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SURVEY OF NORTH CAROLINA CASE LAW

[The "Survey of North Carolina Case Law" is designed to review cases decided by the North Carolina Supreme Court during the period covered and to supplement past and future "Surveys" in presenting developments in North Carolina case law that are deemed of particular importance; it is not the purpose of the "Survey" to discuss all the cases that were decided during the period of its coverage. The North Carolina Supreme Court will be referred to as the "Court" unless it appears by its full title. The United States Supreme Court will be designated only by its full name. North Carolina General Statutes will be signified in text and textual footnotes by "G.S." THE EDITORS.]*

CIVIL PROCEDURE (PLEADING AND PARTIES)

Henry Brandis, Jr.†

"BANJOWORK"

"The trial judge, on motion, should strike from a complaint the embellishments and banjowork inserted for their effect upon the jury."¹ Hear! Hear!

The judge, with considerable restraint, had struck only twenty-six of ninety paragraphs in the first cause of action and thirteen of seventy in the second. Since joinder of causes and parties was the only question presented by the appeal, the Supreme Court's criticism of the length and "manifold ramifications" of the complaint may, in a limited sense, be dictum; but it is nevertheless most welcome if it indicates that the Court may insist that some reasonable attention be paid to the statutory directive that the complaint should contain "a plain and concise statement of the facts constituting a cause of

* The period covered embraces the decisions reported in 260 N.C. 451 through 263 N.C. 826.

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¹ Higgins, J., in *Dowd v. Charlotte Pipe & Foundry Co.*, 263 N.C. 101, 105, 139 S.E.2d 10, 14 (1964).

action, without unnecessary repetition."² And the opinion edges much closer to federal pleading philosophy than is customary in North Carolina when it says: "If a plaintiff wants admissions or factual details, he should get them by interrogatories or adverse examination."³

No dictionary available to this writer defines "banjowork," but its meaning is nevertheless clear. However, the only certain cure for the bar's chronic adjectivitis is to abolish the reading of pleadings to the jury—something which the Court itself could accomplish, since the pernicious practice rests on no statutory requirement. Until that happy day, our pleaders will continue to believe that an eyebrow lifted over the high bench is a small price to pay for a saturated ear in the jury box.⁴

VARIANCE

There is, unfortunately, another reason for some of the excess verbiage in North Carolina pleadings. Even a minor discrepancy between pleading and proof may, with dire consequences, be held to be a variance. This leads to proliferation of details in the effort to anticipate all possible contingencies in the proof. In this context, the Court continues to interpret pleadings narrowly. During the period under review it found variances *requiring nonsuit* in the following situations: (a) allegation that just as plaintiff's car passed defendant's truck, moving in the opposite direction, the rear portion of the truck suddenly swerved across the center line and collided with plaintiff's car—proof that the truck was close behind an unlighted

² N.C. GEN. STAT. § 1-122 (1953). Consultation of the form books (as well as perusal of some of the cases hereinafter cited) will quickly demonstrate the extent to which, in the twentieth century, this has reflected the embalming of black letter law in a dead letter statute.

³ 263 N.C. at 105, 139 S.E.2d at 14. It is perhaps of some significance that the principal case cited as condemning the pleading of evidentiary details is *McLaurin v. Cronly*, 90 N.C. 51 (1884), decided at a time, much closer to the adoption of the Code of Civil Procedure, when judges were perhaps more conscious of the code's basic purposes.

⁴ The Supreme Court itself has not always held the line. See, e.g., *Bumgardner v. Allison Fence Co.*, 236 N.C. 698, 74 S.E.2d 32 (1953), where the Court affirmed the lower court in: (a) striking out "and slaughtered" in the allegations regarding intestate's death; and (b) refusing to strike allegations that the force of the collision drove "one of the pipes through the right eye of plaintiff's intestate, thereby punching the same out, and said pipe was driven through and extended out the back of her head, thereby knocking a big hole in the back of her head, and emptied all of her brains on the floorboard" This is a score for which the banjo is wholly inadequate.

truck-trailer, that the rear wheel of the truck was across the center line and plaintiff ran into it;⁵ (b) allegation that as plaintiff "prepared to cross" a street he observed defendant's car approaching, was afraid to proceed, came to a stop and was hit by the car—proof that plaintiff started across the street and, when two feet across the center line, turned to see if his wife was following and was struck while in that position.⁶

Of course, plaintiff's counsel in such a situation should request permission to amend in the trial court,⁷ but, where there is no objection to the evidence,⁸ either the pleading should be given the broadest possible construction,⁹ or the absence of objection should be

⁵ *Taylor v. E. B. Garrett Co.*, 260 N.C. 672, 133 S.E.2d 518 (1963). The opinion concedes that the evidence, if believed, might justify recovery. Thus, as in *Hall v. Poteat*, 257 N.C. 458, 125 S.E.2d 924 (1962), the situation is: case alleged; case proved; result—nonsuit.

⁶ *Canady v. Collins*, 261 N.C. 412, 134 S.E.2d 669 (1964). If here there was a failure to prove *any* cause of action, the per curiam affirmance of the nonsuit was, nevertheless, grounded on the variance. See also *Watson v. Clutts*, 262 N.C. 153, 136 S.E.2d 617 (1964); *Rice v. Rigsby*, 261 N.C. 687, 136 S.E.2d 35 (1964); *Davis v. Rigsby*, 261 N.C. 684, 136 S.E.2d 33 (1964). In all three cases it was held that a pleader is bound by his allegations and he cannot at the trial take a position contrary thereto, even though there is evidence which would support such a contrary position. Indeed, in the *Davis* and *Rice* cases, the testimony supporting plaintiff's position contrary to the complaint was supplied by defendant himself, called as a plaintiff's witness. Insidiously, a small doubt persists as to whether justice requires that an allegation in the complaint should prevent plaintiff from taking advantage of sworn testimony of the defendant. Certainly no prejudicial surprise is involved. In any event, the rule invoked here seems to present simply another aspect of the fatal variance notion.

⁷ Permission to amend is within the discretion of the trial judge, and the Court has held that he may permit amendment to conform to the proof even after verdict. See, e.g., *Wheeler v. Wheeler*, 239 N.C. 646, 80 S.E.2d 755 (1954). However, such cases as *Taylor v. E. B. Garrett Co.*, 260 N.C. 672, 133 S.E.2d 518 (1963), *Canady v. Collins*, *supra* note 6, and *Wilkins v. Commercial Fin. Co.*, 237 N.C. 396, 75 S.E.2d 118 (1953), hold that a material variance is a failure of proof and requires nonsuit. Hence, as a practical matter, in the absence of prior objection to the proof, the question of amendment does not arise until after plaintiff's case is rested and nonsuit is denied, in which case the trial judge has already committed error in refusing to grant motion for nonsuit.

⁸ If in *Taylor v. E. B. Garrett Co.*, 260 N.C. 672, 133 S.E.2d 518 (1963), and *Canady v. Collins*, 261 N.C. 412, 134 S.E.2d 669 (1964), there was objection to the evidence, such is not indicated in the opinions.

⁹ See *Pinyan v. Settle*, 263 N.C. 578, 139 S.E.2d 863 (1965). The complaint alleged that defendant left his car "unattended." The evidence showed that he left it occupied by a two and one-half year old child (whose experiments with the ignition key led to plaintiff's injury). *Held*, the evidence supported the allegation and there was no fatal variance. The Court was aided in reaching this conclusion by the construction given by the Maryland court to the word *unattended* in a Maryland statute (not involved in the case, since the events in litigation occurred in North Carolina). For this

regarded as sufficient indication that the variance is immaterial.¹⁰

THEORY OF THE PLEADINGS

In *Murphy v. Murphy*¹¹ the Court reiterated the time-honored but still excellent rule that if a complaint's allegations show any right to recover, demurrer for failure to state a cause of action should be overruled, even though plaintiff is not entitled, on the facts alleged, to the relief requested in the prayer. There the complaint did not support recovery under the statute authorizing an award of alimony and custody of children, without divorce,¹² but the Court held that the allegations would justify recovery, under a separation agreement, of an amount due for support of the children, and, upon motion of plaintiff or *ex mero motu*, would also justify treatment of the complaint as a petition for a writ of habeas corpus to award custody; and that the superior court had the option to choose between these procedural alternatives.

Similarly, where the proof in an action for specific performance of a contract failed to justify such relief, the Court held that nonsuit should not have been entered, but rather a judgment for an amount clearly due under the contract, even though the plaintiff, consistently with insistence upon the right to specific performance, had previously refused defendant's tender of that amount.¹³ In technical if not practical contrast, it was held that when the sole relief asked was an injunction, nonsuit was proper when the proof failed to justify such relief; though, while not expressly so held, it

writer, the judicial attitudes manifested in *Taylor v. E.B. Garrett Co.*, *supra* note 8, and *Pinyan v. Settle*, *supra*, are very difficult to reconcile.

¹⁰ Compare FED. R. CIV. P. 15(b): "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." The words used in G.S. § 1-168 are fairly susceptible of (and were once accorded) virtually the same meaning; but in recent years the Court has elected to equate "material variance" (including much that many courts would regard as immaterial) with "failure of proof," ostensibly defined by G.S. § 1-169 as embracing only the situation "where the allegation of the cause of action or defense to which the proof is directed is unproved, *not in some particular or particulars only, but in its entire scope and meaning.*" (Emphasis added.) It is difficult to understand how language so plain can be so grievously misread. See the excellent note, 41 N.C.L. REV. 647 (1963). See also the collection of recent variance cases in 1 MCINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE § 1288 (Supp. 1964).

¹¹ 261 N.C. 95, 134 S.E.2d 148 (1964).

¹² N.C. GEN. STAT. § 50-16 (Supp. 1963).

¹³ *Bell v. Smith Concrete Prods., Inc.*, 263 N.C. 389, 139 S.E.2d 629 (1965). The opinion does not indicate whether the allegations in the complaint supported the right to recover the money judgment.

seems probable that the proof also failed to justify a judgment for damages.¹⁴

ELECTION OF REMEDIES

In *Richardson v. Richardson*¹⁵ it appeared that husband and wife entered into a separation agreement calling for payments to the wife for child support, and thereafter the husband obtained a divorce. In the divorce action the wife pleaded sums due under the agreement as a counterclaim, but upon the husband's motion, it was stricken out. The court, in the divorce decree, awarded the wife custody of the children and ordered the husband to pay for their support a monthly sum smaller than that called for by the agreement. Thereafter the wife sued for the amount due under the agreement. The Court held that she had not waived, by election of remedies or otherwise, the right to recover the amount due under the agreement up to the date of the divorce decree,¹⁶ but that she could not recover the difference between the agreement figure and the court's figure for the period after that date.

In *Keith v. Glenn*¹⁷ plaintiff sued to recover 20,000 dollars for personal injuries and 500 dollars property damage incurred in a collision between his car and that of defendant. The answer pleaded a counterclaim for personal injuries and property damage in the amount of 5,000 dollars, less 1,250 dollars already "paid to the defendant by or on behalf of the plaintiff in partial satisfaction of his damages."¹⁸ There followed: (a) a demurrer to the counterclaim for failure to state a cause of action in that it appeared defendant had already been compensated; (b) order overruling demurrer; (c) motion to strike parts of the answer, including the allegation regarding the 1,250 dollars; (d) order striking that and other allegations; (e) amended, conforming answer; (f) reply pleading, *inter alia*, defendant's receipt of the 1,250 dollars as a bar to his claim, attaching the release and draft used in payment as exhibits, but also alleging that the settlement and payment were made by plaintiff's insurer against the wishes of plaintiff, who still

¹⁴ *James C. Greene Co. v. Kelley*, 261 N.C. 166, 134 S.E.2d 166 (1964). See also *McDaniel v. Fordham*, 261 N.C. 423, 135 S.E.2d 22 (1964), and text accompanying note 67 *infra*.

¹⁵ 261 N.C. 521, 135 S.E.2d 532 (1964).

¹⁶ For this part of the decision, reliance was placed upon *Jenkins v. Jenkins*, 225 N.C. 681, 36 S.E.2d 233 (1945).

¹⁷ 262 N.C. 284, 136 S.E.2d 665 (1964).

¹⁸ Record on Appeal, p. 12, *Keith v. Glenn*, *supra* note 17.

objected to it; (g) motion by defendant for judgment on the pleadings; (h) motion by plaintiff to strike the counterclaim on the grounds "that said counterclaim is a sham pleading and an irrelevant defense for that the defendant has heretofore entered into a settlement in compromise of the purported cause of action set forth in said counterclaim and has executed a full release with plaintiff's liability insurance carrier without plaintiff's knowledge, consent, or ratification; that the purpose of said counterclaim is not recovery from the plaintiff,"¹⁹ attaching an affidavit by a claim examiner for the insurer to the effect that the settlement was made without the knowledge, consent or ratification of plaintiff;²⁰ (i) motion by plaintiff, possibly filed the same day as the motion to strike, for permission to withdraw the reply;²¹ (j) order denying defendant's motion for judgment on the pleadings; (k) order denying plaintiff's motion to strike and, in the court's discretion, motion to withdraw reply; (l) demurrer by defendant to plaintiff's pleadings on the ground that they affirmatively indicated that plaintiff's cause of action had been fully released and hence that his action could not be maintained; (m) order sustaining the demurrer and dismissing the action.²²

The Court affirmed, primarily on the authority of *Bradford v. Kelly*,²³ the opinion in which was filed prior to interposition of the final, successful demurrer in *Keith*. Both cases held that where the insurer, pursuant to authority accorded by the policy, settles with a claimant without insured's consent, the insured must elect: (a) to ratify the settlement, the effect of which is to bar his own claim against the settling claimant; or (b) not to ratify, in which case he may proceed to sue, but the settling defendant may counterclaim, and if he is successful, while his settlement will be applied against his judgment, any excess of judgment over settlement is a personal liability of the insured, the insurer having no obligation either to

¹⁹ *Id.* at 27.

²⁰ The preliminary statement of facts in the report of the case correctly indicates that this motion to strike was made after reply was filed. In the opinion it is inadvertently stated that it was made before filing reply. It seems improbable that this affected the decision. For discussion of the motion to strike as sham, see *Sham Pleading, infra*.

²¹ The motion to withdraw the reply is both dated and stated to have been filed October 7, 1963. The motion to strike is also dated October 7, but is stated to have been filed October 4. Record on Appeal, pp. 27, 29.

²² Total time elapsed from date of summons to dismissal: one year, six months and twenty days.

²³ 260 N.C. 382, 132 S.E.2d 886 (1963).

defend against or to pay the counterclaim.²⁴ Further, either a motion to strike the counterclaim on the ground that it is barred by the release, or a reply pleading the settlement in bar, is a ratification of the settlement which bars plaintiff's recovery. Implicit in the *Keith* opinion is the proposition that when insured, by reply or motion, simultaneously attempts to assert the bar of settlement and his continuing objection to the settlement, the inconsistency is resolved by giving effect to the former and disregarding the latter.²⁵

These cases deal with a most perplexing problem—i.e., determining the consequences when an insured and insurer differ in their appraisal of the potential result of litigation. The Court's solution is not the only possible one. One alternative is to hold that the insurer's settlement bars the insured despite the absence of consent. This strikes the writer as the worst possible solution.²⁶ A second alternative is to hold the insurer liable for *any* recovery on the counterclaim. This virtually disregards the policy clause authorizing the insurer to settle and, in all probability, in the absence of prohibitory legislation, would lead to revision of the policy provisions to make the insurer's settlement binding on the insured. If legislation prevented this, there would be a high probability of rate increase—albeit the legislature might regard its contribution to the increase as justifiable.

A third alternative is to allow the plaintiff to invoke the settlement to bar the counterclaim, while leaving him free to pursue his own claim—the objective sought by plaintiff in *Keith*. This might well discourage settlements, because the releasing claimant would always be limiting his own recovery, while securing no protection from his adversary; it would certainly mean that knowledgeable

²⁴ Cf. *Moore v. Young*, 263 N.C. 483, 139 S.E.2d 704 (1965), discussed in *Treating a Counterclaim as a Complaint*, *infra*.

²⁵ As indicated in the text, plaintiff moved for permission to withdraw the reply, but this was denied by the judge in his discretion and plaintiff took no exception to the denial. Further, plaintiff had simultaneously pending a motion to strike the counterclaim. Therefore, the case did not present the question which would be presented if a reply pleading the settlement were filed but, before any further proceedings were had, permission to withdraw the reply, or to amend it to delete the plea in bar, was sought and granted. The writer suspects that the filing of the original reply would be considered a binding election to ratify, at least in the absence of a showing by plaintiff that he had no understanding of the significance of pleading the settlement and had no intention of ratifying.

²⁶ This was the solution adopted in *Aetna Cas. & Sur. Co. v. Brooks*, 218 Ga. 593, 129 S.E.2d 798 (1963), cited with disapproval in *Bradford v. Kelly*, 260 N.C. 382, 387, 132 S.E.2d 886, 890 (1963). See 41 N.C.L. REV. 240 (1963).

insureds would refuse to consent to insurers' settlements; and it would probably also lead to increased rates because total claims paid by both parties would almost certainly increase.

All in all, in the absence of a definitive legislative solution, the alternative selected by our Court seems to be the best of the four. It allows an insured to back his own appraisal of the case against that of his insurer, but requires that he do so at his own risk. However, because an obvious conflict of interest is involved, it is suggested that the rule of *Bradford* and *Keith* should not be followed when plaintiff and defendant have the same insurer.

In *North Carolina Nat'l Bank v. Stone*²⁷ the Court held that qualifying as executrix is not an irrevocable election by the widow to accept the terms of her husband's will; and where, at the time of qualifying, she did not know the value of the estate or of her share under the will, she was permitted to resign²⁸ and file timely dissent.²⁹

SHAM PLEADING

As indicated under "Election of Remedies," *Keith v. Glenn*³⁰ involved a motion to strike a counterclaim as sham. It was plaintiff's thesis that the counterclaim was not really pleaded to secure a recovery for defendant, but was rather a device to force plaintiff to ratify the settlement between defendant and plaintiff's insurer, thereby barring plaintiff's action—a purpose which, in fact, defendant successfully accomplished. Plaintiff urged as supporting authority *Scott v. Meek*,³¹ a South Carolina case in which such a motion was granted. Our Court affirmed denial of the motion, holding that the factual allegations of the counterclaim regarding defendant's injuries and damage would support recovery of a greater sum than he had received in settlement; that it could not be held as a matter of law

²⁷ 263 N.C. 384, 139 S.E.2d 573 (1965). For a case involving construction of a will clause revoking bequests to those contesting the will, see *Haley v. Pickelsimer*, 261 N.C. 293, 134 S.E.2d 697 (1964).

²⁸ The opinion, by posing but not deciding the question, perhaps intimates that resignation is not prerequisite to filing dissent. The intimation is based upon the reference, in G.S. § 30-1(c), to the surviving spouse as personal representative; and, indeed, the statutory language would readily support such a construction. See N.C. GEN. STAT. § 30-1(c) (Supp. 1963).

²⁹ The decision, in effect, overrules a statement in *Mendenhall v. Mendenhall*, 53 N.C. 287 (1860), that qualification as executrix is irrevocable. As the Court points out, the changes occurring during the intervening century preclude literal application of the statement.

³⁰ 262 N.C. 284, 136 S.E.2d 665 (1964).

³¹ 228 S.C. 29, 88 S.E.2d 768 (1955).

that the settlement amount was in fact full compensation; and hence that the *Scott* case, involving full settlement, was distinguishable.

This seems to misread the *Scott* opinion. There the court did not appraise the factual allegations; and its reference to full settlement is clearly directed to defendant's acceptance of the sum as full settlement—not to the actual adequacy of the amount. In respect to *acceptance* in full settlement there is no valid ground for distinction between the cases. However, *Scott* could be distinguished on the ground that there the court apparently assumed that, even if pleading of the counterclaim were allowed, plaintiff could assert the release as a bar without automatically destroying his own case. The plaintiff's fear thus was not that his assertion of the release would bar his own recovery, but that any evidence regarding the release would so prejudice the jury as to produce an adverse verdict.

Our Court has traditionally been reluctant to strike pleadings as sham;³² and in *Keith*, given the ratification principle adopted by the Court, even if it be conceded that defendant's motive in pleading the counterclaim was solely to force ratification of the release, this could result in barring plaintiff's action—and a pleading which may produce that result is hardly a sham pleading.

However, in the light of the way in which our Court elected to distinguish the *Scott* case, the question is posed as to whether, if plaintiff can show (as, for example, when defendant suffers only property damage) that defendant has in fact been paid in full, he can successfully move to strike the counterclaim. This, of course, is the situation in which plaintiff can refuse to invoke the release without practical risk, since the credit for the settlement would presumably equal the potential maximum recovery on the counterclaim; but important tactical considerations may still be involved because of the possible difference in the jury's reaction, dependent upon the presence or absence of a counterclaim.³³

TREATING A COUNTERCLAIM AS A COMPLAINT

In *Moore v. Young*³⁴ plaintiff, upon accepting a settlement from defendant's insurer after bringing suit, took a consent judgment

³² See Brandis & Bumgarner, *The Motion to Strike Pleadings in North Carolina*, 29 N.C.L. REV. 3, 17 (1950).

³³ Compare the series of unsuccessful motions in *Moore v. Young*, 260 N.C. 654, 133 S.E.2d 510 (1963), discussed in *Treating a Counterclaim as a Complaint*, *infra*.

