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## Torts (1959-1967)

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# Torts

7. Flathead, an employee of the Grubb Coal Co., was operating a company truck between Madison and Sperryville. While traveling east on the two-lane highway he stopped his vehicle to converse with Rumbum, a local farmer whom he saw walking beside the road. When he stopped his vehicle, he pulled only partially off of the traveled portion of the highway, even though there was ample space for him to have pulled completely off of the road. While his vehicle was in this position it was sideswiped by a Stutz Bearcat driven by Deadbeat, who was also traveling east. After striking the truck, the Stutz Bearcat ricocheted across the highway into the west-bound lane where it collided head-on with a west-bound motorcycle operated by Innocent. The evidence indicated that Deadbeat had had an unobscured view of the parked truck for almost 600 feet as he approached it down the highway. The day was clear and the road was dry. Innocent has instituted an action against Deadbeat and the Grubb Coal Co. The company consults you as to its liability. What should you advise?

(TORTS) The Coal Company is not liable. Where a second tort-feasor should be aware of the existence of a potential danger created by the negligence of an original tort-feasor and thereafter by an independent act of negligence brings about an accident, the condition created by the original tort-feasor becomes merely a circumstance of the accident and is not a proximate cause thereof. See 173 Va.448, 3 S.E. (2d) 397 on p.1021 of Torts in these Notes.

8. Hamfat, a Tidewater rancher, was the proud owner of a spotted hog, Sidney. One moonless night Sidney disappeared. Hamfat immediately suspected Cornpone, a local tramp with a reputation for barnyard thievery. He sent his nephew, Bullhead, to search for Cornpone and Sidney while he called the Sheriff. While hunting for Cornpone, Bullhead was informed by Blab that Seedy, another tramp, had been seen carrying a spotted hog. Bullhead went immediately to the railroad yard and there found Seedy with a hog that fit Sidney's description. Although Bullhead had never seen Sidney he correctly surmised that he had found the thief and he immediately hustled the protesting Seedy off to jail. Meanwhile back at the ranch Hamfat had contacted Fosdick, a relentless deputy sheriff. Informed of Hamfat's suspicions concerning the loss of his valuable hog, Fosdick went to Cornpone's shack where he surprised Cornpone in the midst of a roast pork dinner. Cornpone denied any knowledge of the theft and refused to accompany Fosdick since the latter had no warrant for his arrest. Fosdick then seized the reluctant Cornpone by the arm and escorted him to jail. There he discovered that Seedy had already confessed to the act.

Prior to the filing of formal charges, it became necessary to determine the monetary value of Sidney. Much to Hamfat's dismay, it was determined that Sidney was worth only \$45 on the current market. The case was disposed of accordingly, Seedy entering a plea of guilty.

(a) Cornpone consults you in regard to his chances of success in an action for illegal arrest against Fosdick. How would you advise him?

(b) Seedy consults you in regard to his chances for success in an action for damages for illegal arrest against Bullhead. How would you advise him?

(TORTS) Under the Code(V#18-165) stealing a hog is a felony regardless of the value thereof. Since a felony actually had been committed and since Bullhead reasonably believed that Seedy had committed it, the arrest of Seedy by Bullhead, a private person not an officer, was privileged.

As to Fosdick who was an officer of the law, if he reasonably believed that a felony had been committed and that Cornpone was the guilty party his arrest of the latter was also privileged. (Whether or not such a belief was a reasonable one under the facts of this case can be argued either way).



9. Dimwit pulled out of his driveway onto Peachtree Street without stopping and without looking in either direction. After his vehicle had reached the street he noted a vehicle approaching at a very high rate of speed from his left. Dimwit turned his wheels sharply to the right and accelerated his car as much as possible in hopes of outdistancing the approaching car before it struck him. In so doing he lost control of his own car and swerved across into the opposite lane of traffic where his vehicle struck that of Indignant. In an action by Indignant against Dimwit to recover damages, Dimwit asks for an instruction on sudden emergency.

Should this instruction be granted?

(TORTS) The instruction should not be given. One who is himself to blame for the sudden emergency cannot invoke the doctrine for he was negligent in getting into such a position in the first place. See 192 S.E.800 on p.1003 of Torts in these Notes

859  
10. Bloom was the operator of a motion picture theatre. Doom was the owner of an adjacent building. A fire, originating in Bloom's theatre burned down both the theatre and the adjacent building belonging to Doom. The fire was so severe and the damages so extensive that there was no evidence as to the cause of the fire.

May the doctrine of res ipsa loquitur be invoked by Doom in an action against Bloom to recover damages caused by the fire?

(TORTS) No. The fire may or may not have been caused by the negligence of Bloom. It may have been due to an act of God, spontaneous combustion, the act of a pyromaniac, a carelessly thrown cigarette, defective wiring, etc., etc. The doctrine of res ipsa loquitur only applies to those situations in which accidents rarely occur unless defendant has been negligent. See 189 Va.948 on p. 1015 of Torts in these notes.

D 59  
8. Zedd Rux, the overly protective father of Doris Rux, specifically instructed her fiancée, Boris Tanner, to have Doris home by 9:00 o'clock p.m. As the deadline approached, and the couple had not returned, Rux became greatly exercised and took down his shotgun and stationed himself on the front porch. At 9:15 p.m. the couple drove up to the house in Tanner's car, and Rux immediately ran down to the car and began to shout indignities to Tanner and to brandish the gun menacingly. Tanner, afraid for his safety, quickly discharged Doris and drove off rapidly in the car. As he did so, Mrs. Zedd Rux shouted excitedly from the porch, "Shoot him, Zedd!"; whereupon Rux fired a shot at the disappearing car, which damaged its rear end.

In an action for property damages against Zedd Rux, judgment was entered in favor of Tanner for \$100, the cost of repairing the car, but execution thereon was returned "no effects". Tanner then learned that Mrs. Rux owned property in her own name, and he instituted an action by motion for judgment against her for damages for the same occurrence, alleging the above facts.

Mrs. Rux filed (1) a special plea alleging that the judgment against Zedd constituted a bar to the action against her; and (2) a demurrer to the motion for judgment.

How should the court rule: (1) on the special plea; (2) on the demurrer?

(TORTS) (1) The court should rule that the special plea is invalid. Mr. and Mrs. Rux are joint tortfeasors in that Mrs. Rux was present urging and abetting her husband in the tort. A judgment against one joint tortfeasor is not a bar to an action against the other joint tortfeasors unless it has been satisfied by express statutory provision (V#8-368). (2) The demurrer should likewise be overruled because one present and encouraging the commission of a tort is just as liable as the person who commits the requested wrong. See Prosser on Torts (2nd Ed) p.234.



D 59

9. Joe Johnson, a student in college in Charlottesville, had returned to his home in Norfolk for a short vacation and decided to seek diversion at Virginia Beach. He invited his friend Sam Stiles, an insurance adjuster, to accompany him in Johnson's car. Stiles pleaded that he was entirely too busy to take the time off from his work, but that he had promised a visit to his elderly grandmother, who resided near Virginia Beach, and that if Johnson would stop briefly at the grandmother's home, he would then go on to Virginia Beach with Johnson. Johnson then bought 50 cents worth of gasoline at a filling station and Stiles offered to pay

25 cents of it, which offer Johnson accepted.

At a curve on the open highway near Virginia Beach, in a 45-mile per hour speed zone, Johnson was driving at a speed of 50 miles per hour, when his car struck an oily spot which was not visible to him. The car skidded off the highway, struck a tree, and Stiles was injured.

Stiles asks your advice as to whether the above facts give him a cause of action against Johnson. How would you advise him?

(TORTS) No, for two reasons. In the first place Johnson's negligence in going at a rate of five miles above the speed limit was not the proximate cause of the accident. but the slick oily spot for which he was not to blame. In the next place Stiles was a gratuitous guest. Paying 25 cents on the gasoline and stopping on the way to see Stiles' grandmother were mere social amenities rather than a bargained for contract. The only duty owed by Johnson was not to be grossly negligent, and he did not violate that duty. See Headnote 2 to 194 Va.541.

9. <sup>560</sup>Miss Jarvis, an elderly spinster of excellent moral character, took a prominent part in civic affairs and led a crusade against a rather wide-open night spot. One of the performers, commonly known as "The Complete Stripper," took offense at this activity, and at one of the performances said: "Old Jarvis is just jealous, and if she had anything worth seeing she might try to show it, but who wants to look at her." This statement was so loudly applauded by the audience that the proprietor printed it in the programs which were distributed at subsequent performances.

