Case Western Reserve Law Review

Volume 14 | Issue 3

1963

Torts

Justin C. Smith

mortgage. The taxpayer filed its franchise tax return and excluded from the book value of its stock upon which the franchise tax was computed the deferred income represented by its second mortgages. The Tax Commissioner contended that such deferred income should be included. The Board of Tax Appeals referred to section 5733.05 of the Ohio Revised Code which in substance provides that the book value of the stock shall be the total value of the corporation's "capital, surplus, whether earned or unearned, undivided profits and reserves." Evidence was presented and accepted by the Board that the taxpayer's method of accounting was based upon sound accounting principles. Accordingly, the Board found for the taxpayer and held that deferred income, resulting from real estate sales where second mortgages are given to the seller, is not includable as a part of the net worth of the seller for franchise tax purposes.

FRED SIEGEL

TORTS

MUNICIPAL HOSPITAL IMMUNITY

Since *Lloyd v. City of Toledo,*[1] it has generally been assumed in Ohio that the operation of a hospital by a municipal corporation, using municipal funds, constitutes the performance of a governmental function. On this basis, it has been further assumed that the municipality is immune from suit for the negligence of its employees while in the scope of their hospital employment.

The soundness of this view has recently been challenged by the Court of Appeals for Cuyahoga County in *Hyde v. City of Lakewood.*[2] In the *Hyde* case the court ruled that the mere operation of a hospital by a municipal corporation is not a governmental function per se, thus raising the probability that the issue will now have to be decided by the supreme court.

In the *Lloyd* case plaintiff brought suit against the City of Toledo for injuries sustained while a patient in that city's municipal hospital. The trial court sustained defendant's motion for judgment on the pleadings and from that judgment plaintiff appealed. The Court of Appeals for Lucas County affirmed the trial court's judgment on the theory that the operation of an institution at municipal expense in the interest of public health is the performance of a governmental function, regardless of the

1. 42 Ohio App. 36, 180 N.E. 716 (1931). A general discussion of this problem appears in Annot., 25 A.L.R.2d 203 (1952).

2. 175 N.E.2d 323 (Ohio Ct. App. 1961).

fact that some patients pay for these accommodations and services. Once this conclusion was reached the court invoked the immunity rule announced by the supreme court in *Aldrich v. City of Youngstown.*[3]

In the *Hyde* case the plaintiff-patient alleged injuries received while a patient of the city's hospital and that such hospital was operated "for gain, profit and compensation." Pursuant to Ohio Revised Code section 2311.041, the defendant municipal corporation moved for a summary judgment as a matter of law on the theory that the operation of a hospital by a municipality is a governmental function and that the city is therefore immune from suit. Defendant's motion was sustained and the case was appealed to the Court of Appeals for Cuyahoga County. In reversing the trial court's judgment, the court noted that Ohio Revised Code section 715.37, providing for the establishment of municipal hospitals, is permissive and not mandatory. Therefore, the mere operation of a municipal hospital is not a governmental function per se. The court relied upon the governmental versus proprietary function test laid down by the supreme court in *Eversole v. City of Columbus.*[4]

Because of plaintiff's allegation that the defendant hospital was operated for profit, the court stated that the city's immunity could be justified only on the theory that the institution was operated for the protection of health. The court relied upon the now often-quoted case of *Avellone v. St. John's Hosp.*[5] as being the rule in Ohio on the liability of non-charitable institutions. It would appear that the court distinguished between "governmental per se" and proprietary function on the basis of whether the institution was operated for profit or for charity.

The court's decision also sets up the question of whether the *Avellone* holding applies to governmental as well as non-governmental institutions.[6]

CARE OF SICK AND DISABLED

Two aspects of medical malpractice were discussed in cases reported during the survey period. In *Robinson v. Gatti*[7] the court held that to maintain an action sounding in malpractice against a physician for failure to discover and treat a broken rib and punctured lung plaintiff must

3. 106 Ohio St. 342, 140 N.E. 164 (1922).

