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Joinder of Tort-Feasors In Ohio

THE problem of when tort-feasors may properly be joined in a single action has plagued Ohio's courts for many years. The procedural advantage of allowing joinder in a proper case is clear. The rights and liabilities of all parties may be adjudicated in a single proceeding. The courts, however, have been reluctant to allow joinder of parties-defendant in a tort action for various reasons, many of which appear to be without any real justification. Although the problem is, in essence, one of procedure, Ohio courts have emphasized the substantive rights and liabilities of the parties involved. Joinder has been allowed where the facts present particular substantive patterns showing joint liability, and has been disallowed in the absence of these patterns. This note will attempt to present the origin, growth and use of the rules on joinder of tort feasors.

A. *Introduction to the Problem*

At the early common law, only technical joint tort-feasors could be joined in a single action.[1] In this strict sense of the term, in order to constitute a joint tort it was necessary that the defendants act in concert in pursuance of a common design.[2] Because of the existence of this "conspiracy" the wrongful conduct of each was imputable to the others. They were liable jointly and severally for the entire amount of the damage suffered by the plaintiff. Unless the petition alleged that the defandants were joint tort-feasors in this strict sense, they were not joinable in a single action at law.

The first Ohio case ostensibly to adopt this rule was *Clark v. Fry.*[3] In this case it was held that where one person directs another to do an act which is not in itself unlawful, and the person so directing has no control over the manner in which the act is to be done, that person is not liable to someone injured by the performance of the act; however, if although the act directed to be done was in itself lawful the person directing that act has a control over the manner in which it shall be done, both are liable severally but not jointly, and they cannot be properly joined in the same suit. It became necessary that as a condition for joinder, the court find that the defendants were jointly liable; and there could be no joint liability in tort without concert of action. It should be noted that in the *Clark* case, one of the defendants was separately relieved from liability on a substantive ground; the court held that since this defendant had no control over the manner in which the lawful act was to be accomplished, he could not be

[1] PROSSER, TORTS 1096 (1941); 1 COOLEY, TORTS § 73 *et seq.* (4th ed. 1932).
[2] PROSSER, TORTS 1094 (1941).
[3] 8 Ohio St. 358 (1858).

liable, even under the doctrine of *respondeat superior.* The statement by the court concerning joinder was therefore dictum.

The rule with respect to joinder of defendants in a tort action, initially advanced by the court in the *Clark* case, has remained substantially the same. Although a slight relaxation of the rule has come about because of a change in the substantive law regarding joint liability of concurrent tort-feasors, the element of joint liability is still necessary for the allowance of a joinder.

The cases since *Clark v. Fry* have fallen into at least four categories:

1. The principal-agent, master-servant cases, in which the liability of the master arises solely by operation of law under the doctrine of *respondeat superior*
2. Cases in which a common duty was owed the plaintiff by the several defendants.
3. Cases involving the respective liabilities of a negligent abutting-property owner and a municipal corporation.
4. Cases in which the independent wrongful acts of several tort-feasors have concurred to produce a single indivisible injury.

B. *Principal-Agent, Master-Servant Situations*

The courts of Ohio have consistently held that a master and his servant may not be joined in a single action where the liability of the master arises solely by operation of law, i.e., where because of the tortious conduct of a servant committed while acting within the scope of his employment, the law imposes a liability upon his master.[4] Although dictum, this principle of *Clark v. Fry* was followed in the case of *French v. Central Construction Co.,*[5] in which a master and servant were joined in a single action, the liability of the master being predicated solely on the doctrine of *respondeat superior.* The defendant's motion at the close of plaintiff's evidence to require plaintiff to elect was sustained by the trial court. The supreme court held that an action against a master and servant is several and not joint where the liability of the master arises solely by operation of law; and that an objection is timely made and will be sustained where the absence of joint liability does not appear upon the face of the petition but is established at the close of the plaintiff's evidence. Clearly in issue in this case, the rule against joinder of a master and his servant, or principal and agent was firmly established.[6]

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[4] French v. Cent. Construction Co., 76 Ohio St. 509, 81 N.E. 751 (1907); Clark v. Fry, 8 Ohio St. 358 (1858); Gammel v. Sisser, 1 Ohio L. Abs. 816 (App. 1923) At least one Ohio case has held that once an action against a principal and agent has gone to judgment, without objection on the ground of misjoinder, this objection will be held to have been waived. Stevenson v. Hess, 10 Ohio L. Abs. 43 (App. 1931)

[5] 76 Ohio St. 509, 81 N.E. 751 (1907)

[6] In *Albers v. Great Cent. Transport Corp.,* 74 Ohio App. 425, 59 N.E.2d 389 (1944), the plaintiff was injured by the negligence of a terminal truck transferor. An I.C.C. regulation provided that the acts of the transferor are imputed to the car-

An additional reason has been given by the courts in refusing to allow a master and servant to be joined. Aside from the ground that there can be no joinder without joint liability the courts have held that joinder is improper since a master is only secondarily liable, the servant being the actual wrongdoer and the party primarily liable, and that the master would be deprived of his right of action against the servant if joinder were allowed.

