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Observations on Personal Injury Law

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SOME THOUGHTS ON PERSONAL INJURY LAW

Stephen J. Werber*

When I originally came to Ohio in 1970, I was surprised to find that the Ohio state courts lagged considerably behind other states in the development of personal injury law and especially product liability law. Under the leadership of Chief Justice Frank Celebrezze, the court's position was re-oriented. With decisions adopting and liberally defining strict liability (Temple v. Wean United, Inc.,[1] Leichtamer v. American Motors Corp.,[2] Knitz v. Minster Machine Co.[3]), the court took a major step. Shortly thereafter, the court ruled that neither the Ohio Constitution nor any Ohio legislation insulated an employer from liability to employees for intentional torts (Blankenship v. Cincinnati Milacron Chemicals, Inc.,[4] and Jones v. VIP Development Co.[5]). These, and other changes, have moved Ohio to the forefront of legal development in the personal injury field.

With this development came criticism predicated on the belief that the judicially created environment was casting employers into the role of insurers, and damaging the economic and business interests of the state. The failure of General Motors to build its new plant in Ohio fueled the criticism as many believed the Blankenship decision played a significant role. Certainly, the legal environment, together with the tax structure, union interests, the enticements to industry offered by other states, and the weather have combined to impede the economic growth of our

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State. To isolate judicial trends is unfair and incorrect. One can claim that the Ohio Supreme Court has gone too far. One can as readily claim that it has not gone far enough. From my vantage point, both views have merit. The overall business climate must be improved if Ohio and the Cleveland Metropolitan area are to prove recent Department of Commerce projection false.

The Ohio Supreme Court has adopted a liberal definition of strict liability by abolishing the "unreasonably dangerous" requirement for proof of defect. Yet the court has properly refused to adopt the unfair burden of proof standard utilized by California and has not accepted the "guarantor of the safety of its product" standard of Pennsylvania. Moreover, the court rejects failure to warn as a cause of action in strict liability despite the recent appellate level decision in Krosky v. Ohio Edison Co.[6] The question which must now be faced is whether the Ohio judicial system and General Assembly have achieved a proper balance between the rights of injured persons and the rights of business entities which provide basic goods and services. In the area of strict liability a workable balance seems to exist. In the area of employer liability for "intentional tort" such a balance is not yet present. Moreover, unless changes are made in other areas of the law the balance necessary for business development will be weighed heavily against such development. A proper balance can be struck which will permit injured parties to recover in appropriate cases while providing basic fairness and protection in the business world.

That we now recognize a right to recover for intentional tort is neither unfair nor surprising. An intentional tort exception to the workmen's compensation exclusion exists in a majority of states. On the other hand, the present definition of intentional tort, i.e., any situation in which an injury is substantially certain to occur, is vague and overbroad. This definition very nearly casts employers into the role of insurers. Application of the present definition carries with it a necessary ingredient of hind-sight which should not be tolerated. As a practical matter, any employee injury is now a predicate for a personal injury action. I doubt that this was the intention of the court. As with any new concept, it is likely that the court will refine its definition of intentional tort and present a more limited, yet effective, definition.

Judicial developments have not, however, addressed a number of other concerns in which proper direction is necessary to retain protection for injured parties while fostering a friendlier business environment. In at least five areas steps can be taken which will aid Ohio in its effort to balance these competing needs. These areas include:

1. Comparative fault;
2. The seat belt defense;
3. Punitive damage awards;
4. Pain and suffering awards; and
5. The collateral source rule.

Of these five areas, it would appear that Pain and Suffering damages may have to be addressed by the legislature although it could be done judicially. It also appears that at least some aspects of the seat belt issue will be resolved by the Ohio General Assembly early in 1986. As there is a Comparative Fault Act, it would be appropriate for the legislature to take further action. However, nothing precludes judicial extension of the existing legislation.

