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TORTS

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Contributory Negligence

The Fourth Circuit Court of Appeal in *Illinois Central Railroad Co. v. Cullen*[1] refused to hold that the plaintiff railroad's leaving a switch unlocked, in violation of its own regulation, could amount to contributory negligence in its action for damages against a boy who had thrown the switch open and caused a derailment resulting in the damages suffered by the railroad. The facts show that the defendant came upon the unlocked switch, and after throwing it open, realized that a train was coming and unsuccessfully attempted to return it to its original position. The switch remained open just enough to cause the derailment. The court found that the railroad's own regulation required its personnel to keep switches locked to prevent unauthorized persons from tampering with the switches and to keep vibrations from opening them. The regulation was admittedly a safety regulation to prevent damage to the plaintiff's property and employees.

The questionable point of the opinion is that, on the foregoing facts, the court said: "As the open switch did not violate a legal duty owed by plaintiff to the two Cullen boys, the fact that such a switch was a violation of a plaintiff regulation does not constitute plaintiff negligence [*sic*] in this case and cannot be used by the defendants to avoid liability for the tort committed by the boys."[2] The court also stated that "[b]asically, negligence resulting in liability in tort, and contributory negligence in tort cases, is the breach of a legal duty owed by a litigant to an opposing litigant."[3]

Both statements by the court are misconstructions of the nature of contributory negligence. Negligence itself is the breach of a standard of care owed to the injured party. The

that a donation *inter vivos* produces no effect and does not form part of the patrimony of the donee until it is accepted by him in precise terms. (LA. CIV. CODE art. 1540); collation is a purely personal action that can be exercised only by forced heirs. LA. CIV. CODE art. 1235. A succession, on the other hand, devolves upon the heir by operation of law immediately upon the death of the *de cujus*, and a renunciation thereof constitutes an alienation. LA. CIV. CODE art. 1018.

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1. 235 So.2d 154 (La. App. 4th Cir. 1970).
2. *Id.* at 156-57.
3. *Id.* at 156.

duty may be owed by a defendant to a plaintiff, but on the other hand, the plaintiff may be under a duty to use a given standard of care to avoid injury to *himself* and may violate that duty by his own conduct. Classically, such a violation constitutes contributory negligence. When the plaintiff himself is the only party injured, it is unnecessary and illogical to hold that contributory negligence must be based upon a duty owed by plaintiff to the *opposing* party.

The whole concept has been stated simply as follows:

> "Contributory negligence is conduct on the part of the plaintiff which falls below the standard to which he should conform for his own protection and which is a legally contributing cause cooperating with the negligence of the defendant in bringing about the plaintiff's harm."[4]

There could be little argument that leaving the switch unlocked was a substantial factor (cause-in-fact) in the derailment. Surely the scope of duty owed by the railroad to avoid injuries by keeping its switches locked included the avoidance of injuries to itself and its property.[5]

An additional point of interest in the case is that the majority opinion found, in keeping with prior jurisprudence, that a safety regulation of the railroad designed for its own operation may be adopted by the court as the standard of care to measure the conduct of the railroad in determining whether or not the railroad was guilty of negligence. Even though the regulation did not have the standing of a statute or ordinance, the court looked with approval to the safety practices recommended by the railroad for its own operations. Whether the court will adopt such regulations may vary according to the finding that the regulations articulate a reasonable standard of care for railroad operations.

Latent Brake Falure

Latent brake failure was again held to be a defense to a personal injury claim in *Mallett v. State Farm Mutual Auto-*

4. RESTATEMENT (SECOND) OF THE LAW OF TORTS § 463 (1965).

5. Judge Domengeaux, in his dissent, said very much the same thing: "The obvious negligence of the Company (through its employee or employees) in leaving such a potentially dangerous instrument unlocked constitutes contributory negligence which is a proximate cause of the accident and should certainly bar its recovery." Illinois Central R.R. Co. v. Cullen, 235 So.2d 154, 159 (La. App. 4th Cir. 1970).

mobile Insurance Co.[6] Judge Miller, writing for the majority, correctly applied the existing rule of law as announced by our supreme court. The contrary position was most persuasively set forth by Judge Frugé in his concurring opinion,[7] in which he also quoted from a concurring opinion by Justice (then Judge) Tate wherein the latter decried the defense in an earlier latent brake failure case declaring non-liability.[8] In that same concurring opinion, Judge Tate advanced a statutory basis for finding liability in latent brake cases:

> "By LSA-R.S. 32:341, subd. A (1962) our legislature has provided that every motor vehicle '*shall* be equipped with brakes adequate to control the movement of and to stop and hold such vehicle, including two separate means of applying the brakes, each of which *shall* be *effective* to apply the brakes to at least two wheels.' This statutory duty, under its terms, is mandatory; it does not, applied literally at least, admit of an avoidance by attempted but unsuccessful compliance.
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> . . . .
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> "Several states now hold the owner of a car with defective brakes to a strict liability for injuries thereby occasioned, regardless of personal negligence, reasoning that the legislative requirement is mandatory that under no circumstances should an automobile be operated on a state highway without safe brakes. . . .
>
> "In reaching the conclusion that strict liability should apply, the rationale is available that an owner is presumed as a matter of law to know of his defective brakes, because of his statutory duty not to operate a vehicle without proper

6. 240 So.2d 413 (La. App. 3d Cir. 1970).

