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TORTS

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CONTRIBUTORY NEGLIGENCE—LAST CLEAR CHANCE

In *Flanders v. Arkansas and Louisiana Missouri Railway Company*[1] the plaintiff sought to recover for the loss of his truck which had been demolished in a collision caused at least in part by the negligent operation of defendant's train. The truck owner sought to insulate the effect of his own contributory negligence, in parking the truck on the track, by alleging that those operating the train had seen the truck and thus "had the *last clear chance* of avoiding the accident." (Italics supplied.) If it had been established that the train operators had actually been aware of the truck's dangerous position on the tracks, the plaintiff's last clear chance argument would have been sustained.[2] In such cases the courts have broadly stated that the plaintiff's negligence was a "remote cause" of the accident, and, conversely, that the railroad's negligence was the "proximate cause" thereof. Actually, the controlling legal principle has been the fact that the defendant was actually aware of the danger and had a *real* "last clear chance" to avoid the collision. However, the preponderance of the somewhat conflicting testimony in the instant case bore out the brakeman's testimony that those operating the train had no actual knowledge of the truck's position on the track. Thus a case of concurring negligence was presented—where both the plaintiff's employees and the operators of defendant's train had failed to take proper precautions. Under those circumstances the plaintiff's contributing negligence barred his recovery, and the doctrine of last clear chance had no applicability.

The Missouri "humanitarian doctrine" has extended the last clear chance rule by charging a defendant operating a dangerous instrumentality (such as a railroad train) with knowledge of the plaintiff's peril, whether he *actually saw* it or *should have seen* it with a proper lookout.[3] This rule is bottomed on the idea that the driver of the more dangerous vehicle is under a special duty to be ever alert, because of the great potentiality for harm

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1. 220 La. 193, 56 So. 2d 151 (1951).

2. Rottman v. Beverly, 183 La. 947, 165 So. 153 (1935); Russo v. Texas Pac. Ry., 189 La. 1042, 181 So. 485 (1938).

3. Womack v. Missouri Pac. Ry., 337 Mo. 1160, 88 S.W. 2d 368 (1935); Gaines, The Humanitarian Doctrine in Missouri, 20 St. Louis L. Rev. 113 (1935).

of the instrumentality he is handling. In reply, one may inquire why the driver of an automobile approaching a known crossing can exact greater care of the railway engineer than he takes for his own safety. It is not surprising that such an inequitable rule has led to confusion in its application, and has received scant judicial approval outside the jurisdiction of its origin.[4]

Some support for the so-called humantiarian doctrine is to be found in the Louisiana cases. In *Iglesias v. Campbell*[5] a similar principle was applied to permit recovery for injury to a child who while jay-walking was struck by defendant's car. In holding that the driver's negligence was "the proximate cause" of the accident the court declared, "It is an inexorable rule of law that the operator of an automobile is held to see that which he should have seen." Similarly in *Jackson v. Cook*[6] the Louisiana Supreme Court affirmed ". . . the well-recognized and settled rule that the duty of those in charge of motor cars and engines to look ahead and observe never ceases; that what they can see they must see and in legal contemplation they do see; that their failure to see what they could have seen by the exercise of due diligence does not absolve them from liability."

Those who, like the writer, doubt the logic or justice of the Missouri rule will find real comfort in the recent case of *Bergeron v. Department of Highways*.[7] In that decision the Louisiana Supreme Court has apparently limited its holding in the *Cook* case to the facts of that case, that is, where the drunken plaintiff's negligence was "passive, as distinguished from active negligence." The opinion in the *Bergeron* case was somewhat in the nature of dictum, since there was a serious question as to whether defendant's truck driver was negligent in failing to see the approaching bicycle as he proceeded to make his left turn across the sidewalk. Yet the court made it abundantly clear that if there was negligence, the fault of the injured cyclist, who ran head-on into the turning truck, was such as to bar any recovery.[8] Justice LeBlanc's carefully written opinion definitely shows that Louisiana is not ready to subscribe to the Missouri "humanitarian doctrine," which charges the driver of the more dangerous

4. See Prosser, A Handbook of the Law of Torts 414 (1941).

5. 175 So. 145 (La. App. 1937). Accord: Law v. Osterland, 3 So. 2d 674 (La. App. 1941).

6. 189 La. 860, 868, 181 So. 195, 197 (1938).

7. 60 So. 2d 4 (La. 1952).