Comparative fault: This must be distinguished from comparative negligence which now exists in negligence cases. Comparative fault would apply to all personal injury actions regardless of the underlying legal theory (negligence, strict liability, breach of warranty). Such a law would expand the precise fairness now existing in negligence actions. Comparative fault can be adopted as a common law standard, distinct from the Ohio Comparative Negligence Act. Contributory negligence and assumption of the risk have already been merged for purposes of comparative negligence. (Anderson v. Ceccardi[7]). Assumption of the risk has always been recognized as a defense to strict liability. In Wilfong v. Batdorf[8], the court recognized the existence of common law comparative negligence. As recognized by most commentators and a majority of courts, the conduct of a party can be compared to the role of a product manufacturer or goods supplier.

The Sixth Circuit was given an opportunity to take this step when it decided Stearns v. Johns-Manville Sales Corp.,[9] and

Bailey v. V & O Press Company, Inc.,[10] in August, 1985. Despite a well reasoned opinion of Judge Thomas in the Stearns case, the Sixth Circuit ruled that comparative fault was not the law of Ohio and refused to anticipate a change in the Ohio law. By taking a narrow view of its authority under Erie[11] and Klaxon[12] the court refused to truly anticipate the logical development of the Ohio law of comparative fault. The court recognized that a majority of jurisdictions followed comparative fault principles in strict liability actions, yet failed to apply such principles to the cases before it. In light of the fact that the Ohio Supreme Court has taken a position consistent with, and often in advance of, other jurisdictions this was a surprising result. It is now all the more important for the Ohio Supreme Court to clarify its position.

There is good reason to establish common law comparative fault in Ohio. Such an approach has been taken by other courts. The logical next step for the Ohio Supreme Court is to adopt common law comparative fault. Such a step will give greater balance to the interests of all concerned while permitting an injured party to recover fully for all injury caused by the product manufacturer or supplier.

The seat belt defense: The Ohio Assembly will pass a seat belt law in 1986. Both houses have already approved somewhat differing versions of a mandatory use law. An amendment to the bills precludes evidence of non-use in civil actions. If this amendment remains, the court will have no choice. The

preclusion amendment is ill-founded and, hopefully, will be rejec before final passage. Assuming that there is no statutory resolu the court will eventually have to decide this issue. It is urged that non-use should be admissible in regard to the causation of injury, i.e., in mitigation of damages. (This was allowed by the U.S.D.C. for the Southern District of Ohio, in Moore v. Arrow Truck Lines, Inc.[13]). Such a law will encourage seat belt use an thereby save lives and prevent avoidable injuries. It will give the automobile user a real choice--don't wear the belt if you don't want to, but be prepared to pay the price for any injuries your own action has permitted. Moreover, such a rule would be consistent with common law development in an increasing number of states. Admissibility of non-use evidence would be fair to all concerned and place responsibility for one's actions on the perso The automobile manufacturer would not be the insurer of the safet of automobile occupants who negate the safety design of the vehic It is inherently unfair to permit an injured party to claim that automobile design caused his injury while, at the same time, precluding evidence of an integral safety design feature that wou have prevented the injury. The defense is entitled to an opportu to meet the burden of proof necessary to permit a jury to reduce damages.

Punitive Damage Awards: There is an important deterren role to be played through proper application of the doctrine of punitive damages. The concept that punitives should never be applied in product liability litigation has been uniformly reject

The question becomes not whether such damages should ever be awarded, but rather how often. Imposition of multiple awards for single product defects does more than deter, it bankrupts. It is common knowledge that a number of asbestos manufacturers have gone into Chapter 11 proceedings due to multiple punitive awards for wrongful conduct which occurred many years ago. It is less well known that the Robbins Company filed for Chapter 11 immediately after a district court refused to grant national class action status to the punitive damages claims against it arising from its production and sale of the Dalkon Shield. The Sixth Circuit refused to limit multiple punitive damages in Moran v. Johns-Manville Sales Co.[15] on the grounds that to change the law of punitive damages required legislative action. In doing so, the court neglected the fact that punitive damages are a creature of the common law. The Ohio Supreme Court can rectify this in an appropriate case and with due regard for the need to deter improper manufacturer behavior. A limit can be imposed on the number of awards in a given year or a limited number of awards can be paid into a fund for disbursement to all claimants. The court can also delineate a new standard of proof required for imposition of punitive damages in a product liability suit. A new standard can focus on the special aspects of manufacturing entities including such things as whether there remains any reason to deter. An intelligent reappraisal of the punitive damages issue is called for.

