SMU | Dedman School of Law

SMU Law Review

Volume 5
Issue 3 *Survey of Southwestern Law for 1950*

Article 13

1951

Torts

James R. Kinzer

TORTS

COMPARATIVE NEGLIGENCE—MOTORIST STRIKING STANDING FREIGHT TRAIN

Arkansas. The Arkansas Comparative Negligence Law[1] received recent application in the case of *Hawkins v. Missouri Pac. R. Company.*[2]

Under the facts brought out in trial, plaintiff and a friend, riding in plaintiff's automobile, collided with defendant's train standing across a highway in the city of Paragould at about two o'clock early one morning. Evidence showed that plaintiff had been keeping a proper lookout and that the physical condition of the railroad tracks at the scene of the collision was such that plaintiff apparently had a clear road ahead. The tracks, at the point in question, were elevated some two or three feet above the regular level of the highway; plaintiff was thus able to see an approaching automobile's undimmed lights shining (as he was to discover) beneath the freight train immediately prior to the accident. By an unhappy coincidence, that part of the train standing across the highway was an empty freight car with its doors wide open. Through this opening plaintiff could clearly see a traffic light operating in the street ahead. Defendant railroad did not have an active warning signal at the crossing, nor had any member of the train crew been stationed on the road to warn on-coming vehicles. Plaintiff was knocked unconscious and his car demolished in the ensuing wreck.

After the evidence had been presented, the trial court, mindful of respectable authority for the premise that an injured plaintiff ordinarily cannot recover from a railroad company when an automobile has been driven into the side of a train standing across a highway,[3] directed a verdict for the defendant.

In reversing and remanding, the Arkansas Supreme Court quoted the language used in the case of *Fleming, Adm'x, v. Mo.*

[1] ARK. STAT. 1947 ANN. § 73-1004.

[2] .....Ark....., 228 S. W. 2d 642 (1950).

[3] Lowden, Trustee v. Quimby, 192 Ark. 307, 90 S. W. 2d 984 (1936); Gillenwater v. Baldwin, 192 Ark. 447, 93 S. W. 2d 658 (1936).

& Ark. Ry. Co.[4] and repeated in the later case of *Lloyd, Adm'x. v. St. Louis S. W. R. Co.*[5] to the effect that the true rule is that such cases merely present a question as to the comparative degree of negligence on the parts of the plaintiff and the railroad company. The court also noted that a directed verdict is proper only when there is no substantial evidence from which jurors, as reasonable men, could possibly find the issues for the plaintiff.

In the instant case, thought the court, a jury might well have found negligence in the defendant and, even though plaintiff might also be found to have been contributorily negligent, such negligence could very possibly have been of a lesser degree than that of the defendant,[6] thus warranting a recovery under the Comparative Negligence Law.

WRONGFUL DEATH STATUTE—PRESUMPTION OF DECEDENT'S DUE CARE

New Mexico. In the case of *Griego v. Conwell*[7] the New Mexico Supreme Court unanimously affirmed the theory that in a suit under the wrongful death statute,[8] when the issue of contributory negligence on the part of the decedent is raised, "the diligence and due care of the deceased is presumed, and a verdict cannot be directed against his representative on this issue unless reasonable men could not differ in finding him contributorily negligent."[9]

The evidence showed that deceased had parked his car near the center of the road on the right-hand side of the highway, with headlights burning, shortly before midnight. Defendant Conwell and his wife, approaching in an automobile from the opposite direction, saw the headlights of the parked car but did not see the deceased afoot on the road in time to avoid the accident.

Blood tests were taken on the deceased and on Conwell. They showed that deceased had been intoxicated, but no alcohol was

[4] 198 Ark. 290, 128 S. W. 2d 986 (1939).
[5] 207 Ark. 154, 179 S. W. 2d 651 (1944).
[6] Thompson v. Boswell, 166 F. 2d 106 (6th Cir. 1948).
[7] 54 N. M. 281, 222 P. 2d 606 (1950).
[8] N. M. STAT. 1941 ANN. § 24-101 *et seq.*
[9] 222 P. 2d at 607.

found in the blood of Conwell. It was undisputed that the action of deceased in parking his car on the open highway was negligence *per se*, since the car was not disabled when stopped.[10]

The jury found, however, that the stopping of the car on the pavement did not proximately contribute to the accident, and the court was unable to say, as a matter of law, that the verdict for plaintiff was unwarranted. There was thus the anomalous situation that, despite evidence of intoxication and violation of highway laws, the presumption of diligence and due care in his favor controlled in the absence of a showing that decedent's negligence proximately contributed to the accident that resulted in his death.

