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Torts

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held that the trial judge's refusal to appoint experts to examine the defendant, who alleged present insanity as a stay to the execution, was a proper exercise of judicial discretion. The court held that the procedure set out in Article 267 of the Code of Criminal Procedure was applicable to and governed all pleas of insanity in criminal cases. It stressed the provision that the court's obligation to appoint disinterested experts to inquire into the sanity of the accused is limited to cases where it "has reasonable ground to believe" that the defendant is insane or mentally deficient. In the case at bar, each of the witnesses, upon whom defense counsel had relied in urging present insanity, had stated when questioned by the trial judge that he felt the prisoner was perfectly sane.

II. TORTS

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Tort Liability Between Spouses

The problem of tort liability between husband and wife has given rise to confusion and differences of opinion everywhere. In common law jurisdictions the problem is stated simply as one of responsibility: can the husband (or wife) be made liable to the other spouse, or, does their marital relationship preclude tort actions between themselves?[1] The Louisiana court apparently has assumed that this question is to be answered in favor of liability, but it has given the problem a different and difficult twist by positing the issue in terms of community property. Both spouses share in the benefits of the community, and successful damage actions in favor of either of them usually accrue to the community.[2] For this reason it has been urged that a recovery by one spouse against the insurer of the other for damages occasioned by the latter's negligence will result in allowing the tortious spouse, who participates in the community, to benefit by

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1. Prosser, Handbook of the Law of Torts (1941) § 99.

2. Apparently damages for personal injury to the wife resulting in loss of earnings enter the community if she was living with her husband at the time of the injury, while other damages for personal injury are her separate property. See Kientz v. Charles Dennery, Inc., 17 So.(2d) 506 (La. App. 1944), noted in (1944) 19 Tulane L. Rev. 141.

his or her own wrongdoing. This result is alleged to be in violation of public policy and to offer a compelling reason for the refusal of relief.

The above argument was presented to the supreme court recently in the case, *McHenry v. American Employers' Insurance Company.*[3] The evidence in the controversy showed that while McHenry was standing in the driveway to his residence he was struck by an automobile which was negligently driven by his wife, who at that time was acting within the course of her employment and was covered by her employer's automobile liability insurance. McHenry's damage bill was in excess of seven thousand dollars, including loss of wages, impairment of future earning capacity, medical expenses and pain and suffering. The court chose to admit that any recovery that would enrich the community shared by the negligent wife would be in violation of public policy. It avoided most of the implications of this position, however, by holding that the damages claimed by McHenry would not *enrich* the community; they would merely *reimburse* it. This, said the court, falls short of producing the undesirable consequences complained of by defendant.

The writer suggests that this decision fails as a straightforward attack on the problem which faced the court, that the distinction drawn bears no real relationship to the merits of the controversy, and that the position taken by the court may require the drawing of further tenuous distinctions before the state of the law can be made clear.

Let us consider briefly the court's concession that a recovery by the husband which enriches the community is in violation of public policy because it enables the tortious wife to profit by her own wrong. The corollary of this proposition would be that a refusal of recovery would better serve public policy. But is this true? Is it not likewise against public policy to deny recovery to anyone who is the innocent victim of the negligence of another? Was not the husband as much injured here as though he had been struck by a stranger, or is his need for compensation less urgent because of the fact that the malefactor was his wife? There appears no sound reason why the ethical policy urged by the defendant is so valuable that it must be purchased at the expense of the innocent tort victim; unless it could be said that the husband is vicariously responsible for the torts of his wife even when they are committed upon himself, or unless it could be urged that by the marriage he has in some mysterious manner agreed

3. 206 La. 70, 18 So.(2d) 656 (1944).

impliedly to share her individual losses with her. The inescapable conclusion is that some public policy will be violated whether recovery is granted or refused. Which policy is the more valuable to the law? This was the real issue with which the court was faced.

