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# Torts and Workmen's Compensation: Torts

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# Torts and Workmen's Compensation

## TORTS\*

*Richard V. Campbell\*\**

### LIABILITY WITHOUT FAULT

Modern common law emphasizes the fault requirement in tort actions. Some scholars feel that it is more fictitious than real, but they agree that it is orthodox. Logic may dictate that liability without fault should be completely eliminated from the common law; that the fault requirement is sufficiently flexible to administer all cases. This has not happened. Liability without fault exists in various areas of tort, both by common law and by legislation. If there is any trend, it is one of expansion of the areas, not one of contraction.

The basic question was presented to the Louisiana Supreme Court in 1944 in an oil well "blow out" case.<sup>1</sup> The case was strikingly like the California record in *Green v. General Petroleum Corporation*.<sup>2</sup> It was held that fault had been established, that the defendant was liable in negligence under the doctrine of *res ipsa loquitur*.<sup>3</sup> The issue of strict liability was shelved as an interesting academic question.

The problem was raised again recently in *Fontenot v. Magnolia Petroleum Co.*<sup>4</sup> The action was for damages to residences alleged to have resulted from the negligence of the defendants in the use of explosives while conducting geophysical observa-

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\*Four cases decided during the period under review are not discussed: (1) *O'Rourke v. O'Rourke*, 227 La. 262, 79 So.2d 87 (1955), was an action for false arrest and confinement. The main legal problem was the power of the coroner of the Parish of Orleans. (2) *Norman v. State*, 227 La. 904, 80 So.2d 858 (1955), was a suit for personal injuries caused when a wooden bridge collapsed under the weight of a heavily loaded truck. The accident happened on a secondary road. It was held that a fact question was decisive—did the Department of Highways place and maintain a load limit sign in a proper place to warn the driver of the truck? (3) A deliberate trespass was involved in *Brantley v. Tremont & Gulf Ry.*, 226 La. 176, 75 So.2d 236 (1954). An attempted justification of the act was unsuccessful. (4) The principal problems in *Magee v. Texas Construction Co.*, 227 La. 32, 78 So.2d 500 (1955) concerned adequacy of damages and procedural matters.

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1. *Watkins v. Gulf Refining Co.*, 206 La. 942, 20 So.2d 273 (1944).

2. 205 Cal. 328, 270 Pac. 952 (1928).

3. See *The Work of the Louisiana Supreme Court for the 1944-1945 Term—Torts and Workmen's Compensation*, 6 LOUISIANA LAW REVIEW 601 (1946).

4. 227 La. 866, 80 So.2d 845 (1955).

tions in the vicinity. An alternative count was included on liability irrespective of fault. The trial judge ruled for the defendants. A question of fact which was vital under either theory of law was in dispute. The damage in the case consisted mainly of cracks in walls and ceilings. The plaintiffs contended that this damage was caused by vibrations and concussions resulting from the activities of the defendants. The defendants countered with the argument that the damage could not have been caused by their conduct; that it must have been caused by natural earth settlement, or use of inferior materials or poor workmanship in the construction of the buildings. The Supreme Court decided that the damage had been caused by the acts of the defendants.

This formed the background for the law question of the nature of the defendants' responsibility. It was held that the rule of absolute liability is applicable to a situation of this nature. The result is satisfactory, but the theory announced in reaching it is disturbing. The court stated that its conclusion was not founded on Louisiana tort law; that it was an obligation imposed on property owners by the Civil Code. *Devoke v. Yazoo & M.V. R.R.*,<sup>5</sup> decided in 1947, was stressed as authority for the rule.<sup>6</sup> Let us analyze this explanation.

The real problem is which party should bear the loss in cases of this nature, assuming that both are free from fault. The issue is not changed by the label given. The property theory drawn from the Code deals only with property owners in relation to other property owners. In this limited form, it inevitably leads to a distortion of values. Property interests are given greater protection than personality interests. Thus, in an activity of the kind involved here, if a person is injured while walking along the public street, he must prove negligence. If the walls of adjacent property suffer, the defendant is liable irrespective of negligence. This is not sound policy. It is justified only if the court really feels that it is powerless to impose liability without fault in tort. It may be urged then that half a loaf is better than none. Common law courts have not hesitated to depart from the

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5. 211 La. 729, 30 So.2d 816 (1947).

