Louisiana Law Review

Volume 20 | Number 2
The Work of the Louisiana Supreme Court for the 1958-1959 Term
February 1960

Torts and Workmen's Compensation: Torts

Wex S. Malone

Torts and Workmen's Compensation

TORTS

*Wex S. Malone**

NEGLIGENCE

Injury Through the Use of Explosives — Res Ipsa Loquitur

Several cases decided by the Supreme Court during this last term involved chiefly the resolution of a factual dispute or the sufficiency of the evidence to show negligence.[1] Others raised more basic problems and should be discussed briefly.

During a rainy season, defendant, acting under authority of an exploration permit from plaintiff, set off a dynamite charge in a hole drilled to a depth of about fifty feet at a spot on plaintiff's rice field. Less than an hour and a half thereafter a portion of plaintiff's six foot high levee collapsed. The point of collapse was about eight hundred and twenty feet from the explosion. Plaintiff was able to show by convincing circumstantial evidence that the collapse and consequent inundation of his fields was caused by the explosion; but he did not attempt to introduce proof showing any particulars in which he claimed the defendant's conduct should be regarded as negligent. The court, however, relying on res ipsa loquitur, gave judgment for the plaintiff for the damage to the field.[2] The defendant had attempted to rebut the inference of negligence thus arising by showing that the method used in no way varied from the usual and customary procedure adopted by others for this kind of operation. The court, however, properly stressed the fact that the occurrence itself remains in the case as testimony contradicting the defendant's evidence as to the regularity of his practices. As this writer has attempted to point out several times in the past,[3] any enterprise which makes use of explosives, gas, elec-

*Professor of Law, Louisiana State University.

1. Tauzier v. Bondio, 237 La. 516, 111 So.2d 756 (1959) (injury to pedestrian, negligence and contributory negligence); Steele v. State Farm Mutual Ins. Co., 235 La. 564, 105 So.2d 222 (1958) (intersectional collision, contributory negligence of driver on favored street); Dunn v. Tedesco, 235 La. 679, 105 So.2d 264 (1958) (suit against landlord for death of children from allegedly defective gas heater; defect not cause of death).

2. Langlinais v. Geophysical Service, Inc., 237 La. 585, 111 So.2d 781 (1959).

3. Malone, *Res Ipsa Loquitur and Proof by Inference*, 4 LOUISIANA LAW

tricity, or other highly dangerous substances will be regarded virtually as an insurer against any damage occasioned thereby. In such instances the decision may be couched in the language of negligence, but the most that can be said for the defendant's predicament is that he has a theoretical "out" by demonstrating convincingly that the occurrence was utterly unavoidable — something which, in practice, he can seldom do. The distinction between negligence and absolute liability is so shadowy in this area of activity that familiar legal devices and gadgets such as res ipsa loquitur, presumption, inferences of negligence and the like, can be readily used by a court to hitch the standard of care up to top notch and to still talk the language of negligence even as it imposes a virtual insurer's liability.

Traffic and Transportation

A legal antiquarian rummaging through the records of cities and towns for the first decades of this century would probably encounter numerous regulations designed to protect the riders and drivers of horses against the perils of the newfangled "horseless carriage." A north Mississippi town, for example, has never erased from its books an old ordinance requiring that motor propelled vehicles be preceded by a man on horseback armed with a red flag to warn of the approaching devil-machine. Failure of the early motorist to take into strict account the skittish nature of horses on the highway resulted in many sizeable damage awards. Times have changed, and perhaps the sophisticated Dobbin of today is generally expected to take care of himself. The current attitude of the courts is that the modern motorist "is not required to reduce his speed at all when meeting or passing animal-drawn vehicles or mounted horses unless he observes that the animal or animals are frightened or indicate in some manner that they are disturbed by his presence."[4]

Nevertheless, present day drivers cannot totally ignore the wary nature of the horse, and sometimes the precautionary measures expected of motorists are very exacting. A recent example will be found in *Plauche v. Consolidated Companies.*[5] Deceased, a twelve-year old boy, was riding a horse across the Simmsport-Atchafalaya bridge in disobedience to his father's

REVIEW 70 (1941). See also discussion in previous issues of this symposium): 18 LOUISIANA LAW REVIEW 63 (1957); 14 LOUISIANA LAW REVIEW 187 (1953).

4. Plauche v. Consolidated Companies, Inc., 92 So.2d 298, 301 (La. App. 2d Cir. 1957). See also Smith v. Louisiana Power and Light Co., 158 So. 844, 847 (La. App. 2d Cir. 1935).

