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Private Law: Torts

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tion may have been. A certain ring was mentioned in an undated codicil as having been intended by the wife of the testator for a previously deceased person. On several counts this bequest also failed.

Succession of Schmidt[28] registers an attack on the mental capacity of a testator. The rule of presumption of capacity was reiterated and the proof found to be insufficient to overcome this presumption. *Succession of Lanata*[29] was cited for the proposition that even "interdiction, standing alone, would not ipso facto incapacitate the interdict from making a will, but would only have been evidence of her incapacity, to be considered with all the other evidence."

TORTS

*Dale E. Bennett**

RES IPSA LOQUITUR

The res ipsa loquitur exception to the general rule, that the plaintiff must establish the fact of defendant's negligence by a preponderance of the evidence, has been applied by our Louisiana courts to a wide variety of situations.[1] In *Allen v. Shreveport Theatre Corporation*[2] the plaintiff (theatre patron) was suing for injuries sustained when the theatre ceiling fell during a performance. In *Mayerhefer v. Louisiana Coca-Cola Bottling Company*[3] the doctrine was applied to another of the innumerable bottling cases.[4] The plaintiff's cause of action arose out of the drinking of a bottle of Coca-Cola that contained a harmful quantity of free iodine.

Both of these cases squarely met the requirements of the doctrine. First, the accidents occurred under circumstances where common experience strongly suggested negligence. Secondly, the instrumentality (theatre) or process (bottling) causing the

28. 219 La. 675, 53 So. 2d 834 (1951).
29. 205 La. 915, 18 So. 2d 500 (1944).
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1. For a complete analysis of this problem, see Malone, Res Ipsa Loquitur and Proof by Inference—A Discussion of the Louisiana Cases, 4 LOUISIANA LAW REVIEW 70 (1941).
2. 218 La. 1008, 51 So. 2d 607 (1951).
3. 219 La. 320, 52 So. 2d 866 (1951).
4. For a summary of this group of cases, see Note, 4 LOUISIANA LAW REVIEW 606 (1942).

harm was under the defendant's exclusive control or management. To paraphrase this requirement, the defendant was in a better position to prove his innocence than was the plaintiff to prove his negligence.

The inference of negligence varies in res ipsa loquitur situations.[5] Thus, the defendant in the theatre case could have refuted the presumption of negligence by a showing that the defect was a latent one, not discoverable by reasonable periodic inspections of the ceiling. In the Coca-Cola case, however, the presence of a foreign substance in the bottle raised an almost irrebuttable presumption of negligence. In this situation, evidence that the bottling company's equipment is first class and that the procedures followed are consistently careful is of little avail.

COLLISION WITH PARKED TRUCK—LAST CLEAR CHANCE

In *Capitol Transport Company v. A. R. Blossman, Incorporated*,[6] the plaintiff sought to recover the value of a tractor and tank-trailer unit destroyed when it was struck by a truck operated by defendant's driver at a high rate of speed. Defense counsel, in addition to urging due care in the operation of defendant's truck, alleged that plaintiff was guilty of contributory negligence in allowing the damaged truck to obstruct the highway for a period of twelve hours after its tire had gone flat.[7] After reviewing the facts of the case, the supreme court sustained the defendant's claim of contributory negligence and reversed a judgment for the plaintiff.

It is significant to note that Justice McCaleb, who wrote the opinion for a unanimous court, makes no mention of the possible application of the doctrine of last clear chance. It might have been argued that the plaintiff's negligence (leaving its truck on the highway) was at rest at the time of the accident, as was the negligence of the owner of the tethered donkey in the celebrated English case of *Davis v. Mann*,[8] while the defendant had an opportunity to avoid the collision by careful driving. From the standpoint of categorical legal principles, a "last clear chance" situation appears to have been presented. However, from the

5. See Malone, supra note 1.
6. 218 La. 1086, 51 So. 2d 795 (1951).
7. Other charges of negligence, in failing to have proper reflectors and to completely remove the truck from the highway, were not sustained by the evidence.
8. 10 M. & W. 546 (Exch. 1842).

standpoint of comparative fault, it would certainly have been unreasonable to have allowed recovery. We have a defendant whose only fault was a failure to drive at such a rate of speed that he could stop within the range of vision of his lights—a standard which, while clearly established by Louisiana decisions,[9] is frequently disregarded in actual driving. We have a plaintiff who is guilty of creating a serious traffic hazard by allowing his disabled truck to obstruct the highway for an unnecessary length of time and at night.

In another similar recent case, with the parties litigant reversed, the supreme court allowed the night driver to recover damages from the obstructor of the highway.[10] There the court decided, after considerable difference of opinion as to the basis of allowing recovery, that the plaintiff's driver was not guilty of negligence in failing to see the parked vehicle. Such a conclusion of "no negligence" was not available to the night driver who was a defendant in the *Capitol Transport Company* case. However, the court could fall back upon the general defense of contributory negligence of the driver of the parked truck.

Probably the last clear chance doctrine was not considered because it was not raised by the plaintiff, for the issues on appeal appeared largely to concern the existence of negligence in the conduct of the respective parties. Again, the court may not have considered the plaintiff's negligence at rest, since the driver of the disabled truck was present and could always have averted the accident by moving the vehicle. This might serve as a technical, though rather tenuous, basis for ignoring the last clear chance aspect of the case. As one reads this opinion, one senses an application of a broader policy consideration—a trend in Louisiana decisions to favor the night driver who fails to stop within the range of his vision, over the person creating an obvious highway hazard by leaving a vehicle or other obstruction thereon. In so doing an element of comparative fault is indirectly injected into Louisiana tort law. This may be foreign to the categorical tort principles of the negligence–contributory negligence–last clear chance cycle; but it is certainly compatible with a practical administration of justice.

9. Sexton v. Stiles, 130 So. 821, 827 (La. App. 1930); Goodwin v. Theriot, 165 So. 342 (La. App. 1936); La. Power & Light Co. v. Saia, 173 So. 537 (La. App. 1937).

10. Dodge v. Bituminous Casualty Corp., 214 La. 1031, 39 So. 2d 720 (1949), discussed in 10 LOUISIANA LAW REVIEW 192 (1950).