TORTS CASES

THE BASIC FIRST-YEAR COURSE – READINGS

Ross E. Davies

Professor of Law

Scalia Law School, George Mason University

[N]othing clears up a case so much
as stating it to another person.
Sherlock Holmes

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*In Abraham, *The Forms and Functions of Tort Law*

Torts (110-R04), Autumn 2023

Professor Ross E. Davies (rdavies@gmu.edu)

Sketch of the course and learning outcomes: In this course, you will not learn everything you need to know about torts. You will learn (or at least have a reasonable opportunity to learn) enough to get started and then continue to learn more through higher-level coursework, independent study, and practical application. That is the purpose of the course – to get you rolling toward expertise in:

(1) the roots of tort law (by spending a lot of time on some cases and other authorities, and a little bit of time on many others);

(2) current tort doctrine (by, again, spending a lot of time on a few cases and authorities, and a little bit of time on a lot of others);

(3) spotting and dealing with issues involving torts (by spending a lot of time issue-spotting); and

(4) generally thinking and acting like a lawyer – critically, constructively, creatively, civilly, ethically, and articulately.

In the classroom, you will engage mostly in two activities: occasionally speaking during discussions of the assigned reading, and often giving other speakers your undivided attention while working, in your own mind, on the same challenges they are working on out loud. Those in-class activities should inspire you to engage in some outside activities, including reading, outlining, thinking about, and discussing the assigned reading, creating and taking your own practice questions in anticipation of the final exam, and so on. We should, by the way, have some fun as well.

Class sessions and calendars: We will meet on Tuesdays online and Thursdays in person. Our law school's website says class runs from 6:05 p.m.to 8:05 p.m., but on Tuesdays (not Thursdays) we will go to 8:15 p.m. Why? Because on rare occasions it is necessary to cancel a class session. Experience teaches that it is good to avoid make-up sessions, which must be held (due to people's busy schedules) early in the morning, late at night, or on a weekend. By banking a few minutes at the end of some class sessions we can avoid such inconvenient make-up sessions. If we do not use the banked minutes, I will simply cancel our last class session. Good nutrition is an important part of a good education, so, you are free to dine during class (and during office hours), so long as you are quiet about it and clean up after yourself.

Office hours: They will be online right after each Tuesday class session. Attendance at office hours is really, truly optional. I will simply stay after the class session formally ends and chat with anyone who hangs around until we run out of topics or I run out of time. I will not take attendance and will not reward people for attending. It is merely a time for you to have access to me, if you want it. You won't hurt my feelings by not coming. Nor will I be offended if you wander in and out, or show up for a few minutes and leave, or come late, or don't show up in August, September, and October, but do show up in November. It's all good. Also, the agenda is loose. We can talk about torts, and we can talk about other topics – life, the universe, and everything else appropriate – if you like. There are several reasons for conducting office hours this way. Here are a few of the more important ones. First, it preserves a level playing field. No one gets special access to the instructor. Second, it improves the quality of answers to questions, because it is not at all uncommon for students to come up with first-rate answers to office hours questions. Yes, office hours are conversations, not just student-instructor Q&A ping-pong matches. Third, it enables people who are reluctant to speak up (at least at the start) to be a part of office hours. It's perfectly fine to attend office hours and simply listen. Remember: The most useful function of office hours is the challenge of formulating good questions. You don't even need to ask them if you decide not to. Second most useful is participating in developing good answers. Of course, if you need to talk with me about something that is not appropriate for office hours (a personal issue or an ethical concern, or the like), feel free to make an appointment. Finally and very importantly, if you have a concern that you are not comfortable raising with me, you should raise it with Annamaria Nields (anields@gmu.edu), the impressively knowledgeable, wise, kind, and resourceful Associate Dean for Administration and Student Affairs at our law school. I have worked with Dean Nields for many years and have the highest respect for and trust in her.

Disability accommodations: Disability Services at George Mason University is committed to upholding the letter and spirit of the laws that ensure equal treatment of people with disabilities. Under the administration of University Life, Disability Services implements and coordinates reasonable accommodations and disability-related services that afford equal access to university programs and activities. Students can begin the registration process with Disability Services at any time during their enrollment at George Mason University. If you are seeking accommodations, please visit http://ds.gmu.edu/ for detailed information about the Disability Services registration process.

For each class session:

• Read, take notes, and think about the assigned material before class, and be prepared to listen and speak. Stay an assignment or two ahead of schedule, just in case.

• Look up words you do not know. Use a good dictionary or two (including a recent edition of *Black's Law Dictionary*, edited by Bryan Garner). Important, interesting, or odd words are good candidates for exam questions.

• You may use silent electronics in class. But bear in mind a few points: (1) there is some evidence that pointing your face toward a speaker (or at least turning in their direction a bit) improves your comprehension and recollection of what the speaker says, whether it's an in-person interaction or online; (2) the instructor believes the first point is true, believes that even if it isn't true it is still polite, believes that politeness is part of good lawyering, and knows beyond a shadow of a doubt that behaving as though you are trying to model good lawyerly behavior factors in the calculation of participation adjustments in grading for this course; and (3) finally and ironically, there is some evidence of an inverse relationship between a person's belief that they can multitask and their ability to multitask.

• Take notes in your own words. There is some evidence that taking notes that way (rather than merely transcribing what is said in class) improves your comprehension and recollection of what you hear and see (which might come in handy for the exam). Besides, if you are worried about catching every word during class, don't. All class sessions and office hours will be recorded and posted online.

• Note and follow in-class instruction. If you miss a class (or miss something said in a class you do attend) get notes from a classmate. Make arrangements in advance as a precaution against unanticipated absences (and missed somethings). There is a strong tradition in law of sharing notes with colleagues in need. Be a part of it.

Texts:

Required: Kenneth S. Abraham, The Forms and Functions of Tort Law (6th ed. 2022) (free on West Academic via our school's website, which you will learn about in orientation; you can buy a hard copy online – cheap compared to most law school textbooks).

Ross E. Davies, Torts Cases (2023 ed.) (free pdf from the instructor; on Blackboard after the first day of class).

Suggested: Bryan A. Garner, Black's Law Dictionary (11th ed. 2019 as a book, or 10th ed. 2014 as an app) (not cheap, but worth it).

A few words about law school textbooks: They go out of date fast, because the law is a living, constantly changing creature, like the society of which it is a part. So, do not be surprised if we do some tinkering during our course — for example, by adding just a few cases to the readings, here and there — and be on the watch for changes in law throughout your career.

Assignments and class schedule:

Entries to the right of a date indicate the reading assignments for that date. Assignments are subject to change based on the pace of the course and the whim of the instructor.

Date	Topic(s)	Abraham reading	Torts Cases
Aug. 22	Introduction, Battery, Assault	ch. 1 (pp. 1-24); ch. 2 (pp. 25-32)	ch. 1; ch. 2
Aug. 24	False Imprisonment, IIED, Defenses	ch. 2 (pp. 32-41)	ch. 3
Aug. 29	Vicarious Liability	ch. 8 (pp. 212-214)	ch. 4
Aug. 31	review, practice quiz (ungraded)	--	--
Sept. 5	Trespasses, Conversion	ch. 2 (pp. 41-50)	ch. 5
Sept. 7	Nuisance	ch. 2 (pp. 50-59)	ch. 6
Sept. 12	Damages	ch. 10 (pp. 241-259)	ch. 7
Sept. 14	review, practice quiz (ungraded)	--	--
Sept. 19	Negligence	ch. 3 (pp. 61-85)	ch. 8
Sept. 21	ditto	ditto	ditto
Sept. 26	Malpractice	ch. 3 (pp. 85-99)	ch. 9
Sept. 28	ditto	ditto	ditto
Oct. 3	Negligence Per Se	ch. 3 (pp. 99-108)	ch. 10
Oct. 5	review, practice quiz (ungraded)	--	--
Oct. 10 no class (Mon. sch.)	--	--	--
Oct. 12	Causation and Proof	ch. 4 (pp. 109-123)	ch. 11
Oct. 17	Cause-in-Fact	ch. 5 (pp. 125-148)	ch. 12
Oct. 19	ditto	ditto	ditto
Oct. 24	Proximate Cause	ch. 6 (pp. 149-172)	ch. 13
Oct. 26	ditto	ditto	ditto
Oct. 31	Defenses Based on Plaintiff Conduct	ch. 7 (pp. 173-195)	ch. 14
Nov. 2	review, practice quiz (ungraded)	--	--
Nov. 7	Strict Liability	ch. 8 (pp. 197-212)	ch. 15
Nov. 9	Products Liability	ch. 9, pp. 215-240	ch. 16
Nov. 14	ditto	ditto	ditto
Nov. 16	Duties	ch. 11 (pp. 261-281)	ch. 17
Nov. 21	ditto	ditto	ditto
Dec. 4, 6:00 p.m.	final exam	--	--

Class sessions: The basic structure of each class session will be as outlined below. The actual times for each element of a class are likely to vary a bit from day to day, and they are subject to the same "pace of the course" and "whim of the instructor" flexibilities as everything else in the course. The first day of class will definitely be a bit looser.

6:05 p.m.: Opening remarks: Instructor makes announcements and deals with administrative matters.

6:10 p.m.: Panel discussion: The instructor interviews a panel of students (usually three or four) about the day's assigned readings and their implications. The instructor will assign people to panels. Students should feel free to trade panel assignments, so long as they give the instructor fair notice (at least 24 hours, unless it is an emergency switch). During the first week of class there will be no assigned panel. Panel work may be terrifying at first, but soon it will be great fun (or at least exciting).

6:50 p.m.: Break

7:00 p.m.: Instructor-to-student Q&A: The instructor asks questions of many students. These will be short cold-call interactions – partly, of course, to inspire you to do the reading every day and think about it, but also (and more importantly, really) to give you practice expressing your knowledge (and sometimes even your opinions) briefly, coherently, and out loud. Once you get used to this, it will be fun. Our class is big, but even so you should expect to be called on every couple of weeks or so. Some of the questions asked during this part of class will be based on questions that will be on the final exam. After this, everyone can breathe a sigh of relief. Except the instructor.

7:30 p.m.: Break

7:35 p.m.: Student-to-instructor Q&A: Students with questions raise a hand and the instructor calls on them. Sometimes the answers will be direct, sometimes they will be indirect, and sometime they will be questions themselves. Surely all will be helpfully thought provoking.

8:00 p.m.: Wrap-up: Instructor wraps up (or, on Mondays, extends the Q&A for 10 minutes and then wraps up).

After class: Office hours on Tuesdays: Optional conversation. This part is explained in detail above.

Grades: Your grade will be based on two things – a final exam and class participation. Final exam: The exam will be 100% of your grade, unless you earn an adjustment up or down for class participation. The exam will cover the assigned reading and the instructor's remarks in class. It will be a three-hour, 50-question multiple-choice test. It will be as open as our school's exam regulations permit, with one exception: No matter what the regulations say, you must not interact in any way (in person, in writing, by signing, electronically, telepathically, etc.) with any human being during the exam (except, of course, for the fine people in our law school's Records Office and IT Department, since you may need their help with administrative and technical aspects of the exam). Class participation: When determining your grade in the course, the instructor may apply a single-increment adjustment to the exam grade, upward or downward (for example, from B to B+ or from A- to B+), based on class participation (which includes overall good citizenship) in the course. The easiest ways to improve your chances of an upward adjustment are: (1) when the instructor invites you to speak in class, demonstrate that you have done the assigned reading and thought about it and were paying attention to what was going on in the classroom just before the instructor invited you to speak (yes, you can pass on a question, but that won't help you pass the course); (2) make your replies to the instructor and your comments on contributions of classmates short, on-point, and constructive, and pay attention to others' answers and comments (yes, politeness can affect your grades in law school as well as your career after it); and (3) attend class (yes, a school regulation says, "[i]f a student is absent for any reason for more than 20 percent of the sessions of a course, the student is not eligible for credit in that course" and a "student who is not present for at least 75 percent of a session of the course is absent from that session," but those are merely definitions of the lower bounds of certain minimal performances, and minimal performances merit minimal grades). One more tip about participation: Asking the instructor a question that is answered in this syllabus is evidence that you are either not doing the reading or not paying attention.

Academic regulations: They are here: www.law.gmu.edu/academics/regulations. If you have not read them yet, you should, because you are responsible for complying with them!

Intellectual property: The instructor owns all course content, regardless of form. You may share copies of that content with classmates during the course, but other than that you must keep all of it in any format to yourself forever.

How to Read a Legal Opinion

A Guide for New Law Students

Orin S. Kerr

This essay is designed to help new law students prepare for the first few weeks of class. It explains what judicial opinions are, how they are structured, and what law students should look for when reading them.

I. What's in a Legal Opinion?

When two people disagree and that disagreement leads to a lawsuit, the lawsuit will sometimes end with a ruling by a judge in favor of one side. The judge will explain the ruling in a written document referred to as an "opinion." The opinion explains what the case is about, discusses the relevant legal principles, and then applies the law to the facts to reach a ruling in favor of one side and against the other.

Modern judicial opinions reflect hundreds of years of history and practice. They usually follow a simple and predictable formula. This

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Orin Kerr is a professor of law at the George Washington University Law School.

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section takes you through the basic formula. It starts with the introductory materials at the top of an opinion and then moves on to the body of the opinion.

The Caption

The first part of the case is the title of the case, known as the "caption." Examples include *Brown v. Board of Education* and *Miranda v. Arizona*. The caption usually tells you the last names of the person who brought the lawsuit and the person who is being sued. These two sides are often referred to as the "parties" or as the "litigants" in the case. For example, if Ms. Smith sues Mr. Jones, the case caption may be *Smith v. Jones* (or, depending on the court, *Jones v. Smith*).

In criminal law, cases are brought by government prosecutors on behalf of the government itself. This means that the government is the named party. For example, if the federal government charges John Doe with a crime, the case caption will be *United States v. Doe*. If a state brings the charges instead, the caption will be *State v. Doe*, *People v. Doe*, or *Commonwealth v. Doe*, depending on the practices of that state.[1]

The Case Citation

Below the case name you will find some letters and numbers. These letters and numbers are the legal citation for the case. A citation tells you the name of the court that decided the case, the law book in which the opinion was published, and the year in which the court decided the case. For example, "U.S. Supreme Court, 485 U.S. 759 (1988)" refers to a U.S. Supreme Court case decided in 1988 that appears in Volume 485 of the *United States Reports* starting at page 759.

The Author of the Opinion

The next information is the name of the judge who wrote the opinion. Most opinions assigned in law school were issued by courts

[1] English criminal cases normally will be *Rex v. Doe* or *Regina v. Doe*. Rex and Regina aren't the victims: the words are Latin for "King" and "Queen." During the reign of a King, English courts use "Rex"; during the reign of a Queen, they switch to "Regina."

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with multiple judges. The name tells you which judge wrote that particular opinion. In older cases, the opinion often simply states a last name followed by the initial "J." No, judges don't all have the first initial "J." The letter stands for "Judge" or "Justice," depending on the court. On occasion, the opinion will use the Latin phrase "per curiam" instead of a judge's name. Per curiam means "by the court." It signals that the opinion reflects a common view among all the judges rather than the writings of a specific judge.

The Facts of the Case

Now let's move on to the opinion itself. The first part of the body of the opinion presents the facts of the case. In other words, what happened? The facts might be that Andy pulled out a gun and shot Bob. Or maybe Fred agreed to give Sally $100 and then changed his mind. Surprisingly, there are no particular rules for what facts a judge must include in the fact section of an opinion. Sometimes the fact sections are long, and sometimes they are short. Sometimes they are clear and accurate, and other times they are vague or incomplete.

Most discussions of the facts also cover the "procedural history" of the case. The procedural history explains how the legal dispute worked its way through the legal system to the court that is issuing the opinion. It will include various motions, hearings, and trials that occurred after the case was initially filed. Your civil procedure class is all about that kind of stuff; you should pay very close attention to the procedural history of cases when you read assignments for your civil procedure class. The procedural history of cases usually will be less important when you read a case for your other classes.

The Law of the Case

After the opinion presents the facts, it will then discuss the law. Many opinions present the law in two stages. The first stage discusses the general principles of law that are relevant to cases such as the one the court is deciding. This section might explore the history of a particular field of law or may include a discussion of past cases (known as "precedents") that are related to the case the court is de-

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ciding. This part of the opinion gives the reader background to help understand the context and significance of the court's decision. The second stage of the legal section applies the general legal principles to the particular facts of the dispute. As you might guess, this part is in many ways the heart of the opinion: It gets to the bottom line of why the court is ruling for one side and against the other.

Concurring and/or Dissenting Opinions

Most of the opinions you read as a law student are "majority" opinions. When a group of judges get together to decide a case, they vote on which side should win and also try to agree on a legal rationale to explain why that side has won. A majority opinion is an opinion joined by the majority of judges on that court. Although most decisions are unanimous, some cases are not. Some judges may disagree and will write a separate opinion offering a different approach. Those opinions are called "concurring opinions" or "dissenting opinions," and they appear after the majority opinion. A "concurring opinion" (sometimes just called a "concurrence") explains a vote in favor of the winning side but based on a different legal rationale. A "dissenting opinion" (sometimes just called a "dissent") explains a vote in favor of the losing side.

II. Common Legal Terms Found in Opinions

Now that you know what's in a legal opinion, it's time to learn some of the common words you'll find inside them. But first a history lesson, for reasons that should be clear in a minute.

In 1066, William the Conqueror came across the English Channel from what is now France and conquered the land that is today called England. The conquering Normans spoke French and the defeated Saxons spoke Old English. The Normans took over the court system, and their language became the language of the law. For several centuries after the French-speaking Normans took over England, lawyers and judges in English courts spoke in French. When English courts eventually returned to using English, they continued to use many French words.

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Why should you care about this ancient history? The American colonists considered themselves Englishmen, so they used the English legal system and adopted its language. This means that American legal opinions today are littered with weird French terms. Examples include plaintiff, defendant, tort, contract, crime, judge, attorney, counsel, court, verdict, party, appeal, evidence, and jury. These words are the everyday language of the American legal system. And they're all from the French, brought to you by William the Conqueror in 1066.

This means that when you read a legal opinion, you'll come across a lot of foreign-sounding words to describe the court system. You need to learn all of these words eventually; you should read cases with a legal dictionary nearby and should look up every word you don't know. But this section will give you a head start by introducing you to some of the most common words, many of which (but not all) are French in origin.

Types of Disputes and the Names of Participants

There are two basic kinds of legal disputes: civil and criminal. In a civil case, one person files a lawsuit against another asking the court to order the other side to pay him money or to do or stop doing something. An award of money is called "damages" and an order to do something or to refrain from doing something is called an "injunction." The person bringing the lawsuit is known as the "plaintiff" and the person sued is called the "defendant."

In criminal cases, there is no plaintiff and no lawsuit. The role of a plaintiff is occupied by a government prosecutor. Instead of filing a lawsuit (or equivalently, "suing" someone), the prosecutor files criminal "charges." Instead of asking for damages or an injunction, the prosecutor asks the court to punish the individual through either jail time or a fine. The government prosecutor is often referred to as "the state," "the prosecution," or simply "the government." The person charged is called the defendant, just like the person sued in a civil case.

In legal disputes, each party ordinarily is represented by a lawyer. Legal opinions use several different words for lawyers, includ-

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ing "attorney" and "counsel." There are some historical differences among these terms, but for the last century or so they have all meant the same thing. When a lawyer addresses a judge in court, she will always address the judge as "your honor," just like lawyers do in the movies. In legal opinions, however, judges will usually refer to themselves as "the Court."

Terms in Appellate Litigation

Most opinions that you read in law school are appellate opinions, which means that they decide the outcome of appeals. An "appeal" is a legal proceeding that considers whether another court's legal decision was right or wrong. After a court has ruled for one side, the losing side may seek review of that decision by filing an appeal before a higher court. The original court is usually known as the trial court, because that's where the trial occurs if there is one. The higher court is known as the appellate or appeals court, as it is the court that hears the appeal.

A single judge presides over trial court proceedings, but appellate cases are decided by panels of several judges. For example, in the federal court system, run by the United States government, a single trial judge known as a District Court judge oversees the trial stage. Cases can be appealed to the next higher court, the Court of Appeals, where cases are decided by panels of three judges known as Circuit Court judges. A side that loses before the Circuit Court can seek review of that decision at the United States Supreme Court. Supreme Court cases are decided by all nine judges. Supreme Court judges are called Justices instead of judges; there is one "Chief Justice" and the other eight are just plain "Justices" (technically they are "Associate Justices," but everyone just calls them "Justices").

During the proceedings before the higher court, the party that lost at the original court and is therefore filing the appeal is usually known as the "appellant." The party that won in the lower court and must defend the lower court's decision is known as the "appellee" (accent on the last syllable). Some older opinions may refer to the appellant as the "plaintiff in error" and the appellee as the "defendant

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in error." Finally, some courts label an appeal as a "petition," and require the losing party to petition the higher court for relief. In these cases, the party that lost before the lower court and is filing the petition for review is called the "petitioner." The party that won before the lower court and is responding to the petition in the higher court is called the "respondent."

Confused yet? You probably are, but don't worry. You'll read so many cases in the next few weeks that you'll get used to all of this very soon.

III. What You Need to Learn from Reading a Case

Okay, so you've just read a case for class. You think you understand it, but you're not sure if you learned what your professor wanted you to learn. Here is what professors want students to know after reading a case assigned for class:

Know the Facts

Law professors love the facts. When they call on students in class, they typically begin by asking students to state the facts of a particular case. Facts are important because law is often highly fact-sensitive, which is a fancy way of saying that the proper legal outcome depends on the exact details of what happened. If you don't know the facts, you can't really understand the case and can't understand the law.

Most law students don't appreciate the importance of the facts when they read a case. Students think, "I'm in law school, not fact school; I want to know what the law is, not just what happened in this one case." But trust me: the facts are really important.[2]

[2] If you don't believe me, you should take a look at a few law school exams. It turns out that the most common form of law school exam question presents a long description of a very particular set of facts. It then asks the student to "spot" and analyze the legal issues presented by those facts. These exam questions are known as "issue-spotters," as they test the student's ability to understand the facts and spot the legal issues they raise. As you might imagine, doing well on an issue-

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Know the Specific Legal Arguments Made by the Parties

Lawsuits are disputes, and judges only issue opinions when two parties to a dispute disagree on a particular legal question. This means that legal opinions focus on resolving the parties' very specific disagreement. The lawyers, not the judges, take the lead role in framing the issues raised by a case.

In an appeal, for example, the lawyer for the appellant will articulate specific ways in which the lower court was wrong. The appellate court will then look at those arguments and either agree or disagree. (Now you can understand why people pay big bucks for top lawyers; the best lawyers are highly skilled at identifying and articulating their arguments to the court.) Because the lawyers take the lead role in framing the issues, you need to understand exactly what arguments the two sides were making.

Know the Disposition

The "disposition" of a case is the action the court took. It is often announced at the very end of the opinion. For example, an appeals court might "affirm" a lower court decision, upholding it, or it might "reverse" the decision, ruling for the other side. Alternatively, an appeals court might "vacate" the lower court decision, wiping the lower-court decision off the books, and then "remand" the case, sending it back to the lower court for further proceedings. For now, you should keep in mind that when a higher court "affirms" it means that the lower court had it right (in result, if not in reasoning). Words like "reverse," "remand," and "vacate" means that the higher court though the lower court had it wrong.

Understand the Reasoning of the Majority Opinion

To understand the reasoning of an opinion, you should first identify the source of the law the judge applied. Some opinions interpret the Constitution, the founding charter of the government. Other cases

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spotter requires developing a careful and nuanced understanding of the importance of the facts. The best way to prepare for that is to read the fact sections of your cases very carefully.

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interpret "statutes," which is a fancy name for written laws passed by legislative bodies such as Congress. Still other cases interpret "the common law," which is a term that usually refers to the body of prior case decisions that derive ultimately from pre-1776 English law that the Colonists brought over from England.[3]

In your first year, the opinions that you read in your Torts, Contracts, and Property classes will mostly interpret the common law. Opinions in Criminal Law mostly interpret either the common law or statutes. Finally, opinions in your Civil Procedure casebook will mostly interpret statutory law or the Constitution. The source of law is very important because American law follows a clear hierarchy. Constitutional rules trump statutory (statute-based) rules, and statutory rules trump common law rules.

After you have identified the source of law, you should next identify the method of reasoning that the court used to justify its decision. When a case is governed by a statute, for example, the court usually will simply follow what the statute says. The court's role is narrow in such settings because the legislature has settled the law. Similarly, when past courts have already answered similar questions before, a court may conclude that it is required to reach a particular result because it is bound by the past precedents. This is an application of the judicial practice of "stare decisis," an abbreviation of a Latin phrase meaning "That which has been already decided should remain settled."

In other settings, courts may justify their decisions on public policy grounds. That is, they may pick the rule that they think is the best rule, and they may explain in the opinion why they think that rule is best. This is particularly likely in common law cases where judges are not bound by a statute or constitutional rule. Other courts will rely on morality, fairness, or notions of justice to justify

[3] The phrase "common law" started being used about a thousand years ago to refer to laws that were common to all English citizens. Thus, the word "common" in the phrase "common law" means common in the sense of "shared by all," not common in the sense of "not very special." The "common law" was announced in judicial opinions. As a result, you will sometimes hear the phrase "common law" used to refer to areas of judge-made law as opposed to legislatively-made law.

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their decisions. Many courts will mix and match, relying on several or even all of these justifications.

Understand the Significance of the Majority Opinion

Some opinions resolve the parties' legal dispute by announcing and applying a clear rule of law that is new to that particular case. That rule is known as the "holding" of the case. Holdings are often contrasted with "dicta" found in an opinion. Dicta refers to legal statements in the opinion not needed to resolve the dispute of the parties; the word is a pluralized abbreviation of the Latin phrase "obiter dictum," which means "a remark by the way."

When a court announces a clear holding, you should take a minute to think about how the court's rule would apply in other situations. During class, professors like to pose "hypotheticals," new sets of facts that are different from those found in the cases you have read. They do this for two reasons. First, it's hard to understand the significance of a legal rule unless you think about how it might apply to lots of different situations. A rule might look good in one setting, but another set of facts might reveal a major problem or ambiguity. Second, judges often reason by "analogy," which means a new case may be governed by an older case when the facts of the new case are similar to those of the older one. This raises the question, which are the legally relevant facts for this particular rule? The best way to evaluate this is to consider new sets of facts. You'll spend a lot of time doing this in class, and you can get a head start on your class discussions by asking the hypotheticals on your own before class begins.

Finally, you should accept that some opinions are vague. Sometimes a court won't explain its reasoning very well, and that forces us to try to figure out what the opinion means. You'll look for the holding of the case but become frustrated because you can't find one. It's not your fault; some opinions are written in a narrow way so that there is no clear holding, and others are just poorly reasoned or written. Rather than trying to fill in the ambiguity with false certainty, try embracing the ambiguity instead. One of the skills of top-flight lawyers is that they know what they don't know: they know

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when the law is unclear. Indeed, this skill of identifying when a problem is easy and when it is hard (in the sense of being unsettled or unresolved by the courts) is one of the keys to doing very well in law school. The best law students are the ones who recognize and identify these unsettled issues without pretending that they are easy.

Understand Any Concurring and/or Dissenting Opinions

You probably won't believe me at first, but concurrences and dissents are very important. You need to read them carefully. To understand why, you need to appreciate that law is man-made, and Anglo-American law has often been judge-made. Learning to "think like a lawyer" often means learning to think like a judge, which means learning how to evaluate which rules and explanations are strong and which are weak. Courts occasionally say things that are silly, wrongheaded, or confused, and you need to think independently about what judges say.

Concurring and dissenting opinions often do this work for you. Casebook authors edit out any unimportant concurrences and dissents to keep the opinions short. When concurrences and dissents appear in a casebook, it signals that they offer some valuable insights and raise important arguments. Disagreement between the majority opinion and concurring or dissenting opinions often frames the key issue raised by the case; to understand the case, you need to understand the arguments offered in concurring and dissenting opinions.

IV. Why Do Law Professors Use the Case Method?

I'll conclude by stepping back and explaining why law professors bother with the case method. Every law student quickly realizes that law school classes are very different from college classes. Your college professors probably stood at the podium and droned on while you sat back in your chair, safe in your cocoon. You're now starting law school, and it's very different. You're reading about actual cases, real-life disputes, and you're trying to learn about the law by picking up bits and pieces of it from what the opinions tell

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you. Even weirder, your professors are asking you questions about those opinions, getting everyone to join in a discussion about them. Why the difference?, you may be wondering. Why do law schools use the case method at all?

I think there are two major reasons, one historical and the other practical.

The Historical Reason

The legal system that we have inherited from England is largely judge-focused. The judges have made the law what it is through their written opinions. To understand that law, we need to study the actual decisions that the judges have written. Further, we need to learn to look at law the way that judges look at law. In our system of government, judges can only announce the law when deciding real disputes: they can't just have a press conference and announce a set of legal rules. (This is sometimes referred to as the "case or controversy" requirement; a court has no power to decide an issue unless it is presented by an actual case or controversy before the court.) To look at the law the way that judges do, we need to study actual cases and controversies, just like the judges. In short, we study real cases and disputes because real cases and disputes historically have been the primary source of law.

The Practical Reason

A second reason professors use the case method is that it teaches an essential skill for practicing lawyers. Lawyers represent clients, and clients will want to know how laws apply to them. To advise a client, a lawyer needs to understand exactly how an abstract rule of law will apply to the very specific situations a client might encounter. This is more difficult than you might think, in part because a legal rule that sounds definite and clear in the abstract may prove murky in application. (For example, imagine you go to a public park and see a sign that says "No vehicles in the park." That plainly forbids an automobile, but what about bicycles, wheelchairs, toy automobiles? What about airplanes? Ambulances? Are these "vehicles" for the purpose of the rule or not?) As a result, good lawyers

need a vivid imagination; they need to imagine how rules might apply, where they might be unclear, and where they might lead to unexpected outcomes. The case method and the frequent use of hypotheticals will help train your brain to think this way. Learning the law in light of concrete situations will help you deal with particular facts you'll encounter as a practicing lawyer.

Good luck!

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The Know-It-Alls

All good lawyers are know-it-alls, but not all lawyers who are know-it-alls are good lawyers. What is the difference? First, consider an excerpt from Tony Mauro, *Calling a Bad Day in Court Malpractice?*, Legal Times, July 20, 1998:

> In a California courtroom . . . a novel issue is under heated debate: Can a lawyer's oral argument before the Supreme Court ever be deemed to be so bad that it caused his client to lose the case? . . .
>
> If ever there was an oral argument to raise the Supreme Court malpractice issue, it is the one now before the California court: Thomas Campagne's now legendary argument on Dec. 2, 1996, before the justices in *Glickman v. Wileman Brothers & Elliott Inc.*, 117 S. Ct. 2130.
>
> Campagne represented California fruit ranchers in a First Amendment challenge to federal agricultural marketing orders that essentially forced them to fund generic fruit advertising with which they disagreed. It was cast as an important commercial speech case, raising First Amendment issues about government-compelled speech.
>
> The oral argument was preceded by a shoving match over who would argue the case – Campagne, who had represented the growers in early stages of the litigation, or renowned First Amendment litigator Michael McConnell, special counsel to Chicago's Mayer, Brown & Platt who represented some of the growers. Thirteen of the 16 growers in the case asked Campagne to step aside for the arguments, but he refused. The dispute was decided by an unusual coin toss conducted by Supreme Court Clerk William Suter.
>
> Campagne won the coin toss, and without moot court preparation or consultation with high court litigators, dove into oral argument for a raucous and riotous half-hour. He largely ignored the First Amendment, instead using his time as an opportunity to educate the justices about the relative virtues of different varieties of California plums. At one point, Campagne even veered into the bizarre and personal, advising Justice Antonin Scalia not to buy green plums lest his family get sick.
>
> The justices were clearly upset by the arguments and tried repeatedly to push Campagne back on track. An extraordinary letter to the Court from McConnell after the arguments, disavowing concessions made by Campagne, failed to repair the damage. The Court ended up ruling 5-4 in favor of the marketing program, finding that it posed no significant First Amendment problem.
>
> Daniel Gerawan of Reedley, Calif., one of the growers who had tried repeatedly beforehand to get Campagne to step aside and let McConnell argue, sued Campagne for legal malpractice. Without doubt, Gerawan says, the oral argument led directly to the loss.

Second, consider an excerpt from Tony Mauro, *Ennis Remembered As One of the ACLU's Best*, The Recorder, Aug. 7, 2000:

> But it is as a Supreme Court advocate that [Bruce] Ennis may be best remembered. He won 11 of the 16 cases he argued. His preparation for argument was legendary. No matter how late in the game he took on a case, Ennis wanted to know everything about its background and about his client. . . .
>
> In the commercial speech case, *Rubin v. Coors Brewing Corp.* in 1995, Ennis' meticulous preparation earned him a permanent place in Supreme Court lore. Ennis, arguing on behalf of Coors, challenged a federal restriction on beer labels.
>
> But what Justice Antonin Scalia wanted to know during oral argument seemed like a trivia question: What was the difference between beer and ale? Without missing a beat, Ennis told him that ale resulted from a "top fermentation process," while beer came from the bottom.
>
> Stunned Coors officials in the audience later said they could not have answered the question themselves. But Ennis, it so happened, had come across a technical explanation of the brewing

process in the transcript of a 1934 congressional hearing that he read in preparation for arguments.

The beer-ale colloquy has been memorialized in a guidebook for counsel arguing before the Supreme Court that is issued by the Court's clerk, under the heading "Know your client's business." Without mentioning the names of Ennis or Scalia, the entry noted that "the justice who posed the question thanked the counsel in a warm and gracious manner." Coors won the case 9-0.

But Ennis was not just prepared for trivia questions. He was also ready strategically, in many instances devising three different answers to questions he expected to be asked. The answer he picked depended on which justice asked the question.

If the query came from a hostile justice, Ennis had a quick reply ready that would enable him to change the subject fast. If it came from a justice he thought he could persuade, he had an answer ready with his best argument. A third answer was reserved for justices he already thought were on his side.

"If he knew he had three justices in his pocket going in, he focused his argument on winning two more," said Ogden. "He had a sense of the whole package."

Third, consider the list of outside counsel (from the Jenner & Block firm) on the cover page of Respondent's merits brief in the *Coors* case: Bruce J. Ennis, Jr. (*Counsel of Record*), Donald B. Verrilli, Jr., Paul M. Smith, and Nory Miller.

And, finally, consider this anecdote from Warner W. Gardner's memoir, *Pebbles From The Paths Behind: The Public Path 1909-1947* at 124-25 (1989):

May 11, 1942, was a red-letter Supreme Court day for me, in which I "won" a case after a half hour's preparation. I had gone to the Court to move the admission of a capable black attorney named Crockett who was on my staff, and had been pleased to note that the Chief Justice of Texas was a subordinate part of Crockett's group being admitted. I left at the luncheon recess and was caught by the Marshall just as I was going down the marble steps and escorted back to the Court room, where the Justices had remained. The[y] had just discovered that the next case, a prosecution of one McCann, was one where he planned to appear *pro se*. Chief Justice Stone, evidently assuming that one who had left the Solicitor General's Office had left the Government (a sentiment I rather shared), appointed me counsel either to present his case after the luncheon recess or to advise the Court what should be done. I spent the half hour with McCann and then presented the Court with three points, each of which I "won." (a) The issues were serious, and deserved argument. (b) They were also too complex to prepare in half an hour. (c) As I remained a Government attorney, someone else should be appointed to represent McCann. His conviction was affirmed at the next Term, but the vote was 5-4. *Adams v. U.S. ex. rel. McCann*, 317 U.S. 269 (1942).

plaintiff would return and answer the question. This deposition was given May 29, 1885, and it is very apparent that the plaintiff, at that time, had no knowledge that anything had been paid on the note, and that he never received the proceeds of the draft by which the payment of $300 was remitted. The conduct of the plaintiff and of agents of the corporation in respect to the note and draft, after the alleged transfer of the note to plaintiff, raised a strong presumption that such transfer was merely colorable, and that the note remained the property of the corporation during all those transactions. We canot say that the finding of the court in this behalf is not supported by the evidence. The judgment of the circuit court must be affirmed.

(80 Wis. 523)

VOSBURG v. PUTNEY.

(*Supreme Court of Wisconsin.* Nov. 17, 1891.)

ACTION FOR ASSAULT — UNINTENTIONAL INJURY — OPINION EVIDENCE — DAMAGES.

1. Where, in a civil action for assault, it appeared that the parties were in school, and defendant kicked plaintiff on the leg, during school hours, and caused the injury, though defendant may not have intended to injure plaintiff, the act being unlawful, defendant was liable.

2. It is error to admit an answer to a hypothetical question, calling for an opinion in a matter vital to the issue, which excludes from consideration facts already proved by a witness on whose testimony such question is based, when a consideration of such facts is essential in forming an intelligent opinion of the matter.

3. Defendant is liable for such injuries as result directly from his wrongful act, whether or not they could have been foreseen by him.

Appeal from circuit court, Waukesha county; A. SCOTT SLOAN, Judge. Reversed.

Action by Andrew Vosburg agalnst George Putney for personal injuries. From a judgment for plaintiff, defendant appeals.

The other facts fully appear in the following statement by LYON, J.:

The action was brought to recover damages for an assault and battery, alleged to have been committed by the defendant upon the plaintiff on February 20, 1889. The answer is a general denial. At the date of the alleged assault the plaintiff was a little more than 14 years of age, and the defendant a little less than 12 years of age. The injury complained of was caused by a kick inflicted by defendant upon the leg of the plaintiff, a little below the knee. The transaction occurred in a school-room in Waukesha, during school hours, both parties being pupils in the school. A former trial of the cause resulted in a verdict and judgment for the plaintiff for $2,800. The defendant appealed from such judgment to this court, and the same was reversed for error, and a new trial awarded. 78 Wis. 84, 47 N. W. Rep. 99. The case has been again tried in the circuit court, and the trial resulted in a verdict for plaintiff for $2,500. The facts of the case, as they appeared on both trials, are sufficiently stated in the opinion by Mr. Justice ORTON on the former appeal, and require no repetition. On the last trial the jury found a special verdict, as follows: "(1) Had the plaintiff during the month of January, 1889, received an injury just above the knee, which became inflamed, and produced pus? Answer. Yes. (2) Had such injury on the 20th day of February, 1889, nearly healed at the point of the injury? A. Yes. (3) Was the plaintiff, before said 20th of February, lame, as the result of such injury? A. No. (4) Had the *tibia* in the plaintiff's right leg become inflamed or diseased to some extent before he received the blow or kick from the defendant? A. No. (5) What was the exciting cause of the injury to the plaintiff's leg? A. Kick. (6) Did the defendant, in touching the plaintiff with his foot, intend to do him any harm? A. No. (7) At what sum do you assess the damages of the plaintiff? A. Twenty-five hundred dollars." The defendant moved for judgment in his favor on the verdict, and also for a new trial. The plaintiff moved for judgment on the verdict in his favor. The motions of defendant were overruled, and that of the plaintiff granted. Thereupon judgment for plaintiff, for $2,500 damages and costs of suit, was duly entered. The defendant appeals from the judgment.

M. S. Griswold and *T. W. Haight*, (*J. V. Quarles*, of counsel,) for appellant, to sustain the proposition that where there is no evil intent there can be no recovery, cited: 2 Greenl. Ev. §§ 82–85; 2 Add. Torts, § 790; Cooley, Torts, p. 162; Coward v. Baddeley, 4 Hurl. & N. 478; Christopherson v. Bare, 11 Q. B. 473; Hoffman v. Eppers, 41 Wis. 251; Krall v. Lull, 49 Wis. 405, 5 N. W. Rep. 874; Crandall v. Transportation Co., 16 Fed. Rep. 75; Brown v. Kendall, 6 Cush. 292.

Ryan & Merton, for respondent.

LYON, J., (*after stating the facts.*) Several errors are assigned, only three of which will be considered.

I. The jury having found that the defendant, in touching the plaintiff with his foot, did not intend to do him any harm, counsel for defendant maintain that the plaintiff has no cause of action, and that defendant's motion for judgment on the special verdict should have been granted. In support of this proposition counsel quote from 2 Greenl. Ev. § 83, the rule that "the intention to do harm is of the essence of an assault." Such is the rule, no doubt, in actions or prosecutions for mere assaults. But this is an action to recover damages for an alleged assault and battery. In such case the rule is correctly stated, in many of the authorities cited by counsel, that plaintiff must show either that the intention was unlawful, or that the defendant is in fault. If the intended act is unlawful, the intention to commit it must necessarily be unlawful. Hence, as applied to this case, if the kicking of the plaintiff by the defendant was an unlawful act, the intention of defendant to kick him was also unlawful. Had the parties been upon the play-grounds of the school, engaged in the usual boyish sports, the defendant being free from malice, wantonness, or negligence, and intending no harm to plaintiff in what he did, we should hesitate to hold the act of

the defendant unlawful, or that he could be held liable in this action. Some consideration is due to the implied license of the play-grounds. But it appears that the injury was inflicted in the school, after it had been called to order by the teacher, and after the regular exercises of the school had commenced. Under these circumstances, no implied license to do the act complained of existed, and such act was a violation of the order and decorum of the school, and necessarily unlawful. Hence we are of the opinion that, under the evidence and verdict, the action may be sustained.

II. The plaintiff testified, as a witness in his own behalf, as to the circumstances of the alleged injury inflicted upon him by the defendant, and also in regard to the wound he received in January, near the same knee, mentioned in the special verdict. The defendant claimed that such wound was the proximate cause of the injury to plaintiff's leg, in that it produced a diseased condition of the bone, which disease was in active progress when he received the kick, and that such kick did nothing more than to change the location, and perhaps somewhat hasten the progress, of the disease. The testimony of Dr. Bacon, a witness for plaintiff, (who was plaintiff's attending physician,) elicited on cross-examination, tends to some extent to establish such claim. Dr. Bacon first saw the injured leg on February 25th, and Dr. Philler, also one of plaintiff's witnesses, first saw it March 8th. Dr. Philler was called as a witness after the examination of the plaintiff and Dr. Bacon. On his direct examination he testified as follows: "I heard the testimony of Andrew Vosburg in regard to how he received the kick, February 20th, from his playmate. I heard read the testimony of Miss More, and heard where he said he received this kick on that day." (Miss More had already testified that she was the teacher of the school, and saw defendant standing in the aisle by his seat, and kicking across the aisle, hitting the plaintiff.) The following question was then propounded to Dr. Philler: "After hearing that testimony, and what you know of the case of the boy, seeing it on the 8th day of March, what, in your opinion, was the exciting cause that produced the inflammation that you saw in that boy's leg on that day?" An objection to this question was overruled, and the witness answered: "The exciting cause was the injury received at that day by the kick on the shin-bone." It will be observed that the above question to Dr. Philler calls for his opinion as a medical expert, based in part upon the testimony of the plaintiff, as to what was the proximate cause of the injury to plaintiff's leg. The plaintiff testified to two wounds upon his leg, either of which might have been such proximate cause. Without taking both of these wounds into consideration, the expert could give no intelligent or reliable opinion as to which of them caused the injury complained of; yet, in the hypothetical question propounded to him, one of these probable causes was excluded from the consideration of the witness, and he was required to give his opinion upon an imperfect and insufficient hypothesis,—one which excluded from his consideration a material fact essential to an intelligent opinion. A consideration by the witness of the wound received by the plaintiff in January being thus prevented, the witness had but one fact upon which to base his opinion, to-wit, the fact that defendant kicked plaintiff on the shin-bone. Based, as it necessarily was, on that fact alone, the opinion of Dr. Philler that the kick caused the injury was inevitable, when, had the proper hypothesis been submitted to him, his opinion might have been different. The answer of Dr. Philler to the hypothetical question put to him may have had, probably did have, a controlling influence with the jury, for they found by their verdict that his opinion was correct. Surely there can be no rule of evidence which will tolerate a hypothetical question to an expert, calling for his opinion in a matter vital to the case, which excludes from his consideration facts already proved by a witness upon whose testimony such hypothetical question is based, when a consideration of such facts by the expert is absolutely essential to enable him to form an intelligent opinion concerning such matter. The objection to the question put to Dr. Philler should have been sustained. The error in permitting the witness to answer the question is material, and necessarily fatal to the judgment.

III. Certain questions were proposed on behalf of defendant to be submitted to the jury, founded upon the theory that only such damages could be recovered as the defendant might reasonably be supposed to have contemplated as likely to result from his kicking the plaintiff. The court refused to submit such questions to the jury. The ruling was correct. The rule of damages in actions for torts was held in Brown v. Railway Co., 54 Wis. 342, 11 N. W. Rep. 356, 911, to be that the wrongdoer is liable for all injuries resulting directly from the wrongful act, whether they could or could not have been foreseen by him. The chief justice and the writer of this opinion dissented from the judgment in that case; chiefly because we were of the opinion that the complaint stated a cause of action *ex contractu*, and not *ex delicto*, and hence that a different rule of damages —the rule here contended for — was applicable. We did not question that the rule in actions for tort was correctly stated. That case rules this on the question of damages. The remaining errors assigned are upon the rulings of the court on objections to testimony. These rulings are not very likely to be repeated on another trial, and are not of sufficient importance to require a review of them on this appeal. The judgment of the circuit court must be reversed, and the cause will be remanded for a new trial.

(80 Wis. 428)

STACKMAN v. CHICAGO & N. W. RY. CO.

(*Supreme Court of Wisconsin.* Nov. 17, 1891.)

INJURY TO EMPLOYE—NEGLIGENCE OF FOREMAN—CONTRIBUTORY NEGLIGENCE.

1. A railroad company's foreman was engaged with a gang of men in pushing a car over

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Athlyn B. LANGFORD

v.

Midgie L. SHU.

No. 242.

Supreme Court of North Carolina.

Nov. 21, 1962.

Personal injury action. The Superior Court, Mecklenburg County, J. W. Pless, Jr., J., rendered judgment of nonsuit at the close of the plaintiff's evidence, and the plaintiff appealed. The Supreme Court, Sharp, J., held that evidence raised jury question whether defendant was liable in that she approved and participated in practical joke played on plaintiff, a neighbor, who jumped with fright and was injured when defendant's child released spring and a furry object which plaintiff believed to be an animal sprang out at plaintiff from a box which defendant had told her contained a mongoose which ate live snakes.

Reversed.

1. Negligence ⇐1

That it is a practical joke which is cause of injury does not excuse perpetrator from liability for injuries sustained.

2. Torts ⇐3

Where voluntary conduct breaches a duty and causes damage it is tortious although without design to injury.

3. Negligence ⇐1

If an act is done with intention of bringing about an apprehension of harmful or offensive conduct on part of another person, it is immaterial that actor is not inspired by any personal hostility or desire to injure the other.

4. Negligence ⇐48

Defendant owed to visiting neighbor the duty not to subject neighbor to a fright which, in exercise of due care or reasonable foresight, defendant should have known was likely to result in some injury to neighbor.

5. Parent and Child ⇐13(2)

Evidence raised jury question whether defendant was liable in that she approved and participated in practical joke and should have reasonably foreseen that plaintiff, a neighbor, was likely to jump with fright and suffer injury when defendant's child released spring and a furry object which plaintiff believed to be an animal sprang out at plaintiff from a box which defendant had told her contained a mongoose which ate live snakes.

6. Parent and Child ⇐13(1)

The mere relation of parent and child imposes on parent no liability for torts of child; the parent is not liable merely because the child lives at home with him and is under his care and control; apart from the parent's own negligence, liability exists only where tortious act is done by child as servant or agent of parent, or where act is consented to or ratified by parent.

7. Parent and Child ⇐13(1)

A parent is liable for act of his child if parent's conduct was such as to render his own negligence a proximate cause of the injury complained of; in such a case the parent's liability is based on the ordinary rules of negligence and not upon the relation of parent and child.

This civil action to recover damages for personal injuries was dismissed by judgment of nonsuit at the close of the plaintiff's evidence. That ruling presents the only question on appeal.

Plaintiff and defendant are next door neighbors. On the afternoon of March 11, 1961, Mrs. Langford, the plaintiff, came to visit Mrs. Shu, the defendant. As was her custom, she came by way of the backyard. Mrs. Shu was busy in the kitchen and plaintiff entered the house through the screened

back porch. As she entered, to her left on the porch was a picnic table with two benches, a chair and a lounge; on her right was a wicker couch. Beside the couch was a doorway into the kitchen. The furniture arrangement did not leave much "walking space" on the porch. When plaintiff entered the porch she saw on the picnic table a wooden box which was labeled "Danger, African Mongoose, Live Snake Eater." Plaintiff walked past the box into the kitchen and said to Mrs. Shu, "What in the world have you got on the back porch?" Defendant told her that it was a mongoose which a man had given to her husband for their children. Mrs. Langford then asked defendant what she was going to feed it and the reply was, "It eats snakes." Plaintiff and defendant had previously "discussed snakes, bugs, and so forth," and plaintiff had told defendant that she was afraid of them. Defendant told plaintiff to look at the box; that it would not hurt her.

The two Shu children, boys aged nine and eleven years respectively, were in the next room. Hearing this conversation between their mother and Mrs. Langford, and realizing that plaintiff had not seen "the box demonstrated," they came eagerly into the kitchen. The mongoose was in reality only a fox tail. Mrs. Shu, who was called as plaintiff's first witness, testified: "In order to show the box to someone, you have them standing at that end of the box, that is, the end of the box with the wire mesh over it. * * * (T)he lever is released with a spring, and it swings open and that is when it comes out."

The defendant's boys urged plaintiff to go out on the porch and look at the mongoose. Plaintiff declined to get near the box because she was afraid of snakes. When she started to go home she stopped in the kitchen door four or five feet from the box, still refusing "to get near that thing." Steve, the older boy, had been poking into the box with a stick which he then held in his hand. Plaintiff cautioned him not to hold that portion of the stick which had been in the box because "it was dirty down in the box where the animals and snakes were." About that time Steve released the spring on the box. With a whoosh and a screech, a furry object, which plaintiff believed to be an animal, sprang out at her. She jumped back and turned to run. There was so little room on the porch that she hit the lounge and stumbled back into a brick wall of the house, tearing a cartilage in her left knee. After extensive and painful treatments were ineffectual, an operation was required to repair the damage. Plaintiff spent sixty-three days in the hospital, endured much suffering and inconvenience, and incurred medical bills in the sum of $2,219.88.

According to the plaintiff, Mrs. Shu had stepped out on the porch at the time Steve released "the mongoose." According to Mrs. Shu, she was still in the kitchen, only a step from the porch, but she could hear the conversation between the children and Mrs. Langford. Defendant stepped out and saw "the mongoose" as it came out of the box in front of plaintiff.

McDougle, Ervin, Horack & Snepp and C. Eugene McCartha, Charlotte, for plaintiff, appellant.

Boyle, Alexander & Wade, Charlotte, for defendant, appellee.

SHARP, Justice.

[1, 2] This case involves a practical joke which caused unintended injury. However, the fact that it is a practical joke which is the cause of an injury does not excuse the perpetrator from liability for the injuries sustained. 52 Am.Jur., Torts, Sec. 90; 86 C.J.S. Torts § 20. Where voluntary conduct breaches a duty and causes damage it is tortious although without design to injury. 62 C.J., Torts, Sec. 22.

[3] If an act is done with the intention of bringing about an apprehension of harmful or offensive conduct on the part of another person, it is immaterial that the actor

is not inspired by any personal hostility or the desire to injure the other. See Annotation, Right of Victim of Practical Joke to Recover Against its Perpetrator, 9 A. L.R. 364.

In Johnston v. Pittard et al., 62 Ga.App. 550, 8 S.E.2d 717, six defendants, as a practical joke, persuaded plaintiff to go with them to a house in the country to see "some wild women." When they arrived at their destination, a vacant farm house, a man yelled from within and two shots were fired in plaintiff's direction. He "ran in desperation and fear of his life and fell into a ditch as a result of which he sustained injuries." The Court of Appeals, in ordering a new trial after verdict for the defendants, held that the defendants would be liable if they should have foreseen that injurious consequences to the plaintiff were the natural and probable result of their conduct and that this was a question for the jury.

In Lewis v. Woodland et al., 101 Ohio App. 442, 140 N.E.2d 322, plaintiff sought damages for a back injury which occurred while she was a guest in the automobile of the defendant Jones when she jumped with fright after defendant Woodland dropped a life-like rubber lizard in her lap. She alleged that the act of Woodland was the result of a preconceived plan of both defendants to frighten her and cause her to react suddenly and violently. The jury returned a verdict in favor of the plaintiff against both defendants. The court ruled that "the question of forseeability of the consequences of the defendants' perpetration of a joke was properly for consideration by the jury * * *." In the syllabus by the court it is said:

"Where a person's conduct is such as to frighten or cause an emotional disturbance to another, which the former should recognize as involving an unreasonable risk of bodily harm, the fact that the harm results solely from the internal operation of the fright does not protect the former from liability.

"Once it is shown that a person charged with frightening another should have anticipated that some injury would likely result from his conduct, * * * responsibility attaches for all consequences naturally resulting from the former's conduct * * * although it might not have been specifically contemplated or anticipated."

[4] The defendant in the instant case owed to the plaintiff the duty not to subject her to a fright which, in the exercise of due care or reasonable foresight, she should have known was likely to result in some injury to her. Kirby v. Jules Chain Stores Corp., 210 N.C. 808, 188 S.E. 625. Restatement of Torts, 1177, Sec. 436; Lewis v. Woodland, supra. The purpose of the box labeled "Danger, African Mongoose, Live Snake Eater" was to produce sudden fright and to cause the affrighted person to recoil violently. The degree of fright generated would depend upon the fortitude of the individual victim.

[5] Had the defendant herself demonstrated the box and sprung the trap which released the fake mongoose, there is no doubt that it would be for the jury to say whether or not she should have reasonably foreseen that some injury might result to the plaintiff from the perpetration of her joke. The question now arises whether the defendant is liable for the act of her eleven-year-old boy who released the furry object which frightened plaintiff into precipitous flight and caused her injury.

[6, 7] North Carolina is in full accord with the common-law rule that the mere relation of parent and child imposes on the parent no liability for the torts of the child. The parent is not liable merely because the child lives at home with him and is under his care and control. Apart from the parent's own negligence, liability exists only where the tortious act is done by the child as the servant or agent of the parent, or where the act is consented to or ratified by the parent. A parent is liable for the act of his child

if the parent's conduct was such as to render his own negligence a proximate cause of the injury complained of. In such a case the parent's liability is based on the ordinary rules of negligence and not upon the relation of parent and child. 39 Am.Jur., Parent and Child, Sec. 55. Furthermore, "a parent may be liable for the consequences of failure to exercise the power of control which he has over his children, where he knows, or in the exercise of due care should have known, that injury to another is a probable consequence * * *. Failure to restrain the child, it is said, amounts to a sanction of or consent to his acts by the parent * * *. (A)s in all negligence cases, the issue in the last analysis is whether the parent exercised reasonable care under all the circumstances * * *." 39 Am.Jur., Parent and Child, Sec. 58; See also 67 C.J.S. Parent and Child, § 68.

In Lane v. Chatham, 251 N.C. 400, 111 S.E.2d 598, this Court in an opinion by Bobbitt, J. fully considered the liability of parents for the torts of their child. In that case the parents had entrusted their nine-year-old son with an air rifle with which he injured the plaintiff. There was evidence that the mother knew the boy had shot at others before; there was no evidence that the father knew this. In sustaining a verdict against the mother the Court said that a parent was negligent, and therefore liable, if under the circumstances he "could and should, by the exercise of due care, have reasonably foreseen that the boy was likely to use the air rifle in such manner as to cause injury, and failed to exercise reasonable care to prohibit, restrict or supervise his further use thereof."

Defendant in this case set the stage for her children's prank; she aided and abetted it by her answers to the plaintiff's questions about the box. Defendant had seen the box demonstrated and she knew as only the mother of boys aged nine and eleven could know, that unless she took positive steps to prevent it, they would not let such a wary and apprehensive prospect as Mrs. Langford escape without a demonstration. To reach any other conclusion would be to ignore the propensities of little boys who, since the memory of a man runneth not to the contrary, have delighted to stampede timorous ladies with snakes, bugs, lizards, mice and other rewarding small creatures which hold no terror for youngsters. It is implicit in this evidence that defendant expected to enjoy the joke on her neighbor as much as the children, and that she participated in the act with them. To say that she should not have expected one of the boys to spring "the mongoose" on plaintiff would strain credulity.

Defendant contends that the plaintiff, when she came visiting, was a mere licensee, Murrell v. Handley, 245 N.C. 559, 96 S.E.2d 717, and that defendant owed plaintiff no duty to keep her premises in a safe and suitable condition for callers. Suffice it to say that plaintiff's injuries did not arise from any defect or condition of the premises. They were not due to passive negligence or acts of omission. Pafford v. J. A. Jones Construction Co., 217 N.C. 730, 9 S.E.2d 408. Plaintiff's status as a licensee is immaterial to the decision of this case.

Taken in the light most favorable to the plaintiff the evidence would permit the jury to find that defendant approved and participated in the practical joke her children played on the plaintiff; that defendant knew plaintiff was afraid of snakes and of the contents of the box which defendant had told her contained a mongoose which ate live snakes; that in the exercise of due care defendant could have reasonably foreseen that if a furry object came hurtling from the box toward plaintiff she would become so frightened that she was likely to do herself some bodily harm in headlong flight. In our opinion, and we so hold, the evidence makes out a case for the jury.

The judgment of the court below is reversed.

Reversed.

92 Ohio App.3d 232

[232] LEICHTMAN, Appellant,

v.

WLW JACOR COMMUNICATIONS, INC. et al., Appellees.

No. C-920922.

Court of Appeals of Ohio, Hamilton County.

Decided Jan. 26, 1994.

Radio talk show guest (an antismoking advocate) sued radio talk show hosts and radio station for battery, invasion of privacy, and violation of municipal regulation making it illegal to smoke in designated public places. Guest alleged that he was invited to appear on talk show to discuss full effects of smoking and breathing secondary smoke and that, at host's urging, second host lit cigar and repeatedly blew smoke in guest's face. The Court of Common Pleas, Hamilton County, dismissed action for failure to state claim. Guest appealed. The Court of Appeals held that: (1) guest stated claim for battery; (2) guest failed to state claim for invasion of privacy; and (3) there is no private right of action for violation of municipal regulation.

Affirmed in part, reversed and remanded in part.

1. Pretrial Procedure ⇐679

When construing complaint for failure to state claim, court assumes that factual allegations on face of complaint are true. Rules Civ.Proc., Rule 12(B)(6).

2. Pretrial Procedure ⇐622

Court cannot dismiss complaint for failure to state claim merely because it doubts plaintiff will prevail. Rules Civ.Proc., Rule 12(B)(6).

3. Assault and Battery ⇐24(1)

Antismoking advocate sufficiently alleged that radio talk show host committed "battery" by intentionally blowing cigar smoke in advocate's face when advocate was in studio to discuss harmful effects of smoking and breathing secondary smoke. R.C. §§ 3704.01(B), 5709.20(A).

See publication Words and Phrases for other judicial constructions and definitions.

[233] **4. Assault and Battery ⇐2**

Radio talk show guest stated "battery" claim against host by alleging that, at host's urging, second host repeatedly blew cigar smoke in guest's face. R.C. §§ 3704.01(B), 5709.20(A).

5. Master and Servant ⇐302(1)

Employer is not legally responsible for intentional torts of its employees that do not facilitate or promote its business.

6. Master and Servant ⇐332(2)

Whether employer is liable under doctrine of respondent superior because its employee is acting within scope of employment is ordinarily question of fact.

7. Assault and Battery ⇐2

Master and Servant ⇐302(3)

Radio talk show guest stated claim for "battery" against radio station by alleging that he was invited to appear on talk show to discuss full effects of smoking and breathing secondary smoke and that, while in studio, talk show host lit cigar and repeatedly blew smoke in guest's face. R.C. §§ 3704.01(B), 5709.20(A).

8. Torts ⇐8.5(4)

Antismoking advocate failed to state claim against radio talk show hosts and radio station for tortious invasion of privacy by alleging that he appeared on first host's radio talk show to discuss harmful effects of smoking and breathing secondary smoke, and that second host, at first host's prompting, lit cigar and repeatedly blew smoke in guest's face, as there was no substantial intrusion into guest's solicitude, seclusion, habitation, or affairs; guest willingly entered studio to make public radio appearance with first host, who was known for his blowtorch rhetoric.

9. Action ⇐3

Health and Environment ⇐25.15(4.1)

There is no private right of action under municipal regulation that makes it illegal to smoke in designated public places.

Kircher, Robinson, Cook, Newman & Welch and Robert B. Newman, Cincinnati, for appellant.

Strauss & Troy and William K. Flynn, Cincinnati, for appellees WLW Jacor Communications, Inc. and William Cunningham.

Waite, Schneider, Bayless & Chesley, Stanley M. Chesley and Paul M. DeMarco, Cincinnati, for appellee Andy Furman.

234 PER CURIAM.

The plaintiff-appellant, Ahron Leichtman, appeals from the trial court's order dismissing his complaint against the defendants-appellees, WLW Jacor Communications ("WLW"), William Cunningham and Andy Furman, for battery, invasion of privacy, and a violation of Cincinnati Bd. of Health Reg. No. 00083. In his single assignment of error, Leichtman contends that his complaint was sufficient to state a claim upon which relief could be granted and, therefore, the trial court was in error when it granted the defendants' Civ.R. 12(B)(6) motion. We agree in part.

In his complaint, Leichtman claims to be "a nationally known" antismoking advocate. Leichtman alleges that, on the date of the Great American Smokeout, he was invited to appear on the WLW Bill Cunningham radio talk show to discuss the harmful effects of smoking and breathing secondary smoke. He also alleges that, while he was in the studio, Furman, another WLW talk-show host, lit a cigar and repeatedly blew smoke in Leichtman's face "for the purpose of causing physical discomfort, humiliation and distress."

[1, 2] Under the rules of notice pleading, Civ.R. 8(A)(1) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." When construing a complaint for failure to state a claim, under Civ.R. 12(B)(6), the court assumes that the factual allegations on the face of the complaint are true. *O'Brien v. Univ. Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, 71 O.O.2d 223, 327 N.E.2d 753, syllabus. For the court to grant a motion to dismiss, "it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery." *Id.* A court cannot dismiss a complaint under Civ.R. 12(B)(6) merely because it doubts the plaintiff will prevail. *Slife v. Kundtz Properties, Inc.* (1974), 40 Ohio App.2d 179, 69 O.O.2d 178, 318 N.E.2d 557. Because it is so easy for the pleader to satisfy the standard of Civ.R. 8(A), few complaints are subject to dismissal. *Id.* at 182, 69 O.O.2d at 180, 318 N.E.2d at 560.

Leichtman contends that Furman's intentional act constituted a battery. The Restatement of the Law 2d, Torts (1965), states:

"An actor is subject to liability to another for battery if

"(a) he acts intending to cause a harmful or offensive contact with the person of the other * * *, and

"(b) a harmful contact with the person of the other directly or indirectly results[; or] [1]

235 "[c] an offensive contact with the person of the other directly or indirectly results."[2] (Footnote added.)

1. Harmful contact: Restatement of the Law 2d, Torts (1965) 25, Section 13, cited with approval in *Love v. Port Clinton* (1988), 37 Ohio St.3d 98, 99, 524 N.E.2d 166, 167.

2. Offensive contact: Restatement, *supra*, at 30, Section 18. See, generally, *Love* at 99–100, 524 N.E.2d at 167, in which the court: (1) referred to battery as "intentional, offensive touching"; (2) defined offensive contact as that which is "offensive to a reasonable sense of personal dignity"; and (3) commented that if "an arrest is made by a mere touching * * * the touching is offensive and, unless privileged, is a 'battery.'" *Id.*, 37 Ohio St.3d at 99, 524 N.E.2d at 167, fn. 3. See, also, *Schultz v. Elm Beverage Shoppe* (1988), 40 Ohio St.3d 326, 328, 533 N.E.2d 349, 352, fn. 2 (citing Restatement, *supra*, at 22, Chapter 2, Introductory Note), in which the court identified an interest in personality as "freedom from offensive bodily contacts"; *Keister v. Gaker* (Nov. 8, 1978), Warren App. Nos. 219 and 223, unreported (battery is offensive touching).

[3] In determining if a person is liable for a battery, the Supreme Court has adopted the rule that "[c]ontact which is offensive to a reasonable sense of personal dignity is offensive contact." *Love v. Port Clinton* (1988), 37 Ohio St.3d 98, 99, 524 N.E.2d 166, 167. It has defined "offensive" to mean "disagreeable or nauseating or painful because of outrage to taste and sensibilities or affronting insultingness." *State v. Phipps* (1979), 58 Ohio St.2d 271, 274, 12 O.O.3d 273, 275, 389 N.E.2d 1128, 1131. Furthermore, tobacco smoke, as "particulate matter," has the physical properties capable of making contact. R.C. 3704.01(B) and 5709.20(A); Ohio Adm. Code 3745-17.

[4] As alleged in Leichtman's complaint, when Furman intentionally blew cigar smoke in Leichtman's face, under Ohio common law, he committed a battery. No matter how trivial the incident, a battery is actionable, even if damages are only one dollar. *Lacey v. Laird* (1956), 166 Ohio St. 12, 1 O.O.2d 158, 139 N.E.2d 25, paragraph two of the syllabus. The rationale is explained by Roscoe Pound in his essay "Liability": "[I]n civilized society men must be able to assume that others will do them no intentional injury—that others will commit no intentioned aggressions upon them." Pound, An Introduction to the Philosophy of Law (1922) 169.

Other jurisdictions also have concluded that a person can commit a battery by intentionally directing tobacco smoke at another. *Richardson v. Hennly* (1993), 209 Ga.App. 868, 871, 434 S.E.2d 772, 774-775. We do not, however, adopt or lend credence to the theory of a "smoker's battery," which imposes liability if there is substantial certainty that exhaled smoke will predictably contact a nonsmoker. Ezra, Smoker Battery: An Antidote to Second-Hand Smoke (1990), 63 S.Cal.L.Rev. 1061, 1090. Also, whether the "substantial certainty" prong of intent from the Restatement of Torts translates to liability for secondary smoke via the intentional tort doctrine in employment cases as defined by the Supreme 236 Court in *Fyffe v. Jeno's, Inc.* (1991), 59 Ohio St.3d 115, 570 N.E.2d 1108, paragraph one of the syllabus, need not be decided here because Leichtman's claim for battery is based exclusively on Furman's commission of a deliberate act. Finally, because Leichtman alleges that Furman deliberately blew smoke into his face, we find it unnecessary to address offensive contact from passive or secondary smoke under the "glass cage" defense of *McCracken v. Sloan* (1979), 40 N.C.App. 214, 217, 252 S.E.2d 250, 252, relied on by the defendants.

Neither Cunningham nor WLW is entitled to judgment on the battery claim under Civ.R. 12(B)(6). Concerning Cunningham, at common law, one who is present and encourages or incites commission of a battery by words can be equally liable as a principal. *Bell v. Miller* (1831), 5 Ohio 250; 6 Ohio Jurisprudence 3d (1978) 121-122, Assault, Section 20. Leichtman's complaint states, "At Defendant Cunningham's urging, Defendant Furman repeatedly blew cigar smoke in Plaintiff's face."

[5-7] With regard to WLW, an employer is not legally responsible for the intentional torts of its employees that do not facilitate or promote its business. *Osborne v. Lyles* (1992), 63 Ohio St.3d 326, 329-330, 587 N.E.2d 825, 828-829. However, whether an employer is liable under the doctrine of *respondeat superior* because its employee is acting within the scope of employment is ordinarily a question of fact. *Id.* at 330, 587 N.E.2d at 825. Accordingly, Leichtman's claim for battery with the allegations against the three defendants in the second count of the complaint is sufficient to withstand a motion to dismiss under Civ.R. 12(B)(6).

[8] By contrast, the first and third counts of Leichtman's complaint do not state claims upon which relief can be granted. The trial court correctly granted the Civ.R. 12(B)(6) motion as to both counts. In his first count, Leichtman alleged a tortious invasion of his privacy. See, generally, Restatement, *supra*, at 376, Section 652B, as adopted by *Sustin v. Fee* (1982), 69 Ohio St.2d 143, 145, 23 O.O.3d 182, 183-184, 431 N.E.2d 992, 993. A claim for invasion of privacy may involve any one of four distinct torts. Prosser, Privacy (1960), 48 Cal.L.Rev. 383. The tort that is relevant here requires some substantial intrusion into a plaintiff's solitude, seclusion, habitation, or affairs that would be highly

offensive to a reasonable person. See, *e.g.*, Restatement, *supra*, at 378–379, Section 652B, Comments *a* to *d*; *Killilea v. Sears Roebuck & Co.* (1985), 27 Ohio App.3d 163, 166, 27 OBR 196, 198–199, 499 N.E.2d 1291, 1294. Leichtman acknowledges that he willingly entered the WLW radio studio to make a public radio appearance with Cunningham, who is known for his blowtorch rhetoric. Therefore, Leichtman's[237] allegations do not support his assertion that Furman, Cunningham, or WLW intruded into his privacy.

[9] In his third count, Leichtman attempts to create a private right of action for violation of Cincinnati Bd. of Health Reg. No. 00083, which makes it illegal to smoke in designated public places. Even if we are to assume, for argument, that a municipal regulation is tantamount to public policy established by a statute enacted by the General Assembly, the regulation has created rights for nonsmokers that did not exist at common law. Bd. of Health Reg., *supra*, at Sections 00083–7 and 00083–13. Therefore, because sanctions also are provided to enforce the regulation, there is no implied private remedy for its violation. R.C. 3707.99, 3707.48(C); *Franklin Cty. Law Enforcement Assn. v. Fraternal Order of Police, Capital City Lodge No. 9* (1991), 59 Ohio St.3d 167, 169, 572 N.E.2d 87, 89–90; *Fawcett v. G.C. Murphy & Co.* (1976), 46 Ohio St.2d 245, 248–250, 75 O.O.2d 291, 293–294, 348 N.E.2d 144, 147 (superseded by statute on other grounds).

Arguably, trivial cases are responsible for an avalanche of lawsuits in the courts. They delay cases that are important to individuals and corporations and that involve important social issues. The result is justice denied to litigants and their counsel who must wait for their day in court. However, absent circumstances that warrant sanctions for frivolous appeals under App.R. 23, we refuse to limit one's right to sue. Section 16, Article I, Ohio Constitution states, "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay."

This case emphasizes the need for some form of alternative dispute resolution operating totally outside the court system as a means to provide an attentive ear to the parties and a resolution of disputes in a nominal case. Some need a forum in which they can express corrosive contempt for another without dragging their antagonist through the expense inherent in a lawsuit. Until such an alternative forum is created, Leichtman's battery claim, previously knocked out by the trial judge in the first round, now survives round two to advance again through the courts into round three.

We affirm the trial court's judgment as to the first and third counts of the complaint, but we reverse that portion of the trial court's order that dismissed the battery claim in the second count of the complaint. This cause is remanded for further proceedings consistent with law on that claim only.

Judgment accordingly.

DOAN, P.J., and HILDEBRANDT and GORMAN, JJ., concur.

92 Ohio App.3d 238

[238]**The STATE of Ohio, Appellee,**

v.

BOULABEIZ, Appellant.

No. C–930001.

Court of Appeals of Ohio, Hamilton County.

Decided Jan. 26, 1994.

Defendant was convicted in the Court of Common Pleas, Hamilton County, of four counts of felonious assault. Defendant appealed. The Court of Appeals held that: (1) prosecutor's questions to witness and remarks in closing argument concerning culture and beliefs of foreign nation towards women did not prejudicially affect a substan-

held that the rights fixed by the terms of the contract are exclusive. Plaintiff was entitled to have refunded to him the $50 paid at the time the contract was entered into, but was entitled to no other or further relief, by way of damages or otherwise. Nor is he entitled to performance of the contract in so far as defendant is able to perform the same, viz., by conveying the property subject to the homestead right of the wife and her one-third interest in the remainder of the land. Such relief could be awarded only by ignoring the express provisions of the contract. The cases cited in support of the view that plaintiff may demand such partial performance are not in point. We do not question the proposition that where a husband contracts to convey land owned by him, a part of which constitutes his homestead, and his wife refuses to join in the conveyance, he may be compelled to perform to the extent of his power by conveying his interest in the land. Weitzner v. Thingstad, 55 Minn. 244, 56 N. W. 817. But that rule can have no application to a case like that at bar, where the contract expressly provides the remedy and rights of the parties in case of the inability of the vendor to perform. No such remedy was provided by the contract construed in the case just cited.

We do not wish to be understood as holding that the contract is so far exclusive of all other remedies that damages might not be recovered in a proper action based upon fraud and collusion between the husband and wife, by which the husband fraudulently induced the wife to refuse to join in the sale for the purpose of rendering the title defective and bringing into force and effect the clause terminating the contract. But such is not this action.

It follows that all the relief to which plaintiff was entitled was awarded by the court below, and it was error to grant a new trial. In no view of the case could plaintiff recover more than the $50 paid by him at the time the contract was entered into. It is therefore ordered that the order appealed from be reversed, and the cause remanded to the court below, with directions to enter judgment as directed by its findings.

EPSTEIN v. CHICAGO G. W. RY. CO.

(Supreme Court of Minnesota. May 26, 1905.)

Appeal from District Court, Hennepin County; David F. Simpson, Judge.

Action by Max Epstein against the Chicago Great Western Railway Company. Verdict for plaintiff. From an order granting a new trial, plaintiff appeals. Affirmed.

Wm. B. McIntyre, for appellant. A. G. Briggs and T. P. McNamara, for respondent.

PER CURIAM. Action to recover damages for the wrongful taking and carrying away of a quantity of sand and soil from the rear of plaintiff's lot in Minneapolis. The action was tried before a jury, and a verdict for $300 returned for plaintiff, whereupon defendant moved for a new trial upon several grounds; among them, that the verdict was not justified by the evidence and was contrary to law. The motion for a new trial was granted unless plaintiff would consent to a reduction of the verdict to $125, which plaintiff refused, and appealed from the order.

The lot was 32 feet wide by 122 feet in length, located between Washington avenue and the river. The front of the lot was upon grade, and ran back for a distance of about 50 feet, and then sloped upward until at the rear it was about 5 or 6 feet above the grade. The material was taken from the high portion at the back of the lot, causing it to slope off to the grade. The witness on the part of appellant placed the damage at from $250 to $325, and respondent's witness testified that there was no damage at all.

While the motion for a new trial was based upon all of the statutory grounds, it is evident from the order itself that a new trial was granted upon the ground that the court did not consider the verdict justified by the evidence. It does not appear that the court exceeded the limits of sound discretion in granting the new trial, and the case is controlled by the familiar case of Hicks v. Stone, 13 Minn. 434 (Gil. 398).

Order affirmed.

MOHR v. WILLIAMS (two cases).

(Supreme Court of Minnesota. June 23, 1905.)

1. NEW TRIAL—EXCESSIVE DAMAGES.

Whether a new trial upon the ground of excessive or inadequate damages should be granted or refused, or whether the verdict should be reduced where excessive, rests in the sound judicial discretion of the trial court, in reviewing which this court will be guided by the general rule applicable to other discretionary orders.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, §§ 9, 10, 153–156.]

2. ASSAULT — CIVIL ACTION — EVIDENCE—INTENT.

It is unnecessary to show in a civil action for an assault and battery that defendant intended by the act complained of to injure the plaintiff. It is sufficient if it appear that the act was unlawful.

[Ed. Note.—For cases in point, see vol. 4, Cent. Dig. Assault and Battery, § 2.]

3. SAME — UNAUTHORIZED OPERATION BY PHYSICIAN.

A surgical operation by a physician upon the body of his patient is wrongful and unlawful where performed without the express or implied consent of the patient. In the absence of such consent, the physician has no authority, implied or otherwise, to perform the same. Consent may be implied from circumstances.

4. SAME — EVIDENCE — CONSENT — QUESTION FOR JURY.

Plaintiff consulted defendant concerning a difficulty with her right ear. Defendant examined the organ and advised an operation, to

which plaintiff consented. After being placed under the influence of anæsthetics, and when plaintiff was unconscious therefrom, defendant examined her left ear, and found it in a more serious condition than her right, and in greater need of an operation. He called the attention of plaintiff's family physician to the conditions he had discovered, who attended the operation at plaintiff's request, and finally concluded that the operation should be performed upon the left instead of the right ear, to which the family physician made no objection. Plaintiff had not previously experienced any difficulty with her left ear, and was not informed prior to the time she was placed under the influence of anæsthetics that any difficulty existed with reference to it, and she did not consent to an operation thereon. Subsequently, on the claim that the operation seriously impaired her sense of hearing and was wrongful and unlawful, she brought this action to recover damages for an assault and battery. It is *held:*

(a) That defendant had no authority to perform the operation without plaintiff's consent, express or implied.

(b) That her consent was not expressly given, and whether it should be implied from the circumstances of the case, was a question for the jury to determine.

(c) That, if the operation was not authorized by the express or implied consent of plaintiff, it was wrongful and unlawful, and constituted, in law, an assault and battery.

(Syllabus by the Court.)

Appeal from District Court, Ramsey County; Olin B. Lewis, Judge.

Action by Anna Mohr against Cornelius Williams. From an order denying a motion for judgment notwithstanding the verdict, defendant appeals; and from an order granting a new trial, plaintiff appeals. Affirmed.

H. A. Loughran and S. C. Olmstead, for plaintiff. Keith, Evans, Thompson & Fairchild and John D. O'Brien, for defendant.

BROWN, J. Defendant is a physician and surgeon of standing and character, making disorders of the ear a specialty, and having an extensive practice in the city of St. Paul. He was consulted by plaintiff, who complained to him of trouble with her right ear, and, at her request, made an examination of that organ for the purpose of ascertaining its condition. He also at the same time examined her left ear, but, owing to foreign substances therein, was unable to make a full and complete diagnosis at that time. The examination of her right ear disclosed a large perforation in the lower portion of the drum membrane, and a large polyp in the middle ear, which indicated that some of the small bones of the middle ear (ossicles) were probably diseased. He informed plaintiff of the result of his examination, and advised an operation for the purpose of removing the polyp and diseased ossicles. After consultation with her family physician, and one or two further consultations with defendant, plaintiff decided to submit to the proposed operation. She was not informed that her left ear was in any way diseased, and understood that the necessity for an operation applied to her right ear only. She repaired to the hospital, and was placed under the influence of anæsthetics; and, after being made unconscious, defendant made a thorough examination of her left ear, and found it in a more serious condition than her right one. A small perforation was discovered high up in the drum membrane, hooded, and with granulated edges, and the bone of the inner wall of the middle ear was diseased and dead. He called this discovery to the attention of Dr. Davis—plaintiff's family physician, who attended the operation at her request—who also examined the ear, and confirmed defendant in his diagnosis. Defendant also further examined the right ear, and found its condition less serious than expected, and finally concluded that the left, instead of the right, should be operated upon; devoting to the right ear other treatment. He then performed the operation of ossiculectomy on plaintiff's left ear; removing a portion of the drum membrane, and scraping away the diseased portion of the inner wall of the ear. The operation was in every way successful and skillfully performed. It is claimed by plaintiff that the operation greatly impaired her hearing, seriously injured her person, and, not having been consented to by her, was wrongful and unlawful, constituting an assault and battery; and she brought this action to recover damages therefor. The trial in the court below resulted in a verdict for plaintiff for $14,322.50. Defendant thereafter moved the court for judgment notwithstanding the verdict, on the ground that, on the evidence presented, plaintiff was not entitled to recover, or, if that relief was denied, for a new trial on the ground, among others, that the verdict was excessive; appearing to have been given under the influence of passion and prejudice. The trial court denied the motion for judgment, but granted a new trial on the ground, as stated in the order, that the damages were excessive. Defendant appealed from the order denying the motion for judgment, and plaintiff appealed from the order granting a new trial.

1. It is contended on plaintiff's appeal that the trial court erred in granting a new trial of the action; that the order should be reversed, and the verdict reinstated. The new trial was granted, as already stated, on the ground that the verdict was excessive, appearing to have been given under the influence of passion and prejudice; and the point made is that the evidence, as contained in the record, does not sustain this conclusion, within the limits of the rule applicable to motions for a new trial based upon that ground. Considerable confusion has existed with reference to the proper rule guiding this court in reviewing orders of this kind ever since the decision in Nelson v. West Duluth, 55 Minn. 487, 57 N. W. 149, wherein it was said that the rule of Hicks v. Stone, 13 Minn. 434 (Gil. 398), did not apply. Several decisions involving the same question have since

been filed, and the bar is apparently in some doubt as to the true rule upon the subject. We are not disposed to review the former decisions of the court, but, for future guidance, take this occasion to say (that there may be no further controversy in the matter) that in actions to recover unliquidated damages, such as actions for personal injuries, libel, and slander, and similar actions, where the plaintiff's damages cannot be computed by mathematical calculation, and are not susceptible to proof by opinion evidence, and are within the discretion of the jury, the motion for new trial on the ground of excessive or inadequate damages should be made under the fourth subdivision of section 5398, Gen. St. 1894; and in such cases the court will not interfere with the verdict unless the damages awarded appear clearly to be excessive or inadequate, as the case may be, and to have been given under the influence of passion or prejudice. On the other hand, in all actions, whether sounding in tort or contract, where the amount of damages depends upon opinion evidence, as the value of property converted or destroyed, the nature and extent of injuries to person or property, the motion for new trial should be made under the fifth subdivision of the statute referred to; and in cases of doubt, or where both elements of damages are involved, under both subdivisions. State v. Shevlin-Carpenter Co., 66 Minn. 217, 68 N. W. 973. But in any case, whether a new trial upon the ground of excessive or inadequate damages should be granted or refused, or whether the verdict should be reduced, rests in the sound judicial discretion of the trial court (Craig v. Cook, 28 Minn. 232, 9 N. W. 712; Pratt v. Pioneer Press, 32 Minn. 217, 18 N. W. 836, 20 N. W. 87), in reviewing which this court will be guided by the general rule applicable to other discretionary orders. We applied this rule at the present term in Epstein v. Ry. Co. (recently decided) 104 N. W. 12. Where the damages are susceptible of ascertainment by calculation, and the jury return either an inadequate or excessive amount, it is the duty of the court to grant unconditionally a new trial for the inadequacy of the verdict, or, if excessive, a new trial unless plaintiff will consent to a reduction of the amount given by the jury. Applying the rule stated to the case at bar, we are clear the trial court did not abuse its discretion in granting defendant's motion for a new trial, and its order on plaintiff's appeal is affirmed. We cannot adopt the suggestion of counsel for plaintiff that this court now reduce the verdict to a proper amount, for there is no verdict upon which such an order could act. It was set aside by the trial court.

2. We come then to a consideration of the questions presented by defendant's appeal from the order denying his motion for judgment notwithstanding the verdict. It is contended that final judgment should be ordered in his favor for the following reasons: (a) That it appears from the evidence received on the trial that plaintiff consented to the operation on her left ear. (b) If the court shall find that no such consent was given, that, under the circumstances disclosed by the record, no consent was necessary. (c) That, under the facts disclosed, an action for assault and battery will not lie; it appearing conclusively, as counsel urge, that there is a total lack of evidence showing or tending to show malice or an evil intent on the part of defendant, or that the operation was negligently performed.

We shall consider first the question whether, under the circumstances shown in the record, the consent of plaintiff to the operation was necessary. If, under the particular facts of this case, such consent was unnecessary, no recovery can be had, for the evidence fairly shows that the operation complained of was skillfully performed and of a generally beneficial nature. But if the consent of plaintiff was necessary, then the further questions presented become important. This particular question is new in this state. At least, no case has been called to our attention wherein it has been discussed or decided, and very few cases are cited from other courts. We have given it very deliberate consideration, and are unable to concur with counsel for defendant in their contention that the consent of plaintiff was unnecessary. The evidence tends to show that, upon the first examination of plaintiff, defendant pronounced the left ear in good condition, and that, at the time plaintiff repaired to the hospital to submit to the operation on her right ear, she was under the impression that no difficulty existed as to the left. In fact, she testified that she had not previously experienced any trouble with that organ. It cannot be doubted that ordinarily the patient must be consulted, and his consent given, before a physician may operate upon him. It was said in the case of Pratt v. Davis, 37 Chicago Leg. News, 213, referred to and commented on in Cent. Law J. 452: "Under a free government, at least, the free citizen's first and greatest right, which underlies all others—the right to the inviolability of his person; in other words, the right to himself—is the subject of universal acquiescence, and this right necessarily forbids a physician or surgeon, however skillful or eminent, who has been asked to examine, diagnose, advise, and prescribe (which are at least necessary first steps in treatment and care), to violate, without permission, the bodily integrity of his patient by a major or capital operation, placing him under an anæsthetic for that purpose, and operating upon him without his consent or knowledge." 1 Kinkead on Torts, § 375, states the general rule on this subject as follows: "The patient must be the

final arbiter as to whether he will take his chances with the operation, or take his chances of living without it. Such is the natural right of the individual, which the law recognizes as a legal one. Consent, therefore, of an individual, must be either expressly or impliedly given before a surgeon may have the right to operate." There is logic in the principle thus stated, for, in all other trades, professions, or occupations, contracts are entered into by the mutual agreement of the interested parties, and are required to be performed in accordance with their letter and spirit. No reason occurs to us why the same rule should not apply between physician and patient. If the physician advises his patient to submit to a particular operation, and the patient weighs the dangers and risks incident to its performance, and finally consents, he thereby, in effect, enters into a contract authorizing his physician to operate to the extent of the consent given, but no further. It is not, however, contended by defendant that under ordinary circumstances consent is unnecessary, but that, under the particular circumstances of this case, consent was implied; that it was an emergency case, such as to authorize the operation without express consent or permission. The medical profession has made signal progress in solving the problems of health and disease, and they may justly point with pride to the advancements made in supplementing nature and correcting deformities, and relieving pain and suffering. The physician impliedly contracts that he possesses, and will exercise in the treatment of patients, skill and learning, and that he will exercise reasonable care and exert his best judgment to bring about favorable results. The methods of treatment are committed almost exclusively to his judgment, but we are aware of no rule or principle of law which would extend to him free license respecting surgical operations. Reasonable latitude must, however, be allowed the physician in a particular case; and we would not lay down any rule which would unreasonably interfere with the exercise of his discretion, or prevent him from taking such measures as his judgment dictated for the welfare of the patient in a case of emergency. If a person should be injured to the extent of rendering him unconscious, and his injuries were of such a nature as to require prompt surgical attention, a physician called to attend him would be justified in applying such medical or surgical treatment as might reasonably be necessary for the preservation of his life or limb, and consent on the part of the injured person would be implied. And again, if, in the course of an operation to which the patient consented, the physician should discover conditions not anticipated before the operation was commenced, and which, if not removed, would endanger the life or health of the patient, he would, though no express consent was obtained or given, be justified in extending the operation to remove and overcome them. But such is not the case at bar. The diseased condition of plaintiff's left ear was not discovered in the course of an operation on the right, which was authorized, but upon an independent examination of that organ, made after the authorized operation was found unnecessary. Nor is the evidence such as to justify the court in holding, as a matter of law, that it was such an affection as would result immediately in the serious injury of plaintiff, or such an emergency as to justify proceeding without her consent. She had experienced no particular difficulty with that ear, and the questions as to when its diseased condition would become alarming or fatal, and whether there was an immediate necessity for an operation, were, under the evidence, questions of fact for the jury.

3. The contention of defendant that the operation was consented to by plaintiff is not sustained by the evidence. At least, the evidence was such as to take the question to the jury. This contention is based upon the fact that she was represented on the occasion in question by her family physician; that the condition of her left ear was made known to him, and the propriety of an operation thereon suggested, to which he made no objection. It is urged that by his conduct he assented to it, and that plaintiff was bound thereby. It is not claimed that he gave his express consent. It is not disputed but that the family physician of plaintiff was present on the occasion of the operation, and at her request. But the purpose of his presence was not that he might participate in the operation, nor does it appear that he was authorized to consent to any change in the one originally proposed to be made. Plaintiff was naturally nervous and fearful of the consequences of being placed under the influence of anæsthetics, and the presence of her family physician was requested under the impression that it would allay and calm her fears. The evidence made the question one of fact for the jury to determine.

4. The last contention of defendant is that the act complained of did not amount to an assault and battery. This is based upon the theory that, as plaintiff's left ear was in fact diseased, in a condition dangerous and threatening to her health, the operation was necessary, and, having been skillfully performed at a time when plaintiff had requested a like operation on the other ear, the charge of assault and battery cannot be sustained; that, in view of these conditions, and the claim that there was no negligence on the part of defendant, and an entire absence of any evidence tending to show an evil intent, the court should say, as a matter of law, that no assault and battery was committed, even though she did not consent to

the operation. In other words, that the absence of a showing that defendant was actuated by a wrongful intent, or guilty of negligence, relieves the act of defendant from the charge of an unlawful assault and battery. We are unable to reach that conclusion, though the contention is not without merit. It would seem to follow from what has been said on the other features of the case that the act of defendant amounted at least to a technical assault and battery. If the operation was performed without plaintiff's consent, and the circumstances were not such as to justify its performance without, it was wrongful; and, if it was wrongful, it was unlawful. As remarked in 1 Jaggard on Torts, 437, every person has a right to complete immunity of his person from physical interference of others, except in so far as contact may be necessary under the general doctrine of privilege; and any unlawful or unauthorized touching of the person of another, except it be in the spirit of pleasantry, constitutes an assault and battery. In the case at bar, as we have already seen, the question whether defendant's act in performing the operation upon plaintiff was authorized was a question for the jury to determine. If it was unauthorized, then it was, within what we have said, unlawful. It was a violent assault, not a mere pleasantry; and, even though no negligence is shown, it was wrongful and unlawful. The case is unlike a criminal prosecution for assault and battery, for there an unlawful intent must be shown. But that rule does not apply to a civil action, to maintain which it is sufficient to show that the assault complained of was wrongful and unlawful or the result of negligence. 1 Addison on Torts, 689; Lander v. Seaver, 32 Vt. 114, 76 Am. Dec. 156; Vosburg v. Putney, 80 Wis. 523, 50 N. W. 403, 14 L. R. A. 226, 27 Am. St. Rep. 47.

The amount of plaintiff's recovery, if she is entitled to recover at all, must depend upon the character and extent of the injury inflicted upon her, in determining which the nature of the malady intended to be healed and the beneficial nature of the operation should be taken into consideration, as well as the good faith of the defendant.

Order affirmed.

JAGGARD, J., took no part.

SMITH v. MINNEAPOLIS ST. RY. CO.

(Supreme Court of Minnesota. June 23, 1905.)

1. STREET RAILROADS — COLLISION WITH VEHICLE—NEGLIGENCE.

Where an electric car collides with a vehicle, which while being driven along a public street parallel and in the same direction with an advancing street car, turns at a street crossing to go over the track in front of that car, the negligence of the street car company is to be determined in accordance with rules of law giving both the car and the vehicle the right to use the streets and intersections, and imposing on both the reciprocal duty of the exercise of due care to avoid harm.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Street Railroads, §§ 190–194.]

2. SAME—CARE REQUIRED OF MOTONEER.

The exercise of care on the part of the motoneer has special reference to the rate of speed at which the car was moving, his control and exercise of control over it, and his opportunity for observing that the vehicle was about to cross, including the distance from the track at which the vehicle turned and the rapidity with which it was then traveling.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Street Railroads, §§ 172–182.]

3. SAME—CARE AT CROSSING.

The test of the care to be exercised at a street car crossing is not necessarily the same as is required at a steam railway crossing.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Street Railroads, §§ 210–216.]

4. SAME—CONTRIBUTORY NEGLIGENCE.

If a driver of a vehicle approaching a street railway track to cross it at an intersection with another street looks and listens and sees and hears no car approaching for such a distance that he could probably make the crossing safely, he is not guilty of contributory negligence, as a matter of law, if, while attempting to cross the tracks, the car strikes and overturns his vehicle.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Street Railroads, § 214.]

5. SAME—QUESTIONS FOR JURY.

In this case *held*, the negligence of the defendant and the contributory negligence of the plaintiff were for the jury, and its verdict was justified by the evidence.

(Syllabus by the Court.)

Appeal from District Court, Hennepin County; David F. Simpson, Judge.

Action by Howard W. Smith against the Minneapolis Street Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Koon, Whelan & Bennett, for appellant. J. Van Valkeuburg and F. N. Hendrix, for respondent.

JAGGARD, J. The plaintiff and respondent, together with a companion, were, in the daytime, driving a single horse to a phæton with the top down, but not unbowed, in an easterly direction, parallel with defendant's and appellant's street car track, down Hennepin avenue, in the business district of Minneapolis. The plaintiff turned his horse and vehicle for the purpose of crossing the track on Hennepin avenue, near its intersection, at right angles, with Seventh street, to drive up that street. The vehicle was struck and overthrown by a car going in the same direction in which it was being driven. Plaintiff brought this action for consequent personal injuries. On the first trial, the jury found for the plaintiff. The trial court granted a new trial, and refused to direct a judgment notwithstanding the verdict, without assigning reasons therefor. On appeal this court refused to presume that the order granting a new trial was based on the ground that the

NEW TRIAL ORDER

[10] An order granting a new trial is within the discretion of the trial court and may be reversed only if that discretion was clearly abused. *Krolikowski v. Chicago & N.W. Trans. Co.*, 89 Wis.2d 573, 580, 278 N.W.2d 865 (1979). A court may not simply substitute its judgment for that of the jury nor order a new trial on the basis that another jury might reach another result. *Markey v. Hauck*, 73 Wis.2d 165, 172, 242 N.W.2d 914 (1976). Such an order requires reversal and reinstatement of the verdict. In this instance, the court specifically: (1) declined to change the jury's answers; (2) denied the motion for a new trial due to allegations of prejudicial jury misconduct; (3) denied Paul Burch's motion for new trial based on alleged errors; (4) found the verdict was not perverse; and (5) found that a new trial was not warranted by a verdict contrary to the great weight of the evidence.

[11–13] By statute, an order granting a new trial is not effective unless it specifies the grounds for the order. Wis.Stat. § 805.15(2) (1993–1994). Case law reinforces this principle: "[t]he trial court must set forth its reasons for concluding that the jury's findings were inconsistent with the evidence and that justice had miscarried." *Markey*, 73 Wis.2d at 172, 242 N.W.2d 914. Further, if "only one of the several reasons advanced is sufficient, the trial court has not abused its discretion." *Id.* However, in this instance, the only reasons stated by the court for granting a new trial in the interest of justice are purely speculative—that the jury "either didn't understand or didn't listen to the 1021 jury instruction" [6] and "may or may not have been sidetracked."

We hold that neither of these bases is sufficient to support an order for a new trial and therefore conclude that the circuit court erroneously exercised its discretion. For the reasons stated herein, we reverse and remand to the circuit court with instructions to enter an order consistent with this decision.

The order of the circuit court is reversed and cause remanded.

6. A reviewing court may not assume that the jury did not follow its instructions. *Danow v. United States Fidelity & Guaranty Co.*, 37 Wis.2d 214, 224, 154 N.W.2d 881 (1967). The court orally explained the instruction and copies of all substantive instructions, including Wis JI–Civil 1021, were given to jurors for their use during deliberations. Further, pursuant to *In re Meyer's Guardianship*, 218 Wis. 381, 261 N.W. 211 (1935), and our holding today in *Gould v. American Family Mutual Insurance Company*, 198 Wis.2d 450, 543 N.W.2d 282 (1996), the jury was correctly instructed to disregard Amy's mental limitations in determining whether she had acted negligently.

198 Wis.2d 450

Sheri GOULD, Scott Gould and St. Croix County, Plaintiffs–Respondents–Petitioners,

v.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY, Defendant–Appellant–Cross Petitioner.

No. 94–0074.

Supreme Court of Wisconsin.

Argued Oct. 5, 1995.

Decided Jan. 30, 1996.

Caretaker at dementia ward at health center brought suit against institutionalized person's insurer for personal injuries that she sustained as alleged result of assaultive behavior. Following jury trial, the Circuit Court, St. Croix County, Eric J. Lundell, J., entered judgment in favor of caretaker. The Court of Appeals, Myse, J., 187 Wis.2d 671, 523 N.W.2d 295, reversed and remanded, finding that person whose mental condition deprives him of ability to control himself could not be held civilly liable. Both sides petitioned for review. The Supreme Court, Bradley, J., held that person institutionalized with mental disability and who did not have capacity to control or appreciate his behavior could not be held liable in negligence for

personal injuries caused to caretaker employed for financial compensation.

Court of Appeals affirmed in part, reversed in part; remanded to circuit court with directions.

1. Mental Health ⇐411

Person institutionalized with mental disability, and who does not have capacity to control or appreciate his or her conduct, cannot be liable for injuries caused to caretakers who are employed for financial compensation.

2. Appeal and Error ⇐893(1)

Whether public policy considerations precluded imposition of liability upon institutionalized tort-feasor for negligence in injuring caretaker presented question of law to be reviewed de novo.

3. Mental Health ⇐412

Person institutionalized with Alzheimer's disease could not be held liable in negligence to nurse caretaker for personal injuries occurring when he pushed or struck her where he did not have capacity to control or appreciate his behavior.

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[452]For the plaintiffs-respondents-petitioners there were briefs by Michael J. Neitzke, Don Paul Novitzke and Novitzke, Gust & Sempf, Amery and oral argument by Michael J. Neitzke.

For the defendant-appellant-cross petitioner there was a brief by Nancy J. Sixel and Tinglum & Sixel, S.C., River Falls and oral argument by Nancy J. Sixel.

[453]Amicus curiae brief was filed by Betsy J. Abramson and William P. Donaldson, Madison for the Elder Law Center of the Coalition of Wisconsin Aging Groups and the Board on Aging and Long Term Care of the State of Wisconsin.

BRADLEY, Justice.

Both the plaintiffs, Sheri and Scott Gould, and the defendant, American Family Mutual Insurance Company, seek review of a court of appeals' decision which reversed and remanded a judgment of the Circuit Court of St. Croix County, Eric J. Lundell, Judge. The judgment imposed liability against American Family for personal injuries caused by its insured, Roland Monicken, who was institutionalized suffering from Alzheimer's disease. The Goulds assert that the court of appeals erred by abandoning the objective reasonable person standard and adopting a subjective mental incapacity defense in negligence cases. American Family challenges the need for a remand.

[1] While we affirm the court of appeals' reversal of the judgment, we do so on other grounds. We hold that an individual institutionalized, as here, with a mental disability, and who does not have the capacity to control or appreciate his or her conduct cannot be liable for injuries caused to caretakers who are employed for financial compensation. Because the Goulds, in essence, admit that it would be impossible to rebut the evidence of Monicken's incapacity, we reverse the part of the court of appeals' decision remanding the case to the trial court for a determination of Monicken's capacity.

Monicken was diagnosed with Alzheimer's disease after displaying bizarre and irrational behavior. As a [454]result of his deteriorating condition, his family was later forced to admit him to the St. Croix Health Care Center. Sheri Gould was the head nurse of the center's dementia unit and took care of him on several occasions.

Monicken's records from St. Croix indicate that he was often disoriented, resistant to care, and occasionally combative. When not physically restrained, he often went into other patients' rooms and sometimes resisted being removed by staff. On one such occasion, Gould attempted to redirect Monicken to his own room by touching him on the elbow. She sustained personal injuries when Monicken responded by knocking her to the floor.[1]

1. Gould has no recollection of exactly how she was injured. However, Monicken does not dispute that he either pushed or struck Gould.

Gould and her husband brought suit against Monicken and his insurer, American Family. American Family admitted coverage and filed a motion for summary judgment, arguing that Monicken was incapable of negligence as a matter of law due to his lack of mental capacity. An affidavit of Monicken's treating psychiatrist filed in support of the motion stated that Monicken was unable to appreciate the consequences of his acts or to control his behavior. The trial court denied American Family's summary judgment motion and the liability portion of the bifurcated trial was tried to a jury.

After presenting its case, American Family proposed giving instructions and a special verdict that directed the jury to decide, as a threshold question of law, whether Monicken had the mental capacity to understand and appreciate the duty to act with reasonable care at the time of the incident based on his |455 Alzheimer's disease. The trial court denied this request. Pursuant to Wis JI—Civil 1021, the court instructed the jury to disregard any evidence related to Monicken's mental condition and to determine his negligence under the objective reasonable person standard.[2] The jury found Monicken totally negligent and a judgment of liability was entered against American Family.[3]

The court of appeals granted American Family's interlocutory appeal and reversed the judgment, holding that "a person may not be held civilly liable where a mental condition deprives that person of the ability to control his or her conduct." *Gould v. American Family Mut. Ins. Co.*, 187 Wis.2d 671, 673, 523 N.W.2d 295 (Ct.App.1994). The court remanded the case "for a determination of whether there is a disputed issue of material fact as to whether Monicken's mental condition prevented him from controlling or appreciating the consequences of his conduct." *Id.* at 680, 523 N.W.2d 295.

Both the Goulds and American Family petitioned this court for review. The Goulds argue that the court of appeals abandoned clear, long-standing precedent in determining that mental disability may constitute a defense to negligence. American Family agrees with the court of appeals' holding, but petitioned for cross |456 review to reverse the court's remand mandate. American Family asserts that a remand is unnecessary because Monicken's mental incapacity was virtually conceded at trial.

It is a widely accepted rule in most American jurisdictions that mentally disabled adults are held responsible for the torts they commit regardless of their capacity to comprehend their actions; they are held to an objective reasonable person standard. *See generally,* Restatement (Second) of Torts § 283B (1965); W. Page Keeton et al., *Prosser and Keeton on the Law of Torts,* § 135 (1984). Legal scholars trace the origins of this rule to an English trespass case decided in 1616, at a time when strict liability controlled. *Id.* at 1072, citing *Weaver v. Ward,* 80 Eng.Rep. 284 (K.B. 1616).

When fault-based liability replaced strict liability, American courts in common law jurisdictions identified the matter as a question of public policy and maintained the rule imposing liability on the mentally disabled. Although early case law suggested that Wisconsin followed this trend,[4] this court specifi-

2. The trial court instructed the jury in part as follows:

> Evidence has been received and it appears without dispute that the defendant at the time of the incident was mentally and physically ill. It is the law that a person who is mentally and physically ill is held to the same standard of care as one who has normal physical and mental conditions, and in your determination of the question of negligence, you will give no consideration to the defendant's mental or physical condition.

See Wis JI—Civil 1021, "Negligence of Mentally Ill."

3. The damages portion of the bifurcated trial has not been tried to date.

4. For example, in *Huchting v. Engel,* 17 Wis. 230, 238 (1863), an action involving the civil liability of an infant, the court commented in dicta that "a lunatic is as liable to compensate in damages as a man in his right mind." In *Karow v. Continental Ins. Co.*, 57 Wis. 56, 64, 15 N.W. 27 (1883), the court held that an insurance company was not relieved from liability when its insured burned his own property in a state of insanity, but stated in dicta that "the same act of burning another's property might subject such person to damages ... on the principle that where a loss must be borne by one of two *innocent* persons, it should be borne by him who occasioned it." (Emphasis in original; quoted source omitted.)

cally adopted the common law rule and the public policy [457] justifications behind it in *German Mut. Fire Ins. Soc'y v. Meyer*, 218 Wis. 381, 385, 261 N.W. 211 (1935).

In *Meyer*, the defendant was criminally charged with arson to a barn but was committed to a mental hospital after he was found to be insane. In the civil claim filed by the insurer who covered the loss, the defendant pled his insanity as a defense. *Meyer*, 218 Wis. at 382–85, 261 N.W. 211. The court primarily relied on cases from other jurisdictions to conclude that insanity was not a defense for tort liability. *Id.* at 385–90, 261 N.W. 211.

In doing so the court quoted with approval the following statement of the general rule and public policy rationale behind it:

> It is the well settled rule that a person *non compos mentis* is liable in damages to one injured by reason of a tort committed by him unless evil intent or express malice constitutes an essential element in the plaintiff's recovery. This rule is usually considered to be based on the principle that where a loss must be borne by one of two innocent persons, it shall be borne by him who occasioned it, and it has also been held that public policy requires the enforcement of the liability in order that those interested in the estate of the insane person, as relatives or otherwise, may be under inducement to restrain him and that tort-feasors may not simulate or pretend insanity to defend their wrongful acts causing damage to others....

Id. at 385, 261 N.W. 211 (quoted source omitted). *Meyer* forms the basis of the present day jury instruction concerning the primary negligence of the mentally ill, Wis JI—Civil 1021.

This court did not have occasion to address the issue again until *Breunig v. American Family Ins. Co.*, 45 Wis.2d 536, 173 N.W.2d 619 (1970). In *Breunig*, [458] Erma Veith was overcome with a mental delusion while driving and crossed the center line of a roadway, striking the plaintiff's vehicle. The plaintiff sued Veith's automobile liability insurer, and a jury returned a verdict finding her causally negligent on the theory that she had knowledge or forewarning of her mental delusions. *Id.* at 538, 173 N.W.2d 619.

On appeal, the insurer argued that Veith could not be negligent as a matter of law because she was unable to drive with a conscious mind based on the sudden mental delusion. This court created a limited exception to the common law rule, holding that insanity could be a defense in the rare case "where the [person] is suddenly overcome without forewarning by a mental disability or disorder which incapacitates him from conforming his conduct to the standards of a reasonable man under like circumstances." *Id.* at 543, 173 N.W.2d 619. However, because this court concluded that there was sufficient evidence for the jury to find that Veith had forewarning of the mental delusions, she was not entitled to use her condition as a defense. *Id.* at 545, 173 N.W.2d 619.

The court of appeals in the present case relied on expansive dicta in *Breunig* to hold that *Breunig* overruled *Meyer*.[5] It interpreted *Breunig* as a turning point in the law. *See Gould*, 187 Wis.2d at 677–78, 523 N.W.2d 295. We disagree. [459] In contrast to the broad dicta found in *Breunig*, the actual holding was very limited:

> All we hold is that a sudden mental incapacity equivalent in its effect to such physical causes as a sudden heart attack, epileptic seizure, stroke, or fainting should be treated alike and not under the general rule of insanity.

Breunig, 45 Wis.2d at 544, 173 N.W.2d 619. *Breunig* was not a turning point in the development of the common law, but rather it was a limited exception to the *Meyer* rule based on sudden mental disability.

5. We note that prior to this case, the court of appeals also relied on *Breunig v. American Family Ins. Co.*, 45 Wis.2d 536, 173 N.W.2d 619 (1970), to suggest that a mental disability could be a defense to negligence. *See Burch v. American Family Mut. Ins. Co.*, 171 Wis.2d 607, 492 N.W.2d 338 (Ct.App.1992). We reserve further discussion of the facts and circumstances of *Burch* for that opinion. *See Burch v. American Family Mut. Ins. Co.*, 198 Wis.2d 465, 543 N.W.2d 277 (1996).

The court of appeals erroneously perceived the underlying premise of *Breunig* to be that a person should not be held negligent where a mental disability prevents that person from controlling his or her conduct. *Gould*, 187 Wis.2d at 678, 523 N.W.2d 295. By limiting its holding to cases of sudden mental disability, the *Breunig* court chose not to adopt that broad premise. We also decline to do so.

We are concerned that the adoption of the premise, as set forth by the court of appeals, would entail serious administrative difficulties. Mental impairments and emotional disorders come in infinite types and degrees. As the American Law Institute recognized in its Restatement of Torts, a legitimate concern in formulating a test for mentally disabled persons in negligence cases is "[t]he difficulty of drawing any satisfactory line between mental deficiency and those variations of temperament, intellect and emotional balance which cannot, as a practical matter, be taken into account in imposing liability for damage done." Restatement (Second) of Torts, § 283B, cmt. b.1.

The difficulties encountered by the trier of fact in determining the existence, nature, degree, and effect of [460]a mental disability may introduce into the civil law some of the issues that currently exist in the insanity defense in criminal law. We are wary of establishing a defense to negligence based on indeterminate standards of mental disability given the complexities of the various mental illnesses and the increasing rate at which new illnesses are discovered to explain behavior. *See, e.g., State v. Morgan*, 195 Wis.2d 388, 536 N.W.2d 425 (Ct.App.1995) (discussing relevance of expert testimony regarding post-traumatic stress disorder based on defendant's "psycho-social" history).

Further, while the traditional public policy rationale relied on by this court in *Meyer* in support of the common law rule are subject to criticism,[6] we remain hesitant to abandon the long-standing rule in favor of a broad rule adopting the subjective standard for all mentally disabled persons. Generally, the public policy rationale, in varying degrees, remain legitimate concerns. Accordingly, we turn our discussion to how those rationale apply to the facts before us.

American Family does not dispute that Monicken committed an act that was a substantial factor in causing Gould's injury. Rather, it asserts that Monicken cannot be held liable for his alleged negligence as a matter of law based on his lack of mental capacity.

[2] Even though the jury determined that Monicken was negligent and that his negligence was a cause of the plaintiff's injuries, liability does not necessarily follow. Public policy considerations may preclude liability. *Coffey v. Milwaukee*, 74 Wis.2d 526, 540–41, 247 N.W.2d 132 (1976). *See also Morgan v. Pennsylvania*[461] *General Ins. Co.*, 87 Wis.2d 723, 737, 275 N.W.2d 660 (1979). Whether public policy considerations should preclude liability in this instance is a question of law which we review *de novo*. *Rockweit v. Senecal*, 197 Wis.2d 409, 425, 541 N.W.2d 742 (1995).

One recognized public policy reason for not imposing liability despite a finding of negligence is that allowance of recovery would place an unreasonable burden on the negligent tortfeasor. *Morgan*, 87 Wis.2d at 737, 275 N.W.2d 660. As explained in detail below, this court concludes that the circumstances of this case totally negate the rationale behind the *Meyer* rule imposing liability on the mentally disabled, and therefore application of the rule would place an unreasonable burden on the institutionalized mentally disabled tortfeasor.

The first rationale set forth in *Meyer* is that "where a loss must be borne by one of two innocent persons, it shall be borne by him who occasioned it." *Meyer*, 218 Wis. at 385, 261 N.W. 211. The record reveals that Gould was not an innocent member of the public unable to anticipate or safeguard against the harm when encountered. Rather, she was employed as a caretaker specifically for dementia patients and knowingly encountered the dangers associated with such employment. It is undisputed that Gould, as head nurse of the dementia unit,

6. *See* Stephanie I. Splane, *Tort Liability of the Mentally Ill in Negligence Actions*, 93 Yale L.J. 153, 158–60 & n. 30 (1983) (citing law review commentaries criticizing the law).

knew Monicken was diagnosed with Alzheimer's disease and was aware of his disorientation and his potential for violent outbursts. Her own notes indicate that Monicken was angry and resisted being removed from another patient's room on the day of her injury.

By analogy, this court in *Hass v. Chicago & N.W. Ry.*, 48 Wis.2d 321, 326–27, 179 N.W.2d 885 (1970), relied on public policy considerations to exonerate negligent[462] fire-starters or homeowners from liability for injuries suffered by the firefighters called to extinguish the fire. This court held that to make one who negligently starts a fire respond in damages to a firefighter who is injured placed too great a burden on the homeowner because the hazardous situation is the very reason the fireman's aid was enlisted. *Id.* at 324, 327, 179 N.W.2d 885.

Likewise, Gould, as the head nurse in the secured dementia unit and Monicken's caretaker, had express knowledge of the potential danger inherent in dealing with Alzheimer's patients in general and Monicken in particular. Holding Monicken negligent under these circumstances places too great a burden on him because his disorientation and potential for violence is the very reason he was institutionalized and needed the aid of employed caretakers. Accordingly, we conclude that the first *Meyer* rationale does not apply in this case.

The second rationale used to justify the rule is that "those interested in the estate of the insane person, as relatives or otherwise, may be under inducement to restrain him...." *Meyer*, 218 Wis. at 385, 261 N.W. 211. This rationale also has little application to the present case. Monicken's relatives did everything they could to restrain him when they placed him in a secured dementia unit of a restricted health care center. When a mentally disabled person is placed in a nursing home, long-term care facility, health care center, or similar restrictive institution for the mentally disabled, those "interested in the estate" of that person are not likely in need of such further inducement.

The third reason for the common law rule set forth in *Meyer* is to prevent tortfeasors from "simulat[ing] or pretend[ing] insanity to defend their wrongful acts...." *Id.* This rationale is likewise inapplicable under the [463]facts of this case. To suggest that Mr. Monicken would "simulate or pretend" the symptoms of Alzheimer's disease over a period of years in order to avoid a future tort liability is incredible. It is likewise difficult to imagine circumstances under which persons would feign the symptoms of a mental disability and subject themselves to commitment in an institution in order to avoid some future civil liability.

[3] In sum, we agree with the Goulds that ordinarily a mentally disabled person is responsible for his or her torts. However, we conclude that this rule does not apply in this case because the circumstances totally negate the rationale behind the rule and would place an unreasonable burden on the negligent institutionalized mentally disabled. When a mentally disabled person injures an employed caretaker, the injured party can reasonably foresee the danger and is not "innocent" of the risk involved. By placing a mentally disabled person in an institution or similar restrictive setting, "those interested in the estate" of that person are not likely to be in need of an inducement for greater restraint. It is incredible to assert that a tortfeasor would "simulate or pretend insanity" over a prolonged period of time and even be institutionalized in order to avoid being held liable for damages for some future civil act. Therefore, we hold that a person institutionalized, as here, with a mental disability, and who does not have the capacity to control or appreciate his or her conduct cannot be liable for injuries caused to caretakers who are employed for financial compensation.[7]

[464]We next address American Family's challenge to the need for a remand. The court of appeals here remanded the case to the trial court to determine whether there is a disputed issue of fact regarding whether Monicken's mental capacity prevented him

7. We note that other courts have rejected the common law rule within the limited context of severely mentally disabled persons confined in institutions based on similar public policy considerations. *Mujica v. Turner*, 582 So.2d 24, 25 (Fla.Dist.Ct.App.1991); *Anicet v. Gant*, 580 So.2d 273 (Fla.Dist.Ct.App.1991).

from controlling or appreciating the consequences of his conduct. *Gould*, 187 Wis.2d at 680, 523 N.W.2d 295. American Family alleges that Monicken's total incapacity was virtually conceded at trial and therefore a remand is not necessary. Although the Goulds request a remand, in their brief they admit, in essence, that upon remand it would be impossible to rebut the evidence of Monicken's incapacity. Based on our review of the record, we reach a similar conclusion.

Accordingly, we reverse that part of the decision of the court of appeals remanding the case to the trial court for a determination on the issue of Monicken's mental capacity. We remand to the trial court with directions to enter judgment for American Family in accordance with this decision.

The decision of the court of appeals is affirmed in part and reversed in part; the cause is remanded to the circuit court with directions to enter judgment in accordance with this decision.

months later, the trial court found Justus had exercised due diligence in attempting to serve her. Byars enumerates this finding as error and claims the trial court abused its discretion in denying her motion to dismiss the complaint as untimely. We disagree.

[6] At the time this suit was filed, Byars' last name was Huggins. The record shows that on the day the complaint was filed, Justus' court-appointed private process server attempted to serve Huggins at her last known address. Neighbors told the process server she had moved, but they did not know her new address. The process server asked the owner of CPC, Willard Dunson, if he knew where Huggins might be found; he said he did not. A "skip trace" returned a non-existent address in Atlanta. The court allowed Justus to serve Huggins by publication.

The process server ran additional skip trace searches in May, June, and August 1995 and also searched computer databases for her name, all to no avail. In September 1995, Justus' attorney deposed CPC employee Eddie Dunson, who stated he did not know where Huggins could be found. Additional skip trace and computer searches in October 1995 and January 1996 produced no new information. In March 1996, however, a driver's license check revealed that Huggins had renewed her license under the last name Byars, and the agent served her at that address.

Testimony showed that in June 1995, Huggins married Richard Byars, a CPC employee who had worked at the cab company for 12 years. Richard Byars stated that his wife "may have" spoken with Willard or Eddie Dunson prior to September 1995. Although he apparently knew the Dunsons were trying to contact her, he testified that his wife was "the type of person where she don't like, you know, too much information about herself to be give out [sic]." The process server testified that when he served Byars, she told him she was aware of the case, that she had been in contact with the cab company's attorney, and that the cab company had known where she was the entire time but "had just hoped the thing would blow over."

The trial court found that given the circumstances, including Byars' apparent attempts to avoid service and misinformation given Justus' attorney by the Dunsons, the actions taken to perfect service showed due diligence. We cannot say the trial court abused its discretion. See *Starr v. Wimbush*, 201 Ga.App. 280, 281(2), 410 S.E.2d 776 (1991).

[7] 4. CPC claims the evidence presented at trial was insufficient to support a finding that Byars was in the scope of her employment at the time of the accident. Although CPC moved for a directed verdict on the *independent contractor* issue, it asserted no grounds in its motion related to the scope of employment issue. Because it made no specific motion for directed verdict based on this ground, CPC has waived any alleged error. See *Grabowski v. Radiology Assoc.*, 181 Ga.App. 298, 299(2), 352 S.E.2d 185 (1986).

[8] 5. In their final enumeration of error, Byars and CPC complain that the verdict was strongly against the weight of the evidence. We will not review this claim, as "[n]o court except the trial court is vested with the authority to grant a new trial on a matter relating to the weight of the evidence. [Cit.]" *Allstate Ins. Co. v. Brannon*, 214 Ga. App. 300, 304(5), 447 S.E.2d 666 (1994).

Judgment affirmed.

BIRDSONG, P.J., and ELDRIDGE, J., concur.

227 Ga.App. 17

BELL et al.

v.

SMITH et al.

No. A97A0613.

Court of Appeals of Georgia.

June 19, 1997.

Truck passenger's parents brought wrongful death action against defendant who

fired rifle at truck and killed passenger. The Superior Court, Lee County, Smith, J., granted partial summary judgment to plaintiffs on issue of liability. Defendant appealed. The Court of Appeals, Ruffin, J., held that defendant's use of force was not justified by belief that his brother was in danger from swerving truck.

Affirmed.

1. Appeal and Error ⇐893(1), 895(2)

In determining whether trial court properly granted summary judgment, Court of Appeals reviews record evidence de novo, with all inferences construed in nonmovant's favor.

2. Torts ⇐16, 27

Justification is an affirmative defense, such that defendant in civil action bears burden of proving his actions met requirements of statute. O.C.G.A. § 16–3–21(a).

3. Death ⇐21

Defendant's conduct in firing gun in general direction of truck, which caused passenger's death, was not justified by belief that his brother was in danger of being struck by swerving truck or by his suspicion that truck's occupants had recently fired weapons near his house, where truck had passed his brother and was 25 feet down road when defendant fired fatal shot, and defendant did not know if occupants of truck had shot at his home. O.C.G.A. § 16–3–21(a).

Bowles & Bowles, Jesse G. Bowles, III, Cuthbert, for appellants.

William M. Calhoun, Jr., for appellees.

RUFFIN, Judge.

This wrongful death case arises from a shooting incident in rural Lee County on Christmas Eve 1993. David Smith, the plaintiffs' son, was riding in a truck when defendant Cliff Bell shot him in the back with a high-powered rifle. David Smith died, and the Smiths sued Cliff Bell, his brother Jack Bell III, and Mary Denise Bell, their mother. Cliff Bell admitted he fired the shot but claimed he acted in defense of his brother, Jack, after the truck in which Smith was a passenger swerved toward Jack. The trial court granted partial summary judgment to the plaintiffs on the issue of liability after it determined, as a matter of law, that the evidence presented could not support defendant Cliff Bell's claim that his actions were justified. For the following reasons, we affirm the trial court's judgment.

[1] In determining whether the trial court properly granted summary judgment, we review the record evidence de novo to determine whether that evidence, with all inferences construed in Cliff Bell's favor, showed as a matter of law that Bell's actions in firing the fatal shot were unjustified. See *Gentile v. Bower*, 222 Ga.App. 736, 737, 477 S.E.2d 130 (1996).

The transcript of Cliff and Jack Bell's criminal trial on charges relating to this shooting was made a part of the record in this case. The evidence presented in depositions and at the criminal trial showed that around 11 p.m. on Christmas Eve, members of the Bell family were frightened from bed by a loud rifle shot fired near their home. Jack Bell went to the front door, and his 15–year old brother Cliff followed him. When another loud shot sounded, Jack Bell retrieved a shotgun from his truck and began walking toward the public dirt road that fronted their home. Cliff Bell got a .270 deer rifle from Jack's truck and followed his brother toward the road.

As Jack neared the road, a truck some distance away appeared to turn on its headlights and began to accelerate toward the Bell home. According to Cliff Bell, as the truck neared their home, it turned off its lights, "swerved" toward Jack, and continued past the home. Jack, apparently frightened, fired two shotgun blasts in the air. After the truck passed Jack, Cliff, who was behind his brother and a little farther from the truck, fired the rifle in its direction without aiming. He chambered another round and, as the truck continued in a northerly direction past the house, fired again. The trial court found, and it is undisputed, that this second round entered the passenger compartment of the

truck, striking David Smith in the torso and causing his death.

The Smiths moved for summary judgment against Cliff Bell on the issue of liability, contending that Cliff's actions proximately caused David Smith's death and that Cliff was negligent per se because he violated OCGA § 16–11–103. That Code section makes a person guilty of a misdemeanor "when, without legal justification, he discharges a gun or pistol on or within 50 yards of a public highway or street." The trial court rejected Cliff Bell's argument that his actions were "legally justified" as an attempt to defend his brother. Because he admitted that his actions otherwise caused Smith's death, that ruling constitutes the only ground of Cliff Bell's appeal.

[2] The circumstances under which a person is justified in using force to defend another are outlined in OCGA § 16–3–21(a), which states: "A person is justified in threatening or using force against another when and to the extent that he reasonably believes that such threat or force is necessary to defend himself or a third person against such other's imminent use of unlawful force; however, a person is justified in using force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent death or great bodily injury to himself or a third person or to prevent the commission of a forcible felony." See also *McNeil v. Parker,* 169 Ga.App. 756, 757, 315 S.E.2d 270 (1984); Restatement of the Law, Torts 2d, § 76. Because justification is an affirmative defense, in this civil case Cliff Bell bore the burden of proving his actions met the requirements of this statute. See *Williams v. McCranie,* 27 Ga.App. 693, 698–699, 109 S.E. 699 (1921); OCGA § 24–4–1; compare *Brown v. State,* 267 Ga. 350, 351(2), 478 S.E.2d 129 (1996) (in criminal case, although justification is an affirmative defense, the State must disprove that defense). To obtain summary judgment on this claim, therefore, the Smiths, who will not bear the burden of proof at trial on this affirmative defense, are not required to affirmatively disprove the claim of justification. "[I]nstead, the burden on the moving party may be discharged by pointing out by reference to the affidavits, depositions and other documents in the record that there is an absence of evidence to support the nonmoving party's case." *Lau's Corp. v. Haskins,* 261 Ga. 491, 405 S.E.2d 474 (1991).

[3] Although Cliff Bell argues that he reasonably believed his brother to be in danger from the swerving truck when he fired, his own testimony belies this contention. In his deposition testimony, Cliff acknowledged that the Smith truck had passed his brother when he fired the first shot and had traveled an additional 25 feet down the public road when he fired the fatal shot. In his deposition and criminal trial testimony, Cliff acknowledged that when he fired the second shot, the truck was "out of harm's way" and there was no danger that his brother would be run down. Although he feared the occupants of the truck had fired on his home, Cliff admitted he did not know whether those people had fired the shots, nor did he know why the truck's occupants were shooting. He could not see anyone in the truck, and no one in the truck made any verbal threats or displayed any weapons. Although he did not specifically aim at the truck, Cliff stated he was firing in the general direction of the truck in an effort to shoot out its tires or otherwise stop it.

Under these circumstances, the trial court properly found that Cliff Bell's use of force was unreasonable. The question is not whether Cliff *actually* feared the occupants of the truck, but rather whether an objective *reasonable person* would have believed Jack to be in *imminent* danger. See OCGA § 16–3–21(a); *Daniels v. State,* 248 Ga. 591, 592–593(1), 285 S.E.2d 516 (1981); see also *Cox v. State,* 216 Ga.App. 86, 88(2), 453 S.E.2d 471 (1995) (physical precedent only). Cliff's own testimony, construed against him to the extent it is contradictory without explanation, shows Jack was in no danger of being "run down" when Cliff fired the fatal shot. See *Prophecy Corp. v. Charles Rossignol, Inc.,* 256 Ga. 27, 30(2), 343 S.E.2d 680 (1986). As noted, Cliff did not know if the occupants of the truck had shot at his home, nor did he know why shots were fired. His unsubstantiated suspicion that the truck's occupants

had recently fired weapons near his house was, as a matter of law, unreasonable. Cliff had no reason to believe the truck's unknown driver or passengers meant him or his family any harm. Under the circumstances, Cliff's fears that led him to fire at the truck were objectively unreasonable. See *Pruitt v. State*, 211 Ga.App. 654, 655(2), 440 S.E.2d 248 (1994) (where defendant admitted he was not in imminent fear of assault, claim of self-defense was without merit); *Cox*, supra. The trial court, therefore, did not err in granting the Smiths partial summary judgment.

Judgment affirmed.

BIRDSONG, P.J., and ELDRIDGE, J., concur.

227 Ga.App. 9

DEWS

v.

ROADWAY PACKAGE SYSTEM, INC. et al.

No. A97A0292.

Court of Appeals of Georgia.

June 19, 1997.

Driver sued motor carrier, alleging breach of contract, tortious interference, fraud, and bad faith. After arbitrator made award to driver on breach of contract claim, the Superior Court, Bibb County, Christian, J., granted motor carrier's motion for summary judgment. Driver appealed. The Court of Appeals, McMurray, P.J., held that having elected to arbitrate breach of contract claim, driver was bound by contract's merger clause and fraud claims were barred.

Affirmed.

Smith, J., concurred in the judgment only.

1. Arbitration ⇐8

Driver's election to arbitrate his breach of contract claim against motor-carrier barred his fraud claims, as arbitration clause in contract did not prohibit him from rescinding contract and pursuing fraud claims; having affirmed contract by invoking agreement's arbitration clause and accepting arbitration award, driver was bound by contract's merger clause.

2. Fraud ⇐32

In action for fraud, if defrauded party has not rescinded but has elected to affirm contract, he is relegated to recovery in contract and merger clause will prevent recovery.

3. Fraud ⇐36

Where allegedly defrauded party affirms contract which contains merger or disclaimer provision and retains benefits, he is estopped from asserting that he relied on other party's misrepresentation and his action for fraud must fail.

Cedric T. Leslie, Macon, for appellant.

Jones, Day, Reavis & Pogue, Elaine R. Walsh, Theresia M. Moser, Atlanta, for appellees.

McMURRAY, Presiding Judge.

James R. Dews, Sr. entered into a contract with Roadway Package System, Inc. ("Roadway"), a licensed motor carrier, agreeing to pick up and deliver packages for Roadway on certain routes. This contract includes a "merger" clause which provides that "[t]his Agreement, the Addenda hereto, and the Attachments to the Addenda, constitute the entire agreement and understanding between the parties and, when executed, shall constitute a revocation of any earlier Contractor Operating Agreement between the parties."

Roadway severed its relationship with Dews after discovering that Dews had been driving his truck with a suspended driver's license in violation of federal law as well as the parties' agreement. Dews thereafter brought an action against Roadway and its

We find no error in defendant's trial.

NO ERROR.

William Howard WEST, Jr., and wife, Carolyn Sue West

v.

KING'S DEPARTMENT STORE, INC.

No. 466A87.

Supreme Court of North Carolina.

March 9, 1988.

Customer and his wife brought action against store for false imprisonment, slander per se, and intentional infliction of emotional distress. The Superior Court, Forsyth County, Walker, J., directed verdict for store. The Court of Appeals, 86 N.C. App. 485, 358 S.E.2d 386, affirmed, and customer and wife appealed. The Supreme Court, Frye, J., held that: (1) Court erred in directing verdict on customer's claim of false imprisonment but not on wife's claim of false imprisonment; (2) directed verdict was proper on customer's and wife's claim of slander per se; and (3) Court erred in granting directed verdict on customer's and wife's claim of intentional infliction of emotional distress.

Affirmed in part, reversed in part, and remanded.

1. Appeal and Error ⇐927(7)

In determining propriety of trial court's ruling on defendant's motion for directed verdict, plaintiff's evidence must be taken as true and all evidence must be considered in light most favorable to plaintiffs, giving plaintiff benefit of every reasonable inference.

2. Trial ⇐139.1(17)

Directed verdict is improper unless it appears as a matter of law that recovery cannot be had by plaintiff upon any view of facts which evidence reasonably tends to establish.

3. False Imprisonment ⇐5

"False imprisonment" is illegal restraint of person and, while actual force is not required, there must be implied threat of force which compels person to remain where he does not wish to remain or go where he does not wish to go.

See publication Words and Phrases for other judicial constructions and definitions.

4. False Imprisonment ⇐6

Restraint requirement of false imprisonment requires no appreciable period of time but simply sufficient time for one to recognize his illegal restraint; tort is complete with even brief restraint of plaintiff's freedom.

5. False Imprisonment ⇐6

Short period of restraint in false imprisonment claim will play upon jury's award of damages but will not serve to defeat action.

6. False Imprisonment ⇐39

Jury could find that customer, who was detained by store manager and accused of shoplifting, was falsely imprisoned; customer was intimidated into staying in store for one hour by repeated threats to arrest him, and customer could have reasonably concluded that manager had power to arrest him because of presence of officer.

7. False Imprisonment ⇐39

Customer's wife's claim that she was falsely imprisoned when her husband was detained by store manager and accused of shoplifting was not supported by sufficient evidence to carry claim to jury; wife did not accompany husband when he was confronted by store manager, and wife was not present when manager, accompanied by police officer, made several threats of prosecution and arrest.

8. Libel and Slander ⇐33

To establish claim for slander per se, plaintiff must prove defendant spoke base or defamatory words which tended to prejudice him in his reputation, office, trade, business, or means of livelihood or hold him up to disgrace, ridicule or contempt, statement was false, and statement was published or communicated to and understood by third person.

9. Libel and Slander ⇐24

Customer could not recover for slander per se based on store manager's accusation that customer had stole merchandise where customer failed to produce any evidence that anyone, other than customer, heard accusations made by manager.

10. Libel and Slander ⇐24

Mere possibility that someone might have heard slanderous remark is not enough to show that remark was published or communicated to and understood by third person for purposes of claim of slander per se.

11. Damages ⇐50.10

Neither physical injury nor foreseeability of injury is required for intentional infliction of emotional distress.

12. Damages ⇐208(6)

Jury could find that customer, who was detained by store manager and accused of shoplifting, and his wife suffered intentional infliction of emotional distress; store manager confronted wife and accused her of shoplifting after being warned by customer that his wife was receiving outpatient treatment, customer made offer of proof of purchase, which was rebuffed by store manager, and store manager told customer and his wife that they could be arrested for larceny anytime within next year.

Appeal by plaintiffs pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 86 N.C.App. 485, 358 S.E.2d 386 (1987), affirming directed verdicts for defendant, entered by Walker, J., on 17 September 1985, in Superior Court, Forsyth County. Heard in the Supreme Court 8 February 1988.

Pfefferkorn, Pishko, & Elliot, P.A. by Ellen R. Gelbin and William G. Pfefferkorn, Winston-Salem, for plaintiffs-appellants.

Womble Carlyle Sandridge & Rice by Richard T. Rice and J. Daniel McNatt, Winston-Salem, for defendant-appellee.

FRYE, Justice.

Plaintiffs' evidence tends to show that on 7 November 1981, plaintiffs, William and Carolyn West, packed their three children and Mr. West's mother into their Ford Bronco and set out for the "Giant Liquidation Sale" held that day at King's Department Store. When they arrived, they found the store quite disorganized and the merchandise displaced and picked-over. Nonetheless, their search for bargains began.

Two dolly hand trucks caught the eye of Mr. West as he browsed through the store. Noticing that the hand trucks were being "eyed" by another shopper, Mr. West decided to purchase them while they remained available. The trucks each apparently bore two or more price tags, all showing identical prices of $34.99 each. Mrs. West and her mother-in-law took money from Mr. West and purchased the dollies at the cashier's line. The cashier totaled the prices, added tax, and then discounted the sale by fifty percent. The cashier gave Mrs. West a receipt and Mrs. West left the store with her mother-in-law and locked the dollies in the Bronco. They both returned to the store and Mrs. West gave the receipt and change from the purchase to her husband.

The Wests soon realized that the store management was paging the owner of a Ford Bronco (jeep). Mr. West went to see if there was a problem. He left Mrs. West and his mother behind to watch the children and to continue their shopping. Upon reaching the front of the store, Mr. West saw a police officer and asked whether anyone had hit his jeep. There, the store manager accused him of stealing merchandise. The manager threatened him with

arrest if he did not return the goods. Mr. West stated that he did not know to what the manager was referring. The manager repeated the accusation and threat of arrest and Mr. West, finally understanding that the goods in question were the dollies, showed the manager the receipt and change his wife received for the purchase of the goods.

The store manager disregarded the receipt as being "impossible" because the dollies were not for sale, but rather were for use by store employees for transporting merchandise within the store. Mr. West pleaded with the officer not to arrest him as he had indeed purchased the goods and was not a thief. The manager, however continued his accusations of thievery while a number of customers formed small groups around the altercation that had now lasted some twenty minutes.

Attempting further to resolve this embarrassing matter, Mr. West explained that it had been his wife and mother who had purchased the dollies. The manager threatened to arrest them also. Mr. West asked the manager not to involve his wife because she was an outpatient at Forsyth Memorial Hospital and could not handle the aggravation and anxiety. Disregarding this warning, the manager, after spotting Mrs. West, confronted her and accused her of stealing the dollies. Mrs. West protested that she had paid for them, received a receipt, and placed the goods in the jeep. The manager, however, continued his accusations.

Mrs. West located the cashier who had received payment for the dollies. The manager again ignored the proffer of the receipt and the verification by the cashier of the sale. At this time, the officer took the Wests out to their jeep to look at the dollies. By the time they had returned, the Wests had been detained for some seventy-five minutes. Mr. West then asked for the names of the police officer, the store manager, and the cashier. The manager refused to give the names, stating that if the Wests "got the names, then they would be arrested." Plaintiffs left the store without the requested names. Their last memory of this episode was the manager's reminder that they could be arrested for larceny anytime within the next year.

Plaintiffs sued for compensatory and punitive damages for false imprisonment, slander *per se*, and intentional infliction of emotional distress. At the close of plaintiffs' evidence, the trial court directed a verdict in favor of defendant on all three claims. The Court of Appeals affirmed the decision of the trial court finding that there was insufficient evidence upon which a reasonable jury could have returned a verdict in favor of the plaintiffs on any of the three causes of action. *West v. King's*, 86 N.C.App. 485, 358 S.E.2d 386 (1987). Plaintiffs appealed to this Court on the basis of the dissenting opinion. N.C.G.S. § 7A-30(2) (1986).

[1, 2] In *Manganello v. Permastone, Inc.*, 291 N.C. 666, 231 S.E.2d 678 (1977), this Court held that a motion by a defendant for a directed verdict under N.C.G.S. § 1A-1, Rule 50(a), tests the legal sufficiency of the evidence to take the case to the jury and support a verdict for the plaintiff. Therefore, in determining the propriety of the trial judge's ruling on defendant's motion for a directed verdict, plaintiffs' evidence must be taken as true and all the evidence must be considered in the light most favorable to the plaintiffs, giving them the benefit of every reasonable inference. *Anderson v. Butler*, 284 N.C. 723, 202 S.E.2d 585 (1974). A directed verdict is improper unless it appears, as a matter of law, that a recovery cannot be had by the plaintiff upon any view of the facts which the evidence reasonably tends to establish. *Id.*

With this standard as our guide, we shall determine whether the evidence introduced by plaintiffs, when viewed in a light most favorable to them, is legally sufficient to withstand a motion for directed verdict. We shall address each claim in the order briefed by plaintiffs.

[3] Plaintiffs' first claim is that they were falsely imprisoned by defendant's agent. False imprisonment is the illegal restraint of a person. While actual force is not required, there must be an implied

threat of force which compels a person to remain where he does not wish to remain or go where he does not wish to go. *Black v. Clark's Greensboro, Inc.*, 263 N.C. 226, 139 S.E.2d 199 (1964). Indeed, we have specifically held that:

> [f]orce is essential only in the sense of imposing restraint.... If the words or conduct are such as to induce a reasonable apprehension of force, and the means of coercion are at hand, a person may be as effectually restrained and deprived of liberty as by prison bars.

Hales v. McCrory-McLellan Corp., 260 N.C. 568, 570, 133 S.E.2d 225, 227 (1963).

The Court of Appeals found that neither Mr. West nor Mrs. West had been sufficiently restrained so as to support a claim of false imprisonment. We agree with the Court of Appeals' assessment as regarding Mrs. West, however, we find the record sufficiently supports Mr. West's claim of false imprisonment.

The evidence supports the contention, as observed by Judge Phillips in his dissent, that Mr. West was intimidated into staying in the store for nearly an hour, by the repeated threats to arrest him. Mr. West could have reasonably concluded that such was within the manager's power because of the presence of the officer during the encounter. Moreover, Mr. West made several offers of proof that his purchase of the dollies was in fact legitimate. Such offers, nonetheless, were rebuffed by the store manager.

Defendant argues that plaintiff husband is precluded from bringing this action because Mr. West was allowed to walk outside to his jeep at one point during the confrontation. Defendant further contends that because Mr. West remained in the store for a short time after the confrontation and because he realized, upon reflection, that he could not have been arrested at that time, his claim must fail. We disagree.

[4, 5] The restraint requirement of this action requires no appreciable period of time, simply sufficient time for one to recognize his illegal restraint. The tort is complete with even a brief restraint of the plaintiff's freedom. Prosser and Keaton, *Torts* § 11 (5th ed. 1984). Consequently, it is of little importance that Mr. West may have ventured out of the store at one time or even remained at the store after the altercation. What is important is that an illegal restraint occurred, however short, at some period during this confrontation. The period of the restraint will likely play upon the jury's award of damages but will not serve to defeat the action. *Id.*

[6] When viewed in the light most favorable to plaintiff and giving to him all reasonable inferences, we find the facts surrounding Mr. West's detainment to be sufficient to take his case to the jury. A directed verdict on Mr. West's claim for false imprisonment was improper.

[7] The facts offered to support Mrs. West's claim for false imprisonment are not as persuasive. She was not accompanying her husband when he was confronted by the store manager. Nor was she present when the manager, accompanied by a police officer, made several threats of prosecution and arrest. It is the combination of such threats and the resulting apprehension that give rise to an action by the husband. Conversely, it is the lack of such facts that persuade us to agree with the courts below that plaintiff wife has not produced sufficient evidence to carry her claim to the jury.

Plaintiffs, in their second assignment of error, contend that the Court of Appeals erred when it affirmed the granting of a directed verdict against them on their claim of slander *per se*. Because plaintiffs failed to prove publication, we affirm the decision of the Court of Appeals on this issue.

[8] To establish a claim for slander *per se*, a plaintiff must prove: (1) defendant spoke base or defamatory words which tended to prejudice him in his reputation, office, trade, business or means of livelihood or hold him up to disgrace, ridicule or contempt; (2) the statement was false; and (3) the statement was published or communicated to and understood by a third person. *Presnell v. Pell*, 298 N.C. 715, 260 S.E.2d 611 (1979); *Morrow v. King's De-*

partment Stores, 57 N.C.App. 13, 290 S.E. 2d 732, *disc. rev. denied*, 306 N.C. 385, 294 S.E.2d 210 (1982).

[9, 10] While there was sufficient evidence to meet the first two elements of the tort, the evidence was insufficient on the third element. Plaintiffs failed to produce any evidence that anyone, other than the plaintiffs themselves, heard the accusations made by defendant's manager. There is evidence that others gathered in the front of the store during the course of the altercation. However, no evidence was presented that anyone actually heard the alleged slanderous remarks or that they were understood. Though plaintiffs are to be given the benefit of all reasonable inferences which may be drawn from the evidence when determining the propriety of a motion for directed verdict granted against them, a mere possibility that someone might have heard the alleged conversation is not enough. *Tyer v. Leggett*, 246 N.C. 638, 99 S.E.2d 779 (1957). For this reason, the directed verdicts were properly allowed on the claims for relief based on slander *per se*. Because we agree with the Court of Appeals that a directed verdict was properly granted on this issue, we need not address plaintiffs' claims for punitive damages.

Plaintiffs further contend that the Court of Appeals erred in affirming the trial court's grant of defendant's motion for a directed verdict on plantiffs' claim of intentional infliction of emotional distress. When considered in the light most favorable to plaintiffs, we find sufficient facts to support the claim of both Mr. and Mrs. West.

Defendant argues that plaintiffs failed to show sufficient evidence to prove that the store manager's conduct was "extreme and outrageous." Further, defendant contends that plaintiffs failed to show sufficient evidence that defendant intended to inflict such emotional distress. We find ample evidence to support the claim.

In *Stanback v. Stanback*, 297 N.C. 181, 254 S.E.2d 611 (1979), this Court held that liability arises under the tort of intentional infliction of emotional distress when a defendant's conduct exceeds all bounds of decency tolerated by society and the conduct causes mental distress of a very serious kind. We reaffirmed the vitality of this tort in *Dickens v. Puryear*, 302 N.C. 437, 276 S.E.2d 325 (1981) and adopted the Restatement 2d of Torts § 46 definition as follows:

> [o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

Id. at 447, 276 S.E.2d at 332 (citing Restatement 2d of Torts § 46 (1965)).

The extreme and outrageous conduct of the store manager is manifest. Judge Phillips, in his dissent on the Court of Appeals, aptly wrote,

> [f]ew things are more outrageous and more calculated to inflict emotional distress on innocent store customers that have paid their good money for merchandise and have in hand a document to prove their purchase than for the seller or his agent, disdaining to even examine their receipt, to repeatedly tell them in a loud voice in the presence of others that they stole the merchandise and would be arrested if they did not return it.

West v. King's, 86 N.C.App. 485, 358 S.E. 2d 386 (Phillips, J., dissenting).

[11] Furthermore, Mr. West warned the manager that his wife was receiving outpatient treatment at a local hospital and could not withstand a confrontation such as this. Notwithstanding this warning and Mr. West's offer of proof of purchase, the store manager confronted Mrs. West as soon as he saw her and made similar accusations against her. Though neither physical injury nor foreseeability of injury is required for intentional infliction of emotional distress, *Dickens v. Puryear*, 302 N.C. 437, 276 S.E.2d 325, both of these factors go to the outrageousness of the store manager's conduct. Finally, the store manager's last remarks to the Wests as they left the store, a threat of prosecution in the future, left the Wests under a continuing apprehension of prosecution for

a year after this incident. Both plaintiffs required medical treatment after the incident and Mrs. West's previous condition was exacerbated as a result of this sequence of events.

[12] We find that these factors together constitute sufficient evidence upon which a reasonable jury could have returned a verdict in favor of the plaintiffs. His unrelenting attack, in the face of explanation, was both extreme and reckless under the circumstances. Since the intentional element of this tort may be accomplished through reckless behavior, we find this evidence sufficient to sustain a *prima facie* case of intentional infliction of emotional distress for both plaintiffs and the issue should have been sent to the jury. For that reason, we reverse the Court of Appeals on this point.

For the foregoing reasons, we reverse the decision of the Court of Appeals in so far as it affirms the trial court's directed verdict on the issues of Mr. West's false imprisonment claim and the claim of both plaintiffs for intentional infliction of emotional distress. We affirm the Court of Appeals on the claim of slander *per se* brought by both plaintiffs and on Mrs. West's claim for false imprisonment. This case is remanded to the Court of Appeals for further remand to the trial court for further proceedings not inconsistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

STATE of North Carolina

v.

Shelia Diane HOLDEN.

No. 494A87.

Supreme Court of North Carolina.

March 9, 1988.

Defendant was convicted in the Superior Court, Wake County, Henry W. Hight, Jr., J., of second-degree murder, and she appealed. The Supreme Court, Martin, J., held that: (1) evidence was sufficient to establish that defendant took advantage of position of trust or confidence with her three-month-old child when she killed child as aggravating factor at sentencing, and (2) trial judge did not err in failing to find several statutory mitigating factors.

No error.

1. Homicide ⇐354

Evidence was sufficient to establish, as aggravating factor at sentencing, that defendant took advantage of position of trust or confidence with her three-month-old child when she killed child, despite contention that child was incapable of affirmatively placing trust or confidence in defendant. G.S. § 15A-1340.4(a)(1)n.

2. Homicide ⇐354

Evidence concerning defendant's emotional problem engendered by her deprived background and abused environment was insufficient to establish that defendant murdered her infant daughter under duress, coercion, threat, or compulsion as mitigating factor at sentencing; defendant presented only evidence of internal, psychological forces which led her to take life of her child and did not show that she was under any external pressure. G.S. § 15A-1340.4(a)(2)b.

3. Homicide ⇐354

Evidence that defendant was 17 years old at time she killed her infant daughter, had emotional maturity of 12 or 13-year-old and had diminished intellectual capacity did not require finding of statutory mitigating factor that defendant's immaturity or limited mental capacity at time of commission of offense significantly reduced her culpability; evidence indicated that defendant was aware of options other than killing child, planned murder in advance, and fabricated story implicating someone else. G.S. § 15A-1340.4(a)(2)e.

majority can ascertain any distinction between frowning upon decisions grounded in the plain meaning of words, but are the "exclusive province of lawyers," and supporting decisions that change an already established plain meaning, and thus are the "exclusive province" of the makeup of the bench.

Accordingly, I would abide by the *Gardner* decision and would affirm the decision of the Court of Appeals.

MARILYN J. KELLY, J., concurred with MICHAEL F. CAVANAGH, J.

465 Mich. 770

770 **Dennis BRIGHT, Plaintiff–Appellant,**

v.

Lt. Littlefield, Sgt. Meyers, Officer John Doe # 1, Officer John Doe # 2, John Doe # 3 also known as "Eric," and Chester F. Waterhouse, Defendants,

Dorothy AILSHIE, Tim Moore and A–Able Bail Bonds, a Missouri company, Defendants–Appellees.

Docket No. 119111.

Supreme Court of Michigan.

April 9, 2002.

Arrestee, who was apprehended by bounty hunter in Michigan and transported to Missouri, brought action against bail bond business, bounty hunter, and others alleging assault and battery, false imprisonment, intentional infliction of emotional distress, and negligence. The Wayne Circuit Court, Edward M. Thomas, J., entered summary disposition for defendants. Arrestee appealed. The Court of Appeals affirmed. Arrestee appealed. The Supreme Court held that: (1) statute giving private persons limited authority to conduct arrests does not grant arrest authority where the arrestee has not committed a felony, even if the private person has probable cause to believe the arrestee committed a felony; abrogating, *People v. Bashans*, 80 Mich.App. 702, 265 N.W.2d 170 and (2) arrestee had not committed felony, and thus bounty hunter did not have authority to arrest him.

Reversed

1. Statutes ⇦181(1)

In construing statutes, the primary goal of judicial interpretation is to ascertain and give effect to the intent of the legislature.

2. Statutes ⇦188

To determine and give effect to the intent of the legislature, a court must examine the language of the statute itself.

3. Statutes ⇦190

If the language of a statute is unambiguous, a court applies the statute as written.

4. Arrest ⇦64

Statute giving private persons limited authority to conduct arrests does not grant arrest authority where the arrestee has not committed a felony, even if the private person has probable cause to believe the arrestee committed a felony; abrogating, *People v. Bashans*, 80 Mich.App. 702, 265 N.W.2d 170. M.C.L.A. § 764.16(b).

5. Arrest ⇦64

For purposes of the statute that allows a private person to arrest a person who committed a felony, a felony is "committed" when a person engages in the conduct that constitutes a felony, and an

arrest by a private person of another person who has actually committed a felony would be valid regardless of whether the arrested person is ever tried for or convicted of the felony. M.C.L.A. § 764.16(b).

See publication Words and Phrases for other judicial constructions and definitions.

6. Arrest ⚿64

Regardless of the statute defining when a private person may conduct an arrest, a police officer or other state actor acting as such is constitutionally precluded by the Fourth Amendment from making an arrest without probable cause. U.S.C.A. Const.Amend. 4; M.C.L.A. § 764.16(b).

7. Arrest ⚿65

While a warrant may give a law enforcement officer authority to execute it, it should not be construed as extending such authority to a private person, given that the statutory authority for a private person to arrest in certain limited situations given only when the person to be arrested has actually committed a felony. M.C.L.A. § 764.16(b).

8. Arrest ⚿64

Arrestee had not committed felony, and thus bounty hunter did not have authority to arrest him, even though bounty hunter had facially valid Missouri arrest warrant naming arrestee, given that probable cause to believe that arrestee committed felony was not sufficient to support arrest. U.S.C.A. Const.Amend. 4; M.C.L.A. § 764.16(b).

Lopatin, Miller, Freedman, Bluestone, Herskovic & Domol (by Richard E. Shaw), Southfield, for the plaintiff-appellant.

[77] Athina T. Siringas, Detroit, for the defendants-appellees.

PER CURIAM.

Plaintiff's first amended complaint alleged defendants were liable to him under theories of assault and battery, false imprisonment, intentional infliction of emotional distress, and negligence as a result of his being illegally arrested by a bounty hunter and taken to Missouri. In Missouri it was confirmed that the actual person who should have been sought was plaintiff's brother, who had been arrested on a drug charge there. The trial court granted summary disposition for defendants pursuant to MCR 2.116(C)(10). The Court of Appeals affirmed the dismissal, holding the existence of the facially valid Missouri arrest warrant provided authority to arrest plaintiff. We reverse the grant of summary disposition and remand for further proceedings.

I

The pertinent facts are not in dispute. We borrow the Court of Appeals statement of facts:

> Plaintiff's brother Vincent Bright was arrested by Missouri police on a drug charge. Vincent identified himself as plaintiff Dennis Bright, using plaintiff's address, date of birth and social security number. Vincent entered into a bond agreement with defendant, A–Able Bail Bonds, which was issued in plaintiff's name and which Vincent signed using plaintiff's name. When Vincent subsequently absconded on the bond, an arrest warrant was issued in plaintiff's name, again using plaintiff's address, date of birth and social security number. Defendant Tim Moore apprehended plaintiff in Detroit and returned him to the Missouri court, where he was later released and the arrest warrant was

amended to name Vincent. Plaintiff brought this action, alleging assault and battery, false imprisonment, intentional infliction of emotional distress and negligence. The trial [772] court granted summary disposition to defendants, finding that the facially valid Missouri warrant provided the authority to arrest plaintiff.[1]

The Court of Appeals affirmed. Plaintiff has applied for leave to appeal.

II

The Court of Appeals held that, given probable cause, a private citizen may make an arrest for a felony committed in the person's presence or otherwise. MCL 764.16; *People v. Bashans*, 80 Mich.App. 702, 713, 265 N.W.2d 170 (1978). It further noted that a warrant provides probable cause for an arrest, and an arrest on a facially valid warrant is not a basis for a claim of false imprisonment. *Gooch v. Wachowiak*, 352 Mich. 347, 351–354, 89 N.W.2d 496 (1958). It reasoned that the facially valid warrant provided the authority needed to execute it. *People v. Rowe*, 95 Mich.App. 204, 208–209, 289 N.W.2d 915 (1980). The Court concluded that because the Missouri warrant was facially valid and the erroneous identification was not caused by defendants, the trial court did not err in granting summary disposition.

III

[1–3] This case concerns the interpretation of M.C.L. § 764.16. In construing statutes, "[t]he primary goal of judicial interpretation is to ascertain and give effect to the intent of the Legislature." *McJunkin v. Cellasto Plastic Corp.*, 461 Mich. 590, 598, 608 N.W.2d 57 (2000). [773] To do that we examine the "language of the statute itself." *In re MCI Telecommunications*, 460 Mich. 396, 411, 596 N.W.2d 164 (1999). If the language is unambiguous, the Court applies the statute as written.

IV

We deal with a plainly written statute in this matter. MCL 764.16 provides:

> A private person may make an arrest in the following situations:
>
> (a) For a felony committed in the private person's presence.
>
> (b) If the person to be arrested has committed a felony although not in the private person's presence.
>
> (c) If the private person is summoned by a peace officer to assist the officer in making an arrest.
>
> (d) If the private person is a merchant, an agent of a merchant, an employee of a merchant, or an independent contractor providing security for a merchant of a store and has reasonable cause to believe that the person to be arrested has violated section 356c or 356d of the Michigan penal code, Act No. 328 of the Public Acts of 1931, being sections 750.356c and 750.356d of the Michigan Compiled Laws, in that store, regardless of whether the violation was committed in the presence of the private person.

[4–6] The plain language of subsection (b) provides authority for a private person to arrest another, if the other has committed a felony. The statute does not grant arrest authority where the other has not committed a felony [774] even if the private person has probable cause to be-

1. Unpublished opinion per curiam, issued April 10, 2001, 2001 WL 690467 (Docket No. 219182), p. 1.

lieve the other has committed a felony.[2] Notwithstanding the clarity of the Michigan statute, the Court of Appeals in *Bashans* incorrectly read a probable cause qualification into M.C.L. § 764.16. This may not be done. Although such authority may have existed at common law, that authority was abrogated by our Legislature in 1927. 1927 PA 175. Thus, an arrest is only justified by subsection 775(b) if the person to be arrested has actually committed a felony.[3] 776To proceed to arrest, no matter how manifest the likelihood the seized person is the felon, is outside the scope of subsection (b) if the seized person did not commit the felony.[4] In such circumstances, subsection (b) does not shield the party making the "arrest" from liability.[5]

2. While numerous states have similar statutes, several are more expansive and essentially grant authority to private parties to arrest on the basis of reasonable cause. For example, Cal Penal Code 837 provides:

> A private person may arrest another:
>
> 1. For a public offense committed or attempted in his presence.
>
> 2. When the person arrested has committed a felony, although not in his presence.
>
> 3. When a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it.

3. It is noteworthy that the key phrase in subsection b is "*committed* a felony" (emphasis added). Of course, a felony is "committed" when a person engages in the conduct that constitutes a felony. Thus, an arrest by a private person of another person who has actually committed a felony would be valid regardless of whether the arrested person is ever tried for or convicted of the felony. In the present case, it is undisputed that plaintiff is innocent of the alleged Missouri felony underlying his purported arrest. Accordingly, we need not consider the proper allocation of the burden of proof with regard to whether a person committed a felony in a case where that is a disputed issue. Likewise, we assume without deciding for purposes of our analysis that M.C.L. § 764.16(b) provides authority for a private person to arrest for the commission of a felony under the laws of another state.

4. While the plain language of subsection (b) is dispositive, it is noteworthy that subsection (d) of M.C.L. § 764.16 authorizes a merchant (and certain affiliated parties) to make an arrest merely on the basis of "reasonable cause" to believe that a person has committed retail fraud in violation of M.C.L. § 750.356c or M.C.L. § 750.356d in the merchant's store. The absence of any such "reasonable cause" language in subsection (b) underscores that it means what it states in providing authority to arrest only if the person to be arrested has committed a felony.

5. We note that this opinion is consistent with the result and basic analysis of our recent decision in *People v. Hamilton*, 465 Mich. 526, 638 N.W.2d 92 (2002). In *Hamilton*, a city police officer stopped a vehicle outside his jurisdiction and eventually arrested the driver, the defendant in *Hamilton*, for the misdemeanor of operating under the influence of liquor (OUIL). It was later discovered that the defendant had two prior OUIL convictions, which led to him being charged with the felony of OUIL, third offense (OUIL–3d). However, importantly, the police officer was unaware of the prior OUIL convictions at the time of the arrest. This Court concluded that the police officer lacked authority under Michigan statutes, including the statute at issue in this case, M.C.L. § 764.16, to make the arrest for the misdemeanor of simple OUIL. *Id.* at 530–532, 638 N.W.2d 92. However, we also concluded that the arrest did not involve a constitutional violation under the Fourth Amendment because the police officer had probable cause to suspect the defendant committed OUIL. *Id.* at 533, 638 N.W.2d 92. The essential holding of *Hamilton* was that there is no exclusionary rule requiring suppression of evidence flowing from an arrest by a police officer that is only "statutorily illegal," but does not violate the Fourth Amendment. *Id.* at 532–535, 638 N.W.2d 92. Obviously, the present civil case does not implicate any concerns about suppression of evidence in a criminal prosecution on the basis of police misconduct. Accordingly, there is no conflict between the dispositive holding of *Hamilton* and the present opinion.

However, *Hamilton* did include the following language that may warrant further explanation:

[7] Further, the Court of Appeals opinion in *Rowe*, which was cited by the Court of Appeals as support in this case, does not support the lower courts' conclusions. In that case, two city police officers arrested a defendant on a warrant outside their city, but inside the county where the city was located. It was claimed that they had no jurisdiction to effect the arrest outside the city. The Court disagreed, holding that they had the statutory authority to execute the warrant anywhere in the state. The Court further held that, "Pursuant to the statutes cited, when a warrant is directed to a law enforcement officer, the warrant itself provides the authority needed to execute it." *Id.* at 208–209, 289 N.W.2d 915. The present case is distinguishable because it does not involve an arrest by a law enforcement officer. Thus, while a warrant may give a law enforcement officer authority to execute it, it should not be construed as extending such authority to a private person. The authority for a private person to arrest in certain limited situations comes from M.C.L. § 764.16. Under its subsection (b), authority is given only when the person to be arrested has actually committed a felony.

[8] Therefore, because it is undisputed that plaintiff had not committed a felony, defendants did not have [777] authority to arrest him. The facially valid Missouri warrant did not, under these facts, provide the authority to arrest plaintiff.[6] The trial court erred in granting summary disposition. Accordingly, we reverse the judgments of the circuit court and Court of Appeals, and remand this case to the circuit court for further proceedings consistent with this opinion. MCR 7.302(F)(1).

Under M.C.L. § 764.16, a private person has the authority to make a felony arrest, but lacks the authority to make a misdemeanor arrest except in nonapplicable circumstances. " 'No one without a warrant has any right to make an arrest in the absence of actual belief, based on actual facts creating probable cause of guilt.' " *People v. Panknin*, 4 Mich.App. 19, 27, 143 N.W.2d 806 (1966), quoting *People v. Bressler*, 223 Mich. 597, 600–601, 194 N.W. 559 (1923), paraphrasing *People v. Burt*, 51 Mich. 199, 202, 16 N.W. 378 (1883). Here, the officer only had probable cause to make an arrest for a misdemeanor, i.e., OUIL. *The fact that defendant may have committed a felony, i.e., OUIL, third offense, was only discovered after the arrest. Accordingly, the officer lacked the statutory authority to make the arrest under M.C.L. § 764.16.* [*Id.* at 531–532, 16 N.W. 378 (emphasis added).] The critical point was that the police officer in *Hamilton* did not realize that the defendant in that case may have committed the felony of OUIL 3d. Accordingly, the officer in that case plainly did not even purport to arrest the defendant for a felony, but only for the misdemeanor of simple OUIL. Thus, M.C.L. § 764.16 did not provide authority for the misdemeanor arrest made in *Hamilton*. To the extent that the language from prior cases in the above quotation from *Hamilton* suggests that the existence of probable cause is relevant to determining whether a private person's arrest of another person for a felony is permitted by subsection (b) of M.C.L. § 764.16, it is incorrect. Rather, as explained in this opinion, the plain language of subsection (b) means that the question is whether the seized person actually committed a felony. Of course, regardless of M.C.L. § 764.16, a police officer or other state actor acting as such is constitutionally precluded by the Fourth Amendment from making an arrest without probable cause. *Hamilton, supra* at 533, 638 N.W.2d 92.

6. Defendants argue that Moore's status as a bounty hunter insulates him from liability because of alleged wide-ranging common-law powers based in part on the bail bond contract. It is not necessary to determine the extent of those powers, if any, since plaintiff was not a party to the contract.

provisions of Condition F of Columbia's underlying policy, incorporated into Coverage A of the Policy, we find that the trial court properly determined that Continental had discharged its Coverage A obligations to Roper with respect to the *Webster* claim.

For the aforementioned reasons, the judgments of the circuit court of Cook County are affirmed.

Affirmed.

QUINLAN and O'CONNOR, JJ., concur.

173 Ill.App.3d 523
123 Ill.Dec. 367

Margaret VAN DUYN, Plaintiff–Appellant,

v.

Gerald T. SMITH, Defendant–Appellee.

No. 3–87–0598.

Appellate Court of Illinois, Third District.

Aug. 9, 1988.

Rehearing Denied Sept. 20, 1988.

Executive director of abortion clinic brought action against abortion protester alleging intentional infliction of emotional distress, libel and invasion of privacy. The Circuit Court, Peoria County, Stephen J. Covey, P.J., dismissed complaint for failure to state cause of action, and director appealed. The Appellate Court, Scott, J., held that: (1) director was not subject to actual malice standard in order to maintain action for intentional infliction of emotional distress; (2) allegations sufficiently stated claim for emotional distress; and (3) defamation action was properly dismissed for failure to state claim.

Affirmed in part, reversed in part and remanded.

1. Pretrial Procedure ⇐687, 689

Motion to dismiss admits all well-pleaded facts as well as all reasonable inferences drawn therefrom, but such motion does not admit conclusions of law or fact unsupported by allegations of specific facts.

2. Libel and Slander ⇐119

Only public officials and public figures may not recover for intentional infliction of emotional distress based upon publications such as ad parodies without satisfying *New York Times* standard of actual malice.

3. Libel and Slander ⇐48(1)

For purposes of action against abortion protester for intentional infliction of emotional distress, executive director of abortion clinic was not "public figure" subject to actual malice standard; although director apparently was prochoice advocate, she was not in position to influence society, and was not "public figure" by virtue of her employment status.

4. Damages ⇐149

Executive director of abortion clinic made sufficient allegations to maintain action for intentional infliction of emotional distress against abortion protester, even if distribution of posters which represented director as "wanted" killer was not actionable; over two-year period, protester followed director in her car, confronted her at airport, and prevented her ingress and egress which allegedly resulted in severe emotional distress requiring medical care. S.H.A. ch. 110, ¶ 2–615.

5. Libel and Slander ⇐6(1)

Generally, defamation, which consists of identically treated branches of libel and slander, is publication of anything injurious to good name or reputation of another, or which tends to bring him into disrepute.

6. Libel and Slander ⇐6(1)

Each defamation case must be decided on its own facts.

7. Libel and Slander ⇐33

Words defamatory per se are those so obviously and naturally harmful to subject, that proof of their injurious character can be, and is, dispensed with; per se def-

amation is found where words impute commission of criminal offense, infection with communicable disease, inability to perform duties of office or employment, and prejudice to particular party in trade, profession or calling.

8. Libel and Slander ⇐33

Words not falling into categories otherwise attributable to libel per se may be actionable per quod if they are actually defamatory and specific damage is alleged.

9. Libel and Slander ⇐33

Libel per quod requires extrinsic facts and innuendo to give it defamatory meaning.

10. Libel and Slander ⇐100(2)

To sustain action in libel per quod, plaintiff must allege and prove special damages.

11. Libel and Slander ⇐123(2)

For purposes of defamation action, whether statement is one of opinion, thus constitutionally protected, or of fact is matter of law.

12. Libel and Slander ⇐6(1)

Alleged defamatory language must be considered in context to determine whether it is expression of opinion so as to be constitutionally privileged.

13. Pretrial Procedure ⇐678

Court may determine whether alleged defamatory statements are expressions of opinion pursuant to a motion to dismiss for failure to state cause of action in defamation. S.H.A. ch. 110, ¶ 2–615.

14. Libel and Slander ⇐7(6)

"Wanted poster" circulated by abortion protester which accused executive director of abortion clinic of "killing" was not defamatory per se; when considered within social context, word "killing" merely described protester's opinion of results of abortion procedure.

15. Libel and Slander ⇐85

Allegation by executive director of abortion clinic in defamation action against abortion protester that protester stated that director performed abortions on 29–week gestationally old fetuses, which might be criminal act and thus defamatory per se, was inconsistent with posters distributed by protester; poster pertaining to executive director was unrelated to poster accusing other clinic of performing illegal abortions.

16. Torts ⇐8.5(4)

Elements for cause of action for false light invasion of privacy, even for private plaintiff, requires satisfaction of actual malice standard when alleged falsehood is matter of public concern.

John M. Wood, Goldsworth, Fifield & Hasselberg, Michael R. Hasselberg, argued, Goldsworthy & Fifield, Peoria, for Margaret Van Duyn.

Harry M. Williams (argued), Peoria, Daniel J. Smith, Morton, for Gerald T. Smith.

Justice SCOTT delivered the opinion of the court:

This case comes on appeal pursuant to the trial court's dismissal, with prejudice, of plaintiff's multi-count complaint for failure to state a cause of action. Although numerous motions and pleadings were filed in this cause, the relevant pleadings subject to review are plaintiff's second amended complaint counts I and II, amended count IV, and plaintiff's original complaint count III.

Plaintiff's second amended count I alleges the tort of intentional infliction of severe emotional distress; second amended count II alleges libel/negligence; amended count IV alleges libel/malice; and original count III alleges invasion of privacy (false light).

The relevant facts, as alleged, indicate that plaintiff, a private person, is, and was at all times stated herein, employed as the Executive Director of National Health Care Services of Peoria, Inc., an ambulatory surgical treatment center licensed by the State of Illinois, offering first trimester abortions to women in central Illinois. Defendant, a pro-life activist, is employed by Bradley University.

Plaintiff alleges that during a two year period from March 21, 1984, to March 21, 1986, defendant performed the following acts: in his motor vehicle, followed plaintiff in her motor vehicle on several occasions; confronted plaintiff at the Peoria Airport and interfered with her ingress and egress to said airport on at least two occasions; picketed plaintiff's residence on November 17, 1984, in violation of Illinois Revised Statutes 1985, chapter 38, paragraph 21.1–1; picketed plaintiff's employer several times a month; confronted plaintiff at her residence and her place of employment on several occasions requesting plaintiff to quit her position as Executive Director of The National Health Care Services of Peoria, Inc.; and on March 15, 1986, caused to be distributed a "Wanted" poster as well as and in conjunction with a "Face The American Holocaust" poster to plaintiff's friends, neighbors and acquaintances living in the three block area surrounding plaintiff's residence.

Plaintiff claims that the "Wanted" poster, attached to the complaint, resembling those used by the Federal Bureau of Investigation and seen on bulletin boards in public places, states: that plaintiff is a wanted person "for prenatal killing in violation of the Hippocratic Oath and Geneva Code"; that plaintiff uses the alias "Margaret the Malignant"; that plaintiff has participated in killing for profit and has presided over more than 50,000 killings; and the plaintiff's modus operandi is a small round tube attached to a powerful suction machine that tears the developing child limb from limb. The poster further contains a statement at the bottom which indicates in part, that "(n)othing in this poster should be interpreted as a suggestion of any activity that is presently considered unethical. Once abortion was a crime but it is not now considered a crime."

The "Face The American Holocaust" poster, also attached to the complaint, contains pictures of fetuses between 22 and 29 weeks gestational age that have been aborted. Under each picture the "cause of death" of the fetus is listed; referring to the method used to perform the abortion. Among the techniques listed are dismemberment, salt poisoning, and massive hemorrhaging. The poster also contains four paragraphs of information regarding the discovery of some 17,000 fetuses stored in a 3½ ton container in California, the number of abortions performed per day in "America's abortion mills", and how "America's Holocaust is the responsibility of us all." The poster additionally gives the name and address of Pro–Life Action League and lists the defendant's name and telephone number for those who choose to call locally.

Although count III varied slightly, plaintiff further alleged the following: that as a result of defendant's actions, her good name, character and reputation were impaired and brought into disrepute before her friends and acquaintances; that she became emotionally upset and suffered great anxiety and mental anguish; that she was humiliated and embarrassed in front of her friends and neighbors; that she became physically upset, nervous and cried; that her blood pressure became elevated beyond normal limits for several days; that her vision was impaired for approximately 24 hours; that she sought and received emergency medical care at Proctor Hospital and was treated by a physician at Proctor Hospital for several hours because of her physical and emotional condition of ill-being and remained under medication and a doctor's care for approximately two months; that she became physically and emotionally exhausted and had to lie down for approximately 24 hours; that she was unable to work at her occupation and had to cease work for several days; that she could not sleep for several days; and that she incurred doctor and hospital bills. Plaintiff also alleged that her damages exceed $15,000.

The procedural posture of the case is that it comes to this court pursuant to the trial court's granting of defendant's motions to dismiss. Two of defendant's motions to dismiss are at issue since the dismissal of original count III was by order dated July 15, 1986, and the order dismissing second amended counts I and II and amended count IV was entered August 26,

1987. In both motions, however, the defendant has failed to state the section under which the motion was brought. Therefore, our first determination is whether defendant's respective motions were brought pursuant to section 2–615 or section 2–619 of the Illinois Code of Civil Procedure (Ill.Rev.Stat.1985, ch. 110, pars. 2–615 & 2–619) as those sections involve dismissal by different legal theories. (*MBL (USA) CORP. v. Diekman* (1985), 137 Ill. App.3d 238, 91 Ill.Dec. 812, 484 N.E.2d 371.) Both of defendant's motions to dismiss allege that plaintiff's complaint fails to "allege sufficient facts to state a cause of action." Therefore, we construe defendant's statement as disputing the sufficiency of plaintiff's complaint and consider the motions as being brought under section 2–615. As support for our position, we note that motions to dismiss under section 2–619 admit the legal sufficiency of the attacked pleadings and allows assertions of affirmative matter, with or without supporting affidavits, to defeat the plaintiff's claim. (Ill.Rev.Stat.1985, ch. 110, par. 2–619.) Here, defendant has not admitted the legal sufficiency of the complaint.

Our inquiry then, is to determine whether plaintiff has plead sufficient facts to state a cause of action for any or all of the asserted theories of recovery. We keep in mind that "(a) cause of action should not be dismissed on the pleadings unless it clearly appears that no set of facts can be proved which will entitle plaintiff to recover." (*Ogle v. Fuiten* (1984), 102 Ill.2d 356, 360, 80 Ill.Dec. 772, 774, 466 N.E.2d 224, 226; *Fitzgerald v. Chicago Title & Trust Co.* (1978), 72 Ill.2d 179, 187, 20 Ill.Dec. 581, 585, 380 N.E.2d 790, 794.) We will discuss the required elements for each tort thoroughly as we separately discuss each alleged cause of action.

Plaintiff's second amended count I alleged that defendant committed the tort of intentional infliction of severe emotional distress. In *Public Finance Corp. v. Davis* (1976), 66 Ill.2d 85, 4 Ill.Dec. 652, 360 N.E.2d 765, our supreme court set forth the conduct giving rise to a cause of action:

> "First, the conduct must be extreme and outrageous. The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions or trivialities. 'It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice," or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency * * *.' Restatement (Second) of Torts sec. 46, comment *d* (1965).
>
> Second, infliction of emotional distress alone is not sufficient to give rise to a cause of action. The emotional distress must be severe. Although fright, horror, grief, shame, huliliation, worry, etc. may fall within the ambit of the term 'emotional distress,' these mental conditions alone are not actionable. 'The law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it. The intensity and the duration of the distress are factors to be considered in determining its severity.' Comment *j*. See, also Prosser, Law of Torts sec. 12, at 54 (4th ed. 1971).
>
> Third, reckless conduct which will support a cause of action under the rules stated is conduct from which the actor knows severe emotional distress is certain or substantially certain to result. (Comment *i*.) Liability extends to situations in which there is a high degree of probability that severe emotional distress will follow and the actor goes ahead in conscious disregard of it. Prosser, Law of Torts 60 (4th ed. 1971).
>
> Fourth, as is stated in comment *e*, the extreme and outrageous character of the conduct may arise from an abuse of a position or a relation with another which gives the actor actual or apparent authority over the other or power to affect his interest." (*Public Finance Corp. v.*

Davis, 66 Ill.2d at 90, 4 Ill.Dec. at 654, 360 N.E.2d at 767.)

In *Davis*, the defendant, a creditor of the plaintiff, persistently attempted to collect on a debt plaintiff owed. The defendant called plaintiff several times a week, frequently more than once a day, visited plaintiff's home one or more times a week, and called plaintiff at the hospital while her daughter was seriously ill even after plaintiff had requested that defendant refrain from bothering her at the hospital. Defendant further induced plaintiff to draft a check, promising that the check would not be processed. Instead, the defendant immediately phoned and informed an acquaintance of the plaintiff that she was writing bad checks. Lastly, defendant's employee used plaintiff's phone to call in to the company to describe and report the items in plaintiff's home and at the same time refused to leave plaintiff's home until her son arrived.

The *Davis* court stated that defendant's conduct was not of such an extreme and outrageous nature to warrant recovery for intentional infliction of severe emotional distress. The court reasoned that the plaintiff was legally obligated to pay the debt, and that where a creditor is doing no more than insisting upon his legal rights, he must be given some latitude to pursue collection of the debt even though it may cause some "inconvenience, embarrassment or annoyance to the debtor." (*Davis*, 66 Ill.2d at 92, 4 Ill.Dec. at 655, 360 N.E.2d at 768.) There was also no evidence regarding what was said by the agents of defendant who were making the calls and visits to plaintiff at her home and at the hospital which indicated those calls and visits were outrageous. As to the allegation regarding the bad check, the court considered the action as only one isolated event which could be considered extreme or outrageous and refused to invoke liability for a single impermissible act. *Davis*, 66 Ill.2d at 93, 4 Ill.Dec. at 656, 360 N.E.2d at 769.

In *Debolt v. Mutual of Omaha* (1978), 56 Ill.App.3d 111, 13 Ill.Dec. 656, 371 N.E.2d 373, this court concisely stated the elements for intentional infliction of emotional distress as:

> "(1) extreme and outrageous conduct, (2) intent by the defendant to cause, or a reckless disregard of the probability of causing emotional distress, (3) severe or extreme emotional distress suffered by the plaintiff, and (4) an actual and proximate causation of emotional distress by the defendant's outrageous conduct." (*Debolt*, 56 Ill.App.3d at 113, 13 Ill.Dec. at 658, 371 N.E.2d at 375.)

[1] As in the present case, *Debolt* was before this court on defendant's motion to dismiss. This court noted that a motion to dismiss admits all well pleaded facts as well as all reasonable inferences drawn therefrom, but such motion does not admit conclusions of law or fact unsupported by allegations of specific facts. (*Debolt*, 56 Ill.App.3d at 113, 13 Ill.Dec. at 658, 371 N.E.2d at 375, citing *Pierce v. Board of Education of City of Chicago* (1976), 44 Ill.App.3d 324, 3 Ill.Dec. 67, 358 N.E.2d 67.) Therefore, the court stripped the complaint of all conclusory statements and determined that the specific facts alleged could not be interpreted as outrageous conduct on the part of the defendant. (*Debolt*, 56 Ill.App.3d at 113, 13 Ill.Dec. at 658–59, 371 N.E.2d at 375–76.) Numerous other courts have dealt with the tort of intentional infliction of emotional distress. However, the type of conduct and the elements of the tort as cited respectively in *Davis* and *Debolt* are consistent with all other cases we have reviewed.

Complicating our consideration of this cause of action is the recent United States Supreme Court decision in *Hustler Magazine, Inc. v. Falwell* (1988), 485 U.S. ——, 108 S.Ct. 876, 99 L.Ed.2d 41, wherein the Supreme Court added an additional element to the tort of intentional infliction of emotional distress in what we believe are limited circumstances.

In *Hustler Magazine*, the respondent Jerry Falwell filed a diversity action in Federal District Court against petitioners, a nationally circulated magazine and its publisher, to recover damage for invasion of privacy, libel, and intentional infliction of

emotional distress, arising from petitioner's publication of an ad "parody" which portrayed respondent as having engaged in a drunken incestuous rendezvous with his mother in an outhouse. The District Court directed a verdict for petitioners on the privacy claim and the jury found for petitioners on the libel claim, but found for respondent on the claim of intentional infliction of emotional distress. (*Hustler Magazine*, 485 U.S. at ——, 108 S.Ct. at 878, 99 L.Ed.2d at 47.) The issue before the court was whether the jury's award was consistent with the First and Fourteenth Amendments of the United States Constitution.

The jury found that the ad "parody" could not "reasonably be understood as describing actual facts about (respondent) or actual events in which (he) participated." (*Hustler Magazine*, 485 U.S. at ——, 108 S.Ct. at 878, 99 L.Ed.2d at 47.) It was undisputed that respondent was a "public figure" for purposes of First Amendment law. *Hustler Magazine*, 485 U.S. at ——, 108 S.Ct. at 882, 99 L.Ed.2d at 53.

The court held:

"We conclude that public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with 'actual malice', i.e., with knowledge that the statement was false or with reckless disregard as to whether or not it was true. This is not merely a 'blind application' of the *New York Times* standard (*New York Times v. Sullivan* (1964), 376 U.S. 254 [84 S.Ct. 710, 11 L.Ed.2d 686]), see *Time, Inc. v. Hill*, 385 U.S. 374, 390 [87 S.Ct. 534, 543, 17 L.Ed.2d 456] (1967), it reflects our considered judgment that such a standard is necessary to give adequate 'breathing space' to the freedoms protected by the First Amendment." *Hustler Magazine*, 485 U.S. at ——, 108 S.Ct. at 882–83, 99 L.Ed.2d at 52–53.

Defendant asserts that *Hustler Magazine* is controlling for resolution of this issue. We disagree for two reasons. First, *Hustler Magazine* concerned the publication of an ad parody as the sole basis for respondent's claim of severe emotional distress. Although arguably the two posters at issue in the present case can be compared to the ad parody in *Hustler Magazine*, defendant in the present case did much more than distribute posters. Therefore, even if the posters in the present case can be considered privileged speech under the First Amendment and excluded under the holding of *Hustler Magazine*, defendant has committed other tortious acts for which we can find no constitutional privilege. Such acts warrant our consideration whether a jury could find that defendant's conduct was outrageous beyond the bounds of decency.

[2] Second, the court in *Hustler Magazine* was clear in its holding that only public officials and public figures may not recover for intentional infliction of emotional distress based upon publications such as ad parodies without satisfying the *New York Times* standard of actual malice. In our view, the present case does not concern a public official, nor does it concern public figures as that status has been defined by the Supreme Court, as those who are "intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large." (*Associated Press v. Walker*, decided with *Curtis Publishing Co. v. Butts* (1964), 388 U.S. 130, 164, 87 S.Ct. 1975, 1996, 18 L.Ed.2d 1094.) Moreover, instances of involuntary public figures are exceedingly rare.

"For the most part those who attain * * * (public figure) * * * status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues. In either event, they invite attention and comment." (*Gertz v. Welch* (1973), 418 U.S.

323, 345, 94 S.Ct. 2997, 3009, 41 L.Ed.2d 789, 808.)

[3] We do not consider plaintiff a public figure in this case merely because of her status as the executive director of an abortion clinic. Although she must apparently be a pro-choice advocate, we do not consider her as being in a position to influence society. Likewise, we disagree with defendant's position that plaintiff is still subject to the actual malice standard because she is involved in an issue of public interest or concern. In *Gertz v. Welch* (1973), 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789, the Supreme Court left to the individual states the decision as to whether the *New York Times* standard should be applied to defamers of private individuals involved in matters of public concern so long as the states do not impose liability without fault. (*Gertz*, 418 U.S. at 346, 94 S.Ct. at 3010, 41 L.Ed.2d at 809.) Accordingly, in *Troman v. Wood* (1975), 62 Ill.2d 184, 340 N.E.2d 292, the Illinois Supreme Court stated that "(t)o extend the *New York Times* standard to statements falling in the public interest category would thus reduce materially the scope of the protection afforded the private individual." (*Troman*, 62 Ill.2d at 196, 340 N.E.2d at 297.) Therefore, the court held that "negligence may form the basis of liability regardless of whether or not the publication in question related to a matter of public or general interest." *Troman*, 62 Ill.2d at 198, 340 N.E.2d at 299.

Although the *Troman* standard has been eroded somewhat in limited circumstances (see e.g. *Colson v. Stieg* (1982), 89 Ill.2d 205, 60 Ill.Dec. 449, 433 N.E.2d 246), we believe the negligence standard, rather than actual malice, is applicable to the present situation.

[4] Thus, having determined that plaintiff herein need not meet the actual malice standard as did respondent in *Hustler Magazine*, the logical inquiry is whether *Hustler Magazine* should be read broadly enough to require some additional element for private plaintiffs to meet when publications are either wholly or in part the basis for such plaintiff's claims for intentional infliction of emotional distress. In other words, must plaintiff herein additionally show that the posters contained a false statement of fact which the defendant either knew was false or, believing it to be true, lacked reasonable grounds for that belief. We think not. Our review of *Hustler Magazine* leads us to believe that the court's primary concern was with public officials and public figures. Nowhere did the court indicate that its holding applied to private individuals. Although we do not discount defendant's right to free speech under the First Amendment, we do not read *Hustler Magazine* as requiring proof of an additional element to the tort of intentional infliction of emotional distress where the plaintiff is a private individual. Therefore, we consider it proper to take into account the posters and surrounding circumstances when determining if defendant's conduct was sufficiently outrageous to cause plaintiff to suffer severe emotional distress.

If the only alleged actions were the contents and distribution of the two posters, we would be inclined to affirm the trial court's dismissal. However, the distribution of the posters is just the last in a series of events that has spanned a two year period. We find it particularly bothersome that defendant, a seemingly well-educated person, would stoop to following, in his car, plaintiff while she was driving her car and to confronting plaintiff at the airport and preventing her ingress and egress. We believe this type of behavior, compounded with the other acts alleged, is worthy of a jury's consideration whether defendant is liable for the intentional infliction of emotional distress. Although we acknowledge that plaintiff has a position in a highly controversial enterprise, we consider defendant's acts are subject to being viewed as directed at plaintiff personally, not the subject matter of plaintiff's occupation.

We further believe that plaintiff has sufficiently alleged that she suffered severe emotional distress. Plaintiff alleges, among other things: that she was treated at a hospital for her physical and emotional condition of ill-being; that she was under a

doctor's care for two months; that she could not work for several days; that she could not sleep for several days; and that all of this was a direct and proximate result of defendant's conduct. "It is for the court to determine whether on the evidence severe emotional distress can be found; it is for the jury to determine whether, on the evidence, it has in fact existed." Restatement (Second) of Torts sec. 46, comment *j* (1985).

Taken as true for purposes of a motion to dismiss under section 2–615, plaintiff has alleged sufficient facts upon which a jury could find that defendant's conduct was sufficiently outrageous to be beyond the bounds of decency and that plaintiff suffered emotional distress such that "no reasonable man could be expected to endure it." Restatement (Second) of Torts sec. 46, comment j (1985); see also *Public Finance v. Davis*, 66 Ill.2d at 90, 4 Ill.Dec. at 654, 360 N.E.2d at 767.

We therefore reverse and remand the trial court's dismissal of plaintiff's second amended count I consistent with this opinion, but reserve for the trial court the discretion to strike any allegations not in conformance with pleading requirements.

Plaintiff's second amended count II and amended count IV both alleged causes of action for libel. Second amended count II alleged negligence in that defendant either: knew said statements contained within the two posters were false; should have known in exercise of ordinary care that said statements in said posters were false; lacked reasonable grounds for believing said statements were true; or made no investigation as to the truth of the statements contained in said posters. Amended count IV alleged that defendant caused the posters to be distributed with actual malice in that defendant either: knew said statements contained in said posters were false; or caused the posters to be distributed containing false statements with reckless disregard as to whether said statements were false. At all times, plaintiff alleged she was a private person and therefore need only show defendant was negligent. However, plaintiff acknowledged that she must show actual malice on the part of defendant to recover punitive damages. See *Gertz v. Welch*, 418 U.S. at 349, 94 S.Ct. at 3011, 41 L.Ed. at 810.

