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PRESUMED FAULT FOR INJURIES BY ANIMALS AND CHILDREN

In *Holland v. Buckley*,[1] the Louisiana Supreme Court rejected the "first bite" rule which previously obtained in Louisiana as a defense in actions for damages by dog-bite victims. In its place, the court announced a rule, flowing from Louisiana Civil Code article 2321, that the master of the animal is presumed to be at fault. The owner's presumed fault is in the nature of strict liability and he may exculpate himself from it only by showing that the harm was caused by the fault of the victim, by the fault of a third person for whom he is not responsible, or by a fortuitous event.[2] The court justified the change in view of the responsibility of dog owners by saying that "as between him who created the risk of harm and the innocent victim thereby injured, the risk-creator should bear the loss. He maintains the animal for his own use or pleasure."[3] The court further explained that the instant opinion was part of its return to the interpretation of the Civil Code as written, but that:

> We do not do so out of blind adherence to past doctrine, however, but rather from the view that ancient intention best serves modern needs. In the crowded society of today, the burden of harms caused by an animal should be borne by his master who keeps him for his own pleasure or use rather than by an innocent victim injured by the animal.[4]

Justice Tate's opinion is careful to establish only a presumption of fault.[5] Since the owner's liability is based upon a *presumption of fault*, and not upon *strict liability* as set forth in the common law theory of strict liability, the court avoided

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1. 305 So. 2d 113 (La. 1974).

2. *Id.* at 119.

3. *Id.*

4. *Id.* at 120.

5. *Id.* at 119. "The fault so provided is in the nature of strict liability, as an exception to or in addition to any ground of recovery on the basis of negligence, Article 2316." *Id.*

the thorny problem of what to do with contributory negligence. Of course, that problem is primarily obviated by simple reference to the language of the opinion itself, when it allows exculpation of the owner by showing fault in the victim. Hence, while establishing the theory or basis of liability, the opinion wisely sets up the defenses, so that one need not wander down the shadowy hallways of theory to determine by trial and error in what guise defenses must be presented.

This writer suggested some time ago that the canine free lunch program should be ended.[6] *Holland* represents a most equitable balancing of risks and interests protected, set forth in a viable theoretical structure. The only twinge of regret evoked by the opinion is that the words "strict liability" are used at all, since the term has been appropriated by the common law to designate a theory of liability so distinct from the "imputed fault" theory that its use sorely hinders accurate analysis.

In *Turner v. Bucher*,[7] the other presumed fault case, the Louisiana Supreme Court undertook to create a viable structure for handling actions for damages inflicted by children below the traditional age at which they are deemed capable of committing offenses or quasi-offenses. In *Turner* a woman walking on the sidewalk was struck from the rear and injured by a six-year-old boy riding a bicycle. Under the jurisprudence, a six-year-old child is incapable of negligent conduct.[8] Further, under *Johnson v. Butterworth*,[9] parents were not liable for damage inflicted by their children unless the conduct of the child was itself tortious. Consequently, only an independently negligent parent was liable for the damage inflicted by his tender-aged child. *Turner* expressly overrules *Johnson*, holding:

> We conclude that although a child of tender years may be incapable of committing a legal delict because of his lack of capacity to discern the consequences of his act, nevertheless, if the act of a child would be delictual except for this disability, the parent with whom he resides is legally at fault and, therefore, liable for the damage oc-

6. *The Work of the Louisiana Appellate Courts for the 1971-1972 Term—Torts*, 33 LA. L. REV. 206, 218 (1973).

7. 308 So. 2d 270 (La. 1975). *See* Note, 49 TUL. L. REV. 1194 (1975).

8. *E.g.*, Jackson v. Jones, 224 La. 403, 69 So. 2d 729 (1953).

9. 180 La. 586, 157 So. 121 (1934).

> casioned by the child's act. This legal fault is determined without regard to whether the parent could or could not have prevented the act of the child, *i.e.*, without regard to the parent's negligence. It is legally imposed strict liability. This liability may be escaped when a parent shows the harm was caused by the fault of the victim, by the fault of a third person, or by a fortuitous event.[10]

The opinion went further to add that "[t]he fact that the conduct was tortious when measured by *normal standards* is enough to render the father liable therefor."[11] Applying the new rule to the instant facts, the court reiterated that under the "usual standards of conduct" the actions of the child would have been negligent.[12]

The decision is explicitly result-oriented. The court relied on the policy decision that an innocent victim should not be denied reparation so long as there exists a source of financial responsibility.[13] That source, it continued, should be the person charged with the care of the minor due to his legal relation to and general legal responsibility for the minor.[14] Hence, the parent in *Turner* was liable for the act of the child.[15]

The case leaves unanswered three important questions:

(1) Is the "legal fault" or legally imposed "strict liability" announced in the case different from the liability set forth in *Deshotel v. Travelers Indemnity Co.?*[16]

(2) Are there now two age brackets of minors, *i.e.*, those of tender age and those of discerning age?

