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Torts

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TORTS

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Several torts cases during the period of this review presented novel questions for the Court's decision. Probably the most significant is *Hall v. Murphy*[1] in which the Supreme Court decided that a negligent defendant could be liable for pre-natal injuries to a viable child born alive. It was in 1958 that the Court decided that it would not allow a cause of action for the wrongful death of a child born dead. In the *Hall* case, the child was born prematurely and lived only four hours. The child's death resulted from injuries sustained in a collision between the automobile of the defendant and that which the mother of the decedent was riding.

The Court reviewed the change in the decisions over the past fifteen years concluding that in a majority of the cases arising during this period actions of this nature had been allowed. The Court noted that a few other jurisdictions have gone further and held that an action may be maintained even if an infant had not reached the state of a viable fetus at the time of the injury. It specifically reserved that question for the future. For a discussion of some of the factors in the Court's reasoning in this case, the reader is referred to this reviewer's comments in the Spring 1961 issue of the *South Carolina Law Quarterly*.[2]

The second landmark case decided during this period by the Court is the one of *Wallace v. A. H. Guion and Company*.[3] The defendant was engaged in excavating a large ditch in which to lay sewer pipe on property at the rear of the plaintiff's lot and within two hundred feet of his residence. In the course of his work the defendant exploded great amounts of dynamite or other high explosives which resulted in vibrations and shock or concussion waves which caused extensive damages to the plaintiff's home.

Plaintiff's complaint did not allege any negligence on the part of the defendant in the use of high explosives or the

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1. 236 S. C. 257, 113 S. E. 2d 790 (1960).
2. 13 S. C. L. Q. 394, at 396-397 (Spring, 1961).
3. 237 S. C. 349, 117 S. E. 2d 359 (1960).

manner of excavation. By demurrer the question was presented to the Court whether the plaintiff would have to establish negligence on the part of the defendant in order to recover for damage done to his property when no debris was cast upon the land of the plaintiff by the acts of the defendant. The Court followed the lead of the modern cases throughout this country and acknowledged that the defendant's conduct is so dangerous by its nature that, though such conduct is not illegal, it is only just that he pay for damages actually done to the property of others in the conduct of his business. The early South Carolina case, *Harris v. Simon*,[4] was distinguished from the principal case because in the *Harris* case the appeal was concerned solely with the *sufficiency of the evidence* of negligence, the plaintiff having undertaken to plead and prove negligence. The Court also referred to the case of *Momeier v. Koepig*[5] in which opinion it was said of the *Harris* case "that [it] apparently holds that in blasting cases proof of negligence is required to support a verdict for damages," and said the statement was not accurate and was to be disregarded as dictum. Perhaps the greatest significance of the *Wallace* case is that it clearly establishes the fact that South Carolina accepts the rule that liability for blasting is not predicated on negligence but is absolute.

In the case of *Pinkston v. Morrall*[6] it was determined that a city's liability for negligence of a truck driver employee, under the statute giving one injured by a motor vehicle engaged in the business of the city the right to sue the city, is limited to those situations in which the city's negligence is the *sole* proximate cause of plaintiff's injury. The plaintiff's complaint had alleged that his injury was by reason of the joint and concurrent negligence, carelessness and recklessness of the named defendant and the city. The Court found that it was not the intention of the legislature to abrogate the city's immunity in these situations. The case involved a discussion of the proviso to the statute permitting suit against a city which was added by amendment in 1949 and which reads as follows:

> . . . No recovery may be had hereunder if the plaintiff has brought about such injury, death or damage by his

4. 32 S. C. 593, 10 S. E. 1076 (1889).
5. 220 S. C. 124, 66 S. E. 2d 465 (1951).
6. 236 S. C. 601, 115 S. E. 2d 286 (1960).

negligence or negligently or carelessly contributed thereto or *if such plaintiff's injury or damage was brought about by the contributory negligence of any third person. . . .*[7] [Emphasis added.]

The italicized portion of the statute was the part which precipitated the issue in the case. The plaintiff had contended that the term "contributory negligence" in its usual legal context refers only to negligence of a plaintiff and therefore did not bar an action where the negligence contributed was by a joint tortfeasor. The Court said that it was convinced that this language was used to indicate that the legislature intended no action to lie unless the defendant municipality was *solely* responsible for the action because the contributory negligence of a plaintiff was expressly covered in the preceding provision of the Statute.

