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Torts -- 1954 Tennessee Survey

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TORTS—1954 TENNESSEE SURVEY

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There were over forty appellate decisions during the past year in the field of Torts. All but about half a dozen of these involved Negligence, and half of the Negligence cases involved traffic accidents. A reading of this latter group is well calculated to induce an automobile driver to use more care in the future.

I. NEGLIGENCE

1. In General

In the great majority of Negligence cases the defendant owes the plaintiff a duty to use care. As Judge Howard expressed it in *Monday v. Millsaps:*[1] "Whenever one person is by circumstances placed in such a position with regard to another that it is obvious that he must use care to avoid injury to such other person, the duty at once arises to exercise care to avoid the danger commensurate with the circumstances."[2] The statement is a little too broad to apply as a generalization in all negligence cases, but it is quite appropriate for all but a few exceptions.[3]

The principal question in most negligence cases is whether the defendant violated the duty to use care. This decision of whether there has been a breach of the duty—whether defendant has been negligent—is a question normally for the jury to decide. It is normally called a question of fact, though it is actually a mixed question of law and fact involving the determination of what the facts were and the application of a general standard to them. But, "[w]here only one conclusion can be reasonably reached from the evidence and inferences it is proper for a trial court to direct a verdict."[4]

Several cases during the year have turned on the issue of whether there was sufficient evidence of negligence to go to the jury. The appellate courts have been careful to preserve the function of the jury[5] and have frequently affirmed jury verdicts on the ground that

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1. 264 S.W.2d 6, 15 (Tenn. App. E.S. 1953).
2. At another place on the same page he says, "Every person is under a duty to exercise his senses and diligence in his actions in order to avoid injuries to others."
3. See, for example, Evens v. Young, 264 S.W.2d 577 (Tenn. 1954), to be discussed later, holding that no duty to use care regarding the condition of a house is owed to the vendee by the vendor.
4. Monday v. Millsaps, 264 S.W.2d 6, 13 (Tenn. App. E.S. 1953).
5. Two cases [Monday v. Millsaps, 264 S.W.2d 6, 13 (Tenn. App. E.S. 1953); and Hale v. Rayburn, 264 S.W.2d 230, 232 (Tenn. App. E.S. 1953)] made a point of quoting the following sentence from Jackson v. B. Lowenstein & Bros., 175 Tenn. 535, 538, 136 S.W.2d 495, 496 (1940): "[A]ppellate courts [ought]

the case was properly submitted[6] or have reversed the action of the trial court in directing a verdict.[7] On the other hand there are several cases in which a directed verdict was affirmed[8] or the trial court was reversed for submitting the case to the jury.[9]

2. *Standard of Care*

The normal way of submitting to the jury the question of whether the defendant (or plaintiff) has been negligent is to give them a general standard rather than a specific rule of conduct to use as the test. This standard is expressed in terms of what a reasonable, prudent person would do under the same or similar circumstances. It affords the jury wide administrative discretion and permits decisions on particular facts without setting precedents which will be controlling for the future fact situations.[10]

Occasionally, however, the court changes from the general practice and lays down a specific rule of conduct. The most famous example of this is the stop-look-and-listen rule once announced by the United States Supreme Court and followed in some states.[11] Another is the assured-clear-distance-ahead rule, the rule that a motorist should

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not lightly to assume the primary duty of determining liability or nonliability, in actions of tort, but [ought] to leave that duty where the Constitution has placed it, with the jury, as triers of facts, and if they act capriciously and arbitrarily to supervise their action." The statement was originally used in connection with causation but was quoted in regard to negligence.

6. Memphis v. Uselton, 260 S.W.2d 293 (Tenn. App. W.S. 1953) (gas explosion in relaying gas lines to widen streets); Rural Education Ass'n v. Anderson, 261 S.W.2d 151 (Tenn. App. M.S. 1953) (patient fell from upper-story window of hospital); Monday v. Millsaps, 264 S.W.2d 6 (Tenn. App. E.S. 1953) (highway collision); Hale v. Rayburn, 264 S.W.2d 230 (Tenn. App. E.S. 1953) (pedestrian struck by car); Strickland Transp. Co. v. Douglas, 264 S.W.2d 233 (Tenn. App. W.S. 1953) (car hit parked trailer); White v. Seier, 264 S.W.2d 241 (Tenn. App. E.S. 1953) (highway collision).

7. Hammons v. Walker Hauling Co., 263 S.W.2d 753 (Tenn. 1953) (highway collision).

8. Chaffin v. Nashville, C. & St. L. R.R., 36 Tenn. App. 580, 259 S.W.2d 877 (M.S. 1953) (action under F.E.L.A.); Harding v. Moore, 262 S.W.2d 702 (Tenn. App. M.S. 1953) (highway collision); Lawson v. Chattanooga, 263 S.W.2d 538 (Tenn. App. E.S. 1953) (defective wiring); Hawkins v. Clinchfield R.R., 266 S.W.2d 840 (Tenn. App. E.S. 1953) (action under F.E.L.A.).

9. Nashville, C. & St. L. Ry. v. Katzman, 195 Tenn. 127, 258 S.W.2d 730 (1953) (railroad passenger injured by third party); Rowan v. Sauls, 195 Tenn. 573, 260 S.W.2d 880 (1953) (car owner allowed person with limited license to drive); Memphis St. Ry. Co. v. Brown, 260 S.W.2d 401 (Tenn. App. W.S. 1952) (bus passenger injured by sudden stop); Knoxville v. Cooper, 265 S.W.2d 893 (Tenn. App. E.S. 1953) (depression in city street). *Cf.* Davidson v. Burger, 36 Tenn. App. 486, 259 S.W.2d 541 (M.S. 1952) (automobile accident), where the court found there was insufficient basis to allow the jury to find a car passenger contributorily negligent.

10. Sometimes a standard is submitted in terms of "gross negligence." This was held inappropriate in Shew v. Bailey, 260 S.W.2d 362 (Tenn. App. E.S. 1951), where defendant exercised improper judgment in thinking he could cross an intersection before another vehicle reached him.

11. Baltimore & O. R.R. v. Goodman, 275 U.S. 66, 48 Sup. Ct. 24, 72 L. Ed. 167 (1927). The doctrine was substantially modified by Pokora v. Wabash R.R., 292 U.S. 98, 54 Sup. Ct. 346, 78 L. Ed. 1149 (1934). Its importance in the federal courts was diminished by the decision of *Erie Railroad v. Tompkins.*

drive within the range of his headlights. This rule was adopted in several states, including Tennessee.[12] But, in accordance with the general trend away from such rules, it has been repudiated in some states and qualified in others. In Tennessee, also, the edge of the rule has been greatly dulled by later decisions.[13] The case of *Strickland Transp. Co. v. Douglas*[14] has now further blunted it and made it almost ineffective.

There the plaintiff was driving down Main Street in Memphis at night. He passed under a brightly lighted viaduct, and as he came to the street beyond (well lighted but not so brightly, and with cars coming in the opposite direction), a car honked from behind. He pulled over to the right and hit the defendant's trailer-truck, parked on the side of the street. The court held that the issue of plaintiff's negligence was properly left to the jury and said:

> "We think that the law in Tennessee today as developed by the cases . . . is that the assured clear distance rule does not apply where the motorist encounters a dangerous situation which in the exercise of reasonable care he had no reason to expect, and that drivers must use reasonable care under the circumstances which exist at the particular time, and the standard for such reasonable care is flexible, some occasions and sets of circumstances requiring a higher degree of care than others and that, therefore, the question of whether a plaintiff under a certain set of circumstances did or did not exercise the required standard of care is a question for the jury to determine."[15]

It is apparent that an instruction based on this quotation will usually leave the jury free to apply the general standard when it sees fit. The result is in accord with the modern trend.[16]

3. *Violation of Statute*

There is one situation where the general standard of care is quite generally reduced to a specific rule. This is when there is an applicable statute (or ordinance)—usually a traffic regulation or a criminal statute. A substantial majority of the states, including Tennessee, hold that violation of such a statute amounts to negligence per se, and that the jury's function is to determine whether the statute was violated, not whether the actor's conduct was reasonable.

