Louisiana Law Review

Volume 10 | Number 2
The Work of the Louisiana Supreme Court for the 1948-1949 Term
January 1950

Torts and Workmen's Compensation: Torts

Wex S. Malone

This possibility was not considered by the court since it gave judgment in favor of the vendor in this case on another ground.

IV. TORTS AND WORKMEN'S COMPENSATION

*Wex S. Malone**

TORTS

Landowner's Liability to Trespassing Children

The extent of a landowner's duty to protect trespassing children from the danger of drowning in a pond or other body of water maintained on his premises cannot be easily defined. It is admittedly difficult to devise adequate protective measures against such risk without frequently imposing heavy financial burdens on the proprietor or seriously interfering with his effective use of his own property. This is particularly true in Louisiana where the topography of the countryside makes the use of canals and other drainage facilities a necessity. Furthermore, in this state there is an obvious overspreading risk of unavoidable drowning in the many natural bodies of water such as bayous, swamps, and rivers which characterize our terrain. For this reason, the peril of drowning is one to which the child populace of this state would continue to be exposed even if all man-made bodies of water were adequately safeguarded.

The difficulty of working out a compromise formula which would operate fairly for both landowner and trespassing children has induced many courts to close the door to recovery by announcing that the "attractive nuisance" doctrine (which would be the springboard for recovery in such situations) does not apply to ponds and other bodies of water.[1] In the past the Louisiana courts have consistently given judgment for the defendant in cases of this type.[2] Recently, however, in the case, *Saxton v. Plum Orchards, Incorporated*,[3] the supreme court was faced with a tragic occurrence which convinced it that simple rule-of-thumb action denying recovery is too harsh in the drowning cases. The facts of the *Plum Orchards* case indicate that in 1942 defendant had developed several acres of property in New Orleans as a sub-

* Professor of Law, Louisiana State University.

1. See cases collected (1925) 36 A.L.R. 224; (1926) 45 A.L.R. 992; (1928) 53 A.L.R. 1354; (1929) 60 A.L.R. 1453.

2. McKenna v. City of Shreveport, 133 So. 524 (La. App. 2d cir. 1931); Peters v. Town of Ruston, 167 So. 491 (La. App. 2d cir. 1936); Fincher v. Chicago, R.I. & P. Ry., 143 La. 164, 78 So. 433 (1918).

3. 215 La. 378, 40 So.(2d) 791 (1949).

division and had leased about a hundred houses thereon to the public. In order to supply itself with dirt and also probably to drain the area and to provide sewerage, defendant had excavated a place two hundred feet long and about twenty-five feet wide. This hole had filled with water and was left standing at a location less than a hundred and fifty feet from many of the dwellings leased out by defendant. The fact that it had become filled with water deprived it of its usefulness as a drainage and sewerage facility. Plaintiff was one of defendant's tenants. His four year old child was drowned in this excavation. The court was obviously impressed by the high degree of danger involved and particularly the comparative ease with which defendant might have obviated the risk by removing the useless peril entirely. It allowed recovery to the parents under the attractive nuisance doctrine.

It is interesting to note that the court managed to turn the earlier case of *Fincher v. Railroad*[4] (decided in 1918) to its advantage, although the *Fincher* case was in fact almost indistinguishable from the present controversy and had resulted in a judgment for defendant. In both cases the danger from the body of water could easily have been obviated by the proprietor; in each case the pool served no useful purpose; in each the pool was easily accessible to children and was attractive to them. The cases were distinguishable in only one respect: in the *Fincher* case the body of water was not visible until the child had already trespassed upon the property, while in the *Plum Orchards* case the pond could be seen from the adjacent highway. This distinction was noted in the *Plum Orchards* case, although it is not clear that the court intended to emphasize it. It used language in the *Fincher* case, rather, to indicate that a pond of water may under some circumstances be classified as an attractive nuisance.