FRAUD

In the case of *Lancaster v. Smithco, Inc.*[8] the plaintiff, who purchased a house and lot from the defendant, sued in fraud because the general warranty deed made no reference to the fact that the defendant had given an easement ninety feet wide across the rear of the lot for the purpose of installing gas pipe lines to a public utility. The Court pointed to the fact that the gist of a tort action for fraud is intent to deceive. In this case the plaintiff had relied entirely on the absence of a reference to the easement as evidence of the defendant's intent to deceive. The Court noted the question was a novel one and held that a mere omission of a reference to the easement in the deed was not sufficient to establish the intent to deceive necessary to maintain an action for fraud and deceit and reversed plaintiff's judgment. The Court refused to express any opinion as to whether or not the evidence would justify finding a breach of warranty, having pointed out earlier that the information as to the easement was readily available to the plaintiff if he had checked the plat in the records at the courthouse.

In *Warr v. Carolina Power & Light Co.*[9] the plaintiff sold his land to the defendant power company for the purpose of planting and growing pine trees thereon. Later he dis-

7. *Id.* at 603, 115 S. E. 2d at 287 (1960).
8. 238 S. C. 15, 119 S. E. 2d 145 (1961).
9. 237 S. C. 121, 115 S. E. 2d 799 (1960).

covered that the real purpose for which the land was purchased was the creation of a lake to be used for power generating purposes. Plaintiff had been paid $43 an acre for several hundred acres. He learned that other parties in the area had been paid as much as $200 an acre for similar land which was to be used with plaintiff's for the lake site. Plaintiff brought this action in fraud and deceit contending the defendant's agent had misrepresented the purpose to which the land would be used and that he would not have sold it for the price he did if the true purpose had been disclosed to him. Plaintiff alleged that defendant's agent acted with the intention to deceive and that he was deceived by the misrepresentations of the defendant, that the plaintiff was damaged by such misrepresentations in that he sold the land for less than the defendant had paid for similar land. The demurrer having been overruled by the trial court, defendant appealed. The Court found the plaintiff's failure to allege facts which showed actual damage to the plaintiff sufficient to determine the case. The plaintiff had alleged that other persons had been paid a greater price for their land than the plaintiff had been paid for his even though the lands were bought for the same purpose by the defendant. The Court pointed out that this was no proof that the plaintiff received any less than what his land was actually worth. There was no indication that the plaintiff's use of his remaining land was in any way damaged by the purposes to which the defendant put the land that he purchased from the plaintiff, or that plaintiff would have received any benefit if defendant had used the land for planting trees as was represented to plaintiff.

In the case of *Outlaw v. Calhoun Life Insurance Co.*[10] the defendant demurred to the plaintiff's complaint in which it was alleged that the defendant had fraudulently obtained a release from the plaintiff for benefits due under a policy of insurance. The complaint alleged that the plaintiff had been presented with a release which did not indicate the amount of the settlement. She alleged that she signed believing it to be a receipt for the full amount of the accidental death benefits to which she was entitled under the policy for the death of her son. When the insurance company's draft was subsequently presented to her and she saw for the first

10. 236 S. C. 272, 113 S. E. 2d 817 (1960).

time the amount of the settlement, which was for natural death benefits and not the double indemnity amount, she then insisted that the release be returned to her and that the company take back the draft. This the company refused to do. The defendant demurred on the ground that the plaintiff had signed a valid release and that she was not a person incapable of reading and knowing the contents thereof. The trial court's overruling of the demurrer was sustained on this appeal on the ground that the complaint alleged that the plaintiff signed the release without having any means to ascertain from it the amount for which she was signing. The Court added that the defendants, if they presented the release to her without disclosing the exact amount of the settlement, had to do so knowingly and that this was in fact a misrepresentation. The Court took this occasion to reiterate the rule which it had stated earlier in the case of *Jones v. Cooper*[11] that one cannot complain of fraud in the misrepresentation of the contents of a written instrument when the truth could have been ascertained by reading the instrument.

DEFAMATION

In the case of *Renew v. Serby*[12] the Supreme Court reversed a judgment of $2,500 for the plaintiff for slander in which the defendant was alleged to have charged the plaintiff with unchastity, and was therefore actionable without proof of special damages. The appeal was on the ground that defendant's remarks were not susceptible of the inference that plaintiff was charged with unchastity. The language used by the defendant manager to the plaintiff, an employee of the defendant's garment manufacturing plant, was in the presence of two other employees, one male and one female. The defendant said of the plaintiff, "This is my girl," to which she replied "No, I'm not." A few moments later, defendant told plaintiff that she would have to work the next day and then continued, "You will have to break that date tonight," to which plaintiff responded that she was married and had a date every night. Defendant then said, "You go home and tell your husband he cannot have any of that stuff tonight, but you will work tomorrow."

The Supreme Court concluded that, "At their worst, they [the remarks of the defendant] could have been taken as

11. 234 S. C. 477, 109 S. E. 2d 5 (1959).
12. 237 S. C. 116, 115 S. E. 2d 664 (1960).

suggesting that she forego marital intercourse in favor of illicit relations with Serby."

