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One Year Review of Torts

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ONE YEAR REVIEW OF TORTS

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Following upon the heels of a banner year in the development of tort law in 1957, one might have expected 1958 to be anti-climatic. Not so. The Colorado Supreme Court has rendered some further opinions of great importance in 1958. And, in fact, with the issues of the constitutionality of the automobile guest statute, a decision on the application of the doctrine of sovereign immunity to tort cases and other important issues still pending and undecided, there is promise of an even greater abundance of crucial opinions in 1959.

Without doubt, the decision in *Weiss v. Axler*[1] must be conceded to be the most important tort case of the year, not only because it made new law on res ipsa loquitur but also because it did such a fine job of clarifying and defining the old.

FALL CASES

Slip and fall cases came in for considerable attention in the court this year.[2]

One of them, *Crosby v. Kroeger*[3] exemplifies the value of persistence. As the opinion was first written judgment was affirmed for the plaintiff with a single dissent.[4] As rewritten after rehearing, the judgment was unanimously reversed, with three justices not participating. The plaintiff was an invitee making a call upon the defendant's tenant. He was in the hall when the lights suddenly went out leaving him in total darkness. After waiting awhile he proceeded slowly down the hall with his hands in front of him expecting to find the door to the apartment he was visiting. Instead, he pitched down a staircase. Defense counsel relied heavily on *Miller-DuPont, Inc. v. Service*[5] which seemed to place Colorado in the category of those states which hold that the landlord owes no duty to provide light and is not liable for its absence.[6] However, an important distinguishing feature which takes this case out of the *Miller-DuPont* category is the landlord's *assumption* of a duty to keep the hallway lighted and his negligence in failing to perform the duty once assumed.[7] Although there was obviously substantial evidence of probative value upon which the plaintiff's verdict could be based, nevertheless the case was reversed and returned to the trial court because the verdict may well have been based solely upon an erroneous instruction on the Denver building code.

The *Crosby* case is comforting to those plaintiff's attorneys who in the excitement of victory forget to ask the court to include interest in the judgment, because of its further holding that if there is a request for interest in the complaint, then amendment of a personal injury judgment

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[1] 328 P.2d 88, 35 DICTA 307 (Colo. 1958) (to be discussed later in this article).
[2] There were four such cases decided this year: Colorado Springs v. Ochschlager, 322 P.2d 108 (Colo. 1958); Mathias v. Denver Union Terminal Railway, 323 P.2d 624 (Colo. 1958); Harvey v. Braden, 324 P.2d 1043 (Colo. 1958); and Crosby v. Kroeger, 330 P.2d 958 (Colo. 1958).
[3] 330 P.2d 958 (Colo. 1958).
[4] 10 Colo. Bar Ass'n Adv. Sh. 356 (1958).
[5] 120 Colo. 131, 208 P.2d 87 (1949).
[6] Annot., 25 A.L.R.2d 496, 500 (1952).
[7] *Id.* at 505.

to include interest from the date of filing is merely a mandatory, ministerial duty on the part of the trial judge.

AUTOMOBILE CASES

The tired parties in *City of Pueblo v. Ratliff*[8] finally came to the end of almost six years of litigation in a four to three decision. The three-justice dissent seems almost bitter. The plaintiff drove into an unguarded excavation which had been dug in a Pueblo street twenty-one days earlier. The jury found in the plaintiff's favor against both the city and the excavator. The supreme court affirmed as against the excavator but reversed as to the city and it was this latter action which brought about the dissent. The majority opinion by Justice Sutton reasoned that the proof of actual or constructive notice to the city was insufficient. Justice Frantz, writing for the dissenters, charged that the effect of the decision is to,

> "discard the efficacious rule that where the evidence is conflicting, or where the facts and circumstances from which the jury may reasonably draw an inference of negligence are shown, or when the determination of the question of negligence depends upon the inference to be drawn from a variety of facts and circumstances in the consideration of which there is room for substantial difference of opinion, the question of negligence should be submitted to the jury under proper instructions."[9]

The plaintiff's verdict was for $37,500. His physician testified that he was suffering from a herniated disc but that testimony was disputed by the defendant's medical experts. Evidently there was no pathology observable on x-ray. The plaintiff was 44 years old, and a watchmaker, an occupation for which his injuries totally disabled him. All seven justices agreed that the award was not excessive under the evidence.

