Denver Law Review

Volume 31 | Issue 12 Article 3

January 1954

Torts

Frank A. Buchanan

TORTS

FRANK A. BUCHANAN *of the Boulder Bar*

During the past year the Colorado Supreme Court has written opinions in a variety of fact situations involving the application of the law of torts, including a case for malicious prosecution, two malpractice suits, suits for libel, for civil conspiracy, and for fraud, three cases considering falls on sidewalks and one a fall in a rest room, an electrocution case, and eight cases arising out of automobile accidents, of which five were controlled by the Guest Statute.

Both cases against physicians for malpractice were reversed in spite of the fact that in each case the plaintiff had obtained a jury verdict in his favor. In *Lamme v. Ortega,*[1] the doctor's attorneys were able to persuade the appellate court that the plaintiff's own testimony and his own witnesses failed to prove the facts he alleged. The plaintiff had attempted to prove that he had been injured by the defendant's use of X-ray and fluoroscope machines in probing for a bullet in his leg. The Supreme Court said that the burden of proving a causal connection between the defendant's acts and the alleged injury "is not met by showing that it might have resulted from the operations complained of, and jurors should not be left to conjecture as to the efficient and proximate cause."

In the other malpractice suit, *Maercklein and Postma v. Smith,*[2] the plaintiff Smith and his wife had hired the defendants, licensed physicians and surgeons, to perform a circumcision. Instead of the operation requested, a vasectomy was performed, rendering the plaintiff sterile and causing him to suffer in various other ways enumerated in the complaint, to his damage. In July, 1953, the Supreme Court issued an opinion [3] dismissing the entire suit on the grounds that more than one year had elapsed since the "assault and battery" and therefore the action was barred by the Statute of Limitations,[4] two judges dissenting. A rehearing was granted, the original opinion withdrawn, and this opinion issued. This time the Supreme Court dismissed the case only as to surgeon Postma, who had been hired by the defendant Dr. Maercklein, the general practitioner, on the grounds that surgeon Postma had performed the operation skillfully and had been assured by defendant Maercklein that written consent by both the plaintiff and his wife had been obtained. In actual fact, no written consent had been obtained. The Court remanded the case, ordering a new trial to determine the liability of defendant Maercklein, ruling as follows:

> (1) Where a different operation than that ordered is performed, the action, regardless of the form of the pleading, is one based in negligence and not assault and battery. The

[1] 267 P. 2d 1175, 1953-54 C. B. A. Adv. Sh. No. 10, p. 207.
[2] 266 P. 2d 1095, 1953-54 C. B. A. Adv. Sh. No. 9, p. 188.
[3] 1952-53 C. B. A. Adv. Sh., No. 26, p. 416.
[4] COLO. STAT. ANN., c. 102, §2 (1935).

two year Statute of Limitations,[5] not the one year Statute, is applicable.

(2) The trial court erred in permitting only the matter of damages to be determined by the jury—holding that there is no statute or rule of law requiring written consent to be obtained before performing this or any other type of operation and that the terms of employment were here a disputed question of fact, to be determined by the jury. Defendant Maercklein's liability is determined by a jury's answer to the question: What operation had the plaintiff's wife, as the plaintiff's agent, with the plaintiff's knowledge and consent, in actual fact ordered—circumcision or sterilization? [6]

In the malicious prosecution case, *Montgomery Ward v. Pherson*,[7] the Supreme Court reversed a jury verdict, finding as a matter of law that the defendants had probable cause, acted without malice, and were entitled to rely upon the advice of the district attorney in instigating the criminal prosecution of the plaintiff. The Court recognized the difficulty a jury has comprehending how a person found innocent in the criminal proceeding may not be able to recover. The Court ruled that where the facts are conceded or substantially undisputed, probable cause is a question of law for the trial court. In so stating, the Supreme Court observed further as follows:

> An innocent person may be prosecuted unjustly, and subjected to the expense and disgrace incident thereto with no right to call the prosecutor to account, provided he acted upon an honest and reasonable belief in commencing the proceeding complained of. One may act on what appears to be true, even if it turns out to be false, provided he believes it to be true and the appearances are sufficient to justify the belief as reasonable.
>
> It is for the best interests of society that those who offend against the laws of the state shall be promptly punished, and that any citizen who has reasonable grounds to believe that the law has been violated shall have the right to cause the arrest of the person whom he honestly and in good faith believes to be the offender. For the purpose of protecting him in so doing, it is the generally established rule that if he has reasonable grounds for his belief, and acts thereon in good faith in causing the arrest, he shall not be subjected to damages merely because the accused is not convicted. The rule is founded on the grounds of public policy in order to encourage the exposure of crime.