Miss Jarvis consults you as to any right of action she may have against Stripper or the proprietor, telling you that of course she hasn't suffered any pecuniary loss but she wants these people to be made to pay for their acts.

How ought you to advise Miss Jarvis(a)with respect to Stripper and (b) with respect to the proprietor?

(TORTS)One answer: A suggestion that a virtuous woman, if she were pretty, might take off her clothes in public, is insulting. Under the Virginia statute of insulting words no damages need be shown. Hence Miss Jarvis has an action under that statute against Stripper and the proprietor.

Another answer:(a)The words used are so conditional that they are ridiculous rather than insulting. They do not constitute slander per se and there were no damages so Stripper is not liable.(b)In Virginia libel appears to be subject to the same limitations as slander and hence proprietor is not liable either. See 200 Va. 572. Note: It is arguable that proprietor has used Miss Jarvis' name for advertising purposes in violation of her statutory right to privacy and that she is entitled to general and also punitive damages under the statute. See V#8-650.



560  
10. Pedestrian, in daylight, while walking on the eastern sidewalk of Main Street, started to cross First Street from north to south at its intersection with Main. While walking between the cross-walk lines he was struck and killed by an automobile driven by Motorist in an eastern direction on First Street. At the time Pedestrian was struck he had almost completed his crossing and another step or two would have put him on the southern sidewalk. There were no traffic signals at this intersection, and the street was straight and the view unobstructed. Action was brought for damages and on the trial Motorist testified that he looked down Main Street for traffic and saw none; he then looked ahead on First Street and saw Pedestrian directly in front of him, that he applied his brake and cut to his left, but could not avoid striking Pedestrian. At the conclusion of the evidence, the

plaintiff requested, over defendant's objection, two instructions couched in appropriate language:

(a) One telling the jury that if Pedestrian started across First Street before Motorist entered the intersection, then Pedestrian had the right of way and it was Motorist's duty either to change his course, slow down, or come to a complete stop if necessary to permit Pedestrian to cross the street in safety, and

(b) The other, telling the jury that, on the issue of contributory negligence, Pedestrian is presumed to have exercised ordinary care for his own safety and that the burden is on the defendant to establish such negligence by a preponderance of the evidence. How ought the court to rule on each instruction?

(TORTS) Since these both correctly state the law they should both be given.

Note: Since these are not "finding instructions" they need only be complete as to points of law stated therein.

8. <sup>160</sup> Irma Impatient and Gussie Guest, while shopping in Norfolk, Va., decided to have lunch at the Tearoom of Department Store. They arrived at a Tearoom around 12:30 p.m., and found that there was not a very large crowd there. The hostess met them, led them to a table and seated them. The tables in the Tearoom are individual tables of standard design arranged in a row, and customers sit behind them on a long couch against the wall. In order to seat people behind the tables, the hostess customarily pulls the table out and then pushes it back when the customer is seated, as was done in this instance. The tables at which Irma and Gussie were seated had soiled dishes on them. After they had been seated for approximately half an hour without being served, Irma tried to attract the attention of a waitress but was unable to do so. She thereupon got up, turned to her right, caught her foot on the leg of the table, fell and broke her hip. Irma asks your advice as to whether she can recover from Department Store for her injuries. What would you advise?  
(TORTS) No. There was no negligence on the part of the Store. There was no defect. The situation was obvious. The Store was not an insurer of her safety. See 194 Va. 1011.

10. <sup>160</sup> Speedy Jones was driving his car down Highway #59 in a southerly direction at a rapid rate of speed on the night of April 28, 1960, at about 9:00p.m. The night was dark and there was a dense fog or mist. Speedy Jones ran into a car driven by Glen Sikes going in the same direction and pushed it to the left side of the road where it came to a stop. Jones' car ran on a distance of 100 yards from the point of impact and ran off the road and came to rest in a field. Ula Sikes, wife of Glen Sikes, who was a passenger in her husband's car sustained back injuries in this collision.

A car driven by Robert Todd, traveling in the opposite or northerly direction, stopped on the right side of the road beside the Sikes car and offered to take Mrs. Sikes to the hospital to get something done about the injuries to her back. While Todd, Ula and Glen Sikes were standing beside the Todd car, an automobile driven by Joe Woodward, traveling in a southerly direction, negligently struck the Todd car, glanced off and struck Ula Sikes, breaking her right leg in two places. The Woodward car then crashed into the Sikes car.

Ula Sikes consults you as to whether Speedy Jones can be held responsible for the injuries she received in both accidents. How should you advise her?

(TORTS) No. Jones' negligence had spent itself completely. The negligence of Woodward was the sole proximate cause of the second accident. See 168 Va. 38.



9. Prosperous Jones is the owner of a large farm on Highway #58 in Henry County, Virginia, consisting of land and valuable improvements such as mansion house, barns and other outbuildings. The State Highway Department of Virginia leased a portion of an adjoining farm owned by Red Barker, and is now operating, through the Highway Department's agents and employees, a stone quarry to supply rock for the construction of public roads. In the operation of this quarry frequent blasts with dynamite have to be made, which throw large chunks of rock and debris onto the premises of Prosperous Jones, damaging some of his outbuildings, and his tenants have complained that the property is unsafe to be farmed while the stone quarry is in operation.

Prosperous Jones consults you as an attorney as to whether he may maintain an action by motion for judgment against the Highway Commissioner of Virginia for damages because of the careless, reckless and wanton operation of the quarry by the employees of the State Highway Department. How would you advise Prosperous Jones? (TORTS) No. The State is not liable for its torts as we do not have a state tort claims act. The employees have the immunity of the State as long as they are acting within the scope of their authority. There is no evidence that the Highway Commissioner was participating personally in the acts complained of. If these acts amount to a taking of Jones' property his remedy is to mandamus the Highway Commissioner to bring condemnation proceedings. See 195 Va.655 on P.1 of the Torts Supplement Cases following p. 1047 of the Torts cases in these notes.

4. Pat Jockey, a frequent patron of the race tracks and a student of the art of deception, conceived the following plan for acquiring ownership of Bull Run, a valuable race horse, and winning the Virginia Derby, a race for two year olds, with a \$100,000 purse: He would contract to purchase Bull Run from Cy Trainer, promising to pay for the horse five days after the running of the Derby; and the day following the race he would sell Bull Run for such price as he could get, pocket his winnings, if any, and leave for parts unknown, without paying the agreed purchase price. Without disclosing his intentions to Trainer, Jockey procured from Trainer a written contract by the terms of which Trainer sold to Jockey his horse, Bull Run, for the sum of \$20,000; \$1,000 of which was then paid in cash, and \$10,000 was to be paid five days after the running of the Virginia Derby. The contract provided that immediately upon the signing thereof, title to the horse should pass to Jockey. The contract was signed and Jockey acquired possession of the horse. Two days before the Derby, Trainer was told by Jack Skeeter that since the sale he had had an opportunity to observe Bull Run in one of his early morning workouts and that his speed was phenomenal and that the horse should easily win. Skeeter further told Trainer that he overheard Jockey tell Confidant of his plan to sell the horse after the race and leave without paying the purchase price. Trainer promptly tendered to Jockey the \$1,000 he paid and demanded the return of the horse to him. Jockey refused. Trainer immediately consults you and inquires whether he may recover possession of the horse. What would you advise?

(TORTS)(SALES) Yes, Trainer is entitled to bring a possessory action for the horse, or, since the horse is unique, he is entitled to rescind in equity, because of the fraud. When Jockey promised to pay for the horse he impliedly represented that he then had an intent to pay as promised. Whether or not he had such an intent is a present material fact about which Jockey has lied. Because of this fraud Jockey only got a voidable title which Trainer may avoid at anytime before Jockey sells to a bona fide purchaser for value.



856 Johnny and Freddie Butterworth, 8 and 6 years of age, respectively, lived in the City of Richmond. The two brothers took great pleasure in riding atop freight cars being shifted in the railroad yards along the south bank of the James River. They had been warned several times by Vigil, the yard watchman, to stay out of the yard and not to ride on the cars. On a warm afternoon during the month of May, and in spite of Vigil's warnings, Johnny and Freddie went to the yards after Johnny had returned from school, and climbed aboard one of the freight cars which was coupled to a switch engine. Vigil, who the boys thought was off duty, saw them and as the cars were being moved down the track he angrily yelled in a loud and piercing voice, "Get off that car or I'll throw you off." Vigil's loud yell surprised and frightened both the boys and, as they ran along the top of the car, Freddie tripped over a stanchion which was in plain view, fell to the ground and was seriously injured. Shortly thereafter Freddie, proceeding by his next friend, brought an action against both the railroad and Vigil in the Law and Equity Court of the City of Richmond asking damages of \$10,000.