[5–10] Generally, defamation, which consists of the identically treated branches of libel and slander, is the publication of anything injurious to the good name or reputation of another, or which tends to bring him into disrepute. (*Whitby v. Associates Discount Corp.* (1965), 59 Ill.App.2d 337, 207 N.E.2d 482.) Illinois courts have held that a statement is defamatory if it impeaches a person's integrity, virtue, human decency, respect for others, or reputation and thereby lowers that person in the estimation of the community or deters third parties from dealing with that person. (*Dauw v. Field Enterprises, Inc.* (1979), 78 Ill.App.3d 67, 33 Ill.Dec. 708, 397 N.E.2d 41.) Each defamation case must be decided on its own facts. (*Bruck v. Cincotta* (1977), 56 Ill.App.3d 260, 13 Ill.Dec. 782, 371 N.E.2d 874.) Defamatory words, however, are divided into two classes: those actionable *per se* and those actionable *per quod*. (*Harris Trust and Savings Bank v. Phillips* (1987), 154 Ill.App.3d 574, 107 Ill. Dec. 315, 506 N.E.2d 1370; *Cook v. East Shore Newspapers, Inc.* (1945), 327 Ill.App. 559, 64 N.E.2d 751.) Words defamatory *per se* are those so obviously and naturally harmful to the subject, that proof of their injurious character can be, and is, dispensed with. (*Owen v. Carr* (1986), 113 Ill.2d 273, 100 Ill.Dec. 783, 492 N.E.2d 1145; *Harris Trust*, 154 Ill.App.3d at 578–79, 107 Ill.Dec. at 318, 506 N.E.2d at 1373.) *Per se* defamation has been found where words "impute: (1) commission of a criminal offense; (2) infection with a communicable disease; (3) inability to perform, or want of integrity to discharge duties of office or employment; and (4) prejudicing a particular party in his trade, profession or calling." (*Harris Trust*, 154 Ill.App.3d at 580, 107 Ill.Dec. at 319, 506 N.E.2d at 1374, citing *Catalano v. Pechous* (1978), 69 Ill.App.3d 797, 805, 25 Ill.Dec. 838, 845, 387 N.E.2d 714, 721, affirmed (1980), 83 Ill.2d 146, 50 Ill.Dec. 242, 419 N.E.2d 350, cert. denied (1981), 451 U.S. 911, 101 S.Ct. 1981, 68 L.Ed.2d 300.) Words not falling into the

categories otherwise attributable to libel *per se* may be actionable *per quod* if they are actually defamatory and specific damage is alleged. (*American Pet Motels v. Chicago Veterinary Medical Association* (1982), 106 Ill.App.3d 626, 62 Ill.Dec. 325, 435 N.E.2d 1297.) Libel *per quod* requires extrinsic facts and innuendo to give it defamatory meaning. (*Bruck v. Cincotta*, 56 Ill.App.3d at 260, 13 Ill.Dec. at 782, 371 N.E.2d at 874.) To sustain an action of libel *per quod*, plaintiff must allege and prove special damages. *Whitby v. Associates Discount, Inc.*, 59 Ill.App.2d at 337, 207 N.E.2d at 482.

Plaintiff maintains that the "Wanted" poster, when read alone, or in conjunction with the "Face the American Holocaust" poster, contains false statements of fact that are libelous *per se*. In particular, plaintiff argues that defendant's use of the word "killing" would cause the average reader to believe that plaintiff has committed a criminal offense. Alternatively, plaintiff argues that defendant's statements are libelous *per quod*.

[11–13] We acknowledge, however, that the Supreme Court has recognized a constitutional privilege for expressions of opinion. (*Gertz v. Welch*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789; see also *Owen v. Carr* (1986), 113 Ill.2d 273, 100 Ill.Dec. 783, 497 N.E.2d 1145.) Whether a statement is one of opinion or fact is a matter of law. (*Owen*, 113 Ill.2d at 279, 100 Ill.Dec. at 786, 497 N.E.2d at 1148; *Lewis v. Time Inc.* (9th Cir.1983), 710 F.2d 549.) Moreover, the alleged defamatory language must be considered in context to determine whether or not it is an expression of opinion. (*Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin* (1974), 418 U.S. 264, 94 S.Ct. 2770, 41 L.Ed. 2d 745; *Ollman v. Evans* (D.C.Cir.1984), 750 F.2d 970; *Owen*, 113 Ill.2d at 279, 100 Ill.Dec. at 786, 497 N.E.2d at 1148.) We further consider it proper to determine whether alleged defamatory statements are expressions of opinion pursuant to a section 2–615 motion to dismiss for failure to state a cause of action.

In *Ollman v. Evans*, the court drew upon theories used in prior cases to devise the totality of the circumstances analysis for determining whether a publication is a statement of fact or an expression of opinion. The four part analysis is explained as follows:

"First, we will analyze the common usage or meaning of the specific language of the challenged statement itself. Our analysis of the specific language under scrutiny will be aimed at determining whether the statement has a precise core of meaning for which a consensus of understanding exists or, conversely, whether the statement is indefinite and ambiguous. See *Buckley v. Littell*, 539 F.2d 882, 895 (2d Cir.1976), cert. denied, 429 U.S. 1062, 97 S.Ct. 785, 50 L.Ed.2d 777 (1977). Readers are, in our judgment, considerably less likely to infer facts from an indefinite or ambiguous statement than one with a commonly understood meaning. Second, we will consider the statement's verifiability—is the statement capable of being objectively characterized as true or false? See, e.g., *Hotchner v. Castillo–Puche*, supra, 551 F.2d [910] at 913 [(2nd Cir.1977)]. Insofar as a statement lacks a plausible method of verification, a reasonable reader will not believe that the statement has specific factual content. And, in the setting of litigation, the trier of fact obliged in a defamation action to assess the truth of an unverifiable statement will have considerable difficulty returning a verdict based upon anything but speculation. Third, moving from the challenged language itself, we will consider the full context of the statement—the entire article or column, for example—inasmuch as other, unchallenged language surrounding the allegedly defamatory statement will influence the average reader's readiness to infer that a particular statement has factual content. See *Greenbelt Cooperative Publishing Association v. Bresler*, supra, 398 U.S. [6] at 13–14, 90 S.Ct. [1537] at 1541 [26 L.Ed.2d 6 (1970)]; of Restatement (Second) of Torts, Sec. 563. Finally, we will consider the broader context or setting in which

the statement appears. Different types of writing have, as we shall more fully see, widely varying social conventions which signal to the reader the likelihood of a statement's being either fact or opinion. *See Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin*, supra, 418 U.S. at 286, 94 S.Ct. at 2782." (*Ollman v. Evans*, 750 F.2d at 979.)

[14] We believe defendant's statement that plaintiff is involved in "killing" can be commonly understood as meaning that plaintiff has terminated a life of something or someone that was previously living. In itself the accusation that plaintiff is involved with "killing the unwanted and unprotected" is a potentially damaging fact. Our difficulty, however, is that the type of killing being referred to in this instance is not, in our opinion, objectively capable of being proven or disproven. This is especially true when the allegedly defamatory statements are read in the context in which the statements occur. It becomes apparent when looking at the "Wanted" poster in its entirety that defendant's use of the word "killing" is his description of what takes place during an abortion procedure. We are not prepared to find that the word "killing" in this context is verifiable and, thus, a defamatory statement of fact. Additionally, when the statements are considered within the social context, it becomes quite clear that defendant's use of the word "killing" merely describes his opinion of the results of an abortion procedure. Since the Supreme Court decision of *Roe v. Wade* (1973), 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147, rel. den. 410 U.S. 959, 93 S.Ct. 1409, 35 L.Ed.2d 694, wherein a woman's right to have an abortion was determined to be constitutionally protected, one of the primary issues has been, and still is, whether or not there is an actual killing of a human life as the result of an abortion. Pro-life activists certainly maintain that abortion is a killing, however, pro-choice activists believe the contrary, especially before the fetus has reached viability. Regardless of which position may ultimately be considered correct, at the present we find that the average reasonable reader of the "Wanted" poster would not believe as an actual fact that plaintiff has been involved in killing, as that word is commonly understood by our society. In fact, we believe that the average reader would quickly realize that the central theme of the "Wanted" poster is that abortion is a killing, to which plaintiff plays a part, and should be a crime in the opinion of those siding with the pro-life movement.

Although we consider the "Wanted" poster repulsive, explicit, unnecessary and in bad taste, we adhere to the belief that "(u)nder the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." (*Gertz v. Welch*, 418 U.S. at 339–40, 94 S.Ct. at 3007.) As elaboration, we cite *Sloan v. Hatton*, wherein the court stated:

> "Free speech is not restricted to compliments. Were this not so there could be no verbal give and take, no meaningful exchange of ideas, and we would be forced to confine ourselves to plenitudes and compliments. But members of a free society must be able to express candid opinions and make personal judgments. And those opinions and judgments may be harsh or critical—even abusive—yet still not subject the speaker or writer to civil liability." (*Sloan v. Hatton* (1978), 66 Ill.App.3d 41, 42, 22 Ill.Dec. 783, 784, 383 N.E.2d 259, 260.)

[15] We consider the above rationale applicable to all the other allegedly defamatory statements with the exception of the allegedly false statement that plaintiff performs abortions on 29 week gestationally old fetuses. This alleged statement requires reading the two posters in conjunction. In this regard we perceive plaintiff's reasoning to be that the two posters were distributed at the same time, therefore, the average reader would look at the pictures of apparently aborted fetuses on the "Face the American Holocaust" poster and infer that plaintiff was involved with abortions involving fetuses as old as 29 weeks gestationally. Without more information, we

note that an abortion at 29 weeks may be a crime. (Ill.Rev.Stat.1987, ch. 38, ¶ 81–21 et seq.) Our reading of the amended complaint, which incorporates the two posters by reference, does not result in the inference that plaintiff is suggesting. Only well pleaded facts are admitted by a section 2–615 motion to dismiss and it is commonly understood that attached exhibits supercede any inconsistent allegations of a complaint. (*Outboard Marine v. Chisolm & Sons* (1985), 133 Ill.App.3d 238, 88 Ill.Dec. 336, 478 N.E.2d 651.) Accordingly, we find the allegation that defendant stated that plaintiff performs abortions on 29 week gestationally old fetuses is inconsistent with the attached exhibits for two reasons. First, there is absolutely no cross-referencing between the two posters which would lead the average reader to infer that the two posters should be read and considered together. Second, the "Face the American Holocaust" poster tells the story of how 17,000 fetuses were found in a 3½ ton container in Los Angeles, California. Nowhere does it state that plaintiff was responsible for any of the fetuses found in the container.

Plaintiff further argues that an expression of an opinion that does not disclose the facts forming the basis for the speaker's opinion may be actionable. Section 566 of the Restatement (Second) of Torts, captioned "Expression of Opinion", states the following:

> "A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion." (Restatement (Second) of Torts, Sec. 566 (1977).)

Section 566 has been cited approvingly in Illinois. See *Stewart v. Chicago Title Ins. Co.* (1987), 151 Ill.App.3d 888, 104 Ill.Dec. 865, 503 N.E.2d 580; *O'Donnell v. Field Enterprises, Inc.* (1986), 145 Ill.App.3d 1032, 96 Ill.Dec. 752, 491 N.E.2d 1212.

We do not consider the rationale of section 566 applicable to this case. The average reasonable reader would realize that the "Wanted" poster is referring to the practice of abortion and that the basis for defendant's opinion that plaintiff is "killing for profit the unwanted and unprotected" is that plaintiff is somehow involved in the abortion process. Moreover, the average reader of the "Wanted" poster would recognize that it is merely another restatement of the pro-life movement's opinion regarding abortion; an opinion that has been publicized since at least the *Roe v. Wade* decision in 1973. The "Wanted" poster does not imply that plaintiff has been involved in any "killing for profit" outside of her involvement with abortions. The "Face the American Holocaust" poster simply does not refer to plaintiff and cannot be read in conjunction with the "Wanted" poster for reasons previously stated.

Accordingly, we affirm the trial court's dismissal of plaintiff's second amended count II and amended count IV. Plaintiff has not plead facts sufficient to state a cause of action for defamation.

Count III of plaintiff's original complaint alleged a cause of action against defendant for invasion of privacy (false light). By order dated July 15, 1986, the trial court dismissed plaintiff's count III with prejudice based on this court's decision in *Melvin v. Burling* (1986), 141 Ill.App.3d 786, 95 Ill.Dec. 919, 490 N.E.2d 1011.

In *Melvin*, this court stated in dicta, that "the false light area of privacy law has not, as yet, been judicially accepted in Illinois as a cause of action." (*Melvin*, 141 Ill.App.3d at 787, 788, 95 Ill.Dec. at 920, 490 N.E.2d at 1012.) Since *Melvin*, the appellate court for the First District, Fourth Division, in *Berkos v. National Broadcasting Company, Inc.* (1987), 161 Ill.App.3d 476, 113 Ill. Dec. 683, 515 N.E.2d 668, recognized a false light invasion of privacy claim. Quoting the restatements (second) of the law of Torts, the court stated that a complaint for such a claim must allege facts tending to show the following:

> "One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if (a) the false light in which the other was placed would be

highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed." (*Berkos*, 161 Ill.App.3d at 496 [113 Ill.Dec. at 695] 515 N.E.2d at 680, *quoting* Restatement (Second) of the Law of Torts, Sec. 652 E. (1977).)

[16] Plaintiff's complaint alleges a cause of action in negligence. Nonetheless, plaintiff argues that *Berkos* is not controlling because that case involved a public official plaintiff and a media defendant and the *New York Times* actual malice standard applied; whereas, the instant case involves a dispute between two private individuals and thus plaintiff need only satisfy the negligence standard enunciated in *Gertz v. Welch*. We disagree. The principal case for attaching First Amendment privileges to invasion of privacy claims was *Time, Inc. v. Hill* (1967), 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456. In *Time, Inc. v. Hill*, the Supreme Court held that a private plaintiff must satisfy the *New York Times* actual malice standard when the alleged falsehood is a matter of public concern. (*Time, Inc. v. Hill*, 385 U.S. at 390, 87 S.Ct. at 543, 17 L.Ed.2d at 468.) We likewise consider abortion to be a matter of public concern and, thus, consider *Time, Inc. v. Hill* applicable. Moreover, in *Gertz*, the court specifically excluded the *Time, Inc. v. Hill* decision as outside the scope of its consideration. (*Gertz*, 418 U.S. at 348, 94 S.Ct. at 3011, 41 L.Ed.2d at 810.) Therefore, we believe the elements for a cause of action for false light invasion of privacy claim as stated by the restatements and cited by *Berkos* are accurate reflections of the law.

Inasmuch as count III of plaintiff's complaint does not allege malice on the part of defendant, the trial court's dismissal of plaintiff's count III is affirmed.

Finally, defendant made a motion to dismiss appeal alleging that plaintiff failed to argue in her brief the question of whether defendant's statements were privileged. Defendant's motion is denied.

For all of the foregoing reasons, the judgment of the circuit court of Peoria County is reversed and remanded consistent with this opinion as to plaintiff's second amended count I, and affirmed as to plaintiff's second amended count II, count III and amended count IV.

Affirmed in part, reversed in part and remanded.

STOUDER, P.J., and HEIPLE, J., concur.

173 Ill.App.3d 770
123 Ill.Dec. 378

John E. FLISZAR, Plaintiff–Appellant,

v.

COMMONWEALTH EDISON COMPANY, a corporation, Defendant–Appellee (Peterson Electric Panel Manufacturing Company, Inc., a foreign corporation, Paulmarc Electric Company, an Illinois corporation, and Althoff Industries, Inc., an Illinois corporation, Defendants).

No. 87–1667.

Appellate Court of Illinois,
First District, Second Division.

Aug. 9, 1988.

Electrical engineer who was severely burned while working on employer's electrical distribution panel brought negligence and strict liability action against electric company. The Circuit Court, Cook County, Thomas R. Rakowski, J., granted electric company's motion to dismiss, and engineer appealed. The Appellate Court, Scariano, J., held that: (1) electric company owed no duty to engineer to fuse its transformers to protect engineer from malfunction of his employer's equipment, and (2) even if electricity could be considered as product and duty was not element in strict liability case, engineer failed to adequately allege that

Reynolds, White, Allen & Cook, Grant Cook, William A. Paddock, Houston, for petitioners.

Rachel Johnson, Pasadena, for respondent.

PER CURIAM.

[1, 2] During the pendency of a divorce action, the husband without the wife's knowledge, executed a deed of trust on community property which was later sold at a trustee's sale. The wife sued Fannin Bank, the purchaser, to recover the property because she had no notice of her husband's execution of the deed of trust which she alleged was executed by her husband in fraud of her rights. The trial court rendered judgment for the wife, and on appeal the court of civil appeals affirmed the judgment. 417 S.W.2d 502. The intermediate court based its affirmance upon article 4634, Vernon's Ann.Civ.Stats., holding that the pendency of a divorce action had the force of a lis pendens notice even in the absence of compliance with article 6640, Vernon's Ann.Civ.Stats. The holding was not necessary to the result, since the trial court made findings of fact and concluded that the Fannin Bank, as purchaser, had notice of the wife's interest in the real estate which was in litigation, and therefore knew or should have known that it could not rely upon the acts of the husband as manager of the community property. Petitioner Bank urges that there is no evidence to support the findings about notice, but our examination of the record convinces us that there were facts and inferences from which the bank should have known it could not rely upon the husband's signature. It is therefore unnecessary in this case to determine whether the mere pendency of a divorce action renders compliance with article 6640 unnecessary.

We overrule petitioners' motion for rehearing on our order refusing the application for writ of error, no reversible error.

Emmit E. FISHER, Petitioner,

v.

CARROUSEL MOTOR HOTEL, INC., et al., Respondents.

No. B-342.

Supreme Court of Texas.

Dec. 27, 1967.

Guest brought action for assault and battery by motor hotel's agent. The 61st District Court, Harris County, Ben F. Wilson, J., granted defendant's motion n. o. v. that plaintiff take nothing and plaintiff appealed. The Waco Court of Civil Appeals, Tenth Supreme Judicial District, 414 S.W.2d 774, affirmed and plaintiff brought error. The Supreme Court, Greenhill, J., held where the manager of the motor hotel's club dispossessed plaintiff of his dinner plate in a loud and offensive manner a battery occurred on which damages for mental suffering could be based and the motor hotel was liable for exemplary damages.

Reversed.

1. Assault and Battery ⇐2

Actual physical contact is not necessary to constitute a battery so long as there is contact with clothing or an object closely identified with the body.

2. Assault and Battery ⇐2

An intentional snatching of patron's dinner plate from him by manager of motor hotel's club in a loud and offensive manner was sufficient to constitute a battery.

3. Assault and Battery ⇐2

To constitute assault and battery, it is not necessary to touch the plaintiff's body or even his clothing; knocking or snatching anything from plaintiff's hand or touching anything connected with his person, when done in offensive manner, is sufficient.

4. Assault and Battery ⇐38

Where there was a forceful dispossession of patron's dinner plate in a loud and offensive manner which constituted a battery, patron was entitled to actual damages for mental suffering, even in absence of physical injury.

5. Damages ⇐48

Mental suffering is compensable for willful torts which are recognized as torts actionable independently and separately from mental suffering or other injury.

6. Assault and Battery ⇐38

Damages for mental suffering are recoverable without necessity for showing actual injury in a case of willful battery.

7. Assault and Battery ⇐2

Personal indignity is essence of action for battery; consequently defendant is liable for contacts which were offensive and insulting.

8. Master and Servant ⇐331
Principal and Agent ⇐159(1)

A principal or master is liable for exemplary or punitive damages because of acts of his agent or servant under some circumstances.

9. Master and Servant ⇐331

Where motor hotel's club manager was acting within scope of his employment, motor hotel was liable for exemplary damages to patron for willful battery by manager.

10. Principal and Agent ⇐159(1)

Finding of jury that motor hotel did not authorize or approve the act of its agent did not absolve it from liability for exemplary damages where agent was acting in a managerial capacity and in scope of his employment.

Ben G. Levy, Houston, for petitioner.

Vinson, Elkins, Weems & Searls, Raybourne Thompson, Jr. and B. Jeff Crane, Jr., Houston, for respondents.

GREENHILL, Justice.

This is a suit for actual and exemplary damages growing out of an alleged assault and battery. The plaintiff Fisher was a mathematician with the Data Processing Division of the Manned Spacecraft Center, an agency of the National Aeronautics and Space Agency, commonly called NASA, near Houston. The defendants were the Carrousel Motor Hotel, Inc., located in Houston, the Brass Ring Club, which is located in the Carrousel, and Robert W. Flynn, who as an employee of the Carrousel was the manager of the Brass Ring Club. Flynn died before the trial, and the suit proceeded as to the Carrousel and the Brass Ring. Trial was to a jury which found for the plaintiff Fisher. The trial court rendered judgment for the defendants notwithstanding the verdict. The Court of Civil Appeals affirmed. 414 S.W.2d 774. The questions before this Court are whether there was evidence that an actionable battery was committed, and, if so, whether the two corporate defendants must respond in exemplary as well as actual damages for the malicious conduct of Flynn.

The plaintiff Fisher had been invited by Ampex Corporation and Defense Electronics to a one day's meeting regarding telemetry equipment at the Carrousel. The invitation included a luncheon. The guests were asked to reply by telephone whether they could attend the luncheon, and Fisher called in his acceptance. After the morning session, the group of 25 or 30 guests adjourned to the Brass Ring Club for lunch. The luncheon was buffet style, and Fisher stood in line with others and just ahead of a graduate student of Rice University who testified at the trial. As Fisher was about to be served, he was approached by Flynn, who snatched the plate from Fisher's hand and shouted that he, a Negro, could not be

served in the club. Fisher testified that he was not actually touched, and did not testify that he suffered fear or apprehension of physical injury; but he did testify that he was highly embarrassed and hurt by Flynn's conduct in the presence of his associates.

The jury found that Flynn "forceably dispossessed plaintiff of his dinner plate" and "shouted in a loud and offensive manner" that Fisher could not be served there, thus subjecting Fisher to humiliation and indignity. It was stipulated that Flynn was an employee of the Carrousel Hotel and, as such, managed the Brass Ring Club. The jury also found that Flynn acted maliciously and awarded Fisher $400 actual damages for his humiliation and indignity and $500 exemplary damages for Flynn's malicious conduct.

[1] The Court of Civil Appeals held that there was no assault because there was no physical contact and no evidence of fear or apprehension of physical contact. However, it has long been settled that there can be a battery without an assault, and that actual physical contact is not necessary to constitute a battery, so long as there is contact with clothing or an object closely identified with the body. 1 Harper & James, The Law of Torts 216 (1956); Restatement of Torts 2d, §§ 18 and 19. In Prosser, Law of Torts 32 (3d Ed. 1964), it is said:

> "The interest in freedom from intentional and unpermitted contacts with the plaintiff's person is protected by an action for the tort commonly called battery. The protection extends to any part of the body, or to anything which is attached to it and practically identified with it. Thus contact with the plaintiff's clothing, or with a cane, a paper, or any other object held in his hand will be sufficient; * * * The plaintiff's interest in the integrity of his person includes all those things which are in contact or connected with it."

[2, 3] Under the facts of this case, we have no difficulty in holding that the intentional grabbing of plaintiff's plate constituted a battery. The intentional snatching of an object from one's hand is as clearly an offensive invasion of his person as would be an actual contact with the body. "To constitute an assault and battery, it is not necessary to touch the plaintiff's body or even his clothing; knocking or snatching anything from plaintiff's hand or touching anything connected with his person, when done in an offensive manner, is sufficient." Morgan v. Loyacomo, 190 Miss. 656, 1 So.2d 510 (1941).

Such holding is not unique to the jurisprudence of this State. In S. H. Kress & Co. v. Brashier, 50 S.W.2d 922 (Tex.Civ. App.1932, no writ), the defendant was held to have committed "an assault or trespass upon the person" by snatching a book from the plaintiff's hand. The jury findings in that case were that the defendant "dispossessed plaintiff of the book" and caused her to suffer "humiliation and indignity."

The rationale for holding an offensive contact with such an object to be a battery is explained in 1 Restatement of Torts 2d § 18 (Comment p. 31) as follows:

> "Since the essence of the plaintiff's grievance consists in the offense to the dignity involved in the unpermitted and intentional invasion of the inviolability of his person and not in any physical harm done to his body, it is not necessary that the plaintiff's actual body be disturbed. Unpermitted and intentional contacts with anything so connected with the body as to be customarily regarded as part of the other's person and therefore as partaking of its inviolability is actionable as an offensive contact with his person. There are some things such as clothing or a cane or, indeed, anything directly grasped by the hand which are so intimately connected with one's body as to be universally regarded as part of the person."

We hold, therefore, that the forceful dispossession of plaintiff Fisher's plate in an offensive manner was sufficient to constitute a battery, and the trial court erred in granting judgment notwithstanding the verdict on the issue of actual damages.

[4–7] In Harned v. E-Z Finance Co., 151 Tex. 641, 254 S.W.2d 81 (1953), this Court refused to adopt the "new tort" of intentional interference with peace of mind which permits recovery for mental suffering in the absence of resulting physical injury or an assault and battery. This cause of action has long been advocated by respectable writers and legal scholars. See, for example, Prosser, Insult and Outrage, 44 Cal.L.Rev. 40 (1956); Wade, Tort Liability for Abusive and Insulting Language, 4 Vand.L.Rev. 63 (1950); Prosser, Intentional Infliction of Mental Suffering: A New Tort, 37 Mich.L.Rev. 874 (1939); 1 Restatement of Torts 2d § 46(1). However, it is not necessary to adopt such a cause of action in order to sustain the verdict of the jury in this case. The *Harned* case recognized the well established rule that mental suffering is compensable in suits for willful torts "which are recognized as torts and actionable independently and separately from mental suffering or other injury." 254 S.W.2d at 85. Damages for mental suffering are recoverable without the necessity for showing actual physical injury in a case of willful battery because the basis of that action is the unpermitted and intentional invasion of the plaintiff's person and not the actual harm done to the plaintiff's body. Restatement of Torts 2d § 18. Personal indignity is the essence of an action for battery; and consequently the defendant is liable not only for contacts which do actual physical harm, but also for those which are offensive and insulting. Prosser, supra; Wilson v. Orr, 210 Ala. 93, 97 So. 123 (1923). We hold, therefore, that plaintiff was entitled to actual damages for mental suffering due to the willful battery, even in the absence of any physical injury.

[8] We now turn to the question of the liability of the corporations for exemplary damages. In this regard, the jury found that Flynn was acting within the course and scope of his employment on the occasion in question; that Flynn acted maliciously and with a wanton disregard of the rights and feelings of plaintiff on the occasion in question. There is no attack upon these jury findings. The jury further found that the defendant Carrousel did not authorize or approve the conduct of Flynn. It is argued that there is no evidence to support this finding. The jury verdict concluded with a finding that $500 would "reasonably compensate plaintiff for the malicious act and wanton disregard of plaintiff's feelings and rights. * * *"

The rule in Texas is that a principal or master is liable for exemplary or punitive damages because of the acts of his agent, but only if:

(a) the principal authorized the doing and the manner of the act, or

(b) the agent was unfit and the principal was reckless in employing him, or

(c) the agent was employed in a managerial capacity and was acting in the scope of employment, or

(d) the employer or a manager of the employer ratified or approved the act.

[9] The above test is set out in the Restatement of Torts § 909 and was adopted in King v. McGuff, 149 Tex. 432, 234 S.W. 2d 403 (1950). At the trial of this case, the following stipulation was made in open court:

"It is further stipulated and agreed to by all parties that as an employee of the Carrousel Motor Hotel the said Robert W. Flynn was manager of the Brass Ring Club."

We think this stipulation brings the case squarely within part (c) of the rule an-

nounced in the *King* case as to Flynn's managerial capacity. It is undisputed that Flynn was acting in the scope of employment at the time of the incident; he was attempting to enforce the Club rules by depriving Fisher of service.

[10] The rule of the Restatement of Torts adopted in the *King* case set out above has four separate and disjunctive categories as a basis of liability. They are separated by the word "or." As applicable here, there is liability if (a) the act is authorized, or (d) the act is ratified or approved, *or* (c) the agent was employed in a managerial capacity and was acting in the scope of his employment. Since it was established that the agent was employed in a managerial capacity and was in the scope of his employment, the finding of the jury that the Carrousel did not authorize or approve Flynn's conduct became immaterial.

The *King* case also cited and relied upon Ft. Worth Elevator Co. v. Russell, 123 Tex. 128, 70 S.W.2d 397 (1934). In that case, it was held not to be material that the employer did not authorize or ratify the particular conduct of the employee; and the right to exemplary damages was supported under what is section (b) of the Restatement or *King* rule: The agent was unfit, and the principal was reckless in employing [or retaining] him.

After the jury verdict in this case, counsel for the plaintiff moved that the trial court disregard the answer to issue number eight [no authorization or approval of Flynn's conduct on the occasion in question] and for judgment upon the verdict. The trial court erred in overruling that motion and in entering judgment for the defendants notwithstanding the verdict; and the Court of Civil Appeals erred in affirming that judgment.

The judgments of the courts below are reversed, and judgment is here rendered for the plaintiff for $900 with interest from the date of the trial court's judgment, and for costs of this suit.

Fred FENNELL, Jr., Appellant,

v.

The STATE of Texas, Appellee.

No. 40830.

Court of Criminal Appeals of Texas.

March 6, 1968.

The defendant was convicted in the Criminal District Court No. 6, Harris County, Fred M. Hooey, J., of murder without malice, and defendant appealed. The Court of Criminal Appeals, Onion, J., held that charge that was only abstract on law of self-defense and did not apply the law to the facts was reversibly erroneous where testimony of state and defendant clearly and strongly raised issue of self-defense both against unlawful attack giving rise to apprehension or fear of death or serious bodily injury and against milder attack.

Reversed and remanded.

1. Homicide ⇐300(3), 340(1)

Charge that was only abstract on law of self-defense and did not apply the law to the facts was reversibly erroneous in murder prosecution wherein testimony of state and defendant clearly and strongly raised issue of self-defense both against unlawful attack giving rise to apprehension or fear of death or serious bodily injury and against milder attack. Vernon's Ann. P.C. arts. 1221, 1224, 1226.

2. Homicide ⇐300(1), 341

Refusal of timely requested special charge to effect that intoxication or drinking of decedent would not have excused his attack upon defendant nor take from defendant the right of self-defense was reversible error in absence of adequate, comprehensive, complete, and unrestricted instruction on self-defense in murder case wherein testimony for state and defendant clearly and strongly raised issue of self-

IRA S. BUSHEY & SONS, INC.,
Plaintiff-Appellee,

v.

UNITED STATES of America,
Defendant-Appellant.

No. 463, Docket 32086.

United States Court of Appeals
Second Circuit.

Argued April 30, 1968.

Decided June 19, 1968.

Drydock owner's action against United States for damages to drydock and libel by United States against shipyard owner for damages to its vessel. The United States District Court for the Eastern District of New York, Jack B. Weinstein, J., 276 F.Supp. 518, entered judgment holding United States liable and appeal was taken. The Court of Appeals, Friendly, Circuit Judge, held that conduct of intoxicated Coast Guard seaman living aboard Coast Guard vessel while it was in drydock in opening drydock's floodgate valve thereby causing drydock to sink was not so unforeseeable as to make it unfair to charge government with responsibility for damages to drydock.

Affirmed.

1. Admiralty ⇐103

If action is in admiralty, Court of Appeals has power to review judgment determining liability but not fixing damages under statute relating to interlocutory decrees determining rights and liability of parties to admiralty cases in which appeals from final decrees are allowed. 28 U.S.C.A. § 1292(a) (3).

2. Courts ⇐405(3.5)

If action is at law, Court of Appeals has no jurisdiction to review judgment determining liability but not fixing damages.

3. United States ⇐125(13)

Damage to drydock resulting when Coast Guard vessel which while in drydock being repaired slid off blocks and struck wall was maintainable under section of Public Vessels Act as one for damages caused by public vessel of the United States even if no "collision" was involved, and in any event, action was maintainable under section of Suits in Admiralty Act authorizing nonjury proceeding in personam against United States in cases where proceeding in admiralty could be maintained for damage by privately owned vessel. Public Vessels Act, § 1, 46 U.S.C.A. § 781; Suits in Admiralty Act, § 2 as amended 46 U.S.C.A. § 742.

4. Admiralty ⇐1

The purpose of the 1960 Amendment to the Suits in Admiralty Act, 46 U.S.C. § 742, was to bring all maritime claims against United States vessels into the admiralty jurisdiction of the district courts. Suits in Admiralty Act, § 2 as amended 46 U.S.C.A. § 742.

5. Master and Servant ⇐300

Respondeat superior, even within its traditional limits, rests not so much on policy grounds consistent with the governing principles of tort law as in deeply rooted sentiment that a business enterprise cannot justly disclaim responsibility for accidents which may fairly be said to be characteristic of its activities.

6. Master and Servant ⇐300
Wharves ⇐22

Conduct of intoxicated Coast Guard seaman living aboard Coast Guard vessel while it was in drydock in opening drydock's floodgate valve thereby causing drydock to sink was not so unforeseeable as to make it unfair to charge government with responsibility for damages to drydock.

7. Master and Servant ⇐304

What is reasonably foreseeable in context of respondeat superior is quite a different thing from the foreseeably unreasonable risk of harm that spells negligence.

8. Master and Servant ⇐300

Employer should be held to expect risks to the public which arise out of

and in the course of his employment of labor.

9. Master and Servant ⇐300

It is not fatal objection that rule imposing responsibility upon employer for conduct of employee not actuated by purpose to serve the employer if conduct is reasonably foreseeable lacks sharp contours; question is one of expediency with view toward making rule in each case that will be practical and in keeping with the general understanding of mankind.

Philip A. Berns, Washington, D. C., (Edwin L. Weisl, Jr., Asst. Atty. Gen., Joseph P. Hoey, U. S. Atty., Louis E. Greco, Atty. in Charge, New York Office, Admiralty and Shipping Section, Peter M. Klein, Atty., Admiralty and Shipping Section, Dept. of Justice), for the United States, appellant.

Christopher E. Heckman, New York City, Foley & Martin, New York City, for appellee Ira S. Bushey & Sons, Inc.

Before WATERMAN, FRIENDLY and KAUFMAN, Circuit Judges.

FRIENDLY, Circuit Judge:

While the United States Coast Guard vessel Tamaroa was being overhauled in a floating drydock located in Brooklyn's Gowanus Canal, a seaman returning from shore leave late at night, in the condition for which seamen are famed, turned some wheels on the drydock wall. He thus opened valves that controlled the flooding of the tanks on one side of the drydock. Soon the ship listed, slid off the blocks and fell against the wall. Parts of the drydock sank, and the ship partially did—fortunately without loss of life or personal injury. The drydock owner sought and was granted compensation by the District Court for the Eastern District of New York in an amount to be determined, 276 F.Supp. 518; the United States appeals.[1]

Before reaching the merits, we must deal with a procedural issue injected by the district judge, since we would have no jurisdiction of the appeal if his decision of the question was correct. Although Bushey, the drydock owner, had brought its libel under the Public Vessels Act, 46 U.S.C. §§ 781–790, and the United States did not dispute the applicability of that statute save for unsuccessfully contending that Bushey must first present its claim to the Coast Guard Board of Contract Appeals,[2] the judge ruled that the damage to the drydock was not "caused by a public vessel of the United States" since "the Tamaroa was not, in a practical sense, a ship causing a 'collision,' but an inert mass." 276 F.Supp. at 523. He then proceeded to hold (1) that sovereign immunity was nevertheless waived under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b) and 2674, the exception in § 2680(d) for "any claim for which a remedy is provided by sections 741–752, 781–790 of Title 46, relating to claims or suits in admiralty against the United States" being inapplicable because, as he believed, no such remedy was provided; (2) that Bushey's pleading would be deemed amended to allege a claim under the Tort Claims Act which it had not asserted; (3) that New York law applied, 28 U.S.C. § 1346(b); (4) that this, however, was the "whole" law of New York; and (5) that New York would, indeed must, determine liability for a tort on navigable waters in accordance with maritime law. Hence, from a substantive standpoint, the chase was thought to have ended where it began, save for a caveat as to the applicability of distinctive admiralty remedies, notably limitation, an issue not practically important here.

1. The district court also dismissed a libel by the United States against the drydock owner for damage to the vessel; the United States has not appealed from that ruling.

2. This contention has not been pressed on appeal.

[1, 2] What does remain important is that our powers to review a judgment determining liability but not fixing damages are entirely different if the action was in admiralty as the parties thought or at law as the judge held. If it was the former, we have jurisdiction under 28 U.S.C. § 1292(a) (3) relating to "interlocutory decrees * * * determining the rights and liability of the parties to admiralty cases in which appeals from final decrees are allowed," whereas if it were the latter, we would have none. Beebe v. Russell, 60 U.S. (19 How.) 283, 285, 15 L.Ed. 668 (1856); Catlin v. United States, 324 U.S. 229, 233, 65 S.Ct. 631, 89 L.Ed. 911 (1945).

[3, 4] We perceive no basis for the court's restrictive reading of the Public Vessels Act. It is no strain whatever on the language to say that a public vessel has "caused" any tort damage for which she is legally responsible. Thomason v. United States, 184 F.2d 105 (9 Cir. 1950). The Act speaks of causing "damage"; it says nothing about causing "collision." Such debate as there has been concerning the scope of the Public Vessels Act relates to claims sounding in contract, see Calmar S. S. Corp. v. United States, 345 U.S. 446, 456 n. 8, 73 S.Ct. 733, 738, 97 L.Ed. 1140 (1953), and even as to that "equivocal language should be construed so as to secure the most harmonious results." Id. Furthermore, and decisively, even if the judge's narrow reading of § 1 of the Public Vessels Act had been warranted, the suit could nevertheless be maintained under § 2 of the Suits in Admiralty Act as amended, 46 U.S.C. § 742. This provides, *inter alia*, that in cases where if any vessel owned by the United States "were privately owned or possessed, * * * a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States * * *."— the language of the 1920 statute restricting the Suits in Admiralty Act to merchant vessels having been stricken in 1960, 74 Stat. 912, for the very purpose of avoiding fruitless jurisdictional controversies and bringing all maritime claims against United States vessels into the admiralty jurisdiction of the district courts. See S.Rep. 1894, 86th Cong. 2d Sess., 2 U.S. Code Cong. & Adm. News, p. 3583 et seq.[3]

With our appellate jurisdiction under 28 U.S.C. § 1292 (a) (3) thus established, we return to the facts. The Tamaroa had gone into drydock on February 28, 1963; her keel rested on blocks permitting her drive shaft to be removed and repairs to be made to her hull. The contract between the Government and Bushey provided in part:

> (o) The work shall, whenever practical, be performed in such manner as not to interfere with the berthing and messing of personnel attached to the vessel undergoing repair, and provision shall be made so that personnel assigned shall have access to the vessel at all times, it being understood that such personnel will not interfere with the work or the contractor's workmen.

Access from shore to ship was provided by a route past the security guard at the gate, through the yard, up a ladder to the top of one drydock wall and along the wall to a gangway leading to the fantail deck, where men returning from leave reported at a quartermaster's shack.

Seaman Lane, whose prior record was unblemished, returned from shore leave a little after midnight on March 14. He had been drinking heavily; the quartermaster made mental note that he was "loose." For reasons not apparent to us or very likely to Lane,[4] he took it into his head, while progressing along the gangway wall, to turn each of three large

3. The discussion in Gilmore & Black, Admiralty, § 11–11 (1957), which the judge cited, 276 F.Supp. at 523, is thus largely obsolete—a good instance of the compelling need for a revised edition of this indispensable work.

4. Lane disappeared after completing the sentence imposed by a courtmartial and being discharged from the Coast Guard.

wheels some twenty times; unhappily, as previously stated, these wheels controlled the water intake valves. After boarding ship at 12:11 A.M., Lane mumbled to an off-duty seaman that he had "turned some valves" and also muttered something about "valves" to another who was standing the engineering watch. Neither did anything; apparently Lane's condition was not such as to encourage proximity. At 12:20 A.M. a crew member discovered water coming into the drydock. By 12:30 A.M. the ship began to list, the alarm was sounded and the crew were ordered ashore. Ten minutes later the vessel and dock were listing over 20 degrees; in another ten minutes the ship slid off the blocks and fell against the drydock wall.

The Government attacks imposition of liability on the ground that Lane's acts were not within the scope of his employment. It relies heavily on § 228(1) of the Restatement of Agency 2d which says that "conduct of a servant is within the scope of employment if, but only if: * * * (c) it is actuated, at least in part by a purpose to serve the master." Courts have gone to considerable lengths to find such a purpose, as witness a well-known opinion in which Judge Learned Hand concluded that a drunken boatswain who routed the plaintiff out of his bunk with a blow, saying "Get up, you big son of a bitch, and turn to," and then continued to fight, might have thought he was acting in the interest of the ship. Nelson v. American-West African Line, 86 F.2d 730 (2 Cir. 1936), cert. denied, 300 U.S. 665, 57 S.Ct. 509, 81 L.Ed. 873 (1937). It would be going too far to find such a purpose here; while Lane's return to the Tamaroa was to serve his employer, no one has suggested how he could have thought turning the wheels to be, even if—which is by no means clear—he was unaware of the consequences.

In light of the highly artificial way in which the motive test has been applied, the district judge believed himself obliged to test the doctrine's continuing vitality by referring to the larger purposes *respondeat superior* is supposed to serve. He concluded that the old formulation failed this test. We do not find his analysis so compelling, however, as to constitute a sufficient basis in itself for discarding the old doctrine. It is not at all clear, as the court below suggested, that expansion of liability in the manner here suggested will lead to a more efficient allocation of resources. As the most astute exponent of this theory has emphasized, a more efficient allocation can only be expected if there is some reason to believe that imposing a particular cost on the enterprise will lead it to consider whether steps should be taken to prevent a recurrence of the accident. Calabresi, The Decision for Accidents: An Approach to Non-fault Allocation of Costs, 78 Harv.L.Rev. 713, 725–34 (1965). And the suggestion that imposition of liability here will lead to more intensive screening of employees rests on highly questionable premises, see Comment, Assessment of Punitive Damages Against an Entrepreneur for the Malicious Torts of His Employees, 70 Yale L.J. 1296, 1301–04 (1961).[5] The unsatisfactory quality of the allocation of resource rationale is especially striking on the facts of this case. It could well be that application of the traditional rule might induce drydock owners, prodded by their insurance companies, to install locks on their valves to avoid similar incidents in the future,[6] while placing the burden on shipowners is much less

5. We are not here speaking of cases in which the enterprise has negligently hired an employee whose undesirable propensities are known or should have been. See Koehler v. Presque-Isle Transp. Co., 141 F.2d 490 (2 Cir.), cert. denied, 322 U.S. 764, 64 S.Ct. 1288, 88 L.Ed. 1591 (1943).

6. The record reveals that most modern drydocks have automatic locks to guard against unauthorized use of valves.

likely to lead to accident prevention.[7] It is true, of course, that in many cases the plaintiff will not be in a position to insure, and so expansion of liability will, at the very least, serve *respondeat superior*'s loss spreading function. See Smith, Frolic and Detour, 23 Colum.L.Rev. 444, 456 (1923). But the fact that the defendant is better able to afford damages is not alone sufficient to justify legal responsibility, see Blum & Kalven, Public Law Perspectives on a Private Law Problem (1965), and this overarching principle must be taken into account in deciding whether to expand the reach of *respondeat superior*.

[5] A policy analysis thus is not sufficient to justify this proposed expansion of vicarious liability. This is not surprising since *respondeat superior*, even within its traditional limits, rests not so much on policy grounds consistent with the governing principles of tort law as in a deeply rooted sentiment that a business enterprise cannot justly disclaim responsibility for accidents which may fairly be said to be characteristic of its activities. It is in this light that the inadequacy of the motive test becomes apparent. Whatever may have been the case in the past, a doctrine that would create such drastically different consequences for the actions of the drunken boatswain in *Nelson* and those of the drunken seaman here reflects a wholly unrealistic attitude toward the risks characteristically attendant upon the operation of a ship. We concur in the statement of Mr. Justice Rutledge in a case involving violence injuring a fellow-worker, in this instance in the context of workmen's compensation:

> "Men do not discard their personal qualities when they go to work. Into the job they carry their intelligence, skill, habits of care and rectitude. Just as inevitably they take along also their tendencies to carelessness and camaraderie, as well as emotional make-up. In bringing men together, work brings these qualities together, causes frictions between them, creates occasions for lapses into carelessness, and for fun-making and emotional flare-up. * * * These expressions of human nature are incidents inseparable from working together. They involve risks of injury and these risks are inherent in the working environment."

Hartford Accident & Indemnity Co. v. Cardillo, 72 App.D.C. 52, 112 F.2d 11, 15, cert. denied, 310 U.S. 649, 60 S.Ct. 1100, 84 L.Ed. 1415 (1940); cf. Robinson v. Bradshaw, 92 U.S.App.D.C. 216, 206 F.2d 435 (1953). Judge Cardozo reached a similar conclusion in Leonbruno v. Champlain Silk Mills, 229 N.Y. 470, 128 N.E. 711, 13 A.L.R. 522 (1920). Further supporting our decision is the persuasive opinion of Justice Traynor in Carr v. Wm. C. Crowell Co., 28 Cal.2d 652, 171 P.2d 5 (1946) [employer liable for violent acts of servant against employee of a subcontractor working on the same construction job], followed in Fields v. Sanders, 29 Cal.2d 834, 180 P.2d 684, 172 A.L.R. 525 (1947) [employer liable for violent acts of driver against another driver in traffic dispute].

[6–8] Put another way, Lane's conduct was not so "unforeseeable" as to make it unfair to charge the Government with responsibility. We agree with a leading treatise that "what is reasonably foreseeable in this context [of *respondeat superior*] * * * is quite a different thing from the foreseeably unreasonable risk of harm that spells negligence * *. The foresight that should impel the prudent man to take precautions is not the same measure as that by which he should perceive the harm likely to flow from his long-run activity in spite of all reasonable precautions on his own part. The proper test here bears far more resemblance to that which limits liability for workmen's compensation than to the test for negligence. The employer should be held to expect risks, to the public also,

7. Although it is theoretically possible that shipowners would demand that drydock owners take appropriate action, see Coase, The Problem of Social Cost, 3 J.L. & Economics 1 (1960), this would seem unlikely to occur in real life.

which arise 'out of and in the course of' his employment of labor." 2 Harper & James, The Law of Torts 1377–78 (1956). See also Calabresi, Some Thoughts on Risk Distribution and the Law of Torts, 70 Yale L.J. 499, 544 (1961). Here it was foreseeable that crew members crossing the drydock might do damage, negligently or even intentionally, such as pushing a Bushey employee or kicking property into the water. Moreover, the proclivity of seamen to find solace for solitude by copious resort to the bottle while ashore has been noted in opinions too numerous to warrant citation. Once all this is granted, it is immaterial that Lane's precise action was not to be foreseen. Compare, for a similar problem in the law of damages, Petition of Kinsman Transit Co., 338 F.2d 708, 721–726 (2 Cir. 1964), cert. denied, Continental Grain Co. v. City of Buffalo, 380 U.S. 944, 85 S.Ct. 1026, 13 L.Ed.2d 963 (1965), but see also 388 F.2d 821 (2 Cir. 1968). Consequently, we can no longer accept our past decisions that have refused to move beyond the *Nelson* rule, Brailas v. Shepard S.S. Co., 152 F.2d 849 (2d Cir. 1945), cert. denied, 327 U.S. 807, 66 S.Ct. 970, 90 L.Ed. 1032 (1946); Kable v. United States, 169 F.2d 90, 92 (2 Cir. 1948),[8] since they do not accord with modern understanding as to when it is fair for an enterprise to disclaim the actions of its employees.

[9] One can readily think of cases that fall on the other side of the line. If Lane had set fire to the bar where he had been imbibing or had caused an accident on the street while returning to the drydock, the Government would not be liable; the activities of the "enterprise" do not reach into areas where the servant does not create risks different from those attendant on the activities of the community in general. Cf. Gordon v. United States, 180 F.Supp. 591 (Ct.Cl.1960); Trost v. American Hawaiian S.S. Co., 324 F.2d 225 (2 Cir. 1963), cert. denied, 376 U.S. 963, 84 S.Ct. 1125, 11 L.Ed.2d 981 (1964). We agree with the district judge that if the seaman "upon returning to the drydock, recognized the Bushey security guard as his wife's lover and shot him," 276 F.Supp. at 530, vicarious liability would not follow; the incident would have related to the seaman's domestic life, not to his seafaring activity, cf. Hartford Accident & Indemnity Co. v. Cardillo, supra, 112 F.2d at 17, and it would have been the most unlikely happenstance that the confrontation with the paramour occurred on a drydock rather than at the traditional spot. Here Lane had come within the closed-off area where his ship lay, cf. McConville v. United States, 197 F.2d 680 (2 Cir. 1957), to occupy a berth to which the Government insisted he have access, cf. Restatement, Agency 2d, § 267, and while his act is not readily explicable, at least it was not shown to be due entirely to facets of his personal life. The risk that seamen going and coming from the Tamaroa might cause damage to the drydock is enough to make it fair that the enterprise bear the loss. It is not a fatal objection that the rule we lay down lacks sharp contours; in the end, as Judge Andrews said in a related context, "it is all a question [of expediency,] * * * of fair judgment, always keeping in mind the fact that we endeavor to make a rule in each case that will be practical and in keeping with the general understanding of mankind." Palsgraf v. Long Island R.R. Co., 248 N.Y. 339, 354–355, 162 N.E. 99, 104, 59 A.L.R. 1253 (1928) (dissenting opinion).

Since we hold the Government responsible for the damage resulting from Lane's turning the wheels, we find it

8. The *Brailas* decision relied on Davis v. Green, 260 U.S. 349, 43 S.Ct. 123, 67 L.Ed. 299 (1922), which was applied in St. Louis-San Francisco R. Co. v. Mills, 271 U.S. 344, 46 S.Ct. 520, 70 L.Ed. 979 (1926); Atlantic Coast Line R. Co. v. Southwell, 275 U.S. 64, 48 S.Ct. 25, 72 L.Ed. 157 (1927); and Atlanta & Charlotte Air Line R. Co. v. Green, 279 U.S. 821, 49 S.Ct. 350, 73 L.Ed. 976 (1929). However, we agree with Chief Judge Murrah that the Supreme Court would not follow *Davis* today, despite its author's eminence. Copeland v. St. Louis-San Francisco R. Co., 291 F.2d 119, 121, 123 (10 Cir. 1961) (dissenting opinion).

unnecessary to consider Bushey's further arguments that liability would attach in any event because of later inaction of Lane and others on the Tamaroa; and that in libels *in rem*, whose principles are here applicable by virtue of § 3 of the Suits in Admiralty Act, ordinary rules of agency are inapplicable and the ship is liable for anything ship-connected persons cause it to do. Cf. The China, 74 U.S. (7 Wall.) 53, 19 L.Ed. 67 (1868); Burns Bros. v. Central R.R. of N. J., 202 F.2d 910, 914 (2 Cir. 1953).

Affirmed.

UNITED STATES of America
v.
Floretta G. SMITH, Appellant.
No. 16752.

United States Court of Appeals
Third Circuit.

Argued Feb. 19, 1968.

Decided July 11, 1968.

After paying survivor's annuity of $83 monthly under Civil Service Retirement Benefits Act, the United States brought action to recover amount it paid out, claiming that defendant was not decedent's legal widow because decedent and defendant had been divorced. The United States District Court for the District of New Jersey, Mitchell H. Cohen, J., entered judgment in favor of United States, and defendant appealed. The Court of Appeals, Freedman, Circuit Judge, held that failure to require that constructive notice to absent defendant in divorce proceeding be sent by registered or certified mail with provision for return receipt card did not reduce Florida procedure below level of due process, and accordingly, Florida divorce decree did effectively terminate marriage of decedent and defendant.

Judgment affirmed.

1. United States ⇐39(15)

To obtain a survivor's annuity under Civil Service Retirement Benefits Act, spouse to whom retired employee was married at time of his retirement must also be his wife at time of his death. 5 U.S.C.A. §§ 8331–8348.

2. Divorce ⇐316, 369(1)

Because it deals with marital status, decree of divorce is not an in personam judgment, and when obtained in state of plaintiff's but not defendant's domicil, it is entitled to compulsory recognition in other states even though there was only constructive service of process and defendant did not appear.

3. Process ⇐84

Constructive service of process usually is made on an absent defendant by publication in local newspaper, but since, realistically, effectiveness of publication as notice is at best dubious, further efforts to give notice are required where practicable.

4. Constitutional Law ⇐309(2)
Divorce ⇐371

Failure to require that constructive notice to absent defendant in divorce proceeding be sent by registered or certified mail with a provision for return receipt card did not reduce Florida procedure below level of due process, and accordingly, Florida divorce decree did effectively terminate marriage of decedent federal employee and defendant to whom the United States for some months erroneously paid a survivor's annuity of $83 monthly under the Civil Service Retirement Benefits Act. 5 U.S.C.A. §§ 8331–8348.

5. Constitutional Law ⇐309(1)

Test under due process and under full faith and credit clause of validity of notice given nonresident defendant in divorce proceeding is not whether the absent spouse actually received notice, but whether the method used was one reasonably calculated to give actual notice.

Musgrove v. Silver

82 Cal. App. 5th 694 (Cal. Ct. App. 2022)

Brian Hoffstadt[†]

As part of an entourage of family and friends, a Hollywood producer brought the executive assistant he employed through his company as well as a French chef he personally employed to a luxurious resort in Bora Bora; the trip was part vacation for both the assistant and the chef, although the assistant met with the concierge to plan the entourage's daily recreational activities and the chef prepared all lunches and dinners. Tragically, the executive assistant drowned when she went for a midnight swim in the lagoon outside her overwater bungalow. The drowning was accidental, and related to her ingestion of alcohol and cocaine in the hours prior to her swim. The executive assistant's parents sued the producer for wrongful death, on the theory that he is (1) directly liable, because he paid all resort-related expenses of the trip, including for alcohol, and (2) vicariously liable, because he employed the chef, who had met up with the executive assistant for a late-night rendezvous when she drank half a bottle of wine and snorted a "significant" amount of cocaine just before going for a swim. In granting summary judgment, the trial court ruled that the producer was not liable under either theory as a matter of law. The primary issue on appeal is whether the chef was acting within the scope of his employment — thereby rendering the producer vicariously liable — when the chef met up with the executive assistant for a nightcap and, by allegedly supplying her with alcohol and cocaine while knowing she liked to swim at night, put her in a position of peril from which he failed to protect her. Although the precedent on vicarious liability is untidy, we hold that the chef's late-night activities with the assistant were not within the scope of his employment under each of the four tests articulated by the California courts for assessing the scope of employment for purposes of imposing vicarious liability. Because the trial court's ruling on direct liability was also correct, we affirm the judgment for the producer.

Facts and Procedural Background

I. Facts

A. A tragic death

In August 2015, 28-year-old Carmel Musgrove (Musgrove) traveled to the Four Seasons Resort on a private island in Bora Bora, French Polynesia. She was one of 14 or 15 people — largely family and friends — whom Hollywood producer Joel Silver (Silver) had invited to accompany him in attending actress Jennifer Aniston's wedding celebration. Musgrove stayed in her own overwater bungalow at the resort. Along with Silver's other guests, she went fishing, played volleyball, and went to the spa. She also attended the group lunches and dinners Silver hosted, where she would regularly drink wine. Silver covered all of the group's expenses on the trip, including alcohol.

On the evening of August 18, 2015, the group ate dinner indoors because the wind was howling and the water, choppy. Musgrove had wine with dinner, but did not become visibly intoxicated. Around 9 p.m., she went to the Silver's family bungalow to watch a movie with his then young children. After agreeing via text message to meet up with 47-year-old Martin Herold (Herold), another member of

[†] Associate Justice of the California Court of Appeal, Second District, joined by Presiding Justice Elwood Lui and Associate Justice Judith Ashmann-Gerst

Silver's encourage, Musgrove told Silver's family she was not feeling well and excused herself to go back to her bungalow a little after 10 p.m.

Musgrove then met up with Herold to "party." Although precisely where they met and precisely what they did is subject to some dispute, it is undisputed that over the next hour or so Musgrove and Herold kissed, Musgrove drank more wine, and Musgrove ingested cocaine.

At some point around midnight, and after departing from her rendezvous with Herold, Musgrove disrobed in her bungalow and climbed down the ladder from her bungalow's platform into the dark waters of the lagoon for a nighttime dip.

Musgrove did not show up at breakfast or lunch the next day.

Her body washed up onto shore the following night. Two autopsies confirmed that her cause of death was accidental drowning, with contributing causes of alcohol and drug use. Her blood alcohol content was 0.20, which is more than twice the legal limit for drinking. She also had a "significant" amount of cocaine in her liver.

B. Employment relationships

1. Musgrove

For many years prior to the August 2015 trip, Musgrove had been working as Silver's executive assistant. She was officially employed by Silver Pictures Entertainment.

Going to Bora Bora was not a requirement of her job. Rather, Silver invited Musgrove to come along if she wanted: If she came, she would continue to receive her salary and would be expected to spend "maybe 10 percent" of her time coordinating with the resort's staff and others in lining up the recreational activities and meals for Silver and his guests; the rest of the time, however, she would be "on vacation" like the others and would have her travel, lodging, and other expenses paid.

Silver did not prohibit his guests from partaking of alcohol at dinner, at the resort's bars, or through room service; conversely, he did not require or pressure anyone to drink. Whether and how much to drink alcohol was up to each guest.

2. Herold

For over a decade prior to August 2015, Silver had personally employed Herold as his "family's personal chef" who would travel with Silver and his family, and prepare their meals. Silver paid Herold a salary and covered all of his travel, lodging, and other expenses, including any alcohol Herold chose to drink.

Herold arrived in Bora Bora a few days before the rest of Silver's entourage in order to purchase groceries for the lunches and dinners he was to prepare during the trip. Herold had no fixed working hours; instead, he was expected to prepare the group's lunches and dinners, but was otherwise free to spend his remaining time however he wished.

C. Personal relationship between Musgrove and Herold

By August 2015, Musgrove and Herold were not strangers. They had met a few years prior, when Musgrove was traveling as Silver's executive assistant and Herold was accompanying Silver's family as their chef.

Before she departed for the August 2015 Bora Bora trip, Musgrove emailed Herold and asked if he got "any 'candy' down there." Herold responded that he "got a bag of bora herb," which he later explained

meant marijuana. Musgrove was unimpressed, responding, "Meh. U don't [have] a hook up there for the other stuff?" When Herold assured her "Got everything," she responded "What I like to hear" with a smiley face symbol.

Herold also knew that Musgrove enjoyed swimming in the lagoon near the overwater bungalows.

II. Procedural Background

A. Pleadings

In August 2017, Musgrove's parents — Ronald and Ann Musgrove (collectively, plaintiffs) — sued Herold and Silver for the wrongful death of their daughter.[1] In the operative second amended complaint,[2] plaintiffs alleged that Herold and Silver were liable because they had "exposed" Musgrove to "an unreasonable risk of harm" by "furnishing" her with "an excessive amount of alcohol" and "drugs," and simultaneously "promoting dangerous activities, including alcohol consumption, drug consumption, and swimming in a lagoon late at night during unfavorable conditions." Plaintiffs more specifically alleged two theories of liability against Silver — namely, that Silver was (1) directly liable for Musgrove's death because he "caused [her] to be in a vulnerable state on the night" of her death, and (2) "vicariously liable for the negligence" of Herold because Herold was "acting within the course and scope of [his] … employment at the time of [Herold's] negligence."

B. Summary judgment

Silver moved for summary judgment. Following a full round of briefing, evidentiary objections, and a hearing, the trial court granted Silver's motion. The court ruled that Silver was not directly liable for Musgrove's death because Silver had no "special relationship" with Musgrove that would legally obligate him to "assume[] control of her safety and welfare"; to hold Silver directly liable simply because Musgrove "accompanied him" to Bora Bora, the court reasoned, would "contradict[]" California tort law. The court further ruled that Silver was not vicariously liable for Musgrove's death. Although the court found triable issues of fact as to whether Herold owed Musgrove a duty of care and breached that duty, the court concluded as a matter of law that Silver was not vicariously liable for Herold's arguably negligent conduct "in placing Musgrove in a position of peril" by plying her with alcohol and drugs and then not protecting her from swimming. More specifically, the court reasoned that Herold's conduct was outside the scope of his employment by Silver because (1) it was "not an 'outgrowth' of his employment [as a chef or] 'inherent in the working environment,' " (2) it was not " 'typical of or broadly incidental to' [Silver's employment of him as a chef] or, in a general way, foreseeable from [Herold's] duties"; and (3) it was "neither a benefit to the company nor a customary incident" of Herold's "employment relationship" with Silver because Herold's work as a chef "did not cause him to invite Musgrove to his bungalow or to put her in a vulnerable situation and to not protect her from danger."

C. Appeal

Following entry of judgment, plaintiffs filed this timely appeal.

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[1] They also sued Silver Pictures Entertainment and Silver-Katz Holdings, LLC, but those defendants were dismissed following a good faith settlement.

[2] The trial court granted plaintiffs leave to amend and file a second amended complaint after we issued an alternative writ effectively instructing it to do so.

Discussion

Plaintiffs argue that the trial court erred in (1) granting summary judgment, and while doing so, (2) not excluding portions of Silver's declaration as impermissible and conclusory lay opinion. We need not consider plaintiffs' evidentiary objections because, as we discuss below, summary judgment is warranted even if we assume evidentiary error and exclude that evidence from our consideration.[3] We independently review a trial court's grant of summary judgment.[4] (*Hartford Casualty Ins. Co. v. Swift Distribution, Inc.* (2014) 59 Cal.4th 277, 286 (*Hartford*).)

I. Pertinent Law

A. The law of summary judgment

"Summary judgment is appropriate only 'where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law.'" (*Regents of University of California v. Superior Court* (2018) 4 Cal.5th 607, 618 (*Regents*); *Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476; Code Civ. Proc., § 437c, subd. (c).) To prevail on such a motion, the moving party — here, Silver — must show that the plaintiffs "ha[ve] not established, and reasonably cannot be expected to establish, one or more elements of the cause of action in question." (*Patterson v. Domino's Pizza, LLC* (2014) 60 Cal.4th 474, 500.) In independently examining whether Silver has made this showing, we evaluate the issues framed by the plaintiffs' operative pleading (*Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, 115), consider all of the evidence before the trial court except evidence to which an objection was made and sustained (as well as evidence we will assume should have been excluded) (*Hartford, supra*, 59 Cal.4th at p. 286), liberally construe that evidence in support of the party opposing summary judgment, and resolve all doubts concerning that evidence in favor of that party (*id.* at p. 286; Code Civ. Proc., § 437c, subd. (c)). We independently review all subsidiary legal questions — such as whether a duty of care or a special relationship exists — as we do all questions of law. (*Brown v. USA Taekwondo* (2021) 11 Cal.5th 204, 213 (*Brown*) [duty of care]; *Regents*, at p. 620 [special relationship].) And although "'the determination whether an employee has acted within the scope of employment'" "'[o]rdinarily'" "'presents a question of fact[,] it becomes a question of law'" — and hence an appropriate basis for a grant of summary judgment — "'when "the facts are undisputed and no conflicting inferences are possible."'" (*Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal.4th 291, 299 (*Lisa M.*), quoting *Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 213 (*Mary M.*).)

B. Pertinent tort principles

To prevail against Silver on their sole claim of wrongful death, plaintiffs must prove "(1) a 'wrongful act or neglect' on the part of one or more persons [(that is, negligence)] that (2) 'cause[s]' (3) the 'death of

[3] In a petition for rehearing, plaintiffs contend that we impermissibly failed to address their evidentiary objections. We did no such thing. We assumed them to have merit, and proceeded to analyze the summary judgment on that assumption. As a result, analyzing the merits of the objections serves no purpose. Plaintiffs assert that we "necessarily relied" on the evidence we assumed to be invalidly admitted, contrary to our assumption. They are wrong.

[4] In a petition for rehearing, plaintiffs also contend that we synthesized the relevant law differently than they and the trial court did. Because, as noted in the text, our review of a summary judgment motion is de novo, our task is to analyze the trial court's ruling — not its reasoning. We are not bound by the parties' synthesis of the law and are free to conduct our legal research and synthesize the law without running it by the parties first.

[another] person.'" (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 390.) A person may be liable either for (1) *his own* negligence, in which case he is *directly* liable for the resulting death, or (2) *someone else's* negligence, in which case he is *vicariously* liable because — in the eyes of the law — the other person's negligence is deemed to be his own. (E.g., *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, 210; *De Villers v. County of San Diego* (2007) 156 Cal.App.4th 238, 247.) A person acts negligently only if he "'had a duty to use due care'" and "'breached that duty.'" (*Brown, supra*, 11 Cal.5th at p. 213.)

1. Duty

The default rule of tort law in California is that "each person has a duty to act with reasonable care under the circumstances." (*Regents, supra*, 4 Cal.5th at p. 619; Civ. Code, § 1714, subd. (a).) At the same time, a person generally "has no duty to come to the aid of another" by "assist[ing] or protect[ing]" them "unless there is some relationship between them which gives rise to a duty to act." (*Williams v. State of California* (1983) 34 Cal.3d 18, 23 (*Williams*); *Regents*, at p. 619.)

This "no duty to assist or protect" rule has two exceptions pertinent to this case.

First, the "'general duty to exercise due care includes the duty not to place another person in a situation in which the other person is exposed to an unreasonable risk of harm'"; in other words, it includes the duty not to """mak[e] the [other person's] position worse""" by placing them in peril. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1128 (*Zelig*), quoting *Lugtu v. California Highway Patrol* (2001) 26 Cal.4th 703, 716; *Brown, supra*, 11 Cal.5th at p. 214.) If a person's conduct puts another person in peril, that conduct not only constitutes a breach of the duty of care but also obligates him to take "affirmative action to assist or protect" the other person from that peril. (*Regents, supra*, 4 Cal.5th at p. 619; *Williams, supra*, 34 Cal.3d at p. 23; *Zelig*, at p. 1129; *Weirum v. RKO General, Inc.* (1975) 15 Cal.3d 40, 48-49 (*Weirum*); *McHenry v. Asylum Entertainment Delaware, LLC* (2020) 46 Cal.App.5th 469, 485 ["a duty to act can arise from one party's conduct in creating the very peril that necessitates aid and intervention"]; *Jane Doe No. 1 v. Uber Technologies, Inc.* (2022) 79 Cal.App.5th 410, 424 ["when a defendant has affirmatively 'created a peril' that foreseeably leads to the plaintiff's harm …, the defendant can … be held liable for failing to also protect the plaintiff from that peril"].)

Second, a person (typically, the person who becomes the defendant) can have a "duty to protect or assist" another (typically, the person who becomes the plaintiff) if he has a "special relationship" with either (1) the third person who injures the plaintiff or (2) the plaintiff herself. (*Regents, supra*, 4 Cal.5th at p. 619; *Zelig, supra*, 27 Cal.4th at p. 1129; *Davidson v. City of Westminster* (1982) 32 Cal.3d 197, 203 (*Davidson*); *Brown, supra*, 11 Cal.5th at p. 216.) The first type of special relationship runs between the defendant and the third person who injured the plaintiff, and obligates the defendant to control the third person. (*Regents*, at p. 621; Zelig, at p. 1129; *Davidson*, at p. 203.) The second type of special relationship runs between the defendant and the plaintiff, and obligates the defendant to protect the plaintiff. (*Zelig*, at p. 1129; *Davidson*, at p. 203.)

Special relationships have "defined boundaries," insofar as they are "limited" both "to specific individuals" and to the "'risks that arise within the scope of the [special] relationship [at issue].'" (*Regents, supra*, 4 Cal.5th at p. 621; Rest.3d Torts, § 40, subd. (a); *Doe v. Roman Catholic Archbishop of Los Angeles* (2021) 70 Cal.App.5th 657, 670 (*Doe*).) Whether a special relationship between two people exists turns on "the particular facts and circumstances of their association with one another." (*Brown, supra*, 11 Cal.5th

at p. 221.) Because the existence of a duty to act is ultimately a public policy question (*Weirum, supra*, 15 Cal.3d at p. 46), and because special relationships are one means by which a duty may be found to exist, it is not surprising that whether a special relationship exists in a particular case is, at bottom, also a question of law based upon public policy considerations. (Rest.3d Torts, § 40, com. h. ["Whether a relationship is deemed special is a conclusion based on reasons of principle or policy."].) What is more, the existence of a special relationship does not *automatically* create a duty to act; instead, as our Supreme Court recently reaffirmed, courts must also assess whether public policy concerns warrant "limiting" the duty that might otherwise arise by virtue of a special relationship. (*Brown*, at pp. 209, 218-219; *Doe*, at p. 670.)

2. Vicarious liability based on the special relationship between employer and employee

Employers have a special relationship with their employees. (Rest.3d Torts, § 40, subd. (b).) This relationship rests (1) partly on employers' ability to control their employees' conduct and (2) partly on the public policy notion that employers who benefit from their employees' conduct should concomitantly bear "the risks incident to [their] enterprise" as a "cost of doing business." (*Hinman v. Westinghouse Elec. Co.* (1970) 2 Cal.3d 956, 960 (*Hinman*); *Perez v. Van Groningen & Sons, Inc.* (1986) 41 Cal.3d 962, 968 (*Perez*); *Mary M., supra*, 54 Cal.3d at pp. 208-209; *Rodgers v. Kemper Constr. Co.* (1975) 50 Cal.App.3d 608, 618-619 (*Rodgers*).) Imposing liability for the employee's conduct upon the employer has nothing to do with the employer's *fault*. (*Hinman*, at p. 960.)

Due to this special relationship, California deems employers to be vicariously liable for the torts committed by their employees if, but only if, *the employee is acting within the scope of employment*. (*Mary M., supra*, 54 Cal.3d at p. 208; *Lisa M., supra*, 12 Cal.4th at p. 296; *Farmers Ins. Group v. County of Santa Clara* (1995) 11 Cal.4th 992, 1005 (*Farmers*).) This legal principle is known more commonly as respondeat superior. (*Mary M.*, at p. 208; *Moreno v. Visser Ranch, Inc.* (2018) 30 Cal.App.5th 568 (*Moreno*).)

One court has described the task of assessing whether an employee is acting within the scope of employment as "difficult." (*Kephart v. Genuity, Inc.* (2006) 136 Cal.App.4th 280, 291 (Kephart).) This is an understatement. The difficulty stems in part from the fact that the decision whether an employee is acting within the scope of employment is imbued with policy considerations (*Hinman, supra*, 2 Cal.3d at p. 959; *Perez, supra*, 41 Cal.3d at p. 967), and in part from the fact that the courts — while agreeing that the scope of employment should be "interpreted broadly" (*Farmers, supra*, 11 Cal.4th at p. 1004) — have nevertheless articulated no fewer than four different tests for assessing whether particular acts should be deemed to be within the scope of employment and hence a basis for imposing vicarious liability (*Moreno, supra*, 30 Cal.App.5th at p. 577).[5]

[5] There are further refinements-slash-corollaries to these tests, many of which turn on whether the employee is at the work site at the time of the allegedly tortious conduct (in which case liability turns on whether the employee's conduct is a "substantial deviation" from his duties or instead just an act necessary to his personal "comfort, convenience, [or] health" (*Alma W. v. Oakland Unified School Dist.* (1981) 123 Cal.App.3d 133, 138-139 (*Alma W.*)), is "going or coming" to the work site (in which case liability turns on whether the employee-in-transit was on a "special errand" that incidentally benefitted the employer) (*Halliburton Energy Services, Inc. v. Department of Transportation* (2013) 220 Cal.App.4th 87, 95-96); *Jeewarat v. Warner Bros. Entertainment Inc.* (2009) 177 Cal.App.4th 427, 431), or is completely offsite (in which case liability turns more generally on whether the employee's activity was within the scope of his employment, as articulated by one or more of the tests recounted in this opinion). Because these various rules are little more than specialized applications of one or more of the four general

We now set forth each of those tests.

a. Risk-focused test

This test focuses on whether the "risk" engendered by the employee's allegedly tortious conduct is "inherent in the working environment" or """may fairly be regarded as typical of or broadly incidental' to the enterprise undertaken by the employer."" (*Mary M., supra*, 54 Cal.3d at p. 209, quoting *Perez, supra*, 41 Cal.3d at p. 968; *Farmers, supra*, 11 Cal.4th at p. 1003; *Alma W., supra*, 123 Cal.App.3d at p. 139; *Baptist v. Robinson* (2006) 143 Cal.App.4th 151, 160.) Given this focus, an employee's allegedly tortious conduct is deemed to be within the scope of employment only if that conduct is required by, engendered by, or an "'outgrowth'" of his employment. (*Lisa M., supra*, 12 Cal.4th at pp. 298, 300; *Farmers*, at p. 1005.) Put differently, there must be "a 'nexus' between the employee's tort and the employment." (*Marez v. Lyft, Inc.* (2020) 48 Cal.App.5th 569, 582.) This is why an employee's conduct is not within the scope of employment merely because he "uses property or facilities entrusted to him by" his employer. (*Alma W.*, at p. 140.)

b. Foreseeability-focused test

As its name suggests, this test focuses on whether "'the employee's [allegedly tortious] [] conduct could be *reasonably foreseen* by the employer.'" (*Alma W., supra*, 123 Cal.App.3d at p. 139, italics added.) For these purposes, the concept of "foreseeability" has a different — and, significantly, a narrower — definition than it does in tort law generally. Under this narrower definition, an employee's allegedly tortious conduct is sufficiently foreseeable to be deemed within the scope of employment only if, "*in the context of the particular enterprise*," the employee's "conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business." (*Lisa M., supra*, 12 Cal.4th at p. 302, italics in original; *Farmers, supra*, 11 Cal.4th at pp. 1003, 1009; *Rodgers, supra*, 50 Cal.App.3d at pp. 618-619.) As the italicized language indicates, what matters is whether "the employee's act is foreseeable *in light of the duties the employee is hired to perform*" (*Alma W.*, at p. 142, italics added; *Martinez v. Hagopian* (1986) 182 Cal.App.3d 1223, 1230), and hence whether the plaintiff's injury is the type of injury "that "'as a practical matter [is] sure to occur in the conduct of the employer's enterprise.'"" (*Lisa M.*, at p. 299, quoting *Hinman, supra*, 2 Cal.3d at p. 959.)

c. Benefit- and custom-focused test

This test focuses on whether the employee's conduct "*either*" (1) "provided [some conceivable] benefit to the employer" *or* (2) has otherwise become a "'customary incident of the employment relationship.'" (CACI No. 3724, italics added; *Rodgers, supra*, 50 Cal.App.3d at p. 620, quoting *McCarty v. Workmen's Comp. Appeals Bd.* (1974) 12 Cal.3d 677, 681-683 (*McCarty*); *Perez, supra*, 41 Cal.3d at p. 969 [benefit to employer is not required to impose vicarious liability].) Although a benefit need only be "conceivable," the benefit must nevertheless be "'sufficient enough to justify making the employer responsible'" for the employee's conduct. (*Newland v. County of Los Angeles* (2018) 24 Cal.App.5th 676, 686.)

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tests, and because they are becoming increasingly quaint as the line between "work site" and home becomes hopelessly blurred in a post-pandemic world, we focus on the four main tests rather than this intricate web of sub-rules.

d. Public policy-focused test

This test more explicitly focuses on how neatly a finding that the employer should be vicariously liable for the employee's allegedly tortious conduct squares with the public policy rationales animating the respondeat superior doctrine. Courts have identified three rationales for the doctrine: "(1) to prevent recurrence of tortious conduct; (2) to give greater assurance of compensation for the victim; and (3) to ensure that the victim's losses will be equitably borne by those who benefit from the enterprise that gave rise to the injury." (*Mary M., supra*, 54 Cal.3d at p. 209; *Perez, supra*, 41 Cal.3d at p. 967; *Lisa M., supra*, 12 Cal.4th at p. 304; *Farmers, supra*, 11 Cal.4th at pp. 1013-1014.) The various rationales are not hermetically sealed from one another, as "vicarious liability is invoked to provide greater assurance of compensation to victims" (the second rationale) "where it is equitable to shift losses to the employer because the employer benefits from the injury-producing activity and such losses are, as a practical matter, sure to occur from the conduct of the enterprise" (the third rationale). (*Kephart, supra*, 136 Cal.App.4th at p. 297.) Respondeat superior, however, is *not* "merely a justification for reaching a 'deep pocket'"; instead, all three policy rationales are grounded in the "'deeply rooted sentiment that a business enterprise cannot justly disclaim responsibility for accidents which may fairly be said to be characteristic of its activities.'" (*Rodgers, supra*, 50 Cal.App.3d at p. 618.)

Despite the different formulations of the scope-of-employment standard, the courts articulating these tests all agree that an employee's tortious acts may qualify as within the scope of employment — assuming they satisfy the pertinent test — even if the employer did not authorize the employee's conduct (*Perez, supra*, 41 Cal.3d at p. 969), even if the employee acted without the motive of serving the employer's interest (*Lisa M., supra*, 12 Cal.4th at p. 297), and even if the employee engaged in intentional (or even criminal) conduct (*id.* at pp. 296-297).

II. Analysis

Because plaintiffs in their operative complaint as well as in their opposition to Silver's summary judgment motion seek to hold Silver liable on theories of direct liability as well as vicarious liability, we will address both theories on appeal. We will then discuss plaintiffs' remaining arguments.

A. Direct liability

To hold Silver directly liable for Musgrove's death, plaintiffs need to establish either that (1) Silver placed Musgrove in peril and failed to protect her from that very same peril (e.g., *Regents, supra*, 4 Cal.5th at p. 619), or (2) Silver has a special relationship with Musgrove that otherwise obligates him to protect her (e.g., *Zelig, supra*, 27 Cal.4th at p. 1129).

1. Placing in peril

Under the operative pleading that frames the issues on summary judgment, plaintiffs seek to hold Silver liable for (1) placing Musgrove in peril by furnishing her with (a) "an excessive amount of alcohol" and (b) drugs, and (2) not preventing her from engaging in the "dangerous activit[y]" of swimming in the lagoon at night. The evidence before the trial court at the time of summary judgment refuted the allegation that Silver "furnished" Musgrove with drugs; to the contrary, the undisputed facts showed that Silver did not supply anyone with cocaine, or have any knowledge that anyone was ingesting it. At most, the undisputed

evidence showed that Silver furnished Musgrove with alcohol in two ways — by allowing her to drink the wine served with the meals prepared by Herold and by covering the cost of any alcohol she purchased at the resort. This is insufficient, as a matter of law, to establish liability. That is because our Legislature has explicitly established that a private person cannot be held liable in tort for furnishing alcohol to another adult. (Civ. Code, § 1714, subd. (c) ["[N]o social host who furnishes alcoholic beverages to any person may be held legally accountable for … injury to [that] person … resulting from the consumption of those beverages."]; Bus. & Prof. Code, § 25602, subd. (b) [same]; *Allen v. Liberman* (2014) 227 Cal.App.4th 46, 56 (*Allen*) [social host immunity also reaches hosts who do not directly furnish but do not stop others from drinking alcohol they make available].)

2. Special relationship between Silver and Musgrove

As noted above, employers have a special relationship with their employees, which can give rise to a duty to *control* those employees to ensure that they do not harm third parties. (Rest.3d Torts, § 40, subd. (b)(4).) This special relationship can *also* give rise to a duty to *protect* those employees. (*Brown, supra*, 11 Cal.5th at p. 216 ["Relationships between … employers and employees … give rise to an affirmative duty to protect."].)

California law forecloses holding Silver liable for failing to protect Musgrove by virtue of the special relationship between an employer and employee. We come to this conclusion for three reasons.

First, there may not be an employee-employer relationship between Musgrove and *Silver* that gives rise to any special relationship. That is because the undisputed facts show that Musgrove was employed by *Silver Pictures Entertainment*, not Silver himself. Plaintiffs also failed to adduce evidence bearing directly on whether Silver Pictures Entertainment was an alter ego of Silver.

Second, and even if we assume that Musgrove was employed by *Silver*, plaintiffs are seeking to hold Silver liable for Silver's own conduct in failing to protect her from the alcohol he furnished or subsidized. This is not a viable theory because, as noted above, California statutory law provides that a person cannot be liable in tort for furnishing alcohol to another adult. (Civ. Code, § 1714, subd. (c); Bus. & Prof. Code, § 26502, subd. (b).) This statutory prohibition trumps any potential tort liability that might otherwise come into being by virtue of any special relationship obligating Silver to protect Musgrove. (*Allen, supra*, 227 Cal.App.4th at p. 50 ["special relationship, by itself, does not negate the specific statutory social host immunity applicable to these facts" (that is, when the special relationship obligates the defendant to protect the injured party)]; cf. *Childers v. Shasta Livestock Auction Yard, Inc.* (1987) 190 Cal.App.3d 792, 798 (*Childers*) [statutory immunity does not apply when the special relationship obligates the defendant to control the tortfeasor].)

Third, and even if we assume that the special employment relationship between Silver and Musgrove somehow supersedes the immunity conferred by statute, Silver's duty to protect his employees is limited to while they are "at work" or otherwise in a locale the employer controls. (Rest.3d Torts, § 40, subd. (b)(4); *Colonial Van & Storage, Inc. v. Superior Court* (2022) 76 Cal.App.5th 487, 500-501.) Here, the undisputed facts show that what Musgrove needed protection from was her further alcohol consumption and ingestion of cocaine while in a private bungalow after 10 p.m.; that she was not "at work" or undertaking any work-related activities when she did so; and that Silver had no control over any private bungalow at the resort other than his own. On these facts, Silver had no employment-related duty to

protect Musgrove. The fact that Silver expensed the bungalow is not enough as a matter of law. (Accord, *Sakiyama v. AMF Bowling Centers, Inc.* (2003) 110 Cal.App.4th 398, 405-406 [business owner who leases premises not liable for injuries sustained when lessees bring illegal drugs onto premises without the owner's knowledge, causing injury to third parties].)

B. Vicarious liability

To hold Silver vicariously liable for Musgrove's death under the theory articulated in the operative pleading that frames the issues on summary judgment, plaintiffs need to establish that (1) Herold engaged in negligent conduct that caused Musgrove's death, and (2) Herold was acting within the scope of his employment at the time of his negligent conduct. As noted above, a person is negligent for placing a third party in a position of peril and then failing to protect them from that peril. (*Regents, supra*, 4 Cal.5th at p. 619; *Williams, supra*, 34 Cal.3d at p. 23; *Zelig*, at p. 1128; *Weirum, supra*, 15 Cal.3d at p. 48.) Construing the evidence in the light most favorable to plaintiffs, we independently agree with the trial court's conclusion that there exist disputes of material fact regarding whether Herold engaged in negligent conduct by placing Musgrove in peril (by supplying her with alcohol *and*, allegedly, cocaine in the late evening while knowing that she enjoyed swimming at night in the lagoon), and then failing to protect her from that peril. (Accord *Carlsen v. Koivumaki* (2014) 227 Cal.App.4th 879, 894-895 (*Carlsen*) [defendant is negligent for transporting a visibly intoxicated person to a hillside cliff and then failing to protect him from falling]; cf. Civ. Code, § 1714, subd. (c) [merely furnishing alcohol cannot be a basis for liability].) Thus, assuming it to be true that Herold placed Musgrove in peril and failed to protect her, Silver's vicarious liability for Musgrove's death turns on whether Herold was acting within the scope of his employment when he engaged in that tortious conduct.

As explained below, we independently agree with the trial court's conclusion that the undisputed (or assumed) facts establish as a matter of law that Herold was not acting within the scope of his employment under any of the pertinent tests.

1. Risk-focused test

Silver employed Herold as his family's personal chef; for the August 2015 trip, Herold's job was to purchase groceries and then to prepare lunches and dinners for the members of Silver's entourage who accompanied him in Bora Bora. Herold's conduct in meeting up with Musgrove at 10 p.m. in one of their private bungalows to consume wine and cocaine was not required by, engendered by, or any outgrowth of Herold's job as Silver's chef. (*Lisa M., supra*, 12 Cal.4th at pp. 298, 300.) Thus, the risk of harm to Musgrove attendant to Herold's conduct in placing her in peril and then failing to protect her is not, as a matter of law, "" inherent in [his] working environment"" and cannot "'fairly be regarded as typical of or broadly incidental to'" Silver's enterprise of employing Herold as his family's personal chef. (*Mary M., supra*, 54 Cal.3d at p. 209; *Farmers, supra*, 11 Cal.4th at p. 1033; *Alma W., supra*, 123 Cal.App.3d at p. 139.)

Plaintiffs resist this conclusion, arguing that Herold sent an email to Musgrove on the evening of August 18 from the kitchen at a time when he was still preparing dinner, such that all of Herold's conduct later that night was necessarily an "outgrowth" of that initial email. This argument rests on a misreading of the test. The pertinent question is whether the employee's negligent conduct (and its attendant risk)

was an outgrowth of his job, not whether a plaintiff can identify something the employee did while at work that may have set the stage for his subsequent negligent conduct. Herold's flirtation with Musgrove had nothing to do with his job duties as Silver's personal family chef. What is more, the fact that Herold met Musgrove on prior trips where they were brought together because Herold happened to be Silver's personal family chef and Musgrove happened to be Silver's executive assistant does not mean that Herold's conduct in the course of their personal relationship is an outgrowth of Herold's employment as a chef.

2. Foreseeability-focused test

Herold's conduct in furnishing Musgrove with additional alcohol and with cocaine while aware that she might try to go swimming was not, as a matter of law, a "reasonably foreseeable" result of his employment as Silver's personal family chef. That is because, "in the context of th[at] particular enterprise" of working as a chef, his conduct during his personal interaction with Musgrove is "so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of" Silver's business of employing Herold as a chef. (*Lisa M., supra*, 12 Cal.4th at p. 302.) In other words, we conclude as a matter of law that the type of injuries Musgrove suffered were not "'"as a practical matter … sure to occur in the conduct"'" of Silver's employment of Herold as his family's personal chef and the duties that being a chef entailed. (*Id.* at p. 299; *Alma W., supra*, 123 Cal.App.3d at p. 144.)

Plaintiffs urge that Herold's conduct was foreseeable because Silver either never adopted any anti-drug/anti-alcohol policy or never communicated such a policy to Herold. This argument relies on the concept of foreseeability as it is used for a test of negligence in general, rather than the more specialized and narrower concept of foreseeability applicable when imposing *respondeat superior* liability and which, as noted above, views foreseeability through the prism of the employer's enterprise and the employee's duties. (*Rodgers, supra*, 50 Cal.App.3d at pp. 618-619 [contrasting the two tests].) The various definitions of foreseeability are not interchangeable. Tort law is more like baking than cooking; there are specific doctrines, each with its own recipe and whose ingredients cannot be casually swapped. When viewed through the *proper* prism, Musgrove's tragic death is not a foreseeable consequence of Herold's work as Silver's chef.

3. Benefit- and custom-focused test

Silver is also not vicariously liable, as a matter of law, under the test that examines whether the employee's conduct (1) conceivably benefited the employer or (2) was a customary incident of the employment relationship. (CACI No. 3724; *Rodgers, supra*, 50 Cal.App.3d at p. 620.) That is because Herold's conduct in imperiling Musgrove by furnishing her additional alcohol and cocaine did not in any conceivable way benefit Silver's employment of Herold as his family's personal chef. For much the same reason, Herold's imperiling conduct was not a "customary incident" of the employment relationship; there is no evidence that anything like this had ever happened before with anyone in Silver's employ. What is more, the fact that Herold happened to be at the resort where he was providing his chef services for Silver and that Herold had the chance to use his free access to amenities to furnish the alcohol Musgrove drank is insufficient to establish vicarious liability. (*Alma W., supra*, 123 Cal.App.3d at p. 140 [employee's "presence at the place of employment before, during, or after the commission of the offense" and "[t]he mere fact that an employee has the opportunity to abuse the facilities necessary to the performance of his duties" each insufficient to create vicarious liability].)

Plaintiffs urge that they have established triable issues of material fact under this test because Silver's practice of furnishing alcohol to Herold at meals and allowing Herold to expense any further alcohol consumption while traveling with Silver benefitted Silver because it was a job perquisite that kept Herold happy (and hence in Silver's employ) and was a customary incident of Herold's employment. We disagree. Plaintiffs' argument ignores that what matters for this analysis is whether the *employee's conduct* benefits the employer or is a customary part of the employment relationship. According to the allegations of plaintiffs' operative complaint, Herold's conduct was plying Musgrove with alcohol and cocaine and allowing her to swim. *That* conduct is different from — and far more egregious than — Herold's conduct in simply drinking the alcohol Silver supplied or subsidized. It is analytically inappropriate to conflate the two.

4. Public policy-focused test

Treating Herold's conduct as outside the scope of his employment as Silver's chef is also warranted as a matter of law under the test that looks directly at the three main public policy rationales animating respondeat superior liability. Although holding Silver liable for Herold's conduct in imperiling Musgrove would undoubtedly make strides toward "prevent[ing the] recurrence of [similar] tortious conduct" and "giv[ing] greater assurance of compensation [to] the victim" (*Mary M., supra*, 54 Cal.3d at p. 209), these two factors will *always* counsel in favor of imposing liability because they will be furthered *whenever* a defendant is held vicariously liable for a plaintiff's injury. The critical policy consideration is whether holding Silver liable for Herold's conduct in imperiling Musgrove would "ensure that [her parents'] loss[] will be *equitably* borne by those who benefit from the enterprise that gave rise to the injury." (*Ibid.*, italics added.) Whether "it is equitable to shift losses to the employer" turns on whether "the employer benefit[ted] from the injury-producing activity and [whether] such losses are, as a practical matter, sure to occur from the conduct of the enterprise." (*Kephart, supra*, 136 Cal.App.4th at p. 297.) Where the employee's "injury-producing activity" is "'simply too attenuated'" from his duties for "the enterprise," there is no vicarious liability as a matter of law. (*Id.; Farmers, supra*, 11 Cal.4th at p. 1017.) Here, it is inequitable to shift the burden of loss onto Silver because Silver did not benefit from Herold's "injury-producing activity" of supplying Musgrove with more alcohol and with cocaine late at night before she was likely to go swimming, and because this conduct is not, "as a practical matter, sure to occur from" Herold's employment as Silver's personal family chef. In sum, Herold's malfeasance and nonfeasance is "simply too attenuated" from his job duties as a chef to make it equitable to tag Silver with liability arising out of Herold's tortious conduct.

Plaintiffs nonetheless suggest that it is equitable to hold Silver liable for Herold's late-night activities because Herold, as Silver's personal family chef, has no fixed working hours and hence was effectively on-call to prepare meals at any time. As a result, plaintiffs reason, it is fair to hold Silver vicariously liable even for Herold's late-night private conduct with others like Musgrove. This argument is a nonstarter, as courts have "expressly reject[ed] any suggestion that reason, fairness or public policy necessarily demands 24-hour employer liability for the conduct of employees who are on-call 24 hours a day." (*Le Elder v. Rice* (1994) 21 Cal.App.4th 1604, 1607; *id.* at p. 1609 ["Public policy would be ill-served by a rule establishing 24-hour employer liability for on-call employees, regardless of the nature of the employee's activities at the time of an accident."]; *Sunderland v. Lockheed Martin Aeronautical Systems Support Co.* (2005) 130 Cal.App.4th 1, 12 [same].) Applying this "no liability" rule makes particular sense here, where the

employer had no control over Herold's injury-producing activities and where those activities are wholly unrelated to his work duties as Silver's chef.

C. Plaintiffs' remaining arguments

Plaintiffs raise one further category of arguments — namely, that precedent (and four cases in particular) dictates that the trial court's summary judgment ruling is wrong. As explained below, we disagree.

First, plaintiffs cite *Carlsen, supra*, 227 Cal.App.4th 879. In *Carlsen*, a group of ministry students took their "clearly intoxicated" friend to an after-party on the edge of a high cliff. When he suffered injuries stumbling over that cliff, he sued the ministry students. *Carlsen* held that summary judgment for the students was inappropriate on these facts because they put the plaintiff in a position of peril by taking him to a cliffside gathering when the plaintiff was obviously drunk, which obligated them to protect him. (*Id.* at pp. 894-895.) *Carlsen* supports what we have assumed to be true in this case based on the disputes of material fact — namely, that *Herold* had a duty to protect Musgrove after he put her in a position of peril by giving her alcohol and cocaine. But *Carlsen* says nothing about whether Silver should be held vicariously liable for Herold's negligence (as Carlsen did not deal with employer-employee relationships at all). And *Carlsen* says nothing about whether Silver should be held directly liable (as there is no evidence in this case that Silver imperiled Musgrove beyond furnishing or subsidizing her alcohol intake, which is an act for which he cannot be found liable by statutory law).

Second, plaintiffs cite *Rodgers, supra*, 50 Cal.App.3d 608. In *Rodgers*, two employees of a contractor suffered injuries in a melee with two drunken employees of a subcontractor. The subcontractor had maintained an ironically named "dry house" on the work premises where it offered its employees alcohol to encourage them to stay onsite after their work shifts in case the subcontractor needed to recruit additional help for the round-the-clock job. (*Id.* at p. 615.) The melee grew out of a dispute about the proper operation of work equipment. (*Id.* at pp. 615-616.) When the injured employees sued the *subcontractor* (on the theory that it was vicariously liable for the conduct of its employees), *Rodgers* held that it was error to grant summary judgment for the subcontractor because its provision of alcohol at the "dry house" had become "customary" and because the employees' "continued presence after completion of their work shift was 'conceivably' of some benefit to" the subcontractor because "[i]t was a convenience to [the subcontractor] to be able to recruit additional help by simply contacting employees remaining in or about the job site." (*Id.* at p. 620.) *Rodgers* did no more than apply the benefit- and custom-focused test, which we have already found to dictate a finding for Silver as a matter of law. Unlike the subcontractor in *Rodgers* who supplied the alcohol that was the direct impetus of the melee that caused the plaintiffs' injuries, Silver in no way made it a custom or benefitted from Herold's conduct in supplying Musgrove with alcohol and drugs during a late-night rendezvous in a private bungalow.

Third, plaintiffs cite *Childers, supra*, 190 Cal.App.3d 792. In *Childers*, an auction yard "routinely furnished alcohol on the premises to customers and employees to encourage good customer relations." (*Id.* at p. 806.) When a third party was injured by an employee who partook of the auction yard's alcohol and sued the auction yard, *Childers* held that the employer's conduct in furnishing alcohol in order to further its business enterprise was sufficient to ward off summary judgment on a theory of vicarious liability. (*Id.* at pp. 805-806.) *Childers* is inapposite. Silver's payment of all of his guests' expenses, including Herold's

alcohol tabs, has no connection with and certainly does not further the enterprise of Silver's employment of Herold as his personal family chef.

Lastly, plaintiffs cite *Purton v. Marriott International, Inc.* (2013) 218 Cal.App.4th 499 (*Purton*). In *Purton*, a hotel hosted a company party where it served alcohol to its employee-attendees. When one of its employees killed a third party in an auto accident while still drunk from alcohol imbibed at the party, the third party's family sued the hotel under a vicarious liability theory. *Purton* held that summary judgment for the hotel was not warranted; the hotel could be liable, *Purton* reasoned, because the party was "a 'thank you' for its employees" and an exercise in "improving employee morale and furthering employer-employee relationships" that directly benefitted the hotel's business enterprise. (*Id.* at pp. 509-510; accord *McCarty, supra*, 12 Cal.3d at p. 682 [office party where alcohol served benefits company by "foster[ing] company camaraderie" and "provid[ing] an occasion for the discussion of company business"]; *Harris v. Trojan Fireworks Co.* (1981) 120 Cal.App.3d 157, 159, 163-164 (*Harris*) [office party where alcohol served benefits company by "improv[ing] employer/employee relations," "providing [employees] with [an] opportunity for social contact," and constituting a "fringe benefit" that "increase[s] the continuing of employment"].)

This case is different: Silver did not host a company party where he furnished the alcohol and drugs ingested by Herold and Musgrove; he subsidized alcohol, and Herold went off on his own time and in his own space to consume more substances with Musgrove. Even if we ignore this critical difference, plaintiffs continue that Silver's "business" benefitted by subsidizing Herold's alcohol intake because such a perquisite was likely to make Herold happier (as the sole employee of Silver's enterprise of hiring a chef) and hence likely to make him stick around longer as Silver's personal family chef. This is not what *Purton* holds, and *McCarty* and *Harris* involved additional benefits to the employer such as providing opportunities for camaraderie between employees and an opportunity to discuss company business. We decline to read *Purton*, *McCarty*, or *Harris* as holding that any perquisite that an employer offers its employee is sufficient, by itself, to justify the imposition of vicarious liability because such a rule would vastly expand such liability to apply to just about every employee in the workforce. This would ride roughshod over the carefully balanced policy inquiry that animates — and circumscribes — the doctrine of respondeat superior.

Disposition

The judgment is affirmed. Silver is entitled to his costs on appeal.

repaid. The fact that the money was withdrawn from the accumulated income, rather than corpus, does not change the recipient's obligation to make restitution.

It follows from what we have said that the judgment below is

Affirmed.

240 N.C. 548

PEGG v. GRAY.

No. 668.

Supreme Court of North Carolina.

July 9, 1954.

Action for alleged trespasses committed by foxhounds while in heat of chase. The Superior Court, Guilford County, Geo. B. Patton, J., granted defendant's motion for judgment as of nonsuit. Plaintiff appealed. The Supreme Court, Johnson, J., held that dog owner or keeper who sends dogs on lands of another or releases them with actual or constructive knowledge that they likely will go on lands of another in pursuit of game is liable for trespass, in absence of previously obtained permission to use lands, and that evidence was sufficient to carry case to jury on trespass theory.

Reversed.

1. Animals ⇐70, 82, 97

Where dog roams abroad on another's land of its own accord and does damage or inflicts injury to persons, animals, or property there can be no recovery therefor in absence of special statutory enactment, unless it be shown that dog was possessed of propensity to commit depredation complained of and that owner knew, or was chargeable with knowledge of such propensity.

2. Animals ⇐97

Where owner or keeper of dogs for purpose of sport intentionally sends dogs on land of another or releases dogs with knowledge, actual or constructive, that they likely will go on lands of another in pursuit of game, in absence of previously obtained permission to use lands, owner or keeper is liable for trespass though he does not go on lands himself, even though dogs entered land in heat of chase of fox.

3. Animals ⇐100(9)

In action for alleged trespasses committed by foxhounds while in heat of chase, wherein plaintiff testified that defendant's hounds entered upon plaintiff's land at frequent intervals during hunting seasons causing cattle to stampede, resulting in injury to cattle and other property, evidence was sufficient to carry case to jury on theory of trespass.

4. Appeal and Error ⇐171(1)

Where case was cast by pleading and developed by evidence on theory of trespass allegedly committed by defendant's foxhounds in heat of chase, appeal was considered upon same theory and it was not necessary to treat of statutes referred to in briefs and argument. G.S. §§ 67-2, 113-104.

Civil action to recover damages for alleged trespasses committed by foxhounds while in the heat of chase.

The plaintiff's evidence may be summarized as follows: He and the defendant own adjoining farms in Guilford County. During most of the three-year period before the commencement of the action, the defendant kept a pack of from seven to ten foxhounds, and with them at frequent intervals during the hunting seasons chased foxes onto and across the plaintiff's lands without his permission and in disregard of his protests.

The plaintiff's farm contains about 340 acres, on which he cultivated tobacco, corn,

wheat, and other crops. He also maintained a herd of about 70 beef cattle. These were kept in a barbed-wire enclosed pasture of about 125 acres, with partition fences within the over-all enclosure making smaller pastures, for purposes of rotation grazing, ranging from 6 to 40 acres.

The plaintiff's farm lies between two creeks. On the occasions of the hunts the defendant did not go in person upon the lands of the plaintiff. The foxes were found along one or the other of the creeks next to the farm. After being jumped they usually ran from creek to creek across the plaintiff's farm, through his croplands, and in the course of some of the chases damage was done by the dogs to growing crops. Also, the foxes, when tiring and in close pursuit by the dogs, often would run in and through herds of cattle in an effort to elude the hounds, thus causing the cattle to stampede and frequently to break down barbed-wire pasture fences, and by reason of which the cattle were frightened, wounded, and molested in their feeding habits and impeded in their normal growth. The plaintiff in describing one of the hunts he observed said the cattle, some 60 head, were huddled up against one of the fences and the dogs were just "dodging in and among the cattle * * *—stayed in the herd about five minutes," and caused the cattle to stampede against the fence. The plaintiff further testified he knew the sound of the defendant's "pack of hounds when they were in full cry" and that as many as fifteen or twenty times on the mornings after hearing them chase foxes across his premises, he found his cattle stampeded and injured and his partition fences damaged and torn down. As he put it: "In the last year or so we have completely abandoned the partition fences. They were torn down faster than we could fix them up by these hounds chasing fox and stampeding my cattle. * * * It cost me about $150 a year to repair my fences damaged by these cattle stampeding for the years 1950, 1951, and 1952." (Cross-examination): "* * * I identified the dogs by the tags. Mr. Gray's name was stamped on the tags. I stopped the dogs about 25 times and counted them, over this three-year period. * * *"

The plaintiff's son testified: "I estimate I went with my father to the cattle pasture, in relation to the fox hunt, 25 times to see what was disturbing them. I have seen the dogs run across the pasture through the cattle many times. I would catch them to see whose tags were on them, and all the time they were Mr. Gray's. * * * We have seen cows in the morning after the hunt—they had been cut sometimes * * *"

The evidence also discloses that when the plaintiff protested to the defendant when one hunt was in progress, the defendant replied: "I don't want to hear you say that any more. They (the dogs) are not damaging your cattle. If they kill one of them, I'll pay you for it."

At the close of the plaintiff's evidence the defendant moved for judgment as of nonsuit. The motion was allowed.

From judgment in accordance with the foregoing ruling, the plaintiff appealed.

Howerton & Howerton, Greensboro, for plaintiff, appellant.

Hines & Boren, Jordan & Wright, and Charles E. Nichols, Greensboro, for defendant, appellee.

JOHNSON, Justice.

We are not dealing here with a trespass committed by a dog of its own volition while roaming abroad.

[1] It may be conceded as a well-established principle of law that where a dog roams abroad on another's land of its own accord and does damage or inflicts injury to persons, animals, or property there can be no recovery therefor in the absence of special statutory enactment, unless it be shown that (1) the dog was possessed of a propensity to commit the depredation complained of and (2) the owner knew, or was chargeable with knowledge, of such propensity. Buckle v. Holmes, 2 K.B. 125.

54 A.L.R. 89. See also: State v. Smith, 156 N.C. 628, 72 S.E. 321, 36 L.R.A., N.S., 910; Banks v. Maxwell, 205 N.C. 233, 171 S.E. 70.

This principle of law is grounded upon a recognition that by natural instinct and habit an ordinary dog of most breeds is inclined to roam around and stray at times from its immediate habitat without causing injury or doing damage to persons or property. And in deference to this natural instinct of dogs the processes of the early common law eschewed the idea of requiring that they be kept shut up, and instead promulgated the foregoing rule which allows a reputable dog a modicum of liberty to follow his roaming instincts without imposing liability on its master. And so, since early times the law has been and still is that the owner of a reputable dog is not answerable in damages for its entry upon the lands of another upon its own volition under circumstances amounting to an unprovoked trespass. Buckle v. Holmes, supra; Mason v. Keeling, 1 Ld.Raym. 606, 91 Eng.Reprint, 1305; Brown v. Giles, 1 Car. & P. 118, 171 Eng.Reprint, 1127; Buck v. Moore, 35 Hun., N.Y., 338; State ex rel. Smith v. Donohue, 49 N.J.L. 548, 10 A. 150, 60 Am.Rep. 652; 2 Am.Jur., Animals, Sec. 105; Annotation: 107 A.L.R. 1323.

[2] However, the rule is different where a dog owner or keeper for the purpose of sport intentionally sends a dog on the lands of another or releases a dog or pack of dogs with knowledge, actual or constructive, that it or they likely will go on the lands of another or others in pursuit of game. In such cases the true rule would seem to be that the owner or keeper, in the absence of permission to hunt previously obtained, is liable for trespass, and this is so although the master does not himself go upon the lands, but instead sends or so allows his dog or dogs to go thereon in pursuit of game.

The gist of the leading English decisions on the subject, with footnote citations of the decided cases, may be found in Halsbury's Laws of England (1911), Vol. 1, page 395, where it is said: "The owner of a dog is not answerable in trespass for its unauthorized entry into the land of another, often described as an unprovoked trespass. * * * But if a man wilfully send a dog on another man's land in pursuit of game he is liable in trespass, although he did not himself go on the land * * *. So also if he allow a dog to roam at large, knowing it to be addicted to destroying game * * *." And, further, we find this, with supporting note citations of cases, in Halsbury's, Vol. 15, page 226: "* * * or, again, if a person while hunting enters on the land of another without his consent, he commits an act of trespass * * *. *Further, the entry need not be personal in order to be actionable. A man who himself does not enter, but invites or authorizes others to do so, is liable to an action for trespass* * * *. *So, too,* * * * *the sending of a dog on to such land in pursuit of game* * * *." (Italics added.) See Paul v. Summerhayes, 4 Q.B.(Eng.) 9; Beckwith v. Shordike, 4 Bun. 2092, 98 Eng.Reprint, 91; Baker v. Howard County Hunt, 171 Md. 159, 188 A. 223, 107 A.L.R. 1312; Annotation: 107 A.L.R. 1323; Annotation: 21 Ann.Cas. 915; See also 2 Am.Jur., Animals, Sec. 105, p. 770.

We have not overlooked the following statement to which our attention has been directed in 24 Am.Jur., p. 377: "The trespass of a hunter in pursuit of game on another's premises may be made a crime, *but it has been held that such offense is not committed by the sending of a dog on the premises in search or pursuit of game.*" (Italics added.) An examination of the two cases on which this text-statement is based discloses that in each instance the court was dealing with a criminal prosecution for alleged violation of a statute making it unlawful to hunt on the lands of another person. This latter portion of the text-statement, "* * * but it has been held that such offense is not committed by the sending of a dog on the premises in search or pursuit of game," is based solely upon the decision in Pratt v. Martin (1911) 2 K.B. (Eng.) 90, 21 Ann.Cas. 914, wherein the statute at hand made it a criminal offense for any person to commit a trespass by "entering or being upon" any land in search

or pursuit of game. There, the facts were that the appellant hunter was lawfully on the lands of one Babb for the purpose of shooting game. Appellant with gun and dog came to a brook which divided Babb's land from that of another. He waved the dog across the brook into a spinney—a thicket—where the dog "put up a pheasant" which the appellant shot and killed, the bird dropping into the spinney. The dog retrieved the bird and carried it across the brook to the appellant. There was no evidence he was ever off the land of Babb. The lower court convicted. On appeal, the judgment below was reversed upon the theory that the provisions of the statute, as a criminal enactment, did not expressly cover the act of sending a dog on another person's land. The case decides nothing as bearing upon the question of civil trespass in respect to such conduct. It is manifest that the decision in Pratt v. Martin is not at variance with the well-established rule that one who intentionally sends his dog on another person's land in pursuit of game may be held civilly liable therefor on the theory of trespass.

This view is in accord with the decision of the English Court in Paul v. Summerhayes, supra (4 Q.B. 9), in construing the proviso in Section 35 of the English Game Act of 1831 (1 and 2 Wm. 4, c. 32; Halsbury's Statutes of England, 1929, Vol. 9, p. 1079). The Act makes certain trespasses in pursuit of game criminal offenses, whereas the proviso excepts fox hunting from the provisions of the Act in these words: "* * *, that the aforesaid provisions against trespassers and persons found on any land shall not extend to any person hunting or coursing upon any lands with hounds or greyhounds, and being in fresh pursuit of any deer, hare, or fox already started upon any other land, * * *" In Paul v. Summerhayes the appellants, who had been following a pack of foxhounds in the heat of chase, sought to justify entry on the lands of another by virtue of the foregoing proviso contained in the Game Act of 1831. However, it was held that the proviso was intended only to prevent the penal provisions of the Act from being applied against fox hunters, thus leaving the law of civil trespass unaffected by the Act. Said Lord Coleridge, C. J.—great nephew of Coleridge the poet—in delivering his opinion: "There is nothing, * * * in the Act to alter the common law with regard to trespass so far as concerns foxhunting." And Meller, J., by way of concurrence had this to say: "In any case the exception in favour of foxhunting in the 35th Section could only apply to the special provisions of the Act for the protection of game, and could not affect the question whether a trespass could be justified at common law in the course of hunting a fox, * * *"

In recognition that the law of trespass as fixed by the principles of the common law affords no immunity to fox hunting as a sport, it has become the established custom in England for the master of the hunt to raise funds, by subscription of the members of the hunt, with which to pay farmers for damage done their poultry, fences, crops, etc., by the hunt. These funds are known as "Poultry," "Damage," and "Wire" Funds. See Brock, The A. B. C. of Fox-Hunting, (American edition by Scribner's, 1936) p. 17.

To the established rule which holds one liable for trespass for sending his dog on another's land in pursuit of game we are advertent to this statement apparently contra appearing in Ingham, The Law of Animals, (1900), Sec. 41, p. 121: "A person may justify trespass in following a fox with hounds over the grounds of another if he does no more than is necessary to kill the fox." This text-statement is based solely on the decision in Gundry v. Feltham, 1 T.R. 334, 99 Eng.Reprint 1125. That case was an action for trespass for entering the plaintiff's closes with horses and dogs and following a fox with hounds. It was decided by a three-member court composed of Lord Mansfield, C. J., Willes and Buller, JJ. The case was disposed of by this terse statement of Mansfield, C. J.: "By all the cases as far back as in the reign of Henry 8th, it is settled that a man may follow a fox into the grounds of another." However, Buller, J., concurring, had this to say: "The question on this record is, whether the defendant be

justified in following the fox at all over another man's grounds. The demurrer admits that which is averred in the plea, namely, that this was the only means of killing the fox. This case does not determine that a person may unnecessarily trample down another person's hedges, or maliciously ride over his grounds: if he do more than is absolutely necessary (to kill the fox), he cannot justify it; * * *" Thus the decision in Gundry v. Feltham was confined to narrow limits at the time of its rendition. It has been much criticized and has been treated by the English courts as virtually unauthoritative since the notable decision in Paul v. Summerhayes, supra (4 Q.B. 9) decided in 1878. In the latter case, as we have seen, the appellants had been engaged in hunting with a pack of foxhounds. They sought to justify entry on the lands of another while in pursuit of a fox. They urged as authority in justification of their asserted right of entry (1) the proviso contained in Section 35 of the English Game Act of 1831 (1 and 2 Wm. 4, c. 32) which, as we have previously pointed out, was held inapplicable, and (2) the decision in Gundry v. Feltham, supra, decided in 1786. In holding that the decision in Gundry v. Feltham does not justify trespass in hunting on the lands of another with a pack of foxhounds, Lord Coleridge, C. J., said in part:

"It was suggested that there is authority that foxhunting in the popular, well understood, sense of the term, that is, as a sport, can be carried on over the land of a person without his consent and against his will, and the case of Gundry v. Feltham was cited as authority for that proposition. I am of opinion that no such right as that claimed exists. The sport of foxhunting must be carried on in subordination to the ordinary rights of property. Questions such as the present fortunately do not often arise, because those who pursue the sport of foxhunting do so in a reasonable spirit, and only go upon the lands of those whose consent is expressly, or may be assumed to be tacitly, given. There is no principle of law that justifies trespassing over the lands of others for the purpose of foxhunting. The case of Gundry v. Feltham is distinguishable from the present case, and can be supported, if it is to be supported at all, only on the grounds suggested by Lord Ellenborough in the case of Lord Essex v. Capel, to which we have been referred. The demurrer admitted that what was done was the only means for destroying the fox, and Buller, J., expressly puts his decision on that ground. The case was brought under the consideration of Lord Ellenborough in Lord Essex v. Capel, and he was distinctly of opinion that, where any other object was involved than that of the destruction of a noxious animal, an entry on the land of another, against his will, could not be justified. In the case of Lord Essex v. Capel it had been pleaded that the means adopted were the only means, and also that they were the ordinary and proper means of destroying the fox. But the evidence clearly shewed that in the case of foxhunting, as ordinarily pursued, the object of destroying the animal is only collateral. The interest and excitement of the chase is the main object. Lord Ellenborough, than whom there could be no higher authority on such a point, was of opinion that where this was the case, and where the real object was not the mere destruction of a noxious animal, a trespass could not be justified. If persons pursue the fox for the purpose of sport or diversion, they must do so subject to the ordinary rights of property. It would seem that there may be some doubt as to the validity of the justification even where the only object is the destruction of a noxious animal. The idea that there was such a right as that of pursuing a fox on another's land appears to have been based on a mere dictum of Brook, J., in the Year Book, 12 Hen. 8, p. 10. This dictum was not necessary for the decision of the case, for there the chasing of a fox was not in question, and the case went off on an entirely different point. It may well be doubted in my opinion whether, even if the case were one in which the destruction of a fox as a noxious animal was the sole object, there would be any justification. That question, however, does not, I think, arise here. It is enough to say that the case of Gundry v. Feltham, and the dictum of Brook, J., in the Year Book, 12 Hen.

8, p. 10, do not at all conflict with the opinion expressed by Lord Ellenborough in Lord Essex v. Capel which appears to me to be the true view of the law, viz., that a person has no right, in the pursuit of a fox as a sport, to come upon the land of another against his will. For these reasons our judgment must be for the respondent."

It may be conceded that since Samson, according to the folk tale of biblical lore, tied the firebrands to the tails of 300 foxes and sent them into the grain fields of the Philistines (Judges 15:4, 5) the fox has been looked upon by many persons as a noxious animal, to be exterminated. Nevertheless, to countless thousands of devotees of the chase the death of a fox, unless it be in front of hounds, is regarded as a social crime. We embrace the view of Lords Ellenborough and Coleridge, as stated by the latter in Paul v. Summerhayes, supra, that fox hunting as ordinarily pursued—certainly as shown by the record in this case—is pure sport to be followed in subordination to established property rights and subject to the principles governing the law of trespass. See also Baker v. Howard County Hunt, supra; 24 Am.Jur., Game and Game Laws, Sec. 8; 52 Am.Jur., Trespass, Sec. 12, p. 845.

[3, 4] In the case at hand the evidence is sufficient to justify the inference that the defendant, without permission of the plaintiff, on numerous occasions intentionally and for the purpose of sport sent his pack of dogs, or released them knowing they likely would go, on, over, and across the lands of the plaintiff in pursuit of foxes, whereby the plaintiff sustained substantial damage to his fences and other property. Without further elaboration it is enough to say that the evidence when tested by the applicable principles of law is sufficient to carry the case to the jury on the theory of trespass. The record discloses that the case was cast by the pleadings and developed by the evidence on that theory. The rule is that an appeal of necessity follows the theory of the trial. Lyda v. Town of Marion, 239 N.C. 265, 79 S.E.2d 726; Parrish v. Bryant, 237 N.C. 256, 74 S.E.2d 726. Hence it is not necessary to treat of the statutes, G.S. §§ 67–2 and 113–104, referred to in the briefs and discussed on the argument.

The judgment below is

Reversed.

240 N.C. 516

STATE v. PHILLIPS et al.

No. 509.

Supreme Court of North Carolina.

July 9, 1954.

Defendants, who were husband and wife, were convicted of conspiring to obtain money by false pretenses, and husband was convicted of obtaining money by false pretenses. The Superior Court, Gaston County, George B. Patton, Special Judge, entered judgment, and defendants appealed. The Supreme Court, Barnhill, C. J., held that evidence was not sufficient to sustain conviction for the conspiracy and that in prosecution for obtaining money by false pretenses, record was sufficient to reveal that persistent violation of rules of practice governing cross-examination of husband and his witnesses had been sufficient to deprive husband of a fair trial.

New trial upon indictment for false pretense, and reversed on indictment for conspiracy.

1. False Pretenses ⇐51

In prosecution for obtaining money by false pretenses, evidence was sufficient for jury.

2. False Pretenses ⇐7(5)

A promise to do something is ordinarily not sufficient to serve as a false pretense regardless how fraudulent it may be.

> the fair market value caused by the severance. This will be the amount awarded for damages to the residue. Damage to the residue resulting from the exercise of eminent domain may be recovered only for damages not common to the public. Consequential damages such as noise, vibrations, circuity, loss of travel, loss of traffic volume, dust and inconvenience suffered by the owner in common with the public are not to be considered.
>
> Construction plans for the project have been placed in evidence and should be considered by the jury in assessing damages. These plans and specifications including the commitment by ODOT to construct the State Route 762 project will be contained in the judgment entry in this case and can be enforced by the property owner."

{¶ 37} Appellee argues in response that Appellant's proposed instruction number four is not a proper statement of Ohio law in cases where ODOT expressly reserves access. Appellee contends that the *Diver* decision is not applicable to the facts of this case because ODOT's legal description clearly and unambiguously included the reservation required under Ohio law. Appellee concludes that the failure to give Appellant's proposed instruction did not mislead the jury.

{¶ 38} We agree. The jury was charged with determining amounts for compensation and damages. In reviewing the charges given regarding compensation and damages, we find the trial court's instructions were correct statements of the law.

{¶ 39} By contrast, Appellant's proposed jury instruction number four would not have been appropriate to the evidence presented in the case. In this case, the legal description of the taking, set forth above at Paragraph 5, provides a reservation of "all existing rights of ingress and egress to and from any residual area." As we previously stated, although Appellant has attempted to create a legal issue concerning the rights of ingress and egress, we find the appraisers' testimony on this issue to be relevant as a factor in determining compensation and damages. The trial court did not abuse its discretion by failing to give the requested instruction because the instructions given were correct statements of the law and Appellant's proposed instruction had the potential to mislead the jury. Appellant's proposed instruction had the potential to mislead the jury into believing there was no reservation when, in fact, there was.

{¶ 40} For the foregoing reasons, we find no merit to Appellant's argument. As such, we overrule the second assignment of error and affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

HOOVER, P.J. & ABELE, J.: Concur in Judgment and Opinion.

2015-Ohio-4167

Ashley MERCER, Appellant

v.

Christopher HALMBACHER, et al., Appellees.

No. 27799.

Court of Appeals of Ohio, Ninth District, Summit County.

Oct. 7, 2015.

Background: Girlfriend brought action against her former boyfriend, with whom

she had briefly resided, and his mother for wrongful eviction, conversion, trespass to chattels, and invasion of privacy. The Municipal Court, Summit County, No. 14CVF05262, entered summary judgment in favor of boyfriend and mother. Girlfriend appealed.

Holdings: The Court of Appeals, Schafer, J., held that:

(1) girlfriend was not a tenant and thus could not establish wrongful eviction claim;

(2) girlfriend's personal belongings that boyfriend and mother moved to storage were not converted;

(3) genuine issues of material fact existed as to whether boyfriend and mother dispossessed girlfriend of her belongings, and thus precluded summary judgment on claim for trespass to chattels;

(4) award of nominal damages absent proof of actual damages could have been made; and

(5) trial court did not err in granting summary judgment on claim for invasion of privacy.

Affirmed in part, reversed in part, and remanded.

1. Landlord and Tenant ⚿1811

Girlfriend was not a "tenant" of her former boyfriend, despite fact that she briefly resided with him in his apartment for a short period of time, as required to establish wrongful eviction claim against him, absent any evidence she entered into a rental agreement or paid any rent or bills during the time she stayed at apartment. R.C. §§ 5321.01(A, B, D), 5321.15(A, B).

See publication Words and Phrases for other judicial constructions and definitions.

2. Landlord and Tenant ⚿704

A "tenant at will" is one who, under the terms of a written lease agreement, continues in a tenancy as long as the parties mutually agree. R.C. § 5321.01(A).

See publication Words and Phrases for other judicial constructions and definitions.

3. Landlord and Tenant ⚿1811

An individual who lives in a residence with another without a rental agreement and without the payment of rent is not a "tenant" and cannot maintain an action for wrongful eviction. R.C. § 5321.01(A).

4. Conversion and Civil Theft ⚿114(5)

Girlfriend's personal belongings that her former boyfriend and his mother moved to storage unit after they moved belongings out of apartment in which she briefly resided with boyfriend were not converted, where girlfriend was provided with a key to unit one day after items were moved out of apartment, and girlfriend did not make a demand for belongings and was not refused access to them.

5. Conversion and Civil Theft ⚿108, 113

"Conversion" is the wrongful exercise of dominion over property to the exclusion of the rights of the owner, or withholding it from his possession under a claim inconsistent with his rights.

See publication Words and Phrases for other judicial constructions and definitions.

6. Conversion and Civil Theft ⚿100

To prevail on a claim of conversion, a plaintiff must demonstrate (1) that she owned or had the right to control the property at the time of the conversion, (2) the defendant's wrongful act or disposition of the plaintiff's property rights, and (3) damages.

7. Conversion and Civil Theft ⚿100

To prevail on a claim of conversion, it is not necessary that the property be wrongfully obtained.

8. Conversion and Civil Theft ⚿114(5)

When property is otherwise lawfully held, a demand and refusal are usually required to prove the conversion.

9. Judgment ⚿181(33)

Genuine issues of material fact existed as to whether boyfriend and his mother dispossessed his former girlfriend of her belongings by moving them out of boyfriend's apartment and into a storage unit, and thus precluded summary judgment in favor of boyfriend and mother in action for trespass to chattels. Rules Civ.Proc., Rule 56(C); Restatement (Second) of Torts §§ 217(a, c), 218, 221.

10. Trespass ⚿49

An award of nominal damages in the absence of proof of actual damages may be made in an action for trespass to chattels when there has been a dispossession of the other of the chattel. Restatement (Second) of Torts §§ 217(a, c), 218, 221.

11. Judgment ⚿183

Trial court did not err in granting summary judgment to former boyfriend on girlfriend's invasion of privacy claim alleging that boyfriend invaded her privacy when he removed her personal effects from his apartment in which she briefly resided with him, where girlfriend failed to set forth any legal argument supporting her claim and instead merely made blanket assertions that boyfriend invaded her privacy. Rules Civ.Proc., Rule 56(C).

12. Torts ⚿329

The tort of invasion of privacy includes four separate torts: (1) intrusion upon the plaintiff's seclusion or solitude, or into his private affairs; (2) public disclosure of embarrassing private facts about the plaintiff; (3) publicity which places the plaintiff in a false light in the public eye; and (4) appropriation, for the defendant's advantage, of the plaintiff's name or likeness.

Jeffrey V. Hawkins, Attorney at Law, for Appellant.

Brian A. Smith, Attorney at Law, for Appellees.

SCHAFER, Judge.

{¶ 1} Plaintiff–Appellant, Ashley Mercer, appeals the judgment of the Akron Municipal Court granting summary judgment in favor of Defendants–Appellees, Christopher and Julie Halmbacher. This Court affirms in part, reverses in part, and remands.

I.

{¶ 2} Ashley Mercer and Christopher Halmbacher began a romantic relationship in 2014. After a few months of dating, Ms. Mercer moved into Mr. Halmbacher's apartment in Akron, Ohio and was provided with her own key to the residence. The relationship quickly turned sour. In June of 2014, Mr. Halmbacher received an ex parte civil protection order against Ms. Mercer.[1]

{¶ 3} On May 29, 2014, Mr. Halmbacher informed Ms. Mercer that she was no longer welcome at his apartment and that she needed to move out immediately. Ms.

1. A full hearing on the issuance of a civil protection order was later held in July of 2014.

Mercer summoned the police to the apartment. The police instructed Mr. Halmbacher not to undertake self-help measures to evict Ms. Mercer and informed him that he would need to go through the formal eviction process. Despite this admonishment, on May 30, 2014, Mr. Halmbacher and his mother, Julie Halmbacher, proceeded to change the locks to the apartment and moved all of Ms. Mercer's personal belongings into a separate storage unit. Mr. Halmbacher provided Ms. Mercer with a key to the storage unit the next day.

{¶ 4} On July 3, 2014, Ms. Mercer filed a complaint in the Akron Municipal Court against Mr. Halmbacher and his mother for wrongful eviction, conversion, trespass to chattels, and invasion of privacy. Mr. Halmbacher denied Ms. Mercer's allegations in his answer and filed a counterclaim. After the parties exchanged discovery, both parties filed motions for summary judgment and responses thereto.

{¶ 5} On December 16, 2014, the trial court granted summary judgment in favor of Mr. Halmbacher and his mother on all four of Ms. Mercer's claims and denied Ms. Mercer's motion for summary judgment. Ms. Mercer initially appealed the trial court's judgment, but this Court dismissed her attempted appeal for lack of jurisdiction due to Mr. Halmbacher's counterclaim that was still pending before the trial court. Mr. Halmbacher voluntarily dismissed his counterclaim against Ms. Mercer on remand, after which Ms. Mercer again filed a notice of appeal.

{¶ 6} Ms. Mercer timely filed the present appeal, raising one assignment of error for our review.

II.

ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED WHEN IT GRANTED THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT PURSUANT TO RULE 56 OF THE OHIO RULES OF CIVIL PROCEDURE.

{¶ 7} In her sole assignment of error, Ms. Mercer argues that the trial court erred in granting summary judgment in favor of Appellees on all four of her tort claims. We agree to the extent that the trial court erred in granting summary judgment on Ms. Mercer's trespass to chattels claim.

A. Standard of Review

{¶ 8} We review an award of summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Summary judgment is only appropriate where (1) no genuine issue of material fact exists; (2) the movant is entitled to judgment as a matter of law; and (3) the evidence can only produce a finding that is contrary to the non-moving party. Civ.R. 56(C). Before making such a contrary finding, however, a court must view the facts in the light most favorable to the non-moving party and must resolve any doubt in favor of the non-moving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358–359, 604 N.E.2d 138 (1992).

{¶ 9} Summary judgment consists of a burden-shifting framework. To prevail on a motion for summary judgment, the party moving for summary judgment must first be able to point to evidentiary materials that demonstrate there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996). Once a moving party satisfies its burden of supporting its motion for summary judgment with sufficient and acceptable evidence pursuant to Civ.R. 56(C), Civ.R.

56(E) provides that the non-moving party may not rest upon the mere allegations or denials of the moving party's pleadings. Rather, the non-moving party has a reciprocal burden of responding by setting forth specific facts, demonstrating that a "genuine triable issue" exists to be litigated for trial. *State ex rel. Zimmerman v. Tompkins,* 75 Ohio St.3d 447, 449, 663 N.E.2d 639 (1996).

B. Wrongful Eviction Claim

[1] {¶ 10} Ms. Mercer argues that the trial court erred in granting summary judgment in favor of Appellees on her wrongful eviction claim. Specifically, Ms. Mercer contends that she and Mr. Halmbacher entered into a landlord/tenant relationship and that by evicting her, Appellees violated R.C. 5321.15(B).

[2, 3] {¶ 11} R.C. Chapter 5321, Ohio's Landlord–Tenant Act, regulates the relationship between residential landlords and their tenants. R.C. 5321.15(A) provides that landlords may only evict residential tenants by following the procedures set forth in R.C. Chapters 1923, 5303, and 5321. R.C. 5321.01(B) defines a landlord as "the owner, lessor, or sublessor of residential premises, the agent of the owner, lessor, or sublessor, or any person authorized by the owner, lessor, or sublessor to manage the premises or to receive rent from a tenant under a rental agreement." A tenant is an individual who is "entitled under a rental agreement to the use and occupancy of residential premises to the exclusion of others." R.C. 5321.01(A). A rental agreement is "any agreement or lease, written or oral, which establishes or modifies the terms, conditions, rules, or any other provisions concerning the use and occupancy of residential premises by one of the parties." R.C. 5321.01(D). "A tenant at will is one who, under the terms of a written lease agreement, continues in a tenancy as long as the parties mutually agree." *Stone v. Cazeau,* 9th Dist. Lorain No. 07CA009164, 2007-Ohio-6213, 2007 WL 4146777, ¶ 6, citing *Freedline v. Cielensky,* 115 Ohio App. 138, 141, 184 N.E.2d 433 (9th Dist.1961), quoting *Say v. Stoddard,* 27 Ohio St. 478 (1875). "An individual who lives in a residence with another without a rental agreement and without the payment of rent is not a tenant and cannot maintain an action for wrongful eviction." *Id.,* citing *Ogle v. Disbrow,* 6th Dist. Lucas Nos. L–04–1373, L–05–1102, 2005-Ohio-4869, 2005 WL 2249582, ¶ 17.

{¶ 12} Mr. Halmbacher and his mother argued in their motion for summary judgment that they are entitled to summary judgment on Ms. Mercer's wrongful eviction claim because Ms. Mercer failed to put forth any evidence showing that she was a tenant for purposes of R.C. Chapter 5321. Specifically, Appellees contend that Ms. Mercer provided no evidence demonstrating that she either entered into a rental agreement or paid any rent or bills during her time residing at the apartment. Appellees' motion for summary judgment was supported by Mr. Halmbacher and his mother's respective affidavits setting forth facts to this effect. Moreover, their motion for summary judgment was supported by a discovery request, wherein Appellees asked Ms. Mercer to provide them with all documents evidencing a tenancy in the apartment, or a contract, oral lease, or other agreement between her and either Mr. Halmbacher or his mother. To each request for the production of these documents, Ms. Mercer tersely replied: "None."

{¶ 13} Ms. Mercer's motion for summary judgment, on the other hand, asserts that Ms. Mercer did establish a landlord-tenant relationship with Mr. Halmbacher. In support of her argument, Ms. Mercer points to Mr. Halmbacher's testimony during the July 10, 2014 hearing in domestic

relations court on the previously issued ex parte civil protection order. During this hearing, Mr. Halmbacher testified that Ms. Mercer formerly resided at his apartment.

{¶ 14} However, Mr. Halmbacher's testimony that Ms. Mercer briefly resided with him has no bearing on whether Ms. Mercer was a "tenant" as that term is defined in R.C. 5321.01(A). While Ms. Mercer and Mr. Halmbacher certainly resided together for a short period of time, there is no evidence in the record demonstrating the existence of a landlord-tenant relationship. With nothing further in the record to support her claim, we determine that Appellees were entitled to judgment on Ms. Mercer's wrongful eviction claim as a matter of law. Therefore, we conclude that the trial court did not err in granting summary judgment in favor of Appellees on Ms. Mercer's wrongful eviction claim.

C. Conversion

[4] {¶ 15} Ms. Mercer argues that the trial court erred in granting summary judgment in favor of Appellees on her conversion claim. Specifically, Ms. Mercer argues that by moving her personal belongings to a storage unit, Appellees deprived her of her personal property and belongings.

[5–8] {¶ 16} " '[C]onversion is the wrongful exercise of dominion over property to the exclusion of the rights of the owner, or withholding it from his possession under a claim inconsistent with his rights.' " *State ex rel. Toma v. Corrigan*, 92 Ohio St.3d 589, 592, 752 N.E.2d 281 (2001), quoting *Joyce v. Gen. Motors Corp.*, 49 Ohio St.3d 93, 96, 551 N.E.2d 172 (1990). To prevail on a claim of conversion, a plaintiff must demonstrate "(1) that [she] owned or had the right to control the property at the time of the conversion, (2) the defendant's wrongful act or disposition of the plaintiff's property rights, and (3) damages." *Pelmar USA, L.L.C. v. Mach. Exchange Corp.*, 9th Dist., 2012-Ohio-3787, 976 N.E.2d 282, ¶ 12. "It is not necessary that the property be wrongfully obtained." *McCartney v. Universal Elec. Power Corp.*, 9th Dist. Summit No. 21643, 2004-Ohio-959, 2004 WL 384167, ¶ 14. When property is otherwise lawfully held, " '[a] demand and refusal * * * are usually required to prove the conversion[.]' " *Ferreri v. Goodyear Local No. 2 United Rubber, Cork, Linoleum & Plastic Workers of Am. Home Assn.*, 9th Dist. Summit No. 16311, 1994 WL 45740, * 2 (Feb. 9, 1994), quoting *Ohio Tel. Equip. & Sales Inc. v. Hadler Realty Co.*, 24 Ohio App.3d 91, 94, 493 N.E.2d 289 (10th Dist.1985).

{¶ 17} In granting summary judgment in favor of the Appellees on the conversion claim, the trial court determined that Ms. Mercer failed to put forth any evidence demonstrating the existence of a genuine issue of material fact concerning the disposition and damages elements. In their motion for summary judgment, Appellees stated that they provided Ms. Mercer with a key to the storage unit containing her personal belongings one day after moving her items out of the apartment. Appellees both submitted affidavits attesting to this. However, a review of Ms. Mercer's motion for summary judgment and response to the Appellees' motion for summary judgment reveals that Ms. Mercer failed to point to anything in the record demonstrating that she made a demand for her property, was refused access to her personal property, or suffered damages as a result of the Appellees' conduct. Absent such a showing, Ms. Mercer's conversion claim could not survive summary judgment. Therefore, we determine that the Appellees were entitled to judgment as a matter of law on Ms. Mercer's conversion claim and that the trial court did not err by granting summary judgment in favor of Appellees.

D. Trespass to Chattels

[9] {¶ 18} Ms. Mercer contends that the trial court erred in granting summary judgment in favor of Appellees on her trespass to chattels claim. In her appellate brief, Ms. Mercer reiterates the same arguments made in support of her conversion claim to support her trespass to chattels claim.

{¶ 19} While authority under Ohio law respecting an action for trespass to chattels is " 'extremely meager,' " it is an actionable tort and courts applying Ohio law have turned to the Restatement (Second) of Torts for guidance. *Dryden v. Cincinnati Bell Tel. Co.*, 135 Ohio App.3d 394, 404, 734 N.E.2d 409 (1st Dist.1999), quoting *CompuServe, Inc. v. Cyber Promotions*, 962 F.Supp. 1015, 1021 (S.D.Ohio 1997); *Stainbrook v. Fox Broadcasting Co.*, N.D.Ohio No. 3:05 CV 7380, 2006 WL 3757643, * 3 (N.D.Ohio Dec. 19, 2006).

{¶ 20} "A trespass to chattel occurs when one intentionally dispossesses another of their personal property." *Conley v. Caudill*, 4th Dist. Pike No. 02CA697, 2003-Ohio-2854, 2003 WL 21278885, ¶ 7, citing 75 American Jurisprudence 2d (1991), Trespass, Section 17, at 23. According to the Second Restatement, a trespass to a chattel may be committed by intentionally:

(a) dispossessing another of the chattel, or

(b) using or intermeddling with a chattel in the possession of another.

1 Restatement of the Law 2d, Torts, Section 217 (1965). However, one who commits a trespass to a chattel is subject to liability to the possessor of the chattel if, but only if:

(a) he dispossesses the other of the chattel, or

(b) the chattel is impaired as to its condition, quality, or value, or

(c) the possessor is deprived of the use of the chattel for a substantial time, or

(d) bodily harm is caused to the possessor, or harm is caused to some person or thing in which the possessor has a legally protected interest.

1 Restatement of the Law 2d, Torts, Section 218 (1965). Section 221 defines the various ways in which one may dispossess another of a chattel. According to this section of the Restatement, a dispossession may be committed by intentionally:

(a) taking a chattel from the possession of another without the other's consent, or

(b) obtaining possession of a chattel from another by fraud or duress, or

(c) barring the possessor's access to a chattel, or

(d) destroying a chattel while it is in another's possession, or

(e) taking the chattel into the custody of the law.

1 Restatement of the Law 2d, Torts, Section 221 (1965).

{¶ 21} Sections 217(a) and (c) of the Second Restatement are the only relevant provisions under the facts of this case. In granting summary judgment in favor of the Appellees, the trial court determined that Ms. Mercer failed to put forth evidence demonstrating the existence of a genuine issue of material fact showing that she was either dispossessed of her property, that she was deprived the use of her property for a substantial amount of time, and that Ms. Mercer failed to allege or prove damages as a result of the defendants' conduct.

{¶ 22} In support of their motion for summary judgment, Appellees both submitted an affidavit wherein they respectively swear that they moved Ms. Mercer's belongings out of the apartment and into a storage unit. Both parties also included a

transcript from the 2014 civil protection order hearing wherein Mr. Halmbacher testified to same. The Appellees further attest in their respective affidavits that they provided Ms. Mercer with a key to the storage unit containing her personal property just one day after they removed her belongings from the apartment.

{¶ 23} We conclude that the Appellees' conduct in this matter fits squarely within the Second Restatement's definition of "dispossession." The evidence put forth in each parties' respective motion for summary judgment reveals that the Appellees intentionally assumed control over chattel in a manner that was inconsistent with Ms. Mercer's possessory interest. Contrary to the trial court's analysis, the total duration of that dispossession is irrelevant when determining whether one has been "dispossessed" of their property under the Second Restatement.

[10] {¶ 24} Moreover, we conclude that the trial court erred as a matter of law in determining that a trespass to chattels claim will not be supported by nominal damages. Consistent with the Second Restatement, we hold that an award of nominal damages in the absence of proof of actual damages may be made in an action for trespass to chattels when there has been a dispossession. 1 Restatement of the Law 2d, Torts, Section 218, comment d (1965) ("Where the trespass to the chattel is a dispossession, the action will lie although there has been no impairment of the condition, quality, or value of the chattel, and no other harm to any interest of the possessor. He may recover at least nominal damages for the loss of possession, even though it is of brief duration and he is not deprived of the use of the chattel for any substantial length of time.").

{¶ 25} Therefore, we determine that the Appellees were not entitled to judgment as a matter of law on Ms. Mercer's trespass to chattels claim and that the trial court erred by granting summary judgment in favor of Appellees.

E. Invasion of Privacy

[11] {¶ 26} Lastly, Ms. Mercer argues that the trial court erred in granting summary judgment in favor of the Appellees on her invasion of privacy claim. Ms. Mercer alleges that the Appellees invaded her privacy when they removed her personal effects from the apartment and placed them into the storage unit.

[12] {¶ 27} We have previously acknowledged claims for invasion of privacy as:

> involving "the publicizing of one's private affairs with which the public has no legitimate concern, or the wrongful intrusion into one's private activities in such a manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities."

Lamar v. A.J. Rose Mfg. Co., 9th Dist. Lorain No. 99CA007326, 2000 WL 1507919, * 5 (Oct. 11, 2000), quoting *Housh v. Peth*, 165 Ohio St. 35, 133 N.E.2d 340 (1956), paragraph two of the syllabus. The tort of invasion of privacy includes four separate torts: (1) intrusion upon the plaintiff's seclusion or solitude, or into his private affairs; (2) public disclosure of embarrassing private facts about the plaintiff; (3) publicity which places the plaintiff in a false light in the public eye; and (4) appropriation, for the defendant's advantage, of the plaintiff's name or likeness. *Piro v. Franklin Twp.*, 102 Ohio App.3d 130, 144, 656 N.E.2d 1035 (9th Dist.1995), citing *Killilea v. Sears, Roebuck & Co.*, 27 Ohio App.3d 163, 166, 499 N.E.2d 1291 (10th Dist.1985).

{¶ 28} After reviewing the record, we conclude that Ms. Mercer has failed to meet her reciprocal burden of proving that a genuine issue of material fact exists.

Ms. Mercer's reply to the Halmbachers' motion for summary judgment does not even discuss her invasion of privacy claim or lay out facts supporting her argument. Additionally, Ms. Mercer failed to set forth any legal argument supporting her invasion of privacy claim either in her complaint, opposition to summary judgment, or appellate brief. Rather, Ms. Mercer merely makes blanket allegations that Appellees invaded her privacy. In light of this, we conclude that the trial court did not err in granting summary judgment on behalf of Appellees with regard to Ms. Mercer's invasion of privacy claim.

{¶ 29} Accordingly, Ms. Mercer's assignment of error is sustained insofar as the trial court erred in granting summary judgment in favor of the Appellees on the trespass to chattels claim.

III.

{¶ 30} Ms. Mercer's sole assignment of error is sustained in part. The judgment of the Akron Municipal Court is affirmed in part, reversed in part, and the cause remanded for further proceedings consistent with this opinion.

Judgment affirmed in part, reversed in part, and cause remanded.

CARR, P.J., and WHITMORE, J., concur.

2015-Ohio-4202

In the Matter of the GUARDIANSHIP OF FRED VAN DYKE.

No. 26465.

Court of Appeals of Ohio,
Second District, Montgomery County.

Oct. 9, 2015.

Background: Successor guardian brought surcharge action, seeking repayment of monies paid former guardian without court authorization, as well as accounting expenses and legal fees. The Probate Court, Montgomery County, No. 2008–GRD–259, ordered a total surcharge against former guardian in the sum of $18,271.50. Former guardian appealed.

Holdings: The Court of Appeals, No. 26465, Fain, J., held that:

(1) statutory provision that permitted a surcharge for assets conveyed away from a guardianship estate was not limited in scope only to assets concealed or embezzled from the estate;

(2) evidence was sufficient to support a conclusion that former guardian was made aware that prior court approval was required for payments to herself of fees from the guardianship estate;

(3) Probate Court found former guardian guilty of unauthorized conveyances from the guardianship estate, as required for successor guardian to recover those conveyances;

(4) costs necessary to trace assets, reconstruct records, attorney fees, accountant fees and costs that were a direct and proximate result of the former guardian's actions in the administration of her duties to the estate, as well as her failure to file an accounting in a timely manner, constituted valid costs that could be assessed against former guardian;

continuous, so that not more than six or three secular days shall intervene from the commencement of a session until its close, and therefore that the board had no power to adjourn their January meeting over to the 14th, and consequently they had no authority to designate the newspaper at that date. If this construction of section 102 is correct, and as a consequence all proceedings of county boards, after the expiration of six or three secular days from the commencement of a session, are void, the consequences would be very serious, and we apprehend the announcement of such a doctrine would be quite a surprise. But we find nothing in the statute justifying any such construction. It is a general rule, applicable to all such bodies, that, in the absence of any express provision to the contrary, a regular meeting may be adjourned to a future day, and at such adjourned meeting it will be lawful to transact any business which might have been transacted at the stated meeting of which it is, indeed, but the continuation. It would require very clear language to that effect to warrant us in holding that it was the legislative intent to deny this power to boards of county commissioners. Moreover, we are of the opinion that this statutory limitation on the length of sessions is merely directory, the manifest purpose being to limit the amount of compensation or *per diem* of county commissioners. People v. Green, 75 N. C. 329. Of course, a limitation, necessarily implied, to the right of adjourning over, is that a session could not be extended beyond the commencement of the next session fixed by law.

But we think the validity of the designation can be sustained on still another ground, and that is that the provision of the statute as to the time when it shall be done is merely directory. Of course, it is mandatory to the extent that it must be done, if done by the board, before the close of the March meeting, because, if not done by that time, the authority to designate the newspaper devolves upon the county auditor; but, if done within that time, the particular time or meeting at which the commissioners are to perform this duty is merely directory. The general rule is that where the provision of a statute as to the time when an act shall be done is intended merely for the guidance of public officers, so as to insure the orderly and seasonable performance of public business, a disregard of which cannot injuriously affect the rights of parties interested, it will be deemed merely directory. Kipp v. Dawson, 31 Minn. 373, 17 N. W. Rep. 961, and 18 N. W. Rep. 96. The evident purpose of the statute in requiring the county board to act in this matter at either their January or March meeting (which are the two last regular meetings before the delinquent list is to be published) is to insure its being done in time for the publication of the list as required by law. The particular time or the particular meeting at which the newspaper is designated cannot affect the rights of any taxpayer. What the statute provides for his information and protection, and all the interest he has in the matter, is that a copy of the resolution shall be filed with the clerk of the court, so that he may be able to ascertain in what paper the list is published. Consequently we think that a designation of the paper by the county board at any meeting, general or special, prior to the close of their March meeting, would be valid. There is nothing in conflict with this in Hall v. County of Ramsey, 30 Minn. 68, 14 N. W. Rep. 263. On the contrary, that case, when fully examined, is right in line with this view. Hence it makes no difference whether the meeting of the board on January 14th was a lawful continuation of the January session, or an extra and special session, (and it must have been one or the other;) in either view, the action of the board was valid.

2. Two objections are made to the sufficiency of the description of the property in the judgment. One is that the land was described by initial letters to designate the part of a section, without being followed by a period as an "abbreviation mark." There is nothing in this point. As a matter of fact, it is a common practice, in using the initial letters of parts of a section according to government survey, to omit the "abbreviation mark" altogether; but everybody understands perfectly what such initial letters, so used, mean.

The other objection to the description is that in the original judgment the inverted commas or ditto marks, which had been used in preceding descriptions, are continued and inserted in the middle of the description, so that it appears on the judgment book as follows: "S. W. ¼ " S. W. ¼. The description is correct in the delinquent list as filed and as published, and the insertion of these commas was evidently a mere clerical mistake; and whether we disregard it as such, or construe it as referring back to "No.," (an abbreviation for number,) at the head of the column, it does not affect or alter the description. Read either way, it means the same. None of the objections to the title acquired under the sale for taxes of 1879 being well taken, it is unnecessary to consider the other tax title, and the result is that the order denying a new trial is affirmed.

COLLINS, J., took no part.

ANDERSON v. GOULDBERG et al.

(Supreme Court of Minnesota. Nov. 17, 1892.)

REPLEVIN—WHEN LIES—SUFFICIENCY OF BARE POSSESSION AS AGAINST STRANGERS.

Bare possession of property, though wrongfully obtained, is sufficient title to enable the party enjoying it to maintain replevin against a mere stranger to the property, who takes it from him.

(Syllabus by the Court.)

Appeal from district court, Isanti county; LOCHREN, Judge.

Replevin by Sigfrid Anderson against Hans J. Gouldberg and others, partners as Gouldberg & Anderson, to recover cer-

tain logs. Verdict for plaintiff. A new trial was denied, and defendants appeal. Affirmed.

Clapp & McCartney, for appellants. *H. F. Barker*, for respondent.

MITCHELL, J. It is settled by the verdict of the jury that the logs in controversy were not cut upon the land of the defendants, and consequently that they were entire strangers to the property. For the purposes of this appeal, we must also assume the fact to be (as there was evidence from which the jury might have so found) that the plaintiffs obtained possession of the logs in the first instance by trespassing upon the land of some third party. Therefore the only question is whether bare possession of property, though wrongfully obtained, is sufficient title to enable the party enjoying it to maintain replevin against a mere stranger, who takes it from him. We had supposed that this was settled in the affirmative as long ago, at least, as the early case of Armory v. Delamirie, 1 Strange, 504, so often cited on that point. When it is said that to maintain replevin the plaintiff's possession must have been lawful, it means merely that it must have been lawful as against the person who deprived him of it; and possession is good title against all the world except those having a better title. Counsel says that possession only raises a presumption of title, which, however, may be rebutted. Rightly understood, this is correct; but counsel misapplies it. One who takes property from the possession of another can only rebut this presumption by showing a superior title in himself, or in some way connecting himself with one who has. One who has acquired the possession of property, whether by finding, bailment, or by mere tort, has a right to retain that possession as against a mere wrongdoer who is a stranger to the property. Any other rule would lead to an endless series of unlawful seizures and reprisals in every case where property had once passed out of the possession of the rightful owner.

Order affirmed.

(51 Minn. 296)

BLAKE v. BOISJOLI et al.

(Supreme Court of Minnesota. Nov. 17, 1892.)

FRAUDULENT CONVEYANCE—WHAT CONSTITUTES—EVIDENCE.

1. Action to enforce an alleged trust in favor of creditors in land, the consideration for which had been paid by the debtor, but the conveyance made to his wife.

2. The evidence was that the debtor owned 200 acres of land, 80 of which was exempt as a homestead; that the land was subject to incumbrances considerably in excess of the value of the nonexempt 120 acres; that the debtor exchanged the entire tract subject to incumbrances (which the purchaser assumed) for the land in suit. *Held*, that this evidence justified the court in finding that the statutory presumption of fraudulent intent had been disproved.

(Syllabus by the Court.)

Appeal from district court, Morrison county; BAXTER, Judge.

Action by Peter Blake against Joseph Boisjoli and others to enforce an alleged trust in favor of plaintiff, as creditor of defendant Boisjoli, in certain land. Finding for plaintiff. A new trial was refused, and defendants appeal. Affirmed.

A. P. Blanchard, for appellants. *Taylor, Calhoun & Rhodes*, for respondent.

MITCHELL, J. This was an action to enforce an alleged trust in favor of plaintiff, as creditor of defendant J. Boisjoli, (Gen. St. 1878, c. 43, §§ 7, 8,) in land, the consideration for which had been paid by the debtor, and the conveyance made to his wife and codefendant; and the only question raised by this appeal is whether the evidence justified the finding of the court to the effect that the statutory presumption of fraud had been disproved. The undisputed evidence is that the defendant debtor was the owner of 200 acres of land, 80 of which was exempt as his homestead; that the whole of the land was subject to a mortgage for over $1,650; that the nonexempt 120 acres were also subject to the lien of a judgment for $175; that the nonexempt part of the land was worth not to exceed $1,200 to $1,400, or considerably less than the incumbrances; that the debtor exchanged the whole 200 acres subject to the incumbrances (which the purchaser assumed) for the land in suit, worth from $800 to $1,200, and had the conveyance made to his wife. This, which was substantially all the evidence in the case, fully justified the finding of the trial court. The statute provides that "every such conveyance shall be presumed fraudulent as against the creditors, at that time, of the person paying the consideration; and, when a fraudulent intent is not disproved, a trust shall result in favor of such creditors to the extent that may be necessary to satisfy their just demands." The presumption of fraudulent intent in such cases is not conclusive, but simply casts the burden upon the grantee to disprove a fraudulent intent. This was but declaratory of the rule already sanctioned by the great weight of authority, although some authorities, notably Chancellor KENT, in Reade v. Livingston, 3 Johns. Ch. 481, had held that the fact of indebtedness at the time of such a conveyance was conclusive evidence of fraud. To constitute any disposition of property fraudulent as to creditors, an essential element is that the thing disposed of must be of value, out of which the creditor could have realized the whole or a part of his claim, or otherwise expressed property which is appropriable by law to the payment of the debt. As was said in Baldwin v. Rogers, 28 Minn. 544, 11 N. W. Rep. 77: "To make a debtor's transfer of property fraudulent as respects his creditors, there must be an intent to defraud, express or implied, and an act which, if allowed to stand, will actually defraud them by hindering, delaying, or preventing the collection of their claims." It follows logically, as we have repeatedly held, that exempt property is not susceptible of fraudulent alienation as respects creditors, as they have no right to have that class of property applied in satisfaction of their claims. As against plaintiff, the defendant would have had a right to

Nichols, 133 Pa. 438, 19 Atl. 422. The authorities are numerous that, when the deed is only the fulfillment in part of the article, the covenants are not merged in the deed, though it is executed, delivered, and accepted. Neither any rule of evidence nor the rule as to a merger of a preliminary contract in the deed of conveyance debars the plaintiff from alleging and procuring the true consideration for the sale, and that through mistake the consideration was incorrectly stated in the deed. Wilson v. Pearl, 12 Pa. Super. Ct. 66. It is admissible to prove the true contract, and that part of it was omitted from the writing by mistake. And this can be proved by the scrivener, and by the admissions and declarations of the vendee, deceased at the time of the trial. Schotte v. Meredith, 192 Pa. 159, 43 Atl. 952. In 19 Pepper & Lewis' Digest of Decisions, column 32,573, can be found many cases that are exceptions to the general rule that the execution and acceptance of a deed of conveyance, is a consummation of all previous agreements between the parties, and the articles of agreement may be given in evidence to show that their conditions have not been complied with. In Byers v. Mullen, 9 Watts, 266, there was a deed and a receipt in full for the consideration money. The article of agreement showed that the vendee had agreed to pay off a certain judgment. It was offered in evidence, but rejected by the court because merged in the deed. Held to be error, and that the vendee could show notwithstanding the deed that the vendor had not compiled with the article of agreement. In Harbold v. Kuster, 44 Pa. 392, the article of agreement contained a reservation of the grain in the ground, but the deed subsequently given contained no mention of such reservation. It was held that there was no merger, and that the agreement could be enforced.

"Taking the facts of this case and applying the law as we find it, we are convinced that the article and deed are not contradictory, and that both can stand, one the fulfillment of the other. It would have been better to have included all the covenants of the article in the deed, but by the mistake of the scrivener they were left out. This was unfortunate, but should be allowed to overthrow the true agreement between the parties."

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Joseph A. Langfitt, W. A. McAdoo, and H. W. McIntosh, for appellant. M. F. Leason and C. E. Harrington, for appellee.

PER CURIAM. The judgment is affirmed on the discussion and conclusion of law by the court below.

(81 Vt. 471).

PLOOF v. PUTNAM.

(Supreme Court of Vermont. Chittenden. Oct. 2, 1908.)

1. TORTS (§ 3*)—OBLIGATION VIOLATED.

While plaintiff and his wife and children were sailing, a violent tempest arose, whereby the boat and occupants were placed in great danger, and, to save them, plaintiff was compelled to moor the boat to defendant's dock. Defendant, by his servant, unmoored the boat, whereupon it was driven on shore by the tempest without plaintiff's fault, and destroyed, and plaintiff and his wife and children were cast into the water and upon the shore, and injured. *Held*, that plaintiff was entitled to recover.

[Ed. Note.—For other cases, see Torts, Dec. Dig. § 3.*]

2. TORTS (§ 26*)—PLEADING—DESCRIPTION OF WRONG.

A complaint alleging these facts stated a good cause of action, though it did not negative the existence of natural objects to which plaintiff could have moored with equal safety; the details of the situation creating the necessity of mooring to the dock being matters of proof which it was unnecessary to allege.

[Ed. Note.—For other cases, see Torts, Cent. Dig. § 33; Dec. Dig. § 26.*]

3. MASTER AND SERVANT (§ 329*)—MASTER'S LIABILITY FOR INJURIES TO THIRD PERSONS—ACTS OF SERVANT—SCOPE OF EMPLOYMENT.

The declaration having alleged in one count that defendant, by his servant who was in charge of the dock, willfully and designedly unmoored the boat, and in the other that defendant by his servant negligently, carelessly, and wrongfully unmoored it, sufficiently showed that the servant was acting within the scope of his employment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1269; Dec. Dig. § 329.*]

Exceptions from Chittenden County Court; Seneca Haselton, Judge.

Action by Sylvester A. Ploof against Henry W. Putnam. Heard on demurrer to declaration. Demurrer overruled, and declaration adjudged sufficient, and defendant excepted. Judgment affirmed, and cause remanded.

Martin S. Vilas and Cowles & Moulton, for plaintiff. Batchelder & Bates, for defendant.

MUNSON, J. It is alleged as the ground of recovery that on the 13th day of November, 1904, the defendant was the owner of a certain island in Lake Champlain, and of a certain dock attached thereto, which island and dock were then in charge of the defendant's servant; that the plaintiff was then possessed of and sailing upon said lake a certain loaded sloop, on which were the plaintiff and his wife and two minor children; that there then arose a sudden and violent tempest, whereby the sloop and the property and persons therein were placed in great danger of destruction; that, to save these from destruction or injury, the plaintiff was compelled to, and did, moor the sloop to defendant's dock; that the defendant, by his servant, unmoored the sloop, whereupon

it was driven upon the shore by the tempest, without the plaintiff's fault; and that the sloop and its contents were thereby destroyed, and the plaintiff and his wife and children cast into the lake and upon the shore, receiving injuries. This claim is set forth in two counts—one in trespass, charging that the defendant by his servant with force and arms willfully and designedly unmoored the sloop; the other in case, alleging that it was the duty of the defendant by his servant to permit the plaintiff to moor his sloop to the dock, and to permit it to remain so moored during the continuance of the tempest, but that the defendant by his servant, in disregard of this duty, negligently, carelessly, and wrongfully unmoored the sloop. Both counts are demurred to generally.

There are many cases in the books which hold that necessity, and an inability to control movements inaugurated in the proper exercise of a strict right, will justify entries upon land and interferences with personal property that would otherwise have been trespasses. A reference to a few of these will be sufficient to illustrate the doctrine. In Miller v. Fandrye, Poph. 161, trespass was brought for chasing sheep, and the defendant pleaded that the sheep were trespassing upon his land, and that he with a little dog chased them out, and that, as soon as the sheep were off his land, he called in the dog. It was argued that, although the defendant might lawfully drive the sheep from his own ground with a dog, he had no right to pursue them into the next ground; but the court considered that the defendant might drive the sheep from his land with a dog, and that the nature of a dog is such that he cannot be withdrawn in an instant, and that, as the defendant had done his best to recall the dog, trespass would not lie. In trespass of cattle taken in A., defendant pleaded that he was seised of C. and found the cattle there damage feasant, and chased them towards the pound, and they escaped from him and went into A., and he presently retook them; and this was held a good plea. 21 Edw. IV, 64; Vin. Ab. Trespass, H. a, 4, pl. 19. If one have a way over the land of another for his beasts to pass, and the beasts, being properly driven, feed the grass by morsels in passing, or run out of the way and are promptly pursued and brought back, trespass will not lie. See Vin. Ab. Trespass, K. a, pl. 1. A traveler on a highway who finds it obstructed from a sudden and temporary cause may pass upon the adjoining land without becoming a trespasser because of the necessity. Henn's Case, W. Jones, 296; Campbell v. Race, 7 Cush. (Mass.) 408, 54 Am. Dec. 728; Hyde v. Jamaica, 27 Vt. 443 (459); Morey v. Fitzgerald, 56 Vt. 487, 48 Am. Rep. 811. An entry upon land to save goods which are in danger of being lost or destroyed by water or fire is not a trespass. 21 Hen. VII, 27; Vin. Ab. Trespass, H. a, 4, pl. 24, K. a, pl. 3. In Proctor v. Adams, 113 Mass. 376, 18 Am. Rep. 500, the defendant went upon the plaintiff's beach for the purpose of saving and restoring to the lawful owner a boat which had been driven ashore, and was in danger of being carried off by the sea; and it was held no trespass. See, also, Dunwich v. Sterry, 1 B. & Ad. 831.

This doctrine of necessity applies with special force to the preservation of human life. One assaulted and in peril of his life may run through the close of another to escape from his assailant. 37 Hen. VII, pl. 26. One may sacrifice the personal property of another to save his life or the lives of his fellows. In Mouse's Case, 12 Co. 63, the defendant was sued for taking and carrying away the plaintiff's casket and its contents. It appeared that the ferryman of Gravesend took 47 passengers into his barge to pass to London, among whom were the plaintiff and defendant; and the barge being upon the water a great tempest happened, and a strong wind, so that the barge and all the passengers were in danger of being lost if certain ponderous things were not cast out, and the defendant thereupon cast out the plaintiff's casket. It was resolved that in case of necessity, to save the lives of the passengers, it was lawful for the defendant, being a passenger, to cast the plaintiff's casket out of the barge; that, if the ferryman surcharge the barge, the owner shall have his remedy upon the surcharge against the ferryman, but that if there be no surcharge, and the danger accrue only by the act of God, as by tempest, without fault of the ferryman, every one ought to bear his loss to safeguard the life of a man.

It is clear that an entry upon the land of another may be justified by necessity, and that the declaration before us discloses a necessity for mooring the sloop. But the defendant questions the sufficiency of the counts because they do not negative the existence of natural objects to which the plaintiff could have moored with equal safety. The allegations are, in substance, that the stress of a sudden and violent tempest compelled the plaintiff to moor to defendant's dock to save his sloop and the people in it. The averment of necessity is complete, for it covers not only the necessity of mooring, but the necessity of mooring to the dock; and the details of the situation which created this necessity, whatever the legal requirements regarding them, are matters of proof, and need not be alleged. It is certain that the rule suggested cannot be held applicable irrespective of circumstance, and the question must be left for adjudication upon proceedings had with reference to the evidence or the charge.

The defendant insists that the counts are defective, in that they fail to show that the servant in casting off the rope was acting within the scope of his employment. It is said that the allegation that the island and dock were in charge of the servant does not

imply authority to do an unlawful act, and that the allegations as a whole fairly indicate that the servant unmoored the sloop for a wrongful purpose of his own, and not by virtue of any general authority or special instruction received from the defendant. But we think the counts are sufficient in this respect. The allegation is that the defendant did this by his servant. The words "willfully, and designedly" in one count, and "negligently, carelessly, and wrongfully" in the other, are not applied to the servant, but to the defendant acting through the servant. The necessary implication is that the servant was acting within the scope of his employment. 13 Ency. P. & Pr. 922; Voegeli v. Pickel Marble, etc., Co., 49 Mo. App. 643; Wabash Ry. Co. v. Savage, 110 Ind. 156, 9 N. E. 85. See, also, Palmer v. St. Albans, 60 Vt. 427, 13 Atl. 569, 6 Am. St. Rep. 125.

Judgment affirmed and cause remanded.

(81 Vt. 505)

In re BAKER'S ESTATE.

(Supreme Court of Vermont. Washington. Nov. 17, 1908.)

WILLS (§ 788*)—ELECTION—SUFFICIENCY OF WAIVER BY SURVIVING HUSBAND—"AS A WIDOW MAY WAIVE PROVISIONS OF WILL."

Pub. St. § 2935, provides that a husband may waive the provisions of his wife's will when she dies without issue "as a widow may waive the provisions of her husband's will." Section 2925 (3) requires that the widow shall notify the court in writing of her election under her husband's will within eight months after the will is proved, or after letters of administration have been granted. *Held*, that a verbal notification of waiver made to the probate court by the attorney for the husband where the will was presented for probate was insufficient, where it was not followed by the filing of a written waiver within the time allowed by the statute.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 788.*]

Appeal from Probate Court, Washington County; Alfred A. Hall, Judge.

Petition by Sarah J. Baker's administrator to the probate court to determine the validity of the election of William A. Baker, surviving husband of decedent, to waive the provisions of decedent's will. From a judgment of the county court affirming a judgment of the probate court sustaining such waiver, Muncie Gregg and another, heirs of decedent, appeal. Reversed and rendered.

R. W. Hurlburd, for appellants. Geo. W. Wing, for appellee.

TYLER, J. The county court by agreement of parties, heard the case upon the facts found by the probate court, and affirmed its decree. The probate court heard and decided the case upon the facts set forth in the petition of the administrator of Wm. A. Baker's estate made to that court in November, 1905, and upon the evidence produced in its support. The petition alleges, in substance, that Mrs. Sarah J. Baker died in February, 1904, leaving a will in which certain provisions were made for her husband Wm. A. Baker, who survived her; that, when the will was presented for probate, the husband, by his attorney, gave notice of his intention to waive the provisions of the will made in his behalf and take his statutory rights in lieu thereof; that, the said Wm. A. being sick and unable to attend court, his attorney, at his request, drew a formal waiver for him to sign; that he duly executed it and sent it by mail to the attorney to be filed in the probate court; that the attorney received it, and took it to the probate court at the time he filed an application by the husband for the appointment of an administrator upon his wife's estate, and supposed the waiver was filed with that paper until after the husband's death which occurred in April, 1904, when he learned that it had never been filed. The probate court found the fact that the waiver was never filed in that court, and that it never came to the knowledge of the court. It also found that its loss had been duly proved, and held that the husband intended to waive the will and did waive it, and made a decree accordingly.

Section 2935, Pub. St., provides that a husband may waive the provisions of his wife's will when she dies leaving no issue, "as a widow may waive the provisions of her husband's will." But section 2925 (3) Pub. St., requires that the widow shall notify the court in writing of her election to make such waiver, and that the waiver shall be made within eight months after the will is proved, or after letters of administration have been granted upon his estate, or in such other time as the court in its discretion allows. It was held in Re Peck's Estate, 80 Vt. 469, 68 Atl. 433, that the words, "as a widow may waive the provisions," means "in the same manner." That case is also decisive that notice of such election must be given to the probate court within eight months unless the time is extended by the court. In the present case, as the waiver was not filed in said court nor brought to its knowledge, and no extension of time was granted or prayed for, the statute was not complied with, and there was in law no waiver. An intent to waive the provision of the will made known only by signing the paper was not sufficient. The acts of the husband and his attorney did not constitute an election, as a matter in pais, to waive the provisions of the will. In re Peck's Appeal, 80 Vt. 487, 68 Atl. 433.

The parol notice by the husband to the probate court at the time he presented the will for probate of his intention to waive the will can have no force; for, if for no other reason, the time when a waiver could be made had not then arrived.

Judgment reversed, and judgment that there was no waiver by William A. Baker in

was in the exercise of adequate care; defendant should not be penalized therefor. That fact did not destroy the right to concurrently use the street. It did not constitute a trap to deceive the public, or relieve the passenger from the duty of exercising care under the circumstances.

VINCENT et al. v. LAKE ERIE TRANSP. CO.

(Supreme Court of Minnesota. Jan. 14, 1910.)

WHARVES (§ 22*)—INJURY TO WHARF—LIABILITY OF SHIPOWNER.

Where, under stress of weather, a master, for the purpose of preserving his vessel, maintains her moorings to a dock after the full discharge of the vessel's cargo, and the dock is damaged by the striking and pounding of the vessel, the dock owner may recover from the shipowner for the injury sustained, although prudent seamanship required the master to follow the course pursued.

[Ed. Note.—For other cases, see Wharves, Cent. Dig. § 7; Dec. Dig. § 22.*]

Lewis and Jaggard, JJ., dissenting.

(Syllabus by the Court.)

Appeal from District Court, St. Louis County; J. D. Ensign, Judge.

Action by R. C. Vincent and others against the Lake Erie Transportation Company. Verdict for plaintiffs. From an order denying a new trial, defendant appeals. Affirmed.

H. R. Spencer, for appellant. Alford & Hunt, for respondents.

O'BRIEN, J. The steamship Reynolds, owned by the defendant, was for the purpose of discharging her cargo on November 27, 1905, moored to plaintiff's dock in Duluth. While the unloading of the boat was taking place a storm from the northeast developed, which at about 10 o'clock p. m., when the unloading was completed, had so grown in violence that the wind was then moving at 50 miles per hour and continued to increase during the night. There is some evidence that one, and perhaps two, boats were able to enter the harbor that night, but it is plain that navigation was practically suspended from the hour mentioned until the morning of the 29th, when the storm abated, and during that time no master would have been justified in attempting to navigate his vessel, if he could avoid doing so. After the discharge of the cargo the Reynolds signaled for a tug to tow her from the dock, but none could be obtained because of the severity of the storm. If the lines holding the ship to the dock had been cast off, she would doubtless have drifted away; but, instead, the lines were kept fast, and as soon as one parted or chafed it was replaced, sometimes with a larger one. The vessel lay upon the outside of the dock, her bow to the east, the wind and waves striking her starboard quarter with such force that she was constantly being lifted and thrown against the dock, resulting in its damage, as found by the jury, to the amount of $500.

We are satisfied that the character of the storm was such that it would have been highly imprudent for the master of the Reynolds to have attempted to leave the dock or to have permitted his vessel to drift away from it. One witness testified upon the trial that the vessel could have been warped into a slip, and that, if the attempt to bring the ship into the slip had failed, the worst that could have happened would be that the vessel would have been blown ashore upon a soft and muddy bank. The witness was not present in Duluth at the time of the storm, and, while he may have been right in his conclusions, those in charge of the dock and the vessel at the time of the storm were not required to use the highest human intelligence, nor were they required to resort to every possible experiment which could be suggested for the preservation of their property. Nothing more was demanded of them than ordinary prudence and care, and the record in this case fully sustains the contention of the appellant that, in holding the vessel fast to the dock, those in charge of her exercised good judgment and prudent seamanship.

It is claimed by the respondent that it was negligence to moor the boat at an exposed part of the wharf, and to continue in that position after it became apparent that the storm was to be more than usually severe. We do not agree with this position. The part of the wharf where the vessel was moored appears to have been commonly used for that purpose. It was situated within the harbor at Duluth, and must, we think, be considered a proper and safe place, and would undoubtedly have been such during what would be considered a very severe storm. The storm which made it unsafe was one which surpassed in violence any which might have reasonably been anticipated.

The appellant contends by ample assignments of error that, because its conduct during the storm was rendered necessary by prudence and good seamanship under conditions over which it had no control, it cannot be held liable for any injury resulting to the property of others, and claims that the jury should have been so instructed. An analysis of the charge given by the trial court is not necessary, as in our opinion the only question for the jury was the amount of damages which the plaintiffs were entitled to recover, and no complaint is made upon that score.

The situation was one in which the ordinary rules regulating property rights were suspended by forces beyond human control, and if, without the direct intervention of some act by the one sought to be held liable.

the property of another was injured, such injury must be attributed to the act of God, and not to the wrongful act of the person sought to be charged. If during the storm the Reynolds had entered the harbor, and while there had become disabled and been thrown against the plaintiffs' dock, the plaintiffs could not have recovered. Again, if while attempting to hold fast to the dock the lines had parted, without any negligence, and the vessel carried against some other boat or dock in the harbor, there would be no liability upon her owner. But here those in charge of the vessel deliberately and by their direct efforts held her in such a position that the damage to the dock resulted, and, having thus preserved the ship at the expense of the dock, it seems to us that her owners are responsible to the dock owners to the extent of the injury inflicted.

In Depue v. Flatau, 100 Minn. 299, 111 N. W. 1, 8 L. R. A. (N. S.) 485, this court held that where the plaintiff, while lawfully in the defendants' house, became so ill that he was incapable of traveling with safety, the defendants were responsible to him in damages for compelling him to leave the premises. If, however, the owner of the premises had furnished the traveler with proper accommodations and medical attendance, would he have been able to defeat an action brought against him for their reasonable worth?

In Ploof v. Putnam, 71 Atl. 188, 20 L. R. A. (N. S.) 152, the Supreme Court of Vermont held that where, under stress of weather, a vessel was without permission moored to a private dock at an island in Lake Champlain owned by the defendant, the plaintiff was not guilty of trespass, and that the defendant was responsible in damages because his representative upon the island unmoored the vessel, permitting it to drift upon the shore, with resultant injuries to it. If, in that case, the vessel had been permitted to remain, and the dock had suffered an injury, we believe the shipowner would have been held liable for the injury done.

Theologians hold that a starving man may, without moral guilt, take what is necessary to sustain life; but it could hardly be said that the obligation would not be upon such person to pay the value of the property so taken when he became able to do so. And so public necessity, in times of war or peace, may require the taking of private property for public purposes; but under our system of jurisprudence compensation must be made.

Let us imagine in this case that for the better mooring of the vessel those in charge of her had appropriated a valuable cable lying upon the dock. No matter how justifiable such appropriation might have been, it would not be claimed that, because of the overwhelming necessity of the situation, the owner of the cable could not recover its value.

Tnis is not a case where life or property was menaced by any object or thing belonging to the plaintiff, the destruction of which became necessary to prevent the threatened disaster. Nor is it a case where, because of the act of God, or unavoidable accident, the infliction of the injury was beyond the control of the defendant, but is one where the defendant prudently and advisedly availed itself of the plaintiffs' property for the purpose of preserving its own more valuable property, and the plaintiffs are entitled to compensation for the injury done.

Order affirmed.

LEWIS, J. I dissent. It was assumed on the trial before the lower court that appellant's liability depended on whether the master of the ship might, in the exercise of reasonable care, have sought a place of safety before the storm made it impossible to leave the dock. The majority opinion assumes that the evidence is conclusive that appellant moored its boat at respondent's dock pursuant to contract, and that the vessel was lawfully in position at the time the additional cables were fastened to the dock, and the reasoning of the opinion is that, because appellant made use of the stronger cables to hold the boat in position, it became liable under the rule that it had voluntarily made use of the property of another for the purpose of saving its own.

In my judgment, if the boat was lawfully in position at the time the storm broke, and the master could not, in the exercise of due care, have left that position without subjecting his vessel to the hazards of the storm, then the damage to the dock, caused by the pounding of the boat, was the result of an inevitable accident. If the master was in the exercise of due care, he was not at fault. The reasoning of the opinion admits that if the ropes, or cables, first attached to the dock had not parted, or if, in the first instance, the master had used the stronger cables, there would be no liability. If the master could not, in the exercise of reasonable care, have anticipated the severity of the storm and sought a place of safety before it became impossible, why should he be required to anticipate the severity of the storm, and, in the first instance, use the stronger cables?

I am of the opinion that one who constructs a dock to the navigable line of waters, and enters into contractual relations with the owner of a vessel to moor at the same, takes the risk of damage to his dock by a boat caught there by a storm, which event could not have been avoided in the exercise of due care, and further, that the legal status of the parties in such a case is not changed by renewal of cables to keep the boat from being cast adrift at the mercy of the tempest.

JAGGARD, J., concurs herein.

Harriet G. WEGNER, Petitioner, Appellant,

v.

MILWAUKEE MUTUAL INSURANCE COMPANY, Petitioner, Respondent,

The City of Minneapolis, Respondent.

No. C6-90-1400.

Supreme Court of Minnesota.

Dec. 13, 1991.

Rehearing Denied Jan. 27, 1992.

Homeowner sued insurer and city for damages caused by police who fired tear gas into home during course of apprehending armed suspect barricaded in home. The District Court, Hennepin County, Franklin Knoll, J., granted city's motion for summary judgment. Homeowner appealed. The Court of Appeals, 464 N.W.2d 543, affirmed. The Supreme Court, Tomljanovich, J., held that doctrine of public necessity did not insulate municipality from its liability to pay just compensation to homeowner.

Affirmed in part, reversed in part, and remanded.

1. Eminent Domain ⇐1

Just compensation clause of State Constitution imposes condition on exercise of state's inherent supremacy over private property rights. M.S.A. Const. Art. 1, § 13.

2. Eminent Domain ⇐1

Purpose of just compensation clause of State Constitution is to ensure that private landowners are compensated, not only for physical invasion of their property, but also for damages caused by state where no physical invasion has occurred. M.S.A. Const. Art. 1, § 13.

3. Eminent Domain ⇐13, 67

Significant restriction on recovery under just compensation clause of State Constitution is requirement that taking or damaging must be for public use; what constitutes public use is judicial question. M.S.A. Const. Art. 1, § 13.

4. Eminent Domain ⇐2(1.1)

Where innocent third-party's property is damaged by police in course of apprehending suspect, that property is "damaged" within meaning of just compensation clause of State Constitution. M.S.A. Const. Art. 1, § 13.

See publication Words and Phrases for other judicial constructions and definitions.

5. Eminent Domain ⇐2(1.1)

Doctrine of public necessity did not insulate municipality from liability to pay just compensation to innocent third party whose home was damaged by police in course of apprehending barricaded felony suspect. M.S.A. Const. Art. 1, § 13.

Syllabus by the Court

1. Article I, section 13 of the Minnesota Constitution requires a municipality to pay just compensation to an innocent third party whose home is damaged by police in the course of apprehending a barricaded felony suspect.

2. The doctrine of public necessity does not insulate a municipality from liability in such situations.

James P. Westphal, Victor P. Seiler & Associates, Minneapolis, for appellant.

William M. Drinane, Peterson, Bell, Converse & Jensen, for Milwaukee Mut. Ins. Co.

Gail Langfield, Marshall & Associates, P.A., Circle Pines, for City of Minneapolis.

Heard, considered and decided by the court en banc.

TOMLJANOVICH, Justice.

The Minneapolis police department severely damaged a house owned by Harriet G. Wegner while attempting to apprehend an armed suspect. Wegner sought compensation from the City of Minneapolis on trespass and constitutional "taking" theo-

ries. The district court granted the City's motion for summary judgment on the "taking" issue. The court of appeals affirmed, reasoning that although there was a "taking" within the meaning of the Minnesota Constitution, the "taking" was noncompensable under the doctrine of public necessity. We reverse.

The salient facts are not in dispute. Around 6:30 p.m. on August 27, 1986, Minneapolis police were staking out an address in Northeast Minneapolis in the hope of apprehending two suspected felons who were believed to be coming to that address to sell stolen narcotics. The suspects arrived at the address with the stolen narcotics. Before arrests could be made, however, the suspects spotted the police and fled in their car at a high rate of speed with the police in pursuit. Eventually, the suspects abandoned their vehicle, separated and fled on foot. The police exchanged gunfire with one suspect as he fled. This suspect later entered the house of Harriet G. Wegner (Wegner) and hid in the front closet. Wegner's granddaughter, who was living at the house, and her fiance then fled the premises and notified the police.

The police immediately surrounded the house and shortly thereafter called an "Operation 100" around 7:00 p.m. The term "Operation 100" refers to the calling of the Minneapolis Police Department's Emergency Response Unit (ERU) to the scene. The ERU, commonly thought of as a "SWAT" team, consists of personnel specially trained to deal with barricaded suspects, hostage-taking, or similar high-risk situations. Throughout the standoff, the police used a bullhorn and telephone in an attempt to communicate with the suspect. The police, receiving no response, continued efforts to establish contact with the suspect until around 10:00 p.m. At that time the police decided, according to ERU procedure, to take the next step in a barricaded suspect situation, which was to deliver chemical munitions. The police fired at least 25 rounds of chemical munitions or "tear gas" into the house in an attempt to expel the suspect. The police delivered the tear gas to every level of the house, breaking virtually every window in the process. In addition to the tear gas, the police cast three concussion or "flash-bang" grenades into the house to confuse the suspect. The police then entered the home and apprehended the suspect crawling out of a basement window.

The tear gas and flash-bang grenades caused extensive damage to the Wegner house. For example: a pink film from the tear gas covered the walls and furniture; some walls were dented from the impact of the tear gas canisters; one tear gas canister went through one of the upstairs walls. Wegner alleges damages of $71,000. The City denied Wegner's request for reimbursement, so she turned to her insurance carrier, Milwaukee Mutual Insurance Company (Milwaukee Mutual) for coverage. Milwaukee Mutual paid Wegner $26,595.88 for structural damage, $1,410.06 for emergency board and glass repair and denied coverage for the rest of the claim. Milwaukee Mutual is subrogated to the claims of Wegner against the City to the extent of its payments under the policy.

Wegner commenced an action against both the City of Minneapolis and Milwaukee Mutual to recover the remaining damages. In conjunction with a trespass claim against the City, Wegner asserted that the police department's actions constituted a compensable taking under Minn. Const. art. I, § 13. Milwaukee Mutual cross-claimed against the City for its subrogation interest and any additional amounts the insurer may be found liable for in the future.

Milwaukee Mutual and the City both brought motions for summary judgment on all claims. The district court granted partial summary judgment in favor of the City on the "taking" issue, holding that "Eminent domain is not intended as a limitation on [the] police power." Both Wegner and Milwaukee Mutual appealed the trial court's determination.

The court of appeals affirmed the trial court, reasoning that although there was a "taking" within the meaning of Minn. Const. art. I, § 13, the "taking" was noncompensable under the doctrine of public

necessity. *Wegner v. Milwaukee Mut. Ins. Co.*, 464 N.W.2d 543 (Minn.App.1990).

I.

[1] Article I, section 13, of the Minnesota Constitution provides: "Private property shall not be taken, destroyed or damaged for public use without just compensation, first paid or secured." This provision "imposes a condition on the exercise of the state's inherent supremacy over private property rights." *Johnson v. City of Plymouth*, 263 N.W.2d 603, 605 (Minn. 1978). This type of constitutional inhibition "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 1569, 4 L.Ed.2d 1554 (1960).

[2, 3] The purpose of the damage clause is to ensure that private landowners are compensated, not only for physical invasion of their property, but also damages caused by the state where no physical invasion has occurred. *In re Hull*, 163 Minn. 439, 451, 204 N.W. 534, 539 (1925), *error dismissed sub nom., Breen v. Hull*, 275 U.S. 491, 48 S.Ct. 33, 72 L.Ed. 390 (1927).[1] A more significant restriction on recovery under this provision is the requirement that the taking or damaging must be for a public use. *AFSCME Councils 6, 14, 65 and 96 v. Sundquist*, 338 N.W.2d 560, 575 (Minn. 1983), *appeal dismissed sub nom., Minneapolis Police Relief Assn. v. Sundquist*, 466 U.S. 933, 104 S.Ct. 1902, 80 L.Ed.2d 452 (1984). What constitutes a public use under this provision is a judicial question which this court historically construes broadly. *City of Duluth v. State*, 390 N.W.2d 757, 763 (Minn.1986).

The City contends there was no taking for a public use because the actions of the police constituted a legitimate exercise of the police power. The police power in its nature is indefinable.[2] *Kiges v. City of St. Paul*, 240 Minn. 522, 530, 62 N.W.2d 363, 369 (1953). However, simply labeling the actions of the police as an exercise of the police power "cannot justify the disregard of the constitutional inhibitions." *Petition of Dreosch*, 233 Minn. 274, 282, 47 N.W.2d 106, 111 (1951).

The City argues that Wegner and Milwaukee Mutual are confusing the concept of police power and eminent domain. We agree that this is not an eminent domain action and should not be analyzed as such. This action is based on the plain meaning of the language of Minn. Const. art I, § 13, which requires compensation when property is damaged for a public use. Consequently, the issue in this case is not the reasonableness of the use of chemical munitions to extricate the barricaded suspect but rather whether the exercise of the city's admittedly legitimate police power resulted in a "taking".

In resolving this case of first impression, the well-reasoned decision of *Steele v. City of Houston*, 603 S.W.2d 786 (Tex.1980) provides guidance. In *Steele*, the Texas Supreme Court addressed a constitutional taking claim involving facts strikingly similar to the present case. There, a group of escaped prisoners had taken refuge in a house apparently selected at random. After discovering the prisoners in the house, the Houston police discharged incendiary material into the house for the purpose of causing the house to catch fire. The police

1. *Hull* defines the term 'damaged' as referring to damages which could have been recovered at common law had the acts been done without statutory or constitutional authority. The harm suffered must be individual and not the same suffered by the public as a whole. *Id.*, 163 Minn. at 450–51, 204 N.W. at 538–39.

2. One commentator explained:

> [The police power] is used by the court to identify those state and local governmental restrictions and prohibitions which are valid and which may be invoked without payment of compensation. In its best known and most traditional uses, the police power is employed to protect the health, safety, and morals of the community in the form of such things as fire regulations, garbage disposal control, and restrictions upon prostitution and liquor. But it has never been thought that government authority under the police power was limited to those narrow uses.

Sax, *Takings and the Police Power*, 74 Yale L.J. 36, n. 6 (1966).

allegedly let the house burn, even after the fire department arrived, in order to ensure all the prisoners had been forced out. The court, interpreting the taking provision of the Texas Constitution, which is virtually identical to the Minnesota taking provision,[3] stated, "this court has moved beyond the earlier notion that the government's duty to pay for taking property rights is excused by labeling the taking as an exercise of police powers." *Id.* at 789. In discussing the city's governmental immunity argument, the court stated:

> The Constitution itself is the authorization for compensation for the destruction of property and is a waiver of governmental immunity for the taking, damaging or destruction of property for public use.

The court further stated:

> The City argues that the destruction of the property as a means to apprehend escapees is a classic instance of police power exercised for the safety of the public. We do not hold that the police officers wrongfully ordered the destruction of the dwelling; we hold that the innocent third parties are entitled by the Constitution to compensation for their property.[4]

Id. at 791, 793. The court reversed the grant of summary judgment and remanded the case to the trial court so the plaintiffs could prove that the house was intentionally set on fire and that the destruction of the house and its contents was for a public use.

It is unnecessary to remand this case for a determination of whether the police intentionally damaged the Wegner house for a public use. It is undisputed the police intentionally fired tear gas and concussion grenades into the Wegner house. Similarly, it is clear that the damage inflicted by the police in the course of capturing a dangerous suspect was for a public use within the meaning of the constitution.

The court of appeals cited the *Steele* decision for the simple proposition that the apprehension of criminal suspects has been held to be a public use but did not address the rest of the case despite the factual similarities to the case at bar. Instead, the court of appeals placed heavy reliance on the Georgia Intermediate Court of Appeals case of *McCoy v. Sanders*, 113 Ga.App. 565, 148 S.E.2d 902 (1966). The *McCoy* court held the draining of a pond by the police while searching for a murder victim's body was a proper exercise of the police power not requiring compensation under the Georgia Constitution. *Id.*, 113 Ga.App. at 566, 148 S.E.2d at 903. As in *Steele*, the Georgia Constitution also mirrors the Minnesota Constitution.[5] The Georgia courts, however, interpret the damage provision of their constitution as limited to those situations where there is physical interference with the property "in connection with an improvement for public use." *Id.*, 113 Ga.App. at 569, 148 S.E.2d at 905. This court never has held that the takings provision of Minn. Const. art. I, § 13 is to be applied in such a limited way. *See Dreosch*, 233 Minn. at 281, 47 N.W.2d at 110. We believe the *Steele* decision is more directly on point and provides a much better analysis than *McCoy*.

[4] We hold that where an innocent third party's property is damaged by the police in the course of apprehending a sus-

3. Article I, Section 17 of the Texas Constitution provides:

> No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person; and, when taken, except for the use of the State, such compensation shall be first made, or secured by a deposit of money * * *.

4. It is noteworthy that the Texas court did not address the lawfulness of the police actions in this case. The court did not need to reach that issue because it only needed to decide whether the house was damaged for a public use. *See Ginter v. Stallcup*, 869 F.2d 384, 388 n. 5 (8th Cir.1989). Correspondingly, this court need not address the propriety of the police's actions but need only resolve the issue of whether the conduct of the police gives rise to a right of compensation for the damage.

