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Torts

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the will, taxpayer was under no obligation to sell the entire block of stock at one time, but could retain the stock or sell it in parts over a period of time to avoid the depression in the market. The court then defined "actual market value" as used in the pertinent inheritance tax statute[22] and stated that it would not include a forced sale of an entire block of stock. In reversing the lower courts and finding against the taxpayer, the court concluded that the blockage rule should be generally disallowed and that the shares in question should be valued in the usual course as of date of death without consideration of the size of the particular block of stock. In its opinion, the court made reference to the blockage principal applied by some federal courts in determining federal estate or gift tax and declined to follow them.

FRED SIEGEL

TORTS

PURVEYORS OF GOODS AND SERVICES

Supermarkets

Three cases reported during the survey period concern the duty of supermarket owners to their patrons for unlawful detention, or injuries received while on the premises. In *Isaiah v. Great Atlantic & Pacific Tea Company*,[1] a case decided under the Ohio "shoplifters statute,"[2] the Summit County Court of Appeals affirmed a trial court ruling that a store owner is liable for false imprisonment where his restraining action was not justified by a showing of probable cause that the customer was shoplifting. Under the statute, detention is authorized only where the person has manifested an intent to steal. In affirming the Ohio rule that the burden of proof of justification is on him who seeks to escape liability for false arrest, the court charged that the defendant must establish by the weight of the evidence, probable cause for his conduct.[3]

A second case involved injuries occasioned by a defect in an adjacent parking area, and the proprietor's continuing duty of inspection to assure the safe condition of the premises for all invitees. *McClain v. Kroger Company*[4] involved the action by a shopper for injuries sustained when she came in contact with a three-inch wooden splinter projecting from a guardrail in defendant's parking area. In reversing a verdict for plaintiff, the reviewing court held that where the evidence showed that the manager had inspected the lot both before and after the accident, the

22. OHIO REV. CODE § 5731.02 (Supp. 1961).

burden was upon the plaintiff to prove that the splinter was in existence at the time of the inspection. The Ohio rule is that the proprietor has a continuing duty of inspection.[5] However, where it is shown that he has exercised reasonable and ordinary care to discharge this duty, the burden is on the plaintiff to prove neglect in: (1) that the nature of the splinter constituted a potential hazard, (2) the hazard was created by the negligent act of the defendant, and (3) defendant had or should have had notice of the hazard in time to warn its customers of its presence.[6] Since plaintiff had failed to prove the splinter's existence at the time of the inspection, the jury should have been precluded from receiving evidence based entirely on inference adduced from another unsupported inference.[7]

The final case in this area, *McCormick v. Pick-N-Pay Supermarkets,*[8] concerns the liability of the supermarket for injuries sustained by customers within the store. Plaintiff sought damages for injuries sustained when a stack of soft drink cartons collapsed, severely injuring her foot. In reversing a directed verdict for defendant, the reviewing court found the defendant's employees might reasonably have foreseen the potential danger to customers from cartons stacked in an unstable condition. Since the question of falling merchandise is one of first impression in Ohio, it will be interesting to see if Ohio will follow the "foreseeability rule" in these situations as indicated by the court in this case, or whether "res ipsa" will be applied.[9]

Remote Purchaser v. Manufacturer

The Ohio position with regard to the basis of liability of a manufacturer to a remote purchaser for the sale of inherently dangerous products was reaffirmed in *Kennedy v. General Beauty Products, Inc.*[10] The court in upholding the *Wood* doctrine[11] stated that where a remote purchaser

1. 174 N.E.2d 128 (Ohio Ct. App. 1959).
2. OHIO REV. CODE § 2935.041.
3. See Reinhard v. City of Columbus, 49 Ohio St. 257, 31 N.E. 35 (1892).
4. 175 N.E.2d 199 (Ohio Ct. App. 1961).
5. 39 OHIO JUR. *Negligence* § 26 (1959).
6. Anaple v. Standard Oil Co., 162 Ohio St. 537, 124 N.E.2d 128 (1955).
7. The jury should not have been allowed to infer the existence of the splinter without any proof of its existence at the time of inspection. Secondly, the inference of lack of due care in inspection cannot be inferred from the fact that the splinter was not found at the time of inspection. 175 N.E.2d 199, 200 (Ohio Ct. App. 1961).
8. 170 N.E.2d 491 (Ohio Ct. App. 1960).
9. See Leone v. Safeway Stores Inc., 133 N.J.L. 478, 44 A.2d 913 (Sup. Ct. 1945); Robinson v. A & P Tea Co., 184 Misc., 571, 54 N.Y.S.2d 42 (Sup. Ct. App. Div. 1945).
10. 112 Ohio App. 505, 167 N.E.2d 116 (1960).
11. Wood v. General Elec. Co., 159 Ohio St. 273, 112 N.E.2d 8 (1953). See also Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 147 N.E.2d 612 (1958).

is injured through the use of an inherently dangerous product, such as a hair dye, his cause of action is limited to one for breach of an express warranty or negligence because of the absence of privity between the parties, rather than for breach of implied warranty.