The defendants contended that the plaintiff's thirty per cent government disability pension should have been deducted from the award. There was no showing of a relationship between the war-incufred disability and the injuries for which suit was brought. Said the court: "Even damages paid by insurance companies to an injured party, to which the wrongdoer does not contribute, could not diminish an award."[10]

Artz v. Herrera[11] was a head-on collision case. The trial court refused to instruct the jury that there is a presumption of negligence against the driver who was on the wrong side of the road. The supreme court affirmed saying:

> "The presumption of negligence is not conclusive, and might well be overcome by proof that the plaintiff, by reason of defendant's unlawful conduct, was blinded and took all reasonable steps to slow or stop his car in his own lane of traffic and,

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[8] 327 P.2d 270 (Colo. 1958).

[9] *Id.* at 275.

[10] *Id.* at 274. In Carr v. Boyd, 123 Colo. 350, 229 P.2d 659 (1951), the court held that defendant could not properly introduce into evidence for the purpose of mitigating damages benefits paid by the Railroad Retirement Board. In Riss & Co. v. Anderson, 108 Colo. 78, 114 P.2d 278 (1941), the defendant was not permitted to take advantage of monies paid to the plaintiff under a telephone company benefit plan. Said the court: "In such case a tortfeasor may not plead his victim's prudence and foresight to relieve him from the consequences of his own wrong." *Id.* at 84, 114 P.2d at 281.

[11] 325 P.2d 927 (Colo. 1958).

> though unsuccessful in his efforts due to defendant's negligence, was not answerable for being on the wrong side of the road."[12]

Behr v. McCoy[13] was a rear-end collision. The plaintiff testified that she intended to make a left turn and that she approached the intersection at a moderate rate of speed making a proper signal and pulling to the portion of the road way nearest the center. She said that she was stopped for thirty seconds or more waiting for opposing traffic to clear when she was struck from behind by defendant's truck. The defendant claimed that the plaintiff darted around him and then applied her brakes and that he tried but was unable to stop. The plaintiff tendered an instruction based upon the doctrine of *Ridenour v. Diffee*[14] recently reiterated in *Union Pacific Railroad v. Cogburn*,[15] to the effect that a driver on a public highway must keep a vigilant watch ahead and take proper steps to avert danger even if he must stop in order to do so. The court observed that this instruction was consistent with a specific allegation contained in the plaintiff's complaint and with the evidence, and that therefore the plaintiff was entitled to this instruction as a part of her theory. Note that while the trial court did not give the specific instruction tendered by the plaintiff, nevertheless the trial court did tell the jury that if one vehicle runs into the rear of another in daylight this may create an inference, "for the reason that this is rarely capable of an explanation."[16]

However, in *Artz* the court qualified the doctrine of *Ridenour v. Diffee* when it stated: "The rule that one must drive at such speed as to be able to stop within the distance that objects ahead are visible can have no application to approaching objects whether the objects be a car with blinding lights, a deer or a pheasant."[17]

The *Artz* case provides a distinct exception to what had been repeatedly stated as an absolute duty to stop.

Nelson v. District Court[18] destroys the widely held illusion that it is virtually impossible to obtain good service of process under Colorado's so-called "long-arm statute."[19] The court takes the common sense approach towards statutory interpretation in holding that despite what appears to be pathetically restrictive language in the statute, it is all right for the plaintiff's attorney to act as the alter ego of the plaintiff in completing service and in preparing and dispatching the affidavit of compliance.

