South Carolina Law Review

Volume 12 | Issue 1 Article 18

1959

Torts

George S. King
University of South Carolina

TORTS

GEORGE SAVAGE KING*

The decisions of the South Carolina Supreme Court in the field of Torts during the period of this review contain several which are of particular significance, in addition to the usual run of routine appeals because of dissatisfaction with rulings on evidence sufficient to support verdicts. Of the South Carolina cases decided by the U. S. Court of Appeals during this period, none is particularly significant.

Prenatal Injuries

In the case of *West v. McCoy*[1] the Supreme Court had presented to it for the first time the question of whether a cause of action exists for the wrongful death of an unborn child. The plaintiff alleged that she had suffered a miscarriage about one month after a collision between defendant's auto and hers. She alleged that she was 4½ months pregnant at the time of the accident, had felt the baby's movements sometime prior to the accident and subsequent thereto, but about two weeks after the accident complications arose which ultimately led to the miscarriage.

The overruling of defendant's demurrer was reversed and the demurrer sustained. The Court recognized the rapid change which has taken place in the right of a child born *alive* to maintain an action for prenatal injuries. The majority of the states now permit such actions while prior to 1949 the contrary was true.[2] Nevertheless, only two cases appear to have permitted suit for wrongful death when the child was born *dead*.[3] In both of those the child was not only viable, but the injuries were inflicted at the time of normal birth; in fact they arose out of alleged negligence in the delivery of the babies. In the principal case, the Court pointed out that the child was not only born dead, but that it did not

*Professor of Law, University of South Carolina.

1. 233 S. C. 369, 105 S. E. 2d 88 (1958).
2. PROSSER, LAW OF TORTS 174 (2 ed. 1955); See THORNTON & McNEICE, TORTS, 31 N. Y. U. L. REV. 344, 459 (1956); also, RESTATEMENT OF TORTS § 869 (1939).
3. Verkennes v. Corniea, 229 Minn. 365, 38 N. W. 2d 838 (1949); Rainey v. Horn, 221 Miss. 269, 72 So. 2d 434 (1954).

appear that it was viable at the time of the injury. It specifically reserved opinion on the right of a child born *alive* to recover for prenatal injuries. At the pace other jurisdictions have abandoned the lead of the Massachusetts decision by Justice Holmes in 1884, saying that the unborn child was a part of its mother, and therefore denying a right of action, it is hard to believe that South Carolina will not follow the modern trend to permit such a suit. As the Supreme Court well said, "The policy considerations which call for a right of action when a child survives do not necessarily apply in the absence of survival."

Wrongful Death Act

In *Rushton v. Smith*[4] the Supreme Court held that when one class of statutory beneficiaries died before commencement of a wrongful death suit, the right of action reverts to the next statutory class instead of passing to the estate of the first beneficiaries. Acknowledging that the majority view is *contra,* the Court nevertheless concluded that it would not overrule two earlier South Carolina cases[5] which had declared the above rule. In the principal case the plaintiff's intestate died from injuries suffered in an automobile accident while riding with her husband and allegedly caused by his negligence. The husband survived by a few minutes and then died leaving no children. This suit was instituted by the wife's administrator for the benefit of her parents against the husband's estate. The defendant's answer included allegations that the only persons who could maintain the action were the heirs at law of the defendant's estate and therefore any negligence for which he would have been liable would automatically bar their recovery. Plaintiff's motion to strike these allegations from the defendant's answer was granted.

The appellants tried in vain to persuade the Court that the earlier *Morris*[6] case should be confined to a holding that the death of the preferred beneficiary did not abate the action. It happened that the persons in the next statutory class in the *Morris* case were also the heirs at law, and the defendants argued that it was as much because they were heirs at law, as

4. 233 S. C. 292, 104 S. E. 2d 376 (1958).
5. Morris v. Spartanburg Ry., Gas & Electric Co., 70 S. C. 279, 49 S. E. 854 (1904); Elkin v. Southern Ry., 156 S. C. 390, 153 S. E. 337 (1930).
6. 70 S. C. 279, 49 S. E. 854 (1904).

because they were of another statutory class, that the Court upheld the action in that case. However, the Court decided, without giving its reasons why, to adhere to the rule previously announced.

Building Contractor's Liability to Third Parties

Clyde v. Sumerel[7] involved an appeal by the Fiske-Carter Construction Company, a building contractor, against whom, along with the named defendant, the plaintiff obtained a $15,000 judgment for the death of her eight year old son. The jury apportioned the damages at $7,500 against each defendant and only the construction company appealed.

Appellant had constructed a shopping center for the owner of certain premises who had leased to Sumerel one of the stores for the operation of a drug store. After Sumerel had taken possession, two display counters were delivered to him and put on the ground outside the back of the store. A few days later they were moved approximately 10 feet and put on a bank or incline so that the area could be paved by a subcontractor. Who actually moved the counters was in dispute between the defendants, with each contending the other did so. In any event, plaintiff's decedent was found dead under one of the heavy counters about 3 weeks later, having been seen playing on the counters the day before. Appellant had completed all work on the premises 13 days before the accident but it was 3 days before formal acceptance by the owner. The case was tried upon the theory that the defendants had created an attractive nuisance.

