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TORTS IN MISSOURI*

GLENN A. McCLEARY**

The common-law rule of immunity which prevented civil actions between husband and wife arising out of personal torts is rapidly losing its vigor. The Married Women's Acts relieved wives from many of their common-law disabilities. The courts have been fairly uniform in interpreting these acts where they pertain to property interests of married women, but there is a divergence of interpretation by courts, even where the language of the statutes is substantially the same, as to whether these statutes authorize a married woman to sue her husband or to be sued by him for personal tort. The Missouri statute provides:

A married woman shall be deemed a *femme sole* so far as to enable her to carry on and transact business on her own account, to contract and be contracted with, to sue and be sued, and to enforce and have enforced against her property such judgments as may be rendered for or against her, and may sue and be sued at law or in equity, with or without her husband being joined as a party. . . .¹

While this statute does not expressly provide that a married woman may sue her husband and that a husband may sue his wife, neither does it make any specific exception to the all inclusive language as to suits between husband and wife.

The Missouri courts have interpreted this statute to permit suits between spouses in tort actions for conversion of property, for the willful or malicious destruction of the separate property of the plaintiff spouse, on contract, and in equity to recover property.² However, in the area of personal torts subsequent to the Married Women's Act, the common-law disability of one spouse to sue the other was continued as a matter of policy to preserve marital harmony and domestic tranquility.³ If the husband is

*This Article contains a discussion of selected Missouri Supreme Court decisions appearing in volumes 323 to 332, inclusive, of the Southwestern Reporter, Second Series.

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1. § 451.290, RSMo 1949.

2. These cases are collected and cited in the dissenting opinion of Brawner v. Brawner, 327 S.W.2d 808, 817 (Mo. 1959).

3. Rogers v. Rogers, 264 Mo. 200, 177 S.W. 382 (1915).

deceased, the wife may maintain an action against his estate for a personal tort occurring during coverture.⁴ At least, the Married Women's Act was held not to preclude the action for the personal tort after the husband was deceased. Furthermore, the marital harmony argument does not prevent a wife from suing her husband for an antenuptial tort for negligence in the operation of an automobile.⁵

A re-examination of this last vestige of the old common-law rule of immunity, and whether policy arguments of the earlier cases interpreting the Married Women's Act are still sound, found new expression in *Browner v. Browner*,⁶ a decision by the court en banc. The majority opinion refused to overrule former decisions which had held that the Married Women's Act did not authorize actions for personal torts between spouses. But it did give careful consideration to the problem and stated: "It may well be that this court would reach a different conclusion if it were construing similar statutes enacted in a modern setting. . . ."⁷ On the policy argument, as to the effect of a contrary holding on marital harmony, the majority of the court was of the opinion that the legislature was better equipped to determine this phase of the problem. If the public interest requires a change, after considering also the effect of liability insurance in such cases, it was felt that this change should be made by the General Assembly.

A dissent by Chief Justice Hollingsworth, adopting an opinion submitted in Division Two by Commissioner Stockard, is challenging and worthy of careful study, for the reason that it examines carefully the grounds upon which the majority reached its conclusions. Furthermore, it disturbs any blind acceptance that the position reached by the court en banc is sound, other than to continue its earlier interpretation of the policy behind the Married Women's Act, made forty-five years ago. As pointed out by the dissent: "By reason of the broad and unrestricted language used by the Legislature in section 451.290 it is inconsistent and entirely without support in the language used to say it was intended that a married woman may sue her husband and be sued by him on a contract and for a property

4. *Ennis v. Truhitte*, 306 S.W.2d 549 (Mo. 1957) (en banc) (dissenting opinions by Judge Hyde and Judge Eager), noted in 23 Mo. L. Rev. 366 (1958).

5. *Hamilton v. Fulkerson*, 285 S.W.2d 642 (Mo. 1955) (the action was instituted two days before their marriage); *Berry v. Harmon*, 329 S.W.2d 784 (Mo. 1959) (the action was instituted after their marriage).

