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Erroneous Workmen's Compensation Payments: Effective Dodge of Tort Liability?

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by the majority only as to degree. *Gault's* importance lies in the Court's recognition that due process requires more safeguards in juvenile courts than have previously been provided. It is likely that notions of fundamental fairness will give rise to the application of additional constitutional safeguards in the future.[29]

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Erroneous Workmen's Compensation Payments: Effective Dodge of Tort Liability?

After four years of receiving workmen's compensation payments for an injury sustained while employed by defendant as a clerk, plaintiff was notified that payments were being discontinued. Defendant contended payments had been made only by error, that plaintiff was not engaged in a hazardous occupation, and that her employer (defendant) was not engaged in a hazardous business. Plaintiff sued for workman's compensation or, in the alternative, damages for injury ex delicto. The trial court upheld both defendant's exception of no cause of action as to workmen's compensation and the exception of prescription to her action ex delicto. On appeal plaintiff's counsel conceded that the workmen's compensation statute afforded no coverage to plaintiff. *Held*, the ex delicto claim was prescribed; prescription was not suspended or interrupted by the erroneous payment of workmen's compensation. *Williamson v. S. S. Kresge Co.*, 186 So.2d 696 (La. App. 4th Cir. 1966), *writs denied*, 187 So.2d 741.

Does this case suggest a ready scheme for an employer

29. Several state courts, relying on the instant decision, have required recordation of the proceedings, a point which was mentioned but not ruled upon in *Gault*. Ebersole v. State, 428 P.2d 947 (Idaho 1967); Summers v. State, 227 N.E.2d 680 (Ind. 1967). It has also been held, as a result of *Gault*, that juveniles have the same rights as adults to suppress illegally obtained evidence (State v. Lowery, 95 N.J. Super. 307, 230 A.2d 907 (1967), and that change of venue procedure must be accorded juveniles (State v. Lake Juvenile Court, 228 N.E.2d 16 (Ind. 1967)). It seems certain, moreover, that the rationale of *Gault* will not be limited to proceedings in juvenile courts. Already a state court has cited *Gault* as authority for its decision applying right to counsel to proceedings before a lunacy commission. Commonwealth v. Shovlin, 210 Pa. Super. 295, 231 A.2d 760 (1967). The court said: "The argument that McGurrin has not been formally convicted of a crime is no more persuasive than the argument in *Gault* that the juvenile is only adjudged 'delinquent.' Euphemistic terminology cannot obscure the fact that McGurrin has been thrown in the company of murderers, rapists, and criminals of every other conceivable nature." *Id.* at 298, 231 A.2d at 762. See also Parker v. Heryford, 379 F.2d 556 (10th Cir. 1967).

to escape tort liability by forfeiting a relatively small total of workmen's compensation payments until the ex delicto claim has prescribed? The principles underlying workmen's compensation[1] militate against such unethical use by the employer, but the result of the *Williamson* case points out a hiatus between Louisiana's workmen's compensation legislation[2] and code provisions on ex delicto actions.[3]

Workmen's compensation coverage in Louisiana is applicable to hazardous businesses and employments listed in the Workmen's Compensation Act.[4] This limitation, however, does not necessarily mean that other businesses are excluded. Though unlisted, a hazardous-in-fact employment can be brought under compensation coverage by an express agreement between employer and employee. Additionally, employers and employees in businesses which are neither listed nor hazardous-in-fact can extend the coverage of the act to themselves by an express agreement in writing.[5] From these allowable extensions of compensation coverage, the legislative intent is obvious: a statute compulsory for some, but available to others who choose to reap its benefits. Further indication of a legislative tendency to broaden the compensation principle in Louisiana is found in a 1958 amendment[6] which provides that compensation insurers are estopped to deny the hazardous character of the insured's business. However, all other defenses upon which the insured might rely, such as the defense that the work was not a regular part of the employer's business,[7] remain available. The amendment has been interpreted to have no retrospective operation on an insurer.[8]

1. Workmen's compensation is predicated on compromise. The employer sacrifices immunity he would enjoy from accidents not caused by his fault and gains relief from demands for full tort damages. The employee foregoes his right to claim damages commensurate with the injury received for the security, albeit lesser value, of compensation payments to replace lost wages. W. MALONE, LOUISIANA WORKMEN'S COMPENSATION LAW AND PRACTICE § 32 (1951).

2. LA. R.S. 23:1021-1351 (1950).

3. LA. CIVIL CODE art. 2315 (1870) provides, in part: "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it."

Id. art. 3536 provides, in part: "The following actions are also prescribed by one year: That . . . resulting from offenses or quasi offenses."