Most of the cases during the past year involved traffic statutes.

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12. West Const. Co. v. White, 130 Tenn. 520, 172 S.W. 301 (1914).
13. See Main Street Transfer & Storage Co. v. Smith, 166 Tenn. 482, 63 S.W.2d 665 (1933); Halfacre v. Hart, 192 Tenn. 342, 241 S.W.2d 421 (1951), 5 VAND. L. REV. 250 (1952).
14. 264 S.W.2d 233 (Tenn. App. W.S. 1953).
15. *Id.* at 237 (Carney J.). Judge Swepston dissented.
16. See PROSSER, TORTS 287 (1941); James & Sigerson, *Particularizing Standards of Conduct in Negligence Trials*, 5 VAND. L. REV. 697, 704-09 (1952).

Thus *Shew v. Bailey*[17] involved an ordinance requiring stopping for a through street and the statute providing that when cars meet at an intersection the one on the right has the right of way. *Adams v. Brown*[18] involved the statute requiring a signal before turning to the left and the statute prohibiting passing another vehicle at an intersection. *Coffee v. Logan*[19] involved the statute providing for right of way between pedestrian and motorist at an intersection. *Strickland Transp. Co. v. Douglas*[20] involved an ordinance prohibiting parking of a non-self-propelling vehicle without means of movement.

There are several possible legal methods for avoiding application of the doctrine of negligence per se. One of these is by resort to the requirement of causation. Usually this is accomplished by holding that the plaintiff does not come within the group of persons which the statute was intended to protect or that his injury does not come within the hazards which the statute was intended to protect against. In *Adams v. Brown*,[21] however, the court talked only in terms of proximate and remote cause, and held that the jury might find that plaintiff's violation of a statute was not a proximate cause of her injury.

Another method is by interpretation of the statute. This method is well illustrated in *Coffee v. Logan*,[22] where pedestrians made a slight variation from a crosswalk and were struck by a motorist.[23] The court holds the statute applicable in *Shew v. Bailey*,[24] but Judge Anderson gives a valuable interpretation of Code Section 2687, providing that when two vehicles approach an intersection at approximately the same time, the one on the right has the right of way. The case also indicates that one may be found guilty of negligence in failing to stop at a main thoroughfare which he knew to be a through street, even though the particular type of warning sign required by the ordinance was absent.

4. *Proof of Negligence*

The normal way of proving negligence is to introduce direct testimony of what the party did or failed to do. Sometimes expert testimony is used.[25] On occasion, direct evidence is not available and

17. 260 S.W.2d 362 (Tenn. App. E.S. 1951).
18. 262 S.W.2d 79 (Tenn. App. E.S. 1953).
19. 262 S.W.2d 82 (Tenn. App. E.S. 1953).
20. 264 S.W.2d 233 (Tenn. App. W.S. 1953).
21. 262 S.W.2d 79 (Tenn. App. E.S. 1953).
22. 262 S.W.2d 82 (Tenn. App. E.S. 1953).
23. "Such regulations are to be given a reasonable construction. . . . It seems to us impolitic to hold that a slight deviation from a crosswalk, such as here involved, would place pedestrians as a matter of law beyond the protection of traffic controls designed for their protection." *Id.* at 84. There is also considerable discussion of proximate cause in this case.
24. 260 S.W.2d 362 (Tenn. App. E.S. 1951).
25. Thus expert testimony was used in Monday v. Millsaps, 264 S.W.2d 6 (Tenn. App. E.S. 1953) to determine speed from skid marks. Compare the time-and-speed table set out in Shew v. Bailey, 260 S.W.2d 362 (Tenn. App. E.S. 1951).

sometimes the fact that the accident happened or the injury was incurred is sufficient in itself to give rise to a logical inference that the party must have been negligent. Circumstantial evidence should be as useful and as meaningful in a negligence case as in any other type of case.

But circumstantial evidence in negligence cases has become mixed up with the Latin phrase *res ipsa loquitur*, and a complicated set of rules has developed around the doctrine. These rules have tended on occasion to become ends in themselves and to obscure the real basis for their existence. This is recognized in *Sullivan v. Crabtree*,[26] where Judge Felts' excellent opinion may well become the leading treatment of the subject in the state.

The action was brought against the driver of a motor truck for the death of a guest in the cab. Traveling down a mountainside, the driver lost control and the truck swerved from the right side of the road to the left and down an embankment, crushing the guest. Defendant testified that there was some loose gravel and that the pavement was slightly broken on the right-hand side; he could not tell whether the brakes gave way or the wheels grabbed or what caused the truck to go out of control. The case was submitted to the jury, which found for the defendant, and the plaintiff appealed.

The Court of Appeals held first that this was a proper case for application of the doctrine of *res ipsa loquitur*. It recognized that the doctrine does not generally apply to motor vehicle accidents since the circumstances are not ordinarily in the sole control of either driver, but declared that "where a motor vehicle, without apparent cause, runs off the road and causes harm, the normal inference is that the driver was negligent, and *res ipsa loquitur* is usually held to apply."[27] This view is followed by a good majority of the courts where the vehicle struck some person or object off the highway. In the instant case, however, the action was in behalf of the automobile guest. Some courts have declined to apply the doctrine here. Thus in *Galbraith v. Busch*,[28] the New York Court of Appeals declares that the inference is "equally great" that the accident was caused by the driver's lack of care or by a defective condition of the vehicle. A driver owes no duty to a gratuitous guest to use care to see that his vehicle is in safe condition and is liable only for a failure to disclose a hidden defect of which he actually knows. This makes it improper to draw an inference

26. 36 Tenn. App. 469, 258 S.W.2d 782 (M.S. 1953). "The maxim *res ipsa loquitur* means the facts of the occurrence evidence negligence; the circumstances unexplained justify an inference of negligence. In the principle of proof employed, a case of *res ipsa loquitur* does not differ from an ordinary case of circumstantial evidence. *Res ipsa loquitur* is not an arbitrary rule but rather 'a common sense appraisal of the probative value of circumstantial evidence.'" *Id.* at 474, 258 S.W.2d at 784.

27. *Ibid.*

28. 267 N.Y. 230, 196 N.E. 36 (1935).

that the action was caused by negligence of which the plaintiff can complain.

On the other hand a number of courts agree with the Tennessee court in the *Sullivan* case. The case can be justified by the actual fact that the chances are not at least "equally great" that the accident was caused by defective condition of the vehicle. Statistics show that a substantially greater proportion of accidents are caused by negligence in driving rather than in the condition of the car. This makes the inference of lack of care in driving still a permissible one.[29]

The remainder of the opinion in the *Sullivan* case is devoted to a consideration of the procedural effect of a *res ipsa* case. The court describes the three rules which have been followed in this regard: (1) an inference of negligence permitting the case to go the jury, (2) a presumption of negligence giving rise to a directed verdict for plaintiff unless rebutting evidence is introduced, and (3) a presumption of negligence carrying with it a shifting of the ultimate burden of proof to the defendant even though rebutting evidence is introduced. It cites Tennessee cases in support of each rule and declares that the "effect of a case of *res ipsa loquitur*, like that of any other case of circumstantial evidence, varies from case to case, depending on the particular facts of each case . . . and the cogency of the inference of negligence from such facts may of course vary in degree all the way from practical certainty in one case to reasonable probability in another."[30]

The conclusion is, however, that in the usual case the first rule listed above applies, and the establishment of a case of *res ipsa loquitur* "merely permits the jury to choose the inference of defendant's negligence in preference to other permissible or reasonable inferences."[31] The court therefore held that a jury verdict for the defendant should be affirmed.

The doctrine of *res ipsa loquitur* was held inapplicable in three other cases.[32] None of them involved unusual features.[33]

29. In the instant case defendant testified that the brakes could have given way or that a wheel could have grabbed, but not that either one happened.

