Vanderbilt Law Review

Volume 6
Issue 5 *Issue 5 - August 1953*

Article 4

8-1953

Torts

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Recommended Citation
John W. Wade, Torts, 6 *Vanderbilt Law Review* 990 (1953)
Available at: https://scholarship.law.vanderbilt.edu/vlr/vol6/iss5/4

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TORTS

JOHN W. WADE*

As might have been expected a large portion of the litigation before the Tennessee appellate courts during the Survey period involved tort actions. Most of these actions, of course, were based upon negligence. There were several cases involving the intentional harms of assault and battery and false imprisonment. No cases were decided involving deceit, defamation, strict liability or interference with advantageous relations.

I. NEGLIGENCE

A. *Duty*

In the typical negligence case, the requirement of duty to use due care does not raise a real issue. If I am driving my automobile down the street, for example, I unquestionably owe to pedestrians and other drivers a duty to drive it carefully; the major issue is likely to be on the question of whether I breached that duty and drove negligently. On occasion, however, a real question may arise as to whether a duty to use care exists or as to the nature of that duty. Most of these cases involve special relationships. Several of them were decided by the Tennessee courts during the past year.

(1) *Manufacturers and Suppliers*

Over a hundred years ago the English court rendered the decision of *Winterbottom v. Wright*,[1] the origin of the traditional rule that a manufacturer or supplier of a chattel is not liable to parties with whom he is not in privity. It made no difference that the chattel was defective due to the negligence of the defendant, because he was under no duty to the third party to use care. This rule was adopted in Tennessee in 1912.[2] Dissatisfaction with the rule produced a growing number of exceptions; and when the New York Court of Appeals, in the famous case of *MacPherson v. Buick Motor Co.*,[3] declared that the exceptions had become the rule and that a manufacturer was under a duty to third parties to use care, the new doctrine quickly spread to other states. The statement has been made that this doctrine has been adopted in all American jurisdictions,[4] but the Supreme Court of Tennessee has never officially adopted it.[5] No decision during the past year

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1. 10 M. & W. 109, 152 Eng. Rep. 402 (Ex. 1842).
2. Burkett v. Studebaker Motor Co., 126 Tenn. 467, 150 S.W. 421 (1912).
3. 217 N.Y. 382, 111 N.E. 1050, Ann. Cas. 1916C 440 (1916).
4. SMITH AND PROSSER, CASES AND MATERIALS ON TORTS 854 (1952).

involved the liability of manufacturers, but there has been a very thorough study of the state of the law in Tennessee in regard to products liability.[6]

Two cases involved the duty owed by a supplier of goods to third parties. In *English v. Stevens*,[7] W. D. Stevens permitted his brother Marvin to use a truck tractor (minus the trailer) as a pleasure vehicle to take his family on a trip. Marvin collided with the plaintiff and injured her; he did not appeal from a judgment against him. W. D. Stevens did appeal from the judgment against him, and the Court of Appeals reversed, holding that he should have had a directed verdict. A bailor, the Court said, is not liable for the negligence of his bailee. It recognized that he may be liable for his own negligence, such as turning the vehicle over to an incompetent person or supplying a defective vehicle; but it found no evidence that he had been negligent in either respect, since Marvin was "an experienced, capable truck driver" and the vehicle was "in excellent mechanical condition." This recognition of a "duty of exercising ordinary care to avoid putting forth a machine with defects calculated to injure persons who come in contact with it"[8] sounds perfectly consistent with the *MacPherson* doctrine and fully in accord with the present view in the country as a whole.

In *Dabbs v. Tennessee Valley Authority*,[9] the Supreme Court considered another aspect of the duty owed to third parties by a supplier — here a supplier of electricity, a commodity rather than a chattel. The TVA had contracted to supply electricity to a cooperative association. The latter's lines had broken and fallen, starting a fire. Plaintiff's husband came to put out the fire, stepped on a wire and was electrocuted. The Supreme Court affirmed the action of the trial court in sustaining a demurrer to the declaration. It declared that when an electric company sells to a consumer it is under no duty to inspect wires which it did not install and does not control; so also when it transmits electricity to a distributing company. The Court was careful to add, however, that if the generating company had continued "to send its deadly current through the defective wiring of the distributing company . . . after knowledge or reasonable opportunity to learn of said break it is liable for injuries to persons or property caused by this

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5. The latest case of importance is Ford Motor Co. v. Wagoner, 183 Tenn. 392, 192 S.W.2d 840, 164 A.L.R. 364 (1946), which held for the defendant because of the intervening act of a dealer. There is language in this case which has been thought by some to indicate that the Court is ready to adopt the *MacPherson* doctrine. *Id.* at 401, 192 S.W. at 844.

6. Noel, *Products Liability in Tennessee*, 22 TENN. L. REV. 985 (1953). I have myself discussed the Tennessee cases in a book review in 22 TENN. L. REV. 444 (1952).

7. 249 S.W.2d 908 (Tenn. App. W.S. 1952). See the discussion of this case in the section on Bailments in the Personal Property and Sales article.

8. *Id.* at 910. The quotation is based on the earlier Supreme Court case of Vaughn v. Millington Motor Co., 160 Tenn. 197, 200, 22 S.W.2d 226, 227 (1929).

9. 250 S.W.2d 67 (Tenn. 1952).

breach of duty."[10] The analogy here to supplying a motor vehicle to a drunken driver, though not adverted to by the Court, is quite apparent.

In the *Dabbs* case, the plaintiff sought to use another basis to impose a legal duty upon the TVA. She alleged that the defendant maintained a switch upon its own line to cut off an open flow and thus contended that it had undertaken or assumed the duty. But there was no allegation that TVA had undertaken to maintain the switch for the benefit of the cooperative or that the cooperative relied upon any undertaking by the TVA, and the Court regarded this as necessary to impose the affirmative duty.

(2) *Landowners*

The landowner's liability to persons coming on his premises is variable. He does not owe a duty to all of them to use due care to see that his premises are safe. The familiar classification of business guests or invitees, licensees or social guests, and trespassers is used to define the extent of his duty.

Toward business guests he owes the traditional duty to exercise due care. This was recognized, though not expressly stated, in *Harper v. American Nat. Bank & Trust Co.*,[11] where plaintiff, starting down the steps of a business building, tripped over a metal strip slightly higher than the linoleum and injured herself. The Supreme Court assumed that the defendant, as owner of the building and therefore in control of the stairs and hallways, owed plaintiff the duty to use due care, but it found as a matter of law that there was no negligence — no breach of the duty.

In *Brooks v. Southeastern Motor Truck Lines, Inc.*,[12] the Court of Appeals held expressly that plaintiff fell "into the category of a trespasser, to whom the defendant is not liable for simple negligence, that is, the failure to use ordinary care."[13] Plaintiff had stepped into the rear of a delivery truck to assist the driver in finding a package when her foot went through a hole in the floor. She had attempted to be classified as a licensee by showing a custom on the part of herself and other receiving clerks to enter delivery trucks in this way; but the Court found no evidence of knowledge on defendant's part of this custom or of any consent on the part of the driver to the plaintiff's entry. It therefore affirmed a directed verdict for the defendant. Had plaintiff been characterized as a licensee, defendant would then have owed a duty to warn of defects, and plaintiff might have had a case to go to the jury.