Thus there remains an important question: Does the Louisiana court intend to admit that there is a duty of care toward trespassing children with reference to bodies of water which are within eye-shot of the property line, so that recovery can be allowed when circumstances show that justice demands relief, and does it at the same time intend to grant arbitrary immunity for water dangers so long as they cannot be seen from outside the land, even though their presence is known to children and their allurement is obvious?

This distinction between perils which are visible from out-

4. 143 La. 164, 78 So. 433 (1918).

side the property and those which are not was first drawn in the United States Supreme Court by Justice Holmes in the case, *Britt v. United Chemical and Zinc Company*.[5] Strangely enough, this case also involved the death of a child in a body of water. However, the victim was poisoned. The pond was an abandoned reservoir which had formerly been used in connection with defendant's chemical plant and had been left with substantial quantities of sulphuric acid in it. It could not be seen until after the premises were entered, although its presence was a matter of common knowledge in the neighborhood. The negligence was inexcusable and the danger obvious. Yet defendant escaped under the fictional distinction drawn by the eminent jurist, whose decisions in tort cases have been regarded as notoriously deficient when compared with his output in other fields.[6] The rule of the *Britt* case was followed for a while in a few other jurisdictions, but it has generally been repudiated and it was deliberately rejected in the Restatement of Torts.[7]

The writer prefers to regard the *Plum Orchards* case as representing a new and more liberal approach to the attractive nuisance doctrine as applied to artificial bodies of water. Certainly it is the first Louisiana case in which recovery has been allowed for the drowning of a trespassing child. It seems likely that the supreme court preferred to advert to the *Britt* doctrine merely as a means of avoiding direct overruling of the more timid decision in the *Fincher* case. Such is often the way of courts.

Duty with Reference to Parked Aircraft

The Louisiana Supreme Court has recently applied ordinary negligence principles to a collision of airplanes on the ground.[8] Although our state has not adopted the Uniform State Law for Aeronautics,[9] the approach adopted by the supreme court is the same as under Section 6 of that act.[10] The facts of the case showed

5. 258 U.S. 268, 65 L.Ed. 446, 42 S.Ct. 299 (1921).

6. See, for instance, the much-criticized opinion in Baltimore & Ohio R.R. v. Goodman, 275 U.S. 66, 48 S.Ct. 24, 72 L.Ed. 167, 56 A.L.R. 645 (1927).

7. Hudson, the Turntable Cases in the Federal Courts (1923) 36 Harv. L. Rev. 826; Wilson, Limitations on the Attractive Nuisance Doctrine (1923) 1 N.C. L. Rev. 162. A.L.I., Restatement of Torts (1934) § 339.

The highly artificial basis of the rule of the *Britt* case is the theory that the child cannot recover without showing he was lured or "invited" upon the premises by the dangerous thing which injured him. If he entered without being lured and saw the attractive thing only thereafter, he must be regarded as a trespasser toward whom no duty is owed.

8. Southern Air Transport v. Gulf Airways, Inc., 215 La. 366, 40 So.(2d) 787 (1949).

9. 9 Uniform Laws § 6 (1923); 1941 U.S. Av. Rev. 341.

10. Section 6 reads as follows: "The liability of the owner of one aircraft

that defendant's plane was carried two hundred feet along the ground by a severe wind and was thrown against plaintiff's ship, causing the damage complained of. The testimony indicated that about a week before the accident defendant's pilot had parked the plane at the New Orleans airport and probably had set the brakes and blocked the wheels. However, it appeared that immediately after the accident the wheels were free and no blocks were in evidence. It also seemed that the pilot was at the airport at the time of the accident, although he was not in the immediate vicinity of the crash. Although several competing explanations of the accident were available, all pointed toward negligence on the part of defendant's agent. If the plane was safe when left, as contended by defendant, a reasonable inspection to determine the continued adequacy of the safeguards during the interim would have revealed that the plane had become insecure. The court was willing to find that a failure to maintain some sort of periodic inspection was carelessness, particularly in view of the fact that there was advance notice of the approaching storm.

