Denver Law Review

Volume 37 | Issue 1 Article 8

January 1960

One Year Review of Torts

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1959 was another prolific year in the tort field. It was also a rather confusing year of ups and downs for litigants and their lawyers; a year in which the court took its tort cases most seriously, rendering numerous, carefully-detailed and well-documented opinions. In reflecting on these cases it seems that a few decisions were most liberal in allowing plaintiffs' recoveries while others seemed most restrictive.

I. WORKMEN'S COMPENSATION

A statute provides:

> Upon its own motion on the ground of error, mistake or a change in condition, the commission . . . at any time within two years after the date last payment becomes due and payable or within six years from the date of accident, whichever is longer, in cases where compensation has been paid . . . may review any award and on such review, may make an award ending, diminishing, maintaining, or increasing compensation previously awarded. . . . No such review shall affect such award as regards any moneys already paid.[1]

The Supreme Court had occasion to construe this statute in the case of *University of Denver v. Industrial Comm'n.*[2] This case is a sequel to *University of Denver v. Nemeth*[3] wherein it was held that one who played football for a university was covered by workmen's compensation where his employment in other part-time work for the university was dependent upon his participation in athletics. The instant case was spawned when Nemeth petitioned the commission to reopen in December, 1957, on the ground that his condition had changed. Following the first case he had been granted a lump sum settlement in October of 1954 for his injuries which were incurred in April of 1950. The petition to reopen thus was filed more than six years after the date of accident and considerably more than two years from the date on which he received his lump sum settlement. In affirming the trial court's decision ordering the commission to reopen the claimant's case, the Supreme Court held that it was the intention of the legislature that the claim could be reopened within two years after the last periodic payment would have been made had there not been a lump sum settlement. The happy result of this case, therefore, is that a claimant does not prejudice his position with reference to a later petition to reopen by accepting a lump sum settlement rather than periodic payments.

Snyder v. Industrial Comm'n[4] posed the question: Who is the employer? Snyder, an unlicensed cement contractor, obtained

1 Colo. Rev. Stat. § 81-14-19 (1953).
2 138 Colo. 505, 335 P.2d 292 (1959).
3 127 Colo. 385, 257 P.2d 423 (1953).
4 138 Colo. 523, 335 P.2d 543 (1959).

a contract for sidewalks and entered into an agreement with Dillie, who was a licensed cement contractor, that the two would work together, each using his employees, dividing the costs and profits. Dillie obtained the sidewalk permit and it was he who stamped his name on the walk as required by law. Lopez, the injured claimant, was in the general employ of Snyder but on the day he was injured he was receiving his orders from Dillie. The court held that Dillie and Snyder were engaged in a joint enterprise and therefore Lopez was an employee of both, thus holding them jointly responsible for the injuries to Lopez. It is noted in the decision that Snyder carried no workmen's compensation insurance but Dillie was covered.

In *Industrial Comm'n v. Johnson Pontiac, Inc.*[5] there is evidence that the employer reported to the commission that the claimant "strained or pulled his heart muscle when attempting to lift a transmission into an automobile." The insurer filed a general admission of liability and paid temporary compensation. A hearing was subsequently held to determine the extent of permanent disability following which the insurer asked leave to withdraw its admission. The insurer claimed that the admission was based upon a mistake of fact on the part of the employer and that it had no support in the record. The commission denied the motion and entered an award for permanent disability. The district court reversed the award and directed dismissal of the claim. The Supreme Court reversed again, reinstating the claim, and anchored its opinion on the following grounds: (1) The insurance company was fully aware of the facts, and, therefore, its contention that there was a mistake of fact had no support in the record; and (2) there was sufficient medical evidence in the record to establish the reasonable probability that the claimant's injury was causally connected with his work. A doctor's report in evidence stated that the injury "undoubtedly" occurred while the claimant was pushing in a transmission, and that the symptoms noted by the claimant at that time probably m a r k e d the very beginning of a coronary occlusion. In addition, the employer's report contained an admission against interest "having probative value the weight of which was for the consideration of the commission." The commission having determined the issue upon competent evidence, its conclusion is binding upon the courts.