Paying Guest v. Charitable Organization

Bell v. Salvation Army[12] raised the question of the extension of the *Avellone*[13] doctrine to non-hospital charitable organizations. The Ohio Supreme Court, in reversing a judgment for the defendant on the pleadings, declared that a cause of action is stated against a charitable organization where the injury resulted from an activity conducted by the organization for profit and not directly related to its charitable purpose. Since the petition alleged the injured party had paid value for the defendant's services, the court determined that the plaintiff was not precluded by the charitable immunity doctrine and could recover under the exception to the immunity rule. Earlier in the year a court of appeals held that a tuition paying college student was still a "beneficiary" of a non-profit religious educational institution and therefore was barred from recovery under the charitable immunity rule.[14]

Duty of Repairmen and Landowners— Application of Res Ipsa Loquitur

Repairmen

Two cases in the area of goods and services involve the liabilities of repairmen for damages either to the plaintiff's goods or to his premises which were caused by fire. The first, *Ohio Casualty Insurance Company v. Mariemont Garage, Inc.*,[15] held that the duty of redelivery is not avoided by the defense that the bailor's car was destroyed by fire unless the bailee can further show himself free of negligence in the loss.

The second case, *Schafer v. Wells*,[16] which was decided in the Ohio Supreme Court, involved an unusual application of the *res ipsa* doctrine. In this action the owner-plaintiff sought relief from the defendant-repairman for damages occasioned to his premises by the explosion and fire from an alleged defective stove installed by the defendant. The plaintiff

12. 172 Ohio St. 326, 175 N.E.2d 738 (1961).

13. Avellone v. St. Johns Hosp., 165 Ohio St. 467, 135 N.E.2d 410 (1956). See also Gibbon v. Y.W.C.A., 170 Ohio St. 280, 164 N.E.2d 563 (1960), wherein the *Avellone* doctrine was held not to apply to the Y.W.C.A. See *Recent Decision*, 11 WEST. RES. L. REV. 680 (1960).

14. Mathews v. Wittenberg College, 113 Ohio App. 387, 172 N.E.2d 726 (1960)

15. 175 N.E.2d 749 (Ohio Ct. App. 1961).

16. 171 Ohio St. 506, 172 N.E.2d 708 (1961).

offered evidence which tended to prove that: (1) the burner had been installed by the defendant, (2) he and his brother had ignited it for a test, and (3) no one had entered the furnace room from the time defendants left until the fire was discovered an hour and one-half later. The effect was to establish that the instrumentality was in the custody and control of the defendant, and that in the ordinary course of events this type of accident would not occur. Although the trial court was reversed by the court of appeals on the issue of "exclusive control," the supreme court reinstated the verdict on the reasoning that the use of the word "ordinary" indicated that the control need not be continuous and uninterrupted to the moment of the injury, but only that the plaintiff need show that there was no intervening control by a third person or himself.

Landowners

Another application of the res ipsa rule was found in *Joyce v. Union Carbide and Carbon Corporation.*[17] Here plaintiff, an employee of an independent contractor, was severely burned when molten ashes erupted through an open fly ash door from a boiler located within defendant's plant. In reversing a directed verdict for the defendant, the Cuyahoga County Court of Appeals held that Joyce was an invitee and that since defendant retained control over the premises, he owed plaintiff a duty to warn of any hazardous condition which was not obvious. In arriving at its holding, the court distinguished previous Ohio cases which have denied liability for injuries received while engaged in hazardous work.[18]

LEGO-MEDICAL

A previous survey article expressed concern over the growing number of medical malpractice cases arising in this jurisdiction.[19] If society is to achieve a superior level of medical care, it must afford the medical practitioner a broader degree of immunity in practicing his art. There are, however, instances which raise the question of whether the medical profession is living up to its responsibilities.

