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TORTS

Proof of Negligence — Res Ipsa Loquitur

Although our courts in Louisiana still indulge elaborate discussions on the meaning of res ipsa loquitur, they have succeeded in freeing themselves in many instances of the arbitrary limitations on the use of the doctrine that give considerable trouble in other jurisdictions. For instance, in *Saunders v. Walker*,[1] plaintiff hired defendant, who was a professional expert in the installation of cooling systems, to install such a machine in his home. Defendant used rubber tubing instead of copper at some places. One night the tubing came loose where it joined the metal pipe, and shortly thereafter plaintiff's home was seriously injured by an onrush of water under pressure. If plaintiff shows these facts and nothing more, should he be denied recovery? The inferences all point to negligence. Defendant was an expert, while plaintiff was a layman who had entrusted the safety of his dwelling to defendant's care. Defendant knew that if the rubber hose slipped it would cause damage. It was up to him, not plaintiff, to work out a safe connection. The connection he made slipped within a few months thereafter. There would seem to be a normal inference that a connection will not slip within this short period if it has had the attention which the defendant undertook to give it under the circumstances. Of course, defendant could contradict this normal inference by showing that someone tampered with the gadget after he had installed it, or even by showing through experts that the most carefully installed connections frequently break, and that this risk is indigenous to the installation of coolers. But he succeeded in making no such showing, and the natural inference prevails. The court said the case was proper for the application of the doctrine of res ipsa loquitur despite the fact that plaintiff had not attempted to show that all the circumstances were within the physical control of defendant at the time of the accident.[2]

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1. 229 La. 426, 86 So.2d 89 (1956).

2. I have attempted to discuss the requirement of "exclusive control" in Malone, *Res Ipsa Loquitur and Proof by Inference—A Discussion of the Louisiana Cases*, 4 LOUISIANA LAW REVIEW 70, 80-83 (1941).

Contributory Negligence

The constant increase in negligence cases arising from the operation of automobiles has induced courts in the past to reach out for easy rules of thumb which they have hoped would make it possible to dispose of these controversies with a minimum of effort. Thus, there came into being arbitrary pronouncements such as the Stop, Look and Listen Rule devised by Justice Holmes in *Baltimore and Ohio Railway v. Goodman*,[3] and the Assured Clear Distance Rule[4] which still probably prevails in a narrow majority of states. The Stop, Look and Listen Rule never met with a warm reception in the state courts[5] and it was finally overruled by the United States Supreme Court itself.[6] But the Assured Clear Distance Rule is still paid lip service, although it is being rapidly eroded by the creation of numerous exceptions which threaten eventually to reduce it to utter impotency.

The reasons for an aversion to these doctrines are not difficult to find. First, they are the pronouncements of propositions that are inconsistent with common observation and common sense. Motorists simply do not stop, look, and listen at each and every crossing. And if their failures in this respect are to deprive them arbitrarily of a right of recovery without reference to the circumstances otherwise, the result would be to grant a wholesale immunity to railroads for the injuries and deaths they cause at crossings through their neglect of duty. Similarly, motorists do not drive at night with such meticulous care that they can bring their vehicles to a complete stop within the range of vision afforded by their headlights. The elimination of accidents at night can be better accomplished by stepping with a firm foot on those who obstruct the public highways either by casting objects upon the roads or by allowing their vehicles to remain stationary without affording adequate warning of the

3. 275 U. S. 66 (1927).

4. This rule is usually attributed to Lauson v. Town of Fond du Lac, 141 Wis. 57, 123 N.W. 629 (1909).

5. See the excellent discussion in PROSSER, THE LAW OF TORTS, § 40 (2d ed. 1955). Of course, the failure to look or listen before crossing a railway track where the driver's vision is in no way obscured and he is familiar with the crossing would usually amount to failure to use ordinary care and will preclude recovery. A recent illustration is Delta Fire & Casualty Co. v. Texas & Pacific Ry., 229 La. 710, 86 So.2d 681 (1956). In such cases Last Clear Chance Rules are seldom applicable, since the railroad is entitled to assume that a vehicle will not attempt to cross the tracks in the face of the approaching train. When it has become obvious to the train operators that such a crossing will be attempted it is usually too late to bring the train to a halt.