IMPUTED NEGLIGENCE—SUBSTANCES SPRAYED FROM OIL AND GAS WELLS

Oklahoma. Under a statute[11] regarding the disposition of refuse from oil and gas wells, the Supreme Court of Oklahoma recently decided in a close decision that when oil, gas or salt water from a well sprays over surrounding lands, negligence is imputed to both the owner of the well and the drilling contractor without proof of any specific acts of negligence on the part of either. This appears to be an extension of liability, which has heretofore been imposed only on the owner of the well.[12]

Such extension is, in all probability, indicative of the general trend. In *Franklin Drilling Co. v. Jackson*[13] plaintiff Jackson sued to recover damages for loss of growing crops, injuries to his unplanted land and farm equipment, and for loss of use of living quarters and the rights due him under his agricultural lease. In holding liable both the oil company that owned the lease on the adjoining tract and the drilling company, the court noted that the statute was penal in character and designed to afford relief in damages to an injured third party.[14] Such third party may, with-

[10] N. M. STAT. 1941 ANN. § 68-523, as applied in Duncan v. Madrid, 44 N. M. 249, 101 P. 2d 382 (1940), and Hisaw v. Hendrix, 54 N. M. 119, 215 P. 2d 598 (1950).

[11] 52 OKLA. STAT. ANN. (Perm. Ed.) § 296.

[12] See Indian Territory Illuminating Oil Co. v. Graham, 174 Okla. 436, 50 P. 2d 720 (1935).

[13] .....Okla....., 217 P. 2d 816 (1950).

[14] C. L. McMahon, Inc. v. Lentz, 192 Okla. 153, 134 P. 2d 563 (1943).

out proof of specific acts of negligence, recover damages from either or both of the parties violating the statute.

The principal dissenting opinion agreed that the owner should be held liable but argued forcefully that the drilling company should be absolved by virtue of the fact that the duty (to prevent the escape of harmful substances) sought to be imposed upon such driller was nondelegable. A duty of prevention, it maintained, could not be imposed on the driller by contract, and it was not so imposed by statute. "In the absence of negligence, the privilege of working for another does not in law entail responsibility for the other's liabilities."[15] The basis for the owner's liability is that he has the right to elect whether to drill or not and from the fact that he will be the ultimate beneficiary of the enterprise. Under this reasoning, concluded the dissent, the drilling contractor had no such right and, in the absence of specific negligence, ought not to be held liable.

Another dissenting opinion agreed that both defendants should have been held liable, but would so hold the drilling company under the common law maxim, "*sic utere tuo ut alienum non laedas*,"[16] as embodied in the Oklahoma Constitution[17] and statutes.[18]

Res Ipsa Loquitur—Instrumentality Not in Sole Control of Defendant

Oklahoma. In a rather novel situation the Oklahoma Supreme Court invoked the premise that the doctrine of *res ipsa loquitur* cannot be relied upon until plaintiff has established (1) that which caused the injury and (2) that the cause was under the sole control of the defendant or its servants. In the recent case of *Terrell v. First National Bank & Trust Co.*[19] plaintiff was leaving the defendant bank through a revolving door when the door suddenly collapsed, causing her serious spinal injuries. After all the evi-

[15] 217 P. 2d at 822.

[16] "Use your own property in such a manner as not to injure that of another."

[17] Art. II, §§ 6, 23.

[18] 76 Okla. Stat. Ann. (Perm. Ed.) § 1.

[19] .....Okla....., 226 P. 2d 431 (1950).

dence had been presented, the trial court directed a verdict for defendant and gave judgment thereon.

On appeal, plaintiff contended that, under the evidence and under the doctrine of *res ipsa loquitur*,[20] she was at least entitled to have her case submitted to the jury.