It is interesting to note that in cases of ground accident, at least, courts have shown little disposition to impose an extraordinary liability upon the operator of an airplane. In the instant case there was free resort to prevailing practices in parking and maintaining planes, which were established by the testimony of other operators. This attitude was confirmed in a Wisconsin case[11] involving a land collision of planes where the supreme court reversed a plaintiff's judgment because the trial judge had instructed the jury that the defendant was bound to exercise "the highest degree of care."

Inducing Breach of Contract

The supreme court has recently reaffirmed the position consistently adopted in this state that the deliberate inducement of a breach of contract is not a recognized wrong.[12] This has been the view in Louisiana since 1902,[13] despite the fact that a cause of action for this kind of hurt is recognized in France, Germany, and in most common law jurisdictions.[14]

---

to the owner of another aircraft, or to aeronauts or passengers on either aircraft, for damages caused by collision on land or in the air, shall be determined by the rules of law applicable to torts on land."

11. Greunke v. North American Airways Co., 201 Wis. 565, 230 N.W. 618 (1930).

12. Templeton v. Interstate Electric Co., 214 La. 334, 37 So.(2d) 809 (1948).

13. Kline v. Eubanks, 109 La. 241, 33 So. 211 (1902).

14. A.L.I., Restatement of Torts (1934) § 766. Prosser, A Handbook on the Law of Torts (1941) § 164.

Traffic and Transportation

Our supreme court, like the courts in many other states, has insisted in the past on hogtying itself with the arbitrary rule that failure to drive within the range of lights during nighttime is negligence (or contributory negligence) per se.[15] This rule has worked particular hardship in cases where the defendant has obstructed the highway at night causing injury to the oncoming plaintiff motorist who crashes into the defendant's obstruction. In these days of fast moving night traffic the highway obstructor is a particularly grievous offender and, as between himself and the victim who has violated a purely arbitrary rule requiring him to drive within the range of his illuminated vision, it would seem that the obstructor should pay. However, the arbitrary rule referred to has the effect of relieving the obstructing defendant of liability. In some states the courts have adopted the more flexible position that the night driver need only use reasonable care commensurate with the occasion.[16] In these jurisdictions failure to keep within the range of the lights is regarded only as one factor to be weighed in determining whether the plaintiff was guilty of contributory negligence. In states where the courts have adopted the arbitrary position that prevails in Louisiana, the rule has been diluted with numerous exceptions, so that its usefulness is doubtful.[17] The tendency everywhere is to seek to minimize the shortcomings of the night driver when he seeks to recover from the person who is guilty of the more serious offense of obstructing the public highway.

Recently in *Dodge v. Bituminous Casualty Corporation*,[18] a case where the fact situation was fairly typical of those described above, the supreme court launched itself into a daring attack upon the problem. Rule 15 of Louisiana Act 21 of 1932 imposes the common duty of installing warning lights around a vehicle parked upon the public highway at night. The following interesting paragraph appears in this section: " . . . *it shall be the duty of the owner or driver of any such vehicle to remove the same as soon as possible and until removed to protect traffic from same at his responsibility.*" The supreme court appeared to announce

15. Sexton v. Stiles, 130 So. 821, 827 (La. App. 2d cir. 1930); Louisiana Power & Light Co. v. Saia, 173 So. 537 (La. App. Orl. 1937.) See generally Comments (1935) 23 Cal. L. Rev. 498, (1938) 22 Minn. L. Rev. 877.

16. Nixon, Changing Rules of Liability in Automobile Accident Litigation (1936) 3 Law and Contemp. Prob. 476, 479.

17. See, for example, Gaiennie v. Cooperative Produce Co., 196 La. 417, 199 So. 377 (1940); Hanno v. Motor Freight Lines, 134 So. 317 (La. App. 1st cir. 1931); Stafford v. Nelson Bros., 130 So. 234 (La. App. 1st cir. 1930).

