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Civil Code and Related Subjects: Workmen's Compensation

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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

*Wex S. Malone**

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

examination of the language of R.S. 23:1232[2] and the decisions of both the Supreme Court and the courts of appeal prior to 1948.[3]

The effect of the provision thus interpreted was often to confer a windfall on the employer or his insurer, who, relying upon a small compensation payment to a child or parent, could be relieved of any obligation to needy brothers, sisters, or other dependents, even though the total of all claims asserted might not exceed, or even equal, the maximum compensation with which an employer can be charged.

Rumblings of dissatisfaction with this state of affairs became evident in the opinions of the courts of appeal as early as 1944. In *Hamilton v. Consolidated Underwriters*[4] the Court of Appeal for the Second Circuit denied that persons claiming as "other dependent members of the family"[5] were to be excluded from compensation because of the existence of a dependent mother. The court relied upon the peculiar phraseology of the last sentence of R.S. 23:1232(8) relating to this particular class of claimants. It then proceeded to allow compensation to brothers and sisters of the deceased despite the existence of a dependent mother. This result was achieved simply by classifying brothers and sisters as "dependent members of the family."

The next case that urged a departure from the old position was *McDonald v. Louisiana, Arkansas and Texas Transportation Co.*[6] Again the Court of Appeal for the Second Circuit allowed compensation to dependent parents despite the existence of a dependent child of the deceased. The attack this time was different from the one adopted in the *Hamilton* case. Instead of treating "dependent member of the family" as a special classification not subject to deferment, the court concluded in general terms that the existence of a member of a preferred group does not serve to exclude other dependents. It found a general intention by the Legislature that all dependents should share so long as the maximum allowable compensation is not exceeded. This intention was discovered from the terms of R.S. 23:1252, which provides as follows:

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to a maximum of sixty-five per centum of wages for all, regardless of the number of dependents."

3. Bradley v. Swift & Co., 167 La. 249, 119 So. 37 (1928); Brown v. Weber-King Lbr. Co., 7 La. App. 444 (La. App. 1st Cir. 1928); Dugas v. Gulf States Utilities Co., 145 So. 376 (La. App. 1st Cir. 1933).

4. 21 So. 2d 432 (La. App. 2d Cir. 1944).

5. See La. R.S. 1950, 23:1253 in connection with La. R.S. 1950, 23:2343(8), supra note 2.

6. 28 So. 2d 502 (La. App. 2d Cir. 1946).

". . . If there are a sufficient number of persons wholly dependent to take up the maximum compensation, the death benefit shall be divided equally among them, and persons partially dependent, if any, shall receive no part thereof."

The third case indicating that a new approach might be in prospect was *Patin v. T. L. James & Co.*[7] The question presented was whether the existence of a partially dependent mother should be a reason for denying compensation to an illegitimate who was a "dependent member of the family." In holding for the illegitimate the Court of Appeal for the First Circuit relied entirely on the *Hamilton* case.[8]

The *Patin* case went to the Supreme Court. That court, however, was apparently unwilling to accept the rationale of the *Hamilton* case. Neither did it adopt the reasoning of the *McDonald* decision (which had not been mentioned in the hearing before the court of appeal). Instead, the Supreme Court emphasized the fact that the mother was only partially dependent, whereas the illegitimate child was wholly dependent upon the deceased, and it restricted its holding to the proposition that the existence of a *partially* dependent member of a preferred group does not operate so as to deny compensation to a *wholly* dependent member of a deferred group—an entirely new approach to the problem. The question as to how to dispose of the situation where both claimants are wholly dependent was left in abeyance. The opinion, however, did serve warning that some notion akin to the one adopted in the *McDonald* case might prevail if the question were squarely presented. It is noteworthy that in the cases discussed above the claims of all dependents could be satisfied in full without exceeding the maximum compensation which can be assessed against the employer.

Thus the matter stood at the time of *Caddo Contracting Co. v. Johnson.*[9] In this case the deceased through artful deception managed to maintain a legal wife on one side of the Red River and a concubine and several illegitimate children on the other side, with each family ignorant of the existence of the other. All claimants were wholly dependent. The employer claimed that the existence of the legal widow precluded any award of compensation to the illegitimate children across the river. The

7. 218 La. 949, 51 So. 2d 586 (1951).
8. 42 So. 2d 304 (La. App. 1st Cir. 1949).
9. 222 La. 796, 64 So. 2d 177 (1953).