4. 169 Ohio St. 205, 158 N.E.2d 515 (1959) (Syllabus 1). See also the language of Zimmerman, J., to the effect that the modern view is to attach liability regardless of whether the function is governmental or proprietary. *Id.* at 206-07, 158 N.E.2d at 517.

5. 165 Ohio St. 467, 135 N.E.2d 410 (1956).

6. *Quaere,* what further problem is presented where the hospital is jointly operated with the county under authority of OHIO REV. CODE § 513.08? It is clear that, in absence of statutory authorization, the county as an instrument of the state is immune from suit. Schaffer v. Board of Trustees, 171 Ohio St. 228, 168 N.E.2d 547 (1960). Can one sue half a hospital?

7. 115 Ohio App. 173, 184 N.E.2d 509 (1961).

prove two elements. First, plaintiff must prove that there was negligence or unskillfulness on the physician's part in not discovering and treating injuries. Second, the act or acts of alleged malpractice must be the proximate cause of the injury to plaintiff and not merely an antecedent complication.

Conway v. Ogier[8] presented a somewhat related problem although it arose out of a counterclaim to an action for medical services rendered. The Court of Appeals for Franklin County stated that a cause of action for loss of consortium resulting from medical malpractice arises in the state where the malpractice occurs. However, on the authority of *Corpman v. Boyer*,[9] the court found that loss of consortium arising from malpractice is not controlled by the malpractice statute of limitations. Thus, the husband's claim was brought prior to the running of the New York statute of limitations on negligent injury.[10]

CHILDREN

Cases involving injury to children merit separate treatment if for no other reason than by virtue of the fact that this jurisdiction does not recognize the doctrine of attractive nuisance.[11] Ohio courts generally hold a child to something akin to an adult standard of care for his own safety. *Ramsey v. Village of Piketon*[12] is an excellent case in point. In that case, a seven year old "licensee" was denied recovery for injuries sustained when she stepped into an unguarded and uncapped tile which afforded access to a water valve. Although the Court of Appeals for Pike County found that the owner failed to give warning of the condition of the instrumentality, it was nevertheless exonerated by virtue of the fact that there was no allegation of *active negligence* on his part.[13]

Further proof that Ohio courts dealt harshly with minors during the past year is found in *Velioniskis v. Walter*[14] and *Boomershine v. Rice*.[15] In the *Velioniskis* case the defendant, while backing out a driveway at a speed of two or three miles an hour, struck the eleven year old plaintiff who was walking along the sidewalk. The Court of Appeals for Cuyahoga County found that a verdict for the defendant was not against the

8. 115 Ohio App. 251, 184 N.E.2d 681 (1961).

9. 171 Ohio St. 233, 169 N.E.2d 14 (1960). See discussion in Smith, *Survey of Ohio Law — Torts*, 12 W. Res. L. Rev. 564, 566 (1961).

10. It is interesting to note that while the husband could recover for loss of consortium, the injured party's (his wife's) claim for malpractice was barred.

11. See Joyce v. Union Carbide & Carbon Corp., 114 Ohio App. 51, 173 N.E.2d 692 (1961).

12. 115 Ohio App. 153, 184 N.E.2d 482 (1961).

13. *Quaere*, might not the presence of an unguarded, uncapped tile be regarded as a virtual trap when measured against the tender years of the plaintiff in cases such as this?

14. 184 N.E.2d 418 (Ohio Ct. App. 1962).

15. 114 Ohio App. 267, 181 N.E.2d 723 (1960).

great weight of evidence. The court further held that a charge of contributory negligence to the jury was proper.

In the *Boomershine* case a six year old was struck when she emerged from a double row of parked vehicles while crossing a street. Defendant was operating his car at a speed of eight to twenty miles an hour. It was held that it was not error for the trial court to refuse to give special instructions to the effect that the degree of care required of the appellee depended on the apparent age of the child or that the appellee had a duty to anticipate the behavior of children when the evidence disclosed that the appellee had not seen the child before she was struck.

