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TORTS

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In some of the more important torts cases decided during this survey period, the South Carolina Supreme Court recognized the right of an administrator to bring a wrongful death action on behalf of an unborn viable infant, judicially defined the term "unavoidable accident," interpreted the statutory requirement that for an arrest to be made lawfully without a warrant the alleged offense must have occurred in the presence of the arresting officer, and construed "malicious prosecution" to include continuation as well as institution of the prosecution. Also, in district court opinions, the term "social guest" was defined for the first time in South Carolina, and a new exception was established to the general rule that a civil action may not be based upon perjured testimony.

I. PHYSICAL HARMS

A. Prenatal Injuries

Fowler v. Woodward,[1] a case in which a wrongful death action was brought on behalf of an unborn viable infant, was a case of first impression in the Supreme Court of South Carolina. Citing *Hall v. Murphy*[2] as "plenary authority that a viable fetus, 'having reached that period of prenatal maturity where it is capable of independent life apart from its mother, is a person,'" the court reached a decision in line with the change taking place with respect to injuries to unborn infants. It held:

> Since a viable child is a *person* before separation from the body of its mother and since prenatal injuries tortiously inflicted on such a child are *actionable*, it is apparent that the complaint alleges "*such an act, neglect or default*" by the defendant, to the injury of the child, as would have entitled the child "to maintain an action and recover damages in respect thereof . . . if death had not insued." By the very terms of the statute,[3] this is the test of the right of an administrator to maintain an action for wrongful death.[4]

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1. 244 S.C. 608, 138 S.E.2d 42 (1964).
2. 236 S.C. 257, 113 S.E.2d 790 (1960).
3. 244 S.C. 608, 613, 138 S.E.2d 42, 44 (1964).
4. S.C. CODE ANN. §§ 10-1951 to -1956 (1962). See Gregory & Kalven, CASES AND MATERIALS ON TORTS 3 (1959), and 2 Harper & James, TORTS § 18.3 (1956).

This decision was anticipated by the majority of the United States Court of Appeals for the Fourth Circuit in their opinion in the similar case of *Todd v. Sandridge Constr. Co.*[5] A group of comments on the *Fowler* case was recently published in the *South Carolina Law Review*.[6]

B. Choice of Law in Interspousal Tort Actions

In the case of *Oshiek v. Oshiek*,[7] a wife brought an action in South Carolina against her husband, the driver of an automobile in which she had been injured in Georgia. Both parties were domiciled in South Carolina. The supreme court sustained the husband's demurrer applying the general rule that:

> [W]here an action is brought in one jurisdiction for a tort committed in another, all matters relating to the right of action are governed by the *lex loci delicti*. That law determines whether a person has sustained a legal injury. The actionable quality or nature of acts causing bodily injuries as tortious is therefore to be determined by references to the *lex loci delicti* rather than the *lex fori*.[8]

In a recent comment on the *Oshiek* case,[9] it is pointed out that the personal immunity of the husband at common law is based on a public policy of preserving domestic peace and tranquility, on the subordinate economic status of wives at common law and on the federal constitutional principle of full faith and credit. Attention is called to emancipation statutes[10] establishing in South Carolina a strong public policy of allowing interspousal civil actions, to the fact that in most cases the husband carries indemnity insurance, and to the possibility that the domicile state may be left to foot the bill and the recommendation is made that a weighing of the contacts, interest and policies of the two states involved should favor the bringing of such an action under the law of South Carolina.

C. Causation

In *Wade v. Coplan*,[11] an action was brought by a meat cutter against his employer of nineteen years to recover damages for

5. 341 F.2d 75 (4th Cir. 1964).
6. See Figg, Barnwell, Taylor, and Haimbaugh, *Comments on Fowler v. Woodward*, 16 S.C.L. REV. 439 (1964).
7. 244 S.C. 249, 136 S.E.2d 303 (1964).
8. *Id.* at 252, 136 S.E.2d at 305.
9. See 17 S.C.L. REV. 305 (1965).
10. S.C. CODE ANN. § 10-216 (1962).
11. 246 S.C. 6, 142 S.E.2d 201 (1965).

personal injuries. While working alone in a walk-in refrigerated cooler which the plaintiff was responsible for keeping in good condition, the plaintiff, while trying to hang a beef on an overhead block, slipped and sustained a hernia allegedly as a result of the defendant's failure to provide a safe place to work. The complaint alleged that other employees under the defendant's direction, in wetting and icing produce for storage, caused the floor of the refrigerator to become wet and slippery, and cluttered with fragments of produce and humps of ice. The defendant successfully appealed a trial court decision in favor of the plaintiff.

A fellow employee of the plaintiff's testified that prior to the accident he had carried into the cooler sacks of produce which had been dripping water. The witness also testified to the unusual presence in the cooler of a wire buggy through which fragments of ice must have fallen to the floor. The plaintiff testified that the floor of the cooler "was not wet," that it was so foggy in the box that he could not see the floor, and that the only thing he knew was that he slipped. He further testified that on the night before the accident he had performed a customary task of cleaning the floor of the cooler and putting down fresh sawdust to absorb any excess moisture and increase traction.

The supreme court found that there was nothing to suggest that enough water, ice or vegetable fragments had fallen upon the fresh sawdust to wet the floor or to make it slippery or hazardous and that therefore a decision that plaintiff's fall resulted from the presence of water, ice or debris on the floor would of necessity rest upon conjecture rather than evidence. It held that the evidence, viewed in the light most favorable to the plaintiff, was not sufficient to raise a jury issue as to causitive negligence of the defendant.

The case of *Grantham v. Fishing Boat Redwing*,[12] was brought by the libellant under the Jones Act[13] for the wrongful death of his decedent who drowned while serving as a member of the crew of respondent's fishing boat and as he bathed in a tidal river beside the docked boat. The district court found as a matter of fact that:

> [I]f there were life jackets aboard, they were not accessible, and the record reveals no knowledge on the part of the crew

12. 234 F. Supp. 89 (E.D.S.C. 1964).
13. 45 U.S.C. § 51 (1954).