30. 36 Tenn. App. at 476, 477, 258 S.W.2d at 785.

31. *Ibid.*

32. These cases are: O'Brien v. Southern Bell Tel. & Tel. Co., 36 Tenn. App. 518, 259 S.W.2d 554 (M.S. 1952). Plaintiff was walking along a row of desks in the offices of defendant when a man seated in a customer's chair at a desk pushed his chair against her and knocked her down.

Memphis Street Ry. Co. v. Brown, 260 S.W.2d 401 (Tenn. App. W.S. 1952). Passenger on a bus fell when the bus suddenly swerved and stopped. No evidence of extraordinary jerk above that to be expected in traffic. Court affected by circumstance that plaintiff did not inform the bus company in any way for three months, and no other witness available.

Lawson v. Chattanooga, 263 S.W.2d 538 (Tenn. App. E.S. 1953). Defective electric wiring which the city had not installed caused electrocution.

33. The best treatments of the doctrine of *res ipsa loquitur* are James, *Proof of the Breach in Negligence Cases*, 37 VA. L. REV. 179 (1951); and Prosser, *Res Ipsa Loquitur in California*, 37 CALIF. L. REV. 183 (1949), reprinted in PROSSER,

5. *Proximate Cause*

There were two important cases involving causation problems during the Survey period.

In *McKinnon v. Michaud*,[34] defendant's agent was delivering gasoline to a filling station in a group of buildings belonging to the plaintiff. The agent, Nickson, placed the hose from the truck into the pipe for one of the tanks and went to the cab of his truck to read a comic book though he had been warned by Marise, the operator of the filling station, that the tank would not hold all the gasoline in the truck. The tank overflowed and the gasoline ran under the door from the storage room to the office. Seeing it close to an open kerosene stove Marise ran away. Nickson ran into the office and threw some buckets of water on the gasoline with the idea of washing it back into the storage room. This caused the gasoline to splash on the stove, producing an explosion and fire.

Defendant contended that Nickson was acting outside the scope of his employment in throwing the water on the gasoline. Without conceding that this was true the court decided to treat this act as if it were done by an independent third person. Even so, the court held, the defendant would be liable. The act of Nickson in permitting the tank to overflow was clearly "within the scope of his employment and created a risk of harm to plaintiff's property." The later act in the "attempt to prevent the gasoline from reaching the open stove was a normal response to the emergency created by his negligent conduct. This being the case, the primary negligence of the driver in causing the overflow was the legal cause of the injury."[35]

The second act was an intervening act, but it was dependent in the sense that it was produced by an attempt to avert the danger created by the initial negligence. The court cites the *Restatement of Torts*[36] in accord and the decision is clearly correct.

Wallace v. Electric Power Board,[37] the second case, raises a more difficult problem. Defendants maintained a telephone pole at the southeast corner of an intersection, supported by a guy wire attached to a "stub pole" located on the northeast corner. Two cars collided at the intersection and one of them struck the stub pole, cutting it off and causing the guy wire to sag within three or four feet of the pavement. Another car, driven by one Mongar, approaching at about 30 miles per hour, became entangled with the guy wire and the force of

SELECTED TOPICS ON THE LAW OF TORTS c. 6 (1954). Earlier Tennessee cases are discussed in Note, *Res Ipsa Loquitur in Tennessee*, 22 TENN. L. REV. 925 (1953).

34. 260 S.W.2d 721 (Tenn. App. W.S. 1953).

35. *Id.* at 724. It would perhaps have been better to say "*a* legal cause of the injury." Actually there was no single legal cause since both acts contributed in a substantial fashion toward producing the injury.

36. RESTATEMENT, TORTS § 443 (1934).

37. 36 Tenn. App. 527, 259 S.W.2d 558 (E.S. 1953).

the car in pulling the wire caused the telephone pole to topple and fall into the street, striking plaintiff. There was evidence from which a jury could find that the pole "was in a severely decayed condition and that proper practice in the construction of such lines on public streets would have dictated the use of a guy wire on the east of the pole to compensate for stress resulting from wires leading off to the west and particularly to a street light in the center of the intersection." The trial court gave a directed verdict for the defendants and the Court of Appeals affirmed.

As I explained in last year's Torts Survey, Tennessee courts, like those in most of the other states, have not laid down any single test for proximate cause but have made many contradictory statements in the opinions. In the instant case the court relied upon *Moody v. Gulf Ref. Co.*,[38] the case which lays down the strict foreseeability test. It quoted the statement that "an injury which could not have been foreseen nor reasonably anticipated as the probable result of an act of negligence is not actionable," and then finds that "reasonable minds must conclude that the second pole fell as the result of the fortuitous circumstances which defendants could not reasonably be required to foresee."[39] The result is perfectly consistent with the holding in the *Moody* case and logically follows from an application of the test as expressed therein.

But the opposite result might just as logically be reached under a different test just as fully sanctioned by the courts. Take the test set out in *Spivey v. St. Thomas Hospital*, cited in the instant case but not quoted: "The majority of the well-considered cases, we think, apply foreseeableness only as a test of negligence: whether defendant's conduct created an unreasonable risk of harm to plaintiff. If it did, such cases hold defendant liable for all injuries within the reasonable range of such risk, whether they could have been foreseen or not."[40] If the defendant's negligence was in allowing the telephone pole to remain in a "severely decayed condition," what was the risk? That it might fall or be toppled over and injure some one or some thing in the vicinity. This is what happened and the precise steps in reaching this result need not be foreseen and are not controlling.

If the negligence lay in the decayed condition of the pole, the real question is whether this condition was a substantial factor in causing the pole to fall.[41] Was this negligence a cause in fact of the injury

38. 142 Tenn. 280, 218 S.W. 817, 8 A.L.R. 1243 (1920).

39. 36 Tenn. App. at 531, 533, 259 S.W.2d at 560, 561.

40. 31 Tenn. App. 12, 25, 211 S.W.2d 450, 455 (M.S. 1947). Later the court says: "So the particular harm which actually befell [plaintiff] need not have been foreseeable. It is enough that some such harm of a general character was reasonably foreseeable as a likely result of defendant's failure to use due care." *Id.* at 28, 211 S.W.2d at 457. See, also, Inter-City Trucking Co. v. Daniels, 181 Tenn. 126, 178 S.W.2d 756 (1944).

41. The Supreme Court has in several cases indicated that the cause-in-fact

or would the Mongar car (going at from 25 to 30 m.p.h.) have pulled over a sound pole when it became entangled in the guy wire?[42] This is a fact decision, normally for the jury, but the court may decide as a matter of law that there was no causal relation if it is sufficiently convinced. Could this be what was really influencing the decision in the *Wallace* case?

Issues of proximate cause were raised in several other cases but they presented no real problem and the court had no difficulty in disposing of them.[43]

6. *Contributory Negligence*

The dominant impression to be gained from a survey of the several cases involving contributory negligence last year is that plaintiff's negligence is becoming less effective as a complete defense. Occasionally there is a jury verdict for defendant apparently based on this ground,[44] but there were no cases in which defendant won on this basis as a matter of law.[45]

Questions of causal relation of the plaintiff's negligence to the injury

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test is the only one to be applied in determining proximate cause. 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.

42. This is the analysis in the very similar case of Gibson v. Garcia, 96 Cal. App.2d 681, 216 P.2d 119 (1950).

Plaintiff also contended that defendants were negligent in failing to have a guy wire on the east of the pole to compensate for the stress resulting from wires leading off to the west and particularly to a street light in the center of the intersection. If this was negligence the injury did not come within the scope of the risk since the stress of the electric and telephone wires had nothing to do with the toppling of the pole.

43. These cases include:

Rural Education Ass'n v. Anderson, 261 S.W.2d, (Tenn. App. M.S. 1953). Mentally deranged patient fell from second story window of hospital. Neither his own actions nor failure of his relations to supply a special nurse was held to cut off defendant's liability.

