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Torts

Justin C. Smith

court then concluded that its function was not to substitute its judgment for that of the Board on these factual issues, but rather to determine from the evidence presented whether the Board's decision is unreasonable or unlawful.

The current position of the Tax Commissioner regarding the taxability of packaging and wrapping materials was set forth in a letter from the Tax Commissioner dated August 25, 1960.[23] The Department of Taxation has taken the position that the tax applies to "purchases of material, the purpose of which is to facilitate, or make convenient, the shipment of products."[24] In his letter the Commissioner recognizes that certain manufacturing, assembling, processing, and refining operations result in a packaged product in which the package is incorporated as part of the product. However, the Commissioner distinguishes this from other operations "which result in a finished product which may subsequently be packed, packaged, or otherwise adapted to convenient handling, storage, or shipment."[25]

FRED SIEGEL

TORTS

INTRODUCTION

The bulk of significant tort decisions during the current survey period have fallen into two major categories. First, cases concerning care of the sick and disabled, and second, actions arising out of the incident of ownership or possession of real property.

CARE OF THE SICK AND DISABLED

With respect to the first of these two categories some comment is appropriate with regard to the growing number of tort actions that are being instituted both against the individual physician and the hospital. The scope of this trend is not limited to Ohio nor to a particular geographical area, but rather is nationwide in its impact. The legal profession has been sharply criticized by physicians and medical organizations for its role in this type of litigation.[1] A more thoughtful analysis of the problem indicates that the condition is more the result of the inter-play of several outside forces rather than a clearly defined causal relationship, as the prognostication might indicate. One of the several

23. Reported in 2 CCH OHIO TAX REP. ¶ 60-216 (1960).

24. See United States Steel Corp. v. Bowers, 170 Ohio St. 558, 167 N.E.2d 87 (1960).

25. This letter construes OHIO REV. CODE § 5739.01.

factors to be considered is the effect of the various national mass media on the "image" of the medical profession. At present there appears to be a correlation between derogatory themes directed against the medical practitioners and institutions and the increase in the frequency of requests for legal counseling in pressing actions for malpractice. As the "image" has altered over the last quarter century so has the required standard of care necessary to discharge the physician's duty to his patient. Today the prevailing attitude assumes that all error is culpable, and for every error or omission someone must pay. The attitude is synonymous with that which had its inception over a century ago, respondeat superior, the able master must pay.

It is apparent that any unjustified financial exposure to the physician and the resulting encumbrance upon medical research must be judiciously limited in the best interests of society. This requires the utmost in judicial clarity in defining tort liability and the level of care necessary to discharge the physicians' duty. Current developments in the areas of diagnosis and treatment have made the label "malpractice" obsolete by their complexities. A more definitive term is "errors and omissions." It conveys a less onerous meaning in that it is not as prejudicial to the defendant's rights and reputation and at the same time is more specific in that it allows a clearer and more concise delineation of the errors charged. Such a phrase might well be substituted in the best interests of justice and fair play.

Cause of Action — Plaintiff's Rights and the Statute of Limitations

Against this very general setting it is no wonder that the medical profession in Ohio has received with some concern the appellate court's decision in *Stidam v. Ashmore.*[2] This was a case of first impression on the subject of whether a mother has a cause of action for the wrongful death of her viable unborn child, subsequently stillborn due to the alleged negligence of the attending physician. A demurrer to the plaintiff's petition had been sustained, and the petition then dismissed by the trial court. Prior to this time Ohio had recognized a cause of action for injuries sustained by an unborn child[3] and an administrator's right to bring an action for the wrongful death of a child born alive who subsequently succumbed from prenatal injuries.[4] In reversing the trial

1. A selective, but by no means exhaustive, survey by the author of medical journals over the past year indicates that scarcely an issue of general circulation reaches the physician's desk that does not contain an indictment of the legal profession for their diligence in pursuing malpractice claims.

2. 109 Ohio App. 431, 167 N.E.2d 106 (1959).

