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Torts

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TORTS

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I. CHARITABLE AND MUNICIPAL TORT IMMUNITY

Perhaps the most significant of the torts cases decided during the period of this review is that of *Eiserhardt v. State A. & M. Soc'y of South Carolina*,[1] in which the Supreme Court recognized that a charitable corporation's immunity from tort liability does not extend to non-charitable activities "primarily commercial in character and unconnected with" its charitable purposes. In this case plaintiff was injured as a result of stepping into a hole in a parking lot operated by the defendant on its State Fair grounds on the night of a football game at Carolina Stadium. The appeal was from a refusal of the trial judge to grant defendant's motion for judgment on the pleadings because defendant was chartered as an eleemosynary corporation. The Supreme Court held that the charitable character of a corporation is dependent upon the facts and that its charter as an eleemosynary corporation is not conclusive, therefore, the motion was properly refused. The Court expressly reserved its opinion as to the relation of the operation of a parking lot to the charitable purposes of defendant.

The significance of this case lies in the willingness of the Court to recognize the distinction between those activities which have a direct relation to the charitable purposes and those which do not. For the purposes of further clarification of the law in this area, it is unfortunate that the case was subsequently settled without litigation on the merits. It would be very useful to know whether the operation of a parking lot for a football game which the defendant was not sponsoring was directly related to its charitable purposes. The key language in the case is the Court's statement:

> And we do not think immunity should be extended to a situation where the activity out of which the alleged liability arose is primarily commercial in character and wholly unconnected with the charitable purpose for which the corporation was organized.[2]

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1. 235 S. C. 305, 111 S. E. 2d 568 (1959).
2. *Id.* at 312, 111 S. E. 2d at 572.

If the emphasis is placed on *"primarily* commercial in character" in classifying the activities of defendant which are in issue, it will be difficult enough for a plaintiff to bring himself within the rule, but if there is added to it the requirement *"and* wholly unconnected with the charitable purpose", then the plaintiff's chances of having his day in court will be slight indeed. It should be borne in mind that the mere absence of immunity does not spell liability. It only opens the door of the courts to the plaintiff so that he can have his claim adjudged under the existing law which permits the defendant to assert every defense any other defendant would have under the same circumstances.

Since the almost universal condemnation of the charitable immunity doctrine in recent years, its complete abandonment has been accelerated by the eroding effect of exceptions and modifications even in those jurisdictions where the courts have accepted the argument that its abolition can come only through legislation.[3] In 1953 the Supreme Court of Washington rejected the argument that it should await legislative change in the following language, "We closed our courtroom doors without legislative help and we can likewise open them".[4]

In the light of the modern demands on the legislature which expose the individual legislators to such pressures that no legislation unsupported by some organized effort has much chance of passage, it remains for the courts to keep the common law abreast of the needs of society and particularly of the needs of the individuals who make up that society. No individual expects to be an injured plaintiff seeking a remedy against a charitable institution, therefore, he has little interest in proposing or supporting legislation to change the rule until he is a victim. The courts are the guardians of the rights of individuals, and are best equipped to weigh dispassionately the competing interests to be served unaffected by the clamor of interested pressure groups.

An ancient principle of law sometimes expressed in Latin, "Cessante ratione legis, cessat et ipsa lex", is: The reason for the law ceasing, the law itself also ceases. Applying this principle to the charitable immunity doctrine there is little support for its continuation. The originally declared

3. See Moore v. Moyle, 405 Ill. 555, 92 N. E. 2d 81 (1950).
4. Pierce v. Yakima Valley Memorial Hosp. Ass'n., 43 Wash. 2d 162, 260 P. 2d 765, 774 (1953).

need to protect the charitable funds is no longer realistic with the availability of liability insurance. It's hardly charitable to take from a family the breadwinner of that family by reason of wrongful conduct and then deny to it what might be the sole means to prevent it from becoming literally the object of charity. To add the family of the injured plaintiff to the public charity rolls would in itself not necessarily conserve charitable funds, although it may conserve those of the defendant.

Much of what is said above could apply equally to the rule of municipal immunity from tort liability which was reiterated by the South Carolina Supreme Court in the case of *McKenzie v. City of Florence*.[5] The plaintiff sought to recover damages for personal injuries allegedly suffered at the hands of the defendant's police when wrongfully arrested. The city had paid premiums on a "bond" to indemnify it for any loss arising out of the misconduct or failure of the police to perform their duties properly. The Court held that in the absence of statutory permission plaintiff could not maintain a suit against defendant for tort liability and that defendant's purchase of the bond was not a waiver of immunity up to the amount of the bond because no statute empowers a municipality to waive such immunity.