18. 214 La. 1031, 39 So.(2d) 720 (1949).

in what seems unmistakable language that one who violates this statute cannot escape liability because of the claimed contributory negligence of the oncoming plaintiff who collides with a vehicle parked in violation of the section. Said the court, "The responsibility to protect traffic is fixed by statute. The liability for any injury or damage is therefore fixed upon the defendant."[19] Certainly dissenting Justice McCaleb so interpreted the opinion, for he expressly took issue with the conclusion. However, in a per curiam opinion on rehearing the court abjured its intention to make so drastic a pronouncement. It insisted, instead, that the evidence failed to show that the oncoming plaintiff was in fact guilty of contributory negligence.

Perhaps the court was wise to announce a retreat. Sound judgment would dictate dealing strictly with the obstructor where the victim's only fault was his failure to meet the technical requirement of driving within the range of vision. However, the rule suggested in the original opinion would preclude the defense of contributory negligence even if the oncoming plaintiff were guilty of serious inattention and could have avoided the obstruction with ease. We have here another illustration of the old adage that bad poison invites dangerous antidotes.

It is interesting to note that although only three other traffic cases were handed down by the supreme court last year, all involved accidents arising out of efforts to make left turns, and in each instance the collision was between the turning vehicle and an overtaking car which approached from the rear. Two of these cases deserve brief mention here:

Cassar v. Mansfield Lumber Company[20] presented a situation where the driver and occupant of the overtaking vehicle were injured when defendant's truck ahead suddenly undertook a left turn without warning on the open highway. The defense was contributory negligence of the driver of the overtaking car in attempting to pass at an excessive rate of speed. The court conceded the contributory negligence, but it found that the truck-driver was aware of the vehicle approaching from behind at a high speed when he attempted to negotiate the turn. Thus the defendant was aware of the peril and could have avoided it at a time when excessive speed had placed the overtaking driver in a helpless position. The notion of "discovered peril" was ap-

19. 214 La. 1031, 1038, 39 So.(2d) 720, 723.
20. 41 So. (2d) 209 (La. 1949).

plied and recovery was allowed the negligent victim and his passengers.

The owner of the overtaking vehicle (an ambulance) was plaintiff again in the next case, *Hollabaugh-Seale Funeral Home, Incorporated v. Standard Accident Insurance Company.*[21] The driver of the truck negotiating the left turn was charged with negligence in attempting to turn without giving an adequate signal, as in the *Cassar* case. The defense again was contributory negligence by the driver of the overtaking ambulance. He was charged with inattention and also with attempting to pass at an intersection in violation of the rules of the road. Here, however, unlike the picture in *Cassar's* case, it did not appear that the defendant's driver was aware of the approach of the ambulance from behind—although it is clear that a reasonable lookout would have revealed the danger. Hence the court was faced with a situation where there was negligence on both sides and simple inadvertence was chargeable to each driver. Neither had a superior opportunity to avoid the mishap, and the court properly allowed the risk to lie where it had fallen, and denied recovery. The third case, *Papone v. Cotton Trade Warehouse, Incorporated,*[22] depended entirely on a dispute of fact, and is not reviewed here.

WORKMEN'S COMPENSATION

Any person claiming compensation for the death of a worker is required to show dependency upon the deceased at the time of the accident and death.[23] However, in case of the wife and minor children it is sufficient to show that the claimant was living with deceased at the time of accident and death. When this is shown, the claimant is conclusively presumed to be wholly dependent upon the deceased.[24] Up until 1926 actual dependency could be inferred from the fact that claimant needed the support of the victim and had a reasonable expectation of receiving contributions from him, even though no actual support has been forthcoming.[25] This rule had led to complications in cases where the claimant was the parent of the deceased. If the deceased had left the parental roof, it was normally to be expected that he would establish his own family unit and would not be able to support

21. 41 So.(2d) 212 (La. 1949).
22. 41 So.(2d) 505 (La. 1949).
23. La. Act 20 of 1914, § 8(1) (E) [Dart's Stats. (1939) § 4398].
24. La. Act 20 of 1914, § 8(2)(A) [Dart's Stats. (1939) § 4398].
25. Gregory v. Standard Oil Co. of La., 151 La. 228, 91 So. 717 (1922).

parents with whom he no longer lived, and compensation should not be allowable to such parents except under unusual circumstances. Yet the rule announced above enabled parents to successfully claim compensation on the mere expectation that the deceased would have made contribution toward their support if he had continued to live. In order to correct this situation the legislature added to Section 8 of the Workmen's Compensation Act the following provision: "The mere expectation or hope of future contributions to the support of an alleged dependent by an employee shall not constitute proof of dependency as a fact."