At common law, to charge want of chastity to a woman is not actionable without a showing of special damages. Although not mentioned in the pleadings, nor in the order of the trial court refusing judgment n.o.v., nor in the Supreme Court's opinion, the plaintiff's action could be maintained only on the right granted by a statute[13] first enacted in 1824. The general rule in slander cases, contrary to that in libel cases, is that special damages must be shown unless the slander comes within one of four exceptions. In this case plaintiff failed to plead any special damages and therefore, when it was determined that defendant's remarks were not within the exception—here, accusing a woman of unchastity—he was unable to maintain the suit. Although it is not difficult to agree with the Supreme Court in this case that the language used by the defendant did not warrant an inference that the plaintiff was guilty of unchastity, it illustrates the kind of conduct which a defendant can engage in deliberately and with no motive other than an ulterior one, and still escape legal liability. Protection by the law of the right of persons such as the plaintiff to be free from embarrassments such as the defendant subjected her to, would tend to keep down breaches of the peace. It is somewhat surprising that this incident did not precipitate a physical attack by the husband of the plaintiff on the defendant when the plaintiff and her husband returned to the plant to inquire about the defendant's having said what the plaintiff charged him with having said.

In *Costas v. Florence Printing Co.*[14] the plaintiff, who was the operator of a drive-in restaurant located just east of the city of Florence, contended that his reputation was damaged by an article in the defendant's newspaper. The article complained of was one reporting the fact that there had been two youths arrested for disorderly conduct at the place of business of the defendant. It also referred to the fact that these two youths had earlier been charged with armed robbery. The trial court overruled the defendant's demurrer and the defendant appealed on the grounds that the language used was not susceptible of any inference which would be damag-

13. CODE OF LAWS OF SOUTH CAROLINA § 10-2591 (1952).
14. 237 S. C. 655, 118 S. E. 2d 696 (1961).

ing to the plaintiff and his business. The Supreme Court reversed, using the following language:

> We have examined the alleged libelous article set forth in the complaint herein and it contains no statement from which it could be reasonably implied that the respondent had any connection with the arrest made at his place of business; nor does it impute to him or any of his employees any wrongdoing or condonation of wrongful conduct. Certainly, the words complained of do not charge the respondent with any crime, nor with the operation of a disorderly place of business.[15]

The plaintiff pleaded no extrinsic circumstances which gave any special meaning to the article as published and the Court said that the language would therefore be taken in its usual meaning. It could find nothing defamatory and held that the demurrer should have been sustained.

Holding that a qualified privilege is a matter of defense and not available on a demurrer to an action for libel, the Supreme Court, in *Porter v. News & Courier Company*,[16] affirmed the trial court's overruling of the defendant's demurrer. The Court also found that the story published by the defendant could reasonably be understood to have charged the plaintiff with larceny or breach of trust when it recounted his having been erroneously paid more than the amount of a check he cashed at a store, his subsequent use of the excess money, his prosecution therefor and his prompt acquittal. Such a charge was libelous *per se*, it not being necessary to charge one with a crime by name.

INDEPENDENT CONTRACTOR

In the federal case of *South Carolina Natural Gas Company v. Phillips* [17] the plaintiff sought to recover for damages to its property suffered as a result of an explosion and fire which occurred when an independent contractor, King, was undertaking to remove earth from the plaintiff's right-of-way above the plaintiff's natural gas pipeline. The defendant was a general contractor for a housing development for the Air Force at its Charleston Air Base. The defendant had let a sub-contract to King to do grading and filling necessary

15. *Id.* at 662-663, 118 S. E. 2d at 699 (1961).
16. 237 S. C. 102, 115 S. E. 2d 656 (1960).
17. 289 F. 2d 143 (1961).

on the housing site. There was nothing in the contract between King and the defendant specifying the source from which the sub-contractor was to acquire the fill. On his own initiative the sub-contractor obtained from the South Carolina Public Service Authority permission to remove certain earth which was under the power transmission lines of the Authority along its one hundred foot wide right-of-way paralleling the western boundary of the construction site. In attempting to remove the earth fill the sub-contractor's servants, operating a thirty-ton pan earth remover, went beyond the right-of-way of the Authority onto an adjoining one hundred foot right-of-way of the plaintiff which also carried electric power transmission lines overhead. There were no signs or markers indicating the presence of the gas transmission line beneath the surface and neither King nor his servant had actual knowledge of its presence. The sub-contractor's servant ruptured the gas line when he scraped it with the blade of the machine and caused a spark sufficient to ignite escaping gas. At the trial in the federal district court, in which King was not made a party because as to him there was no diversity of citizenship, the jury rendered a verdict for the defendant.

