Nuisance Doctrine in Tennessee*, 21 TENN. L. REV. 658, 669-70.

in the absence of any unusual element of danger.[48] It may be, however, that in the principal case an unusual element of danger was present since the depth of the muddy water was not apparent, and a child might well fail to realize that the bank would crumble. The court evidently was reluctant, however, to weaken the established rule that pools and ponds do not come within the attractive nuisance doctrine.

2. *Electrical Utilities.*—The number of accidents from high tension wires fortunately seems to be diminishing, but there was one such case during the survey period, *Kingsport Utilities, Inc. v. Lamson.*[49] The plaintiff, a boy of fourteen, along with some others was helping a number of men raise a television tower and antenna, about fifty-two feet in height. When the tower was raised, the men lost control and it fell, striking an uninsulated high tension wire. The plaintiff received a severe shock, and another of the boys was killed. The uninsulated wire was about thirty-two feet above the ground at the point of contact, and was located in a residential addition to the City of Kingsport.

The federal court held that the jury could find negligence either in the maintenance of the uninsulated high tension wire at this point without a warning, or in omitting to anchor the supporting poles so as to prevent sagging. The court relied considerably on the case of *Coatney v. Southwest Tennessee Elec. Membership Corp.*,[50] where the facts were similar except the high tension wire was over a driveway rather than over rear lots. Reliance also was placed on the recent decision in *Kingsport Utilities, Inc. v. Brown*,[51] where the issue was whether a utilities company was negligent in maintaining an uninsulated high tension line in the business district of a city. The court there held that this issue was one for the jury, and that it was not necessary for a finding of negligence to show that the line was within some established distance from the ground or from other structures. In that connection the court quoted from the *Brown* case the following language: "'Of course the law does not require that all lines be insulated at any particular place *but only where persons are likely to be and have a right to be, for business, pleasure or otherwise.*'"[52] (Emphasis added by the Federal court.) The *Lamson* case thus seems to answer in the affirmative a question raised in an earlier survey article, as to whether the rule of the *Brown* case will

48. 56 AM. JUR. *Waters* § 436 (1947).
49. 257 F.2d 553 (6th Cir. 1958).
50. 40 Tenn. App. 541, 292 S.W.2d 420 (1956).
51. 201 Tenn. 393, 299 S.W.2d 656 (1955).
52. 257 F.2d 553, 556 (6th Cir. 1958).

be extended to well populated residential areas as well as business sections.[53]

3. Traffic and Transportation—Carriers.—There was a decision during the survey period which illustrates the heavy burden placed on a carrier when goods are lost, *Tennessee Packers, Inc. v. Tennessee Cent. Ry.*[54] Some sixty thousand pounds of tallow were loaded into a tank car by the plaintiff shipper, and there was testimony that the valve at the outlet pipe at the bottom of the car was properly closed. The only irregularity in the loading was that an outlet cap, attached to the bottom of the car by a chain, was attached before the loading instead of after it was completed. After the car had traveled 271 miles the brakeman and the conductor, riding in the caboose, became aware of an odor and saw oil spots on the tracks. They also noticed that there was a car of tallow on the train. They, nevertheless, omitted to stop the train for another six miles. When they did stop they observed that the outlet cap was off, and that the tallow was then pouring out in a large stream. Thereupon the valve was closed and the cap attached, but by this time over half the load was lost.

Under these circumstances the court held that it was an error to direct a verdict for the defendant. While a carrier is not liable for a loss caused by the act of the shipper, it was considered that a jury could find that the car was properly loaded by the shipper and that even if placing the cap on during the loading constituted negligence, the jury might find that this negligence was not the proximate cause of the subsequent leakage. It was further indicated that the railway might have been found to be negligent in failing to stop the train and close the valve when it was first noticed that there was some leakage. The opinion indicated that if negligence on the part of the shipper in failure to stop the leakage were found, the plaintiff would not be barred by the fact that it also may have been negligent in the loading of the car. On a rehearing, the court referred to the fact that whenever there is a loss by a carrier there is a presumption of negligence on its part and stated that in this case the presumption was not overcome by any proof. There was no evidence as to how the car was handled by the carrier, and it may be that rough handling or tampering resulted in a loosening of the outlet valve while the car was in the possession of the carrier.

4. Railroad Precautions Act.—Significant amendments have been made in the statute dealing with the precautions which must be taken by railroads to prevent accidents.[55] The first of these changes

53. See Wade, *Torts—1957 Tennessee Survey*, 10 VAND. L. REV. 1218, 1229 (1957).
54. 319 S.W.2d 502 (Tenn. 1958).
55. TENN. CODE ANN. § 65-1208-1209 (Supp. 1959).

is in favor of the plaintiff. Before the amendment the act required the sounding of the locomotive whistle or bell only at crossings marked with a sign marked by "the overseers" of the public road.[56] Under this provision, the railroad could offer proof that the sign was ordered by officials other than "the overseers." To eliminate this technical defense the statute has replaced the words "overseers of" with the more general term "officials having jurisdiction over" the public road.

