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Private Law: Torts

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latter's vendor, who was a local distributor, and (3) the manufacturer of a steam bath unit. His actions against the seller and the distributor were dismissed by the trial court and he was given judgment against the manufacturer. He appealed inasmuch as the judgment dismissed his action against the seller and the distributor. It was held on appeal that plaintiff's suit against the seller should not have been dismissed. The dismissal in favor of the distributor was upheld on the ground of lack of privity. Not considered was the propriety of the judgment against the manufacturer since this defendant had made no appearance at any time in the suit. Inasmuch as the seller had bought the unit from the distributor it would appear that the plaintiff acquired by way of tacit assignment the seller's right against the distributor,[7] but this contention was apparently not presented to the court. From this point of view, privity is not the issue although a question does arise concerning whether the buyer may sue both his vendor and his vendor's vendor.[8]

TORTS

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The Louisiana Supreme Court in *Grant v. Touro Infirmary*[1] correctly held a surgeon negligent for his failure to remove a sponge from an incision before closing it. The general rule according to Corpus Juris Secundum,[2] classifying the failure as negligence per se, was cited with approval.

The court also held that the surgeon and the hospital had a division of control over the nurses attending the operation and assisting with it; hence, the borrowed servant rule did not apply. The conduct of the nurses was material because a nurse's failure to count sponges correctly during the operation was clearly negligent.

The precise nature of the nurse's function was also important on the overpowering issue of whether Touro's liability insurance carrier had correctly denied coverage and refused to defend in reliance on the clauses in the policy excluding coverage for the

7. *See* McEachern v. Plauche Lumber & Const. Co., 220 La. 696, 57 So.2d 405 (1952); POTHIER, CONTRAT DE VENTE nos 215-16 (Bugnet ed. 1861).
8. *Id.*
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1. 254 La. 204, 223 So.2d 148 (1969).
2. 70 C.J.S. *Physicians and Surgeons* § 48, at 969 (1951).

rendering of medical, surgical, or nursing services or treatment.[3] The insurer argued that the counting of the sponges was the rendering of nursing services and also was service of a professional nature. The court held, in accordance with prior jurisprudence, that counting sponges was not a professional service, nor was it within any of the other exclusionary clauses of the policy.

With the insurer's diligent denial of coverage as an issue in the case, it was predictable that the charitable immunity claimed by Touro would be attacked, not only on the premise that the hospital did not qualify for the doctrine, but that the doctrine itself should be repudiated by the Louisiana courts. On the first count, Touro was found to qualify exactly for the definition of a public charitable institution both under the Louisiana jurisprudence and that recited in American Jurisprudence.[4] On the second count, the court said such a change in the law should be left to the legislature. The majority opinion was not particularly sanguine about the retention or rejection of the doctrine, on the one hand, citing the criticism of the doctrine by text-writers and by the decisions in some states and, on the other, citing the long acceptance of the doctrine in our courts, and its present restricted character.

Three Justices vigorously dissented from the retention of the doctrine, arguing basically that it is no longer a sound theory and, having been court-adopted, could be court-repudiated.

If the court were convinced the doctrine should be rejected, there is ample authority—from no less than the fabled Gény—that it would be proper judicial method for the court itself to interpret anew not only the customary law, but the written law as well, to implement the current values of society, and thus abandon the theory without legislative sanction.[5]

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3. Grant v. Touro Infirmary, 254 La. 204, 211, 223 So.2d 148, 151 (1969):
"A. The Rendering Of Or Failure To Render
"1) Medical, surgical . . . or nursing service or treatment; . . .
"2) Any service or treatment conducive to health or of a professional nature; . . .
"B. The Furnishing Or Disposal Of . . . Surgical Supplies Or Appliances. . . .

4. Jordan v. Touro Infirmary, 123 So. 726 (La. App. Orl. Cir. 1922). 15 AM. JUR. 2D, *Charities* § 148 at 156 (1964).

5. GÉNY, METHOD OF INTERPRETATION AND SOURCES OF PRIVATE POSITIVE LAW no. 186 (La. St. L. Inst. transl. 1963).

Continuing in the medical field, the fourth circuit[6] considered the same type of exclusionary clause as described above in *Grant v. Touro* and concluded that the decision of the nurses in a hospital to refrain from calling the doctor for a patient in worsening condition was an act of nursing service falling squarely within the exclusion.

In *Cothern v. LaRocca*[7] a restaurant operator was held liable in damages to a patron-plaintiff who was injured as she alighted from her car and stepped into a hole in the ground which housed a water valve. A wooden shield usually covered the hole, but was missing at the time of the injury. The hole was not on the restaurant property but was on the property of the adjoining motel. Plaintiff's car was parked partially on the restaurant property and partially on the motel property, as other restaurant patrons often parked. The court exonerated the motel owner on the grounds that plaintiff was at best a licensee and the motel owner had not breached the duty of care thus owed to her.