The principal question at issue was the responsibility of the defendant for the acts of the sub-contractor in damaging the property of the plaintiff. On appeal, the court of appeals affirmed the judgment below holding that there was no right of control nor any exercise of actual control of the sub-contractor by the defendant employer, and since the nature of the work to be done by the sub-contractor was not ultra hazardous, the non-delegable duty exception did not apply. As the Court pointed out in its opinion, the great damage suffered by the plaintiff was not as the result of any risk inherent in the nature of the work done, but was the result of a risk collateral to the fulfillment of defendant's purposes. The Court found it unnecessary to decide whether a trespass was committed by the sub-contractor in going onto the right-of-way of the plaintiff. Since trespass requires a violation of a possessory right (except perhaps for members of the possessor's household), there would seem to be no standing on the part of the plaintiff to maintain an action for trespass against the sub-contractor, because it held only an easement. The fee belonged to the United States. Not having obtained

permission from the government to remove the earth, absent any implied permission, King was a trespasser against the government, but this did not make him a trespasser as to all the world.

In his dissenting opinion, Judge Soper said:

> King took no pains to discover the identity of the true owner, as he was bound to do, and consequently he was a *trespasser ab initio* and liable for the injuries caused by his negligence in the performance of a tortious act.[17a]

As early as 1610 the *Six Carpenters' Case*[18] spelled out the requirement that to have a *trespass ab initio* the entry must have been under a privilege granted by law as distinguished from a license granted by the possessor. In the first instance, tortious conduct by a party entering under a privilege vitiates the privilege and he is a *trespasser ab initio*. In the instance of tortious conduct by one entering under a license granted by a private party, he becomes a trespasser only as of the time of the breach of the license. In this case King entered under a license granted by the government in order to do work on its premises, rather than a privilege granted by law, therefore his tortious act in exceeding the limits of the license would make him a trespasser at that time but not from the beginning, or *ab initio*. But a trespass by King against the government as the fee holder, whether *ab initio* or not, has no relevance to this case. Even if plaintiff had suffered injury to his person he would not be within the class to whom the trespasser would be liable unless he was a member of the possessor's household or otherwise closely identified with him. Any trespass to plaintiff's chattel (the pipeline) requires physical damage, which there obviously was, but also requires intent on the trespasser's part.[18a] Since there was nothing to indicate any intent to damage the pipeline, there would seem to be no reason at all for any application of trespass, either to land, chattel, or person. Why the dissent would seek to stretch the ancient

17a. *Id.* at 152 (1961).
18. 8 Co. 146a (1610).
18a. "Under the principle of law that allows recovery for a trespass to chattels, it is necessary that the defendant have acted for the purpose of interfering with the chattel, or what is almost the same thing, that he have acted with knowledge that such would be the result of his conduct. In other words, he must have intended the intermeddling." HARPER AND JAMES, LAW OF TORTS § 2.5 (1956).

doctrine of *trespass ab initio*[18b] to make it apply in this case is hard to understand. The responsibility of the general contractor for the delicts of the sub-contract is the same in the case of trespass or negligence.

The real issue on appeal was the defendant's degree of control over King. The dissent finds that defendant "had prior knowledge of King's act and expressly consented thereto and accepted the fruits thereof." For support it quotes from the deposition of King (which was not in evidence) that he told the two superintendents of defendant where he intended to get the earth fill. But the dissent apparently overlooked the fact that King also told the superintendents that he would not start the work until he had a letter of permission from the Public Service Authority. A careful reading of the transcript discloses no evidence to support a conclusion that defendant's superintendents knew that the letter of permission was not ample authority for King's removal of the fill from the area under plaintiff's transmission lines.

MANUFACTURER'S LIABILITY

In *Beasley v. Ford Motor Company*[19] the Supreme Court reversed a judgment for the plaintiff in an action in which the plaintiff, wife of the purchaser of a new automobile, allegedly received injuries from the fact of the automobile's catching fire while being driven to a football game. None of the passengers in the automobile received any critical damages at that time. The fire was under the hood and was alleged to have caused the plaintiff such fright that she suffered nervousness and other symptoms such as nightmares and a fear of automobiles. The suit was for $10,000 actual and punitive damages, but on a motion by the defendant, consented to by the plaintiff, the issue of punitive damages

18b. For recurring criticism of this doctrine see Reporter's Notes, RESTATEMENT, (SECOND) TORTS § 214 (1958), Tentative Draft No. 2: 5. Finally, the disapproval of the whole doctrine by Mr. Justice Stone in McGuire v. United States, 273 U. S. 95, 47 S. Ct. 259, 71 L. Ed. 556 (1927); and by Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 469 (1897); Ames, History of Trover, 11 Harv. L. Rev. 277, 287 (1898); Pollock, Torts (13th ed.) 411-13; Salmond, Torts (7th ed.) 245. ("It is to be regretted that a legal fiction due to the misplaced ingenuity of some medieval pleader should have thus succeeded in maintaining its existence and oppressive operation in modern law"); Bohlen, Effect of Subsequent Misconduct Upon a Lawful Arrest, (1928) 28 Col. L. Rev. 841, 846-851.

