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## Duty-Risk in the Lower Courts: Flexibility or Rigidity?

Sylvia R. Cooks

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## NOTES

### DUTY-RISK IN THE LOWER COURTS: FLEXIBILITY OR RIGIDITY?

The taxicab in which the plaintiff Shaw was riding negligently collided with a number of vehicles parked on the shoulder of the road at the scene where Wall, a minor, had a short time before negligently overturned the automobile he was driving. Wall had failed to display flares or otherwise to warn approaching cars of the blocked highway and was in a police car being questioned at the time of the collision. In an action by Shaw against Wall's mother and her insurer for damages resulting from the crash, the Third Circuit Court of Appeal, relying on duty-risk analysis, *held* that Wall's negligence was a cause-in-fact of the accident and that the intervening negligence of the taxidriver did not relieve the defendants of liability. *Shaw v. The Travelers Insurance Co.*, 293 So. 2d 568 (La. App. 3d Cir. 1974), *writs refused*, 295 So. 2d 815 (La. 1974).

Louisiana courts have long recognized that the intervening negligence of a third party may suffice to exonerate an original wrongdoer from liability.<sup>1</sup> In the past, courts employed the vocabulary of "proximate causation" and its derivative "passive negligence" to deny recovery against the original wrongdoer.<sup>2</sup> The negligent conduct of a defendant who created a potentially dangerous situation was considered "passive" and too remote to be a contributing cause of plaintiff's harm when a third party's subsequent negligent act combined with the dangerous situation to cause the damage.<sup>3</sup> Thus, the courts declared that the "sole and proximate cause" of the plaintiff's injuries was the intervening misconduct of the third party.<sup>4</sup> By emphasizing the "chronology of the negligent acts,"<sup>5</sup> the doctrine of passive negli-

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1. *See, e.g.*, *Manning v. Fortenberry Drilling Co.*, 107 So. 2d 713 (La. App. 2d Cir. 1958); *Thiaville v. Toups*, 25 So. 2d 361 (La. App. Or. Cir. 1946). *Cf.* *Jackson v. Jones*, 224 La. 403, 69 So. 2d 729 (1953).

2. *See, e.g.*, *Dixie Drive It Yourself System, Inc. v. American Beverage Co.*, 128 So. 2d 841 (La. App. 4th Cir. 1961); *Penton v. Sears, Roebuck & Co.*, 4 So. 2d 547 (La. App. 1st Cir. 1941).

3. Louisiana courts routinely used the term "passive negligence" to assert that the defendant's conduct "had come to rest," or "had become passive," thus relieving defendant of liability since his conduct was not considered a proximate cause of plaintiff's injury. *Manning v. Fortenberry Drilling Co.*, 107 So. 2d 713, 717 (La. App. 2d Cir. 1958); *Penton v. Sears, Roebuck & Co.*, 4 So. 2d 547, 550 (La. App. 1st Cir. 1941).

4. *See, e.g.*, *Williams v. Pelican Creamer, Inc.*, 30 So. 2d 574, 577 (La. App. 1st Cir. 1947); *Bourgeois v. Longman*, 199 So. 142, 145 (La. App. 1st Cir. 1941).

5. *See Dixie Drive It Yourself System, Inc. v. American Beverage Co.*, 242 La. 471, 496, 137 So. 2d 298, 307 (1962): "The doctrine of passive negligence . . . places undue

gence within the proximate cause setting was viewed by the courts as a rule of law that invariably relieved all but the last wrongdoer of liability to an injured party.<sup>6</sup>

The Louisiana supreme court disavowed the passive negligence approach, however, in *Dixie Drive It Yourself System, Inc. v. American Beverage Co.*,<sup>7</sup> which marked the beginning in Louisiana tort law of a more straightforward, policy-oriented approach to resolving the problem of liability in multi-cause cases.<sup>8</sup> In *Dixie*, defendant's employee failed to display signal flags, as required by statute, when the vehicle he was driving became disabled on the traveled portion of the highway. The driver of an approaching truck, an employee of the lessee of the truck negligently failed to observe the stalled vehicle and a collision resulted. In allowing recovery in a suit by the owner for damages to his truck, the court held that the issue of defendant's liability hinged upon "whether the risk and harm encountered by the

