

COMMENT

THE 1963 PERMISSIVE JOINDER STATUTE IN OHIO

Prior to the abrogation of the distinction between actions at common law and suits in equity, there was no permissive joinder of plaintiffs at common law, although there was permissive joinder of a limited nature of plaintiffs in equity.¹ There was limited permissive joinder of defendants both at common law and in equity.² In 1853, the Ohio Legislature enacted the Code of Civil Procedure³ which was designed to "assist the parties in obtaining justice."⁴ Section 34 of the Code (now Ohio Revised Code section 2307.18) provided for permissive joinder of plaintiffs, while section 35 (now Ohio Revised Code section 2307.19) provided for permissive joinder of defendants. Whether the Code as a whole achieved its objective is debatable,⁵ but the fact that sections 34 and 35 of the Code were ineffective is not.

The courts of some states, including Ohio, have simply refused to give effect to these two sections. Blume, commenting on section 98 of the New York Code (1848), as amended,⁶ which corresponds to section 35 of the Ohio Code, states that the problem arose because, "These provisions were intended to fix the maximum scope of an action in respect to joinder of defendants, but were so *vague* that the courts found it necessary to follow the precedents of the older systems."⁷ (Emphasis added.) Unfortunately, the older system followed was the common law, and even in an equity case, the courts no longer exercised their former discretionary power.⁸ *Rutledge v. Corbin*⁹ was the first case in which the Ohio Supreme Court construed either section 34 or section 35 of the Code. The court held that subsequent attaching creditors had an interest in prior attached property of defendants and could be joined as plaintiffs in an attachment proceeding with the original

¹ Clark, Code Pleading § 56 (2d ed. 1947).

² *Id.* § 59.

³ 51 Ohio Laws 57 (1853).

⁴ 51 Ohio Laws 57, § 2 (1853).

⁵ Compare Field Centenary Essays (Reppy ed. 1949) with Carter, The Proposed Codification of Our Common Law (1884).

⁶ N.Y. Code (1848), § 98, as amended by N.Y. Laws (1849), c. 438, § 118.

⁷ Blume, "The Scope of a Civil Action," 42 Mich. L. Rev. 257, 264 (1943).

⁸ *Id.* at 263.

⁹ 10 Ohio St. 478 (1860).

attaching party.¹⁰ Whether the court viewed the subsequent attaching creditors as parties united in interest with the original attaching party, thus requiring joinder, is not clear. However, in *Allen v. Miller*¹¹ it is clear that the court viewed sections 34, 35, and 36¹² of the Code as *in pari materia*, with section 36 controlling,¹³ *i.e.*, the court would permit joinder only when the parties to the action were united in interest and therefore had to be joined. Further evidence that this was the court's view of joinder is the case of *Clark v. Fry*¹⁴ which held that a master and his servant may not be joined as parties defendant when the master's liability is predicated solely upon the doctrine of respondeat superior. Although the *Clark* case was decided five years after the enactment of the Code, the court did not mention the joinder statutes, but relied instead upon the Massachusetts case of *Parsons v. Winchell*.¹⁵ In *Losito v. Kruse*,¹⁶ the Ohio Supreme Court referred to the master who was liable under the doctrine of respondeat superior as being "secondarily" liable, while the servant was "primarily" liable to the injured party. In *Schimke v. Earley*,¹⁷ Judge Taft in a concurring opinion seemed to indicate that this was still the rule as to joinder of master and servant in Ohio.¹⁸

The major consequence of the Ohio courts' refusal to give substance to the joinder statutes was to prevent joinder of master and servant where the doctrine of respondeat superior was applicable. However, the Ohio courts have not permitted the joinder of plaintiffs when defendant intentionally or negligently injures more than one person by the same intentional or negligent act¹⁹ nor have they permitted such joinder of plaintiffs when defendant injures more than one person by several tortious acts of a similar

¹⁰ *Id.* at 486.

¹¹ 11 Ohio St. 374 (1860).

¹² Section 36 (now Ohio Rev. Code Ann. § 2307.20) provided:

Of the parties to the action, those who are united in interest must be joined, as plaintiffs or defendants; but if the consent of one who should have been joined as plaintiff, cannot be obtained, he may be made a defendant, the reason being stated in the petition.

¹³ *Allen v. Miller*, *supra* note 11, at 377.