The other changes are in favor of the railroad. Section 65-1209 of the *Tennessee Code Annotated* is revised completely to read as follows: "Violation of any of the provisions of Section 65-1208 by any railroad company shall constitute negligence *per se* and in the trial of any causes involving said Section 65-1208, the burden of proof, the issue of proximate cause, and the issue of contributory negligence, shall be tried and be applied in the same manner and with the same effect as in the trial of other negligence actions under the common law of Tennessee."

It is evident that these changes will in some cases make it considerably more difficult for the plaintiff to recover. Under the former law, the burden of proof was on the railroad to show that it had observed the statutory precautions with reference to sounding the whistle, keeping a lookout and the like, under section 65-1210. The new act repeals that section, and expressly places the burden of proof as to all matters necessary to establish recovery on the plaintiff. The amendment also contains changes in the substantive law in favor of the railroads. One of these is that the plaintiff must establish proximate cause. This change is called for by the normal application of tort principles and abolishes the peculiar rule under the old act that failure to comply with the prescribed precautions gives rise to a cause of action for personal injuries even though the violation is not the proximate cause of the accident.[57]

The new act then goes on to provide that the issue of contributory negligence, as well as that of proximate cause, "shall be tried and applied in the same manner and with the same effect as in the trial of other negligence actions under the common law in Tennessee." This changes the rule which has been applied under the act, that negligence on the part of the plaintiff does not bar recovery where the railroad has failed in its statutory duties. The rule has been that contributory fault of the plaintiff, even gross negligence on his part, is to be considered only in mitigation of the damages.[58] Perhaps

56. TENN. CODE ANN. § 65-1208 (1956).
57. Little v. Nashville, C. & St. L. Ry. Co., 39 Tenn. App. 130, 281 S.W.2d 284 (1954).
58. Tennessee Cent. R.R. Co. v. Binkley, 127 Tenn. 77, 86, 153 S.W. 59, 62

this change also is due in fairness to the railroads. There is much to be said for a general comparative negligence rule, but it is not at all clear why the railroads should at the present time be singled out for the application of such a rule. It may be that when the Railroad Precautions Act originally was passed in 1855 the railroads, with inadequate safety devices, were sufficiently dangerous so that even a careless operator of a horse and buggy should be allowed to recover, but today carelessly operated cars seem to constitute a much greater menace to life and limb than do the railroads.

The issue has arisen as to whether the new act applies to pending litigation based on a railroad accident which occurred prior to the passage of the new act. The new act would apply to pending cases if it were simply remedial in nature, dealing only with procedural matters.[59] It has been ruled, however, by a United States District Court, Eastern District of Tennessee, Northeastern Division,[60] that the act is not simply remedial and should not be applied to an accident which occurred before its passage. This ruling seems correct, for the new act, as indicated above, makes significant changes in substantive rights. While the change with reference to burden of proof, and the clause making violation of the act negligence per se in place of the earlier one simply imposing liability in case of violation, seem to be procedural, the changes making it necessary to establish proximate causation and establishing contributory negligence as a complete bar to the plaintiff's action would seem to affect substantive rights of the plaintiff, however they may be technically described. In general, an act will not operate retroactively unless an intent that it be so applied clearly appears,[61] and the statute in this case simply contains the usual clause that it "shall take effect from and after its passage," with no statement one way or the other as to effect on pending litigation.

5. *Automobiles—Res Ipsa Loquitur.*—There was an application of the *res ipsa loquitur* doctrine to an automobile accident in *Roberts v. Ray.*[62] The defendant parked his car on a hill, and about three hours later it ran diagonally across and down the street, damaging the plaintiff's store about 250 feet away. The court held that this was a *res ipsa* case, citing earlier decisions involving an unattended car,[63] and an

(1912). Nashville C. & St. L. Ry. Co. v. Overcast, 3 Tenn. Civ. App. (3 Higgins) 235 (1912).

59. Brandon v. Warmath, 198 Tenn. 38, 277 S.W.2d 408 (1955).

60. Unpublished ruling from the bench, March 20, 1959.

61. Franklin v. Travelers Ins. Co., 155 F. Supp. 746 (E.D. Tenn. 1957). See Sanders and Bowman, *Labor Law and Workman's Compensation—1958 Tennessee Survey,* 11 VAND. L. REV. 1287, 1300-01 (1958).

62. 322 S.W.2d 435 (Tenn. App. M.S. 1959).

63. Whitaker v. Bundy, 4 Tenn. App. 202 (1926).

unattended truck which ran into a building.[64] The court also cited a case where a driver lost control of his truck while rounding a curve on a dry road.[65] The defendant argued that someone may have meddled with the car during the considerable period while it was parked, but the court held that in the absence of any evidence to this effect that "the circumstance that a parked automobile rolls driverless down hill, and causes injury, is, without more, enough to warrant an inference of negligence on the part of the one who parked it."[66] While the *res ipsa* doctrine does not ordinarily apply to automobile accidents, it now seems to be well established that it will be applied in the runaway vehicle situation.

