Louisiana Law Review

Volume 23 | Number 2
The Work of the Louisiana Appellate Courts for the 1961-1962 Term: A Symposium
February 1963

Private Law: Torts

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Inc.,[21] it was held that the sureties on a lease of motor vehicles were discharged by the continuation of the lease on a month-to-month basis after the initial period of one year had expired. The prolongation of the lease was provided for by the contract itself but on the basis of two similar cases involving immovables the court counted this fact as unimportant. This jurisprudence is consistent with Article 2690 of the Code and the basic principle that a contract of suretyship is *strictissimi juris*. No reason appears for drawing a distinction between leases of immovables and leases of movables.

In *Frugé v. Muffoletto*,[22] the Supreme Court, answering a question certified by the Third Circuit Court of Appeal, held that where a tenant makes repairs and improvements to the leased premises in keeping with authority granted by the lease but at his own expense, laborers and furnishers of materials do not have a privilege on the structure under R.S. 9:4801-17, but their sole privilege is against the leasehold rights of the lessee under R.S. 9:4811. Support for this conclusion was found also in Article 3249 of the Civil Code.

TORTS

*David W. Robertson**

INTERVENING NEGLIGENCE—PROXIMATE CAUSE

It would perhaps not be too grotesque an oversimplification of the theory of tort liability to state that when defendant has been guilty of a breach of a duty owed plaintiff, and that breach has in fact caused some harm to plaintiff, then defendant will be liable for the resultant loss. This statement's consistency with fact may be preserved in all cases—even the most exceptional — by manipulation within the meaning of the term duty. Thus, cases where defendant has been guilty of wrongdoing causing plaintiff harm which the law deems unredressable can be handled by stating that defendant owed no duty to plaintiff. More often, however, such situations will be handled by the courts in terms of proximate causation. It will be stated that while defendant has been a wrongdoer and plaintiff has suf-

21. 136 So. 2d 458 (La. App. 1st Cir. 1961).
22. 137 So. 2d 333 (La. App. 3d Cir. 1961).
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fered harm, the harm plaintiff is complaining of did not proximately result from the wrong done.

It is practically a truism that no consistency in definitions of "proximate cause" can be found in the cases. This is one of the reasons supporting a great deal of scholarly argument in favor of explaining no-recovery tort situations in terms of duty rather than proximate cause.[1]

The choice of approaches is frequently presented by cases in which defendant has negligently created a dangerous condition upon which a later negligent act of a third party operates to cause harm to the plaintiff; *e.g.*, defendant negligently leaves his vehicle parked on the highway, and plaintiff, a guest passenger, is injured when his host-driver negligently collides with defendant's vehicle. Recovery against the driver of the parked vehicle in this situation will often be denied, the usual theory being that the later negligence of the host-driver amounted to an intervening cause, which rendered defendant's original negligence passive, and therefore a remote rather than a proximate cause of the harm. A recent case of this type is *Foreman v. American Automobile Insurance Co.*[2] There, plaintiff was a passenger in a truck that, because of faulty brakes, collided with the rear of defendant's truck stopped on the highway. The court said that "since Whitehead, with properly working brakes, had ample time within which to stop his truck before the collision occurred, we think any negligence which may be attributed to Morgan for bringing his truck to a stop suddenly cannot be construed as constituting a proximate or contributing cause of the accident."[3]

The *Foreman* problem could with equal plausibility be handled without reference to the concept of proximate causation. The underlying question—whether defendant ought to be liable for plaintiff's harm—could be framed in terms of the scope of defendant's duty. Specifically, the question would be whether the rule of negligence law violated by defendant—a rule requiring reasonable care and precaution in stopping a vehicle on a public highway—protects against the risk of collision with another vehicle with faulty brakes.

1. See GREEN, RATIONALE OF PROXIMATE CAUSE (1927); Comment, 16 LA. L. REV. 391 (1956).
2. 137 So. 2d 728 (La. App. 3d Cir. 1962).
3. *Id.* at 732.

Several other recent cases presented the problem involved in *Foreman*—whether defendant should be relieved of liability by the later negligence of another. In *Spiers v. Consolidated Companies, Inc.*,[4] defendant, pursuant to a long-standing agreement, had partially blocked a railroad track in order to position a truck for loading. Plaintiff, a railroad train conductor, was injured when the train in which he was riding was forced to come to a sudden stop in order to avoid colliding with the truck. The court concluded, first of all, that the defendant truck company had been guilty of no negligence, adverting to the agreement and to the fact that no injuries had resulted from the practice of parking trucks in that location for more than twenty years. Then, in dictum, the court addressed itself to the proximate cause question, stating: "If we should, however, assume that defendant was negligent, there would still remain in our minds serious doubt whether such negligence was the proximate cause of the accident; and we would probably conclude . . . that the railway was negligent and that its negligence was the proximate cause of the accident."[5] Justice Sanders, dissenting, felt that the negligence of defendant had been clearly established. Therefore, he felt that the proximate cause issue presented the real problem in the case. On this question he stated:

> "[T]he subject of responsible causation is obscured by a smog of empty phrases and verbal intricacies. . . . It is difficult if not impossible to reconcile the decisions that have dealt with it. . . . In the instant case, the negligence of the defendant was a substantial factor in producing the harm to the plaintiff. The intervening negligence of the Railway was not a superseding cause for the employees of the defendant should have reasonably foreseen that an emergency stop of a train might occur. . . . The defendant cannot be absolved from responsibility merely because the negligence of the Railway contributed to the result."[6]

Justice Sanders made reference to *Jackson v. Jones*,[7] a case frequently cited in support of the proposition that whether an intervening cause relieves defendant of liability for his original negligence turns on whether or not the intervening cause was foreseeable. In that case, defendant, a contractor, stacked

4. 241 La. 1012, 132 So. 2d 879 (1961).
5. *Id.* at 1027, 133 So. 2d at 884.
6. *Id.* at 1028, 133 So. 2d at 885.
7. 224 La. 403, 69 So. 2d 729 (1953).

lumber on a schoolyard and a child was injured through being pushed into a protruding nail by a schoolmate. Defendant argued that his original negligence in stacking the lumber on the schoolyard was not a proximate cause of the harm, since the push administered by a schoolmate of plaintiff amounted to an intervening cause. The court rejected this argument, saying that as this kind of occurrence was clearly foreseeable, defendant's negligence was a proximate cause of the harm.

The case of *Brechtel v. Lopez*[8] involved an interesting situation in which the intervening-cause argument was made. Plaintiff was one of two policemen in a prowl car which wrecked while chasing a speeder. Defendant, the speeder, contended that his acts did not amount to a proximate cause of the harm to plaintiff, since the fact that the patrol car's brakes malfunctioned just prior to the collision amounted to an intervening cause. The court rejected this argument, stating:

> "In our opinion, the proximate cause of the accident was speed, the grossly excessive speed of young Lopez. . . . The effect of the speed continued down to the very moment of the accident. . . . The most that can be said from the appellant's standpoint is that the grabbing of the brakes was an intervening efficient cause which broke the chain of causation from the original negligent acts of young Lopez. However, the mere fact that other forces have intervened does not absolve the defendants where the injury might reasonably have been foreseen. [Citing, *inter alia, Jackson v. Jones.*]"[9]

A situation closely analogous to that presented in the *Foreman* case was involved in *Peats v. Martin.*[10] Plaintiff — who the court determined was not contributorily negligent — drove into the rear of a negligently-parked pulpwood truck. A split second later a butane truck collided with plaintiff's vehicle. Defendant, the owner of the pulpwood truck, contended that two separate accidents were involved, and that plaintiff could recover against him for only the injuries sustained when she hit the pulpwood truck. The court stated that it was unimpressed with this argument, since it had not been shown that the butane truck driver was negligent or that his negligence

8. 140 So. 2d 189 (La. App. 4th Cir. 1962).
9. *Id.* at 193.
10. 133 So. 2d 920 (La. App. 2d Cir. 1961).

was a proximate cause of the accident.[11] Furthermore, the court said that even if it be admitted that the negligence of the butane truck driver was an intervening cause, this would not relieve the pulpwood truck owner of liability unless it superseded the original negligence.