3. Williams v. Marion Rapid Transit, Inc., 152 Ohio St. 114, 87 N.E.2d 334 (1949).

4. Jasinsky v. Potts, 153 Ohio St. 529, 92 N.E.2d 809 (1950).

court's ruling on the demurrer the court of appeals declared, in a most persuasive opinion, that it would be illogical to cut off a right of redress merely because death preceded delivery. In effect the court has said that it will no longer refuse to hear these cases on policy grounds, but will allow the plaintiff to present his case despite the complexity of the burden of proof. More than any case reported during the survey period this decision reflects a growth in the law.

A different legal-medical question was presented by the facts in *Corpman v. Boyer.*[5] Presented on appeal was the sole question of whether a cause of action instituted by a husband to recover damages for his wife's medical expenses and the loss of consortium and services, is governed by the one-year statute of limitations for bringing malpractice suits,[6] or the four-year "catch-all" statute.[7] The operation had been performed on the plaintiff's spouse on December 9, 1955 and the action was not brought until October 17, 1958. In determining the statute of limitations question the court had to pass on the issue of whether a husband's claim for medical expenses and loss of services and consortium is a cause of action "growing out of," "founded upon" or "for" malpractice. The majority of the court speaking through Judge Peck found that "The statute itself describes the limited action as one 'for' malpractice . . . ."[8] Hence the one-year limitation did not apply to the facts of the instant case. In arriving at its decision the court overruled the decision of the Court of Appeals for Franklin County in *Cramer v. Price,*[9] which had held that a similar action by the husband was to be regarded as an action "for" malpractice, subject to the one-year "unfavored" statute of limitations.[10] In concluding its opinion the supreme court cited its previous pronouncement in *Klema v. St. Elizabeth's Hospital,*[11] which had been decided some three months earlier. This was a wrongful death action brought against the hospital for the alleged negligence of a foreign trained physician who was serving in the capacity of a "resident in anesthesia."[12] As this case relates to the previous case commented upon, the court held that the action was rightfully brought as a wrongful death

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5. 171 Ohio St. 233, 169 N.E.2d 14 (1960). See also discussion in *Civil Procedure* section, p. 456 *supra.*

6. OHIO REV. CODE § 2305.11.

7. OHIO REV. CODE § 2305.09(D).

8. 171 Ohio St. 233, 234, 169 N.E.2d 14, 15 (1960).

9. 84 Ohio App. 255, 82 N.E.2d 874 (1958).

10. See also Kraut v. Cleveland Ry., 132 Ohio St. 125, 5 N.E.2d 324 (1936). See discussion in *Civil Procedure* section, p. 457 *supra.*

11. 170 Ohio St. 519, 166 N.E.2d 765 (1960). See also discussion in *Civil Procedure* section, p. 457 *supra.*

12. It should be noted that the court did not consider it controlling that the resident was admitted to practice medicine in Italy but not in Ohio.

action to which the two-year statute of limitations applied,[13] and could not be classified as a malpractice action. However, the court stressed heavily the fact that if the deceased had brought an action for the injuries he had sustained, it would have been a malpractice action to which the one-year statute would have applied, regardless of whether the plaintiff's action had sounded in contract or tort.[14]

From an analysis of these cases it would appear that there are three distinct "bundles of rights," the violation of which will support a cause of action against the physician or the hospital. To the extent that these three groups may be described in terms of the statute of limitations which applies to the commencement of each, they are:

(1) An action for malpractice by the injured party for his personal loss and suffering. The injured party has one year in which to initiate the action after he is discharged by the physician or after he terminates the doctor-patient relationship himself. In either case should death subsequently intervene after the action is filed or when the action is timely filed, the proceeds go to the decedent's estate for the benefit of the creditors.

