Vanderbilt Law Review

Volume 17
Issue 3 *Issue 3 - June 1964*

Article 27

6-1964

Torts -- 1963 Tennessee Survey

John W. Wade

Torts—1963 Tennessee Survey

*John W. Wade**

I. NEGLIGENCE IN GENERAL

The elements of a valid cause of action in negligence are specifically enumerated by Justice Holmes of the Tennessee Supreme Court in the case of *Ruth v. Ruth*:

> 1. A duty of care owed by the defendant to the plaintiff.
> 2. A failure on the part of the defendant to perform that duty.
> 3. An injury to the plaintiff resulting proximately from the defendant's breach of that duty of care.[1]

This outline will be used for the treatment of general questions of negligence, and particular fact situations will then be subsequently treated.

A. *Duty of Care*

The *Ruth* case itself presents what is probably the most important problem coming within the topic of duty. It poses the question of whether one who has carelessly placed himself into a position of danger can be held liable to a would-be rescuer who is injured in the rescue attempt. When the defendant has endangered a third

* Dean, Vanderbilt University School of Law; Advisor to Reporter for RESTATEMENT (SECOND), TORTS.

1. 372 S.W.2d 285, 287 (Tenn. 1963), relying on De Glopper v. Nashville Ry. & Light Co., 123 Tenn. 633, 134 S.W. 609 (1911). The third element, as listed in the *Ruth* case is often broken down into two separate parts—causation and damages. See, *e.g.*, PROSSER, TORTS § 35 (2d ed. 1955).

party, the cases are in agreement that he is liable to a person attempting to rescue that party,[2] there he breached a duty to the third party. But in the case where the defendant endangered only himself, early cases held that he owed no duty to anyone to keep himself safe, and refused to allow the rescuer to recover.[3] In disregarding this technical argument in the *Ruth* case,[4] the Tennessee court is in accord with the present majority rule. Modern commentators are in agreement that the rescuer should be allowed to recover.[5]

In *Howell v. Betts*,[6] defendants had surveyed a parcel of land in 1934 "for a former owner," plaintiffs purchasing it in 1958. It was discovered in 1960 that there were errors in the survey so that the size was less than that shown on the survey. The supreme court treated the action as one for negligent misrepresentation and regarded the problem as one of duty. It explained that the old rule requiring privity of contract no longer applies in Tennessee, and that liability should extend to a reasonable foreseeable risk of injury to person or damage to property. The cases are not so clear when the loss is to an intangible interest of the plaintiff, and the negligent representation is made not to the plaintiff or for his specific benefit. In the leading case of *Ultramares Corp. v. Touche*,[7] the New York court had held that liability in negligence for misrepresentation did not extend to a person not in privity unless he was in the immediate contemplation of the parties.[8] Some recent cases have sought to expand the scope of the duty to make it extend to foreseeable persons and risks. An important case to this effect is *Texas Tunneling Co. v. Chattanooga*,[9] recently decided by a federal court in Tennessee.[10] The instant case, in holding for the defendant, is not inconsistent with that case or restrictive of its holding. It regarded the plaintiffs as "unforeseeable" and laid emphasis on the twenty-four years, saying that to impose liability here would be to extend it to "any and all purchasers to the

2. The leading decision and classic case is Wagner v. International Ry., 232 N.Y. 176, 133 N.E. 437 (1921).

3. See, *e.g.*, Saylor v. Parsons, 122 Iowa 679, 98 N.W. 500 (1904).

4. Ruth v. Ruth, 372 S.W.2d 285 (Tenn. 1963).

5. For a very good treatment of the problem, see 2 VAND. L. REV. 491 (1949), commenting on Longacre v. Reddick, 215 S.W.2d 404 (Tex. Civ. App. 1948).

The holding in the *Ruth* case has the effect of negating a possible implication in Dan v. Bryan, 49 Tenn. App. 250, 354 S.W.2d 483 (W.S. 1961), that no duty will be held to exist in such circumstances. See discussion in Noel, *Torts—1962 Tennessee Survey*, 16 VAND. L. REV. 881, 889-90 (1963).

6. 211 Tenn. 134, 362 S.W.2d 924 (1962).

7. 255 N.Y. 170, 174 N.E. 441 (1931).

8. Liability was held to be broader in deceit.

9. 204 F. Supp. 821 (E.D. Tenn. 1962).

10. See comment on this case in 16 VAND. L. REV. 266 (1962); and in Noel, *supra* note 5, at 905-07.

end of time. We think no duty so broad and no liability so limitless should be imposed."[11]

Liability for the wrongful death of an unborn infant was considered in *Durrett v. Owens*.[12] Recently, the Tennessee court had followed the modern rule in holding that a child born alive might recover for prenatal injuries, and that the action might be maintained even though the child subsequently died.[13] But in *Durrett*, the court refused to extend this rule to the case of a stillborn infant, and it thus reiterated its previous holding in *Hogan v. McDaniel*.[14] Although some courts have permitted a wrongful death action in the case of a stillborn child,[15] a majority have declined to permit it. On the whole, the position which the Tennessee court now follows seems to afford an appropriate reconciliation of conflicting interests.[16]

B. *Breach of Duty*

There is full agreement in the rule that it is the jury's function to determine whether the defendant has been negligent—that is, has breached his duty to use care. Numerous cases decided during the survey period contain specific declarations that the question of negligence is normally for the jury and will not be taken from their hands if there is any reasonable basis on which they are to decide.[17]

1. *Standard of Care.*—The issue of negligence is submitted to the jury for its consideration by instructions making use of a standard of conduct. Normally expressed in terms of what a reasonable prudent man would do under the same or similar circumstances, this standard is not a rule of conduct which the jury can apply automatically once it determines the facts, but its application requires a real exercise of discretion. As Justice White said in *Sneed v. Henderson*:

---

11. 211 Tenn. at 138, 362 S.W.2d at 926.

