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TORTS IN MISSOURI*

GLENN A. McCLEARY**

Further erosion of the doctrine, which prohibited a right of one family member to recover from another for a personal tort committed within the family relation, makes the decision of *Brennecke v. Kilpatrick*¹ an important addition to this area of the law. There the question before the Missouri Supreme Court en banc was whether a six year old child, by her father as next friend, could successfully sue the estate of the deceased mother in tort for the alleged negligence of the mother in the operation of an automobile, resulting in the death of the mother and in injury to the child. In a second count the father was suing for medical and hospital bills and the impaired value of the services of his minor daughter. This precise question was one of first impression in Missouri. In an opinion which explains the policy on which the doctrine of intrafamily immunity from such suits rests, the decline in the doctrine in the Missouri decisions is reviewed, the court holding that the reasons for the doctrine expire on the death of the family member protected. The immunity was held not to extend to the decedent's estate for the reason that death terminates the family relationship within the scope and purpose of the doctrine. The court held:

Although, there may be immunity from suit between parent and child during life, the immunity does not extend to the personal representative of the deceased parent. The rationale of the rule of parental immunity has been extinguished by the death of the parent and neither logic nor justice persuades that it remain.²

The same reasoning was applied to the action by the father suing the administrator of his wife's estate for medical and hospital expenses and the impaired value of the services of the child.

*This article contains a discussion of selected Missouri Supreme Court decisions appearing in volumes 333 to 345, inclusive, of the South Western Reporter, Second Series.

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1. 336 S.W.2d 68 (Mo. 1960) (en banc). For an excellent coverage of the entire area of tort actions between members of the family—husband and wife—parent and child, see Comment, 26 Mo. L. Rev. 152 (1961).

2. *Id.* at 73.

A vigorous dissenting opinion reasoned that the underlying policies to protect the family relationship extended beyond the death of a wife, or a mother, or a father. Observation was made "upon the possible effects of such litigation in a family (disregarding insurance for the moment), the bitterness engendered, the estates destroyed, the relationships disrupted." The dissenting opinion is predicated on the legal theory that:

[I]n such a tort . . . an immediate disability is imposed upon the right of action; that this attaches to the right and that it is permanent in nature. If the right of action survives, it survives only with the disability attached.³

Also expressed was the fear that liability insurance "impregnated" the majority opinion. The mother's estate here consisted of assets valued at 250 dollars, and the damages alleged in the petition and sought were 9,600 dollars. However, recognizing that this erosion of the doctrine of intrafamily immunity in tort actions had taken over so that little of the doctrine remained, the writer of the dissenting opinion makes clear that he represents a distinct minority of the court, and that he remains "a voice crying in the wilderness" against the gradual gnawing away of a fundamental principle of sound public policy where the asserted reasons therefor are more artificial than real."

I. NEGLIGENCE

A. *Duties of Persons in Certain Relations*

1. Possessors of Land

As a general rule, an abutting property owner is not liable to pedestrians using the adjacent sidewalk for injuries arising from defects and obstructions originating from sources other than his own premises. His liability arises only from failure to exercise reasonable care to maintain in a reasonably safe condition any structure or other artificial condition created in the sidewalk by him or for his sole benefit. In *Sutton v. Fox Missouri Theatre Co.*,⁴ the action was by a pedestrian and her husband against the city and the theatre company for personal injuries sustained by the pedestrian when her foot caught on the base of a recruiting sign, placed and maintained by the United States Navy on the sidewalk in front of the theatre entrance. She tripped and fell as she attempted to walk

3. *Id.* at 75. (dissenting opinion).

4. 336 S.W.2d 85 (Mo. 1960).

statute was not enacted for the protection of a vehicle parked on the highway for the purpose of replacing a flat tire or of the persons working around the vehicle in making that replacement. The court held that the statute was enacted for the protection of every person or vehicle which would reasonably be afforded a measure of protection by the enforcement of its terms and hence plaintiff had made a submissible case on that issue. A judgment for the defendant was reversed and the case remanded for a new trial.

