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Torts--Assault and Battery--Negligence--Practical Joke--Statute of Limitation (Newman v. Christensen, 31 N.W.2d 417 (Neb. 1948))

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in what respect the essays should be "best" and therefore left it open to the whim of the judge or chance. The court ruled that sufficient appeared in the record to show that the contest was to be judged on the basis of literary merit for advertising purposes.[10] In further support of its ruling the court in the principal case cites *Hoff v. Daily Graphic, Inc.*, a New York case concerning a game involving movie titles, wherein it was said, "The allegations in the complaint clearly indicate the exercise of judgment and taste in the selection of titles, both by the contestant and by the judges, and while taste is to a certain extent individual, and perhaps at times fanciful, nevertheless the exercise of it is far removed from blind guesswork or chance." [11]

In those jurisdictions which have a lottery statute similar to the one in New York [12] which does not provide that the distribution must be by pure chance or by chance exclusively, but by chance, the determination of the character of a contest as a lottery or not is generally held to depend on which is the dominating element. Competitions in which skill or judgment is the predominant factor in determining the winners will not be considered lotteries. The solution of the problem of which is the dominant element, skill or chance, in borderline cases will vary with the jurisdiction.

K. R.

TORTS — ASSAULT AND BATTERY — NEGLIGENCE — PRACTICAL JOKE—STATUTE OF LIMITATION.—Plaintiff instituted an action for personal injuries resulting from "horse play" during a game of pitch with the defendant and other friends. As the defendant stooped to retrieve his money, he jokingly jerked the plaintiff's leg. Plaintiff's chair was fitted with gliders, and since the linoleum was highly waxed, the plaintiff fell over backwards, thereby injuring his back and suffering partial disability. Plaintiff filed his petition one and one-half years after the cause of action accrued. Nebraska statutes provided for a one-year assault and battery statute of limitation,[1] and for a four-year general tort statute of limitation.[2] Defendant claimed the

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[10] *Contra:* People v. Rehm, 13 Cal. App. (Supp.) 2d 755, 57 P. 2d 238 (1936). Contest consisting of selecting titles for cartoons held to be a lottery. "There is no standard by which one title can be said to be either 'best' or 'more appropriate' than all others." State ex Inf. McKittrick Atty. Gen. v. Globe-Democrat Pub. Co., 341 Mo. 862, 110 S. W. 2d 705 (1937).

[11] Hoff v. Daily Graphic, Inc., 132 Misc. 597, 230 N. Y. Supp. 360 (Sup. Ct. 1928). *Contra:* State ex Inf. McKittrick Atty. Gen. v. Globe-Democrat Pub. Co., 341 Mo. 862, 110 S. W. 2d 715 (1937). The court therein states that the *Hoff* case seems to be ruled on the English "pure chance" theory.

[12] N. Y. PENAL CODE §§ 1370-1386.

[1] Neb. Rev. Stat. § 25-208 (1943).

[2] Neb. Rev. Stat. § 25-207 (1943).

injury was the result of assault and battery and that the one-year statute of limitation [3] barred the action. Plaintiff appeals from a judgment entered on a directed verdict for the defendant. *Held,* judgment reversed. Defendant's act was one an ordinarily prudent man would not have done. Since the plaintiff's injury resulted from negligence, the four-year statute of limitation [4] applied. *Newman v. Christensen,* 149 Neb. 471, 31 N. W. 2d 417 (1948).

The pivotal issue turned upon whether the defendant's act was assault and battery or negligence. The Supreme Court of Nebraska held it to be negligence, stating that, while there was an element of intent present, the intention to commit an injury was lacking.[5]

While there is usually little difficulty in distinguishing between an intentional and a negligent injury, there are cases in which the distinction is, at best, a nice one.[6] Where the injury results immediately from the wilful act of the defendant, assault and battery may lie, but where the injury results indirectly from the acts of the defendant, though the acts which constitute the proximate cause were done intentionally, a cause of action in negligence may be maintained. Moreover, where the injury results from negligence, if it was the immediate effect of the defendant's act, the injured plaintiff has an election [7] to sue either in assault and battery or in negligence.[8]

"A person intends a result when he acts for the purpose of accomplishing it, or believes that the result is substantially certain to follow from his act." [9] The intent need neither be a hostile one nor one calculated to do a particular harm which might impose tort liability. The liability will follow if the intent manifests itself in an evasion of the rights of another. Though an act is intended as a practical joke,[10] or one from which the actor honestly believed no

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[3] Neb. Rev. Stat. § 25-208 (1943).

