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“TRESPASS” TO MOVABLES? SAY NO MORE.
MCI COMMUNICATIONS SERVICES, INC. v. HAGAN
AND LOUISIANA CIVIL CODE ARTICLE 2315

Bill Hudson *

Answering a certified question from the U.S. Fifth Circuit Court of Appeals, the Louisiana Supreme Court recently refused to recognize the tort of trespass to chattels, declaring instead that the claim at issue was governed by the general delictual liability provision of Louisiana Civil Code article 2315.

I. BACKGROUND

MCI Communications maintained claims of trespass and negligence against co-defendants Hagan and Joubert in federal court.¹ The suit arose after an MCI fiber optic cable, a portion of which ran underground Hagan’s property, was cut, allegedly by Joubert while operating a backhoe on Hagan’s land.² At trial, MCI attempted to demonstrate the defendants’ negligence by claiming noncompliance with the Louisiana Damage Prevention Act.³

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1. Verizon Business Global initially brought the action, and MCI was substituted when its ownership of the damaged movable was established. *MCI Communications Services, Inc. v. Hagan*, 641 F. 3d 112, 114 (5th Cir. 2011).

2. *MCI Communications Service*, 641 F. 3d at 114.

3. *MCI Communications Services, Inc. v. Hagan*, 74 So. 3d 1148, 1149, 1151 (La. 10/25/11). The Louisiana Underground Utilities and Facilities Damage Prevention Law, or “Damage Prevention Act” as used by the court, LA. REV. STAT. § 49:1749.11 *et seq.*, provides among other things that “no person shall excavate... near the location of an underground facility or utility... without having first ascertained, in the manner prescribed in Subsection B of this Section, the specific location as provided in R.S. 40:1749.14(D) of all underground facilities or utilities in the area which would be affected by the proposed excavation or demolition.” LA. REV. STAT. § 49:1749.13(A).

The trial court found that MCI had only a contractual right for its cable to run through Hagan's property according to the sale terms when Hagan purchased the land, and not a servitude. A jury found the co-defendants had not acted negligently.⁴ Based on these findings, the trial judge declined, over MCI's objection, to instruct the jury, in essence: "A Defendant may be held liable for an inadvertent trespass resulting from an intentional act."⁵

Reviewing the case on MCI's appeal, the U.S. Fifth Circuit Court of Appeals reasoned that, without a servitude in MCI's favor, no trespass to land could have occurred. Although, finding enough evidence to establish Joubert had severed the cable while intentionally operating the backhoe, the Fifth Circuit believed "MCI may [have been] entitled to have the jury instructed on the claim of trespass to chattels."⁶ Having been presented with no Louisiana Supreme Court decision on the requisite intent for "trespass to chattels" (or in regard to the very existence of that tort in Louisiana),⁷ the Court of Appeals certified to the State Supreme Court the question:

Is the proposed jury instruction in this case, which states that "[a] Defendant may be held liable for an inadvertent trespass resulting from an intentional act," a correct statement of Louisiana law when the trespass at issue is the severing of an underground cable located on property owned by one of the alleged trespassors [*sic*], and the property is not subject to a servitude by the owners of the underground cable but only to the contractual right to keep it, as an existing cable, underneath the property?⁸

4. MCI Communications Services, 74 So. 3d at 1151.

5. *Id.*

6. MCI Communications Services, 641 F. 3d at 115.

7. MCI Communications Services, 74 So. 3d at 1152.

8. MCI Communications Services, 641 F. 3d at 116.

II. LOUISIANA SUPREME COURT DECISION

To reply to the Fifth Circuit, the Louisiana Supreme Court framed the issue as “whether Louisiana law recognizes a distinct tort of ‘trespass to chattels’ and, if so, can a ‘trespass to chattels’ be committed inadvertently if it results from an otherwise intentional act.”⁹ The court first noted an important distinction between trespass to chattels and the facts of the *Hagan* case: relying on *Black’s Law Dictionary*, legal scholars, and *The Restatement (Second) of Torts*,¹⁰ the court concluded that “the common law claim of trespass to chattels appears to require intent to interfere with another’s interest in movable property before an action for trespass to chattels may lie.”¹¹