6. 327 S.W.2d 808 (Mo. 1959) (en banc).

7. *Id.* at 811.

tort but not for a personal tort."⁸ It refuses to accept the public policy argument for prohibiting a suit between spouses for a personal tort, that it is an aid to conjugal peace, on the ground that it disregards reality: "Conjugal peace would be as seriously jarred by an action on the contract, or on a promissory note, or for an injury to property . . . all of which the law permits, as by one for personal injury."⁹

This decision ruled the later case of *Deatherage v. Deatherage*.¹⁰ The only factual difference between this and the *Brawner* case is that in the latter the husband sought to maintain the personal tort action against his wife, while in the *Deatherage* case it was the wife against her husband for personal injuries, allegedly sustained as a result of the negligence of the defendant spouse in the operation of the automobile in which the plaintiff spouse was a passenger.

I. NEGLIGENCE

A. Duties of Persons in Certain Relations

1. Possessors of Land

Where the owner and operator of a business building had undertaken to illuminate the parking lot to the rear of that building, he was held, in *Swanson v. Godwin*,¹¹ to have assumed the duty of exercising reasonable care to see that the lot was adequately lighted. This duty was held to be owed the father of an employee of a tenant in the business building who had been assigned space in the parking lot which was open for use by tenants after regular business hours, the father having accompanied his son to the lot. It was held that the landlord's invitation to use the parking lot after hours included use of the lot by the employee's immediate family who were with one assigned space in the parking lot and that the father under these circumstances had the status of an invitee.¹²

8. *Id.* at 821.

9. *Id.* at 822.

10. 328 S.W.2d 624 (Mo. 1959).

11. 327 S.W.2d 903 (Mo. 1959).

12. Actions for injuries alleged to have been caused to invitees by slipping on wet terrazzo floors in the entranceway of places of business have not been infrequent. These cases turn on whether or not the condition, alleged to constitute an unreasonable risk of injury, was obvious to the invitee in the exercise of ordinary care, or was actually known to the invitee, in which situation there is no duty on the occupier of the premises to warn. *Smith v. Alaskan Fur Co.*, 325 S.W.2d 740 (Mo. 1959), held that the occupier owed no duty to have a mat on the terrazzo floor at the entrance when the way was wet from rain, where it was not shown that

2. Automobiles

Year after year, the most numerous cases in the torts area arise from alleged negligence in automobile collisions. Furthermore, in most of these cases the appeal is predicated on error in the instructions, usually in the hypothesization. Obviously, in a limited survey of this nature, these instructions cannot be discussed without setting them out in full. It may be observed, however, that the reading of these automobile collision cases year after year does cause the reader seriously to question our present method of adversary proceedings as the best method for adjusting losses. Surely, some more expeditious and less costly method may be found to take care of these claims. A theory of fault, as a basis of liability, is no longer adequate for taking care of injuries arising on our highways, and the inadequacy of this theory is demonstrating itself more and more as the carnage grows. Recognition of this problem is causing searching studies to be made and, as in the period leading to Workmen's Compensation Acts, sweeping suggestions may be forthcoming.¹³

Missouri Revised Statutes Section 304.021 was intended to establish the passage rights and duties of drivers of vehicles at intersections. One of the provisions gives the right of way to the driver who enters an intersection first over another approaching the intersection from a different highway. Paragraph 4 of this section applies to "through highways" as follows:

The driver of any vehicle shall stop as required by this section at the entrance to a through highway and shall yield the right of way to other vehicles which have entered the intersection on the through highway or which are approaching so closely on the through highway as to constitute an immediate hazard. The state highway commission may erect stop signs at the entrance of any public road into a through highway.

In *Herr v. Ruprecht*,¹⁴ this section was interpreted to extend the defendant's statutory duty beyond stopping at the entrance to the intersection

the occupier had adopted a practice of placing a mat at the entrance. In *Heine v. John R. Thompson Co.*, 330 S.W.2d 867 (Mo. 1959), the invitee had observed the wet and slippery floor and had as much knowledge of its condition as a warning of the hazard by the occupier would have conveyed.