Mitchell v. Reinhardt[16] supported a claim for injuries to an eighteen month old child struck when a truck driver failed to keep a proper lookout to ascertain the presence of the toddler in vicinity of the vehicle. Here the Court of Appeals for Brown County affirmed the proposition that the duty to use ordinary care depends upon the circumstances involved in a particular case. The court observed that a failure to keep a proper lookout after the driver saw, or in exercise of proper care should have seen, the child constituted actionable negligence.

Invasion of Right of Privacy

Few areas of the law of injury to persons or relations have struggled so hard to survive as the right of privacy. Inroads made by mass media, often supported by community opinion, seem to have prevented any orderly growth of the law of privacy. Thus *LaCrone v. Ohio Bell Tel. Co.*[17] offers hope to victorian scholars who, like Brandeis, are appalled by the lack of judicial support for what was once regarded as an inalienable right.

In the *LaCrone* case the Court of Appeals for Franklin County held that a petition which alleges that defendant "deliberately, intentionally, wilfully, unlawfully, and in reckless disregard of the rights of the plaintiff, did place a tap on plaintiff's telephone"[18] states a cause of action. Thus, it would appear that Ohio has taken a step ahead in securing the right of privacy for its citizens.

Person on Property of Another

Suits brought by injured invitees and others provided the courts with considerable problems in cases reported last year. *Martinelli v. Cua*[19] affirmed Ohio's long standing rule that a storekeeper's permitting a natural accumulation of snow and ice to remain on his entrance steps does

16. 114 Ohio App. 175, 181 N.E.2d 53 (1960).
17. 114 Ohio App. 299, 182 N.E.2d 15 (1961).
18. *Id.* at 299, 182 N.E.2d at 15.
19. 115 Ohio App. 151, 184 N.E.2d 514 (1962).

not render him liable to a customer who slips and sustains injuries.[20] Similarly, in *Walker v. Busken*[21] the Court of Appeals for Hamilton County found a bakery not liable for injuries sustained by a customer who inadvertently struck her head on a merchandise shelf.

A case decided early in 1962, *Coughlin v. Campbell*,[22] reaffirmed the long standing proposition that a business invitee loses his preferred standing when he absents himself from the area reserved for trade. Plaintiff visited the establishment for the purpose of seeing his father-in-law who did woodworking in the basement in his spare time. Plaintiff was injured during his uninvited trip to the basement. The court, noting the nature of his trip, stated that when business visitors go where the public is not ordinarily permitted, the proprietor's only obligation is not to willfully cause injury.

However, in *McClure v. Neuman*[23] a pedestrian who met with misadventure as a result of falling into a cellar was found to have a cause of action against both the building owner and the painting contractor. Here the court found that, where the owner of the building had employed the painting contractor and the contractor negligently left the cellarway open, the owner was jointly liable with the contractor.

The question of whether an occupant of a restaurant may recover against a village and several oil companies for injuries sustained as a result of an explosion caused by gasoline entering sanitary sewers was decided in *Surman v. Ohio & Pa. Oil & Gasoline Co.*[24] In finding for the village the court noted that, in the absence of evidence that proper inspection by the municipality of its sewers would have disclosed that gasoline in dangerous quantities had leaked into sanitary sewers, the fact that flood waters allegedly caused gasoline to be forced into a restaurant through a sanitary sewer would not support a claim of negligence against the village. Here the problem of proximate cause was further complicated by expert testimony to the effect that there were eight possible channels by which gasoline could have entered the restaurant. However, no creditable evidence was adduced to identify which of the eight channels was the channel or channels by which gasoline allegedly reached the building.[25]

---

20. See PROSSER, TORTS § 34 (2d ed. 1955).

21. 184 N.E.2d 769 (Ohio Ct. App. 1962).

22. 179 N.E.2d 367 (Ohio Ct. App. 1962).

23. 113 Ohio App. 422, 178 N.E.2d 621 (1961).

24. 183 N.E.2d 386 (Ohio Ct. App. 1962).