Perhaps the answer as to which public policy must be sacrificed is not clear, or perhaps recovery in such situations should not be allowed because of the great likelihood that insurance companies will thereby be subjected to collusive claims and simulated liability. This consideration has prompted other courts to deny recovery by one spouse against the insurer of the other.[4] Nevertheless the court sought (unsuccessfully, it is believed) to avoid the problem before it by holding that a recovery by the injured spouse would not be violative of public policy unless the community were thereby *enriched*—that a recoupment of loss to the community was not enough. The drawing of this tenuous distinction not only precluded a direct attack on the real problem outlined above; it likewise created a wholly inconsequential and spurious issue which cannot but be productive of considerable confusion in future litigation.

Let it be assumed that the tortious spouse must not be permitted to better herself through her own wrongdoing. Such a policy is supported entirely on notions of ethics and propriety, not ideas of property. It is wholly unimportant whether we say that she shall not *gain advantage* by her wrong, that she shall not *benefit* by it, or that she shall not *profit* by it. Ethical considerations do not admit such specious distinctions. If the securing of the judgment by the husband substantially betters her position in any way, this should be enough to bring her situation within the purview of the rule. Thus the wife who at common law is entitled only to her claim for support is substantially benefitted by the receipt of the proceeds of any judgment which fills or replenishes the coffer from which that support must be paid. For our purpose it makes no difference whether her interest in the family assets is a property interest, or a claim, or even a moral obligation on the part of the husband which shows promise of being fulfilled. In either situation her position is bettered when the financial source by which she lives is enhanced.

Of course it might be contended that so long as she has no property interest in the judgment funds which go to the husband,

4. This is the majority view in common law jurisdictions. See, for example, Newton v. Weber, 119 Misc. 240, 196 N.Y. Supp. 113 (1922). Prosser, op. cit. supra note 1, at 903, 907.

they may never be needed or expended for her benefit; whereas if she owns an interest in them, the mere acquisition of ownership constitutes a benefit without more ado. This appears to be a distinction without meaning from the viewpoint of determining how far a policy of ethics is to be limited; for the husband may squander the community through his power of management, just as he may dissipate his personal assets at common law. Certainly the community property system was not devised to alter so basically common notions of right and wrong that prevail everywhere.

Although the proceeds of the judgment may enter the community, said the court, this is not enough to preclude relief. Thus, even the acquisition of a property interest by the tortious spouse does not violate the public policy urged by the defendant. The community must be *enriched*, and this effect is not achieved where the amount of the damages merely replaces a loss which the community has previously suffered or will suffer in the future. This distinction between enrichment and recoupment is certain to give rise to the confusion. Perhaps it is true that by receiving damages for the loss of past salary the community is no better off than if the accident had not happened. But suppose that the damages were not to be received—wouldn't the community then be in a *worse* position? And does it not follow that the award of such damages is a real benefit to both participants in the community? All that has been previously said with reference to salary applies equally to damages awarded for disability or loss of earning power. The commonly accepted definition of enrichment includes the saving of a loss as well as the aggrandisement of assets.[5]

By holding that damages for pain and suffering do not enrich the community the court completely broke down the concept of enrichment that it had erected. It stated that these elements bear directly on the ability of the husband to make a living. But if they are to be regarded as an item of disability, why were they not so included? Was nothing being paid him merely because he suffered? Pain and suffering are usually regarded as items of damage independent from loss of earnings, and such damages are given indiscriminately to earners and non-earners alike. If damages for pain and suffering do not enrich the community, it is impossible to conceive of any damages that *would* have such an effect.

5. A.L.I., Restatement of Restitution (1937) § 1, comment b.

Are we to conclude, then, that no damages received by either spouse in a personal injury action will operate to enrich the community? If so, we can happily dismiss the case merely as a circuitous approach to the desirable conclusion that one spouse may sue the insurer of the other in tort. Under such a view our only criticism is that the court should have concluded simply that the public policy argument proferred by the defendant is not controlling.