6. This case is discussed in an earlier issue of the *Law Review*. See *The Work of the Louisiana Supreme Court for the 1946-1947 Term — Property*, 8 LOUISIANA LAW REVIEW 234, 236 (1948); *The Work of the Louisiana Supreme Court for the 1946-1947 Term — Torts and Workmen's Compensation*, 8 LOUISIANA LAW REVIEW 248 (1948).

fault requirement in tort actions in proper cases.<sup>7</sup> Is the Civil Code more restrictive on the courts of Louisiana?<sup>8</sup>

The decision itself indicates that tort theory is needed. The *Devoke* case<sup>9</sup> apparently requires a property interest by the defendant as a foundation for the servitude. It rests on the provision of the Civil Code dealing with a proprietor and his neighbors. Where is the property interest in the *Fontenot* case?<sup>10</sup> The opinion is silent on the subject. The defendants had at most a bare license to conduct their experiments in the vicinity. In fact, in the case of one of the plaintiffs, the defendants were on his land with his permission.

### NEGLIGENCE

#### *Res Ipsa Loquitur*

The policies surrounding the use of *res ipsa loquitur* doctrine are unnecessarily complicated by the phrase itself. When does the "thing" speak for itself and what does it say? These problems were presented in *Northwestern Mutual Fire Association v. Allain*.<sup>11</sup> *O* owned a frame building which was damaged by fire. *P* insurance company paid *O* for the fire loss and sued *D1* and *D2* for the sum paid. *D1* had entered into a contract with *O* to paint the building. *D1* employed *D2* to assist in the performance of the contract. While two workmen of *D2* were using a blowtorch to remove paint from the house, it caught fire. The fire was not extinguished until the fire department reached the premises. In deciding whether *res ipsa loquitur* spoke in this case, the Supreme Court outlined the requirements in Louisiana. It must appear that:

- (1) "[T]he accident which damaged plaintiff was caused by an agency or instrumentality within the actual or constructive control of the defendant,"
- (2) "[T]he accident is of a kind which ordinarily does not occur in the absence of negligence," and

7. See RESTATEMENT, TORTS §§ 519-24 (1938).

8. For an analysis of this question, see Stone, *Tort Doctrine in Louisiana: The Concept of Fault*, 27 TUL. L. REV. 1 (1952).

9. *Devoke v. Yazoo & M.V.R.R.*, 211 La. 729, 30 So.2d 816 (1947).

10. For a detailed discussion of the case from the aspect of property law, see page 227 *supra*.

11. 226 La. 788, 77 So.2d 395 (1954).

- (3) "[E]vidence as to the true explanation of the accident is more readily accessible to the defendant than to the plaintiff."<sup>12</sup>

The courts in this country generally agree on the first two requirements quoted above. The wording may differ somewhat in detail, but there is slight relation between these linguistic differences and the content of the rule of individual courts. The third proposition stated by the Louisiana Supreme Court is more doubtful. In view of the nature of *res ipsa loquitur* cases, it frequently happens that the defendant is in a better position to explain the facts than the plaintiff. However, few courts adhere to a rigid requirement of this kind. The court's analysis of the evidence in the instant case led it to conclude that the doctrine was available to the plaintiff.

The next question is what does the doctrine say. Does it point an accusing finger at the defendant and cry out in a loud voice or is it a weak assertion? The Louisiana Supreme Court has been vague about the exact meaning of *res ipsa loquitur*. In this one opinion it speaks of it as "a rule of evidence," "a prima facie case of negligence on the part of the defendant," "the burden . . . on the defendant to show absence of negligence on his part," and an "inference of negligence." It may be that the exact effect is not too important under Louisiana procedure.<sup>13</sup> In any event, the instant case emphasizes the distinctive feature of the doctrine — its value as an inference even after substantial evidence has been introduced by the defendant tending to show that he took all care reasonably required. The employees who removed the paint in the instant case stated that they followed each of the customary precautions outlined by the experts. The court concluded that the inference raised from the circumstances of the accident remained to contradict their evidence. This is the strong voice of the *res ipsa loquitur* doctrine. The decision on this point here may have been weakened by the additional conclusion that the testimony of the workmen failed to show satisfactory preparation for extinguishing a fire. Nevertheless, it seems clear that the court is recognizing the full strength of the inference urged

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12. *Id.* at 793, 77 So.2d at 397.