¹⁴ 8 Ohio St. 358 (1858). An excellent article on the subsequent case law of joinder of master and servant in Ohio is Wills, "Joinder of Master and Servant," 23 Ohio St. L.J. 488 (1962).

¹⁵ 59 Mass. (5 Cush.) 592 (1850). *Contra*, *Stanofind Oil & Gas Co. v. Bunce*, 51 Wyo. 1, 62 P.2d 1297 (1936). The Wyoming court in construing an identical statute held that the statute permitted joinder of master and servant.

¹⁶ 136 Ohio St. 183, 24 N.E.2d 705 (1940).

¹⁷ 173 Ohio St. 521, 184 N.E.2d 209 (1962).

¹⁸ *Id.* at 523, 184 N.E.2d at 211 (Taft, J., concurring) (by implication).

¹⁹ *Kraut v. Cleveland Ry.*, 132 Ohio St. 125, 5 N.E.2d 324 (1936) (dictum).

nature.²⁰ Joinder of plaintiffs was further restricted in some cases by Ohio Revised Code section 2309.06²¹ requiring united causes of action to affect all the parties to the action.²² As for the joinder of defendants, the Ohio courts have not permitted the joinder of a city and an abutting landowner when the city and the landowner are not joint tortfeasors,²³ the joinder of a manufacturer and a retailer where there is no joint liability,²⁴ or the joinder of an independent contractor and the person employing him.²⁵ Also, the Ohio courts have refused to permit joinder of defendants in the alternative.²⁶

The Ohio Supreme Court has greatly liberalized permissive joinder of concurrent tortfeasors in the last twenty-five years in the three successive cases of *Wery v. Seff*,²⁷ *Meyer v. Cincinnati Street Ry.*,²⁸ and *Schindler v. Standard Oil Co.*²⁹ It appears that the Ohio Supreme Court may have been ready to overrule *Clark v. Fry*³⁰ since it allowed a motion to certify in *Darling v. Home Gas & Appliances, Inc.*³¹ "for the purpose of reexamining the decisions holding that a plaintiff cannot join a master and his servant as defendants in an action to recover damages caused by the negligence of the servant."³²

After the motion to certify the *Darling* case was granted, the Ohio Legislature enacted Ohio Revised Code section 2307.191,³³ providing for the permissive joinder of persons in one action, and the Ohio Supreme Court thereafter dismissed the appeal because

²⁰ *Aetna Casualty & Surety Co. v. Lanz*, 18 Ohio L. Abs. 121 (Ct. App. 1934). But see *Clark v. McClain Fire Brick Co.*, 100 Ohio St. 110, 125 N.E. 908 (1919).

²¹ Ohio Rev. Code Ann. § 2309.06 provides *inter alia*, "The causes of action united as provided in section 2309.05 of the Revised Code . . . must affect all the parties to the action. . . ."

²² *Taylor v. Brown*, 92 Ohio St. 287, 110 N.E. 739 (1915).

²³ *Larson v. Cleveland Ry.*, 142 Ohio St. 20, 50 N.E.2d 163 (1943).

²⁴ *Canton Provision Co. v. Gauder*, 130 Ohio St. 43, 196 N.E. 634 (1935).

²⁵ *Albers v. Great Central Transport Co.*, 145 Ohio St. 129, 60 N.E.2d 669 (1945).

²⁶ *Prudential Ins. Co. v. Simmons*, 18 Ohio C.C.R. 879, 6 Ohio C.C. Dec. 165 (1897).

²⁷ 136 Ohio St. 307, 25 N.E.2d 692 (1940), noted in 7 Ohio St. L.J. 278 (1941).

²⁸ 157 Ohio St. 38, 104 N.E.2d 173 (1952), noted in 13 Ohio St. L.J. 538 (1952).

²⁹ 166 Ohio St. 391, 143 N.E.2d 133 (1957).

³⁰ *Supra* note 14.

³¹ 175 Ohio St. 250, 193 N.E.2d 391 (1963).

³² *Ibid.*

³³ Ohio Rev. Code Ann. § 2307.191 (Page Supp. 1963), effective August 29, 1963, provides:

(A). All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising

of the enactment of the statute. However, the *Darling* case is significant for the Ohio Supreme Court expressly held therein that this statute permits joinder of master and servant as parties defendant.³⁴ Although the question whether or not a master and his servant *may* be joined in a single action to recover damages for the negligence of the servant has been answered, there are many other questions under the statute which the Ohio Supreme Court will have to answer and many problems which Ohio practitioners will have to recognize. The purpose of the remainder of this comment is to discuss some of these questions and problems.