6. *Automobiles—Reference to Insurance.*—In *Goodall v. Doss*[67] the plaintiff was a guest suing for injuries which occurred when the car in which he was riding left the road at a sharp curve while traveling at fifty miles per hour. The court held that even though a contract to give the plaintiff a ride was alleged, the defendant, aged eighteen, could not avoid liability on grounds of infancy. It was pointed out that the tort did not arise out of a breach of contract but out of a breach of a duty of due care arising irrespective of the contract, with the result that the case was essentially one in tort and not in contract. The court further held that the failure of the trial judge to appoint a guardian *ad litem* was not enough to avoid the judgment where the defendant was ably represented by counsel and no substantial rights were affected.

Another assignment of error arose from the fact that when the plaintiff was testifying about signing a statement and was asked who was there by the attorney for the defendant, he replied "Two men. Two Insurance Adjusters." Since this was no more than a sensible answer to the question asked, and no further reference to insurance was made, the court held that refusal to declare a mistrial or to instruct the jury to disregard the statement did not constitute reversible error.

III. WRONGFUL DEATH—PRENATAL INJURIES

There were two cases of unusual interest during the survey period interpreting the Tennessee wrongful death statute.[68] One of these, *Memphis St. Ry. Co. v. Cooper*,[69] brings out effectively that this act

64. McCloud v. City of LaFollette, 38 Tenn. App. 553, 276 S.W.2d 763 (E.S. 1954).
65. Sullivan v. Crabtree, 36 Tenn. App. 469, 258 S.W.2d 782 (M.S. 1953). See also 24 TENN. L. REV. 398 (1956).
66. Roberts v. Ray, *supra* note 62, at 437.
67. 312 S.W.2d 875 (Tenn. App. M.S. 1958).
68. TENN. CODE ANN. § 20-607 (1955).
69. 313 S.W.2d 444 (1958).

is basically a survival statute. In the original action one Rosie Lee Cooper testified that she was the wife of the decedent and that her five children, present in the court room, were the decedent's children. The jury returned a verdict in favor of Rosie Lee Cooper as administratrix for $9,900. The trial judge granted a new trial when it appeared that Rosie Lee Cooper was never legally married to the decedent and that the children were not his children. At the new trial, in a suit brought by decedent's brothers as administrators, the jury found for the defendant.

The supreme court held that it was error to grant the new trial on the basis of the newly discovered evidence that Rosie Lee Cooper was not married to the decedent and ordered that the original verdict against the defendant be reinstated. The basic reason for this decision was that the wrongful death action was the right of action the deceased would have possessed, if he had lived, and the recovery was in his right, not the right of the widow and children. The recovery is based on the pecuniary value of the life of the decedent to be determined by his life expectancy, health, habits, and earning power, and the recovery goes to the named statutory beneficiaries, whoever they may be. It was pointed out that if the verdict could be set aside on the assumption, perhaps factually correct, that the jury was influenced in its finding of liability by the erroneous testimony that the deceased had a wife and children, a verdict likewise could be set aside whenever it could be shown that the jury was influenced by other legally immaterial factors, such as the consideration that the plaintiff was a pretty woman rather than a homely one, or a preacher rather than a gambler. It was added on a petition to rehear that Rosie Lee Cooper could, under the evidence, have had good reason to believe that she was the widow of the decedent, although it was quite clear that she had no reason for stating that these children were his. This seems to be a case where silence on the part of the decedent's brothers and their attorney until after the first verdict was indeed golden.

In the other wrongful death case, *Hogan v. McDaniel*,[70] the Tennessee Supreme Court was presented for the first time with the problem of whether or not a viable child, capable of living outside the uterus, is a person protected by the wrongful death statute.[71] In an action under the statute the unborn child was alleged to have negligently been killed by the defendant when he drove his bus into a car occupied by the mother, causing the car to overturn several times, with the result that the mother was injured and the child did not survive. The trial court sustained a demurrer to the action and the supreme

70. 319 S.W.2d 221 (Tenn. 1958).

71. See *supra* note 68.

court affirmed, holding that the unborn child was not a person within the statute.