12. 371 S.W.2d 433 (1963).

13. Shousha v. Matthews Drivuself Service, Inc., 210 Tenn. 384, 358 S.W.2d 471 (1962).

14. 204 Tenn. 235, 319 S.W.2d 221 (1958).

15. *E.g.*, Mitchell v. Couch, 285 S.W.2d 901 (Ky. 1955).

16. See Noel, *supra* note 5, at 892; 30 TENN. L. REV. 309 (1963); Notes, 26 TENN. L. REV. 494 (1959); 8 VAND. L. REV. 521 (1955); 3 VAND. L. REV. 282, 287 (1950).

17. See, *e.g.*, Price v. Firestone Tire & Rubber Co., 321 F.2d 725 (6th Cir. 1963); Nichols v. Herrin Transp. Co., 319 F.2d 289 (6th Cir. 1963); Ruth v. Ruth, 372 S.W.2d 285 (Tenn. 1963); Sneed v. Henderson, 211 Tenn. 572, 366 S.W.2d 758 (1963); James v. Ross, 369 S.W.2d 1 (Tenn. App. M.S. 1962); McFerrin v. Crescent Amusement Co., 364 S.W.2d 102 (Tenn. App. M.S. 1962); Birdwell v. Smith, 364 S.W.2d 944 (Tenn. App. M.S. 1962); J. W. Owen, Inc. v. Bost, 364 S.W.2d 499 (Tenn. App. W.S. 1961); Davenport v. Robbins, 370 S.W.2d 929 (Tenn. App. M.S. 1963); Hobbs v. Livesay, 372 S.W.2d 199 (Tenn. App. E.S. 1963).

When there is not sufficient evidence to go to the jury, the court decides as a matter of law *E.g.*, Ford v. Brandan, 367 S.W.2d 481 (Tenn. App. E.S. 1962); Merrell v. Chickasaw Hotel Co., 50 Tenn. App. 420, 362 S.W.2d 262 (W.S. 1961).

> Ordinary care is a flexible standard which varies with circumstances. Thus though the instructions to the jury would be the same in both cases, the standard, for example, places a greater duty on one who is driving on a wet road at night in a congested area than one who is driving on an open road on a clear day. Such flexibility is the beauty of this standard.[18]

The statement of the standard of ordinary care is varied in only a few types of instances. Occasionally it is relaxed, as in the case of a minor child[19] or a person with serious physical impairment. With other types of individuals it may be increased, as in the case of a common carrier of passengers which in Tennessee is held to the "highest degree of care."[20]

Occasionally the special circumstances of the case will warrant express mention in the instructions. Two cases involve the "sudden emergency doctrine." In *Ruth v. Ruth*,[21] the supreme court quoted with approval a statement of the court of appeals "that one who through the negligence of another, and not through his own negligence, suddenly finds himself in a position of peril and is compelled to act instantly to avert an injury to himself, is not guilty of negligence if he makes such a choice as a person of ordinary prudence placed in such a position might make, even though he did not make the wisest choice."[22]

This expression of the "doctrine" seems much better than that used in *Stacks v. Veteran's Cab Co.*,[23] and also quoted from earlier Tennessee cases: "One who in sudden emergency acts according to his best judgment, or who, because of want of time in which to form a judgment, omits to act in the most judicious manner, is not chargeable with negligence."[24] This carries an erroneous implication that the standard in the emergency situation involves a subjective test ("his best judgment") rather than an objective one ("person of ordinary prudence placed in such a position"). As another quotation in the *Stacks* case itself indicates, the person's "own judgment . . . is not in any situation, emergency or otherwise, the law's criterion. The driver is exonerated if the course which he takes in an emergency is one

18. 366 S.W.2d 758, 764 (Tenn. 1963).

19. This is recognized in Ringer v. Godfrey, 50 Tenn. App. 559, 362 S.W.2d 825 (E.S. 1962), where the child was only five years old and was held to be incapable of negligence as a matter of law.

20. Stacks v. Veteran's Cab Co., 366 S.W.2d 539 (Tenn. App. W.S. 1962). On a carrier of goods, see Wayne Knitting Mills v. Delta Motor Lines, 372 S.W.2d 419 (Tenn. App. W.S. 1962).

21. 372 S.W.2d 285 (Tenn. 1963).

22. *Id.* at 289, quoting from Tennessee Elec. Power Co. v. Hanson, 18 Tenn. App. 542, 79 S.W.2d 818 (M.S. 1934). The case involved a plaintiff seeking to rescue a defendant who had gotten himself into a dangerous situation.

23. 366 S.W.2d 539 (Tenn. App. W.S. 1962).

24. *Id.* at 544, quoting from several Tennessee cases. The sentence came originally from 20 R.C.L. 29 (1918).

which might fairly be chosen by an intelligent and prudent person."[25] It is to be hoped that the opinion of the supreme court in the *Ruth* case may now have the effect of eliminating this implicit confusion.

The *Stacks* case[26] raises the interesting question of what is to be done when there are two conflicting reasons for varying from the normal standard of the reasonable prudent man. It involved a taxicab driver, who is subject to the highest degree of care, and it also involved a sudden emergency, when an occupant of a parked car suddenly opened a door directly in front of the approaching taxi. The court held that a cab driver is entitled to the benefit of the sudden emergency doctrine and it did not hold erroneous some instructions of the trial court which tried to express both ideas at the same time. It would appear not to be difficult, however, to phrase an instruction which would say that the cab driver is held to the highest degree of care under the circumstances and that one of the circumstances to be considered was the sudden emergency in which he found himself.

