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TWO RECENT CASES decided by the Supreme Court in 1963 and 1964 are of considerable interest in relation to decisions involving wilful and wanton tort in Ohio since 1899. In the first of these two cases, *Botto et al., Appellants, v. Fischesser, a Minor, et al., Appellees,*[1] decided in 1963, the Supreme Court overruled directed verdicts for the defendants in the trial court which had been sustained in the appellate court, and remanded the cases for jury trial with the comment that "the Guest Statute, being in derogation of common law, should not be extended beyond its reasonable limits. A court should exercise restraint in substituting its judgment for that of a jury and removing the case from the jury by directed verdict."

This language seems to show a variance from the tone of the court in past years, when directed verdicts in wilful and wanton court cases have sometimes seemed to be the rule, rather than the exception, as will be illustrated by a review of applicable cases.

In the *Botto* case, plaintiffs alleged wilfulness and wantonness on the part of Fischesser, a minor, in circumstances which the court described as follows: "A 15 year old boy without a driver's license, unauthorizedly appropriated his father's automobile and took two minor companions for a ride; that he spun the rear wheels of the car in gravel when starting, that he entered two stop streets, known by him to be such, without stopping, making two right-hand turns at a higher than safe speed in the circumstances, causing the rear end of the car to swerve considerably, over the protests of his companions, that he exhibited an attitude of bravado; and that he finally smashed into a tree at a speed of approximately 40 miles per hour near the second right hand turn, thereby causing extensive damage to the front of the automobile and injuring all three occupants."

The trial court directed the jury to return a verdict for the defendant on the ground that no "wanton or wilful misconduct" had been shown, and the Court of Appeals affirmed this decision

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[1] 174 Ohio St. 322 (1963).

with one judge dissenting. It is to be noted that both lower courts bound together the concepts of wilful and wanton tort, as has previously been done more often than not, in Ohio courts. The Supreme Court, however, in the *Botto* case, based its syllabus 2 on wanton misconduct alone, in the following language: "Wanton misconduct under the Guest Statute (Section 4515.02, Revised Code) by the operator of a motor vehicle, may consist of deliberately perverse behavior, with such reckless and inexcusable conduct in driving the vehicle as to endanger the safety of the occupants therein."

The Court in its Syllabus 3 then stated: "A directed verdict for the defendant at the close of plaintiff's case in chief in an action to recover damages for personal injuries is improper and a jury question is presented on the issue of wanton misconduct, where plaintiff's evidence, construed most favorably to him, shows . . ." the court then citing the set of facts earlier set forth herein.

It is this latter unwillingness to sustain a directed verdict, and the language involved in the opinion, which seems to impose a duty on the lower courts to construe pleaded facts more favorably to plaintiffs than has been the case in Ohio in recent years.

The decision in the *Botto* case is of especial interest because in reaching its verdict the court cited the case of *Tighe, a Minor, Appellee, v. Diamond, et al., Appellants,*[2] a 1948 case, and another case in which the protection of the Guest Statute[3] was denied. In the *Tighe* case, also, the Minor Operators' Liability Statute[4] was involved.

The *Tighe* case cited the Ohio Guest Statute at length in its Syllabus 1, to show that either wilful or wanton misconduct must be shown in all guest cases, and then went on, at Syllabus 2 to establish that negligence, as called for in the "Minor Operators' Liability Statute" could not be a factor, because of the pre-existing and superseding requirements of the Guest Statute. The court then went on to state that "wilful misconduct" alone must be the basis for recovery in "Minor Operators' " cases, and that such misconduct must be established as a proximate cause.

It is therefore to be assumed, apparently, that in reaching its decision in the *Botto* case, the language of "wantonness" was

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[2] 149 Ohio St. 520 (1948).

[3] Rev. Code Ohio Sec. 4515.02.

[4] Rev. Code Ohio Sec. 4507.07.

used to bring the action within the Guest Statute but not the Minor Operators' Statute.