The attractive-nuisance exception to the rule that a landowner is

10. *Id.* at 69.
11. 193 Tenn. 617, 249 S.W.2d 583 (1952).
12. 252 S.W.2d 128 (Tenn. App. W.S. 1952).
13. *Id.* at 131.

not liable to trespassers was mentioned in *Vaughn v. City of Alcoa*;[14] but it was held to be inapplicable to children in public parks, thus precluding a means for circumventing municipal tort immunity.[15]

(3) *Carriers and Passengers*

In Tennessee a common carrier "is held to the exercise of the highest degree of care and foresight for the passenger's safety."[16] In the only case during the Survey period involving a common carrier, a passenger stepping down from the steps of a train slipped and fell, some indirect evidence indicating that a banana peel was on the step. In the absence of evidence to show how the peel had come to be there or how long it had been there, the Court of Appeals held that a directed verdict was properly given for the defendant.[17] The railroad was not required "to keep a servant at the steps of every car during all the time they were receiving and discharging passengers."[18]

In many states, by statute or by judicial decision, an automobile driver does not owe a gratuitous passenger a duty to use reasonable care, some lesser standard of care being imposed. But in Tennessee ordinary care is required in driving the car.[19] This was assumed in several cases during the past year.[20]

Does the same rule apply regarding the condition of the car? In *Lively v. Atchley*,[21] the Court of Appeals seemed to suggest that it does not. Thus, it cited a Virginia case as laying down "the general rule that one invited to ride in an automobile by the owner or driver accepts the machine of his host as he finds it, subject only to the limitation that the driver or host must not, by his negligence, contribute to an injury to the guest."[22] This suggests that the gratuitous automobile guest is like the licensee on real property, where the owner is liable only for known latent defects in the condition of the premises but is usually required to use reasonable care in the conduct of activities. In the *Lively* case, a jury verdict for the defendant was affirmed, and the

14. 251 S.W.2d 354 (Tenn. 1952).

15. See, in general, Noel, *The Attractive Nuisance Doctrine in Tennessee*, 21 TENN. L. REV. 658 (1951).

A landowner is not privileged deliberately to shoot a trespasser whom he finds on his premises. See Suzore v. Rutherford, 251 S.W.2d 129 (Tenn. App. W.S. 1952).

16. Knoxville Cab Co., v. Miller, 176 Tenn. 88, 91, 138 S.W.2d 428, 429 (1940); *cf.* Memphis St. Ry. v. Cavell, 135 Tenn. 462, 465, 187 S.W. 179, 180 (1916) ("exercise of the 'utmost diligence, skill, and foresight' ").

17. Shirley v. Louisville & N.R.R., 251 S.W.2d 440 (Tenn. App. M.S. 1952).

18. *Id.* at 441.

19. Tennessee Cent. R.R. v. Vanhoy, 143 Tenn. 312, 226 S.W. 225 (1920); Wilson v. Moudy, 22 Tenn. App. 356, 123 S.W.2d 828 (M.S. 1938).

20. Lively v. Atchley, 256 S.W.2d 58 (Tenn. App. E.S. 1952); Logwood v. Nelson, 250 S.W.2d 582 (Tenn. App. E.S. 1952); France v. Newman, 248 S.W.2d 392 (Tenn. App. E.S. 1951).

21. 256 S.W.2d 58 (Tenn. App. E.S. 1952).

22. *Id.* at 60. The Virginia case is Clark v. Parker, 161 Va. 480, 171 S.E. 600 (1933).

jury may well have found defendant not guilty of ordinary negligence in failing to discover defective condition of brakes which suddenly locked. It is not perfectly clear, therefore, that the Court intended to draw a distinction between the standard of care required in driving and that imposed regarding the condition of the car.[23]

B. *Breach of Duty — The Negligence Issue*

(1) *In General*

> "To maintain an action for negligence, one must be able to show a duty owed to him by another, a breach of that duty, and injury from such breach. Every one owes to every one else the duty of exercising ordinary care not to injure him either in his person or property. Ordinary care is that degree of care which a person of reasonable prudence would exercise under a given state of facts appearing in the evidence in a cause, or in a state of facts similar thereto. This ordinary care may be positive or negative; that is, it may consist of what a person of reasonable prudence would have done under the same or similar circumstances, or of refraining from doing what he would have refrained from doing under these circumstances. What a person of reasonable prudence would have done under the same or similar circumstances must be determined by the jury from their knowledge of mankind, and of how persons of reasonable prudence usually deport themselves in relation to their surroundings."[24]

This quotation from Chief Justice M. M. Neil, in 1912, provides one of the aptest and clearest judicial statements of the elements of a negligence case in Tennessee.

Numerous decisions during the past year have held that the second element — the breach of duty — is to be determined by the jury, who are given the standard of what a reasonable prudent person would have done under the same or similar circumstances. There were decisions holding this in regard to defendant's conduct[25] and plaintiff's conduct.[26] On the other hand, " 'when the inference from the facts is so certain that all reasonable men, in the exercise of a fair and impartial judgment, must agree on it,' "[27] the issue is treated as a matter of law to be determined by the court. In two cases, the Court declared

23. *Cf.* Coppedge v. Blackburn, 15 Tenn. App. 587 (W.S. 1932), in which the same ambiguity exists.
24. Nashville, C. & St. L. Ry. v. Wade, 127 Tenn. 154, 158, 153 S.W. 1120, 1121, Ann. Cas. 1914B 1020 (1912).
25. Central Truckaway System, Inc. v. Waltner, 253 S.W.2d 985 (Tenn. App. E.S. 1952) (truck over center of highway); Southern Coach Lines, Inc. v. Ball, 250 S.W.2d 104 (Tenn. App. M.S. 1952) (speed of bus); City Water Co. v. Butler, 251 S.W.2d 433 (Tenn. App. E.S. 1951) (lighting around excavation); France v. Newman, 248 S.W.2d 392 (Tenn. App. E.S. 1951) (speed of car).
26. Act-O-Lane Gas Service Co. v. Hall, 248 S.W.2d 398 (Tenn. App. E.S. 1951) (failure to change heating system). All of the cases in the preceding note also involved contributory negligence and held that the issue was for the jury.
27. Osborn v. Nashville, 182 Tenn. 197, 204, 185 S.W.2d 510, 513 (1945); *cf.* Carey Roofing & Mfg. Co. v. Black, 129 Tenn. 30, 36, 164 S.W. 1183, 1185 (1914).

as a matter of law both that the defendant was not guilty of negligence and that the plaintiff was guilty of contributory negligence.[28]

(2) *Standard of Care*

Two cases involved injuries to children. In *Tidwell v. Kay's of Nashville, Inc.*,[29] defendant gave two ten-year-old boys some small pieces of dry ice. They put the dry ice in a bottle, placed a cap on it and were injured when the contents expanded and the bottle exploded. The Supreme Court agreed with the Court of Appeals that the trial court was wrong in directing a verdict for the defendant. It said: "The law exacts of one who puts a force in motion that he shall control it with a skill and care proportionate to the danger created. . . . The dry ice, according to the proof, was a dangerous product and where defendant placed this product in the hands of a small child, the resulting injury was a probability and not a possibility."[30]

In *Hadley v. Morris*,[31] defendant was driving slowly along the road, watching a pair of road graders for clearance, when a seven-year-old boy ran out of the yard on the other side directly in front of him; he failed to stop in time to avoid hitting the boy. The Court of Appeals held that the decision of whether the defendant was negligent was one for the jury and declared that he was "only required to exercise ordinary care under the circumstances to discover the peril and to strive to avoid injuring a child or an animal which does run onto the road."[32] This method of using the normal standard of care and treating the plaintiff's infancy as one of the "circumstances" in evaluating defendant's conduct seems more desirable than describing to the jury a special standard of care for a person who is dealing with an infant.[33]

When the infant's own conduct is being evaluated, however, a more specific standard of care is used. This was also treated in the *Hadley* case, where the infant was seven years old. Citing an earlier Court of Appeals case,[34] the Court declared that a child from seven to fourteen is prima facie not capable of negligence. The evidence in the case indicated that the child was capable of appreciating the danger in crossing the highway, and the Court held that this nullified the presumption and justified a jury verdict for the defendant. It is true that the Supreme Court has held that a child under seven is presumed

28. Harper v. American Nat. Bank & Trust Co., 193 Tenn. 617, 249 S.W.2d 583 (1952) (plaintiff, descending steps, tripped over metal strip which she saw slightly protruding over linoleum); King v. Tennessee Cent. R.R., 253 S.W.2d 202 (Tenn. App. M.S. 1952) (car ran into boxcar obstructing road — no evidence that boxcar had been there for unreasonble time).