Supreme Court held that all were entitled to compensation. The reasoning of the opinion seems to be substantially the same as in the *McDonald* case, but the court attempted to make the entire pattern clear. It announced, first, that so long as the aggregate of all claims of wholly dependent persons (irrespective of class) do not exceed the maximum allowable compensation chargeable to the employer, they should all be satisfied in full. Second, if the fund available for compensation without exceeding these limits (65 per cent of wages or 30 dollars weekly, whichever is less) is not enough to satisfy in full the claims of all wholly dependent persons, the deficiency must be borne by those wholly dependent persons whose claims are subordinated by R.S. 23: 1232. In other words, preference as accorded by this provision of the compensation act means only preferential treatment in the event of a deficiency of available compensation.

The decision in the *Johnson* case and its rationale are analyzed elsewhere in the REVIEW.[10] Little can be added here except by way of summary and conjecture as to the implications of the decision for future litigation.

The situations that might arise can be meaningfully divided into two groups: (1) where the claims of all recognized dependents can be satisfied in whole without imposing on the employer a compensation obligation in excess of 65 per cent of earnings at time of accident or in excess of 30 dollars weekly. When the situation is thus, it is fair to assume that claims of both partially and wholly dependent persons will be satisfied in full without reference to any ranking or priority; (2) where the aggregate of all claims will exceed the maximum compensation allowable under the limitations above. In such a situation, some, or all claimants must suffer a reduction in order to avoid exceeding the maximum limitations. If it is borne in mind that claimants are classified in the act both in terms of whole versus partial dependency and in terms of preference because of family relationship or need, it is clear that several permutations are possible. These can be listed as follows:

A. All claimants totally dependent and all belonging to the same preference class;

B. Some totally dependent claimants and some partially dependent claimants, all belonging to the same preference class;

10. Noted infra p. 301.

C. All claimants totally dependent, belonging to different preference classes;

D. All claimants partially dependent, belonging to different preference classes;

E. All totally dependent claimants belonging to one preference class, and one or more partial dependents belonging to a class which is *inferior* to that of the total dependents;

F. All totally dependent claimants belonging to one preference class, and one or more partial dependents belonging to a class which is *superior* to that of the total dependents.

Each of these situations, treated in the order set forth above, deserves brief comment:

A. If all claimants are totally dependent and all belong to the same preference class there is no basis for suggesting that any one claimant should suffer a greater reduction than another if the available fund is not sufficient to satisfy all. Therefore the deficiency must be equally allocated among them. Even here, however, our jurisprudence permits a variation in the case of a widow and three or more children who are not living together. In such a case the widow is entitled to her 32½ per cent of earnings without reduction, while the children must divide the remaining 32½ per cent between themselves.[11]

B. Where there are both total and partial dependents of the same preference class, any deficiency must be absorbed by the partial dependents exclusively. This is expressly provided in R.S. 23:1252.

C. The situation where all claimants are wholly dependent but some of them are in an inferior preference group or classification was the picture before the Supreme Court in the *Johnson* case. The opinion makes clear that the claims of wholly dependent persons in a preferred classification must be met in full before the claims of deferred wholly dependents can be recognized and that any deficiency must be borne by the latter. This,

11. Selser v. Bragmans Bluff Lbr. Co., 146 So. 690 (La. App. Orl. 1933); Britt v. Nashville Bridge Co., 171 So. 493 (La. App. 2d Cir 1937); American Mutual Liab. Ins. Co. v. Sanders, 177 So. 498 (La. App. 2d Cir. 1937); Smith v. Tangipahoa Par. School Board, 21 So. 2d 77 (La. App. 1st Cir. 1945). But cf. Ocean Accident & Guarantee Corp. v. Stuart, 92 F. Supp. 225 (D. C. La. 1950).

according to the court, is the very purpose for the inclusion of R.S. 23:1232 in the statute.

D. If all claimants are partially dependent, but are members of different preference groups, it would seem that by analogy to situation C the members of the superior group should be preferred in the event of a shortage of available compensation.

E. The case of the deferred partial dependent is clear where there are wholly dependent persons in a superior classification. For the reasons stated in both B and C above it is obvious that the claim of the partial dependent cannot be recognized except from a residue that may remain after preferred claims have been satisfied in full.