> was had as to their whereabouts. No drills or instructions were given the crew, and no equipment was in either purse boat. At the time of the fatality neither Captain nor mate was supervising.[14]

The court then found as a matter of fact and law that the aforementioned acts of negligence were the sole cause of the decedent's death and proceeded to quote from the case of *Sadler v. Pennsylvania R.R.*[15]

> One cannot escape the conclusion that the drowning of the decedent was a wholly unnecessary tragedy, and that, with decedent struggling in the water and calling for help and with a half dozen or more employees trying to help him, he could have been saved if adequate lifesaving equipment had been at hand .... [I]t is of the utmost importance that lifesaving equipment be placed where it will be needed and where in case of the excitement of an emergncy such as existed here it will not be overlooked.[16]

In *Whaley v. McAteer*,[17] the car of one Dixon (who made a payment to the plaintiff under a covenant not to enforce a judgment) struck the rear of the defendant's car as both were proceeding southward. Both cars came to rest in the southbound lane of the roadway with the Dixon car behind and to the north of the defendant's car. Shortly after the collision, the plaintiff was injured when the automobile in which she was riding came on the scene travelling south and struck the Dixon car in the rear. The trial judge directed a verdict for the defendant on the ground that the plaintiff failed to show any actionable negligence on his part and the plaintiff appealed. The court affirmed on the grounds that there was (1) a total absence of evidence to sustain the claim that the defendant had caused the initial collision by failing to give proper warning and (2) that in view of the only reasonable inference from the record that the wreck would have happened even if the defendant had moved his vehicle before the plaintiff's car arrived, the defendant's failure to move it—the only other negligence complained of—was not causal.

14. *Supra* note 12, at 91.
15. 159 F.2d 784 (4th Cir. 1947).
16. *Id.* at 786.
17. 245 S.C. 592, 141 S.E.2d 816 (1965).

D. Joint Tort-Feasors

In *Simmons v. Fenters*,[18] it was held that a plaintiff, who sustained injuries and damages in a collision which resulted from the separte but concurrent negligence of the defendant and a third driver and who elected to bring suit against only one joint tort-feasor, who was entitled to a judgment against such defendant. Quoting from the case of *Pendleton v. Columbia Ry. Gas & Elec. Co.*,[19] the court stated:

> That a single injury, which is the proximate result of the separate and independent acts of negligence of two or more parties, subjects the tort-feasors, even in the absence of community of design or concert of action to a liability which is both joint and several, is a proposition recognized and approved in this State and supported by the great weight of authority elsewhere.[20]

E. Unavoidable Accident

In *Collins v. Thomas*,[21] the plaintiff sought damages for personal injuries incurred when the automobile in which she was a passenger stopped at a railroad crossing and was struck from the rear by the automobile of the defendant. The question decided on appeal was that of the applicability to any of the issues raised by the pleadings or evidence of the following instruction to the jury:

> A defendant cannot be held liable for what is called a mere accident or an unavoidable accident, which may be defined as an occurrence not proximately due to, or caused by, either in whole or in part, any negligence or willfulness on the part of any person. In other words, such occurrence as is free from fault arising from human agency.[22]

The evidence indicated that in a twenty-five miles-per-hour speed zone on a clear day with no obstruction to his vision, the teenage defendant drove an automobile equipped with good tires and efficient brakes into the rear of the plaintiff's automobile driving it in turn into the rear of a preceding car and causing extensive damage. The defendant laid down skid marks esti-

18. 233 F. Supp. 550 (E.D.S.C. 1964).
19. 133 S.C. 326, 131 S.E. 265 (1926).
20. *Id.* at 331, 131 S.E. at 267.
21. 244 S.C. 128, 135 S.E.2d 754 (1964).
22. *Id.* at 130, 135 S.E.2d at 755.

mated by an investigating patrolman to be thirty-eight feet long. The court rejected the defendant's argument that the presence of sand and gravel on the road surface could reasonably have been found to have caused the accident without negligence on the part of either party, and found instead that an emergency situation was created by the negligence of one or both of the drivers before the condition of the highway could possibly have been a factor. Finding no South Carolina decision to be in point, the court based affirmance of the trial court's order (granting the plaintiff a new trial) on "the proposition that such an instruction is inappropriate where the evidence shows clearly that the accident was caused or contributed to by the negligence of one or more of the parties."[23]

F. Statutory Standards of Care

The application of a standard of care set by a state and a federal statute is illustrated respectively by the cases of *Simmons v. Fenters*,[24] which is considered above under *Joint Tort-Feasors*, and *Grantham v. Fishing Boat Redwing*,[25] which is considered above under *Causation*. Citing *West v. Sowell*[26] and *Field v. Gregory*,[27] the district court held that the violation by the defendant in *Simmons* of sections 46-405 ("General rule for turning movements") and 46-406 ("Signals required for turning or stopping") of the South Carolina Code constituted negligence per se or negligence as a matter of law. Such negligence, the *West* opinion adds, is actionable if it proximately caused injury to the plaintiff, and, according to the *Field* case, whether such negligence per se constituted a proximate cause to the plaintiff's injury is ordinarily a question for the jury.

In finding the defendant in the *Grantham* case negligent under the Jones Act,[28] the district court had to determine whether the injury or death complained of resulted "in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its . . . boats wharves or other equipment."[29]

23. See Annot., 65 A.L.R. 2d 12 (1959).
24. 233 F. Supp. 550 (E.D.S.C. 1964).
25. 234 F. Supp. 89 (E.D.S.C. 1964).
26. 237 S.C. 641, 118 S.E.2d 692 (1961).
27. 230 S.C. 39, 94 S.E.2d 15 (1956).
28. 45 U.S.C. § 51 (1954).
29. *Ibid.*

This statutory language was construed by the court sitting as a jury to require the following test:

> Under this statute [Jones Act][30] the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought.[31]

The court in *Simmons* stated that the defendant was also guilty of common law negligence in that he failed to exercise due care when he attempted to make a sudden left-hand turn without signaling from the state highway in the path of an oncoming automobile. A similar suggestion is found in the *Grantham* opinion in which the court states that although the tragedy took place in territorial waters, the ship was not relieved of the duty of due diligence in the effort to save its hapless crewman.