19. 237 S. C. 506, 117 S. E. 2d 863 (1961).

was withdrawn from the jury. Nevertheless, a verdict of $10,000 actual damages was returned. The trial court reduced the verdict to $7,500 by order *nisi*. Although it is obvious from the Court's opinion that the evidence of any negligence on the part of the manufacturer was very slight indeed, there was testimony by the plaintiff's husband, purchaser of the automobile, that the defendant's representatives had made admissions of its fault in the manufacture or inspection of the automobile resulting in the fire. The Court commented that no objection had been made to the admission of this testimony of the plaintiff's husband. In conclusion it set aside the verdict as excessive and thus not responsive to the evidence in the case and granted a new trial absolute.

In the case of *McLain v. Carolina Power and Light Company*[20] the district court directed a verdict for the defendant and upon appeal to the court of appeals it was affirmed. The plaintiff was an employee of a construction company which had a contract with the defendant to rebuild certain power lines from the defendant's main distribution line to a cotton gin operated by a customer of the defendant. The plaintiff was on the top of the pole installing new lines among existing lines which were "hot," as he knew. He was injured by coming in contact with one of the "hot" lines. The court recites the facts that established that the new power lines on which the plaintiff was working while atop the pole could not have been energized from the defendant's lines. Without reviewing this evidence it is sufficient to say that the evidence as recited by the court leaves no doubt that the directed verdict was the proper judgment in this case. It should be added that the plaintiff had previously recovered full benefits under the Workmen's Compensation Act against his immediate employer who was the construction company doing the work for the defendant.

TRAFFIC ACCIDENTS

Deece v. Williams[21] is a case involving the negligence of the Highway Department in the operation of a motor vehicle on the highway. The plaintiff was seated in his car which was standing behind another vehicle awaiting the opportunity to proceed up a snow covered hill when the defendant's snow-

20. 286 F. 2d 816 (1961).
21. 237 S. C. 560, 118 S. E. 2d 330 (1961).

plow, coming from the opposite direction, stopped in the downhill lane approximately opposite the plaintiff. This was some two hundred feet below the crest of the hill. A flagman from the snowplow had been sent to the crest of the hill to give warning to the oncoming motorists of the blocked road condition, but before he reached the crest of the hill or at the time he reached the top of the hill, a tractor-trailer driven by one Williams came up the hill at such speed that it was unable to stop when it was close enough to receive the warning from the flagman. As a result, it collided with the back of the truck-snowplow causing it to collide with the plaintiff's parked car on the other side. In a suit against the defendant Highway Department and the tractor-trailer, the jury brought in a verdict for the plaintiff against both defendants. The Highway Department appealed on several grounds. One ground was that the negligence of the defendant snowplow in stopping where it did was not the proximate cause of the plaintiff's injury because the intervening negligence of the tractor-trailer driver was sufficient to break the chain of causation in causing the injury to the plaintiff. Also that the stopping of the snowplow at the point below the crest of the hill was not negligent in that they had no reason to anticipate the truck coming over the hill at such a speed that it would not be able to stop before colliding with that vehicle. The Highway Department also argued that it was not liable under Section 33-229 of the CODE OF LAWS OF SOUTH CAROLINA, 1952, in that the alleged negligence of the defendant was a failure to give adequate warning to the oncoming traffic to avoid the accident, while the statute provides only for liability in connection with the repair of the construction of the streets or highways. The Court answered this argument with ". . . it is the duty of the Department to keep its highways in reasonably safe condition for travel and to erect and maintain such signs of warnings as may be reasonably necessary to enable the users of the highways, exercising ordinary care and prudence, to avoid injury to themselves and others."

There was a discussion of the law regarding the form of the verdict and the rule in this state which permits the jury to apportion the damages among joint tortfeasers which is of general interest but which is not within the scope of this particular review.

In the case of *West v. Sowell*[22] a verdict and judgment for the plaintiff was affirmed on appeal. Plaintiff was driving his car along the highway going to work following a truck driven by a servant of the defendant when the truck pulled to the left of the center line just far enough for his left wheels to cross the line and then made a quick cutback to the right turning into a road going off to the right at the intersection without giving any proper signal to the following motorist, the plaintiff. There was a conflict in the testimony between the plaintiff and the defendant as to the exact position of the vehicles when they collided and as to the signals given and other circumstances with regard to the accident. However, nothing in this case warrants any comment other than it is a routine traffic accident dispute.

