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Torts - Injurious Reliance

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property in question, thus making the act of sale by the wife alone translative of title as a sale of her separate property. While arguments may be proposed in support of either interpretation, the latter presents a more salutary result. Under that interpretation the crux of the problem is centered around the presumption of community property asserted by the plaintiff and not the actual transfer of the property involved. This avoids the necessity of an application of the parol evidence rule and negatives the possibility that the defendant was acquiring property by estoppel.

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TORTS — INJURIOUS RELIANCE

Plaintiff was the employee of defendant, who was engaged in the severance and sale of timber. Defendant, desiring the protection of compensation insurance, approached *X* who regularly purchased timber from defendant and who maintained compensation insurance for his own employees. *X* proposed, in good faith, that the cost of insurance premiums be deducted regularly from the price to be paid for timber purchased from defendant by *X*, and assured defendant that the effect would be to extend the protection of his policy to defendant's employees. Defendant, relying upon *X*'s representation, made no further effort to secure compensation coverage. Thereafter plaintiff was injured during the course of his employment. He instituted suit for compensation against defendant, *X*, and *X*'s insurer. The district court held defendant, *X*, and *X*'s insurer liable in solido in tort. On appeal, *held*, affirmed as to defendant and reversed as to *X* and his insurer. However, the court of appeal, grounding its decision on estoppel, held that *X* was liable in damages to defendant,[1] for whatever amount defendant was forced to expend toward fulfilling the judgment against him. One who, with knowledge of the facts, conducts himself so as to mislead another who relies thereon, is estopped from afterwards assuming a position inconsistent with his prior position. *Carpenter v. Madden*, 90 So.2d 508 (La. App. 1956).

A vendee-vendor relationship between the injured claimant's employer and the defendant will not support a workmen's com-

1. The court did not indicate the process by which they allowed defendant to recover judgment against *X*, thus leaving a procedural question open; however, it is assumed that defendant called *X* in warranty under Louisiana's Third Party Practice Act.

pensation recovery in Louisiana.[2] Therefore, in the instant case plaintiff was precluded from recovering in compensation from *X* or his insurer because *X* was the vendee of defendant.[3] Consequently, since *X* was mistaken as to the effect of his policy, plaintiff's only hope of obtaining judgment on which he could realize a recovery rested on defendant's ability to bring a successful action against *X* in tort. Defendant had several possible theories which he could have argued: to-wit, a gratuitous undertaking, deceit or misrepresentation, and equitable estoppel.

Generally, under principles of tort, one is not liable for failing to render aid or assistance gratuitously[4] unless he commences an undertaking to do something of such a nature as to cause the recipient to rely thereon to his detriment.[5] In such a case the actor is held to a duty of reasonable care[6] in continuing

2. Smith v. Crossett Lumber Co., 72 So.2d 895 (La. App. 1954); Grant v. Consolidated Underwriter, 33 So.2d 575 (La. App. 1947), 9 LOUISIANA LAW REVIEW 573 (1949); Jones v. Pan American Petroleum Corp., 190 So. 204 (La. App. 1939); Harris v. Southern Kraft Corp., 183 So. 65 (La. App. 1938); West v. Martin Lumber Co., 7 La. App. 366 (1927); Morrison v. Weber King Mfg. Co., 6 La. App. 388 (1927); MALONE, LOUISIANA WORKMEN'S COMPENSATION LAW AND PRACTICE §§ 72, 123 (1951); Malone, *Principal's Liability for Workmen's Compensation to Employees of Contractor*, 10 LOUISIANA LAW REVIEW 25, 29-34 (1949).

3. This was, of course, a finding of fact by the court, and the finding would seem to be completely in line with a long string of strikingly similar lumber cases. Smith v. Crossett Lumber Co., 72 So.2d 895 (La. App. 1954); Grant v. Consolidated Underwriters, 33 So.2d 575 (La. App. 1947). *But see* Lasyone v. Gross & Janes Co., 47 So.2d 374 (La. App. 1950); Carter v. Colfax Lumber & Creosoting Co., 9 La. App. 497, 121 So. 233 (1928); MALONE, LOUISIANA WORKMEN'S COMPENSATION LAW AND PRACTICE §§ 72, 123 (1951); Note, 9 LOUISIANA LAW REVIEW 573, 575, n. 9 (1949).