The concept of "constructive knowledge" of surrounding facts on the part of the defendant, instead of an unequivocal pleading of actual knowledge of existing conditions as a requirement on the part of the plaintiff, was also first elucidated in the *Tighe* case, where the court expanded on the definition in its Syllabus 4 to include the words "under circumstances tending to disclose that the motorist knows or should know that injury to his guest will . . . result"; and at its Syllabus 5 the court said that the question of whether the host "drove . . . with knowledge, actual or implied that injury . . . would result . . . is . . . for the jury." The facts in this case were that the defendant drove his automobile over a railroad grade crossing which was four or five feet higher than the road grade, at a speed of sixty miles per hour, after telling his passengers beforehand that he was going to "give them a thrill." He admitted that he had driven over the crossing on about three previous occasions.

In the *Tighe* case, also, the problem of the Minor Operators' Liability Statute made it necessary for the court to draw a sharp distinction between "wilfulness" and "wantonness." These had been merging into a more or less indistinguishable state, with many interlocking decisions and many decisions combining the two words, almost as one, previous to this case.

The Minor Operators' Statute, passed in 1943, provided that the person signing the application for a driver's permit for a minor under eighteen years of age, should be held liable for any damages caused by the "negligence or wilful misconduct" of such minor operator. It may be noted that there was a certain lack of logic in omitting the word "wanton" if the aspect of both intentional and inadvertent misconduct was to be embodied in the law. The court, however, was under the necessity of dealing with the law as it was drawn, and of seeking to separate the terms by definition insofar as the wording of the *Tighe* case made this necessary.

The court then defined wilful misconduct at Syllabus 3 and Syllabus 4 of the *Tighe* case to include the factors of "intent or purpose to do wrong," "intentional deviation from clear duty, with intent to injure," or "with full knowledge of existing conditions the intentional execution of a wrongful course of conduct, which he knows should not be carried out," or "the intentional

failure to do something which he knows should be done in connection with his operation of the automobile under the circumstances, tending to disclose that the motorist knows or should know that an injury to his guest will be the probable result of such conduct."

This latter language is of especial interest when one considers its applicability to the facts of the *Botto* case, where both wantonness and wilfulness were cited and considered by the trial and appellate courts, but where the Supreme Court in its syllabi mentioned only wantonness. It is apparent that in the *Tighe* case in this wording the court has included most of the factors which had previously constituted "wilful and wanton misconduct" into a definition of "wilful misconduct." In doing so, the court carefully stated in both Syllabus 3 and Syllabus 4 that the definitions apply to the "Guest Statute" and to the "Minor Operators' Liability Statute," however, most courts have since applied them indiscriminately to cases where the word "wilful" is used, whether or not the facts of the case brought it under either of these two statutes.

In the *Botto* case, interestingly enough, the court includes much of the concept of constructive scienter previously embodied into the definitions of "wilful misconduct" into its definition of "wanton misconduct."

The element of failure after knowledge of danger to use ordinary care to avoid injury, which was first stated in the case of *Payne, Director General of Railroads, v. Vance,*[5] decided in 1921, was also cited by the court in *Kellerman, Admx., Appellant, v. the J. S. Durig Co., Appellee,*[6] a 1964 case. The *Payne* case has been followed many times. The concept of duty to use ordinary care after knowledge of danger is not included in the definition of wilfulness in the *Tighe* case. However, since the *Payne* case was a non-Guest-Statute case, and contained allegations of wantonness as well as of wilfulness, it cannot be assumed, apparently, that "failure after such knowledge (of danger to the safety of others) to use ordinary care to avoid injury" has been eliminated from the requirements for a showing of "wanton or wilful misconduct" except as to cases under the "Guest Statute" and the "Minor Operators' Liability Statute," where the *Tighe* case

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[5] 103 Ohio St. 59 (1921).

[6] 176 Ohio St. 320 (1964).

would govern, augmented by the *Botto* case decision, based on wantonness alone.

