Torts and Workmen's Compensation

Wex S. Malone
ten lease, only five days' notice to vacate is necessary, in order to maintain summary ejectment proceedings. The court applied the first paragraph of Revised Statutes Section 2155 as amended and said that the ten and thirty day notice provisions of the second paragraph of that section are inapplicable.

The comments on this statute had generally taken a contrary view, but there was no judicial authority on the subject. Lower courts and practicing attorneys should welcome the definitive ruling on this problem.

IV. TORTS AND WORKMEN'S COMPENSATION

Wex S. Malone*

TORTS

Tort Liability of the State

The state's immunity from tort liability is limited only by the requirement of our constitution that "private property shall not be taken or damaged except for public purposes and after just and adequate compensation is paid." Somewhat similar provisions appear in most of the state constitutions. However, the prohibition is generally directed only at the taking of property and is limited to appropriational harms.

The provision in the Louisiana constitution that compensation must likewise be paid for damage to private property opens the way for an expansion of state liability which may result in trimming down the traditional immunity of the sovereign. A substantial body of law had been developed in Louisiana which perhaps pointed in this direction. Damages for injury inadvertently inflicted during the course of public improvement work had been recovered in several decisions. In all these cases, however, the injury followed from affirmative conduct of the state's agents in making public improvements on land, and usually the damage merely represented extended compensation for an in-

11. Compare Comment (1940) 2 LOUISIANA LAW REVIEW 161, and Comment (1946) 21 Tulane L. Rev. 256.
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interest which the state had deliberately seized under its power of expropriation.

The first instance in which a plaintiff sought to hold the state for consequential damages arising from an activity not connected with land improvement was the recent case, *Angelle v. State*. During the course of spraying plaintiff's potatoes for weevils, agents for the Department of Agriculture carelessly allowed a fire to start. The flames destroyed plaintiff's potatoes. His claim for damages under Article 1, Section 2, of the constitution was rejected. The court felt constrained to repudiate several of its previous decisions, particularly *De Moss v. Police Jury* and *Nagle v. Police Jury*. It announced the rule that recovery for damaged property will be allowed only where the damaging is "intentional or occurs as a necessary consequence of the public undertaking."

Sovereign immunity from tort liability is a conception that rests entirely upon the bare fiction that "the king can do no wrong" and, as has been indicated many times, it has no foundation in either good morals or good economy. It thus appears that in *Angelle v. State* the court went out of its way to upset a liberal tradition developing in this jurisdiction. Under the previous rule the state and its subdivisions were liable for all damages "proximately caused" by the making of public improvements. The new rule makes them liable for all damages that are "necessary consequences" of the improvements. Perhaps the substitution of one unknown for another only marks the difference between Tweedledum and Tweedledee. If so, the act of muddying the water seems all the more unnecessary. On the other hand, if (as seems likely) the court means to eliminate all liability for purely negligent depredation, it has discarded a thoroughly acceptable instrument for whittling away at the indefensible immunity of the sovereign.

**Negligence—Standards of Care**

In earlier issues of this symposium the present writer has commented upon the fact that persons who deal in gas and other dangerous substances are likely to be held to so high a degree of

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3. 212 La. 1069, 34 So. (2d) 321 (1948).
4. 167 La. 83, 118 So. 700 (1928).
5. 175 La. 704, 144 So. 425 (1932).
care that for practical purposes they may be regarded as insurers against damage.\textsuperscript{7} Res ipsa loquitur is used freely in these cases to relieve the plaintiff of the necessity of proving the details of negligence, because negligence is not a serious issue.\textsuperscript{8}

This observation is again affirmed in \textit{Plunknett v. United Electric Service}.
\textsuperscript{9} The plaintiff's dwelling was destroyed by fire which, according to his claim, originated in a gas heating system the defendant had installed two days earlier. Although the case was discussed by the court in terms of res ipsa loquitur and recovery was granted through the application of that doctrine, there was sufficient affirmative evidence to raise a persuasive inference of negligence in support of the judgment. Believable testimony showed that the fire originated around the heating unit and that no one had altered the condition of the heater after defendant completed the installation. No more was needed to justify the decision.

