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Civil Code and Related Subjects: Torts

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to which the question of interest was raised prior to the judgment of homologation becoming final. The decision in the 1947 case was of considerable importance as the assets in the hands of the liquidators were sufficient to meet all demands and leave a surplus for the payment of interest. The same doctrine was subsequently applied in *Bank of Baton Rouge v. Hart Estate*[15] to conventional interest claimed on a certificate of deposit.

During the 1953 term in *In re Interstate Trust & Banking Co.*[16] unsuccessful efforts were made by depositors, who filed oppositions to the final liquidating dividends, to reverse these earlier decisions. The District Court for the Parish of Orleans decided that the opponents were entitled to legal interest on the amount of deposits frozen on January 4, 1934. The Supreme Court, citing the earlier jurisprudence with approval, reversed the lower court in part, holding again that the depositors and creditors were not entitled to interest on payments accepted without reservation as to interest due thereon. Because the depositors raising the point had opposed the distribution of the final liquidating dividends amounting to seventeen and one-half per cent of the "frozen" deposits they were entitled to interest claimed on that amount. The court again based its determination upon the applicability of Article 2925 and the conclusive legal presumption which results from the discharge of the principal without reservation of the right to interest.[17] The orderly conclusion of liquidation proceedings which in respect to interest have been predicated on the Supreme Court's pronouncement in the *Liquidation of Canal Bank & Trust Co.*[18] would hardly have permitted of a different result than that reached in the instant case.

TORTS

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Only a few cases of sufficient importance to warrant extended discussion were handed down during the past term.[1]

15. 216 La. 603, 44 So. 2d 311 (1950).
16. 222 La. 979, 64 So. 2d 240 (1953).
17. As to the conclusiveness of the presumption resulting from the release of principal within the meaning of Article 2925 see Grennon v. New Orleans Public Service, Inc., 17 La. App. 700, 136 So. 309 (1931).
18. 211 La. 803, 30 So. 2d 841 (1947).

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1. Several cases involving torts problems only incidentally and a few

NEGLIGENCE VERSUS IMPLIED WARRANTY OF QUALITY

The question of whether the liability of a bottler for injuries caused by consuming a deleterious substance in a bottled drink rests on negligence or on warranty has been a live topic throughout the country for many years and was raised recently in *LeBlanc v. Louisiana Coca-Cola Bottling Company.*[2]

The question is of more academic interest than of practical importance in this particular type of case. If the plaintiff can show that his injury is genuine and the court is convinced that the harmful substance was actually in the bottle at the time he opened it, he will usually recover under one theory or another. If negligence is adopted as the approach, res ipsa loquitur enables the victim to get his case to the jury or warrants an award of damages by the judge. In such cases diligent efforts by the defendant to demonstrate the meticulous care used in bottling the beverage are of little avail in disproving "negligence," although such evidence may be valuable in casting doubt upon the genuineness of the claim. In the final analysis the bottler is regarded as negligent for allowing a harmful substance to get into the bottle. Being careful, in this context, means seeing to it that the drink is not contaminated.[3] Legal purists may find many a flaw in the above statement, but I venture that it pretty faithfully describes the results reached in the courtroom in suits against bottlers. In other words, negligence and warranty are the same for most practical purposes in this kind of case.

The majority opinion of the Supreme Court in *LeBlanc v. Louisiana Coca-Cola Bottling Company* announced that an implied warranty of quality is a proper theory for recovery in a suit against the bottler by the ultimate consumer of a bottled beverage which contains some harmful substance. The dissenting opinion of Justice Hawthorne insisted that absence of privity of contract in such cases should deprive plaintiff of access to the warranty

others which depended only upon questions of fact are not discussed:

Barfield v. Marron, 222 La. 210, 62 So. 2d 276 (1952) (conduct of officer in detaining and jailing plaintiff on suspicion of seining fish did not amount to false imprisonment); Carlton v. Louisiana Power & Light Company, 222 La. 1063, 64 So. 2d 432 (1953) (power company not liable for electrocution of operator of log loader when device made contact with power line, since evidence showed lines were prudently strung at proper height from the ground); Taulli v. Gregory, 223 La. 195, 65 So. 2d 312 (1953) (petition for malicious prosecution against municipal officers setting forth that prosecution was malicious and without probable cause stated all elements of offense and was sufficient to withstand exception of no cause of action).

