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Torts

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The decisions which are herein reviewed fit into two main categories, those involving negligence and those which deal with damages. A few other cases are considered under a miscellaneous heading.

While some of the cases under the negligence section could be dealt with under Agency, and those under the damages section could be taken up under a review of their own, it was felt that these cases involved the law of torts to the extent that they should be considered here.

I

Miscellaneous Decisions

Liability of Hospitals—The Court had occasion in *Sloan v. Edgewood Sanatorium*,[1] to consider the liability of a private hospital to a mental patient who committed suicide. After citing with approval an article in the *Notre Dame Lawyer*[2] in which the test of "foreseeability" was laid down, the Court adopted the majority view that the establishment of the standard of care did not require expert testimony.

Liability of Construction Company — Where suit was brought by a motorist for personal injuries and property damage sustained in an automobile collision against the driver of the other automobile involved and against the construction company building the highway although it had completed its job, and there had been no formal acceptance by the highway department, the Court held in *Nichols v. Craven*[3] that no formal acceptance is necessary and the liability of the contractor will cease with a practical acceptance after completion of the work.

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1. 225 S.C. 1, 80 S.E. 2d 348 (1954).
2. Note, HOSPITAL LIABILITY FOR NON-ATTENDANCE PATIENT, XXVI NOTRE DAME LAWYER, 314 (1951).
3. 224 S.C. 244, 78 S.E. 2d 376 (1953).

Libel and Slander—In *Anderson v. Southern Railway*,[4] the Court reiterated the principle announced in *True v. Southern Railway*[5] that publication at a meeting, required by agreement of the parties, in the absence of malice is privileged.

II

Negligence

The inevitable question to be answered in the automobile collision case where a third party was the driver is that of joint enterprise, master and servant, or principal and agent. All of these questions involving imputed negligence were before the Court during the period under review.

In *Thompson v. S. C. Highway Dept.*,[6] it was held that if the negligent driver was the agent or servant of the passenger, or they were engaged in a joint enterprise, the passenger could not recover against the highway department for injuries sustained when the vehicle struck a hole in the street. However in *McJunkin v. Waldrep*,[7] adopting the majority rule, the Court held that the doctrine of joint enterprise whereby the negligence of one member of the enterprise is imputable to others, resting as it does upon the relationship of agency of one for the other, does not apply in actions between members of the joint enterprise and does not therefore prevent one member of the enterprise from holding another liable for personal injuries inflicted by the latter's negligence in the prosecution of the enterprise.

In *Gillespie v. Ford*[8] where a husband brought action against an insurance agent and his company for damage to husband's automobile and loss of consortium arising out of a collision between husband's automobile, driven by the wife, and the agent's automobile, the Court held that a non-suit was error in that there was evidence sufficient to go to the jury on the question of the wife's contributory negligence, although in an earlier case by the wife against the same defendants arising out of the same accident, the Court had held that the wife was guilty of contributory negligence as a matter of law.[9] The testimony as given by the wife in the present

4. 224 S.C. 65, 77 S.E. 2d 350 (1953).
5. 159 S.C. 454, 157 S.E. 618 (1931).
6. 224 S.C. 338, 79 S.E. 2d 160 (1953).
7. 81 S.E. 2d 284 (S.C. 1954).
8. 81 S.E. 2d 44 (S.C. 1954).
9. Gillespie v. Ford, 222 S.C. 46, 71 S.E. 2d 596 (1952).

trial was to be considered, even though she changed it from that given in the earlier case. The fact that the wife did change her testimony was relevant only to the credibility of the witness and did not relieve the trial judge of the duty to submit the issue to the jury. That the negligence of the wife is here imputable to the husband, is mentioned only in the dissent by Chief Justice Baker.

Violation of Statute - Negligence per se — In the case of *Myers v. Evans*[10] where a pedestrian, who attempted to cross a two lane highway at a place other than at the crosswalk, was hit by a truck, the Court held that this act in violation of the statutory law was not negligence in this instance as the truck was headed in the wrong direction and therefore forfeited its statutory preferential status. The Court further pointed out that it is not the law of this State that a violation of a statute regulating the operation of a motor vehicle creates a rebuttable presumption that such violation is a proximate cause of the injury.

In the two cases decided by the Court involving the Pure Food and Drug Act,[11] *Peters v. Double Cola Bottling Co. of Columbia,*[12] and *Tedder v. Coca-Cola Bottling Co. of Darlington,*[13] it was held that a violation of the act was negligence *per se.* And once a violation is shown, a *prima facie* case is made out. Thereafter, a defendant may adduce evidence to show that there has been, in fact, no negligence.