It may be that this decision represents a correct interpretation of the wrongful death statute, although it is difficult to know what the legislature would have intended had it contemplated this problem. In some jurisdictions similar statutes have been interpreted to protect an unborn child from prenatal injuries.[72] While it does seem a bit peculiar to allow a wrongful death action for the death of someone who was never born, it is unfortunate that the court placed its decision on the ground that a viable child has no separate legal personality and is merely "a part of its own mother's physical body." As noted in a standard treatise, "medical authority has recognized that the child is in existence from the moment of conception."[73] The concept expressed in this decision that the child has no separate existence might tend to preclude recovery in stronger prenatal injury cases, as where the child is later born, but is handicapped by injuries which may be clearly traceable to a specific prenatal injury inflicted by a negligent physician or motorist. While there are difficulties of proof, it should not be assumed that courts and juries are unable to sift the true from the false. The rules of evidence and requirements as to the sufficiency of evidence ordinarily will prevent a jury from finding facts without adequate proof, and convincing medical evidence is now available in many cases. As to the separate personality of the unborn child, the courts have not hesitated to find a child in the mother's womb to be already a person for purposes of property or criminal law wherever such a finding is necessary to prevent injustice.

While in the past the great weight of judicial opinion has been against actions for prenatal injuries and the court was able to cite considerable legal authority in support of its conclusion, a survey of the recent decisions indicates a strong trend in favor of actions for prenatal injuries, based on the interest in the protection of human life. It appears that since 1946 fourteen jurisdictions have decided cases on this question for the first time and out of these fourteen, ten have allowed recovery.[74] A standard treatise states that the "weight of modern authority" now allows recovery for prenatal injuries.[75] It is to be hoped that the present decision will be restricted to its actual holding that an unborn child is not protected from negligent invasion

72. See cases cited 8 VAND. L. REV. 521, 523 (1955).
73. See PROSSER, TORTS § 36, at 174 (2d ed. 1955).
74. See Comment, *Pre-Natal Injuries: Damnum Absque Injuria?* 26 TENN. L. REV. 494, 509 (1959). A quite recent case allowing recovery for injuries to a nonviable fetus is Bennett v. Hymers, 147 A.2d 108 (N.H. 1958).
75. 2 HARPER & JAMES, TORTS § 18.3, at 1029 (1956). See also Gamble, *Actions for Wrongful Death in Tennessee,* 4 VAND. L. REV. 289 (1951); Note, 3 VAND. L. REV. 282 (1950); 8 VAND. L. REV. 521 (1955).

of its interest in freedom from bodily harm resulting in death and that it will not be regarded as foreclosing the protection of interest of an after born child from the risk of prenatal injury. In this situation it would not be necessary to find in order to allow recovery that the legislature intended to create an action for the wrongful death of one who was never actually born.

IV. Damages—Concurrent Tortfeasors—Contribution

In *Yellow Cab Co. v. Pewitt*,[76] the plaintiff, who had to make a left turn, was struck from behind by a cab operated by the defendant cab company. This caused the plaintiff's car to cross the center line of the road where it was struck by an on-coming bus operated by the other defendant, the Greyhound Corporation. The jury returned a verdict against the cab company for about $126,000, and one in favor of the Greyhound Corporation. In granting a new trial, the judge allowed the verdict in favor of the Greyhound Corporation to stand. On the second trial, the jury rendered a verdict against the cab company for $70,000. The trial judge suggested a remittitur to $60,000, which the plaintiff accepted.

On appeal it was urged by the cab company that the trial judge had committed error at the first trial in permitting the verdict in favor of its co-defendant, the Greyhound Corporation, to stand and also that the judgment of $60,000 against the cab company itself was excessive. With reference to the first point, the court held that the cab company could not complain of the dismissal of an action against its co-defendant, a joint or concurrent tortfeasor, since this dismissal would not affect the defendant cab company's liability for the entire damage as a joint or concurrent tortfeasor. The court referred, in this connection, to the "rule of no contribution" between joint tortfeasors. This language suggests that in spite of statements to the contrary in standard texts,[77] the traditional rule as to no contribution between joint tortfeasors still is in effect in Tennessee. It has been thought that cases of *Davis v. Broad St. Garage*[78] and *American Cas. Co. v. Billingsley*[79] in substance have abolished this unjust rule,[80] but as the present decision shows, there still is considerable doubt on the point.

With reference to damages, the court held that these were not ex-

76. 316 S.W.2d 17 (Tenn. App. M.S. 1958).
77. Prosser, Torts § 46, at 248 (2d ed. 1955); 1 Harper & James, Torts, § 10.2 at 716 n.5 (1956).
78. 191 Tenn. 320, 232 S.W.2d 355 (1950), 21 Tenn. L. Rev. 672 (1951), 4 Vand. L. Rev. 907 (1951).
79. 195 Tenn. 448, 260 S.W.2d 173 (1953).
80. See Sturdivant, *Joint Tortfeasors in Tennessee and the New Third Party Statute*, 9 Vand. L. Rev. 69, 74, 76 (1955).

cessive. In view of the fact that the plaintiff suffered a number of fractures, concussion of the brain and of the spinal cord, and other serious injuries, it is not surprising that the court concluded that the verdict was not "plainly so unreasonable as to shock the judicial conscience." The court referred to several judgments for larger amounts for personal injuries to show that this verdict was not out of line with ones previously upheld. Considerable emphasis was placed on the fact that the trial judge as well as the jury considered that $60,000 was not excessive.[81]

