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Torts

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diction.[90] Even though the errors are set forth in a definite and specific manner there must be evidence to support them. The supreme court can only reverse a decision of the Board of Tax Appeals when its shall determine that its decision is unreasonable or unlawful.[91]

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TORTS

Negligence

Function of Judge and of Jury — Res Ipsa Loquitur

In the battle between plaintiffs and defendants in negligence cases, part of the strategy involves the manipulation of the evidence and the jury. Often one party wants the case to go to the jury while the other does not. Deeply involved in the interplay is the question of the sufficiency of the evidence to present a jury question on either causation or lack of due care elements. Such a case may or may not be complicated by the res ipsa loquitur doctrine. There were a number of cases illustrating this general problem which were reported from the Ohio Supreme Court during 1954. In one such case,[1] plaintiff was walking by defendant's place of business in Youngstown when she fell into "rough depressions and elevations" in the sidewalk, suffering severe injuries. She showed in the trial that defendant was remodeling his building and that heavy trucks had ridden over the areas of the sidewalk in question. Not even a jury question, ruled the supreme court. Plaintiff had not shown that defendant was responsible for any particular vehicle that broke the sidewalk. In another case,[2] plaintiff was driving a car purchased from defendant when the car suddenly went out of control and caused plaintiff great loss. Plaintiff proved that he had taken the car to defendant for repairs. He also showed that he had advised defendant that something was wrong with the steering mechanism. Defendant claimed that the malady had been corrected. The key to the case was a kingpin in the steering mechanism. Investigation subsequent to plaintiff's mishap revealed the pin was broken. Plaintiff lost, however, because he could not prove exactly when the pin was broken: before, during or after the crash.[3]

By degrees we move into the res ipsa loquitur problem. The following

[90] Roose v. Board of Revision of Cuyahoga County, 161 Ohio St. 522. 119 N.E.2d 885 (1954). Revised Code Section 5717.04 governs appeals from the Board of Tax Appeals to the Supreme Court.

[91] Queen City Valves, Inc. v. Peck, 161 Ohio St. 579, 120 N.E.2d 310 (1954), construing Revised Code Section 5717.02.

facts were held to fall short of that line: Plaintiff was having his car lubricated in one of the defendant's service stations. As plaintiff stepped onto the hoist track to get into his car, he stepped into a slippery "foreign" substance, falling and suffering bodily injury. The supreme court affirmed a directed verdict for defendant,[4] apparently on the ground that to let the jury have the case would be to let it engage in sheer speculation.[5] The same result would follow, said the court gratuitously, even if plaintiff had proven the substance to be grease.

In Ohio, as in most states, if a case can be brought within the doctrine of res ipsa loquitur, the jury will be allowed to determine whether the defendant was or was not negligent.[6] A major obstacle in getting a case to the jury under this doctrine is the "exclusive control" requirement. Much of the allocation of function in decision-making between judge and jury is channeled through this element. Illustrative of the point are two cases reported from the supreme court. In *Krupar v. Procter & Gamble Co.*,[7] the plaintiff purchased a bar of defendant's soap in its original wrapper from a retail store. The soap was unwrapped and placed in plaintiff's bathroom. Subsequently, eight days after purchase, plaintiff used the soap in taking a bath and was scratched by a piece of wire embedded in the soap. Complications followed from the scratch. The court ruled as a matter of law that defendant had not had exclusive control of the soap. In so deciding the court overruled a trial verdict and successful intermediate appeal for the

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[1] Eichon v. Lustig's, Inc., 161 Ohio St. 11, 117 N.E.2d 436 (1954).

[2] Landon v. Lee Motors, Inc., 161 Ohio St. 82, 118 N.E.2d 147 (1954).

[3] An analogous situation arose in *Lopresti v. Community Traction Co.*, 160 Ohio St. 480, 117 N.E.2d 2 (1954). Plaintiff, suing for wrongful death, showed that defendant injured deceased but could not establish from medical testimony any connection between the injury and the cancer which produced the death.

See also Scott v. Allied Stores of Ohio, Inc., 122 N.E.2d 665 (Ohio App. 1953). Plaintiff here claimed she was knocked down in defendant's store while defendant's servants were chasing an escaping shoplifter. The court held that since store owners are not insurers of their customers' safety, plaintiff must lose since she could not show exactly how she was knocked down. She might have been knocked down by one of the voluntary pursuers who along with plaintiff had been shopping in the store.

[4] Parras v. Standard Oil Co., 160 Ohio St. 315, 116 N.E.2d 300 (1954).

[5] Might not the jury in effect make the financially able defendant an insurer? In other states the doctrine of res ipsa loquitur seems to be used for just such a liberal purpose. Perhaps it is equally as valid for the Ohio Supreme Court to reflect its conservative, protector attitude toward industry by keeping such cases from the jury.