4. Union Pac. R.R. v. Cappier, 66 Kan. 649, 72 Pac. 281, 69 L.R.A. 513 (1903); Osterlind v. Hill, 263 Mass. 73, 160 N.E. 301, 56 A.L.R. 1123 (1928); PROSSER, LAW OF TORTS § 38 (2d ed. 1955).

5. Schroeder v. Mauzy, 16 Cal. App. 443, 118 Pac. 459 (1911); Maddock v. Riggs, 106 Kan. 808, 190 Pac. 12, 12 A.L.R. 216 (1920); Sult v. Scandrett, 119 Mont. 570, 178 P.2d 405 (1947); Smedes v. Bank, 20 Johns. 372 (N.Y. 1823); 2 HARPER & JAMES, THE LAW OF TORTS § 18.6 (1956); PROSSER, LAW OF TORTS § 38 (2d ed. 1955); RESTATEMENT, TORTS § 325 (1934); Arterburn, *Liability for Breach of Gratuitous Promises*, 22 ILL. L. REV. 161 (1927); Seavey, *Reliance upon Gratuitous Promises or Other Conduct*, 64 HARV. L. REV. 913 (1951); Note, 45 HARV. L. REV. 164 (1931).

Until the recent case of Marsalis v. LaSalle, 94 So.2d 120 (La. App. 1957), 18 LOUISIANA LAW REVIEW 584, Louisiana had not had occasion to pass on this problem from a tort viewpoint, although several cases had recognized a comparable duty in other areas. Hazel v. Williams, 80 So.2d 133 (La. App. 1954); Mechanics' and Traders' Bank v. Gorden, 5 La. Ann. 604 (1850); Montillet v. Bank of United States, 1 Mart(N.S.) 365 (La. 1823); Lafarge v. Morgan, 11 Mart.(O.S.) 462 (La. 1822); Durnford v. Patterson, 7 Mart.(O.S.) 460 (La. 1820).

6. Maddock v. Riggs, 106 Kan. 808, 190 Pac. 12, 12 A.L.R. 216 (1920). The Louisiana courts, in their dealings with gratuitous bailees, have said that the bailee's standard of care is determined by Articles 1908, 2937, 2938, and 3003 of the Louisiana Civil Code of 1870. Levy v. Pike Brother & Co., 25 La. Ann.

to act so as not to worsen the condition of the recipient, since his efforts may have caused the recipient to forego attempting to assist himself, or have caused another, who might have assisted the one in peril, to assume that the situation had been remedied. Although there is no set formula for determining what will constitute such an undertaking,[7] the view taken in a recent Louisiana case[8] subsequent to the present case[9] indicates that whenever one promises to render assistance to another, the undertaking is consummated and liability will attach if the relied-upon undertaking is negligently performed. Thus an example of an undertaking would be the case where *A* receives life insurance premiums from *B* and gratuitously agrees to forward them to the insurance company when he sends in his own premiums. In such a case *A*, upon receipt of the premiums, has clearly undertaken the duty to use reasonable care in seeing that they are duly sent on to the company. Should he negligently or intentionally fail to send in the premiums, thus causing the policy to lapse, he will be liable to *B*'s heirs for the beneficial amount under the policy if *B* died believing that the insurance premiums had been paid to the company.[10]

The difficulty in the application of this idea in the present situation lies in the fact that *X* did not undertake or promise to perform any act for the defendant. If *X* had assured defendant that he *would procure* insurance for him and had failed to do so, the right of recovery would be fairly clear.[11]

Another possible basis on which the case might have been

630 (1873) (Article 2937); Mechanics' and Traders' Bank v. Gorden, 5 La. Ann. 604 (1850) (Article 3003).