Unfortunately, this conclusion is not at all clear. The court restricted itself to the items claimed in the particular case by the particular plaintiff, who was regularly employed at the time of the injury. Suppose that he were not supporting the family, although he were capable of doing so? Or suppose that Mrs. McHenry had been injured by her husband, and that she was working at the time, but planned to retire soon to her household duties? Would these be cases where the damages would amount to an enrichment, and hence would afford a valid ground for the refusal of recovery?

One further question remains. Suppose that one spouse were injured through the negligence of a third person, but the negligence of the other spouse contributed to the injury. Although the court has made clear that the contributory negligence of one spouse is not to be *imputed* to the other, the question of enrichment of the community still remains. This situation had been presented to the court in the earlier case, *Vitale v. Checker Cab Company.*[6] In that case, however, the negligent husband was killed in the accident. Hence his enrichment was not involved, and the question turned entirely on imputed negligence, which was easily disposed of.

The writer suggests that in such cases the problem of enrichment is not present, because the defendant tortfeasor will be entitled to contribution against the husband (whether he actually claims contribution would seem to be immaterial). This would appear to work a fair enough adjustment, even though the husband may still benefit by participating in the remaining half of the judgment. After all, he will have been punished for being a bad man, which seems to be the important thing for the court. For this reason, if for no other, the recent court of appeal decision in *Kientz v. Charles Dennery, Incorporated,*[7] appears to reach an undesirable conclusion.

6. 166 La. 527, 117 So. 579 (1928).
7. 17 So. (2d) 506 (La. App. 1944), noted in (1944) 19 Tulane L. Rev. 456.

Negligence

Although conduct that violates a statute is generally regarded as being negligent, this does not apply where the harm suffered was not of the kind which the statute was intended, in general, to prevent.[8] For this reason, in the case, *Picou v. J. B. Luke's Sons*,[9] the mother of a boy who was over fourteen but under sixteen years of age was not allowed to recover for her son's death which was occasioned while he was employed by defendant in violation of a statute[10] prohibiting the employment of such minors without the consent of either the parent or the superintendent of schools. The clear purpose of this act was to assure that the employment of school children would have a minimum harmful effect on their educational progress. The statute was not a personal safety measure. The court stated that the violation of the statute was not the *cause* of the mishap. Perhaps a happier choice of language would have avoided causation and would have rested the issue properly on legislative policy.

The observation has been made that res ipsa loquitur is not appropriate as a rule for the construction of pleadings.[11] In determining whether an exception of no cause of action should be sustained the courts require the use of a more liberal technique than is afforded by the restrictive rules of res ipsa loquitur. This proposition was clearly expressed recently by the supreme court in the case of *Gerald v. Standard Oil Company of Louisiana*,[12] which arose on an exception of no cause of action. Under the facts as set forth in the petition it appeared likely that if the plaintiff were to recover, he would be impelled to fall back upon res ipsa loquitur at the trial. Furthermore, it was not clear from the facts stated that even resort to that doctrine would save his case. The true implications to be drawn from the occurrence could not be gathered until the available testimony had been presented. However, since it seemed not unlikely that the occurrence of the accident when properly enlarged upon by the evidence might give rise to an implication of negligence, the court noted this fact as a reason for allowing the case to proceed to trial. It expressed its position in unequivocal language as follows:

8. Prosser, op. cit. supra note 1, at 269, § 39.
9. 204 La. 881, 16 So.(2d) 466 (1943).
10. La. Act 301 of 1908, § 1, as amended by La. Act 167 of 1932, § 2 [Dart's Stats. (1941) § 4319].
11. Malone, Res Ipsa Loquitur and Proof by Inference—A Discussion of the Louisiana Cases (1941) 4 LOUISIANA LAW REVIEW 70, 92.
12. 204 La. 690, 16 So.(2d) 233 (1944).

"The controversy is one in which the doctrine of res ipsa loquitur is possible of application; however, it is not necessary to hold at this time, and we do not so hold, that such doctrine is applicable."[13]

In the past the Louisiana courts have used the res ipsa loquitur doctrine indiscriminately both as a rule of pleading and as a rule to determine the sufficiency of evidence.[14] This practice has given rise to much confusion.

