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Torts

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should be noted. Ohio Revised Code section 5731.13[27] now imposes a tax on the transfer of nonresident decedents' estates equal to "that proportion of the total tax as the gross property having a taxable situs in Ohio bears to the gross property of the decedent wherever located." Also, while the amount of exemptions has been doubled under Ohio Revised Code section 5731.09,[28] the tax rates in Ohio Revised Code section 5731.12[29] have been increased by one per cent, except for the rate on transfers of $25,000 or less.

NORMAN S. JEAVONS

TORTS

TRIAL OF A NEGLIGENCE CASE

Res Ipsa Loquitur

Dugan v. Hart[1] involved an attempted invocation of *res ipsa loquitur* in connection with a violation of a statute. The plaintiff, while operating her vehicle, collided with defendant's cow, which was running loose upon the highway. The trial court rendered judgment for defendant on the pleadings.

An appeal was predicated upon two grounds of error: (1) that the court failed to apply the doctrine of *res ipsa loquitur;* and (2) that the court failed to hold that under section 951.02 of the Ohio Revised Code,[2] the averments of the petition established a prima facie case for the plaintiff. The judgment was sustained. The appellate court pointed out that neither the statute in question nor its predecessor[3] was enacted for the benefit of highway travelers. Consequently, the allegation in the petition that the defendant had violated the statute did not make out a prima facie case of negligence. Considering the issue of *res ipsa loquitur,* the appellate court pointed out that one prerequisite for the application of the doctrine is that the instrumentality be within the exclusive control of the defendant. The court conceded that the averment of ownership in the petition might have been sufficient to raise an inference of exclusive control. However, the court concluded that *res ipsa loquitur* was not available to the plaintiff because the averments in the petition raised only an inference of negligence which, coupled with only an inference of control, was not sufficient to invoke the doctrine.[4]

Last Clear Chance

In *Cincinnati Transit Company v. Baltimore & Ohio Railroad,*[5] the appellate court was required to pass upon the doctrine of last

27. OHIO REV. CODE § 5731.13 (Supp. 1959).
28. OHIO REV. CODE § 5731.09 (Supp. 1959).
29. OHIO REV. CODE § 5731.12 (Supp. 1959).

clear chance[6] with respect to an accident involving a locomotive and a bus. The facts indicate that the bus, after crossing one rail of the track, became stalled as a result of the fouling of the trolley pole. After remedying the situation, the driver re-entered the bus only to find that the door would not close, thus immobilizing the bus. A moment thereafter, the bus was struck by the defendant's train.

In denying appellant-claimant's appeal, the court found that the doctrine of last clear chance was inapplicable, in that a curve prevented the train crew from apprising themselves fully of the situation, and that the plaintiff's negligence continued up until the moment of impact.

Assumption of Risk

The problem of assumption of risk, which periodically casts a shadow over the plaintiff's case, arose rather uniquely in a case decided early in 1959.[7] Here the plaintiff-appellee, a frequenter of the supermarket, sustained injuries when he fell from a stepladder, the rigidity of which furnished a topic for much judicial discussion.

The first question suggested by the facts was: did the plaintiff know and assume the risk of the instrument employed by him, which he alleged caused his injury? The trial court found, and the appellate court affirmed, that the plaintiff did not assume the risk, since he had no knowledge of the defective condition of the ladder when he began his ascent.

The second question before the court of appeals was: did the trial court, sitting without a jury, prejudice the appellant-supermarket by reaching a conclusion as to the facts somewhat at variance, but not inconsistent with, the allegations set forth in the plaintiff-appellee's petition? The reviewing court, in affirming the judgment in favor of the plaintiff, found:

> In deciding questions of fact that Court is not in such a vacuum that it cannot infer certain ultimate facts from other facts proved by the evidence submitted during the course of the trial.[8]

Thus, it would appear that Ohio is in accord with the weight of au-

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1. 107 Ohio App. 431, 159 N.E.2d 903 (1958). See also discussion in *Evidence* section, p. 380 *supra.*

2. The relevant portions of the statute state: "A person . . . [who] is the owner or has charge of horses, mules, [or] cattle . . . shall not permit them to run at large in the public road . . . . The running at large of any such animal in or upon any of the places mentioned in this section is prima facie evidence that it is running at large in violation of this section."

3. Ohio Laws 185, § 5 at 186 (1865).

4. The court also suggested that to apply the doctrine would be basing an inference on an inference, which is not permissible. However, see discussion in *Evidence* section, p. 380 *supra.*

5. 160 N.E.2d 150 (Ohio Ct. App. 1959).

