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Private Law: Torts

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of Louisiana, there is reason to believe that the *Reymond* decision has opened the gate for a course of meaningful development along these lines in this state.

TORTS

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SELECTED TOPICS

Traffic Cases

In *Cartwright v. Firemen's Insurance Co.*[1] the Supreme Court of Louisiana held emphatically that under Louisiana law an automobile owner may not be held liable under the theory of strict liability for damages resulting from a latent defect in the brakes of his vehicle. The court pointed out that strict liability, or liability without fault, may not be invoked as a theory of recovery unless provided for by the legislation of the state. The court further specifically stated that the policy considerations inherent in the problem were properly for the legislature rather than for the court.

In *Fairbanks v. Travelers Insurance Co.*,[2] involving operation of vehicles on the highways, the Second Circuit Court of Appeal applied and interpreted the so-called "slow speed statute"[3] to find for the plaintiffs. It is the first appellate case reported under this statute. The crucial language of the statute forbids the operation of a motor vehicle upon the highways "at such a slow speed as to impede the normal and reasonable movement of traffic."[4] The court found that it was for the trier of fact to determine whether the speed in a given case was slow enough to constitute a violation of the statute. As the court pointed out, excessive speed under certain conditions has long been found to be negligence. It is hardly debatable that an excessively slow speed on modern highways can be dangerous and therefore should be classifiable as negligence.

A statement by that court in dictum may give rise to trouble in future cases of this nature. The court said:

"Thus, the slightest degree of inattentiveness by the driver

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1. 254 La. 330, 223 So.2d 822 (1969).
2. 232 So.2d 323 (La. App. 2d Cir. 1970), *rehearing denied*, Mar. 3, 1970.
3. LA. R.S. 32:64B (1950).
4. *Id.*

> of the fast moving car, coupled with the unexpected presence of the unreasonably slow moving vehicle combines to cause a collision. Therefore, the negligence of each driver is a cause in fact of the accident."[5]

Defendants in the future will pitch at least part of their case on finding "the slightest degree of inattentiveness by the driver of the fast moving car," in order to pin contributory negligence upon the plaintiff. Defendants could even argue that contributory negligence obtained as a matter of law, in view of the above-quoted dictum, even though a driver guilty of "the slightest degree of inattentiveness" would rarely have violated the standard of care for keeping a proper lookout. The dictum states what may be construed as a different and very much higher standard of care for a following driver in keeping a lookout than now applies.

The Third Circuit Court of Appeal in *Ardoin v. Crown Zellerbach Corp.*[6] discussed, without naming it, the problem of antecedent negligence as precluding the invocation of the last clear chance theory by the plaintiff on the grounds that the defendant had no actual opportunity to avoid the accident after he discovered the peril of the plaintiff. The defendant, driving a giant tractor-trailer, approached an intersection protected by a flashing yellow light toward him and a flashing red light toward the plaintiff. The court found the defendant negligent for failing to reduce speed upon seeing the flashing yellow light and found the plaintiff negligent for attempting to cross with the approaching truck in his vision. The opinion cites expert testimony to establish that defendant's truck was 257 feet from the intersection at the time plaintiff started to cross. Stopping time was established as being 393½ feet, including reaction time. It could easily be calculated, with the time-distance testimony of the experts, that failure of the defendant-truck driver to reduce his speed upon seeing the flashing yellow light effectively deprived him of what would have been a very real opportunity to avoid the accident.