In their grounds of defense, the railroad and Vigil asserted (a) that Freddie was a trespasser to whom was owed no duty, and (b) that, in any event, Freddie was guilty of negligence which barred his right to recover. Are these good defenses?

(TORTS) (a) Even if Freddie was a trespasser the defendants owed him a duty not to act negligently toward him after his presence was discovered. Vigil's sudden and unexpected outburst against children so young could be found by a jury to have been a negligent act for which he and his principal would be liable. (b) The rule in Virginia is that children under 7 are conclusively presumed to be incapable of negligence.

956 On the morning of August 6, 1958, Mrs. Shirley Williams was severely injured in an automobile accident which occurred in the City of Norfolk. Shortly after the accident she was taken from the hospital for examination to a laboratory operated in Norfolk by Dr. Albert Barr for the purpose of undergoing X-rays to determine the extent of injuries to her head. While the X-rays were being taken by Dr. Barr, he received an emergency telephone call which he answered and which caused Mrs. Williams to be subjected to the X-rays for a time far greater than was necessary. The X-rays indicating no skull fractures, Mrs. Williams was returned to the hospital from which she was discharged three weeks later. In December of 1960, Mrs. Williams began suffering from headaches which became progressively worse; and in January of 1961 she became blind. A subsequent examination showed that her blindness had been caused by a tumor of the brain. On June 14, 1961, Mrs. Williams brought an action against Dr. Barr in the Court of Law and Chancery of the City of Norfolk alleging that the negligence of Dr. Barr in X-raying her head for an unreasonable length of time had brought on her brain tumor and caused her blindness. Dr. Barr now consults you. He admits that he X-rayed Mrs. Williams an unnecessary length of time, and that this could have resulted in her blindness. On further questioning, he concedes that Mrs. Williams, prior to her loss of sight, had no way of learning she was suffering from a brain tumor, or learning its cause. Does Dr. Barr have any defense to the action?

(TORTS) Yes, the two year statute of limitations. Our Supreme Court of Appeals has held that the statute of limitations starts running in negligence cases as soon as the wrongful act is committed whether or not the plaintiff knows or should know that he has been injured. See 195 Va. 827 in the Pleading and Practice cases in these Notes, and 185 Va. 561 (the silicosis case) on p. 1033 of the Torts cases in these Notes.



9. <sup>Dale</sup> Frank Mankin operated a business in which he had six employees. Poinder, Dexter and Noble, three of his employees, were engaged to operate a machine which required skill and constant vigilance to avoid injury to the operators. Because of the temporary absence of Noble, Frank Mankin took his place at the machine and assisted in its operation. While the machine was in operation Mankin negligently stopped to light a cigarette and in doing so Poinder's attention to the machine was momentarily diverted. As a proximate result of the negligence of Mankin and Poinder, Dexter was injured. Dexter sued Mankin to recover damages. Mankin defended upon the ground that Dexter assumed the risk of negligence of a fellow-servant.

Is this a good defense?

(TORTS) No. Since there were less than seven employees and no steps had been taken by the employer to come under Workmen's Compensation, common law principles apply. At common law the employer himself cannot be a fellow servant. See 126 Va. 319.

10. <sup>Dale</sup> William Peyton for many years had purchased Grade A milk from the Green Dale Grocery Store. Peyton and his guest, Smith, became ill, and upon an examination by their doctor it was determined that their illnesses resulted from drinking the milk that had been purchased from the grocery store. It was determined that the milk was contaminated with germs of malta fever. Green Dale Grocery Store did not expressly warrant that the milk was fit for human consumption. Peyton and Smith employ you to sue Green Dale Grocery Store, if you determine that they have a good cause of action. What remedies, if any, do Peyton and Smith have against Green Dale Grocery Store?

(TORTS)(CONTRACTS)(SALES) Peyton may recover from Store as the latter impliedly warranted that the milk was fit for human consumption. But this implied warranty ran only in favor of Peyton as there is no privity of contract between Smith and Store. If Smith wants to recover he must prove negligence on the part of Store and there is nothing stated that indicates any such negligence. See Colonna v. Rosedale Dairy Co., 166 Va. 314. Note: In the light of general language in Swift v. Wells, the general tendency of the courts away from the necessity of privity, and the protection of the guest by the Uniform Commercial Code, Smith's case would not be hopeless.

Q. 10 on p. 546 (Sales) Smith may also recover. The Virginia adaptation of U.C.C. #2-318 reads as follows: "Lack of privity between plaintiff and defendant shall be no defense in any action brought against the manufacturer or seller of goods to recover damages for breach of warranty, express or implied, or for negligence, although the plaintiff did not purchase the goods from the defendant, if the plaintiff was a person whom the manufacturer or seller might reasonably have expected to use, consume, or be affected by the goods."

82 <sup>Pete</sup> Pete and Doris had been "dating" for some months, and Pete always called for her at her home in his automobile. Doris usually drove the automobile on these dates, as she enjoyed doing so. Pete considered her to be a careful driver. In March, 1962, Doris drove the car on such a date to a roadhouse, where Pete drank several beers, but Doris drank soft drinks. Afterwards, Doris was driving them towards her home in Prince William County, while Pete dozed. As Doris prepared to slow down to turn an intersection, she mistakenly stepped on the accelerator instead of the brake, the car went out of control, struck a light pole, and Pete was injured.

Pete sued Doris in the proper Virginia court, seeking damages for his injuries, and the above facts were proved without dispute at the trial. At the conclusion of the evidence, Doris moved the court to strike Pete's evidence, contending (1) that the facts proved did not constitute actionable negligence on her part, and (2) that Pete and Doris were joint venturers at the time of the accident. How should the court rule on each of Doris' contentions?

(TORTS) Neither of Doris' contentions is correct. A man cannot be a gratuitous guest in his own car so Doris owed Pete a duty of ordinary care and is liable for ordinary negligence. It is at least a jury question as to whether or not Doris was negligent. Since Doris did not have an equal right to control the car it was not a joint venture or a joint enterprise, and even if it were, she would still be liable if she negligently injured another party engaged in the same joint enterprise. See 170 Fed. Sapp. 143.



9. <sup>562</sup> Painter drove his truck north on Main Street in the town of Gaston, Va. On the side of the truck opposite the driver's side, Painter had tied a ladder thirty feet long. A town ordinance made it a misdemeanor to carry on the side of any vehicle a ladder which protruded beyond either bumper of the vehicle. As Painter passed through the intersection of Main and Eastern Streets, an automobile traveling east on Eastern Street struck the ladder where it protruded ten feet behind Painter's truck. The impact threw the ladder against the plate glass window of a store on the corner of the intersection, and Innocent, a customer inside the store, was injured by the broken glass.

In an action for damages by Innocent against Painter, the above facts were proven. At the conclusion of the evidence, Painter requested the court to instruct the jury that even if they believed he was guilty of negligence which proximately caused the accident, they should nevertheless return a verdict in his favor if they further believed that the injuries to Innocent were not reasonably foreseeable by him.

Should the court so instruct the jury?

(TORTS) The instruction should not be given. It is self contradictory because Painter could not be guilty of negligence proximately causing the accident if there was no element of foreseeability. It is sufficient to foresee that some one in the zone of possible danger might be injured even though the exact manner of injury might not have been reasonably foreseeable.

10. <sup>562</sup> As Jones was sitting on the front porch of his home on Elm Street in Culpeper, a moving van slowly passed by his house, and Jones noticed its driver looking at each house as if searching for a particular number. Suddenly, the van stopped, and without blowing his horn or otherwise signaling, or looking, the driver backed up rapidly. A three-year old child was just then crossing the street behind the van, and startled by the backing vehicle the child stumbled and fell down in its path. Jones, seeing the child's peril, darted from the porch toward the child and was successful in pushing him out of the truck's path, but Jones himself was struck by the tail gate and painfully injured.

Jones sued the truck driver at law for damages in the proper court. At the trial the above facts were proved, and at the conclusion of the evidence the driver moved the court to strike Jones' evidence on the ground that Jones was guilty of contributory negligence as a matter of law. How should the court rule?

(TORTS) Jones is not guilty of contributory negligence as a matter of law. He exercised that amount of care that an ordinary prudent courageous man would exercise. There was an emergency caused by defendant's negligence and Jones had no time to make nice estimates. "Danger invites rescue" and defendant created the danger.