29. 250 S.W.2d 75 (Tenn. 1952).

30. *Id.* at 77. The Court relied heavily upon New York Eskimo Pie Corp. v. Rataj, 73 F.2d 184 (3d Cir. 1934), which reached the same result.

31. 249 S.W.2d 295 (Tenn. App. W.S. 1951).

32. *Id.* at 298.

33. *Cf.* Townsley v. Yellow Cab Co., 145 Tenn. 91, 237 S.W. 58 (1922).

34. West v. Southern Ry., 20 Tenn. App. 491, 100 S.W.2d 1004 (E.S. 1936).

to be incapable of contributory negligence,[35] but it does not appear to have spoken in terms of the presumption in connection with a child between seven and fourteen. Instead, it has repeatedly declared that the standard of care for an infant is "that degree of care ordinarily exercised by one of the same age, discretion, knowledge and experience under the same or similar circumstances."[36] This expression of the standard for a child seven or above seems much preferable to the system of relying upon a presumption;[37] and the actual holding of the *Hadley* case is not inconsistent with it.

The general standard of care — what a reasonable prudent person would do under the same or similar circumstances — is occasionally in particular fact situations reduced to a specific rule of law. Examples applied in some jurisdictions are the stop-look-and-listen rule applied to railroad crossings and the assured-clear-distance-ahead rule applied to automobile speed at night. In the *Hadley* case, where the little boy ran out in front of the defendant's car, the trial court instructed that a pedestrian intending to cross the highway is required to see that the crossing can be made in safety before going on to the highway and that failure to do so is negligence. The Court of Appeals reversed, holding that there is no absolute duty and that "such pedestrian is only bound to exercise ordinary care for his own safety."[38] This is in accord with the commendable trend away from the use of judicially declared rules of conduct to the use of the general standard of care.[39]

(3) *Proof of Negligence*—Res Ipsa Loquitur

In *Harper v. American Nat. Bank & Trust Co.*,[40] where plaintiff fell down steps and claimed to have tripped over a metal strip slightly protruding over the linoleum, the Court found as a matter of law that defendant was not negligent. It was strongly influenced to this decision by evidence that the stairs had been in such condition for a period of about four years and that over 100,000 people had used them without

35. Wells v. McNutt, 136 Tenn. 274, 189 S.W. 365 (1916) (presumption of incapacity of child of six rebuttable).

36. The quotation is taken from Standridge v. Godsey, 189 Tenn. 522, 533, 226 S.W.2d 277, 282 (1949), where the infant was 17 years old. Similar expressions are found in Southern Ry. v. Whaley, 170 Tenn. 668, 677, 98 S.W.2d 1061, 1064 (1936); Marion County v. Cantrell, 166 Tenn. 358, 362, 61 S.W.2d 477, 479 (1933) (child 12); Townsley v. Yellow Cab Co., 145 Tenn. 91, 95, 237 S.W. 58, 59 (1922) (child 11).

37. *Cf.* PROSSER, TORTS 230 (1941).

38. 249 S.W.2d at 301. The Court relied upon the previous holding to this effect in De Rosset v. Malone, 34 Tenn. App. 451, 239 S.W.2d 366 (W.S. 1950).

39. *Cf.* PROSSER, TORTS 287 (1941). Further illustration of the trend is seen in Halfacre v. Hart, 192 Tenn. 342, 241 S.W.2d 421 (1951), 5 VAND. L. REV. 250 (1952), restricting application of the assured-clear-distance ahead rule. See, in general, James & Sigerson, *Particularizing Standards of Conduct in Negligence Trials*, 5 VAND. L. REV. 697, 704-09 (1952).

40. 193 Tenn. 617, 249 S.W.2d 583 (1952).

injury. Presumably, if other persons had tripped over the metal strip, this would have been evidence of negligence.[41]

The only case where the doctrine of *res ipsa loquitur* was discussed last year involved no new principles or applications. In *All v. John Gerber Co.*,[42] the plaintiff suffered serious burns to her head in obtaining a permanent wave. In operating the machine used, rubber and cotton pads serve to insulate the scalp from too much heat. The operator must depend upon the customer to tell when too much heat is reaching the scalp, and the operator in this case adjusted the machine whenever the plaintiff asked that it be done. The Court of Appeals therefore found that "the instrumentality was not under the exclusive control of defendants" and held that the doctrine of *res ipsa loquitur* was inapplicable.[43] In addition, it said, even if the doctrine had been applicable, it would not have excluded either the defense of contributory negligence as a bar or that of remote contributory negligence in mitigation of damages. Actually, it is hard to see how the instrumentality could have been in the exclusive control of the defendant if the plaintiff's negligence contributed in any way to the injury; and most statements of the elements of a *res ipsa* case include the requirement that the plaintiff not be guilty of contributory negligence.[44] In some earlier decisions, the Tennessee courts seem to have been much too strict in regard to the requirement of exclusive control,[45] forgetting that the doctrine of *res ipsa loquitur* is really no more than a sanctioning of circumstantial evidence; but the decision in the instant case seems well taken. There was no consideration of the procedural effect of *res ipsa loquitur*.[46]

(4) *Violation of Statute*

Tennessee follows the majority rule that violation of a statute is negligence *per se*[47] and also applies this rule to municipal ordinances.[48] This latter rule was recognized in *McCampbell v. Central of Georgia Ry.*, [49] but it was explained that proximate contributory negligence

41. *Cf.* Morris, *Proof of Safety History in Negligence Cases*, 61 HARV. L. REV. 205 (1948), reprinted in MORRIS, STUDIES IN THE LAW OF TORTS c. 3 (1952).

42. 252 S.W.2d 138 (Tenn. App. W.S. 1952).

43. The statement was almost dictum, since the plaintiff, appellant, had won below and was contending that the damages were inadequate. This was recognized by the Court.

44. *E.g.*, PROSSER, TORTS § 43 (1941).

45. See Note, *Res Ipsa Loquitur in Tennessee*, 22 TENN. L. REV. 925, 936-40, 943 (1953).

46. By far the best general treatment of the doctrine is Prosser, *Res Ipsa Loquitur in California*, 37 CALIF. L. REV. 183 (1949).

47. Wise & Co. v. Morgan, 101 Tenn. 273, 48 S.W. 971, 44 L.R.A. 548 (1898); Null v. Electric Power Board, 30 Tenn. App. 696, 210 S.W.2d 490 (M.S. 1948).

48. Memphis St. Ry. v. Haynes, 112 Tenn. 712, 81 S.W. 374 (1904); Green v. Crescent Amusement Co., 32 Tenn. App. 554, 223 S.W.2d 201 (M.S. 1949).

49. 253 S.W.2d 763 (Tenn. 1952).

will bar recovery even though the negligence of the defendant consisted of the violation of an ordinance.

The *McCampbell* case also involved a problem regarding the violation of Code section 2628,[50] requiring certain precautions on the part of railroads. Under a unique construction given to this section in its early days, contributory negligence does not bar recovery but merely goes in mitigation of damages,[51] and the railroad company which violates the section is liable whether its violation was the proximate cause of the injury or not.[52] In the *McCampbell* case, the defendant railroad had allegedly approached a crossing without blowing a whistle or bell, and plaintiff's husband had run into the middle of the moving train. Neither contributory negligence nor lack of proximate cause was a defense, and the Court resorted to another legal device to hold for the defendant. It is the usual rule, in Tennessee and elsewhere, that one not in the class of persons whom the statute was intended to protect cannot complain of its violation or base a cause of action on it.[53] It had previously been held that the words "any person, animal, or other obstruction [which] appears on the road" did not include a goose,[54] an unregistered female dog[55]—or an employee.[56] And, in *McCampbell,* the Court held, following prior authority,[57] that a person running into the middle of a train is likewise not protected.

