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Torts

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convert a class action to enjoin the collection of taxes into one to recover taxes illegally collected, nor may he recover the tax by way of ancillary relief in an action for injunction, since it is contrary to the policy of the statutes to permit injunction and recovery at the same time.[36] Having obtained a temporary injunction, plaintiff could not be coerced into payment of the tax while the order remained in effect. The payment of the tax under such circumstances was a voluntary payment, or at least a waiver of any objection to the validity of the tax.

The inference from this holding is that a taxpayer, if he voluntarily pays a tax, must institute an action to recover the tax under section 2723.01, observing both the one year requirement for instituting the action and the payment under protest provision of section 2723.03 to avoid the bar or waiver of the act of voluntary payment.

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TORTS

With an agility hardly expected from such a usually static body, the Ohio Supreme Court jumped aboard two progressive tort bandwagons this last year. While many will regard the removal of the immunity insulation from non-profit hospitals as the more significant action, time may well prove that even deeper social ramifications will follow from the court's almost casual recognition that the right of privacy does indeed exist in Ohio.

Immunities

In a 5-2 decision non-profit hospitals and possibly many other so-called charitable organizations lost their shield of immunity, imperfect as it had become.[1] Recognizing the inconsistencies which had arisen in the Ohio rulings on the general problem and evaluating the changing pattern of events surrounding such institutions, the court swept aside technicality and precedent alike, in a rare moment of conscious recognition of its policy-clarifying role in public affairs. But the consequences of this decision are not clear even for non-profit hospitals. The court carefully adhered to the limits of the pleadings and more important to the doctrine of respondeat superior. Conceivably, later decisions could favor hospital immunity by finding that in particular situations a doctor or a nurse had acted as an independent contractor and not as an employee of the hos-

[36] Pennsylvania R.R. Co. v. Scioto-Sandusky Conservancy Dist., 101 Ohio. App. 61, 137 N.E.2d 891 (1956).

pital.[2] Yet the decision constitutes a vital step. Other "charitable" institutions will undoubtedly be affected. The extent of future changes will be determined by the changing social context and legal ingenuity.[3]

The Right of Privacy

The other landmark was a 4-3 decision.[4] While several lower courts in Ohio had already recognized the right of privacy and while Ohio has been listed for some time now as a state recognizing that right, this decision could not have been predicted with absolute certainty.[5] After all, an earlier group of Ohio judges had managed to block recognition of the analogous tort of mental disturbance.[6] Fortunately, the Supreme Court was confronted with the almost classic privacy situation, a collection agency's harassment of a debtor. The agency telephoned the debtor, her employer and her landlord on numerous occasions and at various times trying to force payment. Plaintiff debtor did allege economic loss, but her main contention seems to have been that she was caused "nervousness, worry, humiliation, mental anguish and loss of sleep." At any rate, the amorphous doctrine has been firmly established in Ohio and the door finally opened to the broader recognition of psychological infringements including perhaps the intentional infliction of mental disturbance.

Deceit

In *Pumphrey v. Quillen*[7] the Supreme Court indicated a hope that its decision and reasoning in that case would have the effect of settling the law of Ohio on the question of *scienter* in an action for deceit. The case is without a doubt highly significant, but unfortunately mightily confusing to an equally hopeful reader. Plaintiff vendee relied on the statements of defendant broker in the purchase of a house. The broker stated that the walls of the house were constructed of tile with a Perma-Stone exterior. While there was a thin Perma-Stone veneer, it surrounded a

[1] Avellone v. St. John's Hospital, 165 Ohio St. 467, 135 N.E.2d 410 (1956) Immunity had not been absolute, as the court's discussion of Ohio precedent shows.

[2] In line with the "New York" rule, see 2 HARPER AND JAMES, THE LAW OF TORTS § 29.17 (1956).

[3] For a full discussion of this case and its implications, see Note, 8 WEST. RES. L. REV. 194 (1957).

[4] Housh v. Peth, 165 Ohio St. 35, 133 N.E.2d 340 (1956).

[5] For a discussion of the right of privacy in Ohio, see Note, 7 WEST. RES. L. REV. 452 (1956).

[6] Bartow v. Smith, 149 Ohio St. 301, 78 N.E.2d 735 (1948). For a discussion of this problem, see Note, 6 WEST. RES. L. REV. 384 (1955).

[7] 165 Ohio St. 343, 135 N.E.2d 328 (1956).

combination of earth, clay and straw. Quite clearly the 6-1 majority has held that something less than the classic *scienter* is required for such a plaintiff to recover damages from such a defendant. It was at least enough that the defendant did not actually know whether his statement was true or false. But what is not so clear is whether the court has gone even further and imposed a warranty liability on this kind of transaction. Knowing commentators do indicate a trend in this direction across the country.[8] The dissenting justice is adamant that the defendant was in good faith and believed what he said. If the split of opinion be not merely a dispute as to whether there was a jury question on the presence or absence of good faith in the defendant, then this case is a signpost of things to come, at least in land sale transactions. Since the court did not fully inform its legal public, it will surely be asked for another opinion on the subject.

Defamation

McCarthy v. The Cincinnati Enquirer[9] is a case interesting for its facts as well as significant for its legal perspective. The plaintiff is apparently a well-known news commentator in Cincinnati. In some of his broadcasts he vehemently criticized the proposed fluoridation of local drinking water. The defendant newspaper attacked the plaintiff and his views in a strongly worded editorial, accusing him of misleading the public and of engaging in a kind of "news reporting that victimizes its gullible listener." The court of appeals ruled in essence that since plaintiff had only pleaded excerpts from the editorial and since he had not shown any specific monetary losses, he had not established a case of libel *per se*. A reading of the majority opinion may lead to the reasonable conclusion either that the majority believed that plaintiff deserved his scolding or that the words used were not defamatory. Unfortunately the majority chose to couch its rationalization in terms of the technical distinction which is coming to cause increasing confusion in Ohio. As always, where such confusion exists, courts seldom get down to discussing the vital issues in understandable terms.[10]

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[8] PROSSER, TORTS § 88 (2d ed. 1955); 1 HARPER AND JAMES, THE LAW OF TORTS § 7.7 (1956) The latter authors also indicate that most of the confusion over the definition of *scienter* comes in the land sale transactions. *Id.* at § 7.4.