Plaintiff had sought to have the court overrule the line of cases in which the tort immunity of municipalities had been established. In declaring that it would not overrule the earlier cases the court said, "This Court is not invested with the *power* to make laws."[6] [Emphasis added]

It would seem to be answer enough to this remark to quote this very Court in a subsequent decision in which it was held that a child born alive may maintain an action for prenatal injuries inflicted by a negligent defendant:

> We think the reasons assigned by the courts for holding that a child after birth may not maintain an action for prenatal injuries are unsound, illogical and unjust. We need not be concerned about lack of precedent. There is now plenty.[7] [In other jurisdictions]

5. 234 S. C. 428, 108 S. E. 2d 825 (1959). For a more thorough discussion of this case and the law involved see casenote, 12 S. C. L. Q. 478 (1960).

6. *Id.* at 435, 108 S. E. 2d at 828.

7. Hall v. Murphy, 236 S. C. 257, 262, 113 S. E. 2d 790, 793 (1960). *Cf.* West v. McCoy, 233 S. C. 369, 105 S. E. 2d 88 (1958).

Few lawyers in South Carolina or elsewhere would have been willing to predict as recent as fifteen years ago that such an action would ever be permitted. There was ample and long-standing precedent (in other jurisdictions) to the contrary and no legislation was enacted, but the Court "made law". This is as it should be if the Court is to perform its proper function. The needs for certainty and predictability required for justice in the fields of property law do not carry over into all fields of law. Professor Warren Seavey of Harvard, who recently retired after fifty years of teaching torts, said:

> . . . [I]n the law of Torts predictability is chiefly important to prevent unnecessary litigation. Assuming that one has been at fault and has caused harm to another, he comes within the general tort principle which would impose liability upon him, and he is in no position to complain that he should not pay for the harm he caused merely because of a prior decision on similar facts that no cause of action existed.
>
> . . . In other words, I am suggesting that the doctrine of *stare decisis* is relative to the subject matter with which the cases deal.[8]
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> In fact, the growth of the law, particularly that of the law of Torts, proves that the judges, and particularly the great judges, have felt bound to sacrifice the rule to preserve the principle. Every interest protected for the first time represented a breaking away from prior precedents.[9]

The late Chief Justice Stone of the United States Supreme Court is quoted as saying:

> If, with discerning eye, we see differences as well as resemblances in the facts and experiences of the present when compared with those recorded in the precedents, we take the decisive step toward the achievement of a progressive science of law. If our appraisals are mechanical and superficial, the law which they generate will likewise be mechanical and superficial, to become at last but dry and sterile formalism.
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> It is just here, within the limited area where the judge has freedom of choice of the rule which he is to adopt,

8. SEAVEY, COGITATIONS ON TORTS at 67 (1954).
9. *Id.* at 69.

and in his comparison of the experiences of the past with those of the present, that occurs the most critical and delicate operation in the process of judicial law-making.[10]

In denying the plaintiff's plea for overruling of the existing tort immunity of municipalities the South Carolina Supreme Court did not examine the arguments on their merits, satisfying itself principally with reliance on the fact that the rule was of long standing and that any change should come through legislation. This again raises the question of what group has a sufficient interest to press for the necessary remedial legislation?

II. TRESPASS TO PROPERTY

In *Hinson v. Sistare Const. Co.*,[11] the plaintiff landowner's verdict for $200 "nominal" compensatory damages was reversed but his verdict for $2,000 punitive damages was affirmed. The Court held that it was not necessary for the plaintiff to suffer actual damages in order to sustain a verdict for punitive damages where the defendant's trespass had been willful. Defendant was a road contractor who had been the successful bidder on a contract to construct a portion of a state highway. The State Highway Department had condemned a portion of the plaintiff's land for the purposes of the highway. The condemnation award which was made by the Condemnation Board was appealed by the plaintiff property owner to the Court of Common Pleas, thus staying the right of the defendant to go on the property of the plaintiff until such time as the highway department made a tender of the amount of the Condemnation Board's award to the plaintiff. In this case the contractor defendant proceeded to send his bulldozers onto plaintiff's land before the highway department had made a tender of the amount of the award. Even though the defendant had no actual knowledge of the necessity that a tender be made before he would have a right to go on the premises of the plaintiff, he was charged with knowledge of the law. The reason for the court's reversal of the finding of the jury of $200 compensatory damages was that the plaintiff had received a condemnation award for the full value of his land; therefore, any damage

10. In Bonbrest v. Kotz, 65 F. Supp. 138 (D. D. C. 1946).
11. 236 S. C. 125, 113 S. E. 2d 341 (1960).

done to the land by the defendant was not an injury to the plaintiff. Holding that the verdict was not responsive to the judge's instruction on nominal damages, the court said, "The verdict for $200 is a verdict for a substantial, not nominal, damages."[12]

III. FALSE IMPRISONMENT

Two cases[13] involving actions for false imprisonment came before the court during the period under review, but both were on the pleadings. Neither makes a contribution to the substantive law and therefore are not deserving of any discussion.

