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Torts -- 1962 Tennessee Survey

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Most of the tort cases during the survey period do not involve any significant changes in the law. Mindful of the necessity of stability and predictability, and of a tradition of even-handed continuity, our courts have been naturally hesitant to upset established rules. However, in a few areas (injuries to unborn children, application of the immunity doctrine to a minor whose disability is removed, scope of liability for negligent misrepresentation) the courts have been faced with new problems and changed conditions. In these areas the decisions frankly accept responsibility for some development of legal doctrine to keep it responsive to the needs of the times, thus maintaining both creativity and continuity in the law of torts. So the supreme court did not hesitate to say in its decision involving harm to unborn children, "While we adhere strongly to the doctrine of stare decisis, we believe even more strongly in the growth and development of the law to the end that every party who suffers a wrongful injury may have a remedy for redress thereof."[1]

I. NEGLIGENCE

A. *The Standard of Care*

1. *Minor Defects in Pavement.*—In *Great Atlantic & Pacific Tea Co. v. Lyle*,[2] the plaintiff parked her car between indicated lines in a parking space maintained by the defendant grocery company as a lessee. She took one or two steps after getting out of her car and then slipped and fell as she stepped into a depression in the asphalt paving of the lot. It was conceded that the plaintiff was an invitee, toward whom the defendant had a duty of due care to keep the premises in safe condition; the principal defense was that the defect was too trivial, or too obvious, to constitute an unreasonable danger. There was evidence that the depression was about twelve to fifteen inches across, and from six to eight inches deep, and was located at a point where customers normally would walk. The plaintiff testified that she did not see the depression because it was in the shadow cast by her car, and was of the same texture as the rest of the lot, with no break in the asphalt to call attention to it.

Under these circumstances a verdict for the plaintiff was sustained. With reference to the defense that the defect was trivial, the court pointed out that the earlier cases do not turn solely on the depth or height of a defect in the pavement or sidewalk, but on all the surrounding circumstances. It was concluded that under this test there was no need to take the case from the jury as has been done in some

1. Shousha v. Matthews Drivurself Serv., Inc., 358 S.W.2d 471, 473 (Tenn. 1962). *Cf.* Keeton, *Creative Continuity in the Law of Torts*, 75 HARV. L. REV. 463 (1962).
2. 351 S.W.2d 391 (Tenn. App. E.S. 1961).

of the sidewalk cases,[3] on the grounds that the defect was too insignificant to be actionable. As to the point that the danger was too obvious, the court found enough evidence to support a conclusion that the depression was not plainly visible, with the result that the plaintiff need not be held guilty of contributory fault as a matter of law.

2. *Prevention of Swells from Boats.*—In view of the increasing amount of boating activity in this state, it is interesting to note that in an action based on the wrongful death act[4] a federal court found there was a duty to avoid causing waves or swells which may harm another boat. In *Byrd v. Belcher*[5] the court said that: "One operating a boat who sees, or should see, another boat, whether moored or navigating, in a position where damage to such other boat from the swell or wave wash from the first boat is foreseeable, must reduce speed and direct the course of the first boat away from the position of the second boat."[6] However, the court, acting as a trier of fact, found for the defendant because of the absence of convincing evidence that defendant's boat passed in dangerous proximity to the decedent's craft, or that the wave which overturned the fourteen-foot craft owned by decedent in fact came from the defendant's boat rather than from some other craft. With reference to jurisdiction, the court found that where death results from a maritime tort committed on navigable waters within a state, the admiralty courts may maintain a libel in personam, when the state statutes provide for a wrongful death action. The court applied the common law of Tennessee to the action, including the principle that proximate contributory negligence would have defeated recovery if negligence on the part of the defendant had been established.

3. *Effect of Customary Failure To Protect Against Noise.*—In connection with proof of negligence under the Federal Employers' Liability Act,[7] it was asserted in *Rubley v. Louisville & Nashville R.R.*[8] that the deafness of a switchman, characterized by his physician as a nerve type loss of hearing, was due to exposure over a period of years to noise from diesel engines. It was further alleged that the failure of the company to institute a hearing conservation program and to furnish the plaintiff with ear-protective devices, which an audiologist thought should be used, constituted evidence that the defendant had not used due care to furnish the plaintiff with a safe place to work.

3. See City of Memphis v. Dush, 199 Tenn. 653, 288 S.W.2d 713 (1956), 24 TENN. L. REV. 1047 (1957).
4. TENN. CODE ANN. § 20-607 (1956).
5. 203 F. Supp. 645 (E.D. Tenn. 1962).
6. *Id.* at 648.
7. 53 Stat. 1404 (1939), 45 U.S.C. §§ 51-59 (1958).
8. 208 F. Supp. 798 (E.D. Tenn. 1962).

It appeared, however, that this was the first claim of this kind by any of the railroad's 16,000 employees, and that there was no indication of any similar claim throughout the entire industry. There likewise was no evidence that any railroad had inaugurated the hearing conservation program advocated by the audiologist who testified for the plaintiff. Finally, a railroad supervisor testified that the use of ear plugs would increase the injury rate. Under these circumstances the federal district judge held there was no substantial evidence of negligence and granted defendant's motion to set aside a verdict for the plaintiff, stating that the "defendant is not to be judged by the standards that a sound expert would promulgate, subsequent to the injury, but by customary standards recognized by the industry at the time of the plaintiff's injury."[9]

This type of case presents difficulties. Two specialists, one a physician, the other an audiologist, indicated that the railroad had a sound problem about which something should be done. If simple audiogram tests would reveal that particular employees are suffering a hearing loss and should be rotated or protected with ear-protective devices which would filter out the damage producing noises, perhaps an adverse verdict in a case like this would help get the railroads in motion. At any rate, in future suits it would seem unsafe to rely on the points that no previous claim of this kind has been made or that the railroads have not yet been apprised of this hazard. It is apparent in this connection that the supreme court has gone to great lengths in upholding jury findings of negligence under the federal act on the basis of rather slender evidence.[10] While in most situations customary prudence is indeed ordinary prudence, occasionally "a whole calling may have unduly lagged in the adoption of new and available devices."[11]

B. *Proof of Negligence*

1. *Res Ipsa Loquitur*—(a) *Start of Fire From Gas Furnace.*—The *res ipsa loquitur* doctrine was applied to a new situation in *Southern*

9. *Id.* at 804.

10. For example, in the recent "bug bite" case, Gallick v. Baltimore & O.R.R., 372 U.S. 108 (1963), a verdict for $625,000 was reinstated on the ground that a jury could find negligence in the failure to clear out a stagnant pool from which may have come an insect which apparently caused an infection eventually necessitating amputation of the plaintiff's legs. That opinion makes it clear that the absence of previous accidents of the same nature will not preclude a finding of negligence.

11. The J. T. Hooper, 60 F.2d 737, 740 (2d Cir. 1932) (failure of a tug boat line to install radios from which it could have received weather reports). See also Nashville, C. & St. L. Ry. v. Wade, 127 Tenn. 154, 159-60, 153 S.W. 1120, 1121 (1912), stating that evidence of custom is not controlling, since "a customary way may be the negligent way, and at last the jury must determine whether under all the facts

Gas Corp. v. Brooks.[12] There the defendant had installed two thermostatically controlled gas floor furnaces in a church, along with a storage tank for propane gas. After installation the furnaces were lighted, all equipment was tested by defendant's employees, and everything seemed to be working properly. When the switches were off no gas was supposed to come into the furnace except enough to burn the pilot light. The thermostats were self-energizing, and no part of the furnace equipment was connected with the electric wiring in the building.

Less than two hours after the defendant's employees left the church it was discovered to be on fire and soon burned down completely. Under these circumstances the court held that the case properly was submitted to the jury, which found for the owners of the church, under the *res ipsa* doctrine.

One traditional requirement for application of the doctrine is that the harm be caused by an instrumentality within the exclusive control of the defendant. On this point the court stated that there was no "suggestion that any of the equipment installed by the defendant was in any manner tampered with after being installed by the defendant's employees and therefore, the defendant must be considered as continuing in the exclusive control and management of said equipment at the time of the fire."[13] With reference to another basic requirement for the doctrine, that the injury be of a kind which ordinarily does not occur without negligence, the court considered that an inference of negligence on the part of defendant could be made in the absence of any explanation by the defendant as to how the fire started. It was found that there was no conclusive rebuttal of this inference by testimony that the gas-burning equipment was properly installed, or by the testimony of a fire chief that the fire started in the roof of the church rather than near the furnaces.

This decision may carry the *res ipsa* doctrine a little further than earlier cases. In *Martin v. Braid Electric Co.*,[14] for example, the court declined to apply the *res ipsa* doctrine in a case where a fire may have been caused by a defective electric fan. In a case from another jurisdiction, *Rafferty v. Northern Utilities Co.*,[15] the *res ipsa* doctrine was applied when a fire had broken out shortly after the installation of a gas furnace, but there was substantial evidence in that case to show that the fire originated in the immediate vicinity of the furnace.