[9] 136 N.E.2d 393 (Ohio App. 1956)

[10] The requirement of libel *per se* comes from confusion of the two meanings of defamation *per se:* (1) words defamatory on their face; or (2) words that are actionable without proof of damage — according to PROSSER, TORTS § 93 (2d ed. 1955).

A careful reading of the latest supreme court declaration on the subject seems to indicate that libel *per se* refers simply to the first meaning indicated above. Westropp v. Scripps Co., 148 Ohio St. 365, 74 N.E.2d 340 (1947)

Income Taxes and Personal Injury Verdicts

Personal injury awards are excluded from gross income under the Internal Revenue Act of 1954.[11] Conceivably juries, quite familiar with the taxability of quiz show awards, might mistakenly believe that they should compensate plaintiffs sufficiently to cover not only the plaintiff's damages but also his taxes on that award. However, the Supreme Court has ruled that it would be improper to instruct the jury that it *must* take this exclusion into consideration in arriving at the amount of its verdict in a personal injury action.[12] Three judges in a concurring opinion significantly pointed out that "a proper charge in this subject could be drawn and properly given if it went only to the extent of warning the jury not to consider income tax liability on the award which it might make."

Municipal Liability for Nuisance

Municipal corporations are expressly subject to liability for failing to keep, *inter alia,* streets and sidewalks free from nuisance.[13] In an admittedly "strict" construction of the nuisance statute, the supreme court has limited its application to situations involving the affirmative use of the streets and sidewalks for purposes of travel.[14] The defendant city had hired an independent contractor to widen one of the city streets. The contractor cut off some of the roots of a tree, leaving it in a weakened condition. During the subsequent winter the tree, located at the curb line, began leaning away from the pavement toward a house which was insured by plaintiff. After the city had been notified of the danger, but before it could carry out the removal of the tree, the tree fell. Plaintiff sued the city for its losses in paying for the damage to the house. Under the court's interpretation, the city was liable neither under the statute nor under the common law. Under the former the "weakened tree did not constitute a disrepair, defect or nuisance in the 'street' itself. " Under the latter, the city was acting in its governmental capacity.

Negligence

One who negligently contributes to the damage of another is not insulated from liability by the negligent acts of an intervening human agency so long as such acts are "foreseeable."[15] As a corollary, two or

[11] 26 U.S.C.A. § 104 (1954)

[12] Maus v. N.Y., Chi. St. L. Rd. Co., 165 Ohio St. 281, 135 N.E.2d 253 (1956).

[13] OHIO REV. CODE § 723.01.

[14] Standard Fire Ins. Co. v. City of Fremont, 164 Ohio St. 344, 131 N.E.2d 221 (1955).

[15] 2 HARPER AND JAMES, THE LAW OF TORTS § 20.05 (1956).

more persons may be concurrently negligent in contributing to another person's damage. However, there are situations where courts conclude that an intervening wrongdoer should be liable, but not the original wrongdoer. A sociological analysis rather than the usual strictly legal, "technical" explanation might justify such a conclusion, but courts are human and like all humans are creatures of habit. Oftentimes in such cases, the rationale expressed by the court is not compelling and may conflict with other equally acceptable legal principles. Such a case is *Hurt v. Charles J. Rogers Transp. Co.*[16] The plaintiff was injured by a steel forging which crashed through the windshield of his automobile. The defendant Ford Motor Co. had negligently packed boxes of forgings which were being transported by a tractor-trailer outfit.[17] The driver of this outfit discovered forgings dropping from his outfit along the highway but took inadequate steps to remedy the situation. The Supreme Court held that this was the familiar situation of the responsible intervening agent who could or *should* have eliminated the hazard negligently created by the original wrongdoer. The court did not mention the principles cited at the beginning of this paragraph. Unless the court is taking a view which is almost unbelievably lenient to original wrongdoers as a class, the reader must figure out his own rationale in terms of the class to which this particular defendant belongs. Thus, in Ohio, articles dropping from highway vehicles become upon his discovery the risk of the transporter rather than of the manufacturer-distributor.[18]

In *Lehman v. Haynam*[19] the Supreme Court reasonably concluded that an automobile driver who crosses to the left over the center line of a highway and crashes into another automobile coming properly from the opposite direction may claim as an excuse in the resulting negligence action that he lost consciousness. The court just as reasonably concluded that such an excuse is by way of defense, that is, the plaintiff need not prove that defendant was conscious, rather defendant has the burden of proving his own unconsciousness. Imagine the difficulty of his doing so. If defendant claimed he had at some prior time lost consciousness while driving or that he was subject to fainting, then he would be proving his own negligence in driving at all.

The other cases of interest were decided in the lower courts. In one case, the driver of a dairy truck was held negligent for not slowing down

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[16] 164 Ohio St. 329, 130 N.E.2d 824 (1955)

[17] The transportation agency was held liable in Hurt v. Charles J. Rogers Transp. Co., 164 Ohio St. 323, 130 N.E.2d 820 (1955)

[18] The court does talk, however, as if it were applying the long outmoded "last wrongdoer" rule. See 2 HARPER AND JAMES, THE LAW OF TORTS § 20.06 (1956)

[19] 164 Ohio St. 595, 133 N.E.2d 97 (1956).