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Private Law: Torts

William E. Crawford
Louisiana State University Law Center

TORTS

*William E. Crawford**

Three cases were decided by the Louisiana supreme court involving suit between members of the same family for an accident occurring in another state. In the most important case, *Jagers v. Royal Indemnity Co.*,[1] on a conflict of laws point, the court rejected the *lex loci* rule followed in *Johnson v. St. Paul Mercury Insurance Co.*[2] and adopted the "vested rights" theory of applying the law of the forum.

The court acknowledged with apparent approval the finding of the court of appeal that Louisiana law did not prohibit an action by a mother against her adult son for her damages arising out of an accident which occurred as a result of the son's negligence while he was a minor. This rule was established in *Deshotel v. Travelers Indemnity Co.*,[3] involving an action by a father against the liability insurer of his negligent minor son. However, the instant case allowed judgment not only against plaintiff's liability insurer, but also against the son individually for an amount in excess of the insurance coverage. Specifically, the court held: "We find no impediment to a suit by a parent against her minor child for a tort committed during his minority."[4]

In *Romero v. State Farm Mutual Automobile Insurance Co.*,[5] a Louisiana domiciled husband and wife were injured in an automobile accident in Texas. The wife subsequently instituted suit in Louisiana against the husband's liability insurer under the direct action statute. The trial court found the husband negligent and awarded damages to the wife for her pain and suffering. The direct action against the insurer for an out-of-state accident was allowed under the rule of *Webb v. Zurich Insurance Co.*,[6] in which that interpretation was first made of our direct action statute. The court of appeal reversed the trial court on the grounds that Texas law should apply, which neither allows a direct action against the insurer nor an action by a wife against her husband. The supreme court, in reversing the court of appeal, noted the recent *Jagers* case, in which it was announced that in such circumstances the law of Louisiana would be applied. It is well established in Louisiana that while the wife may not sue her

* Professor of Law, Louisiana State University.

1. 276 So. 2d 309 (La. 1973).
2. 256 La. 289, 236 So. 2d 216 (1970).
3. 257 La. 567, 243 So. 2d 259 (1971).
4. 276 So. 2d at 313.
5. 277 So. 2d 649 (La. 1973).
6. 251 La. 558, 205 So. 2d 398 (1967).

husband individually in tort, the bar is personal to the husband and may not be claimed by his liability insurer.

In *McNeal v. State Farm Mutual Automobile Insurance Co.*,[7] the suit was by Mrs. McNeal individually and in behalf of her minor daughter against her husband's insurer. While the family was returning to their Louisiana home from an automobile trip to Tennessee, Mr. McNeal lost control of his vehicle and an accident ensued, with the resulting injuries to Mrs. McNeal and her daughter, and the death of Mr. McNeal. While the Louisiana suit was pending, Mrs. McNeal brought a suit in Mississippi on the same cause of action. The Mississippi court dismissed the suit on the ground that the wife and minor daughter had no standing to maintain a civil suit against the husband's estate because of the Mississippi family immunity doctrine. The action against the liability insurer was dismissed because the direct action is not available in Mississippi. The Louisiana trial court maintained an exception of *res judicata* filed by the insurer in the Louisiana proceeding following the Mississippi decision. The Louisiana supreme court, noting their recent *Jagers* opinion, reversed, holding that there was no bar to the action in Louisiana. The exception of *res judicata* was thus overruled on the grounds that the Mississippi judgment did not decide the case on the merits and was not properly *res judicata*. It should be noted that the court of appeal decisions in *Romero* and *McNeal* were rendered prior to the handing down of *Jagers*.

TORT ANALYSIS—STATUTORY STANDARD OF CARE

In *Laird v. Travelers Insurance Co.*,[8] plaintiff Laird, with his wife as a passenger, parked his pickup truck partly on the asphalt portion of a highway and was struck from the rear by a truck-trailer owned by the Red River News Co. The Lairds sued for their damages. It was found that their vehicle did not completely obstruct the highway, thus leaving room in the Lairds' lane for a vehicle to pass safely. Additionally, at the time of the accident the oncoming lane was clear of traffic. It was further found that the Red River News driver was inattentive and failed to notice the Lairds' truck in spite of its easy visibility and the frantic efforts of a third party to signal the driver of the presence of the stopped truck.