13. In *Baccalo v. Nicolosi*, 332 S.W.2d 854 (Mo. 1960), opinion by Judge Eager, it was said: "We recognize the difficulty of preparing entirely proper instructions, and we cannot reverse every case where it appears that one or more instructions might have been drawn more artfully. It should be our endeavor to determine whether there has been such a misstatement, omission, conflict or other defect as to misdirect, confuse or mislead the jury on the material issues."

14. 331 S.W.2d 642 (Mo. 1960).

and giving preference to vehicles already in it, to yielding the right of way to vehicles approaching the intersection so closely on the through highway as to constitute an immediate hazard. Thus the defendant's duty to yield exists not merely at the entrance and while stopped, but it continues with her into the intersection "if and when it appeared (or reasonably should have appeared) to her that plaintiff's approach had then created an immediate hazard; this is true, at least to the extent that she might then be able to stop or slacken and let the other car pass."¹⁵ In this case the plaintiff was a traveler on a through highway, and it was held that the defendant could not pre-empt the right of way by entering the intersection first. The duty to yield in this situation could not be wholly disregarded just because the motorist from an intersecting road got the front end of his vehicle into an intersection with a through highway.

3. Carriers

*Atcheson v. Braniff International Airways*¹⁶ was an action by a widow of a passenger against a commercial airline and the City of Kansas City for the wrongful death of her husband, an experienced commercial air traveler, who was struck by the airplane propeller while running from the passenger ramp onto the field, where he was not supposed to go, in an apparent effort to stop an airplane from taking off without him. The municipal airport had a well-lighted passenger ramp with clearly marked gates and walkways to the place of boarding airplanes. It was held that the defendants could not be held liable on the theory that they negligently failed to provide a safe place for deplaning and implaning passengers at the airport between flights and for failing to provide adequately safeguarded, protected and marked passageways and walkways for passengers. Nor could the defendants reasonably be required to anticipate the unusual and abnormal situation of a passenger running from the passenger ramp onto the field, in an apparent effort to stop an airplane from taking off, so as to warn the passenger of his obvious danger.¹⁷

4. Municipal Corporations

A city may perform dual functions in overlapping capacities, for one of which there may be immunity from liability because it is a governmental

15. *Id.* at 648.

16. 327 S.W.2d 112 (Mo. 1959).

17. There was a number of cases involving the liability of carriers, but the legal issues therein do not merit consideration in this survey of the more important developments in the law.

function, while there may be no immunity for the other. In *Langhammer v. City of Mexico*,¹⁸ the action was for injuries sustained when the plaintiff, while walking from her automobile which was parked on a loop or circle at a dumping area for the purpose of disposing of refuse, fell through the surface of the road and was precipitated into glowing embers of burning coals beneath the surface. There were no formally designed streets in the dumping area proper, but the city had frequently used a bulldozer to keep the approach to the dumping area level, and cinders, rocks and gravel had been graded into the level areas around the perimeter of the dump, which had been used by the public for many years. The evidence sustained a finding that the loops and circles and leveled areas constituted a city maintained way and, even though they came into existence and were maintained as part of the city's exercise of a governmental function of operating the city dump, the city was liable for negligent maintenance. It was recognized that, while a city owes no duty to maintain in reasonable safety the portions of a street outside or beyond the portion set aside for travel, when the city devotes a way to the public use, however it may have come into existence, it assumes a duty of reasonable maintenance.