³⁴ 263 N.C. 483, 139 S.E.2d 704 (1965).

of voluntary nonsuit without prejudice to defendant's counterclaim for damages in the same accident. The reply to the counterclaim, already filed, pleaded contributory negligence and that, as a result of the accident, defendant had been convicted of involuntary manslaughter. The latter defense was stricken.³⁵ At the trial plaintiff moved for permission to: (a) file an amended complaint; (b) amend the reply to plead the settlement in bar; (c) read the original complaint to the jury; (d) go forward with the evidence; (e) explain why defendant was going forward with the evidence; and (f) have the court explain this. All were denied. Defendant won a 25,000 dollar verdict and judgment and the Supreme Court affirmed. It is evident that, had plaintiff found a way to plead his own claim, he would have put defendant to the election which was fatal to the plaintiff in *Keith v. Glenn*.³⁶

The Court, of course, was aware of this, pointing out that if the consent judgment had dismissed the entire action, leaving defendant to start over as a plaintiff, the situation would have been as in *Keith*. Then the Court said:

If defendant had refused to permit the dismissal of his counterclaim when his insurance carrier settled with plaintiff, the court, upon plaintiff's motion, doubtlessly would have relabeled defendant's counterclaim as the complaint it was and would have permitted plaintiff to withdraw his reply theretofore filed and to file an *answer* setting up his own counterclaim. . . .

In this case plaintiff made every conceivable motion except one to withdraw his reply and file an answer setting up his own counterclaim. Had he done so, the court . . . would no doubt have allowed the motion.³⁷

This places an unfortunate emphasis on labels. A counterclaim is always a complaint in the sense that, to withstand demurrer, it must state a cause of action in favor of the pleader. A reply to a counterclaim is always an answer in the sense that it must, by denials or otherwise, plead a defense or open the way for judgment on the pleadings on the counterclaim. But our Court has held, most laudably, that where a complaint's allegations already, in effect,

³⁵ The lower court, because of the conviction, dismissed the counterclaim, but on an earlier appeal the Supreme Court reversed and ordered the striking of the allegations. *Moore v. Young*, 260 N.C. 654, 133 S.E.2d 510 (1963).

³⁶ 262 N.C. 284, 136 S.E.2d 665 (1964). See *Election of Remedies*, *supra*.

³⁷ 263 N.C. at 486, 139 S.E.2d at 707.

constitute an answer to a counterclaim, no reply is necessary.³⁸ It is, therefore, difficult to see why either plaintiff's motion to amend the reply or his motion for permission to file an amended complaint, while leaving the reply in the case, was not a reasonable equivalent of the motion, suggested by the court, for permission to withdraw the reply and file an answer pleading his own claim³⁹—particularly since it is not readily apparent to what authoritative precedent plaintiff's counsel was inadvertent. However, it is well that in the future legal rats, if they be learned enough, will know in which maze corridor the Supreme Court has put the cheese.

REAL PARTY IN INTEREST AND CAPACITY TO SUE AND BE SUED

The Court held that beneficiaries named in a prior will may file a caveat to the later will, though they are neither beneficiaries under the latter nor heirs.⁴⁰ It also held that when, in a joint tort-feasor case, judgment has been rendered against defendant *A* for 3,500 dollars and against *B* (brought into the case by *A*) for 1,750 dollars contribution to *A*, and *A*'s insurer has paid the judgment against *A*, and execution against *B* has been returned unsatisfied, *A* is no longer the real party in interest on the contribution claim and cannot maintain an action on it against *B*'s insurer.⁴¹ This was predicated upon the decision in an earlier case,⁴² the only new element being that here *A* had judgment for contribution *before* his own liability had been paid by his insurer, while there the action was to obtain judgment for contribution after such payment. The case represents the failure of one more effort to circumvent the Court's rule that a tort-feasor's insurer has no right to claim contribution.⁴³ It seems that this tends to make the contribution judgment worthless wherever the judgment against *A* is within his insurance coverage.⁴⁴ To what extent this may discourage joinder of

³⁸ *Williamson v. Varner*, 252 N.C. 446, 114 S.E.2d 92 (1960).

³⁹ That plaintiff's pleadings might have been on two series of pages instead of one would seem to create no insuperable difficulties. In *Keith v. Glenn*, 262 N.C. 284, 136 S.E.2d 665 (1964), a demurrer, which could not have been sustained had it been directed to the complaint alone, was sustained when directed to complaint and reply considered together. If they can be so considered for this purpose, why not for the purpose sought by the plaintiff in *Moore*?

⁴⁰ *In re Will of Belvin*, 261 N.C. 275, 134 S.E.2d 225 (1964).

⁴¹ *Parnell v. Nationwide Mut. Ins. Co.*, 263 N.C. 445, 139 S.E.2d 723 (1965).

⁴² *Herring v. Jackson*, 255 N.C. 537, 122 S.E.2d 366 (1961).

⁴³ *Squires v. Soraham*, 252 N.C. 589, 114 S.E.2d 277 (1960).

⁴⁴ It is true that the contribution judgment was not against *B*'s insurer,

additional defendants for contribution remains to be seen. In part the answer may depend upon how the Court, when called upon to do so, allocates rights and liabilities when *A*'s insurance coverage, and therefore the amount paid by his insurer, is less than the judgment against him.^{44a}

but if *A* loses his status as real party in interest, upon payment by his insurer, it seems to follow that he has no right even to issue execution against *B*.

^{44a} Since the above was written, two cases have radically altered the situation. In *Pittman v. Snedeker*, 264 N.C. 55, 140 S.E.2d 740 (1965), the Court held that execution could issue on a judgment for contribution, obtained in the original action, even though the original defendant's insurer had paid plaintiff's judgment in full. In *Safeco Ins. Co. v. Nationwide Mut. Ins. Co.*, 264 N.C. 749, 142 S.E.2d 694 (1965), judgment for contribution was also obtained in the original action. After payment of plaintiff's judgment in full, execution on the contribution judgment was issued and returned unsatisfied. The original defendant's insurer then sued the additional defendant's insurer, alleging, *inter alia*, that a provision in defendant's policy rendered it liable to those obtaining judgment against its insured. The superior court sustained a demurrer to the complaint, but the Supreme Court reversed. The Court reasoned: (1) the original defendant could have collected his contribution judgment by execution had the judgment debtor possessed sufficient property; (2) he could assign his judgment and the assignee could have execution issued in the assignor's name; (3) in an action on the judgment, the assignee would be the real party in interest; (4) the original defendant's insurer, upon payment of plaintiff's judgment, became, by operation of law, an equitable assignee of the rights under the contribution judgment; (5) all of this imposes no obligation upon the additional defendant's insurer; but (6) defendant's contract does impose an obligation to pay the contribution judgment.

As indicated, the *Safeco* decision is on demurrer and not a final judgment on the merits. Further, the Court pointed out that the additional defendant had not "challenged" the contribution judgment—a somewhat cryptic statement in view of the fact that his liability was fully litigated. It is the writer's understanding that the judgment is now being "challenged" by a motion to have it marked satisfied on the basis of the full payment of plaintiff's judgment. Predictions are brash in an area in which, as here, the two latest cases have reached results which, in the light of earlier decisions, are surprising.

Nevertheless, the following points seem to summarize the present situation: (a) As between insurers, there is still no right of contribution *as such*; (b) a paying insurer, as a practical matter, has a right of contribution, enforceable by execution or action, against the judgment debtor on the contribution judgment; and (c) given a policy provision such as that involved in the *Safeco* case—which the writer understands to be a standard clause—the practical result is that, by contract, the paying insurer may collect from the other insurer in the same manner as if the right of contribution were recognized. These results, while perhaps somewhat indirect, are welcome. To the extent that it may be applicable, they are also consistent with G.S. § 20-279.21(f)(2).

For the present, this discussion must be limited to the situation in which the contribution is obtained, in effect, as a part of the same judgment which awards recovery to the plaintiff. To the extent that such a contribution judgment may be blocked by the unfortunate decision in *Greene v. Charlotte Chem. Lab., Inc.*, 254 N.C. 680, 120 S.E.2d 82 (1961), 40 N.C.L. Rev. 633

In *Franklin v. Standard Cellulose Prods., Inc.*⁴⁵ the Court construed G.S. § 1-105,⁴⁶ which authorizes service on a foreign administrator of a deceased nonresident motorist, as also authorizing suit against such representative in our courts. Justice Higgins dissented, pointing out that a foreign administrator may not bring an action in our courts, but that, under the majority decision, he must necessarily have the right to counterclaim, thus being allowed to litigate in a manner not otherwise open to him. The validity of the first part of his assertion is emphasized by a dictum in the virtually contemporary case of *In re Scarborough*,⁴⁷ reiterating that a plaintiff administrator must be appointed by our courts. However, the principal point of interest in this latter case is that an administrator may be appointed by a clerk of superior court to bring a wrongful death action here, even though the death of the nonresident decedent and all events leading to it occurred outside the state, when the potential corporate defendant, though having no plant or sales office in the state, was represented by a salesman resident in the clerk's county. Further, the clerk is not authorized to consider the existence of defenses to the wrongful death action.⁴⁸

In another case the Court treated lack of capacity to sue as jurisdictional and, upon noticing the matter for itself, remanded with directions to dismiss.⁴⁹

(1962), the situation is not clear. However, as an elementary proposition of feeding everyone out of the same spoon, it seems that effective rights between tort-feasors or their insurers should not vary dependent upon whether plaintiff elects to sue one or more. If consistent rights cannot be obtained by decision, then legislation is in order. See Note, 41 N.C.L. REV. 882 (1963).

⁴⁵ 261 N.C. 626, 135 S.E.2d 655 (1964).

⁴⁶ See *A Survey of Statutory Changes in North Carolina in 1953*, 31 N.C.L. REV. 375, 395 (1953).

⁴⁷ 261 N.C. 565, 135 S.E.2d 529 (1964).

⁴⁸ Questions relating to tort-feasor's negligence, proximate cause, contributory negligence of deceased, statutes of limitation, settlement, or assignment of the asserted cause of action are all properly determinable in a trial on the merits. Because the probate court cannot decide these questions, the assertion that they will prove an insurmountable barrier to a recovery does not render the court powerless to make an appointment. *Id.* at 569, 135 S.E.2d at 532. Justice Parker, concurring, emphasizes that this applies to a defense grounded upon a covenant not to sue executed by an ancillary administrator in South Carolina as part of the settlement of a wrongful death action brought there against other defendants for the same death.

⁴⁹ *Revels v. Oxendine*, 263 N.C. 510, 139 S.E.2d 737 (1965). The action was by a district school committee, which is given no statutory authority to prosecute actions. The case serves once more to demonstrate the invalidity of the assertion in some cases that the objection that plaintiff is not the real party in interest can be raised only by affirmative defense. See

Finally, speaking for a unanimous Court, Justice Sharp, in a thorough and persuasive opinion, held: (a) while the caption of a complaint should indicate plaintiff's representative capacity, its failure to do so is not fatal when there is an allegation that the action is being brought by plaintiff as administratrix; and (b) when plaintiff applied for letters of administration, secured an order therefor, executed the required bond, and brought a wrongful death action, but the bond was not executed by the surety and the letters were not actually issued until after the statute of limitations had run, the complaint may be amended to show the true facts and the amendment will relate back and avoid the defense of the statute.⁵⁰ For the time being, at least, the decision on the second point must be narrowly confined to its facts.⁵¹ Nevertheless, this writer hopes that it presages some further liberalization of our Court's attitude toward relation back.

AUTHORITY OF NEXT FRIEND

In *Teele v. Kerr*⁵² it was held: (a) the function and authority of a next friend ends when he secures a judgment and he has no authority to collect it; and (b) therefore, when the infant has no general guardian, the statute of limitations does not run against an action on the judgment while the minority continues.

VERIFICATION OF COPY OF COMPLAINT SERVED

In *Shackleford v. Taylor*⁵³ it is strongly implied, if not held, that when the copy of the complaint served on the defendant does not include a copy of the executed verification, the situation, for

Leach v. Page, 211 N.C. 622, 191 S.E. 349 (1937); Nall v. McConnell, 211 N.C. 258, 190 S.E. 210 (1937); Murrow v. Cline, 211 N.C. 254, 190 S.E. 207 (1937). The matter may be treated as failure to state a cause of action. See Thomas v. Williams, 222 N.C. 754, 22 S.E.2d 711 (1943). Or, as in the principal case, as lack of legal capacity to sue (expressly made subject to demurrer by G.S. § 1-127) amounting to a jurisdictional defect. Either of the last-mentioned two may be raised at any time or noticed by the Court *ex mero motu*.

⁵⁰ Graves v. Welborn, 260 N.C. 688, 133 S.E.2d 761 (1963).

⁵¹ The opinion: (a) clearly indicates that it would not apply where plaintiff, at the time of bringing the action, had no ground for believing herself to be an administratrix; (b) strongly implies that it would not apply to a *defendant* representative; and (c) reiterates North Carolina's minority position that an amendment changing plaintiff's capacity does not relate back.

⁵² 261 N.C. 148, 134 S.E.2d 126 (1964).

⁵³ 261 N.C. 640, 135 S.E.2d 667 (1964).

default judgment purposes, is as if the original complaint were unverified, even if it is in fact verified. The moral for plaintiffs' attorneys is plain enough.

EXTENDING TIME TO FILE COMPLAINT

Not surprisingly, it was held that G.S. § 1-121 means what it says in prohibiting the clerk from making a second order, further extending the time for filing a complaint; but, upon appeal of the matter to a judge of superior court, the judge was in error in assuming that nothing was before him except the authority of the clerk, as the judge has power to permit such extension and the situation called for him to exercise that discretion to grant or deny it.⁵⁴ Presumably plaintiff's attorney should go directly to the judge with his request.

"TRAUMATIC NEUROSIS" AS SPECIAL DAMAGE REQUIRING SPECIAL ALLEGATION

In *Thacker v. Ward*⁵⁵ the Court held that: (a) while there may be recovery for "traumatic neurosis"⁵⁶ resulting from physical injury, such recovery must be predicated upon express allegations of the condition; and (b) it is not included in allegations that plaintiff suffered head, neck and spinal injuries, that he suffered "constant and intractable headaches," that "his nervous system was severely shocked and damaged," and that he suffered "excruciating physical pain and mental anguish."⁵⁷ Therefore, even though defendant's attorney made no objection⁵⁸ to plaintiff's testimony as

⁵⁴ *Deanes v. Clark*, 261 N.C. 467, 135 S.E.2d 17 (1964).

⁵⁵ 263 N.C. 594, 140 S.E.2d 23 (1965).

⁵⁶ By express acknowledgment in the opinion this is the Court's label, as it had not been used by any of the expert witnesses. According to the Court, it "is a term loosely used to include a variety of emotional and nervous disorders which sometimes follow a physical injury and which cause pain as real as if it had a physical basis." *Id.* at 598, 140 S.E.2d at 27.

⁵⁷ Is it permissible to wonder whether this encourages that very "banjo-work" which elsewhere the Court condemns? See text accompanying note 1 *supra*.

⁵⁸ The opinion speculates that counsel believed that plaintiff's extraordinary testimony, straining the credulity of the most credulous, would actually benefit the defendant. If such was the case, it seems doubtful that counsel should be allowed to have it both ways—hoping that this testimony would prejudice plaintiff's entire case, while, through the instruction (requested by him), guarding against the outside possibility that the jury might elect to believe it all. The Court relies, as to this point, upon North Carolina's rule requiring allegation as well as proof, under which failure to object, far from being fatal, allows counsel thus to play it cute. The rule seems

to his symptoms, the trial judge was correct in instructing the jury not to allow anything for "psychological" complaints.

Refusal to treat "traumatic neurosis" as general damage is grounded on the notion that it is not a usual and ordinary consequence of physical injury. But the Court seems on much more questionable ground in finding that it is not encompassed within the damage allegations mentioned. Cases cited in support dealt with insanity, brain disease and epilepsy and, therefore, they do not seem necessarily to rule this case.⁶⁹ Even though the particular plaintiff's story was something less than appealing,⁶⁰ it would hardly have warped the normal meaning of the words used to find the allegations sufficient.⁶¹

AFFIRMATIVE DEFENSES—CONSIDERATION BEFORE TRIAL

The Court held, in an action for alimony, that while condonation is ordinarily an affirmative defense and must be pleaded, it may be taken advantage of by demurrer when it appears on the face of the complaint.⁶² It also held that it is within the discretion of the superior court judge to pass upon a plea of *res judicata* prior to trial on the merits.⁶³

SINGLE VERSUS MULTIPLE CAUSES OF ACTION

In *Short v. Nance-Trotter Realty, Inc.*⁶⁴ plaintiffs, husband and wife, sued a corporation and its president and vice-president

particularly inappropriate here, where no conceivable surprise was involved. An expert testifying for defendant (thought not originally employed by defendant), who opined that plaintiff's complaints were psychological, had first examined plaintiff more than three years prior to trial.

⁶⁹ Compare *Keefe v. Lee*, 197 N.Y. 68, 70, 90 N.E. 344, 345 (1909). The complaint alleged that plaintiff, attacked by a horse, was injured through his head and skull, and that the horse "did viciously attack the plaintiff, jumping upon him, . . . striking the plaintiff upon his head, breaking his skull, . . . and nearly killing this plaintiff." A divided court excluded evidence that plaintiff was rendered deaf.

⁶⁰ It is an inescapable conclusion that the Court believed plaintiff was lying. The opinion refers to the "bizarre, metastatic symptoms" detailed by plaintiff, and the factual summary points out that plaintiff attended personal injury trials and that he spent time at Miami Beach and a summer "on the sands" at Virginia Beach. (As to the latter, if it be assumed that plaintiff was miserable, it should hardly be to his prejudice that he preferred to be so in pleasant surroundings.)

⁶¹ It is ironical that, while requiring detailed precision of plaintiff's attorney, the Court allows itself a summary label which, concededly, is "loosely used." See note 56 *supra*.

⁶² *Cushing v. Cushing*, 263 N.C. 181, 139 S.E.2d 217 (1964).

⁶³ *Wilson v. Hoyle*, 263 N.C. 194, 139 S.E.2d 206 (1964).

⁶⁴ 262 N.C. 576, 138 S.E.2d 210 (1964).

as individuals, ostensibly alleging three causes of action: (a) trespass, in the form of street making activities, on five lots owned by plaintiffs; (b) same type of trespass on land, claimed by plaintiffs by adverse possession, located at or near the lots; and (c) damage, attendant upon the street building, caused by removing trees, dumping dirt, and diverting surface water. The superior court sustained a demurrer for misjoinder of causes and parties, but the Supreme Court reversed, holding that the complaint alleged only a single cause of action for trespass and resulting damages.⁶⁵ In effect, it ordered plaintiffs' attorney to recast the complaint. The Court then suggested that plaintiffs might not have enough parties in the case to permit them to establish either ownership or right to possession by adverse possession, and pointed out that necessary parties may be brought in by motion, order and service of process. This seems to imply that any property right issue ultimately raised between plaintiffs and other claimants would still be within the single cause of action framework.⁶⁶

In *McDaniel v. Fordham*⁶⁷ the Court construed a complaint by fourteen plaintiffs against four defendants as presenting a single cause of action to enforce a parol trust and to require one defendant to account for rents and profits from the trust *res*, whether they came into his hands as trustee or as guardian for the trustor.⁶⁸ The Court points out that while a separate cause of action might have been alleged against two of the defendants, the complaint made no demand for such relief.

⁶⁵ Cf. *Bryan v. Spivey*, 106 N.C. 95, 11 S.E. 510 (1890), holding that where a number of trespassers have settled on different parts of one tract of land, or upon several that are contiguous and have been consolidated into one tract by the owner, all may be joined as defendants in a single suit to recover possession and have the title adjudicated.

⁶⁶ Whatever this may signify from the standpoint of property law—cf. *Britt v. Baptist Children's Home*, 249 N.C. 409, 106 S.E.2d 474 (1959); *Taylor v. Honeycutt*, 240 N.C. 105, 81 S.E.2d 203 (1954)—procedurally this might open the way for other claimants to the land, when joined, to claim against the original defendants for trespass, thus, in effect, becoming alternative plaintiffs if their claim affects all the realty. But where, as in the principal case, the original plaintiff has undisputed title to some of the land, would such a claim by the added parties immediately involve a misjoinder of causes and parties?

⁶⁷ 261 N.C. 423, 135 S.E.2d 22 (1964). The lower court sustained a demurrer for misjoinder of causes and parties. The Supreme Court reversed.

⁶⁸ See *Brandis, Permissive Joinder of Parties and Causes in North Carolina*, 25 N.C.L. REV. 1, 22 (1946); *Brandis & Graham, Recent Developments in the Field of Permissive Joinder of Parties and Causes in North Carolina*, 34 N.C.L. REV. 405, 412 (1956).

In *Crouch v. Lowther Trucking Co.*⁶⁹ the complaint ostensibly alleged seven causes of action, all based upon alleged conversion of plaintiff's property, after termination of a rental contract, and failure to account for a deposit made under the contract. The Court held that only a single cause was involved, saying: "A plaintiff may not create several causes of action out of a single tortious act, nor may he create several causes of action out of a single failure to comply with a contract in its differing terms."⁷⁰ In *Bassinov v. Finkle*⁷¹ it was held that it was within the discretion of the lower court to allow an amendment to allege punitive damages, since this merely added to the original cause of action.

All of these decisions reflect a concept of a cause of action which, in the context in which the question was presented, is realistically broad.⁷²

JOINDER

In an action by a shareholder, who was also a director, against the corporation and all other directors, the Court recognized two causes of action: (a) to require payment of dividends; and (b) to compel liquidation.⁷³ It affirmed the overruling of a demurrer for misjoinder of causes and parties, holding that the causes arose out of the same controversy and involved the same subject matter—the transaction of the corporate business.⁷⁴ The Court pointed out that if the plaintiff secured liquidation, the dividend question would

⁶⁹ 262 N.C. 85, 136 S.E.2d 246 (1964).

⁷⁰ *Id.* at 87, 136 S.E.2d at 247. The lower court had sustained a demurrer to the "seventh cause of action" and this was affirmed, as it sought damages on a principle not available to plaintiff. The Court also criticized the complaint's prolixity and affirmed the lower court's order requiring the complaint to be recast to state a single cause of action.

⁷¹ 261 N.C. 109, 134 S.E.2d 130 (1964).