Separate counts are filed in Tennessee for each statute alleged to be violated. The Court of Appeals held in *Hadley v. Morris*[58] that it is not error to instruct on violation of a statute under a common law count when the statute is simply declaratory of the common law.

C. *Proximate Cause*

Like the courts of most other jurisdictions, the Tennessee courts have failed to adopt any single test for proximate cause and have made many contradictory statements in the opinions. Decisions range all the way from those which adopt a strict foreseeability test,[59] through

50. TENN. CODE ANN. § 2628 (Williams 1934).
51. *E.g.*, Railway Companies v. Foster, 88 Tenn. 671, 13 S.W. 694, 14 S.W. 428 (1890); East Tenn. V. & G.R.R. v. Humphreys, 80 Tenn. 200 (1883).
52. *E.g.*, Illinois Cent. R.R. v. Davis, 104 Tenn. 442, 58 S.W. 296 (1900); Southern Ry. v. Kuykendall, 186 S.W.2d 617 (Tenn. App. E.S. 1944).
53. Carter v. Redmond, 142 Tenn. 258, 218 S.W. 217 (1920); see PROSSER, TORTS § 39 (1941).
54. Nashville & K. R.R. v. Davis, 78 S.W. 1050 (Tenn. 1902) ("But the line must be drawn somewhere, and we are of the opinion that the goose is a proper bird to draw it at.")
55. Cincinnati, N.O. & T.P.R.R. v. Ford, 139 Tenn. 291, 202 S.W. 72 (1917).
56. St. Louis & S.F.R.R. v. Finley, 122 Tenn. 127, 118 S.W. 692 (1909).
57. Tennessee Cent. Ry. v. Page, 153 Tenn. 84, 282 S.W. 376 (1925); Southern Ry. v. Simpson, 149 Tenn. 458, 261 S.W. 677 (1923). These cases involved a different subsection but constituted proper authority for the decision.
58. 249 S.W.2d 295 (Tenn. App. W.S. 1951).
59. *E.g.*, Moody v. Gulf Ref. Co., 142 Tenn. 280, 218 S.W. 817, 8 A.L.R. 1243 (1920); Nashville, C. & S.L. Ry. v. Harrell, 21 Tenn. App. 353, 110 S.W.2d 1032 (M.S. 1937).

discussions of natural and probable consequences[60] and the risk concept,[61] to those which declare that all that is required is continuous sequence and that the injury would not have occurred without defendant's negligence.[62] There is also disagreement as to whether the determination is to be made by the jury or by the court.

The courts have failed to draw a distinction between cause in fact and legal cause. This distinction has been urged by most of the leading commentators in the field,[63] and it will help materially in reconciling the cases. If it is followed, the cases decided during the past year present no real difficulty.

(1) *Cause in Fact*

The meaning of cause in fact is apparent from its very name. Thus, in *Act-O-Lane Gas Service Co. v. Hall*,[64] where plaintiff's wife died from pneumonia, the problem was whether the propane gas system installed by defendant caused plaintiff's home to become unusually and excessively damp, and, if so, whether this dampness caused the wife's illness and death. The Court of Appeals held that the issue of fact was one for the jury to determine and affirmed a judgment for plaintiff.

Again, in *France v. Newman*,[65] plaintiff, injured in an automobile accident, previously suffered from narcolepsy (uncontrollable desire to sleep for a short time), and the Court of Appeals held that the jury might determine whether the disease was worse after the accident and could award damages for the aggravation if it was present.

Cause in fact is sometimes called *causa sine qua non* — the cause without which the damage would not have been incurred. This approach is illustrated by *City Water Co. v. Butler*.[66] In this case, the defendant had left an excavation in the street at night, and the lighting, according to jury verdict, was inadequate. But plaintiff, who ran into the excavation with his motorcycle, had lights which would reflect only 35 to 40 feet, while the statute required lights reflecting 200 feet; this made him negligent *per se*. The Court of Appeals held that it was for the jury to determine whether plaintiff would have seen the hole in time to stop or swerve aside if his lights had been as strong as the statute required.

60. *E.g.*, Chattanooga Light & Power Co. v. Hodges, 109 Tenn. 331, 70 S.W. 616, 60 L.R.A. 459, 97 Am. St. Rep. 844 (1902).
61. *E.g.*, Inter-City Trucking Co. v. Daniels, 181 Tenn. 126, 178 S.W.2d 756 (1944); Spivey v. St. Thomas Hospital, 31 Tenn. App. 12, 211 S.W.2d 450 (M.S. 1947.)
62. *E.g.*, Cartwright v. Graves, 182 Tenn. 114, 184 S.W.2d 373 (1944); Postal-Telegraph Cable Co. v. Zopfi, 93 Tenn. 369, 24 S.W. 633 (1894).
63. See MORRIS, STUDIES IN THE LAW OF TORTS c. 7 (1952); PROSSER, TORTS §§ 46, 48 (1941).
64. 248 S.W.2d 398 (Tenn. App. E.S. 1951). This action was apparently for breach of contract, but the Court treated the causation issue as if it were a tort action for wrongful death.
65. 248 S.W.2d 392 (Tenn. App. E.S. 1951).
66. 251 S.W.2d 433 (Tenn. App. E.S. 1951).

These cases all indicate that the jury makes the determination as to cause in fact, and it is usually said that the issue is for the jury unless reasonable minds would reach but one conclusion. In the *Act-O-Lane* case, the Court said: "While a jury will not be permitted to choose between two or more equally probable causes, for only one of which the defendant is responsible, it is sufficient if the cause for which defendant is responsible is shown to be as in the present case, the most probable."[67] This statement is apt to prove misleading unless it is realized that the jury makes the determination that the cause for which defendant is responsible is the most probable and that they should be permitted to reach this conclusion if there is any reasonable basis for it.[68]

(2) *Legal Cause*

Even though cause in fact is found to be present, however, defendant's liability may still be cut off because of lack of legal causation. *All v. John Gerber Co.*[69] provides an example. A wife had suffered severe burns to her head from a permanent wave treatment, and her husband sought to recover for "mental anguish suffered by him as a result of 'witnessing the results of his wife's painful injury' and mental anguish to be suffered in the future in being reminded constantly of his wife's misfortune by the permanent scars." Despite the obvious presence of cause in fact (if plaintiff suffered mental distress from his wife's pain and physical condition, it was unquestionably caused by defendant's negligence), the Court of Appeals held that there could be no recovery. This decision is in accord with the great weight of authority.[70] It can be posed in terms of lack of a duty owed to the plaintiff, or lack of an interest subject to legal protection or of an improper element of damages, but it is most generally posed in terms of proximate cause. In any event, the decision is essentially one of policy, embodying the view that the liability of a defendant who has merely been negligent[71] would be entirely too broad if it extended to this type of injury.

The test for cause in fact is a simple one easily transmissable to a

67. 248 S.W.2d at 404.

68. *Cf.* Nashville Gas & Heating Co. v. Phillips, 17 Tenn. App. 648, 664, 69 S.W.2d 914, 923 (M.S. 1933); Nashville Ry. & Light Co. v. Harrison, 5 Tenn. App. 22, 35 (Tenn. App. M.S. 1927).

69. 252 S.W.2d 138 (Tenn. App. W.S. 1952).

