However, there is a distinct difference between physical deficiencies and intoxication. Poor eyesight and hearing cannot always be remedied but intoxication is usually a voluntary condition wherein the person intoxicated risks losing the full use of his senses. So there is not as much reason why the courts should include intoxication in the exceptions to the objective standard test. But if the intoxicated man does meet the requirements of this test and his conduct or acts are equal to what the reasonably prudent sober man would do in the circumstances, that is all that is required. WILLIAM M. DRENNEN.

WANTON MISCONDUCT DISTINGUISHED FROM NEGLIGENCE

Plaintiff collided with the rear of a truck owned by defendant. The evidence showed that the truck was parked a few feet from the side of the road and that the night was misty and rainy. Whether or not the tail light of the truck was burning was a disputed fact, but the accident occurred near a street light. It was admitted by the plaintiff that he was driving at a speed such that he could not bring his car to a stop within the assured clear distance ahead. In his amended petition plaintiff characterized the act of the defendant as "wanton, wilful, gross negligence and misconduct." The trial judge charged the jury on the issue of wanton negligence stating that if such be found defendant could not avail himself of his plea of contributory negligence.

Held: Facts must be pleaded which reveal on their face the element of wantonness and it was an error on the part of the trial judge to instruct the jury on the question of wantonness in this case. *Universal Concrete Pipe Co.* v. *Bassett*, 130 Ohio St. 567, 20 Abs. No. 18, vii, 5 Ohio Op. 214 (1936).

The distinction between a wilful act and a negligent act is rather well defined. A wilful act is one in which the party acting intends to bring about a certain result. A negligent act is one in which the party acting fails to come up to a required standard of care. *Payne* v. *Vance*, 103 Ohio St. 59, 133 N.E. 85 (1921); *Stauffer* v. *Schlegel*, 74 Ind. App. 431, 129 N.E. 44 (1930).

The law often treats a wilful act more severely than a negligent one. Contributory negligence is no defense when the defendant has been guilty of a wilful act. *Payne* v. *Vance, supra.* Punitive damages may be secured against a wilful tortfeasor but not against a negligent one. *Simpson et al.* v. *McCaffrey*, 13 Ohio 509 (1844); in Ohio a driver of a car is liable to a gratuitous guest for a wilful injurious act but not for his negligence. Ohio G.C. Sec. 6308-6.

It seems evident that wantonness lies somewhere between wilfulness and negligence. *Higbee Co.* v. *Jackson*, 101 Ohio St. 75, 128 N.E. 61, 14 A.L.R. 131 (1920). The legal effect of wantonness, however, is the same as wilfulness. Contributory negligence is no defense against a wanton act. *Wabash Ry. Co.* v. *Speer*, 156 Ill. 244, 40 N.E. 835 (1895). Punitive damages can be assessed for a wanton act which results in injury. *Mobile Electric Co.* v. *Fritz*, 200 Ala. 692, 77 So. 235 (1912). In Ohio a driver of a car is liable to a guest for a wanton act which results in injury. Ohio G.C. Sec. 6308-6. A landowner is liable to trespassers for either wanton or wilful acts and not for negligence. *Wabash R. Co.* v. *Norway*, 7 O.C.C. 449, 4 Ohio Cir. Dec. 674 (1893).

A fortiori, the legal effect of wantonness is often very different from that of negligence. The plaintiff's whole case may depend upon showing that the defendant's conduct was something more than negligent—that his conduct amounted to wantonness. The line between negligence and wanton misconduct is not easy to draw. Is a very negligent defendant wanton? The better considered cases say that there is a difference in kind between the two and not merely a difference in degree. *Payne* v. *Vance, supra; Reserve Trucking Co.* v. *Fairchild*, 128 Ohio St. 519, 191 N.E. 745 (1934).

The principal case draws a sharp distinction between negligence and wantonness. Judge Stephenson says, "Mere negligence is not converted into wanton misconduct by the use of the word "wanton" in connection with the specifications of negligence—negligence is the failure to exercise ordinary care—wanton misconduct is such conduct as manifests a disposition to perversity, and it must be under such surrounding and existing conditions that the party doing the act or failing to act must be conscious, from his knowledge of such surrounding circumstances and existing conditions, that his conduct will, in all probability, result in injury."

The principal case avoids the use of the term "wanton negligence." Paragraph three of the syllabus states: "Regardless of the fact that the term 'wanton negligence' is sometimes used both in text and opinion, such use is unwarranted, as it is a misnomer pure and simple. Wanton misconduct is positive in nature while negligence is naturally negative." This seems to be a valid and useful distinction. Wantonness and negligence are clearly inconsistent. One who acts with a positive knowledge of another's dangerous situation is in a different category from one who fails to come up to a certain standard of care.