G. Res Ipsa Loquitur

In *Detyens Shipyards, Inc. v. Marine Indus., Inc.*,[32] the respondent was held liable for damages which occurred when the captain of the respondent's tug failed to discontinue the voyage when there was an opportunity to do so and continued to tow the libelant's drydock in a hazardous and untried manner. Even though there was no direct evidence to establish the cause of the sinking, the district court held that in a case of this nature, in which there is substantial testimony that the drydock was seaworthy, and in which there is no testimony that any unusual hazards of the sea were encountered, the rule laid down in *The Anaconda*[33] becomes applicable:

> Towage is not a bailment and the tug is not an insurer. The burden of proving negligence rests upon the tow.[34] But when an accident occurs under circumstances in which it would not ordinarily have occurred had the proper care been exercised, there is imposed upon the tug the duty of proving that the proper care was exercised. This is merely

30. 45 U.S.C. § 51 (1954).

31. The test was set forth in Ferguson v. Moore-McCormack Lines, 352 U.S. 521 (1957); *accord,* Rogers v. Missouri Pacific R.R., 352 U.S. 500 (1957).

32. 234 F. Supp. 411 (E.D.S.C. 1964).

33. 164 F.2d 224, 228 (4th Cir. 1947).

34. *Accord,* Stevens v. The White City, 285 U.S. 195 (1932).

> the application in admiralty of the well known rule of res ipsa loquitur.[35]

Compare the above statement from *Detyens Shipyards* with the following views expressed earlier by the South Carolina Supreme Court in *Shepherd v. United States Fid. & Guar. Co.*[36]

> The doctrine of *res ipsa loquitur* is not recognized in the decisions of this court but the efficacy of circumstantial evidence to prove negligence is . . . . [I]n some instances at least, . . . the fact that the evidence does not clearly disclose the cause of an accident does not necessarily exculpate the defendant.[37]

H. Absolute Liability

In *Long v. United States*,[38] the plaintiff's leg was nearly amputated when he was dragged across the blade of a mowing machine by a team of mules frightened by an army helicopter flying at tree top level over the plaintiff's field. The district court held the defendant liable irrespective of its actionable negligence in accordance with the South Carolina statute which provides:

> The owner of every aircraft which is operated over the land or waters of this State is absolutely liable for injuries to persons or property on the land or water beneath caused by ascent, descent or flight of the aircraft or the dropping or falling of any object therefrom, whether such owner was negligent or not, unless the injury is caused in whole or in part by the negligence of the person injured or of the owner or bailee of the property injured.[39]

Although a permit signed by the plaintiff authorizing the army to enter upon his land during maneuvers placed him on notice that airplanes and helicopters would be used, it was held not to be a bar or defense to the action.

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35. Detyens Shipyards, Inc. v. Marine Indus., Inc., 234 F. Supp. 411, 414 (E.D.S.C. 1964).

36. 233 S.C. 536, 106 S.E.2d 381 (1958).

37. *Id.* at 540, 542; 106 S.E.2d at 383.

38. 241 F. Supp. 286 (W.D.S.C. 1965).

39. S.C. CODE ANN. § 2-6 (1962). THE FEDERAL TORTS CLAIMS ACT, 28 U.S.C. § 1346 (1962) provides that the United States shall be liable "if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

I. Contributory Negligence

The past year's cases furnish the following examples of a plaintiff's conduct which contributed, as a proximate cause, to the injuries which the plaintiff complained of:

(1) On a clear day at a crossing with an ample and unobstructed view of an approaching train, the plaintiff's intestate, thirty-five year old man with good eyesight and good hearing, approached the crossing at a very slow speed and drove into the path of the train which had failed to give the statutory crossing signals. *Wingate v. Seaboard Air Line R.R.*[40]

(2) While visiting a patient at a veterans' administration hospital, the plaintiff was injured when she sat on a shaky checkerboard table which "someone" had furnished her. *Craft v. United States.*[41]

(3) A plaintiff who was driving on a primary highway was injured in a collision when he failed to observe and obey a soldier who stood in an intersection and motioned the plaintiff's oncoming truck to stop and give way to an army vehicle which was approaching on a secondary highway. *Kirkland v. United States.*[42]

In other cases the court upheld jury findings that plaintiffs had not been contributorily negligent when:

(1) A sixty-five year old woman who had never been at the immediate location before was injured when she stepped into an unseen hole in an Aiken city sidewalk while she was watching the traffic light preparatory to crossing the street. *Kelley v. City of Aiken.*[43]

(2) At the defendant's supermarket which the plaintiff patronized only occasionally, the plaintiff was injured when she stepped into a hole in the defendant's sidewalk which was obscured by the curb and the grocery bag she was holding. *Abeles v. Great Atlantic & Pacific Tea Co.*[44]

(3) An adult plaintiff driving a motorcycle on a narrow dirt road on a clear day at a moderate rate of speed changed from the right to the left rut to avoid a wet spot and was injured when the

40. 244 S.C. 332, 137 S.E.2d 258 (1964).
41. 237 F. Supp. 717 (E.D.S.C. 1965).
42. 241 F. Supp. 198 (W.D.S.C. 1965).
43. 245 S.C. 503, 141 S.E.2d 651 (1965).
44. 244 S.C. 508, 137 S.E.2d 604 (1964).

road caved in to a depth of two feet at a point where the defendant highway department was on constructive notice of previous washouts. *Campbell v. South Carolina State Hwy. Dep't.*[45]