JOINDER OF PARTIES PLAINTIFF

Under the Ohio permissive joinder statute, persons who have been injured by the same intentional or negligent act of a defendant should now be permitted to join as parties plaintiff.³⁵ Persons should also be permitted to join as parties plaintiff when the defendant has injured them by several related tortious acts of a similar

out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, *and against one or more defendants according to their respective rights to relief*, and against one or more defendants according to their respective liabilities.

(B). The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him, and may order separate trials or make other orders to prevent delay or prejudice.

This section is identical to Fed. R. Civ. P. 20 except for the phrase in italics.

The additional phrase was probably added to indicate that the judgment could dispose of a counterclaim. However, it is submitted that a clearer phraseology would have been "and *for* one or more defendants according to their respective rights to relief." Some other jurisdictions which have similar permissive joinder statutes are California, Illinois, North Carolina, New Jersey, New York, Pennsylvania, and Washington.

³⁴ *Supra* note 31, at 251, 193 N.E.2d at 391.

³⁵ This has been the holding both under the Federal Rules and in states which have similar permissive joinder statutes. *Sporia v. Pennsylvania Greyhound Lines*, 143 F.2d 105 (3d Cir. 1944); *Emery v. Pacific Employers Ins. Co.*, 8 Cal. 2d 663, 67 P.2d 1046 (1937); *Seeds v. Chicago Transit Authority*, 409 Ill. 566, 101 N.E.2d 84 (1951). Compare text preceding note 19, *supra*.

nature.³⁶ Furthermore, the limitations on joinder of parties plaintiff imposed by Ohio Revised Code section 2309.06³⁷ should be alleviated by the Ohio permissive joinder statute. The California Court of Appeal in *Peters v. Bigelow*³⁸ held that section 427 of the California Civil Procedure Code³⁹ did not restrict section 378 of the Code⁴⁰ because to hold otherwise would give no effect to the latter statute.⁴¹ The California court also noted that the intention of the legislature in enacting a permissive joinder statute was to simplify the conduct of actions,⁴² and for the court to hold that the permissive joinder statute was limited by section 427 of the Code would be to defeat the intent of the legislature.

The major problem for counsel with the joinder of parties plaintiff is not whether there *can* be joinder, but whether there *should* be joinder in a particular case from a tactical standpoint. As a matter of trial tactics, counsel may not want to join as parties plaintiff persons other than husband and wife or parent and child, which joinder was partially authorized by the 1957 amendment to Ohio Revised Code section 2309.05.⁴³ In deciding whether or not to join two or more persons as parties plaintiff, there are at least two factors which counsel must take into consideration. The first is whether the plaintiffs will cooperate with each other. Total strangers will be primarily interested in the outcome of their own individual causes of action. The course one plaintiff may want to

³⁶ See *Akley v. Kinnicutt*, 238 N.Y. 466, 144 N.E. 682 (1924); *Adams v. Albany*, 124 Cal. App. 2d 639, 269 P.2d 142 (1954). Compare text preceding note 20, *supra*. Other instances where plaintiffs have been joined are: *Peoples' Fed. Sav. & Loan Ass'n. v. State Franchise Tax Bd.*, 110 Cal. App. 2d 696, 243 P.2d 902 (1952), where taxpayers were held to be properly joined as parties plaintiff in a suit for a tax refund, notwithstanding the fact that they would be entitled to refunds of different amount; *Abschagen v. Goldfarb*, 8 App. Div. 2d 750, 185 N.Y.S.2d 339 (1959), where a life tenant of real property and his remainderman joined as parties plaintiff in an action against an adjoining landowner who had done damage to the realty; and *Bush v. Murray*, 209 App. Div. 563, 205 N.Y. Supp. 21 (1924), where plaintiffs joined in an action against their attorney and others for defrauding them and obtaining possession of their property when the claim arose out of the same contract.

³⁷ *Supra* note 21. However, the Ohio Supreme Court failed to recognize the effect of Ohio Rev. Code Ann. 2307.91 in deciding *Huggins v. Morrell & Co.*, 176 Ohio St. 171 (1964).