IV. FRAUD

In *Jackson v. Hobbs*,[14] the plaintiff alleged fraud on the part of the defendant insurance company and its agent in that she was induced to reduce the amount of insurance that she carried on her store building from $1,000 to $500 approximately thirty days before the store building was burned and lost by fire. The plaintiff had previously had a policy with another company for $1,000 but had received notice from the agent of that company that, upon the expiration of the policy, the amount of the insurance would be reduced to $500. Through a friend, she was referred to the defendant Hobbs, who was agent for the defendant insurance company, who in turn did write a policy for her for $1,000. A little more than two months after the issuance of the policy, the agent, Hobbs, came to plaintiff and told her that she would have to accept a reduction in the amount of the policy to $500 or the company would have to cancel it. As a result she signed an endorsement which indicated her acceptance of the reduction of the amount of the insurance to $500. As the court emphasizes, there was no allegation that the plaintiff was illiterate or unable to understand the endorsement which she signed agreeing to the reduction in the amount of the insurance. The representation made by the defendant agent to the plaintiff that she could obtain an original amount of $1,000 insurance was accurate and the policy was issued in that amount. The fact that it was subsequently reduced to $500 was in no sense a misrepresentation to the insured

12. *Id.* at 134, 113 S. E. 2d at 345.
13. Thomas v. Colonial Stores, Inc., 113 S. E. 2d 337 (1960); Hopkins v. Shuman, 235 S. C. 191, 110 S. E. 2d 713 (1959).
14. 234 S. C. 497, 109 S. E. 2d 161 (1959).

plaintiff. She was told that if she did not accept the reduction, the company would have to cancel the policy and there is no allegation to show that this was not the fact. The Supreme Court affirmed, adopting the trial court's order sustaining the demurrer of the defendant as its opinion.

Another deceit action involving an insurance company defendant is *Reid v. George Washington Life Ins. Co.*[15] In this case, an 80 year old lady brought suit against the defendant alleging that the terms of her hospital insurance policy issued by the defendant had been misrepresented to her by the defendant's agent at the time she purchased the policy some seven and a half years prior to the time of her illness. The plaintiff contends that the agent represented that the policy included medical payments for doctor's calls and ambulance service although the policy excluded such items. The Court held that where one has possession of an instrument that sets forth clearly the terms of the agreement and has had it for so ample a time as seven years and there is no allegation that the plaintiff is unable to ascertain the contents thereof by reading it, then there can be no complaint as to the terms of the agreement. Plaintiff was put on notice by the terms of the insurance policy as to what the coverage was and if she had any question about it she should have communicated with the defendant company at an earlier time following the sale to her.

In the case of *Gary v. Jordan*,[16] the defendant sold cattle to the plaintiff after having represented that they were "clean" when in fact they had been exposed to Bang's disease and some of the cattle were suspects. When subsequent test results necessitated slaughter of a number of the cattle, the plaintiff sued to recover from the defendant for misrepresentation and obtained a verdict. The Court would not agree with the defendant that actual knowledge of his misrepresentation was necessary in order to make out a cause of action for fraud. The Court said, ". . . to make a false representation recklessly, without knowledge as to its truth, is tantamount, in contemplation of law, to making it with knowledge of its falsity."[17] It concluded by finding that there was ample evidence to support the finding of the jury that the defendant was aware of his lack of knowledge of the

15. 234 S. C. 599, 109 S. E. 2d 577 (1959).
16. 236 S. C. 144, 113 S. E. 2d 730 (1960).
17. *Id.* at 154, 113 S. E. 2d 735.

truth of the fact that he represented, if not of the falsity of that fact. The plaintiff's not separating certain of the cattle from the remainder of his herd upon his learning of the fact that the cattle had been exposed to Bang's disease, even if considered negligent, was after the fact of the fraud perpetrated by the defendant upon the plaintiff and would therefore have no effect on the cause of action.