(3) What is the standard of care denoted by "normal" or "usual" standards of conduct?

With respect to the first question, in *Deshotel* a father sued his insurer under the direct action statute[17] for damages occasioned by his son's allegedly negligent conduct. The court found that the 15-year-old son had negligently injured his father, for which injury the father had both a cause and a right of action against the son, and hence against the insur-

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10. Turner v. Bucher, 308 So. 2d 270, 277 (La. 1975).
11. *Id.* (emphasis added).
12. *Id.* at 271.
13. *Id.* at 274.
14. *Id.*
15. *Id.* at 277.
16. 257 La. 567, 243 So. 2d 259 (1971). See *The Work of the Louisiana Appellate Courts for the 1970-1971 Term—Torts*, 32 LA. L. REV. 213, 218 (1972).
17. LA. R.S. 22:655 (1950), *as amended by* La. Acts 1962, No. 471 § 1.

ance company, by virtue of Louisiana Civil Code article 2315. Justice Barham, writing for the majority, further stated:

> The Court of Appeal correctly concluded that Article 2318 is inapplicable here, and that it determines only the responsibility of the father for the delicts of the minor child in relation to third parties. *Article 2318 does not create negligence* in the father because of the minor's negligent acts; it merely attaches *financial* responsibility to the father for the delicts of his minor child.[18]

Justice Barham, writing for the majority in *Turner*, again characterized the financial responsibility of the parent under article 2318 for injuries caused by his minor child. The responsibility, he said, is legal fault, or legally imposed strict liability.[19] Does the "legal fault" of *Turner*, then, bar an action, previously available under *Deshotel*, by a father against his insurer for the father's damages caused by the minor child?

With regard to the second question, *Deshotel* dealt with a child of discerning age while *Turner* did not. Neither case mentions the differences, based on age, in duties owed by the child to other persons. The *Turner* opinion purports to deal only with tender-age children, and its overruling of *Johnson v. Butterworth* is restricted to the holding concerning children of tender age.[20] Does the rule of liability under article 2318 differ between parents of discerning children and those with children of tender age?

Finally, what standard of care should the court apply? For the child of discerning age, the "usual standards" should be the standards which now obtain, namely the conduct of the reasonable child of similar age, experience and discretion.[21] The issue left unanswered in *Turner* is what standard to apply to children of tender age. A jury must be charged to apply the law according to the applicable standard, and it is material whether the standard is that of an adult or that of a child.

It is difficult, if not impossible, to review the legislative history of the French Civil Code or the Louisiana Civil Code

18. 257 La. 567, 573, 243 So. 2d 259, 261 (1971) (emphasis added).

19. 308 So. 2d at 277. See text at note 10, *supra*.

20. *Id.* at 276.

21. *E.g.*, Jackson v. Jones, 224 La. 403, 69 So. 2d 729 (1953); Westerfield v. Levis Bros., 43 La. Ann. 63, 9 So. 52 (1891).

and make a case that compels the position announced in the opinion. Apparently the court desired a change in the law regarding liability for the acts of children of a tender age. If one acknowledges that as a desirable goal, this opinion requires immediate clarification to achieve the goal with a deliberate and orderly application of the law. On the other hand, it is quite possible to differ strongly with the inexorable liability which this opinion adopts for parents. As emphasized by the elaborate dissenting opinion,[22] the French have never cast this degree of liability upon a parent; neither has the common law.

The instant opinion says that it reinstates the holding in *Mullins v. Blaise*[23] and the reasoning therein.[24] *Mullins*, however, placed an emphasis on parental supervision not found in *Turner*:

> The act was a fault of the most culpable character. It is true that by reason of the tender years and lack of discernment of the minor, this fault may not be, in a legal sense, imputable to him . . . . The law itself imputes the fault to the father. It presumes that it resulted from lack of sufficient care, watchfulness and discipline on his part in the exercise of the paternal authority. *This is the very reason and foundation of the rule.*[25]

This writer suggests that *Johnson v. Butterworth* states the better rule. That opinion carefully considered every question of legislative intent and reached a result that still seems desirable for modern society.