The supreme court determined that the defendant was not in sole and exclusive control of the revolving door at the time of its collapse and held, as a matter of law, that the doctrine could not be invoked. In fact, said the court, the plaintiff herself was operating the door in attempting to depart; the bank, therefore, lacked the required control. Unless the instrumentality is under the sole management and control of the defendant, and unless the accident is of such a character that it can be said that it would not have occurred but for a want of care on the part of such defendant, the essentials of *res ipsa loquitur* are not present. It is submitted that this is rather harsh on the plaintiff who is injured through no negligence of his own. Rather than the plaintiff controlling the offending instrumentality, the principal case appears to present a situation where control is exercised neither by plaintiff nor defendant. In such a situation, perhaps a theory of "constructive" control might afford an injured plaintiff the remedy he needs.

The holding in the principal case is in accord with authorities elsewhere.[21]

W. H. Fogleman, Jr.

Vicarious Liability of Community Property for Tortious Conduct

Louisiana. The recent case of *Brantley v. Clarkson*[22] wrought a change in Louisiana law pertaining to the vicarious liability of the community for the torts of the wife committed while operating a community automobile. Plaintiff brought suit against the Clarksons for personal injuries and damage to his automobile alleging

[20] The transaction speaks for itself.

[21] See Notes, 58 A. L. R. 140 (1929) and 100 A. L. R. 724 (1936).

[22] 217 La. 425, 46 So. 2d 614 (1950); see Note, 11 La. L. Rev. 190 (1951).

that they were caused by Mrs. Clarkson's negligence in operating an automobile belonging to the community. At the time of the accident in question, Mrs. Clarkson was returning from a social call on a neighbor. The trial court awarded judgment for the plaintiff against both Mr. and Mrs. Clarkson.

The court of appeals reversed the judgment of the trial court as to Mr. Clarkson on the authority of *Adams v. Golson*,[23] although the court expressed its disapproval of the rule of the case. It was the opinion of the court in that case that in order to hold the husband liable as head of the community for torts committed by the wife, it must be affirmatively shown that she was attending to community affairs with her husband's express or implied authorization at the time of the commission of the tort. The wife in *Adams v. Golson* was on a pleasure trip at the time of her tortious conduct, and the court held that a pleasure trip was not a community activity within the purview of the foregoing rule.

The supreme court reversed the judgment of the court of appeals as to Mr. Clarkson, and affirmed the judgment of the trial court. The court expressed its agreement with the court of appeal's disapproval of the rule of *Adams v. Golson* and adopted the court of appeal's premise "that the legitimate pursuits of a wife . . . should be considered as within the scope of community activities."[24] The court recognized that its ruling resulted in a change in the law, but expressed its belief that if the community was to be held liable for the tortious conduct of the husband while driving a community automobile for his own pleasure, the community should also be liable for the tortious conduct of the wife under the same circumstances.

In Louisiana parents are statutorily[25] liable for all the torts of their minor children, and the "family car doctrine" has been rejected by the Louisiana courts.[26] As a result of *Brantley v. Clarkson*, however, the Louisiana community can now be held liable not only for the tortious conduct of the husband and minor children

[23] 187 La. 363, 174 So. 876 (1937).

[24] Brantley v. Clarkson, 39 So. 2d 617, 620 (La. App. 1950).

[25] LA. CIV. CODE (Dart, 1945) art. 2318.

[26] See cases cited in Adams v. Golson, 174 So. at 878.

while operating a community automobile for their own pleasure, but it is also vicariously liable for the torts of the wife committed while operating a community automobile for her pleasure.

APPLICABILITY OF THE ATTRACTIVE NUISANCE DOCTRINE

Texas. In *Massie v. Copeland*[27] the Texas Supreme Court refused to extend and probably expressly limited the rule of *Banker v. McLaughlin*[28] as to the applicability of the attractive nuisance doctrine in Texas. The two cases have very similar fact situations. In each case the plaintiff's young son was drowned in a pit partially filled with water, which was located on defendant's property. In the *Copeland* case the pit was located within the city limits of Floydada, Texas, and city officials had been permitted to create the excavation by removing large quantities of caliche from the land to use on the streets of the municipality. In the *McLaughlin* case the pit was located on a subdivision which the defendant was developing for home sites near Orange, Texas, and he used the dirt dug from the pit on the streets in the subdivision. Neither of the pits served a useful purpose, and the expense of draining either pit would have been nominal. Of the two pits, the one involved in the *Copeland* case was the more accessible to children. The facts which the court considered as distinguishing the two cases were that the McLaughlin child was only five years old, while the Copeland boy was fourteen years of age.