In *Levert v. Travelers Indemnity Co.*,[12] plaintiff, a guest at a dance, fell when she sat on what appeared to be a substantial throne but was in fact a perilous platform consisting of a stool and a satin material which concealed a five-foot drop to a concrete floor. Defendant argued that the hazard created by its insured was not the proximate cause of the accident, but rather that the fall of the stool was the responsible cause. The court rejected this argument, concluding that the fall of plaintiff from the platform was a reasonably foreseeable result of the hazard created.

In the cases discussed, the courts' approach to the question whether a later causally operative force superseded defendant's original negligence appeared to be completely satisfactory in terms of the results achieved and in terms of analysis. But that the proximate cause approach on this question is potentially productive of analytical confusion is seen in the recent case of *Jones v. Tidwell*.[13] There, defendant's pick-up truck stopped on the highway and signalled for a left turn. Plaintiff halted his vehicle behind the truck and waited for a moment; then he undertook to pass the stationary truck on the right shoulder, in violation of a statute. While plaintiff was engaged in this maneuver, defendant's truck suddenly swerved to the right into plaintiff's automobile. The defendant contended that plaintiff's violation of the statute rendered her contributorily negligent. The court rejected this argument, stating that violation of a statute does not constitute actionable or contributory negligence unless the violation is causally connected with the accident. The court stated that "no causal connection between the attempt to pass upon the shoulder and the accident is disclosed."[14] It appears fairly clear that the rule adverted to by the court has no application to the question of proximate cause, but means only that violation of a statute must have been a

11. The court followed up this statement with the puzzling observation that in the absence of the butane truck driver as a party litigant, his negligence could not be shown.

12. 140 So. 2d 811 (La. App. 3d Cir. 1962).

13. 139 So. 2d 57 (La. App. 2d Cir. 1962).

14. *Id.* at 59.

cause-in-fact of the accident in order to come into play in the litigation. Proper application of this rule is seen in *Roberts v. London Guar. & Acc. Co.*[15] There, plaintiff was perhaps speeding when he collided with left-turning defendant. The court held that any speed violation of which plaintiff may have been guilty was not causally related to the accident, since under the facts shown plaintiff would have been unable to avoid the collision no matter how slowly he had been driving. It is difficult to argue that the plaintiff's violation in *Jones v. Tidwell* was not causally related to the accident. Ordinarily an act will be deemed a cause-in-fact of a result when that result would not have occurred but for the act in question; it seems apparent that absent the act of plaintiff in passing on the right, the collision would not have occurred.

In all of the cases discussed, the question whether an intervening cause should relieve defendant of liability could have been handled under the suggested duty approach rather than in proximate cause terms. In *Jones v. Tidwell* the confusion alluded to would perhaps have been avoided had the court handled the problem involved by reference to this question: Was the rule (statute) which plaintiff violated — a prohibition against passing on the right — designed to protect against the risk of collision with a vehicle which signalled for a left turn, then suddenly veered to the right? Under this approach, the possibility of confusion with the cause-in-fact element is diminished, and the question of contributory negligence is thrown into clearer focus.

The suggested duty approach was used in the perhaps revolutionary recent Supreme Court case of *Dixie Drive It Yourself System v. American Beverage Co.*,[16] discussed in an earlier issue of this *Review*.[17] It is sufficient for present purposes to state that defendant therein made the argument that his negligence in parking his truck on the highway without warning flares, in violation of a statute, was only the remote cause of the accident, since the negligence of the driver of the vehicle which collided with the rear of the parked truck was an intervening cause. Mr. Justice Sanders, for the court, in an opinion partially forecast by his dissent in the *Spiers* case, stated that the question of intervening causation could best be handled in terms

15. 140 So. 2d 770 (La. App. 2d Cir. 1962).
16. 242 La. 471, 137 So. 2d 298 (1962).
17. Note, 23 LA. L. REV. 142 (1963).

of duty. His opinion made clear that the issue of causation is restricted to the question of causation in fact — whether, but for the act of defendant, the accident would have occurred. With this problem disposed of, the intervening negligence question was put in terms of whether the statute violated was designed to protect against the risk of collision with an inattentively driven vehicle. The court properly concluded that it was so designed, holding defendant liable.

Inquiry into the extent of the change in tort analysis wrought by the *Dixie Drive It* case could be extensive. A brief examination of two questions will have to suffice for the present. First, the rule violated by defendant in *Dixie* was a statute, rather than a rule of general negligence law. Whether the *Dixie* approach will be followed in a case where defendant's wrong consisted in violating a general case-law negligence rule is open to question. It is somewhat easier to put the proximate cause question in risk-rule terms in a case of a statutory violation, because the transition to the question whether the statute was designed with this particular risk in mind is an easy one. But there seems no good reason for making any distinction. While it is true that courts in cases of statutory violation often speak in terms of legislative intent, it would seem fairly apparent that the real question being determined — the proper protective ambit of the rule — is something the legislature did not consider. Also, in the case of traffic statutes it is generally true that the legislature has merely acted to declare what was already the existing rule of negligence law.

Further argument in favor of applying the *Dixie* approach to cases in which no statutory violation is involved might well be predicated upon analogous problems where statutes and common law negligence rules are treated alike. Recent cases involving cause-in-fact problems present a ready illustration. As already noted, the cases of *Roberts v. London Guar. & Acc. Co.* and *Jones v. Tidwell* involved the proper application of the rule requiring that a statutory violation be causally operative before being given effect in civil litigation. In both, the statutory violation was deemed not to be causally connected. A case of a causally operative statutory violation was *Excel Insurance Co. v. Continental Casualty Co.*,[18] in which plaintiff's violation of a speed limit was held to amount to contributory negligence upon

18. 141 So. 2d 408 (La. App. 4th Cir. 1962).

a showing that he skidded twenty-four feet before hitting defendant's vehicle. If plaintiff had been within the speed limit, he would have slid only eighteen feet and would not have collided with defendant's automobile. Cases involving this same cause-in-fact problem, but where the rule breached is a general negligence rule rather than a statute, are also commonplace. In *Shehee v. Hartford Accident & Indemnity Co.*,[19] plaintiff was a guest passenger in a car driven by her deaf husband. Defendant contended that she was contributorily negligent in entrusting her person to the care of a deaf driver, but the court concluded that the husband's deafness was not causally related to the accident, as the facts showed that even had he heard defendant's horn at the time it was sounded, he could not have avoided the accident.[20]

A second question with regard to the potential ambit of the *Dixie* case is whether the approach taken therein would be followed in a case where defendant's negligently-created hazard is operated upon, not by a third party, but by a contributorily negligent plaintiff. Suppose, for example, defendant's negligently-parked vehicle is struck by a vehicle negligently driven by plaintiff. The question put in *Dixie* would be whether the rule defendant has violated extends to protect against the risk of collision by an inattentive plaintiff. Strictly logical reasoning from the *Dixie* holding might well produce an affirmative answer to this question, on the theory that if inattentive drivers generally are within the ambit of protection of the rule defendant has breached, then there is no apparent reason to exclude inattentive plaintiffs.

19. 139 So. 2d 794 (La. App. 2d Cir. 1962).

20. An interesting twist on this analogous cause-in-fact is seen in the case of Perkins v. Texas & New Orleans R.R., 137 So. 2d 673 (La. App. 3d Cir. 1962), which involved the question whether a railroad train's violation of a speed law amounted to negligence. The court concluded, in light of fact that plaintiff was killed at a blind crossing, that the railroad was negligent in operating a train at a speed of 37 m.p.h. in a 25 m.p.h. zone. A vigorous dissent by Judge Hood pointed out that the train could not possibly have stopped even had it been going the lawful speed, so that it could not be said that speed was the cause of the accident. He exposed the fallacy in arguing that had the train been slower, it would not have arrived at the crossing till plaintiff had gotten across by pointing out that it could with equal plausibility be argued that had the train been driven much faster it would have already passed when plaintiff reached the crossing. It it to be noted that this argument of Judge Hood is implicit in the holding in the *Roberts* case that, because plaintiff could not have stopped in time to avoid defendant's left-turning maneuver even had he been driving at a lawful speed, his violation was not causally operative. Note that the court in *Roberts* did not concern itself with the possible argument that had plaintiff been travelling more slowly he would not have been at the fateful spot at the fateful time.