On appeal the Supreme Court reversed the judgment below, stating that appellant had completed his work before the accident and that the date of the owner's *formal* acceptance was not controlling in applying the general rule that a contractor is not liable to third persons for injuries resulting from his "negligent construction of the work" after completion and actual acceptance by the owner.

Assuming that the evidence supported the jury's verdict (and the Supreme Court did not discuss this because it decided the rule stated above was controlling) it would seem that appellant's liability should be judged on the same basis as any other negligence case: defendant having created an unreasonable risk of harm to others, he had a duty to correct

7. 233 S. C. 228, 104 S. E. 2d 392 (1958).

it or protect others from it. When it is recognized that the rule relieving a contractor from liability has its roots in the doctrine that there must be privity of contract between the parties to support an action for tort, it should not be considered apart from the rapid erosion of that doctrine beginning with the famous case of *MacPherson v. Buick Motor Co.*[8] The Supreme Court of Massachusetts in 1946 said of it, "The *MacPherson* case caused the exception to swallow the asserted general rule of non-liability, leaving nothing upon which that rule could operate."[9]

In *Foley v. Pittsburgh - DesMoines Co.*,[10] the *MacPherson* rule was applied to the defendant contractor who had built a large tank for the storage of liquefied natural gas which exploded 13 months after its completion because of negligence in its construction. In response to the defendant's argument that the rule should not apply because the tanks were a part of the realty, the Court said:

> . . . There is no logical basis for such a distinction, and it would obviously be absurd to hold that a manufacturer would be liable if negligent in building a small, readily movable tank which would undoubtedly be a chattel, but not in building an enormously large and correspondingly more potentially dangerous a one that legalistically was classified as realty. The principle inherent in the *MacPherson v. Buick Motor Co.* case and those that have followed it is that one who manufactures and delivers any article or structure with the knowledge that it will be subjected to use by others, must, for the protection of human life and property, use proper care to make it reasonably safe for such users and for those who may come into its vicinity; certainly the application of that principle cannot be made to depend upon the merely technical distinction between a chattel and a structure built upon the land . . . .[11]

The Restatement of Torts, 1934 edition, recognized the liability of a contractor after acceptance of the work by the owner in the following language:

8. 217 N. Y. 382, 111 N. E. 1050 (1916).
9. Carter v. Yardley & Co., 319 Mass. 92, 64 N. E. 2d 693 (1946).
10. 363 Pa. 1, 68 A. 2d 517 (1949).
11. *Id.* at 533.

§ 385 One who on behalf of the possessor of land erects a structure or creates any other condition thereon is subject to liability to others within or without the land for bodily harm caused to them by the dangerous character of the structure or condition after his work has been accepted by the possessor under the same rules as those . . . determining the liability of one who as a manufacturer or independent contractor makes a chattel for the use of others.

. . . .

c. *When work accepted by possessor.* The liability stated in this Section is imposed upon the servant or contractor as the erector or creator of the structure or condition and not as a person entitled to be upon the land for the purpose of doing work with the consent and on behalf of the possessor. When the work is completed and accepted by the possessor the servant's or contractor's connection with the land ceases, just as a repairman loses possession of a chattel, which is entrusted to him for repair, when he returns it to its owner. In both cases, the liability is not subject to the same limitations as is that of the possessor of land or chattels. While in both cases it extends only to persons who are lawfully using or sharing in the use of the land or chattel with the consent of its possessor, neither a negligent servant or contractor, nor a negligent manufacturer or repairman is relieved from the liability by the fact that he does not know of the dangerous condition of the land or chattel and that the person injured thereby is a gratuitous licensee and not one who enters the land or uses the chattel for the business purposes of its lawful possessor. In this particular, the liability of a servant or contractor for bodily harm done after the work has been turned over to the possessor of the land for whom it is done, differs from that of a servant or contractor for harm done while he is still upon the land and in charge of the work of erecting a structure or otherwise changing the physical condition of the land.

In the principal case the Court relied on *Nichols v. Craven*[12] which involved a suit by a motorist who suffered damages in a collision with another motorist at the approach to a new

12. 224 S. C. 244, 78 S. E. 2d 376 (1953).

bridge which had been constructed by the defendant contractor. The alleged negligence on the part of the contractor was his failure to provide suitable barricades and warnings for the traffic on the highway. There was no alleged negligence in the construction of the bridge or of any other work of the defendant. The sole delict charged to defendant was his failure to maintain signs, barricades, etc., at the time of the accident.[13] This was a case of nonfeasance not misfeasance; thus, defendant's duty to act had to be proved by plaintiff. This plaintiff undertook to do by showing that defendant's contract with the Highway Department imposed such a duty on him. The Court held that defendant's duty to maintain barricades under the contract expired with acceptance of his work by the Department and that acceptance in fact was sufficient, rather than formal acceptance. There was no contention that defendant did his work in a negligent manner which resulted in the necessity of using the barricades. They were required to direct traffic so that the traffic could be maintained while the new bridge was under construction. If there was any negligence in the erection of the barricades by defendant, it was superseded by the subsequent movement of them by the Highway Department.[14] The accident arose out of the negligence of the Highway Department in its handling of the barricades, not from defendant's failure to provide them. This case can be distinguished from the principal case because the alleged negligence of the defendant contractor in the latter was his action by which he created a dangerous condition: placing the display counter on the inclined bank in such a way that it would overturn on a child — misfeasance rather than nonfeasance. The negligent act of the contractor placed the duty on him to correct it or be liable to one damaged thereby.[15] The duty was imposed on him by operation of law irrespective of the contractual relationship; but even so, the existence of the contractual relationship would not relieve him of tort liability.[16]

13. "Therefore this appeal revolves around the question of who was responsible for the failure to safeguard the traveling public . . . . " 224 S. C. 244, 78 S. E. 2d 376 (1953).