25. An explanation of the role of causation, particularly foreseeability and risk, is to be found in HART & HOMORE, CAUSATION IN THE LAW (1959). A parallel work by two American scholars, Becht and Miller, published two years later suggests that American reasoning lays greater weight on foreseeability than does English jurisprudence. BECHT & MILLER, FACTUAL CAUSATION (1961).

NUISANCE

The right of a person to use his property as he sees fit was twice tested last year.

In *Sakler v. Huls*[26] plaintiff sought to enjoin the operation of a drag strip within the corporate limits of Cincinnati. In supporting plaintiff's cause of action the court found that, although the "drag strip" was in an area zoned to permit such operation, this fact did not preclude an injunction against its operation as a nuisance. However, in *City of Columbus v. Becher*[27] the court, perhaps more sympathetic to the needs of society, found that the operation of an animal hospital within a municipality is not a nuisance per se.

STREAMS AND BRIDGES

The question of the obligation of riparian owners to receive surface drainage was again raised in *Munn v. Horvitz Co.*[28] The court found that, where a surface drain sewer had been in open and notorious use for thirty-seven years, an injunction would not lie against its enlargement.

In a turn about from the usual case where the owner of a vessel is liable for damage to docks and piers, the Ohio Supreme Court, in *Toledo Terminal Rd. Co. v. Seaway Excursion Lines, Inc.*,[29] found for the defendant owner. The action had been instituted by the bridge owner for damage to the structure occasioned by defendant's vessel striking it. In reaching its conclusion the court found that the operator of a swing bridge is under a duty to look for approaching vessels and to do so at such a time and manner as will constitute an effective inquiry as to whether any vessels are in the vicinity.

LIABILITY WITHOUT FAULT

In *Weaver v. Yoder*[30] the plaintiff, an adjoining property owner, obtained relief on the theory of liability without fault by showing both damages and a continuous private nuisance. During the course of the trial evidence was offered to the effect that the plaintiff's enjoyment of his estate was materially reduced by blasting in the adjacent quarry. Judge Lamneck, holding for Weaver, noted that vibrations, as opposed to flying debris, may constitute a compensable harm.[31] Furthermore, the defendant cannot exonerate himself by showing the exercise of due care.

---

26. 183 N.E.2d 152 (Ohio C.P. 1961).
27. 115 Ohio App. 239, 184 N.E.2d 617 (1961).
28. 184 N.E.2d 231 (Ohio Ct. App. 1962).
29. 173 Ohio St. 148, 180 N.E.2d 583 (1962).
30. 184 N.E.2d 622 (Ohio C.P. 1961).
31. *Id.* at 625, citing Louden v. City of Cincinnati, 90 Ohio St. 144, 158, 106 N.E. 970, 973-74 (1914).

IMPLIED WARRANTY

The recent appearance of at least two new reporters[32] covering products liability cases suggests the growing number of cases being litigated in this area. *Goldfarb v. Pailet*[33] involved an action against a "muffler-brake" shop for alleged faulty repairs made on plaintiff-appellant's vehicle. The Common Pleas Court of Hamilton County entered judgment for the defendant. Two errors were alleged: first, that the judgment was against the weight of the evidence, and, second, that the special charge was confusing to the jury. In reversing and remanding, the court carefully reviewed the record, calling attention to the sequence of events leading up to the accident. The reviewing court concluded that it was prejudicial error to give the special charge to the jury which called to their attention other possible causes of the mishap, although there was "not one shred of evidence in the record" to support a conclusion to the contrary.

