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strument that can be shown to have been intended to be a mortgage. Possibly a long term lease, even one containing affirmative covenants, could be shown by parol evidence to have been an attempt by a lender to accomplish strict foreclosure upon default, and therefore in reality only a mortgage. Why, then, could not parol evidence be introduced to show that this oil and gas lease was intended to terminate upon repayment of the debt? The peculiar circumstances in the *Atwood* case doubtless led the court to the conclusion that any such attempt in the case would be futile. But the parol evidence rule should not be applied to prevent in every case the possibility of the lessor's sustaining a burden of proving that the lease was in fact a security transaction under which, upon repayment of the sum loaned, the lessor would be entitled to a return of the property free from the burden of the lease.

W. Dawson Sterling.

TORTS

TORT LIABILITY OF PUBLIC OFFICIALS IN LOUISIANA

Louisiana. A Louisiana case brought up a question which has caused much controversy in the law of torts. In *Strahan v. Fussell*[1] plaintiff brought suit to recover damages as a result of the destruction of his automobile from dropping into a hole in a public bridge. The defendant at the time of the accident was a member of the police jury of his parish. Plaintiff alleged in his petition that it was the custom of the police jury of that parish to allocate funds to individual members of the jury for the purpose of road and bridge repair and that there were sufficient funds for adequately repairing the bridge. Defendant was aware of the condition of the bridge because he had caused and supervised what repairs had been

[1] 218 La. 682, 50 So. 2d 805 (1951).

made. The repairs consisted of a runway of planks running with the length of the bridge, while adequate repairs would have necessitated replanking the whole section of the bridge containing the hole. As the plaintiff drove his car onto the runway, the planks turned with the weight of the car and dropped it into the hole. Plaintiff negatived any negligence or assumption of risk on his part by alleging that the condition of the bridge was unknown to him. The trial court dismissed the plaintiff's suit on defendant's exception of no right of action. The dismissal was based on the holding that defendant was exempt from liability for any act of negligence which he was alleged to have committed because, as disclosed by plaintiff's petition, he was a public officer, a member of the police jury.

The supreme court held defendant liable for damages but did not attempt to settle the question for Louisiana as to the personal liability of public officers for failure to keep roads and bridges in repair. Instead defendant was held liable on the ground that his action in repairing the bridge was outside the scope of his authority. Citing certain treatises and a law review article,[2] the court made the statement that immunity as a public officer exists "only so long as he acts honestly and in good faith, and within the scope of his authority. If he acts outside of his strict authority, he breaches the condition of his immunity and is liable to persons harmed by his improper conduct".[3] In order to find that the defendant acted outside the scope of his authority, the court held that allocating funds to individual members of the police jury was an illegal act of the body of which he was a member. When he acted to repair the bridge, he assumed authority vested in the board as a whole and therefore lost his immunity as a public officer.

When this particular case was before the court of appeals, it attempted to settle the question as to liability of public officials for

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[2] Among others, HARPER, TORTS (1933) § 298; David, *The Tort Liability of Public Officers*, 12 So. Calif. L. Rev. 127 (1939).

[3] 50 So. 2d at 807.

negligence in repairing roads and bridges. The court of appeals quoted from *Corpus Juris*:[4]

> According to the weight of authority, the officers charged with the duty of maintenance and repair of bridges are not personally liable for injuries sustained by an individual by reason of their negligent failure to perform their duty in this regard, in the absence of some statute specifically imposing this liability... . The rule..., however, has not received universal acceptance. It has been held that, where public officers have the requisite funds in hand or under their control, they are bound to repair bridges which are out of repair... with reasonable and ordinary care and diligence; and if they omit this duty they are liable to individuals who sustain damages from such neglect.

The court of appeals then said, "Since the supreme court has refused to elect between these two conflicting theories, it appears we must make the election. For our part, we are willing to follow the majority holding in 9 Corpus Juris." The supreme court struck the holding down, stating emphatically that defendant was not "charged with the duty" to repair the bridge. It was by this act that he went beyond the scope of his official authority and lost his immunity as a public official. Once this immunity was found to be gone, then Article 2315 of the Louisiana Civil Code[5] applied and made defendant liable for damages in a civil action.

As has been indicated, the question of tort liability of public officials, has resulted in much conflict in the law of torts. No officer, of course, is absolved from liability for his personal and private torts merely because he is an officer, and the question arises only where he performs, or purports to perform, his official functions. Judges have always been accorded complete immunity for judicial acts, even when their conduct is dictated by improper motives.[6] The same absolute immunity extends to legislators and probably to the highest executive officers of the state and federal governments. As to lower administrative officials, however, there is no such absolute immunity for all acts. The courts have endeavored to apply

[4] 9 C. J., *Bridges*, § 69, p. 469. See also 11 C. J. S., *Bridges*, § 62.

[5] "Every act whatever of man that causes damage to another, obliges him by whose fault it happens to repair it...."