70. The leading case in Waube v. Warrington, 216 Wis. 603, 258 N.W. 497, 98 A.L.R. 394 (1935). To the same effect is Nuckles v. Tennessee Electric Power Co., 155 Tenn. 611, 299 S.W. 775 (1927). *Contra*: Rasmussen v. Benson, 133 Neb. 449, 275 N.W. 674, 122 A.L.R. 1468 (1937).

71. In the instant case, plaintiff had cited Stepp v. Black, 14 Tenn. App. 153 (M.S. 1931), as allowing a husband to recover for mental anguish suffered because of what happened to his wife. But this was an action for criminal conversation, an intentional harm involving a direct invasion of the very interest of the husband's peace of mind; and the Court very properly did not regard it as in point.

jury. Thus, in *Hadley v. Morris*,[72] the Court declared it appropriate to instruct in the language of two earlier Supreme Court cases: "The proximate cause of an injury may, in general, be stated to be that act or omission which immediately causes or fails to prevent the injury; an act or omission occurring or concurring with another, which, had not happened, the injury would not have been inflicted. . . ."[73] But the " 'proximate cause' is not necessarily that which is next or last in time or place, but that which is a procuring, efficient, and predominant cause. Closeness in casual relation, rather, is the meaning."[74] This language is phrased primarily in terms of cause in fact and is adequate to take care of the great majority of cases.

In the comparatively infrequent case involving a true problem of legal cause, this test is not adequate; and there is, indeed, no single test which will explain all of the cases. The *Hadley* case referred to the language of Judge Felts in *Spivey v. St. Thomas Hospital*:[75] "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. . . . So the particular harm which actually befell Spivey need not have been foreseeable. It is enough that some such harm of a like general character was reasonably foreseeable as a likely result of defendant's failure to use due care. . . ." This seems as apt an expression of a single test as can be found. It will explain most of the cases[76] and is entirely consistent with the test used for determining whether the violation of a statute can be the basis of an action by the plaintiff — whether he and his injury come within the class of persons and the interests which the statute was intended to protect.[77]

Should this language be given to the jury? Indeed, is the issue of legal cause one to go to the jury at all? There are many statements that the question of proximate cause is one for the jury.[78] But the Supreme Court has sometimes said that "where the facts are fairly incontrovertible the question of proximate or intervening cause is for

72. 249 S.W.2d 295 (Tenn. App. W.S. 1951).
73. Deming v. Merchants' Cotton-Press Co., 90 Tenn. 306, 353, 17 S.W. 89, 99 (1891).
74. Grigsby & Co. v. Bratton, 128 Tenn. 597, 603, 163 S.W. 804, 806 (1913).
75. 31 Tenn. App. 12, 25, 28, 211 S.W.2d 450, 455, 457 (M.S. 1947).
76. It explains, for example, Tidwell v. Kay's of Nashville, Inc., 250 S.W.2d 75 (Tenn. 1952), where the subject of proximate cause was treated somewhat obliquely. There defendant gave two small boys some dry ice which they placed in a bottle; they were injured when the bottle exploded.
77. See McCampbell v. Central of Georgia Ry, 253 S.W.2d 763 (Tenn. 1952) and discussion *supra* pp. 997-98.
78. During the past year, for example, see Central Truckaway System, Inc. v. Waltner, 253 S.W.2d 985 (Tenn. App. E.S. 1952); France v. Newman, 248 S.W.2d 392 (Tenn. App. E.S. 1951).

the court."[79] This would apparently place the question of legal cause in the hands of the court, since it does not depend upon a resolution of fact issues. At other times, the Court has varied the language to say that the question is for the court when "the facts are uncontroverted and reasonable minds can draw but one conclusion therefrom."[80] At any rate, the court frequently decides the issue of legal cause, particularly if there are crystalized holdings for the type of fact problem involved.[81] If it wishes it can leave the question to the jury, and the language in the *Spivey* case seems appropriate.

D. *Damages*

Several cases discussed the measure of damages to be awarded in negligence actions. Most of them concerned a contention that the amount awarded by the jury was excessive. In *France v. Newman*,[82] the Court enumerated the factors to be considered in passing on this contention: ". . . 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."[83] *Act-O-Lane Gas Service Co. v. Hall*[84] and *Southern Coach Lines, Inc. v. Ball*[85] involved the measure of damages in wrongful-death cases.[86] The measure of damages for loss of consortium was discussed in *All v. John Gerber Co.*[87]

The subject of exemplary damages was considered by the Federal District Court for the Eastern District of Tennessee in *Earley v. Roadway Express, Inc.*[88] Judge Taylor explained that under the Tennessee rule exemplary damages are awarded "where the wrongdoer behaved

79. *E.g.*, Chattanooga Light & Power Co. v. Hodges, 109 Tenn. 331, 341, 70 S.W. 616, 618, 60 L.R.A. 459, 97 Am. St. Rep. 844 (1902).

80. Illinois Central R.R. v. Nichols, 173 Tenn. 602, 617, 118 S.W.2d 213, 218 (1938); see also Moody v. Gulf Ref. Co., 142 Tenn. 280, 290, 218 S.W. 817, 819, 8 A.L.R. 1243 (1920).

81. In the *All* case, *supra* note 69, for example, the court simply made the decision without any thought of submitting the issue to the jury. The majority of courts would have agreed.

82. 248 S.W.2d 392 (Tenn. App. E.S. 1951).

83. *Id.* at 396.

84. 248 S.W.2d 398 (Tenn. App. E.S. 1951).

85. 250 S.W.2d 104 (Tenn. App. M.S. 1952).

86. For a thorough and careful study of this topic, see Gamble, *Actions for Wrongful Death in Tennessee*, 4 VAND. L. REV. 289 (1951). Reference should here be made to an act at the last session of the legislature providing that the wrongful death action in the case of a married woman passes to her surviving husband. Tenn. Pub. Acts 1953, c. 210.

87. 252 S.W.2d 138 (Tenn. App. W.S. 1952). This case contains a good review of the authorities on the substantive law of consortium. In this connection, reference may be made to Napier v. Martin, 250 S.W.2d 35 (Tenn. 1952), suggesting that no action for loss of consortium lies in Tennessee by a wife against a person who negligently injured her husband. See the discussion of the *All* and *Napier* cases in the section on Actions for Loss of Consortium of the Domestic Relations article.

88. 106 F. Supp. 958 (E.D. Tenn. 1952).

so wantonly or grossly as to show a willingness to inflict the injury."[89] They are not normally awarded against a master for the acts of his servant, but a careful examination of the Tennessee cases was found to show three exceptions to this rule: (1) when the master is under a duty imposed by contract or law to refrain from mistreatment of the contractee (*e.g.*, common carrier and passenger); (2) where the nature of the servant's duty is such that the use of force by him is naturally contemplated (*e.g.*, guards or watchmen entrusted with weapons); (3) where a dangerous instrumentality entrusted to the servant is used wantonly to plaintiff's injury (*e.g.*, willful sounding of whistle on railroad locomotive).

E. *Contributory Negligence*

(1) *In General*

Proximate contributory negligence of the plaintiff bars recovery in Tennessee. This was recognized in *McCampbell v. Central of Georgia Ry.*,[90] where the Supreme Court held also that the plaintiff's declaration may state facts showing his contributory negligence so conclusively that a demurrer should have been sustained to the declaration. The Court added that the fact that defendant's negligence consists of violation of a statute or ordinance does not prevent contributory negligence from being a bar.

Contributory negligence is an affirmative defense and must be pleaded as such.[91] But the Court of Appeals held in *Lively v. Atchley*[92] that this rule "does not require a defendant to couch his defenses in legal terminology." An allegation that an automobile guest failed to warn of danger or protest against the manner of operation was held to be adequate.