(2) An action for expenses sustained by the husband or wife in caring for the deceased spouse plus compensation for loss of conjugal relations and loss of services.[15] This action may be brought by the wife or husband within four years of the date of the alleged negligent act.[16]

(3) An action for the wrongful death of the deceased by the personal representative within two years, for the benefit of the class of survivors set forth in the statute.[17]

In the *Klema* case after deciding the action was not barred by the statute the court then turned to the question of whether a hospital could be held liable for the negligent act of an employee performing a "medical act" rather than an "administrative act." Judge Bell held that it is impractical to distinguish between "medical" and "administrative" acts, the proper test being whether the person committing the act was an employee functioning within the scope of his employment.[18] Although this result may seem unduly severe at times, it does have the advantage

13. 170 Ohio St. 519, 521, 166 N.E.2d 765, 767 (1960); see also OHIO REV. CODE § 2125.01.

14. *Id.* at 525, 166 N.E.2d at 771; see also OHIO REV. CODE § 2125.02.

15. It should be noted that Ohio does not recognize a right in the wife to sue for loss of consortium.

16. *Quaere:* Where costly prescribed post-operative care follows the operation, and the alleged negligent act which resulted from a faulty diagnosis causes disability, may the husband be compensated for such care and the loss of consortium and services during the entire period in which the patient was under the physician's care?

17. OHIO REV. CODE § 2125.02.

18. Klema v. St. Elizabeth's Hospital, 170 Ohio St. 519, 166 N.E.2d 765 (1960); see Bing v. Thunig, 2 N.Y.2d 656, 143 N.E.2d 3 (1957).

of certainty and provides a basis for advising hospitals on the amount of proper coverage to obtain.

Errors and Omissions by the Registered Nurse

Davis v. Eubanks[19] held that a registered nurse employed by a hospital but administering treatment to a patient, under the direction of the patient's physician, is a professional person. The court found that there was ample legislative history to support the proposition that a registered nurse "is engaged in a profession,"[20] and is no less of a professional person because she is employed by an institution. It also found that section 2305.11 of the Ohio Revised Code, the malpractice statute of limitations, is applicable to actions brought against a nurse acting in her professional capacity. Here the court relied on the following definition of malpractice taken from *Bouvier's Law Dictionary:*

> Bad or unskillful practice in . . . or other professional person, whereby the health of a patient is injured . . . .[21]

Thus, it would seem that there is no reason why the statute should not apply to the nurse whose alleged act of malpractice preceded the commencement of the suit by a period of more than a year. It removes the doctor's shield of protection from the registered nurse who is performing services which a doctor would otherwise perform. However, there are grounds for disputing the court's conclusion that if the action against the servant is barred, a derivative action against the master is similarly prohibited, in the absence of proof that the master was negligent in the selection and retention of the servant. Although malpractice is a disfavored action, it is in society's best interests that a tortiously injured party be compensated, and although the actor may be immune from suit the culpability of the act still exists. In a number of cases the courts have held that the immunity of the servant does not extend to the master.[22] In the face of recent supreme court decisions and with the widespread availability of liability insurance it seems wholly unjustified to extend this immunity to the hospitals. Another argument against this defense goes to the basic reasons why malpractice is a disfavored action. Certainly a close confidential relationship between hospital and patient can not be purported to exist nor does the patient in submitting to the ministrations of a nurse have the occasion to reflect on the qualifications of the individual, as he would in the normal physician-patient relationship. Further, it can not be asserted that the action brought against the

19. 167 N.E.2d 386 (Ohio C.P. 1960).

20. OHIO REV. CODE §§ 4723.01-.14.

21. 2 BOUVIER'S LAW DICTIONARY 2587 (8th ed. 1914).

22. See MECHEM, OUTLINES ON AGENCY §§ 421-23 (4th ed. 1952) for an excellent discussion of the subject.

hospital would serve to injure its reputation to the extent that the same action would if brought against the nurse. Since Ohio has adopted the view that a hospital incorporated as a nonprofit corporation is liable for the torts of its servants,[23] it seems there is little justification for denying recovery in the case commented upon.

