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One Year Review of Torts

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Opinions of the Colorado Supreme Court which became final in the period November 1, 1955 to January 1, 1957 are covered by this review. Only one case was one of first impression under Colorado law, in which the Supreme Court considered a conflict of authority and adopted the majority rule. In all the other cases, the court applied principles already established in Colorado tort law.

LIABILITY FOR DAMAGE RESULTING FROM BLASTING

In the case of *Garden of the Gods Village v. Hellman*,[1] the court adopted the rule of liability without negligence for damage resulting from blasting operations. The defendant corporation, a land blasting company, employed a company to level building sites. Rocks in the land had to be removed by blasting. At the instance of defendant, the levelling contractor employed another person to do the blasting with dynamite, and the operations were conducted under the direct supervision of the defendant's president. A heavy blast deposited rocks on the roof of the plaintiff's property, damaging the roof, and vibration and concussion from the blast caused additional damage to the building and contents. Defendant contended that it was not liable for damage caused by vibration and concussion unless the blasting was negligently done. The Supreme Court rejected that contention and followed what is stated to be the majority rule: One who uses blasting material likely to cause damage to adjoining property is liable if damage to such adjoining property results, whether from direct impact of rocks thrown out by the explosion, or from concussion or vibration, and it is not necessary for the plaintiff to allege or prove negligence to recover for any damage resulting from this inherently dangerous operation.

LIABILITY FOR INJURY AND DAMAGE FROM INFLAMMABLES

In *Grange Mutual Fire Ins. Co. v. Golden Gas Co.*,[2] the court imposed on a dispenser of propane gas the duty to use a high degree of care commensurate with its dangerous character. Defendant's employee brought the propane gas to a farm residence in a tank truck and was transferring the propane from the truck to a storage tank through a hose. The hose came loose from the storage tank, apparently because of a defective coupling on the storage tank. The flow of propane was not entirely cut off. The free end of the hose whipped around, spraying the house, garage and ground with liquid propane. An explosion occurred within less than a minute. The evidence showed that the fire could have been started by any one or more of three causes: The exhaust from defendant's truck, a burning pilot light on the line from the storage tank to the house or the nozzle of the hose striking rocks. The driver had diverted his

[1] 133 Colo. 286, 294 P.2d 597 (1956).
[2] 133 Colo. 537, 298 P.2d 950 (1956).

attention to look at something else after he had coupled the hose. He had not inspected the truck before making the delivery nor checked to see if the pilot flame was on. The flow of gas was not automatically cut off when the hose broke. The high court held that all of these matters showed failure to use the degree of care required in the handling of propane gas.

In the case of *Burley v. MacDowell*,[3] a nine-year-old boy was denied recovery for injuries sustained in an explosion of gasoline. Plaintiff was the guest of defendants' child. The boys got the gas from an outbuilding which they had been forbidden to enter and brought it into the defendant's residence to use as "fuel" to run a toy boat motivated by a lighted candle which the boys had been sailing in the bath tub. The plaintiff testified that he knew the mixture would burn, and he did not tell defendants he was going to get it because he knew he was not supposed to go into the building where it was kept. The Supreme Court affirmed a judgment for the defendants, pointing out that the situation was different from a case in which inflammable and explosive gasoline was kept in large quantities at a place frequented by children. It was kept separate and apart in a place where the children had been forbidden to go and there was no reason for the defendants to foresee that the plaintiff would do what he did.

AUTOMOBILE GUEST LAW

In the case of *Burrell v. Anderson*,[4] the court again considered the question whether the evidence in a suit brought by a guest passenger against his host disclosed anything more than simple negligence as the cause of the accident. Reviewing the evidence the court concluded that it disclosed, at most, simple negligence on the part of the host, of which the plaintiff guest assumed the risk. Defendant's conduct was the result of a passive mind and not the result of active and purposeful intent; not conscious, voluntary, wilful or wanton.

