

1962

Torts in Missouri

Glenn A. McCleary

Follow this and additional works at: <http://scholarship.law.missouri.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

Glenn A. McCleary, *Torts in Missouri*, 27 Mo. L. Rev. (1962)

Available at: <http://scholarship.law.missouri.edu/mlr/vol27/iss4/5>

This Article is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized administrator of University of Missouri School of Law Scholarship Repository.

TORTS IN MISSOURI*

GLENN A. McCLEARY**

Although no landmark decisions in the area of tort law were handed down during the course of the year under review, nor may it be said that great questions were passed upon, yet there always seem to be new applications of settled principles of law which provide students of the law with ever-challenging interest. As our relationships in an ever-changing society continue to grow more complex, new claims arising out of situations differing slightly from those found in past cases will continue to provide law and lawyers with a challenge in directing our society toward its goal. As well settled as we thought the law to be as it pertains to the liability of a possessor of land, for instance, even here we find new problems presented, and the well-settled principles take on new lustre, and perhaps new meaning. As one of our great American jurists once observed, new applications to new situations may "have in them the germ of some wider theory, and therefore of some profound interstitial change in the very tissue of the law."¹

I. NEGLIGENCE

A. *Duties of Persons in Certain Relations*

1. Possessors of Land

The adjustment between two great policies in the law is seen in working out principles of liability where a child trespasser suffers injuries on the land of a possessor. The one policy is to promote the development of land and the freedom of private enterprise by encouraging the possessor to make a beneficial use of the land; the other is the social interest in children, although they are trespassers on private property and not infrequently may be injured. The attractive nuisance doctrine is perhaps the most developed effort in adjusting these two policies.

*This article contains a discussion of selected decisions of the Missouri Supreme Court which appear in Volumes 346 to 356, inclusive, of the South Western Reporter, Second Series.

**Professor of Law, University of Missouri.

1. HOLMES, COLLECTED LEGAL PAPERS 269 (1920).

There is another rule, independent of the factual situations of the attractive nuisance doctrine, which, as to children of immature judgment, requires the possessor to exercise care in using or maintaining extremely dangerous substances, irrespective of the fact that the children's status is that of trespassers. The court en banc, in *Paisley v. Liebowits*,² applied the dangerous substance exception to a new type of danger. The previous Missouri decisions had applied this exception to highly dangerous explosives which might be found by trespassing children. In the instant case, the defendant was a building contractor and was engaged in constructing apartments in St. Louis. In the late afternoon of the day of the injury, the infant plaintiff, then seven years old, came upon the premises and was playing around the smoldering remains of a fire started for the purpose of burning trash or waste materials created by the construction. The fire was some thirty to fifty feet from the sidewalk. Here the child discovered a can containing some liquid and accidentally knocked it over, spilling some of the contents onto the remains of the fire. The can contained oleum spirits, which the painters used at the close of work each day to clean paint brushes. An expert witness testified that oleum spirits is a volatile type of liquid vapor which will flash and burn when thoroughly vaporized, and explode if confined; that it is somewhere between gasoline and kerosene in volatility. The court held that oleum spirits was a sufficiently dangerous substance to bring the case within the dangerous substance exception to the rule of nonliability to children trespassers, and that whether such conduct constituted negligence was properly for the jury.

A possessor of land who creates or maintains thereon an artificial condition so near to an existing highway that he should realize that it involves an unreasonable risk to others traveling upon the highway or foreseeably deviating from it in the ordinary course of travel, is subject to liability. This is sometimes referred to as the "hard by" rule. In *Winegardner v. City of St. Louis*,³ the parents of a 16 year old son brought an action for the alleged wrongful death of their son, on the theory that a possessor of land abutting upon a public highway is subject to liability for bodily harm caused to children by an excavation or other artificial condition maintained by him thereon, so close to the highway that it involves an unreasonable risk because of a child's tendency to deviate from the highway. The court affirmed

2. 347 S.W.2d 178 (Mo. 1961) (en banc).