6. First announced in Davis v. Mann, 10 Mees. & Wels. 545 (Ex. 1842).

7. Patterson v. Gershaw's Super Markets, Inc., 163 N.E.2d 410 (Ohio Ct. App. 1959).

8. *Id.* at 413.

thority which holds that a judge hearing mixed questions of fact and law is afforded sufficient latitude to draw from common experience in deciding questions involving assumption of risk.

Wrongful Death

There were three cases of unusual interest during the Survey period construing Ohio's wrongful death statute.[9] One, *Patrick v. Baldridge,*[10] is of particular interest. The facts in this case were, essentially, that plaintiff's decedent, a game warden, lost his life while taking a game violator into custody. Plaintiff alleged at trial that while making the arrest, the defendant, upon whose farm the incident occurred, sought to hinder the process of justice and demanded at gunpoint the release of the violator. Defendant admitted the plaintiff's capacity to sue but denied "that he intentionally, willfully and purposefully shot . . . [deceased] and [stated] that Irvin J. Patrick was injured as a result of his own aggression in attempting to wrest defendant's shotgun from him while it was lawfully in defendant's possession."[11] Evidence of the conduct of both the plaintiff's husband and the defendant was offered at trial, with the jury finding for the plaintiff on all material matters.

The appellate court found that no error had been committed in failing to grant a remittitur on the verdict, which amounted to $80,000. The reviewing court noted that the expected earnings of the deceased had been fully established at the trial. In its opinion the court stated:

> The amount of the verdict is not beyond a reasonable computation of the sum which the heirs and next of kin of plaintiff's decedent, in probability, would have received from him had he lived his normal span of life. . . . These were jury questions.[12]

Liability of Manufacturer for Defective Product

A second wrongful death action, *Steele v. Westinghouse Electric Corporation,*[13] was brought on behalf of the estate of a deceased farmer who allegedly was electrocuted when his hand came in contact with the lid of a milk cooler. The theory of plaintiff's case was that the cooler was defective and that such defect was a result of the manufacturer's negligence in designing the machine. The plaintiff's evidence indicated that the cooler, which had been purchased by the decedent's landlord, had been installed by the decedent with the help of his son and a neighbor, none of whom were trained electricians.

9. Ohio Rev. Code § 2125.01.

10. 107 Ohio App. 331, 159 N.E.2d 461 (1958).

11. *Id.* at 332, 159 N.E.2d at 462-63.

12. *Id.* at 333, 159 N.E.2d at 463.

13. 107 Ohio App. 379, 159 N.E.2d 469 (1958). See also discussion in *Sales* section, p. 419 *supra.*

During the installation, the neighbor and decedent's son each received slight shocks from touching the cooler; however, the evidence did not indicate that decedent had any knowledge of this fact. At the end of plaintiff's case, the trial court directed a verdict for the defendant-manufacturer, and the plaintiff appealed.

On appeal, the court was confronted with several issues: First, whether the lack of privity of contract between the decedent and the defendant precluded liability in this action. Second, whether the evidence was sufficient to indicate negligence in the manufacture of the cooler. Third, whether the deceased, as a matter of law, had been contributorily negligent in installing the machine. The court summarily dismissed the issue of privity, since the plaintiff's cause of action rested in negligence. The court then concluded that the issues of defendant's negligence and plaintiff's contributory negligence were properly questions for the consideration of the jury. Although the evidence suggested that grounding the cooler probably could have prevented the death, the appellate court refused to hold that as a matter of law the decedent's failure to take this safety precaution relieved the defendant of liability, since such precaution would not have been necessary if the cooler had not been negligently designed.

The scope of the manufacturer's duty in this area of liability for defective products is not always well defined. In the instant case, if the cooler had been professionally installed, it is quite probable that the accident would not have occurred, since, as the court admitted, grounding is a proper method of installation as a matter of safety. This case indicates that manufacturers of products which are as inherently dangerous as electrical appliances will be held to a high standard of care by the courts.[14] This case might well serve as a warning to such manufacturers to give notice to the ultimate purchaser, of dangers lurking behind "do it yourself" installations.

Propriety of Court's Instructions

In *Slade v. Rockwood Oil Terminals, Incorporated,*[15] the court of appeals was faced with the question of the propriety of the trial court's instruction to the jury.

The action was instituted to recover damages for wrongful death. The facts were that plaintiff's decedent, who suffered from epilepsy, had been a passenger in a car which was struck from behind by defendant's truck. Plaintiff's theory of causation was that the death had resulted from "a new and different epilepsy, . . . a traumatic epilepsy, altogether different from that which he suffered before his accident . . . ."[16] A verdict was rendered for the defendant.