2. 221 La. 919, 60 So. 2d 873 (1952).

3. The cases prior to 1941 are discussed in Malone, Res Ipsa Loquitur and Proof by Inference, 4 LOUISIANA LAW REVIEW 70, 97 (1941).

theory and that recovery must be predicated on negligence via the res ipsa loquitur route. The majority opinion has been criticized by the writer of a note in this review.[4]

One may doubt whether the matter of choice of theory was at all necessary to a solution of the problem before the court in the *LeBlanc* case. The difference of opinion between the majority and the dissenting opinion seems to the writer to relate solely to the extent of proof which should be exacted of the plaintiff in the bottled drink cases. The majority opinion would only require the plaintiff to satisfy the trier that the deleterious substance was in the bottle when the sealed cap was removed, while the dissenting judge would require further that the victim show by affirmative evidence that the substance was in the bottle when it left the possession of the defendant bottler.

If the position of the dissenting judge were to prevail, it is difficult to see how recovery could ever be forthcoming in this class of case. Although it is true that the bottled drink cases are peculiarly susceptible of fraud, yet it still may be doubtful that the proper remedy is to foreclose recovery entirely by placing on the plaintiff a burden of proof which he cannot possibly be expected to carry. Most observers would agree that the real question in these controversies does not relate to what happened *before* the plaintiff got his hands on the bottle, but what happened *after* he got it.

It is difficult to understand how the issue of warranty versus negligence found its way into the case. The court was not concerned with the question of whether the bottler did or did not use due care. After a vigorous three-page opinion defending the negligence approach, Justice Hawthorne appropriately concluded:

> "Conceding, however, that an action for breach of implied warranty is available to the plaintiff even though she was not a purchaser, I do not see how she can be relieved even under this theory of the case from proving that the bottle was in the same condition when it left the defendant as it was when she opened it. The question of tampering is as important under the implied warranty theory as under the res ipsa loquitur theory because, in order for the vendor to be liable for breach of its implied warranty, the defect must have been in the article at the time it sold the bottle."[5]

4. Note, 13 LOUISIANA LAW REVIEW 624 (1953).

5. LeBlanc v. Louisiana Coca Cola Bottling Company, Ltd., 221 La. 919, 939, 60 So. 2d 873, 879-80 (1952).

NEGLIGENCE

The doctrine of res ipsa loquitur cannot be successfully invoked except where the permissive inferences arising from the occurrence of an accident suggest negligence on the part of the defendant as the most plausible explanation of the occurrence. This reason alone justified the Supreme Court recently in refusing the aid of the doctrine to an employee of a steamship company who sought damages against the stevedore whose alleged negligence in stacking cargo caused a pile of freight to give way and fall upon him.[6] The evidence failed to show that the conduct of the stacking operation was under the control of the defendant stevedore rather than the steamship company, plaintiff's employer.

The case was easily disposed of on the ground suggested above. The court, however, interjected the observation that res ipsa loquitur applies only where the defendant is in a superior position to explain the occurrence of the accident and that plaintiff cannot rely on the doctrine where his position in this respect equals that of the defendant. This writer is at a loss to understand why any natural inference of negligence which may arise from the occurrence of an accident should be unavailable to the plaintiff except in cases where he is at a tactical disadvantage otherwise. The type of statement made by the court suggests by implication that res ipsa loquitur is some sort of a new "theory" of recovery available as a substitute for "proof" of negligence and which should be allowed only under extreme circumstances of inequality between the parties. This type of statement was unnecessary to the decision of this case, as it has been unnecessary in the few past decisions where it has been made. It can serve only to confuse counsel and to becloud inquiry as to the function of res ipsa loquitur in establishing a case of negligence. The writer has attempted a more detailed discussion of this matter in an earlier issue of the REVIEW.[7]

Although a person who makes use of a highly inflammable substance, such as butane gas, is held to a high degree of care and seldom escapes liability for damages caused by an explosion, yet the liability is couched in terms of negligence. For this reason the defense of contributory negligence is available to him.