F. Where the partial dependent is a member of a preferred or superior class and the remaining claimants are of an inferior class, but are wholly dependent, the problem is difficult. Several inferences from the *McDonald* and *Johnson* cases are possible: on the one hand it can be argued that the court intended broadly that the classification of inferior and superior dependents established by R.S. 23:1232 should be determinative whenever the maximum available compensation will not satisfy all claims in full. Under this approach the claim of even a partially dependent member of a superior class would be given preference over the claim of a wholly dependent member of an inferior class in the event of a shortage of available compensation. On the other hand, it can be argued that the court's conclusion in the *Johnson* case rests upon the premise that the preference of wholly dependent claimants over partially dependent claimants, as set forth in R.S. 23:1252, represents the dominant purpose of the Legislature and thus afforded justification in the *Johnson* case for depriving the provisions of R.S. 23:1232 of their apparent exclusionary effect. If this approach is correct, the claims of the wholly dependent members of an inferior classification must prevail in the event of an insufficiency of funds to meet all claims in full.

ATTEMPTED RESCUE BY EMPLOYEE

An act of rescue by an employee during the course of his work on his employer's premises involves a risk which arises out of his employment, and compensation will be granted for injury occasioned thereby. This liberal position was adopted by the Supreme Court last year in the case, *Edwards v. Louisiana For-*

estry Commission.[12] Claimant, a fire tower man employed by the Forestry Commission, saw a child under attack by a vicious dog on his employer's premises at a time when the claimant was engaged in his duties atop a fire tower. In his haste to descend the stair to effect a rescue he suffered a strain which resulted in a hernia.

The opinion is a lengthy one which cites many cases from other jurisdictions and a considerable array of periodical literature. It quotes approvingly from the recent opinion of the United States Supreme Court in *O'Leary v. Brown-Pacific-Maxon, Incorporated*[13] wherein the observation was made that "workmen's compensation is not confined by common law conceptions of scope of employment."[14] Following the same opinion, the Louisiana court quotes approvingly, "The test of recovery is not a causal relation between the nature of employment of the injured person and the accident . . . . Nor is it necessary that the employee be engaged at the time of the injury in activity of benefit to his employer. All that is required is that the 'obligations or conditions' of employment create the 'zone of special danger' out of which the injury arose. . . . A reasonable rescue attempt . . . may be 'one of the risks of the employment, an incident of the service, forseeable, if not foreseen, and so covered by the statute.' "[15]

The chief contribution of the opinion, however, is the sage recognition of the worker's right to compensation protection in doing the natural and humane thing when confronted with a sudden and unexpected situation. This is true even though the emergency does not involve the safety of a fellow worker or the employer's property, and even though it is not likely that the situation giving rise to the rescue could involve liability for the employer.

Work Which Is a Part of the Employer's Business

The compensation act protects only employees whose employment is in the course of their employer's trade, business or occupation.[16] The scope of this limitation has been debated many times with reference to workers who were hired to construct, remodel, or repair capital structures of their employer. The

12. 221 La. 818, 60 So. 2d 449 (1952).
13. 340 U.S. 504 (1951).
14. Id. at 506.
15. Id. at 507.
16. La. R.S. 1950, 23:1035.

initial position of the court was that such work is not part of the employer's trade, business or occupation unless the latter was engaged in the construction business.[17] This attitude prevailed even with respect to building and loan companies, who frequently maintain regular crews of workmen to preserve property in which they are financially interested.[18]

Beginning in 1936 there developed a line of decisions in the courts of appeal holding that where the business of the employer is a hazardous one, repairs and similar work on capital structures will be regarded as part of the business of the employer.[19] This would not be true where the business is not hazardous independent of construction or repair work (although such work is, of course, specifically classified as hazardous in the act).[20] Recently the Supreme Court has approved this line of decisions in *Speed v. Page*.[21] In that case claimant was injured while engaged in demolition and construction work for the defendant who was rebuilding his motion picture theater which had been destroyed by fire.

The position adopted in *Speed v. Page* represents a forward step in keeping with the purposes of the compensation statute. One may doubt, however, that the insistence that the business be hazardous without respect to the construction work is either a logical or wise limitation. Under this position the proprietor of a livery stable or a restaurant would not be liable in compensation to those of his workers who undertake to repair his establishment, while under similar circumstances the proprietor of a garage or motion picture establishment would be subject to liability. Perhaps it can be argued that this position is inherently fair because the livery stable proprietor is not liable for compensation in the conduct of his regular business, while the proprietor of the garage *is* so liable. Thus the announced principle does not serve to bring any new businesses under the coverage of the statute, and it merely expands the scope of cover-

17. Shipp v. Bordelon, 152 La. 795, 94 So. 399 (1922); Wilkie v. Langlois, 164 So. 434 (La. App. 1st Cir. 1935); Lay v. Pugh, 119 So. 456 (La. App. 1st Cir. 1928).