V. PUNITIVE DAMAGES—LIABILITY OF PRINCIPAL

The matter of when punitive damages may be assessed against the principal was involved in *State ex rel. Coffelt v. Hartford Acc. & Indem. Co.*[82] There a deputy of the defendant sheriff had arrested two boys about to start a fist fight. When one of the boys, Coffelt, broke away and started running the sheriff shot him twice in the leg. Since this clearly was an unprivileged amount of force to recapture one guilty only of a misdemeanor, suit was brought against the sheriff and against the surety on his bond. The jury returned a verdict in favor of the mother of the boy in the amount of $500 compensatory damages and $500 punitive damages. It was urged on appeal, among other things, that a principal is not liable for punitive damages, but the court held otherwise, stating: "As to the issue of punitive damages, it is well settled in this state that where a principal is found to be liable for a wrongful act of his agent, 'done with a bad motive and a disregard of social obligations,' the principal may be held for exemplary or punitive damages as well as the agent."[83]

This statement should be compared with one in a recent federal case where it is said: "As a general rule, however, wantonness may not be imputed to the master or principal of the wrongdoer, where the wrongdoer is a servant or agent."[84] The statement in the federal court opinion is supported by an extensive discussion of the Tennessee decisions which in fact seem to show that the principal is liable for exemplary damages only in three special situations. One of these occurs where the master is under a contract imposed duty, as in the case of common carrier, requiring him to refrain from mistreatment of the contractee.[85] A second exception occurs where the nature of the employment or the duty imposed on the servant is

81. For some representative examples of remittitur in the Tennessee decisions, see Comment, 24 TENN. L. REV. 1155, 1163 (1957).
82. 314 S.W.2d 161 (Tenn. App. M.S. 1958).
83. *Id.* at 163.
84. Earley v. Roadway Express, Inc., 106 F. Supp. 958 (E.D. Tenn. 1952).
85. Knoxville Traction Co. v. Lane, 103 Tenn. 376, 53 S.W. 557 (1899).

such that the master must contemplate the use of force by the servant. The third occurs where a dangerous instrumentality is entrusted by the employer to the servant, and the servant uses the instrumentality wantonly to the injury of the plaintiff.[86]

The result in the *Coffelt* case may well be correct under either the second or the third of these exceptions. It seems questionable, however, that there should be any general rule imposing upon a principal liability for exemplary damages. It seems enough to hold the principal liable for the tort of his agent, without also holding him accountable for punitive damages based on the willfulness of the agent's conduct, in the absence of any proof that he "knows of the reckless character of the agent."[87] As stated in a leading decision,

> Exemplary or punitive damages being awarded, not by way of compensation of the sufferer, but by way of punishment of the offenders, and as a warning to others, can only be awarded against one who has participated in the offense. A principal, therefore, though of course liable to make compensation for injuries done by his agent, within the scope of his employment, cannot be held liable for exemplary or punitive damages, merely by reason of wanton, oppressive or malicious intent on the part of the agent.[88]

A case during the survey period which throws light on the difference between actual and punitive damages is *Montgomery Ward & Co. v. Morris*,[89] involving an action for malicious prosecution. Employees of the defendant's store had cashed a $50 check payable to Norman E. Morris, for a person identifying himself by that name, and giving his address as that of the plaintiff, whose name was Norman E. Morris. The endorsement proved to be fraudulent. When the plaintiff was asked to make the check good, he said that he was not the person who cashed it, and offered to come to the store to present himself for identification. He was told that this would be unnecessary. The same evening the defendant's collector had him arrested at his home. He was later tried and acquitted. In a suit for malicious prosecution appropriate instructions were given about punitive and actual damages. In connection with punitive damages, it was stated that these could be awarded only if the conduct of the defendant was so careless and reckless as to indicate a wilful intent to harm the plaintiff and that the jury could look to the financial standing of the defendant in its determination of punitive damages. As to this latter point, evidence was introduced that the defendant's net worth was $648,767,051. The jury returned a verdict for the plaintiff for $25,000. One would sup-

86. See Hunt-Berlin Coal Co. v. Patton, 139 Tenn. 611, 202 S.W. 935 (1918).
87. See Nashville & Chattanooga R.R. Co. v. Starnes, 56 Tenn. 52 (1871).
88. Lakeshore & Mich. So. Ry. Co. v. Prentice, 147 U.S. 101 (1893).
89. 260 F.2d 504 (6th Cir. 1958).

pose that this represented to a considerable extent punitive damages, but in response to questions of the court the foreman expressly stated that the jury's award was for compensatory damages alone and did not embrace any punitive damages.