5. Article I, Section III, Paragraph I of the Georgia Constitution provides:

> Private property shall not be taken, or damaged, for public purposes, without just and adequate compensation being first paid.

pect, that property is damaged within the meaning of the constitution.

II.

[5] We briefly address the application of the doctrine of public necessity to these facts. The Restatement (Second) of Torts § 196 describes the doctrine as follows:

> One is privileged to enter land in the possession of another if it is, or if the actor reasonably believes it to be, necessary for the purpose of averting an imminent public disaster.[6]

See McDonald v. City of Red Wing, 13 Minn. 38 (Gil. 25) (1868) (city excused from paying compensation under the doctrine of "public safety" where city officers destroyed building to prevent the spread of fire). Prosser, apparently somewhat troubled by the potential harsh outcomes of this doctrine, states:

> It would seem that the moral obligation upon the group affected to make compensation in such a case should be recognized by the law, but recovery usually has been denied.

Prosser and Keeton, *The Law of Torts,* § 24 (5th ed. 1984); *see also Restatement (Second) of Torts* § 196 comment h. Here, the police were attempting to apprehend a dangerous felon who had fired shots at pursuing officers. The capture of this individual most certainly was beneficial to the whole community. In such circumstances, an individual in Wegner's position should not be forced to bear the entire cost of a benefit conferred on the community as a whole.

Although the court of appeals found there to be a "taking" under Minn. Const. art. I, § 13, the court ruled the "taking" was noncompensable based on the doctrine of public necessity. We do not agree. Once a "taking" is found, compensation is required by operation of law. Thus, if the doctrine of public necessity were to apply to a given fact situation, no taking could be found under Minn. Const. art. I, § 13.

We are not inclined to allow the city to defend its actions on the grounds of public necessity under the facts of this case. *But see Steele,* 603 S.W.2d at 792. We believe the better rule, in situations where an innocent third party's property is taken, damaged or destroyed by the police in the course of apprehending a suspect, is for the municipality to compensate the innocent party for the resulting damages. The policy considerations in this case center around the basic notions of fairness and justice. At its most basic level, the issue is whether it is fair to allocate the entire risk of loss to an innocent homeowner for the good of the public. We do not believe the imposition of such a burden on the innocent citizens of this state would square with the underlying principles of our system of justice. Therefore, the City must reimburse Wegner for the losses sustained.

As a final note, we hold that the individual police officers, who were acting in the public interest, cannot be held personally liable. Instead, the citizens of the City should all bear the cost of the benefit conferred.

The judgments of the courts below are reversed and the cause remanded for trial on the issue of damages.

Affirmed in part, reversed in part and remanded.

6. Prosser explains:

> Where the danger affects the entire community, or so many people that the public interest is involved, that interest serves as a complete justification to the defendant who acts to avert the peril to all. Thus, one who dynamites a house to stop the spread of a conflagration that threatens a town, or shoots a mad dog in the street, or burns clothing infected with smallpox germs, or in time of war, destroys property which should not be allowed to fall into the hands of the enemy, is not liable to the owner, so long as the emergency is great enough, and he has acted reasonably under the circumstances. This notion does not require the "champion of the public" to pay for the general salvation out of his own pocket. The number of persons who must be endangered in order to create a public necessity has not been determined by the courts.

Prosser and Keeton, *The Law of Torts,* § 24 (5th ed.1984).

oath is according to the form and effect of stat. 27 Eliz. and according to the count?

Mich. 6. Jac. Rot. 639. Robert Banks, gent. brought an action upon the statute of Winton, 13 Ed. 1. against the inhabitants of the hundred of Burnham in the county of Bucks; and counted, that certain misdoers, to the plaintiff unknown, at Hitcham, in the county aforesaid, which town is in the hundred of Burnham, the 22 Nov. anno regni Regis Jacobi 5. assaulted the plaintiff, and robbed him of 25l. 3s. 2d. *ob.*; and that the plaintiff immediately after the robbery, *scil.* the 22d of Nov. at Joplow and Manlow, in the county aforesaid, which were towns next the said town of Hitcham, within the said hundred, made hue and cry of the said robbery, and gave notice of the said robbery to the inhabitants of the said towns of Joplow and Manlow; and after the said robbery, and within twenty days before the purchase of the writ, *scil.* 19th day of Feb. anno 5, at Dorney in the county aforesaid, the plaintiff, before Sir Wm. Gerrard, Knt. then justice of peace within the same county, an inhabitant next to the said hundred, being examined upon his oath, according to the statute of 27 El. the plaintiff upon his oath said, that he did not know the parties who did rob him, nor any of them: and since the said robbery are forty days past, and the inhabitants of the said hundred of Burnham have not made amends of the said robbery to the plaintiff, nor the body of the felons and misdoers aforesaid, nor any of them have taken, nor answered their bodies, nor the bodies of them, but have suffered the felons to escape. To which the defendants plead (not guilty) and a *venire facias* was awarded to the sheriff, *de vicineto* of the hundred of Stoke, which is the hundred next adjacent to the said hundred of Burnham: and the jury gave a special verdict; they found that the plaintiff was robbed, and that he made hue and cry in manner and form, as he hath counted, and found over, that the plaintiff was sworn before the said Sir William Gerrard, then being a justice of peace within the same county, and an inhabitant next unto the hundred of Burnham, and said upon his oath in these English words, "that he, on Thursday, being the two and twentieth day of November, 1608, riding under Hitcham Wood, in the parish of Hitcham, within the hundred of Burnham, was then and there set upon by two horsemen, which then, nor at this present he did, nor doth know, and by them robbed and spoiled of the just sum of 25l. 3s. 2d. *ob.* not without great danger of his life:" but whether the said oath so taken is true, according to the form and effect of the said Act of 27 El. and according to the count, and jurors pray the direction of the Court (A).

[63] MOUSE'S CASE.

Mich. 6. Jac. 1.

If a ferryman surcharge a barge, any passenger may cast the things out of the barge, in case of necessity, for the safety of the lives of the passengers; and the owners shall have their remedy against the ferryman.

If there be no surcharge, and the danger accrued only by the act of God, no default being in the ferryman, every one ought to bear his own loss.

If a tempest arise at sea, *levandi navis causâ*, and for the salvation of the lives of the men, passengers may cast over the merchandizes, &c.

In an action of trespass brought by Mouse, for a casket, and a hundred and thirteen pounds, taken and carried away, the case was, the ferryman of Gravesend, took forty-seven passengers into his barge, to pass to London, and Mouse was one of them, and the barge being upon the water, a great tempest happened, and a strong wind, so that the barge and all the passengers were in danger to be drowned, if a hogshead of wine and other ponderous things were not cast out, for the safeguard of the lives of the

(A) *Vid.* the notes of Serjt. Williams, *Pinkney* v. *Inhabitants de Rotel*, 2 Saund. 374, for the proceedings against the hundred, upon the Statute of Hue and Cry.

men: it was resolved *per totam Curiam*, that in case of necessity, for the saving of the lives of the passengers, it was lawful to the defendant, being a passenger, to cast the casket of the plaintiff out of the barge, with the other things in it; for *quod quis ob tutelam corporis sui fecerit, jure id fecisse videtur*, to which the defendant pleads all this special matter; and the plaintiff replies, *de injuria sua propria absque tali causa:* and the first day of this term, this issue was tried, and it was proved directly, that if the things had not been cast out of the barge, the passengers had been drowned; and that *levandi causa* they were ejected, some by one passenger, and some by another; and upon this the plaintiff was nonsuit.

It was also resolved, that although the ferryman surcharge the barge, yet for safety of the lives of passengers in such a time and accident of necessity, it is lawful for any passenger to cast the things out of the barge: and the owners shall have their remedy upon the surcharge against the ferryman, for the fault was in him upon the surcharge; but if no surcharge was, but the danger accrued only by the act of God, as by tempest, no default being in the ferryman, everyone ought to bear his loss for the safeguard and life of a man: for *interest reipublicæ quod homines conserventur*, 8 Ed. 4. 23, &c. 12 H. 8. 15. 28 H. 8. Dyer, 36. plucking down of a house, in time of fire, &c. and this *pro bono publico; et conservatio vitæ hominis est bonum publicum.* So if a tempest arise in the sea, *levandi navis causa*, and for salvation of the lives of men, it may be lawful for passengers to cast over the merchandizes, &c.

Prohibitions Del Roy.

Mich. 5 Jacobi 1.

The King in his own person cannot adjudge any case, either criminal or betwixt party and party; but it ought to be determined and adjudged in some Court of Justice, according to the law and custom of England.

The King may sit in the King's Bench, but the Court gives the judgment. No King after the conquest assumed to himself to give any judgment in any cause whatsoever which concerned the administration of justice, within the realm; but these causes were solely determined in the Courts of Justice.

The King cannot arrest any man.

4 Inst. 71. Com. Dig. Courts, A. See and note the introduction to Gibson's Codex, p. 20, 21.

Note, upon Sunday the 10th of November in this same term, the King, upon complaint made to him by Bancroft, Archbishop of Canterbury, concerning prohibitions, the King was informed, that when the question was made of what matters the Ecclesiastical Judges have cognizance, either upon the exposition of the statutes concerning tithes, or any other thing ecclesiastical, or upon the statute 1 El. concerning the high commission or in any other case in which there is not express authority in law, the King himself may decide it in his Royal person; and that the Judges are but the delegates of the King, and that the King may take what causes he shall please to determine, from the determination of the Judges, and may determine them himself. And the Archbishop said, that this was clear in divinity, that such authority belongs to the King by the word of God in the Scripture. To which it was answered by me, in the presence, and with the clear consent of all the Judges of England, and Barons of the Exchequer, that the King in his own [64] person cannot adjudge any case, either criminal, as treason, felony, &c. or betwixt party and party, concerning his inheritance, chattels, or goods, &c. but this ought to be determined and adjudged in some Court of Justice, according to the law and custom of England; and always judgments are given, *ideo consideratum est per Curiam*, so that the Court gives the judgment; and the King hath his Court, viz. in the Upper House of Parliament, in which he with his Lords is the supreme Judge over all other Judges; for if error be in the Common Pleas, that may be reversed in the King's Bench; and if the Court of King's Bench err, that may be reversed in the Upper House of Parliament,

26 N.Y.2d 219

Oscar H. BOOMER et al., Appellants,

v.

ATLANTIC CEMENT COMPANY, Inc., Respondent. (And Five Other Actions.)

Charles J. MEILAK et al., Appellants,

v.

ATLANTIC CEMENT COMPANY, Inc., Respondent.

Court of Appeals of New York.

March 4, 1970.

Actions by landowners for injunction restraining operator of cement plant from emitting dust and raw materials and conducting excessive blasting in operating its plant and for damages sustained as result of nuisance so created. The Supreme Court, Trial Term, Albany County, R. Waldron Herzberg, J., 55 Misc.2d 1023, 287 N.Y.S.2d 112, entered judgment for cement company which was affirmed by the Supreme Court, Appellate Division, 30 A. D.2d 480, 294 N.Y.S.2d 452. Judgment for cement company in second action was affirmed by the Supreme Court, Appellate Division, 31 A.D.2d 578, 295 N.Y.S.2d 622. From orders of the Appellate Division appeals were taken. The Court of Appeals, Bergan, J., held that where neighboring landowners sustained injury to property from dirt, smoke and vibration emanating from defendant's cement plant, and defendant's investment in plant was in excess of $45,000,000 and over 300 people were employed in the plant, and it appeared unlikely that techniques to eliminate annoying by-products of cement making were unlikely to be developed by any research defendant could undertake within any short period, injunction would be conditioned on payment by defendant and acceptance by landowners of permanent damages in compensation for servitude on the land.

Reversed and cases remitted with directions.

Jasen, J., dissented in part.

1. Health ⇐28

Court in resolving private litigation should not undertake to lay down and implement a policy for the elimination of air pollution.

2. Nuisance ⇐25(2)

Nuisance will be enjoined although marked disparity be shown in economic consequence between effect of injunction and effect of the nuisance.

3. Nuisance ⇐25(2)

Where neighboring landowners sustained injury to property from dirt, smoke and vibration emanating from defendant's cement plant, and defendant's investment in plant was in excess of $45,000,000 and over 300 people were employed in the plant, and it appeared unlikely that techniques to eliminate annoying by-products of cement making were unlikely to be developed by any research defendant could undertake within any short period, injunction would be conditioned on payment by defendant and acceptance by landowners of permanent damages in compensation for servitude on the land.

4. Judgment ⇐702

Limitation of relief granted landowners complaining of injury to property from dirt, smoke and vibration emanating from defendant's plant to an injunction conditioned on payment of permanent damages to landowners would not foreclose public health or other public agencies from seeking proper relief in a proper court.

5. Nuisance ⇐41

Where nuisance is of such permanent and unabatable character that a single recovery can be had, including the whole damage past and future resulting therefrom, there can be but one recovery.

6. Judgment ⇐606

Nuisance ⇐56

Judgment allowing permanent damages to landowners alleging injury to property

from dirt, smoke and vibration emanating from defendant's cement plant would preclude future recovery by landowners or their grantees, and judgment should contain provision that payment by defendant and acceptance by landowners of permanent damages would be in compensation for servitude on land.

E. David Duncan, Albany, for appellants Oscar H. Boomer, and others.

Daniel H. Prior, Jr. and John J. Biscone, Albany, for appellants Charles J. Meilak, and others.

Thomas F. Tracy and Frank J. Warner, Jr., Albany, for respondent.

BERGAN, Judge.

Defendant operates a large cement plant near Albany. These are actions for injunction and damages by neighboring land owners alleging injury to property from dirt, smoke and vibration emanating from the plant. A nuisance has been found after trial, temporary damages have been allowed; but an injunction has been denied.

The public concern with air pollution arising from many sources in industry and in transportation is currently accorded ever wider recognition accompanied by a growing sense of responsibility in State and Federal Governments to control it. Cement plants are obvious sources of air pollution in the neighborhoods where they operate.

But there is now before the court private litigation in which individual property owners have sought specific relief from a single plant operation. The threshold question raised by the division of view on this appeal is whether the court should resolve the litigation between the parties now before it as equitably as seems possible; or whether, seeking promotion of the general public welfare, it should channel private litigation into broad public objectives.

A court performs its essential function when it decides the rights of parties before it. Its decision of private controversies may sometimes greatly affect public issues. Large questions of law are often resolved by the manner in which private litigation is decided. But this is normally an incident to the court's main function to settle controversy. It is a rare exercise of judicial power to use a decision in private litigation as a purposeful mechanism to achieve direct public objectives greatly beyond the rights and interests before the court.

Effective control of air pollution is a problem presently far from solution even with the full public and financial powers of government. In large measure adequate technical procedures are yet to be developed and some that appear possible may be economically impracticable.

It seems apparent that the amelioration of air pollution will depend on technical research in great depth; on a carefully balanced consideration of the economic impact of close regulation; and of the actual effect on public health. It is likely to require massive public expenditure and to demand more than any local community can accomplish and to depend on regional and interstate controls.

[1] A court should not try to do this on its own as a by-product of private litigation and it seems manifest that the judicial establishment is neither equipped in the limited nature of any judgment it can pronounce nor prepared to lay down and implement an effective policy for the elimination of air pollution. This is an area beyond the circumference of one private lawsuit. It is a direct responsibility for government and should not thus be undertaken as an incident to solving a dispute between property owners and a single cement plant—one of many—in the Hudson River valley.

The cement making operations of defendant have been found by the court at Special Term to have damaged the nearby

properties of plaintiffs in these two actions. That court, as it has been noted, accordingly found defendant maintained a nuisance and this has been affirmed at the Appellate Division. The total damage to plaintiffs' properties is, however, relatively small in comparison with the value of defendant's operation and with the consequences of the injunction which plaintiffs seek.

The ground for the denial of injunction, notwithstanding the finding both that there is a nuisance and that plaintiffs have been damaged substantially, is the large disparity in economic consequences of the nuisance and of the injunction. This theory cannot, however, be sustained without overruling a doctrine which has been consistently reaffirmed in several leading cases in this court and which has never been disavowed here, namely that where a nuisance has been found and where there has been any suhstantial damage shown by the party complaining an injunction will be granted.

[2] The rule in New York has been that such a nuisance will be enjoined although marked disparity be shown in economic consequence between the effect of the injunction and the effect of the nuisance.

The problem of disparity in economic consequence was sharply in focus in Whalen v. Union Bag & Paper Co., 208 N.Y. 1, 101 N.E. 805. A pulp mill entailing an investment of more than a million dollars polluted a stream in which plaintiff, who owned a farm, was "a lower riparian owner". The economic loss to plaintiff from this pollution was small. This court, reversing the Appellate Division, reinstated the injunction granted by the Special Term against the argument of the mill owner that in view of "the slight advantage to plaintiff and the great loss that will be inflicted on defendant" an injunction should not be granted (p. 2, 101 N.E. p. 805). "Such a balancing of injuries cannot be justified by the circumstances of this case", Judge Werner noted (p. 4, 101 N.E. p. 805). He continued: "Although the damage to the plaintiff may be slight as compared with the defendant's expense of abating the condition, that is not a good reason for refusing an injunction" (p. 5, 101 N.E. p. 806).

Thus the unconditional injunction granted at Special Term was reinstated. The rule laid down in that case, then, is that whenever the damage resulting from a nuisance is found not "unsubstantial", viz., $100 a year, injunction would follow. This states a rule that had been followed in this court with marked consistency (McCarty v. Natural Carbonic Gas Co., 189 N.Y. 40, 81 N.E. 549; Strobel v. Kerr Salt Co., 164 N.Y. 303, 58 N.E. 142; Campbell v. Seaman, 63 N.Y. 568).

There are cases where injunction has been denied. McCann v. Chasm Power Co., 211 N.Y. 301, 105 N.E. 416 is one of them. There, however, the damage shown by plaintiffs was not only unsubstantial, it was non-existent. Plaintiffs owned a rocky bank of the stream in which defendant had raised the level of the water. This had no economic or other adverse consequence to plaintiffs, and thus injunctive relief was denied. Similar is the basis for denial of injunction in Forstmann v. Joray Holding Co., 244 N.Y. 22, 154 N.E. 652 where no benefit to plaintiffs could be seen from the injunction sought (p. 32, 154 N.E. 655). Thus if, within Whalen v. Union Bag & Paper Co., *supra* which authoritatively states the rule in New York, the damage to plaintiffs in these present cases from defendant's cement plant is "not unsubstantial", an injunction should follow.

Although the court at Special Term and the Appellate Division held that injunction should be denied, it was found that plaintiffs had been damaged in various specific amounts up to the time of the trial and damages to the respective plaintiffs were awarded for those amounts. The effect of this was, injunction having been denied, plaintiffs could maintain successive actions

at law for damages thereafter as further damage was incurred.

The court at Special Term also found the amount of permanent damage attributable to each plaintiff, for the guidance of the parties in the event both sides stipulated to the payment and acceptance of such permanent damage as a settlement of all the controversies among the parties. The total of permanent damages to all plaintiffs thus found was $185,000. This basis of adjustment has not resulted in any stipulation by the parties.

This result at Special Term and at the Appellate Division is a departure from a rule that has become settled; but to follow the rule literally in these cases would be to close down the plant at once. This court is fully agreed to avoid that immediately drastic remedy; the difference in view is how best to avoid it.*

[3] One alternative is to grant the injunction but postpone its effect to a specified future date to give opportunity for technical advances to permit defendant to eliminate the nuisance; another is to grant the injunction conditioned on the payment of permanent damages to plaintiffs which would compensate them for the total economic loss to their property present and future caused by defendant's operations. For reasons which will be developed the court chooses the latter alternative.

If the injunction were to be granted unless within a short period—e. g., 18 months—the nuisance be abated by improved methods, there would be no assurance that any significant technical improvement would occur.

The parties could settle this private litigation at any time if defendant paid enough money and the imminent threat of closing the plant would build up the pressure on defendant. If there were no improved techniques found, there would inevitably be applications to the court at Special Term for extensions of time to perform on showing of good faith efforts to find such techniques.

Moreover, techniques to eliminate dust and other annoying by-products of cement making are unlikely to be developed by any research the defendant can undertake within any short period, but will depend on the total resources of the cement industry nationwide and throughout the world. The problem is universal wherever cement is made.

For obvious reasons the rate of the research is beyond control of defendant. If at the end of 18 months the whole industry has not found a technical solution a court would be hard put to close down this one cement plant if due regard be given to equitable principles.

On the other hand, to grant the injunction unless defendant pays plaintiffs such permanent damages as may be fixed by the court seems to do justice between the contending parties. All of the attributions of economic loss to the properties on which plaintiffs' complaints are based will have been redressed.

[4] The nuisance complained of by these plaintiffs may have other public or private consequences, but these particular parties are the only ones who have sought remedies and the judgment proposed will fully redress them. The limitation of relief granted is a limitation only within the four corners of these actions and does not foreclose public health or other public agencies from seeking proper relief in a proper court.

It seems reasonable to think that the risk of being required to pay permanent damages to injured property owners by cement plant owners would itself be a reasonable effective spur to research for improved techniques to minimize nuisance.

* Respondent's investment in the plant is in excess of $45,000,000. There are over 300 people employed there.

The power of the court to condition on equitable grounds the continuance of an injunction on the payment of permanent damages seems undoubted. (See, e. g., the alternatives considered in McCarty v. Natural Carbonic Gas Co., *supra*, as well as Strobel v. Kerr Salt Co., *supra*.)

[5] The damage base here suggested is consistent with the general rule in those nuisance cases where damages are allowed. "Where a nuisance is of such a permanent and unabatable character that a single recovery can be had, including the whole damage past and future resulting therefrom, there can be but one recovery" (66 C.J.S. Nuisances § 140, p. 947). It has been said that permanent damages are allowed where the loss recoverable would obviously be small as compared with the cost of removal of the nuisance (Kentucky-Ohio Gas Co. v. Bowling, 264 Ky. 470, 477, 95 S.W.2d 1).

The present cases and the remedy here proposed are in a number of other respects rather similar to Northern Indiana Public Service Co. v. W. J. & M. S. Vesey, 210 Ind. 338, 200 N.E. 620 decided by the Supreme Court of Indiana. The gases, odors, ammonia and smoke from the Northern Indiana company's gas plant damaged the nearby Vesey greenhouse operation. An injunction and damages were sought, but an injunction was denied and the relief granted was limited to permanent damages "present, past, and future" (p. 371, 200 N. E. 620).

Denial of injunction was grounded on a public interest in the operation of the gas plant and on the court's conclusion "that less injury would be occasioned by requiring the appellant [Public Service] to pay the appellee [Vesey] all damages suffered by it * * * than by enjoining the operation of the gas plant; and that the maintenance and operation of the gas plant should not be enjoined" (p. 349, 200 N.E. p. 625).

The Indiana Supreme Court opinion continued: "When the trial court refused injunctive relief to the appellee upon the ground of public interest in the continuance of the gas plant, it properly retained jurisdiction of the case and awarded full compensation to the appellee. This is upon the general equitable principle that equity will give full relief in one action and prevent a multiplicity of suits" (pp. 353–354, 200 N.E. p. 627).

It was held that in this type of continuing and recurrent nuisance permanent damages were appropriate. See, also, City of Amarillo v. Ware, 120 Tex. 456, 40 S.W. 2d 57 where recurring overflows from a system of storm sewers were treated as the kind of nuisance for which permanent depreciation of value of affected property would be recoverable.

There is some parallel to the conditioning of an injunction on the payment of permanent damages in the noted "elevated railway cases" (Pappenheim v. Metropolitan El. Ry. Co., 128 N.Y. 436, 28 N.E. 518 and others which followed). Decisions in these cases were based on the finding that the railways created a nuisance as to adjacent property owners, but in lieu of enjoining their operation, the court allowed permanent damages.

Judge Finch, reviewing these cases in Ferguson v. Village of Hamburg, 272 N.Y. 234, 239–240, 5 N.E.2d 801, 803, said: "The courts decided that the plaintiffs had a valuable right which was being impaired, but did not grant an absolute injunction or require the railway companies to resort to separate condemnation proceedings. Instead they held that a court of equity could ascertain the damages and grant an injunction which was not to be effective unless the defendant failed to pay the amount fixed as damages for the past and permanent injury inflicted." (See, also, Lynch v. Metropolitan El. Ry. Co., 129 N.Y. 274, 29 N.E. 315; Van Allen v. New York El. R. R. Co., 144 N.Y. 174, 38 N.E. 997; Cox v. City of New York, 265 N.Y. 411, 193 N.E. 251, and similarly, Westphal v. City of New York, 177 N.Y. 140, 69 N.E. 369.)

Thus it seems fair to both sides to grant permanent damages to plaintiffs which will terminate this private litigation. The theory of damage is the "servitude on land" of plaintiffs imposed by defendant's nuisance. (See United States v. Causby, 328 U.S. 256, 261, 262, 267, 66 S.Ct. 1062, 90 L.Ed. 1206, where the term "servitude" addressed to the land was used by Justice Douglas relating to the effect of airplane noise on property near an airport.)

[6] The judgment, by allowance of permanent damages imposing a servitude on land, which is the basis of the actions, would preclude future recovery by plaintiffs or their grantees (see Northern Indiana Public Serv. Co. v. W. J. & M. S. Vesey, *supra*, p. 351, 200 N.E. 620).

This should be placed beyond debate by a provision of the judgment that the payment by defendant and the acceptance by plaintiffs of permanent damages found by the court shall be in compensation for a servitude on the land.

Although the Trial Term has found permanent damages as a possible basis of settlement of the litigation, on remission the court should be entirely free to re-examine this subject. It may again find the permanent damage already found; or make new findings.

The orders should be reversed, without costs, and the cases remitted to Supreme Court, Albany County to grant an injunction which shall be vacated upon payment by defendant of such amounts of permanent damage to the respective plaintiffs as shall for this purpose be determined by the court.

JASEN, Judge (dissenting).

I agree with the majority that a reversal is required here, but I do not subscribe to the newly enunciated doctrine of assessment of permanent damages, in lieu of an injunction, where substantial property rights have been impaired by the creation of a nuisance.

It has long been the rule in this State, as the majority acknowledges, that a nuisance which results in substantial continuing damage to neighbors must be enjoined. (Whalen v. Union Bag & Paper Co., 208 N.Y. 1, 101 N.E. 805; Campbell v. Seaman, 63 N.Y. 568; see, also, Kennedy v. Moog Servocontrols, 21 N.Y.2d 966, 290 N.Y.S.2d 193, 237 N.E.2d 356.) To now change the rule to permit the cement company to continue polluting the air indefinitely upon the payment of permanent damages is, in my opinion, compounding the magnitude of a very serious problem in our State and Nation today.

In recognition of this problem, the Legislature of this State has enacted the Air Pollution Control Act (Public Health Law, Consol.Laws, c. 45, §§ 1264 to 1299–m) declaring that it is the State policy to require the use of all available and reasonable methods to prevent and control air pollution (Public Health Law § 1265 [1]).

The harmful nature and widespread occurrence of air pollution have been extensively documented. Congressional hearings have revealed that air pollution causes substantial property damage, as well as being a contributing factor to a rising incidence of lung cancer, emphysema, bronchitis and asthma.[2]

The specific problem faced here is known as particulate contamination because of the fine dust particles emanating from defendant's cement plant. The particular type of nuisance is not new, having appeared in many cases for at least the past 60 years. (See Hulbert v. California Portland Cement Co., 161 Cal. 239, 118 P.

1. See, also, Air Quality Act of 1967, 81 U.S.Stat. 485 (1967).

2. See U.S.Cong., Senate Comm. on Public Works, Special Subcomm. on Air and Water Pollution, Air Pollution 1966, 89th Cong., 2d Sess., 1966, at pp. 22–24; U.S. Cong., Senate Comm. on Public Works, Special Subcomm. on Air and Water Pollution, Air Pollution 1968, 90th Cong., 2d Sess., 1968, at pp. 850, 1084.

928 [1911].) It is interesting to note that cement production has recently been identified as a significant source of particulate contamination in the Hudson Valley.[3] This type of pollution, wherein very small particles escape and stay in the atmosphere, has been denominated as the type of air pollution which produces the greatest hazard to human health.[4] We have thus a nuisance which not only is damaging to the plaintiffs,[5] but also is decidedly harmful to the general public.

I see grave dangers in overruling our long-established rule of granting an injunction where a nuisance results in substantial continuing damage. In permitting the injunction to become inoperative upon the payment of permanent damages, the majority is, in effect, licensing a continuing wrong. It is the same as saying to the cement company, you may continue to do harm to your neighbors so long as you pay a fee for it. Furthermore, once such permanent damages are assessed and paid, the incentive to alleviate the wrong would be eliminated, thereby continuing air pollution of an area without abatement.

It is true that some courts have sanctioned the remedy here proposed by the majority in a number of cases,[6] but none of the authorities relied upon by the majority are analogous to the situation before us. In those cases, the courts, in denying an injunction and awarding money damages, grounded their decision on a showing that the use to which the property was intended to be put was primarily for the public benefit. Here, on the other hand, it is clearly established that the cement company is creating a continuing air pollution nuisance primarily for its own private interest with no public benefit.

This kind of inverse condemnation (Ferguson v. Village of Hamburg, 272 N.Y. 234, 5 N.E.2d 801) may not be invoked by a private person or corporation for private gain or advantage. Inverse condemnation should only be permitted when the public is primarily served in the taking or impairment of property. (Matter of New York City Housing Auth. v. Muller, 270 N.Y. 333, 343, 1 N.E.2d 153, 156; Pocantico Water Works Co. v. Bird, 130 N.Y. 249, 258, 29 N.E. 246, 248.) The promotion of the interests of the polluting cement company has, in my opinion, no public use or benefit.

Nor is it constitutionally permissible to impose servitude on land, without consent of the owner, by payment of permanent damages where the continuing impairment of the land is for a private use. (See Fifth Ave. Coach Lines v. City of New York, 11 N.Y.2d 342, 347, 229 N.Y.S.2d 400, 403, 183 N.E.2d 684, 686; Walker v. City of Hutchinson, 352 U.S. 112, 77 S.Ct. 200, 1 L.Ed.2d 178.) This is made clear by the State Constitution (art. I, § 7, subd. [a]) which provides that "[p]rivate property shall not be taken for *public use* without just compensation" (emphasis added). It is, of course, significant that the section makes no mention of taking for a *private* use.

3. New York State Bureau of Air Pollution Control Services, Air Pollution Capital District, 1968, at p. 8.

4. J. Ludwig, Air Pollution Control Technology: Research and Development on New and Improved Systems, 33 Law & Contemp.Prob., 217, 219 (1968).

5. There are seven plaintiffs here who have been substantially damaged by the maintenance of this nuisance. The trial court found their total permanent damages to equal $185,000.

6. See United States v. Causby, 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206; Kentucky-Ohio Gas Co. v. Bowling, 264 Ky. 470, 477, 95 S.W.2d 1; Northern Indiana Public Service Co. v. W. J. & M. S. Vesey, 210 Ind. 338, 200 N.E. 620; City of Amarillo v. Ware, 120 Tex. 456, 40 S.W.2d 57; Pappenheim v. Metropolitan El. Ry. Co., 128 N.Y. 436, 28 N.E. 518; Ferguson v. Village of Hamburg, 272 N.Y. 234, 5 N.E.2d 801.

In sum, then, by constitutional mandate as well as by judicial pronouncement, the permanent impairment of private property for private purposes is not authorized in the absence of clearly demonstrated public benefit and use.

I would enjoin the defendant cement company from continuing the discharge of dust particles upon its neighbors' properties unless, within 18 months, the cement company abated this nuisance.[7]

It is not my intention to cause the removal of the cement plant from the Albany area, but to recognize the urgency of the problem stemming from this stationary source of air pollution, and to allow the company a specified period of time to develop a means to alleviate this nuisance.

I am aware that the trial court found that the most modern dust control devices available have been installed in defendant's plant, but, I submit, this does not mean that *better* and more effective dust control devices could not be developed within the time allowed to abate the pollution.

Moreover, I believe it is incumbent upon the defendant to develop such devices, since the cement company, at the time the plant commenced production (1962), was well aware of the plaintiffs' presence in the area, as well as the probable consequences of its contemplated operation. Yet, it still chose to build and operate the plant at this site.

In a day when there is a growing concern for clean air, highly developed industry should not expect acquiescence by the courts, but should, instead, plan its operations to eliminate contamination of our air and damage to its neighbors.

Accordingly, the orders of the Appellate Division, insofar as they denied the injunction, should be reversed, and the actions remitted to Supreme Court, Albany County to grant an injunction to take effect 18 months hence, unless the nuisance is abated by improved techniques prior to said date.

FULD, C. J., and BURKE and SCILEPPI, JJ., concur with BERGAN, J.

JASEN, J., dissents in part and votes to reverse in a separate opinion.

BREITEL and GIBSON, JJ., taking no part.

In each action: Order reversed, without costs, and the case remitted to Supreme Court, Albany County, for further proceedings in accordance with the opinion herein.

26 N.Y.2d 232

Samuel RANHAND, Respondent,

v.

Irving SINOWITZ, Appellant.

Court of Appeals of New York.

March 5, 1970.

Action on notes. The Supreme Court, Special Term, New York County, Frederick Backer, J., entered a republished order denying defendant's motion for summary judgment, and defendant appealed. The Supreme Court, Appellate Division, First Judicial Department, by order entered April 17, 1969, 32 A.D.2d 519, 299 N.Y.S. 2d 518, affirmed, and defendant appealed by permission of the Appellate Division, which certified the question whether the Supreme Court order, as affirmed, was properly made and certified that its deter-

7. The issuance of an injunction to become effective in the future is not an entirely new concept. For instance, in Schwarzenbach v. Oneonta Light & Power Co., 207 N.Y. 671, 100 N.E. 1134, an injunction against the maintenance of a dam spilling water on plaintiff's property was issued to become effective one year hence.

The majority point out that class actions are not properly a subject for justice court practice, and I agree with this position. A refusal to allow aggregation for purposes of arriving at a jurisdictional amount does not mean that a class action is a proper remedy for a justice court. A.R.S. § 22–211 provides that the procedure and practices in the Superior Court "so far as applicable" govern procedure and practices in justice of the peace courts. It is clear and would be a proper holding that class actions are not applicable to the justice of the peace courts. The power to make procedural rules applicable to any court rests with this Court, Article 6, section 5(5).

The class action is a useful procedural device for bringing before the court a large number of persons who have similar issues to be decided, and in the interest of economy in time and expense to court and litigant the matters can be resolved in a single action. The jurisdiction of the Superior Court is broad enough to deal with almost every area of concern except those instances where the amount involved is less than $200.00 and the Superior Court does not otherwise have jurisdiction. It would seem that in those instances in which the only issue is the amount of money, a claim for less than $200.00 should be prosecuted in the justice court, and the fact that others may have a similar or identical claim should be of no consequence, and the parties should be left to their own individual decisions as to whether to seek recovery for the amount of their claim in the justice court.

The class action can be abused by persons, who for private motives, prosecute a claim for a very small amount on their own part but by aggregating other such small claims in a class action exaggerate the whole controversy all out of proportion to the amount and justice required. It appears to me that the Court's ruling today invites much mischief in the area of the class action. Matters of small consequence can by the device of the class action be made into major controversies by the ambitious, vengeful or ruthless, when, were it not for such device, the claims would have been resolved in the justice courts or passed over by some claimants as not worth the effort. Requiring that each claim in a class action equal the jurisdictional requirement for Superior Court would avoid such mischief and still provide justice.

In my view the relief sought by the petitioner to prohibit further proceedings in the Superior Court as a class action in this cause should have been granted.

108 Ariz. 178

SPUR INDUSTRIES, INC., an Arizona corporation formerly Spur Feeding Co., an Arizona corporation, Appellant and Cross-Appellee,

v.

DEL E. WEBB DEVELOPMENT CO., an Arizona corporation, Appellee and Cross-Appellant.

No. 10410.

Supreme Court of Arizona,
In Banc.

March 17, 1972.

Rehearing Denied April 18, 1972.

Action was brought by real estate developer to enjoin cattle feeding operation. The Superior Court of Maricopa County, Cause No. C–207029, Kenneth C. Chatwin, J., entered a decree from which cross-appeals were taken. The Supreme Court, Cameron, V. C. J., held, inter alia, that where defendant commenced cattle feeding operations in agricultural area well outside boundaries of any city and subsequently real estate developer purchased land nearby and commenced an extensive retirement community development, developer was entitled to enjoin the cattle feeding opera-

tion as a nuisance but it was required to indemnify cattle feeder for the reasonable cost of moving or shutting down.

Affirmed in part, reversed in part and remanded.

1. Nuisance ⇐1

"Private nuisance" is one affecting a single individual or definite small number of persons in enjoyment of private rights not common to the public.

See publication Words and Phrases for other judicial constructions and definitions.

2. Nuisance ⇐59

"Public nuisance" is one affecting rights enjoyed by citizens as part of public and must affect a considerable number of people or an entire community or neighborhood.

See publication Words and Phrases for other judicial constructions and definitions.

3. Nuisance ⇐23(2)

Remedy for minor inconveniences caused by nuisance lies in an action for damages rather than one for an injunction.

4. Nuisance ⇐3(10), 21, 61, 75

As to residents of community, operation of cattle feeding lot with its accompanying odors, flies, etc., was both a public and private nuisance and the residents could have successfully maintained action to abate the nuisance. A.R.S. § 36–601, subsec. A.

5. Nuisance ⇐26

Developer of real estate adjacent to commercial cattle feeding operation which produced odors, flies, etc., having shown loss of lot sales because of such operation, had standing to bring suit to enjoin the nuisance. A.R.S. § 36–601, subsec. A.

6. Nuisance ⇐18

Suit to enjoin nuisance sounds in equity and while courts have a special responsibility to public they are also concerned with protecting operator of a lawful, albeit noxious, business from result of a knowing and willful encroachment by others near his business.

7. Nuisance ⇐23(1), 35

Where defendant commenced cattle feeding operations in agricultural area well outside boundaries of any city and subsequently real estate developer purchased land nearby and commenced an extensive retirement community development, developer was entitled to enjoin the cattle feeding operation as a nuisance but it was required to indemnify cattle feeder for the reasonable cost of moving or shutting down.

Snell & Wilmer, by Mark Wilmer, and John Lundin, Phoenix, for appellant and cross-appellee.

L. Dennis Marlowe, Tempe, for appellee and cross-appellant.

CAMERON, Vice Chief Justice.

From a judgment permanently enjoining the defendant, Spur Industries, Inc., from operating a cattle feedlot near the plaintiff Del E. Webb Development Company's Sun City, Spur appeals. Webb cross-appeals. Although numerous issues are raised, we feel that it is necessary to answer only two questions. They are:

1. Where the operation of a business, such as a cattle feedlot is lawful in the first instance, but becomes a nuisance by reason of a nearby residential area, may the feedlot operation be enjoined in an action brought by the developer of the residential area?

2. Assuming that the nuisance may be enjoined, may the developer of a completely new town or urban area in a previously agricultural area be required to indemnify the operator of the feedlot who must move or cease operation because of the presence of the residential area created by the developer?

The facts necessary for a determination of this matter on appeal are as follows. The area in question is located in Maricopa County, Arizona, some 14 to 15 miles west of the urban area of Phoenix, on the Phoenix-Wickenburg Highway, also known as Grand Avenue. About two miles south of Grand Avenue is Olive Avenue which runs east and west. 111th Avenue runs north and south as does the Agua Fria River immediately to the west. See Exhibits A and B below.

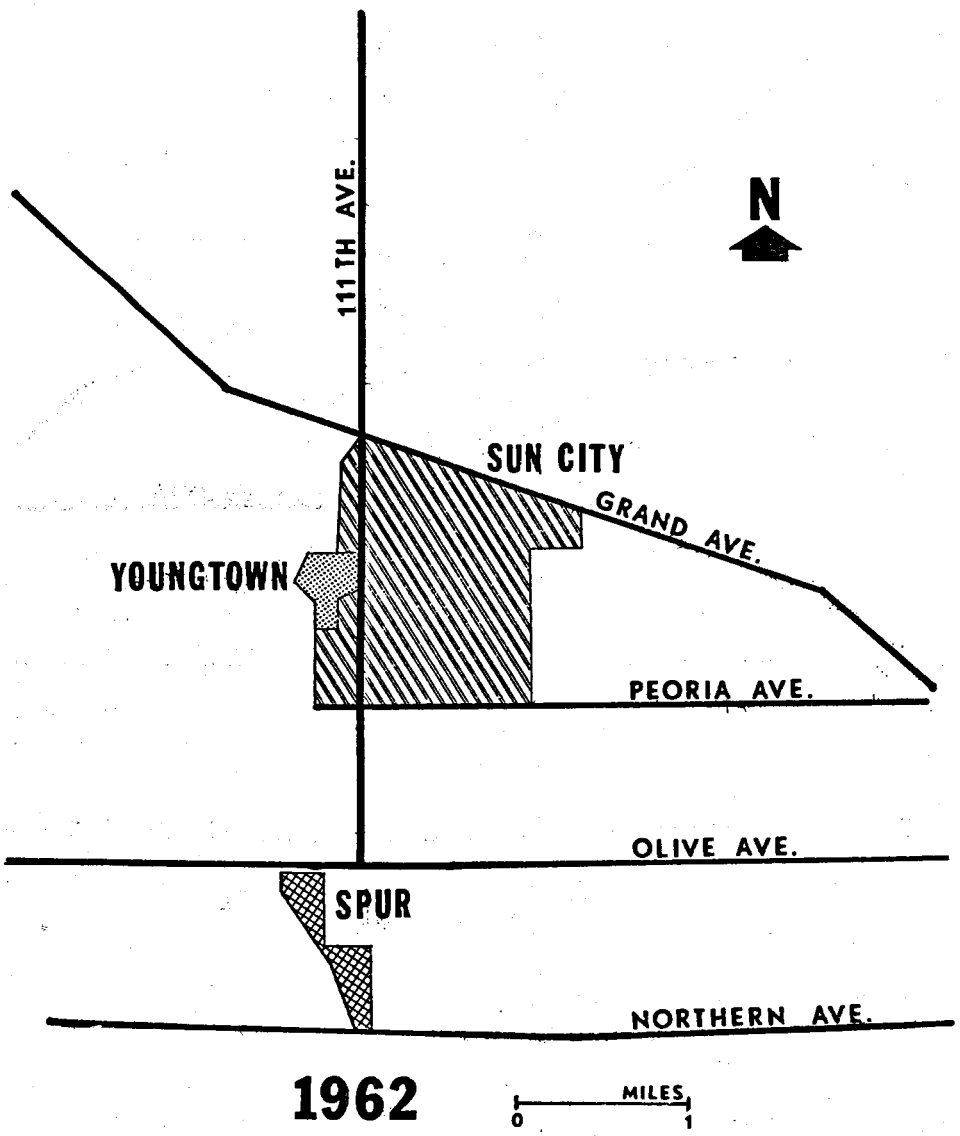

EXHIBIT A

[A54171]

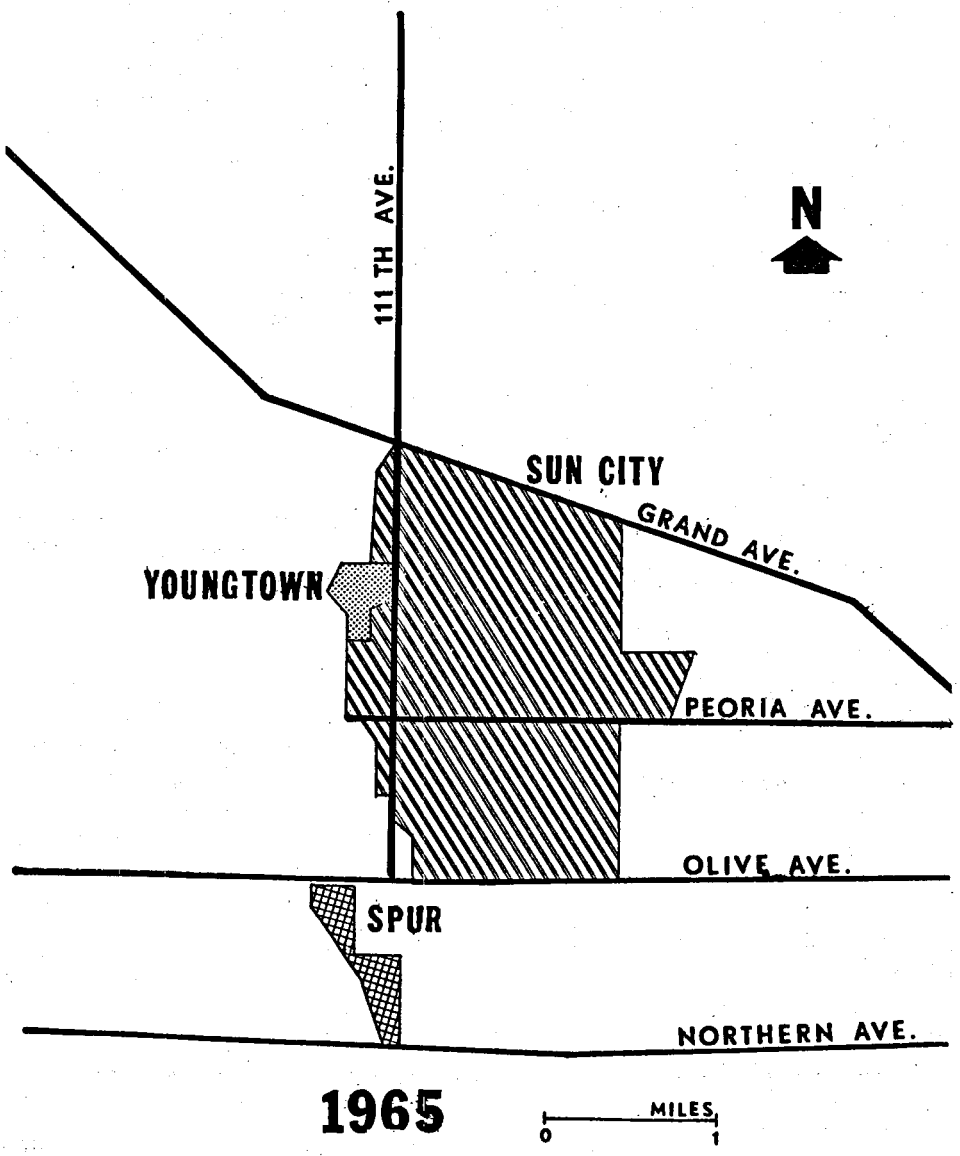

EXHIBIT B

Farming started in this area about 1911. In 1929, with the completion of the Carl Pleasant Dam, gravity flow water became available to the property located to the west of the Agua Fria River, though land to the east remained dependent upon well water for irrigation. By 1950, the only urban areas in the vicinity were the agriculturally related communities of Peoria, El Mirage, and Surprise located along Grand Avenue. Along 111th Avenue, approximately one mile south of Grand Avenue and 1½ miles north of Olive Avenue, the community of Youngtown was com-

menced in 1954. Youngtown is a retirement community appealing primarily to senior citizens.

In 1956, Spur's predecessors in interest, H. Marion Welborn and the Northside Hay Mill and Trading Company, developed feedlots, about ½ mile south of Olive Avenue, in an area between the confluence of the usually dry Agua Fria and New Rivers. The area is well suited for cattle feeding and in 1959, there were 25 cattle feeding pens or dairy operations within a 7 mile radius of the location developed by Spur's predecessors. In April and May of 1959, the Northside Hay Mill was feeding between 6,000 and 7,000 head of cattle and Welborn approximately 1,500 head on a combined area of 35 acres.

In May of 1959, Del Webb began to plan the development of an urban area to be known as Sun City. For this purpose, the Marinette and the Santa Fe Ranches, some 20,000 acres of farmland, were purchased for $15,000,000 or $750.00 per acre. This price was considerably less than the price of land located near the urban area of Phoenix, and along with the success of Youngtown was a factor influencing the decision to purchase the property in question.

By September 1959, Del Webb had started construction of a golf course south of Grand Avenue and Spur's predecessors had started to level ground for more feedlot area. In 1960, Spur purchased the property in question and began a rebuilding and expansion program extending both to the north and south of the original facilities. By 1962, Spur's expansion program was completed and had expanded from approximately 35 acres to 114 acres. See Exhibit A above.

Accompanied by an extensive advertising campaign, homes were first offered by Del Webb in January 1960 and the first unit to be completed was south of Grand Avenue and approximately 2½ miles north of Spur. By 2 May 1960, there were 450 to 500 houses completed or under construction. At this time, Del Webb did not consider odors from the Spur feed pens a problem and Del Webb continued to develop in a southerly direction, until sales resistance became so great that the parcels were difficult if not impossible to sell. Thomas E. Breen, Vice President and General Manager of the housing division of Del Webb, testified at deposition as follows:

"Q Did you ever have any discussions with Tony Cole at or about the time the sales office was opened south of Peoria concerning the problem in sales as the development came closer towards the feed lots?

"A Not at the time that that facility was opened. That was subsequent to that.

"Q All right, what is it that you recall about conversations with Cole on that subject?

"A Well, when the feed lot problem became a bigger problem, which, really, to the best of my recollection, commenced to become a serious problem in 1963, and there was some talk about not developing that area because of sales resistance, and to my recollection we shifted—we had planned at that time to the eastern portion of the property, and it was a consideration.

"Q Was any specific suggestion made by Mr. Cole as to the line of demarcation that should be drawn or anything of that type exactly where the development should cease?

"A I don't recall anything specific as far as the definite line would be, other than, you know, that it would be advisable to stay out of the southwestern portion there because of sales resistance.

"Q And to the best of your recollection, this was in about 1963?

"A That would be my recollection, yes.

* * * * * *

"Q As you recall it, what was the reason that the suggestion was not

adopted to stop developing towards the southwest of the development?

"A Well, as far as I know, that decision was made subsequent to that time.

"Q Right. But I mean at that time?

"A Well, at that time what I am really referring to is more of a long-range planning than immediate planning, and I think it was the case of just trying to figure out how far you could go with it before you really ran into a lot of sales resistance and found a necessity to shift the direction.

"Q So the plan was to go as far as you could until the resistance got to the point where you couldn't go any further?

"A I would say that is reasonable, yes."

By December 1967, Del Webb's property had extended south to Olive Avenue and Spur was within 500 feet of Olive Avenue to the north. See Exhibit B above. Del Webb filed its original complaint alleging that in excess of 1,300 lots in the southwest portion were unfit for development for sale as residential lots because of the operation of the Spur feedlot.

Del Webb's suit complained that the Spur feeding operation was a public nuisance because of the flies and the odor which were drifting or being blown by the prevailing south to north wind over the southern portion of Sun City. At the time of the suit, Spur was feeding between 20,000 and 30,000 head of cattle, and the facts amply support the finding of the trial court that the feed pens had become a nuisance to the people who resided in the southern part of Del Webb's development. The testimony indicated that cattle in a commercial feedlot will produce 35 to 40 pounds of wet manure per day, per head, or over a million pounds of wet manure per day for 30,000 head of cattle, and that despite the admittedly good feedlot management and good housekeeping practices by Spur, the resulting odor and flies produced an annoying if not unhealthy situation as far as the senior citizens of southern Sun City were concerned. There is no doubt that some of the citizens of Sun City were unable to enjoy the outdoor living which Del Webb had advertised and that Del Webb was faced with sales resistance from prospective purchasers as well as strong and persistent complaints from the people who had purchased homes in that area.

Trial was commenced before the court with an advisory jury. The advisory jury was later discharged and the trial was continued before the court alone. Findings of fact and conclusions of law were requested and given. The case was vigorously contested, including special actions in this court on some of the matters. In one of the special actions before this court, Spur agreed to, and did, shut down its operation without prejudice to a determination of the matter on appeal. On appeal the many questions raised were extensively briefed.

It is noted, however, that neither the citizens of Sun City nor Youngtown are represented in this lawsuit and the suit is solely between Del E. Webb Development Company and Spur Industries, Inc.

MAY SPUR BE ENJOINED?

[1, 2] The difference between a private nuisance and a public nuisance is generally one of degree. A private nuisance is one affecting a single individual or a definite small number of persons in the enjoyment of private rights not common to the public, while a public nuisance is one affecting the rights enjoyed by citizens as a part of the public. To constitute a public nuisance, the nuisance must affect a considerable number of people or an entire community or neighborhood. City of Phoenix v. Johnson, 51 Ariz. 115, 75 P.2d 30 (1938).

[3] Where the injury is slight, the remedy for minor inconveniences lies in an action for damages rather than in one for an injunction. Kubby v. Hammond, 68 Ariz. 17, 198 P.2d 134 (1948). Moreover,

some courts have held, in the "balancing of conveniences" cases, that damages may be the sole remedy. See Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 309 N.Y.S.2d 312, 257 N.E.2d 870, 40 A.L.R.3d 590 (1970), and annotation comments, 40 A.L.R.3d 601.

Thus, it would appear from the admittedly incomplete record as developed in the trial court, that, at most, residents of Youngtown would be entitled to damages rather than injunctive relief.

We have no difficulty, however, in agreeing with the conclusion of the trial court that Spur's operation was an enjoinable public nuisance as far as the people in the southern portion of Del Webb's Sun City were concerned.

§ 36–601, subsec. A reads as follows:

"§ 36–601. Public nuisances dangerous to public health

"A. The following conditions are specifically declared public nuisances dangerous to the public health:

"1. Any condition or place in populous areas which constitutes a breeding place for flies, rodents, mosquitoes and other insects which are capable of carrying and transmitting disease-causing organisms to any person or persons."

By this statute, before an otherwise lawful (and necessary) business may be declared a public nuisance, there must be a "populous" area in which people are injured:

"* * * [I]t hardly admits a doubt that, in determining the question as to whether a lawful occupation is so conducted as to constitute a nuisance as a matter of fact, the locality and surroundings are of the first importance. (citations omitted) A business which is not per se a public nuisance may become such by being carried on at a place where the health, comfort, or convenience of a populous neighborhood is affected. * * * What might amount to a serious nuisance in one locality by reason of the density of the population, or character of the neighborhood affected, may in another place and under different surroundings be deemed proper and unobjectionable. * * *." MacDonald v. Perry, 32 Ariz. 39, 49–50, 255 P. 494, 497 (1927).

[4, 5] It is clear that as to the citizens of Sun City, the operation of Spur's feedlot was both a public and a private nuisance. They could have successfully maintained an action to abate the nuisance. Del Webb, having shown a special injury in the loss of sales, had a standing to bring suit to enjoin the nuisance. Engle v. Clark, 53 Ariz. 472, 90 P.2d 994 (1939); City of Phoenix v. Johnson, supra. The judgment of the trial court permanently enjoining the operation of the feedlot is affirmed.

MUST DEL WEBB INDEMNIFY SPUR?

[6] A suit to enjoin a nuisance sounds in equity and the courts have long recognized a special responsibility to the public when acting as a court of equity:

§ 104. Where public interest is involved.

"Courts of equity may, and frequently do, go much further both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved. Accordingly, the granting or withholding of relief may properly be dependent upon considerations of public interest. * *." 27 Am.Jur.2d, Equity, page 626.

In addition to protecting the public interest, however, courts of equity are concerned with protecting the operator of a lawfully, albeit noxious, business from the result of a knowing and willful encroachment by others near his business.

In the so-called "coming to the nuisance" cases, the courts have held that the residen-

tial landowner may not have relief if he knowingly came into a neighborhood reserved for industrial or agricultural endeavors and has been damaged thereby:

"Plaintiffs chose to live in an area uncontrolled by zoning laws or restrictive covenants and remote from urban development. In such an area plaintiffs cannot complain that legitimate agricultural pursuits are being carried on in the vicinity, nor can plaintiffs, having chosen to build in an agricultural area, complain that the agricultural pursuits carried on in the area depreciate the value of their homes. The area being *primarily agricultural,* any opinion reflecting the value of such property must take this factor into account. The standards affecting the value of residence property in an urban setting, subject to zoning controls and controlled planning techniques, cannot be the standards by which agricultural properties are judged.

"People employed in a city who build their homes in suburban areas of the county beyond the limits of a city and zoning regulations do so for a reason. Some do so to avoid the high taxation rate imposed by cities, or to avoid special assessments for street, sewer and water projects. They usually build on improved or hard surface highways, which have been built either at state or county expense and thereby avoid special assessments for these improvements. It may be that they desire to get away from the congestion of traffic, smoke, noise, foul air and the many other annoyances of city life. But with all these advantages in going beyond the area which is zoned and restricted to protect them in their homes, they must be prepared to take the disadvantages." Dill v. Excel Packing Company, 183 Kan. 513, 525, 526, 331 P. 2d 539, 548, 549 (1958). See also East St. Johns Shingle Co. v. City of Portland, 195 Or. 505, 246 P.2d 554, 560–562 (1952).

And:

"* * * a party cannot justly call upon the law to make that place suitable for his residence which was not so when he selected it. * * *." Gilbert v. Showerman, 23 Mich. 448, 455, 2 Brown 158 (1871).

Were Webb the only party injured, we would feel justified in holding that the doctrine of "coming to the nuisance" would have been a bar to the relief asked by Webb, and, on the other hand, had Spur located the feedlot near the outskirts of a city and had the city grown toward the feedlot, Spur would have to suffer the cost of abating the nuisance as to those people locating within the growth pattern of the expanding city:

"The case affords, perhaps, an example where a business established at a place remote from population is gradually surrounded and becomes part of a populous center, so that a business which formerly was not an interference with the rights of others has become so by the encroachment of the population * * *." City of Ft. Smith v. Western Hide & Fur Co., 153 Ark. 99, 103, 239 S.W. 724, 726 (1922).

We agree, however, with the Massachusetts court that:

"The law of nuisance affords no rigid rule to be applied in all instances. It is elastic. It undertakes to require only that which is fair and reasonable under all the circumstances. In a commonwealth like this, which depends for its material prosperity so largely on the continued growth and enlargement of manufacturing of diverse varieties, 'extreme rights' cannot be enforced. * * *." Stevens v. Rockport Granite Co., 216 Mass. 486, 488, 104 N.E. 371, 373 (1914).

[7] There was no indication in the instant case at the time Spur and its predecessors located in western Maricopa County that a new city would spring up, full-blown, alongside the feeding operation and that the developer of that city would ask the court to order Spur to move because of the new

city. Spur is required to move not because of any wrongdoing on the part of Spur, but because of a proper and legitimate regard of the courts for the rights and interests of the public.

Del Webb, on the other hand, is entitled to the relief prayed for (a permanent injunction), not because Webb is blameless, but because of the damage to the people who have been encouraged to purchase homes in Sun City. It does not equitably or legally follow, however, that Webb, being entitled to the injunction, is then free of any liability to Spur if Webb has in fact been the cause of the damage Spur has sustained. It does not seem harsh to require a developer, who has taken advantage of the lesser land values in a rural area as well as the availability of large tracts of land on which to build and develop a new town or city in the area, to indemnify those who are forced to leave as a result.

Having brought people to the nuisance to the foreseeable detriment of Spur, Webb must indemnify Spur for a reasonable amount of the cost of moving or shutting down. It should be noted that this relief to Spur is limited to a case wherein a developer has, with foreseeability, brought into a previously agricultural or industrial area the population which makes necessary the granting of an injunction against a lawful business and for which the business has no adequate relief.

It is therefore the decision of this court that the matter be remanded to the trial court for a hearing upon the damages sustained by the defendant Spur as a reasonable and direct result of the granting of the permanent injunction. Since the result of the appeal may appear novel and both sides have obtained a measure of relief, it is ordered that each side will bear its own costs.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

HAYS, C. J., STRUCKMEYER and LOCKWOOD, JJ., and UDALL, Retired Justice.

108 Ariz. 186

Mark READER and Frances Reader, his wife, Albert Mayer and Jean Mayer, his wife, on behalf of themselves and all others similarly situated, Appellants,

v.

MAGMA-SUPERIOR COPPER COMPANY, an Arizona corporation, et al., Appellees.

No. 10414-PR.

Supreme Court of Arizona,
In Banc.
March 15, 1972.

Proceeding on petition for review of an order of the Court of Appeals dismissing the appeal from an order of the Superior Court, Maricopa County. The Supreme Court, Struckmeyer, J., held that order determining that plaintiffs, bringing an action against six asserted owners or operators of copper smelters on behalf of the entire population of the county for compensatory and punitive damages, could not maintain lawsuit as a class action was an order which in effect terminated the litigation and was appealable under statute authorizing an appeal from any order affecting substantial rights when order in effect determines that action and prevents judgment from which an appeal might be taken.

Order of Court of Appeals vacated with directions.

Cameron, V. C. J., did not participate in determination of matter.

Appeal and Error ⇐93

Order determining that plaintiffs, bringing an action against six asserted owners or operators of copper smelters on behalf of the entire population of county for compensatory and punitive damages, could not maintain lawsuit as a class action was an order which in effect terminated the litigation and was appealable under statute authorizing an appeal from any order affecting substantial rights when order

ed to demand a jury trial and that the trial would be rushed so that the judge could take care of other business. Counsel's remark, "Judge, I don't mean to antagonize" shows that he realized that the judge was upset. In this atmosphere, it can hardly be said that the waiver of a jury trial the defendant "definitely" wanted was voluntary. Nor does it matter that the defendant was represented by counsel of his own choice for the issue here is not one of incompetency of counsel. We therefore hold that the intemperate remarks of the trial judge resulted in a jury waiver that was not voluntarily made. The defendant is therefore entitled to a new trial. We find it neither necessary nor appropriate to comment on the sufficiency of the evidence or to discuss other claims advanced by the defendant.

The judgment of the appellate court is reversed and the cause is remanded to the circuit court of Cook County for a new trial.

Reversed and remanded.

34 Ill.2d 544

BELMAR DRIVE-IN THEATRE CO., Appellant,

v.

The ILLINOIS STATE TOLL HIGHWAY COMMISSION et al., Appellees.

No. 39502.

Supreme Court of Illinois.

May 23, 1966.

Operator of drive-in moving picture theater brought action against the Illinois State Toll Highway Commission and operators of business concessions at toll road service center for damage to theater business because of brilliant artificial lights employed at center. The Circuit Court, Du Page County, William J. Bauer, J., entered a judgment dismissing the amended complaint, and the operator of the theater appealed. The Supreme Court, Underwood, J., held that complaint was insufficient to state a cause of action for nuisance, negligence, or for damages for inverse eminent domain.

Judgment affirmed.

1. Nuisance ⇐1

A "nuisance" at common law is that which unlawfully annoys or does damage to another.

See publication Words and Phrases for other judicial constructions and definitions.

2. Nuisance ⇐4

To constitute a nuisance, the act, structure, or device complained about must cause some injury, real and not fanciful, and must work some material annoyance, inconvenience, or other injury to person or property of another.

3. Nuisance ⇐4

In deciding whether a particular annoyance is sufficient to constitute a nuisance, so far as injury to the person is concerned, criterion is its effect on ordinarily reasonable man, that is, a normal person of ordinary habits and sensibilities.

4. Nuisance ⇐4

A person cannot increase liability of his neighbor for nuisance by applying his own property to special and delicate uses, whether for business or pleasure.

5. Nuisance ⇐48

Count of amended complaint alleging that defendants, which were Illinois State Toll Highway Commission and operators of business concessions at toll-road service center, employed such brilliant artificial lights at center that the light approximated the light of day and made it impossible for plaintiff to exhibit moving pictures at its drive-in theater was insufficient to

state a cause of action for a private "nuisance," since allegations established that injury claimed was due solely to exceptionally sensitive and delicate use to which plaintiff devoted its own property.

6. Nuisance ⇐43

Ordinarily, neither negligence of defendant nor contributory negligence of plaintiff is involved in action with respect to nuisance.

7. Negligence ⇐111(1)

Count of amended complaint alleging that defendants, which were Illinois State Toll Highway Commission and operators of business concessions at toll-road service center, employed such brilliant artificial lights at center that the light approximated the light of day and made it impossible for plaintiff to exhibit moving pictures at its drive-in theater, and that center was arbitrarily and carelessly constructed in close proximity to property of plaintiff, did not state a cause of action in negligence against defendants for their careless, needless and unreasonable use of extraordinarily brilliant light.

8. Pleading ⇐48

A complaint which fails to allege facts, existence of which is necessary to enable plaintiff to recover, does not state a cause of action, and its deficiency may not be remedied by liberal construction or argument.

9. Jury ⇐31(6)

Dismissal of first count of amended complaint, which was insufficient to state a cause of action for private nuisance, did not deprive plaintiff of right to jury trial as guaranteed by the Constitution, where there was no controverted or controversial issue of fact to be submitted to jury. S.H.A.Const. art. 2, § 5.

10. Evidence ⇐5(2)

It is common knowledge that business of showing outdoor moving pictures is a property use peculiarly and abnormally sensitive to light.

11. Jury ⇐34(1)

Function of jury is to decide disputed questions of fact, and where no such issue is presented, there can be no denial of right to jury trial. S.H.A.Const. art. 2, § 5.

12. Jury ⇐31(6)

There is no denial of right to jury trial where complaint fails to state a cause of action. S.H.A.Const. art. 2, § 5.

13. Eminent Domain ⇐293(1)

Count of amended complaint alleging that Illinois State Toll Highway Commission used such brilliant artificial lights at toll-road service center as to damage business of drive-in moving picture theater was insufficient to allege a cause of action in inverse eminent domain under section of Constitution providing that private property shall not be taken or damaged for public use without just compensation. S.H.A. Const. art. 2, § 13.

14. Turnpikes and Toll Roads ⇐17

The location of service centers on toll highways is a matter of discretion and is not subject to judicial review unless there is a showing of bad faith, fraud, corruption, manifest oppression, or clear abuse of discretion.

15. Turnpikes and Toll Roads ⇐16

Count of amended complaint alleging that defendants, which were Illinois State Toll Highway Commission and operators of business concessions at toll-road service center, employed such brilliant artificial lights at center that the light approximated the light of day and made it impossible for plaintiff to exhibit moving pictures at its drive-in theater, did not allege a cause of action for abuse of discretion in locating center.

16. Constitutional Law ⇐322

Fact that complaint of operator of drive-in moving picture theater failed to state cause of action for nuisance, negligence, or inverse eminent domain against Illinois State Toll Highway Commission and operators of business concessions at toll road service center because brilliant artificial lights at center made it impossible to exhibit moving pictures properly did not place duty on courts to provide alternate remedy under section of Constitution providing that every person ought to find remedy in laws for all injuries and wrongs which he may receive. S.H.A.Const. art. 2, §§ 13, 19.

Edward M. Gerrity, Sycamore, and Sears, Streit, Dreyer & Foote, Aurora (Edward M. Gerrity, Sycamore, and John E. Dreyer, Aurora, of counsel), for appellant.

William P. Richmond, Chicago (Sidley, Austin, Burgess & Smith, Chicago, of counsel), for appellee, Fred Harvey, Inc.

William G. Clark, Atty. Gen., Chicago (Thomas J. McCracken, Chicago, of counsel), for appellee, Illinois State Toll Highway Commission.

Corrigan & Mackay, Wheaton (John R. Mackay, Wheaton, of counsel), for appellee, Standard Oil Co. and the American Oil Co.

UNDERWOOD, Justice.

This action was initiated in the circuit court of Du Page County by Belmar Drive-in Theatre Company to recover damages to its business allegedly caused by bright lights emanating from a toll-road service center, or "oasis," located on the Northwest Tollway adjacent to plaintiff's outdoor movie theatre. Named as defendants were the Illinois State Toll Highway Commission together with Standard Oil Company, American Oil Company and Fred Harvey, Inc., the operators of business concessions on the oasis. Asserting that constitutional questions are involved, plaintiff appeals from a judgment order dismissing its amended complaint as being insufficient at law.

The amended complaint consisted of three counts and the plaintiff's contentions here make it expedient to treat upon each count separately. The basic charge of count I is that brilliant artificial lights employed on the oasis and its approaches approximate the light of day and dispel darkness on neighboring premises, making it impossible to properly exhibit outdoor movies, and thus constitute a private nuisance which has caused a substantial decline in plaintiff's business and entitles it to damages. However, we are in accord with the determination of the trial court that the facts pleaded to support the charge of a private nuisance do not charge the defendants with an actionable wrong.

[1] A nuisance at common law is that which unlawfully annoys or does damage to another. (City of Chicago v. Reuter Bros. Iron Works, Inc., 398 Ill. 202, 75 N.E.2d 355, 173 A.L.R. 266.) And although we find no Illinois decisions precisely in point, it may be conceded, as plaintiff contends, that the casting of light on the land of another may, in some circumstances, constitute a nuisance remediable by injunction or suit for damages. (E. g., The Shelburne, Inc. v. Crossan Corp., 95 N.J.Eq. 188, 122 A. 749; Nugent v. Melville Shoe Corp., 280 Mass. 469, 182 N.E. 825; National Refining Co. v. Batte, 135 Miss. 819, 100 So. 388, 35 A.L.R. 91; Hansen v. Independent School Dist. No. 1, 61 Idaho 109, 98 P.2d 959.) The latter decisions, however, have no application under the facts of the instant case.

[2–4] It is established law that, to constitute a nuisance, the act, structure or device complained about must cause some injury, real and not fanciful, and must work some material annoyance, inconven-

ience or other injury to the person or property of another. (Joseph v. Wieland Dairy Co., 297 Ill. 574, 131 N.E. 94, 29 I.L.P., Nuisances, sec. 14.) So far as injury to the person is concerned, it is held that in deciding whether a particular annoyance is sufficient to constitute a nuisance the criterion is "its effect upon an ordinarily reasonable man,—that is, a normal person of ordinary habits and sensibilities, * * *." (39 Am.Jur., Nuisances, sec. 31, p. 311; see also 66 C.J.S. Nuisances § 18c.) As stated in Cooper v. Randall, 53 Ill. 24, at 27, "the injury must be something more than * * * a question of mere delicacy or fastidiousness arising from elegant and dainty habits of life; * * *." The same doctrine, indirectly recognized by this court in Department of Public Works and Buildings v. Bloomer, 28 Ill.2d 267, at 273, 191 N.E.2d 245, has been applied by American and English courts where the use to which a plaintiff puts his land is abnormally sensitive to the type of interference caused by the defendant, and is stated in Joyce, Law of Nuisances, sec. 26, in this manner: "* * * But the doing of something not in itself noxious does not become a nuisance merely because it does harm to some particular trade of a delicate nature in the adjoining property where it does not affect any ordinary trade carried on there nor interfere with the ordinary enjoyment of life. A man who carries on an exceptionally delicate trade cannot complain because it is injured by his neighbor doing something lawful on his property, if it is something which would not injure an ordinary trade or anything but an exceptionally delicate trade." (See also: Amphitheaters Inc. v. Portland Meadows, 184 Or. 336, 198 P.2d 847, 5 A.L.R.2d 690; Sheridan Drive-in Theater, Inc., v. State of Wyoming, Wyo., 384 P.2d 597; Wright v. Commonwealth, 286 Mass. 371, 190 N.E. 593; Prosser on Torts, 2d ed., chap. 14, p. 396.) Again, it is stated in 5 A.L.R.2d 705: "The private nuisance light cases, considered as a whole, seem to warrant the generalization that if the intensity of light shining from adjoining land is strong enough to seriously disturb a person of ordinary sensibilities, or interfere with an occupation which is no more than ordinarily susceptible to light, it is a nuisance; if not, there is no cause of action. The courts will not afford protection to hypersensitive individuals or industries." The underlying notion of the doctrine is that a person cannot increase the liability of his neighbor by applying his own property to special and delicate uses, whether for business or pleasure.

[5] Application of the doctrine here makes it clear that count I was insufficient to state a cause of action for a private nuisance. Its own allegations establish that the injury claimed is due solely to the exceptionally sensitive and delicate use to which plaintiff devotes its own property.

[6-8] Ordinarily neither the negligence of the defendant nor the contributory negligence of the plaintiff is involved in an action with respect to a nuisance. (29 I.L.P., Nuisances, sec. 13; 66 C.J.S. Nuisances § 11.) However, apparently seeking to rely on the principle that negligence may become an issue when a lawful act becomes a nuisance by reason of its careless performance, (see: 66 C.J.S., Nuisances, § 9a (2); 39 Am.Jur., Nuisances, sec. 24; Fligelman v. City of Chicago, 348 Ill. 294, 180 N.E. 797,) plaintiff next argues that count I states a cause of action in negligence against defendants for their careless, needless and unreasonable use of extraordinarily brilliant light. Even by indulging in the most liberal of constructions of count I we do not find this to be so, and neither does it appear to our satisfaction that such negligence theory was pursued in the trial court. While there is language that the oasis was arbitrarily and carelessly constructed in close proximity to plaintiff's premises, it is devoid of allegations that negligence attends the use of the lights, and of allegations of the

respects in which defendants are negligent. A complaint which fails to allege facts, the existence of which is necessary to enable plaintiff to recover does not state a cause of action, and its deficiency may not be remedied by liberal construction or argument. Cf. Allis-Chalmers Mfg. Co. v. City of Chicago, 297 Ill. 444, 130 N.E. 736; Walters v. Christy, 5 Ill.App.2d 68, 124 N.E.2d 658.

[9-12] Plaintiff next contends that it was entitled to a jury determination of whether the use of its land was in fact delicate and sensitive, and on this basis argues that the dismissal of the nuisance charge deprived it of the right to a jury trial guaranteed by section 5 of article II of the Illinois constitution, S.H.A. We do not agree. There was no controverted or controversial issue of fact to be submitted to the jury. Plaintiff's own pleading is an admission that its business, or property use, is particularly sensitive to light. Moreover, it is common knowledge, and all reasonable men would agree, that the business of showing outdoor movies is a property use peculiarly and abnormally sensitive to light. (See: Amphitheaters Inc. v. Portland Meadows, 184 Or. 336, 198 P.2d 847, at 858.) The function of the jury is to decide disputed questions of fact, and it is obvious that where no such issue is presented there can be no denial of the right to a jury trial. (Diversey Liquidating Corp. v. Neunkirchen, 370 Ill. 523, 527, 19 N.E.2d 363, 120 A.L.R. 1395; 23 I.L.P., Juries, sec. 13.) Equally certain, in response to further contentions of plaintiff that common-law actions of nuisance and negligence are normally heard by juries, is the conclusion that there can be no denial of the right to jury trial where a complaint fails to state a cause of action.

[13] Count II of the amended complaint, construed most liberally, is, in the words of the court in Sheridan Drive-in Theatre, Inc. v. State of Wyoming, Wyo., 384 P.2d 597, "an action in inverse eminent domain" directed at the Toll Highway Commission and bottomed on the language of section 13 of article II of the Illinios constitution which ordains that private property shall not be taken or damaged for public use without just compensation. (See: Grunewald v. City of Chicago, 371 Ill. 528, 21 N.E.2d 739; Illinois Power and Light Corp. v. Peterson, 322 Ill. 342, 153 N.E. 577, 49 A.L.R. 692; Childs & Co. v. City of Chicago, 279 Ill. 623, 117 N.E. 115.) It has long been held, however, that the section of the constitution relied upon was not intended to reach every possible injury that might be occasioned by a public improvement, (e.g. City of Winchester v. Ring, 312 Ill. 544, 144 N.E. 333, 36 A.L.R. 520; Rigney v. City of Chicago, 102 Ill. 64,) and we have recently held that damages arising from a sensitive or delicate use of land are not compensable. (Department of Public Works and Bldgs. v. Bloomer, 28 Ill.2d 267, 273, 191 N.E.2d 245.) This alone serves to demonstrate the inadequacy of the second count. But, in addition, it has long been established that there are certain injuries, necessarily incident to the ownership of property, which directly impair the value of private property and for which the law does not, and never has, afforded any relief, examples being the depreciation caused by the building of fire houses, police stations, hospitals, cemeteries and the like in close proximity to private property. (See: Rigney v. City of Chicago, 102 Ill. 64; Frazer v. City of Chicago, 186 Ill. 480, 57 N.E. 1055, 51 L.R.A. 306; Doyle v. City of Sycamore, 193 Ill. 501, 61 N.E. 1117; Aldrich v. Metropolitan West Side Elevated Railroad Co., 195 Ill. 456, 63 N.E. 155, 57 L.R.A. 237; Eckhoff v. Forest Preserve Dist., 377 Ill. 208, 36 N.E.2d 245.) Such injury is deemed to be *damnum absque injuria*—loss without injury in the legal sense—on the theory that the property owner is compensated for the injury sustained by sharing the general benefits which inure to all from the public improvement. (City of Winchester v. Ring, 312 Ill. 544, 552, 144 N.E. 333.) In our opinion, the damage claimed in this particular instance due to the location of the toll

highway, and the oasis which is an integral part of such highway, (see: Illinois State Toll Highway Com. v. Eden Cemetery Ass'n, 16 Ill.2d 539, 158 N.E.2d 766; Illinois State Toll Highway Com. v. Korzen, 32 Ill.2d 338, 205 N.E.2d 433,) is not an injury embraced within the constitutional provision relied upon, but is *damnum absque injuria*.

[14, 15] Count III of the amended complaint realleged count I and, according to plaintiff's arguments here, was intended to state a cause of action against the commission for manifest oppression and abuse of discretion in locating the oasis where it did. The location of service centers on toll highways is a matter of discretion, (Combs v. Illinois State Toll Highway Com. (N.D.Ill. 1955,) 128 F.Supp. 305,) and is not subject to judicial review unless there is a showing of bad faith, fraud, corruption, manifest oppression or a clear abuse of discretion. (People v. Illinois State Toll Highway Com., 3 Ill.2d 218, 233-234, 120 N.E.2d 35; Mowry v. Department of Public Works and Bldgs., 345 Ill. 121, 177 N.E. 753; Boyden v. Department of Public Works and Bldgs., 349 Ill. 363, 182 N.E. 379.) It may thus be agreed that there is a basis for plaintiff's theory, but we are in accord with the finding of the trial court that the complaint utterly failed to state such a cause of action. We could not hold otherwise, even under the most liberal construction.

[16] This count also contained an allegation in the language of section 19 of article II of our constitution to the effect that plaintiff ought to find a remedy in the laws for the wrong perpetrated against it, and plaintiff now contends that even if its complaint failed to state a cause of action for nuisance, or negligence, or for damages under section 13 of article II, the trial court had a duty under the constitution to provide it with a remedy against the commission for the redress of wrongs caused by its oppressive and arbitrary acts. We have already held, however, that recourse to the courts may be had where the discretionary powers of the commission are attended by bad faith, fraud, corruption, manifest oppression or a clear abuse of discretion. (People v. Illinois State Toll Highway Com., 3 Ill.2d 218, 233-234, 120 N.E.2d 35.) Manifestly, the failure of the complaint to plead facts sufficient to entitle the plaintiff to relief against the commission does not permit recourse to section 19 of article II, nor place a duty upon the courts to provide an alternative remedy. Hawkins v. Hawkins, 350 Ill. 227, 183 N.E. 9.

The judgment of the circuit court dismissing the amended complaint was correct, and is therefore affirmed.

Judgment affirmed.

34 Ill.2d 527

The PEOPLE of the State of Illinois, Defendant In Error,

v.

Charles MILLER, Plaintiff In Error.

No. 38953.

Supreme Court of Illinois.

May 23, 1966.

Defendant was convicted in the Circuit Court, Cook County, Emmett Morrissey, J., of unlawful possession of narcotics and he appealed. The Supreme Court, House, J., held that police officer had probable cause for arrest of defendant where officer was informed that defendant was selling narcotics by an informer who had in the previous six months given him five tips, all of which had resulted in convictions or returns of indictments.

Affirmed.

1. Arrest ⇐63(4)

Probable cause for an arrest may be based upon information supplied by an in-

Arnulfo MORENO and Yamileth Moreno, Appellants,

v.

Jose DIAZ and George Lopez, Appellees.

No. 3D06–241.

District Court of Appeal of Florida, Third District.

Dec. 13, 2006.

Background: Motorist and his wife filed a complaint against defendant driver and owner of driver's vehicle after motorist was injured when his vehicle was rear-ended by driver. The Circuit Court, Miami-Dade County, Jon I. Gordon, J., entered judgment on jury verdict and then granted driver and owner's motion for remittitur or a new trial as to past and future medical expenses. Motorist appealed.

Holdings: The District Court of Appeal, Cortiñas, J., held that:

(1) jury did not have to find that motorist sustained a permanent injury to award future medical expenses, and

(2) evidence was insufficient to support the jury's award of $171,000 for future medical expenses, and thus remittitur was proper.

Affirmed.

1. Appeal and Error ⚿979(5)

A trial court's order for remittitur or new trial is reviewed for abuse of discretion.

2. New Trial ⚿162(1)

If the jury verdict is excessive, remittitur is the appropriate remedy.

3. New Trial ⚿76(1), 162(1)

A trial judge may set aside a jury's verdict on grounds of excessiveness and order remittitur if the record affirmatively shows the impropriety of the verdict, or if the trial judge makes a determination that the jury was influenced by factors outside the record.

4. Damages ⚿43

Jury did not have to find that motorist sustained a permanent injury to award future medical expenses, in motor vehicle negligence case; recovery for future medical expenses was permitted as long as there was sufficient evidence the motorist would reasonably incur future medical expenses for a condition arising from the motor vehicle collision.

5. Damages ⚿127.71(2)
Evidence ⚿571(10)
New Trial ⚿162(1)

Evidence was insufficient to support the jury's award of $171,000 for future medical expenses, in motor vehicle negligence case, and thus remittitur was proper; expert testimony established that there was a 25% probability that motorist would require an additional back surgery in the future, and the estimated cost of that surgery was $79,000. West's F.S.A. §§ 768.74, 768.74(5).

Beckham & Beckham and Robert Beckham, Miami, for appellants.

Douberley & Cicero and William M. Douberley, Sunrise, for appellees.

Before WELLS, CORTIÑAS, and ROTHENBERG, JJ.

CORTIÑAS, Judge.

The plaintiffs, Arnulfo Moreno and his wife Yamileth Moreno (collectively "the Morenos"), appeal an order granting George Lopez and Jose Diaz's (collectively

"defendants") motion for remittitur or new trial as to past and future medical expenses awarded by a jury. We affirm.

Arnulfo Moreno was injured in a rear-end motor vehicle collision with the defendants.[1] The Morenos sued the defendants and sought compensatory damages for past medical expenses, future medical expenses, past and future lost wages, pain and suffering, and loss of consortium. Specifically, Arnulfo Moreno alleged that as a result of the collision, he suffered two herniated discs in his lower back and injuries to his hand, which required surgery.

The defendants admitted liability and a jury trial was held on the issue of damages only. At trial, the jury heard conflicting evidence from six medical doctors regarding Arnulfo Moreno's injuries. A neurosurgeon, one of the Morenos' experts, testified that statistically twenty-five percent (25%) of people with Arnulfo Moreno's back injury would require additional surgery within ten (10) years. He testified that the cost of that surgery was between $50,000 and $75,000, with an additional $3000 to $4000 for rehabilitative therapy. Additionally, an orthopedic surgeon, also a medical expert for the Morenos, stated that the back surgery, if necessary, would cost between $60,000 and $80,000. Although the jury ultimately found that Arnulfo Moreno was not permanently injured as a result of the collision, it awarded the Morenos $171,000 in future medical expenses. Additionally, the jury also awarded the Morenos $110,000 in past medical expenses.[2]

Thereafter, the defendants filed a motion to reduce the verdict by $10,000 as a set-off for PIP benefits, and a motion for remittitur or new trial on the issue of past and future medical expenses. At the hearing on the post-trial motions, the defendants agreed to reduce the amount of past medical expenses to $100,000, less the PIP setoff.[3] However, the trial court found that the record did not support an award of future medical expenses in excess of $79,000. The trial court issued an order granting the defendants' motion for remittitur or, alternatively, if the Morenos did not agree with the remittitur, granting a new trial. The Morenos rejected the remittitur and filed this appeal.

[1–3] A trial court's order for remittitur or new trial is reviewed for abuse of discretion. *See Russell v. KSL Hotel Corp.,* 887 So.2d 372, 377–81 (Fla. 3d DCA 2004) (citing *Brown v. Estate of Stuckey,* 749 So.2d 490, 497–98 (Fla.1999)); *McCarthy Bros. Co. v. Tilbury Constr., Inc.,* 849 So.2d 7, 9 (Fla. 1st DCA 2003) (citations omitted). If the jury verdict is excessive, remittitur is the appropriate remedy. *McCarthy,* 849 So.2d at 9. A trial judge may set aside a jury's verdict on grounds of excessiveness and order remittitur if the record affirmatively shows the impropriety of the verdict, or if the trial judge makes a determination that the jury was influenced by factors outside the record. *See Kaine v. Gov't Employees Ins. Co.,* 735 So.2d 599, 600–01 (Fla. 3d DCA 1999) (citing *Bould v. Touchette,* 349 So.2d 1181, 1184 (Fla.1977)) (ordering the trial court to reinstate the jury's verdict upon finding that the record

1. Defendant Lopez was driving defendant Diaz's motor vehicle with his permission.

2. Notably, the trial court did not admit Arnulfo Moreno's past medical records into evidence; therefore, the jury based its decision on the expert testimony presented by the parties.

3. The defendants stipulate to the $100,000 figure for past medical expenses only for purposes of the instant appeal. If there is to be a new trial on damages, the defendants maintain that the Morenos will have to prove both past and future medical expenses.

revealed sufficient evidence to support the amount awarded for loss of past earnings).

In *Auto–Owners Insurance Co. v. Tompkins,* 651 So.2d 89, 90 (Fla.1995), the Florida Supreme Court held that a jury need not find that a plaintiff suffered a permanent injury before it can award future economic damages. Nevertheless, it is well-established that a plaintiff is only entitled to damages for future medical expenses which are supported by sufficient evidence in the record. *See, e.g., Garriga v. Guerra,* 753 So.2d 146, 147–48 (Fla. 3d DCA 2000) (citations omitted); *Fravel v. Haughey,* 727 So.2d 1033, 1037–38 (Fla. 5th DCA 1999)(finding that an award in the amount of $200,000 for future medical expenses was not supported by the evidence where the plaintiff's doctor testified that a future surgery would cost between $20,000 and $25,000); *Nuta v. Genders,* 617 So.2d 329, 331 (Fla. 3d DCA 1993)(reversing part of a judgment awarding future medical expenses where the plaintiff presented no evidence regarding a specific amount for future medical expenses); *Broward Cmty. Coll. v. Schwartz,* 616 So.2d 1040, 1041 (Fla. 4th DCA 1993)(finding that the evidence was insufficient to support an award for future medical expenses in excess of $300 where the plaintiff's doctor testified that the plaintiff may require an additional surgery at a cost of $300); *cf. Metrolimo, Inc. v. Lamm,* 666 So.2d 552, 553 (Fla. 3d DCA 1995)(finding that an award in the amount of $150,000 for future medical expenses and nursing care was supported by the testimony of the plaintiff's medical experts).

[4] Here, we agree with the Morenos' contention that the jury did not have to find that Arnulfo Moreno sustained a permanent injury to award future medical expenses. Recovery for future medical expenses in this case is permitted, as long as there is sufficient evidence that Arnulfo Moreno would reasonably incur medical expenses for a condition arising from the motor vehicle collision. However, as the Morenos also contend on appeal, the jury's verdict for future medical expenses, $171,000, must be supported by sufficient evidence in the record before us.

[5] In conjunction with the well-established Florida law on remittitur, section 768.74, Florida Statutes (2001),[4] delineates certain criteria a trial court must follow in determining if an award is excessive and, therefore, contrary to the weight of the evidence. *See Fravel,* 727 So.2d at 1037; *Kaine,* 735 So.2d at 601. Section 768.74(5) states, in relevant part, as follows:

> (5) In determining whether an award is excessive or inadequate in light of the facts and circumstances presented to the trier of fact and in determining the amount, if any, that such award exceeds a reasonable range of damages or is inadequate, the court shall consider the following criteria:
>
> (a) Whether the amount awarded is indicative of prejudice, passion, or corruption on the part of the trier of fact;
>
> (b) Whether it appears that the trier of fact ignored the evidence in reaching a verdict or misconceived the merits of the case relating to the amount of damages recoverable;
>
> (c) Whether the trier of fact took improper elements of damages into account or arrived at the amount of damages by speculation and conjecture;
>
> (d) Whether the amount awarded bears a reasonable relation to the amount of

4. Section 768.043, Florida Statutes (2001), similarly authorizes remittitur in actions arising from the operation of motor vehicles.

damages proved and the injury suffered; and

(e) Whether the amount awarded is supported by the evidence and is such that it could be adduced in a logical manner by reasonable persons.

Here, our review of the record reveals that there is insufficient evidence to support an award for Arnulfo Moreno's future medical expenses in the amount of $171,000. Moreover, the trial judge was correct in finding that the amount awarded does not bear a reasonable relationship to the damages proved at trial. *See* § 768.74(5)(e), Fla. Stat. (2001). Arnulfo Moreno presented testimony from two experts regarding his future medical expenses. The testimony of both the neurosurgeon and the orthopedic surgeon described the type of surgery and the cost of the surgery that Mr. Moreno may need to undergo in the future. The expert testimony clearly showed that there is a twenty-five percent (25%) probability that Mr. Moreno may require one additional surgery at an estimated cost of $79,000 or less. Therefore, we find that the amount awarded by the jury, $171,000, was not within the range testified to by the Morenos' medical experts and was not reasonably related to the damages actually proven.

Accordingly, we affirm the trial court's order granting the defendants' motion for remittitur or new trial as to past and future medical expenses awarded by the jury. *See* § 768.74(4), Fla. (2001)("If the party adversely affected by such remittitur . . . does not agree, the court shall order a new trial in the cause on the issue of damages only.").

Affirmed.

Detlef SAUER, Appellant,

v.

Yolanda SAUER, Appellee.

No. 3D04–2550.

District Court of Appeal of Florida, Third District.

Dec. 13, 2006.

An Appeal from the Circuit Court for Miami–Dade County, Judith L. Kreeger, Judge.

Cain & Snihur and May L. Cain, Miami, for appellant.

Contreras, Jonasz & Camacho and Jonathan Jonasz, Coral Gables; Richard J. Preira, Miami Beach, for appellee.

Before FLETCHER, SHEPHERD, and SUAREZ, JJ.

PER CURIAM.

In this dissolution matter the former husband appeals the final judgment and raises numerous issues. We affirm in all respects, but remand for correction of a mathematical error in the final judgment. On Page 15 of the final judgment, the former husband's net monthly income, after payment of his alimony obligations, should be $5,356.74 instead of the $6,106 found by the court. The former wife acknowledges that the former husband's child support obligation, therefore, would be 64% or $1,642.24 rather than the 67% or $1,793.35 found by the court. We therefore remand the case for correction of these errors.

Affirmed and remanded for corrections.

ifies the effect of the filing of a timely motion for rehearing." 114 F.R.D. 374 (1987). "Clarifies" rather than "reverses" is the appropriate word. Unless a motion under Rule 8015 suspends the finality of the judgment, the authorization to file the motion is hot air—because the losing party must file a protective notice of appeal that will deprive the district judge of the power to act on the motion. X-Cel was compelled to file such a notice. We do not read the current version of Rule 8015 as self-defeating. *Dieter* establishes that an authorized motion for rehearing suspends the finality of the judgment. This appeal, filed while the motion for rehearing was pending, is premature.

X-Cel has not asked us to treat its notice of appeal as a challenge to the district court's order on rehearing, so we need not decide whether that would be appropriate. The appeal is dismissed for want of jurisdiction.

Alyce M. KWASNY, administrator of the estate of William C. Kwasny, deceased, Plaintiff-Appellee,

v.

UNITED STATES of America, Defendant-Appellant.

No. 86-2694.

United States Court of Appeals, Seventh Circuit.

Argued Feb. 24, 1987.

Decided July 13, 1987.

Wrongful death action was brought against Government under Federal Tort Claims Act, alleging patient's death was caused by Government physicians' negligence in "intubating" patient before administering general anesthetic. The United States District Court of the Northern District of Illinois, Eastern Division, James B. Parsons, J., entered judgment awarding plaintiffs $485,215 damages, and Government appealed. The Court of Appeals, Posner, Circuit Judge, held that: (1) medical evidence was sufficient to sustain finding of causation; (2) award of $100,000 damages for loss of consortium was not excessive; and (3) award of $350,000 damages for pain and suffering was excessive and had to be reduced to $175,000.

Modified and affirmed as modified.

1. Federal Courts ⇐891

Error that would not, if corrected in time, have altered judge's conclusion is harmless and thus, not ground for reversal. Fed.Rules Civ.Proc.Rule 61, 28 U.S.C.A.

2. United States ⇐146

Uncertainty of causality of death did not require reversal of judgment of liability against Government in wrongful death action alleging Government physicians' initial attempt to "intubate" decedent during operation had been negligent and had perforated decedent's windpipe and perforation had led ultimately to decedent's death; there was medical evidence that brutally forced tube perforated decedent's windpipe and that, but for windpipe's being perforated, decedent would not have died when he did. 28 U.S.C.A. §§ 1346(b), 2671-2680.

3. United States ⇐78(9)

Whether younger or more robust person would have been fatally injured by negligent "intubation" procedure was irrelevant in determining whether Government was liable for death of patient allegedly caused by negligent "intubation" procedure. 28 U.S.C.A. §§ 1346(b), 2671-2680.

4. Death ⇐103(4)

Whether crippled and aged person conferred benefits on those he lived with was question for trier of fact in determining award of damages for loss of consortium in wrongful death action.

5. Death ⇐99(4)

Award of $100,000 to wife of decedent who had been confined to wheelchair was

not excessive in wrongful death action; wife testified as to how much she missed decedent.

6. United States ⇐142

Under Illinois law, possibility that decedent would have deprived positive utility from years of his life that were denied him as result of Government physicians' negligence was irrelevant in determining damages for pain and suffering in wrongful death action; only relevant cost was pain and suffering decedent experienced as result of Government's negligence. 28 U.S.C.A. §§ 1346(b), 2671–2680; Ill.S.H.A. ch. 70, ¶¶ 1, 2; ch. 110½, ¶ 27–6.

7. United States ⇐142

Award of $350,000 damages for pain and suffering to patient caused by Government's negligence in "intubating" patient, lacerating his lip, loosening tooth and possibly perforating trachea, was excessive; highest reasonable award was $175,000. 28 U.S.C.A. §§ 1346(b), 2671–2680; Ill.S.H.A. ch. 70, ¶¶ 1, 2; ch. 110½, ¶ 27–6.

8. Damages ⇐32

Federal Courts ⇐875

Pain and suffering are real costs allowable as damages in tort suits, but justified public concern with extravagant tort awards imposes duty on appellate court to keep awards for pain and suffering within reason.

Linda A. Wawzenski, Asst. U.S. Atty., Chicago, Ill., for defendant-appellant.

Michael L. Bolos, Michael L. Bolos, Ltd., Chicago, Ill., for plaintiff-appellee.

Before WOOD, POSNER, and MANION, Circuit Judges.

POSNER, Circuit Judge.

This suit for wrongful death, brought under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671–2680, charges that William Kwasny's death was due to negligence by doctors employed at a hospital owned by the Veterans Administration. The district judge found negligence and awarded damages of $485,215. The government appeals, complaining about both the finding of liability and the size of the damage award, which, the government argues, should not exceed $100,000.

A veteran of World War II, Kwasny contracted rheumatoid arthritis in 1945, when he was 30 years old. This is a chronic, crippling, incurable disease. It is sometimes virulent, and was in Kwasny's case. By 1978, when he was 63, his spine and knees were frozen in a bent position, he was confined to a wheelchair, and for the last 10 years he had been unable to work. Despite his disability he made recordings for the blind as a community service.

He had had many operations, the most recent one in 1976, and in all of these he had been operated on while under a general anesthetic. On one occasion he had explicitly refused to have a spinal anesthetic instead. In 1978 he was admitted to the hospital for another operation, this one on a knee. The doctors were concerned that it might be difficult to "intubate" Kwasny, i.e., to insert a tube in his windpipe through which oxygen would be pumped while he was anesthetized (a general anesthetic paralyzes the lungs). One doctor suggested a spinal anesthetic, but Kwasny refused; he wanted a general anesthetic, as he had always had. But he was heavily medicated when he made this decision, so it may not have been well considered.

Before the general anesthetic was administered, Kwasny was put into a light sleep (one in which he would still be breathing under his own power). The next step was to "preoxygenate" Kwasny, that is, fill his lungs with oxygen, so that he would not be deprived of oxygen during the few minutes occupied by the next stage of the procedure. That stage begins with the administration of a muscle relaxant that causes the patient to stop breathing. The doctors then "intubate" the patient, which means inserting a tube through the mouth (or nose) and down the trachea. When intubation is complete the breathing machine is switched on and the general anesthetic is administered. See 3 Gray & Gordy, Attorneys' Textbook of Medicine ¶¶ 58.80–58.81(2) (3d ed. 1986).

At first the doctors tried to intubate Kwasny through the mouth (the normal procedure). His neck was so bent that they had to apply considerable force with the intubating instrument (a laryngoscope), causing his lip to be lacerated and a tooth to be loosened. Even so they were unable to effect an intubation. They then tried to intubate him through his nose; this worked easily, and they then gave him the general anesthetic and performed the operation without incident.

When Kwasny awoke after the operation, he complained of difficulty in swallowing. The next day the tissues of his neck swelled. Two days later he suffered an arrest of breathing and an emergency tracheotomy was performed. He appeared to recover, and was discharged from the hospital, but continued to complain about his throat. Six months later he suffered an acute respiratory arrest, was hospitalized, went downhill rapidly, and died. The death certificate lists many causes of death, including acute respiratory failure, airway obstruction, kidney failure, and rheumatoid arthritis. The plaintiff's theory of the case, in support of which expert medical testimony was presented and which the district judge accepted, was that the initial attempt to intubate Kwasny during his last operation had been negligent and had perforated his windpipe and that the perforation had led ultimately to his death. The government presented contrary evidence on both negligence and causation.

[1] The government points out correctly that the district judge's findings contain factual errors and that its expert witnesses were more experienced than the plaintiff's. There is no need to take up space in the *Federal Reporter* to rehearse these purely factual and evidentiary disputes. Suffice it to say that there is enough evidence to support the judge's conclusions and that his findings, while probably erroneous in some respects, do not reflect so fundamental or pervasive a confusion as to invalidate his conclusions. An error that would not (if corrected in time) have altered the judge's conclusion is a harmless error, and therefore not a ground for reversal. See Fed.R.Civ.P. 61; *Nord v. United States Steel Corp.*, 758 F.2d 1462, 1467–68 (11th Cir.1985); *Phillips v. Crown Central Petroleum Corp.*, 602 F.2d 616, 626 (4th Cir. 1979). The government has never explained why its doctors thought it necessary—in what it concedes and indeed emphasizes was elective surgery, and given the possibility of nasal intubation—to use such force in trying to push a tube through the windpipe of this frail and badly crippled man that they lacerated his lip, loosened a tooth, and, more seriously, may have perforated his trachea; and while the causality of his death is by no means certain, uncertainty cannot by itself justify reversing a judgment of liability.

[2, 3] The general tendency of courts in tort cases, once negligence is established, is to resolve doubts about causation, within reason, in the plaintiff's favor. See Prosser and Keeton on the Law of Torts § 41, at p. 270 (5th ed. 1984); 4 Harper, James & Gray, The Law of Torts § 20.2, at pp. 92–93, 97 (2d ed. 1986). Kwasny cannot invoke this principle, because the Illinois cases do not support it. See, e.g., *McInturff v. Chicago Title & Trust Co.*, 102 Ill.App.2d 39, 243 N.E.2d 657 (1968). But they do support the proposition that the factfinder's resolution of the issue of causation will be given particular deference. See, e.g., *Estock v. Tri-Rental Co.*, 122 Ill.App.3d 1074, 1077, 78 Ill.Dec. 814, 816, 462 N.E.2d 933, 935 (1984) (dictum). However skeptical we might be as an original matter, we cannot gainsay the presence in the record of adequate medical evidence not only that the brutally forced tube perforated Kwasny's windpipe but also that the perforation caused his death in the sense that, but for the windpipe's being perforated, he would not have died when he did. Nothing more is required to place the district court's finding of causation beyond our legitimate power to revise. That a younger and more robust person would not have been fatally injured by the botched intubation is irrelevant; the tortfeasor takes his victim as he finds him. *Balestri v. Terminal Freight Coop. Ass'n*, 76 Ill.2d 451, 455–56, 31 Ill.Dec. 189, 191, 394 N.E.2d 391, 393 (1979).

[4] The troublesome issue in the case is the amount of the damage award—almost $500,000. At issue is $100,000 for loss of consortium, awarded to Mrs. Kwasny, and $350,000 for pain and suffering (including deprivation of the utility he derived from reading to the blind) suffered by Mr. Kwasny before he died. The government, which contends that the maximum reasonable award for both loss of consortium and pain and suffering should be less than $65,000, comes close to arguing that given Mr. Kwasny's miserable physical state the hospital did him and his wife a favor by shortening his life. It is of course true that some people, especially people who suffer from chronic disabling illnesses, derive little positive utility from life, and sometimes no or even negative utility; suicide by sane people would be inexplicable otherwise. But it cannot be presumed that because a person is crippled and aged, as Mr. Kwasny was, he derives no benefits from living, and (more important as we shall see) confers none on those he lives with. It is a question for the trier of fact whether these things are so or not. The district judge heard the testimony of Mrs. Kwasny and their daughter. He heard Mrs. Kwasny testify to how much she missed her husband. He heard her and her daughter testify about the pleasure that Mr. Kwasny derived from recording books for the blind. He heard testimony about the pain and suffering that Kwasny suffered in his last illness.

[5–7] In light of the trial judge's superior ability to gauge the credibility of the witnesses and to make necessarily subjective assessments of intangible loss, we have no basis for disturbing his award of $100,000 for loss of consortium. But we think $350,000 for pain and suffering was clearly excessive, and must be reduced. Illinois (whose substantive law governs this case) does not permit recovery in a wrongful death suit of the loss of utility to the decedent from having his life cut short; the only thing that can be recovered is the pecuniary loss to the survivors. Ill.Rev. Stat. ch. 70, ¶¶ 1–2. It is true that the decedent's own suit for personal injury survives his death, see Ill.Rev.Stat. ch. 110½, ¶ 27–6, but such a suit, at least as conventionally conceived, is a suit for the loss sustained by him during his lifetime, and not for the loss of utility from dying prematurely. The qualification is important. In another federal tort claims case governed by Illinois law, the government conceded, despite the absence of any case authority in Illinois, that a reduction in life expectancy is compensable upon proper proof. See *DePass v. United States*, 721 F.2d 203, 208 (7th Cir.1983) (dissenting opinion). But the plaintiff in this case did not seek, and the district court did not award, any damages on the basis of such a theory. It is therefore irrelevant to our consideration of the reasonableness of the damages that Mr. Kwasny, despite his radically impaired health and mobility, might have derived positive utility from the years that were denied him as a result of the government's negligence. The only relevant cost is the pain and suffering that he experienced as a result of that negligence. As the government points out, he was unconscious throughout most of his last illness, and before then his suffering from the botched intubation had been limited to minor problems with swallowing and hoarseness, plus the episode of respiratory arrest and the ensuing tracheotomy and convalescence therefrom. The cumulative pain and discomfort were not trivial but the award of $350,000 to compensate for them was in our view "manifestly erroneous." *Lynch v. Precision Machine Shop, Ltd.*, 93 Ill.2d 266, 278, 66 Ill.Dec. 643, 649, 443 N.E.2d 569, 575 (1982).

[8] We disagree with those students of tort law who believe that pain and suffering are not real costs and should not be allowable items of damages in a tort suit. No one likes pain and suffering and most people would pay a good deal of money to be free from them. If they were not recoverable in damages, the cost of negligence would be less to the tortfeasors and there would be more negligence, more accidents, more pain and suffering, and hence higher social costs. But there is a justified public concern with extravagant tort awards, and it is a duty of an appellate court to keep

these awards within reason. We think $175,000 is the highest reasonable estimate of Mr. Kwasny's pain and suffering due to the government's negligence. We order the judgment of the district court modified accordingly, and as modified the judgment is

AFFIRMED.

In re Paul V. ROLAIN, Debtor.

NORWEST BANK ST. PAUL, N.A., Plaintiff-Appellee,

v.

Edward W. BERGQUIST, Trustee of the Estate of Paul V. Rolain, Defendant-Appellant.

No. 86-5382.

United States Court of Appeals, Eighth Circuit.

Submitted May 13, 1987.

Decided June 26, 1987.

Creditor moved, in bankruptcy proceeding, for partial summary judgment, alleging that it had perfected security interest in note held by debtor's attorney under written agency agreement with creditor. The Bankruptcy Court granted creditor's motion. Trustee appealed. The United States District Court for the District of Minnesota, James M. Rosenbaum, J., affirmed. Trustee appealed. The Court of Appeals, Eugene A. Wright, Circuit Judge, sitting by designation, held that debtor's attorney was valid bailee/agent of creditor, and thus, creditor had perfected security interest in the note.

Affirmed.

1. Bankruptcy ⇐185, 188

Bankruptcy trustee's rights to avoid transfers or encumbrances on property of the bankrupt estate are derivative and are those of creditor under state law. Bankr. Code, 11 U.S.C.A. § 544.

2. Secured Transactions ⇐89

Debtor's attorney, who received possession of collateral note under written agency agreement with creditor, was valid bailee/agent of creditor, for purposes of statute which permits security interests to be perfected by possession of the collateral by creditor's bailee/agent, and thus, creditor had perfected security interest in the note; attorney asserted no interest in the collateral, and attorney's possession of the note put others on notice that the note was encumbered. M.S.A. § 336.9-305.

Mark P. Wine, Minneapolis, Minn., for defendant-appellant.

Shannon M. O'Toole, St. Paul, Minn., for plaintiff-appellee.

Before ARNOLD, JOHN R. GIBSON, and WRIGHT,* Circuit Judges.

EUGENE A. WRIGHT, Circuit Judge.

We are asked to apply Minnesota law in this appeal arising from bankruptcy proceedings. The trustee in bankruptcy contends that the creditor bank has no perfected security interest in a negotiable instrument entrusted by the bank to an attorney agent. We find that there was a perfected security interest and affirm the judgment of the district court.

Norwest Bank loaned $163,000 to Rolain and a corporation of which he was president, United Wisconsin Properties. United Wisconsin executed a promissory note that was later partially guaranteed by United Corporations of Minnesota (UCM), its parent company. UCM's guarantee was secured by a note of one of its debtors, Owen. The Owen note was the collateral

* The HONORABLE EUGENE A. WRIGHT, Senior United States Circuit Judge for the United States Court of Appeals, Ninth Circuit, sitting by designation.

1

Teresa A. CRAIG, Appellant,

v.

Larry D. CRAIG, Appellee.

No. 96–3935.

District Court of Appeal of Florida,
First District.

June 12, 1997.

An appeal from the Circuit Court for Bay County; N. Russell Bower, Judge.

Carroll L. McCauley of McCuley & Peters, Panama City, for Appellant.

Bonnie K. Roberts, Bonifay, for Appellee.

PER CURIAM.

Former Wife appeals a final judgment of the trial court equitably distributing the parties' assets and liabilities, establishing child visitation, and denying her request for attorney fees. As to the denial of attorney fees and the requirement that the parties comply with the Twelfth Judicial Circuit visitation schedule, no abuse of discretion is shown, and we affirm. However, as to the equitable distribution scheme, we must reverse and remand because the trial court diminished the parties' marital assets with non-marital debts incurred after the established date of valuation without findings that might support this ruling.

AFFIRMED in part; REVERSED and REMANDED in part.

BOOTH, JOANOS and VAN NORTWICK, JJ., concur.

2

James Wade WHITE, III, Appellant,

v.

STATE of Florida, Appellee.

No. 96–878.

District Court of Appeal of Florida,
First District.

June 12, 1997.

Circuit Court for Bay County; Dedee Costello, Judge.

Nancy A. Daniels, Public Defender; Carl S. McGinnes, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General; Amelia L. Beisner, Assistant Attorney General, Tallahassee, for Appellee.

PER CURIAM.

We affirm the appellant's conviction and sentence but remand the case for the correction of a scrivener's error in the probation order. The order should reflect that the appellant was convicted by a jury of the lesser included offense of burglary of a dwelling, and not that he entered a nolo contendere plea to the charge of burglary of a dwelling with an assault.

MINER, LAWRENCE and PADOVANO, JJ., concur.

3

Carl F. ZINN and Poungtong Zinn, Appellants,

v.

GJPS LUKAS, INC., etc., et al., Appellees.

No. 96–2418.

District Court of Appeal of Florida,
Fifth District.

June 13, 1997.

Shrimp growers brought tort action against neighboring farmer and pesticide-

spraying company, seeking damages for defendants' negligent overspraying of pesticide. The Circuit Court, Volusia County, John V. Doyle, J., entered directed verdict against growers on their business loss claim. Growers appealed. The District Court of Appeal, Goshorn, J., held that proper measure of damages was growers' lost profits rather than market value of their business.

Reversed and remanded for new trial.

1. **Damages** ⇐103

In shrimp growers' tort action against neighboring farmer and pesticide-spraying company, record demonstrated that growers' business was not completely destroyed by defendants' negligent overspraying of pesticide, and therefore proper measure of damages was growers' lost profits rather than market value of their business at time of its alleged destruction; growers continued to raise some shrimp for resale in covered shed and to buy and sell tropical fish.

2. **Damages** ⇐40(3)

Where business continues after suffering from act of negligence, business is entitled to recover lost profits attributable to defendant's negligent act.

Joel D. Eaton of Podhurst, Orseck, Josefsberg, Eaton, Meadow, Olin & Perwin, P.A., Miami; and Wagner, Vaughan & McLaughlin, P.A., Tampa, for Appellants.

H. Terrell Griffin of Griffin & Linder, P.A., Orlando, for Appellees.

GOSHORN, Judge.

Carl and Poungtong Zinn appeal the final judgment in favor of GJPS Lukas, Inc. and J & M Flying Service, Inc. [Appellees], defendants in the underlying tort action. The Zinns argue that the court erred in entering a directed verdict against them on the issue of their business loss claims. Specifically, they contend that their business was not destroyed by Appellees' admitted negligent overspraying of a neighboring field, but rather was interrupted, entitling them to restoration costs and lost profits. Accordingly, they argue, the lack of evidence of the value of the business should not have subjected them to a directed verdict. We agree and reverse.

The Zinns built and maintained ponds in which they raised brine shrimp for resale to pet shops and individuals. They also bought and raised tropical fish for resale. The Zinns averaged almost $10,000 per month in sales from the brine shrimp alone. Appellee Lukas owned adjacent farm land and, in 1991, hired Appellee J & M Flying Service, Inc. to aerially spray its corn crop with pesticides. Expert testimony established that the pesticide overspray was lethal to the algae in the Zinns' ponds and therefore to the shrimp. The Zinns twice attempted to restart their brine shrimp in the outdoor ponds, but repeated pesticide spraying killed off these shrimp also. With the important exception of brine shrimp that Mrs. Zinn continued to grow for resale in a covered shed, the brine shrimp "farming" ended.

At the close of all the evidence, the Appellees renewed their motion for directed verdict based on the Zinns' failure to put on any evidence of the value of their business, arguing that because the business had been destroyed, the measure of damages was the market value of the business at the time of its destruction, not the lost profits the Zinns were claiming. *See Aetna Life & Casualty Co. v. Little,* 384 So.2d 213 (Fla. 4th DCA 1980) (where business was completely destroyed by execution and sale, proper measure of damages is market value on date of the sale). The trial court agreed that the business had been destroyed. Because the Zinns failed to adduce evidence of the value of the business on the date of its destruction, the court entered a directed verdict against the Zinns on their business loss claim.

[1, 2] Our review of the record demonstrates that while the Zinns' business was greatly diminished, it was not destroyed. Mrs. Zinn continued to grow brine shrimp for resale after the crop dusting ended. She also continued to buy and sell tropical fish. Where a business continues after suffering from an act of negligence, the business is entitled to recover the lost profits attributable to the defendant's negligent act. *W.W. Gay Mechanical Contractor, Inc. v. Wharfside Two, Ltd.,* 545 So.2d 1348 (Fla.1989); *see also Restatement (Second) of Torts* § 931

cmt. e (1977) ("Detention or Preventing Use of Land or Chattels") ("In addition to the value of the use during a period of detention, the owner is entitled to damages for the harm legally caused to the land or chattel or to the owner's business by the deprivation.... If the detention of the land or chattel causes the owner to lose a specific sale or to lose a ready market, damages can be awarded for the loss."). Accordingly, should a jury find Appellees liable for damaging the Zinns' business, the Zinns should be awarded their lost profits.[1]

The amount of lost profits recoverable will be dependent, in part, upon whether the Zinns discharged their duty to mitigate their damages. Their financial status is relevant to this issue. *See* Restatement (Second) of Torts § 918 cmt. e (1977) ("Avoidable Consequences").[2] The circumstances in which the Zinns found themselves are also relevant to the mitigation issue. The Zinns should be permitted to attempt to establish that the threat of renewed spraying was very real and prevented them from reasonably reinstituting full production. Their position is bolstered by the fact that twice after the initial kill-off they tried to return to full production but were thwarted by renewed spraying.

REVERSED and REMANDED for new trial.

COBB and ANTOON, JJ., concur.

1. The damage to the business would not be too remote to permit recovery: Appellees knew of the Zinns' aquatic-based business, knew that the pesticides were fatal to aquatic invertebrates, were told that the spray had in fact killed off the brine shrimp, and yet continued to spray.

2. Section 918, comment e states:

> e. *When substantial expense and effort are required.* A person whose body has been hurt or whose things have been damaged may not be unreasonable in refusing to expend money or effort in repairing the hurt or preventing further harm. Whether or not he is unreasonable in refusing the effort or expense depends upon the amount of harm that may result if he does not do so, the chance that the harm will result if nothing is done, the amount of money or effort required as a preventive, his ability to provide it and the likelihood that the measures will be successful. There must also be considered the personal situation of the plaintiff. A poor man cannot be expected to diminish his resources by the expenditure of an amount that might be expected from a person of greater wealth. So too, whether it is unreasonable for a slightly injured person not to seek medical advice may depend on his ability to pay for it without financial embarrassment. Likewise when a person seeks to recover damages for loss of profits or because the tortfeasor has prevented him from taking advantage of a favorable market, his financial ability to provide a substitute for that of which he has been deprived is relevant. If he has adequate resources, he must use them to minimize the loss.

Vanessa Garcia STANFIELD, Appellant,

v.

SALVATION ARMY, etc., Appellee.

No. 96–2722.

District Court of Appeal of Florida, Fifth District.

June 13, 1997.

Plaintiff brought action under public records statute seeking disclosure of records generated by private organization which provided misdemeanor probation services for county. The Circuit Court, Marion County, Carven D. Angel, J., denied request and plaintiff appealed. The District Court of Appeal, Goshorn, J., held that: (1) organization was agency and, thus, was subject to public records law, and (2) plaintiff was not entitled to attorney fees.

Reversed.

Cobb, J., filed opinion concurring specially.

1. Records ⇐51

Private organization which, under statute and contract, took over county's role as provider of probation services was "agency" within meaning of statute defining agency to

proceeds. Thus, "Currency" was included in the warrant because there was probable cause for seizure of such. We, like the magistrate judge, read "currency" to include both the cash and the coins. *See* BLACK'S LAW DICTIONARY 382 (6th ed.1990). The plaintiff still retains his right to prove his legitimate claim to the currency, if he has one, at a later date.

IV.

For the foregoing reasons, the decision of the District Court is hereby AFFIRMED.

Jeffrey KEMEZY, Plaintiff–Appellee,

v.

James PETERS, Defendant–Appellant.

Nos. 95–1860, 95–1904, and 95–2121.

United States Court of Appeals,
Seventh Circuit.

Argued Dec. 12, 1995.

Decided March 5, 1996.

In § 1983 action against police officer, the United States District Court for the Southern District of Indiana, John Daniel Tinder, J., entered judgment on jury verdict awarding plaintiff compensatory and punitive damages. Officer appealed. The Court of Appeals, Posner, Chief Judge, held that plaintiff was not required to introduce evidence of officer's net worth.

Affirmed.

1. Civil Rights ⇐275(1)

Section 1983 plaintiff seeking punitive damages against police officer for allegedly wantonly beating him with nightstick was not required to introduce evidence of officer's net worth. 42 U.S.C.A. § 1983.

2. Damages ⇐181, 184

Plaintiff seeking punitive damages is never required to introduce evidence concerning defendant's net worth, and if defendant is to be fully indemnified, such evidence is inadmissible.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division; No. 90 C 669, John D. Tinder, Judge.

Michael K. Sutherlin, Ida Coleman Lamberti (argued), Sutherlin & Associates, Indianapolis, IN, for Jeffrey Kemezy.

John H. Brooke (argued), Casey Dean Cloyd (argued), McClellan, McClellan, Brooke & Arnold, Muncie, IN, for James Peters, individually and as a Police Officer of the City of Muncie.

Before POSNER, Chief Judge, and ESCHBACH and DIANE P. WOOD, Circuit Judges.

POSNER, Chief Judge.

[1] Jeffrey Kemezy sued a Muncie, Indiana policeman named James Peters under 42 U.S.C. § 1983, claiming that Peters had wantonly beaten him with the officer's nightstick in an altercation in a bowling alley where Peters was moonlighting as a security guard. The jury awarded Kemezy $10,000 in compensatory damages and $20,000 in punitive damages. Peters' appeal challenges only the award of punitive damages, and that on the narrowest of grounds: that it was the plaintiff's burden to introduce evidence concerning the defendant's net worth for purposes of equipping the jury with information essential to a just measurement of punitive damages.

Two courts have adopted the position that Peters advocates. *Adams v. Murakami,* 54 Cal.3d 105, 284 Cal.Rptr. 318, 327–330, 813 P.2d 1348, 1357–60 (1991); *Adel v. Parkhurst,* 681 P.2d 886, 892 (Wyo.1984); and see the dissent in *Keenan v. City of Philadelphia,* 983 F.2d 459, 483–84 (3d Cir.1992). But the majority view is opposed, as noted in *Hutchinson v. Stuckey,* 952 F.2d 1418, 1422

n. 4 (D.C.Cir.1992); see, e.g., *Smith v. Lightning Bolt Productions, Inc.*, 861 F.2d 363, 373 (2d Cir.1988); *Fishman v. Clancy*, 763 F.2d 485, 490 (1st Cir.1985); *Woods–Drake v. Lundy*, 667 F.2d 1198, 1203 n. 9 (5th Cir. 1982). Our decision in *Littlefield v. McGuffey*, 954 F.2d 1337, 1349 (7th Cir.1992), can be read as aligning us with the majority, although as Peters points out the plaintiff there had presented some evidence of the defendant's net worth and it is possible (though not necessary) to read our opinion as placing some minimal burden of production on the plaintiff. See *id.* at 1349–50. But we think the majority rule, which places no burden of production on the plaintiff, is sound, and we take this opportunity to make clear that it is indeed the law of this circuit.

The standard judicial formulation of the purpose of punitive damages is that it is to punish the defendant for reprehensible conduct and to deter him and others from engaging in similar conduct. E.g., *Memphis Community School District v. Stachura*, 477 U.S. 299, 307 n. 9, 106 S.Ct. 2537, 2542 n. 9, 91 L.Ed.2d 249 (1986); *Smith v. Wade*, 461 U.S. 30, 54, 103 S.Ct. 1625, 1639, 75 L.Ed.2d 632 (1983); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266–67, 101 S.Ct. 2748, 2759–60, 69 L.Ed.2d 616 (1981); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350, 94 S.Ct. 2997, 3012, 41 L.Ed.2d 789 (1974). This formulation is cryptic, since deterrence is a purpose of punishment, rather than, as the formulation implies, a parallel purpose, along with punishment itself, for imposing the specific form of punishment that is punitive damages. An extensive academic literature, however, elaborates on the cryptic judicial formula, offering a number of reasons for awards of punitive damages. See, e.g., *Symposium: Punitive Damages*, 40 Ala.L.Rev. 687 (1989); *Symposium: Punitive Damages*, 56 S.Cal.L.Rev. 1 (1982); 1 Dan B. Dobbs, *Law of Remedies: Damages–Equity–Restitution* § 3.11(3) (2d ed. 1993); William M. Landes & Richard A. Posner, *The Economic Structure of Tort Law*, ch. 6 (1987); W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 2, pp. 9, 11–12 (5th ed. 1984). Some of these reasons are mentioned in our cases. See, e.g., *Zazú Designs v. L'Oréal, S.A.*, 979 F.2d 499, 508 (7th Cir.1992); *Fortino v. Quasar Co.*, 950 F.2d 389, 398 (7th Cir.1991); *FDIC v. W.R. Grace & Co.*, 877 F.2d 614, 623 (7th Cir.1989). A review of the reasons will point us toward a sound choice between the majority and minority views.

1. Compensatory damages do not always compensate fully. Because courts insist that an award of compensatory damages have an objective basis in evidence, such awards are likely to fall short in some cases, especially when the injury is of an elusive or intangible character. If you spit upon another person in anger, you inflict a real injury but one exceedingly difficult to quantify. If the court is confident that the injurious conduct had no redeeming social value, so that "overdeterring" such conduct by an "excessive" award of damages is not a concern, a generous award of punitive damages will assure full compensation without impeding socially valuable conduct.

2. By the same token, punitive damages are necessary in such cases in order to make sure that tortious conduct is not underdeterred, as it might be if compensatory damages fell short of the actual injury inflicted by the tort.

These two points bring out the close relation between the compensatory and deterrent objectives of tort law, or, more precisely perhaps, its rectificatory and regulatory purposes. Knowing that he will have to pay compensation for harm inflicted, the potential injurer will be deterred from inflicting that harm unless the benefits to him are greater. If we do not want him to balance costs and benefits in this fashion, we can add a dollop of punitive damages to make the costs greater.

3. Punitive damages are necessary in some cases to make sure that people channel transactions through the market when the costs of voluntary transactions are low. We do not want a person to be able to take his neighbor's car and when the neighbor complains tell him to go sue for its value. Guido Calabresi & A. Douglas Melamed, "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral," 85 *Harv.L.Rev.* 1089, 1124–27 (1972). We want to make such expropriations valueless to the expropriator

and we can do this by adding a punitive exaction to the judgment for the market value of what is taken. This function of punitive damages is particularly important in areas such as defamation and sexual assault, where the tortfeasor may, if the only price of the tort is having to compensate his victim, commit the tort because he derives greater pleasure from the act than the victim incurs pain.

4. When a tortious act is concealable, a judgment equal to the harm done by the act will underdeter. Suppose a person who goes around assaulting other people is caught only half the time. Then in comparing the costs, in the form of anticipated damages, of the assaults with the benefits to him, he will discount the costs (but not the benefits, because they are realized in every assault) by 50 percent, and so in deciding whether to commit the next assault he will not be confronted by the full social cost of his activity.

5. An award of punitive damages expresses the community's abhorrence at the defendant's act. We understand that otherwise upright, decent, law-abiding people are sometimes careless and that their carelessness can result in unintentional injury for which compensation should be required. We react far more strongly to the deliberate or reckless wrongdoer, and an award of punitive damages commutes our indignation into a kind of civil fine, civil punishment.

Some of these functions are also performed by the criminal justice system. Many legal systems do not permit awards of punitive damages at all, believing that such awards anomalously intrude the principles of criminal justice into civil cases. Even our cousins the English allow punitive damages only in an excruciatingly narrow category of cases. See, e.g., *AB v. South West Water Services Ltd.*, [1993] 1 All E.R. 609 (Ct.App.1992). But whether because the American legal and political cultures are unique, or because the criminal justice system in this country is overloaded and some of its functions have devolved upon the tort system, punitive damages are a regular feature of American tort cases, though reserved generally for intentional torts, including the deliberate use of excess force as here. This suggests additional functions of punitive damages:

6. Punitive damages relieve the pressures on the criminal justice system. They do this not so much by creating an additional sanction, which could be done by increasing the fines imposed in criminal cases, as by giving private individuals—the tort victims themselves—a monetary incentive to shoulder the costs of enforcement.

7. If we assume realistically that the criminal justice system could not or would not take up the slack if punitive damages were abolished, then they have the additional function of heading off breaches of the peace by giving individuals injured by relatively minor outrages a judicial remedy in lieu of the violent self-help to which they might resort if their complaints to the criminal justice authorities were certain to be ignored and they had no other legal remedy.

What is striking about the purposes that are served by the awarding of punitive damages is that none of them depends critically on proof that the defendant's income or wealth *exceeds* some specified level. The more wealth the defendant has, the smaller is the relative bite that an award of punitive damages not actually geared to that wealth will take out of his pocketbook, while if he has very little wealth the award of punitive damages may exceed his ability to pay and perhaps drive him into bankruptcy. To a very rich person, the pain of having to pay a heavy award of damages may be a mere pinprick and so not deter him (or people like him) from continuing to engage in the same type of wrongdoing. *Zazú Designs v. L'Oréal, S.A., supra*, 979 F.2d at 508. What in economics is called the principle of diminishing marginal utility teaches, what is anyway obvious, that losing $1 is likely to cause less unhappiness (disutility) to a rich person than to a poor one. (This point, as the opinion in *Zazú Designs* emphasizes, does not apply to institutions as distinct from natural persons. *Id.* at 508–09.) But rich people are not famous for being indifferent to money, and if they are forced to pay not merely the cost of the harm to the victims of their torts but also some multiple of that cost they are likely to think twice before engaging in such expen-

sive behavior again. Juries, rightly or wrongly, think differently, so plaintiffs who are seeking punitive damages often present evidence of the defendant's wealth. The question is whether they *must* present such evidence—whether it is somehow unjust to allow a jury to award punitive damages without knowing that the defendant really is a wealthy person. The answer, obviously, is no. A plaintiff is not required to seek punitive damages in the first place, so he should not be denied an award of punitive damages merely because he does not present evidence that if believed would persuade the jury to award him even more than he is asking.

Take the question from the other side: if the defendant is not as wealthy as the jury might in the absence of any evidence suppose, should the plaintiff be required to show this? That seems an odd suggestion too. The reprehensibility of a person's conduct is not mitigated by his not being a rich person, and plaintiffs are never required to apologize for seeking damages that if awarded will precipitate the defendant into bankruptcy. A plea of poverty is a classic appeal to the mercy of the judge or jury, and why the plaintiff should be required to make the plea on behalf of his opponent eludes us.

The usual practice with respect to fines is not to proportion the fine to the defendant's wealth, but to allow him to argue that the fine should be waived or lowered because he cannot possibly pay it. U.S.S.G. § 5E1.2(a); *United States v. Young*, 66 F.3d 830, 839 (7th Cir.1995). (For a rare exception, based on a special statute, see *Merritt v. United States*, 960 F.2d 15, 18 (2d Cir.1992).) The practice with regard to sanctions under Fed.R.Civ.P. 11 is similar. E.g., *Johnson v. A.W. Chesterton Co.*, 18 F.3d 1362, 1366 (7th Cir.1994). It is unnecessary to multiply examples. Given the close relation between fines and punitive damages, this is the proper approach to punitive damages as well. The defendant who cannot pay a large award of punitive damages can point this out to the jury so that they will not waste their time and that of the bankruptcy courts by awarding an amount that exceeds his ability to pay.

It ill becomes *defendants* to argue that plaintiffs *must* introduce evidence of the defendant's wealth. Since most tort defendants against whom punitive damages are sought are enterprises rather than individuals, the effect of such a rule would be to encourage plaintiffs to seek punitive damages whether or not justified, in order to be able to put before the jury evidence that the defendant has a deep pocket and therefore should be made to pay a large judgment regardless of any nice calculation of actual culpability. (The judge might not allow this, if persuaded by the suggestion in *Zazú Designs* that the defendant's net worth is irrelevant to the size of the award of punitive damages when the defendant is a corporation or other institution rather than an individual.) Individual defendants, as in the present case, are reluctant to disclose their net worth in any circumstances, so that compelling plaintiffs to seek discovery of that information would invite a particularly intrusive and resented form of pretrial discovery and disable the defendant from objecting. Since, moreover, information about net worth is in the possession of the person whose net wealth is in issue, the normal principles of pleading would put the burden of production on the defendant—which, as we have been at pains to stress, is just where defendants as a whole would want it.

Peters argues that a defendant who presents evidence of his net worth to the jury in an effort to minimize any award of punitive damages will be understood by the jury to be conceding the appropriateness of awarding punitive damages in at least the amount suggested by the defendant. This is just the kind of thinking that has so often led defendants into disaster when they decided not to put into evidence their own estimate of the damages to which the plaintiff was entitled, but instead played the equivalent of double or nothing. See, e.g., *Avitia v. Metropolitan Club of Chicago, Inc.*, 49 F.3d 1219, 1230 (7th Cir.1995). Most jurors should be able to understand the structure of an argument to the effect that the defendant does not concede liability, let alone liability for punitive damages, but that if the jury disagrees it should award only a nominal amount of punitive damages because the defendant is a person of limited means.

The defendant should not be allowed to plead poverty if his employer or an insurance company is going to pick up the tab. *DeLoach v. Bevers*, 922 F.2d 618, 624 (10th Cir.1990); *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656, 669, 413 S.E.2d 897, 910 (1991); *DeMatteo v. Simon*, 112 N.M. 112, 115, 812 P.2d 361, 364 (Ct.App.1991). The contrary argument, accepted in *Michael v. Cole*, 122 Ariz. 450, 452, 595 P.2d 995, 997 (1979), that the insurance contract is a purely private matter between the defendant and his insured, ignores the consequence of such a view for the deterrent efficacy of punitive damages. It is bad enough that insurance or other indemnification reduces the financial incentive to avoid wrongdoing—which is why insuring against criminal liability is prohibited. It would be worse if the cost of the insurance fell, reducing the financial disincentive to engage in wrongful behavior, because the insurance company knew that its insured could plead poverty to the jury.

[2] We were told by Peters' lawyer without contradiction that Peters will not be indemnified for the punitive damages that he has been ordered to pay. We have noted the inappropriateness of allowing the defendant to plead poverty if he will be indemnified not because such a plea was attempted here, but to underscore the anomaly of requiring plaintiffs seeking punitive damages always to put in evidence of the defendant's net worth. When the defendant is to be fully indemnified, such evidence, far from being required, is inadmissible. Thus, in some cases it is inadmissible, but in no cases is it required.

AFFIRMED.

NBD BANK, an Illinois banking corporation, Plaintiff–Appellant and Cross–Appellee,

v.

STANDARD BANK AND TRUST CO., an Illinois banking corporation, Defendant–Appellee and Cross–Appellant.

Nos. 94–3409, 94–3603.

United States Court of Appeals, Seventh Circuit.

Argued April 11, 1995.

Decided March 11, 1996.

Plaintiff bank brought action against defendant bank, seeking declaratory judgment that defendant bore loss resulting from check-kiting scheme. Defendant counterclaimed. The United States District Court for the Northern District of Illinois, James F. Holderman, J., dismissed for lack of subject matter jurisdiction, and parties appealed. The Court of Appeals, Eschbach, Circuit Judge, held that Expedited Funds Availability Act (EFAA) provides for federal court jurisdiction in suits between depository institutions.

Reversed and remanded.

Federal Courts ⇐192

Expedited Funds Availability Act (EFAA) provides for federal court jurisdiction in suits between depository institutions. Competitive Equality Banking Act of 1987, §§ 602–611, 12 U.S.C.A. §§ 4001–4010.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division, No. 93 C 7234; James F. Holderman, Judge.

Robert P. Hurlbert (argued), Daniel J. Sheridan, Louis Theros, Dickinson, Wright, Moon, Van Dusen & Freeman, Chicago, IL, for plaintiff-appellant.

Francis D. Morrissey, Michael A. Pollard (argued), Richard M. Franklin, Thomas F. Bridgman, Baker & McKenzie, Chicago, IL.

Syllabus

PHILIP MORRIS USA *v.* WILLIAMS, PERSONAL REPRESENTATIVE OF ESTATE OF WILLIAMS, DECEASED

CERTIORARI TO THE SUPREME COURT OF OREGON

No. 05–1256. Argued October 31, 2006—Decided February 20, 2007

In this state negligence and deceit lawsuit, a jury found that Jesse Williams' death was caused by smoking and that petitioner Philip Morris, which manufactured the cigarettes he favored, knowingly and falsely led him to believe that smoking was safe. In respect to deceit, it awarded $821,000 in compensatory damages and $79.5 million in punitive damages to respondent, the personal representative of Williams' estate. The trial court reduced the latter award, but it was restored by the Oregon Court of Appeals. The State Supreme Court rejected Philip Morris' arguments that the trial court should have instructed the jury that it could not punish Philip Morris for injury to persons not before the court, and that the roughly 100-to-1 ratio the $79.5 million award bore to the compensatory damages amount indicated a "grossly excessive" punitive award.

Held:

1. A punitive damages award based in part on a jury's desire to punish a defendant for harming nonparties amounts to a taking of property from the defendant without due process. Pp. 352–357.

(a) While "[p]unitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition," *BMW of North America, Inc.* v. *Gore*, 517 U. S. 559, 568, unless a State insists upon proper standards to cabin the jury's discretionary authority, its punitive damages system may deprive a defendant of "fair notice . . . of the severity of the penalty that a State may impose," *id.*, at 574; may threaten "arbitrary punishments," *State Farm Mut. Automobile Ins. Co.* v. *Campbell*, 538 U. S. 408, 416; and, where the amounts are sufficiently large, may impose one State's (or one jury's) "policy choice" upon "neighboring States" with different public policies, *BMW*, *supra*, at 571–572. Thus, the Constitution imposes limits on both the procedures for awarding punitive damages and amounts forbidden as "grossly excessive." See *Honda Motor Co.* v. *Oberg*, 512 U. S. 415, 432. The Constitution's procedural limitations are considered here. Pp. 352–353.

(b) The Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury inflicted on strangers to the litigation. For one thing, a defendant threatened with punishment for

such injury has no opportunity to defend against the charge. See *Lindsey* v. *Normet*, 405 U. S. 56, 66. For another, permitting such punishment would add a near standardless dimension to the punitive damages equation and magnify the fundamental due process concerns of this Court's pertinent cases—arbitrariness, uncertainty, and lack of notice. Finally, the Court finds no authority to support using punitive damages awards to punish a defendant for harming others. *BMW*, *supra*, at 568, n. 11, distinguished. Respondent argues that showing harm to others is relevant to a different part of the punitive damages constitutional equation, namely, reprehensibility. While evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk to the general public, and so was particularly reprehensible, a jury may not go further and use a punitive damages verdict to punish a defendant directly for harms to those nonparties. Given the risks of unfairness, it is constitutionally important for a court to provide assurance that a jury is asking the right question; and given the risks of arbitrariness, inadequate notice, and imposing one State's policies on other States, it is particularly important that States avoid procedure that unnecessarily deprives juries of proper legal guidance. Pp. 353–355.

(c) The Oregon Supreme Court's opinion focused on more than reprehensibility. In rejecting Philip Morris' claim that the Constitution prohibits using punitive damages to punish a defendant for harm to nonparties, it made three statements. The first—that this Court held in *State Farm* only that a jury could not base an award on dissimilar acts of a defendant—was correct, but this Court now explicitly holds that a jury may not punish for harm to others. This Court disagrees with the second statement—that if a jury cannot punish for the conduct, there is no reason to consider it—since the Due Process Clause prohibits a State's inflicting punishment for harm to nonparties, but permits a jury to consider such harm in determining reprehensibility. The third statement—that it is unclear how a jury could consider harm to nonparties and then withhold that consideration from the punishment calculus—raises the practical problem of how to know whether a jury punished the defendant for causing injury to others rather than just took such injury into account under the rubric of reprehensibility. The answer is that state courts cannot authorize procedures that create an unreasonable and unnecessary risk of any such confusion occurring. Although States have some flexibility in determining what kind of procedures to implement to protect against that risk, federal constitutional law obligates them to provide some form of protection where the risk of misunderstanding is a significant one. Pp. 355–357.

Syllabus

2. Because the Oregon Supreme Court's application of the correct standard may lead to a new trial, or a change in the level of the punitive damages award, this Court will not consider the question whether the award is constitutionally "grossly excessive." Pp. 357–358.

340 Ore. 35, 127 P. 3d 1165, vacated and remanded.

BREYER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, SOUTER, and ALITO, JJ., joined. STEVENS, J., *post*, p. 358, and THOMAS, J., *post*, p. 361, filed dissenting opinions. GINSBURG, J., filed a dissenting opinion, in which SCALIA and THOMAS, JJ., joined, *post*, p. 362.

Andrew L. Frey argued the cause for petitioner. With him on the briefs were *Andrew H. Schapiro*, *Lauren R. Goldman*, *Murray R. Garnick*, *Kenneth S. Geller*, *Evan M. Tager*, *William F. Gary*, and *Sharon A. Rudnick*.

Robert S. Peck argued the cause for respondent. With him on the brief were *Ned Miltenberg*, *Charles S. Tauman*, *James S. Coon*, *Raymond F. Thomas*, *William A. Gaylord*, *Maureen Leonard*, and *Kathryn H. Clarke*.*

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*Briefs of *amici curiae* urging reversal were filed for the Alliance of Automobile Manufacturers by *H. Christopher Bartolomucci* and *John T. Whatley;* for the American Tort Reform Association by *Roy T. Englert, Jr.*, and *Alan E. Untereiner;* for the Chamber of Commerce of the United States of America by *Jonathan D. Hacker*, *Robin S. Conrad*, and *Amar D. Sarwal;* for the National Association of Manufacturers et al. by *Gene C. Schaerr*, *Steffen N. Johnson*, *Linda T. Coberly*, *Jan S. Amundson*, *Quentin Riegel*, and *Donald D. Evans;* for the National Association of Mutual Insurance Cos. et al. by *Sheila L. Birnbaum*, *Barbara Wrubel*, *Douglas W. Dunham*, *Ellen P. Quackenbos*, *J. Stephen Zielezienski*, *David F. Snyder*, and *Allan J. Stein;* for the Pacific Legal Foundation by *Deborah J. La Fetra* and *Timothy Sandefur;* for the Product Liability Advisory Council by *Theodore B. Olson*, *Thomas H. Dupree, Jr.*, and *Theodore J. Boutrous, Jr.;* for R. J. Reynolds Tobacco Co. et al. by *Meir Feder*, *Charles R. A. Morse*, *James T. Newsom*, *Donald B. Ayer*, and *Robert H. Klonoff;* for the Washington Legal Foundation et al. by *Arvin Maskin*, *Daniel J. Popeo*, and *Paul D. Kamenar;* and for Steven L. Chanenson et al. by *Robert D. Fox* and *John F. Gullace*.

Briefs of *amici curiae* urging affirmance were filed for the State of Oregon et al. by *Hardy Myers*, Attorney General of Oregon, *Peter Shepherd*, Deputy Attorney General, *Mary H. Williams*, Solicitor General, and *Janet A. Metcalf* and *Kaye E. McDonald*, Assistant Attorneys General,

JUSTICE BREYER delivered the opinion of the Court.

The question we address today concerns a large state-court punitive damages award. We are asked whether the Constitution's Due Process Clause permits a jury to base that award in part upon its desire to *punish* the defendant for harming persons who are not before the court (*e. g.*, victims whom the parties do not represent). We hold that such an award would amount to a taking of "property" from the defendant without due process.

I

This lawsuit arises out of the death of Jesse Williams, a heavy cigarette smoker. Respondent, Williams' widow, represents his estate in this state lawsuit for negligence and deceit against Philip Morris, the manufacturer of Marlboro, the brand that Williams favored. A jury found that Williams' death was caused by smoking; that Williams smoked in significant part because he thought it was safe to do so;

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and by the Attorneys General for their respective States as follows: *Bill Lockyer* of California, *J. Joseph Curran, Jr.*, of Maryland, *Mike Hatch* of Minnesota, *Jim Hood* of Mississippi, *Jeremiah W. (Jay) Nixon* of Missouri, *Mike McGrath* of Montana, *Patricia A. Madrid* of New Mexico, *W. A. Drew Edmondson* of Oklahoma, *Mark L. Shurtleff* of Utah, and *Peg Lautenschlager* of Wisconsin; for AARP et al. by *Elizabeth J. Cabraser* and *Deborah Zuckerman;* for the Association of Trial Lawyers of America by *Gerson H. Smoger* and *Brent M. Rosenthal;* for the Campaign for Tobacco-Free Kids et al. by *William B. Schultz;* for the Center for a Just Society by *Brian G. Brooks;* for Trial Lawyers for Public Justice by *Michael V. Ciresi*, *Roberta B. Walburn*, *Arthur H. Bryant*, and *Leslie A. Brueckner;* for Henry H. Drummonds et al. by *Steven C. Berman;* for Keith N. Hylton et al. by *Ronald Simon*, *Ed Bell*, *Patrick Carr*, *Richard L. Denney*, *Charles Siegel*, and *Gerry L. Spence;* and for Neil Vidmar et al. by *Frederick M. Baron.*

Briefs of *amici curiae* were filed for the Oregon Forest Industries Council et al. by *Thomas W. Brown;* for the Tobacco Control Legal Consortium et al. by *Edward L. Sweda, Jr.;* for Akhil Reed Amar et al. by *Kenneth Chesebro*, *Michael J. Piuze*, and *Arthur McEvoy;* and for A. Mitchell Polinsky et al. by *Timothy Lynch.*

and that Philip Morris knowingly and falsely led him to believe that this was so. The jury ultimately found that Philip Morris was negligent (as was Williams) and that Philip Morris had engaged in deceit. In respect to deceit, the claim at issue here, it awarded compensatory damages of about $821,000 (about $21,000 economic and $800,000 noneconomic) along with $79.5 million in punitive damages.

The trial judge subsequently found the $79.5 million punitive damages award "excessive," see, *e. g., BMW of North America, Inc.* v. *Gore*, 517 U. S. 559 (1996), and reduced it to $32 million. Both sides appealed. The Oregon Court of Appeals rejected Philip Morris' arguments and restored the $79.5 million jury award. Subsequently, Philip Morris sought review in the Oregon Supreme Court (which denied review) and then here. We remanded the case in light of *State Farm Mut. Automobile Ins. Co.* v. *Campbell*, 538 U. S. 408 (2003). 540 U. S. 801 (2003). The Oregon Court of Appeals adhered to its original views. And Philip Morris sought, and this time obtained, review in the Oregon Supreme Court.

Philip Morris then made two arguments relevant here. First, it said that the trial court should have accepted, but did not accept, a proposed "punitive damages" instruction that specified the jury could not seek to punish Philip Morris for injury to other persons not before the court. In particular, Philip Morris pointed out that the plaintiff's attorney had told the jury to "think about how many other Jesse Williams in the last 40 years in the State of Oregon there have been. . . . In Oregon, how many people do we see outside, driving home . . . smoking cigarettes? . . . [C]igarettes . . . are going to kill ten [of every hundred]. [And] the market share of Marlboros [*i. e.*, Philip Morris] is one-third [*i. e.*, one of every three killed]." App. 197a, 199a. In light of this argument, Philip Morris asked the trial court to tell the jury that "you may consider the extent of harm suffered by others in determining what [the] reasonable relationship is" be-

tween any punitive award and "the harm caused to Jesse Williams" by Philip Morris' misconduct, "[but] you are not to punish the defendant for the impact of its alleged misconduct on other persons, who may bring lawsuits of their own in which other juries can resolve their claims . . . ." *Id.*, at 280a. The judge rejected this proposal and instead told the jury that "[p]unitive damages are awarded against a defendant to punish misconduct and to deter misconduct," and "are not intended to compensate the plaintiff or anyone else for damages caused by the defendant's conduct." *Id.*, at 283a. In Philip Morris' view, the result was a significant likelihood that a portion of the $79.5 million award represented punishment for its having harmed others, a punishment that the Due Process Clause would here forbid.

Second, Philip Morris pointed to the roughly 100-to-1 ratio the $79.5 million punitive damages award bears to $821,000 in compensatory damages. Philip Morris noted that this Court in *BMW* emphasized the constitutional need for punitive damages awards to reflect (1) the "reprehensibility" of the defendant's conduct, (2) a "reasonable relationship" to the harm the plaintiff (or related victim) suffered, and (3) the presence (or absence) of "sanctions," *e. g.*, criminal penalties, that state law provided for comparable conduct, 517 U. S., at 575–585. And in *State Farm*, this Court said that the longstanding historical practice of setting punitive damages at two, three, or four times the size of compensatory damages, while "not binding," is "instructive," and that "[s]ingle-digit multipliers are more likely to comport with due process." 538 U. S., at 425. Philip Morris claimed that, in light of this case law, the punitive award was "grossly excessive." See *TXO Production Corp.* v. *Alliance Resources Corp.*, 509 U. S. 443, 458 (1993) (plurality opinion); *BMW*, *supra*, at 574–575; *State Farm*, *supra*, at 416–417.

The Oregon Supreme Court rejected these and other Philip Morris arguments. In particular, it rejected Philip Morris' claim that the Constitution prohibits a state jury

"from using punitive damages to punish a defendant for harm to nonparties." 340 Ore. 35, 51–52, 127 P. 3d 1165, 1175 (2006). And in light of Philip Morris' reprehensible conduct, it found that the $79.5 million award was not "grossly excessive." *Id.*, at 63–64, 127 P. 3d, at 1181–1182.

Philip Morris then sought certiorari. It asked us to consider, among other things, (1) its claim that Oregon had unconstitutionally permitted it to be punished for harming nonparty victims; and (2) whether Oregon had in effect disregarded "the constitutional requirement that punitive damages be reasonably related to the plaintiff's harm." Pet. for Cert. (I). We granted certiorari limited to these two questions.

For reasons we shall set forth, we consider only the first of these questions. We vacate the Oregon Supreme Court's judgment, and we remand the case for further proceedings.

II

This Court has long made clear that "[p]unitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition." *BMW*, *supra*, at 568. See also *Gertz* v. *Robert Welch*, *Inc.*, 418 U. S. 323, 350 (1974); *Newport* v. *Fact Concerts, Inc.*, 453 U. S. 247, 266–267 (1981); *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U. S. 1, 22 (1991). At the same time, we have emphasized the need to avoid an arbitrary determination of an award's amount. Unless a State insists upon proper standards that will cabin the jury's discretionary authority, its punitive damages system may deprive a defendant of "fair notice . . . of the severity of the penalty that a State may impose," *BMW*, *supra*, at 574; it may threaten "arbitrary punishments," *i. e.*, punishments that reflect not an "application of law" but "a decisionmaker's caprice," *State Farm*, *supra*, at 416, 418 (internal quotation marks omitted); and, where the amounts are sufficiently large, it may impose one State's (or one jury's) "policy choice," say, as to the condi-

tions under which (or even whether) certain products can be sold, upon "neighboring States" with different public policies, *BMW*, *supra*, at 571–572.

For these and similar reasons, this Court has found that the Constitution imposes certain limits, in respect both to procedures for awarding punitive damages and to amounts forbidden as "grossly excessive." See *Honda Motor Co.* v. *Oberg*, 512 U. S. 415, 432 (1994) (requiring judicial review of the size of punitive awards); *Cooper Industries, Inc.* v. *Leatherman Tool Group, Inc.*, 532 U. S. 424, 443 (2001) (review must be *de novo*); *BMW*, *supra*, at 574–585 (excessiveness decision depends upon the reprehensibility of the defendant's conduct, whether the award bears a reasonable relationship to the actual and potential harm caused by the defendant to the plaintiff, and the difference between the award and sanctions "authorized or imposed in comparable cases"); *State Farm*, *supra*, at 425 (excessiveness more likely where ratio exceeds single digits). Because we shall not decide whether the award here at issue is "grossly excessive," we need now only consider the Constitution's procedural limitations.

III

In our view, the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i. e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation. For one thing, the Due Process Clause prohibits a State from punishing an individual without first providing that individual with "an opportunity to present every available defense." *Lindsey* v. *Normet*, 405 U. S. 56, 66 (1972) (internal quotation marks omitted). Yet a defendant threatened with punishment for injuring a nonparty victim has no opportunity to defend against the charge, by showing, for example in a case such as this, that the other victim was not entitled to dam-

ages because he or she knew that smoking was dangerous or did not rely upon the defendant's statements to the contrary.

For another, to permit punishment for injuring a nonparty victim would add a near standardless dimension to the punitive damages equation. How many such victims are there? How seriously were they injured? Under what circumstances did injury occur? The trial will not likely answer such questions as to nonparty victims. The jury will be left to speculate. And the fundamental due process concerns to which our punitive damages cases refer—risks of arbitrariness, uncertainty, and lack of notice—will be magnified. *State Farm*, 538 U. S., at 416, 418; *BMW*, 517 U. S., at 574.

Finally, we can find no authority supporting the use of punitive damages awards for the purpose of punishing a defendant for harming others. We have said that it may be appropriate to consider the reasonableness of a punitive damages award in light of the *potential* harm the defendant's conduct could have caused. But we have made clear that the potential harm at issue was harm potentially caused *the plaintiff*. See *State Farm*, *supra*, at 424 ("[W]e have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, *to the plaintiff* and the punitive damages award" (emphasis added)). See also *TXO*, 509 U. S., at 460–462 (plurality opinion) (using same kind of comparison as basis for finding a punitive award not unconstitutionally excessive). We did use the term "error-free" (in *BMW*) to describe a lower court punitive damages calculation that likely included harm to others in the equation. 517 U. S., at 568, n. 11. But context makes clear that the term "error-free" in the *BMW* footnote referred to errors relevant to the case at hand. Although elsewhere in *BMW* we noted that there was no suggestion that the plaintiff "or any other BMW purchaser was threatened with any additional potential harm" by the defendant's conduct, we did not purport to decide the question of harm to others. *Id.*, at 582. Rather, the opinion appears to have left the question open.

Respondent argues that she is free to show harm to other victims because it is relevant to a different part of the punitive damages constitutional equation, namely, reprehensibility. That is to say, harm to others shows more reprehensible conduct. Philip Morris, in turn, does not deny that a plaintiff may show harm to others in order to demonstrate reprehensibility. Nor do we. Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible—although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse. Yet for the reasons given above, a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties.

Given the risks of unfairness that we have mentioned, it is constitutionally important for a court to provide assurance that the jury will ask the right question, not the wrong one. And given the risks of arbitrariness, the concern for adequate notice, and the risk that punitive damages awards can, in practice, impose one State's (or one jury's) policies (*e. g.*, banning cigarettes) upon other States—all of which accompany awards that, today, may be many times the size of such awards in the 18th and 19th centuries, see *id.*, at 594–595 (BREYER, J., concurring)—it is particularly important that States avoid procedure that unnecessarily deprives juries of proper legal guidance. We therefore conclude that the Due Process Clause requires States to provide assurance that juries are not asking the wrong question, *i. e.*, seeking, not simply to determine reprehensibility, but also to punish for harm caused strangers.

IV

Respondent suggests as well that the Oregon Supreme Court, in essence, agreed with us, that it did not authorize punitive damages awards based upon punishment for harm caused to nonparties. We concede that one might read some

portions of the Oregon Supreme Court's opinion as focusing only upon reprehensibility. See, *e. g.*, 340 Ore., at 51, 127 P. 3d, at 1175 ("[T]he jury could consider whether Williams and his misfortune were merely exemplars of the harm that Philip Morris was prepared to inflict on the smoking public at large"). But the Oregon court's opinion elsewhere makes clear that that court held more than these few phrases might suggest.

The instruction that Philip Morris said the trial court should have given distinguishes between using harm to others as part of the "reasonable relationship" equation (which it would allow) and using it directly as a basis for punishment. The instruction asked the trial court to tell the jury that "you *may* consider the extent of harm suffered by others *in determining what [the] reasonable relationship is*" between Philip Morris' punishable misconduct and harm caused to Jesse Williams, "*[but] you are not to punish the defendant for the impact of its alleged misconduct on other persons, who may bring lawsuits of their own* in which other juries can resolve their claims . . . ." App. 280a (emphasis added). And as the Oregon Supreme Court explicitly recognized, Philip Morris argued that the Constitution "prohibits the state, acting through a civil jury, from using punitive damages to punish a defendant for harm to nonparties." 340 Ore., at 51–52, 127 P. 3d, at 1175.

The court rejected that claim. In doing so, it pointed out (1) that this Court in *State Farm* had held only that a jury could not base its award upon "dissimilar" acts of a defendant. 340 Ore., at 52–53, 127 P. 3d, at 1175–1176. It added (2) that "[i]f a jury cannot punish for the conduct, then it is difficult to see why it may consider it at all." *Id.*, at 52, n. 3, 127 P. 3d, at 1175, n. 3. And it stated (3) that "[i]t is unclear to us how a jury could 'consider' harm to others, yet withhold that consideration from the punishment calculus." *Ibid.*

The Oregon court's first statement is correct. We did not previously hold explicitly that a jury may not punish for the

harm caused others. But we do so hold now. We do not agree with the Oregon court's second statement. We have explained why we believe the Due Process Clause prohibits a State's inflicting punishment for harm caused strangers to the litigation. At the same time we recognize that conduct that risks harm to many is likely more reprehensible than conduct that risks harm to only a few. And a jury consequently may take this fact into account in determining reprehensibility. Cf., *e. g.*, *Witte* v. *United States*, 515 U. S. 389, 400 (1995) (recidivism statutes taking into account a criminal defendant's other misconduct do not impose an " 'additional penalty for the earlier crimes,' but instead . . . 'a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one' " (quoting *Gryger* v. *Burke*, 334 U. S. 728, 732 (1948))).

The Oregon court's third statement raises a practical problem. How can we know whether a jury, in taking account of harm caused others under the rubric of reprehensibility, also seeks to *punish* the defendant for having caused injury to others? Our answer is that state courts cannot authorize procedures that create an unreasonable and unnecessary risk of any such confusion occurring. In particular, we believe that where the risk of that misunderstanding is a significant one—because, for instance, of the sort of evidence that was introduced at trial or the kinds of argument the plaintiff made to the jury—a court, upon request, must protect against that risk. Although the States have some flexibility to determine what *kind* of procedures they will implement, federal constitutional law obligates them to provide *some* form of protection in appropriate cases.

V

As the preceding discussion makes clear, we believe that the Oregon Supreme Court applied the wrong constitutional standard when considering Philip Morris' appeal. We remand this case so that the Oregon Supreme Court can apply

the standard we have set forth. Because the application of this standard may lead to the need for a new trial, or a change in the level of the punitive damages award, we shall not consider whether the award is constitutionally "grossly excessive." We vacate the Oregon Supreme Court's judgment and remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE STEVENS, dissenting.

The Due Process Clause of the Fourteenth Amendment imposes both substantive and procedural constraints on the power of the States to impose punitive damages on tortfeasors. See *State Farm Mut. Automobile Ins. Co.* v. *Campbell*, 538 U. S. 408 (2003); *Cooper Industries, Inc.* v. *Leatherman Tool Group, Inc.*, 532 U. S. 424 (2001); *BMW of North America, Inc.* v. *Gore*, 517 U. S. 559 (1996); *Honda Motor Co.* v. *Oberg*, 512 U. S. 415 (1994); *TXO Production Corp.* v. *Alliance Resources Corp.*, 509 U. S. 443 (1993). I remain firmly convinced that the cases announcing those constraints were correctly decided. In my view the Oregon Supreme Court faithfully applied the reasoning in those opinions to the egregious facts disclosed by this record. I agree with JUSTICE GINSBURG's explanation of why no procedural error even arguably justifying reversal occurred at the trial in this case. See *post*, p. 362 (dissenting opinion).

Of greater importance to me, however, is the Court's imposition of a novel limit on the State's power to impose punishment in civil litigation. Unlike the Court, I see no reason why an interest in punishing a wrongdoer "for harming persons who are not before the court," *ante*, at 349, should not be taken into consideration when assessing the appropriate sanction for reprehensible conduct.

Whereas compensatory damages are measured by the harm the defendant has caused the plaintiff, punitive damages are a sanction for the public harm the defendant's con-

duct has caused or threatened. There is little difference between the justification for a criminal sanction, such as a fine or a term of imprisonment, and an award of punitive damages. See *Cooper Industries*, 532 U. S., at 432. In our early history either type of sanction might have been imposed in litigation prosecuted by a private citizen. See *Steel Co.* v. *Citizens for Better Environment*, 523 U. S. 83, 127–128 (1998) (STEVENS, J., concurring in judgment). And while in neither context would the sanction typically include a pecuniary award measured by the harm that the conduct had caused to any third parties, in both contexts the harm to third parties would surely be a relevant factor to consider in evaluating the reprehensibility of the defendant's wrongdoing. We have never held otherwise.

In the case before us, evidence attesting to the possible harm the defendant's extensive deceitful conduct caused other Oregonians was properly presented to the jury. No evidence was offered to establish an appropriate measure of damages to compensate such third parties for their injuries, and no one argued that the punitive damages award would serve any such purpose. To award compensatory damages to remedy such third-party harm might well constitute a taking of property from the defendant without due process, cf. *ante*, at 349. But a punitive damages award, instead of serving a compensatory purpose, serves the entirely different purposes of retribution and deterrence that underlie every criminal sanction. *State Farm*, 538 U. S., at 416. This justification for punitive damages has even greater salience when, as in this case, see Ore. Rev. Stat. § 31.735(1) (2003), the award is payable in whole or in part to the State rather than to the private litigant.[1]

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[1] The Court's holding in *Browning-Ferris Industries of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U. S. 257 (1989), distinguished, for the purposes of appellate review under the Excessive Fines Clause of the Eighth Amendment, between criminal sanctions and civil fines awarded entirely to the plaintiff. The fact that part of the award in this case is payable to the

While apparently recognizing the novelty of its holding, *ante*, at 356–357, the majority relies on a distinction between taking third-party harm into account in order to assess the reprehensibility of the defendant's conduct—which is permitted—and doing so in order to punish the defendant "directly"—which is forbidden. *Ante*, at 355. This nuance eludes me. When a jury increases a punitive damages award because injuries to third parties enhanced the reprehensibility of the defendant's conduct, the jury is by definition punishing the defendant—directly—for third-party harm.[2] A murderer who kills his victim by throwing a bomb that injures dozens of bystanders should be punished more severely than one who harms no one other than his intended victim. Similarly, there is no reason why the measure of the appropriate punishment for engaging in a campaign of deceit in distributing a poisonous and addictive substance to thousands of cigarette smokers statewide should not include consideration of the harm to those "bystanders" as well as the harm to the individual plaintiff. The Court endorses a contrary conclusion without providing us with any reasoned justification.

It is far too late in the day to argue that the Due Process Clause merely guarantees fair procedure and imposes no

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State lends further support to my conclusion that it should be treated as the functional equivalent of a criminal sanction. See *id.*, at 263–264. I continue to agree with Justice O'Connor and those scholars who have concluded that the Excessive Fines Clause is applicable to punitive damages awards regardless of who receives the ultimate payout. See *id.*, at 286–299 (opinion concurring in part and dissenting in part).

[2] It is no answer to refer, as the majority does, to recidivism statutes. *Ante*, at 357. In that context, we have distinguished between taking prior crimes into account as an aggravating factor in penalizing the conduct before the court versus doing so to punish for the earlier crimes. *Ibid.* But if enhancing a penalty for a present crime because of prior conduct that has already been punished is permissible, it is certainly proper to enhance a penalty because the conduct before the court, which has never been punished, injured multiple victims.

substantive limits on a State's lawmaking power. See, *e. g.*, *Moore* v. *East Cleveland*, 431 U. S. 494, 544 (1977) (White, J., dissenting); *Poe* v. *Ullman*, 367 U. S. 497, 540–541 (1961) (Harlan, J., dissenting); *Whitney* v. *California*, 274 U. S. 357, 373 (1927) (Brandeis, J., concurring). It remains true, however, that the Court should be "reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Collins* v. *Harker Heights*, 503 U. S. 115, 125 (1992). Judicial restraint counsels us to "exercise the utmost care whenever we are asked to break new ground in this field." *Ibid.* Today the majority ignores that sound advice when it announces its new rule of substantive law.

Essentially for the reasons stated in the opinion of the Supreme Court of Oregon, I would affirm its judgment.

JUSTICE THOMAS, dissenting.

I join JUSTICE GINSBURG's dissent in full. I write separately to reiterate my view that "'the Constitution does not constrain the size of punitive damages awards.'" *State Farm Mut. Automobile Ins. Co.* v. *Campbell*, 538 U. S. 408, 429–430 (2003) (THOMAS, J., dissenting) (quoting *Cooper Industries, Inc.* v. *Leatherman Tool Group, Inc.*, 532 U. S. 424, 443 (2001) (THOMAS, J., concurring)). It matters not that the Court styles today's holding as "procedural" because the "procedural" rule is simply a confusing implementation of the substantive due process regime this Court has created for punitive damages. See *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U. S. 1, 26–27 (1991) (SCALIA, J., concurring in judgment) ("In 1868 . . . punitive damages were undoubtedly an established part of the American common law of torts. It is . . . clear that no particular procedures were deemed necessary to circumscribe a jury's discretion regarding the award of such damages, or their amount"). Today's opinion proves once again that this Court's punitive damages jurisprudence is "insusceptible of principled application." *BMW of North*

America, Inc. v. *Gore*, 517 U. S. 559, 599 (1996) (SCALIA, J., joined by THOMAS, J., dissenting).

JUSTICE GINSBURG, with whom JUSTICE SCALIA and JUSTICE THOMAS join, dissenting.

The purpose of punitive damages, it can hardly be denied, is not to compensate, but to punish. Punish for what? Not for harm actually caused "strangers to the litigation," *ante*, at 353, the Court states, but for the *reprehensibility* of defendant's conduct, *ante*, at 355. "[C]onduct that risks harm to many," the Court observes, "is likely more reprehensible than conduct that risks harm to only a few." *Ante*, at 357. The Court thus conveys that, when punitive damages are at issue, a jury is properly instructed to consider the extent of harm suffered by others as a measure of reprehensibility, but not to mete out punishment for injuries in fact sustained by nonparties. *Ante*, at 355–357. The Oregon courts did not rule otherwise. They have endeavored to follow our decisions, most recently in *BMW of North America, Inc.* v. *Gore*, 517 U. S. 559 (1996), and *State Farm Mut. Automobile Ins. Co.* v. *Campbell*, 538 U. S. 408 (2003), and have "deprive[d] [no jury] of proper legal guidance," *ante*, at 355. Vacation of the Oregon Supreme Court's judgment, I am convinced, is unwarranted.

The right question regarding reprehensibility, the Court acknowledges, *ante*, at 356, would train on "the harm that Philip Morris was prepared to inflict on the smoking public at large." *Ibid.* (quoting 340 Ore. 35, 51, 127 P. 3d 1165, 1175 (2006)). See also *id.*, at 55, 127 P. 3d, at 1177 ("[T]he jury, *in assessing the reprehensibility of Philip Morris's actions*, could consider evidence of similar harm to other Oregonians caused (or threatened) by the same conduct." (emphasis added)). The Court identifies no evidence introduced and no charge delivered inconsistent with that inquiry.

The Court's order vacating the Oregon Supreme Court's judgment is all the more inexplicable considering that Philip

Morris did not preserve any objection to the charges in fact delivered to the jury, to the evidence introduced at trial, or to opposing counsel's argument. The sole objection Philip Morris preserved was to the trial court's refusal to give defendant's requested charge number 34. See *id.*, at 54, 127 P. 3d, at 1176. The proposed instruction read in pertinent part:

> "If you determine that some amount of punitive damages should be imposed on the defendant, it will then be your task to set an amount that is appropriate. This should be such amount as you believe is necessary to achieve the objectives of deterrence and punishment. While there is no set formula to be applied in reaching an appropriate amount, I will now advise you of some of the factors that you may wish to consider in this connection.
>
> "(1) The size of any punishment should bear a reasonable relationship to the harm caused to Jesse Williams by the defendant's punishable misconduct. Although you may consider the extent of harm suffered by others in determining what that reasonable relationship is, you are not to punish the defendant for the impact of its alleged misconduct on other persons, who may bring lawsuits of their own in which other juries can resolve their claims and award punitive damages for those harms, as such other juries see fit.
>
> . . . . .
>
> "(2) The size of the punishment may appropriately reflect the degree of reprehensibility of the defendant's conduct—that is, how far the defendant has departed from accepted societal norms of conduct." App. 280a.

Under that charge, just what use could the jury properly make of "the extent of harm suffered by others"? The answer slips from my grasp. A judge seeking to enlighten rather than confuse surely would resist delivering the requested charge.

The Court ventures no opinion on the propriety of the charge proposed by Philip Morris, though Philip Morris preserved no other objection to the trial proceedings. Rather than addressing the one objection Philip Morris properly preserved, the Court reaches outside the bounds of the case as postured when the trial court entered its judgment. I would accord more respectful treatment to the proceedings and dispositions of state courts that sought diligently to adhere to our changing, less than crystalline precedent.

* * *

For the reasons stated, and in light of the abundant evidence of "the potential harm [Philip Morris'] conduct could have caused," *ante,* at 354 (emphasis deleted), I would affirm the decision of the Oregon Supreme Court.

ners Landing Condominium itself, and the renting or leasing of individual units by individual owners,[619] differs markedly from the commercial venture typified by a large apartment building or even a smaller two- or three-family tenement building.

There is no evidence in this case that the public was solicited to enter the common areas on a regular basis, or that commercial or public activities and events were promoted on the grounds. Use of the structures described in § 51, by contrast, involves invitation of a significant number of the public to come on the premises for relatively short durations of time, although perhaps on a repeated basis. Use of such structures provides the public with little or no opportunity or incentive to determine whether the structure satisfies the requirements of the building code, or whether there are dangers lurking unsuspected.

Each of the building categories described in the statute—e.g., "a place of assembly, theatre, special hall, public hall, factory, workshop, manufacturing establishment"—have an intrinsic public or commercial character; they are places where the public may come together in numbers for brief, intermittent use. Condominium common areas, although available for use by certain members of the public, are not inherently "public" in the same sense as the specific structures identified in the statute; they were not designed and maintained for continuing public assembly. The common areas of Mariners Landing Condominiums were essentially for the use of the unit owners, who held an ownership interest in the areas; they are private property, subject only to incidental use by individual members of the public. They are not places where members of the public were invited to assemble, for either commercial or other purposes.

Our unwillingness to expand the scope of § 51 to include Mariners Landing Condominiums does not deprive Osorno of a remedy under established negligence principles. Here, Osorno had every opportunity to assert his negligence claim and did so.[620] The jury returned a verdict indicating that the trustees were not negligent.

We think that the reasoning in *Santos*, that "[t]he large number of owners of single family houses in the Commonwealth should not be exposed to expanded civil liability deriving from the regulatory provisions of chapter 143 except by express and clear legislation evidencing that intention," *Santos v. Bettencourt*, 40 Mass.App. Ct. at 94, 661 N.E.2d 671, is applicable to the Mariners Landing Condominiums.

Given the foregoing, we need not reach the second issue asserted by the trustees, that Osorno's evidence of causation was based upon expert opinion that should not have been admitted in evidence.

Judgment affirmed.

residential use would exclude them, has not been reached. The case of *Festa v. Piemonte*, 349 Mass. 761, 207 N.E.2d 535 (1965), involving a claim of strict liability, partly under § 51, for injuries suffered in a five-unit tenement, was decided on other grounds.

56 Mass.App.Ct. 919

[919] **Jeanette D. ANDERSON**

v.

PETER PAN BUS LINES, INC., & another.[1]

No. 01–P–96.

Appeals Court of Massachusetts.

Dec. 4, 2002.

Injured passenger brought negligence action against bus line to recover for per-

1. John Doe, a pseudonym for the driver of the bus involved in the case.

sonal injuries she sustained when she was required to stand on charter bus and then fell when driver suddenly hit the brakes. Following a verdict of $22,600 in favor of passenger, the District Court granted bus line's motion for judgment notwithstanding the verdict (JNOV). Passenger appealed. The Appellate Division, 2000 WL 1146523, vacated judgment for the bus line and reinstated the judgment for the passenger based on the jury verdict. Bus line appealed. The Appeals Court held that issue of whether bus line exercised reasonable care was for the jury to decide.

Affirmed.

1. Carriers ⇐320(19)

Issue of whether bus line exercised reasonable care was for the jury, correctly instructed about general principles of negligence and applying ordinary life experience and good sense, to decide, in passenger's negligence action against bus line to recover for personal injuries she sustained when she was required to stand on charter bus and then fell when driver suddenly hit the brakes.

2. Appeal and Error ⇐837(10)

Appellate Division was entitled to decline to consider regulation prohibiting bus lines from requiring passengers to stand for trips in excess of 20 miles that counsel for injured passenger sought to introduce for first time on appeal. 220 CMR 155.02(26).

3. Appeal and Error ⇐863

In reviewing the allowance of a motion for judgment notwithstanding the verdict (JNOV), it is the task of the Appellate Division to consider whether anywhere in the evidence, from whatever source derived, any combination of circumstances could be found from which a reasonable inference could be drawn in favor of the plaintiff.

Philip J. Shine, Springfield, for the defendants.

Michael C. Najjar, Lowell, for the plaintiff.

RESCRIPT.

Jeanette D. Anderson, the plaintiff, fell and hurt herself on a bus operated by the defendant Peter Pan Bus Lines, Inc. (Peter Pan). The trial of her negligence action against Peter Pan poses the question whether there was sufficient evidence of negligence to take the case to the jury, which had returned a verdict of $22,600 in favor of the plaintiff.

Taking the evidence in the light most favorable to the plaintiff (*McAvoy v. Shufrin*, 401 Mass. 593, 596, 518 N.E.2d 513 [1988]; *Hull v. North Adams Hoosac Sav. Bank*, 49 Mass.App.Ct. 514, 515, 730 N.E.2d 910 [2000]), the jury of six sitting in the District Court were warranted in finding the following facts. Seats were oversold on a charter bus trip that Peter Pan ran on November 16, 1996, from Worcester to the Foxwoods casino in Connecticut. This was the second leg of a trip that had originated in Lowell and there had been a change of vehicles in Worcester. Along with three or four other passengers, the plaintiff was obliged to stand because there were not enough seats for everyone allowed aboard. The plaintiff fell when the bus, which was cruising on an

interstate highway at limited access highway speed, made erratic movements, accelerating to change lanes, then braking, and, consequently, decelerating abruptly. Anderson suffered minor injuries.

At the conclusion of the plaintiff's case, Peter Pan moved for a directed verdict. The judge denied that motion.[2] In closing argument, the plaintiff's counsel focused on the frequent lane changing, speeding up, and slowing down of the bus. Counsel added that the plaintiff should have had a seat because she paid for one. After the jury returned their verdict, Peter Pan moved for judgment notwithstanding the verdict on the basis of a line of cases of which *Cuddyer v. Boston Elev. Ry.*, 314 Mass. 680, 682–685, 51 N.E.2d 244 (1943), is an [920] exemplar. The trial judge allowed that motion and a judgment was entered for the defendant.

[1] The *Cuddyer* opinion requires a passenger in a public conveyance who is injured because of its sudden and violent stop to prove that the unusual movement was not the consequence of a traffic emergency against which the driver (or motorman), in the exercise of due care, could not have guarded. *Id.* at 682, 51 N.E.2d 244. The *Cuddyer* line of cases seems antique insofar as it places a burden on the plaintiff of disproving an affirmative defense, as to facts peculiarly within the knowledge of the defendant. If something on the road required sudden evasive action, the driver, not the passenger, would know about it. In the instant case, Peter Pan had discharged the driver and his whereabouts were unknown. We need not, however, as will appear, tackle the question of whether the *Cuddyer* line of cases still has vitality.

[2] Anderson appealed the adverse judgment to the Appellate Division of the District Court for the Northern District. At that stage of the case, different counsel for the plaintiff called to the attention of the court, as evidence of negligence, 220 Code Mass. Regs. § 155.02(26) (1994), which, in pertinent part, provides: "In no event shall standing passengers be carried for a distance in excess of 20 miles." Correctly, the Appellate Division declined to consider evidence that had not been offered at trial.

[3] In reviewing the allowance of a motion for judgment notwithstanding the verdict, however, it was the task of the Appellate Division to consider whether "anywhere in the evidence, from whatever source derived, any combination of circumstances could be found from which a reasonable inference could be drawn in favor of the plaintiff." *Kelly v. Railway Exp. Agency, Inc.*, 315 Mass. 301, 302, 52 N.E.2d 411 (1943). *Freeman v. Planning Bd. of W. Boylston*, 419 Mass. 548, 550, 646 N.E.2d 139, cert. denied, 516 U.S. 931, 116 S.Ct. 337, 133 L.Ed.2d 235 (1995). *Hall v. Horizon House Microwave, Inc.*, 24 Mass.App.Ct. 84, 89–90, 506 N.E.2d 178 (1987). *Moose v. Massachusetts Inst. of Technology*, 43 Mass.App.Ct. 420, 421–422, 683 N.E.2d 706 (1997). The Appellate Division decided that a jury, on the basis of "common sense factors" could find that having passengers standing on a bus traveling at high speed on a long drive constituted negligent operation by a bus line. Accordingly, the Appellate Division vacated the judgment for the defendant and reinstated the judgment for the plaintiff based on the jury verdict. From that judgment Peter Pan has appealed.

2. Peter Pan introduced no evidence after the plaintiff rested.

On the subject of negligence, the trial judge instructed the jury as follows:

"The standard of care in negligence cases is how a person of reasonable prudence would act in similar circumstances.

"To flesh that out for you. The law defines negligence as the failure of a person to exercise that degree of care which a reasonable person would exercise in the circumstances. Negligence is doing something that a reasonably prudent person in the ordinary course of events would not do or failing to do something that a reasonable person of ordinary prudence would do.

"The classic definition of negligence is: Negligence is the failure of a responsible person, either by omission or by action, to exercise that degree of care, diligence, and forethought, which, in the discharge of [921]the duty then resting on him or her, a person of ordinary caution and prudence ought to exercise under the particular circumstances. It is a want of diligence commensurate with the requirement of the duty at the moment imposed by the law. The mere happening of an accident is not proof of negligence."

That was a correct instruction, and neither party objected to it.

Often, a jury requires assistance from expert witnesses as to what amounts to reasonable care or a want of reasonable care. Such is typically the case, for example, in an action claiming malpractice on the part of an architect, engineer, lawyer, or physician. *Atlas Tack Corp. v. Donabed*, 47 Mass.App.Ct. 221, 227 n. 4, 712 N.E.2d 617 (1999). Questions about the design of a motorcycle or a pharmaceutical compound are additional illustrations. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592–593, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Whether a bus line has exercised reasonable care in all the circumstances if it has passengers standing on a bus traveling at high speed over a long distance is the sort of question that a jury, correctly instructed about general principles of negligence and applying ordinary life experience and good sense, can decide. See *Thomas v. Tom's Food World, Inc.*, 352 Mass. 449, 451, 226 N.E.2d 188 (1967) (jury could decide that a greasy loading ramp set at a forty-five degree angle was unsafe); *Upham v. Chateau De Ville Dinner Theatre, Inc.*, 380 Mass. 350, 355–356, 403 N.E.2d 384 (1980) (jury could consider whether theater had taken reasonable care to light stairs, particularly for a group of elderly patrons); *McInnis v. Tewksbury*, 19 Mass.App.Ct. 310, 313, 473 N.E.2d 1160 (1985) (jury could determine whether sawdust in a long jump pit was deep enough to be safe). The Appellate Division was right in reinstating the verdict.

Decision and order of Appellate Division affirmed.

56 Mass.App.Ct. 635

[635]**TOWN OF NORTH ATTLEBORO**

v.

LABOR RELATIONS COMMISSION.

No. 01–P–26.

Appeals Court of Massachusetts, Suffolk.

Argued Sept. 11, 2002.

Decided Dec. 4, 2002.

Appeal was taken from ruling of labor relations commission that municipality had

370 Pa. 449

DAVIS v. FEINSTEIN et al.

Supreme Court of Pennsylvania.

May 26, 1952.

Action in trespass by George W. Davis against Milton Feinstein and Howard Feinstein, individually and trading as Gibson Furniture Company, for personal injuries. The Common Pleas Court, No. 3 of the County of Philadelphia (tried in No. 5), as of March Term, 1950, No. 3221, Fenerty, J., entered judgment for plaintiff and defendants appealed. The Supreme Court No. 98, January Term, 1952, Allen M. Stearne, J., held that questions of negligence and contributory negligence were for the jury and that it was not unreasonable for jury to have concluded that plaintiff, who was a blind man, exercised due care for his safety when he used his cane as a guide, moving it laterally in order to touch the walls of abutting buildings and keeping on a straight course, and also tapping the ground before him to search out obstacles in his path.

Judgment affirmed.

1. Municipal Corporations ⇐821(17)

In action of trespass for personal injuries to a blind man, who was using a cane as a guide, and who fell into an open cellarway in front of furniture store maintained by defendants, question of negligence was for the jury.

2. Judgment ⇐199(3.2)

In considering defendants' motion for judgment non obstante veredicto all reasonable inferences from testimony must be taken most favorably to plaintiff.

3. Negligence ⇐86

Blind person is not bound to discover everything which a person of normal vision would but he is bound to use due care under the circumstances.

4. Negligence ⇐86, 136(29)

"Due care" for a blind person includes a reasonable effort to compensate for his unfortunate affliction by the use of artificial aids for discerning obstacles in his path and when an effort in this direction is made, it will ordinarily be a jury question whether or not such effort was the reasonable one.

See publication Words and Phrases, for other judicial constructions and definitions of "Due Care".

5. Negligence ⇐136(9)

Contributory negligence may be declared as a matter of law only when it is so clearly revealed that fair and reasonable persons cannot disagree as to its existence.

6. Municipal Corporations ⇐821(21)

In action of trespass for personal injury to a blind man, who fell into a cellarway in front of furniture store maintained by defendants, where blind man employed a cane as a guide, moving it laterally in order to touch the walls of abutting buildings and keeping on a straight course, and also tapping the ground before to search out obstacles in his path, whether blind man exercised due care for his safety was for jury.

Michael A. Foley, Philadelphia, for appellant.

Raymond Pace Alexander, Philadelphia, for appellee.

Before DREW, C. J., and STEARNE, JONES, BELL, CHIDSEY and MUSMANNO, JJ.

ALLEN M. STEARNE, Justice.

[1] This is an appeal from judgment entered on a jury's verdict for plaintiff in an action of trespass. Defendants concede that there was sufficient evidence of negligence to submit the case to the jury but rest their motion for judgment non obstante veredicto on the sole ground that plaintiff was guilty of contributory negligence as matter of law. We agree with the learned court below that a jury question was presented.

[2] Plaintiff is a blind man. While walking south on 60th Street between Market and Arch Streets in Philadelphia, he fell into an open cellarway in front of the furniture store maintained by defendants. The opening was equipped with a cellar door, flush with the pavement when closed, and consisting of two sections each about two and one-half feet wide. When the

door was open, an iron bar about five feet in length usually connected with two sections at the front, holding them erect and thus presenting a barrier which would ordinarily prevent a pedestrian from stepping into the opening. At the time of the accident, the north section was closed and even with the sidewalk; the connecting bar was not in place; and the south section of the door was standing erect. It was into the aperture thus left uncovered that the plaintiff fell and suffered the injuries which were the basis of this suit. Defendant introduced testimony to contradict the plaintiff's testimony that one door was closed at the time of the accident. We must, however, accept plaintiff's version under the familiar rule that in considering defendants' motion for judgment n. o. v. all reasonable inferences from the testimony must be taken most favorably to plaintiff: Guca v. Pittsburgh Railways Company, 367 Pa. 579, 581, 80 A.2d 779.

Plaintiff further testified that on the morning of the accident he carried a white cane customarily employed by blind persons. He described his use of it as follows:

"A. As I walked down, I touched this way to guide myself to see if I am walking straight. I had the cane in front of me. I touched over here to see if I went from one side to the other.

"Q. You are referring to the fact that you moved your cane to the right? A. Yes.

"Q. What did you do with respect to your front distance? A. I put it up at least two or three feet like that and as I step, I put it two steps ahead as I step one step.

"Q. In front of you? A. Yes."

Both sides agree with the statement of the learned court below that the controlling authority is Smith v. Sneller, 345 Pa. 68, 26 A.2d 452, 141 A.L.R. 718. In that case the blind plaintiff employed no cane or other compensatory aid. Speaking through Mr. Chief Justice Drew (then Justice) we said, 345 Pa. at page 72, 26 A.2d at page 454:

"While it is not negligence per se for a blind person to go unattended upon the sidewalk of a city, he does so at great risk and must always have in mind his own unfortunate disadvantage and do what a reasonably prudent person in his situation would do to ward off danger and prevent an accident. The fact that plaintiff did not anticipate the existence of the ditch across the sidewalk, in itself, does not charge him with negligence. But, it is common knowledge, chargeable to plaintiff, that obstructions and defects are not uncommon in the sidewalks of a city, any one of which may be a source of injury to the blind. Plaintiff's vision was so defective that he could not see a dangerous condition immediately in front of him. In such circumstances he was bound to take precautions which one not so afflicted need not take. In the exercise of due care for his own safety it was his duty to use one of the common, well-known compensatory devices for the blind, such as a cane, a 'seeing-eye' dog, or a companion."

In the instant case plaintiff testified that he was employing his cane as a guide, moving it laterally in order to touch the walls of abutting buildings and keep on a straight course, and also tapping the ground before him to search out obstacles in his path. Defense counsel argues:

"Even as a man with sight cannot say he did not observe that which was open and obvious, neither can a blind man say that he made proper use of the cane and was unable to learn of the existence of the defect. It necessarily follows that he did not have a proper instrument, that is to say, the cane was not adequate or he did not use it properly."

[3-5] We did not so decide in Smith v. Sneller, supra. A blind person is not bound to discover *everything* which a person of normal vision would. He is bound to use due care under the circumstances. Due care for a blind man includes a reasonable effort to compensate for his unfortunate

affliction by the use of artificial aids for discerning obstacles in his path. When an effort in this direction is made, it will ordinarily be a jury question whether or not such effort was a *reasonable* one. The general rule applies that "Contributory negligence may be declared as a matter of law only when it is so clearly revealed that fair and reasonable persons cannot disagree as to its existence * * *": Guca v. Pittsburgh Railways Company, 367 Pa. 579, 583, 80 A.2d 779, 781.

[6] It was not unreasonable for the jury to have concluded that plaintiff exercised due care for his safety when he used his cane in the manner which he described. The uncontroverted physical facts did not effectively disprove plaintiff's testimony.

Judgment affirmed.

371 Pa. 28

NUNAMAKER et ux. v. NEW ALEXANDRIA BUS CO., Inc., et al.

Appeal of NEW ALEXANDRIA BUS CO., Inc.

Supreme Court of Pennsylvania.

May 29, 1952.

Action by Charles Nunamaker and Nellie Nunamaker, his wife, against New Alexandria Bus Company, Inc., and another, for personal injuries to Nellie Nunamaker when she was passenger in defendant's bus which collided with automobile of other defendant. The Court of Common Pleas of Westmoreland County, at No. 124, August Term, 1950, John M. O'Connell, J., entered judgment on verdict for plaintiff and denied motion for new trial, and defendant appealed. The Supreme Court, Jones, J., held that instruction which authorized entry of but single verdict in action by husband and wife to enforce separate substantive rights was erroneous.

Judgment reversed and new trial granted.

Musmanno, J., dissented.

1. Courts ⇐50

In order that even division of opinion in court of first resort sitting en banc may be avoided and positive judicial opinion obtained, judges may rotate in panels of three for purpose of constituting a court en banc, or, if all four judges desire to participate in court en banc at any given time, outside judge should be called as an additional member of court for the disposition of the matter involved.

2. Husband and Wife ⇐209(2), 235(4), 238(2)

Injury to wife, not resulting in death, confers upon her and her husband, separate and distinct rights of action for which separate verdict must be returned and separate judgments entered. 12 P.S. § 1621 et seq.

3. Husband and Wife ⇐209(2)

Rules of civil procedure providing for enforcement in one action of the separate rights of husband and wife for injury to the wife, and for returning of separate verdicts on respective causes of action of husband and wife and for entering separate judgments thereon, recognize the existence of separate substantive rights of husband and wife for injury to the wife, and continues in force the purely procedural changes of common law effected by prior statute. Pa. R.C.P. Nos. 2228(a), 2231(d), 12 P.S. Appendix; 12 P.S. §§ 1621, 1622.

4. Husband and Wife ⇐238(2)

Right to separate judgments in action by husband and wife for injuries to wife is not for benefit of husband and wife alone, but is right of defendant as well, in that only by such allegation can defendant be informed if verdicts are consistent or whether one or other is excessive. Pa. R.C.P. Nos. 2228(a), 2231(d), 12 P.S. Appendix; 12 P.S. §§ 1621, 1622.