(4) The plaintiff's decedent, guest passenger in a car which raced for ten miles, did not take advantage of an opportunity to leave the car when it stopped near Adrien as he had no reason to anticipate that the defendant would engage in another race on the way back. *Singleton v. Hughes.*[46]

J. Plaintiff's Sole Negligence

The district court found the plaintiff's injuries or damages had been caused by the sole negligence of the plaintiff in cases where:

(1) On a clear, dry day with good visability, the plaintiff's eighty-year-old decedent drove through a stop sign at a high rate of speed into the path of defendant who was proceeding with ordinary care and caution for the safety of himself and others. *Copeland v. Petroleum Transit Co.*[47]

(2) The plaintiff lost her footing while descending the well-lighted stairway of defendant's rooming house in which she was a paying guest. *Hadden v. McLaughlin.*[48]

(3) The inexpert handling of the *Ocean Queen* by its captain, the respondent, in approaching the *Plover* caused a collision with the latter vessel while it was dead in the water with its engines stopped. *United States v. Vereen.*[49]

K. Assumption of Risk

In *Lawless v. Fraser*,[50] the plaintiff who had worked as a service station attendant for thirteen years was sent by his employer to the defendant's home to help him start his car. When he was unable to do so with a booster battery, the defendant who was in a hurry to get to the office requested that his car be pushed with the service truck and that the plaintiff stand on the bumper of the stalled car so that the bumpers of the two vehicles

45. 244 S.C. 186, 135 S.E.2d 838 (1964).
46. 245 S.C. 169, 139 S.E.2d 747 (1965).
47. 233 F. Supp. 286 (E.D.S.C. 1964).
48. 237 F. Supp. 209 (E.D.S.C. 1965).
49. 236 F. Supp. 1018 (E.D.S.C. 1965).
50. 244 S.C. 501, 137 S.E.2d 591 (1964).

would met. Failure of the defendant to give a promised warning before he started his car and pulled away from the truck caused the plaintiff to fall in the path of the truck and sustain serious injury. In affirming a judgment for the plaintiff, the court stated that contributory recklessness was a jury issue and that the doctrine of assumption of risk as set forth in *Cooper v. Mayes*[51] was inapplicable to the facts of this case. In the *Cooper* case, that doctrine is formulated as follows:

> Assumption of risk, in its true sense, rests in contract, not tort. A true case of assumption of risk arises when an employee, without negligence on his part or that of his employer, is injured as the result of a hazard ordinarily incident to the proper performance of the duties of his employment. When by his own negligence the employee increases the hazard to which his work would normally expose him, and as the result of such negligence and not of any negligence of his employer sustains injury from the abnormal hazard which he has thus created, he is barred from recovery by his own negligence. Where the extraordinary hazard is attributable to the employer's negligence, but would not have caused the injury except for the negligence of the employee, the bar to recovery is not assumption of risk, but contributory negligence. Where negligence enters into the consideration of the rights of an injured employee against his employer, the issue moves from the field of contract into that of tort. Attempt in such cases to interrelate assumption of risk and contributory negligence is more academic than practical, and sometimes loses sight of the fact that the difference between the two is fundamental and not merely of degree.[52]

L. Defendant's Opportunity to Avoid

McCombs v. Anderson Truck Line[53] was a wrongful death action in which a truck driven by the defendant struck the car driven by the plaintiff's eighty-four year old intestate when the latter was turning at a "T" intersection at a time when the truck was in its proper lane and so close as to constitute an immediate hazard. The district court found that "the accident to and the

51. 234 S.C. 491, 109 S.E.2d 12 (1952).
52. *Id.* at 495-96, 109 S.E.2d at 15.
53. 241 F. Supp. 26 (W.D.S.C. 1965).

death of the plaintiff's intestate were caused solely or were contributed to by the negligence and recklessness of the plaintiff's intestate"[54] and that the defendant had no opportunity to avoid the collision under the rule of *Guyton v. Guyton*[55] in which the South Carolina Supreme Court stated: "An automobile may not be controlled by brakes or steering so as to avoid a hazard which becomes apparent for only a split second before the point of impact is reached."[56] Use by the court of the term "opportunity" instead of "last clear chance" to avoid is explained by the court's finding as a matter of law that wrong or negligence on the part of the defendant was not established by the facts. The district court stated in the recent case of *Page v. United States*:[57]

> The law with reference to the doctrine of last clear chance in South Carolina seems now to be settled. In *Jones v. Atlanta-Charlotte Air Line R.* . . . , the Supreme Court said: "A plaintiff who has negligently subjected himself to a risk of harm from the *defendant's subsequent negligence* may recover for harm caused thereby if, immediately preceding the harm, (a) the plaintiff is unable to avoid it by the exercise of reasonable vigilance and care, and (b) the defendant (1) knows of the plaintiff's situation and realizes the helpless peril involved therein; or (2) knows of the plaintiff's situation and has reason to realize the peril involved therein; or (3) would have discovered the plaintiff's situation and thus had reason to realize the plaintiff's helpless peril had he exercised the vigilance which it was his duty to the plaintiff to exercise, and (c) thereafter is negligent in failing to utilize with reasonable care and competence his then existing ability to avoid harming the plaintiff."[58]

Compare the *McCombs* case with *Herring v. Boyd*[59] in which the South Carolina Supreme Court stated:

> [W]e have held that where a motorist is proceeding with due regard to the law of the road and the regulations governing the operation of his vehicle, he is not generally liable for injuries received by a child who enters the highway so

54. *Id.* at 28.
55. 244 S.C. 357, 137 S.E.2d 273 (1964).
56. *Id.* at 361, 137 S.E.2d at 275.
57. 212 F. Supp. 668 (E.D.S.C. 1963).
58. *Id.* at 670 (emphasis added.) This formulation is taken from RESTATEMENT, TORTS § 479 (1934).
59. 245 S.C. 284, 140 S.E.2d 246 (1965).

