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Torts--Willful and Wanton Misconduct When Driving While Intoxicated

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The question of the right of a federal court to enjoin a strike had similarly been resolved in prior lower court decisions.[16] In the past, injunctions had been granted by district courts under section 208 when there had been a strike by bituminous coal workers,[17] a threatened strike by West Coast longshoremen,[18] walkouts tying up the North Atlantic maritime industry,[19] and a strike of 1500 steelworkers engaged in producing materials for the Atomic Energy Commission during the Korean War.[20] Often these injunctions were issued when impediments to the national health or safety were less substantial than in the present case. In none of these cases did the district courts distinguish between whether national safety, national health, or both, was imperiled. Rather, the courts construed the "national health or safety" clause in a broad sense. They used the general welfare of the nation as the criterion for determining whether or not to issue an injunction.

It is apparent that in its first encounter with this problem the Supreme Court has succeeded in creating a strong precedent. A brief but lucid analysis of the "national health or safety" clause was made by the Court. The majority declared that when either "national health or national safety" was imperiled, an injunction would lie. Further, although the meaning of "national health" was not resolved, the Court construed "national safety" to mean, that required to satisfy the nation's defense needs.[21] The concurring justices said that a finding of peril to "national safety" was itself sufficient to satisfy the second condition in section 208.[22]

There can be no doubt that the two separate conditions necessary for the issuance of an injunction as provided in section 208 of the Taft-Hartley Act, were satisfied. Since a nation-wide strike in a vital industry often impedes our defense and space programs, injunctions must be permissible under the law in such instances. In view of this, the Supreme Court's decision is unassailable.

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TORTS — WILLFUL AND WANTON MISCONDUCT WHEN DRIVING WHILE INTOXICATED

In *White v. Harvey*,[1] the plaintiff sued to recover damages for injuries received when defendant's car, in which she was a passenger, collided with a parked truck. The trial court sustained defendant's

16. *Ibid.*

17. United States v. United Mine Workers of America, 89 F. Supp. 187 (D.D.C. 1950), *aff'd*, 190 F.2d 865 (D.C. Cir. 1951).

18. United States v. International Longshoremen, 78 F. Supp. 710 (N.D. Cal. 1948).

19. United States v. International Longshoremen, 116 F. Supp. 255 (S.D.N.Y. 1953).

20. United States v. American Locomotive Co., 109 F. Supp. 78 (W.D.N.Y. 1952).

21. United Steelworkers of America v. United States, 361 U.S. 39, 42 (1959).

22. *Id.* at 55 (concurring opinion).

demurrer, and when plaintiff failed to plead further, judgment was entered for the defendant, and the court of appeals affirmed. The Ohio Supreme Court, in a four to three decision, reversed and remanded the case for further proceedings on the ground that the petition sufficiently alleged willful and wanton misconduct by the defendant, thereby taking the plaintiff outside of the guest statute.[2]

The Ohio guest statute extinguishes the common-law liability for ordinary negligence on the part of the driver which results in injury to a guest riding in his motor vehicle. The statute provides that a guest[3] can successfully maintain an action for damages only when the injuries are caused by the willful and wanton misconduct of the operator.[4] Further, the injured party must plead unequivocally that the operator of the motor vehicle had knowledge of existing conditions,[5] and allege facts that reveal on their face the elements of the proscribed conduct, or else the pleading is demurrable.[6]

The problem confronting the court in the *Harvey* case was whether the plaintiff had sufficiently alleged facts showing willful and wanton misconduct by the defendant. The plaintiff alleged (1) that defendant knew that vehicles were often parked on the paved portion of the highway; (2) that defendant drove at a "fairly good speed" at night, although he knew he could not, because of his intoxicated condition, keep any lookout; (3) that defendant was indifferent to the consequences of his acts and was ready and willing to take chances even at the risk of danger to himself; and (4) that defendant knew that his conduct would, in all probability, result in injury to plaintiff.

The majority of the court was not willing to state that drunkenness and willful or wanton misconduct were inconsistent allegations so as to require abandonment of the petition. They stated that even though the plaintiff may have difficulty proving what she had alleged, sufficient facts had been pleaded alleging willful and wanton misconduct to stand against demurrer. Three justices dissented on the ground that they could not see how one who loses his reason by

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1. 170 Ohio St. 262, 163 N.E.2d 898 (1960).

2. OHIO REV. CODE § 4515.02. "The . . . operator . . . of a motor vehicle shall not be liable for loss or damage arising from injuries to or death of a guest, resulting from the operation of such motor vehicle, while such guest is being transported without payment therefor . . . unless such injuries or death are caused by the willful or wanton misconduct of such operator . . . of said motor vehicle."

3. To create the relationship of host and guest within the meaning of the guest statute, the privilege of riding afforded the passenger must be entirely gratuitous, and no benefit can flow to the host. Vest v. Kramer, 111 N.E.2d 696 (Ohio Ct. App. 1951).