In *Jones v. Cooper*[18] the plaintiff sued the defendant for fraud in defendant's sale of some hot dog cooking machines. Under the terms of an agreement between the parties the defendant had agreed to obtain locations about the city of High Point, N. C., in which the plaintiff lived, where the machines would be placed for the purpose of selling hot dogs. The defendant's agent had placed the machines in locations which were, according to the testimony of the plaintiff, chiefly Negro business establishments of such low standing that he was reluctant to go into them to service the machines as would be required. Plaintiff was so dissatisfied with the locations and the amount of time which he found would be consumed in servicing the machines that he withdrew them all from the locations in which the defendant's agent had placed them. He then undertook to return them to the defendant and the defendant refused to accept them on the ground that the plaintiff had made an outright purchase of the machines and they were his property. The plaintiff contended that the defendant misrepresented to him the amount of time which would be necessary to service the machines and the money which he could earn by the operation of the machines in various business establishments as well as the types of locations in which the machines were placed. The Court pointed to the fact that the defendant fulfilled every term of the agreement just as he had made it. That the plaintiff himself signed a list approving the locations of the machines, and that the plaintiff had never given the machines an opportunity to operate in order to prove whether they could earn $100 a week as the defendant had contended. The Court emphasized the fact that the plaintiff himself was a salesman; that he knew what he was signing when he signed the contract with the defendant; that there was no contention that he could not read; that he was responsible for knowing the terms of the contract. The mere fact that the

18. 234 S. C. 477, 109 S. E. 2d 5 (1959).

defendant represented that the plaintiff might earn as much as $100 per week out of the business was not a representation of an existing fact but a promise as to the future which is not a sufficient representation for a cause of action for fraud. This type of representation, called "puffing" in the law, was referred to by plaintiff himself as "sales talk." Finding no ground on which an action for fraud could be supported, a verdict and judgment for the plaintiff was reversed and judgment entered for the defendant.

V. NUISANCE

The fact that plaintiffs alleged that the quiet enjoyment of their homes and the health of the members of the plaintiffs' families would be disturbed by the operation of a supermarket in the neighborhood, particularly where it was alleged that large motor trucks would be unloading from time to time "during and after regular business hours" and that certain of the members of the plaintiff's household were subject to various ailments caused by allergies traceable mainly to dust, was sufficient to overrule the defendant's demurrer to the complaint seeking to enjoin the construction of the supermarket on the location adjoining plaintiff's property. The Court concluded in *Strong v. Winn-Dixie Stores, Inc.*,[19] that these allegations were sufficient to take the case to the jury if proof could be offered to sustain the allegation. It therefore reversed the sustaining of the demurrer.

VI. NEGLIGENCE

(a) *Traffic Accidents*

(1) *Railroad Crossings*

Where the decedent drove onto the railroad track in front of an oncoming train, which could be seen for approximately a mile, and his car stalled resulting in its being struck by the defendant's train, the Supreme Court held that the plaintiff was guilty of gross contributory negligence as a matter of law. Plaintiff's effort to have the doctrine of last clear chance applied in this situation was held to be inappropriate. The Court pointed to the fact that the train was only some 120 or 180 feet away from the crossing at the time the car approached the crossing, so that by the time it was up on

19. 235 S. C. 646, 112 S. E. 2d 646 (1960).

the tracks, the train was somewhat less than that away from the vehicle. The trial judge's judgment n.o.v. was affirmed on appeal in *Bramlett v. Southern Ry. Co.*[20]

A verdict for $67,618 actual damages was affirmed on appeal in *Johnson v. Charleston & W. C. Ry.*[21] Plaintiff's decedent was killed in a collision with defendant's train at a highway crossing when he ran into an unlighted freight car which was slowly moving across the intersection. The night was foggy and misty and there was no evidence that that railroad had placed any particular warnings in front of the train such as flares, or a watchman with a flag or with a lantern. There were conflicts in the testimony which the court felt were sufficient to justify submission of the case to the jury. It held that the alleged contributory negligence of the plaintiff was not sufficient to overcome the failure on the part of the defendant to ring the bell and blow the whistle on the train in accord with the requirements of the crossing statute.[22] In discussing the size of the verdict, the Court said, ". . . we cannot say from the record here that it was so shockingly excessive as to require the conclusion for which appellant contends."[23]

(2) *Truck-pedestrian*

In *Thompson v. Washington*,[24] decided by the Court of Appeals for the Fourth Circuit, judgment for the plaintiff was reversed on the grounds that there was no evidence to support the finding of the trial judge. The decedent, a three year old boy, was crossing the highway when struck by the defendant's truck, whose driver was accompanied by another driver, while the truck was on its proper side of the highway. The decedent had been in a cotton field where his mother was working and came through some underbrush, bordering a ditch paralleling the highway, and out onto the highway. A path paralleled the highway for at least thirteen feet from the point decedent crossed the highway . The Court of Appeals found that there was no testimony of any witness that the child had actually come along the pathway parallel to the road where he could have been seen by approaching motorists before he attempted to cross the highway. But,

