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TORTS—1955 TENNESSEE SURVEY

JOHN W. WADE*

I. NEGLIGENCE

1. Breach of Duty to Use Care

The decision of whether a defendant is negligent is normally for the jury to decide. This year, as in other years, the Tennessee courts have taken frequent opportunity to emphasize this,¹ though a directed verdict is proper when the jury could reasonably reach only a single result.²

The negligence issue is submitted to the jury in terms of the usual standard—whether the defendant acted as a reasonable prudent person would have acted under the same or similar circumstances.³ At times some of the circumstances may be more specifically adverted to in the instructions. Thus, under the “emergency” or “sudden peril doctrine,” specific reference is made to the emergency and the jury may be told that “he is not held to the same accuracy of judgment as would be required of him if he had time for deliberation.”⁴ The only cases raising this matter during the Survey period did so for the purpose of emphasizing the limitation on the “doctrine” to the effect that it is inapplicable when the defendant creates the emergency by his own negligence.⁵

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1. *E.g.*, *Noe v. Talley*, 274 S.W.2d 367 (Tenn. App. E.S. 1954) (automobile collision); *East Tennessee Natural Gas Co. v. Peltz*, 270 S.W.2d 591 (Tenn. App. E.S. 1954) (use of explosives); *Chattanooga Gas Co. v. Underwood*, 270 S.W.2d 652 (Tenn. App. E.S. 1954) (gas explosion); *Massey v. Chattanooga Station Co.*, 210 F.2d 167 (6th Cir. 1954) (safe place to work for employee). See the extensive discussion by Judge Hickerson in *Finks v. Gillum*, 273 S.W.2d 722 (Tenn. App. M.S. 1954) (automobile accident).

2. “Only where one conclusion can be reasonably reached from the evidence and inferences is it proper for a trial court to direct a verdict.” Howard, J., in *Shuler v. Clabough*, 274 S.W.2d 17, 20 (Tenn. App. E.S. 1954) (automobile accident—directed verdict improper). In *Rader v. Nashville Gas Co.*, 37 Tenn. App. 621, 268 S.W.2d 114 (M.S. 1954) (gas explosion), a directed verdict was held proper. In *Horne v. Palmer*, 274 S.W.2d 372 (Tenn. App. E.S. 1954), jury verdicts were so confused and inconsistent that the court held they should be set aside and a new trial granted.

3. See, *e.g.*, *Nashville, C. & St. L. Ry. v. Wade*, 127 Tenn. 154, 158, 153 S.W. 1120, 1121, Ann. Cas. 1914B 1020 (1912).

4. *McClard v. Reid*, 190 Tenn. 337, 345, 229 S.W.2d 505, 508 (1950). Some of the earlier cases seemed to express the standard here on a more subjective basis. Thus in *Moody v. Gulf Ref. Co.*, 142 Tenn. 280, 293, 218 S.W. 817, 820, 8 A.L.R. 1243 (1920), the court quoted a statement that “One who in a 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.” But in the *McClard* case, *supra*, the court correctly phrased the test according to objective standards: “Accordingly if he exercised such care as an ordinarily prudent person would exercise when confronted by a like emergency, he is not liable for an injury which has resulted from his conduct, even though another course of conduct would have been more judicious or safer or might even have avoided the injury. . . .”

5. *Tennessee Copper Co. v. Smith*, 216 F.2d 428 (6th Cir. 1954); *Hopper v.*

In certain types of activities the defendant may be held to a higher standard of care than that of the ordinary prudent person. Thus, in *East Tennessee Natural Gas Co. v. Peltz*,⁶ where defendants were blasting, they were held to be "under a duty to exercise the highest degree of care possible." In several cases the court made a point of declaring that the defendant was not an insurer but was under a duty to use only reasonable care.⁷

When a statute or ordinance lays down a definite rule of conduct, this rule takes the place of the general standard given to the jury, who are told that violation of this rule is negligence per se. There were several references to the negligence per se doctrine during the Survey period,⁸ but the only one worthy of special mention is *Horne v. Palmer*,⁹ holding that a statutory 30 m.p.h. speed limit for a "business or residential district" prevails over a Department of Safety sign of 45 m.p.h. Occasionally, the courts themselves lay down a specific rule of conduct instead of the general standard. An example of decreasing importance is the assured-clear-distance-ahead rule, to the effect that one must drive slow enough to be able to stop within the range of his vision ahead. Recent cases have indicated that exceptions and qualifications to this rule have practically eroded the rule away.¹⁰ This was recognized by Judge Darr in *Hopper v. United States*,¹¹ but he properly indicated that the qualifications on the rule are as to its effect as a "matter of law" and that the fact-finder may well find a person negligent who drives faster than the range of his headlights warrants.

Proof of negligence, or of breach of duty, is normally by direct evidence of what the defendant did. There are times, however, when

United States, 122 F. Supp. 181 (E.D. Tenn. 1953), *aff'd mem.*, 214 F.2d 129 (6th Cir. 1954).

6. 270 S.W.2d 591, 605 (Tenn. App. E.S. 1954). Several earlier Tennessee cases had held that there is strict liability for blasting operations, so that no proof of negligence is necessary. See, e.g., *Knoxville v. Peebles*, 19 Tenn. App. 340, 87 S.W.2d 1022 (W.S. 1935); *Aycock v. Nashville, C. & St. L. Ry.*, 4 Tenn. App. 655 (M.S. 1927). This rule is not referred to in the instant case, which may be distinguishable on the possible ground that since plaintiff had contracted to allow defendant to conduct the blasting operations on his land, he could complain only for negligent operation.

7. E.g., *Glassman v. Martin*, 269 S.W.2d 908 (Tenn. 1954) (landlord); *Chattanooga Gas Co. v. Underwood*, 270 S.W.2d 652 (Tenn. App. E.S. 1954) (gas company).

8. E.g., *Shuler v. Clabough*, 274 S.W.2d 17 (Tenn. App. E.S. 1954) (failure to put out flags for parked truck); *Louisville & N. R.R. v. Farmer*, 220 F.2d 90 (6th Cir. 1955) (municipal ordinance—speed limit); *Hopper v. United States*, 122 F. Supp. 181 (E.D. Tenn. 1953), *aff'd mem.*, 214 F.2d 129 (6th Cir. 1954) (statutory rule of the road).

9. 274 S.W.2d 372 (Tenn. App. E.S. 1954).

10. See discussion of last year's cases, Wade, *Torts—1954 Tennessee Survey*, 7 VAND. L. REV. 951, 952-53 (1954). And see 23 TENN. L. REV. 1073 (1955), discussing *Shuler v. Clabough*, 274 S.W.2d 17 (Tenn. App. E.S. 1954), treated later herein.

11. 122 F. Supp. 181 (E.D. Tenn. 1953), *aff'd mem.*, 214 F.2d 129 (6th Cir. 1954).

the evidence must be circumstantial in nature, the nature of the accident and the circumstances surrounding it indicating that (1) someone must have been negligent and (2) that person must have been the defendant. In the field of negligence this type of circumstantial evidence goes by the grandiose name of the doctrine of *res ipsa loquitur*. The leading Tennessee case on *res ipsa loquitur* is *Sullivan v. Crabtree*,¹² discussed last year. In *McCloud v. City of La Follette*,¹³ Judge Hale quotes Judge Felts' opinion in the *Sullivan* case at considerable length. The facts in the *McCloud* decision were as follows: An employee of the defendant city was operating the city's truck-and-trailer, using it to water streets late one night. The vehicle rolled down a hill into the plaintiff's building, damaging it. The employee was found in the street, higher up the hill, and he died without being able to tell what happened. There were no witnesses. The court of appeals held that this was properly treated by the trial court as a *res ipsa* case and that a jury verdict for the plaintiff was warranted.