The two words "wilful" and "wanton" are used in conjunction with each other in so many cases in Ohio, that while they are not congruent on all points, they have been very closely interrelated and interlocked by decisions and fact findings.

This merging began in the case of *Schweinfurth, Admr. v. G. C. C. & St. Louis Railway Co.*,[7] decided in 1899 and still ruling case law in Ohio, where the court held that both charges (of wilfulness and wantonness) could be combined in a single cause of action. Considering the term "wantonness" separately for purposes of clarity in tracing case decisions, however, we find that there are seven rather distinct factors which must be found to exist before legal "wantonness" can be established. Two of these are stated, by necessity, in the negative. They are as follows, in the order of their establishment as ruling case law: a knowledge of plaintiff's danger, with conscious indifference to the consequences; ill will not being a necessary factor; simple violation of a statute not being sufficient; entire want of care a requisite; disposition to perversity must be established; the tortfeasor must be conscious and aware that his conduct will in all common probability result in harm to another; and he must have had a conscious and timely knowledge of the approach to danger. These constitute a very interesting yardstick when applied to the *Botto* case, especially the "simple violation of a statute" provision, which has been invoked so many times, and in aggravated circumstances in a number of cases.

The factor of intoxication, not at issue in the *Botto* case, in the general run of Ohio cases in both wilful and wanton misconduct, has been given little weight.

In the case of *Payne, Director General of Railroads v. Vance,* previously mentioned, a grade crossing matter was concerned. The plaintiff sought to escape the consequences of his own contributory negligence in venturing onto a railroad crossing while a train was approaching, by alleging a number of counts of "wilful and wanton misconduct" on the part of the railroad in its mode of maintaining the crossing and operating its trains across it. This case was decided for the most part with regard to the allegations of "wilfulness," but some discussion of "wanton misconduct" appears in the opinion, and the court included at its

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[7] 60 Ohio St. 215 (1899).

eighth syllabus the following statement: "An instruction to the jury which attempts to define wilful acts or wantonness, which does not include the element of defendant's knowledge of plaintiff's danger, or such conscious indifference to consequences as would be the equivalent of wilful and intentional injury, is erroneous."

This doctrine was modified with regard to "wilful" misconduct in the *Tighe* case, where the words "knows or should know," are used, but Syllabus 4, embodying this wording, is applied only to "wilful misconduct . . . under the 'guest statute' and the 'minor operator's liability statute'," so that the more positive requirement of the wording in the *Payne* case must be regarded, at this juncture, as prevailing when wantonness is at issue.

The fact that ill will on the part of the tortfeasor is not a necessary factor in cases involving wantonness was stated in *Higbee Company v. Jackson*,[8] and was expanded as follows in the third syllabus of that case: "To constitute wanton negligence, it is not necessary that there should be ill-will toward the person injured, but an entire absence of care for the safety of others which exhibits indifference to consequences, establishes legal wantonness."

This concept was reiterated in Syllabus 8 of the *Payne* case, and in *Reserve Trucking Company v. Fairchild*.[9] This latter case, incidentally, is cited as to its syllabi 2 and 4 in the *Kellerman* case, and has been followed many times in Ohio.

The statement that "the simple violation of a statute is not sufficient" for a showing of legal wantonness is likewise first found in the *Higbee* case at Syllabus 4. It is there stated that "The question whether there was such (wilful and wanton) negligence, and if so whether it was the proximate cause of injury in a particular case is one of fact to be determined by the jury." This was a 1920 case, but in subsequent years, prior to the *Botto* case, the court had been ruling such cases as not for the jury in a wide variety of instances.

However, the statement that "the simple violation of a statute" does not constitute wantonness appears in either the syllabi or the opinion of most cases where wantonness coupled with the violation of a statute appears. Among these is the case of *Mc-*

[8] 101 Ohio St. 75 (1920).

[9] 128 Ohio St. 519 (1934).