5. Appeal and Error ⇐273(7)

General exception to court's charge which permitted jury to return single verdict in action by husband and wife for injuries to the wife was sufficient to preserve for appellate review the error in such instruction, since such error was basic and fundamental, being in direct contravention of established rules of civil procedure. Pa. R.C.P. Nos. 2228(a), 2231(d), 12 P.S.Appendix; 12 P.S. §§ 1621, 1622.

6. Trial ⇐345

Where lump sum verdict was returned for plaintiffs in action by husband and wife

Reginald E. DANIELS, Adm'r

v.

John K. EVANS.

Supreme Court of New Hampshire.

Grafton.

Argued Sept. 7, 1966.

Decided Oct. 31, 1966.

Rehearing Denied Nov. 30, 1966.

Action to recover damages for death of 19-year-old boy. The verdict was for the plaintiff administrator, and defendant took exceptions which were reserved and transferred by Loughlin, J. The Supreme Court, Lampron, J., held that since minor operating motor vehicle must be judged by same standard of care as adult, defendant's objection to instruction that 19-year-old boy who was killed as a result of collision between his motorcycle and defendant's automobile was not held to same degree of care as adult was valid.

Exception sustained.

1. Negligence ⇐85(2)

Minors are entitled to be judged by standards of care commensurate with their age, experience, and wisdom when engaged in activities appropriate to their age, experience, and wisdom, and their conduct should be judged by what is reasonable conduct under circumstances among which are age, experience, and stage of mental development of minor involved.

2. Automobiles ⇐147

Statute which establishes rules of road for operation of motor vehicles and provides that it is unlawful for any person to do any acts forbidden or fail to perform any act required in statute is some indication of intent on part of legislature that all drivers must, and have right to expect that others using highways, regardless of their age and experience, will, obey traffic laws and thus exercise adult standard of ordinary care. RSA 262-A:2; Laws 1961, c. 74.

3. Automobiles ⇐188

Statute which is designed to permit exercise of powers of state as parens patriae over minors and which specifically excludes from its application minors sixteen years of age or over who are charged with violation of motor vehicle law was indication by legislature that conduct of minors who are engaged in adult activity should be treated in same manner and judged by same standards as adults. RSA 169:1 et seq.; Laws 1961, c. 74.

4. Automobiles ⇐188

To apply to minors a more lenient standard in operation of motor vehicles, whether an automobile or a motorcycle, than that applied to adults is unrealistic, contrary to expressed legislative policy, and inimical to public safety. RSA 169:1 et seq., 262-A:2; Laws 1961, c. 74.

5. Automobiles ⇐188, 223(1)

When minor is operating motor vehicle there is no reason for making distinction based on whether he is charged with primary negligence, contributory negligence, or a causal violation of statute. RSA 169:1 et seq., 262-A:2; Laws 1961, c. 74.

6. Automobiles ⇐246(35)

Since minor operating motor vehicle must be judged by same standard of care as adult, defendant's objection to instruction that 19-year-old boy who was killed as a result of collision between his motorcycle and defendant's automobile was not held to same degree of care as adult was valid. RSA 169:1 et seq., 262-A:2; Laws 1961, c. 74.

Action by the administrator of the estate of Robert E. Daniels to recover damages for his death resulting from a collision between a motorcycle which he was driving and defendant's automobile at Lebanon on August 4, 1962.

Trial by jury, with a view, resulted in a verdict for the plaintiff in the amount of $6,986.

Although various exceptions of the defendant were reserved and transferred by Loughlin, J., the only exception argued and briefed relates to that portion of the Trial Court's charge pertaining to the standard of care required of the decedent who was 19 years old at the time of the accident.

Tesreau, Stebbins & Johnson and David H. Bradley, Lebanon, for plaintiff Reginald E. Daniels.

Wiggin, Nourie, Sundeen, Nassikas & Pingree and William S. Orcutt, Manchester, for defendant John K. Evans.

LAMPRON, Justice.

As to the standard of care to be applied to the conduct of the decedent Robert E. Daniels, 19 years of age, the Trial Court charged the jury in part as follows:

"Now, he is considered a minor, being under the age of twenty-one, and a minor child must exercise the care of the average child of his or her age, experience and stage of mental development. In other words, he is not held to the same degree of care as an adult."

Concededly these instructions substantially reflect the rule by which the care of a minor has been judged heretofore in the courts of our State. Charbonneau v. MacRury, 84 N.H. 501, 507, 510, 153 A. 457, 73 A.L.R. 1266; Codding v. Makris, 104 N.H. 381, 382, 187 A.2d 804. However an examination of the cases will reveal that in most the minors therein were engaged in activities appropriate to their age, experience and wisdom. These included being a pedestrian (George v. New England Dressed Meat & Wool Company, 86 N.H. 121, 164 A. 209; Howe v. Amoskeag Mfg. Company, 87 N.H. 122, 174 A. 776), riding a bicycle (Shimkus v. Caesar, 95 N.H. 286, 62 A.2d 728), riding a horse (Katsikas v. Manchester St. Railway, 90 N.H. 21, 3 A.2d 821), coasting (Codding v. Makris, 104 N.H. 381, 187 A.2d 804).

[1] We agree that minors are entitled to be judged by standards commensurate with their age, experience, and wisdom when engaged in activities appropriate to their age, experience, and wisdom. Hence when children are walking, running, playing with toys, throwing balls, operating bicycles, sliding or engaged in other childhood activities their conduct should be judged by the rule of what is reasonable conduct under the circumstances among which are the age, experience, and stage of mental development of the minor involved. Charbonneau v. MacRury, 84 N.H. 501, 507, 153 A. 457.

However, the question is raised by the defendant in this case whether the standard of care applied to minors in such cases should prevail when the minor is engaged in activities normally undertaken by adults. In other words, when a minor undertakes an adult activity which can result in grave danger to others and to the minor himself if the care used in the course of the activity drops below that care which the reasonable and prudent adult would use, the defendant maintains that the minor's conduct in that instance should meet the same standards as that of an adult.

Many recent cases have held that "when a minor assumes responsibility for the operation of so potentially dangerous an instrument as an automobile, he should * * * assume responsibility for its careful and safe operation in the light of adult standards". 2 Idaho L.Rev., 103, 111 (1965); Dellwo v. Pearson, 259 Minn. 452, 107

N.W.2d 859, 97 A.L.R.2d 866; Nielsen v. Brown, 232 Or. 426, 374 P.2d 896; Carano v. Cardina, 115 Ohio App. 30, 184 N.E.2d 430; Wagner v. Shanks, 194 A.2d 701 (Del.1963); Harrelson v. Whitehead, 236 Ark. 325, 365 S.W.2d 868 (1963); Dawson v. Hoffmann, 43 Ill.App.2d 17, 192 N.E.2d 695; Neudeck v. Bransten, 233 Cal.App. 2d 17, 43 Cal.Rptr. 250; Prichard v. Veterans Cab Company, 63 Cal.2d 727, 47 Cal. Rptr. 904, 408 P.2d 360. The rule has been recognized in Restatement (Second), Torts, s. 283 A, comment c, in 2 Harper and James, The Law of Torts, s. 16.8, p. 926, and in Prosser, Torts, (3rd ed.) s. 19, p. 159. In an annotation in 97 A.L.R.2d 872 at page 875 it is said that recent decisions "hold that when a minor engages in such activities as the operation of an automobile or similar power driven device, he forfeits his rights to have the reasonableness of his conduct measured by a standard commensurate with his age and is thenceforth held to the same standard as all other persons".

One of the reasons for such a rule has been stated thusly in Dellwo v. Pearson, supra, 259 Minn. 458, 107 N.W.2d 863: "To give legal sanction to the operation of automobiles by teen-agers with less than ordinary care for the safety of others is impractical today, to say the least. We may take judicial notice of the hazards of automobile traffic, the frequency of accidents, the often catastrophic results of accidents, and the fact that immature individuals are no less prone to accidents than adults. * * * [I]t would be unfair to the public to permit a minor in the operation of a motor vehicle to observe any other standards of care and conduct than those expected of all others. A person observing children at play * * * may anticipate conduct that does not reach an adult standard of care or prudence. However, one cannot know whether the operator of an approaching automobile * * * is a minor or an adult, and usually cannot protect himself against youthful imprudence even if warned".

The Supreme Court of Delaware in Wagner v. Shanks, 194 A.2d 701, 708 stated that their "statute, which permits the licensing of minors, does not provide two standards of care for the licensing of minors and adults. The * * * act was passed for the protection of the general public and users of the streets and highways and not for the protection of immature, inexperienced and negligent drivers". "We consider it to be a matter of paramount public policy, in fact a rule of necessity, that society in general be assured that all drivers of motor vehicles upon our highways be charged with equal responsibility in the operation of motor vehicles regardless of age."

[2] RSA 262-A:2 which establishes rules of the road for the operation of motor vehicles on our highways reads as follows: "Required Obedience to Traffic Laws. It is unlawful and * * * a misdemeanor for *any person* to do any act forbidden or fail to perform any act required in this chapter". (Emphasis supplied). This is some indication of an intent on the part of our Legislature that all drivers must, and have the right to expect that others using the highways, regardless of their age and experience, will, obey the traffic laws and thus exercise the adult standard of ordinary care.

[3] RSA ch. 169 designed to permit the exercise of the powers of the state as *"Parens patriae"* over minors (Petition of Morin, 95 N.H. 518, 520, 68 A.2d 668) specifically excluded in 1961, its application "in the case or cases of persons sixteen years of age or over who are charged with the violation of a motor vehicle law, an aeronautic law, a law relating to navigation of boats or a game law that pertains to hunting any wild bird or wild animal of any kind". Laws 1961, 74:1. The Legislature has again indicated its intent to have the conduct of minors who are engaged in adult activities treated in the same manner and judged by the same standards as are adults. See In re Perham, 104 N.H. 276, 184 A.2d 449, 100 A.L.R.2d 1238.

The rule charged by the Trial Court pertaining to the standard of care to be applied by the jury to the conduct of the minor plaintiff Robert E. Daniels in the operation of the motorcycle was proper in "the bygone days" when children were using relatively innocent contrivances. See Annot. 97 A.L.R.2d 872, 874. However in the circumstances of to-day's modern life, where vehicles moved by powerful motors are readily available and used by many minors, we question the propriety of a rule which would allow such vehicles to be operated to the hazard of the public, and to the driver himself, with less than the degree of care required of an adult.

[4, 5] We are of the opinion that to apply to minors a more lenient standard in the operation of motor vehicles, whether an automobile or a motorcycle, than that applied to adults is unrealistic, contrary to the expressed legislative policy, and inimical to public safety. Furthermore when a minor is operating a motor vehicle there is no reason for making a distinction based on whether he is charged with primary negligence, contributory negligence, or a causal violation of a statute and we so hold. Charbonneau v. MacRury, 84 N.H. 501, 507, 509, 153 A. 457, 73 A.L.R. 1266; Codding v. Makris, 104 N.H. 381, 187 A.2d 804; Rothacher v. Jones, 38 Ill.App.2d 19, 186 N.E.2d 157; Harrelson v. Whitehead, 236 Ark. 325, 365 S.W.2d 868 (1963). See Annot. 97 A.L.R.2d 872, 875.

[6] We hold therefore that a minor operating a motor vehicle, whether an automobile or a motorcycle, must be judged by the same standard of care as an adult and the defendant's objection to the Trial Court's charge applying a different standard to the conduct of plaintiff's intestate was valid. Neudeck v. Bransten, 233 Cal. App.2d 17, 43 Cal.Rptr. 250; Prichard v. Veterans Cab Company, 63 Cal.2d 727, 47 Cal.Rptr. 904, 408 P.2d 360; Dellwo v. Pearson, 259 Minn. 452, 107 N.W.2d 859; Carano v. Cardina, 115 Ohio App. 30, 184 N.E.2d 430; Wagner v. Shanks, 194 A.2d 701 (Del.1963); Nielsen v. Brown, 232 Or. 426, 374 P.2d 896; Dawson v. Hoffmann, 43 Ill.App.2d 17, 192 N.E.2d 695.

All concurred.

Exception sustained.

Madeleine Y. MURRAY et al.

v.

BOSTON & MAINE RAILROAD.

Supreme Court of New Hampshire.
Merrimack.

Argued June 7, 1966.

Decided Sept. 30, 1966.

Rehearing Denied Nov. 30, 1966.

Actions by passenger and her husband against railroad for damages resulting when passenger fell while boarding train. Upon verdicts for defendant, exceptions by plaintiffs were reserved and case transferred by Griffith, J. The Supreme Court, Blandin, J., held that instructions that railroad was corporation carrying passenger for hire and bound by standard of conduct of reasonably prudent person was adequate and left to jury question whether there was apparent necessity for assistance to passenger in boarding, that instruction that violation of operating rule, while evidence of negligence, did not conclusively show negligence was correct, and that other instructions were adequate although not given in precise language tendered by plaintiffs, and that cross-examination as to husband's substantial income was proper on issue whether husband could afford maid to care for wife rather than doing so himself with consequent loss of salary.

Judgment rendered on verdicts.

Duncan, J., **dissented.**

proper to tell them anything about the presumption, for that is solely for the court.

Judgment affirmed.

THE T. J. HOOPER.

THE NORTHERN NO. 30 AND NO. 17.

THE MONTROSE.

In re EASTERN TRANSP. CO.

NEW ENGLAND COAL & COKE CO. v. NORTHERN BARGE CORPORATION.

H. N. HARTWELL & SON, Inc., v. SAME.

No. 430.

Circuit Court of Appeals, Second Circuit.
July 21, 1932.

1. Shipping ⇐121(2).

Test of seaworthiness of oceangoing barge is ability for service undertaken.

2. Shipping ⇐132(5⅛).

Evidence *held* to establish that oceangoing barges, lost in gale, were unseaworthy, and lack of reasonable diligence to make them seaworthy, rendering owners liable for cargo loss.

3. Shipping ⇐209(3).

Evidence disclosing coastwise tugs were not properly equipped with radio receiving sets to receive storm warnings *held* to establish tugs' unseaworthiness, precluding limitation of liability.

Appeal from the District Court of the United States for the Southern District of New York.

Petition by the Eastern Transportation Company, as owner of the tugs Montrose and T. J. Hooper, for exoneration from, or limitation of, liability; separate libels by the New England Coal & Coke Company and by H. N. Hartwell & Son, Inc., against the Northern Barge Corporation, as owner of the barge Northern No. 30 and the barge Northern No. 17; and libel by the Northern Barge Corporation against the tugs Montrose and Hooper. The suits were joined and heard together. From the decree rendered [53 F.(2d) 107], the petitioner Eastern Transportation Company and the Northern Barge Corporation, appeal.

Decree affirmed.

Foley & Martin, of New York City (James A. Martin and John R. Stewart, both of New York City, of counsel), for Eastern Transp. Co.

Burnham, Bingham, Gould & Murphy, of Boston, Mass., and Kirlin, Campbell, Hickox, Keating & McGrann, of New York City (Charles S. Bolster and Miles Wambaugh, both of Boston, Mass., of counsel), for New England Coal & Coke Co. and another.

John W. Oast, Jr., of Norfolk, Va. and Crowell & Rouse, of New York City, for Northern Barge Corporation.

Before L. HAND, SWAN, and AUGUSTUS N. HAND, Circuit Judges.

L. HAND, Circuit Judge.

The barges No. 17 and No. 30, belonging to the Northern Barge Company, had lifted cargoes of coal at Norfolk, Virginia, for New York in March, 1928. They were towed by two tugs of the petitioner, the "Montrose" and the "Hooper," and were lost off the Jersey Coast on March tenth, in an easterly gale. The cargo owners sued the barges under the contracts of carriage; the owner of the barges sued the tugs under the towing contract, both for its own loss and as bailee of the cargoes; the owner of the tug filed a petition to limit its liability. All the suits were joined and heard together, and the judge found that all the vessels were unseaworthy; the tugs, because they did not carry radio receiving sets by which they could have seasonably got warnings of a change in the weather which should have caused them to seek shelter in the Delaware Breakwater en route. He therefore entered an interlocutory decree holding each tug and barge jointly liable to each cargo owner, and each tug for half damages for the loss of its barge. The petitioner appealed, and the barge owner appealed and filed assignments of error.

Each tug had three ocean going coal barges in tow, the lost barge being at the end. The "Montrose," which had the No. 17, took an outside course; the "Hooper" with the No. 30, inside. The weather was fair without ominous symptoms, as the tows passed the Delaware Breakwater about midnight of March eighth, and the barges did not get into serious trouble until they were about opposite Atlantic City some sixty or seventy miles to the north. The wind began to freshen in the morning of the ninth and rose to a gale before noon; by afternoon the second barge of the Hooper's tow

was out of hand and signalled the tug, which found that not only this barge needed help, but that the No. 30 was aleak. Both barges anchored and the crew of the No. 30 rode out the storm until the afternoon of the tenth, when she sank, her crew having been meanwhile taken off. The No. 17 sprang a leak about the same time; she too anchored at the Montrose's command and sank on the next morning after her crew also had been rescued. The cargoes and the tugs maintain that the barges were not fit for their service; the cargoes and the barges that the tugs should have gone into the Delaware Breakwater, and besides, did not handle their tows properly.

[1, 2] The evidence of the condition of the barges was very extensive, the greater part being taken out of court. As to each, the fact remains that she foundered in weather that she was bound to withstand. A March gale is not unusual north of Hatteras; barges along the coast must be ready to meet one, and there is in the case at bar no adequate explanation for the result except that these were not well-found. The test of seaworthiness, being ability for the service undertaken, the case might perhaps be left with no more than this. As to the cargoes, the charters excused the barges if "reasonable means" were taken to make them seaworthy; and the barge owners amended their answers during the trial to allege that they had used due diligence in that regard. As will appear, the barges were certainly not seaworthy in fact, and we do not think that the record shows affirmatively the exercise of due diligence to examine them. The examinations at least of the pumps were perfunctory; had they been sufficient the loss would not have occurred.

To take up the evidence more in detail, the bargee of the No. 30 swore that she was making daily about a foot to eighteen inches of water when she left Norfolk, and Hutson, her owner's agent in charge of her upkeep, testified that a barge which made five inches was unseaworthy. Some doubt is thrown upon the bargee's testimony because he had served only upon moulded barges and the No. 30 was flat-bottomed; from which it is argued that he could not have known just how much she really leaked. Nevertheless, he was a man of experience, who swore to a fact of his own observation. We cannot discredit him merely upon the hypothesis that he did not know how to sound his boat. It is not however necessary to depend upon the proof of her leaking when she left Norfolk; she began to leak badly under stress of weather before which she should have been staunch, at least so far that her pumps could keep her alive, and her pumps failed. She had two kinds, hand and steam, but the first could not be manned. While the leaks had been gaining a little before the breakdown, it is probable, or at least possible, that had the tubes not burst, she would have lived, for the gale moderated on Friday night. The tubes were apparently sound when put in about a year before, and it does not appear why they burst; Hutson was very ambiguous as to how long they should last. The barge answers that it was the cold water which burst them, but the bargee gave no such explanation. Moreover, if she leaked so badly that the water gained until it reached the tubes, this was itself evidence of unseaworthiness. If a vessel is to be excused for leaking, she must at least be able to keep the leak down so as not to flood the pumps.

The unseaworthiness of the No. 17 is even clearer. Not only did she begin to leak under no greater stress of weather than the No. 30, but her pumps also failed, though for quite another reason. Part of her cargo was held back from the chain locker by a temporary bulkhead, which carried away because of the barge's pounding. She had begun to leak early in the morning of the ninth, but her bargee believed that he could have kept down the water if he could have used his pumps. When the bulkhead gave, the coal fell into the chain locker and clogged the suction, letting the bow fill without relief, putting the barge by the head and making her helpless. In addition a ventilator carried away, the water finding entrance through the hole; and the judge charged her for the absence of a proper cover, on which however we do not rely; the failure of the bulkhead was quite enough. As already intimated, we need not hold that a barge is necessarily unseaworthy because she leaks in a gale; the heaving and straining of the seams will often probe weak spots which no diligence can discover. It is, however, just against that possibility that the pumps are necessary; whatever impedes their action, or might reasonably be anticipated to do so, is a defect which makes her unfit for her service. As to both barges, therefore, we do not resort to the admissions put in the mouths of both bargees, some of them too extravagant for credence. We do not believe for instance that the No. 30 had six feet of water in her when she broke

ground at Norfolk, or that she leaked as well when light as when loaded. We doubt also whether the No. 17 was leaking two inches an hour at Norfolk, or that her bargee complained of an overload. Admissions, especially in cases of this kind, are notoriously unreliable; and watermen are not given to understatement.

[3] A more difficult issue is as to the tugs. We agree with the judge that once conceding the propriety of passing the Breakwater on the night of the eighth, the navigation was good enough. It might have been worse to go back when the storm broke than to keep on. The seas were from the east and southeast, breaking on the starboard quarter of the barges, which if tight and well found should have lived. True they were at the tail and this is the most trying position, but to face the seas in an attempt to return was a doubtful choice; the masters' decision is final unless they made a plain error. The evidence does not justify that conclusion; and so, the case as to them turns upon whether they should have put in at the Breakwater.

The weather bureau at Arlington broadcasts two predictions daily, at ten in the morning and ten in the evening. Apparently there are other reports floating about, which come at uncertain hours but which can also be picked up. The Arlington report of the morning read as follows: "Moderate north, shifting to east and southeast winds, increasing Friday, fair weather to-night." The substance of this, apparently from another source, reached a tow bound north to New York about noon, and, coupled with a falling glass, decided the master to put in to the Delaware Breakwater in the afternoon. The glass had not indeed fallen much and perhaps the tug was over cautious; nevertheless, although the appearances were all fair, he thought discretion the better part of valor. Three other tows followed him, the masters of two of which testified. Their decision was in part determined by example; but they too had received the Arlington report or its equivalent, and though it is doubtful whether alone it would have turned the scale, it is plain that it left them in an indecision which needed little to be resolved on the side of prudence; they preferred to take no chances, and chances they believed there were. Courts have not often such evidence of the opinion of impartial experts, formed in the very circumstances and confirmed by their own conduct at the time.

Moreover, the "Montrose" and the "Hooper" would have had the benefit of the evening report from Arlington had they had proper receiving sets. This predicted worse weather; it read: "Increasing east and southeast winds, becoming fresh to strong, Friday night and increasing cloudiness followed by rain Friday." The bare "increase" of the morning had become "fresh to strong." To be sure this scarcely foretold a gale of from forty to fifty miles for five hours or more, rising at one time to fifty-six; but if the four tows thought the first report enough, the second ought to have laid any doubts. The master of the "Montrose" himself, when asked what he would have done had he received a substantially similar report, said that he would certainly have put in. The master of the "Hooper" was also asked for his opinion, and said that he would have turned back also, but this admission is somewhat vitiated by the incorporation in the question of the statement that it was a "storm warning," which the witness seized upon in his answer. All this seems to us to support the conclusion of the judge that prudent masters, who had received the second warning, would have found the risk more than the exigency warranted; they would have been amply vindicated by what followed. To be sure the barges would, as we have said, probably have withstood the gale, had they been well found; but a master is not justified in putting his tow to every test which she will survive, if she be fit. There is a zone in which proper caution will avoid putting her capacity to the proof; a coefficient of prudence that he should not disregard. Taking the situation as a whole, it seems to us that these masters would have taken undue chances, had they got the broadcasts.

They did not, because their private radio receiving sets, which were on board, were not in working order. These belonged to them personally, and were partly a toy, partly a part of the equipment, but neither furnished by the owner, nor supervised by it. It is not fair to say that there was a general custom among coastwise carriers so to equip their tugs. One line alone did it; as for the rest, they relied upon their crews, so far as they can be said to have relied at all. An adequate receiving set suitable for a coastwise tug can now be got at small cost and is reasonably reliable if kept up; obviously it is a source of great protection to their tows. Twice every day they can receive these pre-

dictions, based upon the widest possible information, available to every vessel within two or three hundred miles and more. Such a set is the ears of the tug to catch the spoken word, just as the master's binoculars are her eyes to see a storm signal ashore. Whatever may be said as to other vessels, tugs towing heavy coal laden barges, strung out for half a mile, have little power to manœuvre, and do not, as this case proves, expose themselves to weather which would not turn back stauncher craft. They can have at hand protection against dangers of which they can learn in no other way.

Is it then a final answer that the business had not yet generally adopted receiving sets? There are, no doubt, cases where courts seem to make the general practice of the calling the standard of proper diligence; we have indeed given some currency to the notion ourselves. Ketterer v. Armour & Co. (C. C. A.) 247 F. 921, 931, L. R. A. 1918D, 798; Spang Chalfant & Co. v. Dimon, etc., Corp. (C. C. A.) 57 F.(2d) 965, 967. Indeed in most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own tests, however persuasive be its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission. Wabash R. Co. v. McDaniels, 107 U. S. 454, 459–461, 2 S. Ct. 932, 27 L. Ed. 605; Texas & P. R. Co. v. Behymer, 189 U. S. 468, 470, 23 S. Ct. 622, 47 L. Ed. 905; Shandrew v. Chicago, etc., R. Co., 142 F. 320, 324, 325 (C. C. A. 8); Maynard v. Buck, 100 Mass. 40. But here there was no custom at all as to receiving sets; some had them, some did not; the most that can be urged is that they had not yet become general. Certainly in such a case we need not pause; when some have thought a device necessary, at least we may say that they were right, and the others too slack. The statute (section 484, title 46, U. S. Code [46 USCA § 484]) does not bear on this situation at all. It prescribes not a receiving, but a transmitting set, and for a very different purpose; to call for help, not to get news. We hold the tugs therefore because had they been properly equipped, they would have got the Arlington reports. The injury was a direct consequence of this unseaworthiness.

Decree affirmed.

AUTOMATIC ARC WELDING CO. v. A. O. SMITH CORPORATION. *

No. 4728.

Circuit Court of Appeals, Seventh Circuit.

July 29, 1932.

1. Patents ⇐314.

In patent suits, findings on issues determinative of validity are not required, if patent is not infringed (Equity Rule 70½ [28 USCA § 723]).

2. Patents ⇐74.

Inventor of automatic electric arc welding machine *held* chargeable with knowledge imputed by prior patents dealing with process of casting metals by electric arc.

3. Patents ⇐74.

Problems of engineer in illuminating arc art and film art *held* so similar to those in arc welding art that electrical engineer was chargeable with knowledge common to those laboring therein.

4. Patents ⇐72(1).

Apparatus found in regulation of feed of carbon electrode in arc lamp and electrode feed regulation in moving picture machine *held* part of prior art confronting inventor of automatic arc welding machine.

5. Patents ⇐234.

Engineer designing automatic electric arc welding apparatus *held* entitled to use structure shown in prior patents as against owner of subsequent patent, and in doing so did not infringe subsequent patent.

6. Patents ⇐328.

Morton patent, No. 1,648,560, covering electric arc welding, *held* not infringed.

7. Patents ⇐328.

Morton patent, No. 1,278,985, covering portable electric arc welding apparatus, *held* not infringed.

8. Patents 328.

Morton patent, No. 1,648,562, covering electric arc welding control methods and means, *held* not infringed.

9. Patents ⇐112(3).

In patent infringement suit, opinion of patent official who decided interference case between patentee and other inventors, but to which defendant was not party, *held* inadmissible.

Appeal from the District Court of the United States for the Eastern District of Wisconsin; Ferdinand A. Geiger, Judge.

* Rehearing denied November 2, 1932.

could; or by a sale of some of the assets so far as he could not. He could thus increase the deduction allowable to his legatees upon whatever assets he chose to keep. Had Congress been aware of such a possibility, it can scarcely be doubted that it would have provided against it.

The taxpayer relies upon the decision of the First Circuit in Commissioner v. Garland,[5] and it must be owned that in principle it is to the contrary. The wife had there used income from her husband's estate arising after his death to pay charges upon it, yet her executor was allowed to deduct the full value of the identified assets. However, although, as has appeared, we ourselves cannot see what difference it makes from where the money comes, the First Circuit did see a difference, for it expressly reserved decision in a case where the legatee paid the debts with his own money, which so far as the record shows may have been what the wife did here. Moreover, Bahr v. Commissioner[6] is directly in our favor; we accept Judge Sibley's discussion, which indeed put the whole argument in a nutshell. It is true that in that case Frank's estate had not been administered when Eugene died, but it was Eugene's executor, not Frank's administrator c. t. a., who paid Frank's estate tax. We cannot understand how it could have made a difference if Eugene had lived long enough to pay the debts himself. There is no more likely way to misapprehend the meaning of language—be it in a constitution, a statute, a will or a contract—than to read the words literally, forgetting the object which the document as a whole is meant to secure. Nor is a court ever less likely to do its duty than when, with an obsequious show of submission, it disregards the overriding purpose because the particular occasion which has arisen, was not foreseen. That there are hazards in this is quite true; there are hazards in all interpretation, at best a perilous course between dangers on either hand; but it scarcely helps to give so wide a berth to Charybdis's maw that one is in danger of being impaled upon Scylla's rocks.

Order affirmed.

[5] 136 F.2d 82.

[6] 5 Cir., 119 F.2d 371.

UNITED STATES et al. v. CARROLL TOWING CO., Inc., et al.

Nos. 96 and 97, Dockets 20371 and 20372.

Circuit Court of Appeals, Second Circuit.

Jan. 9, 1947.

1. Shipping ⇐54(2)

Harbor master, while rearranging line on barge incident to the shifting of another barge, was not acting as a deck hand on tug working as a shifting tug for steamship line which employed the harbor master so as to relieve steamship line from liability for harbor master's negligence.

2. Shipping ⇐58(2¾)

Evidence showed that, in rearranging line or barge incident to shifting of another barge, there was negligence on part of shifting tug and harbor master employed by steamship company, and that both the company and tug should be held jointly responsible for damage to barge.

3. Shipping ⇐63

A bargee's absence during working hours is not necessarily excusable because he has properly made fast his barge to a pier, when he leaves her.

4. Shipping ⇐207

Where bargee left at 5 p. m. and at 2 p. m. the following day, when bargee was still away, flotilla including the barge broke away when tier off pier broke adrift when lines were negligently shifted on barge by harbor master and deck hand of shifting tug, and at place and time involved barges were constantly being "drilled" in and out, bargee's absence without excuse at time of accident contributed to damage to barge resulting from negligent shifting of lines, so that owner and charterer of tug were entitled to limitation of their liability for such damage.

Appeal from the District Court of the United States for the Eastern District of New York.

Libel by Conners Marine Company, Inc., against Pennsylvania Railroad Company, charterer of the covered barge Anna C,

for damages to such barge, wherein the Grace Line, Inc., was impleaded, and proceedings in the matter of the petition of the Carroll Towing Company, Inc., as owner of the steamship Joseph F. Carroll, for exoneration from, or limitation of, liability. From two decrees, Conners Marine Co. v. Pennsylvania R. Co., 66 F.Supp. 396, which in conjunction disposed of the liabilities arising out of the sinking of the barge of the Conners Marine Company, Inc., in the harbor of New York on January 4, 1944, the Grace Line, Inc., appeals and the Carroll Company and the Pennsylvania Railroad Company filed assignments of error.

Reversed and remanded.

Robert S. Erskine and Kirlin, Campbell, Hickox & Keating, all of New York City (John H. Hanrahan, of New York City, of counsel), for Grace Line, Inc.

Edmund F. Lamb and Purdy & Lamb, all of New York City, for Conners Marine Co., Inc.,

Christopher E. Heckman and Foley & Martin, all of New York City, for Carroll Towing Co., Inc.

Frederic Conger and Burlingham, Veeder, Clark & Hupper, all of New York City (Chauncey I. Clark, of New York City, of counsel), for Pennsylvania Railroad Company.

Before L. HAND, CHASE and FRANK, Circuit Judges.

L. HAND, Circuit Judge.

These appeals concern the sinking of the barge, "Anna C," on January 4, 1944, off Pier 51, North River. The Conners Marine Co., Inc., was the owner of the barge, which the Pennsylvania Railroad Company had chartered; the Grace Line, Inc., was the charterer of the tug, "Carroll," of which the Carroll Towing Co., Inc., was the owner. The decree in the limitation proceeding held the Carroll Company liable to the United States for the loss of the barge's cargo of flour, and to the Pennsylvania Railroad Company, for expenses in salving the cargo and barge; and it held the Carroll Company also liable to the Conners Company for one half the damage to the barge; these liabilities being all subject to limitation. The decree in the libel suit held the Grace Line primarily liable for the other half of the damage to the barge, and for any part of the first half, not recovered against the Carroll Company because of limitation of liability; it also held the Pennsylvania Railroad secondarily liable for the same amount that the Grace Line was liable. The Carroll Company and the Pennsylvania Railroad Company have filed assignments of error.

The facts, as the judge found them, were as follows. On June 20, 1943, the Conners Company chartered the barge, "Anna C," to the Pennsylvania Railroad Company at a stated hire per diem, by a charter of the kind usual in the Harbor, which included the services of a bargee, apparently limited to the hours 8 A.M. to 4 P.M. On January 2, 1944, the barge, which had lifted the cargo of flour, was made fast off the end of Pier 58 on the Manhattan side of the North River, whence she was later shifted to Pier 52. At some time not disclosed, five other barges were moored outside her, extending into the river; her lines to the pier were not then strengthened. At the end of the next pier north (called the Public Pier), lay four barges; and a line had been made fast from the outermost of these to the fourth barge of the tier hanging to Pier 52. The purpose of this line is not entirely apparent, and in any event it obstructed entrance into the slip between the two tiers of barges. The Grace Line, which had chartered the tug, "Carroll," sent her down to the locus in quo to "drill" out one of the barges which lay at the end of the Public Pier; and in order to do so it was necessary to throw off the line between the two tiers. On board the "Carroll" at the time were not only her master, but a "harbormaster" employed by the Grace Line. Before throwing off the line between the two tiers, the "Carroll" nosed up against the outer barge of the tier lying off Pier 52, ran a line from her own stem to the middle bit of that barge, and kept working her engines "slow ahead" against the ebb tide which was making at that time. The captain of the "Carroll" put a deckhand and the "harbormaster" on the barges, told them to throw off the line which barred the entrance to the slip;

but, before doing so, to make sure that the tier on Pier 52 was safely moored, as there was a strong northerly wind blowing down the river. The "harbormaster" and the deckhand went aboard the barges and readjusted all the fasts to their satisfaction, including those from the "Anna C," to the pier.

After doing so, they threw off the line between the two tiers and again boarded the "Carroll," which backed away from the outside barge, preparatory to "drilling" out the barge she was after in the tier off the Public Pier. She had only got about seventy-five feet away when the tier off Pier 52 broke adrift because the fasts from the "Anna C," either rendered, or carried away. The tide and wind carried down the six barges, still holding together, until the "Anna C" fetched up against a tanker, lying on the north side of the pier below—Pier 51—whose propeller broke a hole in her at or near her bottom. Shortly thereafter: i. e., at about 2:15 P.M., she careened, dumped her cargo of flour and sank. The tug, "Grace," owned by the Grace Line, and the "Carroll," came to the help of the flotilla after it broke loose; and, as both had syphon pumps on board, they could have kept the "Anna C" afloat, had they learned of her condition; but the bargee had left her on the evening before, and nobody was on board to observe that she was leaking. The Grace Line wishes to exonerate itself from all liability because the "harbormaster" was not authorized to pass on the sufficiency of the fasts of the "Anna C" which held the tier to Pier 52; the Carroll Company wishes to charge the Grace Line with the entire liability because the "harbormaster" was given an over-all authority. Both wish to charge the "Anna C" with a share of all her damages, or at least with so much as resulted from her sinking. The Pennsylvania Railroad Company also wishes to hold the barge liable. The Conners Company wishes the decrees to be affirmed.

[1] The first question is whether the Grace Line should be held liable at all for any part of the damages. The answer depends first upon how far the "harbormaster's" authority went, for concededly he was an employee of some sort. Although the judge made no other finding of fact than that he was an "employee," in his second conclusion of law he held that the Grace Line was "responsible for his negligence." Since the facts on which he based this liability do not appear, we cannot give that weight to the conclusion which we should to a finding of fact; but it so happens that on cross-examination the "harbormaster" showed that he was authorized to pass on the sufficiency of the fasts of the "Anna C." He said that it was part of his job to tie up barges; that when he came "to tie up a barge" he had "to go in and look at the barges that are inside the barge" he was "handling"; that in such cases "most of the time" he went in "to see that the lines to the inside barges are strong enough to hold these barges"; and that "if they are not" he "put out sufficient other lines as are necessary." That does not, however, determine the other question: i. e., whether, when the master of the "Carroll" told him and the deckhand to go aboard the tier and look at the fasts, preparatory to casting off the line between the tiers, the tug master meant the "harbormaster" to exercise a joint authority with the deckhand. As to this the judge in his tenth finding said: "The captain of the Carroll then put the deckhand of the tug and the harbor master aboard the boats at the end of Pier 52 to throw off the line between the two tiers of boats after first ascertaining if it would be safe to do so." Whatever doubts the testimony of the "harbormaster" might raise, this finding settles it for us that the master of the "Carroll" deputed the deckhand and the "harbormaster," jointly to pass upon the sufficiency of the "Anna C's" fasts to the pier. The case is stronger against the Grace Line than Rice v. The Marion A. C. Meseck,[1] was against the tug there held liable, because the tug had only acted under the express orders of the "harbormaster." Here, although the relations were reversed, that makes no difference in principle; and the "harbormaster" was not instructed what he should do about the fasts, but was allowed

[1] 2 Cir., 148 F.2d 522.

to use his own judgment. The fact that the deckhand shared in this decision, did not exonerate him, and there is no reason why both should not be held equally liable, as the judge held them.

[2] We cannot, however, excuse the Conners Company for the bargee's failure to care for the barge, and we think that this prevents full recovery. First as to the facts. As we have said, the deckhand and the "harbormaster" jointly undertook to pass upon the "Anna C's" fasts to the pier; and even though we assume that the bargee was responsible for his fasts after the other barges were added outside, there is not the slightest ground for saying that the deckhand and the "harbormaster" would have paid any attention to any protest which he might have made, had he been there. We do not therefore attribute it as in any degree a fault of the "Anna C" that the flotilla broke adrift. Hence she may recover in full against the Carroll Company and the Grace Line for any injury she suffered from the contact with the tanker's propeller, which we shall speak of as the "collision damages." On the other hand, if the bargee had been on board, and had done his duty to his employer, he would have gone below at once, examined the injury, and called for help from the "Carroll" and the Grace Line tug. Moreover, it is clear that these tugs could have kept the barge afloat, until they had safely beached her, and saved her cargo. This would have avoided what we shall call the "sinking damages." Thus, if it was a failure in the Conner Company's proper care of its own barge, for the bargee to be absent, the company can recover only one third of the "sinking" damages from the Carroll Company and one third from the Grace Line. For this reason the question arises whether a barge owner is slack in the care of his barge if the bargee is absent.

As to the consequences of a bargee's absence from his barge there have been a number of decisions; and we cannot agree that it is never ground for liability even to other vessels who may be injured. As early as 1843, Judge Sprague in Clapp v. Young,[2] held a schooner liable which broke adrift from her moorings in a gale in Provincetown Harbor, and ran down another ship. The ground was that the owners of the offending ship had left no one on board, even though it was the custom in that harbor not to do so. Judge Tenney in Fenno v. The Mary E. Cuff,[3] treated it as one of several faults against another vessel which was run down, to leave the offending vessel unattended in a storm in Port Jefferson Harbor. Judge Thomas in The On-the-Level,[4] held liable for damage to a stake-boat, a barge moored to the stake-boat "south of Liberty Light, off the Jersey shore," because she had been left without a bargee; indeed he declared that the bargee's absence was "gross negligence." In the Kathryn B. Guinan,[5] Ward, J., did indeed say that, when a barge was made fast to a pier in the harbor, as distinct from being in open waters, the bargee's absence would not be the basis for the owner's negligence. However, the facts in that case made no such holding necessary; the offending barge in fact had a bargee aboard though he was asleep. In the Beeko,[6] Judge Campbell exonerated a power boat which had no watchman on board, which boys had maliciously cast loose from her moorings at the Marine Basin in Brooklyn and which collided with another vessel. Obviously that decision has no bearing on the facts at bar. In United States Trucking Corporation v. City of New York,[7] the same judge refused to reduce the recovery of a coal hoister, injured at a foul berth, because the engineer was not on board; he had gone home for the night as was apparently his custom. We reversed the decree,[8] but for another reason. In The Sadie,[9] we affirmed Judge Coleman's holding[10] that it was actionable negligence to leave without a bargee on board a barge made fast outside another barge, in the face of storm warnings. The damage was done to the

[2] Fed.Cas.No. 2786.
[3] D.C., 84 F. 719.
[4] D.C., 128 F. 511.
[5] 2 Cir., 176 F. 301.
[6] D.C., 10 F.2d 884.
[7] D.C., 14 F.2d 528.
[8] 2 Cir., 18 F.2d 775.
[9] 2 Cir., 62 F.2d 1076.
[10] D.C., 57 F.2d 908.

inside barge. In The P. R. R. No. 216,[11] we charged with liability a lighter which broke loose from, or was cast off, by a tanker to which she was moored, on the ground that her bargee should not have left her over Sunday. He could not know when the tanker might have to cast her off. We carried this so far in The East Indian,[12] as to hold a lighter whose bargee went ashore for breakfast, during which the stevedores cast off some of the lighter's lines. True, the bargee came back after she was free and was then ineffectual in taking control of her before she damaged another vessel; but we held his absence itself a fault, knowing as he must have, that the stevedores were apt to cast off the lighter. The Conway No. 23[13] went on the theory that the absence of the bargee had no connection with the damage done to the vessel itself; it assumed liability, if the contrary had been proved. In The Trenton,[14] we refused to hold a moored vessel because another outside of her had overcharged her fasts. The bargee had gone away for the night when a storm arose; and our exoneration of the offending vessel did depend upon the theory that it was not negligent for the bargee to be away for the night; but no danger was apparently then to be apprehended. In Bouker Contracting Co. v. Williamsburgh Power Plant Corporation[15], we charged a scow with half damages because her bargee left her without adequate precautions. In O'Donnell Transportation Co. v. M. & J. Tracy,[16] we refused to charge a barge whose bargee had been absent from 9 A.M. to 1:30 P.M., having "left the vessel to go ashore for a time on his own business."

[3, 4] It appears from the foregoing review that there is no general rule to determine when the absence of a bargee or other attendant will make the owner of the barge liable for injuries to other vessels if she breaks away from her moorings. However, in any cases where he would be so liable for injuries to others, obviously he must reduce his damages proportionately, if the injury is to his own barge. It becomes apparent why there can be no such general rule, when we consider the grounds for such a liability. Since there are occasions when every vessel will break from her moorings, and since, if she does, she becomes a menace to those about her; the owner's duty, as in other similar situations, to provide against resulting injuries is a function of three variables: (1) The probability that she will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions. Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i. e., whether $B < PL$. Applied to the situation at bar, the likelihood that a barge will break from her fasts and the damage she will do, vary with the place and time; for example, if a storm threatens, the danger is greater; so it is, if she is in a crowded harbor where moored barges are constantly being shifted about. On the other hand, the barge must not be the bargee's prison, even though he lives aboard; he must go ashore at times. We need not say whether, even in such crowded waters as New York Harbor a bargee must be aboard at night at all; it may be that the custom is otherwise, as Ward, J., supposed in "The Kathryn B. Guinan," supra;[17] and that, if so, the situation is one where custom should control. We leave that question open; but we hold that it is not in all cases a sufficient answer to a bargee's absence without excuse, during working hours, that he has properly made fast his barge to a pier, when he leaves her. In the case at bar the bargee left at five o'clock in the afternoon of January 3rd, and the flotilla broke away at about two o'clock in the afternoon of the following day, twenty-one hours afterwards. The bargee had been away all the time, and we hold that his fabricated story was affirmative evidence

[11] 56 F.2d 604.
[12] 2 Cir., 62 F.2d 242.
[13] 2 Cir., 64 F.2d 121.
[14] 2 Cir., 72 F.2d 283.
[15] 2 Cir., 130 F.2d 96, 98.
[16] 2 Cir., 150 F.2d 735, 738.
[17] 2 Cir., 176 F.2d 301.

that he had no excuse for his absence. At the locus in quo—especially during the short January days and in the full tide of war activity—barges were being constantly "drilled" in and out. Certainly it was not beyond reasonable expectation that, with the inevitable haste and bustle, the work might not be done with adequate care. In such circumstances we hold—and it is all that we do hold—that it was a fair requirement that the Conners Company should have a bargee aboard (unless he had some excuse for his absence), during the working hours of daylight.

The decrees will be modified as follows. In the libel of the Conners Company against the Pennsylvania Railroad Company in which the Grace Line was impleaded, since the Grace Line is liable in solido, and the Carroll Company was not impleaded, the decree must be for full "collision damages" and half "sinking damages," and the Pennsylvania Railroad Company will be secondarily liable. In the limitation proceeding of the Carroll Company (the privilege of limitation being conceded), the claim of the United States and of the Pennsylvania Railroad Company will be allowed in full. Since the claim of the Conners Company for "collision damages" will be collected in full in the libel against the Grace Line, the claim will be disallowed pro tanto. The claim of the Conners Company for "sinking damages" being allowed for one half in the libel, will be allowed for only one sixth in the limitation proceeding. The Grace Line has claimed for only so much as the Conners Company may recover in the libel. That means that its claim will be for one half the "collision damages" and for one sixth the "sinking damages." If the fund be large enough, the result will be to throw one half the "collision damages" upon the Grace Line and one half on the Carroll Company; and one third of the "sinking damages" on the Conners Company, the Grace Line and the Carroll Company, each. If the fund is not large enough, the Grace Line will not be able altogether to recoup itself in the limitation proceeding for its proper contribution from the Carroll Company.

Decrees reversed and cause remanded for further proceedings in accordance with the foregoing.

TIDE WATER ASSOCIATED OIL CO. et al. v. STOTT et al.

No. 11669.

Circuit Court of Appeals, Fifth Circuit.

Dec. 30, 1946.

Writ of Certiorari Denied May 5, 1947.

See 67 S.Ct. 1306.

1. Mines and minerals ⇐78(1)

The implied covenants of oil and gas lease are to drill wells within a reasonable time, testing the land for oil and gas; and to drill test wells within a reasonable time after notice even though lease provides for delay by payment of delay rentals; and if oil or gas is found in paying quantities, to proceed with reasonable diligence in drilling sufficient number of wells to reasonably develop premises; and to protect land from drainage through wells on adjoining lands by drilling offset wells; and to market product of producing wells.

2. Mines and minerals ⇐78(1)

Implied covenant in oil and gas lease to protect from drainage does not impose an insurer's liability upon lessee, but only requires lessee to drill well to protect land from drainage if such well will produce gas at profit.

3. Mines and minerals ⇐78(1)

Oil and gas lessees fulfilled implied covenant in lease to protect leased premises from drainage where reasonable and prudent operator would not have drilled additional well upon the leased tracts, and lessees were producing from such tracts all mineral products which could be produced in absence of recycling, and recycling was not practical in absence of unitization, which lessors had refused.

4. Mines and minerals ⇐78(7)

Oil and gas lessors cannot recover from lessees damages for draining leased

Eckert v. Long Island R.R., 43 N.Y. 502 (N.Y. 1871)

ANNA ECKERT, Administratrix of HENRY ECKERT, deceased, Respondent,
v.
THE LONG ISLAND RAILROAD COMPANY, Appellant.
Court of Appeals of New York.
Decided Jan. 24th, 1871.

*502 The law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under circumstances constituting rashness in the judgment of prudent persons.

A person voluntarily placing himself, for the protection of property merely, in a position of danger, is negligent, so as to preclude his recovery for an injury so received. It is otherwise, however, when such an exposure is for the purpose of saving human life, and it is for the jury to say, in such cases, whether the conduct of the party injured is to be deemed rash and reckless.

Accordingly, where the plaintiff's intestate, seeing a little child on the track of the defendant's railroad and a train swiftly approaching, so that the child would be almost instantly crushed unless an immediate effort was made to save it, and thereupon, in the sudden exigency of the occasion, rushing to save the child, and succeeding in that, lost his own life by being run over by the train.--Held (ALLEN and FOLGER, JJ., contra), that his voluntarily exposing himself to the danger, for the purpose of *503 saving the child's life, was not, as matter of law, negligence on his part precluding a recovery, and that the court did not err in refusing to non suit on that ground.

APPEAL from the judgment of the late General Term of the Supreme Court, in the second judicial district, affirming a judgment for the plaintiff in the City Court of Brooklyn, upon the verdict of a jury. Action in the City Court of Brooklyn, by the plaintiff as administratrix of her husband, Henry Eckert, deceased, to recover damages for the death of the intestate, caused as alleged by the negligence of the defendant, its servants and agents, in the conduct and running of a train of cars over its road. The case, as made by the plaintiff, was, that the deceased received an injury from a locomotive engine of the defendant, which resulted in his death, on the 26th day of November, 1867, under the following circumstances:

He was standing in the afternoon of the day named, in conversation with another person about fifty feet from the defendant's track, in East New York, as a train of cars was coming in from Jamaica, at a rate of speed estimated by the plaintiffs' witnesses of from twelve to twenty miles per hour. The plaintiff's witnesses heard no signal either from the whistle or the bell upon the engine. The engine was constructed to run either way without turning, and it was then running backward with the cow-catcher next the train it was drawing, and nothing in front to remove obstacles from the track. The claim of the plaintiff was that the evidence authorized the jury to find that the speed of the train was improper and negligent in that particular place, it being a thickly populated neighborhood, and one of the stations of the road.

The evidence on the part of the plaintiff, also showed, that a child three or four years old, was sitting or standing upon the track of the defendant's road as the train of cars was approaching, and was liable to be run over, if not removed; and the deceased seeing the danger of the child, ran to it, and seizing *504it, threw it clear of the track on the side opposite to that from which he came; but continuing across the track himself, was struck by the step or some part of the locomotive or tender, thrown down, and received injuries from which he died the same night.

The evidence on the part of defendant, tended to prove that the cars were being run at a very moderate speed, not over seven or eight miles per hour, that the signals required by law were given, and that the child was not on the track over which the cars were passing, but on a side track near the main track.

So far as there was any conflict of evidence or question of fact, the questions were submitted to the jury. At the close of the plaintiff's case, the counsel for the defendant moved for a nonsuit upon the ground that it appeared that the deceased's negligence contributed to the injury, and the motion was denied and an exception taken. After the

evidence was all in, the judge was requested by the counsel for the defendant to charge the jury, in different forms, that if the deceased voluntarily placed himself in peril from which he received the injury, to save the child, whether the child was or was not in danger, the plaintiff could not recover, and all the requests were refused and exceptions taken, and the question whether the negligence of the intestate contributed to the accident was submitted to the jury. The jury found a verdict for the plaintiff, and the judgment entered thereon was affirmed, on appeal, by the Supreme Court, and from the latter judgment the defendant has appealed to this court.

Aaron J. Vanderpoel, for the appellant, after arguing and citing cases to show that there was no evidence of negligence on the part of the defendant, on the question of the negligence of the plaintiff's intestate, cited 47 Penn., 300, 375; Evansville R. R. Co. v. Hyat (17 Ind., 102); Grippen v. N. Y. C. R. R. Co. (40 N. Y., 34, 50); Ernst v. Hudson R. R. Co. (39 N. Y., 91); Wilcox v. Rome & Watertown R. R. Co (39 N. Y., 61); Havens v. Erie Railway (41 N. Y., 296).

*505 George G. Reynolds, for the respondent, cited Mangam v. Brooklyn City R. R. Co. (38 N. Y., 455); Newson v. N. Y. C. R. R. Co. (39 N. Y., 383, 390); Johnson v. Hudson River R. Co. (20 N. Y., 65. 71); Ernst v. Hudson River R. R. (35 N. Y., 26); Munger v. Tonawanda R. (5 Den., 225, 264-5); Fero v. Buffalo and State Line R. Co.(22 N. Y., 213); Stokes v. Salstonstall (13 Peters, 181); Sherman & Redf. on Negl., 27, 28; Wild v. Hudson R. R. Co. (33 Barb., 503, 507, 508, 509); Collins v. Alb. and Sch. R. R. Co. (12 Barb., 492).

GROVER, J.

The important question in this case arises upon the exception taken by the defendant's counsel to the denial of his motion for a nonsuit, made upon the ground that the negligence of the plaintiff's intestate contributed to the injury that caused his death. The evidence showed that the train was approaching in plain view of the deceased, and had he for his own purposes attempted to cross the track, or with a view to save property placed himself voluntarily in a position where he might have received an injury from a collision with the train, his conduct would have been grossly negligent, and no recovery could have been had for such injury. But the evidence further showed that there was a small child upon the track, who, if not rescued, must have been inevitably crushed by the rapidly approaching train. This the deceased saw, and he owed a duty of important obligation to this child to rescue it from its extreme peril, if he could do so without incurring great danger to himself. Negligence implies some act of commission or omission wrongful in itself. Under the circumstances in which the deceased was placed, it was not wrongful in him to make every effort in his power to rescue the child, compatible with a reasonable regard for his own safety. It was his duty to exercise his judgment as to whether he could probably save the child without serious injury to himself. If, from the appearances, he believed that he could, it was not negligence to make an attempt so to do, although believing that possibly he might fail *506 and receive an injury himself. He had no time for deliberation He must act instantly, if at all, as a moment's delay would have been fatal to the child. The law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness in the judgment of prudent persons. For a person engaged in his ordinary affairs, or in the mere protection of property, knowingly and voluntarily to place himself in a position where he is liable to receive a serious injury, is negligence, which will preclude a recovery for an injury so received; but when the exposure is for the purpose of saving life, it is not wrongful, and therefore not negligent unless such as to be regarded either rash or reckless. The jury were warranted in finding the deceased free from negligence under the rule as above stated. The motion for a nonsuit was, therefore, properly denied. That the jury were warranted in finding the defendant guilty of negligence in running the train in the manner it was running, requires no discussion. None of the exceptions taken to the charge as given, or to the refusals to charge as requested, affect the right of recovery. Upon the principle above stated, the judgment appealed from must be affirmed with costs.

CHURCH, Ch. J., PECKHAM and RAPALLO, JJ., concur.

ALLEN, J. (dissenting).

The plaintiff's intestate was not placed in the peril from which he received the injury resulting in his death, by any act or omission of duty of the defendants, its servants, or agents. He went upon the track of the defendant's road in front of an approaching train, voluntarily, in the exercise of his free will, and while in the full possession of all his

faculties, and with capacity to judge of the danger. His action was the result of his own choice, and such choice not compulsory. He was not compelled, or apparently compelled, to take any action to avoid a peril, and harm to himself, from the negligent or wrongful act of the defendant, or the agents in charge of the train. The plaintiff's rights are the same as those of the intestate would have *507 been, had he survived the injury and brought the action, and must be tested by the same rules; and to him and consequently to the plaintiff, the maxim volenti non fit injuria applies. It is a well established rule, that no one can maintain an action for a wrong, when he consents or contributes to the act which occasions his loss. One who with liberty of choice, and knowledge of the hazard of injury, places himself in a position of danger, does so at his own peril, and must take the consequences of his act. This rule has been applied to actions for torts as well as to actions upon contract, under almost every variety of circumstance.

Whenever there has been notice of the danger, and freedom of action, the injured party has been compelled to bear the consequences of the action irrespective of the character and degree of negligence of other parties. (Gould v. Oliver, 2 Scotts. N. R., 257; Ilott v. Wilkes, 3 B. & Ald., 311; Slagan v. Slingerland, 2 Caines, 219; Per MARVIN, J., in Corwin v. N. Y. and E. R. R. Co., 3 Ker., 42; per COWEN, J., in Hatfield v. Roper, 21 W. R., 620.) The doctrine applicable to voluntary payments of money not recoverable by law grows out of this rule of law, and the rules governing in cases of contributing negligence of the injured party is nearly allied to, if not an outgrowth of the maxim volenti non fit injuria.

Whether the defendant was or was not guilty of negligence, or whatever the character and degree of the culpability of the defendant and its servants is not material. The testator had full view of the train and saw, or could have seen, the manner in which it was made up, and the locomotive attached, and the speed at which it was approaching, and, if in the exercise of his free will, he chose for any purpose to attempt the crossing of the track, he must take the consequence of his act. The defendant may have been running the train improperly, and perchance illegally, and so as to create a legal liability in respect to any one sustaining loss solely from such cause, but the company is not the insurer of, or liable to those *508 who, of their own choice and with full notice, place themselves in the path of the train and are injured.

It is not the law that the co-operating act of the injured party must be culpable or wrong in intention. It may be merely negligence or the result of the free exercise of the will. (Per BEARDSLEY, J., Tonawanda R. R. Co., v. Munger, 5 Denio, 255.) The rescue of the child from apparent imminent danger was a praiseworthy act and entitled the plaintiff to the favorable consideration of the court and to a lenient and liberal interpretation and application of the rules of law in her behalf. But the principles of law cannot yield to particular cases.

The act of the intestate in attempting to save the child was lawful as well as meritorious, and he was not a trespasser upon the property of the defendant, but it was not in the performance of any duty imposed by law, or growing out of his relation to the child, or the result of any necessity. There is nothing to relieve it from the character of a voluntary act, the performance of a self-imposed duty, with full knowledge and apprehension of the risk incurred. Evansville R. R. Co. v. Hyatt (17 Ind., 102), is in circumstance somewhat like the case before us, and the decision is in accord with the views herein expressed.

I am of the opinion that the judgment of the Supreme Court and of the City Court of Brooklyn should be reversed and new trial granted, costs to abide event.

FOLGER. J., concurred in the foregoing opinion.

Judgment affirmed.

this Court finds Beamon's sentencing argument to be without merit.

CONCLUSION

¶ 13. We affirm the "Judgment on Guilty Plea" and sentence of the Circuit Court of Neshoba County.

¶ 14. **CONVICTION OF STRONG ARMED ROBBERY AND SENTENCE OF FIFTEEN (15) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, AFFIRMED.**

WALLER, C.J., CARLSON, P.J., DICKINSON, LAMAR, KITCHENS, CHANDLER AND PIERCE, JJ., CONCUR. GRAVES, P.J., CONCURS IN RESULT ONLY.

The ESTATE OF Abner K. NORTHROP, Jr., Abner K. Northrop, III, Administrator

v.

Davis HUTTO, Stanley Turner, Memorial Hospital at Gulfport and Thomas Letard, M.D.

No. 2007–CT–00355–SCT.

Supreme Court of Mississippi.

May 21, 2009.

Background: Patient brought medical malpractice action against hospital, anesthesiologist, and nurse anesthetists, alleging that lack of monitoring of intravenous catheter (IV) during surgery resulted in extravasation. The Circuit Court, Harrison County, Lisa P. Dodson, J., granted summary judgment in favor of defendants. Patient appealed. The Court of Appeals, 9 So.3d 388, 2008 WL 2345945, reversed and remanded. Defendants sought certiorari review.

Holding: The Supreme Court, Randolph, J., held that expert medical witness's testimony failed to articulate an objective standard of care.

Reversed.

Kitchens, J., dissented and filed opinion, in which Graves, J., joined.

1. Appeal and Error ⚿893(1)

The circuit court's grant of a motion for summary judgment is reviewed by Supreme Court de novo.

2. Appeal and Error ⚿895(2)

In Supreme Court's de novo review of circuit court's grant of a motion for summary judgment, the evidence must be viewed in the light most favorable to the party against whom the motion has been made.

3. Health ⚿611

To make a prima facie case of medical malpractice, the following elements must be shown: the existence of a duty on the part of the physician to conform to the specific standard of conduct, the applicable standard of care, the failure to perform to that standard, that the breach of duty by the physician was the proximate cause of the plaintiff's injury, and that damages to plaintiff have resulted.

4. Health ⚿620

A physician is under a duty to meet the national standard of care.

5. Health ⚿620, 621

Given the circumstances of each patient, each physician has a duty to treat each patient, with such reasonable diligence, skill, competence, and prudence as

are practiced by minimally competent physicians in the same specialty or general field of practice throughout the country.

6. Evidence ⚿555.10

The standard of care articulated by expert in medical malpractice action must be objective, not subjective.

7. Evidence ⚿571(3)

Health ⚿823(5)

Expert medical witness's testimony failed to articulate an objective standard of care required of providers of anesthesia services with regard to intravenous catheter (IV) that had extravasated during patient's surgery; expert did not state that providers should have monitored anything in particular, but stated only that standard of care required "constant vigilance," and expert's personal preferences did not establish a national standard of care.

Floyd J. Logan, Gulfport, attorney for appellant.

Patricia K. Simpson, Gulfport, Ross Douglas Vaughn, Fredrick B. Feeney, Margaret P. Mcarthur, attorneys for appellees.

EN BANC.

ON WRIT OF CERTIORARI.

RANDOLPH, Justice, for the Court.

¶ 1. This medical malpractice case is before this Court on writ of certiorari. A divided Court of Appeals reversed a grant of summary judgment in favor of the defendants. *Northrop v. Hutto,* 9 So.3d 388, 2008 Miss.App. LEXIS 352 (Miss. Ct.App. June 10, 2008). The issue before the Court is what testimony is required from a medical expert witness to establish a prima facie case sufficient to defeat a motion for summary judgment in a medical-malpractice case. Our body of law requires medical experts to articulate a specific, objectively-determined standard of care. The legal requirement remains unchanged. The plaintiff must establish the existence of a recognized duty to the patient, and a breach of that duty, which results in injury proximately caused by the breach.

¶ 2. We conclude that the Court of Appeals decision is in conflict with its own prior decisions and the published opinions of this Court. The Court of Appeals majority held that summary judgment was inappropriate because the plaintiff, as nonmovant, should benefit when doubt exists as to whether a fact is at issue. *Northrop,* 9 So.3d at 390, 2008 Miss.App. LEXIS 352 at *9. However, the first bridge that must be crossed is establishing duty, which is a legal question. If a plaintiff fails to establish an objectively-determined standard of care and attendant breach by competent medical testimony, summary judgment is appropriate.

FACTS

¶ 3. The plaintiff, Abner K. Northrop, Jr. ("Northrop"), had a radical prostatectomy at the Memorial Hospital at Gulfport in March 1999. His surgeon was Dr. Ronald Brown ("Dr. Brown"). Anesthesia services were provided by the defendants, Thomas P. Letard, M.D. ("Dr. Letard"), Davis R. Hutto, CRNA [1] ("Hutto"), and Stanley Turner, CRNA ("Turner"). Dr. Letard led the anesthesia team and supervised the two CRNAs. Dr. Letard was in the operating room at the beginning of the procedure and left Hutto in attendance

1. Hutto and Turner are Certified Registered Nurse Anesthetists ("CRNA") in the employ of the hospital. Dr. Letard is a medical doctor specializing in anesthesiology.

after the intubation and induction of Northrop. Turner relieved Hutto near the end of the procedure.

¶ 4. Northrop had multiple intravenous catheters ("IVs") in place, including a peripheral IV in each arm and a central line in his neck. All IV lines were in place and functioning when Northrop was brought to the operating room. Northrop's arms were extended at ninety-degree angles from his body, and were taped to arm boards. Northrop's upper body, including his arms, was covered with a Bair Hugger [2] and a blanket. Hutto taped the patient's arms to the boards, placed the Bair Hugger and blanket, and taped the blanket to the boards. The IV site in the left arm was latent during the surgery. The surgery lasted approximately three hours and ten minutes. During this time, among their many other responsibilities, the anesthesia team members were responsible for maintaining the IV lines. The team monitored the function of the IVs by multiple methods, including checking vital signs every five minutes, monitoring the IV drip rate, and monitoring the patient's effective response to IV medications and fluids.

¶ 5. Upon completion of the surgery, Turner removed the Bair Hugger and blanket and discovered that the IV in the left arm had extravasated.[3] Turner removed the IV and informed Dr. Letard. The team called Dr. Alton H. Dauterive ("Dr. Dauterive"), a vascular surgeon. Dr. Dauterive diagnosed compartment syndrome and performed a fasciotomy [4] on Northrop while he was still under anesthesia. A few days later, Dr. Dauterive closed the incisions. One incision required a skin graft, which was taken from Northrop's thigh. Northrop's arm fully recovered, albeit with some scarring, with full range of motion and all nerves intact.

PROCEDURAL HISTORY

¶ 6. Northrop filed suit, alleging medical malpractice, in the Circuit Court of the First Judicial District of Harrison County, against Hutto, Turner, Dr. Letard, and the Memorial Hospital at Gulfport. Upon completion of discovery, the defendants moved for summary judgment. The circuit court granted summary judgment for the defendants, finding that Northrop's expert, Dr. Felipe Urdaneta ("Dr. Urdaneta"), had not articulated a standard of care, nor had he shown that any of the defendants had breached the standard or that any breach was the proximate cause of Northrop's injuries. A divided Court of Appeals reversed the grant of summary judgment and remanded the case to the circuit court. *Id.* at 391–92, 2008 Miss. App. LEXIS *10. The dissent concluded that Northrop's expert had "failed to establish the standard of care, and even if a standard of care was established, there exists no genuine issue of material fact as to the elements of breach and causation." *Id.* The Court of Appeals denied the defendants' motion for rehearing. *Northrop v. Hutto,* 2008 Miss.App. LEXIS 652 (Miss. Ct.App. Oct. 21, 2008). This Court granted the defendants' petitions for certiorari. *Northrop v. Hutto,* 2009 Miss. LEXIS 54 (Miss. Feb. 3, 2009).

2. Bair Huggers are forced-air warming systems used to prevent hypothermia while a patient is under anesthesia and cannot maintain body temperature.

3. Extravasation is leakage of IV fluid outside the intended vessel and into the surrounding tissue.

4. Compartment syndrome is a condition caused by increased fluid pressure in tissues. A fasciotomy is a procedure in which incisions are made to allow for drainage to release pressure.

ANALYSIS

¶ 7. We consider whether Northrop's expert articulated the required standard of care.

[1, 2] ¶ 8. Our standard of review is de novo, as follows:

> The circuit court's grant of a motion for summary judgment is reviewed by this Court de novo. *See Wilner v. White,* 929 So.2d 315, 318 (Miss.2006).... In this Court's de novo review, "[t]he evidence must be viewed in the light most favorable to the party against whom the motion has been made." *Daniels v. GNB, Inc.,* 629 So.2d 595, 599 (Miss. 1993) (citation omitted).

Kilhullen v. Kan. City S. Ry., 2009 Miss. LEXIS 87, *15–16 (Miss. Jan. 6, 2009).

Whether Northrop's expert articulated the required standard of care.

[3–6] ¶ 9. To make a prima facie case of medical malpractice, the following elements must be shown:

> the existence of a duty on the part of the physician to conform to the specific standard of conduct, the applicable standard of care, the failure to perform to that standard, that the breach of duty by the physician was the proximate cause of the plaintiff's injury, and that damages to plaintiff have resulted.

Barner v. Gorman, 605 So.2d 805, 808–09 (Miss.1992). This Court has stated that the "general rule is that the negligence of a physician may be established only by expert medical testimony." *Palmer v. Biloxi Reg'l Med. Ctr.,* 564 So.2d 1346, 1355 (Miss.1990) (quoting *Cole v. Wiggins,* 487 So.2d 203, 206 (Miss.1986)). A physician is under a duty to meet the national standard of care.

> [G]iven the circumstances of each patient, each physician has a duty to ... treat ... each patient, with such reasonable diligence, skill, competence, and prudence as are practiced by minimally competent physicians in the same specialty or general field of practice throughout the United States....

Palmer, 564 So.2d at 1354 (citing *Hall v. Hilbun,* 466 So.2d 856, 873 (Miss.1985)). *See also Maxwell v. Baptist Mem'l Hosp.-Desoto, Inc.,* 958 So.2d 284, 289 (Miss.Ct. App.2007). The standard articulated must be objective, not subjective. This Court stated in *Hall,* "[e]mphasis is given the proposition that physicians incur civil liability only when the quality of care they render falls below *objectively ascertained* minimally acceptable levels." *Hall,* 466 So.2d at 871 (emphasis added). *See also Maxwell,* 958 So.2d at 289 (witness who answered in terms of what he would do as a physician was found not to be articulating an objective standard).

[7] ¶ 10. The success of a plaintiff in establishing a case of medical malpractice rests heavily on the shoulders of the plaintiff's selected medical expert. The expert must articulate an objective standard of care. Excerpts of Dr. Urdaneta's testimony are as follows:

> Q: And you didn't see anything in your review of the chart or the depositions of the parties to indicate that Mr. Northrop was not getting the desired effects of the medications, did you?
>
> A: Not really.
>
> ...
>
> A: In my opinion, I think it was basically the fact that they did not monitor the IV fluids that were actually given to the patient. They were not looking at the extremity where those IV fluids were being given.
>
> ...
>
> Q: Do you know why the extravasation occurred in this case?
>
> A: No, I don't know.

Q: Do you know when it occurred?

A: No.

. . .

A: . . . but it could have happened at any point.

Q: It could have happened five minutes before they took the curtains down?

A: Theoretically, yes. . . .

. . . Q: And what do you know was given through that left IV in this case?

A: . . . just basically IV fluids, crystaloids as well as blood.

. . .

A: The extravasation, per se, is not proof of negligence, that is correct.

Q: An extravasation can happen suddenly?

A: Yes.

Q: Without warning?

A: Without warning.

. . .

Q: . . . From your review of these records, what about Mr. Northrop's course of this procedure would have alerted a reasonably careful anesthesiologist to the presence of an extravasation?

A: The only—reviewing the records, from the vital signs there's no way you can tell an extravasation is occurring.

. . .

Q: Is it your contention that the standard of care requires visual monitoring of the actual placement of the IV into the patient's body, wherever it may be, in the extremity or otherwise, throughout the entire case?

A: That's not according—in other words, the [American Board of Anesthesiology] does not state particular—that particular mandate. It basically states that you need to be monitoring the cardiovascular, the respiratory, the oxygenation as well as the—what's the called the end tidal CO_2. There's no particular mandate that you need to actually be looking at the extremity, if that's what you're referring.

. . .

A: I don't think there's any particular mandate you have to look at the extremities, but you have to monitor where you're [sic] IV fluids are going. . . .

. . .

A: . . . I don't think you will find anywhere a treatise or any book or anything that states that you need to be looking . . . at the extremity every so often or any . . . period of time. I'm sorry. But I think you have to monitor your patient globally.

. . .

Q: . . . the standard of care does not specifically require the anesthesiologist to pull up the Bair Warmer [sic] and the warming blanket to look at that site as the case is going on?

A: You will not find a standard that says you need to Bair Hugger [sic] every so often, if that's what you're referring to.

Q: That's what I'm asking you. You would agree that is not the standard of care?

A: That is not the standard of care, correct.

. . .

Q: And would you agree that in those anesthesia cases where the patient's arms are tucked to the side, the peripheral lines are sometimes used?

A: Yes.

. . .

Q: . . . Would you agree that the site where the line goes into the arm is not visible to the anesthesiologist?

A: That's correct.

Q: . . . it would not be possible to view the site. . . .

A: . . . I will not say impossible but it will be a major undertaking to look at the arm where—the extremity where the IV is.

Q: And it's not routinely done, is it?

A: If the arm is tucked, usually not.

Q: If there's no indication that there's a problem with the anesthesia, you don't go and visually observe the IV site in those cases, do you?

A: That is correct.

. . .

A: . . . if the arms are on the side, they're not part of the sterile field so you actually have access to them.

Q: So, just because you have access to them, you're required to look at them; is that your testimony?

A: I did not say required.

Q: Well, required by the standard of care. No?

A: I don't think there is any standard of care that says if the arms are on the side you need to look at them. I think it's part of the common sense that if you have access to them . . . in my opinion you should actually consider that you can.

. . .

Q: And you've told me that the standard of care does not require a visual observation of the arms out to the side?

A: That's correct.

. . .

Q: . . . the standard of care does not specifically require the person to pull the . . . warming blanket up to look at the site where the IV goes into the hand; correct?

A: Correct.

. . .

Q: . . . you said this standard of care that you're testifying that was breached by these CRNAs is contained in these texts and articles that you have presented to us today?

A: I would not—they do not specifically say CRNAs should be monitoring anything in particular. . . .

. . .

Q: . . . How often, in your opinion, were the CRNAs supposed to look at the arm during this procedure?

A: I have no specific time. There's no standard or no pattern that you have to actually follow. . . .

. . .

Q: So, obviously, Doctor, this would not indicate the standard of care in March of 1999, would it?

A: I don't—I'm not sure what you mean by describing the standard of care. None of [the documents brought to the deposition] deal with the standard of care. They are all case reports of infiltration, different problems with extravasation. I have not brought anything on the standard of care if that's what you're referring to.

. . .

Q: . . . There is no textbook of anesthesia that says in writing the standard of care requires visual or palpation observation of the fluid actually going into the vein during an ongoing case; that is correct?

A: That is correct.

. . .

¶ 11. Dr. Urdaneta distinguished a national standard of care from his own preferences and practices in his testimony. He discussed the proper way for an anesthesiologist or CRNA to document blood pressure readings. Excerpts from this part of his testimony include: "The only thing I can tell you is that from personal—and the way I teach my residents to do it is. . . . But that's personal. That's not universally accepted. That's my personal

way of doing it." On another question, he responded, "That's universal. That's a standard, yes." Then he reverted to "But that's, again, not universal. That's the way we do it here at the University of Florida." After acknowledging that a requirement to observe IV sites "might not be written as part of the standard of care," he maintained that an anesthesiology team member should manually and visually check IV insertion sites periodically. When pressed on the meaning of "periodically," he replied, "I cannot—I mean, it varies. It's so variable. It deals with so many variables. I usually—I make sure when I put my IVs initially that I don't see any infiltration. But that's just a personal observation. And fortunately, since I deal mostly with cardiac patients, I usually have access to the arm, so I'm always looking. . . ."

¶ 12. When asked to provide documentation of his claims about visual inspection and palpation of IV injection sites, Dr. Urdaneta was unable to do so. He repeatedly said that no such mandate exists as part of the standard of care. He stated, "I don't think you will find anywhere a treatise or book or anything that states . . . that you need to look at the extremity every so often or . . . any period of time." When asked if any of the medical articles and texts he brought to his deposition contained a confirmation of his position, he replied, "they do not specifically say CRNAs should be monitoring anything in particular." He summed up the articles by saying they require constant vigilance.

¶ 13. The standard of care as posed by Northrop's expert, "constant vigilance," fails to satisfy multiple long-held principles of Mississippi law which have been confirmed repeatedly by holdings of this Court, as well as those of the Court of Appeals. Dr. Urdaneta's personal preference does not establish a national standard of care. *See Barner*, 605 So.2d at 808–09; *Palmer*, 564 So.2d at 1354. The requisite standard is objective, not subjective. *See Hall*, 466 So.2d at 871; *Maxwell*, 958 So.2d at 289. It is clear that Northrop's expert failed to establish an objective standard of care to make a prima facie case of medical malpractice.

¶ 14. For the reasons stated, we reverse the judgment of the Court of Appeals and reinstate and affirm the judgment of the Circuit Court of the First Judicial District of Harrison County.

¶ 15. **THE JUDGMENT OF THE COURT OF APPEALS IS REVERSED. THE JUDGMENT OF THE CIRCUIT COURT OF HARRISON COUNTY, FIRST JUDICIAL DISTRICT, IS REINSTATED AND AFFIRMED.**

WALLER, C.J., CARLSON, P.J., DICKINSON, LAMAR, AND PIERCE, JJ., CONCUR. KITCHENS, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY GRAVES, P.J. CHANDLER, J., NOT PARTICIPATING.

KITCHENS, Justice, Dissenting.

¶ 16. Because I am satisfied that Northrop presented evidence of an objective standard of care through a qualified expert witness, namely, the standard of constant vigilance, I dissent from today's judgment. I would affirm the decision of the Court of Appeals and remand this case for trial in the Circuit Court of the First Judicial District of Harrison County.

GRAVES, P.J., JOINS THIS OPINION.

Accordingly, we affirm the judgment of sentence of death.[17] Judgments of sentence affirmed.

LARSEN, J., did not participate in the consideration or decision of this case.

Paula SINCLAIR, a minor, by her parents and natural guardians, Joan A. SINCLAIR and Mark Sinclair, individually and in their own right, Appellants,

v.

Robert Alan BLOCK, M.D., and Philadelphia OB-GYN Group, Ltd., Health Services Plan of Pennsylvania, Appellees.

Supreme Court of Pennsylvania.

Argued Oct. 21, 1992.

Decided Nov. 10, 1993.

Reargument Denied Jan. 31, 1994.

Medical malpractice action was filed on behalf of minor claiming that use of forceps during delivery process caused brain damage. The Court of Common Pleas, Philadelphia County, Civil Division, August 13, 1990, at 1217, October Term 1983, Nelson A. Diaz, J., entered judgment in favor of physician and denied plaintiffs' posttrial motions. Plaintiffs appealed. The Superior Court, Nos. 2540 and 2541 Philadelphia 1990, 406 Pa.Super. 540, 594 A.2d 750, affirmed. Plaintiffs appealed. The Supreme Court, No. 153 E.D. Appeal Docket 1991, Nix, C.J., held that: (1) use of forceps to facilitate natural childbirth was not operative procedure that implicated doctrine of informed consent; (2) physician was not required to inform mother of risks associated with forceps delivery, and general consent obtained from mother was sufficient; and (3) "two schools of thought" doctrine applied to issue of whether doctor should have used forceps under circumstances.

Affirmed in part; vacated in part and remanded.

Papadakos, J., filed opinion concurring in part and dissenting in part.

1. Physicians and Surgeons ⇐15(8)

Physician's use of forceps to facilitate natural childbirth was not "operative procedure" that implicated doctrine of informed consent; use of forceps was merely extension of physician's hands.

See publication Words and Phrases for other judicial constructions and definitions.

2. Physicians and Surgeons ⇐15(8)

Mother was not required to be informed of risks associated with use of forceps to facilitate natural childbirth, and general consent obtained from mother for natural delivery process was sufficient to authorize use of forceps.

3. Physicians and Surgeons ⇐15(8, 15)

Goal of informed consent doctrine is to provide patient with material information necessary to determine whether to proceed with surgical or operative procedure or to remain in present condition; doctrine presupposes that patient has choice to exercise.

4. Physicians and Surgeons ⇐15(8)

Informed consent doctrine does not apply to natural delivery process since labor is inevitable and there is no choice to make.

5. Physicians and Surgeons ⇐15(8)

Natural delivery process does not require that patient give specific informed consent for procedure; rather, general consent is appropriate.

6. Physicians and Surgeons ⇐15(8)

Physician did not go beyond scope of general consent given by mother for natural childbirth procedure by using forceps to facilitate process; forceps were merely tool physician used to facilitate natural delivery

17. The Prothonotary of the Supreme Court is directed to transmit the complete record of the case *sub judice* to the Governor of Pennsylvania. 42 Pa.C.S. § 9711(i).

process and fell within general consent to natural delivery process.

7. Physicians and Surgeons ⇐18.100

"Two schools of thought" instruction was inappropriate for claim of negligence against physician based upon physician's failure to properly apply forceps during delivery, where issue of whether physician breached standard of care was credibility determination given contradictory testimony of defendant's and plaintiffs' experts.

8. Physicians and Surgeons ⇐15(5.1)

"Two schools of thought" doctrine applied to issue of whether physician was negligent in using forceps when there was arrest of descent with baby's head in transverse position during childbirth, where testimony of plaintiffs' expert that physician should not have attempted to use forceps but should have proceeded directly to perform Caesarean section was countered by defendant's expert testimony that it was reasonable to attempt vaginal delivery prior to performing Caesarean section.

Lawrence D. Finney, Philadelphia, for appellants.

Joseph H. Foster, Philadelphia, for appellees.

Before NIX, C.J., and FLAHERTY, ZAPPALA, PAPADAKOS and CAPPY, JJ.

OPINION

NIX, Chief Justice.

Appellants, Paula Sinclair, a minor, by her parents and natural guardians, Joan Sinclair and Mark Sinclair, individually and in their own right, appeal from the Order of the Superior Court affirming the Order of the Court of Common Pleas which denied Appellants' post-trial motions and entered judgment in favor of Appellees, Dr. Block and Philadelphia OB–GYN Group, Ltd. Appellants present two issues for our review. The first issue is whether the Superior Court erred in concluding that the use of forceps during delivery was not a surgical or operative procedure to which the "informed consent" doctrine applies. The second issue is whether the Superior Court erred in holding that the trial court properly charged the jury as to the "two schools of thought" doctrine. For the reasons that follow, we affirm in part, reverse in part, and remand for a new trial.

In 1981, Mrs. Sinclair became pregnant. As a result, she sought medical care from Appellees. Towards the end of her pregnancy, Mrs. Sinclair visited Appellee Dr. Block in his office. While there, she signed a consent form which outlined the procedures necessary to treat/diagnose her condition as being "prenatal care, delivery care, postnatal care and/or caesarian section." Appellants' Brief Exhibit C. Mrs. Sinclair was not informed, either in writing or verbally, that Appellee might opt to use forceps during delivery of the baby.

In October of 1982, Mrs. Sinclair's labor commenced. She arrived at the hospital where Appellee Dr. Block monitored her progress. After several hours, although Mrs. Sinclair's cervix reached full dilation, the baby stopped moving through the birth canal, which is referred to by physicians as an "arrest of descent." Dr. Block then observed that the baby was turned to the side and was not proceeding through the birth canal in the usual position.[1] As a result of the baby's position and the fact that the baby's heart rate had slowed, Dr. Block attempted to deliver the baby by using forceps, which would turn the baby to the correct delivery position. The use of forceps to facilitate natural delivery failed. The baby was subsequently delivered by Caesarian section.

After birth, baby Paula had areas of swelling on her scalp and a faint mark on her face and forehead, which was alleged to be a mark from the forceps. Subsequent examination revealed that Paula had suffered a fractured skull and seizures.

1. The baby was situated with the back of her head turned towards the mother's right side. *See* Record at 32a. Dr. Block indicated that it was not possible to deliver the baby with its head in this position. *See* Record at 520a.

Appellants commenced suit against Appellees as a result of Paula's injuries. A jury trial was conducted. The trial court entered a nonsuit as to Dr. Block and as to Dr. Block's employer, Philadelphia OB–GYN Group, Ltd., on the issue of informed consent. Subsequently, the jury entered a verdict in favor of Appellees on the issue of negligence. Appellants filed post-trial motions which were denied.

Appellants appealed to the Superior Court. The Superior Court affirmed the trial court and found, *inter alia*, that the use of forceps is not a surgical procedure which requires the application of the informed consent doctrine, and that the trial court properly gave the "two schools of thought" charge to the jury. *Sinclair v. Block*, 406 Pa.Super. 540, 594 A.2d 750 (1991).

In holding that the use of forceps was not a surgical procedure, the Superior Court stated that the circumstances in this case were "analogous to a situation in which a physician uses a tool to accomplish a particular task." *Id.* at 554, 594 A.2d at 758. The Superior Court compared a physician's use of forceps with the use of other medical instruments that would not require specific consent to use the tool because it would be covered by the patient's general consent. *Id.* [2]

The Superior Court concluded that "[i]n comparing the use of forceps with the use of [those other] types of instruments, it would be erroneous to treat a forceps delivery as the type of operative or surgical procedure which requires the physician to obtain additional consent." *Id.* at 554–55, 594 A.2d at 758. Thus, "the use of forceps merely involves the application of a tool to assist the physician in providing treatment ... [and] Dr. Block was not required to obtain Mrs. Sinclair's specific consent to use forceps to deliver the child because she had already given her general consent to the delivery." *Id.* at 555, 594 A.2d at 758.

The Superior Court also found that the trial court properly gave the "two schools of thought" charge to the jury. The Superior Court stated that the "two schools of thought" instruction was required because the experts "disagreed as to the manner or type of treatment which should have been administered to Mrs. Sinclair to assist her with the delivery of her child." *Id.* at 552, 594 A.2d at 757. Upon request of Appellants, we granted allocatur. 529 Pa. 623, 600 A.2d 538 (1991).

[1] The first issue presented for our review is whether the Superior Court made an error of law in upholding the trial court's entry of a nonsuit on the informed consent issue and concluding that the use of forceps during delivery was not a surgical or operative procedure to which the "informed consent" doctrine applies. A nonsuit may only be granted where "the plaintiff has failed to establish a right to relief." Pa.R.C.P. No. 230.1. *See also Morena v. South Hills Health System*, 501 Pa. 634, 462 A.2d 680 (1983). In reviewing the nonsuit entered in favor of Appellees, we must view "the evidence adduced on behalf of the plaintiff[s] as true; reading it in the light most favorable to [them]; giving [them] the benefit of every reasonable inference that a jury might derive from the evidence and resolving all doubts, if any, in [their] favor." *Brannan v. Lankenau Hospital*, 490 Pa. 588, 595, 417 A.2d 196, 199 (1980) (quoting *Auel v. White*, 389 Pa. 208, 210, 132 A.2d 350, 352 (1957)).

This Court has upheld the informed consent doctrine, which grants the competent patient the right to medical self-determination regarding an operative or surgical procedure. *See Gray v. Grunnagle*, 423 Pa. 144,

2. The Superior Court compared the use of forceps with the following situations where a physician uses a tool to accomplish a particular task.

> For example, physicians routinely utilize otoscopes to examine the ears and ear canals of their patients. In performing such an examination, the physician would not be required to specifically obtain the patient's consent to use the otoscope, as this procedure would be covered by the patient's general consent to the examination. Similarly, a gynecologist typically inserts a speculum into a woman's vagina in order to perform a vaginal examination. Again, such a procedure would not require the physician to obtain the patient's specific consent to utilize this tool, as it would be covered by the patient's general consent to the examination.

Id.

223 A.2d 663 (1966); *Smith v. Yohe*, 412 Pa. 94, 194 A.2d 167 (1963). We have held

> that a physician or surgeon who fails to advise a patient of material facts, risks, complications and alternatives to *surgery* which a reasonable [person] in the patient's position would have considered significant in deciding whether to have the operation is liable for damages which ensue, and the patient need not prove that a causal relationship exists between the physician's or surgeon's failure to disclose information and the patient's consent to undergo surgery.

Gouse v. Cassel, 532 Pa. 197, 202, 615 A.2d 331, 333 (1992) (emphasis added). Thus, it is apparent that this view protects the patient's right to make an informed choice as to whether to proceed with a *surgical* or *operative procedure*.

Instantly, Appellants argue that the use of forceps to facilitate delivery constitutes an operative procedure; therefore, the physician must obtain additional consent to use the forceps, which necessarily includes a discussion of the material risks involved in a "forceps delivery." Appellee argues that the use of forceps does not constitute an operative procedure, but rather, is used to facilitate a natural delivery; thus, the use of forceps falls within the patient's general consent to the delivery. We agree that the use of forceps to facilitate natural childbirth is not an operative procedure that implicates the doctrine of informed consent.

The Superior Court correctly determined that the use of forceps is not an operative procedure. Under the circumstances of this case, the physician's use of forceps involved the application of a tool to assist in the natural delivery process, and as such, was merely an extension of the physician's hands. We agree with the Superior Court's conclusion that the physician's use of forceps in this case is indistinguishable from a physician's use of an otoscope to examine the ear canal or a physician's insertion of a speculum into a woman's vagina in order to perform a vaginal examination. *Sinclair v. Block*, 406 Pa.Super. 540, 554–55, 594 A.2d 750, 758 (1991).[3] Moreover, we find that the physician's attempt to use forceps is part of one event: the natural delivery process. Thus, the physician's use of forceps to facilitate natural delivery is not a distinct surgical or operative procedure and, as a result, does not require additional consent to use the forceps.

[2] Appellants also assert that, even if this Court finds that the use of forceps during the natural delivery process does not constitute an operative or surgical procedure, the informed consent doctrine should nevertheless apply to this case because the Appellants were not apprised of the risks associated with the forceps delivery. Restated, Appellants argue that regardless of whether a forceps delivery is a surgical or operative procedure, they were not informed of all material facts, risks, complications and alternatives of the delivery process. Appellants submit that, while there are limits to informed consent, nonetheless, any touching of the patient which involves risks of serious injury requires that the physician inform the patient of said risks and then receive the patient's consent in order to perform the procedure. Under the circumstances of this case, we disagree.

[3, 4] The goal of the informed consent doctrine is to provide the patient with material information necessary to determine whether to proceed with the surgical or operative procedure or to remain in the present condition. *See Gouse v. Cassel*, 532 Pa. 197, 615 A.2d 331 (1992); *Gray v. Grunnagle*, 423 Pa. 144, 223 A.2d 663 (1966). The doctrine presupposes that the patient has a choice to exercise. Instantly, however, Mrs. Sinclair had no decision to make. Having carried her child to term, she could not elect to remain in her present condition. Regardless of any decision that she might attempt to make, the natural delivery process was inevitable. During the course of natural delivery, as opposed to an operative or surgical procedure, the physician is present to assist na-

3. Appellants submit that this Court should consider the use of forceps an operative or surgical procedure because the medical community does. However, because we find that the use of forceps is indistinguishable from the use of tools such as an otoscope or speculum, we reject this argument.

ture. The physician intervenes if complications arise during the natural delivery process. At that point, the physician might have to conduct an operative or surgical procedure such as a Caesarian section which, except in an emergency situation, would require the patient's informed consent.[4] Thus, because labor is inevitable and there is no choice to make, the informed consent doctrine does not apply to the natural delivery process.

[5, 6] By reason of the fact that the woman does not make the decision to proceed with an operative or surgical procedure or to remain in the present condition and that the natural delivery process does not require an incision, or the excision of tissue, bone, etc.,[5] we hold that the natural delivery process does not require that the patient give specific informed consent for the procedure; rather, general consent is appropriate. In the instant case, Appellees obtained a general consent from Mrs. Sinclair for the natural delivery process. Thus, the Superior Court properly upheld the trial court's decision to enter a nonsuit on the informed consent issue.[6]

[7] The second issue raised by Appellants is whether the Superior Court erred in holding that the trial court properly charged the jury as to the "two schools of thought" doctrine. "The 'two schools of thought' doctrine provides a complete defense to a malpractice claim when the prescribed medical treatment or procedure has been approved by one group of medical experts even though an alternate group recommends another approach, or the experts agree that alternative treatments or procedures are acceptable." *Levine v. Rosen*, 532 Pa. 512, 519, 616 A.2d 623, 627 (1992). The law provides that "[w]here competent medical authority is divided, a physician will not be held responsible if in the exercise of his judgment he followed a course of treatment advocated by a considerable number of recognized and respected professionals in his given area of expertise." *Jones v. Chidester*, 531 Pa. 31, 40, 610 A.2d 964, 969 (1992).

Subsequent to oral argument in this case, this Court decided *Levine v. Rosen*, 532 Pa. 512, 616 A.2d 623 (1992), in which this Court was confronted with circumstances similar to those presented in the instant case. In *Levine*, there was evidence that the doctor was negligent in failing to diagnose breast cancer from the physical symptoms, and in failing to recommend annual mammograms. The trial judge gave a general instruction regarding the "two schools of thought" doctrine. This Court held that the jury instruction was improper because it "did not specifically delineate between the alleged negligent failure to diagnose and the negligent failure to order a yearly mammography; the latter allegation of negligence being the only one for which Dr. Rosen was entitled to the 'two schools of thought' instruction." *Id.* at 521, 616 A.2d at 628. The first allegation of negligent failure to diagnose was a credibility issue which required the jury to decide whether the patient actually reported the symptoms to the doctor. *Id.* at 520, 616 A.2d at 627. Thus, a trial judge must specify on which allegation of negligence the "two schools of thought" doctrine applies.

Instantly, the Appellants claimed Dr. Block was negligent in: (1) applying the forceps under the circumstances, *i.e.*, when there is an arrest of descent with the baby's head in a transverse position; and (2) failing

4. Appellees told Mrs. Sinclair of the material facts, risks, complications and alternatives involved in a Caesarian section and she gave her informed consent to that procedure. *See* Record at 438a and 444a–45a.

5. Appellants argue that if the extraction of teeth requires informed consent then the delivery of a baby should require informed consent. The extraction of teeth, however, requires a determination to proceed with the extraction or to remain in the present condition. Again, this determination is not an issue in the natural delivery process.

6. We note that this case is distinguishable from cases where the physician exceeded the scope of the consent. *See, e.g., Gray v. Grunnagle*, 423 Pa. 144, 223 A.2d 663 (1966). Instantly, Mrs. Sinclair authorized Appellees to perform any procedure which was necessary to accomplish the delivery of her baby. Thus, Appellants cannot argue that Appellee went beyond the scope of the general consent in this case when he attempted to facilitate the natural delivery process by using forceps. The forceps were merely a tool Appellee used to facilitate the natural delivery process, and thus, it falls within the general consent to the natural delivery process.

to properly apply the forceps. On the latter issue, there was no evidence that there were "two schools of thought." The resolution of the issue depended on whether Dr. Block breached the standard of care in the actual application of the forceps as Appellants claimed. The issue is a credibility determination. Either the jury believed the Sinclairs' expert or Dr. Block's expert. As a result, the "two schools of thought" instruction was inappropriate for the latter claim of negligence. *See id.* at 520, 616 A.2d at 627–28.

[8] However, on the issue of whether the doctor should have used forceps under these circumstances, the "two schools of thought" doctrine could apply. The Sinclairs presented expert testimony that Dr. Block should not have attempted to use forceps; rather, he should have directly proceeded to perform a Caesarean section. *See* Record at 100a and 606a–08a. Dr. Block countered with expert testimony that it was reasonable to attempt a vaginal delivery by using forceps prior to performing a Caesarean section. *See* Record at 323a–24a and 326a–28a.

At the close of the evidence, the trial court gave the following instruction to the jury:

> Where competent medical authority is divided, a physician will not be held responsible if, in the exercise of his or her judgment, he or she follows a course of treatment advocated by a considerable number of medical authority in good standing in his or her community.
>
> The law imposes certain duties upon a physician in his relationship with his patient. This is a claim of professional negligence on the part of the physician during the course of the physician/patient relationship.
>
> Now, I'm going to give you some general definitions of negligence and authenticize that definition as it relates to professional negligence.

Record at 655a–56a. Clearly, the trial court did not specify on which allegation of negligence the "two schools of thought" doctrine applied.

Thus, assuming the introduction of appropriate evidence on retrial, the trial court should delineate on which allegation of negligence the "two schools of thought" instruction is warranted. Moreover, the trial court should instruct the jury consistent with *Jones v. Chidester*, 531 Pa. 31, 610 A.2d 964 (1992).

Accordingly, we affirm the trial court's issuance of a nonsuit on the informed consent cause of action; we vacate the trial court's judgment on the negligence cause of action and remand for a new trial in accordance with this opinion.

LARSEN, J., did not participate in the consideration or decision of this case.

PAPADAKOS, J., files a concurring and dissenting opinion.

PAPADAKOS, Justice, concurring and dissenting.

I dissent from the majority's resolution of the informed consent issue. Their decision on this point defies both logic and common sense.

Once a baby is conceived, childbirth is a process that progresses according to biological rules. It is, of course, true that a woman cannot remain pregnant forever and that the phenomenon of childbirth is not pathological. Nonetheless, childbirth is analogous to injury or illness which also often progress in a natural and predictable fashion. Medical intervention is frequently beneficial in cases of injury or illness just as it is in some cases of childbirth that have become problematic. It is the medical intervention itself that constitutes the procedure that a patient must give informed consent to, however, not the underlying physical condition. On this basis, it is absurd to claim that the use of forceps is part of the natural delivery process. It is not. It is a specific form of drastic medical intervention in the process and informed consent should be required just as it is for a caesarian. Use of forceps is an invasive procedure. It is well known that forceps can cause serious injury to, or serious disfiguration of, the child. A prospective mother could reasonably choose to avoid the use of forceps for the sake of the child's safety and elect to proceed directly to a caesarian if serious problems develop. She should have the right

to choose. Because the majority takes away that right, I vigorously dissent.

On the second issue decided by the majority, I concur in remanding the matter to the trial court for proper instruction of the jury on the "two schools of thought" doctrine.

Cynthia M. MALESKI, Insurance Commissioner of the Commonwealth of Pennsylvania, Plaintiff,

v.

The MUTUAL FIRE, MARINE AND INLAND INSURANCE COMPANY, Defendant.

Cynthia M. MALESKI, Insurance Commissioner of the Commonwealth of Pennsylvania, as Rehabilitator of the Mutual Fire, Marine and Inland Insurance Company, Appellant,

v.

REPUBLIC INSURANCE COMPANY and Republic Insurance Group, Appellees.

Appeal of Cynthia M. MALESKI, as Rehabilitator of the Mutual Fire, Marine and Inland Insurance Company.

Supreme Court of Pennsylvania.

Submitted Dec. 7, 1992.

Decided Nov. 10, 1993.

Statutory rehabilitator of insolvent insurer filed complaint alleging that insolvent insurer entered into series of reinsurance agreements with reinsurers and that reinsurers refused to honor agreements. The Commonwealth Court, No. 3483 C.D. 1986, Bernard L. McGinley, J., granted reinsurers' petition to compel arbitration of action. Rehabilitator appealed. The Supreme Court, No. 89 M.D. Appeal Docket 1991, Nix, C.J., held that Commonwealth Court was required to stay court action upon ordering arbitration and, therefore, Supreme Court did not have jurisdiction to hear appeal.

Ordered accordingly.

See also 614 A.2d 1086.

1. Insurance ⇐574(7)

When Commonwealth Court ordered arbitration, it was required to stay court action under Arbitration Act and, therefore, appellate court did not have jurisdiction to determine merits of appeal from Commonwealth Court's granting of petition to compel arbitration of action. 42 Pa.C.S.A. §§ 7301–7362, 7304(d), 7320, 7320(a)(1, 6).

2. Arbitration ⇐23.20

Order compelling arbitration and staying court action is not final but, rather, it is interlocutory order because parties are not forced out of court.

3. Arbitration ⇐23.20

Under Arbitration Act, although party may take appeal from court order denying application to compel arbitration, there is no corresponding statutory authority that allows party to take appeal from order that compels arbitration. 42 Pa.C.S.A. § 7320(a)(1).

Gregory P. Miller, Gregg W. Mackuse, and Gaetan J. Alfano, Philadelphia, for appellant.

Virginia Lynn Hogben, Edward F. Mannino, Philadelphia, David M. Raim, Donald Mros, and Ellen Woodbury, Washington, DC, for Republic Ins. Co., Vanguard Ins. Co., Blue Ridge Ins. Co., Republic–Vanguard Ins. Co., Republic Underwriters Ins. Co. and Vanguard Underwriters Ins. Co.

Before NIX, C.J., and FLAHERTY, ZAPPALA, PAPADAKOS, CAPPY and MONTEMURO, JJ.

OPINION

NIX, Chief Justice.

Appellant, Cynthia M. Maleski, Insurance Commissioner of the Commonwealth of Pennsylvania, as Rehabilitator of the Mutual Fire, Marine and Inland Insurance Company

the public welfare. In addition, Comcast presented uncontroverted testimony establishing the need for additional service in the area. The site, moreover, is particularly suited for a telecommunications facility. It is in a commercial zone, adjoins a major highway, and is well situated within Comcast's system to deliver the necessary service.

[4] Comcast, however, did not present expert testimony from a land use planner or other qualified expert on the effect of the grant of the variance on the master plan or zoning ordinance. Although cases may arise in which expert testimony is unnecessary, we believe that the better practice is for applicants generally to present such testimony. Given the lengthy history of this case, and the modification of the dispositive legal principles during its pendency, we conclude that the appropriate resolution is to remand the matter to the Board so Comcast and other interested parties may offer expert testimony concerning the negative criteria.[26] If the Board approves the use variance, it should then consider Comcast's request for a bulk variance.

The decision of the Appellate Division is reversed, and the matter is remanded to the Board.

For reversal and remandment—Chief Justice PORITZ and Justices HANDLER, POLLOCK, O'HERN, GARIBALDI, STEIN and COLEMAN—7.

Opposed—None.

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[26]Jean MATTHIES, Plaintiff–Respondent,

v.

Edward D. MASTROMONACO, D.O., Defendant–Appellant.

Supreme Court of New Jersey.

Argued Feb. 16, 1999.
Decided July 8, 1999.

Patient sued orthopedic surgeon, alleging lack of informed consent and malpractice regarding decision to treat hip fracture with bed rest. The Superior Court, Law Division, Civil Part, Hudson County, concluded that patient could not assert cause of action for lack of informed consent and entered judgment on jury verdict on malpractice claim. Patient appealed and the Superior Court, Appellate Division, Kestin, J.A.D., 310 *N.J.Super.* 572, 709 *A.*2d 238, reversed. After granting surgeon's petition for certification, the Supreme Court, Pollock, J., held that doctrine of informed consent applied to noninvasive procedures.

Judgment of Appellate Division affirmed.

[27]1. Physicians and Surgeons ⚿15(8, 15)

To obtain a patient's informed consent to one of several alternative courses of treatment, the physician should explain medically reasonable invasive and noninvasive alternatives, including the risks and likely outcomes of those alternatives, even when the chosen course is noninvasive.

2. Physicians and Surgeons ⚿15(8), 17

Choosing among medically reasonable treatment alternatives is a shared responsibility of physicians and patients, and to discharge their responsibilities, patients should provide their physicians with the information necessary for them to make diagnoses and determine courses of treatment, while physicians have a duty to eval-

uate the relevant information and disclose all courses of treatment that are medically reasonable under the circumstances.

3. Physicians and Surgeons ⚿15(.5)

Ultimate decision on course of treatment is for the patient.

4. Physicians and Surgeons ⚿15(8)

Doctrine of informed consent applied to noninvasive as well as invasive procedures, and thus required orthopedic surgeon to obtain patient's consent to treat patient's hip fracture with bed rest rather than surgery.

5. Physicians and Surgeons ⚿15(8)

In informed consent analysis, the decisive factor is not whether a treatment alternative is invasive or noninvasive, but whether the physician adequately presents the material facts so that the patient can make an informed decision.

6. Physicians and Surgeons ⚿15(8)

Reasonable patient standard obligates the physician to disclose only that information material to a reasonable patient's informed decision for purposes of informed consent doctrine.

[28]7. Physicians and Surgeons ⚿15(8)

Under the informed consent doctrine, physicians are obligated to inform patients of medically reasonable treatment alternatives and their attendant probable risks and outcomes.

8. Physicians and Surgeons ⚿15(8)

Physicians do not adequately discharge their responsibility under informed consent doctrine by disclosing only treatment alternatives that they recommend.

9. Physicians and Surgeons ⚿15(8)

Under doctrine of informed consent, physician should discuss the medically reasonable courses of treatment, including nontreatment.

10. Physicians and Surgeons ⚿15(8, 15)

Critical consideration for doctrine of informed consent is not the invasiveness of the procedure, but the patient's need for information to make a reasonable decision about the appropriate course of medical treatment, whether invasive or noninvasive.

Melvin Greenberg, Philadelphia, for defendant-appellant (Greenberg Dauber & Epstein, attorneys; Mr. Greenberg and Michael H. Freeman, on the briefs).

Arthur J. Messineo, Jr., for plaintiff-respondent (Messineo & Messineo, attorneys; Nancy C. Ferro, Ridgewood, on the brief).

The opinion of the Court was delivered by

POLLOCK, J.

[1] This appeal presents the question whether the doctrine of informed consent requires a physician to obtain the patient's consent before implementing a nonsurgical course of treatment. It questions also whether a physician, in addition to discussing with the patient treatment alternatives that the physician recommends, should discuss medically reasonable alternative courses of [29]treatment that the physician does not recommend. We hold that to obtain a patient's informed consent to one of several alternative courses of treatment, the physician should explain medically reasonable invasive and noninvasive alternatives, including the risks and likely outcomes of those alternatives, even when the chosen course is noninvasive.

The Law Division concluded that plaintiff, Jean Matthies, could not assert a cause of action for breach of the duty of informed consent against defendant, Dr. Edward D. Mastromonaco. According to the court, a physician must secure a patient's informed consent only to invasive procedures, not to those that are noninvasive. Consequently, the court prevented Matthies from presenting evidence that Dr. Mastromonaco had not obtained her informed consent to use bed-rest treat-

ment, which is noninvasive, instead of surgery. On the issue whether Dr. Mastromonaco had committed malpractice by failing to perform surgery on Matthies, the jury returned a verdict of no cause for action. The Appellate Division reversed, holding that the doctrine of informed consent applies even when the course of treatment implemented by the physician is noninvasive. 310 *N.J.Super.* 572, 709 *A.*2d 238 (App.Div.1998) We granted Dr. Mastromonaco's petition for certification, 156 *N.J.* 406, 719 *A.*2d 638 (1998), and now affirm.

I.

In 1990, Matthies was eighty-one years old and living alone in the Bella Vista Apartments, a twenty-three-story senior citizen residence in Union City. On August 26, 1990, she fell in her apartment and fractured her right hip. For two days, she remained undiscovered. When found, she was suffering the consequences of a lack of prompt medical attention, including dehydration, distended bowels, and confusion. An emergency service transported her to Christ Hospital in Jersey City. She was treated in the emergency room and admitted to the intensive care unit.

[30] One day after Matthies's admission, her initial treating physician called Dr. Mastromonaco, an osteopath and board-certified orthopedic surgeon, as a consultant. Dr. Mastromonaco reviewed Matthies's medical history, condition, and x-rays. He decided against pinning her hip, a procedure that would have involved the insertion of four steel screws, each approximately one-quarter inch thick and four inches long.

Dr. Mastromonaco reached that decision for several reasons. First, Matthies was elderly, frail, and in a weakened condition. Surgery involving the installation of screws would be risky. Second, Matthies suffered from osteoporosis, which led Dr. Mastromonaco to conclude that her bones were too porous to hold the screws. He anticipated that the screws probably would loosen, causing severe pain and necessitating a partial or total hip replacement. Third, forty years earlier, Matthies had suffered a stroke from a mismatched blood transfusion during surgery. The stroke had left her partially paralyzed on her right side. Consequently she had worn a brace and essentially used her right leg as a post while propelling herself forward with her left leg. After considering these factors, Dr. Mastromonaco decided that with bed rest, a course of treatment that he recognized as "controversial," Matthies's fracture could heal sufficiently to restore her right leg to its limited function. He prescribed a "bed–rest treatment," which consisted of complete restriction to bed for several days, followed by increasingly extended periods spent sitting in a chair and walking about the room.

Before her fall, Matthies had maintained an independent lifestyle. She had done her own grocery shopping, cooking, housework, and laundry. Her dentist of many years, Dr. Arthur Massarsky, testified that he often had observed Matthies climbing unassisted the two flights of stairs to his office. Matthies is now confined to a nursing home.

Matthies's expert, Dr. Hervey Sicherman, a board-certified orthopedic surgeon, testified that under the circumstances, bed rest was an inappropriate treatment. He maintained that bed rest [31] alone is not advisable for a hip fracture unless the patient does not expect to regain the ability to walk. Essentially, he rejected bed rest except when the patient is terminally ill or in a vegetative state. Dr. Sicherman explained that unless accompanied by traction, the danger of treating a hip fracture with bed rest is that the fracture could dislocate. In fact, shortly after Matthies began her bed-rest treatment, the head of her right femur displaced. Her right leg shortened, and she has never regained the ability to walk. According to Dr. Sicherman, the weakness and porosity of Matthies's bones increased the likelihood of

this bad outcome. Even defendant's expert, Dr. Ira Rochelle, another board-certified orthopedic surgeon, admitted that pinning Matthies's hip would have decreased the risk of displacement. He nonetheless agreed with Dr. Mastromonaco that Matthies's bones were probably too brittle to withstand insertion of the pins.

Dr. Mastromonaco's goal in conservatively treating Matthies was to help her "get through this with the least complication as possible and to maintain a lifestyle conducive to her disability." He believed that rather than continue living on her own, Matthies should live in a long-term care facility. He explained, "I'm not going to give her that leg she wanted. She wanted to live alone, but she couldn't live alone.... I wanted her to be at peace with herself in the confines of professional care, somebody to care for her. She could not live alone."

Matthies asserts that she would not have consented to bed rest if Dr. Mastromonaco had told her of the probable effect of the treatment on the quality of her life. She claims that Dr. Mastromonaco knew that without surgery, she never would walk again. He did not provide her, however, with the opportunity to choose between bed rest and the riskier, but potentially more successful, alternative of surgery. Dr. Mastromonaco maintained that bed rest did not foreclose surgery at a later date.

A jury question existed whether Dr. Mastromonaco consulted either with plaintiff or her family about the possibility of surgery. The trial court permitted Dr. Mastromonaco to testify that he had [32]discussed surgical alternatives with Matthies, but that she had refused them because of her concern about the risks of a blood transfusion. Matthies's daughter, Jean Kurzrok, who also spoke with Dr. Mastromonaco, testified that he had said that her mother did not need or want surgery. Kurzrok said that she told Dr. Mastromonaco, "Well, if she doesn't need it, she doesn't want it." According to Ms. Kurzrok, Dr. Mastromonaco never discussed the treatment alternatives or their probable outcomes. Instead, he minimized the fracture, describing it as "just a little crack" that was "going to heal itself."

Matthies remained at Christ Hospital until October 1990. She was then discharged to the Andover Intermediate Care Center, a residential nursing home in which she received physical therapy. While at Andover, Matthies was attended by several physicians, including orthopedic surgeons. Those doctors continued the conservative treatment begun by Dr. Mastromonaco. Matthies also saw psychiatrists and was treated at Andover for depression because she grew increasingly despondent over her continued inability to walk.

In January 1993, Matthies was transferred to the Castle Hill Health Care Center, another residential care facility. Except for hospital stays, she has remained at Castle Hill.

In June 1995, Matthies was admitted to Orange Hospital for knee surgery. She spent September to October 1995 at St. Francis Hospital following a hip replacement. Her hip replacement, five years after her fall, resulted in life-threatening complications, including serious blood clots and infections. Although she recovered, the bone density in her right femur could not support the hip implant. Consequently, her right femur broke below the implant, and she underwent a second hip replacement. Even after that procedure, however, the unequal lengths of Matthies's legs have prevented her from walking. She is confined to a bed or chair and is completely dependent on others.

Matthies sued Dr. Mastromonaco on two theories. First, she claimed that he had deviated from standard medical care by failing to [33]pin her hip at the time of her injury. Second, she asserted that he negligently had failed to obtain her informed consent to bed rest as a treatment alterna-

tive. Specifically, Matthies contended that Mastromonaco had failed to disclose the alternative of surgery.

Dr. Mastromonaco's counsel argued that informed consent was irrelevant in a case in which the treatment administered was noninvasive. Accepting that argument, the trial court refused to charge the jury on the issue of lack of informed consent. It reasoned that the malpractice claim subsumed the claim for lack of informed consent. The court nevertheless permitted Dr. Mastromonaco to testify that he had explained the surgical alternative to Matthies. As Dr. Mastromonaco explained, Matthies had said that she "did not want" surgery, because she was afraid of a blood transfusion. The trial court, however, prevented Matthies's counsel from cross-examining Dr. Mastromonaco on that point.

The jury concluded that Dr. Mastromonaco, in deciding not to perform immediate surgery, had not deviated from the accepted standard of medical care. Accordingly, it returned a verdict of no cause for action on Matthies's medical malpractice claim.

The Appellate Division reversed. 310 *N.J.Super.* at 572, 709 *A.*2d 238. Observing that New Jersey's doctrine of informed consent is based not on battery, but on negligence, the court concluded that the doctrine applies to noninvasive, as well as invasive, procedures. *Id.* at 589–94, 709 *A.*2d 238. A physician has a duty to disclose information that will enable a patient "to consider and weigh knowledgeably the options available and the risk attendant to each." *Id.* at 593, 709 *A.*2d 238 (citation omitted). At a minimum, Dr. Mastromonaco should have explained to Matthies the risks of bed rest and his reasons for recommending it as a course of treatment. *Id.* at 596, 709 *A.*2d 238. The court observed: "Defendant's own testimony suggests that he made the decision to treat plaintiff conservatively after assessing her physical condition and determining that plaintiff would be better off in the care of others, *i.e.* that she could not live alone. As we have [34]held, this was not defendant's decision to make." *Id.* at 595, 709 *A.*2d 238.

In sum, the Appellate Division concluded that the trial court's restriction on the presentation of evidence on Matthies's informed consent claim also affected her medical malpractice claim. *Id.* at 599, 709 *A.*2d 238. Consequently, the court remanded for a new trial on both issues.

II.

[2, 3] Choosing among medically reasonable treatment alternatives is a shared responsibility of physicians and patients. To discharge their responsibilities, patients should provide their physicians with the information necessary for them to make diagnoses and determine courses of treatment. Physicians, in turn, have a duty to evaluate the relevant information and disclose all courses of treatment that are medically reasonable under the circumstances. Generally, a physician will recommend a course of treatment. As a practical matter, a patient often decides to adopt the physician's recommendation. Still, the ultimate decision is for the patient.

[4] We reject defendant's contention that informed consent applies only to invasive procedures. Historically, the failure to obtain a patient's informed consent to an invasive procedure, such as surgery, was treated as a battery. The physician's need to obtain the consent of the patient to surgery derived from the patient's right to reject a nonconsensual touching. Eventually, courts recognized that the need for the patient's consent is better understood as deriving from the right of self-determination. *Canesi v. Wilson,* 158 *N.J.* 490, 503–04, 730 *A.*2d 805 (1999); *Schloendorff v. Society of N.Y. Hosp.,* 211 *N.Y.* 125, 105 *N.E.* 92, 93 (1914). A shrinking minority of jurisdictions persist in limiting informed consent actions to invasive procedures. In those jurisdictions, battery survives as the appropriate cause of action. *See, e.g., Karlsons v. Guerinot,* 57 *A.D.*2d 73, 394

*N.Y.S.*2d 933, 939 (1977) (limiting application of informed consent to "those situations [35]where the harm suffered arose from some affirmative violation of the patient's physical integrity such as surgical procedures, injections or invasive diagnostic tests"); *Morgan v. MacPhail*, 550 *Pa.* 202, 704 *A.*2d 617, 619 (1997) (stating that informed consent in Pennsylvania "has not been required in cases involving non-surgical procedures"). Most jurisdictions view the failure to obtain a patient's informed consent as an act of negligence or malpractice, not battery. *See, e.g.,* Joan P. Dailey, *The Two Schools of Thought and Informed Consent Doctrines in Pennsylvania: A Model For Integration*, 98 *Dick. L.Rev.* 713, 727–28 & n. 101 (stating battery basis recognized in only minority of jurisdictions, for example, Georgia, Pennsylvania, and Virginia); Paula Walter, *The Doctrine of Informed Consent: To Inform or Not To Inform?*, 71 *St. John's L.Rev.* 543, 543, 558–59 (1997) (noting that two 1980 cases moved informed consent doctrine of New York, one of few remaining battery jurisdictions, toward theory of negligence).

The rationale for basing an informed consent action on negligence rather than battery principles is that the physician's failure is better viewed as a breach of professional responsibility than as a nonconsensual touching. *Baird v. American Med. Optics*, 155 *N.J.* 54, 70–71, 713 *A.*2d 1019 (1998); *Largey v. Rothman*, 110 *N.J.* 204, 207–08, 540 *A.*2d 504 (1988). As we have stated, "Informed consent is a negligence concept predicated on the duty of a physician to disclose to a patient information that will enable him to 'evaluate knowledgeably the options available and the risks attendant upon each' before subjecting that patient to a course of treatment." *Perna v. Pirozzi*, 92 *N.J.* 446, 459, 457 *A.*2d 431 (1983); *see also Kaplan v. Haines*, 96 *N.J.Super.* 242, 257, 232 *A.*2d 840 (App.Div.1967), *aff'd o.b.*, 51 *N.J.* 404, 241 *A.*2d 235 (1968) (sanctioning negligence-view, lack-of-informed-consent tort twenty years prior to *Largey*). Analysis based on the principle of battery is generally restricted to cases in which a physician has not obtained any consent or has exceeded the scope of consent. 3 David W. Louisell & Harold Williams, *Medical Malpractice* §§ 22.02, 22.03 (1999). The essential difference in analyzing informed[36] consent claims under negligence, rather than battery principles, is that the analysis focuses not on an unauthorized touching or invasion of the patient's body, but on the physician's deviation from a standard of care.

[5–7] In informed consent analysis, the decisive factor is not whether a treatment alternative is invasive or noninvasive, but whether the physician adequately presents the material facts so that the patient can make an informed decision. That conclusion does not imply that a physician must explain in detail all treatment options in every case. For example, a physician need not recite all the risks and benefits of each potential appropriate antibiotic when writing a prescription for treatment of an upper respiratory infection. Conversely, a physician could be obligated, depending on the circumstances, to discuss a variety of treatment alternatives, such as chemotherapy, radiation, or surgery, with a patient diagnosed with cancer. Distinguishing the two situations are the limitations of the reasonable patient standard, which need not unduly burden the physician-patient relationship. The standard obligates the physician to disclose only that information material to a reasonable patient's informed decision. *Largey, supra*, 110 *N.J.* at 211–12; , 540 *A.*2d 504 3 Louisell & Williams, *supra*, § 22.03(2). Physicians thus remain obligated to inform patients of medically reasonable treatment alternatives and their attendant probable risks and outcomes. Otherwise, the patient, in selecting one alternative rather than another, cannot make a decision that is informed.

[8] To the extent that *Parris v. Sands*, 21 *Cal.App.*4th 187, 25 *Cal.Rptr.*2d 800 (Ct.App.1993), on which Dr. Mastromonaco relies, would not require a physician to

inform a patient of alternative treatments, we disagree with that decision. *Parris,* however, is distinguishable. It involved not the failure of a physician to inform a patient of a nonrecommended treatment alternative, but the alleged negligence of the physician in diagnosing the patient's pneumonia as viral rather than bacterial. *See* 3 Louisell & Williams, *supra,* § 22.04(3)(c) & n. 18. The extent to which the [37]reasonable patient standard obligates physicians to disclose the details of alternative diagnoses, as distinguished from treatment alternatives, is not before us. In sum, physicians do not adequately discharge their responsibility by disclosing only treatment alternatives that they recommend.

To assure that the patient's consent is informed, the physician should describe, among other things, the material risks inherent in a procedure or course of treatment. *Largey, supra,* 110 *N.J.* at 210–13, 540 *A.*2d 504. The test for measuring the materiality of a risk is whether a reasonable patient in the patient's position would have considered the risk material. *Id.* at 211–12, 540 *A.*2d 504. Although the test of materiality is objective, a "patient obviously has no complaint if he would have submitted to the therapy notwithstanding awareness that the risk was one of its perils." *Canterbury v. Spence,* 464 *F.*2d 772, 790 (D.C.Cir.), *cert. denied,* 409 *U.S.* 1064, 93 *S.Ct.* 560, 34 *L.Ed.*2d 518 (1972) (citation omitted). As the court stated in *Canterbury:*

> We think a technique which ties the factual conclusion on causation simply to the assessment of the patient's credibility is unsatisfactory.... [W]hen causality is explored at a post-injury trial with a professedly uninformed patient, the question whether he actually would have turned the treatment down if he had known the risks is purely hypothetical.... And the answer which the patient supplies hardly represents more than a guess, perhaps tinged by the circumstance that the uncommunicated hazard has in fact materialized. In our view, this method of dealing with the issue on causation comes in second-best.... Better it is, we believe, to resolve the causality issue on an objective basis: in terms of what a prudent person in the patient's position would have decided if suitably informed of all perils bearing significance. If adequate disclosure could reasonably be expected to have caused that person to decline the treatment because of the revelation of the kind of risk or danger that resulted in harm, causation is shown, but otherwise not. The patient's testimony is relevant on that score of course but it would not threaten to dominate the findings. And since that testimony would probably be appraised congruently with the factfinder's belief in its reasonableness, the case for a wholly objective standard for passing on causation is strengthened.
>
> [*Id.* at 790–91; *see also Largey, supra,* 110 *N.J.* at 215–16, 540 *A.*2d 504 (approving *Canterbury*'s adoption of objective test); *Model Jury Charge* 5.36C (1989) ("Although plaintiff's testimony may be considered on the question as to whether he/she would have consented, the issue to be resolved is not what this plaintiff would have done....").]

[38]**[9]** For consent to be informed, the patient must know not only of alternatives that the physician recommends, but of medically reasonable alternatives that the physician does not recommend. Otherwise, the physician, by not discussing these alternatives, effectively makes the choice for the patient. Accordingly, the physician should discuss the medically reasonable courses of treatment, including nontreatment. *Largey, supra,* 110 *N.J.* at 213, 540 *A.*2d 504. As we recently wrote: "The negligence lies in the physician's failure to disclose sufficient information for the patient to make an informed decision about

the comparative risks of various treatment options." *Baird, supra,* 155 *N.J.* at 71, 713 *A.*2d 1019; *In re Conroy,* 98 *N.J.* 321, 347, 486 *A.*2d 1209 (1985) ("[T]he patient must have a clear understanding of the risks and benefits of the proposed treatment alternatives or nontreatment. . . ."); *Battenfeld v. Gregory,* 247 *N.J.Super.* 538, 550, 589 *A.*2d 1059 (App.Div.1991) ("We are convinced . . . that a physician may be held liable for withholding information concerning the potential harm likely to result if the patient remains untreated."). To the same effect, the Department of Health has declared:

> Similar concerns animate our Administrative Code's "patient rights," which include a patient's right "[t]o receive from the patient's physician[s]—in terms that the patient understands—an explanation of his or her complete medical condition, recommended treatment, risk[s] of the treatment, expected results and reasonable medical alternatives."
>
> [*N.J.A.C.* 8:43G–4.1(a)(6).]

The medical profession likewise recognizes the physician's obligation to explain all medically reasonable alternatives to the patient. The American Medical Association's Code of Medical Ethics states:

> The patient's right of self-decision can be effectively exercised only if the patient possesses enough information to enable an intelligent choice. The patient should make his or her own determination on treatment. The physician's obligation is to present the medical facts accurately to the patient or to the individual responsible for the patient's care and to make recommendations for management in accordance with good medical practice. . . . Social policy does not accept the paternalistic view that the physician may remain silent because divulgence might prompt the patient to forego needed therapy. Rational, informed patients should not be expected to act uniformly, even under similar circumstances, in agreeing to or refusing treatment.[39]
>
> [39][American Medical Association, *Code of Medical Ethics: Current Opinions with Annotations,* Opinion 8.08 (1981).]

Because the patient has a right to be fully informed about medically reasonable courses of treatment, we are unpersuaded that a cause of action predicated on the physician's breach of a standard of care adequately protects the patient's right to be informed of treatment alternatives. A physician may select a method of treatment that is medically reasonable, but not the one that the patient would have selected if informed of alternative methods. Like the deviation from a standard of care, the physician's failure to obtain informed consent is a form of medical negligence. *See Baird, supra,* 155 *N.J.* at 70, 713 *A.*2d 1019; *Teilhaber v. Greene,* 320 *N.J.Super.* 453, 457, 727 *A.*2d 518 (App.Div.1999). Recognition of a separate duty emphasizes the physician's obligation to inform, as well as treat, the patient. The physician's selection of one of several medically reasonable alternatives may not violate a standard of care, but it may represent a choice that the patient would not make. Physicians may neither impose their values on their patients nor substitute their level of risk aversion for that of their patients. One patient may prefer to undergo a potentially risky procedure, such as surgery, to enjoy a better quality of life. Another patient may choose a more conservative course of treatment to secure reduced risk at the cost of a diminished lifestyle. The choice is not for the physician, but the patient in consultation with the physician. By not telling the patient of all medically reasonable alternatives, the physician breaches the patient's right to make an informed choice.

The physician's duty to inform the patient of alternatives is especially important when the alternatives are mutually exclusive. If, as a practical matter, the choice of one alternative precludes the choice of others, or even if it increases appreciably the risks attendant on the other alterna-

tives, the patient's need for relevant information is critical. That need intensifies when the choice turns not so much on purely medical considerations as on the choice of one lifestyle or set of values over another.

[40][10] It is not dispositive that the alternative that the physician recommends is more or less invasive than other alternatives. *See Caputa v. Antiles,* 296 *N.J.Super.* 123, 686 *A.*2d 356 (App.Div.1996) (holding doctor had duty to disclose alternative of "observation" as well as recommended alternative of surgery). The critical consideration is not the invasiveness of the procedure, but the patient's need for information to make a reasonable decision about the appropriate course of medical treatment, whether invasive or noninvasive.

According to Dr. Mastromonaco's testimony, he recognized that need. He testified that he discussed the alternative of surgery with Matthies. Whether that discussion ever took place and, if so, what the parties said, should have been an issue at trial.

The trial court, believing informed consent applied to invasive procedures only, precluded Matthies's attorney from cross-examining Dr. Mastromonaco on that issue. Several times during the trial, Matthies's counsel attempted to introduce testimony to refute Dr. Mastromonaco's assertion that he had discussed surgery as an option. Each time, the trial court barred the testimony. At the conclusion of the case, therefore, Dr. Mastromonaco had presented his side of the story on the issue of informed consent, but Matthies had been prevented from presenting her side. The trial court, moreover, refused to charge the jury on the issue of informed consent. Hence, the only issue submitted to the jury was whether Dr. Mastromonaco had breached a standard of care in selecting bed rest as a treatment alternative. Consequently, the jury did not have the opportunity to consider the issue that forms the basis of this appeal, whether Dr. Mastromonaco had obtained Matthies's informed consent to the treatment he recommended.

The issue of informed consent often intertwines with that of medical malpractice. *Baird, supra,* 155 *N.J.* at 70–71, 713 *A.*2d 1019. Because of the interrelationship between the malpractice [41]and informed consent issues in the present case, the jury should consider both issues at the retrial.

The judgment of the Appellate Division is affirmed.

For affirmance—Chief Justice PORITZ and Justices HANDLER, POLLOCK, O'HERN, GARIBALDI, STEIN and COLEMAN—7.

Opposed—None.

160 N.J. 41

[41]**Josephine F. LANG, Plaintiff–Respondent,**

v.

ZONING BOARD OF ADJUSTMENT OF THE BOROUGH OF NORTH CALDWELL, Defendant–Appellant,

and

Robert Calabrese, Defendant.

Supreme Court of New Jersey.

Argued Feb. 16, 1999.

Decided July 19, 1999.

Landowner sought dimensional variance to permit construction of in-ground swimming pool to replace existing above-ground pool. The zoning board granted the variance, and neighbor sought judicial review. The Superior Court, Law Division, upheld the variance. Neighbor appealed.

mantez from office. *See* Tex. Local Gov't Code § 87.031. However, all the acts for which Talamantez was convicted were committed prior to his reelection on November 8, 1988. Therefore, under section 87.001 of the Local Government Code, Talamantez cannot be removed from office based on those acts.

The trial judge's order of removal is directly contrary to section 87.001 of the Local Government Code. Pursuant to Texas Rule of Appellate Procedure 122 and without hearing oral argument, we conditionally grant Talamantez' petition for writ of mandamus. The writ will issue only if Judge Strauss fails to vacate his order of removal.

Frank COSGROVE, Petitioner,

v.

Walter GRIMES et al., Respondents.

No. C–8089.

Supreme Court of Texas.

June 28, 1989.

Client sued attorneys for negligence, breach of contract, and violation of state Deceptive Trade Practices Act under theory of breach of implied warranty. The 334th District Court, Harris County, Marsha D. Anthony, J., rendered take-nothing judgment as to one attorney after client dropped second attorney from suit and third attorney died, and client appealed. The Court of Appeals, 757 S.W.2d 508, affirmed and client applied for writ of error. The Supreme Court, Spears, J., held that: (1) no subjective good-faith excuse existed for attorney negligence; (2) client was entitled to recover in negligence; and (3) attorney waived objections to damage instructions.

Reversed and rendered.

1. Attorney and Client ⇐105

An attorney malpractice action is based on negligence.

2. Attorney and Client ⇐107

There is no subjective good-faith excuse for attorney negligence, but rather a lawyer is held to the standard of care which would be exercised by a reasonably prudent attorney.

3. Attorney and Client ⇐106

In a legal malpractice action, the jury must evaluate the attorney's conduct based on the information the attorney had at the time of the alleged act of negligence.

4. Attorney and Client ⇐129(2)

Determination that attorney was negligent in his representation of client in personal injury action and that such negligence adversely affected client was supported by sufficient evidence.

5. Attorney and Client ⇐129(4)

Proper amount of damages in legal malpratice action for negligent misrepresentation in a personal injury action is amount of damages recoverable and collectible by client from personal injury defendant if suit had been properly prosecuted.

6. Appeal and Error ⇐231(9)

Attorney's failure to distinctly point out any error in damage instructions in legal malpractice action resulted in waiver of issue of whether instructions were proper.

7. Damages ⇐49.10

Plaintiff in legal malpractice action was entitled to recover for mental anguish suffered as a result of attorney's negligence.

8. Trial ⇐351.2(4)

Legal malpractice plaintiff's failure to tender to court a properly worded jury issue on breach of implied warranty under Deceptive Trade Practices Act waived any ground of recovery based on Act. Vernon's Ann.Texas Rules Civ.Proc., Rule 278; V.T.C.A., Bus. & C. § 17.41 et seq.

Timothy H. Pletcher, Helm, Pletcher, Hogan, Bowen & Saunders, Houston, for petitioner.

George D. Gordon, Baggett & Gordon, Richard S. Browne, Houston, for respondents.

OPINION ON MOTION FOR REHEARING

SPEARS, Justice.

Our opinion and judgment of April 19, 1989 are withdrawn and the following substituted therefor:

The issues in this case concern the applicability of the "good faith" defense in legal malpractice actions. The trial court held that the exception barred client Frank Cosgrove from recovering on his claim. The court of appeals affirmed. 757 S.W.2d 508. We reverse and render judgment for Cosgrove.

In July 1976, Cosgrove was injured when the automobile he was driving was struck from the rear by a car driven by Will Michael Stephens. Timothy Purnell was a passenger in Stephens' car at the time of the accident which occurred on Decker Drive, south of the intersection with Airhart in Baytown, Texas. The Baytown Police Department was called, and an accident report was made by the responding officer.

Soon after the accident, Cosgrove contacted attorney Ed W. Bass, Jr. regarding the accident. Cosgrove executed a power of attorney which designated Bass and Walter Grimes, also an attorney, to represent his interest in the claim. Bass apparently performed no investigation of the circumstances surrounding the case and no lawsuit was filed by Bass. Some time after this initial meeting and before July 1978, Bass notified Cosgrove that he was leaving the state and was turning his automobile collision claim over to Grimes. It is disputed at what point Grimes was notified of the circumstances surrounding the automobile collision. At some time before the statute of limitations ran, however, Grimes filed suit against Purnell.

After the statute of limitations had run, Cosgrove learned that suit had been filed against the wrong person. Grimes, alleging that he had relied on Cosgrove's information, had filed suit against the passenger in the car which struck Cosgrove, rather than Stephens, the car's driver. Cosgrove also discovered that Grimes had alleged the wrong location of the accident.

Based upon errors in the suit filed, Cosgrove sued attorneys Bass and Grimes, and another attorney, Don Hendrix.[1] Cosgrove's malpractice suit alleged negligence, breach of contract, false representations and Deceptive Trade Practices Act ("DTPA") violations under a theory of breach of implied warranty.[2] This suit was consolidated with Cosgrove's personal injury claim.

Eventually, the defendant Hendrix was dropped, and the suit against the remaining defendants proceeded to trial before a jury. Most of the evidence at trial regarding the legal malpractice claim concerned only Grimes. Grimes insisted that he had no knowledge of Cosgrove's cause of action until July 10, 1978, five days before the two-year statute of limitations would run. Grimes testified that on that date he met with Cosgrove and received information concerning the name of the party to sue and the accident's location. Grimes also stated he had not been notified that his name was on the power of attorney executed by Cosgrove, and that he had never been engaged in a partnership with Bass. Cosgrove testified that he contacted and met with Grimes shortly after Bass left the state. Cosgrove said the contact, five days before limitations ran, was actually only a telephone inquiry about the status of the case.

The jury found that Stephens, the driver of the car that hit Cosgrove, had been negligent and that such negligence was a proximate cause of the accident. The jury

1. After the death of Bass, his estate was made a party defendant.

2. The DTPA claim was brought under the 1977 version of that act, thus all references to the DTPA concern the act in effect in 1977.

also found that Cosgrove would probably have collected $2,000 from Stephens as damages resulting from the collision.

The jury also found that Grimes had been negligent and that such negligence was a proximate cause of damages to Cosgrove. Further, the jury found that Grimes had failed to use "reasonable and ordinary care and diligence" in prosecuting the suit arising from the automobile collision, that this failure adversely affected Cosgrove, and that $500.00 would compensate Cosgrove for the mental anguish he suffered as a result of Grimes' representation. No issues were submitted regarding the role of attorney Bass.

Grimes submitted proposed issues which included a good faith defense to a legal malpractice claim. Cosgrove objected to these issues as merely evidentiary, as submitting an inferential rebuttal issue, and as failing to properly submit all elements of any good faith defense, should one exist. The trial court submitted the two issues over Cosgrove's objections. The jury found Grimes had in good faith relied on the information given to him by Cosgrove, and based upon that information, Grimes had acted in Cosgrove's best interest.

Having received favorable jury answers on their submitted issues, both Cosgrove and Grimes moved for judgment on the verdict. Cosgrove later filed a motion to disregard the special issues concerning Grimes' good faith and whether his actions were in Cosgrove's best interest. The trial court denied this motion, and judgment was rendered that Cosgrove take nothing in his suit against the passenger, Purnell, and that he take nothing against Grimes or Bass.

The court of appeals affirmed, holding that the good faith exception to attorney negligence applied when the attorney exercised his best judgment in what he believed was his client's best interests. 757 S.W.2d 508. The court of appeals also ruled that the issue of good faith was defensive, rather than an inferential rebuttal, and thus its submission in this case was proper. Finally, the court held that Cosgrove had not properly submitted issues concerning his DTPA claim, and thus the trial court properly denied him recovery on that cause of action.

In his application for writ of error in this court Cosgrove advances two arguments. First, he contends the good faith exception to attorney negligence should be abolished because it allows attorney conduct to be measured by a lower standard of care than that of other professions. Second, he argues that the jury's answers to the issues submitted establish his right to recover based on negligence and also breach of implied warranty under the DTPA.

[1] An attorney malpractice action in Texas is based on negligence. *Fireman's Fund Amer. Ins. Co. v. Patterson & Lamberty, Inc.*, 528 S.W.2d 67 (Tex.Civ.App.—Tyler 1975, writ ref'd n.r.e.); *Patterson & Wallace v. Frazer*, 79 S.W. 1077 (Tex.Civ. App. 1904, no writ), *appeal after remand*, 93 S.W. 146 (Tex.Civ.App.), *rev'd on other grounds*, 100 Tex. 103, 94 S.W. 324 (1906). Some courts have held that if an attorney makes an error in judgment, but acted in good faith and in what the attorney believed was the client's best interest, the attorney is not liable for malpractice. *See e.g., Cook v. Irion*, 409 S.W.2d 475 (Tex. Civ.App.—San Antonio 1966, no writ). In the instant case the jury found that Grimes had acted in good faith in relying on the information Cosgrove allegedly furnished to Grimes, and the trial court rendered judgment for Grimes.

[2, 3] There is no subjective good faith excuse for attorney negligence. A lawyer in Texas is held to the standard of care which would be exercised by a reasonably prudent attorney. The jury must evaluate his conduct based on the information the attorney has at the time of the alleged act of negligence. In some instances an attorney is required to make tactical or strategic decisions. Ostensibly, the good faith exception was created to protect this unique attorney work product. However, allowing the attorney to assert his subjective good faith, when the acts he pursues are unreasonable as measured by the reasonably competent practioner standard, creates too great a burden for wronged clients to over-

come. The instruction to the jury should clearly set out the standard for negligence in terms which encompass the attorney's reasonableness in choosing one course of action over another.

If an attorney makes a decision which a reasonably prudent attorney *could* make in the same or similar circumstance, it is not an act of negligence even if the result is undesirable. Attorneys cannot be held strictly liable for all of their clients' unfulfilled expectations. An attorney who makes a reasonable decision in the handling of a case may not be held liable if the decision later proves to be imperfect. The standard is an objective exercise of professional judgment, not the subjective belief that his acts are in good faith. To the extent that some Texas courts have recognized an exception to attorney negligence based on the subjective good faith of the attorney, those cases are disapproved. *E.g., Tijerina v. Wennermark*, 700 S.W.2d 342 (Tex.App.—San Antonio 1985, no writ); *Medrano v. Miller*, 608 S.W.2d 781 (Tex. Civ.App.—San Antonio 1980, writ ref'd n.r.e.); *State v. Baker*, 539 S.W.2d 367 (Tex. Civ.App.—Austin 1976, writ ref'd n.r.e.); *Hicks v. State*, 422 S.W.2d 539 (Tex.Civ. App.—Houston [14th Dist.] 1967, writ ref'd n.r.e.); *Cook v. Irion*, 409 S.W.2d 475 (Tex. Civ.App.—San Antonio 1966, no writ).

Disregarding the jury's findings concerning good faith, we must now determine whether Cosgrove may recover on his claim of malpractice. An action for negligence is based on four elements. The plaintiff must prove that there is a duty owed to him by the defendant, a breach of that duty, that the breach proximately caused the plaintiff injury and that damages occurred. *McKinley v. Stripling*, 763 S.W.2d 407 (Tex.1989).

[4] In this case Cosgrove submitted seven special issues regarding his professional malpractice claim against Grimes.[3] The jury found in issue number 5 that Grimes had been negligent in his representation of Cosgrove and in issue number 6 that such negligence adversely affected Cosgrove. There is evidence in the record to support these findings.

[5, 6] Issues number 7 and 8 inquired about damages Cosgrove would have recovered and collected as a result of the

3. The five special issues relevant here are set out below:

SPECIAL ISSUE NO. 5
Do you find that Defendant Walter Grimes failed to exercise reasonable and ordinary care and diligence in applying the skill and knowledge at hand in the prosecution of the lawsuit arising from the July 15, 1976 collision?
Answer "Yes" or "No."
ANSWER: Yes
If your answer to Special Issue No. 5 was "Yes," and only in that event, then answer Special Issue No. 6 below.
SPECIAL ISSUE NO. 6
Did such failure adversely affect Frank Cosgrove?
Answer "Yes" or "No."
ANSWER: Yes
SPECIAL ISSUE NO. 7
Find from a preponderance of the evidence what sum of money, if any, if paid now in cash, would fairly and reasonably compensate Frank Cosgrove for his loss, if any, resulting from the occurrence in question?
You are to consider each element of damage separately, so as not to include damages for one element in any other element.
You are instructed that you shall award the sum, if any, that Frank Cosgrove would have in reasonable probability recovered as a result of the July 15, 1976 collision.
Consider the following elements of damage, if any, and none other and answer separately in dollars and cents, if any:
(a) Physical pain and mental anguish in the past; loss of earning capacity in the past; disfigurement in the past and physical impairment in the past.
$2,000.00
(b) Disfigurement and physical impairment that, in reasonable probability, he will suffer in the future.
$ 0
SPECIAL ISSUE NO. 8
Find from a preponderance of the evidence the amount of damages you found in Special Issue No. 7 that Frank Cosgrove would have in reasonable probability collected from WILL MICHAEL STEPHENS as a result of the collision?
Answer in dollars and cents, if any.
$2,000.00
SPECIAL ISSUE NO. 9
Find from a preponderance of the evidence what sum of money, if any, if paid now in cash, would fairly and reasonably compensate Frank Cosgrove for the mental anguish he has suffered if any, as a result of the actions of Walter Grimes in connection with his representation of Mr. Cosgrove regarding the July 15, 1976 collision?
Answer in dollars and cents, if any.
ANSWER: $500.00

collision. The two issues should have inquired as to the amount of damages recoverable and collectible from Stephens *if the suit had been properly prosecuted.* *See* 3 State Bar of Texas, *Texas Pattern Jury Charges* PJC 85.01 (1982). Although these issues were defectively submitted, Grimes failed to object to them by distinctly pointing out any error. Because Grimes waived the error in the submission, we render judgment that Cosgrove recover $2000 in accordance with the jury's finding on issues number 7 and 8. *See* Tex.R.Civ.P. 274; *see also* 34 G. Hodges & T. Guy, *The Jury Charge in Texas Civil Litigation* § 149, at 271–74 (Texas Practice 2d ed. 1988).

[7] The jury found in response to issue number 9, that $500 would fairly and reasonably compensate Cosgrove for mental anguish suffered as a result of Grimes' negligence. This issue properly assessed damages incurred by Cosgrove because of Grimes' negligent handling of the first suit. Therefore, Cosgrove is entitled to recover this amount based upon the jury's finding.

[8] Cosgrove also argues that issue number 5 and issue number 6 embrace a DTPA claim based on breach of an implied warranty. Assuming *arguendo* such a cause of action existed against an attorney under the 1977 version of the DTPA, the issues requested by Cosgrove did not properly place the matter before the jury. At best the language of the submission vaguely alluded to a standard of care, not to an implied warranty. Because the issue did not inquire whether Grimes breached an implied warranty, Cosgrove may not recover on such a claim. Cosgrove's failure to tender a properly worded jury issue to the court for inclusion in the jury charge constituted waiver of any ground of recovery based on the DTPA. Tex.R.Civ.P. 278.

We hold that the trial court erred in submitting issues to the jury concerning Grimes' good faith. Based on the jury's answers to the remaining issues, we reverse the judgment of the court of appeals and render judgment that Cosgrove be awarded $2500.00 as compensation for damages suffered as a result of Grimes' negligent prosecution of Cosgrove's cause of action.

RESPONSIVE TERMINAL SYSTEMS, INC., Petitioner,

v.

BOY SCOUTS OF AMERICA, Respondent.

No. C–7194.

Supreme Court of Texas.

July 5, 1989.

Rehearing Denied Sept. 13, 1989.

Computer distributor brought action against national scouting organization to recover on basis of promissory estoppel for organization's decision to recommend another computer firm as vendor of choice for local councils. Organization filed counterclaim for overcharges. The 101st District Court, Dallas County, Craig T. Enoch, J., rendered judgment in favor of distributor and in favor of organization on its counterclaim. Appeal was taken. In unpublished opinion, the Dallas Court of Appeals, Fifth Supreme Judicial District, Linda Thomas, reversed judgment in favor of distributor and found no jurisdiction over distributor's cross points attacking counterclaim. Review was granted. The Supreme Court held that: (1) Court of Appeals had jurisdiction over cross points attacking counterclaim, and (2) some evidence supported distributor's promissory estoppel theory.

Court of Appeals reversed, and cause remanded.

1. Appeal and Error ⇐878(1)

Court of Appeals had jurisdiction over plaintiff's cross points attacking counter-

(228 N. Y. 164)

MARTIN v. HERZOG et al.

(Court of Appeals of New York. Feb. 24, 1920.)

1. APPEAL AND ERROR ⟸171(1)—WHETHER VEHICLE SHOULD HAVE SHOWN LIGHTS CANNOT BE FIRST CONSIDERED ON APPEAL.

Where the case was tried on the assumption that at the hour of the accident vehicle lights were required, and was argued on appeal on the same assumption, the Court of Appeals cannot consider whether that might have been made a question for the jury.

2. HIGHWAYS ⟸172(1)—OMISSION TO CARRY ON WAGON LIGHT REQUIRED BY STATUTE IS NEGLIGENCE.

The failure of the driver of a wagon to display the lights required by Highway Law, § 329a, as amended by Laws 1915, c. 367, is negligence, not merely evidence from which the jury can find negligence.

3. HIGHWAYS ⟸172(1)—FAILURE TO CARRY LIGHTS BARS RECOVERY ONLY IF PROXIMATE CAUSE.

Though the failure to display lights required by statute is negligence, it does not bar recovery, unless it was the proximate cause of the accident.

4. HIGHWAYS ⟸184(2) — INFERENCE THAT FAILURE TO DISPLAY LIGHTS WAS PROXIMATE CAUSE HELD WARRANTED.

Where a collision occurred more than an hour after sundown between a buggy, which had no lights, and an automobile, whose driver did not see the buggy, a causal connection between the collision and the lack of lights may be inferred, and, if nothing else is shown to break the connection, is prima facie sufficient to establish contributory negligence.

5. HIGHWAYS ⟸184(2)—PLAINTIFF HAS BURDEN OF PROVING WANT OF LIGHTS DID NOT CAUSE ACCIDENT.

Where plaintiff's intestate was killed in a collision between the buggy he was driving without lights and defendant's automobile, under circumstances warranting the inference that the lack of lights was the proximate cause of the collision, the burden is on plaintiff to prove that the other lights on the highway or other circumstances were sufficient to rebut the presumption.

6. HIGHWAYS ⟸184(4)—INSTRUCTION AS TO ABSENCE OF LIGHTS ON PLAINTIFF'S WAGON HELD ERRONEOUS, IN VIEW OF REFUSED REQUEST.

In an action for death resulting from a collision of defendant's automobile with decedent's wagon, which was without the required lights, an instruction that the jury could consider the absence of lights in determining contributory negligence, but that such absence did not necessarily make him negligent, in connection with a refused request that the absence of lights was prima facie negligence, tended to minimize in the jury's minds the fault of decedent, so that the verdict for plaintiff was properly set aside.

Hogan, J., dissenting.

Appeal from Supreme Court, Appellate Division, Second Department.

Action by Elizabeth Martin, as administratrix of William J. Martin, deceased, against Samuel A. Herzog and another. Judgment for the plaintiff against the named defendant was reversed by the Appellate Division (176 App. Div. 614, 163 N. Y. Supp. 189), and plaintiff appeals. Judgment of Appellate Division affirmed, and judgment absolute directed on stipulation in favor of defendant.

Hugh A. Thornton, of Tarrytown, for appellant.

Herbert C. Smyth, of New York City, for respondent.

CARDOZO, J. The action is one to recover damages for injuries resulting in death. Plaintiff and her husband, while driving toward Tarrytown in a buggy on the night of August 21, 1915, were struck by the defendant's automobile coming in the opposite direction. They were thrown to the ground, and the man was killed. At the point of the collision the highway makes a curve. The car was rounding the curve, when suddenly it came upon the buggy, emerging, the defendant tells us, from the gloom. Negligence is charged against the defendant, the driver of the car, in that he did not keep to the right of the center of the highway. Highway Law, § 286, subd. 3, and section 332 (Consol. Laws, c. 25). Negligence is charged against the plaintiff's intestate, the driver of the wagon, in that he was traveling without lights. Highway Law, § 329a, as amended by Laws 1915, c. 367. There is no evidence that the defendant was moving at an excessive speed. There is none of any defect in the equipment of his car. The beam of light from his lamps pointed to the right as the wheels of his car turned along the curve toward the left; and, looking in the direction of the plaintiff's approach, he was peering into the shadow. The case against him must stand, therefore, if at all, upon the divergence of his course from the center of the highway. The jury found him delinquent and his victim blameless. The Appellate Division reversed, and ordered a new trial.

[1] We agree with the Appellate Division that the charge to the jury was erroneous and misleading. The case was tried on the assumption that the hour had arrived when lights were due. It was argued on the same assumption in this court. In such circumstances, it is not important whether the hour might have been made a question for the jury. Todd v. Nelson, 109 N. Y. 316, 325, 16 N. E. 360. A controversy put out of the case by the parties is not to be put into it by us. We say this by way of preface to our review of the contested rulings. In the body of the charge the trial judge said that the

jury could consider the absence of light "in determining whether the plaintiff's intestate was guilty of contributory negligence in failing to have a light upon the buggy as provided by law. I do not mean to say that the absence of light necessarily makes him negligent, but it is a fact for your consideration." The defendant requested a ruling that the absence of a light on the plaintiff's vehicle was "prima facie evidence of contributory negligence." This request was refused, and the jury were *again instructed* that they might consider the absence of lights as some evidence of negligence, but that it was not conclusive evidence. The plaintiff then requested a charge that "the fact that the plaintiff's intestate was driving without a light is not negligence in itself," and to this the court acceded. The defendant saved his rights by appropriate exceptions.

[2] We think the unexcused omission of the statutory signals is more than some evidence of negligence. It *is* negligence in itself. Lights are intended for the guidance and protection of other travelers on the highway. Highway Law, § 329a. By the very terms of the hypothesis, to omit, willfully or heedlessly, the safeguards prescribed by law for the benefit of another that he may be preserved in life or limb, is to fall short of the standard of diligence to which those who live in organized society are under a duty to conform. That, we think, is now the established rule in this state. Amberg v. Kinley, 214 N. Y. 531, 108 N. E. 830, L. R. A. 1915E, 519; Karpeles v. Heine, 227 N. Y. 74, 124 N. E. 101; Jetter v. N. Y. & H. R. R. Co., 2 Abb. Dec. 458; Cordell v. N. Y. C. & H. R. R. Co., 64 N. Y. 535, 538; Marino v. Lehmaier, 173 N. Y. 530, 536, 66 N. E. 572, 61 L. R. A. 811; cf. Texas & Pacific Ry. Co. v. Rigsby, 241 U. S. 33, 39, 40, 36 Sup. Ct. 482, 60 L. Ed. 874; Prest-O-Lite Co. v. Skeel, 182 Ind. 593, 600, 601, 106 N. E. 355; Newcomb v. Boston Protective Dept., 146 Mass. 596, 16 N. E. 555, 4 Am. St. Rep. 354; Bourne v. Whitman, 209 Mass. 155, 163, 95 N. E. 404, 35 L. R. A. (N. S.) 701. Whether the omission of an absolute duty, not willfully or heedlessly, but through unavoidable accident, is also to be characterized as negligence, is a question of nomenclature into which we need not enter, for it does not touch the case before us. There may be times, when, if jural niceties are to be preserved, the two wrongs, negligence and breach of statutory duty, must be kept distinct in speech and thought. Pollock, Torts, (10th Ed.) p. 458; Clark & Linsell, Torts (6th Ed.) p. 493; Salmond, Jurisprudence (5th Ed.) pp. 351, 363; Texas & Pac. Ry. Co. v. Rigsby, supra, 241 U. S. 43, 36 Sup. Ct. 482, 60 L. Ed. 874; Chicago, B. & Q. Ry. Co. v. U. S., 220 U. S. 559, 31 Sup. Ct. 612, 55 L. Ed. 582.

In the conditions here present they come together and coalesce. A rule less rigid has been applied where the one who complains of the omission is not a member of the class for whose protection the safeguard is designed. Amberg v. Kinley, supra; Union Pac. Ry. Co. v. McDonald, 152 U. S. 262, 283, 14 Sup. Ct. 619, 38 L. Ed. 434; Kelley v. N. Y. State Rys., 207 N. Y. 342, 100 N. E. 1115; Ward v. Hobbs, 4 App. Cas. 13. Some relaxation there has also been where the safeguard is prescribed by local ordinance, and not by statute. Massoth v. D. & H. C. Co., 64 N. Y. 524, 532; Knupfle v. Knickerbocker Ice Co., 84 N. Y. 488. Courts have been reluctant to hold that the police regulations of boards and councils and other subordinate officials create rights of action beyond the specific penalties imposed. This has led them to say that the violation of a statute is negligence, and the violation of a like ordinance is only evidence of negligence. An ordinance, however, like a statute, is a law within its sphere of operation, and so the distinction has not escaped criticism. Jetter v. N. Y. & H. R. R. Co., supra; Knupfle v. Knickerbocker Ice Co., supra; Newcomb v. Boston Protective Dept., supra; Prest-O-Lite Co. v. Skeel, supra. Whether it has become too deeply rooted to be abandoned, even if it be thought illogical, is a question not now before us. What concerns us at this time is that, even in the ordinance cases, the omission of a safeguard prescribed by statute is put upon a different plane, and is held not merely some evidence of negligence, but negligence in itself. Massoth v. D. & H. Canal Co., supra. Cf. Cordell v. N. Y. C. & H. R. R. R. Co., supra.

In the case at hand, we have an instance of the admitted violation of a statute intended for the protection of travelers on the highway, of whom the defendant at the time was one. Yet the jurors were instructed in effect that they were at liberty in their discretion to treat the omission of lights either as innocent or as culpable. They were allowed to "consider the default as lightly or gravely" as they would (Thomas, J., in the court below). They might as well have been told that they could use a like discretion in holding a master at fault for the omission of a safety appliance prescribed by positive law for the protection of a workman. Scott v. International Paper Co., 204 N. Y. 49, 97 N. E. 413; Fitzwater v. Warren, 206 N. Y. 355, 99 N. E. 1042, 42 L. R. A. (N. S.) 1229; Texas & Pac. Ry. Co. v. Rigsby, 241 U. S. 33, 36 Sup. Ct. 482, 60 L. Ed. 874. Jurors have no dispensing power, by which they may relax the duty that one traveler on the highway owes under the statute to another. It is error to tell them that they have. The omission of these lights was a wrong, and, being wholly unexcused, was also a negligent wrong. No license should have been conceded to the triers of the facts to find it anything else.

[3] We must be on our guard, however, against confusing the question of negligence with that of the causal connection between the negligence and the injury. A defendant who travels without lights is not to pay damages for his fault, unless the absence of lights is the cause of the disaster. A plaintiff who travels without them is not to forfeit the right to damages, unless the absence of lights is at least a contributing cause of the disaster. To say that conduct is negligence is not to say that it is always contributory negligence. "Proof of negligence in the air, so to speak, will not do." Pollock Torts (10th Ed.) p. 472.

[4] We think, however, that evidence of a collision occurring more than an hour after sundown between a car and an unseen buggy, proceeding without lights, is evidence from which a causal connection may be inferred between the collision and the lack of signals. Lambert v. Staten Island R. R. Co., 70 N. Y. 104, 109, 110; Walsh v. Boston R. R. Co., 171 Mass. 52, 58, 50 N. E. 453. The Pennsylvania, 19 Wall. 125, 136, 137, 22 L. Ed. 148; Fisher v. Village of Cambridge, 133 N. Y. 527, 532, 30 N. E. 663. If nothing else is shown to break the connection, we have a case, prima facie sufficient, of negligence contributing to the result.

[5] There may, indeed, be times when the lights on a highway are so many and so bright that lights on a wagon are superfluous. If that is so, it is for the offender to go forward with the evidence, and prove the illumination as a kind of substituted performance. The plaintiff asserts that she did so here. She says that the scene of the accident was illumined by moonlight, by an electric lamp, and by the lights of the approaching car. Her position is that, if the defendant did not see the buggy thus illumined, a jury might reasonably infer that he would not have seen it anyhow. We may doubt whether there is any evidence of illumination sufficient to sustain the jury in drawing such an inference; but the decision of the case does not make it necessary to resolve the doubt, and so we leave it open. It is certain that they were not required to find that lights on the wagon were superfluous. They might reasonably have found the contrary. They ought, therefore, to have been informed what effect they were free to give, in that event, to the violation of the statute. They should have been told, not only that the omission of the light was negligence, but that it was "prima facie evidence of contributory negligence"; i. e., that it was sufficient in itself unless its probative force was overcome (Thomas, J., in court below) to sustain a verdict that the decedent was at fault. Kelly v. Jackson, 6 Pet. 622, 632, 8 L. Ed. 523.

Here, on the undisputed facts, lack of vision, whether excusable or not, was the cause of the disaster. The defendant may have been negligent in swerving from the center of the road; but he did not run into the buggy purposely, nor was he driving while intoxicated, nor was he going at such a reckless speed that warning would of necessity have been futile. Nothing of the kind is shown. The collision was due to his failure to see at a time when sight should have been aroused and guided by the statutory warnings. Some explanation of the effect to be given to the absence of those warnings, if the plaintiff failed to prove that other lights on the car or the highway took their place as equivalents, should have been put before the jury. The explanation was asked for and refused.

[6] We are persuaded that the tendency of the charge, and of all the rulings, following it, was to minimize unduly, in the minds of the triers of the facts, the gravity of the decedent's fault. Errors may not be ignored as unsubstantial, when they tend to such an outcome. A statute designed for the protection of human life is not to be brushed aside as a form of words, its commands reduced to the level of cautions, and the duty to obey attenuated into an option to conform.

The order of the Appellate Division should be affirmed, and judgment absolute directed on the stipulation in favor of the defendant, with costs in all courts.

HOGAN, J. (dissenting). Upon the trial of this action, a jury rendered a verdict in favor of the plaintiff. Defendant appealed from the judgment entered thereon, and an order made denying an application to set aside the verdict and for a new trial, to the Appellate Division. The latter court reversed the judgment on the law, and granted a new trial on questions of law only; the court having examined the facts and found no error therein. The decision thus made was equivalent to a determination by the court that it had passed upon the question of the sufficiency of the evidence, and as to whether the verdict rendered by the jury was against the weight of evidence. The effect of that decision was that the order denying the motion to set aside the verdict and grant a new trial was upon the facts properly denied. Judson v. Central Vt. R. Co., 158 N. Y. 597, 602, 53 N. E. 514. A jury and the Appellate Division having determined that, upon the facts developed on the trial of the action, the plaintiff was entitled to recover, in view of certain statements in the prevailing opinion, and for the purpose of explanation of my dissent, I shall refer to the facts which were of necessity found in favor of plaintiff, and approved by the Appellate Division. The following facts are undisputed:

Leading from Broadway, in the village of Tarrytown, Westchester county, is a certain public highway, known as Neperham road,

which runs in an easterly direction to East View, town of Greenburg. The worked portion of the highway varies in width from 21½ feet at the narrowest point, a short distance easterly of the place of the collision hereinafter mentioned, to a width of 27½ feet at the point where the collision occurred.

On the evening of August 21, 1915, the plaintiff, together with her husband, now deceased, were seated in an open wagon drawn by a horse. They were traveling on the highway westerly towards Tarrytown. The defendant was traveling alone on the highway in the opposite direction, viz. from Tarrytown easterly towards East View, in an automobile which weighed about 3,000 pounds, having a capacity of 70 horse power, capable of developing a speed of 75 miles an hour. Defendant was driving the car.

A collision occurred between the two vehicles on the highway, at or near a hydrant located on the northerly side of the road. Plaintiff and her husband were thrown from the wagon in which they were seated. Plaintiff was bruised and her shoulder dislocated. Her husband was seriously injured and died as a result of the accident.

The plaintiff, as administratrix, brought this action to recover damages arising by reason of the death of her husband, caused, as she alleged, solely by the negligence of defendant in operating, driving, and running the automobile at a high, unlawful, excessive, and unsafe rate of speed, in failing to blow a horn or give any warning or signal of the approach of said automobile, and in operating, driving, and riding said automobile at said time and place upon his left-hand or wrongful side of said road or highway, thereby causing the death of her husband.

Defendant by his answer admitted that he was operating the automobile, put in issue the remaining allegations of the complaint, and affirmatively alleged that any injury to plaintiff's intestate was caused by his contributory negligence.

As indicated in the prevailing opinion, the manner in which the accident happened and the point in the highway where the collision occurred are important facts in this case, for as therein stated:

"The case against him [defendant] must stand, therefore, if at all, upon the divergence of his course from the center of the highway."

The evidence on behalf of plaintiff tended to establish that on the evening in question her husband was driving the horse at a jogging gait along on the right side of the highway near the grass, which was outside of the worked part of the road on the northerly side thereof; that plaintiff observed about 120 feet down the road the automobile operated by defendant approaching at a high rate of speed, two searchlights upon the same, and that the car seemed to be upon her side of the road; that the automobile ran into the wagon in which plaintiff and her husband were seated at a point on their side of the road, while they were riding along near the grass. Evidence was also presented tending to show that the rate of speed of the automobile was 18 to 20 miles an hour and the lights upon the car illuminated the entire road. The defendant was the sole witness on the part of the defense upon the subject under consideration. His version was:

"Just before I passed the Tarrytown Heights station, I noticed a number of children playing in the road. I slowed my car down a little more than I had been running. I continued to drive along the road; probably I proceeded along the road 300 or 400 feet further, I do not know exactly how far, when suddenly there was a crash, and I stopped my car as soon as I could after I realized that there had been a collision. Whether I saw anything in that imperceptible fraction of space before the wagon and car came together I do not know. I have an impression, about a quarter of a second before the collision took place, I saw something white cross the road and heard somebody call 'whoa,' and that is all I knew until I stopped my car. * * * My best judgment is I was traveling about 12 miles an hour. * * * At the time of the collision I was driving on the right of the road."

The manner in which and the point in the highway where the accident occurred presented a question of fact for a jury. If the testimony of defendant was accredited by the jury, plaintiff and her intestate, having observed the approaching automobile deliberately, thoughtlessly, or with an intention to avoid the same, left their side of the road at a moment when an automobile was rapidly approaching with lights illuminating the road, to cross over to the side of the highway where the automobile should be, and as claimed by defendant was traveling, and thereby collided with the same, or, on the contrary, defendant was driving upon his left side of the road and caused the collision. The trial justice charged the jury fully as to the claims of the parties, and also charged that the plaintiff in her complaint specifically alleged the acts constituting negligence on the part of defendant (amongst which was that he was driving on the wrong side of the road, thereby causing the death of her husband, the alleged absence of signals having been eliminated from the case), and in order to recover the plaintiff must show that the accident happened in the way and in the manner she has alleged in her complaint.

"It is for you to determine whether the defendant was driving on the wrong side of the road at the time he collided with the buggy; whether his lights did light up the road, and the whole road, ahead of him to the extent that the buggy was visible, and so, if he negligently approached the buggy in which plaintiff and her husband were driving at the time. If you find, from the evidence here, he was driving on the

wrong side of the road, and that for this reason he collided with the buggy, which was proceeding on the proper side, or if you find that as he approached the buggy the road was so well lighted up that he saw or should have seen the buggy, and yet collided with it, then you may say, if you so find, that the defendant was careless and negligent."

No exception was taken by the defendant to that charge, but at the close of the charge counsel for defendant made certain requests to charge upon the subject as follows:

"(1) If the jury find that Mr. Martin was guilty of any negligence, no matter how slight, which contributed to the accident, the verdict must be for defendant.

"(2) In considering the photographs, and consideration of which side of the vehicle, wagon, was damaged, that the jury have no right to disregard physical facts, and unless they find the accident happened as described by Mrs. Martin and Mrs. Cain, the verdict must be for the defendant.

"(3) The plaintiff must stand or fall on her claim as made, and, if the jury do not find that the accident happened as substantially claimed by her and her witnesses, that the verdict of the jury must be for defendant.

"(4) It was the duty of Mr. Martin to keep to the right."

Each one of the several requests was charged, and in addition the trial justice charged that if the deceased, Mr. Martin, collided with the automobile while the wagon was on the wrong side of the road, the verdict must be for defendant. The principal issue of fact was not only presented to the jury in the original charge made by the trial justice, but emphasized and concurred in by counsel for defendant.

The prevailing opinion, in referring to the accident and the highway at the point where the accident occurred, describes the same in the following language:

"At the point of the collision the highway makes a curve. The car was rounding the curve, when suddenly it came upon the buggy, emerging, the defendant tells us, from the gloom."

Such in substance was the testimony of the defendant, but his version was rejected by the jurors and the Appellate Division, and the evidence in the record is ample to sustain a contrary conclusion. As to the statement that the car was rounding "a curve," two maps made by engineers from actual measurements and surveys for defendant were put in evidence by counsel for plaintiff. Certain photographs, made for the purposes of the trial, were also before the jury. I think we may assume that the jurors gave credence to the maps and actual measurements, rather than to the photographs, and failed to discover therefrom a curve of any importance, or which would interfere with an unobstructed view of the road. As to the "buggy emerging, the defendant tells us, from the gloom," evidence was adduced by plaintiff tending to show that the searchlights on defendant's car lighted up the entire roadway to the extent that the vehicle in which plaintiff and her husband were riding was visible; that the evening was not dark, though it appeared as though a rainfall might be expected. Some witnesses testified it was moonlight. The doctor called from Tarrytown, who arrived within 20 minutes after the collision, testified that the electric lights all along the highway were burning as he passed over the road. The width of the worked part of the highway at the point of the accident was 27½ feet. About 25 feet westerly on the southerly side was located an electric light, which was burning. A line drawn across the highway from that light to the point of the accident would be about 42 feet.

One witness called by plaintiff lived in a house directly across the highway from the point of the accident. Seated in a front room, it was sufficiently light for her to see plaintiff's intestate when he was driving along the road at a point near a telegraph pole, which is shown on the map some 90 or 100 feet easterly of the point of the accident, when she observed him turn his horse into the right towards the fence. Soon thereafter she heard the crash of the collision, and immediately went across the highway and found Mr. Martin in a sitting position on the grass. A witness called by the defendant testified that she was on the stoop of her house, which is across the highway from the point of the accident and about 40 feet distant from said point, and while seated there she could see the body of Mr. Martin. While she testified the evening was dark, the lights on the highway were sufficient to enable her to see the body of Mr. Martin lying upon the grass 40 feet distant. The defendant upon cross-examination was confronted with his testimony given before the coroner, where he testified that the road was "fairly light."

The facts narrated were passed upon by the jury under a proper charge relating to the same, and were sustained by the Appellate Division. The conclusions deducible therefrom are: (a) Defendant was driving his car upon the wrong side of the road. (b) Plaintiff and her intestate were driving a horse attached to the wagon in which they were seated upon the extreme right side of the road. (c) The highway was well lighted. The evening was not dark. (d) Defendant collided with the vehicle in which plaintiff and her husband were riding and caused the accident.

I must here note the fact that concededly there was no light upon the wagon in which plaintiff and her husband were riding, in order that I may express my views upon additional phrases in the prevailing opinion. Therein it is stated:

"There may, indeed, be times when the lights on a highway are so many and so bright that lights on a wagon are superfluous."

I am in accord with that statement, but I dissent from the suggestion we may doubt whether there is any evidence of illumination sufficient to sustain the jury in drawing the inference that, if defendant did not see the buggy thus illumined, it might reasonably infer that he would not have seen it anyway. Further the opinion states:

"Here on the undisputed facts lack of vision, whether excusable or not, was the cause of the disaster. The defendant may have been negligent in swerving from the center of the road, but did not run into the buggy purposely, nor was he driving while intoxicated, nor was he going at such a reckless rate of speed that warning would of necessity be futile. Nothing of this kind is shown."

As to the rate of speed of the automobile, the evidence adduced by plaintiff's witnesses was from 18 to 20 miles an hour, as "very fast"; further that after the collision the car proceeded 100 feet before it was stopped. The defendant testified that he was driving about 12 miles an hour, that at such rate of speed he thought the car should be stopped in 5 or 6 feet, and though he put on the foot brake, he ran 20 feet before he stopped. The jury had the right to find that a car traveling at the rate of 12 miles an hour, which could be stopped within 5 or 6 feet, and with the foot brake on, was not halted within 100 feet, must at the time of the collision have been running "very fast," or at a reckless rate of speed, and therefore warning would of necessity be futile. No claim was made that defendant was intoxicated, or that he purposely ran into the buggy. Nor was proof of such facts essential to plaintiff's right to recover. This case does not differ from many others, wherein the failure to exercise reasonable care to observe a condition is disclosed by evidence and properly held a question of fact for a jury. In the earlier part of the prevailing opinion, as I have pointed out, the statement was:

"The case against him [defendant] must stand or fall, if at all, upon the divergence of his course from the center of the highway."

It would appear that "lack of vision, whether excusable or not, was the cause of the disaster," had been adopted in lieu of divergence from the center of the highway. I have therefore discussed divergence from the center of the road. My examination of the record leads me to the conclusion that lack of vision was not, on the undisputed facts, the sole cause of the disaster. Had the defendant been upon his right side of the road, upon the plaintiff's theory he might have been driving recklessly, and, the plaintiff and her intestate being near to the grass on the northerly side of a roadway 27 feet and upwards in width, the accident would not have happened, and the presence of or lack of vision would not be material. If, however, as found by the jury, defendant was wrongfully on plaintiff's side of the road and caused the accident, the question of whether or not, under the facts, in the exercise of reasonable care, he might have discovered his error and the presence of plaintiff, and thereupon avoid the collision, was for the jury. The question was presented whether or not, as defendant approached the wagon, the roadway was so well lighted up that defendant saw, or in the exercise of reasonable care could have seen, the wagon in time to avoid colliding with the same, and upon that proposition the conclusion of the jury was adverse to defendant, thereby establishing that the lights of the car on the highway were equivalent to any light which, if placed upon the wagon of plaintiff, would have aroused the attention of defendant, and that no causal connection existed between the collision and absence of a light on the wagon.

At the close of the charge to the jury the trial justice was requested by counsel for defendant to charge:

"That the failure to have a light on plaintiff's vehicle is prima facie evidence of contributory negligence on the part of plaintiff."

The justice declined to charge in the language stated, but did charge that the jury might consider it on the question of negligence, but it was not in itself conclusive evidence of negligence. For the refusal to instruct the jury as requested, the judgment of the Trial Term was reversed by the Appellate Division.

The request to charge was a mere abstract proposition. Even assuming that such was the law, it would not bar a recovery by plaintiff, unless such contributory negligence was the proximate and not a remote contributory cause of the injury. Laidlaw v. Sage, 158 N. Y. 73, 52 N. E. 679, 44 L. R. A. 216; Rider v. Syracuse R. T. Ry. Co., 171 N. Y. 139, 63 N. E. 836, 58 L. R. A. 125, and cases cited. The request to charge excluded that important requisite. The trial justice charged the jury that the burden rested upon plaintiff to establish by the greater weight of evidence that plaintiff's intestate's death was caused by the negligence of the defendant and that such negligence was the proximate cause of his death; that by "proximate cause" is meant that cause without which the injury would not have happened, otherwise she could not recover in the action. In the course of his charge the justice enlarged on the subject of contributory negligence, and in connection therewith read to the jury the provisions of the highway law, and then charged that the jury should consider the absence of a light upon the wagon in which plaintiff and her intestate were riding and whether the ab-

sence of a light on the wagon contributed to the accident.

At the request of counsel for defendant, the justice charged that, if the jury should find any negligence on the part of Mr. Martin, no matter how slight, contributed to the accident, the verdict must be for the defendant. I cannot concur that we may infer that the absence of a light on the front of the wagon was not only the cause, but the proximate cause, of the accident. Upon the evidence adduced upon the trial and the credence attached to the same, the fact has been determined that the accident would have been avoided, had the defendant been upon his side of the road, or attentive to where he was driving along a public highway, or had he been driving slowly, used his sense of sight, and observed plaintiff and her intestate as he approached them; they being visible at the time. The defendant's request to charge, which was granted, "that plaintiff must stand or fall on her claim as made, and, if the jury do not find that the accident happened as substantially claimed by her and her witnesses, that the verdict of the jury must be for the defendant," presented the question quite succinctly. The jury found that the accident happened as claimed by the plaintiff and her witnesses, and we cannot surmise or infer that the accident would not have happened, had a light been located on the wagon.

In my opinion the charge of the trial justice upon the subject of proximate cause of the accident was a full and complete statement of the law of the cases, especially when considered in connection with the charge that the slightest negligence on the part of the intestate contributing to the accident would require a verdict for defendant.

It would not be profitable to refer to and analyze the numerous decisions of this court upon the effect of a violation of an ordinance or a statute. A large number of cases were cited in the opinions in the Amberg Case. That case was decided upon the principle that, where a duty is imposed by statute and a violation of the duty causes an injury, such violation is evidence of negligence as matter of law. That proposition was clearly discussed in the Amberg Case (Amberg v. Kinley, 214 N. Y. 531, 108 N. E. 830, L. R. A. 1915E, 519), as will appear by the result therein. The doctrine of causal connection therein declared was but a reiteration of the rule down in Willy v. Mulledy, 78 N. Y. 310, 34 Am. Rep. 536, Briggs v. N. Y. C. & H. R. R. Co., 72 N. Y. 26, and numerous other cases.

The charge requested and denied in this case was in effect that a failure to have a light upon the intestate's wagon was as matter of law such negligence on his part as to defeat the cause of action, irrespective of whether or not such negligence was the proximate cause of the injury. My conclusion is that we are substituting form and phrases for substance, and diverging from the rule of causal connection.

HISCOCK, C. J., and POUND, McLAUGHLIN, ANDREWS, and ELKUS, JJ., concur with CARDOZO, J.

Order affirmed.

(131 Ohio St. 24)

KUHN v. SOUTHERN OHIO LOAN & TRUST CO. (No. 16317.)

(Supreme Court of Ohio. Jan. 27, 1920.)

(Syllabus by the Court.)

1. MORTGAGES ⊂⊃151(2)—MORTGAGE FOR OBLIGATORY FUTURE ADVANCES HAS PRIORITY OF SUBSEQUENT MORTGAGE RECORDED BEFORE FUTURE ADVANCES PAID.

A mortgage, duly recorded, given for definite future advances, which the mortgagee is obligated to make, is entitled to priority for the full amount of such advances over a subsequent mortgage, recorded after the former one, though prior to the making of such future advances. Spader et al v. Lawler, 17 Ohio, 371, 49 Am. Dec. 461, distinguished.

2. MORTGAGES ⊂⊃171(5)—RECORD OF MORTGAGE FOR OBLIGATORY FUTURE ADVANCES NOTICE TO SUBSEQUENT INCUMBRANCERS.

Where a mortgage for obligatory advances is duly recorded, such record is notice to subsequent incumbrancers of a prior lien for the full amount of such obligatory advances.

Error to Court of Appeals, Hamilton County.

Action by the Southern Ohio Loan & Trust Company against one Kuhn and others to foreclose a mortgage. A decree of foreclosure and distribution was affirmed by the Court of Appeals, and defendant Kuhn brings error. Affirmed.

On the second day of May, 1916, Luella C. Bagley and James M. Bagley, her husband, executed and delivered to the defendant in error their certain promissory note in the sum of $3,000, payable one year after date, and on the same day, to secure the payment of said note, executed and delivered to the defendant in error their mortgage deed to certain premises, which mortgage contained the following clause:

"This mortgage is given to improve the premises described herein, to pay off prior incumbrances thereon, and the mortgagor hereby consents and agrees with the mortgagee that the funds secured by this mortgage may be paid out by the mortgagee as provided in section 8321—1 of the General Code of Ohio."

The mortgage was recorded May 6, 1916. The consideration for said note and mortgage

Natural laws may in some cases directly and inexorably lead from known cause to known effect, while in other cases human action, variable and difficult to predict, intervenes and gives to known cause an effect it would not otherwise have. The test of responsibility for injury caused by act or neglect is always whether a reasonably prudent person would anticipate that from particular act or neglect, injury to another might follow. Where human intervention by third parties, whether by lawful or wrongful act, may be foreseen by the prudent, such intervention must be taken into account. If the course can be charted in advance from cause to injury it is unimportant whether the course is dictated by inexorable natural law or by arbitrary human act.

The judgments should be reversed and a new trial ordered.

CRANE, C. J., and O'BRIEN, HUBBS, and RIPPEY, JJ., concur with FINCH, J.

LEHMAN, J., dissents in opinion, in which LOUGHRAN, J., concurs.

Judgments reversed, etc.

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TEDLA et al. v. ELLMAN et al.

BACHEK v. SAME.

Court of Appeals of New York.

Feb. 28, 1939.

1. Automobiles ⇐218

Where there were no footpaths along highway and center grass plot was soft, it was not unlawful for pedestrian, wheeling a baby carriage, to use roadway.

2. Automobiles ⇐216

A pedestrian using roadway is bound to exercise such care for his safety as a reasonably prudent person would use.

3. Negligence ⇐76

The omission by a plaintiff of a safeguard prescribed by statute against a recognized danger constitutes "negligence" as a matter of law which bars recovery for damages caused by incidence of the danger for which the safeguard was prescribed.

[Ed. Note.—For other definitions of "Negligence," see Words & Phrases.]

4. Negligence ⇐1

"Negligence" is the failure to exercise the care required by law.

5. Negligence ⇐6

Where a statute defines the standard of care and the safeguards required to meet a recognized danger, no other measure may be applied in determining whether a person has carried out the duty of care imposed by law.

6. Negligence ⇐6

Failure to observe the standard of care imposed by statute is "negligence" as a matter of law.

7. Negligence ⇐6

Where a statutory general rule of conduct fixes no definite standard of care but merely codifies or supplements a common-law rule, which has always been subject to exceptions or where statutory rule regulates conflicting rights and obligations in manner calculated to promote public convenience and safety, then the statute in absence of clear language to contrary should not be construed as intended to wipe out the limitations and exceptions which judicial decisions have attached to the common-law duty, nor as an inflexible command that the general rule of conduct intended to prevent accidents must be followed under conditions when observance might cause accidents.

8. Automobiles ⇐218

The Court of Appeals could assume reasonably that Legislature directed pedestrians to keep to left of center of road because that would enable them to care for their own safety better than if traffic approached them from the rear. Vehicle and Traffic Law, § 85, subd. 6.

9. Automobiles ⇐218

The Court of Appeals could not assume reasonably that the Legislature intended that a statute enacted for the preservation of life and limb of pedestrians must be observed when observance would subject them to more imminent danger. Vehicle and Traffic Law, § 85, subd. 6.

10. Automobiles ⇐218, 226(1)

A deviation from general statutory rule of conduct, requiring pedestrians to keep to

left of center of road, without good cause is a wrong and the wrongdoer is responsible for the damages resulting from his wrong. Vehicle and Traffic Law, § 85, subd. 6.

11. Automobiles ⇐245(72, 90)

In actions for death of one pedestrian and damages resulting from injuries sustained by another pedestrian when struck by automobile while wheeling baby carriages, question whether pedestrians were guilty of contributory negligence in failing to observe statute requiring pedestrians to keep to center line of highway and question of proximate cause were for jury where there was no footpath along highway, center grass plot was soft and, at time of accident, there were very few automobiles traveling on pedestrians' right side of highway but there was very heavy night traffic on pedestrians' left side of highway. Vehicle and Traffic Law, § 85, subd. 6.

O'BRIEN and FINCH, JJ., dissenting.

Appeal from Supreme Court, Appellate Division; Second Department.

Action by Anna Tedla and husband for damages resulting from injuries sustained by Anna Tedla, against Joseph Ellman and another, consolidated with action by Mary Bachek, as administratrix of the estate of John Bachek, deceased, to recover damages for death of deceased, against Joseph Ellman and another. From judgments of the Appellate Division of the Supreme Court, 253 App.Div. 764, 300 N.Y.S. 1051, affirming judgments in favor of plaintiffs entered upon a verdict in each case, the defendants appeal by permission.

Judgment in each action affirmed.

Hobart R. Marvin and James A. Hughes, both of New York City, for appellants.

Jacob Zelenko and Sidney R. Siben, both of New York City, for respondents.

LEHMAN, Judge.

While walking along a highway, Anna Tedla and her brother, John Bachek, were struck by a passing automobile, operated by the defendant Hellman. She was injured and Bachek was killed. Bachek was a deaf-mute. His occupation was collecting and selling junk. His sister, Mrs. Tedla, was engaged in the same occupation. They often picked up junk at the incinerator of the village of Islip. At the time of the accident they were walking along "Sunrise Highway" and wheeling baby carriages containing junk and wood which they had picked up at the incinerator. It was about six o'clock, or a little earlier, on a Sunday evening in December. Darkness had already set in. Bachek was carrying a lighted lantern, or, at least, there is testimony to that effect. The jury found that the accident was due solely to the negligence of the operator of the automobile. The defendants do not, upon this appeal, challenge the finding of negligence on the part of the operator. They maintain, however, that Mrs. Tedla and her brother were guilty of contributory negligence as matter of law.

[1, 2] Sunrise Highway, at the place of the accident, consists of two roadways, separated by a grass plot. There are no footpaths along the highway and the center grass plot was soft. It is not unlawful for a pedestrian, wheeling a baby carriage, to use the roadway under such circumstances, but a pedestrian using the roadway is bound to exercise such care for his safety as a reasonably prudent person would use. The Vehicle and Traffic Law (Consol. Laws, c. 71) provides that "Pedestrians walking or remaining on the paved portion, or traveled part of a roadway shall be subject to, and comply with, the rules governing vehicles, with respect to meeting and turning out, except that such pedestrians shall keep to the left of the center line thereof, and turn to their left instead of right side thereof, so as to permit all vehicles passing them in either direction to pass on their right. Such pedestrians shall not be subject to the rules governing vehicles as to giving signals." Section 85, subd. 6. Mrs. Tedla and her brother did not observe the statutory rule, and at the time of the accident were proceeding in easterly direction on the east bound or right-hand roadway. The defendants moved to dismiss the complaint on the ground, among others, that violation of the statutory rule constitutes contributory negligence as matter of law. They did not, in the courts below, urge that any negligence in other respect of Mrs. Tedla or her brother bars a recovery. The trial judge left to the jury the question whether failure to observe the statutory rule was a

proximate cause of the accident; he left to the jury no question of other fault or negligence on the part of Mrs. Tedla or her brother, and the defendants did not request that any other question be submitted. Upon this appeal, the only question presented is whether, as matter of law, disregard of the statutory rule that pedestrians shall keep to the left of the center line of a highway constitutes contributory negligence which bars any recovery by the plaintiff.

Vehicular traffic can proceed safely and without recurrent traffic tangles only if vehicles observe accepted rules of the road. Such rules, and especially the rule that all vehicles proceeding in one direction must keep to a designated part or side of the road—in this country the right-hand side—have been dictated by necessity and formulated by custom. The general use of automobiles has increased in unprecedented degree the number and speed of vehicles. Control of traffic becomes an increasingly difficult problem. Rules of the road, regulating the rights and duties of those who use highways, have, in consequence, become increasingly important. The Legislature no longer leaves to custom the formulation of such rules. Statutes now codify, define, supplement, and, where changing conditions suggest change in rule, even change rules of the road which formerly rested on custom. Custom and common sense have always dictated that vehicles should have the right of way over pedestrians and that pedestrians should walk along the edge of a highway so that they might step aside for passing vehicles with least danger to themselves and least obstruction to vehicular traffic. Otherwise, perhaps, no customary rule of the road was observed by pedestrians with the same uniformity as by vehicles; though, in general, they probably followed, until recently, the same rules as vehicles.

Pedestrians are seldom a source of danger or serious obstruction to vehicles and when horse-drawn vehicles were common they seldom injured pedestrians using a highway with reasonable care, unless the horse became unmanageable or the driver was grossly negligent or guilty of willful wrong. Swift-moving motor vehicles, it was soon recognized, do endanger the safety of pedestrians crossing highways, and it is imperative that there the relative rights and duties of pedestrians and of vehicles should be understood and observed. The Legislature in the first five subdivisions of section 85 of the Vehicle and Traffic Law has provided regulations to govern the conduct of pedestrians and of drivers of vehicles when a pedestrian is crossing a road. Until by chapter 114 of the Laws of 1933, it adopted subdivision 6 of section 85, quoted above, there was no special statutory rule for pedestrians walking along a highway. Then for the first time it reversed, for pedestrians, the rule established for vehicles by immemorial custom, and provided that pedestrians shall keep to the left of the center line of a highway.

The plaintiffs showed by the testimony of a State policeman that "there were very few cars going east" at the time of the accident, but that going west there was "very heavy Sunday night traffic." Until the recent adoption of the new statutory rule for pedestrians, ordinary prudence would have dictated that pedestrians should not expose themselves to the danger of walking along the roadway upon which the "very heavy Sunday night traffic" was proceeding when they could walk in comparative safety along a roadway used by very few cars. It is said that now, by force of the statutory rule, pedestrians are guilty of contributory negligence as matter of law when they use the safer roadway, unless that roadway is left of the center of the road. Disregard of the statutory rule of the road and observance of a rule based on immemorial custom, it is said, is negligence which as matter of law is a proximate cause of the accident, though observance of the statutory rule might, under the circumstances of the particular case, expose a pedestrian to serious danger from which he would be free if he followed the rule that had been established by custom. If that be true, then the Legislature has decreed that pedestrians must observe the general rule of conduct which it has prescribed for their safety even under circumstances where observance would subject them to unusual risk; that pedestrians are to be charged with negligence as matter of law for acting as prudence dictates. It is unreasonable to ascribe to the Legislature an intention that the statute should have so extraordinary a result, and the courts may not give to a statute an effect not intended by the Legislature.