R.S. 32:141(A) provides that no person shall park a vehicle upon the paved part of a highway when it is practicable to park off that

7. 278 So. 2d 108 (La. 1973).

8. 263 La. 199, 267 So. 2d 714 (1972).

part of the highway. It is construed to be a criminal statute because of the sanctions provided for its violation. Under the jurisprudence, criminal statutes do not have the force of law in setting standards for civil liability, although the court may adopt as the civil standard of care the one set out in the criminal statute.

Having decided that the criminal statute must be considered, the court used the duty-risk analysis enunciated in *Hill v. Lundin & Associates, Inc.*,[9] applying it here to a standard derived from a statutory rule, rather than to a judge-formulated rule as in *Hill*. The court then found that the presence of the Laird truck was a cause of the collision, since obviously it would not have occurred but for the truck's presence.

The crucial inquiry which followed was whether Laird owed a duty to himself, to his wife, or to the Red River News driver to protect them against any harm resulting from the risk arising from the parking of his truck on the highway. The court answered the duty question as to all three parties in the negative by finding that the highway was not obstructed in the sense contemplated by the statute. The court reasoned that the duty imposed, when one considers the purpose of the criminal statute, did not encompass the particular risk encountered. The court accordingly affirmed judgments in favor of Mr. and Mrs. Laird for their damages.

It should be noted that when there is a *civil* statute regulating conduct in a given endeavor, the analysis of the applicability of the statute takes the following form:

(1) Is the plaintiff within the class of persons afforded protection under the statute?

(2) Is the type of harm by which the plaintiff was injured within the protection afforded by the statute?

(3) Is the plaintiff's interest injured by the harm one protected by the statute?

If under the foregoing analysis it is determined that the statute is applicable, the same determination has been made as is accomplished by the duty-risk analysis. Customarily, a violation of an applicable statute is negligence per se.

In the same vein, in *Smolinski v. Taulli*,[10] the supreme court noted that a stairway and guard railing were unreasonably dangerous and held a landlord liable for the serious injury suffered by a child who fell through the guard railing. The court found that the stairway and hand-rail were constructed in violation of the Jefferson Parish

9. 260 La. 542, 256 So. 2d 620 (1972).

10. 276 So. 2d 286 (La. 1973).

Building Code and of a building ordinance of the City of Gretna. While it may be concluded that the civil standard of care was adopted by analogy from the provision of the two building codes, the court seemed to base its finding of liability principally on their conclusion that the stairway and landing were not reasonably safe for the intended use by persons, especially children, whom the landlord-owner could reasonably foresee would use it.

Continuing on the subject of application of statutes to determine the civil standard of care, the court in *Weber v. Phoenix Assurance Company of New York*[11] continued weaving the fabric of its analysis by pointing out that when the court adopts for a civil standard of care the provisions of a penal statute, it is improper to say that the violation constitutes "negligence per se" in a civil action. The term "negligence per se" is properly used when it is found that a civil statute is applicable to defendant's conduct and upon a factual determination that defendant violated that statute with his conduct. It may be found that no further weighing of the circumstances is required to conclude that defendant was negligent, for having determined that the statute is applicable, and that it was breached, the finding of negligence is mandatory, since, by definition, violation of the appropriate standard of care is the creation of an unreasonable risk, which in turn is the bedrock definition of negligence.

In *Odom v. Hooper*,[12] a plaintiff's action was dismissed on defendant's motion for summary judgment because the trial court concluded that the plaintiff was guilty of contributory negligence *as a matter of law*, since the pleadings showed that decedent collided with the nineteenth boxcar in a train which had preempted the intersection. "Negligence as a matter of law," arises when the jurisprudence invariably finds negligence in a well-delimited set of circumstances, and serves the same purpose that the term "negligence per se" serves for violation of applicable civil statutes.

The supreme court reversed, overturning the summary judgment. After analyzing the jurisprudence "on negligence as a matter of law," the court concluded that with the change in highway conditions and other factors involved in the operating of automobiles, there should no longer be a hard and fast rule in a given category of accident, but that a consideration of the facts in each case should govern the question of liability. This reasoning is much the same as that used to abrogate the assured clear distance rule, to which the instant case was analogized.