> The reason given in both *French, Adm'r. v. Central Construction Co.,* and *Clark v. Fry,* for denying the right to join is that the principal, in the event he is required to pay, has a right of action against the agent to recover for his loss resulting from the latter's wrongful act, and that right arises because the principal is not in *pari delicto.*[7]

A fortiori, if the servant is absolved from liability, no action can be maintained against the master.[8]

Where the liability of the master arises independently and not by application of the doctrine of *respondeat superior,* the courts have allowed joinder, provided that joint liability is found to exist. Thus, when the relationship between the defendants is that of joint adventurers in the particular transaction involved, although their relationship otherwise is that of master and servant, joinder will be held to be proper.[9]

The Ohio courts have refused to allow a joinder of master and servant then, when the liability of the master arises solely by operation of law, on two grounds:

1. There is no joint liability.
2. The master has a right of indemnity against the servant for the amount of damages which he may be made to respond in favor of the injured plaintiff.

Although some courts have followed the above rule,[10] the reasons given therefor have not provided a barrier to joinder in other jurisdictions.[11] The

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rier by whom he was hired. Although no master-servant relationship existed, the court held that since the liability of the carrier arose solely by operation of law, it could not be joined in an action against the transferor.

[7] *Id.* at 431, 59 N.E.2d at 392; French v. Cent. Construction Co., 76 Ohio St. 509, 81 N.E. 751 (1907); Clark v. Fry, 8 Ohio St. 358 (1858).

[8] *See* Losito v. Kruse, 136 Ohio St. 183, 24 N.E.2d 705 (1940).

[9] Wenzlanski v. Allen, 51 Ohio App. 482, 1 N.E.2d 1018 (1936) *Accord,* Schoedler v. Motometer Gauge & Equipment Corp., 134 Ohio St. 78, 15 N.E.2d 598 (1938). And in *Kaiser v. Rodenbaugh,* 33 Ohio Op. 196, 68 N.E.2d 239 (Summit Com. Pl. 1946), the court held that an allegation that the defendant-master was negligent in hiring the servant is sufficient to withstand demurrer, but that plaintiff may be required to elect upon motion if there is a failure of proof as to this allegation.

[10] Western Union Telegraph Co. v. Olsson, 40 Colo. 264, 90 Pac. 841 (1907)

[11] Bernheimer-Leader Stores, Inc. v. Burlingame, 152 Md. 284, 136 Atl. 622 (1927); Clark v. Cliffside Park, 110 N.J.L. 589, 166 Atl. 309 (1933); Fedden v. Brooklyn Eastern District Terminal, 204 App. Div. 741, 199 N.Y. Supp. 9 (2d Dep't 1923)

policy of preventing a circuity of actions, in any event, would appear to outweigh any latent justification there may be for restricting joinder under these circumstances.

C. *Common Duty*

The second category into which the cases fall are those in which the defendants owed plaintiff a common duty to exercise reasonable care for his protection.[12] The most common illustration of such a case is the duty to maintain a party wall. Some jurisdictions have allowed a joinder of an abutting property owner and a municipal corporation on this ground.[13] As will be seen later, Ohio has not chosen to follow this principle. In *Board of County Comm'rs of Warren County v. Shurts*,[14] however, joinder was held to be proper where a village and the County Board of Commissioners each failed to provide a guardrail at a bridge abutment, causing plaintiff's intestate to fall to his death in a river below. The ground for this decision was that the defendants had breached a common duty to provide the rail as a protection to the public.

D. *Abutting-Landowner, Municipality Situation*

The third group of cases in which the problem of joinder has been met are those involving an action against a negligent abutting-property owner and a municipal corporation, whose liability is predicated on Ohio Revised Code Section 723.01[15] (Ohio General Code Section 3714), which imposes a duty upon the municipality to keep its streets free from nuisance. Ohio courts have refused to allow joinder under these circumstances on the ground that the liability of the abutting-property owner is primary while that of the municipality is secondary, and also on the ground that there is no joint liability.[16] It will be seen, therefore, that the grounds for refusing joinder in the abutting-landowner-municipality cases are identical with those employed by the courts in the master-servant cases.