An action by an employee of a roofing company, who was injured in attempting to descend a fire escape, against the owner of the building and the manufacturer-installer of the fire escape on the grounds that the mishap resulted from the combined and concurrent negligence of both defendants set the stage for *Cornett v. Ficks Reed Co.*[34] In holding for the plaintiff the court noted that where the manufacturer is guilty of negligence in the manufacture of an article for use by the general public and a member of that group is injured, the manufacturer may be liable without privity of contract.[35]

The outdated rationale set forth in *Winterbottom v. Wright*[36] was given new life in *Miller v. Chrysler Corp.*[37] A truck driver sought recovery on the grounds of implied warranty of fitness and negligence. In reversing in part and affirming in part, the court stated that in the "absence of privity between the plaintiff and defendant, an action predicated on the theory of implied warranty cannot be maintained" in Ohio.[38] However, the court should be commended for pointing out that "if a different

---

32. HURSH, AMERICAN LAW OF PRODUCTS LIABILITY (1961); CCH PROD. LIAB. REP. (1963).

33. 184 N.E.2d 827 (Ohio Ct. App. 1962).

34. 172 N.E.2d 183 (Ohio C.P. 1959), *aff'd*, 175 N.E.2d 105 (Ohio Ct. App. 1960).

35. 172 N.E.2d at 185. The principle claim of negligence against the defendant Ficks Reed Company was a failure to maintain its fire escape in a safe condition. OHIO REV. CODE § 3785.46 provides that "the owner of the building shall keep all fire ladders and fire escapes in good repair . . . ."

36. 10 M & W 109, 152 Eng. Rep. 402 (Ex. 1842). Here plaintiff, a mail coachman, was denied recovery on theory that a contract to supply mail coaches ran to the postmaster general and did not inure to the benefit of injured.

37. 183 N.E.2d 421 (Ohio Ct. App. 1962).

38. *Id.* at 422.

rule should be adopted in Ohio, the Supreme Court of Ohio is the proper tribunal to make such change."[39]

MOTOR VEHICLE INSURANCE

Several years ago Dean Leon Green set forth the arguments for overhauling our system of voluntary automobile liability coverage.[40] Among the arguments advanced for "compulsory loss" insurance is the prospect of doing away with the numerous defenses available to insurance carriers, which defenses may leave the assured virtually unprotected.

Late in 1962 the Ohio Supreme Court, in *Weaver v. Ballard*,[41] affirmed the proposition that the burden of proving lack of cooperation of the assured rests on the carrier and is not met where the named defendant did not appear at trial and there was no showing that his carrier sought his cooperation. Thus, the assured will be protected from an insurer's alleged defense of failure to co-operate.

FEDERAL EMPLOYER'S LIABILITY ACT

Whether the death of an employee, resulting from his vehicle skidding into the path of another vehicle when he had been directed to make an automobile trip over snow covered highways, subjected his employer to liability under the F.E.L.A.[42] was passed upon by the Ohio Supreme Court in *Spinello v. New York, Chicago & St. Louis Rd. Co.*[43] In affirming the trial court and reversing the court of appeals, the court found that negligence was not established by defendant's foreman directing the employee to make the trip in view of the fact that only a short time earlier the deceased had made the trip without mishap. Citing *Wilkerson v. McCarthy*[44] the court noted:

> [I]t has been clearly established under such act [F.E.L.A.] that an employer is not an absolute insurer of his employee's safety but is liable as to such employee only for negligence.[45]

Unanswered is the question of whether foreseeability or anticipation is an essential element in establishing negligence within the meaning of F.E.L.A., for the Act specifically excludes proximate cause from the test of causation by substituting the language "whole or in part."[46]

---

39. *Ibid.*
40. GREEN, TRAFFIC VICTIMS (1958).
41. 174 Ohio St. 59, 186 N.E.2d 834 (1962).
42. Federal Employer's Liability Act, 35 Stat. 65 (1908), 45 U.S.C. § 51 (1952).
43. 173 Ohio St. 324, 181 N.E.2d 884 (1962).
44. 336 U.S. 53 (1949).
45. 173 Ohio St. 324, 329, 181 N.E.2d 884, 888 (1962).
46. Federal Employer's Liability Act, 35 Stat. 65 (1908), 45 U.S.C. § 51 (1952).