Warner v. Barnard[5] was a suit by a guest passenger against the host driver in which the plaintiff alleged that the accident was caused by the defendant's intoxication and negligence consisting

[3] 133 Colo. 566, 298 P.2d 399 (1956).
[4] 133 Colo. 386, 295 P.2d 1039 (1956).
[5] 304 P.2d 898 (Colo. 1956).

of a wilful and wanton disregard of the rights of others. On appeal from a judgment for the defendant on a jury verdict, the Supreme Court reversed and remanded the case for a new trial because of an erroneous instruction on the issues of liability and because of error in admitting evidence concerning the damages sustained by the defendant and his wife for which no claim was made in the suit. The instruction (to which neither party had objected) told the jury in substance that if they found that it was equally probable that the accident was caused by the defendant's simple negligence, his intoxication or his wilful and wanton disregard of the rights of others, or by an unavoidable accident, their verdict must be for the defendant. The court indicated that the instruction might be clear to a lawyer, but could only be confusing to a jury of laymen and was clearly erroneous.

DUTY TO BUSINESS INVITEE

In the case of *Webb v. Thomas*,[6] the court stated the rule governing imposition of liability on the possessor of land for injury to a business patron. To impose liability, two elements must be present: 1) a realization that the condition constitutes an unreasonable risk to the patron and 2) the absence of any reason to believe that the condition will be discovered by the patron or the risk realized by him. The defendant was the proprietor of a swimming pool. He had spent time and money studying swimming pools, had employed the services of a well known swimming pool company to build the pool and at the time of trial more than 12,000 persons had used the pool without injury. At about ten o'clock at night the plaintiff, who had had a few drinks, dove into the water at the shallow end of the pool and was seriously injured. The water was three and a half feet deep at that end, and eight and a half feet deep at the other end. The water was clear and well lighted. The only diving board was at the deep end. However, there were no signs showing the depth of the water. The court held that there was no negligence on the part of the defendant and he could not reasonably have foreseen that the plaintiff would attempt to dive into the shallow water.

In the case of *Brent v. Bank of Aurora*,[7] the Supreme Court sustained a judgment on a directed verdict for the defendant in a case in which the plaintiff, a customer of the defendant bank, slipped on ice in the bank's parking lot. The Supreme Court held that the plaintiff had failed to establish that the ice had been there long enough and was of such a dangerous character that the bank, by the exercise of reasonable care, should have discovered and remedied the condition. In fact, there was no evidence as to when or how the ice got there and no evidence that anyone, even the plaintiff, saw the ice before the accident.

INNKEEPER'S LIABILITY

In *Lombardy v. Stees*,[8] a judgment against an innkeeper was reversed and remanded with direction to dismiss the complaint of a guest who was assaulted by the defendant's bartender. The court

[6] 133 Colo. 458, 296 P.2d 1036 (1956).
[7] 132 Colo. 577, 291 P.2d 391 (1955).
[8] 132 Colo. 570, 290 P.2d 1110 (1955).

said that the evidence clearly showed that the only instructions the defendant had given the bartender were to serve drinks and to refuse any patron who had had too much. It was clear that the blow was motivated by a personal insult which the bartender had received from the plaintiff. The injury was done during the bartender's employment, but not within the scope of his employment, and for this act of his servant, without his authority, the innkeeper was not liable.

But another innkeeper's employee subjected his master to liability by conduct outside the scope and course of his employment in the case of *Bidlake v. Shirley Co.*[9] In this case a guest drove his car up to the front door of the defendant's hotel and was met by the defendant's uniformed night porter, who asked the plaintiff if he wanted the car stored. The plaintiff answered affirmatively and gave the car keys to the porter, who gave him a claim check. The procedure authorized by the employer was for the porter to call a nearby garage, which would send an employee to pick up the car. Instead of doing that the porter drove the car away on a "joy ride." The next day, the plaintiff found his car parked on the street in a damaged condition with valuable personal property missing from it. The court held that under these circumstances the plaintiff had a right to assume that the porter had authority to take possession of the car. The court quoted the statute which provides:

> "The landlord or keeper of any hotel or public inn shall not be liable for loss of or damage to the property of any guest or patron of such hotel or public inn by fire or by any unforeseen causes or by inevitable accident, unless such loss of or damage shall occur on account of his negligence or the negligence of his servants or employees."[10]

The high court cited decisions of other states holding innkeepers liable in similar fact situations and concluded that under the evidence the trial court erred in entering judgment for the defendant.