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the motor was managed in such a way as a person of reasonable prudence would have managed it."

12. 359 S.W.2d 570 (Tenn. App. W.S. 1961).

13. 359 S.W.2d at 581.

14. 9 Tenn. App. 542 (M.S. 1929).

15. 73 Wyo. 287, 278 P.2d 605 (1955).

In *Coca-Cola Bottling Works v. Sullivan*,[16] the court required for application of the doctrine that " 'the nature and circumstances of the accident must be of such a character that there could be no reasonable inference, but that the injury complained of was due to the negligence of defendant. . . .' "[17] More recent decisions, however, like the present one, seem to regard it as enough in situations where tampering is unlikely that the accident be one which "does not usually occur without negligence" on the part of the defendant.[18]

The plaintiff was aided by a doctrine resembling *res ipsa* in *Miller v. Cincinnati, New Orleans & Texas Pacific Ry.*,[19] a case arising under the Federal Employers' Liability Act[20] and based on negligence in maintaining equipment. After finding that the plaintiff must establish actual or constructive knowledge of a dangerous condition by the employer, the court proceeded to considerably ease the plaintiff's problem of proof by finding that once it was established that the equipment was defective at the time of the accident and had been in the custody of the plaintiff for some time prior thereto, then the defendant had the burden of going forward with proof negating actual or constructive knowledge of the defect. Pointing out that such proof would be peculiarly within the possession of the defendant, the court remarked: "Although this is not a *res ipsa* case, much of the same rationale as would apply in a res ipsa loquitur case would apply with equal logic to this situation."[21] It was also pointed out that the precise injury need not be foreseen; it is enough that the defendant "might reasonably have foreseen that *an* injury might occur from the existence of the defective equipment."[22]

(b) *Fall of Commercial Aircraft.*—A few years ago the doctrine of res ipsa loquitur was applied for the first time in this jurisdiction to the fall of a commercial aircraft, in *Capital Airlines, Inc. v. Barger*.[23] The doctrine again was applied, to a somewhat different type of crash, in *Southeastern Aviation, Inc. v. Hurd*.[24] The plane there involved was equipped with only one automatic direction finder (A.D.F.) and there was testimony that the most up-to-date aircraft were equipped with two A.D.F.'s. More significantly, there was testimony that as the plane approached Nashville its single A.D.F. was not functioning properly. The pilot nevertheless left that city for the Tri-Cities Air-

16. 178 Tenn. 405, 158 S.W.2d 721 (1942).
17. *Id.* at 417, 158 S.W.2d at 726.
18. Sullivan v. Crabtree, 36 Tenn. App. 469, 474, 258 S.W.2d 782, 784 (M.S. 1953).
19. 203 F. Supp. 107 (E.D. Tenn. 1962).
20. 53 Stat. 1404 (1939), 45 U.S.C. §§ 51-59 (1958).
21. 203 F. Supp. at 112.
22. *Id.* at 113.
23. 47 Tenn. App. 636, 341 S.W.2d 579 (E.S. 1960), 28 TENN. L. REV. 282 (1961).
24. 355 S.W.2d 436 (Tenn.), *appeal dismissed for want of a substantial federal question*, 371 U.S. 21 (1962).

port, after informing another pilot that the plane's A.D.F. was "malfunctioning." As the plane approached the Tri-Cities Airport there was snow and fog, so that an instrument landing became necessary. The plane was cleared to land, but in response to subsequent inquiry from the tower operator as to position and altitude, the pilot replied, "'I am *having trouble with my ADF. I didn't pick up the outer marker, either aural or visual.*'"[25] The plane flew some twenty miles east of the airport and crashed into the side of Holston Mountain. There were no survivors.

A wrongful death action was brought by the father of a passenger who had been killed along with her husband. A jury returned a verdict for $145,000 compensatory damages, and $5,000 punitive damages. This verdict was sustained as to the compensatory damages, but not as to the punitive damages. With reference to the punitive damages, it was held that while the pilot and his first officer were negligent in undertaking to fly a plane that was not airworthy, "there . . . [was] nothing to show such gross and wanton negligence on their part as to evince conscious indifference to consequences,"[26] particularly since "their own lives were at stake, and they evidently expected to make a safe landing."[27]

In affirming the judgment for compensatory damages, the court observed that the airline, as a common carrier, owed to its passengers "a duty of the highest degree of care consistent with the practical operation of the plane."[28] This duty extends to the equipment and maintenance of the plane, as well as to its actual operation. Since two A.D.F.'s were needed on a plane "to meet the highest skill of the art,"[29] and here not even the single one was operating properly, there was ample evidence of negligence to take the case to the jury. It was further found that the trial judge had properly submitted the case to the jury under the *res ipsa* doctrine, on the authority of *Capital Airlines, Inc. v. Barger*. It was urged in that connection that the defendant lacked the exclusive control necessary for application of the *res ipsa* doctrine because the aviation agency which operated the control tower was giving the pilot instructions. The court rejected this contention, since the defendant's employees had exclusive physical control of the plane itself, even to the point that they were free to disregard safety regulations. It was further held that the plaintiff did not lose the benefit of the *res ipsa* doctrine by the fact that he alleged specific acts of negligence which he failed to prove.

The defendant raised a jurisdictional issue based on the fact that

25. 355 S.W.2d at 445.
26. *Id.* at 447.
27. *Ibid.*
28. *Id.* at 446.
29. *Id.* at 445.

violations of regulations of the Civil Aeronautics Board were alleged. It was held, however, that the suit was based in substance on common law negligence, with the violations of federal regulations merely adding one more ground of negligence. Consequently the decision did not turn on an issue of federal law and was not removable to the federal court as a case under the Constitution or laws of the United States.

2. *Slippery Floor—When Notice Not Essential.*—When a customer in a store or other business premises falls because of some obstruction or slippery substance on the floor, ordinarily it is necessary to establish that the defendant had notice of the condition, or that it had existed long enough that the defendant should have discovered it.[30] Where, however, the dangerous condition is traceable to the defendant or his agents, the issue of notice may be irrelevant, as illustrated by the recent decision in *Kinser v. Rich's, Inc.*[31] There a bottle of oily lotion had been placed on the cosmetics counter in order that customers could sample its contents. They did so by pressing a plunger to squirt some of the lotion on their hands. As the plaintiff came up to the cosmetics counter she slipped, fell, and was injured. She testified that after the fall she saw oily or creamy substances on the floor. It was asserted that employees and customers of the defendant had caused the substances to fall on the floor from the sample bottle. Recovery was allowed, with the approval of an instruction by the trial judge that if the defendant "through the acts of its employees caused this portion of the floor in its store to be slippery and dangerous, the question of notice was immaterial."[32]

The situation here is different from that in *Hill v. Castner-Knott Dry Goods Co.*,[33] where the plaintiff slipped on a dress improperly left hanging from a counter into the aisle of the store. There the plaintiff failed to recover in the absence of notice because proof was lacking that the dress had been left in the aisle by an employee rather than by a customer. In the *Kinser* case, it was clear that the dangerous situation was created by the defendant's employees. Even though some of the customers may have handled the sample bottle carelessly, this would not place the result outside the risk created by the defendant's conduct, since a jury could find that such carelessness on the part of the customers was foreseeable. While it may be customary to permit a lotion to be sampled in this manner, and while customary prudence generally is ordinary prudence, that is not always the case.

30. Bell v. F.W. Woolworth Co., 44 Tenn. App. 587, 316 S.W.2d 34 (W.S. 1957).

31. 300 F.2d 902 (6th Cir. 1962).

32. *Id.* at 902.

33. 25 Tenn. App. 230, 166 S.W.2d 638 (M.S. 1942).

Ultimately the question of whether a foreseeable danger has been created is one for juries and courts.[34]

C. *Result Within the Risk or Proximate Cause*

1. *Foreseeability of Rescue at Swimming Pool.*—A swimming pool accident led to an unusual suit in *Dan v. Bryan.*[35] The owner of the pool, Sheriff Reeves of Memphis, was undertaking to pump it out, using an electric pump lent to him by his friend Bryan. Some insulation on one of the wires attached to the pump was defective, but there was no evidence that this fact was known to Bryan or to Reeves, who had the pump checked by a electrician after borrowing it from Bryan. While Reeves and Bryan were trying with much difficulty to get the pump into operation, Reeves entered the pool and held his hand on an iron pipe to which the pump was connected. About a minute later, after Bryan had primed the pump and turned it on by connecting an extension cord, Bryan saw Reeves lying in the water face down. He was unable to pull his friend, a much heavier man, out of the pool, and both Bryan and Mrs. Reeves called for help, thinking that Reeves had suffered a heart attack. A neighbor, Dan, heard the cries, ran to the pool and jumped in to render assistance. He also was electrocuted.

