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TORTS

FRANK K. SLOAN*

Twenty-three decisions in the field of torts were handed down by the Supreme Court and by the U. S. Court of Appeals for the Fourth Circuit in the past year, eighteen of them were automobile accident cases. No distinctly new pronouncement of the law was made in any of them. Perhaps the strongest impression from the whole of them that the reader discovers, is that defendants appeal verdicts as being excessive with dogged regularity, and the Supreme Court rejects this ground of appeal with equal persistence. Indeed, in only one appeal from a jury verdict did the appellants *not* appeal on the ground of excessiveness, in *Butler v. Temples*[1] where the jury awarded only $7,500 damages in a death case involving a small child who was killed accidently by a neighbor backing a car out of the yard.

For convenience the tort decisions considered below are divided into negligence cases and into other classes of tort decisions considered.

Negligence

Pleading — The Supreme Court announced no new propositions in the pleading of tort actions, but re-affirmed two propositions that are worthy of notice to the practitioner. In *Jackson v. Solomon*[2] the court restated the rule that the party wishing to avail itself of the doctrine of "last clear chance" must plead this matter affirmatively or it will not be available. The doctrine of "last clear chance", being closely akin to matters of contributory negligence, it seems proper that it should be pleaded affirmatively. Chief Justice Baker also commented that the doctrine is probably equally applicable to the rights of a defendant as to those of a plaintiff, although a ruling on this point was not necessary to the decision. This also seems a correct and logical holding.

The second decision involving a point of particular interest to the pleader, and one which seems likely to produce some difficulties is *Johns v. Castles*.[3] The court re-affirmed the long established rule that the plaintiff may at his election assert his claim against one or

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1. 227 S.C. 496, 88 S.E. 2d 586 (1955).
2. 228 S.C. 225, 89 S.E. 2d 436 (1955).
3. 229 S.C. 51, 91 S.E. 2d 721 (1956).

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more or all of the joint tort-feasors; but restates the holding in *Brown v. Quinn,*[4] that this election by the plaintiff does not prevent the defendant in his counterclaim from joining other tort-feasors with the plaintiff. This may well result in a tendency to bring all of the parties involved into the court in one action and thus tend to consolidate suits.

Damages — By far the most common subject in the tort decisions is that of damages and their excessiveness. As noted above, only one appellant resisted the temptation to argue the matter of excessiveness, although the Supreme Court has given little or no comfort in this direction in many volumes of decisions. The decisions ranged from *Geiger v. Checker Cab Company,*[5] where the court held proper the granting of a new trial for *inadequate* verdict of $1,600 in an automobile collision case, all the way up to a holding that a $65,000 verdict was not excessive in a railroad crossing death case.

In the latter case, *Mock v. Atlantic Coast Line,*[6] the court apparently laid to rest any lingering doubt that it will refuse to grant a new trial on the ground that a verdict is excessive. There the jury gave a verdict of $50,000 actual damages plus $15,000 punitive damages to a father for the death of a 12-year old son who was a grade school student, and for whom no earning capacity to serve as a basis for measure of damages could be proved. The decision quoted at length from *Bowers v. Charleston & WC Railroad Company,*[7] wherein the court stated that the power to reverse for excessive verdicts "exists" but is rarely exercised. In sum the decision stated that if the trial Judge does not see fit to grant a new trial *nisi,* then the Supreme Court will not "interfere" by granting a new trial absolute. The decision reserves the right in the court to grant a new trial "in the other class of cases where the verdict is so grossly excessive as to be deemed to be the result of a disregard of the facts and of the instructions of the court," but does not give an example of what such cases might be. Chief Justice Baker found little satisfaction with the result, and Justice Stukes, the new Chief Justice, concurred in his opinion; however, the remainder of the court was apparently satisfied.

The same argument in seven other automobile cases involving damages from $35,000 downward received no more comfort from the court, and considerably less discussion.

4. 220 S.C. 426, 68 S.E. 2d 326 (1951).
5. 229 S.C. 39, 91 S.E. 2d 552 (1956).
6. 227 S.C. 245, 87 S.E. 2d 830 (1955).
7. 210 S.C. 367, 42 S.E. 2d 705 (1947).

Trial — The use of "stopping distance" charts, as prepared by the Highway Department or other organizations, has become quite common in automobile accident cases, particularly as a basis for questions on cross-examination. However, in *Smith v. Hardy*[8] the Supreme Court agreed with the trial Judge that such charts or statistics on factual matters of this nature are not admissible in evidence unless they are properly qualified by having the expert or person who made them present to testify as to their nature, accuracy, etc. The court further stated that such statistics were not sufficiently proved by science to be the subject of acceptance under judicial notice.

A familiar tactic of trial lawyers is to ask questions in auto accident cases which will reveal to the jury that the opposing party was charged with a traffic law violation by the investigating police officer. In *Wynn v. Rood*[9] plaintiff was asked by his own counsel if defendant had not been so charged. The trial Judge sustained defendant's objection, but refused to grant a mistrial. The Supreme Court held that it was sufficient for the trial Judge to direct the jury to disregard such questions. It is probably to be expected, therefore, that the bringing in of such matter indirectly will continue unabated. Certainly the risk of mistrial seems materially reduced.

Of the remaining automobile cases only *Jacks v. Townsend*[10] and *Swindler v. Peay*[11] produced noteworthy comments. In *Jacks* the court pointed out that the scene of an occurrence is not "offered in evidence" but that rather the court is requested to allow the jury to view the scene, the granting of this request being discretionary with the trial Judge. In *Swindler* the court reaffirmed the propriety of charging the language of a criminal statute, if there is evidence of a violation thereof sufficient to go to the jury, and such alleged violation is material to the action.