One such case is *Koubeck v. Fairview Park Hospital.*[20] Plaintiff in this action was treated in defendant's emergency room for injuries to his knee sustained in a fall into an evergreen tree. Treatment was rendered by a foreign resident employed by the defendant-hospital and who at the

17. 173 N.E.2d 692 (Ohio Ct. App. 1961).
18. *Id.* at 697.
19. Smith, *Survey of Ohio Law — Torts,* 12 WEST. RES. L. REV. 564 (1961).
20. 172 N.E.2d 491 (Ohio C.P. 1961).

time of his entry in the United States some three years before "knew no words of English." Plaintiff complained of pain in the knee and told of removing a branch from it after the fall. The defendant-physician took X-rays and probed the wound, but finding nothing, he sutured it and released the patient. Subsequent swellings and inflammation of the joint necessitated removal of a splinter and surgery which resulted in fusing the joint.

Testimony offered during the trial affirmed that the splinter should not have been overlooked if the probe of the knee had been conducted with ordinary care. This splinter was not produced at the trial because it had been destroyed by one of the physicians before the trial began. The court of appeals in sustaining a jury verdict for the plaintiff held that the hospital, a non-profit corporation, could be liable for the negligence of one of its resident doctors.[21] The obvious question still unanswered is the liability of a hospital for the negligent acts of medical personnel where the hospital has no authority or control over their professional conduct.[22]

A second lego-medical question, whether a hospital may be compelled to provide a former patient with access to all records of her confinement, was the gist of the action in *Wallace v. University Hospitals of Cleveland.*[23] A final answer by the supreme court was rendered impossible when the defendant, in compliance with an order of the common pleas court, provided the plaintiff with a photostatic copy of the desired records. The supreme court, obviously concerned with this procedure, dismissed the case as moot, although acknowledging that other jurisdictions have retained such cases on the ground that the case presents a question of great public interest. The general rule is that a hospital must permit a former patient to see his hospital records only if the hospital deems the inspection to be of benefit to the patient.[24] Therefore, the question of who decides which records are of benefit to the patient must remain unanswered in a case such as this where the hospital in fact permitted the patient to see the records.

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21. This is not the first time that the liability of a non-profit hospital for the negligent acts of its resident employees has been raised. Nor is it the first reported case of unnoticed objects in puncture wounds. See Rush v. Akron Gen. Hosp., 171 N.E.2d 378 (Ohio Ct. App. 1957).

22. The most serious facet of a case of this kind is the apparent compromise of medical competence under the "exchange visitor program." Although this program has afforded many foreign national residents the opportunity to study our more advanced methods of treatment, it would seem that the interests of the public require that hospitals assure emergency as well as all other patients that they may rely on the skill and training of those whom the hospital selects to minister to their needs. In addition, before the medical profession is given the authority to pass on its own cases of alleged malpractice it would seem that there must be some binding assurance that all evidence will be preserved for future deliberations.

23. 171 Ohio St. 487, 172 N.E.2d 459 (1961).

24. *Id.* at 488, 172 N.E.2d 459 (1961).

TRADITIONAL TORT AREAS

Causal Relationship

The famous "bug bite" case, *Gallick v. Baltimore & Ohio Railroad Company*,[25] which produced one of the largest verdicts in the history of Cuyahoga County, was reversed on appeal because the claim of causation was too tenuous upon which to base the defendant's liability. The action arose under the FELA[26] from an insect bite which the plaintiff received while employed as a foreman in the defendant's Cleveland yard. Plaintiff's contention was that the insect probably came from a vermin-infested pool adjacent to the portion of the tracks where he and his crew were assigned to work. In reversing the lower court's verdict, the appellate court noted that there was no direct evidence offered which would tend to prove that the existence of the unidentified bug had any connection with the infected pool, only a series of guesses and speculation.

In another case involving the question of causal relationship, *Barnett v. Sun Oil Company*,[27] the Hamilton County Court of Appeals reaffirmed Ohio's position with respect to the "physical impact" doctrine. Here recovery was denied the representative of a woman who died of hypertension while trying to escape a conflagration in front of her home caused by the upsetting of defendant's loaded tanker truck. The court in following *Miller v. Baltimore & South Western Railway Company*[28] held that in an action involving ordinary negligence there is no liability for fright or its consequences where it is unaccompanied by physical injury.[29]

In the final case[30] in this area during the past year the supreme court in an able opinion by Justice Taft dismissed, due to remoteness of causation, the claim of an engineer that the presence of a defective brake beam, in violation of the Federal Safety Appliance Act,[31] was the proximate cause of an injury sustained when he alighted from his engine some forty-five minutes after it had been halted for repairs. In his opinion, Judge Taft again raised objection to the application of the federal "split-scintilla" rule in cases where it is obvious the claimant elected to bring his action in the state court to avail himself of procedural advantages.

