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Torts

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the court of appeals determined the relative priority of mechanics' liens and the United States general lien for taxes assessed after the first work performed by the materialmen. The probate court had determined that the mechanics' liens (four in number) had priority over the tax liens of the United States which all attached later than the commencement of work. In reversing the decision of the probate court, the court of appeals assumed that mechanics' liens had not become choate in the federal sense before the tax liens attached. The court concluded that the mechanics' liens were not within the favored class against which priority dates only from the filing of the federal lien and therefore granted the federal tax lien priority over these inchoate mechanics' liens.

MAURICE S. CULP

TORTS

Traffic Victims[1]

If an Ohio lawyer wanted evidence supporting a currently mounting feeling that traffic cases need to be handled in a special way, he could find it in a few of the cases reported last year.

Laughlin v. City of Cleveland[2] is a case in point. A reading of both majority and dissenting opinions shows what is really true of almost all cases: the considerable difficulty in determining what actually happened. The collision between plaintiff's car and defendant's bus apparently *was* known to have occurred in a five point intersection controlled by traffic lights as well as stop signs. Both parties were held under the circumstances to have equal rights to enter the intersection. Of course, both parties claimed to have proceeded with caution. Now it is up to a jury to determine if one or the other or both drove negligently. Clearly, such a "fact" cannot be determined scientifically. If only there could be an end to two-valued thinking, liable or not liable, all or nothing, a judge could be allowed in such a case to decide that apportionment of damages was the only answer. Unfortunately, there are presently no strong pressure groups to sponsor such a cause before the Ohio legislature.

Of course, pressure groups do sponsor other kinds of legislation. Certain insurance company groups are known to have sponsored the various guest statutes across the country. But the Ohio Supreme Court seems

1. The phrase is pilfered from Leon Green's recent work of the same name, a work which should be read by every lawyer as a matter of general education. See a review of the book in 10 WEST. RES. L. REV. 186 (1959).

2. 148 N.E.2d 347 (Ohio Ct. App. 1958).

in one instance to have forgotten how such legislation gets on the books. In *Lombardo v. DeShance*[3] a passenger, who claimed to be so intoxicated that she did not know what she was doing, was held to be a "guest" rider so that she could recover in her suit for personal injuries only by proving the wilfullness or wantonness of the host defendant. Plaintiff had argued, plausibly enough, that she could not be a "guest" if she did not know enough to accept the proffered hospitality. Some states had taken just this view in the analagous situation of child-passengers. The rationale offered by the court for its decision was that guest statutes were passed to avoid the spectre of one person accepting the kindness or hospitality of another and suing for "mere" negligence. This kind of reasoning makes for hard chewing in this day of rapidly changing views on the traffic problem. I choose to believe that the judges on this court were speaking euphemistically. There are a number of situations in which one person may accept another person's hospitality and then sue him for mere negligence.[4] Furthermore, the average reasonable and hospitable driver is not going to be offended by such a suit because he will have adequate insurance coverage. Of course the insurance companies will care. Admittedly, a different result might encourage the collusion the guest statute was designed to prevent. However, the judges on this particular court chose not to discuss these more significant facets of the case.

Yet there are times when the court does allow itself to be visibly affected by the insurance back drop of personal injury litigation.[5] There will be more and more of this kind of realism. Indeed, the day is foreseeable when automobile cases and a great many other so-called tort cases may be handled by a law school in its class on Insurance. In this respect, consider *Brewer v. DeCant*.[6] Plaintiff had been hit by a car purchased by one DeCant. Under the law of sales, the "title" had passed from the used car dealer to DeCant. Formerly it would have followed that complete responsibility for the car was in DeCant. In Ohio, however, the law of sales is conditioned in automobile transactions by the Certificate of Title Act.[7] Therefore, since the dealer had not satisfied all the technical requirements of the Act, the certificate of title was still

3. 167 Ohio St. 431, 149 N.E.2d 914 (1958), see also 10 WEST. RES. L. REV. 312 (1959).

4. Consider, for instance, the greater spectre of an ungrateful person suing the good samaritan expert on first aid for the latter's negligence.

5. One of the outstanding recent examples was Avellone v. St. John's Hospital, 165 Ohio St. 467, 135 N.E.2d 410 (1956), removing the immunity of charitable hospitals for the torts of their servants.

6. 167 Ohio St. 411, 149 N.E.2d 166 (1958). See discussion in INSURANCE and SALES sections, *supra*.

7. OHIO REV. CODE § 4505.04.

in the dealer's name. The result was that DeCant was liable but that the dealer's insurance company was the ultimate obligor. The doctrine is sound enough. The result will probably seem sound, too, at least to plaintiffs' attorneys as well as those who believe in spreading the risk of traffic accidents over larger groups. It is highly unlikely that there was any other insurance covering this car at the time of the accident. It will be interesting to see if dealers and their insurers in any way change their marketing practices.

Up for the second time was *Lehman v. Haynam.*[8] Plaintiff had sued defendant for damages inflicted when defendant's automobile crossed over the center line of the highway to collide with plaintiff's car. On the first appeal, the supreme court had allowed defendant to raise the defense of unforeseeable unconsciousness. The second appeal brought a new trial because of unfairness in the previous trial, but the court in passing established that the defendant need not prove *exactly* why he blacked out. His testimony alone to the effect that he did black out will make a jury case.

Proof that the driver who strikes from the rear will likely pay comes from *Beauchamp v. B.&L. Motor Freight, Inc.*[9] The defendant carrier owned and operated a tractor-trailer which had defective brakes. The operator took the tractor into a nearby mechanic who "repaired" them. Subsequently the outfit ran into a car, causing an accordion action and damage to several cars ahead in the line. The several drivers sued defendant. The court held that the general inference of negligence arising from such a rear-end collision had not been sufficiently rebutted to keep the case from the jury, particularly since there was still a question for the jury as to whether the driver had been negligent in his selection of a mechanic. The decision at least proves that there are various ways to get a case to a jury.