[6] Sweeney v. Young, 82 N. H. 159, 131 Atl. 155 (1925).

the rather unworkable distinction between acts which are regarded as "quasi-judicial" or discretionary and those which are ministerial. Discretionary acts are those which require deliberation, decision, and judgment, while ministerial acts are those which amount to an obedience to orders or the performance of a duty in which there is no choice left. An immunity is extended for discretionary acts, but the tendency is to limit it to acts done in good faith and with good motives. For ministerial acts, on the other hand, the officer is fully liable in tort. The distinction is, at most, one of degree, since it is hard to imagine any act that does not require some discretion. Another distinction holds that all officers, including judges, are liable if they act wholly outside of their jurisdiction or official authority, even where the act is a discretionary one.[7] The decision in this case added Louisiana to the jurisdictions applying this rule of personal liability for action by public officials "outside the scope of their authority".

Had the Louisiana Supreme Court chosen, it could have settled the case on the precedent that an official is fully liable in tort for ministerial acts. A case practically on all fours with this case is *Tholkes v. Decock.*[8] Defendant in that case was a public official, termed a township highway officer, charged with the duty to repair highways and bridges. Defendant had undertaken to repair a culvert and had left it open and uncovered overnight and without warning signals of any kind. The plaintiff, without any knowledge of the condition of the culvert, ran into it and was injured. The court held that the repair of highways involves ministerial duties so far as the actual repairs are concerned. The court held further that the acts of defendant amounted to affirmative misconduct in the performance of a ministerial duty and that there could be no serious question as to his liability. The court recognized that some authori-

[7] Stiles v. Morse, 233 Mass. 174, 123 N. E. 615 (1919) (members of municipal council held personally liable for unlawful method used in removing city treasurer); Lowe v. Conroy, 120 Wis. 151, 97 N. W. 942 (1904) (public health officer held personally liable for destruction of healthy cattle). It is interesting to note how narrowly "scope of authority" of public officials is construed by the courts as compared with "scope of authority" under the *respondeat superior* doctrine.

[8] 125 Minn. 507, 147 N. W. 648 (1914).

ties decline to impose liability for mere failure to perform a ministerial duty on the theory that misfeasance, as distinguished from nonfeasance, is required.[9] *Strong v. Day*[10] is a case applying the stricter rule imposing liability for negligent failure to perform ministerial duties. In that case a bridge had been left in such a condition for 17 months that it amounted to, as alleged in plaintiff's petition, a "veritable death trap". The court said that after such a length of time with adequate funds available, "the duty to repair became ministerial, and if the defendants negligently failed to perform that duty, they were liable to plaintiff in the absence of contributory negligence on his part." Plainly the plaintiff's pleadings in the Louisiana case charged defendant with affirmative misconduct, but perhaps decision on a basis which avoids the troublesome distinction between misfeasance and nonfeasance is to be preferred. In any event, it is submitted that the court was correct in holding defendant liable for his tort.

Irrespective of whether an act is regarded as discretionary or ministerial, or outside the scope of his authority, it is difficult to see any just basis for a public official's escaping liability for his negligence merely because of his position. An official should neither suffer for an honest and reasonable mistake in the effort to carry out his responsibility to the public, nor should he escape liability for negligence because of his official position. The test for liability should be made to depend on whether the officer has acted with proper motives and with due care in the performance of his official duties. Suct a view is being advocated more and more by writers on the subject of tort liability of public officials.[12]

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[9] It is to be noted that the passage from CORPUS JURIS quoted *supra* uses the phrase "negligent failure to perform their duty," and *Tholkes v. Decock* may therefore be reconciled with the "weight of authority" therein referred to.

[10] 61 Okla. 166, 160 Pac. 722 (1916).

[11] Jennings, *Tort Liability of Administrative Officers*, 21 Minn. L. Rev. 263 (1937); and GELLHORN, ADMINISTRATIVE LAW (Cases and Comments) (1940) 402-414.

IS SPECULATION A BASIS FOR DETERMINING TORT LIABILITY?

New Mexico. Ortega v. Koury[12] is a recent 3-2 decision involving negligent driving. Plaintiff administrator brought action for the death of a 3½-year-old child caused by being run over by defendant's automobile. The defendant on May 12, 1948, between 12:00 noon and 1:00 P.M., was driving north on a paved road 21 feet wide. His automobile was the only car on the road, and evidence was introduced on trial that there was an unobstructed view of the street for 600 feet. Defendant testified that he was travelling around 10-15 miles per hour when the child was struck, and in support of his testimony it was shown that his car was stopped 20 feet from the point of impact. The major conflict in the testimony and actually the deciding point in the case concerned where the child was struck. Defendant said the child was found lying three to five feet from the east sideline after being hit, while the policeman covering the accident said there was broken glass from the right headlight of the defendant's automobile 10 feet from the east sideline, or 6 inches from the centerline of the street, and a pool of blood. No one had seen the child for 15 minutes prior to the accident, and neither the defendant nor any of the four people riding with him saw the child in the street. The case was tried without a jury, and the trial court resolved the issues in favor of defendant. The majority after reviewing the evidence reversed the trial court and remanded the case for assessment of damages.