[6] A general statement of the rule is that the instrumentality involved must have been within the "exclusive control" of the defendant and must have caused plaintiff damage under circumstances indicating a high probability of negligence. Facts meeting this formula leave less to the imagination and emotions and so may safely be passed to the jury by the trial judge.

[7] 160 Ohio St. 489, 117 N.E.2d 7 (1954).

plaintiff.[8] In *Koktavy v. United Fireworks Mfg. Co., Inc.*,[9] the plaintiff purchased some fireworks including an aerial salute bomb manufactured by the defendant. The purchase was made through a retail jobber. Such bombs are supposed to explode after rising into the air. This bomb exploded on the ground after plaintiff lit the fuse, injuring plaintiff. The court of appeals overruled a directed verdict for the defendant, but was in turn overruled by the supreme court. The latter court ruled as a matter of law that plaintiff had not sufficiently shown that the bomb had been handled with due care while in the possession of the retailer. In either of these two cases, the jury might have been allowed to decide the matter determined by the court: Did plaintiff sufficiently preclude the negligence of others who had possession of the instrumentality involved? The Ohio Supreme Court seems to show little faith in juries in this area. Thus, Ohio is one of the states known for interpreting the exclusive control element comparatively strictly.

Given defendant's exclusive control over the injury-causing instrumentality, plaintiff's problem of getting to the jury is not so difficult. In *Manker v. Shaffer*,[10] plaintiff was, along with eight other people, a paying rider in a station wagon driven by defendant. While in transit the vehicle suddenly swerved off the road and hit a tree. Plaintiff sued defendant for negligence. In reversing a directed verdict for defendant, the supreme court held this was properly a case for the jury since the facts supported a permissible inference of negligence on the defendant's part.[11]

Duty — Relationship

One of the prerequisites to the establishment of a prima facie case of negligence is the showing of a duty in defendant to use due care to protect plaintiff from the injury involved. Various factors enter into both the determination that a duty is owed and the definition of the scope of that duty. One of the factors is the weighing of the competing interests of plaintiff and defendant, or in shorthand, the "relationship" of the parties.

1. *Parent-Child*

The supreme court wrote the second and probably last chapter to *Signs v. Signs*.[12] The plaintiff was six and one-half years old when he suffered

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[8] See 5 WEST. RES. L. REV. 315 (1954) for comment on court of appeals decision.

[9] 160 Ohio St. 461, 117 N.E.2d 16 (1954).

[10] 161 Ohio St. 285, 118 N.E.2d 641 (1954).

[11] Of particular importance in such a case is the absence of any explanation by defendant regarding the collision. Otherwise it must be that the Supreme Court is less concerned about insurance companies than about manufacturers. (Assuming the court is ever consciously controlled by other factors than the mere legal doctrines.)

[12] 161 Ohio St. 241, 118 N.E.2d 411 (1954).

his injury. He lived with his parents. His father and another person were partners engaged in the business of selling gasoline from pumps located on premises owned by the mother of the plaintiff. While plaintiff and some other children were playing with the pump, plaintiff became splattered with gasoline. Later, another child struck a match. Plaintiff sued for the resultant injury. The court decided in the first opinion that the father was not immune from suit by his son since the damage had occurred by virtue of the father's pursuit of his business.[13] In the second opinion, the court held as a matter of law that the father owed no greater duty to his child than to warn him to stay away from the pump — and this the father had done. The court seemed to be shocked at any notion that a father might owe a greater legal duty to his child than he owes to a social guest. Even assuming the social guest analogy is a good one,[14] why not leave to the jury the question whether the giving of a warning is the only action a reasonable man would take to protect a six and one-half year old social guest under such circumstances.[15]

2. *Automobile Driver-Rider*

In *Birmelin v. Gist*,[16] an action for wrongful death, it was decided by the supreme court that the guest statute[17] was applicable even though the defendant driver was offered compensation for gas consumed in driving decedent home. Therefore, defendant would be liable only for wanton misconduct. Such an offer of compensation is merely a social gesture and not a business arrangement, according to the court, unless it can be shown that the driver intended to assume additional risks of liability.

3. *Landlord and Tenant*

In *Marshman v. Stanley*[18] the owners of a rooming house were sued for the wrongful death of two roomers, husband and wife. A former operator of the premises had negligently installed gas conduits in such

[13] 156 Ohio St. 566, 103 N.E.2d 743 (1952).

[14] The court cannot be too much criticized for limiting the scope of the duty here. For an essentially conservative court, it has gone quite far in recognizing any duty at all. Once the duty gains acceptance and becomes "old hat," then surely a future court must find a father owes a greater legal duty to his son than he owes to the boy up the street — under the reasonable man rule.

[15] There was insurance, of course, as a reading of the first *Signs* case will show. Is the second *Signs* case another example of judicial control over possible "emotional" jury verdicts? In addition, the court briefly lists the Ohio cases which have refuted the attractive nuisance doctrine. Admitting that the full sway of that doctrine may leave too much to juries, the court could take a middle ground and give some consideration to the facts of life.