A recent case demonstrates that a negligent plaintiff may sometimes recover, even under the proximate cause analysis. In *Colonial Dairy Farms, Inc. v. Texas & Pacific Ry.*,[21] one of defendant's trains killed seventeen and injured three of plaintiff's cows. The court rejected defendant's contention that the contributory negligence of plaintiff's employees barred recovery, stating: "It may be true that the plaintiff's employees were at fault in failing to secure the gate . . .; however, this negligence was the remote and not the proximate cause of the accident. The legal or proximate cause thereof was the failure of defendant's crew. . . ."[22]

The general effect which may be given the *Dixie* case may be indicated by its impact on those of the above-discussed cases which were decided after the *Dixie* opinion was rendered. In the *Foreman* case, Judge Tate in dissent called the attention of the majority to the *Dixie* decision, stating: "The sudden unsignalled stop in violation of a highway safety ordinance was a substantial cause in fact and is considered a proximate cause of the accident, even though the negligence of the following driver may have contributed to the accident."[23] In the *Levert* case, after stating that the risk of plaintiff's falling was foreseeable and therefore a proximate result of the hazard created, the court also stated that "the injury received was one for the prevention of which the duty existed not to create such a concealed hazard to the patrons' safety," citing the *Dixie* case.[24] And in the case of *Steagall v. Houston Fire and Casualty Insurance Co.*,[25] plaintiff was a guest passenger in a car which collided with the rear of a vehicle negligently left on the highway by defendant. The trial court therein sustained an exception of no cause of action, on the theory that the negligence of plaintiff's husband constituted an intervening cause which rendered defendant's negligence passive rather than active, and therefore a remote, rather than a proximate cause. The court of appeal reversed this determination, stating: "As we understand the Dixie Drive It decision of our Supreme Court, it holds that the concept of passive negligence is not recognized in Louisiana law to defeat the claim of an innocent tort victim."[26] And,

21. 138 So. 2d 216 (La. App. 4th Cir. 1962).
22. *Id.* at 218.
23. 137 So. 2d 728, 734 (La. App. 3d Cir. 1962).
24. 140 So. 2d 189 (La. App. 4th Cir. 1962).
25. 138 So. 2d 433 (La. App. 3d Cir. 1962).
26. *Id.* at 436.

finally, in a case which is beyond the ambit of the present discussion, the court stated that the *Dixie* case departs from the general rule that foreseeability is the test for determining whether an intervening cause will operate to relieve the defendant of liability.[27]

DAMAGES FOR MENTAL SUFFERING

The law with regard to recovery of damages for emotional or mental distress has long been in a state of confusion. Traditionally, the common law refused recovery for such injuries because they were considered remote and difficult of proof. Gradual incursions into this general rule have left the law in a cloudy state.[28]

However, one rule which has been reasonably clear in Louisiana is that a plaintiff may not recover for mental pain and suffering occasioned by injury or threat of injury to the person of another. A sizeable line of cases, beginning with *Black v. The Carrollton R.R.*,[29] in which a father who witnessed his son being mutilated by one of defendant's trains was denied recovery, has established this proposition.[30]

Now it appears that this rule is likewise subject to exception. In *Holland v. St. Paul Mercury Insurance Co.*,[31] noted elsewhere in this *Review*,[32] plaintiffs' infant son allegedly became ill from eating rat poison left in plaintiffs' home by defendant exterminator pursuant to a contract for periodic fumigation and antipest treatment of the home. Plaintiffs' suit sought recovery for mental and physical suffering undergone by the child, for medical damages sustained on behalf of the child, and for mental pain and suffering undergone by the parents as a result of this experience. In the trial court a jury found against plaintiffs

27. Norton v. Argonaut Insurance Co., 144 So. 2d 249 (La. App. 1st Cir. 1962).

28. See PROSSER, TORTS §§ 11, 37 (1955); Note, 21 LA. L. REV. 858 (1961); Comment, 15 LA. L. REV. 451 (1955); Note, 6 LA. L. REV. 475 (1945).

29. 10 La. Ann. 33 (1855).

30. Sperier v. Ott, 116 La. 1087, 41 So. 323 (1906); Brinkman v. St. Landry Cotton Oil Co., 118 La. 835, 43 So. 458 (1907); Barrera v. Schuler, 5 La. App. 67 (Orl. Cir. 1926); Alston v. Cooley, 5 La. App. 623 (1st Cir. 1927); Sherwood v. Ticheli, 120 So. 107 (La. App. 2d Cir. 1929); Seligman v. Holladay, 154 So. 481 (La. App. 2d Cir. 1934); Grier v. Tri-State Transit Co., 30 F. Supp. 26 (D. La. 1940); Hughes v. Gill, 41 So. 2d 536 (La. App. 1st Cir. 1949); Covey v. Marquette Casualty Co., 84 So. 2d 217 (La. App. Orl Cir. 1956); Honeycutt v. American General Ins. Co., 126 So. 2d 789 (La. App. 1st Cir. 1961).

31. 135 So. 2d 145 (La. App. 1st Cir. 1961).

32. Note, 23 LA. L. REV. 473 (1963).

as to the damages sustained by the child. An exception of no cause of action was sustained by the trial judge as to the causes seeking recovery for the parents' mental damages. Only the latter issue was presented on appeal.

The court of appeal reversed the trial court as to the cause of action for mental suffering of the parents. After an exhaustive review of the jurisprudence, the court acknowledged the rule that recovery may not be had for mental suffering growing out of physical damages to the person of another. However, the court pointed out that in a respectable group of cases damages have been had for mental suffering unaccompanied by physical damage. According to the court's reasoning, plaintiffs' cause did not derive from physical injury to their son, but rather upon a separate duty to them — the duty swiftly to divulge the contents of the poison it was feared that the infant had eaten. The record in the case showed that defendant was not able to state the contents of the poison used with explicitness or promptness sufficient for proper treatment of the child. As a result of this failure the parents spent three hours fearing the child would die for lack of treatment, which could not be administered without some identification of the poison consumed. Thus it was immaterial whether the child actually ate any poison or not; plaintiffs could recover for breach of a separate duty owed to them. Recognizing that a new rule of liability was being laid down, the court was at pains to restrict the parties to whom such a duty of divulgence is owed to the father and mother, expressly enumerating several third parties, such as house guests, who would not be within the ambit of the duty.

This case appears to the reviewer to be highly significant, and bears further analysis. First, the law governing recovery of damages for mental suffering unaccompanied by physical injury lacks the clarity attributed to it by the court in the *Holland* case. With one exception,[33] which the court implied was a sport, the cases cited by plaintiff and accepted by the court in support of this proposition involved either breach of contract or intentional and somewhat outrageous conduct on the part of defendant.[34] In none of these cases was recovery allowed for negligently-inflicted mental suffering unaccompanied by physical injury.