In the case of *Hucks v. Sellers*[23] the plaintiff was injured in an automobile collision resulting from his car being struck by a truck driven by the defendant when the plaintiff undertook to pass the defendant's truck and a second truck which had been following immediately behind the defendant's truck. Plaintiff's testimony was that he had been following some little distance and he pulled out beyond the center line so as to see if there was any oncoming traffic. Seeing none he undertook to pass. When he finished passing the first truck and before he could reach the second truck it turned to the left without giving any signal and in an effort to avoid a collision plaintiff pulled off to the left. The two vehicles collided and plaintiff was seriously injured. The verdict and judgment for the plaintiff was appealed by the defendant on the grounds that the plaintiff was guilty of contributory negligence as a matter of law in that he had tried to pass within one hundred feet of an intersection as prohibited by statute.[24] The Court answered that the evidence was susceptible of the inference that plaintiff would have passed the defendant more than one hundred feet from the intersection if the truck had not borne to the left and struck it. The judgment was affirmed.

Guest Statute

Fuller v. Bailey[25] was an action by the plaintiff for the wrongful death of his wife caused by the overturning of an

22. 237 S. C. 641, 118 S. E. 2d 692 (1961).
23. 236 S. C. 239, 113 S. E. 2d 753 (1960).
24. CODE OF LAWS OF SOUTH CAROLINA § 46-388(2) (1952).
25. 237 S. C. 573, 118 S. E. 2d 340 (1961).

automobile belonging to the defendant and in which the defendant and the deceased's wife had been riding when the accident occurred. There was no direct evidence as to who was driving the automobile at the time of the accident. Although the defendant survived he had no recollection of the accident at all; therefore, his testimony could go no further than his recollection: sometime prior to the accident. However, the Court found the following circumstances to be sufficient to support an inference by the jury that the owner was the driver of the car: the fact that the defendant was the owner; that he kept his car in good condition; that there was testimony that he never let others drive it; that deceased did not like to drive an automobile; and that the deceased and the defendant were seen half an hour before the accident and, at that time, the defendant was driving with the deceased seated in the front seat with him. Further evidence to support this inference was that the deceased's body showed that she had collided with the radio which was mounted in the right side of the dashboard, that the defendant was thrown clear of the automobile when it overturned and that the left front door was torn from the car. The Court also found ample circumstantial evidence as to the necessary recklessness and heedlessness of the defendant in causing the accident from the facts that the automobile overturned several times, was thoroughly damaged on all four sides as well as the bottom and top; and that it had left the highway on a curve of which there was specific notice given by a flashing warning light. A verdict of $2,000 actual damages was set aside by the trial Court as being inadequate and a new trial was granted. On appeal the Supreme Court affirmed finding no abuse of discretion. The deceased was a woman thirty-nine years old, the mother of several children, and there was testimony that she had a life expectancy in excess of thirty years and that she had been a good mother and wife.

In the case of *Williams v. Clinton*[26] a directed verdict for the defendant was affirmed by the Supreme Court. The plaintiff was seeking damages for the wrongful death of a ten year old boy who was killed when riding a bicycle from an intersecting road into the state highway on which the defendant was traveling in an automobile. The testimony was that the deceased rode on his bicycle into the highway

26. 236 S. C. 373, 114 S. E. 2d 490 (1960).

from a lane running at right angles to the highway and which was bordered for some distance by a high hedge which prevented his being seen from the highway. The Court concluded that the physical facts supported only one reasonable conclusion and that was that the decedent's death was caused by his own contributory negligence in riding into the highway at a fast pace without stopping to look before entering it.

Green v. Bolen[27] is a case in which the defendant's appeal was on the grounds that plaintiff was contributorily negligent as a matter of law. Plaintiff was injured by defendant's dump truck loaded with dirt which was being backed upon a roadway being extended into the swamp for logging operations. The plaintiff was working as a flagman for a skidder and was engaged in giving signals to the skidder from those received from men in the swamp out of which they were hauling logs by means of a winch and cables. While the plaintiff had his back turned and was absorbed in the business of conveying signals to the skidder, the defendant's truck was backed along the roadway and into the plaintiff who was standing in a loading area along the roadway. The defendant contended that the plaintiff was guilty of contributory negligence in that he failed to be aware of the presence of the truck. The Court pointed to several cases in which it has been held that the failure of one to be aware of the presence of a truck backed up onto him when he was concentrating on the job he was doing was not contributory negligence. Concluding that the evidence was sufficient to go to the jury the Court affirmed the judgment based on the verdict of the jury.