⁷² *Cf. Hormel & Co. v. Winston-Salem*, 263 N.C. 666, 140 S.E.2d 362 (1965), where the Court refused permission to amend the complaint in a way regarded by the Court as setting up a wholly different cause of action, or changing the original cause substantially, and such permission was not sought until five days before the appeal from judgment of involuntary nonsuit was to be argued to the Supreme Court. Rejecting the proffered amendment as belated seems reasonable enough, particularly since in no event could plaintiff have had judgment without a new trial; but to the extent that the opinion may imply that the lower court would have lacked discretionary power to allow amendment (as conforming to the proof) during the trial, the decision is perhaps more questionable. See 1 MCINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE § 1285 (Supp. 1964).

⁷³ *Dowd v. Charlotte Pipe & Foundry Co.*, 263 N.C. 101, 139 S.E.2d 10 (1964).

⁷⁴ See Brandis, *Permissive Joinder of Parties and Causes in North Carolina*, 25 N.C.L. REV. 1, 25 (1946).

become moot and that it would obviate the inconsistency if the two causes were stated in the alternative.⁷⁵ This decision is most welcome for two reasons: (a) In effect, it gives a broad definition to "the same transaction, or transaction connected with the same subject of action," as used in the joinder statute,⁷⁶ by contrast with some earlier cases invoking a very narrow definition.⁷⁷ (b) Hopefully, it may indicate that the Court, having recently recognized the propriety of joining mutually destructive causes of action where alternative parties are involved,⁷⁸ will now readily allow joinder of mutually destructive causes which do not involve alternative parties.⁷⁹

In two cases the Court found misjoinder of causes and parties and dismissed the action. In one the attempt was to join: (a) a cause against the drawee of a draft for the purchase price of hogs sold; and (b) a cause against a bank for negligent failure to notify plaintiff that the draft had not been honored.⁸⁰ In the other the attempt was to join: (a) a cause against an administrator to surcharge and falsify his account, in which other defendants were properly joined; and (b) a cause against him as an individual for conspiracy in connection with the sale of land by a commissioner, in which the other defendants had no interest.⁸¹ Both decisions are consistent with prior authority.

COUNTERCLAIMS

A case involving the treatment of a counterclaim as a complaint has already been discussed.⁸² In another case,⁸³ plaintiffs, children of a testator, brought a declaratory judgment proceeding to de-

⁷⁵ The Court also believed the complaint was too prolix, even after the lower court had eliminated 39 of its 160 paragraphs. See text accompanying note 1 *supra*.

⁷⁶ N.C. GEN. STAT. § 1-123 (1953).

⁷⁷ See, e.g., *Pressley v. Great Atl. & Pac. Tea Co.*, 226 N.C. 518, 39 S.E.2d 382 (1946).

⁷⁸ *Conger v. Travelers Ins. Co.*, 260 N.C. 112, 131 S.E.2d 889 (1963), 42 N.C.L. REV. 242 (1963).

⁷⁹ Cf. the cases in which the Court has stated that "repugnant" allegations neutralize each other, *Hunnicut v. Shelby Mut. Ins. Co.*, 255 N.C. 515, 122 S.E.2d 74 (1961), and cases therein cited. See also 1 MCINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE § 1285 (Supp. 1964), discussing the introduction of an inconsistent cause of action by amendment.

⁸⁰ *Bannister & Sons, Inc. v. Williams*, 261 N.C. 586, 136 S.E.2d 572 (1964).

⁸¹ *Kearns v. Primm*, 263 N.C. 423, 139 S.E.2d 697 (1965).

⁸² Text accompanying note 34 *supra*.

⁸³ *Cunningham v. Brigman*, 263 N.C. 208, 139 S.E.2d 353 (1964); cf. *Burton v. Dixon*, 259 N.C. 473, 131 S.E.2d 27 (1963). The *Burton* case was an action against executor for services rendered decedent. Counter-

termine the rights of the parties under the will, alleging that testator's "widow" was not lawfully such, since she was not validly divorced from a prior husband when she purportedly married the testator and hence had no right to dissent from the will. Her answer pleaded, *inter alia*, that if she was not validly married to testator, she had rendered services to him, under the impression that she was married to him, reasonably worth 60,000 dollars, for which she counterclaimed. The Court held that the counterclaim was properly stricken, as it did not arise out of any rights under the will. It may be doubted whether, as a matter of substantive law, the "widow" could recover for services under these circumstances; but, procedurally, it is arguable that the counterclaim should have been allowed. The statute⁸⁴ allows a counterclaim for "a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of action." Here the complaint is not exclusively for determination of rights under the will. The widow's right to dissent is statutory and in derogation of the will. As a practical matter, the complaint seeks a determination of the defendant's rights *in the estate*, and the counterclaim presents a claim to a part of that estate. At the least, the case is a good example of why the State should adopt the more flexible federal counterclaim notions.

In *Perfecting Serv. Co. v. Product Dev. & Sales Co.*⁸⁵ plaintiff, as vendor, sued *A*, as vendee, for breach of contract, joining *B* as *A*'s guarantor. *B* had made the initial contract with plaintiff, but plaintiff consented to cancellation of *B*'s and substitution of *A*'s purchase orders. The goods still wound up with *B*, by purchase from *A*. *B*'s answer: (a) cross-claimed⁸⁶ against *A* for breach of warranty and counterclaimed against plaintiff for breach of the same warranties; and (b) counterclaimed against plaintiff for breach of warranty under the initial contract between plaintiff and *B* prior to its cancellation. The Court held that the counterclaim under (a) was improper, not as a procedural matter, but because lack of privity prevented *B* from having such a claim against plaintiff. It then held that the counterclaim under (b) was proper, not under the trans-

claim against plaintiff, joining her husband, for conspiracy to take possession of and convert decedent's property. Counterclaim held proper.

⁸⁴ N.C. GEN. STAT. § 1-137 (1953).

⁸⁵ 261 N.C. 660, 136 S.E.2d 56 (1964).

⁸⁶ See *Cross-Claims*, *infra*.

action clause of the statute, but under the contracts clause.⁸⁷ The opinion does not discuss the fact that the (b) counterclaim is not compulsory and also does not affect *A*, unless by indirection.⁸⁸ However, there is certainly no compulsion to apply here the much over-worked requirement that all causes must affect all parties.

In another case,⁸⁹ a vehicle owner and his driver instituted separate negligence actions against the same defendant. Defendant removed the driver's action to federal court and there counterclaimed for her own injuries in the same accident. Thereafter in the owner's action, still in state court, she counterclaimed and asked that the driver be joined as an additional defendant on the counterclaim. The lower court allowed the motion and the Supreme Court affirmed. Except for the additional factor of the pending action in federal court, the decision follows an earlier case.⁹⁰ The Court observes that it is passing only on plaintiff's objection—not any potential objections of the driver, who had not yet actually become a party. However, it seems most doubtful that he could successfully object if the counterclaim states a cause of action against him.⁹¹

⁸⁷ N.C. GEN. STAT. § 1-137 (1953). Actually the Court affirmed a judgment striking both (a) and (b) because they were improperly commingled, but it left the way open for *B* to ask permission to replead (b).

⁸⁸ Ordinarily when a plaintiff sues two defendants, and one counterclaims on an independent contract claim, the other defendant is indirectly affected, because if there is recovery on both complaint and counterclaim, both defendants benefit by the offset. Cf. 1 MCINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE § 1239 (Supp. 1964). In the instant case, despite the Court's failure to regard it as a transaction clause counterclaim, the circumstances are such that it seems virtually impossible to have recovery on both complaint and counterclaim. In all probability establishment of facts allowing recovery on the complaint will necessarily defeat the counterclaim, and vice versa.

⁸⁹ *Diamond Brand Canvas Prod. Co. v. Christy*, 262 N.C. 579, 138 S.E.2d 218 (1964). Plaintiff asked that the counterclaim against him be abated because of the federal case, and this was denied.

⁹⁰ *Bullard v. Berry Coal & Oil Co.* 254 N.C. 756, 119 S.E.2d 910 (1961). There it was the principal who was brought in as a new party to the counterclaim against plaintiff agent, while the converse was true in *Christy*, but that should make no difference. Further, *Bullard* seems to make it clear that bringing in the new party is a matter of right and not of discretion. In *Christy*, the Court cited not only *Bullard*, but also *Adler v. Curle*, 254 N.C. 502, 119 S.E.2d 393 (1961), where, after long delay, the matter was treated as one of discretion. It seems doubtful, however, that this is intended to imply that the granting of a timely motion is a matter of discretion.

⁹¹ In *Bullard v. Berry Coal & Oil Co.*, *supra* note 90, the objections were by the new party. In *Diamond Brand Canvas Prod. Co. v. Christy*, 262 N.C. 579, 138 S.E.2d 218 (1964), the Court's observations about the relation of the federal suit to plaintiff would not apply to the driver. Nevertheless, since the prior action pending between the driver and defendant

CROSS-CLAIMS (INCLUDING THIRD PARTY PRACTICE)

Our Court continues to adhere to its rule that an original defendant may cross-claim against another original defendant, or against an additional defendant brought in for the purpose, only when his claim is "germane" to plaintiff's cause of action. The rule, not compelled by any statute, is unfortunately and unnecessarily restrictive; and the Court's extremely narrow concept of what is "germane" still further reduces the field of permissible cross-claims.

In *Perfecting Serv. Co. v. Product Dev. & Sales Co.*⁹² plaintiff, as vendor, sued *A*, as vendee, for breach of a sales contract, joining *B* as *A*'s guarantor. *A*'s answer pleaded breach of warranty by plaintiff. *B*, who had repurchased the goods from *A*, alleged that *A* had made the same warranties to *B* as plaintiff had made to *A*, and cross-claimed against *A*. The Court held that the cross-claim was properly stricken because of the lack of privity between plaintiff and *B*.⁹³ In *Davis v. Radford*,⁹⁴ where plaintiff sued a retailer for breach of warranty, the Court allowed the retailer to bring in his wholesaler and conditionally cross-claim for breach of the same warranty. In the principal case the Court said that *Davis* is confined to situations involving the sale of articles for human consumption sold in sealed packages prepared by the manufacturer. As a practical matter, nothing seems less justifiable than to make the propriety of a cross-claim turn on such technical notions of privity.

In another case,⁹⁵ plaintiff alleged injury caused by the negligence of defendant employee, jointly employed by two other defendants. One employer defendant conditionally cross-claimed: (a) against the other employer defendant on an alleged indemnity contract; and (b) against the employee defendant on a primary-secondary liability theory. The Court held that (a) was improper, but

was in federal court, the ordinary abatement rule, applied when both actions are in North Carolina state courts, would not seem to apply. *Kesterson v. Southern Ry.*, 146 N.C. 276, 59 S.E. 871 (1907); *Sloan v. McDowell*, 75 N.C. 29 (1876).

⁹² 261 N.C. 660, 136 S.E.2d 56 (1964). For an excellent discussion of cross-claim rules, see 1 MCINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE §§ 722, 722.5, 1244.5 (Supp. 1964).

⁹³ The Court also believed that the cross-claim was collusive and this might have alone justified the decision, but that it was not the sole ground of decision is clearly indicated by the stress placed on lack of privity.

⁹⁴ 233 N.C. 283, 63 S.E.2d 822 (1951).

⁹⁵ *Steele v. Moore-Fleischer Hauling Co.*, 260 N.C. 486, 133 S.E.2d 197 (1963).

(b) was proper. We thus have two cross-claims based upon theories of indemnity, the only difference being that (a) rests upon contract between the defendants, while (b) rests upon an obligation implied by law from the relationship between the defendants.⁹⁶ To predicate these differing results upon a distinction so technical and tenuous should bring great posthumous joy to all the learned common law pleaders who reveled in the re-splitting of hairs.

Fortunately, the Court continues to permit new defendants to be brought in on conditional cross-claims for contribution, and has expressly rejected an invitation to put a stop to the practice on grounds of inconsistency.⁹⁷

While, as already indicated, a primary-secondary liability situation is also regarded as permitting a cross-claim, the Court in two cases found that the allegations would not support such a theory.⁹⁸

CONFLICT OF LAWS

*Seymour W. Wurfel**

In the choice of law field three recent pronouncements of the Court have been confined to applying traditional *lex loci* rules in determining the statutory jurisdiction of North Carolina tribunals.

Two of these cases delimit the extent of the in personam jurisdiction granted over foreign non-domesticated corporations in behalf of North Carolina residents by the language of G.S. § 55-145 (4): "Out of tortious conduct in this State, whether arising out of repeated activity or single acts, and whether arising out of misfeasance or nonfeasance." Each case involved negligent manufacture

⁹⁶ Indeed, the obligation, broadly speaking, is contractual in nature, though, more precisely speaking, it is quasi-contractual and grounded in tort. See *Cox v. Shaw*, 263 N.C. 361, 139 S.E.2d 676 (1965).

⁹⁷ *Woods v. Turner*, 261 N.C. 643, 135 S.E.2d 664 (1964). See also *McPherson v. Haire*, 262 N.C. 71, 136 S.E.2d 224 (1964) (additional defendant liable, if at all, on doctrine of respondeat superior).

⁹⁸ *Edwards v. Hamill*, 262 N.C. 528, 138 S.E.2d 151 (1964); *Cox v. Shaw*, 263 N.C. 361, 139 S.E.2d 676 (1965). In the latter it is said that a father may not recover on such a theory from his unemancipated minor child or the child's estate. Technically this may be dictum, but the opinion leaves no doubt that it is a deliberately considered and expressed statement of North Carolina law.

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in Michigan of products allegedly causing injury elsewhere. In *Farmer v. Ferris*¹ a defective amusement device caused injury at Carolina Beach. After finding sufficient contacts with North Carolina to satisfy due process requirements, the Court in upholding jurisdiction said: "Only the consequences to plaintiff occurred in North Carolina. . . . [T]he place of a wrong is in the State where the last event takes place which is necessary to render the actor liable for an alleged tort. Restatement, Conflict of Laws, sec. 377. . . ."²

In *Atlantic Coast Line R.R. v. J. B. Hunt & Sons, Inc.*,³ a heater explosion in one of plaintiff's refrigerator cars in Virginia killed an employee. Plaintiff sought indemnity for its expense in settling the resulting Federal Employers' Liability Act claim, by substituted service on the Secretary of State against the defendant Michigan corporation as provided by G.S. § 55-144, contending this cause of action arose "out of business solicited in this State by mail or otherwise" within the meaning of G.S. § 55-145 (2). The Court affirmed the quashing of service, holding that "the jurisdiction created by G.S. 55-145 pertains only to *local actions*,"⁴ and not to those arising outside of North Carolina. The Court pointed out that "a suit on a cause of action arising out of the State may be maintained here against an undomesticated foreign corporation if personal service can be had within the State upon an *actual agent* of the corporation . . ."⁵ This simply preserved the normal situation regard-

¹ 260 N.C. 619, 133 S.E.2d 492 (1963).

² *Id.* at 627, 133 S.E.2d at 498. *Quaere*: what does this holding do to the earlier ruling of the court of appeals in *Lowe's North Wilkesboro Hardware, Inc. v. Fidelity Mut. Life Ins. Co.*, 319 F.2d 469 (4th Cir. 1963), 42 N.C.L. Rev. 419 (1964), that North Carolina had no choice of law rule applicable to torts with multi-state features? The court of appeals said, "we find it most reasonable, in these circumstances, to avoid a rigid rule and to pursue instead a more flexible approach which would allow the court in each case to inquire which state has the most significant relationships with the events constituting the alleged tort and with the parties . . . [and] then . . . apply the law of that jurisdiction." *Id.* at 473. Under *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1937), a federal court sitting in a diversity of citizenship case must follow the choice of law rule prevailing in the state of the forum. If the state court has not decided the point, then the rule is, as stated in *Lowe's North Wilkesboro Hardware*, that the federal court "must nevertheless determine the rule that the North Carolina Supreme Court would probably follow, not fashion a rule which . . . an independent federal court . . . might consider best." 319 F.2d at 472. The federal effort at prophecy here has possibly miscarried.

³ 260 N.C. 717, 133 S.E.2d 644 (1963).

⁴ *Id.* at 721, 133 S.E.2d at 648.

⁵ *Id.* at 722, 133 S.E.2d at 648.

ing a transitory cause of action arising in another state, while refusing to make applicable thereto the substituted service contemplated by G.S. § 55-144.

In *Rice v. Uwharrie Council Boy Scouts of America*⁶ an injury to a Scout executive while engaged in official deep sea fishing on the high seas adjacent to Jekyll Island, Georgia, was held compensable under the North Carolina Workmen's Compensation Act since the contract of employment was made in North Carolina, the plaintiff was a North Carolina resident, the defendant Boy Scout Council maintained a place of business in North Carolina, and the employment contract was not expressly for services exclusively outside of North Carolina.⁷ Defendant contended the exclusive remedy of plaintiff was under the Longshoremen's and Harbor Workers Act.⁸ The Court rejected this contention pointing out that section 903 (a) of that act makes it applicable only "if recovery . . . through Workmen's Compensation proceedings may not validly be provided by State law."⁹ The Court said, "The proper forum is the North Carolina Industrial Commission. . . . The claim does not arise under Maritime Law, but under an employment contract made in North Carolina by residents of that State."¹⁰ This characterization of the cause of action as one of "employment contract" is consistent with the previous practice of the Court in Workmen's Compensation Act cases.¹¹

While these cases do not really break new ground, each presents an interesting application of an old principle to a new setting. Another choice of law case arose out of a more conventional background, but caused the Court to draw a nice distinction between "substance" and "procedure."

In *Kirby v. Fulbright*¹² the accident occurred on U.S. Highway No. 1 in Virginia. Defendant, driving a tractor-trailer, ran out of gasoline at night and parked his vehicle without lights or flares, partly on the shoulder and partly in the right of two south-bound traffic lanes. Another south-bound tractor-trailer in which plaintiff was a sleeping passenger struck the parked vehicle, seriously injur-

⁶ 263 N.C. 204, 139 S.E.2d 223 (1964).

⁷ N.C. GEN. STAT. § 97-36 (1965).

⁸ 44 Stat. 1424 (1927), 33 U.S.C. §§ 901-50 (1957).

⁹ 263 N.C. at 206, 139 S.E.2d at 225.

¹⁰ *Id.* at 206, 139 S.E.2d at 225-26.

¹¹ *E.g.*, *Warren v. Dixon & Christopher Co.*, 252 N.C. 534, 114 S.E.2d 250 (1960).

¹² 262 N.C. 144, 136 S.E.2d 652 (1964).

ing plaintiff. Defendant, on appeal from a verdict and judgment for plaintiff, urged that he was entitled to a nonsuit on the ground that the sole proximate cause of plaintiff's injury was the negligence of the driver of the vehicle in which plaintiff was a passenger. After an analysis of Virginia statute and case law the North Carolina Supreme Court held, "Applying . . . Virginia decisions . . . there was ample basis for a factual finding that the negligence of defendants was at least one of the proximate causes of the collision."¹³ This the Court did pursuant to its own mandate that, "The substantive rights and liabilities of the parties are to be determined in accordance with the law of Virginia, the *lex loci*."¹⁴ Similarly, in rejecting appellant's contention that the driver of the other vehicle was guilty of contributory negligence as a matter of law, the Court applied Virginia decisions in determining that the facts did not warrant withdrawing this issue from the jury.

Regarding procedure the Court said:

Procedural matters are to be determined in accordance with the law of North Carolina, the *lex fori*. . . . Whether, under the substantive law of Virginia, the evidence was sufficient to require its submission to the jury is determinable in accordance with the procedural law of this jurisdiction. . . . Hence . . . the evidence must be considered in the light most favorable to plaintiff. . . . [D]iscrepancies and contradictions . . . are to be resolved by the jury, not by the court.¹⁵

One more recent choice of law case merits mention. In *In re Scarborough*¹⁶ petitioner's intestate, a resident of Michigan en route to Florida, died at a motel in Laurens, South Carolina, the victim of a defective heater. Deceased never resided in and had no heirs or next of kin in North Carolina. A domiciliary administrator was appointed in Michigan. An ancillary administrator appointed in South Carolina brought a wrongful death action there against the motel owner, a propane supplier and an insurance company in which a settlement was made in return for a covenant not to sue. Thereafter petitioner, a resident of North Carolina, applied in Mecklenburg County for letters of ancillary administration for the purpose of filing a wrongful death action against the Martin Stove Co., an Alabama corporation, with a resident agent in Charlotte. This

¹³ *Id.* at 150, 136 S.E.2d at 656.

¹⁴ *Id.* at 147, 136 S.E.2d at 654.

¹⁵ *Ibid.*

¹⁶ 261 N.C. 565, 135 S.E.2d 529 (1964).

suit, based on the same death in South Carolina, was the sole asset of the estate in North Carolina. It was held, over objection by Martin Stove Co., that ancillary letters should issue and that the right of action for wrongful death is an asset with situs in the county in which personal service can be had on the tort-feasor. The Court reaffirmed that though this right of action is transitory it can only be maintained by an administrator appointed in North Carolina. It further held that even if meritorious defenses to the suit existed these could not prevent the appointment of an administrator "because the probate court cannot decide these questions."¹⁷ Justice Parker, in a separate concurring opinion, said, "Martin . . . by appropriate pleadings can raise all matters of defense . . . , one of which is the interesting question as to whether there can be more than one recovery for an alleged wrongful death under the same South Carolina statute."¹⁸

The Court further said, "Liability for negligence resulting in personal injury or death is determined by the law of the state where the tort is committed. . . . The action must be brought by the personal representative of the deceased. . . ."¹⁹

The winds of change have caused New York²⁰ and Pennsylvania,²¹ at least partially, to depart from the traditional *lex loci delicti* conflict of law rule in choosing the law applicable to an out of state tort, and to substitute therefor, at least as to their own residents,²² a policy analysis approach of determining which state has the most significant contacts with the matter in dispute and then applying the law of that state. Those winds, depending on the point of view of the reader, have neither seared nor blessed the soil of North Carolina. As previously noted in the *Review*,²³ the Court in *Shaw v. Lee*²⁴ did "not deem it wise to voyage into such an uncharted sea, leaving behind well established conflict of laws rules."²⁵ The Court evidences no disposition to deviate from this position in its later choice of law decisions here reviewed.