The supreme court affirmed a judgment for the plaintiff in the *McLaughlin* case after an intensive review of the attractive nuisance doctrine in Texas and other jurisdictions.[29] In the *Copeland* case the trial court sustained a special exception to the plaintiff's petition because it failed to state a cause of action. The court of civil appeals reversed the judgment of the trial court, being of the opinion[30] that the judgment was in conflict with the principles

---

[27] .....Tex....., 233 S. W. 2d 449 (1950).

[28] 146 Tex. 434, 208 S. W. 2d 843 (1948).

[29] See Notes, 3 Southwestern L. J. 78, 354 (1949).

[30] "The question of whether or not a normal boy of the age, experience, capacity, intelligence and understanding of the deceased Copeland boy had sufficient discretion to know and understand the dangers of swimming in the pit in question and the

stated in the *McLaughlin* case. The supreme court reversed the court of civil appeals and affirmed the judgment of the trial court, holding that the question as to whether a child could understand and appreciate the danger of a so-called attractive nuisance was a question of law for the court rather than a question of fact for the jury. The court stated that the question had been so treated in the *McLaughlin* case, and in support of its holding quoted from a law review article discussing that case.[31]

A dissenting opinion questioned the desirability of finally determining as a matter of law whether the individual in question should be afforded the protection of the attractive nuisance doctrine without a full development of the facts bearing on the issue. The question of the applicability of the attractive nuisance doctrine seems to have been assumed rather than decided in the *McLaughlin* case; therefore, it would seem to be a doubtful precedent for the court's holding on the question. In any future case seeking to invoke the attractive nuisance doctrine, however, it seems clear that plaintiff's petition must develop the facts sufficiently to satisfy the court that the child in question could not appreciate the danger inherent in defendant's attractive nuisance as a matter of law, or the case cannot reach the jury because of plaintiff's failure to state a cause of action.

Discovered Peril—Possible Extrication a Necessary Issue

Texas. Sisti v. Thompson[32] is an affirmance by the Supreme Court of Texas of the long standing rule in the lower Texas courts that in addition to special issues on the usual elements[33] of the

consequences of such is a fact question for the fact-finding body." Copeland v. Massie, 228 S. W. 2d 960, 967 (Tex. Civ. App. 1950).

[31] "Every subsequent case will have to run the gauntlet of a court, *first of the judge who must find in the facts a duty to the particular child or parent, plus enough evidence to raise an issue of its violation;* and *second,* of a jury who, after considering all the facts and circumstances of the case and what the prudent man should have anticipated as a probable result of the defendant's conduct in the particular case, must find that the defendant violated his duty." (Emphasis added by the supreme court.) Green, *Landowners' Responsibility to Children,* 27 Tex. L. Rev. 1, 12 (1948).

[32] .....Tex....., 229 S. W. 2d 610 (1950), *aff'g* 224 S. W. 2d 500 (Tex. Civ. App. 1949).

[33] These elements are: (1) plaintiff's perilous position; (2) defendant's discovery of plaintiff's peril; and (3) defendant's failure to use reasonable means to avoid injury to plaintiff.

doctrine of discovered peril, a special issue on the possible extrication of the plaintiff from his position of peril is necessary in the correct submission of the doctrine, if possible extrication is an element of the case.[84]

In *Sisti v. Thompson* the deceased was operating a road maintainer which became hung up on the tracks of a railroad over which deceased was attempting to pass. Deceased was causing the maintainer to move backward and forward in an attempt to free the maintainer from the entanglement when a train approached the crossing. The crew of the train discovered that the maintainer was on the track while still a sufficient distance away to have stopped the train before reaching the crossing. Although the train whistle was sounded several times, no attempt was made to stop the train until about the time that the train collided with the maintainer. The trial court's submission of the doctrine of discovered peril to the jury did not include a special issue on possible extrication. The court of civil appeals held this to be error, and its judgment was affirmed by the supreme court. It was held that in this particular type of case, *i.e.*, where the element of possible extrication is present, a "clear and direct" submission of that element is a necessary part of the submission of the doctrine of discovered peril.