---

[5] COLO. STAT. ANN., c. 102, §7 (1935).
[6] See also Bates v. Newman, 264 P. 2d 197, for unusual damage.
[7] 272 P. 2d 643, 1953-54 C. B. A. Adv. Sh., No. 15, p. 363.

The Court also expressed the rule of law that it is a complete defense to such a suit if the criminal proceeding was advised by a district attorney after a good faith, full and fair disclosure of all the facts had been made to him. In discussing this principle, the Court stated as follows:

> It is the common duty of every citizen to report to the legally constituted authorities every violation of the law, to the end that the law may be enforced; . . . if the complaining party states the facts fully and fairly to the district attorney, and that officer incorrectly determines that such facts constitute a crime, and proceeds to formulate the necessary papers to set on foot the prosecution, the complaining party is not liable, since the fault is not his, but that of the officer.
>
> If the officers of the state, who are appointed on account of their legal learning, consider that a given state of facts is sufficient evidence or probable cause, how can a private citizen be said to be in fault in acting upon such facts, and how can the state condemn him to damages for so doing? To decide so is to use the machinery of government as a trap to ensnare those who trust in government for such matters, and who ought to trust in it.

Hadden v. Gateway West Publishing Company [8] is the libel suit. A past member of the now famous Board of Education of Jefferson County tangled with the *Jefferson Sentinel.* In affirming a jury verdict for the defendants, the Supreme Court declared that irrelevant, immaterial and incompetent hearsay testimony, in order to be grounds for reversal, must also be shown to have been prejudicial. Because of the special provisions of our State Constitution [9] concerning truth as a defense in suits for libel, the Court ruled that a general denial to the allegations that the defendants had published articles which were "false, defamatory, untrue and libelous" included the defense that the matters published were true.

In *Lockwood Grader Corporation v. Bockhaus,*[10] the defendant asserted, in his answer to the plaintiff's suit to foreclose a mortgage securing an admitted debt, a counterclaim for actual and exemplary damages resulting from the plaintiff's conspiracy to force him out of business. Apparently, a soft hearted creditor—plaintiff in effect financed the debtor defendant for a number of years and became so entwined that he found it difficult to get untangled. In fact, the jury found for the debtor—defendant on his counterclaim, for $500.00 actual damages and $3,000.00 exemplary damages. The Supreme Court failed to find any evidence to support the jury verdict, reversed it and stated that to constitute a

[8] 273 P. 2d 733, 1953-54 C. B. A. Adv. Sh., No. 17, p. 437.
[9] COLO. CONST. Art. II, §10.
[10] 270 P. 2d 193, 1953-54 C. B. A. Adv. Sh., No. 13, p. 298.

civil conspiracy, there must be (1) two or more persons (and for this purpose a corporation is a person); (2) an object to be accomplished; (3) a meeting of minds on the object or course of action; (4) one or more unlawful overt acts; and (5) damages as the proximate result thereof.

In *Platte Valley Motor Company, Inc. v. Wayne*,[11] the plaintiffs, beet farmers, had purchased a beet harvesting machine which they alleged would not harvest beets, and sued both the seller and the manufacturer on the implied warranty that the machine was reasonably suited for the purpose for which it was designed and sold. The Supreme Court summarized the pleading of both defendants by saying that it was a case of the kettle calling the pot black, and observed that the plaintiffs agreed with both defendants on this score. The Supreme Court found both the pot and the kettle to be black, for they reversed and remanded for a new trial and ruled that under the Uniform Sales Act [12] both the distributor and the manufacturer gave an implied warranty that goods are reasonably fit for the purpose for which they are purchased. The case is also authority that an amended complaint relates back to the time of filing of the original complaint. The Statute of Limitations [13] does not bar a claim for damages for fraud and misrepresentation if the claim arose out of facts originally pleaded, even though the statutory period elapsed since the happening of the events giving rise thereto if, as in this case, the original complaint had been filed within the period.