The decision as to whether the plaintiff was contributorily negligent is normally for the jury,[93] but it may be so clear that the court decides it as a matter of law.[94]

(2) *Mitigation of Damages*

There were no cases during the year discussing the unique Tennessee doctrine that, while proximate contributory negligence bars recovery,

89. *Id.* at 959.
90. 253 S.W.2d 763 (Tenn. 1952).
91. This was laid down in Creekmore v. Woodard, 192 Tenn. 280, 241 S.W.2d 397 (1951). For comment, see Farrell, *Special Pleas in Law Cases in Tennessee*, 5 VAND L. REV. 200 (1952).
92. 256 S.W.2d 58, 60 (Tenn. App. E.S. 1952).
93. Southern Coach Lines, Inc. v. Ball, 250 S.W.2d 104 (Tenn. App. M.S. 1952); City Water Co. v. Butler, 251 S.W.2d 433 (Tenn. App. E.S. 1951); Act-O-Lane Gas Service Co. v. Hall, 248 S.W.2d 398 (Tenn. App. E.S. 1951); France v. Newman, 248 S.W.2d 392 (Tenn. App. E.S. 1951).
94. Harper v. American Nat. Bank & Trust Co., 193 Tenn. 617, 249 S.W.2d 583 (1952); King v. Tennessee Cent. R.R., 253 S.W.2d 202 (Tenn. App. M.S. 1952).

remote contributory negligence does not bar recovery but must be considered by the jury in mitigation of damages. In one case, reference was made to the doctrine, and the Court said, without more, that it was properly charged to the jury.[95] The doctrine has much of merit to it, but it badly needs clarification.[96] There were no cases involving application of Code section 2628,[97] the railroad statute, which has been construed to mean that contributory negligence merely mitigates damages if the railroad has violated the statute.

(3) *Last Clear Chance*

The doctrine of last clear chance was raised in two cases during the past year, though it was properly held in both of them not to be applicable. In *Vaughn v. City of Alcoa,*[98] the Supreme Court held that it could not be used as a means of circumventing the governmental tort immunity of a municipality. In *Hadley v. Morris,*[99] the Court of Appeals held that the doctrine did not apply when a little boy ran out in front of defendant's car and defendant did not see him in time to avoid hitting him.

Both cases recognized the existence of the doctrine, and there seems to be no doubt but that the doctrine has effect in Tennessee, though the cases in which it has actually been applied are quite rare, despite the fairly frequent judicial discussion. If the plaintiff's danger is seen and realized by the defendant and he then negligently fails to avoid the accident, he is held liable. This is the "doctrine of discovered peril," recognized by a majority of the jurisdictions and applied in Tennessee.[100] On the other hand, if the negligence of both parties is con-

95. All v. John Gerber Co., 252 S.W.2d 138, 140 (Tenn. App. W.S. 1952).

96. The historical development of the doctrine is sketched in Note, *Remote Contributory Negligence: A Tennessee Concept*, 22 TENN. L. REV. 1030 (1953); but the writer of the Note expressly abstained from seeking to "define the correct meaning or proper legal connotation" of the expressions "proximate" or "remote" as used in this connection. Clearly "remote" has a different meaning from that given it in other states, where remote negligence has no effect on the cause of action at all. A series of Court of Appeals cases has defined the "remote" cause as "that which may have happened and yet no injury have occurred, notwithstanding that no injury could have occurred if it had not happened." Elmore v. Thompson, 14 Tenn. App. 78, 100 (M.S. 1931). See also De Rossett v. Malone, 34 Tenn. App. 451, 475, 239 S.W.2d 366, 377 (W.S. 1950); Tri-State Transit Co. v. Duffey, 27 Tenn. App. 731, 746, 173 S.W.2d 706, 712 (W.S. 1940); Phillips-Buttorff Mfg. Co. v. McAlexander, 15 Tenn. App. 618, 641 (M.S. 1932).

97. TENN. CODE ANN. § 2628 (Williams 1934).

98. 251 S.W.2d 304 (Tenn. 1952). See the discussion on this case in Tort Liability section of the article on Local Government Law.

99. 249 S.W.2d 295 (Tenn. App. W.S. 1951).

100. The leading case in Tennessee is Todd v. Cincinnati, N.O. & T.P. Ry., 135 Tenn. 92, 185 S.W. 62, L.R.A. 1916E 555 (1916), where the Court found the doctrine inapplicable because of plaintiff's gross negligence. See also discussion in Tennessee Cent. Ry. v. Ledbetter, 159 Tenn. 404, 408-10, 19 S.W.2d 258, 259 (1929); and Southern Ry. v. Whaley, 170 Tenn. 668, 679-82 98 S.W.2d 1061, 1065 (1936), in both of which the doctrine was held not applicable. It was applied in Short Way Lines v. Thomas, 34 Tenn. App. 641, 241 S.W.2d 875 (E.S. 1951).

current to the moment of the injury, recovery is not allowed in Tennessee or the great majority of states. A possible exception is the so-called "humanitarian doctrine," followed in Missouri, and perhaps in Tennessee, and applied where the defendant is engaged in a hazardous business, operating a dangerous instrumentality.[101] For the situation in between, where the plaintiff has negligently placed himself in a position of peril but is now helpless and unable to extricate himself and the defendant negligently fails to discover plaintiff's situation, other jurisdictions are divided, and there is no ruling in Tennessee.

But the major problem in Tennessee is the relationship of the doctrine of last clear chance to the Tennessee doctrine of remote contributory negligence. Last clear chance is usually explained on a causation basis, and so is remote contributory negligence. It would logically appear that in Tennessee the plaintiff's recovery should be diminished according to his negligence even though the last clear chance doctrine applies, and there is some authority suggesting this.[102] If this is so, then the doctrine of last clear chance has no real independent significance in Tennessee, being merely a part of the doctrine of remote contributory negligence. But most of the cases in which last clear chance has been raised have failed to discuss remote contributory negligence in any way, and the problem probably remains to be settled.

(4) *Imputed Negligence*

The negligence of the driver of an automobile is not imputed to his guests in Tennessee.[103] This was recognized by implication in several cases decided during the Survey period.[104] If the occupants of the car are engaged in what is characterized as a joint enterprise, however, the negligence of one will be imputed to the others. This has been the position of the Tennessee courts for some time[105] and was recognized in the case of *Logwood v. Nelson*.[106] In this case, plaintiff was traveling with her daughter to take her son's car to him at an army camp. The daughter was driving, plaintiff being unable to drive;

101. The suggestion that the humanitarian doctrine applies in Tennessee is made in Todd v. Cincinnati, N.O. & T.P. Ry., 135 Tenn. 92, 106, 185 S.W. 62, 65, L.R.A. 1916E 555 (1916). The Court in the instant case of Hadley v. Morris, 249 S.W.2d 295, 299 (Tenn. App. W.S. 1951), indicated that it may be confined to "railroads, electric power companies, etc. operating dangerous instrumentalities," and gives no suggestion that it might apply to an automobile.

102. See Hemmer v. Tennessee Electric Power Co., 24 Tenn. App. 42, 53, 139 S.W.2d 698, 705 (M.S. 1940); and see Memphis Street Ry. v. Haynes, 112 Tenn. 712, 735, 81 S.W. 374, 379 (1904), not based expressly on last clear chance but explained in later cases on this basis.

103. Berryman v. Dilworth, 178 Tenn. 566, 160 S.W.2d 899 (1942); Stem v. Nashville Interurban Ry., 142 Tenn. 494, 221 S.W. 192 (1920).

104. King v. Tennessee Cent. R.R., 253 S.W.2d 202 (Tenn. App. M.S. 1952); *cf.* Lively v. Atchley, 256 S.W.2d 58 (Tenn. App. E.S. 1952); France v. Newman, 248 S.W.2d 392 (Tenn. App. E.S. 1951).

