TORTS

SUPREME COURT REVIEW

During the past year the Supreme Court of Nebraska was confronted with a wide variety of cases in the field of torts. In the great majority of these cases the issues were easily resolved by reference to precedent and will be discussed only where a point of particular interest is presented. The court did, however, consider two very significant torts issues, *viz.*, the constitutionality of Nebraska's automobile guest statute[1] and contribution between joint tortfeasers.[2]

GUEST STATUTE

> In *Botsch v. Reisdorff*[3] the Nebraska Supreme Court held that the guest statute does not violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, nor any provision of the Constitution of the State of Nebraska. . . .[4]

The legitimate state interests of promoting hospitality[5] and prevention of fraud[6] provide a rational basis for upholding the statute. The court briefly discussed other more tenuous considerations that could be related to the guest statute as well.[7] The decision thus predictably fell into the conservative half of decisions in various states considering the identical issue.[8]

Another case decided within the purview of the guest statute during the past year held that the statute is applicable to the operation of a motor vehicle upon private property[9] as well as to a guest

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1. Botsch v. Reisdorff, 193 Neb. 165, 226 N.W.2d 121 (1975).
2. Royal Indemnity Co. v. Aetna Cas. & Sur. Co., 193 Neb. 752, 229 N.W.2d 183 (1975).
3. 193 Neb. 165, 226 N.W.2d 121 (1975).
4. *Id.* at 167, 226 N.W.2d at 124. The Nebraska guest statute is NEB. REV. STAT. § 39-6,191 (Reissue 1974).
5. *Id.* at 172, 226 N.W.2d at 126-27.
6. *Id.* at 175, 226 N.W.2d at 128.
7. These interests are the total cumulative miles travelled on Nebraska highways and the conservation of petroleum and other natural resources. *Id.* at 173, 226 N.W.2d at 127.
8. A thorough review of the status of guest statutes generally and their underlying considerations is found in Comment, 8 CREIGHTON L. REV. 432 (1974).
9. Hale v. Taylor, 192 Neb. 298, 220 N.W.2d 378 (1974). "[I]n most of the few cases which have discussed the matter, the courts, finding noth-

who is injured while entering the vehicle in preparation for transportation.[10]

The court also found in another case that three two dollar payments were incidental and were not "the defendant's motivating influence in providng transportation for the plaintiff."[11] On the other hand, it was held in a different factual situation that compensation as construed under the guest statute is not limited to cash or its equivalent.[12] There the plaintiff's decedent had helped to hook up the tractor and baler and travelled to the field with the defendant, promoting goodwill for the defendant's business. These circumstances prevented the application of the guest statute because the defendant had received "tangible and substantial benefits from the arrangement."[13]

In a case considering defenses to liability in a guest-host relationship, the court reiterated that the defenses of contributory negligence and assumption of the risk are not inconsistent. The former requires the negligence of the plaintiff to be a proximate or proximately contributory cause of injury; while the plaintiff assumes a risk when he voluntarily exposes himself to a risk of injury although his actions play no part in causing the injury.[14] The court further held that although plaintiff and defendant had consumed alcoholic beverages together for several hours, plaintiff did not assume the risk as a matter of law by riding with the defendant, so long as reasonable minds could differ as to whether or not the plaintiff knew or should have known that the defendant was too intoxicated to drive.[15]

A bill was introduced in the legislature to repeal the guest statute, but the proposal died in committee.[16]

CONTRIBUTION

In the case of *Royal Indemnity Co. v. Aetna Casualty and Surety Co.*[17] the Nebraska Supreme Court overruled two previous

ing in the statute to indicate any intention to restrict its operation to the public highways, have held that it applied." *Annot.*, 64 ALR2d 694 (1959).

