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> The Law must be stable, but it must not stand still.
>
> Roscoe Pound, Introduction to the Philosophy of Law (1922)

To satisfy the curious statisticians, there were thirty-three cases in the tort field decided by the Colorado Supreme Court in 1961. And if one is really interested in statistical meaninglessness, twenty-two of the trial court decisions were affirmed, ten were reversed, and one case was returned to the trial court for a determination of the issue of damages alone. Of the twenty-two cases affirmed, fifteen were judgments for the plaintiff. Of the ten cases reversed, seven of the lower court judgments were rendered in favor of the defendant. The case remanded on the issue of damages alone was, obviously, a verdict for the plaintiff.

I. CLEAR PRINCIPLES REAFFIRMED

The bar was heartened by the fundamental reassertion of the purpose of the law of torts in *Mountain States Tel. & Tel. Co. v. Horn Tower Constr. Co.*[1] The telephone company brought an action against a subcontractor to recover on the theory of trespass for severance of an underground conduit. The jury rendered a verdict for defendant, and plaintiff sued out writ of error, urging that absolute liability for damage as a result of trespass to the personal property of plaintiff was involved and that the issue of absolute liability should have been submitted to the jury, not merely the issue of negligence. The court defined trespass to chattels as "the intentional interference with the possession or physical condition of a chattel in possession of another without justification." Thereafter, the court re-established sound but fundamental tort law in two respects:

(1) The court, through Mr. Justice Doyle, discarded plaintiff's argument that: It is not necessary that the defendant shall have acted maliciously toward the plaintiff's property; it is sufficient if defendant intentionally did the act which resulted in the damage. Instead, the court stated: "The alleged wrongdoer must have intended the result, or must have acted wantonly or at least negligently. Unintentional non-negligent interferences with chattels is not actionable."[2] The court exemplified by saying: "The driving of an automobile in heavy traffic will not subject the driver to a claim in trespass by one whose car is struck. In this latter case liability would have to depend on proof of negligence."[3]

(2) "The doctrine of this case has been universally accepted and applied and has been the basis for the fundamental principle of the law of negligence and its corollary, the law of wantonness, that fault of the action is an essential ingredient of liability."[4]

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1 363 P.2d 175 (Colo. 1961).
2 *Id.* at 178.
3 *Ibid.*
4 *Ibid.*

Additional sound law in bailments was announced in *Bankers Warehouse Co. v. Bennett.*[5] Defendant was bailee of certain nut meats. There was evidence that the nut meats were received by the defendant in good marketable condition. When the nuts were withdrawn from the warehouse by the plaintiff, they were contaminated and unusable for the purpose intended—the nuts being impregnated with the odor of moth balls. The plaintiff offered no testimony of specific acts of negligence on the part of the defendant bailee. The court stated: "Under the law applicable to such a situation, a presumption of negligence on the part of the bailee at once arises, and the burden of going forward with evidence to overcome this presumption rests on the defendant. . . . Here it was incumbent upon the defendant to show that the nut meats were not contaminated by reason of its negligence. This it failed to do."[6] Judgment for the plaintiff in the trial court was affirmed. It is good to see that the law remains stable.

II. THE PRICE OF MENTAL ANGUISH

Some established principles of law were constantly reaffirmed by the court in 1961. Denial of recovery for mental anguish unaccompanied by physical injury was not an exception to this desirable consistency.

In *Valley Development Co. v. Weeks,*[7] plaintiff sought damages, and other relief, as owner of a water and ditch right which supplied her lands with irrigation water, resulting from defendant's relocation of the ditch. The court held that plaintiff had a vested right in the ditch which was protected from defendant's interference, and that an action in tort would lie for any such interference. However, the supreme court reversed that part of the judgment entered in compensation for mental anguish suffered in connection with the interference. The court said:

> Without detailing at length various opinions in the above citations, suffice it to say that under ordinary circumstances there can be no recovery in tort for mental anguish suffered by a plaintiff in connection with an injury to his property, either real or personal. Where, however, the act occasioning the damage to property was inspired by fraud, malice, or other such motives, mental suffering is often held to be a proper element of damage.[8]

The supreme court refers to the fact that the trial court found no willful and wanton conduct on the part of defendant. On the basis of this finding, the supreme court found error in the trial court's award of damages, in any amount, for mental pain and suffering.