6. Dorman v. T. Smith & Son, Inc., 223 La. 29, 64 So. 2d 833 (1953).

7. Malone, Res Ipsa Loquitur and Proof by Inference, 4 LOUISIANA LAW REVIEW 70 (1941).

In *Harris Drilling Company v. Delafield*,[8] the drilling company maintained a butane gas pipe in dangerous proximity to a wooden runway leading to his drilling site. Delafield's truck driven by his employee ran off the runway, struck the pipe and caused an explosion which damaged both the property of the drilling company and Delafield's truck. Each party sought damages from the other. The court, finding that the driver was careless in allowing the truck to leave the runway, denied damages to Delafield because of contributory negligence, and similarly held that the carelessness of the drilling company precluded recovery against the truck owner.

The opinion followed the accepted rule that proof of conformity to custom is not controlling in determining the existence of negligence. The drilling company had attempted to show that the practice of running butane gas lines near to runways was common among drillers. When the act is obviously dangerous, proof that others are similarly careless is of no avail.

What conduct by a guest in an automobile amounts to contributory negligence so as to preclude recovery against the careless host driver or the operator of another vehicle? Most courts, including our own, have declined to require that the guest undertake to maintain a watchout unless there is some affirmative reason for him to believe that the operator is not handling the vehicle properly or that he is unaware of some danger on the highway which is known to the guest. This position was reaffirmed last year in *White v. State Farm Mut. Auto Ins. Co.*[9] Plaintiff was riding as a guest of the driver of a pick-up truck. The evening of the accident was a cold one, and sleet had accumulated on the highway and on the windshield of the vehicle. The vision of the driver was not seriously obstructed, because the windshield wiper on his side was operating effectively. However, the wiper on plaintiff's side was out of order and plaintiff could not see. The truck collided with a vehicle of the Department of Highways which was parked on the western incline of the Mississippi River Bridge at Baton Rouge. The negligence of the respective drivers of the two vehicles was not in issue, and their carelessness is to be assumed for present purposes. The court of appeal denied recovery on the ground that plaintiff was guilty of contributory negligence. This was reversed on appeal. The alleged carelessness consisted in a failure to keep an affirma-

8. 222 La. 416, 62 So. 2d 627 (1952).
9. 222 La. 994, 64 So. 2d 245 (1953).

tive lookout and failure to warn the driver of his excessive speed. The Supreme Court stated the rule above that the guest may rely upon the assumption that the driver will exercise proper care and caution unless the danger is known or obvious to the guest. It also felt that even if the latter were conceded to be careless with respect to the speed maintained by the driver, this speed was not a cause of the accident. There was a dissenting opinion by Justice LeBlanc. He emphasized that driving conditions were abnormal at the time and the guest should have seen to it that the ice was removed on his side of the windshield so that he could assist the driver. If this position had prevailed, an interesting question of last clear chance might have been interjected by the plaintiff, since at the time of the collision the driver could see, while the guest was helpless in that respect.

WORKMEN'S COMPENSATION

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CLAIMANTS, PREFERENCE AND EXCLUSION

The most important and widely discussed decision of the past year on workmen's compensation is *Caddo Contracting Co. v. Johnson.*[1] The Supreme Court gave a new perspective to the matter of priorities between dependents. Many persons, including the writer, had assumed that our compensation statute, wisely or unwisely, set up a system of priorities for dependents so that the existence of a widow or child who was entitled to compensation precluded any other dependent from successfully claiming benefits under the act. Likewise the existence of a dependent parent would seem to eliminate the claim of a brother or sister of the deceased. This conclusion seemed inescapable from an

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1. 222 La. 796, 64 So. 2d 177 (1953).

2. "(7) If there are neither widow, widower, nor child, then to the father or mother, thirty-two and one-half per centum of wages of the deceased. If there are both father and mother, sixty-five per centum of wages.

"(8) If there are neither widow, widower, nor child, nor dependent parent entitled to compensation, then to one brother or sister, thirty-two and one-half per centum of wages with eleven per centum additional for each brother or sister in excess of one. If other dependents than those enumerated, thirty-two and one-half per centum of wages for one, and eleven per centum additional for each such dependent in excess of one, subject