The most important of the sidewalk cases is *Parker v. City and County of Denver*.[14] In this case, the Supreme Court reversed all of its prior decisions insofar as they may have established a definite or mathematical rule as to the depth of a depression or elevation in a sidewalk necessary to constitute actionable negligence against a municipality. The usual rules of negligence are substituted for a mathematical formula, and it is stated that a reasonably safe sidewalk is to be henceforth determined by the amount of travel, the location of the depression or elevation, the nature of the area, and any other circumstances of the particular case, as well as the "measured" depth or elevation over which a plaintiff may have stumbled. The decision was *en banc*, with Mr. Justice Holland dissenting. As Justice Holland points out in his dissenting opinion, the majority decision is not clear as to whether or not a depression or elevation less than one and three-eighths inches remains as a matter of law not actionable. This writer believes that the proper role of the jury and the usual principles of negligence have been restored to the sidewalk cases.

In *Clark v. Joslin Dry Goods*,[15] the second sidewalk case, the

[11] 1953-54 C. B. A. Adv. Sh., No. 17, p. 433.
[12] COLO. STAT. ANN., c. 143A, §15(1) (1935).
[13] COLO. STAT. ANN., c. 102, §6 (1935).
[14] 262 P. 2d 553, 1953-54 C. B. A. Adv. Sh., No. 3, p. 52.
[15] 262 P. 2d 546, 1953-54 C. B. A. Adv. Sh., No. 2, p. 37.

Supreme Court affirmed the trial judge's direction of a verdict for the defendant, holding that a 61 year old person weighing 285 pounds, while using a cane and carrying bundles, suffering from high blood pressure and other ailments, cannot recover for injuries suffered from a fall on a sidewalk on which she had observed little rivulets of waste water from the washing of display windows, as follows:

> When a person travels along a sidewalk which he knows to be dangerous, he cannot recover for injuries sustained resulting from defects of which he had knowledge, unless he exercises care commensurate with the danger about to be encountered, and his ability to cope with it. The precautions which an ordinary prudent person in the full possession of his physical faculties would take to avoid danger would be wholly insufficient to protect one from the same danger whose physical faculties were impaired.

In the third sidewalk case, *Beezley v. Olson*,[16] the Court ruled that a sidewalk trowelled to a smooth surface is not an inherently dangerous and unsafe condition simply because a pedestrian slipped and fell thereon during snowy and icy conditions. The Court observed that in these sidewalk cases not every defect is actionable but depends entirely upon all the circumstances of the case. Since only slight defects and obstructions in sidewalks are sometimes not actionable, the Supreme Court did not wish to affirm a decision which permitted a smooth sidewalk to be actionable unless it were also shown that the sidewalk was slippery at all times and not just when wet or covered with ice. Note, however, that this suit was not based on the theory that the defendant was negligent in failing to remove the ice and snow, but rather on the theory that the trowelled smooth sidewalk was an inherently dangerous and unsafe condition.

In *Van Schaack v. Perkins*,[17] the plaintiff, a member of the fair sex and of our learned profession, slipped and fell in the rest room in the building in which she maintained her professional offices. The janitor had left green liquid soap on the floor, making it slippery. The defendants claimed they could not be held liable because they had no notice or knowledge, actual or constructive, of the dangerous condition. The Supreme Court differentiated between those situations where a dangerous condition exists in a public building through no act of the landlord (in which case the landlord is held liable for a user's injury only when the landlord had actual notice or knowledge of the dangerous condition or the condition had existed for such a length of time that in law he is

---

[16] 270 P. 2d 758, 1953-54 C. B. A. Adv. Sh., No. 14, p. 326.
[17] 272 P. 2d 269, 1953-54 C. B. A. Adv. Sh., No. 16, p. 392.

charged with constructive notice thereof) and those situations, as here, where an agent of the owner of the building negligently created the dangerous condition. In this latter instance, no actual knowledge or constructive notice is necessary for a plaintiff to recover, and the verdict for the plaintiff was affirmed.