In *Grant v. Gwyn,*[9] defendant in the lower court inserted a counterclaim asking damage to her person and business reputation and for having suffered shock and mental distress as a result of alleged disturbances and annoyances occasioned by the plaintiff. The trial court dismissed the claim and the supreme court rightfully affirmed the dismissal saying:

5 365 P.2d 889 (Colo. 1961).
6 *Id.* at 891.
7 364 P.2d 730 (Colo. 1961).
8 *Id.* at 733.
9 365 P.2d 256 (Colo. 1961).

> In essence, it is a claim for damages arising from alleged emotional disturbance resulting from alleged threats and "annoying" conduct attributed to Gwyn which caused "mental distress" in the mind of Grant, over a period of time (not specified), prior to the incident of March 21, 1956, which forms the basis of Gwyn's complaint. Counsel for Grant has cited no case which holds that damages for such an emotional disturbance can be adjudicated.[10]

III. ANIMALS AND ORDINANCES

Animals were considered with some frequency this year. In *Swerdfeger v. Krueger*,[11] an eleven year old boy entered the defendant's unfenced yard where the defendant's Malemute Husky was securely chained to a dog house. Before entering the yard, the boy's companions warned him that the dog had vicious propensities. Nevertheless, the boy entered the yard and, as expected, was bitten. Suit was instituted by the mother for injury to the minor. It was urged that according to established Colorado authority absolute liability is imposed on an owner of a dog known to be vicious.[12] The court dismissed this contention as not supported in Colorado law. Further the court found, as dictum, that contributory negligence could form the basis of defense in a case of this nature. In reversing a judgment for the minor and dismissing the case, the supreme court states that the minor "deliberately put himself in harm's way with full knowledge and understanding of what his companions had told him about the dog."[13] According to the Restatement of the Law of Torts, such circumstances absolve a dog owner of liability to a trespassing child. Two dissents raise the question of contributory negligence of an eleven year old, and the soundness of the Restatement principle with respect to technical trespasses by children and the variable standard between children and between children and adults. It appears that children must still be taught that vicious dogs bite.

An early 1961 case announced some sound law with respect to statutory construction and provided some subtle humor. In *Moore v. Fletcher*,[14] we find two disgruntled (for whatever reason) hunters suing a fellow hunter for injuries sustained from the muzzle of a .22 rifle. The plaintiffs arrived at defendant's land in the darkness of early morning. There, without permission of the defendant, they dug their goose pit. Little known to them, the defendant was in a similar blind nearby. As dawn broke, the defendant noticed plaintiff's decoys and shot into them. One shot hit one plaintiff. A second shot hit another plaintiff. The court found that the plaintiffs were trespassers and that defendant did not know of the plaintiffs' presence until after the shots were fired. The trial court entered judgment of dismissal on these facts. Our supreme court affirmed the judgment asserting that defendant, a lessee in possession, breached no duty to plaintiffs in that he owed only the duty to have his premises in a reasonably safe condition and to give warning of latent or concealed defects. No additional duty was owed since defendant was

10 *Id.* at 259.
11 358 P.2d 479 (Colo. 1961).
12 Yegge, *Dog's Bill of Rights*, 34 DICTA 178 (1957).
13 Swerdfeger v. Krueger, *supra* note 11, at 482.
14 363 P.2d 1056 (Colo. 1961).

not aware of the presence of the plaintiffs. Plaintiffs urged that violation of Colo. Rev. Stat. 62-12-3 (1953), regarding use of a rifle or pistol to hunt, kill, or scare migratory waterfowl, was negligence per se. Mr. Justice McWilliams pointed out that the statute was enacted to protect waterfowl, not poachers. The statute could not establish negligence per se when it was not enacted to protect the interests of the class of which the plaintiffs were members. The law does not protect migratory goose hunters without "licenses."