The plaintiff, Dan's widow, brought an action for the death of her husband against the estate of Reeves and against Bryan, alleging negligence on the part of both Reeves and Bryan. The trial court directed a verdict for the estate of Reeves, the pool owner, but let the case go to the jury against the supplier of the pump, Bryan. The jury found for Bryan, but it was alleged in that connection that there was misconduct on the part of one of the jurors and on the part of Bryan himself. On appeal it was held that a verdict should have been directed in favor of both defendants. Referring to the testimony in the case, the court stated that "not one line of it establishes any duty on the part of either defendant Reeves or defendant Bryan towards the deceased, Melwyn B. Dan, violation of which entitles Mrs. Dan to a right of action."[36] It was concluded that "even if we assume that both defendants were guilty of negligence"[37] a jury could not find liability to Dan, the rescuer.

It may be that on its face this is not a strong case for application of the danger-invites-rescue doctrine, although at least in the case of Bryan, a supplier of restaurant equipment, including electrical equipment, perhaps a jury could properly have found some lack of

34. See note 11 *supra.*
35. 354 S.W.2d 483 (Tenn. App. W.S. 1961), 30 TENN. L. REV. 305 (1963).
36. 354 S.W.2d at 486.
37. *Ibid.*

due care in his failure to discover the defective insulation, or the need of a "ground" for the pump, or the need to disconnect the pump before Dan entered the pool. In any event, the court's assumption that even if Reeves and Bryan were careless, still there would be no cause of action for Dan's death, is puzzling. The opinion refers to the act of the rescuer as an intervening cause. There has been wide acceptance, however, of the view that reasonable efforts to save another are not to be regarded as an intervening cause.[38] As stated in a leading case, "the risk of rescue, if only it be not wanton, is born on the occasion. The emergency begets the man."[39] This general doctrine clearly has been accepted in Tennessee.[40] It perhaps would have been necessary to carry the matter a step further here, at least in the case of Reeves, for he may have been careless only with reference to his own safety. The court assumes that under these circumstances any fault on the part of Reeves was carelessness only toward himself, remarking that "he paid for that negligence with his life."[41] There now is considerable authority, however, "that a person who carelessly exposes himself to danger . . . in a place where others may be expected to be, does commit a wrongful act toward them in that it exposes them to a recognizable risk of injury."[42] To support the view that Reeves was under no duty, the court says that Dan was not an invitee of Reeves, who already was dead at the time of the call for help; but since Dan came to the premises in response to a desperate call both from Mrs. Reeves and Bryan, he would seem to be something more than a mere licensee. Probably this decision is not intended to limit the "danger-invites-rescue" doctrine in cases where the accident resulting from the carelessness of the endangered party is of a less unusual character.

2. *Misuse of Pistol Sold to Minor in Violation of Statute.*—Another difficult case concerning proximate causation or result within the risk is *Ward v. University of the South.*[43] There a university student, Sawyer, had purchased a pistol from one of the defendants, a gunsmith. While Sawyer was "negligently and recklessly" toying with the pistol in his dormitory room, he accidently caused it to fire, and fatally injured another student, Ward. Suit was brought against the

38. PROSSER, TORTS § 49, at 277 (2d ed. 1955).

39. Wagner v. International Ry., 232 N.Y. 176, 133 N.E. 437 (1921).

40. Mobile & O.R.R. v. Ridley, 114 Tenn. 727, 86 S.W. 606 (1905); Chattanooga Light & Power Co. v. Hodges, 109 Tenn. 331, 70 S.W. 616 (1902); Williams v. Town of Morristown, 32 Tenn. App. 274, 222 S.W.2d 607 (M.S. 1949).

41. 354 S.W.2d at 486.

42. BOHLEN, STUDIES IN THE LAW OF TORTS 569 n.33 (926); *accord*, Butler v. Jersey Coast News Co., 109 N.J.L. 255, 160 Atl. 659 (1932); Carney v. Buyea, 271 App. Div. 338, 65 N.Y.S.2d 902 (1946); Longacre v. Reddick, 215 S.W.2d 404 (Tex. Civ. App. 1948).

43. 354 S.W.2d 246 (Tenn. 1962), 30 TENN. L. REV. 317 (1963).

university and some of its officials for negligence in failing to enforce its regulation prohibiting students from having firearms, and in failing to prevent students from purchasing firearms from the defendant gunsmith located in a nearby town. With reference to the gunsmith himself, it was alleged that he was negligent in selling a pistol to a minor in violation of law, which provides:

> Any person who sells, loans, or gives to any minor a pistol, bowie knife, dirk, hunter's knife, or like dangerous weapon, except a gun for hunting, is guilty of a misdemeanor, and shall be fined not less than one hundred dollars ($100) and be imprisoned in the county jail, in the discretion of the court.[44]

This negligence was asserted to be the proximate cause of Ward's death.

It was held that demurrers with respect to both defendants were properly sustained. The principal basis for the decision was that the act of Sawyer was the sole proximate cause of the accident. In that connection the court states that Sawyer "at the age of 19 and a sophomore at the University, was capable of comprehending the full import and consequences of his deed."[45] This case, like *Dan v. Bryan*,[46] presents a question as to what harm is within the risk created by the defendant's conduct. Since the default of the university was concerned only with a self-imposed regulation, the case against it does not seem a strong one. With reference to the gunsmith, the matter is somewhat less clear. The legislature chose to include within the scope of the prohibitive statute all minors, including those close to majority, and apparently one purpose of the legislation was to protect third persons from harm from the careless handling of dangerous weapons by minors generally. Whether the intervening negligence of Sawyer should be regarded as placing the result outside the risk depends on whether or not his conduct was foreseeable.[47] The Tennessee courts have been inclined to regard an intervening act which involves deliberate assumption of risk as unforeseeable and as placing the result without the risk,[48] but sometimes careless or even reckless conduct may be regarded as foreseeable.[49] In favor of the gunsmith, however, is the consideration that the legislature may not have intended to impose the burden of a heavy civil liability as well as criminal responsibility in the case of a sale to minors of advanced age, at least in the absence of any allegation that the minor is in-

44. TENN. CODE ANN. § 39-4905 (1956).
45. Ward v. University of the South, 354 S.W.2d 246, 250-51 (Tenn. 1962).
46. See pp. 889-90 *supra*.
47. RESTATEMENT, TORTS § 447(a) (1934); PROSSER, TORTS § 49, at 272 (2d ed. 1955).
48. Ford Motor Co. v. Waggoner, 183 Tenn. 392, 192 S.W.2d 840 (1945).
49. Justus v. Wood, 348 S.W.2d 332 (Tenn. 1961), 29 TENN. L. REV. 468 (1962).

experienced or otherwise incompetent. A Georgia case leaving the issue of proximate cause to the jury involved a considerably younger child, age "about fourteen."[50] As the court in the instant case points out, the law does not require the defendant "to anticipate and provide against what is unusual or unlikely to happen, or that which is remotely possible. . . ."[51]

In view of Sawyer's advanced age, this accident does seem rather unusual and in this type of case perhaps much is to be said for allowing flexibility of judicial action as to the effect of violation of criminal statutes in establishing civil liabilty.[52] The decision does not mean, however, that the court may not in other situations where a statute has been violated let the case go to the jury on the proximate cause or result-within-the-risk issue, or even, in some cases, direct a verdict against the violator of a criminal statute designed to protect a class of persons against the type of harm which occurs.

3. *Prenatal Injury.*—A few years ago in the case of *Hogan v. McDaniel*[53] it was decided, in a case of first impression, that an unborn viable child who failed to survive a traffic accident in which his mother was injured was not within the protection of the wrongful death statute.[54] This year the court was faced, in *Shousa v. Matthews Drivurself Service, Inc.*,[55] with a case where triplets were born alive two days after a truck was recklessly driven into the rear of a car occupied by an expectant mother. It was alleged that each unborn child "was at the time riding as a guest en ventre sa mere in the automobile operated by his mother."[56] It was further alleged that each child received serious injuries from which it died soon after birth. The trial court sustained a demurrer on the authority of *Hogan v. McDaniel.*

This action was reversed by the supreme court. The decision in *Hogan v. McDaniel* was restricted to its actual holding that the wrongful death act "did not entitle the next of kin or parents of an unborn child to sue for injuries sustained which brought about its death before it was born."[57] In an opinion which carefully considers recent decisions throughout the country and the views of various writers,[58] the court concluded that a viable infant may, upon being

50. Spires v. Goldberg, 26 Ga. App. 530, 106 S.E. 585 (1921).
51. 354 S.W.2d at 250.
52. RESTATEMENT (SECOND), TORTS § 286 (Tent. Draft No. 4, 1959). *Cf.* Wade, *Torts—1961 Tennessee Survey (II)*, 15 VAND. L. REV. 952, 957 (1962).
53. 204 Tenn. 235, 319 S.W.2d 221 (1958). See Noel, *Torts—1959 Tennessee Survey*, 12 VAND. L. REV. 1350, 1365-66 (1959).
54. TENN. CODE ANN. § 20-607 (1956).
55. 358 S.W.2d 471 (Tenn. 1962), 30 TENN. L. REV. 309 (1963).
56. 358 S.W.2d at 472.
57. *Id.* at 473.
58. 2 HARPER & JAMES, TORTS § 18.3, at 1030 (1956); PROSSER, TORTS § 36, at 175

born alive, recover for prenatal injuries negligently inflicted, and consequently for wrongful death. The rule denying recovery was criticized as "contrary to that justice which law seeks to save and promote."[59]

Since in the present case the infants were viable, that is, capable of living outside the uterus, the decision naturally was restricted to that situation. It may be, however, that liability will be extended to a non-viable foetus, in accordance with suggestions in standard treatises, since it is clear that a child is in existence and subject to prenatal injury for a considerable time before it becomes viable. It has been stated in a leading text with reference to the distinction between a viable and non-viable child that "there appears to be no good reason for the distinction, which will inevitably involve difficult questions of proof."[60]

D. *Particular Relationships*

1. *Possessors of Land—Duty To Warn.*—In *Broome v. Parkview, Inc.*,[61] the operator of a bowling alley was having some remodeling work done. The contractor, to help maintain heat, had suspended a non-transparent plastic curtain from the roof and had later removed the wall behind the curtain. An invitee at the alley leaned against the curtain, as she had in the past. Since the wall had been removed, and the curtain provided little support, she fell into a construction area behind the curtain and was injured.