The use of res ipsa loquitur complicated the task of the court, for it enabled the defendant to interject a typical limitation on that doctrine. He contended that res ipsa loquitur does not apply unless the instrumentality allegedly causing the accident was at the time in the exclusive possession and control of defendant. This contention was properly rejected as inapplicable to the facts of the case. The court pointed to \textit{Motor Sales and Service, Incorporated v. Grasselli Chemical Company}\textsuperscript{10} and to the numerous cases in Louisiana in which recovery has been allowed against bottlers for damages caused by injurious substances in beverages or by exploding bottles. In none of these cases was the instrumentality within the control of the defendant at the time of the accident.\textsuperscript{11}

The \textit{Plunknett} case reached a fair and sensible conclusion; but the writer again takes the liberty of asking, why complicate a simple case of circumstantial proof by treating it as though it were different from other cases? Why must it be said that such

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\textsuperscript{7} The Work of the Louisiana Supreme Court (1946) 6 \textit{LOUISIANA LAW REVIEW} 601; (1947) 7 \textit{LOUISIANA LAW REVIEW} 246, 250; (1948) 8 \textit{LOUISIANA LAW REVIEW} 248, 250.

\textsuperscript{8} Malone, \textit{Res Ipsa Loquitur and Proof by Inference—A Discussion of the Louisiana Cases} (1941) 4 \textit{LOUISIANA LAW REVIEW} 70, 98, and cases cited therein.

\textsuperscript{9} 36 So. (2d) 704 (La. 1948).

\textsuperscript{10} 15 La. App. 353, 131 So. 623 (1930). See the comment on this case in (1933) 1 U. of Chi. L. Rev. 519, 530.

\textsuperscript{11} These cases are collected in Malone, \textit{Res Ipsa Loquitur and Proof by Inference} (1941) 4 \textit{LOUISIANA LAW REVIEW} 70, 81, 98. The only serious points of dispute in such controversies are whether the foreign substance was in the bottle before it was opened and whether the alleged damage was genuine.
a case requires the use of some special Latin doctrine to save the plaintiff from defeat? It is enough to observe that those who install gas heaters must do the job in such a way as to avoid an imminent hazard of fire, and if the installation does cause fire the installers are liable for the resulting damage. To this simple observation the court need only add that the plaintiff has shown by satisfactory proof that the heater as installed by the defendant was probably the source of the fire. What more is necessary? Cases are proved by probabilities.

The supreme court recently indicated its willingness to impose what virtually amounts to absolute liability upon the operators of vessels for injuries occasioned by swells. Defendant, Higgins Industries, was operating a towboat and a barge upon the waters of the Tickfaw River, which is well known as a resort for fishing with small craft. Plaintiff's decedent and a friend were in a fourteen foot skiff which was swamped by swells produced by defendant's vessel, and as a result decedent was drowned. The judgment of the trial court awarding damages of $26,500.00 was sustained, although the amount was reduced to $19,000.00. The alleged negligence was a failure to keep a watchout for small vessels. Said the court, "A duty rests upon vessels not to travel upon navigable waters in such a manner as to produce displacement waves that will cause injury to other properly handled craft." The duty, when so framed, expresses almost an insurer's liability. As in the case of other ultrahazardous agencies, the court suggested that the burden rests upon defendant to exonerate itself by showing the injury was not avoidable.

Negligence—Proof

An excellent illustration of proof by inference or circumstance is afforded in Davis v. Horne Lumber Company. Defendant's factory had been operating for a long time without

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12. The term, negligence, can be used to express all conceivable exactions upon the defendant. The physician is free from negligence if his colleagues will testify that he conformed to their version of the prevailing medical practice in the locality. It is interesting to contrast this with the unyielding standard required of those who deal with electricity: "The fact that frequent inspections of the line were made to ascertain the condition of the wires and remedy defective insulation does not relieve the company of liability. If the span wire had become dangerously charged with the electrical current the company's inspection should have been thorough enough to have detected it. . . . It was its business to know the span wire in question was a 'live' wire through leakage from the trolley which it suspended." Whitworth v. South Arkansas Lbr. Co., 121 La. 894, 899, 46 So. 912, 914 (1908).
spark arrestors despite warnings of the state fire marshall. The existence of a fire hazard was made clear by proof that on previous occasions plaintiff’s property had been damaged by sparks created by this defective condition. Plaintiff showed that on the occasion in question her house was destroyed by fire during the night time. She testified that at the time of the fire a strong south-east wind was blowing toward her property from the direction of defendant’s establishment, carrying with it sparks and embers. She also affirmed that the fire originated on the shingled roof of the dwelling, and she eliminated other possible causes, such as a defective flue or inadequate wiring. The trial court’s finding that the fire was caused by the defendant’s admittedly negligent operation was affirmed by the supreme court despite the absence of any eyewitness report of a spark falling upon the roof. Readers who are interested in the problem of proof of negligence and causation in cases of this kind will find the earlier case, Higdon v. W. R. Pickering Lumber Company,\textsuperscript{15} good reading.