14. " . . . The barricades being moved from one road to the other from time to time by the Highway Department as it facilitated the paving program." *Id.* at 251.

15. Heaven v. Pender, 11 Q. B. D. 503 (1883); PROSSER, LAW OF TORTS 183 (2d ed. 1955).

16. "On the other hand, where the contract creates a certain relationship between the parties, and certain duties arise by operation of law,

Furthermore, the A.L.R. annotation which the Court cited for the general rule of nonliability includes the following language: "The trend of judicial decisions has, as in the case of the liability of a manufacturer of articles for negligence to third persons, revealed a gradual limitation of the rule of nonliability of the construction contractor by the ingrafting of limitations or exceptions upon the rule. The notion that no duty, other than a contractual duty owing solely to the contractee, rests upon the contractor, has been at times subjected to severe attack by the courts, and has resulted in certain exceptions to the rule, predicated on the imminency or inherency of the danger involved in the defective construction of the project, the likelihood that it will result in injury to persons coming in contact therewith, the knowledge of the contractor of the danger involved or the doctrine of implied invitation and of maintenance of a nuisance."[17]

Thus we find less and less law and no apparent reason for a rule that insulates a contractor from liability to those injured as a result of his negligence in performing his undertakings.

Interference With Right of Attachment

In *Stewart v. Martin*[18] plaintiff's attempt to attach a third party's automobile which collided with plaintiff's automobile led to a suit by plaintiff against the defendant finance company for secreting the offending automobile, on which it held a mortgage, to avoid the attachment. The trial court had treated the case as a cause of action for conversion and sustained the defendant's demurrer that no such action could be maintained because the plaintiff had no lien on the car until there had been a judicial determination to that effect. The Supreme Court reversed and said it did not construe the complaint as an action for conversion but rather as "an action to recover damages resulting from the wrongful and malicious

irrespective of the contract, because of this relationship, then the breach of such duties warrants an action in tort. As was said in one of the cases cited by counsel, to wit, St. Charles Merc. Co. v. Armour & Co., 156 S. C. 397, 153 S. E. 473, 477 (1929), 'Actions in tort often have their beginning in contractual matters.'" Meddlin v. Southern Ry., 218 S. C. 155, 165, 62 S. E. 2d 109 (1950).

17. 13 A. L. R. 2d 233 (1951).

18. 232 S. C. 483, 102 S. E. 2d 886 (1958).

act of the defendants in removing and secreting said Chevrolet automobile and thereby preventing the sheriff from seizing same under the attachment in its hands."[19]

In answer to the defendant's argument that it could not be determined whether plaintiff had suffered any damages until a judicial determination of plaintiff's rights against the offending automobile could be had, the Court answered:

> But we do not think the recovery of a judgment in the other action is a prerequisite to bringing this action, which is entirely distinct from an action for damages against the offending car or its driver.[20]

In the opinion the Court went on to approve its earlier cases holding that the plaintiff's lien against the automobile arises at the time of the accident and is independent of the attachment of the automobile.[21] This raises the very important question of what is the wrong which the defendant is alleged to have committed? The defendant also, as the mortgagee, had a very substantial interest in the automobile which he secreted. He has done nothing to prevent the lien nor to extinguish it. The Court said this was not an action for conversion, i.e., the exercise of unlawful dominion over the property. There was no allegation that defendant had damaged or destroyed the property. If the cause of action is to protect the plaintiff's right to conserve the property under lien by having it taken into custody by the sheriff, it appears that plaintiff could not be damaged until it could be shown that plaintiff obtained a judgment and had failed in his efforts to collect it. Since the Court said a judgment against the offending automobile or driver was not essential to maintain the action, it must have had in mind protecting some other right of the plaintiff. This appears to lead to the conclusion that it was undertaking to vindicate plaintiff's right to have his attachment without interference by defendant or anyone else, regardless of any property damage which he may have suffered. Thus it is likened to an action for trespass where the law presumes

19. *Id.* at 887.
20. *Id.* at 889.
21. Waldrop v. M. & J. Finance Corporation, 178 S. C. 527, 183 S. E. 460 (1936); Stephenson Finance Co. v. Burgess, 225 S. C. 347, 82 S. E. 2d 512 (1954).

plaintiff's damages as the result of defendant's wrongful conduct and nominal damages are sufficient to support a verdict for punitive damages in such situations.[22]

If the above analysis of the case is correct, plaintiff could have his action against the defendant even *after* plaintiff's suit had resulted in a judgment for the car or driver; likewise plaintiff could maintain the action even if plaintiff received a judgment against the driver and it was paid from other assets.