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emphasis on the chronology of the negligent acts and omissions. In so doing it insulates the first wrongdoer from liability to innocent victims." It necessarily followed that whenever the court concluded defendant's original conduct was too remote or passive, his liability ceased. See Malone, *Ruminations on Dixie Drive It Yourself versus American Beverage Company*, 30 LA. L. REV. 363, 368 (1970) [hereinafter cited as *Ruminations*]: "Whenever an intervening act of negligence on the part of a third party is discoverable, it necessarily follows that the defendant's earlier wrongdoing must be regarded as having become passive. This is inescapable because if the original wrongdoer were still in action, his misconduct and that of the third party must necessarily be regarded as concurrent, and there would be no intervening wrong. Hence the active-passive distinction adds nothing to the discussion."

6. See Robertson, *Reason versus Rule in Louisiana Tort Law: Dialogues on Hill v. Lundin and Associates, Inc.*, 34 LA. L. REV. 1, 13 (1973) [hereinafter cited as *Dialogues*].

7. 242 La. 471, 137 So. 2d 298 (1962).

8. See *Dialogues* at 20; *Ruminations* at 364. For a survey of later decisions affirming the *Dixie* abandonment of the doctrine of passive negligence see *Woods v. Employers Liab. Assurance Corp.*, 172 So. 2d 100, 111 (La. App. 1st Cir. 1965): "Though one's negligence may be passive and have come to rest, it nevertheless subjects one to liability for all resulting injury within the protective scope of the duty or burden of care that has been violated, when the subsequent negligence of another in combination therewith produces injury to an innocent third party." See also *Steagall v. Houston Fire & Cas. Ins. Co.*, 138 So. 2d 433, 436 (La. App. 3d Cir. 1962): "The concept of passive negligence is not recognized in Louisiana Law to defeat the claim of an innocent tort victim." *Accord*, *Newton v. Allstate Ins. Co.*, 209 So. 2d 744 (La. App. 2d Cir. 1968); *Champagne v. Southern Farm Bureau Cas. Ins. Co.*, 170 So. 2d 226 (La. App. 4th Cir. 1964); *Bertrand v. Trunkline Gas Co.*, 149 So. 2d 152, 154 (La. App. 3d Cir. 1963). It is interesting to note that in a number of cases lower courts have failed to heed the admonition in *Dixie* against employing the "passive negligence" approach. See *Monger v. McFarlain*, 204 So. 2d 86 (La. App. 3d Cir. 1967); *Hartzog v. Eubanks*, 200 So. 2d 303 (La. App. 1st Cir. 1967); *Surry v. Arkansas Louisiana Gas Co.*, 170 So. 2d 133 (La. App. 2d Cir. 1964), *cert. denied*, 247 La. 358, 171 So. 2d 477 (1965).

plaintiff [fell] within the scope of the protection of the statute" violated by the defendant.<sup>9</sup> Specifically, the court reasoned that the statutory duty requiring a disabled vehicle to display signal flags was designed to protect against the risk that an oncoming motorist, whether cautious or inattentive, would fail to perceive the vehicle in time to avoid a collision.<sup>10</sup> The court further intimated that the issue of defendant's liability depends, in part, upon a policy inquiry which must be undertaken under the facts of each case without recourse to automatic doctrines like passive negligence.<sup>11</sup>

In *Pierre v. Allstate Insurance Co.*,<sup>12</sup> the Louisiana supreme court again indicated its preference for a policy-oriented approach and applied the *Dixie* analysis to the facts before it. Defendant's insured had parked his Chrysler, unattended and partially blocking traffic, on a narrow road in violation of a statute. Because the Chrysler was blocking its right lane, the pickup truck in which plaintiffs' father was riding was forced to halt behind the Chrysler to wait until the oncoming traffic had passed. An inattentively operated dump truck then crashed into the back of the stopped pickup, killing plaintiffs' father. Although *Pierre* involved a different statutory restriction than that violated in *Dixie*,<sup>13</sup> the court again found that one of the risks sought to be avoided by imposing the statutory duty not to partially block the highway was that an inattentive driver might fail to observe a motorist stopped behind the obstructing vehicle in time to avoid an accident.<sup>14</sup>