For the majority to find the defendant guilty of negligence, it was necessary to find a legal duty to conform to a certain standard of conduct for the protection of others against harm and a failure to conform to the standard. Defendant and his other witnesses had testified they had not seen the child before the accident. The standard to which the defendant had to conform was found in *Corpus Juris Secundum*[13] and in *Gregware v. Polquin.*[14] The

12 ______ N. M. ______, 227 P. 2d 941 (1951).
13 60 C. J. S., *Motor Vehicles*, § 284(c), p. 667.
14 135 Me. 139, 190 Atl. 811 (1937).

standard stated in the former authority was: "In order to keep a proper look-out, a motorist must do more than merely look; it is his duty to see and be cognizant of what is in plain view or obviously apparent, and he is chargeable with seeing what he should have seen, but not with what he could not have seen in the exercise of ordinary care." In the *Gregware* case the court said, "Whenever it is the duty of a person to look for danger, mere looking will not suffice. One is bound to see what is obviously apparent. If the failure of a motor vehicle operator to see that which by the exercise of reasonable care he should have seen is the proximate cause of an injury to another, he is liable in damages for his negligence."[15]

Having found the required standard of care to be the duty "to look and to see what should be seen", the majority not only had to disbelieve the testimony of not seeing the child but had to believe the child had been hit in the middle of the street rather than towards the side. As stated above, it was the location of the broken glass and pool of blood which decided the case because it gave credence to the majority's belief that defendant was negligent. The court said, "Physical facts and conditions may point so unerringly to the truth as to leave no room for a contrary conclusion based on reason or common sense, and under such circumstances the physical facts are not affected by sworn testimony which in mere words conflicts with them. When the surrounding facts and circumstances make the story of a witness incredible, or when the testimony is inherently improbable, such evidence is not substantial."[16] The court recognized the rule that when a trial court's finding is based on substantial evidence, the finding will not be disturbed. But the court felt this rule did not relieve it of the duty to examine the facts to see if the findings were based upon substantial evidence. "The power of a court of review ought not to be left paralyzed so as to prevent a miscarriage of justice, merely by the erroneous findings of a trial court or the verdict of a jury."[17] Defendant's testimony

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[15] 190 Atl. at 813.

[16] 227 P. 2d at 942.

[17] *Id.* at 944, quoting from Thuringer v. Grafton, 58 Colo. 250, 144 Pac. 866, 868 (1914).

plainly appeared so incredible to the majority as to be unworthy of belief. The theory adopted as to the true state of facts was that the defendant saw the child crossing the street, and, instead of stopping, swerved to go around; therefore, the defendant was negligent for not recognizing the danger and as a matter of law violated his duty of care. Even if the child had not been seen, application of the standard as defined would convict him of negligence if the circumstances indicated he had not kept a proper look-out.

This case is noteworthy because, according to the dissenting opinion, two well-settled rules in New Mexico were overruled. One rule followed previous to this decision was that evidence in a case would be viewed in all its aspects most favorable to support a judgment.[18] In this case the majority relied on evidence most favorable to a reversal of the judgment. The minority said that had the majority followed the well-settled rule, the case would have been decided on the following facts. The defendant was driving at a speed of 10-15 miles per hour with his car under control; he stopped within 20 feet from the point of impact; he was driving on the right hand side of the street watching the road; neither the defendant nor his passengers saw the child in the street before it was struck three to five feet from the right side of the street; and no one saw the child for at least 15 minutes prior to the accident. The child was struck approximately opposite the northerly edge of his yard, and at that spot adjacent to the street there was a large telephone pole. There was a sidewalk separated from the street by a few feet, and then next to the sidewalk, a fence enclosing the child's yard. A vine was growing on the fence, and there were two trees in the yard.

The other rule that had not been modified or overruled until this case was stated in *Cerillos Coal R. Co. v. Deserant.*[19] According to the dissent in the principal case, the rule announced there was: "where it was purely speculative as to which of two ways an ex-

[18] Griego v. Conwell, 54 N. M. 287, 222 P. 2d 606 (1950); Brown v. Cobb, 53 N. M. 169, 204 P. 2d 264 (1949).