³⁸ 137 Cal. App. 135, 30 P.2d 450 (1934).

³⁹ This section is comparable to Ohio Rev. Code Ann. § 2309.06 (Page Supp. 1963).

⁴⁰ This section is comparable to Ohio Rev. Code Ann. § 2307.191, *supra* note 33.

⁴¹ *Supra* note 38, at 141, 30 P.2d at 452.

⁴² *Supra* note 38, at 141-42, 30 P.2d at 453. *Accord*, *Weigend v. Hulsh*, 315 Ill. App. 116, 42 N.E.2d 146 (1942); *Chiba v. Kurutz*, 263 App. Div. 33, 31 N.Y.S.2d 171 (1941).

⁴³ Effective November 9, 1957.

pursue could be contrary to the best interests of another plaintiff. The second factor to be taken into consideration is the nature of the cause of action. If the action is one for personal injury to two or more persons, each person is likely to recover more when each claim is tried separately.⁴⁴ However, if the action is one for deceit or fraudulent misrepresentation, it would probably be advantageous to each plaintiff for a number of similar instances to be presented simultaneously.⁴⁵ Counsel must analyze each case to determine whether or not it would be advantageous to join two or more persons as parties plaintiff under the permissive joinder statute.

If a person joins as a co-plaintiff, he should, as in any other case, assert his entire cause of action.⁴⁶ If he asserts only part of his cause of action, a judgment on the merits may have the effect of extinguishing his entire cause of action. A co-plaintiff is more likely than a sole plaintiff to make the procedural error of "splitting a cause of action."

If an action by one plaintiff would have been removable to federal court, an action by two or more plaintiffs may possibly be removable because of the presence of a "separate and independent cause of action" within the meaning of 28 U.S.C. §1441(c), even though the presence of the other plaintiffs prevents removal under paragraph (a) or (b) of that section.⁴⁷ Thus joinder of plaintiffs will not necessarily be effective to prevent removal to federal court.

JOINDER OF PARTIES DEFENDANT

By reason of the holding of the Ohio Supreme Court in the *Darling* case,⁴⁸ a plaintiff should be able to join as parties defendant all persons who are primarily and secondarily liable to him for an injury to his person or property. This would include the joinder of a city and abutting property owner, the joinder of a manufacturer and a retailer, and the joinder of an independent contractor and the person employing him. This changes the former Ohio rule.⁴⁹ As a result of this change in the Ohio joinder rule, a plain-

⁴⁴ Louisell & Hazard, *Pleading and Procedure: State and Federal* 675 (1962).

⁴⁵ *Ibid.*

⁴⁶ For example, plaintiff must assert a personal injury claim and a property damage claim caused by the same tortious act of defendant in one cause of action under the present Ohio rule. *Rush v. Maple Heights*, 167 Ohio St. 221, 147 N.E.2d 599 (1958), noted in 19 Ohio St. L.J. 477 (1958).

⁴⁷ Moore, *Commentary on the U.S. Judicial Code* 238-39 (1949); Moore & Vandercreek, "Multi-Party, Multi-Claim Removal Problems: The Separate and Independent Claim Under Section 1441(c)," 46 Iowa L. Rev. 489, 505 (1961).

⁴⁸ *Supra* note 31.

⁴⁹ Compare text following note 22, *supra*. Other instances where defendants have been joined are: *Delia Plastering Co. v. D. H. Dave, Inc.*, 11 F.R.D. 304 (N.D.

tiff may now prevent removal to federal court in some instances by joining as a defendant the servant of another defendant. The cause of action against the non-resident master does not constitute a "separate and independent cause of action" even though the master could have removed had he been the sole defendant.⁵⁰ A plaintiff can properly join concurrent or joint tortfeasors either under Ohio Revised Code section 2307.19⁵¹ or under the new permissive joinder statute. In addition, a similar permissive joinder statute has been construed to permit a plaintiff to join the representatives of a deceased joint tortfeasor with the surviving joint tortfeasors.⁵² Whether the Ohio courts should permit joinder of independent tortfeasors when the injuries inflicted are divisible and distinct will be discussed *infra*.