Dual Standards of Care For Doctors and Interns

A rather inauspicious case is *Rush v. Akron General Hospital.*[24] This appellate decision indicates a dual standard for foreign doctors practicing as interns in Ohio as opposed to Ohio physicians in the same hospital. This unfortunate case arose from the plaintiff's admission to the hospital emergency ward following an altercation which saw him propelled through a glass door. Upon arrival at the hospital the patient was treated by the doctor-intern who inadvertently left a three and one half inch fragment of glass in the plaintiff's wound. Upon trial the following interrogatories were submitted to the jury:

> Question: Do you find that the defendant was negligent? Answer: Yes. Question: If your answer to interrogatory No. 1 is "Yes" state in what respect or respects the defendant was negligent. Answer: The defendant was negligent to the extent that the wound was sufficiently large to warrant calling the senior doctor in charge to examine the patient.[25]

Following entry of judgment upon the verdict, the court, upon motion of the defendant, entered final judgment notwithstanding the verdict. The disquieting aspect of the appellate opinion, which affirmed the lower court, is that after commenting on evidence advanced in the course of the trial to the effect that the "ministrations of the intern show no deviation from the standard of care, diligence or skill employed in the examination and treatment of such cases . . . in this community," Judge Doyle speaking for the court observed:

> It would be unreasonable to exact from an intern . . . that high degree of skill which is impliedly possessed by a physician and surgeon in the general practice of his profession, with an extensive and constant practice in hospitals and the community.[26]

Cognizance should be taken that the party referred to is a doctor licensed to practice medicine in another state and only his failure to take advantage of Ohio's reciprocity statute[27] prevented him from becoming a physician in Ohio. He was presumably held out to the community on a

23. Avellone v. St. John's Hospital, 165 Ohio St. 467, 135 N.E.2d 410 (1956).
24. 84 Ohio L. Abs. 292 (Ct. App. 1957).
25. *Id.* at 293.
26. *Id.* at 295.
27. OHIO REV. CODE § 4731.27.

"24-hour tour of duty" to serve patients coming to the hospital's emergency room. Concluding its opinion the court went on to say:

> What is required in the case of an intern is that he shall possess such skill and use such care and diligence in the handling of emergency cases as capable medical college graduates serving hospitals as interns ordinarily possess under similar circumstances . . . .[28]

This may be the subjective standard used by the jury in reaching its verdict. It is extremely doubtful that it is the objective standard used by the majority of the courts on appeal. The standard on appeal would seem to be that standard of care exercised by doctors in the community with consideration being given to the care which this profession would exercise in the same or a like situation. While the law does recognize that there are different schools of medicine, there would seem to be little justification in creating still another category, that of interns in the same or similar localities.

Treatment In Absentia

A final case in the medical-legal area presented the question of whether a hospital can be held liable for the refusal of its staff to perform certain acts in connection with the care of a patient where no authority to do so has been given the hospital or staff by the surgeon in charge. The facts in *Shutts v. Siehl*[29] do not suggest anything unusual apart from the fact that the surgeon who had operated on the patient had temporarily absented himself from the community after first satisfying himself that the patient was convalescing in a satisfactory manner. The record disclosed that the patient had made requests for medication for his discomfort prior to and after the doctor's departure and that the defendant hospital had made reasonable efforts to ascertain the nature of that discomfort. However, since no specific instructions regarding medications out of the norm had been given such steps were not taken. In such a case where the nature of the condition is something short of an emergency the hospital is clearly in a dilemma. May they on their own depart from the treatment prescribed or must they first secure the permission of the physician if this is reasonably feasible under the existing facts? The opinion of the Court of Appeals for Montgomery County would appear to affirm the fact that the selection of a specific line of treatment is still in the hands of the attending physician.

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28. Rush v. Akron General Hospital, 84 Ohio L. Abs. 292, 295 (Ct. App. 1957).

29. 109 Ohio App. 145, 164 N.E.2d 443 (1959).