The fact that the Court quoted from C.J.S. ("one who impedes or obstructs another's remedy for enforcement of a fixed and ascertained right against a third person has been held responsible for the injury thus occasioned")[23] supports the conclusion that the injury it had in mind was the interference with plaintiff's right to have his legal process served. This is somewhat reinforced by the fact that the South Carolina case cited by C.J.S. as the only authority for the quotation[24] involved conversion, which the Court had stated was not involved in this case. In other words, the Court appears to have adopted the proposition stated in the text without having it limited by the facts of the case cited.

Unfortunately no reference was made to any of the cases involving suits for obstructing a process server. It has been held that a plaintiff cannot maintain a suit against a person for assisting one to escape a process server without a showing of damages proximately caused.[25] In the 1812 South Carolina case of *Seehorn v. Darwin,*[26] it was held that plaintiff could not maintain an action against the defendant who had assisted in the escape of a debtor (defendant's son) after he had been taken into custody under a *capias ad satisfaciendum.* This case would seem to be analagous to the principal case in that plaintiff sought recovery against a third party who had

22. PROSSER, LAW OF TORTS 27 (2d ed. 1955); Jones v. A. C. L. Railroad Co., 108 S. C. 217, 94 S. E. 490 (1917). "If the defendant received and disposed of the cotton mentioned in the complaint, having *actual* notice of the plaintiff's prior lien for rent, then he became liable, *not for the value of the cotton or its proceeds,* but for the damages which the Plaintiff sustained by reason of the impairment of the security which the plaintiff had for enforcing payment of his lien for rent." [Emphasis added.] Graham v. Seignious, 53 S. C. 132, 137, 31 S. E. 51 (1897).

23. Stewart v. Martin, 232 S. C. 483, 102 S. E. 2d 886, 888 (1958).

24. Michalson v. All, 43 S. C. 459, 21 S. E. 323 (1895).

25. Waggener v. Harding, 79 Colo. 214, 244 P. 908 (1926).

26. 3 Brev. 282 (5 S. C. L.) (1812).

interfered with the plaintiff's security for a debt. The significant difference was that the sheriff had the security in custody in that case, whereas in the principal case he was prevented from taking the security into custody. However, in the *Seehorn* case[27] the plaintiff still had a remedy against the sheriff, which he did not have in the principal case.

The Court offered as one reason for its conclusion the fact that a plaintiff, seeking to bring an action *in rem* against the car alone, would be completely thwarted by conduct such as defendant's. But it was not so alleged in this case, nor did the Court state that such a limitation should be applied to the application of this rule. Nor was it pointed out the the conduct of defendant must be willful and done with knowledge of the plaintiff's claim against the car. Is this limitation implicit in the decision? Does plaintiff have to make a demand on defendant for the secreted automobile and have it refused before he can maintain the action? Would defendant's surrender of the car to the sheriff anytime before judgment abate the action?

There seems to be no reason why a defendant acting *deliberately* to thwart another's use of legal process available to that other, should not be answerable to him in damages, actual and punitive, and such arguments as used in the *Seehorn* case: "I have never read or heard of such an action; . . . there is no privity of contract between the parties . . . ,"[28] have lost their forcefulness in the modern law of torts. The only questions should be, has plaintiff suffered an interference with his legal right? Has the defendant acted intentionally to bring this about? The wrong should be clearly identified as the interference with the legal process and not dependent upon a special property interest in the nature of an inchoate lien. There would seem to be no necessity to require plaintiff to make a demand on defendant, because defendant may have succeeded in concealing that he had secreted the automobile until after it was determined that the driver of the automobile was not liable to plaintiff which would thereby extinguish plaintiff's right to demand the automobile.

No doubt this case will precipitate further litigation on this subject.

27. *Ibid.*
28. *Id.* at 282, 283.

Conversion

In the case of *Caroll v. M. & J. Finance Corp.*[29] the plaintiff's judgment for defendant's conversion of plaintiff's wrecked automobile was reversed and judgment entered for defendant. The Court held that there was no evidence of defendant's having done anything to interfere with plaintiff's possession of the automobile even though defendant had advertised it for sale erroneously thinking plaintiff was in arrears on her mortgage payments to defendant for the automobile. The sale was cancelled and defendant made no effort to move the automobile nor to prevent plaintiff from moving it from the garage to which plaintiff had had it towed. In the absence of some evidence showing that defendant had assumed actual control of the property there was a lack of the essential taking of dominion over the property to the exclusion of plaintiff's rights.

Slander

A Supermarket manager's question to a customer at the cash register, "Have you paid for that coffee you have got in your bag?", was held not to be a charge that the customer (plaintiff) was guilty of larceny. In *Drakeford v. Dixie Home Stores*,[30] plaintiff had gone into defendant's store with a jar of coffee visible in her open handbag hanging from her shoulder. When the manager asked her the question, she explained that she had brought the coffee into the store whereupon he left and went to the back of the store. The fact that plaintiff herself then said to the cashier, "He has deliberately charged me with stealing this coffee," was held to have added nothing to the defendant's conduct. The Court found error in the trial court's having stated in its order: "As a matter of law the question of the manager was as to a matter of concern to both plaintiff and himself and therefore privileged."[31] Holding that the issue of privilege is a matter of defense not for determination on demurrer, the Court nevertheless affirmed the sustaining of the demurrer on the ground that it failed to state a cause of action.