On the question of the procedural effect of a *res ipsa* case when it exists the court held that the trial court was correct in instructing the jury that the event "merely warrants an inference of negligence which the jury may or may not draw as its judgment under all the facts and circumstances may dictate. It merely permits the jury to consider and choose the inference of defendant's negligence, if any, in preference to other permissible and reasonable inferences."¹⁴ This follows the majority rule and is consistent with the *Sullivan* opinion.¹⁵

The court held that the trial court was correct in declining to instruct that the doctrine will not apply unless the defendant has superior knowledge of the cause. This is a proper holding in the normal case of *res ipsa loquitur* since the strength of the inference to be drawn from the events (the circumstantial evidence) is not dependent on which party has the greater knowledge.¹⁶

Finally the court held that allegations of specific acts of negligence in the declaration might be treated as mere surplusage and disregarded. This is one of some four views regarding the effect of allegations of specific acts of negligence on a *res ipsa* case. Some courts disagree entirely and hold that specific allegations constitute an abandonment of the *res ipsa* case; others take positions in between. But this is the Tennessee rule, laid down by earlier decisions.¹⁷

Several other cases deserve mention in connection with the doctrine of *res ipsa loquitur*. In *Chattanooga Gas Co. v. Underwood*,¹⁸ involv-

12. 36 Tenn. App. 469, 258 S.W.2d 782 (M.S. 1953).

13. 276 S.W.2d 763 (Tenn. App. E.S. 1954).

14. *Id.* at 767.

15. See, in general, PROSSER, TORTS § 43 (2d ed. 1955).

16. *Id.* at 209-10.

17. *Nashville Interurban Ry. v. Gregory*, 137 Tenn. 422, 193 S.W. 1053 (1917). For discussion of the several rules, see PROSSER, TORTS 214-15 (2d ed. 1955).

18. 270 S.W.2d 652 (Tenn. App. E.S. 1954).

ing a gas explosion in a bathroom, the court declared that "under the doctrine of *res ipsa loquitur*, the explosions having been proved and the origin having been established as gas escaping from a main under defendant's exclusive control, the burden shifted to the defendant to show freedom from negligence."¹⁹ In *Railway Express Agency, Inc. v. Smith*,²⁰ the court held that when damage occurs to goods while they are in the exclusive control of a carrier, "an inference of negligence may be drawn, thereby shifting to the carrier the burden of going forward with the evidence when proof is adduced to the effect that (1) the shipment was in good condition and properly packed when received by the carrier, and (2) that it was damaged when the carrier delivered it to the consignee."²¹ The meaning of the term "burden" in these two quotations is not perfectly clear. It appears to mean that in either or both of these two situations the *res ipsa* case creates an inference so strong that there will be a directed verdict for the plaintiff unless the defendant meets the burden of introducing evidence in rebuttal of the case and brings the case back into the province of the jury. On the other hand, it is possible that it simply means that there is a case sufficient to go to the jury and that the jury is likely to hold for the plaintiff unless the defendant supplies rebutting evidence.²²

Butler v. Molinski,²³ was an action of malpractice in setting a fractured wrist. The court held *res ipsa loquitur* not applicable and indicated that a failure to cure does not give rise to an inference of negligence. There was expert evidence that defendant's treatment followed customary practice. On the other hand, in *Dunn v. Ralston Purina Co.*,²⁴ the court held that when horse feed, delivered in unopened and unaltered bags, was found to be spoiled a "prima facie case of negligence" was established.

2. Causation

"In every case the question of proximate cause, or legal cause, or cause in law, involves first an inquiry into the question of cause in fact. If that inquiry shows that defendant's conduct, in point of fact, was not a factor in causing plaintiff's damage, that ends the matter.

19. *Id.* at 658.

20. 212 F.2d 47 (6th Cir. 1954).

21. *Id.* at 50.

22. The second meaning may well have been intended in the gas case. For a collection of other cases on *res ipsa loquitur* and leakage from gas mains, see Annot., 26 A.L.R.2d 136, 192 (1952).

In the carrier case, however, the court must have had in mind the first meaning. See the discussion of Judge Anderson in *Illinois Cent. R.R. v. H. Row & Co.*, 25 Tenn. App. 475, 159 S.W.2d 839 (W.S. 1940). Indeed, as that opinion makes clear, the liability of a carrier of goods is essentially that of an insurer, with certain exceptions, such as perishable goods, involved in the *Row* case but not in the instant case.

23. 277 S.W.2d 448 (Tenn. 1955).

24. 272 S.W.2d 479 (Tenn. App. M.S. 1954).

But if it shows his conduct was a factor in causing plaintiff's damage, then the further question is whether his conduct played such a part in causing the damage as makes him in the eye of law the author of such damage and liable therefor." This quotation from Judge Felts' opinion in this year's case of *Carney v. Goodman*²⁵ affords an apt introduction to the subject of causation in negligence.

The initial determination of cause in fact, being a factual issue, is of course for the jury. Thus, in *East Tennessee Natural Gas Co. v. Peltz*,²⁶ defendants in laying a gas line, set off heavy charges of explosive; the question was whether these blasting operations caused the destruction of plaintiff's concrete dam. There was sharply conflicting testimony and the court held that the jury verdict should stand, declaring that, "Where there is a conflict between expert or scientific testimony and testimony as to facts, the jury must determine the relative weight of the evidence."²⁷ The one exception to the rule that factual cause is necessary to impose liability upon the defendant arises from a long standing interpretation of the Railroad Precaution Statute (Code Section 2628).²⁸ In two cases during the Survey period, this unusual holding was regarded as controlling,²⁹ but the court explained in one of them that it is limited to this single statute and does not apply to other bases on which the railroad might be held liable.³⁰

As Judge Felts indicated in the *Carney* case, the most appropriate way to express a test for cause in fact is to consider whether the defendant's negligence "was a substantial factor in causing plaintiff's damage."³¹ In the *Carney* case, defendant Stamper had parked her car diagonally on the side of a highway so that it protruded from two to five feet into the paved part of the road, which was slick from fresh oil and rain. The driver of a first truck came up to her car and stopped, since the other lane was filled with heavy traffic. The driver of a second truck failed to observe that the first one had stopped until he came within 150 to 200 feet of it. He immediately put on his brakes but because of the oil slick was unable to avoid hitting the first truck. Plaintiff was in the back of the second truck with a large, heavy tar kettle. This kettle slid forward, crushing plaintiff against the cab of the truck. The trial judge gave a directed verdict against the plaintiff on the ground that "the cause of the accident was the slick-

25. 270 S.W.2d 572,575 (Tenn. App. M.S. 1954).

26. 270 S.W.2d 591 (Tenn. App. E.S. 1954).

27. *Id.* at 603. See also *Dunn v. Ralston Purina Co.*, 272 S.W.2d 479 (Tenn. App. M.S. 1954), where there was a similar conflict of expert opinion on whether spoiled feed caused the death of a horse by colic. Here, too, the court held the issue was for the jury.

28. *Illinois Cent. R.R. v. Davis*, 104 Tenn. 442, 58 S.W. 296 (1900).

29. *Louisville & N. R.R. v. Farmer*, 220 F.2d 90 (6th Cir. 1955); *Illinois Cent. R.R. v. Perkins*, 79 So.2d 459 (Miss. 1955) (Tennessee law).

30. *Louisville & N. R.R. v. Farmer*, *supra* note 29, at 99.