Hospital Immunity in Ohio

Gibbon v. YWCA[30] has been given thorough treatment in other articles.[31] In that case the court found no compelling reasons to remove the charitable immunity from a YWCA, as it had done from hospitals in *Avellone v. St. John's Hospital.*[32] Of concern here is the scope of paragraph one of the court's syllabus which recites as follows:

> A charitable or eleemosynary institution, other than one which has as its purpose the maintenance and operation of a hospital, is, as a matter of public policy not liable for tortious injury except (1) when the injured person is not a beneficiary of the institution, and (2) when a beneficiary suffers harm as a result of failure of the institution to exercise due care in the selection or retention of an employee.[33]

This statement by implication would seem to delineate the scope of the court's 1956 holding in *Avellone,* which provided that a suitable definition can be arrived at as to what constitutes a "hospital" in keeping with the underlying considerations of current cases. Certainly the small suburban clinic or nursing home are no less hospitals simply because they operate under different names. Indeed, support for this position can be found in Judge Putnam's dissent in the *Avellone* case:

> Although the instant case involves the liability of a charitable hospital, [the logic behind this rule] . . . applies to all public charitable institutions . . . various homes for the aged . . . .[34]

Whether the extension of this doctrine should be made to cover other related institutions such as nursing homes is questionable at this time. However, if the populous must wait for the legislature to act, the court may have to intervene as they did in *Avellone.* Certainly liability protection is no less available to the nursing home than it is to the urban hospital and the injury no less onerous when it occurs late in life.

TORT LIABILITY OF OWNERS AND POSSESSORS OF REAL PROPERTY

Persons on the Premises of Others

The survey period saw the publication of a number of decisions touching on the tort liability of owners and possessors of real property. *Morgenstern v. Austin*[35] offers a good point of departure into this area. The

30. 170 Ohio St. 280, 164 N.E.2d 563 (1960).

31. For complete discussions of the *Gibbon* case and its relation to the *Avellone* decision see 74 HARV. L. REV. 614 (1961), and 11 WEST. RES. L. REV. 680 (1960).

32. 165 Ohio St. 467, 135 N.E.2d 410 (1956).

33. Gibbon v. YWCA, 170 Ohio St. 280, 164 N.E.2d 563 (1960).

34. 165 Ohio St. 467, 479, 135 N.E.2d 410, 418 (1956), (dissenting opinion).

35. 170 Ohio St. 113, 162 N.E.2d 849 (1959). See also discussion in *Civil Procedure* section, p. 460 *supra.*

action was instituted by the owner of a warehouse against his neighbor for damage to his roof occasioned by children who used the defendant's shed to gain access to the plaintiff's structure. According to the court the "essential allegations" of the plaintiff's petition are as follows:

> Plaintiff . . . says that defendant has built said shed . . . as to violate the rules and ordinances of the city of Cleveland . . . , that said defendant so constructed said shed as to cause it to be . . . an attractive nuisance . . . , that young children are attracted to play about and on top of said shed and thereby be able to crawl upon the plaintiff's warehouse building, causing much damage to be done to the same.[36]

After commenting on the fact that the principal question before the court was whether the trial judge erred in overruling defendant's motion for a directed verdict the court went on to say:

> An examination of the petition in the instant case demonstrates that the action against the defendant is predicated solely upon the ground of attractive nuisance. The doctrine of attractive nuisance has been repudiated in Ohio . . . . Thus no matter what plaintiff pleads or proves she can not recover under such doctrine in Ohio since she neither states nor proved a cause of action.[37]

Although it is difficult to believe that the court actually meant what it impliedly said, if this is the case, then the opinion raises several questions.

Prosser's *Law of Torts* devotes considerable space to clearing up the many misnomers surrounding the subject of nuisance.[38] One of the first points that Dean Prosser makes in discussing nuisance is that a private nuisance is the term applied to an unreasonable interference with the interests of an individual in the use or enjoyment of land,[39] and that nuisance is a field of tort liability rather than a type of tortious conduct.[40] Ohio lumps diverse conduct ranging from "anything which endangers life or health" to "the wrongful invasion of personal rights"[41] under the heading of nuisance and follows the majority of jurisdictions in so doing. The fact that Ohio recognizes a variety of conduct as constituting a nuisance should have aided the plaintiff in the *Morgenstern* case. His structure had been damaged directly as a result of the defendant's shed being used as a "bridge" to his property. Furthermore, the shed had been built in violation of the municipal building code and set-back ordinances which suggests an action for perpetration of a private nuisance. To deny a recovery under these facts would suggest that Ohio is now committed to follow the minority view that the plaintiff must resort to self-help in

36. *Id.* at 113, 162 N.E.2d at 850.
37. *Id.* at 115, 162 N.E.2d at 851.
38. PROSSER, LAW OF TORTS 389-426 (2d ed. 1955).
39. *Id.* at 389.
40. *Id.* at 391.
41. See 41 OHIO JUR. 2d *Nuisance* §§ 1-14 (1960), especially § 2.

abating a nuisance of this type rather than relying on the judicial processes.