8. "It was the bicycle rider who had the better opportunity to observe the situation and apprehend the danger before it became imminent." 60 So. 2d 4, 8.

vehicle with a last clear chance which he did not in fact have. "The doctrine of the last clear chance," affirms Justice LeBlanc, "is one involving nice distinctions, often of a technical nature, and courts should be wary in extending its application."[9]

DEFAMATION—PRIVILEGED STATEMENTS

The general rule that false defamatory statements are actionable is subject to an exception in cases where the words are spoken in protecting a socially recognized interest. To come within this exception the words must be spoken to a person to whom the knowledge is likely to prove material in protecting the speaker's interest. In such cases a *qualified privilege* is found to exist and no cause of action for defamation arises if the untrue statement is made in good faith and without malice. In *Jones v. Hansen*[10] the secretary of a local labor union in his official capacity notified employers having contracts with the union that certain disciplined members were not in good standing. Assuming the statement to have been false when made, which appears highly doubtful from the reported facts, a *qualified privilege* existed and the circumstances were clearly such as to raise an inference of good faith and proper motives.[11]

The more complete protection of an *absolute privilege* is generally accorded to participants in judicial proceedings. It is important that the judge on the bench, witnesses, attorneys and litigants shall be able to speak freely and without fear of consequences. Thus the common law grants a complete immunity as to any defamatory statements made in court, even though the statement may be known to be false and is motivated by ill will.[12] Louisiana has recognized an absolute privilege as to judicial statements, and as to testimony which is reasonably believed to be relevant to the matter in controversy.[13] However, only a qualified privilege has been accorded to parties litigant and their attorneys.[14] Here there is not the same urgent necessity for an

9. 60 So. 2d 4, 8, quoting from Hutcheson v. Misenheimer, 169 Va. 511, 516-517, 194 S.E. 665, 667 (1938).

10. 220 La. 673, 57 So. 2d 224 (1952).

11. Any possible contrary inference was completely dispelled by the fact that after the National Executive Committee referred the disciplinary action back for further consideration the defendant immediately sent out notices that the members might be employed.

12. Prosser, A Handbook of the Law of Torts 823 (1941).

13. Art. 50, La. Crim. Code of 1942; La. R.S. 1950, 14:50; Oakes v. Walther, 179 La. 365, 154 So. 26 (1934).

14. Art. 49(4), La. Crim. Code of 1942; La. R.S. 1950, 14:49(4); Lescale v. Schwartz Co., 116 La. 293, 40 So. 708 (1906); Dunn v. Southern Ins. Co., 116 La. 431, 40 So. 786 (1906).

absolute freedom of expression. *Waldo v. Morrison*[15] presented a case of rather strong statements by counsel for one of the parties in a controversy over the disposition of a decedent's estate. Attorneys for the daughter had stated in a brief opposing the son's motion for a new trial that the son "did not even have the common decency to take the time to attend his mother's funeral, and yet has months of time to spend squeezing the last penny out of his mother's estate" and had further referred to the son's "niggardly position" in the litigation. Justice Moise reiterated Louisiana's prior position that parties litigant and their attorneys have only a "qualified" privilege, but did not feel that the statements made were "without probable cause" or motivated by malice. Conceding that the statements were "inaccurate," the court concluded that "each was pertinent to the strenuous and bitter litigation between plaintiff and his sister . . . involving their mother's succession. Furthermore, the extrinsic circumstances of plaintiff's actions constituted probable cause for the statements made."[16] In short, while Louisiana does not grant an absolute privilege to parties litigant and their attorneys, false defamatory statements will not be actionable unless they are clearly irrelevant, or obviously unreasonable. Otherwise the propriety of the defendant's motives will be presumed.

WORKMEN'S COMPENSATION

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FAILURE OF INSURER TO MAKE PROMPT PAYMENT OF CLAIM

Over the dissenting opinions of Justices LeBlanc and Hamiter, the Supreme Court held that the penalty provisions of R.S. 22:658 are applicable to workmen's compensation insurers. Writing the majority opinion in *Wright v. National Surety Corporation*,[1] Justice McCaleb found that an *employee* is an *insured* within the meaning of this penal provision of the Insurance Code. In arriving at this conclusion, the court relied heavily upon the section of the Employer's Liability Act[2] which provides (1) that a workmen's compensation insurance policy shall be "construed to be a direct obligation by the insurer to the person entitled to

15. 220 La. 1006, 58 So. 2d 210 (1952).
16. 220 La. 1006, 58 So. 2d 210, 212.

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1. 221 La. 486, 59 So. 2d 695 (1952).
2. La. R.S. 1950, 23:1162.