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Torts and Workmen's Compensation

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without development on the area for which cancellation was asked may have been an influential factor though it was not stated to have been. The fact that by the terms of the contract the lessee might discard unwonted acreage and reduce land rentals while keeping what it wanted without development is well stressed. Again, that upon cancellation in whole or in part for any reason, a producing well and 160 acres of land might be held is a convincing answer to the lessee's plea of indivisibility of lease. The facts of the former cases holding for indivisibility of lease, under theory of indivisibility of obligation to drill a well are easily distinguished in fact but not so readily in doctrine. Be that as it may, this decision is most heartening, particularly to those who have had difficulty in assimilating the mysteries of indivisibility of lease in some previous cases—when met with others dealing with assignment of part of the acreage.

Active breach by refusal to comply with demand, requiring no putting in default, is well illustrated by the instant case. Revised Statutes 30:102 having been complied with by lessor, award of reasonable attorney's fees obviously followed.

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TORTS

Negligence

Standard of care. Courts generally agree that it is the duty of the physician, surgeon or dentist to exercise the degree of skill ordinarily employed, under similar circumstances, by the members of his profession in good standing in the same locality, and to use reasonable care and diligence, along with his best judgment, in the application of his skill to the case. Two ideas are implicit in this definition of the professional standard of conduct: First, the standard of skill is that of a complex and erudite profession. It is conceded that the medical layman, including even the judge, is incapable of passing an intelligent judgment on such matters and that there must be resort to medically expert opinion which will likely be determinative in each controversy. Second, the element of care and diligence

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(as distinguished from skill) is gauged simply by the term "reasonable." This suggests that the trier is entitled to more latitude and that he can draw from his own experience and judgment in evaluating the attentiveness and diligence of the physician or surgeon. No judge or jury could attempt to determine for itself whether a diagnosis of a complicated disease was acceptable or unacceptable within the medical profession. If, however, an attending physician were to drop a bottle of nitric acid on a patient during a course of treatment, if a surgeon were to open a window during the course of an operation so that flies and insects entered an incision, or if the surgeon's knife were to slip and sever healthy tissue, no judge would hesitate to rely upon his own good judgment in asserting that there was negligence. The attempt to distinguish those pieces of alleged professional conduct which must be judged through medical expertise and those which can be subjected to the homely scrutiny of "ordinary care" is a difficult matter, and judges have frequently disagreed.

This kind of disagreement brought about six separate hearings in *Meyer v. St. Paul-Mercury Indemnity Company.*[1] Plaintiff was referred by her dentist to an oral surgeon for the extraction of all her teeth. A cursory examination indicated one obviously loose tooth. She was placed under ether by the anesthetist. The plan for anesthetization was nasal indotracheal intubation, which requires that a tube be inserted through the nose and seated behind the trachea. In order to guide the tube and insure its proper placement it is necessary to insert through the mouth a large illuminating device known as a laryngoscope, which occupies almost the entire opening between the lips. When the laryngoscope was withdrawn the anesthetist discovered that a tooth had been forced from its socket and had lodged in the lung. A suit was brought in which negligence of the surgeon and the anesthetist was alleged.

The basic point of difference between the majority and the minority, both on the original hearing and the rehearing, was whether the judge was free to exercise his own judgment in determining the negligence of the surgeon and anesthetist or whether the complete absence of any expert testimony suggesting carelessness must be accepted as conclusive. The majority held that the accident resulted from the laryngoscope's coming

1. 225 La. 618, 73 So.2d 781 (1953), Justices Ponder, McCaleb, and Moise dissenting.

into contact with the upper front teeth, which, according to the experts, was impossible to avoid. Judgment for defendant was accordingly affirmed. In view of the fact that in situations of this kind matters of expert knowledge and skill are inextricably intervolved with matters of common knowledge and observation, it is not surprising that substantial differences of opinion will exist. The *Meyer* case can be profitably compared with a California decision, *Brown v. Shortlidge*,[2] where recovery was allowed under very similar circumstances.