11. 273 So. 2d 30 (La. 1973).
12. 273 So. 2d 510 (La. 1973).

SCOPE OF PROTECTION UNDER MOTOR VEHICLE REGULATORY STATUTES

In *Brantley v. Brown*,[13] the supreme court found a twelve-year-old boy free of contributory negligence in an action seeking to recover damages for injuries the boy suffered as a result of an intersectional collision involving the car on whose fender the boy was riding. Brantley, the boy, was riding on the fender of a car driven by Brown. The other car in the collision was driven by Myles. The court found that the Myles vehicle negligently entered the right of way path of the Brown vehicle. Brown threw on his brakes and Brantley was thrown into the Myles vehicle just prior to the collison.

In considering whether Brantley was contributorily negligent, the court interpreted the fender-riding statute, R.S. 32:284 and concluded that

> [t]he principles uniformly applied by these cases are: An outrider on a vehicle assumes only such risks as are ordinarily incident to his position. He does not assume the risk of negligent driving on the part of his driver, as he is ordinarily entitled to rely reasonably upon his driver's exercise of ordinary care. He particularly does not assume the risk of the negligence of the driver of another vehicle which collides with that upon which he is riding: any negligence on the outrider's part does not causally contribute to such an accident or to his injuries thereby resulting, for in the absence of the other driver's negligence there would have been no accident thus no injury at all . . . .[14]

It is difficult to imagine conduct more pregnant with negligence than riding on the fender of an automobile at 25 miles per hour. The only apparent reason this writer can deduce for the restrictive interpretation of the fender-rider statute is that otherwise the statute would make a fender-rider a sitting duck for the near intentional whimsy of his driver or of another driver wishing to have sport on the occasion. If the court's interpretation were otherwise, would not the fender-rider be invariably without an action, being barred by his contributory negligence?

The holding, however, smacks of injustice to Myles. Without reference to the regulatory statute, did not Brantley violate the standard of care which an ordinary, reasonable and prudent twelve-year-old must observe to avoid injury to himself? Is not the fender-riding at 25 miles per hour the creation of an unreasonable risk of injury to one's self? The conduct has no social utility or value whatever, and

13. 277 So. 2d 141 (La. 1973).
14. *Id.* at 143.

the burden of prevention is attractively small. The risk which materialized seems to be precisely that which any reasonable man would envision as one of the probable consequences of fender-riding.

Perhaps by holding fender-riders to be non-contributorily negligent if the slightest negligence is found on the part of the fender-rider's driver, the great likelihood of liability deters drivers from allowing fender-riding on their vehicles. However, that consideration is inapplicable to the action by Brantley against Myles. Fender-riding in this motorized age is so fraught with peril that it might best be deterred by letting fender-riders bear their own losses. It seems unjust to draw Myles into the negligence picture and then interpret the statute to preclude the defense of contributory negligence on the basis of a statute which does not even apply to Myles.

The Louisiana supreme court in *Matte v. Continental Trailways, Inc.*[15] construed the scope of protection of a motor vehicle statute regulating the use of headlights to include a pedestrian who had just alighted from a bus and was struck and killed by another driver claiming to be blinded by the bus's headlights. The action was brought by the survivors of the decedent. According to the petition, as the decedent descended from the bus and attempted to cross the highway, the bus turned toward an approaching vehicle so that the bus's headlights blinded the oncoming driver, causing him to strike and kill the decedent. Petitioner sued the oncoming driver, Gaudet, the bus company, and McNeil, the driver of the bus. Gaudet then filed a third party action against McNeil and the bus company in the event Gaudet was cast in judgment. The instant decision was rendered on the exception of no cause of action filed by the third party defendants to Gaudet's third party demand. The supreme court held that while the carrier-passenger relationship had terminated when the decedent safely alighted from the bus, the scope of protection under the headlight statute extended to the decedent as a pedestrian since "the object of the statute is to protect not only motorists directly affected but others to whom harm might reasonably be expected to result from the violation of the statute."[16]

Ordinarily, motor vehicle regulatory statutes are construed to be for the benefit of other motorists. However, the consequences from negligent driving are obviously so widespread that the court's broadened interpretation of these statutes is eminently correct and beneficial to society. While the court did not discuss the statutes in terms of adopting a standard of care for civil litigation purposes, it is as-

15. 278 So. 2d 60 (La. 1973).