The liberal approach which is proper in the construction of pleadings is usually inappropriate in making a final determination of the controversy. It follows that when pleading cases are urged upon the courts as precedents for the use of res ipsa loquitur in determining the sufficiency of evidence, the result is often embarrassing, and the courts are forced to draw tenuous and often unsound distinctions. It is to be hoped that the courts will adhere to the wise procedure of the instant decision and make clear that res ipsa loquitur is not a rule of pleading, although noting at the same time that the fact that the doctrine may later become available on trial is a sound reason for dismissing the exception of no cause of action.

Controversies resulting from falls in motion picture theaters usually present close questions on the alleged negligence of the proprietor. It is impossible to run such an establishment successfully and maintain at the same time sufficient lighting to avoid accidents. Small defects in construction which usually would not endanger the safety of patrons assume a substantially hazardous aspect because of the low lighting in which the movie house must operate. Although the decisions differ in the language used to explain the standard of care imposed upon the proprietor, the outcome of these cases is frequently determined through resort to the standard practices of theater construction.[15] If the theater is no darker than the mine run of similar establishments and the construction of the theater conforms in all pertinent details with accepted practices, the plaintiff will not

13. 204 La. 690, 699, 16 So.(2d) 233, 236.

14. In the following cases, among others, res ipsa loquitur was used as a rule to construe the pleadings: Costello v. Morrison Cafeteria Co. of Louisiana, 18 La. App. 40, 135 So. 245 (1931); Urban Land Co. v. City of Shreveport, 182 La. 978, 162 So. 747 (1935); Auzenne v. Gulf Public Service Co., 181 So. 54 (La. App. 1938); Bentz v. Saenger-Ehrlich Enterprises, 197 So. 659 (La. App. 1940).

15. See Dire v. Balaban and Katz, 241 Ill. App. 199, 203 (1926); Rosston v. Sullivan, 278 Mass. 31, 35, 179 N.E. 173, 175 (1932); Falk v. Stanley Fabian Corp., 115 N. J. Law 141, 142, 178 Atl. 740, 741 (1935).

likely recover. This result usually follows because, as a rule, theater architects have attempted to profit from previous mistakes and to avoid for their clients the risk of mishaps whenever possible.

But the adoption of standard practices does not afford a guarantee against recovery if the court can appreciate that a particular hazard could have been avoided without undue expense or trouble. The opinion of experts and the resort to custom are likely to control the disposition of the controversy only when the judge has reason to distrust his own lay opinion. For this reason, courts are usually careful to emphasize that conformity to accepted standards is not conclusive proof that reasonable care has been used. In *Cassanova v. Paramount-Richards Theatres, Incorporated*,[16] the supreme court again made this clear, and allowed a recovery for a fall which resulted from a defect so obvious and so easily remediable that the court was not willing to excuse defendant on the ground that other respectable theater owners were currently making the same mistake.

The court's appreciation of the defect and its conviction that the accident could easily have been avoided led it to lay down a broad rule excluding testimony that no similar mishap had occurred previously in the establishment. It is believed that the decision went further than was necessary. The only conceivable objection to testimony of this kind is the fact that its probative value may often be doubtful. For example, the fact that a defendant motorist has never previously had an accident at a street intersection is hardly persuasive of his having used due care on any particular occasion. On the other hand, the fact that a theater has been in continuous operation for a period of several years under conditions virtually identical with those attendant at the time of the accident, that during this period hundreds of thousands of patrons had escaped mishap—all this is highly persuasive of the fact that the alleged defect did not constitute an appreciable hazard to the safety of patrons. Such testimony should be receivable whenever the court feels that it may have substantial probative value, and it should be rejected when the converse appears likely. No hard and fast rule of exclusion such as was laid down in the *Cassanova* case is desirable.[17] Particularly is this true in Louisiana where possible jury misapprehensions of this type of evidence are most unlikely.