3. 346 S.W.2d 219 (Mo. 1961).

the dismissal of the action since this was not a deviation situation. Here the boy had departed from the road, traveled a path on private property a certain distance to the quarry maintained by the defendant, and thereafter had entered the water in the quarry.

In *Gruetzemacher v. Billings*,⁴ the plaintiff had entered defendants' premises to rescue a three year old child whose foot was caught on top of a fence and who was screaming to be helped. As plaintiff attempted to return to her adjoining premises by passing through the defendants' flower bed, she tripped over a stake which the defendants had placed there to protect flowers. Her cause of action was based on the theory that, in entering the premises of the defendants to rescue a child who was playing with the defendants' children, she occupied the status of invitee. This presented a question as to the status of one who enters the premises of another to rescue one in peril. The plaintiff did not contend that she was on the premises for the business benefit of the possessors. Verdict and judgment were for the plaintiff, but the trial court, on defendants' motion, set aside the verdict and judgment for the plaintiff and entered judgment for the defendants. On appeal, this action was affirmed. The appellate court did not have to pass upon the status of the rescuer, but based the decision on the ground that, even if the plaintiff occupied the status of an invitee when she entered, she did not occupy that status at the time she was returning to her own lot by undertaking to walk through the defendants' flower bed. Only a few feet further she could have crossed on the lawn area. The court found no evidence which tended to show that the area used as a flower bed was ever intended for use as a walkway or passageway between the two buildings. In returning to her own property, she could not reasonably be expected to walk through the flower bed, when better and safer ways were easily available. At that time her status as to existing conditions on the premises was no greater than that of a licensee; hence the defendants owed no duty to make safe or to warn of the danger of tripping over the stake.

Although the injuries were sustained in Arkansas, no Arkansas case was cited or found involving the liability of a possessor to an adult trespasser, where the employees of a railroad, with actual knowledge of the presence of the plaintiff trespasser, injured him by an affirmative act of negligence involving the use of an inherently dangerous explosive. The Mis-

4. 348 S.W.2d 952 (Mo. 1961).

souri court, in *Stevens v. Missouri Pac. R.R.*,⁵ instead applied its own precedents and affirmed a verdict for the plaintiff trespasser. The railroad employees had found some dynamite caps among trash which they were burning. Plaintiff had been standing nearby and his presence was known to the employees engaged in the burning. The court held that where a possessor maintains and handles extremely dangerous explosives, a duty to exercise reasonable care exists, irrespective of the fact that the status of the person may be that of a trespasser. This exception to the rule of nonliability to trespassers "is fully applicable to adult trespassers where the activity which a possessor of land carries on upon the land is such that unless carefully carried on it is likely to cause death or serious bodily harm, and he has actual knowledge that a trespasser is on the premises at some point made dangerous by the conduct of the activity."⁶

2. Automobiles

The dilemma of a motorist whose automobile had skidded, while still daylight, on icy pavement and had come to rest blocking most of one lane, was presented in *Eastman v. Brackman*.⁷ There is a duty not to obstruct the traveled portion of a highway with one's car, which means that if one does so he has a duty to remove it as promptly as reasonably possible. At the same time, there is a duty to warn approaching motorists of the hazard which has been created on the traveled portion of the highway. A motorist cannot do both, and a question may arise as to which duty is to be performed first. In the instant case the plaintiff contended that the defendant, after slipping from the pavement, knew she was helplessly bogged down, and that she should have abandoned the car and gone immediately to the top of the hill to warn oncoming drivers of the danger below. The defendant knew she needed traction to move her car and believed she had the means to supply it in the form of wire mesh skid pads designed to give traction to automobiles on icy surfaces. In addition, she had a sack of sand, and was attempting to get it from the trunk of the car when an approaching motor vehicle, seeking to stop, also skidded on the ice, causing it to collide with the truck in which plaintiff was a passenger and which had stopped to render assistance to defendant. It was not contended that the defendant was negligent in permitting her car to slide from the pavement.