6. Pokora v. Wabash R.R. Co., 292 U.S. 98 (1934).

danger. The second reason for the decline of arbitrary rules of this kind is that they usually have the effect of giving increased life to the unpopular doctrine of contributory negligence. They do not *create* liability. They serve more often to *extinguish* it, and usually the worst offender becomes the beneficiary.

Although our courts in Louisiana have not yet seen fit to measure the obligation of the night driver by the standard of ordinary care under the circumstances and they still adhere in form at least to the Assured Clear Distance Rule, yet they have riddled the rule with so many exceptions that it serves little more purpose in the law than the appendix does in the human body. The courts discuss it solemnly in their opinions while they ignore it in practice. Hasn't the time come to throw the rule out of our jurisprudence and to judge each case on its merits through the reasonable care formula? Other courts have done so.[7] Our latest case recognizing an exception to the Assured Clear Distance Rule is *Vowell v. Manufacturers Casualty Insurance Co.*[8] Defendant's truck obstructed the highway by remaining stationary for about five minutes on the travelled portion without rear lights. Plaintiff approached from the rear at what the court regarded as a reasonable speed with his headlights dimmed for the benefit of oncoming traffic, and he rammed the rear of the obstructing truck. As usual, it was the plaintiff, not the truck, that suffered the most severe injury. The court found that the Assured Clear Distance Rule does not apply to "unexpected and unusual obstructions" that the plaintiff had no reason to anticipate. If the obstruction had been "expected" or "usual," there would be no difficulty in finding that the plaintiff was guilty of ordinary contributory negligence in failing to reduce his speed and to bring his car under control accordingly. Hence we find that the Assured Clear Distance Rule is not needed in the cases where it would be applicable, and, conversely, it is not applicable in the cases where it would differ from the ordinary rules of negligence.

Another instance involving an obstruction of a highway and in which the defense of contributory negligence was dismissed

7. In addition to the discussion by PROSSER, THE LAW OF TORTS n. 5 (2d ed. 1955), see the cases collected in 23 CALIF. L. REV. 498 (1935).

8. 229 La. 798, 86 So.2d 909 (1956). Followed in Dyck v. Manufacturers Cas. Ins. Co., 229 La. 815, 86 So.2d 915 (1956); Salmon v. Manufacturers Cas. Ins. Co., 229 La. 814, 86 So.2d 915 (1956); Graham v. Manufacturers Cas. Ins. Co., 229 La. 816, 86 So.2d 916 (1956).

is *Snodgrass v. Centanni.*[9] Defendant felled a large oak tree in New Orleans so that it fell upon plaintiff's car which was moving upon a public street. The defendant's fault was not seriously contested, but he contended that the plaintiff became aware of the imminence of danger and saw one of defendant's workmen waving his arms in an effort to stop him. Plaintiff also observed cars ahead of him moving at a suddenly accelerated speed. He attempted to increase his own speed so as to pass safely before the tree fell upon him, but he failed. The court observed that a failure to adopt the most advisable procedure at a time of emergency is not necessarily negligence. The emergency was of the defendant's creation and he was not entitled to insist that plaintiff, who was placed in sudden confusion by his conduct, was negligent in failing to take those steps which hindsight might suggest would have been more appropriate.