The restaurant owner's liability was predicated upon the rule that a "lessee who invites the public to his leased premises owes to them the reasonable care of providing a safe place for them therein."[8] The obvious problem is raised that a burden of care for *another's* premises may have been imposed upon this lessee. The exoneration of the motel owner and the casting in judgment of the restaurant operator both seem eminently just, and the jurisprudential solution seems to be as good as any which might be worked out. The case illustrates, however, the wisdom of abandoning the thicket of invitee-licensee-trespasser distinctions and of applying instead the conventional rules of ordinary negligence, which is what the court here seems to have done very well. A student casenote will discuss the case in a later issue of this *Review.*

In *Bazanac v. State of Louisiana, Department of Highways,*[9] the court held that the highway department was immune from suit in tort and that the immunity was not affected by the *Hamilton*[10] case or by the 1960 amendment to article 3, section 35, of the Louisiana Constitution of 1921. On the other hand,

6. Tankersley v. Ins. Co. of North America, 216 So.2d 333 (La. App. 4th Cir. 1968).
7. 221 So.2d 836 (La. App. 4th Cir. 1969).
8. *Id.* at 842.
9. 218 So.2d 121 (La. App. 4th Cir. 1969).
10. Hamilton v. City of Shreveport, 247 La. 784, 174 So.2d 529 (1965).

the First Circuit and the Third Circuit Courts of Appeal both have held to the contrary in the *Lambert*[11] and *Herrin*[12] cases, respectively. Additionally, in *Bazanac*, the fourth circuit held that the provisions of Civil Code article 667 do not apply to the highway department, while in the *Reymond* case the first circuit held to the contrary. In view of the writs granted by the Louisiana Supreme Court in *Bazanac* and in *Herrin*, the conflict should soon be resolved.

Boudreaux v. Allstate Finance Corporation[13] adds to the growing list of cases properly allowing damages for emotional distress produced by intentional harassment and embarrassment of a debtor by his creditor.

In *Marcantel v. Aetna Cas. & Surety Co.*[14] the court said:

> ". . . When opposing versions of an accident are given at a trial, and when under either version at least some of the parties to the trial must necessarily recover, the decisional function requires the trier to adjudicate the determinative *fact* issue which will resolve which party recovers. Under such circumstances, the trier of fact commits error of law when it rejects all claims by refusing to decide which version is correct or to determine the central *fact-issue* simultaneously essential to the recovery by one party and to the denial of recovery to the other." (Emphasis added.)

The quoted passage is the essence of the concurring opinion amplifying the holding in *Marcantel.* It announces a judicial obligation for fact finding which the Louisiana Supreme Court has enunciated and which has been enforced a number of times. *Marcantel* involved a head-on collision with claims by guest passengers and others in both cars. The evidence was conflicting as to which car, if either, was in the wrong lane when the impact occurred. The trial court said it could not resolve the conflicting testimony on that point of fact and dismissed all suits for lack of a preponderance of evidence of negligence on the part of either driver. One guest passenger-claimant should have recovered regardless of the lane in which the impact occurred. The appellate court here admonished the trial court that at the conclusion of the taking of evidence every essential fact has either been

11. Lambert v. Austin Bridge Co., 189 So.2d 752 (La. App. 1st Cir. 1966).
12. Herrin v. Perry, 215 So.2d 177 (La. App. 3d Cir. 1968).
13. 217 So.2d 439 (La. App. 1st Cir. 1968).
14. 219 So.2d 180, 185 (La. App. 3d Cir. 1969).

established by a preponderance of the evidence[15] or it has not, and found that the pile of debris in one lane gave a preponderance. In utilizing this burden to find the facts based upon the evidence adduced, one must keep in mind the distinction between discharging the burden of proof on a disputed fact and discharging the burden of establishing all essential facts requisite to proving the cause of action urged.

MATRIMONIAL REGIMES

*Robert A. Pascal**

SCOPE OF THE SECTION

The Symposium of last year[1] did not contain a discussion of the matrimonial regime decisions of the judicial year 1967-68. For this reason the more significant decisions of that year and the present judicial year will be mentioned here. Space limitations, however, require the writer to minimize his remarks and, it being more important to offer guidance than to praise, most comments will be on inconsistencies of decisions or *dicta* with the legislation and on the inadequacies of current legislation made apparent through the decisions.

PRENUPTIAL DEBTS

Probably the most startling decision of the two-year period was that in *United States Fidelity & Guar. Co. v. Green*[2] in which the court reversed the prior jurisprudence and declared that antenuptial creditors of the husband were not entitled to enforce their credits by execution against community assets. The court relied on two arguments. First, it declared the prior practice to be founded on the notion the wife had no interest in the community assets until termination of the regime and that this notion had been repudiated by later jurisprudence. Second, it declared article 2403, under which debts incurred during marriage are payable out of the separate assets of the indebted spouse, to be conclusive of the issue. Both these arguments were demonstrated to be false in a very able student Note which was pub-

15. *See* Sanders, *The Anatomy of Proof in Civil Actions*, 28 LA. L. REV. 297, 298 (1968).

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1. *The Work of the Louisiana Appellate Courts for the 1967-1968 Term*, 29 LA. L. REV. 171-327 (1969).

2. 252 La. 227, 210 So.2d 328 (1968).