Comer v. Traveler’s Insurance Company\textsuperscript{16} presents the simple but sad story of a minister who accidentally ran over and killed his infant niece while backing his car from the driveway of the child’s home. The evidence indicated that the child was standing on the porch with defendant’s daughter when defendant entered the car preparatory to leaving. The only issue was whether or not defendant, knowing the child’s fondness for him, should have anticipated her possible presence behind the rear wheel of his car. The supreme court found for defendant.

**Negligence—Traffic and Transportation**

Several years ago the supreme court stated that a motorist who is favored by a traffic light need not keep a watchout to determine whether intersecting traffic is proceeding in disregard of the red signal.\textsuperscript{17} More recently in Koob v. Cooperative. Cab Company\textsuperscript{18} this same observation was made with reference to a motorist on a thoroughfare protected by “stop” signs displayed on intersecting streets. He is entitled to rely upon the fact that the arbitrary demand of the sign will be obeyed. The driver on the less favored street cannot discharge his duty merely by

\begin{itemize}
  \item 15. 148 La. 504, 87 So. 252 (1921).
  \item 16. 213 La. 178, 34 So. (2d) 511 (1948).
  \item 18. 213 La. 903, 35 So. (2d) 849 (1948).
\end{itemize}
“reasonably giving way,” and those who use a highway protected by signs can proceed with assurance unless they know, or, from facts within their knowledge, should know, that a violation is impending.

**Damages**

In *Matheson v. Placid Oil Company*\(^\text{19}\) defendant trespassed upon plaintiff's property and drilled for oil. The result was a dry hole. The supreme court, following the rule in this state, awarded damages representing the acreage loss of value of the land for mineral leasing purposes.\(^\text{20}\) Plaintiff also claimed damages for surface injuries to his property. This item was allowed despite defendant’s insistence that such damage would not have been recoverable if a lease had been secured.

**Defamation and Malicious Prosecution**

In dealing with questions arising from the so-called privilege of “fair comment” the courts need all possible elbow room. The formulas in this area of law are therefore purposely loose and indefinite. Perhaps in strict accuracy “fair comment” is not a privilege. The term is used to indicate the notion that courts do not protect a plaintiff’s claim to enjoy the favorable opinion of others.\(^\text{21}\) The only limits on fair comment are, first, that the opinion must not suggest the existence of supporting facts which are false and defamatory, and, second, the opinion must not transcend the bounds of propriety through its vigor and excessiveness. Within these limits is room for infinite variation, and it is difficult to insist that any one case should be precedent for another.\(^\text{22}\)

The issue of “fair comment” was discussed at some length last year in the case, *Kennedy v. Item Company*.\(^\text{23}\) Kennedy incurred the displeasure of an editor of the New Orleans Item by challenging the constitutionality of the recently demised Civil Service Act. The paper printed an editorial that charged in substance that Kennedy was either incompetent or was intentionally stirring up vexatious litigation for his own purposes. The editor suggested as a further alternative that Kennedy hoped to secure a decision dictated by politics rather than reason. The court

\(^{19}\) 212 La. 807, 33 So. (2d) 527 (1947).
\(^{22}\) Id. at 338.
\(^{23}\) 213 La. 347, 34 So. (2d) 886 (1948).
held that defendant had transcended the limits of fair comment and assessed damages at $7,500.00.