13. See Malone, *Res Ipsa Loquitur and Proof by Inference — A Discussion of the Louisiana Cases*, 4 LOUISIANA LAW REVIEW 70 (1941).

so forcefully in Dean Prosser's writings on this subject. The opinion quotes at length from his book on torts.<sup>14</sup>

The requirement of control by the defendant is obviously designed to fix responsibility on this particular party. The facts may demonstrate that someone was negligent. This is not enough. That someone must be this defendant. This feature is vital but should not be pressed to absurd extremes. Control may be sufficient to prove the defendant's negligence although the situation includes collateral negligence by others. One item of the control requirement is clear. It must appear that the defendant's conduct was a cause of the plaintiff's damage. Two recent cases are excellent examples. *Res ipsa loquitur* failed in each case because the plaintiff was unable to convince the court of this factual connection.

In one of these cases, the action was against a railroad for damages caused by fire near its tracks.<sup>15</sup> Judgment was for the defendant below. The Supreme Court held that the plaintiff had failed to meet his burden of showing, either by direct evidence or inference, that the fire was caused by a passing train or other instrumentality of the defendant. In the other case, the defendant operated a machine to break up concrete on a highway.<sup>16</sup> The plaintiff claimed that this cracked the walls of his home. The judgment below again was in favor of the defendant. The Supreme Court affirmed on the ground that the plaintiff failed to prove that the damage to his house was caused by the operation of the machine.

### *Effect of Emergency*

The "emergency rule" is a familiar one throughout the country. In statement it frequently sounds like it excuses negligence. A recent Louisiana case, *Commercial Standard Insurance Co. v. Johnson*,<sup>17</sup> is typical. Of course, emergency is vital in the administration of standards of due care. It should be given weight as should all other significant facts. However, it does not excuse negligence; rather it illustrates the nature of negligence. The problem is never one of sitting in an armchair after the event

14. Specifically, Prosser, *Torts* 291, 309 (1941).

15. *Pearson v. Louisiana & Arkansas Ry.*, 226 La. 834, 77 So.2d 411 (1954).

16. *Tadin v. New Orleans Public Service, Inc.*, 226 La. 629, 76 So.2d 910 (1954).

17. 82 So.2d 8 (La. 1955).

and determining what should have been done. Negligence depends on the situation as it existed at the time of action. A party is not required by the law of negligence to make the right choice. It is sufficient if his choice is a reasonable one under the circumstances as they appeared when he acted.

The "emergency rule" problem is not as serious in Louisiana as in the other states where the jury system prevails. It is unlikely that the judges will be misled by the awkward wording of the rule. Where a jury must be instructed, a substantial practical problem is presented.

It is agreed that the rule does not apply where the emergency faced by a party is the result of his own negligence. The label for the rule fully demonstrates that it is inapplicable where there is no emergency. This was the basis for the decision in the instant case.

#### *Range of Vision Rule*

The "drive within the radius of your lights" rule has been announced in a number of Louisiana cases. It means that attention is concentrated on a single fact. Did the party in motion hit the stationary or slow moving object? If he did, he is automatically negligent. A literal use of this idea produces an unwarranted inflexibility in the application of standards of due care to the operation of motor vehicles at night under modern traffic conditions. In several Supreme Court opinions the emphasis has shifted to *all* the facts and circumstances of the case.<sup>18</sup> Thus, where one party is illegally parked on the highway without proper lights, the other party has been allowed to recover although he failed to stop within the radius of his headlights.<sup>19</sup> This result undoubtedly reflects dissatisfaction with the contributory negligence bar rule, but it has not been accomplished by creating another exception to that rule. The plaintiff has been completely exonerated of negligence. It seems likely that in time, cases of this nature will completely undermine the announced rule. However, a recent decision illustrates that the doctrine still has some vitality.<sup>20</sup> The action was for the value of cattle killed by a bus.

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18. See *The Work of the Louisiana Supreme Court for the 1948-1949 Term — Torts and Workmen's Compensation*, 10 LOUISIANA LAW REVIEW 188, 192 (1950).