33. Valence v. Louisiana Power & Light Co., 50 So. 2d 847 (La. App. Orl. Cir. 1951).

34. Lafitte v. New Orleans City & L.R.R., 43 La. Ann. 34, 8 So. 701 (1890)

For present purposes, discussion of the breach of contract cases will be omitted. But the basis of any distinction between negligently and intentionally-inflicted mental suffering — a distinction which the instant court did not acknowledge — bears pondering. At the outset, a problem of definition presents itself. When will conduct causing mental or emotional harm be counted as intentional? In one sense, all conduct causing mental or any other kind of distress is intentional — defendant always intends to do something. However, in line with the generally accepted definition of intention, it would probably be correct to state that mental distress is intentionally inflicted when defendant either actively desired to bring about that result or realized to a virtual certainty that it would come about. Taking this definition on its face, and contrasting it with the generally understood meaning of the concept of negligence, there would perhaps seem no apparent reason for drawing a distinction between mental distress which is negligently inflicted and like harm caused intentionally. However, in the great majority of the cases involving intentional conduct there is an element of outrageousness involved, at least to the extent of crass disregard of ordinary human feelings. This was true of the cases relied upon by the instant court in support of the proposition that recovery may be had for mental damage unaccompanied by physical injury.[35] This is the position which has been taken by the *Restatement of Torts*.[36] The element of outrage is important for two reasons — one, because it places a moral onus upon defendant which militates toward liability; two, because the element of outrage goes far toward guaranteeing the genuineness of the injury claimed.

But there is a deeper issue in the case. The basis of the holding would appear to be that plaintiffs are not relying upon the breach of duty to their son, or upon the alleged injury to their son. On the contrary, they are parties to whom a duty

(intentional; plaintiff falsely accused of passing a counterfeit bill); Lewis v. Holmes, 109 La. 1030, 34 So. 66 (1903) (breach of contract for furnishing wedding dress); Graham v. Western Union Telegraph Co., 109 La. 1069, 34 So. 91 (1930) (defendant failed to deliver death telegram; treated as quasi-contract, because plaintiff not sender, but addressee); Haile v. New Orleans Ry. & Light Co., 135 La. 229, 65 So. 225 (1914) (intentional; plaintiff told that a person as fat as she should sit in rear of bus); Quina v. Roberts, 16 So. 2d 558 (La. App. Orl. Cir. 1944) (intentional; debt letter to plaintiff's employer).

35. *Ibid.* The conduct in *Quina v. Roberts* may not merit the descriptive "outrageous."

36. RESTATEMENT, TORTS § 46 (1948 Supp.); RESTATEMENT (SECOND), TORTS § 46 (1957).

has been owed and breached, with the result that they have undergone emotional damage — just as were the plaintiffs in the cases cited.[37] One problem with this approach has already been mentioned — the traditional significance accorded to the difference in the type of conduct involved. More basically, the statement that a separate duty is owed in one sense assumes the matter to be decided. If there is any validity to traditional tort doctrine, recovery will lie whenever a duty has been owed to plaintiff, that duty has been breached, and damage to plaintiff has been proximately caused thereby. The statement that a duty exists is often, as would appear to be true in the instant case, merely another way of saying that liability will be imposed. There is nothing wrong with saying that defendant owed plaintiffs a duty here to be prompt and accurate in divulging information about the ingredients in the poisons used. But it ought to be emphasized that finding a separate duty is not a reason for liability; it is but another way of stating that liability will ensue. If the existence of a separate duty is to be counted as a reason for imposing liability, then why not impose a duty upon the tortfeasor in cases like *Black v. The Carrollton R.R.*? Would it not be entirely plausible to state that the defendant in such a case owed a duty of due care to the injured child, based upon the reasonable foreseeability of injury to persons from negligent operation of the railway, and an entirely separate duty of due care to plaintiff-father, based upon the reasonable foreseeability of mental injury to parents who witness their children injured by a negligently-operated railway? It is true that in the instant case the physical actions which would be necessary in order for defendants to discharge the duty to the parents are different from those which would be involved in discharging the duty to the child. As to the parents, defendants are required to know and promptly divulge the ingredients of the poisons used; as to the child, to use due care in administering the poison. But is there any reason why this difference should be of significance?

Similar difficulties present themselves when the problem is put in terms of proximate causation.[38] This approach would

37. See note 34, *supra*.

38. An approach which the instant court seems to have repudiated (quoting from an annotation at 18 A.L.R.2d 240 (1951), as follows: " 'As to the solving of the question on legal principle, the better-considered opinions declare that it is not a question of proximate cause *but one of legal duty*.' " 135 So. 145, 152), yet followed. (*Id.* at 157.)

in the *Carrollton Railroad* case involve assuming the existence of a duty of due care, and in asking the question whether the injuries the father sustained were so remote from the act of negligence or so unforeseeable as not to be the proximate result thereof. In the instant case, the same approach would involve assuming the existence of a duty of due care in handling and usage of poisons, which would include reasonable knowledge of their ingredients, and in asking the question whether the injury sustained by the parents as the result of a failure to discharge that duty properly was without the realm of foreseeability to such an extent as not to be the proximate result of the breach. Here, again, the same anomaly — is the one less foreseeable or more remote than the other?

Despite these difficulties of rationale, the policy reason for extending liability in the *Holland* case is easily discovered. The primary reasons underlying holdings like that in the *Carrollton Railroad* case are fear on the part of the courts that proof of genuineness of the harm will be troublesome and that to allow recovery in such cases would be unduly provocative of litigation. The court was careful to point out that a duty restricted to the father and mother would hardly be subject to these criticisms. Further, the fact that the parties involved in the *Holland* case were in a position of reliance upon defendant's implied warranty of due care is an added safeguard against the danger of overly extending the rule of the case.

Res Ipsa Loquitur

In origin the phrase *res ipsa loquitur* was descriptive of a particular kind of case in which a finding of negligence was based upon circumstantial evidence. In that narrow class of cases the thing spoke for itself because the particular bit of data from which the fact of negligence was inferred was the occurrence of harm itself. However, in the way of easy phrases, the descriptive developed into a doctrine, with concomitant qualifications and requirements. One frequently-stated requisite to the application of the doctrine is that defendant must be in better position to explain the occurrence than plaintiff. This restriction has been criticized as being based upon an erroneous view of the nature of a *res ipsa* case, and any formalistic resort to it has been deplored because it is not a restriction which operates as to inferential proof generally, and because of the

unwisdom of a rule whereby "the strength of an inference is . . . measured in terms of how badly it is needed."[39]

Despite such criticism, the recent Louisiana jurisprudence indicates that the superiority of defendents' understanding of the accident is an often-stated, if less often operative, part of the doctrine. In at least five recent cases, various statements of the requirement that defendant must be in better position to explain the occurrence than plaintiff were made. In three of these cases, the *res ipsa loquitur* doctrine was nevertheless applied.[40] In the remaining two, where *res ipsa loquitur* was held unavailable to plaintiff, it is probable that the restriction in question had less effect than the circumstance that a variety of equally compelling inferences were permissible.[41]

A second and even less supportable restriction that has sometimes hampered use of the *res ipsa* doctrine is the notion that plaintiff cannot rely upon the inference presented by the fact of the accident if he has alleged or attempted to prove specific acts of negligence. The existence of this idea is probably explained by an unfounded feeling that a *res ipsa loquitur* case is something mysterious and different from others in which inference from circumstantial evidence is crucial, and therefore ought to be carefully hedged in. The restriction has no particular logical merit, and it is certainly a weighty argument that plaintiff "should not be denied the benefit of any natural inference which may arise from the occurrence of the accident merely because he does not care to rest his chances upon that inference alone."[42] In *Transcontinental Insurance Co. v. Gilette Oil Co.*,[43] defendant argued against applying the doctrine be-

39. Malone, *Res Ipsa Loquitur and Proof by Inference — A Discussion of the Louisiana Cases*, 4 LA. L. REV. 70, 92 (1941).

40. State Farm Mutual Automobile Insurance Co. v. Herrin Transportation Co., 136 So.2d 272 (La. App. 2d Cir. 1962) (Where plaintiff's automobile struck an unidentified metal object as he was meeting one of defendant's trucks, liability was predicated upon the inference that the object came from the truck. As a matter of fact, the object was never found nor identified, and defendant was actually as unable to explain as was plaintiff.); Bonura v. Barq's Beverages of Baton Rouge, 135 So. 2d 338 (La. App. 1st Cir. 1961) (exploding bottle of root beer); Maryland Casualty Company v. Rittiner, 133 So. 2d 172 (La. App. 4th Cir. 1961) (builders caused flash asphalt fire; liability predicated upon Article 667, and upon Article 2315 buttressed by res ipsa loquitur).