31. 270 S.W.2d at 575.

ness of the road." The court of appeals reversed so far as defendant Stamper was concerned and remanded for a trial.³²

Clearly Stamper's negligence was a cause in fact of plaintiff's injuries. As the court phrased it, it was not only a "substantial factor," it was "the most important factor, for it really put the others into operation." Legal cause is sometimes determined by the court but is often left also to the jury. The court held that the issue should have been submitted to the jury here. It said: "[H]er negligence, as a legal or proximate cause of plaintiff's injuries [was not] superseded by the intervening acts of the two truck drivers. Such acts were within the range of the risk created by her negligence, were reasonably foreseeable as a likely result thereof, and were not new, independent, or superseding causes; for her negligence was continuous and operative up to the instant of the collision, or so the jury might have found."³³

In *Rader v. Nashville Gas Co.*,³⁴ defendant gas company removed a meter from a building but left the gas pipes in the ground. The building was later torn down and the ground graded and filled. Heavy machinery apparently broke the gas line and escaping gas gradually accumulated in plaintiff's attic where it exploded. The court of appeals affirmed a directed verdict for the defendant. It declared that it could not find "any evidence which indicates that this explosion was caused by any negligence of this defendant."³⁵ This settled the problem, since if the defendant was not negligent there was no need to consider or discuss the problem of causation. But, following the lead of the trial court, the court cited and quoted from the line of Tennessee cases that "an injury which could not have been foreseen nor reasonably anticipated as the probable result of an act of negligence is not actionable."³⁶ The holding of no negligence was therefore buttressed by an additional indication of no proximate cause.³⁷

32. Suit was against Stamper and against both the driver and owner of the first truck and a verdict was directed for all defendants. The court of appeals affirmed the action as to the truck driver and owner on the ground that there was no evidence that the truck driver was negligent in any way.

33. *Id.* at 575. It adds that if the second driver had seen the standing vehicle in time to enable him to avoid the collision but with this knowledge had still negligently failed to stop in time to avoid the collision, his negligence would have cut off Stamper's liability.

34. 37 Tenn. App. 621, 268 S.W.2d 114 (M.S. 1954).

35. *Id.* at 116. See also: "We cannot say that this defendant was guilty of any negligence in not foreseeing that this lot upon which a restaurant building had stood would be graded and filled and run over by heavy machinery and equipment and the gas pipes under the ground broken, allowing gas to escape and flow under ground to the building of the plaintiffs next door to the lot, over ninety days after the meter was removed." *Id.* at 117.

36. The quotation comes by way of *Wallace v. Electric Power Board*, 36 Tenn. App. 527, 531, 259 S.W.2d 558, 560 (E.S. 1953), from *Moody v. Gulf Ref. Co.*, 142 Tenn. 280, 290, 218 S.W. 817, 819, 8 A.L.R. 1243 (1920).

37. This holding seems somewhat questionable. If the defendant had by some chance been found negligent in leaving the gas pipes in the ground with gas in them, this must have been because it created the risk that someone not

In the Survey issues for the two previous years I have called attention to the fact that the Tennessee courts have developed several independent lines of authority regarding the test for proximate cause, from the very narrow test quoted in the *Rader* case to the very broad one requiring merely factual cause,³⁸ with several positions in between.³⁹ This provides a desirable flexibility and freedom of decision for the appellate courts, but it produces a misleading appearance of certainty and directs attention away from the exercise of discretion which is the essence of the decision. There is much to be said for phrasing the test in terms of a standard (like the standard of the reasonable, prudent man for determining negligence) which affords the same flexibility and yet points up the element of discretion which must be exercised by the determining agency, whether it is jury, trial judge or appellate court. Such a standard is adequately expressed by saying that there must be a reasonably close connection between the risk created by the defendant's negligent conduct and the damage or injury suffered by the plaintiff.⁴⁰ This provides only a slight change from the language of the court in the *Carney* case, quoted above,⁴¹ and that used in several earlier decisions.⁴² The addition of the phrase "reasonably close connection" turns the test into a standard and emphasizes the discretionary aspect of the decision.

3. Defenses

Since the decision of *Creekmore v. Woodard*⁴³ in 1951, it has been assumed that when the defendant is required to plead specially, he must plead contributory negligence in order to rely on it as a defense.⁴⁴ The case of *Gerwin v. American News Co.*,⁴⁵ raises a slight question in this connection. Plaintiff sued for damages sustained

knowing what the pipes were or not knowing that they were there might negligently interfere with them or damage them in some way and cause gas to escape. This is exactly what happened. It would, therefore, seem to have been better for several reasons to have decided the case simply on the basis of no negligence.

38. See, e.g., *Postal Telegraph Cable Co. v. Zopfi*, 93 Tenn. 369, 24 S.W. 633 (1894); *Deming & Co. v. Merchants' Cotton-Press Co.*, 90 Tenn. 306, 17 S.W. 89, 13 L.R.A. 518 (1891). These are the cases usually cited when a jury verdict for plaintiff is sustained, just as the *Moody* case is usually cited when the case is taken out of the hands of the jury and a decision rendered for defendant.

39. See Wade, *Torts—1953 Tennessee Survey*, 6 VAND. L. REV. 990,1000-02 (1953); Wade, *Torts—1954 Tennessee Survey*, 7 VAND. L. REV. 951,958 (1954). Tennessee cases are also discussed in Comment, *Proximate Cause: A Checkered Landscape in Tennessee*, 23 TENN. L. REV. 1015 (1955).

40. For elaboration, see Wade, Book Review, 8 VAND. L. REV. 657, 660-63 (1955).

41. See text to note 33, *supra*.

42. E.g., *Inter-City Trucking Co. v. Daniels*, 181 Tenn. 126, 131, 178 S.W.2d 756,758 (1944); *Spivey v. St. Thomas Hospital*, 31 Tenn. App. 12,25, 211 S.W.2d 450,455 (M.S. 1947).

43. 192 Tenn. 280, 241 S.W.2d 397 (1951).

44. See *Lively v. Atchley*, 36 Tenn. App. 399, 256 S.W.2d 58 (E.S. 1952), (facts only and not technical legal conclusions are required).

45. 270 S.W.2d 354 (Tenn. 1954).

when water flooded a basement which it was renting, claiming that defendant, another tenant in the building, negligently allowed water to escape from his part of the building. Defendant's plea in response to an order under Code Section 8767 to plead specially was that the basement was not flooded with water coming from the premises occupied by him. Under this plea he was allowed to introduce evidence that the water came from a broken water pipe maintained by the city in the street for the reason that this showed the water did not come from his premises. Could a defendant plead that plaintiff's injury was not caused by defendant's negligence and then introduce proof of plaintiff's contributory negligence under the contention that it was the cause of the injury? Probably not. Plaintiff's contributory negligence does not necessarily mean that defendant was not negligent or that his negligence failed to contribute to the injury.

The harshness of the common-law rule that contributory negligence on the part of a plaintiff completely bars his recovery has produced numerous exceptions and qualifications on the rule. Most states agree that when defendant is guilty of an intentional wrong or of wilful and wanton misconduct, contributory negligence does not bar his recovery. In Tennessee the same position is taken when the defendant is guilty of gross negligence. This was reiterated during the year in the case of *Shuler v. Clabough*.⁴⁶ But an allegation of gross negligence and wilful and wanton misconduct in the declaration is not enough to warrant an instruction to the jury; the allegation must be supported by proof.⁴⁷

There were no cases during the Survey period involving the doctrine of last clear chance. Several cases, however, involved the Tennessee doctrine of remote contributory negligence, under which plaintiff's negligence, if classified as remote, does not bar recovery but serves instead to mitigate damages. In *Louisville & N. R.R. v. Farmer*,⁴⁸ involving a crossing collision, the court referred to the doctrine and declared that the issue was for the jury whether the decedents were "guilty of either proximate or remote contributory negligence." In *Horne v. Palmer*,⁴⁹ the court declared that from the evidence there was a permissible inference that one of the two plaintiffs "was guilty of proximate or remote negligence. The finding of some amount, small though it is, in his favor negatives a finding of proximate negligence, leaving remote negligence as the only possible jury finding against

46. 274 S.W.2d 17 (Tenn. App. E.S. 1954), 23 TENN. L. REV. 1073 (1955). The court relies on *Inter-City Trucking Co. v. Daniels*, 181 Tenn. 126, 178 S.W.2d 756 (1944); and *Mason v. Burgess*, 8 Tenn. Civ. App. 138 (1917). See also *Stagner v. Craig*, 159 Tenn. 511, 19 S.W.2d 234 (1929), where gross negligence and wilful and wanton misconduct are apparently regarded as equivalent terms.