4. LA. R.S. 23:1035 (1950).

5. W. MALONE, LOUISIANA WORKMEN'S COMPENSATION LAW AND PRACTICE § 92 (1951).

6. LA. R.S. 23:1166 (Supp. 1968), added by La. Acts 1958, No. 495, § 1.

7. Richard v. Landreneau Enterprises, 167 So.2d 827 (La. App. 3d Cir. 1964).

8. W. MALONE, LOUISIANA WORKMEN'S COMPENSATION LAW AND PRACTICE § 104 (Supp. 1964).

The 1958 amendment did not apply in *Williamson* since defendant was not insured. Additionally, it must be assumed from the reported decision that there was no written agreement for coverage.

The Louisiana Workmen's Compensation Act has a special provision on prescription of compensation claims.[9] If an employer makes a compensation payment within a year following the accident, prescription is interrupted and begins to run anew from the date of the last payment.[10] In *Williamson*, had plaintiff been entitled to workmen's compensation, prescription would have started running from the date of her employer's last payment to her, which was only weeks before filing of the suit.

It is also pertinent to note that had plaintiff been covered by workmen's compensation, her only legal remedy would have been under the act, for it excludes other remedies.[11] However, the worker whose claim falls outside the act has a right of action against the employer ex delicto,[12] despite the fact that he may have accepted erroneous workmen's compensation payments in the interim.[13]

Therefore, having no right to workmen's compensation, plaintiff on appeal confined herself to seeking damages in tort, with defendant's plea of prescription liberandi causa the sole issue.

The basic theory of liberative prescription has been described as "the loss of a right by reason of failure to use it during a period when it could have been exercised."[14] The rationale is that the law affords the action (ex delicto in the instant case) and can regulate its effective use. Prescription of tort claims is designed to relieve those who may be charged with commission of torts from fear of litigation and the uncertainty of unsettled obligations.[15] Thus the law discourages the injured from delinquency in taking action.[16] The law of prescrip-

9. LA. R.S. 23:1209 (1950) provides, in part, that all claims are barred one year after time of injury unless judicial proceedings have been filed or the parties have agreed on payments.

10. La. R.S. 23:1209 (1950); W. MALONE, LOUISIANA WORKMEN'S COMPENSATION LAW AND PRACTICE § 384 (1951).

11. LA. R.S. 23:1032 (1950).

12. Atchison v. May, 201 La. 1003, 10 So.2d 785 (1942).

13. Gerstmayr v. Kolb, 158 So. 647 (La. App. Orl. Cir. 1935).

14. *The Work of the Louisiana Supreme Court for the 1946-1947 Term—Prescription*, 8 LA. L. REV. 239, 241 (1948).

15. Davies v. Consolidated Underwriters, 14 So.2d 494 (La. App. 2d Cir. 1943).

16. LA. CIVIL CODE art. 3518 (1870) provides for legal interruption of prescription by filing of suit.

tion is not without its balancing aspects, however, and there are two main exceptions to the rule that prescription begins to run from the time of the injury: the delayed-knowledge theory[17] and *contra non volentem agere nulla currit praescriptio* (prescription does not run against one who is unable to act).[18]

Testing either of these theories in application to the *Williamson* fact situation is an interesting maze to follow, but leads only to the conclusion that neither will provide relief sought by plaintiff.

The delayed-knowledge theory involves the starting point for computing prescription. Normally one-year prescription of a tort action begins at the date of the injury, but when damage is unknown to the injured party, prescription will not begin until the date of knowledge. However, this exception to the general rule contemplates lack of knowledge of the injury itself;[19] it does not contemplate lack of knowledge of the right. In the instant case, plaintiff knew she was injured at the occurrence of the accident. Regardless of actual knowledge *vel non* of her legal rights, Louisiana law charges her with knowledge,[20] as *Williamson* was quick to point out.[21]

Contra non volentem contemplates relief for those who lack legal capacity to act. The maxim expresses a "suspension" of the running of time of prescription "in favor of . . . [persons] . . . while under legal incapacity to act in the exercise of their rights."[22] Typical examples are minors and interdicts. Thus plaintiff might have prevailed in a plea of *contra non volentem* if acceptance of workmen's compensation payments were deemed

17. *Id.* art. 3537 provides that prescription of a tort claim for property damage will not begin to run until the owner of the property has knowledge or is chargeable with the knowledge of the damage. See thorough explanation in *The Work of the Louisiana Supreme Court for the 1945-1946 Term—Torts and Workmen's Compensation*, 7 LA. L. REV. 246, 253 (1947).