It appeared that the plaintiff's actual expenses were $875 and that he was a foreman in a truck body building plant. There was little publicity about the case, and the trial took less than a day. Under these circumstances the defendant moved to have the verdict set aside as excessive. In refusing to do so, or to suggest a remittitur, the trial judge stated that the record disclosed a degree of recklessness in making the charge which was rather unusual in this kind of a case, particularly for a responsible business. It was held on appeal that since the trial court quite evidently had given consideration, in passing on the defendant's motion, to the matter of how carelessly the charge was made, the plaintiff's motion should be reconsidered. While the way in which the charge is made is relevant with respect to punitive damages, it does not have any bearing on the issue of compensatory damages. With reference to compensatory damages, the appellate court made the significant statement: "Under the facts of this case we are of the opinion that a substantial remittitur would have been justified."[90] Since the trial court apparently would be bound to accept as accurate the foreman's somewhat incredible statement that the verdict represented only compensatory and not any punitive damages, this reversal would seem to be necessary. Even though the trial judge apparently thought that punitive damages were in order, since the jury did not find any such damages, it would seem that he should follow the suggestion of the appellate court that a substantial remittur would be in order. Even if the verdict had been stated by the foreman to represent partly punitive damages, it seems excessive under the circumstances of this case. The loss would fall on innocent stockholders, and the prosecution seems to have been based on carelessness rather than actual malice.

VI. MUNICIPAL CORPORATIONS—DANGEROUS INSTRUMENTALITY

There was an interesting attempt to hold a municipal corporation liable for the negligent act of a policeman in *Nishan v. Godsey*.[91] The policeman's revolver accidentally went off while he was engaged in horseplay with his friend, the plaintiff. The city had waived its immunity by procuring insurance, but it was found that at the time of the accident the policeman was not on duty and that the negligent shooting was not in the course of his employment. The plaintiff

90. *Id.* at 506.
91. 166 F. Supp. 6 (E.D. Tenn. 1958).

nevertheless claimed that the municipality should be liable, on the ground that it permitted the policeman to carry at all hours of the day a dangerous instrumentality. It was asserted in this connection that an employer may be liable even when the agent is not acting within the scope of his employment where he injures a third party in the use of a dangerous instrumentality entrusted to him by the employer.

To support this principle the plaintiff relied principally on a case where a railroad engineer, entrusted with a locomotive, mischievously blew the whistle simply to frighten some horses.[92] In that case, the engineer, unlike this policeman, was on duty at the time. The court did base its decision in that case, however, on the assumption that the engineer's act, "was not done within the actual nor apparent scope of the agent's employment," and stated that liability could be based on the ground "that by putting such an instrumentality in the hands of a servant, the company consents to be bound by the servant's acts, and should be bound by any use of the dangerous instrumentality by the servant, whether in furtherance of the master's business or to serve the servant's own purpose."[93] As the federal court in the present case pointed out, however, there are no decisions in Tennessee extending this principle from locomotives to firearms, and under these circumstances it was held that the plaintiff could not recover on this theory. Perhaps the fact that revolvers, unlike locomotives, are easily obtainable from sources other than the employer played a considerable part in the courts reluctance to extend the principle of the locomotive case to this situation.

The plaintiff further claimed that the city was liable on the ground that it was negligent in the employment and retention of this particular policeman, in view of his asserted reputation of handling firearms in a careless manner, and a reputation for fighting in his own city. It was found that this contention was not sustained by the proof and that as to any prior irregularities in the policeman's conduct, there was "no evidence that the city knew or by the exercise of due care could have known of them prior to the accident."

VII. Defamation

There were some significant decisions in the field of defamation during the survey period. One of these, *Langford v. Vanderbilt Univ.*[94] deals with subsequent developments in the earlier *Langford* suits.[95] In the original decision the court held, among other things,

92. I. C. R. R. Co. v. Toombs, 6 Tenn. Civ. App. 293 (1915).
93. *Id.* at 297.
94. 318 S.W.2d 568 (Tenn. App. M.S. 1958).
95. Langford v. Vanderbilt Univ., 199 Tenn. 389, 287 S.W.2d 32, 24 Tenn.

that there was a privilege to report defamatory matter contained in a complaint, even though no judicial action had been taken on the pleadings, "provided the publication is a fair and accurate statement of the contents of the pleadings, and made without malice." Since it was alleged that the report of the suit was unfair, inaccurate, and malicious, the case was remanded for trial on these issues of fact.

At the trial the plaintiff argued that the student newspaper, the *Hustler,* which reported the contents of the complaint had arbitrarily quoted only a few paragraphs, giving undue prominence to the "inculpatory facts." It was further argued that malice was shown "in lifting the most atrocious allegations from the prior declarations and in republishing the horrible page from the Chase." The trial court nevertheless directed a verdict for the defendant. In sustaining this action, the court of appeals remarked that the plaintiff had been unable to point out other matters necessary to make the report of the pleadings fair and accurate, and found that the reproduction of the page from the Chase was necessary to an understanding of the matter. No evidence of actual malice was found.