47. *Roach v. Franzle*, 37 Tenn. App. 629, 268 S.W.2d 118 (M.S. 1953).

48. 220 F.2d 90 (6th Cir. 1955).

49. 274 S.W.2d 372 (Tenn. App. E.S. 1954).

the Hornes."⁵⁰ But the verdicts and the evidence indicated such confusion on the part of the jury that a new trial was granted.

Three cases also involved application of the Railroad Precaution Statute (Code Section 2628) and the established interpretation of it that contributory negligence, whether proximate or remote, will have the effect only of mitigating damages.⁵¹ In one of them the jury were peremptorily instructed that the deceased was guilty of contributory negligence, and the court declared that it was "manifest from the size of the verdict that the jury applied the contributory negligence of the deceased in the reduction of damages."⁵²

This approach to the problem of contributory negligence—treating it not as a complete bar to recovery but letting it go in diminution of damages—has had for many years an established basis for certain types of cases in Tennessee, and there are strong arguments that it should become the general rule, applicable to all types of negligence suits.⁵³

The matter of imputed negligence was raised in *Hamilton v. Peoples*.⁵⁴ The court of appeals held that the lower court was wrong in instructing that a driver's negligence is imputed to his passenger. As the court indicated, however, the passenger may himself be negligent.⁵⁵ The court found that under the facts of the *Hamilton* case, the parties in the car, having gone to Florida on a fishing trip under an expense-sharing arrangement, were engaged in a joint enterprise. This meant that the negligence of one would be imputed to the others in an action against a third party. But this was an action between the parties themselves, and after indicating the confusion in the Tennessee cases the court announced what is clearly the better rule, that imputed negligence is not applied in an action between the joint entrepreneurs themselves.⁵⁶

50. *Id.* at 374.

51. *Louisville & N. R.R. v. Farmer*, 220 F.2d 90 (6th Cir. 1955); *Louisville & N. R.R. v. Tucker*, 211 F.2d 325, modified on rehearing, 215 F.2d 227 (6th Cir. 1954); *Illinois Cent. R.R. v. Perkins*, 79 So.2d 459 (Miss. 1955) (accident in Tennessee and Tennessee law applied).

52. *Illinois Cent. R.R. v. Perkins*, 79 So.2d 459,468 (Miss. 1955).

53. For an excellent treatment of the subject, see PROSSER, *Comparative Negligence*, in *SELECTED TOPICS OF THE LAW OF TORTS* c. 1 (1954). A proposed model statute is set out in *id.* at 68-69; see Wade, Book Review, 8 *VAND. L. REV.* 657, 659-60 (1955), for discussion of this statute and suggested refinements.

54. 274 S.W.2d 630 (Tenn. App. E.S. 1954), 23 *TENN. L. REV.* 1076 (1955).

55. Both holdings are also laid down in *Louisville & N. R.R. v. Tucker*, 211 F.2d 325, modified on rehearing 215 F.2d 227 (6th Cir. 1954); and *Louisville & N. R.R. v. Farmer*, 220 F.2d 90 (6th Cir. 1955). See also *McMahan v. McMahan*, 276 S.W.2d 738 (Tenn. App. E.S. 1954) (Ohio law).

56. The court relied primarily on *Chumley v. Anderton*, 20 *Tenn. App.* 621, 103 S.W.2d 331 (M.S. 1936). For general treatment see PROSSER, *TORTS* 366-67 (2d ed. 1955).

In the *Hamilton* case, the accident happened in Florida so that Florida law controlled. The court found no Florida decisions in point, however, and making the presumption that Florida law was the same as that of Tennessee, it proceeded to lay down the law for Tennessee.

The doctrine of assumption of risk was involved in two cases. Assumption of risk corresponds to the defense of consent in an action for intentional harm. A case of express consent was involved in *Martin v. Greyhound Corp.*⁵⁷ Plaintiff, wife of an employee of defendant, was traveling on a pass providing that she "voluntarily assumes all risks of accidents." The pass was regarded as a gratuity so that the contract to assume the risk was not in violation of federal statute and was binding on the plaintiff.

The consent need not be express, however, and may be implied from conduct. In this connection the expression, assumption of risk, has in many cases been freely and somewhat recklessly used. In *Chattanooga Gas Co. v. Underwood*,⁵⁸ the Eastern Section of the Court of Appeals reacted against this. An explosion had occurred in a house, and plaintiff, captain in the Chattanooga Fire Department, came to investigate as a part of his duty. Representatives of the gas company had already arrived and they informed plaintiff that no natural gas was involved; there was no smell of natural gas. While investigating, plaintiff picked up an open cigarette lighter from the bathroom floor and when he closed it another explosion took place, injuring him. It was later discovered that the explosions were caused by natural gas, leaking from a main and coming into the house through sewer pipes. The gas company's defenses included contributory negligence and assumption of risk. The court held that the issue of contributory negligence was for the jury and that the defense of assumption of risk was not available. It said: "In this State the doctrine of assumption of risk is limited in its application to cases of master and servant, 'but one frequently finds in opinions of the courts the expression 'assumption of risk' as the practical equivalent of the term 'contributory negligence.'" ⁵⁹

The court is correct in saying that the expression is sometimes used inaccurately as a synonym for contributory negligence. At other times it is used as an easier way of indicating that the defendant has not breached his duty. This may help to explain some cases applying the doctrine to people coming on defendant's premises or to automobile guests. If the defect is obvious and apparent or the plaintiff knows of it, the defendant has breached no duty; another way of saying this is that the plaintiff has assumed the risk. Use of the expression *should* be restricted, as Judge Howard suggests in the *Chattanooga Gas* case. But there are still cases which would be somewhat difficult to explain if it were confined solely to master and servant situations. What of the numerous cases involving spectators at athletic events? In the

57. 125 F. Supp. 362 (M.D. Tenn. 1954).

58. 270 S.W.2d 652 (Tenn. App. E.S. 1954).

59. *Id.* at 659. The double quote is from *Bouchard & Sons Co. v. Keaton*, 9 Tenn. App. 467, 481 (M.S. 1928).

Chattanooga Gas case itself, suppose a fire had developed and plaintiff, as a fireman fighting the blaze, had been injured when the house collapsed. As a fire fighter, would he not have been held to have assumed this risk?⁶⁰

4. Damages

In several cases an appellant claimed error as to the damages awarded but little consideration or discussion was given to the issues raised and the court did not reverse.⁶¹ The Tennessee rule that there cannot be recovery in a wrongful-death action for loss of society and companionship was considered in one case.⁶² There is a possible hint in another that punitive damages may be added in an appropriate case to nominal damages.⁶³

5. Particular Fact Situations and Relationships

(a) Manufacturers

Perhaps the most important Torts case during the Survey period is *Dunn v. Ralston Purina Co.*⁶⁴ Like other states, Tennessee had an early decision following the English view that a manufacturer owes no duty to those not in privity of contract with him to use care in the making of his products.⁶⁵ Exceptions to the rule quickly developed and multiplied, and beginning with the famous case of *MacPherson v. Buick Motor Co.*,⁶⁶ in New York in 1916, the several states have gradually abrogated this rule. Tennessee has had some unreported decisions of the court of appeals to this effect but they did not have supreme court sanction and the supreme court itself had left the problem open.⁶⁷ The *Dunn* case is the first outright, officially recognized decision and there can now be no doubt as to the Tennessee rule on the subject.