2. *Negligence Per Se.*—Instead of using the general standard of the reasonable prudent man, courts sometimes announce a specific rule of conduct. The stop-look-and-listen rule is the classic example.[27] This practice has been followed infrequently in recent years.[28] When there is a criminal or traffic statute in existence, however, the courts freely adopt the rule of conduct set out in it, and make violation of that rule negligence per se. The significance of this analysis is that the court is not compelled by the existence of the criminal statute to apply it to civil actions. When it does so it is acting of its own free will, and it may decline to adopt a rule of conduct from an inappropriate statute.[29]

The same reasoning may, of course, be applied to a municipal ordinance or a significant administration regulation, so that a violation may be treated as negligence per se. But in *Williams v. Tillett Brothers Construction Co.*,[30] the federal court felt that the Tennessee courts would not apply it to specifications in a contract between the Tennessee Highway Department and a highway contractor. These

25. *Ibid.*, quoting through other cases from 5 AM. JUR. *Automobiles* § 171, at 601 (1936). See also, Wade, *Torts—1960 Tennessee Survey*, 13 VAND. L. REV. 1269, 1273 (1960).

26. 366 S.W.2d 539 (Tenn. App. W.S. 1962).

27. See Baltimore & O.R.R. v. Goodman, 275 U.S. 66 (1927).

28. *But see* Horn v. Commercial Carriers, Inc., 365 S.W.2d 908 (Tenn. App. E.S. 1962), and the "rule" that an automobile driver must keep his car in "such control as to be able to stop in time to prevent running into the car ahead in case the latter vehicle comes to a sudden stop." *Id.* at 914-15. And compare the Tennessee cases involving the assured-clear-distance-ahead rule. See Wade, *Torts—1954 Tennessee Survey*, 7 VAND. L. REV. 951, 952-53 (1954).

29. See RESTATEMENT (SECOND), TORTS § 286 (Tent. Draft. No. 4, 1959).

30. 319 F.2d 300 (6th Cir. 1963).

specifications were held not to amount to administrative regulations.[31]

In several cases during the survey period the decision turned on the interpretation of a statute. Thus, the Child Labor Statute[32] was held to apply to permitting a boy to work, without a formal employment contract, so that he could recover when injured in working on a "go-cart," though he obtained no pay and simply received free rides.[33] In a right-of-way statute a sled was construed as being a "vehicle."[34] A similar statute was held not to give a right-of-way to a boy on a bicycle coming out of a private driveway.[35]

The Pure Food and Drug Act was involved in *Walton v. Guthrie*,[36] but there was held to be no evidence of its violation. The Railroad Precautions Statute was construed in *Baggett v. Louisville & N.R.R.*[37] Its recent amendment was held to change it from a statute creating a new, independent cause of action which must be stated in a separate count, into a "mere common law right of action" which would not require a separate count but would amount to negligence per se.

In *Mead v. Parker*,[38] an ice cream truck was parked on the wrong side of the street, and a child was injured in crossing the street to make a purchase. In accordance with well established authority the court held that the plaintiff could not base an action on violation of the ordinance in parking the wrong way. The purpose of the ordinance was the "prevention of traffic bottlenecks and the collision-free passage of other vehicles," and not the "protection of pedestrians."[39]

3. *Proof of Negligence.*—Proof of defendant's breach of duty to use care is often presented by direct evidence. Sometimes, however, circumstantial evidence is needed to prove some aspect of the case. Thus, in *Kee v. Hill*,[40] evidence as to the position of bodies and the nature of injuries sustained was held sufficient to allow a reasonable inference as to who was the driver of a car. In *Gilreath v. Southern*

31. The specifications were held properly admitted in evidence to be considered by the jury, which held for the defendant. Somewhat in point is a group of three Tennessee cases declining to treat provisions of a "National Electric Code" as the equivalent of a statute or ordinance. The indication there was that the provisions of the "Code" might be considered in evidence, but should not be adopted by the court as controlling. See Wade, *Torts—1957 Tennessee Survey*, 10 VAND. L. REV. 1218, 1220 (1957).

32. TENN. CODE ANN. §§ 50-701 to 50-725 (1956).

33. Swift v. Wimberly, 370 S.W.2d 500 (Tenn. App. W.S. 1963).

34. Davenport v. Robbins, *supra* note 17.

35. James v. Ross, 369 S.W.2d 1 (Tenn. App. M.S. 1962).

36. 50 Tenn. App. 383, 362 S.W.2d 41 (W.S. 1962), 30 TENN. L. REV. 478 (1963).

37. 365 S.W.2d 902 (Tenn. App. W.S. 1962).

38. 221 F. Supp. 601 (E.D. Tenn. 1963).

39. *Id.* at 602. See generally Comment, 30 TENN. L. REV. 556 (1963).

40. 366 S.W.2d 520 (Tenn. App. W.S. 1962), Note, 30 TENN. L. REV. 671 (1963).

Ry.,[41] circumstantial evidence was held adequate to show that deceased was an "obstruction" on the tracks within the terms of the Railroad Precautions Act. On the other hand evidence that a man had previously been convicted on charges of drunken and reckless driving was held not sufficient to prove knowledge by defendant of his incompetency as a driver, and thus to permit a finding of negligence on defendant's part in letting him borrow an automobile.[42]

One form of circumstantial evidence goes by the name of *res ipsa loquitur*. If the accident is such that it would not ordinarily happen in the absence of negligence and circumstances were sufficiently within the control of the defendant as to point to him, then a finding of defendant's negligence is permitted. Three professional negligence cases raised this problem. Thus, in *French v. Fischer*,[43] where a surgical sponge was sewed up in the abdomen of a small child, *res ipsa* was applicable.[44] In *Pack v. Nazareth Literary and Benevolent Institute, Inc.*,[45] where a hypodermic given in the buttock produced a sterile abscess and there was testimony that it was "highly unlikely" that dramamine (which should have been used) would have caused the abscess but an irritant drug might, the doctrine was again held applicable.[46] But in *Thompson v. Methodist Hospital*,[47] where a newborn infant contracted a staph infection, the doctrine was held inapplicable since this might well have happened in the absence of negligence.