In *Divelbiss v. Industrial Comm'n*[6] a divided court held that where a helper on an open hearth furnace in a steel mill was injured while showering after work but before he "punched out" and it appeared that the claimant had worked in dense heat and dolemite dust and that the shower was provided by the employer but that its use was optional, the act of showering was the performance of services arising out of and in the course of employment. The majority of the court applied the test set forth in *Industrial Comm'n v. Golden Cycle Corp.*[7]: "[I]t arises out of the employment if it is connected with the nature, conditions, operations, or incidents of the employment. . . ."

5 344 P.2d 186 (Colo. 1959).
6 344 P.2d 1084 (Colo. 1959).
7 126 Colo. 68, 246 P.2d 902, 904 (1952).

The court expressly rejected the contrary decision in *Industrial Comm'n v. Rocky Mountain Fuel Co.*[8] as being out of harmony with the modern trend. The majority of the court observed:

> The fact that the employer has provided these showers and the fact that substantially all of the employees find it necessary to use them, constitutes persuasive evidence leading to the conclusion that the shower facilities provided are something more than a contribution to the convenience of the employees. The health of the employee is of interest to the employer and the inference that the employer was not providing for the comfort and pleasure of the employee when it installed these extensive shower facilities is a fair one. The employers interest was actually here served.[9]

The dissent noted that the claimant was not working by the hour but by the ton, and that showering is just a matter of personal taste. Therefore he was not performing services for his employer when injured; "taking a bath," the minority tells us, "had nothing to do with tending the furnace. . . ."[10]

This writer is moved by the humor of Professor Larson[11] wherein he criticised the *Rocky Mountain Fuel Co.* case on the basis that "perhaps the court's ideas of personal hygiene were not very exacting."[12]

II. AUTOMOBILE CASES

A. Guest Statute

Hennigar v. Van Every[13] is another in a long chain of unfortunate examples of the fact-finding process to which the courts must resort in construing cases under the Colorado Guest Statute.[14] This vague and confusing statute continues to clutter judicial literature, the courts endlessly disagreeing on whether a case falls on this side of an imaginary line or on the other.[15] The ridiculous cost of the guest statute in terms of time and legal brains alone is a powerful argument for its repeal. No lawyer ever seems to be able to predict the outcome of a guest staute case and no verdict either way seems safe until after the Supreme Court has spoken.

Mr. Hennigar was killed while a guest in an automobile driven by Mr. Van Every. The defendant sped down a dark and unfamiliar road ignoring signs warning him of dangerous road conditions and disregarding oncoming traffic. He drove across a one-lane bridge without reducing his speed although there was a car approaching from the opposite direction. His car struck the bridge railing, then struck the front of an approaching truck and overturned. Undoubtedly the trial court relied on the language of *Pettingell v. Moede*[16] which told us that the word "willful" in the guest statute connotes intentional. It directed a verdict in favor of the defendant. Somehow the Supreme Court drew a fine line deciding that

8 107 Colo. 226, 110 P.2d 654 (1941).
9 344 P.2d at 1087.
10 344 P.2d at 1088.
11 1 Larson, Workmen's Compensation 315 (1952).
12 344 P.2d at 1087.
13 337 P.2d 7 (Colo. 1959).
14 Colo. Rev. Stat. § 13-9-1 (1953).
15 See discussion at 35 *DICTA* 182 (1958).
16 129 Colo. 484, 491, 271 P.2d 1038, 1042 (1954).

Van Every's conduct was willful because the danger was obvious and Van Every had knowledge of it. The horrendous *Pettingell* case was not mentioned in the decision.

There will be no certainty of the interpretation of the guest statute as long as there are human beings on the court. Guest cases will continue to be appealed wherever and whenever the losing party has the funds to do so. It is to be hoped that the Supreme Court will soon have an opportunity to attack the problem of the constitutionality of the statute as that problem was raised in *Noakes v. Gaiser.*[17]

Houghtaling v. Davis[18] holds that where there is a regular weekly payment for transportation to work even though it be a small payment, the passenger is not a guest under the meaning of the statute and the driver is therefore responsible for injuries resulting to the passenger from the driver's ordinary negligence. The court further observed that since the guest statute is a matter of affirmative defense and is in derogation of the common law, the burden of establishing such a defense is upon the driver. It is therefore unnecessary for the plaintiff to plead or prove that the action lies outside the statute.