25. 173 N.E.2d 382 (Ohio Ct. App.), *appeal dismissed*, 172 Ohio St. 488, 178 N.E.2d 597 (1961), *cert. granted*, 30 U.S.L. WEEK, 3323 (U.S. April 17, 1962) (No. 765).

26. 53 Stat. 1404 (1939), 45 U.S.C. §§ 51-60 (1959).

27. 113 Ohio App. 449, 172 N.E.2d 734 (1961).

28. 78 Ohio St. 309, 85 N.E. 499 (1908).

29. Query, what if the plaintiff in the instant case had claimed physical injury from the inhalation of smoke? See Battalla v. State, 21 N.Y.S.2d 34, 176 N.E.2d 929 (1961), wherein the New York Court of Appeals reversed that state's position held since 1896. See also Morton v. Stack, 122 Ohio St. 115, 170 N.E. 869 (1930), where the court held that coughing was sufficient to satisfy the requirement of physical injury.

30. Reed v. Pennsylvania Ry., 171 Ohio St. 433, 171 N.E.2d 718 (1961).

31. 36 Stat. 298 (1910), 45 U.S.C. §§ 1-43 (1959).

Discovered Peril

In *Freeman v. New York Central Railroad Company*,[32] the court was faced with an attempted application of the doctrine of "discovered peril." The plaintiff, a trespasser on defendant's railroad yard, who by his own admission was in such an intoxicated condition that "he was unable to exercise his facilities of reasoning and judgment," was struck by defendant's train. Plaintiff claimed that defendant had knowledge that the plaintiff was on its tracks and in a condition which prevented him from removing himself. Following a jury verdict for plaintiff, the court entered a judgment notwithstanding the verdict which was affirmed on the ground that the plaintiff had not exercised ordinary care for his own safety up to and including the time of the accident.

Contributory Negligence v. Assumption of Risk

An analysis of the cases touching the issue of contributory negligence produces some thoughtful consideration on the use of the doctrine. It will serve the pleader well to remember the distinction between contributory negligence and assumption of risk. The two are not synonymous; contributory negligence is based on carelessness, assumption of risk reflects venturousness.[33] Thus where there is due care on the part of the plaintiff the court may not rule as a matter of law that he is guilty of contributory negligence.[34] Since contributory negligence is an affirmative defense and a complete bar to recovery, it is reversable error to charge the jury on it if it has not been pleaded or proven.[35]

The use of assumption of risk as an affirmative defense is illustrated by two cases reported in 1961. In *Holm v. American Shipbuilding Company*[36] plaintiff was denied recovery where it was shown he had knowledge of the slippery condition of the gangplank prior either to his walking on it or falling from it. In *Bates v. Cleveland Electric Illuminating Company*[37] the plaintiffs had knowledge of the dangerous nature of the work and were precluded from claiming otherwise in their attempted recovery under the "frequenter" statutes.[38]

These cases illustrate only a small portion of the problem. Society seeks to encourage a high standard of care, on the one hand, while allowing compensation for the injured party and his family on the other. Cer-

32. 112 Ohio App. 395, 174 N.E.2d 750 (1960).
33. PROSSER, TORTS 304-05 (2d ed. 1955).
34. Truer v. New York Central Ry., 112 Ohio App. 418, 176 N.E.2d 276 (1960).
35. Grande v. Erie Ry., 172 N.E.2d 161 (Ohio Ct. App. 1959).
36. 276 F.2d 201 (6th Cir. 1960).
37. 171 N.E.2d 548 (Ohio Ct. App. 1961).
38. OHIO REV. CODE §§ 4101.01, 4101.11-.12.

tainly, in other areas of tort law courts have recognized that more than the rights of the actual parties are involved in any legal proceeding.[39]

Joint Enterprise

A joint enterprise has been defined by the supreme court as "the joint prosecution of a common purpose under such circumstances that each member of such enterprise has the authority to act for all in respect to the control of the agencies employed to execute such common purpose."[40] In *Vonderheide v. Comerford*[41] the question was presented as to whether three employees of the city who were working together were engaged in a joint enterprise so that a mutual agency was established. Citing Judge Taft's opinion in *Parton v. Weilnau*,[42] the court felt it unreasonable to impose liability upon a co-worker for the negligence of a fellow worker where there is no choice as to co-employees and they are engaged in a duty owed to a common employer.