Although the most numerous cases in the torts area continue to arise from alleged negligence in automobile collisions, the appeals raise few questions of liability that have not previously been adjudicated. Instead, the appeals are largely predicated on errors in the instructions which for obvious reasons cannot be treated in a limited survey of this nature. However, they do cause the reader seriously to question whether our present method of adversary proceedings is the best method for adjusting these losses.

3. Lessors

The lessor of a baseball field who owned two taverns and a pavilion on the same tract of land in close proximity to the playing field, and who had retained all concessionary rights for the sale of refreshments to the patrons of the baseball field, was held, in *Spear v. Heine Meine, Inc.*,⁷ not to have retained possession or control of the field so as to impose a duty to provide a reasonably safe means for the plaintiff, a spectator at the ball game and a recent patron of the defendant at its nearby tavern, to enter and exit from the screened seats behind the backstop. The plaintiff was struck by a foul ball, resulting in the loss of an eye, as she stepped beyond the screened area to go to one of the defendant's taverns to purchase popcorn or soda pop for her younger brother and sister. There was no evidence that sales were made by employees circulating among the crowd; on the contrary, the people had to come to the pavilion or taverns to buy. The lease also provided that the lessor "shall be responsible for the upkeep of the baseball field at all times and shall keep it in a reasonably fair condition." This was held not to impose a duty to dismantle lessee's improvements or to provide a safe means of entrance and exit from the seats which the lessee had constructed.

7. 343 S.W.2d 1 (Mo. 1961). The lessee was joined as a defendant but had received a directed verdict in the trial court as a charitable corporation.

through a crowd of theatre patrons standing in front of the theatre waiting admission. Her husband sought damages for loss of the services and consortium of his wife, and for medical expenses incurred. The negligence alleged against the city was that it allowed and permitted the sign to obstruct a portion of the sidewalk in front of the theatre, making it dangerous for pedestrian traffic when it knew that the sign was located there, and knew that large crowds of people collected in front of the theatre so as to obstruct a view of the base of the sign. The negligence alleged against the theatre was the creation of an artificial condition on the sidewalk by causing and permitting the crowd, assembled by it for its own benefit, to gather so closely around the sign which was known to be there, as unreasonably to endanger safe passage along the sidewalk in that the crowd standing and milling around the sign obstructed a view of its base to pedestrians using the sidewalk. The trial court directed verdicts for both defendants. On appeal to the Supreme Court, it was held that a submissible case was shown against both the theatre and the city.⁵

2. Automobiles

Whether Section 304.017, Revised Statutes of Missouri (1959), providing that the driver of an automobile shall not follow another vehicle more closely than is reasonably safe and prudent, was applicable to a passenger of another automobile who sustained personal injuries when struck by the motorist's vehicle as the passenger was helping to change a flat tire on an automobile parked at the ridge edge of a four-lane highway, was before the court in *Binion v. Armentrout*,⁶ as a question of first impression. There was testimony showing that the motorist, approaching the scene of the accident at night, was following about two automobile lengths behind the preceding vehicle and did not see the passenger, who was helping to change the tire on the parked vehicle, until it was too late to avoid the collision. On appeal by the plaintiff, the defendant contended that the

5. *Brown v. Kroger Co.*, 344 S.W.2d 80 (Mo. 1961), was an action by a patron against the store owner for injuries allegedly caused when a soft drink bottle fell through a carton having a wet bottom and broke, cutting the invitee's leg. There was a directed verdict for the defendant at the close of plaintiff's evidence in the trial court. On appeal, it was held that a submissible case had been made in view of the knowledge which the store manager had of prior instances in which wet or damp cartons had been placed on the shelves and of the fact that cartons which had been wet and had dried were unfit for use, so that a jury could reasonably have found that the defendant owed invitee the duty to inspect the cartons either before they were placed on the shelves or before they were made available to customers.

6. 333 S.W.2d 87 (Mo. 1960).