19. *Dodge v. Bituminous Casualty Corp.*, 214 La. 1031, 39 So.2d 720 (1949); *Gaiennie v. Cooperative Produce Co.*, 196 La. 417, 199 So. 377 (1940).

20. *Geoghegan v. Greyhound Corp.*, 226 La. 405, 76 So.2d 412 (1954).

The bus driver was traveling forty-five miles per hour on a wet road in a mist which restricted his visibility. The animals "walked" or "stalked" onto the highway in front of the bus. The district court found for the plaintiff. The court of appeal reversed, but the Supreme Court reinstated the judgment of the trial court.<sup>21</sup> The announced ground for the decision was that a driver of an automobile is guilty of negligence in driving at a rate of speed greater than that in which he is able to stop within the range of his vision.

### *Traffic Regulations*

*Driving on the right.* In *Anthony Bass Lumber Co. v. Marquette Casualty Co.*<sup>22</sup> two trucks were approaching each other when *D*'s truck commenced to skid and swerved across the center line into the traffic lane occupied by *P*. *D* urged that he was without fault because he lost control when forced to apply the brakes on the wet highway to avoid striking a third truck which suddenly emerged from a stationary position in front of *D*'s truck. The opinion indicated that when *D* invaded the left side of the highway, the usual burden of proof shifted; that *D* was now obliged to demonstrate by a preponderance of the evidence that he was blameless. Under *D*'s version of the facts, he was successful. People in the parked truck had a different view of the facts which was not favorable to *D*. The trial judge was impressed by the testimony of *D*'s driver and found in his favor. The Supreme Court affirmed the judgment.

Courts may use different words to describe the law in a case of this nature, but the net result is substantially the same. Some jurisdictions would say that the statute was violated and that *D* was negligent *per se* or at least *prima facie* negligent. In either event, they would allow him to offer the excuse of no actual fault. If he was able to prove that he was blameless, as he did here, judgment would be given in his favor.

*Davis v. Lewis & Lewis*<sup>23</sup> involved a case where a driver invaded the left side of the highway without excuse. This happened at a curve and the court was convinced that he was not watching

21. This accident happened in 1951 and did not involve the effect of the new stock law on the rights of an owner of cattle against the operator of a motor vehicle. LA. R.S. 3:2801 *et seq.* (Supp. 1954).

22. 227 La. 339, 79 So.2d 330 (1955).

23. 226 La. 1064, 78 So.2d 174 (1954).

the road ahead of him. The main problem was the responsibility of the driver on the right. In cases of this nature he is in an extreme emergency due to no fault of his own. Whatever move he makes may be wrong. The law should be tolerant with a person in this dilemma. In the instant case the trial judge decided in favor of the driver on the right, the plaintiff in the litigation. The court of appeal reversed on the ground that he was guilty of contributory negligence, one judge dissenting. The Supreme Court agreed with the trial judge and reinstated the judgment for the plaintiff.

*Right of way.* *Booth v. Columbia Casualty Co.*<sup>24</sup> involved a collision at an intersection between vehicles approaching at right angles. *P* was in the intersection first, going about seven miles per hour, and *D* approached from *P*'s right at approximately twenty miles per hour. The court in ruling in favor of *P* on the ground that he had preempted the intersection said that "under the well-settled jurisprudence the automobile which first enters an intersection has the right of way over an approaching automobile and the driver who does not respect this legal right of the automobile which first entered the intersection to proceed through in safety, is negligent, even though the car thereafter entering the intersection is being driven on a right of way street."<sup>25</sup> This bare statement sounds like an invitation to evil, but undoubtedly such is not the case. It seems clear that preemption is not established by beating a fellow motorist to the intersection. The courts of appeal now generally agree that the doctrine is qualified by a requirement that the entrance must be made with the reasonable expectation of clearing the intersection without obstructing others.<sup>26</sup> In the *Booth* case, the intersection was a blind one. The briefs indicate that there were no traffic signal controls and that both streets were two-way streets. The opinion of the court would have been more satisfactory if it had expressly limited its broad statement of the preemption doctrine. However, it seems proper to assume that the court was convinced that *P* took all reasonable precautions feasible before entering the intersection.