Although the first two of the editorial charges in question seem fairly to suggest only the editor's opinion drawn from the record of the litigation upon which he was commenting, yet it seems that even here the remarks were more vitriolic and intemperate than the legitimate needs of free speech require. The final charge, that Kennedy may have hoped for a political decision, seems to this reader to approach an insinuation of fact and passes beyond mere critical comment upon proceedings of public interest. By thus spitting upon the altar cloth the editor did little to arouse a sympathetic response from the court.

The case, Eumont v. Railway Express Agency, decided during the last term, demonstrates the almost insurmountable difficulties that beset the path of the plaintiff who seeks to maintain an action for malicious prosecution. It is not enough that the defendant instigated a prosecution maliciously, nor is it enough that there was a lack of probable cause. The plaintiff in such a suit must establish the concurrence of both elements if he wishes to recover. In the present case, the damaging prosecution was for embezzling property in the custody of the defendant express agency, plaintiff's employer. The facts indicated that the prosecution was based upon a signed confession of the plaintiff, to which was added the affirmative testimony of an alleged receiver of the embezzled goods. Plaintiff relied on a verdict of "not guilty" in the criminal proceeding and also on his controverted statement that the confession was secured through physical violence. Recovery was denied. Since the court refused to accept plaintiff's version that he was beaten or maltreated in order to exact a confession, the case leaves open the question as to what effect should be given the administration of such treatment if it were established. In view of the fact that the integrity of the person is protected against physical abuse of this kind by the law of assault, battery and possibly false imprisonment, it seems proper that such treatment should be considered only as a favorable circumstance along with other factors in a malicious prosecution action. It should not be conclusive.

24. 36 So. (2d) 30 (La. 1948).
25. Mention may be made here of Harding v. Operating Co., 212 La. 467, 32 So. (2d) 893 (1947), decided during the present term. Plaintiff sought damages for false imprisonment and malicious prosecution. The court found that the evidence did not support the charges. The case is not noteworthy.
Rights of Minor Employees

Prior to this year the situation of the minor employee claiming compensation was precarious indeed. If he was of such age that his employment was illegal, he was arbitrarily deprived of the benefit of compensation by the terms of the act.¹ If he was under eighteen but was legally employed, he was entitled to compensation provided that his parents knew of the employment and had some sort of opportunity to elect for or against the application of the act. But if he was employed and suffered injury or death before his parents gained knowledge of his employment, there was no right to compensation.²

Both these obstacles to recovery by minors have now been removed. The illegally employed minor is now entitled to compensation on equal terms with other minor employees by reason of an amendment to the act in the 1948 session of the legislature.³ This year in Bourgeois v. J. W. Crawford Construction Company⁴ the supreme court changed the course of the law and held that although a minor under eighteen years of age cannot make an expressed or an implied election for or against compensation, yet there is a presumed election to accept the provisions of the act, and this presumed election applies indiscriminately to all employees of all ages. Thus parental knowledge of the employment is not necessary. As the result of these two innovations all minor employees are on an equal footing with adults.

In view of the happy conclusion of the court, this writer feels that only ingratitude or bad taste could prompt criticism of the gallant steed who has carried his burden to the proper destination under trying conditions, even though the route chosen was somewhat tortuous. Requiescat in pace.

Prematurity and Prescription

Several years ago in Thornton v. E. I. DuPont de Nemours


³. La. 20 of 1914, § 3 (6) as amended by La. Act 179 of 1948. This act is discussed in Louisiana Legislation of 1948 (1948) 9 Louisiana Law Review 1, 98.

⁴. 36 So.(2d) 13 (La. 1948).
and Company the supreme court attempted to make a final disposition of the problems of prematurity and prescription relative to the claim of an injured employee who was retained on the employer's payroll at a wage which exceeded the maximum allowable compensation. This writer accepted the opinion as holding that the continued payment of wages does not prevent the running of prescription, irrespective of whether the wage is earned or unearned.

The recent decision, D'Antoni v. Employers' Liability Assurance Corporation, contains dicta which invites the suspicion that this chronic headache is still with us. D'Antoni, an employee of the State Department of Safety, was injured in the line of duty. After a brief period of hospitalization, he was returned to light work at the same wage. His attorney, prompted by the dictates of the Thornton case, consulted the appropriate official of the department and apparently requested that compensation payments be made, or that part of the wage be formally designated as compensation payment, and that the extent of the disability be agreed to. This official replied that he could not make a commitment as to compensation and that such a matter must be settled by the courts. He did indicate, however, that he wanted claimant to receive "his just dues."