Bridges v. Lintz[19] further clarifies the matter of payment for transportation. In that case, instead of an actual money payment as in the *Houghtaling* case, there was a car-pool arrangement whereby the plaintiff and the defendant drove their own cars on alternate days. The court held that the relationship was nevertheless an impersonal one based upon expediency and mutual benefit and therefore the guest statute was not applicable.

B. Expert Witnesses

In *Bridges v. Lintz*[20] a police officer testified that he observed ice on the street, that the street was designated as a detour, that it was black top, that the car had spun around, and that he saw thirty-five feet of side-sliding marks. Based upon these observations the officer was permitted to testify that excessive speed plus icy conditions and loss of control of the car caused the collision of the car with a post. The court observed that even though this conclusion of the officer clearly invaded the province of the jury, it was nevertheless proper since the officer was qualified by his experience and training to judge the matter of speed. The jury was properly instructed that it could reject or accept the officer's opinion or could give limited weight to it. Thus the court reaffirmed the liberal view taken in *Ferguson v. Hurford*[21] wherein a patrolman was permitted to testify that greatly excessive speed was evidenced by skid marks.

C. Experiment

The court declared in *Kling v. City and County of Denver*[22] that it is within the trial court's sound discretion to admit into evidence testimony of a police officer's experiment in which he

17 136 Colo. 73, 77, 315 P.2d 183, 185 (Colo. 1957) (dissenting opinion).
18 344 P.2d 176 (Colo. 1959).
19 346 P.2d 571 (Colo. 1959).
20 *Ibid.*
21 132 Colo. 507, 290 P.2d 229 (1955).
22 138 Colo. 567, 335 P.2d 876 (1959).

drove over the roadway at an automobile crash scene three or four days after the crash to determine whether the condition of the street was reasonably safe for general vehicular traffic. The court stated that such a test is properly to be considered in connection with other evidence. The officer drove a police car; the vehicle involved in the crash was sixteen years old. It was claimed the steering mechanism had broken because of ruts in the road.

D. Imputed Negligence

Swanson v. McQuown[23] clarified a point which has been particularly troublesome. The plaintiff, a sergeant in the United States Army, was a passenger in a military vehicle driven by a corporal. They were on duty as military police. The plaintiff was listening for radio calls. The corporal drove into an uncontrolled intersection taking the right of way from the defendant who was approaching from the right. The plaintiff brought an action for his injuries against the driver of the other car, alleging negligence. The trial court directed a verdict in favor of the defendant because he had not so driven his vehicle as to lose the right of way.

Reversing the trial court and returning the case for a new trial, the Supreme Court observed that the question of whether or not the defendant was negligent was broader than the simple matter of right of way; that the evidence raised a jury question as to whether or not the defendant might have violated the ordinance on careless driving by entering the intersection at a rate of speed which might have been imprudent under the blind conditions existing there.

The court held that the negligence of the corporal could not be imputed to the plaintiff despite his higher rank, adopting with approval the Restatement position[24] that imputation of negligence depends on whether the plaintiff himself would have been liable to a third person for the tort. Likening the position of the sergeant-plaintiff to that of a public officer, the court pointed out that a public officer is not liable for the negligence of his subordinate unless he cooperates in the act complained of or directs or encourages it. Since the plaintiff is not barred by the fact that the corporal took the right of way, there is an issue of fact for the jury as to whether or not the defendant drove negligently despite the fact that he did not lose the right of way.

23 340 P.2d 1063 (Colo. 1959).
24 Restatement, Torts, § 485 (1934).

Another extremely important case in the field of imputed negligence is *Seal v. Lemmel.*[25] Seal, a coroner, procured a ride in a sheriff's car for personal reasons. The deputy sheriff who was driving received a radio call pertaining to a hold-up and was instructed to proceed as an emergency. Seal knew that this meant that he would drive at a very high rate of speed. He had an opportunity to leave the car before the deputy began the emergency run but said that he didn't wish to do so because he would have to walk a mile and a half to his destination.