5. Suppliers

In *Tharp v. Monsees*,¹⁹ the defendant sold three cents worth of gasoline—less than a pint—in a glass container with a lid on it to the plaintiff, who was almost twelve years and ten months of age, and normal for his age, for use by an eleven and a half year old friend as a solvent for cleaning paint cans and brushes. After using the gasoline for the purpose of the purchase, the friend started playing with the remaining gasoline to see how it would burn when poured over objects which had been set on fire. In dribbling it from the jar onto an open flame, the fire backlashed up into the jar. In swinging around to throw the jar away, the plaintiff was in the way and the flaming gasoline spilled over him, resulting in severe injuries. The issue was whether the defendant, in supplying directly or through a third person a chattel for the use of another whom the supplier knows or from facts known to him should know to be likely, because of his youth, inexperience or otherwise, to use it in a manner involving an unreasonable risk of bodily harm to himself and others whom the supplier should expect to share in, or

18. 327 S.W.2d 831 (Mo. 1959).

19. 327 S.W.2d 889 (Mo. 1959) (en banc).

be in the immediate vicinity of its use, was liable for negligence for the bodily harm caused thereby. The verdict for the plaintiff was reversed by the court en banc on this appeal, on the ground that there was no issue of negligence for the jury, because there was "nothing in the record to support a finding that defendant had any reasonable cause to anticipate that . . . (the plaintiff) would make any dangerous or improper use of the small quantity of gasoline sold, or that he would deliver it, as he did, to an associate for an improper purpose. We find no evidence to support a finding that defendant knew or ought to have known that in selling this small quantity of gasoline to a normal neighbor boy of the age shown, he was placing a 'highly inflammable and inherently dangerous' substance *into the hands of a child of insufficient maturity and information to be able to safely handle it or that he knew or should of known that it 'would be reasonably likely to cause said child or others in proximity to him to be injured.'*"²⁰ (Italics the court's.) Among other considerations made in the well reasoned opinion, it was pointed out that the plaintiff had purchased gasoline in a container before and was generally familiar with the inflammable qualities of gasoline. "In this day and time," said the court, "it would be hard to conceive of a normal twelve year old boy (ready to enter high school) and living in a town or in the country or particularly in the vicinity of a great city with its many gasoline filling stations and its thousands of gasoline operated motors, lawn mowers and motor vehicles, that did not know of the general properties of gasoline and the ease with which it takes fire or can be ignited."²¹ The facts of this case distinguished it from those situations in which dangerous articles or instrumentalities, such as firearms or explosives, are sold to a child who, by reason of his youth and inexperience, is known or ought to be known to be unfit to be trusted with it, and who might innocently and ignorantly play with or use it to his injury.

The general rule is that suppliers of electricity must use the highest degree of care to keep their wires in such condition as to prevent injury to persons who may lawfully come in close proximity thereto. In *Reichholdt v. Union Electric Co.*,²² the question was whether a duty existed which would require the defendant supplier of electrical current to the plaintiffs' house to fuse its transformer in such a manner as to make plaintiffs' wires and

20. *Id.* at 898.

21. *Id.* at 897.

22. 329 S.W.2d 634 (Mo. 1959).

other electrical facilities reasonably safe in the event of a short circuit in the wires which had been installed by plaintiffs, and which were owned, controlled and maintained by them. There was a verdict for the plaintiffs for damages resulting from the loss of their home and personal property as a result of a fire which started from a short circuit in the electric wires at a point where the wires passed through the garage wall of plaintiffs' house and between the meter base on the outside of the wall and the circuit breaker installed inside the wall, the distance between the meter base and the circuit breaker being approximately five inches. On appeal, the judgment for the plaintiffs was reversed for error by the trial court in overruling defendant's motion for a directed verdict, since the duty of the supplier of the electricity was limited to making a proper connection and delivering the electric current to the plaintiffs' wires. Therefore, where the wiring on private premises is owned and controlled by the owner or occupant of such premises, the supplier of the electrical current is not responsible for the insulation or condition of such wiring, and the fact that the supplier could have afforded protection to the plaintiffs' wires by fusing its transformer with a 5-ampere instead of a 10-ampere fuse did not mean that it had a duty to do so.²³