The pleading problem posed by this case will be commented upon in detail elsewhere,[42] but some mention should be made of the fact that the court apparently found the descriptive term "attractive" a fatal defect in plaintiff's petition. Read as a whole, the petition stated "a cause of action sounding in nuisance." Therefore, the distinction between the use of the term, "attractive" nuisance, in a descriptive sense and the "doctrine making the occupier of land liable for conditions which are highly dangerous to trespassing children,"[43] should have been clear. Whatever impact this case may have on the law of nuisance in Ohio, one thing is apparent; if the plaintiff is seeking to describe a type of nuisance he had better be sure that no ambiguity arises through the use of the descriptive adjective, "attractive."

Unlike the previous case involving trespass to land, *Comerford v. Jones & Laughlin Steel Corporation*[44] raises problems concerning individuals lawfully upon the land of another. In this case the court affirmed the rule that where the general contractor does not have control over the place of employment he is not liable for injuries sustained by the employee of a subcontractor. Involved in this case was Ohio's "frequenter" statute which provides quite simply:

> Every employer shall . . . furnish a place of employment which shall be safe for the employees therein and the frequenters thereof . . . .[45]

Passing on the question of whether the defendant, a general contractor, owed the plaintiff a duty under the statute, the court wisely chose to relate an employer's duty to the question of whether the employer had control over the premises with respect to providing for the safety of the nonemployees. Judge Peck, in his opinion, noted that this was not a case where the defendant knew of a dangerous condition and failed to warn the plaintiff of the situation. Thus, it is control per se rather than mere presence that raises the duty under the "frequenter" statute.

A third case under this particular heading suggests that even an abject tenant may on occasion have his day in court. *Weidner v. Schottenstein*[46] involved an action brought by a tenant who inadvertently stepped onto a defective cover of a sunken garbage can assigned to a fellow tenant and suffered injuries occasioned by her percipetation downward. By way of defense the landlord alleged that the tenant in proceeding to the apartment from her garage, trespassed into an area exclusively in the posses-

42. See discussion in *Civil Procedure* section, p. 460 *supra.*
43. PROSSER, LAW OF TORTS 438 (2d ed. 1955).
44. 170 Ohio St. 117, 162 N.E.2d 861 (1959).
45. OHIO REV. CODE § 4101.11.
46. 169 N.E.2d 304 (Ohio Ct. App. 1960).

sion and control of her fellow tenant. The Court of Appeals for Franklin County rejected the defense commenting: ". . . assuming, however, that the plaintiff trespassed a few inches, that fact would not necessarily bar recovery."[47] The court accepted the majority view that while a landlord may be under no obligation to repair the leased premises he may nevertheless be liable for damages sustained as a result of his negligence in caring for the adjacent premises. Thus, the negligence of the defendant and the possible contributory negligence of the plaintiff were for the jury to decide.