The court says:

> "Just who licks the stamp and who deposits the letter is quite immaterial. Under counsel's contentions, a year-old child would be without recourse because of lack of ability to prepare the letter, lick the stamp, and drop it into the mail box; a corporation would be without recourse because it can act only through its agents and attorneys."[20]

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[12] *Id* at 931. In Schumacher v. Bedford Truck Lines, 314 P.2d 485 (Cal. App. 1957), the California court decided that a defendant's negligence could be predicated upon his failure to yield and take the shoulder of the road to avoid being hit by a vehicle in which plaintiff is riding as a passenger, which is approaching from the opposite direction on the wrong side of the road.

[13] 330 P.2d 535 (Colo. 1958).

[14] 133 Colo. 467, 297 P.2d 280 (1956).

[15] 136 Colo. 184, 315 P.2d 209 (1957).

[16] 330 P.2d 535, 537 (Colo. 1958).

[17] 325 P.2d 927, 930 (Colo. 1958).

[18] 136 Colo. 467, 320 P.2d 959 (1958).

[19] Colo. Rev. Stat. §§ 13-8-1 to 4 (1953).

[20] 136 Colo. 467, 479, 320 P.2d 959, 966 (1958).

More important is that part of the decision which discusses the object of a motion to quash the summons, service or return. On this subject the court says:

> "Illegality, apparent from matters of record, should be pointed out in the motion. In case defendant, moving to quash, relies upon facts dehors the record, then those facts should be set forth in the motion, and as evidence of good faith, and that the motion is not filed frivolously or for the sole purpose of delay, the facts relied upon should be verified by affidavit, the defendant thereby indicating his belief that, on hearing, he can prove the facts alleged and relied upon."[21]

Does not the same logic apply to motions to dismiss and to other motions routinely filed on behalf of defendants? Is it not time in the face of crowded court dockets and a restless public for lawyers to face up to the fact that it is their duty as officers of the courts to proceed with dispatch on both sides of the table to bring cases to issue and not to file such motions unless they are able to set forth the grounds upon which they rely?

The defendant in *Snedden v. Summer*[22] was traveling sixty miles per hour on a highway. When he was about 400 feet from the point of impact he attempted to pass an unidentified vehicle which, he said, swerved to the left. Defendant stated that he applied his brakes, pulled to the left, laid down 130 feet of skid marks, went into a borrow pit on the left, travelled 110 feet there, returned to the highway and struck the plaintiff's car which was proceeding in the same direction, then veered to the left again and travelled ninety feet more before stopping. He testified that he applied his brakes when his car was some 484 feet from the point of impact. The undisputed evidence placed plaintiff on her own side of the road driving at forty miles per hour in a careful manner. A highway patrolman estimated that the defendant must have been travelling at least seventy-five miles per hour. In the face of this evidence, the trial court refused to direct a verdict for the plaintiff but allowed the jury to decide whether there was a "sudden emergency" caused by the unknown car. In one of those unbelievable results, the jury returned a verdict for the defendant. The supreme court reversed and remanded the case with instructions to try the issue of damages only, holding that the fact showed negligence as a matter of law. In the court's understatement of the year, it was observed that the sudden emergency defense was "not convincing."[23]

SUITS AGAINST ESTATES OF DECEASED TORTFEASORS

It is hard to imagine the trial of a modern personal injury lawsuit without benefit of pleadings, and, indeed, without benefit of a law-trained judge. But this is the prospect faced by plaintiffs bringing suit against the estates of deceased tortfeasors. In *Koon v. Barmettler*[24] the court observed that under Colorado statutes[25] the county court has exclusive jurisdiction over probate matters, and, therefore, claims against deceased tortfeasors must be decided in that court. In *Meyers v.*

[21] *Id.* at 475, 320 P.2d at 964.
[22] 330 P.2d 530 (Colo. 1958).
[23] *Id.* at 531.
[24] 134 Colo. 221, 301 P.2d 713 (1956).
[25] Colo. Rev. Stat. § 152-1-3 (1953). See also Colo. Const. art. VI, § 23.