Jackson v. Mountain Utilities Corporation [18] is an interesting case. A pole of a mountain transmission line rotted and fell, and blocked the plaintiff's driveway with high voltage lines. The plaintiff lived to bring suit after being electrocuted while trying to attach a rope to the pole to raise the lines and unblock the driveway. The trial court had set aside a jury verdict for the plaintiff and entered judgment for the defendant. The plaintiff appealed and the Supreme Court affirmed the lower court, holding that a plaintiff cannot recover who was fully aware of the extreme danger surrounding contact with high voltage electrical wires, does not deny that he had knowledge of the present danger, and while acting under no emergency, assumed the risk. The Supreme Court further held that the negligence of the defendant, that of failing to replace a rotten pole, was not the proximate cause of the plaintiff's injury, when the plaintiff had observed the condition, assumed the risk, and with full knowledge of the extreme danger nevertheless assumed to act. The Court found the plaintiff guilty of contributory negligence as a matter of law.

Many of the "friendly" suits now pending by a plaintiff guest-passenger to collect damages for injuries sustained in an automobile accident, allegedly caused by the wilful and wanton negligence of the owner-driver defendant, might just as well be dismissed with prejudice. In this past year the Supreme Court has had occasion to consider five cases where a jury verdict had been obtained for the guest-passenger. Four of the five were reversed.

The case of *Pettingell v. Moede* [19] provided an ideal fact situation for the Court to further construe the Guest Statute. The defendant was courting the plaintiff. She had accompanied him on a hunting trip to the Western slope. While returning via Berthoud Pass, the four wheel drive jeep equipped with snow tread tires slipped off the road, injuring both parties. The plaintiff admitted that the defendant was a careful driver and had not been drinking, but asserted that driving 35 miles per hour on a slippery downgrade was wilful and wanton negligence. The Supreme Court ruled that under these circumstances, the defendant was guilty of nothing more than simple negligence. Because of the frequency of errors in jury instructions in these cases, it seems proper to quote directly from the decision the Court's ruling concerning the words "wilful and wanton", as follows:

> Under the guest statute, the facts must show more than negligence. To wilfully and wantonly disregard the

[18] 263 P. 2d 812, 1953-54 C. B. A. Adv. Sh., No. 5, p. 103.
[19] 271 P. 2d 1038, 1953-54 C. B. A. Adv. Sh., No. 15, p. 358.

> rights of others requires a consciousness of heedless and reckless conduct by which the safety of others is endangered. For the purpose of properly construing this statute, ordinary or simple negligence should be considered as resulting from a passive mind, while a wilful and wanton disregard expresses the thought that the action of which complaint is made was the result of an active and purposeful intent. Wilful action means voluntary; by choice; intentional; purposeful. Wantonness signifies an even higher degree of culpability in that it is wholly disregardful of the rights, feelings and safety of others. It may, at times, even imply an element of evil. One may be said to be guilty of "wilful and wanton disregard" when he is conscious of his misconduct, and although have no intent to injure anyone, from his knowledge of surrounding circumstances and existing conditions is aware that his conduct in the natural sequence of events will probably result in injury to his guest, and is unconcerned over the possibility of such result. The word wanton is defined in Webster's New International Dictionary (2d ed.), as: 'Marked by or manifesting arrogant recklessness of justice, of the rights or feelings of others, or the like; . . .' Synonyms given for it are capricious, wayward, spiteful. To be 'wilful and wanton' there must be some affirmative act purposefully committed which the actor must have realized as dangerous, done heedlessly and recklessly, without regard to consequences, or of the rights and safety of others, particularly the guest. To be so classified, conduct must be negative in both attention and concern; it must demonstrate indifference as well as inattention to consequences which may result.

The foregoing is rather to be expected. In framing instructions in these cases, however, one is confronted with a defendant who insists that he was not conscious of the danger to others when most certainly he should have been. All prior decisions seemed to approve the phrase "or should have known" as qualifying the defendant's consciousness of the danger. This decision qualifies, overrules, and explains the previous decisions[20] in this regard, as follows:

> As a matter of fact, the phraseology under discussion probably has been somewhat unfortunately expressed in our former opinions. In view of the previous discussion herein of the meaning of 'wilful and wanton disregard', wherein we have tried to make plain that this represents a condition of the mind and requires an active rather

[20] See, however, Bundy v. Bien, 269 P. 2d 707, 1953-54 C. B. A. Adv., Sh., No. 12, p. 279.