¹⁷ *Id.* at 569, 135 S.E.2d at 532.

¹⁸ *Id.* at 570, 135 S.E.2d at 532.

¹⁹ *Id.* at 567, 135 S.E.2d at 530.

²⁰ *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

²¹ *Griffith v. United Air Lines, Inc.*, 416 Pa. 1, 203 A.2d 796 (1964), 43 N.C.L. Rev. 586 (1965). See also 42 N.C.L. Rev. 419 (1964).

²² *Goulding v. Sands*, 237 F. Supp. 577 (W.D. Pa. 1965).

²³ See 43 N.C.L. Rev. 586 (1965); 42 N.C.L. Rev. 624 (1964); 42 N.C.L. Rev. 419 (1964).

²⁴ 258 N.C. 609, 129 S.E.2d 288 (1963), 42 N.C.L. Rev. 624 (1964).

²⁵ 258 N.C. at 616, 129 S.E.2d at 293.

EVIDENCE

*Herbert Baer**

CORROBORATION

The distinction between substantive evidence and corroborative testimony has frequently been made clear by our Court. Nonetheless, trial courts continue to fail to admit corroborative testimony in appropriate cases. In *Walker v. Continental Baking Co.*¹ the litigation involved a typical auto accident. Plaintiff, Walker, had testified how the accident happened. His credibility had been impugned. He called a patrolman as a witness who had arrived fifteen minutes after the accident and asked the patrolman to tell the jury what he (Walker) had said about the happening of the accident at the time. The trial court refused to admit the testimony which would have corroborated Walker's evidence on the stand.

The Court held the patrolman's evidence was not substantive proof of how the accident happened but should have been admitted for the sole purpose of corroborating Walker. The decision is not novel and is noted here merely because of the repeated errors made on this point in the trial courts.

DEMONSTRATIVE EVIDENCE

Television has entered the North Carolina courtrooms through the back door. In *State v. Knight*² defendants were charged with larceny of some 75,000 dollars currency from a safe belonging to one Dr. McAnally. On his cross examination by defense counsel, the doctor testified that a lot of the money he had in the safe was Series 1950 money. He also asserted that he had not, theretofore, made a statement on television to the effect that nothing had been put in the safe in the last twenty-five years.

Thereupon counsel for the defendants had a television screen set up and proposed to show a recording made of the television interview with the doctor. They wished to have the doctor identify it and put it in evidence on cross examination. The trial judge refused

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¹ 262 N.C. 534, 138 S.E.2d 33 (1964).

² 261 N.C. 17, 134 S.E.2d 101 (1964).

to allow the showing unless defendants wished it to be considered as their own evidence. To this ruling exception was taken.

After the state had rested its case, the recording was shown and identified by the doctor as his television interview and put into evidence. From a conviction defendants appealed and alleged as error the trial court's ruling on the television recording.

The Court held the trial court had erred in not permitting the recording to be shown so that it might be identified by the doctor on cross examination. The Court also held that the recording after having been identified could then, properly, only be admitted as part of defendants' case. Inasmuch as the recording was identified by the doctor and entirely put in on defendants' case the Court found no prejudicial error in the action of the trial judge.

Counsel on appeal also contended they were entitled to the opening and closing arguments. The Court ruled that the trial judge was proper in according those arguments to the state because the defendants, by showing the recording and putting it in evidence, had put on their own case and thus lost the right to the opening and closing jury arguments.³

EXPERT OPINION TESTIMONY

It is common practice in this state to inquire of a medical expert whether a condition of which the personal injury plaintiff is suffering *could or might* be the result of the accident he sustained. In *Lockwood v. McCaskill*⁴ a psychiatrist, on the basis of a hypothesis, was asked whether a plaintiff's accident was a "contributing factor to his attack of amnesia."⁵ He replied, "It may have had an influence on his condition."⁶

In a painstaking opinion, the Court declared that if an expert's testimony clearly shows he is speaking in terms of mere possibility the testimony should be excluded. However, the Court further stated that if by the use of such terms as *could or might* the expert is indicating that the condition in question is a *reasonably probable* result of the accident, the testimony is admissible. Upon looking at the testimony of the doctor given on cross examination, the Court was satisfied that the doctor was of the opinion that the

³ See N.C. SUP. CT. R. 3; see also *State v. Smith*, 237 N.C. 1, 23, 74 S.E.2d 291, 306 (1953).

⁴ 262 N.C. 663, 138 S.E.2d 541 (1964).

⁵ *Id.* at 666, 138 S.E.2d at 543.

⁶ *Id.* at 667, 138 S.E.2d at 543.

amnesia was *not merely a possible* result, but a *probable* result of the accident. Accordingly, the admission of the evidence is sustained.

The principle announced in *Lockwood v. McCaskill* was applied in *Gillikin v. Burbage*,⁷ where recovery was sought for a ruptured disc. The Court declared, "In this record there is not a scintilla of medical evidence that plaintiff's ruptured disc might, with *reasonable probability*, have resulted from the accident"⁸

DOCTOR-PATIENT PRIVILEGE—EFFECT OF G.S. § 8-53

G.S. § 8-53 provides that no physician shall be required to disclose any information which he acquired in attending a patient and which information was necessary to enable the physician to prescribe for the patient. The statute contains a proviso that "the presiding judge of a superior court may compel such disclosure, if in his opinion the same is necessary to a proper administration of justice." The privilege accorded by the statute applies to hospital records in so far as they contain the type of information indicated when prepared by physicians or persons under their direction.⁹ Such hospital records, if duly authenticated, are admissible in evidence as an exception to the hearsay rule, being considered records made in the regular course of business.¹⁰

In *Lockwood v. McCaskill*¹¹ defendants applied for an order permitting them to take the deposition of a psychiatrist who treated the plaintiff. Judge McConnell, who was presiding at the then term of court, granted defendant's motion and ordered the doctor's deposition to be taken. Plaintiff excepted and took an immediate appeal. In *Johnston v. United Ins. Co. of America*¹² defendant obtained an order from Judge Carr allowing defendant to examine and make copies of hospital records relating to the plaintiff. An immediate appeal was taken by the plaintiff from this order.

The Court reversed the orders in both cases on the theory that in neither case was the judge making the order the judge presiding at the trial of the cause. G.S. § 8-53, we are told, refers to the judge trying the case and not to some other judge who may be hearing

⁷ 263 N.C. 317, 139 S.E.2d 753 (1965).

⁸ *Id.* at 324, 139 S.E.2d at 759. (Emphasis added.)

⁹ *Sims v. Charlotte Liberty Mut. Ins. Co.*, 257 N.C. 32, 125 S.E.2d 326 (1962).

¹⁰ *Id.* at 35, 125 S.E.2d at 328-29.

¹¹ 261 N.C. 754, 136 S.E.2d 67 (1964).

¹² 262 N.C. 253, 136 S.E.2d 587 (1964).

motions but who is not presiding at the trial. G.S. § 8-71, which provides that a party may take the deposition of a person whose evidence he may desire, does not operate to destroy the privilege accorded by G.S. § 8-53. It is only the trial judge who has the authority to determine whether the physician-patient privilege has been waived or whether the interests of justice compel disclosure.¹³

DYING DECLARATIONS

The extent to which a declarant must have believed his death from injuries was inevitable in order that his statement meet the requirements of a dying declaration is fully discussed in *State v. Brown*.¹⁴ In that case the decedent had suffered severe burns as a result of the defendant pouring gasoline over her and then igniting it. The incident occurred in the early morning of March 16. Decedent died the following morning as a result of the burns.

While in the hospital decedent stated that the defendant had poured gasoline over her and then set her on fire. The Court affirmed the trial court which admitted an account of her statement as a dying declaration. Defendant had urged the declaration should have been ruled out because decedent did not believe she was going to die. The Court found that this requirement was shown to have existed because the deceased at the time said that the Lord had spared her so she could tell about the incident; that she did not know if she was going to make it; that she must have swallowed some fire, and that her mother had told her "if anyone ever swallowed fire it would kill them."¹⁵

The Court also held that the fact decedent had inquired of a physician if she was going to live and that the physician had falsely told her he thought she would be all right did not destroy the admissibility of the declaration.¹⁶

ADOPTIVE ADMISSIONS BY SILENCE—EFFECT OF ARREST

Our Court has repeatedly declared that statements made in the presence and hearing of the accused implicating him in the commission of a crime, to which he makes no reply, are competent

¹³ *Lockwood v. McCaskill*, 261 N.C. 754, 759, 136 S.E.2d 67, 70 (1964).

¹⁴ 263 N.C. 327, 139 S.E.2d 609 (1965).

¹⁵ *Id.* at 332, 139 S.E.2d at 612.

¹⁶ *Id.* at 335, 139 S.E.2d at 614.

against him as implied admissions.¹⁷ If at the time in question the accused is under arrest, courts have differed as to whether his silence may be construed as an adoptive admission. In some state courts, and in the federal courts in general, the fact that the accused is under arrest at the time of the alleged adoptive admission bars the introduction of the testimony.¹⁸ In two recent cases the North Carolina Supreme Court had occasion to consider the effect of the accused's arrest at the time of his silence in the face of an accusatory statement.

While in the first of these, *State v. Guffey*,¹⁹ the Court found that the alleged accusatory statement did not in fact charge the defendant with a crime, the Court did consider the effect of an accused being under arrest at the time an accusatory statement is made.

The statement and the circumstances under which it is made must call for a reply, and defendant must exhibit some act of the mind amounting to voluntary demeanor or conduct. . . . However, if the evidence is otherwise competent, the mere fact that defendant is under arrest or in jail does not necessarily render the admission inadmissible. . . . Incarceration is only a circumstance to be considered in determining the competency of the purported admission by adoption.²⁰

In the same case the Court declared that, if there was a contradiction in the evidence as to whether or not the accusatory statement was heard by the defendant, a jury question was raised on that issue.

In the second case, *State v. Virgil*,²¹ the defendant had been found guilty of burglary. At the trial, Covert, a deputy sheriff who

¹⁷ *E.g.*, *State v. Case*, 253 N.C. 130, 116 S.E.2d 429 (1960); *State v. Hendrick*, 232 N.C. 447, 61 S.E.2d 349 (1950). See generally STANSBURY, EVIDENCE § 179 (2d ed. 1943).

¹⁸ See cases collected in 4 WIGMORE, EVIDENCE § 1072, at 81 n.10 (3d ed. 1943). Thus in *State v. Battles*, 357 Mo. 1223, 1229, 212 S.W.2d 753, 757 (1948), the court said: "Silence of the accused when not under arrest, and in circumstances such that only a guilty person would have remained silent, may be shown. After arrest or while in custody the evidence is inadmissible . . ." In *United States v. Lo Bido*, 135 F.2d 130, 131 (2d Cir. 1943), the court, per curiam, said: "[O]ne under arrest or in custody, charged with crime, is under no duty to make any statement concernnig the crime, and statements tending to implicate him made in his presence by others, although not denied by him, are not admissible against him." For discussion of the federal rule, see Comment, *Silence as Incrimination in Federal Courts*, 40 MINN. L. REV. 598 (1956). For discussion of the related subject of silence as hearsay, see 24 N.C.L. REV. 274 (1946).

¹⁹ 261 N.C. 322, 134 S.E.2d 619 (1964).

²⁰ *Id.* at 324, 134 S.E.2d at 619.

²¹ 263 N.C. 73, 138 S.E.2d 777 (1964).

had arrested defendant, testified that he told the defendant he was under arrest for burglary and that defendant on several occasions denied knowing anything about the affair in question. It appeared that one Evans had been shot and caught in the act of the burglary and was then in a hospital. Covert, over objection of defendant, was permitted to testify that Evans had made a statement implicating defendant as an accomplice; that Covert while defendant was under arrest took him to Evans' hospital room where the statement was read to Evans in defendant's presence; that Evans said the statement was true and that Evans further, directly addressing himself to the defendant, charged him with being his accomplice at the time of the burglary. To all of this, Covert testified, defendant said nothing but started to cry and shake all over and that at no time thereafter did he deny the truth of Evans' statement.

In reversing and ordering a new trial, the Court stressed the fact that defendant prior to the incident in Evans' hospital room had "*repeatedly*"²² declared he knew nothing of the burglary. The Court also placed significance on the fact that Covert had taken defendant to Evans' room, that defendant's presence there could not be deemed voluntary, and that no person can be "forced to incriminate himself, or to make a false statement to avoid doing so."²³

The fact that defendant had repeatedly denied knowledge of the burglary might well be sufficient reason for not admitting Covert's testimony if the Court was of the opinion that defendant's confrontation with Evans did not call for a renewed denial.²⁴ But, when the Court speaks of defendant's appearance before Evans not being voluntary because Covert "*took*"²⁵ him to Evans' hospital room while under arrest, one is prompted to inquire whether there is not also an involuntary appearance when defendant is jailed and the accusatory comments are made in his presence in jail. It is difficult to see why if, as declared in *Guffey*, incarceration in jail does not "necessarily render the admission inadmissible,"²⁶ the taking of the defendant to Evans' hospital room while under arrest should necessarily lead to exclusion.

²² *Id.* at 76, 138 S.E.2d at 779. (The emphasis is that of the Court.)

²³ *Id.* at 77, 138 S.E.2d at 779.

²⁴ Compare the dissenting opinion of Chief Justice Stacy in *State v. Portee*, 200 N.C. 142, 148, 156 S.E. 783, 786-87 (1931).

²⁵ The Court itself lended emphasis to the word *took* by placing it in quotation marks. See 263 N.C. at 76, 138 S.E.2d at 779.

²⁶ 261 N.C. at 324, 134 S.E.2d at 621.

TORTS

*Robert G. Byrd and Dan B. Dobbs**

INTENTIONAL TORTS

Malicious Prosecution

"The action of malicious prosecution, which began as a remedy for unjustifiable criminal proceedings, has been undergoing a slow process of extension into the field of the wrongful initiation of civil suits."¹ North Carolina, as do apparently a slight majority of American jurisdictions,² permits an action for malicious prosecution in relation to some civil proceedings.

Although in North Carolina recovery in a malicious prosecution action based upon earlier civil proceedings may include elements of damages similar to those recovered in an action based upon a prior criminal prosecution, it is clear that the proof necessary for recovery in the two situations is not identical. Where the tort action grows out of earlier criminal proceedings, proof of the initiation of the proceeding by the defendant without probable cause, with malice and a favorable termination for the plaintiff entitles him to recover at least nominal damages.³ Here recognition of the tort action safeguards the plaintiff's interest in freedom from malicious, unjustified criminal prosecution by providing a means of redress and whatever incidental deterrent effect it may have.

On the other hand, no cause of action arises from the malicious instigation of civil proceedings, standing alone, even though begun without probable cause and terminated in plaintiff's favor. Before any cause of action will exist in connection with malicious, unjustified civil proceedings, they must result in an arrest of plaintiff's person, a seizure of his property or other special damages.⁴ For example, a cause of action for malicious prosecution will not lie solely on the grounds that defendant caused service of summons on

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¹ PROSSER, TORTS 870 (3d ed. 1964) [hereinafter cited as PROSSER].

² *Ibid.*

³ *Newton v. McGowan*, 256 N.C. 421, 426, 124 S.E.2d 142, 145 (1962).

⁴ *Carver v. Lykes*, 262 N.C. 345, 137 S.E.2d 139 (1964); *Ely v. Davis*, 111 N.C. 24, 15 S.E. 878 (1892) (dictum).

the plaintiff in a suit for recovery on a note.⁵ However, if in connection with the civil proceeding, the defendant has caused execution to be issued against the plaintiff's person⁶ or has caused his property to be attached⁷ or taken control of by a receiver,⁸ an action for malicious prosecution will lie. An action to set aside a deed in which *lis pendens* is filed creates a cloud upon plaintiff's title and is considered sufficient interference with plaintiff's property to bring it within the above rule.⁹ The defendant's causing a restraining order to issue prohibiting a designated use by plaintiff of his property has also been held sufficient.¹⁰

Recent cases recognized two other situations in which an action for malicious prosecution may arise from civil proceedings. In *Fowle v. Fowle*,¹¹ an action for malicious prosecution was sustained on the basis of the institution of proceedings before the clerk of court by which the plaintiff was committed to a state mental hospital. Restraint on the plaintiff's person from the commitment proceedings is apparent. *Carver v. Lykes*¹² upheld a malicious prosecution action based upon the instigation by defendant of a hearing into the conduct of a real estate broker by a state real estate licensing board with power to revoke or suspend the realtor's license. The defendant had filed a written, verified complaint with the licensing board, which if it made out a *prima facie* case, required the board because of statutory provision to hold such a hearing. The requirement of "special damages" may be met in this case either because the hearing could result in loss or suspension of plaintiff's license or, less specifically, because of the possible adverse effect the charge of misconduct could have on plaintiff's business.

The first of these grounds seems to be the one relied upon by the Court. However, as neither loss nor suspension of plaintiff's license occurred at any time, *Carver* appears to be a definite extension of the type of interference with the person or property recognized in previous cases as sufficient to support an action for malicious prosecution. In a sense, it may be a natural extension of an earlier

⁵ *Jerome v. Shaw*, 172 N.C. 862, 90 S.E. 764 (1916).

⁶ *Overton v. Coms*, 182 N.C. 4, 108 S.E. 357 (1921).

⁷ *Brown v. Guaranty Estates Corp.*, 239 N.C. 595, 80 S.E.2d 645 (1954).

⁸ *Nassif v. Goodman*, 203 N.C. 451, 166 S.E. 308 (1932).

⁹ *Chatham Estates v. American Nat'l Bank*, 171 N.C. 579, 88 S.E. 783 (1916).

¹⁰ *Shute v. Shute*, 180 N.C. 386, 104 S.E. 764 (1920).

¹¹ 263 N.C. 724, 140 S.E.2d 398 (1965).

¹² 262 N.C. 345, 137 S.E.2d 139 (1964).

decision¹³ that the restraint on alienability of real property resulting from an action to set aside a deed in connection with which *lis pendens* was filed is sufficient. Yet, in that case both the restraint itself and the property to which it applied were specific; in the present case, this is true only if the potential, rather than the actual, consequences of the earlier civil proceeding are considered. If only the actual consequences to the plaintiff of the proceeding before the licensing board are taken into account, the interference amounts to nothing more than the general adverse effect upon the plaintiff's business opportunities of the charge of misconduct and the hearing on that charge.

Examination of the above possibilities demonstrates why the *Carver* case appears to be a very definite expansion of the recognition of an action for malicious prosecution based upon the civil proceedings. If we consider the potential effect of a civil proceeding, every civil suit for recovery of money, if successful, will result in a lien against plaintiff's real property upon docketing of the judgment. Also, any given civil suit may affect the plaintiff's business opportunities almost as drastically as the revocation or suspension of his license to conduct that business. If only the actual consequences of the civil proceeding are to be taken into account, again any number of civil proceedings may have the same or worse adverse effect upon the plaintiff's business as an unsuccessful hearing to revoke or suspend his business license. One may legitimately ask—if the effect of the *Carver* decision is to extend the protection afforded by an action for malicious prosecution—why relationships other than commercial should not be given equal protection by the law.

It should also be noted that although the "special damages" rule states a prerequisite to the existence of the cause of action, apparently it does not place any limitation upon the damages recoverable once the cause of action is proved. Thus, in the *Carver* case the Court recognized that the plaintiff "may recover for any resulting loss of business, injury to reputation, mental suffering, expenses reasonably necessary to defend himself against the charge, and any other loss which proximately resulted from the defendant's wrongful action."¹⁴

The *Carver* decision is also significant because it recognizes that

¹³ *Chatham Estates v. American Nat'l Bank*, 171 N.C. 579, 88 S.E. 783 (1916).

¹⁴ 262 N.C. at 352-53, 137 S.E.2d at 144.

a proceeding before an administrative agency may give rise to an action for malicious prosecution. As a general rule, of course, the proceeding out of which the action for malicious prosecution arises must be a "judicial proceeding."¹⁵ The administrative proceeding may form the basis for an action for malicious prosecution "under certain circumstances" when "such proceeding is adjudicatory in nature and may adversely affect a legally protected interest."¹⁶ To support its holding the Court adopted the following reasoning from the Circuit Court of the District of Columbia:¹⁷

Much of the jurisdiction formerly residing in the courts has been transferred to administrative tribunals, and much new jurisdiction involving private rights and penal consequences has been vested in them. In a broad sense their creation involves the emergence of a new system of courts, not less significant than the evolution of chancery. The same harmful consequences may flow from the groundless and malicious institution of proceedings in them as does from judicial proceedings similarly begun. When one's livelihood depends upon a public license, it makes little difference to him whether it is taken away by a court or by an administrative body or official. Nor should his right to redress the injury depend upon the technical form of the proceeding by which it is inflicted. The administrative process is also a legal process, and its abuse in the same way with the same injury should receive the same penalty.¹⁸

False Imprisonment

Modern methods of retail merchandising under which most of the merchant's wares are freely available for customer inspection and frequently sold on a self-service basis coupled with the high incidence of shoplifting which has accompanied them have created a real dilemma for solution by the courts. The interest of merchants to take steps to prevent and to discover pilfering often conflicts directly with that of customers to move about freely unmolested by detention, questioning, or search. Unquestionably, even the confrontation of a customer by someone in a position of authority, whether the police or agents of the merchant, brings to bear some compulsion upon the customer to refute the accusation implicit in questioning concerning the theft of merchandise or the request to

¹⁵ *Fowle v. Fowle*, 263 N.C. 724, 729, 140 S.E.2d 398, 401 (1965).

¹⁶ 262 N.C. at 352, 137 S.E.2d at 145.

¹⁷ *Melvin v. Pence*, 130 F.2d 423 (D.C. Cir. 1942).

¹⁸ 262 N.C. at 352, 137 S.E.2d at 145.

bare the contents of the customer's purse or shopping bag. The innocent customer's desire to avoid further entanglement may also cause him to submit to such request. Submission may often be in response to the "authority" asserted rather than by choice, or, finally, in response to a combination of some or all of these factors.