In *Kee v. Hill*,[48] where a car ran off a road and hit a bridge abutment, *res ipsa* was held applicable. It was held inapplicable, however, in an action against the Tennessee Valley Authority.[49]

C. *Causal Relationship Between Injury and Negligence*

The case of *Gipson v. Memphis Street Ry.*,[50] raises the issue of causation in its simplest form. The deceased, while boarding an electric coach, received an electric shock. Shortly thereafter she became quite ill and was diagnosed as having a brain tumor. An operation disclosed that it was a malignant, rapidly growing tumor,

41. 323 F.2d 158 (6th Cir. 1963).
42. Kennedy v. Crumley, 367 S.W.2d 797 (Tenn. App. M.S. 1962).
43. 50 Tenn. App. 587, 362 S.W.2d 926 (W.S. 1962).
44. There was also direct evidence of negligence here.
45. 50 Tenn. App. 540, 362 S.W.2d 816 (E.S. 1962).
46. The court declared that it was unnecessary to decide whether this constituted *res ipsa loquitur* or circumstantial evidence but quoted a statement from Judge Felts that "res ipsa loquitur does not differ from an ordinary case of circumstantial evidence." *Id.* at 546-47, 362 S.W.2d at 819-20, quoting Sullivan v. Crabtree, 36 Tenn. App. 469, 258 S.W.2d 782 (M.S. 1953).
47. 211 Tenn. 650, 367 S.W.2d 134 (1962).
48. *Supra* note 40.
49. Fowler v. TVA, 321 F.2d 566 (6th Cir. 1963).
50. 364 S.W.2d 110 (Tenn. App. W.S. 1962).

and she died immediately thereafter. The court decided that there was no credible evidence that the shock produced the tumor or accelerated her death in any way and held that the lower court was correct in giving a directed verdict for the defendant. Ordinarily the question of cause-in-fact is for the jury, but here the evidence did not raise a jury question.

If the electric shock had accelerated Mrs. Gipson's death, this would have been sufficient to allow a cause of action, even though the tumor had already existed. Thus, in *McCandless v. Sammons*,[51] recovery was permitted for the aggravation of a pre-existing injury. The case involved injury to the neck and back from a rear-end collision.

Haun v. Brown[52] provides an appropriate illustration of *causa sine qua non*. Defendant may have been driving too fast, but another car swerved in front of him so suddenly that he could not avoid hitting it. The court declared that there was "no proof from which it might reasonably be inferred that if defendant had been going only 45 miles per hour he could have stopped in time to avoid the collision," and it affirmed a decision below for the defendant.

The same explanation may also be appropriate for *Ringer v. Godfrey*,[53] where a little five-year-old boy suddenly ran in front of defendant's car too late for her to do anything. A jury verdict for defendant may well have been based on the ground that defendant was not negligent, but it would also be possible that any negligence on her part was not the cause in fact of the injury. The court below, however, had instructed that the child could not be found contributorily negligent because of its age but that his conduct could constitute an intervening act preventing defendant's conduct from being the proximate cause. The appellate court, after some discussion, indicates that a child's act may be an "intervening, independent, efficient cause . . . [which] will break the causal connection."[54]

In *Brown v. Hudson*,[55] defendants had rented a dump truck to defendant's employer. A defective condition was discovered and decedent climbed under the raised truck bed to try to fix it. It fell on him, killing him. The court held that the "negligent acts" of decedent and his employer "superseded and intervened as an independent cause which released defendants as a matter of law."[56] For this position it relied upon the Tennessee case of *Ford Motor Co. v.*

51. 50 Tenn. App. 413, 362 S.W.2d 259 (W.S. 1961).
52. 50 Tenn. App. 510, 362 S.W.2d 802 (E.S. 1962).
53. 50 Tenn. App. 559, 362 S.W.2d 825 (E.S. 1962).
54. *Id.* at 565-66, 362 S.W.2d at 828.
55. 50 Tenn. App. 658, 363 S.W.2d 505 (M.S. 1962).
56. *Id.* at 669, 363 S.W.2d at 510.

Wagoner.[57] That case, however, involved the intervening act of a third party rather than the plaintiff himself; perhaps the holding for the defendant in the instant case is made easier by the thought that plaintiff may be treated as guilty of proximate contributory negligence. At any rate the problem of shifting responsibility from one person to another is one of the most difficult ones in the field of proximate cause.[58]

D. *Contributory Negligence*

As with defendants' negligence, the question of contributory negligence is normally for the jury.[59] Occasionally it is so clear, however, that the court rules as a matter of law. This was so in *Walters v. Kee*,[60] where plaintiff went to sleep in the back seat of a car, knowing that the driver was also very sleepy.

In two cases the unique Tennessee doctrine of remote contributory negligence was used to diminish the amount of damages,[61] and in another case reference was made to the doctrine.[62]

The case of *Howard v. Dewey Motor Co.*[63] involved imputed contributory negligence. Two car salesmen for a common employer were test driving a trade-in car when it collided with defendant's car. The court held that the salesmen were engaged in a joint venture, so that the negligence of the driver was imputed to the other salesman in an action against the defendant.[64]

The relationship of the defenses of contributory negligence and assumption of risk is treated briefly in *Walters v. Kee*.[65] The court explains that while they are two separate defenses, "there are situations where the two defenses overlap," in which case the distinction between them "is not very clear," with "many Courts using the terms interchangeably."[66]

---

57. 183 Tenn. 392, 192 S.W.2d 840 (1946).

58. See generally, RESTATEMENT (SECOND), TORTS § 452 (Tent. Draft. No. 9, 1963).

59. Williams v. Kitchin, 316 F.2d 310 (6th Cir. 1963); Martin v. McMinnville, 369 S.W.2d 902 (Tenn. App. M.S. 1962); Birdwell v. Smith, 364 S.W.2d 944 (Tenn. App. M.S. 1962).

60. 366 S.W.2d 534 (Tenn. App. W.S. 1962), 30 TENN. L. REV. 671 (1963).