Duties toward children. An increasing respect for the safety of young children is apparent in the torts decisions throughout the nation. The most obvious illustration is, of course, the creation and expansion of the attractive nuisance doctrine so as to afford some protection to trespassing children against highly dangerous conditions attractive to them. Where the child is not a trespasser there is discoverable a corresponding liberality in determining what is to be regarded as negligent conduct. A recent illustration of this is *Jackson v. Jones*.[3] Jones, a contractor who was completing the construction of a gymnasium on public school property in Baton Rouge, piled salvaged lumber near the playground. In a piece of this lumber was a nail which lacerated the leg of plaintiff, a seven-year old first-grade pupil who was pushed by a playmate during a game of follow-the-leader upon the lumber pile. The trial court denied that the evidence indicated the presence of a nail as claimed. It also found that the seven-year old child was guilty of contributory negligence by violating instructions of the school authorities to keep away from the lumber pile. Finally, the trial court held that the act of a playmate in pushing the plaintiff intervened and prevented the conduct of the defendant from being the proximate cause of injury. All these findings were regarded as erroneous by the Supreme Court, which reversed the judgment and remanded the case.

One of the chief arguments to support defendant's contentention that it was not negligent was that the defendant consulted with the principal of the school over the advisability of erecting an enclosure for the lumber. This suggestion was abandoned because they both felt that such a structure might create additional dangers. The principal proposed, instead, to warn the children. The Supreme Court observed that such an

2. 98 Cal. App. 352 (1929).
3. 224 La. 403, 69 So.2d 729 (1953).

attempted delegation would not absolve defendant of responsibility if the precaution proved to be inadequate. It further announced that a child of seven years is incapable of contributory negligence in the absence of a showing of extraordinary conditions. With reference to the intervening act of the playmate it was sufficient to observe that if the occurrence of an accident of this kind was foreseeable, it is immaterial that there was an intervening act of a third person which contributed to the result.

Contributory negligence. Although a guest in an automobile is not required to keep an affirmative watchout for danger in order to avoid being charged with contributory negligence, yet it would seem that if he actively participates in the driving of the vehicle by instructing the driver or making suggestions as to the management of the car, he should be held to the standard of ordinary care. However, the Supreme Court dealt with such a back seat driver with extreme liberality in a recent decision.[4] Plaintiff was the husband of the driver. The car was trailing a truck driven by the defendant, and as the car approached a curve the plaintiff advised the driver to pass this truck as soon as the way was clear. After the curve was negotiated he urged her to pass. Directly ahead was an intersection and the usual yellow line on the highway warning against overtaking at this place. The truck attempted to turn into the intersection just as the wife was passing, and a collision followed. Both the defendant and the plaintiff's wife were found negligent. The court held, however, that the husband's conduct was no more than annoying backseat driving, and that the wife should have ignored his urging. Hence he was not precluded from recovery by his contributory negligence. The opinion made the surprising observation that the husband did not know, nor should he have known, of the intersection's presence. It seems to this writer, however, that once the guest undertakes to interject his advice and urgings into the operation of the car, he should make the reasonable observations necessary to assure himself that the advice he is giving is not dangerous.[5] If the purpose of relieving the quiescent passenger of any duty to watch out is to discourage backseat driving, the position taken in the instant case can plausibly have the opposite effect. The observation that the driver was experienced and should have known

4. Herget v. Saucier, 223 La. 938, 67 So.2d 543 (1953).
5. Solomon v. Davis Bus Line, Inc., 1 So.2d 816 (La. App. 1941).

better has little bearing on an evaluation of the conduct of the guest husband. Perhaps the best explanation of the decision is the fact that the defense of contributory negligence is becoming increasingly unpopular.