[19] 9 N. M. 49, 49 Pac. 807 (1897).

plosion causing injuries originated, the verdict should be for the defendant if, by either or both, the defendant was exempt from liability."[20] Even by discrediting the testimony of the defendant, the actual facts of the accident must remain speculative, since no one saw the accident. While the circumstantial evidence of the location of the blood and broken glass may be very persuasive, it is not conclusive of negligence. The judge writing the dissenting opinion closed with these words: "By considering only the evidence most favorable to the plaintiff, and then injecting the doctrine of last clear chance, adding a dash of res ipsa loquitur, indulging in surmise, conjecture and speculation, the majority determine the defendant guilty of negligence as a matter of law, reverse a contrary finding and judgment, and direct the trial court to assess the damages. As all the cases I find on the subject hold to the contrary, I dissent."[21]

Negligence has been defined as conduct which falls below the standard established by law for the protection of others against unreasonably great risk of harm.[22] The standard imposed by society is an external one and is not necessarily based on any moral fault of the individual, although as the probability of injury becomes more apparent from facts within the person's knowledge, his conduct takes on more of the attributes of intent until it may become inseparable from intent itself. The almost universal use of the phrase "due care" to describe conduct which is not negligent should not be permitted to obscure the fact that the real basis of negligence is not carelessness, but behavior which should be recognized as involving unreasonable danger to others.[23] Negligence is conduct, and the standard of conduct required of an individual is usually dealt with in terms of duty. Duty is a question of whether the defendant is under any obligation for the benefit of the plaintiff; and in negligence cases the duty is always the same, to conform to the

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[20] 227 P. 2d at 945.

[21] *Id.* at 946.

[22] 2 RESTATEMENT, TORTS (1934) § 282.

[23] Edgerton, *Negligence, Inadvertence, and Indifference; the Relation of Mental States to Negligence*, 39 Harv. L. Rev. 849 (1926).

legal standard of reasonable conduct in the light of the apparent risk. Acceptable conduct is generally measured against what a reasonably prudent man would have done under like or similar circumstances, although applying this standard is very difficult because of the infinite variety of situations that may arise. Consequently, allowance must be made for factors such as apparent risk, the person's capacity to meet it and the circumstances under which it must be met.

Did the defendant in this case violate the standard of care required of him? There are many situations in which the hypothetical reasonable man would be expected to anticipate and guard against the conduct of others. One of these situations arises when it may be anticipated that a child may dash into the path of a car. *Taylor v. Patterson's Administrator*[24] is a case illustrating liability in connection with children. Defendant in that case was franchised to operate a jitney bus and each day carried plaintiff's intestate, a child of less than seven years, from his home to school and back. On the day of the accident defendant let the child out of the bus across the street from his home. The street carried a great deal of traffic. The child was struck by a truck as he attempted to cross the street. The court said, "It is not reasonable to reach any other conclusion than that the duty of Taylor did not end when the passenger Billy Patterson alighted upon the sidewalk, but . . . continued . . . until he was safely across Greenup Avenue . . . . 'It is a reasonable and necessary rule that a higher degree of care should be exercised toward a child incapable of using discretion commensurate with the perils of his situation than one of mature age and capacity . . . .' "[25] *Guillory v. Heckory*[26] is another case dealing with the duty owed to children but is more analogous to the case at hand. Some children were playing tag on the side of a street. Defendant was driving a truck and trailer toward where they were playing and clearly

[24] 272 Ky. 415, 114 S. W. 2d 488 (1938).

[25] 114 S. W. 2d at 490, quoting from Bransom's Adm. v. Lakrot, 81 Ky. 638, 50 Am. Rep. 193, 196 (1884).

[26] 185 La. 21, 168 So. 481 (1936).

saw them. An 11-year-old girl was killed as she dashed into the street. The court held, "The situation called at once, on his part, for great care. He should have gotten down to a very moderate speed and held his truck well in hand, ready to stop or swerve as might be necessary to avoid the result of an impulsive act on the part of the children."[27] The uncontroverted evidence in the present case that defendant stopped 20 feet from the point of impact tends to bear out his testimony that he was driving 10-15 miles per hour. However, he might have been travelling at such a speed that after applying his brakes, long before reaching the point of impact, he was only able to stop 20 feet beyond the point of impact. But considering his testimony as true, it would rule out of the case any recklessness or bad intent. That would leave the question of whether he saw the child and then failed to act as a reasonable man. In the *Guillory* case, *supra,* defendant saw the children and had sufficient warning to act, but in the principal case the defendant said he did not see the child. Is it then the duty of every motorist to drive in the constant expectation of danger which requires the immediate action of the "mythical reasonable man" even in an emergency? The emergency doctrine does not hold a person to the same standard as one who has had time to reflect; his choice may be mistaken and yet prudent.