61. Still v. Townsend, 311 F.2d 23 (6th Cir. 1962); Cline v. United States, 214 F. Supp. 66 (E.D. Tenn. 1962).

62. Birdwell v. Smith, *supra* note 59. On remote contributory negligence see generally, Comment, 22 TENN. L. REV. 1030 (1953).

63. 50 Tenn. App. 631, 363 S.W.2d 206 (W.S. 1961).

64. The trend in recent years is toward narrowing the application of imputed negligence. In addition, the total concept of joint enterprise has been subjected to much criticism. See generally, PROSSER, TORTS §§ 54, 65 (2d ed. 1955).

65. *Supra* note 47.

66. *Id.* at 538. See also Campbell v. Hoffman, 371 S.W.2d 174 (Tenn. App. E.S. 1963), where the court quotes another opinion to the effect that frequently "the difference between the two is merely a difference in the choice of language or style of

II. PARTICULAR RELATIONS

A. *Traffic and Transportation*

A good majority of the cases decided during the survey period have involved some aspect of traffic or transportation. No unique problems of unusual significance have been presented, however, and many of the traffic cases have been cited and discussed above in the general treatment of negligence.

Cases frequently involved car collisions.[67] Cars sometimes left the road,[68] or struck pedestrians.[69] Others involved a collision with a bicycle,[70] a sled,[71] and a tractor-trailer.[72] Some were actions by a passenger against a driver;[73] one of these involved a sudden stop.[74] There were cases involving liability for lending a car to an incompetent person[75] and the presumption of agency.[76] One case involved injury from a "go-cart,[77] and another injury while using water skis;[78] the latter was held subject to admiralty rules.

The high degree of care required of a common carrier of passengers was involved in one case;[79] and the responsibility of a carrier of goods in another.[80]

Two cases involved the Railroad Precautions Statute, one before[81] and the other after[82] the 1959 amendment.[83] The second case discusses in detail the effects of the amendment, and concludes that they "are

---

expression." *Id.* at 182. This case involved a licensee on premises, and assumption of risk is also mixed up with a holding that there was no breach of duty to the plaintiff. See generally, Wade, *The Place of Assumption of Risk in the Law of Negligence*, 22 LA. L. REV. 5 (1961).

67. *E.g.*, Cline v. United States, *supra* note 61 (three-car collision); Hobbs v. Livesay, 372 S.W.2d 199 (Tenn. App. E.S. 1963); Horn v. Commercial Carriers, Inc., *supra* note 28 (several cars); McCandless v. Sammons, *supra* note 51 (rear end); Haun v. Brown, *supra* note 52.

68. *E.g.*, Kee v. Hill, *supra* note 40.

69. *E.g.*, Ringer v. Godfrey, *supra* note 53; J. W. Owen, Inc. v. Bost, *supra* note 17; Mead v. Parker, *supra* note 38.

70. James v. Ross, *supra* note 35; Keenan v. United States, 217 F. Supp. 603 (E.D. Tenn. 1963).

71. Davenport v. Robbins, *supra* note 17.

72. Nichols v. Herrin Transp. Co., *supra* note 17.

73. Still v. Townsend, *supra* note 61.

74. Stacks v. Veteran's Cab Co., 366 S.W.2d 539 (Tenn. App. W.S. 1962).

75. Kennedy v. Crumley, *supra* note 42.

76. Caldwell v. Adams, 367 S.W.2d 804 (Tenn. App. M.S. 1962).

77. Swift v. Wimberley, 370 S.W.2d 500 (Tenn. App. W.S. 1963).

78. King v. Testerman, 214 F. Supp. 335 (E.D. Tenn. 1963).

79. Stacks v. Veteran's Cab Co., *supra* note 74.

80. Wayne Knitting Mills v. Delta Motor Lines, 372 S.W.2d 419 (Tenn. App. W.S. 1962).

81. Gilreath v. Southern Ry., 323 F.2d 158 (6th Cir. 1963). The question was whether the deceased was an "obstruction" on the tracks so as to make the statute applicable.

82. Baggett v. Louisville & N.R.R., *supra* note 37.

83. TENN. CODE ANN. §§ 65-1208, -1209 (Supp. 1963).

substantive in character and reduce causes of action arising out of violation of the Statutory Precautions Act to mere common law rights of action."[84]

B. *Landowners*

Toward an invitee (sometimes called a business guest) a landowner owes a duty to use reasonable care to make his premises safe. Two cases involved this principle, but in both the holding was for the defendant. In *Merrell v. Chickasaw Hotel Co.*,[85] a hotel guest, starting to enter a restroom, fell when the door suddenly opened throwing him off balance. It was held that there was not sufficient proof of negligence to go to the jury. In *Ford v. Brandan*,[86] defendants operated an amusement park containing twelve trampolines. Plaintiff, a teenage boy, was pushed by a companion and was seriously injured as a result. Defendants had an attendant, and plaintiff failed to introduce evidence showing "that defendants knew or should have known that horseplay of a nature which caused one of their patrons to be injured was being carried on." A directed verdict for defendant was affirmed.

One who does not attain to the level of invitee is not entitled to claim a full duty to use care to make the premises safe. In *Phillips v. Bush*,[87] plaintiff, a young boy trying to sell handmade potholders at an apartment house, discovered a dynamite cap on the premises, took it away, and was injured. The court held that as a door-to-door salesman he was not an invitee but a mere licensee. It held that there was no breach of duty toward him in failing to remove the cap, and a directed verdict for the defendant was proper. In reaching this result the court repeated again a statement frequently found in the Tennessee cases that a defendant owes to a licensee "no duty except to refrain from willfully injuring him or from committing negligence so gross as to amount to willfulness."[88] Though the actual holding is justified, the quotation is quite unfortunate. It gives an erroneous impression as to the state of the law when it was first pronounced,[89] and it is clearly out of accord with the vast weight of the authority

84. 365 S.W.2d at 904. See Noel, *Torts—1959 Tennessee Survey*, 12 VAND. L. REV. 1350, 1361-63 (1959).