5. 355 S.W.2d 122 (Mo. 1962).

6. *Id.* at 129.

7. 347 S.W.2d 126 (Mo. 1961) (en banc).

Under all the circumstances—the fact that it was still daylight and the range of visibility was reasonably good, that the average grade for a distance of 200 feet from the crown of the hill was a little over four per cent, that the defendant believed that she had the means with her to obtain the needed traction in order to move her car, and that she lacked warning devices to place on the highway—the court en banc found that she was exercising diligence in doing all that could reasonably be expected. A judgment for the defendant was affirmed.

One who acts, even though gratuitously, may thereby become subject to the duty of acting with reasonable care as to foreseeable risks. Thus a driver of a motor vehicle who gratuitously undertakes to signal the driver of another motor vehicle may be liable for the consequences if in giving the signal he does not exercise the highest degree of care. This standard of conduct was applied in *Miller v. Watkins*,⁸ an action against the driver of a school bus for the wrongful death of a seven or eight year old boy who dashed into the street and was struck by a truck as the latter was passing the school bus. The bus was stopping to pick up the boy, who was running toward the highway to board the bus. The defendant knew that the boy on previous occasions had run out into the highway to board the bus without looking for traffic, but did not see the boy on this occasion. The boy's view of traffic approaching from the direction of the truck was partially obstructed by a car in a driveway parked eight to twelve feet from the pavement, and by four mailboxes three or four feet from the edge of the pavement. The driver of the school bus had come to a stop with his lights flashing but had not lowered the cross arm stop sign. After observing the approach of the truck, when the two vehicles were 175 feet apart, the defendant bus

8. 355 S.W.2d 1 (Mo. 1962). The judgment for the defendant in the trial court was reversed and the case remanded for a new trial due to a burden of proof instruction which required proof of negligence to a reasonable degree of *certainty*: The Court instructs the jury that in considering the evidence in this case as to whether any defendant was guilty of negligence as defined and submitted in these instructions, you are not at liberty to resort to guesswork, speculation or conjecture, but you must be governed by all the facts and circumstances in evidence and the instructions of the Court, *and if*, under the evidence and the instructions of the Court, *you are unable to determine with any reasonable degree of certainty whether a certain defendant was guilty of negligence* as defined and submitted in these instructions, *then the plaintiffs would not be entitled to recover against said defendants and your verdict must be in favor of that defendant*; and in this connection, the Court instructs you that under no circumstances are you to be swayed or influenced by bias, prejudice or sympathy, for or against any party to this action. (Criticized portion italicized by the court.)

driver made a gesture with his hand, motioning the driver of the approaching truck, who was slowing down, "to come on through." He motioned twice more when the vehicles were 150 feet apart, and the driver of the truck proceeded to go on through, accelerating his speed slightly. The driver of the truck did not observe the boy running straight toward the highway, "as fast as he could," until it was too late to prevent the boy from crashing into the side of the truck. The truck driver's view had also been obstructed by the parked car and the row of mailboxes. It was held that the jury could reasonably find that signaling and waving the truck driver through under these circumstances involved a foreseeable risk to the boy, which the driver of the school bus would not have taken in the exercise of the highest degree of care.

Although the automobile cases based on a theory of negligence continue to constitute a large share of the torts cases before the court in the period under review, few new questions of liability were presented. The appeals were usually predicated on alleged errors in instructions, which cannot be treated adequately in a limited survey of this nature.