14. See White Sewing Mach. Co. v. Feisel, 28 Ohio App. 152, 162 N.E. 633 (1927).
15. 159 N.E.2d 776 (Ohio Ct. App. 1959).
16. *Id.* at 777.

An appeal was made by the plaintiff on the ground that the lower court had erred in mentioning aggravation of pre-existing condition in its charge to the jury. The counsel for both plaintiff and defendant contended in their briefs and in oral argument that the sole issue in the case was whether the decedent had died as a result of a seizure of traumatic epilepsy induced by the accident, and not whether the accident had aggravated his pre-existing epilepsy, thereby causing death. The appellate court admitted that if this were the sole issue, then the court's charge to the jury was erroneous. However, the appellate court, in affirming the decision, decided that such was not the case.

The court in its opinion pointed out that the issue of aggravation of a pre-existing condition had been raised by the testimony of one of the medical expert witnesses, and also by the plaintiff's own recommended charge to the jury, which was given by the court. The court concluded that the error was "self-induced and plaintiff cannot now complain."[17]

Cases Involving Children

The Child Trespasser

The attractive nuisance doctrine has been adopted in many states[18] since it was first pronounced by the United States Supreme Court in *Sioux City & Pacific Railroad v. Stout.*[19] Since 1907, however, it has been well settled that Ohio does not recognize the doctrine.[20]

In *Brown v. Rechel,*[21] a case decided early in 1959, the court of appeals was given an opportunity to reconsider the Ohio position on this doctrine. The plaintiff in this case instituted a wrongful death action against a landowner for the death of his four-year-old child who drowned as a result of falling into a fish pond, three feet deep, which was maintained on the defendant's land. The plaintiff's amended petition averred, in substance, that the defendant was negligent in maintaining a pond which was readily accessible to children in the neighborhood. The complaint also averred that the death was the result of the wilful and wanton conduct of the defendant. The trial court sustained a demurrer to the petition, and plaintiff appealed.

The appellate court gave recognition to the attractive nuisance doctrine as annunciated by the United States Supreme Court, but concluded that the law was too well established in Ohio on the point to be changed by this court:

17. *Id.* at 778.
18. See 38 Am. Jur. *Negligence* §§ 142-57 (1941).
19. 84 U.S. (17 Wall.) 657 (1874).
20. Railroad Co. v. Harvey, 77 Ohio St. 235, 83 N.E. 66 (1907).
21. 108 Ohio App. 347, 161 N.E.2d 638 (1959).

> This Court of Appeals cannot strike a path along a new course. . . . [T]he creation of liability in a case of this nature, marking a point of departure from the law as we know it today, must come from the Legislature or from the Supreme Court. . . .[22]

The Child Tortfeasor

The question of the liability of parents for the torts of their minor children was raised in *Joseph v. Peterson*.[23] The facts of the case were that the eight-year-old son of the defendant-appellees shot and injured a minor four years old with a metal-tipped arrow, necessitating the later removal of the youngster's eye. The court of common pleas directed a verdict for the defendants. The basis of the trial court's decision was that the evidence of the plaintiff did not show that the defendants had been negligent, in that there was no evidence indicating a course of conduct on the part of the defendants' son which would have given them warning that the child might injure someone. The court also held that the parents were not negligent in merely allowing the child to play with the bow and arrow since this was not a dangerous weapon, *as a matter of law*.[24]

On appeal, the decision for the defendants was affirmed. The appellate court reviewed the evidence and then concluded that no showing of negligence had been made. The court stated:

> [I]t was incumbent upon the plaintiff-appellant to show . . . that the parents were negligent in permitting the child to be in possession of the bow and arrow . . . because of a specific, known course of prior conduct in which the son had engaged and which would give them warning that the son would probably injure another. . . .[25]

The strict application of the rule of "parental immunity" in this case seems inequitable. Undoubtedly there is much merit in the rule, in that it serves to safeguard parents from "vicarious liability" which might arise out of the child-parent relationship per se. However, the rule should not be used to shield the parent from liability for his own negligence. With the realization that a parent has a special power of control over the conduct of the child, which he is under a duty to exercise for the protection of others,[26] it seems improvident to hold *as a matter of law* that a reasonably prudent parent would not foresee that a bow and arrow, in the hands of a small child, could cause serious injury to another.

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22. *Id.* at 357, 161 N.E.2d at 646.

23. 160 N.E.2d 420 (Ohio Ct. App. 1959).

24. In so holding, the trial court followed the authority in White v. Page, 105 N.E.2d 652 (Ohio Ct. App. 1950).

25. Joseph v. Peterson, 160 N.E.2d 420, 422 (Ohio Ct. App. 1959).

26. See Harper & Kime, *The Duty to Control the Conduct of Another*, 43 YALE L.J. 886 (1934).