How would the doctrine of res ispa loquitur apply to the case? The elements of res ipsa loquitur are: (1) the accident is one which does not ordinarily occur in the absence of someone's negligence, (2) it is caused by an instrumentality within the exclusive control of the defendant, and (3) the possibility of contributing conduct on the part of plaintiff is eliminated. Whether defendant had exclusive control of the instrumentality could certainly be questioned if the child's presence in the street is considered part of the instrumentality. As to the third element, there would be a strong possibility for it to exist, since the child was capable of very little contributory negligence, if any. The minimum age for children to be capable of

[27] 168 So. at 483.

negligence has been arbitrarily set by some courts at around seven years,[28] but the weight of authority holds that no arbitrary limit should be set. Probably the irreducible minimum is around three years of age.[29] That leaves only the first element of the doctrine for consideration. Ample authority can be found holding that the mere fact that an automobile collides with a pedestrian does not raise a presumption of negligence.[30] A good many of the cases deal with accidents involving children. Since no one saw the accident occur, then according to this authority no presumption would be inferred from the mere collision. Negligence would have to be proved by the circumstances of the case, and in the instant case the evidence relied upon was circumstantial — the position of the blood and broken glass. "The mere fact that an accident or an injury has occurred, with nothing more, is not evidence of negligence. . . . What is required is evidence from which reasonable men may conclude that, upon the whole, it is more likely that there was negligence than that there was not."[31] In *Lawson v. Anderson & Kerr Drilling Co.*[32] the court ruled: "An inference of negligence must be based on something more than mere conjecture or speculation, and it is not sufficient to introduce evidence of a state of facts simply consistent with or indicating a mere possibility, or which suggests with equal force and leaves fully as reasonable an inference of the nonexistence of negligence." The New Mexico case, *Cerillos Coal R. Co. v. Deserant, supra,* ruled substantially the same as the *Lawson* case.

The minority opinion seems to be the sounder, based on the facts and circumstances of this case. It is true that the testimony was very unsatisfactory in explaining what actually happened. The explanation adopted by the majority is very plausible, but equally as plausible explanations could be imagined whereby defendant would not be guilty of negligence. It seems there is a large area left open

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[28] Chicago City Ry. v. Tuohy, 196 Ill. 410, 63 N. E. 997 (1902).

[29] PROSSER, TORTS (1941) 231.

[30] See Notes, 5 A. L. R. 1240 (1920), 64 *id.* 255, 258 (1929), 93 *id.* 1101, 1110 (1934).

[31] PROSSER, TORTS (1941) 292.

[32] 184 Okla. 107, 84 P. 2d 1104, 1105 (1938), quoting from the syllabus in Chicago, R. I. & P. Ry. v. Smith, 160 Okla. 287, 16 P. 2d 226, 227 (1932).

in the majority opinion in which reasonable men could find there was no negligence, but merely an unfortunate and unavoidable accident. It would be interesting to know what difference it would have made in the outcome if this case had been originally tried before a jury.

The majority opinion did not discuss the cases that were cited by the minority as being overruled. If the majority considered that those cases were being overruled, it is logical to assume that some reasons would have been given by the majority. Therefore, the minority statement that this case overrules two well-settled New Mexico rules cannot be taken at face value. It remains for the future to determine whether this decision will be extended to other situations, distinguished, or harmonized with prior decisions.

Samuel M. Mims, Jr.

IMMUNITY OF MUNICIPAL CORPORATION — WHAT IS A GOVERNMENTAL FUNCTION?

Texas. The dual character of the municipal corporation has long given the courts difficulty. On the one hand the corporation is a subdivision of the state and on the other it is a corporate entity with much the same interests as a private corporation. As a matter of common knowledge it is quite often found in competition with private corporations.

In its governmental capacity as a subdivision of the state the municipal corporation has been protected from liability under the broad spread of the principle which holds that the state is immune from liability. This principle was at first extended to include all of the acts of the municipality,[33] but in 1842 the immunity was narrowed by the distinction which was drawn between "governmental" and "proprietary" functions. The immunity was limited to liabilities incurred in the performance of governmental functions.[34]

[33] Russell v. Men of Devon, 2 T. R. 667, 100 Eng. Rep. 359 (K. B. 1798).
[34] Bailey v. Mayor of New York, 3 Hill 531, 38 Am. Dec. 669 (N. Y. 1942).

This distinction has been preserved until the present in practically all jurisdictions including Texas.

The classifications of particular functions has not proved easy. The shifting line of demarcation between "governmental" and "proprietary" functions has furnished a battle ground and a challenge for those who favor responsible government and who look with disfavor upon the notion that "the King can do no wrong." The criticism of the general principle of governmental immunity has found expression in the narrowing of the immunity of the municipal corporation. The result is an extension of municipal liability, usually by the route of finding that the particular function involved is not a "governmental" one. Such is the nature of a recent, interesting Texas case.

In *City of Houston v. Shilling*[35] the Texas Supreme Court, with four justices dissenting, moved to restrict the immunities[36] of municipalities. The case has been noted with interest in Texas and elsewhere[37] and seems clearly in line with the tendency of other jurisdictions.[38]

Mrs. Birdie Shilling was injured in a collision between her automobile and the City of Houston's garbage truck. The jury found that the injuries suffered by Mrs. Shilling were caused by (1) negligent operation of the garbage truck by its driver and (2) the negligent failure on the part of city employees to inspect and repair brakes on the garbage truck immediately before the collision. The court conceded that the City would not have been liable for the negligent truck operation under the well-established rule of the *George* case,[39] which held garbage collection to be a governmental

[35] ___ Tex. ___, 240 S. W. 2d 1010 (1951).