"The rule now, in our opinion, is that where a product is such that, if negligently made, it may reasonably be expected to injure the per-

60. *Buckeye Cotton Oil Co. v. Campagna*, 146 Tenn. 389, 242 S.W. 646 (1922), indicates that the owner of the building would not be liable. Would the gas company be liable for this injury even though its negligence caused the fire, if there were no subsequent explosions? Should the issue here depend on whether the plaintiff was contributorily negligent in subjecting himself to the risk?

61. See, e.g., *Finks v. Gillum*, 273 S.W.2d 722 (Tenn. App. M.S. 1954); *Tennessee Copper Co. v. Smith*, 216 F.2d 428 (6th Cir. 1954) (lower court had given remittitur).

62. *Illinois Cent. R.R. v. Perkins*, 79 So.2d 459 (Miss. 1955) (Tenn. law). See, in general, Gamble, *Actions for Wrongful Death in Tennessee*, 4 VAND. L. REV. 289 (1951).

63. *Butler v. Molinski*, 277 S.W.2d 448 (Tenn. 1955).

64. 272 S.W.2d 479 (Tenn. App. M.S. 1954), 23 TENN. L. REV. 1079 (1955).

65. *Burkett v. Studebaker Bros. Mfg. Co.*, 126 Tenn. 467, 150 S.W. 421 (1912).

66. 217 N.Y. 382, 111 N.E. 1050, L.R.A. 1916F 696, Ann. Cas. 1916C 440 (1916).

67. For a more complete treatment of the Tennessee cases prior to the *Dunn* case, see Noel, *Products Liability of a Manufacturer in Tennessee*, 22 TENN. L. REV. 985 (1953); Wade, Book Review, 22 TENN. L. REV. 444 (1952). Both are cited in the opinion of the *Dunn* case.

son or property of an ultimate user of it, then, irrespective of contract, the manufacturer is under a duty to such user to make it carefully."⁶⁸

The case involved horse feed which had spoiled and which the jury might find had caused the death of plaintiff's horse. The court held that the rule that a manufacturer must use care extends to the manufacture of animal feeds. The spoiled condition of the feed created a prima facie case of negligence and to the defendant's contention that the feed had spoiled through natural causes, the court replied that it was negligent to put out "without any warning . . . a product which was apparently safe, but which to its knowledge would likely spoil and become dangerous before it could be used for the purpose for which it was sold."⁶⁹ There was also a hint of a possible warranty in the express representation of defendant's agent that the feed "was safe and fit and the best feed for his horse," though the decision is clearly based on negligence.

(b) *Landowners*

A landlord who leases premises which he knows to have a condition dangerous to those outside the premises and which will remain this way may be liable for damages caused by this condition just as the tenant may. This is illustrated by *Shuey v. Frierson*,⁷⁰ where a rented building had a door opening out on the sidewalk and the plaintiff was injured when it opened directly in front of her. Plaintiff had sued both lessor and lessee. The jury found for the defendant lessee and this was sustained by the supreme court. A verdict at the same time against the lessor was reversed by the court of appeals and a new trial granted, but the jury again found the lessor liable. This verdict was affirmed by the supreme court on the ground that the lessor's liability was independent of any misconduct of the lessee and therefore not derivative.

It is the majority rule that a landlord is not liable to a tenant for damage caused by the defective condition of the premises, though several exceptions have developed. In Tennessee, starting with the famous *Willcox* cases,⁷¹ the rule is otherwise, and the landlord is under a duty to use "reasonable care and diligence" to discover defects. In *Glassman v. Martin*,⁷² the wooden riser for some steps had been eaten out by termites and the whole stairs collapsed with plaintiff on them. The defect was not apparent but could have been discovered by punching the riser with an ice pick. The court of appeals affirmed a jury verdict for the plaintiff, but the supreme court reversed, saying: "The law does

68. 272 S.W.2d at 481.

69. *Id.* at 482.

70. 270 S.W.2d 883 (Tenn. 1954), 23 TENN. L. REV. 899 (1955).

71. *Hines v. Willcox*, 96 Tenn. 148, 33 S.W. 914 (1896); *Hines v. Willcox*, 96 Tenn. 328, 34 S.W. 420 (1896); *Willcox v. Hines*, 100 Tenn. 524, 45 S.W. 781 (1898); *Willcox v. Hines*, 100 Tenn. 538, 46 S.W. 297 (1898).

72. 196 Tenn. 595, 269 S.W.2d 908 (1954).

not impose upon the landlord the duty of constant care and inspection of the premises. It imposes upon him the duty of reasonable care to inform himself of the condition of the property."⁷³

The liability of a landowner to a person who comes on to his premises was involved in *De Soto Auto Hotel, Inc. v. McDonough*.⁷⁴ Plaintiff went into defendant garage with a friend who had stored his car there. He slipped on some grease on the floor and fell, breaking his leg. The court affirmed a jury verdict for plaintiff, holding that he was a business guest rather than a licensee. Two reasons were given for this, though it is not clear that the court regarded them as separate reasons: "(1) It is not necessary in order for a person to be a business invitee that he be expressly invited to come upon the premises for the purpose of doing business with the owner. An invitation is implied when the owner, by acts or conduct leads another to the belief that the use of the premises is in accordance with the design for which the place was adapted and allowed to be used in mutuality of interest. . . . (2) The visit may be for the convenience or arise out of the necessities of others who are themselves upon the premises for such a purpose."⁷⁵ Either basis for calling the plaintiff a business guest would have been adequate. The jury's finding of negligence was held to be justified since the defendant knew that cars dripped oil and gas and had a janitor whose duty it was to clean it off but who had not been in that part of the garage for over an hour.⁷⁶

(c) *Traffic and Transportation*

Automobiles.—About half of the Torts cases during the Survey period involved the operation of automobiles. Most of them were cases of collision between two automobiles, but in three there was a crossing collision with a train,⁷⁷ in two a car struck a pedestrian,⁷⁸ in one a car left the road on a curve⁷⁹ and in another a vehicle struck a building.⁸⁰

In three cases where defendant was blocking the highway he was

73. *Id.* at 601, 269 S.W.2d at 910. See, in general, Comment, *Landlord and Tenant: Tort Liability in Tennessee*, 23 TENN. L. REV. 219 (1954).

74. 219 F.2d 253 (6th Cir. 1955).

75. *Id.* at 255.

76. Two other cases may be somewhat relevant to this section. *Massey v. Chattanooga Station Co.*, 210 F.2d 167 (6th Cir. 1954), involves the duty of a master to use care to provide a safe place to work and safe tools. *Gerwin v. American News Co.*, 270 S.W.2d 354 (Tenn. 1954), suggests that one tenant will be liable to another when his activities damage him.

77. *Louisville & N. R.R. v. Farmer*, 220 F.2d 90 (6th Cir. 1955); *Louisville & N. R.R. v. Tucker*, 211 F.2d 325, *modified on rehearing*, 215 F.2d 227 (6th Cir. 1954); *Illinois Cent. R.R. v. Perkins*, 79 So.2d 459 (Miss. 1955). The railroad aspects of these cases are discussed later.

78. *Jones v. Agnew*, 274 S.W.2d 821 (Tenn. App. W.S. 1954), 274 S.W.2d 825 (Tenn. 1954) (statute raising presumption of agency); *Roach v. Franzle*, 37 Tenn. App. 629, 268 S.W.2d 118 (M.S. 1954) (jury verdict for defendant).

79. *McMahan v. McMahan*, 276 S.W.2d 738 (Tenn. App. E.S. 1954) (Ohio guest statute).