Gatlinburg Const. Co. v. McKinney, 263 S.W.2d 765 (Tenn. App. E.S. 1953). Eight-year-old boy injured when he dropped a lighted match into empty gasoline tank negligently permitted by defendant to remain on vacant lot "playground." Neither his own actions nor failure of his mother to keep him off the "playground" was held to cut off defendant's liability.

In Adams v. Brown, 262 S.W.2d 79 (Tenn. App. E.S. 1953); and Coffee v. Logan, 262 S.W.2d. 82 (Tenn. App. E.S. 1953) the question was whether plaintiffs' negligence was a proximate cause of their injuries. The issue was held for the jury in both cases.

44. Davidson v. Burger, 36 Tenn. App. 486, 259 S.W.2d 541 (M.S. 1952). Even here the jury verdict for defendants was reversed as to one of the plaintiffs because there was no basis for finding her contributorily negligent. See Hammons v. Walker Hauling Co., 263 S.W.2d 753 (Tenn. 1953), where plaintiff ran into the rear of a truck trailer stopped at an intersection.

45. Cases in which the appellate court expressly held that the issue of contributory negligence was properly left to the jury and a jury verdict for the plaintiff was sustained include: Watts v. Town of Dickson, 36 Tenn. App. 678, 260 S.W.2d 206 (M.S. 1953) (plaintiff stepped in water meter box left open by defendant); Gatlinburg Const. Co. v. McKinney, 263 S.W.2d 765 (Tenn. App. E.S. 1953) (infant played on vacant lot with mother's acquiescence); White v. Seier, 264 S.W.2d 241 (Tenn. App. E.S. 1953) (highway collision.)

are also held to be for the jury. This was held to be true even when the plaintiff had violated a statute and was therefore guilty of negligence per se.[46] And the modification of the assured-clear-distance rule in *Strickland Transp. Co. v. Douglas*[47] has the effect of giving the jury more discretion regarding the consequence to be attached to plaintiff's conduct.

In two cases the doctrine of last clear chance was raised. One of them is unimportant.[48] The other is *Hale v. Rayburn*.[49] A 17-year-old girl stepped out of a north-bound car on the highway. She waited until two other vehicles had passed and then started across. When she had reached a point "about one step from the west edge of the pavement" she was struck by defendant, going south, and killed. Defendant claimed not to have seen the girl and contended that the trial court erred in instructing that "even though the plaintiff . . . was negligent, yet if the defendant after discovering her peril, or by the exercise of ordinary care should have discovered it, could have avoided the consequence of such negligence by the exercise of ordinary care and failed to do so, the defendant is liable." The Court of Appeals found that the instruction was taken verbatim from the case of *Harbor v. Wallace*[50] and held that it was an accurate expression of the law, properly given in this case.

This is the first outright holding that the doctrine of last clear chance is this broad in its application in Tennessee. There have been earlier cases either holding or stating that the so-called doctrine of discovered peril is applicable so that a negligent plaintiff can recover when the defendant realized his situation and then failed to exercise due care,[51] just as there are decisions suggesting that the so-called humanitarian doctrine is applicable so that knowledge by the defendant of plaintiff's situation may not be required if defendant is a railroad or a street car company operating what is characterized as a dangerous instrumentality.[52] But on several occasions the courts have indicated that this is

46. Adams v. Brown, 262 S.W.2d 79 (Tenn. App. E.S. 1953) (plaintiff, passing a truck at an intersection, was struck when the truck driver turned left without signalling). See also Coffee v. Logan, 262 S.W.2d 82 (Tenn. App. E.S. 1953) (plaintiffs, deviating from a crosswalk, were struck by a car); McKinnon v. Michaud, 260 S.W.2d 721 (Tenn. App. W.S. 1953) (physical condition and arrangement of buildings destroyed by fire).

47. 264 S.W.2d 233 (Tenn. App. W.S. 1953).

48. Monday v. Millsaps, 264 S.W.2d 6 (Tenn. App. E.S. 1953). Here the court simply stated that the charge on last clear chance was more favorable to the defendant, who was complaining, than to the plaintiff and passed over the matter.

49. 264 S.W.2d 230 (Tenn. App. E.S. 1953).

50. 31 Tenn. App. 1, 7, 211 S.W.2d 172, 175 (W.S. 1946).

51. In Short Way Lines v. Thomas, 34 Tenn. App. 641, 241 S.W.2d 875 (E.S. 1951), plaintiff was allowed to recover on the basis of discovered peril. Numerous other cases, including those cited in the next two footnotes, refer to the doctrine.

52. The initial and still leading case is Todd v. Cincinnati, N.O. & T.P. Ry., 135 Tenn. 92, 185 S.W. 62 (1915).

the extent of the doctrine of last clear chance and that it should not be applied to the situation where an ordinary defendant negligently failed to discover plaintiff's predicament.[53] The quotation from *Harbor v. Wallace*,[54] used in the instance case, was a mere dictum, since the court held that the doctrine of last clear chance was completely inapplicable and therefore had no occasion to consider carefully its attributes.

If the position of the Eastern Section of the Court of Appeals in the instant case—*Hale v. Rayburn*—is now followed by the Supreme Court and the other sections, the doctrine of last clear chance will be applied where the defendant fails to discover plaintiff's predicament. This position is adopted in a number of states and has the approval of the *Restatement*.[55] There is one restriction on it, however, which is not adverted to in either *Harbor* or the instant case, and which needs to be made clear. This is that it applies only where the plaintiff has become unable to extricate himself from his predicament and not where the plaintiff has merely failed to observe his peril and to do anything about it. In the last situation there is no difference between the conduct of the plaintiff and the defendant. The negligence of both remains active and concurrent until the time of the impact, and there is no basis for holding that either has the last clear chance.

There were no cases during the year referring specifically to Tennessee's unique doctrine of remote contributory negligence, though a number of the cases must have involved its application. This doctrine is much broader in its scope than that of last clear chance and should really incorporate it. The treatment of "remote" contributory negligence as not barring recovery but merely mitigating damages has much of merit in it but greatly needs clarification. A legislative act making explicit the good features of the doctrine seems to be highly desirable.

7. *Damages*

Attention was given to the measure of damages in several cases. Two involved unusually large amounts. In *Olson v. Sharpe*,[56] where the jury awarded $100,000 for personal injuries, the court declared that the amount was "far in excess of any amount previously considered by the Supreme Court or by this Court in personal injury cases." After "mature consideration" it affirmed with a remittitur to

53. The *Todd* case, *supra* note 52, indicates as much. See the thorough discussion in Tennessee Electric Power Co. v. Day, 10 Tenn. App. 334 (E.S. 1929). And see Tennessee Central Ry. v. Ledbetter, 159 Tenn. 404, 19 S.W.2d 258 (1929); Hemmer v. Tennessee Electric Power Co., 24 Tenn. App. 42, 139 S.W.2d 698 (M.S. 1940); Hadley v. Morris, 35 Tenn. App. 534, 249 S.W.2d 295 (W.S. 1951).

54. 31 Tenn. App. 1, 211 S.W.2d 172 (W.S. 1946), *supra* note 50.

55. RESTATEMENT, TORTS § 479 (1934).

56. 36 Tenn. App. 557, 259 S.W.2d 867 (E.S. 1953).