6. Employer-employee

An employer's duty to his employee is not only to exercise care in furnishing the employee with a reasonably safe place to work and reasonably safe appliances with which to perform the work, but also to use care in selecting safe methods of work where risks of injury may be reasonably anticipated. In *Miller v. F. W. Woolworth Co.*,²⁴ the action was for injuries allegedly resulting from failure to provide a reasonably safe place to work. The plaintiff was a saleslady at a counter on which a greeting card rack had been placed. In the performance of her duties in waiting on customers, it was necessary for her to reach repeatedly over and across the sloping top of a three-foot-wide counter, the rear of which was fifty-one inches above

23. In *Losh v. Ozark Border Electric Cooperative*, 330 S.W.2d 847 (Mo. 1960), the action against electric cooperative for death by electrocution was based on alleged negligence of cooperative's inspector in failing to make proper inspection of electrical work at the home of the deceased. It was held that jury questions were presented as to whether the furnace switch was defectively wired so that the "hot" lead was not broken when switch was turned off, whether switch was installed prior to date of inspection, whether the defendant's inspector missed the switch in his inspection, whether the defect could have been disclosed by proper inspection and whether the switch was "off" when the deceased was electrocuted.

24. 328 S.W.2d 684 (Mo. 1959) (en banc).

the floor. Being of short stature, the strain from the awkward movement of the arm and shoulder in reaching over the counter in making as many as two hundred sales in a day was alleged to have resulted in traumatic neuritis. After verdict for the plaintiff, the trial court granted the after-trial motions of the defendants for judgment in accordance with their prior motions for a directed verdict. On appeal, the court en banc affirmed this judgment on the ground that plaintiff's injuries did not result from a failure to provide a reasonably safe place to work. The majority of the court also held there was no proof that the work method adopted by the defendants was any other or different than the ordinary usage of other employers with respect to sales personnel engaged in like work. Two judges dissented on the ground that a submissible case had been made upon a breach of defendants' duty to exercise ordinary care with reference to the method adopted for the transaction of defendants' business, and a jury could find that, in requiring the plaintiff to stand behind the counter and card rack and reach over the rack in waiting on customers, it was a dangerous and unsafe method in that it exposed plaintiff to an unreasonable risk of harm.²⁵

7. Physician-patient

A physician or surgeon is required to use and exercise that degree of care, skill, and proficiency which is commonly exercised by the skillful, careful, and prudent physician or surgeon engaged in similar practice, under the same or similar circumstances. It is not sufficient that he may have possessed the requisite training and skill; he must also have used and applied it in the treatment of the patient. In *Steele v. Woods*,²⁶ the patient's action against the physician was for damages due to gangrene and resulting crippling by loss of toes and part of her feet following a varicose vein operation. The trial court had granted the physician's motion for judgment, after verdict for the patient. On appeal by the patient, it was held that there was sufficient evidence to support a jury finding that a paravertebral block was necessary to relieve the patient's condition and restore necessary circulation to pre-

25. Where the negligent act of a fellow employee occurred prior to the time that the plaintiff became associated in a common employment, so that the plaintiff could have influenced or corrected or prevented the proposed negligent act, the fellow servant rule was not available as a defense to the common employer. In *Daniels v. Banning*, 329 S.W.2d 647 (Mo. 1959), the plaintiff sustained injuries while assisting in moving a boat dock, when it collided with a steel drum which another of the defendant's employees had shoved into the lake prior to the beginning of plaintiff's association in the common employment.

26. 327 S.W.2d 187 (Mo. 1959).

vent gangrene following the varicose vein operation, and that a jury could have found from the conflicting testimony that the physician never discussed a paravertebral block with her at any time when she was so sufficiently in possession of her mental faculties that it reached into her consciousness and understanding of what the physician was talking about. Said the court: "And if the patient is incompetent or incapable of understanding but urgently requires necessary treatment proffered and the doctor knows or should know of this condition, the duty of the physician to advise the treatment does not necessarily end. . . . [T]he circumstances may require and make it his duty to communicate with and advise the husband or other members of the family who are available and competent to advise with or speak for the patient or take other steps to bring understanding of the need home to the patient."²⁷ Furthermore, the court held that expert testimony was not required to establish whether or not the physician had complied with his duty to communicate the advice of a treatment, since the conduct in question did not involve skill or technique in the peculiar possession of the profession.