In line with the established jurisprudence the Supreme Court has imposed liability on a power company for allowing its wires to lose their insulation at a place where they enter a private dwelling.[10] A painter was electrocuted by coming into contact with the wires. There were no eye witnesses. In answer to the defendant's contention that the deceased was guilty of negligence in painting in close proximity to the wires, the court replied that there was no evidence showing the circumstances under which the victim met his death, and it relied upon the well established proposition that the defendant must affirmatively show contributory negligence. The decision is eminently sound. Concerns that traffic in dangerous substances are regarded almost as insurers against injury or death, and the alleged carelessness of the victim is usually sidestepped whenever possible. A concern should not be allowed to expose the public to the risk of electrocution and then insist that the victim did not do everything possible to avoid the danger which was of the defendant's making.

Joint Tortfeasors — Right to Indemnity

The Louisiana courts have consistently recognized that a tortfeasor who is obliged to satisfy a judgment against him may seek indemnity from a third party who, as between himself and the indemnity claimant, was primarily responsible for

9. 229 La. 915, 87 So.2d 127 (1956).

10. Stansbury v. Mayor & Councilmen of Morgan City, 228 La. 880, 84 So.2d 445 (1955).

the injury to the victim.[11] A typical situation of this kind is presented where a contractor who has been subjected to liability to the owner because of damages inflicted through the negligence of a sub-contractor is allowed indemnity against such sub-contractor.[12] This familiar principle, although seemingly applicable to the facts of the recent case, *Second Church of Christ, Scientist v. Spencer*,[13] was not referred to, and indemnity was denied. The church entered into a contract with Spencer for certain repairs and improvements in the upper part of the structure of its building, including the installation of what is commonly called a built-up roof. This latter item of work was sublet by Spencer to defendant, Olympia Roofing Company. Due to careless installation of the last unit of temporary flashing by Olympia, water entered the rear of the church building and seriously damaged the organ. The only default of Spencer was his failure to inspect the state of Olympia's work and to cover the area with a tarpaulin if the condition was found to be unsafe. Plaintiff was properly allowed a judgment against both Spencer and Olympia, but Spencer's claim for indemnity over against Olympia was dismissed. The court observed:

> "The general contractor, Spencer, and the sub-contractor, Olympia, being engaged in a concert of action, a common unity of purpose and design, are joint tort-feasors, both chargeable with the negligence in which this claim in damages finds it root."

Although both Spencer and Olympia were properly answerable to the church, yet Spencer's liability arose out of his arbitrary responsibility for the acts of his sub-contractor plus his failure to take affirmative precautions against the negligence of the sub-contractor. His personal fault, if any, was clearly secondary to that of Olympia, who created the dangerous condition and who, as between himself and Spencer, was primarily chargeable with the duty to provide protection. Our courts have not yet decided expressly whether a claim for indemnity may be interposed in the original suit against the indemnity claimant,[14]

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11. Appalachian Corp. v. Brooklyn Cooperage Co., 151 La. 41, 91 So. 539 (1922); American Employer's Ins. Co. v. Gulf States Utilities Co., 4 So.2d 628 (La. App. 1st Cir. 1941); Sutton v. Champagne, 141 La. 469, 75 So. 209 (1917).
12. American Employer's Ins. Co. v. Gulf States Utilities Co., *supra*.
13. 230 La. 432, 88 So.2d 810 (1956).
14. Such a claim was recognized, however, in Sutton v. Champagne, 141 La. 469, 75 So. 209 (1917).

and perhaps the instant decision could be regarded as a ruling that this cannot be done. If so, Spencer's right to indemnity can still be asserted once he has satisfied the judgment. But I find it difficult to so interpret the decision.