Whether to recognize antecedent negligence depriving the defendant of the opportunity to avoid the accident as operating in favor of defendant or plaintiff is a question usually resolved in favor of the defendant. The dilemma clearly presents itself

5. 232 So.2d 323, 327-28 (La. App. 2d Cir. 1970).
6. 232 So.2d 136 (La. App. 3d Cir. 1970).

when it is recognized that a speed demon operating at 90 miles an hour may win his case while a motorist who is traveling at a reasonable rate of speed, but who simply fails to act promptly to avoid the accident, may lose. Under the antecedent negligence reasoning currently obtaining in most jurisdictions, the speed demon goes free because he never had the opportunity to stop. It seems that Judge Hood in the *Thayer* case[7] found a way to eliminate this injustice by finding that the negligence of the plaintiff in those situations simply is not a legal cause of the accident. It is not a last clear chance situation at all. The question is whether, in view of the defendant's antecedent negligence, the plaintiff's negligence is a contributing cause at all, and if it is contributing, whether it is sufficient to qualify as a substantial factor, as a legal cause, or as a proximate cause (in absence of which, the court with complete rationality could find for the plaintiff). The case at hand does not involve conduct as reprehensible as the foregoing illustration of the speed demon, however, and the result reached by the court seems to be a just one.

Premises Liability

In *Cothern v. LaRocca*[8] the supreme court reversed an appellate decision and found no duty on the part of a restaurant operator to warn of or repair a dangerous condition just beyond the boundary of his parking lot. The plaintiff, coming to the restaurant as a patron, stepped from her car onto the adjoining premises and injured her leg when she alighted into a recess in the ground for a water valve. The majority opinion cited articles 2315 and 2316 of the Civil Code to determine the duty of care owed by an owner or occupier of a premises to those who come upon the premises. The court acknowledged the prominent presence in our jurisprudence of the common law classifications of trespasser, licensee, and invitee and went on to find that, because the hole was off the restaurant premises and because the restaurant operator had no knowledge of the hole and further did not have knowledge that patrons might park in this spot, he therefore could not be held liable.

Is it possible that there was a duty from the restaurant operator to the plaintiff not grounded in the traditional

7. Thayer v. State Farm Mutual Auto. Ins. Co., 229 So.2d 767 (La. App. 3d Cir. 1969), *rehearing denied*, Aug. 26, 1969.

8. 255 La. 673, 232 So.2d 473 (1970), *rehearing denied*, Mar. 30, 1970.

trespasser-licensee-invitee status? Is it plausible to say that the restaurant operator was negligent toward the plaintiff in failing to delimit clearly the parking area for which he assumed responsibility, and thereby distinguish that area from the property of the adjoining motel for which the restaurant operator undertook no responsibility? (It should be noted that common law cases are cited in the opinion giving off-premises responsibility where adjoining parking lots were indistinguishable.) Must fault under article 2315 be restricted to the considerations inexorably attached to the common law licensee-invitee-trespasser categories? It seems unduly restrictive of article 2315 to say that the plaintiff's action must fail unless she fits her case within the categories and fulfills the particular requirements attaching thereto. In short, there seems to be room here for a discussion of duty and negligence completely apart from the premises-liability categories.

Proximate Cause

The case of *Craig v. Burch*[9] involved injuries to the plaintiff resulting from the failure of a recapped automobile tire. It is interesting that the court inquired most thoughtfully into the problem of proximate cause between the failure of the tire and the resulting injuries. The court pointed out that the proximate cause problem is actually a consideration of the duty owed by the defendant to the plaintiff with respect to the protection or not of the plaintiff's interests. Yet, the basis for the defendant's liability was held by the court to be his negligent breach of warranty under article 2476 of the Civil Code. The proper analysis would therefore have been to consider the statutory law, article 2476, and determine whether the intent of that legislation was to protect this plaintiff against this harm. The court apparently did not base its recovery upon article 2315. Proximate cause analysis is peculiarly tort and is perhaps unnecessary where the plaintiff relies upon a duty owed under the specific provisions of an article of the Civil Code or under the provisions of other legislation.