In a footnote the court states that it was unable to find another case which is factually like this one. Therefore, the opinion may well be recognized as a leading case in spelling out further the scope of the duty which a physician or surgeon owes to his patient in similar situations.

8. Humanitarian Negligence

In this annual survey of the torts cases, those predicated on the humanitarian doctrine are covered separately in a later issue of the *Review* by Mr. Becker, so that more adequate consideration may be given to this important Missouri doctrine.

B. *Res Ipsa Loquitur*

In *Littlefield v. Laughlin*,²⁸ an action against the employer for injuries sustained by an employee when a chain supporting a homemade elevator broke, thus causing the elevator to fall, the problem was presented whether an accident instruction may be given in a *res ipsa loquitur* situation where the cause of the accident is known. The essential requirement for giving an accident instruction is that the happening is one to which human fault does not contribute and the cause of the accident is unknown. Here the

27. *Id.* at 198.

28. 327 S.W.2d 863 (Mo. 1959).

cause of the accident, the breaking of the chain, was known, although the cause for the chain's breaking was not known. There was conflicting evidence as to why the chain broke. On the one side an inference of negligence could be drawn in this *res ipsa loquitur* case; on the other side there were facts from which it could be inferred that the chain broke without negligence on the part of the defendant. The issue then was whether or not the defendant was negligent and the giving of an accident instruction was held to have constituted prejudicial error.²⁹

C. *Defenses in Negligence Cases*

Important changes in the rule in Missouri requiring the plaintiff in his verdict-directing instruction to negative his contributory negligence were made in two en banc decisions. Since 1888, it has been the established rule that what would otherwise be reversible error in failing to negative contributory negligence, is cured by the submission of that issue in instructions by the defendant. In *Moore v. Ready Mixed Concrete Co.*,³⁰ the old rule is changed to the effect that the plaintiff should negative his contributory negligence in the event that the defendant does submit his pleaded and supported affirmative defense of contributory negligence, for it is a live issue for the jury and the plaintiff's instructions should not ignore that issue. The reason given by the court is that, "When plaintiff's verdict-directing instruction fails to refer to the defense of contributory negligence, and such defense is submitted in an instruction offered by the defendant, the result is a definite conflict between the two instructions. . . . The two instructions are not harmonious or consistent. Which will the jury follow? If the jury finds the facts hypothesized in plaintiff's instruction it may consider that it need not give further consideration to other instructions dealing with the issue of liability. On the other hand, if, as it should, the jury carefully considers and attempts to reconcile all of the instructions, it will likely be perplexed and confused as to the proper manner to interpret and attempt to follow inconsistent directions contained in the two conflicting instructions."³¹ In administering the rule as stated in this opinion, the court states

29. For an objection to an instruction which submits failure to have a car under control as submitting general negligence and giving the widest kind of a roving commission, see dissenting opinion by Judge Hyde in *McCarthy v. Sebben*, 331 S.W.2d 601 (Mo. 1960). Whether a rear end collision with a car parked along the curbing is specific negligence or is one of general negligence under the *res ipsa loquitur* doctrine, see *Boresow v. Manzella*, 330 S.W.2d 827 (Mo. 1959).

30. 329 S.W.2d 14 (Mo. 1959) (en banc).