Defamation and Malicious Prosecution

At common law the action for libel affords little protection against the person who files false and derogatory criminal charges against another. There is an absolute privilege conferred by law for all pertinent statements made during the course of a judicial proceeding.[6] In such instances the only appropriate remedy is the suit for malicious prosecution. The privilege to prosecute or file criminal proceedings, unlike the privilege to defame, protects the defendant only where there is probable cause for the charges which were made and further where he was not actuated by malice. In the suit for malicious prosecution, however, the plaintiff is obliged to show that the criminal proceeding was disposed of favorably to him. This showing, of course, is not necessary in the ordinary suit for libel and slander.[7] In Louisiana, where statements made in the course of a judicial proceeding may be actionable as libels or slanders, and where the privilege in such cases is qualified, rather than absolute, the distinction between the torts of defamation and malicious prosecution is virtually non-existent. Irrespective of the theory adopted by the plaintiff, he may recover by showing that the affidavit or prosecution was false and that it was made maliciously and without probable cause.[8] This was pointed out recently in *Acme Stores v. Better Business Bureau of Baton Rouge.*[9] Presumably, in Louisiana the plaintiff, irrespective of the theory he adopts, will recover the expense of defending the criminal proceeding and any damages for imprisonment he may have suffered, in addition to damages for injury to his reputation. The chief practical effect of consolidating the torts of malicious prosecution and libel is that it is no longer necessary for the plaintiff to show that the criminal proceeding instigated against him terminated in his favor.

Several other cases considered by the Supreme Court are not discussed herein because they made no appreciable con-

6. RESTATEMENT, TORTS § 587 (1938).
7. Harper, *Malicious Prosecution, False Imprisonment and Defamation,* 15 TEXAS L. REV. 157 (1937).
8. Waldo v. Morrison, 220 La. 1006, 58 So.2d 210 (1952).
9. 74 So.2d 43 (La. 1954).

tribution to the jurisprudence.[10] Several were decisions upon the findings of fact.

WORKMEN'S COMPENSATION

Accidents during Course of Employer's Business

It is frequently difficult to determine when a salesman can be regarded as performing his duties. Sales promotion requires many activities which are of a semi-personal or social character but which are nevertheless undertaken partly for the purpose of furthering the employer's business. In such cases the courts attempt to determine whether the dominant purpose of the undertaking was the business of the employer or the personal pleasure of the employee. If the former is the principal purpose, compensation will not be denied because of the fact that the salesman derived personal pleasure from the same undertaking.[11]

In *Green v. Heard Motor Company*[12] deceased, a car salesman, had visited the Springhill Trade School for the purpose of making contact with a prospective customer who, at the time, was absent, but whose return was expected. While waiting for the latter's arrival, Green accepted an invitation to ride in an airplane with a third party. He was heard to observe that he had "just as soon try to sell him an automobile as anyone else." Green was killed when the plane crashed due to the intoxication of the pilot. Compensation was denied in the court of appeal,[13] but this was reversed by the Supreme Court. The opinion observed:

> "Purchasers are influenced in part by intangible considerations, and it is commonly known that good salesmanship results from a combination of factors, among which are the creation of good will and the making of contacts. It therefore follows that an activity engaged in with the end in view to promoting good salesmanship is clearly a function arising out of a salesman's employment."[14]

In evaluating this statement it should be borne in mind

10. Bergeron v. Roberson, 224 La. 932, 71 So.2d 332 (1954); Bagala v. Kimble, 74 So.2d 172 (La. 1954) (although this case is lengthy and a rehearing was granted, the dispute is entirely on the facts and the issue of negligence); Ott v. Fornea, 224 La. 36, 68 So.2d 749 (1953).

11. Harkness v. Olcott-Stone Motors, 203 La. 947, 14 So.2d 773 (1943).

12. 224 La. 1077, 71 So.2d 849 (1954), 15 LOUISIANA LAW REVIEW 482 (1955).

13. 63 So.2d 178 (La. App. 1953).