41. Kamra Lumber Co. v. Louisiana Power & Light Co., 132 So. 2d 688 (La. App. 1st Cir. 1961); Jefferson Davis Electric Cooperative, Inc. v. Mike Hooks, Inc., 134 So. 2d 326 (La. App. 3d Cir. 1961).

42. Malone, *Res Ipsa Loquitur and Proof by Inference — A Discussion of the Louisiana Cases*, 4 LA. L. REV. 70, 92 (1941).

43. 139 So.2d 541 (La. App. 4th Cir. 1962).

cause plaintiff had attempted to prove the cause of the accident and particular negligent acts of defendant. The court did not meet that argument, stating that "whether or not the doctrine is applicable is immaterial,"[44] because defendant would not be liable in either event.[45]

INVITEES AND LICENSEES

Traditional tort theory places persons who enter the land or premises of another in three categories — invitees, licensees, and trespassers. With respect to dangerous conditions on the land, the duty owed an invitee, a person who enters with the express or implied permission of the occupier under circumstances in which the invitation carries an implied representation of the safety of the premises, is ordinarily to use reasonable care to learn of such conditions and warn the invitee of the danger or to make the premises safe. A licensee is a person who comes upon the premises with the express or implied permission of the occupier for a purpose wholly his own. To him, the occupier's duty is generally to warn of any dangerous conditions which are actually known. With some exceptions, the only duty owed a trespasser is to warn him of known conditions once his presence is discovered.

The use of these classifications in determining the nature of an occupier's duty to persons on his premises has been subjected to some criticism as an arbitrary and artificial method of dealing with the problem. Despite such criticism, the distinctions persist. It is, however, notable that in at least three recent court

44. *Id.* at 543.

45. Several other recent cases involved res ipsa loquitur problems worthy of passing mention. In Wright v. Superior Oil Co., 138 So. 2d 688 (La. App. 3d Cir. 1962), plaintiff's water well was damaged by a seismographic explosion caused by defendant. Plaintiff recovered, but no mention of res ipsa loquitur was made in the case, arguably out of regard for the requirement that defendant be in better position to explain. In Montet v. Nicklos Drilling Co., 135 So. 2d 805 (La. App. 3d Cir. 1961), defendants had been engaged in pumping out their reserve pit, discharging red drilling mud and salt, and plaintiff's farmlands became salty and covered with a red substance. The court of appeal affirmed a trial court conclusion that plaintiff had failed to prove that his damage was caused by the defendant. The res ipsa doctrine was not discussed, but would clearly seem to have been available. It is often invoked in cases where the missing element is not breach of duty, but, as here, cause-in-fact. In Calvert Fire Insurance Co. v. Grotts, 136 So. 2d 836 (La. App. 4th Cir. 1962), plaintiff's car was destroyed by fire while in defendant's charge for the purpose of welding a trailer hitch on the rear bumper. The court stated that defendant's admission that his employee was using a welding torch near the gasoline tank of the car was "prima facie proof under the res ipsa loquitur doctrine, since Grotts' agent was using a dangerous instrumentality . . . close to a tank full of gasoline." *Id.* at 837-38.

of appeal cases, situations which ordinarily evoke reference to the categories were handled without expressly classifying the injured parties.[46] One of the three, *Jumonville v. Calogne*,[47] involved a plaintiff whose status has caused some difficulty — a social guest. Plaintiff in that case fell down the basement stairs in defendant's home while being shown to the bathroom by her hostess. The court recognized a duty on the part of the homeowner to warn plaintiff of existing dangers, but held that her fall was due to her own contributory negligence. Under the circumstances of the case, the duty owed plaintiff would have been the same whether she be classified as invitee or licensee, defendant homeowner being presumed to have knowledge of the existence of a stairway in his home — which probably accounts for the court's unconcern with the invitee-licensee distinction.

By way of contrast, plaintiffs were expressly classified in at least four recent cases. *Dedon v. Grant Chemical Co.*[48] involved the question whether plaintiff, who went into defendant's warehouse to inquire about a bill of lading but who deviated from his original purpose to get a drink of water, continued to occupy his original invitee status at the time his injury was sustained — when he drank from a jar containing a harmful chemical, believing it to be water. The court of appeal held that plaintiff continued to be an invitee, distinguishing cases in which invitees who remained on the premises after completion of their business mission were held to have been demoted to licensees when the business mission ceased; but pointed out that even if plaintiff herein were considered a licensee he would still recover, since defendants owed him a duty to warn of dangers of which they were aware.

In *Levert v. Travelers Indemnity Co.*,[49] plaintiff, a guest at a dance given by a civic organization, was classified as an in-

46. Jumonville v. Calogne, 141 So. 2d 430 (La. App. 4th Cir. 1962); Baker v. Hartford Accident and Indemnity Co., 136 So. 2d 828 (La. App. 1st Cir. 1961), in which plaintiff, a business guest who slipped on a wet service station driveway, was impliedly treated as an invitee but was denied recovery; LeJeune v. Hartford Accident and Indemnity Co., 136 So. 2d 157 (La. App. 3d Cir. 1961), in which plaintiff who tripped over a chair in the aisle of a department store was denied recovery because there was no showing that the chair was placed in that position by an employee of defendant or that it had been there long enough to impose a duty of knowledge and removal.

47. 141 So. 2d 430 (La. App. 4th Cir. 1962).

48. 136 So. 2d 758 (La. App. 1st Cir. 1961).

49. 140 So. 2d 811 (La. App. 3d Cir. 1962), also discussed in text acompanying notes 12, 24, *supra*.

vitee. In *Hartford Fire Insurance Co. v. Illinois Central R.R.*,[50] plaintiffs engaged in unloading some heavy machinery by crane near defendant's railroad track were classified as invitees, and liability was predicated upon defendant's failure correctly to predict the arrival time of a train which damaged plaintiffs' crane. The court quoted with approval from the trial court's judgment, in which the trial judge referred to a 1957 decision[51] that advocated abolishing the distinction between invitee and licensee and recognized classification of social guests as a major difficulty. The trial court in the instant case stated that "until the distinction . . . is directly adjudged and abolished, we will apply the existing invitee rule."[52]

Finally, in *Greenlee v. Sears, Roebuck and Co.*,[53] plaintiff, the purchaser of a hot water heater from defendant, sustained back injuries while assisting an employee of defendant in the unloading operations at plaintiff's home. The court of appeal, while stating that plaintiff occupied the status of an invitee as to defendant, held that it was not negligence for defendant to send only one employee to deliver the heater. Ordinarily, of course, the invitee classification applies to a plaintiff who has gone upon land occupied by another. However, support for the court's classification of plaintiff in the *Greenlee* case may be found in *Campbell v. All State Insurance Co.*,[54] in which the court wrestled with a similar problem and expressly held that the fact that defendant did not own the premises upon which the injury occurred was immaterial in light of the fact that defendant had requested plaintiff to assist him. Difficulties of this kind highlight the artificial nature of the invitee-licensee distinction.

LATENT BRAKE DEFECT AS A DEFENSE

The automobile driver who collides with another vehicle while outside his proper lane of traffic is ordinarily held to a strict burden of exculpation. This burden operated devastatingly against defendant in at least two recent cases.[55] In one of them,

50. 140 So. 2d 811 (La. App. 3d Cir. 1962).
51. Alexander v. General Accident Fire and Life Assurance Co., 98 So. 2d 730 (La. App. 1st Cir. 1957), noted at 19 LA. L. REV. 906 (1959).
52. 140 So. 2d 811, 926 (La. App. 3d Cir. 1962).
53. 138 So. 2d 866 (La. App. 2d Cir. 1962).
54. 112 So. 2d 143 (La. App. 1st Cir. 1949).
55. Breaux v. Valin, 138 So. 2d 405 (La. App. 3d Cir. 1962); Service Fire Insurance Co. v. Johnson, 138 So. 2d 410 (La. App. 3d Cir. 1962).