$80,000. In *Monday v. Millsaps,*[57] a few months later, it received a case involving a verdict for $109,000 in which the trial judge had ordered a remittitur to $90,000. The judgment was affirmed. Both cases involved very serious and extensive injuries, and in both cases the court quoted from an earlier case the statement that "it is the duty of the courts to take into consideration the nature and extent of the injuries, the suffering, expenses, diminution of earning capacity, inflation and high cost of living, age, expectancy of life and amount awarded in other similar cases."[58] A verdict for $35,000 for personal injuries was affirmed in *Thoni v. Hayborn,*[59] with some very quotable remarks by Judge Hickerson. *White v. Seier*[60] involved a plaintiff who already had an injured back which had improved and was now injured again. It also raised the question of whether plaintiff had used "reasonable diligence to minimize his damage by waiting eleven weeks before going to a doctor." The measure of damages in a death action was considered in *Rural Education Ass'n v. Anderson.*[61] The decedent had been in very poor health and the court declared that the "amount awarded by the jury would indicate that they took into consideration his state of health, expectancy, and other relevant factors in estimating the damages."[62]

The measure of damages for damage to property was considered in *McKinnon v. Michaud.*[63] It was held that the trial court "was correct in instructing the jury that in arriving at the difference between the value of the premises immediately before and after the fire they could take into consideration the reasonable cost of restoring the property to its former condition allowing for depreciation" but held that the court should have added that if the jury "found the reasonable cost of restoring the property to its former condition was less than the difference in the value immediately before and after the fire, the reasonable cost of reconstruction would be the measure of damages."[64]

8. Particular Fact Situations and Relationships

(a) *Traffic and Transportation*

A majority of the Torts cases during the Survey period have involved some form of traffic and transportation. Of course, the bulk of these cases dealt with automobiles. There were numerous cases

57. 264 S.W.2d 6 (Tenn. App. E.S. 1953).
58. The quotation is from France v. Newman, 35 Tenn. App. 486, 497, 248 S.W.2d 392, 396 (E.S. 1951).
59. 260 S.W.2d 376, 378 (Tenn. App. M.S. 1953).
60. 264 S.W.2d 241 (Tenn. App. E.S. 1953).
61. 261 S.W.2d 151 (Tenn. App. M.S. 1953).
62. *Id.* at 156-57. For complete discussion, see Gamble, *Actions for Wrongful Death in Tennessee,* 4 VAND. L. REV. 289 (1951).
63. 260 S.W.2d 721 (Tenn. App. W.S. 1953).
64. *Id.* at 727, 728.

involving collision of two motor vehicles,[65] and several where a car hit a pedestrian.[66]

These cases have been discussed in the general treatment of negligence and there is little which can be added specifically here. Several cases indicated that a motorist must be on the lookout for negligent conduct on the part of others,[67] and in *Strickland Transp. Co. v. Douglas,*[68] the court delivered some quotable remarks on the duty of the motorist in this "motor age."[69] In *Shew v. Bailey,*[70] the court declared that neither a failure to see another vehicle nor an error in judgment in concluding that a collision would be avoided will amount to gross negligence.

"The general rule is that one who turns his automobile over to one under the influence of an intoxicant, or to one addicted to the use of intoxicants to excess, or to a driver who is known to the party loaning the car to be a reckless or negligent or otherwise incompetent driver, is charged with negligence." This quotation comes from *Rowan v. Sauls,*[71] where the Supreme Court held that the rule did not apply to a defendant who allowed a 24-year-old college student to drive his car, even though the student had a temporarily restricted license due to the fact that he was a recent immigrant.

The relationship of driver and automobile guest was presented in

65. Hammons v. Walker Hauling Co., 263 S.W.2d 753 (Tenn. 1953); Scates v. Board of Comm'rs of Union City, 265 S.W.2d 563 (Tenn. 1954); Davidson v. Burger, 36 Tenn. App. 486, 259 S.W.2d 541 (M.S. 1952); Wallace v. Electric Power Board, 36 Tenn. App. 527, 259 S.W.2d 558 (E.S. 1953) (other intervening forces produced the injury); Shew v. Bailey, 260 S.W.2d 362 (Tenn. App. E.S. 1951) (car and motorcycle); Adams v. Brown, 262 S.W.2d 79 (Tenn. App. E.S. 1953) (car and truck); Harding v. Moore, 262 S.W.2d 702 (Tenn. App. M.S. 1953); Monday v. Millsaps, 264 S.W.2d 6 (Tenn. App. E.S. 1953) (car and truck); Strickland Transp. Co. v. Douglas, 264 S.W. 2d 233 (Tenn. App. W.S. 1953 (car and parked trailer); White v. Seier, 264 S.W.2d (Tenn. App. E.S. 1953).

66. Olson v. Sharpe, 36 Tenn. App. 557, 259 S.W.2d 867 (E.S. 1953) (truck backing on road being paved); Coffee v. Logan, 262 S.W.2d 82 (Tenn. App. E.S. 1953) (intersection); Hale v. Rayburn, 264 S.W.2d 230 (Tenn. App. E.S. 1953) (middle of highway).

67. Monday v. Millsaps, 264 S.W.2d 6 (Tenn. App. E.S. 1953); Hale v. Rayburn, 264 S.W.2d 230 (Tenn. App. E.S. 1953).

68. 264 S.W.2d 233 (Tenn. App. W.S. 1953).

69. "We live in a motor age and with the tremendous increase in the number of motor vehicles using our streets and highways, a new yardstick must be used to measure the standard of due caution and reasonable care in the operation of motor vehicles on our highways. No longer can he rely on slow speed, good brakes and a proper lookout ahead. The modern motorist must not only keep a proper lookout ahead, but also must watch traffic and pedestrians on each side and to the rear. Obviously he cannot look in all directions at the same time. Formerly the exercise of due care required the motorist to drive within the range of his lights. Under existing highway conditions, a motorist would cause unbelievable havoc if he attempted to slow down or stop his car every time he was faced with the hazard of driving into a blind spot caused by the lights of an approaching car." *Id.* at 237.

70. 260 S.W.2d 362 (Tenn. App. E.S. 1951).

71. 195 Tenn. 573, 578, 260 S.W.2d 880, 882 (1953), 23 TENN. L. REV. 334 (1954).

Sullivan v. Crabtree,[72] but it does not seem to have affected the decision. Normally a gratuitous guest is entitled to the exercise of due care only in the act of driving and not in regard to the condition of the vehicle. As to the latter he is entitled only to be warned of known latent defects.

A paying passenger on a common carrier, on the other hand, is entitled to "the highest degree of care and foresight."[73] Despite this, plaintiffs were unable to recover in the two cases involving common carriers. In *Memphis Street Ry. v. Brown*,[74] a passenger who claimed to have been injured by a sudden swerve and stop of a bus was unable to prove negligence. *Nashville C. & St. L. Ry. v. Katzman*[75] involves the duty of a carrier to protect passengers against third persons. In this case a passenger was assaulted by a military policeman, but the court held that there was no evidence to show that the railroad "should reasonably have anticipated the occurrence," since there was no indication that there had ever been any previous trouble between MP's and civilians or that defendant had given MP's authority over civilians.

The care required by a city in maintaining its streets is considered in *Knoxville v. Cooper*.[76] Here, a man travelling on a motorcycle hit a slight depression near a manhole in the street, was thrown against the curb and killed. A jury verdict for plaintiff was reversed and the case dismissed, the court saying that a "municipality is not required to keep its streets and sidewalks in perfect condition and free from slight holes or depressions, though it may be held liable for injuries caused by defects in the nature of traps."[77]

(b) *Public Utilities*

Two cases involve the liability of gas or electric companies for injuries produced by defective conditions in the private home of a consumer.

In *Lawson v. Chattanooga*,[78] the court repeated a statement frequently made before: "Where a company merely transmits its electric current from its line to the consumer's wires, which it did not install and does not control, it has no duty to inspect such wires and is not liable for injury caused by defects in them. . . . But where the company knows of such a defect its duty is to stop and not to send its deadly current into the defective wiring of the consumer, and it is liable for injuries to person or property caused by breach of this

72. 36 Tenn. App. 469, 258 S.W.2d 782 (M.S. 1953).
73. Knoxville Cab Co. v. Miller, 176 Tenn. 88, 91, 138 S.W.2d 428, 429 (1940).
74. 260 S.W.2d 401 (Tenn. App. W.S. 1952).
75. 195 Tenn. 127, 258 S.W.2d 730 (Tenn. 1953).
76. 265 S.W.2d 893 (Tenn. App. E.S. 1953).
77. *Id.* at 896. *Cf.* also Memphis v. Uselton, 260 S.W.2d 293 (Tenn. App. W.S. 1953) (injury resulting while street being widened).
78. 263 S.W.2d 538 (Tenn. App. E.S. 1953).

duty."[79] There was no evidence in the case that defendant knew of the defective condition and an inspection of one circuit when an electric range was installed involved no obligation to inspect the other circuits. A provision of the Building Code giving the city electrician the authority to inspect houses was held not to affect the result and the defendant was held not liable.