Considering the conflicting interests involved, a holding, frequently reached by courts,¹⁹ that submission is voluntary if it grows out of the customer's desire to exculpate himself, seems reasonable. However, if submission is due to a "show of force" through an assertion of authority or otherwise which is of a nature to cause a reasonable person to believe he has no choice but to submit, any resulting unlawful restraint should constitute false imprisonment. Difficulties arise in placing a given case in one category or the other because the evidence seldom delineates the causes of submission so clearly. Two recent North Carolina cases illustrate this difficulty.

In *Black v. Clark's Greensboro, Inc.*,²⁰ plaintiff had purchased and paid for items of merchandise in defendant's store. After leaving defendant's store plaintiff returned to a friend's car in defendant's parking lot. There, two men, agents of defendant, detained the driver of the car in which plaintiff was riding. One showed a badge, asked to see plaintiff's pocketbook, examined it, and told plaintiff to remove a bracelet from it. Plaintiff was then called upon to give an explanation of her possession of the bracelet, which she did. The Court conceded that if an arrest had been made, plaintiff would have been unlawfully restrained as no probable cause existed. It then explained the effect of the evidence to be that plaintiff was undisturbed by any fear of the discovery of incriminating evidence but was disturbed primarily by the implication of being suspected of shoplifting. For this reason, the Court concluded that the granting of an involuntary nonsuit was proper.

In contrast, nonsuit of the plaintiff by the trial court was reversed in *Hales v. McCrory-McLellan Corp.*²¹ In this case, plaintiff's evidence showed that she had gone to defendant's store to exchange articles previously purchased there. While in the store she was approached by defendant's agents who charged her with shoplifting and ordered her to "come over here with me . . . you

¹⁹ PROSSER 58.

²⁰ 263 N.C. 226, 139 S.E.2d 199 (1964).

²¹ 260 N.C. 568, 133 S.E.2d 225 (1963).

know what for." The agent instructed another of defendant's employees to call the police. After waiting for the policemen's arrival, she was taken to a small room where defendant's employees accused her of shoplifting in the presence of the policemen. Defendant's agent also told one of the policemen that "he wanted to sign papers." Plaintiff was then taken to the police station where she was kept until released on bond. Defendant's agent signed an affidavit on the basis of which a warrant for plaintiff's arrest was issued.

The Court rejected the defendant's contention that the evidence showed plaintiff had submitted of her own free will.

From the foregoing circumstances, may not the jury, however, infer that the defendants, backed up by the presence and participation of two police officers whom they had called, induced the plaintiff to consider herself under restraint and to believe that any move or attempt on her part to leave the scene would not be allowed? . . . A jury may find that she was justified in assuming she was under involuntary restraint. It may further find the restraint was unlawful.²²

The most apparent reason discernible from the opinions themselves for the different results in these cases is that in *Black* defendant's conduct was a cause of plaintiff's restraint while in *Hales* it was not. Such a distinction, as pointed out in the above discussion, is a valid one, and finding of lack of cause-in-fact seems appropriate where the evidence shows that plaintiff's submission was due to a desire to exculpate himself rather than to the authority asserted by the defendant. Yet, in this type of case, inferences must necessarily be drawn from the facts shown by the evidence as to whether restraint upon the plaintiff is voluntarily submitted to or is imposed against his will. The inference drawn in a given case will be largely dependent upon the emphasis placed upon particular facts which may be selected from the evidence presented. In these cases, it is difficult to suggest that the facts in one show the use of greater force than those in the other. Further, in the *Black* case the only evidence to support the Court's conclusion that the plaintiff's submission was due primarily to a desire to free herself from suspicion was her testimony that at the time of the incident she was employed at Sears and was aware that such precautionary steps had to be taken. Clearly, however, if the emphasis placed by the

²² *Id.* at 570, 133 S.E.2d at 226.

Court on this aspect of the case is accepted, the decisions are easily reconcilable.

It may be useful to point out another principle, which has received some acceptance by courts,²³ under which the cases can be distinguished. This principle recognizes that a store proprietor is privileged reasonably to detain persons suspected of shoplifting for questioning and investigation. Of course, the privilege is a limited one and will not justify the use of any physical force, detention for an unreasonable period of time or search of the plaintiff against his protests. Recognition of the principle would, however, seem to relieve defendant of liability under circumstances such as those present in the *Black* case where none of the above factors existed. It also limits the rather strict rule that a store proprietor detains a customer at his own peril in the absence of a showing of legal probable cause.

A theme which has become fairly recurrent in the Court's discussion in false imprisonment cases is that false imprisonment always includes at least a technical assault. Apparently, the Court's use of the phrase "technical assault" is to indicate that restraint must result from a show of force sufficient to cause a reasonable person to submit to it. If this is the Court's meaning, the choice of the word "assault" is an unfortunate one as it has obtained a distinct meaning as the description of an entirely separate tort. There is nothing in the Court's opinions to indicate that it requires all of the elements of the tort of assault to be present before an action for false imprisonment will lie. If these observations are correct, much can be said for abandoning the use of such a misleading phrase as the Court did in the *Hales* case.

NEGLIGENCE

Patient's Right of Disclosure of Risks in Surgery

Obtaining the consent of patients for surgery has become standard procedure for surgeons and hospitals. The potential liability for an unauthorized operation by a surgeon whose professional qualifications are admitted and whose performance in diagnosis and operation is unquestioned makes this precaution necessary. Although the requirement of consent may be an unavoidable inconvenience to the surgeon, its absence would have far deeper implications for

²³ PROSSER 123-24.

the patient. The mere statement that a surgeon should be permitted to operate upon a patient without his consent, except in unusual circumstances, carries its own refutation. Clearly, such unpermitted contact, whatever risks it involves, should not be sanctioned even though the surgeon acts upon skilled judgment and out of the best motives. Recognizing this, courts generally hold an unauthorized operation to constitute a battery.²⁴ Appropriate exceptions are made where emergency circumstances prevent the timely obtaining of consent.²⁵

If proposed surgery involves serious risks to the life or health of the patient, it seems equally clear that the patient should, in the absence of unusual circumstances, be given the opportunity to accept or reject those risks in relation to whatever alternatives that may exist, even if the only alternative is that of trusting to blind faith. Of course, in the majority of cases more meaningful alternatives will be present. Adopting this view, most courts that have considered the problem have held that the standard of ordinary care requires the surgeon *reasonably* to inform the patient of risks involved in the operation.²⁶ Thus, even though the patient consents to the operation, liability may be imposed on the surgeon for negligence in failing to inform the patient of the risks involved. Exactly what disclosures must be made to constitute ordinary care is not always readily apparent.

The facts in a recent North Carolina case²⁷ point up this difficulty. A young woman, thirty-two years old, had a diseased thyroid gland. Her family physician referred her to a specialist in surgery who determined that a subtotal thyroidectomy should be performed to remove the diseased gland. Apparently, removal of the gland by surgery involved some risk of resulting paralysis of the vocal cords. Other methods of treatment were available, but the effectiveness of a particular treatment depended upon the patient's age, the nature and extent of the disease, and other factors. The surgeon obtained her consent to perform the operation. His choice of method of treatment and his performance of the operation were both medically sound. However, paralysis of the vocal cords resulted. Afterwards,

²⁴ McCord, *A Reappraisal of Liability for Unauthorized Medical Treatment*, 41 MINN. L. REV. 381, 383 (1957).

²⁵ *Id.* at 392.

²⁶ Note, 75 HARV. L. REV. 1445 (1962); Annot., 79 A.L.R.2d 1028 (1961).

²⁷ *Watson v. Clutts*, 262 N.C. 153, 136 S.E.2d 617 (1964).

the patient claimed that if she had been fully informed concerning the risks involved she would never have consented to the operation. She brought an action to recover damages, alleging negligence of the surgeon in failing to advise her of the dangers involved in the surgery so that she could intelligently decide whether to consent.

What advice should a surgeon in the exercise of ordinary care give a patient under these circumstances? May he rely on the fact that the patient has, by her consent, placed herself in his trust and confidence and operate without making any disclosures at all? If he advises her that the operation is a serious one, will this suffice? Or must he identify specific risks involved in the operation? Must he inform her of alternative methods of treatment and the relative risks involved in them?

The North Carolina Court held sufficient advice by the surgeon that "she would have to remain in the hospital approximately a week prior to surgery as this was a serious operation; that the operation was not done without risk, that it was a bigger operation than one would say of an appendectomy or some lesser procedure."²⁸ The Court affirmed a nonsuit granted in the trial court. Conceding that a requirement of absolute disclosure is too stringent under the circumstances set out above, particularly in view of the fact that there was no evidence that fuller disclosure would have had any adverse effect upon the patient or the pending operation, this seems to be a close case for a finding of no negligence as a matter of law. In an earlier case,²⁹ however, an even less sympathetic view of the patient's right to be informed was taken. There, surgery was undertaken to remove a piece of metal lodged in the patient's neck. As a result of the operation, the patient permanently lost the use of an arm. The following was the plaintiff's evidence of negligent disclosure: "I asked him about the operation, if it was a very serious one, and he said it wasn't nothing to it, it was very simple."³⁰ In affirming a judgment of nonsuit by the trial court, the Court said:

The plaintiff's evidence is sufficient to support a finding the operation was of a very serious nature. . . . It is understandable the surgeon wanted to reassure the patient so that he would not go to the operating room unduly apprehensive. Failure to explain the risks involved, therefore, may be considered a mistake on the

²⁸ *Id.* at 155, 136 S.E.2d at 618.

²⁹ *Hunt v. Bradshaw*, 242 N.C. 517, 88 S.E.2d 762 (1955).

³⁰ *Id.* at 519, 88 S.E.2d at 763.

part of the surgeon, but under the facts cannot be deemed such want of ordinary care as to import liability.³¹

Here, in response to an express request by the patient as to the seriousness of the operation, the doctor not only failed to make full disclosure but also was misleading in the disclosure made. Again, there is nothing in the opinion to indicate that full disclosure would have been detrimental to the patient or to the success of the operation.

Although these cases seem somewhat niggardly³² in their recognition of the patient's right to disclosure, fortunately, the Court did not adopt the view, accepted in a few jurisdictions,³³ that the adequacy of disclosure is dependent upon the custom of other physicians similarly situated. The latter view, of course, requires the use of expert testimony to show the custom or practice of other physicians as a standard against which defendant's conduct can be measured. Except, perhaps, in situations where justification for lack of full disclosure is claimed because of its possible adverse effect upon the patient or the success of the operation, such a standard seems inappropriate for determining whether the physician has made adequate disclosure. This determination would seem to be not only one within the competence of the jury but also one to which medical expertise would contribute little. If this is true, no sound reason can be found for permitting surgeons, either generally or in a particular locality, to determine the standard of conduct required by due care.

Res Ipsa Loquitur

The Court continues to be demanding on a plaintiff who seeks the aid of the doctrine of *res ipsa loquitur* to get his case to the jury. For example, in *Warren v. Jeffries*,³⁴ plaintiff's evidence showed the following: Defendant parked his car on an incline in the yard of the father of plaintiff's intestate. The car remained parked there for approximately one hour before the accident occurred. During this period no one had gone to the car or touched it. Defendant loaned the car to intestate's mother to drive to the store. Intestate and four other children got into the rear seat of the car; none of

³¹ *Id.* at 523, 88 S.E.2d at 766.

³² For discussion of more liberal cases, see 75 HARV. L. REV. 1445 (1962); Annot., 79 A.L.R.2d 1028 (1961).

³³ See cases cited in Annot., 79 A.L.R.2d 1028 (1961).

³⁴ 263 N.C. 531, 139 S.E.2d 718 (1964).

them touched any of the control mechanisms of the car. No one got into the front seat. When intestate, the last to get into the car, closed the car door "something clicked in the front and . . . the car started rolling backwards." In jumping from the rolling car intestate fell and the front wheel of the car ran over him. In a *per curiam* opinion, the Court held:

There is no evidence as to the condition of the brakes, whether the hand brake had been set, or whether the car was in gear. [These omissions were the allegations of negligence contained in the complaint.] Apparently the car was not examined after the accident. What caused it to make a "clicking" sound and begin rolling backwards is pure speculation. The doctrine of *res ipsa loquitur* is not applicable.⁸⁵

It is difficult to find more than two inferences as to the cause of the car rolling down the incline which have any degree of probability at all. One possible cause is mechanical defect. As there was no evidence that defendant had knowledge of any such defect and as plaintiff's intestate should probably be considered a licensee, the defendant would have no responsibility to the intestate for the condition of the car. The other possible cause of the accident was the negligence of the defendant in failing to take proper precautions in parking the car. It should be remembered that plaintiff's evidence negated any tampering with the car from the time it was parked by defendant until the accident happened. Of these two possible causes, the negligence of the defendant would seem to have by far the greater probability. The probability of any combination of either the brakes or gears, or both, being defective, unknown to the defendant, or failing at the same time seems slight.

Proof in a case need not preclude every inference other than that of the defendant's negligence before the doctrine of *res ipsa* can apply. If the inference that the defendant's negligence caused the happening is more likely than other permissible inferences as to its cause, the doctrine should apply. The fact that several possible inferences as to the cause of an accident may be drawn from the evidence does not necessarily leave the matter in the realm of conjecture, as the normal course of human experience may indicate that one more likely caused the accident than the others. If this is the case, plaintiff's evidence should be permitted to go to the jury.

Although the above constitutes a fair statement of the generally

⁸⁵ *Id.* at 533, 139 S.E.2d at 720.

accepted view of *res ipsa*,³⁶ the principal case, as well as earlier North Carolina cases, raises a serious question as to whether it is the view followed by the North Carolina Court. In this connection, the earlier case of *Lane v. Dorney*³⁷ should be examined. There, a car driven by defendant's intestate left the road when approaching a curve, injuring passengers riding in the car. On the initial hearing³⁸ of the case by the Court, nonsuit of the plaintiff by the trial court was affirmed. The Court held that *res ipsa loquitur* would not apply. On rehearing,³⁹ the Court held that the evidence was sufficient to go to the jury but reaffirmed its holding in the initial hearing that *res ipsa loquitur* was inapplicable. How, then, did the Court allow the case to go to the jury as neither direct nor circumstantial evidence affirmatively showing any acts of negligence was present? The Court found that plaintiff's evidence eliminated *all* possible causes of the accident other than the defendant's negligence. Thus, even though there was no evidence from which an affirmative inference of the defendant's negligence could be drawn, the evidence, by excluding *all* other possible causes, permitted a negative inference that defendant's negligence caused the accident.

Randall v. Rogers,⁴⁰ a 1964 case, seems to have been decided under the *Dorney* principle. Although the evidence is not clear, the mechanical condition of the car, the condition of the road, possible interference from within the car, traffic and other possible external factors were negated as possible causes and the Court, in holding the evidence sufficient to go to the jury, stated that "this decision is in line with our decisions in *Lane v. Dorney*. . . ."⁴¹ In view of the *Dorney* principle and the results in the *Warren* decision, a question which may warrant further investigation is whether the Court will permit evidence of circumstances surrounding the "accident" to limit the range of possible causes so as to invoke application of *res ipsa*. Although, again, under the doctrine as generally applied, this is permissible, the Court's insistence in *Dorney* that *res ipsa* was inapplicable and its obvious concern in *Warren* over the absence of evidence as to the mechanical condition of the

³⁶ PROSSER 222.

³⁷ 250 N.C. 15, 108 S.E.2d 55 (1959), *rev'd on rehearing*, 252 N.C. 90, 113 S.E.2d 33 (1960); 39 N.C.L. REV. 198 (1961).

³⁸ *Lane v. Dorney*, 250 N.C. 15, 108 S.E.2d 55 (1959).

³⁹ *Lane v. Dorney*, 252 N.C. 90, 113 S.E.2d 33 (1960).

⁴⁰ 262 N.C. 544, 138 S.E.2d 248 (1964).

⁴¹ *Id.* at 549, 138 S.E.2d at 252.

car—an unaccounted for possible cause of the accident but, as previously suggested, one of relatively slight probability—raise doubts as to what position our Court has taken.

Miscellaneous

Another recent case merits comment. In *Routh v. Hudson-Bell Co.*,⁴² plaintiff fell when she tripped in entering defendant's elevator which had been stopped approximately two inches above the floor level. The elevator operator did not warn the plaintiff, who was carrying packages, of the different levels. In affirming nonsuit, the Court said, "In a manually-operated elevator, to miss attaining exactness by only two inches is an insufficient showing to establish actionable negligence."⁴³ One may not quarrel with this position taken by the Court. But, does not the very fact that it asserts strongly indicate that a jury could find that ordinary care required defendant's operator to give warning to persons about to enter the elevator?

Proximate Cause

In *Palsgraf v. Long Island R.R.*,⁴⁴ the defendant breached a duty of care to *X*, but the result of this negligence was injury to *Y*. Cardozo's famous opinion for the majority of the New York Court held that the defendant had "no duty" to *Y*, since injury was foreseen only as to *X*. Thus, although foreseeability was not necessarily a required element of "proximate cause" in New York,⁴⁵ it became an element of "duty," and unless injury to the plaintiff or someone in his general class could be foreseen, there was no duty to him and no negligence toward him and hence no liability to him. But in *Wagner v. International Ry.*,⁴⁶ Cardozo had taken what was perhaps a different approach. In that case, the defendant railroad negligently caused a passenger to fall from a train while it was traveling a high trestle. The plaintiff attempted a rescue and was injured. The defendant railroad was held liable to the rescuer.

The grounds for the decision in *Wagner* might have been

⁴² 263 N.C. 112, 139 S.E.2d 1 (1964).

⁴³ *Id.* at 114, 139 S.E.2d at 3.

⁴⁴ 248 N.Y. 339, 162 N.E. 99 (1928).

⁴⁵ See *Ehrgott v. Mayor of New York*, 96 N.Y. 264 (1884), a case relied upon by Cardozo in *Wagner v. International Ry.*, 232 N.Y. 176, 133 N.E. 437 (1921).

⁴⁶ 232 N.Y. 176, 133 N.E. 437 (1921).

either that when a defendant is negligent toward *X*, rescue and injury by *Y* is foreseeable, or that when a defendant is negligent toward *X* he is liable to *Y* for rescue-injury of *X* even if such rescue-injury is *not* foreseeable. Cardozo's opinion achieved an elegant ambiguity. At least some of his language seems to indicate that foreseeability of rescue and injury was not required: "The wrongdoer may not have foreseen the coming of a deliverer. He is accountable as if he had."⁴⁷ For this proposition Cardozo cited a case that clearly did not use the foreseeability test.⁴⁸ And it was this language that the North Carolina Court quoted in *Britt v. Mangum*,⁴⁹ a case holding that one who drives negligently, so as to create a risk to himself, is liable to his own rescuer for injuries sustained by the rescuer. In that case, the defendant allegedly drove at an excessive rate of speed on an open highway, lost control of her car and turned the car over on the highway near the plaintiff's home. The defendant was pinned under the car. The plaintiff, who lived off the highway, came—apparently from his house—and lifted the car to release the defendant, suffering a back injury as a result. The Court, in accord with most of the scant authority⁵⁰ on the facts, held that these allegations stated a cause of action.

It is, no doubt, arguable that rescue-injury is not foreseeable, and that a risk of harm to *X* is not a risk of harm to his rescuer.⁵¹ Possibly the view could be taken that when a defendant creates a risk only to himself, as where there is no one else on the highway, he is not negligent at all, although this seems extreme. If the view is taken that rescue-injury of one's self is not foreseeable, the outcome of the rescuer's claim may well depend upon whether the

⁴⁷ *Id.* at 180, 133 N.E. at 438 (1921), citing *Ehrgott v. Mayor of New York*, 96 N.Y. 264 (1884), a case not requiring foreseeability. This case, however, could be considered as eliminating foreseeability only in a limited sense. It did not deal with the unforeseeable plaintiff situation. *Wagner's* ambiguity on this point may have been intentional. The case has been regarded, however, as holding that foreseeability is required and that rescue-injury is foreseeable. See PROSSER 297-98, quoting Cardozo's statement that rescue is "natural and probable." But "natural and probable" is not necessarily the same as "foreseeable." See KEETON, *LEGAL CAUSE IN THE LAW OF TORTS* 26-28 (1963).

⁴⁸ See note 47 *supra*.

⁴⁹ 261 N.C. 250, 134 S.E.2d 235 (1964).

⁵⁰ *E.g.*, *Lynch v. Fisher*, 34 So. 2d 513 (La. Ct. App. 1947); *Longacre v. Reddick*, 215 S.W.2d 404 (Tex. Civ. App. 1948).

⁵¹ See PROSSER 297, declaring that anticipation of rescue and harm to the rescuer is at least a "strain" on the requirement of "foreseeability."

court characterizes the problem as one of "duty" or as one of "proximate cause." Some courts might say with *Palsgraf* that if the plaintiff is not in a class to whom injury may be foreseen, then to that plaintiff defendant owes no duty.⁵² If this view should be followed, then the claim of the rescuer may be dismissed without consideration of other legal issues. If, however, a court characterizes the problem as one of "proximate cause," the conclusion that the plaintiff was unforeseeable will not necessarily foreclose a recovery. This is so because even courts that normally test proximate cause by foreseeability do not always do so, and some courts would be willing to concede that the "coming of a deliverer" could not be foreseen but would nevertheless impose liability.⁵³

In the *Britt* case the North Carolina Court viewed the question involved as one of proximate cause rather than one of duty. But it is not clear whether it held that rescue-injury was foreseeable, or whether it eliminated the foreseeability test of proximate cause. In quoting a Louisiana case,⁵⁴ the Court said that the "doctrine of foreseeability is not applicable to the extent of relieving one who sets in motion, through the agency of a negligent act, a chain of circumstances leading to the final resultant injury."⁵⁵ Certainly this language, though perhaps ambiguous, lends some credence to the dissenting opinion of Justice Higgins, who argued that the Court had eliminated "reasonable foreseeability as one of the constituent elements of actionable negligence."⁵⁶ On the other hand, the Court in quoting another case⁵⁷ asserted that "rescue is something that might reasonably be foreseen."⁵⁸ Thus it seems uncertain whether the Court has declared that rescue-injury is foreseeable, or whether it has declared that foreseeability is not always required as a test of proximate cause. Certainly it has not eliminated foreseeability as a requirement of negligence, nor has it eliminated foreseeability as a test of proximate cause in all cases. Nevertheless, it is possible to read the majority opinion in *Britt* as at least a suggestion that foreseeability is not always a test of "proximate

⁵² Support for this position in the self-rescue cases is almost entirely lacking. Only *Saylor v. Parsons*, 122 Iowa 679, 98 N.W. 500 (1904), seems to give any support to such a view.