Breaux v. Valin,[56] defendant attempted to discharge her burden by showing that when she touched her brake pedal out of regard for a child running toward the highway, the brakes on her pick-up truck malfunctioned, causing the truck to veer to the left into plaintiff's lane of traffic. The court adverted to "Louisiana jurisprudence holding that the unsupported testimony of the driver that the brakes suddenly failed due to a latent defect is not sufficient evidence to prove that the accident was unavoidable for such reason."[57] Since defendant did not produce the testimony of a mechanic or other evidence of the existence of a defect in her brakes, this line of defense was deemed unworthy.

It is significant that the court of appeal decision was a reversal of the trial court's judgment in this case. It is evident that the trial court had accepted defendant's testimony as to the brake failure. Ordinarily, trial court findings of fact, particularly when based squarely upon testimony of in-court witnesses, are entitled to great weight on appeal; it is generally stated that such findings will not be overturned unless found manifestly erroneous.[58] The court in *Breaux* made no mention of the manifest error rule, presumably on the theory that the rule of non-acceptance of uncorroborated exculpatory testimony as to brake failure amounts to a rule of law. Therefore, in theory the court of appeal was not engaged in overturning a trial court finding of fact but in correcting a mistake of law.

In support of the requirement of additional evidence, the court cited two cases. In *Hassell v. Colletti*,[59] when defendant's tractor-trailer rig collided with the rear of plaintiff's stationary automobile, he was held liable despite his plea that his brakes suddenly failed. In the opinion of this reviewer, the language used by the court does not demonstrate any intention to establish an unbending rule of law that defendant will never be believed when he alleges that his brakes failed.[60] It is notable that the finding of the trial court was

56. Breaux v. Valin, 138 So. 2d 405 (La. App. 3d Cir. 1962).

57. *Id.* at 408.

58. See Tate, *'Manifest Error' — Further Observations on Appellate Review of Facts in Louisiana Civil Cases*, 22 LA. L. REV. 605 (1962); Hardy, *The Manifest Error Rule*, 21 LA. L. REV. 749 (1961); Comment, 21 LA. L. REV. 402 (1961).

59. 12 So. 2d 31 (La. App. Orl. Cir. 1943).

60. "The main witness . . . was . . . the driver of the truck and trailer. The sum and substance of his testimony is that the brakes on the trailer had been relined approximately a month and a half before the accident; that the

accepted in *Hassell*; no conflict with the manifest error rule was presented. Furthermore, the requirement of corroborating testimony did not appear to be crucial to the outcome, as it was in *Breaux*, since in *Hassell* the court stated that it was evident that the truck owner failed to have the brake system regularly inspected, and further that a statute requiring a second operative set of brakes had been violated.[61]

In the second case cited in *Breaux*, *Trascher v. Eagle Indemnity Co.*,[62] the court did refer to the requirement of some corroboration of the existence of defective brakes as a "rule of law,"[63] citing the *Hassell* case. In *Trascher*, as in *Hassell*, the accident occurred when defendant drove into the rear of plaintiff's stopped automobile. And here again, the trial court's finding was affirmed.

In *Foreman v. American Automobile Insurance Co.*,[64] Judge Tate, who was the author of the *Breaux* opinion, had earlier adverted to the requirement of corroborative testimony in the case of allegedly exculpatory brake failure, this time in dissent. In that case, plaintiff was a passenger in one of the trucks owned by defendant, his employer. The truck in which plaintiff was riding collided with the rear of another of defendant's trucks which was stopped in the highway. The majority of the court affirmed the trial court's decision for plaintiff based upon a finding that the accident occurred because the brakes of the truck in which plaintiff was riding were faulty, rather than because of any negligence on the part of the driver of the stationary truck. The conclusion that the brakes of the moving

brakes were checked every other week; that, on the day of the accident and prior thereto, they had been in perfect working condition and that, when he was descending the west ramp of the Huey P. Long bridge, they suddenly failed to respond to his timely application. If this testimony should be deemed sufficient to exonerate the defendants, it would indeed be an easy matter for any defendant in an accident of this kind to avoid the consequences of his neglect. While the doctrine of latent defects in automobiles has been recognized as a valid defense by the courts in actions of this kind, it is manifest that the proof submitted by the alleged tort-feasor must be of a most convincing nature. In fact, we think that the evidence should be such as to exclude any other reasonable hypothesis in respect to the cause of the accident except that it resulted solely from the alleged defect." *Id.* at 32.

61. See Comment, 5 LA. L. REV. 432, 461 (1943): "In [the *Hassell*] case where defendant's truck ran into plaintiff's parked car, a defense based on latent defects in the brakes was rejected because defendant did not attempt to prove the nature of the defect or that if it existed it could not have been discovered and remedied by proper inspection."

62. 48 So. 2d 695 (La. App. Orl. Cir. 1950).

63. *Id.* at 698.

64. 137 So. 2d 728 (La. App. 3d Cir. 1962), discussed in text accompanying note 2 *supra*.

truck were faulty was based upon testimony of its driver. Judge Tate dissented from refusal to grant a rehearing because "the courts do not allow the rather common exculpatory excuse advanced by drivers that an unanticipated brake failure was the cause of an accident . . . when such excuse is supported only by the uncorroborated testimony of the driver."[65]

Aside from Judge Tate's two recent statements of this rule, and the two cases cited by him in support thereof, no cases have been discovered in which it has received application. In *Marks v. Highway Insurance Underwriters*,[66] one defendant sought to exonerate himself by claiming sudden brake failure. The court rejected this defense without reference to any special requirement of corroborative evidence, simply stating that "the weight of the evidence is against defendants on this point."[67]

Where the alleged exculpatory latent defect is of a type other than brake failure, there is indication in the jurisprudence that the courts are indisposed to resort to any such rule. In *Lasseigne v. Kent*,[68] defendant's automobile swerved into the rear of plaintiff's vehicle while defendant was attempting to overtake and pass plaintiff. Defendant contended that the swerving of his vehicle was caused by the sudden puncture of a tire, and that the accident was therefore unavoidable. The court stated:

> "The . . . defense . . . that the swerving of the automobile was caused by a suddenly acquired puncture, depends entirely upon the determination of a question-of-fact. . . . There are circumstances which are corroborative of the testimony given by each set of witnesses, and had the record been presented to us without guiding light furnished by the opinion of our brother below, who saw and heard the witnesses, we would find it difficult indeed to arrive at the conclusion that the testimony for either side substantially preponderates. *But in such case the rule is applicable that a finding of fact made by a trial court will not be reversed, unless manifestly erroneous,* and we are unable to say that

65. *Id.* at 734. The *Hassell* and *Trascher* cases were cited.

66. 51 So. 2d 819 (La. App. 2d Cir. 1951).

67. *Id.* at 823. The court of appeal disagreed with the trial court as to the existence of the defect. The trial court gave judgment against defendant, stating that the accident was the result of "either the bad condition of the brakes . . . or bad driving." Quoted *id.* at 820. The court of appeal thought no brake defect had been established, but upheld the trial court's judgment on the basis of the "bad driving."

68. 142 So. 867 (La. App. Orl. Cir. 1932).

the finding in favor of plaintiff on this question of fact was manifestly wrong."[69] (Emphasis added.)

Likewise, there seems no disposition on the part of the courts to resort to any formal requirement of corroborative evidence in cases where the existence of brake failure is relied upon as evidence of negligence, rather than in exculpation.[70]

It is highly noteworthy that in both cases relied upon by the *Breaux* court in support of the rule in question, the trial court's finding of fact on the point of brake failure was affirmed; therefore, no conflict with the habitual deference accorded trial court findings of fact was presented. Furthermore, both of those cases involved factual situations in which defendant's automobile collided with the rear of plaintiff's stationary vehicle. It would seem that if there is any proper scope of application of a rule of law requiring defendant to produce some external evidence when he is relying upon a latent brake defect in defense, it should be restricted to cases of this kind — *i.e.*, where defendant's inability to stop caused the accident. Indeed, the court in *Breaux* appeared to acknowledge this situation as the typical one, stating that "an honest witness may indeed truthfully feel that the failure of his brakes to react as he desperately desired them to during the split-seconds of sudden accident was the cause of the accident instead of his own inattention or lack of control."[71]

DRIVER OF AUTOMOBILE AS AGENT OF OWNER

The advent of the teen-age driver provoked some machinations in the law of the parent-child relationship in most common law states. Policy demanded that some legal means of imposing liability upon the parent of a judgment-proof negligent teenager be devised. One of the methods commonly used was to seize upon any shred of an element of agency or employment between the parent and the child-driver, and thus to determine liability under the rules applicable to master and servant.