Children at Large

In view of the fact that some states afford special recognition to the rights, responsibilities, and propensitites of children, it seems appropriate to treat the injured child under a separate heading. Although Ohio does not follow the doctrine of "attractive nuisance,"[48] notwithstanding the protestations of some that it is the vanguard of the enlightened,[49] a separate treatment of a case arising this year suggests that the doctrine may have some merit. *Rose v. Lerkis*,[50] involved a two-year-old youngster who was injured when she stepped onto a neighbor's new asphalt driveway. The facts suggest that her plight was not discovered until someone noticed her standing barefooted in the hot asphalt. The Court of Appeals for Summit County in a short but pointed opinion found that (a) an independent contractor is entitled to the same immunities from liability as is the owner of the property upon which he is working, and (b) a child of tender years, like any other licensee, takes the property as he finds it, save for wanton or wilfull misconduct directed toward him. Although apparently the plaintiff did not choose to allege it, a cause of action might have been made out under the "frequenter" statute.[51] However, in his attempt to broaden the scope of the statute, counsel would have had to urge the court to distinguish the *Rose* case from *Morgan v. Wehrung*.[52] In that case the plaintiff, following an evening of night club entertainment sought a ride home with a newly acquired friend who offered to meet him at an adjacent parking ramp. After a somewhat belated arrival at the ramp, the plaintiff, Morgan, instituted a search for his benefactor which terminated in his subsequent fall from the building. The court held that the "frequenter" statute did not apply.

Certainly the distinction between the wanderings of a two-year-old

47. *Id.* at 307.
48. 39 OHIO JUR. 2d *Negligence* § 75 (1959).
49. PROSSER, LAW OF TORTS 438 (2d ed. 1955).
50. 110 Ohio App. 100, 168 N.E.2d 422 (1958).
51. OHIO REV. CODE § 4101.11.
52. 103 N.E.2d 789 (Ohio Ct. App. 1951).

child, one of a group of children playing in an abutting yard, and the amblings of a gentleman, dazed from an evening of libation, can be made. The mere fact that the statute was placed in the "Labor and Industry" section of the Code does not preclude its use by those not of the working class. If the legislature had this view in mind it would have restricted the class benefited to "invitees" rather than the more inclusive term "frequenters," which includes all save the trespasser.

CONTRIBUTORY NEGLIGENCE V. COMPARATIVE NEGLIGENCE

A strong case for the adoption of the doctrine of comparative negligence[53] may be made from an evaluation of the results achieved in *Harper v. Henry*.[54] This action was brought for an eight-year-old who suffered injuries received when a property owner, intent on trimming his tree lawn, guided his power mower onto the public sidewalk and into the path of the oncoming bicycle. In the resulting collision the boy was thrown from the bicycle to the pavement, his hand entering the mower casing and causing him severe injuries. The Court of Appeals for Stark County found the jury's verdict for the property owner was not against the manifest weight of the evidence and held that the jury had been properly instructed on the question of contributory negligence. Apparently three factors mitigated against the plaintiff, namely, that he was riding (a) in a "standing pumping" position, (b) at a "fast" rate of speed and (c) "while looking down at the sidewalk." These factors coupled with the following instructions by the court seemingly barred recovery:

> . . . and [when] you reach this issue of contributory negligence, you will determine whether the plaintiff used that care which a child of ordinary care and prudence of the same age, education and experience, would use for his own safety . . . and in the event you find that the plaintiff was guilty of negligence which proximately contributed to cause his injury, the court charges you that the plaintiff would not be entitled to recover in this law suit, even though you have found the defendant guilty of negligence which proximately caused the plaintiff's injuries.[55]

Contributory negligence is an unfortunate term in several respects. Its shortcoming lies in the fact that it does not allow the jurors to weigh overtly the conduct of both the plaintiff and the defendant. Further, the conduct which the term is to define is not negligence in that it does not involve a specific breach of a duty owed by the actor to the injured party. Thus, the plaintiff's smallest default in the care which he is exercising for his own safety may deprive him of any recovery. Contributory fault[56]

53. PROSSER, LAW OF TORTS 296-99 (2d ed. 1955).
54. 110 Ohio App. 233, 169 N.E.2d 20 (1959).
55. *Id.* at 239, 169 N.E.2d at 25.
56. PROSSER, LAW OF TORTS 285 (2d ed. 1955).

would appear to be a more descriptive term for the undue risk to which the plaintiff has exposed himself. A more equitable approach would be to enact a statute similar to the one passed by the Wisconsin legislature in 1931:

> Contributory negligence shall not bar a recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property if such negligence was not as great as the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person recovering.[57]

WATER ENCROACHMENT

To date, the nation's water resources have been neglected with the result that little thought has been given to the subjects of use, misuse, and re-use of this important resource. As man continues to reshape the contour of the countryside and urbanize the nation's watershed at a rate of a million acres a year, certain problems arise as are illustrated by four recent Ohio cases.