It was held on appeal that a verdict was improperly directed in favor of the proprietor and the contractor. After finding that both defendants were under a duty to use due care for the protection of business guests, the court found that there was substantial evidence of negligence on the part of each defendant either in failing to correct a dangerous condition or in permitting the use of the bowling alleys without adequate warning. With reference to the principal defense that the plaintiff had assumed an obvious risk, it was held that a jury could find that this danger was not obvious, "in view of the fact that proof showed that the curtain was originally hung over the solid wall and permitted to remain there for several days before a portion of the wall was removed, and in view of the fact that the curtain

(2d ed. 1955); Note, *Pre-natal Injuries: Damnum Absque Injuria?*, 26 TENN. L. REV. 494 (1959); Note, *Tort Actions for Injuries to Unborn Infants*, 3 VAND. L. REV. 282, 287 (1950).

59. 358 S.W.2d at 476.

60. PROSSER, TORTS § 36, at 175 (2d ed. 1955). See also 2 HARPER & JAMES, TORTS § 18.4, at 1031 (1956), where it is said concerning the viability requirement that "any such rule would involve the courts in serious and controversial questions that should be encountered only if there is real need for it."

61. 359 S.W.2d 566 (Tenn. App. E.S. 1962), 30 TENN. L. REV. 474 (1963).

was opaque, was hung in front of the wall, and the wall could be seen extending from behind the plastic sheet and continuing to the rear of the building."[62]

2. *Landlord's Duty Under Covenant To Repair.*—The Tennessee courts at an early date adopted the modern view that where a landlord covenants to repair premises, he is liable to the tenant and any others on the land with the tenant's consent for harm caused by dangerous disrepair.[63] The recent decision in *Browning v. St. James Hotel Co.*[64] applies this rule to a case where a defective air conditioner "iced up" repeatedly and leaked water onto a terrazzo office floor. The case makes it clear that the landlord's duty extends not only to the tenant but to his employees and to all who are "lawfully on the premises." While the liability of a landlord who agrees to repair is restricted to situations where he has reasonable notice of the defect and a chance to repair,[65] here it was evident that the landlord knew of the dangerous condition for he had sent a man to mop up the water, and his manager had been advised that some repairs made shortly before the plaintiff's fall might not correct the difficulty unless additional controls were installed.

Under these circumstances it was decided, reversing the trial court, that a jury could find lack of due care by the landlord in failing to remedy this situation. It further was held that the trial court had improperly found the plaintiff guilty of contributory negligence as a matter of law. The issue of contributory negligence ordinarily is left to the jury, and in this particular case, where the plaintiff was an outside salesman who visited the premises for only a short time each day it seems clear that a jury could find freedom from contributory negligence unless, as the court remarks, there is an "absolute duty on every person to look to see that every step will be safe. . . ."[66] If that duty were imposed, it would become practically impossible to recover in a slip-and-fall case.[67]

II. CONCURRENT CAUSES—CONTRIBUTION

The question of what conduct constitutes concurrent negligence was raised in *Nichols v. Givens.*[68] There the plaintiff was a passenger

62. 359 S.W.2d at 568.
63. Merchants' Cotton Press & Storage Co. v. Miller, 135 Tenn. 187, 186 S.W. 87 (1916); RESTATEMENT, TORTS § 357 (1934).
64. 355 S.W.2d 462 (Tenn. App. E.S. 1962).
65. See Noel, *Landlord's Tort Liability in Tennessee,* 30 TENN. L. REV. 368, 373 (1963).
66. 355 S.W.2d at 464.
67. See McBrown v. Southeastern Greyhound Lines, 29 Tenn. App. 13, 193 S.W.2d 92 (E.S. 1945).
68. 358 S.W.2d 480 (Tenn. App. M.S. 1962).

in a car driven by Givens. When he came to a highway stop sign, Givens ran somewhat past the sign, and then suddenly came to a stop or a near stop. Charleston, the driver of the immediately following car in a line of traffic, thinking that Givens was going to continue, looked up the highway to see if anything was coming, failed to see that Givens had stopped, and ran into him. There was testimony that Givens, after getting out to inspect the damage, negligently backed his car into the Charleston car before driving away. The plaintiff, who suffered neck and back strains, secured a verdict and a judgment against both defendants.

Givens appealed on the ground that even if he did back into the Charleston car, this was an entirely separate accident and not concurrent negligence. Since there was evidence that Givens was negligent in connection with the original collision, and the jury had returned a general verdict against both defendants, which may have been based on their undoubtedly concurrent negligence at the time of the original accident, the issue of whether or not the negligence involved in the second accident was sufficiently concurrent for joint liability does not seem to have been squarely presented, for under Tennessee law concerning general verdicts[69] the verdict could be supported by the negligence in connection with the original collision. In affirming the judgment, however, the court quoted with approval a statement from an earlier case that each defendant is liable for the entire harm where the negligence is "concurrent or successive."[70] So apparently even if Givens had been negligent only with reference to the second accident, it would be enough for joint and several liability for the entire harm that each party substantially contributed to a single indivisible injury.[71]

With further reference to concurrent torts, a significant federal court decision, *Huggins v. Graves*,[72] allows contribution between joint tortfeasors without allegations that the party seeking contribution was guilty only of passive negligence and that the party from whom the contribution is sought was guilty of active negligence. This case is more fully discussed in another part of this Survey.[73] It should be noted here, however, that the decision interprets the well known Tennessee decision in *Davis v. Broad Street Garage*[74] as not limited to active-passive negligence situations, but rather as allowing contribu-

69. See Tracy v. Finn Equip. Co., 290 F.2d 498 (6th Cir.), *cert. denied*, 368 U.S. 826 (1961).

70. See Yellow Cab Co. v. Pewitt, 44 Tenn. App. 572, 579, 316 S.W.2d 17 (M.S. 1958).

71. PROSSER, TORTS § 45, at 226 (2d ed. 1955).

72. 210 F. Supp. 98 (E.D. Tenn. 1962), 30 TENN. L. REV. 456 (1963).

73. Wade, *Restitution—1962 Tennessee Survey*, *supra* p. 857, at 860-63.

74. 191 Tenn. 320, 232 S.W.2d 355 (1950), 21 TENN. L. REV. 672 (1951).

tion between joint tortfeasors in negligence cases generally. In that connection the court quotes the following significant statement from the *Davis* case: "Upon reconsideration and further thought the majority of this Court holds that the rule of law expressed in the majority opinion should be the law of Tennessee and not just applicable to the facts of the instant case. We feel that justice, right and equity demand this conclusion."[75] The opinion reflects a careful analysis of numerous Tennessee decisions and of the views of various commentators and seems clearly to establish that this jurisdiction now definitely has set aside the old rule against contribution. No one is likely to mourn its departure, for as Prosser remarks:

> There is an obvious lack of sense and justice in a rule which permits the entire burden of the loss, for which two defendants were equally, unintentionally responsible, to be shoudered onto one alone, according to the accident of a successful levy of execution, the existence of liability insurance, the plaintiff's whim or spite, or his collusion with the other wrongdoer, while the latter goes scot free.[76]

III. CONTRIBUTORY NEGLIGENCE—STANDARDS AND PROOF

A. *Duty of Guest in Car*

The duty of a guest in a car to exercise due care for his own protection was involved in *Bray v. Harwell.*[77] There the defendant invited the plaintiff and one Briscoe to ride in his car, on which he had just installed a new air jet. There was contradictory testimony as to whether defendant said he was going to test the car, or test its speed. Immediately after starting, the defendant pushed the accelerator to the floor and soon reached a speed of seventy miles per hour. Briscoe, seated between defendant and the plaintiff on the front seat said, "Harwell, are you scared"?[78] The plaintiff replied, "Yes, I wish he would slow down."[79] The defendant testified that he did slow down somewhat, although he still covered the six-tenths of a mile from his point of starting to the place of the accident in forty-five seconds.