69. *Id.* at 868.

70. See Davis v. New York Underwriters Insurance Co., 141 So. 2d 673 (La. App. 1st Cir. 1962); Burton v. Southwsetern Gas & Electric Co., 107 So. 2d 62 (La. App. 2d Cir. 1958); Woodward v. Tillman, 82 So. 2d 121 (La. App. 1st Cir. 1955); Pine v. Edmonds, 73 So. 2d 318 (La. App. 2d Cir. 1954); Dejean v. Hattier, 65 So. 2d 623 (La. App. Orl. Cir. 1953); Allen v. Allbritton, 172 So. 198 (La. App. 2d Cir. 1937).

71. 138 So. 2d at 408.

Louisiana was able to stand smugly by and witness this struggle, since our long-standing rule of vicarious liability of parents obviated the problem.[72] However, something similar has apparently been taking place in our recent jurisprudence with regard to the responsibility of an owner-passenger for negligent harm caused by the automobile while in the control of another. Obviously, the existence of an actual agency or employment relationship will impose liability under familiar agency principles. *Service Fire Insurance Co. v. Johnson*[73] illustrates the more traditional agency relationship between owner-passenger and driver. There, defendant-owner, intoxicated, was being driven by a fifteen-year-old boy, whose negligence the court experienced no difficulty in imputing to defendant. On the other hand, *Mayberry v. McDuffie*[74] involved factual circumstances in which the agency relationship was more nebulous. There, the owner of the offending vehicle had lent it to a minister for the purpose of making some hospital visits. Her testimony that she accompanied him solely for the pleasure of the ride was not accepted by the court. While recognizing that "the presumptions flowing from the ownership and service of a motor vehicle . . . are rebuttable,"[75] the court nevertheless felt that "defendant relied solely upon her own testimony, and its unsatisfactory and unconvincing character is insufficient."[76]

By way of contrast, in *Washington Fire and Marine Insurance Co. v. Bacon*,[77] plaintiff's automobile was being driven by her son, apparently a major. The court stated that since the son was "using his mother's automobile to serve his own interests and was not engaged upon a mission for her either as agent or employee, his [contributory] negligence, if any, cannot be imputed to her."[78] Apparently, however, if plaintiff had been present in the automobile at the time of the accident, the presumption described in *Mayberry v. McDuffie* would have operated against her.

VIOLATION OF ZONING ORDINANCE AS NUISANCE PER SE

Louisiana is in accord with the majority of American states

72. See LA. CIVIL CODE art. 2318 (1870).
73. 138 So. 2d 410 (La. App. 3d Cir. 1962).
74. 135 So. 2d 366 (La. App. 2d Cir. 1961).
75. *Id.* at 367.
76. *Ibid.*
77. 138 So. 2d 667 (La. App. 4th Cir. 1962).
78. *Id.* at 669.

in consistently holding that the violation of a zoning ordinance amounts to a nuisance per se. The theory underlying this rule is often stated to be that such defiance of municipal government must be considered a nuisance at law.[79] Recent doubt was cast upon the universality of this rule in *Hutson v. Continental Oil Co.*,[80] in which defendant service station owner was in violation of ordinances of the City of Shreveport in two relatively minor particulars. Rejecting plaintiff's contention that the mere fact of defendant's violation of the ordinances was sufficient to characterize the activity in question as a nuisance per se, the court stated: "Absent the establishment of any element of damage, we find no authority by which individuals are vested with the right to an injunction for the purpose of preventing violations of a zoning ordinance."[81]

The *Hutson* decision casts doubt on the theory that it is the fact of defiance of governmental authority, rather than the character of the particular activity, which amounts to a nuisance. In a later case in the same circuit, the court referred to the *Hutson* case, stating that "it is made abundantly clear in the Hutson decision that the reason plaintiffs' demands were rejected was because of the minor nature of the violations involved."[82]

SOVEREIGN IMMUNITY — "SIDEWALK" EXCEPTION

A well-recognized exception to the rule of non-liability of a municipality for harm caused in the performance of a governmental function allows recovery for personal injuries resulting from the city's failure to keep streets and sidewalks in reasonable and safe condition for their intended use. The proper extent of this sidewalk exception was at issue in *Cook v. Shreveport*.[83] Plaintiff had tripped over a surveyor's stake, which city employees had driven into the ground within the fenced area of her yard. The court, apparently influenced by the fact that the stake was placed within a clearly-defined footpath leading from plaintiff's gate to her front door, held that the sidewalk exception would operate to plaintiff's benefit under these facts. A dissenting judge pointed out that the area in question

79. See 166 A.L.R. 659, 661 (1947).
80. 136 So. 2d 714 (La. App. 2d Cir. 1961).
81. *Id.* at 719.
82. Wright v. DeFatta, 142 So. 2d 489, 494 (La. App. 2d Cir. 1962).
83. 134 So. 2d 582 (La. App. 2d Cir. 1961).

was not open to the public, but clearly well away from the area which would ordinarily be expected to accommodate users of streets and sidewalks. In his view, the majority position represented an unreasonable extension of the exception. It is noteworthy that the *Cook* case reaches a result consonant with an apparent national trend toward diminution of the sovereign immunity doctrine.

VOLUNTARY INTOXICATION AND CONTRIBUTORY NEGLIGENCE

It is hornbook law that one who has voluntarily disabled himself by reason of intoxication is held to the same degree of care and prudence in the interest of his own safety as is required of a sober person. Further, evidence of intoxication is admissible as indicative of contributory negligence, and may be conclusive if it is shown that the intoxication was of such degree as to cause loss of control of the muscles and senses.[84] Two recent cases properly applied the general rule that intoxication offers no comfort to the contributorily negligent plaintiff.[85] But in *Johnson v. New Orleans Public Service Inc.*,[86] which turned upon the duty owed by a public carrier to an intoxicated passenger, the court of appeal stated, in its summary of the trial court's findings in that case: "The court was of the opinion that, as a result of his intoxication, Johnson was incapable of being contributorily negligent."[87] The opinion of the court of appeal makes no further reference to this portion of the trial court's holding, and the judgment for plaintiff was reversed, the court finding that no breach of the carrier's duty had been shown. In view of the overwhelming weight of authority against the implication that it is possible to be too drunk to be chargeable with contributory negligence, it seems apparent that the court of appeal did not intend that the trial court's statement to this effect be tacitly confirmed. On the contrary, the court's silence is explained by the absence of any necessity of dealing

84. See 38 AM. JUR. 883, 203 (1941).

85. Robinson v. Fidelity and Casualty Co., 135 So. 2d 607 (La. App. 1st Cir. 1961), holding that the dismissal of a father's suit for damages sustained by his seventeen-year-old son while drunk on wine sold to him by defendant in violation of statute was proper when son's contributory negligence was obvious from plaintiff's petition; Manuel v. United States Fire Insurance Co., 140 So. 2d 702 (La. App. 3d Cir. 1962), holding that defendant sheriff was not negligent in closing the jail door on plaintiff's little finger, and stating in dictum that even could defendant be shown to have been negligent, intoxicated plaintiff's contributory negligence would bar his recovery.

86. 139 So. 2d 7 (La. App. 4th Cir. 1962).

87. *Id.* at 8.

with the question of contributory negligence, since primary negligence was found to be lacking. However, in light of the completely erroneous nature of the trial court statement, perhaps an express rejection of it by the court of appeal would have been warranted.