29. 233 S. C. 200, 104 S. E. 2d 171 (1958).
30. 233 S. C. 519, 105 S. E. 2d 711 (1958).
31. *Id.* at 713.

Libel

In *Rogers v. Florence Printing Co.*,[32] the defendant's attack on the soundness of the doctrine of punitive damages was to no avail. Plaintiff's judgment for $20,000 punitive and $5,000 actual damages for a libellous article in defendant's newspaper was affirmed. Although the Court acknowledged that many have contended that punitive damages have no place in civil suits, that such punishment is for the criminal courts, it found that this state has operated under the policy of permitting punitive damages for torts not alone as punishment of defendant, but as a vindication of private rights. Defendant's argument that the maximum fine of $5,000 provided for one guilty of criminal libel should operate as a limit to the amount of punitive damages did not impress the Court.

Defendant's contention that the prejudice of the jury was reflected in its assessment of punitive damages, in spite of plaintiff's failure to prove the wealth of the defendant, was answered by the Court by reaffirming the rule declared in *Charles v. Texas Company*,[33] that the proof of defendant's financial worth is not a prerequisite to punitive damages although it may be considered by the jury, despite defendant's argument that a defendant should not be compelled to prove his poverty at his peril.

Without implying the slightest disagreement with the soundness of the conclusion reached in *this* case, it is hoped that the Court will not attempt to live too literally by its statement that public policy once established by the Courts should not be changed except by legislation. As the New York Court of Appeals had occasion recently to point out, the common law is not static; the obligation of the courts to change an existing rule of law should not always be shunted off to the legislatures:

> Of course, rules of law on which men rely in their business dealings should not be changed in the middle of the game, but what has that to do with bringing to justice a tortfeasor who surely has no moral or other right to rely on a decision of the New York Court of Appeals? Negligence Law is common law, and the common law has been molded and changed and brought up-to-date in many another case. Our court said, long ago, that it had

32. 233 S. C. 567, 106 S. E. 2d 258 (1958).
33. 199 S. C. 156, 18 S. E. 2d 719 (1942).

> not only the right, but the duty to re-examine a question where justice demands it. [Citations omitted.] . . . . And Justice Sutherland, writing for the Supreme Court in *Funk v. United States* (290 U.S. 371, 382, 54 S. Ct. 212, 215, 78 L. Ed. 369), said that while legislative bodies have the power to change old rules of law, nevertheless, when they fail to act, it is the duty of the court to bring the law into accordance with present day standards of wisdom and justice rather than "with some outworn and antiquated rule of the past." . . . .
>
> We act in the finest common-law tradition when we adapt and alter decisional law to produce common-sense justice.
>
> The same answer goes to the argument that the change we here propose should come from the Legislature, not the courts. Legislative action there could, of course, be, but we abdicate our own function, in a field peculiarly non statutory, when we refuse to reconsider an old and unsatisfactory court made rule.[34]

In *Timmons v. News and Press*,[35] the Supreme Court reversed the trial court's sustaining of a demurrer to plaintiff's complaint alleging that plaintiff's store was identified as the source from which a plague of town drunks were obtaining a bay rum shaving lotion. The article proceeded at some length to detail the fact that plaintiff's store was reputed to sell enough of the lotion to provide for over 1400 binges per week; that the police were confronted with a problem since the sales were not illegal; and that the savings, which were considerable as compared to the cost of liquor, could be applied toward the payments of fines for drunkenness after the purchaser became drunk. There was no doubt as to the identity of plaintiff's place of business because the newspaper

34. Woods v. Lancet, 303 N. Y. 349, 102 N. E. 2d 691, 694 (1951); "We are of the opinion there is no justification for absolute immunity [of a charitable corporation] if the trust is protected, because that has been the reason for the rule of absolute immunity. Reason and justice require an extension of the rule in an attempt to inject some humanitarian principles into the abstract rule of absolute immunity. The law is not static and must follow and conform to changing conditions and new trends in human relations to justify its existence as a servant and protector of the people and, when necessary, new remedies must be applied where none exist." Moore v. Moyle, 405 Ill. 555, 92 N. E. 2d 81, 86 (1950).

35. 232 S. C. 639, 103 S. E. 2d 277 (1958).

story included a photograph. Without specifying the particular allegations which it found to be defamatory, the Supreme Court held them to be sufficient.

The opinion does not serve as much of a guide for the trial court because it does not differentiate the allegations of fact from the legal conclusions of the pleader, nor point specifically to errors in the trial judge's conclusions that the defamation, if any, was of the plaintiff's customers and not the plaintiff. There was no accusation that plaintiff was doing anything illegal in selling the lotion, although it was implied that his refusal to sell it for internal consumption would help alleviate the situation. Is the defamation to be found in the allegation that plaintiff sold the lotion for internal consumption? Or that he sold it in large quantities? Or that he had a lot of customers who were habitual drunkards? Or a combination of all these facts? If there is no allegation that one has cultivated habitual drunkards, it would seem difficult to find defamation in the mere fact that they are regular customers of the plaintiff. Perhaps the Court was most impressed with the item in the newspaper that another merchant stopped selling the product for known use as a beverage thereby implying that plaintiff's failure to do the same was an indirect way of cultivating associations with the habitual drunkards, but it did not make this clear.