20. 234 S. C. 283, 108 S. E. 2d 91 (1959).
21. 234 S. C. 448, 108 S. E. 2d 777 (1959).
22. CODE OF LAWS OF SOUTH CAROLINA § 58-743 (1952).
23. 234 S. C. at 469, 108 S. E. 2d at 787.
24. 266 F. 2d 147 (4th Cir. 1959).

by contrast, there was the testimony of both truck drivers that the child had come directly across the highway from the adjoining field and had run through the bushes and tall weeds which were along the edge of the field and the side of the road so that they did not see him more than some thirty-five feet before striking him. Concluding that the judge's finding that the child first walked along the roadside could only be based on conjecture or surmise, the court found no negligence by defendant.

(3) *Truck-truck*

In the case of *Collins v. Risner*,[25] the plaintiff was driving a bakery truck on the highway before daylight, following another truck of the same company. The truck ahead of him stopped for reasons that he didn't know. The plaintiff stopped along side of the first truck, leaving his truck partially on the highway, and opened his right hand door to ask of the first driver, "What's the matter?" Before the first driver could answer, the defendant's truck, which had been following the plaintiff, crashed into the back of the plaintiff's truck and did serious harm to him. The truck in which the plaintiff was riding weighed some six tons; the defendant's truck, 25 tons; and it was a tractor-trailer which defendant had been driving for more than seven hours before having the collision at about six o'clock in the morning. At the trial the court removed all consideration of any gross negligence and the plaintiff's case was submitted to the jury on the basis of negligence alone. The jury found for the plaintiff in the sum of $15,000; nevertheless, the court set the verdict aside and gave a judgment n.o.v. for the defendant. On appeal, the Court of Appeals affirmed the judgment.

The court found no error in the conclusion of the district judge that the plaintiff was guilty of contributory negligence as a matter of law in that he violated a statute which requires that one pull off the highway altogether insofar as it is practical to do so when he stops his vehicle. The evidence showed that plaintiff clearly could have done so. There was some evidence in the case to which the court did not attach much weight that the defendant had said right after the accident that he must have fallen asleep. This evidence, nevertheless, precipitated a discussion by the court of the legal

25. 269 F. 2d 654 (4th Cir. 1959).

effect of one's falling asleep while driving on the highway. The court pointed to the general rule that the mere fact that one drops to sleep while driving a vehicle does not establish gross negligence, though it is sufficient for negligence. The rule requires that there be a showing of some symptoms which put the defendant on notice that he is likely to drop to sleep; such symptoms as drowsiness, or such a previous lack of sleep that it would reasonably indicate that he might fall asleep because of the lack of it. There is no governing South Carolina case on this point and so the court concluded that it would follow the general rule.

Judging by other traffic cases in which the South Carolina Supreme Court has found gross negligence, it would seem that dropping asleep when driving a truck of more than 25 tons while following behind two other trucks on the highway would certainly be evidence of at least gross negligence, if not recklessness. Even dropping asleep while driving a much lighter vehicle on an open highway with no traffic in sight would seem to create a sure risk of very serious harm. The question might also be raised as to whether one could ever go to sleep without having some prior warnings of the fact that he is likely to fall asleep. Whenever the South Carolina Supreme Court does have the question presented, it is hoped that it will not be satisfied with a rule which finds no room for gross negligence in dropping asleep while driving a 25 ton truck on the highway. This comment does not reflect disagreement with the result in this case, but it would be regrettable to allow the doubtfulness of the proof of a fact in a given case to determine the limits of a rule to be adopted, and which may have future application.

(4) *Truck-auto*

Of the four cases under this heading, three were decided by the United States Court of Appeals for the Fourth Circuit. In the first of these, *Kosa v. Hicks*,[26] the plaintiff's judgment was affirmed. He had suffered injuries while making a left turn in his truck from the highway into a side road. Defendant's auto struck plaintiff's truck after the defendant had pulled out into the left lane to pass another automobile immediately in front of the defendant, and which had obstructed defendant's view of the plaintiff's truck just ahead

26. 266 F. 2d 74 (4th Cir. 1959).

of the automobile. Plaintiff had given a left turn signal which had been seen by the automobile immediately following him but which had not been seen by the defendant. By the time the defendant was able to see plaintiff's truck making the left turn, it was too late for him to slow down enough to avoid the collision because he was travelling at such a rapid rate relative to the speed of the other two vehicles. The court was not impressed with defendant's argument that the plaintiff was guilty of contributory negligence, as a matter of law, because he made the left turn without observing the defendant behind him. The court pointed to the fact that the plaintiff had no duty to observe what could not be observed. The location of defendant's vehicle behind the automobile between plaintiff and defendant prevented his being seen.