[36] See City of Houston v. Quinones, 142 Tex. 282, 177 S. W. 2d 259 (1944); Kemp Hotel Operating Co. v. City of Wichita Falls, 141 Tex. 90, 170 S. W. 2d 217 (1943); City of Port Arthur v. Wallace, 141 Tex. 201, 171 S. W. 2d 480 (1943); City of Amarillo v. Ware, 120 Tex. 456, 40 S. W. 2d 57 (1931); City of Fort Worth v. George, 108 S. W. 2d 929 (Tex. Civ. App. 1937) *er. ref.*

[37] Recent Cases, 4 Baylor L. Rev. 92 (1951), 30 Tex. L. Rev. 266 (1951), 13 U. Pittsburgh L. Rev. 438 (1952).

[38] See PROSSER, TORTS (1941) 1068; Note, 46 Harv. L. Rev. 305 (1932).

[39] City of Fort Worth v. George, cited *supra* note 36.

function. The majority looked instead to the jury's finding that the injuries were caused by the negligent failure to inspect and repair and held that there was nothing to relieve the City from liability, since the maintenance of such inspection and repair facilities was not a governmental function.

It is apparent then that the technical point upon which the case hinged was the determination of whether the inspection and repair of the garbage trucks was or was not a "governmental" function. The minority felt strongly that the operation of the garage was as much a part of the gathering and disposal of garbage as was the driving of the trucks and that such garage operation was "in truth a part of the very performance" of the governmental function. The majority, however, felt that "a line must be drawn" at which municipal immunity must end, and made the interesting observation that "[i]t could just as easily be contended that since it is necessary that the trucks have gasoline that the city could maintain service stations or oil wells and refineries, and that in these operations the city would be immune to liability."[40] The majority noted that the precise question had not been passed on by the Texas courts and that the repair and maintenance of city vehicles had been held not to be a governmental function in other jurisdictions,[41] and that a holding contrary to these decisions would operate to extend the immunity now allowed cities. This extension of immunity the court refused to make, saying, "the maintenance of a garage . . . is not a governmental function nor a necessary element of a governmental function so as to relieve the city from liability. . . . "[42]

The majority opinion, though rationalized on a technical basis, appears to have been inspired by a broader purpose. It points out that the doctrine of immunity has often been criticized and questioned and that public policy does not demand a departure from a

[40] 240 S. W. 2d at 1012.

[41] Bertiz v. City of Los Angeles, 74 Cal. App. 792, 241 Pac. 921 (1925); Levin v. City of Omaha, 102 Neb. 328, 167 N. W. 214 (1918); City of Muskogee v. Magee, 177 Okla. 39, 57 P. 2d 252 (1936); Oklahoma City v. Haggard, 170 Okla. 473, 41 P. 2d 150 (1935); Oklahoma City v. Foster, 118 Okla. 120, 247 Pac. 80, 47 A. L. R. 822 (1926).

[42] 240 S. W. 2d at 1013.

strict limitation of such immunity of municipalities for their torts. That the import of the decision was clearly recognized by the minority of the court is indicated by the words of Justice Smedley, dissenting: "The decision of the majority appears . . . to be influenced by disapproval of the rule that exempts cities from liability for negligence in the performance of governmental functions. . . . It would be better for the Court to meet the question squarely and overrule the prior decisions. It would be still better that the law . . . be changed . . . by legislative enactment."[43]

The result seems fair and sensible because there is no longer any real need for municipal immunity. The method of reaching the result may be criticized on the ground that it further complicates an already "absurd and distressing mess of 'spotted and striped' law."[44] Whether or not one approves of the trend, one must admit that the scope of governmental activity is being continually enlarged. In view of this fact it is particularly heartening to note that there is another trend in the direction of responsible government. Even though the movement is made by a delimiting of an "immunity," it is none the less a step toward increasing the government's responsibility in tort. Borchard[45] has observed, "The whole course of history, with slight though infrequent interruptions, has been toward responsible government, that is, responsible toward those for whose benefit and needs it presumably exists."[46] The Federal Tort Claims Act[47] is an illustration of this trend. There is much truth in Professor Borchard's statement: " The community will gain by promoting respect among its members for its fairness and justice and, instead of relying upon antiquated formulas to escape liability,

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[43] *Id.* at 1015, 1016.

[44] Barnett, *The Foundations of the Distinction between Public and Private Functions in Respect to the Common Law Tort Liability of Municipal Corporations*, 16 Ore. L. Rev. 250, 269 (1937).

[45] Professor Edwin M. Borchard has written an exhaustive series of articles entitled "Government Liability in Tort" appearing in 34 Yale L. J. 1, 129 (1924), 229 (1925); 36 Yale L. J. 1 (1926), 757, 1030 (1927); 28 Col. L. Rev. 577, 734 (1928).