Pain and Suffering Awards: Pain and suffering damages are an open invitation to unlimited damages. The traditional con-

cept that personal injury awards are designed to compensate for harm correctly allows such damages. However, verdicts today have reached unprecedented and excessive levels largely due to the intangible factor of pain and suffering. Some states have responded with special legislation. For example, in malpractice actions under California law there is now a statutory ceiling of $250,000 for non-economic damages which was upheld in Fein v. Permanente Medical Group.[16] (The United States Supreme Court refused to hear the case on the grounds that it did not raise a federal question.)[17] At this time, more and more product manufacturers are finding it impossible to obtain or pay for adequate insurance. The question, as with punitive damages, is how much compensation for pain and suffering is enough. Any ceiling will, by definition, be arbitrary. Such a figure, even as high as $1,000,000, will be fairer than the present gamble system. A limitation figure will promote settlement thereby reducing litigation costs. It will also promote a more predictable environment for insurers and quite possibly provide greater access to insurance. The injured consumer will still receive full compensation for actual losses and a substantial recovery for pain and suffering. If the goal is compensation, rather than lining the pockets of counsel, a limit can be imposed. This has now been recognized in the medical malpractice area. A ceiling would not deprive anyone of their day in court. Any reasonable ceiling will provide the certainty needed by business while protecting the injured party.

The Collateral Source Rule. Nothing in the Law of evidence is more archaic than the collateral source rule. In an era of self-insurance, company based insurance, and multiple sources of recovery, it is evident that retention of the rule promotes double, triple, or greater recovery. Now that workmen's compensation is no longer an exclusive remedy, it is possible for an injured worker to obtain damages from his employer through workmen's compensation while at the same time recovering independently under the intentional tort doctrine, a company or personal disability insurance program, and a social security disability. If the injured party's loss of earnings have been paid, why should that party recover them again? In many instances, there is no subrogation right in the initial payor. Refusal to admit evidence of insurance payments, worker's compensation payments, pension payments, and government aid promotes awards for non-existent damages. This permits a party to turn an injury into a source of unprecedented wealth. The impact upon society as a whole, which largely bears these costs, is real. Abolition of the collateral source rule is within the judicial province. If balance and fairness are to be promoted, such abolition is called for.

FOOTNOTES

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1. 50 Ohio St.2d 317, 364 N.E.2d 267 (1977).
2. 67 Ohio St.2d 456, 424 N.E.2d 568 (1981).
3. 69 Ohio St.2d 460, 432 N.E.2d 814 (1982).
4. 69 Ohio St.2d 608, 433 N.E.2d 572 (1982).
5. 15 Ohio St.3d 90, 472 N.E.2d 1046 (1984).
6. 20 Ohio App.3d 10, 20 Ohio B. R. 10 (1984).
7. 6 Ohio St.3d 110, 451 N.E.2d 780 (1983).
8. 6 Ohio St.3d 100, 451 N.E.2d 1185 (1983).
9. Slip Opinion, Case No. 84-3382 and 84-3412 (August 16, 1985).
10. Slip Opinion, Case No. 84-3001 (August 16, 1985).
11. Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1934).
12. Klaxon Co. v. Stentor Electric Manufacturing Co., 313 U.S. 487 (194
13. Case No. C-2-82-1131 (S.D. Ohio 1984).
14. 54 U.S.L.Wk. 2140 (September 10, 1985).
15. 691 F.2d 811 (1982).
16. 38 Cal.3d 137, 695 P.2d 665 (1985).
17. 54 U.S.L.Wk. 3250 (October 15, 1985).