18. For history of *contra non volentem* in Louisiana see Note, 32 TUL. L. REV. 783 (1958).

19. Logically, it would seem rare for a personal injury to be unknown to the party at the time of the delict. However, in Perrin v. Rodriguez, 153 So. 555 (La. App. Orl. Cir. 1934), the court upheld the delayed-knowledge theory in favor of a dental patient who suffered from roots of teeth being left in the gums. Prescription did not start to run against the plaintiff when there was no knowledge of the fact that there was damage, even though it did not appear that the knowledge was intentionally concealed from him.

20. LA. CIVIL CODE art. 7 (1870).

21. 186 So.2d 696, 698 (La. App. 4th Cir. 1966).

22. *The Work of the Louisiana Supreme Court for the 1951-1952 Term—Prescription*, 13 LA. L. REV. 262, 265 (1953).

a temporary legal bar to plaintiff's assertion of a tort right. This, however, is not the Louisiana rule.[23]

In *Williamson*, plaintiff, conceding the abstract applicability of the rules of prescription, contended that the defendant company was estopped from pleading prescription to the tort action by virtue of its having paid her compensation. She argued that defendant had "lulled her into a sense of security and, in fact, induced her to refrain from filing suit ex delicto."[24] In essence this is a plea of *estoppel in pais*.[25]

Estoppel is not limited to a certain type of action such as contract, but has been recognized generally in tort actions.[26] The *Williamson* court maintained that the length of the workmen's compensation payments, about four years, precluded "any suggestion that they were made in order to intentionally defeat"[27] the one-year prescriptive period, implying that no estoppel could be found without the intent element in defendant's act. It is submitted that not only is it impractical to judge intent merely by the length of payment,[28] but also that intent is not an essential element to a finding of equitable estoppel.[29]

23. See note 13 *supra* and accompanying text. The *Williamson* court cited two cases which refused plaintiffs the application of the maxim: Ayres v. New York Life Ins. Co., 219 La. 945, 54 So.2d 409 (1951), and Green v. Grain Dealers Mut. Ins. Co., 144 So.2d 685 (La. App. 4th Cir. 1962). In *Ayres* plaintiff asserted inability to act because of physical incapacity through illness. In *Green* claimant alleged deliberate misrepresentation by an insurance adjuster led to the delay in filing suit.

24. 186 So.2d 696, 698 (La. App. 4th Cir. 1966).

25. BLACK, LAW DICTIONARY 689 (3d ed. 1933), quotes Graves & Gross v. Leach, 192 Ala. 164, 68 So. 297, 298 (1915): "'An "equitable estoppel" or "estoppel in pais" arises when one represents by words of mouth, conduct, or silent acquiescence that a certain state of facts exists, thus inducing another to act in reliance upon the supposed existence of such facts, so that if the party making the representation were not estopped to deny its truth, the party relying thereon would be subjected to loss or injury.'"

26. McCampbell v. Southard, 62 Ohio App. 339, 23 N.E.2d 954 (1937), held that the doctrine of estoppel against pleading the statute of limitations applied to actions *ex delicto* as well as *ex contractu*. *Accord*, Boston & Albany R.R. v. Reardon, 226 Mass. 286, 115 N.E. 408 (1917); Renackowsky v. Water Comm'n, 122 Mich. 613, 81 N.W. 581 (1900).

27. 186 So.2d 696, 698 (La. App. 4th Cir. 1966).

28. Does the court intimate something less than four years might be "intentional"? Two years? One year and a day? If length of time of payments is to be the test, incongruous decisions could be forthcoming. In the *Williamson* case, defendant paid a total of approximately $5,500 by which he escaped a claim for $109,500 and a possible total of almost $5,000 more in weekly installments up to 400 weeks total; this was not intentional. Hypothetically, another employer might try to escape a mere $50,000 claim with total compensation of $5,500, but in slightly over three years instead of four, and be deemed "intentional."