In *Sparks v. Lead Belt Beer Co.*,⁸ a petition was held to state a cause of action in which the plaintiff-owner of a building alleged that the defendant had rented it for the storage of beer on a month-to-month basis, and had negligently loaded the floors with an excessive number of cases of beer, far exceeding the structural ability of the building and without providing for the excessive weight, as a result of which internal parts of the building collapsed.

It is a well-established principle of law, where a landlord undertakes to repair demised premises, that he must exercise reasonable care in doing so and is liable to his tenant for injuries caused by his negligence in making the repairs or in leaving the premises in an unsafe condition. In *Stewart v. Zuellig*,⁹ the landlord at the request of the tenant had re-enforced the porch floor and had placed braces or structural supports to upright corner posts, which had become insecure. He did not install any additional slats in the porch banister or change the position of existing slats or railings. The plaintiff's twenty-nine month old child fell from the porch, but none of the railings, boards or slats broke or came loose, or caused or contributed to the fall of the small child. Even if it be assumed that the child fell through an opening between the slats, it was held that the fall and injuries were not occasioned by any negligence of the landlord in making the repairs. A directed verdict for the defendants and judgment entered thereon was affirmed.

4. Municipal Corporations

It is well settled in Missouri that one receiving personal injuries from instrumentalities used solely for the regulation of traffic, although negligently maintained, has no cause of action against a municipal corporation for the reason that the regulation of traffic is a governmental function. In *Gillen v. City of St. Louis*,¹⁰ a traffic sign attached to a light standard, built and maintained by the city for traffic control, fell on the sidewalk injuring plaintiff. He contended that his case was based upon injuries received from the dangerous condition of the sidewalk by reason of an obstruction overhead, a proprietary function for which a city is liable in tort, and the fact that the obstruction happened to be a traffic sign was incidental since the defect did not pertain to the direction of traffic. The

8. 337 S.W.2d 44 (Mo. 1960).

9. 336 S.W.2d 399 (Mo. 1960).

10. 345 S.W.2d 69 (Mo. 1961).

trial court granted defendant's motion to dismiss the petition on the ground that the cause of action arose out of the governmental function of traffic regulation. On appeal, the judgment was affirmed.

The collection of garbage by a city has been held in earlier Missouri cases to be a governmental function, and a city is not liable for the negligence of its employees when so engaged. However, in *Dallas v. City of St. Louis*,¹¹ an action was brought against the municipality for the death of a mechanic who was killed while working upon and servicing a garbage truck in a garage, operated by the city for the maintenance of city-owned motor vehicles. It was held that the city had entered the area of proprietary functions and could be liable for the death of one of its employees based upon the negligent operation of the garage, even though at the time of the death the employee was working on a garbage truck. The court distinguished the facts from cases where the alleged negligence related to the operation of the device used by the city in the performance of a governmental function, the act performed being for the common good of all. Here, the city in electing to own and operate a garage for the maintenance and repair of motor vehicles was acting for the special benefit or profit of the corporate entity and had entered the area of proprietary functions. The judgment for the city in the trial court, after dismissing the plaintiff's petition, was reversed and the cause remanded.

5. Supplier of Products

The supplier of a chattel is subject to liability in its use by another when the supplier knows or should know that its use is likely to be dangerous, and when there is reason to believe that one using it will not realize this, if the supplier fails to use reasonable care to warn of the dangers involved. In *Bean v. Ross Mfg. Co.*¹² the action was brought by a plumber, against the manufacturer of a drain solvent, for eye injuries resulting in substantial total blindness which were sustained in an explosion while using the solvent to unplug a drain. There were directions and warnings on the can of the solvent including the following: "Do not plug or close opening and stand away far enough so effervescent mixture will not touch person or clothing." The word "Poison" appeared in very large black print and carried the real emphasis of the entire label. The plaintiff had read the label more than once, including the warning stated above. He had been working as a plumber for approximately six years. In attempting to open

11. 338 S.W.2d 39 (Mo. 1960).