The new permissive joinder statute expressly permits the joinder of parties in the alternative, which was not permitted by previous Ohio decisions.⁵³ For example, a plaintiff should now be able to join two persons as parties defendant by stating his claim against the defendants in the alternative when he does not know which of two defendants were driving a motor vehicle at the time of an accident,⁵⁴ or when he does not know whether a purported agent had the authority to make a contract on behalf of his purported principal.⁵⁵ In a proper instance, a plaintiff can assert his

Ohio 1951), where the court held that a surety company, which according to the terms of its bond was jointly and severally liable with the subcontractor on the contract, was a proper party defendant in an action for breach of the subcontract under Fed. R. Civ. P. 20(a); and *Schoner v. Koeppel*, 237 App. Div. 860, 261 N.Y. Supp. 458 (1932), where a third person who, with a partner, had wrongfully deprived the partnership of some of its assets was properly joined as a defendant in a partnership accounting.

⁵⁰ Moore, *supra* note 47, at 238; Moore & Vandercreek, *supra* note 47, at 502-05. It was formerly held that if plaintiff joined master and servant in an Ohio state court in violation of the Ohio rule, such joinder was "constructively fraudulent" and did not prevent removal by the non-resident master. *Baier v. General Motors* (Delco Div.), Civil No. 2110, S.D.W.D. Ohio, April 26, 1957. Undoubtedly the change in the Ohio joinder rule destroys the basis of the *Baier* holding. The effect of a voluntary dismissal of the resident servant in this situation will be discussed *infra*.

⁵¹ *Wery v. Seff*, *supra* note 27.

⁵² *Fischer v. Lippmann*, 240 App. Div. 770, 266 N.Y. Supp. 14 (1933). This was probably permissible even under Ohio Rev. Code Ann. § 2307.19.

⁵³ *Supra* note 26.

⁵⁴ *Fowler v. Baker*, 3 Fed. Rules Serv. 8e.63, Case 1 (M.D.Pa. June 20, 1940). See West's Fed. R. Civ. P. 139-40, Form 10 (1959).

⁵⁵ *Amalgamated Packaging Industries, Ltd. v. National Container Corp.* (Del.), 14 F.R.D. 194 (S.D.N.Y. 1953); *Stein, Hall & Co. v. A. M. Alison & Co.*, 123 Misc. 382, 205 N.Y. Supp. 422 (App. T. 1924).

claim against three defendants in the alternative.⁵⁶ In such actions, not only will the plaintiff save time and money, but he will be protected against the risk of inconsistent findings of fact in two or more separate trials, each of which is adverse to the plaintiff.⁵⁷ At the same time, the burden upon the court dockets may be appreciably reduced.

SPECIAL PROBLEMS

This comment will discuss four problems which probably will arise in the use of the new permissive joinder statute. The first is an election problem. Although as a result of the 1936 statute a plaintiff will no longer be required to elect between a master and his servant who have been joined as defendants,⁵⁸ a plaintiff may decide to do so voluntarily in some cases. Thus when plaintiff has established to his satisfaction the existence of agency in an action against a master and his servant for injuries caused by the negligent conduct of the servant, plaintiff may prefer to dismiss voluntarily as to the defendant servant. If plaintiff does not voluntarily elect, but goes to the jury against both defendants, there is the danger that the jury may improperly return a verdict against the master but in favor of the servant, especially in a case where a corporation is the master. In considering whether to dismiss as against the defendant servant, plaintiff must realize that he will not be able to maintain a new action against the dismissed servant if the statute of limitations has run, because the saving statute⁵⁹ does not apply to voluntary dismissals.⁶⁰ Furthermore, if a judgment is rendered in favor of the master by reason of a determination that the servant was not negligent, such a judgment would preclude recovery against the servant.⁶¹ In some situations, a voluntary dismissal of the servant may make the case removable

⁵⁶ *George v. Long Transp. Co.*, 11 F.R.D. 305 (N.D. Ohio 1951). See *Metrakos v. New York Cent. R.R.*, 12 F.R.D. 177 (N.D. Ohio 1951), where the court held that plaintiff can assert his claim in the alternative against all persons against whom he asserts a right to relief; and *Tanbro Fabrics Corp. v. Beaunit Mills, Inc.*, 4 App. Div. 2d 519, 167 N.Y.S.2d 387 (1957), where the court held that a purchaser of textile goods was entitled to join the seller and the processor of the goods in a single action to determine whether the goods were defective, and if so, whether the defect was a consequence of the breach of the seller or the processor, or both of them.