INJURIES SUSTAINED WHILE RIDING IN MOTOR VEHICLES

Assured Clear Distance

In *Woods v. Brown's Bakery*,[43] the supreme court had before it the Ohio assured-clear-distance statute.[44] The case arose over the collision of two vehicles at a fog-blanketed intersection. Although "under ordinary circumstances" the rule has no application to intersection cases, the court ruled it does where the visibility of the drivers is obscured by fog. The effect of this decision was to bar plaintiff's recovery because he had approached the intersection at a speed which did not permit him to stop within the assured clear distance when the defendant's truck suddenly loomed in front of him. The application of the rule seems to favor a driver who has proceeded through a stop sign, but, as the courts have pointed out, this is a harsh and arbitrary rule which must be enforced until the legislature amends or repeals the statute.

In *Gordon v. Columbus & Southern Ohio Electric Company*[45] a driver sought to avoid the harshness of the assured clear distance rule by pleading that he was blinded by the back-up lights of the truck which he struck

39. In Videtto v. Marsh, 112 Ohio App. 151, 175 N.E.2d 764 (1960), the court held that a father was not barred in an action to recover medical expenses for his son's injuries by the fact that the defendant had been judicially determined non-negligent in the prior tort action by the son. See discussion in *Recent Decision*, p. 600 *infra*.

40. Bloom v. Leech, 120 Ohio St. 239, 166 N.E. 137 (1929).

41. 113 Ohio App. 284, 177 N.E.2d 793 (1961).

42. 112 Ohio App. 480, 176 N.E.2d 299 (1960).

43. 171 Ohio St. 383, 171 N.E.2d 496 (1960).

44. OHIO REV. CODE § 4511.21.

45. 112 Ohio App. 218, 173 N.E.2d 720 (1960).

from the rear. The court was unsympathetic. It would seem that the only way to avoid the operation of the rule in a factual situation calling for its application is for the court to forget to charge the jury on the rule. In such a case the error is one of omission, not commission, and therefore not usually grounds for reversal.[46]

Vehicle Ownership and Control

Two reported cases point up the lengths courts will go to avoid attaching liability to the owners of automobiles who are not themselves personally involved in the accident. The first of these, *Florita v. Back*,[47] involved the use of the owner's truck and trailer under conditions which the plaintiff claimed satisfied the requirements of the statute imposing liability on owners of motor vehicles which they are not actually driving.[48] The court dismissed the action as to the owner on the ground that it was not shown he had knowingly permitted the trucks to be used by his brother. The second case, *Tonti v. Paglia*,[49] held that the mere allegation of negligent entrustment of a vehicle by a mother to her minor son does not state a cause of action against such parent-owner for subsequent injuries to a passenger occasioned by the minor's use of the vehicle. Since the passenger was within the guest statute, the owner's duty was only to be free of willful or wanton conduct causing injury to the passenger.

Guest Statute

The Ohio Guest Statute,[50] described by some as the most anti-social piece of legislation currently on the statute books, is usually the basis for several "hard" decisions each year. The only parties who did not feel its effect are those who proved they were paying passengers.

In two cases reported during the survey period, plaintiffs have been able to recover despite the fact they were injured while riding in automobiles driven by members of their own family. In *Henline v. Wilson*[51] the court ruled that the mere status of family relationship of the occupants does not raise a presumption either for or against the proposition that the relative-passenger is a guest. In *Campbell v. Marquis*[52] the Jack-

46. Hipp v. Williams, 113 Ohio App. 473 (1961).

47. 112 Ohio App. 480, 176 N.E.2d 299 (1960).

48. Ohio Revised Code section 4513.02 states in part: "No person shall drive or move, or cause or knowingly permit to be driven or moved, on any highway any vehicle or combination of vehicles which is in such unsafe condition as to endanger any person . . . ."

49. 171 Ohio St. 520, 172 N.E.2d 914 (1961).

50. OHIO REV. CODE § 4515.02.

51. 111 Ohio App. 515, 174 N.E.2d 122 (1960).

52. 112 Ohio App. 50, 175 N.E.2d 106 (1960).