[3] The Legislature, when it enacted the statute, presumably knew that this court and the courts of other jurisdictions had established the general principle that omission by a plaintiff of a safeguard, prescribed by statute, against a recognized danger, constitutes negligence as matter of law which bars recovery for damages caused by incidence of the danger for which the safeguard was prescribed. The principle has been formulated in the Restatement of the Law of Torts: "A plaintiff who has violated a legislative enactment designed to prevent a certain type of dangerous situation is barred from recovery for a harm caused by a violation of the statute if, but only if, the harm was sustained by reason of a situation of that type." § 469. So where a plaintiff failed to place lights upon a vehicle, as required by statute, this court has said: "we think the unexcused omission of the statutory signals is more than some evidence of negligence. It is negligence in itself. Lights are intended for the guidance and protection of other travelers on the highway. Highway Law [Consol.Laws, c. 25] § 329-a. By the very terms of the hypothesis, to omit, willfully or heedlessly, the safeguards prescribed by law for the benefit of another that he may be preserved in life or limb, is to fall short of the standard of diligence to which those who live in organized society are under a duty to conform. That, we think, is now the established rule in this State." Martin v. Herzog, 228 N.Y. 164, 168, 126 N.E. 814, 815, per Cardozo, J. The appellants lean heavily upon that and kindred cases and the principle established by them.

The analogy is, however, incomplete. The "established rule" should not be weakened either by subtle distinctions or by extension beyond its letter or spirit into a field where "by the very terms of the hypothesis" it can have no proper application. At times the indefinite and flexible standard of care of the traditional reasonably prudent man may be, in the opinion of the Legislature, an insufficient measure of the care which should be exercised to guard against a recognized danger; at times, the duty, imposed by custom, that no man shall use what is his to the harm of others provides insufficient safeguard for the preservation of the life or limb or property of others. Then the Legislature may by statute prescribe additional safeguards and may define duty and standard of care in rigid terms; and when the Legislature has spoken, the standard of the care required is no longer what the reasonably prudent man would do under the circumstances but what the Legislature has commanded. That is the rule established by the courts and "by the very terms of the hypothesis" the rule applies where the Legislature has prescribed safeguards "for the benefit of another that he may be preserved in life or limb." In that field debate as to whether the safeguards so prescribed are reasonably necessary is ended by the legislative fiat. Obedience to that fiat cannot add to the danger, even assuming that the prescribed safeguards are not reasonably necessary and where the legislative anticipation of dangers is realized and harm results through heedless or willful omission of the prescribed safeguard, injury flows from wrong and the wrongdoer is properly held responsible for the consequent damages.

The statute upon which the defendants rely is of different character. It does not prescribe additional safeguards which pedestrians must provide for the preservation of the life or limb or property of others, or even of themselves, nor does it impose upon pedestrians a higher standard of care. What the statute does provide is rules of the road to be observed by pedestrians and by vehicles, so that all those who use the road may know how they and others should proceed, at least under usual circumstances. A general rule of conduct—and, specifically, a rule of the road—may accomplish its intended purpose under usual conditions, but, when the unusual occurs, strict observance may defeat the purpose of the rule and produce catastrophic results.

[4-9] Negligence is failure to exercise the care required by law. Where a statute defines the standard of care and the safeguards required to meet a recognized danger, then, as we have said, no other measure may be applied in determining whether a person has carried out the duty of care imposed by law. Failure to observe the standard imposed by statute is negligence, as matter of law. On the other hand, where a statutory general rule of conduct fixes no definite standard of care which would under all circumstances tend to protect life, limb or property but merely codifies or supplements a common-law rule, which has always been subject to

limitations and exceptions; or where the statutory rule of conduct regulates conflicting rights and obligations in manner calculated to promote public convenience and safety, then the statute, in the absence of clear language to the contrary, should not be construed as intended to wipe out the limitations and exceptions which judicial decisions have attached to the common-law duty; nor should it be construed as an inflexible command that the general rule of conduct intended to prevent accidents must be followed even under conditions when observance might cause accidents. We may assume reasonably that the Legislature directed pedestrians to keep to the left of the center of the road because that would cause them to face traffic approaching in that lane and would enable them to care for their own safety better than if the traffic approached them from the rear. We cannot assume reasonably that the Legislature intended that a statute enacted for the preservation of the life and limb of pedestrians must be observed when observance would subject them to more imminent danger.

The distinction in the effect of statutes defining a standard of care or requiring specified safeguards against recognized dangers and the effect of statutes which merely codify, supplement or even change common-law rules or which prescribe a general rule of conduct calculated to prevent accidents but which under unusual conditions may cause accidents, has been pointed out often. Seldom have the courts held that failure to observe a rule of the road, even though embodied in a statute, constitutes negligence as matter of law where observance would subject a person to danger which might be avoided by disregard of the general rule. "In the United States and in England certain rules regarding the rights of vehicles and persons meeting or passing in the public highway have been established by long continued custom or usage, or, in many jurisdictions, by statutory regulation. These rules and regulations are usually spoken of as 'the law of the road' or 'the rules of the road.' These rules are, however, not inflexible, and a strict observance should be avoided when there is a plain risk in adhering to them, and one who too rigidly adheres to such rules when the injury might have been averted by variance therefrom may be charged with fault; * * * the exceptions to the rule of the road depend upon the special circumstances of the case and in respect to which no general rule can be applied." 13 Ruling Case Law, tit. "Highways," § 222. Cf. Clarke v. Woop, 159 App.Div. 437, 144 N.Y.S. 595; Thomas on Negligence (2d Ed.), 2346; Shearman & Redfield on Negligence, 649; Herdman v. Zwart, 167 Iowa 500, 503, 149 N.W. 631; McElhinney v. Knittle, 199 Iowa 278, 201 N.W. 586; Piper v. Adams Express Co., 270 Pa. 54, 113 A. 562; Dohm v. R. N. Cardozo & Bro., 165 Minn. 193, 206 N.W. 377; Snow v. Riggs, 172 Ark. 835, 840, 290 S.W. 591. See, also, 24 A.L.R. 1304, note; 63 A. L.R. 277, note.

The generally accepted rule and the reasons for it are set forth in the comment to section 286 of the Restatement of the Law of Torts: "Many statutes and ordinances are so worded as apparently to express a universally obligatory rule of conduct. Such enactments, however, may in view of their purpose and spirit be properly construed as intended to apply only to ordinary situations and to be subject to the qualification that the conduct prohibited thereby is not wrongful if, because of an emergency or the like, the circumstances justify an apparent disobedience to the letter of the enactment. * * * The provisions of statutes intended to codify and supplement the rules of conduct which are established by a course of judicial decision or by custom, are often construed as subject to the same limitations and exceptions as the rules which they supersede. Thus, a statute or ordinance requiring all persons to drive on the right side of the road may be construed as subject to an exception permitting travellers to drive upon the other side, if so doing is likely to prevent rather than cause the accidents which it is the purpose of the statute or ordinance to prevent."

[10] Even under that construction of the statute, a pedestrian is, of course, at fault if he fails without good reason to observe the statutory rule of conduct. The general duty is established by the statute, and deviation from it without good cause is a wrong and the wrongdoer is responsible for the damages resulting from his wrong. Cf. Dohm v. R. N. Cardozo & Bro., supra; Herdman v. Zwart, supra; Clarke v. Woop, supra.

[11] I have so far discussed the problem of the plaintiffs' right to compensation for the damages caused by defendants' negligence as if it depended solely upon the question of whether the pedestrians were at fault, and I have ignored the question whether their alleged fault was a proximate cause of the accident. In truth, the two questions cannot be separated completely. If the pedestrians had observed the statutory rule of the road they would have proceeded easterly along the roadway on the left of the center grass plot, and then, it must be conceded, they would not have been struck by the automobile in which the defendants were riding, proceeding in the same direction along the roadway on the right. Their presence on the roadway where they were struck was an essential condition of their injury. Was it also as matter of law a proximate cause of the accident? "The position of a vehicle which has been struck by another may or many not have been one of the causes of the striking. Of course, it could not have been struck if it had not been in the place where the blow came. But this is a statement of an essential condition, and not of a cause of the impact. The distinction is between that which directly or proximately produces or helps to produce, a result as an efficient cause and that which is a necessary condition or attendant cause of it. * * * That is, a contributing cause of an accident, is usually a question for a jury, to be determined by the facts of the particular case." Newcomb v. Boston Protective Department, 146 Mass. 596, 604, 16 N.E. 555, 559, 4 Am.St.Rep. 354. Here the jury might find that the pedestrians avoided a greater, indeed an almost suicidal, risk by proceeding along the east bound roadway; that the operator of the automobile was entirely heedless of the possibility of the presence of pedestrians on the highway; and that a pedestrian could not have avoided the accident even if he had faced oncoming traffic. Under those circumstances the question of proximate cause, as well as the question of negligence, was one of fact.

In each action, the judgment should be affirmed, with costs.

CRANE, C. J., and HUBBS, LOUGHRAN, and RIPPEY, JJ., concur.

O'BRIEN and FINCH, JJ., dissent on the authority of Martin v. Herzog, 228 N.Y. 164, 126 N.E. 814.

Judgments affirmed.

280 N.Y. 135

SWIFT & CO., Inc., v. BANKERS TRUST CO. et al.

Court of Appeals of New York.

Feb. 28, 1939.

1. Bills and notes ⇐6

The statute defining instrument as payable to bearer when payable to order of a fictitious or nonexistent person to maker's knowledge codifies common-law rule that maker's intention controls and that maker must know payee to be fictitious and intend to make the paper payable to a fictitious person. Negotiable Instruments Law, § 28, subd. 3.

2. Bills and notes ⇐6

Under Illinois law, checks which corporate maker's clerk fraudulently induced maker to make payable to a nonexistent person, under belief that such a person actually existed, were payable to bearer, could be transferred without indorsement, and authorized bank to pay the checks without indorsement and without liability for payment after forged indorsement by the clerk. Smith-Hurd Stats.Ill. c. 98, § 29.

3. Contracts ⇐276

Where contract is to be performed in a foreign country, parties are deemed to have intended that performance should be rendered in accordance with the law of the place of performance.

4. Contracts ⇐276

Subject to certain limitations, parties to a contract may agree that the extent of their obligations and the sufficiency of performance are to be determined by the law of either the place of making or the place of performance.

5. Bills and notes ⇐1

The statutory definition of "bill of exchange" amplifies and supersedes, but does not change in effect, the judicial definition of

ROSS v. HARTMAN.

No. 8413.

United States Court of Appeals.
District of Columbia.

Argued Oct. 12, 1943.

Decided Nov. 22, 1943.

1. Negligence ⇐6, 56(3)

Violation of an ordinance intended to promote safety is negligence, and if by creating hazard which ordinance was intended to avoid it brings about harm which ordinance was intended to prevent, it is a legal cause of the harm.

2. Automobiles ⇐11

The purpose of ordinance requiring motor vehicles to be locked is not to prevent theft for the sake of owners or the police, but to promote the safety of the public in the streets.

3. Automobiles ⇐173(8)

An ordinance requiring motor vehicles, left unattended in public place, to be locked is a safety measure, and its violation is negligence.

4. Automobiles ⇐173(8), 201(5)

Where truck owner's agent violated traffic ordinance by leaving truck unattended, in a public alley, with ignition unlocked and key in switch and an unknown person drove truck away and negligently ran over plaintiff, the violation of the ordinance was negligence and constituted the "proximate cause" of the injury rendering owner liable therefor.

See Words and Phrases, Permanent Edition, for all other definitions of "Proximate Cause"

Appeal from the District Court of the United States for the District of Columbia.

Personal injury action by Willie Ross against James O. Hartman. Judgment for defendant, and plaintiff appeals.

Reversed.

Mr. Charles H. Houston, of Washington, D. C., with whom Mr. Joseph C. Waddy and Mrs. Margaret A. Haywood, both of Washington, D. C., were on the brief, for appellant.

Mr. Howard Boyd, of Washington, D. C., with whom Mr. Edmund L. Jones, of Washington, D. C., was on the brief, for appellee.

Before GRONER, Chief Justice and EDGERTON and ARNOLD, Associate Justices.

EDGERTON, Associate Justice.

This is an appeal by the plaintiff from a judgment for the defendant in a personal injury action.

The facts were stipulated. Appellee's agent violated a traffic ordinance of the District of Columbia[1] by leaving appellee's truck unattended in a public alley, with the ignition unlocked and the key in the switch. He left the truck outside a garage "so that it might be taken inside the garage by the garage attendant for night storage," but he does not appear to have notified anyone that he had left it. Within two hours an unknown person drove the truck away and negligently ran over the appellant.

The trial court duly directed a verdict for the appellee on the authority of Squires v. Brooks.[2] That case was decided in 1916. On facts essentially similar to these, and despite the presence of a similar ordinance, this court held that the defendant's act in leaving the car unlocked was not a "proximate" or legal cause of the plaintiff's injury because the wrongful act of a third person intervened.[3] We cannot reconcile that decision with facts which have become clearer and principles which have become better established than they were in 1916, and we think it should be overruled.

1 "Locks on Motor Vehicles. Every motor vehicle shall be equipped with a lock suitable to lock the starting lever, throttle, or switch, or gear-shift lever, by which the vehicle is set in motion, and no person shall allow any motor vehicle operated by him to stand or remain unattended on any street or in any public place without first having locked the lever, throttle, or switch by which said motor vehicle may be set in motion." Traffic and Motor Vehicle Regulations for the District of Columbia, Section 58.

2 44 App.D.C. 320.

3 Slater v. T. C. Baker Co., 1927, 261 Mass. 424, 158 N.E. 778, and Castay v. Katz & Besthoff, Ltd., La.App.1933, 148 So. 76, are to similar effect; but cf. Malloy v. Newman, 1941, 310 Mass. 269, 37 N.E. 2d 1001.

Everyone knows now that children and thieves frequently cause harm by tampering with unlocked cars. The danger that they will do so on a particular occasion may be slight or great. In the absence of an ordinance, therefore, leaving a car unlocked might not be negligent in some circumstances, although in other circumstances it might be both negligent and a legal or "proximate" cause of a resulting accident.[4]

[1] But the existence of an ordinance changes the situation. If a driver causes an accident by exceeding the speed limit, for example, we do not inquire whether his prohibited conduct was unreasonably dangerous. It is enough that it was prohibited. Violation of an ordinance intended to promote safety is negligence. If by creating the hazard[5] which the ordinance was intended to avoid it brings about the harm which the ordinance was intended to prevent, it is a legal cause of the harm.[6] This comes only to saying that in such circumstances the law has no reason to ignore and does not ignore the causal relation which obviously exists in fact. The law has excellent reason to recognize it, since it is the very relation which the makers of the ordinance anticipated. This court has applied these principles to speed limits and other regulations of the manner of driving.[7]

[2-4] The same principles govern this case. The particular ordinance involved here is one of a series which require, among other things, that motor vehicles be equipped with horns and lamps. Ordinary bicycles are required to have bells and lamps,[8] but they are not required to be locked. The evident purpose of requiring motor vehicles to be locked is not to prevent theft for the sake of owners or the police, but to promote the safety of the public in the streets. An unlocked motor vehicle creates little more risk of theft than an unlocked bicycle, or for that matter an unlocked house, but it creates much more risk that meddling by children, thieves, or others will result in injuries to the public. The ordinance is intended to prevent such consequences. Since it is a safety measure, its violation was negligence.[9] This negligence created the hazard and thereby brought about the harm which the ordinance was intended to prevent. It was therefore a legal or "proximate" cause of the harm.[10] Both negligence and causation

[4] Lee v. Van Beuren & New York Bill Posting Co., 190 App.Div. 742, 180 N.Y.S. 295; Gumbrell v. Clausen-Flanagan Brewery, 199 App.Div. 778, 192 N.Y.S. 451; Connell v. Berland, 223 App.Div. 234, 228 N.Y.S. 20.

Contra, Rhad v. Duquesne Light Co., 255 Pa. 409, 100 A. 262, L.R.A.1917D, 864.

The New York Court of Appeals has said broadly that "If one is negligent in leaving a motor vehicle improperly secured, if as a result thereof and in immediate sequence therewith some other event occurs, which would not have occurred except for such negligence, and if injury follows, such a one is responsible, even though the negligent act comes first in order of time." Maloney v. Kaplan, 233 N. Y. 426, 135 N.E. 838, 839, 26 A.L.R. 909.

[5] Cf. Boronkay v. Robinson & Carpenter, 247 N.Y. 365, 160 N.E. 400.

[6] Clements v. Potomac Electric Power Co., 26 App.D.C. 482; Janof v. Newsom, 60 App.D.C. 291, 53 F.2d 149; Martin v. Herzog, 228 N.Y. 164, 126 N.E. 814; DeHaen v. Rockwood Sprinkler Co., 258 N. Y. 350, 179 N.E. 764; Osborne v. McMasters, 40 Minn. 103, 41 N.W. 543, 12 Am. St.Rep. 698; Restatement, Torts, §§ 286, 449.

[7] Capital Traction Co. v. Apple, 34 App. D.C. 559; Danzansky v. Zimbolist, 70 App.D.C. 234, 105 F.2d 457.

[8] §§ 53(c), 47(e).

[9] In Rosenberg v. Murray, 73 App.D.C. 67, 116 F.2d 552, on which appellee relies, it did not appear that either the owner of the car or any agent whom he had employed to drive it had acted negligently.

[10] This does not mean that one who violates a safety ordinance is responsible for all harm that accompanies or follows his negligence. He is responsible for the consequences of his negligence but not for coincidences. If in the present case, for example, the intermeddler had simply released the brake of appellee's truck, without making use of the ignition key or the unlocked switch, and the truck had thereupon rolled downhill and injured appellant, appellee would not have been responsible for the injuries because of the negligence of his agent in leaving the switch unlocked, since it would have had no part in causing them. In other words the fact that the ignition was unlocked, which alone gave the agent's conduct its negligent character, would have had nothing to do with bringing about the harm.

Neither do we suggest that the ordinance should be interpreted as intended to apply in all possible circumstances. In some emergencies, no douht, the act of leaving a car unlocked and unattended in a public

are too clear in this case, we think, for submission to a jury.

The fact that the intermeddler's conduct was itself a proximate cause of the harm, and was probably criminal, is immaterial. Janof v. Newsom[11] involved a statute which forbade employment agencies to recommend servants without investigating their references. An agency recommended a servant to the plaintiff without investigation, the plaintiff employed the servant, and the servant robbed the plaintiff. This court held the agency responsible for the plaintiff's loss. In that case as in this, the conduct of the defendant or his agent was negligent precisely because it created a risk that a third person would act improperly. In such circumstances the fact that a third person does act improperly is not an intelligible reason for excusing the defendant.[12]

There are practical as well as theoretical reasons for not excusing him. The rule we are adopting tends to make the streets safer by discouraging the hazardous conduct which the ordinance forbids. It puts the burden of the risk, as far as may be, upon those who create it. Appellee's agent created a risk which was both obvious and prohibited. Since appellee was responsible for the risk, it is fairer to hold him responsible for the harm than to deny a remedy to the innocent victim.

Reversed.

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place would not be a violation of the ordinance, fairly interpreted, and would therefore entail no responsibility for consequences. A classic illustration of the same general principle is the Bologna ordinance against blood-letting in the streets, which did not make criminals of surgeons.

[11] 60 App.D.C. 291, 53 F.2d 149.

[12] Restatement, Torts, § 449. Cf. Butts v. Ward, 227 Wis. 387, 279 N.W. 6, 116 A.L.R. 1441.

the defendant in the other action recovered **[722]** judgment against the plaintiff, the defendants in this action are still liable. It is said that the plaintiff ought to have replied specially, but I am of opinion that the defendants ought by their plea to shew that the judgment in the former action proceeded on a ground which operated as a discharge of all the joint debtors.

Judgment for the plaintiff.

BYRNE *v.* BOADLE. Nov. 25, 1863.—The plaintiff was walking in a public street past the defendant's shop when a barrel of flour fell upon him from a window above the shop, and seriously injured him. Held sufficient primâ facie evidence of negligence for the jury, to cast on the defendant the onus of proving that the accident was not caused by his negligence.

[S. C. 33 L. J. Ex. 13; 12 W. R. 279; 9 L. T. 450. Followed, *Briggs* v. *Oliver*, 1866, 4 H. & C. 407. Adopted, *Smith* v. *Great Eastern Railway*, 1866, L. R. 2 C. P. 11.]

Declaration. For that the defendant, by his servants, so negligently and unskilfully managed and lowered certain barrels of flour by means of a certain jigger-hoist and machinery attached to the shop of the defendant, situated in a certain highway, along which the plaintiff was then passing, that by and through the negligence of the defendant, by his said servants, one of the said barrels of flour fell upon and struck against the plaintiff, whereby the plaintiff was thrown down, wounded, lamed, and permanently injured, and was prevented from attending to his business for a long time, to wit, thence hitherto, and incurred great expense for medical attendance, and suffered great pain and anguish, and was otherwise damnified.

Plea. Not guilty.

At the trial before the learned Assessor of the Court of Passage at Liverpool, the evidence adduced on the part of the plaintiff was as follows:—A witness named Critchley said: "On the 18th July, I was in Scotland Road, on the right side going north, defendant's shop is on that side. When I was opposite to his shop, a barrel of flour fell from a window above in defendant's house and shop, and knocked **[723]** the plaintiff down. He was carried into an adjoining shop. A horse and cart came opposite the defendant's door. Barrels of flour were in the cart. I do not think the barrel was being lowered by a rope. I cannot say: I did not see the barrel until it struck the plaintiff. It was not swinging when it struck the plaintiff. It struck him on the shoulder and knocked him towards the shop. No one called out until after the accident." The plaintiff said: "On approaching Scotland Place and defendant's shop, I lost all recollection. I felt no blow. I saw nothing to warn me of danger. I was taken home in a cab. I was helpless for a fortnight." (He then described his sufferings.) "I saw the path clear. I did not see any cart opposite defendant's shop." Another witness said: "I saw a barrel falling. I don't know how, but from defendant's." The only other witness was a surgeon, who described the injury which the plaintiff had received. It was admitted that the defendant was a dealer in flour.

It was submitted, on the part of the defendant, that there was no evidence of negligence for the jury. The learned Assessor was of that opinion, and nonsuited the plaintiff, reserving leave to him to move the Court of Exchequer to enter the verdict for him with 50l. damages, the amount assessed by the jury.

Littler, in the present term, obtained a rule nisi to enter the verdict for the plaintiff, on the ground of misdirection of the learned Assessor in ruling that there was no evidence of negligence on the part of the defendant; against which

Charles Russell now shewed cause. First, there was no evidence to connect the defendant or his servants with the occurrence. It is not suggested that the defendant himself was present, and it will be argued that upon these pleadings it is not open to the defendant to contend that his servants were not engaged in lowering the barrel of flour. But the **[724]** declaration alleges that the defendant, by his servants, so negligently lowered the barrel of flour, that by and through the negligence of the defendant, by his said servants, it fell upon the plaintiff. That is tantamount to an allegation that the injury was caused by the defendant's negligence, and it is competent to him, under the plea of not guilty, to contend that his servants were not concerned in the act alleged. The plaintiff could not properly plead to this declaration that his servants were not guilty of negligence, or that the servants were not his servants. If it

had been stated by way of inducement that at the time of the grievance the defendant's servants were engaged in lowering the barrel of flour, that would have been a traversable allegation, not in issue under the plea of not guilty. *Mitchell* v. *Crassweller* (13 C. B. 237) and *Hart* v. *Crowley* (12 A. & E. 378) are authorities in favour of the defendant. Then, assuming the point is open upon these pleadings, there was no evidence that the defendant, or any person for whose acts he would be responsible, was engaged in lowering the barrel of flour. It is consistent with the evidence that the purchaser of the flour was superintending the lowering of it by his servant, or it may be that a stranger was engaged to do it without the knowledge or authority of the defendant. [Pollock, C. B. The presumption is that the defendant's servants were engaged in removing the defendant's flour; if they were not it was competent to the defendant to prove it.] Surmise ought not to be substituted for strict proof when it is sought to fix a defendant with serious liability. The plaintiff should establish his case by affirmative evidence.

Secondly, assuming the facts to be brought home to the defendant or his servants, these facts do not disclose any evidence for the jury of negligence. The plaintiff was bound to give affirmative proof of negligence. But there **[725]** was not a scintilla of evidence, unless the occurrence is of itself evidence of negligence. There was not even evidence that the barrel was being lowered by a jigger-hoist as alleged in the declaration. [Pollock, C. B. There are certain cases of which it may be said res ipsa loquitur, and this seems one of them. In some cases the Courts have held that the mere fact of the accident having occurred is evidence of negligence, as, for instance, in the case of railway collisions.] On examination of the authorities, that doctrine would seem to be confined to the case of a collision between two trains upon the same line, and both being the property and under the management of the same Company. Such was the case of *Skinner* v. *The London, Brighton and South Coast Railway Company* (5 Exch. 787), where the train in which the plaintiff was ran into another train which had stopped a short distance from a station, in consequence of a luggage train before it having broken down. In that case there must have been negligence, or the accident could not have happened. Other cases cited in the text-books, in support of the doctrine of presumptive negligence, when examined, will be found not to do so. Amongst them is *Carpue* v. *The London and Brighton Railway Company* (5 Q. B. 747), but there, in addition to proof of the occurrence, the plaintiff gave affirmative evidence of negligence, by shewing that the rails were somewhat deranged at the spot where the accident took place, and that the train was proceeding at a speed which, considering the state of the rails, was hazardous. Another case is *Christie* v. *Griggs* (2 Campb. 79), where a stage-coach on which the plaintiff was travelling broke down in consequence of the axle-tree having snapped asunder. But that was an action on the contract to carry safely, and one of the counts imputed the accident to the insufficiency of the **[726]** coach, of which its breaking down would be evidence for the jury. [Pollock, C. B. What difference would it have made, if instead of a passenger a bystander had been injured?] In the one case the coach proprietor was bound by his contract to provide a safe vehicle, in the other he would only be liable in case of negligence. The fact of the accident might be evidence of negligence in the one case, though not in the other. It would seem, from the case of *Bird* v. *The Great Northern Railway Company* (28 L. J. Exch. 3), that the fact of a train running off the line is not primâ facie proof where the occurrence is consistent with the absence of negligence on the part of the defendants. Later cases have qualified the doctrine of presumptive negligence. In *Cotton* v. *Wood* (8 C. B. N. S. 568) it was held that a Judge is not justified in leaving the case to the jury where the plaintiff's evidence is equally consistent with the absence as with the existence of negligence in the defendant. In *Hammack* v. *White* (11 C. B. N. S. 588, 594), Erle, J., said that he was of opinion "that the plaintiff in a case of this sort was not entitled to have the case left to the jury unless he gives some affirmative evidence that there has been negligence on the part of the defendant." [Pollock, C. B. If he meant that to apply to all cases, I must say, with great respect, that I entirely differ from him. He must refer to the mere nature of the accident in that particular case. Bramwell, B. No doubt, the presumption of negligence is not raised in every case of injury from accident, but in some it is. We must judge of the facts in a reasonable way; and regarding them in that light we know that these accidents do not take place without a cause, and in general that cause is negligence.] The law will not presume that a man is guilty of a wrong. It is consistent with the

facts proved that the defendant's servants were using [727] the utmost care and the best appliances to lower the barrel with safety. Then why should the fact that accidents of this nature are sometimes caused by negligence raise any presumption against the defendant? There are many accidents from which no presumption of negligence can arise. [Bramwell, B. Looking at the matter in a reasonable way it comes to this—an injury is done to the plaintiff, who has no means of knowing whether it was the result of negligence; the defendant, who knows how it was caused, does not think fit to tell the jury.] Unless a plaintiff gives some evidence which ought to be submitted to the jury, the defendant is not bound to offer any defence. The plaintiff cannot, by a defective proof of his case, compel the defendant to give evidence in explanation. [Pollock, C. B. I have frequently observed that a defendant has a right to remain silent unless a primâ facie case is established against him. But here the question is whether the plaintiff has not shewn such a case.] In a case of this nature, in which the sympathies of a jury are with the plaintiff, it would be dangerous to allow presumption to be substituted for affirmative proof of negligence.

Littler appeared to support the rule, but was not called upon to argue.

POLLOCK, C. B. We are all of opinion that the rule must be absolute to enter the verdict for the plaintiff. The learned counsel was quite right in saying that there are many accidents from which no presumption of negligence can arise, but I think it would be wrong to lay down as a rule that in no case can presumption of negligence arise from the fact of an accident. Suppose in this case the barrel had rolled out of the warehouse and fallen on the plaintiff, how could he possibly ascertain from what cause it occurred? It is [728] the duty of persons who keep barrels in a warehouse to take care that they do not roll out, and I think that such a case would, beyond all doubt, afford primâ facie evidence of negligence. A barrel could not roll out of a warehouse without some negligence, and to say that a plaintiff who is injured by it must call witnesses from the warehouse to prove negligence seems to me preposterous. So in the building or repairing a house, or putting pots on the chimneys, if a person passing along the road is injured by something falling upon him, I think the accident alone would be primâ facie evidence of negligence. Or if an article calculated to cause damage is put in a wrong place and does mischief, I think that those whose duty it was to put it in the right place are primâ facie responsible, and if there is any state of facts to rebut the presumption of negligence, they must prove them. The present case upon the evidence comes to this, a man is passing in front of the premises of a dealer in flour, and there falls down upon him a barrel of flour. I think it apparent that the barrel was in the custody of the defendant who occupied the premises, and who is responsible for the acts of his servants who had the controul of it; and in my opinion the fact of its falling is primâ facie evidence of negligence, and the plaintiff who was injured by it is not bound to shew that it could not fall without negligence, but if there are any facts inconsistent with negligence it is for the defendant to prove them.

BRAMWELL, B. I am of the same opinion.

CHANNELL, B. I am of the same opinion. The first part of the rules assumes the existence of negligence, but takes this shape, that there was no evidence to connect the defendant with the negligence. The barrel of flour fell from a warehouse over a shop which the defendant occupied, and [729] therefore primâ facie he is responsible. Then the question is whether there was any evidence of negligence, not a mere scintilla, but such as in the absence of any evidence in answer would entitle the plaintiff to a verdict. I am of opinion that there was. I think that a person who has a warehouse by the side of a public highway, and assumes to himself the right to lower from it a barrel of flour into a cart, has a duty cast upon him to take care that persons passing along the highway are not injured by it. I agree that it is not every accident which will warrant the inference of negligence. On the other hand, I dissent from the doctrine that there is no accident which will in itself raise a presumption of negligence. In this case I think that there was evidence for the jury, and that the rule ought to be absolute to enter the verdict for the plaintiff.

PIGOTT, B. I am of the same opinion.

Rule absolute.

Savings v. California Pressed Brick Company, 183 Cal. 295, 297, 191 P. 524; Pacific Finance Corporation v. Hendley, 103 Cal. App. 335, 338, 284 P. 736, 285 P. 1048.

[9] (2) Respondent claims that appellants should be denied recovery on the ground that they based their right to possession of tractor 7 upon exhibits A and B which he contends are violative of the Emergency Price Control Act. Such claim is without lawful basis. While it is true respondent proved (1) that appellants sold the tractor to Grove for $8500; (2) that the maximum price to be charged for such used tractor not rebuilt and guaranteed is 55 per cent of its "base price" (Maximum Price Regulations, No. 136 of the United States Office of Price Administration, sections 12 (e) (g), 4) which is the price f.o.b. the manufacturer's plant, and (3) that the base price of tractor 7 was $10,171.21, exclusive of sales tax, yet such proof was wholly immaterial and incompetent by reason of the fact that appellants did not rely upon their contracts with Grove to establish their right to possession. Respondent acquired no rights by virtue of appellants' violation of the federal statute or of the regulations pursuant thereto.

In view of the conclusions above announced discussion of appellants' other points would be supererogatory.

It is therefore ordered that the judgment and the order denying plaintiffs' motion for judgment notwithstanding the verdict be and each is reversed with instructions that judgment be entered in favor of plaintiffs as follows:

"It is ordered, adjudged and decreed that plaintiffs have and recover of and from defendant the sum of $11,770 as damages for the detention of the tractor involved herein;

"It is further ordered, adjudged and decreed that plaintiffs have and recover possession of the tractor bearing serial number 1H7401 or, in the event possession cannot be restored, the value thereof in the sum of $6000.00;

"And costs, which are hereby taxed in the sum of $—."

McCOMB and WILSON, JJ., concur.

LARSON v. ST. FRANCIS HOTEL et al.

Civ. 13573.

District Court of Appeal, First District, Division 1, California.

Jan. 12, 1948.

1. Appeal and error ⇐927(3)

In nonsuit cases every favorable inference fairly deducible from evidence must be drawn in favor of plaintiff, and all evidence must be construed most strongly against the defendants.

2. Innkeepers ⇐14¼

In pedestrian's action against hotel for injuries sustained when pedestrian, while passing hotel, was struck on head by a falling armchair, doctrine of res ipsa loquitur did not apply for want of showing of exclusive control of hotel over chair and because accident was not such that it would have been prevented in ordinary course of events by hotel's exercise of ordinary care.

3. Negligence ⇐121(2)

Plaintiff proceeding under "res ipsa loquitur" doctrine must prove an accident, that thing or instrument causing accident was under exclusive control of defendant, and that accident would not have happened in ordinary course of events if defendant had used ordinary care.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Ipsa Loquitur".

4. Negligence ⇐121(2)

The res ipsa loquitur doctrine applies only where cause of injury is said to be under exclusive control of defendant, it can have no application to a case having a divided responsibility, and plaintiff must fail if evidence does not conclusively show that injury resulted from cause for which defendant was liable.

5. Trial ⇐163

In action by pedestrian against hotel for injuries sustained when pedestrian, while passing hotel, was struck on head by a falling chair, motion for nonsuit on ground that there was no evidence from which it might be inferred that hotel was

guilty of any negligence which caused a chair to hit pedestrian, and that only evidence attempting to connect hotel with accident was fact that accident occurred in proximity of hotel, was sufficient under rule that motion for a nonsuit must point attention of court and counsel to precise grounds upon which it is made.

6. Innkeepers ⇐14¼

Where plaintiff alleged in a particular paragraph that defendants were engaged in hotel business on all the premises described and had right of control and management thereof, which allegation defendants denied followed by statement that in further answer to such paragraph defendants admitted that they operated hotel at time as copartners, such admission was not an admission that defendants had exclusive control and management of furniture of hotel so as to warrant application of doctrine of res ipsa loquitur.

Appeal from Superior Court, City and County of San Francisco; Edward P. Murphy, Judge.

Action by Beulah Larson against St. Francis Hotel, etc., and others, for injuries sustained when plaintiff was struck on the head by an arm chair which had presumably been dropped from a window in defendant's hotel. Judgment of nonsuit, and plaintiff appeals.

Affirmed.

Harry G. Henderson, of San Francisco, for appellant.

Hoge, Pelton & Gunther and Leo V. Killion, all of San Francisco, for respondents.

BRAY, Justice.

[1] The accident out of which this action arose was apparently the result of the effervescence and ebullition of San Franciscans in their exuberance of joy on V-J Day, August 14, 1945. Plaintiff (who is not included in the above description), while walking on the sidewalk on Post Street adjoining the St. Francis Hotel, just after stepping out from under the marquee, was struck on the head by a heavy, overstuffed arm chair, knocked unconscious, and received injuries for which she is asking damages from the owners of the hotel. Although there were a number of persons in the immediate vicinity, no one appears to have seen from whence the chair came nor to have seen it before it was within a few feet of plaintiff's head, nor was there any identification of the chair as belonging to the hotel. However, it is a reasonable inference that the chair came from some portion of the hotel. For the purposes of this opinion, we will so assume, in view of the rule on nonsuit cases that every favorable inference fairly deducible from the evidence must be drawn in favor of plaintiff, and that all the evidence must be construed most strongly against the defendants. 9 Cal.Jur. p. 551.

[2] At the trial, plaintiff, after proving the foregoing facts and the extent of her injuries, rested, relying upon the doctrine of res ipsa loquitur. On motion of defendant the court granted a nonsuit. The main question to be determined is whether under the circumstances shown, the doctrine applies. The trial court correctly held that it did not.

[3, 4] In Gerhart v. Southern California Gas Co., 56 Cal.App.2d 425, 132 P.2d 874, 877, cited by plaintiff, the court sets forth the test for the applicability of the doctrine. "* * * for a plaintiff to make out a case entitling him to the benefit of the doctrine, *he must prove* (1) that there was an accident; (2) that the thing or instrumentality which caused the accident was at the time of and prior thereto under the *exclusive* control and management of the defendant; (3) *that the accident was such that in the ordinary course of events, the defendant using ordinary care, the accident would not have happened.* * * * The doctrine of res ipsa loquitur applies only where the cause of the injury is shown to be under the exclusive control and management of the defendant and can have no application * * * to a case having a divided responsibility where an unexplained accident may have been attributable to one of several causes, for some of which the defendant is not responsible, and when it appears that the injury was caused by one of two causes for one of which defendant is responsible but not for the other, plaintiff

must fail, if the evidence does not show that the injury was the result of the former cause, or leaves it as probable that it was caused by one or the other." (Emphasis added.)

Applying the rule to the facts of this case, it is obvious that the doctrine does not apply. While, as pointed out by plaintiff, the rule of exclusive control "is not limited to the actual physical control but applies to the right of control of the instrumentality which causes the injury" it is not clear to us how this helps plaintiff's case. A hotel does not have exclusive control, either actual or potential, of its furniture. Guests have, at least, partial control. Moreover, it cannot be said that with the hotel using ordinary care "the accident was such that in the ordinary course of events * * * would not have happened." On the contrary, the mishap would quite as likely be due to the fault of a guest or other person as to that of defendants. The most logical inference from the circumstances shown is that the chair was thrown by some such person from a window. It thus appears that this occurrence is not such as ordinarily does not happen without the negligence of the party charged, but, rather, one in which the accident ordinarily might happen despite the fact that the defendants used reasonable care and were totally free from negligence. To keep guests and visitors from throwing furniture out windows would require a guard to be placed in every room in the hotel, and no one would contend that there is any rule of law requiring a hotel to do that.

The cases cited by plaintiff as authority for the application of the doctrine of res ipsa loquitur are easily distinguishable from this case. In Gerhart v. Southern California Gas Co., supra, which involved an explosion from leaking gas, the court found (56 Cal.App.2d 425 at page 427, 132 P.2d 874) that defendant was in the exclusive ownership, control and management of the supply, flow and existence of the gas which exploded. In Helms v. Pacific Gas & Electric Co., 21 Cal.App.2d 711, 70 P.2d 247, a glass portion of an electrolier fell and injured the plaintiff, who was standing on the sidewalk beneath it. The parties stipulated that the electrolier was owned and maintained by the defendant. There, not only was the instrumentality which caused the accident in the *exclusive* control and management of the defendant, but the falling of the glass portion was something that in the ordinary course of events would not occur if the defendant used ordinary care in maintaining it.

In Michener v. Hutton, 203 Cal. 604, 265 P. 238, 59 A.L.R. 480, the length of pipe which fell and caused the injury was "unquestionably under the management of the appellants at the time of the accident." 203 Cal. at page 609, 265 P. at page 240, 59 A.L.R. 480. While the court holds that, 203 Cal. at page 608, 265 P. 239, 59 A.L.R. 480: "The doctrine has also found frequent application in actions for damages for injuries incurred by reason of being struck by falling objects," it is limited to situations in which the thing is shown to be under the exclusive management or control of the defendant or his servants, or in which it must necessarily follow that the injury would not have occurred had the defendant used ordinary care.

In Mintzer v. Wilson, 21 Cal.App.2d 85, 68 P.2d 370, a paid guest in defendant's hotel was injured while in bed by the falling of a huge piece of plaster from the ceiling. It was held by the court that the ceiling was in the exclusive control of the hotel, and that plaster does not ordinarily fall from properly constructed ceilings.

Hubbert v. Aztec Brewing Co., 26 Cal. App.2d 664, holds at page 688, 80 P.2d 185, 197, 1016: "The mere fact that an accident has occurred does not of itself result in any inference of negligence as against a defendant. * * * To justify the invocation of the rule res ipsa loquitur the instrumentality which caused the injury must have been under the exclusive management of the defendant" and quotes from Biddlecomb v. Haydon, 4 Cal.App.2d 361, 364, 40 P.2d 873, as follows: "Neither does it apply where the cause of the accident is unexplained and might have been due to one of several causes for some of which the defendant is not responsible." See also Hilson v. Pacific Gas & Electric Co., 131 Cal.App 427, 434, 21 P.2d 662, 665, which held that in a situation as last above quoted, the doctrine "can in no event apply."

[5] Plaintiff quotes 9 Cal.Jur. 548 to the effect "that a motion for a nonsuit must point the attention of the court and counsel to the precise grounds upon which it is made" and contends that the motion for nonsuit in the trial court did not do this. The motion was made on the ground that "there is no evidence from which it might be inferred that the hotel was guilty of any negligence which caused the chair" to hit plaintiff. It further points out that the only evidence attempting to connect the hotel with the accident is the fact that it occurred in the proximity of the hotel, and that such proof is not sufficient to establish liability. The motion was sufficient.

[6] In her complaint plaintiff alleged in paragraph III that the defendant was engaged in the hotel business on all the premises described therein and had the right of control and management thereof. In its answer defendants denied all of the allegations of paragraph III and then stated: "Further answering paragraph III, these defendants admit that they operated the St. Francis Hotel at said time as co-partners." Plaintiff contends that in some way this is an admission that defendants had exclusive control and management of the furniture of the hotel so as to warrant the application of the doctrine of res ipsa loquitur. It is obvious that such contention is without merit.

The judgment appealed from is affirmed.

PETERS, P. J., and WARD, J., concur.

SWALES et al. v. BARR.

Civ. 3809.

District Court of Appeal, Fourth District, California.

Jan. 16, 1948.

1. Appeal and error ⇐996

Where two conflicting reasonable inferences may be drawn from the same evidence, trial judge must decide which inference should be drawn.

2. Appeal and error ⇐996

In action on implied contract to pay commission to yacht broker and his salesman for sale of defendant's yacht, reasonable inference drawn by trial judge in favor of defendant on questions of implied contract and implied promise to pay was conclusive in appellate court, notwithstanding that contrary inference might have been reasonably drawn. Business and Professions Code, § 8900 et seq.

3. Brokers ⇐86(1)

Evidence warranted finding that yacht broker and his salesman abandoned any employment that they may have had for sale of defendant's yacht, precluding recovery of commission for such sale. Business and Professions Code, § 8900 et seq.

Appeal from Superior Court, Orange County; Martin J. Coughlin, Judge.

Action for commission for sale of yacht by L. G. Swales and another against Wilbur H. Barr. From a judgment for the defendant, the plaintiffs appeal.

Affirmed.

Hampton Hutton, of Los Angeles, for appellants.

Forgy, Reinhaus & Forgy, of Santa Ana, for respondent.

MARKS, Justice.

This is an appeal from a judgment for defendant in an action in which plaintiffs sought to recover $1,100 as commission on the sale of a yacht owned by defendant.

L. G. Swales is a duly licensed yacht broker and O. T. Walkey is a duly licensed yacht salesman working under him.

Wilbur H. Barr was the owner of the yacht Branta, which was anchored at its mooring in Newport Harbor about one and one-half miles from the place of business of plaintiffs.

J. W. Reckman operated a boatswain's locker at Newport Harbor. He repaired boats, sold hardware and did an occasional brokerage business. He had done some

the claim against the Greenfield estate be paid as follows: one-half to the plaintiff, A. W. Mather, and one-half to the defendant Anna Inez Mather.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concurred.

YBARRA v. SPANGARD et al.
L. A. 19067.

Supreme Court of California.
Dec. 27, 1944.

Rehearing Denied Jan. 25, 1945.

1. Negligence ⇐121(2)

To authorize application of doctrine of "res ipsa loquitur", accident must be of a kind which ordinarily does not occur in absence of some one's negligence, it must be caused by an agency or instrumentality within exclusive control of defendant, and must not have been due to any voluntary action or contribution on part of plaintiff.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Ipsa Loquitur".

2. Hospitals ⇐8
Physicians and surgeons ⇐18(6)

Doctrine of res ipsa loquitur is applied in a wide variety of situations including cases of medical or dental treatment or hospital care.

3. Negligence ⇐121(2)

The doctrine of res ipsa loquitur which throws upon party charged duty of producing evidence may be invoked when chief evidence of true cause of injury, whether culpable or innocent, is practically accessible to defendant but inaccessible to injured person.

4. Physicians and surgeons ⇐18(6)

Where patient submitted himself to care and custody of doctors and nurses for purpose of having an appendectomy performed, and while under anesthetic received serious injuries to his arm which was not the subject of treatment or within area covered by operation, patient was entitled to aid of doctrine of res ipsa loquitur in action to recover for such injuries, and was not required to show which doctor or nurse was responsible for his injury.

5. Negligence ⇐121(2)

Neither the number nor relationship of defendants alone determines whether doctrine of res ipsa loquitur applies.

6. Physicians and surgeons ⇐15

Where plaintiff entered hospital to have appendectomy performed, it was duty of each of defendant doctors and nurses in whose custody patient was placed, to exercise ordinary care to protect patient from unnecessary harm and liability attached to each defendant for failure in such regard.

7. Physicians and surgeons ⇐16

Assisting physicians and nurses, although employed by hospital or engaged by patient, normally become temporary servants or agents of surgeon in charge while operation is in progress, and liability may be imposed upon surgeon for their negligent acts under doctrine of respondeat superior.

8. Physicians and surgeons ⇐18(6)

Where control at one time or another of one or more of various agencies or instrumentalities which might have harmed patient was in hands of every defendant doctor or nurse or his employees or temporary servants, fact that it might appear at trial that one or more defendants would be found liable and others absolved for injury to plaintiff did not preclude application of doctrine of res ipsa loquitur.

9. Negligence ⇐121(2)

The requirement for application of doctrine of res ipsa loquitur that injury must be caused by agency or instrumentality within exclusive control of defendant is subject to an exception making test one of right of control rather than actual control when purpose of doctrine would be otherwise defeated.

10. Physicians and surgeons ⇐18(6)

Where a plaintiff receives unusual injuries while unconscious and in course of medical treatment, all those defendants who had any control over his body or instrumentalities which might have caused the injuries may properly be called upon

under doctrine of res ipsa loquitur to meet inference of negligence by giving an explanation of their conduct.

In Bank.

Appeal from Superior Court, Los Angeles County; Goodwin J. Knight, Judge.

Action by Joseph Roman Ybarra against Lawrence C. Spangard and others for injuries resulting from allegedly improper treatment by physicians and nurses. From a judgment of nonsuit, plaintiff appeals.

Reversed.

Prior opinion, 146 P.2d 982.

Marion P. Betty and Wycoff Westover, both of Los Angeles, for appellant.

Parker & Stanbury, Raymond G. Stanbury, and Vernon W. Hunt, all of Los Angeles, for respondents.

GIBSON, Chief Justice.

This is an action for damages for personal injuries alleged to have been inflicted on plaintiff by defendants during the course of a surgical operation. The trial court entered judgments of nonsuit as to all defendants and plaintiff appealed.

On October 28, 1939, plaintiff consulted defendant Dr. Tilley, who diagnosed his ailment as appendicitis, and made arrangements for an appendectomy to be performed by defendant Dr. Spangard at a hospital owned and managed by defendant Dr. Swift. Plaintiff entered the hospital, was given a hypodermic injection, slept, and later was awakened by Drs. Tilley and Spangard and wheeled into the operating room by a nurse whom he believed to be defendant Gisler, an employee of Dr. Swift. Defendant Dr. Reser, the anesthetist, also an employee of Dr. Swift, adjusted plaintiff for the operation, pulling his body to the head of the operating table and, according to plaintiff's testimony, laying him back against two hard objects at the top of his shoulders, about an inch below his neck. Dr. Reser then administered the anesthetic and plaintiff lost consciousness. When he awoke early the following morning he was in his hospital room attended by defendant Thompson, the special nurse, and another nurse who was not made a defendant.

Plaintiff testified that prior to the operation he had never had any pain in, or injury to, his right arm or shoulder, but that when he awakened he felt a sharp pain about half way between the neck and the point of the right shoulder. He complained to the nurse, and then to Dr. Tilley, who gave him diathermy treatments while he remained in the hospital. The pain did not cease but spread down to the lower part of his arm, and after his release from the hospital the condition grew worse. He was unable to rotate or lift his arm, and developed paralysis and atrophy of the muscles around the shoulder. He received further treatments from Dr. Tilley until March, 1940, and then returned to work, wearing his arm in a splint on the advice of Dr. Spangard.

Plaintiff also consulted Dr. Wilfred Sterling Clark, who had X-ray pictures taken which showed an area of diminished sensation below the shoulder and atrophy and wasting away of the muscles around the shoulder. In the opinion of Dr. Clark, plaintiff's condition was due to trauma or injury by pressure or strain applied between his right shoulder and neck.

Plaintiff was also examined by Dr. Fernando Garduno, who expressed the opinion that plaintiff's injury was a paralysis of traumatic origin, not arising from pathological causes, and not systemic, and that the injury resulted in atrophy, loss of use and restriction of motion of the right arm and shoulder.

Plaintiff's theory is that the foregoing evidence presents a proper case for the application of the doctrine of res ipsa loquitur, and that the inference of negligence arising therefrom makes the granting of a nonsuit improper. Defendants take the position that, assuming that plaintiff's condition was in fact the result of an injury, there is no showing that the act of any particular defendant, nor any particular instrumentality, was the cause thereof. They attack plaintiff's action as an attempt to fix liability "en masse" on various defendants, some of whom were not responsible for the acts of others; and they further point to the failure to show which defendants had control of the instrumentalities that may have been involved. Their main defense may be briefly stated in two propositions: (1) that where there are several defendants, and there is a division of responsibility in the use of an instrumentality causing the injury, and the injury might have resulted from the separate act of either one of two

or more persons, the rule of res ipsa loquitur cannot be invoked against any one of them; and (2) that where there are several instrumentalities, and no showing is made as to which caused the injury or as to the particular defendant in control of it, the doctrine cannot apply. We are satisfied, however, that these objections are not well taken in the circumstances of this case.

[1, 2] The doctrine of res ipsa loquitur has three conditions: "(1) the accident must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff." Prosser, Torts, p. 295. It is applied in a wide variety of situations, including cases of medical or dental treatment and hospital care. Ales v. Ryan, 8 Cal.2d 82, 64 P.2d 409; Brown v. Shortlidge, 98 Cal.App. 352, 277 P. 134; Moore v. Steen, 102 Cal.App. 723, 283 P. 833; Armstrong v. Wallace, 8 Cal.App.2d 429, 47 P.2d 740; Meyer v. McNutt Hospital, 173 Cal. 156, 159 P. 436; Vergeldt v. Hartzell, 8 Cir., 1 F.2d 633; Maki v. Murray Hospital, 91 Mont. 251, 7 P.2d 228; Whetstine v. Moravec, 228 Iowa 352, 291 N.W. 425; see Shain, Res Ipsa Loquitur, 17 So. Cal.L.Rev. 187, 196.

[3] There is, however, some uncertainty as to the extent to which res ipsa loquitur may be invoked in cases of injury from medical treatment. This is in part due to the tendency, in some decisions, to lay undue emphasis on the limitations of the doctrine, and to give too little attention to its basic underlying purpose. The result has been that a simple, understandable rule of circumstantial evidence, with a sound background of common sense and human experience, has occasionally been transformed into a rigid legal formula, which arbitrarily precludes its application in many cases where it is most important that it should be applied. If the doctrine is to continue to serve a useful purpose, we should not forget that "the particular force and justice of the rule, regarded as a presumption throwing upon the party charged the duty of producing evidence, consists in the circumstance that the chief evidence of the true cause, whether culpable or innocent, is practically accessible to him but inaccessible to the injured person." 9 Wigmore, Evidence, 3d Ed., § 2509, p. 382; see, also, Whetstine v. Moravec, 228 Iowa 352, 291 N.W. 425, 432; Ross v. Double Shoals Cotton Mills, 140 N.C. 115, 52 S.E. 121, 1 L.R.A.,N.S., 298; Maki v. Murray Hospital, 91 Mont. 251, 7 P.2d 228, 231. In the last-named case, where an unconscious patient in a hospital received injuries from a fall, the court declared that without the doctrine the maxim that for every wrong there is a remedy would be rendered nugatory, "by denying one, patently entitled to damages, satisfaction merely because he is ignorant of facts peculiarly within the knowledge of the party who should, in all justice, pay them."

[4] The present case is of a type which comes within the reason and spirit of the doctrine more fully perhaps than any other. The passenger sitting awake in a railroad car at the time of a collision, the pedestrian walking along the street and struck by a falling object or the debris of an explosion, are surely not more entitled to an explanation than the unconscious patient on the operating table. Viewed from this aspect, it is difficult to see how the doctrine can, with any justification, be so restricted in its statement as to become inapplicable to a patient who submits himself to the care and custody of doctors and nurses, is rendered unconscious, and receives some injury from instrumentalities used in his treatment. Without the aid of the doctrine a patient who received permanent injuries of a serious character, obviously the result of some one's negligence, would be entirely unable to recover unless the doctors and nurses in attendance voluntarily chose to disclose the identity of the negligent person and the facts establishing liability. See Maki v. Murray Hospital, 91 Mont. 251, 7 P.2d 228. If this were the state of the law of negligence, the courts, to avoid gross injustice, would be forced to invoke the principles of absolute liability, irrespective of negligence, in actions by persons suffering injuries during the course of treatment under anesthesia. But we think this juncture has not yet been reached, and that the doctrine of res ipsa loquitur is properly applicable to the case before us.

The condition that the injury must not have been due to the plaintiff's voluntary action is of course fully satisfied under the evidence produced herein; and the same is true of the condition that the accident must be one which ordinarily does not

occur unless some one was negligent. We have here no problem of negligence in treatment, but of distinct injury to a healthy part of the body not the subject of treatment, nor within the area covered by the operation. The decisions in this state make it clear that such circumstances raise the inference of negligence and call upon the defendant to explain the unusual result. See Ales v. Ryan, 8 Cal.2d 82, 64 P.2d 409; Brown v. Shortlidge, 98 Cal. App. 352, 277 P. 134.

The argument of defendants is simply that plaintiff has not shown an injury caused by an instrumentality under a defendant's control, because he has not shown which of the several instrumentalities that he came in contact with while in the hospital caused the injury; and he has not shown that any one defendant or his servants had exclusive control over any particular instrumentality. Defendants assert that some of them were not the employees of other defendants, that some did not stand in any permanent relationship from which liability in tort would follow, and that in view of the nature of the injury, the number of defendants and the different functions performed by each, they could not all be liable for the wrong, if any.

[5, 6] We have no doubt that in a modern hospital a patient is quite likely to come under the care of a number of persons in different types of contractual and other relationships with each other. For example, in the present case it appears that Drs. Smith, Spangard and Tilley were physicians or surgeons commonly placed in the legal category of independent contractors; and Dr. Reser, the anesthetist, and defendant Thompson, the special nurse, were employees of Dr. Swift and not of the other doctors. But we do not believe that either the number or relationship of the defendants alone determines whether the doctrine of res ipsa loquitur applies. Every defendant in whose custody the plaintiff was placed for any period was bound to exercise ordinary care to see that no unnecessary harm came to him and each would be liable for failure in this regard. Any defendant who negligently injured him, and any defendant charged with his care who so neglected him as to allow injury to occur, would be liable. The defendant employers would be liable for the neglect of their employees; and the doctor in charge of the operation would be liable for the negligence of those who became his temporary servants for the purpose of assisting in the operation.

[7] In this connection, it should be noted that while the assisting physicians and nurses may be employed by the hospital, or engaged by the patient, they normally become the temporary servants or agents of the surgeon in charge while the operation is in progress, and liability may be imposed upon him for their negligent acts under the doctrine of respondeat superior. Thus a surgeon has been held liable for the negligence of an assisting nurse who leaves a sponge or other object inside a patient, and the fact that the duty of seeing that such mistakes do not occur is delegated to others does not absolve the doctor from responsibility for their negligence. See Ales v. Ryan, 8 Cal.2d 82, 64 P.2d 409; Armstrong v. Wallace, 8 Cal.App.2d 429, 47 P.2d 740; Ault v. Hall, 119 Ohio St. 422, 164 N.E. 518, 60 A.L.R. 128; and see, also, Maki v. Murray Hospital, 91 Mont. 251, 7 P.2d 228, 233.

[8] It may appear at the trial that, consistent with the principles outlined above, one or more defendants will be found liable and others absolved, but this should not preclude the application of the rule of res ipsa loquitur. The control at one time or another, of one or more of the various agencies or instrumentalities which might have harmed the plaintiff was in the hands of every defendant or of his employees or temporary servants. This, we think, places upon them the burden of initial explanation. Plaintiff was rendered unconscious for the purpose of undergoing surgical treatment by the defendants; it is manifestly unreasonable for them to insist that he identify any one of them as the person who did the alleged negligent act.

The other aspect of the case which defendants so strongly emphasize is that plaintiff has not identified the instrumentality any more than he has the particular guilty defendant. Here, again, there is a misconception which, if carried to the extreme for which defendants contend, would unreasonably limit the application of the res ipsa loquitur rule. It should be enough that the plaintiff can show an injury resulting from an external force applied while he lay unconscious in the hospital; this is as clear a case of identifi-

cation of the instrumentality as the plaintiff may ever be able to make.

[9] An examination of the recent cases, particularly in this state, discloses that the test of actual exclusive control of an instrumentality has not been strictly followed, but exceptions have been recognized where the purpose of the doctrine of res ipsa loquitur would otherwise be defeated. Thus, the test has become one of right of control rather than actual control. See Metz v. Southern Pac. Co., 51 Cal.App.2d 260, 268, 124 P.2d 670. In the bursting bottle cases where the bottler has delivered the instrumentality to a retailer and thus has given up actual control, he will nevertheless be subject to the doctrine where it is shown that no change in the condition of the bottle occurred after it left the bottler's possession, and it can accordingly be said that he was in constructive control. Escola v. Coca Cola Bottling Co., 24 Cal.2d —, 150 P.2d 436. Moreover, this court departed from the single instrumentality theory in the colliding vehicle cases, where two defendants were involved, each in control of a separate vehicle. See Smith v. O'Donnell, 215 Cal. 714, 12 P.2d 933; Godfrey v. Brown, 220 Cal. 57, 29 P.2d 165, 93 A.L.R. 1092; Carpenter, 10 So.Cal.L.Rev. 170. Finally, it has been suggested that the hospital cases may properly be considered exceptional, and that the doctrine of res ipsa loquitur "should apply with equal force in cases wherein medical and nursing staffs take the place of machinery and may, through carelessness or lack of skill, inflict, or permit the infliction of injury upon a patient who is thereafter in no position to say how he received his injuries." Maki v. Murray Hospital, 91 Mont. 251, 7 P.2d 228, 231; see, also, Whetstine v. Moravec, 228 Iowa 352, 291 N.W. 425, 435, where the court refers to the "instrumentalities" as including "the unconscious body of the plaintiff."

In the face of these examples of liberalization of the tests for res ipsa loquitur, there can be no justification for the rejection of the doctrine in the instant case. As pointed out above, if we accept the contention of defendants herein, there will rarely be any compensation for patients injured while unconscious. A hospital today conducts a highly integrated system of activities, with many persons contributing their efforts. There may be, e.g., preparation for surgery by nurses and internes who are employees of the hospital; administering of an anesthetic by a doctor who may be an employee of the hospital, an employee of the operating surgeon, or an independent contractor; performance of an operation by a surgeon and assistants who may be his employees, employees of the hospital, or independent contractors; and post surgical care by the surgeon, a hospital physician, and nurses. The number of those in whose care the patient is placed is not a good reason for denying him all reasonable opportunity to recover for negligent harm. It is rather a good reason for re-examination of the statement of legal theories which supposedly compel such a shocking result.

[10] We do not at this time undertake to state the extent to which the reasoning of this case may be applied to other situations in which the doctrine of res ipsa loquitur is invoked. We merely hold that where a plaintiff receives unusual injuries while unconscious and in the course of medical treatment, all those defendants who had any control over his body or the instrumentalities which might have caused the injuries may properly be called upon to meet the inference of negligence by giving an explanation of their conduct.

The judgment is reversed.

SHENK, CURTIS, EDMONDS, CARTER and SCHAUER, JJ., concurred.

Rehearing denied; TRAYNOR, J., dissenting.

Because the appellee failed to support his claim by evidence showing fault on the part of the Hicki Hoy, we are of the opinion that the decree below was improvidently granted, and it is therefore reversed.

NEW YORK CENT. R. CO. v. GRIMSTAD.

(Circuit Court of Appeals, Second Circuit. February 18, 1920.)

No. 140.

Master and servant ⊂=129(1)—Barge captain's death held not due to want of life-preservers.

The death of the captain of a barge, who fell overboard when the barge was struck by a passing tug while lying in a slip, and was drowned, being unable to swim, *held* not legally attributable to negligence of the owner of the barge in failing to equip it with life-preservers or buoys, in the absence of any evidence tending to show that the presence of such appliances on board would have saved deceased.

In Error to the District Court of the United States for the Eastern District of New York.

Action by Elfrieda Grimstad, administratrix of the estate of Angell Grimstad, deceased, against the New York Central Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

Alex. S. Lyman, of New York City (W. Mann, of New York City, of counsel), for plaintiff in error.

T. J. O'Neill, of New York City (L. F. Fish, of New York City, and William F. Lally, of Yonkers, N. Y., of counsel), for defendant in error.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

WARD, Circuit Judge. This is an action under the federal Employers' Liability Act (Comp. St. §§ 8657–8665) to recover damages for the death of Angell Grimstad, captain of the covered barge Grayton, owned by the defendant railroad company. The charge of negligence is failure to equip the barge with proper life-preservers and other necessary and proper appliances, for want of which the decedent, having fallen into the water, was drowned.

The barge was lying on the port side of the steamer Santa Clara, on the north side of Pier 2, Erie Basin, Brooklyn, loaded with sugar in transit from Havana to St. John, N. B. The tug Mary M, entering the slip between Piers 1 and 2, bumped against the barge. The decedent's wife, feeling the shock, came out from the cabin, looked on one side of the barge, and saw nothing, and then went across the deck to the other side, and discovered her husband in the water about 10 feet from the barge holding up his hands out of the water. He did not know how to swim. She immediately ran back into the cabin for a small line, and when she returned with it he had disappeared.

It is admitted that the decedent at the time was engaged in inter-

state commerce. The court left it to the jury to say whether the defendant was negligent in not equipping the barge with life-preservers and whether, if there had been a life-preserver on board, Grimstad would have been saved from drowning.

The jury found as a fact that the defendant was negligent in not equipping the barge with life-preservers. Life-preservers and life belts are intended to be put on the body of a person before getting into the water, and would have been of no use at all to the decedent. On the other hand, life buoys are intended to be thrown to a person when in the water, and we will treat the charge in the complaint as covering life buoys.

Obviously the proximate cause of the decedent's death was his falling into the water, and in the absence of any testimony whatever on the point, we will assume that this happened without negligence on his part or on the part of the defendant. On the second question, whether a life buoy would have saved the decedent from drowning, we think the jury were left to pure conjecture and speculation. A jury might well conclude that a light near an open hatch or a rail on the side of a vessel's deck would have prevented a person's falling into the hatch or into the water, in the dark. But there is nothing whatever to show that the decedent was not drowned because he did not know how to swim, nor anything to show that, if there had been a life buoy on board, the decedent's wife would have got it in time, that is, sooner than she got the small line, or, if she had, that she would have thrown it so that her husband could have seized it, or, if she did, that he would have seized it, or that, if he did, it would have prevented him from drowning.

The court erred in denying the defendant's motion to dismiss the complaint at the end of the case.

Judgment reversed.

KIRINCICH v. STANDARD DREDGING CO.

No. 7186.

Circuit Court of Appeals, Third Circuit.

May 8, 1940.

1. Seamen ⇐29(4)

As respects duty to rescue deck-hand who had fallen overboard, there was no defense of contributory negligence.

2. Evidence ⇐14

In libel for death of deck-hand, in determining whether due care had been exercised where deck-hands threw heaving lines one inch in diameter in direction of deck-hand who had fallen overboard but did not use life preservers, even if he could not swim, court could take judicial notice of the instinct of self-preservation that at first compensates for lack of skill.

3. Seamen ⇐29(1)

Where it appeared that deck-hand fell overboard from barge, that deck-hands threw heaving lines one inch in diameter in his direction, that one line came within two feet of spot where he was struggling in water but that life preservers were not used, owner of barge was liable for death of deck-hand. 46 U.S.C.A. § 490.

Appeal from the District Court of the United States for the District of New Jersey; John Boyd Avis, Judge.

Libel by Frank Kirincich, administrator of Stefan Kirincich, deceased, against the Standard Dredging Company to recover for the death of the deceased. From a judgment dismissing the libel, 27 F.Supp. 219, the libelant appeals.

Judgment vacated and cause remanded, with directions.

Howard S. Tilton, of Camden, N. J., Silas B. Axtell, of New York City, and Dominick Blasi, of Brooklyn, N. Y., for appellant.

Howard M. Long, of Philadelphia, Pa., for appellee.

Before BIGGS, MARIS, and CLARK, Circuit Judges.

CLARK, Circuit Judge.

We think it fair to say that the resolvement of the case at bar depends upon the judicial stigmatism of the court deciding it. The learned district judge and ourselves are required to appraise facts in relation to, first, causation and, second, a standard of care. Our appraisal happens to differ with his and we find the same difference elsewhere in the "books". It is an application of facts to a point of view. We should begin, therefore, with a statement of those facts.

Libelant's intestate was a deck-hand employed on the dredge of the respondent. That dredge was, at the time of the fatal accident sued upon, engaged in cutting the "interior channel" in the neighborhood of Ft. Lauderdale, Florida. The dredge crew was working in two shifts and part of the accordingly large number lived on a "quarter-boat" tied up to the shore between piers. These piers seem to have served as a sort of base for the dredging operation.

About four o'clock on the morning of February 19, 1933, a small diesel-engined launch towed two barges or scows from the dredge to the shore base. The barge next the launch and attached to it by a towing bridle was loaded with lengths of the pipe used in the dredging and behind it and lashed to it stern foremost was a barge on which was a derrick (for unloading the pipe) and an engine to operate it. The launch had five lights (two ordinary navigating) and the derrick barge an unspecified number of kerosene lanterns. The dawn had not yet lightened the darkness.

Kirincich and two other deck-hands (one in a supervisory capacity) were on the rear of the derrick barge as the two approached the pier. The supervisory deck-hand ordered the other deck-hands to proceed to the corners of the barges in readiness for making them fast. As the two slowed up in the calm water between the piers cries for help were heard and the libelant's intestate was seen to be in the water (depth 35 feet) 20 yards or so from the end (bow) of the derrick barge. The tide was running out, he was carried with it, and finally disappeared with a last tragic "Goodby fellows". At the first cries each of the deck-hands instantly threw heaving lines (1 inch diameter) in his direction. They repeated their casts three times and came once and with one line within two feet of the spot where he was struggling in the water. He never grasped the lines and his body was recovered some hours later.

The launch was cut loose from the tow and turned around in a vain effort to find the drowning man. On the shelf in front of its wheel were several life preservers of the standard type familiar to all who travel on marine craft from ferry-boats up. These remained in their racks and the personnel of the tow and launch remained in none too glorious safety.

[1] All these facts are undisputed. The only disagreement concerns, first, the irrelevance of how the deceased came to fall into the water anyway, and second, the controverted question of his ability to remain afloat after he had done so. As there is no substantial suggestion of suicide, it is immaterial whether he carelessly slipped, or, as his mess boy friend waiting on the dock said, whether a careless bump precipitated him. To the duty of rescue there is no defense of contributory negligence. Harris v. Pennsylvania Railroad Co., 4 Cir., 50 F.2d 866, 868.

The variable evidence raises an issue only dimly sensed by counsel. We say only dimly because we gather it from their citations rather than from their argument. Before we reach the complexities of "proximate cause", we encounter the requirement of causation in its logical sense. This requirement finds one expression in the "But-for" or "Would have happened anyway" rule. Professor Beale phrases it in this wise: "Where the act is the failure merely of a legal duty, causation is established only when the doing of the act would have prevented the result; if the result would have happened just as it did whether the alleged actor had done his duty or not the failure to perform the duty was not a factor in the result, or, in other words did not cause it." Beale, The Proximate Consequences of an Act, 33 Harvard Law Review 633, 637. See, also, Smith, Legal Cause in Actions of Tort, 25 Harvard Law Review 103, 109; McLaughlin, Proximate Cause, 39 Harvard Law Review 149, 153, 154; Hirschberg, The Proximate Cause in the Legal Doctrine of the United States and Germany, 2 Southern California Law Review 207, 211, 212, 217; cf. v. Liszt-Schmidt, Lehrbuch des Strafrechts; Max Ludwig Mueller, Die Bedeutung des Kausalzusammenhanges.

[2, 3] The stock illustrations of the writers are: the child running in front of the horses whose reins were carelessly out of the driver's hands, Regina v. Dalloway, 2 Cox C.C. 273; and the runaway horses going through an obligatory fence not strong enough to stop them anyway, Sowles v. Moore, 65 Vt. 322, 26 A. 629, 21 L.R.A. 723. Nearer to our own facts, Professor Beale cites a case where the mate fell from the defendant's vessel, never arose to the surface, and the ship's boat was negligently lashed to the deck, Ford v. Trident Fisheries Co., 232 Mass. 400, 122 N.E. 389. In the light, then, of this logic and these examples, would Kirincich have drowned even if a larger and more buoyant object than the inch heaving line had been thrown within two feet of him? If he could swim, even badly, there would be no doubt. Assuming he could not, we think he might (the appropriate grammatical mood) have saved himself through the help of something which he could more easily grasp. We can take judicial notice of the instinct of self-preservation that at first compensates for lack of skill. A drowning man comes to the surface and clutches at what he finds there—hence the significance of size and buoyancy in life saving apparatus. In other words, we prefer the doctrine of Judge Learned Hand in the case of Zinnel v. United States Shipping Board Emergency Fleet Corp., 2 Cir., 10 F.2d 47, 49: "There of course remains the question whether they might have also said that the fault caused the loss. About that we agree no certain conclusion was possible. Nobody could, in the nature of things, be sure that the intestate would have seized the rope, or, if he had not, that it would have stopped his body. But we are not dealing with a criminal case, nor are we justified, where certainty is impossible, in insisting upon it. * * * we think it a question about which reasonable men might at least differ whether the intestate would not have been saved, had it been there." to that of his colleague, Judge Hough, dissenting in that case, and concurring in the earlier case of New York Central R. Co. v. Grimstad, 2 Cir., 264 F. 334, 335. See, also, Harris v. Pennsylvania Railroad Co., 4 Cir., 50 F.2d 866, 869.

In appraising care we are faced, as in another and recent decision, Cawman v. Pennsylvania Seashore Lines, 3 Cir., 110 F.2d 832, with the prescription of a standard of equipment. In the case at bar, the prescription is entirely ours (not a jury's) and so is (subject to certiorari) final. We asserted there, and we reiterate here, our view that the emphasis should be for life

and against property. In some fields and in some philosophies of ruggedness that has been disputed. It can hardly be maintained in the face of the absurdly simple precautions here contended for. Those precautions focalize on what amounts to the degrees of specific gravity. We can concede no importance to the particular type of "buoyant apparatus", as the English Safety and Load Line Conventions Act has it, 22 Geo. 5, c. 9, 25 Halsbury's Laws of England 631–638. The cases do not, and common sense does not, distinguish among life boats, life preservers and life rings, Newport News Shipbuilding & Dry Dock Co. v. Watson, 4 Cir., 19 F.2d 832, 834; Harris v. Pennsylvania Railroad Co., 4 Cir., 50 F.2d 866, 867; The Carson (Brashear v. Union Dredging Co.), 9 Cir., 104 F.2d 762, 764; The G. W. Glenn (Brown v. Donoho), D.C., 4 F.Supp. 727, 730. They all float and they all can be grasped by and sustain drowning persons. Although some of the cases do not,[1] we think common sense does distinguish between such "buoyant apparatus" and the one inch heaving line of the principal case, Harris v. Pennsylvania Railroad Co., above cited; The G. W. Glenn (Brown v. Donoho), above cited. The difference in life saving utility between a very small line that sinks and a comparatively large object that floats is too apparent for exposition. By the same token, the difference in cost of stepping-up the specific gravity (a heaving line having other uses) is too trivial for comment. We prefer to balance the budget on the side of the cheap precaution rather than to so characterize the life it is designed to save. The learned judge writing the opinion in Harris v. Pennsylvania Railroad Co., above cited, points out that these considerations have peculiar force in the field of the principal case. With some eloquence, he says: "There is no other peaceful pursuit in which the dominion of the superior is so absolute and the dependence of the subordinate so complete, as in that of a sailor upon a vessel at sea. * * * If he is taken sick or is injured on board the ship, or *is cast into the sea* by the violence of the elements or *by misfortune or negligent conduct*, he is completely dependent for care and safety upon *such succor* as may be given by the members of the crew. By reason of these conditions, the maritime law extends to mariners a protection greater than is afforded by the general rules of common law to those employed in service upon the land. From time immemorial, seamen have been called the 'wards of admiralty'; and in this country as elsewhere the Legislature has enacted an elaborate system of legislation for their protection." Harris v. Pennsylvania Railroad Co., 4 Cir., 50 F.2d 866, 868. (italics ours)

We are not interested in the life preservers on the launch. There was a complete failure to do anything with them. The question of lights or flares is a fortiori to the one at bar.

We must regret libelant's method and manner of trial. The learned trial judge had just occasion to complain of the submission to him of a misquoted citation, 7 C.J.S., Attorney and Client, § 23(e), page 753. No offer of expert testimony was made, Ekblom v. G. O. Reed, Inc., 5 Cir., 71 F.2d 399, nor was there any reference to its pragmatic companion "similar facts and transactions showing methods of preventing injury", Sporsem v. First National Bank, 133 Wash. 199, 233 P. 641, 40 A.L.R. 854. Any trial judge can testify to the general availability of the former, and some slight examination of our own indicates a plethora of the latter. For instance, we find the English Board of Trade provides:

"Class XII * * * steam fish carriers, steam lighters, dredgers, steam hoppers, and *hulks which do not proceed to sea.* * * *

"Rule B—A ship of this class shall carry two approved lifebuoys." Rules promulgated under Merchant Shipping Act, 1894 (57 & 58 Vict., c. 60 § 427(2).

And in this country a somewhat analogous[2] provision of the Department of Commerce reads: "Any open or uncovered barge carrying passengers while in tow of any steamer shall carry 1 life preserver or 1 float for every person carried. * * *" Rule 9, § 1, Barges—Department of Commerce, Steamboat Inspection Service, General Rules and Regulations Prescribed by

[1] Young v. New Orleans Coal & Bisso Towboat Co., D.C., 8 F.2d 310; Martin v. Lower Coast Construction Co., 5 Cir., 16 F.2d 835.

[2] We say somewhat analogous because this rule, enacted under 40 U.S.C. § 490, 46 U.S.C.A. § 490, involves the meaning to be attributed to the word "passengers".

the Board of Supervising Inspectors—Rivers, March 2, 1931, p. 123.[3]

In discussing the general subject our Sea Scout Manual uses language quite applicable to the facts at bar:

"Another type of life preserver often seen is the ring buoy. These are to be found attached to the rails and bridge combings of large vessels; on hooks against a deck house or secured to the *standing rigging on smaller boats*; sometimes merely resting on the after-deck, in all cases ready for instant use. They are for use, when the cry 'Man Overboard' goes ringing through the ship. It is the duty of the man nearest a life buoy to instantly toss it overboard, first securing the lemon, or bitter, end of the line attached to the ring, usually by placing his foot over the line. * * *

"The man who has fallen overboard thanks to *modern safety laws* stands a very good chance of again reaching his vessel. Even though *not a swimmer* the dire emergency of the situation will often enable a man to *somehow fight to the life ring and cling on.*" Sea Scout Manual, pp. 38–39. (italics ours)

The decree of the District Court is vacated and the cause remanded for the entry of an interlocutory decree fixing the respondent's liability, to be followed by the determination of the damages to which the libelant is entitled, and the entry of a final decree pursuant to such determination.

[3] Similar provisions for various craft in varying circumstances are found collected in other literature, Department of Commerce, Bureau of Marine Inspection and Navigation, Laws Governing Marine Inspection, April 1, 1938, pp. 93, 107, 108, 109, 146, 147; International Conference on Safety of Life at Sea, Convention and Final Act, 1929, pp. 59, 62, 63, 68; International Convention on Safety of Life at Sea, Issued by the United States Shipping Board, 1929, pp. 41, 42, 43; Department of Commerce, Steamboat Inspection Service, General Rules and Regulations Prescribed by the Board of Supervising Inspectors—Ocean and Coastwise, March 2, 1931, 83–89; Department of Commerce, Steamboat Inspection Service, General Rules and Regulations Prescribed by the Board of Supervising Inspectors—Great Lakes, March 2, 1931, pp. 80–86, 133; Department of Commerce, Steamboat Inspection Service, General Rules and Regulations Prescribed by the Board of Supervising Inspectors—Bays, Sounds, and Lakes Other than the Great Lakes, March 2, 1931, pp. 78–87, 120; Department of Commerce, Bureau of Marine Inspection and Navigation, General Rules and Regulations Prescribed by the Board of Supervising Inspectors—Tank Vessels, Rules and Regulations Series, No. 14, April 19, 1939, pp. 27, 104, 117–123; Department of Commerce, Bureau of Marine Inspection and Navigation, Supp. 2, General Rules and Regulations Prescribed by the Board of Supervising Inspectors, Rules and Regulations Series, No. 15, May 5, 1939, pp. 11–13, 14–20; Department of Commerce, Bureau of Marine Inspection and Navigation, Instruments, Machines, and Equipments Approved, Vessels Inclined, and Rulings, September 25, 1936, pp. 2–4; Department of Commerce, Bureau of Marine Inspection and Navigation, Manual for Lifeboatmen and Able Seamen, March 1937, pp. 23, 24. It will be noted that some of this has to do with ships on the open sea rather than on inland waters. It may be, however, that a tendency to omit the precaution of rails, etc., on the craft appropriate to the latter, minimizes the difference in hazard.

DISTRICT OF COLUMBIA, Appellant,

v.

Gilman R. CARLSON, Jr., et ux., Appellees.

No. 01–CV–24.

District of Columbia Court of Appeals.

Argued Oct. 11, 2001.

Decided March 21, 2002.

Pedestrian, who was severely injured when he was struck by motorist at intersection where traffic signals were not operating, brought action against motorist, District of Columbia, engineering company that was responsible for marking the location of utility lines, construction company which cut an electric utility line with a backhoe while replacing a storm drainpipe, electric power company which owned line, and pedestrian's underinsured motorist insurer. The Superior Court, Ann O'Regan Keary, J., entered judgment in favor of pedestrian against motorist and the District of Columbia and in favor of construction company and engineering company on the pedestrian's claims against them. District appealed. The Court of Appeals, Terry, J., held that evidence was sufficient to support jury's findings that District of Columbia's failure to provide adequate traffic control measures when traffic light was not functioning was substantial factor in causing pedestrian to be struck and injured by motorist's car and that this accident was foreseeable consequence of absence of any traffic control devices for purposes of pedestrian's negligence action.

Affirmed.

1. Negligence ⚿1713

Questions of proximate cause are usually questions of fact in negligence cases.

2. Automobiles ⚿245(14, 61, 80)

Automobile collisions at street intersections nearly always present questions of fact, and only in exceptional cases will questions of negligence, contributory negligence, and proximate cause pass from the realm of fact to one of law.

3. Negligence ⚿371, 378

Proximate cause has two components: cause-in-fact and a policy element which limits a defendant's liability when the chain of events leading to the plaintiff's injury is unforeseeable or highly extraordinary in retrospect.

4. Automobiles ⚿306(7)

Evidence was sufficient to support jury's findings that District of Columbia's failure to provide adequate traffic control measures when traffic light was not functioning was substantial factor in causing pedestrian to be struck and injured by motorist's car and that this accident was foreseeable consequence of absence of any traffic control devices for purposes of pedestrian's negligence action; even though motorist's conduct, striking pedestrian in crosswalk, violated criminal statute, pedestrian met his heightened burden of showing that motorist's actions were foreseeable in light of District's negligence. D.C. Official Code, 2001 Ed. § 40–726.

5. Negligence ⚿378

Policy element of proximate cause includes various factors which relieve a defendant of liability even when his actions were the cause-in-fact of the injury.

6. Negligence ⚿431

Although the intervening act of another makes the causal connection between the defendant's negligence and the plaintiff's injury more attenuated, such an act does not by itself make the injury unforeseeable.

7. Negligence ⇨431, 433

Defendant will be responsible for the damages which result, despite the intervention of another's act in the chain of causation, if the danger of an intervening negligent or criminal act should have been reasonably anticipated and protected against; however, if the intervening act is criminal, the law requires that the foreseeability of the risk be more precisely shown. Restatement (Second) of Torts §§ 302A, 302B.

8. Negligence ⇨1713

Proximate cause, including the foreseeability component, is nearly always a question of fact for the jury in negligence action.

9. Automobiles ⇨279

District of Columbia is not liable for a decision not to install a traffic control device at an intersection, but once it does so, it may be liable if it fails to maintain that device.

James C. McKay, Jr., Assistant Corporation Counsel, with whom Robert R. Rigsby, Corporation Counsel, and Charles L. Reischel, Deputy Corporation Counsel, were on the brief, for appellant.

Jacob A. Stein, with whom Richard A. Bussey, Washington, DC, was on the brief, for appellees.

Before TERRY, FARRELL, and GLICKMAN, Associate Judges.

TERRY, Associate Judge:

A car driven by Alfred Poe struck and injured a pedestrian, Gilman Carlson, at the intersection of Sixth Street and Independence Avenue, Southwest, directly in front of the National Air and Space Museum. At the time of the accident, the traffic signals at the intersection were not operating. A jury found that the District of Columbia was negligent in failing either to maintain the signal or to provide alternative traffic control devices, and that its negligence was a proximate cause of the accident. The District appeals, arguing that the non-functioning traffic signal was not a cause-in-fact of the accident, and that, even if it was, the actions of Mr. Poe were an unforeseeable superseding cause that relieves the District of any liability. We affirm.

I

On the morning of July 13, 1995, an employee of D & F Construction Company ("D & F") cut an electric utility line with a backhoe while replacing a storm drainpipe at Madison Drive and Ninth Street, Northwest, a few blocks away from the site of the accident. The line was owned by Potomac Electric Power Company ("Pepco"). Byers Engineering Company ("Byers") had been responsible for marking the location of utility lines so that a contractor doing work would not interfere with those lines, but on that day there were no markings at the worksite. As a result of the damage to the power line, many of the traffic lights in the vicinity, including the light at Sixth Street and Independence Avenue, lost electricity and ceased to function. The District responded to several reports of non-functioning traffic lights, one of which was at Seventh Street and Independence Avenue, but it did not respond to, or repair, the traffic light at Sixth Street until after the accident that gave rise to this case.

At around 4:45 p.m., Alfred Poe was driving east on Independence Avenue in the far left lane. The weather was clear and sunny. Mr. Poe stopped for a red traffic light at Seventh Street with no car

ahead of him. When the light changed, however, a black car pulled into his lane from the right, directly in front of him. Mr. Poe traveled about five to ten feet behind the black car at about thirty miles per hour for approximately ten seconds, from Seventh Street to Sixth Street, before he applied his brakes. Unaware that he was near an intersection, Mr. Poe swerved to avoid hitting the black car, and as he did so, he looked in the rear view mirror to see if there was another car behind him. When he turned his attention back to the road, Mr. Carlson, who was crossing the street in the crosswalk at the intersection, was immediately in front of his car, and Mr. Poe could not avoid hitting him. Mr. Carlson was severely injured. He and his wife sued Mr. Poe, the District, Byers, D & F, Pepco, and United Services Automobile Association, Mr. Carlson's underinsured motorist insurance carrier. Each defendant filed cross-claims against some or all of the other defendants.

At trial, Mr. Carlson maintained that the District was negligent in failing either to repair the traffic light or to place alternative traffic control devices, such as cones or a portable stop sign, at the intersection. He presented the testimony of John Callow, an expert on the subject of traffic engineering. Mr. Callow testified that the volume of traffic at Sixth Street and Independence Avenue required operational traffic control signals and that the absence of a signal "increases the probability of conflicts." [1] Mr. Callow also testified that, according to national standards, the District should have placed cones or a portable stop sign at the intersection, or assigned a police officer there to direct traffic, if it was aware of a problem with the traffic light.

The District did not dispute Mr. Callow's testimony, but asserted that the inoperative status of the traffic light was not a cause of the accident. The District relied on the testimony of Mr. Poe, both in his deposition and in court, that he could not see the traffic signals at Sixth Street. Mr. Poe stated that his view of the traffic signals, which were located on poles on either side of the street, was obstructed by the black car in front of him. Because he was so focused on the black car, he said, he did not notice the non-functioning traffic light.

At the close of all the evidence, the District moved for judgment as a matter of law, but the court reserved ruling on the motion. The jury then returned a verdict for the Carlsons, finding that both Mr. Poe and the District were negligent and that their negligent actions were proximate causes of the accident.[2] After the verdict, the District moved again for judgment as a matter of law or, in the alternative, for a new trial. The court denied the motion in a written order, stating, "[T]here was clearly evidence in the record from which jurors could logically conclude that, despite the earlier occurrences which were not District-caused, the negligence of the District, after notice was given of the traffic signal outage, was a substantial factor in plaintiff's injuries."

1. Although on cross-examination Mr. Callow said that conflicts are not accidents, he stated that conflicts "have the potential ... of causing accidents."

2. The jury also found that Byers was negligent but that its negligence was not a proximate cause of the accident; that the driver of the unidentified car was not negligent; that D & F was not negligent; and that Mr. Carlson was not contributorily negligent and did not assume any risk. The court had earlier granted Pepco's motion for judgment because the Carlsons had failed to present expert testimony to support their claim against Pepco.

Final judgment was then entered in favor of the Carlsons against Poe and the District, and in favor of D & F and Byers on the Carlsons' claims against them. From that judgment, which also resolved all the cross-claims, only the District appeals.

II

[1, 2] Questions of proximate cause are usually questions of fact. In particular:

> Automobile collisions at street intersections nearly always present questions of fact. The credibility of witnesses must be passed on, conflicting testimony must be weighed, and inferences must be drawn. From this conflict and uncertainty the trier of facts, whether judge or jury, must determine the ultimate facts of the case. Only in exceptional cases will questions of negligence, contributory negligence, and proximate cause pass from the realm of fact to one of law.

Shu v. Basinger, 57 A.2d 295, 295–296 (D.C.1948); *accord, e.g., Washington Metropolitan Area Transit Authority v. Jones,* 443 A.2d 45, 50 (D.C.1982) (en banc) ("It is only in a case where the facts are undisputed and, considering every legitimate inference, only one conclusion may be drawn, that the trial court may rule as a matter of law on ... proximate cause" (citations omitted)).

[3] Proximate cause has two components: "cause-in-fact" and a "policy element" which limits a defendant's liability when the chain of events leading to the plaintiff's injury is unforeseeable or "highly extraordinary in retrospect." *Lacy v. District of Columbia,* 424 A.2d 317, 320–321 (D.C.1980) (citation omitted). The District argues that the trial court should have granted judgment in its favor because the Carlsons failed to prove either cause-in-fact or foreseeability. We disagree.

A. *Cause-in-fact*

[4] This court has adopted the "substantial factor" test set out in the Restatement of Torts for determining whether a negligent act or omission is the cause-in-fact of a plaintiff's injury. *Lacy,* 424 A.2d at 321; *see Graham v. Roberts,* 142 U.S.App. D.C. 305, 308 n. 3, 441 F.2d 995, 998 n. 3 (1970). The Restatement says that "[t]he actor's negligent conduct is a legal cause of harm to another if ... his conduct is a substantial factor in bringing about the harm...." RESTATEMENT (SECOND) OF TORTS § 431 (1965).

The District argues that the evidence at trial showed conclusively that the nonfunctioning traffic light was not a "substantial factor" in the accident because Mr. Poe would have hit Mr. Carlson even if the light had been functioning or alternative traffic control devices had been present. Because Mr. Poe's view was obstructed by the black car, says the District, his attention was focused on that car, and he was looking in the rear view mirror for several seconds as he swerved into the next lane (where he struck Mr. Carlson) to avoid the black car.

Mr. Poe's testimony, however, was inconsistent on the question of whether his view was obstructed. Although Mr. Poe testified unequivocally in his deposition, which was read to the jury, that the black car obstructed his view of the traffic signals, what he said in his deposition was undermined by his testimony in the courtroom. First, he stated in court that his view of the road was not obstructed when he stopped at the previous traffic light at Seventh Street. Thus it is possible—*i.e.,* the jury could reasonably have found—that Mr. Poe would have seen a functioning traffic light or an alternative control

device (a portable stop sign or orange cones in the road, for example) at Sixth Street, as he was traveling from Seventh to Sixth, if such a device had been present. Second, on cross-examination by counsel for Byers, Mr. Poe said that his view was not completely obstructed, and he admitted that there was nothing to obstruct his view of Mr. Carlson as he was crossing the street. Finally, on cross-examination by Carlson's counsel, Mr. Poe initially said (contrary to his deposition) that the black car did not physically obstruct his view of the traffic lights. After an objection to the form of the question, Mr. Poe answered again, but reversed himself and stated that his view was obstructed. The pertinent testimony was as follows:

Q. The car that was traveling in front of you was directly in front of you in your lane?

A. Yes.

Q. So, that car in front of you in your lane didn't physically block your ability to see the traffic lights on Independence Avenue, had they been lit?

A. Yes.

MR. KING [counsel for Byers]: Objection.

THE COURT: Basis?

MR. KING: Double-barreled question.

THE COURT: Please break it down, Mr. Bussey [counsel for Carlson], in terms of the compound nature of it.

Q. The car that was traveling in front of you as you proceeded down Independence Avenue did not interfere—did not actually physically block your ability to see the traffic lights where they were located at the intersection?

A. To me they did, yes.

Q. These lights are to your right as you are coming down, or to your left, correct?

A. Yes.

Q. They are not directly in front of you?

A. Yes, that's true.

Q. All right. As you indicated earlier in response to a question of one of the other attorneys, there was nothing interfering with your ability to look to the right?

A. There was. The car in front of me was—

[Interruption by the court] [3]

In light of these contradictions, the jury could reasonably find that Mr. Poe either could or could not have seen the traffic light from his position behind the black car. This was a matter for the jury to decide.

The closer question is whether Mr. Poe's attention was so closely focused on the car in front of him that he would not have seen the light even if it had been working. Although it is clear that Mr. Poe did not actually see the traffic light, Mr. Carlson argues that the jury could find that Mr. Poe would have seen it if it were functioning because just a few seconds earlier he saw and obeyed a functioning traffic light at Seventh Street. We agree that a jury could reasonably infer, from all the evidence, that a driver in Poe's position would normally see and obey a traffic signal if it were operating properly even if the driver were closely following another vehicle. Because cause-in-fact is a factual determination, *see Shu*, 57 A.2d at 295–296, and because there was more than one possible

3. After the interruption, the questioning turned to other matters. A few moments later, Mr. Carlson was asked whether he had seen "any red traffic signal, yellow traffic signal, or green traffic signal facing you on either of the light poles that you described," to which he answered, "No." He was not asked whether he *could have seen* such traffic lights.

conclusion that the jury could draw from the evidence, *see Jones,* 443 A.2d at 50, the trial court did not err in denying the District's motion on this ground.

B. *Foreseeability*

[5–7] The "policy element" of proximate cause includes various factors which relieve a defendant of liability even when his actions were the cause-in-fact of the injury. We have held that a defendant "may not be held liable for harm actually caused where the chain of events leading to the injury appears 'highly extraordinary in retrospect.' " *Morgan v. District of Columbia,* 468 A.2d 1306, 1318 (D.C.1983) (en banc) (citing *Lacy,* 424 A.2d at 320–321). Although the intervening act of another makes the causal connection between the defendant's negligence and the plaintiff's injury more attenuated, such an act does not by itself make the injury unforeseeable. "[A] defendant will be responsible for the damages which result, despite the intervention of another's act in the chain of causation, '[i]f the danger of an intervening negligent or criminal act should have been reasonably anticipated and protected against.' " *Lacy,* 424 A.2d at 323 (citation omitted); *see* RESTATEMENT (SECOND) OF TORTS §§ 302A, 302B (1965). If the intervening act is criminal, however, "the law requires that the foreseeability of the risk be more precisely shown." *Id.; see McKethean v. Washington Metropolitan Area Transit Authority,* 588 A.2d 708, 716–717 (D.C.1991) ("When an intervening act is criminal, this court demands a more heightened showing of foreseeability than if it were merely negligent.... The defendant will be liable only if the criminal act is so foreseeable that a duty arises to guard against it."); RESTATEMENT (SECOND) OF TORTS § 448 (1965).

The District presents two arguments in support of its assertion that Mr. Poe's actions were unforeseeable. First, the District stresses that Mr. Poe's conduct constituted a criminal act, in that he violated D.C.Code § 40–726 (1998), which deals with "Right-of-way at crosswalks," [4] when he struck Mr. Carlson in the crosswalk. We hold that even though Mr. Poe's actions violated a criminal statute, Mr. Carlson met his heightened burden of showing that Mr. Poe's actions were foreseeable in light of the District's negligence. First, Mr. Callow's expert testimony established that the lack of a traffic control device at the Sixth Street intersection would increase the risk of traffic accidents. Second, the fact that the District did not respond to the inoperative light for almost eight hours made it highly foreseeable that a negligent driver might strike a pedestrian crossing the street during that time.[5]

4. Section 40–726(a) reads:

> When official traffic-control signals are not in place or not in operation, the driver of a vehicle shall yield the right-of-way to a pedestrian crossing the roadway within any marked crosswalk or unmarked crosswalk at an intersection.
>
> A driver who fails to yield to a pedestrian in a crosswalk is subject to a fine of not more than $500 or imprisonment for not more than thirty days. D.C.Code § 40–726(c).

Section 40–726 has recently been recodified as D.C.Code § 50–2201.28 (2001), but the statutory language was not changed in the recodification.

5. Mr. Carlson was required to show that Mr. Poe's particular conduct was foreseeable, but he did not have to prove that the District could anticipate the precise injury or the particular method through which the harm would occur. *See Lacy,* 424 A.2d at 323. On the facts in this case, we think the jury could find it reasonably foreseeable (1) that there would be a negligent driver on Independence Avenue, a busy thoroughfare, during the eight-hour period when the traffic light was not working, and (2) that such a driver would be more likely to cause injury to a pedestrian in a crosswalk when no traffic control device, permanent or temporary, was present.

Finally, Mr. Poe's negligent driving was not an intentional act, and thus it was more foreseeable than if it had been.[6]

The District's second argument is that this case is controlled by our prior decision in *District of Columbia v. Freeman*, 477 A.2d 713 (D.C.1984). In *Freeman* an automobile struck a child walking across the street in a crosswalk. A warning sign, which was normally present, was missing. We held that the District was not liable because as a matter of law the absence of the warning sign was not a proximate cause of the accident. *Id.* at 715.

[8] *Freeman* is not applicable to this case. First, the court in *Freeman* did not reach the issue of foreseeability. *See Freeman*, 477 A.2d at 716 n. 10 ("we express no opinion as to whether [plaintiff's] injuries were a foreseeable consequence of the sign's absence"). Second, proximate cause, including the foreseeability component, is "nearly always" a question of fact for the jury, *Shu*, 57 A.2d at 295, and the facts of *Freeman* are different from the facts of this case. In *Freeman* we concluded that the "evidence, viewed in its most favorable light, simply could not allow the jury to conclude reasonably that the warning sign's absence played a central role in the incident." *Freeman*, 477 A.2d at 716 (footnote omitted). The reason for that conclusion was that "the missing sign had no independent legal significance [and] did not control traffic." *Id.* at 717. In this case, by contrast, the inoperative traffic light had "legal significance" because, if it had been working properly, it "would have placed approaching motorists under a legal duty to stop at the intersection," *id.*, and it did control traffic. Further, in *Freeman* the driver was aware that he was approaching an intersection because of the presence of an already stopped car. Mr. Poe, by contrast, was unaware that he was close to an intersection. On these facts a reasonable jury could find that a functioning traffic light, or even a temporary stop sign or a police officer, would have alerted Mr. Poe to the intersection and to the attendant duty to modify his driving accordingly.

We agree with Mr. Carlson that this case is more akin to *Wagshal v. District of Columbia*, 216 A.2d 172 (D.C.1966). In *Wagshal* an accident occurred at an intersection where a stop sign that normally controlled traffic was missing. We held that "[a] jury could reasonably find from the evidence presented in this case that a collision was the natural and probable consequence of the failure to repair the stop sign." *Id.* at 175; *see Johnson v. Strouse*, 697 F.Supp. 535, 539 (D.D.C.1988). Similarly, in this case, a jury could reasonably conclude that the accident was a foreseeable consequence of the District's failure to repair the non-functioning traffic light, or at least to replace it temporarily with an adequate substitute.

[9] The District argues that *Freeman* is dispositive here because a crosswalk was involved in both cases. Even though the traffic light was out, the District maintains, the crosswalk established a duty to stop. While it is true that the crosswalk established a duty to stop, *see Freeman*, 477 A.2d at 717, the relevant issue was whether a breach of that duty was foreseeable in the absence of a traffic control device at the Sixth Street intersection. Under *Wagshal*, the District is not liable for a decision not to install a traffic control device at an intersection, but once it does so, it may be liable if it fails to maintain that device.

6. The District argues that Mr. Poe's actions constituted "road rage" and were reckless. There is no basis in the evidence for the claim of "road rage," and in our view a jury could conclude from all the testimony that his driving was merely negligent, not reckless.

Wagshal, 216 A.2d at 174; *accord*, *Johnson*, 697 F.Supp. at 538. In this case the District determined that, in addition to the crosswalk, a traffic light with a pedestrian signal was necessary, a decision that it did not make in *Freeman*. This determination itself was evidence from which a jury could infer that an accident in the absence of such a signal was foreseeable. Mr. Callow's testimony about the need for traffic signals at that intersection was additional evidence supporting such an inference.

III

We hold that there was sufficient evidence for the jury to find that the District's failure to provide adequate traffic control measures when the traffic light was not functioning was a substantial factor in causing Mr. Carlson to be struck and injured by a car. We also hold that there was sufficient evidence for the jury to determine that the accident was a foreseeable consequence of the absence of any traffic control devices. The judgment is therefore

Affirmed.

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KUMHO TIRE CO., LTD., ET AL. *v.* CARMICHAEL ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 97–1709. Argued December 7, 1998—Decided March 23, 1999

When a tire on the vehicle driven by Patrick Carmichael blew out and the vehicle overturned, one passenger died and the others were injured. The survivors and the decedent's representative, respondents here, brought this diversity suit against the tire's maker and its distributor (collectively Kumho Tire), claiming that the tire that failed was defective. They rested their case in significant part upon the depositions of a tire failure analyst, Dennis Carlson, Jr., who intended to testify that, in his expert opinion, a defect in the tire's manufacture or design caused the blowout. That opinion was based upon a visual and tactile inspection of the tire and upon the theory that in the absence of at least two of four specific, physical symptoms indicating tire abuse, the tire failure of the sort that occurred here was caused by a defect. Kumho Tire moved to exclude Carlson's testimony on the ground that his methodology failed to satisfy Federal Rule of Evidence 702, which says: "If scientific, technical, or other specialized knowledge will assist the trier of fact . . . , a witness qualified as an expert . . . may testify thereto in the form of an opinion." Granting the motion (and entering summary judgment for the defendants), the District Court acknowledged that it should act as a reliability "gatekeeper" under *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U. S. 579, 589, in which this Court held that Rule 702 imposes a special obligation upon a trial judge to ensure that scientific testimony is not only relevant, but reliable. The court noted that *Daubert* discussed four factors—testing, peer review, error rates, and "acceptability" in the relevant scientific community—which might prove helpful in determining the reliability of a particular scientific theory or technique, *id.*, at 593–594, and found that those factors argued against the reliability of Carlson's methodology. On the plaintiffs' motion for reconsideration, the court agreed that *Daubert* should be applied flexibly, that its four factors were simply illustrative, and that other factors could argue in favor of admissibility. However, the court affirmed its earlier order because it found insufficient indications of the reliability of Carlson's methodology. In reversing, the Eleventh Circuit held that the District Court had erred as a matter of law in applying *Daubert*. Believing that *Daubert* was limited to the scientific context,

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the court held that the *Daubert* factors did not apply to Carlson's testimony, which it characterized as skill or experience based.

Held:

1. The *Daubert* factors may apply to the testimony of engineers and other experts who are not scientists. Pp. 147–153.

(a) The *Daubert* "gatekeeping" obligation applies not only to "scientific" testimony, but to all expert testimony. Rule 702 does not distinguish between "scientific" knowledge and "technical" or "other specialized" knowledge, but makes clear that any such knowledge might become the subject of expert testimony. It is the Rule's word "knowledge," not the words (like "scientific") that modify that word, that establishes a standard of evidentiary reliability. 509 U. S., at 589–590. *Daubert* referred only to "scientific" knowledge because that was the nature of the expertise there at issue. *Id.*, at 590, n. 8. Neither is the evidentiary rationale underlying *Daubert*'s "gatekeeping" determination limited to "scientific" knowledge. Rules 702 and 703 grant all expert witnesses, not just "scientific" ones, testimonial latitude unavailable to other witnesses on the assumption that the expert's opinion will have a reliable basis in the knowledge and experience of his discipline. *Id.*, at 592. Finally, it would prove difficult, if not impossible, for judges to administer evidentiary rules under which a "gatekeeping" obligation depended upon a distinction between "scientific" knowledge and "technical" or "other specialized" knowledge, since there is no clear line dividing the one from the others and no convincing need to make such distinctions. Pp. 147–149.

(b) A trial judge determining the admissibility of an engineering expert's testimony *may* consider one or more of the specific *Daubert* factors. The emphasis on the word "may" reflects *Daubert*'s description of the Rule 702 inquiry as "a flexible one." 509 U. S., at 594. The *Daubert* factors do *not* constitute a definitive checklist or test, *id.*, at 593, and the gatekeeping inquiry must be tied to the particular facts, *id.*, at 591. Those factors may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony. Some of those factors may be helpful in evaluating the reliability even of experience-based expert testimony, and the Court of Appeals erred insofar as it ruled those factors out in such cases. In determining whether particular expert testimony is reliable, the trial court should consider the specific *Daubert* factors where they are reasonable measures of reliability. Pp. 149–152.

(c) A court of appeals must apply an abuse-of-discretion standard when it reviews a trial court's decision to admit or exclude expert

testimony. *General Electric Co.* v. *Joiner*, 522 U. S. 136, 138–139. That standard applies as much to the trial court's decisions about how to determine reliability as to its ultimate conclusion. Thus, whether *Daubert*'s specific factors are, or are not, reasonable measures of reliability in a particular case is a matter that the law grants the trial judge broad latitude to determine. See *id.*, at 143. The Eleventh Circuit erred insofar as it held to the contrary. Pp. 152–153.

2. Application of the foregoing standards demonstrates that the District Court's decision not to admit Carlson's expert testimony was lawful. The District Court did not question Carlson's qualifications, but excluded his testimony because it initially doubted his methodology and then found it unreliable after examining the transcript in some detail and considering respondents' defense of it. The doubts that triggered the court's initial inquiry were reasonable, as was the court's ultimate conclusion that Carlson could not reliably determine the cause of the failure of the tire in question. The question was not the reliability of Carlson's methodology in general, but rather whether he could reliably determine the cause of failure of *the particular tire at issue.* That tire, Carlson conceded, had traveled far enough so that some of the tread had been worn bald, it should have been taken out of service, it had been repaired (inadequately) for punctures, and it bore some of the very marks that he said indicated, not a defect, but abuse. Moreover, Carlson's own testimony cast considerable doubt upon the reliability of both his theory about the need for at least two signs of abuse and his proposition about the significance of visual inspection in this case. Respondents stress that other tire failure experts, like Carlson, rely on visual and tactile examinations of tires. But there is no indication in the record that other experts in the industry use Carlson's *particular* approach or that tire experts normally make the very fine distinctions necessary to support his conclusions, nor are there references to articles or papers that validate his approach. Respondents' argument that the District Court too rigidly applied *Daubert* might have had some validity with respect to the court's initial opinion, but fails because the court, on reconsideration, recognized that the relevant reliability inquiry should be "flexible," and ultimately based its decision upon Carlson's failure to satisfy either *Daubert*'s factors *or any other* set of reasonable reliability criteria. Pp. 153–158.

131 F. 3d 1433, reversed.

BREYER, J., delivered the opinion of the Court, Parts I and II of which were unanimous, and Part III of which was joined by REHNQUIST, C. J., and O'CONNOR, SCALIA, KENNEDY, SOUTER, THOMAS, and GINSBURG,

Syllabus

JJ. SCALIA, J., filed a concurring opinion, in which O'CONNOR and THOMAS, JJ., joined, *post*, p. 158. STEVENS, J., filed an opinion concurring in part and dissenting in part, *post*, p. 159.

Joseph P. H. Babington argued the cause for petitioners. With him on the briefs were *Warren C. Herlong, Jr.*, *John T. Dukes*, *Kenneth S. Geller*, and *Alan E. Untereiner.*

Jeffrey P. Minear argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Waxman*, *Assistant Attorney General Hunger*, *Deputy Solicitor General Wallace*, *Anthony J. Steinmeyer*, and *John P. Schnitker.*

Sidney W. Jackson III argued the cause for respondents. With him on the brief were *Robert J. Hedge*, *Michael D. Hausfeld*, *Richard S. Lewis*, *Joseph M. Sellers*, and *Anthony Z. Roisman.**

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*Briefs of *amici curiae* urging reversal were filed for the American Automobile Manufacturers Association et al. by *Michael Hoenig*, *Phillip D. Brady*, and *Charles H. Lockwood II;* for the American Insurance Association et al. by *Mark F. Horning* and *Craig A. Berrington;* for the American Tort Reform Association et al. by *Victor E. Schwartz*, *Patrick W. Lee*, *Robert P. Charrow*, *Mark A. Behrens*, *Jan S. Amundson*, and *Quentin Riegel;* for the Product Liability Advisory Council, Inc., et al. by *Mary A. Wells*, *Robin S. Conrad*, and *Donald D. Evans;* for the Rubber Manufacturers Association by *Bert Black*, *Michael S. Truesdale*, and *Michael L. McAllister;* for the Washington Legal Foundation et al. by *Arvin Maskin*, *Theodore E. Tsekerides*, *Daniel J. Popeo*, and *Paul D. Kamenar;* for John Allen et al. by *Carter G. Phillips* and *David M. Levy;* and for Stephen N. Bobo et al. by *Martin S. Kaufman.*

Briefs of *amici curiae* urging affirmance were filed for the Association of Trial Lawyers of America by *Jeffrey Robert White* and *Mark S. Mandell;* for the Attorneys Information Exchange Group, Inc., by *Bruce J. McKee* and *Francis H. Hare, Jr.;* for Bona Shipping (U. S.), Inc., et al. by *Robert L. Klawetter* and *Michael F. Sturley;* for the International Association of Arson Investigators by *Kenneth M. Suggs;* for the National Academy of Forensic Engineers by *Alvin S. Weinstein*, *Larry E. Coben*, and *David V. Scott;* for Trial Lawyers for Public Justice, P. C., et al. by *Gerson H. Smoger*, *Arthur H. Bryant*, *Sarah Posner*, *William A. Rossbach*, and *Brian Wolfman;* and for Margaret A. Berger et al. by *Kenneth J. Chese-*

JUSTICE BREYER delivered the opinion of the Court.

In *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U. S. 579 (1993), this Court focused upon the admissibility of scientific expert testimony. It pointed out that such testimony is admissible only if it is both relevant and reliable. And it held that the Federal Rules of Evidence "assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Id.*, at 597. The Court also discussed certain more specific factors, such as testing, peer review, error rates, and "acceptability" in the relevant scientific community, some or all of which might prove helpful in determining the reliability of a particular scientific "theory or technique." *Id.*, at 593–594.

This case requires us to decide how *Daubert* applies to the testimony of engineers and other experts who are not scientists. We conclude that *Daubert*'s general holding—setting forth the trial judge's general "gatekeeping" obligation—applies not only to testimony based on "scientific" knowledge, but also to testimony based on "technical" and "other specialized" knowledge. See Fed. Rule Evid. 702. We also conclude that a trial court *may* consider one or more of the more specific factors that *Daubert* mentioned when doing so will help determine that testimony's reliability. But, as the Court stated in *Daubert*, the test of reliability is "flexible," and *Daubert*'s list of specific factors neither necessarily nor exclusively applies to all experts or in every case.

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bro, Edward J. Imwinkelried, Ms. Berger, pro se, Stephen A. Saltzburg, David G. Wirtes, Jr., Don Howarth, Suzelle M. Smith, Edward M. Ricci, C. Tab Turner, James L. Gilbert, and *David L. Perry.*

Briefs of *amici curiae* were filed for the Defense Research Institute by *Lloyd H. Milliken, Jr., Julia Blackwell Gelinas, Nelson D. Alexander,* and *Sandra Boyd Williams;* for the National Academy of Engineering by *Richard A. Meserve, Elliott Schulder,* and *Thomas L. Cubbage III;* and for Neil Vidmar et al. by *Ronald Simon, Turner W. Branch, Ronald Motley, Robert Habush,* and *M. Clay Alspaugh.*

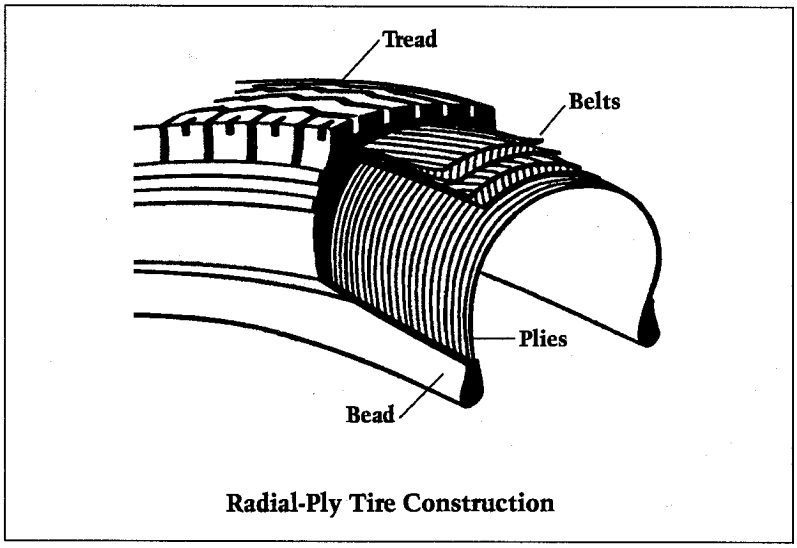
Rather, the law grants a district court the same broad latitude when it decides *how* to determine reliability as it enjoys in respect to its ultimate reliability determination. See *General Electric Co.* v. *Joiner*, 522 U. S. 136, 143 (1997) (courts of appeals are to apply "abuse of discretion" standard when reviewing district court's reliability determination). Applying these standards, we determine that the District Court's decision in this case—not to admit certain expert testimony—was within its discretion and therefore lawful.

I

On July 6, 1993, the right rear tire of a minivan driven by Patrick Carmichael blew out. In the accident that followed, one of the passengers died, and others were severely injured. In October 1993, the Carmichaels brought this diversity suit against the tire's maker and its distributor, whom we refer to collectively as Kumho Tire, claiming that the tire was defective. The plaintiffs rested their case in significant part upon deposition testimony provided by an expert in tire failure analysis, Dennis Carlson, Jr., who intended to testify in support of their conclusion.

Carlson's depositions relied upon certain features of tire technology that are not in dispute. A steel-belted radial tire like the Carmichaels' is made up of a "carcass" containing many layers of flexible cords, called "plies," along which (between the cords and the outer tread) are laid steel strips called "belts." Steel wire loops, called "beads," hold the cords together at the plies' bottom edges. An outer layer, called the "tread," encases the carcass, and the entire tire is bound together in rubber, through the application of heat and various chemicals. See generally, *e. g.*, J. Dixon, Tires, Suspension and Handling 68–72 (2d ed. 1996). The bead of the tire sits upon a "bead seat," which is part of the wheel assembly. That assembly contains a "rim flange," which extends over the bead and rests against the side of the

tire. See M. Mavrigian, Performance Wheels & Tires 81, 83 (1998) (illustrations).



Radial-Ply Tire Construction

A. Markovich, How To Buy and Care For Tires 4 (1994).

Carlson's testimony also accepted certain background facts about the tire in question. He assumed that before the blowout the tire had traveled far. (The tire was made in 1988 and had been installed some time before the Carmichaels bought the used minivan in March 1993; the Carmichaels had driven the van approximately 7,000 additional miles in the two months they had owned it.) Carlson noted that the tire's tread depth, which was $^{11}/_{32}$ of an inch when new, App. 242, had been worn down to depths that ranged from $^{3}/_{32}$ of an inch along some parts of the tire, to nothing at all along others. *Id.*, at 287. He conceded that the tire tread had at least two punctures which had been inadequately repaired. *Id.*, at 258–261, 322.

Despite the tire's age and history, Carlson concluded that a defect in its manufacture or design caused the blowout. He rested this conclusion in part upon three premises which,

for present purposes, we must assume are not in dispute: First, a tire's carcass should stay bound to the inner side of the tread for a significant period of time after its tread depth has worn away. *Id.*, at 208–209. Second, the tread of the tire at issue had separated from its inner steel-belted carcass prior to the accident. *Id.*, at 336. Third, this "separation" caused the blowout. *Ibid.*

Carlson's conclusion that a defect caused the separation, however, rested upon certain other propositions, several of which the defendants strongly dispute. First, Carlson said that if a separation is *not* caused by a certain kind of tire misuse called "overdeflection" (which consists of underinflating the tire or causing it to carry too much weight, thereby generating heat that can undo the chemical tread/carcass bond), then, ordinarily, its cause is a tire defect. *Id.*, at 193–195, 277–278. Second, he said that if a tire has been subject to sufficient overdeflection to cause a separation, it should reveal certain physical symptoms. These symptoms include (a) tread wear on the tire's shoulder that is greater than the tread wear along the tire's center, *id.*, at 211; (b) signs of a "bead groove," where the beads have been pushed too hard against the bead seat on the inside of the tire's rim, *id.*, at 196–197; (c) sidewalls of the tire with physical signs of deterioration, such as discoloration, *id.*, at 212; and/or (d) marks on the tire's rim flange, *id.*, at 219–220. Third, Carlson said that where he does not find *at least two* of the four physical signs just mentioned (and presumably where there is no reason to suspect a less common cause of separation), he concludes that a manufacturing or design defect caused the separation. *Id.*, at 223–224.

Carlson added that he had inspected the tire in question. He conceded that the tire to a limited degree showed greater wear on the shoulder than in the center, some signs of "bead groove," some discoloration, a few marks on the rim flange, and inadequately filled puncture holes (which can also cause heat that might lead to separation). *Id.*, at 256–257, 258–

261, 277, 303–304, 308. But, in each instance, he testified that the symptoms were not significant, and he explained why he believed that they did not reveal overdeflection. For example, the extra shoulder wear, he said, appeared primarily on one shoulder, whereas an overdeflected tire would reveal equally abnormal wear on both shoulders. *Id.*, at 277. Carlson concluded that the tire did not bear at least two of the four overdeflection symptoms, nor was there any less obvious cause of separation; and since neither overdeflection nor the punctures caused the blowout, a defect must have done so.

Kumho Tire moved the District Court to exclude Carlson's testimony on the ground that his methodology failed Rule 702's reliability requirement. The court agreed with Kumho that it should act as a *Daubert*-type reliability "gatekeeper," even though one might consider Carlson's testimony as "technical," rather than "scientific." See *Carmichael* v. *Samyang Tires, Inc.*, 923 F. Supp. 1514, 1521–1522 (SD Ala. 1996). The court then examined Carlson's methodology in light of the reliability-related factors that *Daubert* mentioned, such as a theory's testability, whether it "has been a subject of peer review or publication," the "known or potential rate of error," and the "degree of acceptance . . . within the relevant scientific community." 923 F. Supp., at 1520 (citing *Daubert*, 509 U. S., at 589–595). The District Court found that all those factors argued against the reliability of Carlson's methods, and it granted the motion to exclude the testimony (as well as the defendants' accompanying motion for summary judgment).

The plaintiffs, arguing that the court's application of the *Daubert* factors was too "inflexible," asked for reconsideration. And the court granted that motion. *Carmichael* v. *Samyang Tires, Inc.*, Civ. Action No. 93–0860–CB–S (SD Ala., June 5, 1996), App. to Pet. for Cert. 1c. After reconsidering the matter, the court agreed with the plaintiffs that *Daubert* should be applied flexibly, that its four factors were

simply illustrative, and that other factors could argue in favor of admissibility. It conceded that there may be widespread acceptance of a "visual-inspection method" for some relevant purposes. But the court found insufficient indications of the reliability of

> "the component of Carlson's tire failure analysis which most concerned the Court, namely, the methodology employed by the expert in analyzing the data obtained in the visual inspection, and the scientific basis, if any, for such an analysis." *Id.*, at 6c.

It consequently affirmed its earlier order declaring Carlson's testimony inadmissible and granting the defendants' motion for summary judgment.

The Eleventh Circuit reversed. See *Carmichael* v. *Samyang Tire, Inc.*, 131 F. 3d 1433 (1997). It "review[ed] . . . *de novo*" the "district court's legal decision to apply *Daubert.*" *Id.*, at 1435. It noted that "the Supreme Court in *Daubert* explicitly limited its holding to cover only the 'scientific context,'" adding that "a *Daubert* analysis" applies only where an expert relies "on the application of scientific principles," rather than "on skill- or experience-based observation." *Id.*, at 1435–1436. It concluded that Carlson's testimony, which it viewed as relying on experience, "falls outside the scope of *Daubert,*" that "the district court erred as a matter of law by applying *Daubert* in this case," and that the case must be remanded for further (non-*Daubert*-type) consideration under Rule 702. 131 F. 3d, at 1436.

Kumho Tire petitioned for certiorari, asking us to determine whether a trial court "may" consider *Daubert*'s specific "factors" when determining the "admissibility of an engineering expert's testimony." Pet. for Cert. i. We granted certiorari in light of uncertainty among the lower courts about whether, or how, *Daubert* applies to expert testimony that might be characterized as based not upon "scientific" knowledge, but rather upon "technical" or "other special-

ized" knowledge. Fed. Rule Evid. 702; compare, *e. g.*, *Watkins* v. *Telsmith, Inc.*, 121 F. 3d 984, 990–991 (CA5 1997), with, *e. g.*, *Compton* v. *Subaru of America, Inc.*, 82 F. 3d 1513, 1518–1519 (CA10), cert. denied, 519 U. S. 1042 (1996).

II

A

In *Daubert*, this Court held that Federal Rule of Evidence 702 imposes a special obligation upon a trial judge to "ensure that any and all scientific testimony . . . is not only relevant, but reliable." 509 U. S., at 589. The initial question before us is whether this basic gatekeeping obligation applies only to "scientific" testimony or to all expert testimony. We, like the parties, believe that it applies to all expert testimony. See Brief for Petitioners 19; Brief for Respondents 17.

For one thing, Rule 702 itself says:

> "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

This language makes no relevant distinction between "scientific" knowledge and "technical" or "other specialized" knowledge. It makes clear that any such knowledge might become the subject of expert testimony. In *Daubert*, the Court specified that it is the Rule's word "knowledge," not the words (like "scientific") that modify that word, that "establishes a standard of evidentiary reliability." 509 U. S., at 589–590. Hence, as a matter of language, the Rule applies its reliability standard to all "scientific," "technical," or "other specialized" matters within its scope. We concede that the Court in *Daubert* referred only to "scientific" knowledge. But as the Court there said, it referred to "sci-

entific" testimony "because that [wa]s the nature of the expertise" at issue. *Id.*, at 590, n. 8.

Neither is the evidentiary rationale that underlay the Court's basic *Daubert* "gatekeeping" determination limited to "scientific" knowledge. *Daubert* pointed out that Federal Rules 702 and 703 grant expert witnesses testimonial latitude unavailable to other witnesses on the "assumption that the expert's opinion will have a reliable basis in the knowledge and experience of his discipline." *Id.*, at 592 (pointing out that experts may testify to opinions, including those that are not based on firsthand knowledge or observation). The Rules grant that latitude to all experts, not just to "scientific" ones.

Finally, it would prove difficult, if not impossible, for judges to administer evidentiary rules under which a gatekeeping obligation depended upon a distinction between "scientific" knowledge and "technical" or "other specialized" knowledge. There is no clear line that divides the one from the others. Disciplines such as engineering rest upon scientific knowledge. Pure scientific theory itself may depend for its development upon observation and properly engineered machinery. And conceptual efforts to distinguish the two are unlikely to produce clear legal lines capable of application in particular cases. Cf. Brief for National Academy of Engineering as *Amicus Curiae* 9 (scientist seeks to understand nature while the engineer seeks nature's modification); Brief for Rubber Manufacturers Association as *Amicus Curiae* 14–16 (engineering, as an "'applied science,'" relies on "scientific reasoning and methodology"); Brief for John Allen et al. as *Amici Curiae* 6 (engineering relies upon "scientific knowledge and methods").

Neither is there a convincing need to make such distinctions. Experts of all kinds tie observations to conclusions through the use of what Judge Learned Hand called "general truths derived from . . . specialized experience." Hand, Historical and Practical Considerations Regarding Expert Testi-

mony, 15 Harv. L. Rev. 40, 54 (1901). And whether the specific expert testimony focuses upon specialized observations, the specialized translation of those observations into theory, a specialized theory itself, or the application of such a theory in a particular case, the expert's testimony often will rest "upon an experience confessedly foreign in kind to [the jury's] own." *Ibid.* The trial judge's effort to assure that the specialized testimony is reliable and relevant can help the jury evaluate that foreign experience, whether the testimony reflects scientific, technical, or other specialized knowledge.

We conclude that *Daubert*'s general principles apply to the expert matters described in Rule 702. The Rule, in respect to all such matters, "establishes a standard of evidentiary reliability." 509 U. S., at 590. It "requires a valid . . . connection to the pertinent inquiry as a precondition to admissibility." *Id.*, at 592. And where such testimony's factual basis, data, principles, methods, or their application are called sufficiently into question, see Part III, *infra*, the trial judge must determine whether the testimony has "a reliable basis in the knowledge and experience of [the relevant] discipline." 509 U. S., at 592.

B

Petitioners ask more specifically whether a trial judge determining the "admissibility of an engineering expert's testimony" *may* consider several more specific factors that *Daubert* said might "bear on" a judge's gatekeeping determination. Brief for Petitioners i. These factors include:

—Whether a "theory or technique . . . can be (and has been) tested";

—Whether it "has been subjected to peer review and publication";

—Whether, in respect to a particular technique, there is a high "known or potential rate of error" and whether there are "standards controlling the technique's operation"; and

> —Whether the theory or technique enjoys "'general acceptance'" within a "'relevant scientific community.'" 509 U. S., at 592–594.

Emphasizing the word "may" in the question, we answer that question yes.

Engineering testimony rests upon scientific foundations, the reliability of which will be at issue in some cases. See, *e. g.*, Brief for Stephen N. Bobo et al. as *Amici Curiae* 23 (stressing the scientific bases of engineering disciplines). In other cases, the relevant reliability concerns may focus upon personal knowledge or experience. As the Solicitor General points out, there are many different kinds of experts, and many different kinds of expertise. See Brief for United States as *Amicus Curiae* 18–19, and n. 5 (citing cases involving experts in drug terms, handwriting analysis, criminal *modus operandi*, land valuation, agricultural practices, railroad procedures, attorney's fee valuation, and others). Our emphasis on the word "may" thus reflects *Daubert*'s description of the Rule 702 inquiry as "a flexible one." 509 U. S., at 594. *Daubert* makes clear that the factors it mentions do *not* constitute a "definitive checklist or test." *Id.*, at 593. And *Daubert* adds that the gatekeeping inquiry must be "'tied to the facts'" of a particular "case." *Id.*, at 591 (quoting *United States* v. *Downing*, 753 F. 2d 1224, 1242 (CA3 1985)). We agree with the Solicitor General that "[t]he factors identified in *Daubert* may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony." Brief for United States as *Amicus Curiae* 19. The conclusion, in our view, is that we can neither rule out, nor rule in, for all cases and for all time the applicability of the factors mentioned in *Daubert*, nor can we now do so for subsets of cases categorized by category of expert or by kind of evidence. Too much depends upon the particular circumstances of the particular case at issue.

Daubert itself is not to the contrary. It made clear that its list of factors was meant to be helpful, not definitive. Indeed, those factors do not all necessarily apply even in every instance in which the reliability of scientific testimony is challenged. It might not be surprising in a particular case, for example, that a claim made by a scientific witness has never been the subject of peer review, for the particular application at issue may never previously have interested any scientist. Nor, on the other hand, does the presence of *Daubert*'s general acceptance factor help show that an expert's testimony is reliable where the discipline itself lacks reliability, as, for example, do theories grounded in any so-called generally accepted principles of astrology or necromancy.

At the same time, and contrary to the Court of Appeals' view, some of *Daubert*'s questions can help to evaluate the reliability even of experience-based testimony. In certain cases, it will be appropriate for the trial judge to ask, for example, how often an engineering expert's experience-based methodology has produced erroneous results, or whether such a method is generally accepted in the relevant engineering community. Likewise, it will at times be useful to ask even of a witness whose expertise is based purely on experience, say, a perfume tester able to distinguish among 140 odors at a sniff, whether his preparation is of a kind that others in the field would recognize as acceptable.

We must therefore disagree with the Eleventh Circuit's holding that a trial judge may ask questions of the sort *Daubert* mentioned only where an expert "relies on the application of scientific principles," but not where an expert relies "on skill- or experience-based observation." 131 F. 3d, at 1435. We do not believe that Rule 702 creates a schematism that segregates expertise by type while mapping certain kinds of questions to certain kinds of experts. Life and the legal cases that it generates are too complex to warrant so definitive a match.

To say this is not to deny the importance of *Daubert*'s gatekeeping requirement. The objective of that requirement is to ensure the reliability and relevancy of expert testimony. It is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field. Nor do we deny that, as stated in *Daubert*, the particular questions that it mentioned will often be appropriate for use in determining the reliability of challenged expert testimony. Rather, we conclude that the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable. That is to say, a trial court should consider the specific factors identified in *Daubert* where they are reasonable measures of the reliability of expert testimony.

C

The trial court must have the same kind of latitude in deciding *how* to test an expert's reliability, and to decide whether or when special briefing or other proceedings are needed to investigate reliability, as it enjoys when it decides *whether* that expert's relevant testimony is reliable. Our opinion in *Joiner* makes clear that a court of appeals is to apply an abuse-of-discretion standard when it "review[s] a trial court's decision to admit or exclude expert testimony." 522 U. S., at 138–139. That standard applies as much to the trial court's decisions about how to determine reliability as to its ultimate conclusion. Otherwise, the trial judge would lack the discretionary authority needed both to avoid unnecessary "reliability" proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted, and to require appropriate proceedings in the less usual or more complex cases where cause for questioning the expert's reliability arises. Indeed, the Rules seek to avoid "unjustifiable expense and delay" as part of their search for

"truth" and the "jus[t] determin[ation]" of proceedings. Fed. Rule Evid. 102. Thus, whether *Daubert*'s specific factors are, or are not, reasonable measures of reliability in a particular case is a matter that the law grants the trial judge broad latitude to determine. See *Joiner*, *supra*, at 143. And the Eleventh Circuit erred insofar as it held to the contrary.

III

We further explain the way in which a trial judge "may" consider *Daubert*'s factors by applying these considerations to the case at hand, a matter that has been briefed exhaustively by the parties and their 19 *amici*. The District Court did not doubt Carlson's qualifications, which included a masters degree in mechanical engineering, 10 years' work at Michelin America, Inc., and testimony as a tire failure consultant in other tort cases. Rather, it excluded the testimony because, despite those qualifications, it initially doubted, and then found unreliable, "the methodology employed by the expert in analyzing the data obtained in the visual inspection, and the scientific basis, if any, for such an analysis." Civ. Action No. 93–0860–CB–S (SD Ala., June 5, 1996), App. to Pet. for Cert. 6c. After examining the transcript in "some detail," 923 F. Supp., at 1518–1519, n. 4, and after considering respondents' defense of Carlson's methodology, the District Court determined that Carlson's testimony was not reliable. It fell outside the range where experts might reasonably differ, and where the jury must decide among the conflicting views of different experts, even though the evidence is "shaky." *Daubert*, 509 U. S., at 596. In our view, the doubts that triggered the District Court's initial inquiry here were reasonable, as was the court's ultimate conclusion.

For one thing, and contrary to respondents' suggestion, the specific issue before the court was not the reasonableness *in general* of a tire expert's use of a visual and tactile inspection to determine whether overdeflection had caused

the tire's tread to separate from its steel-belted carcass. Rather, it was the reasonableness of using such an approach, along with Carlson's particular method of analyzing the data thereby obtained, to draw a conclusion regarding *the particular matter to which the expert testimony was directly relevant.* That matter concerned the likelihood that a defect in the tire at issue caused its tread to separate from its carcass. The tire in question, the expert conceded, had traveled far enough so that some of the tread had been worn bald; it should have been taken out of service; it had been repaired (inadequately) for punctures; and it bore some of the very marks that the expert said indicated, not a defect, but abuse through overdeflection. See *supra,* at 143–144; App. 293–294. The relevant issue was whether the expert could reliably determine the cause of *this* tire's separation.

Nor was the basis for Carlson's conclusion simply the general theory that, in the absence of evidence of abuse, a defect will normally have caused a tire's separation. Rather, the expert employed a more specific theory to establish the existence (or absence) of such abuse. Carlson testified precisely that in the absence of *at least two* of four signs of abuse (proportionately greater tread wear on the shoulder; signs of grooves caused by the beads; discolored sidewalls; marks on the rim flange), he concludes that a defect caused the separation. And his analysis depended upon acceptance of a further implicit proposition, namely, that his visual and tactile inspection could determine that the tire before him had not been abused despite some evidence of the presence of the very signs for which he looked (and two punctures).

For another thing, the transcripts of Carlson's depositions support both the trial court's initial uncertainty and its final conclusion. Those transcripts cast considerable doubt upon the reliability of both the explicit theory (about the need for two signs of abuse) and the implicit proposition (about the significance of visual inspection in this case). Among other things, the expert could not say whether the tire had trav-

eled more than 10, or 20, or 30, or 40, or 50 thousand miles, adding that 6,000 miles was "about how far" he could "say with any certainty." *Id.*, at 265. The court could reasonably have wondered about the reliability of a method of visual and tactile inspection sufficiently precise to ascertain with some certainty the abuse-related significance of minute shoulder/center relative tread wear differences, but insufficiently precise to tell "with any certainty" from the tread wear whether a tire had traveled less than 10,000 or more than 50,000 miles. And these concerns might have been augmented by Carlson's repeated reliance on the "subjective[ness]" of his mode of analysis in response to questions seeking specific information regarding how he could differentiate between a tire that actually had been overdeflected and a tire that merely looked as though it had been. *Id.*, at 222, 224–225, 285–286. They would have been further augmented by the fact that Carlson said he had inspected the tire itself for the first time the morning of his first deposition, and then only for a few hours. (His initial conclusions were based on photographs.) *Id.*, at 180.

Moreover, prior to his first deposition, Carlson had issued a signed report in which he concluded that the tire had "not been . . . overloaded or underinflated," not because of the absence of "two of four" signs of abuse, but simply because "the rim flange impressions . . . were normal." *Id.*, at 335–336. That report also said that the "tread depth remaining was $\frac{3}{32}$ inch," *id.*, at 336, though the opposing expert's (apparently undisputed) measurements indicate that the tread depth taken at various positions around the tire actually ranged from $\frac{5}{32}$ of an inch to $\frac{4}{32}$ of an inch, with the tire apparently showing greater wear along *both* shoulders than along the center, *id.*, at 432–433.

Further, in respect to one sign of abuse, bead grooving, the expert seemed to deny the sufficiency of his own simple visual-inspection methodology. He testified that most tires have some bead groove pattern, that where there is reason

to suspect an abnormal bead groove he would ideally "look at a lot of [similar] tires" to know the grooving's significance, and that he had not looked at many tires similar to the one at issue. *Id.*, at 212–213, 214, 217.

Finally, the court, after looking for a defense of Carlson's methodology as applied in these circumstances, found no convincing defense. Rather, it found (1) that "none" of the *Daubert* factors, including that of "general acceptance" in the relevant expert community, indicated that Carlson's testimony was reliable, 923 F. Supp., at 1521; (2) that its own analysis "revealed no countervailing factors operating in favor of admissibility which could outweigh those identified in *Daubert*," App. to Pet. for Cert. 4c; and (3) that the "parties identified no such factors in their briefs," *ibid.* For these three reasons *taken together*, it concluded that Carlson's testimony was unreliable.

Respondents now argue to us, as they did to the District Court, that a method of tire failure analysis that employs a visual/tactile inspection is a reliable method, and they point both to its use by other experts and to Carlson's long experience working for Michelin as sufficient indication that that is so. But no one denies that an expert might draw a conclusion from a set of observations based on extensive and specialized experience. Nor does anyone deny that, as a general matter, tire abuse may often be identified by qualified experts through visual or tactile inspection of the tire. See Affidavit of H. R. Baumgardner 1–2, cited in Brief for National Academy of Forensic Engineers as *Amicus Curiae* 16 (Tire engineers rely on visual examination and process of elimination to analyze experimental test tires). As we said before, *supra*, at 153–154, the question before the trial court was specific, not general. The trial court had to decide whether this particular expert had sufficient specialized knowledge to assist the jurors "in deciding the particular issues in the case." 4 J. McLaughlin, Weinstein's Federal Evidence ¶ 702.05[1], p. 702–33 (2d ed. 1998); see also Advisory

Committee's Note on Proposed Fed. Rule Evid. 702, Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and Evidence: Request for Comment 126 (1998) (stressing that district courts must "scrutinize" whether the "principles and methods" employed by an expert "have been properly applied to the facts of the case").

The particular issue in this case concerned the use of Carlson's two-factor test and his related use of visual/tactile inspection to draw conclusions on the basis of what seemed small observational differences. We have found no indication in the record that other experts in the industry use Carlson's two-factor test or that tire experts such as Carlson normally make the very fine distinctions about, say, the symmetry of comparatively greater shoulder tread wear that were necessary, on Carlson's own theory, to support his conclusions. Nor, despite the prevalence of tire testing, does anyone refer to any articles or papers that validate Carlson's approach. Cf. Bobo, Tire Flaws and Separations, in Mechanics of Pneumatic Tires 636–637 (S. Clark ed. 1981); C. Schnuth, R. Fuller, G. Follen, G. Gold, & J. Smith, Compression Grooving and Rim Flange Abrasion as Indicators of Over-Deflected Operating Conditions in Tires, presented to Rubber Division of the American Chemical Society, Oct. 21–24, 1997; J. Walter & R. Kiminecz, Bead Contact Pressure Measurements at the Tire-Rim Interface, presented to the Society of Automotive Engineers, Inc., Feb. 24–28, 1975. Indeed, no one has argued that Carlson himself, were he still working for Michelin, would have concluded in a report to his employer that a similar tire was similarly defective on grounds identical to those upon which he rested his conclusion here. Of course, Carlson himself claimed that his method was accurate, but, as we pointed out in *Joiner*, "nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." 522 U. S., at 146.

Respondents additionally argue that the District Court too rigidly applied *Daubert*'s criteria. They read its opinion to hold that a failure to satisfy any one of those criteria automatically renders expert testimony inadmissible. The District Court's initial opinion might have been vulnerable to a form of this argument. There, the court, after rejecting respondents' claim that Carlson's testimony was "exempted from *Daubert*-style scrutiny" because it was "technical analysis" rather than "scientific evidence," simply added that "none of the four admissibility criteria outlined by the *Daubert* court are satisfied." 923 F. Supp., at 1521. Subsequently, however, the court granted respondents' motion for reconsideration. It then explicitly recognized that the relevant reliability inquiry "should be 'flexible,'" that its "'overarching subject [should be] . . . validity' and reliability," and that "*Daubert* was intended neither to be exhaustive nor to apply in every case." App. to Pet. for Cert. 4c (quoting *Daubert*, 509 U. S., at 594–595). And the court ultimately based its decision upon Carlson's failure to satisfy either *Daubert*'s factors *or any other* set of reasonable reliability criteria. In light of the record as developed by the parties, that conclusion was within the District Court's lawful discretion.

In sum, Rule 702 grants the district judge the discretionary authority, reviewable for its abuse, to determine reliability in light of the particular facts and circumstances of the particular case. The District Court did not abuse its discretionary authority in this case. Hence, the judgment of the Court of Appeals is

Reversed.

JUSTICE SCALIA, with whom JUSTICE O'CONNOR and JUSTICE THOMAS join, concurring.

I join the opinion of the Court, which makes clear that the discretion it endorses—trial-court discretion in choosing the manner of testing expert reliability—is not discretion to

abandon the gatekeeping function. I think it worth adding that it is not discretion to perform the function inadequately. Rather, it is discretion to choose among *reasonable* means of excluding expertise that is *fausse* and science that is junky. Though, as the Court makes clear today, the *Daubert* factors are not holy writ, in a particular case the failure to apply one or another of them may be unreasonable, and hence an abuse of discretion.

JUSTICE STEVENS, concurring in part and dissenting in part.

The only question that we granted certiorari to decide is whether a trial judge "[m]ay . . . consider the four factors set out by this Court in *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U. S. 579 (1993), in a Rule 702 analysis of admissibility of an engineering expert's testimony." Pet. for Cert. i. That question is fully and correctly answered in Parts I and II of the Court's opinion, which I join.

Part III answers the quite different question whether the trial judge abused his discretion when he excluded the testimony of Dennis Carlson. Because a proper answer to that question requires a study of the record that can be performed more efficiently by the Court of Appeals than by the nine Members of this Court, I would remand the case to the Eleventh Circuit to perform that task. There are, of course, exceptions to most rules, but I firmly believe that it is neither fair to litigants nor good practice for this Court to reach out to decide questions not raised by the certiorari petition. See *General Electric Co.* v. *Joiner*, 522 U. S. 136, 150–151 (1997) (STEVENS, J., concurring in part and dissenting in part).

Accordingly, while I do not feel qualified to disagree with the well-reasoned factual analysis in Part III of the Court's opinion, I do not join that Part, and I respectfully dissent from the Court's disposition of the case.

PACIFIC REPORTER

VOL. 199, SECOND SERIES

33 Cal.2d 80

SUMMERS v. TICE et al.

L. A. 20650, 20651.

Supreme Court of California, in Bank.

Nov. 17, 1948.

Rehearing Denied Dec. 16, 1948.

1. Weapons ⇐18(2)

Evidence that defendants shot uphill at a quail in the direction of plaintiff, though knowing his location, authorized finding of negligence.

2. Weapons ⇐18(1)

Members of a hunting party do not necessarily assume risk of their companions' negligence.

3. Weapons ⇐18(1)

Where plaintiff suggested that all members of hunting party "stay in line" while hunting, and went uphill at right angle to hunting line, but cautioned other hunters to use care, and other hunters knew plaintiff's position, court could find that plaintiff did not act negligently nor assume risk of being shot by other hunters.

4. Weapons ⇐18(2)

Where evidence did not clearly show which of two defendants' shot struck plaintiff, finding that pellets lodged in plaintiff's eye and lip as result of shots fired "by defendants and each of them" was a sufficient finding that defendants were jointly liable and that negligence of both was cause of injury.

5. Weapons ⇐18(2)

Where evidence showed that two defendants, while hunting, shot at about same time at quail and that two birdshot struck plaintiff, who was in the hunting party, burden of proving which defendant's shot struck plaintiff shifted to defendants, and in absence of further evidence judgment against both defendants was proper.

6. Damages ⇐163(1)

If defendants are independent tort feasors and thus each liable for damage caused by him alone, but matter of apportionment is incapable of proof, innocent wronged party should not be deprived of redress but wrongdoers should be left to work out between themselves any apportionment.

7. Weapons ⇐18(1)

Where member of hunting party was shot when two other hunters shot at quail at about the same time, each was liable for the whole damage whether they be deemed to have acted in concert or independently, in absence of direct evidence as to which hunter's shot struck plaintiff.

Appeal from Superior Court, Los Angeles County; John A. Holland, Judge pro tem.

Actions by Charles A. Summers against Harold W. Tice and against Ernest Simonson for negligently shooting plaintiff while hunting. From judgments for plaintiff, defendants appeal, and the appeals were consolidated pursuant to stipulation.

Affirmed.

Prior opinion, 190 P.2d 963.

Gale & Purciel, of Bell, Joseph D. Taylor, of Los Angeles, and Wm. A. Wittman, of South Gate, for appellants.

Werner O. Graf, of Los Angeles, for respondent.

CARTER, Justice.

Each of the two defendants appeals from a judgment against them in an action for personal injuries. Pursuant to stipulation the appeals have been consolidated.

Plaintiff's action was against both defendants for an injury to his right eye and

face as the result of being struck by bird shot discharged from a shotgun. The case was tried by the court without a jury and the court found that on November 20, 1945, plaintiff and the two defendants were hunting quail on the open range. Each of the defendants was armed with a 12 gauge shotgun loaded with shells containing 7½ size shot. Prior to going hunting plaintiff discussed the hunting procedure with defendants, indicating that they were to exercise care when shooting and to "keep in line." In the course of hunting plaintiff proceeded up a hill, thus placing the hunters at the points of a triangle. The view of defendants with reference to plaintiff was unobstructed and they knew his location. Defendant Tice flushed a quail which rose in flight to a ten foot elevation and flew between plaintiff and defendants. Both defendants shot at the quail, shooting in plaintiff's direction. At that time defendants were 75 yards from plaintiff. One shot struck plaintiff in his eye and another in his upper lip. Finally it was found by the court that as the direct result of the shooting by defendants the shots struck plaintiff as above mentioned and that defendants were negligent in so shooting and plaintiff was not contributorily negligent.

[1] First, on the subject of negligence, defendant Simonson contends that the evidence is insufficient to sustain the finding on that score, but he does not point out wherein it is lacking. There is evidence that both defendants, at about the same time or one immediately after the other, shot at a quail and in so doing shot toward plaintiff who was uphill from them, and that they knew his location. That is sufficient from which the trial court could conclude that they acted with respect to plaintiff other than as persons of ordinary prudence. The issue was one of fact for the trial court. See, Rudd v. Byrnes, 156 Cal. 636, 105 P. 957, 26 L.R.A., N.S., 134, 20 Ann. Cas. 124.

Defendant Tice states in his opening brief, "we have decided not to argue the insufficiency of negligence on the part of defendant Tice." It is true he states in his answer to plaintiff's petition for a hearing in this court that he did not concede this point but he does not argue it. Nothing more need be said on the subject.

[2, 3] Defendant Simonson urges that plaintiff was guilty of contributory negligence and assumed the risk as a matter of law. He cites no authority for the proposition that by going on a hunting party the various hunters assume the risk of negligence on the part of their companions. Such a tenet is not reasonable. It is true that plaintiff suggested that they all "stay in line," presumably abreast, while hunting, and he went uphill at somewhat of a right angle to the hunting line, but he also cautioned that they use care, and defendants knew plaintiff's position. We hold, therefore, that the trial court was justified in finding that he did not assume the risk or act other than as a person of ordinary prudence under the circumstances. See, Anthony v. Hobbie, 25 Cal.2d 814, 818, 155 P. 2d 826; Rudd v. Byrnes, supra. None of the cases cited by Simonson are in point.

The problem presented in this case is whether the judgment against both defendants may stand. It is argued by defendants that they are not joint tort feasors, and thus jointly and severally liable, as they were not acting in concert, and that there is not sufficient evidence to show which defendant was guilty of the negligence which caused the injuries—the shooting by Tice or that by Simonson. Tice argues that there is evidence to show that the shot which struck plaintiff came from Simonson's gun because of admissions allegedly made by him to third persons and no evidence that they came from his gun. Further in connection with the latter contention, the court failed to find on plaintiff's allegation in his complaint that he did not know which one was at fault—did not find which defendant was guilty of the negligence which caused the injuries to plaintiff.

[4] Considering the last argument first, we believe it is clear that the court sufficiently found on the issue that defendants were jointly liable and that thus the negligence of both was the cause of the injury or to that legal effect. It found that both defendants were negligent and "That as a direct and proximate result of the shots fired by *defendants, and each of them,* a

birdshot pellet was caused to and did lodge in plaintiff's right eye and that another birdshot pellet was caused to and did lodge in plaintiff's upper lip." In so doing the court evidently did not give credence to the admissions of Simonson to third persons that he fired the shots, which it was justified in doing. It thus determined that the negligence of both defendants was the legal cause of the injury—or that both were responsible. Implicit in such finding is the assumption that the court was unable to ascertain whether the shots were from the gun of one defendant or the other or one shot from each of them. The one shot that entered plaintiff's eye was the major factor in assessing damages and that shot could not have come from the gun of both defendants. It was from one or the other only.

It has been held that where a group of persons are on a hunting party, or otherwise engaged in the use of firearms, and two of them are negligent in firing in the direction of a third person who is injured thereby, both of those so firing are liable for the injury suffered by the third person, although the negligence of only one of them could have caused the injury. Moore v. Foster, Miss., 180 So. 73; Oliver v. Miles, Miss., 110 So. 666, 50 A.L.R. 357; Reyher v. Mayne, 90 Colo. 856, 10 P.2d 1109; Benson v. Ross, 143 Mich. 452, 106 N.W. 1120, 114 Am.St.Rep. 675. The same rule has been applied in criminal cases (State v. Newberg, 129 Or. 564, 278 P. 568, 63 A.L.R. 1225), and both drivers have been held liable for the negligence of one where they engaged in a racing contest causing an injury to a third person. Saisa v. Lilja, 1 Cir., 76 F.2d 380. These cases speak of the action of defendants as being in concert as the ground of decision, yet it would seem they are straining that concept and the more reasonable basis appears in Oliver v. Miles, supra. There two persons were hunting together. Both shot at some partridges and in so doing shot across the highway injuring plaintiff who was travelling on it. The court stated they were acting in concert and thus both were liable. The court then stated [110 So. 668]: "We think that * * * each is liable for the resulting injury to the boy, although no one can say definitely who actually shot him. *To hold otherwise would be to exonerate both from liability, although each was negligent, and the injury resulted from such negligence.*" [Emphasis added.] 110 So. p. 668. It is said in the Restatement: "For harm resulting to a third person from the tortious conduct of another, a person is liable if he * * * (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person." (Rest., Torts, sec. 876(b) (c).) Under subsection (b) the example is given: "A and B are members of a hunting party. Each of them in the presence of the other shoots across a public road at an animal, this being negligent as to persons on the road. A hits the animal. B's bullet strikes C, a traveler on the road. A is liable to C." (Rest., Torts, Sec. 876(b), Com., Illus. 3.) An illustration given under subsection (c) is the same as above except the factor of both defendants shooting is missing and joint liability is not imposed. It is further said that: "If two forces are actively operating, one because of the actor's negligence, the other not because of any misconduct on his part, and each of itself is sufficient to bring about harm to another, the actor's negligence may be held by the jury to be a substantial factor in bringing it about." (Rest., Torts, sec. 432.) Dean Wigmore has this to say: "When two or more persons by their acts are possibly the sole cause of a harm, or when two or more acts of the same person are possibly the sole cause, and the plaintiff has introduced evidence that the one of the two persons, or the one of the same person's two acts, is culpable, then the defendant has the burden of proving that the other person, or his other act, was the sole cause of the harm. (b) * * * The real reason for the rule that each joint tortfeasor is responsible for the whole damage is the practical unfairness of denying the injured person redress simply because he cannot prove how much damage each did, when it is certain that between them they did all; let them be the

ones to apportion it among themselves. Since, then, the difficulty of proof is the reason, the rule should apply whenever the harm has plural causes, and not merely when they acted in conscious concert. * * *" (Wigmore, Select Cases on the Law of Torts, sec. 153.) Similarly Professor Carpenter has said: "[Suppose] the case where A and B independently shoot at C and but one bullet touches C's body. In such case, such proof as is ordinarily required that either A or B shot C, of course fails. It is suggested that there should be a relaxation of the proof required of the plaintiff * * * where the injury occurs as the result of one where more than one independent force is operating, and it is impossible to determine that the force set in operation by defendant did not in fact constitute a cause of the damage, and where it may have caused the damage, but the plaintiff is unable to establish that it was a cause." (20 Cal.L.Rev. 406.)

[5] When we consider the relative position of the parties and the results that would flow if plaintiff was required to pin the injury on one of the defendants only, a requirement that the burden of proof on that subject be shifted to defendants becomes manifest. They are both wrongdoers—both negligent toward plaintiff. They brought about a situation where the negligence of one of them injured the plaintiff, hence it should rest with them each to absolve himself if he can. The injured party has been placed by defendants in the unfair position of pointing to which defendant caused the harm. If one can escape the other may also and plaintiff is remediless. Ordinarily defendants are in a far better position to offer evidence to determine which one caused the injury. This reasoning has recently found favor in this Court. In a quite analogous situation this Court held that a patient injured while unconscious on an operating table in a hospital could hold all or any of the persons who had any connection with the operation even though he could not select the particular acts by the particular person which led to his disability. Ybarra v. Spangard, 25 Cal. 2d 486, 154 P.2d 687, 162 A.L.R. 1258. There the Court was considering whether the patient could avail himself of res ipsa loquitur, rather than where the burden of proof lay, yet the effect of the decision is that plaintiff has made out a case when he has produced evidence which gives rise to an inference of negligence which was the proximate cause of the injury. It is up to defendants to explain the cause of the injury. It was there said: "If the doctrine is to continue to serve a useful purpose, we should not forget that 'the particular force and justice of the rule, regarded as a presumption throwing upon the party charged the duty of producing evidence, consists in the circumstance that the chief evidence of the true cause, whether culpable or innocent, is practically accessible to him but inaccessible to the injured person.'" 25 Cal. 2d at page 490, 154 P.2d at page 689, 162 A.L.R. 1258. Similarly in the instant case plaintiff is not able to establish which of defendants caused his injury.

The foregoing discussion disposes of the authorities cited by defendants such as Kraft v. Smith, 24 Cal.2d 124, 148 P.2d 23, and Hernandez v. Southern California Gas Co., 213 Cal. 384, 2 P.2d 360, stating the general rule that one defendant is not liable for the independent tort of the other defendant, or that ordinarily the plaintiff must show a causal connection between the negligence and the injury. There was an entire lack of such connection in the Hernandez case and there were not several negligent defendants, one of whom must have caused the injury.

Defendants rely upon Christensen v. Los Angeles Electrical Supply Co., 112 Cal.App. 629, 297 P. 614, holding that a defendant is not liable where he negligently knocked down with his car a pedestrian and a third person then ran over the prostrate person. That involves the question of intervening cause which we do not have here. Moreover it is out of harmony with the current rule on that subject and was properly questioned in Hill v. Peres, 136 Cal.App. 132, 28 P.2d 946 (hearing in this Court denied), and must be deemed disapproved. See, Mosley v. Arden Farms Co., 26 Cal.2d 213, 157 P.2d 372, 158 A.L.R. 872; Sawyer v. Southern California Gas Co., 206 Cal. 366, 274 P. 544; 6 Cal.Jur. Ten Yr.Supp., Automobiles, sec. 349; 19 Cal.Jur. 570-572.

Cases are cited for the proposition that where two or more tort feasors acting independently of each other cause an injury to plaintiff, they are not joint tort feasors and plaintiff must establish the portion of the damage caused by each, even though it is impossible to prove the portion of the injury caused by each. See, Slater v. Pacific American Oil Co., 212 Cal. 648, 300 P. 31; Miller v. Highland Ditch Co., 87 Cal. 430, 25 P. 550, 22 Am.St.Rep. 254; People v. Gold Run D. & M. Co., 66 Cal. 138, 4 P. 1152, 56 Am.Rep. 80; Wade v. Thorsen, 5 Cal.App.2d 706, 43 P.2d 592; California Orange Co. v. Riverside P. C. Co., 50 Cal. App. 522, 195 P. 694; City of Oakland v. Pacific Gas & E. Co., 47 Cal.App.2d 444, 118 P.2d 328. In view of the foregoing discussion it is apparent that defendants in cases like the present one may be treated as liable on the same basis as joint tort feasors, and hence the last cited cases are distinguishable inasmuch as they involve independent tort feasors.

[6] In addition to that, however, it should be pointed out that the same reasons of policy and justice shift the burden to each of defendants to absolve himself if he can—relieving the wronged person of the duty of apportioning the injury to a particular defendant, apply here where we are concerned with whether plaintiff is required to supply evidence for the apportionment of damages. If defendants are independent tort feasors and thus each liable for the damage caused by him alone, and, at least, where the matter of apportionment is incapable of proof, the innocent wronged party should not be deprived of his right to redress. The wrongdoers should be left to work out between themselves any apportionment. See, Colonial Ins. Co., v. Industrial Acc. Com., 29 Cal.2d 79, 172 P.2d 884. Some of the cited cases refer to the difficulty of apportioning the burden of damages between the independent tort feasors, and say that where factually a correct division cannot be made, the trier of fact may make it the best it can, which would be more or less a guess, stressing the factor that the wrongdoers are not in a position to complain of uncertainty. California Orange Co. v. Riverside P. C. Co., supra.

[7] It is urged that plaintiff now has changed the theory of his case in claiming a concert of action; that he did not plead or prove such concert. From what has been said it is clear that there has been no change in theory. The joint liability, as well as the lack of knowledge as to which defendant was liable, was pleaded and the proof developed the case under either theory. We have seen that for the reasons of policy discussed herein, the case is based upon the legal proposition that, under the circumstances here presented, each defendant is liable for the whole damage whether they are deemed to be acting in concert or independently.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

31 Cal.2d 868

Walter TROMBLEY, Petitioner, v. JUSTICE'S COURT OF TOWNSHIP 15, COUNTY OF CONTRA COSTA et al., Respondents.

S. F. 17549.

Supreme Court of California, in Bank.

May 3, 1948.

Proceeding for a writ of certiorari.

Judgment affirmed.

Francis T. Cornish, of Berkeley, for petitioner.

Fred N. Howser, Atty. Gen., Herbert E. Wenig, Deputy Atty. Gen., Francis W. Collins, Dist. Atty., of Martinez, and Douglas M. Quinlan, Deputy Dist. Atty., of Richmond, for respondents.

Samuel S. Berman, of San Francisco, Harold J. Fisher, of Los Angeles, and Leon E. Gold, of San Francisco, as amici curiæ on behalf of respondents.

als to this effect offered to the convention, and without doubt discussion and debate upon the subject would have followed.

Making the matter of necessity for a state highway a question to be determined by a court or some similar tribunal, with its appeals and delays, was, in my opinion, farthest from the minds of the members of the convention.

For the reasons above stated, I am of the opinion that the act under consideration is not in conflict with any provision of the Constitution, and that it is valid.

The decree will be affirmed, but, as the question involved is a public one, no costs will be awarded.

FELLOWS, J., concurred with SNOW, J.

KINGSTON v. CHICAGO & N. W. RY. CO.

(Supreme Court of Wisconsin. Jan. 11, 1927.)

1. **Negligence ⟹15—Each tort-feasor is responsible for entire damage from concurring acts of negligence.**

Each of two or more joint tort-feasors, whose concurring acts of negligence result in injury, is responsible for entire damage.

2. **Negligence ⟹15—Each wrong-doer is responsible for entire damage where separate acts of negligence concur in producing injury and either would produce it alone.**

Where two causes, each attributable to negligence of responsible person, concur in producing injury, and either cause would produce it regardless of other, each person is liable for entire damage whether concurrence be intentional, actual, or constructive, since each adopts conduct of his coactor, and damages cannot be apportioned.

3. **Negligence ⟹121(4)—Defendant must show that fire caused by him which united with another was not proximate cause of damage.**

Where forest fire, caused by defendant, unites with another of natural origin or of much greater proportions, and thereafter destroys property, defendant has burden of showing that fire set by him was not proximate cause of damage.

4. **Railroads ⟹464—Railroad held liable for entire damage, where forest fire caused by it united with another fire.**

Where defendant railroad caused one forest fire, which united with another fire of unknown human origin of equal rank, and combined fires destroyed plaintiff's property, defendant *held* liable for entire damage.

Appeal from Circuit Court, Shawano County; Edgar V. Werner, Judge.

Action by W. J. Kingston against the Chicago & Northwestern Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.—[By Editorial Staff.]

Action to recover damages caused by a fire. One main line of defendant's railroad extends in a general north and south direction from Gillett, Wis., to Saunders, Mich., through Bonita. A branch line extends westerly from Bonita to Oconto Company's logging read. The branch runs generally in an east and west direction, and is about ten miles in length. La Fortune's spur is on the branch about two miles west of Bonita. The spur consists of a side track on the south side of and parallel with the branch track. Plaintiff's property was located on a landing, known as Kingston's landing and as the cedar yard, adjacent to and south of the spur track.

On April 29, 1925, a forest fire was burning about one-half to one mile northwesterly, nearly west, of this landing. On the same date another fire was burning about four miles northeast of the landing. On April 30th these two fires united in a region about 940 feet north of the railroad track. The line of fire thus formed after the union was about 40 or 50 rods east and west. It then traveled south and burned plaintiff's property, consisting of logs, timber, and poles on this landing or in the cedar yard. The plaintiff claims that both fires which united were set by the railroad company; one by a locomotive on its main line running north of Bonita, the other by a locomotive on the branch about three miles west of Bonita and about a mile in a westerly direction from the spur.

The jury found that both fires were set by locomotives belonging to the defendant company, and that both fires constituted a proximate cause of the damage. It further appears that, in an effort to save plaintiff's property in the afternoon of April 30th, when the united fire was bearing down upon this property, a crew of men had gathered at the spur with a view of assisting in fighting the fire. A brother of the plaintiff was present, acting for and representing the plaintiff. There was talk of backfiring, but Kingston, representing the plaintiff, said that he did not want to back fire except as a last resort. Among these men were certain section men in the employ of the defendant, who, it appears, were there for the purpose of fighting the fire. Finally Kingston gave the word to backfire. He, with others, started a backfire in a westerly direction. At a point about 70 feet from where Kingston started his backfire, three section men started a backfire which they carried in an easterly direction. This backfire was started upon or very close to the line of defendant's right of way. The backfire started by the section men got beyond their control, ran across the track and into plaintiff's logs and timber. The jury also found that the section men were negligent in permitting the backfire to get beyond their control, and

such negligence constituted a proximate cause of the damage.

Judgment was rendered for the plaintiff for the amount of the damages as found by the jury, and the defendant brings this appeal.

J. F. Baker, and Llewellyn Cole, both of Milwaukee, for appellant.

Winter & Winter, of Shawano, for respondent.

OWEN, J. The jury found that both fires were set by sparks emitted from locomotives on and over defendant's right of way. Appellant contends that there is no evidence to support the finding that either fire was so set. We have carefully examined the record, and have come to the conclusion that the evidence does support the finding that the northeast fire was set by sparks emitted from a locomotive then being run on and over the right of way of defendant's main line. We conclude, however, that the evidence does not support the finding that the northwest fire was set by sparks emitted from defendant's locomotives or that the defendant had any connection with its origin. A review of the evidence to justify these conclusions would seem to serve no good purpose, and we content ourselves by a simple statement of the conclusions thus reached.

We, therefore, have this situation: The northeast fire was set by sparks emitted from defendant's locomotive. This fire, according to the finding of the jury, constituted a proximate cause of the destruction of plaintiff's property. This finding we find to be well supported by the evidence. We have the northwest fire, of unknown origin. This fire, according to the finding of the jury, also constituted a proximate cause of the destruction of the plaintiff's property. This finding we also find to be well supported by the evidence. We have a union of these two fires 940 feet north of plaintiff's property, from which point the united fire bore down upon and destroyed the property. We, therefore, have two separate, independent, and distinct agencies, each of which constituted the proximate cause of plaintiff's damage, and either of which, in the absence of the other, would have accomplished such result.

[1, 2] It is settled in the law of negligence that any one of two or more joint tort-feasors, or one of two or more wrongdoers whose concurring acts of negligence result in injury, are each individually responsible for the entire damage resulting from their joint or concurrent acts of negligence. This rule also obtains—

"where two causes, each attributable to the negligence of a responsible person, concur in producing an injury to another, either of which causes would produce it regardless of the other, * * * because, whether the concurrence be intentional, actual or constructive, each wrongdoer, in effect, adopts the conduct of his coactor, and for the further reason that it is impossible to apportion the damage or to say that either perpetrated any distinct injury that can be separated from the whole. The whole loss must necessarily be considered and treated as an entirety." Cook v. Minneapolis, St. Paul & Sault Ste. Marie R. Co., 98 Wis. 634, at page 642, 74 N. W. 561, 566 (40 L. R. A. 457, 67 Am. St. Rep. 830).

[3, 4] That case presented a situation very similar to this. One fire, originating by sparks emitted from a locomotive, united with another fire of unknown origin and consumed plaintiff's property. There was nothing to indicate that the fire of unknown origin was not set by some human agency. The evidence in the case merely failed to identify the agency. In that case it was held that the railroad company which set one fire was not responsible for the damage committed by the united fires because the origin of the other fire was not identified. In that case a rule of law was announced, which is stated in the syllabus prepared by the writer of the opinion as follows:

"A fire started by defendant's negligence, after spreading one mile and a quarter to the northeast, near plaintiffs' property, met a fire having no responsible origin, coming from the northwest. After the union, fire swept on from the northwest to and into plaintiffs' property, causing its destruction. Either fire, if the other had not existed, would have reached the property and caused its destruction at the same time. Held:

"(1) That the rule of liability in case of joint wrongdoers does not apply.

"(2) That the independent fire from the northwest became a superseding cause so that the destruction of the property could not, with reasonable certainty, be attributed in whole or in part to the fire having a responsible origin; that the chain of responsible causation was so broken by the fire from the northwest that the negligent fire, if it reached the property at all, was a remote and not the proximate cause of the loss."

Emphasis is placed upon the fact, especially in the opinion, that one fire had "no responsible origin." At other times in the opinion the fact is emphasized that it had no "known responsible origin." The plain inference from the entire opinion is that, if both fires had been of responsible origin, or of known responsible origin, each wrongdoer would have been liable for the entire damage. The conclusion of the court exempting the railroad company from liability seems to be based upon the single fact that one fire had no responsible origin, or no known responsible origin. It is difficult to determine just what weight was accorded to the fact that the origin of the fire was unknown. If the conclusion of the court was founded upon the assumption that the fire of unknown origin had no responsible origin, the conclusion announced may be sound and in harmony with well-settled principles of negligence.

From our present consideration of the subject, we are not disposed to criticise the doc-

trine which exempts from liability a wrongdoer who sets a fire which unites with a fire originating from natural causes, such as lightning, not attributable to any human agency, resulting in damage. It is also conceivable that a fire so set might unite with a fire of so much greater proportions, such as a raging forest fire, so as to be enveloped or swallowed up by the greater holocaust, and its identity destroyed, so that the greater fire could be said to be an intervening or superseding cause. But we have no such situation here. These fires were of comparatively equal rank. If there was any difference in their magnitude or threatening aspect the record indicates that the northeast fire was the larger fire and was really regarded as the menacing agency. At any rate, there is no intimation or suggestion that the northeast fire was enveloped and swallowed up by the northwest fire. We will err on the side of the defendant if we regard the two fires as of equal rank.

According to well-settled principles of negligence, it is undoubted that, if the proof disclosed the origin of the northwest fire, even though its origin be attributed to a third person, the railroad company, as the originator of the northwest fire, would be liable for the entire damage. There is no reason to believe that the northwest fire originated from any other than human agency. It was a small fire. It had traveled over a limited area. It had been in existence but for a day. For a time it was thought to have been extinguished. It was not in the nature of a raging forest fire. The record discloses nothing of natural phenomena which could have given rise to the fire. It is morally certain that it was set by some human agency.

Now the question is whether the railroad company, which is found to have been responsible for the origin of the northeast fire, escapes liability, because the origin of the northwest fire is not identified, although there is no reason to believe that it had any other than human origin. An affirmative answer to that question would certainly make a wrongdoer a favorite of the law at the expense of an innocent sufferer. The injustice of such a doctrine sufficiently impeaches the logic upon which it is founded. Where one who has suffered damage by fire proves the origin of a fire and the course of that fire up to the point of the destruction of his property, one has certainly established liability on the part of the originator of the fire. Granting that the union of that fire with another of natural origin, or with another of much greater proportions, is available as a defense the burden is on the defendant to show that, by reason of such union with a fire of such character, the fire set by him was not the proximate cause of the damage. No principle of justice requires that the plaintiff be placed under the burden of specifically identifying the origin of both fires in order to recover the damages for which either or both fires are responsible.

Speaking of the decision in the Cook Case, Thompson, in his work on Negligence, § 739, says:

"The conclusion is so clearly wrong as not to deserve discussion. It is just as though two wrongdoers, not acting in concert, or simultaneously, fire shots from different directions at the same person, each shot inflicting a mortal wound. Either wound being sufficient to cause death, it would be a childish casuistry that would engage in a debate as to which of the wrongdoers was innocent on the ground that the other was guilty."

His illustration does not exactly answer the reason which we conceive to underlie the decision in the Cook Case. It would exactly fit it, as we understand the Cook Case, if the one who was known to have fired one of the shots should be permitted to escape liability for death because he who fired the other shot had not been identified, although it was certain that the other shot had been fired by some other human being. We are not disposed to apply the doctrine of the Cook Case to the instant situation. There being no attempt on the part of the defendant to prove that the northwest fire was due to an irresponsible origin—that is, an origin not attributable to a human being—and the evidence in the case affording no reason to believe that it had an origin not attributable to a human being, and it appearing that the northeast fire, for the origin of which the defendant is responsible, was a proximate cause of plaintiff's loss the defendant is responsible for the entire amount of that loss. While under some circumstances a wrongdoer is not responsible for damage which would have occurred in the absence of his wrongful act, even though such wrongful act was a proximate cause of the accident, that doctrine does not obtain "where two causes, each attributable to the negligence of a responsible person, concur in producing an injury to another, either of which causes would produce it regardless of the other." This is because "it is impossible to apportion the damages or to say that either perpetrated any distinct injury that can be separated from the whole," and to permit each of two wrongdoers to plead the wrong of the other as a defense to his own wrongdoing, would permit both wrongdoers to escape and penalize the innocent party who has been damaged by their wrongful acts.

The fact that the northeast fire was set by the railroad company, which fire was a proximate cause of plaintiff's damage, is sufficient to affirm the judgment. This conclusion renders it unnecessary to consider other grounds of liability stressed in respondent's brief.

Judgment affirmed.

of the pleas, because otherwise it would cause a double trial, by two juries, viz. 1. The general issue by the Grand Assise; 2. The collateral matter by a common jury. Booth, 101. And it never was the intent of the statute to permit any pleas to be pleaded unless capable of the same trial.

Walker now shewed for cause, that issue was already joined and the cause ready for trial, and therefore this motion (which is in the nature of shewing cause against the rule to plead several matters) comes too late. That the statute 4 & 5 Anne, c. 16, s. 4, extends to all real actions, as appears by the use of the words "demandant" and "tenant." That the multiplicity of trials is no objection; for that, in dower, different questions in the same cause may be triable in two or three different ways, and by different juries. That where a judgment is partly by default and partly on defence, there may be a necessity for two juries. But here one will suffice. For, according to Roll. Abr. Trial, 674, twelve jurymen may try the mise in a writ of right; and the same jury may certainly try the collateral matter.

[892] The Court inclined to think, from the authority of 9 Ed. 4, 40, (cited Bro. Enquest, 59), and the reason of the thing, that in so large and comprehensive an issue as that of the mise in a writ of right, (viz. that the tenant hath more right to hold than the demandant to demand), that a fine and non-claim, or almost any other collateral matter, might be given in evidence to the Grand Assise. But they recommended the parties to agree the present question, and accordingly a rule was made by consent,

That the plea of fine and non-claim be struck out, and that the tenant may be at liberty to give in evidence such fine and non-claim on the general issue, the demandant being also allowed in such case to give in evidence nil habuit in tenementis (*u*).

(*u*) See 2 Wms. Saund. 45 m., in notis; *Hardman* v. *Clegg*, Holt's N. P. C. 657; 1 Roscoe on Real Actions, 215, 216. See also S. C. post, 941; *Luke* v. *Harris*, post, 1261, 1293.

DAVIES ON THE DEMISE OF POVEY *v.* DOE. Attachment absolute in the first instance for non-delivery of possession pursuant to a rule of Court.

In ejectment an attachment was granted absolute in the first instance against the tenant in possession, on affidavit that he had been served with a rule of Court made absolute for delivering up the possession, and had refused so to do (*w*).

(*w*) The Court of C. P. said, that their practice should be conformable to that of K. B.; and the rule should be to shew cause, why the attachment should not issue, in all cases, except on non-payment of costs on the prothonotary's allocatur; *Chaunt* v. *Smart*, 1 Bos. & P. 477: and see Tidd's Pr. 492, (ed. 1821).

SCOTT, an Infant, by his next Friend, *v.* SHEPHERD, an Infant, by Guardian. Trespass and assault will lie for originally throwing a squib, which after having been thrown about in self-defence by other persons, at last put out the plaintiff's eye.

[Followed, *Byme* v. *Watson*, 1862, 15 Ir. C. L. R. 339. Referred to, *The George and Richard*, 1871, L. R. 3 A. & E. 476; *Sneesby* v. *Lancashire & Yorkshire Railway Company*, 1874-75, L. R. 9 Q. B. 267; 1 Q. B. D. 42; *Clark* v. *Chambers*, 1878, 3 Q. B. D. 330; *Whalley* v. *Lancashire & Yorkshire Railway Company*, 1884, 13 Q. B. D. 140; *R.* v. *Ashwell*, 1885, 16 Q. B. D. 226. Applied, *Sullivan* v. *Creed*, [1904], 2 Ir. R. 350.]

S. C. 3 Wils. 403.

Trespass and assault for throwing, casting, and tossing a lighted squib at and against the plaintiff, and striking him therewith on the face, and so burning one of his eyes, that he lost the sight of it, whereby, &c. On not guilty pleaded, the cause came on to be tried before Nares, J., last Summer Assizes, at Bridgwater, when the jury found a verdict for the plaintiff with 100l. damages, subject to the opinion of the Court on this case:—On the evening of the fair-day at Milborne Port, 28th October, 1770, the defendant threw a lighted squib, made of gun-**[893]**-powder, &c. from the street into the market-house, which is a covered building, supported by

arches, and enclosed at one end, but open at the other and both the sides, where a large concourse of people were assembled; which lighted squib, so thrown by the defendant, fell upon the standing of one Yates, who sold gingerbread, &c. That one Willis instantly, and to prevent injury to himself and the said wares of the said Yates, took up the said lighted squib from off the said standing, and then threw it across the said market-house, when it fell upon another standing there of one Ryal, who sold the same sort of wares, who instantly, and to save his own goods from being injured, took up the said ligbted squib from off the said standing, and then threw it to another part of the said market-house, and, in so throwing it, struck the plaintiff then in the said market-house in the face therewith, and the combustible matter then bursting, put out one of the plaintiff's eyes. Qu. If this action be maintainable?

This case was argued last term by Glyn, for the plaintiff, and Burland, for the defendant: and this term, the Court, being divided in their judgment, delivered their opinions seriatim.

Nares, J., was of opinion, that trespass would well lie in the present case. That the natural and probable consequence of the act done by the defendant was injury to somebody, and therefore the act was illegal at common law. And the throwing of squibs has by Statute W. 3 (*x*), been since made a nusance. Being therefore unlawful, the defendant was liable to answer for the consequences, be the injury mediate or immediate. 21 Hen. 7, 28, is express that malus animus is not necessary to constitute a trespass. So, too, 1 Stra. 596 (*y*); Hob. 134 (*z*); T. Jones, 205 (*a*); 6 Edw. 4, 7, 8; Fitzh. Trespass, 110. The principle I go upon is what is laid down in *Reynolds and Clark*, Stra. 634, that if the act in the first instance be unlawful, trespass will lie. Wherever therefore an act is unlawful at first, trespass will lie for the consequences of it. So, in 12 Hen. 4, trespass lay for stopping a sewer with earth, so as to overflow the plaintiff's land. In 26 Hen. 8, 8, for going upon the plaintiff's land to take the boughs off which had fallen thereon in **[894]** lopping. See also Hardr. 60 (*b*); Reg. 108, 95; 6 Edw. 4, 7, 8; 1 Ld. Raym. 272 (*c*); Hob. 180 (*d*); Cro. Jac. 122, 43 (*e*); F. N. B. 202, [91, G]. I do not think it necessary, to maintain trespass, that the defendant should personally touch the plaintiff; if he does it by a mean it is sufficient.—Qui facit per aliud facit per se. He is the person, who, in the present case, gave the mischievous faculty to the squib. That mischievous faculty remained in it till the explosion. No new power of doing mischief was communicated to it by Willis or Ryal. It is like the case of a mad ox turned loose in a crowd. The person who turns him loose is answerable in trespass for whatever mischief he may do (*f*). The intermediate acts of Willis and Ryal will not purge the original tort in the defendant. But he who does the first wrong is answerable for all the consequential damages. So held in the *The King and Huggins*, 2 Lord Raym. 1574 (*g*); *Parkhurst and Foster*, 1 Lord Raym. 480; *Rosewell and Prior*, 12 Mod. 639. And it was declared by this Court, in *Slater and Baker*, M. 8 Geo. 3, 2 Wils. 359, that they would not look with eagle's eyes to see whether the evidence applies exactly or not to the case: but if the plaintiff has obtained a verdict for such damages as he deserves, they will establish it if possible.

Blackstone, J., was of opinion, that an action of trespass did not lie for Scott against Shepherd upon this case. He took the settled distinction to be, that where the injury is immediate, an action of trespass will lie; where it is only consequential, it must be an action on the case: *Reynolds and Clarke*, Lord Raym. 1401. Stra. 634; *Haward and Bankes*, Burr. 1114; *Harker and Birkbeck*, Burr. 1559 (*h*). The lawfulness or unlawfulness of the original act is not the criterion; though something of that sort is put into Lord Raymond's mouth in Stra. 635, where it can only mean, that if the act then in question, of erecting a spout, had been in itself unlawful, trespass might have lain; but as it was a lawful act, (upon the defendant's own ground), and the injury to the plaintiff only consequential, it must be an action on the case (*i*). But this cannot be the general rule; for it is held by the Court in the same case, that if I throw a log of timber into the highway, (which is an unlawful act), and another man tumbles over it, and is hurt, an action on the case only lies, it being a consequential **[895]** damage; but if in throwing it I hit another man, he may bring trespass, because it is an immediate wrong. Trespass may sometimes lie for the consequences of a lawful act. If in lopping my own trees a bough accidentally falls on my neighbour's ground, and I go thereon to fetch it, trespass lies. This is the case cited from 6 Edw. 4, 7. But then the entry is of itself an immediate wrong. And case will sometimes lie for

the consequence of an unlawful act. If by false imprisonment I have a special damage, as if I forfeit my recognizance thereby, I shall have an action on the case; per Powel, J., 11 Mod. 180. Yet here the original act was unlawful, and in the nature of trespass. So that lawful or unlawful is quite out of the case; the solid distinction is between direct or immediate injuries on the one hand, and mediate or consequential on the other. And trespass never lay for the latter. If this be so, the only question will be, whether the injury which the plaintiff suffered was immediate, or consequential only; and I hold it to be the latter. The original act was, as against Yates, a trespass; not as against Ryal, or Scott. The tortious act was complete when the squib lay at rest upon Yates's stall. He, or any bystander, had, I allow, a right to protect themselves by removing the squib, but should have taken care to do it in such a manner as not to endamage others. But Shepherd, I think, is not answerable in an action of trespass and assault for the mischief done by the squib in the new motion impressed upon it, and the new direction given it, by either Willis or Ryal; who both were free agents, and acted upon their own judgment. This differs it from the cases put of turning loose a wild beast or a madman. They are only instruments in the hand of the first agent. Nor is it like diverting the course of an enraged ox, or of a stone thrown, or an arrow glancing against a tree; because there the original motion, the vis impressa, is continued, though diverted. Here the instrument of mischief was at rest, till a new impetus and a new direction are given it, not once only, but by two successive rational agents. But it is said that the act is not complete, nor the squib at rest, till after it is spent or exploded. It certainly has a power **[896]** of doing fresh mischief, and so has a stone that has been thrown against my windows, and now lies still. Yet if any person gives that stone a new motion, and does farther mischief with it, trespass will not lie for that against the original thrower. No doubt but Yates may maintain trespass against Shepherd. And, according to the doctrine contended for, so may Ryal and Scott. Three actions for one single act! nay, it may be extended in infinitum. If a man tosses a football into the street, and, after being kicked about by one hundred people, it at last breaks a tradesman's windows; shall he have trespass against the man who first produced it? Surely only against the man who gave it that mischievous direction. But it is said, if Scott has no action against Shepherd, against whom must he seek his remedy? I give no opinion whether case would lie against Shepherd for the consequential damage; though, as at present advised, I think, upon the circumstances, it would. But I think, in strictness of law, trespass would lie against Ryal, the immediate actor in this unhappy business. Both he and Willis have exceeded the bounds of self-defence, and not used sufficient circumspection in removing the danger from themselves. The throwing it across the market-house, instead of brushing it down, or throwing [it] out of the open sides into the street, (if it was not meant to continue the sport, as it is called), was at least an unnecessary and incautious act. Not even menaces from others are sufficient to justify a trespass against a third person; much less a fear of danger to either his goods or his person;—nothing but inevitable necessity; *Weaver and Ward*, Hob. 134; *Dickenson and Watson*, T. Jones, 205; *Gilbert and Stone*, Al. 35, Styl. 72. So in the case put by Brian, J., and assented to by Littleton and Cheke, C.J., and relied on in Raym. 467 (*k*),—"If a man assaults me, so that I cannot avoid him, and I lift up my staff to defend myself, and, in lifting it up, undesignedly hit another who is behind me, an action lies by that person against me; and yet I did a lawful act in endeavouring to defend myself." But none of these great lawyers ever thought that trespass would lie, by the person struck, againt him who first assaulted the striker. **[897]** The cases cited from the register and Hardres are all of immediate acts, or the direct and inevitable effects of the defendants' immediate acts. And I admit that the defendant is answerable in trespass for all the direct and inevitable effects caused by his own immediate act.—But what is his own immediate act? The throwing the squib to Yates's stall. Had Yates's goods been burnt, or his person injured, Shepherd must have been responsible in trespass. But he is not responsible for the acts of other men. The subsequent throwing across the market-house by Willis, is neither the act of Shepherd, nor the inevitable effect of it; much less the subsequent throwing by Ryal. *Slater and Barker* was first a motion for a new trial after verdict. In our case the verdict is suspended till the determination of the Court. And though after verdict the Court will not look with eagle's eyes to spy out a variance, yet, when a question is put by the jury upon such a variance, and it is made the very point of the cause, the Court will not wink against the light, and

say that evidence, which at most is only applicable to an action on the case, will maintain an action of trespass. 2. It was an action on the case that was brought, and the Court held the special case laid to be fully proved. So that the present question could not arise upon that action. 3. The same evidence that will maintain trespass, may also frequently maintain case, but not e converso. Every action of trespass with a "per quoad" includes an action on the case. I may bring trespass for the immediate injury, and subjoin a "per quod" for the consequential damages; —or may bring case for the consequential damages, and pass over the immediate injury, as in the case from 11 Mod. 180, before cited. But if I bring trespass for an immediate injury, and prove at most only a consequential damage, judgment must be for the defendant; *Gates and Bailey*, Tr. 6 Geo. 3, 2 Wils. 313. It is said by Lord Raymond, and very justly, in *Reynolds and Clarke*, "we must keep up the boundaries of actions, otherwise we shall introduce the utmost confusion" (*l*). As I therefore think no immediate injury passed from the defendant to the plaintiff, (and without such immediate injury no action of [898] trespass can be maintained), I am of opinion, that in this action judgment ought to be for the defendant.

Gould, J., was of the same opinion with Nares, J., that this action was well maintainable.—The whole difficulty lies in the form of the action, and not in the substance of the remedy. The line is very nice between case and trespass upon these occasions: I am persuaded there are many instances wherein both or either will lie (*m*). I agree with brother Nares, that wherever a man does an unlawful act, he is answerable for all the consequences; and trespass will lie against him, if the consequence be in nature of trespass. But, exclusive of this, I think the defendant may be considered in the same view as if he himself had personally thrown the squib in the plaintiff's face. The terror impressed upon Willis and Ryal excited self-defence, and deprived them of the power of recollection. What they did was therefore the inevitable consequence of the defendant's unlawful act. Had the squib been thrown into a coach full of company, the person throwing it out again would not have been answerable for the consequences. What Willis and Ryal did, was by necessity, and the defendant imposed that necessity upon them. As to the case of the football, I think that if all the people assembled act in concert, they are all trespassers; 1. From the general mischievous intent; 2. From the obvious and natural consequences of such an act: which reasoning will equally apply to the case before us. And that actions of trespass will lie for the mischievous consequences of another's act, whether lawful or unlawful, appears from their being maintained for acts done in the plaintiff's own land: Hardr. 60; *Courtney and Collet*, 1 Lord Raym. 272. I shall not go over again the ground which brother Nares has relied on and explained, but concur in his opinion, that this action is supported by the evidence.

De Grey, C.J.—This case is one of those wherein the line drawn by the law between actions on the case and actions of trespass is very nice and delicate. [899] Trespass is an injury accompanied with force, for which an action of trespass vi et armis lies against the person from whom it is received. The question here is, whether the injury received by the plaintiff arises from the force of the original act of the defendant, or from a new force by a third person (*n*). I agree with my brother Blackstone as to the principles he has laid down, but not in his application of those principles to the present case. The real question certainly does not turn upon the lawfulness or unlawfulness of the original act; for actions of trespass will lie for legal acts when they become trespasses by accident; as in the cases cited for cutting thorns, lopping of a tree, shooting at a mark, defending oneself by a stick which strikes another behind, &c.—They may also not lie for the consequences even of illegal acts, as that of casting a log in the highway, &c.—But the true question is, whether the injury is the direct and immediate act of the defendant; and I am of opinion, that in this case it is (*o*). The throwing the squib was an act unlawful and tending to affright the bystanders. So far, mischief was originally intended; not any particular mischief, but mischief indiscriminate and wanton. Whatever mischief therefore follows, he is the author of it;—Egreditur personam, as the phrase is in criminal cases. And though criminal cases are no rule for civil ones, yet in trespass I think there is an analogy. Every one who does an unlawful act is considered as the doer of all that follows; if done with a deliberate intent, the consequence may amount to murder; if incautiously, to manslaughter; Fost. 261. So too, in 1 Ventr. 295, a person breaking a horse in Lincoln's Inn Fields hurt a man; held, that trepass lay (*p*): and, 2 Lev. 172, that it

need not be laid scienter (*q*). I look upon all that was done subsequent to the original throwing as a continuation of the first force and first act, which will continue till the squib was spent by bursting. And I think that any innocent person removing the danger from himself to another is justifiable; the blame lights upon the first thrower. The new direction and new force flow out of the first force, and are not a new trespass. The writ in the Register, 95 a. for trespass in maliciously cutting down a head of water, which thereupon flowed down [900] to and overwhelmed another's pond, shews that the immediate act need not be instantaneous, but that a chain of effects connected together will be sufficient. It has been urged, that the intervention of a free agent will make a difference: but I do not consider Willis and Ryal as free agents in the present case, but acting under a compulsive necessity for their own safety and self-preservation. On these reasons I concur with Brothers Gould and Nares, that the present action is maintainable.

Postea to the plaintiff.

(*x*) 9 & 10 W. 3, c. 7. A schoolmaster, who permits an infant pupil under his care to make use of fire-works, is liable, in assumpsit, for a breach of his duty and undertaking to the parent of such infant for any mischief which ensues to the infant from being so permitted to make use of them; *King* v. *Ford*, 1 Stark. R. 421.

(*y*) *Underwood* v. *Hewson*.

(*z*) *Weaver* v. *Ward*; S. C. 20 Vin. Abr. Trespass, (G).