Some jurisdictions have allowed joinder in this situation on the ground

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[12] See English v. Aubry, 90 Ohio App. 121, 103 N.E.2d 828 (1952) (alternative holding); *semble*, Blanton v. Sisters of Charity, 82 Ohio App. 20, 79 N.E.2d 688 (1948); Board of County Comm'rs of Warren County v. Shurts, 10 Ohio App. 219 (1918)

[13] Veits v. Hartford, 134 Conn. 428, 58 A.2d 389 (1948); Spurling v. Incorporated Town of Stratford, 195 Iowa 1002, 191 N.W 724 (1923); Fortmeyer v. Nat. Biscuit Co., 116 Minn. 158, 133 N.W 461 (1911)

[14] 10 Ohio App. 219 (1918).

[15] "Municipal corporations shall have special power to regulate the use of the streets and shall cause them to be kept open, in repair, and free from nuisance."

[16] Hillyer v. East Cleveland, 155 Ohio St. 552, 99 N.E.2d 772 (1951); Herron v. Youngstown, 136 Ohio St. 190, 24 N.E.2d 708 (1940); Bello v. Cleveland, 106 Ohio St. 94, 138 N.E. 526 (1922); Morris v. Woodburn, 57 Ohio St. 330, 48 N.E. 1097 (1897)

that the defendants owed a common duty to the traveling public.[17] This view would appear to have some merit, since the liability of the municipality, although traceable to the wrongful conduct of the abutting-landowner, arises from the breach of its distinct duty, imposed by statute, to keep the streets free from nuisance. It is the failure to abate this nuisance, after notice thereof, which gives rise to the liability of the municipality, and not the negligence of the property owner.

E. *Independent, Concurrent Tort-Feasors*

Originally, Ohio courts refused to allow joinder of independent tort-feasors whose negligence concurred to produce a single indivisible injury, on the ground that the defendants were not joint tort-feasors in the technical sense, i.e., did not act in concert in pursuance of a common design.[18]

Because of the relaxation of the rules for joint liability, independent but concurrent tort-feasors have in recent years been held joinable in a single action at law. The case of *Wery v. Seff*[19] was the first to recognize this principle in Ohio. Here a suit was brought against a parent for allowing his son, aged 15, to drive a motor vehicle owned by the parent, in violation of a city ordinance. The son, as driver of the vehicle, was joined in the action. The court held joinder to be proper on the ground that both parties were primarily liable, and that their separate acts of negligence concurred in producing the injury. The court dispensed with the requirement of the common-law that the defendants must have acted in concert in order to give rise to joint liability. The rule has since been consistently followed by our courts.[20]

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[17] See note 13, *supra*.

[18] This rule was expressed by the court in *Stark County Agricultural Society v. Brenner*, 122 Ohio St. 560, 172 N.E. 659 (1930), a case in which the court said that there could be no joint liability where the want of care of each of the defendants was not of the same character and their acts were done without concert of action. As in the *Clark* case, however, the rule as announced was not determinative of the case before the court. Suit was brought in Stark County against a resident of that county and a non-resident; the court first found that the resident defendant was not liable since it owed no duty to plaintiff; hence a joint liability was not established and the trial court never acquired jurisdiction over the person of the non-resident defendant. The dictum with respect to the requirements for joint liability was, however, followed in later cases. See Hudson v. Ohio Bus Line Co., 56 Ohio App. 483, 11 N.E.2d 113 (1937); Davies v. Seasley, 18 Ohio L. Abs. 607 (App. 1934); Lynch v. Pennsylvania R.R., 28 Ohio N.P. (N.S.) 498 (Hamilton Com. Pl. 1931); Heils v. Cincinnati Traction Co., 14 Ohio C.C. (N.S.) 384 (1911). *But cf.* Maumee Valley Ry. & Light Co. v. Montgomery, 81 Ohio St. 426, 91 N.E. 181 (1910); Cincinnati Street Ry. v. Murray, 53 Ohio St. 570, 42 N.E. 596 (1895); Cleveland Ry. v. Heller, 15 Ohio App. 346 (1921).

[19] 136 Ohio St. 307, 25 N.E.2d 692 (1940).

[20] Glass v. McCullough Transfer Co., 159 Ohio St. 505, 115 N.E.2d 78 (1953); Meyer v. Cincinnati Street Ry., 157 Ohio St. 38, 104 N.E.2d 173 (1952); Garbe v.

F. *Other Cases Involving Joinder*

In addition to the above enumerated categories, the problem of joinder has arisen in several other instances worthy of mention. Where an action is brought for the unlawful sale of deleterious food, the manufacturer or wholesaler may not be joined with the retailer.[21] One of the reasons given by our courts for refusing to allow a joinder under these circumstances is that the manufacturer or wholesaler is primarily liable, and the retailer only secondarily liable for the sale of the food. The action maintainable by the retailer against the wholesaler is founded upon the loss of business and reputation he may have sustained because of the sale.[22] This action therefore differs from those arising in favor of a master against his tortious servant, or in favor of a municipal corporation against a negligent abutting-property owner, in which cases the parties secondarily liable have a right of indemnity for damages measured by the amount by which they have been compelled to respond in favor of the injured party.