[46] *Government Liability in Tort*, 36 Yale L. J. 1039, 1099 (1927).

[47] 28 U. S. C. 1946 ed. Supp. V, § 1346.

it will meet the exigencies of modern organized life by discharging what the rest of the world recognizes as just obligations."[48]

NEGLIGENT ENTRUSTMENT — HOW MAY PROXIMATE CAUSE BE SHOWN?

In *Spratling v. Butler*[49] an employer had entrusted a truck to an employee without first ascertaining whether the employee had a valid driver's license. On the night of the second day following his employment, after he had consumed two bottles of beer and while on a mission wholly of his own, the employee ran the truck off the road and into the plaintiff's house. The case was not tried on any claim that the employee was acting in the course of his employment when he ran into the house but on the theory that the employer had entrusted the truck to the employee knowing that his license had expired or without using ordinary care to find out that it had expired.

The jury found (1) that unknown to the employer the employee's license had expired at the time when he was hired but that the employer was negligent in not ascertaining the fact; and (2) that the employee was operating the truck in a negligent manner, which negligence was a proximate cause of the collision with the house. The district court rendered judgment for the plaintiff, but the court of civil appeals felt that the result of the employee's drinking two beers and driving off the road was not included within the risk which the employer took in letting the employee drive without ascertainment of the status of the license. Accordingly, the trial court was reversed on a holding that a showing of proximate cause was necessary to connect the employer's negligence with the damage occasioned to the plaintiff.

In an earlier case, *Mundy v. Pirie-Slaughter Motor Company*,[50] the plaintiff had attempted to establish negligence *per se* by proving

[48] *Government Liability in Tort,* 34 Yale L. J. 258 (1925).

[49] ....Tex.........., 240 S. W. 2d 1016 (1951), *rev'g* 237 S. W. 2d 793 (Tex. Civ. App. 1951).

[50] 146 Tex. 314, 206 S. W. 2d 587 (1947).

the defendant's violation of a statute by his lending to an unlicensed driver. The Texas court said, "The purpose of the statute which defendant is alleged to have violated is to prevent the lending of automobiles to persons *not shown by examination and license* to be competent to drive, and the danger anticipated and intended to be prevented by statute is the *such persons,* if given opportunity to drive, will do so negligently and thereby cause damage to other persons."[51] The court held that, although the statute prohibits lending only where the owner *knows* and that a statutory violation could be found only where the owner had actual knowledge, nevertheless the statute also determined what should be the standard of care of the reasonable man in such circumstances and what results should be reasonably foreseeable to the average automobile owner. The court in the case indicated that when the negligent driving, which proximately caused the injury, was a danger designed by the statute to be prevented (*i.e.*, arising from entrustment to a person not shown by examination and license to be competent), and the plaintiff was one of the class designed to be protected (*i.e.*, third person injured by negligence of such driver), then the causal connection between the employer's act of entrustment and the plaintiff's injury was shown.

Upon appeal of the principal case to the supreme court the judgment of the court of civil appeals which stated the necessity for a finding of proximate cause was reversed in a curious manner. The court, speaking through Justice Brewster, held that the judgment of the court of civil appeals was contrary to *Mundy v. Pirie-Slaughter Motor Co.* The opinion quoted from three consecutive sentences of the *Mundy* opinion, omitting only the middle sentence which is the one quoted in the paragraph above. The substance of the opinion is as follows: "If, after the automobile is entrusted to such driver, he operates is negligently, and thereby causes damages to a third person, the causal connection is shown between the

[51] *Id.* at 321, 206 S. W. 2d at 591. Emphasis added.

negligence of the owner in lending him the automobile and the damage to the third person."[52] On the basis of this principle the court held that the trial court's charge had adequately submitted the issue of proximate cause; the judgment of the court of civil appeals was reversed and that of the trial court was affirmed. Is this principle sound?

The defendants had argued that their negligence in not ascertaining the facts relating to the employee's license was immaterial because (1) the employee was driving against orders and without permission on a mission of his own and (2) there was no proof that the truck was out of control at the time, only that the man was drunk. The supreme court held that under its previous holdings "those considerations are without significance in a case of negligent entrustment."

That there is a certain risk involved in entrusting a vehicle to one "not shown by examination and license to be competent to drive" will go without dispute. That the defendant's liability should extend to injuries which are results within this risk will likewise go with little dispute. It is when the defendant's liability is extended to results which are difficult to find within the risk (*e.g.*, those caused by drunkenness and carelessness as distinguished from incompetence) that there is great room for question.

In the subject case it is even more difficult to justify the conclusion that the result was within the risk since the employee was *not* one of those "not shown by examination and license to be competent to drive." The evidence in the case showed that he had been examined and had been licensed. The evidence did not show that he had lost his skill since the expiration of his license. His failing, so far as appeared from the evidence, was solely one of not having sent the Department of Public Safety $1.00 for a renewal.