(*a*) *Dickenson* v. *Watson*; S. C. Vin. Abr. ibid.

(*b*) *Preston* v. *Mercer*; S. C. 20 Vin. Abr. Trespass, (Y 2), pl. 18.

(*c*) *Courtney* v. *Collett*; S. C. Carth. 436.

(*d*) *Wheatley* v. *Stone*; S. C. Vin. Abr. ibid.

(*e*) *Dent* v. *Oliver*.

(*f*) S. P. per Ld. Ellenborough, 3 East, 595. "If a man hath an unruly horse in his stable, and leaves open the stable door, whereby the horse goes forth and does mischief; an action lies against the master;" per Wild, J., 1 Ventr. 295. "If one hath kept a tame fox, which gets loose and grows wild, he that kept him before shall not answer for the damage the fox doth after he hath lost him, and he hath resumed his wild nature;" per Twisden, C.J., ibid.

(*g*) S. C. 2 Stra. 882, 1 Barnard. 358, 396, Fost. Cr. L. 322.

(*h*) S. C. ante, 482.

(*i*) Where the defendant had nailed to his own wall a board, which overhung the plaintiff's close, it seems, that case, and not trespass, would be the proper remedy; *Pickering* v. *Rudd*, 4 Camp. 219, and see Lord Ellenborough's observations there.

(*k*) *Bessey* v. *Olliott*.

(*l*) 1 Stra. 635. S. P. 1 Bos. & P. 476. "It is of importance that the boundaries between the different actions should be preserved, and particularly in cases of this kind; for if in an action of trespass the plaintiff recover less than 40s., he is entitled to no more costs than damages; whereas a verdict with nominal damages only in an action on the case, carries all the costs;" per Ld. Kenyon, 6 T. R. 129.

(*m*) See *Pitts* v. *Gaince*, 1 Salk. 10.

(*n*) Lord Ellenborough observed, that this appears to be the true criterion; 3 East, 599. And indeed, in the principal case, all the Judges were agreed as to the principle, and they only differed as to the conclusion which might be drawn from the facts of the case:—whether the injury done to Scott was to be considered as arising directly and immediately from the wrongful act of Shepherd, as if the squib had been thrown at him in the first instance, or as if, by its own elasticity, or the action of the fire-work, or any other cause, it had rebounded from Yates's stall to Ryal's, and from Ryal's into Scott's face, without the agency of Willis and Ryal; or whether they were to be considered as having severally given it a new and original impulse.

(*o*) S. P. *Leame* v. *Bray*, 3 East, 593, where all the cases are fully considered. There Lord Ellenborough observed, that the principal case went to the limit of the law.—"It is a settled distinction, that where the immediate act itself occasions a prejudice, or is an injury to the plaintiff's person, house, land, &c., trespass vi et armis will lie: but where the act itself is not an injury, but a consequence from that act is prejudicial to the plaintiff's person, house, land, &c., trespass vi et armis will not lie, but the proper remedy is case;" Bul. N.P. 26.—"The distinction between the actions of trespass vi et armis and on the case is perfectly clear. If the injury be committed

by the immediate act complained of, the action must be trespass; if the injury be merely consequential upon that act, an action upon the case is the proper remedy;" per Ld. Kenyon, in *Day* v. *Edwards*, 5 T. R. 649. That was an action on the case against the defendant for driving his cart with great violence against the plaintiff's carriage, per quod the loss happened; and it was there held, that the action in that form could not be supported: it should have been trespass vi et armis. See also *Turner* v. *Hawkins*, 1 Bos. & P. 472; from which case it appears, that where the injury to the plaintiff arises from the non-feasance of the defendant or his servants, there an action on the case is the proper remedy. S. P. *Ogle* v. *Barnes*, 8 T. R. 188, where Ld. Kenyon observed of the principal case, that though the Judges differed as to the conclusion to be drawn from the facts of the case, they all agreed in the principle: (see n. (*n*), supra). Indeed, in that case, which was an action on the case for running foul of the plaintiff's vessel, it did not appear, as observed by Lord Ellenborough, in 3 East, 599, "that it must have been the personal act of the defendants; it is not even alleged that they were on board the ship at the time: it is said, indeed, that they had the care, direction, and management of it; but that might be through the medium of other persons in their employ on board. That therefore might be sustained as an action on the case." These observations equally apply to *Turner* v. *Hawkins*, supra; and would bring both those cases within the principle of the decision in *Huggett* v. *Montgomery*, and other cases mentioned in note (*q*), infra. Yet in *Rogers* v. *Imbleton*, 2 N. R. 117, where the defendant drove his cart against the plaintiff's horse, and the declaration alleged it to have been done "by and through the mere negligence, inattention, and want of proper care" of the defendant; it was held, on demurrer to this declaration, as not being in trespass, that it was good in case. The Court of C. P. threw out doubts there, as well as in the case of *Huggett* v. *Montgomery*, id. 446, as to the propriety of the decision in *Leame* v. *Bray*. But in *Lotan* v. *Cross*, 2 Camp. 464, an action of trespass for the accidental and unintentional, but immediate act of running the defendant's carriage against the plaintiff's chaise, Lord Ellenborough ruled, at Nisi Prius, that that was the proper remedy, on the authority of *Leame* v. *Bray*. And the Court of K. B. afterwards refused to grant a new trial, on the ground that the action had been misconceived, and adhered to their former opinion; id. 466. So in *Cowell* v. *Laming*, 1 Camp. 497, where the owner of a ship, being himself standing at the helm, unintentionally ran against another ship from unskilful management, it was held, at Nisi Prius, that the proper remedy was trespass, and not case. Lord Ellenborough,—"I know there is a difference of opinion upon this subject. 'Whether the injury complained of arises directly, or follows consequentially, from the act of the defendant,' I consider as the only just and intelligible criterion of trespass and case. The defendant was at the helm, and guided the motions of the vessel. The winds and the waves were only instrumental in carrying her along in the direction which he communicated. The force, therefore, proceeded from him, and the injury which the plaintiff sustained was the immediate effect of that force."

(*p*) But it appears, from the report in 1 Ventr., to have been an action on the case.

(*q*) *Michael* v. *Alestree:* this also was an action on the case, and was brought against master and servant jointly, charging, "for that the servant" (in the absence of the master) "brought a coach with two ungovernable horses to train, and the horses, because of their ferocity, being not to be managed, ran upon the plaintiff, &c." And, indeed, where an injury arises from the unskilfulness or negligence of a servant or agent, it seems that the proper remedy against the master or principal is an action on the case, provided the act be done while the servant be in the course of the service in which he is retained by the master, or be acting under his express orders: otherwise the master will not be at all liable. A master is not liable in trespass for the wilful act of his servant in driving his master's carriage against another, done without the direction or assent of the master. But he is liable to answer for any damage arising to another from the negligence or unskilfulness of his servant acting in his employ; *M'Manus* v. *Crickett*, 1 East, 106, where all the cases on this subject are discussed.—Ld. Ellenborough: "The form of these actions shews, that where the servant is in point of law a trespasser, the master is not chargeable as such, though liable to make a compensation for the damage consequential from his employing an unskilful or negligent servant." And it appears, from *Morley* v. *Gaisford*, 2 H. Bla. 442, that case is the proper remedy against the master. S. P. *Dixon* v. *Bell*, 5 M. & S. 198, 1 Stark.

R. 287. So where one ship ran foul of another through the negligence of the pilot, who gave the order which caused the accident, and not the master, though the latter was on board at the time; it was held, that trespass would not lie against the owner, but that case was the proper remedy. It appears, from *M'Manus* v. *Crickett*, and the following cases, that the master is not liable, either in case or in trespass, for the wilful act of the servant, though he will be liable in case for his injudicious act in the course of his employment; *Savignac* v. *Roome*, 6 T. R. 125; *Croft* v. *Alison*, 4 B. & A. 590. It is to be observed, however, that in *Savignac* v. *Roome*, which was an action on the case, Lord Kenyon said, that in reality it should have been trespass; but in *Bowcher* v. *Noidstrom*, 1 Taunt. 568, it was held, that an action of trespass would not lie against the master of a vessel for the wilful act of one of his crew. In a recent case it was decided, that an action on the case might be supported against the joint proprietors of a stage-coach for an accident which happened through the negligence of the person driving, though that person was himself one of the proprietors; for they are all responsible for the person appointed to drive, whether the person be, or be not, one of themselves. The Court also intimated, that trespass might have been maintained against the proprietor driving the coach, individually; *Moreton* v. *Hardern*, 4 B. & C. 223, 6 D. & R. 275.

PALLANT *v.* ROLL. In trespass for hunting, laid upon the statute 4 & 5 W. & M. against the defendant as a dissolute person, &c. if the plaintiff proves the trespass, but not the circumstances under the statute, he shall recover as in common actions of trespass, viz. no more costs than damages, if the damages are under 40s.

Trespass, for that the defendant, "being a dissolute person, neglecting his employment, and following hunting and other game, and by no means qualified by law so to do," broke and entered the plaintiff's closes, and with dogs, guns, and other engines for destruction of the game, hunted upon the said closes, trod down the grass and corn, and broke the fences, &c. "against the form of the statute." On not guilty pleaded, and issue thereon, a verdict was found for the plaintiff, at Bury Assizes, for one shilling damages, subject to the opinion of the Court upon this case:—The defendant was not qualified in his own right to kill game, but was, and for three years had been, a menial servant and huntsman to Robert Leman, Esq., a gentleman of 1500l. per annum estate, who has kept hounds these twenty years; and the defendant, in December, 1771, went out by his master's orders with the hounds, his master not being present (*r*), and was beating over the plaintiff's grounds. The plaintiff desired the defendant to go off his land, which he refused, and at length found a hare, and hunted her over several pieces of land mentioned in the declaration, two of which were sown with wheat.—Qu. Whether, if the Court should be of opinion, that the defendant is not a dissolute person, &c. under stat. 4 & **[901]** 5 W. & M., c. 23, s. 10 (*s*), the plaintiff can recover against him in this action, or whether he ought to have brought a common action of trespass quare clausum fregit?

This case was argued by Sayer, for the plaintiff, and Foster, for the defendant. And

By De Grey, C.J.—We have no doubt but that the defendant is not a dissolute person, &c. within the meaning of the statute. The only real question is, whether, as this action is framed, the plaintiff can recover any thing? He certainly cannot have his full costs; if he cannot recover any thing, but is nonsuit, he must pay costs: if he can recover as upon a common action of trespass, he saves his costs. Now certainly any man might have always brought an action of trespass for hunting upon his grounds (*t*). For this injury, among others, the Statute of Gloucester gave costs as well as damages. The Statute of Car. 2 (*v*), to prevent vexation, lowered the costs, and if less than 40s. recovered, gave no more costs than damages. The Statute 4 & 5 W. & M. restored full costs again, even in case of small damages recovered against dissolute persons, inferior tradesmen, &c. This statute gives no new cause of action: the old right of action always existed, and does still exist (*u*). The plaintiff complains of a trespass, and sues for the common law remedy. He also states collateral circumstances, which under the statute would entitle him to costs upon a verdict for small damages. If he proves those circumstances, he has his full costs; if they are not proved, they are mere words of surplusage, and the defendant stands exactly in the same situation as if the Statute 4 & 5 W. & M. had never been made. Many

[5] We hold that T.C.A. § 35-610 does not require qualification of a co-guardian to serve and act with plaintiff and that this statute does not operate to deprive the district court of jurisdiction under the facts of this case.

Reversed and remanded for further proceedings not inconsistent with this opinion.

Petitions of The KINSMAN TRANSIT COMPANY, as Owner and Operator of the STEAMER MacGILVRAY SHIRAS, Appellant,

and of

Midland Steamship Line, Inc., as Owner and Operator of the STEAMER MICHAEL K. TEWKSBURY, their Engines, etc., Appellee,

for Exoneration from or Limitation of Liability,

City of Buffalo, Claimant-Respondent-Appellant,

Kelley Island New York Corporation, et al., Claimants-Appellees.

Nos. 238-243, Dockets 28387-28392.

United States Court of Appeals
Second Circuit.

Argued March 3, 1964.

Decided Oct. 29, 1964.

As Modified on Denial of Petition for Rehearing of Continental Grain Co., Dec. 1, 1964.

Appeals from an interlocutory decree of the United States District Court for the Western District of New York, Harold P. Burke, Chief Judge, adjudicating liability in proceedings in admiralty arising out of collisions in the Buffalo River. The Court of Appeals, Friendly, Circuit Judge, held, inter alia, that city's failure, in face of Corps of Engineers' regulation, to raise bridge before drifting vessel crashed into its center did not require that city bear sole liability to vessel and wharfinger whose negligence resulted in crash with bridge and exempting of ship and wharfinger from all liability for demolishing city property but rather there was to be division of damages.

Modified and affirmed.

Moore, Circuit Judge, dissented in part.

1. Admiralty ⇐118.7(3)

Whether city of Buffalo created special hazard of ice jams by its construction and subsequent maintenance of flood improvements in Buffalo River and Cazenovia Creek and whether city was negligent in failing to dynamite ice were questions on conflicting evidence for trial court whose findings thereon in favor of city the Court of Appeals would accept. Rivers and Harbors Appropriation Act of 1899, § 10, 33 U.S.C.A. § 403.

2. Shipping ⇐81(1)
Wharves ⇐20(4)

Judge was justified in holding that, with her bow protruding into bank of river just below bend and with eroded bank incapable of taking long lead or anchor chain, vessel ought to have put out anchor from port bow and was at fault in not so doing while wharfinger was at fault for inadequately securing deadman and vessel was at fault for shipkeeper's failure to ready anchors when danger had become apparent.

3. Shipping ⇐208

President and vice-president and treasurer of corporate vessel owner held such positions in corporate owner as to impute their privity or knowledge as the phrase is used in limitation of liability statute to corporate owner.

4. Shipping ⇐81(1)

Officers of vessel owner were not negligent in assigning to one who had been master of vessel the task of supervising remooring of vessel during winter.

5. Shipping ⇐208

Knowledge of captain who had been master of vessel and who supervised its

remooring during winter for corporate shipowner would be imputed to shipowner on issue of exoneration but he was not sufficiently high for his knowledge to be imputed on question of limitation of liability.

6. Collision ⇐25

Corporate vessel owner was entitled to limit liability for damage which occurred after its vessel broke loose from moorings in river where no officer of corporate owner, which was located a few hundred miles distant from point where mishap occurred, had knowledge of mooring save for report which was reassuring.

7. Admiralty ⇐118.7(5)

Reviewing court would take judge's failure to fault vessel as not being seaworthy in primitive sense for failure to have adequate number of mooring lines as a finding, not clearly erroneous, that claim was not established.

8. Shipping ⇐136

The "personal contract" exception to limitation of liability would extend only to damage to stored cargo and could not avail cargo owner in absence of such damage.

9. Shipping ⇐86(2¾)

Evidence permitted court to find that, in view of vessel's sheltered position in relatively protected area against face of dock on outer bank just below hairpin bend of river so that there was no opportunity to afford ice to build up between her and dock, omission to put out anchor and anchor chain was not negligence though vessel's mooring lines parted when another vessel which had broken free upstream collided with it.

10. Shipping ⇐81(2)

Trial judge could properly conclude that presence of shipkeeper, who was away from vessel when it was struck by another vessel which had broken loose from its mooring and had drifted downstream in river, causing the struck vessel likewise to drift free, would not have averted disaster which occurred when it crashed into center of bridge.

11. Navigable Waters ⇐2, 19

Power of Congress with respect to navigable streams is plenary; nothing prevents Congress from abating any erections that may have been made, and preventing any others from being made, except in conformity with such regulations as it may impose. Rivers and Harbors Appropriation Act of 1899, § 10, 33 U.S.C.A. § 403; Bridge Act of 1906, § 4, 33 U.S.C.A. § 494; 33 U.S.C.A. § 499.

12. Navigable Waters ⇐20(1)

Statutes and regulations lay down standard of care with respect to vessels in ordinary course of navigation with which bridge owners must comply in absence of circumstances excusing compliance. Rivers and Harbors Appropriation Act of 1899, § 10, 33 U.S.C.A. § 403; Bridge Act of 1906, § 4, 33 U.S.C.A. § 494; 33 U.S.C.A. § 499.

13. Navigable Waters ⇐19

Drifting vessels as well as vessels in ordinary course of navigation were within general purpose of insuring freedom of navigation of statute prohibiting creation of any obstruction not affirmatively authorized by Congress to navigable capacity of waters. Rivers and Harbors Appropriation Act of 1899, § 10, 33 U.S.C.A. § 403.

14. Navigable Waters ⇐20(7)

Effect of Corps of Engineers' regulation stating when designated bridges would not be required to be open for passage of vessels and stating that bridges should otherwise be opened promptly on signal of vessel for passage was to withdraw decision as to when bridge might be left unattended from what would otherwise have been permissible area for exercise of prudent judgment by city maintaining bridges. Bridge Act of 1906, § 4, 33 U.S.C.A. § 494; 33 U.S.C.A. § 499.

15. Negligence ⇐62(3)

Actor whose negligence has set dangerous force in motion is not saved from liability for harm it has caused to innocent persons solely because another has negligently failed to take action that would have avoided it.

16. Negligence ⇐62(3)

As against third persons, one negligent actor cannot defend on basis that the other had "the last clear chance."

17. Navigable Waters ⇐26(3)
Shipping ⇐86(3)
Wharves ⇐13

City's failure, in face of Corps of Engineers' regulation, to raise bridge before drifting vessel crashed into its center did not require that city bear sole liability to vessel and wharfinger whose negligence resulted in crash with bridge nor exempt ship and wharfinger from all liability for demolishing city property, but rather there was to be division of damages.

18. Shipping ⇐81(1)
Wharves ⇐13

As shipowner and wharfinger owed duty of care to all within reach of ship's known destructive power, impossibility of advance identification of particular person who would be hurt by ship after it broke loose and drifted was without legal consequence.

19. Navigable Waters ⇐20(8)

Foreseeable consequences of city's failure to raise bridge in compliance with federal regulation before drifting vessels crashed into it were not limited to those vessels but embraced danger that bridge towers might fall onto adjoining property, and danger of flood damage to upstream property from partial damming.

20. Negligence ⇐10

Foreseeability of danger is necessary to render conduct negligent.

21. Wharves ⇐13

Where damage was caused by just those forces whose existence required exercise of greater care than was taken by wharfinger at whose wharf vessel was moored, current, ice, and physical mass of vessel, the incurring of consequences other and greater than foreseen did not make conduct less culpable or provide reasoncd basis for insulation.

22. Negligence ⇐59

Where damage has resulted from same physical forces whose existence required exercise of greater care than was displayed and the damage was of same general sort that was expectable, unforeseeability of exact developments and of extent of loss will not limit liability.

23. Admiralty ⇐118.7(1)

Court of Appeals would not alter three-way division of damages decreed in favor of claimants who were free from fault so that negligence of bridge owner in failing to raise bridge before vessel crashed into bridge could be considered one efficient force and combined negligence of owner of vessel which broke loose from wharf and of wharfinger as another, where point had not been argued and matter would have little practical importance in view of such vessel owner's limitation of liability.

24. Navigable Waters ⇐26(3)
Shipping ⇐86(3)
Wharves ⇐13

Deficiency resulting from limitation of vessel owner's liability to three-way division of damages against vessel owner, wharfinger and bridge owner was to be divided equally between bridge owner and wharfinger.

25. Contribution ⇐7
Navigable Waters ⇐26(3)
Shipping ⇐86(3)
Wharves ⇐13

Where vessel owner, who was permitted to limit liability, wharfinger and bridge owner were all at fault with respect to damages, bridge owner could recover two thirds of the damages to its property from wharfinger and vessel owner subject to limitation by vessel owner but with wharfinger bearing only half of vessel owner's deficiency, while wharfinger could have similar recovery for flood damage against bridge owner, and vessel owner which made no claim against wharfinger could recover half of its damages suffered at bridge from bridge owner which could obtain contribution of half of that amount from wharfinger.

26. Shipping ⇐210

Under principle of marshaling, limitation fund with respect to vessel which broke free from wharf and crashed into bridge was first to be applied ratably to 50% of those claims of innocent parties for which vessel owner and wharfinger but not bridge owner shared responsibility, and, if anything remained of limitation fund thereafter, bridge owner and wharfinger would precede other claimants.

27. Admiralty ⇐126

Bridge owner successful on appeal in averting sole liability for certain mishaps under last clear chance doctrine but unsuccessful on other issues could recover half of its costs against vessel owner and wharfinger who were decreed to share liability with it.

28. Admiralty ⇐126

Vessel owner unsuccessful in its endeavor to avoid all liability but successful in holding its limitation could recover half of its costs on appeal against bridge owner and wharfinger, the two parties that challenged limitation.

29. Admiralty ⇐126

Costs awarded on appeal against vessel owner successful in holding its limitation of liability were to be paid by it personally and not out of limitation fund while costs payable to it would not form part of fund.

Edward J. Desmond, Buffalo, N. Y., Elmer S. Stengel, Corp. Counsel, City of Buffalo (John E. Drury, Jr., Buffalo, N. Y., of counsel), for City of Buffalo.

David S. Jackson, Buffalo, N. Y. (Roy P. Ohlin, Buffalo, N. Y., Wilbur H. Hecht, John J. Sullivan, New York City, of counsel, Ohlin, Damon, Morey, Sawyer & Moot, Buffalo, N. Y., and Mendes & Mount, New York City on brief), for Continental Grain Co.

Lee C. Hinslea and Lucian Y. Ray, McCreary, Hinslea & Ray, Cleveland, Ohio (James P. Heffernan, Buffalo, N. Y., of counsel; Coffey, Heffernan & Harrison, Buffalo, N. Y., on brief), for Kinsman Transit Co.

John T. Jaeger, Johnson, Branand & Jaeger, Cleveland, Ohio (Robert Branand, Cleveland, Ohio, and Robert M. Hitchcock, Buffalo, N. Y., of counsel; Phillips, Mahoney, Lytle, Yorkey & Letchworth, Buffalo, N. Y., on brief), for Midland S.S. Line, Inc.

W. M. Connelly, Hamilton, Dobmeier, Connelly & Kirchgraber, Buffalo, N. Y., for Tomlinson Fleet and others.

Arthur E. Otten, Buffalo, N. Y., (Brennan & Brennan, Buffalo, N. Y., on brief), for Kelley Island New York Corp. and Moira C. McGrane.

Before WATERMAN, MOORE and FRIENDLY, Circuit Judges.

FRIENDLY, Circuit Judge:

We have here six appeals, 28 U.S.C. § 1292(a) (3), from an interlocutory decree in admiralty adjudicating liability. The litigation, in the District Court for the Western District of New York, arose out of a series of misadventures on a navigable portion of the Buffalo River during the night of January 21, 1959. The owners of two vessels petitioned for exoneration from or limitation of liability; numerous claimants appeared in these proceedings and also filed libels against the Continental Grain Company and the City of Buffalo, which filed cross-claims. The proceedings were consolidated for trial before Judge Burke. We shall summarize the facts as found by him:

The Buffalo River flows through Buffalo from east to west, with many turns and bends, until it empties into Lake Erie. Its navigable western portion is lined with docks, grain elevators, and industrial installations; during the winter, lake vessels tie up there pending resumption of navigation on the Great Lakes, without power and with only a shipkeeper aboard. About a mile from the mouth, the City of Buffalo maintains a lift bridge at Michigan Avenue. Thaws and rain frequently cause freshets to develop in the upper part of the

river and its tributary, Cazenovia Creek; currents then range up to fifteen miles an hour and propel broken ice down the river, which sometimes overflows its banks.

On January 21, 1959, rain and thaw followed a period of freezing weather. The United States Weather Bureau issued appropriate warnings which were published and broadcast. Around 6 P.M. an ice jam that had formed in Cazenovia Creek disintegrated. Another ice jam formed just west of the junction of the creek and the river; it broke loose around 9 P.M.

The MacGilvray Shiras, owned by The Kinsman Transit Company, was moored at the dock of the Concrete Elevator, operated by Continental Grain Company, on the south side of the river about three miles upstream of the Michigan Avenue Bridge. She was loaded with grain owned by Continental. The berth, east of the main portion of the dock, was exposed in the sense that about 150′ of the Shiras' forward end, pointing upstream, and 70′ of her stern—a total of over half her length—projected beyond the dock. This left between her stem and the bank a space of water seventy-five feet wide where the ice and other debris could float in and accumulate. The position was the more hazardous in that the berth was just below a bend in the river, and the Shiras was on the inner bank. None of her anchors had been put out. From about 10 P.M. large chunks of ice and debris began to pile up between the Shiras' starboard bow and the bank; the pressure exerted by this mass on her starboard bow was augmented by the force of the current and of floating ice against her port quarter. The mooring lines began to part, and a "deadman," to which the No. 1 mooring cable had been attached, pulled out of the ground—the judge finding that it had not been properly constructed or inspected. About 10:40 P.M. the stern lines parted, and the Shiras drifted into the current. During the previous forty minutes, the shipkeeper took no action to ready the anchors by releasing the devil's claws; when he sought to drop them after the Shiras broke loose, he released the compressors with the claws still hooked in the chain so that the anchors jammed and could no longer be dropped. The trial judge reasonably found that if the anchors had dropped at that time, the Shiras would probably have fetched up at the hairpin bend just below the Concrete Elevator, and that in any case they would considerably have slowed her progress, the significance of which will shortly appear.

Careening stern first down the S-shaped river, the Shiras, at about 11 P.M., struck the bow of the Michael K. Tewksbury, owned by Midland Steamship Line, Inc. The Tewksbury was moored in a relatively protected area flush against the face of a dock on the outer bank just below a hairpin bend so that no opportunity was afforded for ice to build up between her port bow and the dock. Her shipkeeper had left around 5 P.M. and spent the evening watching television with a girl friend and her family. The collision caused the Tewksbury's mooring lines to part; she too drifted stern first down the river, followed by the Shiras. The collision caused damage to the Steamer Druckenmiller which was moored opposite the Tewksbury.

Thus far there was no substantial conflict in the testimony; as to what followed there was. Judge Burke found, and we accept his findings as soundly based, that at about 10:43 P.M., Goetz, the superintendent of the Concrete Elevator, telephoned Kruptavich, another employee of Continental, that the Shiras was adrift; Kruptavich called the Coast Guard, which called the city fire station on the river, which in turn warned the crew on the Michigan Avenue Bridge, this last call being made about 10:48 P.M. Not quite twenty minutes later the watchman at the elevator where the Tewksbury had been moored phoned the bridge crew to raise the bridge. Although not more than two minutes and ten seconds were needed to elevate the bridge to full height after traffic was

stopped, assuming that the motor started promptly, the bridge was just being raised when, at 11:17 P.M., the Tewksbury crashed into its center. The bridge crew consisted of an operator and two tenders; a change of shift was scheduled for 11 P.M. The inference is rather strong, despite contrary testimony, that the operator on the earlier shift had not yet returned from a tavern when the telephone call from the fire station was received; that the operator on the second shift did not arrive until shortly before the call from the elevator where the Tewksbury had been moored; and that in consequence the brige was not raised until too late.

The first crash was followed by a second, when the south tower of the bridge fell. The Tewksbury grounded and stopped in the wreckage with her forward end resting against the stern of the Steamer Farr, which was moored on the south side of the river just above the bridge. The Shiras ended her journey with her stern against the Tewksbury and her bow against the north side of the river. So wedged, the two vessels substantially dammed the flow, causing water and ice to back up and flood installations on the banks with consequent damage as far as the Concrete Elevator, nearly three miles upstream. Two of the bridge crew suffered injuries. Later the north tower of the bridge collapsed, damaging adjacent property.

Judge Burke concluded that Continental and the Shiras had committed various faults discussed below; that the faults of the Shiras were without the privity or knowledge of her owner, thus entitling Kinsman to limit its liability,[1] 46 U.S.C. § 183; that the Tewksbury and her owner were entitled to exoneration; and that the City of Buffalo was at fault for failing to raise the Michigan Avenue Bridge. The City was not faulted for the manner in which it had constructed and maintained flood improvements on the river and on Cazenovia Creek, or for failing to dynamite the ice jams. For the damages sustained by the Tewksbury and the Druckenmiller in the collisions at the Standard Elevator dock, Judge Burke allowed those vessels to recover equally from Continental and from Kinsman, jointly and severally, subject however, to the latter's right to limit liability. He held the City, Continental and Kinsman equally liable jointly and severally (again subject to Kinsman's limitation of liability) for damages to persons and property sustained by all others as a result of the disaster at the bridge.[2] But, on the basis of the last clear chance rule, he held the City solely liable for damages sustained by the other tort-feasors, to wit, the Shiras and Continental as operator of the Concrete Elevator, and refused to allow recovery by the City against them.

The complaints as to the judge's determinations are so numerous that, in order to deal properly with the most serious ones and avoid inordinate length, we must state our conclusions on the others in rather summary fashion:

(1) *Non-liability of the City of Buffalo for action and inaction in the upper reaches of the Buffalo River and Cazenovia Creek.*

[1] On conflicting evidence, the trial judge concluded that the City had not created "a special hazard of ice jams" by its construction, completed twenty and thirty years previously, and its maintenance thereafter of flood improvements in the Buffalo River and

1. The limitation fund was determined to be $76,788.45, the value of the Shiras and her freight, augmented by the amount to be realized on Kinsman's claim against the City; Kinsman does not appear to have asserted a claim against Continental. We assume the dollar figure was intended to bear interest. See 3 Benedict, Admiralty p. 573 (1940). Kinsman's brief conceded that the limitation amount stated in the interlocutory decree does not relate to the two personal injury claims. 46 U.S.C. § 183(b)–(f). But see 46 U.S.C. § 188 and Gilmore & Black, Admiralty, § 10-35 (1956).

2. The judge reduced the personal injury claim of the bridge operator on the 11 P.M. shift by 50% for contributory negligence; he has not appealed.

Cazenovia Creek; he further found that the City's failure to dynamite ice jams on January 21, 1959, was not negligent. Since we accept these conclusions, it is immaterial at this point that we would disagree, for reasons later intimated, with his ruling that "the claimed faults on the part of the City in creating and failing to control those conditions were not proximately contributing causes" since "the disaster would not have occurred without the actionable faults of Continental and the Shiras." Nor need we reach the City's contention that it could not in any event be cast in liability for deficiencies in the improvements, the original plan for which had been submitted to the Secretary of War under the Act of March 3, 1899, 33 U.S.C. § 403, or for failure to take ameliorative action, either by way of further construction or through dynamiting, which allegedly would have been only voluntary on its part. Cf. Faust v. City of Cleveland, 121 F. 810 (6 Cir. 1903). But see City of Detroit v. Wyandotte Transp. Co., 76 F.2d 674 (6 Cir.), cert. denied, 296 U.S. 595, 56 S.Ct. 112, 80 L.Ed. 422 (1935).

(2) *Negligence of Kinsman and Continental.*

[2] The mooring of the Shiras, as to which more will be said under the next heading, was the joint work of Kinsman, acting through Captain Davies, her former master, and of Continental. The judge was justified in holding that, with her bow protruding into the river just below a bend and with the eroded bank incapable of taking a long lead line or an anchor chain, the Shiras ought to have put out an anchor from her port bow. He was also warranted in finding that Continental was at fault for the inadequately secured "deadman" and the Shiras for the shipkeeper's failure to ready the anchors in the interval between 10 P.M. and 10:40 P.M. on January 21. The current and ice conditions on the fateful evening were not so unexpectable as to go beyond the range of foreseeability and hence to come within the principle of inevitable accident; the conditions were of the very sort that had been occurring for years, although not in quite the same degree. Kinsman and Continental say that no ship had drifted loose in the river as the result of the breaking of an ice jam since an episode in 1916 relating to The Anna C. Minch, 271 F. 192 (2 Cir. 1921), and that we exonerated her. However, the basis for exoneration was not that the strong currents and heavy ice were unexpectable but that the Minch had taken all reasonable precautions against them.

(3) *Limitation of Kinsman's liability.*

We find this issue more difficult; some further statement of the facts is required.

Kinsman's principal office is in Cleveland. It owned five vessels, four of which were in Buffalo in the winter of 1958–59. Kinsman is a family corporation; Henry Steinbrenner was its president and his son, George, then only twenty-eight years old and without maritime studies or experience, had become its vice president and treasurer in 1957.

The Shiras arrived in Buffalo with a cargo of grain for Continental late in November and was moored for the winter at the coal dock of the Lackawanna Railroad in the ship canal. Inspection of the grain revealed heating, which made it desirable to unload the Shiras and then reload her for further storage. George Steinbrenner went to Buffalo on December 8 to work out the plans; he returned to Cleveland on the 12th and, having gone to Florida on a vacation, was not in Buffalo again until after the accident. It is not shown that he had knowledge of the precise place where or the manner in which the Shiras would ultimately be moored.

When Kinsman had mooring or loading problems in Buffalo during the winter, it sometimes relied on its agents, Boland & Cornelius, and sometimes would dispatch one of its masters, grounded for the winter, who were paid for such work on a per diem basis. On this occasion it took the latter course. Henry Steinbrenner assigned the task

to Captain Davies who had been master of the Shiras during the 1958 season. Davies came to Buffalo on three occasions. On the first he supervised the shifting of the Shiras to the unloading leg of the Concrete Elevator dock, on the second to the loading leg, and on the third, January 7, to the place east of the loading leg where she was expected to remain moored for the rest of the winter. The remooring was effected, without the aid of tugs, by a gang of Continental employees bossed by Kruptavich, which placed the lines on the shore. Kinsman had never made any effort to obtain information as to winter weather or harbor conditions in Buffalo but relied on inspection and approval by United States Salvage Association, which was employed to that end by the Great Lakes Protective Association, a mutual insurance association of steamship operators. Rozycki, a marine surveyor employed by United States Salvage, inspected the mooring on January 8 and made a favorable report; a formal certificate of approval was later sent to Henry Steinbrenner.

[3–6] The case gives point to the comment that the statutory phrase, "without the privity or knowledge of such owner," is largely "devoid of meaning," Gilmore & Black, Admiralty, 695 (1957)—a statement supplemented with the admittedly unhelpful comment: "Where a vessel is held in corporate ownership, the imputation of 'privity or knowledge' to the corporate owner will be made if a corporate officer sufficiently high in the hierarchy of management is chargeable with the requisite knowledge or is himself responsible on a negligence rationale. How high is 'sufficiently high' will depend on the facts of particular cases * * *." Ibid. 701. Henry and George Steinbrenner were "sufficiently high," but George had no knowledge of the mooring, and Henry had none save for Davies' report on his return from Buffalo and the United States Salvage certificate, both of which were reassuring rather than the reverse. They were not negligent in assigning the task to Davies, whose competence was established. Davies was not "sufficiently high," under the authorities cited below. His knowledge is imputed to the corporation on the issue of exoneration, but that is precisely what the statute forbids on the issue of limitation. Still it seems likely that if Kinsman's headquarters had been in Buffalo, limitation would be denied under Spencer Kellogg & Sons v. Hicks, 285 U.S. 502, 52 S.Ct. 450, 76 L.Ed. 903 (1932), on the basis that it was negligent not to check the adequacy of the mooring of the Shiras when dangerous conditions threatened on January 21, or even that it was negligent to fail to make a cautionary inspection of the moorings of Kinsman's vessels in the harbor at an earlier date. If the latter view were taken, one might query the good sense of a distinction that would lead to a different result in this age of rapid transportation and communication because Kinsman's office was a few hundred miles away from the harbor where four of its five ships were berthed. The query seems especially pertinent when, as here, there is every indication that nothing different would have been done if George Steinbrenner had been on the scene during the final mooring as he had entrusted the operation to one admittedly more competent to oversee it than he was. Indeed, the whole rationale of the doctrine is of questionable application in a case like this where there was no need for the owner to rely on the skill of a master or other agents as he must when a vessel is at sea or in a distant port. All this, however, is not for us; shipowners and their insurers are entitled to rely on the statute and the decisions applying it, and we must take these as we find them until a higher authority intervenes. Although we doubt that the decisions can all be reconciled, this case is closer to Craig v. Continental Ins. Co., 141 U.S. 638, 12 S.Ct. 97, 35 L.Ed. 886 (1891); Quinlan v. Pew, 56 F. 111 (1 Cir. 1893); The Annie Faxon, 75 F. 312 (9 Cir. 1896), and The Erie Lighter 108, 250 F. 490 (D.N.J.1918), allowing limitation.

than to McGill v. Michigan SS. Co., 144 F. 788 (9 Cir.), cert. denied, 203 U.S. 593, 27 S.Ct. 782, 51 L.Ed. 332 (1906); The Marguerite, 140 F.2d 491 (7 Cir. 1944); The Cleveco, 154 F.2d 605 (6 Cir. 1946); The Edmund Fanning, 105 F. Supp. 353, 363–366, 371 (S.D.N.Y. 1952), aff'd as to this point, 201 F.2d 281 (2 Cir. 1953), and States SS. Co. v. United States, 259 F.2d 458 (9 Cir. 1957), cert. denied, 358 U.S. 933, 79 S. Ct. 316, 3 L.Ed.2d 305 (1959); Admiral Towing Co. v. Woolen, 290 F.2d 641 (9 Cir. 1961), and The Derrick Trenton, 189 F.Supp. 400 (S.D.N.Y.1960), denying it. We are aware of the difference in the ages of the two sets of decisions, but we find nothing in the later cases reflecting on the authority of the earlier ones on fact situations within their sweep—a view which Coryell v. Phipps, 317 U.S. 406, 63 S.Ct. 291, 87 L.Ed. 363 (1943), tends to confirm.

[7, 8] Two other points must be considered. If the Shiras was not seaworthy in what has been termed the "primitive sense" of being "tight, staunch, strong and well and sufficiently tackled, appareled, furnished and equipped," a corporate owner who has failed in his duty to provide such a ship does not escape full liability, Gilmore & Black, supra, 702. It is argued that the Shiras was unseaworthy in this sense on the basis that although she put out all the mooring lines she had, their number was inadequate. The latter claim was the subject of conflicting testimony, and we take the judge's failure to fault the Shiras on this score as a finding, not clearly erroneous, that the claim was not established. Continental's claim that, under the "personal contract" exception, Gilmore & Black, Admiralty, §§ 10–26ff., Kinsman may not limit liability to it because of breach of the warranty of seaworthiness in the storage contract signed by Henry Steinbrenner, is defeated both by lack of proof of breach [3] and by the fact that the exception would apply only to damage to the stored cargo, which did not occur. See 3 Benedict, Admiralty, 373 (1940).

(4) *Exoneration of Midland and of the Tewksbury.*

[9, 10] The exoneration of the Tewksbury and of her owner is challenged by the argument that the Tewksbury should have put out an anchor and an anchor chain and that it was negligent for her shipkeeper to be away. As to the former we see no sufficient reason to reject the judge's conclusion that, in view of the Tewksbury's sheltered position, the omission to take these added precautions, even in the conditions that had developed on January 21, was not negligent. As to the second point, it is not altogether clear whether the judge rested his conclusion on absence of negligence and also on lack of causal relation or solely on the latter. We should have difficulty in saying it was not negligent to leave the Tewksbury unguarded on what was known to be a perilous night, especially in view of the Buffalo ordinance forbidding any "master or other person owning or having charge of any vessel" to leave her in the harbor "without having on board or in charge thereof some competent person to control, manage or secure the same, without first obtaining permission of the harbor master." But we accept the judge's conclusion that the shipkeeper's presence would not have averted the disaster. The only ameliorative measure which it is suggested he might have taken is the dropping of the one anchor left to the Tewksbury after the Shiras destroyed the other. But it is highly questionable whether such action would have had a

3. Although the shipkeeper's failure to ready the anchors may have rendered the Shiras unseaworthy in the expanded sense used in seamen's personal injury actions, the contractual warranty is for "The fitness of the ship at the moment of breaking ground * * *, and not her suitability under conditions thereafter arising which are beyond the owner's control." Cullen Fuel Co. v. W. E. Hedger, Inc., 290 U.S. 82, 89, 54 S.Ct. 10, 11, 78 L.Ed. 189 (1933); The Soerstad, 257 F. 130 (S.D.N.Y.1919).

significant effect on the short rock-bottomed stretch between the Standard Elevator and the bridge. See The Anna C. Minch, 260 F. 522, 527 (W.D.N.Y.); 271 F. 192, 198 (2 Cir. 1921). Moreover, the shipkeeper might well have been reasonably reluctant to drop an anchor knowing that if it held, the Shiras would crash into the Tewksbury again.

We thus come to what we consider the most serious issues: (I) Whether the City of Buffalo was at fault for failing to raise the bridge on learning of the prospective advent of the Shiras and the Tewksbury; (II) the consequences of the time relation of the City's failure to the prior faults of the Shiras and Continental; and (III) the effect of the allegedly unexpectable character of the events leading to much of the damage—and here of the Palsgraf case, infra.

I. *The City's failure to raise the bridge.*

If this were a run of the mine negligence case, the City's argument against liability for not promptly raising the Michigan Avenue Bridge would be impressive: All the vessels moored in the harbor were known to be without power and incapable of controlled movement save with the aid of tugs. The tugs had quit at 4 P.M.; they were not docked in the river, and would not undertake after quitting time to tow a vessel into or out of the inner harbor. Since the breaking loose of a ship was not to be anticipated, it would have been consistent with prudence for the City to relieve the bridge crews of their duties.[4] Neglect by the crews ought not subject the City to liability merely because, out of abundance of caution, it had ordered them to be present when prudence did not so require. The case is unlike those in which a railway or a city, having undertaken to give warning signals at a crossing although under no duty to do so, is held liable to a plaintiff who relied on the absence of warning when it failed to continue its practice. See Prosser, Torts, 187, and fn. 87 (1955). It would be nonsense to suppose that Continental and the Shiras did what they did, and didn't what they didn't, in reliance on the bridge operators being sufficiently alert to avert disaster if the Shiras should break loose.

Buffalo's adversaries answer with § 4 of the Bridge Act of 1906, 33 U.S.C. § 494, which requires, inter alia, that if a bridge over a navigable stream "shall be constructed with a draw, then the draw shall be opened promptly by the persons owning or operating such bridge upon reasonable signal for the passage of boats and other water craft." Buffalo replies that this general language cannot reasonably be construed to require that all drawbridges over all navigable streams in all fifty states shall be tended at all times of day or night, summer or winter, despite the near certainty that no traffic will approach. Alternatively it is arguable that a signal given when no traffic was to be expected would not be a "reasonable signal" unless this gave the bridge owner reasonable time to get someone down to the bridge to open it. However, an older statute, 28 Stat. 362 (1894), as amended, 33 U.S.C. § 499, makes it "the duty of all persons owning, operating, and tending the drawbridges * * * across the navigable rivers and other waters of the United States, to open, or cause to be opened, the draws of such bridges under such rules and regulations as in the opinion of the Secretary of the Army the public interests require to govern the opening of drawbridges for the passage of vessels and other watercrafts, and such rules and regulations, when so made and published, shall have the force of law. * * *" The section goes on to authorize the promulgation of such

4. The claimants cannot prevail on their argument that the City was bound to see to it that the bridge could be opened at all times to permit passage of the tug maintained by the fire department west of the bridge. Violation of a duty to take steps that would mitigate fire would not subject the City to liability for what occurred—the harm must be "within the risk." See note 9, infra.

regulations by the Secretary of the Army and to make it a misdemeanor to delay unreasonably the opening of a draw after reasonable signal. Pursuant to this authority, the Corps of Engineers promulgated 33 C.F.R. § 203.707, as follows:

> "(a) The Michigan Avenue bridges across Buffalo River and Buffalo Ship Canal will not be required to open for the passage of vessels from 7:00 to 7:30 a. m., 8:00 to 8:30 a. m., 3:45 to 4:30 p. m., and 5:15 to 6:00 p. m.
>
> * * * * * *
>
> "(d) The closed periods prescribed in this section shall not be effective on Sundays and on New Year's day * * * [and other holidays].
>
> "(e) The draws of these bridges shall be opened promptly on signal for the passage of any vessel at all times during the day or night except as otherwise provided in this section." [None of the unquoted subsections provide otherwise.]

[11, 12] It is possible to read this statute and the regulations thereunder as creating by implication a cause of action, irrespective of negligence, for any person, or at least for any ship, injured by their breach. The power of Congress with respect to navigable streams is plenary; nothing prevents Congress from "abating any erections that may have been made, and preventing any others from being made, except in conformity with such regulations as it may impose." Willamette Iron Bridge Co. v. Hatch, 125 U.S. 1, 12–13, 8 S.Ct. 811, 817, 31 L.Ed. 629 (1888). Responsive to that decision Congress has enacted that "The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; * * *," 33 U.S.C. § 403; the Michigan Avenue Bridge was allowed to exist only subject to the conditions as to its raising previously stated. However, we are not here required to decide whether the statute and regulations create such an implied cause of action and, if so, in whose favor. See United States v. Perma Paving Co., 332 F.2d 754 (2 Cir. 1964). It is enough for this case that they lay down a standard of care with which bridge owners must comply in the absence of circumstances, not here present, excusing such compliance.

[13, 14] There can be no question as to this being so with respect to vessels in the ordinary course of navigation. City of Chicago v. Chicago Transp. Co., 222 F. 238, L.R.A.1915F, 1062 (7 Cir.), cert. denied, 238 U.S. 626, 35 S.Ct. 664, 59 L.Ed. 1495 (1915); City of Cleveland v. McIver, 109 F.2d 69 (6 Cir.1940). Cf. Nassau County Bridge Auth. v. Tug Dorothy McAllister, 207 F.Supp. 167 (E.D.N.Y.1962), aff'd 315 F.2d 631 (2 Cir. 1963). The same rule has been held applicable as to drifting vessels, Dorrington v. City of Detroit, 223 F. 232 (6 Cir. 1915). Although these were doubtless not in the forefront of Congress' mind, they too were within the general purpose of insuring freedom of navigation at which the statute was aimed. Compare De Haen v. Rockwood Sprinkler Co., 258 N.Y. 350, 179 N.E. 764 (1932); Urie v. Thompson, 337 U.S. 163, 191, 69 S.Ct. 1018, 93 L.Ed. 1282 (1949); contrast Gorris v. Scott, L.R. 9 Ex. 125 (1874), and see A. L. I. Restatement 2d, Torts § 286 (Tent.Draft No. 4, April, 1959), and Prosser, Torts, 157–58 (1955). The effect of the Corps of Engineers' regulation was to withdraw decision as to when the bridge might be left untended from what would otherwise have been a permissible area for exercise of the City's prudent judgment. See The Pennsylvania, 19 Wall. (86 U.S.) 125, 22 L.Ed. 148 (1874). Indeed, Buffalo exercised no judgment contrary to the regulation; the fault lay in its employees' failure to carry out the United States' commands and those of their employer.

II. *The time relation of the City's failure to the prior faults of the Shiras and Continental.*

All three parties held liable complain of the effect which the judge gave to the failure of the City to raise the bridge.

Kinsman and Continental contend that the City's failure insulates them from liability for damages to others resulting from the collision at the bridge; the City objects to the imposition of sole liability for damage to the Shiras and to Continental and to the exoneration of these parties from liability for destruction of the bridge.

[15, 16] We speedily overrule the objections of Kinsman and Continental. Save for exceptions which are not here pertinent, an actor whose negligence has set a dangerous force in motion is not saved from liability for harm it has caused to innocent persons solely because another has negligently failed to take action that would have avoided this. See A. L. I. Restatement, Torts §§ 439, 447 and 452; Restatement 2d Torts §§ 442A, 442B, and 452(1), comments *b* and *c* (Tent.Draft No. 9, April, 1963); Harper & James, The Law of Torts, 1146 (1956); James, Last Clear Chance: A Transitional Doctrine, 47 Yale L.J. 704, 708 (1938). As against third persons, one negligent actor cannot defend on the basis that the other had "the last clear chance." See Prosser, Torts, 291 and fn. 72 (1955); Bohlen, Contributory Negligence, 21 Harv.L.Rev. 233, 237–41 (1908); MacIntyre The Rationale of Last Clear Chance, 53 Harv.L.Rev. 1225, 1234–35 (1940). The contrary argument grows out of the discredited notion that only the last wrongful act can be a cause—a notion as faulty in logic as it is wanting in fairness. The established principle is especially appealing in admiralty which will divide the damages among the negligent actors or non-actors.

[17] On the other hand, we disagree with the judge's holding that because the City had "the last clear chance," Kinsman and Continental as plaintiffs against it are absolved of their negligence and the City as plaintiff is left without recourse against them. Here, as in the case of the injuries to persons not at fault, the damages should be divided. Explanation of our reasons requires some analysis of the origin of the last clear chance rule and of its application in admiralty.

As has been pointed out, the earliest common law decisions upholding the defense of contributory negligence were cases where the plaintiff's negligence came later than the defendant's and rested on the now discarded belief that only the last negligent act could be a legal cause. See Bohlen, Contributory Negligence, supra, 21 Harv.L.Rev. at 238; 8 Holdsworth, A History of English Law 459 (2d ed. 1925); Harper & James, supra, 1241–45. This same notion that had thus given rise to contributory negligence as a complete defense then became the basis for avoiding it; the first and still the most current explanation of the last clear chance rule is that under such circumstances the plaintiff's negligence is not a proximate cause of his injury. Dowell v. General Steam Nav. Co., 5 El. & Bl. 195 (1855); Tuff v. Warman, 5 C.B. (N.S.) 573, 585, 141 Eng.Rep. 231, 236 (1858). The error in this has been often demonstrated, see Prosser, Torts, 291; Harper & James, The Law of Torts, 1244, and fn. 18; the theory is, of course, entirely inconsistent with the acknowledged right of third persons to recover against the first as well as the second actor in the temporal chain. But, despite its demonstrable fallacy, the last clear chance doctrine has remained popular at common law as ameliorating the harshness of the rule whereby a negligent act of the plaintiff, often very slight in comparison to the dangerous conduct of the defendant, would otherwise bar recovery.

Although it might have been thought that the less severe consequences attributed to contributory negligence by the admiralty would have prevented the last clear chance doctrine from entering maritime law, see The Norman B. Ream, 252 F. 409, 414 (7 Cir.1918), a number of factors dictated otherwise. One was the influence of English cases in the common law courts involving collisions in territorial waters; another was the manning of the Court of Appeal and the House of Lords and of both trial and ap-

pellate admiralty tribunals in this country with lawyers whose principal training was in the common law; a third—no longer applicable in England since the Brussels Rules for apportioning damages in proportion to fault were adopted by the Maritime Conventions Act, 1 & 2 Geo. V, c. 57, § 1(1) (1911), but highly influential here—is that the doctrine, selectively applied, has helped to overcome results of the equal division principle which are sometimes quite as shocking as those of the common law bar for contributory negligence—especially in cases where reliance by a relatively innocent plaintiff on the "major-minor fault" exception has been thought to be barred by the rule of The Pennsylvania, 19 Wall. (86 U.S.) 125, 22 L.Ed. 148 (1874), that a party to a collision who has violated a statutory rule of navigation may not escape liability except on proof that the violation could not have contributed to the accident. See MacIntyre, supra, 53 Harv.L.Rev. at 1236–41; Gilmore & Black, Admiralty, 403–407, 438–442.

None of the cases in which this Court has applied the last clear chance rule to impose sole liability in admiralty is at all analogous to this one; indeed we doubt whether this case would come within the principle as generally applied at common law. One line of authority that is plainly distinguishable is where the vessel committing the later fault was contractually bound to care for the one guilty of an earlier fault of which the vessel held solely liable had become aware—typified by the tug that neglects a leaky tow, as in Henry Du Bois Sons Co. v. Pennsylvania RR., 47 F.2d 172 (2 Cir.1931), or in what was fated to be Judge Learned Hand's last opinion, Chemical Transporter, Inc. v. M. Turecamo, Inc., 290 F.2d 496 (2 Cir.1961). See also Sternberg Dredging Co. v. Moran Towing and Transp. Co., 196 F.2d 1002 (2 Cir.1952). In the other cases relied on by Continental and the Shiras, as in those just cited, the vessel solely charged had engaged in dangerous conduct in full knowledge of the peril created by the other's fault, often small although statutory. The Perseverance, 63 F.2d 788 (2 Cir.), cert. denied sub nom. Cornell Steamboat Co. v. Lavender, 289 U.S. 744, 53 S.Ct. 692, 77 L.Ed. 1490 (1933); The Sanday, 122 F.2d 325 (2 Cir. 1941); The Socony No. 19, 29 F.2d 20 (2 Cir. 1928); The Syosset, 71 F.2d 666 (2 Cir. 1934); The Cornelius Vanderbilt, 120 F.2d 766 (2 Cir. 1941). Indeed, in the three cases last cited it is not altogether clear that the fault of the exonerated vessel was a "cause" in the sense that the accident was within the risk that made her action negligent. Furthermore, if, as we believe, what really happened here was that neither of the bridge operators was on hand to raise the bridge when the first warning came, and the second operator had just arrived at the time of the second warning, the situation may well have been one in which "defendant did not in fact have a chance of avoiding injury to a negligent plaintiff but would have had such chance had it not been for some prior negligence," Harper & James, supra, 1251–55. Many states do not apply the last clear chance rule in such cases. See also Prosser, supra, 290, 295; A. L. I. Restatement of Torts § 479, although there is famous authority for doing so. British Columbia Elec. Ry. v. Loach, [1916] 1 A. C. 719 (P.C.1915).

However the case would stand at common law, the last clear chance doctrine, not very satisfactory at best, has been utilized in admiralty quite selectively, to free a claimant from the consequences of a rather low degree of negligence in creating a dangerous situation of which the party whose activity led to the damage was well aware and which he could easily have overcome. See Gilmore & Black, supra, 404 & fn. 47. It would be a far cry from that to impose on the City sole liability to the ship and the wharfinger whose negligence resulted in the crash with the bridge and to exempt the ship and the wharfinger from all liability for demolishing the City's property. In a ship-bridge collision somewhat the converse of this, where the ship, if provided with a lookout, would have had the last clear chance, we direct-

ed division of damages, Circle Line Sightseeing Yachts, Inc. v. City of New York, 283 F.2d 811 (2 Cir. 1960), cert. denied, 365 U.S. 879, 81 S.Ct. 1030, 6 L. Ed.2d 191 (1961); the same course should be followed here.

III. *The allegedly unexpectable character of the events leading to much of the damage.*

The very statement of the case suggests the need for considering Palsgraf v. Long Island RR., 248 N.Y. 339, 162 N.E. 99, 59 A.L.R. 1253 (1928), and the closely related problem of liability for unforeseeable consequences.

In Sinram v. Pennsylvania R.R., 61 F. 2d 767, 770 (2 Cir. 1932), which received Palsgraf into the admiralty, Judge Learned Hand characterized the issue in that case as "whether, if A. omitted to perform a positive duty to B., C., who had been damaged in consequence, might invoke the breach, though otherwise A. owed him no duty; in short, whether A. was chargeable for the results to others of his breach of duty to B." Thus stated, the query rather answers itself; Hohfeld's analysis tells us that once it is concluded that A. had no duty to C., it is simply a correlative that C. has no right against A. The important question is what was the basis for Chief Judge Cardozo's conclusion that the Long Island Railroad owed no "duty" to Mrs. Palsgraf under the circumstances.

Certainly there is no general principle that a railroad owes no duty to persons on station platforms not in immediate proximity to the tracks, as would have been quickly demonstrated if Mrs. Palsgraf had been injured by the fall of improperly loaded objects from a passing train. Cf. the decision with respect to the husband in Carey v. Pure Distributing Corp., 133 Tex. 31, 124 S.W.2d 847 (1939). Neither is there any principle that railroad guards who jostle a package-carrying passenger owe a duty only to him; if the package had contained bottles, the Long Island would surely have been liable for injury caused to close bystanders by flying glass or spurting liquid. The reason why the Long Island was thought to owe no duty to Mrs. Palsgraf was the lack of any notice that the package contained a substance demanding the exercise of any care toward anyone so far away; Mrs. Palsgraf was not considered to be within the area of apparent hazard created by whatever lack of care the guard had displayed to the anonymous carrier of the unknown fireworks.[5] The key sentences in Chief Judge Cardozo's opinion are these:

> "Here, by concession, there was nothing in the situation to suggest to the most cautious mind that the parcel wrapped in newspaper would spread wreckage through the station. If the guard had thrown it down knowingly and willfully, he would not have threatened the plaintiff's safety, so far as appearances could warn him. Liability can be no greater where the act is inadvertent." 248 N.Y. at 345, 162 N.E. at 101.

[18, 19] We see little similarity between the Palsgraf case and the situation before us. The point of Palsgraf was that the appearance of the newspaper-wrapped package gave no notice that its dislodgement could do any harm save to

5. There was exceedingly little evidence of negligence of any sort. The only lack of care suggested by the majority in the Appellate Division was that instead of endeavoring to assist the passenger, the guards "might better have discouraged and warned him not to board the moving train." 222 App.Div. 166, 167, 225 N.Y.S. 412, 413 (2d Dept. 1927). Chief Judge Cardozo said: "The man was not injured in his person nor even put in danger. The purpose of the act, as well as its effect, was to make his person safe. If there was a wrong to him at all, which may very well be doubted, it was a wrong to a property interest only, the safety of his package." 248 N.Y. at 343, 162 N.E. at 100. Judge Andrews' dissent said the Long Island had been negligent, 248 N.Y. at 347, 162 N.E. 99, but did not state in what respect.

How much ink would have been saved over the years if the Court of Appeals had reversed Mrs. Palsgraf's judgment on the basis that there was no evidence of negligence at all!

itself and those nearby, and this by impact, perhaps with consequent breakage, and not by explosion. In contrast, a ship insecurely moored in a fast flowing river is a known danger not only to herself but to the owners of all other ships and structures down-river, and to persons upon them. No one would dream of saying that a shipowner who "knowingly and wilfully" failed to secure his ship at a pier on such a river "would not have threatened" persons and owners of property downstream in some manner.[6] The shipowner and the wharfinger in this case having thus owed a duty of care to all within the reach of the ship's known destructive power, the impossibility of advance identification of the particular person who would be hurt is without legal consequence. Jackson v. B. Lowenstein & Bros., 175 Tenn. 535, 136 S.W.2d 495 (1940); Pfeifer v. Standard Gateway Theater, 262 Wis. 229, 55 N.W.2d 29 (1952). Similarly the foreseeable consequences of the City's failure to raise the bridge were not limited to the Shiras and the Tewksbury. Collision plainly created a danger that the bridge towers might fall onto adjoining property, and the crash of two uncontrolled lake vessels, one 425 feet and the other 525 feet long, into a bridge over a swift ice-ridden stream, with a channel only 177 feet wide, could well result in a partial damming that would flood property upstream. As to the City also, it is useful to consider, by way of contrast, Chief Judge Cardozo's statement that the Long Island would not have been liable to Mrs. Palsgraf had the guard wilfully thrown the package down. If the City had deliberately kept the bridge closed in the face of the onrushing vessels, taking the risk that they might not come so far, no one would give house-room to a claim that it "owed no duty" to those who later suffered from the flooding. Unlike Mrs. Palsgraf, they were within the area of hazard.

The case is quite different from this Court's ruling in Sinram, where a tug which had negligently rammed a barge was held free of liability for the loss of coal that the bargee subsequently allowed to be loaded into his barge without first having inspected her for damage. That case illustrates the principle, noted in Judge Hand's opinion, 61 F.2d at 771, "that there must be a terminus somewhere, short of eternity, at which the second party becomes responsible in lieu of the first," Prosser, Torts, 280—a principle now explicitly recognized in the Restatement 2d Torts, § 452(2) (Tent. Draft No. 9, April, 1963): "Where, by contract or otherwise, all responsibility for the protection of the other against the threatened harm is shifted to the third person, his intentional or negligent failure to act to prevent such harm is a superseding cause." See, applying this, Ford Motor Co. v. Wagoner, 183 Tenn. 392, 192 S.W.2d 840, 852, 164 A.L.R. 364 (1946); Stultz v. Benson Lumber Co., 6 Cal.2d 688, 59 P.2d 100 (1936).[7]

Since all the claimants here met the Palsgraf requirement of being persons to whom the actors owed a "duty of care," we are not obliged to reconsider whether that case furnishes as useful a standard for determining the boundaries of liability in admiralty for negligent conduct as was thought in Sinram, when Palsgraf was still in its infancy. But this does not dispose of the alternative argument that the manner in which several of the claimants were harmed, particularly by flood damage, was unforeseeable and that recovery for this may not be had—whether the argument is put in the forthright form that unforeseeable damages are not

6. The facts here do not oblige us to decide whether the Shiras and Continental could successfully invoke Palsgraf against claims of owners of shore-side property upstream from the Concrete Elevator or of non-riparian property other than the real and personal property which was sufficiently close to the bridge to have been damaged by the fall of the towers.

7. Compare Professor Beale's "come to rest" rule, The Proximate Consequences of an Act, 33 Harv.L.Rev. 633, 651 ff. (1920), and Professor Seavey's "termination of risk" principle, Principles of Torts, 56 Harv.L.Rev. 72, 93 (1942).

recoverable or is concealed under a formula of lack of "proximate cause." [8]

So far as concerns the City, the argument lacks factual support. Although the obvious risks from not raising the bridge were damage to itself and to the vessels, the danger of a fall of the bridge and of flooding would not have been unforeseeable under the circumstances to anyone who gave them thought. And the same can be said as to the failure of Kinsman's shipkeeper to ready the anchors after the danger had become apparent. The exhibits indicate that the width of the channel between the Concrete Elevator and the bridge is at most points less than two hundred fifty feet. If the Shiras caught up on a dock or vessel moored along the shore, the current might well swing her bow across the channel so as to block the ice floes, as indeed could easily have occurred at the Standard Elevator dock where the stern of the Shiras struck the Tewksbury's bow. At this point the channel scarcely exceeds two hundred feet, and this was further narrowed by the presence of the Druckenmiller moored on the opposite bank. Had the Tewksbury's mooring held, it is thus by no means unlikely that these three ships would have dammed the river. Nor was it unforeseeable that the drawbridge would not be raised since, apart from any other reason, there was no assurance of timely warning. What may have been less foreseeable was that the Shiras would get that far down the twisting river, but this is somewhat negated both by the known speed of the current when freshets developed and by the evidence that, on learning of the Shiras' departure, Continental's employees and those they informed foresaw precisely that.

Continental's position on the facts is stronger. It was indeed foreseeable that the improper construction and lack of inspection of the "deadman" might cause a ship to break loose and damage persons and property on or near the river—that was what made Continental's conduct negligent. With the aid of hindsight one can also say that a prudent man, carefully pondering the problem, would have realized that the danger of this would be greatest under such water conditions as developed during the night of January 21, 1959, and that if a vessel should break loose under those circumstances, events might transpire as they did. But such *post hoc* step by step analysis would render "foreseeable" almost anything that has in fact occurred; if the argument relied upon has legal validity, it ought not be circumvented by characterizing as foreseeable what almost no one would in fact have foreseen at the time.

[20, 21] The effect of unforeseeability of damage upon liability for negligence has recently been considered by the Judicial Committee of the Privy Council, Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co. (The Wagon Mound), [1961] 1 All E.R. 404. The Committee there disapproved the proposition, thought to be supported by Re Polemis and Furness, Withy & Co. Ltd., [1921] 3 K.B. 560 (C.A.), "that unforeseeability is irrelevant if damage is 'direct.'" We have no difficulty with the result of The Wagon Mound, in view of the finding, 1 All E.R. at 407, that the appellant had no reason to believe that the floating furnace oil would burn, see also the extended discussion in Miller SS. Co. v. Overseas Tankship (U.K.) Ltd., The Wagon Mound No. 2, [1963] 1 Lloyd's Law List Rep. 402 (Sup.Ct.N.S.W.). On that view the decision simply applies the principle which excludes liability where the injury sprang from a hazard different from that which was improperly risked, see fn. 9. Although some language in the judgment goes beyond this, we would find it difficult to understand why one who had failed to use the care required to protect others in the light of expectable forces should

8. It is worth underscoring that the *ratio decidendi* in Palsgraf was that the Long Island was not required to use *any* care with respect to the package vis-a-vis Mrs. Palsgraf; Chief Judge Cardozo did not reach the issue of "proximate cause" for which the case is often cited. 248 N.Y. at 346–347, 162 N.E. 99.

be exonerated when the very risks that rendered his conduct negligent produced other and more serious consequences to such persons than were fairly foreseeable when he fell short of what the law demanded. Foreseeability of danger is necessary to render conduct negligent; where as here the damage was caused by just those forces whose existence required the exercise of greater care than was taken—the current, the ice, and the physical mass of the Shiras, the incurring of consequences other and greater than foreseen does not make the conduct less culpable or provide a reasoned basis for insulation.[9] See Hart and Honoré Causation in the Law, 234–48 (1959). The oft encountered argument that failure to limit liability to foreseeable consequences may subject the defendant to a loss wholly out of proportion to his fault seems scarcely consistent with the universally accepted rule that the defendant takes the plaintiff as he finds him and will be responsible for the full extent of the injury even though a latent susceptibility of the plaintiff renders this far more serious than could reasonably have been anticipated. See Prosser, Torts, 260.

The weight of authority in this country rejects the limitation of damages to consequences foreseeable at the time of the negligent conduct when the consequences are "direct," and the damage, although other and greater than expectable, is of the same general sort that was risked. See the many cases cited in Prosser, Torts, 260–62, fns. 75–78, and 263–64, and the recent reaffirmation, Dellwo v. Pearson, 259 Minn. 452, 107 N.W.2d 859, 97 A.L.R.2d 866 (1961), of Mr. Justice Mitchell's statement in Christianson v. Chicago, St. P., M. & O. Ry., 67 Minn. 94, 96, 69 N.W. 640, 641 (1896), that the rule of Hadley v. Baxendale, 9 Exch. 341 (1854), has no place in negligence law. Other American courts, purporting to apply a test of foreseeability to damages, extend that concept to such unforeseen lengths as to raise serious doubt whether the concept is meaningful;[10] indeed, we

9. The contrasting situation is illustrated by the familiar instances of the running down of a pedestrian by a safely driven but carelessly loaded car, or of the explosion of unlabeled rat poison, inflammable but not known to be, placed near a coffee burner. Larrimore v. American Nat. Ins. Co., 184 Okl. 614, 89 P.2d 340 (1939). Exoneration of the defendant in such cases rests on the basis that a negligent actor is responsible only for harm the risk of which was increased by the *negligent aspect* of his conduct. See Keeton, Legal Cause in the Law of Torts, 1–10 (1963); Hart & Honoré, Causation in the Law, 157–58 (1959). Compare Berry v. Borough of Sugar Notch, 191 Pa. 345, 43 A. 240 (1899).

This principle supports the judgment for the defendant in the recent case of Doughty v. Turner Mfg. Co., [1964] 2 W.L.R. 240 (C.A.). The company maintained a bath of molten cyanide protected by an asbestos cover, reasonably believed to be incapable of causing an explosion if immersed. An employee inadvertently knocked the cover into the bath, but there was no damage from splashing. A minute or two later an explosion occurred as a result of chemical changes in the cover and the plaintiff, who was standing near the bath, was injured by the molten drops. The risk against which defendant *was* required to use care—splashing of the molten liquid from dropping the supposedly explosion proof cover—did not materialize, and the defendant was found not to have lacked proper care against the risk that did. As said by Lord Justice Diplock, [1964] 2 W.L.R. at 247, "The former risk was well known (that was foreseeable) at the time of the accident; but it did not happen. It was the second risk which happened and caused the plaintiff damage by burning." Moreover, if, as indicated in Lord Pearce's judgment, [1964] 2 W.L.R. at 244, the plaintiff was not within the area of potential splashing, the case parallels Palsgraf; Lord Justice Diplock's statement, [1964] 2 W.L.R. at 248, that defendants "would have been under no liability to the plaintiff if they had intentionally immersed the cover in the liquid" is reminiscent of Chief Judge Cardozo's quoted above.

10. An instance is In re Guardian Casualty Co., 253 App.Div. 360, 2 N.Y.S.2d 232 (1st Dept.), aff'd, 278 N.Y. 674, 16 N.E. 2d 397 (1938), where the majority gravely asserted that a foreseeable consequence of driving a taxicab too fast was that a collision with another car would project the cab against a building with

wonder whether the British courts are not finding it necessary to limit the language of The Wagon Mound as we have indicated.[11]

[22] We see no reason why an actor engaging in conduct which entails a large risk of small damage and a small risk of other and greater damage, of the same general sort, from the same forces, and to the same class of persons, should be relieved of responsibility for the latter simply because the chance of its occurrence, if viewed alone, may not have been large enough to require the exercise of care. By hypothesis, the risk of the lesser harm was sufficient to render his disregard of it actionable; the existence of a less likely additional risk that the very forces against whose action he was required to guard would produce other and greater damage than could have been reasonably anticipated should inculpate him further rather than limit his liability. This does not mean that the careless actor will always be held for all damages for which the forces that he risked were a cause in fact. Somewhere a point will be reached when courts will agree that the link has become too tenuous—that what is claimed to be consequence is only fortuity. Thus, if the destruction of the Michigan Avenue Bridge had delayed the arrival of a doctor, with consequent loss of a patient's life, few judges would impose liability on any of the parties here, although the agreement in result might not be paralleled by similar unanimity in reasoning; perhaps in the long run one returns to Judge Andrews' statement in Palsgraf, 248 N.Y. at 354–355, 162 N.E. at 104 (dissenting opinion). "It is all a question of expediency, * * * of fair judgment, always keeping in mind the fact that we endeavor to make a rule in each case that will be practical and in keeping with the general understanding of mankind." It would be pleasant if greater certainty were possible, see Prosser, Torts, 262, but the many efforts that have been made at defining the *locus* of the "uncertain and wavering line," 248 N.Y. at 354, 162 N.E. 99, are not very promising; what courts do in such cases makes better sense than what they, or others, say. Where the line will be drawn will vary from age to age; as society has

such force as to cause a portion of the building to collapse twenty minutes later, when the cab was being removed, and injure a spectator twenty feet away. Surely this is "straining the idea of foreseeability past the breaking point," Bohlen, Book Review, 47 Harv.L.Rev. 556, 557 (1934), at least if the matter be viewed as of the time of the negligent act, as the supposedly symmetrical test of The Wagon Mound demands, [1961] 1 All Eng.R. at 415. On the other hand, if the issue of foreseeability is viewed as of the moment of impact, see Seavey, Mr. Justice Cardozo and the Law of Torts, 52 Harv.L.Rev. 372, 385 (1939), the test loses functional significance since at that time the defendant is no longer able to amend his conduct so as to avert the consequences.

11. In a recent case, workmen who had adjourned for their tea-break on a November afternoon left paraffin lamps as warnings around a tent covering an open manhole. Two boys determined to explore the manhole, using a ladder lying nearby; after they had performed this successfully, one of the lamps fell or was kicked into the manhole, an explosion occurred, and a boy fell in and suffered burns, particularly from applying his fingers to the hot rungs of the ladder. The Court of Sessions affirmed a defendant's judgment in deference to The Wagon Mound. The House of Lords reversed, their lordships explaining that this was not different from "the type or kind of accident * * * or occurrence that could reasonably have been foreseen." They stated that "The fact that the features or developments of an accident may not reasonably have been foreseen does not mean that the accident itself was not foreseeable"; that "In order to establish a coherent chain of causation it is not necessary that the precise details leading up to the accident should have been reasonably foreseeable"; and that "to demand too great precision in the test of foreseeability would be unfair * * * since the facets of misadventure are innumerable." Hughes v. Lord Advocate, [1963] A.C. 837, 852, 855, 857, reversing 1961 S.C. 310. This comes very close to saying that where the damage was of the sort that was risked, foreseeability is not required.

come to rely increasingly on insurance and other methods of loss-sharing, the point may lie further off than a century ago. Here it is surely more equitable that the losses from the operators' negligent failure to raise the Michigan Avenue Bridge should be ratably borne by Buffalo's taxpayers than left with the innocent victims of the flooding; yet the mind is also repelled by a solution that would impose liability solely on the City and exonerate the persons whose negligent acts of commission and omission were the precipitating force of the collision with the bridge and its sequelae. We go only so far as to hold that where, as here, the damages resulted from the same physical forces whose existence required the exercise of greater care than was displayed and were of the same general sort that was expectable, unforeseeability of the exact developments and of the extent of the loss will not limit liability. Other fact situations can be dealt with when they arise.

[23] We have considered whether we should alter the three-way division of damages, decreed by the judge in favor of claimants who were free from fault, so that the negligence of the City would be considered one efficient force and the combined negligence of Kinsman and Continental another, with a further division between the latter, subject to Kinsman's limitation of liability. See The Eugene F. Moran, 212 U.S. 466, 29 S.Ct. 339, 53 L.Ed. 600 (1909); The Norwich Victory, 77 F.Supp. 264 (E.D.Pa.1948), aff'd United States v. Dump Scows No. 116, No. 120 and No. 122, 175 F.2d 556 (3 Cir.), cert. denied, American Dredging Co. v. United States, 338 U.S. 871, 70 S.Ct. 147, 94 L.Ed. 534 (1949); Moran Towing & Transp. Co., Inc. v. Empresa Hondurena de Vapores, 194 F. 2d 629 (5 Cir.), cert. denied, 343 U.S. 978, 72 S.Ct. 1074, 96 L.Ed. 1370 (1952); Pennsylvania R. Co. v. The Beatrice, 275 F.2d 209 (2 Cir. 1960). But the point has not been argued and although the issue may be sufficiently comprehended by Continental's appeal from being cast in any liability to enable us to consider it if we chose, contrast International Milling Co. v. Brown SS. Co., 264 F.2d 803 (2 Cir. 1959), we are reluctant to take the initiative in adding still another to the number of issues here decided, and the matter appears to have little practical importance if Kinsman's limitation stands.

[24] A separate problem is how to deal, among the negligent parties, with that part of Kinsman's responsibility of which its limitation frees it. We think the fair solution is to divide that deficiency equally between Buffalo and Continental, rather than to hold Continental liable to Buffalo for the entire unsatisfied portion of Kinsman's share and *vice versa*. This comports with the spirit of the rule whereby damages owing to an innocent third party are apportioned equally among responsible tortfeasors if another, through limitation or insolvency, is incapable of responding for his share—even though neither Buffalo nor Continental can technically be a tortfeasor against itself. See The Alabama, 92 U.S. 695, 23 L.Ed. 763 (1876); The City of Hartford, 97 U.S. 323, 24 L.Ed. 930 (1877).

[25, 26] The decree is modified so that the City of Buffalo may recover two-thirds of the damages to its property from Continental and Kinsman subject to limitation by the latter but with Continental bearing only half of Kinsman's deficiency, that Continental may recover two-thirds of the damages to its property from the City and Kinsman subject to limitation by the latter but with the City bearing only half of Kinsman's deficiency, and that Kinsman, which made no claim against Continental, may recover half of the damages suffered by the Shiras at the bridge from the City of Buffalo, which may then obtain contribution of half that amount from Continental. Under the principle of marshaling, see United States v. Behrens, 230 F.2d 504 (2 Cir. 1956), cert. denied, 351 U.S. 919, 76 S.Ct. 709, 100 L.Ed. 1451 (1956), Moore-McCormack Lines v. Richardson, 295 F.2d 583, 96 A.L.R.2d 1085 (2 Cir. 1961), cert.

denied, 368 U.S. 989, 82 S.Ct. 606, 7 L.Ed. 2d 526, 370 U.S. 937, 82 S.Ct. 1577, 8 L. Ed.2d 806 (1962), the limitation fund should first be applied ratably to 50% of those claims of innocent parties for which Kinsman and Continental, but not the City, share responsibility, to wit, those damages to the Tewksbury and the Druckenmiller which occurred prior to the Tewksbury's collision with the bridge. If anything remains of the limitation fund thereafter, the City and Continental should precede other claimants. As so modified, the decree is affirmed.

[27–29] Parties other than the City, Kinsman and Continental may recover their costs on appeal. The City, successful on the last clear chance issue but unsuccessful on others, may recover half costs against Kinsman and Continental. Kinsman, unsuccessful in its endeavor to avoid all liability but successful in holding its limitation, may recover half costs against the City and Continental, the two parties that challenged its limitation. Costs awarded against Kinsman shall be payable by it personally and not out of the limitation fund; costs payable to it shall not form part of the fund.

It is so ordered.

MOORE, Circuit Judge (concurring and dissenting):

I do not hesitate to concur with Judge Friendly's well-reasoned and well-expressed opinion as to limitation of Kinsman's liability, the extent of the liability of the City of Buffalo, Continental and Kinsman for the damages suffered by the City, the Shiras, the Tewkshury, the Druckenmiller and the Farr and the division of damages.

I cannot agree, however, merely because "society has come to rely increasingly on insurance and other methods of loss-sharing" that the courts should, or have the power to, create a vast judicial insurance company which will adequately compensate all who have suffered damages. Equally disturbing is the suggestion that "[H]ere it is surely more equitable that the losses from the operators' negligent failure to raise the Michigan Avenue Bridge should be ratably borne by Buffalo's taxpayers than left with the innocent victims of the flooding." Under any such principle, negligence suits would become further simplified by requiring a claimant to establish only his own innocence and then offer, in addition to his financial statement, proof of the financial condition of the respective defendants. Judgment would be entered against the defendant which court or jury decided was best able to pay. Nor am I convinced that it should be the responsibility of the Buffalo taxpayers to reimburse the "innocent victims" in their community for damages sustained. In my opinion, before financial liability is imposed, there should be some showing of legal liability.

Unfortunate though it was for Buffalo to have had its fine vehicular bridge demolished in a most unexpected manner, I accept the finding of liability for normal consequences because the City had plenty of time to raise the bridge after notice was given. Bridges, however, serve two purposes. They permit vehicles to cross the river when they are down; they permit vessels to travel on the river when they are up. But no bridge builder or bridge operator would envision a bridge as a dam or as a dam potential.

By an extraordinary concatenation of even more extraordinary events, not unlike the humorous and almost-beyond-all-imagination sequences depicted by the famous cartoonist, Rube Goldberg, the Shiras with its companions which it picked up en route did combine with the bridge demolition to create a very effective dam across the Buffalo River. Without specification of the nature of the damages, claims in favor of some twenty persons and companies were allowed (Finding of Fact #33, Interlocutory Decree, par. 11) resulting from the various collisions and from "the damming of the river at the bridge, the backing up of the water and ice upstream, and the overflowing of the banks of the river and flooding of industrial installations along

the river banks." (Sup. Finding of Fact #26a.)

My dissent is limited to that portion of the opinion which approves the awarding of damages suffered as a result of the flooding of various properties upstream. I am not satisfied with reliance on hindsight or on the assumption that since flooding occurred, therefore, it must have been foreseeable. In fact, the majority hold that the danger "of flooding would not have been unforeseeable under the circumstances to anyone who gave them thought." But believing that "anyone" might be too broad, they resort to that most famous of all legal mythological characters, the reasonably "prudent man." Even he, however, "carefully pondering the problem," is not to be relied upon because they permit him to become prudent "[W]ith the aid of hindsight."

The majority, in effect, would remove from the law of negligence the concept of foreseeability because, as they say, "[T]he weight of authority in this country rejects the limitation of damages to consequences foreseeable at the time of the negligent conduct when the consequences are 'direct.'" Yet lingering thoughts of recognized legal principles create for them lingering doubts because they say: "This does not mean that the careless actor will always be held for all damages for which the forces that he risked were a cause in fact. Somewhere a point will be reached when courts will agree that the link has become too tenuous—that what is claimed to be consequence is only fortuity." The very example given, namely, the patient who dies because the doctor is delayed by the destruction of the bridge, certainly presents a direct consequence as a factual matter yet the majority opinion states that "few judges would impose liability on any of the parties here," under these circumstances.

In final analysis the answers to the questions when the link is "too tenuous" and when "consequence is only fortuity" are dependent solely on the particular point of view of the particular judge under the particular circumstances. In differing with my colleagues, I must be giving "unconscious recognition of the harshness of holding a man for what he could not conceivably have guarded against, because human foresight could not go so far." (L. Hand, C. J., in Sinram v. Pennsylvania R. Co., 61 F.2d 767, 770, 2 Cir., 1932.) If "foreseeability" be the test, I can foresee the likelihood that a vessel negligently allowed to break its moorings and to drift uncontrolled in a rapidly flowing river may well strike other ships, piers and bridges. Liability would also result on the "direct consequence" theory. However, to me the fortuitous circumstance of the vessels so arranging themselves as to create a dam is much "too tenuous."

The decisions bearing on the foreseeability question have been so completely collected in three English cases [1] that no repetition of the reasoning pro and con of this principle need be made here. To these cases may be added the many American cases cited in the majority opinion which to me push the doctrine of foreseeability to ridiculous lengths—ridiculous, I suppose, only to the judge whose "human foresight" is restricted to finite limits but not to the judge who can say: It happened; *ergo*, it must have been foreseeable. The line of demarcation will always be "uncertain and wavering," Palsgraf v. Long Island R.R., 248 N.Y. 339, 354, 162 N.E. 99, 59 A.L.R. 1253 (1928), but if, concededly, a line exists, there must be areas on each side. The flood claimants are much too far on the non-liability side of the line. As to them, I would not award any recovery even if the taxpayers of Buffalo are better able to bear the loss.

1. In re Polemis and Furness, Withy & Co., [1921] 3 K.B. 560 (C.A.); Overseas Tankship (U. K.), Ltd. v. Morts Dock & Engineering Co., Ltd. (The Wagon Mound), [1961] 1 All E. R. 404; Miller Steamship Company, Pty., Ltd. v. Overseas Tankship (U. K.) Ltd., [1963] 1 Lloyd's Law List Rep. 402 (Sup.Ct., New South Wales).

Delayne A. ATHERTON, Appellant,

v.

Dan Joseph DEVINE, Appellee.

No. 53445.

Supreme Court of Oklahoma.

Sept. 18, 1979.

Rehearing Denied Nov. 26, 1979.

Action was brought to recover for injuries sustained in automobile collision. The District Court, Oklahoma County, Stewart M. Hunter, J., held that defendant motorist could not be held liable for injuries sustained when ambulance which was taking plaintiff motorist to hospital was itself involved in another collision. Certiorari was granted. The Supreme Court, Hodges, J., held that: (1) risk which must be borne by an original tortfeasor includes not only medical treatment, but also transportation to a place where treatment may be obtained, and (2) reasonable foreseeability required that the original tort-feasor be held liable for subsequent injuries which were involved as a result of the second accident.

Reversed.

Irwin, V. C. J., and Opala, J., concurred in result.

1. Negligence ⇐62(1)

General rule is that an intervening force which could reasonably have been foreseen or which is a normal incident of the risk created will not suffice to relieve an original tort-feasor of liability.

2. Damages ⇐34

A person who has received an injury due to the negligence of another is entitled to recover all damages proximately traceable to the primary negligence including subsequent aggravation which the law regards as a sequence and natural result likely to flow from the original injury even though there may have been some intervening cause contributing to the result.

3. Negligence ⇐62(1)

Where there is an intervening responsible agency which directly produces an injury, the question whether the original negligence is to be regarded as the proximate cause of the injury, or only as a condition, is to be determined by ascertaining whether the agency which intervened was of such character and the circumstances under which it occurred were such that it might have been reasonably expected that an injury similar to the one caused might actually have happened.

4. Negligence ⇐62(1)

If, under the circumstances, the intervention of another agency in the manner in which it occurred might reasonably have been expected to happen, the chain of causation extending from the original wrongful act to the injury is not broken by the independent intervening agency, and the original wrongful act is treated as the proximate cause thereof.

5. Negligence ⇐59

Foreseeability is an essential element of proximate cause, and is the standard by which proximate cause, as distinguished from the existence of a mere condition, is to be tested.

6. Damages ⇐34

A tort-feasor whose negligence has caused injury to another is also liable for any subsequent injury or the injury that was the proximate result of the original injury, except where the subsequent injury or reinjury was caused by the negligence of the injured person or by an independent or intervening act of the injured person, or by an independent or intervening act of a third person.

7. Negligence ⇐56(1.9)

The first injury or act of negligence need not be the sole cause of the subsequent injury for the initial tort-feasor to be held liable for the total injury, as it is sufficient it is a substantial factor in causing the latter injury.

8. Damages ⇐34

An original wrongdoer negligently causing injury to another is liable for the negligence of a physician who treats the injured person where the negligent treatment results in the aggravation of injuries, so long as the injured person exercises good faith in the choice of his physician.

9. Damages ⇐34

Reasonable foreseeability rule required that tort-feasor who was involved in original automobile accident be held liable for subsequent injuries which occurred when ambulance taking the other motorist to the hospital was itself involved in an automobile collision.

10. Damages ⇐34

Risk which must be borne by an original tort-feasor includes not only medical treatment, but also transportation to a place where treatment may be obtained.

11. Negligence ⇐136(25)

Causation traditionally lies within the realm of fact, not law.

12. Negligence ⇐136(25)

In a negligence action, it is a jury question whether the injurious consequences resulting from the negligence could have reasonably been foreseen or anticipated.

13. Negligence ⇐136(25)

Where the evidence is conflicting or where reasonable men might draw different conclusions, the question of reasonable foreseeability of an intervening act or agency causing subsequent injury is to be determined by the jury.

Appeal from the District Court of Oklahoma County; Stewart M. Hunter, Judge.

Certiorari granted pursuant to 12 O.S. 1971 § 952(b)(3). Appellant seeks reversal of the trial court's order that as a matter of law the appellee involved in a traffic accident cannot be held liable for the subsequent injury sustained by the appellant while he was a passenger in an ambulance transporting him to the hospital from the situs of the original accident.

REVERSED.

Bloodworth, Smith & Biscone by Robert B. Smith, Oklahoma City, for appellant.

Proctor, Fleming & Speck by Kent Fleming, Oklahoma City, for appellee.

HODGES, Justice.

The certified order which affects a substantial part of the merits of this controversy is the holding of the district court that, as a matter of law, the appellee, Dan Joseph Devine, who was involved in the original accident, cannot be held liable for subsequent injuries sustained by the appellant, Dalayne A. Atherton, while he was a passenger in an ambulance transporting him to the hospital from the scene of the initial accident. Because it is a case of first impression, and interlocutory appeal will materially advance the ultimate determination of this action, we grant certiorari.

Immediately following the automobile accident involving the parties, an ambulance was summoned to take the appellant to the hospital for treatment of injuries he had received as the result of the collision. The ambulance was involved in a second collision resulting in the appellant sustaining additional personal injuries.

I

The question presented is whether an original tortfeasor, causing personal injury to one because of his negligence, may be liable to that person for injuries received in a second accident while being transported in an ambulance from the situs of the first accident. It is asserted by appellant that the appellee should be held responsible for the subsequent injuries because, absent the conduct of the appellee in the first accident, the appellant would not have been placed in the position, i. e., an ambulance ride to the hospital which resulted in his additional injuries.

[1-5] The general rule is that an intervening force which could reasonably have been foreseen or which is a normal incident

of the risk created will not suffice to relieve an original tortfeasor of liability.[1] A person who has received an injury due to the negligence of another is entitled to recover all damages proximately traceable to the primary negligence including subsequent aggravation which the law regards as a sequence and natural result likely to flow from the original injury even though there may have been some intervening cause contributing to the result. Where there is an intervening responsible agency which directly produces an injury the question whether the original negligence is to be regarded as the proximate cause of the injury, or only as a condition, is to be determined by ascertaining whether the agency which intervened was of such character and the circumstances under which it occurred were such that it might have been reasonably expected that an injury similar to the one caused might actually happen. If, under the circumstances, the intervention of such an agency in the manner in which it occurred might reasonably have been expected to happen, then the chain of causation extending from the original wrongful act to the injury is not broken by the independent intervening agency, and the original wrongful act is treated as the proximate cause thereof.[2] Foreseeability is an essential element of proximate cause in Oklahoma, and it is the standard by which proximate cause, as distinguished from the existence of a mere condition, is to be tested. This Court has considered the dichotomy of the condition precedent and proximate cause several times involving illegally parked vehicles.[3] The question in this case does not involve proximate cause for the purpose of determining culpability, as in the parked car cases, but rather to determine the extent of the injuries for which the appellee should be held liable.

[6–8] It has uniformly been recognized that a tortfeasor whose negligence has caused injury to another is also liable for any subsequent injury or reinjury that is the proximate result of the original injury, except where the subsequent injury or reinjury was caused by either the negligence of the injured person, or by an independent or intervening act of the injured person, or by an independent or intervening act of a third person. The courts have taken the position that the first injury or act of negligence need not be the sole cause of the subsequent injury, but is sufficient if it was a substantial factor in causing the latter injury.[4] It has long been the rule in Oklahoma that an original wrongdoer, negligently causing injury to another is liable for the negligence of a physician who treats the injured person where the negligent treatment results in the aggravation of injuries, so long as the injured person exercises good faith in the choice of his physician.[5] The reason for the rule is that the employment of a physician is regarded as a natural consequence of the original wrong, because the necessity for

1. The general rule of law relative to additional harm resulting from efforts to mitigate harm caused by negligence is found in the Second Restatement of Torts, Ch. 16, § 457, p. 496. It provides:

"If a negligent actor is liable for another's bodily injury, he is also subject to liability for an additional bodily harm resulting from normal efforts of third persons in rendering aid which the other injury reasonably requires, irrespective of whether such acts are done in a proper or negligent manner."

2. *Oklahoma Natural Gas Co. v. Courtney*, 182 Okl. 582, 79 P.2d 235 (1938).

3. See *Thur v. Dunkley*, 474 P.2d 403 (Okl.1970); *Woodward v. Kinchen*, 446 P.2d 375 (Okl. 1968); and *Pepsi Cola Bottling Co. v. Von Brady*, 386 P.2d 993 (Okl.1964). The Court held in all these cases that an illegally parked vehicle is merely a condition, and not the cause of plaintiff's injuries. However, the parked car cases involve a defendant whose conduct operating alone would not have resulted in harm to anyone except for the negligence of another party. The conduct of the defendant in the parked car cases did not amount to a completed tort since the parking of the car in itself did not result in injury. These cases are clearly distinguishable from the facts in this case because the conduct has already resulted in an injury and a completed tort exists.

4. Annot., Proximate Cause Liability of Tortfeasor for Injured Person's Subsequent Injury or Reinjury, 31 A.L.R.3d 1000 (1970).

5. *Smith v. Missouri, K. & T. Ry. Co.*, 76 Okl. 303, 185 P. 70 (1919).

such employment is imposed on the injured party by the fault of the original tortfeasor. This liability is founded on sound reasons of public policy.[6]

As a matter of principle, there would seem to be no material distinction between medical treatment required because of the tortious act, and transportation required to reach an institution where medical treatment is available. The use of an ambulance, like the use of a surgeon's scalpel, is necessitated by the tortfeasor's wrong, and either may be used negligently. Although this is a novel question in Oklahoma, it was determined under similar fact situations in *State v. Weinstein*, 398 S.W.2d 41, 44 (Mo. App.1965) and in *Pridham v. Cash & Carry Building Center, Inc.*, 116 N.H. 292, 359 A.2d 193, 198 (1976) that any negligence connected with the treatment of an injury necessitated by the act of the original wrongdoer should be regarded as the proximate result of the original wrong, whether it would be due to the physician's negligence or the negligence of an ambulance driver conveying the injured party to the hospital for treatment. In *Weinstein*, the rule holding the original tortfeasor liable for the negligence of a physician who treats the injured party was extended to injuries sustained by one injured while being conveyed to a place where medical service could be obtained.

[9, 10] We, therefore hold that the reasonable foreseeability rule requires that the original tortfeasor be held liable for subsequent injuries which were involved as the result of the second accident. Liability is imposed against the original tortfeasor for efforts of third persons in rendering aid which resulted in additional injury to the victim. The risk which must be borne by an original tortfeasor includes not only medical treatment, but also transportation to a place where treatment may be obtained. The first tortfeasor is in no position to avoid liability for an aggravation sustained by the injured in taking one of the steps necessary to obtain further treatment.[7]

II

[11-13] Causation traditionally lies within the realm of fact, not law.[8] In an action for injuries caused by the defendant's negligence, it is a jury question whether the injurious consequences resulting from the negligence could have reasonably been foreseen or anticipated.[9] Likewise, where the evidence is conflicting or where reasonable men might draw different conclusions, the question of reasonable foreseeability of an intervening act or agency causing subsequent injury is to be determined by the jury.[10] Foreseeableness becomes a question of law for the court only when one reasonable conclusion can be drawn from the facts.[11]

REVERSED.

LAVENDER, C. J., and WILLIAMS, BARNES, SIMMS, DOOLIN and HARGRAVE, JJ., concur.

IRWIN, V. C. J., and OPALA, J., concur in result.

6. *Elliott v. Kansas City*, 174 Mo. 554, 74 S.W. 617 (1903).

7. Annot., "Civil Liability of One Causing Personal Injury for Consequence of Negligence, Mistake, or Lack of Skill of Physician or Surgeon Present," 100 A.L.R.2d 808 (1955).

8. *Pryor v. Lee C. Moore Corp.*, 262 F.2d 673 (10th Cir. 1959), *cert. denied* 360 U.S. 902, 79 S.Ct. 1284, 3 L.Ed.2d 1254 (1959).

9. *Smith v. Davis*, 430 P.2d 799 (Okl.1967).

10. See *England v. Kilcrease*, 456 P.2d 521 (Okl. 1969); *Continental Oil Co. v. Ryan*, 392 P.2d 492 (Okl.1963).

11. See *Sturm v. Green*, 398 P.2d 799 (Okl. 1965). See also Restatement of Torts, Ch. 16 § 453, p. 1208 (1934).

Bishop DiLorenzo and Solodar as the parties to the sale, acknowledged Beitz as Bishop DiLorenzo's representative in the transaction, identified the Chancery Buildings as the properties to be sold, stated an approximate purchase price, identified the terms of sale, and provided that a commission would be paid to Vaughan.

[10] In his demurrer to Vaughan's amended complaint, Bishop DiLorenzo contends that Vaughan failed to "set[ ] out the necessary terms to include parties, duration and compensation." Compensation is not required by the plain language of Code § 11–2, the last paragraph of which expressly eliminates consideration as an element of the agreement required in the writing. And as our analysis in *Murphy* articulates, no written durational language is required in order to remove the bar of the statute of frauds from a real estate brokerage agreement. It bears repeating that the "statute [of frauds] is concerned, not with the validity of the contract, but with its enforceability." *T ... v. T ...*, 216 Va. at 871, 224 S.E.2d at 151.

[11] The present case is distinguishable from *Murphy* because here the Solodar Agreement was not consummated. However, the terminated Solodar Agreement is not the contract Vaughan seeks to enforce.

> When the bar [of the statute of frauds] is removed, it is the oral contract which is subject to enforcement, not the memorandum. Because the memorandum serves only to remove a bar to the enforcement of the oral contract, the validity of the oral contract may be established by other evidence.

Drake, 231 Va. at 120, 341 S.E.2d at 188. Just as the sales contract in *Murphy* contained "references ... sufficient to remove the oral [real estate brokerage] agreement from the operation of the statute of frauds," 226 Va. at 82, 307 S.E.2d at 245, we hold that the Solodar Agreement, by itself, is sufficient to overcome a plea of the statute of frauds in this case.

In addition to the Solodar Agreement, Vaughan introduced additional writings that bolster its argument that the statute of frauds should not operate to bar its claim. The VCU Letter was signed by Shreve, identified in Vaughan's amended complaint as "Vicar General of the defendant." By authorizing that request, Shreve ratified VCU's reference to Bishop DiLorenzo as Vaughan's "client." Additionally, while not sufficient standing alone, the March 2, 2007 and August 6, 2007 letters from Bishop DiLorenzo to Beitz further support Vaughan's claim of a contract between the parties. We have long held that multiple writings may be used to defeat a plea of the statute of frauds. *See Jordan & Davis v. Mahoney,* 109 Va. 133, 136, 63 S.E. 467, 468 (1909). Taken together, in this case "[m]anifestly" there was "some memorandum ... in writing and signed by the party to be charged or his agent," Code § 11–2, "sufficient to remove the oral agreement from the operation of the statute of frauds." *Murphy,* 226 Va. at 81, 82, 307 S.E.2d at 245.

As we held in *Murphy,* "while the whole services agreement is not memorialized by the writing, nevertheless, the references in the sales contract are sufficient to remove the oral agreement from the operation of the statute of frauds." *Id.* at 82, 307 S.E.2d at 245. The same principles of law hold true here. Of course, Vaughan will bear the burden of proof concerning the oral agreement at trial.

III. CONCLUSION

We hold that the trial court erred when it sustained Bishop DiLorenzo's demurrer. Accordingly, we will reverse the judgment of the trial court and remand this case for a trial on the merits.

Reversed and remanded.

279 Va. 370

William P. RASCHER

v.

Cathleen FRIEND.

Record No. 090193.

Supreme Court of Virginia.

Feb. 25, 2010.

Background: Bicyclist brought negligence action against motorist who failed to yield

right of way and turned in front of him at an intersection. The Circuit Court, Prince William County, Herman A. Whisenant, Jr., J., granted motorist's motion to strike bicyclist's evidence on ground that he was contributorily negligent as a matter of law, and entered judgment for motorist. Bicyclist appealed.

Holding: The Supreme Court, Lawrence L. Koontz, Jr., J., held that whether bicyclist could not have avoided accident was question for jury.

Reversed and remanded.

1. Appeal and Error ⇐927(5)

The standard under which a circuit court should review the evidence in a jury trial before granting a defendant's motion to strike based on the assertion that the plaintiff was contributorily negligent as a matter of law requires the court to accept as true all the evidence favorable to the plaintiff as well as any reasonable inference the jury might draw from the evidence which would sustain the plaintiff's cause of action.

2. Appeal and Error ⇐927(5)

On appeal, the Supreme Court reviews a trial court's judgment striking the evidence, considering the facts in the light most favorable to the plaintiff and drawing all fair inferences from those facts.

3. Negligence ⇐502(1), 503, 1531

Contributory negligence is an affirmative defense that must be proved according to an objective standard of whether the plaintiff failed to act as a reasonable person would have acted for his own safety under the circumstances; the essential concept of contributory negligence is carelessness.

4. Negligence ⇐1717(1)

The issue whether a plaintiff is guilty of contributory negligence is ordinarily a question of fact to be decided by the fact finder; the issue becomes one of law for the circuit court to decide only when reasonable minds could not differ about what conclusion could be drawn from the evidence.

5. Negligence ⇐452, 502(1), 1568, 1571

Contributory negligence consists of the independent elements of negligence and proximate causation; accordingly, when a defendant relies upon contributory negligence as a defense, he has the burden of proving by the greater weight of the evidence not only that the plaintiff was negligent, but also that his negligence was a proximate cause, a direct, efficient contributing cause of the accident.

6. Automobiles ⇐226(2), 242(7, 8)

Generally, when contributory negligence is asserted by the defendant in a motor vehicle accident case and it is not disputed that the plaintiff had the right of way, the defendant must show that the plaintiff was negligent because he actually saw or had the opportunity to see the defendant's vehicle, but failed to maintain a proper lookout, and that this negligence was a proximate cause of his injuries because otherwise the plaintiff would have been able to avoid the accident.

7. Automobiles ⇐245(82, 90)

Whether bicyclist was contributorily negligent when he failed to maintain a proper lookout such that his conduct, in looking away from his lane of travel only momentarily to check his speed at time he had the right of way and could assume that oncoming motorist in other lane would not turn illegally in front of him, was proximate cause of accident, was question for jury.

8. Automobiles ⇐150, 168(1)

While a person operating a vehicle on a public road with the right-of-way has a continuing duty to maintain a proper lookout, he also has a duty to monitor his speed. West's V.C.A. § 46.2–823.

9. Negligence ⇐379, 384

The proximate cause of an event is that act or omission which, in natural and continuous sequence, unbroken by an efficient intervening cause, produces the event, and without which that event would not have occurred.

10. Negligence ⇐422

There may be more than one proximate cause of an event.

11. Negligence ⚿1713

Whether an act was a proximate cause of an event is best determined by the jury; this is so simply because the particular facts of each case are critical to that determination.

12. Negligence ⚿1694
Trial ⚿158

The trial court should overrule a motion to strike the evidence in every case in which there is any doubt that the party with the burden to do so has failed to prove negligence, contributory negligence, and proximate cause, as the case may be; this rule avoids the delay and expense to the parties when a plaintiff is successful on appeal and a new trial is required.

13. Appeal and Error ⚿999(1), 1001(3), 1175(2)

If a court overrules the motion to strike, submits the case to the jury and a plaintiff's verdict is returned, the court may set the verdict aside as being contrary to the evidence or without evidence to support it; if the Supreme Court reaches a different conclusion upon appeal, the record includes the verdict and the Court can enter final judgment, thus ending the case. West's V.C.A. § 8.01–430.

James J. O'Keeffe IV (Monica Taylor Monday; Anthony M. Russell; Gentry Locke Rakes & Moore, Roanoke, on briefs), for appellant.

Michael E. Thorsen (Dana L. Tubb; Trichilo, Bancroft, McGavin, Horvath & Judkins, Fairfax, on brief), for appellee.

Present: HASSELL, C.J., KEENAN, KOONTZ, KINSER, LEMONS, and MILLETTE, JJ., and CARRICO, S.J.

OPINION BY Justice LAWRENCE L. KOONTZ, JR.

In this appeal, we consider whether the circuit court erred in striking the plaintiff's evidence in a personal injury case arising from a motor vehicle accident on the ground that the plaintiff was contributorily negligent as a matter of law. The plaintiff contends that the issue of his contributory negligence should have been submitted to the jury. Additionally, the plaintiff contends that, even if his actions were negligent, the jury could have found that his negligence was not a proximate case of the accident that resulted in his injuries.

BACKGROUND

[1, 2] The well established standard under which a circuit court should review the evidence in a jury trial before granting a defendant's motion to strike based on the assertion that the plaintiff was contributorily negligent as a matter of law requires the court to accept as true all the evidence favorable to the plaintiff as well as any reasonable inference the jury might draw from the evidence which would sustain the plaintiff's cause of action. *McGowan v. Lewis*, 233 Va. 386, 387, 355 S.E.2d 334, 334 (1987); *see also Austin v. Shoney's, Inc.*, 254 Va. 134, 138, 486 S.E.2d 285, 287 (1997). Similarly, "[o]n appeal, we review a trial court's judgment striking the evidence, considering the facts in the light most favorable to the plaintiff and drawing all fair inferences from those facts." *Green v. Ingram*, 269 Va. 281, 290, 608 S.E.2d 917, 922 (2005).

When so viewed, the evidence presented at trial established that around noon on September 2, 2006, William P. Rascher was traveling on his bicycle south on Antietam Road in Prince William County, a two-lane road running through a primarily residential area with a 25 m.p.h. speed limit. Cathleen Friend was driving her minivan north on the same road. Antietam Elementary School lies west of the road and is reached though a circular driveway. Although it had been raining earlier in the day and the pavement was wet, the weather was clear and visibility was optimal.

As Rascher approached the intersection of Antietam Road and the school's driveway, he observed Friend stopped in her minivan in the opposite lane approximately 50 feet away, apparently waiting to make a left turn into the school's driveway. Rascher, who was wearing a red riding jacket, "stared" at Friend and was confident that she could see

him. Rascher then looked down at his bicycle's speedometer for "a half second to a second" and determined that he was traveling at about 19 m.p.h. When Rascher looked up, he saw that Friend had turned left and that her minivan was about three to five feet in front of him in his lane of travel.

Rascher struck the rear passenger side of Friend's minivan. From the force of the impact, Rascher was thrown forward over the handlebars of the bicycle and landed on the road. As a result of injuries to his shoulder, thigh, and wrist, Rascher subsequently incurred over $15,000 in medical expenses.

Following the accident, Friend told Rascher that she had not seen him and accepted responsibility for the collision. Friend was charged with failing to yield the right of way, Code § 46.2–825, and pre-paid the statutory fine for that offense.

On October 1, 2007, Rascher filed a complaint against Friend in the Circuit Court of Prince William County. Rascher sought $250,000 in damages for his medical expenses, pain, and suffering. On October 25, 2007, Friend filed an answer denying liability for Rascher's injuries and further asserting that she would rely on the defense of contributory negligence.

A jury trial was held in the circuit court on September 8 and 9, 2008 in which evidence in accord with the above recited facts was received. Friend made a motion to strike Rascher's evidence at the conclusion of Rascher's case-in-chief and renewed that motion at the conclusion of all the evidence, contending that Rascher had failed to maintain a proper lookout because he looked at his speedometer after determining that Friend intended to turn left across his lane of travel. The circuit court granted Friend's motion, ruling that while "[t]here's no question that [Friend] was negligent in failing to yield the right of way," "Rascher was contributor[ily] negligent in not exercising ordinary care to keep a reasonable lookout [when] he took his eyes off the intersection of the road and [Friend's minivan] and looked down at his speedometer." The court reasoned that had Rascher not taken his eyes off the road to check his speed, "maybe he could have avoided the accident" because he would have seen Friend turn sooner. On October 24, 2008, the circuit court entered a final order memorializing its ruling granting the motion to strike and entered judgment for Friend, with Rascher noting specific objections in writing. We awarded Rascher this appeal.

DISCUSSION

Rascher contends that the circuit court erred in granting Friend's motion to strike because the jury could have determined from the evidence that Rascher had acted reasonably under the circumstances and, thus, had not acted with any negligence. He further contends that even if his failure to maintain constant visual contact with Friend's vehicle was negligent, the jury could nonetheless have found that such negligence was not a proximate cause of the accident. We agree with Rascher on both points.

[3, 4] The principles of contributory negligence are familiar and well settled. "Contributory negligence is an affirmative defense that must be proved according to an objective standard whether the plaintiff failed to act as a reasonable person would have acted for his own safety under the circumstances. The essential concept of contributory negligence is carelessness." *Jenkins v. Pyles,* 269 Va. 383, 388, 611 S.E.2d 404, 407 (2005) (citations omitted). "The issue whether a plaintiff is guilty of contributory negligence is ordinarily a question of fact to be decided by the fact finder. The issue becomes one of law for the circuit court to decide only when reasonable minds could not differ about what conclusion could be drawn from the evidence." *Id.* at 389, 611 S.E.2d at 407.

[5] Contributory negligence consists of the independent elements of negligence and proximate causation. *Karim v. Grover,* 235 Va. 550, 552, 369 S.E.2d 185, 186 (1988). Accordingly, "[w]hen a defendant relies upon contributory negligence as a defense, he has the burden of proving by the greater weight of the evidence not only that the plaintiff was negligent, but also that his negligence was a proximate cause, a direct, efficient contribut-

ing cause of the accident." *Id.* (internal quotations and citation omitted)

[6] Generally, when contributory negligence is asserted by the defendant in a motor vehicle accident case and it is not disputed that the plaintiff had the right of way, the defendant must show that the plaintiff was negligent because he actually saw or had the opportunity to see the defendant's vehicle, but failed to maintain a proper lookout, and that this negligence was a proximate cause of his injuries because otherwise the plaintiff would have been able to avoid the accident. *See, e.g., Butler v. Yates,* 222 Va. 550, 554, 281 S.E.2d 905, 907 (1981). Typically, the defendant prevails by showing that the plaintiff actually saw the defendant's vehicle, but thereafter completely disregarded the possibility that the defendant would not yield the right of way, *see, e.g., Branson v. Wise,* 206 Va. 139, 141–42, 142 S.E.2d 582, 583–84 (1965), or that the plaintiff reasonably should have seen the defendant and could have easily avoided the collision, but was inattentive. *See, e.g., Sayre v. Shields,* 209 Va. 409, 410–11, 164 S.E.2d 665, 667 (1968).

[7, 8] In this case, however, the evidence showed only that Rascher, clearly aware of Friend's vehicle and that he had the right of way, looked away from his lane of travel only momentarily to check his speed. While the circuit court presumed that had Rascher not done so he might have been able to avoid the accident, the evidence was by no means so clear on this point as to establish that Rascher was negligent as a matter of law. Moreover, Code § 46.2–823 provides that a person operating "any vehicle traveling at an unlawful speed shall forfeit any right-of-way which he might otherwise have." Accordingly, while a person operating a vehicle on a public road with the right-of-way has a continuing duty to maintain a proper lookout, he also has a duty to monitor his speed. Thus, the jury could have determined that Rascher's action of momentarily looking at his speedometer to check his speed was a reasonable action under the circumstances.

[9–11] The law of proximate causation, as an element of contributory negligence, is also well established. " 'The proximate cause of an event is that act or omission which, in natural and continuous sequence, unbroken by an efficient intervening cause, produces the event, and without which that event would not have occurred.' " *Beverly Enterprises–Virginia, Inc. v. Nichols,* 247 Va. 264, 269, 441 S.E.2d 1, 4 (1994) (quoting *Coleman v. Blankenship Oil Corp.,* 221 Va. 124, 131, 267 S.E.2d 143, 147 (1980)); *accord Williams v. Le,* 276 Va. 161, 167, 662 S.E.2d 73, 77 (2008). There may be more than one proximate cause of an event. *Williams,* 276 Va. at 167, 662 S.E.2d at 77 (citing *Panousos v. Allen,* 245 Va. 60, 65, 425 S.E.2d 496, 499 (1993)). As with questions of negligence, whether an act was a proximate cause of an event is best determined by the jury. *Kellermann v. McDonough,* 278 Va. 478, 493, 684 S.E.2d 786, 793 (2009); *Moses v. Southwestern Va. Transit Mgmt. Co.,* 273 Va. 672, 679, 643 S.E.2d 156, 160 (2007); *Jenkins,* 251 Va. at 128, 465 S.E.2d at 799. This is so simply because the particular facts of each case are critical to that determination.

As indicated above, Rascher's alleged failure to maintain a proper lookout when he had the right of way and could assume that Friend would not turn illegally in front of him would only have been contributorily negligent if the evidence established that he could have avoided striking Friend's vehicle upon maintaining a proper lookout. If the evidence established that he could not have avoided the collision, then any negligence on his part would not have been a proximate cause of the accident.

The evidence showed that Rascher was no more than 50 feet from the intersection of Antietam Road and the school's driveway where the accident occurred when he glanced down at his speedometer to observe his speed, which was just under 20 m.p.h. At that rate of travel, Rascher would have covered the distance to the intersection in less than two seconds. *See* Code § 46.2–880 (statutory speed table indicating that 20 miles per hour equates to 29.3 feet per second). On these facts, a jury reasonably could have found that Rascher would have had no opportunity to avoid the accident even if he had maintained visual contact with Friend's vehicle. Thus, the alleged negligence on his

part would not have been a proximate cause of the accident as a matter of law.

[12, 13] Having resolved the issues raised in this appeal, we take the opportunity to again stress the principle of tort litigation that issues of negligence and proximate cause ordinarily are questions of fact for the jury to determine, rather than questions to be determined by the trial court as a matter of law. The trial court should overrule a motion to strike the evidence in every case in which there is any doubt that the party with the burden to do so has failed to prove negligence, contributory negligence, and proximate cause, as the case may be. *Brown v. Koulizakis*, 229 Va. 524, 531, 331 S.E.2d 440, 445 (1985). The rule "avoids the delay and expense to the parties when a plaintiff is successful on appeal and a new trial is required. If the court overrules the motion to strike, submits the case to the jury and a plaintiff's verdict is returned, the court may set the verdict aside as being contrary to the evidence or without evidence to support it. If this Court reaches a different conclusion upon appeal, the record includes the verdict and we can enter final judgment, thus ending the case." *Id.* (citing Code § 8.01–430).

CONCLUSION

For these reasons, we hold that circuit court erred in granting Friend's motion to strike Rascher's evidence on the ground that Rascher was contributorily negligent as a matter of law. Accordingly, the judgment in favor of Friend will be reversed, and the case remanded to the circuit court for a new trial.

Reversed and remanded.

279 Va. 312

David F. LIGON, III

v.

COUNTY OF GOOCHLAND.

Record No. 090250.

Supreme Court of Virginia.

Feb. 25, 2010.

Background: Former county employee brought action against county for unlawful termination and relief under whistleblower protection provision of Fraud Against Taxpayers Act (FATA). The Circuit Court, Goochland County, Timothy K. Sanner, J., dismissed. Former employee appealed.

Holding: The Supreme Court, Barbara Milano Keenan, J., held that sovereign immunity doctrine barred claim, as a matter of first impression.

Affirmed.

1. Appeal and Error ⚿893(1)

Whether doctrine of sovereign immunity bars claim against county presents purely legal question which is reviewed de novo.

2. States ⚿191.9(1)

Under the doctrine of sovereign immunity, the Commonwealth is immune from liability for damages and from suits to restrain governmental action or to compel such action.

3. States ⚿112.1(1)

Commonwealth is immune from tort liability for the acts or omissions of its agents and employees unless an express statutory or constitutional provision waives that immunity.

4. Counties ⚿141

Sovereign immunity principles which apply to Commonwealth also apply to counties which are its political subdivisions.

5. States ⚿191.1

Purposes of sovereign immunity include protecting the public purse, ensuring the uninterrupted functioning of government, eliminating any public inconvenience and danger that may result from officials being fearful to act, assuring that citizens will continue to accept public employment, and discouraging individuals from improperly threatening or initiating vexatious litigation.

6. States ⚿191.2(1)

Only the General Assembly can determine as a matter of policy whether the Com-

as to create a ... presumption that it has been abandoned or satisfied." *Presbyterian Church of James Island v. Pendarvis*, 227 S.C. 50, 86 S.E.2d 740 (1955).

[6] The common law presumption of grant bars the appellants' claim. The doctrine is based on the principle that, after a passage of time, anything necessary to quiet title is presumed done, even if the truth is otherwise, so that possession of land for a long period of time perfects title. *Riddlehoover v. Kinard*, 1 Hill Eq. 376 (1833). Under this doctrine, the court must presume that the Authority gave notice to the heirs of Charles Mouzon and that the heirs released any right Mouzon held to repurchase the property.

[7] The appellants rely on the alleged adverse possession of the tract by the heirs. We disagree. Although some of the heirs farmed the tract after it was condemned, they believed that the PSA owned the land. The heirs also paid the PSA rent pursuant to a lease agreement. The possession by the heirs was not hostile, continuous, or without recognition of the true owner's title. *Gregg v. Moore*, 226 S.C. 366, 85 S.E.2d 279 (1954).

The judgment below is, accordingly,

AFFIRMED.

LITTLEJOHN, C.J., and GREGORY and CHANDLER, JJ., concur.

HARWELL, J., not participating.

Robin LANGLEY, Appellant,

v.

James Lee BOYTER and Concrete Specialties of America, Respondents.

No. 0325.

Court of Appeals of South Carolina.

Heard Jan. 26, 1984.

Decided Nov. 29, 1984.

In a negligence suit brought by one automobile driver against another, an appeal was taken from the judgment of the Common Pleas Court, Richland County, C. Victor Pyle, J., entered in favor of defendant, asserting error in refusal to strike defense of contributory negligence and charge doctrine of comparative negligence. The Court of Appeals, Sanders, C.J., held that doctrine of contributory negligence, as it has previously been applied in South Carolina, would be abrogated and replaced with modified form of doctrine of comparative negligence which permits recovery by a person who has been negligent in causing an accident so long as his negligence is not greater than negligence of person against whom recovery is sought, provided that amount of his recovery shall be reduced in proportion to amount of his negligence; application of comparative negligence doctrine would be stayed until instant decision became final, and then doctrine would apply prospectively to all cases based on causes of action which arise on that date or thereafter.

Reversed and remanded.

1. Negligence ⇐80

Generally speaking, under doctrine of contributory negligence, if negligence of a plaintiff contributed to his damages, he is barred from recovering anything against a defendant guilty of even greater negligence.

2. Statutes ⇐174

Within constitutional limits, courts should defer to their legislatures in construing statutes, so as to give effect to legislative intent.

3. Courts ⇐89

Doctrine of "stare decisis" says that where a principle of law has become settled by a series of court decisions, it should be followed in similar cases.

See publication Words and Phrases for other judicial constructions and definitions.

4. Courts ⇐100(1)
Negligence ⇐97

Doctrine of contributory negligence, as it has previously been applied in South Carolina, would be abrogated and replaced with modified form of doctrine of comparative negligence which permits recovery by a person who has been negligent in causing an accident so long as his negligence is not greater than negligence of person against whom recovery is sought, provided that amount of his recovery shall be reduced in proportion to amount of his negligence; application of comparative negligence doctrine would be stayed until instant decision became final, and then doctrine would apply prospectively to all cases based on causes of action which arise on that date or thereafter.

Kenneth M. Suggs, of Suggs & Kelly, Columbia, for appellant.

H. Fred Kuhn, Jr., Beaufort, on behalf of S.C. Trial Lawyers Ass'n; and Charles E. Carpenter, Jr., Columbia, and Lawrence B. Orr, Florence, on behalf of S.C. Defense Trial Attys.' Ass'n, for amicus curiae.

Robert G. Currin, Jr., of Nelson, Mullins, Grier & Scarborough, Columbia, for respondents.

SANDERS, Chief Judge:

The single question presented by this appeal is whether the common law doctrine of contributory negligence should be abrogated by this court and the doctrine of comparative negligence adopted in its place.[1]

I

THE FACTS

Appellant Robin Langley sued respondents James Lee Boyter and Concrete Specialties of America alleging in her complaint that she suffered serious personal injuries when the car she was driving collided with a car being driven toward her by Mr. Boyter as an agent of Concrete Specialties. Her complaint further alleged that the collision and her resulting injuries were caused by Mr. Boyter's driving on "the wrong side of the road," and that he was negligent, careless and reckless in driving too fast for conditions and in failing to maintain a proper lookout and control of the car he was driving. Mr. Boyter answered with a general denial of the material allegations of the complaint and further alleged that any injury or damage suffered by Ms. Langley was caused by her own negligence, recklessness, wilfulness and wantonness "in operating her vehicle on the wrong side of the road," in failing to maintain a proper lookout and control of her car and in failing to brake or steer her car so as to avoid the collision. Finally, Mr. Boyter pleaded in his answer Ms. Langley's "contributory negligence, recklessness, wilfulness and wantonness as a complete bar to this action."

At trial, Ms. Langley testified that as she drove her car into a curve, the car being driven by Mr. Boyter "came around the curve into my lane and hit me." She went on to testify that the front of the Boyter car struck her car at "the front left fender between the fender and the door," and

1. In addition to the excellent arguments and briefs of the parties in this case, we appreciate the Amicus Curiae briefs filed by the South Carolina Defense Trial Attorneys' Association and the South Carolina Trial Lawyers Association. In the words of Sir Walter Scott: "Wild work they make of it; for the Whigs were as dour as the Cavaliers were fierce, and it was which should first tire the other." W. Scott, "Wandering Willie's Tale," *Redgauntlet* (1824).

after the impact both cars came to rest on her side of the road with her car partially "off the road in my lane."

A highway patrolman who investigated the accident testified he found Ms. Langley's car on her side of the road with its front end on the shoulder and Mr. Boyter's car in Ms. Langley's lane of travel.

Mr. Boyter testified he did not cross from his half of the road into the opposite lane before impact and he believed Ms. Langley's car was partially in his lane when the collision occurred.

Another witness testified Ms. Langley was driving at an excessive rate of speed and her car crossed over the center line of the road by "approximately one and a half to two feet" prior to the collision.

At the pre-trial conference, Ms. Langley moved to strike the defense of contributory negligence and requested the judge to charge the doctrine of comparative negligence instead. The trial judge denied these motions and at trial charged the doctrine of contributory negligence. Ms. Langley excepted to the charge and again requested that the doctrine of comparative negligence be charged. The trial judge denied this request. The case was submitted to the jury which returned a verdict for Mr. Boyter and Concrete Specialties. Following the verdict, Ms. Langley moved for a new trial on the ground that the trial judge refused to strike the defense of contributory negligence and charge the doctrine of comparative negligence. The trial judge denied this motion. Ms. Langley then appealed.

Respondents first argue that even if the doctrine of comparative negligence were to be recognized in South Carolina, it would be inapplicable to this case because the only question of fact was whether Mr. Boyter or Ms. Langley was driving on the wrong side of the road. We reject this argument. In our view of the evidence, the jury could have found that negligence by both Mr. Boyter and Ms. Langley caused the collision. For example, it could have found Mr. Boyter was driving on the wrong side of the road and Ms. Langley was driving too fast for conditions. The jury also could have found Ms. Langley and Mr. Boyter were both driving partially on the wrong side of the road. If a finding of negligence by both parties was not possible, the defense of contributory negligence pleaded by Mr. Boyter and Concrete Specialties and the charge of the trial judge on this defense would have been inappropriate, and the case would have to be reversed on that ground alone. *See White v. Fowler*, 276 S.C. 370, 278 S.E.2d 777 (1981) (it is reversible error to charge a correct principle of law when the principle is inapplicable to the issues on trial).

II

THE DOCTRINE OF CONTRIBUTORY NEGLIGENCE AND ITS HISTORY

[1] Generally speaking, under the doctrine of contributory negligence, if the negligence of a plaintiff contributed to his damages, he is barred from recovering anything against a defendant guilty of even greater negligence.[2] The earliest case recognizing the doctrine is *Butterfield v. Forrester*, 11 East 60, 103 Eng.Rep. 926 (1809).[3] In that case, the defendant obstructed a public road by placing a pole across a part of it. The plaintiff, riding his

2. We recognize this statement is neither a complete definition of the doctrine of contributory negligence nor a paragon of clarity. Most courts use the words themselves to define the doctrine, and all complete definitions become even more convoluted when the variously recognized exceptions and modifications to the doctrine (none of which are applicable to the facts of this case) are taken into account. *See, e.g.*, 57 Am.Jur.2d *Negligence* § 288 (1971); 65A C.J.S. *Negligence* § 116 (1966).

3. Some commentators trace the doctrine of contributory negligence to earlier times. *See, e.g.*, 8 Holdsworth, *A History of the English Law* 459–61 (1926) (contributory negligence was "a natural and a logical doctrine" which found expression in 17th century opinions but was recognized much earlier). However, most modern courts and scholars agree with Professor Prosser in attributing the first recorded formulation of the doctrine to *Butterfield*. W. Prosser, *Law of Torts* § 65 at 416 n. 1 (4th ed. 1971).

horse too fast to see the pole, rode into it and was injured. The doctrine of contributory negligence was announced by Lord Chief Justice Ellenborough:

> One person being at fault will not dispense with another's using ordinary care for himself. Two things must concur to support this action, an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff.

Butterfield, 103 Eng.Rep. at 927.

The doctrine was first adopted in this country in *Smith v. Smith,* 2 Pick. 621 (Mass.1824). Most states proceeded to adopt the doctrine soon thereafter. H. Woods, *The Negligence Case: Comparative Fault* § 1:4 (1978) (hereafter cited as Woods, *The Negligence Case*).

South Carolina first recognized the doctrine in dictum in *Freer v. Cameron,* 38 S.C.L. (4 Rich.) 228 (1851). In that case the trial judge charged the jury that if, under all the circumstances, the plaintiff could have avoided the accident by the exercise of that degree of prudence which a reasonable person might be expected to exercise in her position, then she ought not to recover. The plaintiff apparently took no exception to this charge and did not dispute the law thus stated on appeal. Consequently, the Court of Appeals decided the issue of contributory negligence on a point of evidence, not a question of law: "We cannot discover in the evidence reported anything which makes the law cited for the defendants, and not disputed, available for their protection." *Freer* at 232. Although the defendants cited *Butterfield* as authority, that decision was neither mentioned nor approved in the opinion of the Court. It therefore appears that South Carolina first acknowledged the doctrine of contributory negligence in a case where it was held inapplicable and in which the issue of whether it should be adopted as the common law of this State was not raised. Subsequent cases simply cited *Freer* without further analysis as precedent for applying the doctrine.[4] The doctrine has resided in this house of cards ever since. Surprisingly, we can find no reported South Carolina case in which it has been challenged.

It can be argued that a possible basis for recognition of the doctrine is found in the reception statute passed by the provincial assembly in 1712. 2 S.C.Stat. 401 (1712). This statute provided:[5]

> That all and every part of the Common Law of England, where the same is not altered by the above enumerated Acts, or inconsistent with the particular constitutions, customs and laws of this Province ... is hereby enacted and declared to be of ... full force in this Province ....

2 S.C.Stat. at 413–414. In 1812, our Supreme Court first addressed the effect of the Act of 1712 in *Shecut v. McDowel,* 6 S.C.L. (1 Tread.) 35, 38 (1812):

> The ... question ... is whether ... this Court is to be governed by the principles of the Common Law, as settled in England .... [O]ur act of Assembly, passed in the year 1712, says, the Common Law of England shall be in as full force and virtue in this State as in England. And even if it did not, I do not know by what other law we should be governed; for the Common Law is as much the law of this country as of England. I do not mean to say, that we are bound by every decision made by the courts of England. We have a right to take our own view of the Common Law; but, when a principle of law has been settled for ages, by a series of uniform decisions, the reasons must be very strong, that would authorize a departure

4. *See, e.g., Wade v. The Columbia Electric etc. Co.,* 51 S.Ct. 296, 29 S.E. 233 (1897); *Wilson v. Southern Ry.,* 73 S.C. 481, 53 S.E. 968 (1906); *Bradford v. F.W. Woolworth Co.,* 141 S.C. 453, 140 S.E. 105 (1927).

5. The Act of 1712 was apparently embodied in the South Carolina Code until 1912, when it was omitted from codification until restored in 1972, and is presently codified as Code section 14-1-50. However, in 1919 our Supreme Court held the omission of no consequence because the Act was "merely declaratory in its nature." *State v. Charleston Bridge Co.,* 113 S.C. 116, 101 S.E. 657, 660 (1919).

from it; and, in no case, ought an established rule to be given up, without substituting another in its place. It would be launching into a boundless ocean of uncertainty; without a compass by which to direct our course.

When the statute of 1712 was enacted, the doctrine of contributory negligence had not yet been recognized in England. At the time the Court in *Shecut* defined the extent to which the common law of England is applicable in South Carolina, the doctrine was not a principle of law which had been settled for ages. Rather, it was a mere infant of three years in England and was not even born in this country until some twelve years later. No opinion of our Supreme Court recognizing or applying the doctrine cites or discusses this statute as a basis for doing so. For these reasons, we conclude that the doctrine of contributory negligence has no independent statutory basis in South Carolina as a doctrine of general application.

Three South Carolina statutes make contributory negligence a bar to recovery in certain cases and require that the plaintiff plead and prove he was not contributorily negligent. S.C.Code Ann. § 5-7-70 (1976) (action against municipality to recover damages to person or property received through defect or mismanagement of anything under the control of the municipality); § 57-5-1840 (action against State Highway Department); § 57-17-810 (action against county for damages caused by defective highways, causeways, bridges or ferries). A fourth South Carolina statute provides that "common law" defenses, including the defense of contributory negligence, are available to an employer when sued by an employee who elects not to proceed under the South Carolina Workers' Compensation Law.[6] S.C.Code Ann. § 42-1-520 (1976). However, no South Carolina statute provides for the general application of the doctrine of contributory negligence or its application to the facts of this case. Thus the doctrine is not a creation of statute in South Carolina.

Since the doctrine was first adopted in this country, numerous exceptions have eroded the scope of its application. One exception is the rule that the negligence of the plaintiff is no defense when the defendant's conduct is wilful, wanton or reckless. Woods, *The Negligence Case* § 1:6. *See also Davenport v. Walker*, 280 S.C. 588, 313 S.E.2d 354 (S.C.App.1984), citing *Oliver v. Blakeney*, 244 S.C. 565, 137 S.E.2d 772 (1964) (simple contributory negligence is not a defense to reckless or wilful misconduct).

The most important exception is the doctrine of last clear chance which originated in the case of *Davies v. Mann*, 10 N. & W. 546, 152 Eng.Rep. 588 (1842). Woods, *The Negligence Case* § 1:7. In that case, the defendant negligently ran into the plaintiff's donkey which he had left tied up in the highway. The court held that the negligence of the plaintiff in leaving the donkey in the road did not bar his recovery because the defendant had the "last clear chance" to avoid the accident.[7]

Application of this exception has resulted in enormous confusion among, and even within, the various states. *See* W. Prosser, *Law of Torts* § 66 at 428 (4th ed. 1971). The courts in South Carolina have not escaped difficulty in applying the doctrine of last clear chance. *See, e.g., Thomas v. Bruton*, 270 F.Supp. 33, 35 (D.S.C.1967) ("[The doctrine of last clear chance] is an exception or a qualification or modification to the doctrine of contributory negligence...."); *Eastern Brick and Tile Co. v. United States*, 281 F.Supp. 216, 221 (D.S.C.1968), citing *Seay v. Southern Ry.-Carolina Division*, 205 S.C. 162, 31 S.E.2d 133, 138 (1944) ("[The doctrine of last clear chance] constitutes no exception to the gen-

6. Sometimes erroneously referred to as the "South Carolina Workmen's Compensation Law."

7. Professor Prosser refers to last clear chance as "the jackass doctrine," a pejorative having obvious dual implications in view of the great difficulties it has caused both judges and lawyers since 1842. Prosser, *Law of Torts* § 66 at 427 n. 3.

eral doctrine of contributory negligence, and does not permit one to recover in spite of contributory negligence."); *Britt v. Seaboard Coast Line Railroad Company,* 281 F.Supp. 481, 487 (D.S.C.1968) ("The 'last clear chance' doctrine is well settled and has often been applied in this State."); *Brown v. George,* 278 S.C. 183, 294 S.E.2d 35, 36 (1982) ("The doctrine [of last clear chance] is not applicable in every case where the defendant alleges the plaintiff was contributorily negligent. It applies only where the antecedent negligence of the plaintiff has become remote in the chain of causation and a mere condition of his injury.").

In 1953, Professor Prosser said no logical reason had ever been given for recognizing the doctrine of last clear chance and suggested:

> The real explanation would appear to be nothing more than a dislike for the defense of contributory negligence, and a rebellion against its application in a group of cases where its hardship is most apparent.

Prosser, *Comparative Negligence,* 51 Mich.L.Rev. 465, 472 (1953).

A discussion of other difficult to apply and widely misunderstood exceptions is found in an article by Professor Lambert in the American Trial Lawyers Association Journal. Lambert, *The Common Law is Never Finished (Comparative Negligence on the March),* 32 A.T.L.A.J. 741, 743–749 (1968).

The South Carolina Legislature has enacted two statutes which purport to eliminate the defense of contributory negligence in certain cases.[8] S.C.Code Ann. § 15–1–300 (1976) (contributory negligence shall not bar recovery in an action involving a motor vehicle accident, "if such negligence was equal to or less than the negligence which must be established in order to recover from the party against whom recovery is sought"); § 58–17–3730 (contributory negligence of railroad employee does not bar recovery of damages for injury or death in action against railroad).

As hereafter discussed in greater detail, Code section 15–1–300 was ruled unconstitutional as a denial of equal protection under both the state and federal constitutions. *Marley v. Kirby,* 271 S.C. 122, 245 S.E.2d 604 (1978). Although obviously similar, the constitutionality of Code section 58–17–3730 has not been challenged. *See, e.g., Boyleston v. Southern Ry. Co.,* 211 S.C. 232, 44 S.E.2d 537 (1947).

Four statutes appear to limit or eliminate the application of the doctrine in certain cases, without referring to it by name. S.C.Code Ann. § 15–73–30 (1976) (adopts "comments to § 402A of the Restatement of Torts, Second," as the legislative intent of Chapter 73, Title 15, including comment 'n' which eliminates contributory negligence as a defense in certain products liability cases); § 42–1–510 (employer who elects not to operate under the Workers' Compensation Law cannot defend a suit by an employee subject to that law on the ground "that the employee was negligent"); § 43–33–30 (Supp.1983) (failure of totally or partially blind or deaf pedestrian to use a guide dog on common carriers or in certain public places does not constitute negligence); § 58–17–1440 ("mere want of ordinary care" is not a defense in actions against railroads for injuries received in a collision at a railroad crossing if required signals not given).

The United States District Court for South Carolina has ruled Code section 58–17–1440 unconstitutional as a denial of equal protection. *Wessinger v. Southern Railway Company,* 470 F.Supp. 930 (D.S.C.1979).

8. Two other statutes provide that certain conduct does not constitute contributory negligence. S.C.Code Ann. § 56–5–3220 (1976) (failure of totally or partially blind or otherwise incapacitated person to carry a cane or walking stick or be guided by a guide dog on the streets, highways or sidewalks shall not constitute or be evidence of contributory negligence); § 56–5–6460 (Supp.1983) (violation of Title 56, Chapter 5, Article 47 [Child Passenger Restraint System] shall not constitute negligence per se, contributory negligence, nor be admissible as evidence in any trial of any civil action).

South Carolina is one of only seven states which still recognize the doctrine of contributory negligence as applicable to negligence actions generally. The doctrine has long since been abandoned virtually everywhere it was once recognized, including in England, the country of its birth. Prosser, *Comparative Negligence* 466–467. In its place, courts and legislatures have developed various systems that by some methods, in some situations, apportion damages, at least in part, on the basis of the relative fault of the responsible parties. These systems are referred to collectively as the doctrine of comparative negligence.

III

THE DOCTRINE OF COMPARATIVE NEGLIGENCE AND ITS HISTORY

Generally speaking, under the doctrine of comparative negligence, a plaintiff is allowed to recover the proportion of damages not attributable to his own fault. As Professor Prosser has indicated:

> "Comparative negligence" properly refers only to a comparison of the fault of the plaintiff with that of the defendant. It does not necessarily result in any division of the damages, but may permit full recovery by the plaintiff notwithstanding his contributory negligence.

Prosser, *Comparative Negligence* at 465 n. 2. Nevertheless, the comparative negligence systems that are in operation in this country today do not usually operate in this precise manner. Rather, they almost always involve some method of dividing damages when the plaintiff has been contributorily negligent.

Some commentators trace the roots of the doctrine to Roman law via the Digest of Justinian completed in A.D. 533. Woods, *The Negligence Case* § 1:9 at 17, citing Mole & Wilson, *Comparative Negligence*, 17 Cornell L.Q. 333 (1932). While the ancient lineage claimed for the doctrine is debatable, the concept is by no means younger than springtime.

Early English admiralty cases applied a rule which divided damages between the plaintiff and the defendant when only the defendant was at fault. Marsden, *Collisions at Sea* 135 (8th ed. 1923). Beginning in the eighteenth century English admiralty courts adopted a rule which provided for an equal division of damages when both parties were negligent. Marsden at 195. These courts were apparently influenced by principles of civil law which were applied by other countries engaged in maritime shipping. Prosser, *Comparative Negligence* 475–476. Another factor may have been the fact these courts had no juries to mistrust.

English courts continued to divide damages equally where both parties were negligent in causing a collision between ships until 1911 when a statute was adopted providing for a division of damages "in proportion to the degree in which each vessel was at fault." The English Maritime Conventions Act of 1911, 1 & 2 Geo. V, c. 57. American courts also divided damages equally between negligent parties in these cases until 1975 when the United States Supreme Court adopted a rule, without benefit of statute, apportioning damages based on degree of fault whenever it was possible to do so. *United States v. Reliable Transfer Co., Inc.*, 421 U.S. 397, 95 S.Ct. 1708, 44 L.Ed.2d 251 (1975).

According to dictum contained in a recent Illinois case, in 1858 that state became the first to recognize the doctrine of comparative negligence. *Alvis v. Ribar*, 85 Ill.2d 1, 52 Ill.Dec. 23, 421 N.E.2d 886 (1981), citing *Galena & Chicago Union R.R. Co. v. Jacobs*, 20 Ill. 478 (1858). A version of the doctrine appears to have been applied in Illinois until 1885, when contributory negligence was recognized as a complete bar to recovery. *Alvis*, 52 Ill. Dec. 23, 27, 421 N.E.2d 886, 890, citing *Calumet Iron & Steel Co. v. Martin*, 115 Ill. 358, 3 N.E. 456 (1885), *City of Lanark v. Dougherty*, 153 Ill. 163, 38 N.E. 892 (1894) and Green, *Illinois Negligence Law*, 39 Ill.L.Rev. 36 (1944).[9]

9. Illinois has had a checkered history in recognizing the doctrine of comparative negligence.

The courts and legislatures of several other states appear to have flirted with the concept of comparative negligence during the nineteenth century. Prosser, *Comparative Negligence* 477. However, these early attempts were not true applications of the doctrine as it is generally understood today, and most of them were abandoned before the end of the century. V. Schwartz, *Comparative Negligence* § 1.5 (1974).

The doctrine of comparative negligence was first widely recognized in this country in 1908 with the adoption of the Federal Employers' Liability Act (F.E.L.A.) of April 22, 1908, ch. 149, § 3, 35 Stat. 66, 45 U.S.C. § 53. The Act applied to suits brought against railroads by their employees who were injured while engaged in interstate commerce. It provided that contributory negligence would not bar recovery, but the amount of damages recovered would be reduced in proportion to the amount of negligence attributable to the plaintiff. This Act became the catalyst for a flood of state statutes which established the doctrine of comparative negligence in cases involving injuries to industrial employees, especially those of railroads. Prosser, *Comparative Negligence* 478. One such state statute applying to railroad employees engaged in intrastate commerce was enacted in South Carolina. S.C.Code Ann. § 58-17-3730 (1976).

In 1920, Congress adopted the doctrine of comparative negligence for cases arising under the Merchant Marine (Jones) Act (Act of June 5, 1920, as amended, ch. 250, § 33, 41 Stat. 1007, 46 U.S.C. § 688) and under the Death on the High Seas Act (Act of March 30, 1920, ch. 111, § 6, 41 Stat. 537, 46 U.S.C. § 766).

In 1910, Mississippi became the first state to adopt a comparative negligence statute of general application. Woods, *The Negligence Case* § 1:11 at 24, citing Miss. Code Ann. § 11-7-15 (1972). Florida was the first state in this century to adopt the doctrine judicially, doing so in 1973. Woods, *The Negligence Case* § 1:11 at 27, citing *Hoffman v. Jones*, 280 So.2d 431 (Fla.1973).[10]

When Professor Turk wrote his memorable article, *Comparative Negligence on the March*, 28 Chicago-Kent L.Rev. 189 (1950), only a few states applied the doctrine in any form to negligence actions generally. Since then the "march" he referred to has become a stampede. Today, some version of the doctrine of comparative negligence, as a doctrine of general application, has been adopted either judicially or legislatively by a vast majority of the states. Including Indiana, whose statute is effective next year, a total of forty-three states now apply the doctrine in one form or another to negligence actions generally.[11]

After first recognizing and then abandoning a version of that doctrine in the 1800's, Illinois then applied the doctrine of contributory negligence until 1967 when its Court of Appeals adopted a modified form of the doctrine of comparative negligence. *Maki v. Frelk*, 85 Ill. App.2d 439, 229 N.E.2d 284 (1967). However, in 1968, the Illinois Supreme Court reversed *Maki* and returned the state to its nineteenth century posture. *Maki v. Frelk*, 40 Ill.2d 193, 239 N.E.2d 445 (1968). Finally, in 1981, the Illinois Supreme Court changed its mind and abolished the doctrine of contributory negligence altogether in favor of the "pure" version of the doctrine of comparative negligence. *Alvis v. Ribar*, 85 Ill.2d 1, 52 Ill.Dec. 23, 421 N.E.2d 886 (1981).

10. Earlier in this century, the Georgia Supreme Court began to recognize apportionment of damages in negligence actions generally by the unique blending of an 1860 statute providing for a diminution of damages when a negligent plaintiff is injured in railroad operations with another statute providing that a "defendant is not relieved [from liability], although the plaintiff may in some way have contributed to the injury sustained." *See* Schwartz, *Comparative Negligence* §§ 1.4-1.5, and Hilkey, *Comparative Negligence in Georgia*, 8 Ga.B.J. 51 (1945). Professor Prosser has called this "a remarkable tour de force of [statutory] construction." Prosser, *Law of Torts* § 67 at 436.

11. (1) Alaska, *Kaatz v. State*, 540 P.2d 1037 (Alaska 1975); (2) Arizona, Ariz.Rev.Stat.Ann. § 12-2505 (Supp.1984); (3) Arkansas, Ark.Stat. Ann. §§ 27-1763 to -1765 (1979); (4) California, *Li v. Yellow Cab Company of California*, 13 Cal.3d 804, 532 P.2d 1226, 119 Cal.Rptr. 858 (1975); (5) Colorado, Colo.Rev.Stat. § 13-21-111 (1973 & Supp.1983); (6) Connecticut, Conn. Gen.Stat. § 52-572h to -572o (1983); (7) Florida, *Hoffman v. Jones*, 280 So.2d 431 (Fla.1973);

The courts in four states have refused to recognize the doctrine of comparative negligence judicially, considering it more appropriate to defer to their legislatures.[12] In the three remaining states there has been both judicial and legislative silence on adopting the doctrine as a doctrine of general application. Two of these are North Carolina and Virginia.[13] The third is South Carolina.

The South Carolina statute previously cited as purporting to abolish the doctrine of contributory negligence in motor vehicle accident cases also purports to adopt a form of the doctrine of comparative negligence in those cases. S.C.Ann. § 15-1-300 (1976).[14] As we have said, this statute was ruled unconstitutional by our Supreme Court in *Marley*. The Court based its decision on a violation of the equal protection clauses of the state and federal constitutions because the doctrine of comparative negligence was provided only to people involved in motor vehicle accidents. The Court was careful to add that it recognized the validity of the doctrine, if generally applied.[15]

(8) Georgia, Ga.Code Ann. § 105-603 (Supp. 1982); (9) Hawaii, Hawaii Rev.Stat. § 663-31 (1976); (10) Idaho, Idaho Code §§ 6-801 to -806 (1979); (11) Illinois, *Alvis v. Ribar*, 85 Ill.2d 1, 52 Ill.Dec. 23, 421 N.E.2d 886 (1981); (12) Indiana, Ind.Code Ann. §§ 34-4-33-1 to -8 (Burns Supp.1983); (13) Iowa, *Goetzman v. Wichern*, 327 N.W.2d 742 (Iowa 1982); (14) Kansas, Kan. Stat.Ann. § 60-258a to -258b (1976); (15) Kentucky, *Hilen v. Hays*, 673 S.W.2d 713 (Ky.1984); (16) Louisiana, La.Civ.Code Ann. art. 2323 (West Supp.1983); (17) Maine, Me.Rev.Stat.Ann. tit. 14, § 156 (1980); (18) Massachusetts, Mass. Gen.Laws Ann. ch. 231, § 85 (West Supp.1983); (19) Michigan, *Placek v. City of Sterling Heights*, 405 Mich. 638, 275 N.W.2d 511 (1979); (20) Minnesota, Minn.Stat.Ann. §§ 604.01-.02 (West 1982); (21) Mississippi, Miss.Code Ann. § 11-7-15 (1972); (22) Missouri, *Gustafson v. Benda*, 661 S.W.2d 11 (Mo.1983); (23) Montana, Mont. Code Ann. §§ 27-1-702 to -703 (1983); (24) Nebraska, Neb.Rev.Stat. § 25-1151 (1979); (25) Nevada, Nev.Rev.Stat. § 41.141 (1979); (26) New Hampshire, N.H.Rev.Stat.Ann. § 507:7-a (Supp.1979); (27) New Jersey, N.J.Stat.Ann. §§ 2A:15-5.1 to -5.3 (West Supp.1983-1984); (28) New Mexico, *Scott v. Rizzo*, 96 N.M. 682, 634 P.2d 1234 (1981); (29) New York, N.Y.Civ. Prac.Law § 1411 (McKinney 1976); (30) North Dakota, N.D.Cent.Code § 9-10-07 (1975); (31) Ohio, Ohio Rev.Code Ann. § 2315.19 (Page 1982); (32) Oklahoma, Okla.Stat.Ann. tit. 23, §§ 11-14 (West Supp.1982-1983); (33) Oregon, Or.Rev.Stat. § 18.470 (1981); (34) Pennsylvania, Pa.Stat.Ann. tit. 42, § 7102 (Purdon 1982 and Supp.1983-1984); (35) Rhode Island, R.I.Gen. Laws §§ 9-20-4 to -4.1 (Supp.1982); (36) South Dakota, S.D.Comp.Laws Ann. § 20-9-2 (1979); (37) Texas, Tex.Rev.Civ.Stat.Ann. art. 2212a (Vernon Supp.1982-1983); (38) Utah, Utah Code Ann. §§ 78-27-37 to -43 (1953); (39) Vermont, Vt.Stat.Ann. tit. 12, § 1036 (Supp.1983); (40) Washington, Wash.Rev.Code Ann. §§ 4.22.-005-.920 (Supp.1983-1984); (41) West Virginia, *Bradley v. Appalachian Power Company*, 163 W.Va. 332, 256 S.E.2d 879 (1979); (42) Wisconsin, Wis.Stat.Ann. § 895.045 (West 1983); (43) Wyoming, Wyo.Stat. § 1-1-109 (1977). *See generally Hilen v. Hays;* Me.Rev.Stat.Ann. tit. 14, § 156 (Supp.1983); Schwartz, *Comparative Negligence* § 1.

12. *See Golden v. McCurry*, 392 So.2d 815 (Ala. 1980); *Rabar v. E.I. duPont de Nemours & Co., Inc.*, 415 A.2d 499 (Del.Super.Ct.1980); *Harrison v. Montgomery County Board of Education*, 295 Md. 442, 456 A.2d 894 (1983); *Gross v. Nashville Gas Company*, 608 S.W.2d 860 (Tenn.App.1980) (Tennessee Court of Appeals deferred to its Supreme Court and legislature).

13. A recent decision of the Virginia Supreme Court appears to erode substantially the application of the doctrine of contributory negligence in that state and accomplish many of the aims of the doctrine of comparative negligence through the use of the concept of mitigation of damages. *Lawrence v. Wirth*, 226 Va. 408, 309 S.E.2d 315 (1983); *see also* LeBel, *Contributory Negligence and Mitigation of Damages: Comparative Negligence Through the Back Door*, Vol. X, No. 4, Va.B.J. (Fall 1984).

14. In 1936, a young law student made the following perceptive observation:

> [I]f the shifting of loss is to be based on fault, the comparative negligence statutes at least provide a more rational approach to the problem [of distributing costs of automobile accidents] than the crude doctrines of the common law.

Nixon, *Changing Rules of Liability in Automobile Accident Litigation*, 3 Law & Contemp.Prob. 476, 483 (1936). Thirty-eight years later the South Carolina Legislature apparently agreed by enacting Code section 15-1-300. Ironically, it was the same year the author of these prophetic words encountered larger legal problems causing him to resign from the Bar and as President of the United States.

15. *See Taylor v. Bridgebuilders, Inc.*, 275 S.C. 236, 269 S.E.2d 337 (1980), *Stockman v. Marlowe*, 271 S.C. 334, 247 S.E.2d 340 (1978) and

Our Supreme Court has had occasion to mention the doctrine of comparative negligence in several other cases.[16] While the Court obviously did not recognize the doctrine of comparative negligence, as a doctrine of general application, in these cases or any other, it does not appear the Court has ever been asked to do so. Thus, the absence of the doctrine of comparative negligence in South Carolina, like the presence of the doctrine of contributory negligence, has been brought about because, until now, no one has ever questioned which doctrine should be applied.

IV

JUDICIAL v. LEGISLATIVE CHANGE

Legitimate arguments are made that the courts should defer to their legislatures on the question here presented. Whenever any court contemplates making a change in the law, it should first consider whether the change contemplated is one which has been addressed, or can better be addressed, by the legislature as the more direct representative of the people. We have considered deferring to the legislature in the instant case and have concluded this is not appropriate under the circumstances.

[2] Within constitutional limits, courts should defer to their legislatures in construing statutes, so as to give effect to legislative intent. Consistent with this principle, we have deferred in past cases to the legislature by applying statutes enacted by it without regard to our own view of "wisdom and justice." *See Busby v. State Farm Mutual Automobile Insurance Company,* 280 S.C. 330, 312 S.E.2d 716 (S.C.App.1984); *S.C. Law Enforcement Division v. The "Michael and Lance,"* 281 S.C. 339, 315 S.E.2d 171 (S.C.App.1984). However, the South Carolina Legislature has not passed any statute applicable to this case which provides for either the doctrine of contributory negligence or comparative negligence.

In *Marley,* the Court said a statute providing for the doctrine of comparative negligence as a doctrine of general application would be valid. While it is true the legislature has failed to enact any such statute since the court said it could validly do so, it would be wrong to conclude we should be bound, or even guided, by its inaction. We agree with the Michigan Supreme Court when it said: "As a practical matter, there are a variety of reasons why bills or ideas do not become law and it is not the role of the courts to guess what legislative silence means." *Kirby v. Larson,* 400 Mich. 585, 256 N.W.2d 400, 420 (1977). When the courts are asked to reexamine the justice of an outmoded common law doctrine, it is their duty to do so. The growth of the common law should not be halted by shifting responsibility from the courts to the legislature. As the Illinois Supreme Court has said, "Such a stalemate is a manifest injustice to the public." *Alvis,* 421 N.E.2d at 896.

Williams v. Barry, 271 S.C. 295, 247 S.E.2d 319 (1978) (cases tried before *Marley* in which the statute held unconstitutional in that case was applied).

16. *See, e.g., McLean v. Atlantic Coast Line R. Co.,* 81 S.C. 100, 61 S.E. 900, 904 (1908) (held plaintiff contributorily negligent as a matter of law and observed "the doctrine of comparative negligence is not recognized"); *Gladden v. Southern Ry. Co.,* 142 S.C. 492, 141 S.E. 90, 100 (1928) (held jury charge by trial judge improperly defined contributory negligence and noted "the doctrine of comparative negligence does not prevail in this state"); *Bedford v. Armory Wholesale Grocery Co.,* 195 S.C. 150, 10 S.E.2d 330 (1940) (held not error for trial judge to refuse requested charge that doctrine of comparative negligence does not exist in South Carolina); *Coleman v. Lurey,* 199 S.C. 442, 20 S.E.2d 65, 66 (1942) (held improper for trial judge to charge jury: "where the plaintiff and defendant are equally at fault in producing an injury, where both are negligent, one is just as negligent as the other, the law leaves them where it finds them," and noted "we do not recognize or apply the doctrine of comparative negligence in this State unless it is required by statute"); *Boyleston v. Southern Ry. Co.,* 211 S.C. 232, 44 S.E.2d 537 (1947) (held general rule that doctrine of comparative negligence is not recognized in South Carolina is subject to statutory exception in suits against railroads by their employees); *Sturcken v. Richland Oil Company,* 248 S.C. 355, 150 S.E.2d 341 (1966) (held jury charge on doctrine of contributory negligence was improper where charge referred to "grades" of negligence).

We have considered the argument that the legislature has approved the doctrine of contributory negligence by implication in enacting the several statutes which refer to it. We reject this argument because we believe that when the legislature enacted these statutes, it did not focus on the merits of the doctrine but rather conformed its statutes to the law as then applied by our Supreme Court. As Professor Phillips has concluded in his recent article exhaustively addressing this question, "In any event, there is no legislation to prevent the South Carolina judiciary from applying comparative fault to all negligence actions." Phillips, *The Case for Judicial Adoption of Comparative Fault in South Carolina*, 32 S.C.L.Rev. 295, 300 (1980).

The doctrine of contributory negligence, as a doctrine of general application, is a judicial creation in South Carolina. It is within the power of courts to abrogate that which they have created. In each of the states that have judicially adopted the doctrine of comparative negligence, the court addressed the propriety of judicial versus legislative adoption and concluded that deference to the legislature was not proper. *See, e.g., Alvis,* 421 N.E.2d 886, 895, and cases cited therein. Indeed, the United States Supreme Court deemed it proper in admiralty cases to "adopt the proportional fault doctrine without congressional action." *Reliable Transfer Co.*, 421 U.S. at 410, 95 S.Ct. at 1715, citing G. Gilmore and C. Black, *The Law of Admiralty* 531 (2d ed. 1975).

As Professor Prosser has concluded:

> There never has been any essential reason why the change could not be made without a statute by the courts which made the contributory negligence rule in the first place....

Prosser, *Law of Torts* § 67 at 434.

We have also considered and rejected the argument that the legislature is better suited to adopt the doctrine of comparative negligence by statute because such a statute could comprehensively address all situations in which the doctrine would be applied, whereas courts are limited to deciding its application on a case by case basis. We view this argument as suggesting, in essence, that where a court cannot correct all injustice, it should correct none. But even if this argument has some validity in theory, the history of legislative action in the various states which have adopted the doctrine by statute reveals that comprehensive statutes are not usually adopted. Instead, the legislatures often leave questions of how the doctrine will be applied to the courts. Our own legislature obviously did this in enacting Code section 15-1-300 (previously cited as purporting to adopt a version of the doctrine in motor vehicle cases).

V

STARE DECISIS AND THE AUTHORITY OF THE SOUTH CAROLINA COURT OF APPEALS

We next address the argument that we are prevented by previous decisions of our Supreme Court and this court from considering the question here presented.

[3] The doctrine of stare decisis says that where a principle of law has become settled by a series of court decisions, it should be followed in similar cases. *State v. Ballance,* 229 N.C. 764, 51 S.E.2d 731 (1949). Strictly speaking, stare decisis is not a rule of law but is a matter of judicial policy. 20 Am.Jur.2d *Courts* § 184 (1965).

In *International News Service v. Associated Press,* 248 U.S. 215, 39 S.Ct. 68, 81, 63 L.Ed. 211 (1918), Justice Brandeis, dissenting, wrote:

> The unwritten law possesses capacity for growth; and has often satisfied new demands for justice by invoking analogies or by expanding a rule or principle.

Justice Sutherland wrote in *Funk v. United States,* 290 U.S. 371, 54 S.Ct. 212, 216, 78 L.Ed. 369 (1933):

> [T]o say that the courts of this country are forever bound to perpetuate such of its rules as, by every reasonable test, are found to be neither wise nor just, because we have once adopted them as

suited to our situation and institutions at a particular time, is to deny to the common law in the place of its adoption a "flexibility and capacity for growth and adaptation" which was "the peculiar boast and excellence" of the system in the place of its origin.

We are obviously aware that the doctrine of contributory negligence has been applied in numerous South Carolina cases for more than a century. While we agree that the need for stability in the law requires that substantial change should not be undertaken hastily or lightly, we also are of the opinion that the need for stability should not be allowed to stultify the natural development of the common law. Neither should courts perpetuate injustice resulting from the application of a doctrine in need of reevaluation, no matter how long or often it has been applied.

This attitude is evidenced by our Supreme Court in a number of recent decisions abrogating judicially adopted doctrines.[17] It is also shown in the Court's recognition of doctrines of law.[18] Thus, stare decisis does not necessarily foreclose consideration being given to the question of adopting the doctrine of comparative negligence in place of the doctrine of contributory negligence. Whether this court has the authority to do so is another matter.

In one of the early decisions of this court we held: "Where the law has been recently addressed by our Supreme Court, and is unmistakably clear, this court has no authority to change it." *Bain, Exr. v. Self Memorial Hospital,* 281 S.C. 138, 314 S.E.2d 603 (S.C.App.1984), citing *Shea v. State Department of Mental Retardation,* 279 S.C. 604, 310 S.E.2d 819 (S.C.App.1983). While we adhere to this holding, we conclude it is not applicable here. Not only has the single question presented by this appeal not been recently addressed by our Supreme Court, it has never been addressed at all.

South Carolina is an "exception state." This means the South Carolina Supreme Court and this court are "confined to a disposition of appeals upon the exceptions taken...." *Mishoe v. Atlantic Coast Line R. Co.,* 186 S.C. 402, 197 S.E. 97, 106 (1938); *Evans v. Bruce,* 245 S.C. 42, 138 S.E.2d 643 (1964); *Bartles v. Livingston,* S.C., 319 S.E.2d 707 (S.C.App.1984); *Ellison v. Heritage Dodge, Inc.,* S.C., 320 S.E.2d 716 (S.C. App.1984). More simply put, appellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked. The question here before us has never been answered because it has never been asked. As previously discussed, the doctrine of contributory negligence was first recognized without dispute in a case in which it was held inapplicable. It has been applied unchallenged ever since. The question of whether the doctrine of comparative negligence should be adopted in its place has never before been raised on appeal. Thus, no precedent exists which is determinative of our decision here.

In reaching this conclusion, we are also mindful that this case was first appealed to our Supreme Court and thereafter transferred to this court after its creation. Unlike *Shea* and *Bain,* it presents only a single question to be answered on appeal. It cannot be assumed that the Supreme Court transferred this case to us without being aware of the question it presents. Prior to the case being transferred, a petition was filed with the Supreme Court by the South Carolina Defense Trial Attorneys' Association seeking permission to file

17. *See, e.g., King v. Williams,* 276 S.C. 478, 279 S.E.2d 618 (1981) (abolished "locality rule" in medical malpractice cases); *Elam v. Elam,* 275 S.C. 132, 268 S.E.2d 109 (1980) (abolished doctrine of parental immunity); *Fitzer v. Greater Greenville South Carolina Young Men's Christian Association,* 277 S.C. 1, 282 S.E.2d 230 (1981) (abolished doctrine of charitable immunity).

18. *See, e.g., Ford v. Hutson,* 276 S.C. 157, 276 S.E.2d 776 (1981) (recognized cause of action for intentional infliction of emotional distress); *Meetze v. Associated Press,* 230 S.C. 330, 95 S.E.2d 606 (1956) (recognized cause of action for invasion of privacy).

an Amicus Curiae brief. In this petition, the question presented on appeal was specifically called to the attention of the Court. In addition, Ms. Langley filed a petition to argue against precedent with the Supreme Court which also called attention to this question. The Court acted on both petitions before transferring the case to this court. While it is true both petitions were denied without comment, we reject the suggestion of the Defense Attorneys' that this denial constituted a decision by the Court on the merits of this case.

Therefore, we must conclude that when our Supreme Court transferred this case to us, it meant for us to answer the only question which it presents. We will proceed to do so.

VI

CONTRIBUTORY NEGLIGENCE v. COMPARATIVE NEGLIGENCE

To paraphrase John Locke, there is nothing less powerful than an idea whose time is gone. In our opinion, the doctrine of contributory negligence is an idea whose time is gone in South Carolina. It is extinct almost everywhere it once existed. It no longer exists in England, the country of its birth. It survives only in parts of this country, where it is threatened and endangered. Indeed, the doctrine of contributory negligence exists today as the Ivory-Billed Woodpecker of the common law.

The continued existence of the doctrine of contributory negligence as presently applied in South Carolina cannot be justified on any logical basis. It is contrary to the basic premise of our fault system to allow a defendant, who is at fault in causing an accident, to escape bearing any of its cost, while requiring a plaintiff, who is no more than equally at fault or even less at fault, to bear all of its cost. As our Supreme Court has observed, "There is no tenet more fundamental in our law than liability follows the tortious wrongdoer." *Fitzer*, 282 S.E.2d at 231.

Organizations representing a wide variety of perspectives have taken the position that the doctrine of comparative negligence is the better system. These include the American Bar Association, the Association of Trial Lawyers of America and the Defense Research Institute.[19] Virtually all modern commentators agree, including, among others, Campbell, Fleming, Green, Harper and James, Dreton, Leflar, Malone, Pound, and Prosser.

Those who still argue to retain the doctrine of contributory negligence are an ever shrinking group. Schwartz, *Comparative Negligence* § 21.1. However, we feel it is our responsibility to address the arguments which are made for retention of the doctrine and against adoption of the doctrine of comparative negligence.

It is argued that the numerous exceptions to the doctrine of contributory negligence allow juries sufficient flexibility to do substantial justice, and even where no exception is applicable juries often ignore the doctrine when necessary to render justice.[20]

In our opinion, the very fact courts and legislatures have had to craft so many exceptions to the doctrine of contributory negligence in order to produce justice supports an argument against its retention, particularly in view of the difficulties which have been encountered in applying these exceptions. The doctrine of comparative negligence presents a less difficult and easier to understand alternative.

While we agree that juries may often ignore the law because of its harshness, we view this proclivity as a compelling reason to abrogate the doctrine rather than retain it. There is something fundamentally

19. Schwartz, *Comparative Negligence* § 1.1 at 2, citing Marryott, *The Automobile Accident Reparations System and the American Bar Association*, 6 Forum 79 (1971); A.T.L.A. Monograph, *Comparative Negligence* (1970); D.R.I. Pamphlet No. 8, *Responsible Reform: A Program to Improve the Liability Reparation System* 23 (1969).

20. This argument in support of the doctrine based on its exceptions and lack of uniform application reminds us of the old story about the man who ate a pair of shoes. When asked how he liked them, he replied that the part he liked best was the holes. Fuller, *The Case of the Speluncean Explorers*, 62 Harv.L.Rev. 616 (1949).

wrong with a rule of law which is so contrary to the convictions of ordinary citizens that, when serving as jurors, they often refuse to enforce it in violation of their oaths. The disrespect for the law engendered by perpetuating such a rule is obvious. *See Hoffman*, 280 So.2d 431.

The further argument is made that the doctrine of contributory negligence is a deterrent to carelessness. The fallacy of this argument was pointed out by Professor Prosser:

> [T]he assumption that the speeding motorist is, or should be, meditating on the possible failure of a lawsuit for his possible injuries lacks all reality, and it is quite as reasonable to say that the rule promotes accidents by encouraging the negligent defendant.

Prosser, *Comparative Negligence* at 468.

It is also argued that the apportionment of fault cannot be accomplished by juries. This argument ignores the fact that such apportionment *is* being accomplished by juries in forty-two other states. We have no reason to believe South Carolina juries are any less competent. Of course, even in South Carolina, juries have been apportioning damages in F.E.L.A. cases and cases brought pursuant to Code section 58–17–3730 (previously cited as purporting to adopt comparative negligence in certain actions brought against railroads by their employees).

Although it must be conceded that allocations of fault in many instances must be approximate, in our opinion, verdicts rendered on this basis will come closer to "speaking the truth" than do those rendered on the all-or-nothing basis required by the doctrine of contributory negligence. Furthermore, apportionment of damages is no more approximate or difficult for a jury than, for example, assigning a dollar value to pain and suffering or humiliation or applying the doctrine of contributory negligence with its numerous exceptions, as now required by our tort system.

The argument is made that adoption of the doctrine of comparative negligence will discourage settlements and thereby add to the workload of our courts. This argument is refuted by a careful study of the experience in Arkansas before and after that state adopted the doctrine.[21] This study found that just as many cases were settled as when the doctrine of contributory negligence was applied. Rosenberg, *Comparative Negligence in Arkansas; A "Before and After" Survey*, 13 Ark.L.Rev. 89 (1959). *See also* Note, *Comparative Negligence—A Survey of the Arkansas Experience*, 22 Ark.L.Rev. 692 (1969). Other commentators have concluded that adoption of the doctrine can actually increase settlements by providing a more realistic approach to determining liability. *See, e.g.*, Pfankuch, *Comparative Negligence v. Contributory Negligence*, 548 Ins.L.J. 725 (1968).

However, even if we were to assume adoption of the doctrine of comparative negligence would increase litigation, we would agree with the response of the United States Supreme Court to this argument:

> [Defendants ask] us to continue the operation of an archaic rule because its facile application out of court yields quick, though inequitable, settlements, and relieves the courts of some litigation. Congestion in the courts cannot justify a legal rule that produces unjust results in litigation simply to encourage speedy out-of-court accommodations.

Reliable Transfer Co., 421 U.S. at 408, 95 S.Ct. at 1714.

Finally, we address the argument that adoption of the doctrine of comparative negligence will cause substantial increases in liability insurance rates. Both the Rosenberg study, previously cited, as well as a most thorough survey conducted by

21. The history of the doctrine of comparative negligence in Arkansas is particularly useful because that state is the only one to have had experience with both the pure and a modified version of the doctrine. In 1955, Arkansas adopted the pure version by a statute drafted by Professor Prosser and known as the "Prosser Act." 1955 Ark.Acts 191. In 1957, this statute was replaced by one providing for a modified version of the doctrine which allows recovery by a negligent plaintiff only if his negligence was "of less degree" than the negligence of the defendant. Ark.Stat.Ann. §§ 27–1763 to –1765 (1979).

Professor Peck refute this argument. Peck, *Comparative Negligence and Automobile Liability Insurance,* 58 Mich.L. Rev. 689 (1960).

In 1969, it was reported that the cost of automobile insurance in *all* the states which recognized the doctrine of comparative negligence was below the national average. Heft, *Comparative Negligence,* 19 Fed.Ins.Counsel Q. 91 (Spring 1969). Of course, we are aware that many variables must be taken into account in predicting insurance rates. However, we find no support for the argument that adoption of the doctrine of comparative negligence will cause rates to increase substantially. But even if this was not the case, we would agree with Professor Pound when he said, "But keeping down insurance rates at the expense of justice is not in keeping with humanitarian ideals of today." Pound, *Comparative Negligence,* 13 NACCA 195, 199 (1954).

For all these reasons we are of the opinion that the common law doctrine of contributory negligence should no longer be applied in South Carolina, and the doctrine of comparative negligence should be adopted in its place. There remains the question of which form of the doctrine of comparative negligence should be adopted.

VII

THE VERSIONS OF COMPARATIVE NEGLIGENCE

The four leading versions of the doctrine are the slight-gross version, two modified versions, and the pure version.[22]

Under the slight-gross version, if the defendant's negligence is gross and the plaintiff's negligence is slight, then the plaintiff may recover, with his damages reduced in proportion to his own negligence. This version has been adopted by statute in only two states and has not been looked on with favor by the commentators and courts. There appears to be very little difference in this version from the exception to the doctrine of contributory negligence already recognized in South Carolina which provides that a plaintiff guilty of simple contributory negligence is not barred from recovery against a defendant whose conduct is reckless. *See Davenport,* 313 S.E.2d 354, 356 n. 2.

The two modified versions of the doctrine of comparative negligence are similar to each other. One allows recovery by the plaintiff if his negligence was *not as great as* the negligence of the defendant. The other modified version allows the plaintiff to recover if his negligence is *not greater than* the defendant's negligence. In both versions, recovery is reduced by the amount of the plaintiff's negligence. The majority of the states have adopted one of these two versions. The recent trend in the states has been toward the latter version.

Under the pure version of comparative negligence, the plaintiff may recover even if his negligence is greater than that of the defendant, with his recovery diminished by the amount of his negligence. This version is recognized in a minority of the states.

The following examples illustrate the application of each of these four versions of the doctrine. In each example, assume the plaintiff's damages are $1,000:

Plaintiff guilty of slight negligence as compared to defendant's gross negligence. If the negligence of the plaintiff is 1% and that of the defendant is 99%, under the slight-gross version, the plaintiff would be permitted to recover $990 since his negligence is slight as compared to the gross negligence of the defendant. The same result would be obtained under either of the modified versions and the pure version. Of course, under the doctrine of contributory negligence the plaintiff would recover nothing. Neither would he recover anything in any of the three following examples.

Plaintiff guilty of the lesser negligence. If the negligence of the plaintiff is 25% while that of defendant 75%, under the slight-gross version, the plaintiff would be

22. For an excellent discussion of the various forms of the doctrine of comparative negligence see, Comment, *A Call for the Adoption of Comparative Negligence in South Carolina,* 31 S.C.L. Rev. 757 (1980).

permitted to recover anything since his negligence is not slight in comparison with that of defendant. Under the not-as-great-as version, the plaintiff would be entitled to recover 75% of his damages, or $750. The same result should be obtained under both the not-greater-than and the pure comparative negligence versions.

Parties equally negligent. If both plaintiff and defendant are 50% negligent, under the slight-gross version, the action of the plaintiff would obviously fail. Likewise, under the not-as-great-as version plaintiff can recover only if his negligence was not as great as the defendant's negligence. However, under the not-greater-than version, the plaintiff would be entitled to recover $500 from the defendant since the negligence of the plaintiff was not greater than that of the defendant. This would also be the result under the pure comparative negligence approach.

Plaintiff guilty of the greater negligence. If the plaintiff is 75% negligent while the defendant is responsible for only 25%, under the slight-gross, not-as-great-as, and not-greater-than versions of comparative negligence, the plaintiff would recover nothing. Only under a pure comparative negligence version would plaintiff recover anything. In this instance, he would be entitled to $250.

In our opinion, only the modified versions of the doctrine and the pure version are worthy of serious consideration. It is our further opinion that the not-greater-than modified version is preferable.

While a sound argument is made for the pure version, it is subject to the criticism that it allows a plaintiff who is the most at fault in causing an accident to recover against a defendant only minimally at fault. *See, e.g., Lamborn v. Phillips Pacific Chemical Co.*, 89 Wash.2d 701, 575 P.2d 215 (1978) (plaintiff found 99% negligent in causing an accident but awarded verdict of $3,500 based on damages of $350,000). Just as it is unreasonable to require perfect conduct by a plaintiff in order for him to recover anything as required by the doctrine of contributory negligence, it is similarly unreasonable to require perfect conduct by a defendant in order for him to escape liability as provided by the pure version of the doctrine of comparative negligence. Perfection in human behavior is an unrealistic expectation.

We reject the not-as-great-as version because it arbitrarily allows a defendant who is equally at fault in causing an accident to escape responsibility for any of its cost. As Professor Schwartz points out, that is "a situation that occurs with some frequency in the minds of jurors...." Schwartz, *Comparative Negligence* § 21.3 at 344.

We choose the not-greater-than version of the doctrine for essentially two reasons. Unlike the pure version, it does not allow a plaintiff to recover when he has been the most at fault in causing an accident. But, unlike the not-as-great-as version, it does not allow a defendant to escape all responsibility for an accident which he was equally at fault in causing. Instead, the not-greater-than version of the doctrine strikes the reasonable balance of providing that parties equally at fault in causing an accident share equally in its cost.

In choosing this modified version of the doctrine over the pure version, we are also influenced by the conservative approach taken by our Supreme Court in abrogating doctrines of common law. *See, e.g., Brown v. Anderson County Hospital Association*, 268 S.C. 479, 234 S.E.2d 873 (1977) (court modified doctrine of charitable immunity only as it applied to hospitals); *Fitzer*, 282 S.E.2d 230 (court abolished doctrine of charitable immunity altogether).

VIII

CONCLUSION AND APPLICATION

[4] We hold the doctrine of contributory negligence, as it has previously been applied in South Carolina, is abrogated and replaced with the modified form of the doctrine of comparative negligence which permits recovery by a person who has been negligent in causing an accident so long as his negligence is not greater than the negligence of the person against whom recovery is sought, provided, however, that the amount of his recovery shall be reduced in proportion to the amount of his negligence.

We resist the temptation to give our views on how the doctrine of comparative negligence should be applied in various situations not presented by the instant case. It would be improper for us to do so since these issues are not before us. Abundant guidance is available from the many decisions in other states, as well as the voluminous textual materials, as to how these issues should be resolved in every conceivable factual context.

We also decline to express our views as to any changes in the statutory law of this state which may need to be considered in light of this decision. To do so would be an unwarranted invasion of the prerogative of the legislature, in view of our conclusion that there is no statute applicable to the facts of this case.

At the same time, we realize this decision will have substantial impact on the trial of many cases in this state. It is also not difficult to predict that the parties in the instant case may petition this court for rehearing, and if rehearing is denied, thereafter petition the Supreme Court for certiorari. The Supreme Court may also take certiorari on its own motion. *See* Supreme Court Rules of Practice, Rules 17 and 55. While we have no doubt about the soundness of the decision we have reached, it is our responsibility to provide for an orderly transition in applying this decision. To avoid the confusion which could result in cases tried prior to this decision's becoming final, a stay of its effective date is necessary. We are of the further opinion that we should provide for application of this decision to future cases in the manner most recently adopted by our Supreme Court when it abolished the doctrine of charitable immunity. *See Hupman v. Erskine College,* 281 S.C. 43, 314 S.E.2d 314 (1984) (applied decision in *Fitzer* abolishing charitable immunity prospectively to cases based on causes of action arising after that decision).

We therefore hold that the application of this decision in the instant case and to other cases is stayed until the decision becomes final. By "final" we mean:

In the unlikely event no rehearing is sought, then this decision will become final ten days after the date of this opinion.

If a petition for rehearing is denied and no notice of petition for certiorari to our Supreme Court is thereafter filed, then this decision will become final ten days after the date rehearing is denied.

If a notice of petition for certiorari to the Supreme Court is filed or if the Supreme Court takes certiorari on its own motion, then this decision will become final when the case is finally acted upon by our Supreme Court.

On the date this decision becomes final, it will apply to the instant case and prospectively to all cases based on causes of action which arise on that date or thereafter.

Accordingly, the judgment of the trial court is reversed and this case is remanded for a new trial consistent with this opinion.

REVERSED AND REMANDED.

SHAW and BELL, JJ., concur.

LIBERTY MUTUAL INSURANCE COMPANY, Respondent,

v.

EMPLOYERS INSURANCE OF WAUSAU, Sadie Shropshire and Dace W. Jones, Jr., Defendants,

of whom Andrew Shropshire, Administrator, of the Estate of Sadie Shropshire, Appellant.

Appeal of Andrew SHROPSHIRE.

No. 0361.

Court of Appeals of South Carolina.

Heard Nov. 19, 1984.

Decided Jan. 8, 1985.

Insurance company brought action against claimant, and administrator for

[3] The property sold was never subject to Sutton's attachment lien. Any claim Sutton may have against the escrowed funds would not have priority over Maynard's judgment lien. We hold the trial court erred in subordinating Maynard's lien.

REVERSED.

LITTLEJOHN, C.J., and GREGORY, HARWELL and CHANDLER, JJ., concur.

Robin LANGLEY, Respondent,

v.

James Lee BOYTER and Concrete Specialties of America, Petitioners.

No. 22343.

Supreme Court of South Carolina.

Writ Issued Dec. 10, 1984.

Heard May 7, 1985.

Decided June 11, 1985.

In automobile collision case, the Court of Common Pleas, Richland County, C. Victor Pyle, J., entered judgment upon a jury verdict in favor of defendants and denied plaintiff's request for new trial on ground that judge erred in refusing to apply law of comparative negligence. On appeal, the Supreme Court denied permission to argue for abolition of doctrine of contributory negligence. After transfer to the Court of Appeals, 325 S.E.2d 550, Court granted plaintiff's motion, thus allowing argument for overruling of doctrine of contributory negligence, reversed the trial judge, and ordered a new trial. Writ of certiorari to review opinion of Court of Appeals was issued. The Supreme Court held that inasmuch as the Supreme Court had denied counsel right to argue against doctrine of contributory negligence in favor of doctrine of comparative negligence, Court of Appeals erred in granting motion and in reversing orders of trial judge.

Opinion of Court of Appeals quashed.

Courts ⇐244

Inasmuch as Supreme Court had denied counsel right to argue against doctrine of contributory negligence in favor of doctrine of comparative negligence, Court of Appeals erred in granting motion allowing argument for overruling doctrine of contributory negligence and in reversing orders of trial court judge; upon transfer of case from Supreme Court, the Court of Appeals could take only such action as Supreme Court might have taken.

Kenneth M. Suggs, Columbia, for respondent.

Robert G. Currin, Jr., Columbia, for petitioners.

Charles E. Carpenter, Jr., Columbia, amicus curiae, for S.C. Defense Trial Attorneys.

H. Fred Kuhn, Jr., Beaufort, amicus curiae, for S.C. Trial Lawyers Association.

PER CURIAM:

This is a typical automobile collision case wherein the plaintiff seeks damages for personal injuries and property loss. The complaint alleges negligence, proximate cause and damages attributable to the defendants. The defendants deny negligence and assert the affirmative defense of contributory negligence on the part of the plaintiff. At a pre-trial conference, plaintiff moved that the defense of contributory negligence be struck and that the court apply the doctrine of comparative negligence instead. The motion was denied.

Upon a jury trial, the plaintiff requested that the judge charge the law of comparative negligence in lieu of the law of contributory negligence. This motion was also denied. After the jury returned a verdict

in favor of the defendants, the plaintiff requested a new trial on the ground that the judge erred in refusing to apply the law of comparative negligence. A new trial was denied and an appeal to the Supreme Court of South Carolina followed.

Counsel for the plaintiff petitioned the Court for permission to argue for the abolition of the doctrine of contributory negligence and for the overruling of prior cases upholding that doctrine. On January 6, 1982, this Court denied the petition.

Thereafter, the case was included among those transferred to the Court of Appeals for hearing. On November 21, 1983, the plaintiff filed an identical petition with the Court of Appeals to be allowed to argue for the overruling of the doctrine of contributory negligence. That motion was granted by the Court of Appeals. Thereafter, the Court of Appeals reversed the trial judge and declared for the first time the law of comparative negligence was applicable in this state. Accordingly, a new trial was ordered by the Court of Appeals.

Subsequently, a Writ of Certiorari to review the opinion of the Court of Appeals was issued. We have now heard arguments and quash the opinion of the Court of Appeals as found in *Langley v. Boyter*, 325 S.E.2d 550 (S.C.App.1984).

The defendants contend that inasmuch as the Supreme Court had denied counsel the right to argue against the doctrine of contributory negligence in favor of the doctrine of comparative negligence, the Court of Appeals erred in granting the motion and in reversing the orders of the trial court judge. We agree.

Upon transfer of the case, the Court of Appeals could take only such action as the Supreme Court might have taken. The argument against precedent could not have been made in our Court and was accordingly improper in the Court of Appeals.

We do not reach the merits of comparative negligence as contrasted with the merits of contributory negligence. That issue must await the permission of this Court before a change in this basic, well-established law is brought about, unless the Legislature acts on the matter beforehand.

The opinion of the Court of Appeals is QUASHED.

C.P. BOARDMAN, Jr., et al., Respondents-Petitioners,

v.

LOVETT ENTERPRISES, INC., et al., Defendants,

Of Whom Lovett Enterprises, Inc., and James C. Lovett are Petitioners-Respondents.

No. 85–438.

Supreme Court of South Carolina.

June 27, 1985.

ORDER

Both parties ask this Court to issue writs of certiorari to review the decision of the Court of Appeals in *Boardman v. Lovett Enterprises, Inc.*, 283 S.C. 425, 323 S.E.2d 784 (S.C.App.1984). We grant the writs as to all questions presented in both petitions.

The Appendix shall be docketed as the Transcript of Record as of the date of this order. Petitioners Lovett and Lovett Enterprises shall file eight additional copies of the Appendix by the deadline for the filing of the petitioners' briefs. The materials in the Appendix need not be certified copies. Both parties are deemed appellants for purposes of Supreme Court Rule 8 although either may file a respondent's brief in opposition to the other parties' brief. The parties are directed to file briefs in accordance with Rule 8, except only one original brief and nine copies are required. This matter shall proceed in conformity with the Court's rules.

Helmly's deposition and his medical records show that he had a heart attack in October of 1985 and underwent heart surgery in December of 1985. However, the summons and complaint were served eight months after Helmly's heart surgery and Helmly admitted in his deposition that he had returned to work by the time the summons and complaint were served on him. Helmly's medical records reflect that three months before service of the summons and complaint, Helmly was working ten to fourteen hours a day and was doing extremely well. The only other evidence of Helmly's medical problems is the removal of several polyps in May of 1986 and May of 1987. This last surgery occurred nine months after the service of the summons and complaint, nearly six months after the service of the order of default, and two months prior to the damages hearing. There is no evidence that these ailments caused any enduring incapacity. Furthermore, Helmly stated in his deposition that his sons helped him with his businesses during the time of his heart surgery and thereafter. We agree with the trial judge's ruling that Helmly failed to show excusable neglect as the medical evidence does not support Helmly's claim that he was incapacitated. We can find no semblance of a justification for Helmly's failure to protect his rights. Having concluded there is an insufficient factual basis for finding excusable neglect, we need not decide whether Palmetto Ice Company has shown a meritorious defense.

[6] Palmetto Ice Company also argues that the judgment should be vacated because the damage award was unsupported by the evidence and excessive. However, the trial judge did not consider this issue. As this claim was not raised below, it will not be considered for the first time on appeal. *Hoffman v. Powell*, 298 S.C. 338, 380 S.E.2d 821 (1989). Accordingly, the order of the trial judge is

AFFIRMED.

GREGORY, C.J., and CHANDLER, FINNEY and TOAL, JJ., concur.

Rick NELSON, Personal Representative for the Estate of Gladys H. Nelson, Deceased, Appellant,

v.

CONCRETE SUPPLY COMPANY, and John T. Clinkscales, Respondents.

No. 23303.

Supreme Court of South Carolina.

Heard Nov. 14, 1990.

Decided Jan. 7, 1991.

Negligence action was filed to recover damages for death of motorist who was killed when vehicle she was driving ran into back of 18 wheel tractor trailer on entrance ramp to freeway. After jury trial, the Common Pleas Court, Richland County, Jonathan Z. McKown, J., entered judgment in favor of defendants. Plaintiffs appealed. The Supreme Court, Gregory, C.J., held that for all causes of action arising on or after July 1, 1991, plaintiff in negligence action may recover damages if his or her negligence is not greater than that of defendant, and amount of plaintiff's recovery shall be reduced in proportion to the amount of his or her negligence.

Affirmed.

Negligence ⇐97

For all causes of action arising on or after July 1, 1991, plaintiff in negligence action may recover damages if his or her negligence is not greater than that of defendant, and amount of plaintiff's recovery shall be reduced in proportion to amount of his or her negligence; if there is more than one defendant, plaintiff's negligence shall be compared to combined negligence of all defendants.

Ken Suggs, Suggs & Kelly, Lawyers, Columbia, for appellant.

Susan McWilliams and Susan Lipscomb, Nexsen, Pruet, Jacobs & Pollard, Columbia, for respondents.

GREGORY, Chief Justice:

Appellant commenced this negligence action to recover damages for the death of Gladys Nelson. Mrs. Nelson was killed when the vehicle she was driving ran into the back of an eighteen-wheel tractor trailer truck owned by respondent Concrete Supply Company and driven by respondent John Clinkscales. The truck was on an entrance ramp to the interstate highway waiting to merge with oncoming traffic when the collision occurred. The jury returned a verdict for respondents. We affirm.

At trial, appellant requested a jury charge on the law of comparative negligence which the trial judge refused. In arguing for reversal, appellant asks this Court to overrule *Freer v. Cameron*, 37 S.C.L. (4 Rich.) 228 (1851), and subsequent precedent upholding our long-standing rule of contributory negligence. Having determined comparative negligence is the more equitable doctrine, we now join the vast majority of our sister jurisdictions and adopt it as the law of South Carolina to the extent set forth below. For an exhaustive analytical discussion of the history and merits of comparative negligence, we refer the bench and bar to the opinion of Chief Judge Sanders in *Langley v. Boyter*, 284 S.C. 162, 325 S.E.2d 550 (Ct.App.1984).

For all causes of action arising on or after July 1, 1991,[1] a plaintiff in a negligence action may recover damages if his or her negligence is not greater than that of the defendant. The amount of the plaintiff's recovery shall be reduced in proportion to the amount of his or her negligence. If there is more than one defendant, the plaintiff's negligence shall be compared to the combined negligence of all defendants. *See Elder v. Orluck*, 511 Pa. 402, 515 A.2d 517 (1986).

We dispose of appellant's remaining exceptions pursuant to Supreme Court Rule 23.

AFFIRMED.

HARWELL, FINNEY and TOAL, JJ., and LITTLEJOHN, Associate Justice, concur.

Allison BROWN, Appellant,

v.

COUNTY OF CHARLESTON/CHARLESTON COUNTY COUNCIL, Respondent.

No. 1536.

Court of Appeals of South Carolina.

Heard April 11, 1990.

Decided Aug. 27, 1990.

Landowner applied to county office of zoning and planning for permit to operate a commercial outdoor gun range. The zoning board denied the permit. Landowner appealed. The county council affirmed. Landowner again appealed. The Common Pleas Court, Charleston County, Ralph King Anderson, Jr., J., affirmed. Appeal was taken. The Court of Appeals held that zoning ordinance amendment under which permit was denied was void, as it had been adopted following inadequate notice to landowner.

Reversed and remanded.

1. Constitutional Law ⇐278.2(2)
Zoning and Planning ⇐194

Statute mandating public notice of zoning amendments is subject to general principles of due process that notice fairly and reasonably apprise those whose rights may

1. We note that on the record before us, the doctrine of comparative negligence would not aid appellant in this case since we find as a matter of law no negligence on the part of respondent Clinkscales. *See* S.C.Code Ann. § 56-5-600 (1976).

ing the amounts to be subsequently determined. This is not new or unusual in leases or agreements.