[4] Neb. Rev. Stat. § 25-207 (1943).

[5] "Although it may be true that every personal injury committed through negligence is, strictly speaking, a 'battery,' within the common law definition, it does not follow that the word 'battery,' as used in Section 25-208, R. S. 1943, is to be construed to include all personal injury actions. The action for a battery, . . . , is proper if founded upon an intentonally administered injury to the person. But there is another class of cases in which the personal injury occurred through the negligent act of one person, and such negligent acts do not come within the definitions of assault and battery . . . , for the intention to inflict the injury is entirely lacking." Newman v. Christensen, 149 Neb. 471, 31 N. W. 2d 417, 419 (1948). *But see* McGovern v. Weis, 265 App. Div. 367, 370, 39 N. Y. S. 2d 115, 118 (4th Dep't 1943). See also 6 C. J. S., Assault and Battery § 11 (1937); 4 AM. JUR., Assault and Battery § 3 (1936).

[6] Kelly v. Lett, 35 N. C. 50 (1851).

[7] Dalton v. Favour, 3 N. H. 465 (1826).

[8] Thus, though the strictness for compliance with the common law forms of action no longer obtains, "the ghosts of ancient common law forms of action, long since obsolete, still walk through our courts." PROSSER, TORTS 36 (1941).

[9] *Id.* at 40.

[10] See Note, 9 A. L. R. 364 (1920).

injury would result,[11] the actor may still be held accountable for the resulting injury.[12] Thus the defendant has been held liable for injuries resulting from an invitation to see some "wild" women,[13] for delivering a package containing a dead rat,[14] and for mixing gunpowder with tobacco to discourage a frequent tobacco borrower.[15]

"On the other hand, the mere knowledge and appreciation of a risk, short of substantial certainty, is not the equivalent of intent. The defendant who acts in the belief or consciousness that he is causing an appreciable risk of harm to another may be negligent, and if the risk is great his conduct may be characterized as reckless or wanton, but it is not classed as an intentional wrong." [16] The courts have attempted to draw the line of demarcation between intentional torts and negligent ones at the point where the risk ceases to be foreseeable by a reasonable man and becomes an apparent certainty.[17] The element of foreseeability is also operative in distinguishing an unavoidable accident—where the occurrence was not intended and could not have been avoided or prevented even by the exercise of reasonable care.[18]

The trend seems to manifest itself in the leading case of *Reynolds v. Pierson*.[19] In that case the defendant jokingly, and without intent to injure anyone, pulled his friend's arm so forcefully that the plaintiff, an elderly man leaning on the friend's arm, was thereby thrown and injured. The Appellate Court of Indiana held the defendant answerable in assault and battery by applying the doctrine of constructive intent. This appears to be the position taken by the majority,[20] and thus the principal case clearly falls out of line; for while the defendant did not intend an injury, he did intend to cause a physical contact.

Therefore, in the principal case, it appears as though the court circumvented the statute of limitation to enable the plaintiff to pursue

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[11] Vosburg v. Putney, 80 Wis. 523, 50 N. W. 403 (1891).

[12] "The fact that a practical joke is the cause of the injury to a person does not excuse the perpetrator from liability in damages for the injury sustained." 52 AM. JUR., Torts § 90 (1945).

[13] Johnston v. Pittard, 62 Ga. App. 550, 8 S. E. 2d 717 (1940).

[14] Great Atlantic & Pacific Tea Co. v. Roch, 160 Md. 189, 153 Atl. 22 (1931).