The Court of Appeals for the Fourth Circuit made further difficulty for the lawyer trying cases against stores brought by customers who slip and fall in the aisles. In *H. L. Green Co. v. Bowen*,[12] the court reiterated that plaintiff must prove either, (1) that the store had actual notice of the defect causing the accident, or (2) that the defect was in existence long enough to charge the store with constructive notice. In the court's view that period of time must clearly be more than a "few minutes". To escape the consequences of the rule will be difficult, for the plaintiff will be involved in contributory

8. 228 S.C. 112, 88 S.E. 2d 865 (1955).
9. 228 S.C. 577, 91 S.E. 2d 276 (1956).
10. 228 S.C. 26, 88 S.E. 2d 776 (1955).
11. 227 S.C. 157, 87 S.E. 2d 296 (1955).
12. 223 F. 2d 523 (4th Cir. 1955).

negligence problems if he proves that he knew of the defect for a period of time. He will need third-party witnesses.

False Imprisonment

Evidence of involuntary confinement and mistreatment of plaintiff by defendants in *Wright v. Gilbert*,[13] apparently weighed heavily with the jury. Although an elderly woman, under the control of a committee, she was awarded $25,000 damages against the defendants for false imprisonment, the maximum asked in her complaint. Aside from the size of the verdict, which clearly indicates the trend in tort cases, the decision offers no new statement of law. The long-followed rule of *Westbrook v. Hutchinson*[14] is again quoted with approval:

> The wrong may be committed by words alone, or by acts alone, or by both, and may be merely operating on the will of the individual, or by personal violence, or by both. It is not necessary that the individual be confined within a prison, or within walls, or that he be assaulted, or even touched. It is not necessary that there should be any injury done to the individual's person, or to his character, or reputation. Nor is it necessary that the wrongful act be committed with malice, or ill-will, or even with the slightest wrongful intention.

Fraud

Turner v. Carey[15] presented an unusual situation, as the complaint was drawn on the basis of recission of a contract for fraud, but the case was tried before the jury as one for recovery of damages for fraud and deceit. The facts are of minor interest, but the situation produced a clear and valuable statement of the law by Justice Oxner which will doubtless be useful for citation for many years to come. It is better to quote it than attempt a summary:

> It will be helpful in deciding the questions presented to consider the remedies available to [one] who is induced to enter into a contract of purchase by fraudulent misrepresentations on the part of the seller. As a general rule, he has a choice of several remedies. "He may, despite the fraud, elect to affirm the contract, retain the property received under it, and bring an action at law for fraud and deceit against the vendor to recover the damages sustained by reason of the fraud or misrepre-

13. 227 S.C. 334, 88 S.E. 2d 72 (1955).
14. 195 S.C. 101, 10 S.E. 2d 145 (1940).
15. 227 S.C. 298, 87 S.E. 2d 871 (1955).

sentations, or, if sued for the agreed price, set off or recoup the damages resulting from the fraud . . . . . Instead of bringing an action for damages, a defrauded purchaser may rescind the sale and recover the consideration paid. Rescission for fraud may be asserted as a defense to an action by the vendor for the purchase money or damages . . . . The two remedies are inconsistent, the one being based on the continued existence of the sale, the other on its abrogation, and the purchaser cannot in the one form of action secure the relief appropriate to the other."

Libel and Slander

Both the South Carolina Supreme Court and the Court of Appeals for the Fourth Circuit handed down decisions in the field of libel and slander. Both of them also made worthy contributions to the law by making more definite statements as to (1) the defense of qualified privilege and (2) the requirement of clearly defamatory words. There are few areas in the law where the rule of liability is so rigid, hence the great importance of clear definition of requirements and exceptions.

In *Cullum v. Dun & Bradstreet, Inc.*[16] the Supreme Court made a long-needed statement as to the limit of liability of "credit" reporting agencies for erroneous credit reports. Justice Legge put this State on the side of the majority in stating, "The defense of qualified privilege is available to a mercantile agency in respect of reports on the credit and financial standing of an individual or business concern communicated confidentially, and in good faith, to a subscriber having an interest in the particular matter" . . . and, although false, is not actionable in absence of malice. Malice is, of course, a jury question but the case illustrates that plaintiff must offer more evidence of malice than an error in the credit report.

In *Jack's Cookie Company v. Brooks*[17] the Court of Appeals examined the South Carolina cases and refused to give the alleged libelous words more than their ordinary meaning. In a letter to customers, Jack's had advised that Brooks was no longer the sales representative of Jack's, then stated:

> We are sorry that situations of this nature have to arise, but we have no hesitancy in doing that which in our judgment is best for the company, its distributors, representatives and customers.

16. 228 S.C. 384, 90 S.E. 2d 370 (1955).
17. 227 F. 2d 935 (4th Cir. 1955).

You will be contacted as soon as possible by an official representative of this company.

Three recipients of the letter were permitted to testify that they thought the letter implied wrongdoing by Brooks; but the court stated, "The decision must rest upon the ordinary meaning of the words and not upon mere speculation of the recipients of the letter . . . the innuendo cannot enlarge or restrict the natural meaning of the words, or introduce new matter." The result is a further adherence to the modern view that ambiguities of meaning cannot be forced upon the words so as to make a jury question concerning the effect on the minds of the hearers.[18]

18. 130 S.C. 180, 125 S.E. 912 (1924).