The court emphasized that such a requirement did not place an undue burden on the plaintiff, as the doctrine of discovered peril allows a person to escape the consequences of his own contributory negligence, which is ordinarily a complete defense to his cause of action. At least one Texas case[85] held by implication that the element of possible extrication is included in an issue on plaintiff's perilous position; however, the holding of the present case seems more consistent with the Texas doctrine of special issue submission in which each element of a case must be submitted to the jury in a separate issue. The possibility of conflicting answers to issues on perilous position and possible extrication is always present where an issue on possible extrication is submitted sep-

[84] See Note, 28 Tex. L. Rev. 880 (1950).

[85] Baker v. Shafter, 231 S. W. 349 (Tex. Comm. App. 1921).

arately, but the jury can be returned to the jury room to resolve any conflict. By obtaining consistent answers to separate special issues on these elements of the doctrine of discovered peril, the court can accurately determine whom the triers of the facts found to be legally responsible for the accident in question.

JOINT TORTFEASORS—RIGHT OF CONTRIBUTION OR INDEMNITY

Texas. The right of contribution or indemnity among joint tortfeasors was considered by the Supreme Court of Texas again in 1950 in the case of *Renfro Drug Co. v. Lewis.*[36] Two cases[37] decided by the supreme court in 1949 involved the application of the statute[38] which provides for contribution among solvent joint tortfeasors who are in *pari delicto* when no such right exists under statute or at common law.[39] This statute was applied in the *Lewis* case by the court of civil appeals.[40]

Plaintiff was injured in passing through a defective entrance to a drug store from a parking garage, both of which were located in an office building owned by the Capital National Bank of Austin and occupied by the Motoramp Garage, the Renfro Drug Co., the bank, and the office building. The building was so constructed that a person leaving his automobile in the parking garage could enter the drug store without leaving the building and proceed through the drug store either to the bank or to an office in the building. The lease from the bank to the drug store store provided that the drug store would permit persons leaving their automobiles in the garage to pass through the drug store in going to and from the bank or offices in the building, and that the bank would keep the entrances to the drug store in good repair. The plaintiff brought suit for negligence against the garage, the drug store, and the bank, and recovered a judgment in the trial court which denied any recovery against the garage, held the drug store and the bank

---

[36] .....Tex....., 235 S. W. 2d 609 (1950).

[37] Austin Road Co. v. Pope, 147 Tex. 430, 216 S. W. 2d 563 (1949), and Humble Oil and Ref. Co. v. Martin, 148 Tex. 175, 222 S. W. 2d 995 (1949).

[38] TEX. REV. CIV. STAT. (Vernon, 1948) art. 2212.

[39] See Note, 4 Southwestern L. J. 349 (1950).

[40] Renfro Drug Co. v. Lewis, 228 S. W. 2d 221 (Tex. Civ. App. 1950).

jointly and severally liable, and granted the drug store recovery over against the bank by way of indemnity for any part of the judgment it might be compelled to pay. The court of civil appeals reversed that portion of the judgment allowing the drug store indemnity against the bank, holding that the bank and the drug store were joint tortfeasors entitled to contribution under the statute in that under the covenants in the lease there was a joint duty to exercise care in keeping the premises in a safe condition for the public.

The supreme court reversed that part of the judgment of the court of civil appeals which denied the drug store indemnity against the bank, and affirmed the judgment of the trial court. Finding no Texas cases in point on the facts, the court adopted the following rule:

> "Where the lessor or lessee has breached his covenant with respect to the condition of the premises and the covenantee has had a judgment entered against it or has been obliged to pay to third persons a claim for damages caused by such breach, the covenantor must indemnify the covenantee for the loss."[41]

The court held that the court of civil appeals erred in holding the statute applicable, as it operates only where no right of contribution or indemnity is given by statute or exists at common law. The right of indemnity was held to exist in Texas as to joint tortfeasors not in *pari delicto* by virtue of common law. Since the plaintiff's injury resulted from the breach of the bank's duty under the terms of the lease to keep the entrances to the drug store in repair, the drug store and the bank were not in *pari delicto* under the rule that the court adopted.

The court's opinion further clarifies the application of the statute governing contribution and, by adopting what appears to be a desirable new rule of law concerning covenants to repair between lessor and lessee, will enable future leases to be contracted with a better understanding of the possible tort liabilities of the respective parties.

James R. Kinzer.

[41] 235 S. W. 2d at 623; see Note, 157 A. L. R. 623 (1945).