Defendant's directed verdict was set aside on appeal in *Grooms v. Minute Maid.*[27] Plaintiff was injured when his automobile was involved in a head-on collision with defendant's truck. A second truck, which had been following plaintiff pulled out to pass plaintiff when defendant's truck suddenly appeared at the crest of a hill coming at a very high rate of speed. While trying to pull back into his original lane behind plaintiff's car, he struck the rear of plaintiff's automobile, knocking it into the path of the defendant's oncoming vehicle.

The district judge directed a verdict for the defendant, declaring that he was bound by a South Carolina case which had held that a defendant's excessive rate of speed was not the proximate cause of the injury to another who unexpectedly and suddenly was knocked into his path when the defendant was on his proper side of the road. The Court of Appeals pointed to the fact that the case to which the district judge referred had a proviso attached to this statement of the rule reading, "provided the driver who is on his proper side of the road does all that is reasonably possible to avoid the collision after he discovers the peril."[28] Since there was testimony that the defendant's truck was approaching at a speed of at least 70 miles per hour, and that it was at least 1,100 feet away from the point of collision when it came into view, the Court of Appeals felt that there was sufficient

27. 267 F. 2d 541 (4th Cir. 1959).
28. *Id.* at 545.

evidence to go to the jury on the question of the reasonableness of the defendant driver's conduct under these circumstances. The second truck, which had undertaken to pass plaintiff's automobile, was required to pull back in line because of the rapid speed at which the defendant's truck was approaching, and the Court of Appeals found that, therefore, defendant's speed could have been a factor in the plaintiff's injury.

In *Pepsi-Cola Distribs. v. Barker*[29] the Court of Appeals affirmed a jury's verdict for the plaintiff. Both the defendant and the plaintiff contended that they had the right of way at the street intersection at which they collided. There were traffic signal lights but the evidence was in conflict as to which one had the green light. The court held that such a conflict of testimony was clearly a question for the jury and that the trial court properly overruled the motions for a directed verdict.

In the case of *Wineglass v. McMinn*,[30] the South Carolina Supreme Court held that the defendant, who was doing business as the Dr. Pepper Bottling Co., was liable to the plaintiff for injuries inflicted on him by the defendant's truck when it suddenly lurched forward from its parked position hitting plaintiff, who was between his parked station wagon and the front of the truck. Plaintiff's injury was caused by the attempt of the fourteen year old boy, who helped on the truck but knew nothing about driving one, to move the truck. The regular driver of defendant's truck had gone "down the street" for a few minutes leaving the boy with the truck. The ignition key was in the truck, though the motor was not running. When a third party insisted that the boy move the truck so he could move his car which was behind the truck, the boy attempted to do so and caused the accident. The court found the necessary negligence on the part of the defendant in its truck driver's failure to maintain proper custody of the vehicle, although the boy made an attempt to locate the driver before submitting to the demand that he move the truck. Thus the question of the boy's relation to the defendant company did not have to be answered in order to determine the company's liability.

29. 274 F. 2d 372 (4th Cir. 1960).
30. 235 S. C. 537, 112 S. E. 2d 652 (1960).

(5) *Auto-auto*

In *Dean v. Temptron*[31] the court found that the question of the negligence and contributory negligence of the respective drivers of two automobiles which collided at an intersection of the highway was a question for the jury and affirmed plaintiff's judgment. The driver of the defendant's vehicle stopped very suddenly without just cause as he approached an intersection at which he had the right of way and the plaintiff's car piled into the back end of the defendant's car doing extensive damage.

(6) *Guest statute*

Jackson v. Jackson[32] is a case in which plaintiff, the wife, was injured in an automobile accident when riding with her husband, the defendant. Defendant, after driving recklessly through the streets of the city, collided with a parked vehicle. The plaintiff's testimony was that she knew that her husband had had a drink but that she did not know that he was intoxicated; that he drove in this reckless manner over her protests just before the collision occurred. The testimony of the police officers who investigated the accident conflicted with that of the plaintiff in certain particulars about the condition of the vehicle prior to the accident. The defendant did not put up any witnesses in his behalf and the trial judge directed a verdict for the plaintiff. On appeal, the Supreme Court decided that the evidence was susceptible of more than one inference in that the credibility of the plaintiff as a witness was a question for the trier of the fact. The mere fact that the plaintiff had testified as she did as to certain facts did not mean that the jury would have to accept these statements as true. The case was reversed for a trial by jury.