On appeal from a verdict and judgment for the plaintiff, the issue was whether or not the plaintiff was barred by contributory negligence as a matter of law. The court noted that a guest in a car ordinarily has the duty to protest when he sees that the driver is acting carelessly, but it proceeded to hold, as in most cases of this type, that the

75. 210 F. Supp. at 102.
76. PROSSER, TORTS § 46, at 248 (2d ed. 1955).
77. 360 S.W.2d 58 (Tenn. App. W.S. 1962).
78. *Id.* at 59.
79. *Id.* at 60.

contributory negligence issue was properly submitted to the jury. The driver may have heard the plaintiff's statement to Briscoe, and in view of the shortness of the ride, the plaintiff may not have been under a duty to voice a second protest, particularly since the driver himself testified that he did reduce his speed. It was further held that it was not inappropriate to instruct the jury that where a driver is proceeding properly it is not negligence to fail to speak where "the driver suddenly commits some act of negligence before the guest has time to protest or give warning. . . ."[80] This instruction was regarded as having some applicability to the situation involved because of the extremely short period of the entire ride for which the plaintiff was taken.

B. *Assured Clear Distance Rule*

There were three cases during the survey period which involved the assured clear distance rule. In general this rule requires that a motorist must not operate his car at so great a speed "that he cannot bring it to a standstill within a distance that he can plainly see defects or obstructions ahead of him."[81] Modern traffic conditions, however, continue to make the rule one of decreasing significance, as is brought out in the current decisions. In *Fontaine v. Mason Dixon Freight Lines*,[82] a truck going up a mountain had stopped on the wrong side of the highway, just below a sharp turn. The plaintiff, descending the mountain, rounded the curve and saw the truck in front of her, completely blocking her side of the highway. The other side of the highway likewise was blocked by a car proceeding up the mountain. Under these circumstances the plaintiff was unable to avoid a head-on collision with the truck. The trial judge, acting as the trier of fact, found that the plaintiff was guilty of contributory negligence as a matter of law under the assured clear distance rule and dismissed the suit.

This dismissal was reversed on appeal. One ground for the decision was that the assured clear distance rule does not apply when the motorist encounters a situation which he has no reason to expect. It was stated in that connection that "a motorist has a right to assume that his passage will not be blocked by the illegal stopping or parking of another vehicle on the wrong side of the highway, especially in such close proximity to a sharp curve on a much traveled highway."[83]

The authority most in point was *Halfacre v. Hart*.[84] There the

80. *Id.* at 63.
81. Faulk v. McPherson, 27 Tenn. App. 506, 511, 182 S.W.2d 130 (W.S. 1943).
82. 357 S.W.2d 631 (Tenn. App. E.S. 1962).
83. *Id.* at 634.
84. 192 Tenn. 342, 241 S.W.2d 421 (1951), 22 TENN. L. REV. 435 (1952).

court simply held that the case should go to the jury on the issue of contributory negligence and that the plaintiff was not guilty of contributory negligence as a matter of law. In the present case it was held that the plaintiff was entitled to a judgment. This was because the defendant had consciously violated traffic laws and testified that he realized he was "taking an awful chance." He therefore was held to be guilty of gross negligence, with the result that even if the trier of fact should find contributory negligence on the part of the plaintiff, still this would not bar her recovery.[85]

Likewise in *Garner v. Maxwell*[86] the assured clear distance rule did not prevent recovery by a driver, in this case a highway patrolman, who ran into an illegally parked tractor-trailer. The rig had become disabled and was left on the highway with the lights turned off and only one reflector in front of, and one behind, the vehicle, instead of the three reflectors or lights required by statute.[87] The opinion refers to the original rule laid down in *West Construction Co. v. White*,[88] that the failure of a plaintiff to stop his car within the distance illuminated by his headlights amounts to contributory negligence as a matter of law, but the court notes that subsequent decisions have considerably modified this rule. It was indicated that under these earlier cases the driver in the approaching car has the right to assume that no obstruction of this character lies in his path unless he sees the clear and inescapable warning required by statute. In this case, as in the one involving the truck parked near the curve, the decision did not actually turn on whether or not the assured clear distance rule should be applied; even if it had been applied the plaintiff would have recovered because the defendant was guilty of more than ordinary negligence. Referring to the failure to provide the lights or reflectors as required by statute and the substantial delay in securing a wrecker, the court found that this conduct supported a conclusion that the "defendants were guilty of such gross negligence as to deprive them of the right of relying on the defense of contributory negligence."[89]

The assured clear distance rule also was invoked in *Brinkley v. Gallahar*,[90] where the defendant had erected highway barricades to channel traffic into a newly constructed section of the highway. The plaintiff's car struck the barricade and plunged over a steep bank. The jury found that the barricades were so constructed as to constitute a dangerous condition in the absence of an adequate warning

85. Inter-City Trucking Co. v. Daniels, 181 Tenn. 126, 178 S.W.2d 756 (1943).
86. 360 S.W.2d 64 (Tenn. App. W.S. 1962).
87. TENN. CODE ANN. § 59-919 (1956).
88. 130 Tenn. 520, 172 S.W. 301 (1914).
89. 360 S.W.2d at 66.
90. 359 S.W.2d 857 (Tenn. App. E.S. 1962).

and that the lights and signs provided did not constitute such a warning. The plaintiff recovered for personal injuries and property damage. On appeal the court found substantial evidence to support this finding. The principal issue was whether or not the plaintiff was guilty of contributory negligence as a matter of law under the assured clear distance rule. In holding that he was not, the court referred to the language in *Strickland Transportation Co. v. Douglas*[91] stating that the rule did not apply "where the motorist encounters a dangerous situation which in the exercise of reasonable care he had no reason to expect. . . ."[92] It was considered that the present case was taken out of the rule by the fact that a curve prevented the lights of the plaintiff's car from shining on the barricades and by the misleading effect created by lighting the barricade furthest from the motoring public while other parts were unlighted. The presence of mud on a wet highway, making it slippery, was an additional ground for not applying the rule in this case and leaving the issue of contributory negligence to the jury.

These three cases, along with other recent decisions,[93] illustrate that under modern traffic conditions the number of situations in which the assured clear distance rule can safely be relied on as a defense is steadily decreasing.

C. *Effect of Violation of Statute—Remote Contributory Negligence*

The troublesome question of the effect of violation of a criminal statute on the plaintiff's right to recover arose in *Chandler v. Nolan*.[94] There the plaintiff's son, age fourteen, was riding his bicycle along the highway about dusk. He did not have a headlight and was violating a statute which required a headlight half an hour after sunset. A motorist approaching from the opposite direction undertook to pass a pickup truck. As he came abreast of the truck his left front fender struck the bicycle and the rider was killed instantly. There was substantial evidence to show that the motorist was guilty of violating a forty-five mile an hour speed limit and a statute prohibiting passing except where the left lane is clear. The trial judge held, however, that this negligence could not lead to liability because the conduct of the boy in violating the statute requiring headlights constituted contributory negligence as a matter of law. Reliance was placed on *Donaho v. Large*,[95] where a pedestrian who violated the statute requiring him to walk facing the traffic was found guilty of contribu-

91. 37 Tenn. App. 421, 264 S.W.2d 233 (W.S. 1953).
92. 359 S.W.2d at 861.
93. See Noel, *Torts—1959 Tennessee Survey*, 12 VAND. L. REV. 1350-54 (1959).
94. 359 S.W.2d 591 (Tenn. App. W.S. 1961).
95. 25 Tenn. App. 433, 158 S.W.2d 447 (E.S. 1941).

tory negligence as a matter of law.

On appeal it was held that while the cyclist's violation of the statute was negligence per se, the case should have been submitted to the jury on the proximate cause issue, particularly since the jury might have found simply "remote contributory negligence which would only mitigate damages."[96] This action was taken on the authority of *Adams v. Brown*[97] and *Standridge v. Godsey*.[98] Both these cases hold that even where the plaintiff is found guilty of negligence per se in violating a traffic law, the case may still present an issue for the jury on the proximate causation point.

It would seem that the effect of the doctrine that violation of a statute designed to protect a particular class of persons from a particular hazard constitutes negligence per se is somewhat softened by decisions of this kind permitting the case to go to the jury under the proximate causation concept. Of course if violation of the statute is not a cause in fact of the injury, the violation is not significant. Where, however, there is cause in fact and the injury is one of the kind the legislature obviously had in mind, the accident would seem to be a proximate result of the statutory violation, or a result within the risk created by not obeying the law in question.

Another way to handle the problem of statutory violation would be to say that violation of a criminal statute may, rather than must, be regarded as negligence per se by the court, depending on all the circumstances. This would leave room for a desirable flexibility on the part of the courts in handling this problem.[99] So in cases like the present one where negligence of the other party seems considerably more serious than that of the violator of the statute, a just result may be reached either by holding that violation of the statute is only evidence of negligence or, if negligence must be found by uniform application of the negligence per se doctrine, by submitting the case to the jury on the issue of cause in fact.