The question whether a master should be responsible for injuries caused by his servant's carelessness or drunkenness while in performance of a task for which he was hired is an entirely different

[52] *Ibid.*; quoted in the principal case, 240 S. W. 2d at 1017.

one; the liability of the master is not based upon his own participation in the wrong. In the subject case the servant was on a mission "wholly his own", and no attempt was made to find vicarious liability for the servant's tort, since he was without the scope of his employment. Where the negligence of the principal himself is the issue, one cannot avoid asking these questions: What was foreseeable by him? What was the risk which made his conduct negligent? Should his liability be extended beyond that risk?

Suppose the driver in the principal case had absconded and driven the truck to California and there caused the deaths of three persons by his careless driving. Certainly it would not have been held that defendant was liable simply because, in the language of the Texas court, "after the automobile is entrusted to such driver, he operates it negligently, and thereby causes damages to a third person." It would probably have been held that this result was not foreseeable and that the defendant therefore was not liable (either on the theory of want of duty to the plaintiff, or want of proof of proximate cause). Where is the dividing line? Is there any real difference between the subject case and the leaving of a key in a car so that an unauthorized person may take it and drive it negligently against the plaintiff? On the facts of this case, to say the least, reasonable men might conclude that this was a result outside the foreseeable risk, if not being forced to this conclusion as a matter of law.

This case has extended the employer's liability for "negligent entrustment." It is not plain just where is placed the limiting line on this extension, short of absolute liability for all ensuing consequences of negligent driving even during unauthorized use of a vehicle by the one to whom it was entrusted. Nor is it perfectly clear that there is such a line.

VOLENTI NON FIT INJURIA — HOW FAR WILL THE "CONSENT" EXTEND?

The doctrine of assumption of risk in its primary sense has been generally held to be in the nature of a contractual relationship and therefore limited to controversies between master and servant. In its broader sense, however, the doctrine extends beyond contractual relationships[53] with the test being designated by the maxim, *volenti non fit injuria,*[54] and consisting of the two conditions that the injured party (1) must have known of and appreciated the danger, and (2) must have voluntarily assented thereto.

An interesting example of an attempted application of this latter doctrine was recently before the Texas Supreme Court in *Wood v. Kane Boiler Works, Inc.*[55] In this case defendant boiler works was in the process of manufacturing steel pipe for a large gas transmission company, the pipe being made by rolling sheets of steel to the proper shape and then welding the two edges which were drawn together to form the cylinder. The transmission company had contracted with a commercial testing laboratory to have tests made of the pipe at the boiler works as soon as each section was completed. The plaintiff wife's decedent husband was employed by the testing laboratory and stationed at the boiler works to test the pipe, and it was while so engaged that he was killed.

An improperly welded seam burst at a pressure of 980 pounds per square inch when an attempt was being made to subject it to 1000 pounds. The stream of water which resulted from this failure struck plaintiff's husband and propelled him violently for some distance causing his death shortly thereafter.

In trying to determine just what dangers the husband knew of and appreciated and voluntarily assented to, the court looked very carefully at the defective weld, the methods of construction used, and the aids that were available to the defendant in assuring that the weld had been properly made. It is of paramount importance

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53 PROSSER, TORTS (1941) 385; B. Shoninger Co. v. Mann, 219 Ill. 242, 76 N. E. 354 (1905).

54 "That to which a person assents is not esteemed in law an injury."

55 ___ Tex. ___, 238 S. W. 2d 172 (1951).

that such a weld be made exactly upon the seam created by the drawing together of the two edges of the plate. A piece of the burst pipe which was submitted in evidence showed that the weld had not been centered over the seam. The husband had nothing to do with the operation of the welding machine, nor was he under any duty of supervising it. The court pointed out that not only was there a way prescribed in the industry by which the boiler works might have properly welded the seam but also that "there was a gauge test which it had agreed to use and which it could quickly and easily make after welding this seam to determine whether the weld had been properly centered and properly applied."[56]

Defendant contended and a vigorous dissenting opinion agreed that plaintiff's husband had consented to search out just such negligently created dangers. This conclusion as to what was in the deceased husband's mind seems to require a far stretch of the imagination when the method of inspection is taken into consideration. It appeared that water would be turned into a completed length of pipe and then the pressure raised to the required 1000 pounds. The inspector would then move along the pipe, keeping his head close to the seam, and strike continuously on or near the weld with a hammer in order to find, in the words of the dissenting justice, "defects that were so latent that they . . . could be seen only under a magnifying glass."[57] Had the pipe's bursting been one of the risks consented to, it seems logical to assume that the pipe would have been handled in a more indirect manner.

The majority of the court held that the husband had no knowledge that the ordinary precautions, which would have resulted in the discovery of the defect, had not been taken, and that the husband had consented to search only for minor imperfections remaining after all due care had been taken. His going on with the work could therefore not have been consent for the boiler works to disregard its obligations to take those precautions.

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[56] *Id.* at 178.
[57] *Id.* at 180.