⁵⁷ *Louisell & Hazard, op. cit. supra* note 44, at 675.

⁵⁸ *Sypherd v. Haeckl's Express, Inc.*, 31 F.R.D. 255 (S.D. Ohio 1962).

⁵⁹ Ohio Rev. Code Ann. § 2305.19.

⁶⁰ *Siegfried v. Railroad Co.*, 50 Ohio St. 294, 34 N.E. 331 (1893). This case was limited somewhat by *Cero Realty Corp. v. American Mfrs. Mutl. Ins. Co.*, 171 Ohio St. 82, 167 N.E.2d 774 (1960), but the rule in *Siegfried* would still be applicable to the situation described in the text.

⁶¹ *Schimke v. Earley, supra* note 17.

to federal court. Thus, if the master is a non-resident of Ohio and the servant is a resident,⁶² voluntary dismissal of the resident defendant would arguably make the case removable to federal court if all the jurisdictional requirements are met, because this would be the first opportunity the non-resident defendant has to remove to federal court.⁶³ Another factor which may militate against a voluntary election is the possibility of excess liability insurance coverage which may be available to the plaintiff only if a judgment is recovered against the servant.

The second problem which the Ohio courts should consider is the abrogation of the highly technical and patently unsound rule in *Bucurenciu v. Ramba*.⁶⁴ This rule was laid down at a time when the distinction between the procedural problem of joinder of defendants and the substantive problem of entire liability⁶⁵ was not recognized. The new permissive joinder statute clearly permits joinder of defendants even if entire liability is uncertain or unlikely. Therefore, the basic policy of the new statute will be frustrated unless the *Bucurenciu* line of cases is overruled. The *Bucurenciu* rule is not necessary to prevent joinder of defendants in bad faith. If a plaintiff deliberately joins a resident defendant against whom no substantial possibility of recovery exists, for the sole purpose of manufacturing venue, the court undoubtedly has the power to set aside the summons which has been issued to a foreign county.

⁶² If plaintiff is a citizen of Ohio, defendant master is a citizen of a state other than Ohio, and defendant servant is a citizen of Ohio, the case can not be removed to federal court with master and servant joined as parties defendant because there is not complete diversity of citizenship. *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806). Even if there is complete diversity of citizenship in the state court action, the joinder of the resident defendant servant would prevent removal to the federal district court. 28 U.S.C. § 1441(b) (1948).

⁶³ 28 U.S.C. § 1446(b) (1948), as amended, 28 U.S.C. § 1446(b) (Supp. II, 1949), provides *inter alia*:

If the case stated by the initial pleading is not removable, a petition for removal may be filed within twenty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

⁶⁴ 117 Ohio St. 546, 159 N.E. 565 (1927), where the court held that a non-resident defendant who was joined as a concurrent tortfeasor with a resident defendant raised the question of jurisdiction over his person by entering a general denial, and that if the jury found in favor of the resident defendant, but against the non-resident defendant, the non-resident defendant was to be dismissed. *Accord*, *Glass v. McCullough Transfer Co.*, 159 Ohio St. 505, 115 N.E.2d 78 (1957).

⁶⁵ Entire liability is the common law doctrine that a defendant "might be liable for the entire damages sustained by a plaintiff, even though his act concurred or combined and that of another wrongdoer to produce the result. . . ." Prosser, *Torts* 240 (2d ed. 1955).

The third problem is the joinder in a single action of independent contributing tortfeasors whose separate acts inflict injuries which are divisible and distinct. The present rule in Ohio is that a plaintiff is not permitted to join independent contributing tortfeasors in the same action.⁶⁶ However, when a question of law or fact common to all defendants arises (which might be the case in an action for damages caused by separately maintained nuisances) the Ohio permissive joinder statute provides that a plaintiff may join the parties as defendants in a single action.⁶⁷ This will require the Ohio courts to permit juries to return verdicts in different amounts against each defendant according to his respective liability. This is consistent with federal decisions on this question under the federal permissive joinder rule.⁶⁸ Under the former Ohio joinder rule, if a plaintiff was uncertain whether the evidence would establish a single indivisible injury, or divisible and distinct injuries, he might well hesitate to join defendants in a single action, as a joint verdict in a single amount could not properly be returned in the second case. Under the new statute, plaintiff may safely join the defendants, and the court should, in a proper case, submit alternative forms of verdict to the jury, along with appropriate instructions. Thus, in a case in which the evidence would permit the jury to find that either type of liability is established, a court might properly submit (1) a verdict in favor of plaintiff against defendant *A*, (2) a verdict against plaintiff in favor of defendant *A*, (3) a verdict in favor of plaintiff against defendant *B*, (4) a verdict against plaintiff in favor of defendant *B*, (5) a verdict in favor of plaintiff against defendants *A* and *B*, and (6) a verdict against plaintiff in favor of defendants *A* and *B*. If in a particular case it appears that the instructions and general verdict forms will be difficult for the jury to follow, counsel might give consideration to the desirability of making a request for a special verdict under Ohio Revised Code section 2315.15.⁶⁹ In a complex multiparty case, it might be much easier for a jury to render a special verdict.