4. Vecchio v. Vecchio, 131 Ohio St. 59, 1 N.E.2d 624 (1936) (syllabus 1).

5. *Id.* at syllabus 3.

6. Vecchio v. Vecchio, 131 Ohio St. 59, 1 N.E.2d 624 (1936); Universal Concrete Pipe Co v. Bassett, 130 Ohio St. 567, 200 N.E. 843 (1936).

becoming intoxicated can subsequently exercise his lost reason by indulging in *willful* conduct.[7]

It has generally been held that driving while intoxicated will not be enough, in and of itself, to justify submitting to the jury the question of whether such driving amounted to willful or wanton misconduct.[8] What is sufficient to constitute willful misconduct by a motorist depends upon the facts of the particular situation.[9] It is such conduct as manifests a disposition to perversity,[10] and involves the doing of an act in disregard of a risk known to him, or so obvious that he must be taken to have been aware of it, or so great as to make it highly probable that harm would follow.[11]

Thus, the question is whether one who is under the influence of intoxicating liquor can possibly act in a willful or wanton manner. Since people react to liquor in different ways, an amount consumed by one person may make him drunk, whereas the same amount may leave another sober.[12] It is possible that one may be intoxicated to such an extent as to be unable to form an intent to do wrong or deviate from a clear-cut duty,[13] and have no knowledge of the risk involved in his conduct.[14] On the other hand, it is possible for one to become intoxicated only to such a degree that his judgment is partially impaired. Although he may be violating the state statute[15] by driving while under the influence of intoxicating liquors, he may still have a sufficiently clear mind to realize what is happening and to conduct himself in such a manner as to have a complete disregard for the safety of himself and others, and be conscious that his conduct will, in all probability, result in injury to his passenger. Thus, the court should not have been reluctant to hold consistent plaintiff's allegations of intoxication and willful and wanton misconduct.

The fact that one may be guilty of willful or wanton misconduct when driving while intoxicated does not alter the generally accepted rule that driving while intoxicated is not, in and of itself, willful and wanton misconduct.[16] Petitions that allege drunkenness on the part of the defendant will not circumvent the requirement of pleading such misconduct in guest-statute situations, and should be demurrable. In

7. White v. Harvey, 170 Ohio St. 262, 267, 163 N.E.2d 898, 901 (1960) (dissenting opinion).

8. Bielawski v. Nicks, 290 Mich. 401, 287 N.W. 560 (1939); O'Rourke v. Gunsley, 154 Ohio St. 375, 96 N.E.2d 1 (1950).

9. Cowgill v. Boock, 189 Ore. 282, 218 P.2d 445 (1950).

10. Masters v. New York Cent. R.R., 147 Ohio St. 293, 70 N.E.2d 898 (1947); Universal Concrete Co. v. Bassett, 130 Ohio St. 567, 200 N.E. 843 (1936).

11. Helleren v. Dixon, 152 Ohio St. 40, 86 N.E.2d 777 (1949); Tighe v. Diamond, 149 Ohio St. 520, 80 N.E.2d 122 (1948); PROSSER, TORTS 150 (2d ed. 1955).

12. See generally Grimm, *The Drunken Driver*, 43 OHIO OP. 61 (1951).

13. Tighe v. Diamond, 149 Ohio St. 520, 80 N.E.2d 122 (1948).

14. Thomas v. Foody, 54 Ohio App. 423, 7 N.E.2d 820 (1936).

15. OHIO REV. CODE § 4511.19.

16. Davis v. Hollowell, 326 Mich. 673, 40 N.W.2d 641 (1950).

addition to the intoxication of the driver, facts must be alleged showing willful or wanton misconduct. After pleading such additional facts, the plaintiff may put himself in an untenable position concerning proof. If it is alleged that the defendant was so intoxicated as to cause him to lose consciousness temporarily, the petition may be subject to demurrer on the ground that unconsciousness and willful or wanton misconduct are inconsistent. Should the petition stand against demurrer, the plaintiff may still have considerable difficulty in proving that the defendant could form an intention to do wrong, or to deviate from a rule of conduct.

It is clear from the decision in *White v. Harvey* that a petition alleging intoxication and willful and wanton misconduct will stand against demurrer. Moreover, it is suggested that such allegations are not incapable of proof where the defendant is in a lesser state of intoxication. A showing in court of the defendant's knowledge of existing circumstances, and of conduct and statements made by him prior to and after the accident, may prove that the defendant knew what he was doing, yet maintained an indifferent attitude toward the consequences of his acts. Drunkenness which has not made the operator of an automobile unconscious or entirely helpless should not always absolve him from liability for injury to his guest when the accident and injury are caused by the operator's act and conduct which, if he were sober, would evince a reckless disregard of the rights of others.

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