7. The older cases, lead by Thorne v. Deas, 4 Johns. 84 (N.Y. 1809), held that an undertaking began only when some action was taken toward the actual assistance of another, and mere promises of aid would not constitute an undertaking regardless of the reliance. However, in attempting to retain this old nonfeasance formula, courts have confused the problem by finding extremely trivial acts on which the plaintiff could have relied, thus constituting actionable misfeasance. Carr v. Maine Cent. R.R., 78 N.H. 502, 102 Atl. 532 (1917) (accepting a piece of paper). See PROSSER, LAW OF TORTS § 38 (2d ed. 1955); Seavey, *Reliance upon Gratuitous Promises or Other Conduct*, 64 HARV. L. REV. 913 (1951); Note, 45 HARV. L. REV. 164 (1931); Note, 18 LOUISIANA LAW REVIEW 584 (1958).

8. Marsalis v. LaSalle, 94 So.2d 120 (La. App. 1957), 18 LOUISIANA LAW REVIEW 584, would certainly indicate the trend in Louisiana. See RESTATEMENT, AGENCY § 378 (1933); RESTATEMENT, TORTS § 325 (1934); Arterburn, *Liability for Breach of Gratuitous Promises*, 22 ILL. L. REV. 161 (1927); Seavey, *Reliance upon Gratuitous Promises or Other Conduct*, 64 HARV. L. REV. 913 (1951); Note, 45 HARV. L. REV. 164 (1931). *Contra*, PROSSER, LAW OF TORTS 185-86 (2d ed. 1955).

9. See note 8 *supra*.

10. Maddock v. Riggs, 106 Kan. 808, 190 Pac. 12 (1920).

11. Marsalis v. LaSalle, 94 So.2d 120 (La. App. 1957). See note 7 *supra*.

argued is that of deceit or misrepresentation. Deceit principles impose liability upon one who knowingly misleads another so as to gain some benefit over him.[12] Derived from deceit principles, the theory of negligent misrepresentation[13] provides that by reason of his position, one may fall under a duty to exercise reasonable care to insure the accuracy and validity of his assertions. Also stemming from deceit, innocent misrepresentation[14] provides that one is liable for an incorrect statement which he believed to be true and made as of his own knowledge to be so. Thus it would appear that defendant, in the instant case, could have successfully argued misrepresentation, because he relied on the assertion by *X* as to the legal effect of the policy. However, an obstacle to the use of misrepresentation as the basis of the cause of action is that the present case seems to contain an honestly made misrepresentation of law, and misrepresentations of law are generally accorded the same treatment as opinions and are therefore non-actionable[15] because they cannot be justifiably relied upon. But the trend seems to be away from this rule,[16] especially when there is a decided disparity between the parties.[17] The present case seems to be subject to the exception or modern trend in that there was certainly a vast dif-

12. The idea that "scienter" or fraudulent intent is requisite to form a basis for an action in deceit comes from Derry v. Peck, 14 A.C. 337, 58 L.J. 864 (Ch. 1889), and although rejected in many United States jurisdictions still appears to be the majority general rule. See HARPER & JAMES, THE LAW OF TORTS §§ 7.1, 7.3, 7.5 (1956); PROSSER, LAW OF TORTS § 88 (2d ed. 1955). Louisiana seems to have adopted the rule that "scienter" is required. In Montilly v. His Creditors, 18 La. 383 (1841), the court said: "In order to constitute a fraud, two conditions are legally necessary: there must be the intention of defrauding, consilium fraudis, and the event or the effective and actual loss sustained by the creditors, eventus damni; if one of these requisites does not exist, there is no fraud." Buxton v. McKendrick, 223 La. 62, 64 So.2d 844 (1953); Swain v. Lindsay, 85 So.2d 360 (La. App. 1956).