The car was speeding on a busy street at night with its headlights and a red light on. The driver was intermittently operating a siren, and in addition, was flashing a white spotlight on approaching cars to determine whether the hold-up get-away car might be among them. The deputy testified that he last sounded his siren about three-tenths of a mile from the crash scene. The defendant was driving in the opposite direction on the same street and made a left turn directly in front of the deputy's car. The defendant and an eyewitness both testified they did not hear the siren.

The court instructed the jury that any negligence of the deputy sheriff would be imputed to the plaintiff. This was held error by the Supreme Court which observed that there was no evidence that the plaintiff was aiding the driver, or that he was his employer, or that he was in control of the vehicle, or that there was a joint enterprise. Therefore, under the rule of *Swanson v. McQuown,*[26] it was error to submit to the jury the question as to whether or not the deputy sheriff was negligent. Such negligence would not be imputable.

It was held that the trial court compounded its error by asking the jury to determine whether or not the plaintiff under the facts had voluntarily assumed the risk of the collision by continuing to ride in the sheriff's vehicle when he had an opportunity to leave before the emergency run began. The Supreme Court observed that there may have been a question of voluntary assumption of risk in an action between the coroner and deputy sheriff but as between the plaintiff coroner and the driver of the other vehicle, the plaintiff assumed no risk; therefore, the doctrine of assumption of risk had no place in the law suit. Nor did the Supreme Court believe that the plaintiff was guilty of contributory negligence merely because he did not reject the opportunity for transportation to his destination. In this regard the court cited *Jacobsen v. McGinness*[27] as follows: "To say that in such circumstances Jacobsen was contributorily negligent would be to say that he should not have been on that road at that time in the morning, or better still, should have stayed at home."

E. Head-On Collision

According to the testimony in *Bird v. Richardson*[28] the plaintiff driver saw the defendant approaching on the wrong side of the road at a high rate of speed some distance away. The plaintiff

25 344 P.2d 694 (Colo. 1959).
26 340 P.2d 1063 (Colo. 1959).
27 135 Colo. 357, 362, 311 P.2d 696, 699 (1957).
28 344 P.2d 957 (Colo. 1959).

continued to drive in his own lane without reducing speed. He said that he assumed the oncoming car would return to its proper lane. At a point about 100 to 150 feet from the point of impact, the defendant started a side skid whereupon the plaintiff attempted to drive into the drainage ditch on his right to avoid a collision. He was evidently a split second too late because his left rear fender was struck by the left rear fender of the defendant's car. At the close of all the evidence the plaintiff moved for a directed verdict in his favor, which motion was denied by the court. Verdict and judgment for the defendant resulted. In reversing the trial court, the Supreme Court held that a directed verdict should have been granted. The court said that it was error to submit the question of contributory negligence to the jury under circumstances wherein the freedom of action of the plaintiff was so limited. The driver could not be expected, observed the court, to immediately leave the roadway and drive into a ditch to avoid a collision which might not occur if the opposing driver returned to his proper lane of traffic. The plaintiff cannot be charged with negligence in failing to anticipate that the defendant will continue to drive on the wrong side of the road when it appears that the defendant may return to his own lane in time. Nor does the unwise choice of alternatives open the plaintiff to the charge of contributory negligence. If the plaintiff turns left who knows but what the defendant might return to his own lane? If the plaintiff continues in his own lane so might the defendant. If the plaintiff heads for the ditch on the right side, might not the defendant do the same? The dilemma of the plaintiff is a direct result of the negligence of the defendant and his decision even though wrong does not form the basis for a charge to the jury on the question of contributory negligence.

F. Defective Brakes

In *Eddy v. McAninch*[29] the defendant admittedly drove through a red light striking a car in which the plaintiff was riding as a passenger. The defendant testified that he had owned the car only about a week; that it was supplied with an inspection sticker when he bought it; that he had no advance notice of the brakes being inoperative; that as he attempted to stop for the light the brakes failed. The investigating officer arrived at the scene minutes after the collision, tested the brakes, and found that they were not then operating. The service manager of the firm from which the car was purchased said that the brakes were good when the car was sold and that he had personally examined and tested them the morning after the collision at which time they were operating. A brake and wheel shop tested the brakes a few days later and found them to be in good condition. There was testimony that a brake failure can happen suddenly and unexpectedly by reason of dirt becoming lodged in a valve of the master cylinder. The court submitted the issue of the defendant's negligence to the jury and a verdict in favor of the defendant resulted. The plaintiff claimed that her motion for judgment notwithstanding the verdict should have been granted. A Colorado statute[30] requires that automobiles