Williams[26] the plaintiffs were the children of a woman who died in the same occurrence which killed the tortfeasor. The defendant was the executor of the latter. The plaintiffs, after first filing a timely, proper claim in the county court probate proceeding, obtained judgment in the district court for $8,000 under the old $10,000 death limit. The defendant did not challenge the district court's jurisdiction and, in fact, stipulated that the cause could be tried there. Nevertheless, the supreme court held that jurisdiction cannot be conferred even by consent of the parties and that only the county court can determine the claim.[27]

Koon v. Barmettler and *Meyers v. Williams* are replete with traps for plaintiffs. For instance, does not this holding in effect create a six-month statute of limitations? Let us assume the hypothetical situation (not too far fetched) that the deceased tortfeasor was fully insured. Let us further assume that the plaintiff is a minor child and that the estate is without assets. What if the insurance company, immediately after the tort, proceeds with dispatch to open and close the estate? If this can be done before the plaintiff "gets wise," is the plaintiff completely and forevermore without a remedy against the insurance policy of the deceased tortfeasor? We take strenuous exception to what appears to be the opinion of the supreme court that an insured tort by a deceased tortfeasor is a matter to be handled under the probate jurisdiction of the county court.

EMPLOYER'S LIABILITY ACT CASES

A deplorable legislative lag is exposed in *Bein Farms, Inc. v. Dale*[28] where the plaintiff, an employee of the defendant, recovered a judgment of $28,000 in a jury trial for injuries found to result from the defendant's negligence. Again, as in the case of *Jacobson v. Doan*[29] our court ruled that despite the fact that no reference was made by the parties or by the trial court to the Employer's Liability Act[30], nevertheless, the statute was applicable. The supreme court modified this judgment by reducing it to $10,000. In the *Jacobson* case a jury verdict of $30,000 was reduced to $10,000. The injustice of the existing law is obvious, for under the Employer's Liability Act the plaintiff must prove negligence and yet his maximum recovery may be even less than the pittance which would be allotted to him under workmen's compensation. One wonders when the employees of this state will rise to complain in the legislature of this $10,000 maximum.

WORKMEN'S COMPENSATION

It is difficult to reconcile two 1958 workmen's compensation decisions.

In *Miller v. Denver Post*[31] a newspaper carrier had folded his papers and was about to depart on his deliveries when other newsboys took a radio aerial from his bicycle and ran with it. While chasing after the boys in an attempt to retrieve his aerial he received injuries. The

[26] 324 P.2d 788 (Colo. 1958).
[27] As a happy sequel the writer has learned that this case was subsequently tried in the county court where a $10,000 judgment was obtained.
[28] 326 P.2d 72 (Colo. 1958).
[29] 136 Colo. 496, 319 P.2d 975 (1957).
[30] Colo. Rev. Stat. §§ 80-6-1 to 5 (1953).
[31] 322 P.2d 661 (Colo. 1958).

commission did not pause to determine whether the relationship of employer-employee existed between the claimant and The Denver Post but assumed the point without deciding it and quickly passed to the question of whether the accident arose out of the claimant's employment. This they decided in the negative. The supreme court affirmed the commisison's position that there was no causal relationship between the claimant's work and his injury.[32] In a dissenting opinion by Justice Frantz the point is made that the question of the employment relationship should have been determined first. Thus, if indeed there had been no such relationship, then there would have been an utter failure of jurisdiction under the workmen's compensation act and the claimant would have been free to employ whatever common-law remedies he might have had. If, however, there was in truth an employment it was Justice Frantz's opinion that the risk of skylarking fellow carriers could well have been a part of the working environment. Persuasive is the argument of Justice Frantz that, "the majority opinion may result in a denial of any remedy to Miller for his serious injury."[33]

Now compare *Lyttle v. State Compensation Insurance Fund*[34] where a non-salaried employee of the state was held to come within the terms of Colorado's workmen's compensation act. The claimant was in Denver to attend a meeting the following day in connection with his duties. He had dinner with a fellow employee for the purpose of discussing state business and after leaving the restaurant was crossing the street when he was struck by an automobile. The court affirmed the position it had taken in *Alexander Film Co. v. Industrial Commission*[35] that while a claimant is away from home a hazard such as this is a normal and necessary incident of his employment. This holding is certainly most logical, but isn't it equally logical that the hazard to which the newspaper boy was exposed was also a normal and necessary incident of his employment?