105. Berryman v. Dilworth, 178 Tenn. 566, 160 S.W.2d 899 (1942); Schwartz v. Johnson, 152 Tenn. 586, 280 S.W. 32, 47 A.L.R. 323 (1926).

106. 250 S.W.2d 582 (Tenn. App. E.S. 1952), 22 TENN. L. REV. 1072 (1953).

expenses of the trip were being paid by the son. The car skidded going over an icy bridge and came to a stop on the shoulder; it was then struck by a car driven by defendant Coffey. Plaintiff brought this action against her daughter and Coffey. Coffey appealed a verdict against him, contending that the daughter's negligence was imputed to plaintiff. The Court found that plaintiff did not have "an equal and joint right of control in the prosecution of a common enterprise"[107] and quoted a previous statement to the effect that "'the mere fact that both have engaged in the drive because of the mutual pleasure to be so desired (derived) does not materially alter the situation.'"[108] The Tennessee courts have taken a commendable position in restricting the scope of the joint-enterprise defense.[109]

II. INTENTIONAL HARMS

A. *Assault and Battery*

In two cases, plaintiff was shot by defendant.[110] In both, the jury rendered a verdict for plaintiff involving substantial compensatory damages and a large sum for punitive damages. The Court of Appeals sustained both awards. In one case,[111] it discussed the subject of punitive damages at some length, indicating the factors on which punitive damages are awarded and declaring that it is proper to consider the financial condition of the defendant in assessing them and that no particular relationship is required between the amount of the actual damages and the punitive damages.

B. *False Imprisonment*

There were also two cases involving false imprisonment. *Rogers v. McDaniel*[112] raised no difficulties. Defendant, chief of police, had arrested plaintiff, a taxidriver, for parking in the wrong place. Plaintiff was fined and appealed, being released on filing an appeal bond. Defendant then arrested him again and put him in jail. There was a dispute of fact as to whether the second arrest was for the old offense or for a new one, and a jury verdict for the plaintiff was sustained.

The case of *(Blue) Star Service, Inc., v. McCurdy*[113] raised some very important problems and may well be the most significant tort case decided during the past year. This was an action for "wrongfully and illegally procuring the arrest of plaintiff by Memphis police of-

107. *Id.* at 585.
108. *Id.* at 584.
109. See PROSSER, TORTS § 65 (1941).
110. McDaniel v. Textile Workers Union of America (CIO), 254 S.W.2d 1 (Tenn. App. E.S. 1952); Suzore v. Rutherford, 251 S.W.2d 129 (Tenn. App. W.S. 1952).
111. Suzore v. Rutherford, 251 S.W.2d 129 (Tenn. App. W.S. 1952).
112. 253 S.W.2d 36 (Tenn. App. M.S. 1952).
113. 251 S.W.2d 139 (Tenn. App. W.S. 1952), 22 TENN. L. REV. 1070 (1953).

ficers." Plaintiff was in arrears in payments on his car with the C.I.T., and it seized his car, placing it in storage with the defendant parking lot. Plaintiff subsequently paid the arrearage to the C.I.T. and received a receipt and claim check for the car. He then went down and got the car from the parking lot. His version is that he turned in the check and paid $1.50 charges to a Negro boy before taking the car. Defendant claimed to have no record of the claim check or the money and contended that plaintiff did not speak with any of its employees. Finding the car missing on the following day, defendant's agent, Simmons, reported it to the police, stating that he did not know whether plaintiff had come and got the car or not. The police asked Simmons to check. Simmons called C.I.T. and learned that plaintiff had no telephone and lived on a rural route. Without inquiring further, he reported back to the police that he had made the investigation and that the car had been stolen. On the following day, police picked up the plaintiff driving the car, arrested him and took him to jail. He was later taken out to the parking lot, where his innocence was established. An altercation then occurred between him and the police, and they took him back to jail and kept him there overnight.

A jury verdict for plaintiff for $3500 was reduced by remittitur to $2500, and the Court of Appeals affirmed the trial court. The Court declared that it "matters not whether defendant directly order the arrest, if he set in motion the machinery which proximately caused the arrest; that is, if the arrest was not the act of the officer or other person making the arrest on his own volition."[114] It held that the defendant in this case came within the first clause and added that, since the evidence on this issue was not in dispute, "this was not a jury question."[115] It cited the *Restatement of Torts* to the effect that, "if an act done with the intention of affecting a third person . . . imposes a confinement upon another, the actor is liable . . . as though it were intended so to affect him";[116] and then said: "So it matters not whether defendant intended or not that plaintiff be arrested, because he intended or knew that somebody would be arrested, if found in the car. Under these circumstances defendant owed the duty of reasonable care in making a stolen car report."[117]

This case has caused me considerable concern. I have found no decision directly in point;[118] but if the action is treated as one for false

114. *Id.* at 143.
115. *Ibid.*
116. *Id.* at 142.
117. *Ibid.*
118. Mouse v. Central Sav. & Trust Co., 120 Ohio St. 599, 167 N.E. 868 (1929), cited and relied upon by the Court, is clearly distinguishable. There defendant bank mistakenly refused payment of plaintiff depositor's check payable to a third party on the ground that there was no account, and the latter swore out a warrant for the plaintiff and had him arrested and jailed. It was held error to direct a verdict in favor of the bank on the ground that the bank

imprisonment, as the Court seems to have treated it, the decision seems to be inconsistent with the established state of the law. In three respects the decision seems to me to be questionable.

(1) "The mere giving of information to an officer tending to show that a crime has been committed is not enough to render the informer guilty of a resulting false imprisonment by an officer, and this is so even if the information purports to show that the person later falsely arrested is the one who committed the alleged crime." This conclusion is drawn in a very recent, very thorough annotation, entitled "False Imprisonment: Liability of Private Citizen for False Arrest by Officer."[119] It is sustained by numerous cases, some of which are close in their facts to the instant one;[120] and other authorities agree.[121] In Tennessee it is sustained by the case of *Hertzka v. Ellison.*[122] If the arrest was not made by the private citizen or in his presence so that he participated in it, he is not liable unless he "directed, advised, countenanced, encouraged, or instigated it."[123] The informer may possibly be liable if he consciously makes false statements, but if "he is honest, although unreasonably mistaken," he is not liable;[124] and the rule of no-liability has been held to apply "even if the informer acts maliciously and without probable cause."[125]

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was not the proximate cause of the arrest, since the probability of the arrest could have been foreseen. But this action was not for false imprisonment or malicious prosecution. Instead, it was based on the duty of the bank to honor the check of the depositor, breach of which gives rise to a cause of action in either tort or contract. See 5A MICHIE, BANKS AND BANKING c. 9, §§ 232, 241-44 (1950). The normal damages incurred involve damage to the credit of the depositor; and the only question raised in the *Mouse* case was one of proximate cause, whether the damages for the arrest might also be awarded. In this connection, it may be of interest to note that the great majority of courts disagree with the holding in the *Mouse* case. See comment on the case in 30 COL. L. REV. 126 (1930).

119. Note, 21 A.L.R.2d 643, 694 (1952).

120. See especially Triangle Motors Co. v. Smith, 216 Ky. 479, 287 S.W. 914 (1926) (report by car dealer that car was stolen); Snider v. Wimberley, 357 Mo. 491, 209 S.W.2d 239 (1948) (report of prowler on premises with statement of belief that plaintiff was prowler); *cf.* Simpson v. Burton, 328 Mich. 557, 44 N.W.2d 178 (1950) (report of poisoning and identification of plaintiffs).

121. NEWELL, MALICIOUS PROSECUTION, FALSE IMPRISONMENT AND THE ABUSE OF LEGAL PROCESS 211 (1892); PROSSER, TORTS 72 (1941); Harper, *Malicious Prosecution, False Imprisonment and Defamation*, 15 TEXAS L. REV. 157, 165 (1937); Perkins, *The Tennessee Law of Arrest*, 2 VAND. L. REV. 509, 644 (1949).