⁵³ See *Lynch v. Fisher*, 34 So. 2d 513 (La. Ct. App. 1947).

⁵⁴ *Ibid.*

⁵⁵ 261 N.C. at 255, 134 S.E.2d at 239.

⁵⁶ *Id.* at 256, 134 S.E.2d at 239.

⁵⁷ *Longacre v. Reddick*, 215 S.W.2d 404 (Tex. Civ. App. 1948).

⁵⁸ 261 N.C. at 255, 134 S.E.2d at 238.

cause." Whether this is or is not desirable is debatable and is much debated, but it is certainly accurate to recognize that, whatever may be *said*, foreseeability is not in *fact* always required in the cases.

In any event, it would be a mistake to unduly emphasize any implication in *Britt* that foreseeability may not be required, because there seems no great difficulty in permitting the foreseeability issue to reach the jury on the facts in that case. Surely one who subjects himself to a risk of injury can reasonably foresee a rescuer. Even if this is considered to be a close case, any doubt is fairly resolved against the negligent defendant in deciding whether the issue goes to the jury or not. (By hypothesis, the defendant is negligent, else the proximate cause issue will not arise; and by the same token, the plaintiff is "innocent," else he will be barred by contributory negligence and again the proximate cause issue need not be reached.) Furthermore, it seems appropriate in close cases to consider elements of policy beyond those associated with foreseeability. In *Britt*, the defendant enjoyed a benefit—rescue—at the plaintiff's expense. This would not necessarily justify a quasi-contract recovery;⁵⁹ but the fact of benefit conferred is a fact that can be fairly considered in determining whether to submit the "proximate cause" issue to the jury.⁶⁰

It is, perhaps, unfortunate that the Court in *Britt* did not make it entirely clear whether it was or was not requiring foreseeability on the proximate cause issue. But, since most courts have agreed in holding the defendant in rescue situations, and since it seems at least arguably foreseeable that a rescue-injury would occur, the decision seems entirely appropriate in its result.

A second and more complex case involving what may be considered a problem of an unforeseeable plaintiff arose in *Belk v. Boyce*.⁶¹ The plaintiff there was a sixteen-year old boy who, with his dog, was on defendant's land. The defendant, unaware of the plaintiff's presence, shot at the dog. One of the shots fired at the dog struck the plaintiff and seriously injured him. The jury found for the defendant. Challenging an instruction, the plaintiff argued

⁵⁹ Cf. RESTATEMENT, RESTITUTION §116 (1937). See also *Harrington v. Taylor*, 225 N.C. 690, 36 S.E.2d 227 (1945) (promise to pay for saving life was without consideration and not actionable).

⁶⁰ Cf. KEETON, LEGAL CAUSE IN THE LAW OF TORTS 23 (1963) (discussing the effect of moral judgments in close cases of "proximate cause").

⁶¹ 263 N.C. 24, 138 S.E.2d 789 (1964).

that, as defendant was violating a statute⁶² by shooting at the dog, the defendant was liable even though he was unaware of plaintiff's presence and that the trial court should have so charged the jury. This argument was rejected on the ground that the statute was intended for the protection of animals, not people, and hence that its violation was not negligence per se.

Presented in such terms, the case seems entirely correct. However, it suggests two difficult points. The first is that the plaintiff might have argued, not negligence per se, but battery. Had he done so, a problem of the so-called "transferred intent" would have been raised. If a defendant shoots at *A* and the bullet strikes *B*, the defendant is held liable even though he had no intent to strike *B* and did not know of *B*'s presence.⁶³ The facts of *Belk* suggest the question whether the defendant would also be liable if he shot at *A*'s dog and the bullet struck *A*. Apparently only one case has been decided on precisely these facts and on this theory.⁶⁴ That case held the defendant liable. It was enough that he intended to shoot a dog, even though the bullet actually struck the plaintiff of whose presence the defendant was not aware, since the act of destroying property without a privilege is itself wrongful. This is the issue not reached and apparently not argued in *Belk*, because the case was tried solely upon a negligence rather than a battery theory. The violation of the statute by the defendant did not raise this issue because the statute was not for protection of dog-owners but for the protection of animals themselves, so that the plaintiff could not take advantage of its violation.

The second point suggested by *Belk* is perhaps more difficult. In *Palsgraf*, Cardozo suggested that if a defendant was negligent

⁶² N.C. GEN. STAT. § 14-360 (1953).

⁶³ See *Carnes v. Thompson*, 48 S.W.2d 903 (Mo. 1932). This rule is discussed in PROSSER 32-37.

⁶⁴ *Corn v. Sheppard*, 179 Minn. 490, 229 N.W. 869 (1930). The defendant intended to shoot a dog and this was wrongful. The shot struck plaintiff. The defendant was held liable for plaintiff's injuries "although he did not intend to hit the other nor even know that any person was within range." *Id.* at 493, 229 N.W. at 871. Quite similar, but apparently regarding the action as one based upon negligence, is *Isham v. Dow's Estate*, 70 Vt. 588, 41 Atl. 585 (1898), where defendant intentionally shot plaintiff's dog and was held liable to the plaintiff for injuries she suffered when the injured dog sprang up, ran into plaintiff's house, and knocked her down. *Moore v. Fletcher*, 147 Colo. 407, 363 P.2d 1056 (1961), relied upon by the Court in *Belk*, did not hold the defendant liable; but unlike *Belk*, the defendant there was shooting at wild birds, and his wrong was not a wrong to any interest of the plaintiff, not even to plaintiff's property interests.

toward plaintiff's property, but not toward plaintiff's person, he might be liable only for injury to the property,⁶⁵ since injury to the plaintiff's person would be unforeseeable. If a defendant negligently ran over a box in a driveway he would be liable to the owner of the box for its value and perhaps for the value of any property inside it. But if the box contained a young child playing in it, under Cardozo's suggestion the limit of the defendant's liability would be the value of the box and he would not be liable to the child for injuries to the person of the child. This would be true even if the child were the owner of the box, because the defendant would be regarded as having been negligent toward property only and not toward any *person*. There is little if any support for Cardozo's suggestion to this effect,⁶⁶ but the holding in *Belk* seems close to accepting such a view. In *Belk* the defendant was not only negligent but was also guilty of an intentional effort to trespass upon the plaintiff's property—his dog. Although the defendant could not foresee or intend injury to the plaintiff's person, he could foresee or intend injury to plaintiff's property interests. Thus, quite independently of the statute against animal injury, it would seem that the plaintiff would have a good cause of action unless the Court is willing to accept the "different interests" analysis suggested in *Palsgraf*. However, since this argument apparently was not made to the Court, the decision in *Belk* is probably not authority for any point except that violation of the statute, as such, did not establish the plaintiff's right to recover, absent the defendant's ability to foresee harm to the plaintiff. So limited, *Belk* seems correct. If, however, *Belk* means that an intentional wrongdoer, or even a negligent one, escapes liability for personal injury merely because his wrong was directed at the plaintiff's property rather than at the plaintiff's person, the decision is a highly debatable one.

A different kind of "proximate cause" problem arose in *Lockwood v. McCaskill*,⁶⁷ where, several months after an automobile collision for which defendant was responsible, the plaintiff developed amnesia. The plaintiff was peculiarly susceptible to amnesia, and

⁶⁵ "There is room for argument that a distinction is to be drawn according to the diversity of interests invaded by the act, as where conduct negligent in that it threatens an insignificant invasion of an interest in property results in an unforeseeable invasion of an interest of another order, as, e.g., one of bodily security." 248 N.Y. at 346-47, 162 N.E. at 101.

⁶⁶ See *Isham v. Dow's Estate*, 70 Vt. 588, 41 Atl. 585 (1898), which does not apply the *Palsgraf* suggestion.

⁶⁷ 262 N.C. 663, 138 S.E.2d 541 (1964).

under the circumstances normal persons would not have developed it. The Court allowed a recovery against the defendant for all injuries caused by the collision, including the amnesia. This seems to be an application of the "thin skull" rule to emotional as well as physical injury.

Where a defendant's negligent conduct causes physical harm, the usual rule is that he is liable for all the harm caused, whether that harm is physical or emotional or both. And he is liable even if the harm is much greater than he could possibly have foreseen. If he negligently hits the plaintiff in such a way that he might ordinarily foresee a scratch or bruise, he is liable if his slight blow breaks the plaintiff's unusually thin skull.⁶⁸ The North Carolina Court has now applied this rule to an unforeseeable emotional injury to a person of unusual susceptibility.

The defendant, of course, must be negligent—his conduct must have "amounted to a breach of duty to a person of ordinary susceptibility"⁶⁹ so that he could foresee *some* harm, physical or emotional. But aside from this, and the requirement that claims for emotional harm must be specifically pleaded,⁷⁰ there appears to be little qualification to the rule. It is apparently enough that the defendant can foresee physical injury; he need not be able to foresee any emotional harm at all if the facts in *Lockwood* provide any guide. The medical testimony there was that an individual of ordinary susceptibility would not have suffered emotional harm but only physical pain—at least, that is its most probable meaning.⁷¹ There was nothing to indicate that the defendant could have foreseen any emotional harm from the automobile collision at all. Thus, it appears that a defendant will be held for any emotional harm once he has caused an impact by his negligent conduct.

All this is presumably qualified by the Court's earlier holding in

⁶⁸ See, e.g., *McCahill v. New York Transp. Co.*, 201 N.Y. 221, 94 N.E. 616 (1911). Plaintiff developed delirium tremens after injury. The court held this was a proximate result of defendant's negligence, but said that probability of later death from the same pre-existing disorders goes to the issue of damages.

⁶⁹ *Lockwood v. McCaskill*, 262 N.C. 663, 670, 138 S.E.2d 541, 546 (1964).

⁷⁰ *Thacker v. Ward*, 263 N.C. 594, 140 S.E.2d 23 (1965). An allegation of shock to the nervous system was not sufficient to permit damages for "traumatic neurosis" even though no objection to proof of "psychological complaints" was made.

⁷¹ 262 N.C. at 670, 138 S.E.2d at 546: "If he (plaintiff) had been a normal person, this collision which resulted in some back pain and did not require hospitalization at that time and some leg pain, would not have brought on amnesia."

Williamson v. Bennett.⁷² In that case the plaintiff suffered from a pre-existing emotional condition which caused her to worry unduly about the possibility of hitting a child on a bicycle. The defendant drove a car into the plaintiff's car, precipitating a severely neurotic reaction in the plaintiff, who feared that she had somehow struck a child on a bicycle. The Court refused to permit a recovery for plaintiff's neurotic condition in an opinion which is open to some considerable latitude in interpretation. There is language in the case that might be read as indicating that defendant's conduct did not cause the injury—that it was caused instead by the plaintiff's pre-existing anxiety. But if *Williamson* ever meant that, it no longer does after the *Lockwood* decision. Nevertheless, *Williamson* probably qualifies *Lockwood* in some ways. Even after *Lockwood*, it remains consistent to say, as *Williamson* did, that (1) there can be no recovery when the plaintiff's emotional harm results from fear for another rather than fear for himself; and (2) there can be no recovery when plaintiff's emotional reaction is not a reaction to the real, or apparently real, facts, but rather a reaction to her own fantasies, already existing at the time of the accident. This second qualification barely escapes conflict with the *Lockwood* holding, since any severely neurotic reaction stems in part from pre-existing mental or emotional conditions on the part of the plaintiff. Yet it seems fair enough to draw a line between the plaintiff's worried concern over business realities in *Lockwood* and the plaintiff's concern for a "phantom child on a non-existent bicycle" in *Williamson*; and if such a line can be drawn, then the *Lockwood* holding must be qualified to that extent. In neither of the two cases was emotional harm, as such, foreseeable; in both cases the emotional reaction was an abnormal one deriving from peculiarities of the plaintiffs. But in *Lockwood* the abnormal reaction was a response to real-life conditions, while in *Williamson* it was not. This difference may at times be difficult to deal with, but so long as both cases are on the books it is the difference to be reckoned with.

The *Lockwood* decision seems correct in applying the "thin skull" rule to emotional harms. There is no real reason to distinguish between a physical "thin skull" and an emotional "thin skull"; if a defendant is liable when he causes greater physical damage than is foreseeable he ought equally to be liable when he causes greater

⁷² 251 N.C. 498, 112 S.E.2d 48 (1960), 39 N.C.L. Rev. 303 (1961).

emotional damages than is foreseeable. But there remains a problem in assessing damages. If a plaintiff is peculiarly susceptible to harm—whether physical or emotional—it seems likely that sooner or later such harm will eventuate. If he has an “eggshell” skull, the chance seems high that it will be someday broken—perhaps without the fault of anyone. If he is peculiarly prone to hysteria or amnesia it seems likely that sooner or later the hysteria or amnesia will be precipitated—again, perhaps without the fault of anyone. If there is any real likelihood that plaintiff would eventually suffer because of his peculiar susceptibility to harm, this fact ought to be considered in assessing damages. Defendant’s conduct has caused harm, and it is fair enough to hold him liable; but to the extent that the harm would have eventuated later in any event, there is no reason to hold the defendant for full damages. Thus, while the *Lockwood* holding seems entirely proper, it might be equally proper to give an instruction to the jury on the damage issue, calling attention to the likelihood (or possibility) that plaintiff would eventually suffer a similar emotional harm by reason of events for which the defendant is not liable. Of course, this involves some “speculation”—an estimate about the future. But so does life expectancy and so does any claim for permanent injury and so does “pain and suffering.” It does not, therefore, seem inappropriate, if proof warrants a judgment at all on the matter, to make a reasonable estimate of the plaintiff’s damages by taking into account the likelihood that the plaintiff would eventually suffer such damages in any event. At least some courts have said this,⁷³ and it is certainly a point that a defendant in emotional injury cases will not wish to overlook.

Far more common than any of the proximate cause problems just discussed are problems associated with “intervening” causes—after the tort-feasor has acted, a new event takes place so that both the tort-feasor’s act and the new event both play some part in the injury suffered by the plaintiff. In certain kinds of multiple auto accidents, the Court sometimes makes the issue of proximate cause turn on the time elapsed between the first and second collisions. If there is a significant time lapse between the two impacts, the first tort-feasor is not liable for damages done in the second collision.⁷⁴ The real

⁷³ *McCahill v. New York Transp. Co.*, 201 N.Y. 221, 94 N.E. 616 (1911); *Bates v. Fraser*, 38 D.L.R. 30 (Ont. High Ct. 1963).

⁷⁴ *E.g.*, *Shaw v. Barnard*, 229 N.C. 713, 51 S.E.2d 295 (1949).

explanation for such decisions, however, appears to be something quite different. In *Lockwood* the defendant negligently caused the original impact. Several months later, while the plaintiff was recuperating from this, one of plaintiff's employees wrecked a customer's car, and it was this event that precipitated the plaintiff's attack of amnesia. Although the defendant's negligence was causal in that it set the stage for the amnesiac reaction, there was assuredly a considerable time lapse between the two events. Similarly, prior to 1961 legislation⁷⁵ at least, the Court held that a tort-feasor was liable both for injury caused in an impact and aggravation of that injury caused by medical malpractice which might occur at a much later time. Thus lapsed time will not alone explain the results in the cases.

*Copple v. Warner*⁷⁶ illustrates the lapsed time test in the successive auto collision cases. There, one Warner allegedly ran a stop sign and struck the plaintiff's vehicle in the side in the familiar T-bone fashion. This impact left the plaintiff's vehicle in its own lane and apparently in a normal traveling position. The plaintiff remained in her vehicle while the two cars were being separated. While she was in her car, one West was driving on the same highway approaching her car from the opposite direction. He crossed the center line and struck the car, causing injury to the plaintiff. Both Warner and West were sued for injuries arising out of the second impact, and Warner demurred. The Court held that the demurrer was properly sustained: The time lapse between the Warner impact and the West impact was sufficient to separate the vehicles involved in the first collision, and this time lapse indicated that Warner's negligence in causing the first impact was not a proximate cause of the second.

Another recent case, *Batts v. Faggart*,⁷⁷ is similar. There the plaintiff was stunned by the first impact and left in this condition in an opposing lane of traffic. However, the plaintiff recovered himself, straightened his car in the highway, and drove down the highway for some distance before being struck from behind by a second defendant. Again, the Court held that the first defendant's negligence

⁷⁵ N.C. GEN. STAT. § 1-540.1 (Supp. 1963). For discussion, see Baer, *Effect of Release Given Tortfeasor Causing Initial Injury in Later Action for Malpractice Against Physician*, 40 N.C.L. REV. 88 (1961).

⁷⁶ 260 N.C. 727, 133 S.E.2d 641 (1963).

⁷⁷ 260 N.C. 641, 133 S.E.2d 504 (1963).

was not a proximate cause of the damage resulting from the second impact.

In both of these cases there was a significant time lapse between the first and second collisions, and both decisions seem entirely correct in holding that the defendant causing the first impact is not liable for damages done in the second. But the time-lapse explanation can hardly be the real one. If the first impact had left the plaintiff unconscious in the middle of the road, the first defendant would surely be held responsible for the injuries resulting from a second impact—even if the second impact occurred hours later.⁷⁸ The real reason for protecting the first tort-feasor seems to be something like the one suggested by Justice Bobbitt in *Batts*, namely, that the plaintiff would have been in the "same position" even if the first impact had not occurred. In *Batts* the plaintiff was put in a position of risk from a second impact when the defendant struck him; but before the second impact he had recovered and had resumed a normal traveling position. In *Copple*, the first impact did not put the plaintiff in a position of risk from a second impact by an oncoming car at all. In each case, if there was risk of a second impact, it was a risk normal to travel upon the highway; it was not enhanced by the first defendant's negligence at all. Now, of course, the first tort-feasor can reasonably foresee that if he runs into the plaintiff, he creates a risk of further impacts and that these may come about in a wide variety of ways. If the foreseeability test is used at the time of the first actor's negligent conduct, it is possible that he should be held for subsequent impacts, since they are foreseeable. Nevertheless, after the first impact takes place, if it can be

⁷⁸ In *Hall v. Coble Dairies*, 234 N.C. 206, 67 S.E.2d 63 (1951), the first defendant allegedly parked its truck on the highway without flares, causing plaintiff to collide with it. Plaintiff got out of his car, went around to its right side to assist his wife, and thereafter, returned to the left side of his car in a dazed condition. At this point he was struck by another vehicle. The Court held the complaint stated a cause of action against the first defendant for all damages suffered. Somewhat similar is *Robertson v. Ghee*, 262 N.C. 584, 138 S.E.2d 220 (1964), where the first defendant was parked on the road, causing one Johnson to collide with his vehicle. The plaintiff, driving a third vehicle, overturned in an effort to avoid impact with one of the persons at the scene. The first defendant was held liable. Much like *Robertson* is *Green v. Isenhour Brick & Tile Co.*, 263 N.C. 503, 139 S.E.2d 538 (1964), where the first defendant had misparked its vehicle on a city street, causing plaintiff's vehicle to swerve out at a time when a second car was passing. In all these cases, time lapse seems quite unimportant, as is entirely clear in *Hall v. Coble Dairies* and as Justice Bobbitt recognized in his discussion of *Hall* in *Batts v. Faggart*, *supra* note 77.

determined that the plaintiff is not in fact in a position of risk from further impact, or if he recovers his original position, it can be said that the risk of second impact, though originally foreseeable, has terminated. Thus, in *Copple*, the plaintiff's vehicle remained in its own lane. It was stopped, and that created a risk of impact from behind, but there was no risk remaining, beyond the normal travel risk, of impact from the front.

There are, to be sure, difficulties with this "termination of the risk" approach.⁷⁹ But it nevertheless remains considerably more accurate than the "lapsed time" approach. Lapsed time is a reasonably good rule of thumb, because in many cases it will reflect the same results that would be achieved by a more complex analysis in terms of risk termination. Yet, the theoretical underpinning of these "intervening cause" cases can be important as a practical matter. The lapsed time approach can, if applied mechanically, yield some quite unhappy results. Suppose, for example, that a defendant drives his vehicle into the side of the plaintiff's vehicle, as in *Copple*. This forces the plaintiff to stop his car, and this in turn enhances the risk of a second impact from behind. If a second impact occurs from behind the stopped car, it clearly does not matter on the proximate cause issue whether it takes place seconds or minutes later, although the time lapse may be important on such issues as contributory negligence. If the second impact occurs mere seconds later, the first defendant is liable because this is a risk his conduct has created. If the second impact occurs minutes later, he is still liable, and for the same reason—the second impact is still a risk his conduct has created. A termination-of-risk approach would recognize that the plaintiff in either case is still in a position of risk of impact from behind, regardless of lapse of time. A mechanical application of the lapsed-time approach might get a different result.

A more serious objection to the lapsed-time approach arises when the plaintiff suffers damage from both impacts, but the damages are inseparable. For example, the first tort-feasor strikes the plaintiff, leaving him in the road, unconscious. Half an hour later, a second tort-feasor strikes the plaintiff while he is lying in the road. If the plaintiff suffers from shock, multiple broken bones, and internal injuries as a result, it seems plain enough that he will not

⁷⁹ The termination of risk approach may tend to eliminate the foreseeability test or else hold a defendant only for risks which can be specifically foreseen. See KEETON, *LEGAL CAUSE IN THE LAW OF TORTS* 74-78 (1963).

be able to say that the first tort-feasor caused three broken bones, one-sixth of the shock, and one-half of the internal injuries. Nor will he be able to attribute any particular item of damage to the second tort-feasor. If he cannot hold both of them together, jointly and severally, he cannot recover at all. The modern view seems to be that in such a situation, elapsed time between the first and second collisions makes no difference.⁸⁰ If the conduct of the two tort-feasors concurs, not in *time*, but in *effect*, to produce inseparable injuries, then the first tort-feasor is liable for all of the damages, including those resulting from the second impact, even if the second impact occurs much later in time. In such a situation, it is, or should be, enough that the first actor has created a risk of harm from a second impact.

