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Torts

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The Board of Tax Appeals in reviewing an assessment by the Tax Commissioner must base its decision on the evidence, and when the record before the Board contains merely the order of the commissioner on one side and substantial evidence supporting the taxpayer's claim on the other, the Board may not reasonably affirm the order of the commissioner.[27]

Injunction Against Tax Collection

Section 2723.01, Ohio Revised Code, confers jurisdiction upon the courts of common pleas to enjoin the illegal levy or collection of taxes and assessments and to entertain actions to recover them when collected. In *Charles W. Birdsong, Inc. v. Taylor*,[28] the taxpayer filed a suit pursuant to this statute to enjoin the collection of a personal property tax by the Ohio Tax Commissioner because of alleged illegality and invalidity. There was no appeal to the Board of Tax Appeals. The court of appeals held that the action could not be maintained because the taxpayer had failed to pursue his administrative remedies and affirmed a judgment on the pleadings in favor of the defendants.

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TORTS

There were few torts in the Ohio courts last year, at least few that would leave any lasting impression or be classified otherwise than miscellaneous. In the foothills of future peak decisions was the ruling by a common pleas court which distinguished so-called charitable hospitals from a Roman Catholic church and refused to impose liability upon the church for the possible negligence of its officers.[1] Two courts of appeals dealt with the problems of minors. First, parents or other persons who sponsor the driving of minors under eighteen by signing their applications for drivers' licenses appear to be completely responsible for the driving habits of those minors. At least that is the result of the latest decision on the matter barring a father from recovering for damage to his car caused by the combined negligence of his son and another driver.[2] The other decision denied a cause of action to a minor daughter against persons who were allegedly negligent in causing physical damage to her

[27] Youngstown Sheet and Tube Co. v. Bowers, 166 Ohio St. 122, 140 N.E.2d 313 (1957). The decision on this issue is an express approval and affirmance of the position previously taken in Bloch v. Glander, 151 Ohio St. 381, 86 N.E.2d 318 (1949).

[28] 103 Ohio App. 123, 144 N.E.2d 689 (1956).

father resulting in loss to the daughter of love, affection, companionship, and so on.[3]

Two decisions in related areas deserve mention. A court of appeals would impose a warranty liability upon a manufacturer regardless of lack of privity with the claimant.[4] In an equally progressive decision, the Supreme Court approved the joinder as defendants of contributors to a nuisance, basing the decision on their allegedly "joint" adventure, but suggesting that joinder might be based on the indivisibility of the damage.[5]

Outside the "miscellaneous" category were a few cases of more direct or more permanent interest. Thus, for better or for worse, we now know that the Supreme Court stands among the extremists in its definition of libel per se. In *Becker v. Toulmin*[6] the court has indicated that allegedly libelous statements will not provide the basis for a presumption of damages so long as the court, not the jury, believes that the words are reasonably susceptible of an innocent interpretation. The opinion is so overburdened with technicalities, some inconsistent, and so empty of socially justified explanations as to be embarrassing. Be that as it may, the opinion is one which clearly restricts the tort of libel to a smaller corner than has ever been reserved for its sister tort of slander and which gives a large area of decision-making over to the trial judge. If nothing else, the opinion is evidence aplenty of the need for a wider knowledge in the legal profession of the uses and abuses of language symbols.[7]

The Supreme Court has taken a large step in defining the "tort" duties which may arise out of contractual transactions. In *Durham v. The Warner Elevator Mfg. Co.*,[8] plaintiff was injured at his place of employment when the elevator which he was using fell a considerable distance in its shaft. The defendant company had contracted with plaintiff's employer to inspect and maintain the elevator. Accordingly, the court ruled

[1] Hunsche v. Alter, 145 N.E. 2d 368 (Ohio C.P. 1957). The first judicial limitation of Avellone v. St. John's Hospital, 165 Ohio St. 467, 135 N.E.2d 410 (1956).

[2] Hartough v. Brint, 101 Ohio App. 350, 140 N.E.2d 34 (1955).

[3] Gibson v. Johnston, 144 N.E.2d 310 (Ohio Ct. App. 1957).

[4] Rogers v. Toni Home Permanent Company, 139 N.E.2d 871 (Ohio Ct. App. 1957). There were, however, representations of quality by the manufacturer.

[5] Schindler v. The Standard Oil Co., 166 Ohio St. 391, 143 N.E.2d 133 (1957).

[6] 165 Ohio St. 549, 138 N.E.2d 391 (1956). This opinion as well as the complete history of libel *per se* in Ohio is ably discussed at Note, 9 WEST. RES. L. REV. 43 (1957).

[7] The court manifests its share of the widespread naïvete regarding the psychology of words, both from the point of view of the user and from the point of view of the listener or reader. For a study of this general problem, see *Symposium — The Language of Law*, 9 WEST. RES. L. REV. 117 (1958).

[8] 166 Ohio St. 31, 139 N.E.2d 10 (1956).

that plaintiff could and had made out a jury case under the principles of negligence law. The decision is in line with the trend across the country, applying the salutary principles of *McPherson v. Buick Co.*[9] to independent contractors as well as manufacturers.

In *Lacey v. Laird*,[10] the plaintiff was an eighteen year old girl who had asked defendant doctor to perform plastic surgery on her nose. Defendant complied but made no attempt to obtain the consent of the parents. In resolution of the plaintiff's suit for assault and battery, brought to salve at least supposed wounds of humiliation, the Supreme Court in a 4-3 disagreement held that this was not even a technical battery. The three minority judges stuck to the older technical view that twenty-one is the magic age of consent. Casting aside analogies of contract law, the majority relied on the policy reflected in the criminal law which allowed even younger girls to consent to other kinds of acts.

The remaining cases were all in some way related to the Ohio guest statute.[11] A sobering result was reached in *Zalewski v. Yancey*[12] in which it was held that the intoxication of the driver is no bar to his liability under the guest statute. In another case, an injured rider made an ingenious attempt to take himself out of the "guest" classification. Defendant driver had only a beginner's driving permit and asked plaintiff, who had the unqualified license, to come along so that defendant might drive legally and so get himself a "cup of coffee." The court rejected the argument, being unable to find any express contract or business relationship.[13]

In *Lewis v. Woodland*,[14] the female plaintiff was entering a car owned by one of the drivers. Supposedly as a practical joke, a life-like rubber lizard was exhibited to her in such a fashion as to cause her to "jump up and down" and "break her back and injure herself." This situation was held to be outside the scope of the guest statute because at the time of the incident the car was not in operation. Of further interest in the case is the disagreement of the deciding judges on a vital point. The majority held that since physical injury had not been intended the jury should determine whether the consequences were foreseeable. The concurring judge expressed his opinion that there was sufficient foreseeability to make the act culpable so that liability should follow for all consequences directly related to the "culpable" act. There is no

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[9] 217 N.Y. 382, 111 N.E. 1050 (1916).

[10] 166 Ohio St. 12, 139 N.E.2d 25 (1956).

[11] OHIO REV. CODE § 4515.02. For an excellent discussion of this statute and its interpretations, see Note, 8 WEST. RES. L. REV. 170 (1957).

[12] 101 Ohio App. 501, 140 N.E.2d 592 (1956).

[13] Sabo v. Marn, 144 N.E.2d 248 (Ohio Ct. App. 1957).