Fraud

In *Mishoe v. General Motors Acceptance Corporation*[36] plaintiff's judgment against defendant for fraud and deceit in the repossession of an automobile, on which an installment was four days overdue, was reversed for entry of a judgment for defendant. Defendant's agent had called on plaintiff four days after an annual installment of $600 was due, and when plaintiff asked how much the payment including overdue interest would be, the agent said he didn't know, for plaintiff to go to Tabor City with him and they would get it straightened out. When they were at the dealer's in Tabor City from whom plaintiff had purchased the auto, defendant's agent took possession of the automobile and said plaintiff could regain possession only by paying that day the full balance due

36. 234 S. C. 182, 107 S. E. 2d 43 (1958).

on the car: the $600 plus the next annual and final installment of $833.99. Since plaintiff did not pay the balance, defendant later sold the car at public auction for $1000. The fraud charged by plaintiff was that defendant's agent had invited him to go to Tabor City representing the purpose to be to calculate the interest on the one installment overdue while it was his secret purpose to take possession of the automobile and demand the full payment of the indebtedness. The damage alleged to have been suffered by plaintiff was the loss of possession of his automobile.

The Supreme Court recited the pertinent terms of the conditional sales contract which gave defendant the right to accelerate the due date of the entire balance if plaintiff defaulted on any installment as well as the right to immediate possession of the automobile. Holding that defendant had acted within its rights in taking peaceable possession of the automobile, as well as in having demanded payment of the full balance for its release, the Court found no basis for an action in fraud. It pointed to the fact that plaintiff was present at the sale of the automobile at public auction and made no effort to protect his equity of redemption by paying the debt owed or attempting to purchase the car at auction. It found no damage suffered by plaintiff.

Negligent Maintenance of Equipment

In *Brown v. National Oil Company*,[37] the jury's willingness to let the negligent truck driver of defendant oil company go without liability raised the question of whether the verdict for the plaintiff could be supported by other evidence of negligence on the part of the Company besides that of the truck driver. Plaintiff's filling station and general store had burned down as a result of a fire which began when a third party lit a cigarette near defendant's unloading oil tank truck. The Court found sufficient evidence of negligence on the Company's part in not properly venting the gasoline pumps which it had supplied and maintained. The Court, concluding that the conscious act of the third party which set off the initial explosion was not the efficient operating cause of plaintiff's loss because it was foreseeable that customers would be smoking in the area, and that the accumulation of gasoline vapors which

37. 233 S. C. 345, 105 S. E. 2d 81 (1958).

were ignited resulted from the negligent installation and maintenance of the pumps, reversed the judgment for defendant *n.o.v.*

In *Elliott v. Black River Electric Cooperative*,[38] the plaintiff's judgment for $106,100 actual and $5,000 punitive damages was affirmed by the Supreme Court. Plaintiff's husband was killed while replacing a 21-foot section of the lift rod to his water pump which came into contact with defendant's overhead high voltage line while the decedent was withdrawing it from the well.

The Court found that defendant knew, or should have known, that this length of lift rod was standard in the area and that it was customary to remove them from the wells from time to time, thus defendant owed a duty to locate its high voltage lines so that they would not pass directly over the wells, or to give warning to those in decedent's position of the dangers inherent in the high voltage lines. Calling attention to the high duty of care owed by those handling electricity the Court said:

> The care thus required of power companies means more than mechanical skill. It includes foresight with regard to reasonably probable contingencies.[39]

In reviewing the size of the verdict which defendant complained was so excessive as to be manifestly the result of passion and prejudice, the Court observed:

> The growing tendency in recent years toward verdicts in death cases which, although not manifestly the result of passion, prejudice or other improper motive, are nevertheless so large as to indicate, even in an inflated economy undue liberality on the part of the jury, has given this court much concern; but we have no power to reduce such verdicts. If relief from them is to be provided, it must come from: (1) the juries themselves . . . (2) the trial judges . . . (3) the General Assembly . . .[40]

If the dollar continues its steady decline in purchasing power for the next twenty years at the same pace it has for the past twenty years, it's doubtful that the verdict should be considered excessive for the death of a man 51 years old, in

38. 233 S. C. 233, 104 S. E. 2d 357 (1958).
39. *Id.* at 368.
40. *Id.* at 374.

sound health with an annual income of about $6,800 and a life expectancy of 21 years leaving a widow and seven children.

Emotional Distress Causing Physical Harm Without Impact

Padgett v. Colonial Wholesale Distributing Co.,[41] affirmed the liability of the defendant for plaintiff's physical damages resulting from the emotional shock of having defendant's liquor truck run into the living room of plaintiff's home but without hitting plaintiff.