> suddenly that its driver cannot stop or otherwise avoid injuring him . . . . However, where the driver of a vehicle knows, or should know, that children may reasonably be expected to be in, near, or adjacent to the street or highway, he is under a duty to anticipate the likelihood of their running into or across the roadway in obedience to childish impulses, and to exercise due care under the circumstances for their safety.[60]

M. Comparative Negligence

Oliver v. Blakeney,[61] a case in which the defendant's truck stopped on the highway ahead of the plaintiff without prior warning, holds that in order to sustain the defense of contributory negligence, "it must appear that the plaintiff was guilty of contributory recklessness as a matter of law, since simple contributory negligence would not constitute a defense to reckless or wilful conduct."[62]

N. Imputation of Driver's Negligence to Passenger

The defense that the negligence of another was imputable to the plaintiff was rejected in three collision cases last year. In *Ray v. Simon*,[63] a case where a young girl was injured while riding in an automobile driven by her mother, the supreme court stated: "The test, when we undertake to impute to the plaintiff the negligence of her driver is whether such driver was her agent, or did she have any control over the management of the automobile."[64]

In *Gray v. Barnes*,[65] a case in which a guest passenger was injured while on a pleasure ride in a car driven by a fellow teenager, the supreme court stated: "Appellants here have failed to carry the burden of showing that Respondent had any right or control over the car or to direct its movements to the extent of creating a joint enterprise."[66]

60. *Id.* at 290, 140 S.E.2d at 249.
61. 244 S.C. 565, 137 S.E.2d 772 (1964).
62. *Id.* at 569, 137 S.E.2d at 774; *accord*, Jumper v. Goodwin, 239 S.C. 508, 123 S.E.2d 857 (1962). See 13 S.C.L.Q. 405-06 (1961).
63. 245 S.C. 346, 140 S.E.2d 575 (1965).
64. *Id.* at 359, 140 S.E.2d at 581.
65. 244 S.C. 454, 137 S.E.2d 594 (1964).
66. *Id.* at 465, 137 S.E.2d at 600.

In *Davenport v. United States*,[67] the defendant agreed that the alleged negligence of a father could not be imputed to the plaintiff, his minor son, who was riding with him when injured. In all three cases, the test applied derives from *Rock v. Atlantic Coast Line R. R.*[68]—expressly in the cases of *Ray* and *Gray* and in *Davenport* by reference to *Doremus v. Atlantic Coast Line R.R.*[69] which in turn cites *Rock* as the most recent case pertaining to the imputed negligence issue.[70] The supreme court in *Rock* stated:

> In order to constitute a joint enterprise so that the negligence of the driver of an automobile may be imputed to an occupant of the car, it is generally held that there must be a common purpose and a community of interest in the object of the enterprise and an equal right to direct and control the conduct of each other with respect thereto . . . . Each must have the control of the means or agencies employed to prosecute the common purpose.[71]

O. Manufacturer's Liability

In *Gonzales v. Virginia-Carolina Chem. Co.*,[72] the district court found the defendant manufacturer liable to the plaintiff, a well-qualified crop dusting pilot. The defendant's distribution to the plaintiff of a poisonous defoliant without adequate tests, without adequate warning and without making known or available a protective antidote was held to have been negligence per se in that it violated the labeling requirements of federal[73] and South Carolina statutes.[74] Even if the defendant's conduct had satisfied statutory requirements, the court expressed its opinion that, as a manufacturer of a hazardous material, the defendant was still under a common law duty to make proper tests, and give adequate warning and in general protect the public from potential dangers arising out of the manufacture and sale of such hazardous materials. Although this might be interpreted as

67. 241 F. Supp. 320 (W.D.S.C. 1965).
68. 222 S.C. 362, 72 S.E.2d 900 (1952).
69. 242 S.C. 123, 130 S.E.2d 370 (1963).
70. *Id.* at 137, 130 S.E.2d at 376.
71. 222 S.C. 362, 373, 72 S.E.2d 900, 904 (1952).
72. 239 F. Supp. 567 (E.D.S.C. 1965).
73. Federal Insecticide, Fungicide, and Rodenticide Act, §§ 1-13 as amended, 7 U.S.C. §§ 135-135k (1964).
74. S.C. CODE ANN. §§ 3-151 to -176 (1962).

extending the duty of the manufacturer beyond *users* of the product to the public at large, latter portions of the *Gonzales* opinion suggest a more restrictive intention on the part of the court. The "failure of the manufacturer to exercise reasonable care in the making of an article which if negligently made is likely to cause injury *to the person using* it sounds in tort."[75]

P. Proximate Cause

Finding that the negligence of the defendant had contributed as a proximate cause to the plaintiff's injuries and damages in the *Gonzales* case, the district court said: "Proximate cause in the law is not necessarily the proximate cause of the logician, but is determined upon mixed considerations of logic, common sense and experience, policy and precedent."[76]

Q. Premises Liability Cases

Licensees

In *Frankel v. Kurtz*,[77] an action was brought by a seventy-three year-old plaintiff with poor eyesight for injuries sustained in a fall on the premises of her daughter as a result of stepping in a grass covered ditch cut along a walkway—a hazard which, it was alleged, was known to the defendant but not to the plaintiff. The case is of interest because both parties joined in classifying the plaintiff as a "social guest," a term or category not previously treated as such, or by such name, in South Carolina common law, or by statute. The court was thus saddled with the question of whether the classification connotes a definition of variety and distinction all its own. The court decided that it does not but that a "social guest" is the same as "social visitor," "guest," "gratuitous licensee" or "licensee," and that "with or without an invitation to visit, the duty of the host is to refrain from wilful and wanton injury."[78]

75. 239 F. Supp. 567, 573 (E.D.S.C. 1965) (emphasis added.)

76. *Ibid.; accord,* Ballenger v. Southern Worsted Corp., 209 S.C. 463, 40 S.E.2d 681 (1946).

77. 239 F. Supp. 713 (W.D.S.C. 1965).

