

Who is an Executive Officer for Liability Insurance Coverage?

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plates that actual damages can be reduced.²⁵ Although mitigation of damages has been criticized as having the same thoretical objections as allowing the provocation as a full defense,²⁶ article 2323 of the Civil Code does authorize an examination of the actions of an injured party in the computation of damages.²⁷

In the instant case, the court made clear that one who commits assault or battery cannot justify his tort by pointing to the words of the victim as provocation. It is unfortunate that the court did not use this opportunity to repudiate the aggressor doctrine in its entirety. The doctrine is inconsistent with traditional notions of assault, battery, and privilege,²⁸ and no clear authority exists for it in Louisiana law. A repudiation of the doctrine would not do violence to civilian principles. The basis of tort liability in Louisiana is the invasion of legally protected interests, just as it is at common law.²⁹ Our law would be well served by completely rejecting the aggressor doctrine and replacing it with a consistent inquiry into the scope of duties imposed and privileges granted.

Terrence George O'Brien

WHO IS AN EXECUTIVE OFFICER FOR LIABILITY INSURANCE COVERAGE?

Louisiana's workmen's compensation law provides that an injured employee may maintain a suit for damages against a "third person" other than the employer without affecting his right to receive

25. In the instant case, the court found the words insufficient to merit any mitigation.

26. Note, 13 NOTRE DAME LAW. 332 (1938).

27. LA. CIV. CODE art. 2323: "The damage caused is not always estimated at the exact value of the thing destroyed or injured; it may be reduced according to circumstances, if the owner . . . has exposed it imprudently." For a discussion of this article as authority for a doctrine of comparative fault see Malone, *Comparative Negligence—Louisiana's Forgotten Heritage*, 6 LA. L. REV. 125 (1945).

28. The relevance of such traditional considerations as the presence of a "cooling-off" period or the use of excessive force is also questionable under the aggressor doctrine. See *The Work of the Louisiana Appellate Courts for the 1965-1966 Term—Torts*, 26 LA. L. REV. 459, 517 (1966).

29. Professor Stone has written: "The end of the law of tort consists in the production and maintenance of a harmonious balance among the conflicting forces and interests of society, and in the affording and protection of an opportunity to all members of the community to realize the maximum of liberty which is consonant with the best interest of that society of which they are a part." Stone, *Tort Doctrine in Louisiana: The Materials for the Decision of a Case*, 17 TUL. L. REV. 159 (1942).

compensation.¹ Included within this category of "third persons" are executive officers of corporate employers² and co-employees.³

In addition to workmen's compensation insurance, most employers carry public liability insurance.⁴ There are various types of this insurance available to the employer,⁵ most of which cover executive officers under the standard clause:

[T]he unqualified word "*insured*" includes the named insured and also includes any *executive officer*, director or stockholder thereof while acting within the scope of his duties as such⁶

Employees are not ordinarily covered under such clauses and as a result, many third party suits brought against the alleged insurer under Louisiana's direct action statute⁷ raise the question of who is an executive officer.

This issue was first raised in *Bruce v. Travelers Insurance Co.*,⁸ where the court held that a drilling foreman of Gulf Refining Co. was not an executive officer. The court reasoned that its decision resulted from a "correct reading of the intention of Gulf and Travelers as they expressed their intention in their insurance agreement" and concluded that "[t]he best place to look for evidence of that inten-

1. LA. R.S. 23:1101 (1950).

2. *Boudreaux v. Falco*, 215 So. 2d 538 (La. App. 1st Cir. 1968); *Adams v. Fidelity and Cas. Co.*, 107 So. 2d 496 (La. App. 1st Cir. 1958).

Attempts to bring individual partners of a partnership within the classification of a third party have failed, and the individual partner is not now considered a third party amenable to suit in tort by the employee of the partnership. *Bersuder v. N.O. Pub. Serv.*, 273 So. 2d 46 (La. App. 4th Cir. 1973); *Cockerham v. Consolidated Und.*, 262 So. 2d 119 (La. App. 2d Cir.), *writ refused*, 262 La. 315, 263 So. 2d 49 (1972); *Leger v. Townsend*, 257 So. 2d 761 (La. App. 3d Cir.), *writ refused*, 261 La. 464, 259 So. 2d 914 (1972).