10. *Id.* at 306, 220 N.W.2d at 383.
11. Zoimen v. Landsman, 192 Neb. 561, 565, 223 N.W.2d 49, 53 (1974).
12. Vandenberg v. Langan, 192 Neb. 779, 224 N.W.2d 366 (1974).
13. *Id.* at 786, 224 N.W.2d at 370.
14. Circo v. Sisson, 193 Neb. 704, 710, 229 N.W.2d 50, 53 (1975).
15. *Id.* at 712, 229 N.W.2d at 54. The key factors in the case were that two police officers had opined that the defendant was not too intoxicated to drive, and the defendant consumed no more alcohol between the giving of that opinion and her operation of the automobile. *Id.* at 707, 229 N.W.2d at 52.
16. L.B. 491, Nebraska Legislature, 1975 Session (not passed).
17. 193 Neb. 752, 229 N.W.2d 183 (1975).

cases[18] and allowed contribution between joint judgment debtors jointly liable in tort for negligently caused damages.[19] This right of contribution becomes enforceable on behalf of any party when he discharges more than his proportionate share of the judgment.[20] However, the old rule denying contribution between joint tortfeasers is enforced where intentional or concerted action is present.[21]

The majority opinion felt that this decision did not invade the legislative arena inasmuch as the common law rule denying contribution was evolved by the courts.[22] Justice Spencer differed with the majority on this point. In a vigorous dissent he stated that courts should practice what they preach with respect to invasion of one area of government by another.[23]

LIABILITY OF OCCUPIERS OF LAND

In *Jensen v. Hawkins Construction Co.*[24] the court held that a plaintiff-licensee who stepped on the defendant's floor knowing it was wet could recover for injuries suffered when he fell, because the floor was unusually slippery from the application of a sealer. The court considered the floor with the sealer on it a concealed danger, so as to impose a duty toward the licensee.[25] The court stated that

> [t]here is no evidence here that any ordinary man in the position of the plaintiff could or should have known that the liquid on the floor was concrete sealer which was extremely slippery and slick as ice. A duty to warn may arise even though a defect or condition is in fact open and ob-

18. Farmer's Elevator Mut. Ins. Co. v. American Mut. Liab. Ins. Co., 185 Neb. 4, 173 N.W.2d 378 (1969); Tober v. Hampton, 178 Neb. 858, 136 N.W.2d 194 (1965).

19. Royal Indemnity Co. v. Aetna Cas. & Sur. Co., 193 Neb. 752, 764, 229 N.W.2d 183, 190 (1975).

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* at 767-68, 229 N.W.2d at 191.

24. 193 Neb. 220, 226 N.W.2d 346 (1975).

25. *Id.* at 224-25, 226 N.W.2d at 350. The court relied on RESTATEMENT (SECOND) OF TORTS § 342 Comment c (1966) in reaching this conclusion:

> The possessor's duty also arises if he has had peculiar experience which enables him to realize the risk involved in a condition which he should recognize as unlikely to be appreciated by his licensee as an ordinary man or where he knows that his licensee's experience and intelligence is likely to prevent him from appreciating the risk which is appreciable by a man of ordinary experience and judgment.

Id. The defendant's warning sign had been hidden when an unknown person opened the door on which it was posted. The court found that this could be a foreseeable act when the defendant posted the warning, and that it was an issue for the jury. *Id.* at 224, 226 N.W.2d at 349-50.

> vious where the circumstances are such that there is reason to believe the risk of harm involved would not be anticipated or appreciated.[26]

Justices Spencer and Boslaugh vigorously dissented, arguing that the defendant had done all it reasonably could to warn of the danger. The fact that the floor was merely more slippery than anticipated did not convert it into a trap or concealed danger.[27]

In another case, the court found as a matter of law that a tavern owner was not responsible for injuries suffered by a patron when another customer accidentally shot him, although the gun in question had been brought to the tavern at the owner's invitation for earlier target practice in the tavern basement.[28] The customer's acts with the gun were regarded as an intervening cause, relieving the owner from liability.[29] Justice Clinton, dissenting, felt that the possibility of an accidental injury was reasonably foreseeable to the tavern owner, and that the case should not be decided as a matter of law.[30]

In *Haden v. Hockenberger & Chambers Co.*[31] the Nebraska Supreme Court held that a sixteen year old boy who was sufficiently able to realize and avoid a particular danger could not recover under the "attractive nuisance" doctrine.[32]