[15] Parker v. Enslow, 102 Ill. 272, 40 Am. Rep. 588 (1882).

[16] PROSSER, TORTS 42 (1941).

[17] RESTATEMENT, TORTS § 13, Comment *d*, § 21 (1934).

[18] Filippone v. Reisenburger, 135 App. Div. 707, 119 N. Y. Supp. 632 (2d Dep't 1909); Brown v. Kendall, 60 Mass. 292 (1850). But when the act is unlawful per se or is accompanied by a disregard of the possible and probable consequences, there is no basis for excusing the act as an unavoidable accident.

[19] 29 Ind. App. 273, 64 N. E. 484 (1902); People *ex rel.* Starvis v. Rogers, 170 Misc. 609, 610, 10 N. Y. S. 2d 722, 723 (City Ct. 1939).

[20] *Cf.* Honeycutt v. Louis Pizitz Dry Goods Co., 235 Ala. 507, 180 So. 91 (1938); Pizitz v. Bloomburgh, 206 Ala. 136, 89 So. 287 (1921); Mooney v. Carter, 114 Colo. 267, 160 P. 2d 390 (1945); Fortier v. Stone, 79 N. H. 235, 107 Atl. 342 (1919).

a remedy which otherwise might have been denied him, for there is a dearth of respectable authority to support the position taken.[21] It is submitted that the New York courts will not follow the view set forth in the principal case. When an intent to engage in an unreasonable and unprivileged physical contact is clearly shown, and the resulting injury, though not intended, is the natural and probable consequence of the act, assault and battery is the proper remedy to be pursued,[22] and, in New York, the two-year assault and battery statute of limitation,[23] rather than the three-year negligence statute of limitation,[24] is applicable.

H. I. L.

TORTS — AUTOMOBILES — LIABILITY FOR INJURIES UNDER A GUEST STATUTE.—The defendant had transported plaintiff to a social gathering. Before beginning the return trip, plaintiff entered defendant's automobile but alighted when defendant couldn't find the car keys. The defendant inadvertently caused the vehicle to lurch backwards, thus striking the plaintiff. Defendant offers as a bar to this action to recover for the injuries so sustained, Ohio Gen. Code Ann. § 6308-6 which states, in substance, that the owner, responsible for the operation of a motor vehicle, shall not be liable for loss or damage arising from injuries to a guest, while being transported without payment therefor *in or upon said motor vehicle,* resulting from the operation thereof, unless such injuries are caused by the willful or wanton misconduct of such operator. Defendant contends that the phrase, *in or upon said motor vehicle,* should be construed as to include a mere temporary interruption in the transportation as the alighting of plaintiff in this case, and, as a matter of law, that plaintiff was being transported as a guest at the time she was struck. *Held,* judgment for the plaintiff. To hold as defendant contends would require the elimination from the statute of the words, "in or upon said motor vehicle." *Eshelman v. Wilson,* — Ohio App. —, 80 N. E. 2d 803 (1948).

The common law of most states has placed the gratuitous automobile guest in much the same position as a mere invitee concerning *defects in the vehicle;* the owner is responsible only for injuries

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[21] Johnston v. Pittard, 62 Ga. App. 550, 8 S. E. 2d 717 (1940); Baltimore City Pass. Ry. v. Tanner, 90 Md. 315, 45 Atl. 188 (1900); Koons v. Rook, 295 S. W. 592 (Tex. Com. App. 1927), *affirming* Rook v. Koons, 289 S. W. 1077 (Tex. Civ. App. 1926).

[22] McGovern v. Weis, 265 App. Div. 367, 370, 39 N. Y. S. 2d 115, 118 (4th Dep't 1943); Gage v. Bewley, 160 N. Y. Supp. 1111 (Co. Ct. 1916), *aff'd mem.,* 175 App. Div. 914, 160 N. Y. Supp. 1131 (4th Dep't 1916); Noonan v. Luther, 206 N. Y. 105, 99 N. E. 178 (1912).

[23] N. Y. CIV. PRAC. ACT § 50.

[24] N. Y. CIV. PRAC. ACT § 49.