7. "In the light of the legislatively imposed duty to operate a safe vehicle; the appalling amount of damage and injury done to the innocent victims of automobile accidents; and the increasingly dangerous propensities of automobiles and other motorized vehicles, can we continue to ignore these innocent victims by supporting this jurisprudentially created rule further?

"Should we not, on the other hand, turn our attention to another rule of law which states that as between two innocent victims, the one by whose action the wrong could have been prevented must bear the loss?" *Id.* at 416.

8. *Quoting from* Cartwright v. Fireman's Ins. Co. 213 So.2d 154, 156 (La. App. 3d Cir. 1968): "In the light of modern traffic conditions and our crowded and urbanized society * * * certainly the better rule . . . would be instead to apply a strict liability against owners who permit vehicles with defective brakes—highly dangerous instrumentalities, whether the defects are latent or not—to be operated on the highways and to do harm to innocent persons lawfully on or near the highway." *Id.* at 416.

> brakes . . . or again, that one who engages in abnormally dangerous activities (such as operating a car without effective brakes) is held to strict liability for damages thereby occasioned . . . ."[9]

It is an aberration of the entire thrust of tort law in automobile cases to force the innocent injured party to bear the loss for the nonfunctioning of the defendant's brakes. The standard of care to be expected of all motorists, to have functioning brakes, should be so high that nonfunctioning brakes would be a conclusive presumption of the violation of that standard, statutory or not, with some possible exceptions for malicious or criminal acts destroying the brakes, or perhaps an act of God intervening. It would not be necessary to adopt the doctrine of strict liability as such if the statutory bases cited by now Justice Tate were invoked.

Scope of Statutory Duty

The Louisiana Supreme Court in *Pierre v. Allstate Insurance Co.*,[10] on rehearing, held the defendant in a wrongful death action liable as insurer of an automobile illegally parked blocking the lane of a highway in violation of the provisions of R.S. 32:143 (A) (14).[11] Plaintiff's decedent was killed when the pick-up truck in which he was riding stopped behind the illegally parked car and was then struck from the rear by a third party not keeping a proper lookout. Only the liability of the insurer of the illegally parked car was at issue.

The trial court, the court of appeal,[12] and the supreme court in its original opinion, all held that the illegal parking was not a proximate cause or a contributing factor to the accident, because as noted by the court of appeal, "the accident would have happened in the same way if decedent's driver had been required to stop at the time he did stop or slow down his forward progress for any other reason."[13] *Dixie Drive-It-Your-*

9. Cartwright v. Firemen's Ins. Co., 213 So.2d 154, 156-57 (La. App. 3d Cir. 1968) (concurring opinion).

10. 257 La. 471, 242 So.2d 821 (1970).

11. "A. No person shall stand, or park a vehicle, except when necessary to avoid conflict with other traffic, or in compliance with law or the directions of a police officer or traffic control device, in any of the following places:

. . . .

"(14) At any place where official signs prohibit such;"

12. Pierre v. Allstate Ins. Co., 221 So.2d 846 (La. App. 4th Cir. 1969).

13. 257 La. 471, 481, 242 So.2d 821, 825 (1970).

self[14] was distinguished from the instant case on the theory that the illegal parking by the offending truck in *Dixie* was a substantial factor in bringing about the accident, while the illegally parked car in the instant case was not a substantial factor in decedent's death, since the illegal parking did not render the decedent's position of safety in the stopped pickup truck "any more hazardous than it would have been had the parked truck been required to stop on the highway for any other cause which slowed or impeded the forward progress of the vehicles headed southbound."[15]

The original supreme court opinion held the violation of the statute to be negligence per se, but then founded its denial of plaintiff's cause upon absence of cause-in-fact. Clearly, the issue was not cause-in-fact. There is no question that it was the illegal obstruction which forced the decedent's driver to come to a stop and thereby expose decedent to the very risk which killed him. The true question in the case is whether the statute violated by defendant extended its protection to the decedent against the risk of being struck from the rear while stopped for the illegal obstruction.