Coy, Admr. v. Faulkenberg[10] at syllabus 2. The fact that violation of specific types of statutes does not constitute wantonness is cited in a wide variety of instances. The statement that "excessive speed in itself is not sufficient" to constitute legal wantonness appears at syllabus 1 in the case of *Morrow v. Hume, Admx.*,[11] a 1936 case which has been followed many times. In this case the driver was "going 75 or 80 miles per hour," so that if we accept this as a "simple violation" of a statute, we must probably assume that the extent or degree of violation of one statute, in the view of the court which decided the *Morrow* case, did not preclude such violation from being "simple." The decision in the *Botto* case, which concerned a speed of about 40 miles per hour, is an interesting contrast to the *Morrow* case.

A violation of the "assured clear distance" rule has been held not to constitute legal wantonness in several appellate cases: that of *Fischer v. Faflik*,[12] where the driver drove through fog and struck a truck in the rear; *Schulz, Appellee v. Fible, Appellant*,[13] where the driver disregarded remonstrances and drove through dense vapor, striking the car ahead of him, both of which cases have since been followed several times. This view was also taken in the case of *Johnson, Appellee v. Gernon, Jr., Appellant*,[14] where the driver continued driving after his glasses had been brushed off his nose, although he could not see without them. All three of the above were "Guest Statute" cases, resulting in directed verdicts for defendants.

On the other hand, in the case of *Jenkins, Appellee v. Sharp, Appellant*,[15] also a guest case, and cited in the *Kellerman* and *Botto* cases, the question of whether a defendant's driving through a "stop" light constituted legal wantonness was held to be one of fact for the jury.

The requirement of a showing of "entire absence of care" before legal wantonness can be found, is first stated in the case of *Higbee v. Jackson*, previously cited, at Syllabus 3, which states ". . . an entire absence of care for the safety of others,

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[10] 53 Ohio App. 98 (1935).

[11] 131 Ohio St. 319 (1936).

[12] 52 Ohio App. 69 (1936).

[13] 71 Ohio App. 353 (1943).

[14] 91 Ohio App. 529 (1947).

[15] 140 Ohio St. 80 (1942).

which exhibits indifference to consequences, establishes legal wantonness."

This syllabus, quoted in *Reserve Trucking Company v. Fairchild,* previously cited, involves a change of wording, as follows: "The term 'wanton negligence' implies the failure to exercise any care for those to whom a duty of care is owing, when the wrongdoer has knowledge of the great probability of harm to such persons which the exercise of care might avert, and exhibits a reckless disregard of consequences."

In syllabus 6 of the same case, the court stated: "It is error to charge a jury that 'in order to establish wantonness, it is not necessary to show an entire want of care'." In other words, any vestige of care must have been shown to be lacking. It is interesting to note that the 1964 *Kellerman* case reverts to the wording "failure to exercise any care."

The concept has also been cited many times in both opinions and syllabi, one such instance being an appellate decision, that of *Cousins v. Booksbaum,*[16] for example, which states as its first syllabus: "Wanton misconduct within the purview of Section 6308-6 G. C. (the then Guest Statute citation) is proven only when the jury concludes by a preponderance of the evidence that the defendant failed to exercise any care," and in *Rupright v. Burns,*[17] an appellate case decided in 1947, which held in its syllabus 2 that "wanton negligence implies a failure to exercise any care." In a preponderance of these cases, verdicts were directed for defendants.

The *Higbee* case and the *Reserve* case, while they have been cited on the above concept in many "Guest Statute" cases, were not themselves "guest" cases.

Therefore, the doctrine of "failure to exercise any care" arose in non-"guest-statute" cases, but is often applied to "guest statute cases," as in *Rupright v. Burns* and *Cousins v. Booksbaum,* previously cited. This results in a somewhat forced application of the words "lack of any care." It may be remarked that it is impossible to drive a motor vehicle without "any" care, unless one were to start it off, take his hands off the wheel, and let it go where it would. Thus the indiscriminate citing of "Guest Statute" syllabi in non-"guest-statute" cases, and vice versa, brings about some rather odd constructions of the law.