Perhaps the chief significance of this case is that it shows how a report of the contents of a complaint will be regarded as fair and accurate even though the report is limited to the more colorful aspects of the case, provided that it does not convey a definitely erroneous impression to those who read it. The decision also illustrates the difficulty of establishing malice when the report is by a newspaper, for its news interest, as distinguished from a report by a private individual.[96] The court found, however, in this particular case that even if malice had been established, the defendant would be protected by an absolute privilege. This arose out of the fact that the plaintiff in a conversation with the editors of the *Hustler* had said that he "wanted publicity" given to the suit, and thereby consented to the publication of the report, even though he later objected to its character.

The other case, *Lamb v. Sutton,*[97] involves the impact of the Federal Communications Act on the state law of defamation. The federal act provides that when radio time is granted to a candidate for political office, the station must grant the use of its facilities for an equal time to opposing candidates and that the station "shall have no power of censorship over the material broadcast."[98] Sutton, a

L. REV. 914 (1957). See Wade, *Torts—1956 Tennessee Survey,* 9 VAND. L. REV. 1137, 1148 (1956).

96. See 1 HARPER & JAMES, TORTS 434 (1956).

97. 164 F. Supp. 928 (M.D. Tenn. 1958); 12 VAND. L. REV. 301 (1958); 26 TENN. L. REV. 434 (1959); 8 BUFFALO L. REV. 275 (1959).

98. Federal Communications Act, § 315, 48 Stat. 1088 (1934), as amended, 47 U.S.C. § 315 (1952).

candidate in a primary election, while engaged in a twenty-six hour "talkathon" over the defendant radio stations, on time granted to him to respond to the incumbent senator, stated that the plaintiff, a third person not a candidate, "was a known communist and that his license to operate a radio and television stations had been revoked by the Federal Communications Commission." The federal district court affirmed a verdict against Sutton, but held that the verdicts against the broadcasters should be set aside.

The decision was based on the ground that the federal act contains an absolute prohibition of censorship, and that there should flow from this an implied grant of immunity from liability for defamation. The court assumed, following an opinion of the Federal Communications Commission in *Port Huron Broadcasting Co.*,[99] that by the passage of the act Congress intended to override any state defamation law which might conflict with such an immunity.

The case presents a difficult problem. It would seem to be a serious injustice, as the opinion points out, to require broadcasters to publish defamatory material and not at the same time grant an immunity from liability. On the other hand it also seems a serious injustice to the person defamed to find that his reputation may be caused serious damage by the widespread broadcasting of defamatory statements, and that his only remedy will be against the political candidate, who may be quite unable to pay a judgment. The court in the present case said that the congressional intent to grant an immunity is indicated by the fact that no legislative action has been taken to change the ruling of the Federal Communications Commission asserting the immunity, although it seems equally significant that Congress has been asked sixteen times to amend the statute to expressly confer immunity, and has sixteen times refused to do so.[100] Furthermore, a section in the original bill granting an exemption of the stations from liability was omitted because the House conferees at a joint conference on the bill were unwilling to include it.[101] The United States Supreme Court recently has held, however, in a five-to-four decision that the federal statute does contain a definite grant of immunity from liability for defamatory statements in a political broadcast made pursuant to the act and abrogates any state law to the contrary.[102]

99. 12 F.C.C. 1069 (1948). *Contra*, Houston Post Co. v. United States, 79 F. Supp. 199 (S.D. Tex. 1948).

100. See argument before the Supreme Court in Farmers Educ. & Co-op. Union v. WDAY, Inc., 27 U.S.L. WEEK 3269 (U.S. Mar. 31, 1959).

101. See Note, *Libel and Slander: Liability of Broadcasting Stations for Defamatory Statements by Candidates for Public Office*, 12 OKLA. L. REV. 297, 299 (1959).

102. Farmers Educ. & Co-op. Union v. WDAY, Inc., 79 Sup. Ct. 1302, reported 27 U.S.L. WEEK 4521 (June 29, 1959).

This decision may upset state law in a few jurisdictions where broadcasters are held to a strict liability without fault on the theory that the loss should be borne by the station rather than by the defamed plaintiff. In the majority of states, however, radio broadcasters are protected from strict liability either by common law decisions or by statute. So in Tennessee it is clear that a radio broadcaster does not incur liability in the absence of negligence[103] and that "in no event" is there any liability on the part of the station for defamatory statements uttered by a candidate for public office.[104] In such jurisdictions it seems likely that even under state law the decision would be in favor of the broadcaster in this situation where he is acting pursuant to the command of the federal act, which the recent Supreme Court decision interprets to require the broadcasting even of matter which is clearly defamatory.

It might be added that on the controversial question of whether radio defamation is slander or libel, an issue which has not arisen in Tennessee until this case, the opinion in *Lamb v. Sutton*[105] assumes that remarks over the radio are to be regarded as "libelous."