WORKMEN'S COMPENSATION

The Employment Relation

The previously accepted position in this state that a working partner is not entitled to workmen's compensation as against the partnership was rejected last year by the Supreme Court in *Trappey v. Lumbermen's Mutual Casualty Co.*[1] After a full discussion of the Louisiana law of partnerships the court concluded that a partnership is a legal entity in Louisiana, separate from its members. In the *Trappey* case the claimant was a working partner and received a wage in addition to his minor participation in the partnership profits. The position of the court is commendable. There is no reason other than the possible technical theory of identity to justify the drawing of a distinction between the wage earning partner and the worker employed by a corporation, who holds stock in the enterprise that employs him. The conclusion reached by the Supreme Court has been achieved by statute in several common law jurisdictions.[2] Although the court did not mention the matter, it would appear that the rule announced is applicable only to the wage earning partner, who is entitled to his wage as a contract obligation of the partnership independent of the profits which might accrue to him by reason of his participation as a partner. In the *Trappey* case it is noteworthy that suit was brought against the partnership's liability insurer. In this way the claimant avoided the procedural prohibition of suit between the individual partner and the partnership.

In an interesting and well considered opinion by Justice McCaleb, the Supreme Court held that a church is a "trade, business, or occupation" within the meaning of La. R.S. 23:1035, and that its minister is an employee within the intendment of

1. 229 La. 632, 86 So.2d 515 (1956).
2. CAL. LABOR CODE ANN. § 3359 (1943); MICH. STAT. ANN. § 17.147 (Reis, 1947). Oklahoma is the only state apart from Louisiana that has recognized the wage earning partner as an employee. Rodgers v. Blair, 201 Okla. 249, 204 P.2d 867 (1949).

the statute, so that he was entitled to compensation when he was injured while using a motor vehicle for the performance of his ministerial duties.[3] In holding that a religious institution is a business the court pointed out that the purpose of compensation — to pass along to the ultimate consumers or users the cost of the accident risks to which the enterprise is subjected — embraces non-profit organizations as well as concerns that operate for a profit. Those who derive the benefit of organized religious worship should pay for its accident costs just as the user of the services of a transportation organization must shoulder the similar risks of accident to transportation employees. It is unfortunate that outworn notions of charitable immunity to tort liability should have prompted a few courts in other jurisdictions to reach the conclusion that charities are not subject to compensation.[4] Our Supreme Court expressly rejected this argument in the case under discussion, and in so doing aligned itself with the better considered decisions in other jurisdictions.[5]

I suggest that the court was on equally sound ground in declaring that a minister is an employee within the meaning of the statute. Too often courts have followed the analogy of master and servant law and have refused to find the necessary control in the case of professional employees. Control is perhaps an indispensable element of liability where the employer is being subjected to vicarious liability to a third person for the acts of his servant. In such cases the power of control is the only excuse for imposing vicarious liability upon the blameless employer. In compensation, however, it is different. The purpose of requiring a showing of an employment relationship in compensation is primarily to establish that the worker is economically dependent on the enterprise which he serves and whose business exposed him to the risk of injury. Skilled professional employees are as much entitled to be protected against the risk of accident as manual workers.

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3. Meyers v. Southwest Region Conference Association of Seventh Day Adventists, 230 La. 310, 88 So.2d 381 (1956); Cox v. Southwest Region Conference Association of Seventh Day Adventists, 230 La. 383, 88 So.2d 665 (1956).

4. Charitable employers are expressly excluded by the compensation statutes of Arkansas, Georgia and Idaho. Several other states exclude activities that are not carried on for pecuniary gain.

5. See, for example, Gardner v. Trustees of Main Street Methodist Episcopal Church of Ottumwa, 250 N.W. 740 (Iowa 1933).

The court faced no difficulty in finding that the business was hazardous and that the minister was engaged in hazardous work at the time of his accident. His duties required the frequent use of an automobile, and he was injured while actively using such a vehicle. A mere reference to the *Haddad* case[6] would have sufficed to dispose of this point.[7] It is therefore interesting to conjecture as to why the court took this opportunity to make the gratuitous observation that *Brownfield v. Southern Amusement Company*[8] cannot be regarded as an authoritative decision in this state. The *Brownfield* case was wholly inapposite to the situation before the court. Mrs. Brownfield, who used a car only occasionally in her duties as a theater employee, was injured while she was in the ticket booth of her employer, and the court declined to apply the doctrine of *Byas v. Hotel Bentley*[9] to the accident. But the Reverend Meyers, who used a car frequently, was injured while actively engaged in riding in a motor vehicle. An ultimate decision as to the merits or demerits of the *Brownfield* opinion must eventually be made.[10] The problem is a difficult and extremely important one. This reviewer regrets that a serious glancing blow was given the *Brownfield* decision under circumstances in which it seems to me this was unnecessary.