It is in this context that the court reversed its position in the opinion on rehearing and found in favor of the plaintiff. The court, in a tightly reasoned opinion, found: (1) The illegal parking and obstruction of the highway by defendant's insured was a contributing cause-in-fact of the accident since it was not necessary for the cause which stopped decedent's driver to place decedent in a more hazardous position than he would have been exposed to had the cause of the stopping been innocent. (2) The highway statutes, R.S. 32:141 and 143(A) (14), protect motorists against risks from accidents brought on by the illegal blocking of traffic lanes. (3) The negligence of the following truck driver who crashed into the rear of the vehicle in which the decedent was riding, while constituting a later and intervening negligent cause, did not act as a superseding cause to the illegally parked defendant.

The opinion on rehearing is unquestionably correct. It was not a question of whether the illegal parking was a cause-in-fact of the accident, but rather, was the statutory duty not to park

14. Dixie Drive It Yourself Sys. v. American Beverage Co., 242 La. 471, 137 So.2d 298 (1962).
15. 257 La. 471, 483, 242 So.2d 821, 826 (1970).

illegally intended to burden the illegal parking with liability for crashes caused in part by another tortfeasor. That is a classic duty question in the form of a statutory interpretation and the court wisely found that such liability was contemplated by the statutes.

Vicarious Responsibility: Non-Imputation of Negligence

The Louisiana Supreme Court, in *Deshotel v. Travelers Indemnity Co.*,[16] held that a father's vicarious responsibility under article 2318 of the Louisiana Civil Code[17] does not bar the father's action for his own damages resulting from the negligence (or contributory negligence) of his minor son. The noteworthiness of the case lies in the clear distinction recognized by the court between vicarious responsibility and imputed negligence. The uniform jurisprudence of the courts of appeal of this state has been that the responsibility of the father for the torts of his minor child under article 2318 barred his action for damages when his minor child was negligent in producing those damages.[18] The facts of the instant case are typical of earlier cases involving the problem. The minor son was driving the family automobile with the father as a passenger. The son was found to be contributorily negligent in the ensuing accident which resulted in the father's personal injuries. Justice Barham correctly pointed out that, while article 2318 imposes financial responsibility on the parent for damages which a third party may suffer from negligent injury by the child, that responsibility is not synonymous with an imputation of negligence to the parent.

While the instant case was a demand by the father for damages arising from his personal injuries and redress was claimed from his family insurer in a direct action, the opinion points out that the action is not barred even in those cases where the father is not present in the automobile but suffers damage through medical expenses for his injured child or

16. 257 La. 567, 243 So.2d 259 (1971).

17. LA. CIV. CODE art. 2318: "The father, or after his decease, the mother, are responsible for the damage occasioned by their minor or unemancipated children, residing with them, or placed by them under the care of other persons, reserving to them recourse against those persons.

"The same responsibility attaches to the tutors of minors."

18. *See* Funderburk v. Millers Mut. Fire Ins. Co., 228 So.2d 169 (La. App. 3d Cir. 1969) and cases cited therein.

through repairs to the family automobile.[19] None of the earlier jurisprudence explains why vicarious responsibility has barred an action in the same fashion as contributory negligence. The instant opinion gives an interpretation of article 2318 which is completely sound.

MATRIMONIAL REGIMES

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"Actions for Damages . . . Suffered by the Husband"

The Digest of 1808 did not contain any specific provision on the separate or community character of damages recovered by either spouse for personal injuries. Presumably during the life of that Digest, and consistently with the Spanish law of which it was a digest, recoveries for personal injuries to either spouse belonged to that spouse as separate assets. The Civil Code of 1825, however, introduced an "omnibus clause" into what is now article 2334 of the current Civil Code, providing that "[c]ommon property is that which is acquired by the husband and wife during marriage, in any manner different from that above declared [to be separate property]." Under this clause, the judiciary came to declare that amounts recovered for personal injuries to either of the spouses entered the community of gains. Act 68 of 1902 amended article 2402 to read in part that "*damages* resulting from personal injuries to the wife . . . shall always be . . . separate property of the wife." Then Act 170 of 1912 amended article 2334 to read in part that "*actions* for damages resulting from offenses and quasi-offenses [to the wife] . . . are [the wife's] separate property." Finally Act 186 of 1920 further amended article 2334 in part to provide that "[a]ctions for damages resulting from offenses and quasi-offenses suffered by the husband, living separate and apart from his wife, by reason of fault on her part, sufficient for separation or divorce shall be his separate property." From this time on, certainly there could be no doubt that *actions* for damages for personal injuries to the wife occurring during the existence of the community of gains form part of her separate patrimony, whereas similar *actions* for personal injuries suffered by the husband during the community of gains are common assets unless he has suffered the injuries while liv-

19. This holding was accomplished in footnote 3 of the opinion by expressly overruling *Funderburk*. 257 La. 567, 574, 243 So.2d 259, 261 (1971).

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