[16] 162 Ohio St. 46, 120 N.E.2d 711 (1954).

[17] OHIO REV. CODE § 4515.02.

[18] 122 N.E.2d 482 (Ohio App. 1952).

fashion that a fatal explosion resulted when decedent husband struck a match to light his pipe. The dangerous condition was apparently unknown to the defendant landlords. Held, by a court of appeals, a landlord is not liable for such an occurrence in the absence of a showing of fraud or concealment. In other words, the landlord is under no duty to inspect for dangerous conditions on his premises.[19]

4. *Municipalities and Pedestrians*

In *Kimball v. City of Cincinnati*[20] plaintiff sued for injuries received when she tripped over a fault in one of defendant's sidewalks. The fault consisted of a difference in the level of two adjoining sections — a difference of from one-half to three-fourths of an inch. The condition had existed for thirteen years, but apparently no one had called it to the city's attention. Noting that the city was not an insurer, the supreme court ruled that allowing the existence of such a defect was as a matter of law not negligence. Overruled were a trial court and an appellate court and a substantial judgment in plaintiff's favor. Perhaps we may expect future rulings by the court that seven-eighths of an inch is not for the jury but that fifteen-sixteenths of an inch is.

Violation of a Statute

Eisenhuth v. Moneyhon[21] illustrates how the facts of a case may be given to the jury to determine whether the defendant acted reasonably, even though a statute is involved. In Ohio, a driver on the highways is required to give "proper" signals of his intention to turn his vehicle from one lane to another.[22] In this case it was held that the standard of care imposed by the statute was not specific enough so that the question whether a proper signal was given, or whether any signal at all should have been given, was one for the jury.[23]

1. *Assured Clear Distance Ahead Statute*[24]

In *Rogers v. Anchor Motor Freight, Inc.*,[25] plaintiff ran into an unlighted

[19] The holding is not novel, but many bad rules are equally traditional. In this particular case, the outcome is not so harsh since the original wrongdoer was also a party to the suit.

[20] 160 Ohio St. 370, 116 N.E.2d 708 (1954).

[21] 161 Ohio St. 367, 119 N.E.2d 440 (1954).

[22] OHIO REV. CODE § 4511.39.

[23] At least under the facts of this case where a driver is moving from the right hand lane to the next lane on a four lane highway and does not signal to a driver behind him.

[24] OHIO REV. CODE § 4511.21.

[25] 95 Ohio App. 62, 117 N.E.2d 451 (1954). The case cited in footnote 21, *supra*,

trailer truck parked partially on the highway. He sued the owner of the trailer truck for negligence. The trial judge left to the jury the question of plaintiff's contributory negligence. The court of appeals affirmed on the theory that plaintiff had taken himself out of the assured clear distance ahead statute by showing his attention had been diverted by an oncoming car in his lane. One judge vigorously dissented that plaintiff was clearly within the statute and so should have been found contributorily negligent as a matter of law. The judge argued that the evidence was uncontradicted that plaintiff continued to travel faster than required by the statute *after* the emergency had ceased.[26]

Proximate Cause

As with some of the other cases reviewed in this section, *Hartman v. Hinton*[27] is of interest not so much for any startling rule of law laid down or novel facts as for its illustration of how appellate judges may exercise a good deal of control over the jury function under the traditional concepts of negligence, in this case the matter of proximate cause. Plaintiff was a guest rider in an automobile which ran into an unlighted road roller. The road roller was parked in an area of the highway which was under repair. The highway was open to traffic, but there is no real discussion in the case as to the propriety of the road roller's being parked where it was or as to the unreasonableness of its being parked without warning lights. The driver of the car in which plaintiff was riding was apparently the only witness regarding the reasons for the collision. He testified that the lights of an approaching car blinded him causing him to pull to the right side of the road. He then lost control of the car in the unimproved portion of the highway and collided with the road roller. Defendant was given a judgment in the court of appeals, notwithstanding a verdict below, apparently on the basis that the driver said in answer to cross examination that even if there had been lights on the road roller, he probably would have run into it. Thus, there was no "causal connection between the defendant's negligence and the plaintiff's injury"—reasonable minds could not arrive at

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involves a finding that a jury must determine whether the statute involved was violated. This case involves an apparently different way out of a statute; a holding that a violation is excusable under certain circumstances to be determined by the jury. The process is really the same in the two cases.

[26] One cannot blame a trial judge for passing doubtful cases to the jury. The majority opinion may perhaps be best justified (even granting the dissenter's remarks about the defendant's speed) on the theory that a reasonable man may *not* be aware of his speed, even though a judge may determine from an exercise of hindsight when the emergency was in fact ended.

[27] 122 N.E.2d 646 (Ohio App. 1953).