Nature of the Work Performed

The capacity of the judicial process for gradual growth through erosion and reconstruction is beautifully illustrated in the line of Louisiana cases dealing with the compensation rights of a worker who is injured while doing repair, construction or demolition work on the business structures of his employer. Early in the history of our compensation litigation the courts announced unequivocally that a business proprietor was not liable for compensation to those employees who were hired to do work of this character unless the employer was engaged in the business of construction, repair, or demolition for other per-

6. Haddad v. Commercial Motor Truck Company, 146 La. 897, 84 So. 197 (1920).

7. MALONE, LOUISIANA WORKMEN'S COMPENSATION LAW AND PRACTICE § 99 (1951).

8. 196 La. 74, 198 So. 656 (1940).

9. 157 La. 1030, 103 So. 303 (1924); Malone, *op. cit. supra* § 101.

10. The *Brownfield* case has been followed by the court of appeal. Harrington v. Franklin's Stores, 55 So.2d 647 (La. App. 1st Cir. 1951); Brown v. Toler, 19 So.2d 680 (La. App. 1st Cir. 1944).

sons.[11] Gradually, however, there emerged a line of decisions in the courts of appeal to the effect that compensation should be awarded the employee who does this character of work when the business of the employer is, independently of that work, of a hazardous character within the meaning of this statute.[12] A few years ago the Supreme Court placed its authority clearly behind this new position.[13]

Even before this development there arose a tendency to allow compensation to the repairmen of mortgage companies and other large holders of property who are obliged to maintain a sizeable crew of workers for the preservation of the security value of property upon which they had loaned money.[14]

These same general tendencies have become even more clearly obvious in the recent case, *Landry v. Fuselier*.[15] Fuselier operated several businesses. He owned a piece of rental property, a half-interest in a bar room, and a service station. Only this latter business was clearly hazardous within the meaning of the Compensation Statute. Fuselier likewise owned a vacant building, which had collapsed, and he employed the plaintiff, Landry, his father-in-law, to assist in the demolition of this structure. Landry was injured while so doing. The facts were susceptible of the interpretation that Fuselier intended to use a part of the salvaged material in improvements to his service station and to use other parts in his saloon and in the erection of a home. The Court of Appeal for the First Circuit denied compensation on the ground that the intended use of the salvage material for the service station was not satisfactorily established by the evidence.[16] Judge Tate, dissented from this conclusion of fact. More important, the dissent observed that it was not necessary to show that the material was dedicated in the mind of the employer to a use in connection with a business which is independently hazardous. The demolition work itself was hazardous

11. MALONE, LOUISIANA WORKMEN'S COMPENSATION LAW AND PRACTICE § 102 (1951). See particularly Caldwell v. George Sproull Company, 184 La. 951, 168 So. 112 (1936). *Cf.* Clementine v. Ritchie, 1 La. App. 296 (Orl. 1924).

12. Rayburn v. De Moss, 194 La. 175, 193 So. 579 (1940); Hecker v. Betz, 172 So. 816 (La. App. Orl. 1937); Gonsoulin v. Southern Amusement Co., 32 So.2d 94 (La. App. 1st Cir. 1947).

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

14. Compare McAllister v. Peoples Homestead & Savings Association, 171 So. 130 (La. App. 2d Cir. 1936); and Wood v. Peoples Homestead & Savings Association, 177 So. 466 (La. App. 2d Cir. 1937).