85. 50 Tenn. App. 420, 362 S.W.2d 262 (W.S. 1961).

86. 367 S.W.2d 481 (Tenn. App. E.S. 1962).

87. 50 Tenn. App. 639, 363 S.W.2d 401 (E.S. 1961).

88. *Id.* at 644, 363 S.W.2d at 403, quoting Smith v. Burks, 43 Tenn. App. 32, 37, 305 S.W.2d 748 (M.S. 1957).

89. Some of the earlier cases in the United States used language like this. Perhaps the leading case in Tennessee is Westborne Coal Co. v. Willoughby, 133 Tenn. 257, 180 S.W. 322 (1915). The opinion there used similar language but also contained other statements which indicated that the duty of a landowner to a licensee may be much broader.

in the United States at the present time.[90] It is to be hoped that an opportunity will arise some time soon for the state supreme court to consider the state of the authorities within and outside Tennessee and to prepare a statement which will be less misleading and more in accord with modern understanding of the rule.

In *Campbell v. Hoffman*,[91] plaintiff, finding the door to her dentist's office locked, went in another door to private portions of the same building seeking another way into the office. She caught her heel on a slight elevation on a step, fell and was injured. The court thoroughly nailed down a holding for the defendant by holding (1) that there was no evidence of negligence even if the plaintiff was an invitee, (2) that plaintiff was not an invitee but only a licensee in this part of the building and was therefore owed no duty "except to refrain from willfully or wantonly injuring her," and (3) the action was barred by both contributory negligence and assumption of risk. Little point is therefore seen in discussing any single one of these holdings.

The courts are agreed that even less duty is owed to a trespasser than to a licensee. An exception to this lies in the case of trespassing children, where the doctrine of attractive nuisance has developed. The doctrine was involved in the case of *Pirtle v. Hart's Bakery*,[92] where a 14-year-old boy was playing with others in the back of a bakery, having slipped in past a locked screen door. He crawled into an oven, and the shelves were revolved, with the result that he was crushed. The court held as a matter of law that this was not an attractive nuisance since the place had been locked, but added that there was also no evidence of negligence on defendant's part.[93] In *Mead v. Parker*,[94] the court held that the doctrine of attractive nuisance did not apply to an ice cream truck parked on the street.[95]

The duty of care owed by a landlord to a tenant is considered in the case of *Sneed v. Henderson*,[96] where the landlord's maintenance man made what the jury found was a negligent repair job on a

90. See RESTATEMENT, TORTS §§ 341, 342 (1934); 2 HARPER AND JAMES, TORTS §§ 27.8-27.11 (1956); PROSSER, TORTS § 77 (2d ed. 1955). As to the condition of premises, the duty is to use reasonable care to warn of (or to make safe) known latent dangerous conditions, and to warn of any change in the conditions which would be dangerous to the licensee and which he might reasonably be expected not to discover. As to active conduct, the duty is to use reasonable care to discover the licensee and in carrying on the activity. Very few states today continue to use language like that quoted above.

91. 371 S.W.2d 174 (Tenn. App. E.S. 1963).

92. 372 S.W.2d 209 (Tenn. App. W.S. 1963).

93. See RESTATEMENT (SECOND), TORTS § 339 (Tent. Draft. No. 5, 1960). The amendment to the old section adds a requirement of negligence.

94. 221 F. Supp. 601 (E.D. Tenn. 1963).

95. On trespassing children in general, see Noel, *The Attractive Nuisance Doctrine in Tennessee*, 21 TENN. L. REV. 658 (1950).

96. 211 Tenn. 572, 366 S.W.2d 758 (1963).

refrigerator, with the result that the tenant was asphyxiated. A jury verdict for the plaintiff was affirmed.[97]

In *McFerrin v. Crescent Amusement Co.*,[98] defendant changed the sidewalk in front of its premises by installing terrazo paving. Plaintiff slipped on the surface when it was wet, and was hurt. The court held that a jury question was raised as to whether the defendant was negligent, and the court below was in error in directing a verdict.

C. *Professional Services*

Perhaps a trend is indicated by the fact that there were six cases this year involving actions against doctors or hospitals. Recovery was approved or seemed indicated in five of them.

In *Methodist Hospital v. Ball*,[99] a boy was brought into the emergency room of the hospital as one of several victims of an accident. There was testimony that he was not properly examined but was accused of being drunk. When he asked for treatment, he was strapped to the stretcher and shipped to another hospital. He died within fifteen minutes upon reaching the second hospital, with serious injuries, including a lacerated liver. There was testimony that the method of holding him and lashing him to the stretcher may well have exacerbated his injuries and that he might have recovered if given prompt treatment by defendant. A jury verdict for plaintiff was affirmed, subject to a remittitur.

In *French v. Fischer*,[100] a surgical sponge was left in the abdomen of an 18-day-old infant, following an operation. The doctor sent the circulating nurse out of the room during the operation and this prevented a double check on the number of sponges. A jury verdict for plaintiff was affirmed.

In *Wooten v. Curry*,[101] the defendant performed a hysterectomy on the plaintiff, allowed her to return home and did not have her back for a check-up for six weeks. It was then discovered that adhesion had developed in the wall of the vagina, so that it was practically closed. The doctor was quoted as saying that "he did not know why plaintiff was in this condition; that he did not intend for it to happen 'and if he had examined her sooner he would have seen it.'" A directed verdict for the defendant was reversed and a jury trial indicated.

---

97. On the landlord's duty generally, see Noel, *Landlord's Tort Liability in Tennessee*, 30 TENN. L. REV. 368 (1963).

98. 364 S.W.2d 102 (Tenn. App. M.S. 1962).

99. 50 Tenn. App. 460, 362 S.W.2d 475 (W.S. 1961).