31. *Id.* at 23.

that, "Cases to the contrary should no longer be followed. Since the rule we have expressed relates to a rule which deals with procedural rather than substantive law, we think our ruling herein should be applied prospectively and hence should have no application to the instant case or to any other case submitted in the trial court prior to the publication of this opinion in the advance sheet of the Southwestern Reporter."³²

Decided on the same date as the *Moore* case, the court en banc, in *Shepard v. Harris*,³³ in another application, stated the new rule to be "that when a defendant fails to submit the affirmative defense of contributory negligence he has thereby abandoned that defense and it no longer remains an issue in the case for any purpose, and, consequently, a plaintiff's verdict-directing instruction which ignores such abandoned issue of contributory negligence is not erroneous."³⁴ Therefore, unless the defendant pleads, supports, and submits the affirmative defense of contributory negligence, irrespective of what the evidence may show as to contributory negligence (short of contributory negligence as a matter of law), the plaintiff is not required to hypothesize for a recovery any facts which go beyond the plaintiff's own theory of recovery.³⁵

32. *Id.* at 24.

33. 329 S.W.2d 1 (Mo. 1959) (en banc).

34. *Id.* at 7.

35. Other cases presenting aspects of the defense of contributory negligence may be noted. An instruction submitting contributory negligence is erroneous which uses the phrases "merely contributed to cause the collision," and "concurrent in any degree, however slight," on the ground that it "connotes something less than a direct, producing or efficient contributing cause, thereby weakening the element of causation." *Danner v. Weinreich*, 323 S.W.2d 746 (Mo. 1959).

One who has voluntarily disabled himself by reason of intoxication is held to the same degree of care in the interests of his own safety that is required of a sober man, and intoxication is no excuse for his failure to use ordinary care for his own safety. *Miser v. Hay*, 328 S.W.2d 672 (Mo. 1959).

Since the defense of sole cause is not an affirmative defense and the plaintiff has the burden of proving defendant's negligence, it is not necessary that he hypothesize in his sole cause instruction a set of facts to show affirmatively that he was not negligent, but it is sufficient to require the jury to find that he is not guilty of negligence charged against him in the other given instructions. But he must hypothesize facts, supported by the evidence, to show that the injuries to the plaintiff were the result of the negligence of someone other than him. *Lynn v. Kern*, 323 S.W.2d 726 (Mo. 1959).

Where the plaintiff stepped backward into a driveway and into the side of the defendant's automobile, when the automobile was in a position to endanger the pedestrian if she moved backwards, and when she could have seen the automobile and appreciated the danger if she had looked, an instruction on contributory negligence was properly given. *Timmons v. Kilpatrick*, 332 S.W.2d 918 (Mo. 1960).

On the care required by guests riding in automobile for their own safety: *Lammers v. Licklider*, 332 S.W.2d 882 (Mo. 1960); *Cunningham v. Pulver*, 327 S.W.2d 227 (Mo. 1959); *Brooks v. Mock*, 330 S.W.2d 759 (Mo. 1959).

II. DECEIT

Two cases in deceit were decided on well settled principles in this area of tort law. Statements of value made by a seller to a purchaser of real estate do not ordinarily constitute fraud, for the reason that they are considered mere expressions of opinion, and it is not reasonable for recipients to rely. However, if the one making the representations as to value has special knowledge which the other does not have in respect to the value of the property sold, and this fact is known to the maker of the representations, the parties deal on unequal terms and the general rule as to misrepresentations of value does not apply. In *Shephard v. Woodson*,³⁶ a jury could find that the plaintiff-buyer was inexperienced and ignorant of real estate transactions and that the defendant was an experienced real estate salesman. Therefore, the parties were not dealing on an equal footing, and the misrepresentations of value constituted actionable fraud.

In *Nagels v. Christy*,³⁷ the action was against a former horse owner for fraudulent misrepresentation made in the sale of the animal. The horse had been delivered to a horse dealer for the purpose of having the horse offered for sale, with the owner to receive fifteen hundred dollars net. It was held that the relationship of principal and factor existed between the owner and the dealer, in offering the horse for sale, and therefore, the owner was liable to a buyer for the dealer's misrepresentations as to the condition of the horse.

36. 328 S.W.2d 1 (Mo. 1959).

37. 330 S.W.2d 754 (Mo. 1959).