LIABILITY OF CITY AND ABUTTING PROPERTY OWNER FOR INJURY TO PEDESTRIAN FALLING ON CITY-OWNED PARKWAY

In *Aikens v. Clayton Trust*,[11] the Supreme Court held that "Plaintiff's own testimony doomed her right of recovery, leaving no other course for the trial court than to dismiss the complaint."[12] Plaintiff got off a bus at a corner with which she was thoroughly familiar, started to walk across the "parkway" to the sidewalk, stepped into a hole in the parkway she knew about and always tried to avoid, could not step high enough when she tried to step out of the hole, stubbed her toe, fell all the way across the sidewalk and onto a low guard railing on the corner of the private property abutting the sidewalk. She sued the owner of this property and the city. The city claim was dismissed because of the plaintiff's failure to give the city notice of the accident within the time required by the ordinance. The Supreme Court held that the guard

[9] 133 Colo. 166, 292 P.2d 749 (1956).
[10] Colo. Rev. Stat. Ann. § 68-1-11 (1953).
[11] 132 Colo. 374, 288 P.2d 349 (1955).
[12] 132 Colo. at 378, 288 P.2d at 351.

rail was not a dangerous obstruction and there was no negligence in installing it where it was. There was nothing to show that anything the defendants did or did not do was a proximate cause of the accident. By way of dictum the court indicated that even if the city had not been dismissed because notice was not given, it would not be liable, because the parkway was not a part of the sidewalk that should be maintained in a safe condition for pedestrian use, and the degree of care relative to the parkway area is of a lower standard than that required in the construction and maintenance of sidewalks.

EMPLOYERS' LIABILITY

In a common law action against his employer, the plaintiff in the case of *Perry v. Ruybal*[13] failed to prove any negligence on the part of the employer as the cause of his injury. The evidence tended to show that his own misstep caused his accident, and proved nothing beyond the mere happening of the accident.

LIBEL AND SLANDER

In *Brown v. Barnes*,[14] an action for libel and slander, the plaintiff alleged that his reputation had been injured and that he had lost an election in which he was running for re-election as sheriff because the defendant had said: "The sheriff [plaintiff] has accumulated property of the value of $80,000. A person cannot accumulate that much money on a $425.00 salary in a period of 4 years."[15]

The plaintiff contended that the innuendo of these words was that he had accumulated property by embezzlement and other dishonesty in office. However, he produced no evidence that anyone had refused to vote for him on account of such statements. He proved that he had acquired the property during his term of office through his own work in the real estate business. The defendant pleaded the truth of the statement as a defense and contended that the statement was not slanderous *per se* and did not carry the innuendo contended for. The Supreme Court upheld the defendant's contention and pointed out that the alleged statement was susceptible of another meaning—that the plaintiff's preoccupation with his real

[13] 133 Colo. 502, 297 P.2d 531 (1956).
[14] 133 Colo. 411, 296 P.2d 739 (1956).
[15] 133 Colo. at 412; 296 P.2d at 740.

estate business precluded adequate performance of his duties as sheriff. The court also held that there was no proof that the making of the statement caused the loss of the election.

NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE: ISSUE OF FACT OR LAW IN AUTOMOBILE CASES

In a number of cases, the court wrestled with the question whether a party's conduct was negligence or contributory negligence or not negligence as a matter of law. Whether or not these opinions disclose a departure from the basic principle that issues of negligence are questions of fact probably cannot be determined at this time.

In one rural intersection accident case, the court upheld the trial court's finding that the plaintiff was contributorily negligent as a matter of law, and in another case arising out of an accident at the same kind of intersection (except that it was more obstructed) the court held that the trial court had erred in finding that a driver, killed in the accident, was contributorily negligent as a matter of law.

In the first-mentioned case, *Bennett v. Hall*,[16] ". . . plaintiff was traveling on a preferred thoroughfare at a speed under the allowable limit in the proper lane and having the right of way."[17] He first saw the defendant's car when he (plaintiff) was five or six hundred feet from the intersection, at which time the defendant was forty-five feet from the intersection. He kept on watching the defendant, and wondered what the defendant was going to do. When he was three hundred feet from the intersection, traveling fifty miles an hour, he lightly touched the brake and slowed to forty, and when a hundred and twenty-five feet from the intersection slammed on the brake and turned to the right but was unable to avoid hitting the defendant's car. The court held that there was no doubt that the defendant was negligent, but the plaintiff's right of way did not relieve him of the duty to use reasonable care to avoid an accident.