12. 344 S.W.2d 18 (Mo. 1961) (en banc).

a stopped-up drain in the basement of a grade school building, the usual methods were first employed without results. Then the entire can of solvent, twenty ounces, was poured into the drain, a plug inserted in the three inch drain pipe and the plug capped with a solid fitting. Shortly thereafter, the test plug blew out and some of the liquid from the drain was blown across the plaintiff's face, eyes and ears. The case was submitted upon the sole theory that the defendant did not adequately warn the plaintiff of the dangers inherent in the use of this product. There was a substantial verdict for the plaintiff in the trial court. On appeal, it was held that in the instructions, submitting the question of adequacy or inadequacy of the cautions and directions given on the label of the can, the adequacy should have been considered as the directions and cautions appeared to the plaintiff, a plumber, or to members of the class to which he belonged with similar experience, rather than to an ordinary prudent person. The judgment of the trial court for plaintiff was reversed and the cause remanded for a new trial.

6. Physician-patient

In malpractice law, the courts have allowed the medical profession to play a predominant role in setting its own legal standards, mainly for the reason that the courts recognize that they are less qualified than those with special training and skill in the healing arts. Each medical case involves many factors which must be balanced, so that better results may be achieved by not laying down strict legal rules which the medical profession must follow. Expressed in general terms, therefore, a physician's legal duty is stated in terms of a standard to use such care and skill as is exercised by physicians in the community where he resides, who are of the same school of practice, and having due regard for the conditions of contemporary medical science. Another rule of law requires that the patient's consent is a prerequisite to any treatment or operation; otherwise the physician may be liable for battery.

In *Mitchell v. Robinson*,¹³ an additional element was added to the standard of due care in at least one group of malpractice actions. There the action was against physicians for convulsive fractures sustained by the patient while undergoing insulin therapy for treatment of emotional illness. No expert testimony was offered by the plaintiff to support an inference of negligence with respect to the procedures, measures, restraints

13. 334 S.W.2d 11 (Mo. 1960).

and treatment employed in the administration of insulin treatment. The plaintiff's principal claim was that the doctors were negligent in failing to inform him of the dangers of shock therapy. It was held, in view of the rather high incidence of unintended convulsions and resultant fractures in insulin treatment for emotional illness, that the doctors owed the patient, who was in possession of his faculties, the duty to inform him generally of the possible serious collateral hazards of insulin treatment, leaving to the patient the option of living with his illness or of taking the treatment and accepting its hazards. The court held that a submissible fact issue of whether the doctors were negligent in failing to inform the plaintiff of the dangers of shock therapy was presented, upon which there was no necessity for expert testimony. However, it was not possible to affirm the judgment which the plaintiff had received in the trial court due to confusing and erroneous instructions given for the plaintiff. The judgment was reversed and the cause remanded.

This case is one of first impression on this problem and presents difficult questions to the doctor. His primary duty is to do what is best for the patient. It has been pointed out that:

Disclosure sufficient to form the basis of an intelligent consent could conceivably alarm an already unduly apprehensive patient to the point that he might refuse necessary treatment even if the risk is minimal. Such disclosures could actually increase the risks through adverse psychological effects.¹⁴

Quaere, may not a rule of law that requires full disclosure in some cases tend to cause the doctor to disclose matters to his patient, not so much from consideration of the patient's best interests as for his own protection from liability, and thus compromise him in his primary professional duty of doing what is best for the patient's welfare.

In *Gregory v. Robinson*,¹⁵ the action was against two physicians and the executor of a third who, as partners, operated a hospital for the care and treatment of mental and nervous diseases. The plaintiff, who was undergoing treatment in the hospital for severe depression, suffered injuries when he leaped from an unbarred window on the stair landing between the second and third floors of the hospital. The negligence alleged was the act of one of the doctors, who was physician in charge at that time, in unlocking a barred door leading into the stairway from the third floor, where acutely

14. 109 U. PA. L. REV. 768, 773 (1961), a note on the instant decision.