8. <sup>563</sup> John Lord was the owner of a warehouse in the City of Newport News. The warehouse was quite old and badly in need of repair. On Jan. 2, 1963 Lord leased the building to Ben Tate for a term of four years at a low rental. A provision of the lease obligated Tate to place the building in safe condition by repairs to be made within a period of three months. On April 10th Lord visited the building and, seeing that Tate had not made the repairs required of him, stated that he must do so within the next thirty days or face eviction. Tate promised faithfully to make the repairs. However, by May 26th no repairs had been made and on that day while Frank Jones was carefully driving his automobile in a public alley alongside the building a cornice of the building broke loose, fell upon the automobile, and seriously injured Jones.

Jones now consults you, reciting the foregoing facts. He inquires what rights of action, if any, he might have (a) against Lord, and (b) against Tate.

What should your advice be?

(TORTS) Both are liable as joint tortfeasors. Lord has leased premises that were in a dangerous state of disrepair and he cannot escape liability to third parties rightfully on the highways by trying to get Tate to make the repairs. Tate is liable because he is negligently continuing a public nuisance. See #80 of Prosser on Torts (2d Ed.).



9. <sup>113</sup> Jerry, an infant patient in Disabled Children's Hospital, a charitable corporation of Bedford, was fatally burned due to the negligence of a night nurse who was an employee. Frank Walton, the father of Jerry, upon hearing of the fatality raced to the hospital late at night, and on entering the hospital fell into an unlighted elevator shaft and suffered serious personal injuries.

Shortly thereafter, Walton filed two motions for judgment in the Circuit Court of Bedford County against the Hospital. The first, as Administrator of Jerry Walton, was for his wrongful death, and the second was for his own personal injuries caused by falling into the elevator shaft.

In each case, the Hospital filed identical defenses, viz. that the Hospital was a charitable institution and was not liable for the negligence of its employees.

In both trials, the uncontradicted evidence showed that the Hospital had exercised due care in the selection and retention of its employees, but in each instance there was clear evidence that due care had not been exercised by the defendant's employees. In each case, the jury rendered a verdict for the plaintiff.

The attorney for the defendant Hospital has moved to set aside each verdict on the ground of charitable immunity.

How should the court rule on the motion to set aside (1) in the action for wrongful death of Jerry Walton; and (2) in the action for the personal injuries to James Walton?

(TORTS) (1) The motion to set aside the verdict for damages for the death of Jerry Walton should be granted. He was the recipient of the charity and the defendant has the charitable immunity from suit in Virginia when sued by a person by a privy of such person who is the beneficiary of the charity.

(2) The motion to set aside the verdict for the injury to the father would be denied. He was not the beneficiary of the charity. The Hospital owed him at least a duty to warn of the danger even if he were only a licensee.

Virginia cases in point are 131 Va.587; 187 Va.5; 200 Va.878.

10. <sup>113</sup> Bill Careless operated his truck in a westerly direction on Route 7 in Clarke County. Noticing a friend plowing corn in a field to his right, Careless parked his truck with the left wheels standing on the traveled portion of the west-bound lane, and walked into the field to converse with his friend.

John Bull, while traveling in a westerly direction on the same road and when he was approximately 500 feet to the rear of the parked truck, observed the approach of an automobile traveling in an easterly direction and operated by Sally Prudence. As Bull approached the parked truck he applied his brakes, but as they were not in proper adjustment, a fact known to Bull, he was unable to bring his car to a stop. Although Bull reduced his speed, his automobile swerved slightly to the left and struck the corner of the parked truck. Losing control of his car, Bull's vehicle collided with the automobile driven by Sally Prudence at a point 100 feet west of the parked truck. Sally Prudence was injured and sued both Careless and Bull in the same action to recover damages.

In the trial of the action the foregoing facts were proved by Sally Prudence. When the plaintiff rested her case, each defendant moved the court to strike plaintiff's evidence. How should the court rule on each motion?

(TORTS) The evidence should be stricken as to Careless, but not as to Bull. The sole proximate cause of the accident was the later negligence of Bull. Careless is not required to anticipate that others will drive cars with defective brakes. In 173 Va. 148 it is said, "Where a second tort-feasor becomes aware, or by the exercise of ordinary care should be aware, of the existence of a potential danger created by the negligence of an original tort-feasor, and thereafter by an independent act of negligence brings about an accident, the condition created by the first tort-feasor becomes merely a circumstance of the accident, but is not a proximate cause thereof. The original negligence of the first tort-feasor is legally insulated by the intervening independent negligence of the second tort-feasor, and the latter becomes the sole proximate cause of the accident."

Note: Considerable credit probably will be given for an answer that states that the evidence should not be stricken as to either, for it is at least a jury question, or for a well reasoned argument contra, such as Bull's having bad brakes was antecedent negligence, and hence that he did not thereafter bring about the accident by a new act of negligence.



7. <sup>D63</sup> In the early morning hours of February 12, 1963, Albert Muffett of the City of Fredericksburg finished playing poker with some close friends and got in his automobile to hurry home. A heavy snow had fallen and, although it had been cleaned from the streets, remained on the branches of overhanging tree limbs. As Muffett neared his home a heavy limb broke from one of the trees, fell across the top of Muffett's automobile, and caused a slight cut across his forehead. He was not otherwise injured. Unable to extricate himself from the automobile, Muffett remained in the car until 6:30 o'clock in the morning when a passerby discovered him and drove him toward the hospital. However, on the way to the hospital Muffett died as a result of profuse bleeding from the cut across his forehead. Thereafter the Administrator of Muffett's estate brought an action against the City of Fredericksburg asking damages of \$35,000 for the wrongful death of Muffett. On the trial of the case evidence showed that the limb which fell upon Muffett's car was old and rotten, and that this had been known to the City for many months prior to the accident; that Muffett had been driving prior to, and at the time of, the accident 20 miles per hour in excess of the speed limit; that Muffett was afflicted with the rare and hereditary disease of hemophilia which prevents cessation of bleeding; and that had he not been so afflicted he would not have died. When both parties had rested, the City, conceding its own negligence, moved the Court to strike the plaintiff's evidence on the following grounds:

(a) that Muffett's car would not have been struck by the falling limb had he been driving from the poker game to his home at a lawful rate of speed, and

(b) that the City could not be held liable for the wrongful death of Muffett in that it could not be charged with a duty to foresee that the fallen limb would injure a person suffering from such a rare and hereditary disease.

How should the Court rule on each ground of the motion?

(TORTS) Neither ground is valid. (a) Muffett's negligence in speeding was not the cause of the limb falling on him. If he had driven even faster, he would likewise have escaped injury. It was just a coincident circumstance or condition that Muffett happened to be there at that time. See 43 A.2d 40; Prosser on Torts, (2d Ed.) p.286.

(b) A man with a disability is not an outlaw and is entitled to recover the damages he has suffered as a result of defendant's negligence even if they were not completely foreseeable. Prosser on Torts, (2d Ed.) p.260.

8. <sup>D63</sup> On the afternoon of November 14, 1963, Jack Holmes drove through a stop sign while coming out of a side street into Main Street in the City of Lynchburg and crashed into an automobile driven by Robert Charles. Holmes lost consciousness as his car careened across Main Street and came to a stop in its west bound lane. At the time of the collision, William Stock was driving his automobile along Main Street in a westerly direction approximately 500 feet east of the place of the accident. Stock who had seen the accident occur, and who thought he could pass by it safely by driving to his left and passing between the automobiles of Holmes and Charles, continued driving along Main Street. However, when attempting to pass between the vehicles of Holmes and Charles, he found the space too narrow and collided with the rear of Holmes' automobile. That collision caused serious personal injuries to Holmes who has now brought an action against Stock in the Corporation Court of the City of Lynchburg to recover damages for those injuries.

Stock now consults you, and asks your advice on whether he has a good defense to the action. What should your advice be?

(TORTS) No. Holmes' negligence had completely spent itself at the time of Stock's collision with him, and hence was not a proximate cause of the collision with Stock. Besides Stock had a last clear chance of avoiding the accident, but instead of so doing, failed to use due care when he attempted to drive through the narrow space between the two cars. "Where the injured person has negligently placed himself in a situation of peril from which he is physically unable to remove himself, the defendant is liable if he saw, or should have seen, him in time to avert the accident by using reasonable care." 197 Va.233 at p.238.