> "Plaintiff failed to have his car sufficiently under control to avoid striking the defendant's car. Plaintiff's failure to guard against the possibility of the eventuality concerning which he expressed apprehension certainly furnishes ample ground for a conclusion that he was contributorily negligent."[18]

In the second case, *Rigot v. Conda*,[19] an action by the deceased driver's personal representative and children, the accident occurred at a more or less "blind" intersection. The decedent was traveling on what was posted as a through highway, but at this intersection the stop sign had been removed. Just before the accident he waved at a passing driver, and waved at a friend sitting on a porch nearby. The court said that the facts were entirely different from those of the *Bennett* case, in that there was no evidence in the *Rigot* case the decendent saw the defendant's truck as it approached the

[16] 132 Colo. 419, 290 P.2d 241 (1955).
[17] 132 Colo. at 423, 290 P.2d at 243.
[18] 132 Colo. at 425, 290 P.2d at 244.
[19] 304 P.2d 629 (Colo. 1956).

highway, and it cannot be said that waving at others was contributory negligence as a matter of law.

In several cases the court held that there was no evidence of contributory negligence on the part of the plaintiff sufficient to justify the giving of a jury instruction on the doctrine. The plaintiff in the *Sherry* case,[20] a thirteen year old girl, was attempting to cross West 8th Avenue at Lipan Street in Denver, from the southwest to the northwest corner of the intersection. There were no signal lights. Before stepping into the street she stopped to wait for traffic. A truck going east in the south lane of traffic stopped near the crosswalk, and other automobiles traveling east in the south lane halted behind the truck. The truck driver motioned the plaintiff to cross. Plaintiff walked in the crosswalk in front of the truck and was struck by the defendant's car, traveling east in the north lane of traffic, passing the line of stopped automobiles at a speed of about twenty-five miles an hour. A city ordinance prohibited passing a vehicle stopped at a crosswalk to permit a pedestrian to cross. The Supreme Court held, reversing a jury verdict for the defendant, that if the plaintiff saw the defendant's car coming she had a right to assume the defendant would stop, and that giving an instruction on contributory negligence, in the absence of any testimony, was error, because the jury would have inferred that the court believed there was evidence of contributory negligence.

[20] Sherry v. Jones, 133 Colo. 160, 292 P.2d 746 (1956).

The plaintiffs in the *Ridenour* case[21] were two women who were struck by the defendant's car while walking east across Broadway in Denver, in a crosswalk, at 12:30 A. M., with a green light. The defendant, traveling west with the green light, made a left turn to go south on Broadway and did not see the plaintiffs until he was about twelve feet from them. He was not traveling at an excessive rate of speed, but was unable to stop in time to avoid hitting the plaintiffs after he saw them. The plaintiffs testified that they looked before crossing the street, and noticed only one car, not the defendant's, and did not see defendant's car before it hit them. A city ordinance required the driver to yield the right of way to pedestrians lawfully within the intersection. The Supreme Court held that the failure of the plaintiffs to see the defendant's car was not contributory negligence: "It is obvious they didn't see defendant's vehicle when they lawfully started to cross the street because it was not yet in the intersection."[22] The court reversed a judgment on a jury verdict in favor of the defendant and remanded the case for a new trial on the issue of damages only.

In the *Stephens case*,[23] the plaintiff, traveling on his own side of the road, was struck by the defendant's car coming from the opposite direction. Defendant's explanation was that he lost control on the icy pavement when he had to turn sharply to the left to miss a car which had cut in front of him. The court approved the giving of an unavoidable accident instruction, but reversed a judgment on a jury verdict in favor of the defendant and remanded the case for a new trial, holding that it was error to give an instruction on contributory negligence.

In *Brakhahn v. Hildebrand*[24] the Supreme Court held that it was negligence to move a herd of cattle on a highway at night with no one in attendance except a man on horseback and another man in a jeep, the headlights of which faced oncoming cars. The plaintiff was a passenger in an automobile which struck the cattle. The court held that the jury should not have been instructed on contributory negligence, as there was no evidence upon which any negligence on the part of the driver of the car plaintiff was riding in could be imputed to plaintiff, and indicated that the defendant's negligence was negligence as a matter of law.

[21] Ridenour v. Diffee, 133 Colo. 467, 297 P.2d 280 (1956).
[22] *Id.* at 471, 297 P.2d at 282.
[23] Stephens v. Lung, 133 Colo. 560, 298 P.2d 960 (1956).
[24] 301 P.2d 347 (Colo. 1956).