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[16] 51 Ohio App. 150 (1935).

[17] 82 N. E. 2nd 330 (Ohio App. 1947).

The most recent case in the field of wanton misconduct, that of *Kellerman v. the J. S. Durig Co.*, previously cited, is a 1964 case, and does not involve the Guest Statute nor the Minor Operators' Liability Statute. In the *Kellerman* case, the plaintiff's decedent drove his car into the rear end of defendant's unlighted truck, the end of which was in his path on a two-lane highway. The trial court directed a verdict for the defendant under the ruling in *Universal Concrete Pipe Company v. Bassett,*[18] a 1936 case which has become ruling case law in cases involving violations of the assured clear distance statute. The court cited, also, the case of *Smiley v. Arrow Spring Bed Co.*[19] on assured clear distance, together with several similar cases, and allowed no recovery. The appellate court affirmed this judgment without written opinion. The Supreme Court overruled the trial and appellate courts, citing *Durham v. the Warner Elevator Manufacturing Company,*[20] with the statement that the "Court must construe evidence most strongly in favor of a party against whom the motion (in effect a demurrer to the cause of action in this case) is made, and where there is substantial competent evidence to support his side of the case on which reasonable minds may reach different conclusions, the motion must not be denied."

In its syllabus 2 of the *Kellerman* case, the Court stated: "Wanton misconduct charged against a defendant implies a disposition to perversity and a failure to exercise any care toward those to whom a duty of care was owing when the probability that harm would result from such failure was great and such probability was actually known, or in the circumstances ought to have been known, to the defendant."

The court distinguished the *Kellerman* case from the *Universal Concrete Pipe* case, since in that case the defendant's employee "left his truck unattended but properly parked for only a few minutes," while in the *Kellerman* case "the truck extended five feet or more into the road and the driver passively allowed it to so remain for an hour or longer, unlighted, after darkness had set in, and with no warning signals whatsoever, when he knew or should have known that such a situation created an extreme danger and hazard for the drivers of motor vehicles using the road." The court remarked that "In the opinion of the

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[18] 130 Ohio St. 567 (1936).

[19] 138 Ohio St. 81 (1941).

[20] 166 Ohio St. 31 (1956).

majority of this Court such conduct is found to have occurred as would amount to a 'disposition to perversity' and a complete lack of care toward those to whom a duty of care existed, and would warrant the finding that the employee (truckdriver) was chargeable with wanton misconduct and that the evidence was such as to require submission of the case to the jury on the issue of wanton misconduct . . ." in the circumstances.

In this late court's view of the attitude of mind constituting a "disposition to perversity" one can detect a more stringent view than that which has obtained in courts in the past, which have not been disposed to find a "disposition to perversity" under far more aggravated sets of facts.

In the *Kellerman* case the court also cited Section 4511.21 of the Revised Code as to "assured clear distance," and distinguished the *Universal Concrete Pipe* case in this regard in the following words: "The combined derelictions charged to the defendant, if determined to be true with attaching liability, show a reckless and inexcusable disregard of the rights and protection of others and tend to differentiate this case from other cases where the assured clear distance ahead statute was applied to defeat the plaintiff."

The court then went on to state in its syllabus 3: "where wanton negligence on the part of a defendant existed, negligence on the part of the plaintiff is not available as a defense."

It will be noted that the court in the *Kellerman* case, however, still clings to the "disposition to perversity" doctrine, construing it favorably to the plaintiff, however, whereas previously it has more often been found as a stumbling block to plaintiffs, and has resulted in failures of proof.

The "disposition to perversity" doctrine, while it has been a prime consideration for showings of wantonness since the *Universal Concrete Pipe* decision, has been criticized by students of law,[21] and while it has been annotated and quoted by the digest services as showing of Ohio law, no other state has adopted it.