9. In May of 1963 Jack Burch, a wholesaler in pickles, contracted with Super-Markets, Inc. to sell it 100 barrels of grade A dill pickles, delivery to be made on November 1, 1963. During the fall of 1963, there was a shortage of good quality dill pickles, and such could be then purchased from wholesalers only at advanced prices. In October, Burch, growing short of his dill pickle supply, but knowing that his old friend Frank Parks who ran a small grocery chain in the City of Richmond was sorely in need of such pickles, voluntarily offered to sell 120 barrels of grade A dill pickles to Parks at a low price. Although knowing of Burch's contract with Super-Markets, Inc. and that the purchase from Burch would exhaust all Burch's supply, Parks nevertheless accepted the proposal of Burch and paid him the agreed price on delivery of the dill pickles. On November 1st, Burch being unable to make delivery to Super-Markets, Inc., the latter purchased 100 barrels of grade A dill pickles from another source paying therefor a price \$1,000 in excess of that contracted for by Burch.

Super-Markets, Inc. now consults you and inquires whether it has a cause of action against Parks. What should you advise?

(TORTS) It has not. Title to the pickles had not passed to Super-Markets. Burch can still buy other pickles on the market. Parks has not actively sought to injure Super-Markets. See Torts Restatement #766 and especially the illustration given in Comment i thereto.

8. Sam Parks sued Bill Dozer in the Circuit Court of Goochland County, Va., to recover damages for personal injuries resulting from an automobile collision. At the trial of the case the evidence established the following facts: The collision of the automobiles occurred at nighttime; Dozer was operating his car with his headlights on high beam; no other traffic was approaching from the direction in which Dozer was traveling; Dozer had been driving for twelve hours without rest and was sleepy; Parks, who had been traveling in the same direction as Dozer, had stopped his car in Dozer's lane of traffic to talk to a friend of his who was standing by the roadside and while thus parked he turned on his parking lights, but due to faulty wiring the taillights on his car were not burning; Parks' car was black in color and the night was very dark and there was some fog; for a very brief moment before Parks' car came within the range of Dozer's headlights, Dozer nodded with sleep and when he awoke his car was approximately two car lengths behind Parks' car; Parks' car would have been observable within the range of Dozer's headlights when the Dozer car was six lengths behind Parks' car; startled by the sudden appearance of Parks' car in his lane of traffic, Dozer forcibly applied the brakes of his car which was then traveling at the lawful speed of 55 miles per hour, but he was unable to bring his car to a stop before it struck the rear of Parks' car; Dozer, in the exercise of ordinary care, could have avoided striking the rear of Parks' car had he, immediately upon seeing it, cut his car to the left, but because of his alarm and the brief moment for action he elected to attempt to avoid the collision by applying his brakes. At the conclusion of the evidence the Court overruled Dozer's motion to strike the plaintiff's evidence, whereupon Dozer requested the Court to give an instruction on sudden emergency. Should the instruction be given?

(TORTS) No. Dozer is not entitled to such an instruction because the sudden emergency was due to his own fault. See 197 Va.240.

9. In the trial of an action for fraud and deceit, commenced by John Sawyer against Stephen Forester, the following facts were proved: Sawyer operated a sawmill and was engaged in the manufacture of lumber; Forester called upon Sawyer at the latter's home in Roanoke, and offered to sell to him a tract of pine timber, situated in Stafford County, Va.; Sawyer told Forester that he was only interested in making purchases of timber tracts that would produce not less than 3,000,000 board feet of high quality pine lumber; thereupon Forester said to Sawyer, "I have owned this tract for 10 years, I have been over it many times,



and it is my opinion that this tract of timber will cut 3,250,000 board feet of beautiful pine lumber, the highest quality"; Sawyer knew that Forester had bought and sold timber tracts for more than 20 years and that Forester had been employed for many years by different lumber companies to cruise timber tracts and to advise them upon the quality of timber; Sawyer told Forester that he was leaving the next day for a trip West and that he would not return for 2 months and because he would not have a chance to examine the timber he was not interested in purchasing it; thereupon Forester said to Sawyer, "I am anxious to sell this tract of timber immediately and I know it is what you want, and I repeat that it is my opinion that you cannot find better quality pine and I am also of the opinion that this tract will cut out at least 3,250,000 board feet"; Sawyer then said to Forester, "I know you have had a lot of experience and I accept your statement regarding the quality and quantity of the timber, and I am willing to buy your tract of timber and pay you the sum of \$19,500"; the written contract of sale and purchase, hereafter set out, was then signed by the parties; during Sawyer's absence his employees, at his direction, cut and removed the entire tract of timber and Sawyer learned upon his return the tract produced only 1,000,000 board feet of lumber; unbeknown to Sawyer, Forester had never cruised the timber tract but he believed that the tract actually did contain 3,250,000 board feet of timber; and plaintiff introduced in evidence the following written contract:

"I, Stephen Forester, do hereby sell to John Sawyer the entire tract of pine timber, situated on my Pine Top Farm, Stafford County, Va., and John Sawyer does herewith agree to pay for said tract of timber upon the signing of this contract the sum of \$19,500.

"Witness the following signatures and seals:

"s/ Stephen Forester (Seal)  
2/s/ John Sawyer (Seal)"

After all of the evidence had been introduced defendant moved to strike plaintiff's evidence and that summary judgment be entered for defendant. How should the Court rule?

(TORTS) Either of two answers: (1) The motion should be granted. Forester only expressed an opinion. If Sawyer wanted to protect himself he could easily have done so by requiring a warranty of quantity. The parties were on equal terms. There is no evidence that Forester lied about his opinion, or (2) The motion should be overruled. It is at least a jury question as to whether or not Forester really had such an opinion. It is most unlikely that an experienced timber cruiser could make such a gross mistake. If Forester misrepresented his opinion, and his opinion was material, as here, he has misrepresented a fact. The opinion was meant to be relied upon and was justifiably relied upon.

See 199 Va.18 and Prosser and Torts ##89 and 90.

10. <sup>364</sup> Jimmy Underpass, 17 years of age, invited Tommy Childress, 13 years of age, to ride with him on his single-seated motorcycle. Childress seated himself astride the gas tank, between the seat and the handlebars, and Underpass occupied the only seat on the motorcycle. While proceeding along a street in the City of Lynchburg, Va., the motorcycle collided at an intersection with another vehicle and Childress was seriously injured. A City Ordinance made it unlawful for the operator of a motorcycle to carry more persons than there are seats available, and it also made it unlawful for any person to ride or be transported upon such a vehicle unless occupying a regular seat. A violation of this ordinance would result in the imposition of a fine. Childress, by his next friend, sued Underpass to recover damages for personal injuries. During the trial of the case defendant requested and the Court gave an instruction telling the jury that Childress was guilty of negligence per se in violating the ordinance, and if such negligence constituted a contributing proximate cause of the collision plaintiff could not recover. The jury returned a verdict for the defendant and upon a motion to set aside the verdict plaintiff contended that the Court committed error in instructing the jury that plaintiff's violation of the ordinance constituted negligence per se.

How should the Court rule on the motion to set aside the verdict?

(TORTS) The motion should be granted. In Virginia there is a rebuttable presumption that a child over 7 and under 14 is incapable of being contributorily negligent whether his conduct is to be tested on common law principles or in view of a statute or ordinance. Hence it was error to instruct the jury that plaintiff's violation of the ordinance constituted negligence per se. 197 Va.572.



9. <sup>D64</sup>Otis, knowing that Clyde had worked for demolition firms for about a year as a laborer, contracted with Clyde to demolish two buildings on Otis' property. The contract provided that for \$2,500 Clyde would furnish all labor, machinery, and material, including explosives, and would be responsible for all details to accomplish the demolition in sixty days. Because of the slowness of the work, Clyde obtained a crane, never having used one before, and while using the crane and blasting some footings, one building was caused to fall and damage the adjoining building of Neighbors.

In an action by Neighbors against Otis and Clyde, it was shown that the work was done pursuant to the contract, with no direction and control by Otis, and that the negligence of Clyde, in fact, caused the damage. Is Otis liable to Neighbors? (TORTS) Yes under three possible theories. (1) Otis himself has been negligent in letting a mere laborer handle heavy machinery and explosives, or (2) While a principal is not ordinarily liable for the torts of his independent contractor an exception exists where the independent contractor is engaged in extra-hazardous work, or (3) in some jurisdictions one engages in such inherently dangerous work at his

peril - i.e., he is absolutely liable for damages caused, and one cannot escape such liability by getting some one else to do the job for him.

10. <sup>D64</sup>Sport had the gasoline tank on his automobile filled with gasoline at the Meek Oil Co. After traveling two miles, his engine quit, and he stopped his automobile opposite Pristine Gas Company station. Attentive, an employee of Pristine, diagnosed the trouble as water in the gasoline and, at Sport's insistence, agreed to drain the eighteen-gallon automobile tank by using a six-gallon tire-testing tank. When it was apparent that the gasoline was draining very slowly, Sport became impatient and increasingly angry and insisted on going back to Meek Oil Co. to make complaint. After repeated urging, Attentive took Sport back to Meek Oil Co., and Sport learned that Meek, in fact, had negligently allowed water to mix with the gasoline. While they were gone the receptacle into which the gasoline was draining overflowed, and a passerby, Curious, wondered aloud if it was water or gasoline that was in the gutter and to find out threw a lighted match in it with the result that Sport's automobile was destroyed by fire.