29. "The statute of limitations is for the benefit of individuals, and not to secure general objects of policy . . . [W]hile the doctrine of estoppel in pais rests upon the ground of fraud, it is not essential that the representa-

The court's ruling that the prescription was neither "suspended" nor "interrupted" by the workmen's compensation payments confuses elements of prescription with the theory of estoppel. Estoppel in pais is not based on prescription being suspended or interrupted. Rather estoppel recognizes that prescription has accrued, but that the defendant is barred from pleading it.[30]

Noting only three other cases,[31] the *Williamson* court readily asserted that Louisiana jurisprudence "militates" against the plaintiff's right. This writer suggests that although the decision is in keeping with Louisiana law and jurisprudence on liberative prescription, the result "militates" against equitable principles and is completely at odds with the spirit of workmen's compensation. Admittedly if plaintiff had been covered by workmen's compensation, she would have had no choice of remedy; however, her required relinquishment of tort rights would have been counterbalanced with her right to compensation payments in keeping with the degree of disability. Conceding that plaintiff willingly accepted compensation payments in lieu of tort damages, she did not willingly agree to a discontinuance of compensation at the option of defendant. This is not to impute bad faith to the instant employer, but it seems manifestly unfair to allow any employer, under cover of law, to engineer minimization of his own liability, however unconsciously, to the detriment of his employee's legal rights.

It seems the application of the equitable doctrine of estoppel would have been justified in the instant case, for "the test appears to be whether in all the circumstances of the case conscience and duty of honest dealing should deny one the right to repudiate the consequences of his representations or conduct."[32] Perhaps this is the route courts will chart if some

tions or conduct giving rise to its application should be fraudulent in the strictly legal significance of that term, or with intent to mislead or deceive." Howard v. West Jersey & Seashore R.R., 102 N.J.Eq. 517, 520, 141 A. 755, 757 (1928); *accord*, Annot., *Estoppel Against Defense of Limitations in Tort Actions*, 77 A.L.R. 1044 (1932).

30. Renackowsky v. Water Comm'n, 122 Mich. 613, 81 N.W. 581 (1900). See note 29 *supra*.

31. See note 23 *supra* and accompanying text. Thompson v. Staples, 341 F.2d 536 (5th Cir. 1965), a personal injury case, held that claimant's allegation that an insurance adjuster made deliberate misrepresentations leading claimant reasonably to believe that insurer had fully intended to settle claim did not avoid the application of the Louisiana one-year prescription statute.

32. Howard v. West Jersey & Seashore R.R., 102 N.J.Eq. 517, 520, 141 A. 755, 757 (1928).

unconscionable employer adopts the tactics suggested by the *Williamson* fact situation.

An estoppel similar to that of the 1958 amendment[33] affecting workmen's compensation insurers could be extended by legislation to cover cases of uninsured employers who make workmen's compensation payments of this nature. However, because the amendment covers only the defense of nonhazardous nature of employment, such estoppel might require extension to several of the other more important defenses available to employers. Such legislative measures would seem necessary only in the face of a widespread use of this dodge of tort liability by "erroneous" payments.

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MINERAL LAW—LEASES—NECESSITY OF PUTTING IN DEFAULT

Plaintiff-lessor sued for cancellation of a mineral lease, alleging shut-in royalties had not been paid.[1] Defendant-lessee answered that by the terms of the lease the lessor was obliged to give notice of breach before bringing action on the lease[2] and that notice had not been given. Defendant also pleaded that it owed no royalties on the lease. The district judge cancelled

33. See note 6 *supra* and accompanying text.

1. Plaintiff also contended that production royalties had not been timely paid, but neither the district judge nor the First Circuit relied on nonpayment of production royalties in rendering their decisions. The shut-in royalty clause, clause 3(d) in the lease, reads as follows:

"For any period or periods when, after thirty (30) days following discovery of gas or distillate on the leased premises such product is not being sold due to lack of a market and is not being used off the leased premises or in the manufacture of gasoline or other product, and for that reason the well or wells are shut-in, Lessee shall pay as advance royalty for the shut-in well or wells an amount per well as set forth in paragrah 4(e) hereof and pro rata for any lesser period. Said advance royalty shall be payable within thirty days after the shutting-in of the well or wells. Under such circumstances, it will be considered that gas or distillate is being produced, but such gas well cannot be shut-in for a period longer than two (2) consecutive years."

Clause 4(e) of the lease states: "For the purpose of calculating shut-in gas royalty payments, shut-in royalties shall be calculated at $50.00 per acre per well per year (an arpent is deemed to be an acre)."

2. Clause 9 states: "In the event Lessor considers that Lessee has failed to comply with one or more of its obligations hereunder, either expressed or implied, Lessor shall notify Lessee in writing setting out specifically in what respects Lessor claims Lessee has breached this lease. The service of such notice and the lapse of thirty (30) days without Lessee's meeting or commencing to meet the alleged breaches shall be a condition precedent to such action by Lessor on this lease."