13. *But see* Beyer v. Estopinal, 224 La. 516, 70 So.2d 109 (1954); Tardos v. Bozant, 1 La. Ann. 199 (1846); Glanzer v. Shepard, 233 N.Y. 236, 135 N.E. 275, 23 A.L.R. 1425 (1923); Seale v. Baker, 70 Tex. 283, 7 S.W. 742 (1888); HARPER & JAMES, THE LAW OF TORTS § 7.6 (1956); PROSSER, LAW OF TORTS § 88 (2d ed. 1955); RESTATEMENT, TORTS § 552 (1934); Green, *Deceit*, 16 VA. L. REV. 749 (1930).

14. Lerner v. Riverside Citrus Ass'n, 115 Cal. App.2d 544, 252 P.2d 744 (1953); Scholossman's, Inc. v. Niewinski, 12 N.J. Super. 500, 79 A.2d 870 (1951); HARPER & JAMES, THE LAW OF TORTS § 7.7 (1956); PROSSER, LAW OF TORTS § 88 (2d ed. 1955).

15. Furman v. Keith, 226 S.W.2d 218 (Tex. Civ. App. 1950); Gormely v. Gymnastic Ass'n, 55 Wis. 350, 13 N.W. 242 (1882). In reaching this conclusion, some courts hold that everyone is presumed to know the law. Smith v. Brown, 59 Cal. App.2d 836, 140 P.2d 86 (1943).

16. Peterson v. First Nat. Bank, 162 Minn. 369, 203 N.W. 53, 42 A.L.R. 1185 (1925); PROSSER, LAW OF TORTS 559-60 (2d ed. 1955); RESTATEMENT, TORTS § 545 (1934).

17. Sainsbury v. Pennsylvania Greyhound Line, 183 F.2d 548, 21 A.L.R.2d 266 (4th Cir. 1950); Rice v. Press, 117 Vt. 442, 94 A.2d 397 (1953).

ference in the capacities of the parties. *X* was a man experienced in such matters as taking out insurance and other business transactions, while defendant was a mere novice, to say the least, in engaging in independent operations and obtaining insurance. Further, the close vendee-vendor relationship between the parties would lend itself to trust and reliance.[18] Then, too, the confusion relative to the amount of damages that may be recovered under an action for misrepresentation presents a practical obstacle in the choice of this action.[19] Some jurisdictions adhere to the "out-of-pocket" damage theory which would mean that here the recovery would be limited to the return of the premiums withheld by *X* from his payments to defendant. The other damage rule, the "benefit-of-bargain" rule, allows full recovery under the bargain which here would mean the amount recoverable from defendant by plaintiff in compensation. However, it is believed that the Louisiana courts will follow the "benefit-of-bargain" rule in cases similar to the present case where the damages under this rule are easily ascertainable and the "out-of-pocket" damages would be wholly inadequate.[20] Thus misrepresentation remains available to defendant as a practical matter.

The necessity of discussing these possible remedies in the instant case was avoided by basing the decision on the "convenient catch-all"[21] doctrine of equitable estoppel. Use of the

18. Fawcett v. Sun Life Assur Co. of Canada, 135 F.2d 544, 153 A.L.R. 533 (10th Cir. 1943); Rice v. Press, 117 Vt. 442, 94 A.2d 397 (1953).

19. The "out-of-pocket" rule is in effect a rule of restitution which holds that the victim of the deceit may recover the amount that he has paid out because of the deception. Hancock v. Williams, 99 Cal. App.2d 80, 221 P.2d 129 (1950); Liebell v. Prentice-Hall, Inc., 280 App. Div. 824, 113 N.Y.S.2d 763 (1952).

The "loss-of-bargain," "benefit-of-bargain," or "warranty" rule holds that damages will be assessed so as to give the plaintiff the position that he would have occupied had the representations been true. Sposato v. Heggs, 123 Colo. 533, 233 P.2d 385 (1951); National Shawmut Bank v. Johnson, 317 Mass. 485, 58 N.E.2d 849 (1945). In general, see HARPER & JAMES, THE LAW OF TORTS § 7.15 (1956); PROSSER, LAW OF TORTS § 91 (2d ed. 1955).