What North Carolina would do when faced with such a situation is largely speculative.⁸¹ There are a number of cases using "lapsed time" as a test of proximate cause.⁸² But the Court has applied this approach selectively. It has not been mentioned in some of the successive collision cases,⁸³ and in some analogous cases the Court has omitted reference even to "proximate cause."⁸⁴ The gist of Justice Bobbitt's analysis in *Batts* is in accord with that suggested here, and it goes a long way toward reconciling a number of the cases which cannot be reconciled on the basis of lapsed time alone. In view of this, it does not seem unreasonable to expect that "lapsed time" will in appropriate cases be recognized as merely a shorthand expression, adequate to deal with many of the cases where it has been used, but no substitute for analysis in more complex cases.

Once it is recognized that lapsed time between first and second impacts is not in itself determinative, it is difficult to feel that this kind of proximate cause question can be determined properly on demurrer. The question becomes, not how much time has lapsed,

⁸⁰ See *Maddux v. Donaldson*, 362 Mich. 425, 108 N.W.2d 33 (1961), 41 N.C.L. REV. 512, 514 (1963).

⁸¹ Cf. *Fox v. Hollar*, 257 N.C. 65, 125 S.E.2d 334 (1962), 41 N.C.L. REV. 512, 514-18 (1963). Some of the language in *Shaw v. Barnard*, 229 N.C. 713, 51 S.E.2d 295 (1949), seems to employ a test of separability of injuries, but other language in the same case seems to employ the lapsed time test.

⁸² E.g., *Copple v. Warner*, 260 N.C. 727, 133 S.E.2d 641 (1963); *Shaw v. Barnard*, 229 N.C. 713, 51 S.E.2d 295 (1949).

⁸³ See *Robertson v. Ghee*, 262 N.C. 584, 138 S.E.2d 220 (1964); *Batts v. Faggart*, 260 N.C. 641, 133 S.E.2d 504 (1963).

⁸⁴ See *Robertson v. Ghee*, *supra* note 83.

but whether the defendant's conduct created an unreasonable risk of a second impact. The answer to such a question must often depend upon evidentiary facts that ordinarily should not appear in the complaint. Thus it would seem preferable to decide proximate cause issues of this sort, not on demurrer, but on a full trial record.

One further problem of proximate cause appears in recent cases. Prior to 1961 legislation,⁸⁵ it was held that a release of the first tort-feasor was also a release of a doctor whose malpractice aggravated the plaintiff's injury.⁸⁶ The implied basis of such decisions was that the first tort-feasor was liable to the plaintiff (1) for injuries caused and (2) for all "natural and probable consequences" of his injuries, including aggravation by medical malpractice.⁸⁷ Since the first tort-feasor was liable for the entire damages, a release of him indicated that the plaintiff had settled for all of his damages, including any caused by the malpractice. A statute of 1961 provided that a release of the first tort-feasor did *not* release a physician treating injuries.⁸⁸ The results of the prior cases were thus overruled by the statute. The question then arises whether the statute overruled not only the *results* of prior decisions, but also overruled their implied premises. Did the statute, in other words, have the effect of saying that the first tort-feasor is no longer liable to the plaintiff for aggravation of his injuries by medical malpractice? If so, the plaintiff can recover from the first tort-feasor *only* the damages incurred in the impact, and cannot recover from him for the aggravation of those damages by reason of medical malpractice. He will be required to sue the first tort-feasor and the doctor separately, and there will be concomitant difficulties in apportioning damages between the two. In *Galloway v. Lawrence*,⁸⁹ the Court indicated in a dictum that it regarded the statute in this light. It described the first tort-feasor's negligence as an "independent" and "separate" tort, saying that the original wrongdoer could not be held liable for the negligence of the physician who later treated the injury, although in earlier cases the Court had described such aggravation of

⁸⁵ N.C. GEN. STAT. § 1-540.1 (Supp. 1963). For discussion, see Baer, *supra* note 75.

⁸⁶ A consent judgment had the same effect. *Bell v. Hankins*, 249 N.C. 199, 105 S.E.2d 642 (1958).

⁸⁷ *Id.* at 203, 105 S.E.2d at 644.

⁸⁸ N.C. GEN. STAT. § 1-540.1 (Supp. 1963).

⁸⁹ 263 N.C. 433, 139 S.E.2d 761 (1965).

damages as a "natural and probable consequence" of the original injury.⁹⁰

This dictum seems unfortunate. The statute simply provides that a release of the first tort-feasor is no bar to a claim against the doctor for subsequent malpractice. By its terms it is directed at the results of specific prior decisions; it does not go further and provide that the first tort-feasor is no longer liable for the doctor's aggravation of damages. The statute is unquestionably a "plaintiff's statute," but to follow the dictum in *Galloway* will be to give to the plaintiff the power to settle with one hand and to take from him the right of full recovery from the first tort-feasor with the other—a purpose one can scarcely believe the legislature had in mind. More to the point, if the plaintiff cannot recover all his damages from the first tort-feasor, there will be considerable difficulty in many cases in determining what damage was caused by the impact and what damage was caused by the subsequent malpractice. The possibility of inconsistent verdicts in the two suits opens a very real possibility that the plaintiff may not make a full recovery. Everyone might concede that the plaintiff's damages amounted to 10,000 dollars, yet the first tort-feasor may convince a jury that most of this was due to a "separate tort" by the negligent doctor, while the doctor might convince a second jury that most of the injury resulted from the original impact. In the light of these considerations, it seems desirable to adhere to the original rule, that the first wrongdoer is liable for all the "natural and probable consequences" of his negligence—including aggravation of injury by the physician. The statute may be treated as doing just what it purports to do and nothing more—permitting a settlement with the first tort-feasor without barring a claim against the doctor.

IMMUNITIES

The common law immunity of husband and wife to tort claims of each other has been abolished in North Carolina,⁹¹ but the parent-child immunity remains, on the dubious theory that if parents and children could sue one another, family harmony would be disrupted.⁹² Although there is no immunity if the child is emanci-

⁹⁰ See *Bell v. Hankins*, 249 N.C. 199, 105 S.E.2d 642 (1958).

⁹¹ N.C. GEN. STAT. § 52-10.1 (Supp. 1963). See *A Survey of Statutory Changes in North Carolina in 1951*, 29 N.C.L. REV. 351, 395-96 (1951).

⁹² See *Gillikin v. Burbage*, 263 N.C. 317, 139 S.E.2d 753 (1965); *Small v. Morrison*, 185 N.C. 577, 118 S.E. 12 (1923).

pated,⁹³ the immunity is retained in North Carolina even though the parent, or the child, is deceased and the action is wholly between the administrators of the deceased parent and child.⁹⁴ Such a set of rules leads to difficulties, as is illustrated in *Cox v. Shaw*.⁹⁵ In that case, a mother, father and minor son were together in a family purpose automobile driven by the son. There was a collision with a third person, and the mother and son were both killed. The mother's administrator brought an action against (1) the son's administrators, (2) the father-husband, and (3) the third person. The Court first held, on the basis of authority,⁹⁶ that the son's estate was immune to any direct suit by the mother's administrator. It then held that the mother's administrator would be permitted to sue the father, since there is no immunity between husband and wife. The father's liability was derivative only—it was based upon the son's negligence under the family car doctrine—but the Court held that this did not confer the son's immunity upon him. Again, this is in accord with authority.⁹⁷

One argument against the father's liability was that, if held, then he would have an action over against the son's estate for indemnity; if this were permitted, then the parent-child immunity would be effectively destroyed, because the ultimate cost of the recovery by the mother's estate would be borne by the son's estate. The Court's answer to this argument was simple and direct: the father will not be permitted any action of indemnity against the

⁹³ See *Gillikin v. Burbage*, *supra* note 92, holding that evidence was sufficient to permit a finding of emancipation of a minor child who supported herself, contributed to family finances, owned her own car and came and went as she chose, even though she also assisted in household chores on request of her mother.

⁹⁴ *E.g.*, *Capps v. Smith*, 263 N.C. 120, 139 S.E.2d 19 (1964); *Goldsmith v. Samet*, 201 N.C. 574, 160 S.E. 835 (1931). Some courts have held that on the death of one party, the reason for the immunity—disruption of the family—disappears, and therefore the intra-family immunity also disappears. These results depend in part on construction of local death statutes. See *Harlan Nat'l Bank v. Gross*, 346 S.W.2d 482 (Ky. 1961); *Heyman v. Gordon*, 40 N.J. 52, 55, 190 A.2d 670, 672 (1963) (dissenting opinion).

⁹⁵ 263 N.C. 361, 139 S.E.2d 676 (1965).

⁹⁶ See note 93 *supra*.

⁹⁷ See, *e.g.*, *Schubert v. Schubert Wagon Co.*, 249 N.Y. 253, 164 N.E. 42 (1928); *Wright v. Wright*, 229 N.C. 503, 50 S.E.2d 540 (1948). See generally *PROSSER* 890. In both the cases cited as well as others cited in the Court's opinion, actions were against the employer of the husband-father. In each case, the employer was held liable even though the husband-father was immune to suit. *Cox* is merely an extension of this rule to another form of vicarious liability—that based upon the family purpose doctrine rather than upon the orthodox *respondeat superior* rules.

son's estate, hence the parent-child immunity will be preserved.⁹⁸ Thus the estate of the wife-mother may not recover directly against the estate of the son, but may recover against the father-husband. The father-husband is likewise denied any recovery for indemnity against the son's estate and is further denied the son's immunity, even though his liability is based upon the son's conduct. Given the parent-child immunity, this is not only in accord with authority, but is probably the best answer to a difficult situation. Denial of the father-husband's right of indemnity probably makes no practical difference in most cases, because normally both father and minor son will be covered by the same insurance policy and to permit indemnity would be merely to award the insurer the useless right to sue itself.

But the puzzling problems of *Cox* do not end there. The Court went on to say that, though the father-husband was liable only derivatively under the family purpose doctrine, he was nevertheless a wrongdoer who could not "profit from his own wrong." On this basis he was denied the right to share in any recovery on behalf of the mother-wife's estate. This rule may seem appropriate enough where there is actual negligence on the part of the tort-feasor, but it does seem open to argument when the normal beneficiary of an estate is denied the right to share in it merely because he is vicariously liable.⁹⁹ Yet, if the father-husband in *Cox* were allowed to share in the recovery, he would be sharing funds provided by his own insurance carrier under his own liability insurance policy—at least, if the insurance situation is the normal one. It may seem inappropriate to permit a party to recover—even indirectly—from his own insurance carrier. On the other hand, there may be situations in which he will be permitted to do so, as where the insured lends his car to a friend who later negligently runs over the insured. In such a situation the insured's omnibus clause coverage insures the friend, and if the insured sues his friend for negligence, it will be the

⁹⁸ This holding required the Court's recognition that the right of indemnity is not "contractual," as it is sometimes said to be, but is based instead upon equitable notions. Since the right of indemnity, if any, is based upon a tort, the parent-child immunity is retained and cannot be avoided by saying that indemnity claim of the father is "contractual." This immunity will also normally bar contribution against the immune party by any third party who is held liable for the injuries. See generally PROSSER 277.

⁹⁹ This result, however, is not new in North Carolina. In *Dixon v. Briley*, 253 N.C. 807, 117 S.E.2d 747 (1961), the father of a deceased son was held barred from recovery by reason of the son's negligence imputed to him under the family purpose doctrine.

insured's own liability insurance which pays the judgment. Perhaps it could be argued on this basis that the father-husband in *Cox* should not be denied a share of the recovery on behalf of the mother's estate. If the fact that he would be recovering from his own insurer (indirectly) is not enough to prevent his sharing in a recovery, then the fact that he is vicariously "at fault" does not seem enough to do so, so long as he is not in *fact* at fault.

There is still another twist to *Cox*. Both the mother and son were killed in the accident in that case. The father was denied the right to share in any recovery that might be had by the mother's estate. That left a daughter, who was not in the car, as the sole ultimate beneficiary of any recovery to be made by the mother's estate against the father. Thus the effect of the case is to say that (1) the parent-child immunity bars a suit by a mother's estate against a son's estate, since to hold otherwise would encourage family disharmony; but (2) the parent-child immunity does *not* bar a suit by a daughter (as beneficiary of the mother's estate) against a father. The result is a backdoor invasion of the immunity rule, for in realistic terms, this is simply a case of a daughter (as sole beneficiary of the deceased mother) suing a father (as the only person not immune to the mother's estate). *Cox* permits what amounts to a daughter-father action even though it is an action between estates of the mother-son.¹⁰⁰ The difference between the daughter's claim against the father (which will be permitted) and the mother's claim against the son (which will be denied) is surely one of form alone. If there is danger of family disharmony, it is certainly more likely to result from an action between a living daughter and a living father than it is between a deceased mother and a deceased son, whose relations in any event now seem beyond the jurisdiction of the Court. If the real reason for parent-child immunities is the danger of collusion between members of the

¹⁰⁰ The Courts will look beyond the nominal party whose name appears on the record as plaintiff and consider the legal questions raised as they may affect the real party or parties in interest. The real party in interest in this action is not the administrator, but the beneficiary under the statute for whom the recovery is sought.

Davenport v. Patrick, 227 N.C. 686, 688, 44 S.E.2d 203, 205 (1947). On this very basis, an action by a mother's estate against her surviving husband was dismissed where it appeared that the sole beneficiary was a surviving child, since, looking beyond form, the action was reduced to one by the child (as beneficiary) against the father-husband. *Heyman v. Gordon*, 40 N.J. 52, 190 A.2d 670 (1963).

family, such dangers seem no less in an action which is essentially between a living daughter and father than in an action between two administrators of a deceased mother and son.

None of this is intended to criticize any of the decisions in *Cox*. The case was extraordinarily complex and an overworked Court handled the issues with an extraordinarily sure touch, arriving on all issues at results justified by authority. But the very complexity of issues in an ordinary two-car accident case raises doubts, especially when some of the solutions forced upon the Court by dilemma and authority seem unsatisfactory. Perhaps the time has come to re-examine the family immunities to determine anew whether they are worth the price to be paid in complexity, and, sometimes, unfairness. In any event, judicial exploration of the real reasons for such immunities, with due regard to the dangers of collusion and the realities of insurance, might be a good beginning toward a clarification of the problems mentioned.

PRODUCTS LIABILITY—WARRANTY

In *Terry v. Double Cola Bottling Co.*,¹⁰¹ the Court reiterated its view that privity is an absolute prerequisite to a warranty action, even when the action is based upon allegedly deleterious food products. In so holding—over the detailed opposition of Justice Sharp¹⁰²—the Court refused to re-consider a position originally taken thirty years ago,¹⁰³ even though in the interim most states have abolished the privity requirement in food cases.¹⁰⁴ In the same interim North Carolina has continued to assert the privity requirement in dicta,¹⁰⁵ but it appears that in thirty years no case in North

¹⁰¹ 263 N.C. 1, 138 S.E.2d 753 (1964), 43 N.C.L. Rev. 647 (1965).

¹⁰² 263 N.C. at 3, 138 S.E.2d at 754. Justice Sharp concurred in the result on the ground that there was inadequate proof of breach—that is, that the deleterious matter was not satisfactorily shown to have been in the bottled drink at the time the bottle was sold.

¹⁰³ *Thomason v. Ballard & Ballard Co.*, 208 N.C. 1, 179 S.E.2d 30 (1935).

¹⁰⁴ See 43 N.C.L. Rev. 647 (1965).

¹⁰⁵ *E.g.*, *Caudle v. F.M. Bohannon Tobacco Co.*, 220 N.C. 105, 16 S.E.2d 680 (1941). The recent food cases have been decided on the ground that there was no breach of warranty. *Phillips v. Pepsi-Cola Bottling Co.*, 256 N.C. 728, 125 S.E.2d 30 (1962); *Prince v. Smith*, 254 N.C. 768, 119 S.E.2d 923 (1961); *Adams v. Great Atl. & Pac. Tea Co.*, 251 N.C. 565, 112 S.E.2d 92 (1960). Other recent cases have not involved food or products for intimate bodily use. *E.g.*, *Murray v. Bensen Aircraft Corp.*, 259 N.C. 638, 131 S.E.2d 367 (1963). In non-food cases there has been less agreement that the privity requirement should be abolished, hence such cases are historically distinguishable.

Carolina has been squarely decided on the basis of that requirement where deleterious food was involved. Furthermore, the Court has itself recognized the changing state of authority, and indicated in a dictum some years ago that "the requirement of privity of contract is not always controlling" in food cases.¹⁰⁶ Notwithstanding all this, the Court refused to re-examine the problem.

The Court's premise was simply that a claim for breach of warranty is contractual in nature. Contract actions may be maintained only by parties or by certain third-party beneficiaries. The plaintiff was not a party to any contract with the bottler of the soft drink in *Terry*, and hence could not maintain a contract action, *i.e.*, an action on warranty. But this logic, faultless as it is, cannot really avoid the policy problem: *should* a manufacturer be held liable without proof of negligence for defective or deleterious products? It does not avoid the problem, because its premise does not exclude the possibility of accepting the modern view expressed by the *Restatement of Torts 2d*,¹⁰⁷ that the so-called warranty claim is one of strict liability in tort when personal injury rather than commercial loss is involved. It is perfectly consistent to insist upon privity of contract in contract cases and at the same time impose strict liability in tort for deleterious food products causing harm to the ultimate consumer. Certainly by most practical standards, as well as by historical ones,¹⁰⁸ the "warranty" claim for personal injury is a tort claim, and has been recognized as such by recent cases.¹⁰⁹ Other courts have not always called the action one of tort, but have imported such tort defenses as contributory negligence,¹¹⁰ indicating at least a tacit recognition of the tort character of the action. Whether a court accepts the argument that a manufacturer should be strictly liable is, of course, another matter, dependent entirely upon the court's assessment of policy issues. However, since there is a perfectly legitimate basis for eliminating the privity requirement—by viewing the action realistically as one in tort—it seems that an examination

¹⁰⁶ *Davis v. Radford*, 233 N.C. 283, 286, 63 S.E.2d 822, 825 (1951).

¹⁰⁷ RESTATEMENT (SECOND), TORTS §402A (Tent. Draft No. 10, 1964).

¹⁰⁸ See Ames, *History of Assumpsit*, 2 HARV. L. REV. 1, 8 (1888). If the "warranty" action for personal injuries had taken the course of the action for deceit, which also grew out of "warranty," then no privity would ever have been required, just as it is not required in deceit cases. See *Pasley v. Freeman*, 3 T.R. 51, 100 Eng. Rep. 450 (K.B. 1789); PROSSER 699.

¹⁰⁹ *Greenman v. Yuba Power Prod., Inc.*, 59 Cal. 2d 67, 377 P.2d 897, 27 Cal. Rptr. 697 (1963); *Goldberg v. Kollsman Instrument Corp.*, 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963).

¹¹⁰ *E.g.*, *Dallison v. Sears, Roebuck & Co.*, 313 F.2d 343 (10th Cir. 1962).

of this possibility by the Court is in order, when and if it is properly presented. If such an argument is made in an appropriate case, the Court's decisions on privity to date will not be technically binding. And, since the Court has not as yet attempted to decide the basic policy issues, it will have a clean slate on which to write if it chooses to reconsider the problem in the light of the massive change of view in most states.

TRIAL PRACTICE

*Herbert Baer**

PROCESS

G.S. § 1-88 states that a civil action is commenced by the issuance of summons. Case law prior to 1951 held that a summons is "issued" when it passes out of the hands of the clerk for service, whether delivered directly to the sheriff or another for him.¹ Thus under that law, if the summons was signed by the clerk on May 1 but only left his office for delivery to the sheriff on May 3, the latter date would determine the date of issue and hence the commencement of the action. In 1951 the legislature departed from this case law by enacting G.S. § 1-88.1 which states, "A summons is issued when, after being filled out and dated, it is signed by the officer having authority so to do. The date the summons bears is prima facie evidence of the date of issuance."

In *Deaton v. Thomas*² a summons had been issued by the clerk on April 3, 1963, and delivered to the sheriff for service. It was duly returned on April 17 as not served, defendant not being found. On April 23 the clerk made the customary endorsement on the summons extending the time for service to May 13. But this time, instead of delivering the summons to the sheriff for service, the

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¹ See, e.g., *McClure v. Fellows*, 131 N.C. 509, 42 S.E. 951 (1902).

² 262 N.C. 565, 138 S.E.2d 201 (1964). Attention is called to the first headnote of this case which states that "a summons which is not delivered to the sheriff or to someone for him expressly or by implication, but is delivered by the clerk to the attorney for plaintiff, and retained in the possession of the attorney, is not issued." While this was, in effect, the law prior to 1951, it is not the law today, and the Court does not hold as this paragraph of the headnote indicates.

clerk gave it to the plaintiff's attorney who kept it. On May 20 the attorney took the summons back to the clerk who again endorsed it extending time for service another twenty days. Again counsel kept the summons. Finally, on August 1 the summons was again returned by counsel to the clerk who entered another twenty-day endorsement. Service was made by the sheriff on August 3.

The Supreme Court affirmed the trial judge who held that there had been a break in the chain of summonses and that a new action was instituted by the endorsement made by the clerk on the original summons on August 1.