MALICIOUS PROSECUTION

In a false arrest and imprisonment action against a county attorney, the court held that because the county attorney's function is quasi-judicial and discretionary when he "acts in good faith he is immune from suit for an erroneous or negligent determination" of the merits of the charges brought.[33]

In an action for malicious prosecution the court restated the rule that to maintain such an action the plaintiff must prove malice and want of probable cause.[34]

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26. *Id.* at 225, 226 N.W.2d at 350.
27. *Id.* at 226-27, 226 N.W.2d at 351.
28. Welsh v. Zuck, 192 Neb. 1, 218 N.W.2d 236 (1974).
29. *Id.* at 8, 218 N.W.2d at 240.
30. *Id.* at 11, 218 N.W.2d at 242.
31. 193 Neb. 713, 228 N.W.2d 883 (1975).
32. *Id.* at 716, 228 N.W.2d at 885. The "attractive nuisance" rule is well-stated in RESTATEMENT (SECOND) OF TORTS § 339 (1966). The court also stated that the attractive nuisance rule does not apply to pools, ponds, or other bodies of water, artificial or natural, where there exist no unusual traps or hazards, nor does it apply to useful machinery in a static condition unless the machinery is especially enticing and inherently dangerous to children too immature to realize the danger. *Id.*
33. Koch v. Grimminger, 192 Neb. 706, 714, 223 N.W.2d 833, 837 (1974).
34. Cimino v. Rosen, 193 Neb. 162, 225 N.W.2d 567 (1975).

RANGE OF VISION RULE

During the past year the Nebraska Supreme Court reaffirmed the general rule that it is negligence as a matter of law for a motorist to drive an automobile on a highway in such a manner that he cannot stop in time to avoid a collision with an object within his range of vision.[35] An exception to the rule, which creates a jury question as to the negligence alleged, occurs when the object struck is such that it blends into the surrounding area and cannot usually be observed by the exercise of ordinary care in time to avoid collision.[36]

EXPERT TESTIMONY

In *Halligan v. Cotton*[37] the state supreme court had to decide whether in a specific evidentiary contest expert testimony was required for the plaintiff to make out a prima facie case against the defendant doctor.[38] The court felt that in such situations the appellate court is compelled to make a judgment about its own ignorance or knowledge with respect to the evidentiary matter involved and that the different results in factually similar cases flow from the assumptions the individual appellate court is willing to make.[39] Here the court decided to require expert testimony.[40] Justice Clinton in a Personal Addendum felt that whether or not expert testimony is available often is determinative of a case apart from the actual merit of the action and that the problem of hired experts can be solved by legislation requiring the medical and legal professions to cooperate.[41]

DAMAGES

In six appeals from damages verdicts, involving both claims of inadequate and excessive awards, the Nebraska court stood firm in its refusal to invade the province of the jury, unless the amounts awarded are clearly erroneous. All six cases were affirmed.[42]

35. Brewer v. Case, 192 Neb. 538, 222 N.W.2d 823 (1974).
36. Wrasse v. Gustavson, 193 Neb. 41, 225 N.W.2d 274 (1975). See *Annot.*, 50 ALR3d 1379 (1973).
37. 193 Neb. 331, 227 N.W.2d 10 (1975).
38. *Id.* at 332, 227 N.W.2d at 11.
39. *Id.* at 340, 227 N.W.2d at 15.
40. *Id.*
41. *Id.* at 340-41, 227 N.W.2d at 15.
42. Damages claimed inadequate on appeal: Brewer v. Case, 192 Neb. 538, 222 N.W.2d 823 (1974); Selders v. Armentrout, 192 Neb. 291, 220 N.W.2d 222 (1974). Damages claimed excessive on appeal: Bakhit v. Thomsen, 193 Neb. 133, 225 N.W.2d 860 (1975); Stapleton v. Norvell, 193 Neb. 71, 225 N.W. 2d 409 (1975); Vandenberg v. Langan, 192 Neb. 779, 224 N.W.2d 366 (1974); Anson v. Fletcher, 192 Neb. 317, 220 N.W.2d 371 (1974).