The court twice again considered the effect of violation of a statute or ordinance as establishing negligence, absent proof. Colorado, in 1961, did not look with favor upon the attempted establishment of fault without proof of negligence. In *Piper v. Mayer*,[15] the trial court instructed the jury as to numerous statutory provisions, pertaining to parking and required lights on the highway, in a case wherein the plaintiff's vehicle struck a parked and disabled vehicle on an icy highway. The trial court instructed the jury that if it found that any of the provisions of the statutes had been violated and the violation was the proximate cause of the injury, said violation constituted negligence per se. The court, in evaluating the evidence, pointed to facts showing independent cause of the accident and concluded: "In the light of these factors, it is impossible, in the present state of the record, to find evidence suggesting that statutory violations by the defendants constituted the proximate cause of the collision."[16]

In a distinctly worded opinion by Mr. Justice Moore, a 1961 case[17] established that violation of a city ordinance, which violation was not proximately connected with the damage, could not in itself form the basis for plaintiff's recovery. The plaintiff argued, as the sole ground for charging the defendant with responsibility for the accident, that the defendant's violation of an ordinance disallowing persons from leaving running motor vehicles unattended, was negligence per se. Plaintiff contended that this violation was the proximate cause of the accident involving a vehicle owned by defendant and operated by a thief. The court stated that violation of an ordinance adopted for the safety of the public may be negligence per se, but it is nevertheless essential to recovery of damages based upon such violations to establish that it was the proximate cause of the

15 360 P.2d 433 (Colo. 1961).
16 *Id.* at 437.
17 Lambotte v. Payton, 363 P.2d 167 (Colo. 1961).

injury complained of. "The violation of a statute or ordinance enacted for the protection of persons or property does not ipso facto import liability unless the violation be shown by proper proof to be the proximate cause of the injury."[18]

Animals and statutes found their common ground in *State v. Morison*.[19] Plaintiffs, upon legislation allowing suit against the agents of the sovereign, sought to recover for loss of their herd of cattle after the herd had been infected with paratuberculosis. Plaintiffs alleged that a neighbor's herd of cattle showed symptoms of paratuberculosis and that such was called to the attention of the state veterinarian who refused to act to prevent the spread of the contagious and infectious disease. To assist in establishing negligence on the state veterinarian's part, the plaintiff contended that the state veterinarian breached certain duties thrust upon him by statute and that the violation of these statutory duties constituted negligence. The statute imposes a duty on the State Agricultural Commission to take steps that will prevent the spread of disease within the state. Mr. Justice McWilliams, in a well reasoned opinion, found that the statute in question was designed to protect not only the general public, but also a class of persons of which the plaintiffs were members. Accordingly, the plaintiffs could properly rely on the statute to show defendant's negligence.

IV. FRAUD: TRADITIONAL AND AGGRAVATED

Fraud with respect to real property thrice faced the Colorado Supreme Court in 1961. Fraud cases covered cheating the aged, over-puffing the property intended for sale, and inflating the income potential of rental property.

Poor old Dr. Hinshaw met his match in Cora Marie Hook.[20] The well-to-do eighty year old man married the younger woman, after which time she would not live with him until he conveyed two valuable pieces of real estate to her for only nominal consideration. The executor of Dr. Hinshaw's estate brought suit against Cora Marie to cancel the two deeds. The trial court dismissed the suit on the ground that no fraud was established. The supreme court stated: "It is true, as the defendants urge, that the burden of proof to establish fraud and undue influence is upon him who asserts it, and that it must be established by clear and satisfactory evidence. However, we have held that fraud in some situations may be presumed from the relationship, or from the circumstances and conditions of the contracting parties."[21] The court reversed the judgment of dismissal, finding that the record disclosed a substantial inequality between the parties and thus, the burden shifted to the former wife to prove that the transactions were in fact fair, just and reasonable and not fraudulent. Often, the law does not look out for those who look out for themselves.

Corder v. Laws[22] affirmed a judgment in favor of a vendee against a vendor. The vendor represented to the vendee that the second floor of the premises, which were later purchased, were being rented for $200 a month on a five year lease. Leases substantiat-

18 *Id.* at 168.
19 365 P.2d 266 (Colo. 1961).
20 Hinshaw v. Hinshaw, 365 P.2d 815 (Colo. 1961)
21 *Id.* at 817.
22 366 P.2d 369 (Colo. 1961).

ing such representation were shown to vendee. However, the vendor failed to reveal that he had a private understanding with the tenant that the tenant need not pay rent for the first six months of the tenancy, and the vendor did not reveal that the tenant did not intend to live up to the terms of the lease. As a result of the failure to reveal the true relationship between the vendor and the tenant, the court affirmed a judgment for damages against vendor based upon fraud.