Thus, under the court's analysis, where a statutory duty is imposed to protect against the risk incurred, the mere fact that there is a later, "intervening negligent actor who helped to create the particular risk involved will not absolve the first negligent actor from responsibility."<sup>15</sup> However, the court in *Pierre* was careful to note that the *Dixie* decision did not hold that the original wrongdoer may never be relieved of liability when an intervening negligent act occurs, but only that the passive negligence theory should not be used invariably to relieve all but the last wrongdoer from liability.<sup>16</sup>

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9. *Dixie Drive It Yourself System, Inc. v. American Beverage Co.*, 242 La. 471, 488, 137 So. 2d 298, 304 (1962).

10. *Id.* at 492, 137 So. 2d at 306.

11. *Id.* at 488, 137 So. 2d at 304.

12. 257 La. 471, 242 So. 2d 821 (1970).

13. *Dixie* was concerned with a violation of LA. R.S. 32:442 (1942) (using red flags for stopped vehicle); *Pierre* centered upon a violation of LA. R.S. 32:141 (1950) (prohibiting stopping on traveled portion of the road).

14. 257 La. at 498, 242 So. 2d at 831.

15. *Id.* (emphasis in original).

16. *Id.*

The more recent case of *Laird v. Travelers Insurance Co.*,<sup>17</sup> although not concerned with the question of intervening negligence, suggests the flexibility of the duty-risk formulation. In *Laird*, the Louisiana supreme court, in rejecting defendant's claim of contributory negligence, held that the risk that a careless driver, totally oblivious to the conditions ahead, would collide with the plaintiff's stopped vehicle, a pickup truck that protruded slightly into the road, was not within the protective ambit of the statute requiring the plaintiff to park his vehicle so as not to encroach upon the lane of travel.<sup>18</sup> Although it held that the plaintiff Laird violated the statutory provision by stopping on the traveled portion of the highway when it was practicable to stop off the highway, the court found that the duty imposed upon the plaintiff by the statute was not intended to protect against the risk that an accident would occur under the circumstances that actually materialized.<sup>19</sup>

Several specific facts influenced the *Laird* court in its analysis. There was no approaching or closely following traffic impeding passage on the part of the highway not occupied by Laird's vehicle, which took up, at most, two and three-fourths feet of the twenty-foot paved portion of the highway; thus, the driver of defendant's vehicle could have passed the pickup truck without moving out of the usual lane of travel.<sup>20</sup> Moreover, Laird's brake lights were on and his vehicle was visible for at least two tenths of a mile.<sup>21</sup> A person standing by the stopped truck tried unsuccessfully to warn the approaching driver to avoid the parked vehicle and there were also highway construction signs in the area which should have alerted the driver to the possibility of danger ahead.<sup>22</sup> Consequently, although the court noted that under different circumstances Laird could have been held contributorily negligent, he was not negligent under the facts presented "because there was no breach of a duty on his part which gave rise to the harm occasioned."<sup>23</sup> Thus, *Laird* illustrates that the duty-risk formulation is not narrow and rigid in application but, as intimated in *Pierre*, may be used to deny as well as sustain liability of a person who breaches a statutory obligation.<sup>24</sup>

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17. 263 La. 199, 267 So. 2d 714 (1972).

18. *Id.* at 215, 267 So. 2d at 720.

19. *Id.* at 215-16, 267 So. 2d at 720.

20. *Id.* at 213, 267 So. 2d at 719.

21. *Id.*

22. *Id.* at 213-14, 267 So. 2d at 719.

23. *Id.* at 216, 267 So. 2d at 720.