Sport brought an action for damages against Meek Oil Co. for the loss of his automobile. Is Sport entitled to a recovery?

(TORTS) No. The act of Meek Oil Co. was not the proximate cause of the loss as there was an efficient intervening act of another party or parties not reasonably foreseeable by Meek Oil Co. Besides Sport was himself negligent in not thinking of the draining operation when he was so insistent that he be taken to Meek Oil Co.

See 171 Va.62, 197 S.E.468 on p.1020 of the Tort Cases in these Notes.



7. The We-Rent-Um Corporation was in the business of renting automobiles to be driven by the person to whom the car was leased. Smith rented a car from this corporation and while using it struck and seriously injured Pedestrian. The particular car involved had been driven several years and its brakes had become defective, due to which cause Smith was unable to control it properly and had run a red light at a crossing where Pedestrian had the right of way. Pedestrian sued the We-Rent-Um Corporation alleging, that if it had made a reasonable inspection of the automobile before its rental the defect would have been discovered, and that such inspection was not made. Assuming that the proof sustained these allegations, is the corporation liable to Pedestrian for his injuries?

(TORTS) Yes. Such injuries could be reasonably foreseen. Prosser on Torts (3rd Ed.) pp. 685-686 reads, "The lessor of an automobile, or any other bailor for hire, is liable to a guest in the vehicle, or a person run down by it on the highway, not only if he knows that the car is dangerously defective at the time he turns it over, or that the person entrusted with it is incompetent to handle it, but also if he merely fails to make reasonable inspection to discover possible defects before turning it over."

8. Crumbley owned a large farm, part of which lay between the highway and Lake Beautiful. Fortunate owned a handsome residence on the other side of the highway. Fortunate's front porch commanded an attractive view across Crumbley's pasture field to the lake beyond. Crumbley became angry at Fortunate over a business transaction, and while he needed a new dairy barn and there were several other suitable locations for it, he built it in his pasture directly in front of Fortunate's residence, cutting off the view of the lake and seriously depreciating the value of the residence, remarking to his contractor, "I guess this will teach that stuckup dude that I can get even with him."

Fortunate sued Crumbley for damages to his property alleging that the barn was placed on its present location out of spite and malice, and that his property was damaged by at least \$10,000. Assume the evidence established the above facts, is Fortunate entitled to recover damages?

(TORTS) Fortunate is not entitled to damages. Crumbley was privileged to build a barn on his own land. If the barn also served a useful purpose it is not a private nuisance and it is immaterial that there was a spite motive also. Fortunate is not entitled to an easement of view over Crumbley's land unless the latter grants such an easement to him. See Prosser on Torts (3rd Ed.) P.619, note 19.

9. Thom, while motoring on a pleasure trip, negligently struck Pedestrian in Roanoke, breaking both his legs. While Pedestrian was lying helpless in the roadway, Jones, not keeping an adequate lookout, ran over and broke Pedestrian's arm.

What is the extent of liability, if any, for the injuries sustained, (a) with respect to Thom, and (b) with respect to Jones?

(TORTS) Thom is liable for both injuries. Jones is liable only for the broken arm. Prosser on Torts (2nd Ed.) p.230 reads in part as follows: "If an automobile negligently driven by defendant A strikes the plaintiff, fractures his skull, and leaves him helpless on the highway, where shortly afterward a second automobile, negligently driven by defendant B, runs over him and breaks his leg, A will be liable for both injuries, for when the plaintiff was left in the highway, it was reasonably to be anticipated that a second car would run him down. But defendant B should be liable only for the broken leg, since he had no part in causing the fractured skull, and could not foresee or avoid it."



8. <sup>D65</sup> Al and Bill, unemancipated infant brothers, residing in the same household, were dating their respective girl friends, Martha and Barbara. Al drove them to a Drive-In movie in his 1965 Plymouth sedan. On their way home, all occupants of the car were injured when Bill, while driving Al's car, lost control of it and struck a telephone pole in Bath County, Va. No other vehicle was involved.

Separate personal injury actions were brought on behalf of Al, Martha and Barbara against Bill in the Circuit Court of Bath County.

What degree of negligence on the part of Bill must Al, Martha and Barbara each prove in order to recover?

(TORTS) Al need prove only ordinary negligence. He cannot be a guest in his own car. The two young ladies must prove gross negligence as they were non-paying passenger guests of Al and/or his chauffeur, Bill. While it is arguable that Al's date was not Bill's guest the better view would seem to be that this entire trip was social rather than business and hence the girls should be treated as if they were non-paying guests whether Bill or Al is the one who is driving.

9. <sup>D65</sup> Jones, while operating a truck in the scope of his employment by Smith, was involved in an accident in the City of Richmond with an automobile being driven by Thomas. The truck was owned by Smith, and he was a passenger in it at the time of the accident. Both Smith and Thomas suffered injuries proximately caused by the accident.

Smith brought a joing action against Jones and Thomas for his personal injuries, and Thomas brought a similar action against Smith and Jones. Both actions were brought in the appropriate Richmond court.

Assuming that the evidence showed that Jones was guilty of gross negligence, while Thomas was guilty of only simple negligence, but that the conduct of both proximately contributed to cause the accident. (A) May Smith recover against either Jones or Thomas? (B) May Thomas recover against either Jones or Smith?

(TORTS) (A) Smith may recover from his servant, Jones but not against Thomas. Jones violated a duty he owed his employer when he drove negligently. Jones' negligence is imputed to Smith in Smith's action against Thomas and constitutes a bar to any recovery.

(B) No. Thomas' negligence bars any action he might otherwise have.

10. <sup>D65</sup> Herbert Homeowner undertook to revamp the exterior of his home. He decided to do the paint job himself, but for a needed replacement of some of the slate on his roof he secured an independent roofing contractor to join in the undertaking on a cost basis.

Roy Roofrunner, an employee of the roofing contractor, arrived at Homeowner's house to do the roof work. He found there a large scaffold extending from the ground to the top of the house, and which had been recently constructed by Homeowner, who was temporarily away from the premises. Already on the scaffold was Yorrick Yardman, a neighbor's servant, who had found the scaffold a handy means of taking advantage of his permission of long standing to gather apples from Homeowner's tree, next to which the scaffold now stood.

Perceiving that this scaffold was the only access to the roof, Roofrunner proceeded up it immediately to start his work. At this point the scaffold collapsed as a result of its negligent construction by Homeowner, injuring both of its occupants.

Is Homeowner liable in damages for the injuries sustained by (A) Roofrunner, and (B) Yardman?

(TORTS) (a) Homeowner is liable to Roofrunner who was a business visitor. He owed a duty to him to have the premises in a reasonably safe condition. Roofrunner was impliedly invited to use the scaffolding. (b) Homeowner is not liable to Yardman who was a bare licensee. He owed Yardman no duty of prevision. Yardman took the premises as he found them. The scaffold was built for Roofrunner--not for Yardman.



7. <sup>766</sup>One evening James Dove and his wife Shirley, intending to visit their friends Mr. and Mrs. Bates, mistakenly went to the wrong residence and knocked on the front door. The door was opened by Andy Gump, who was owner of the residence and the operator of a neighborhood confectionary. When he saw James Dove he became livid with anger and said, "You are the customer I saw steal \$10 from my cash register this afternoon and run from my store before I could catch you." Thereupon Gump seized Dove, dragged him into the hallway, struck him across the face and forced him into the hallway closet, locking the door. He then called through the door to Dove and said, "You are going to stay in that closet until you either return my money or tell me where you have hidden it." With that Shirley Dove ran screaming from the house in search of a policeman. Although Dove protested to Gump his innocence, Gump refused to release him. After having been locked in the closet approximately twenty minutes, Dove succeeded in breaking open the door, running past Gump, and making his escape. Dove now consults you and asks that you advise him of what cause or causes of action he has against Gump.

Assuming Dove innocent of the charges made against him by Gump, how should you advise him?

(TORTS) Slander, insulting words, assault and battery, false imprisonment.