DEFAMATION — QUALIFIED PRIVILEGE

Prior to the 1905 case of *Lescale v. Joseph Schwartz Co.*,[88] the scope of the privilege against defamation actions extended by Louisiana law to statements of parties and attorneys in judicial proceedings was ill-defined. That case, however, settled the proposition that the common law rule of absolute privilege does not apply in Louisiana. On the contrary, statements by attorneys or parties litigant in judicial proceedings[89] will be privileged only if relevant, made without malice, and with "probable cause."[90] Similar statements of the extent of this privilege have appeared in subsequent cases.[91] These cases have made clear that the existence *vel non* of probable cause is an issue to be determined on the facts of each case.

Further light was cast upon the content of the probable cause standard in the recent case of *Oakes v. Alexander*.[92] The court of appeal was faced with a problematical factual situation involving application of the privilege to pleadings in a civil suit. Defendants — who had been plaintiffs in the federal civil action wherein the questioned allegations were made — had charged plaintiffs with certain unethical and criminal acts. The instant court stated that it was "unnecessary to delve into any extensive details bearing upon the asserted libelous contents of these pleadings, for it is apparent, even upon a casual perusal . . . that the accusations . . . constituted charges of numerous breaches of ethical conduct, as well as the commission of criminal offenses of conspiracy to defraud and actual theft, all of which, if untrue, are libelous, per se."[93] The court went on to

88. 116 La. 293, 40 So. 708 (1905).

89. There has been some indication that a broader privilege may obtain with respect to witnesses. See *The Work of the Louisiana Supreme Court for the 1951-1952 Term — Torts*, 13 LA. L. REV. 278, 280 (1953).

90. 116 La. 293, 302, 40 So. 708, 711 (1905): "[A]n allegation is not privileged unless founded on probable cause."

91. See, *e.g.*, Dunn v. Southern Insurance Co., 116 La. 431, 40 So. 786 (1906); Sabine Tram Co. v. Jurgens, 143 La. 1092, 79 So. 872 (1918); Waldo v. Morrison, 220 La. 1006, 58 So. 2d 210 (1952).

92. 135 So. 2d 513 (La. App. 2d Cir. 1961). See companion case of Meadors v. Alexander, 135 So. 2d 518 (La. App. 2d Cir. 1961).

93. *Id.* at 514.

point out that in defendants' brief in this action, it was stated that no justification for the questionable allegations had been found by counsel in the record of the instant proceeding or in the record of the federal action. Construing this statement as an admission taking the issue of probable cause out of the case, the court experienced no difficulty in predicating liability on *Lescale* and other cases holding that the privilege in question is not absolute.

It is noteworthy that defendants had acquired new counsel since the earlier federal court action in which the allegedly defamatory pleadings were filed. Counsel in the instant case argued strongly that defendants should not be held responsible for the unwise statements of prior counsel. The above-mentioned fatal statement in defendants' brief was made in the effort to buttress this argument.

The court, referring to the fact that defendants had signed the pleading affidavit, found no merit in the attempt to transfer the onus from defendants' shoulders to those of prior counsel. In light of the position taken by the court on this argument, it is perhaps unfortunate that the brief's admission that no justification for the pleadings could be found was taken so literally. If the statement by the court that the allegations were libelous on their face was based upon study of the record, and may further be taken to mean that the statements were both untrue and made without probable cause, well and good. However, if the court based this statement on the admission by defendants' second set of counsel that no justification could be found, this is another matter. It seems doubtful that counsel meant to admit that the questioned allegations were made without probable cause. The term "justification" has not traditionally been substituted for the "probable cause" terminology of the jurisprudence. It seems more likely that counsel's statement was used with reference to the presence in the record of factual basis for the allegations. If this were the case, then inquiry by the court into the requirements of the probable cause standard would not have been precluded.

ASSAULT AND BATTERY

Any unauthorized offensive or harmful touching amounts to a battery. This definition includes any such touching, although incident to medical treatment. However, because of the exigen-

cies of medical practice, the determination whether treatment is "authorized" — *i.e.*, whether there has been consent to the treatment — often takes on a different color than in the ordinary battery case. Thus a doctor is privileged to proceed without consent in the face of an extreme emergency, on the theory that the unconscious patient is to be presumed to have consented to the effort to save him from death or serious harm. Likewise, often a patient will be held to have impliedly consented to treatment by reason of the special relationship existing between him and the doctor under circumstances which would not constitute an implied consent absent such relationship. Despite these differences in application, however, the rules remain the same for unauthorized medical treatment as for any other allegedly harmful or offensive touching. If the patient is not found to have consented to the treatment as a whole, or if the doctor is found to have gone beyond the bounds of consent given in the course of his treatment of the patient, a battery will have been committed.

The proper application of these legal principles was in question in *Carroll v. Chapman*.[94] Plaintiff had presented herself to defendant, a chiropodist, complaining of a callus formation on the ball of her right foot. In 1958 defendant treated her for the first time, removing the callus without penetrating the outer skin. On February 8, 1960, plaintiff returned to defendant, the callus having recurred in a worsened condition. This time defendant undertook to remedy the situation by removing a portion of a metatarsal. This remedy called for surgery, which was performed. The operation was not a success, leaving plaintiff with a deformed foot, and she brought suit, claiming that she was unaware that the bone was to be removed until defendant was well into the operative procedure. The trial court gave her a judgment based on her lack of consent to the treatment in question. The court of appeal reversed. After a thorough review of the record, the court found that there was no showing of express consent. However, adverting to a presumption of consent "to a minor operation where the probability of ill consequences is rather remote,"[95] the court found that plaintiff had impliedly consented to the operation.

The reviewer is left with the distinct impression that plaintiff herein had not the slightest idea that a piece of bone was

94. 139 So. 2d 61 (La. App. 2d Cir. 1962).
95. *Id.* at 66.

about to be taken from her foot, and might well have balked had she been warned that such was to be the treatment. It appears that defendant did not indicate to the patient that the treatment would be any way different from that earlier received and that preparations for the treatment would not have indicated such difference. The court's finding of implied consent seems to be based primarily upon the presumption that by submitting to treatment plaintiff had consented to "minor" operations. It is noteworthy that the court cited no authority for the existence of such a presumption, and it is submitted that to originate one would be undesirable. Protection of the medical profession against frivolous battery suits is of course desirable. On the other hand, the law is equally concerned with protecting parties from unconsented-to invasions of personality at the hands of anyone, and in the instant case it seems that just such an invasion had taken place. In striking a workable balance between these aims, courts are assisted by the flexibility of the usual approach to the question of the existence of consent to medical treatment. A presumption of consent to minor operations "where the probability of ill consequences is rather remote"[96] would, if literally applied, rob this approach of much of its flexibility.

MARITAL REGIMES[1]

*Robert A. Pascal**

SUITS TO ENFORCE COMMUNITY RIGHTS

Ordinarily only the husband may sue to enforce a community right. The general rule was applied in *Warren v. Yellow Cab Co.*,[2] a suit to recover for losses borne by the community of

96. *Ibid.*

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1. Decisions on this subject matter applying well understood principles and rules, and which therefore need not be discussed, are: Sylvester v. Sylvester, 137 So. 2d 716 (La. App. 3d Cir. 1952) on marital property following a reconciliation; Simon v. Simon, 138 So. 2d 260 (La. App. 2d Cir. 1962); Succession of Cazendeck, 138 So. 2d 613 (La. App. 4th Cir. 1962); and Monk v. Costin, 134 So. 2d 598 (La. App. 2d Cir. 1961), on the presumption things acquired during marriage are community property; Johnson v. Shreveport Transit Co., 137 So. 2d 463 (La. App. 2d Cir. 1962) and Gallie v. Ingraham, 140 So. 2d 741 (La. App. 4th Cir. 1962) on torts of the wife; and Egstrom's of Alexandria, Inc. v. Vaughn, 138 So. 2d 672 (La. App. 3d Cir. 1962) on eligibility for homestead rights.

2. 136 So. 2d 319 (La. App. 2d Cir. 1961).