Distributed Injuries

The most prevalent concern of the law of torts is with injuries which arise out of the complex aspects of our technological activities. One discernible pattern in these activities is that of automobile traffic. Another such pattern arises out of the manufacturing-distributing-purchasing-consuming complex together with what we might appropriately call distributed injuries. For this reason, in such a survey as this, I must pay some attention to the warranty cases insofar as they involve such injuries. Let such matters be the exclusive concern of the surveys in Contracts or Sales

8. 104 Ohio App. 198, 147 N.E.2d 870 (1957). See comment on the previous decision in *Survey*, 8 WEST. RES. L. REV. 376 (1957).
9. 152 N.E.2d 334 (Ohio Ct. App. 1958).

only insofar as they involve problems of bickering and dickering over the terms and the performance of contracts for the sale of goods.

Rogers v. Toni Home Permanent Co.[10] of course highlights this area. A lady whose hair and scalp were injured through the use of a home permanent kit was allowed a suit for breach of warranty against the manufacturer. The doctrinal technicalities need not concern us here. Suffice it to say that Ohio now joins in the trend toward spreading this kind of risk over the entire consuming public (no matter how much it may understandably hurt the very soul of the defendant lawyer), by imposing strict liability on manufacturers who seem too much to have been avoiding responsibility for their marketing practices.

The court has not gone all the way, however. Three judges would not go so far in the *Toni* case. And in a case decided only weeks previously to *Toni,* the court refused to upset the privity bar to a suit, involving an electric frying pan, brought by a lady who claimed she was hurt because of the pan's defective condition.[11] Of course she could have sued the seller for breach of warranty if she had personally purchased the frying pan. That is the law, as they say.

A lower court apparently would go even further than *Toni.* In *Markovich v. McKesson & Robbins*[12] another home permanent kit was involved. The court would impose liability on the basis of an implied warranty. Generally speaking, the express warranty found in the *Toni* case is a little harder to substantiate. Implied warranties, on the other hand, need little more than a favorable judicial attitude.

Workmen's Compensation and the New Look in FELA

Two lower court decisions will help to prevent forum shopping in F.E.L.A. suits. In both *Harris v. Penn. Rd. Co.*[13] and *Barbour v. Baltimore & Ohio Rd. Co.*[14] will be found implicit approval of the Federal move to make F.E.L.A. an improved form of Workmen's Compensation with a "more adequate award." The method is simple enough and approved by the Supreme Court of the United States: send such cases to juries to find "negligence" on the very slightest of evidence.

On the other hand, the Ohio Supreme Court encourages forum shop-

10. 167 Ohio St. 244, 147 N.E.2d 612 (1958). See also 9 WEST. RES. L. REV. 511 (1958).

11. Welsh v. Ledyard, 167 Ohio St. 57, 146 N.E.2d 299 (1958). This was a suit against the dealer, a difference of some significance.

12. 149 N.E.2d 181 (Ohio Ct. App. 1958).

13. 146 N.E.2d 744 (Ohio Ct. App. 1957).

14. 152 N.E.2d 134 (Ohio Ct. App. 1957).

ping in another kind of case. In *Ellis v. Garwood*[15] the widow of a deceased worker was allowed to sue a fellow employee of the deceased, the person who had allegedly negligently killed her husband in an automobile accident in Ohio. Earlier she had been compensated under the New York Workmen's Compensation Act because her husband had been in the course of his employment for his New York employer. That act provided that her remedy under the act was exclusive. The remedy under the Ohio act is exclusive only as to the liability of the employer.

Right To Work

While the people of Ohio rejected the so-called Right to Work measure last November, the Ohio high court had previously given recognition to a tort which might properly be called the invasion of the right to work. The plaintiff had sued his union and certain of its officials for conspiring to deprive him of his job. The union protested that Ohio courts were without jurisdiction to hear a labor relations controversy. But this was a tort, said the court. Plaintiff was harmed in his relationship with his employer with a resultant loss of money.[16]

Hospitals and Causation

Hospitals may no longer be immune from liability for the negligence of their servants, but there are still means available to lower courts to favor the former immunity. In *Kletrovetz v. Grant Hospital*[17] the plaintiff sued the defendant hospital for negligence in failing to place guards on her bed and thus causing her to fall and suffer damage while under the influence of a "hynotic dose." Judgment on the pleadings was given for defendant on the theory that the proximate cause of the injury must be established by the plaintiff. "Where two or more reasonable inferences may be drawn from established facts it can not be presumed that the injury occurred in a manner which would give rise to liability."[18] This reasoning seems to run counter to the usual notion that the test of a prima facie case is whether a jury might reasonably decide the facts in plaintiff's favor. Then it becomes the jury's function to determine if plaintiff has established his case by a preponderance of the evidence.

15. 168 Ohio St. 241, 152 N.E.2d 100 (1958). 10 WEST. RES. L. REV. 318 (1959). See also discussion in CONFLICTS section, *supra* and in WORKMEN'S COMPENSATION section, *infra*.

16. Perko v. Local No. 207 of International Assoc. of Bridge Structual and Ornamental Iron Workers Union, 168 Ohio St. 16, 151 N.E.2d 742 (1958). See also ADMINISTRATIVE and LABOR LAW sections, *supra*.

17. 152 N.E.2d 149 (Ohio Ct. App. 1958).

18. *Id.* at 151.