The principal case seems to hold that knowledge of plaintiff's danger

is a requirement for wanton misconduct. Thus in *Vecchio* v. *Vecchio*, 131 Ohio St. 59, 5 Ohio Op. 368 (1936), a recent case arising under the guest act, a demurrer to the declaration was sustained because plaintiff did not allege unequivocally that defendant knew of plaintiff's danger. The complaint stated, "Defendant was careless and wantonly negligent, when in the exercise of ordinary care, she *knew or ought to have known* that door of said *automobile was not closed securely*." (Italics writer's). There are some decisions, however, that permit recovery where the element is lacking. The following fact situations are illustrations of cases in which the defendant's conduct was held to be wanton:

Reserve Trucking Co. v. *Fairchild, supra;* (Truck standing crosswise in city street on rainy night.) *Higbee Co.* v. *Jackson, supra;* (Driver of truck passing car at high speed and colliding with wagon coming from the other direction while plaintiff, a boy, was hanging on side of truck.) *Bernier* v. *Illinois Central Ry. Co.*, 296 Ill. 464, 129 N.E. 747 (1921); (Train exceeding speed limit while plaintiff, a woman, was standing in area between rails of approaching train and passing freight). *Collins* v. *Missouri-Illinois Ry. Co.*, 233 Ill. App. 545 (1924); (Engineer backing train without being able to see track on which he was traveling and running into plaintiff.) *Mobile Electric Co.* v. *Fritz, supra;* (Plaintiff intestate killed by coming in contact with charged wire belonging to defendant's company, which wire had been blown down by storm).

On the other hand in the following cases it was held that a charge of wanton misconduct was incorrect. *Johnson* v. *Duluth, W. & P. Ry. Co.*, 152 Minn. 151, 188 N.W. 221 (1922); (Plaintiff, a boy, falling from footboard of locomotive as a result of the accidental release of a jet of steam). *Alabama Power Co.* v. *Conine*, 210 Ala. 320, 97 So. 791 (1923); (Plaintiff electrocuted by dangling wire. Defendant's superintendent believed wire to be harmless and told plaintiff so.) *Slicker* v. *Seccombe*, 42 Ohio App. 357, 182 N.E. 131, 120 Abs. 507 (1931); (Defendant attempting to pass on right side of automobile on which plaintiff's wife was riding on running board.)

There is little unanimity among various courts as to what factual material must be present to justify a charge as to the law on wantonness.

It is evident that a plaintiff who was himself negligent or who was, under the guest act, a guest in an automobile, would like a jury to find that the defendant's conduct amounted to wantonness. If the distinction between the two is to have any substance, it is important that the

trial court refuse to submit the issue of wantonness to the jury unless the facts alleged justify such a finding.

The decision in the principle case seems clearly sound, and it is hoped that it will have a salutary effect in the future.

GEORGE BAILEY.

PRACTICE

VOIR DIRE EXAMINATION AND AUTOMOBILE INSURANCE

One of the most important of the recent decisions rendered by the Supreme Court of Ohio was the decision of the case of *Dowd-Feder, Inc.* v. *Truesdell*, 130 Ohio St. 530, 5 Ohio Op. 179 (Decided March 18, 1936).

The action was brought to recover damages for injuries sustained by the plaintiff, when he was struck by an automobile driven in a negligent manner by an employee of the defendant. The defense was being conducted by an attorney known by counsel for the plaintiff to be an "insurance company's lawyer." At the trial counsel for the plaintiff on the voir dire examination of prospective jurors was permitted to question them as to their relationship to or interest in a casualty insurance company. The defense moved for withdrawal of a juror because of those questions, and such motion having been denied, exceptions were duly taken. A verdict was returned for the plaintiff and judgment was rendered thereon. The defendant prosecuted error to the Court of Appeals where the judgment was affirmed. The case was presented to the Supreme Court on the allowance of a motion to certify.

The Supreme Court held: "In the examination of a prospective juror upon his voir dire in cases involving property damage, personal injury, or both, he may be asked the general question whether he has or has had any connection with or interest in a casualty insurance company. * * * "

"All questions in the voir dire examination must be propounded in good faith. The character and scope of such questions cannot become standardized, but must be controlled by the court in the exercise of its sound discretion, the court having for its purpose the securing to every litigant an unbiased jury."

The decision of the Supreme Court in the principal case apparently settles that much debated question as to the extent to which counsel may