15. 338 S.W.2d 88 (Mo. 1960) (en banc).

mentally ill patients were housed, after noting that the plaintiff was sitting on his bed in his room some fifteen feet away from the door to the stairway, and knowing that in plaintiff's mental state he might either attempt to escape or commit suicide by forcing his way into the stairway while the doctor had the door unlocked. The jury returned a verdict for the plaintiff, but the trial court set aside the verdict, entered judgment for the defendants and in the alternative sustained defendants' motion for a new trial. In affirming this judgment, on appeal by the plaintiff, it was held that the doctor was not reasonably required "to anticipate that the plaintiff was likely to make a precipitous bolt for the door as he was passing through it, and to adopt some other procedure in his exit." A dissenting opinion held that a submissible case of negligence had been made out in view of the defendants' understanding of the impulses of the mentally ill, the knowledge that the plaintiff in his condition might undertake to commit suicide, and the further knowledge that the plaintiff, wanting to go home and being disappointed when told that he could not do so, might attempt to escape from the ward in the hospital and injure himself in his attempt.

7. Humanitarian Negligence

So that more adequate consideration may be given to this important Missouri doctrine, the cases predicated on the humanitarian doctrine are covered separately in the *Review*.¹⁶

B. *Res Ipsa Loquitur*

There were no unusual applications of the *res ipsa loquitur* doctrine in the cases under review either to the facts or in the theory. It was held applicable for injuries received in the falling of a jackhammer on the foot of the plaintiff;¹⁷ in the situation where a large metal box dropped from defendant's trailer into the path of an oncoming automobile in which plaintiff was riding;¹⁸ for injuries sustained by a passenger in a truck which overturned down an embankment and into a ditch when the left front wheel suddenly came off;¹⁹ and to an action by a tenant against landlords, who had employed a corporation to do remodeling work on the heating plant, where the employee of the corporation doing the work allegedly operated an acetylene torch in such manner as to cause damages to personal property

16. See Becker & Porter, *The Missouri Humanitarian Doctrine in the Years 1958-1960*, 26 Mo. L. REV. 26-43 (1961).

17. *Westfall v. Mossinghoff, J & Co.*, 345 S.W.2d 148 (Mo. 1961).

18. *Grote v. Reed*, 345 S.W.2d 96 (Mo. 1961).

19. *Golian v. Stanley*, 334 S.W.2d 88 (Mo. 1960).

and loss of profits.²⁰ In the last case it was contended that courts are reluctant to apply the *res ipsa* rule in fire cases because the cause of fire is generally unknown and often fires occur even though due care has been exercised. The court recognized the wide acceptance of the general rule, but held it did not preclude the application of the *res ipsa* rule where circumstances under which the fire originated are such as to show negligence in the defendant or his servants.

In *Golian v. Stanley*,²¹ the Missouri rule was reaffirmed in holding that, although the defendant offered evidence to exculpate himself from a charge of negligence, he was not entitled to a directed verdict where plaintiff had made a submissible case under the *res ipsa* doctrine:

A prima facie showing of negligence under that doctrine raises a substantial factual inference of defendant's negligence which amounts to negligence, as distinguished from a mere procedural presumption, that does not disappear upon the submission of evidence tending to exculpate defendant, but remains in the case as evidence sufficient to support an affirmative finding for plaintiff.²²

While not found to be prejudicially erroneous, the court recommended, in *Grote v. Reed*,²³ against using an instruction in a *res ipsa* case which tells the jury that:

[You are] not permitted to base a verdict entirely and exclusively on mere surmise, guesswork and speculation; and if upon the whole evidence in the case, fairly considered, you are not able to make a finding that defendant was negligent without resorting to surmise, guesswork and speculation outside of and beyond the scope of the evidence, and the reasonable inferences deductible [sic] therefrom, then it is your duty to, and you must, return a verdict for the defendant.²⁴

II. FALSE ARREST AND ASSAULT

It was held in *Manson v. Wabash R.R. Co.*²⁵ that a private watchman for the railroad, which was sued for false arrest for an act committed within the presence of the watchman in violation of an ordinance, has a right to rely on the validity of the ordinance in making an arrest until such time as

20. *Gateway Chem. Co. v. Groves*, 338 S.W.2d 83 (Mo. 1960).