78. The court further defined a licensee as follows:

> A licensee is a person who is privileged to enter upon land by virtue of the possessor's consent. The possessor is under no obligation to exercise care to make the premises safe for his reception, and is under no duty toward him except: (a) To use reasonable care to discover him and avoid injury to him in carrying on activities upon the land. (b) To use reasonable care to warn him of any concealed dangerous conditions or activities which are known to the possessor, or of any change in the condition of the premises which may be dangerous to him, and which he may reasonable be expected to discover.

Frankel v. Kurtz, 239 F. Supp. 713, 717 (W.D.S.C. 1965).

Invitees

The case of *Parker v. Stevenson Oil Co.*[79] resulted in a further definition of the scope of the term "invitee." An action for personal injuries was brought in that case on behalf of the thirteen-year-old plaintiff who came to the defendant's filling station intending to purchase drinks and to use the rest room and was injured by a fall into an unguarded grease pit. The injury occurred at 8:30 p.m. after the station's lights had been switched off and while the plaintiff was en route to the station's men's rest room, the sidewalk to which was completely or partially blocked at several points. It was assumed by the court without challenge by the defendant that the station's vending machines were in service and that the rest room door was unlocked. Whether the defendant owed the plaintiff a duty to exercise due care to keep the premises in a reasonably safe condition for his use, the court stated, depended on whether the evidence was legally sufficient to support the finding of fact, implicit in the verdict, that the plaintiff was an invitee on the defendant's premises at the time and place of injury. Defining an invitee as one who enters upon the premises of another at the express or implied invitation of the occupant, especially when he is upon a matter of mutual interest or advantage, the court answered the question in the affirmative.[80]

Children

In *Everett v. White*,[81] an action was brought by the guardian ad litem for the five-year-old plaintiff who sustained personal injuries when he fell into a six-foot hole which contained water, debris and other materials which had been excavated by the defendant in the course of constructing a house. According to the complaint, the defendant knew children were accustomed to play on the premises where the hole was located and took no precaution to guard or give warning of the hazard. From an order of the circuit court overruling his demurrer, the defendant appealed on the grounds that (1) the condition complained of was open and obvious, even to small children, involved no latent peril or hidden danger, and (2) that no facts were alleged showing that the plaintiff was *attracted* to the hazard which caused his injury.

79. 245 S.C. 275, 140 S.E.2d 177 (1965).
80. *Accord,* Bruno v. Pendleton Realty Co., 240 S.C. 46, 124 S.E.2d 580 (1962). See generally 95 A.L.R. 2d 1333 (1964); 38 AM. JUR. *Negligence* § 131 (1941); 65 C.J.S. *Negligence* §§ 43(1), 44 (1950); PROSSER, TORTS § 61 (3d ed. 1964).
81. 245 S.C. 331, 140 S.E.2d 582 (1965).

In the light of the facts alleged and the appearance of the hole, the court found that it was inferable that the small hole practically filled with water, mud and other material, would not have alerted a small child to the peril which it presented. In considering the second ground of appeal, the court surveyed a number of pertinent South Carolina cases. It pointed out that although the early case of *Bridges v. Asheville & Spartanburg R.R.*[82] which involved a turntable injury to a playing child, had been referred to by the court as having followed the doctrine announced in *Sioux City & Pacific R.R. v. Stout*,[83] (the first of what are known as the turntable or attractive nuisance cases), the *Bridges* case was sustained, apparently, on ordinary concepts of negligence and proximate cause. The court in *Bridges* stated that a landowner was legally responsible for injuries from a dangerous instrumentality located and left unguarded and unprotected in an exposed place if the injuries were sustained by a plantiff mentally incapable of knowing and appreciating the danger either from want of age or otherwise. Although the later case of *Frank v. Southern Cotton Oil Co.*[84] is usually regarded as resting on attractive nuisance doctrine, the opinion in that case also recognized alternative grounds of recovery by children in premises liability cases. Similar dicta in the opinions in *Sexton v. Noll Constr. Co.*[85] and *McLendon v. Hampton Cotton Mills Co.*[86] are noted by the court. Of *Hancock v. Aiken Mills*,[87] a case cited by the defendant in support of his second position, the court says that the opinion in that case "lends support to the view that attraction by the hazard inflicting the injury is essential to recovery in a case tried solely on the theory of attractive nuisance, but it does not trench upon any other ground of recovery recognized by the prior decisions of this court."[88] The court concludes: "[T]he complaint states a cause of action against the defendant based upon actionable negligence independently of those allegations which refer to the condition exposed by the defendant as an attractive nuisance."[89]

82. 25 S.C. 24 (1885).
83. 84 U.S. (17 Wall.) 657 (1874).
84. 78 S.C. 10, 58 S.E. 960 (1907).
85. 108 S.C. 516, 95 S.E. 129 (1916).
86. 109 S.C. 238, 95 S.E. 781 (1917).
87. 180 S.C. 93, 185 S.E. 188 (1936).
88. *Supra* note 81 at 338, 140 S.E.2d at 586.
89. See 65 C.J.S. *Negligence* § 28 (1950); PROSSER, TORTS § 59 (3d ed. 1964); RESTATEMENT, TORTS § 339 (1965).

II. INDIGNITIES

A. False Imprisonment

Prosser v. Parsons[90] was an action for false imprisonment, malicious prosecution, and conversion of an automobile brought against a game warden who arrested the plaintiff and procured a warrant against him for hunting at night. After the grand jury returned a "No Bill," the defendant, acting on the advice of the circuit solicitor, took out another warrant and the grand jury again entered a "No Bill." The defendant successfully appealed a court of common pleas judgment against him.