80. *McCloud v. City of La Follette*, 276 S.W.2d 763 (Tenn. App. E.S. 1954) (*res ipsa loquitur*).

found liable.⁸¹ The speed limit was involved in several cases.⁸² Two cases involved foreign automobile guest statutes.⁸³ Plaintiff was hit from behind in one case,⁸⁴ another involved a collision at an intersection,⁸⁵ and another involved the rule of the road.⁸⁶ There were several miscellaneous decisions.⁸⁷ None of the automobile cases raised questions of law which have not been adequately discussed in the general treatment of negligence.

Railroads.—The three cases involving railroad crossing collisions were all concerned with the Railroad Precaution Statute (Section 2628). All raised an issue under subsection (4), the lookout provision, requiring a lookout and adding that “when any person, animal, or other obstruction appears upon the road, the alarm whistle shall be sounded, the brakes put down, and every possible means employed to stop the train and prevent an accident.” When does an obstruction appear upon the road? In *Majestic v. Louisville & N. R.R.*,⁸⁸ decided in 1945, the federal court of appeals laid down the interpretation that “‘the road’, in contemplation of the statute, is not merely what is called strictly the roadbed or track, but also includes the public approaches thereto and it is the duty of the lookout to view the whole road within the orbit of his vision.”⁸⁹

This interpretation was quoted and relied on during the Survey period in *Louisville & N. R.R. v. Tucker*,⁹⁰ but after the holding was rendered, on petition for rehearing together with a brief by amici

81. *Carney v. Goodman*, 270 S.W.2d 572 (Tenn. App. M.S. 1954) (rear of diagonally parked car protruded 2 to 5 feet on highway); *Shuler v. Clabough*, 274 S.W.2d 17 (Tenn. App. E.S. 1954) (truck left parked on highway without flags or flares); *Noe v. Talley*, 274 S.W.2d 367 (Tenn. App. E.S. 1954) (gasoline truck stalled on highway emitting large clouds of smoke obscuring it).

82. *Horne v. Palmer*, 274 S.W.2d 372 (Tenn. App. E.S. 1954); *Hopper v. United States*, 122 F. Supp. 181 (E.D. Tenn. 1953), *aff'd mem.*, 214 F.2d 129 (6th Cir. 1954); *Tennessee Copper Co. v. Smith*, 216 F.2d 428 (6th Cir. 1954); *Jones v. Agnew*, 274 S.W.2d 821 (Tenn. App. W.S. 1954), *aff'd*, 274 S.W.2d 825 (Tenn. 1954) (ambulance).

83. *Hamilton v. Peoples*, 274 S.W.2d 630 (Tenn. App. E.S. 1954) (Florida); *McMahan v. McMahan*, 276 S.W.2d 738 (Tenn. App. M.S. 1954) (Ohio).

84. *Finks v. Gillum*, 273 S.W.2d 722 (Tenn. App. M.S. 1954). Cf. *Carney v. Goodman*, 270 S.W.2d 572 (Tenn. App. M.S. 1954) (driver of first truck stopped for obstruction in road, driver of second truck did not see him in time to stop; passenger in second truck failed to recover from driver of first truck because no proof of negligence).

85. *Horne v. Palmer*, 274 S.W.2d 372 (Tenn. App. E.S. 1954).

86. *Hopper v. United States*, 122 F. Supp. 181 (E.D. Tenn. 1953), *aff'd mem.*, 214 F.2d 129 (6th Cir. 1954).

87. *Gogan v. Jones*, 273 S.W.2d 700 (Tenn. 1954) (suit by foreign administrator for death in accident in Tennessee); *Franklin v. Wills*, 217 F.2d 899 (6th Cir. 1954) (action by wife for North Carolina accident); *Fontenot v. Roach*, 120 F. Supp. 788 (E.D. Tenn. 1954) (attempt to bring in driver of plaintiff's car, as third party defendant for contribution).

88. 147 F.2d 621 (6th Cir. 1945).

89. *Id.* at 624-25. The court relied on *Nashville & C. R.R. v. Anthony*, 69 Tenn. 516 (1879). This was a case of horses caught within the fences of the railroad right of way and perhaps not on the track while running before the train until they jumped in front of it and were struck.

90. 211 F.2d 325 (6th Cir. 1954).

curiae, the court became convinced that it was inconsistent with the interpretation of the State Supreme Court, and it deleted this part of its opinion, though declining to change the actual holding in the case.⁹¹ This modified view was followed, with explanation, in *Louisville & N. R.R. v. Farmer*,⁹² and it appears that the federal courts are now completely in accord with state court position that "appearance on the road means appearance on the track in front of the moving train, or so near that the object will be struck by the moving train."⁹³

In *Illinois Cent. R.R. v. Perkins*,⁹⁴ on the other hand, the Mississippi court, in applying the Tennessee statute, had its attention called to the interpretation laid down in the *Majestic* case but not to the later modification. As a result in a case where decedent struck the front drive wheel of the engine, the court held that "The jury was well warranted in finding that if the engineer had been keeping the proper lookout as required by the statute, viewing the crossing ahead and the approaches thereto, all within the orbit or range of his vision, he would have observed the deceased approaching the crossing at a time when the engineer was at a distance of 150 feet from the crossing, and that had he then immediately applied his emergency brake as the statute requires, the collision might have been avoided."⁹⁵ A moment's reflection will indicate the implications of this decision if it and the *Majestic* interpretation were actually the law in Tennessee. Every time a car approaching an intersection was within the orbit of the engineer's view he would be required to put on his emergency brakes to avert a possible collision. No comment seems necessary.⁹⁶

The *Perkins* case also involved Subsection (3) of the Precautions Statute, the bell-ringing provision requiring the train to sound a bell or whistle one mile from a city or town and at short intervals thereafter. The engineer had not sounded the signals until he reached a point about a half mile before reaching the city limits of Selmer. This violated the statute, and the court held, in accordance with established authority, that this made the railroad liable, whether this failure was a cause of the accident or not.⁹⁷ Here is another place where inter-

91. 215 F.2d 227 (6th Cir. 1954).

92. 220 F.2d 90, 97 (6th Cir. 1955).

93. *Gaines v. Tennessee Cent. Ry.*, 175 Tenn. 389, 393, 135 S.W.2d 441, 442 (1940). The modification of the holding in the *Tucker* case is overlooked in Comment, *Look Out Ahead—Tennessee Grade Crossings*, 23 TENN. L. REV. 865 (1955), and the *Farmer* case had apparently not been published when it was written.

94. 79 So.2d 459 (Miss. 1955).

95. *Id.* at 467.

96. Contrast the holding in *Tennessee Cent. Ry. v. Ledbetter*, 159 Tenn. 404, 19 S.W.2d 258 (1929).

97. See, e.g., *Illinois Cent. R.R. v. Davis*, 104 Tenn. 442, 449, 58 S.W. 296, 298 (1900): "The . . . assignment is that the Court erred in refusing defendant's request, to the effect that if the jury found that the bell or whistle on said train was sounded at short intervals for a distance of one-half or three-quarters of a mile from the corporate limits of South Fulton in the State of

pretation of the statute might reasonably be modified. It would apparently make no difference if the bell had been continuously sounded after that time and the deceased had actually heard it in time to stop. It apparently makes no difference how large the city is. Is it illogical to take the holding further and say that a failure to sound before entering the preceding town or on the preceding day also makes the railroad liable, or is this a *reductio ad absurdum*?

The rule that the statute does not apply to switching operations was held in the *Tucker* case⁹⁸ to be confined to operations in the switching yard, where the tracks do not cross a street or road.

In both federal cases the plaintiffs relied not only on the statute but also on common law negligence. Normal principles of negligence apply then, even though the railroad may be found guilty of negligence *per se* in violating a municipal ordinance.⁹⁹

Carriers.—In *Martin v. Greyhound Corp.*,¹⁰⁰ involving a carrier of passengers, it was held that a provision in a pass that the recipient assumed the risk of all injuries was valid and binding.