GUEST STATUTE

The anti-social nature of the guest statute[47] has been treated before and needs no additional comment. It suffices to say that its presence does little to deter the reckless driver, less to punish the errant, and affords the liability carrier the "perfect defense." Further, one might join with Professor Willard K. Pedrick in asking:

> [W]hy, for example, [do] automobile liability companies require premium receipts in double the amount of the claims they pay. By way of contrast, the Blue Cross Hospitalization Insurance organization manages a payout rate of about 95 per cent of its receipts.[48]

Botto v. Fischesser[49] demonstrates that wanton misconduct under the guest statute may consist of deliberately perverse behavior, with such reckless and inexcusable conduct in driving the vehicle as to endanger the safety of the occupants.

> Substantially, the evidence of negligence was as follows: The speed of the car when it started . . . caused a spray of gravel; the speed, as the car turned the bend was between thirty and forty miles per hour; it went through a stop sign, skidded around a turn and crashed into a tree.[50]

Evidence was also adduced at trial, "that the driver of the car smiled when his passengers remonstrated him with reference to speed."[51]

In *Pahanish v. Everett,*[52] a court of appeals was faced with similar testimony. The defendant spun the wheels on initial acceleration, failed to stop before entering the highway, traveled about forty-five miles an hour, and failed to negotiate a curve, thereby wrecking the car and injuring the plaintiff. The court, over protests of the injured, did not take the defendant outside the protection of guest statute. However, the *Pahanish* case was decided prior to the *Botto* case.

It would further appear that excess speed amounting to one hundred miles an hour coupled with admonishments from a plaintiff does not constitute willful or wanton conduct per se,[53] although such evidence is for the jury. However, in *Russell v. Elkins*[54] it was held prejudicial to refuse the defendant a judgment notwithstanding the verdict where the claim for wrongful death could only be supported by allegations of intoxi-

---

47. OHIO REV. CODE § 4515.02.

48. Pedrick, *On Civilizing the Law of Torts,* 6 J. SOC'Y PUB. TEACHERS OF LAW 2, 3 (1961).

49. 174 Ohio St. 322, 189 N.E.2d 127 (1963).

50. 180 N.E.2d 30, 31 (Ohio Ct. App. 1962).

51. *Ibid.*

52. 186 N.E.2d 633 (Ohio Ct. App. 1962).

53. Phillips v. Ullmer, 114 Ohio App. 95, 180 N.E.2d 610 (1960).

54. 115 Ohio App. 341, 177 N.E.2d 355 (1961).

cation and speeding. Cases such as these and others have prompted one observer to write:

> It is a tribute to the lobby system of legislation that in this country a surgeon operating on a charity patient is bound to exercise ordinary care but is permitted, should he drive his patient home from the hospital, to abandon that standard and be subjected to liability only on proof of gross negligence or wilful and wanton conduct.[55]

McManus v. Buskirk[56] affirmed the theory that a volunteer who offers to transport her classmates upon common business or solicitations, the benefit of which she will share, owes her passenger a duty to exercise ordinary care, and the guest statute is inapplicable.

ASSURED CLEAR DISTANCE

The question of what constitutes an assured clear distance was raised inferentially in *Applegate v. Harshman.*[57] The court found that the assured clear distance rule is not applicable unless it is shown that the defect is discernible in time to permit the driver to avoid it. Upon an appeal prosecuted by the Board of Trustees of Southington Township[58] the Court of Appeals for Trumbull County found that the township was not entitled to instructions on the assured clear distance rule in the absence of a showing that the defect in the highway was sufficiently obvious to permit the driver to avoid it. This reaffirms the proposition set forth in *Brown v. Oakland County*[59] to the effect that violation of a statutory rule respecting assured clear distance does not preclude recovery for injuries occasioned by a defect in the road. Also worthy of note is the court's willingness to sustain a sizeable verdict against a governmental subdivision.

UNAVOIDABLE ACCIDENT

The question of what constitutes an unavoidable accident is not easily understandable under Ohio law. *Masterana v. Cashner*[60] called attention to the fact that the defense of unavoidable accident is nothing more than a denial of negligence. This defense, when offered to excuse negligence per se, casts the burden of proof on defendant to establish that, "without his fault and because of circumstances over which he had no

55. Pedrick, *Taken For a Ride: The Automobile Guest and Assumption of Risk,* 22 LA. L. REV. 90, 92 (1961).

56. 183 N.E.2d 473 (Ohio C.P. 1962).