The *Universal Concrete Pipe* case, also, is a non-"guest statute" case which is consistently cited in "Guest Statute" actions. In the *Universal Concrete Pipe* case the truck driver, as the Court in the *Kellerman* case observed, had stopped his truck beside the road at night to go into a house and inquire directions. Another driver came along and drove into the truck from the

[21] 10 Cinc. L. Rev. 485 (1936).

rear. The charge of wantonness was directed, not against the driver who struck the parked truck, but against the truck driver for so parking his vehicle.

It is obvious from these facts, that while the parking may have been negligent, it could hardly have been held "wanton" under the definitions existing in Ohio at that time or since. The characterization of the facts as "wantonness" by the plaintiff was an effort, as the court observed, to hurdle his own violation of the "assured clear distance" statute. The court held that the truck driver was not required under the law to anticipate that the plaintiff, or one in like position, would not keep his car under control, and would violate this statute, and that only if he was required to so anticipate, then he was guilty of wanton misconduct.[22] This is good law, and it is to be regretted that the court then saw fit to write its second syllabus, stating that "wanton misconduct is such conduct as manifests a disposition to perversity, and it must be under such surrounding circumstances and existing conditions that his conduct will in all common probability result in injury." The court elucidated its view on "perversity" with the words "wantonness is a synonym for what is popularly known as 'cussedness' and cussedness is a disposition to perversity." [23]

In the *Kellerman* case, the court distinguished the *Universal Concrete Pipe* case, as quoted above, and found that the parking truck driver, in parking his truck so that it extended into the lane of travel, was guilty of wantonness, in that he should have anticipated that the surrounding circumstances would in all likelihood result in injury to other drivers to whom a duty of care was owing.

This the court interpreted as a "disposition to perversity," but a review of earlier Ohio cases will show that this is quite a departure from earlier decisions.

In the case of *Masters v. New York Central Railroad,*[24] decided in 1947, the Supreme Court ruled that no "disposition to perversity" was shown on the part of a defendant railroad in starting a train before an off-duty trainman could get on, so that he attempted to board the moving train and was injured. This was not, of course, a guest statute case.

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[22] 130 Ohio St. 567 (1936).

[23] *Ibid.*, at 573.

[24] 147 Ohio St. 293 (1947).

The doctrine of "disposition to perversity" has been freely and indiscriminately applied to guest statute cases by the Supreme Court, as in *Jenkins v. Sharp,* previously cited, and in *Hellern, Admx., v. Dixon*[25] where three judges found defendant's conduct not to show a "disposition to perversity" and two judges worded a strong statement of dissent, all citing the authority of the *Universal Concrete Pipe* case and the *Masters v. New York Central* definition. In the *Helleren* case the element of intoxication entered into the facts of a case involving highly reckless driving, which was decided in the Supreme Court in 1949. The court remarked in its statement of facts that while the driver had one bottle of beer on the way, and three glasses of beer on the return trip, "no claim was made in the petition or at the trial that the defendant was intoxicated."[26] The court then made no further reference to intoxication. This situation is interesting since the facts then showed that the driver drove, by his own statement, "as fast as the car would go," in heavy rain, with the windshield wiper not working, onto the berm of the road for a distance of 150 feet, while sinking into the mud of the berm, whereupon he struck a culvert with great impact, killing plaintiff's decedent. The court held that "there was no substantial evidence tending to prove the death of the decedent was caused by the wilful or wanton misconduct of the defendant"[27] and that the trial court should have directed the verdict for the defendant. This was a guest statute case, and the court may have felt that the plaintiff guest-passenger assumed the risk of knowingly riding with such a host driver, although no statement on this point is found in the opinion. The facts, however, make an interesting contrast to those of the *Botto* case, where an opposite decision was reached.

Bound up in the same syllabus with the "perversity" doctrine in the *Universal Concrete Pipe* case is another factor, sometimes cited separately: that "The party doing the act or failing to act must be conscious, from his knowledge of surrounding circumstances and existing conditions that his conduct will in all common probability result in injury."[28] This language is considered as being distinguished by the *Kellerman* case, but pre-

[25] 152 Ohio St. 40 (1949).