3. Carriers

In *Hahn v. Terminal R.R. Ass'n of St. Louis*,⁹ an action was brought under the Safety Appliance Act for injuries sustained by a plaintiff who fell from defendant's boxcar when it collided with another car on an industrial siding as the result of an inefficient handbrake. Whether the defendant was liable under the act turned on whether the boxcar was being used on the defendant's line at the time of the injury. The track where the accident occurred was on land owned by an industry, but the railroad company had been granted the exclusive right to enter on the land for the purpose of constructing, maintaining, and operating over the tracks located there. The railroad owned the ties and rails and, under the agreement with the industry served, had the duty to maintain the track. Under this agreement the industry's employees moved boxcars on the track for the purpose of unloading. Plaintiff was an employee of the industry. It was held that the track did not cease to be an integral part of the defendant's line simply because the industry's employees moved the cars for the purpose of unloading; in moving the cars to and from the unloading point on the defendant's track, the employees only assisted the defendant in the movement of cars on its

9. 355 S.W.2d 867 (Mo. 1962).

line. The court distinguished the case from those where an industry's employee was injured while moving railroad cars on tracks owned by the industry, in which the court treated the system of tracks on the industry's property as though it constituted a private railroad system. Judgment for the plaintiff was affirmed.

4. Municipal Corporations

Under the law of Missouri it is the duty of a city to exercise ordinary care to keep its streets in a reasonably safe condition for travel. The city is also liable for torts arising out of acts of its employees engaged in maintaining or repairing the streets to make them reasonably safe for travel. In *Myers v. City of Palmyra*,¹⁰ the action was for injuries sustained by a pedestrian when he was struck by a city-owned tractor which was being operated by employees of the city to remove accumulations of snow from the streets to make them passable for traffic. The defendant sought to classify this activity as a governmental function so that the doctrine of immunity for torts would apply, based on Missouri decisions which hold that the cleaning of streets by a municipality is for the protection and preservation of health—in the instant case by enabling the sick to get medical assistance and provisions necessary to preserve health. The trial court dismissed the petition and entered summary judgment for the defendant. On appeal by the plaintiff, it was held that "the removal by a municipality of accumulations of snow from its streets, when not done primarily for purposes of sanitation and the health of the community, constitutes a maintenance of the streets in furtherance of the general duty of a city to maintain its streets in a reasonably safe condition for travel."¹¹ Thus the immunity doctrine was not applicable. "The fact that from the activity of removing snow to make the streets passable there may be an incidental benefit to the health of the community is not controlling."¹²

5. Electricity

Suppliers of electricity are held to exercise the highest degree of care to keep their wires in such condition as to prevent injury to others who lawfully may be in close proximity to those wires. Whether the defendant, in the exercise of the highest degree of care, should reasonably have an-

10. 355 S.W.2d 17 (Mo. 1962).

11. *Id.* at 20.

12. *Id.* at 19.

anticipated that someone lawfully in the area was likely to be injured as a result of contact with high-voltage wires, was presented in *Erbes v. Union Elec. Co.*¹³ and *Carey v. Crawford Elec. Co-op., Inc.*¹⁴ In the former case it was held that the plaintiff made a submissible case for injuries sustained when a cable he was holding came in contact with the defendant's uninsulated, overhead transmission line. The cable was attached to a crane which was being used on a construction project. The evidence made a jury question as to whether the defendant electric company, in the exercise of the highest degree of care, should have foreseen a reasonable likelihood that some persons engaged in constructing a building would be injured as a result of the nature and location of its power line. The judgment for the plaintiff was affirmed. On the other hand, in the latter decision, under appropriate instructions for the defendant, the jury found that two wires, carrying high voltage electric current and extending twenty-two and twenty-six feet above the ground, were constructed at such height that the defendant, in the exercise of the highest degree of care, could not reasonably have anticipated that plaintiff's decedent would come in contact with the wires when he was assisting in the installation of a roof television antenna system on a farm home.