The Tennessee doctrine of remote contributory negligence also provides for flexibility by permitting the jury to allow the plaintiff to recover, but in a diminished amount, if the plaintiff's statutory violation is found to be only a remote cause of the accident. Another case in which the doctrine of remote contributory negligence arose was *Evans v. Mahal*.[100] There the plaintiff was a rider in a truck which collided with a car owned by one of the defendants and driven by the other, who recently had given the plaintiff a temporary job skid-

96. 359 S.W.2d at 594.
97. 37 Tenn. App. 258, 262 S.W.2d 79 (E.S. 1953).
98. 189 Tenn. 522, 226 S.W.2d 277 (1949).
99. See RESTATEMENT (SECOND), TORTS § 286 (Tent. Draft No. 4, 1959), § 469(2) (Tent. Draft No. 9, 1963).
100. 300 F.2d 192 (6th Cir. 1962).

ding pulpwood. The plaintiff recovered and the only issue on appeal was whether the trial court had erred in refusing to charge on the subject of remote contributory negligence. The pretrial hearing and the pretrial order indicated that contributory negligence would be an issue, but there was no reference to remote contributory negligence. There was no evidence that the plaintiff, a migrant farm worker who lived at the soldier's home, was guilty of any kind of contributory negligence in not telling his employer how to handle the truck at the time of the collision, when judgment and experience in driving were crucial. Under these circumstances the court held that no error had been committed in refusing to give the requested charge, stating: "We are not persuaded, and do not believe that it is the rule in Tennessee that in every negligence case, it is necessary to charge the jury on the possible remote contributory negligence of a plaintiff, especially where the jury finds him guilty of no negligence whatever."[101] Apparently all this case holds is that where there is no substantial evidence of remote contributory negligence, it is not necessary to charge the jury on the subject. Otherwise it is established that the charge must be given, apparently even in the absence of a request on the subject.[102]

IV. Wrongful Death

A. *Suit Against Subsequently Emancipated Child—Removal of Family Immunity*

The case of *Logan v. Reeves*[103] is one of first impression involving the application of the family immunity doctrine to a wrongful death action. The defendant, while an unemancipated minor, was driving a car in which her mother was riding as a guest. The mother was killed when the car collided with a truck at an intersection due to the alleged negligence of the daughter. Within a year after the accident, the daughter became completely emancipated by marriage and by a court decree.[104] The administratrix of the deceased's estate brought suit under the wrongful death act. A demurrer to the complaint was sustained by the trial judge, but the supreme court reversed, holding

101. *Id.* at 196. The court also observed that since the doctrine of remote contributory negligence is peculiar to Tennessee, and "has aspects that have often perplexed the trial courts of that state, as well as leading authorities on the law of torts (see 22 Tenn. L. Rev. 1030, 1038 (1952)), we attach importance to the circumstances that the district court, in ruling upon this question, had been an experienced practitioner in the law of that state, and has, for a number of years, been an experienced member of the federal judiciary of Tennessee." *Id.* at 197.

102. McClard v. Reid, 190 Tenn. 337, 341-43, 229 S.W.2d 505 (1950).

103. 209 Tenn. 631, 354 S.W.2d 789 (Tenn. 1962), 29 Tenn. L. Rev. 595 (1962), 48 Iowa L. Rev. 748 (1963).

104. See Tenn. Code Ann. § 23-1201 (1956).

that an action for the wrongful death of a parent caused by the negligence of his unemancipated minor child may be maintained by the parent's administratrix after the child has become emancipated.

It seems clear that if this suit had been brought before the minor defendant had become completely emancipated, it would have been barred by the family immunity doctrine. The rule which excludes actions between parent and child for personal torts is one that has become well established in most jurisdictions, including Tennessee.[105] The chief grounds relied on to support this immunity are that an action between parent and child would disturb domestic tranquility, and at least where the suit is brought by the child, would disturb parental discipline and control. In this particular case, however, it was clear that neither of these reasons applied, since the family relationship and parental control both had been severed by the mother's death and also had been terminated by the subsequent emancipation of the child. The court concluded that since the sole reason for the immunity was to protect the family relationship, it followed "that when the reason ceases, the rule ceases; and that the reason fails and the rule does not apply where the family relationship has been severed or terminated."[106]

The opinion seems to emphasize the termination of the relationship by the complete emancipation of the child somewhat more than the severance of the relationship by death. This suggests that even if the mother had not died, she could have maintained the action upon the emancipation of the child.[107] That conclusion is further supported by the court's distinguishing *Turner v. Carter*,[108] where the administrator of a deceased parent was not allowed to sue a minor son for wrongful death, on the ground that the son "had not become completely emancipated. . . ."[109] It might be added that it still is the prevailing rule that the parent-child immunity will bar a wrongful death action in the ordinary situation where the child has not become emancipated, although there is a growing minority of courts holding the other way on the ground that the relationship is destroyed by death.[110]

It was argued by the defendant that the subsequent emancipation of the child could not relate back and "breathe the breath of life into this claim." This argument might have merit in the case of the

105. Ownby v. Kleyhammer, 194 Tenn. 109, 250 S.W.2d 37 (1952); McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664 (1903); PROSSER, TORTS § 101, at 675-76 (2d ed. 1955).

106. 209 Tenn. at 636, 354 S.W.2d at 791.

107. See PROSSER, TORTS § 101, at 676 (2d ed. 1955).

108. 169 Tenn. 553, 89 S.W.2d 751 (1936).

109. *Ibid.*

110. Dunn, *Parent-Child Tort Actions*, 12 CLEV. MAR. L. REV. 339, 343 (1963).

immunity between husband and wife.[111] With respect to parent-child actions, however, the court regarded the immunity as procedural, with the result that a right of action did arise, but the right was "merely suspended and its enforcement prevented by the public policy of protecting the family relation."[112]

This decision is in accord with the current tendency to restrict the family immunity doctrine. That doctrine is under attack partly because of changed conditions resulting from the presence of insurance. A standard treatise states:

> If a recovery can be permitted without disrupting the family tranquility, it ought not to be refused because an insurer will thereby be rendered liable on his contract when he would otherwise not be liable, and the fact that his liability is the very fact which prevents the recovery by the parent or child from disrupting the family peace is an immaterial factor in the case.[113]

It may be recalled in this connection that the supreme court recently refused to extend the immunity doctrine to a suit involving unemancipated minor brothers, even though the net result was to diminish the parent-child immunity. The court permitted the administrator of the deceased boy to bring a wrongful death action against the unemancipated minor brother, even though the parents were the statutory beneficiaries of the administrator's action.[114] While there is a risk of collusion in family suits, there are methods of detecting fraud; it seems unwise to bar all family suits, including ones where there are no indications of collusion, by a general immunity doctrine. Of course if an insurance company does not wish to insure against the risk of family suits, on the ground that the fraud problem is too difficult to cope with, it can easily exclude such suits from the coverage of the policy. Such an exclusion will be protected even from indirect attack, as shown by the recent decision in *Morris v. State Farm Mutual Automobile Insurance Co.*[115] There an accident in which a husband negligently injured his wife had occurred in Arkansas, where the immunity no longer exists in the case of suit by a wife against her husband. The insurance company, however, had excluded this type of case from the coverage of the policy. It was assumed that a third party involved in the accident also was liable to the wife, and that under Arkansas law there was a right of contribution or

111. Prince v. Prince, 205 Tenn. 451, 326 S.W.2d 908 (1959), 27 TENN. L. REV. 422 (1960).

112. 209 Tenn. at 637, 354 S.W.2d at 792.

113. HARPER & JAMES, TORTS § 8.11, at 649 (1956). See also PROSSER, TORTS § 101, at 676-77 (2d ed. 1955).

114. Herrell v. Haney, 207 Tenn. 532, 341 S.W.2d 574 (1960), 28 TENN. L. REV. 419 (1961).

115. 360 S.W.2d 776 (Tenn. App. W.S. 1961).

indemnity against the insured husband. Since, however, the policy excluded coverage in case of family suits, it was held that the husband's insurance company was not even obliged to pay the costs of defending the third party's claim against the insured husband for indemnity or contribution.

B. *Suit by Illegitimate Child*

Another new point with reference to the Tennessee Wrongful Death Act was raised in *Dilworth v. Tisdale Transfer & Storage Co.*[116] The plaintiff, a minor, brought suit by his next friend for the wrongful death of his putative father, who had acknowledged the plaintiff as his son and had contributed to his support. A demurrer was filed on the ground that an illegitimate child cannot bring an action under the statute. Since the deceased left no will, it was clear that under the act the right of action passed "to his children."[117] It was held that the plaintiff could not recover.