Res ipsa loquitur — In *Barnwell v. Elliott,*[14] the Court reaffirmed its long standing position that the doctrine of *Res ipsa loquitur* does not apply in this State. It went further to state that this does not mean negligence may not be established by circumstantial evidence. It is interesting to note that Chief Justice Baker, in his dissenting opinion, accuses the majority of circumventing the law in holding that there was some circumstantial evidence from which the jury could infer negligence in the case at hand. He expresses the opinion that it would be better to overrule the prior decisions and adopt the rule rather than to circumvent it.[15]

10. 81 S.E. 2d 32 (S.C. 1954).
11. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 32-1451 *et seq.*
12. 224 S.C. 437, 79 S.E. 2d 710 (1954).
13. 224 S.C. 46, 77 S.E. 2d 293 (1953).
14. 225 S.C. 62, 80 S.E. 2d 748 (1954).
15. See Joseph v. Sears Roebuck & Co., 224 S.C. 105, 77 S.E. 2d 583 (1953), where Chief Justice Baker shows how the plaintiff used an alleged oral warranty to circumvent the doctrine.

Guest Statute—The Court reaffirmed a long line of decisions involving the Guest Statute[16] in the case of *Bailey v. Seymore*[17] wherein it was stated that the driver must be guilty of heedlessness or recklessness before a recovery can be had.

Last Clear Chance—The Court finally called a spade a spade in *Miller v. Atlantic Coast Line R. R. Co.*[18] acknowledging that the Court had been playing with words when it had previously stated that the doctrine of last clear chance did not apply in this State.[19]

Knowledge as Affecting Negligence—In the case of *Coffee v. Anderson County,*[20] the Court restated the proposition that one who uses a highway even though he knows of a defect in it, or a danger near it, is not guilty of negligence in doing so, unless the defect is of such a nature or the danger so obvious that a person of ordinary prudence would not have used it.

III

Damages

Trespass - Punitive Damages — The Court held that punitive damages are awarded not only as punishment for a wrong, but also as vindiction of a private right, and when under proper allegations a plaintiff proves a wilful, wanton, reckless, or malicious violation of his rights it is not only the right but the duty of the jury to award punitive damages in the case of *Davenport v. Woodside Cotton Mills Co.*[21] where the evidence indicated that defendant dumped poisonous waste on plaintiff's land after it had notice that the substance was killing plaintiff's hogs.

Contract - Punitive Damages — In *Collopy v. Citizens Bank of Darlington,*[22] the Court had occasion to re-examine the proposition that punitive damages can be properly given for wilful or wanton injury arising out of contract even though no fraud is alleged. Citing *Winthrop v. Allen,*[23] it was said that

16. CODE OF LAWS OF SOUTH CAROLINA, 1952 § 46-801.
17. 224 S.C. 162, 77 S.E. 2d 803 (1953).
18. 81 S.E. 2d 355 (S.C. 1954).
19. See 1 S.C.L.Q. 70 (1948) and 4 S.C.L.Q. 179 (1951) for notes on the doctrine in South Carolina.
20. 225 S.C. 477, 80 S.E. 2d 51 (1954).
21. 225 S.C. 52, 80 S.E. 2d 740 (1954).
22. 223 S.C. 493, 77 S.E. 2d 215 (1953).
23. 116 S.C. 388, 108 S.E. 153, 154 (1921).

a mere wilful violation of a contract does not create a tort, but if such is a wilful invasion accompanied by a purpose of financial self benefit, a tort will have been committed and the injured party may elect which form of action he will pursue.

Default Judgment - Punitive Damages — In the case of *Patrick v. Wolowek*,[24] the Court pointed out the new procedure available in obtaining punitive damages on default, brought about by the amendment to the Code in 1953[25] which permits a Judge of the Court of Common Pleas to render a judgment by default of punitive damages in a tort action without aid of a jury.

Mental Suffering as Element of — Where a portion of a cemetery lot was sold to a stranger to the plaintiff who owned such lot and burial therein of strangers was made, mental suffering or mental anguish suffered by the plaintiff as a result thereof was held to be an element of actual damages. The Court said in *Lanford v. West Oakwood Cemetery*,[26] that it was unnecessary to show wilfulness, wantonness or maliciousness in order to recover for mental suffering or anguish which was the natural and probable consequence of the wrong.

24. 81 S.E. 2d 717 (S.C. 1954).
25. 48 ST. AT LARGE, p. 137 (1953).
26. 223 S.C. 150, 75 S.E. 2d 865 (1953). See 6 S.C.L.Q. 108 (1953) for case note on subject.