Many courts require that plaintiff show that he was put in fear of physical harm to his person before recovery will be permitted in cases where no impact has been suffered even when there has been physical damage resulting from the emotional stress negligently caused by defendant.[42] In the principal case the report does not make it clear whether the plaintiff was placed in fear of harm to himself or not, although it may be a reasonable inference from the fact that he was in the sitting room looking at television when he heard a terrible noise and felt the jarring of the house as the truck crashed into the front of it. To illustrate the point, would defendant also be liable to plaintiff's wife if she had watched from across the highway and suffered paralysis as a result of her fear for her family's safety? Nothing in the case would seem to prevent such a recovery. And what about the neighbor who also was watching and suffered a severe case of the hives resulting therefrom? The early South Carolina case of *Mack v. South Bound R. Co.*,[43] which permitted recovery by an infant of tender years who had enough presence of mind to crouch down between the tracks when defendant's negligently operated train passed over him, did not discuss the need for fear of physical harm to the plaintiff, but it was clearly apparent from the facts that plaintiff was put in fear of harm to himself. The present case is not so clearcut and leaves the door open for further inquiry.

41. 232 S. C. 593, 103 S. E. 2d 265 (1958).
42. PROSSER, LAW OF TORTS 181 (2d ed. 1955); Wambe v. Warrington, 216 Wis. 603, 258 N. W. 497 (1935).
43. 52 S. C. 323, 29 S. E. 905 (1898).

Liability of Occupant of Land to Persons Entering Thereon

In *Baker v. Clark*,[44] a directed verdict for the defendant department store owner was affirmed by the Supreme Court on the grounds that the plaintiff had assumed the risk or was at least contributorily negligent. Plaintiff, who was an occasional customer, was injured when she slipped down on defendant's floor which had just been polished and about which she had just been warned by defendant's clerk who had given plaintiff permission to use a toilet reserved for employees. Although there was conflict in the testimony as to exactly what the warning was, there was no denial of the fact that she was warned. The Court thus found it unnecessary to determine whether she was an invitee or licensee, holding that the duty to an invitee would be no more than to warn her.

Bowling v. Lewis[45] also involved the duty of the occupant of the premises to others coming on the premises. The United States Court of Appeals for the Fourth Circuit reversed the involuntary dismissal of plaintiff's action by the District Judge, holding that the evidence presented a question for the jury. Plaintiff, a guest in defendant's motel, was injured when he fell over a large rock on defendant's private sidewalk leading to plaintiff's motel room from the parking space to which he had been assigned. Plaintiff and his family had gone from the motel about 7:15 p.m. without incident; upon their return to the motel about two hours later, defendant had turned off all outside lights which left the walkway so dark that plaintiff remained in his automobile with the headlights on so that his wife and two small children could see to get to the room. After extinguishing the automobile lights, plaintiff walked on the same sidewalk to his room and tripped over the rock which had fallen from a two-foot wall alongside the sidewalk and built of loose coral rock without mortar. When the manager was told of the accident, he said he didn't know why the rocks had fallen out of the wall so much more this year. The Court found sufficient evidence of negligence in the fact that defendant knew that the rocks had been falling into the walk and the fact that defendant had cut all the outside lights to save expense because this was during an off-season and plaintiff was his only guest. Finding no South Carolina cases involving the duty of an innkeeper to his guests,

44. 233 S. C. 20, 103 S. E. 2d 395 (1958).
45. 261 F. 2d 311 (4th Cir. 1958).

the Court concluded it would certainly be no less than that owed by a merchant to a prospective customer: reasonable care to make the premises reasonably safe.

Manufacturer's Liability to Third Persons

In *Ford Motor Company v. McDavid,*[46] the United States Court of Appeals for the Fourth Circuit reversed the judgment for plaintiff on the grounds that a verdict should have been directed for defendant. Plaintiff was injured when riding as a passenger in his wife's automobile purchased from a dealer of the defendant. The automobile had been driven only 2600 miles when a front tire blew out because of excessive wear due to the misalignment of the front wheels. The Court found that the evidence of the misalignment having originated at defendant's factory was insufficient because it was undisputed that the dealer had replaced the power steering with which the car was equipped at the factory and that in so doing the alignment of the wheels would necessarily be involved. Furthermore, the automobile had been inspected several times by widely separated dealers, none of whom had noted any misalignment even though the car had been driven far enough before the last inspection that excessive wear on the tires would have been obvious to the most casual inspection. In a footnote discussing the dearth of South Carolina law relating to the tort liability of a manufacturer to a remote vendee for a product negligently made the Court concluded:

> In the light of what it has said, and at this late date, we would be wholly unrealistic if we assumed that the Supreme Court of South Carolina would now apply the unduly restrictive and long discredited limitation which recognizes no obligation of a manufacturer except to those in privity of contract with him claiming under a breach of warranty. See Pierce v. Ford Motor Co. 4 Cir., 190 F. 2d 910.[47]

Automobile Collisions

In *Smith v. Lynch,*[48] plaintiff's verdict for $45,000 actual and $500 punitive damages was affirmed by the Supreme

46. 259 F. 2d 261 (4th Cir. 1958).
47. *Id.* at 265, f. n. 3.
48. 232 S. C. 608, 103 S. E. 2d 54 (1958).