Lastly, *Denver Business Sales Co. v. Lewis*[23] considered the representation of a seller of real property that "the house was built and constructed of the very finest material and workmanship; that it was constructed in such manner that it was and would be trouble free, and was ready for the plaintiff to occupy over a long period of time."[24] In fact, there were some geological problems with the soil on which the house was built, which it was alleged were not properly provided for in the construction period. Objection was taken to the instruction given on fraud which included that "the sellers failed to disclose a matter which in the exercise of reasonable care they should have known." The court stated: "The inclusion of this language in the instruction was error. In an action based on fraud, which generally involves a corrupt motive, one cannot be held liable for concealing a condition concerning which he had no knowledge."[25] The court pointed out that the applicability of exercise of reasonable prudence with respect to acts in negligence cases has no application to cases based on fraud and deceit. Hear no evil, speak no evil, see no evil.

V. WHEN NEGLIGENT CONDUCT IS NOT NEGLIGENCE

The question of health as it affects the capacity to commit a negligent act was twice discussed by the Colorado Supreme Court.

Renell v. Argonaut Liquor Co.[26] concerned a rear-end accident. The attack by the plaintiff was twofold: negligence of the employee in operation of a motor vehicle, and negligence of the employer who knew or reasonably should have known that the defendant was too drowsy, overworked and fatigued to drive an automobile on the public highway. The jury returned a verdict for defendants, driver and employer. First, the court established that if in fact the defendant "blacked out" or "fainted" under circumstances not foreseen by him, he would not be answerable as negligent for events which occurred while he was blacked out or in a faint. Second, the jury's findings with regard to the fainting and with regard to the employer's alleged neglect would not be disturbed under the circumstances of the record.

Johnson v. Lambotte[27] considered the question of whether a person who is mentally incompetent can be held liable for tortious conduct. Affirming a judgment against a defendant who was under treatment for chronic schizophrenia, but had not been adjudicated mentally incompetent, the court cited with approval Corpus Juris Secundum, *Insane Persons*, section 122, which concludes that an insane person may be liable for his tort, the same as a sane person.

23 365 P.2d 895 (Colo. 1961).
24 *Id.* at 896.
25 *Id.* at 898.
26 365 P.2d 239 (Colo. 1961).
27 363 P.2d 165 (Colo. 1961).

except perhaps those in which malice and intention are a necessary ingredient.

VI. WHEN NO CONDUCT IS NEGLIGENCE

Another insight into the law regarding imputation of negligence from driver to passenger was gained in *Lasnetske v. Parres*.[28] Negligence was imputed from the driver to the passenger inasmuch as both driver and passenger contributed their respective earnings to the maintenance of the household; the automobile was jointly owned by them; and the accident occurred as the two were driving home from work. An additional fact was present, however: The passenger did not have a driver's license and did not know how to operate an automobile. The Colorado court affirmed its prior holding that joint ownership, occupancy, possession and use in a joint mission presumes an agency.[29] In addition, it rejected the significance of the inability of the passenger to drive, authority of other jurisdictions to the contrary notwithstanding. It is hard to say whether the law remains stable.

VII. UNDAMAGED: RES IPSA LOQUITUR

Res ipsa loquitur again found its way to the Colorado Supreme Court for interpretation in 1961. The court treated the fiction with care by strictly applying its tenets in conjunction with other well established and reaffirmed torts principles.

In *McGee v. Heim*,[30] plaintiffs, owners of real property, sued their tenant for damage occasioned by fire which took place in the rented premises. Plaintiff relied upon the doctrine of *res ipsa loquitur*. The court reaffirmed the principle that, under usual circumstances, the mere happening of a fire, or the happening of an accident, under mysterious circumstances, cannot alone call the doctrine of *res ipsa loquitur* into play. In holding that the doctrine did not apply in the present case, the court stated: "When it can, with equal reasonableness, as here, be inferred that the accident in question was due to a cause other than the alleged negligence of the defendant, *res ipsa loquitur* may not be invoked against such a defendant."[31]