A second ground for refusing joinder was advanced by the courts in the decided cases which arose before *Wery v. Seff.* This ground was that the liability of the defendants differed in degree and kind, and could not therefore be considered joint. In view of the fact that this reasoning was adopted from the common-law rule, which has since been dispensed with, it does not appear that it could be validly asserted in a future action of this kind.

Mention should also be made of that group of cases in which suit was brought by a non-resident plaintiff, in a county in which the cause of action did not arise, against a resident of that county and a non-resident of such county. Service upon the non-resident defendant[23] will be proper provided that an allegation of joint liability is made. The question of whether a joint liability has been alleged is therefore before the court. In several cases an averment that the independent but concurrent negligence of the defendants caused the plaintiff's injury, although contrary to the then prevailing rule, was held to be a sufficient allegation of joint liability.[24] It is

Halloran, 150 Ohio St. 476, 83 N.E.2d 217 (1948); Melville v. Greyhound Corp., 94 Ohio App. 259, 115 N.E.2d 42 (1953); English v. Aubry, 90 Ohio App. 121, 103 N.E.2d 828 (1952); Davis v. Lanesky, 91 Ohio App. 125, 107 N.E.2d 919 (1951); Adams v. Lambert, 91 Ohio App. 333, 108 N.E.2d 241 (1951); Micelli v. Hirsch, 52 Ohio L. Abs. 426, 83 N.E.2d 240 (App. 1948); *semble,* Blanton v. Sisters of Charity, 82 Ohio App. 20, 79 N.E.2d 688 (1948). *But cf.* Larson v. Cleveland Ry., 142 Ohio St. 20, 50 N.E.2d 163 (1943); Seabold v. Dayton, 56 Ohio L. Abs. 417, 92 N.E.2d 701 (App. 1949)

[21] Kniess v. Armour & Co., 134 Ohio St. 432, 17 N.E.2d 734 (1938); Canton Provision Co. v. Gauder, 130 Ohio St. 43, 196 N.E. 634 (1935)

[22] *Ibid.*

[23] Under Ohio Revised Code Section 2703.04 (Ohio General Code Section 11282).

[24] Maloney v. Callahan, 127 Ohio St. 387, 188 N.E. 656 (1933); Baltimore & O. R.R. v. Baillie, 112 Ohio St. 567, 148 N.E. 233 (1925) In *Glass v. McCullough*

doubtful, however, that any of the present rules of joint liability will be ignored in the resident-non-resident cases.

CONCLUSION

Ohio courts have seen fit to allow joinder of defendants in a tort action only where there exists a joint liability. It is presumed that joint liability can be found to exist only where, because of the nature of the wrongful conduct of the defendants, or because of the nature of the resulting injury each tort-feasor should be held liable for the full amount of the damage sustained by the injured plaintiff. This does not mean, however, that in the absence of such joint liability procedural difficulties, which might otherwise be avoided, must necessarily ensue. Ohio Revised Code Section 2307.19 (Ohio General Code Section 11255) provides: "Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of a question involved therein." This section is sufficiently broad to allow joinder in the absence of joint liability, and in any of the situations discussed above, and should be so construed. In any event, the absence or presence of joint liability should not be made the criterion for refusing to allow a joinder of tort-feasors.

The refusal to allow such joinder on the ground that one of the defendants is primarily liable, while the other is only secondarily liable is equally without merit. The intimation that the party secondarily liable would be deprived of his right of action against the party primarily liable is without basis in law or fact.

The illogical turn which the above reasoning may take is evidenced by *Kniess v. Armour & Co.*,[25] a case in which the court held that there could be no joinder without joint liability; that, therefore, if joinder were allowed there must necessarily be joint liability; and that since there is no contribution among joint tort-feasors in Ohio, the party secondarily liable would be deprived of his right of action against the party primarily liable.

It is submitted that by removal of these restrictive rules on joinder, a more efficient disposal of litigation could be effected.

RUSSELL J. SPETRINO

Transfer Co., 159 Ohio St. 505, 115 N.E.2d 78 (1953), the non-resident defendant filed a motion to dismiss after a verdict was directed in favor of the resident defendant. Plaintiff contended that the objection was not timely since she (plaintiff) had failed to allege joint liability, and that this was apparent upon the face of the petition. The court held that since plaintiff alleged concurring acts of negligence proximately operating and resulting in injury, joint liability was alleged; that the action was not rightly brought, a verdict having been directed for the resident defendant; and that therefore jurisdiction over the person of the non-resident defendant was not acquired.

[25] 134 Ohio St. 432, 17 N.E.2d 734 (1938).