In *Evens v. Young*,[80] a gas water heater exploded because it had been installed in a closet too small for the oxygen requirements. There were allegations that the defendant gas company had inspected the installations when the house was built and that it knew or should have known of the hazardous condition at the time it connected the pipes of the house with the gas line and that it failed to warn the plaintiff of the danger. The Supreme Court held that a demurrer was properly sustained. It said: "Where the injury occurred as the result of gas escaping from defective pipes or appliances, owned by the consumer, the burden is on the Plaintiff to show that there was a defective condition, for the repair of which the Company was responsible."[81]

This statement is exceedingly broad and seems to be inconsistent with the statement quoted above regarding electricity, which has been frequently made by the Supreme Court itself. Surely if the gas company had notice that gas was escaping from the pipes in the home of a consumer and failed after proper notice to cut off the gas, it would not be relieved of liability because it was not responsible for the repair of the pipes in the consumer's house.[82]

There are three differences between this situation and the facts of the *Evens* case. In *Evens:* (1) the pipes were not leaking and the danger was not imminently portending but was simply potential, (2) the inspection took place prior to plaintiff's purchase of the house, and (3) it was alleged only that defendant should have known of the dangerous condition, not that it was actually aware of it. Each of these circumstances is referred to in the opinion, but somewhat obliquely, and it is not possible to tell what precise significance each has. *Lawson v. Chattanooga* seems to suggest that if the utility makes an inspection of a consumer's wiring (or pipes) before connecting with the supply line and negligently fails to discover a defect which results in damage, the utility may be held liable. Does *Evens* contradict this?

Wallace v. Electric Power Board[83] involves the liability of a utility

79. *Id.* at 541, citing numerous Tennessee cases, including the recent case of Dabbs v. Tennessee Valley Authority, 194 Tenn. 185, 250 S.W.2d 67 (1952).
80. 264 S.W.2d 577 (Tenn. 1954).
81. *Id.* at 583.
82. Even Conway v. Philadelphia Gas Works Co., 336 Pa. 11, 7 A.2d 326 (1939), the case cited for the quotation above, expressly declares that there would be liability under these circumstances.
83. 36 Tenn. App. 527, 259 S.W.2d 558 (E.S. 1953).

for allowing a telephone pole to become decayed. Liability was denied on grounds of proximate cause.

(c) *Hospitals*

Rural Education Ass'n, Inc. v. Anderson[84] involved an action against a hospital for the death of a mentally deranged patient who jumped or fell from a second-story window. The court sustained a jury verdict for the plaintiff, saying that "A private hospital owes a duty to give its patient such reasonable care and attention for his safety as his physical and mental condition may require; and it must use reasonable care to safeguard him against any known or reasonably apprehended danger to himself due to his mental derangement."[85]

Defendant's contention that it did not have a sufficient staff of nurses and attendants to supply full-time supervision to this patient and that it had requested the plaintiff (patient's wife) to supply a special nurse, was held not to "relieve defendant from its duty to see that this patient who was *in extremis* was given such attention as his condition apparently rendered necessary for his protection."[86] Another asserted defense was that the medical director, acting not in this capacity but as patient's physician, reached a "medical decision" not to move the patient from the second floor or to tie him in his bed, so that the nurses "could not be found negligent for following this medical decision of the patient's physician." The court answered that the testimony showed the patient was so irrational that he could not be handled and that it "is a matter of common knowledge and common sense of laymen that a patient in such a condition should be watched and protected and not left unattended on an upper story by an unguarded window through which he might, and ultimately did, fall or jump to his death."[87]

(d) *Landowners*

To a business guest or invitee a landowner owes a duty to exercise due care to make his premises safe. This was recognized in two cases but in neither instance was the defendant found to be negligent. In *Phillips v. Harvey Co.*,[88] plaintiff alleged that she tripped over an obstruction in a department store, but she could tell nothing about the obstruction; a demurrer was sustained. In *O'Brien v. Southern*

84. 261 S.W.2d 151 (Tenn. App. M.S. 1953).

85. *Id.* at 154, citing numerous Tennessee and other cases and Harbison, *The Standard of Care Owed by a Hospital to Its Patients*, 2 VAND. L. REV. 660 (1949).

86. 261 S.W.2d at 155. This would probably not mean that a hospital must always keep on hand an adequate staff for even an extraordinary emergency.

87. *Ibid.* Horner v. Cookeville, 36 Tenn. App. 535, 259 S.W.2d 561 (M.S. 1952) involved an action against a city as a operator of a hospital for injuries received by an infant while in an incubator, but the case turned on a procedural issue and did not reach the merits.

88. 264 S.W.2d 810 (Tenn. 1954).

Bell Tel. & Tel. Co.,[89] plaintiff had gone to defendant's offices to pay a bill. As she was leaving a man seated in a customer's seat by a desk pushed his chair against her and knocked her down. A directed verdict for defendant was affirmed.

The landowner does not owe trespassers a duty to use care to make his premises safe. In most states there has developed an exception to this rule in the case of certain infant trespassers, under the so-called attractive nuisance doctrine. Tennessee has followed the minority, restricted view of the scope of the doctrine, to the effect that it does not apply unless the child was attracted on the land by a dangerous condition which itself produced his injury.[90] This restriction in Tennessee is partially compensated by the so-called "playground theory." The court applied this theory in *Gatlinburg Const. Co. v. McKinney*[91] and defined its basis as being "that if an owner of land knows that children of tender years habitually play upon his land to the extent that it becomes known as a playground for children, he is bound to exercise ordinary care to see that his premises are reasonably safe for the purpose and is duty bound not to permit them to be exposed to a known danger."[92]

The two Tennessee doctrines when combined come close to approximating the majority interpretation of the attractive nuisance doctrine, as expressed in the *Restatement*.[93] They are more hemmed in by technical requirements, however, and leave less to the sound discretion of judge and jury, and it is encouraging to observe that the court cited the *Restatement* in the *Gatlinburg* case. This citation and some of Judge McAmis' language suggest that the two Tennessee doctrines may soon merge into the *Restatement* position.

In *Gatlinburg*, an eight-year-old child was injured when he tossed a lighted match into an empty gasoline tank which defendant had left on a vacant lot. The boy's act was held not to break the chain of causation, and neither the boy nor his mother was found guilty of contributory negligence.

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89. 36 Tenn. App. 518, 259 S.W.2d 554 (M.S. 1952).

90. For citation and discussion of the cases, see Noel, *The Attractive Nuisance Doctrine in Tennessee*, 21 TENN. L. REV. 658 (1951); 20 TENN. L. REV. 765 (1949); 2 VAND. L. REV. 716 (1949).

91. 263 S.W.2d 765 (Tenn. App. E.S. 1953), 23 TENN. L. REV. 448 (1954).

92. *Id.* at 767. The language is taken almost verbatim from Williams v. Morristown, 32 Tenn. App. 274, 287, 222 S.W.2d 607, 612 (M.S. 1949).

93. RESTATEMENT, TORTS § 339. This section provides: "A possessor of land is subject to liability for bodily harm to young children trespassing thereon caused by a structure or other artificial condition which he maintains upon the land, if

(a) the place where the condition is maintained is one upon which the possessor knows or should know that such children are likely to trespass, and

(b) the condition is one of which the possessor knows or should know and which he realizes or should realize as involving an unreasonable risk of death or serious bodily harm to such children, and

(c) the children because of their youth do not discover the condition or

(e) *Independent Contractors*

In *Evens v. Young*,[94] a gas water heater exploded, allegedly because it had been installed in a closet too small to provide a sufficient supply of oxygen. Plaintiff sued the Central Equipment & Supply Co., which had supplied the heater and installed it. There was nothing wrong with the heater itself and the installation was in accordance with the directions of the builder, who later sold to the plaintiff. The Supreme Court held that defendant's demurrer to the declaration was properly sustained.