3. *Vidrine v. Soileau*, 38 So. 2d 77 (La. App. 1st Cir. 1948); *Kembro v. Holladay*, 154 So. 369 (La. App. 2d Cir. 1934).

4. R. LONG, *THE LAW OF LIABILITY INSURANCE* § 10.01, at 10-2 (1973).

5. These include Comprehensive General Liability Insurance affording broad coverage; Owners, Landlord's and Tenants' Liability Insurance covering the owner or operator of premises; Manufacturers' and Contractors' Insurance covering manufacturing or contracting operations; and Storekeepers' Liability Insurance, similar to Owner's Landlords' and Tenants' insurance but designed for the smaller retail store. See, W. RODDA, *PROPERTY AND LIABILITY INSURANCE* 384-92 (1966).

6. R. LONG, *THE LAW OF LIABILITY INSURANCE* § 10.01, at 10-2 (1973). (Emphasis added.)

7. LA. R.S. 22:655 (1950), as amended by La. Acts 1962. No. 471 § 1.

8. 266 F.2d 781 (5th Cir. 1959).

9. *Id.* at 785.

tion was in Gulf's charter and bylaws defining and denominating officers."¹⁰ Since the drilling foreman was not listed as an executive officer,¹¹ the court held that he was not within the coverage afforded executive officers.

In subsequent decisions involving corporate employers,¹² courts followed the procedure established by *Bruce*.¹³ Thus, it appeared settled that the courts would look to the corporate charter and by-laws to determine executive officer status. However, the Fifth Circuit departed from that practice in *Guillory v. Aetna Insurance Co.*¹⁴ That case involved a "thinly capitalized corporation which issued no capital stock, owned no property, kept no minutes, [and] had no by-laws"¹⁵ The alleged executive officer who was employed to supervise the corporation's only job contract was never formally designated an officer but was given authority by the majority shareholder to write

10. *Id.*

11. The corporate charter designated the normal corporate officers and provided that the board of directors could appoint other officers. The by-laws also provided that the president of the corporation shall be the "chief executive officer" of the corporation." 266 F.2d 781, 784 (5th Cir. 1959).

12. In *Employer's Liability Assurance Corp. v. Upham*, 150 So. 2d 595 (La. App. 4th Cir. 1963), the court had a unique problem concerning executive officer coverage. The court first had to decide if the extended coverage of executive officers was limited only to corporations or was also applicable to a sole proprietorship. The insurer made the logical argument that the term "executive officer" when read with the entire standard clause applied to corporations only. The court disagreed, reasoning that it was "conceivable that . . . an unincorporated business . . . could have an executive officer . . ." and proceeded to answer the question of whether a carpenter-foreman could be an executive officer. *Id.* at 596. Examining the relationship of the individual to his employer and finding that he had "no managerial authority nor anything to do with the operation of his employer's business, save in the capacity of workman. . .", the court held that he was not an executive officer. *Id.* at 597.

13. In *Grant v. Sutorbuilt Corp.*, 343 F.2d 807 (5th Cir. 1965) (per curiam), the general manager of a corporation was not an executive officer since he was not an elected official and had no authority to sign checks. Likewise, an oilfield engineer and a shop foreman were not executive officers where neither "held a position or office created by the corporate charter" *Thibodeaux v. Parks Equip. Co.*, 185 So. 2d 232, 247 (La. App. 1st Cir.) (original hearing), *writs refused*, 249 La. 194, 186 So. 2d 157 (1966). In another case the Fifth Circuit held that a job superintendent and a pipe foreman were not executive officers stating that "[t]he decision depends on the coverage afforded by the terms of the insurance agreement between [the corporation] and the [insurer] and both the insurer's and the insured's intention as expressed in the agreement. [The corporation's] intentions are found in its charter and by-laws. These documents clearly show that [the job superintendent] and [the pipe foreman] were not 'executive officers'." *Lemmons v. Zurich Ins. Co.*, 403 F.2d 512, 514 (5th Cir. 1968). (Emphasis added.)

14. 415 F.2d 650 (5th Cir. 1969).