*Railway Express Agency, Inc. v. Smith*¹⁰¹ involves the liability of a carrier for goods shown to be properly packed and in good condition when received and damaged when delivered. In *Railway Express Agency v. General Shoe Corp.*,¹⁰² the provision in the uniform express receipt that as a condition precedent to recovery a claim must be made in writing within nine months and fifteen days after shipment was held to be binding, and applicable to a tort action for conversion as well as a contract action.

(d) *Public Service Companies*

In two cases involving gas companies there were explosions. *Chattanooga Gas Co. v. Underwood*¹⁰³ held that the company "was under a duty to use reasonable diligence in the inspection of its pipes, mains and connections, and the fact that the leaks from which the gas escaped could have been discovered by the exercise of reasonable diligence previous to the explosions was sufficient, under the circumstances, to charge the defendant with negligence." It was also held

Tennessee, that this was a substantial compliance with the statute. . . . We think the instruction was properly refused, for the reason the statute requires that the bell and whistle shall be sounded at the distance of one mile from the town. . . . The statute is imperative, and the breach of it gives a right of action, whether the nonobservance of the statute was the proximate cause of the accident or not." See also *Southern Ry. v. Kuykendall*, 186 S.W.2d 617 (Tenn. App. E.S. 1944), citing and quoting from numerous other cases.

98. 211 F.2d 325, 332 (6th Cir. 1954).

99. Proximate cause is required and contributory negligence bars recovery unless it is remote contributory negligence. *Louisville & N. R.R. v. Farmer*, 220 F.2d 90, 95-96, 99 (6th Cir. 1955).

100. 125 F. Supp. 362 (M.D. Tenn. 1954).

101. 212 F.2d 47 (6th Cir. 1954).

102. 276 S.W.2d 725 (Tenn. 1955).

103. 270 S.W.2d 652, 658 (Tenn. App. E.S. 1954).

that the jury might find the defendant negligent in failing properly to odorize the gas.

In *Rader v. Nashville Gas Co.*,¹⁰⁴ on the other hand, the defendant was found not negligent as a matter of law in removing a meter in a building and capping the gas line in the ground without removing it, so that it was not liable when the building was torn down and the line broken by heavy dirt-moving equipment.

(e) *Professions*

Of the two cases on malpractice, one involved a physician¹⁰⁵ and the other an attorney.¹⁰⁶ Both turned on side issues and provided little discussion of the standard of care.¹⁰⁷ Two quotations from the physician case may be pertinent. "The mere fact that the professional service rendered was not a success does not in any sense justify the conclusion that the defendant was guilty of actionable negligence."¹⁰⁸ As to "petitioner's contention that negligent malpractice may be shown by testimony other than by expert testimony, . . . [n]o doubt there are cases where the nature and extent of an injury would sustain this contention, as where the rule *res ipsa loquitur* applies. But it is not true in the case at bar."¹⁰⁹

II. OTHER TORTS

1. *Assault and Battery*

In *Blalock v. Temple*,¹¹⁰ the two defendants had stopped at plaintiff's filling station, engaged in an argument and had a fight. They then bought soft drinks. One of them finished his drink and started toward the other, who threw a bottle at him. It missed and hit a glass door, knocking glass in plaintiff's eye and putting it out. The court held that there was sufficient evidence from which the jury could find that the second fight was a continuation of the first and held both defendants liable. "[W]here two or more persons engage in an unlawful act and one of them commits a serious, civil injury upon a person not engaged therein, all are equally liable for damages to the injured party."¹¹¹

In *Butler v. Molinski*,¹¹² the court spoke by way of dictum of the action which one would have when a doctor not authorized by the

104. 37 Tenn. App. 621, 268 S.W.2d 114 (M.S. 1953).

105. *Butler v. Molinski*, 277 S.W.2d 448 (Tenn. 1955).

106. *Bland v. Smith*, 277 S.W.2d 377 (Tenn. 1955).

107. In the *Butler* case the issue was whether a husband could recover for loss of consortium when a wrist set by defendant failed to knit properly. In the *Bland* case the issue was the statute of limitations and whether the action was in tort or contract. The tort limitation period was applied.

108. 277 S.W.2d at 451.

109. *Id.* at 452.

110. 276 S.W.2d 493 (Tenn. App. E.S. 1954).

111. *Id.* at 496.

112. 277 S.W.2d 448 (Tenn. 1955).

patient to set a wrist, did so himself instead of having the authorized doctor do it. If there were no injury the only damages for the battery would be nominal, with possible punitive damages. But the court held that the patient's husband had no action as there was no battery or other injury to him.

2. Defamation

A letter saying that defendant's former wife had been a prostitute was held libelous per se in *Williams v. Shelton*.¹¹³ The Tennessee rule that "each publication of a libel constitutes a separate cause of action" was repeated in *Forgey v. Wallin*.¹¹⁴ Statements in a pleading were declared to be privileged if they were pertinent to the proceeding in *Lann v. Third National Bank*.¹¹⁵ It was held in *Smith v. Archer*¹¹⁶ that when defamatory words are spoken of two or more persons they cannot join in a single action because the wrong done to one is no wrong to the others.

3. Alienation of Affections

In *Scates v. Nailling*,¹¹⁷ an action for criminal conversation and alienation of affection was held to lie when brought by a married woman. *Rheudasil v. Clower*¹¹⁸ was an action for alienation of affections. Both cases turned on the statute of limitations.

4. Malicious Prosecution

In *Ernst v. Bennett*,¹¹⁹ an employer had brought an action of replevin against a former employee, claiming that the tools which the latter took belonged to him; but he lost the action. He later swore out warrants for larceny and receiving stolen goods and participated in the arrest. When the grand jury returned no true bill, the employee brought this action of malicious prosecution. The court of appeals affirmed a jury verdict for \$7500, with a remittitur for \$4500, holding that the jury might reasonably find malice and lack of probable cause. To the defense that the defendant had acted on the advice of a law student, qualified to practice law, the court declared that the student had acted as an investigator and had participated in making the decisions and therefore "owed the same duty as the client to use reasonable diligence and make proper investigation . . . and . . . was chargeable with knowledge of all the facts he could have learned by such diligence. . . ." ¹²⁰

113. 125 F. Supp. 355 (M.D. Tenn. 1954).

114. 270 S.W.2d 342 (Tenn. 1954).

115. 277 S.W.2d 439 (Tenn. 1955).

116. 270 S.W.2d 375 (Tenn. 1954).

117. 196 Tenn. 508, 268 S.W.2d 561 (1954).

118. 270 S.W.2d 345 (Tenn. 1954).

119. 273 S.W.2d 492 (Tenn. App. M.S. 1954).

120. *Id.* at 495.

5. *Tortious Interference with Prospective Advantage*

The complicated set of facts alleged by plaintiff in her declaration in *Lann v. Third National Bank*¹²¹ was as follows: Complainant owned a tourist court (claimed to be worth \$40,000), subject to a mortgage for \$14,000; she also owed defendant bank \$2675. She went to the bank to borrow funds to refinance the mortgage and cover her debt to the bank, but it refused. The mortgagee then advertised the property for foreclosure, and being unable to find funds complainant entered into an arrangement with another party to convey the property to him for \$16,000, he giving her back a year's repurchase option for \$18,000 and renting the property to her. The deed was recorded but not the option or the lease. The bank urged her to pledge her option to it as security for her debt to it and when she declined, it advised her to see a named real estate agent about selling and this agency seemed interested. But apparently on the same day the bank filed a bill against her, alleging fraud and seeking to have the deed declared a mortgage. (This bill was later voluntarily dismissed with costs by the bank after she answered it.) When news of this suit reached the papers, the real estate agent lost interest and other agents also had no interest. She was finally forced to sell for \$23,500, which left her \$313 after she had paid off all debts and attorney's fees. Defendant's demurrer to the declaration was sustained in the trial court and the supreme court affirmed.