18. White v. Equitable Real Estate Co., 139 So. 45 (La. App. Orl. 1932); McAllister v. Peoples Homestead & Savings Association, 171 So. 130 (La. App. 2d Cir. 1936).

19. Hecker v. Betz, 172 So. 816 (La. App. Orl. 1937); Gonsoulin v. Southern Amusement Company, 32 So. 2d 94 (La. App. 1st Cir. 1947).

20. "Work in any of the building or metal trades in the erection, construction, extension, decoration, alteration, repair or demolition of any building or structural appurtenances." La. R.S. 1950, 23:1035.

21. Speed v. Page, 222 La. 529, 62 So. 2d 824 (1952).

age for businesses which are already affected. This argument would be persuasive if it were true that certain businesses are definitely within the protection of the act, while others are with equal certainty not protected. In truth, however, there are few businesses, however small and rudimentary their operations may be, which do not lie within the fringe of compensation coverage. A business management that would forego compensation insurance protection on the assumption that its operations were wholly non hazardous would be rash indeed. Thus the distinction drawn is not likely to be of much practical benefit, and it will probably result in further confusion and litigation.

EMPLOYER'S RIGHT AGAINST THIRD PERSON

Although an illegitimate child is not entitled to maintain a tort action under the provisions of Article 2315 of the Civil Code for the death of its parent,[22] yet the illegitimate is entitled to workmen's compensation from the parent's employer in the event of the parent's death.[23] This inconsistency between the two statutes is highlighted where the employer pays compensation to the illegitimate and then seeks to recoup his loss by a suit against the third party wrongdoer pursuant to Section 7 of the compensation statute. Such was the situation presented in the recent case, *Board of Commissioners of Port of New Orleans v. City of New Orleans.*[24] The Supreme Court allowed the employer's claim against the third party and dismissed the latter's exception of no cause of action. The court characterized the employer's suit under Section 7 as the exercise of a separate right of action rather than a claim based upon principles of subrogation. The compensation statute, said the court, vests in the employer a part of the liability of the tortfeasor sufficient to warrant indemnification to the former for the compensation he has paid. It then observed that death does not extinguish the cause of action which accrued when the employee was injured. This cause of action merely passes to anyone who is specifically granted the privilege of enforcing it. The employer, who is expressly authorized to sue by Section 7 of the compensation statute, is such a person.

22. Youchican v. Texas & Pacific Ry. Co., 147 La. 1080, 86 So. 551 (1920); Green v. New Orleans, S. & G. I. R. Co., 141 La. 120, 74 So. 717 (1917); Thompson v. Vestal Lumber & Mfg. Co., 208 La. 83, 22 So. 2d 842 (1945); Brown v. Texas & P. Ry. Co., 138 So. 221, 18 La. App. 656 (1931).

23. Thompson v. Vestal Lbr. & Mfg. Co., 208 La. 83, 22 So. 2d 842 (1945); Williams v. Jahncke Service, Inc., 55 So. 2d 668 (La. App. Orl. 1951).

24. Board of Com'rs of Port of New Orleans v. New Orleans By and Through Public Belt R. Commission, 223 La. 199, 65 So. 2d 313 (1953).

The settled rule in Louisiana is that an employee of a sub-contractor cannot pursue a tort claim for damages against the negligent principal contractor, since the latter is not a third person within the meaning of Section 7 of the compensation statute.[25] The Supreme Court has recently held that under such circumstances the sub-contractor who has paid compensation to his employee cannot recover from the principal contractor under Section 7 (2) of the act.[26] The sub-contractor, relying upon *Foster and Glassell Company v. Knight Brothers*,[27] insisted that his rights against the principal arise, not only from Section 7 of the statute, but by way of a claim for indemnification as well. The answer of the court was that one who is primarily liable for compensation (which includes the sub-contractor under Section 6 of the act) cannot have indemnity from a person who is only secondarily liable (the principal contractor under Section 6 of the act). The position of the court is also justifiable from practical considerations. The principal contractor has presumably paid the premium for the sub-contractor's compensation insurance as a part of the price for the contracted work. Therefore, he should not later be called upon to shoulder the compensation obligation of the sub-contractor's insurer under circumstances where he could not have been made answerable in tort to the injured employee.