> than a passive mental attitude, it is impossible to say accurately that one 'should have known'. We thereby infer that he did not know, whereas the meaning of the terms wilful and wanton expresses the thought that he did know. Without doubt the thought that was intended to be conveyed in the former opinions to which reference has been made, relates to the principle that, where, from the surrounding facts and circumstances, the jury may rightfully determine that a reasonably prudent person should have known the probable result of his reckless conduct, the jury may find by inference that the defendant did know, regardless of the fact that he himself maintains that he did not know. It is the same principle by which the jury is enabled in various instances to determine from all surrounding facts and circumstances the thought that was in the mind of a defendant at a particular time. It is the method by which *intent* is determined.

In the second case (*Loeffler v. Crandall*)[21] another young woman sued her suitor and the Supreme Court ruled that the sharing of expenses of a vacation trip is merely incidental and does not constitute the "moving influence for the transportation", and therefore the passenger remains a guest for the purpose of the statute; and also, once it is established that the plaintiff was a "guest", the plaintiff has the burden of proof to show he has a right to recover under the restrictions or exceptions of the Statute. In *Lewis v. Oliver*,[22] the Supreme Court ruled that a jury must not be instructed concerning the definition of simple negligence if the trial court determines that the Guest Statute controls liability. The last case, *Vick v. Zumwalt*,[23] holds that the owner of a family car is afforded the same statutory protection as controls liability between the plaintiff and the driver. Thus if the Guest Statute bars recovery as between the passenger and the defendant's son who was driving the car, it also bars recovery from the parent.

These cases, in addition to considering the Guest Statute, also the following rules of law:

1. Remarks of counsel during final argument concerning the purport of evidence not adduced at trial are grounds for a mistrial, the offending party to pay costs, and instructions to the jury to disregard such remarks do not cure the error.[24]

2. Implied consent of a head of a household for a member of his household to use the family automobile can be established only by competent evidence, direct or circumstantial, which actually proves customary or continued

[21] 270 P. 2d 769, 1953-54 C. B. A. Adv. Sh., No. 14, p. 319.
[22] 271 P. 2d 1055, 1953-54 C. B. A. Adv. Sh., No. 15, p. 356.
[23] 1953-54 C. B. A. Adv. Sh., No. 18, p. 470.
[24] See Footnote 22, *supra.*

use of the automobile by such member of the household, and cannot be established merely by facts and circumstances which would lead a reasonable person to believe that actual consent had been given.[25]

3. If a trial judge recognizes the necessity of further consideration by a jury of its verdict or answers to interrogatories and re-submits the case for further jury deliberation, this should be done by the judge without comment or emphasis on any single phase or instruction in the case.[26]

The last three cases, *Yockey Trucking v. Handy*,[27] *Book v. Paddock*,[28] and *Siefried v. Mosher*,[29] had similar fact situations, in that each involved a collision of automobiles on our state highways. The decisions were not reached by application of tort law, but simply affirmed jury verdicts for the plaintiffs, on the premises that all inferences fairly deducible from the evidence are drawn in favor of the verdict by an appellate court and in favor of the other party by a trial court when it is asked to direct a verdict. The *Yockey Trucking* case further stated that this rule of law is equally applicable to those situations where the facts are undisputed, if fair minded persons may form different opinions and draw different conclusions from the facts.

DAMAGES, WORKMEN'S COMPENSATION AND LABOR LAW

WINSTON W. WOLVINGTON, *of the Denver Bar*

DAMAGES

In the past year, four cases involving the general question of damages have been decided by our Supreme Court. Two of the cases deal with the question of the substantive right to damages and two cases deal with the question of the proper measure of damages.

In the case of *Weng v. Schleiger*,[1] several interesting questions of damages were determined. Mr. and Mrs. Schleiger owned an automobile jointly. They and their minor son, John, were in the automobile when it was struck by the defendant's truck, causing injuries to all three and damages to the car. All three brought an action against defendant which contained causes of action as follows: (1) a cause of action by Mr. and Mrs. Schleiger for the damage to the automobile; (2) a cause of action by Mrs. Schleiger for the loss of support and companionship of her husband; (3) a cause

---

[25] See Footnote 23, *supra*.
[26] See Footnote 22, *supra*.
[27] 262 P. 2d 930, 1953-54 C. B. A. Adv. Sh., No. 4, p. 72.
[28] 267 P. 2d 247, 1953-54 C. B. A. Adv. Sh., No. 9, p. 196.
[29] 268 P. 2d 411, 1953-54 C. B. A. Adv. Sh., No. 10, p. 218.
[1] 273 P. 2d 356, 1953-54 C. B. A, Adv. Sh. No. 17.