The plaintiff in *Flader v. Simonsen*[32] attempted, for the first time in the supreme court, to argue that injury sustained by a pas-

28 365 P.2d 250 (Colo. 1961).
29 Moore v. Skiles, 130 Colo. 191, 274 P.2d 311 (1954).
30 362 P.2d 193 (Colo. 1961).
31 *Id.* at 196.
32 356 P.2d 678 (Colo. 1961).

senger in a private aircraft invoked the doctrine of *res ipsa loquitur*. The court rejected the argument as too late, as not urged in the trial court and as inconsistent with proof of negligence offered in the trial court. However, the court affirmed the trial court in finding that the facts were such as not to warrant invoking the doctrine.

Worthy of speculation is the disposition of the seven justices when the doctrine is timely urged in an accident of this kind. With the increased use of aircraft for everyday transportation, the issue will doubtless be resolved soon. Does the law remain stable, or do the artifacts of modern technology demand different rules?

VIII. RISKS AND GUESTS: CONTRIBUTORY AND ASSUMPTIVE

The year 1961 saw an interesting admixture of contributory negligence compounded with assumption of risk to which was added a dash of the guest statute.

With respect to contributory negligence, *Stevens v. Strauss*[33] reaffirms a well known principle saying: "No obligation rests upon a plaintiff to negative contributory negligence. Contributory negligence is not presumed. While the proof offered by the plaintiff may establish contributory negligence, unless it so appears, such negligence is an affirmative defense, and the burden of proving it rests upon the defendant."[34] Such statement was made in rejecting the defendant's assignment of error that the plaintiff failed to plead and prove freedom from contributory negligence.

In *Farmer v. McColm*,[35] plaintiff was riding a motor scooter on a street which was snow-packed and icy, cut off his throttle and tipped over, after which he was struck by an oncoming motor vehicle. It was resolved in the trial court by a directed verdict for the defendant on the ground that the plaintiff was guilty of negligence as a matter of law. The supreme court, in reversing the directed verdict, stated that the evidence was sufficient to make the issue of contributory negligence a disputed one of fact properly to be resolved by the jury, and under the circumstances should not have been resolved by the trial court as a matter of law. "Intelligent jurors might well differ in their opinion as to whether under all the circumstances plaintiff was negligent in the manner in which he attempted to stop his motor scooter when confronted with what he deemed was an emergency situation."[36]

Radetsky v. Leonard[37] established: "It is not necessarily negligence for a pedestrian to be a short distance outside of a crosswalk if such does not lead to resulting injury."[38] This determination was made by the supreme court in reversing a judgment for the defendant in a case wherein the defendant made a left turn and hit the pedestrian outside of the crosswalk. The supreme court stated that there was error in submitting the question of contributory negligence to the jury. The trial court should have directed a verdict for the plaintiff, where the sole defense appeared to be that the plaintiff was outside the crosswalk.

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33 364 P.2d 382 (Colo. 1961).
34 *Id.* at 384.
35 364 P.2d 1059 (Colo. 1961).
36 *Id.* at 1061.
37 358 P.2d 1014 (Colo. 1961).
38 *Id.* at 1016.

Assumption of risk, somewhat confused with contributory negligence, seemed to mix well with beer in 1961. In *Appelhans v. Kirkwood*,[39] a fourteen year old plaintiff was a passenger in a vehicle driven by defendant which collided with a post on the Valley Highway. Both plaintiff and minor defendant had been drinking beer prior to the accident. After entry of judgment for the plaintiff, defendant sought reversal on the ground that as a matter of law the plaintiff had assumed the risk of injury. In denying the defendant's contention, the court said: "Plaintiff's age and mental immaturity were matters to be considered by the jury in measuring the extent of the plaintiff's knowlege of automobiles and alcohol, and were for the jury to weigh and consider in determining whether there was a voluntary assumption of risk with full knowledge of the hazards threatened."[40]

In *Pletchas v. Von Poppenheim*,[41] a passenger sued the driver of an automobile for injuries when the automobile skidded over and down the bank of a mountain highway. The defendant driver had been drinking beer and his driving ability was impaired. Again it was urged, after entry of judgment for the plaintiff, that a verdict should have been directed for the defendant upon the evidence of drinking by the defendant driver which would establish assumption of risk as a matter of law. The court did not agree. The trial court properly submitted the case to the jury, leaving to the jury the factual issue of proximate cause of the accident. It seems that the amount of beer consumed was a disputed issue of fact. Whether fact or law, the court considered that the extent to which the consumption of beer affected the driver's operation of the vehicle was a question for the jury.