16. *Id.* at 63.

sumed that the opinion does not depart from the decisions discussed above.

RES IPSA LOQUITUR—DOCTORS AND HOSPITALS

In *McCann v. Baton Rouge General Hospital*,[17] the Louisiana supreme court reviewed the dismissal on an exception of no cause of action of a suit to recover damages for the injuries suffered by a fourteen-year-old boy who was taken to the hospital for the treatment of a fractured elbow. After the boy was given an anesthetic and was treated by a surgeon in the hospital operating room, he was returned to his room. It was then discovered that he had suffered injuries completely unconnected with the treatment of his elbow. The suit was brought against the doctor, the hospital, and their insurers. The trial court sustained the exception of no cause of action in behalf of the doctor and his insurer. The question before the supreme court was whether to uphold the dismissal of the doctor.

The allegations of the petition were clearly lacking the specific charges of negligence necessary to sustain an action against the doctor in tort. However, it is also clear that there was no possible way the facts surrounding the alleged injury could be known to the plaintiff. Without the applicability of res ipsa loquitur, the petition would not state a cause of action.

The court reversed, holding that

> [w]hen, as here, the injury occurred within the confines of the special service rooms at the hospital, the failure to allege the specific acts of the defendant producing the injury cannot vitiate the cause of action. The surrounding circumstances are peculiarly within the knowledge of the defendants or their employees and unavailable to plaintiff.[18]

Further, the court pointed out that

> [t]he vital facts alleged are that the body of the injured youth was in the exclusive custody of the several defendants. During that time, while under anesthesia, he received injuries to a part of the body not involved in the surgery. Under these circumstances, a cause of action is stated against the operating surgeon. The application of *res ipsa loquitur* and evidentiary doctrine, must, of course, be determined at the conclusion of the trial.[19]

17. 276 So. 2d 259 (La. 1973).
18. *Id.* at 261.
19. *Id.* at 262.

Without the application of res ipsa loquitur to this type situation, a plaintiff is effectively without a cause of action. Even though it would be possible after suit was filed to undertake discovery and ferret out the facts, the inability to allege specific negligence would expose the petition to dismissal on an exception of no cause of action; thus, the opportunity to use discovery would never arise. It must also be noted that in this type situation the right to use discovery procedures by no means assures that the facts will become known. The effect of the applicability of res ipsa loquitur forces the defendants to come forward with some explanation.

The court wisely pretermitted any attempt future plaintiffs might make for promiscuous use of res ipsa loquitur in the field of medical malpractice. The court said

> we in no way sanction the application of *res ipsa loquitur* to malpractice cases involving no more than a failure to obtain satisfactory results from surgery or medical treatment. We limit our holding to untoward or unusual occurrences during the time of medical supervision.[20]

MINOR'S TORTS

In *Deshotel v. Travelers Indemnity Co.*,[21] the supreme court announced several years ago that under Civil Code article 2318 the parent is only vicariously liable for the tortious acts of a minor child residing with him. This enabled the parent to maintain an action for his own damages, whether they be for harm to property or to person, suffered as a result of the parent's riding as guest passenger with the minor when he committed his act of negligence.

In the current session in *Wooten v. Wimberly*,[22] the court held that a negligent minor and his parent are not solidarily liable for the minor's torts. This is consistent with *Deshotel* and appears to be a sound analysis of the law, although the court was sharply divided on whether, under the Civil Code, solidarity arises from the mere simultaneous indebtedness of each of two obligors for the whole of a debt. This aspect of the case is discussed elsewhere in the *Symposium* under the subject of "Obligations."[23]

The court in *Walker v. Milton*[24] applied the rule of *Smith v.*

20. *Id.*

21. 257 La. 567, 243 So. 2d 259 (1971).

22. 272 So. 2d 303 (La. 1973).