8. <sup>766</sup>Adam Grew was driving his Volkswagen with his wife as a passenger in the business section of the City of Richmond. While driving at a high rate of speed, Grew turned to the left from Main Street on to Eighth Street and the vehicle overturned. Adam Grew was rendered unconscious. Although Mrs. Grew was thrown out of the Volkswagen, it fell heavily on the lower part of her body and pinned her beneath it. Mrs. Grew at once began to scream from the extreme pain she was suffering, and Thomas Keene rushed from the sidewalk and with great effort raised the vehicle sufficiently to permit Mrs. Grew to crawl free. Because of his efforts in aiding Mrs. Grew, Keene suffered torn muscles in his back and was bedridden for approximately six weeks.

Thereafter, Keene sued Adam Grew in the Law and Equity Court of the City of Richmond for \$6,000 damages charging Grew with negligence proximately causing Keene's injuries. In his grounds of defense, Grew alleged Keene had assumed the risk and was guilty of contributory negligence. During the trial, and while Keene was on the witness stand, counsel for Grew asked him, "How old are you?" Keene answered, "I am 68". Grew's counsel then asked, "Didn't you realize that you ran considerable risk of injury to yourself in lifting that Volkswagen off of Mrs. Grew?" Keene replied, "Yes. I knew that it was a dangerous thing for me to do, but I felt I had to do something to help Mrs. Grew." Shortly thereafter Keene rested his case, and counsel for Grew moved the Court to strike Keene's evidence on the ground that the latter's testimony showed him to have assumed the risk and to be guilty of contributory negligence as a matter of law. How should the Court rule?

(TORTS) It is at least a jury question as to whether Keene assumed the risk and therefore Grew's motion should be denied. The general rule is that one who sees a **person** in imminent and serious peril caused by the negligence of another cannot be charged with contributory negligence, as a matter of law, in risking his own life or serious injury in attempting to effect a rescue, provided the attempt is not recklessly or rashly made. 2 Restatement of Torts #472; Andrews, 192 Va. 150; Wright, 110 Va. 670; Southern, 114 Va. 723.

9. <sup>766</sup>While Alfred Romeo was 500 feet away from, and driving in a westerly direction toward, a two lane bridge suspended over the Dan River in Halifax County, he saw Thomas MacBeth standing against the railing of the bridge and fishing from its right side. At the same time, Romeo saw distantly approaching in the eastbound lane an automobile being driven by Geoffrey Hamlet. Romeo did not slacken his speed and, to avoid Macbeth, on nearing him Romeo swung his automobile into the eastbound lane of traffic. Before he could return to the westbound lane, the left front portion of his automobile collided with the left front portion of that being driven by Hamlet. As a result of the collision, Hamlet suffered severe injuries. Shortly thereafter, Hamlet brought an action against both Romeo and Macbeth in the Circuit Court of Halifax County charging each with negligence contributing to his injuries. Neither Romeo nor Macbeth charged Hamlet with contributory negligence. During the



trial, the foregoing facts were proven. After all evidence was in, Hamlet offered several instructions to the Court, one of which read as follows:

"The Court instructs the jury that an ordinance of Halifax County makes it a misdemeanor for any person to fish from a bridge over which there is vehicular traffic. Accordingly, should you believe from a preponderance of the evidence that the defendant Macbeth was fishing from the bridge at the time of the accident involved in this case, that in so doing he caused the defendant Romeo to swerve his automobile into the eastbound lane, and that this contributed to the collision between the vehicle of the defendant Romeo and that of the plaintiff Hamlet, then you should find the defendant Macbeth guilty of negligence and return your verdict against him and for the plaintiff Hamlet."

Counsel for Macbeth conceded that this instruction correctly recited the ordinance of Halifax County, but objected to the giving of the instruction assigning grounds therefor. Should this objection have been sustained?

(TORTS) Instruction is incorrect as the negligence of Romeo intervened and insulated the negligence of Macbeth. Hubbard, 173 Va.448, at pp. 455 & 456.

TORTS *b66*

7. On Saturday afternoon, at 2:30 o'clock, Rose Gardner entered the self-service store of Cash & Carry Grocery, Inc., in a community shopping center, in Virginia, for the purpose of doing her weekly shopping. The shelves upon which the articles of merchandise were placed were arranged to serve the convenience of the customers, the bottom shelves standing a short distance above the floor. While reaching to a top shelf to obtain an article of merchandise, Rose Gardner placed her right foot three or four inches under the bottom shelf and when she turned to move away she slipped and fell to the floor severely injuring her knee. After arising from the floor she noticed a small dark object about an inch and a half long at one end of a skid mark on the floor about six inches in length. Upon examining the object it was determined to be a small onion which was discolored. The manager of the store was promptly notified and upon investigation he saw the skid mark, the discolored onion, and observed that Rose Gardner had a great amount of swelling in her knee. Shortly thereafter Rose Gardner sued Cash & Carry Grocery, Inc. to recover damages for her injuries. During the course of the trial plaintiff proved the foregoing facts. Whereupon, the defendant proved that the floors of the store were swept clean every evening after closing and every morning early, as a matter of routine, and that they were swept at other times when the manager thought it necessary. The defendant also proved that the floors had been swept clean on the morning the plaintiff slipped and fell. The jury returned a verdict for the plaintiff and defendant made a motion to set aside the verdict and enter judgment for the defendant.

How should the Court rule on the motion to set aside the verdict and enter judgment for the defendant?

There was no evidence of negligence on the part of the store and the court should set aside the verdict and enter final judgment for the defendant. Rose would have the burden of showing that the onion was a hazard and that the defendant reasonably should have known about its presence. The contention that the onion had been on the floor a long time is based on its dark color is mere speculation. Juries should not be allowed to speculate on such matters...208 Va 913.

TORTS *b66*

8. Maria Metcalf was struck by a passenger bus operated by an employee of Carefree Transportation Company. In an action by Maria Metcalf against the Company to recover damages for personal injuries she proved the following facts: that plaintiff was standing on the sidewalk at the corner of an



intersection of two streets; that the bus, as it approached the intersection of the two streets, ran up on the sidewalk at the corner of the intersection and struck the plaintiff causing her to sustain a fracture of her right leg, a fracture of her left arm, and a compression fracture of a lumbar vertebra; and that the bus was under defendant's exclusive control. After proving the foregoing facts plaintiff rested her case, whereupon defendant moved the court to strike plaintiff's evidence and to enter summary judgment for defendant, contending that plaintiff had not proved any specific act of negligence on the part of defendant.

The court should overrule this motion. The facts of this case clearly present a situation under which the doctrine of res ipsa loquitur applies. When a vehicle, under exclusive control of the defendant, leaves a vehicular thoroughfare and enters upon a city sidewalk, a place set aside for pedestrians, any injury inflicted is clearly the fault of the plaintiff under res ipsa. The burden is thus upon the defendant Bus Company to present evidence showing that there was no negligence on the part of its agent.

190 Va 979 *It need not prove precise act of negl.*

*Tests* 9. An indictment was returned in the Circuit Court of Pittsylvania County, Virginia, against Marrow Bone charging that he illegally practiced law before that Court. On motion of Bone this indictment was quashed and dismissed upon the ground that the offense charged was barred by the statute of limitations. Shortly after the indictment had been dismissed, Bone commenced an action in the Circuit Court of that County against Sam Barrister to recover damages for malicious prosecution. In his motion for judgment Bone charged that Barrister maliciously and without probable cause procured the indictment; that the indictment had been dismissed as the offense was barred by the statute of limitations; and that Bone had been seriously damaged in his reputation as a result of the procurement of the indictment. Barrister filed grounds of defense admitting that the offense charged was barred by the statute of limitations. He did not respond to the other averments contained in the motion for judgment, but he did charge in his grounds of defense that the charge contained in the indictment was true, and that Bone was guilty of illegally practicing law. At the trial of the case Bone offered evidence proving that Barrister procured the indictment and that Barrister had acted pursuant to a malicious intent on his part to injure Bone. Bone testified in his own behalf and on cross-examination he admitted that he did not have a license to practice law in Virginia, and that the charge contained in the indictment was true. When plaintiff rested his case defendant moved to strike his evidence and for summary judgment.

How should the Court rule?

The court should sustain defendant's motion and enter summary judgment for him. The maintenance of an action for malicious prosecution rest on two conditions: (1) favorable termination of the case on the merits; and (2) lack of probable cause for the action to be brought. With these conditions mandatory, proof of actual guilt of the person accused is a complete defense, even if the original prosecution had been dismissed. (193 Va 301)

(b) The form of the pleading by plaintiff is bad. To state correctly a good cause of action for libel, slander or insulting words, the exact words charged to have been used by the defendant must be alleged. Because plaintiff failed to set out the exact words used by defendant, his motion is insufficient under Virginia law. Furthermore, plaintiff has not alleged special damages, and such allegations would be necessary to sustain a cause of action where no libel per se is involved. (173 Va.200).