122. 8 Tenn. App. 667, 674 (M.S. 1928): "One cannot be held liable for a false imprisonment where he merely informed an officer of circumstances which had aroused his suspicions, but made no request or suggestion that the suspected person be arrested, and the officer, of his own volition made an arrest." The case of Eichengreen v. Louisville & N.R.R., 96 Tenn. 229, 34 S.W. 219, 31 L.R.A. 702 (1896), relied upon in the instant case, was adequately distinguished in the *Hertzka* case; the facts there indicated a participation in the arrest.

123. Snider v. Wimberly, 357 Mo. 491, 209 S.W.2d 239, 241 (1948), citing 22 AM. JUR., *False Imprisonment* § 32 (1939), 35 C.J.S., *False Imprisonment* § 24 (1943), and numerous cases.

124. Harper, *Malicious Prosecution, False Imprisonment and Defamation*, 15 TEXAS L. REV. 157, 166 (1937).

125. Note, 21 A.L.R.2d 643, 694 (1952).

(2) False imprisonment has always been regarded as an intentional tort, not an action based upon negligence or a failure to exercise reasonable care. The rule quoted from the *Restatement of Torts*[126] that intent to confine one party constitutes intent to confine another hardly seems applicable here. This "doctrine of transferred intent" was taken from the law of assault and battery, where there are actual cases, and was considered by the editors of the *Restatement* in connection with physical boundaries, as the illustrations to the section show. Should it apply to the cases of instigating an arrest? If I wrongfully direct an officer to arrest *A* and he arrests *B* by mistake, am I liable for false imprisonment? But perhaps this objection is based primarily on the circumstance that defendant in the instant case only reported a stolen car "and did not directly request the arrest of anybody,"[127] and is therefore only another way of expressing the first objection.

(3) If both of the first two objections are unacceptable and defendant is to be treated as having intentionally participated by instigation in the arrest of plaintiff, then he should be liable for false imprisonment. But he is liable absolutely, and it makes no difference whether he used reasonable care and had a reasonable belief or not. The charge of stealing a car is a charge of a felony. An officer may arrest on reasonable suggestion of a felony; but for a private person to be privileged to make the arrest or to participate in it, he must show that a felony has in fact been committed and that he has reasonable grounds for believing the plaintiff guilty of committing it.[128] Here no felony was committed. The defendant, as a private person, would therefore be liable even though there were reasonable grounds for believing that the plaintiff had committed a felony and the arrest was lawful so far as the officers were concerned.[129] *Travis v. Bacherig*,[130] relied upon by the Court in the instant case as a holding on the duty to exercise care before procuring an arrest, was a case in which a felony had actually been committed, and the reasonableness of defendant's belief was relevant in determining whether he was privileged to make the arrest.[131]

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126. RESTATEMENT, TORTS § 43 (1934).
127. 251 S.W.2d at 141.
128. See especially Martin v. Castner-Knott Dry Goods Co., 27 Tenn. App. 421, 181 S.W.2d 638 (M.S. 1944), which carefully considered and ruled directly on this point. And see TENN. CODE ANN. § 11541 (Williams 1934); McCaslin v. McCord, 116 Tenn. 690, 708, 94 S.W. 79, 83 (1906); Harper, *Malicious Prosecution, False Imprisonment and Defamation*, 15 TEXAS L. REV. 157, 179 (1937); Perkins, *The Tennessee Law of Arrest*, 2 VAND. L. REV. 509, 572-76 (1949).
129. See Harper, *Malicious Prosecution, False Imprisonment and Defamation*, 15 TEXAS L. REV. 157, 164 (1937).
130. 7 Tenn. App. 638 (M.S. 1928).
131. This is explained by the Court in Martin v. Castner-Knott Dry Goods Co., 27 Tenn. App. 421, 427, 181 S.W.2d 638, 641 (M.S. 1944). In the *Travis* case, defendant, a private person, had participated with a policeman in making the arrest.

If the *(Blue) Star* case is not to be explained on the traditional basis for false imprisonment, perhaps it can be justified as an action for malicious prosecution. In many respects it is more like malicious prosecution, because the plaintiff made a report to the authorities and the action was taken by them. In addition, the concept of "probable cause" in the law of malicious prosecution is not unlike the "duty of reasonable care in making a stolen car report" required by the Court in the instant case.[132] But there are difficulties here, too. In the first place, it is generally held that a criminal prosecution must be commenced, and this involves at least an indictment or the issuance of a process for arrest,[133] while in this case there was simply an arrest without a warrant of any kind. In the second place, the necessary element of "malice" is almost certainly absent. "Malice need not be ill will, but may be any motive other than a purpose in good faith to bring an offender to justice."[134] And finally, there seems to be no indication of application of the doctrine of transferred intent to the tort of malicious prosecution. A stolen car report, not identifying or pointing to anyone, can hardly be basis in itself for contending that the defendant has instituted criminal proceedings against the person arrested.

Unquestionably there is a real hiatus between the two torts of false imprisonment and malicious prosecution. They protect somewhat similar interests, and perhaps the common law in regard to the two should grow and merge and provide more complete protection, making the law which covers the "gap" partake to some extent of the elements of both torts. The *(Blue) Star* case may turn out to be a very significant one disclosing true growth in the law.[135] On the other hand, it may be

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132. See PROSSER, TORTS 872 (1941); RESTATEMENT, TORTS § 662 (1938); F. W. Woolworth Co. v. Connors, 142 Tenn. 678, 683, 222 S.W. 1053, 1054 (1920).

133. See PROSSER, TORTS 863-64 (1941); RESTATEMENT, TORTS § 654 (1938); Harper, *Malicious Prosecution, False Imprisonment and Defamation*, 15 TEXAS L. REV. 157, 164 (1937).

134. Thompson v. Schulz, 34 Tenn. App. 488, 494, 240 S.W.2d 252, 255 (M.S. 1949); see PROSSER, TORTS 880-83 (1941); RESTATEMENT, TORTS § 668 (1938).

135. In considering the scope of the principle involved in the *(Blue) Star* case, thought may be given to the following cases. Should the principle allow recovery under these facts?

(1) *P* leaves his car at *D*'s parking lot. He returns to find the attendant busy, puts a coin down on the ticket window ledge, gets into his car and drives off. A check at the end of the day discloses the car as missing, and *D* reports it as stolen. The police arrest *P*.

(2) *D* gives an art object to his neighbor *P*. He absent-mindedly forgets the gift and, when the object is missing from his home, reports it as stolen. *P* is arrested when he seeks to sell it.

(3) *D* loses his wrist watch on the street. In order to make sure that the police will assist in finding it, he reports it as stolen. *P*, an innocent finder, is arrested with it.

restricted to its own peculiar facts and not turn out to have any independent significance.[136]

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136. Reference is here made to tort-related problems discussed in other articles in the Survey. Cases involving tort immunity were Vaughn v. City of Alcoa, 251 S.W.2d 304 (Tenn. 1952), commented on in the Tort Liability section of the Local Government Law article, and Owenby v. Kleyhammer, 250 S.W.2d 37 (Tenn. 1952), discussed in the Parent and Child section of the Domestic Relations article. Problems regarding the effect of jury consideration of liability insurance arose in City Water Co. v. Butler, 251 S.W.2d 433 (Tenn. App. E.S. 1951); Logwood v. Nelson, 250 S.W.2d 582 (Tenn. App. E.S. 1952); and France v. Newman, 248 S.W.2d 392 (Tenn. App. E.S. 1951), all of which are noted in the Trial section of the Procedure and Evidence article.