6. Imputed Negligence

All joint adventurers are liable for personal injuries suffered by others as a result of negligence in the maintenance of premises, including instances in which the actual negligence is that of some, but not all, members of the joint adventure. In *Pigg v. Bridges*,¹⁵ the question was whether an insurance group and its district agent had engaged in a joint adventure while conducting a formal opening of a district office, in determining liability to an invitee at the reception for injuries sustained when the invitee fell down the cellar stairway. The contractual undertaking between the insurance group and its district agent expressly provided that "Nothing contained herein is intended or shall be construed to create the relationship of employer and employee."¹⁶ However, this was held not to be decisive of the relationship in the staging of the formal opening of the district office. A representative of the insurance group had inspected and had approved the office selected by

13. 353 S.W.2d 659 (Mo. 1962).

14. 347 S.W.2d 184 (Mo. 1961).

15. 352 S.W.2d 28 (Mo. 1961) (en banc).

16. *Id.* at 31.

the district agent. He had also advised the district agent that the insurance group had a regular form of advertisement, publicizing the formal opening and inviting the public to attend, which was usually placed in the newspapers. This advertisement was run in a local paper and the cost was divided between the insurance group and the district agent. In various places in the advertisement the names of both appeared. In extra large block letters above a plate-glass window of the building were the words "Farmers Insurance Group." This and a sign hanging above the door in the form of the official insignia of the group were suggested or furnished by the group. The court en banc found, on appeal, that the evidence would support a finding of joint adventure between the insurance group and the district agent in conducting the formal opening of the district office, and that the general public was invited there primarily to induce the public to do business with the insurance group, through the district agent, under policies issued by the group. The planning, advertising, participating in, and sharing of the expense of the formal opening of the district office was held to warrant a finding that the defendants were active participants as joint adventurers in carrying it out for the profit of both, thus making those attending the opening invitees of both parties.¹⁷

The question in *Hume v. Crane*¹⁸ was whether the petition stated a cause of action by one of the occupants of a car against the owner, who was riding in the front seat beside the alleged negligent driver, where all of the occupants were on a joint enterprise. The driver at the time of the accident was the husband of the plaintiff. The accident occurred in New Mexico, where the law provides that a wife does not have a cause of action against her husband for personal injuries sustained during coverture through his negligence. Therefore, under New Mexico law, plaintiff's earlier action for damages against the administrator of her husband's estate failed. The present action against the son-in-law, the owner of the car, who was riding

17. When the appeal was in division one, the case was submitted under the doctrine of respondeat superior but the plaintiff did not brief his contention that the case was submissible on the theory of joint adventure. In division one the judges were unable to agree on the precise legal relationship between the insurance group and the district agent. The court en banc, in affirming the trial court's order granting the plaintiff a new trial, held that the plaintiff was not precluded from amending his petition so as to try his case upon the theory of joint adventure, which under the evidence made a submissible case; and "that upon transfer to the court en banc plaintiff, as respondent, under the circumstances here shown had the right to brief defendants' liability under the latter theory and to seek remand for trial upon that theory." *Id.* at 34.

18. 352 S.W.2d 610 (Mo. 1962).

in the front seat with his father-in-law when the automobile left the pavement and overturned, was predicated on the theory of imputed negligence of the driver to the defendant. It was held that the doctrine of imputed negligence did not apply as between the parties to a joint enterprise. To do so would permit one member of a joint enterprise to charge another member, who was without fault, with the negligence of a third member of the enterprise. Here the negligence of the driver, if imputed to the owner of the car, should by the same reasoning be likewise chargeable to the plaintiff, who was also a member of the joint enterprise.

7. Humanitarian Negligence

The decisions predicated on the humanitarian doctrine are not included in this survey, but will be covered separately in a subsequent issue of the *Review*.

B. *Res Ipsa Loquitur*

Two 1962 decisions, when studied together, contain an instructive analysis of the question of whether the plaintiff may go to the jury on the doctrine of *res ipsa loquitur*, although his evidence tends to show the specific cause of the accident. That is, by introducing evidence tending to show the specific acts of negligence, is the plaintiff held to have abandoned the inference of negligence which arises in a *res ipsa loquitur* situation?