23. *See The Work of the Louisiana Appellate Courts for the 1972-1973 Term—Obligations*, 34 LA. L. REV. 231 (1974).

24. 263 La. 555, 268 So. 2d 654 (1972).

Southern Farm Bureau Casualty Insurance Co.[25] in allowing contribution in favor of a joint tortfeasor against his co-joint tortfeasor who was a member of the plaintiff's family subject to the intrafamily immunity from suit. In *Walker*, a mother and her children were injured in an accident in which both the mother and the other driver were negligent. One of the minor children was awarded damages against the third party, who with his insurer sought contribution from the minor's mother as a joint tortfeasor solidarily liable with the third party. The court allowed the contribution in keeping with their prior rulings in interspousal tort cases. It is a reinforcing of the well-established rule that while the intrafamily statutes bar an action, they do not destroy the cause of action.

SOVEREIGN IMMUNITY

Perhaps the most significant torts case in this session of the court was *Board of Commissioners of Port of New Orleans v. Splendour Shipping & Enterprise Co.*,[26] in which the court dealt with the sovereign immunity issue. The doctrine of sovereign immunity has been chipped away in many jurisdictions. In Louisiana, the immunity of a particular state agency or board has been determined by reference to the legislative or constitutional language creating the entity.

In its fully researched and documented opinion, the court pointed out that the doctrine in Louisiana is jurisprudential. Next, the court pointed out its ruling of waiver of the immunity in the case of *Hamilton v. City of Shreveport*,[27] in which it was held that the legislature had granted Shreveport the power to sue and be sued, which constituted a waiver of whatever immunity the city may otherwise have enjoyed. With reference to the Board of Commissioners for the Port of New Orleans, the court pointed out that the legislative and jurisprudential history of the particular board was that it was immune from suit. Openly making a pure policy decision, the court stated that in its view the doctrine of immunity was no longer useful or justified and that they were here withdrawing from the board the immunity with which it previously was insulated from suits in tort.

The intriguing focus of the entire case is that the court said, "[w]e hold that the Board of Commissioners of the Port of New Orleans, and other such boards and agencies, are not immune from suit for tort."[28] If the State of Louisiana itself, apart from its boards

25. 247 La. 695, 174 So. 2d 122 (1965).
26. 273 So. 2d 19 (La. 1973).
27. 247 La. 784, 174 So. 2d 529 (1965).
28. 273 So. 2d at 26.

and agencies, is capable of committing a tort, has it been deprived of its sovereign immunity? A reasonable reading of the court's language compels the conclusion that the state still enjoys its immunity. It is hoped that on an early occasion the court will clarify the extent to which sovereign immunity has been abolished.

WORDS ALONE AS PROVOCATION

In *Morneau v. American Oil Co.*,[29] the supreme court disavowed a long train of court of appeal decisions which have recognized that words alone can constitute provocation to excuse or justify what would otherwise be an unlawful act such as battery. It is well established in the common law that words alone, without accompanying movement, cannot be pleaded as privilege for a responsive blow. The supreme court did acknowledge that there is the rule of law applicable in this state that words calculated to provoke and arouse to the point of physical retaliation may mitigate the damages in a civil action, but in looking at the facts before them they found that no such mitigation was proper.

NON-DELEGABLE DUTY

In *Vonner v. State Department of Public Welfare*,[30] a mother sued for the death of her five-year-old son who died from physical abuse at the hands of foster parents in whose care he had been placed by the defendant department. The defense to the action was that the foster parents were independent contractors for whose actions the Department was not responsible. The argument by plaintiff was that the foster parents were servants of the Department so that defendant had a master's responsibility for the servant's acts. The court indicated it would be willing to base liability upon the negligence of the Department in failing to react to information and other indications that the child was being physically abused. The Department's own regulations as to periodic visits and examinations had not been followed. Liability under this view would have flowed from breach of a duty to supervise another who had the primary responsibility for the well-being of the child. However, the court went on to find that the duty of the Department to take care of the children was nondelegable, and the Department was therefore found vicariously liable for the acts of the foster parents.

29. 272 So. 2d 313 (La. 1973).
30. 273 So. 2d 252 (La. 1973).