To take the position that the lessors could wait perhaps months or years for the decision of the arbitrators would be extremely unfair and unreasonable to the lessee. At the end of his term, he would not know whether he was a lessee or what he was. What would be his position? What estate would he have? I confess I do not know. The hold-over could not be a tenancy at will. The lessee could not leave the premises or give up the tenancy without forfeiting the buildings. He would be held in suspense at the will of the lessor or the arbitrators for an indefinite time; a suspense against his will. He could not give subleases; his subtenants would have no assurance of staying on; he would have an empty building on his hands, awaiting the slow measure of arbitration machinery. Neither could he make improvements or repairs if he were a manufacturer; value was to be determined as of the end of the term. This uncertainty would be hanging over his head with no means whatever of making it certain until the decision of the arbitrators. At any moment they might fix the value and the renewal rent; the lessors then could take the buildings, or offer a lease at their "election." *The time, however*, when they could do these things, would be absolutely beyond the determination of man, whereas the lease prepared by these parties *fixed* a definite time for such determination, to wit, the end of the term.

The courts below, in my judgment, have properly disposed of this case in holding that the lessors having taken the position that they would not "elect," even within a reasonable time after the expiration of the lease, the lessee had the right to "elect" for himself. I feel that no injustice will be done by the affirmance of this judgment.

POUND, LEHMAN, and KELLOGG, JJ., concur with HUBBS, J.

CRANE, J., dissents in opinion.

O'BRIEN, J., not voting. CARDOZO, C. J., not sitting.

Judgments reversed, etc.

(250 N. Y. 479)

MURPHY v. STEEPLECHASE AMUSEMENT CO., Inc.

Court of Appeals of New York. April 16, 1929.

1. **Theaters and shows ⇐6—Damages for injury by fall from moving belt of amusement device held not recoverable on ground of sudden jerk.**

One stepping on moving belt of amusement park device, which normally ran smoothly, *held* not entitled to recover damages for injuries by fall therefrom on ground that it threw him with a sudden jerk, in absence of evidence that it was out of order, especially as fall was very hazard invited and foreseen.

2. **Theaters and shows ⇐6—One stepping on moving belt of amusement device accepts obvious and necessary dangers.**

One taking part in sport of trying to keep his footing on moving belt of amusement park device accepts dangers inhering therein, so far as they are obvious and necessary.

3. **Theaters and shows ⇐6—Nurse's testimony that she had attended patrons injured at certain amusement device, but that none had suffered broken bones, as did plaintiff, held insufficient to show that it was trap for unwary.**

In action for injuries to one falling from moving belt of amusement park device, testimony of nurse at park hospital that she had attended patrons injured at such device on other occasions, but that she could not say how many and that none had been badly injured or suffered broken bones as did plaintiff, *held* insufficient to show that it was a trap for the unwary, in view of evidence that 250,000 visitors were at device in year.

4. **Theaters and shows ⇐6—One injured by fall from moving belt cannot recover on theory of defective padding where case went to jury on theory of sudden jerk.**

One injured by fall from moving belt of amusement park device *held* not entitled to recover on ground that canvas padding was not kept in repair to break force of fall, where case went to jury on theory that negligence was dependent on a sharp and sudden jerk.

O'Brien, J., dissenting.

Appeal from Supreme Court, Appellate Division, First Department.

Action by James Murphy, an infant, against the Steeplechase Amusement Company, Inc. From a judgment of the Appellate Division (224 App. Div. 832, 231 N. Y. S. 826), affirming by a divided court a judgment of the Trial Term on the verdict of a jury for plaintiff, defendant appeals. Reversed, and a new trial granted.

Gardiner Conroy and Reginald S. Hardy, both of Brooklyn, for appellant.

Charles Kennedy, of New York City, for respondent.

CARDOZO, C. J. The defendant, Steeplechase Amusement Company maintains, an amusement park at Coney Island, N. Y. One of the supposed attractions is known as "the Flopper." It is a moving belt, running upward on an inclined plane, on which passengers sit or stand. Many of them are unable to keep their feet because of the movement of the belt, and are thrown backward or aside. The belt runs in a groove, with padded walls on either side to a height of four feet, and

with padded flooring beyond the walls at the same angle as the belt. An electric motor, driven by current furnished by the Brooklyn Edison Company, supplies the needed power.

[1] Plaintiff, a vigorous young man, visited the park with friends. One of them, a young woman, now his wife, stepped upon the moving belt. Plaintiff followed and stepped behind her. As he did so, he felt what he describes as a sudden jerk, and was thrown to the floor. His wife in front and also friends behind him were thrown at the same time. Something more was here, as every one understood, than the slowly moving escalator that is common in shops and public places. A fall was foreseen as one of the risks of the adventure. There would have been no point to the whole thing, no adventure about it, if the risk had not been there. The very name, above the gate, "the Flopper," was warning to the timid. If the name was not enough, there was warning more distinct in the experience of others. We are told by the plaintiff's wife that the members of her party stood looking at the sport before joining in it themselves. Some aboard the belt were able, as she viewed them, to sit down with decorum or even to stand and keep their footing; others jumped or fell. The tumbling bodies and the screams and laughter supplied the merriment and fun. "I took a chance," she said when asked whether she thought that a fall might be expected.

Plaintiff took the chance with her, but, less lucky than his companions, suffered a fracture of a knee cap. He states in his complaint that the belt was dangerous to life and limb, in that it stopped and started violently and suddenly and was not properly equipped to prevent injuries to persons who were using it without knowledge of its dangers, and in a bill of particulars he adds that it was operated at a fast and dangerous rate of speed and was not supplied with a proper railing, guard, or other device to prevent a fall therefrom. No other negligence is charged.

We see no adequate basis for a finding that the belt was out of order. It was already in motion when the plaintiff put his foot on it. He cannot help himself to a verdict in such circumstances by the addition of the facile comment that it threw him with a jerk. One who steps upon a moving belt and finds his heels above his head is in no position to discriminate with nicety between the successive stages of the shock, between the jerk which is a cause and the jerk, accompanying the fall, as an instantaneous effect. There is evidence for the defendant that power was transmitted smoothly, and could not be transmitted otherwise. If the movement was spasmodic, it was an unexplained and, it seems, an inexplicable departure from the normal workings of the mechanism. An aberration so extraordinary, if it is to lay the basis for a verdict, should rest on something firmer than a mere descriptive epithet, a summary of the sensations of a tense and crowded moment. Matter of Case, 214 N. Y. 199, 108 N. E. 408; Dochtermann v. Brooklyn Heights R. R. Co., 32 App. Div. 13, 15, 52 N. Y. S. 1051; Id., 164 N. Y. 580, 58 N. E. 1087; Foley v. Boston & M. R. R. Co., 193 Mass. 332, 335, 79 N. E. 765, 7 L. R. A. (N. S.) 1076; Work v. Boston Elevated R. Co., 207 Mass. 447, 448, 93 N. E. 633; N. & W. Ry. Co. v. Birchett (C. C. A.) 252 F. 512, 515, 5 A. L. R. 1028. But the jerk, if it were established, would add little to the case. Whether the movement of the belt was uniform or irregular, the risk at greatest was a fall. This was the very hazard that was invited and foreseen. Lumsden v. L. A. Thompson Scenic Ry. Co., 130 App. Div. 209, 212, 213, 114 N. Y. S. 421.

[2] Volenti non fit injuria. One who takes part in such a sport accepts the dangers that inhere in it so far as they are obvious and necessary, just as a fencer accepts the risk of a thrust by his antagonist or a spectator at a ball game the chance of contact with the ball. Pollock, Torts (11th Ed.) p. 171; Lumsden v. L. A. Thompson Scenic Ry. Co., supra; Godfrey v. Connecticut Co., 98 Conn. 63, 118 A. 446; Johnson v. City of New York, 186 N. Y. 139, 148, 78 N. E. 715, 116 Am. St. Rep. 545, 9 Ann. Cas. 824; McFarlane v. City of Niagara Falls, 247 N. Y. 340, 349, 160 N. E. 391, 57 A. L. R. 1; cf. 1 Beven, Negligence, 787; Bohlen, Studies in the Law of Torts, p. 443. The antics of the clown are not the paces of the cloistered cleric. The rough and boisterous joke, the horseplay of the crowd, evokes its own guffaws, but they are not the pleasures of tranquillity. The plaintiff was not seeking a retreat for meditation. Visitors were tumbling about the belt to the merriment of onlookers when he made his choice to join them. He took the chance of a like fate, with whatever damage to his body might ensue from such a fall. The timorous may stay at home.

[3] A different case would be here if the dangers inherent in the sport were obscure or unobserved (Godfrey v. Connecticut Co., supra; Tantillo v. Goldstein Bros. Amusement Co., 248 N. Y. 280, 162 N. E. 82), or so serious as to justify the belief that precautions of some kind must have been taken to avert them (cf. O'Callaghan v. Delwool Park Co., 242 Ill. 336, 89 N. E. 1005, 26 L. R. A. (N. S.) 1054, 134 Am. St. Rep. 331, 17 Ann. Cas. 407). Nothing happened to the plaintiff except what common experience tells us may happen at any time as the consequence of a sudden fall. Many a skater or a horseman can rehearse a tale of equal woe. A different

case there would also be if the accidents had been so many as to show that the game in its inherent nature was too dangerous to be continued without change. The president of the amusement company says that there had never been such an accident before. A nurse employed at an emergency hospital maintained in connection with the park contradicts him to some extent. She says that on other occasions she had attended patrons of the park who had been injured at the Flopper, how many she could not say. None, however, had been badly injured or had suffered broken bones. Such testimony is not enough to show that the game was a trap for the unwary, too perilous to be endured. According to the defendant's estimate, 250,000 visitors were at the Flopper in a year. Some quota of accidents was to be looked for in so great a mass One might as well say that a skating rink should be abandoned because skaters sometimes fall.

[4] There is testimony by the plaintiff that he fell upon wood, and not upon a canvas padding. He is strongly contradicted by the photographs and by the witnesses for the defendant, and is without corroboration in the testimony of his companions who were witnesses in his behalf. If his observation was correct, there was a defect in the equipment, and one not obvious or known. The padding should have been kept in repair to break the force of any fall. The case did not go to the jury, however, upon any such theory of the defendant's liability, nor is the defect fairly suggested by the plaintiff's bill of particulars, which limits his complaint. The case went to the jury upon the theory that negligence was dependent upon a sharp and sudden jerk.

The judgment of the Appellate Division and that of the Trial Term should be reversed, and a new trial granted, with costs to abide the event.

POUND, CRANE, LEHMAN, KELLOGG, and HUBBS, JJ., concur.

O'BRIEN, J., dissents on the authority of Tantillo v. Goldstein Bros. Amusement Co., 248 N. Y. 286, 162 N. E. 82.

Judgments reversed, etc.

(250 N. Y. 484)

BAKER v. HULL et al.

Court of Appeals of New York. April 16, 1929.

1. Sales ⇐469, 474(1)—At common law, no title passed to buyer under conditional sales contract until price was paid, and neither execution nor levy created lien on chattel sold.

Under common law, conditional sale contract did not pass title to buyer until contract price was paid, and hence neither execution issued against property of buyer nor levy thereunder *gave right* to lien on chattel sold.

2. Sales ⇐474(2)—Conditional sales contract does not pass title subject to lien of execution, except as to buyer's creditors acquiring lien by levy or attachment before contract is filed (Personal Property Law, §§ 64, 65).

Under Personal Property Law (Consol. Laws, c. 41) §§ 64, 65, condition of conditional sales contract remains valid, and no title passes to become subject to lien of execution as to all creditors of buyer except those who acquire lien by levy or attachment before contract is filed, not merely by issuance of execution.

3. Sales ⇐474(2)—Conditional sales contract, filed after execution, but before levy by buyer's creditor, survived execution and levy (Personal Property Law, §§ 64, 65).

Under Personal Property Law (Consol. Laws, c. 41) §§ 64, 65, condition in conditional sales contract, filed after execution by creditor of buyer, but before levy, survived issuance of execution without filing, and survived levy with filing.

4. Execution ⇐109—Civil Practice Act, binding debtor's chattels by execution, does not create lien with issuance of execution, irrespective of levy (Civil Practice Act, § 679).

Civil Practice Act, § 679, making goods and chattels of judgment debtor bound by execution where not exempt, does not bestow lien not theretofore existing, and does not create lien by issuance of execution irrespective of levy.

Appeal from Supreme Court, Appellate Division, Second Department.

Action by George Baker against Henry Hull and another. From a judgment of the Appellate Division, Second Department (223 App. Div. 859, 228 N. Y. S. 748), affirming a judgment of the Trial Term, which dismissed the claim on the merits, plaintiff appeals by permission. Reversed, and new trial granted.

Samuel W. Eager, Jr., of Middletown, for appellant.

Herbert B. Royce, of Middletown, and Philip A. Rorty, of Goshen, for respondents.

KELLOGG, J. On the 10th day of June, 1927, the plaintiff sold and delivered an automobile to Jesse B. Earle. Contemporaneously Earle executed and delivered to the plaintiff a conditional sale contract. The instrument engaged Earle to pay to the plaintiff an agreed purchase price; it provided that title to the automobile should remain in the plaintiff until payment had been made. On the 22d of July, 1927, Samuel T. Randall recovered a judgment against Earle, which was docketed in the county of Orange, within which Earle resided. An execution against the property of Earle was issued on the 23d

32 Cal.Rptr. 33

Olga TUNKL, as Executrix of the Estate of Hugo Tunkl, Deceased, Plaintiff and Appellant,

v.

The REGENTS OF the UNIVERSITY OF CALIFORNIA, Defendant and Respondent.

L. A. 26984.

Supreme Court of California,
In Bank.
July 9, 1963.

Action by hospital patient against charitable hospital for negligence. The patient died, and his surviving wife, as executrix, was substituted as plaintiff. The Superior Court, Los Angeles County, Jerold E. Weil, J., entered judgment for the defendant and plaintiff appealed. The Supreme Court, Tobriner, J., held that release from liability for future negligence imposed as condition for admission to charitable research hospital was invalid, under statute prohibiting agreements exempting a person from his own fraud, willful injury to another, or violation of law, on ground that the agreement affected the public interest.

Reversed.

Opinion, 23 Cal.Rptr. 328, vacated.

1. Release ⇐2

Release from liability for future negligence as condition of admission to charitable research hospital was invalid, under statute prohibiting agreements exempting a person from willful injury or violation of law, on ground that agreement between hospital and patient affected public interest. West's Ann.Civ.Code, § 1668; West's Ann. Health & Safety Code, §§ 1400–1421, 32000–32508.

2. Contracts ⇐108(2)

Public policy does not oppose private, voluntary transactions in which one party, for a consideration, agrees to shoulder a risk which the law would otherwise have placed upon the other party.

3. Release ⇐2

Hospital's selectivity as to patients it would accept did not negate its public aspect or public interest therein and did not permit it to contract, as condition of admission of patient, to release itself from liability for future negligence. West's Ann.Civ.Code, § 1668; West's Ann.Health & Safety Code, §§ 1400–1421, 32000–32508.

4. Release ⇐2

That hospital was a charitable hospital did not make release of hospital from liability for future negligence as condition of admission of patient valid. West's Ann. Civ.Code, § 1668; West's Ann.Health & Safety Code, §§ 1400–1421, 32000–32508.

5. Charities ⇐45(2)

Charitable hospital which accepted selected patients from public at large was not permitted to exempt itself from negligence of its employees, as opposed to its own negligence, toward patient as condition of admitting patient. West's Ann.Civ. Code, § 1668; West's Ann.Health & Safety Code, §§ 1400–1421, 32000–32508.

6. Hospitals ⇐8

Patient suing hospital on theory of negligence must prove negligence.

Caidin, Bloomgarden & Kalman and Newton Kalman, Beverly Hills, for plaintiff and appellant.

Edward I. Pollock, William Jerome Pollack and Morris L. Marcus, Los Angeles, amici curiæ on behalf of plaintiff and appellant.

Belcher, Henzie & Fargo, Los Angeles, Leo J. Biegenzahn, West Covina, and William I. Chertok, Los Angeles, for defendant and respondent.

TOBRINER, Justice.

[1] This case concerns the validity of a release from liability for future negligence imposed as a condition for admission to a charitable research hospital. For the reasons we hereinafter specify, we have concluded that an agreement between a hospi-

tal and an entering patient affects the public interest and that, in consequence, the exculpatory provision included within it must be invalid under Civil Code section 1668.

Hugo Tunkl brought this action to recover damages for personal injuries alleged to have resulted from the negligence of two physicians in the employ of the University of California Los Angeles Medical Center, a hospital operated and maintained by the Regents of the University of California as a nonprofit charitable institution. Mr. Tunkl died after suit was brought, and his surviving wife, as executrix, was substituted as plaintiff.

The University of California at Los Angeles Medical Center admitted Tunkl as a patient on June 11, 1956. The Regents maintain the hospital for the primary purpose of aiding and developing a program of research and education in the field of medicine; patients are selected and admitted if the study and treatment of their condition would tend to achieve these purposes. Upon his entry to the hospital, Tunkl signed a document setting forth certain "Conditions of Admission." The crucial condition number six reads as follows: "RELEASE: The hospital is a nonprofit, charitable institution. In consideration of the hospital and allied services to be rendered and the rates charged therefor, the patient or his legal representative agrees to and hereby releases The Regents of the University of California, and the hospital from any and all liability for the negligent or wrongful acts or omissions of its employees, if the hospital has used due care in selecting its employees."

Plaintiff stipulated that the hospital had selected its employees with due care. The trial court ordered that the issue of the validity of the exculpatory clause be first submitted to the jury and that, if the jury found that the provision did not bind plaintiff, a second jury try the issue of alleged malpractice. When, on the preliminary issue, the jury returned a verdict sustaining the validity of the executed release, the court entered judgment in favor of the Regents.[1] Plaintiff appeals from the judgment.

We shall first set out the basis for our prime ruling that the exculpatory provision of the hospital's contract fell under the proscription of Civil Code section 1668; we then dispose of two answering arguments of defendant.

We begin with the dictate of the relevant Civil Code section 1668. The section states: "All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law."

The course of section 1668, however, has been a troubled one. Although, as we shall explain, the decisions uniformly uphold its prohibitory impact in one circumstance, the courts' interpretations of it have been diverse. Some of the cases have applied the statute strictly, invalidating any contract for exemption from liability for negligence. The court in England v. Lyon Fireproof Storage Co. (1928) 94 Cal.App. 562, 271 P. 532, categorically states, "The court correctly instructed the jury that—'The defendant cannot limit its liability against its own negligence by contract, and any contract to that effect would be void.'" (94 Cal.App. p. 575, 271 P. p. 537.) (To

1. Plaintiff at the time of signing the release was in great pain, under sedation, and probably unable to read. At trial plaintiff contended that the release was invalid, asserting that a release does not bind the releasor if at the time of its execution he suffered from so weak a mental condition that he was unable to comprehend the effect of his act (Perkins v. Sunset Tel. & Tel. Co. (1909) 155 Cal. 712, 103 P. 190; Raynale v. Yellow Cab Co. (1931) 115 Cal.App. 90, 300 P. 991; 42 Cal.Jur.2d, Release § 20). The jury, however, found against plaintiff on this issue. Since the verdict of the jury established that plaintiff either knew or should have known the significance of the release, this appeal raises the sole question of whether the release can stand as a matter of law.

the same effect: Union Constr. Co. v. Western Union Tel. Co. (1912) 163 Cal. 298, 314–315, 125 P. 242.)[2] The recent case of Mills v. Ruppert (1959) 167 Cal. App.2d 58, 62–63, 333 P.2d 818; however, apparently limits "[N]egligent * * * violation of law" exclusively to statutory law.[3] Other cases hold that the statute prohibits the exculpation of gross negligence only;[4] still another case states that the section forbids exemption from active as contrasted with passive negligence.[5]

In one respect, as we have said, the decisions are uniform. The cases have consistently held that the exculpatory provision may stand only if it does not involve "the public interest."[6] Interestingly enough, this theory found its first expression in a decision which did not expressly refer to section 1668. In Stephens v. Southern Pacific Co. (1895) 109 Cal. 86, 41 P. 783, 29 L.R.A. 751, a railroad company had leased land, which adjoined its depot, to a lessee who had constructed a warehouse upon it. The lessee convenanted that the railroad company would not be responsible for damage from fire "caused by any * * * means." (109 Cal. p. 87, 41 P. p. 783.) This exemption, under the court ruling, applied to the lessee's damage resulting from the railroad company's carelessly burning dry grass and rubbish. Declaring the contract not "violative of sound public policy" (109 Cal. p. 89, 41 P. p. 784), the court pointed out "* * * As far as this transaction was concerned, the parties, when contracting, stood upon common ground, and dealt with each other as A. and B. might deal with each other with reference to any private business undertaking. * * *" (109 Cal. p. 88, 41 P. p. 784.) The court concluded "that the *interests of the public* in the contract are more sentimental than real" (109 Cal. p. 95, 41 P. p. 786; emphasis added) and that the exculpatory provision was therefore enforceable.

In applying this approach and in manifesting their reaction as to the effect of the exemptive clause upon the public interest, some later courts enforced, and others in-

2. Accord, Hiroshima v. Bank of Italy (1926) 78 Cal.App. 362, 377–378, 248 P. 947; cf. Estate of Garcelon (1894) 104 Cal. 570, 589, 38 P. 414, 32 L.R.A. 595.

3. To the same effect: Werner v. Knoll (1948) 89 Cal.App.2d 474, 201 P.2d 45; 15 Cal.L.Rev. 46 (1926). This interpretation was criticized in Barkett v. Brucato (1953) 122 Cal.App.2d 264, 277, 264 P. 2d 978, and 1 Witkin, Summary of California Law 228 (7th ed. 1960). The latter states: "Apart from the debatable interpretation of 'violation of law' as limited strictly to violation of *statutes*, the explanation appears to make an unsatisfactory distinction between (1) valid exemptions from liability for injury or death resulting from types of ordinary or gross negligence not expressed in statutes, and (2) invalid exemptions where the negligence consists of violation of one of the many hundreds of statutory provisions setting forth standards of care."

4. See Butt v. Bertola (1952) 110 Cal.App. 2d 128, 242 P.2d 32; Ryan Mercantile Co. v. Great Northern Ry. Co. (D.Mont. 1960) 186 F.Supp. 660, 667–668. See also Smith, Contractual Controls of Damages in Commercial Transactions, 12 Hastings L.J. 122, 142 (1960), suggesting that section 1668 permits exculpatory clauses for all but intentional wrongs, an interpretation which would render the term "negligent * * * violation of law" totally ineffective.

5. Barkett v. Brucato (1953) 122 Cal.App. 2d 264, 277, 264 P.2d 978.

6. The view that the exculpatory contract is valid only if the public interest is not involved represents the majority holding in the United States. Only New Hampshire, in definite opposition to "public interest" test, categorically refuses to enforce exculpatory provisions. The cases are collected in an extensive annotation in 175 A.L.R. 8 (1948). In addition to the California cases cited in the text and note 7 infra, the public interest doctrine is recognized in dictum in Sproul v. Cuddy (1955) 131 Cal.App.2d 85, 95, 280 P.2d 158; Basin Oil Co. v. Baash-Ross Tool Co. (1954) 125 Cal. App.2d 578, 594, 271 P.2d 122; Hubbard v. Matson Navigation Co. (1939) 34 Cal. App.2d 475, 477, 93 P.2d 846. Each of these cases involved exculpatory clauses which were construed by the court as not applicable to the conduct of the defendant in question

validated such provisions under section 1668. Thus in Nichols v. Hitchcock Motor Co. (1937) 22 Cal.App.2d 151, 159, 70 P.2d 654, 658, the court enforced an exculpatory clause on the ground that "the public neither had nor could have any interest whatsoever in the subject-matter of the contract, considered either as a whole or as to the incidental covenant in question. The agreement between the parties concerned 'their private affairs' only." [7]

In Barkett v. Brucato (1953) 122 Cal.App.2d 264, 276, 264 P.2d 978, 987, which involved a waiver clause in a private lease, Justice Peters summarizes the previous decisions in this language: "These cases hold that the matter is simply one of interpreting a contract; that both parties are free to contract; that the relationship of landlord and tenant *does not affect the public interest*; that such a provision *affects only the private affairs of the parties.* * *" (Emphasis added.)

On the other hand, courts struck down exculpatory clauses as contrary to public policy in the case of a contract to transmit a telegraph message (Union Constr. Co. v. Western Union Tel. Co. (1912) 163 Cal. 298, 125 P. 242) and in the instance of a contract of bailment (England v. Lyon Fireproof Storage Co. (1928) 94 Cal.App. 562, 271 P. 532). In Hiroshima v. Bank of Italy (1926) 78 Cal.App. 362, 248 P. 947, the court invalidated an exemption provision in the form used by a payee in directing a bank to stop payment on a check. The court relied in part upon the fact that "the banking public, as well as the particular individual who may be concerned in the giving of any stop notice, is interested in seeing that the bank is held accountable for the ordinary and regular performance of its duties, and also in seeing that directions in relation to the disposition of funds deposited in the bank are not heedlessly, negligently, and carelessly disobeyed, and money paid out contrary to directions given." (78 Cal.App. p. 377, 248 P. p. 953.) The opinion in Hiroshima was approved and followed in Grisinger v. Golden State Bank (1928) 92 Cal.App. 443, 268 P. 425.[8]

If, then, the exculpatory clause which affects the public interest cannot stand, we must ascertain those factors or characteristics which constitute the public interest. The social forces that have led to such characterization are volatile and dynamic. No definition of the concept of public interest can be contained within the four corners of a formula. The concept, always the subject of great debate, has ranged over the whole course of the common law; rather than attempt to prescribe its nature, we can only designate the situations in which it has been applied. We can determine whether the instant contract does or does not manifest the characteristics which have been held to stamp a contract as one affected with a public interest.

In placing particular contracts within or without the category of those affected with a public interest, the courts have revealed a rough outline of that type of transaction in which exculpatory provisions will

7. See also Hischemoeller v. Nat. Ice etc. Storage Co. (1956) 46 Cal.2d 318, 328, 294 P.2d 433 [contract upheld as an "ordinary business transaction between businessmen"]; Mills v. Ruppert (1959) 167 Cal.App.2d 58, 62, 333 P.2d 818 [lease held not a matter of public interest]; Inglis v. Garland (1933) 19 Cal.App.2d Supp. 767, 773, 64 P.2d 501 [same]; cf. Northwestern Mutual Fire Ass'n v. Pacific Co. (1921) 187 Cal. 38, 41, 200 P. 934 [exculpatory clause in bailment upheld because of special business situation].

8. Exculpatory clauses were regarded as invalid, although without reference to the public interest doctrine, in Franklin v. Southern Pacific Co. (1928) 203 Cal. 680, 686, 265 P. 936, 59 A.L.R. 118 [common carrier]; Dieterle v. Bekin (1904) 143 Cal. 683, 688, 77 P. 664 [bailment]; George v. Bekins Van & Storage Co. (1949) 33 Cal.2d 834, 846, 205 P.2d 1037 [bailment, clause upheld as one for declaration of value and not complete exculpation]; Hall-Scott Motor Car Co. v. Universal Ins. Co. (9th Cir. 1941) 122 F.2d 531, 533-534 [California law, clause upheld on ground that transaction not a bailment].

be held invalid. Thus the attempted but invalid exemption involves a transaction which exhibits some or all of the following characteristics. It concerns a business of a type generally thought suitable for public regulation.[9] The party seeking exculpation is engaged in performing a service of great importance to the public,[10] which is often a matter of practical necessity for some members of the public.[11] The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards.[12] As a result of the essential nature

9. "Though the standard followed does not always clearly appear, a distinction seems to be made between those contracts which modify the responsibilities normally attaching to a relationship which has been regarded in other connections as a fit subject for special regulatory treatment and those which affect a relationship not generally subjected to particularized control." (11 So.Cal.L.Rev. 296, 297 (1938); see also Note 175 A.L.R. 8, 38–41 (1948).

In Munn v. Illinois (1877) 94 U.S. 113, 24 L.Ed. 77, the Supreme Court appropriated the common law concept of a business affected with a public interest to serve as the test of the constitutionality of state price fixing laws, a role it retained until Nebbia v. New York (1934) 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940, and Olsen v. Nebraska (1941) 313 U.S. 236, 61 S.Ct. 862, 85 L.Ed. 1305. For discussion of the constitutional use and application of the "public interest" concept, see generally Hall, Concept of Public Business (1940); Hamilton, Affectation with a Public Interest, 39 Yale L.J. 1089 (1930).

10. See New York Cent. Railroad Co. v. Lockwood (1873) 17 Wall. 357, 84 U.S. 357, 378–382, 21 L.Ed. 627; Millers Mut. Fire Ins. Ass'n v. Parker (1951) 234 N.C. 20, 65 S.E.2d 341; Hirosbima v. Bank of Italy (1926) 78 Cal.App. 362, 377, 248 P. 947; cf. Lombard v. Louisiana (1963) 373 U.S. 267, 83 S.Ct. 1122, 10 L.Ed.2d 338 [Douglas, J., concurring] [holding that restaurants cannot discriminate on racial grounds, and noting that "[p]laces of public accommodation such as retail stores, restaurants, and the like render a 'service which has become a public interest' * * * in the manner of the innkeepers and common carriers of old."]; Charles Wolff Packing Co. v. Court of Industrial Relations (1923), 262 U.S. 522, 43 S.Ct. 630, 67 L.Ed. 1103 ["public interest" as test of constitutionality of price fixing]; German Alliance Ins. Co. v. Kansas (1914) 233 U.S. 389, 34 S.Ct. 612, 58 L.Ed. 1011 [same]; Hamilton, Affectation with a Public Interest, 39 Yale L.J. 1089 (1930) [same]; Arterburn, The Origin and First Test of Public Callings, 75 U.Pa.L.Rev. 411, 428 (1927) ["public interest" as one test of whether business has duty to serve all comers]. But see Simmons v. Columbus Venetian Stevens Buildings (1958) 20 Ill.App.2d 1, 25–32, 155 N.E.2d 372, 384–387 [apartment leases, in which exculpatory clauses are generally permitted, are in aggregate as important to society as contracts with common carriers].

11. See Bisso v. Inland Waterways Corp. (1955) 349 U.S. 85, 91, 75 S.Ct. 629, 99 L.Ed. 911; New York Cent. Railroad Co. v. Lockwood, supra; Fairfax Gas & Supply Co. v. Hadary (4th Cir. 1945) 151 F.2d 939; Millers Mut. Fire Ins. Ass'n v. Parker (1951) 234 N.C. 20, 65 S.E.2d 341; Irish & Swartz Stores v. First Nat. Bank of Eugene (1960) 220 Or. 362, 375, 349 P.2d 814, 821; 15 U.Pitt.L.Rev. 493, 499–500 (1954); Note 175 A.L.R. 8, 16–17 (1948); cf. Charles Wolff Packing Co. v. Court of Industrial Relations (1923) 262 U.S. 522, 43 S.Ct. 630, 67 L.Ed. 1103 [constitutional law]; Munn v. Illinois (1877) 94 U.S. 113, 24 L.Ed. 77 [same]; Hall, Concept of Public Business 94 (1940) [same].

12. See Burdick, The Origin of the Peculiar Duties of Public Service Companies, 11 Colum.L.Rev. (1911) 514, 616, 743; Lombard v. Louisiana, supra, fn. 10. There is a close historical relationship between the duty of common carriers, public warehousemen, innkeepers, etc. to give reasonable service to all persons who apply, and the refusal of courts to permit such businesses to obtain exemption from liability for negligence. See generally Arterburn, supra, fn. 10. This relationship has lead occasional courts and writers to assert that exculpatory contracts are invalid only if the seller has a duty of public service. 28 Brooklyn L.Rev. 357, 359 (1962); see Ciofalo v. Vic Tanney Gyms, Inc. (1961) 10 N.Y.2d 294, 220 N.Y.S.2d 962, 117 N.E.2d 925. A seller under a duty to serve is generally denied exemption from liability for negligence; (however, the converse is not necessarily true.) 44 Cal.L.Rev. 120 (1956); cf. Charles

of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services.[13] In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation,[14] and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence.[15] Finally, as a result of the transaction, the person or property of the purchaser is placed under the control of the seller,[16] subject to the risk of carelessness by the seller or his agents.

[2] While obviously no public policy opposes private, voluntary transactions in which one party, for a consideration, agrees to shoulder a risk which the law would otherwise have placed upon the other party, the above circumstances pose a different situation. In this situation the releasing party does not really acquiesce voluntarily in the contractual shifting of the risk, nor can we be reasonably certain that he receives an adequate consideration for the transfer. Since the service is one which each

Wolff Packing Co. v. Court of Industrial Relations (1923) 262 U.S. 522, 538, 43 S.Ct. 630, 67 L.Ed. 1103 [absence of duty to serve public does not necessarily exclude business from class of those constitutionally subject to state price regulation under test of Munn v. Illinois]; German Alliance Ins. Co. v. Kansas (1914) 233 U.S. 389, 407, 34 S.Ct. 612, 58 L.Ed. 1011 [same]. A number of cases have denied enforcement to exculpatory provisions although the seller had no duty to serve. See e. g., Bisso v. Inland Waterways Corp. (1955) 349 U.S. 85, 75 S.Ct. 629, 99 L.Ed. 911; Millers Mut. Fire Ins. Ass'n v. Parker (1951) 234 N.C. 20, 65 S.E.2d 341; cases on exculpatory provisions in employment contracts collected in 35 Am.Jur., Master & Servant, § 136.

13. Prosser, Torts (2d ed. 1955) 306: "The courts have refused to uphold such agreements * * * where one party is at such obvious disadvantage in bargaining power that the effect of the contract is to put him at the mercy of the other's negligence." Note 175 A.L.R. 8, 18 (1948): "Validity is almost universally denied to contracts exempting from liability for its negligence the party which occupies a superior bargaining position." Accord: Bisso v. Inland Waterways Corp. (1955) 349 U.S. 85, 91, 75 S.Ct. 629, 99 L.Ed. 911; Hiroshima v. Bank of Italy (1926) 78 Cal.App. 362, 377, 248 P. 947; Ciofalo v. Vic Tanney Gyms, Inc. (1961) 13 App.Div.2d 702, 214 N.Y.S.2d 99; (Kleinfeld, J. dissenting); 6 Williston, Contracts (Rev. ed. 1938) § 1751C; Note, The Significance of Comparative Bargaining Power in the Law of Exculpation (1937) 37 Colum. L.Rev. 248; 20 Corn.L.Q. 352 (1935); 3 U.Fla.L.Rev. 109, 120–121 (1955); 15 U.Pitt.L.Rev. 493 (1954); 19 So.Cal. L.Rev. 441 (1946); see New York Cent. Railroad Co. v. Lockwood (1873) 17 Wall. 357, 84 U.S. 357, 378–382, 21 L. Ed. 627; Fairfax Gas & Supply Co. v. Hadary (4th Cir. 1945) 151 F.2d 939; Northwestern Mutual Fire Ass'n v. Pacific Co. (1921) 187 Cal. 38, 43–44, 200 P. 934; Inglis v. Garland (1936) 19 Cal.App.2d Supp. 767, 773, 64 P.2d 501; Jackson v. First Nat. Bank of Lake Forest (1953) 415 Ill. 453, 462–463, 114 N.E.2d 721, 726; Simmons v. Columbus Venetian Stevens Buildings (1958) 20 Ill.App.2d 1, 26–32, 155 N.E.2d 372, 384–387; Hall v. Sinclair Refining Co. (1955) 242 N.C. 707, 89 S.E.2d 396; Millers Mut. Fire Ins. Ass'n v. Parker (1951) 234 N.C. 20, 65 S.E.2d 341; Irish & Swartz Stores v. First Nat. Bank of Eugene (1960) 220 Or. 362, 375, 349 P.2d 814, 821; 44 Cal.L.Rev. 120 (1956); 4 Mo.L.Rev. 55 (1939).

14. See Simmons v. Columbus Venetian Stevens Building (1958) 20 Ill.App.2d 1, 30–33, 155 N.E.2d 372, 386–387; Irish & Swartz Stores v. First Nat. Bank of Eugene (1960) 220 Or. 362, 376, 349 P.2d 814, 821; Note 175 A.L.R. 8, 15–16, 112 (1948).

15. See 6A Corbin, Contracts (1962) § 1472 at p. 595; Note 175 A.L.R. 8, 17–18 (1948).

16. See Franklin v. Southern Pacific Co. (1928) 203 Cal. 680, 689–690, 265 P. 936, 59 A.L.R. 118; Stephens v. Southern Pacific Co. (1895) 109 Cal. 86, 90–91, 41 P. 783, 29 L.R.A. 751; Irish & Swartz Stores v. First Nat. Bank of Eugene (1960) 220 Or. 362, 377, 349 P.2d 814, 822; 44 Cal.L.Rev. 120, 128 (1956); 20 Corn.L.Q. 352, 358 (1935).

member of the public, presently or potentially, may find essential to him, he faces, despite his economic inability to do so, the prospect of a compulsory assumption of the risk of another's negligence. The public policy of this state has been, in substance, to posit the risk of negligence upon the actor; in instances in which this policy has been abandoned, it has generally been to allow or require that the risk shift to another party better or equally able to bear it, not to shift the risk to the weak bargainer.

In the light of the decisions, we think that the hospital-patient contract clearly falls within the category of agreements affecting the public interest. To meet that test, the agreement need only fulfill some of the characteristics above outlined; here, the relationship fulfills all of them. Thus the contract of exculpation involves an institution suitable for, and a subject of, public regulation. (See Health & Saf.Code, §§ 1400–1421, 32000–32508.) [17] That the services of the hospital to those members of the public who are in special need of the particular skill of its staff and facilities constitute a practical and crucial necessity is hardly open to question.

[3] The hospital, likewise, holds itself out as willing to perform its services for those members of the public who qualify for its research and training facilities. While it is true that the hospital is selective as to the patients it will accept, such selectivity does not negate its public aspect or the public interest in it. The hospital is selective only in the sense that it accepts from the public at large certain types of cases which qualify for the research and training in which it specializes. But the hospital does hold itself out to the public as an institution which performs such services for those members of the public who can qualify for them.[18]

In insisting that the patient accept the provision of waiver in the contract, the hospital certainly exercises a decisive advantage in bargaining. The would-be patient is in no position to reject the proffered agreement, to bargain with the hospital, or in lieu of agreement to find another hospital. The admission room of a hospital contains no bargaining table where, as in a private business transaction, the parties can debate the terms of their contract. As a result, we cannot but conclude that the instant agreement manifested the characteristics of the so-called adhesion contract. Finally, when the patient signed the contract, he completely placed himself in the control of the hospital; he subjected himself to the risk of its carelessness.

In brief, the patient here sought the services which the hospital offered to a selective portion of the public; the patient, as the price of admission and as a result of his inferior bargaining position, accepted a clause in a contract of adhesion waiving the hospital's negligence; the patient thereby subjected himself to control of the hospital and the possible infliction of the negligence which he had thus been compelled to waive. The hospital, under such circumstances, occupied a status different than a mere private party; its contract with the patient affected the public interest. We see no cogent current reason for according to the patron of the inn a greater protection than the patient of the hospital; we cannot hold the innkeeper's performance affords a greater public service than that of the hospital.

17. "[P]roviding hospital facilities to those legally entitled thereto is a proper exercise of the police power of the county * * * as it tends to promote the public health and general welfare of the citizens of the county." (Goodall v. Brite (1936) 11 Cal.App.2d 540, 548, 54 P.2d 510, 514; see Jardine v. City of Pasadena (1926) 199 Cal. 64, 248 P. 225, 48 A.L.R. 509.)

18. See Wilmington General Hospital v. Manlove (Del.1961) 174 A.2d 135, holding that a private hospital which holds itself out as rendering emergency service cannot refuse to admit a patient in an emergency and comment on the above case in 14 Stan.L.Rev. 910 (1962).

[4, 5] We turn to a consideration of the two arguments urged by defendant to save the exemptive clause. Defendant first contends that while the public interest may possibly invalidate the exculpatory provision as to the paying patient, it certainly cannot do so as to the charitable one. Defendant secondly argues that even if the hospital cannot obtain exemption as to its "own" negligence it should be in a position to do so as to that of its employees. We have found neither proposition persuasive.

As to the first, we see no distinction in the hospital's duty of due care between the paying and nonpaying patient. (But see Rest., Contracts, § 575(1) (b).) The duty, emanating not merely from contract but also tort, imports no discrimination based upon economic status. (See Malloy v. Fong (1951) 37 Cal.2d 356, 366, 232 P.2d 241; Rest., Torts, §§ 323–324.) Rejecting a proposed differentiation between paying and nonpaying patients, we refused in Malloy to retain charitable immunity for charitable patients. Quoting Rutledge, J. in President & Directors of Georgetown College v. Hughes (1942) 76 U.S.App.D.C. 123, 130 F.2d 810, 827, we said: "Retention [of charitable immunity] for the nonpaying patient is the least defensible and most unfortunate of the distinction's refinements. He, least of all, is able to bear the burden. More than all others, he has no choice. * * He should be the first to have reparation, not last and least among those who receive it." (37 Cal.2d p. 365, 232 P.2d p. 246.) To immunize the hospital from negligence as to the charitable patient because he does not pay would be as abhorrent to medical ethics as it is to legal principle.

Defendant's second attempted distinction, the differentiation between its own and vicarious liability, strikes a similar discordant note. In form defendant is a corporation. In everything it does, including the selection of its employees, it necessarily acts through agents. A legion of decisions involving contracts between common carriers and their customers, public utilities and their customers, bailees and bailors, and the like, have drawn no distinction between the corporation's "own" liability and vicarious liability resulting from negligence of agents. We see no reason to initiate so far-reaching a distinction now. If, as defendant argues, a right of action against the negligent agent is in fact a sufficient remedy, then defendant by paying a judgment against it may be subrogated to the right of the patient against the negligent agent, and thus may exercise that remedy.

[6] In substance defendant here asks us to modify our decision in Malloy, which removed the charitable immunity; defendant urges that otherwise the funds of the research hospital may be deflected from the real objective of the extension of medical knowledge to the payment of claims for alleged negligence. Since a research hospital necessarily entails surgery and treatment in which fixed standards of care may not yet be evolved, defendant says the hospital should in this situation be excused from such care. But the answer lies in the fact that possible plaintiffs must *prove negligence*; the standards of care will themselves reflect the research nature of the treatment; the hospital will not become an insurer or guarantor of the patient's recovery. To exempt the hospital completely from any standard of due care is to grant it immunity by the side-door method of a contractual clause exacted of the patient. We cannot reconcile that technique with the teaching of Malloy.

We must note, finally, that the integrated and specialized society of today, structured upon mutual dependency, cannot rigidly narrow the concept of the public interest. From the observance of simple standards of due care in the driving of a car to the performance of the high standards of hospital practice, the individual citizen must be completely dependent upon the responsibility of others. The fabric of this pattern is so closely woven that the snarling of a single thread affects the whole. We cannot lightly accept a sought immunity from careless failure to provide the hospital service upon which many must depend. Even if the

hospital's doors are open only to those in a specialized category, the hospital cannot claim isolated immunity in the interdependent community of our time. It, too, is part of the social fabric, and prearranged exculpation from its negligence must partly rend the pattern and necessarily affect the public interest.

The judgment is reversed.

GIBSON, C. J., and TRAYNOR, SCHAUER, McCOMB, PETERS, and PEEK, JJ., concur.

32 Cal.Rptr. 41

The PEOPLE, Plaintiff and Respondent,

v.

Robert Eugene EDGAR, Defendant and Appellant.

Cr. 7359.

Supreme Court of California, In Bank.

July 9, 1963.

Convicted, in the Superior Court, Humboldt County, William G. Watson, Jr., J., of, inter alia, violating the Penal Code, § 288a, defendant appealed. The Supreme Court, Traynor, J., held that officers who, at most, had reasonable cause to believe that mother of defendant intended to withhold evidence in violation of misdemeanor provision pursuant to request of defendant that she hide certain pictures which were at their residence secured pictures by unlawful assertion of authority when they told her that if she did not deliver pictures she would be booked for withholding evidence, though she had merely asked to consult attorney, and the pictures were inadmissible in evidence against defendant.

Reversed.

McComb and Schauer, JJ., dissented.

Opinion, 28 Cal.Rptr. 139, vacated.

1. Criminal Law ⇐1169(1)

Where, although photograph did not show with certainty whether prosecution or defense version of what occurred in automobile was correct, jury could interpret its depiction as persuasive evidence in support of prosecution witness' testimony, error in receiving it in evidence where it had been illegally obtained by police was prejudicial, requiring reversal of conviction for violation of Penal Code, § 288a. West's Ann.Const. art. 6, § 4½; West's Ann.Pen.Code, § 288a.

2. Criminal Law ⇐671

Trial court properly heard evidence on admissibility of picture in prosecution for alleged violation of Penal Code, § 288a, outside of presence of jury, as admissibility presented question for court. West's Ann.Pen.Code, § 288a.

3. Criminal Law ⇐394.1(2)

Officers who, at most, had reasonable cause to believe that mother of defendant intended to withhold evidence in violation of misdemeanor provision pursuant to request of defendant that she hide certain pictures which were at their residence secured pictures by unlawful assertion of authority when they told her that if she did not deliver pictures, she would be booked for withholding evidence, though she had merely asked to consult attorney, and the pictures were inadmissible in evidence against defendant. West's Ann.Const. art. 6, § 4½; West's Ann.Pen.Code, § 288a.

4. Searches and Seizures ⇐7(10)

Necessity for officers to act without search warrant was irrelevant for both state and federal Constitutions make it emphatically clear that, important as efficient law enforcement may be, right of privacy guaranteed by those provisions be respected. West's Ann.Const. art. 6, § 4½.

Harold L. Hammond, Public Defender, James E. Marks, Deputy Public Defender, Hill & Dalton and Charles V. Moore, Eureka, for defendant and appellant.

Lipka v. DiLungo, 2000 WL 29535526 (Conn. Super. Ct.)

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.
Superior Court of Connecticut.
Alfred LIPKA et al.,
v.
Mark DiLUNGO.
No. 407399.
March 8, 2000.
Memorandum of Decision Re Motion to Strike (No. 101)

BLUE.

*1 On the day after the Declaration of Independence was signed, John Adams wrote to a friend that the event should be celebrated with "bonfires and illuminations, from one end of this continent to the other, from this time forward, for evermore." Following Adams' precept, generations of Americans have celebrated the Fourth of July with displays of fireworks. As is very well known, not all of these displays are legal. In Connecticut, such displays are illegal when not conducted pursuant to a permit. Conn.Gen.Stat. § 29-357. Unhappily, just as it is predictable that many fireworks displays will be conducted without a permit no matter what the authorities do, it is equally predictable that a few people will be injured, some very seriously, by the fireworks illegally discharged. This case involves an allegation of such an injury. The interesting question presented is whether an illegal fireworks display is an abnormally dangerous activity to which the principle of strict liability in tort ought to be applied. For the reasons that follow, the answer to this question is in the affirmative.

Because the question is presented in the context of a motion to strike, the facts asserted in the complaint must be taken as true. The plaintiff, Alfred Lipka, alleges that on July 4, 1997, the defendants, Mark and Marie DiLungo, hosted "an illegal fireworks show" on property that they owned. Lipka claims that he was struck in the forehead by one of the fireworks and suffered serious injuries. The complaint consists of four counts, but only one of those counts-the second-is in question here. Paragraph 5 of that count asserts that, "The defendants, Mark and Marie DiLungo, are strictly liable to the plaintiff, Alfred Lipka, for the plaintiff's injuries caused by the firework because the defendants engaged in an ultrahazardous activity of hosting and/or operating an illegal fireworks display, and this ultrahazardous activity caused the plaintiffs serious and painful loss."

Alfred Lipka and his wife, Cheryl Lipka (who claims loss of consortium in a count not now before the Court), commenced this action by service of process on December 9, 1997. On February 10, 1998, the defendants filed the motion to strike now before the Court. The motion is directed only at the second count of the complaint. It contends that, "A fireworks display is not an ultrahazardous activity so as to be subject to the doctrine of strict liability." The motion was heard on March 6, 2000.

The second count is based on the doctrine of strict liability imposed on persons who engage in what the FIRST RESTATEMENT refers to as "ultrahazardous activity," RESTATEMENT (FIRST) OF TORTS § 520 (1938), and the SECOND RESTATEMENT terms "abnormally dangerous activity," RESTATEMENT (SECOND) OF TORTS § 520 (1977). In Connecticut, "[t]he doctrine has traditionally been applied in cases involving blasting and explosives," Green v. Ensign Bickford Co., 25 Conn.App. 479, 482-83, 595 A.2d 1383, cert. denied, 220 Conn. 919, 597 A.2d 341 (1991), and has been extended only to pile driving; Caporale v. C.W. Blakeslee & Sons, Inc., 149 Conn. 79, 175 A.2d 61 (1961); and the storage of explosives; Green v. Ensign Bickford, supra. "The issue of whether an activity is abnormally dangerous ... is a question of law for a court to decide." Id. at 485.

*2 The question of whether a lawful fireworks display is an abnormally dangerous activity has divided the courts that have considered it. Compare Miller v. Westcor Limited Partnership, 831 P.2d 386 (Ariz.Ct.App.1992), and Klein v. Pyrodyne Corp., 810 P.2d 917 (Wash.1991) (imposing strict liability), with Litzman v. Humboldt County, 273 P.2d 82 (Cal.Dist.Ct.App.1954); Cadena v. Chicago Fireworks Manufacturing Co., 697 N.E.2d 802 (Ill.App.Ct.), cert. denied, 706 N.E.2d 495 (Ill.1998), and Haddon v. Lotito, 161 A.2d 160 (Pa.1960) (finding no

strict liability). In contrast, the question of whether an unlawful fireworks display is an activity of this description has received little modern judicial attention.

Haddon, while concluding that the doctrine of strict liability should not be applied to lawful fireworks displays, suggests that unlawful displays require a different analysis. “Where one discharges fireworks illegally or in such a manner as to amount to a nuisance and causes injury to another, some jurisdictions have held that liability follows without more.” 161 A.2d at 162.

Haddon does not elaborate on this analysis. It cites two cases for this proposition: Gerrard v. Porcheddu, 243 Ill.App. 562 (1927), and Doughty v. Atlantic City Business League, 80 A. 473 (N.J.1911). Neither Gerrard nor Doughty, however, involve displays that were illegal as such. Rather, each of these cases appear to involve legal fireworks that caused damage by falling on the property of another. Gerrard involved a firework shot by the defendant from his property that landed on the roof of the plaintiff's house and caused a fire that burned it down. The defendant claimed that his act was not an unlawful one, but the court found that the act of “[t]hrowing something over on to the land of another, which sets a fire or causes damage, is a trespass, and is unlawful.” 243 Ill.App. at 566. Similarly, Doughty involved a fireworks display on a vacant lot that set a fire on the plaintiff's property. This act was held to be a nuisance. 80 A. at 473.

Gerrard and Doughty follow closely in the path of the most famous case imposing strict liability, Rylands v. Fletcher, [1868] 3 L.R. 330 (H.L.1868). Rylands involved a newly excavated reservoir which burst downward as it was being filled for the first time and flooded a nearby coal mine. The law was memorably pronounced by Blackburn, J. in the Court of Exchequer Chamber and adopted by Cairns, L.C. in the House of Lords:

> We think that the true rule of law is, that the person who, for his own purposes, brings on his land and keeps there anything likely to do mischief if it escapes must keep it at his peril; and if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape ... The person whose grass or corn is eaten down by the escaping cattle of his neighbor, or whose mine is flooded by the water from his neighbor's reservoir, or whose cellar is invaded by the filth of his neighbor's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbour who has brought something on his own property (which was not naturally there), harmless to others so long as it is confined to his own property, but which he knows will be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there, so that no mischief may accrue, or answer for the natural and anticipated consequence. And upon authority this we think is established, whether the things so brought be beasts, or water, or filth, or stenches.

*3 Id. at 339-40.

The Rylands doctrine, thus stated, is notable for the wide variety of “things so brought” on land to which it purportedly applies. It has been limited in the land of its birth to cases in which there has been an “escape” from land under the control of the defendant; Read v. J. Lyons & Co., [1947] A.C. 156, 173 (H.L .1946); but, on this side of the Atlantic, the doctrine has been more generally applied to “abnormally dangerous activities.” RESTATEMENT (SECOND) OF TORTS, supra, § 520. See PROSSER AND KEETON ON THE LAW OF TORTS 551-55 (5th ed.1984). The appropriate judicial task in jurisdictions adopting this latter rule is to determine whether the activity before the court is an “abnormally dangerous” one.

The Appellate Court has determined that, in Connecticut, the analysis in question is to be made with reference to the six factors identified in § 520 of the SECOND RESTATEMENT. Green v. Ensign Bickford Co., supra, 25 Conn.App. at 486. Sec. 520 provides that:

In determining whether an activity is abnormally dangerous, the following factors are to be considered:

(a) existence of a high degree of risk of some harm to the person, land or chattels of others;

(b) likelihood that the harm that results from it will be great;

(c) inability to eliminate the risk by the exercise of reasonable care;

(d) extent to which the activity is not a matter of common usage;

(e) inappropriateness of the activity to the place where it is carried on; and

(f) extent to which its value to the community is outweighed by its dangerous attributes.

The characteristics of an illegal fireworks display must now be reviewed with these six factors in mind.

(a) Existence of a high degree of risk of some harm. Even jurists opposing the imposition of strict liability with respect to lawful fireworks displays have acknowledged that such displays satisfy this factor. See Cadena v. Chicago Fireworks Manufacturing Co., supra, 697 N.E.2d at 814; Klein v. Pyrodyne Corp., supra, 810 P.2d at 926(Dolliver, J., concurring). This concession may be unnecessary in the case of properly regulated lawful displays. Such displays are watched by millions of people with comparatively few injuries. With respect to unlawfuldisplays, however, the degree of risk will inevitably be increased. The restrictions placed on lawful fireworks displays; see, e.g., Conn. Agencies Regs. § 29-357-4a.1; are intended to reduce the degree of risk involved. The absence of such restrictions will necessarily increase the degree of risk. Unless the proper precautions are taken, injury might reasonably be expected to occur. See Burbee v. McFarland, 114 Conn. 56, 157 A.2d 647 (1931). Factor (a) is established here.

(b) Likelihood that the resulting harm will be great. Fireworks are capable of causing extremely serious injuries. If they cause harm, the harm is likely to be great. Factor (b) is easily established here.

*4 (c) Inability to eliminate the risk by the exercise of due care . Conn.Gen.Stat., § 29-357 is a legislative determination that the risk associated with fireworks displays will be reduced by the exercise of due care. That risk, however, will not be eliminated. Our Supreme Court opined long ago that, the use of "firecrackers and other squibs" is not ordinarily dangerous. Pope v. City of New Haven, 91 Conn. 79, 83, 99 A. 331 (1916). Modern fireworks, however, are considerably more powerful than the "firecrackers and other squibs" discharged in that bygone era. Fireworks are, by definition, explosive devices; Conn.Gen.Stat. § 29-356; and incidents of injuries to spectators of carefully conducted municipal displays will occasionally occur. Conn.Gen.Stat. § 29-359 recognizes this fact by requiring persons conducting lawful fireworks displays to "furnish proof of financial responsibility to satisfy claims for damages" resulting from such displays. The crucial factor is "the unavoidable risk remaining in the activity." RESTATEMENT (SECOND) OF TORTS, supra, § 520, cmt.h. These considerations support the conclusion that an unavoidable risk remains even in the case of a lawful fireworks display. The risk inevitably will be increased in the case of an unlawful display. Factor (c) is established here.

(d) Extent to which the activity is not a matter of common usage. Illegal fireworks displays are common on the Fourth of July. But this factor is not, in itself, sufficient to eliminate factor (d). Factor (d) is intended to eliminate common lawful activities, such as the operation of automobiles, from the ambit of strict liability. RESTATEMENT (SECOND) OF TORTS, supra, § 520, cmt.i. It would be anomalous for the law to condone common illegal activity simply because it is common. To take an unhappy modern example, the inherent dangers of controlled substances are not diminished by the fact that the use of such substances is common in some areas. As a matter of policy, the common usage of an illegal activity should not be considered in determining whether strict liability should apply.

(e) Inappropriateness of the activity to the place where it is carried on. The complaint in this case does not state facts sufficient to address this factor. Nor, because the issue arises on a motion to strike, can the Court address the defendants' factual contentions on this factor. Consequently, this factor will not be considered.

(f) Value to the community. Lawful fireworks displays have a value to the community that outweighs their dangerous attributes. Pope v. City of New Haven, supra, 91 Conn. at 81. By enacting Conn.Gen.Stat. § 29-357,

however, the legislature has made a determination that the value of unlawful displays is outweighed by their dangerousness. This legislative determination is eminently reasonable. Factor (f) is satisfied in this case.

This analysis establishes that each of the four factors-(a), (b), (c), and (f)-that properly may be considered in the context of this case is satisfied with respect to unlawful fireworks displays. It is not necessary that each of the six § 520 factors be present, "especially if others weigh heavily." RESTATEMENT (SECOND) OF TORTS, supra, § 520, cmt.f. The plaintiff has appropriately stated a case of strict liability in tort under the RESTATEMENT.

*5 Judicial decisions in tort law should not be strictly mechanical affairs, made by toting up the factors. Modern tort law has a moral basis, and this is why fault has become "the dominant principle of liability." 3 FOWLER V. HARPER, FLEMING JAMES, JR. & OSCAR S. GRAY, THE LAW OF TORTS § 14.3 at 195 (2d ed.1986). This trend explains why the principle of strict liability in tort has been limited in its application. It also explains the case law declining to extend this principle to lawful fireworks displays, since such displays are legitimized and often promoted by governmental entities. But the policy analysis applicable to unlawful displays is quite different. The fact that unsanctioned fireworks displays are illegal is extremely well known. It is equally well known that the precise reason for the illegality of such displays is their dangerousness. Strict liability under these circumstances can hardly be said to be a trap for the unwary. If a person deliberately and consciously engages in a highly dangerous activity involving explosive devices, knowing that activity to be illegal, the intentional illegality itself provides a sufficient policy basis on which to allocate the risk of loss to the person engaging in such highly dangerous behavior. Such a rule has the virtue of shifting the risk of loss on the basis of culpability and upholding the rule of law.

The motion to strike is denied.

in McKee v. Club-View Heights, supra, the subject matter, the nature of the act to be performed, and the situation of the parties must be considered in determining whether time and circumstances have worked a termination.

[4] Nevertheless, we are of the opinion that the expiration of more than 45 years after the date of the grant and more than 25 years after the erection of a state capitol on the grounds near by, plus the acceptance by the legislature of the Jennie J. Kearns grant of land and residence for use as a governor's residence, and the use and maintenance thereof for that purpose for several years, adequately support the court's conclusion that the estate granted had terminated.

The judgment is consequently affirmed. Costs to respondent.

MOFFAT, C. J., and LARSON and PRATT, JJ., concur.

WOLFE, J., not participating.

MADSEN v. EAST JORDAN IRR. CO.

No. 6457.

Supreme Court of Utah.

May 15, 1942.

1. Explosives ⇐12

A rule of absolute liability prevails when one uses explosives and the blasting of the explosives results in hurling rock, earth, or debris causing injury to another.

2. Explosives ⇐12

In action for damage resulting from the use of explosives, there is no distinction in liability in nonconcussion and concussion cases.

3. Explosives ⇐12

He who fires explosives is not liable for every occurrence following the explosion, which has a semblance of connection to the explosion.

4. Explosives ⇐12

The results chargeable to the nonnegligent user of explosives are those things ordinarily resulting from an explosion.

5. Explosives ⇐12

Irrigation company, which blasted with explosives in repairing its canal, was not liable to owner of mink farm for loss of minks' offspring which were killed by their mothers when the mothers became frightened by vibrations and noises caused by the blasting.

Appeal from District Court, Third District, Salt Lake County; Bryan P. Leverich, Judge.

Action by Edgar R. Madsen against the East Jordan Irrigation Company to recover for the death of minks being raised on plaintiff's mink farm, allegedly as result of blasting operations of defendant. From a judgment sustaining a general demurrer to plaintiff's amended complaint, and entering judgment for defendant, the plaintiff appeals.

Judgment affirmed.

Thomas & Thomas, of Salt Lake City, for appellant.

M. E. Wilson and Robert C. Wilson, both of Salt Lake City, for respondent.

PRATT, Justice.

This is an appeal from a decree of the lower court sustaining a general demurrer to appellant's amended complaint and entering judgment for the respondent.

The facts, as alleged in the amended complaint, are as follows: Appellant owns the Madsen Mink Farm in Sandy, Utah, using said farm to breed and raise mink for sale. The farm is located 100 yards north of respondent's irrigation canal and, on May 5, 1941, respondent, in repairing its canal, blasted with explosives, causing vibrations and noises which frightened the mother mink and caused 108 of them to kill 230 of their "kittens" (offspring). The appellant further alleges that, by nature, habit and disposition all mink, when with and attending their young, are highly excitable and, when disturbed, will become terrified and kill their young. Appellant places a value of $25 each on said "kittens" and seeks to recover $5,750 as damages.

Respondent filed a general demurrer to the amended complaint, which demurrer was sustained and appellant given five days in which to amend.

Appellant failed to amend and judgment was entered for the respondent. It is from such judgment that this appeal is taken.

Respondent, in his brief, contends that, because the injury in the present case was consequential rather than immediate, the amended complaint does not state facts sufficient to constitute a cause of action in trespass. He further contends that the amended complaint did not state facts sufficient to constitute a cause of action in case.

[1, 2] It is conceded that the rule of absolute liability prevails when one uses explosives and the blasting of said explosives results in hurling of rock, earth or debris which causes injury to another. 22 Am. Jur., Explosions, Page 179, Paragraph 53; 25 C.J. 192. The weight of authority sustains the position that there is no distinction in liability for damage in nonconcussion and concussion cases. This majority rule, led by California, prevails in 14 jurisdictions.

The minority rule, led by New York, holds that negligence must be alleged in concussion cases. These jurisdictions do not concede liability in blasting cases where damage is caused by shock or air vibrations rather than the hurling of rock, earth or debris. This distinction is based upon the historical differences between the common-law actions of trespass and case. There is no practical difference between liability occasioned by blasting which projects rocks on another's property or by creating a sudden vacuum and resultant concussion. 92 A.L.R. 742. Had the concussion in the instant case killed the kittens directly, without the intervention of the mother minks, the majority rule of liability in concussion cases would have been applicable, but the case at bar presents the additional element of the mother minks' independent acts, thereby raising a question of proximate causation. Query: Did the mother minks' intervention break the chain of causation and therefore require an allegation of negligence?

Many years ago (1896) a Maine court held that the intervening act of an animal broke the chain of causation to such extent that blasting could not be considered the proximate cause of injury and negligence on the part of the blaster had to be proved. Wadsworth v. Marshall, 88 Me. 263, 34 A. 30, 32 L.R.A. 588. In the Wadsworth case, the plaintiff was riding along a public highway near which defendant was operating a quarry. He exploded a blast which frightened plaintiff's horse and she (plaintiff) was injured. There was a Maine statute requiring persons engaged in blasting to give reasonable notice of their intention to blast to all persons in the vicinity of the blast. The trial court excluded testimony as to the viciousness and nervousness of plaintiff's horse, proceeding upon the ground that defendant violated the statute by failing to give the required notice and therefore he was liable regardless of the character of the horse or any negligence of the plaintiff. The appellate court reversed the lower court's decision, holding that it would be a harsh construction of the statute to hold that the negligence of the quarryman in not giving notice subjected him to liability for damages largely, if not wholly, resulting from the negligence of the traveler in riding an unsuitable horse. The court ruled that "the established doctrine of contributory negligence, as a defense, applies to this class of actions."

[3-5] While the above ruling interjects an element—contributory negligence—which is absent in the present case, it impresses one with the thought that he who fires explosives is not liable for every occurrence following the explosion which has a semblance of connection to it. Jake's horse might become so excited that he would run next door and kick a few ribs out of Cy's jersey cow, but is such a thing to be anticipated from an explosion? Whether the cases are concussion or nonconcussion, the results chargeable to the nonnegligent user of explosives are those things ordinarily resulting from an explosion. Shock, air vibrations, thrown missiles are all illustrative of the anticipated results of explosives; they are physical as distinguished from mental in character. The famous Squib case does not mitigate what has been said in the preceding lines. That was a case where the mental reaction was to be anticipated as an instinctive matter of self-preservation. In the instant case, the killing of their kittens was not an act of self-preservation on the part of the mother mink but a peculiarity of disposition which was not within the realm of matters to be anticipated. Had a squib been thrown and suddenly picked up by a dog, in fun, and carried near another, it is ventured that we would not have had a famous Squib case, as such a result would not have been within the realm of anticipation.

We are of the opinion that the lower court properly sustained the demurrer.

Judgment affirmed. Costs to respondent.

MOFFAT, C. J., and LARSON and McDONOUGH, JJ., concur.

WOLFE, Justice (concurring).

I concur. If actual tangible matter is projected by the blast on the property of another, it is held to be a trespass. One can sympathize with the view that if property is immediately injured by a force caused by a blast transmitted by concussion of air it is still a trespass. As stated in the opinion, there is a division of authority on that matter.

In the case of O'Neill v. San Pedro, Los Angeles & Salt Lake Railroad Company, 38 Utah 475, 114 P. 127, it was held that damage due to repeated vibrations over a long period of time must be chargeable in case, and negligence proved. Unless distinction can be made between a result caused by a series of recurring similar events and a result caused by one event, it would seem that the O'Neill case has committed this court to the view that a vibration transmitted through a solid medium acting on a building is not a trespass but calls for an action of trespass on the case. It would follow, therefore, that a force transmitted by a rarer medium would also call for action of trespass on the case. Realistically, there is a difference between a damage caused by continued vibrations of trains which are performing a necessary public service, and a damage caused by a single blast set off on the private property of another. It is such differences which make law not mainly the product of logic, but of experience, social necessity and distribution of the cost of consequences. Our common existence may require the law to hold that damage to property caused by unavoidable vibrations of passing trains is damnum absque injuria whilst to permit one owner, by a blast on his own property to shake down the house of another, requires a rule which recognizes that however free from negligence the first may be the second innocent person should not suffer. The very essence of fairness seems to suggest that if one, in order to obtain a certain type of use or enjoyment of his own property, is compelled to blast, he must, as part of the cost of such use or enjoyment, pay the damages he causes to his innocent neighbor. Logically a series of imperceptible injuries to a dwelling due to the periodic vibration of trains over a long period of time is but the accumulated injuries inflicted by each of a series of trespasses. Law not following logic may say: "The vibration of a train in itself is not dangerous like a blast from an explosion. Its single influence is imperceptible but the accumulated results may be injurious, but only if it can be shown that the accumulated results were the result of negligent construction or operation can we give damages. Otherwise, the property owner must submit to the greater needs of society."

Be that as it may, jurisdictions which hold that trespass lies where damage is directly and immediately caused by concussion arising from a blast on neighboring property cannot be said to hold that trespass lies for ultimate damage caused by an animal or a human who is affected by the concussions.

Scott v. Shepherd, 1 Smith Leading Cases 337, 2 W.Bl. 892, 3 Wils. 403 (Squib Case), is not to the contrary. That was treated as a ricochetting Squib, the transfer by human hands being automatic. Distinctions based on the nature of the mental reaction may, in some cases, be too refined to be of practical use. We may say at least that where the reaction is purely reflex and automatic according to the Squib case the person so acting is as if an inanimate link in the chain of causation and the action lies in trespass. Where the animal or person commits an injury concededly acting in response to certain stimuli, but not purely automatically, which were the result of forces set in motion by the defendant, the action, if any, lies in case.

Being an action in case, negligence must be alleged and proved. We do not need to determine whether if negligence had been alleged a cause of action would have been stated under the circumstances of this case. A discussion of the "range of apprehension" as expressed in Palsgraf v. Long Island R. Co., 248 N.Y. 339, 162 N.E. 99, 100, 59 A.L.R. 1253, is contained in Barrus v. Western Union Telegraph Co., 90 Utah 391, 62 P.2d 113. I conceive of the intermediation of the reflexes of the mother mink as serving in legal concept a dual purpose. Even where it is held that injury due to concussion transmitted by air is a trespass where the injury is direct or immediate, a result arrived at through the concussion action on the mind of the mother mink would not be trespass; hence, negligence would have to be alleged. If alleged it would then be time to determine whether it was within the range of apprehensibility.

Richard WELGE, Plaintiff-Appellant,

v.

PLANTERS LIFESAVERS COMPANY, et al., Defendants-Appellees.

No. 93-2080.

United States Court of Appeals, Seventh Circuit.

Argued Jan. 3, 1994.

Decided Feb. 22, 1994.

Peanut consumer, who was injured when a glass jar of peanuts shattered, brought products liability action against seller and manufacturers of peanuts and jar. The United States District Court for the Northern District of Illinois, Anne Claire Williams, J., granted summary judgment in favor of defendants. Consumer appealed. The Court of Appeals, Posner, Chief Judge, held that fact questions as to what caused defect in jar precluded summary judgment.

Reversed and remanded.

1. Federal Civil Procedure ⇐2515

In products liability action arising out of injuries sustained by consumer when peanut jar shattered, fact questions as to when defect was introduced and as to whether use of knife to remove label from jar was misuse precluded summary judgment.

2. Products Liability ⇐27

Under Illinois law, even though mishandling or misuse, by consumer or by anyone else (other than defendant itself), is defense, though limited and partial defense, to products liability suit, defendant cannot defend against products liability suit on basis of misuse that he invited; invited misuse is no defense to products liability claim.

3. Products Liability ⇐27

Under Illinois law, for purposes of products liability, "invited misuse" is not misuse.

See publication Words and Phrases for other judicial constructions and definitions.

4. Negligence ⇐97

Products Liability ⇐27

In regime of comparative negligence, misuse of product is not defense to liability but merely reduces plaintiff's damages, unless misuse is sole cause of accident.

5. Products Liability ⇐82.1

Under Illinois law, plaintiff in products liability suit is not required to exclude every possibility, however fantastic or remote, that defect which led to accident was caused by someone other than one of defendants.

6. Products Liability ⇐76

Under Illinois law, doctrine of res ipsa loquitur is not strictly applicable to products liability case because, unlike ordinary accident case, defendant in products case has parted with possession and control of harmful object before accident occurs.

7. Products Liability ⇐82.1

Under Illinois law, in products liability case, as in any other tort case, accident can itself be evidence of liability; if it is kind of accident that would not have occurred but for defect in product, and if it is reasonably plain that defect was not introduced after product was sold, accident is evidence that product was defective when sold.

8. Products Liability ⇐16

Under Illinois law, seller subject to strict-liability law in products liability action is liable for defects in product even if those defects were introduced, without slightest fault of his own for failing to discover them, at some anterior stage of production.

9. Federal Courts ⇐384

When state courts of same level reach opposite conclusions, federal court in diversity case is not bound to follow either.

Philip J. Schmidt, Chicago, IL (argued), Justin J. Tedrowe, Woodridge, IL, for plaintiff-appellant.

John C. Kiely, Dennis M. Glynn, John J. Zachara, Robert H. Riley, Thomas P. Heneghan (argued), Schiff, Hardin & Waite, Chicago, IL, for defendants-appellees.

Before POSNER, Chief Judge, ROVNER, Circuit Judge, and MIHM, District Judge.*

POSNER, Chief Judge.

[1] Richard Welge, forty-something but young in spirit, loves to sprinkle peanuts on his ice cream sundaes. On January 18, 1991, Karen Godfrey, with whom Welge boards, bought a 24-ounce vacuum-sealed plastic-capped jar of Planters peanuts for him at a K-Mart store in Chicago. To obtain a $2 rebate that the maker of Alka-Seltzer was offering to anyone who bought a "party" item, such as peanuts, Godfrey needed proof of her purchase of the jar of peanuts; so, using an Exacto knife (basically a razor blade with a handle), she removed the part of the label that contained the bar code. She then placed the jar on top of the refrigerator, where Welge could get at it without rooting about in her cupboards. About a week later, Welge removed the plastic seal from the jar, uncapped it, took some peanuts, replaced the cap, and returned the jar to the top of the refrigerator, all without incident. A week after that, on February 3, the accident occurred. Welge took down the jar, removed the plastic cap, spilled some peanuts into his left hand to put on his sundae, and replaced the cap with his right hand—but as he pushed the cap down on the open jar the jar shattered. His hand, continuing in its downward motion, was severely cut, and is now, he claims, permanently impaired.

Welge brought this products liability suit in federal district court under the diversity jurisdiction; Illinois law governs the substantive issues. Welge named three defendants (plus the corporate parent of one—why we don't know). They are K-Mart, which sold the jar of peanuts to Karen Godfrey; Planters, which manufactured the product—that is to say, filled the glass jar with peanuts and sealed and capped it; and Brockway, which manufactured the glass jar itself and sold it to Planters. After pretrial discovery was complete the defendants moved for summary judgment. The district judge granted the motion on the ground that the plaintiff had failed to exclude possible causes of the accident other than a defect introduced during the manufacturing process.

No doubt there are men strong enough to shatter a thick glass jar with one blow. But Welge's testimony stands uncontradicted that he used no more than the normal force that one exerts in snapping a plastic lid onto a jar. So the jar must have been defective. No expert testimony and no fancy doctrine are required for such a conclusion. A nondefective jar does not shatter when normal force is used to clamp its plastic lid on. The question is when the defect was introduced. It could have been at any time from the manufacture of the glass jar by Brockway (for no one suggests that the defect might have been caused by something in the raw materials out of which the jar was made) to moments before the accident. But testimony by Welge and Karen Godfrey, if believed—and at this stage in the proceedings we are required to believe it—excludes all reasonable possibility that the defect was introduced into the jar after Godfrey plucked it from a shelf in the K-Mart store. From the shelf she put it in her shopping cart. The checker at the check-out counter scanned the bar code without banging the jar. She then placed the jar in a plastic bag. Godfrey carried the bag to her car and put it on the floor. She drove directly home, without incident. After the bar-code portion of the label was removed, the jar sat on top of the refrigerator except for the two times Welge removed it to take peanuts out of it. Throughout this process it was not, so far as anyone knows, jostled, dropped, bumped, or otherwise subjected to stress beyond what is to be expected in the ordinary use of the product. Chicago is not Los Angeles; there were no earthquakes. Chicago is not Amityville either; no supernatural interventions are alleged. So the defect must have been introduced earlier, when the jar was in the hands of the defendants.

[2, 3] But, they argue, this overlooks two things. One is that Karen Godfrey took a knife to the jar. And no doubt one can weaken a glass jar with a knife. But nothing is more common or, we should have thought, more harmless than to use a knife or a razor

* Hon. Michael M. Mihm of the Central District of Illinois.

blade to remove a label from a jar or bottle. People do this all the time with the price labels on bottles of wine. Even though mishandling or misuse, by the consumer or by anyone else (other than the defendant itself), is a defense, though a limited and (subject to a qualification noted later) partial defense, to a products liability suit in Illinois as elsewhere, e.g., *J.I. Case Co. v. McCartin-McAuliffe Plumbing & Heating, Inc.*, 118 Ill.2d 447, 114 Ill.Dec. 105, 111, 516 N.E.2d 260, 266 (1987); *King v. American Food Equipment Co.*, 160 Ill.App.3d 898, 112 Ill. Dec. 349, 356, 513 N.E.2d 958, 965 (1987); *Early-Gary, Inc. v. Walters*, 294 So.2d 181, 186–87 (Miss.1974); Annot., "Products Liability: Sufficiency of Evidence to Support Product Misuse Defense in Actions Concerning Bottles, Cans, Storage Tanks, or Other Containers," 58 A.L.R.4th 160 (1987), and even if, as we greatly doubt, such normal mutilation as occurred in this case could be thought a species of mishandling or misuse, a defendant cannot defend against a products liability suit on the basis of a misuse that he *invited*. The Alka-Seltzer promotion to which Karen Godfrey was responding when she removed a portion of the label of the jar of Planters peanuts was in the K-Mart store. It was there, obviously, with K-Mart's permission. By the promotion K-Mart invited its peanut customers to remove a part of the label on each peanut jar bought, in order to be able to furnish the maker of Alka-Seltzer with proof of purchase. If one just wants to efface a label one can usually do that by scraping it off with a fingernail, but to remove the label intact requires the use of a knife or a razor blade. Invited misuse is no defense to a products liability claim. Invited misuse is not misuse.

[4] The invitation, it is true, was issued by K-Mart, not by the other defendants; and we do not know their involvement, if any, in the promotion. As to them, the defense of misuse must fail, at this stage of the proceedings, for two other reasons. The evidence does not establish with the certitude required for summary judgment that the use of an Exacto knife to remove a label from a jar is a misuse of the jar. And in a regime of comparative negligence misuse is not a defense to liability but merely reduces the plaintiff's damages, unless the misuse is the sole cause of the accident.

[5–7] Even so, the defendants point out, it is always *possible* that the jar was damaged while it was sitting unattended on the top of the refrigerator, in which event they are not responsible. Only if it had been securely under lock and key when not being used could the plaintiff and Karen Godfrey be *certain* that nothing happened to damage it after she brought it home. That is true—there are no metaphysical certainties—but it leads nowhere. Elves may have played ninepins with the jar of peanuts while Welge and Godfrey were sleeping; but elves could remove a jar of peanuts from a locked cupboard. The plaintiff in a products liability suit is not required to exclude every possibility, however fantastic or remote, that the defect which led to the accident was caused by someone other than one of the defendants. The doctrine of res ipsa loquitur teaches that an accident that is unlikely to occur unless the defendant was negligent is itself circumstantial evidence that the defendant *was* negligent. The doctrine is not strictly applicable to a products liability case because unlike an ordinary accident case the defendant in a products case has parted with possession and control of the harmful object before the accident occurs. *St. Paul Fire & Marine Ins. Co. v. Michelin Tire Corp.*, 12 Ill.App.3d 165, 298 N.E.2d 289, 297–98 (1973). But the doctrine merely instantiates the broader principle, which is as applicable to a products case as to any other tort case, that an accident can itself be evidence of liability. *Id.*, 298 N.E.2d at 298; *Doyle v. White Metal Rolling & Stamping Corp.*, 249 Ill.App.3d 370, 188 Ill. Dec. 339, 346 and n. 3, 618 N.E.2d 909, 916 and n. 3 (1993). If it is the kind of accident that would not have occurred but for a defect in the product, and if it is reasonably plain that the defect was not introduced after the product was sold, the accident is evidence that the product was defective when sold. The second condition (as well as the first) has been established here, at least to a probability sufficient to defeat a motion for summary judgment. Normal people do not lock up their jars and cans lest something happen to damage these containers while no one is

looking. The probability of such damage is too remote. It is not only too remote to make a rational person take measures to prevent it; it is too remote to defeat a products liability suit should a container prove dangerously defective.

Of course, unlikely as it may seem that the defect was introduced into the jar after Karen Godfrey bought it if the plaintiffs' testimony is believed, other evidence might make their testimony unworthy of belief—might even show, contrary to all the probabilities, that the knife or some mysterious night visitor caused the defect after all. The fragments of glass into which the jar shattered were preserved and were examined by experts for both sides. The experts agreed that the jar must have contained a defect but they could not find the fracture that had precipitated the shattering of the jar and they could not figure out when the defect that caused the fracture that caused the collapse of the jar had come into being. The defendants' experts could neither rule out, nor rule in, the possibility that the defect had been introduced at some stage of the manufacturing process. The plaintiff's expert noticed what he thought was a preexisting crack in one of the fragments, and he speculated that a similar crack might have caused the fracture that shattered the jar. This, the district judge ruled, was not enough.

But if the probability that the defect which caused the accident arose after Karen Godfrey bought the jar of Planters peanuts is very small—and on the present state of the record we are required to assume that it is—then the probability that the defect was introduced *by one of the defendants* is very high. In principle there is a third possibility—mishandling by a carrier hired to transport the jar from Brockway to Planters or Planters to K-Mart—but we do not even know whether a carrier was used for any of these shipments, rather than the shipper's own trucks. Apart from that possibility, which has not been mentioned in the litigation so far and which in any event, as we are about to see, would not affect K-Mart's liability, the jar was in the control of one of the defendants at all times until Karen Godfrey bought it.

[8] Which one? It does not matter. The strict-liability element in modern products liability law comes precisely from the fact that a seller subject to that law is liable for defects in his product even if those defects were introduced, without the slightest fault of his own for failing to discover them, at some anterior stage of production. *Crowe v. Public Building Comm'n*, 74 Ill.2d 10, 23 Ill.Dec. 80, 81, 383 N.E.2d 951, 952 (1978); *Thomas v. Kaiser Agricultural Chemicals*, 81 Ill.2d 206, 40 Ill.Dec. 801, 805, 407 N.E.2d 32, 36 (1980); *Flaminio v. Honda Motor Co.*, 733 F.2d 463, 467 (7th Cir.1984). So the fact that K-Mart sold a defective jar of peanuts to Karen Godfrey would be conclusive of K-Mart's liability, and since it is a large and solvent firm there would be no need for the plaintiff to look further for a tortfeasor. This point seems to have been more or less conceded by the defendants in the district court—the thrust of their defense was that the plaintiff had failed to show that the defect had been caused by *any* of them—though this leaves us mystified as to why the plaintiff bothered to name additional defendants.

And even if, as we doubt, the plaintiff took on the unnecessary burden of proving that it is more likely than not that a given defendant introduced the defect into the jar, he might be able to avail himself of the rule of *Ybarra v. Spangard*, 25 Cal.2d 486, 154 P.2d 687 (1944), and force each defendant to produce some exculpatory evidence. *Hessel v. O'Hearn*, 977 F.2d 299, 305 (7th Cir.1992). In fact K-Mart put in some evidence on the precautions it takes to protect containers of food from being damaged by jarring or bumping. A jury convinced by such evidence, impressed by the sturdiness of jars of peanuts (familiar to every consumer), and perhaps perplexed at how the process of filling a jar with peanuts and vacuum-sealing it could render a normal jar vulnerable to collapsing at a touch, might decide that the probability that the defect had been introduced by either K-Mart or Planters was remote. So what? Evidence of K-Mart's care in handling peanut jars would be relevant only to whether the defect was introduced after sale; if it was introduced at any

time before sale—if the jar was defective when K–Mart sold it—the source of the defect would be irrelevant to K–Mart's liability. In exactly the same way, Planters' liability would be unaffected by the fact, if it is a fact, that the defect was due to Brockway rather than to itself. To repeat an earlier and fundamental point, a seller who is subject to strict products liability is responsible for the consequences of selling a defective product even if the defect was introduced without any fault on his part by his supplier or by his supplier's supplier.

In reaching the result she did the district judge relied heavily on *Erzrumly v. Dominick's Finer Foods, Inc.*, 50 Ill.App.3d 359, 8 Ill.Dec. 446, 365 N.E.2d 684 (1977). A six-year-old was injured by a Coke bottle that she was carrying up a flight of stairs to her family's apartment shortly after its purchase. The court held that the plaintiff had failed to eliminate the possibility that the Coke bottle had failed because of something that had happened after it left the store. If, as the defendants in our case represent, the bottle in *Erzrumly* "exploded," that case would be very close to this one. A nondefective Coke bottle is unlikely to explode without very rough handling. The contents are under pressure, it is true, but the glass is strengthened accordingly. But it was unclear in *Erzrumly* what had happened to the bottle. There was testimony that the accident had been preceded by the sound of a bottle exploding but there was other evidence that the bottle may simply have been dropped and have broken—the latter being the sort of accident that happens commonly after purchase. Although the opinion contains some broad language helpful to the defendants in the present case, the holding was simply that murky facts required the plaintiff to make a greater effort to determine whether the product was defective when it left the store. Here we know to a virtual certainty (always assuming that the plaintiff's evidence is believed, which is a matter for the jury) that the accident was not due to mishandling after purchase but to a defect that had been introduced earlier.

[9] Even the narrow holding of *Erzrumly* is probably wrong, in light of bottle and other container cases decided by Illinois courts both before and after, *Tweedy v. Wright Ford Sales, Inc.*, 64 Ill.2d 570, 2 Ill.Dec. 282, 357 N.E.2d 449 (1976); *Mabee v. Sutliff & Case Co.*, 404 Ill. 27, 88 N.E.2d 12 (Ill.1949); *Fullreide v. Midstates Beverage Co.*, 70 Ill.App.3d 758, 27 Ill.Dec. 107, 388 N.E.2d 1070 (1979); *Roper v. Dad's Root Beer Co.*, 336 Ill.App. 91, 82 N.E.2d 815 (1948), as well as by courts of other states. E.g., *Van Duzer v. Shoshone Coca Cola Bottling Co.*, 103 Nev. 383, 741 P.2d 811 (1987) (per curiam); *Virgil v. "Kash N' Karry" Service Corp.*, 61 Md.App. 23, 484 A.2d 652, 657 (Md.App.1984); *Renninger v. Foremost Dairies, Inc.*, 171 So.2d 602, 604 (Fla.App. 1965). Right or wrong, *Erzrumly* is plainly contrary to *Fullreide;* and obviously when state courts of the same level reach opposite conclusions, a federal court in a diversity case is not bound to follow either.

REVERSED AND REMANDED.

James W. RICHARDSON,
Plaintiff–Appellant,

v.

CONSOLIDATED RAIL CORPORATION,
Defendant–Appellee.

No. 93–2424.

United States Court of Appeals,
Seventh Circuit.

Argued Jan. 5, 1994.

Decided Feb. 22, 1994.

Injured railroad engineer brought action against railroad under Federal Boiler Inspection Act (BIA) and Federal Safety Appliance Act (SAA). The United States District Court for the Southern District of Indiana, S. Hugh Dillin, J., entered judgment for railroad. Engineer appealed. The Court of Appeals, Fairchild, Circuit Judge, held that: (1)

Cotter v. McDonald's Restaurant of Mass., Inc., 2006 WL 2382735 (Mass. App.)

2006 Mass.App.Div. 132
Massachusetts Appellate Division, District Court Department, Northern District.
Paul E. COTTER
v.
McDONALD'S RESTAURANT OF MASS., INC.
No. 06–WAD–03.
Heard May 12, 2006. Opinion Certified Aug. 16, 2006.

GARDNER, J.

*1 This is a Dist./Mun. Cts. R.A.D.A. 8C appeal by the plaintiff of the allowance of the defendant's motion for summary judgment.

Plaintiff Paul E. Cotter ("Cotter") brought this suit against McDonald's Restaurant of Massachusetts, Inc. ("McDonald's") alleging that on April 3, 2002, he sustained an injury to his tooth as the result of biting into a "foreign object" in a "Quarter Pounder" hamburger that was prepared and sold to him by McDonald's. In his one count complaint, Cotter asserted that McDonald's was negligent and breached express and implied warranties in selling him defective, dangerous and unsafe food. The action was commenced on August 29, 2003. On February 2, 2005, after the parties completed discovery, McDonald's filed motions, inter alia, for summary judgment. The summary judgment motion was allowed after hearing, and Cotter filed this appeal.

On April 3, 2002, Cotter purchased an "Extra Value Meal" at the drive-thru window of the McDonald's restaurant on Main Street in Worcester. Cotter claims that he began eating the "Quarter Pounder" hamburger as he was driving his car, bit into an object about the size of a "BB" and felt a sharp pain in his tooth. He spit the food and the "BB sized" object out the car window. There was no blood present. Cotter continued home, where he had previously arranged to meet his boss and go fishing. He visited his dentist the next day and was informed that he had fractured one of his wisdom teeth. He underwent subsequent oral surgery to remove the tooth. Cotter now claims that as a result of the defendant's negligence and breach of warranties, he incurred medical expenses and endured pain and suffering.

"The standard of review of a grant of summary judgment is whether, viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to a judgment as a matter of law." Audette v. Commonwealth, 63 Mass.App.Ct. 727, 728, 829 N.E.2d 248 (2005). While the reviewing court utilizes the same Mass. R. Civ. P. 56 standard applied by the trial court, it may adopt different reasoning and is free to consider any grounds in the record that support the trial court's ruling. Beal v. Board of Selectmen of Hingham, 419 Mass. 535, 539, 646 N.E.2d 131 (1995).

*2 Pursuant to Rule 56(c), the evidence to be reviewed by the motion judge includes the "pleadings, depositions, answers to interrogatories, and responses to requests for admissions under Rule 36, together with the affidavits, if any...." "Facts, which as a matter of practicality are not subject to direct proof, may be proved through inference." Rolanti v. Boston Edison Corp., 33 Mass.App.Ct. 516, 522, 603 N.E.2d 211 (1992). The moving party has the burden of affirmatively demonstrating that the pleadings present no genuine question of fact on any material issue. Attorney General v. Bailey, 386 Mass. 367, 371, 436 N.E.2d 139 (1982). Where, as in the instant case, the movant would not have the burden of proof at trial, the movant may satisfy his summary judgment burden by demonstrating that proof of an essential element of the other party's claim is unlikely to be advanced at trial. Kourouvacilis v. General Motors Corp., 410 Mass. 706, 714, 575 N.E.2d 734 (1991).

In defective foods cases, Massachusetts courts follow the "reasonable expectations" test, which "has been generally recognized as preferable to the foreign substance-natural substance test." Phillips v. Town of West Springfield, 405 Mass. 411, 412, 540 N.E.2d 1331 (1989). "The reasonable expectations test ... considers whether the consumer reasonably should have expected to find the injury-causing substance in the food." Id., citing 3 A.M. Squillante & J.R. Fonseca, S. Williston on Sales § 18–10 at 103 (4th ed.1974). In the case at bar, the plaintiff is unable to identify

the composition of the "injury-causing substance." He cannot state, much less prove, that the "bb sized" object was foreign to the food, or was a piece of bone or some other substance generated by the food processing procedure. In the absence of direct evidence, the dispositive issue is whether the plaintiff could advance circumstantial evidence sufficient to defeat the defendant's summary judgment motion.

In Schafer v. JLC Food Systems, Inc., 695 N.W.2d 570 (Minn.2005), the Supreme Court of Minnesota vacated the allowance of summary judgment for the defendant, stating:

> "[W]hen the specific harm-causing object is not known, circumstantial evidence should be available, if such evidence is sufficient and other causes are adequately eliminated, for purposes of submitting the issue of liability to the jury in defective food products cases.... The use of circumstantial evidence, however, is not without limits, nor should it be. In order to address defendants' legitimate concerns about a lack of boundaries for such claims, we hold that in defective food products cases a plaintiff may reach the jury, without direct proof of the specific injury-causing object or substance, when the plaintiff establishes by reasonable inference from circumstantial evidence that: (1) the injury-causing event was of a kind that would ordinarily only occur as a result of a defective condition in the food product; (2) the defendant was responsible for a condition that was the cause of the injury; and (3) the injury-causing event was not caused by anything other than a food product defect existing at the time of the food product's sale. In order to forestall summary judgment, each of the three elements must be met."

*3 Id. at 576–577. In Schafer, a woman went to a restaurant, purchased a muffin and began to eat it on the premises. Using a fork, she took the first bite of the muffin and immediately felt a sharp pain in her throat and a choking sensation. The woman went directly to a hospital emergency room where she was treated for a laceration in her throat. The uneaten portion of the muffin was not saved, and the alleged foreign object was never recovered.

In contrast, the plaintiff in this case began eating the McDonald's hamburger as he drove away from the restaurant. Cotter bit into the "bb" sized object and spit it out the window while his car was moving. Cotter was alone; no one witnessed the event. He continued to his home and went fishing later that day. Cotter did not go immediately to the restaurant to report the event,[1] and delayed until the following day to seek medical treatment. Further, the nature of the alleged object and resulting injury differ from those in the Schafer case; i.e., biting on a "bb" sized object as opposed to having a sharp object lacerate the throat or mouth area.[2] Viewing this circumstantial evidence in the light most favorable to Cotter, Doe v. Harbor Schools, Inc., 446 Mass. 245, 248, 843 N.E.2d 1058 (2006), we conclude that a jury could not reasonably infer that Cotter's injury was of a kind that would have ordinarily occurred only as a result of a defective condition in a hamburger and did not result from any other cause. Cotter could not "rest upon the mere allegations or denials of his pleading" to defeat McDonald's summary judgment motion, but was obligated to "set forth specific facts showing that there [was] a genuine issue for trial." Mass. R. Civ. P. 56(e). See, e.g., Foster v. Hurley, 444 Mass. 157, 160 n. 3, 826 N.E.2d 719 (2005). As he failed to do so, summary judgment was properly entered in favor of the defendant.[3]

Summary judgment for the defendant is affirmed.

So ordered.

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[1] The record does not state when the defendant received notice of the claim.

[2] It is conceivable that the object Cotter bit was a dislodged piece of his own tooth or filling.

[3] Given the propriety of summary judgment for the defendant, it is unnecessary to reach McDonald's additional motion to exclude evidence of the "bb sized" object on the ground of spoliation. See, generally, Keene v. Brigham & Women's Hosp., Inc.,439 Mass. 223, 234–236, 786 N.E.2d 824 (2003). There is no indication in the record that the trial court made any ruling on McDonald's motion, or even considered the question of spoliation in entering summary judgment.

Dorothy MARTIN and James E. Martin, Plaintiffs Below, Appellants,

v.

RYDER TRUCK RENTAL, INC., a Florida Corporation, et al., Defendant Below, Appellee.

Supreme Court of Delaware.

Submitted Sept. 10, 1975.

Decided Feb. 19, 1976.

Motorist and her husband brought strict tort liability action against truck rental business for injuries arising out of accident caused by failure of rented truck's brakes to function properly. The Superior Court granted summary judgment in favor of truck rental business, holding that strict tort liability doctrine was not applicable, and plaintiffs appealed. The Supreme Court, Herrmann, C. J., held that bailment lease of motor vehicle, entered into in regular course of truck rental business, was subject to application of doctrine of strict tort liability in favor of injured bystander; and that truck rental business could be held liable in tort, without proof of negligence, if truck it placed in circulation proved to have defect that proximately caused personal injury or property damage to motorist whose automobile was rear-ended by truck due to failure of its braking system.

Reversed and remanded.

Duffy, J., concurred with opinion.

1. Bailment ⇐9

Warranty provisions of Uniform Commercial Code are clearly limited to sales of goods; thus, legislature has not preempted field as to bailments and leases and court was free, in common-law tradition, to apply doctrine of strict tort liability to bailment lease. 6 Del.C. § 2–318.

2. Automobiles ⇐387

Doctrine of strict tort liability would be extended to bailor lessor of truck rented in regular course of business.

3. Automobiles ⇐391

Bailment lease of motor vehicle, entered into in regular course of truck rental business, was subject to application of doctrine of strict tort liability in favor of bystander injured when brakes of truck failed to function properly. 6 Del.C. § 2–318.

4. Automobiles ⇐391

Truck rental business would be strictly liabile in court action brought by motorist injured in automobile accident caused by failure of rented truck's brakes to function properly.

5. Automobiles ⇐391

Truck rental business could be held liable in tort, without proof of negligence, if truck it placed in circulation proved it had defect that proximately caused personal injury or property damage to injured motorist, when due to failure of its braking system, truck did not stop for traffic light and struck rear of automobile which had stopped for signal, causing that automobile to collide with vehicle driven by injured motorist.

Upon appeal from the Superior Court. Reversed.

John M. Bader and Robert Jacobs, Bader, Dorsey & Kreshtool, Wilmington, for plaintiffs below, appellants.

H. Alfred Tarrant, Jr. and Everett P. Priestley, Cooch & Taylor, Wilmington, for defendant below, appellee.

Before HERRMANN, C. J., and DUFFY and McNEILLY, JJ.,

HERRMANN, Chief Justice.

We hold today that a bailment-lease of a motor vehicle, entered into in the regular course of a truck rental business, is subject to application of the doctrine of strict tort liability in favor of an injured bystander.

I.

According to the plaintiffs in this case:

A truck was leased by the defendant, Ryder Truck Rental, Inc., to Gagliardi Brothers, Inc., in the regular course of Ryder's truck rental business.[1] The truck, operated by a Gagliardi employee, was involved in an intersectional collision. Due to a failure of its braking system, the truck did not stop for a traffic light and struck the rear of an automobile which had stopped for the signal, causing that automobile to collide with the vehicle driven by the plaintiff, Dorothy Martin. As a result, she was injured, her car was damaged, and this suit was brought by her and her husband against Ryder.

The plaintiffs base their cause of action solely upon the doctrine of strict tort liability, *i. e.*, tort liability without proof of negligence.[2] The Superior Court granted summary judgment in favor of Ryder,

1. The rental was from year to year, covered by a "Truck Lease and Service Agreement" under which Ryder agreed, at its own cost and expense:

"A. To provide from Ryder's garages fuel, oil, lubricants, tires, tubes and all other operating supplies and accessories necessary for the proper and efficient operation of the vehicles.

"B. To provide fuel, oil and lubricants at service stations authorized and designated by Ryder to furnish such supplies on its behalf, provided, Lessee shall pay to Ryder the amount by which the cost of such fuel (including fuel taxes) to Ryder exceeds the 'maximum fuel allowance' per gallon indicated on Schedule A for the applicable vehicle.

"C. To maintain and repair the leased vehicles and furnish all labor and parts which may be required to keep the vehicles in good operating condition. Maintenance shall include road service due to mechanical and tire failure.

In turn, Gagliardi agreed:

"C. To return each vehicle to Ryder for service and maintenance at the location stated on Schedule A for a minimum of eight hours each week during Ryder's normal business hours, at such scheduled time as is agreed by the parties.

"D. Not to cause or permit any person other than Ryder or persons expressly authorized by Ryder to make repairs or adjustments to vehicles, governors and other accessories. In all cases where repair of vehicles is necessary, Lessee shall notify Ryder by the speediest means of communication available. Ryder will not be responsible for any repair or service while such vehicle is away from Ryder's garage, unless expressly authorized by Ryder and unless Lessee submits an acceptable voucher of the repairs or services."

The agreement also contained termination and purchase provisions.

2. An early statement of the doctrine of strict tort liability appears in *Restatement (Second) of Torts* § 402A (1965) as follows:

"§ 402A. Special Liability of Seller of Product for Physical Harm to User or Consumer.

"(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller."

As to leased chattels, compare *Restatement (Second) of Torts* § 408 (1965):

"§ 408. Lease of Chattel for Immediate Use

"One who leases a chattel as safe for immediate use is subject to liability to those whom he should expect to use the chattel, or to be endangered by its probable use, for physical harm caused by its use in a manner for which, and by a person for whose use, it is leased, if the lessor fails to exercise reasonable care to make it safe for such use or to disclose its actual condition to those who may be expected to use it."

holding that the doctrine is not applicable to the factual situation here presented. We disagree.

II.

This is a case of first impression in this Court on the subject of strict tort liability in the law of products liability. *Ciociola v. Delaware Coca Cola Bottling Company*, Del.Supr., 3 Storey 477, 172 A.2d 252 (1961), which was decided prior to the evolution of that doctrine during the 1960's, stood for the proposition that in products liability cases Delaware was committed to the common law rules of privity governing actions in contract based upon implied warranty, and that any change required legislative action. Uniform Commercial Code, 6 Del.C. § 2–318, abrogating such privity requirements, was the legislative response to *Ciociola*.[3] In *Jackson v. Hearn Brothers, Inc.*, Del.Supr., 212 A.2d 726 (1965), this Court disposed of a strict tort liability contention by assuming, without deciding, that such a rule was available, but concluded that its application was unjustified in that case.

In the Superior Court, *Kates v. Pepsi Cola Bottling Company of Salisbury, Md.*, Del.Super., 263 A.2d 308 (1970); *Moore v. Douglas Aircraft Co.*, Del.Super., 282 A.2d 625 (1971), and *Dillon v. General Motors Corporation*, Del.Super., 315 A.2d 732 (1974), recently touched upon the subject.[4] All were sale cases; none directly addressed the question here presented.

[1] The defendant contends that if the Legislature intended to create a strict liability for bailments for hire, it would have done so in the UCC. Thus, the threshold question in the instant case is whether, by the enactment of the UCC and the limitation of its strict warranty provisions to sales, the Legislature has preempted this field of the law of products liability; or whether, the UCC notwithstanding, the courts are free to provide for bailments and leases the alternate, but somewhat conflicting, remedy of strict tort liability.[5]

3. 6 Del.C. § 2–318 provides:
"§ 2–318. *Third party beneficiaries of warranties express or implied.*
"A seller's warranty whether express or implied extends to any natural person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty. A seller may not exclude or limit the operation of this section."
The official text of § 2–318, recommended as "Alternative A" by the American Law Institute Draftsman, extended the sellers express or implied warranty to any person "who is in the family or household of his buyer or who is a guest in his home * *." The version of § 2–318 adopted by Delaware was subsequently suggested by the A.L.I. Draftsman as "Alternative B." See 2 L. Frumer & M. Friedman, *Products Liability*, § 16.04[3], at 3–218 (1975). Delaware's variation of § 2–318 was enacted in order to abrogate the privity requirements theretofore prevailiug iu this State under *Ciociola, supra*. As appears in the Delaware Study Comment to § 2–318:
"The variation iu the language of § 2–318 is required to accomplish this purpose because of the decision of the Delaware Supreme Court in *Ciociola v. Delaware Coca Cola Bottling Co.*, 53 Delaware 477, 172 A.2d 252 (1961). In that case the Court held that Delaware was committed to the common law rule governing actions for breach of implied warranties and that any change would have to be made by the Legislature rather than the Judicial Branch."

4. For a careful review of earlier Delaware Superior Court cases dealing with the application of strict tort liability to the owners of dangerous or vicious animals, and to abnormally dangerous instrumentalities and activities, see *Handy v. Uniroyal, Inc.*, D.Del., 327 F.Supp. 596, 603–05 (1971).

5. For the contrariety of opinion upon the question of legislative preemption in the field of products liability by reason of the enactment of the UCC, see *Markle v. Mulholland's Inc.*, 265 Or. 259, 509 P.2d 529, 535 (1973), especially the concurring opinion of Chief Justice O'Connell, 509 P.2d at 536 *et seq.*; Titus, *Restatement (Second) of Torts Section 402A and the Uniform Commercial Code*, 22 Stan.L.Rev. 713 (1970); Speidel, *The Virginia 'Anti-Privity' Statute. Strict Products Liability Under the Uniform Commercial Code*, 51 Va.L.Rev. 804 (1965); Franklin, *When Worlds Collide: Liability Theories and Disclaimers in Defective-Product Cases*, 18 Stan.L.Rev. 974 (1966); Dickerson, *The ABC's of Products Liability—With a*

The warranty provisions of Article 2 of the UCC, §§ 2–313 (express) and 2–315 (implied), are clearly limited to the sales of goods; the Statute is "neutral" as to other types of relationships.[6] Manifestly, the Legislature has not preempted the field as to bailments and leases by enactment of the UCC.[7] Silence on the subject may not be deemed to be such preemption.

Hence, we are free, in the common law tradition, to apply the doctrine of strict tort liability to a bailment-lease. The question is whether that course should be adopted; and for that decision, consideration of the nature and evolution of the doctrine is important:

III.

[2] The development of the doctrine of strict tort liability in the law of products liability has evolved rapidly during the past decade, until it has become the prevailing remedy throughout the country. It is now the rule in approximately two-thirds of the states, including Pennsylvania and New Jersey.[8] Prosser, *The Law of Torts* (4th ed.1971); 2 Frumer & Friedman, *Products Liability*, § 16A[3], at 3–248 n. 2 (1975).

Strict tort liability in the field of products liability has developed in a "step by step" process out of the law of contract warranty into the law of tort, for the purpose of the greater protection of the user and the public against defective goods by eliminating the "luggage" and "undesirable complications" of the contract-warranty remedy in direct sales transactions, such as the requirement of a sale and notice, and the provision for limitation and disclaimer, generally prescribed by the Uniform Sales Act and the UCC. See Prosser, *The Law of Torts*, § 97, at 655–56; Prosser, *The Assault Upon the Citadel*, 69 Yale L.J. 1099 (1960); Prosser, *The Fall of the Citadel*, 50 Minn.L.Rev. 791 (1966); 2 Frumer & Friedman, § 16A[4][a], at 3–262.5 *et seq.*

At the forefront of this development was the landmark case of *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960), which brought a "breakthrough" in extending strict warranty liability to products other than food and drink.

The first significant application of the strict tort liability concept in a products liability case was the landmark decision of *Greenman v. Yuba Power Products, Inc.*, 59 Cal.2d 57, 27 Cal.Rptr. 697, 377 P.2d 897 (1963), termed "certainly the most important decision since *Henningsen* and perhaps the most important since *MacPherson v. Buick* [217 N.Y. 382, 111 N.E. 1050 (1916)]." 2 Frumer & Friedman § 16A[1], at 3–238. The defendant remote-manufacturer there sought to avoid liability for breach of warranty on a defective power tool on the ground that reasonable notice

Close Look at Section 402A and the Code, 36 Tenn.L.Rev. 439 (1969). See also *Chapman v. Brown*, D.Haw., 198 F.Supp. 78 (1961), *aff'd*, 9th Cir., 304 F.2d 149 (1962); *Larson v. Clark Equipment Co.*, Colo.App., 518 P.2d 308 (1974).

6. The A.L.I. Official Comment to § 2–313 reads:

"Although this section is limited in its scope and direct purpose to warranties made by the seller to the buyer as part of a contract for sale, the warranty sections of this Article are not designed in any way to disturb those lines of case law growth which have recognized that warranties need not be confined either to sales contracts or to the direct parties to such a contract. They may arise in other appropriate circumstances such as in the case of bailments for hire * * *. [T]he matter is left to the case law with the intention that the policies of this Act may offer useful guidance in dealing with further cases as they arise."

7. Reserved for another day is the question of whether the Legislature has preempted the field as to direct sales cases and whether the warranty provisions of the UCC are, therefore, the exclusive source of strict liability in such cases.

8. *Webb v. Zern*, 422 Pa. 424, 220 A.2d 853 (1966); *Santor v. A. and M. Karagheusian, Inc.*, 44 N.J. 52, 207 A.2d 305 (1965); but not Maryland, *Myers v. Montgomery Ward & Co.*, 253 Md. 282, 252 A.2d 855 (1969).

of the breach had not been given under the notice requirements of the California Sales Act governing contract warranties. The Court held otherwise, stating:

"A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being. * * *

"Although * * * strict liability has usually been based on the theory of an express or implied warranty running from the manufacturer to the plaintiff, * * * the liability is not one governed by the law of contract warranties but by the law of strict liability in tort. Accordingly, rules defining and governing warranties that were developed to meet the needs of commercial transactions cannot properly be invoked to govern the manufacturer's liability to those injured by their defective products unless those rules also serve the purposes for which such liability is imposed.

"* * * The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves. Sales warranties serve this purpose fitfully at best. * * * Implicit in the machine's presence on the market * * * was a representation that it would safely do the jobs for which it was built. * * * To establish the manufacturer's liability it was sufficient that plaintiff proved that he was injured while using the [product] in a way it was intended to be used as a result of a defect in design and manufacture of which plaintiff was not aware that made the [product] unsafe for its intended use." 377 P.2d at 900, 901.

Influenced, as were other courts, by *Yuba's* reasoning, the Supreme Court of New Jersey in 1965 abandoned the warranty terminology of *Henningsen* and embraced strict tort liability in *Santor v. A. and M. Karagheusian, Inc.*, 44 N.J. 52, 207 A.2d 305 (1965). Warranty concepts were there side-tracked because:

"As was noted in Henningsen, in seeking justice for ultimate consumers the courts were hard put to find legal mechanisms to overcome the strictures of the long-standing privity of contract requirement. * * * We chose at that time to measure the manufacturer's responsibility under modern marketing conditions by an implied warranty of reasonable suitability of the article manufactured for the use for which it was reasonably intended to be sold. * * *

"It must be said that in the present-day marketing milieu, treatment of the manufacturer's liability to ultimate purchasers or consumers in terms of implied warranty is simply using a convenient legal device or formalism to accomplish the purpose. It has been suggested, however, that conceptually such a doctrine is somewhat illusory because traditionally warranty has had its source in contract. * * * Ordinarily there is no contract in a real sense between a manufacturer and an expected ultimate consumer of his product. The fact is that as a matter of public policy the law has imposed on manufacturers a duty to such persons irrespective of contract or a privity relationship between them. Such concept expressed in terms of breach of implied warranty of fitness or merchantability bespeaks a *sui generis* cause of action. Its character is hybrid, having its commencement in contract and its termination in tort. * * *

"In this developing field of the law, courts have necessarily been proceeding step by step in their search for a stable principle which can stand on its own base as a permanent part of the substantive law. The quest has found sound expression, we believe, in the doctrine of strict liability in tort." 207 A.2d at 311.

Strict tort liability was found preferable to warranty language because:

> "The obligation of the manufacturer [must become] what in justice it ought to be—an enterprise liability, and one which should not depend upon the intricacies of the law of sales. The purpose of such liability is to insure that the cost of injuries or damage, either to the goods sold or to other property, resulting from defective products, is borne by the makers of the products who put them in the channels of trade, rather than by the injured or damaged persons who ordinarily are powerless to protect themselves." 207 A.2d at 311–12.

Since *Yuba* and *Santor,* the doctrine of strict tort liability has met with widespread acceptance throughout the country. Consequently, in the past decade, the protection afforded to a person injured by a defective product has been greatly enhanced by the steady and consistent expansion of the concept. The doctrine was developed at the outset for application against remote manufacturers for the protection of users and consumers. See 2 Frumer & Friedman, §§ 16A[1]–[3], at 3–237 *et seq.* It has been in a constant state of refinement and extension, however. One of the extensions of the doctrine has been to bailors and lessors; another has been to injured bystanders. Once again, the leading decisions emanate from California and New Jersey:

A.

In *Cintrone v. Hertz Truck Leasing, etc.,* 45 N.J. 434, 212 A.2d 769 (1965), the New Jersey Supreme Court applied strict liability in tort to a motor vehicle bailment situation because "[a] bailor for hire, such as a person in the U-drive-it business, puts motor vehicles in the stream of commerce in a fashion not unlike a manufacturer or retailer"; subjects such a leased vehicle "to more sustained use on the highways than most ordinary car purchasers"; and by the very nature of his business, exposes "the bailee, his employees, passengers and the traveling public * * * to a greater *quantum* of potential danger of harm from defective vehicles than usually arises out of sales by the manufacturer." 212 A.2d at 777.

The California Supreme Court endorsed the *Cintrone* "step" in *Price v. Shell Oil Company,* 2 Cal.3d 245, 85 Cal.Rptr. 178, 466 P.2d 722 (1970):

> "* * * [A] broad philosophy evolves naturally from the purpose of imposing strict liability which 'is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves.' [Citing *Yuba*]. Essentially the paramount policy to be promoted by the rule is the protection of otherwise defenseless victims of manufacturing defects and the spreading throughout society of the cost of compensating them. * * *
>
> "* * * [W]e can perceive no substantial difference between *sellers* of personal property and *non-sellers,* such as bailors and lessors. In each instance, the seller or non-seller 'places [an article] on the market, knowing that it is to be used without inspection for defects, * * *.' [Citing *Yuba*] In the light of the policy to be subserved, it should make no difference that the party distributing the article has retained title to it. Nor can we see how the risk of harm associated with the use of the chattel can vary with the legal form under which it is held. Having in mind the market realities and the widespread use of the lease of personalty in today's business world, we think it makes good sense to impose on the lessors of chattels the same liability for physical harm which has been imposed on the manufacturers and retailers. The former, like the latter, are able to bear the cost of compensating for injuries resulting from defects by spreading the loss through an

adjustment of the rental." 85 Cal.Rptr. at 181, 466 P.2d at 725–26.

The extension of the doctrine of strict tort liability to bailors-lessors has been limited, however, to leases made in the regular course of a rental business, the doctrine being applicable only in a commercial setting by its very nature. *Price, supra,* 85 Cal.Rptr. at 183–84, 466 P.2d at 727–28; *Cintrone, supra,* 212 A.2d at 777. Strict tort liability has been found "peculiarly applicable" to the lessor of motor vehicles in "today's society with 'the growth of the business of renting motor vehicles, trucks and pleasure cars' * * * and the persistent advertising efforts to put one 'in the driver's seat.'" *Price, supra,* 85 Cal. Rptr. at 183, 466 P.2d at 727, quoting from *Cintrone, supra,* 212 A.2d at 776, 777.

For the reasons so well stated by the leading authorities in this field, we are of the opinion that, since the General Assembly has not preempted this area of the field, the common law must grow to fulfill the requirements of justice as dictated by changing times and conditions.

The present-day magnitude of the motor vehicle rental business, and the trade practices which have developed therein, require maximum protection for the victims of defective rentals. This translates into the imposition of strict tort liability upon the lessor. The public policy considerations which appeared in the development of the doctrine during the past decade, are especially relevant where, as in the instant case, the bailor-lessor retains exclusive control and supervision over the maintenance and repair of the motor vehicle it places in circulation upon the highways. All of the societal policy reasons leading to the expansion of strict tort liability in sales cases are equally applicable in this motor vehicle rental case: (1) the concept that the cost of compensating for injuries and damages arising from the use of a defective motor vehicle should be borne by the party who placed it in circulation, who is best able to prevent distribution of a defective product, and who can spread the cost as a risk and expense of the business enterprise; (2) the concept that the defective motor vehicle was placed on the highways in violation of a representation of fitness by the lessor implied by law from the circumstances and trade practices of the business; and (3) the concept that the imposition upon the lessor of liability without fault will result in general risk-reduction by arousing in the lessor an additional impetus to furnish safer vehicles.

Accordingly, we hold that the doctrine of strict tort liability is applicable to Ryder in the instant case. *Accord, Stang v. Hertz Corporation,* 83 N.M. 730, 497 P.2d 732 (1972); *Stewart v. Budget Rent-A-Car Corporation,* 52 Haw. 71, 470 P.2d 240 (1970); *Coleman v. Hertz Corporation,* Okl.App., 534 P.2d 940 (1975); *Galuccio v. Hertz Corporation,* 1 Ill.App.3d 272, 274 N.E.2d 178 (1971); *see Bachner v. Pearson,* Alaska, 479 P.2d 319 (1970); *Rourke v. Garza,* Tex.Civ.App., 511 S.W.2d 331 (1974).

The remaining question is whether the doctrine is applicable to the case of an injured bystander.

B.

[3] The doctrine of strict liability in tort has been extended to injured bystanders. We endorse the rationale of *Elmore v. American Motors Corporation,* 70 Cal.2d 578, 75 Cal.Rptr. 652, 451 P.2d 84 (1969):

"If anything, bystanders should be entitled to greater protection than the consumer or user where injury to bystanders from the defect is reasonably foreseeable. Consumers and users, at least, have the opportunity to inspect for defects, * * * where as the bystander ordinarily has no such opportunities. In short, the bystander is in greater need of protection from defective products which are dangerous, and if any distinction should be made between bystanders and users, it should be made * * * to ex-

tend greater liability in favor of the bystanders." 75 Cal.Rptr. at 657, 451 P.2d at 89.

Bystander recovery is the prevailing rule in the application of the doctrine of strict tort liability by the overwhelming weight of authority.[9] Fairness and logic, as well as the philosophy underlying the doctrine, require that an injured bystander be covered in its application. We so hold.

It is noteworthy that under the UCC § 2–318 an injured bystander may be protected as one "affected by" a defective product in a direct sale situation covered by an implied warranty. See *Wasik v. Borg*, 2d Cir., 423 F.2d 44, 48–49 (1970). Thus, the conclusion reached here is in accord with the public policy underlying § 2–318.

IV.

[4] Ryder contends that the imposition of any new measure of liability in this field (1) should be left to the Legislature, citing *Bona v. Graefe*, 264 Md. 69, 285 A. 2d 607 (1972); or (2) should be made effective prospectively only. As to the first point: where, as here, the Legislature has not preempted the field the common law must be kept abreast of the time and must grow to fulfill the demands of justice. As to the second point: these plaintiffs may not be deprived of the benefits of the development of the law they have prompted by their perseverance in this litigation; to do so would render this opinion pure *dictum*. See *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 53 S.Ct. 145, 77 L.Ed. 360 (1932); Schaefer, *The Control of "Sunbursts"; Techniques of Prospective Overruling*, 42 N.Y.U.L. Rev. 631 (1967). We decline to limit the rulings herein to prospective application.

V.

To summarize:

[5] Under the doctrine of strict tort liability in the instant case, Ryder may be held liable in tort, without proof of negligence, if the truck it placed in circulation proved to have a defect that proximately

9. *Accord*, *Fulbright v. Klamath Gas Company*, Or.Supr., 533 P.2d 316 (1975); *see Passwaters v. General Motors Corporation*, 8th Cir., 454 F.2d 1270 (1972); *Wasik v. Borg*, 2d Cir., 423 F.2d 44 (1970); *White v. Jeffrey Galion, Inc.*, E.D.Ill., 326 F.Supp. 751 (1971); *Sills v. Massey-Ferguson, Inc.*, N.D.Ind., 296 F.Supp. 776 (1969); *Giberson v. Ford Motor Company*, Mo.Supr., 504 S.W.2d 8 (1974); *Codling v. Paglia*, 32 N.Y. 2d 330, 345 N.Y.S.2d 461, 298 N.E.2d 622 (1973); *Howes v. Hansen*, 56 Wis.2d 247, 201 N.W.2d 825 (1972); *Elmore, supra; Darryl v. Ford Motor Company*, Tex.Supr., 440 S.W.2d 630 (1969); *Webb v. Zern*, 422 Pa. 424, 220 A.2d 853 (1966); *Micher v. Brown*, 3 Ill.App.3d 802, 278 N.E.2d 869 (1972); *Lamendola v. Mizell*, 115 N.J. Super. 514, 280 A.2d 241 (1971); *Caruth v. Mariani*, 11 Ariz.App. 188, 463 P.2d 83 (1970); *Preissman v. Ford Motor Company*, 1 Cal.App.3d 841, 82 Cal.Rptr. 108 (1969); *Mitchell v. Miller*, 26 Conn.Sup. 142, 214 A.2d 694 (1965); *cf. Ford Motor Company v. Cockrell*, Miss.Supr., 211 So.2d 833 (1968); *see also Klimas v. International Telephone and Telegraph Corp.*, D.R.I., 297 F.Supp. 937 (1969).

Bystander recovery in warranty actions include: *Moss v. Polyco, Inc.*, Okl.Supr., 522 P.2d 622 (1974); *Toombs v. Fort Pierce Gas Company*, Fla.Supr., 208 So.2d 615 (1968); *Piercefield v. Remington Arms Co.*, 375 Mich. 85, 133 N.W.2d 129 (1965); *Cawley v. General Motors Corporation*, 67 Misc.2d 768, 324 N.Y.S.2d 246 (1971). See also *Deveny v. Rheem Manufacturing Company*, 2d Cir., 319 F.2d 124 (1963).

Other materials relating to bystander recovery include: 2 Frumer & Friedman, § 16.04[2][c], at 3–169 *et seq.*; Noel, *Products Liability: Bystanders, Contributory Fault and Unusual Uses*, 50 F.R.D. 321 (1971); Comment, *Strict Product Liability to the Bystander: A Study in Common Law Determinism*, 38 U.Chi.L.Rev. 625 (1971); Noel, *Defective Products: Extension of Strict Liability to Bystanders*, 38 Tenn.L.Rev. 1 (1970); Annot., *Products Liability: Extension of Strict Liability in Tort to Permit Recovery by a Third Person Who Was Neither a Purchaser Nor User of Product*, 33 A.L.R.3d 415 (1970); Note, *Strict Products Liability and the Bystander*, 64 Colum. L.Rev. 916 (1964).

caused personal injury or property damage to the plaintiffs.

* * * * * *

The judgment below is reversed and the cause remanded for further proceedings consistent herewith.

DUFFY, Justice (concurring):

I agree with the judgment of the Court and I concur in the opinion. But it seems to me desirable to particularly emphasize that the result is consistent with Delaware statutory policy which provides a remedy to third persons injured under comparable circumstances, and that it is an extrapolation of Delaware decisional law in strict tort liability to the products area. In sum, the result is completely consistent with public policy as expressed by the General Assembly, with our decisional law, with case law which has evolved in many other jurisdictions, and with the plain requirements of justice.

In my view, justice requires that an innocent third person, injured as plaintiff Dorothy Martin alleges she was, have a remedy against the person who caused those injuries. The General Assembly has not provided her with a statutory remedy but, as the opinion notes, the public policy underlying 6 Del.C. § 2-318 is broad enough to permit the Court to rely on it in our evolution of the common law. And, in principle, a bailor-lessor engaged in the business of putting motor vehicles in the stream of traffic is no different from a seller (who is bound by the statute) who does the same thing, cf. *Cintrone v. Hertz Truck Leasing, etc.*, 45 N.J. 434, 212 A.2d 769 (1965). In addition, Delaware has applied the principle of strict tort liability over the years to varying fact situations (where damage had been done by a vicious animal, for example), and while efforts to extend the doctrine have met with mixed results in our Courts, see the comprehensive study by Chief Judge Latchum in *Handy v. Uniroyal, Inc.*, D.Del., 327 F. Supp. 596 (1971), this case is a reasonable enlargement in the products liability field. And the case law which has emerged so rapidly in recent years in other jurisdictions certainly supports our result.

Joan PERRY, Plaintiff,

v.

AMERICAN MOTORS CORPORATION, a Maryland Corporation, et al., Defendants.

Superior Court of Delaware, New Castle.

Submitted Jan. 30, 1976.

Decided Feb. 24, 1976.

Automobile owner brought action against, inter alia, manufacturer of the automobile to recover for personal injuries sustained in automobile accident. On manufacturer's motion to quash service of process, the Superior Court, New Castle County, Walsh, J., held that suit which was based upon failure of the brakes of an automobile bought and serviced in Delaware arose out of a business transaction occurring in the state of Delaware even though the accident in question occurred in New Jersey; and that automobile manufacturer whose automobiles were sold in Delaware through a regular and invariable chain of sales involving a subsidiary, which did extensive advertising in Delaware, and which issued warranties on the automobiles concurrent with the purchase was "transacting business" in Delaware for purposes of long-arm statute.

Motion denied.

Asst. U.S. Atty., Tucson, Ariz., for respondent-appellee.

Appeal from the United States District Court for the District of Arizona; Alfredo C. Marquez, District Judge, Presiding.

Before WALLACE, Chief Judge, HUG, SCHROEDER, D.W. NELSON, NORRIS, REINHARDT, HALL, THOMPSON, TROTT, FERNANDEZ, and THOMAS G. NELSON, Circuit Judges.

ORDER

The appeal in this case is dismissed as moot. The district court's judgment is vacated, and the case is remanded with instructions to dismiss the action. *See Funbus Systems, Inc. v. California Public Utilities Commission*, 801 F.2d 1120, 1131–32 (9th Cir.1986).

Wilhelm WINTER; Cynthia Zheng, Plaintiffs–Appellants,

v.

G.P. PUTNAM'S SONS, Defendant–Appellee.

No. 89–16308.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Feb. 15, 1991.

Decided July 12, 1991.

Mushroom enthusiasts who became severely ill from picking and eating mushrooms after relying on information in a book brought suit against book's publisher. The United States District Court for the Northern District of California, Charles A. Legge, J., granted summary judgment to book publisher, and mushroom enthusiasts appealed. The Court of Appeals, Sneed, Circuit Judge, held that: (1) mushroom enthusiasts could not recover against book's publisher under a products liability theory, and (2) book publisher had no duty to investigate accuracy of contents of book which it published and therefore plaintiffs could not recover against book's publisher under negligence theory.

Affirmed.

1. Food ⇐25

Mushroom enthusiasts who became severely ill from picking and eating mushrooms after relying on information in book could not recover against book's publisher under a products liability theory.

2. Food ⇐25

Book publisher had no duty to investigate accuracy of contents of book which it published; thus, mushroom enthusiasts who became severely ill from picking and eating mushrooms after relying on information in book could not recover against book's publisher under negligence theory.

Paul L. Hendrix, Bruce E. Krell, San Francisco, Cal., for plaintiffs-appellants.

Neil L. Shapiro, Brobeck, Phleger & Harrison, with Kenneth M. Kwartler, Cooper, White & Cooper, on brief, San Francisco, Cal., for defendant-appellee.

Appeal from the United States District Court for the Northern District of California.

Before SNEED, TANG and THOMPSON, Circuit Judges.

SNEED, Circuit Judge:

Plaintiffs are mushroom enthusiasts who became severely ill from picking and eating mushrooms after relying on information in *The Encyclopedia of Mushrooms*, a book published by the defendant. Plaintiffs sued the publisher and sought damages under various theories. The district court granted summary judgment for the defendant. We affirm.

I.

FACTS AND PROCEEDINGS BELOW

The Encyclopedia of Mushrooms is a reference guide containing information on the habitat, collection, and cooking of mushrooms. It was written by two British authors and originally published by a British publishing company. Defendant Putnam, an American book publisher, purchased copies of the book from the British publisher and distributed the finished product in the United States. Putnam neither wrote nor edited the book.

Plaintiffs purchased the book to help them collect and eat wild mushrooms. In 1988, plaintiffs went mushroom hunting and relied on the descriptions in the book in determining which mushrooms were safe to eat. After cooking and eating their harvest, plaintiffs became critically ill. Both have required liver transplants.

Plaintiffs allege that the book contained erroneous and misleading information concerning the identification of the most deadly species of mushrooms. In their suit against the book publisher, plaintiffs allege liability based on products liability, breach of warranty, negligence, negligent misrepresentation, and false representations. Defendant moved for summary judgment asserting that plaintiffs' claims failed as a matter of law because 1) the information contained in a book is not a product for the purposes of strict liability under products liability law; and 2) defendant is not liable under any remaining theories because a publisher does not have a duty to investigate the accuracy of the text it publishes. The district court granted summary judgment for the defendant. Plaintiffs appeal. We affirm.[1]

II.

DISCUSSION

A book containing Shakespeare's sonnets consists of two parts, the material and print therein, and the ideas and expression thereof. The first may be a product, but the second is not. The latter, were Shakespeare alive, would be governed by copyright laws; the laws of libel, to the extent consistent with the First Amendment; and the laws of misrepresentation, negligent misrepresentation, negligence, and mistake. These doctrines applicable to the second part are aimed at the delicate issues that arise with respect to intangibles such as ideas and expression. Products liability law is geared to the tangible world.

A. *Products Liability*

[1] The language of products liability law reflects its focus on tangible items. In describing the scope of products liability law, the Restatement (Second) of Torts lists examples of items that are covered.[2] All of these are tangible items, such as tires, automobiles, and insecticides.[3] The American Law Institute clearly was concerned with including all physical items but gave no indication that the doctrine should be expanded beyond that area.

The purposes served by products liability law also are focused on the tangible world and do not take into consideration the unique characteristics of ideas and expression. Under products liability law, strict

1. This court has jurisdiction through diversity. 28 U.S.C. § 1332 (1988). California tort law applies. *Sherman v. Mutual Benefit Life Ins. Co.*, 633 F.2d 782, 784 (9th Cir.1980).

2. The California courts look to the Restatement (Second) of Torts, § 402A for guidance on products liability law. *See Brooks v. Eugene Burger Management Corp.*, 215 Cal.App.3d 1611, 1624–25, 264 Cal.Rptr. 756, 763–64 (1989).

3. The relevant comment states:

> The rule stated in this Section is not limited to the sale of food for human consumption, or other products for intimate bodily use, although it will obviously include them. It extends to any product sold in the condition, or substantially the same condition, in which it is expected to reach the ultimate user or consumer. Thus the rule stated applies to an automobile, a tire, an airplane, a grinding wheel, a water heater, a gas stove, a power tool, a riveting machine, a chair, and an insecticide. It applies also to products which, if they are defective, may be expected to and do cause only "physical harm" in the form of damage to the user's land or chattels, as in the case of animal food or a herbicide.

Restatement (Second) of Torts § 402A comment d (1965).

liability is imposed on the theory that "[t]he costs of damaging events due to defectively dangerous products can best be borne by the enterprisers who make and sell these products." *Prosser & Keeton on The Law of Torts*, § 98, at 692–93 (W. Keeton ed. 5th ed. 1984). Strict liability principles have been adopted to further the "cause of accident prevention ... [by] the elimination of the necessity of proving negligence." *Id.* at 693. Additionally, because of the difficulty of establishing fault or negligence in products liability cases, strict liability is the appropriate legal theory to hold manufacturers liable for defective products. *Id.* Thus, the seller is subject to liability "even though he has exercised all possible care in the preparation and sale of the product." Restatement § 402A comment a. It is not a question of fault but simply a determination of how society wishes to assess certain costs that arise from the creation and distribution of products in a complex technological society in which the consumer thereof is unable to protect himself against certain product defects.

Although there is always some appeal to the involuntary spreading of costs of injuries in any area, the costs in any comprehensive cost/benefit analysis would be quite different were strict liability concepts applied to words and ideas. We place a high priority on the unfettered exchange of ideas. We accept the risk that words and ideas have wings we cannot clip and which carry them we know not where. The threat of liability without fault (financial responsibility for our words and ideas in the absence of fault or a special undertaking or responsibility) could seriously inhibit those who wish to share thoughts and theories. As a New York court commented, with the specter of strict liability, "[w]ould any author wish to be exposed ... for writing on a topic which might result in physical injury? e.g. How to cut trees; How to keep bees?" *Walter v. Bauer*, 109 Misc.2d 189, 191, 439 N.Y.S.2d 821, 823 (Sup.Ct.1981) (student injured doing science project described in textbook; court held that the book was not a product for purposes of products liability law), *aff'd in part & rev'd in part on other grounds*, 88 A.D.2d 787, 451 N.Y.S.2d 533 (1982). One might add: "Would anyone undertake to guide by ideas expressed in words either a discrete group, a nation, or humanity in general?"

Strict liability principles even when applied to products are not without their costs. Innovation may be inhibited. We tolerate these losses. They are much less disturbing than the prospect that we might be deprived of the latest ideas and theories.

Plaintiffs suggest, however, that our fears would be groundless were strict liability rules applied only to books that give instruction on how to accomplish a physical activity and that are intended to be used as part of an activity that is inherently dangerous. We find such a limitation illusory. Ideas are often intimately linked with proposed action, and it would be difficult to draw such a bright line. While "How To" books are a special genre, we decline to attempt to draw a line that puts "How To Live A Good Life" books beyond the reach of strict liability while leaving "How To Exercise Properly" books within its reach.

Plaintiffs' argument is stronger when they assert that *The Encyclopedia of Mushrooms* should be analogized to aeronautical charts. Several jurisdictions have held that charts which graphically depict geographic features or instrument approach information for airplanes are "products" for the purpose of products liability law. *See Brocklesby v. United States*, 767 F.2d 1288, 1294–95 (9th Cir.1985) (applying Restatement for the purpose of California law), *cert. denied*, 474 U.S. 1101, 106 S.Ct. 882, 88 L.Ed.2d 918 (1986); *Saloomey v. Jeppesen & Co.*, 707 F.2d 671, 676–77 (2d Cir.1983) (applying Restatement for the purpose of Colorado Law); *Aetna Casualty & Surety Co. v. Jeppesen & Co.*, 642 F.2d 339, 342–43 (9th Cir.1981) (applying Nevada law); *Fluor Corp. v. Jeppesen & Co.*, 170 Cal.App.3d 468, 475, 216 Cal.Rptr. 68, 71 (1985) (applying California law). Plaintiffs suggest that *The Encyclopedia of Mushrooms* can be compared to aeronautical charts because both items contain representations of natural features and both are intended to be used while engag-

ing in a hazardous activity. We are not persuaded.

Aeronautical charts are highly technical tools. They are graphic depictions of technical, mechanical data. The best analogy to an aeronautical chart is a compass. Both may be used to guide an individual who is engaged in an activity requiring certain knowledge of natural features. Computer software that fails to yield the result for which it was designed may be another. In contrast, *The Encyclopedia of Mushrooms* is like a book on how to *use* a compass or an aeronautical chart. The chart itself is like a physical "product" while the "How to Use" book is pure thought and expression.[4]

Given these considerations, we decline to expand products liability law to embrace the ideas and expression in a book.[5] We know of no court that has chosen the path to which the plaintiffs point.[6]

B. *The Remaining Theories*

As discussed above, plaintiffs must look to the doctrines of copyright, libel, misrepresentation, negligent misrepresentation, negligence, and mistake to form the basis of a claim against the defendant publisher. Unless it is assumed that the publisher is a guarantor of the accuracy of an author's statements of fact, plaintiffs have made no case under any of these theories other than possibly negligence. Guided by the First Amendment and the values embodied therein, we decline to extend liability under this theory to the ideas and expression contained in a book.

4. In reversing a lower court opinion that aeronautical charts are not products, the *Fluor* court made the following comments:

> [The trial court] explained that it believed strict liability principles are applicable only to items whose physical properties render them innately dangerous, e.g., mechanical devices, explosives, combustible or flammable materials, etc. This belief was erroneous.
>
> ... [A]lthough a sheet of paper might not be dangerous, per se, it would be difficult indeed to conceive of a salable commodity with more inherent lethal potential than an aid to aircraft navigation that, contrary to its own design standards, fails to list the highest land mass immediately surrounding a landing site.

Fluor Corp. v. Jeppesen & Co., 170 Cal.App.3d 468, 475–76, 216 Cal.Rptr. 68, 71–72 (1985). Plaintiffs argue that this language shows that California courts would not draw a line between physical products and intangible ideas.

The *Fluor* language, however, cannot be stretched that far. The court was simply discussing the fact that under products liability law, the injury does not have to be caused by impact from the physical properties of the item. In other words, the injury does not have to result because a compass explodes in your hand, but can result because the compass malfunctions and leads you over a cliff. *Cf. Vandermark v. Ford Motor Co.*, 61 Cal.2d 256, 261, 37 Cal.Rptr. 896, 899, 391 P.2d 168, 171 (1964) (in bank) (negligence action allowed against manufacturer for injuries that resulted when automobile brakes malfunctioned causing accident). This is quite different from saying that liability can be imposed for such things as ideas which have no physical properties at all.

5. Plaintiffs also have brought a claim under Restatement (Second) § 402B for false representation. This section provides strict liability for misrepresentations concerning the character or quality of "chattels" sold. To the extent that it is inappropriate to apply § 402A because strict liability should not be applied to the transmission of ideas, the same logic would apply to § 402B which also imposes strict liability.

6. *See Jones v. J.B. Lippincott Co.*, 694 F.Supp. 1216, 1217–18 (D.Md.1988) (nursing student injured treating self with constipation remedy listed in nursing textbook; court held that Restatement § 402A does not extend to dissemination of an idea of knowledge); *Herceg v. Hustler Magazine, Inc.*, 565 F.Supp. 802, 803–04 (S.D. Tex.1983) (person died after imitating "autoerotic asphyxiation" described in magazine article; court held that contents of magazines are not within meaning of Restatement § 402A); *Walter v. Bauer*, 109 Misc.2d 189, 190–91, 439 N.Y.S.2d 821, 822–23 (Sup.Ct.1981) (student injured doing science project described in textbook; court held that the book was not a defective product for purposes of products liability law because the intended use of a book is reading and the plaintiff was not injured by reading), *aff'd in part & rev'd in part on other grounds*, 88 A.D.2d 787, 451 N.Y.S.2d 533 (1982); *Smith v. Linn*, 386 Pa.Super. 392, 398, 563 A.2d 123, 126 (1989) (reader of *Last Chance Diet* book died from diet complications; court held that book is not a product under Restatement § 402A), *aff'd*, 587 A.2d 309 (1991); *cf. Cardozo v. True*, 342 So.2d 1053, 1056–57 (Fla.Dist.Ct.App.) (transmission of words is not the same as selling items with physical properties so that where a bookseller merely passes on a book without inspection, the thoughts and ideas within the book do not constitute a "good" for the purposes of a breach of implied warranty claim under the UCC), *cert. denied*, 353 So.2d 674 (1977).

[2] In order for negligence to be actionable, there must be a legal duty to exercise due care. 6 B. Witkin, *Summary of California Law,* Torts § 732 (9th ed. 1988). The plaintiffs urge this court that the publisher had a duty to investigate the accuracy of *The Encyclopedia of Mushrooms'* contents. We conclude that the defendants have no duty to investigate the accuracy of the contents of the books it publishes. A publisher may of course assume such a burden,[7] but there is nothing inherent in the role of publisher or the surrounding legal doctrines to suggest that such a duty should be imposed on publishers. Indeed the cases uniformly refuse to impose such a duty.[8] Were we tempted to create this duty, the gentle tug of the First Amendment and the values embodied therein would remind us of the social costs.[9]

Finally, plaintiffs ask us to find that a publisher should be required to give a warning 1) that the information in the book is not complete and that the consumer may not fully rely on it or 2) that this publisher has not investigated the text and cannot guarantee its accuracy. With respect to the first, a publisher would not know what warnings, if any, were required without engaging in a detailed analysis of the factual contents of the book. This would force the publisher to do exactly what we have said he has no duty to do—that is, independently investigate the accuracy of the text. We will not introduce a duty we

7. *See Hanberry v. Hearst Corp.,* 276 Cal.App.2d 680, 683–84, 81 Cal.Rptr. 519, 521 (1969) (Good Housekeeping held liable for defective product because it had given the product its "Good Housekeeping's Consumer's Guaranty Seal"). In *Hanberry,* the defendant had made an independent examination of the product and issued an express, limited warranty. The defendant here has done nothing similar.

8. *See First Equity Corp. v. Standard & Poor's Corp.,* 869 F.2d 175, 179–80 (2d Cir.1989) (investors who relied on inaccurate financial publications to their detriment may not recover their losses); *Jones v. J.B. Lippincott Co.,* 694 F.Supp. 1216, 1216–17 (D.Md.1988) (publisher not liable to nursing student injured in treating self with remedy described in nursing textbook); *Lewin v. McCreight,* 655 F.Supp. 282, 283–84 (E.D. Mich.1987) (publisher not liable to plaintiffs injured in explosion while mixing a mordant according to a book on metalsmithing); *Alm v. Van Nostrand Reinhold Co.,* 134 Ill.App.3d 716, 721, 89 Ill.Dec. 520, 524, 480 N.E.2d 1263, 1267 (1985) (publisher not liable to plaintiff injured following instructions in book on how to make tools); *Roman v. City of New York,* 110 Misc.2d 799, 802, 442 N.Y.S.2d 945, 948 (Sup.Ct.1981) (Planned Parenthood not liable for misstatement in contraceptive pamphlet); *Gutter v. Dow Jones, Inc.,* 22 Ohio St.3d 286, 291, 490 N.E.2d 898, 902 (1986) (Wall Street Journal not liable for inaccurate description of certain corporate bonds); *Smith v. Linn,* 386 Pa.Super. 392, 396, 563 A.2d 123, 126 (1989) (publisher of diet book not liable for death caused by complications arising from the diet), *aff'd,* 587 A.2d 309 (1991); *see also Herceg v. Hustler Magazine, Inc.,* 565 F.Supp. 802, 803 (S.D.Tex.1983) (finding magazine publisher not liable to family of youth who died emulating "autoerotic asphyxiation" as described in article but granting leave to amend incitement claim); *cf. Libertelli v. Hoffman–La Roche,* 7 Media L.Rptr. (BNA) 1734, 1736 (S.D. N.Y.1981) (publisher of Physician's Desk Reference not liable for failure to include drug warning because the work was like a published advertisement of products rather than a reference work); *Yuhas v. Mudge,* 129 N.J.Super. 207, 209–10, 322 A.2d 824, 825 (1974) (magazine publisher not liable for injury caused by advertised product); *Beasock v. Dioguardi Enters., Inc.,* 130 Misc.2d 25, 30–31, 494 N.Y.S.2d 974, 979 (Sup. Ct.1985) (truck association not liable for injuries caused by products manufactured in adherence to industry standards adopted, approved and published by association).

The *Weirum* case, cited by the plaintiffs, is inapposite. *Weirum v. RKO General, Inc.,* 15 Cal.3d 40, 123 Cal.Rptr. 468, 539 P.2d 36 (1975) (in bank). In *Weirum,* a radio station ran a promotional contest for teenagers encouraging them to pursue a travelling disc jockey. The station broadcast periodic updates on the disc jockey's location and encouraged teenagers to scramble to the next place. Two teens, who were speeding after the disc jockey, caused a fatal traffic accident. The radio station was held liable. In upholding the jury verdict, the *Weirum* court carefully limited its holding to the facts of the case, which the court described as "a competitive scramble in which the thrill of the chase to be the one and only victor was intensified by the live broadcasts which accompanied the pursuit." *Id.* at 48, 123 Cal.Rptr. at 473, 539 P.2d at 41; *see also id.* at 46 n. 4, 123 Cal.Rptr. at 471 n. 4, 539 P.2d at 39 n. 4 (noting that duty determinations must be made case by case). A publisher's role in bringing ideas and information to the public bears no resemblance to the *Weirum* scenario.

9. A stronger argument might be made by a plaintiff alleging libel or fraudulent, intentional, or malicious misrepresentation, but such is not contended in this case. *Gutter v. Dow Jones, Inc.,* 490 N.E.2d at 902 n. 4.

have just rejected by renaming it a "mere" warning label. With respect to the second, such a warning is unnecessary given that *no* publisher has a duty as a guarantor.

For the reasons outlined above, the decision of the district court is AFFIRMED.

ARIZONA STATE CARPENTERS PENSION TRUST FUND, a trust, et al., Plaintiffs–Appellants,

v.

William E. MILLER, and Georgia Miller, his wife; Keith E. Dolgaard, and Pleidas Dolgaard, his wife; Arizona Trust Company, an Arizona corporation; Arizona Trust Company Escrow Agency, Inc., an Arizona company; Indian Summer Investors, Inc., an Arizona corporation; Cougar Enterprise, Inc., an Arizona corporation, Defendants–Appellees,

Manufacturers Hanover Trust Company, a New York corporation, Intervenor–Appellee.

ARIZONA STATE CARPENTERS PENSION TRUST FUND, a trust, et al., Plaintiffs–Appellants,

v.

William E. MILLER, and Georgia Miller, his wife; Mitchell Hutchins Institutional Investors, Inc., a Delaware corporation, et al., Defendants–Appellants,

Manufacturers Hanover Trust Company, a New York corporation, Intervenor–Appellee.

Nos. 89–16682, 90–15253.

United States Court of Appeals, Ninth Circuit.

Argued April 9, 1991.

Submission Deferred April 9, 1991.

Resubmitted July 11, 1991.

Decided July 15, 1991.

As Amended Aug. 27, 1991.

Pension and welfare funds and their trustees brought action against investment manager and others seeking compensatory damages, rescission and attorney fees under Employee Retirement Income Security Act (ERISA) and seeking punitive damages for wanton, malicious, cruel and callous breaches of fiduciary duty under ERISA. The United States District Court for the District of Arizona, William P. Copple, J., dismissed punitive damages count. Funds and trustees appealed. The Court of Appeals, David R. Thompson, Circuit Judge, held that order dismissing punitive damages count was not a final, appealable order which could be certified for immediate appeal.

Appeals dismissed.

1. Federal Courts ⇐660.20

Even though decisions on only one of multiple claims is certified for immediate appeal, Court of Appeals must make sure it is dealing with a final judgment before exercising its jurisdiction. Fed.Rules Civ. Proc.Rule 54(b), 28 U.S.C.A.

2. Federal Courts ⇐584

A decision is final and appealable if it ends litigation on merits and leaves nothing for court to do but execute judgment. 28 U.S.C.A. § 1291.

3. Federal Courts ⇐660.20

Rule permitting certification for immediate appeal of a judgment on fewer than all of multiple claims does not relax finality required of each decision, as an individual claim, to render it appealable; rule simply allows judgment to be entered if it has requisite degree of finality as to individual claim in a multiclaim action. Fed.Rules Civ.Proc.Rule 54(b), 28 U.S.C.A.

4. Federal Courts ⇐660.20

Employee Retirement Income Security Act (ERISA) count for punitive damages for wanton, malicious, cruel and callous breaches of fiduciary duty was not separate and distinct from other counts seeking compensatory damages, rescission and at-

that law substantially burdens the free exercise of religion. *See* Fla. Stat. §§ 761.01—.05 (2003); *Warner*, 887 So.2d at 1035–36. The Florida Supreme Court concluded that the city's ordinance did not substantially burden Plaintiffs' exercise of their religions, agreeing with the district court's reasoning on this point. *Id.* at 1035. Accordingly, Florida's high court determined that the city's ordinance did not violate FRFRA. *Id.* Thus, the Florida court engaged in no further analysis under the statute. *Id.* We affirm the district court's decision on that same basis. We also affirm the district court's decision that the city's ordinance violates no provision in Florida's constitution.

[3, 4] The Florida Supreme Court also concluded that FRFRA—the state law at issue here—"expands the scope of religious protection beyond the conduct considered protected by cases from the United States Supreme Court." *Warner*, 887 So.2d at 1035. So after hearing from Florida that the city's ordinance violates no state law, we independently conclude that Plaintiffs' claims under the federal Constitution must also fail. The Free Exercise claim fails because the ordinance is a neutral law of general applicability. *See Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 1598–1602, 108 L.Ed.2d 876 (1990). The Free Speech claim fails because the ordinance is viewpoint neutral and reasonable. *See Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 112 S.Ct. 2701, 2705–06, 120 L.Ed.2d 541 (1992).[1]

AFFIRMED.

1. We reject Plaintiffs' argument that cemeteries are public fora. We are aware of no federal court that has concluded otherwise.

Mai Thi TRAN, Nader Nemai, Plaintiffs–Appellants,

v.

TOYOTA MOTOR CORPORATION, Toyota Motor Sales U.S.A., Inc., Tokai Rika Co., Ltd., Defendants–Appellees.

No. 04–12520.

United States Court of Appeals, Eleventh Circuit.

Aug. 18, 2005.

Background: Driver sued manufacturer of her vehicle, alleging negligence and strict liability in the manufacture, design, and testing of its passive restraint system. The United States District Court for the Middle District of Florida, No. 02-01014-CV-ORL-31-DAB, Gregory A. Presnell, J., entered judgment for manufacturer, and driver appealed.

Holdings: The Court of Appeals, Wilson, Circuit Judge, held that:

(1) instruction on strict liability design defect, was an erroneous statement of Florida law as it did not provide for a consumer expectation test as an independent basis for liability, and

(2) court did not err in admitting into evidence a study of other accidents involving vehicle's restraint system to demonstrate the system's overall effectiveness in a wide array of accidents.

Affirmed in part, reversed and remanded in part.

1. Federal Courts ⚿433

In a diversity case, the jury charge must accurately state the substantive law of the forum state.

2. Products Liability ⚿5

Under Florida law, a strict product liability action requires the plaintiff to prove that (1) a product (2) produced by a manufacturer (3) was defective or created an unreasonably dangerous condition (4) that proximately caused (5) injury.

3. Products Liability ⚿11, 96.5

Instruction on strict liability design defect, which was given in products liability action against seat belt manufacturer, was an erroneous statement of Florida law as it did not provide for a consumer expectation test as an independent basis for liability; such instruction was required since the product in question was one about which an ordinary consumer could form expectations.

4. Federal Civil Procedure ⚿2011

Exclusion of a third expert witness as cumulative was not an abuse of the district court's discretion in products liability action; it was not clear that third expert would have added any different information that plaintiff could not have presented through other experts who testified as to her neck injury. Fed.Rules Evid.Rule 403, 28 U.S.C.A.

5. Federal Civil Procedure ⚿1952, 2011

District courts have broad authority over the management of trials, and part of that authority is the power to exclude cumulative testimony. Fed.Rules Evid.Rule 403, 28 U.S.C.A.

6. Federal Courts ⚿823, 896.1

Court will only reverse a district court's ruling concerning the admissibility of evidence where the appellant can show that the judge abused his broad discretion and that the decision affected the substantial rights of the complaining party.

7. Evidence ⚿141

Substantial similarity doctrine did not apply where the evidence was pointedly dissimilar and not offered to reenact the accident giving rise to products liability suit against manufacturer of automobile's passive restraint system; therefore, district court did not err in admitting into evidence a study of other accidents involving vehicle's restraint system to demonstrate the system's overall effectiveness in a wide array of accidents.

Scott B. Cooper, Cooper, Jones & Jones, LLP, Irvine, CA, Lance A. Cooper, Cooper & Jones, LLP, Marietta, GA, for Plaintiffs–Appellants.

Wendy F. Lumish, Jeffrey A. Cohen, Carlton Fields, P.A., Miami, FL, David Bryan Shelton, Rumberger, Kirk & Caldwell, Orlando, FL, Richard H. Willis, Nelson, Mullins, Riley & Scarborough, LLP, Columbia, SC, for Defendants–Appellees.

Appeal from the United States District Court for the Middle District of Florida.

Before BLACK, WILSON and STAPLETON*, Circuit Judges.

WILSON, Circuit Judge:

On December 15, 1998, Mai Tran drove home from work in Orlando, Florida, in her 1983 Toyota Cressida. Her car crossed the center line and collided head-on with another vehicle. Tran's Cressida was equipped with a restraint system consisting of a manual lap belt and an automatic shoulder belt. The shoulder belt was a "passive" restraint. When the driver's door was opened, the belt slid along a

* Honorable Walter K. Stapleton, United States Circuit Judge for the Third Circuit, sitting by designation.

motorized track towards the front of the car, allowing the driver to enter or exit. When the door closed, the belt slid back on its track into place, restraining the driver.

Tran was not wearing the manual lap belt during the accident. As a result of the collision, Tran suffered a spinal cord injury that rendered her quadriplegic. Tran and her husband[1] sued Toyota Motor Corporation, the manufacturer of her vehicle, alleging negligence and strict liability in the manufacture, design, and testing of the Cressida, and that these defects were the cause of her injury. Specifically, she contended that the Cressida's automatic shoulder belt improperly fit shorter passengers like Tran. Tran was between 5′2″ and 5′4″ at the time of the accident. Tran asserted that the shoulder belt rode across her neck at the point of her injury. Tran claimed the belt instead should have been positioned to ride across her shoulder and sternum. Toyota's defense was that the passive restraint system was not defectively designed, that the shoulder belt did not cause Tran's spinal cord injury, that the belt could not have been across Tran's neck given the details of her injury, and that the cause of the injury was the inertial forces of the collision.

At the conclusion of an eight-day trial, the jury, finding that the vehicle's passive restraint system was not defective and that Toyota was not negligent, returned a verdict for Toyota. The district court entered a final judgment in accordance with the verdict, and Tran timely appealed.[2] Tran presents three claims on appeal, and we address them in turn.

I. Jury Instruction

[1] Tran contends that the court's instruction to the jury on strict liability design defect misstated the law. In a diversity case, the jury charge must accurately state the substantive law of the forum state. *Wilson v. Bicycle South*, 915 F.2d 1503, 1510 (11th Cir.1990). "[T]he manner of giving jury instructions is procedural rather than substantive," and thus our review is governed by federal law. *Id.* at 1511. "We review jury instructions *de novo* to determine whether they misstate the law or mislead the jury to the prejudice of the objecting party." *Conroy v. Abraham Chevrolet–Tampa, Inc.*, 375 F.3d 1228, 1233 (11th Cir.2004) (quoting *Palmer v. Bd. of Regents of the Univ. Sys. of Ga.*, 208 F.3d 969, 973 (11th Cir.2000)).

[2] "Under Florida law, a strict product liability action requires the plaintiff to prove that (1) a product (2) produced by a manufacturer (3) was defective or created an unreasonably dangerous condition (4) that proximately caused (5) injury." *McCorvey v. Baxter Healthcare Corp.*, 298 F.3d 1253, 1257 (11th Cir.2002) (citing *Edward M. Chadbourne, Inc. v. Vaughn*, 491 So.2d 551, 553 (Fla.1986)).

[3] Tran requested a jury instruction on design defect drawn from the Florida Standard Jury Instruction PL 5, which provides in relevant part that:

> A product is unreasonably dangerous because of its design if the product fails to perform as safely as an ordinary consumer would expect when used as intended or in a manner reasonably foreseeable by the manufacturer or the risk of danger in the design outweighs the benefits.

Standard Jury Instructions Civil Cases, 778 So.2d 264, 271 (Fla.2000). The court ruled that this instruction was "inappropriate" and declined to issue Tran's requested instruction. The court instead issued a

1. For convenience, this opinion refers to the Plaintiffs–Appellants as "Tran."

2. The district court exercised jurisdiction pursuant to 28 U.S.C. § 1332, and we have jurisdiction under 28 U.S.C. § 1291.

jury instruction crafted from the Restatement (Third) of Torts: Product Liability § 2. The relevant portion read as follows:

> A product is defective in design when the foreseeable risk of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller and the omission of the alternative design renders the product not reasonably safe to the user. This standard for judging whether a product is defective in design incorporates a reasonableness ("risk utility balancing") test. More specifically, the test is whether a reasonable alternative design would, at reasonable cost, have reduced the foreseeable risks of harm posed by the product and, if so, whether the omission of the alternative design by the seller rendered the product not reasonably safe. The balancing of risks and benefits in judging product design and marketing must be done in light of the knowledge of risks and risk-avoidance techniques reasonably attainable at the time of distribution.
>
> A broad range of factors may be considered in determining whether an alternative design is reasonable and whether its omission renders a product not reasonably safe. The factors include, among others, the magnitude and probability of the foreseeable risks of harm, the instructions and warnings accompanying the product, and the nature and strength of consumer expectations regarding the product, including expectations arising from product portrayal and marketing. The relative advantages and disadvantages of the product as designed and as it alternatively could have been designed may also be considered. Thus, the likely effects of the alternative design on product costs; the effects of the alternative design on product longevity, maintenance, repair, and esthetics; and the range of consumer choice among products are factors that may be taken into account. The relevance of these factors and other factors vary, depending on the facts as you find them. Moreover, the factors interact with one another. For example, evidence of the magnitude and probability of foreseeable harm may be offset by evidence that the proposed alternative design would reduce the efficiency and the utility of the product. On the other hand, evidence that a proposed alternative design would increase production costs may be offset by evidence that the product portrayal and marketing created substantial expectations of performance or safety, thus increasing the probability of foreseeable harm. Depending on the mix of these factors, a number of variations in the design of a given product may be relevant to determining whether a product is defective. In sum, the rule that a product is defective in design if the foreseeable risks of harm could have been reduced by a reasonable alternative design is based on the commonsense notion that liability for harm caused by product designs should attach only when harm is reasonably preventable.

R. 187 at 9–10.

While the court's instruction did mention "the nature and strength of consumer expectations" as one factor in the risk-utility test it directed the jury to apply, it did not, as Tran requested, provide for a consumer expectation test as an independent basis for liability. The court's instruction was an erroneous statement of Florida law.

A few months after Tran's trial, the Florida Fifth District Court of Appeal decided *Force v. Ford Motor Co.*, 879 So.2d 103 (Fla.Dist.Ct.App.2004). In that case, plaintiff Force alleged that he was injured in an automobile collision when his seatbelt failed to restrain him. He sought a jury instruction, drawn from the standard Florida jury instruction, that provided both the

consumer expectations test and the risk-utility test. The trial court agreed with the defendants that only the risk-utility test applied, and instructed the jury accordingly. *Id.* at 105

The District Court of Appeal reversed. First, the court held that every case to have addressed the issue confirmed the applicability of the consumer expectations test under Florida products liability law, "at least for some products." *Id.* at 108. Then, the court addressed the defendants' contention that the consumer expectations test was inappropriate in complex product cases, where the jury "simply has no idea how [the product] should perform." *Id.* at 109 (internal quotation omitted). Surveying cases, the court ultimately concluded that seatbelts were not such a product, and that consumers were capable of forming expectations about their performance. *Id.* at 109–10.

Force controls our decision on this issue. Toyota attempts to distinguish *Force* by noting that here the district court included consumer expectations as a factor in the risk-utility analysis, whereas the trial court in *Force* did not mention consumer expectations at all. However, Florida law recognizes consumer expectations as "one of the *independent* standards to be applied in at least some Florida products liability cases." *Id.* at 108 (emphasis added).

We emphasize that we do not hold that the consumer expectations test jury instruction is required in all product liability cases. We merely hold, like the court in *Force,* that the instruction is proper as an independent basis for liability under Florida law when the product in question is one about which an ordinary consumer could form expectations. Under Florida law, seatbelts are such a product. The district court did not have the benefit of the *Force* court's analysis, but in light of that case we must conclude that the court erred in not instructing the jury that it could find for Tran under a consumer expectations theory.

Our review of a district court's jury instruction is deferential, but we will reverse a district court because of an erroneous instruction if we are "left with a substantial and ineradicable doubt as to whether the jury was properly guided in its deliberations." *Carter v. DecisionOne Corp.,* 122 F.3d 997, 1005 (11th Cir.1997) (quoting *Johnson v. Bryant,* 671 F.2d 1276, 1280 (11th Cir.1982)). Tran was prejudiced by the erroneous instruction because the jury was not aware that consumer expectations was an adequate and independent basis for liability, rather than merely one factor among many in the risk-utility balance. Toyota's contention that Tran could have argued her consumer expectations theory to the jury is misplaced because, under the instruction the court issued, she was unable to argue that unmet consumer expectations were an independently sufficient basis for liability. Indeed, the jury could not have found Toyota liable even if consumer expectations were unmet, if it determined that other factors in the risk-utility balancing test outweighed that factor. In sum, we cannot say that the jury instruction "sufficiently instructed the jury so that the jurors understood the issues and were not misled." *Carter,* 122 F.3d at 1005 (quoting *Wilkinson v. Carnival Cruise Lines, Inc.,* 920 F.2d 1560, 1569 (11th Cir.1991)). Accordingly, we conclude that the district court erred in instructing the jury and that the error requires a remand for a new trial.

II. Exclusion of Dr. Clark's Testimony

[4] Tran next argues that the district court erred in excluding the testimony of Dr. Charles Clark. Tran proposed to present Dr. Clark as an expert witness to testify about Tran's neck injury from a "micro perspective." *Appellants' Brief* at

18. Tran was able to offer the testimony of the treating physician, Dr. Michael Cheatham. In addition, Tran presented the expert testimony of Dr. Joseph Burton, whose testimony Tran characterizes as encompassing a "macro perspective" on the collision and Tran's injury. *Id.* at 17.

After Dr. Burton testified, Toyota objected to Dr. Clark's testimony as cumulative. *See* Fed.R.Evid. 403. The court examined Dr. Clark's deposition and expert witness report, and extensively examined Dr. Clark's qualifications. The court concluded that Dr. Clark's opinions, and the bases for these opinions, were the same as those of Dr. Burton. The court sustained Toyota's objection and excluded Dr. Clark from testifying.

"The district court has broad discretion to determine the admissibility of evidence, and we will not disturb the court's judgment absent a clear abuse of discretion." *United States v. McLean,* 138 F.3d 1398, 1403 (11th Cir.1998). "An abuse of discretion can occur where the district court applies the wrong law, follows the wrong procedure, bases its decision on clearly erroneous facts, or commits a clear error in judgment." *United States v. Brown,* 415 F.3d 1257, 1266 (11th Cir.2005) (discussing admissibility of expert testimony) (citing *McClain v. Metabolife Intern., Inc.,* 401 F.3d 1233, 1238 (11th Cir.2005)).

Tran relies on *Johnson v. United States,* 780 F.2d 902 (11th Cir.1986). In that case, we held that the exclusion of a third expert witness as cumulative was an abuse of the district court's discretion. *Id.* at 906. We noted that the excluded expert's "analysis was somewhat different," his testimony was "more comprehensive," and the witness "had different, and arguably better qualifications than the other experts." *Id.* The same is not true here.

Drs. Burton and Clark relied on the same medical evidence in forming their opinions. In addition to testimony about the collision and inertial forces, Dr. Burton testified about Tran's neck injury and the impact of the seat belt. These "micro" issues are the same as those about which Dr. Clark would have testified. Moreover, the treating physician, Dr. Cheatham, testified about Tran's injury as well. In sum, Tran presented extensive testimony to the jury suggesting that the seat belt caused her injury, and it is not at all clear that Dr. Clark would have added any different information that Tran could not have presented through Drs. Burton and Cheatham. Additionally, unlike in *Johnson,* Dr. Clark's qualifications are not significantly greater than the other doctors'. Finally, Tran could have called Dr. Clark when given an opportunity for rebuttal, but did not call him at that time. While we note that in *Johnson* we held that a *third* expert witness was not cumulative, whereas Dr. Clark was excluded from testifying as a *second* expert witness, the mere number of witnesses is not conclusive when these other factors support the district court's decision.

[5] District courts have broad authority over the management of trials. *Id.* at 905. Part of this authority is the power to exclude cumulative testimony. Fed. R.Evid. 403; *Johnson,* 780 F.2d at 905. "Inherent in this [abuse of discretion] standard is the firm recognition that there are difficult evidentiary rulings that turn on matters uniquely within the purview of the district court, which has first-hand access to documentary evidence and is physically proximate to testifying witnesses and the jury." *United States v. Jernigan,* 341 F.3d 1273, 1285 (11th Cir.2003).

"[U]nder the abuse of discretion standard of review there will be occasions in which we affirm the district court even though we would have gone the other way had it been our call." *Rasbury v. Internal Revenue Serv. (In re Rasbury),* 24 F.3d

159, 168 (11th Cir.1994). On this record, we cannot say that the court would have abused its discretion had it allowed Dr. Clark to testify. The testimony likely would not have unduly prolonged the trial, Dr. Clark's practice and experience was somewhat different from that of the other doctors, and Tran might have presented her evidence differently had she known earlier that Dr. Clark would be excluded. Given our deferential standard of review, however, we cannot say that the district court's decision fell outside its permissible "range of choice." *United States v. Kelly,* 888 F.2d 732, 745 (11th Cir.1989). Therefore, we affirm the court's order excluding Dr. Clark's testimony as cumulative.

III. Toyota Study of Other Incidents

[6] Finally, Tran argues that the district court erred in admitting into evidence a study of Cressida accidents performed by Dr. Donald Huelke in the 1980s ("the Toyota study" or "the study"). "[T]his court will afford great deference to the decisions of the district court with regard to evidentiary matters. We will only reverse a district court's ruling concerning the admissibility of evidence where the appellant can show that the judge abused his broad discretion and that the decision affected the substantial rights of the complaining party." *Heath v. Suzuki Motor Corp.,* 126 F.3d 1391, 1395 (11th Cir.1997) (quoting *Wood v. Morbark Indus., Inc.,* 70 F.3d 1201, 1206 (11th Cir.1995)).

The Toyota study was an examination of other accidents involving the Cressida's restraint system. Toyota introduced the study to demonstrate the system's overall effectiveness in a wide array of accidents. Tran asserts that the Toyota study should not have been admitted because Toyota did not prove that the accidents in the study were substantially similar to hers.

> The doctrine of substantial similarity applies when one party seeks to admit prior accidents or occurrences involving the opposing party, in order to show, for example notice, magnitude of the danger involved, the [party's] ability to correct a known defect, the lack of safety for intended uses, strength of a product, the standard of care, and causation. In order to limit the substantial prejudice that might inure to a party should these past occurrences or accidents be admitted into evidence, courts have developed limitations governing the admissibility of such evidence, including the "substantial similarity doctrine." This doctrine applies to protect parties against the admission of unfairly prejudicial evidence, evidence which, because it is not substantially similar to the accident or incident at issue, is apt to confuse or mislead the jury.

Heath, 126 F.3d at 1396 (quoting *Jones v. Otis Elevator Co.,* 861 F.2d 655, 661 (11th Cir.1988)) (internal citation and footnotes omitted; alteration in original).

[7] The substantial similarity doctrine does not apply to situations, like this one, where the evidence is "pointedly dissimilar" and "not offered to reenact the accident." *Heath,* 126 F.3d at 1396–97. The evidence may have had some prejudicial effect on Tran's case by showing that the Cressida's restraint system generally performed well in a variety of accidents (a point that Tran's expert conceded). But the district court did not abuse its broad discretion in concluding that this prejudice did not outweigh the probative value of the study as part of Toyota's case that its restraint system was not defectively designed. *Id.* Therefore, we affirm the district court's ruling on Tran's objection to the admission of the Toyota study.

IV. Conclusion

For the reasons stated above, we affirm the district court's decision to exclude the testimony of Dr. Clark, as well as its deci-

sion to admit the Toyota study into evidence. However, we conclude that the jury instruction regarding design defect products liability was erroneous. Accordingly, we vacate the district court's order and remand the proceeding for a new trial consistent with this opinion.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

GUIDEONE ELITE INSURANCE COMPANY, Plaintiff–Counter–Defendant–Appellee,

v.

OLD CUTLER PRESBYTERIAN CHURCH, INC., Defendant–Counter–Plaintiff–Appellant,

J.A.W., Individually and as Legal Guardian/Parent of E.S.W., E.S.W., Husband of J.A.W., J.S.W., as Legal Guardian/Parent of E.S.W., Defendants–Appellants,

P.W., Interested Party–Appellant.

No. 04–12846.

United States Court of Appeals, Eleventh Circuit.

Aug. 19, 2005.

Background: Commercial general liability (CGL) insurer filed declaratory judgment action seeking determination that it did not owe duty to defend or indemnify insured church against state-court negligence claims arising from third party's perpetration of kidnapping, sexual assault, battery, robbery and false imprisonment offenses against victims, which commenced in insured's parking lot. The United States District Court for the Southern District of Florida, No. 03-21130-CV-JLK, James Lawrence King, J., 328 F.Supp.2d 1346, granted summary judgment in favor of insurer. Insured and victims appealed.

Holdings: The Court of Appeals, Fay, Circuit Judge, held that:

(1) District Court did not abuse its discretion in denying insured's motions for leave to amend its counterclaim to join additional nondiverse parties and to dismiss for lack of diversity jurisdiction;

(2) sexual misconduct exclusion barred coverage for injuries resulting from rape of victim;

(3) sexual misconduct exclusion did not bar coverage for victims' injuries resulting from false imprisonment, kidnapping, assault, robbery, and battery perpetrated against victims by third party;

(4) policy provided coverage for negligence claims asserted against insured, arising from victims' injuries caused by third party's commission of multiple crimes against victim; and

(5) each crime committed by the third party against victims was a separate "occurrence," for purpose of determining the limits of coverage.

Reversed with instructions.

1. Federal Courts ⇨813

The Court of Appeals must review the district court's exercise of authority to proceed with a declaratory judgment action for abuse of discretion.

2. Federal Courts ⇨812

When a decision is "discretionary," or a district court has discretion to grant or deny a motion, the court has a range of choice, and its decision will not be disturbed on appeal as long as it stays within

Shannon UNREIN, Plaintiff–Appellant,

v.

TIMESAVERS, INC., Defendant Third Party Plaintiff–Appellee,

v.

Foley–Martens Company, also known as Foley–Belsaw Company, a Minnesota corporation, Third Party Defendant–Appellee.

No. 04–1042.

United States Court of Appeals, Eighth Circuit.

Submitted: Nov. 18, 2004.

Filed: Jan. 10, 2005.

Background: Worker filed products liability action against manufacturer of industrial sander. Manufacturer filed third party contribution claim against employer. The United States District Court for the District of Minnesota, David S. Doty, J., entered summary judgment in favor of manufacturer, and worker appealed.

Holding: The Court of Appeals, Murphy, Circuit Judge, held that district court did not abuse its discretion in excluding mechanical engineer's proposed expert testimony.

Affirmed.

1. Federal Courts ⇐416

Admissibility of expert testimony in diversity cases is governed by federal law.

2. Federal Courts ⇐823

District court's decision to exclude expert's opinion is reviewed for abuse of discretion.

3. Evidence ⇐555.2

In evaluating proffered expert testimony, court should consider whether theory or technique is subject to testing, whether it has been tested, whether it has been subjected to peer review and publication, whether there is high known or potential rate of error associated with it, and whether it is generally accepted within relevant community. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

4. Evidence ⇐508, 555.2

There is no single requirement for admissibility of expert testimony as long as proffer indicates that expert evidence is reliable and relevant. Fed.Rules Evid. Rule 702, 28 U.S.C.A.

5. Evidence ⇐555.7

Experts are not required to manufacture new device or prototype in order for their opinion to be admitted in defective design products liability case. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

6. Evidence ⇐555.7

Expert proposing safety modifications must demonstrate by some means that they would work to protect machine operators but would not interfere with machine's utility. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

7. Evidence ⇐555.7

District court did not abuse its discretion in excluding mechanical engineer's proposed expert testimony that industrial sander was defectively designed and unreasonably dangerous because infeed area lacked safeguarding, even though expert stated that accident could have been avoided by adding braking device and safety trip cord, where engineer did not give any examples of trip cord's use with other industrial sanders or similar machines or prepare drawings showing how it would be integrated into sander. Fed.Rules Evid. Rule 702, 28 U.S.C.A.

William W. Fluegel, argued, Minneapolis, MN (Harry A. Sieben, Jr., Minneapolis, MN, on the brief), for appellant.

Kay Nord Hunt, argued, Minneapolis, MN (Gay B. Umess, St. Paul, MN, on the brief), for appellee.

Before MURPHY, LAY, and MELLOY, Circuit Judges.

MURPHY, Circuit Judge.

Shannon Unrein was injured at work while operating an industrial sander manufactured by Timesavers, Inc. She sued the manufacturer for a defective product, and the district court [1] granted summary judgment to Timesavers. Unrein appeals, arguing that the district court erred by excluding the testimony of her expert witness. We affirm.

Unrein was injured on February 6, 2001 while working in the Kingsford, Michigan plant of Foley–Martens. Her job was to brand logos onto wooden cutting boards and similar items, and she occasionally had to use the Timesavers sander to remove flaws in the boards. While she was feeding individual boards into the sander that day, she noticed that two boards had come together on the conveyor belt and were moving along one on top of the other. When she reached out to dislodge one of the boards, her right arm was pulled into the machine all the way up to the elbow. She tried to pull her arm out, but it was caught and she was unable to turn off the machine. She screamed, and two other workers came to help. One of them turned the machine off with a button apparently located on the back of the sander, and the other lowered the table inside the sander to release her arm. There were no witnesses to the accident, and Unrein does not know how the two boards came together on the belt or exactly how her arm was pulled into the sander.

Unrein sustained serious injuries to her hand and arm. The sanding belt came into contact with her hand, resulting in a "crush degloving" injury which exposed bone, shredded tendons, and caused tissue loss. She underwent four surgical procedures, physical therapy, and treatment at a pain clinic. She cannot move the index and middle fingers of her right hand and has only limited ability to move the other fingers. She has no feeling on the top of the hand where the skin was grafted, and she has numbness in her forearm, with scarring on the underside from contact with the conveyor belt.

Unrein filed a products liability suit against Timesavers, alleging defective design and failure to warn, and Timesavers in turn filed a third party contribution claim against Foley–Martens. Both are Minnesota corporations, but the Foley–Martens plant where Unrein was injured is in Michigan and she was paid worker compensation benefits under Michigan law, which unlike Minnesota law does not permit contribution claims against an employer. The district court denied as moot the summary judgment motion of Foley–Martens on the claim for contribution since summary judgment was entered against Unrein in the main action. Because of our disposition of Unrein's claim, we need not decide which state law applies to the contribution claim or reach its merits.

To prove her products claim Unrein engaged Tarald O. Kvalseth, Ph.D., to provide expert testimony. Dr. Kvalseth has graduate degrees in industrial engineering and an undergraduate degree in mechanical engineering. He is a professor of mechanical engineering at the University of

1. The Honorable David S. Doty, United States District Judge for the District of Minnesota.

Minnesota where he specializes in human factors engineering and safety. He has worked for some thirty years as an industrial consultant in the areas of human factors engineering, occupational safety, methods engineering, and work measurement. Previously he also worked as a design engineer. In preparation for his testimony in this case, Dr. Kvalseth reviewed various documents relating to the sander, the litigation, and safety standards. He also inspected the sander and watched a video showing it in operation. He then wrote a report outlining his proposed testimony.

Dr. Kvalseth's report stated that the sander was defectively designed and unreasonably dangerous because the infeed area lacked safeguarding. He stated that without proper safeguarding, an operator's hand could get caught in the "nip point" between the conveyor belt and the pinch roll; serious injury could result. Dr. Kvalseth further observed that the sander lacked a braking device that would make the conveyor belt stop quickly. In his opinion it took too much time for the conveyor belt to halt after one of the emergency stop buttons was pressed, and such a delay would enhance the injury to an operator whose hand was caught in the nip point. Although the machine had a warning posted on it ("Do not place hands between work piece and conveyor belt or near rolls"), the warning was no substitute for a design solution according to Dr. Kvalseth. In his opinion the most important measure for safety is to "design the hazard out of the machine." The next most important is to safeguard against the hazard.

Dr. Kvalseth discussed several different ways in which the Timesavers sander could be made safer. He said initially that a guard could be installed to serve as a physical barrier between the operator and the nip point. Such a guard would need to have an adjustable opening to accommodate wood of different dimensions and would need to be properly located to comply with safety guidelines. Other than pointing out these features in his report, he did not develop the guard concept further. He also discussed using a light beam attached to a brake so that if a hand were to cross the light beam, the conveyor belt would come to a quick stop. He pointed out that Foley–Martens had installed a light beam and fast brake in the sander after Unrein's accident, but he stated without explanation that this approach "would not generally have provided adequate protection for this nip point."

The "preferred and appropriate design solution" described in Dr. Kvalseth's report would have used "a continuous safety trip cord along the outside of each of the three sides of the infeed area of the sander," together with a brake to stop the conveyor belt quickly. Dr. Kvalseth stated that a sanding machine equipped in this way would halt if the operator were to hit the trip cord or press against it in an emergency. In Dr. Kvalseth's opinion, Unrein's injury would not have occurred if the sander had been designed as he proposed. According to his report, safety trip cord technology was first patented in 1904 as "safety gear for ironing machines." He claims that this technology has been used on a wide variety of equipment and machinery, but the report does not identify any of these other applications.

Timesavers moved for summary judgment on both claims. It argued that Unrein presented no evidence from Dr. Kvalseth's report or elsewhere that the warnings on the sander were inadequate or that the lack of some particular warning caused her injuries. The district court concluded that summary judgment on the failure to warn claim was appropri-

ate even if Dr. Kvalseth's proposed testimony were admissible because his report did not state that the warnings posted on the sander were inadequate and Unrein presented no evidence to support that claim. She does not appeal this ruling.

Timesavers also argued to the district court that the defective design claim should be dismissed because Dr. Kvalseth's proposed testimony was unreliable and that Unrein would not have a submissible case without it. In its analysis of the admissibility of Dr. Kvalseth's proposed testimony, the court applied *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). The court observed that Dr. Kvalseth had not furnished a design of his proposed safety features. Although he stated that safety trip cords are in widespread use, he gave no examples of their use with other industrial sanders or similar machines. The court concluded that Dr. Kvalseth had not shown that his suggested measures were feasible and compatible with the sander's operation, and his proposed testimony was therefore inadmissible. Because Unrein had presented no other evidence linking her injuries to any defective design of the sander, the court granted summary judgment to Timesavers. Unrein appeals this ruling.

[1, 2] Unrein argues that the district court erred in excluding Dr. Kvalseth's proposed testimony because it met the requirements of federal law and because Minnesota substantive law does not require proof of the feasibility of alternate designs in a design defect case. Since the admissibility of expert testimony in diversity cases is governed by federal law, *Clark v. Heidrick*, 150 F.3d 912, 914 (8th Cir.1998), we must focus on whether the proposed testimony meets the federal standard for admissibility. The district court's decision to exclude Dr. Kvalseth's opinion is reviewed for an abuse of discretion. *Peitzmeier v. Hennessy Indus., Inc.*, 97 F.3d 293, 296 (8th Cir.1996).

Federal Rule of Evidence 702 applies to admission of expert opinion, and it provides that: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Timesavers does not claim that Dr. Kvalseth is unqualified to render an opinion, but it contends that his opinion would not assist the trier of fact.

[3, 4] In *Daubert* the Supreme Court discussed the district court's gatekeeper role in screening expert testimony for reliability and relevance. *See* 509 U.S. at 589, 113 S.Ct. 2786. Some of the factors it identified for evaluation of proffered testimony were whether the theory or technique is subject to testing, whether it has been tested, whether it has been subjected to peer review and publication, whether there is a high known or potential rate of error associated with it, and whether it is generally accepted within the relevant community. *Id.* at 593–94, 113 S.Ct. 2786. This evidentiary inquiry is meant to be flexible and fact specific, and a court should use, adapt, or reject *Daubert* factors as the particular case demands. *See Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 141–42, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999). There is no single requirement for admissibility as long as the proffer indicates that the expert evidence is reliable and relevant.

Timesavers argues that Dr. Kvalseth's proposed testimony must be excluded because it did not satisfy any of the *Daubert* factors. Timesavers focuses in particular on the fact that Dr. Kvalseth's proposal had not been tested, stating in its brief

that engineers who design new devices almost always test their hypotheses. Timesavers went further in oral argument, suggesting that Dr. Kvalseth's proposed testimony would be admissible only if he had constructed a functional sander installed with his suggested safety trip cord and brake.

[5, 6] Our cases do not require that experts manufacture a new device or prototype in order for their opinion to be admitted. The question is whether the expert's opinion is sufficiently grounded to be helpful to the jury. We conclude that Dr. Kvalseth's proffered opinion lacked indicia of reliability for other reasons. Although he proposed using a safety trip cord, a commonly used device, he did not prepare drawings showing how it would be integrated into the Timesavers sander or present photographs showing its use with similar machines. *See Dancy v. Hyster,* 127 F.3d 649, 651–52 (8th Cir.1997) (excluding testimony of expert who had not designed proposed safety device or pointed to its use on similar machines). Dr. Kvalseth provided even less information about how the brake would function. An expert proposing safety modifications must demonstrate by some means that they would work to protect the machine operators but would not interfere with the machine's utility. *See Jaurequi v. Carter Mfg. Co.,* 173 F.3d 1076, 1084 (8th Cir.1999); *Peitzmeier,* 97 F.3d at 297.

Unrein relies on *Lauzon v. Senco Products, Inc.,* 270 F.3d 681 (8th Cir.2001), where there was a greater showing of reliability for the expert's opinion. The expert opinion in *Lauzon* was based in part on a very thorough examination and analysis of the bottom fire nail gun and its functioning. The expert measured the trigger force, the force needed to activate the bottom contact point, and the nail speed from various distances. He also performed a pendulum test to measure recoil forces, and he reproduced the site of the accident to reenact the work the plaintiff had been doing with the nail gun. *Id.* at 689. Additionally, the expert in *Lauzon* was prepared to testify that the bottom fire nail gun should be taken off the market because it was inherently dangerous and that the sequential fire nail gun would work just as well and was safer. *Id.* at 685. Because the expert was not proposing to modify the nail gun, there were no concerns about feasibility or compatibility.

[7] In this case we conclude that the district court did not abuse its discretion in excluding Dr. Kvalseth's proposed testimony. The judgment of the district court is therefore affirmed.

Randall R. BRADFORD, Plaintiff—Appellee,

v.

Mike HUCKABEE, Individually and as Governor of the State of Arkansas, et al., Defendants—Appellants.

No. 03–2972.

United States Court of Appeals, Eighth Circuit.

Submitted: Sept. 17, 2004.

Filed: Jan. 10, 2005.

Background: State's former executive chief information officer (ECIO) filed § 1983 action alleging that he was constructively discharged in violation of his First Amendment free speech rights. The District Court denied officials' motion to dismiss, and officials filed interlocutory ap-

Susana was only partially dependent on her father for her support. I therefore respectfully dissent from the court's opinion in this matter.

The testimony of Ms. Costa-Hughes and the findings of the Judge of Workers' Compensation are both ambiguous on the question of whether the $80 a week which Joaquim Costa paid for his daughter's support from the time of his divorce until his death constituted the full cost of her maintenance. If resolution of that issue were dispositive of the outcome of this appeal, I would remand this matter to the Division of Workers' Compensation for a further hearing and determination of the question. However, in the light of *Comparri* and *Stone*, whether Susana was fully or only partially dependent on her father depends solely on a determination whether or not Ms. Costa-Hughes shared Mr. Costa's legal |444obligation to support their daughter. As *Stone* recognizes, a minor child almost invariably has a legal right to financial support from both parents. No facts have been shown here to make that general rule inapplicable to the present case. Consequently, Susana was only partially dependent on her father within the meaning of *N.J.S.A.* 34:15-13f.

Since Mr. Costa earned gross wages of $618 a week and contributed $80 a week to his daughter's support, her dependency benefits will be 50 percent of his wages or $309 a week if she was fully dependent on her father and 50 percent of his contribution or $40 a week if she was only partially dependent on him. *Ricciardi v. Damar Products Co.*, 45 *N.J.* 54, 64-5, 211 *A.*2d 347 (1965). As *Ricciardi* points out, "It seems odd that a dependent should receive [the scheduled percentage] of *total wages* if the dependent subsisted fully on the contribution but only [the scheduled percentage] of the *contribution* if the dependency on the same contribution was less than total, but that is our statutory scheme...." *Id.* at 65, 211 *A.*2d 347.

The schedule of percentages in *N.J.S.A.* 34:15-13, whether applied to total wages or to contribution, reflects an evident determination by the Legislature that the compensation to be paid a surviving dependent of a deceased worker should ordinarily replace only part of the financial support which the survivor has lost. Even in an intact household in which both parents are working, the household members are likely to be dependent on the full amount of the take-home pay of both wage earners and they are certainly likely to be dependent on more than the scheduled percentage of the wages of the deceased wage earner. *See e.g. Ricciardi v. Damar Products Co., supra*, at 62-3, 211 *A.*2d 347. But treating a surviving minor child or children of divorced parents as fully dependent on the deceased father will almost invariably result, as it does in this case, in the workers' compensation benefits exceeding the weekly support actually contributed by the decedent during his lifetime. See the Supreme Court's current Schedule of Child Support Guidelines Percentages which |445shows that total child support ordinarily payable by both parents will never reach 50 percent of the parents' *combined* weekly *available* income for a family of three or fewer children. The majority's interpretation of *N.J.S.A.* 34:15-13 results in an excessive payment to the decedent's daughter and frustrates the legislative intent that compensation benefits should only partially replace the survivors' financial loss.

I would therefore hold that Susana was only partially dependent on her father for purposes of *N.J.S.A.* 34:15-13.

267 N.J.Super. 445

|445**William GRAVES and Joyce A. Graves, his wife, Plaintiffs-Appellants,**

v.

CHURCH & DWIGHT COMPANY, INC., a New Jersey Corporation, Defendant-Respondent.

Superior Court of New Jersey, Appellate Division.

Argued April 26, 1993.
Decided Aug. 11, 1993.

Plaintiff and his wife brought action for damages against baking soda manufac-

turer when he suffered stomach rupture after taking baking soda for indigestion. The Superior Court, Law Division, Middlesex County, entered judgment for defendant, and plaintiffs appealed. The Superior Court, Appellate Division, Keefe, J.A.D., held that: (1) evidence that plaintiff gave inconsistent evidence whether he ever read label and that his conduct was instinctive created sufficient facts to rebut presumption that he would have read warning label and heeded its advice; (2) use of word "probable" did not mislead jury into applying "but for" |446rather than "substantial factor" test for determining probable cause; (3) trial judge maintained distinction between subjective and objective standards for determining whether lack of warning was proximate cause of plaintiff's conduct on night in question; (4) use of phrase "night in question" did not foreclose jury from considering effect adequate warning might have had on plaintiff's conduct if warning had been placed on product years earlier; and (5) claim that defendant was liable under design defect theory was factually unsupported by evidence.

Affirmed.

1. Products Liability ⇐75.1

Heeding presumption applied in claim for negligent failure to warn, creating rebuttable presumption that plaintiff would have read any warning on product box and heeded it.

2. Products Liability ⇐75.1

Effect of heeding presumption is to require defendant to come forward with evidence sufficient to rebut presumption that plaintiff would have read warning on product and heeded it, or risk directed finding against it as to presumed fact.

3. Evidence ⇐89

Under rule regarding effect of rebuttable presumption, assumed fact must be taken to exist if evidence contrary to assumed fact does not create genuine issue of fact. Rules of Evid., N.J.S.A. 2A:84A, Rule 14.

4. Evidence ⇐89

Rebuttal evidence sufficient to create genuine issue of fact so that minds of reason people could find that presumed fact had not been established is quantum of evidence necessary to overcome presumption, and is sufficient to make existence or nonexistence of presumed fact question for jury. Rules of Evid., N.J.S.A. 2A:84A, Rule 14 note.

|4475. Evidence ⇐96(1)

Burden of coming forward with evidence to rebut presumption is on defendant, but burden of proof never shifts from plaintiff.

6. Trial ⇐205

There is general prohibition against calling presumptions to attention of jury.