100. 50 Tenn. App. 587, 362 S.W.2d 926 (W.S. 1962), 30 TENN. L. REV. 666 (1963).

101. 50 Tenn. App. 549, 362 S.W.2d 820 (E.S. 1961).

In *Pack v. Nazareth Literary & Benevolent Institution, Inc.*,[102] plaintiff was given a hypodermic of what was supposed to be dramamine in the buttock. It caused excruciating pain, all down the leg, and a sterile abscess developed. There was testimony that dramamine was not known to produce these results, and that the most likely cause was the injection of some irritant. A directed verdict for the defendant was held in error, as a case of res ipsa loquitur was established.

In *Thompson v. Methodist Hospital*,[103] a newborn baby developed an infection known as staphylococcus aureus while in the hospital, and transmitted it to the parents. There was testimony that the infection was in the several Memphis hospitals at the time and that extreme care was used. The supreme court affirmed the action of the court of appeals in setting aside a jury verdict for the plaintiff and dismissing the action.[104]

The liability of a surveyor is considered in *Howell v. Betts*.[105] He had made an error in a survey and description of land. Liability was held not to extend to "an unforeseeable and remote purchaser 24 years after the survey."

Negligence in the rendering of a service was found in *Price v. Firestone Tire & Rubber Co.*,[106] where it was contended that a tire recapper had misaligned a lock ring in an inflated truck tire. The court affirmed a jury verdict for the plaintiff, holding that questions of negligence and contributory negligence were for the jury.

In *Williams v. Tillett Brothers Construction Co.*,[107] an action was brought against a highway contractor for alleged negligence in failing to guard or warn of an excavation. The court held that failure to comply with contract specifications did not constitute negligence per se, and a jury verdict for the defendant was affirmed.

D. *Suppliers*

In *Walton v. Guthrie*,[108] defendant, operator of a drive-in restaurant, sold plaintiff a barbecued ham hock. Plaintiff and his wife ate it after driving away, and the plaintiff became violently ill within the hour. His illness was diagnosed as "gastro enteritis due to food poisoning of an undetermined type." There was medical testimony as to types

102. 50 Tenn. App. 540, 362 S.W.2d 816 (E.S. 1962).
103. 211 Tenn. 650, 367 S.W.2d 134 (1962).
104. On the general subject of malpractice suits, see McCoid, *The Care Required of Medical Practitioners*, 12 VAND. L. REV. 549 (1959). This is one article in a symposium on professional negligence, and it is also found in PROFESSIONAL NEGLIGENCE 13 (Roady & Anderson 1960).
105. 211 Tenn. 134, 362 S.W.2d 924 (1962).
106. 321 F.2d 725 (6th Cir. 1963).
107. 319 F.2d 300 (6th Cir. 1963).
108. 50 Tenn. App. 383, 362 S.W.2d 41 (W.S. 1962), 30 TENN. L. REV. 478 (1963).

of food poisoning, with indication that it could not have been salmonella (which customarily originates in cooked foods) since it would not cause illness until eight to twenty-four hours after ingestion, and that staphylococcic food poisoning, while it may manifest itself within one to four hours, usually does not originate in foods which are kept hot and normally produces an active illness of ouly one day, rather than the three-day illness which plaintiff incurred. There was also considerable testimony as to the care with which the food was barbecued and kept, and the high rating of the restaurant. The lower court directed a verdict for the defendant, and the court of appeals affirmed.

As to the negligence count, the court found that there was no evidence of negligence which could be submitted to the jury. Though it did not speak of the doctrine of res ipsa loquitur, it obviously did regard it as applicable. A second negligence count was based on the Pure Food and Drug Act. Violation of this act has been previously held to constitute negligence per se,[109] but the court held this inapplicable "because there is not a scintilla of evidence in the record that said ham hock was adulterated or contained deleterious ingredients."[110]

A third count was based on implied warranty, and the court might have handled it on the same basis as the Food Act by saying that there was no proof that the food was unwholesome. Instead, it relied upon the unreported supreme court opinion of *Pettricelli v. Green*,[111] holding that the supplying of food to be eaten on the premises does not amount to a sale but the rendering of a service, so that an implied warranty does not apply. This is quite unfortunate, since this rule, whatever its original early historical basis when an innkeeper did not sell food but "uttered" it with the lodging of the person and stabling of the horse, is now in a distinct minority,[112] with the trend away from it.[113] It is to be hoped that the statement will subsequently be treated as dictum, since the court felt that there was no evidence of

109. White v. East Tennessee Packing Co., 15 CCH NEG. CAS. 186 (Tenn. App. E.S. 1947), *aff'd*, 15 CCH NEG. CAS. 272 (Tenn. 1947). Neither case was officially reported. *Cf.* Jones v. Mercer Pie Co., 187 Tenn. 322, 214 S.W.2d 46 (1948).

110. 50 Tenn. App. at 392, 362 S.W.2d at 44.

111. Pettrucelli v. Green (Tenn. 1925), unreported opinion cited and described in Bell v. Bowers Stores, Inc., 3 Tenn. App. 590, 598 (W.S. 1926).

112. The statement in the *Walton* case that *Pettrucelli v. Green* "adopted the ruling of the weight of authority in this country" is in error.