21. *Supra* note 19.

22. *Golian v. Stanley*, *supra* note 19, at 93-94.

23. *Supra* note 18.

24. *Grote v. Reed*, *supra* note 18, at 102.

25. 338 S.W.2d 54 (Mo. 1960) (en banc).

the ordinance is declared to be void. He had been licensed to make arrests under the same circumstances as would a member of the police force of St. Louis. It was contended by the plaintiff that the ordinance was invalid and could not, therefore, serve as a justification for the plaintiff's arrest. Since the ordinance involved had not been declared void, the court did not need to pass upon its validity because the watchman had the right to depend upon its validity. Otherwise, reasoned the court, it may lead to a breakdown in law enforcement if an officer had to run the risk, before making an arrest, of incurring personal liability should the ordinance later be declared invalid.

The only evidence of an assault committed in making the arrest in this case was that the arresting watchman pointed a gun at the plaintiffs and threatened to shoot if they ran. While in misdemeanor cases an officer cannot use unnecessary force in making a privileged arrest or endanger human life, it was held that there was no evidence sufficient in this case to raise a question for the jury as to whether the watchman used unnecessary force.

III. LIBEL

In *Williams v. Kansas City Transit, Inc.*,²⁶ a discharged employee brought the action against his former employer to recover damages for an alleged libelous statement contained in a service letter, requested by the discharged employee, stating the reason for his dismissal. That part of the service letter involved in this action read:

You were discharged for the following reason, to-wit, that investigations conducted by duly accredited representatives of the Company between July 25th and August 1, 1951, appeared to give reasonable grounds for believing, and, on the basis thereof, the Company did believe, that you had mishandled fares which you collected as an operator of the Company, in that you had not required each fare to be deposited by the passenger in the fare box and registered, had not accounted to the Company for the fares received but not deposited in the fare box and had misappropriated the fares received belonging to the Company, not deposited in the fare box.²⁷

On appeal by the plaintiff from a judgment entered on a directed verdict for the former employer at the close of the case, the court held that the

26. 339 S.W.2d 792 (Mo. 1960).

27. *Id.* at 795.

service letter required by the statute,²⁸ upon the written request of the former employee, "truly stating for what cause, if any, such employee has quit such service," was a qualifiedly privileged communication.

IV. MALICIOUS PROSECUTION

A case of first impression in Missouri, *Huffstutler v. Coates*,²⁹ presented the question, in an action for malicious prosecution, as to the effect of the binding over by a committing magistrate in the earlier criminal proceedings, on the issue of probable cause. The criminal charge which the plaintiff claimed the defendant maliciously and without probable cause prosecuted against him was attempted arson. The defendant had executed an affidavit, as a result of which the plaintiff was arrested and held for trial in the circuit court, after a preliminary hearing before a magistrate. At the trial in the circuit court, he was discharged at the close of the state's evidence when the trial judge sustained his motion for a judgment of acquittal. On appeal by the defendant, this judgment was affirmed. The court found there was substantial evidence that the order of the committing magistrate, that the plaintiff be held on a charge of attempted arson, was procured by false testimony of the defendant. Thus the same rule is applied to commitments by an examining magistrate in Missouri as where a grand jury has returned an indictment, namely, that the commitment or binding over of the accused for further proceedings is only prima facie evidence of probable cause for the institution of the prosecution in which it is made, but its effect may be overcome, in a subsequent action for malicious prosecution against the complaining witness, by producing evidence which, if believed, would show want of probable cause.

28. § 290.140, RSMo 1959.

29. 335 S.W.2d 70 (Mo. 1960).