For many years a manufacturer or supplier of a chattel was held to owe no duty to use care regarding the condition of the chattel to persons with whom he was not in privity of contract. Exceptions to this rule gradually become so extensive that the rule itself was changed. Practically all of the states today, probably including Tennessee, hold that privity of contract is no longer a necessary element to an action against a manufacturer for injuries produced by dangerous condition of a chattel which could have been avoided by due care.[95] The original requirement of privity of contract was also adopted regarding work of an independent contractor which was accepted by the person with whom he made the contract. But the development of the law as to contractors "has tended to lag some twenty or thirty years behind"[96] the law as to manufacturers and sellers.

In the instant case, where the installation was in accord with the instructions of the builder-employer, and the danger was created not by negligence in the manner of installation but by the instructions themselves, the majority of the courts would agree that the contractor is not liable.[97] Previous Tennessee authority sustains the holding.[98]

(f) *Vendors*

Evens v. Young[99] also raises the question of the liability of the vendor of a house to the vendee for injuries suffered because of a dangerous condition. Defendant Young was the architect, the builder and the vendor of the house. He had originally designed a closet under a stairway for an electric water heater but had later changed to a gas water heater. The closet was alleged to be too small to afford an ade-

realize the risk involved in intermeddling in it or in coming within the area made dangerous by it, and

(d) the utility to the possessor of maintaining the condition is slight as compared to the risk to young children involved therein."

94. 264 S.W.2d 577 (Tenn. 1954).

95. For discussion of the Tennessee cases, see Noel, *Products Liability of a Manufacturer in Tennessee*, 22 TENN. L. REV. 985 (1953); Wade, Book Review, 22 TENN. L. REV. 444 (1952). For a good general treatment, see PROSSER, TORTS § 83 (1941).

96. SMITH AND PROSSER, CASES ON TORTS 886 (1952).

97. See PROSSER, TORTS § 84.

98. The court cites Hester v. Hubbuch, 26 Tenn. App. 246, 170 S.W.2d 922 (E.S. 1942). For discussion of additional cases, see 22 TENN. L. REV. 308 (1952).

99. 264 S.W.2d 577 (Tenn. 1954).

quate supply of oxygen, and some two or three years after the sale, when an unusual amount of hot water was used, the heater exploded. The Supreme Court held that a demurrer to the declaration was properly sustained.

The ruling was based on the earlier decision of *Smith v. Tucker*,[100] holding that the rule of *caveat emptor* applies to the sale of real estate and that the vendor is not required to disclose a dangerous condition of the premises. *Caveat emptor* may eliminate an implied warranty or any other action based on contract; it takes an additional fiat to hold that no action can be based on negligence because the vendor owes no duty to the vendee to use care.

Historically there may be a substanital difference between sales of land and sales of chattels. But from the standpoint of the general integrity of tort law and pervading principles of negligence, it would seem that a person who sells a dangerous thing, whether it be real or personal property, should be liable for injuries caused by his failure to use care or at least for his failure to disclose known dangers. Some day there will be a *MacPherson* decision[101] regarding real property; and the Supreme Court, while sustained by authority in *Evens*, lost a splendid opportunity to render a decision which might well proceed to become the leading authority in the country.

The eventual rule may perhaps not impose liability upon the casual seller of his own secondhand house for failure to discover a dangerous condition. But the defendant in *Evens* was selling a new house and was apparently in the business of building and selling houses. On general policy grounds, is there any reason to distinguish him from a manufacturer and seller of chattels?

The *Evens* case and *Smith v. Tucker* clearly indicate a gap in the law of torts since their effect is to hold that there is no relief against anyone, not on the ground of lack of negligence but on the ground that there is no duty to exercise care or perhaps even to do anything about a known dangerous condition.

Indeed, the court might well have held for the plaintiff without modifying the present state of the law on vendor and vendee. Defendant was not just the vendor; he was the architect and builder of the house and himself designed and constructed the dangerous condition. On the basis of such cases as *Hale v. Depaoli*,[102] he could properly be held liable on this ground without reference to the fact that he was the vendor.

100. 151 Tenn. 347, 270 S.W. 66, 41 A.L.R. 830 (1925).

101. Judge Cardozo's decision in MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050, Ann. Cas. 1916C 440 (1916), is universally recognized as creating the modern law on tort liability of manufacturers and sellers.

102. 33 Cal.2d 228, 201 P.2d 1 (1948). This is a very strong opinion holding that the jury might find a contractor liable for the defective condition of the railing of an upstairs porch, though he had sold the house and had sometime later repurchased and leased to the plaintiff's family. (The landlord-tenant

II. OTHER TORTS

1. *Assault and Battery*

In *Garner v. State* ex rel. *Askins*,[103] a constable, arresting the plaintiff for a traffic violation, cursed him, jerked him out of his truck and struck him several times on the face and head with a blackjack, lacerating him and fracturing his skull. The jury awarded $4,000 compensating damages and $50 punitive damages. The trial court granted a remittitur of $3,300; but the appellate court found this to be error.

It declared that the plaintiff's guilt of a traffic offense should not affect the amount of damage since it "could not justify or mitigate the constable's savage attack upon the prisoner in his custody." Compensation should be awarded "for all his injuries—those already suffered and those he is reasonably certain to suffer—including an allowance for his physical pain and mental anguish, for the affront to his personality, the indignity, disgrace, humiliation and mortification to which he was subjected by the conduct of this peace officer."[104]

2. *False Imprisonment and Malicious Prosecution*

In *Bricker v. Sims*,[105] the City of Martin had passed a curfew law and plaintiff had been arrested for being out on the street after the designated hour. Claiming that the ordinance was unconstitutional he brought an action for false imprisonment against the city, the mayor and board of aldermen, and the sheriff and deputy sheriff who arrested him. The Supreme Court held that even assuming that the ordinance was unconstitutional demurrers by each of the defendants were properly sustained. The city, the mayor and board of aldermen were all entitled to governmental immunity. The sheriff (and deputy sheriff) was not liable because it was not his function to determine whether or not the ordinance was constitutional. In the absence of a judicial declaration of unconstitutionality he was under a duty to enforce it.

Streetman v. Richardson[106] was a suit "for false arrest and malicious prosecution." It was alleged that one defendant maliciously and without probable cause swore out a warrant against plaintiff charging him with fraudulently obtaining property by means of a worthless check and that a second defendant testified before the grand jury which

relationship had no connection with the liability.) Though the injury occurred 18 years after the house was built, the court held that the mere passage of time presented a question of fact and not of law in determining whether the danger was "inherent" or "imminent."

103. 266 S.W.2d 358 (Tenn. App. M.S. 1953).
104. *Id.* at 364.
105. 195 Tenn. 361, 259 S.W.2d 661 (1953).
106. 266 S.W.2d 838 (Tenn. App. M.S. 1953).

indicted the plaintiff. Plaintiff was acquitted in the criminal prosecution and sues these two defendants and a third one who was apparently their employer. The employees did not make any defense or appeal the verdict against all three defendants. The Court of Appeals affirmed, with a remittitur, and considered only the question of whether the employer was responsible for the acts of the other two. The court's statement of facts indicates a case of malicious prosecution but no basis for an action of false imprisonment.[107]

3. *Defamation*

Hayslip v. Wellford[108] is the second suit arising from a single fact situation. Plaintiff, a high school teacher in Memphis, had made charges of immorality in the school. A grand jury investigated, found no evidence of the immorality and in its report charged that she had "viciously maligned" the school and that "her continued employment . . . would be . . . a disservice to the community." She filed a motion to expunge the remarks from the report of the grand jury. The trial judge denied the motion and in the case of *Hayslip v. State*[109] a divided Supreme Court affirmed on the ground that while by the majority rule charges against private persons are not within the authority of the grand jury when not followed by an indictment, the question of whether it should be expunged is within the discretion of the trial court.