In *Hornberger v. St. Louis Pub. Serv. Co.*,¹⁹ defendant's bus, on which the plaintiff was a passenger, collided with a private vehicle. She submitted her case on *res ipsa loquitur* against the company and on specific negligence against the operator of the private vehicle. Under Missouri law, the passenger in this situation is given the benefit of the doctrine in making out a *prima facie* case of negligence against the carrier, even though the defendant is not in sole control and management of the agencies involved. As a part of her case she used the admissions of the operator of the private vehicle. The carrier contended that these admissions repelled any inference of negligence on the part of the bus operator or, at least, showed a situation justifying a reasonable inference that the accident was due to a cause other than its negligence. This evidence showed that the private vehicle involved had crossed the center line prior to the collision and was on the wrong side of the street at the time of the impact. The court recognized that

19. 353 S.W.2d 635 (Mo. 1962).

plaintiff's evidence might have supported either an inference that the private vehicle skidded onto the wrong side of the street due to ice, or that it was there due to negligent operation by the driver of the car. However, this evidence was not thought to have been developed to the point where it proved conclusively that the driver of the bus was at all times in the exercise of the highest degree of care. It was pointed out that this evidence did not show the location of the bus at the time the private vehicle crossed the center line, the relative positions of the two vehicles at the time of the collision, whether the private vehicle was stopped prior to the impact, the speed of the bus as it approached, or the traffic conditions. Thus, plaintiff's evidence did not repel a reasonable inference of the operator's concurring or contributing negligence, and did not preclude the plaintiff from submitting her case against the carrier on the *res ipsa loquitur* doctrine.

The same problem was before the court in *Stevens v. Missouri Pac. R.R.*,²⁰ where the plaintiff received injuries on the defendant's premises when refuse of a bunk car was thrown into a fire near where plaintiff was standing, resulting in an explosion. His evidence showed facts and circumstances from which the jury could infer specific negligence on the part of defendant's employees. The court pointed out that an inference could be drawn that someone had negligently left dynamite caps in the material burned, and that the employees were negligent in not warning the plaintiff, or in not inspecting the refuse before removing it from the bunk car, or in throwing it on the fire without inspecting it, when they should have known or suspected that it contained explosives. But this did not indicate the specific act of negligence, although it may have tended to show the specific cause of the accident. The specific act of negligence was still uncertain, for the evidence did not

clearly etch and outline the precise and specific act of negligence that caused plaintiff's injuries, as to exclude all doubt as to the true cause of the occurrence. Plaintiff's proof did not show precisely where the dynamite caps came from, or that they came out of the bunk car, or by whom they were handled, or that they were in old clothing, shoes or containers thrown onto the fire, or that they were thrown onto the fire.²¹

It was observed that these caps may have been lying on the ground before the fire was started. After plaintiff's evidence was in, the issue was still

20. *Supra* note 5.

21. *Id.* at 130.

in doubt as to where the caps came from, and therefore plaintiff was entitled to go to the jury on the *res ipsa* doctrine.

C. *Defenses in Negligence Cases*

The application of well-settled principles of defense in negligence cases was found in a few fact situations of interest. In *Gitterman v. Danella*,²² the owner of a furniture store had made arrangements to have the defendants spray the store periodically for the purpose of exterminating vermin and insects. At the time of the arrangements she had specifically inquired whether the spraying would be dangerous to people in the store and was assured by a representative of the exterminators that it would not. While seated in one of the rooms of the store watching television, she saw a man spraying other rooms, could smell the spray, and knew the purpose of the spraying. When the exterminators reached the room in which she was sitting, she was not requested to leave or change her position; hence she remained seated while the spraying continued for about fifteen minutes. She remained seated for thirty minutes to an hour after the spraying of this room was completed, when she became nauseated and otherwise ill. She was taken to the hospital, where she remained for over two months. After verdict by the jury for the defendants, the trial court awarded plaintiff a new trial, which was affirmed on appeal, on the ground that an instruction which authorized a finding for the defendants if the jury found that the plaintiff, by continuing to sit in the room during spraying, failed to exercise ordinary care for her own safety, was fatally defective in failing to require the further finding that plaintiff knew or in the exercise of ordinary care should have known that to remain seated under such circumstances would likely cause some injury to her.