29 347 P.2d 499 (Colo. 1959).
30 Colo. Rev. Stat. § 13-4-105 (1953).

shall be equipped with brakes adequate to stop the car within certain prescribed distances and that these brakes shall be maintained in good working order. The plaintiff contended that the collision was proximately caused by the defendant's failure to comply with that statute. The Supreme Court, however, held that such violation as well as violation of the statute on signal lights merely raised a rebuttable presumption and that there remained a jury question as to whether the defendant had met the burden of disproving his negligence. Query: Would it not be better for the court to require the defendant to prove the presence of dirt in the master cylinder rather than to allow him to escape on testimony to the effect that there "might have been"?

G. Child In Street

In *Cornell v. Deuser*[31] the three-year-old plaintiff was struck by an automobile driven by the defendant. The defendant testified that she did not see the plaintiff in the street before the impact. The court instructed the jury that, ". . . a person driving upon the highway is entitled in the absence of actual knowledge to the contrary, to assume that it is safe to proceed on said highway at a lawful speed."[32]

Holding this instruction to be error, the court observed that the requirement of "actual knowledge" would relieve the driver of the necessity of using reasonable and ordinary care to observe the presence of children in the street or to observe any other circumstance which would put him on notice that a dangerous situation was presented. The court in reversing the case and remanding it for a new trial declared, "The motorist is bound to know that which a reasonable person would ascertain by the exercise of ordinary care."[33]

H. Elderly Pedestrian

In *Allison v. Trustee*,[34] the plaintiff, an eighty-year-old woman, was attempting to cross U. S. Highway 24 at the western edge of Simla when she was struck by the defendant's car. The court instructed the jury that there was neither a marked nor unmarked crosswalk at the place where the impact occurred and that the pertinent Colorado statutes[35] provided: "Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right of way to all vehicles on the roadway."

In another instruction the jury was told that violation of a statute is negligence in and of itself.

The court refused to include in its instructions another section of the same statute[36] which provided in essence that notwithstanding the provisions of subsection (1), drivers shall use due care to avoid colliding with pedestrians and shall exercise proper care

31 347 P.2d 964 (Colo. 1959).
32 *Id.* at 965.
33 *Ibid.*
34 344 P.2d 1077 (Colo. 1959).
35 Colo. Rev. Stat. § 13-4-59(1) (1953).
36 Colo. Rev. Stat. § 13-4-59(4) (1959).

upon observing children or confused or incapacitated persons on the road.

At the pre-trial conference the defendants had admitted the truth of the plaintiff's allegation that the plaintiff was crossing in in a crosswalk.

From a verdict and judgment for the defendant the plaintiff appealed. The Supreme Court held that it was error not to tell the jury about the degree of care required of drivers under subsection (4) and stated that the trial court erred in giving to the jury an instruction that the plainiff was not in a crosswalk in the face of the defendant's pre-trial stipulation.

III. DAMAGES

In *Jones v. Franklin*,[37] a case involving an assault and battery by a police officer, the court held that the jury could properly consider the following elements in assessing the plaintiff's damages: fear, anxiety, indignity, disgrace, physical injuries, nervous shock, pain, suffering, medical expenses, and loss of earnings.

IV. SLIP AND FALL

King Soopers, Inc. v. Mitchell,[38] is a milestone among slip and fall cases. The defendant appealed from a judgment in favor of the plaintiff arising out of a fall which occurred on the defendant's parking lot adjoining its grocery store. In determining whether the grocery had a duty to clear the parking lot of ice and snow, the court was impressed with the argument that the plaintiff was carrying a sack of groceries which he had just purchased at the store; that this made it difficult for him to see the ground; that the company should have been able to foresee the likelihood of injury to a shopper who must carry packages across the lot to his car. The court held that the issues of negligence and contributory negligence were properly submitted to the jury.

37 340 P.2d 123 (Colo. 1959).
38 342 P.2d 1006 (Colo. 1959).