Under the South Carolina Code and prior decisions,[91] in order for the defendant to have lawfully arrested the plaintiff, the alleged violation must have occurred in the presence of the defendant. Although the defendant had not personally observed the plaintiff hunting in the nighttime but had only observed him with the equipment for such sport, the court held that the arrest was lawful because there were approximately ten game wardens working together in the same general area keeping each other informed by radio and that, "under those circumstances, an act taking place within the view of one officer was in legal effect within the view of the other co-operating officers."[92]

The 1965 session of the South Carolina Legislature enacted (as code section 16-359.14) the following definition of the right of merchants to investigate suspected shoplifters:

> In any action brought by reason of having been delayed by a merchant or merchant's employee or agent on or near the premises of a mercantile establishment for the purpose of investigation concerning the ownership of any merchandise, it shall be a defense to such action if: (1) the person was delayed in a reasonable manner and for a reasonable time to permit such investigation, and (2) reasonable cause existed to believe that the person delayed had committed the crime of shoplifting.

90. 245 S.C. 493, 141 S.E.2d 342 (1965).

91. S.C. CODE ANN. § 17-253 (1962); State v. Williams, 237 S.C. 252, 116 S.E.2d 858 (1960).

92. In defining "false imprisonment," the court stated:
> The essence of the tort of false imprisonment consists in depriving plaintiff of his liberty without lawful justification, and if the restraint or imprisonment complained of is lawful, the action fails. Thomas v. Colonial Stores, Inc., 236 S.C. 25, 113 S.E.2d 337 (1960). The legality of an arrest without warrant does not depend on the final results of the charge on which the arrest was made.

Prosser v. Parsons, 245 S.C. 493, 498, 141 S.E.2d 342, 346 (1965).

B. Malicious Prosecution

In *Prosser v. Parsons*, *supra*, the court further held that there had been no malicious prosecution because the defendant had probable cause and had acted on advice of counsel who was fully cognizant of all material facts bearing on the case having prepared both indictments and submitted them to the grand jury.[93] The court said:

> [A]ctions for malicious prosecution . . . have never been regarded with favor and are not encouraged as it is in the interest of good order that criminals be brought to justice; and it is generally held that the prosecutor is free from damage if there be probable cause of the accusation made.[94]

In *Gibson v. Brown*,[95] the plaintiff brought an action for malicious prosecution against the defendant for having sworn out a warrant against him for rape and burglary and against her father for having aided and abetted her thus causing the plaintiff to be arrested. Describing what, in general, must be shown to authorize the maintenance of an action for malicious prosecution, the court listed the following elements:

> (1) the institution or continuation of original judicial proceedings, either civil or criminal; (2) by, or at the instance of, the defendant; (3) the termination of such proceedings in plaintiff's favor; (4) malice in instituting the proceedings; (5) want of probable cause for the proceeding; and (6) the suffering of injury or damage as a result of the action or prosecution complained of.[96]

The father demurred to the facts on the ground that the complaint only alleged acts on his part subsequent to the commencement of prosecution by the daughter. Affirming the trial court's order overruling the demurrer, the court held that one who has not sworn out a warrant may be held liable in an action for malicious prosecution if he had "instituted a criminal action against the plaintiff, or had caused one to be maintained or had voluntarily aided or assisted in its prosecution."[97]

93. Also, the defendant's detention of the plaintiff's car under the circumstances was held to have been part of his duties as game warden according to S.C. CODE ANN. § 28-457 (1962).
94. 245 S.C. 493, 502, 141 S.E.2d 342, 347 (1965).
95. 245 S.C. 547, 141 S.E.2d 653 (1965).
96. *Id.* at 549, 141 S.E.2d at 654.
97. *Id.* at 550, 141 S.E.2d at 655; *accord,* Nance v. Gall, 187 Md. 656, 50 A.2d 120 (1947).

C. Civil Rights

In *Rosemond v. Employers Mut. Cas. Co.*[98] the plaintiff complained of alleged violation of his civil rights arising out of his apprehension, arrest and physical abuse by highway patrolmen (the individual defendants) with resulting personal injury, pain, embarrassment and degradation. Although the Civil Rights Act,[99] under which the action was brought, was intended to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position "under color of law," the district court held that the plaintiff had failed to establish credible facts sufficient to impose liability on the defendants who had arrested him in a routine driver's license check. The plaintiff was treated in a manner which was not unreasonable considering that he had been unable to produce a driver's license, or registration certificate and had refused to get into the patrol car and later tried to escape.

III. Commercial Harms

A. Fraud

Viewed in the light most favorable to the plaintiff, the record in *Parks v. Morris Homes Corp.*[100] revealed, in the words of the court,

> a case of an ignorant negro woman, a widow, with two daughters present of doubtful help and with no circumstances to incite suspicion, dealing with the agents of the defendant who were experienced in the business of selling shell homes, and who fraudulently misrepresented the nature and contents of the instruments so as to obtain the signature of the plaintiff thereto.[101]

The court stated the pertinent legal doctrine as follows:

> It is well settled in this jurisdiction that the right to rely upon representations as to the contents of a written instrument must be determined in the light of the duty on the part of the representee to use reasonable prudence and diligence under the particular circumstances for his own protection. In the application of this test to the conduct of the defrauded

98. 238 F. Supp. 657 (W.D.S.C. 1965).
99. 42 U.S.C. § 1983 (1964).
100. 245 S.C. 461, 141 S.E.2d 129 (1965).
101. *Id.* at 468, 141 S.E.2d at 133.

party, no fixed rule can be formulated, but the question must be determined upon the facts of the particular case[102] . . . . What constitutes reasonable prudence and diligence with respect to reliance upon a representation in a particular case and the degree of fault attributable to such reliance will depend upon the various circumstances involved, such as the form and materiality of the representation, the respective intelligence, experience, age, and mental and physical condition of the parties, the relation and respective knowledge of the parties, etc.[103] . . . . While the failure of the defrauded party to read his contract before signing or to have it read for him, will ordinarily bar him of recovery, this is not an absolute rule. It is subject to the just doctrine that a wrongdoer cannot shield himself from liability by asking the law to condemn the credulity of the ignorant and the unwary.[104]

Frist v. Gallant[105] is another fraud case although, perhaps, better described as an economic rather than a commercial harm. The plaintiff alleged that the defendants, who were her husband and father-in-law, jointly conspired and schemed to defraud her in her case for separate maintenance by giving false testimony in reference to the annual income of the defendant husband. In this case of first impression in South Carolina, the district court gave the following reason for denying the defendants' motion to dismiss:

> Under the circumstances here it would appear that the public policy considerations which form the basis for denying causes of action based upon perjured testimony, are overshadowed by the public interest behind the right to civil redress of this plaintiff, who allegedly has been wronged by the successful execution of a conspiracy, even though the success of such alleged scheme was based primarily upon the use of false testimony.[106]

102. *Id.* at 467, 141 S.E.2d at 132; *accord,* Thomas v. American Workmen, 197 S.C. 178, 14 S.E.2d 886 (1941).