While the Court refers to cases prior to 1951 which speak of a summons not being issued until it had left the hands of the clerk for the sheriff, the Court specifically addresses itself to the right of a person to have an extension of time for the service of summons. In upholding the trial judge, the Court says:

We hold that where a summons is issued by a clerk of the superior court and such summons is never delivered to the officer to whom it is directed for service, after the time for service has been extended, such summons may not be used as a basis for the issuance of an alias process or the extension of time for service.³

The right of a party to get an extension of time for service of summons is, says the Court, predicated on the theory that the summons had been delivered to the sheriff for service. Keeping the summons in plaintiff's attorney's brief case or files and never delivering it to the sheriff resulted in the summons becoming dead as of May 13, the end of the first period of extension made after the sheriff's return of no service.

In 1935 the Supreme Court declared in *Dowling v. Winters*⁴ that service could not be made on the personal representative of a deceased non-resident motorist by serving the State Commissioner of Revenue under the then provisions for the service of process on non-resident motorists.⁵ The Court pointed out that there was no provision in the then statute for service on the executor or administrator of a deceased non-resident motorist who had been involved in an accident in North Carolina. The Court also declared that it

³ 262 N.C. at 568, 138 S.E.2d at 203.

⁴ 208 N.C. 521, 181 S.E. 751 (1935).

⁵ N.C. Sess. Laws 1929, ch. 75, § 1. The comparable statute today is N.C. GEN. STAT. § 1-105 (1953).

is the general law of agency that an appointment of an agent, unless coupled with an interest, is terminated with the death of the principal.

In 1953 the then non-resident motorist statute, now G.S. § 1-105, was rewritten and provision made for service on the executor or administrator of the motorist by serving the Commissioner of Motor Vehicles. The new provision was drawn directly from the New York act.⁶ Similar provisions found themselves into other state statutes. In some states they were declared unconstitutional, while in others their constitutionality was upheld.⁷

In *Franklin v. Standard Cellulose Prods., Inc.*,⁸ the majority of the Supreme Court in an opinion by Justice Bobbitt upheld a trial judge who refused to dismiss an action for lack of proper service when service on the administrator of a non-resident deceased motorist was made in accordance with the present statute. In answer to the contention that a foreign administrator has no status to either sue or be sued in North Carolina courts, the Court declared that G.S. § 1-105 as amended in 1953 is an exception to the general rule, expressed in *Cannon v. Cannon*,⁹ that a foreign executor or administrator can neither prosecute nor defend an action in the courts of this state in his representative capacity.

In the last sentence of Justice Bobbitt's opinion he said, "It is noted that appellant makes no contention that any provision of G.S. § 1-105 is unconstitutional."¹⁰ We accordingly are not informed as to what position the Court would take if the constitutionality of the current statute were attacked.

In his dissenting opinion Justice Higgins agrees that by virtue of the statute the non-resident motorist makes the Commissioner of Motor Vehicles a process agent both for himself and his personal representative. However, he does not believe that it was the intent of the legislature to authorize a foreign executor or administrator to sue or be sued in his representative capacity. If the foreign representative can be sued, he may counterclaim, and this, in

⁶ N.Y. VEHICLE AND TRAFFIC LAW § 52. For discussion, see 31 N.C.L. REV. 395 (1953).

⁷ *Knoop v. Anderson*, 71 F. Supp. 832 (N.D. Iowa 1947) (Iowa statute held unconstitutional); *Leighton v. Roper*, 194 Misc. 893, 87 N.Y.S.2d 527 (Sup. Ct. 1948), *aff'd*, 300 N.Y. 434, 91 N.E.2d 876 (1950) (New York statute held constitutional). See generally Annot., 18 A.L.R.2d 544 (1951).

⁸ 261 N.C. 626, 135 S.E.2d 655 (1964).

⁹ 228 N.C. 211, 45 S.E.2d 34 (1947).

¹⁰ 261 N.C. at 629, 135 S.E.2d at 658.

Justice Higgins' opinion, would endow the foreign representative with a capacity he does not have. The objection of Justice Higgins would be overcome by a statute which would expressly state that in this type of case the foreign executor or administrator may be sued, and if sued may counterclaim. Such a statute would not remove any possible unconstitutionality of the present act. We shall have to await decision by our Court on that question.

The importance of making sure that a trial judge finds the facts as to the activities in this state of a foreign labor union and that his finding appear in the record was highlighted in *Sizemore v. Maroney*.¹¹ On a special appearance before the clerk by the defendant labor union, which contended no valid service had been had on it, the clerk found that the union had failed to comply with G.S. § 1-97(6), in that it had failed to appoint an agent for the service of process. Accordingly, the clerk held that process could be served on the Secretary of State. On appeal to Judge Olive, the clerk was reversed, the judge declaring that the plaintiff's claim was based on an outstate tort and that there was insufficient evidence before the court that the union was doing business in North Carolina.

The Supreme Court in turn reversed Judge Olive for the reason that he found no facts and that his statement that the labor union was not "doing business" in North Carolina was a "pure legal conclusion." Judge Olive had neither recited what evidence he heard, nor made any finding of fact. Accordingly, the judgment of dismissal was vacated and the case returned to the lower court so that specific facts may be found on the crucial question of the activities of the union in North Carolina. Then, on those facts, the lower court is to make its conclusion of law.¹²

The question of whether a foreign corporation which has not qualified to do business in North Carolina, but is doing business in this state can be sued by serving process on the Secretary of State in an action arising from an outstate tort was determined in *Atlantic Coast Line R.R. v. J. B. Hunt & Sons, Inc.*¹³

In that case, action was brought against Insto-Gas Corporation, of Michigan, to recover damages resulting from an explosion of one of its gas heaters in Virginia. Insto had not qualified to do busi-

¹¹ 263 N.C. 14, 138 S.E.2d 803 (1964).

¹² For other North Carolina cases in point, see 37 N.C.L. REV. 463 (1959); for a general discussion on the subject of service on foreign labor unions, see 38 N.C.L. REV. 615 (1960).

¹³ 260 N.C. 717, 133 S.E.2d 644 (1963).

ness in this state, and although it had certain contacts with North Carolina which might be urged as constituting doing business (although the trial court found otherwise), the Court declared that whether or not Insto was doing business in this state was immaterial because no statute authorizes service of process on the Secretary of State when the foreign corporation is being sued for an outside tort and has not qualified to do business in North Carolina. Had Insto domesticated, service could have been made on the Secretary of State for the outstate tort.

The decision of the Court is clearly in line with the statute and the interpretation placed upon the statute by its draftsmen.¹⁴ It is only when the non-qualifying corporation gives rise to a cause of action *in this state* that service may be made on it by serving the Secretary of State under G.S. § 55-144. The Court points out that such corporation can be sued even for an outstate tort by having service made on an *actual agent* of the corporation in North Carolina¹⁵

In *Cushing v. Cushing*¹⁶ a husband, pursuant to a decree of a South Carolina domestic relations court, exercised his right of visitation and came into North Carolina to visit his child who was then in his wife's custody. At the time of the husband's visit, the wife apparently arranged to have the husband served with summons in an action instituted by her for alimony and custody of the child. Defendant husband moved to quash the service of the summons on the ground that he was "exempt from service" while exercising his visitation rights.

The Court held that the defendant was not immune from service. He had not come into the state as a witness, nor had he been brought in by extradition proceedings. As to any trickery being practised upon him, the Court declared that if he had been induced to come into the state by fraud, the service would be set aside, but under the facts of this case, there was no evidence that the wife had

¹⁴ See Latty, Powers & Breckenridge, *The Proposed North Carolina Business Corporation Act*, 33 N.C.L. Rev. 26 (1954). "The explanation for the paradox that a foreign corporation which fails to comply with the law is treated more generously than the foreign corporation which does domesticate is that the former will have filed no express consent to such substituted service and constitutional problems might be presented in the absence of this limitation." *Id.* at 54.

¹⁵ Citing *Dumas v. Chesapeake & O. Ry.*, 253 N.C. 501, 117 S.E.2d 426 (1960).

¹⁶ 263 N.C. 181, 139 S.E.2d 217 (1964).

decoyed her husband into North Carolina by any fraud or false representations. She merely had taken advantage of his visitation of the child and while the action of the wife may appear "unsporting" there was nothing illegal in what she had done.

PRE-TRIAL JUDGE HAS NO AUTHORITY TO NONSUIT

In *Whitaker v. Beasley*¹⁷ the Court reversed a judgment of nonsuit entered by a judge at a pre-trial hearing held pursuant to G.S. § 1-169.1. At the pre-trial conference, the judge declared that he found as a fact and as a matter of law that the plaintiff had failed to state a cause of action against defendant General Motors in the first complaint filed and that in a second complaint filed by plaintiff the cause of action against General Motors was barred by the statute of limitations. He then entered a nonsuit as to General Motors.

In reversing, the Court declared that the pre-trial judge had exceeded his authority since the purpose of a pre-trial proceeding under the statute is to *consider* specifics as motions to amend pleadings, issues, references, admissions, judicial notice, and other matters which may aid in the disposition of the case. The pre-trial order is interlocutory in nature and does not contemplate a final disposition of the case by the pre-trial judge.

JURY TRIAL—WAIVER UNDER G.S. § 50-10

Under G.S. § 50-10, as amended in 1963, whenever a divorce is sought on the ground of two years separation and the defendant has been personally served with process, or has accepted service of summons either within or without the state, right to trial by jury is waived unless the plaintiff or defendant file a request for jury trial with the clerk of court prior to the call of the action for trial.

In *Becker v. Becker*¹⁸ plaintiff sued for a divorce on the grounds of two years separation. Defendant counterclaimed for divorce on the ground of adultery. At the trial term, defendant announced he withdrew his counterclaim but amended his pleading to set up the adultery as matter in recrimination and a bar to plaintiff's action. Defendant's motion was granted but a further motion by the defendant for a continuance was denied.

Thereupon the court called the case for trial. Then, defendant, for the first time, demanded a jury trial which the trial court denied.

¹⁷ 261 N.C. 733, 136 S.E.2d 127 (1964).

¹⁸ 262 N.C. 685, 138 S.E.2d 507 (1964).

On appeal from a judgment of divorce for plaintiff, the Court held that the trial judge had not abused his discretion in denying the continuance and that the defendant's request for a jury trial had come too late. His demand therefore should have been made before the case was called for trial and his withdrawal of the counterclaim did not do away with the necessity of jury demand in due time if he desired a jury.

PRE-TRIAL CHARGE

In *Hardee v. York*¹⁹ the trial judge, after the selection of the jury but before the introduction of evidence, gave certain pre-trial instructions so as to inform the jury of their functions, the court procedure, etc. He defined burden of proof, greater weight of the evidence, negligence and proximate cause in the abstract. One of the grounds of appeal urged by the losing party was that the giving of the pre-trial charge was improper and warranted reversal. Although there was a reversal because of errors made by the trial judge in his charge to the jury after the evidence was in, the Court discussed the matter of a pre-trial charge. The Court said it found no statute nor judicial decision which either authorized or prohibited a pre-trial charge. While the Court found it contrary to usual practice, the Court noted that in recent years booklets have been distributed to jurors advising them in general as to their functions and duties.

The Court declared as to the pre-trial charge, "We neither condemn nor approve pre-trial charges. If prejudicial error results, the offended party may take advantage thereof on appeal."²⁰ The result is that the mere giving of a pre-trial charge is not error, but if by the charge a party is prejudiced such would be error.

IMPROPER CONDUCT OF SOLICITOR REQUIRING NEW TRIAL

In *State v. Wheeler*²¹ defendant was on trial for larceny. An alleged accomplice of the defendant was the principal witness for the state. The defendant took the stand. Evidence by the state's witness was to the effect that he had advised the defendant to go to the officers and request a lie detector test. To impeach the credibility of the defendant, the solicitor asked him what his reply was to that suggestion. Objection to this question was sustained.

¹⁹ 262 N.C. 237, 136 S.E.2d 582 (1964).

²⁰ *Id.* at 240, 136 S.E.2d at 585-86.

²¹ 261 N.C. 651, 135 S.E.2d 669 (1964).

However, the solicitor proceeded to argue the admissibility of such evidence and on three different occasions thereafter repeated his inquiry to the defendant. Although the trial court upheld defendant's objection on each occasion, the Court held that the persistence of the solicitor and the bickering that went on at the trial in this connection created a situation which was not conducive to a fair impartial trial. "Lack of firmness," said the Court, "on the part of the presiding judge permitted the trial to get out of hand."²²

COURT'S CHARGE

Under G.S. § 1-180 a trial judge is required to give "equal stress" to the contentions of plaintiff and defendant in his charge. *Pressley v. Godfrey*²³ involved an ordinary automobile accident case in which the defendant counterclaimed for his damages. In about twelve pages of the record the court fully defined and explained the principles of law arising on the plaintiff's allegations and gave in detail plaintiff's contentions. In about two pages of the record it gave the defendant's contentions. The evidence of both parties as to how the accident occurred was about of equal length. On this state of the record the Court reversed stating that, "There is a glaring inequality in the stress given the contentions of the parties."²⁴

In *Brown v. Griffin*²⁵ plaintiff sued to recover damages for personal injuries sustained. In the court's charge he did not advise the jury that plaintiff was entitled to recover damages for the period of time he was unable to work even though he had been paid his wages for that period by his employer. However, at the conclusion of his charge, the trial judge asked counsel if they had any requests for further instructions and counsel for plaintiff answered in the negative. On appeal, plaintiff alleged error in the charge for that the trial judge did not state the rule of law set out above and thus violated G.S. § 1-180.

The Court held that the plaintiff had no ground for reversal on that court because, not only had he not alleged loss of wages as an element of damages, but he could not now complain of the alleged

²² *Id.* at 652, 135 S.E.2d at 670.

²³ 263 N.C. 82, 138 S.E.2d 770 (1964).

²⁴ *Id.* at 85, 138 S.E.2d at 772. Compare *Edgewood Knoll Apartments, Inc. v. Braswell*, 239 N.C. 560, 571, 80 S.E.2d 653, 661-62 (1954), with *Albritton v. Albritton*, 210 N.C. 111, 115, 185 S.E. 762, 765 (1936).

²⁵ 263 N.C. 61, 138 S.E.2d 823 (1964).

deficiency in the charge because he failed to ask for further instructions when given the opportunity to do so by the court.

It has been said that where the court's instruction is proper as far as it goes, a party desiring a more specific instruction must request it. "This applies to subordinate elaboration, but not substantive, material and essential features of the charge."²⁶ This terminology leaves the appellate court in the situation where it must determine if the omitted portion complained of was "mere subordinate elaboration" or an "essential feature" of the charge.²⁷

G.S. § 1-180 has always been the bane of trial judges who have ventured to make comments which to them at the time seemed perfectly harmless. Sometimes the comment results in reversal, sometimes not. In *Burkey v. Kornegay*²⁸ the trial judge in charging the jury said, "Plaintiff offered the testimony of . . . [the witness], a young lady of perhaps weak mentality."²⁹ There was no testimony nor admission in the case reflecting on the mentality of the girl in question. As might be expected, reversal was ordered on the ground that the trial judge by his comment had violated G.S. § 1-180 which prohibits him from expressing an opinion.

In *State v. Humphrey*³⁰ the defendant, while on the stand, was asked about the friend with whom he spent the night. He said, "The girl friend I was talking about is not my girl friend, but she is just a friend, girl."³¹ During his charge the judge said, "I don't know what the difference is between girl friend and friend, girl, but there apparently is some."³² Defendant excepted to this portion of the court's charge, but on appeal it was held the exception was without merit for the court was merely calling the jury's attention to the fact that the defendant himself made the distinction.

In *State v. Forrest*³³ defendant was on trial for driving while under the influence of intoxicating liquor. Apparently the trial judge had tried several "drunken driving" cases at the term and when it came to charging the jury he told them that the defendant

²⁶ *McCall v. Gloucester Lumber Co.*, 196 N.C. 597, 602, 146 S.E. 579, 582 (1929).

²⁷ On the question of damages being an essential feature of the charge, see *McCall v. Gloucester Lumber Co.*, *supra* note 26.

²⁸ 261 N.C. 513, 135 S.E.2d 204 (1964).

²⁹ *Id.* at 513, 135 S.E.2d at 205.

³⁰ 261 N.C. 511, 135 S.E.2d 214 (1964).

³¹ *Id.* at 512, 135 S.E.2d at 215.

³² *Ibid.*

³³ 262 N.C. 625, 138 S.E.2d 284 (1964).

was not charged with driving a motor vehicle while drunk or intoxicated but with operating a motor vehicle on the public highways while under the influence of intoxicating beverages. He then added:

The Court has been over these definitions before, and I think most of you gentlemen have been on the jury, and I think the others have heard the distinction between the two, and the Court instructs you to take that into consideration when you come to make up your verdict.³⁴

From a verdict of guilty and judgment thereon, the defendant sought a reversal because of this portion of the court's charge. Without the need for citation of authority, the Court readily reversed on the obvious theory that each defendant is entitled to have a full and complete charge made in his own case and prior charges which the jury may have overheard are not to be incorporated by reference as was here attempted by the trial judge.

In *State v. Hollingsworth*³⁵ a jury returned a verdict of guilty upon which judgment of conviction was entered. Two days later, new counsel for the defendant appeared before the court and wished to question the jurors as to whether they had heard all of the court's charge. The trial judge permitted counsel to examine a juror who said he had not heard all the judge's charge. The court then stopped further examination and counsel excepted to the court's refusal to continue with the examination.

On appeal, based on this refusal of the trial judge, the Court, relying on the well established rule in North Carolina that evidence of jurors cannot be taken to impeach their verdict, held that jurors could not be examined for the purpose of showing they were unable to hear the trial judge at the time he gave his charge. Any doubt on that point should have been called to the attention of the court at the time the judge was giving his charge.

VERDICT

When a jury brings in a verdict which is either indefinite or inconsistent or obviously defective in the omission of certain words, there is a great temptation on the part of the trial judge to inquire of the jury whether by their verdict they did not mean thus and so.

³⁴ *Id.* at 626, 138 S.E.2d at 285.

³⁵ 263 N.C. 158, 139 S.E.2d 235 (1964). The opinion contains an excellent discussion of the law relative to the power of jurors to impeach their verdicts. See also 39 N.C.L. REV. 410 (1961).

The jury answers in the affirmative and a judgment entered on the verdict as thus clarified by the question of the trial judge is later reversed because of the judge's action.

Thus, in *State v. Godwin*³⁶ the defendant was being prosecuted for an assault with a deadly weapon with intent to kill resulting in serious injury. The jury, in returning its verdict, said, "We decided that he [defendant] is guilty of an assault on this person."³⁷ The trial judge then asked the jury, "Do I understand that the jury finds the defendant guilty of an assault with a deadly weapon, inflicting serious injuries, not resulting in death, as charged in the bill of indictment?"³⁸ All the jurors replied that they did and judgment was entered holding the defendant guilty as charged in the indictment.

On appeal the Court reversed, holding it was error for the judge to proceed as he had in this case instead of further instructing the jury and having them retire to reconsider their verdict. The Court cited as authority for its position the earlier case of *State v. Gatlin*,³⁹ in which a defendant was charged with manslaughter in driving an automobile. In that case the jury returned a verdict stating they found the defendant guilty of driving. The court asked, "And guilty of manslaughter?"⁴⁰ The jury answered in the affirmative, and judgment was entered accordingly. Then, as in *State v. Godwin*, the Court held the trial judge had no authority to suggest to the jury what their verdict should be by his question.

In *Brown v. Griffin*⁴¹ plaintiff sought to recover damages sustained while he was a passenger in a car which collided with a utility pole. At the trial plaintiff testified he had incurred medical and hospital bills amounting to 1,752 dollars. Defendant made no admission as to the accuracy of these amounts. Neither does it appear that defendant disputed them by way of any testimony. The jury returned a verdict for plaintiff in the amount of 1,000 dollars. Plaintiff sought to set the verdict aside on the ground that, even if the jury gave him nothing for pain and suffering, the verdict could not be less than the amount of bills he testified to, namely, 1,752 dollars.

³⁶ 260 N.C. 580, 133 S.E.2d 166 (1963).

³⁷ *Ibid.*

³⁸ *Id.* at 580, 133 S.E.2d at 166-67.

³⁹ 241 N.C. 175, 84 S.E.2d 880 (1954).

⁴⁰ *Id.* at 176, 84 S.E.2d at 880.

⁴¹ 263 N.C. 61, 138 S.E.2d 823 (1964).

In holding that the trial court did not err in refusing to set aside the verdict, the Court said:

True, the jury could have accepted plaintiff's testimony with respect to his expenditures; but it was not compelled to do so. Defendant made no admissions with respect thereto. The judge had the discretionary power to set the verdict aside; but he was not compelled to act. . . . Abuse of discretion is not shown.⁴²

This decision is in line with the oft repeated rule adopted by the North Carolina courts, that the credibility of a party's testimony, even though not contradicted, is always for the jury.⁴³

VACATION OF DEFAULT JUDGMENT FOR EXCUSABLE NEGLECT

In *Gaster v. Goodwin*⁴⁴ suit was instituted in 1947 and issue was joined in 1948. The case was continued from time to time and finally in June, 1958, the court advised defendant's counsel that the case would be tried at the October 1958 term. At the October term, neither the defendant nor his counsel appeared and default judgment was entered. Execution on the judgment was not issued until 1962. That was the first time defendant had actual notice of the judgment and he forthwith moved to set aside on the ground of excusable neglect.

Upon a finding of the trial judge, who granted defendant's motion that the defendant had set out a meritorious defense, that during the years since the institution of the suit he had been in repeated contact with his attorney, and that defendant was unaware his attorney was so incapacitated he could not attend to the litigation, the Court sustained the vacation of the judgment.

In reply to plaintiff's contention that defendant's motion to vacate was too late because more than a year since the entry of the judgment, the Court declared that if his motion was made, as it was, within one year of his actual knowledge of the default, the motion was in time in accordance with G.S. § 1-220.

⁴² *Id.* at 64, 138 S.E.2d at 825.

⁴³ Compare *Devine v. Patterson*, 242 F.2d 828 (6th Cir.), *cert. denied*, 355 U.S. 821 (1957), where in a situation similar to *Brown* the trial court was reversed for failing to set aside a verdict for less than the actual losses testified to.

⁴⁴ 263 N.C. 441, 139 S.E.2d 716 (1965).