15. *Id.* at 651.

checks and negotiate contracts for the corporation. In sustaining a jury finding that the supervisor was an executive officer, the court did not limit the jury to an examination of the corporate charter and by-laws. The court concluded that "normal corporate formalities were not decisive in determining whether [an individual] was an executive officer within the meaning of the insurance contract."¹⁶ Thus it was proper for the jury to examine the individual's responsibilities and his relationship to the corporate officers. *Bruce* was distinguished on the grounds that *Guillory* involved a small corporation that took no action to designate executive officers and the alleged officer in *Guillory* had considerably more managerial authority than the alleged officer in *Bruce*. As additional support the court added that the term "executive officer" was ambiguous and should be interpreted against the insurer.¹⁷

In *Berry v. Aetna Casualty and Surety Co.*¹⁸ the Louisiana Second Circuit found that the manager of the Shreveport plant of Libbey-Owens Ford Glass Co. was an executive officer since he "was directly under a corporate officer . . . and participated in the formulation and execution of company policy . . . at the Shreveport plant."¹⁹ It also found that the safety director of the entire company was an executive officer because he was responsible "for the safety of all the hourly employees of the corporation generally, and his position [was] one closely connected with the officers of the corporation."²⁰ It did not appear that the court made any attempt to refer to

16. *Id.* at 653.

17. This seems to be in conflict with the language in *Bruce v. Travelers Ins. Co.*, 266 F.2d 781, 784 (5th Cir. 1959) (referring to the executive officer clause): "Paragraph 32 of the by-laws provides that the president of the corporation shall be the 'chief executive officer' of the corporation.

"This language is free from ambiguity. The intention of these provisions of the by-laws is clearly to allow the corporation to determine for itself what persons shall be officers and how they shall be chosen. . . .

". . . Insurance policies should be construed liberally, but the words of a policy must be given the meaning they ordinarily bear. 'No strained or unusual construction should be given to any of the terms of a policy of insurance, in favor of the insurer or of the insured.' Or, we add, in favor of a third party claimant." *Id.* at 784. (Citations omitted.) (Emphasis added.) Also in *Lemmons v. Zurich Ins. Co.*, 403 F.2d 512 (5th Cir. 1968), the court had no difficulty in defining who was an executive officer since the corporate charter and by-laws clearly showed this. See note 14 *supra*.

18. 240 So. 2d 243 (La. App. 2d Cir.), writ refused, 256 La. 914, 240 So. 2d 374 (1970).

19. *Id.* at 246.

20. *Id.*

the charter and by-laws to determine the parties' intent, thus applying the procedure of *Guillory* to large corporations.²¹

An examination of the corporate charter and by-laws need not be decisive in determining whether an individual is an executive officer. However, the practice should not be abandoned by the courts as appears to have been done in *Berry*. The issue of executive officer status has its origin in the insurance contract and the court is only called upon to determine the intent of the parties. If one of the parties has taken action to express that intent—for example, by designating executive officers in the corporate charter and by-laws—the court should utilize this in deciding the issue. However, if there are no executive officers designated only *then* should the court examine the responsibilities of the “managerial employees” and their relationship to the corporate officers. Taken in the context of the entire clause,²² the term “executive officer” seems to relate to an individual easily associated with the corporate entity and having broad overall authority in corporate affairs. Thus the duties and responsibilities of these “managerial employees” should resemble those of a “corporate officer” as closely as possible. His responsibilities should include participation in the formulation of company policy and his authority should extend company wide. However, this analysis should be used to determine, not defeat, the intent of the contracting parties.

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RES IPSA LOQUITUR AND UNEXPLAINED INJURIES TO ANESTHETIZED PATIENTS

Plaintiff sustained unexplained burn injuries to his thigh and reproductive organs while under the effects of anesthesia for an elbow operation. Suit was brought against the hospital and the surgeon as individual defendants. Not knowing the cause of these injuries, plaintiff urged that the doctrine of *res ipsa loquitur* was applicable. In

21. In *Spillers v. Northern Assurance Co. of America*, 254 So. 2d 125 (La. App. 3d Cir. 1971), the last case involving the issue, the court apparently did not regard the charter and by-laws as in *Guillory* and *Berry*, holding that a carpenter and a superintendent of construction were not executive officers because they had no managerial responsibility for the affairs of the corporation generally. This process seems to have been employed by other jurisdictions in at least two instances. *Graven v. Pasa*, 355 F.2d 413 (9th Cir. 1966) (foreman of underground mining is not an executive officer); *U.S. Fidelity and Guar. Co. v. Warhurst*, 336 F. Supp. 1190 (W.D. Ala. 1971) (department foreman not an executive officer).

22. See text at note 6 *supra*.