The case of *Williams v. Kalutz*[28] involved an accident between a pedestrian and an automobile at an intersection in the city of Columbia. The plaintiff appealed from a verdict for the defendant. The appeal was on the ground that the trial court erred in refusing to peremptorily instruct the jury that the undisputed evidence showed liability on the part of the defendant. The Supreme Court reviewed the evidence and noted that the testimony of one of plaintiff's witnesses contradicted to some extent the plaintiff's own testimony as to how the accident occurred. The plaintiff had testified

27. 237 S. C. 1, 115 S. E. 2d 667 (1960).
28. 237 S. C. 398, 117 S. E. 2d 591 (1960).

that the defendant made a left turn cutting the corner at great speed and that this caused him to step back which in turn caused him to lose his balance and that as a result he collided with the car. The Court pointed to the fact that it was undisputed that the defendant's automobile never touched the body of the plaintiff, that the plaintiff had put out his hand and touched the automobile. After emphasizing the law that one who has the right of way, which the pedestrian-plaintiff here undoubtedly did, is not relieved of his duty to exercise due care under the circumstances, the Court held that there was ample evidence of the plaintiff's contributory negligence to take the case to the jury. The judgment was affirmed.

In the case of *Flynn v. Carolina Scenic Stages*[29] a widow, eighty-one years of age, in good health but with impaired hearing alighted from defendant's bus onto the shoulder of the highway and then attempted to cross the highway in front of the bus to her destination and was run over and killed by the bus when it started off to continue on down the highway. The trial court granted a non-suit upon the grounds (1) that there was no proof of negligence on the part of the defendant, and (2) that plaintiff's intestate was guilty of contributory negligence as a matter of law. On appeal by the plaintiff the Supreme Court reversed and remanded the case for a new trial. The following quotation from the case gives a summary of the Court's reason for reversal:

> It may be reasonably inferred that the driver violated Section 2.10 of the safety regulations issued by the Public Service Commission, Volume 7, page 771 of the 1952 Code, which provides: 'No motor vehicle shall be set in motion until due caution has been taken to ascertain that the course is clear.' It is for the jury to say whether due to her impaired hearing the decedent heard the driver's admonition to go around the back of the bus and after giving this admonition whether the driver was negligent in not thereafter observing the movements of decedent, particularly in view of her age. Since it was raining and the dirt shoulder of the road was wet and perhaps slippery, a jury could reasonably conclude that the driver should have considered the possibility that decedent might

29. 237 S. C. 340, 117 S. E. 2d 364 (1960).

> cross in front of the bus. A factual issue is also presented as to whether the driver should have seen the deceased as she passed the side door of the bus and went around in front of it. . . . . If there were circumstances justifying a failure to see her, they should be known to the driver, but he has not testified.[30]

As in all cases of a non-suit, the evidence was considered in the light most favorable to the plaintiff.

In the case of *Indemnity Insurance Co. of North America v. Odom*[31] the plaintiff had paid a $10,000 claim for the death of an employee of Ballinger Electrical Contractors under the Workmen's Compensation Act and having been subrogated to the rights of the decedent-employee brought this action for the decedent's wrongful death against defendant and his tractor-trailer truck. Without discussing the novel Workmen's Compensation aspects of the case which are covered in the review under that subject, the tort issues involved the question of imputing the negligence of the driver of the vehicle in which the decedent was a passenger and the decedent's own contributory negligence.

The deceased was riding in the back of a pickup truck which had been arranged by the employer for the transportation of workers from their places of residence to the job site. The back of the truck had been enclosed in canvas and tin, leaving only a small rear window and a little window to the front. The deceased was riding in the back of the truck which was driven by the foreman of his job when it collided with a tractor-trailer driven by the defendant. The jury was instructed to find a general verdict and in addition to answer the following special issue: "Was the death of C. Earl Lyda caused or brought about through contributory negligence or contributory wilfullness by C. H. Rogers, the driver of the pickup truck in which the deceased was riding?" The jury answered this question in the affirmative. Defendants contended that since the deceased was riding together with other employees in a vehicle in the course of their employment, this made them participants in a joint enterprise. Thus, having a common interest, any negligence on the part of the driver must be imputed to the other employees. The Court recognized that there are some decisions which uphold this

30. *Id.* at 347, 117 S. E. 2d at 367-368 (1960).
31. 237 S. C. 167, 116 S. E. 2d 22 (1960).

view but noted the great weight of authority to the contrary and then quoted from the Restatement of Torts[32] which also expresses a contrary view. Concluding that the driver in this instance was a vice-principal or alter-ego of the employer, and that therefore the deceased certainly had no voice in the control of the truck nor did he have an equal right with the driver to direct its movements, the Court found it unnecessary to resolve the conflict of authority upon the question of the joint enterprise arising out of the mere use of the vehicle in the course of employment as the defendant had contended.[33]

The defendant also argued that the deceased had been negligent in his failure to keep a look out and use care for his own protection. The Court answered this by pointing out that there was no evidence that the decedent had any reason to doubt the competency of the driver nor did he have any choice as to the place in which he was riding in the truck since the cab was filled with other people and the only space left was in the back of the truck. The Court sustained the ruling of the trial court that as a matter of law the negligence of the driver could not be imputed to the deceased. It also sustained the ruling by the trial judge that there was no evidence of contributory negligence to submit to the jury.