When D'Antoni instituted suit to prevent loss of his claim by prescription, his employer entered a plea of prematurity. The court of appeal conceded that under the Thornton case the continued payment of wage did not amount to a payment of compensation. It found, however, that as a matter of fact there was no refusal by defendant to meet the compensation demand of his employee. Accordingly it sustained defendant's plea. Nevertheless, as plaintiff pointed out, there was a refusal to admit compensation liability without a court adjudication and there was a refusal to make any concession as to the extent of liability. Since the payment of wage did not meet the compensation obligation of defendant, the latter was in default, and it seems clear that plaintiff was entitled to maintain suit to prevent the loss of his claim through prescription. The supreme court so held, and remanded the case.

5. 207 La. 239, 21 So. (2d) 46 (1944).
7. 213 La. 67, 34 So. (2d) 378 (1948).
One statement in the D'Antoni opinion has given this writer considerable concern. The court interpreted its previous opinion in the Thornton case as follows:

"If the employee is actually earning the wages paid him, his suit cannot be dismissed on a plea of prematurity for as much as he is not receiving compensation ... conversely, if it is shown on the trial of the plea that the wages being paid the employee are in reality a gratuity and not for the performance of work, then the action will be dismissed as premature—for, in such instance, the payment of the wage is the equivalent to the payment of compensation."

The facts in the Thornton case clearly showed that the wage received by the employee after injury was bestowed in large part, at least, as a gratuity. The same was true in the D'Antoni case as was shown by the plaintiff's own unequivocal admission in Article 14 of his petition. If the rule is as the court declared it in the quotation above, the petition should have been dismissed as premature in both cases.

This writer suggests that both the Thornton and the D'Antoni cases were properly decided, and that the above statement in the D'Antoni case represents a misconception of the rule of Thornton's case. As I understand the latter decision, prescription runs unless compensation is paid as such, and the payment of neither earned nor unearned wage can entitle the employer to maintain a plea of prematurity. Any other rule would force the claimant to speculate helplessly as to whether the wage received is in whole or in part a gratuity. He will not want to institute suit only to have his claim dismissed as premature and perhaps to find himself dismissed by his employer for stirring up trouble.

**Procedure**

The traditional attitude of liberality toward the plaintiff's petition in a suit for compensation was shown again during the last term in the case, Reagor v. First National Life Insurance Company. Plaintiff, a solicitor for defendant insurance company, fell and injured himself while performing his duties on foot. He sought to show that his occupation was hazardous by alleging that he was regularly exposed to motor vehicle traffic in the street. This contention was dismissed by the court of ap-
peal, and the holding in this respect was affirmed by the supreme court.

However, the plaintiff offered to amend by showing additional facts. Presumably he proposed to allege that his duties sometimes required that he operate or ride in motor vehicles, and he sought to bring his situation within the doctrine of cases such as Collins v. Spielman. The court of appeal's refusal to allow this amendment was regarded as error by the supreme court and the case was remanded.

V. BUSINESS AND COMMERCIAL LAW

NEGOTIABLE INSTRUMENTS

Alvin B. Rubin*

In Sherer v. State the court held that certificates of indebtedness of the Public Service Commission were not negotiable instruments. Plaintiff sought to recover on certain lost certificates. The state defended on the basis of potential claims by third persons who might show up with the certificates. Under Article 2644 of the Civil Code, payment to the original owner of a non-negotiable instrument would bar action by any transferee, and the court ordered payment by the state.

VI. CIVIL PROCEDURE

Henry G. McMahon**

Jurisdiction Ratione Personae

An important question of venue was decided for the first time during the past year. On the theory that all members of a partnership are liable either jointly or in solido for its debts, plaintiff sued defendant partnership, which was domiciled in Jefferson Parish, and all of its alleged partners in Orleans Parish, the domicile of one alleged partner. Two of the individual defendants excepted to the jurisdiction ratione personae of the

12. 200 La. 586, 8 So. (2d) 608 (1942).
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1. 213 La. 728, 35 So. (2d) 591 (1948).
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