24. Perhaps the different results reached by the court in *Laird* and *Pierre* may be explained by the fact that *Laird* involved the question of contributory negligence on

The decision in the instant case casts doubt upon the implementation of the duty-risk approach by lower courts. It appears from the majority opinion that the court viewed the facts before it as generally analogous to those in *Pierre*, and applied that holding without considering the particular circumstances surrounding the injury incurred by Shaw. Moreover, the court seemed to imply that liability is contingent only upon a finding that the breach of a duty is a cause-in-fact of the damage incurred by the plaintiff. The court stated:

The exact situation presented in *Pierre v. Allstate Insurance Company* . . . exists in this case. In fact, the situation presented here creates an even stronger factual situation for finding that Wall's negligence was a cause-in-fact of the accident . . . . It is difficult to see how the trial court erred in applying *Pierre* . . . to the case at bar.<sup>25</sup>

In deciding whether to impose liability upon a negligent defendant, the supreme court has made clear that duty-risk analysis, properly employed, requires that the courts, in addition to finding that defendant's conduct was a cause-in-fact of the accident,<sup>26</sup> must make an individualized determination of whether the defendant owed a *legal duty* to the plaintiff to guard against the particular risk incurred, under *all* the facts presented.<sup>27</sup> Neither the trial court nor the court of appeal in the instant case specified what statutory duty had been breached by Wall or whether that duty encompassed the risk of Shaw's injury. Further, a court's duty-risk determination should involve, in part, a consideration of certain "legal or policy" factors "which grant excuses from certain consequences which follow an orig-

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the part of an original wrongdoer. The absence of a comparative negligence doctrine in Louisiana might have made the court reluctant to find plaintiff negligent and hence totally bar his recovery. Whatever reason might be behind the different results, *Laird* does illustrate the court's effort to infuse flexibility into the duty-risk formulation.

25. *Shaw v. Travelers Ins. Co.*, 293 So. 2d 568, 572 (La. App. 3d Cir. 1974).

26. Properly viewed, cause-in-fact is purely a straightforward factual inquiry, involving little resort to factors of policy or justice. If the harm suffered by the plaintiff would not have occurred "but for" the conduct of the defendant, defendant's conduct is deemed a cause-in-fact of plaintiff's harm. For a survey of cases confusing the issue of causation with the ultimate determination of liability see *Brantley v. Brown*, 277 So. 2d 141 (La. 1973); *Johnson v. Johnson*, 171 So. 2d 710 (La. App. 4th Cir. 1965). For a general discussion of cause-in-fact, see Malone, *Ruminations on Cause-In-Fact*, 9 STAN. L. REV. 60 (1956); *The Work of the Louisiana Appellate Courts for the 1965-1966 Term—Torts*, 26 LA. L. REV. 510, 518 (1966). See also *Dialogues* at 20-21 n.47.

27. The court in *Pierre* stated that one of the keys for the solution of the issue of responsibility when there is more than one cause-in-fact of damages is "a determination of the exact risk or risks anticipated by the imposition of the legal duty which has been breached . . . ." 257 La. at 499, 242 So. 2d at 831.

inal act of negligence."<sup>28</sup> If this analytical technique had been properly applied in *Shaw*, it is at least questionable whether defendant would have been required to respond in damages.

In pointing out that the majority had failed to correctly apply the duty-risk approach, Judge Frugé, in dissent, indicated which circumstances he felt might bear on the defendant's ultimate liability but which had not been considered.<sup>29</sup> For instance, the highway, which was rather wide, was not obstructed completely and the cars which had stopped were on the shoulder of the highway.<sup>30</sup> The area was well illuminated from the headlights of the parked vehicles, whose emergency flashers and turn signals were engaged to warn approaching traffic.<sup>31</sup> Justice Barham, in his dissent from the supreme court's denial of writs in the case, indicated another fact which he felt should have been decisive in the case: the defendant had been arrested or otherwise detained by the police and thus was unable to take precautionary measures to prevent the accidents that occurred.<sup>32</sup> Whether or not these factors would have changed the result in *Shaw*, the court should have at least considered whether they caused the