14. 224 La. 1078, 1085, 71 So.2d 849, 851 (1954).

that Green was admittedly waiting for a customer with whom negotiations for the sale of a car were pending at the time he accepted the invitation to ride. In a sense, therefore, he could be regarded as standing by when the accident occurred. Courts have frequently held that accidents that happen while the employee is standing by in preparation for the performance of his duties occur during the course of employment.[15]

The *Green* case certainly represents a liberal attitude toward the extent of the course of employment. Other jurisdictions, however, have witnessed even more extreme instances of recovery. See, for example, *Harrison v. Stanton*[16] where an undertaker's assistant was awarded compensation for injuries sustained while he was driving a babysitter to her home following a ball sponsored by the Optimists' Club, and *Adams v. East Pennsylvania Conference*[17] where a social-minded minister was compensated for an eye which was lost while he was deer hunting with members of his congregation.

Total Disability

During the last few years considerable speculation has developed concerning the proper interpretation of total disability in some of the more recent decisions of the Supreme Court. The storm center of dispute has been the opinion in *Morgan v. American Bitumuls Co.*[18] and particularly the observation by the Supreme Court in that case that a worker is not totally disabled merely because he cannot perform the identical duties of the employment in which he was engaged at the time of the accident.

Two different interpretations of the *Morgan* decision were possible. First, the argument has been advanced that the Supreme Court had indicated a retreat from the rule of the *Knispel* decision as applied to all workers, both skilled and semi-skilled. This point of view was represented by the opinion of the Court of Appeal for Orleans in *Brannon v. Zurich General Accident and Liability Ins. Co.*[19] Brannon, a carpenter, suffered an injury to his knee, which obliged the removal of the patella. The medical testimony indicated that Brannon would thereafter be disabled

15. See cases cited MALONE, LOUISIANA WORKMEN'S COMPENSATION LAW AND PRACTICE § 164 (1951).
16. 26 N.J. Super. 194, 97 A.2d 687 (1953).
17. 49 Pa. D. & C. 61 (1943).
18. 217 La. 968, 47 So.2d 739 (1950).
19. 61 So.2d 257 (La. App. 1952).

from, or seriously handicapped in, assuming a squatting or kneeling position and in climbing. Despite these handicaps, the court of appeal was of the opinion that under the rule of the *Morgan* case Brannon was only partially disabled, since a worker is not totally disabled merely because he cannot perform all the duties of the "identical" position he held prior to the accident. It is noteworthy in passing that partial disability was based upon the medical estimate of the extent of physical impairment involved.

Prior to the hearing of Brannon's dispute by the court of appeal, however, the Supreme Court had passed upon the case, *Wright v. National Surety Corporation*,[20] and the opinion in that decision had considered the *Morgan* case and had indicated that the statement that the worker is not disabled merely because he cannot do the identical work as before the accident must be considered in the context of the unskilled manual laborer. Wright, the operator of an asphalt distributing machine, was regarded by the Supreme Court as a skilled worker, and the fact that he retained the ability to operate a light truck did not prevent his being totally disabled where the loss of an arm precluded the lifting operations necessary in performing his prior work.

The *Wright* decision was recently referred to by the Supreme Court in reversing the judgment of the court of appeal in the *Brannon* case.[21] The opinion emphasized that Brannon was a skilled carpenter and the fact that he could perform some of the same operations as before the accident did not prevent his being totally disabled so long as parts of his work obligated him to endure suffering and increased the hazard to himself and his fellow workers. The court then emphasized its adherence to the rule of the *Knispel* case. It made an observation which appears to the writer to be one of the important underlying bases of the *Knispel* rule—that there is no market for the services of a carpenter who cannot do all the work of a carpenter.

20. 221 La. 486, 59 So.2d 695 (1952).

21. Brannon v. Zurich General Accident & Liability Ins. Co., 224 La. 161, 69 So.2d 1 (1953).