16. 204 La. 813, 16 So.(2d) 444 (1943).

17. 1 Shearman & Redfield, A Treatise on the Law of Negligence (rev. ed. 1941) § 59.

This ruling gave rise to a rehearing in which the court perhaps retreated from its previous uncompromising position. It explained that even in the light of the excluded testimony the negligence of the defendant appeared to be clear. This conclusion was fair enough, but the court failed to state whether it proposed to retain or to reject the rule announced on the first hearing. As a result, the opinion on rehearing merely beclouded doubtful law with confusion.

The court recently had occasion to discuss the liability of a landlord for the defective condition of those portions of the leased premises over which he has retained possession and which are maintained for the use and convenience of all tenants. That such liability exists has been affirmed many times in Louisiana and elsewhere.[18] The only point which might be considered as noteworthy in the latest case, *Bates v. Blitz*,[19] is the fact that it was not clear that the landlord had erected the defective structure (a platform in the courtyard of a tenement house). Nevertheless, the court correctly pointed out that the dangerous portion of the premises was in his possession, and that reasonable care to inspect and either remove or repair was imposed upon him.

The conflicting interests of two of Louisiana's chief industries was before the supreme court in the highly interesting case, *Doucet v. Texas Company*.[20] The defendant oil company, during the course of its drilling operations deposited large quantities of oil well brine and petroleum in surrounding coastal waters. These materials were carried to the waters in which plaintiff operated his oyster beds. Shortly thereafter the oysters died and plaintiff's industry was substantially injured. It appears that at least four major issues were involved: (1) Did the defendant cause oil and refuse to be deposited in the waters? (2) Did this material spread in substantial quantities to the more distant waters covering the plaintiff's oyster beds? (3) Did the substances so carried cause the death of the oysters? (4) Was the defendant's conduct wrongful as being negligent toward the plaintiff's interests?

The answers to the first two issues came readily enough, although there was some little conflict in the testimony. As to the third issue, the court presented an excellent condensation of the voluminous record of scientific testimony and the results

18. Glain v. Sparandeo, 119 La. 339, 44 So. 120 (1907); Mosher v. Burglass, 170 So. 416 (La. App. 1936).
19. 205 La. 536, 17 So.(2d) 816 (1944).
20. 205 La. 312, 17 So.(2d) 340 (1944).

of extensive biological experiments. Although the experts who testified were by no means in complete accord, there was ample evidence to justify the court's conclusion that the presence of oil in the quantities found above the oyster beds impaired the ability of the oysters to absorb nourishment from the water and resulted eventually in starvation.

The issue of the wrongfulness of the defendant's conduct was dealt with more sparingly than the other questions of the controversy. The court was satisfied that some of the oil escaped through carelessness on the part of the pumper or gauger, and that leaks developed in the pipes. One might conjecture whether such a case as this really rests upon negligence, or whether the trespassory nature of the invasion, or theories of nuisance, might not be employed if necessary so as to impose an insurer's responsibility.

III. PROCEDURE

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Appeals and Appellate Procedure

In *Mistich v. Holman*[1] plaintiff petitioned for a suspensive appeal and requested permission to file a statement of facts at any time before the return day of the appeal, reserving to the defendant the right to file a statement of facts. The plaintiff could not get the defendant to draft jointly a statement of facts.[2] The plaintiff thereupon asked the trial judge to make a statement according to his recollection of the facts pursuant to Article 603 of the Code of Practice. The trial judge refused, stating that he was without authority to do so after the signing of the order of appeal, and on the further ground that the chief deputy clerk of court was without authority to extend the period of time fixed by law for making a statement of facts. The supreme court, on appeal, held that once an order of appeal has been granted and the appeal bond signed, the appeal is perfected, and the trial court is divested of jurisdiction, except the right to test the sufficiency of the appeal bond as of the date when filed. Also, that

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1. 205 La. 171, 17 So. (2d) 23 (1944).

2. Art. 602, La. Code of Practice of 1870.