The present action was one of libel brought against the members of the grand jury. The Supreme Court held that the statements were subject to an absolute privilege. It said that the members of the grand jury are entitled to the same privileges as the judge is in a trial. Though the grand jury may have made an error of judgment and exceeded its authority in placing the criticisms in the report, the act was still a judicial act "entitled to the protection of privilege just the same as if this finding had been an indictment or a presentment."[110]

The position that the grand jury is entitled to the absolute privilege of a judicial proceeding is adopted by a majority of the American states. There is disagreement, however, as to whether the privilege extends to a report of an investigation not resulting in an indictment.[111]

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107. There sems to be no thought in this case of applying the principles enunciated in (Blue) Star Service, Inc. v. McCurdy, 36 Tenn. App. 1, 251 S.W.2d 139 (W.S. 1952), which I discussed at length in last year's Survey. Wade, *Torts—1953 Tennessee Survey*, 6 VAND. L. REV. 990, 1006-11 (1953). There are said to have been some unpublished opinions based on the doctrine of this case and it will be most interesting to see what the courts finally make of it.

108. 263 S.W.2d 136 (Tenn. 1953), *cert. denied*, 346 U.S. 911 (1953).

109. 193 Tenn. 643, 249 S.W.2d 882 (1952), *cert. denied*, 344 U.S. 879 (1952), 6 VAND L. REV. 134.

110. 263 S.W.2d at 138.

111. A qualified privilege was held to exist in Rector v. Smith, 11 Iowa 302 (1860). No privilege was held to exist in Parsons v. Age-Herald Pub. Co.,

An absolute privilege is given to judges, grand juries, legislatures, etc. "in the interest of public welfare that [they] should be allowed to express their sentiments and speak their minds fully and fearlessly."[112] Perhaps we should not be too technical in determining whether they are acting within the exact scope of their authority and jurisdiction. But it is unfortunate that no relief of any kind is available to the traduced person. The plaintiff in the *Hayslip* case was apparently far more interested in vindicating and justifying herself than in obtaining monetary damages. Could not an opportunity to prove what she claims to be the falsity of the statement be made available to her and to the victims of irresponsible statements by legislators and Congressmen? We would then promote the policy behind the absolute privilege by refusing to impose financial responsibility upon the person publishing the remark, but we give the "victim" a legal opportunity to protect his name and reputation against false accusations.[113]

4. *Strict Liability*

In *State* ex rel. *George v. Fleming*,[114] defendants, a sheriff and a contractor, were in the process of raising a radio tower next to plaintiff's property. After it had been completed to a height of 110 feet it blew over in a windstorm, causing damage to plaintiff's property. Plaintiff sued for damages, and "the theory of the declaration was that the erection of the tower and the scaffolding was an inherently dangerous occupation, within the rule of strict liability which is applied in such things as dynamite, electricity, gas, and blasting." The Court of Appeals held, however, that there was "no proof that erection of this tower and scaffolding was necessarily dangerous, or ultrahazardous, or involved any more risk than the erection of any other common structures, such as buildings, etc."[115] For this reason and since the plaintiffs had not alleged negligence a jury verdict for defendants was affirmed.

III. MISCELLANEOUS

1. *Joint Tortfeasors*

Six cases involved some aspect of joint torts. *Olson v. Sharpe*[116] involved the question of whether the jury rendered inconsistent verdicts

181 Ala. 439, 61 So. 345 (1913); and Bennett v. Stockwell, 197 Mich. 50, 163 N.W. 482, L.R.A. 1917F 761 (1917).

112. NEWELL, SLANDER AND LIBEL 387 (4th ed. 1924).

113. Compare the description of the "lie bill" as used in Arkansas, in Leflar, *Legal Remedies for Defamation*, 6 ARK. L. REV. 423 (1952). This article gives careful consideration to various types of remedies for defamatory statements.

114. 264 S.W.2d 589 (Tenn. App. M.S. 1953).

115. *Id.* at 591. It cited Cash v. Case-Hedges Co., 139 Tenn. 179, 201 S.W. 347 (1917), holding that the rule of strict liability did not apply to erection of a smokestack.

116. 36 Tenn. App. 557, 259 S.W.2d 867 (E.S. 1953).

in finding a servant not liable and the master liable. It was found that there was no inconsistency since the master's liability was not imposed on the ground of *respondeat superior* but on the ground that the master was itself negligent in failing to supply a flagman. In *Hammons v. Walker Hauling Co.*,[117] the trial court granted a directed verdict for one defendant and the jury found for the other, which had pleaded lack of negligence on its part and contributory negligence on plaintiff's part. The Court of Appeals found that the directed verdict was erroneous, but affirmed on the ground that the jury verdict for the second defendant amounted to a holding of contributory negligence which would apply in plaintiff's action against the first defendant. This was reversed by the Supreme Court. It declared that since the jury verdict was general, there was no indication as to the basis of the finding against plaintiff so that *res adjudicata* could not apply.

Horner v. Cookeville[118] draws a distinction between a release and a covenant not to sue. A release of one joint tortfeasor has the effect of discharging the other. The instrument in question, however, was held to be a covenant not to sue and left the plaintiff's action against the second tortfeasor intact.

Three cases involved actions for contribution between joint tortfeasors.[119] They are discussed in more detail in the article on Restitution.

2. *Governmental Immunity*

When a municipality is engaged in a governmental function it is not subject to tort liability. Thus in *Bricker v. Sims*,[120] neither the city nor the mayor and board of aldermen were liable for passing an ordinance, claimed to be unconstitutional, which resulted in plaintiff's arrest. The Supreme Court held in *Scates v. Board of Comm'rs of Union City*[121] that this immunity applies to a cross-declaration as well as to an original cause of action.

But if the city is engaged in a proprietary function it may be held liable for negligence. Thus it may be liable for negligence in connection with the supplying of water or electricity[122] or in connection with the construction or maintenance of streets.[123]

117. 263 S.W.2d 753 (Tenn. 1953).
118. 36 Tenn. App. 535, 259 S.W.2d 561 (M.S. 1952).
119. American Cas. Co. v. Billingsley, 260 S.W.2d 173 (Tenn. 1953); Vaughn v. Gill, 264 S.W.2d 805 (Tenn. 1953); Allbright Bros. v. Hull-Dobbs Co., 209 F.2d 103 (6th Cir. 1953).
120. 195 Tenn. 361, 259 S.W.2d 661 (1953).
121. 265 S.W.2d 563 (Tenn. 1954).
122. See Watts v. Town of Dickson, 36 Tenn. App. 678, 260 S.W.2d 206 (M.S. 1953) (top left off water meter box—town held liable); Lawson v. Chattanooga, 263 S.W.2d 538 (Tenn. App. E.S. 1953) (electricity—city not negligent).
123. Memphis v. Uselton, 260 S.W.2d 293 (Tenn. App. W.S. 1953) (widening street—city liable); Knoxville v. Cooper, 265 S.W.2d 893 (Tenn. App. E.S. 1953) (small depression in street—city not negligent).

3. *Statutory Actions*

Actions under the Federal Employers Liability Act were brought in two cases but in both instances the plaintiff was unable to prove negligence.[124] In *Thoni v. Hayborn*,[125] the defendant employer had elected not to come under the state workmen's compensation act and since the employment was found not to be "casual" the defendant was unable to rely upon the common law defenses of contributory negligence and assumption of risk. A jury verdict for the plaintiff was affirmed.

124. Chaffin v. Nashville, C. & St. L. R.R., 36 Tenn. App. 580, 259 S.W.2d 877 (M.S. 1953); Hawkins v. Clinchfield R.R., 266 S.W.2d 840 (Tenn. App. E.S. 1953).

125. 260 S.W.2d 376 (Tenn. App. M.S. 1953).