The court then concluded that, regardless of the presence or absence of intent, an owner of movable property damaged by another “has an adequate remedy under the law of tort without recourse to the common law trespass to chattels” under the broadly-phrased Louisiana Civil Code article 2315(A)—“[e]very act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.”¹² A remedy under article 2315 does not preclude evidence of a defendant’s noncompliance with the Damage Prevention Act, since, even though “a violation of the statute does not result in either strict civil liability or negligence *per se*,” ignoring the duty to locate “an underground utility as required by statute subjects the excavator to delictual liability under the theory of negligence, and any statutory violation is considered in the traditional duty-risk analysis.”¹³ MCI’s proposed jury instruction was thus “not a correct statement of Louisiana law.”¹⁴

9. *Id.* at 1153.

10. *Id.* at 1153-1154 & n.8-10.

11. *Id.* at 1154.

12. *Id.* at 1155 (quoting LA. CIV. CODE art. 2315(A)).

13. *Id.* at 1155.

14. *Id.*

III. COMMENTARY

Hagan is a key illustration of the basic difference in how the common law and the civil law remedy damages. The decision underlines, and will doubtlessly help to preserve, Louisiana's civil law tradition.

The question certified by the Fifth Circuit appears to have resulted from MCI's ignoring Louisiana's encompassing codal framework for remedying damages, and needlessly pinning its case to a "trespass" theory. Presented with the issue of trespass, the Fifth Circuit wondered whether a certain type of trespass theory—trespass to chattels—was applicable to the claim.

At common law, a claim for damage to movable property would involve a more particularized claim centered on one or more specific theories of recovery, since common law tort suits, traceable to old writs,¹⁵ are maintained under theories of recovery connected to specific sets of facts.¹⁶ The task of fitting the right theory with its corresponding elements to an injury-causing occurrence can become highly technical: regarding cases of damage to buried utility lines, Prosser and Keeton note that the intent element alone produces contention in the fact-specific inquiries surrounding trespass to chattels claims.¹⁷ By contrast, Louisiana Civil Code article 2315 gives legal effect to a general principle, as is characteristic of codal law,¹⁸ that there may be a remedy for any act which causes damage, thus removing the

15. 1 DAN B. DOBBS ET AL., PRACTITIONER TREATISE SERIES: THE LAW OF TORTS 127, 162 (2d ed. 2011) (brief background of writs for trespasses to land and personal property).

16. H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD 211 (2000); (Common law "could not, and did not, subsequently modernize itself, in terms of overall expression.... [T]here is still a law of torts (the plural is important) since there were no general principles of liability in England, only given wrongs...") *Id.* at 217.

17. W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS 86 (W. Page Keeton ed., 5th ed. 1984).

18. GLENN, *supra* note 16 at 126; *see generally*, Alain Levasseur, *On the Structure of a Civil Code*, 44 TUL. L. REV. 693 (1970).

complexity of defining and recognizing specific torts claim-by-claim and fact-by-fact.

In *Hagan*, the State Supreme Court applied article 2315 literally, in accordance with the Code's rule of interpretation: "When a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature."¹⁹ The court recognized article 2315's capacity to remedy damage, and it prevented the adoption of a common law theory which, given its historical application, could have become the basis for tort liability for trespass alone, even when trespass does not produce damages.²⁰

In his treatise on Louisiana tort law, Professor William E. Crawford states, "The fact of trespass in itself is not an actionable civil wrong, contrary to the common law. All actions for trespass under Louisiana law have involved damage done by the trespasser after or in the course of the trespass."²¹ Indeed, under the reasoning of cases like *Dickie's Sportsman's Centers, Inc. v. Department of Transp. & Dev.*, an action in trespass without damages would be absurd in Louisiana:

In the assessment of damages arising out of trespass, the trial court has much discretion. The damage, however, must be certain, and the discretion exercised only to the extent of the damage and ascertained from all the facts and circumstances.²²

Without damage, there can be no recovery; therefore, there is no "tort" in the sense of "[a] civil wrong, other than breach of contract, for which a remedy may be obtained."²³ The simple

19. LA. CIV. CODE art. 9.

20. KEETON ET AL., *supra* note 17 at 67.

21. WILLIAM E. CRAWFORD, 12 LOUISIANA CIVIL LAW TREATISE: TORT LAW 242 (2d ed. 2009).

22. *Dickie's Sportsman's Centers, Inc. v. Dept. of Transp. and Dev.*, 477 So. 2d 744, 751 (La. Ct. App. 1 Cir. 1985) (citations in original omitted).

23. BLACK'S LAW DICTIONARY 1626 (9th ed. 2009).

solution in *Hagan* is a consistent application of these concepts: a claim for trespass to movable property cannot stand alone and apart from a claim for damages; thus Civil Code article 2315 governs actions where there is damage resulting from trespass.

Trespass as recognized in Louisiana appears to be a tort almost completely anticipated by the broad wording of article 2315. It would seem that filing a suit “for trespass” should be effectively unnecessary in Louisiana, since a “suit for damages pursuant to La. Civ. Code art. 2315” would likely be a more accurate description. Even trespass accompanied by the conversion of trees on another’s property, the distinctive instance where interference with private property gives rise to enhanced damages in Louisiana, is governed by statute, and not fact-specific common law theory.²⁴ Where trespass is concerned, the language of the Civil Code, while broad, does not seem to need court-created factors “borrowed from the common law of torts” to substantially clarify how liability is to be proven, as opposed to concepts like “assault, battery, false imprisonment...[, and] negligence,” in regards to which the common law has been readily enlisted to define essential elements.²⁵ Rather, a plaintiff in a trespass action succeeds by proving what the Code plainly and simply requires: damage caused by another’s act.

Yet how valuable is *Hagan* in “predict[ing] the path of Louisiana tort law”²⁶ generally, or the direction of state law in its entirety? The opinion seems at first glance a sweeping defense of civilian methodology, insisting on reliance upon the Civil Code’s language despite a common law theory which might more closely fit the facts alleged, and reconciling a claim for damages to

24. LA. REV. STAT. § 3:4278.1; CRAWFORD, *supra* note 21.

25. Harriet Spiller Dagget et al., *A Reappraisal Appraised: A Brief for the Civil Law of Louisiana*, 12 TUL. L. REV. 12, 32 (1937). *See also*, CRAWFORD, *supra* note 21, at 22 (“The codal texts governing délit are so spare and general that the court must as a practical matter write most of the tort law with its own pen, though it is done in the name of interpretation.”).

26. CRAWFORD, *supra* note 21, at 24.

movable property with statutory text. But the Louisiana trespass claim might be rather unique even in Louisiana tort law for the ease with which it can be understood and maintained. Proving liability for other delicts in the state appears to require more attention to the factors of specific wrongs, as evidenced by the importation of common law elements to define many other torts.²⁷

Another indication of plain application of statutory language being a less-than-universal principle is the wide discretion exercised by Louisiana appellate courts in tort cases. Prof. Crawford has identified forty-five key cases spanning twenty-four years which represent the state judiciary's independent modifications of rules on such matters as strict liability, prescription, and damages for mental and emotional suffering.²⁸ The old notion that "[t]here is no liability in this State for damages sounding in tort except where such liability is expressly or impliedly authorized by the codal articles and statutes of the state"²⁹ seems unlikely to remain absolute when one reads a long list of Louisiana appellate decisions illustrating "[l]iberalization of tort liability by the Louisiana appellate courts."³⁰

In Louisiana jurisprudence on other matters of law as well, strict adherence to civil law principles has counterparts. While one can identify close adherence to elementary civil law principles in a number of court opinions,³¹ there are others in which common law doctrine seems about to summarily supplant existing statutory principles. For instance, in the 2004 Louisiana Supreme Court decision in *Avenal v. State*, the majority³² and concurring³³

27. Dagget et al., *supra* note 25.

28. *Id.* at 25-30.