The duty of a motorist contemplating the making of a left turn was before the court in *Myers v. Searcy*.²³ Plaintiff's action was for injuries sustained when an overtaking automobile driven by the defendant collided with the automobile driven by the plaintiff, as the latter was making a left turn at a street intersection. Defendant's car was second in line behind plaintiff's car and had pulled out to the left to pass the other two cars. There was evidence that defendant's automobile was already on the left side of the street and about fifty feet to the rear when plaintiff started

22. 356 S.W.2d 52 (Mo. 1962).

23. 356 S.W.2d 59 (Mo. 1962).

his left turn. By that time defendant was unable to stop his car before it collided with the left door of plaintiff's automobile. On appeal from an order of the trial court sustaining plaintiff's motion for a new trial on the ground that error had been committed in giving defendant's instruction, the court observed that the questioned instruction was somewhat unusual and that no case had been found in which a similar instruction had been given. It read as follows:

The court instructs the jury that it was the duty of plaintiff to exercise the highest degree of care to keep a lookout to avoid turning into the path of other vehicles being operated on 63rd Street. Therefore, if you find and believe from the evidence that the plaintiff saw or by the exercise of the highest degree of care could have seen defendant's automobile approaching and passing, if so, in time to have stopped his automobile and thereby have avoided the collision, if so, but that plaintiff negligently failed so to do and if such negligence directly caused or directly contributed to cause the collision, if so, then your verdict must be for the defendant.²⁴

In finding that the instruction was not prejudicially erroneous, the court held that a motorist intending to make a left turn at an intersection is under a duty to keep a lookout for oncoming vehicles and also for vehicles which may be following him, and that this duty exists even if the driver of the overtaking vehicle is attempting to pass within 100 feet of the intersection, in violation of a statute.

II. POSSESSORS OF ANIMALS

Infrequently do cases involving liability for personal injuries from animals reach the highest court. Two recent decisions indicate, however, that strict liability applies against the possessor of domestic animals for injuries caused to others, where the possessor knew of the propensity of the domestic animal to harm. In each case the plaintiff recovered a very substantial verdict for damages. In *Dansker v. Gelb*,²⁵ plaintiff's injuries were sustained when she, a social guest, was caused to step backwards to the edge of the basement stairs and to fall down the stairs, when defendant's large dog raised up on his hind legs and lunged at the plaintiff. There was no evidence that the dog touched plaintiff. There was ev-

24. *Id.* at 62.

25. 352 S.W.2d 12 (Mo. 1961).

idence that prior to the occasion in question the dog had lunged at a neighbor, who injured his back in jumping to avoid the dog, and that garbage men were afraid of the dog. It was held that the defendant's evidence showed that she possessed knowledge of the viciousness of the dog, and that "whether the dog lunged or jumped at people out of anger or viciousness or out of playfulness is immaterial so long as the defendant had knowledge of the fact that the dog had a tendency through its actions to injure persons."²⁶

*Humes v. Salerno*²⁷ was an action for injuries sustained by the plaintiff when he was bitten by defendant's race horse while exercising the horse for the defendant. The evidence was held to sustain the finding by the jury that the horse was vicious and that the defendant knew of its propensity to injure persons.