Both the *Appelhans* and *Pletchas* cases considered the applicability of the guest statute, at least indirectly. *Appelhans* states that the cause was submitted to the jury, pursuant to the guest statute, when apparently no question of the guest statute was raised. *Pletchas* affirmed the trial court's holding that the guest statute was inapplicable to the case, inasmuch as custom among professional wrestlers (both plaintiff and defendant being professional wrestlers) was for a passenger (plaintiff) to pay the driver (defendant) on a mileage basis at the end of the trip. Hence, the defendant was a carrier for hire; the guest statute did not apply by its own terms.

IX. IS AN ACCIDENT EVER UNAVOIDABLE?

As one might expect, the apparent mythological legal principle of "Unavoidable Accident" was raised in *Piper v. Mayer*.[42] There, in a case for personal injuries resulting from an automobile accident, the defendants' vehicle spun out of control on an icy highway and hit the rear of the plaintiff's stalled and parked car. The trial court submitted to the jury the question of unavoidable accident, and the jury returned a verdict for the defendants. The supreme court reversed, stating that the unavoidable accident instruction was error; observing that there was evidence the defendants were driving at an unreasonable rate of speed in view of the road conditions; and

39 365 P.2d 233 (Colo. 1961).
40 *Id.* at 237.
41 365 P.2d 261 (Colo. 1961).
42 360 P.2d 433 (Colo. 1961).

holding "the jury should have been permitted to resolve this conflict free of the confusion resulting from submission of a theory of law leading to the conclusion that plaintiffs might not be permitted to recover irrespective of the negligence or non-negligence of the defendants."[43]

Query: Is there such a thing as a doctrine of "Unavoidable Accident"?

X. THE VARIOUS DUTIES TO PROTECT INVITEES

The duty owed business invitees was four times considered. The matter of proof of negligence was considered in *Remley v. Newton.*[44] A child guest at a resort was found lying unconscious on the ground near a tether ball pole which was not anchored to the ground, but merely held upright by an iron wheel. The court affirmed the principle that proof of the happening of an accident or occurrence of injury alone raises no inference of negligence. The court went on to say that negligence may be established by facts and circumstances surrounding the accident. Toward that end the claimant had offered the testimony of an employee of the school district whose job it was to install and maintain playground equipment, including tether ball equipment. The testimony was proffered to the issue that there was a safe way to install such equipment so that a child would not get hurt and so that there would be no danger of the pole toppling. It is inferred from the opinion that the proffered testimony would establish that the equipment was not properly installed by the defendant. The trial court had excluded such evidence. In reversing this order, the supreme court cited Restatement of the Law of Torts, section 343, and concluded: "If, as contended by counsel for plaintiff, there is a safe and proper way to install tether ball equipment which is uniformly maintained on children's playgrounds, we see no reason why testimony establishing that fact should be excluded."[45] The court rejected the argument that there is a distinction between a playground at a school and a playground at a vacation resort in allowing the "expert" testimony of a man familiar with school equipment, and not familiar with resort equipment.

In a somewhat different conclusion, *Blackburn v. Tombling*[46] considered the propriety of a judgment against a hotel operator for injuries sustained by a plaintiff who fell on the hotel steps. When one of the outer doors of the hotel was opened it extended about 20 inches beyond the outer side of a step down to the sidewalk level. The plaintiff suffered the injury while leaving the hotel through this door. The trial court allowed the plaintiff to call a so-called expert witness to testify that defendant's doorway constituted a dangerous condition. The expert was an architect who had long practiced in the community of the hotel, and had constructed many hotels. The witness testified, as an expert, that it was his opinion that the doorway condition was dangerous. In this case the court held that the expert's testimony was not admissible. The court reaffirms the age old principle: "There is no need for expert opinion

43 *Id.* at 436.
44 354 P.2d 581 (Colo. 1961).
45 *Id.* at 583.
46 365 P.2d 243 (Colo. 1961).

with reference to facts involving commonplace occurences." Soundly, the court also found error in admission of evidence that other persons had fallen or stumbled over the doorway in question prior to the time of the plaintiff's accident, saying: "Plaintiff made no attempt to establish any similarity of the circumstances of the isolated events and the accident in question. There was no showing whether such prior incidents occurred while persons were entering or leaving the hotel; whether they occurred in the daytime or at night, or whether they were in any way similar to the accident in question."[47] There is no mention of the duty of care imposed on a hotel operator in the opinion.