RES IPSA LOQUITUR

Now we come to *Weiss v. Axler*[36] which undoubtedly is destined to become a landmark case in the development of the doctrine of res ipsa loquitur. There the plaintiff received a permanent wave in the defendant's shop. In this waving process a certain chemical preparation was used. The beauty operator failed to follow the manufacturer's written instructions regarding pre-testing procedures. A few days later the plaintiff's hair began to fall out and she returned to the defendant, who, according to the plaintiff's testimony, advised her that the operator might have left the solution on too long or that the solution might have been too strong, or both. The defendant undertook to give the plaintiff remedial treatment which proved unsuccessful. The trial court instructed the jury on res ipsa loquitur and refused to admit testimony concerning custom and usage in applying the preparation by a method at variance with the manufacturer's directions.

The opinion here restores simplicity and meaning to a doctrine which had become confusion thrice confounded in an astounding

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[32] But see the long annotation following Colo. Rev. Stat. § 81-13-2 (1953).
[33] 322 P.2d 661, 666 (Colo. 1958).
[34] 322 P.2d 1049 (Colo. 1958).
[35] 136 Colo. 486, 319 P.2d 1074 (1957).
[36] 328 P.2d 88 (Colo. 1958).

number of Colorado cases, all of which are discussed and analyzed by Justice Frantz, writing for the court. In affirming the trial court, our supreme court held that the facts called for application of the doctrine and thus required the defendant to *prove* exculpation from negligence. The court tells us that once the doctrine of res ipsa loquitur comes into play then the defendant must satisfy the court or jury that he was not negligent. It is the province of the fact finder to consider the defendant's explanation and to determine the credibility of the defendant's witnesses.

Further, the court observed that custom and usage of a dangerous product may not be resorted to as a test of due care where not in compliance with the manufacturer's directions. Failure to follow those directions is negligence. Additionally, the court held that attempts by the plaintiff to allege and to prove specific negligence do not preclude reliance on res ipsa loquitur.

One must look far to find a case which takes a more dynamic approach to the problem of adjusting law to a rapidly advancing civilization. The court, speaking through Justice Frantz, declared:

> "It seems a proper sequitur to say that the more we are removed from 'the horse and buggy days,' the more intensified and diversified our industrialism, mechanics and science become, and the more technology and automation advance, the more the doctrine of *res ipsa loquitur* should take on a stellar role in the law of negligence. The necessity to remove existing confusion and to state a formulary for the use of the doctrine thus appears obvious. Laws should march abreast of a highly mechanized and science-developed economy."[37]

The court then discussed the warning by the California Supreme Court that as an alternative to a widening use of res ipsa loquitur courts may be forced to resort to the imposition of liability without fault to avoid gross injustice. "It may not be amiss to heed the prognosis of Mark Shain in his work, *Res Ipsa Loquitur*, wherein he said at page 264: 'The very interests which these unreasoned decisions seem to serve—ownership and management—may ultimately realize that the true doctrine *res ipsa loquitur* and its burden-shifting presumption is, in reality, their friend and refuge.' "[38]

CONCLUSION

Although in this paper the reader will find criticism of some 1958 tort decisions, nevertheless it must be conceded that the court this year has done a commendable job in spite of its burdensome and ever-growing backlog of cases. No case better exemplifies the court's painstaking care to work conscientiously in the face of great obstacles than does the case of *Canon City v. Merris.*[39] Coloradoans may point with pride and comfort to their supreme court in knowledge that seven men have been painstaking in protecting the legal rights of those they serve.

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[37] *Id.* at 91.
[38] *Ibid.*
[39] 323 P.2d 614 (Colo. 1958).