7. Drugs and Narcotics ⇐21

Evidence that plaintiff smoked cigarettes despite warnings on cigarette packages provided jury with basis to make analogy between plaintiff's smoking and his projected behavior if health warning label had been on baking soda, to support rebuttal of presumption that he would have read label and heeded its advice.

8. Drugs and Narcotics ⇐21

Evidence that plaintiff gave inconsistent testimony concerning whether he had ever read *baking soda* label, and evidence that plaintiff's conduct in mixing and consuming baking soda was so instinctive that no warning would have helped, created sufficient facts to rebut presumption that plaintiff would have read label and heeded its advice.

9. Drugs and Narcotics ⇐20.1

Jury charge regarding proximate cause did not mislead jury into applying "but for" rather than "substantial factor" test for finding absence of adequate warning of possible stomach rupture on baking soda package was proximate cause of injury; mere use of word "probable" in portion of charge did not mislead jury into applying "but for" test after reading charge in its entirety, and plaintiff's failure to object to charge during trial could be taken to

mean that counsel did not consider claimed error to be significant in context of trial.

[448]10. **Negligence** ⇐56(1.9), 61(1)

Substantial factor test is modified standard of proximate cause which should be used to explain proximate causation in cases where occurrence of event is produced by concurrent causes.

11. **Drugs and Narcotics** ⇐18

Substantial factor test was appropriate test of proximate causation in action for negligent failure to warn of possible stomach rupture from baking soda; jury could have found on record that plaintiff's distress from dysfunctional stomach caused him to ingest baking soda, and that absence of adequate warning of possible stomach rupture was just one contributing factor.

12. **Trial** ⇐295(1)

On appeal, jury charge must be reviewed in its entirety to determine whether jury was confused or mislead by charge.

13. **Drugs and Narcotics** ⇐20.1

Trial judge properly maintained distinction between subjective and objective standards in determining whether lack of warning was proximate cause of plaintiff's ingesting defendant's product, where he directed jury first to apply reasonable person standard to determine whether defendant's warning was adequate, and then to determine if adequate warning would have deterred plaintiff specifically.

14. **Trial** ⇐194(5)

Trial judge properly commented to jury that human factors experts could not testify as to what went on in plaintiff's mind in determining whether adequate warning would have deterred him from consuming defendant's product.

15. **Trial** ⇐186

Judge may comment on evidence when it will assist jury in its findings.

[449]16. **Drugs and Narcotics** ⇐20.1, 21

Instructing jury to consider whether lack of warning was proximate cause of plaintiff's ingesting defendant's product on night in question did not limit jury's consideration of all evidence relevant to issue of proximate causation; plaintiff had burden of proving that defect in product's warnings was proximate cause of plaintiff's consumption of product on specific date.

17. **Drugs and Narcotics** ⇐21

Claim that defendant was liable for injuries caused by plaintiff's consumption of its baking soda product as antacid under design defect theory was not supported by evidence; there was no suggestion that baking soda was dangerous product for all purposes.

18. **Appeal and Error** ⇐1026

It is not sufficient simply for plaintiffs to prove on appeal that some legal error exists in trial record; plaintiffs must show that legal error was of such nature as to have been clearly capable of producing unjust result. R. 2:10–2.

19. **Appeal and Error** ⇐1056.4

Any error in excluding evidence of changes in label after injury to warn that baking soda could generate enough gas to cause stomach rupture was not reversible, where jury had already resolved question of product defect in favor of plaintiff. R. 2:10–2.

Adrian I. Karp, Morris Plains, for plaintiffs-appellants (Mr. Karp, Morris Plains, and Kenneth M. Trombly, Washington, DC, attorneys).

John I. Lisowski, Livingston, for defendant-respondent (Morgan, Melhuish, Monaghan, Arvidson, Abrutyn & Lisowski, attorneys; Clifford James, Shea & Gould, New York City, of counsel).

Before Judges PETRELLA, D'ANNUNZIO and KEEFE.

The opinion of the court was delivered by

[450]KEEFE, J.A.D.

Plaintiff William Graves suffered a spontaneous stomach rupture in the early morning hours of August 22, 1979, after ingest-

ing Arm & Hammer baking soda manufactured by Church & Dwight Company, Inc. (Church & Dwight) which he had taken to resolve indigestion. Misdiagnosed as having suffered a perforated ulcer, Graves only came to believe in 1983 that the baking soda caused his injury. On August 8, 1984, he and his wife filed a complaint against Church & Dwight.[1] The eight-count complaint alleged misrepresentation and mislabeling; negligent failure to warn; strict liability in tort; breach of warranty; and fraud.[2]

The matter was tried over several weeks. Only the strict liability warning issue was submitted to the jury, the other claims having been dismissed. The jury was given four interrogatories to answer pertaining to liability. The questions were:

1. Did the plaintiff consume defendant's Arm & Hammer Baking Soda on the night in question?

2. Was the Arm & Hammer Baking Soda product defective by reason of its failure to warn about possible stomach rupture?

3. Was the failure to warn a proximate cause of plaintiff's consumption of Arm & Hammer Baking Soda on the night in question?

4. Was the consumption of Arm & Hammer Baking Soda a substantial contributing factor proximately causing plaintiff's stomach rupture?

The jury unanimously found, in response to the first question, that defendant's product was involved in the incident. By a five-to-one majority it answered questions two in the affirmative and [451] three in the negative. Having found that the failure to warn was not a proximate cause of Graves' injury, the jury did not answer question four.[3]

The trial judge entered judgment in favor of defendant and denied plaintiffs' post-trial motion. Plaintiffs filed a notice of appeal, and defendant was permitted to file a *nunc pro tunc* cross-appeal from the denial of its summary judgment motion. However, defendant has not briefed the issue raised in its cross-appeal. Thus, the issue is deemed waived, and the cross-appeal is dismissed. *Matter of Bloomingdale Conval. Ctr.*, 233 *N.J.Super.* 46, 48 n. 1, 558 *A.*2d 19 (App.Div.1989).

The trial record discloses the following pertinent facts. As a child, William Graves had been given Arm & Hammer baking soda as an antacid by his grandmother. She would take a teaspoon and measure out "a certain amount" and put it in a glass of water. Plaintiff, however, had not used this home remedy from the time he stopped living with his grandmother in 1939 until August 22, 1979, the date of his injury.

On August 21, 1979, Graves, then 52 years old, was senior assistant editor for *National Geographic* magazine. He and his wife Joyce, his bride of six months, were in Graves' house in Martha's Vineyard. His then 17 year-old son was also there. Graves ate dinner around 6:30 p.m.. He characterized the meal,[4] which was finished by 7:45 p.m., as "substantial but not huge."

He felt fine when he retired to the bedroom shortly after dinner. He took an iced brandy with him, and read for no more

1. References herein to "Graves" or "plaintiff" is to William Graves. References to "plaintiffs" is to William and Joyce A. Graves.

2. Church & Dwight's motion to dismiss the complaint as time-barred or, in the alternative, for a *Lopez v. Swyer* hearing was denied by order of April 22, 1985. In response to defendant's motion for leave to appeal, a panel of this court summarily reversed the denial of a *Lopez* hearing.

After the hearing on remand, the complaint was dismissed as time-barred. This court reversed that dismissal. 225 *N.J.Super.* 49, 541 *A.*2d 725 (App.Div.1988). A divided Supreme Court split evenly on its review of the decision, and the Appellate Division ruling stood. 115 *N.J.* 256, 558 *A.*2d 463 (1989).

3. Question four apparently was based on defendant's theory that the mere ingestion of any liquid would have caused Graves to suffer the spontaneous rupture.

4. For dinner plaintiff had two martinis with some Fritos, followed by chili (probably one eighteen ounce bowl but possibly part of a second), cornbread, salad with dressing, and a glass of wine.

than an hour, before going to sleep between 9:00 and 9:30 p.m.

|452He awakened around or shortly after midnight with noticeable, although not severe, heartburn. Although he had been diagnosed with an ulcer at twenty-two, he had no real indigestion problems. He infrequently took Bisodol for bouts of indigestion; however, on this occasion, he had no Bisodol and thought of his grandmother's remedy.

He went to the kitchen and took a box of baking soda out, "sifted some of the baking soda into the bottom of the glass," and filled the approximately eight-ounce glass with water to within an inch of its top.[5] This was the same technique he used when he took Bisodol. The baking soda was sufficient in amount to cover the bottom of the glass.

At trial, Graves demonstrated the amount of baking soda he used on August 22 and the manner in which he mixed it with water. The amount was later stipulated to be 5.7 grams. The half-teaspoon dosage recommended by defendant measures 1.8 grams.

Graves drank the solution down quickly. In four gulps he emptied two-thirds of the glass. Before he could return the glass to the counter, an enormous pain drove him to his hands and knees. His wife heard his screams and called for help. Graves told his wife that if he passed out, to tell emergency personnel that "all he did was take a little baking soda."

Graves underwent surgery on August 22, 1979 and was misdiagnosed as suffering from a perforated ulcer. He had six subsequent surgeries for abscesses or hernia repair. His medical specials as of the time of trial totalled $55,085.84.

Baking soda has been used as an antacid for more than 100 years. When the Food and Drug Administration ("FDA") was formed in the 1930s, baking soda, like aspirin, was accorded |453"GRAS" status; i.e., "Generally Recommended as Safe." Such products were exempt from FDA testing.

Over the years, the recommended dosage varied from one-quarter teaspoon to two teaspoons. In 1979, the Arm and Hammer box recommended one-half teaspoon in a glass of water.

In the 1960s and 1970s, the FDA conducted monograph studies on all GRAS products. Baking soda had its turn in 1974, when the FDA told manufacturers how to label their packaging, including a recommended dosage.

The FDA employed five physicians to help with its baking soda monograph. Two of these, Dr. John Morrissey and Dr. Edward Moore, testified for the plaintiffs at trial. Both said that they relied on the manufacturer to tell them of the potential for, or known, adverse reactions; neither relied on the articles suggesting a causal relationship between baking soda and spontaneous stomach rupture that were included in a bibliography provided to them by FDA researchers.

According to Morrissey and Moore, they would have been concerned with the possibility of stomach rupture from baking soda if they had known about these articles when they were consulting for the FDA. As it was, the FDA was concerned with the effect of long-term use on certain chronic conditions.

Much of the testimony at trial focused on these articles and Church & Dwight's lack of knowledge of their existence. There is no doubt that some of them predate Graves' accident by more than fifty years. The defendant, however, disclaimed any pre–1979 knowledge of them.

The basic premise of both sides was that Graves' stomach was overly distended by his meal, and that for some reason it was not emptying normally. Plaintiffs' theory essentially was that the baking soda combined with stomach acid to create a large volume of gas immediately that, in turn, caused the stomach rupture. Defendant

5. At trial an attempt was made to show that Graves took Davis baking powder, rather than Arm & Hammer baking soda. This dispute accounts for the first special interrogatory on product identification. The issue is not, however, being disputed on appeal.

essentially sought to prove that Graves' stomach, whether emptying properly or not, was full enough that the |454 volume of water in which Graves dissolved the baking soda was alone sufficient to cause the rupture, that the *very small* amount of gas produced was alone sufficient, or that the two factors acted together in concert.

Plaintiffs' gastroenterologists Lawrence Feinman, Morrissey, and Moore found baking soda, as an antacid, could be unsafe in any dosage. However, defense expert, Dr. John Fordtran, opined that it was possible for the amount of baking soda taken by plaintiff to cause spontaneous stomach rupture under certain circumstances, which he hastened to add were not present in Graves' case, and defense expert, Francis Morel, an M.I.T. "aqueous chemist," felt the volume of the bicarbonate solution, but not the bicarbonate, caused the rupture of the overfilled stomach.

In 1979, the Arm and Hammer label read in pertinent part:

> *AS AN ANTACID*
>
> Effective as an antacid to alleviate heartburn, sour stomach and/or acid indigestion.
>
> *DIRECTIONS:* ½ tsp. in glass of water every 2 hours up to maximum dosage or as directed by physician.
>
> . . . . .
>
> *WARNINGS:* Do not take more than eight ½ tsp. for persons up to 60 years old or four ½ tsp. for persons 60 years or older in a 24 hour period, or use the maximum dosage of this product for more than 2 weeks, except under the advice and supervision of a physician. Do not use this product except under the advice and supervision of a physician. Do not use this product except under the advice and supervision of a physician if you are on a sodium restricted diet.

Graves vacillated between saying that he had never read the label on the Arm and Hammer box, and saying that he must have read the label as a child in his grandmother's house. In any event, he did not read the label in the early hours of August 22, 1979.

Plaintiffs' experts denounced the label, but were far from unanimous as to what warnings should have been given. Dr. Morton Leeds, a pharmacologist, opined that the label, "at a minimum," should indicate that the recommended dose "should not be exceeded." Dr. Feinman testified that the label contained no warning against taking too much baking soda when the stomach was overly |455 distended. Dr. Morrissey said the label did not adequately warn of significant medical risks, although he characterized Graves' injury as a "rare phenomenon."

Dr. Moore suggested that only if "you replace the biceps [in the company's logo] with a skull and cross bones" was it possible that "maybe somebody would notice" the warning. Dr. Brian Strom, a clinical epidemiologist, opined that the 1979 label gave no notice of possible gastric rupture, and did not reveal the actual dangerousness of the product.

Finally, plaintiffs offered a human factors expert, Dr. Robert Cunitz, to testify about the psychology of warnings. He similarly opined that there should have been a warning as to the possibility of stomach rupture, and that the 1979 label was ineffective. He came as close as any of plaintiffs' experts to talking about what kind of warning was necessary.

Cunitz suggested that the warning be moved to the front of the package:

> You can use the English language. You could use a pictograph of some picture of a stomach rupturing or something along those lines following somebody ingesting this product from a glass. I mean that would be pretty graphic[.] ... [A] circle and a slash through it would do or an x across it would do to let people know not to do that. Alternatively, you might have to spell out the hazard in words but you also need to include an instruction to avoid harm and you might show a cup or a glass with the product in it and a circle with a circle and a slash through it to indicate that one shouldn't take it this way and then back up with the written language.

After acknowledging that there were probably "twenty ways" to warn, Cunitz went on to suggest that in order to be effective to change a long established pattern of use, the Arm and Hammer name should be relegated to the top one-eighth or one-quarter of the front of the box the logo moved elsewhere, and that a warning take up the rest of the front panel.

Defendant's expert on warnings, psychologist Dr. Donald Horst, offered an opinion that, given the long-accepted practice of using baking soda as an antacid and the general perception of it as safe, warning against a potential danger would be difficult. He did not hold out "much hope" of affecting what people will do with a [456]product if they are generally familiar with its propensities. He believed that using an extreme pictograph simply destroys credibility of the product, and in any event, a skull and cross bones is an inaccurate warning for baking soda. Horst suggested that no warning was needed.

On appeal plaintiffs' present the following issues for resolution:

POINT I IT WAS PLAIN ERROR FOR THE COURT TO HAVE SUBMITTED JURY QUESTION 3, WHICH STATED, "WAS THE FAILURE TO WARN A PROXIMATE CAUSE OF PLAINTIFF'S CONSUMPTION OF ARM & HAMMER BAKING SODA ON THE NIGHT IN QUESTION?"

A. THE TRIAL COURT ERRED IN APPLYING A "BUT FOR" RATHER THAN A "SUBSTANTIAL FACTOR" TEST IN THE VERBIAGE OF QUESTION 3 AND IN INSTRUCTING THE JURY ON PROXIMATE CAUSE.

B. BECAUSE DEFENDANT'S PRODUCT BORE NO WARNING ON THE KNOWN RISK OF STOMACH RUPTURE, THE TRIAL COURT ERRED IN NOT INSTRUCTING THE JURY THAT PLAINTIFF WAS ENTITLED TO A REBUTTABLE PRESUMPTION THAT HE WOULD HAVE READ AND HEEDED A PROPER LABEL.

C. THE TRIAL COURT ERRED IN NOT INSTRUCTING THE JURY THAT HAD DEFENDANT'S PRODUCT BORNE A WARNING, THIS DANGER COULD HAVE BEEN READ BY PLAINTIFF ON PRIOR OCCASIONS OR BEEN COMMUNICATED TO HIM BY THIRD PARTIES, SUCH AS HIS WIFE.

POINT II: THE TRIAL JUDGE COMMITTED REVERSIBLE ERROR IN INSTRUCTING THE JURY TO INTERCHANGEABLY APPLY BOTH SUBJECTIVE AND OBJECTIVE STANDARDS IN DETERMINING WHETHER THE LACK OF WARNING WAS THE PROXIMATE CAUSE OF PLAINTIFF'S INGESTING DEFENDANT'S PRODUCT ON THE NIGHT IN QUESTION AND IN HIS COMMENTS ON THE EVIDENCE.

POINT III:

A. THE DISMISSAL OF PLAINTIFF'S CLAIM OF STRICT LIABILITY PREDICATED UPON DEFENDANT'S PRODUCT BEING UNREASONABLY DANGEROUS CONSTITUTED PLAIN ERROR.

B. THE COURT ERRED IN DISMISSING PLAINTIFF'S CAUSE OF ACTION ALLEGING A MISREPRESENTATION AND A MISLABELING OF DEFENDANT'S PRODUCT.

POINT IV: WHERE DEFENDANT CONTENDED THAT NO WARNING WOULD HAVE PREVENTED PLAINTIFF'S INGESTION OF ITS PRODUCT, THE TRIAL JUDGE IMPROPERLY DENIED THE ADMISSION INTO EVIDENCE OF BOTH CONTEMPLATED AND ACTUAL POST-ACCIDENT LABEL CHANGES.

POINT V: THE JURY'S VERDICT ON QUESTION 3 WAS AGAINST THE WEIGHT OF THE EVIDENCE.

[457]POINT VI: A PARTIAL NEW TRIAL SHOULD BE GRANTED AS TO THOSE ISSUES WHICH HAVE NOT ALREADY BEEN DETERMINED BY THE JURY'S VERDICTS.

Our review of the record in light of the issues presented satisfies us that there is no error in the Law Division proceedings warranting our intervention. Therefore,

we affirm the judgment under review for the reasons stated herein.[6]

I

In response to the second interrogatory submitted to the jury, the jury found that defendant's baking soda product was defective by reason of its failure to warn about possible stomach rupture.

Plaintiffs' first argument on appeal is that "[i]t was error to submit to the jury the issue of proximate cause between the effect of a non-existing warning and plaintiff's ingestion of the product, where he possessed no conscious knowledge of the danger." The quoted statement from plaintiffs' brief implies that proximate cause, as found in the third jury question, is not an issue in a strict liability case where the plaintiff is unaware of the specific danger, and the manufacturer fails to warn of the danger in its product instructions. Another way of stating plaintiffs' argument is that, where a product is found to be defective for a lack of proper warning, there is a conclusive presumption that a consumer would have read and heeded a warning had it been given; thereby relieving Graves of his burden of proving proximate causation between the defect and his consumption of the product. No authority is cited to support plaintiffs' argument. Indeed, the law is clearly to the contrary. There are a number of cases from our Supreme Court, and this court, that require proof of proximate causation in failure to warn cases where the plaintiff was unaware of the danger. *See*, e.g. *Michalko v. Cooke Color & Chem. Corp.*, 91 *N.J.* 386, 402, 451 *A.*2d 179 (1982); *Freund v. Cellofilm Properties, Inc.*, 87 *N.J.* 229, 241, 432 *A.*2d 925 (1981); *Molino v.*]458*B.F. Goodrich Co.*, 261 *N.J.Super.*, 85, 98–101, 617 *A.*2d 1235 (App.Div.1992); *Coffman v. Keene Corp.*, 257 *N.J.Super.* 279, 285, 608 *A.*2d 416 (App.Div.), *certif. granted,* 130 *N.J.* 596, 617 *A.*2d 1219 (1992).

Rather, plaintiffs' question, properly phrased, should be whether there was a genuine factual dispute on the issue of proximate causation which required jury resolution. Evidence that the plaintiff had some knowledge of the danger is, for sure, one way in which such a fact issue may be created. *See Campos v. Firestone Tire & Rubber Co.*, 98 *N.J.* 198, 209, 485 *A.*2d 305 (1984). That, of course, does not mean to say that the converse is true; i.e., it does not follow that there is no issue of fact simply because plaintiff had no knowledge of the danger. Fact issues pertaining to proximate causation may be created where there is evidence that

> the user was blind, illiterate, intoxicated at the time of the use, irresponsible or lax in judgment or by some other circumstance tending to show that the improper use was or would have been made regardless of the warning.
>
> [*Coffman v. Keene Corp., supra,* 257 *N.J.Super.* at 286, 608 *A.*2d 416 (App. Div.1992), quoting *Technical Chem. Co. v. Jacobs,* 480 *S.W.*2d 602, 606 (Tex. 1972).]

For the reasons stated *infra* at I.A. there were sufficient facts to submit the issue to the jury.

A.

[1] Plaintiffs alternatively challenge the propriety of submitting the third jury question, contending that, in a failure to warn case, a rebuttable presumption that Graves would have read any warning on the box, and heeded it, is created as a matter of law. They argue that the trial judge erred in failing to consider the presumption and direct a verdict in their favor, because there was no evidence in the record to rebut the presumption. On the other hand, plaintiffs argue that, even if there was sufficient rebuttal evidence, the judge should have instructed the jury that plaintiffs were to receive "the benefit of the doubt" that a warning would have been read and heeded; i.e. the judge should have informed the jury that such a presumption exists.

]459Although plaintiffs contended at trial that they were not obligated to prove proximate causation, the precise argument con-

6. We do not address the issues necessarily in the same order as they were raised by plaintiff.

cerning the existence of a "heeding presumption" was not raised until post-trial motions. However, because the heeding presumption is so intertwined with the concept of proximate causation, we deem it appropriate to decide the issue on the merits, rather than procedurally bar plaintiffs from raising it now.

In *Campos v. Firestone Tire & Rubber Co., supra.*, decided before this case was tried, there was a suggestion that a heeding presumption might find favor with the Supreme Court. However, it was not until *Coffman v. Keene Corp., supra,* was decided, that an appellate court of this state definitively found that the absence of a warning created a rebuttable presumption that a plaintiff would have read a proper warning had it been given. More specifically, *Coffman* stands for the proposition that the heeding presumption is sufficient to sustain plaintiff's burden of proof on proximate causation where the "defendant produces no evidence to overcome the presumption." 257 *N.J.Super.* at 290, 608 *A.*2d 416.

We have no doubt that the *Coffman* court did not intend to limit its holding to asbestos cases, as defendant here suggests. The heeding presumption had its genesis in comment j of the Restatement of Torts 2d, 402A, *See, Technical Chem. Co. v. W.T. Jacobs,* 480 *S.W.*2d 602, 606 (Tex. 1972). It has been applied to defective warning cases involving various products in the opinions of other states. *See,* e.g., the list of cases cited in *Coffman, supra,* 257 *N.J.Super.* at 287–88, 608 *A.*2d 416. Subsequent to *Coffman,* other parts of this court have stated that the heeding presumption has general application. *Fabian v. Minster Machine Co.,* 258 *N.J.Super.* 261, 278, 609 *A.*2d 487 (App.Div.), *certif. denied,* 130 *N.J.* 598, 617 *A.*2d 1220 (1992) (involving a press/product liability case); *Molino v. B.F. Goodrich Co.,* 261 *N.J.Super.* 85, 100–01, 617 *A.*2d 1235 (App.Div. 1992) (involving tire/product liability case, specifically noting that the "presumption has been applied to products liability cases not involving asbestos.")

460 [2] Thus, we agree with plaintiffs that a heeding presumption was relevant in the context of plaintiffs' liability theory. The effect of such a presumption is to require defendant to come forward with evidence sufficient to rebut the presumption, or risk a directed finding against it as to the presumed fact. *In re Weeks,* 29 *N.J.Super.* 533, 537–38, 103 *A.*2d 43 (App. Div.1954).

[3, 4] While we have looked to the law of other states in deciding whether the heeding presumption should be adopted as a part of the substantive law of this State, *see Campos* and *Coffman, supra,* once the presumption has been adopted as a part of our substantive law, it is clear that the effect to be given to the presumption is dictated by the evidence law of New Jersey. *Evid.R.* 14 provides:

> [I]f evidence to the contrary of a presumed fact is offered, the existence or non-existence of such fact shall be for the trier of fact, unless the evidence is such that the minds of reasonable men would not differ as to the existence or nonexistence of the presumed fact.

Under the rule, an assumed fact must be taken to exist if evidence contrary to the assumed fact does not create a genuine issue of fact; i.e. if "reasonable men would not differ as to the existence or non-existence of the presumed fact." *Id.; Harvey v. Craw,* 110 *N.J.Super.* 68, 74, 264 *A.*2d 448 (App.Div.), *certif. denied,* 56 *N.J.* 479, 267 *A.*2d 61 (1970). Conversely, it is logical to conclude that rebuttal evidence sufficient to create a genuine issue of fact so that the "minds of reasonable men" could find that the presumed fact had not been established, is the quantum of evidence necessary to overcome the presumption, and is sufficient to make the existence or non-existence of the presumed fact a question for the jury. Biunno, *Current N.J.Rules of Evidence,* 1967 Commission Note and comment 1 on *Evid.R.* 14 (1993).

[5] The burden of coming forward with evidence to rebut the presumption is on the defendant, but the burden of proof never shifts from the plaintiff. *Ford Motor Co. v. Township of Edison,* 127 *N.J.* 290, 314–15, 604 *A.*2d 580 (1992). That is to say,

once the presumption is rebutted, the risk of non-persuasion remains with the party upon whom the burden of proof was originally placed, in [461]this case, the plaintiff. *Rumson Bor. v. Peckham*, 7 *N.J.Tax* 539, 548–49 (Tax 1985).

[6] Furthermore, under New Jersey law, there is a general prohibition against calling presumptions to the attention of a jury. *See Jurman v. Samuel Braen, Inc.*, 47 *N.J.* 586, 222 *A.*2d 78 (1966) and *Kirschbaum v. Metropolitan Life Ins. Co.*, 133 *N.J.L.* 5, 42 *A.*2d 257 (E & A 1945). For these reasons, plaintiffs' reliance on *Nissen Trampoline Co. v. Terre Haute First National Bank*, 332 *N.E.*2d 820 (Ind. 1975), *rev'd on other grounds*, 265 *Ind.* 457, 358 *N.E.*2d 974 (1976) (holding that the burden of proof on the heeding presumption shifts to the manufacturer), and their reliance on *Butz v. Werner*, 438 *N.W.*2d 509 (N.D.1989) (holding that a jury should be instructed on the heeding presumption), is misplaced, since the evidence law of the states where they were decided is contrary to that of New Jersey.[7]

[7] Plaintiffs contend that there was no rebuttal evidence contrary to the presumed fact that Graves would have read a warning had it been given, and, for that reason, proximate cause was not an issue in the case. Defendant, on the other hand, calls our attention to several areas of evidence which it claims rebutted the heeding presumption. Although we do not endorse all of defendant's arguments on this point, there are several areas of evidence which sufficiently support the conclusion that a jury question was presented.

Graves characterized himself as a "compulsive" reader, especially paying attention to product labels because of a potentially fatal allergy to nuts. In that respect Graves testified, on direct examination, what he would have done if he had seen a warning on the baking soda box:

> Q. My final question to you, Mr. Graves is this: Assume back in—on August 22, 1979, you picked up or load [sic] from your shelf in your cupboard that box of Arm & Hammer Baking Soda or a similar box.... And you had seen on it a big skull [462]and cross bones or bold letters saying, may cause stomach rupture, being a reader and being a man with an allergy such as you've described to nuts, what do you believe that you would have done?
>
> . . . . .
>
> A. I wouldn't have taken it. I would have put up with the heartburn. I'm conditioned all my life to reading warnings and knowing that certain foods are enormously harmful to me and I think I simply wouldn't have taken it if I had seen an adequate warning or something to call my attention to it.

By introducing evidence in his direct case concerning what he would have done had there been a warning on the product, Graves, perhaps, eschewed reliance on the heeding presumption, but, at the very least, put his credibility as a careful reader and heeder of health warnings in issue.

For at least five years prior to his accident, Graves smoked two to three packs of cigarettes a day, and had a cigarette cough which would sometimes begin in the morning when he got up. He also attributed being winded when climbing stairs to his cigarette consumption. He was aware that cigarettes bore a warning label from the Surgeon General of the United States concerning health hazards. Nonetheless, when asked whether he would have smoked cigarettes on the morning of the accident had a skull and cross bones been on the package of cigarettes, Graves admitted that he "hadn't thought of that."

The evidence concerning Graves smoking, notwithstanding warnings on cigarette packages, was admitted without objection. Such evidence, in our view, provided the jury with a basis to make an analogy between Graves smoking in the face of the health warnings on cigarettes, and his projected behavior if a warning had been on the baking soda.

7. We note that *Evid.R.* 301, now effective in this State, is consistent with our rulings concerning the effect of a rebuttable presumption in New Jersey.

Additionally, Graves gave inconsistent testimony as to when he last read the baking soda label. Indeed, a jury could reasonably conclude that he had never done so. In any event, while the inconsistency is not determinative, standing alone, the history he gave on reading the label is. The latest date on which Graves could have read the label, was 1939, the year he stopped living with his grandmother. He never remembers reading the label for [463]recommended dosage. Indeed, there is one exchange in the record that puts Graves' attitude concerning baking soda in sharp perspective, and could reasonably be relied upon by a jury to conclude that he would not have read a warning had it been provided:

> Q. Did you stand there and read the label that night to find out how much the manufacturer of this product Arm & Hammer Baking Soda told you to put in the glass?
>
> A. No. I didn't.
>
> Q. Why not?
>
> A. I've taken it off and on for over half a century and it always worked, and I've simply felt I think that a reasonable amount would—would work again, would do the job.[8]

[8] Graves' attitude toward the product, coupled with his physical distress after awakening from a sound sleep, could also have been viewed by the jury as producing an instinctive reaction, resulting in Graves reaching for the baking soda, and pouring it into the glass, rather than measuring it as his grandmother had done. Evidence that plaintiff gave inconsistent testimony concerning whether the label provided had ever been read, and/or, evidence that plaintiff's conduct was so instinctive that no warning would have helped, creates sufficient facts to rebut the heeding presumption. *Technical Chem. Co. v. Jacobs, supra,* 480 *S.W.*2d at 606; *Campos v. Firestone Tire & Rubber Co., supra,* 98 *N.J.* at 210, 485 *A.*2d 305.

8. The amount plaintiff actually consumed was approximately three times the recommended dose.

B.

[9, 10] Plaintiffs, again focusing on the third jury interrogatory, argue that the trial judge erred in applying a "but for" rather than a "substantial factor" test in his instructions concerning proximate causation relative to that question. Specifically, plaintiffs' contend that the interrogatories should have stated: "Was the failure to warn a substantial factor in plaintiff's consumption of [464]Arm & Hammer Baking Soda?" Plaintiffs' brief fails to point us to any particular place in the record in which that specific objection was made, nor do plaintiffs indicate where in their objections to the court's instructions this alleged shortfall was brought to the trial judge's attention. Thus, we address the issue in terms of plain error. *Gaido v. Weiser,* 115 *N.J.* 310, 558 *A.*2d 845 (1989). In any event, plaintiffs cite no authority for the proposition that the relevancy of the substantial factor test precludes the use of the term "proximate cause" in the formulation of a jury interrogatory. The substantial factor test is but a modified standard of proximate cause which should be used to explain proximate causation in cases where the occurrence of an event is "produced by concurrent causes." *Scafidi v. Seiler,* 119 *N.J.* 93, 109, 574 *A.*2d 398 (1990).

[11] Interestingly, plaintiffs' argument that the substantial factor test should have been utilized is a concession that a factfinder could conclude under the evidence in this case that causes other than the lack of warning contributed to plaintiff's consumption of the baking soda on the night in question. Although plaintiffs do not specifically say so in their brief, the argument appears to concede that Graves' overly distended stomach, and the resulting discomfort, were at least contributing causes of his accident, and that is why the "substantial factor" test is appropriate. The very concept of proximate cause "includes the notion of concurrent cause when more than one act contributes to the accidental harm."

Brown v. United States Stove Co., 98 *N.J.* 155, 171, 484 *A.*2d 1234 (1984). Certainly, a jury could have found on this record that Graves's distress resulting from his dysfunctional stomach caused him to ingest the baking soda, and that the absence of an adequate warning of possible stomach rupture was just one, albeit, a substantial factor, in contributing to that conduct. Thus, we agree with plaintiffs that the substantial factor test was the appropriate test of proximate causation in the context of the third jury interrogatory.

[12] On appeal, a jury charge must be reviewed in its entirety. *State v. Wilbely*, 63 *N.J.* 420, 422, 307 *A.*2d 608 (1973). In the ⌊465final analysis, it is a question of whether or not the jury was confused or mislead by the charge in its entirety. *Navarro v. George Koch & Sons, Inc.*, 211 *N.J.Super.* 558, 512 *A.*2d 507 (App.Div.), *certif. denied*, 107 *N.J.* 48, 526 *A.*2d 138 (1986).

Plaintiffs cite one excerpt from the charge that they now contend shows the imposition of a "but for" test:

> Now, what do we mean [by proximate cause] in the context of a lack of warning case? ... [I]s it probable that such a warning would have been effective in deterring the plaintiff from the conduct, in this case, the consumption of the product in question which he claims caused his injury.

Plaintiffs do not specifically articulate their quarrel with the portion of the charge they quote. We assume it has to do with the use of the word "probable," which arguably invokes the standard definition of proximate cause as "a cause which naturally and probably led to and might have been expected to produce the injury complained of." *Model Jury Charge* (Civil), Proximate Cause, § 7.11 (1973). Assuming that to be the case, plaintiffs, nevertheless, offer no support for the argument that the mere use of the word "probable" could have interfered with the jury's function. We are not of the view that the quoted section of the charge reasonably conveyed to the jury an instruction that it could answer the question in the affirmative only if it found that Graves would not have consumed the baking soda "but for" the lack of warning. As noted earlier, we must look to the charge as a whole in determining whether the jury was mislead. Immediately after the now objected to portion of the charge, the trial judge told the jury that: "[b]y proximate cause we do not mean that be the only cause." Later in his instructions on the same issue he said:

> Again whenever I say proximate cause understand there may be more than one proximate cause to any particular accident[.] [S]o long [as] its a contributing factor[,] to [that] extent it may indeed be a proximate cause.

Finally, on this point, it is reasonable to infer that plaintiffs' failure to specifically object to the charge on the specific grounds now advanced can be taken to mean that counsel did not consider the claimed error to be significant in the context of the trial. *State v. Macon*, 57 *N.J.* 325, 333, 273 *A.*2d 1 (1971).

⌊466C.

[13] Plaintiffs also contend that the trial judge committed reversible error in instructing the jury to interchangeably apply both subjective and objective standards in determining whether the lack of warning was a proximate cause of plaintiff's ingesting defendant's product on the night in question.

There are different standards for different elements in such cases, as the Supreme Court stated in *Campos v. Firestone Tire & Rubber Co., supra.* There is an objective duty of a manufacturer to produce a defect-free product. *Campos, supra*, 98 *N.J.* at 209, 485 *A.*2d 305; *cf. Johansen v. Makita USA, Inc.*, 128 *N.J.* 86, 102, 607 *A.*2d 637 (1992), (duty to manufacture a safe product exists irrespective of plaintiff's conduct). The objective duty of the manufacturer in a warning setting is best exemplified by the Legislature's recent codification of prior law:

> An adequate product warning or instruction is one that a reasonably prudent person in the same or similar circumstances would have provided with respect

to the danger and that communicates adequate information on the dangers and safe use of the product, taking into account the characteristics of, and the ordinary knowledge common to, the persons by whom the product is intended to be used[.]

[*N.J.S.A.* 2A:58C–4.]

It is the subjective knowledge of the plaintiff, however, that is relevant in determining whether a breach of the manufacturer's duty is a proximate cause of the injury in question. *Campos supra*, 98 *N.J.* at 209, 485 *A.*2d 305.

In our view, the trial judge maintained that distinction in his instructions. He directed the jury first to apply a reasonable person standard to determine whether defendant's warning was adequate, and then to determine if an adequate warning would have deterred Graves specifically. Both in his original instructions to the jury on interrogatory number three, and in his supplemental instructions on that interrogatory in response to the jury's question, the trial judge necessarily had to discuss the objective standard and the subjective standard together because [467]he had no idea how the jury was going to respond to interrogatory number two, which specifically addressed the objective standard.

[14, 15] Nor do we find error in the trial judge's comment to the jury that the human factors experts could not testify as to what went on in Graves' mind. The judge's statement that the best such testimony could do is inform them what the "public at large," or those in "controlled groups," do, was an accurate comment on the testimony offered. The trial judge did not prohibit the jury from drawing an inference from the general proposition to Graves' subjective thought process. A judge may comment on the evidence when it will assist the jury in its findings. *Dafler v. Raymark Industries, Inc.*, 259 *N.J.Super.* 17, 37, 611 *A.*2d 136 (App.Div.), *certif. granted*, 130 *N.J.* 601, 617 *A.*2d 1223 (1992).

D.

[16] At trial, plaintiffs objected to the trial judge's use of the phrase "the night in question" with respect to the third jury interrogatory. They argued then, as they now do on appeal, that the use of that phrase foreclosed the jury from considering the effect, if any, that an adequate warning might have had on Graves' conduct had it been placed on the product years earlier, postulating that the warning could then have been communicated to Graves through third parties.

There was evidence before the jury, fortified by counsels' arguments, that defendant could have and should have warned of the risk of stomach rupture many years before 1979. Dr. Cunitz, plaintiffs' human factors expert, testified that the existence of warnings over a long term have an impact on consumer expectations relative to a product's qualities. He said:

> Well, what happens is common sense changes. That's really what it is. Had there been a warning for a good number of years on this product, then people's common knowledge and, therefore, their common sense about the product begins to change and ultimately does change.

[468]Indeed, a jury may have reasonably inferred from this testimony, and other related testimony offered at the trial, that a warning, placed on the baking soda before 1979, may have had some impact on Graves' knowledge concerning the product's efficacy. If the jury instructions were such that the trial judge foreclosed the jury's consideration of that issue, we might agree with plaintiffs' argument that the issue of proximate causation was too narrowly focused. But our review of the instructions do not reveal any such limitation on the jury's understanding of its function in addressing that question.

Moreover, the words themselves do not constitute error standing alone. Clearly, plaintiffs had the burden of proving that the defect in the product's instructions and warnings, whenever that defect is considered to have existed, was a proximate cause of Graves' consumption of the product on August 22, 1979. Certainly there

would have been nothing wrong with the question had the trial judge placed the date of consumption in the interrogatory. Substituting the date with the phrase "on the night in question" is a distinction without a difference. The important thing is that the judge's instructions did not limit the jury's consideration of all the evidence relevant to the subjective aspect of Graves' conduct and knowledge in determining the issue of proximate causation.

II

[17] Plaintiffs contend that the trial judge erred in dismissing their "unreasonably dangerous product" claim which they contend was set forth in Count IV of their complaint. We have reviewed that count of the complaint and fail to find any clear reference to such a claim. However, we shall address the issue on its merits.

Plaintiffs argue that they postulated defendant's liability on separate theories of a failure to warn, and on "having placed an unreasonably dangerous product in the market place." Their reliance upon the "unreasonably dangerous" phrase is apparently based on the words of Restatement of Torts, Second, § 402A. However, that rubric has long been in disfavor in this State. |469*Suter v. San Angelo Foundry & Machine Co.*, 81 *N.J.* 150, 174, 406 *A.*2d 140 (1979). "Defining the strict liability principle in terms of a defect and an unreasonably dangerous condition does not advance an understanding of the concept and will not assist a jury's comprehension of the issues which it must resolve." *Id.* at 176, 406 *A.*2d 140. Thus, we are somewhat at a loss to understand the import of plaintiffs' argument in the context of New Jersey decisional law.

There are but "three theories under which a manufacturer or seller may be held strictly for harm caused by a product—defective manufacture, defective design, and defective warnings[.]" *Dewey v. R.J. Reynolds Tobacco Co.*, 121 *N.J.* 69, 94–95, 577 *A.*2d 1239 (1990). This was so, before and after the New Jersey Product Liability Act, *N.J.S.A.* 2A:58C–1 et seq. If plaintiffs are arguing a theory, albeit mislabeled, different from their failure to warn theory, we can only assume that what they are really contending is that defendant's baking soda product is one whose risks outweigh its utility, a concept used in a design defect liability case. *See O'Brien v. Muskin Corp.*, 94 *N.J.* 169, 463 *A.*2d 298 (1983). However, if plaintiffs are claiming that defendant is liable under a design defect theory, their argument is factually unsupported by the evidence.

Undoubtedly, there was expert evidence offered by plaintiffs from which one could infer that the ingestion of any amount of baking soda carried some risk, and that it simply should not have been marketed as an antacid. However, baking soda has other safe uses. No suggestion was made by any of plaintiffs' witnesses that baking soda was a dangerous product for all purposes. No one suggested taking the product off the market. Quite simply, the resolution of the issue plaintiffs' experts posed in this narrow view of the evidence cannot be resolved in the context of the risk/utility analysis applicable to a pure design defect case, because the crux of the safety problem lies in the warning rather than the physical properties of the product itself. *See, Freund, supra*, 87 *N.J.* at 242, 432 *A.*2d 925. ("[W]here the design defect |470consists of an inadequate warning as to safe use, the utility of the product, as counterbalanced against the risks of its use, is rarely at issue.") Thus we conclude that the trial judge was correct in determining that the evidence in this case created a product defect issue based on inadequate warnings.

III

Plaintiffs contend that the trial judge erred in dismissing their causes of action based upon *Restatement of Torts*, Second, § 388 (Chattel Known to be Dangerous for Intended Use), *Restatement of Torts*, Second § 402B (Misrepresentation by Seller of Chattels to Consumer) and *N.J.S.A.* 24:5–1, –10, –18a, and –18f (misbranding of a drug product). The trial judge held that these causes of action were essentially based on negligence principles and sub-

sumed by strict liability. In dismissing them, the judge relied upon this court's decision in *Tirrell v. Navistar Intern., Inc.*, 248 *N.J.Super.* 390, 591 *A.*2d 643 (App.Div.1991), *certif. denied*, 126 *N.J.* 390, 599 *A.*2d 166 (1991) which held that, even before the adoption of the Product Liability Act, our common law had progressed to the point where personal injury claims resulting from product injuries were to be pled and proved on strict liability principles, rather than on breach of implied warranty or negligence concepts. *Id.* at 399, 591 *A.*2d 643.

Defendant contends on appeal, that the causes of action in question were the subject of amendments to interrogatories, rather than amendments to pleadings, after the New Jersey Product Liability Act became effective, and, therefore, are barred by the Act. Defendant also contends that, with respect to the New Jersey statutory cause of action, no private right of action is created by the statute because of its penal nature, or, alternatively, the statute does not apply to products which cause injuries outside of the State of New Jersey.

We will assume, for the purpose of discussion, that the New Jersey Product Liability Act did not preclude these causes of action, that the causes of action are not based on negligence, that [471]the New Jersey statute concerning misbranding of a drug product creates a personal cause of action, and that the trial judge erred in striking the claims.

[18] However, it is not sufficient simply for plaintiffs to prove that some legal error exists in the trial record. Plaintiffs are obliged to show that the legal error was "of such a nature as to have been clearly capable of producing an unjust result[.]" *R.* 2:10–2. Plaintiffs utterly fail to address in their brief how a strict liability claim based upon a failure to warn differs from the three dismissed causes of action, and how those differences may have impacted on the jury's determination in this case.

It appears to us that the three theories proposed by plaintiff are simply alternative ways in which a jury might determine that the product was defective, i.e. unsafe, because of inadequate warnings. Because that is precisely what the jury found in response to the second jury interrogatory, we are at a loss to understand how plaintiffs were harmed by the consolidation of those theories into the strict liability/warning theory on which the jury was instructed. Under any theory of liability, even those excluded by the trial judge, the jury was required to determine proximate causation. Plaintiffs fail to explain how a finding in their favor on any of the excluded causes of action might have impacted on the proximate causation issue in a more favorable way. Thus, we find no reversible error in the trial court's exclusion of the subject causes of action.

IV

[19] Plaintiffs contend that the trial judge improperly precluded evidence of both contemplated and actual post-accident label changes. They contend that the actual changes should have been permitted into evidence because they do not qualify as remedial changes, but, rather, reflect on the credibility of defendant in that it took the position that the baking soda could not generate enough gas to cause a rupture but subsequently changed the label to warn against such injury. With respect to the proposed but not [472]adopted changes, plaintiffs argue that the proposed changes show a continuing course of objectionable conduct on defendant's part, and that the proposals were therefore admissible.

The evidence, if admitted, was clearly relevant on the question of product defect, and the fourth jury interrogatory which was not answered. Because the jury resolved the product defect issue in plaintiff's favor, the exclusion of that evidence produced no harm to plaintiff. Thus, even if the trial judge was wrong in excluding the evidence, a question we specifically do not decide, such error would not be reversible. *R.* 2:10–2.

V

Plaintiffs contend that if the third jury interrogatory was properly submitted for

the jury's consideration, its verdict in response to the question is against the weight of the evidence. However, plaintiffs' argument focuses on the question of product defect, a question that was resolved in plaintiffs' favor when the jury answered the second interrogatory. The question addressed in number three was whether, even if the proper warning had been placed on the product, such warning would have been a substantial factor in preventing Graves' consumption of it, and the resulting harm. Plaintiffs fail to analyze the evidence on that issue toward a conclusion that reasonable minds could not differ on the subject as required by *R.* 2:10–1. As indicated earlier in this opinion, we conclude that a genuine fact issue was presented on the proximate cause issue. The jury's resolution of that issue against plaintiffs has a factual basis in the record.

The judgment under review is affirmed.

267 N.J.Super. 473

[473]**John S. KLINE, Alfred R. Kline and Mary Kline, Plaintiffs–Appellants,**

v.

BERNARDSVILLE ASSOCIATION, INC., a N.J. Corp., t/a Hillsborough Center, The Township of Hillsborough and the Planning Board of the Township of Hillsborough, Defendants–Respondents.

Superior Court of New Jersey, Appellate Division.

Submitted Sept. 13, 1993.

Decided Oct. 8, 1993.

Township planning board granted application for site plan approval upon condition that applicant relocate right-of-way easement held by adjacent property owners. Adjacent property owners instituted action challenging board's authority to relocate easement without their consent. The Superior Court, Law Division, Somerset County, held that planning board could compel relocation of easement, and adjacent property owners appealed. The Superior Court, Appellate Division, Baime, J.A.D., held that planning board did not have authority to compel relocation of easement.

Reversed and remanded.

1. Easements ⇐1

"Easement" is nonpossessory incorporeal interest in another's possessory estate in land, entitling holder to make some use of the other's property.

See publication Words and Phrases for other judicial constructions and definitions.

2. Easements ⇐5, 12(1), 15.1

Easements are created by express acts of the parties, by implication, or by prescription.

[474]**3. Easements ⇐54**

Where easement comes into being by way of agreement, universally accepted principle is that landowner may not, without consent of easement holder, unreasonably interfere with latter's rights or change character of easement so as to make use thereof significantly more difficult or burdensome.

4. Easements ⇐48(6)

Court may compel relocation of easement to advance interests of justice where modification is minor and parties' essential rights are fully preserved.

5. Easements ⇐48(6)

Relocation of easement without mutual consent of parties is extraordinary remedy and should be grounded in strong showing of necessity.

6. Zoning and Planning ⇐353.1

Township planning board is not vested with power to compel relocation of easement at expense of property owner who is

Liebeck v. McDonald's Restaurants, P.T.S., Inc., 1995 WL 360309 (D. Ct. N. Mex.)

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.
District Court of New Mexico, Second Judicial District, Bernalillo County.
Stella LIEBECK, Plaintiff,
v.
MCDONALD'S RESTAURANTS, P.T.S., INC. and McDonald's International, Inc., Defendants.
CV-93-02419.
Aug. 18, 1994.

JUDGMENT

ROBERT H. SCOTT, District Judge.

*1 THIS MATTER came on for trial before the Court and a twelve (12) person jury on August 8, 9, 10, 11, 12, 15, 16 and 17, 1994. Defendant P.T.S., Inc. was dismissed with prejudice by stipulation of the parties entered into during trial. The issues having been duly tried and a jury having rendered its verdict against the sole remaining defendant McDonald's Corporation as follows:

1. On Plaintiff's claim for product defect, for Plaintiff;

2. On Plaintiff's claim for breach of the implied warranty of merchantability, for Plaintiff;

3. On Plaintiff's claim for breach of the implied warranty of fitness for particular purpose, for Plaintiff;

4. On Plaintiff's claim that Plaintiff was comparatively at fault, Plaintiff was determined to be twenty percent (20%) at fault;

5. On Plaintiff's claim for compensatory damages, Plaintiff is entitled to $200,000.00 to be reduced by $40,000.00, representing her twenty percent (20%) comparative negligence, for a net judgment of $160,000.00;

6. On Plaintiff's claim for punitive damages, punitive damages are awarded in the sum of $2,700,000.00.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment is entered solely against McDonald's Corporation and to Plaintiff in the amount of $160,000.00 for compensatory damages, and $2,700,000.00 to Plaintiff for punitive damages.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff shall be awarded interest as permitted by law.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff shall be awarded her costs to be determined upon presentation of a Cost Bill to the Court in accord with applicable law.

397 Pa. 316

Anna YANIA, Administratrix of the Estate of Joseph Yania, Deceased, Anna Yania, in her own right, and Anna Yania, Trustee ad litem, Appellant,

v.

John E. BIGAN.

Supreme Court of Pennsylvania.

Nov. 9, 1959.

Wrongful death and survival actions. The Court of Common Pleas of Somerset County, No. 1101 Continuance Docket, 1958, Thomas F. Lansberry, J., sustained preliminary objections, and an appeal was taken. The Supreme Court, No. 138, March Term, 1959, Benjamin R. Jones, J., held that it might be conceivable that taunting and enticement could constitute actionable negligence if it resulted in harm to child of tender years or person mentally deficient, but that such taunting and enticement could not constitute negligence when directed to an adult in full possession of all his mental faculties, and held, therefore, that even if deceased coal strip-mining operator had been deprived of his volition and freedom of choice and placed under compulsion to jump into water as result of defendant's employment of cajolery and inveiglement, there could be no recovery for his death by drowning.

Affirmed.

1. Pleading ⇐214(2, 4)

On preliminary objections, in nature of demurrers, every material and relevant fact well pleaded in complaint and every inference fairly deducible therefrom were to be taken as true.

2. Death ⇐7

The Wrongful Death Act and the Survival Act confer no more than rights to recover damages growing out of single cause of action, namely, negligence of defendant which caused damage suffered. 12 P.S. § 1601; 20 P.S. § 320.603.

3. Death ⇐58(1)

In wrongful death and survival actions, there was presumption that decedent had not been negligent, but such presumption afforded no basis for inference that defendant had been negligent.

4. Negligence ⇐1

It might be conceivable that taunting and enticement could constitute actionable negligence if it resulted in harm to child of tender years or person mentally deficient, but such taunting and enticement could not constitute negligence when directed to an adult in full possession of all his mental faculties, and therefore, even if deceased coal strip-mining operator had been deprived of his volition and freedom of choice and placed under compulsion to jump into water as result of defendant's employment of cajolery and inveiglement, there could be no recovery for his death by drowning. 12 P.S. § 1601; 20 P.S. § 320.603.

5. Negligence ⇐32(2.8), 48, 50, 52

Decedent who had come to defendant's property for purpose of discussing a business matter with defendant was a business invitee, and defendant could become subject to liability for physical harm to decedent caused by artificial or natural condition upon land (1) if, but only if, defendant knew or could have discovered condition which, if known to him, he should have realized involved an unreasonable risk of harm to decedent, (2) if defendant had no reason to believe that decedent would discover condition and realize risk of harm, and (3) if he invited or permitted decedent to enter upon land without exercising reasonable care to make condition reasonably safe or give adequate warning to enable decedent to avoid harm.

6. Negligence ⇐52

Where water-filled cut or trench was as obvious and apparent to decedent as to defendant, both of whom were coal strip-mining operators, defendant could not be held liable for death by drowning of dece-

dent on theory that, as possessor of land, he should have warned decedent of dangerous condition.

7. Negligence ⇐29

Where defendant was not legally responsible, in whole or in part, for placing decedent in perilous position, mere fact that he saw decedent in position of peril in water imposed upon him no legal obligation or duty to go to his rescue; and recovery in wrongful death and survival actions could not be predicated upon defendant's failure to take necessary steps to rescue decedent from drowning.

Archibald M. Matthews, Somerset, for appellant.

Taylor B. Coffroth, Somerset, for appellee.

Before CHARLES ALVIN JONES, C. J., and BELL, BENJAMIN R. JONES, COHEN, BOK and McBRIDE, JJ.

BENJAMIN R. JONES, Justice.

A bizarre and most unusual circumstance provides the background of this appeal.

On September 25, 1957 John E. Bigan was engaged in a coal strip-mining operation in Shade Township, Somerset County. On the property being stripped were large cuts or trenches created by Bigan when he removed the earthen overburden for the purpose of removing the coal underneath. One cut contained water 8 to 10 feet in depth with side walls or embankments 16 to 18 feet in height; at this cut Bigan had installed a pump to remove the water.

At approximately 4 p. m. on that date, Joseph F. Yania, the operator of another coal strip-mining operation, and one Boyd M. Ross went upon Bigan's property for the purpose of discussing a business matter with Bigan, and, while there, were asked by Bigan to aid him in starting the pump. Ross and Bigan entered the cut and stood at the point where the pump was located. Yania stood at the top of one of the cut's side walls and then jumped from the side wall—a height of 16 to 18 feet—into the water and was drowned.

Yania's widow, in her own right and on behalf of her three children, instituted wrongful death and survival actions against Bigan contending Bigan was responsible for Yania's death. Preliminary objections, in the nature of demurrers, to the complaint were filed on behalf of Bigan. The court below sustained the preliminary objections; from the entry of that order this appeal was taken.

[1] Since Bigan has chosen to file preliminary objections, in the nature of demurrers, every material and relevent fact well pleaded in the complaint and every inference fairly deducible therefrom are to be taken as true. Commonwealth v. Musser Forests, Inc., 394 Pa. 205, 209, 146 A.2d 714; Byers v. Ward, 368 Pa. 416, 420, 84 A.2d 307.

The complaint avers negligence in the following manner: (1) "The death by drowning of * * * [Yania] was caused entirely by the acts of [Bigan] * * * in *urging, enticing, taunting and inveigling* [Yania] to jump into the water, which [Bigan] knew or ought to have known was of a depth of 8 to 10 feet and dangerous to the life of anyone who would jump therein" (emphasis supplied); (2) "* * * [Bigan] violated his obligations to a business invitee in not having his premises reasonably safe, and not warning his business invitee of a dangerous condition and to the contrary urged, induced and inveigled [Yania] into a dangerous position and a dangerous act, whereby [Yania] came to his death"; (3) "After [Yania] was in the water, a highly dangerous position, having been induced and inveigled therein by [Bigan], [Bigan] failed and neglected to take reasonable steps and action to protect or assist [Yania], or extradite [Yania] from the dangerous position in which [Bigan] had placed him". Summarized,

Bigan stands charged with three-fold negligence: (1) by urging, enticing, taunting and inveigling Yania to jump into the water; (2) by failing to warn Yania of a dangerous condition on the land, i. e. the cut wherein lay 8 to 10 feet of water; (3) by failing to go to Yania's rescue after he had jumped into the water.[1]

[2, 3] The Wrongful Death Act (Act of April 15, 1851, P.L. 669, § 19, 12 P.S. § 1601) and the Survival Act (Act of April 18, 1949, P.L. 512, art. VI, § 603, 20 P.S. § 320.603) "* * * really confer no more than rights to recover damages growing out of a single cause of action, namely, *the negligence of the defendant* which caused the damages suffered." (Emphasis supplied.) Fisher v. Hill, 368 Pa. 53, 58, 81 A.2d 860, 863. While the law presumes that Yania was not negligent, such presumption affords no basis for an inference that Bigan was negligent (Wenhold v. O'Dea, 338 Pa. 33, 35, 12 A.2d 115). Our inquiry must be to ascertain whether the well-pleaded facts in the complaint, assumedly true, would, if shown, suffice to prove negligent conduct on the part of Bigan.

[4] Appellant initially contends that Yania's descent from the high embankment into the water and the resulting death were caused "entirely" by the spoken words and blandishments of Bigan delivered at a distance from Yania. The complaint does not allege that Yania slipped or that he was pushed or that Bigan made any *physical* impact upon Yania. On the contrary, the only inference deducible from the facts alleged in the complaint is that Bigan, by the employment of cajolery and inveiglement, caused such a *mental* impact on Yania that the latter was deprived of his volition and freedom of choice and placed under a compulsion to jump into the water. Had Yania been a child of tender years or a person mentally deficient then it is conceivable that taunting and enticement could constitute actionable negligence if it resulted in harm. However, to contend that such conduct directed to an adult in full possession of all his mental faculties constitutes actionable negligence is not only without precedent but completely without merit. McGrew v. Stone, 53 Pa. 436; Rugart v. Keebler-Weyl Baking Co., 277 Pa. 408, 121 A. 198, and Bisson v. John B. Kelly Inc., 314 Pa. 99, 170 A. 139, relied upon by appellant, are clearly inapposite.

[5, 6] Appellant next urges that Bigan, as the possessor of the land, violated a duty owed to Yania in that his land contained a dangerous condition, i. e. the water-filled cut or trench, and he failed to warn Yania of such condition. Yania was a business invitee in that he entered upon the land for a common business purpose for the mutual benefit of Bigan and himself (Restatement, Torts, § 332; Parsons v. Drake, 347 Pa. 247, 250, 32 A.2d 27). As possessor of the land, Bigan would become subject to liability to Yania for any physical harm caused by any artificial or natural condition upon the land (1) if, and only if, Bigan knew or could have discovered the condition which, if known to him he should have realized involved an unreasonable risk of harm to Yania, (2) if Bigan had no reason to believe Yania would discover the condition or realize the risk of harm and (3) if he invited or permitted Yania to enter upon the land without exercising reasonable care to make the condition reasonably safe or give adequate warning to enable him to avoid the harm. Schon v. Scranton-Springbrook Water Service Co., 381 Pa. 148, 152, 112 A.2d 89, and cases therein cited; Engle v. Reider, 366 Pa. 411, 77 A.2d 621; Johnson v. Rulon, 363 Pa. 585, 70 A.2d 325. The inapplicability of this rule of liability to the instant facts is readily apparent.

The *only* condition on Bigan's land which could possibly have contributed in any manner to Yania's death was the water-filled

1. So far as the record is concerned we must treat the 33 year old Yania as in full possession of his mental faculties at the time he jumped.

cut with its high embankment. Of this condition there was neither concealment nor failure to warn, but, on the contrary, the complaint specifically avers that Bigan not only requested Yania and Boyd to assist him in starting the pump to remove the water from the cut but "led" them to the cut itself. If this cut possessed any potentiality of danger, such a condition was as obvious and apparent to Yania as to Bigan, both coal strip-mine operators. Under the circumstances herein depicted Bigan could not be held liable in this respect.

[7] Lastly, it is urged that Bigan failed to take the necessary steps to rescue Yania from the water. The mere fact that Bigan saw Yania in a position of peril in the water imposed upon him no legal, although a moral, obligation or duty to go to his rescue unless Bigan was legally responsible, in whole or in part, for placing Yania in the perilous position. Restatement, Torts, § 314. Cf. Restatement, Torts, § 322. The language of this Court in Brown v. French, 104 Pa. 604, 607, 608, is apt: "If it appeared that the deceased, by his own carelessness, contributed in any degree to the accident which caused the loss of his life, the defendants ought not to have been held to answer for the consequences resulting from that accident. * * * He voluntarily placed himself in the way of danger, and his death was the result of his own act. * * * That his undertaking was an exceedingly reckless and dangerous one, the event proves, but there was no one to blame for it but himself. He had the right to try the experiment, obviously dangerous as it was, but then also upon him rested the consequences of that experiment, and upon no one else; he may have been, and probably was, ignorant of the risk which he was taking upon himself, or knowing it, and trusting to his own skill, he may have regarded it as easily superable. But in either case, the result of his ignorance, or of his mistake, must rest with himself—and cannot be charged to the defendants". The complaint does not aver any facts which impose upon Bigan legal responsibility for placing Yania in the dangerous position in the water and, absent such legal responsibility, the law imposes on Bigan no duty of rescue.

Recognizing that the deceased Yania is entitled to the benefit of the presumption that he was exercising due care and extending to appellant the benefit of every well pleaded fact in this complaint and the fair inferences arising therefrom, yet we can reach but one conclusion: that Yania, a reasonable and prudent adult in full possession of all his mental faculties, undertook to perform an act which he knew or should have known was attended with more or less peril and it was the performance of that act and not any conduct upon Bigan's part which caused his unfortunate death.

Order affirmed.

397 Pa. 323

Elizabeth GARBER and Melvin Garber, her husband,

v.

GREAT ATLANTIC & PACIFIC TEA COMPANY, Appellant.

Supreme Court of Pennsylvania.

Nov. 9, 1959.

Action by patron for injuries sustained when a gallon can of merchandise weighing about six pounds fell about three feet from a stack of displayed merchandise and spout on can pierced her foot. From adverse judgment of the Court of Common Pleas, Allegheny County, No. 2931, April Term, 1955, Homer S. Brown, J., the defendant appealed. The Supreme Court, No. 110, March Term, 1959, Bok, J., held that case was properly left within the competence of the jury.

Judgments affirmed.

roneous and must be accepted on this review. Rule 52(a), Federal Rules of Civil Procedure, 28 U.S.C.A.

[3–5] The defenses of laches and estoppel are without merit. Laches involves more than a failure to assert a claim. It contemplates a delay that is unreasonable under the circumstances, during which period material changes in conditions or the relations of the parties were induced or resulted, and where it would be unjust and inequitable to the adverse party to disturb the status quo thus created. Barrowman Coal Corp. v. Kentland Coal & Coke Co., 302 Ky. 803, 196 S.W.2d 428. Nor is silence enough by itself to work an estoppel. "Silence, to work an estoppel, must amount to bad faith, and this can not be inferred from facts of which the person sought to be estopped has no knowledge." Shaw v. Farmers' Bank & Trust Co., 235 Ky. 502, 31 S.W.2d 893, 895; Codell v. American Surety Co., 6 Cir., 149 F.2d 854. Appellant at no time made inquiry of the appellee about the status of the lease and was never told by the appellee that the lease was not in force and effect. Information about the lease was easily available to the appellant if it took the trouble to make the inquiry. Instead, it accepted a transfer of the lease and did not record the deed. We find nothing inequitable or unjust in requiring the appellant to perform the terms of a lease which it voluntarily purchased without a representation of any kind being made to it by the lessor as an inducement to its purchase.

The appellant pleaded the 15-year, 10-year and 5-year statutes of limitation, KRS 413.090, 413.160, 413.120. The District Judge did not expressly refer to these defenses, but necessarily rejected them in awarding judgment to the appellee.

[6, 7] When, as the result of certain conduct on the part of a defendant, such as by concealing the plaintiff's cause of action in such a way that it could not be discovered by the exercise of ordinary diligence, the period of such obstruction is not computed as any part of the period within which the action must be commenced. KRS 413.190. In our opinion, the facts in this case bring it within this tolling provision. St. Clair v. Bardstown Transfer Line, Inc., 310 Ky. 776, 221 S.W.2d 679, 10 A.L.R.2d 560.

Judgment is affirmed.

UNITED STATES of America, Appellant and Cross-Appellee,

v.

Oren LAWTER, Appellee and Cross-Appellant.

Oren LAWTER, Appellee and Cross-Appellant,

v.

UNITED STATES of America, Appellant and Cross-Appellee.

No. 15050.

United States Court of Appeals, Fifth Circuit.

March 2, 1955.

Action by husband under Public Vessels Act and Tort Claims Act for damages for death of wife who fell from Coast Guard helicopter during rescue operations. The United States District Court for the Southern District of Florida, John W. Holland, C. J., gave judgment for husband. Government appealed. The Court of Appeals, Hutcheson, Chief Judge, held that where there was a Coast Guardsman aboard helicopter who was trained in use of helicopter's air-sea rescue equipment, but officer in charge of helicopter allowed an untrained man to operate rescue equipment, and wife fell from helicopter during rescue operations, evidence was sufficient to support finding that Government was negligent.

Judgment affirmed.

1. United States ⇐141(8)

In action by husband under Public Vessels Act and Tort Claims Act for damages for death of wife who fell from Coast Guard helicopter during rescue operations, where there was a Coast Guardsman aboard helicopter who was trained in operation of rescue equipment, but officer in charge of helicopter allowed an untrained man to operate rescue equipment, evidence was sufficient to support finding that Government was negligent. Public Vessels Act, § 1 et seq., 46 U.S.C.A. § 781 et seq.; 28 U.S.C.A. § 1346(b).

2. Negligence ⇐2

The law imposes an obligation upon every one who attempts to do anything to assist a person, even gratuitously, not to injure him by the negligent performance of that which he has undertaken.

3. United States ⇐78(6)

Where Coast Guard affirmatively took over rescue operations to assist persons whose boat had swamped, and excluded others therefrom, Coast Guard was obliged not to injure those persons by the negligent performance of rescue operations. Public Vessels Act, § 1 et seq., 46 U.S.C.A. § 781 et seq.; 28 U.S.C.A. § 1346(b).

4. Death ⇐99(4)

In action by husband under Public Vessels Act and Tort Claims Act for damages for death of wife who fell from Coast Guard helicopter during rescue operations conducted by Coast Guard, award of $10,000 damages was not excessive. Public Vessels Act, § 1 et seq., 46 U.S.C.A. § 781 et seq.; 28 U.S.C.A. § 1346(b); Fed.Rules Civ.Proc. rule 52(a), 28 U.S.C.A.

5. Courts ⇐406.3(25)

Court of Appeals has power in a case tried to a court without a jury to review findings as to damages. Fed. Rules Civ.Proc. rule 52(a), 28 U.S.C.A.

Alan S. Rosenthal, Atty., Dept. of Justice, Paul A. Sweeney, Washington, D. C., E. David Rosen, Asst. U. S. Atty., Miami, Fla., Warren E. Burger, Asst. Atty. Gen., James L. Guilmartin, U. S. Atty., Miami, Fla., Leavenworth Colby, Atty., Dept. of Justice, Washington, D. C., Lieutenant William E. Fuller, U. S. Coast Guard, Washington, D. C., of counsel, for appellant.

Arthur Roth and Monte K. Rassner, Miami, Fla., Jacob Rassner, New York City, of counsel, for appellee.

Before HUTCHESON, Chief Judge, and HOLMES and RUSSELL, Circuit Judges.

HUTCHESON, Chief Judge.

Claiming under the Public Vessels Act, Title 46 U.S.C.A. § 781 et seq., and the Tort Claims Act, Title 28 U.S.C. § 1346 (b), the suit was for damages for the death of plaintiff's wife. The claim was that the death was caused by the negligence of Coast Guard personnel in the conduct of a helicopter air-sea rescue.

The defenses were: (1) that the United States was not liable and had not consented to be sued for the negligence of the Coast Guard in the conduct of such rescues; (2) that the death was not caused or contributed to by any fault, negligence, or want of care on the part of the United States, the helicopter, or those in charge or control of it; and (3) that it was caused by the negligence and fault of the deceased and of the plaintiff, her husband, in not securing her firmly by the straps on the helicopter cable before permitting her to be drawn up.

The evidence concluded, there were findings of fact and conclusions of law [1] in favor of, and a judgment for, plaintiff.

1. Findings of Fact:

(1) The Court has jurisdiction of the parties and subject matter.

(2) On or about April 18, 1953, the deceased, Loretta Jean Lawter, her husband and libelant herein, Oren Lawter, his brother Andrew Lawter and his wife, Susan Lawter, were in a 16 foot skiff in Biscayne Bay, when a wave drowned out the outboard motor attached to the skiff and further waves resulted in the swamping of the boat. As a result thereof, the

Defendant, appealing from the judgment, is here insisting that the complaint does not state a cause of action and the judgment must, therefore, be reversed and remanded with instructions to dismiss, or that at least the findings

four passengers were cast into water approximately 500 yards from the nearest shore. The water at that particular point was approximately four feet deep.

(3) At the time of the accident small craft warnings were posted and the wind was blowing at a sufficient rate to cause whitecaps and rough water.

(4) At this time a U.S. Coast Guard helicopter, Model HO4S-2G, was making a routine patrol flight over the Biscayne Bay area. The pilot of the helicopter was Eugene Farley, Lt., J.G., U.S. Coast Guard. Sitting in the co-pilot seat, as a passenger, was Petty Officer First Class Nathaniel Passmore. The crewman in the cabin of the ship was Lloyd S. Antle, Jr.

(5) The flight by the helicopter was made for the purpose of determining if any vessels or people in the area were in the need of aid or assistance, so that such aid or assistance could be rendered before darkness set in.

(6) The crew of the helicopter saw the four Lawters in the water. There were no boats or vessels nearby to rescue them. The crew of the helicopter proceeded to undertake the rescue.

(7) The helicopter was equipped for air-sea rescue work by having as a part of its equipment a cable and a hoist to lower and raise such cable. The hoist was operated by a manual switch and also had an automatic switch stopping the raising of the cable when a weight attached thereto made contact with the boom to which the cable was attached.

(8) Lloyd S. Antle, Jr., had never taken part in any rescue mission and had had no training in such work or the operation of the hoist. Nathaniel Passmore had taken part in several air-sea rescues and was experienced in such operations.

(9) The pilot of the helicopter, due to the construction of the ship, was unable to see directly under it when engaged in hoisting people from the sea.

(10) The pilot did not order Passmore to operate the hoist or conduct the rescue from the cabin of the ship. Instead, he allowed Antle, an untrained man, to perform such duties.

(11) After undertaking the rescue, Antle directed the pilot until the helicopter was over the four Lawters. The cable was dropped and Susan Lawter took hold of the cable. The belt or sling attached to the cable was not attached to her.

(12) The cable was dropped again. Oren Lawter secured it and took it over to the deceased. Oren and Andrew Lawter were engaged in the process of attaching the belt or sling to her when Antle began raising the cable. The belt or sling was not attached to deceased and she was merely holding on with her hands. She was raised until her head and shoulders were above the bottom of the door in the helicopter, when Antle stopped the cable. Deceased had not been raised high enough to be brought into the cabin. Before the cable could be raised further, she lost her grip and fell.

(13) The respondent was guilty of negligence under all of the circumstances. The Court recognizes that the helicopter was not particularly sent to conduct this rescue and that the situation giving rise to the attempt arose suddenly and was in the nature of an emergency. However, there was an experienced man on board in the person of Passmore, and it was negligence to permit Antle to attempt to conduct such rescue operations when Passmore was available. It is clear to the Court that Antle, in his inexperience, began hoisting too soon, stopped raising the deceased before she reached a proper height and, in general, failed to act as an experienced man, such as Passmore would have acted under the circumstances.

The Court does not mean by this finding that Antle, in view of his inexperience and lack of training, did not act to the best of his ability under the circumstances. The actionable negligence lies in not having the rescue operation conducted by the available experienced man who could have conducted it in a much safer manner.

(14) The libelant, the deceased, Andrew Lawter and Susan Lawter, and none of them, were guilty of any negligence proximately contributing to the death of the deceased.

(15) As a direct and proximate result of respondent's negligence, libelant suffered damages in the amount of $10,000.

Conclusions of Law:

(1) A duty is imposed upon respondent to act with due and reasonable care in the performance of rescue operations once such rescue operations are undertaken.

(2) The libelant should have and recover of the respondent the sum of $10,000.

that the Coast Guard was, and plaintiff was not, negligent should be set aside as clearly erroneous.

Appellee, attacking the quantum of the finding and award of damages as inadequate and clearly erroneous, seeks an increase of the award here.

[1] A careful examination and consideration of the findings of fact, in the light of the record as a whole, and of the conclusions of law, in the light of settled legal principle, convinces us that they are well supported and that, as against appellant's attack upon them, they should and must be sustained.

As appellee correctly points out, the case made is not one of omission or failure on the part of the Coast Guard to act, but of a definite and affirmative act causing death, an act deliberately undertaken and negligently performed by it.

[2, 3] Whatever then might be said of the liability of the United States, if the case had to do with mere negligent omission or inaction of the Coast Guard, as was the case in Indian Towing Co. v. U. S., 5 Cir., 211 F.2d 886, is not controlling here. For the uncontradicted evidence shows that the Coast Guard, pursuant to long established policy,[2] affirmatively took over the rescue mission, excluding others therefrom, and thus not only placed the deceased in a worse position than when it took charge, but negligently brought about her death, and it is hornbook law that under such circumstances the law imposes an obligation upon everyone who attempts to do anything, even gratuitously, for another not to injure him by the negligent performance of that which he has undertaken. 38 Am.Jur., "Negligence", Sec. 17, p. 659.

[4, 5] As to appellee's attack upon the quantum of the finding and award of damages as clearly erroneous, we have held in Sanders v. Leech, 5 Cir., 158 F.2d 486, at page 487,[3] this court has the power in a case tried to a court without a jury to review findings as to damages. However for the reasons stated in the Sanders case, we feel here, as we felt there, that we cannot say that the findings are clearly erroneous.

The judgment is affirmed.

Judge RUSSELL sat during the argument of this case but, due to illness, he took no part in its decision.

2. Cf. Act of Dec., 1837, 5 Stat. 208, 14 U.S.C.A. § 53, and the 1947 Revision and Recodification of the Laws pertaining to the Coast Guard, 14 U.S.C.A. § 88.

3. "* * * Under [rule 52(a)], as it plainly reads and has been interpreted by the courts, it is not for the appellate court to substitute its judgment on disputed issues of fact for that of the trial court where there is substantial credible evidence to support the finding. It may reverse, though, under the rule (1) where the findings are without substantial evidence to support them; (2) where the court misapprehended the effect of the evidence; and (3) if, though there is evidence which if credible would be substantial, the force and effect of the testimony considered as a whole convinces that the finding is so against the great preponderance of the credible testimony that it does not reflect or represent the truth and right of the case." Cf. what was later said by the Supreme Court in United States v. United States Gypsum Co., 333 U.S. 364 at page 395, 68 S.Ct. 525, 92 L.Ed. 746.

HURLEY v. EDDINGFIELD.

(Supreme Court of Indiana. April 4, 1901.)

PHYSICIANS AND SURGEONS—FAILURE TO ANSWER CALL—LIABILITY.

A physician, licensed to practice medicine under Act 1897, p. 255, and Act 1899, p. 247, authorizing the licensing of physicians found to possess the necessary qualifications, etc., is not liable for arbitrarily refusing to respond to a call, though he is the only physician available.

Appeal from circuit court, Montgomery county; Jere West, Judge.

Action by George D. Hurley, as administrator, against George W. Eddingfield. From a judgment in favor of the defendant, the plaintiff appeals. Affirmed.

Hurley & Van Cleave and Dumont Kennedy, for appellant. Clodfelter & Fine, for appellee.

BAKER, J. The appellant sued appellee for $10,000 damages for wrongfully causing the death of his intestate. The court sustained appellee's demurrer to the complaint, and this ruling is assigned as error.

The material facts alleged may be summarized thus: At and for years before decedent's death appellee was a practicing physician at Mace, in Montgomery county, duly licensed under the laws of the state. He held himself out to the public as a general practitioner of medicine. He had been decedent's family physician. Decedent became dangerously ill, and sent for appellee. The messenger informed appellee of decedent's violent sickness, tendered him his fee for his services, and stated to him that no other physician was procurable in time, and that decedent relied on him for attention. No other physician was procurable in time to be of any use, and decedent did rely on appellee for medical assistance. Without any reason whatever, appellee refused to render aid to decedent. No other patients were requiring appellee's immediate service, and he could have gone to the relief of decedent if he had been willing to do so. Death ensued, without decedent's fault, and wholly from appellee's wrongful act. The alleged wrongful act was appellee's refusal to enter into a contract of employment. Counsel do not contend that, before the enactment of the law regulating the practice of medicine, physicians were bound to render professional service to every one who applied. Whart. Neg. § 731. The act regulating the practice of medicine provides for a board of examiners, standards of qualification, examinations, licenses to those found qualified, and penalties for practicing without license. Acts 1897, p. 255; Acts 1899, p. 247. The act is a preventive, not a compulsive, measure. In obtaining the state's license (permission) to practice medicine, the state does not require, and the licensee does not engage, that he will practice at all or on other terms than he may choose to accept. Counsel's analogies, drawn from the obligations to the public on the part of innkeepers, common carriers, and the like, are beside the mark. Judgment affirmed.

TOWN OF GOSPORT v. PRITCHARD et al.

(Supreme Court of Indiana. April 2, 1901.)

MUNICIPAL CORPORATIONS—STREETS—ELECTRIC LIGHTING — CONTRACTS — ACTIONS — PLEADING—MANDAMUS — TAXATION — ORDINANCE—PUBLICATION.

1. Since Burns' Rev. St. 1894, § 4301, give towns authority to contract for the lighting of streets and alleys, and since fraud or abuse of discretion is never presumed, but must be averred, it was not necessary for plaintiff, suing a town for the contract price for lighting streets, to state the population, amount of taxables, current expenses, etc., in order that the court might know that the contract was not ultra vires or oppressive.

2. Where plaintiff agreed to furnish a certain number of lights for the streets, and the town agreed to pay a certain rate per year, payments to be made every month, but not in advance, and after a certain month the town refused payment, not because it lacked funds, but asserting that the contract was void, plaintiff's action for the amount due was properly brought on the contract, instead of by application for mandamus.

3. A contract for lighting streets, purporting to be the contract of the town, and signed by one as president of the board of trustees, and attested by the clerk, and entered on the proceedings of the board of trustees, is binding on the town, and is not merely the contract of the persons whose names are signed.

4. In an action against a town for the contract price for lighting its streets, defendant's answer stated that its population was 600, its taxable property $197,960, polls 105; that the rate of taxation was $2.45 on each $100 for all purposes, and a poll tax of $3.50; that the tax rate for general purposes was 35 cents on each $100; that no levy had been made to meet the expense of lighting; that the town's indebtedness was $1,000, and its current expenses $800 per annum; and that a levy to pay the indebtedness, current expenses, and expense of plaintiff's contract would be burdensome and oppressive. *Held*, that a demurrer was properly sustained, as the answer did not show nor allege that such contract placed defendant's indebtedness beyond the constitutional limit, nor mention the items of current expenses, nor show that the town had not sufficient money on hand to pay plaintiff's claim.

5. The power of a municipal corporation to contract for electric lighting being discretionary, and not legislative, no ordinance was necessary to authorize a contract for that purpose; hence it was immaterial that an ordinance for such purpose was not published in a newspaper, as required by Burns' Rev. St. 1894, § 4357, subd. 16.

Appeal from circuit court, Owen county; George W. Grubbs, Judge.

Action by Caleb A. Pritchard and others against the town of Gosport. From a judgment in plaintiffs' favor, defendant appeals. Affirmed.

Inman H. Fowler, Thomas G. Fowler, and Ed. S. Davis, for appellant. L. A. Downey and Willis Hickman, for appellees.

MONKS, J. Appellees brought this action against appellant to recover the contract

Frisbee, 114 Hawai'i at 84, 156 P.3d at 1190; Matias, 102 Hawai'i at 306, 75 P.3d at 1197.

V. CONCLUSION

Accordingly, the ICA's June 6, 2018 Judgment on Appeal and the circuit court's August 13, 2015 Judgment, Conviction and Sentence are vacated, and this case is remanded to the circuit court for further proceedings consistent with this opinion.

Bernadine KUAHIWINUI, Individually and as Personal Representative of the Estate of Kristerpher Kaupu-Kuahiwinui, deceased; and Kenneth Kaupu, Respondents/Plaintiffs-Appellants,

v.

ZELO'S INC., dba Sushi & Blues, Petitioner/Defendant-Appellee,

and

Tahiti Nui Enterprises, Inc., dba Tahiti Nui, and State of Hawai'i, Respondents/Defendants-Appellees. (5CC08000067)

Zelo's Inc., dba Sushi & Blues, Petitioner/Third-Party Plaintiff,

v.

Solomon Makua Kuahiwinui, Respondent/Third-Party Defendant. (5CC08000067)

State of Hawai'i, Respondent/Third-Party Plaintiff,

v.

Solomon Kuahiwinui and Christopher Ferguson, Respondents/Third-Party Defendants. (5CC08000067)

Sheryl Ann Ackerman, Individually; Sheryl Ann Ackerman, as mother of, natural guardian and next friend for Britney Ann Hardsky, Minor; and Sheryl Ann Ackerman, as Personal Representative of the Estate of Christopher Cole Ferguson, deceased, Respondent/Plaintiff,

v.

Zelo's Inc., dba Sushi & Blues, Petitioner/Defendant,

and

Solomon Makua Kuahiwinui; James B. Edmonds; Tahiti Nui Enterprises, Inc., dba Tahiti Nui; State of Hawai'i; and the County of Kauai, Respondents/De-

problematic. For instance, the jury in a criminal trial is specifically instructed that statements and remarks by counsel are not evidence. See State v. Valdivia, 95 Hawai'i 465, 480, 24 P.3d 661, 676 (2001). Lavoie has not raised the flawed nature of this procedure on appeal, and it is not necessary for this court to resolve whether it warrants plain error review in light of our disposition of this case. Nevertheless, this matter is brought to the attention of the court and counsel so that the procedure used at the trial is not repeated.

fendants. (5CC08000069)

SCWC-13-0001803

Supreme Court of Hawai'i.

November 21, 2019

Background: Estate brought action against liquor licensee, asserting dram shop claim on behalf of passenger who died while riding in vehicle operated by intoxicated driver who was allegedly served alcohol by licensee. The Circuit Court, Fifth Circuit, granted summary judgment in favor of licensee, and estate appealed. The Intermediate Court of Appeals, Nakamura, Chief Judge, 141 Hawai'i 368, 409 P.3d 772, reversed and remanded. Licensee filed application for writ of certiorari, which was granted.

Holdings: The Supreme Court, Wilson, J., held that genuine issue of material fact as to whether passenger engaged in conduct that was more negligent than that of licensee precluded summary judgment.

Affirmed.

1. Alcoholic Beverages ⚿1001, 1040

A negligent violation of liquor licensee's duty to refrain from serving alcohol to patrons they know, or have reason to know, are under the influence of intoxicating liquor constitutes a cause of action known as a "dram shop" action. Haw. Rev. Stat. § 281-78.

2. Alcoholic Beverages ⚿1128

Under a complicity defense, an injured third party is excluded from the class of "innocent third parties" that may bring a dram shop claim against a liquor licensee when he or she actively contributed to or procured the intoxication of the drunk driver who injured him or her. Haw. Rev. Stat. § 281-78.

3. Appeal and Error ⚿3554

The appellate court reviews the circuit court's grant or denial of summary judgment de novo.

4. Alcoholic Beverages ⚿1025

Although a dram shop owes no duty to a customer who injures himself or herself after drinking, it owes a duty to innocent injured third parties. Haw. Rev. Stat. § 281-78.

5. Negligence ⚿549(10)

Pursuant to the comparative negligence statute, claims arising from acts of negligence that result in death or in injury to person or property are not barred by the negligence of the injured plaintiff unless his or her negligence is greater than that of the individual against whom recovery is sought. Haw. Rev. Stat. § 663-31(a).

6. Alcoholic Beverages ⚿1125, 1128

Complicity defense conflicts with statutory comparative negligence defense because it bars a potential plaintiff from asserting a negligence claim against a liquor licensee per se if the plaintiff actively contributed to or procured the intoxication of the individual that caused the plaintiff's injury, regardless of whether the plaintiff's negligence is greater than that of the liquor licensee; therefore, complicity defense would bar recovery to an injured individual who would otherwise be able to recover pursuant to the comparative negligence statute. Haw. Rev. Stat. §§ 281-78, 663-31(a).

7. Judgment ⚿181(33)

Genuine issues of material fact existed as to degree of negligence attributable to passenger who was killed in one-car accident in which driver was intoxicated and to liquor licensee who allegedly served driver and passenger, and whether passenger engaged in conduct that was more negligent than that of licensee, precluding summary judgment in dram shop action brought by passenger's estate. Haw. Rev. Stat. §§ 281-78, 663-31(a).

8. Judgment ⚿185(6)

Summary judgment is required if, viewing the evidence in the light most favorable to the non-moving party, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS (CAAP-13-0001803)

Michelle-Lynn E. Luke, for Petitioner.

Stephen M. Tannenbaum, (James J. Bickerton, Nathan P. Roehrig on the brief), Honolulu, for Respondents Bernadine Kuahiwinui and Kenneth Kaupu.

RECKTENWALD, C.J., NAKAYAMA, McKENNA, POLLACK, AND WILSON, JJ.

OPINION OF THE COURT BY WILSON, J.

[1] Under Hawai'i's liquor control statute, Hawai'i Revised Statutes ("HRS") § 281-78 (Supp. 1996), liquor licensees have a duty to refrain from serving alcohol to patrons that they know, or have reason to know, are under the influence of intoxicating liquor. Ono v. Applegate, 62 Haw. 131, 138, 612 P.2d 533, 539 (1980). A negligent violation of this duty constitutes a cause of action known as a "dram shop" action. Id. at 134 n.2, 612 P.2d at 537 n.2. Respondents/Plaintiffs-Appellants Bernadine Kuahiwinui and Kenneth Kaupu ("Kristerpher's Estate") assert a dram shop claim on behalf of their son, Kristerpher Kuahiwinui ("Kristerpher"),[1] who died while riding as a passenger in a vehicle driven by Kristerpher's intoxicated cousin Solomon Kuahiwinui ("Solomon"). The liquor licensee that served Solomon and Kristerpher alcohol, Petitioner/Defendant-Appellee Zelo's Inc. ("Zelo's"), moved for summary judgment on the dram shop claim, alleging that Kristerpher's Estate lacked standing to bring its claim of negligence against Zelo's. The Circuit Court of the Fifth Circuit ("circuit court") granted summary judgment to Zelo's because Kristerpher was also intoxicated at the time of the accident, and therefore not an "innocent third party" with standing to bring a dram shop claim.[2] The Intermediate Court of Appeals ("ICA") reversed the circuit court's judgment, holding that there are genuine issues of material fact regarding the complicity defense, i.e. "whether Kristerpher actively contributed to or procured the intoxication of Solomon and thus, whether Kristerpher falls within the protected class of innocent third parties entitled to bring a dram shop cause of action." Kuahiwinui v. Zelo's Inc., 141 Hawai'i 368, 379, 409 P.3d 772, 783 (App. 2017). Because the complicity defense is inconsistent with application of the defense of contributory negligence, the judgment of the ICA is affirmed, but on the grounds that there are genuine issues of material fact as to whether Kristerpher's contributory negligence exceeded the negligence of Zelo's.

I. Background

On April 1, 2006 on the island of Kaua'i, Solomon was driving his cousin, Kristerpher, and friend, Christopher Ferguson ("Ferguson"), home after having dinner and alcoholic drinks at Sushi & Blues—a restaurant owned and operated by Zelo's. When their vehicle failed to negotiate a left turn, it tumbled down an embankment and landed in the Hanalei River upside-down. Solomon survived, but Kristerpher and Ferguson were unable to escape from the vehicle, and died.

Solomon testified in his deposition as to the events that occurred leading up to the accident. When Solomon, Ferguson, and Kristerpher stopped at a bank to deposit their checks in the late afternoon on March 31, 2006, Ferguson purchased a twelve-pack of beer from a nearby store. They drove to Hanalei Bay, where they remained for two hours drinking beer. Kristerpher also purchased marijuana from a group of people nearby. Solomon drank two beers and smoked marijuana during this time. Solomon then drove himself, Kristerpher, and Ferguson from Hanalei Bay to Sushi & Blues, where they had dinner and drinks. They were served by Zelo's' employee Serge Bullington ("Bullington") who later stated in his deposition that Solomon did not appear intoxicated. Bullington recalled serving Solomon

1. Bernadine Kuahiwinui brought the case in her individual capacity and as representative of Kristerpher's estate. Kenneth Kaupu appears in his individual capacity.

2. The Honorable Randal G.B. Valenciano presided.

two beers and two shots. According to Solomon, Kristerpher also purchased a mixed drink with "strong tequila" which the three men shared.

Solomon, Kristerpher, and Ferguson left Sushi & Blues and Solomon drove them to a nearby bar called Tahiti Nui. Solomon ordered one beer at Tahiti Nui, but after a few sips, the security guard asked Solomon and Kristerpher to leave.[3] When they left Tahiti Nui around midnight, Solomon was driving. As the car approached the Hanalei Bridge, it failed to negotiate a left turn, hit a guard rail, rolled down an embankment, and plunged into the river upside down. Kristerpher and Ferguson drowned and Solomon escaped. Blood tests later revealed that Solomon's blood alcohol content ("BAC") was 0.13, or one and a half times the legal limit for driving.[4]

A. Circuit Court Proceedings

As noted, Kristerpher's Estate filed a dram shop claim against Zelo's.[5] It argued that Zelo's breached its duty to refrain from serving alcohol to patrons that it knew, or had reason to know, were under the influence of an intoxicant. Zelo's moved for summary judgment with respect to the dram shop claim, arguing that "[i]ntoxicated persons . . . are simply not afforded the right to assert civil liability against a commercial seller of alcohol[.]" Because Kristerpher was intoxicated at the time of his death,[6] Zelo's argued that he did not fall within the class of persons intended to be protected by dram shop liability. The circuit court granted Zelo's' motion for summary judgment, finding that Kristerpher's Estate lacked standing to assert the claim because Kristerpher was intoxicated at the time of the accident. It held that Zelo's did not owe a duty to Kristerpher to refrain from serving alcohol to Solomon, the driver, because Kristerpher was not an "innocent third party" protected by the dram shop law. Kristerpher's Estate appealed to the ICA.

B. ICA Proceedings

On appeal, Kristerpher's Estate argued that the circuit court erred in holding that Kristerpher was not an "innocent third party" intended to be protected by the dram shop law. It claimed that only individuals who injure themselves as a result of drunk driving are precluded from asserting dram shop causes of action, and since Kristerpher was a passenger in a vehicle driven by a drunk driver, Kristerpher's Estate is not barred from raising the claim.

The ICA vacated the circuit court's order granting summary judgment to Zelo's. Zelo's, 141 Hawai'i at 379, 409 P.3d at 783. It described the duty owed by a liquor licensee "not to serve alcohol to a person it knows or reasonably should know is under the influence of alcohol" and noted that the class of people intended to be protected by this legal duty are "innocent third parties." Id. at 369, 409 P.3d at 773. The ICA stated that "an innocent third party injured by a drunk driver has a negligence cause of action against a liquor licensee that, preceding the injury, served alcohol to the drunk driver, who it knew or reasonably should have known was intoxicated." Id. The ICA held that an injured third party that is intoxicated "is not automatically excluded from the class of innocent third parties entitled to pursue a dram shop cause of action." Id. at 372, 409 P.3d at 776. Rather, only an individual "*who injures himself or herself* while driving drunk" is precluded from raising such a

3. Solomon speculated that they were asked to leave Tahiti Nui because Kristerpher was underage.

4. Pursuant to HRS § 291E-61(a)(4) (Supp. 2005), the legal limit for driving is 0.08 grams of alcohol per one hundred milliliters or cubic centimeters of blood:

> (a) A person commits the offense of operating a vehicle under the influence of an intoxicant if the person operates or assumes actual physical control of a vehicle:
>
> . . . .
>
> (4) With .08 or more grams of alcohol per one hundred milliliters or cubic centimeters of blood.

5. Kristerpher's Estate also brought a dram shop claim against Tahiti Nui, but it was dismissed with prejudice pursuant to a stipulation entered into by the parties.

6. Kristerpher's BAC at the time of the accident was 0.16—twice the legal limit for driving.

claim. Id. at 376, 409 P.3d at 780 (emphasis in original).

[2] To determine what constitutes an "innocent third party," the ICA applied a complicity defense analysis that has been adopted in several other jurisdictions. Id. at 378, 409 P.3d at 782. Under a complicity defense, an injured third party is excluded from the class of "innocent third parties" that may bring a dram shop claim against a liquor licensee when he or she "actively contributed to or procured the intoxication of the drunk driver who injured him or her." Id. at 370, 409 P.3d at 774. Here, because Kristerpher was not the driver of the vehicle, the ICA determined that he was not automatically excluded from the class of "innocent third parties." Id. at 376-77, 409 P.3d at 780-81. However, it held that genuine issues of material fact existed concerning whether Kristerpher "actively contributed to or procured" Solomon's intoxication, which would remove him from the class of "innocent third parties" and thereby bar him from raising a dram shop claim against Zelo's. Id. at 379, 409 P.3d at 783. The ICA vacated the circuit court's judgment and remanded to the circuit court for further proceedings consistent with its opinion that the complicity defense was available to Zelo's. Id.

C. Supreme Court Filings

Zelo's raised three issues in its Application for Writ of Certiorari: (1) generally, whether a party asserting a dram shop cause of action must establish its "standing as an 'innocent third party' within the protected class of individuals for which the claim is reserved[;]" (2) whether Kristerpher is an "innocent third party;" and (3) whether the ICA erred in applying the complicity defense to determine that there are genuine issues of material fact with regard to Kristerpher's status as an "innocent third party." In response, Kristerpher's Estate argued that the ICA properly applied the complicity defense doctrine and correctly found that there are genuine issues of material fact regarding whether Kristerpher is an "innocent third party" in this case.

II. Standard of Review

[3] The appellate court reviews "the circuit court's grant or denial of summary judgment *de novo*." Querubin v. Thronas, 107 Hawai'i 48, 56, 109 P.3d 689, 697 (2005) (quoting Durette v. Aloha Plastic Recycling, Inc., 105 Hawai'i 490, 501, 100 P.3d 60, 71 (2004)). This court has often articulated that:

> [S]ummary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties. The evidence must be viewed in the light most favorable to the non-moving party. In other words, we must view all of the evidence and the inferences drawn therefrom in the light most favorable to the party opposing the motion.

Id. (brackets in original) (quoting Durette, 105 Hawai'i at 501, 100 P.3d at 71).

III. Discussion

A. Kristerpher's Estate has standing to assert a dram shop claim against Zelo's.

[4] Kristerpher's Estate has standing to raise a dram shop claim against Zelo's pursuant to Hawai'i's liquor control statute, HRS § 281-78,[7] which imposes a duty upon liquor licensees to refrain from serving individuals that the licensees know, or have reason to know, are under the influence of an intoxicating liquor. See Ono, 62 Haw. at 138, 612 P.2d at 539. Although a dram shop owes no duty to a customer who injures himself or herself after drinking, it owes a duty to innocent injured third parties.[8] Bertelmann, 69 Haw. at 101, 735 P.2d at 934.

7. At the time of the accident, HRS § 281-78(b)(1)(B) (Supp. 1996) stated "[a]t no time under any circumstances shall any licensee or its employee ... [s]ell, serve, or furnish any liquor to, or allow the consumption of any liquor by: ... [a]ny person at the time under the influence of liquor[.]"

8. In Bertelmann v. Taas Assocs., this court "emphatically reject[ed] the contention that intoxicat-

Bertelmann does not provide a dispositive resolution to the question raised by this case. Bertelmann involved a consumer of alcohol who died from injuries he received while driving his car alone after drinking at a hotel. Id. at 96, 735 P.2d at 931. This court held that "merely serving liquor to an already intoxicated customer and allowing said customer to leave the premises, of itself, does not constitute actionable negligence" "in the absence of harm to an innocent third party," id. at 101, 735 P.2d at 934, but did not expound on who counts as an "innocent third party." In our view, "an innocent third party" would, under our law of comparative negligence, be a person whose negligence does not exceed that of the tortfeasor.

Because Kristerpher's Estate is a third party representing an individual who sustained injuries allegedly due to the negligent conduct of Zelo's, it has standing to bring a dram shop claim against Zelo's. See Ono, 62 Haw. at 134-41, 612 P.2d at 537-41. Under the facts of this case and the holding of Bertelmann, only Solomon, the driver, would be precluded from recovering from Zelo's.[9]

B. The complicity defense is not applicable in this jurisdiction because it conflicts with the comparative negligence statute.

[5, 6] The complicity defense bars an individual from asserting a dram shop claim if the individual "actively contributed to or procured the intoxication of" the drunk driver. Zelo's, 141 Hawai'i at 379, 409 P.3d at 783. The comparative negligence defense applicable in this jurisdiction is inconsistent with the complicity defense. Pursuant to HRS § 663-31(a), claims arising from acts of negligence that result "in death or in injury to person or property" are not barred by the negligence of the injured plaintiff unless his or her negligence is greater than that of the individual against whom recovery is sought.[10] The

ed liquor consumers can seek recovery from the bar or tavern which sold them alcohol'' in the absence of ''affirmative acts which increase the peril of an intoxicated customer.'' 69 Haw. 95, 100-01, 735 P.2d 930, 933-34 (1987). In doing so, we created an inconsistency between our dram shop liability rules and our general modified comparative negligence statute, HRS § 663-31 (2016), under which ''an injured plaintiff may recover against a defendant even if her negligence contributed to her own injury, as long as her negligence is not greater than that of the defendant.'' Steigman v. Outrigger Enters., Inc., 126 Hawai'i 133, 135, 267 P.3d 1238, 1240 (2011). It has accordingly been suggested that our holding in Bertelmann, which was later reaffirmed in Feliciano v. Waikiki Deep Water, Inc., 69 Haw. 605, 752 P.2d 1076 (1988), and extended to preclude underage drinkers from recovering from commercial liquor sellers in Winters v. Silver Fox Bar, 71 Haw. 524, 797 P.2d 51 (1990), should be reassessed. See Reyes v. Kuboyama, 76 Hawai'i 137, 147, 870 P.2d 1281, 1291 (1994) (Levinson, J., concurring). However, in 2003, the legislature implicitly acknowledged this inconsistency by enacting HRS § 663-41 (2016), which imposes the same liability rules on social hosts. HRS § 663-41 provides that social hosts over the age of twenty-one who provide or permit the provision of alcoholic beverages to persons under the age of twenty-one are ''liable for all injuries or damages caused by the intoxicated person under twenty-one years of age[,]'' except that ''[a]n intoxicated person under the age of twenty-one years who causes an injury or damage shall have no right of action under this part.''

9. That is not to say, however, that a passenger injured in a drunk driving accident is precluded as a matter of law from being found to be more responsible than a commercial supplier of liquor under our general modified comparative negligence rules. Accordingly, we agree with the ICA that a passenger's own intoxication does not ''automatically exclude[ ] him from the class of innocent third parties protected by the dram shop cause of action.'' Zelo's, 141 Hawai'i at 377, 409 P.3d at 781 (emphasis added).

10. HRS § 663-31 provides:

(a) Contributory negligence shall not bar recovery in any action by any person or the person's legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not greater than the negligence of the person or in the case of more than one person, the aggregate negligence of such persons against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person for whose injury, damage or death recovery is made.

(b) In any action to which subsection (a) of this section applies, the court, in a nonjury trial, shall make findings of fact or, in a jury trial, the jury shall return a special verdict which shall state:

(1) The amount of the damages which would have been recoverable if there had been no contributory negligence; and

(2) The degree of negligence of each party, expressed as a percentage.

complicity defense conflicts with HRS § 663-31(a) because it bars a potential plaintiff from asserting a negligence claim against a liquor licensee per se if the plaintiff "actively contributed to or procured the intoxication of" the individual that caused the plaintiff's injury, regardless of whether the plaintiff's negligence is greater than that of the liquor licensee. Zelo's, 141 Hawai'i at 379, 409 P.3d at 783. Therefore, the complicity defense would bar recovery to an injured individual who would otherwise be able to recover pursuant to the comparative negligence statute, HRS § 663-31. Accordingly, evidence that Kristerpher "actively contributed to or procured the intoxication of Solomon" is relevant to the jury's comparison of the degree of negligence between Kristerpher and Zelo's, but any "active" contribution by him does not bar Kristerpher's Estate from raising a dram shop claim against Zelo's. Id.

C. There are genuine issues of material fact regarding whether Kristerpher's negligence exceeded that of Zelo's.

[7, 8] Summary judgment is required if, viewing the evidence in the light most favorable to the non-moving party, "there is "no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Querubin, 107 Hawai'i at 56, 109 P.3d at 697 (quoting Durette, 105 Hawai'i at 501, 100 P.3d at 71). Per Zelo's' comparative negligence defense—and viewing the evidence in the light most favorable to Kristerpher's Estate—genuine issues of material fact exist as to whether Zelo's' negligence exceeded Kristerpher's. The record contains evidence that could support a finding that Zelo's was negligent. Before arriving at Sushi & Blues, Solomon drank two beers and smoked marijuana. Evidence that Solomon had been drinking and smoking before he arrived at Sushi & Blues indicates that Zelo's may have known, or had reason to know, that Solomon was under the influence of an intoxicant when it served him alcohol. See Ono, 62 Haw. at 140, 612 P.2d at 540. The record also contains evidence that Kristerpher may have been negligent. Solomon testified in his deposition that Kristerpher purchased and smoked marijuana and drank beers with Solomon at Hanalei Bay and purchased one "strong" mixed drink which he shared with Solomon at Sushi & Blues before riding as a passenger in a car driven by Solomon. Because Kristerpher accepted a ride from an individual with whom he had been consuming intoxicants, a jury could find that Kristerpher was negligent. However, viewed in the light most favorable to Kristerpher's Estate, the evidence in the record contains a genuine issue of material fact as to the degree of negligence attributable to Kristerpher and Zelo's, and whether Kristerpher engaged in conduct that was more negligent than that of Zelo's.

IV. Conclusion

Viewing the evidence in the light most favorable to the non-moving party, there are genuine issues of material fact as to whether Kristerpher's negligence was greater than that of Zelo's. Therefore, we affirm the ICA's January 30, 2018 judgment on appeal vacating the circuit court's June 7, 2013 final judgment but for the reasons stated herein and remand to the circuit court for further proceedings consistent with this opinion.

(c) Upon the making of the findings of fact or the return of a special verdict, as is contemplated by subsection (b) above, the court shall reduce the amount of the award in proportion to the amount of negligence attributable to the person for whose injury, damage or death recovery is made; provided that if the said proportion is greater than the negligence of the person or in the case of more than one person, the aggregate negligence of such persons against whom recovery is sought, the court will enter a judgment for the defendant.

(d) The court shall instruct the jury regarding the law of comparative negligence where appropriate.

health care. Surely, the majority cannot reasonably expect this to occur.

Instead, the reality of the majority's opinion will be that year after year the legislature will be forced to continually adjust its spending, ever upward, to match school district by school district and county by county spending, benefiting our richer counties at the expense of our poorer ones. In short, despite its rhetoric, the majority has transformed the Hancock Amendment from a shield to protect the people of Missouri from the increasing growth of government and taxation into a sword mandating continued increases in spending.

I cannot believe this was the intention of those who drafted the Hancock Amendment or the voters who passed it.

Jonathan D. CARTER and Laurie J. Carter, Appellants,

v.

Ronald KINNEY and Mary Kinney, Respondents.

No. 77487.

Supreme Court of Missouri, En Banc.

April 25, 1995.

Church member, who slipped and fell on driveway of second church member's house while en route to Bible class, sued second church member for personal injuries. The Circuit Court, Platte County, Ward B. Stuckey, J., entered judgment for second member and appeal was taken. The Court of Appeals affirmed. Transfer was granted. The Supreme Court, Robertson, J., held that: (1) first member was licensee, rather than an invitee, and (2) trial court correctly determined that second member had no duty to protect first member from unknown dangerous conditions.

Trial court judgment affirmed.

Price, J., concurred in result.

1. Judgment ⇐181(33)
Negligence ⇐136(15)

Question of whether injured party was an invitee or licensee is question of law which can be resolved by trial court by summary judgment.

2. Negligence ⇐32(2, 2.3)

All visitors entering premises with permission are "licensees" until possessor has interest in visits such that visitor has reason to believe premises have been made safe to receive him, at which time visitor becomes "invitee."

See publication Words and Phrases for other judicial constructions and definitions.

3. Negligence ⇐33(1)

Possessor of land owes trespasser no duty of care.

4. Negligence ⇐32(2.2)

Possessor of land owes licensee duty to make safe dangers of which possessor is aware.

5. Negligence ⇐32(2.3), 48

Possessor of land owes invitees duty to exercise reasonable care to protect invitees against both known dangers and those that would be revealed by inspection.

6. Negligence ⇐32(2.13)

For purposes of determining degree of care required to be exercised by possessors of land, social guest is subclass of licensee, rather than an invitee.

7. Negligence ⇐32(2.3)

An entrant becomes a "invitee," for purposes of determining degree of care required to be taken for his or her safety by possessor of land, when possessor invites entrant with expectation of material benefit from visit or extends invitation to public generally. Restatement (Second) of Torts § 332.

8. Negligence ⇐32(2, 2.3)

Member of church who slipped and fell on premises of fellow member while entering home for purpose of attending Bible study class was licensee, to whom fellow member owed duty to make safe dangers of which he was aware, rather than invitee to whom fellow member would owe duty to exercise care against both known dangers and those which would be revealed by inspection; injured member had not been invited unto premises for material benefit, and as Bible study was confined to small group within congregation fellow member had not thrown open his property to public generally.

David T. Greis, William H. Pickett, Kansas City, for appellants.

John B. Reddoch, Scott J. Sullivan, Sherrill P. Vickers, Liberty, for respondents.

Jeffrey L. Groves, Springfield, for amicus curiae Mo. Organization of Defense Lawyers.

ROBERTSON, Judge.

Detouring from its already lengthy opinion in this case, the Court of Appeals, Western District, speculated that dicta in *Seward v. Terminal Railroad Association*, 854 S.W.2d 426, 428–9 (Mo. banc 1993), acknowledged in *Gray v. Russell*, 853 S.W.2d 928, 930, n. 2 (Mo. banc 1993), amounted to a "sub silentio" overruling of the common law of this state basing premises liability on the status of the injured entrant to the land. We granted transfer because of the general interest of the issues raised in the case and to assure the western district that *Seward* did not abolish the licensee-invitee distinction in Missouri.[1] We have jurisdiction. Mo. Const. art. V, § 10. The judgment of the trial court sustaining the defendants' motion for summary judgment is affirmed.

I.

Ronald and Mary Kinney hosted a Bible study at their home for members of the Northwest Bible Church. Appellant Jonathan Carter, a member of the Northwest Bible Church, attended the early morning Bible study at the Kinney's home on February 3, 1990. Mr. Kinney had shoveled snow from his driveway the previous evening, but was not aware that ice had formed overnight. Mr. Carter arrived shortly after 7:00 a.m., slipped on a patch of ice in the Kinneys' driveway, and broke his leg. The Carters filed suit against the Kinneys.

The parties agree that the Kinneys offered their home for the Bible study as part of a series sponsored by their church; that some Bible studies took place at the church and others were held at the homes of church members; that interested church members signed up for the studies on a sheet at the church, which actively encouraged enrollment but did not solicit contributions through the classes or issue an invitation to the general public to attend the studies; that the Kinneys and the Carters had not engaged in any social interaction outside of church prior to Mr. Carter's injury, and that Mr. Carter had no social relationship with the other participants in the class. Finally, the parties agree that the Kinneys received neither a financial nor other tangible benefit from Mr. Carter in connection with the Bible study class.

They disagree, however, as to Mr. Carter's status. Mr. Carter claims he was an invitee; the Kinneys say he was a licensee. And the parties dispute certain facts bearing on the purpose of his visit, specifically, whether the parties intended a future social relationship, and whether the Kinneys held the Bible study class in order to confer some intangible benefit on themselves and others.

On the basis of these facts, the Kinneys moved for summary judgment. The trial court sustained the Kinney's summary judg-

1. *Harris v. Niehaus*, 857 S.W.2d 222 (Mo. banc 1993), a case decided *after Seward* and *Gray*, assumed the continued existence of the licensee-invitee distinction and found that plaintiffs had failed to make a submissible case as a matter of law. Harris expressly adopted the Restatement (Second) of Torts, §§ 343 & 343(A) (1965) as the law of Missouri. Those portions of the Restatement discuss invitee liability. Moreover, the Court's opinion relied on the Restatement definitions of "licensee", Restatement (Second). Torts, § 330 (1965) and invitee. Restatement (Second) of Torts, § 332 (1965).

ment motion on the ground that Mr. Carter was a licensee and that the Kinneys did not have a duty to a licensee with respect to a dangerous condition of which they had no knowledge. This appeal followed.

II.

A.

This case comes to the Court on summary judgment. "Summary judgment is designed to permit the trial court to enter judgment, without delay, where the moving party has demonstrated, on the basis of the facts as to which there is no genuine dispute, a right to judgment as a matter of law." *ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). The propriety of summary judgment is purely an issue of law which an appellate court may review *de novo* on the record on appeal. *Id.*

[1] As to premises liability, "the particular standard of care that society recognizes as applicable under a given set of facts is a question of law for the courts." *Harris v. Niehaus*, 857 S.W.2d 222, 225 (Mo. banc 1993). Thus, whether Mr. Carter was an invitee, as he claims, or a licensee is a question of law and summary judgment is appropriate if the defendants' conduct conforms to the standard of care Mr. Carter's status imposes on them.

B.

The Kinneys' motion for summary judgment characterizes Mr. Carter as a social guest. The Kinneys' description of Mr. Carter's status as a social guest has led to some confusion in the parties' briefing of the legal issues in this case. Indeed, the Carters assign error to the trial court's decision to sustain the Kinneys' motion for summary judgment, because they believe factual issues are in dispute as to that status.

[2–5] Historically, premises liability cases recognize three broad classes of plaintiffs: trespassers, licensees and invitees. All entrants to land are trespassers until the possessor of the land gives them permission to enter. All persons who enter a premises with permission are licensees until the possessor has an interest in the visit such that the visitor "has reason to believe that the premises have been made safe to receive him." 65 C.J.S. Negligence, § 63(41), 719. That makes the visitor an invitee. The possessor's intention in offering the invitation determines the status of the visitor and establishes the duty of care the possessor owes the visitor. *Generally,* the possessor owes a trespasser no duty of care, *Seward,* 854 S.W.2d at 428; the possessor owes a licensee the duty to make safe dangers of which the possessor is aware, *Wells v. Goforth,* 443 S.W.2d 155, 158 (Mo. banc 1969); and the possessor owes invitees the duty to exercise reasonable care to protect them against both known dangers and those that would be revealed by inspection. *Harris,* 857 S.W.2d at 225–6. The exceptions to these general rules are myriad, but not germane here.

[6] A social guest is a person who has received a social invitation. *Wolfson v. Chelist,* 284 S.W.2d 447, 450 (Mo.1955). Though the parties seem to believe otherwise, Missouri does not recognize social guests as a fourth class of entrant. *Cf. Scheibel v. Lipton,* 156 Ohio St. 308, 102 N.E.2d 453 (1951). In Missouri, social guests are but a subclass of licensees. The fact that an invitation underlies a visit does not render the visitor an invitee for purposes of premises liability law. This is because "[t]he invitation was not tendered with any material benefit motive".... and "[t]he invitation was not extended to the public generally or to some undefined portion of the public from which invitation, ... entrants might reasonably expect precautions have been taken, in the exercise of ordinary care, to protect them from danger." *Wolfson,* 284 S.W.2d at 450. Thus, this Court held that there "is no reason for concluding it is unjust to the parties ... to put a social guest in the legal category of licensee." *Id.* at 451.

[7] It does not follow from this that a person invited for purposes not strictly social is perforce an invitee. As *Wolfson* clearly indicates, an entrant becomes an invitee when the possessor invites with the expectation of a material benefit from the visit or extends an invitation to the public generally.

See also Restatement (Second) of Torts, § 332 [2] (defining an invitee for business purposes) and 65 C.J.S. Negligence, § 63(41) (A person is an invitee "if the premises are thrown open to the public and [the person] enters pursuant to the purposes for which they are thrown open."). Absent the sort of invitation from the possessor that lifts a licensee to invitee status, the visitor remains a licensee as a matter of law.

[8] The record shows beyond cavil that Mr. Carter did not enter the Kinneys' land to afford the Kinneys any material benefit. He is therefore not an invitee under the definition of invitee contained in Section 332 of the Restatement. The record also demonstrates that the Kinneys did not "throw open" their premises to the public in such a way as would imply a warranty of safety. The Kinneys took no steps to encourage general attendance by some undefined portion of the public; they invited only church members who signed up at church. They did nothing more than give permission to a limited class of persons—church members—to enter their property.

Mr. Carter's response to the Kinneys' motion for summary judgment includes Mr. Carter's affidavit in which he says that he did not intend to socialize with the Kinneys and that the Kinneys would obtain an intangible benefit, albeit mutual, from Mr. Carter's participation in the class. Mr. Carter's affidavit attempts to create an issue of fact for the purpose of defeating summary judgment. But taking Mr. Carter's statement of the facts as true in all respects, he argues a factual distinction that has no meaning under Missouri law. Human intercourse and the intangible benefits of sharing one's property with others for a mutual purpose are hallmarks of a licensee's permission to enter. Mr. Carter's factual argument makes the legal point he wishes to avoid: his invitation is not of the sort that makes an invitee. He is a licensee.

The trial court concluded as a matter of law that Mr. Carter was a licensee, that the Kinneys had no duty to protect him from unknown dangerous conditions, and that the defendants were entitled to summary judgment as a matter of law. In that conclusion, the trial court was eminently correct.

C.

The Carters next argue that this Court should abolish the distinction between licensees and invitees and hold all possessors to a standard of reasonable care under the circumstances. They argue that the current system that recognizes a lower standard of care for licensees than invitees is arbitrary and denies deserving plaintiffs compensation for their injuries. *See Mounsey v. Ellard*, 363 Mass. 693, 297 N.E.2d 43, 52 (1973) (Abolition of the licensee/invitee distinction in favor of a duty of reasonable care in all circumstances "prevents the plaintiff's status as licensee or invitee from being the sole determinative factor in assessing the occupier's liability.") The Carters note that twenty states [3] have abolished the distinction since

2. Section 332 defines an "invitee" as "a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land."

3. Nine states have abolished only the licensee-invitee distinction and retained the distinction regarding trespassers: *Wood v. Camp*, 284 So.2d 691, 695 (Fla.1973); *Jones v. Hansen*, 254 Kan. 499, 867 P.2d 303, 310 (1994); *Poulin v. Colby College*, 402 A.2d 846, 850 (Me.1979); *Mounsey v. Ellard*, 363 Mass. 693, 297 N.E.2d 43, 51 (1973); *Peterson v. Balach*, 294 Minn. 161, 199 N.W.2d 639, 642 (1972); *Ford v. Board of County Commissioners*, 118 N.M. 134, 879 P.2d 766, 771 (1994); *O'Leary v. Coenen*, 251 N.W.2d 746, 751 (N.D.1977); *Hudson v. Gaitan*, 675 S.W.2d 699, 703 (Tenn.1984); and *Antoniewicz v. Reszcynski*, 70 Wis.2d 836, 236 N.W.2d 1, 11 (1975). The rest abolished all distinctions: *Webb v. Sitka*, 561 P.2d 731, 733 (Alaska 1977); *Rowland v. Christian*, 69 Cal.2d 108, 70 Cal.Rptr. 97, 104, 443 P.2d 561, 568 (1968); *Mile High Fence Co. v. Radovich*, 175 Colo. 537, 489 P.2d 308, 311 (1971); *Smith v. Arbaugh's Restaurant*, 469 F.2d 97, 100 (D.C.Cir.1972), *cert. denied*, 412 U.S. 939, 93 S.Ct. 2774, 37 L.Ed.2d 399 (1973); *Pickard v. Honolulu*, 51 Haw. 134, 452 P.2d 445, 446 (1969); *Cates v. Beauregard Elec. Coop., Inc.*, 328 So.2d 367, 371 (La.), *cert. denied*, 429 U.S. 833, 97 S.Ct. 97, 50 L.Ed.2d 98 (1976); *Limberhand v. Big Ditch Co.*, 218 Mont. 132, 706 P.2d 491, 496 (1985); *Ouellette v. Blanchard*, 116 N.H. 552, 364 A.2d 631, 634 (1976); *Basso v. Miller*, 40 N.Y.2d 233, 386 N.Y.S.2d 564, 567–69, 352 N.E.2d 868, 872–73 (1976); and *Mariorenzi v. Joseph Di Ponte, Inc.*, 114 R.I. 294, 333 A.2d 127, 133 (1975).

Illinois eliminated the distinctions by statute in 1983. *The Premises Liability Act*, 740 Ill. Com-

1968 and encourage Missouri to join this "trend."

The Kinneys claim that the trend is little more than a fad. They note that twelve states [4] have expressly rejected the abolition of the distinction since the "trend" began in 1968 and that the remaining eighteen states, including Missouri, have not directly addressed the issue and maintain the common law distinctions.

We are not persuaded that the licensee/invitee distinction no longer serves. The possessor's intentions in issuing the invitation determine not only the status of the entrant but the possessor's duty of care to that entrant. The contours of the legal relationship that results from the possessor's invitation reflect a careful and patient effort by courts over time to balance the interests of persons injured by conditions of land against the interests of possessors of land to enjoy and employ their land for the purposes they wish. Moreover, and despite the exceptions courts have developed to the general rules, the maintenance of the distinction between licensee and invitee creates fairly predictable rules within which entrants and possessors can determine appropriate conduct and juries can assess liability. To abandon the careful work of generations for an amorphous "reasonable care under the circumstances" standard seems—to put it kindly—improvident.

Though six states have abolished the distinction between licensee and invitee since Professor Keeton penned his words, he speculates that the failure of more states to join the "trend"

> may reflect a more fundamental dissatisfaction with certain developments in accident law that accelerated during the 1960's—reduction of whole systems of legal principles to a single, perhaps simplistic, standard of reasonable care, the sometimes blind subordination of other legitimate social objectives to the goals of accident prevention and compensation, and the commensurate shifting of the balance of power to the jury from the judge. At least it appears that the courts are . . . acquiring a more healthy skepticism toward invitations to jettison years of developed jurisprudence in favor of beguiling legal panacea.

W.P. Keeton, Prosser and Keeton on the Law of Torts, § 62 (1984).

We remain among the healthy skeptics. The experience of the states that have abolished the distinction between licensee and invitee does not convince us that their idea is a better one. Indeed, we are convinced that they have chosen wrongly.

III.

The judgment of the trial court is affirmed.

COVINGTON, C.J., and HOLSTEIN, BENTON, THOMAS, and LIMBAUGH, JJ., concur.

PRICE, J., concurs in result.

piled Stat.Ann. 130/2 (1994). In 1990, the Colorado Legislature reinstated the distinctions. *See Lawson v. Safeway, Inc.*, 878 P.2d 127, 129 (Colo. Ct.App.1994). In *Tantimonico v. Allendale Mut. Ins. Co.*, 637 A.2d 1056, 1062 (R.I.1994), the Supreme Court of Rhode Island restored the trespasser classification originally eliminated in *Mariorenzi, supra.*

4. *McMullan v. Butler*, 346 So.2d 950, 951 (Ala. 1977); *Baldwin v. Mosley*, 295 Ark. 285, 748 S.W.2d 146, 147 (1988); *Morin v. Bell Court Condominium Ass'n, Inc.*, 223 Conn. 323, 612 A.2d 1197, 1201 (1992); *Bailey v. Pennington*, 406 A.2d 44, 47–48 (Del.1979), *appeal dismissed*, 444 U.S. 1061, 100 S.Ct. 1000, 62 L.Ed.2d 744 (1980); *Mooney v. Robinson*, 93 Idaho 676, 678, 471 P.2d 63, 65 (1970); *Kirschner v. Louisville Gas & Elec. Co.*, 743 S.W.2d 840, 844 (Ky.1988); *Astleford v. Milner Enterprises, Inc.*, 233 So.2d 524, 525 (Miss.1970); *Di Gildo v. Caponi*, 18 Ohio St.2d 125, 130–31, 247 N.E.2d 732, 736 (1969); *Sutherland v. Saint Francis Hosp., Inc.*, 595 P.2d 780, 782 (Okla.1979); *Tjas v. Proctor*, 591 P.2d 438, 441 (Utah 1979); *Younce v. Ferguson*, 106 Wash.2d 658, 724 P.2d 991, 995 (1986); and *Yalowizer v. Husky Oil Co.*, 629 P.2d 465, 469 (Wyo.1981).

moving to adjudge Pearson in contempt and defending against Rockstone's civil action were, as the trial justice assessed, "reasonable."

[5, 6] Additionally, there is no indication that awarding attorney's fees to Marion based on the settlement agreement countervails public policy and is therefore unenforceable. *See Mendez v. Brites,* 849 A.2d 329, 338 (R.I.2004) ("[T]his Court may deem contractual provisions that violate public policy to be unenforceable."). Though Pearson argues that G.L.1956 § 15–5–16, pertaining to domestic relations, does not expressly authorize an award of attorney's fees to a nonprevailing party, we hold that these provisions do not apply to the instant contract dispute, nor does § 15–5–16 expressly disallow awarding fees to a nonprevailing party. Moreover, our Legislature has not "ma[de] an adequate declaration of public policy which is inconsistent with the contract's terms." *Shadis v. Beal,* 685 F.2d 824, 833—34 (3d Cir.1982); *see also Ryan v. Knoller,* 695 A.2d 990, 992 (R.I.1997) (holding that an intoxication exclusion in a rental insurance agreement violated the General Assembly's "strong public policy in favor of insurance coverage for motor vehicle rental companies"). As such, we are not persuaded to disturb the arms-length settlement agreement between Marion and Pearson. Indeed, "[i]t is a basic tenet of contract law that the contracting parties can make as 'good a deal or as bad a deal' as they see fit * * *." *Rodrigues,* 926 A.2d at 624 (quoting *Durfee v. Ocean State Steel, Inc.,* 636 A.2d 698, 703 (R.I.1994)).

B

Consideration of the § 15–5–16 Factors

Pearson also incorrectly contends that the Family Court justice erred when he failed to consult § 15–5–16 before awarding fees to Marion. Section 15–5–16(b) lists factors that the Family Court shall consider when awarding attorney's fees relative to granting a "petition for divorce, divorce from bed and board, or relief without the commencement of divorce proceedings * * *." Section 15–5–16(a). Here, as the attorney's fees at issue were based on a contractual provision triggered by Pearson's bankruptcy and not awarded during one of the three events encompassed by § 15–5–16(a), it was not necessary or proper for the Family Court justice to consult these factors. Accordingly, we hold that the Family Court correctly awarded attorney's fees to Marion without considering § 15–5–16.

IV

Conclusion

In accordance with the foregoing, we affirm the order of the Family Court. The associated documents may be remanded to that court.

Harry HILL et al.

v.

NATIONAL GRID et al.

No. 2009–214–Appeal.

Supreme Court of Rhode Island.

Jan. 21, 2011.

Background: Parents of child injured on landowner's field brought action against landowner, alleging that landowner was liable for child's injuries under doctrine of attractive nuisance. The Superior Court, Providence County, Patricia A. Hurst, J.,

entered summary judgment in favor of landowner, and parents appealed.

Holding: The Supreme Court, Flaherty, J., held that fact issues precluded summary judgment.

Vacated and remanded.

1. Appeal and Error ⚿893(1)

In reviewing the granting of a motion for summary judgment, the Supreme Court conduct its review on a de novo basis; in doing so, the Court adhere to the same rules and criteria as did the hearing justice.

2. Judgment ⚿181(2)

A hearing justice should grant a party's motion for summary judgment if there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

3. Judgment ⚿185(2)

In reviewing the evidence supporting a motion for summary judgment, a court draws all reasonable inferences in the light most favorable to the nonmoving party.

4. Judgment ⚿185(2, 5), 185.2(4)

In opposing a motion for summary judgment, it is the burden of the nonmoving party to prove the existence of a disputed issue of material fact by competent evidence; it cannot rest on allegations or denials in the pleadings or on conclusions or legal opinions.

5. Negligence ⚿1045(3, 4)

Property owners owe no duty of care to trespassers but to refrain from wanton or willful conduct; and even then, only upon discovering a trespasser in a position of danger.

6. Negligence ⚿1172

An exception to the general rule under which property owners owe no duty of care to trespassers but to refrain from wanton or willful misconduct, the attractive nuisance doctrine, imposes a duty of care on landowners to trespassing children. Restatement (Second) Torts § 339.

7. Negligence ⚿1172

The policy underlying the attractive nuisance doctrine, which imposes a duty of care on landowners to trespassing children, is that there must and should be an accommodation between the landowner's unrestricted right to use of his land and society's interest in the protection of the life and limb of its young; when these respective social-economic interests are placed on the scale, the public's concern for a youth's safety far outweighs the owner's desire to utilize his land as he sees fit. Restatement (Second) Torts § 339.

8. Judgment ⚿181(33)

Genuine issues of material fact, as to whether landowner knew or had reason to know that children were likely to trespass on its land and whether there was any dangerous condition on the land of which landowner knew or had reason to know, precluded summary judgment in favor of landowner on issue of whether landowner owned a duty to trespassing child pursuant to doctrine of attractive nuisance, in action against landowner arising when child played football on land and cut himself on protruding metal post. Restatement (Second) Torts § 339.

9. Judgment ⚿178, 181(2)

Summary judgment is an extreme remedy because it results in the end of the suit; as such, motions for summary judgment should be denied where genuine issues of material fact are present.

Ronald J. Resmini, Esq., Providence, for Plaintiff.

Stanley F. Pupecki, Esq., Providence, for Defendant.

Present: SUTTELL, C.J., GOLDBERG, FLAHERTY, ROBINSON, and INDEGLIA, JJ.

OPINION

Justice FLAHERTY, for the Court.

On an idyllic fall afternoon, a group of youngsters was engaged in the classic American pastime of touch football. Their play was abruptly interrupted when twelve-year-old Austin Hill stumbled and cut himself on a protruding metal post. The plaintiffs filed a complaint for negligence in Providence County Superior Court, alleging that Austin was injured by a dangerous condition on property owned by the defendant, National Grid. The plaintiffs now appeal from a grant of summary judgment in favor of the defendant.

This case came before the Supreme Court on December 7, 2010, pursuant to an order directing the parties to appear and show cause why the issues raised in this appeal should not summarily be decided. After hearing the arguments of counsel and reviewing the memoranda of the parties, we are satisfied that cause has not been shown. Accordingly, we shall decide the appeal at this time without further briefing or argument. For the reasons set forth in this opinion, we vacate the judgment of the Superior Court.

Facts and Travel

On the afternoon of October 4, 2006, Austin Hill accompanied several friends to a grass-covered vacant lot at the corner of Monticello Road and Williston Way in Pawtucket for a game of touch football.[1] While he was running, he suddenly tripped over an unseen metal pole that was protruding from the ground. Austin fell on the ground and struck a second metal pole, lacerating his left thigh. Because he was bleeding profusely, Austin hopped on his bike and went home. Austin's mother, Rebecca, brought the boy to a local emergency room, where he received treatment for the laceration. The wound eventually healed, but a permanent scar remains.

Harry and Rebecca Hill filed suit in Superior Court individually and as parents and next-of-kin to Austin and his siblings, Aydan and Jake. In their complaint, the Hills alleged that National Grid negligently maintained its property and that, as a result, Austin suffered injuries.[2] The defendant, a public utility that owned the lot, asserted that it owed no duty to Austin under the circumstances because he was a trespasser on its property. The plaintiffs contended that defendant had a duty under the attractive nuisance doctrine. After hearing arguments about the applicability of that doctrine, a justice of the Superior Court granted defendant's motion for summary judgment. She determined that plaintiffs had failed to make any showing that defendant knew or had reason to know that children were trespassing. It is from that decision that plaintiffs have sought review in this Court.

Standard of Review

[1–4] "In reviewing the granting of a motion for summary judgment, we conduct our review on a *de novo* basis; in doing so, we adhere to the same rules and criteria as did the hearing justice." *Classic Entertainment & Sports, Inc. v. Pemberton*, 988

1. Because this is an appeal from summary judgment sought by defendants, we review the facts in the light most favorable to plaintiffs.

2. In addition to their claim for personal injuries, plaintiffs also claimed a loss of consortium. Those claims were dismissed by agreement of the parties.

A.2d 847, 849 (R.I.2010). "A hearing justice should grant a party's motion for summary judgment 'if there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.' " *Id.* (quoting *Lynch v. Spirit Rent–A–Car, Inc.*, 965 A.2d 417, 424 (R.I.2009)). In reviewing the evidence, we draw "all reasonable inferences in the light most favorable to the nonmoving party." *Fiorenzano v. Lima*, 982 A.2d 585, 589 (R.I. 2009); *see also Planned Environments Management Corp. v. Robert*, 966 A.2d 117, 121 (R.I.2009); *Chavers v. Fleet Bank (RI) N.A.*, 844 A.2d 666, 669 (R.I.2004). It is the burden of the nonmoving party to prove the existence of a disputed issue of material fact by competent evidence; it "cannot rest on allegations or denials in the pleadings or on conclusions or legal opinions." *Classic Entertainment & Sports, Inc.*, 988 A.2d at 849 (quoting *Accent Store Design, Inc. v. Marathon House, Inc.*, 674 A.2d 1223, 1225 (R.I. 1996)); *see also Fiorenzano*, 982 A.2d at 589; *Chavers*, 844 A.2d at 669–70; *United Lending Corp. v. City of Providence*, 827 A.2d 626, 631 (R.I.2003). We have cautioned, however, that "[s]ummary judgment is an extreme remedy that should be applied cautiously." *Plainfield Pike Gas & Convenience, LLC v. 1889 Plainfield Pike Realty Corp.*, 994 A.2d 54, 57 (R.I. 2010) (quoting *Johnston v. Poulin*, 844 A.2d 707, 710 (R.I.2004)).

Analysis

A

History of Attractive Nuisance

[5–7] It is a well-established principle of law that property owners owe no duty of care to trespassers but to refrain from wanton or willful conduct; and even then, only upon discovering a trespasser in a position of danger.[3] *Cain v. Johnson*, 755 A.2d 156, 160 (R.I.2000); *Tantimonico v. Allendale Mutual Insurance Co.*, 637 A.2d 1056, 1061 (R.I.1994). An exception to this principle is the so-called "attractive nuisance" doctrine, which, in some instances, imposes a duty of care on landowners to trespassing children. At the core of this doctrine is the policy that

> "[t]here must and should be an accommodation between the landowner's unrestricted right to use of his land and society's interest in the protection of the life and limb of its young. When these respective social-economic interests are placed on the scale, the public's concern for a youth's safety far outweighs the owner's desire to utilize his land as he sees fit." *Haddad v. First National Stores, Inc.*, 109 R.I. 59, 64, 280 A.2d 93, 96 (1971).

Rhode Island adopted the Restatement (Second) *Torts'* articulation of the attractive nuisance doctrine in its 1971 decision in *Haddad*. There, a child was injured while being pushed around a defendant supermarket's parking lot in a shopping cart that had been left unsecured after the store had closed. Under the Restatement (Second) *Torts* § 339 at 197 (1965),

> "[a] possessor of land is subject to liability for physical harm to children trespassing thereon caused by an artificial condition upon the land if
>
> "(a) the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass, and
>
> "(b) the condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, and

3. Significantly, when articulating this principle, the Court specifically precluded its application to child-trespassers. *Tantimonico v. Allendale Mutual Insurance Co.*, 637 A.2d 1056, 1061, 1061 n. 1 (R.I.1994).

"(c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, and

"(d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and

"(e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children."

B

Current Status of the "Attractive Nuisance" Doctrine in Rhode Island

Since deciding *Haddad* in 1971, we have had but a few opportunities to consider the attractive nuisance doctrine.[4] In applying the doctrine to the situation at issue here, it is useful to consider the cases that have come before this Court recently. In 1992, we affirmed the Superior Court's grant of a directed verdict in favor of the landowner in *Bateman v. Mello,* 617 A.2d 877, 881 (R.I.1992) (child injured when he fell from a natural gas pipe upon which he was climbing while on defendant landowner's property). There we concluded that "[the] defendant had no reason to foresee that the gas pipe might be dangerous or involve an unreasonable risk of serious injury to [trespassing children]. The pipe and the spotlight are not, in and of themselves, inherently dangerous objects." *Id.* at 880. We further noted that the gas pipe served a useful purpose and, because it was not only the gas pipe, but also a spotlight activated by a preset timer that caused the plaintiff to fall, "that such a coincidental string of happenings could not, under any test of reasonable foreseeability, have been anticipated by [the] defendant." *Id.*

We next considered the doctrine in *Wolf v. National Railroad Passenger Corp.,* 697 A.2d 1082, 1086–87 (R.I.1997). There we affirmed summary judgment in favor of the defendant railroad after a twelve-year-old boy was killed tragically while trying to outrun a train on a trestle that extended over the water. In *Wolf,* we embraced the view of the overwhelming majority of jurisdictions that train trestles, as a matter of law, are not attractive nuisances. *Id.* (citing *Holland v. Baltimore & Ohio Railroad Co.,* 431 A.2d 597, 602 (D.C.Ct.App. 1981) (*en banc*); *Brownfield v. Missouri Pacific Railroad Co.,* 794 S.W.2d 773, 777 (Tex.Ct.App.1990) (writ denied)). That rule rests on the notion that train trestles are an "obvious danger" to even young prospective trespassers. *Wolf,* 697 A.2d at 1087 (describing the trestle in question as a "deathtrap").

C

Facts Are Sufficient to Survive Summary Judgment

[8, 9] Summary judgment is an extreme remedy because it results in the end of the suit. *See Plainfield Pike Gas & Convenience, LLC,* 994 A.2d at 57. As such, motions for summary judgment should be denied where genuine issues of material fact are present. *See Classic Entertainment & Sports, Inc.,* 988 A.2d at 849. As it did in the Superior Court, defendant argues before us that plaintiffs raised no material facts from which a jury could conclude (1) that defendant knew or had reason to know children were likely to trespass on the property or (2) that there was any dangerous condition on its land of

4. The first case this Court considered after adopting the attractive nuisance doctrine did not apply it because the injuries in question had occurred before this Court's decision in *Haddad v. First National Stores, Inc.,* 109 R.I. 59, 280 A.2d 93 (1971). *See Mariorenzi v. Joseph DiPonte, Inc.,* 114 R.I. 294, 300 n. 1, 333 A.2d 127, 130 n. 1 (1975).

which it knew or had reason to know. The Superior Court agreed with that argument, but we do not.

In our opinion, plaintiffs have raised sufficient facts from which a reasonable jury could conclude that defendant knew or had reason to know trespass was likely.[5] First, defendant suggests in its argument that it must know or have reason to know that children *are* trespassing on the property. This, however, is not the teaching of § 339(a) of the Restatement (Second) *Torts;* that section does not require the defendant to know or have reason to know that children *are* trespassing on the property, but rather that children are *likely* to trespass on the premises. Indeed, comment *e* in the Reporter's Notes in the Restatement highlight this distinction by noting that § 339(a) applies "whether children *are* trespassing, or are *likely* to trespass." (Emphases added.)

In the deposition of Eric Gemborys, a National Grid employee, it was disclosed that he looks at the property five or six times a year.[6] He further indicated that he was familiar with the area surrounding the lot, that it was between School Street and Route 1A, and that it was situated in the midst of "quite a few" residential homes. He conceded that National Grid had a policy in place to address trespassers, noting that in the event children were playing on the property, the employee who observed that activity was supposed to call the police.[7] Collectively, these facts give rise to a genuine factual dispute about whether the defendant knew or had reason to know that children were likely to trespass on the lot. Questions of fact must be resolved by a fact-finder and are not appropriate for summary judgment.

Also, defendant argues that the condition causing the injury, two protruding metal posts, was not one of which it knew or had reason to know. However, Mr. Gemborys testified at his deposition that he personally had visited the property five or six times over two years. He also described monthly maintenance by a grounds-keeping crew that mowed the grass and removed debris. Based on these activities by a variety of National Grid agents, a reasonable jury could conclude that defendant knew or had reason to know of the metal stakes protruding from the ground.

In summary, because there are disputed material facts from which a reasonable jury could find that the defendant knew or had reason to know that children were likely to trespass and knew or had reason to know of the potentially dangerous condition, the entry of summary judgment was improper.

Conclusion

For the reasons set forth in this opinion, we vacate the judgment of the Superior Court. This file is remanded to that court.

5. "The words 'reason to know' * * * denote the fact that the actor has information from which a person of reasonable intelligence or of the superior intelligence of the actor would infer that the fact in question exists, or that such person would govern his conduct upon the assumption that such fact exists." Restatement (Second) *Torts* § 12 at 19 (1965).

6. Mr. Gemborys was not the employee charged with these responsibilities at the time of the incident in question. However, the record suggests that his predecessor, now-deceased, carried on the same or similar functions.

7. Mr. Gemborys' deposition testimony is not completely clear, but he at least suggested that the protruding stakes may have held no trespassing signs at one point.

Charles THOMPSON, Virginia Thompson, Robert Deckard, Tammy L. Deckard, Donald Thomas, Patricia Thomas, James L. Greeson, Judy Greeson, Christopher Pitts, Mary Kay Pitts, John L. Armstrong, Appellants–Plaintiffs,

v.

The MURAT SHRINE CLUB, INC., and Murat Temple Association, Inc., Appellees–Defendants.

No. 29A02–9208–CV–367.

Court of Appeals of Indiana, Second District.

Sept. 7, 1994.

Firefighters brought action against landowners alleging that landowners had breached duty of care to firefighters after loft in building where firefighters were fighting fire collapsed, injuring several firefighters. The Hamilton Circuit Court, Judith S. Proffitt, J., entered judgment for landowners and firefighters appealed. The Court of Appeals, Sullivan, J., held that landowners did not breach any duty of care owed to firefighters.

Affirmed.

Kirsch, J., concurred and filed opinion.

1. Appeal and Error ⇐863

In order to prevail on appeal where summary judgment motion has been granted in favor of opposing party, party must establish existence of genuine issue of material fact from materials designated to trial court. Trial Procedure Rule 56.

2. Negligence ⇐32(2.18)

Unless statute or ordinance imposes duty to keep building safe specifically for benefit of firefighters in case of fire, landowner's duties are those prescribed by common law.

3. Negligence ⇐32(2.18)

Application of fireman's rule, precluding firefighters from holding another negligent for creating situation to which they respond in professional capacity, is not limited only to protecting landowners from liability for fire-related injuries, but extends to liability for injuries unrelated to cause of fire.

4. Negligence ⇐52

Landowners were not liable to injured firefighters on theory that landowners knew, but failed to warn firefighters that loft, where firefighters were injured while putting out fire, was latent danger, though landowners failed to construct loft in conformity with building regulations, and though, after fire, loft was characterized as firetrap, where it was not shown that landowner's conduct violated statute drafted to insure safety of firefighters in case of fire, and where loft as constructed seemed safe and secure, and daily use did not pose known or unanticipated danger.

5. Negligence ⇐47

After-the-fact characterization of instrumentality alleged to have created trap which caused injury does not provide necessary basis on which to establish entrapment.

6. Negligence ⇐32(2.18)

Court of Appeals declined to abandon classification system of land entrants or to reclassify firefighters as invitees; Court bound to uphold fireman's rule, classifying firefighters as licensees, absent legislative directive to contrary and in light of rule's continuing application by state's courts.

7. Negligence ⇐32(2.18)

Court of Appeals declined to abandon premises liability as basis for fireman's rule in favor of assumption of risk or public policy; fireman's rule remains law in state and must be applied.

Kevin P. Farrell, Yosha, Cline, Farrell & Ladendorf, Indianapolis, for appellants.

Norman T. Funk, Hill, Fulwider, McDowell, Funk & Matthews, Indianapolis, for appellees.

SULLIVAN, Judge.

On February 9, 1988, several members of the Indianapolis Fire Department (Firefighters) were injured while fighting a fire at the

Murat Shrine Club and Murat Temple Association (collectively "Murat"). Upon arriving at the scene, the firefighters located the source of the fire in a second floor storage room. The flames in the room were extinguished within minutes. During this time, some of the firefighters discovered a loft, or attic, above the storage room.

The loft, constructed in 1983 by Murat employees, provided additional storage space for paper goods and miscellaneous kitchen items. An open stairway from the storage room floor led to a closed door that opened into the loft. Using a hose that had been dragged up the stairs, one of the firefighters sprayed a two-second burst of water and extinguished a "spot" fire in the loft. Moments later, as the fireman crawled across the loft to determine whether the fire was out, the loft collapsed, trapping and injuring several firefighters.

[1] The trial court granted summary judgment in favor of the defendants Murat Shrine Club and Murat Temple Association. In order to prevail upon appeal, the Firefighters must establish the existence of a genuine issue of material fact from the materials designated to the trial court. Ind.T.R. 56. The restated issues presented upon appeal are:

> I. Whether genuine issues of material fact exist that show defendants breached the duty of care owed to plaintiffs by maintaining a latent danger, by entrapment, or through willful or wanton misconduct;
>
> II. Whether Indiana should adopt a standard of reasonable care under the circumstances owed all lawful entrants notwithstanding present distinctions between the duties owed licensees and invitees;
>
> III. Whether firefighters who enter private property in the scope of their employment should be reclassified as invitees; and
>
> IV. Whether premises liability should be abandoned either in favor of assumption of risk or in favor of public policy as the basis for the fireman's rule?

We affirm.

I. Duty of Care

[2] Indiana had long held that the Fireman's Rule bars negligence actions seeking recovery for injuries sustained by firefighters in the line of duty. In *Woodruff v. Bowen* (1893) 136 Ind. 431, 34 N.E. 1113, our Supreme Court classified firefighters as licensees to whom a landowner owes no duty "except that of abstaining from any positive wrongful act which may result in his injury...." *Id.* at 442, 34 N.E. at 1117. Further, a firefighter is deemed to take "all risks as to the safe condition of the premises upon which he enters." *Id.* Unless a statute or ordinance imposes a duty to keep a building safe *specifically* for the benefit of firefighters "in case of a fire," the landowner's duties are those prescribed by common law. *Id.* at 443–44, 34 N.E. at 1117.

In *Woodruff,* a fireman was killed when a roof upon which he ventured to fight a fire collapsed without warning. The building had been remodeled prior to the fire, but the owner neither increased the strength of the walls nor altered the foundation to the degree necessary to provide sufficient support for the building's uses. The owner of the building knew the building could not support the weight of the stock of stationery and books stored therein and, furthermore, knew that the building would not withstand any additional weight such as the weight of water in case of fire. The prevailing city ordinance declared it unlawful to "construct, erect or maintain any unsafe, insecure and dangerous wall, building or structure within the limits of [Indianapolis]...." *Woodruff, supra,* at 435–36, 34 N.E. at 1115. Any wall, structure or building that was "likely to fall, or to take fire" was deemed unsafe and insecure. *Id.*

Despite the building owner's knowledge that the building was likely to fall because it was insecure and unsafe, the owner concealed this condition from the fire department when it responded to a fire upon the premises. The firefighters proceeded to throw water upon the building and its contents. Our Supreme Court attributed the building collapse to the weight of the stock and the water used to douse the flames as well as to pre-existing structural inadequacies of the building. These factors combined

to cause the walls to give way "without being weakened or impaired at all in their bearing strength by the fire which was burning." *Id.* at 438, 34 N.E. at 1116. The Court also concluded that the ordinance in question was not drafted to ensure the safety of firemen in the case of fire; rather, it was of general application. *Id.* at 444, 34 N.E. at 1117.[1] So long as the building was safe under ordinary circumstances, the owner was not required to anticipate extraordinary events, e.g., that the building tenant stored stationery upon which large quantities of water were thrown thereby "putting [the building] to an extraordinary strain." *Id.* at 445, 34 N.E.2d at 1118.

[3, 4] Today, the Fireman's Rule encapsulates the principle that public safety officers "whose occupations by nature expose them to particular risks, may not hold another negligent for creating[2] the situation to which they respond in their professional capacity." *Kennedy v. Tri–City Health Center* (1992) 3d Dist.Ind.App., 590 N.E.2d 140, 142, *trans. denied* (quoting *Koehn v. Devereaux* (1986) 3d Dist.Ind.App., 495 N.E.2d 211, 215). Notwithstanding *Woodruff, supra*, and its progeny, the Firefighters cite positive wrongful acts, identified in *Kennedy, supra*, which might permit recovery. The Firefighters contend: (1) that Murat knew, but failed to warn them, that the loft was a latent danger; (2) that Murat's conduct in constructing the loft was so grossly deviant from everyday standards as to render Murat's conduct willful or wanton; and (3) that the loft constituted an entrapment.

The Firefighters place substantial reliance upon the fact that the Murat failed to obtain a building permit[3] before the loft was constructed in contravention of local ordinances. The gist of this argument is that, had a permit been obtained, the oversight provided by architects, engineers, or building inspectors would have averted any potential structural defect or safety concern. The Firefighters equate the failure to obtain a permit (as well as the failure to secure the advice of an architect or engineer) with a "positive wrongful act." In the Firefighters' opinion, this presents a genuine issue of material fact as to whether the failure was willful or wanton conduct, i.e., that the Murat proceeded without regard to the required procedures which led, eventually, to the concealment of a latent danger and the maintenance of an entrapment.

We disagree. First, and foremost, even if the Murat should have either secured professional advice or obtained a permit before altering the storage room, the Firefighters have failed to show that the conduct violated a statute drafted to insure the safety of firemen in case of a fire. *Woodruff, supra* (distinguishing ordinances for the safety of "public safety officers" from those providing for the safety of the general public). Thus, failure to proceed in conformity with building regulations does not trigger liability under *Woodruff, supra.*

Second, even if the Murat had used alternative[4] construction methods that arguably

1. There can be little doubt that the ordinance involved in *Woodruff* encompassed a safety purpose with regard to members of the general public. *See Carroll v. Joe,* (1994) 3rd Dist.Ind. App., 638 N.E.2d 467, 471 (Sullivan, J., dissenting).

2. The application of the Fireman's Rule is not limited, as Firefighters suggest, only to the negligent act *creating* a fire. The Firefighters adamantly contend that the Rule is "specifically designed to protect landowners from liability for fire-related injuries." Reply Brief of Appellant at 3. Consequently, they argue that whether their injuries "were caused by a fire-related injury is hotly contested in this case." *Id.* This position, however, ignores caselaw to the contrary. Clearly, liability may attach even if negligence *unrelated* to the cause of the fire is the source of the injury. *See Woodruff, supra* (firemen injured due to building's structural default); *Pallikan v. Mark* (1975) 1st Dist., 163 Ind.App. 178, 322 N.E.2d 398 (fireman injured when stepping into large hole covered with grass and weeds on property).

3. Apparently, prior to receiving a permit, plans and specifications would have been filed with and approved by the state building commissioner. I.C. 22–11–1–12 (Burns Code Ed.1974), *repealed by* Acts 1984, P.L. 8, § 136 and by Acts 1987, P.L. 245, § 22. For present provisions, see I.C. 22–12–2 through 22–12–5 (Burns Code Ed.1992 & Supp.1993).

4. A professional engineer, who reviewed the methods employed by the Murat employees who constructed the loft, opined that had the loft been built in compliance with the Uniform Building Code, it would not have collapsed during the fire.

might have rendered the loft more structurally sound, the loft *as constructed* seemed safe and secure. There was no evidence that the loft was built with disregard for its structural soundness. Although no outside advice was sought, the Murat employees discussed various ways of securing the platform, ultimately agreeing that a system of beams and joists anchored in the concrete block walls provided adequate support. Further, the Murat employees who used the loft neither detected any shifting or pulling of the loft nor detected any "give" to the loft. Even with the added weight of several adults moving about the loft, the loft did not vibrate, sway, or sag. The Murat staff considered the loft safe and deemed it structurally secure. Given the consensus as to the loft's integrity, it simply does not follow that the Murat knew, but failed to warn the Firefighters, that the loft was a latent danger. By its conduct, the Murat demonstrated the exact opposite, i.e., through daily use, the loft did not pose a known or unanticipated danger.

[5] Third, the Firefighters seize upon a reference to the loft as a "firetrap" as evidence of a genuine issue of material fact as to whether the loft was an entrapment.[5] After the fire, John Preston, the Murat's General Manager, discussed plans to rebuild the storage room in a manner that would eliminate a pre-existing firetrap. In further testimony, however, Preston clarified that it was a fireman who, after the fire, called the loft a firetrap. As is often the case, the illumination of hindsight often suggests a better course of conduct once the danger is past. Be that as it may, an after-the-fact characterization does not provide the necessary basis upon which to establish entrapment.

5. According to the Firefighters, the entrapment test requires a showing that the defendant both created and controlled the instrumentality creating a trap. *Harper v. Kampschaefer* (1990) 4th Dist.Ind.App., 549 N.E.2d 1067, 1070, *trans. denied.* Here, the loft was specifically designed and used to house paper and linen products. Such a purpose seems wholly incongruous with creating and maintaining firetraps.

6. The Firefighters rely upon *Burrell v. Meads* (1991) Ind., 569 N.E.2d 637 in support of their invitation to abolish the invitee-licensee distinction. Although *Burrell* reclassified social guests as invitees, in its response to dissatisfaction over the tests used to determine who is an invitee, a three-tiered classification system (invitee, licensee, and trespasser) remains intact.

7. For example, in *Pallikan, supra,* our First District rejected the fireman's invitation to ascribe "invitee" status to firemen based upon the authority of *Dini v. Naiditch* (1960) Ill., 20 Ill.2d 406, 170 N.E.2d 881. Further, after our Supreme Court reformulated the invitee classification in *Burrell, supra,* it denied transfer in *Kennedy v. Tri–City Health, supra,* a case that based the denial of recovery upon the viability of the Fireman's Rule and the policemen's status as *licensees.* It is also important to note that in *Kennedy,*

II. & III. Licensee Status

[6] The Firefighters essentially challenge the common law distinctions between licensees and invitees. In a two-pronged attack, the Firefighters urge this court to abolish the "antiquated" common law classification system or, in the alternative, reclassify firefighters as invitees. The Murat counters that, notwithstanding recent reform[6] to Indiana's classification system of land entrants, invitees remain a separate and distinct class and that Indiana law maintains, a separate and distinct degree of care owed to licensees.

At the outset, we note that the Firefighters have presented an able argument and have provided ample authority upon which to premise a change in the law. The Firefighters urge that Indiana "extricate [itself] from a semantical quagmire", quoting *Mariorenzi v. Joseph DiPonte, Inc.* (1975) 114 R.I. 294, 333 A.2d 127, 133, that has perpetuated the "antiquated common law system of classifying entrants to premises" to which Indiana tenaciously clings. Brief of Appellant at 29. In its place, they posit, Indiana should adopt a unitary standard of reasonable care under the circumstances. The Firefighters also cite authority for the proposition that firefighters should be classified as invitees and, therefore, be afforded the duty of reasonable care.

As eloquent or as persuasive as the argument may be, we feel compelled, despite its age, to apply the tenets of *Woodruff, supra.* In reviewing the line of cases that have relied upon *Woodruff,* we are reminded that the arguments presented here have apparently fallen upon deaf ears.[7] Be that as it may, it

is not our prerogative to fashion new garments from what might well be thread-bare remnants of a rule from days gone by. In the instant case, we are bound to uphold the Fireman's Rule absent legislative directive to the contrary and in light of the Rule's continuing application by the courts of our state.

IV. Alternatives to Premises Liability

[7] The Firefighters also invite us to abandon premises liability as a basis for the Fireman's Rule in favor of (1) the assumption of risk or (2) public policy. Their position is supported, once again, with various rules employed by other jurisdictions. The Firefighters propose various tests and standards of care to determine the landowner's duty to public safety officers.

The assumption of risk approach, articulated in *Armstrong v. Mailand* (1979) Minn., 284 N.W.2d 343, 350, imposes a duty of reasonable care upon landowners "except to the extent firemen primarily assume the risk when entering upon the land.... [but firemen] do not assume, in a primary sense, risks that are hidden from or unanticipated by the firemen." Thus, the Firefighters in the instant case would not be precluded from recovery if they could prove that the collapse of the loft was "not the product of the fire but pre-existed the conflagration and, therefore, could be deemed a hidden or unanticipated risk." Brief of Appellant at 40 (quoting *Flowers v. Sting Security* (1985), 62 Md. App. 116, 488 A.2d 523, 537, *aff'd sub nom. Flowers v. Rock Creek Terrace Ltd.* (1987), 308 Md. 432, 520 A.2d 361).

Alternatively, the Firefighters note that in certain jurisdictions, firemen are simply not classified for purposes of premises liability. Rather, on the basis of public policy, firefighters are precluded from recovering for injuries sustained in the line of duty. *See, e.g., Kreski v. Modern Wholesale Electric Supply Co.* (1987), 429 Mich. 347, 415 N.W.2d 178. The public policy rationale is based, in part, upon the "relationship between firemen and policemen and the public that calls on these safety officers specifically to confront certain hazards on behalf of the public." *Id.* 415 N.W.2d at 187. Accordingly, the availability of worker's compensation benefits "fairly spreads the cost of these injuries to the public as a whole rather than individual property owners." *Id.* 415 N.W.2d at 188.[8] Under such a public policy rationale, Firefighters would permit or bar recovery based upon the exercise of reasonable care under the circumstances.

As we have previously stated, *supra*, whether the foregoing analyses provide a more valid or more rational response to the issue before us is beyond our consideration. Neither are we at liberty to impose or to effectuate the judicial ruminations of foreign jurisdictions no matter how persuasive or well-intentioned they may be. At this juncture, the Fireman's Rule, and its theoretical underpinnings, remains the law in Indiana and must be applied in the instant case. Having determined that the Firefighters have failed to identify an issue of material fact and having rejected the Firefighters' attempt to displace the prevailing rule of law, we must conclude that the Murat was entitled to summary judgment as a matter of law.

The judgment of the trial court is affirmed.

RILEY, J., concurs.

KIRSCH, J., concurs and files separate opinion.

KIRSCH, Judge, concurring.

I concur with the majority in all respects. I write separately only to note that our deci-

supra, our Third District considered, but declined to follow, the lead of foreign jurisdictions abandoning the Fireman's Rule. Judge Garrard's admonition to "refrain from counting the jurisdictions accepting or rejecting the rule as a means of determining whether it will apply in this state or not" is well-taken. *Kennedy, supra*, 590 N.E.2d at 143. Finally, in *Heck v. Robey* (1994) 1st Dist.Ind.App., 630 N.E.2d 1361, this court continued to apply the Fireman's Rule to police as licensees.

8. Indiana courts have also recognized that the public policy rationale provides *additional* support, although it neither replaces nor detracts from, the Fireman's Rule as historically applied in Indiana. *See Fox v. Hawkins* (1992) 1st Dist. Ind.App., 594 N.E.2d 493, 497; *Kennedy, supra*, 590 N.E.2d at 144.

sion is mandated by the century-old holding in *Woodruff v. Bowen* (1893), 136 Ind. 431, 34 N.E. 1113. In *Burrell v. Meads* (1991), Ind., 569 N.E.2d 637, our supreme court took a significant step toward modernizing the law of premises liability in Indiana. The instant case presents the opportunity to take another such step.

Kevin HUGHEY, Appellant,

v.

REVIEW BOARD OF THE INDIANA DEPARTMENT OF EMPLOYMENT AND TRAINING SERVICES, Mable Martin-Scott, Chairperson, and George H. Baker, Member, and Mark T. Robbins, Member, and Spencer Cord Company, Appellees.

No. 93A02-9312-EX-678.

Court of Appeals of Indiana,
Fourth District.

Sept. 8, 1994.

Transfer Denied Jan. 3, 1995.

Claimant appealed decision of Review Board of Department of Employment and Training Services denying benefits. The Court of Appeals, Ratliff, Senior Judge, held that claimant could not be discharged under statute defining "discharge for just cause" as including discharge for incarceration in jail following conviction, since claimant was not incarcerated after conviction.

Reversed.

Hoffman, J., dissented and filed opinion.

1. Administrative Law and Procedure ⇐763

Social Security and Public Welfare ⇐651.1

When reviewing decision by Review Board of Department of Employment and Training Services, Court of Appeals determines whether decision of Board is reasonable in light of its findings.

2. Administrative Law and Procedure ⇐784.1

Social Security and Public Welfare ⇐659.1

Court of Appeals must accept facts as found by Review Board of Department of Employment and Training Services unless its findings fall within exceptions under which Court may reverse.

3. Administrative Law and Procedure ⇐791

Social Security and Public Welfare ⇐662

One exception under which Court of Appeals may reverse factual finding of Review Board of Department of Employment and Training Services is when Board's finding is not supported by substantial evidence.

4. Administrative Law and Procedure ⇐784.1

Social Security and Public Welfare ⇐660

Court of Appeals may reverse decision of Review Board of Department of Employment and Training Services if reasonable persons would be bound to reach conclusion different from that reached by Board based on evidence before Board.

5. Administrative Law and Procedure ⇐796

Social Security and Public Welfare ⇐666

When appeal involves question of law, Court of Appeals is not bound by agency's interpretation of law but rather determines whether agency correctly interpreted law and correctly applied applicable law.

6. Social Security and Public Welfare ⇐562.5

In unemployment compensation proceeding, discharging employer has burden of establishing prima facie showing of just cause for termination.

amended complaint is not time barred, we believe that he is entitled to develop his case further. However, we are fully aware that appellant may not have enough of a claim to withstand summary judgment, and we do not intend by our decision to inhibit the subsequent filing of such motion.

The judgment of the district court is affirmed insofar as it relates to all named defendants except Cruz Lebron Gonzalez and the cause is remanded to the district court with instructions to entertain plaintiff's August 21, 1984 motion to amend the complaint by adding Cruz Lebron Gonzalez as a defendant under Rule 15(c), Fed.R.Civ.P. and for further proceedings in accordance with the opinion filed this date.

BARBER LINES A/S, et al., Plaintiffs, Appellants,

v.

M/V DONAU MARU, et al., Defendants, Appellees.

No. 84-1851.

United States Court of Appeals, First Circuit.

June 14, 1985.

Shipowners and charterers sued owners of second ship in admiralty, seeking recovery of damages occasioned by fuel oil spill into harbor. The United States District Court for the District of Massachusetts, Rya W. Zobel, J., rendered judgment for the defendants, and plaintiffs appealed. The Court of Appeals, Breyer, Circuit Judge, held that, adhering to longstanding and reasonably consistent precedent, no tort action could be maintained to recover damages for negligently caused, purely financial harm arising out of fuel oil spill from one ship into harbor which prevented a different ship from docking at nearby berth, requiring it to discharge cargo at another pier at significant cost.

Affirmed.

Navigable Waters ⇐19

Adhering to longstanding and reasonably consistent precedent, no tort action could be maintained to recover damages for negligently caused, purely financial harm arising out of fuel oil spill from one ship into harbor which prevented a different ship from docking at nearby berth, requiring it to discharge cargo at another pier at significant cost.

James B. Conroy, Boston, Mass., with whom Charles R. Parrott, Robert S. Brintz and Nutter, McClennen & Fish, Boston, Mass., were on brief, for plaintiffs, appellants.

E. Susan Garsh, Boston, Mass., with whom Thomas H. Walsh, Jr. and Bingham, Dana & Gould, Boston, Mass., were on brief, for defendants, appellees.

Before BREYER, Circuit Judge, ROSENN,* Senior Circuit Judge, and TORRUELLA, Circuit Judge.

BREYER, Circuit Judge.

In December 1979 the ship Donau Maru spilled fuel oil into Boston Harbor. The spill prevented a different ship, the Tamara, from docking at a nearby berth. The Tamara had to discharge her cargo at another pier. In doing so, she incurred significant extra labor, fuel, transport and docking costs. The Tamara, her owners, and her charterers sued the Donau Maru and her owners in admiralty. Insofar as is here relevant, they claimed negligence and sought recovery of the extra expenses as damages. The district court denied recovery on the basis of the pleadings, citing as

* Of the Third Circuit, sitting by designation.

authority *Petition of Kinsman Transit Co.*, 388 F.2d 821 (2d Cir.1968) ("*Kinsman II*"). The plaintiffs have appealed. We believe the district court was correct, and we affirm its judgment, for three related sets of reasons.

1. Plaintiffs-appellants seek recovery for a financial injury caused by defendants' negligence. We assume that the injury was foreseeable. Nonetheless controlling case law denies that a plaintiff can recover damages for negligently caused financial harm, even when foreseeable, except in special circumstances. There is present here neither the most common such special circumstance—physical injury to the plaintiffs or to their property—nor any other special feature that would permit recovery. *See* pp. 55–56 *infra*.

The leading "pure financial injury" case is *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 48 S.Ct. 134, 72 L.Ed. 290 (1927) (Holmes, J.). Flint had chartered a ship, agreeing with its owners to have the ship docked for repairs every few months. During that time Flint would neither use the ship nor pay rent. The dry dock negligently damaged the ship's propeller, delaying repairs, and causing Flint to lose the use of the ship for two weeks. The Court held that the ship's owners might sue for negligent damage to the ship, but the charterer, suffering no *physical* injury to himself or to his property, could not do so. Justice Holmes wrote,

> as a general rule, at least, a tort to the person or property of one man does not make the tortfeasor liable to another merely because the injured person was under a contract with that other unknown to the doer of the wrong. See *Savings Bank v. Ward*, 100 U.S. [(10 Otto)] 195 [25 L.Ed. 621]. The law does not spread its protection so far. A good statement, applicable here, will be found in *Elliot Steam Tug Co., Ltd. v. The Shipping Controller*, [1922] 1 K.B. 127, 139, 140. *Byrd v. English*, 117 Ga. 192 [43 S.E. 419]. *The Federal No. 2*, 21 F.(2d) 313.

Robins Dry Dock & Repair Co. v. Flint, 275 U.S. at 309, 48 S.Ct. at 135. The facts of *Robins* are strikingly similar to the present case. Just as the damaged propeller prevented Flint from using the ship, so the oil spill prevented the appellants from using the dock. The defendants in both cases were negligent. The injury in both cases (despite Holmes' use of the word "unknown") seems likely foreseeable. The harm in both cases was purely financial, without accompanying physical harm to person or property.

While we see three possible grounds of distinction, we do not believe them controlling. First, Flint alleged a specific contract with the shipowner, while the appellants here do not allege a contract with the dock. The authority that Justice Holmes says contains a "good statement" of the legal principle does not, however, turn so much on the existence of a formal contract as on the existence of limitations upon tort recovery for financial injury, *see Elliot Steam Tug Co., Ltd. v. The Shipping Controller, supra; Byrd v. English*, 117 Ga. 192, 43 S.E. 419 (1902). Moreover, the present appellants must have had a "right" to use the dock; and interference with that "right" caused the loss. It is difficult in this instance to see why the technical legal label applied to that right should make a legal difference.

Second, Flint apparently sued for lost profits. Appellants here sue for expense. Typically, an extra expense is more easily proved than a lost profit. Again, however, Justice Holmes points to authority that includes both added expenses and lost profits, *see Savings Bank v. Ward*, 100 U.S. (10 Otto) 195, 25 L.Ed. 621 (1879); *The Federal No. 2*, 21 F.2d 313 (2d Cir.1927). Other cases, decided both before and after *Robins*, for the most part make no such distinctions. *E.g., Hercules Carriers, Inc. v. Florida*, 720 F.2d 1201 (11th Cir.1983), *aff'd by an equally divided court*, 728 F.2d 1359 (1984) (en banc); *Marine Navigation Sulphur Carriers, Inc. v. Lone Star Industries, Inc.*, 638 F.2d 700 (4th Cir.1981); *Ultramares Corp. v. Touche*, 255 N.Y. 170, 174 N.E. 441 (1931); *Con-*

necticut Mutual Life Insurance Co. v. New York & New Haven Railroad, 25 Conn. 265 (1856); *Caltex Oil v. The Dredge "Willemstad",* 11 A.L.R. 227 (Austl.H.C. 1976); *Chargeurs Reunis Compagnie Francaise de Navigation a Vapeur v. English & American Shipping Co.,* 9 Lloyd's List, L.R. 464 (1921); *Cattle v. Stockton Waterworks Co.,* L.R. 10 Q.B. 453 (1875).

Third, one might claim that *Robins* is wrong or out of date and, therefore, that the inferior courts are free to "limit" it through a narrow reading. For reasons set out below, however, we think the principles underlying *Robins* remain legally sound insofar as they place plaintiffs like those before us "outside the scope" of those to whom defendant owes a legal duty of care. *Cf. Sinram v. Pennsylvania Railroad,* 61 F.2d 767 (2d Cir.1932) (Hand, J.); *Palsgraf v. Long Island Railroad,* 248 N.Y. 339, 162 N.E. 99 (1928) (Cardozo, J.).

In *Kinsman II, supra,* another leading case, the Second Circuit more recently came to the same result as the Supreme Court in *Robins Dry Dock.* In *Kinsman II,* defendant's ship broke loose from her moorings, crashed into another ship, then into a bridge, and, subsequently, with the help of ice floes, created a barrier that prevented other ships from moving upstream to unload cargo. The Second Circuit held that the financial injuries suffered by these other ships—extra unloading expenses—were too "remote" to warrant recovery. The court analogized the careening ship to a negligent driver who crashes into another car in a tunnel. Such a driver, though negligent, is not thought liable for all the inevitable (and foreseeable) financial losses resulting from the delays that he has caused. We can find in the case before us no relevant distinction from *Kinsman II.*

Appellants argue that *Kinsman II* raises a factual issue of "foreseeability." We read *Kinsman II,* however, not as saying that the injury, as a matter of fact, was unforeseeable but, rather, as drawing a legal line, based on considerations of policy, *cf. Sinram, supra,* that forbids compensation for certain types of foreseeable, negligently caused, financial injury. The details of the *Kinsman II* accident were unusual, but the *precise* details of many, or most, accidents cannot be foreseen in advance. Rather, foreseeability is a matter of a class, or type, of harm. And, in terms of perfectly traditional, reasonably specific, commonsense classes, the *Kinsman II* blockade, delay, and extra cost were foreseeable. Still more so are the extra costs involved in the analogous *Kinsman II* example, the extra trucking costs arising from tunnel accident delays. Viewing the legal implications of *Kinsman II* in this way, we cannot distinguish a barrier created by an oil spill from a barrier created by a careening ship, each of which increases unloading costs by requiring other ships to go elsewhere. It is still more difficult for us to distinguish this case from delays created by, say, tunnel accidents, which are likely to mean extra cost for truckers, shippers and merchants, all of which are foreseeable.

A third major, and recent, decision is that of the Fifth Circuit in *Louisiana ex rel. Guste v. M/V Testbank,* 752 F.2d 1019 (5th Cir.1985). The majority in that case sets forth a reasonably clear rule, which says that one who suffers only financial loss, unaccompanied by physical injury, cannot recover damages from a negligent defendant, whether or not the financial loss is foreseeable. The holding is consistent with the way in which most commentators have characterized pre-existing case authority. *See* James, *Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal,* 25 Vand.L.Rev. 43 (1972) ("[A] plaintiff may not recover for his economic loss resulting from bodily harm to another or from physical damage to property in which he has no proprietary interest."); Atiyah, *Negligence and Economic Loss,* 83 L.Q.Rev. 248, 249 (1967) (no "remedy for purely financial loss in the law of negligence to a person who had suffered such loss as a result of damage to, or the destruction of, a chattel in which he had no proprietary or possessory interest"). The holding also invalidates the authority of

several Fifth Circuit cases on which appellants here rely, and which in any event expressed a minority view. *See Micmar Motorship Corp. v. Cabaneli Naviera, S.A.*, 477 F.Supp. 45 (E.D.La.1979); *vacated and remanded*, 620 F.2d 298 (5th Cir. 1980); *In re Lyra Shipping Co.*, 360 F.Supp. 1188 (E.D.La.1973); *In re China Union Lines, Ltd*, 285 F.Supp. 426 (S.D. Tex.1967). We need not embrace the whole of *Testbank*'s rule in order to recognize that it constitutes additional, strong case law against allowing appellants to recover here.

We note that the courts in the cases we have cited have not always used the same legal terminology to describe their conclusions. One might, for example, use Judge Hand's language in *Sinram*, and say that plaintiffs like those before us are persons to whom appellee owes no "duty of care." Alternatively, one could use the slightly more obscure "proximate cause" terminology, and say that plaintiffs' injuries are too "remote." One could also appeal to historic legal terminology, and describe plaintiffs as suffering *damnum absque injuria*. Regardless of descriptive terminology, the holdings of these major cases are the same. They refuse to hold a defendant liable for negligently caused financial harm without accompanying physical injury or other special circumstances, *see* pp. 55–56, *infra*, none of which is present here. *E.g., Cattle v. Stockton Waterworks Co., supra* (no recovery for builder's contractual losses caused by tunnel obstruction); *Weller & Co. v. Foot & Mouth Disease Research Institute*, 1 Q.B. 569 (1966) (no recovery by cattle auctioneers for losses caused by virus escaped from research institute); *Robins Dry Dock & Repair Co. v. Flint, supra; Petition of Kinsman Transit Co., supra.*

2. Before affirming the district court on the basis of existing precedent, we have asked ourselves whether that precedent remains good law. After all, courts have sometimes departed from past legal precedent where changing circumstances viewed in light of underlying legal policy deprived that precedent of sound support. *See, e.g., Glanzer v. Shepard*, 233 N.Y. 236, 135 N.E. 275 (1922) (Cardozo, J.); *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916) (Cardozo, J.). Here, however, precedent seems, at least in general, to rest on a firm policy foundation. The same judges who removed other recovery limitations left this one firmly in place, *compare Glanzer v. Shepard, supra, and MacPherson v. Buick Motor Co., supra, with Ultramares Corp. v. Touche, supra* (Cardozo, J.). Much written commentary, which for a time in the 1940's attacked the limitation, *see* W. Prosser, *Handbook on the Law of Torts* 993 (1st ed. 1941), Carpenter, *Interference with Contract Relations*, 41 Harv.L.Rev. 728 (1928), has more recently supported it, while offering a variety of refinements. *See* Rizzo, *A Theory of Economic Loss in the Law of Torts*, 11 J.Leg. Stud. 281 (1982) (advocating recovery where its value outweighs "channeling" costs and litigation costs); Bishop, *Economic Loss in Tort*, 2 Oxford J.Leg.Stud. 1 (1982); Atiyah, *supra* (advocating minor changes); James, *supra*. *But see* Coval, Smith & Rush, *"Out of the Maze": Towards a "Clear Understanding" of the Test for Remoteness of Damages in Negligence*, 61 Can.B.Rev. 559 (1983) (advocating recovery when damage falls within a class of foreseeable damages); Seidelson, *Some Reflections on Proximate Cause*, 19 Duq. L.Rev. 1 (1980) (advocating test based on inquiry into relationship between defendant's conduct and plaintiff's commercial activities). Indeed, foreign civil law systems, which do not distinguish between financial and physical harm, nonetheless seem to have devised other rules that lead to similar results. *See* Marshall, *Liability for Pure Economic Loss Negligently Caused—French and English Law Compared*, 24 Int'l & Comp.Q. 748 (1975).

The cases and commentaries, in making a plausible argument that existing precedent rests on sound considerations of policy, also reveal that these considerations are highly general and abstract. Judges lack the empirical information that would allow measurement of their force or magnitude;

and, in particular, judges cannot apply these considerations on a case by case basis.

We have concluded that we could not find for appellants here without ignoring these policy considerations, or at a minimum, applying them case by case, a practice that we believe would be unwise. A brief description of the kinds of policy considerations typically advanced as supporting existing law (perhaps with a few modifications) will show why these considerations have led us to conclude that we must adhere to prior precedent.

First, cases and commentators point to pragmatic or practical administrative considerations which, *when taken together,* offer support for a rule limiting recovery for negligently caused pure financial harm. The number of persons suffering foreseeable financial harm in a typical accident is likely to be far greater than those who suffer traditional (recoverable) physical harm. The typical downtown auto accident, that harms a few persons physically and physically damages the property of several others, may well cause financial harm (e.g., through delay) to a vast number of potential plaintiffs. The less usual, negligently caused, oil spill foreseeably harms not only ships, docks, piers, beaches, wildlife, and the like, that are covered with oil, but also harms blockaded ships, marina merchants, suppliers of those firms, the employees of marina businesses and suppliers, the suppliers' suppliers, and so forth. To use the notion of "foreseeability" that courts use in physical injury cases to separate the financially injured allowed to sue from the financially injured not allowed to sue would draw vast numbers of injured persons within the class of potential plaintiffs in even the most simple accident cases (unless it leads courts, unwarrantedly, to narrow the scope of "foreseeability" as applied to persons suffering physical harm). That possibility—a large number of different plaintiffs each with somewhat different claims—in turn threatens to raise significantly the cost of even relatively simple tort actions. *See* Rizzo, *supra.* Yet the tort action is already a very expensive administrative device for compensating victims of accidents. Indeed, the legal time, the legal resources, the delay appurtenant to the tort action apparently mean that on average the victim recovers only between 28 and 44 cents of every dollar paid by actual or potential defendants, while victims who insure themselves directly recover at least between 55 and 66 cents of each premium dollar earned by insurance companies and between 85 and 90 cents of every dollar actually paid out to investigate and satisfy claims. *See* O'Connell, *An Alternative to Abandoning Tort Liability: Elective No-Fault Insurance for Many Kinds of Injuries,* 60 Minn.L.Rev. 503–12 (1976); *Best's Aggregates and Averages: Property-Casualty* 4–5 (1984). *See also* P. Munch, *Costs and Benefits of the Tort System if Viewed as a Compensation system* (Rand 1977); O'Connell, *Offers That Can't Be Refused: Foreclosure of Personal Injury Claims by Defendants' Prompt Tender of Claimants' Net Economic Losses,* 77 Nw.U.L.Rev. 589, 593–96 (1982); James, *supra* at 52 & n. 40. The added cost of the increased complexity, while unknowable with precision, seems likely significant.

At the same time many of the "financially injured" will find it easier than the "physically injured" to arrange for cheaper, alternative compensation. The typical "financial" plaintiff is likely to be a business firm that, in any event, buys insurance, and which may well be able to arrange for "first party" loss compensation for foreseeable financial harm. Other such victims will be able to sue under tort principles, for they will suffer at least some physical harm to their property. Still others may have contracts with, or be able to contract with, persons who can themselves recover from the negligent defendant. A shipowner, for example, might contract with a dock owner for "inaccessibility" compensation; and the dock owner (whose pier is physically covered with oil) might recover this compensation as part of its tort damages. *See* Rizzo, *supra* at 293. Of course, such a tort suit, embodying a "contract-defined" injury, may

still raise difficult foreseeability questions, *cf. Hadley v. Baxendale*, 9 Exch. 341 (1854). But the bringing of one suit, instead of several, still makes the litigation as a whole a less costly compensation device. *See* Rizzo, *supra;* Atiyah, *supra.* Finally, some of the "financially injured" will have suffered harm that is, in any event, noncompensable because it is not sufficiently distinguishable from minor harms typical of ordinary living. *Cf.* Fletcher, *Fairness and Utility in Tort Theory*, 85 Harv.L.Rev. 536, 543 (1972). The law does not compensate, for example, the cost of unused baseball tickets or flowers needed for apology regardless of the cause of the delay that foreseeably led to the added expense. Insofar as these considerations, taken as a whole, support recovery limitations, they reflect a fear of creating victim compensation costs that, from an administrative point of view, are unnecessarily high. *See Stevenson v. East Ohio Gas Co.*, 73 N.E.2d 200, 202 (Ohio 1946).

A second set of considerations focuses on the "disproportionality" between liability and fault. Those who argue "disproportionality" are not reiterating the discredited nineteenth century view that tort liability would destroy industry, investment, or capitalism. *See* F. Wharton, *A Suggestion as to Causation* 11 (1874); Horwitz, *The Doctrine of Objective Causation*, in *The Politics of Law: A Progressive Critique* 201 (D. Kairys, ed. 1982). Rather, they recognize that tort liability provides a powerful set of economic incentives and disincentives to engage in economic activity or to make it safer, *see generally* G. Calabresi, *The Costs of Accidents* (1970). And, liability for pure financial harm, insofar as it proved vast, cumulative and inherently unknowable in amount, could create incentives that are perverse.

Might not unbounded liability for foreseeable financial damage, for example, make auto insurance premiums too expensive for the average driver? Is such a result desirable? After all, the high premiums would reflect not *only* the costs of the harm inflicted; they would also reflect administrative costs of law suits, jury verdicts in uncertain amounts, some percentage of unbounded or inflated economic claims, and lessened incentive for financial victims to avoid harm or to mitigate damage. Given the existing liability for physical injury (and for accompanying financial injury), can one say that still higher premiums are needed to make the public realize that driving is socially expensive or to provide greater incentive to drive safely (an incentive that risk spreading through insurance dilutes in any event, *see* Shavell, *On Liability and Insurance*, 13 Bell J. of Econ. 120 [1982])?

These considerations, of administrability and disproportionality, offer plausible, though highly abstract, "policy" support for the reluctance of the courts to impose tort liability for purely financial harm. While they seem unlikely to apply with equal strength to every sort of "financial harm" claim, their abstraction and generality, along with the comparative inaccessibility of the empirical information needed to confirm or to invalidate them, mean that courts cannot weigh or apply them case by case. What, for example, in cases like this one, are the added administrative costs involved in allowing all persons suffering pure financial harm to sue the shipowner instead of "channeling" suits (perhaps via contract) through traditionally injured plaintiffs? Is there a problem of "disproportionality"? How far, for example, would additional, unbounded, pure financial loss liability for negligently caused oil spills, when added to the already large potential traditional liability, affect the type of insurance carried, the incentive to mitigate losses, the incentive to transport oil safely, the likelihood that shippers will use pipelines and domestic wells instead of ships and foreign wells, and the consequences of these and other related changes? We do not know the answers to these questions, nor can judges readily answer them in particular cases.

It does not surprise us then that, under these circumstances, courts have neither enforced one clear rule nor considered the

matter case by case. *Cf.* Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law,* 80 Harv.L.Rev. 1165, 1249–53 (1967). Rather, they have spoken of a general principle against liability for negligently caused financial harm, while creating many exceptions. *See, e.g.,* 1) *Newlin v. New England Telephone & Telegraph Co.,* 316 Mass. 234, 54 N.E.2d 929 (1944) (accompanying physical harm); 2) *Lumley v. Gye,* 2 El. & Bl. 216, 118 Eng.Rep. 749 (1853); *Beekman v. Marsters,* 195 Mass. 205, 80 N.E. 817 (1907) (intentionally caused harm); 3) *Dalton v. Meister,* 52 Wis.2d 173, 188 N.W.2d 494 (defamation), *cert. denied,* 405 U.S. 934, 92 S.Ct. 947, 30 L.Ed.2d 810 (1971); *Systems Operations, Inc. v. Scientific Games Development Corp.,* 555 F.2d 1131 (3d Cir. 1977) (injurious falsehood); 4) *Hitaffer v. Argonne Co.,* 183 F.2d 811 (D.C.Cir.) (loss of consortium), *cert. denied,* 340 U.S. 852, 71 S.Ct. 80, 95 L.Ed. 624 (1950); 5) *Chicago, Duluth & Georgia Bay Transit Co. v. Moore,* 259 Fed. 490 (6th Cir.) (medical costs of injured plaintiff paid by a different family member), *cert. denied,* 251 U.S. 553, 40 S.Ct. 118, 64 L.Ed. 411 (1919); 6) *Hedley Byrne Co. Ltd. v. Heller & Partners Ltd.,* A.C. 465 (1964) (negligent misstatements about financial matters); 7) *Jones v. Waterman S.S. Corp.,* 155 F.2d 992 (3d Cir.1946) (master-servant); 8) *Western Union Telegraph Co. v. Mathis,* 215 Ala. 282, 110 So. 399 (1926) (telegraph-addressee); 9) *Union Oil Co. v. Oppen,* 501 F.2d 558 (9th Cir.1974) (commercial fishermen as special "favorites of admiralty"). These exceptions seem designed to pick out broad categories of cases where the "administrative" and "disproportionality" problems intuitively seem insignificant or where some strong countervailing consideration militates in favor of liability. Thus an award of financial damages to one *also* caused physical harm does not threaten proliferation of law suits, for the plaintiff could sue anyway (for physical damages). Financial harm awards to family members carry with them an obvious self-limiting principle (as perhaps does awarding such damages to fishermen, as "favorites" of admiralty). Awarding damages for financial harm caused by negligent misrepresentation is special in that, without such liability, tort law would not exert significant financial pressure to avoid negligence; a negligent accountant lacks physically harmed victims as potential plaintiffs. *See* Atiyah, *supra* at 264.

We need not explore the exceptions in detail. Rather, we here simply point to the existence of plausible reasons underlying the judicial hesitance to award damages in a case like this one, and the need to consider exceptions by class rather than case by case. The existence of these factors, together with our comparative inability to evaluate their empirical significance, cautions us against departing from prior law.

3. We note that several dissenting Fifth Circuit judges in *Testbank, supra,* have advocated abandonment of traditional tort rules in this area and the adoption of a new rule that might allow recovery in this case. They would adopt a principle used to identify the class of private plaintiffs permitted to sue in "public nuisance" cases; and they would allow that class of persons to sue negligent defendants to recover foreseeable financial harm. To be more specific, they would allow "particularly damaged" plaintiffs to sue for financial harms suffered "beyond the general economic dislocation." "Particular damages" would have to be

> different in kind and degree from those suffered by the general public.... [Such damage typically arises] when the plaintiff is prevented from performing a specific contract, or is put to additional expense in performing it.... although plaintiffs who are delayed by a public nuisance cannot recover money for the delay itself ..., they can recover for actual additional expenses, such as extra fuel, additional crew expenses, and greater demurrage charges.

Louisiana ex rel. Guste v. M/V Testbank, 752 F.2d at 1047–49 (Wisdom, J., dissenting).

We do not believe we can adopt this general principle and apply it here for the

following reasons. First, if meant literally, it would amount to a near reversal of the general judicial principle that (with exceptions) forbids recoveries for negligently caused purely financial losses. Traditionally, the "public nuisance" suit involved an *intentional* tort—say, a deliberate blocking of a highway. The permissible plaintiffs included all those whose damage was different from that of the ordinary traveler. This class consisted of all those suffering definite financial harm, namely virtually all business travelers. *See* W. Prosser & W. Keeton, *Handbook on the Law of Torts* § 90 (1984). It is one thing to allow these persons to sue in the narrow, and relatively unusual, instance of an intentionally caused nuisance; it is quite another to allow them to sue whenever they are negligently, and foreseeably, injured. To do so—to depart from *Robins, Kinsman II* and others—would simply create the problems discussed in Part 2 above.

Second, the *Testbank* minority could escape the general problems discussed in Part 2 only by narrowing the class of plaintiffs—by eliminating some who suffer the type of financial harm that would qualify them as plaintiffs in public nuisance cases. The Fifth Circuit dissenters may want to do this, for they say they would allow delayed ships, bait shops, tackle shops, dry docks, repair services, boat charterers, to sue for financial harm caused by a negligent oil spill. But, they would not allow seafood restaurants or, presumably, grocery stores or owners of other businesses in the area to sue though they may have suffered equivalent, and equally foreseeable, harm. We fear, however, the ad hoc quality of the examples. We recognize the difficulty of avoiding a measure of judicial fiat in the tort area. *Cf. Sinram, supra.* And, we understand the dissenters' efforts to broaden liability in oil spill cases, while maintaining workable, administrable limits. But we do not see in the dissent a principle that would do so—that would broaden liability somewhat without running squarely into the practical problems outlined in Part 2. At best, the dissenters seem to have created a principle that would have to be applied case by case—yet this individualized type of application raises the difficulties we have previously discussed.

Third, we do not see how to apply the dissenters' principle outside the area of oil spills. Their reasoning and examples, applied to tunnel accidents, would allow truckers who ordinarily use the tunnel, firms whose employees use it regularly to commute, and other businesses, to recover for foreseeable financial losses from negligent drivers. While it may make sense to allow such persons to recover from one who intentionally builds a barricade in the tunnel, to allow such suits against a negligent driver raises the problems of Part 2 in full force. We do not believe it practical for courts to distinguish between, say, oil spill accidents and tunnel accidents, depending solely on the industrial context of the accident.

We conclude that we should follow existing precedent that requires us, as a matter of law, to deny recovery. That precedent is reasonably consistent. It is supported by plausible considerations of tort policy. Appellants have failed to bring themselves within any recognized class or category in which financial damages are already allowed, and appellants have failed to provide convincing reasons for the creation of any new exception or class that would work to their legal benefit.

For these reasons, the judgment of the district court is

Affirmed.