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28. *Id.* See *Dialogues* at 17-19 n.38: "The operative limitation *Dixie* stresses is the policy inquiry into the coverage of the duty." Correctly applying the *Dixie* approach, the court in *Todd v. Aetna Cas. & Sur. Co.*, 219 So. 2d 538, 540 n.3 (La. App. 3d Cir. 1969) quoting from W. PROSSER, PROSSER ON TORTS § 49 at 282-83 (3d ed. 1964) stated: "Once it is established that the defendant's conduct has in fact been one of the causes of the plaintiff's injury, there remains the question whether the defendant should be legally responsible for what he has caused. Unlike the fact of causation, with which it is often hopelessly confused, this is essentially a problem of law. It is sometimes said to be a question of whether the conduct has been so significant and important a cause that the defendant should be legally responsible. But both significance and importance turn upon conclusions in terms of legal policy, so that this becomes essentially a question of whether the policy of the law will extend the responsibility for the conduct to the consequences which have in fact occurred." For a discussion of policy as a guide in determining liability see *Dialogues* at 12; Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014, 1034 (1928); Malone, *Ruminations on Cause-In-Fact*, 9 STAN. L. REV. 60 (1956). See also *Lynch v. Fisher*, 41 So. 2d 692 (La. App. 2d Cir. 1949).

The courts have recognized that violation of statutes under certain circumstances may be excusable in civil cases. See *Laird v. Travelers Ins. Co.*, 263 La. 199, 267 So. 2d 714 (1972); *Rowe v. Travelers Ins. Co.*, 253 La. 659, 219 So. 2d 486 (1969); *Jackson v. Beechwood, Inc.*, 180 So. 2d 732 (La. App. 1st Cir. 1965); *Moses v. Mosley*, 146 So. 2d 263 (La. App. 3d Cir. 1962). See also *Ruminations* at 386-87.

29. "The facts found in the opinion rendered by this court are contrary to the written findings of the trial court. The misconstruction of the facts has contributed to the misapplication of the law." 293 So. 2d at 573.

30. *Id.*

31. *Id.*

32. *Shaw v. Travelers Ins. Co.*, 295 So. 2d 815 (La. 1974) (Barham, J., dissenting from denial of writs).

risk encountered by the plaintiff to be beyond the duty imposed on the defendant.

More importantly, the instant decision demonstrates a tendency by the lower courts to extract from *Dixie* and *Pierre* a "rule" out of what was originally meant to be an approach or technique.<sup>33</sup> Prior to the introduction of the duty-risk approach, courts had, by applying the "passive negligence" doctrine as a rule, generally relieved the original wrongdoer from liability.<sup>34</sup> Disapproval of the "passive negligence" rule was not intended to establish a converse rule sustaining a finding of liability against the original wrongdoer regardless of the nature of the subsequent misconduct of a third party.<sup>35</sup> Nevertheless, in applying the holding in *Pierre* to the factual situation before it, the court in the present case appears to have substituted a rule automatically sustaining the liability of the original wrongdoer for one automatically rejecting liability.<sup>36</sup> Duty-risk should be viewed as a method of analysis that leaves the courts free to consider the acts of misconduct in the context of the facts and circumstances of each controversy and to confer immunity upon the original wrongdoer where policy so dictates. The current confusion exemplified by *Shaw* suggests a need by the lower courts to pause and take note of the true nature of the duty-risk approach so that the effort of the supreme court to infuse flexibility into Louisiana tort law will not be frustrated.

Sylvia R. Cooks

#### LEGAL EXPENSES AND THE ORIGIN TEST

Taxpayers, sole shareholders of a corporation, received the cor-

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33. See *Addison v. Travelers Ins. Co.*, 281 So. 2d 805, 812 (La. App. 1st Cir. 1973); *Phillips v. Ursin*, 280 So. 2d 243, 249 (La. App. 4th Cir. 1973); *Craig v. Burch*, 228 So. 2d 723, 729 (La. App. 1st Cir. 1969); *Pico v. Allstate Ins. Co.*, 206 So. 2d 99, 101 (La. App. 4th Cir. 1968).

34. See cases cited at note 2, *supra*.

35. *Ruminations* at 393.

36. Referring to *Pierre*, Professor Robertson observed: "What the case amounts to is a clear and almost fully explicit admonition that rules are not magic; that each case must be approached, within a fabric of principle and doctrine, on its own facts. It seems evident that the Supreme Court of Louisiana has been trending rather strongly in recent years toward a fairly consistent position that the Louisiana tort law should seek to avoid the proliferation of doctrines of narrow and rigid thrust, in favor of more straightforward, conscious, and fact-oriented resort to the underlying principles of the Louisiana Civil Code." *Dialogues* at 24-25. See also *Ruminations* at 369.