III. RELEASES

The question in *Spencer v. Bradley*²⁸ was whether the execution of a partial release to parties named therein also constituted an appropriation by a widower of the entire cause of action for his wife's wrongful death, not only as to the alleged tort-feasors named in the release, but also as to all other persons who might be properly charged with the alleged wrongful death. The action was brought by the minor children for the wrongful death of their mother, alleging that their father, as the surviving spouse of the deceased, did not, by executing a partial release to some, but not to all, the alleged tortfeasors who were responsible for his wife's death, appropriate or extinguish the balance of the claim against a tortfeasor not included in the release. Because a right of action was specifically reserved against the defendant, it was contended that the unused right of action under the Missouri Death Act vested in the deceased's minor children after the surviving spouse's period for bringing his action had expired, and that each wrongdoer was liable to each proper party, in his turn, for the whole period of the act's statute of limitations, unless effectively released by suit or other appropriate means. The defendant's position was that the act provides for a single right of recovery for death; that during the first six months following the death of the wife and mother this right of recovery

26. *Id.* at 16.

27. 351 S.W.2d 749 (Mo. 1961).

28. 351 S.W.2d 202 (Mo. 1961).

was vested exclusively in her surviving husband; that during this period the husband appropriated this right of recovery by executing the partial release to persons named in the release; that having so appropriated the right of recovery during such period, he appropriated the right as against any and all other tortfeasors; and, therefore, that no right of recovery passed to the children at the end of the six months' period. In affirming, on appeal, the action of the trial court which had sustained defendant's motion to dismiss the petition, the court held that the right of action being single, the appropriation of it by executing a partial release constituted an appropriation of the entire cause or right to sue, not only as to the alleged tortfeasors named in the release but also as to all other persons who might properly be charged with the alleged wrongful death.

Apparently before the court for the first time was the question whether a release of an employee's liability for tort operated to release the employer, where the plaintiff's claim against the employer was based on the theory of respondeat superior. In *Max v. Spaeth*,²⁹ a car driven by the plaintiff collided with a truck owned by the defendant and driven by his employee. The employee had sued the plaintiff for negligence, but the suit was dismissed by a stipulation of dismissal which stated:

All of the matters and things in controversy in the above entitled cause having been adjusted, compromised and finally settled, it is hereby stipulated and agreed, by and between plaintiff and defendant, that this cause shall be dismissed with prejudice to any other or future action on account of the matters and things contained and set forth in plaintiff's petition, and that court costs shall be paid by defendant.³⁰

The trial court entered judgment for the employer on his motion for summary judgment. On appeal by the plaintiff to the supreme court, it was held that the settlement of the employee's tort action against the plaintiff, in which plaintiff agreed without any qualification that "all matters and things in controversy" had been adjusted, "compromised and finally settled," operated to bar all rights plaintiff might have had to sue the defendant's employee on any claim based on his negligence, and also released her claim, based on the theory of respondeat superior, against the employer. Although not citing any previous Missouri case involving similar facts, the court

29. 349 S.W.2d 1 (Mo. 1961).

30. *Id.* at 2.

observed that, "Certainly the same rule should apply when the question of a servant's liability is finally determined by a release as when it is determined by verdict."³¹

31. *Id.* at 3. Additional facts in the case showed that the plaintiff had also filed suit against the defendant employer, who then had filed a counterclaim for damages to his truck and an answer alleging contributory negligence. After plaintiff had filed a reply to the counterclaim, a stipulation of dismissal was filed, which stated:

All of the matters and things set forth in the defendant's counterclaim having been adjusted, compromised and finally settled, it is hereby stipulated and agreed by and between plaintiff and defendant that defendant's counterclaim shall be dismissed with prejudice to any other or future action on account of the matters and things contained and set forth in said counterclaim; that court costs shall abide the disposition of plaintiff's cause of action and that plaintiff's cause of action shall remain on the docket of pending causes in this Court, without prejudice.

Id. at 2. The court held that by filing the counterclaim and dismissing it the defendant employer did not concede that the plaintiff had any meritorious claim against him, and was not estopped from asserting the claim of release, even though the stipulation for dismissal of his counterclaim stated that the plaintiff's cause of action against the employer was to remain on the docket without prejudice.