It may be urged that the preemption rule is a misfit in the present day with its statutory controls on right of way. In any

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24. 227 La. 932, 80 So.2d 869 (1955).

25. *Id.* at 935, 80 So.2d at 870.

26. *Harris v. Travelers Indemnity Co.*, 70 So.2d 235 (La. App. 1954).

event, it is clear that a person should never secure the right of way solely because he reaches the intersection first.

#### GOVERNMENTAL IMMUNITY

The rule granting immunity of governmental units from liability for the torts of their agents or servants where performing in a governmental capacity, a rule much criticized by many members of the legal profession, was reaffirmed by the court in *Barber Laboratories, Inc. v. New Orleans*,<sup>27</sup> a suit against the city for alleged negligence of its fire department employees in extinguishing a fire on the plaintiff's premises. Because the case deals with local governmental responsibility in tort it is treated elsewhere in this Symposium.<sup>28</sup>

#### RIGHT OF PRIVACY

*Hamilton v. Lumbermen's Mutual Casualty Co.*<sup>29</sup> was an unusual case on the right of privacy. *P* had a liability insurance policy written by *D*. *P* became involved in a serious automobile accident. *D*, as his insurer, investigated the matter and was later sued by third persons injured in the accident for the sum of over \$100,000. *P* was hospitalized for some time, and he was unable to give *D* any information about the accident. *D* finally published a statement in a New Orleans paper which was signed with *P*'s name. This publication stated that *P* would like to see anyone who had witnessed the accident. The address listed under *P*'s name was that of an employee of *D*. This entire plan was handled without the knowledge or consent of *P*. He claimed damages for physical pain and suffering, humiliation, and invasion of his right of privacy. Trial was held before a jury and judgment returned in the sum of \$12,500. *D* appealed to the Supreme Court. It was held that the case was not within the jurisdiction of that court on an appeal because suits for damages for physical injuries to a person or for other damages sustained by such person arising out of the same circumstances are excepted from such jurisdiction. It was held that all the damages claimed here, including those for physical pain and suffering, arose out of the same circumstances. The case was transferred to the appropriate

27. 227 La. 104, 78 So.2d 525 (1955).

28. See page 316 *infra*.

29. 226 La. 644, 76 So.2d 916 (1954).

court of appeal which ruled that *P* had a good cause of action.<sup>30</sup> It felt that *D*'s acts could not be justified although it did recognize mitigating circumstances and consequently reduced the damages to \$3,000. One judge felt that an award of \$500 would have been ample.

#### MASTER AND SERVANT

*Amyx v. Henry & Hall*<sup>31</sup> involved the distinction between an independent contractor and an employee. The general tests for deciding this problem are well settled. Disagreement is in the application of the tests to the facts of particular cases. The instant case is a good example. *X* owned a truck jointly with *Y*, and used it in all sorts of jobs. On hearing that *D* needed truck haulers, *X* went to the gravel pit of *D* and offered his truck and services at two dollars per cubic yard, oil and gas to be paid by him. There was no agreement as to how much he would haul. Thirty or forty other truck drivers operated their own trucks for *D* under the same conditions. Loading was by *D*'s equipment and *D*'s foreman supervised the loading as to both quality and quantity. Either party could terminate the relationship at his pleasure.

The trial court found that *X* was not an independent contractor but that he was employee of *D*. This finding was reversed by the court of appeal,<sup>32</sup> one judge dissenting. The Supreme Court reversed the court of appeal,<sup>33</sup> ruling that the trial judge was correct, one justice dissenting.

*B & G Crane Service, Inc. v. Thomas W. Hooley & Sons*<sup>34</sup> is another situation where broad general principles of law are well settled. The case involved the question of responsibility for the acts of an operator furnished with a leased machine. Which of the two masters is liable? It was held that under the facts of this case the operator was the servant of the lessee.

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30. *Hamilton v. Lumbermen's Mutual Casualty Co.*, 82 So.2d 61 (La. App. 1955).

31. 227 La. 364, 79 So.2d 483 (1955).

32. *Amyx v. Henry & Hall*, 69 So.2d 69 (La. App. 1953).

33. 227 La. 364, 79 So.2d 483 (1955).

34. 227 La. 677, 80 So.2d 369 (1955).