5. 235 La. 692, 105 So.2d 269 (1958).

orders that he should lead the animal across the half-mile long structure. This bridge is so designed that its superstructure affords a semi-enclosed funnel surrounding the roadway which is made of steel runways laid on a plank flooring. Because of these features of construction a great deal of noise is generated by the wheels of passing vehicles. It was also found that the confining enclosure of the superstructure is calculated to frighten an animal. Under these circumstances the driver of defendant's heavily loaded trailer truck was found to be negligent, first, by entering the bridge at all while it was occupied by deceased and his horse who were only about three hundred feet from the terminus, and, perhaps more important, by operating his air brakes as the truck passed the oncoming horse so as to produce a hissing noise which frightened the animal, causing it to throw and kill the child. In reply to defendant's contention of contributory negligence the opinion emphasized that a child's caution must be judged by his maturity and capacity to evaluate circumstances in each particular case, and he must exercise only the care expected of his age, intelligence, and experience. The court properly observed that the child's disobedience to his father's orders tended at most to show knowledge of danger and that the deceased had safely ridden his horse across the bridge on previous occasions. The court did not mention the last chance doctrine, although it appears to this writer that the contributory negligence issue could have been disposed of favorably to plaintiff on that issue.

An interesting traffic accident involving three vehicles was before the court in *Billiot v. Noble Drilling Company*.[6] Mrs. Miller's vehicle was proceeding down the highway followed at a distance of fifty feet by the Billiot car, which was moving at a speed of fifty miles per hour. Although Mrs. Miller gave the proper hand signal for a turn as she reduced her speed, her car was struck in the rear by Billiot and pushed ahead about six feet. Almost immediately after the cars came to rest the rear of the Billiot car was struck by the vehicle of the defendant drilling company which, as the court found, was being driven carelessly as it approached from behind. The impact rammed the Billiot car into the Miller car and both were pushed a distance of about eighty feet. All injuries to both the front vehicles were caused by this second impact. Miller sought damages

6. 236 La. 793, 109 So.2d 96 (1959).

against both Billiot and the drilling company, while Billiot claimed his own damage against the company. Both the court of appeal and the Supreme Court concluded that, although Billiot was negligent with respect to the first impact with the Miller vehicle, yet this played no causal part with reference to the later blow for which the drilling company's driver was responsible. Strangely, however, the court of appeal denied Billiot's claim against the company on the ground of contributory negligence. This part of the holding was reversed by the Supreme Court. Billiot was negligent only with respect to the first (and harmless) impact with the Miller car. He was not negligent toward the following vehicle, whose driver was under a duty to so operate his car as not to follow another vehicle more closely than is reasonable and prudent.

Wrongful Death — Funeral Expenses

The extent of responsibility of a wrongdoer for medical and funeral expenses in death cases was clarified considerably by the Supreme Court recently in *Andrus v. White*.[7] In this case the expenses had been paid by deceased's father, who had made no claim against the estate for reimbursement. These items of expense, however, were included in the damages sought by deceased's minor child — the only beneficiary entitled to maintain suit under Civil Code Article 2315. The court pointed out that the ranking beneficiary may be entitled to recover for expenses of this kind where payment by the succession had resulted in a reduction of the beneficiary's inheritance, or where the beneficiary is legally obligated to pay such expenses or even where he has actually paid them pursuant to a moral or natural obligation. However, where, as here, the expenses were paid by a third party who is not entitled to reimbursement as a beneficiary and who has made no claim against the estate, there is no resulting damage to the beneficiary with respect to these items and hence no right of recovery.

WRONGFUL SEIZURE OF PROPERTY — DAMAGES

A wrongful seizure of property pursuant to a foreclosure proceeding constitutes an actionable tort under Civil Code Article 2315. In *Hernandez v. Hanson*[8] the property seized and detained for a period of twenty-one months was an automobile.

7. 236 La. 28, 106 So.2d 705 (1958).
8. 237 La. 389, 111 So.2d 320 (1959).

Several interesting propositions were announced in the decision. First, damages were allowed for depreciation in the value of the car during the interval between its seizure and its return to plaintiff plus one thousand dollars for "humiliation, mortification and mental anxiety, and for physical discomfort and inconvenience as a result of the deprivation of use and enjoyment of his car during the period of its seizure and detention."[9] With respect to these latter items the approach of the Louisiana court differs from the usual common law position under which the plaintiff would be entitled to indemnity for the deprivation of use and enjoyment of the car, which would usually amount to the rental value of the vehicle during the period affected. Emotional and non-pecuniary losses are usually denied in such cases, although if the conduct of defendant were oppressive, an award of punitive damages would be permitted at common law. In the *Hernandez* case it was conceded that the defendant did not act arbitrarily, oppressively, or in bad faith. In fact, the right to possession of the car was in good faith dispute during the entire period of its detention. The second point involved in the *Hernandez* case related to the defendant's plea of prescription. Normally the prescriptive period of one year runs from the time of wrongful seizure. Here, however, where the title to the property was in litigation in a separate dispute, the court properly announced that the present claim could not have been effectively prosecuted until title had been determined. Hence the running of the prescriptive period was postponed until final judgment in th title controversy.

WORKMEN'S COMPENSATION

*Wex S. Malone**

Work Which Is Not Part of Employer's Trade, Business, or Occupation

Two years ago the Supreme Court decided the case, *Meyers v. Southwest Region Conference Association of Seventh Day Adventists*,[1] in which it concluded that a church organization is a business, trade, or occupation within the meaning of the Workmen's Compensation Statute. As this writer pointed out in a pre-

9. *Id.* at 401, 111 So.2d at 324.

*Professor of Law, Louisiana State University.

1. 230 La. 310, 88 So.2d 381 (1956).