Duty to Supervise Young Hunters

In *Laney v. Stubbs*[10] the Supreme Court of Louisiana found the defendant not liable for the damages suffered by the

9. 228 So.2d 723 (La. App. 1st Cir. 1969), *rehearing denied*, Dec. 22, 1969.
10. 255 La. 84, 229 So.2d 708 (1969).

plaintiffs as a result of the death of their son, age 14, caused by the bullet wound from a .22 caliber rifle in the hands of one of a group of teenage boys on a hunting venture originating from defendant's residence. Of the four boys hunting, three had shotguns and only one had a rifle. The decedent incurred his tragic wound when the rifle was fired on the level in the field where decedent was hunting. The sole issue considered by the supreme court was whether defendant, father of the young hunter who had given the rifle to his companion to use, had breached a duty toward the decedent. The court found that defendant had no duty of supervision, because he "had no knowledge of inexperience or ineptness on the part of Macmurdo [the boy who fired the rifle], nor did he know which gun he was using. After admonishing the hunters to be careful, he returned home. Under the circumstances, he had no duty to supervise the bird hunt."[11]

Expert Testimony—Cause-in-Fact

An interesting cause-in-fact problem was discussed in *Helminger v. Cook Paint & Varnish Co.*[12] Plaintiff was a tile contractor who, after using defendant's product on a job, suffered burns and irritation of a very serious nature to his hands and feet. The trial court found for the defendant. The appellate court reversed, finding that while the chemical experts could testify as to the nature of the ingredient suspected of causing the harm, it was for a medical expert to speak on whether the ingredient was actually capable of inflicting the injuries.

After the testimony of a medical expert was reviewed and accepted by the appellate court, it turned to the question of whether the ingredient could be a cause-in-fact of the injuries. The court pointed out that the medical diagnosis indicated that the ingredient's causation was likely; and that:

> "Considering all of the circumstances, and in the absence of any other plausible explanation, we find that the most probable cause of Helminger's chemical hand and foot burns was his repeated exposure to MEKP residue in the brush-cleaning operations. This sufficiently proves that the MEKP exposure was the cause-in-fact of the plaintiff's injuries, for proof is sufficient to constitute a preponderance of the

11. *Id.* at 89, 229 So.2d at 710.
12. 230 So.2d 623 (La. App. 3d Cir. 1970).

evidence when as a whole it shows that the event or causation sought to be proved is more probable than not."[13]

Apparently the court correctly relied on the expert medical testimony that causation was likely as the major proof of causation. It is interesting to note the fine line separating the areas of competence of the experts. In this case the chemical experts could testify as to the qualities of the ingredient, but were not competent to testify as to the ingredient's effect upon human skin, a point at which a medical expert became the paramount authority.

MATRIMONIAL REGIMES

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"Earnings" and "Fruits"

Wurst v. Pruyn[1] decided that the wife's earnings were not "fruits of labor" within the meaning of article 2386 of the Louisiana Civil Code and therefore that the wife's filing of a declaration reserving to herself the administration of her paraphernalia and all rights to its fruits, including those "from the result of labor," had no effect on whether her earnings were separate or community income. In *Smith v. Smith*,[2] decided in 1960, the Court of Appeal for the Second Circuit had decided the same issue in contrary fashion, but the *Smith* decision clearly was in error. Article 2386 refers to "fruits of the paraphernal property of the wife" only, but lists all three kinds of fruits, those "natural," "civil," and "from the result of labor," which latter phrase is substantially the definition of "cultivated fruits" under article 545 of the Civil Code.

There are instances, however, in which it becomes more difficult to decide whether income consists of "earnings," "fruits," or capital gains. Perhaps the classic instance is that of *Hellberg v. Hyland*, decided in 1929,[3] in which the supreme court treated as earnings the capital gains made by the wife through the manipulation of her paraphernal assets. *Paxton v. Bramlette*[4] may become equally celebrated. A wife placed paraphernal immov-

13. *Id.* at 628.

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1. 233 So.2d 255 (La. App. 1st Cir. 1970).
2. 117 So.2d 670 (La. App. 2d Cir. 1960).
3. 168 La. 493, 122 So. 593 (1929).
4. 228 So.2d 161 (La. App. 3d Cir. 1969).