For children and tether balls, experts on proper construction are competent to testify; for adult hotel guests, experts on proper construction are not competent.

Nettrour v. J. C. Penney Co.[48] at last establishes a duty owed to an invitee by the owner of property. In this case, a five year old boy was injured while riding an escalator in defendant's department store. Upon the following evidence, the trial court granted a directed verdict to the defendant: The escalator started and stopped in a jerking sort of way, the child's mother's attention was misdirected, and soon she heard her child calling, after which she saw that the child had fallen and his right index finger was engaged between the moving step and the side wall of the escalator. The mother vainly attempted to have the escalator stopped and finally

47 *Id.* at 245.
48 360 P.2d 964 (Colo. 1961).

she disengaged the child's finger. Evidence disclosed that the emergency stop button on the escalator was located at such a place that there was no warning or directional sign near it. The court impliedly rejected the argument that the defendant was functioning as a common carrier and cited Corpus Juris Secundum for the general rule that the owner of property owes to an invitee or business visitor the duty of exercising reasonable or ordinary care for safety commensurate with the particular circumstances involved. Nevertheless, on the particular facts, the supreme court reversed the directed verdict for defendant, holding that the case should have been submitted to the jury, there being present issues upon which reasonable minds might differ. Apparently, although it is not clear, the difference would be on the interpretation of an ordinance requiring emergency stop buttons.

Another case involving the liability of hotel owners was *Sniezek v. Cimino*,[49] setting forth a test for duty of care owed an invitee. A neon sign repairman, in repairing the hotel owner's neon sign, was electrocuted as a result of a stray wire in the area of repairs. The trial court directed a verdict for the hotel owner, to which the claimant took exception. First, the supreme court held that the repairman, who was an employee of the neon sign company, was an invitee, as to the hotel owner. Second, in affirming the directed verdict, the court set forth the duty of the hotel owner as applied to the facts of the case, saying: "Such owner can only be held responsible for those hazards about which he knows or should have, as a prudent man, discovered. In the case at bar, had the roof been accessible to the Blairs [owners] and had they made an investigation, it would not have altered the situation since their knowledge is not shown to have been sufficient to detect the danger or warn the decedent or his employer of the hazard."[50]

Regularly used escalators and five year olds are certain circumstances which raise factual issues of safety; uninvestigated, undetected dangers and adult repairmen are certain circumstances which do not raise factual issues of safety. Department stores and hotel owners are prudent men who should detect knowledgeable dangers.

XI. MALPRACTICE OF TRADESMEN

Surprise! There were no medical malpractice cases in 1961 before the Colorado Supreme Court. However, the malpractice of occupations less traditionally known as professional did concern the Colorado court.

Plumbers' malpractice was twice the subject of litigation reaching the Supreme Court of Colorado in 1961. Lembke Plumbing and Heating was sued by a homeowner as a result of damage for failure to protect a pipe in a concrete wall and for damage occasioned by a broken tube while the plumbing firm's employee was performing repair work at a later date.[51] In defense, Lembke urged contributory negligence because the plaintiff failed to have soil tests made which, the defendants urged, would have shown water in such amount as to expand the clay, such expansion causing the damage. The court

49 360 P.2d 813 (Colo. 1961).
50 *Id.* at 815.
51 Lembke Plumbing & Heating v. Hayutin, 366 P.2d 673 (Colo. 1961).

found that the evidence did not show an abnormal water content in the soil, and further stated: "Hayutins [plaintiffs] were not bound at the time of construction or prior thereto to anticipate defective plumbing and leakage and to make provision therefor."[52] Defendant further urged that a printed form contract signed by the plaintiff precluded recovery by the recital that the contract "lawfully expires one year from date." The court held that the contract does not provide a substitute statute of limitations for acts of negligence in the absence of an express provision therefor and again reaffirmed the principle that contracts limiting liability are strictly construed. Upon review it was found that the finding of negligence in the lower court was justified and the trial court's judgment for the plaintiff was affirmed.