The parties and the court were unable to agree upon the nature of the tort for which complainant was suing. Complainant characterized the action as being for "interference with and injury to [her] business." Defendant described the suit as "(1) slander of property, based upon the alleged false and defamatory matter obtained in the original bill in a prior case, and (2) moral or business duress based alike on said alleged false and defamatory matter and other facts and circumstances." The court did not attempt to choose between these three classifications, but apparently it was influenced by defendant's emphasis on "false and defamatory matter."

In an action for libel, it correctly indicated, defamatory matter contained in a pleading is absolutely privileged so long as it is pertinent to the proceeding. In this case the gravamen of the complaint was based on the allegations of fraud which were contained in the bank's original bill and which had the effect of causing real estate agents to take a hands-off attitude toward the property. The court continued: "Obviously the reason for the rule [that matters stated in a pleading are privileged] lies, not in whether it is a suit for libel or slander or what form the action on which their falsity is based takes but in the fact that in the interest of justice litigants are protected against suits

121. 277 S.W.2d 439 (Tenn. 1955).

made upon the falsity of allegations which are made in good faith, regardless of what kind of an action it is. Thus it seems to us that it would make no difference what we call this action there can be no liability under the allegations of this bill because it seems to us that the allegations of the bill of the bank were pertinent to the issues therein."¹²²

There is a tort known as interference with prospective advantage,¹²³ and the Tennessee court has recognized it.¹²⁴ I have found no case raising the specific issue discussed in this case, as to the effect on the action of the privileged character of statements in a pleading. There are several cases, however, in which relief was granted against the filing of numerous unwarranted civil actions for the purpose of injuring plaintiff's business or prospective advantage.¹²⁵

By analogy to the well-recognized tort of malicious prosecution, a majority of American states today permit an action in tort to be maintained "for the unjustifiable initiation of any civil action resulting in actual damage."¹²⁶ Tennessee agrees with this majority position.¹²⁷ This is the real basis upon which the complainant should have been suing. If the bank's original bill (in the nature of a creditor's bill) was unjustified litigation, she should be allowed to recover. She has shown actual damage and termination of the suit in her favor; it remains to be seen whether there were "malice" (improper purpose) and lack of probable cause. If these elements should be shown to be present, too, then the tort of wrongful civil proceedings combined with the tort of wrongful interference with prospective advantage provide the plaintiff's cause of action. It then makes no difference whether the bank's pleading was defamatory or not, and the issue of privilege does not arise at all.

122. *Id.* at 443. Following this conclusion, the court spent considerable time discussing *Johnson v. Ford*, 147 Tenn. 63, 245 S.W. 531 (1922), and the theory of duress of property. It declared that "in a suit for duress of property the duress must be wrongful, tortious, or unlawful" (277 S.W.2d at 443), and decided that the various acts of the bank did not come within this classification. It would seem that the suit for duress of property would not succeed here for another reason. It is not a suit in tort but for restitution—to recover an enrichment which the defendant unjustly obtained at plaintiff's expense. (This was true in *Johnson v. Ford*, *supra*, for example). In the instant case there is no indication that the bank profited or obtained any enrichment from the complainant.

123. See PROSSER, TORTS § 107 (2d ed. 1955). And see Annot., 9 A.L.R.2d 228 (1950), relied on by the complainant.

124. See, e.g., *Hutton v. Watters*, 132 Tenn. 527, 179 S.W. 134, L.R.A. 1916B 1238, Ann. Cas. 1916C 433 (1915); cf. *McKee v. Hughes*, 133 Tenn. 455, 181 S.W. 930, L.R.A. 1916D 391, Ann. Cas. 1918A 459 (1916).

125. *Maytag Co. v. Meadows Mfg. Co.*, 35 F.2d 403 (7th Cir. 1929); *Munson Line v. Green*, 6 F.R.D. 14 (S.D. N.Y. 1946), 56 YALE L.J. 885 (1947). In *Dehydro, Inc. v. Tretolite Co.*, 53 F.2d 273 (D. Okla. 1931), where the suits were threatened the court declared that the gravamen of the action was not the defamatory nature of the threats but the unfair competition aspect.

126. PROSSER, TORTS § 99 (2d ed. 1955).

127. *Lipscomb v. Shofner*, 96 Tenn. 112, 33 S.W. 818 (1896).

III. MISCELLANEOUS

1. *Joint Tortfeasors*

When parties engage in a fight together both of them are liable to a third person for the full damages caused by one of them.¹²⁸

When the liability of one of two persons is derivative, depending on the negligence of the other (as in the master-servant relationship), a holding for the second means that the first is also released. This rule was held not to apply to a lessor-lessee relationship in *Shuey v. Frierson*,¹²⁹ since the lessor might be liable "on grounds other than the misconduct of the lessee."

The Tennessee rule that there may be contribution between negligent tortfeasors was held in *Fontenot v. Roach*¹³⁰ not to combine with the federal third-party practice to allow a defendant to bring in a third party for the purpose of obtaining contribution.

2. *Tort or Contract?*

*Bland v. Smith*¹³¹ involved an action against an attorney for improper representation in a divorce action. In determining whether the suit was in tort or contract (for purposes of the statute of limitations), the court declared that it "must look to the plaintiff's declaration to determine the real purpose of the law suit. . . . In determining the real purpose or the gravamen of the action the Court must look to the basis for which damages are sought."¹³² Plaintiff sought punitive damages and claimed that defendant's conduct resulted "to his great damage, injury, and detriment," producing "no end of pain and mental anguish." As a result the court concluded "that the plaintiff based his entire action not only on tort to begin with, but injuries to his person."¹³³

3. *Statute of Limitations*

In *Bland v. Smith*, just discussed, the court held that an action against an attorney for malpractice was not in contract but in tort for personal injury and it applied the one-year statute of limitations. The statute was held to start running when the attorney's services were completed and since this was a tort action it was not tolled by a later payment of money.¹³⁴

In *Scates v. Nailling*,¹³⁵ an action for criminal conversation and alienation of affections, the court held that the statute of limitations begins to run "when from the conduct of the erring spouse, or other-

128. *Blalock v. Temple*, 276 S.W.2d 493 (Tenn. App. E.S. 1954).

129. 270 S.W.2d 883 (Tenn. 1954), 23 TENN. L. REV. 899 (1955).

130. 120 F. Supp. 788 (E.D. Tenn. 1954).

131. 277 S.W.2d 377 (Tenn. 1955).

132. *Id.* at 379.

133. *Id.* at 380.

134. *Id.* at 380-81.

135. 196 Tenn. 508, 268 S.W.2d 561 (1954).

wise, the other spouse knows that he or she has a cause of action." Unlike an action for seduction, it does not start anew for each act; nor is delay allowed for attempted reconciliation. In *Rheudasil v. Clower*,¹³⁶ the one-year statute expressly applying to criminal conversation was held to apply to alienation of affections; and it began running from the time plaintiff became aware of the alienation, not from the time of final separation.

4. *Governmental Immunity*

In *Barnett v. Memphis*,¹³⁷ a board of education and its individual members were held entitled to immunity and not liable for injuries suffered by a boy at school. Washing of streets by a city was held to be a governmental function in *McCloud v. City of La Follette*,¹³⁸ but the city was held to be liable to the extent of the liability insurance it maintained. Plaintiff might allege and prove the amount of insurance.

136. 270 S.W.2d 345 (Tenn. 1954), 23 TENN. L. REV. 1046 (1955).

137. 196 Tenn. 590, 269 S.W.2d 906 (1954).

138. 276 S.W.2d 763 (Tenn. E.S. 1954).