Recently in *Haynes v. Loffland Brothers' Company*[26] suit was instituted by the former wife of a deceased employee who was killed while in defendant's service. She claimed compensation on behalf of their minor child. The mother had divorced deceased several years earlier, and custody of the child had been awarded to her. Under the terms of the decree the deceased had been ordered to pay to the mother for the support of the child $15 per month. This provision of the decree was consistently ignored by the deceased, and several months before the fatal accident deceased was indicted by a Texas grand jury for non-support. This indictment had no effect.

The supreme court denied the claim for compensation because of the failure to show dependency on the part of the child. Since the child was not living with deceased at the time of accident and death he could not rely on the conclusive presumption of dependency and was required to prove dependency in fact. The court felt constrained to apply the quoted portion of the act set forth above, and since no contributions had been made to the child's support by the father, the hope that support would be forthcoming was not enough, even though this hope was reinforced with a court order and a grand jury indictment.

In *Hughes v. Enloe*[27] the supreme court reaffirmed a proposition which it had announced repeatedly in several decisions during past years. Claimant had accidentally lost several fingers from one hand. The court of appeal allowed compensation for specific injury under Section 8 (d) of the Workmen's Compensation Act, although claimant was disabled from doing work of the same reasonable character he had performed prior to the accident. On appeal the supreme court stated that when there is disability the disability provisions [Sections 8 (a) and 8 (b)] pre-

26. 215 La. 280, 40 So.(2d) 243 (1949).
27. 214 La. 538, 38 So.(2d) 225 (1948).

vail over the less generous provisions for specific losses in Section 8 (d).[28]

V. INSURANCE

*J. Denson Smith**

In the field of insurance, some interesting cases were before the court during the 1948-1949 session.

The troublesome question of whether the defense of lack of coverage is available despite an incontestability clause in the policy and Act 140 of 1938[1] was up for decision in *Gordon v. Unity Life Insurance Company.*[2] The court ruled that the incontestability clause in question did not operate to extend coverage to a risk excluded under the policy and specifically excepted from the operation of the clause, that is, death by venereal disease. It distinguished the earlier cases of *Bernier v. Pacific Mutual Life Insurance Company of California*[3] and *Garrell v. Good Citizens Mutual Benefit Association, Incorporated.*[4] Justice McCaleb filed a persuasive concurring opinion in which he argued that the *Garrell* case had incorrectly applied the *Bernier* case and that the court should have taken advantage of the opportunity to correct it. The basic holding that the incontestability clause and Act 140 of 1938 do not relate to risks excluded from coverage, unless an ambiguity is created by the wording of the policy, was concurred in by the whole court.

Whether the insurer should have credited to certain insurance policies dividends declared for the year 1942 and payable on policy anniversaries in 1943, "provided premiums shall have been paid in full to such anniversaries and the policies are then in full force" was the question in *Oil Well Supply Company v. New York Life Insurance Company.*[5] By crediting the dividends, the life of the policies would have been extended beyond the death of insured.

The court found that the 1943 anniversary date of each policy was, in keeping with an election by the assured at the time of

28. This rule was conclusively established in Robichaux v. Realty Operators, 195 La. 70, 196 So. 23 (1940). See generally The Work of the Louisiana Supreme Court for the 1946-1947 Term—Torts and Workmen's Compensation (1948) 8 LOUISIANA LAW REVIEW 248, 253 et seq.

* Professor of Law, Louisiana State University.

1. Dart's Stats. (1939) § 4134.4.
2. 215 La. 25, 39 So.(2d) 812 (1949).
3. 173 La. 1078, 139 So. 629 (1932).
4. 204 La. 871, 16 So.(2d) 463 (1943).
5. 214 La. 772, 38 So.(2d) 777 (1949).