103. 245 S.C. 461, 467, 141 S.E.2d 129, 132 (1965); *accord,* J. B. Colt Co. v. Britt, 129 S.C. 266, 123 S.E. 845 (1924).

104. 245 S.C. 461, 467, 141 S.E.2d 129, 132 (1965).

105. 240 F. Supp. 827 (W.D.S.C. 1965).

106. *Id.* at 829. See generally 41 AM. JUR. *Perjury* § 81 (1942); 15 C.J.S. *Conspiracy* § 16 (1939). The former source states that although,

> ordinarily aside from defamation and malicious prosecution, the courts will not recognize any injury from false testimony upon which a civil action for damages can be maintained, . . . it is apparently well settled that where the giving of false testimony is only a part of the carrying out of a scheme to defraud the plaintiff by means of the combination of fraud, and deceit of the defendants, an action will lie for damages.

B. Limitation of Liability by Contract

In *Pride v. Southern Bell Tel. & Tel. Co.*,[107] a dentist brought an action to recover damages from the telephone company for having listed under his name in the classified or yellow pages an address and telephone number which not only were not the plaintiff's but were those of another dentist. The advertisement had been published pursuant to a written contract between the parties, in which the liability of the defendant for errors in publication were limited to an amount not to exceed the charges for such advertisement. The lower court overruled the plaintiff's challenge by demurrer to the legal sufficiency of the defense on the ground that such a limitation was against public policy and public interest and so unenforceable. The court affirmed the order below for the following reasons:

> In our opinion the publication of plaintiff's ad was wholly a matter of private contract. Such contracts are not required to be filed with the South Carolina Public Service Commission and the Commission exercises no jurisdiction over this feature of the defendant's telephone directory. The defendant was not required to render an advertising service as a part of its duties as a public utility. If the plaintiff had not purchased the ad, he would have been deprived of no service which the defendant was obligated, or assumed, to render as a public service[108] . . . . The relationship of the parties arose in connection with the publication of the ad solely by reason of the contract and not by virtue of any duty owed by the defendant to the public.[109]

In his argument the plaintiff also raised the questions of whether the limitation of the defendant's liability was not violative of public policy (1) because of the absence of equality in bargaining power, and (2) because the publishing error of the defendant was negligently or *wilfully* made. Since the necessary factual basis for an intelligent determination of the first question did not appear in the pleadings and since the second question was not raised or mentioned in the briefs, the court left the first open for determination in the light of facts developed at the trial and indicated no opinion about the second.

107. 244 S.C. 615, 138 S.E.2d 155 (1964).

108. *Id.* at 621, 138 S.E.2d at 157.

109. *Ibid.; accord,* Savannah Bldg. Supply Co. v. Atlantic Coast Line R.R., 85 S.C. 405, 67 S.E. 1135 (1910).

C. Covenant Not To Sue

Although it "considers a lawyer's files a sanctuary," the district court reluctantly ordered the plaintiff in the private antitrust case of *Ayers v. Pastime Amusement Co.*[110] to turn over, pursuant to rule 34 of the Federal Rules of Civil Procedure, a true copy of a purported covenant not to sue so that it could be determined whether the purported agreement was a general release of one alleged tort-feasor which would release all other alleged tort-feasors including the defendant or a true covenant not to sue which would operate simply to reduce the amount recoverable from any other joint tort-feasor.[111]

D. Copyright Infringement

In *Bourne v. Fouche*,[112] two music publishers brought joint action for separate infringement of their respective copyright in "San Antonio Rose" and "Mr. Sandman." The defendant proprietors of the Skyline Club based their defense on a belief that they were not responsible for infringing performances "if such performances occurred without their knowledge or intent to infringe, or if the performances were rendered by musicians engaged as independent contractors, or if the performances were rendered by such musicians contrary to defendants' instructions."[113] In support of its holding that this defense was unavailing, the district court quoted the following from the case of *M. Witmark & Sons v. Calloway*:

> The rule of the common law applies, to wit, that the master is civilly liable in damages for the wrongful act of his servant in the transaction of the business which he was employed to do, although the particular act may have been done without express authority from the master, or even against orders . . . . Assuming that the defendant did not intend to infringe, the lack of intention does not affect the fact of liability. The result, and not the intention, determines the question of infringement.[115]

110. 240 F. Supp. 811 (E.D.S.C. 1965).
111. *Id.* at 812.
112. 238 F. Supp. 745 (E.D.S.C. 1965).
113. *Id.* at 746.
114. 22 F.2d 412 (D.C. Cir. 1927).
115. *Id.* at 414.

Defendants were enjoined from permitting further performances of the two compositions.

In *Edwin H. Morris & Co. v. Munn*,[116] two other music publishers were granted similar injunctions against further infringement of their respective copyrights in "Sentimental Journey" and "The Waltz You Saved for Me," and were awarded the same statutory[117] minimum damages of 250 dollars each as well as 250 dollars attorney's fees each and costs.

116. 233 F. Supp. 71 (E.D.S.C. 1964).
117. 17 U.S.C. § 116 (1952).