The rights of village residents in the flow level of a watercourse running through their property was the subject of deliberation in *Aubele v. Galetovich*.[58] The petitioner sought to enjoin the defendants, a real estate developer, three residents along a particular street, and the Village of Seven Hills, from casting surface water and effluent from their septic tanks into a common watercourse which flowed through the plaintiff's property. After weighing the testimony of several expert witnesses to the effect that the creek "emitted no offensive odor and did not contain foreign matter, bacteria or e-coli in greater amount than in many other similar streams" the court went on to observe:

> A lower riparian owner, along a water course, must expect that, as the upper lands are built up with homes and stores, much of the water which was absorbed by the land will now run off of hard-surfaced streets and roofs of buildings, to seek its natural outlet in the channel developed with the contour of the land.[59]

From the question of whether there has been an injury resulting in damage to the plaintiff's rights, our attention is next turned to the question of whether a municipality has the right to construct its storm sewer system in such a way as to knowingly cause injury to the owners of lower lands by causing an overflow to inundate the area. *Oakwood Club v. City of South Euclid*[60] suggests that a municipality may do just that. The injury in this case was by no means speculative, in that the plaintiff offered

57. WIS. STAT. § 331.045 (1958).

58. 165 N.E.2d 683 (Ohio Ct. App. 1960).

59. *Id.* at 685.

60. 165 N.E.2d 699 (Ohio Ct. App. 1960). See also discussion in *Real Property* section, p. 549 *supra.*

proof to the effect that since 1947, following every rain storm, the low lying areas of its golf course, including the area adjacent to the club house, have been flooded to the detriment of the grounds and the fixtures. Evidence was offered to show the club had sought to mitigate the damage by deepening and widening the stream but that this had been to no avail. Although there was argument both for and against the proposition that waters outside the natural watershed served by the stream were being cast upon the club's lands, the court in its opinion made no attempt to define the bounds of a watershed during a period in which the area is undergoing a change in use. The term "watershed" to a geologist denotes a three dimensional evaluation of an area including (a) boundaries, (b) coverage as it relates to ability to hold, absorb, and transmit moisture and (c) topography and over all surface gradient.

Ohio has not yet recognized the "capacity of the stream" rule[61] which provides that the flow of water may be increased as long as it does not go beyond the natural capacity of the watercourse.[62] However, it has been accepted in other jurisdictions, and cognizance should be taken that the rationale for the rejection of a particular doctrine must be re-examined under the facts of each succeeding case. The law should not grant to real estate speculators the right to profit while burdening municipalities and subsequent purchasers with their latent mistakes.

A more pragmatic approach to the problem of the handling of surface run-off as occasioned by urban build up is to be found in *Boettler v. Board of Township Trustees,*[63] wherein a resourceful farmer had stemmed the "tide" from a newly constructed county airport by damming the encroaching waters and diverting their flow onto a country road. In applying what the court chose to call the "so called rural rule,"[64] subject to its modern and common sense interpretation, the court took notice of the following facts:

> In the construction of said airport, . . . hills were graded down to level and gullies filled, and the level area resulting was hardsurfaced, . . . and the surface waters which would naturally seep into the soil . . . or be disposed of by evaporation or other natural means . . . [were directed and diverted onto the plaintiff's land].[65]

In weighing the respective equities, the court ordered engineers for both parties to submit plans for abating the nuisance and assessed the cost of the project to be borne proportionally, three-quarters by the county and one-quarter by the landowner, but in so far as the owner is concerned the

61. *Id.* at 702.
62. 93 C.J.S. *Waters* § 117 (1956).
63. 165 N.E.2d 705 (Ohio C.P. 1960).
64. *Id.* at 708, 709. Contrast this with the reference to the "urban rule" at the same pages.
65. *Id.* at 707.