EMPLOYER'S DEFENSES

In a suit for compensation the employer is allowed to show as a defense that the employee deliberately failed to use an adequate guard or protection against accident provided for him.[28] This defense was asserted in *Herring v. Hercules Powder Company*[29] against a claim for compensation by the dependents of an employee who was killed when the truck and trailer he was driving was struck by a train at a crossing. The truck was provided with an air brake, but the deceased had knowingly neglected to attach it because his experience had shown that it became easily disconnected when the truck moved along rough

25. Thibodaux v. Sun Oil Co., 218 La. 453, 49 So. 2d 852 (1950); Gaiennie Co., Ltd. v. John O. Chisoln, 3 La. App. 358 (Orl. 1926); Dandridge v. Fidelity & Gas Co. of N.Y., 192 So. 887 (La. App. 2d Cir. 1939); Isthmian S.S. Co. of Delaware v. Olivieri, 202 F. 2d 492 (5th Cir. 1953).

26. Coal Operators Gas Co. v. Fidelity & Casualty Co. of New York, 66 So. 2d 852 (La. 1953).

27. 152 La. 596, 93 So. 913 (1922).

28. La. R.S. 1950, 23:1081.

29. Herring v. Hercules Powder Co., 222 La. 162, 62 So. 2d 260 (1952).

roads. The Supreme Court held that the defense had not been established. The employer failed to sustain the burden of showing that connecting the brake would have avoided the accident. The opinion also cast some light on the controversy as to what constitutes "deliberate failure" to use a safety device. It indicated that where there is a good reason for not using the guard or device the failure is not deliberate. This, in general, accords with the approach which had been taken in several earlier cases of the courts of appeal—that mere intentional rejection of a safety device does not per se constitute the deliberate action contemplated by the statute.[30]

Wage Basis of Compensation Payments

The basis for computing compensation, announced in the landmark case, *Rylander v. T. Smith and Son*,[31] is the daily rate of pay multiplied by the number of days in a full work week. This holds true even though it is conceded that the employee worked only irregularly, for compensation is based upon loss of earning capacity, rather than on actual loss of pay. This position was reaffirmed recently in *Troquille v. Lacaze's Estate*.[32] The claimant had worked irregularly for defendant for a substantial period of time when he was injured. The court of appeal had computed compensation on the basis of his average weekly earnings for the preceding year. This was reversed on appeal, and the test announced above was substituted.

Disability

There were no significant decisions in the Supreme Court dealing with the subject of disability. The court affirmed the position that an employee is totally disabled when an injury deprives him of the ability to do work of the same character as that done at the time of the accident. In *Edwards v. Louisiana Forestry Commission*[33] a tower man who sustained a hernia which entirely prevented climbing and forced him to resign his job was regarded as totally disabled.

30. McClendon v. Louisiana Cent. Lbr. Co., 135 So. 754 (La. App. 2d Cir. 1931); Cole v. List Weatherly Const. Co., 156 So. 88 (La. App. 2d Cir. 1934).

31. 177 La. 716, 149 So. 434 (1933).

32. Troquille v. Lacaze's Estate, 222 La. 611, 63 So. 2d 139 (1953).

33. Edwards v. Louisiana Forestry Commission, 221 La. 818, 60 So. 2d 449 (1952) (rehearing 1952).

In another case[34] the court announced that where partial disability was conceded it was improper to deny compensation on the ground that the difference between the wage earned before the accident and the earnings thereafter was too insignificant to be a proper measure of loss of earning capacity. In such a case, observed the court, the minimum compensation of three dollars weekly should be awarded.

Civil Procedure

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THE PETITION

The late Judge Westerfield is reputed to have reminded counsel, after reading the prayer for damages on a palpably inflated claim, that the Biblical injunction "Ask and ye shall receive" had no application to such worldly matters as damage suits. *Friedman Iron & Supply Co. v. J. B. Beaird Co.*[1] presented the converse of this situation, where the plaintiff failed to pray for as much damages as it proved it had sustained as the result of defendant's breach of a contract to purchase scrap steel. The facts of the case are somewhat involved and, as they are discussed in another section of this symposium,[2] need not be repeated here. For present purposes it suffices to point out that originally plaintiff prayed for $12,500 damages, then in a supplemental petition claimed only $6,300, and finally on the trial proved it had sustained damages of $8,622.40. In its final decision, rendered after two rehearings had been granted, and with two justices dissenting on other grounds, the Supreme Court limited the recovery of damages to the $6,300 prayed for in the amended petition.

McCarthy v. Osborn[3] provides further evidence of a commendable attitude on the part of Louisiana's highest court to have lawsuits decided on their merits, rather than on procedural

34. Blanchard v. Pittsburgh-Des Moines Steel Co., 66 So. 2d 342 (La. 1953).

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1. 222 La. 627, 63 So. 2d 144 (1952).

2. Supra p. 145.

3. 223 La. 305, 65 So. 2d 776 (1953).