Court. Defendant's intestate had driven through an intersection of two U.S. highways without stopping, as she was required to do by the posted signs, and collided with plaintiff's intestate who was travelling on the intersecting highway. Plaintiff's intestate was killed instantly; defendant's intestate died three days later. Eye witnesses testified that neither automobile slowed down and that defendant's intestate had stated after the accident that she didn't see the stop sign. The Court held that plaintiff's intestate's contributory negligence was a question for the jury.

In *Green v. Boney*,[49] plaintiff's verdict for $12,500 actual and $2000 punitive damages was affirmed by the Supreme Court. Plaintiff and defendant were driving in opposite directions on the highway in daylight under optimum weather conditions. Plaintiff turned left to go to a small store when defendant's automobile collided with plaintiff's after defendant's skidded some 175 feet on the highway. Plaintiff was in defendant's lane when he was hit. There was evidence to the effect that defendant was driving at a very high rate of speed just a few minutes before the accident, and the Court held that the questions of negligence and contributory negligence were for the jury. The fact of defendant's having plead guilty of involuntary manslaughter in the death of plaintiff's passenger who was killed instantly was no doubt very persuasive evidence.

That circumstantial evidence of negligence may overcome the testimony of a witness to the contrary is illustrated in *Shepherd v. U.S.F.&G. Co.*,[50] in which plaintiff was involved in an auto accident with defendant's runaway auto. The last driver of defendant's auto testified she had parked the car in the carport with the parking brake set and with the automatic drive in "park" position. About an hour later the automobile had rolled out of the driveway which declines sharply to the street and collided with plaintiff in his automobile. At that time the automatic shift lever was in "neutral" rather than "park" and the brakes were not set, nor was the window up, as the driver had testified she had left them. The Court found these facts ample evidence to support the jury's verdict for the plaintiff, which was affirmed.

49. 233 S. C. 49, 103 S. E. 2d 733 (1958).
50. 233 S. C. 536, 106 S. E. 2d 381 (1958).

In *Spencer v. Kirby*,[51] in which plaintiff's intestate drove his car into a highway from his driveway on the defendant's right and crossed over to the defendant's left side of the road to travel in the opposite direction to defendant and collided head on with defendant who had swerved to the left in an effort to avoid plaintiff's intestate, the Court held that the question of negligence and contributory negligence was for the jury. Chief Justice Stukes dissented on the grounds that the evidence is susceptible of only one inference: that plaintiff's intestate entered the highway without stopping and got in the path of defendant's vehicle. He argues that decedent's violation of the statute requiring one entering the highway to yield the right of way would be as much recklessness as defendant's violation of the speed statute and would therefore bar plaintiff's recovery.

This raises the question which has often occurred: since the Supreme Court justices themselves disagreed as to what inferences may be drawn from the evidence, is this not the best evidence that the case should go to the jury on the grounds that reasonable men may disagree as to the inferences? Or, to state it another way, is it not inconsistent to say that only one reasonable inference may be drawn from the evidence, when members of the Supreme Court have themselves reached a different conclusion?

The U. S. Court of Appeals for the Fourth Circuit affirmed a judgment for the plaintiff in the case of *Nationwide Mutual Insurance Co. v. DeLoach*[52] in which the plaintiff suffered damage to his Volkswagen automobile as well as personal injuries when a state owned school bus turned suddenly to the left while he was passing it on the highway. The defendant contended that plaintiff's failure to sound his horn when passing was a violation of the statute and therefore negligence *per se*. The Court noted that the statute required sounding of the overtaking automobile's horn only when reasonably necessary to insure safe operation of the vehicle and held that the trial court was justified in concluding that there were no circumstances to require plaintiff's use of his horn in this case.

51. 234 S. C. 59, 106 S. E. 2d 883 (1959).
52. 262 F. 2d 775 (4th Cir. 1959).

In *Meek v. Harris*,[53] the Court of Appeals for the Fourth Circuit in a *per curiam* opinion held that testimony that defendant had operated his automobile at speeds of 70 to 75 miles per hour and on the wrong side of the road was sufficient evidence to meet the Guest Statute's requirements of recklessness or heedlessness. Plaintiff's judgment was affirmed.

In *Williams v. Ford*,[54] the Supreme Court affirmed the trial judge's granting of judgment for the defendant *n.o.v.* Plaintiff's decedent was killed when struck by defendant's truck on the highway. According to defendant's witnesses, plaintiff was struck when he staggered out into the highway in front of defendant's truck just as it turned out to the left to pass an automobile which turned off onto the right shoulder to avoid plaintiff's decedent. Plaintiff's contention was that the circumstantial evidence pointed to the decedent's having been run down from behind while walking on the shoulder of the highway facing oncoming traffic as the statute required. Defendant's truck driver's testimony was corroborated by the driver of the automobile which had pulled off on the right shoulder to avoid hitting decedent and by the driver of another truck following behind defendant's truck. Although the driver of the second truck was a friend of defendant's driver, the automobile driver witness was a stranger. Plaintiff had no eye witnesses and the Court held that the uncontradicted testimony of defendant's witnesses must prevail as against circumstantial evidence which was inconsistent therewith.

53. 256 F. 2d 579 (4th Cir. 1958).
54. 233 S. C. 304, 104 S. E. 2d 378 (1958).