20. The present case does not fall squarely within the classical reasons for these distinctions in the measure of damages, for the problem usually arises where a sale is involved. And probably one major reason for a jurisdiction choosing the "out-of-pocket" rule is the difficulty in determining what is the amount recoverable under the "loss-of-bargain" rule. But as is stated in a recent Oregon case, Selman v. Shirley, 161 Ore. 582, 85 P.2d 384, 91 P.2d 312 (1938), where the damages under the "benefit-of-bargain" rule can be proved with reasonable certainty, it should be used. Louisiana in at least one case, Tardos v. Bozant, 1 La. Ann. 199 (1846), has seemingly applied the "benefit-of-bargain" rule to a situation similar to the instant one.

21. Prosser, *Delay in Acting on an Application for Insurance*, 3 U. CHI. L. REV. 39, 47 (1935). Estoppel has also been referred to as "that haven of refuge of the perplexed jurist" by Funk, *The Duty of an Insurer to Act Promptly on Applications*, 75 PA. L. REV. 207, 223 (1927).

estoppel doctrine presents some difficulty, as the underlying theory of estoppel is that a man is estopped from denying his prior position to the detriment of another.[22] In this case it would mean that *X* was estopped from denying that his compensation insurance covered defendant's employees. This, of course, would not bind the insurer, and since *X* never represented that he was subjecting himself to personal liability, so that he could be estopped from so denying, *X* would seem not to be liable under estoppel. However, had defendant argued misrepresentation, it would seem that a cause of action had been stated. Therefore, it is submitted that misrepresentation would have been a more satisfactory basis for the instant decision, in view of the fact that "estoppels are not favored in law"[23] and are supposed to be used only when there is no other means of affording justice.[24]

Ray Carlton Muirhead

TORTS — MUNICIPAL IMMUNITY

The widow of deceased sued defendant municipality for the wrongful death of her helplessly intoxicated husband who suffocated from smoke after being locked in jail and left alone. The trial court denied recovery by applying the doctrine of municipal tort immunity. On appeal to the Florida Supreme Court, *held*, reversed. A municipality has no immunity from liability in a tort action when a person suffers a direct personal injury proximately caused by the negligence of a municipal employee who is acting within the scope of his employment. However, the immunity still exists in legislative and judicial functions.[1] *Hargrove v. Town of Cocoa Beach*, 96 So.2d 130 (Fla. 1957).

The general rule is that municipalities are immune from

22. " 'Estoppe' cometh of the French word *estoupe*, from whence the English word *stopped;* and it is called an estoppel, or conclusion, because a man's own act or acceptance, stoppeth or closeth up his mouth to alleage or plead the truth." COKE'S INSTITUTES 352a. See Reynolds v. St. John's Grand Lodge, A.F. & A.M., 171 La. 395, 131 So. 186 (1930); Lewis v. King, 157 La. 718, 103 So. 19 (1925); Patorno v. Villio, 9 Orl. App. 104 (1912); Lichtentag v. Feitel, 1 Orl. App. 172 (La. App. 1904); PROSSER, LAW OF TORTS 529-30 (2d ed. 1955).

23. Arkansas Louisiana Gas Co. v. Thompson, 222 La. 868, 64 So.2d 202 (1952); Carpenter v. Madden, 90 So.2d 508, 514 (La. App. 1956).

24. Estoppel is an equitable remedy. Glover v. Southern Cities Distributing Co., 142 So. 289 (La. App. 1932). Therefore estoppel must bow to the equitable rule that a complete and adequate legal remedy excludes equitable remedies. Lacassagne v. Chapuis, 144 U.S. 119 (1892).

1. The judiciary and the legislature have always been accorded immunity from tort liability because of the desire to preserve their independence. See PROSSER, LAW OF TORTS 780, § 109 (2d ed. 1955).