The final problem is the proper form of verdict and judgment in cases in which one defendant is under a duty to indemnify an-

⁶⁶ *City of Mansfield v. Bristor*, 76 Ohio St. 270, 81 N.E. 631 (1907) (dictum), where the court stated that when different parties discharge sewerage into a stream without concerted action, the parties are not joint tortfeasors and therefore can not be joined. A similar problem is created when *A* injures plaintiff's leg and then *B* injures plaintiff's arm. Prosser, *supra* note 65, at 230.

⁶⁷ Ohio Rev. Code Ann. § 2307.191, *supra* note 33.

⁶⁸ *Rabbitt v. Hale*, 184 F.2d 443 (8th Cir. 1950).

⁶⁹ In *Miller v. McAllister*, 169 Ohio St. 487, 160 N.E.2d 231 (1959), the Ohio Supreme Court suggested a form of special verdict in negligence cases.

other defendant. This includes the primary-secondary liability cases such as those in which a master and his servant, a city and an abutting property owner, a manufacturer and a retailer, an independent contractor and the person employing him have been joined. As the the permissive joinder statute expressly permits judgments to be entered "against one or more defendants according to their respective liabilities,"⁷⁰ the court (if a request is made by any party) should require the jury, if it finds both defendants liable, to render separate verdicts against each defendant in the same amount. The court should then enter separate judgments against each defendant in the same amount and ordinarily in the same journal entry.⁷¹ The journal entry should make it clear that both judgments are for the same injury, and that the satisfaction of either judgment will discharge the other. The journal entry might also contain express findings that defendants are not concurrent tortfeasors, and that defendant *B* is liable solely by reason of the primary-secondary relationship between the defendants. This procedure in a master-servant case should preserve the master's right against the servant for reimbursement in the event that the judgment is enforced against the master.

SEPARATE TRIALS

Even though a plaintiff has properly joined with another or has properly joined two or more parties as parties defendant, the court in its discretion may order separate trials or other relief in certain instances.⁷² The statute thus recognizes that joinder of parties is a pleading problem, and that a rule which permits parties to be joined as a matter of pleading should not necessarily require the claims by or against such parties to be tried together. However, the burden of proof of undue prejudice is upon the person objecting to the joinder of parties⁷³ and therefore should not prove to be a problem area under the statute.

CONCLUSION

The permissive joinder statute will be a valuable aid in avoiding multiplicity of suits in Ohio, but it should not be used automatically and indiscriminately. Counsel should analyze each case

⁷⁰ Ohio Rev. Code Ann. § 2307.191, *supra* note 33. See also Ohio Rev. Code Ann. § 2323.02.

⁷¹ Wills, "Joinder of Master and Servant," 23 Ohio St. L.J. 488, 499-501 (1962).

⁷² Ohio Rev. Code Ann. § 2307.191, *supra* note 33.

⁷³ See *Bossak v. National Surety Co. of New York*, 205 App. Div. 707, 200 N.Y. Supp. 148 (1923), where the court held that striking the name of a defendant who had been properly joined was an abuse of the trial court's discretion when no undue prejudice was shown by the defendant.

from a legal and a tactical viewpoint before making a decision to utilize the statute. Various problems will arise by reason of the freer joinder of parties under the new statute. This is the price which must be paid for reducing the number of lawsuits. However, these problems have been solved satisfactorily in the many jurisdictions which have modern party joinder provisions, and there is no reason to believe that they cannot be similarly solved in Ohio.

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