(b) *Duty Owed to Persons on Defendant's Premises*

The Court of Appeals in a *per curiam* opinion sustained the direction of a verdict for the defendant in the case of *Burkley v. The A & P Tea Co.*[33] As the plaintiff was leaving the defendant's supermarket, she was injured by a young boy who rushed through the entrance door and collided with her. The plaintiff contended that the defendant was negligent in that

31. 234 S. C. 532, 109 S. E. 2d 167 (1959).
32. 234 S. C. 291, 108 S. E. 2d 86 (1959).
33. 265 F. 2d 606 (4th Cir. 1959).

the lobby immediately adjoining the entrance and exit doors of the building was so narrow that she had only about 24 inches between the arc of the door through which one entered the building and a couch which was against the wall on the opposite side of the passageway. The boy dashed into the store unexpectedly and collided with the plaintiff just as she was passing this point. Without reviewing the physical facts in much detail, the court referred to the trial judge's finding that the boy's act was the sole proximate cause of plaintiff's injury and quoted him as follows: "That is all there was to it. If that entrance had been forty feet wide the same thing would have happened."[34] The court did not discuss the fact that it may be the duty of the defendant to foresee the acts of another which may, in turn, result in harm to third persons. Keeping in mind the narrowness of the passageway and the limited space which was allowed the plaintiff-customer to dodge the boy running through the doorway as was done here, it is difficult to understand how it could be held, *as a matter of law*, that the defendant could not reasonably foresee that someone might be injured as a result. It is not necessary that the exact manner of injury be foreseen. It should also be noted that the risk of harm such as occurred here could have been avoided with relatively little expense.

The case of *Gilliland v. Pierce Motor Co.*[35] involved an injury to the plaintiff caused by his slipping on a grease spot in the defendant's garage when he was on the way out of the garage after having collected soiled coveralls for the laundry for which he worked. The plaintiff, assisted by his young nephew, had only a few minutes before walked through the garage to the locker room to collect the laundry and was returning by the same route when he slipped on the grease spot. The verdict for the plaintiff was set aside by a judgment n.o.v. by the trial judge on the grounds that there was no evidence to show that the defendant had either actual or constructive knowledge of the presence of the grease spot. There was evidence that the floor had been thoroughly cleaned during the holiday which immediately preceded the morning of the accident. There was also evidence that other persons in the garage had passed over this same spot several

34. *Id.* at 606.
35. 235 S. C. 268, 111 S. E. 2d 521 (1959).

times earlier that morning without having seen any evidence of oil on the floor. As a result, the court concluded that the oil must have been put there within such a short time prior to the plaintiff's injury that the defendant could not be charged with negligence in not having removed it.

(c) *Miscellaneous*

The South Carolina Supreme Court had little difficulty in agreeing with the trial judge in *Cooper v. Mayes*[36] who found that the plaintiff was guilty of contributory negligence when he was injured by an electrical shock caused by his undertaking to cut some live power lines with his pliers while standing on an aluminum ladder, leaning against a wet pole. Plaintiff was an experienced electrician of twenty-five years and had ample safety equipment in his truck a few feet away and easy access to the master switch about 200 feet away by which he could have cut off all current in the whole area before ascending the ladder, had he bothered to do so. The plaintiff contended that the defendant was negligent in that the defendant had told him about a week before that there was no current in the line that he had attempted to cut. The court pointed to the experience of the plaintiff as an electrician and his own testimony that, "It is dangerous to work on electric wires at any time."[37] Furthermore, the plaintiff had worked on these particular wires at various other times for the defendant and was familiar with their dilapidated state. Plaintiff's non-suit was affirmed on appeal.

The Court of Appeals, in *Berry v. Atlantic Coast Line Railroad*,[38] affirmed the trial court's summary judgment for both defendants when the plaintiff sued the power company and railroad for the death of her son caused by electrocution. The deceased was assisting his brother, a crane operator for a contractor, while they were unloading steel from a railroad car, when he was killed. The car had been spotted on a siding near the high power lines of the defendant electric company. Arriving at the scene of the unloading, the crane operator had surveyed the situation and decided that the boom on the crane was so long that it must be shortened to avoid coming into contact with the high power lines overhead. After shortening the boom, two of the four outriggers used to steady

36. 234 S. C. 491, 109 S. E. 2d 12 (1959).
37. *Id.* at 497, 109 S. E. 2d at 15 (1959).
38. 273 F. 2d 572 (4th Cir. 1960).