[26] *Id.* at 42.

[27] *Id.* at 48.

[28] 130 Ohio St. 567 at 568.

viously this subjective requirement, taken in conjunction with the requirement of a "disposition to perversity" cited earlier in the same syllabus, seems to require the commission of a quite deliberate, malicious and knowledgeable act. Such an act had heretofore been the province of the wilful tort. This latter part of the second syllabus in the *Universal Concrete Pipe* case has also been applied in guest statute cases such as the *Helleren* case and in *Rupright v. Burns.*[29]

In the case of *Miljak, Appellee v. Boyle, Appellant,*[30] also a guest case, the court in construing the "perversity" doctrine stated in its second syllabus that "a disposition to perversity, standing alone, is not sufficient to establish wanton misconduct." [31]

The court then went on to follow a requirement set up in *Rupright v. Burns,* previously cited, that the tortfeasor must proceed into the presence of danger, with indifference to consequences, and with absence of all care, notwithstanding his conscious and timely knowledge of an approach to unusual danger, and the common probability of injury to others." [32]

The facts of the *Rupright* case involved a host driver who drove at a high speed over a road which had repeated "dips" and rises. On coming over such a rise he came up suddenly behind a car which was going rather slowly. He endeavored to cut around it into the left lane, saw a pedestrian there, and cut back into the right lane, striking the other car. The court ruled for the defendant, finding none of the above cited factors present in the fact situation.

The court in the *Miljak* case, previously cited, held that "failure or inability of a jury to find the existence of a conscious and timely knowledge by the defendant of an approach to unusual danger, absence of all care on his part, and an indifference to consequences which the exercise of care would avert, is equivalent to a finding *against* the party having the burden of establishing wanton misconduct." [33]

The facts in the *Miljak* case were that the defendant had been driving at 70 miles per hour on a heavily traveled winding

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[29] 82 N. E. 2d 330 (Ohio App. 1947).

[30] 93 Ohio App. 169 (1952).

[31] *Ibid.*

[32] 82 N. E. 2d at 331 (Ohio 1947).

[33] 93 Ohio App. 169 (1952) at Syllabus 4.

road in a built-up section. His passengers remonstrated with him a number of times, but he kept on at the same speed. He then struck a concrete divider and the car went into a ditch. The jury found for the plaintiff. The court held that the jury had failed to include a specific finding on "consciousness of danger" or of the unusually dangerous situation. The court then cited the *Masters* case, previously cited, and entered final judgment for the defendant. The court therefore construed the facts cited as not showing wantonness under Ohio law.

To sum up the requirements which the various holdings of the courts have set forth, as necessary findings before legal wantonness can be found, is to realize that a showing of each of these would be all but impossible. To recapitulate: the tortfeasor must "know" of plaintiff's danger and act with "conscious" indifference to the consequences; he need not have had ill will, and "simple violation of a statute" will not make him chargeable; but he must have shown an "entire want of care"; his "disposition to perversity" must be established; he must be "aware and conscious" that his conduct will in all common probability result in harm to another, and he must have a "conscious and timely knowledge" of the approach of danger. Taken together, these attitudes of mind seem to spell out a fairly premeditated and deliberate course of conduct, rather than the "devil-may-care" attitude associated with "wantonness" in the lay mind, in early Ohio law and in the law of other jurisdictions.

It would seem that this vague and yet categorical set of requirements is more likely to confuse a jury, and even a court, than it is to assist them in making a decision with regard to an ordinary tort situation. The decisions in the *Kellerman* and *Botto* cases seem to evidence a swinging of the pendulum against directed verdicts in cases involving wanton tort. If future decisions of our present Supreme Court can bring greater balance and clarification in this area of Ohio law, it will indeed help to resolve what has become a very inconsistent situation.