15. 230 La. 271, 88 So.2d 218 (1956).

16. Landry v. Fuselier, 230 La. 271, 87 So.2d 442 (1955).

under the statute, and if work of this kind is a recurrent and regular practice in connection with structures used for business purposes, it falls within the protection of the act. This dissenting opinion was adopted in full by the Supreme Court in reversing the judgment and awarding compensation to Landry.

The Louisiana Compensation Statute provides for protection against accidents that befall the person who is "performing services arising out of and incidental to his employment in the course of his employer's trade, business, or occupation."[17] The Supreme Court has recently given new evidence of its liberal attitude toward this requirement.[18] An employee, hired to work in his employer's oil and gas business, was injured while assisting in the removal of a fence surrounding his employer's residence. Compensation was allowed despite the insurer's insistence that the work being done had no relation to the employer's business, which it had insured. The same conclusion has generally been reached in other jurisdictions that have faced this problem.[19] An opposite conclusion would place the employee in a serious dilemma. Upon receiving orders to do personal work for the employer he would be obliged to choose between surrendering his compensation rights if he obeys and of running the risk of being fired if he refuses. Courts have felt that this is not cricket, and they have extended compensation protection during the performance of the personal errand. But it cannot be denied that this decision places an added burden on the insurer, who undertook to provide protection only against accidents in the employer's business and who now finds himself obliged to pay for injuries that are totally foreign to that business. Superficially, it may be argued that once the rule has been announced the insurer can readjust the premium rate to protect against the added risk. But this only gets us into deeper water. It is expected that premium charges will be added by the employer as a cost of production and passed on to the consumers of his product. One might question at this point whether the purchaser of gas and oil should be required to pay more for what he buys in order to support the accident cost incident to repairing the oil driller's home fence.

17. LA. R.S. 23:1035 (1950).
18. Dobson v. Standard Accident Ins. Co., 228 La. 837, 84 So. 210 (1955).
19. 1 LARSON, LAW OF WORKMEN'S COMPENSATION § 27.40 (1952).

Disability

A welder's helper suffered an injury to his hand, necessitating an amputation of the upper portion of the middle finger and resulting in numerous contusions and abrasions to all digits except the thumb and index finger. He was disabled from performing his former work and also lost the ability to do heavy manual labor. He further suffered continual pain when working because of frequent hitting and knocking the hand, which increased his distress. The Supreme Court found that he was totally disabled since he could not carry on his former occupation and was substantially hampered in the performance of any manual labor.[20]

Prescription

Affirming the position adopted several years ago in *Mottet v. Libbey-Owens-Ford Glass Co.*,[21] the Supreme Court has again announced that the prescriptive period of one year does not commence to run until total disability has developed.[22] In *Bigham v. Swift & Company*[23] the claimant stumbled and fell while carrying a heavy piece of meat for his employer on September 1, 1953. On September 24 his ailment was diagnosed by the company physician as a sacroiliac strain. A belt was provided and he was treated for about three weeks, during which period he lost ten or twelve days from work. He complained of illness again several months later (presumably in March or April, 1954) and the company physician pronounced him totally disabled in June 1954. Suit was instituted September 23, 1954. The employer's plea of prescription was dismissed. The period did not start running until the worker was apprised of the disabling nature of his injury in March or April of the year in which suit was instituted.[24]

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20. Bean v. Higgins, Inc., 230 La. 211, 88 So.2d 30 (1956).
21. 220 La. 653, 57 So.2d 218 (1952).
22. See generally, MALONE, LOUISIANA WORKMEN'S COMPENSATION LAW AND PRACTICE § 384 (Supp. 1955).
23. 229 La. 341, 86 So.2d 59 (1956).
24. *Accord*, Wallace v. Remington Rand, Inc., 229 La. 651, 86 So.2d 522 (1956) (ruptured disc, first diagnosed as sprain; claimant continued working for seventy weeks in severe pain).