*Ans 7 (last)*



6. <sup>567</sup>Allison, who owned a station wagon used for general family purposes, was approached by an acquaintance, Benton, about moving a bar cabinet from one part of town to another. Caldwell, a friend of Benton, overheard the discussion and stated that he had a stuffed gnu that he wanted to move. Allison suggested that if Caldwell would help move the bar, then he would move the stuffed gnu. The next day the three men met and moved the bar, with each one having two drinks of whiskey from the well-stocked bar. They then loaded Caldwell's gnu, and enroute to their destination, while Allison was driving in a line of traffic within the speed limit, his attention was attracted by Jane Mainesfeld, a well-proportioned young lady in a miniskirt, walking along the sidewalk and as they passed, Allison turned his head for about a second to gain a well-rounded view. When he looked back, he saw to his dismay that the traffic ahead had stopped and he crashed into the car in front of him, causing the stuffed gnu to topple on Caldwell and seriously injure him.

Caldwell consults you as to his rights, if any, against Allison to recover for his personal injuries. How would you advise him?

(TORTS) You should advise C that he has no rights as against A. The facts fail to establish a contract of hire or relation which would give to C a status other than that of a guest. No apparent benefit, pecuniary or otherwise, inured to A out of any part of the activities involved. A's undertaking to assist both B and C in what each wished to accomplish was solely a voluntary and neighborly gesture on his part, and without consideration. Thus, the Va. Guest Statute, 8-646.1, C could only recover from A if he can show gross negligence on the part of A. The facts show a momentary lack of attention, not gross negligence or willful and wanton disregard of C's safety. C has no right of action as against A. (188 Va.207).

7. <sup>567</sup>Deadbeat was employed by Puritan as a clothing salesman working on a commission basis in Norfolk, Va. Deadbeat owed Strongarm a nine-month past-due indebtedness of \$400, for which demand for payment repeatedly had been made. Deadbeat paid Strongarm, but through negligent mishandling of his records, Strongarm did not credit Deadbeat's account and subsequently wrote a letter to Puritan as follows:

"Your employee Deadbeat has owed us \$400 for almost a year and has consistently refused to pay the same. We know that you would take a dim view of an employee of yours acting in this way toward a creditor and feel that if you explain to him his responsibilities and liabilities and possible effects of the same upon himself, he would be induced to make payment to us."

(C).

Puritan showed Deadbeat the letter and angrily lectured him, but upon being assured that the debt had been paid, Puritan told Deadbeat not to let it happen again and sent him back to work.

Deadbeat brought an action at law against Strongarm by a motion for judgment, and the paragraph of the motion for judgment stating his alleged cause of action was as follows:

"Strongarm did wrongfully, unlawfully and with malice write and publish to Puritan a letter which wrongfully and mistakenly alleged that Deadbeat was indebted to Strongarm, with intent to force payment which was not due and/or to induce Puritan to discharge Deadbeat, all to the humiliation, ridicule, and embarrassment of the plaintiff, Deadbeat, for which he is entitled to compensation."

(a) Does plaintiff, Deadbeat, have a substantive cause of action on which he may recover?

(b) Is the quoted paragraph of the motion sufficient as to form?

(TORTS)(a) Plaintiff has no substantive cause of action under Virginia law. As respects a charge of failure to pay one's debts, without any imputation of insolvency, a writing containing the mere statement that a person who is not a trader or a merchant, or engaged in any vocation wherein credit is necessary for the conduct of business, owes a debt and refuses to pay, or owes a debt which is long past due, is not libelous per se and does not render the author or publisher of such statement libel without proof of special damages. Neither plaintiff's allegations nor the evidence show proof of any special damages which must in fact have been differed if plaintiff were to have a cause of action for libel under these circumstances. (182 Va.512, 200 Va.572)



367  
8. Playgirl invited Shyman to her home for a cozy dinner, during which she asked Shyman to fetch another bottle of champagne from the cellar. Upon descending to the dimly lighted basement and turning the corner of a stairway, Shyman's left leg was impaled on the splintered end of a wooden board which Playgirl had left wedged in the side of the stairwell after her last karate practice session. Shyman ascertained that Dr. Quackenbush was considered to be a competent and qualified physician and went to him for treatment of his leg wound, during the course of which, Dr. Quackenbush overlooked removing one of twelve minute splinters deeply imbedded in the leg, which, other consulting physicians agreed, would have been most difficult to detect even by the most careful examination.

After Shyman recovered from the initial disability of the actual wounds, an infection set in from the splinter which required treatment and caused a subsequent disability. After recovery from this and after the scars were well healed and though they were slightly unsightly only, Shyman went to Dr. Newskin, a plastic surgeon considered to be competent and qualified, for revision of the scars on his leg. During this operation, Dr. Newskin left a small sponge under the skin at one incision site, and though Shyman complained of pain, Dr. Newskin ignored the complaints and did nothing and left town for several weeks with the result that serious complications set in and Shyman was again disabled.

Consulting physicians advised that the sponge could have been discovered at the time of closing the incision and an examination afterward would have also revealed the same under the skin.

Shyman consults you as to his rights of recovery, if any, against Playgirl for:

- (1) the initial injury and disability,
- (2) the infection and second disability while under the treatment of Dr. Quackenbush, and
- (3) the third disability as the result of Dr. Newskin's treatment.

724.

(TORTS) (1) Playgirl is liable to plaintiff for the initial injury and disability. While the general rule, which is followed in Virginia, says a host is under no duty to keep his premises in a safe and suitable condition for the use of a licensee, there are exceptions where a host knows or has reason to know of a dangerous condition on the premises, should realize it involves an unreasonable risk of harm to plaintiff, knows plaintiff would not discover or realize the danger, and fails to exercise reasonable care to make the condition safe or to warn plaintiff, then defendant can be held liable. The facts of this case seem reasonably to fall under this exception to the general rule and be controlled by it. (207 Va. 343).

(2) Playgirl can also be held liable for the second disability. The general rule holds that if an injured person uses ordinary care in selecting a physician for treatment, the law regards the aggravation of the injury resulting from the negligent act of the physician as part of the immediate and direct damages which flow from the original injury. It is so held because the aggravation under these facts could reasonably have been anticipated. Also, there would be a question if the actions of Dr. Q were in fact negligent under these facts. (187 Va. 222)

(3) Playgirl not liable for actions of Dr. N. The subsequent negligent acts of Dr. N were more than the aggravation of an original injury, since it was not reasonable to anticipate Dr. N would be so grossly negligent as to sew up a foreign substance in plaintiff, and then completely disregard his complaints. The acts of Dr. N constituted a separate, and independent act of negligence, for which Playgirl cannot, under the law, be reasonably held liable for. (187 Va. 222). *Test of foreseeability*



7 <sup>267</sup> Carlin worked for the Universal Paper Co. which conducted a large operation in Virginia, employing several hundred men. Due to the negligence of Austin, a fellow employee, on September 16, 1967, Carlin was killed while performing his duties as a skip operator. You are consulted as to whether Carlin's administrator can maintain an action for damages for wrongful death.

(a) Against Austin, and (b) against Universal. How ought you to advise?  
(AGENCY, TORTS) The administrator cannot maintain an action for damages for wrongful death against either the negligent employee or the employer. Every employer and employee is conclusively presumed to have accepted the provisions of the Workmen's Compensation Act. And under the Act, the rights and remedies granted to an employee respecting compensation on account of personal injury or death by accident shall exclude all other rights and remedies of the employee or personal representative. Hence no wrongful death action may be maintained. (184 Va.96; 65-37; 65-20; 65-21; 65-22)

8. <sup>D 67</sup> Decedent was killed when his automobile slipped off a jack which he was using in an attempt to change a tire, and his administrator sued the manufacturer of the jack for his wrongful death. At the trial it was proved that the accident might have happened either because of a structural defect in the jack or because of the failure of Decedent to "chock" the wheels properly, and it was impossible to say which caused the accident. At the conclusion of all the evidence the manufacturer moved the Court to strike the evidence. How ought the Court to rule on the motion?

(TORTS) The Court should strike the evidence. The party who affirms actionable negligence must establish it by proof sufficient to satisfy reasonable and well balanced minds. The evidence must show more than a probability of a negligent act. Moreover, if the injury complained of may have resulted from one of two causes, for one of which the defendant is liable, but not for the other, the plaintiff cannot recover. Neither can he recover if it is just as probable that the damage was caused by the one as by the other. (103 Va.64)