57. 186 N.E.2d 763 (Ohio Ct. App. 1962).

58. The Board was a defendant in the *Applegate* case.

59. 279 Mich. 55, 271 N.W. 550 (1937).

60. 114 Ohio App. 379, 182 N.E.2d 853 (1959).

control and which were not foreseeable, compliance with the statute was rendered impossible."[61]

Amplification of that theory is found in *McClain v. Ford*[62] where the reviewing court held that it was reversible error to submit the issue of "unavoidable accident" to the jury. Evidence was submitted to the effect that it had been snowing for three hours and the highway was covered with five to six inches of snow. The highway was described in the defendant's own testimony as being "in very bad condition."

CONTRIBUTORY NEGLIGENCE

The Court of Appeals for Geauga County held in *Mutual Benefit Ins. Co. v. Reiss*[63] that skidding into the oncoming lane during a snow storm does not excuse a violation of Ohio Revised Code section 4511.25.[64] The court further found that leaving a disabled car on the left berm of the highway was not an act of contributory negligence so as to bar plaintiff-appellee from recovery.

In *Arnett v. Faulkner*[65] parking in a no parking zone in violation of an ordinance was held not to be, as a matter of law, the proximate cause of an accident occasioned when the vehicle was struck by a negligent driver of a second vehicle.

EMERGENCY VEHICLES

Problems involving the use of motor vehicles in answer to an emergency arose in three reported cases. The first, *Weiss v. Tait*,[66] involved a private ambulance. The decision affirmed the general rule that the operator of an ambulance does not have an absolute right to "run traffic signals." He has only a preferred right and is required to employ ordinary care in exercising that right.

Traditionally the courts have stated the maxim: "The King can do no wrong." As a result, a municipal body is not liable for the tortious acts of its servants.[67] The only major statutory modification of this immunity has been in requiring municipal corporations to supervise and control the public way, keeping it in repair and free from nuisance,[68]

61. *Id.* at 382, 182 N.E.2d at 856.

62. 115 Ohio App. 69, 184 N.E.2d 530 (1961).

63. 184 N.E.2d 106 (Ohio Ct. App. 1961).

64. That statute deals with driving left of center.

65. 115 Ohio App. 461, 181 N.E.2d 295 (1962).

66. 116 Ohio App. 53, 184 N.E.2d 122 (1962).

67. All cases touching on municipal immunity seem to lead to Russell v. Men of Devon, 16 East. 305, 100 Eng. Rep. 359 (K.B. 1788), where it was held that an action for injuries resulting from a defective bridge must fail because the county itself had no money and the legislature was not authorized to assess individuals as in the case of the "hue and cry."

68. OHIO REV. CODE § 723.01.

and to hold them liable for harm caused by their servants while engaged in the operation of any vehicle on the public highway. However, the legislature has retained immunity for municipalities if the vehicle is driven by members of the police department engaged in emergency police duties or members of a fire department when answering an alarm.[69]

City of Worthington v. O'Dea[70] affirmed the rule that the exemption given police vehicles is a conditioned one. Inadequate use of a siren and flashing red lights, coupled with absence of ordinary care in entering an intersection, constitutes contributory negligence as a matter of law. In its opinion the court noted that Ohio Revised Code section 4513.21 requires that "the driver of the emergency vehicle sound such equipment when it is necessary to warn pedestrians and other drivers of the approach thereof."[71] The question of whether the police officer was personally liable was not raised. However, under the statute granting personal immunity, all that is required is that the officer shall be "engaged in the operation of a motor vehicle while responding to an emergency call."[72]

In *Rosenstiel v. Weigel*[73] defendant's automobile was struck by a firetruck operated by plaintiff. The Court of Appeals for Hamilton County found the lower court in error in removing the case from the jury at close of plaintiff's evidence on theory of contributory negligence. Plaintiff-appellant alleged the removal of his foot from the accelerator, allowing compression to slow vehicle, while entering an intersection in response to an alarm brought him under the provisions of section 4511.03. Finding that reasonable minds might differ, the appellate court reversed and remanded the cause.