In *Larrick v. Burt Chevrolet, Inc.*,[53] the automobile dealer had engaged Larrick to build an addition to its body shop. Larrick employed a plumber to relocate steam pipes connected with the heating plant. The plumber, acting under instructions from the general contractor, shut off the gas boiler, drained the same, relocated the pipe, filled the boiler again with water and then undertook to light the gas burner. It was found that the boiler was dry and extensive damage was suffered as a result of dry-firing. In the suit, the plumber cross-claimed against the general contractor for indemnity. In affirming a judgment against the plumber and the general contrac-

52 *Id.* at 677.
53 362 P.2d 1030 (Colo. 1961).

tor, the court observed that the plumber was wholly unqualified to do the job he undertook and it was due to his lack of qualifications, ineptitude and negligence that caused the boiler to be dry-fired and damaged. Furthermore, it was found that the general contractor and plumber were joint tort feasors and, therefore, there was no right of indemnity.

XII. A MISCELLANY ON PROOF

Contaminated food was the subject of litigation in *Gonzales v. Safeway Stores, Inc.*[54] Plaintiff, in preparing dinner, opened a can of peas, poured them into a clean saucepan, warmed them and served them to her husband and herself. While eating the peas, the plaintiffs, husband and wife, discovered a bug in the peas. Alleged injury followed. The trial court granted the defendant's motion to dismiss. In the supreme court the case was reversed. The court reaffirmed the implied warranty of fitness in food and rejected the trial court's resolution of "a case of equal probability." The trial court apparently took the view that through inadvertence the bug got into the food while being prepared in the plaintiffs' kitchen. The supreme court stated that where evidence concerning material facts is such that reasonable minds could differ, a case should be submitted to the jury and the court's refusal to do so was error.

An interesting review of acts of a private airplane pilot which do not constitute negligence with respect to a non-paying passenger in such aircraft are discussed in *Flader v. Simonsen.*[55] In the case, judgment was entered for the plaintiff in the trial court for negligence, allegedly in the defendant's failing to use due care with respect to operation of the airplane. In a lengthy discussion of the facts, the supreme court reversed the trial court's finding and dismissed the complaint.

Although this article does not review damages, it is significant to note that an award of $7,676.96 to a father and $12,500 to a mother, both of whom had a life expectancy of 20 years, for wrongful death of their well educated, well trained daughter, who was a senior at Colorado University at the time of the accident, was not excessive in the case of *Stevens v. Strauss.*[56] In *Thompson v. Gurule,*[57] the court held that an award of $250 to a mother and $100 to a minor daughter for bruises, abrasion and shock sustained when they were thrown about in an automobile was not excessive.

Numerous cases were decided with respect to proof necessary to sustain a jury verdict and the propriety of submitting questions to a jury.[58]

54 363 P.2d 667 (Colo. 1961).
55 366 P.2d 678 (Colo. 1961).
56 364 P.2d 382 (Colo. 1961).
57 360 P.2d 679 (Colo. 1961).
58 Frank v. Whinery, 366 P.2d 560 (Colo. 1961) (whether plaintiff stopped for a red light, whether orthopedic devices interfered with her ability to drive and whether defendant gave turn signal); Smith v. Eichheim, 363 P.2d 185 (Colo. 1961) (whether loss of farmer's wheat crops were proximately caused by operation of neighbor's harvesting equipment); Chicago Rock Island & Pac. R.R. v. Williams, 367 P.2d 342 (Colo. 1961) (whether railroad was negligent in grade crossing collision); Lasnetske v. Parres, 365 P.2d 250 (Colo. 1961) (whether left turning motorist or oncoming motorist in the intersection automobile collision was negligent or contributorily negligent); Thompson v. Gurule, 360 P.2d 679 (Colo. 1961) (whether defendant was negligent in driving his automobile without its headlights); Bobo v. Logan, 358 P.2d 889 (Colo. 1961) (whether evidence was sufficient to establish wilful and wanton acts which would take the case from under the protection of the guest statute).