the crane were put out at the back but none at the front. When the first load of steel was hoisted and was being swung around to the truck on which it was to be loaded, the decedent was steadying it with his hand to stop its swaying, when the crane tilted over on one side causing the boom to come in contact with the 22,000 volt electric wire overhead and electrocuting the plaintiff. After a thorough analysis of the facts, the court concluded that there was no evidence sufficient to justify the issue of negligence going to the jury because the plaintiff had failed to prove that the defendant railroad's location of the siding was unreasonable because of the presence of the power line some 28 feet away and more than 28 feet above ground; likewise, there was no negligence by the power company. The court acknowledged that the defendant power company has a very high duty of care when dealing with anything so dangerous as high voltage electric lines. Nevertheless, the court concluded that the fact that the lines were placed in accordance with the regulations of the South Carolina Public Service Commsision was at least *some* evidence of due care, even though under the South Carolina cases it has been held not to be *conclusive* evidence of due care. The operator of the crane was thoroughly aware of the danger from the overhead power lines as was evidenced by his having taken precautionary steps to avoid having the boom strike the wires. The duty owed by the defendants was to protect persons against the risks created *or* to warn them of the risks. Since the operator knew of the risks the defendant's duty to warn was satisfied. It was the court's conviction that the failure on the part of the crane operator to utilize the remaining outriggers was responsible for the death of the decedent.[39]

The plaintiff's verdict for $40,000 actual damages in a novel action arising out of the aggravation of a stomach ulcer was reversed by the Supreme Court and judgment entered for the defendant in *Williams v. E. I. DuPont DeNemour &*

39. In a sequel to the principal case, the deceased's employer's workmen's compensation insurance carrier was taxed the costs of both defendants because it did not waive its right to reimbursement for the $8,000 it had paid for compensation. The District Court pointed to the carrier's right to control the litigation, although it did permit the litigation to be handled by counsel for the estate of the deceased. The carrier had obtained an order from the District Court allowing it to file a pleading setting up a lien for the amount which it had paid. Berry v. Atlantic Coast Line Ry. Co., 185 F. Supp. 699 (E. D. S. C. 1960).

Co.[40] It was conceded by the plaintiff that his work with the defendant company did not cause his ulcer. Plaintiff alleged negligence on several grounds including one that the doctor in the defendant's medical department had given him assurance that his return to work would not interfere with the healing of his ulcer, even though his own personal physician had advised him that it would not be in his best interest to do so. Another allegation of negligence was the fact that the defendant had failed to provide him with ample opportunities to get adequate rest and have frequent access to food which his diet required. The court found that it was unnecessary to decide whether the defendant's actions warranted submission of the question of negligence to the jury because its review of the evidence, and particularly the testimony of the plaintiff himself, thoroughly convinced the court that the plaintiff's contributory negligence was, as a matter of law, sufficient to bar his recovery. The court properly distinguished this case from one in which the plaintiff is alleging that he has been required by the employer to perform a particular task against the employee's protest that it would injure his health. This case was simply a question of the plaintiff returning to his regular work duties after having been absent for some time for the treatment of his ulcer. He was at liberty to refuse to return to work or to quit his job at any time.

VII. DEFAMATION

The case of *Reinhardt v. State-Record Company*[41] involved an alleged libel by a story in the daily newspaper relating to the setting of preliminary hearings on the plaintiff's indictment on a charge of conspiracy to file false returns for an insurance company. The plaintiff was an insurance examiner for the State Insurance Commissioner's office. He acknowledged that the reference in the newspaper was accurately reported insofar as it referred to his indictment but the alleged libel was in the fact that the story described his indictment as being connected with the "Capital Life Insurance Company conspiracy case." In the latter case a number of parties, including the then State Insurance Commissioner, had been charged with various fraudulent practices having

40. 235 S. C. 497, 112 S. E. 2d 485 (1960).
41. 235 S. C. 480, 112 S. E. 2d 500 (1960).

resulted in the forced sale of the Capital Life Insurance Company by its owners to another company for a price of approximately one million dollars less than its true value. The gist of the plaintiff's complaint was that he had no direct connection with the Capital Life case and that the news article linking his name with that case gave the impression that he was one of the ones charged with attempting to defraud others. He contended he was charged with a much less serious offense and that, furthermore, on subsequent trial he was acquitted.

The court reversed the verdict for the plaintiff and entered judgment for the defendant on the ground that it was unable to find anything in the record upon which to support the contention of the plaintiff that the statements were false and libelous, holding in effect that the plaintiff's indictment was one facet of a case with many facets.

VIII. INTERFERENCE WITH CONTRACT

The case of *Hopkins v. Shuman*[42] deserves passing notice for the recognition which it afforded to the fact that our Supreme Court reiterated the existence of a cause of action in South Carolina for interference with plaintiff's employment contract.

42. 235 S. C. 191, 110 S. E. 2d 713 (1959).