What impact these cases will have on Ohio law remains doubtful. In *Eversole v. Columbus*[74] the Ohio Supreme Court was frank to confess that it is often impossible to distinguish what is governmental from what is proprietary.

However, in view of the recent action of the Minnesota Supreme Court,[75] prospectively overruling the doctrine of sovereign tort immunity

69. OHIO REV. CODE § 701.02. This is conditioned upon compliance with other statutes such as OHIO REV. CODE § 4511.03.

70. 115 Ohio App. 375, 185 N.E.2d 323 (1962).

71. OHIO REV. CODE § 4513.21.

72. OHIO REV. CODE § 701.02. Note that the supreme court in McDermott v. Irwin, 148 Ohio St. 67, 69-70, 73 N.E.2d 86, 87 (1947), held: "it is a full defense to an action against a policeman for negligence while engaged in the operation of a motor vehicle that he was at the time of his alleged negligence responding to an emergency call." At least two cases have broadly defined an emergency call. Rankin v. Sander, 96 Ohio App. 40, 121 N.E.2d 91 (1953), found that a "trouble run" was sufficient. Subsequently, Spencer v. Heise, 107 Ohio App. 505, 158 N.E.2d 570 (1958), held that investigation of a body was sufficient.

73. 184 N.E.2d 772 (Ohio Ct. App. 1962).

74. 169 Ohio St. 205, 158 N.E.2d 515 (1959).

75. Spanel v. Mounds View School Dist. No. 621, 118 N.W.2d 795 (Minn. 1962).

subject to legislative action, the three Ohio decisions reviewed suggest a need for judicial revision of the doctrine of sovereign immunity in Ohio.

DISABLED VEHICLES

Emergencies occasioned by the breakdown to automobiles have a reputation for making bad law. *Rice v. Yellow Cab Co.*[76] is no exception. The reviewing court found that although defendant taxi cab company's limousine stalled on a high level bridge due to a mechanical breakdown, such was not the proximate cause of plaintiff's injuries. The independent intervening acts of another driver were found to be the cause of the injury.

However, in *Badurina v. Bolen,*[77] an action by a truck driver against a motorist for injuries sustained when the motorist struck the rear of the stalled truck, the Court of Appeals for Franklin County held that the truck driver could not request instructions on the emergency doctrine where it appeared that the driver had been standing in front of the truck for some time. However, in alighting from the vehicle and attempting to crank it, he had not assumed the risk of injury.

CARE FOR SELF

In the ever advancing machine age, where technological progress has made momentous strides in the protection and prolongation of human life, there are still areas where progress and interest have not been evidenced. Historically, the motor vehicle was regarded as a dangerous instrumentality when first introduced in Great Britain and on the continent. As the price of automobiles was brought within the reach of the average man, the "street lobbies," often in the form of automobile clubs, backed legislation to establish minimal protection for users of the public way. It has been observed that since the triers of the fact are themselves operators of motor vehicles, more often than not the judicial process does little more than pace legislation.

However, four cases reported during the survey period offer hope for the pedestrian. *Hardy v. Crabbe*[78] held that, although allegations of intoxication and negligence may be stated in the petition and opening argument, examination of plaintiff as to whether she could have seen the vehicle had she looked was prejudicial error, since she was in the crosswalk. Similarly, in *Gottlieb v. Liptak,*[79] proceeding across the street in reliance on a "green light" without looking for or at the traffic was held not to be contributory negligence as a matter of law.

76. 179 N.E.2d 139 (Ohio Ct. App. 1961).
77. 114 Ohio App. 478, 183 N.E.2d 241 (1961).
78. 114 Ohio App. 218, 181 N.E.2d 483 (1961).
79. 183 N.E.2d 145 (Ohio Ct. App. 1961).