It is difficult to see how this result could be avoided. Earlier cases have held that the wrongful death act, with its provisions for recovery by designated persons, "is in the nature of statutes providing for the descent and distribution of estates. . . ."[118] As to the designated beneficiaries, it is provided that the amounts recoverable under the act shall be distributed, free from the claims of the creditors of the deceased, "as in the case of the distribution of personal property."[119] The statute providing for the descent of personal property states that where there is no surviving husband or wife, the personalty descends "to the children,"[120] thus paralleling the provisions of the wrongful death act concerning who may bring the action. With respect to statutes of descent and distribution generally, it is well settled that these do not apply to illegitimates "unless they are embraced by its terms or by necessary implication,"[121] and it has been more specifically held that an illegitimate child cannot inherit from its putative father.[122] Under these circumstances, while the court expressed sympathy with the trend to relax the harsh rules of the common law with respect to illegitimate children, it saw no way to permit a child who had not been legitimated by statutory process to bring suit under the wrongful death act.

It might be added that where a posthumous illegitimate child is

116. 354 S.W.2d 261 (Tenn. 1962).
117. See TENN. CODE ANN. § 20-607 (Supp. 1959).
118. Johnson v. Morgan, 184 Tenn. 254, 198 S.W.2d 549, 551 (1946); Heggie v. Barley, 5 Tenn. Civ. App. 78 (Hamilton County Cir. Ct. 1914).
119. TENN. CODE ANN. § 20-609 (1956).
120. TENN. CODE ANN. § 31-201 (1956).
121. Henderson v. Linston, 186 Tenn. 273, 209 S.W.2d 38, 40 (1947).
122. Adams v. Jackson, 23 Tenn. App. 118, 126 S.W.2d 899 (M.S. 1939).

claiming benefits under the Tennessee Workmen's Compensation Act,[123] he can recover.[124] The different result in this situation is due to the fact that the Bastardy Act[125] makes an illegitimate child a dependent of its father, and this evidences the public policy that an illegitimate child is to be regarded as a "dependent" under the workmen's compensation act.[126]

V. Misrepresentation—Liability for Negligence

One of the more significant decisions during the survey period was *Texas Tunneling Co. v. City of Chattanooga.*[127] There a partnership of consulting engineers, Havens and Emerson, was employed by the City of Chattanooga in connection with the design of a long sewage tunnel through a hill known as Stringer's Ridge. The firm supplied the city with drawings which purported to include the results of a number of test borings. With regard to two of the borings near the central part of the hill, however, the drawings omitted information concerning the percentage of core recovery. The city solicited bids for the work and gave the drawings to the successful prime contractor, who in turn showed it to the plaintiff, a sub-contractor for the tunneling work. The plaintiff agreed to do the work for $106,384, estimating its costs on the basis of the core recovery findings shown on the drawings. Unanticipated costs in the amount of $17,730 were incurred by the plaintiff when he encountered unexpected geological formations necessitating rock blasting and diamond boring in place of anticipated "fishtail" boring methods. The presence of the harder materials would have been revealed if the chart prepared by Havens and Emerson had revealed the results of the two borings at the central part of the hill. The federal court found that the omission on the drawings was not due to fraud but to "oversight or at most simple and unintentional carelessness. . . ."[128] It nevertheless held, acting as a trier of fact, that the action could be maintained against the engineers who prepared the misleading drawings.

The defendants urged that traditionally the courts have required scienter or fraudulent intent to support a deceit action. In that connection it is stated in the leading case of *Shwab v. Walters,*[129] that "an action for fraud and deceit differs from one brought for recission,

123. Tenn. Code Ann. § 50-901 to -1028 (1956).
124. Shelley v. Central Woodwork, Inc., 207 Tenn. 411, 340 S.W.2d 896 (1960), 29 Tenn. L. Rev. 600 (1962).
125. Tenn. Code Ann. § 36-223 (Supp. 1961).
126. Tenn. Code Ann. § 50-1013 (1956).
127. 204 F. Supp. 821 (E.D. Tenn. 1962), 16 Vand. L. Rev. 266 (1962).
128. *Id.* at 826.
129. 147 Tenn. 638, 251 S.W. 42 (1932).

in that the plaintiff must prove in the former that the representation was false and the person making it knew it to be false, while in the latter the plaintiff need only to show that a misrepresentation was made and it is immaterial whether made dishonestly or not."[130] In the present case, however, the court observed that the opinion in *Shwab v. Walters* also quoted with approval the familiar statement from *Derry v. Peek*[131] that "fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false." It is pointed out in the present decision that the phrase "recklessly, careless of whether it be true or false" is at least a step in the direction of liability for negligent misrepresentation, representing "some concession in favor of such liability."[132]

More definite support for the conclusion that actual intent to deceive is not necessary in Tennessee was found in three cases involving negligently prepared title abstracts.[133] These cases were not directly in point, since they involved suits for an accounting rather than deceit actions, but as the court concludes, the "actual and substantial basis of these cases was negligence. . . ."[134] The court further observes that a rule shielding the defendant from financial loss in the absence of intent to deceive "has the seemingly unjustifiable result of shielding from liability the defendant whose negligent statements result in financial ruin to the plaintiff, while holding fully accountable the defendant whose similar statements result in personal or property injury to the plaintiff."[135]

It was urged that even if liability should be imposed in some cases for negligent misrepresentation, the defendant should not be liable to the plaintiff in this case for the reason that the misrepresentation was not made directly to him but was received through two intermediaries, the city and the prime contractor. It was pointed out that under a leading New York decision, *Ultramares Corp. v. Touche*,[136] the court declined to impose liability for negligent misrepresentation in a certified balance sheet which might be used in a wide range of transactions. The court relied, however, on the *Restatement of Torts*,[137] which says that it is enough that "the harm is suffered . . . by one of a class of persons for whose guidance the information is sup-

130. 147 Tenn. at 643, 251 S.W. at 44.
131. 14 App. Cas. 337, 375 (1889).
132. 204 F. Supp. at 827.
133. Equitable Bldg. Ass'n v. Bank of Commerce & Trust Co., 118 Tenn. 678, 102 S.W. 901 (1907); Denton v. Nashville Title Co., 112 Tenn. 320, 79 S.W. 799 (1903); Dickle v. Nashville Abstract Co., 89 Tenn. 431, 14 S.W. 896 (1890).
134. 204 F. Supp. at 829.
135. *Id.* at 830.
136. 255 N.Y. 170, 174 N.E. 441 (1931).
137. RESTATEMENT, TORTS § 522(b)(1) (1934).

plied. . . ." The court noted that thirty years have elapsed since the decision in the *Ultramares* case, and that "the growing complexity of business relations and the growing specialization of business functions all require more and more reliance in business transactions upon the representations of specialists."[138] Perhaps the *Ultramares* case could have been distinguished on the ground that the defendant there might, if held responsible, be exposed to "liability in an indeterminate amount for an indeterminate time to an indeterminate class,"[139] while in the present case only a single party would be the successful bidder and suffer the unexpected loss in boring the tunnel.

It is believed that the earlier Tennessee title abstract cases, like the *Restatement*, do not require that the defendant have in mind the specific plaintiff, so long as the defendant knows that the abstract will be used by a vendee as well as by the vendor who orders it.[140] The recent decision in *Howell v. Betts*[141] likewise is consistent with this federal case, for while it relieves a defendant who negligently prepared a survey from liability, there the purchaser who suffered loss bought the property twenty-four years later and was for that reason "unforeseeable and remote."

The *Texas Tunneling* decision of course does not mean that liability always will be incurred for negligent misrepresentation. The *Restatement of Torts* provision on which the court relies[142] carefully restricts this liability to information supplied in the course of one's business or profession, and the harm must be suffered by a class of persons for whom the information is supplied.

VI. Defamation

A. *Privilege in Judicial Proceedings*

There were two defamation cases during the survey period. *Jones v. Trice*[143] involved some basic points about the absolute privilege in judicial proceedings. In an affidavit incorporated in a motion for a new trial it was alleged that one Jones had been interested in the outcome of the original trial, because he had a similar claim which would be presented later. It was further asserted that Jones had improperly influenced the jury at the trial. At a hearing on the motion the defamatory accusations against Jones were withdrawn. In the

138. 204 F. Supp. at 833.

139. *Cf.* Equitable Bldg. & Loan Ass'n v. Bank of Commerce & Trust Co., 118 Tenn. 678, 102 S.W. 910 (1907); Denton v. Nashville Title Co., 112 Tenn. 320, 79 S.W. 777 (1903).

140. See note 133 *supra*.

141. 362 S.W.2d 924 (Tenn. 1962).

142. § 552 (1938).

143. 360 S.W.2d 48 (Tenn. 1962).

defamation suit, it was held that a demurrer was properly sustained on the ground that the statement was absolutely privileged.

The first issue considered was whether the defamatory statement was made in the course of judicial proceedings. In that connection the court referred to an earlier case in which a statement contained in an affidavit used to obtain the improper commitment of the plaintiff in an insanity proceeding[144] was regarded as in the course of judicial proceedings. In applying that rule to the present case the court said "it is immaterial whether the affidavit is a separate writing or is incorporated into the motion."[145]

The opinion then dealt with the defense that the defamatory statement was made about a person not a party to the judicial proceedings involved. It was held on that point, on the authority of *Crockett v. McClanahan*,[146] that it makes no difference that the alleged libel concerns a third party so long as the matter is pertinent to a free judicial inquiry of the matter involved.