29. *Martin v. Brown*, 240 La. 674, 680 (La. 1960).

30. CRAWFORD, *supra* note 21, at 25.

31. *See e.g.*, *State ex rel. D.W.*, 865 So. 2d 45, 46 (La. 2004) (on statutory construction); *Gregor v. Argenot Great Cent. Ins. Co.*, 851 So. 2d 959, 964 n.6 (La. 2003) ("Legislation is superior to any other source of law and is a solemn expression of legislative will."); *State Farm Fire & Cas. Co. v. Sewerage & Water Bd.*, 710 So. 2d 290, 292 (La. App. 4 Cir. 1998) (on sources of law).

32. *Avenal v. State*, 886 So. 2d 1085, 1101-1102, 1108 n.28 (La. 2004); John J. Costonis, *Avenal v. State: Takings and Damagings in Louisiana*, 65 LA.

opinions suggested a common law public trust doctrine could be applied in Louisiana, despite scholars' conclusions that Louisiana's constitution and legislation might well serve the purposes met by the public trust doctrine in other states.³⁴

However, despite any drifting away from the pure civil law caused by Louisiana judicial decisions,³⁵ the delict akin to trespass to chattels as concerned in *Hagan* seems particularly suited for straightforward application of the Civil Code's language, and thus is unlikely to be complicated by judicial gloss in the future. "Trespass" claims like that brought by MCI are suits for either unauthorized intrusion upon another's property, or damage to another's property.³⁶ Louisiana law does not remedy mere unauthorized intrusions if no damage has resulted, and plainly allows recovery when there is injury caused by another. Refusing to recognize a specific action for trespass to chattels, the Louisiana Supreme Court refused to complicate the plain meaning of article 2315 and the requirements for maintaining a suit for delictual damages, and declined to expand unnecessarily state law through jurisprudence. The court followed its charge from the legislature

L. REV. 1015, 1030 (2005) ("Justice Victory... announced... the public trust-based doctrine acknowledging the 'right of the state to disperse fresh water... over saltwater marshes in order to prevent coastal erosion.'").

33. Avenal, 886 So. 2d 1085, at 1115 n.8 (Weimer, J., concurring).

34. Lee Hargrave, *The Public Trust Doctrine: A Plea for Precision*, 53 LA. L. REV. 1535, 1541-1544 (1993); A. N. Yiannopoulos, *Five Babes Lost in the Tide—A Saga of Land Titles in Two States: Philips Petroleum Co. v. Mississippi*, 62 TUL. L. REV. 1357, 1370 (1988).

35. The ultimate question, likely, is whether Louisiana courts have sometimes looked completely beyond statutory law and proceeded according to a kind of common law, or have acted within their authority under Civil Code article 4: "When no rule for a particular situation can be derived from legislation or custom, the court is bound to proceed according to equity. To decide equitably, resort is made to justice, reason, and prevailing usages." This issue cannot be fully examined here. However, the breadth of article 2315 in sanctioning remedies for all damage-causing acts, as well as the public trust-like statutory law of Louisiana, see e.g., LA. CIV. CODE arts. 450-452, 455-456; Hargrave, *supra* note 34, call into question the necessity of judicially-created rules in cases to which this legislation would seem to apply.

36. MCI Communications Services, 74 So. 3d 1151.

most exactly, applied what the Code clearly provides, and was thereby true to the law, in principle and in letter.