113. For full treatment see DICKERSON, PRODUCTS LIABILITY AND THE FOOD CONSUMER §§ 3.1, 3.2 (1951); FRUMER AND FRIEDMAN, PRODUCTS LIABILITY §§ 24.01, 24.02 (1960); 2 HARPER AND JAMES, TORTS 1577 (1956) ("Some courts still apply this quaint concept. . . . Others more realistic than antiquarian, find a sale and imply a warranty"); PROSSER, TORTS 495-96 (2d ed. 1955) ("theory is entirely unsuited to modern restaurants").

unwholesomeness, and that Tennessee can soon be in accord with the modern majority rule.[114]

Tracy v. Finn Equipment Co.,[115] involved an injury sustained from a mulching machine manufactured by defendant. The trial court left to the jury the questions as to whether there was negligence in the design of the machine and whether the plaintiff was contributorily negligent; and the appellate court affirmed a verdict for the plaintiff.[116]

In *Brown v. Hudson*,[117] defendant bailed a defective dump truck, and decedent was killed trying to repair it, having crawled under the raised truck bed. The opinion properly indicates that the bailor is under duty to exercise reasonable care to see that the article is in safe condition, but it holds that when the defect has been discovered by the bailee and he deliberately and negligently subjects himself to the danger involved his action cuts off liability.

Kennedy v. Crumley,[118] holds that it is negligence to bail an automobile to an incompetent driver and that the bailor can be liable to a third party. A jury verdict for the plaintiff was reversed, however, because it was not shown that defendant knew of the bailee's incompetency.

Fowler v. Tennessee Valley Authority,[119] involved the liability of a supplier of electricity. It was held that there was no negligence. On the other hand, in *Martin v. McMinnville*,[120] a distributor was held liable when an uninsulated electric wire was close to the roof of a building.

III. MISCELLANEOUS

A. *Governmental Liability*

Several cases involved actions under the Federal Tort Claims Act, which permits recovery against the Federal Government if a private person would be liable in negligence, subject, of course, to certain exceptions.

In *Cline v. United States*,[121] a mail carrier suddenly came out into the highway in front of a car, causing a three-car collision; liability

114. There is a good comment on the *Walton* case in 30 TENN. L. REV. 478 (1963).

115. 310 F.2d 436 (6th Cir. 1962).

116. See generally, Noel, *Products Liability of a Manufacturer in Tennessee*, 22 TENN. L. REV. 985 (1953); and see Noel, *Manufacturer's Negligence of Design or Directions for Use of a Product*, 71 YALE L.J. 816 (1962).

117. 50 Tenn. App. 658, 363 S.W.2d 505 (M.S. 1962), 30 TENN. L. REV. 663 (1963).

118. 367 S.W.2d 797 (Tenn. App. M.S. 1962), 30 TENN. L. REV. 658 (1963). See also, Caldwell v. Adams, 367 S.W.2d 804 (Tenn. App. M.S. 1962), involving application of a presumption of agency.

119. 321 F.2d 566 (6th Cir. 1963).

120. 369 S.W.2d 902 (Tenn. App. M.S. 1962), 31 TENN. L. REV. 275 (1964).

121. 214 F. Supp. 66 (E.D. Tenn. 1962)

was imposed. In *Keenan v. United States*,[122] there was a collision between a mail truck and a bicycle; it was held that the truck driver was not negligent.

Stratton v. United States,[123] announces that the "general rule in Tennessee is that negligence, to be actionable, must result in damage to the plaintiff which the defendant could reasonably have anticipated or foreseen."[124] It adds that the Federal Tort Claims Act does not impose strict liability upon the government for extrahazardous activities, and that the government was not liable for negligence of an employee of a corporation to which it had entrusted a governmental center. A similar point was involved in *Mahoney v. United States*,[125] where the court spoke not of strict liability for ultrahazardous activities but of nondelegable duties. It suggested that recovery might be possible on this basis; but in a later hearing it found that the plaintiffs had failed to prove that their illnesses were produced by radiation or toxic gases.[126]

B. *Joint Tortfeasors*

In *O'Rear v. Oman Constr. Co.*,[127] a covenant not to sue given to one joint tortfeasor was held not to release the other. If the second tortfeasor had been liable only derivately, as principal for the other, the court indicates, he would have been released, but here there was independent liability. *Alabama Highway Express, Inc. v. Luster*[128] holds that inconsistent judgments cannot stand.

In *Chamberlain v. McCleary*,[129] contribution was not allowed against the husband of the original plaintiff because of his immunity. In *Roberson v. Bitner*,[130] indemnity was allowed. Three other cases involved attempts to set aside a release on the ground of mistake or fraud.[131] All four of these cases are treated in the article on Restitution.[132]

C. *Wrongful Death*

Sneed v. Henderson,[133] holds that an illegitimate child can maintain a wrongful death action for the death of her mother. *Anderson v.*

122. 217 F. Supp. 603 (E.D. Tenn. 1963).
123. 213 F. Supp. 556 (E.D. Tenn. 1962).
124. *Id.* at 560.
125. 216 F. Supp. 523 (E.D. Tenn. 1962).
126. Mahoney v. United States, 220 F. Supp. 823 (E.D. Tenn. 1963).
127. 210 Tenn. 651, 362 S.W.2d 217 (1962).
128. 371 S.W.2d 182 (Tenn. App. M.S. 1963).
129. 217 F. Supp. 591 (E.D. Tenn. 1963).
130. 221 F. Supp. 279 (E.D. Tenn. 1963).
131. Short v. Louisville & N.R.R., 213 F. Supp. 549 (E.D. Tenn. 1962) (fraud); Warren v. Crockett, 211 Tenn. 173, 364 S.W.2d 352 (1962) (mistake), 31 TENN. L. REV. 259 (1964); Collier v. Walls, 369 S.W.2d 747 (Tenn. App. W.S. 1962) (mistake).
132. See Reed, *Restitution—1963 Tennessee Survey*, 17 VAND. L. REV.*** (1964).
133. 211 Tenu. 572, 366 S.W.2d 758 (1963).

Anderson,[134] holds that a father is entitled to recover under the statute although he had abandoned the deceased.

D. *Nuisance*

In *McFerrin v. Crescent Amusement Co.*,[135] where a theater owner used terrazo for paving a part of the sidewalk in front, the question of whether this created a nuisance was held to be for the jury.

134. 211 Tenn. 566, 366 S.W.2d 755 (1963).
135. 364 S.W.2d 102 (Tenn. App. M.S. 1962).