In the case of *Roscoe v. Grubb*[34] plaintiff received a verdict for $17,500 actual damages in a wrongful death action against the defendant arising out of an automobile accident. The trial court reduced the verdict by $3,500 and defendant appealed. The plaintiff's intestate died on August 3, 1957. The automobile collision occurred on August 9, 1956. The sole question on appeal was whether the decedent's death was proximately caused by the negligence of the defendant resulting in the automobile collision. The testimony showed that the plaintiff was a man some sixty-three years of age, and that he had been in rather poor health prior to the time of the accident. He was diabetic, as well as suffering from arteriosclerosis. The evidence showed that the intestate's injuries were trivial but that beginning at the time of the accident, he constantly worried about the accident and especially the inability to reach a settlement over it. "Accord-

32. § 491(d) (1934).
33. For an excellent discussion of the South Carolina law on imputed negligence see DOAR, IMPUTED NEGLIGENCE IN SOUTH CAROLINA, 11 S. C. L. Q. 195 (1959).
34. 237 S. C. 590, 118 S. E. 2d 337 (1961).

ing to Dr. Perry, Mr. Huntley's symptoms, other than those of general deterioration as the result of diabetes and arteriosclerosis, were primarily those of emotional instability and worry."[35] On November 2, 1956, the intestate was brought to the doctor's office showing signs of coronary heart attack. From that time on his deterioration was rapid until it resulted in his death nine months later. During this period his mental deterioration was complete; so much so that he made groundless accusations against his wife; would get lost in his own home; would at times wander into the highway and had to be constantly attended. In answer to a question at the trial, the doctor testified that in his opinion, the accident accelerated the time of the decedent's death. The Supreme Court reversed the judgment for the plaintiff and entered judgment for the defendant finding the evidence insufficient to support a verdict in favor of the plaintiff. The plaintiff had relied upon the case of *Padgett v. Colonial Wholesale Distributing Co.*[36] in which the defendant was held liable for physical injury brought on by emotional distress which resulted from the negligent acts of the defendant, even though there was no physical impact. The Court distinguished the *Padgett* case on the ground that the plaintiff's fright in that case was "a natural, immediate, and foreseeable result of the negligent operation of the defendant's truck whereby it crashed into the plaintiff's home. . . ." while in this case, the plaintiff's injury was a trivial bruise and indicated no shock, fright or emotional upset as a result.

> The worry that respondent would couple to appelants' negligent act so as to make that act the proximate cause of the death of his intestate concerned not the negligent act itself but the decedent's impatience or dissatisfaction with the progress of negotiations or litigation looking to settlement of his claims, which included a claim for damage to his automobile. To uphold his contention would be to extend the concept of proximate cause far beyond the scope contemplated in the *Padgett case* or any other precedent in this jurisdiction, and, we think, beyond reason.[37]

In support of the above conclusion the Court pointed to the fact that the doctor testified that the deceased's "acci-

35. *Id.* at 592-593, 118 S. E. 2d at 338 (1961).
36. 232 S. C. 593, 103 S. E. 2d 265 (1958).
37. 237 S. C. at 595, 118 S. E. 2d at 339 (1961).

dent" accelerated the process of arteriosclerosis with consequent deterioration and ultimate death, rather than his "injuries" received in the accident. This distinction is significant in the context of the testimony in this case, as the opinion points out, but it would be unfortunate for the distinction to be seized upon in subsequent cases to create a difference where there is none. Perhaps the following additional quotation from the testimony of the deceased's doctor will make more obvious the context in which the Court found the distinction.

> Q. I see. So on October 1st you thought he was doing very nicely.
>
> A. Yes, sir.
>
> Q. And as a matter of fact at that time he was entirely symptom free, wasn't he?
>
> A. As far as his physical symptoms were concerned, yes, sir.
>
> Q. In other words you mean by that as far as his physical condition was concerned he was all right so far as you could see?
>
> A. So far as his physical condition was concerned at that time I would have to say he was in pretty good shape, sir.
>
> Q. Right. That was October 1st.
>
> A. Yes, sir.
>
> Q. Wasn't it with reference to that same date, October 1, 1956, that you made the statement that he was in as reasonably good a condition—was in a reasonably good physical condition for a man of his age?
>
> A. Yes, sir.
>
> Q. Considering what you knew of his past record and so forth?
>
> A. Yes, sir.
>
> Q. So I take it, Doctor, that as of that October 1st date you felt pretty good about the whole thing and thought that things were working along all right?
>
> A. I felt reasonably good, yes, sir.
>
> Q. So then you didn't have occasion to see him again until he had an attack of some kind on the second of November, isn't that right, sir?
>
> A. That is correct I believe, sir.[38]

38. Record, p. 36.