Mention might be made of another federal case which lays down some new defamation law applicable to federal officials which will be binding on the state courts in Tennessee and elsewhere. In this case, *Barr v. Matteo*,[106] the Supreme Court held that the acting director of the Office of Rent Stabilization was absolutely privileged to defame two employees in a press release, so long as the release was issued in the line of duty.[107] The Court based its decision on the assumption that it is "important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government."[108]

As stated in a dissenting opinion by Justice Breunan, the main assumption on which this opinion is based may be "a gossamer web self-spun without a scintilla of support to which one can point." Furthermore, as indicated by Chief Justice Warren, in another dissenting opinion joined in by Justice Douglas, the decision leaves considerable doubt as to just what federal officials are covered by

103. TENN. CODE ANN. § 23-2606 (Supp. 1959).
104. TENN. CODE ANN. § 23-2607 (Supp. 1959).
105. 164 F. Supp. 928 (M.D. Tenn. 1958).
106. 79 Sup. Ct. 1335 (1959).
107. There was a similar holding in the companion case of Howard v. Lyons, 79 Sup. Ct. 1331 (1959), with reference to a navy captain.
108. 79 Sup. Ct. 1339 (1959).

this absolute privilege, which in the past apparently has been limited to cabinet officials, so far as generally circulated statements, as distinguished from internal reports from a superior, are concerned. As the Chief Justice points out, when a citizen criticizes a public official, he does not have, in most jurisdictions, even a qualified privilege to make any misstatements of fact.[109] Yet in this decision, says the Chief Justice, "the Court has given some amorphous group of officials —who have the most direct and personal contact with the public— an absolute privilege when their agency or their action is criticized." It may well be that federal officials below Cabinet or equivalent rank would be adequately protected if given a qualified privilege, conditioned upon lack of malice and reasonable grounds for belief, with reference to statements to the general public, and that this decision unduly subordinates the interest of the individual in obtaining redress for defamation.

VIII. Inducing Breach of Contract

There was an unusual suit in *Emco Ins. Co. v. Beacon Mut. Indem. Co.*,[110] brought by one insurance company against another and based on the statute which makes it unlawful to induce or procure a breach of contract, with provision for treble damages to the injured party.[111] The plaintiff company had insured one Watkins against damage to his car from collision. The Watkins car was involved in a collision with a truck owned by Chunn, who carried liability insurance with the defendant company. On January 30, 1956, the plaintiff company paid Watkins $750 for the damage to his car and Watkins at that time agreed that the plaintiff should be subrogated to his rights against Chunn for the property damage to his car, to the extent of the payment made by the plaintiff. A few months later, on April 14, 1956, Watkins, in consideration of $500, executed a covenant not to sue Chunn. It was alleged that at the time of this settlement and covenant the defendant insurance company and the defendant Chunn had been notified that the plaintiff carried the collision insurance on the Watkins car and was an interested party in any settlement. The plaintiff's claim was that by securing from Watkins the covenant not to sue the defendants had induced him to violate a contractual

109. An article cited in this connection by Warren, C.J. brings out that in only nine states, not including Tennessee, have courts held or clearly stated that there is a qualified privilege to make misstatements of fact about public officials or candidates as distinguished from criticism and comment. See Noel, *Defamation of Public Officers and Candidates*, 49 Col. L. Rev. 875, 896 (1949).

110. 322 S.W.2d 226 (Tenn. 1959).

111. Tenn. Code Ann. § 47-1706 (1955).

obligation to the plaintiff, as his collision insurance carrier, not to sue for damages to his car.

The court held that no cause of action was stated. It was pointed out that the claim which Watkins compromised for $500 was a settlement not only of liability for damages to the car, but also of any liability for personal injury, and had the additional effect of preventing any cross action by Chunn against Watkins. After stating that the law favors compromises, the court added: "The compromise was not a legal wrong, nor was it an act of moral delinquency for the defendant insurance carrier and Chunn to make an advantageous settlement." It was further pointed out that the plaintiff had made an assumption that Chunn's negligence was the sole proximate cause of the damage to the Watkins car, and that this had not been established. It was concluded that the defendants had not been guilty of the improper inducement of breach of contract contemplated by the treble damage statute.[112]

112. Reference is here made to tort-related problems dealt with elsewhere in this survey: The problem of service on non-resident motorists arose in Noseworthy v. Robinson, 315 S.W.2d 259 (Tenn. 1958), discussed in the articles on Conflict of Laws and Procedure & Evidence. The parental immunity issue in Glover v. Glover, 319 S.W.2d 436 (Tenn. 1958) is discussed in the Domestic Relations article. The liability of an insurer for failure to settle, involved in United States Fid. & Guar. Co. v. Canale, 257 F.2d 138 (6th Cir. 1958), is discussed in the Insurance article, along with a consideration of the amendments to the financial responsibility laws.