The major part of the opinion deals with the requirement that the defamatory material must be "pertinent or relevant" to the proceedings. The court stated that these words "do not mean relevant within the technical rules of evidence"[147] and found that the charges made had a reasonable relationship to the motion for a new trial. Even though the defamatory statements were withdrawn at the hearing on the motion, the court found no basis in reason or authority for regarding this withdrawal as creating a "limitation or exception to the privilege."[148]

The opinion makes it clear that the privilege to make defamatory statements in the course of judicial proceedings is an absolute one, applying even where the statements are known to be false and are published only to injure the plaintiff. The privilege extends to statements by judges, witnesses, counsel or parties.

B. *Libel Per Se*

In the other defamation decision, *Venn v. Tennessean Newspapers, Inc.*,[149] a federal court had to deal with the intricacies of the law of libel, including the doctrine of libel per se. It appeared that Venn, engaged in advertising and publicity promotion, had arranged several "talkathons" on behalf of Congressman Pat Sutton in his contest with Senator Kefauver for the Democratic nomination to the

144. Dyer v. Dyer, 178 Tenn. 234, 156 S.W.2d 445 (1941).
145. 360 S.W.2d at 50.
146. 109 Tenn. 517, 72 S.W. 950 (1903).
147. 360 S.W.2d at 54.
148. *Ibid.*
149. 201 F. Supp. 47 (M.D. Tenn. 1962).

United States Senate. The Nashville *Tennessean*, which supported Kefauver, published a series of articles which allegedly intimated that Venn was "an associate both in business and social circles of criminals, gangsters, mobsters, and other elements of the underworld, and second, that plaintiff Venn in conducting the talkathon in the Sutton campaign against Kefauver, was a 'tie-in' or connection between Sutton and such criminal elements. . . ."[150]

The court found that two of the articles did contain accusations of this sort and constituted libel per se because the defamatory reference appeared "from the four corners of the article itself without reference to other publications and without reference to extraneous facts."[151] Since these two articles were found to be actionable per se, Venn was able to recover general damages without alleging special damages.

With reference to a number of other articles complained about, it was found that these were "so ambiguous and uncertain in meaning insofar as the plaintiff is concerned, that it must be held that they are not libelous per se, and that an inneundo must be pleaded and proved to establish a defamatory implication with respect to the plaintiff."[152] It was further held that the plaintiff must plead and prove special damages before recovering for those articles which were only libelous per quod.

Originally the doctrine of libel per se referred simply to the rule of pleading that if the words used in the writing complained of need extrinsic facts to make them appear libelous, the plaintiff would fail to establish any cause of action unless he pleads and proves these facts.[153] Later, however, there developed the concept that whenever written words need extrinsic facts to make them appear defamatory, the plaintiff must not only plead and prove the extrinsic facts, but also must establish special damages. This doctrine has been criticized[154] and seems to be based on a confusion between libel per se and slander per se.[155] Be this as it may, the doctrine of libel per se has now won considerable acceptance and was clearly adopted in Tennessee many years ago in *Continental National Bank v. Bowdre*[156] which was followed by the federal court in the present case.

It was further held in the *Venn* decision that the privilege of fair

150. *Id.* at 50.
151. *Ibid.*
152. *Ibid.*
153. See Note, *Libel Per Se and Special Damages*, 13 VAND. L. REV. 730, 731 (1960).
154. See *id.* at 732; Noel, *Defamation of Public Officers and Candidates*, 49 COLUM. L. REV. 875, 900 (1949).
155. PROSSER, TORTS § 93, at 588 (2d ed. 1955). See also Hinson v. Pollock, 159 Tenn. 1, 15 S.W.2d 737 (1929), misinterpreting NEWELL, SLANDER AND LIBEL 36 (4th ed. 1924).
156. 92 Tenn. 723, 23 S.W. 131 (1893).

comment did not apply because that privilege extends only to comment and not to misstatements of fact. The court observed in this connection that the imputations that Venn moved in criminal circles could not possibly be "classified as comments or expressions of views or opinions upon a matter of public interest."[157]

VII. MISCELLANEOUS

A. *Nuisance*

In *Henegar v. International Minerals & Chemical Corp.*[158] the plaintiffs sued for damages for harm to their premises and personal property from vapor, gas and smoke from the defendant's factory. The suit, filed in December 1959, was for damages from a temporary nuisance and the declaration was for harm suffered during the period from October 1, 1957, to October 1, 1959; subsequently the plaintiffs' declaration was amended to cover only the period from October 1, 1957, to October 1, 1958, and the loss of value for that period was recovered. When a later action was brought for harm during the period from October 1, 1958, to October 1, 1959, the trial judge's action in sustaining a demurrer was upheld, on the ground that the plaintiffs had fatally split their cause of action with reference to damages suffered prior to the bringing of the first suit. Since the right to recover damages up to October 1959 could have been litigated in the original action filed in December of that year, the first judgment was res judicata as to all damages sustained up to the time of the original suit. So while in an action for damages for a temporary nuisance the plaintiff may bring successive actions for future damages he "cannot arbitrarily select part of the past period, sue for it, and then later sue for other parts of the same period."[159]

B. *Inducing Breach of Contract*

In *Mefford v. City of Dupontonia,*[160] the complainant was supplying water to some five hundred customers in Dupontonia. He had for several years added a charge to his customers' water bills on account of services rendered by him in helping maintain a sewer system owned by the city. In 1959 the city passed an ordinance authorizing itself to spend funds to maintain the sewer system. At the same time it sent a circular to residents of the city advising them of the ordinance and saying there was no longer any need for them to pay a

157. 201 F. Supp. at 56.
158. 354 S.W.2d 69 (Tenn. 1962).
159. *Id.* at 70.
160. 354 S.W.2d 823 (Tenn. App. M.S. 1962).

sewer maintenance charge to the complainant. Suit was brought for an injunction and damages under the statute providing for treble damages for inducing breach of contract.[161] The chancellor granted the injunction but refused to allow damages, and this action was sustained.

The court found that the statute prohibited interference with implied as well as formal contracts, but since the complainant's customers frequently had protested against the sewer charge by him, the assent necessary to establish an implied contract to pay the disputed charge was not established. Any quasi-contractual obligation to pay for the complainant's service, "imposed by law, without assent," was not regarded as a contract within the protection of the statute. It was further held that in any event the city's action was privileged because taken to protect the health and welfare of its citizens.[162] Furthermore, the city's action, since it was taken pursuant to an ordinance, was regarded as governmental, with the result that it was protected by the usual immunity applicable to governmental actions.

C. *Damages*

Two recent cases during the survey period involved the matter of excessive damages. In *Sappington v. Kilavos*,[163] an automobile accident victim who was thrown into the steering wheel of his truck suffered pain, aggravation of a duodenal ulcer, and severe recurring headaches as a result of a spinal tap administered during treatment. His special damages totaled $2,332. The jury returned a verdict for $5,000, and the trial judge ordered a remittitur of $4,000. It is clear that unless there is clear abuse of discretion the trial judge's action in granting or refusing to grant a remittitur will not be set aside.[164] It is not surprising, however, that the court found an abuse of discretion in this case and reduced the remittitur to $1,500, directing that judgment be entered in favor of the plaintiff for $3,500, an amount which certainly does not seem excessive, in view of the special damages.

The other case, *Bell v. Cincinnati, New Orleans & Texas Pacific Ry.*,[165] involved a motorist injured at a railway crossing. Here there was a five per cent permanent residual disability as a result of an elbow injury. The special damages were $1,000. The jury returned a verdict for $13,500. The federal judge was shocked at this amount

161. TENN. CODE ANN. § 47-1706 (1956).
162. RESTATEMENT, TORTS § 770 (1934); PROSSER, TORTS § 106, at 737 (2d ed. 1955).
163. 356 S.W.2d 602 (Tenn. App. W.S. 1961), 30 TENN. L. REV. 462 (1963).
164. Spence v. Carne, 40 Tenn. App. 580, 292 S.W.2d 438 (1954).
165. 205 F. Supp. 781 (E.D. Tenn. 1962).

and stated on the record that he could not contemplate damages of more than $5,000, exclusive of the special damages. There could be no remittitur, however, because the court found that under constitutional provisions it was "not authorized to arbitrarily reduce the amount of damages awarded by the jury, for so to do would deprive the parties of their constitutional right to trial by jury . . . ."[166] The court did, however, order a new trial under rule 59 of the Federal Rules of Civil Procedure, on the ground that a mistake grave enough to involve a "miscarriage of justice" had been committed, with resulting unjust enrichment of the plaintiff at the expense of the railroad. It would seem that the court's mention of a particular figure as an appropriate maximum would be enough to facilitate settlement of the case without the new trial.

166. *Id.* at 785.