DAMAGES UNDER CIVIL CODE ARTICLE 667

Only the courageous should venture into the arena wherein will be decided the nature of the obligations and remedies under Louisiana Civil Code article 667. The case at hand is *Hero Lands Co. v. Texaco, Inc.*,[26] in which the Louisiana Supreme Court held that a petition stated a cause of action for damages by alleging diminution of the value of plaintiff's land resulting from the creation of a dangerous

22. 308 So. 2d at 277.
23. 37 La. Ann. 92 (1885).
24. 308 So. 2d at 277.
25. 37 La. Ann. at 93 (emphasis added).
26. 310 So. 2d 93 (La. 1975). See Note, 36 LA. L. REV. 711 (1975).

nuisance on adjoining property in the form of works involving inherent hazards and dangers. The question bound to provoke great discussion is whether those damages should be collectible under article 667 or instead under article 2315 as a matter of fault based upon the violation of standards of care established in article 667, à la *Langlois*.[27]

The *Hero* opinion states that both articles 667 and 2315 may serve as bases for recovery under appropriate circumstances. Further, it states that article 2315 "contemplates responsibility founded on fault, namely, negligence or intentional misconduct, including abuse of rights."[28] Justice Tate took exception with that statement, as did Justice Barham, and the writer submits that their exceptions were properly taken, for it is now well established that fault under article 2315 is broader than negligence or intentional misconduct. The *Langlois* doctrine shows clearly that fault may be found from the violation of article 667, and need not flow only from negligent or intentional conduct. It is submitted that the *Langlois* theory gives the most coherent and cohesive scheme possible under the Civil Code for handling the recovery of damages under article 667. The court in *Langlois* said that the violation of article 669 constituted "fault," invoking article 2315 with its mandate to repair the damage resulting from the fault. One has only to recall *Reymond v. State Department of Highways*,[29] *Chaney v. Travelers Insurance Co.*[30] and the volumes of discussion[31] written about those cases to look in hopeful desperation for a clean-cut characterization of the obligations contained in article 667 and the means for implementing the remedies for breach of those obligations.

The per curiam of the court on rehearing pointed out that its holding was restricted to diminution of value from ultrahazardous construction. It is a curious restriction because the provisions of article 667 are not so restricted. The "obligation of vicinage" may be violated without negligence, without intentional misconduct, and without conduct constituting an

27. Langlois v. Allied Chemical Corp., 258 La. 1067, 1084, 249 So. 2d 133, 140 (1971).

28. 310 So. 2d at 97.

29. 255 La. 425, 231 So. 2d 375 (1970).

30. 259 La. 1, 249 So. 2d 181 (1971).

31. *The Work of the Louisiana Appellate Courts for the 1969-1970 Term—Property*, 31 LA. L. REV. 196, 217 (1971); *The Work of the Louisiana Appellate Courts for the 1969-1970 Term—Torts*, 31 LA. L. REV. 231 (1971).

abuse of right.[32] It seems then that a cause of action should be stated when facts are alleged showing damage from the neighbor-defendant's works without their being ultra-hazardous.[33]

APPELLATE REVIEW OF LOWER COURT DECISIONS

Damage Awards

Revon v. American Guarantee & Liability Insurance Co.[34] is a major research source on the question of appellate review of damage awards. In that case the Louisiana Supreme Court chose to set forth, as definitively as it could, the rule that the trial court has "much discretion" in fixing damages, as authorized by Louisiana Civil Code article 1934.[35] But when has the trial judge crossed the forbidden barrier and "abused his discretion"? The cases point out that the mere fact that an award is different from prior awards elsewhere in the jurisprudence does not necessarily make it an abuse of discretion. The jurisprudence serves only as a guideline.

There is little guidance in the jurisprudence to determine what constitutes an abuse of discretion. The Louisiana Supreme Court in *Gaspard v. LeMaire*[36] reduced an award from $19,500 to $8,500 on the grounds that the amount awarded by the jury was far out of line with those given to the plaintiffs in other cases for similar injuries. On rehearing the court pointed out that to seek too intensely a degree of uniformity of awards in court decisions was error, and that each case should be compensated on the basis of its particular circumstances. It cited with approval the opinion of the Third Circuit Court of Appeal in *White v. Robbins*[37] that the court should not make awards entirely out of proportion with previous judgments for somewhat similar injuries, and that the

32. Yiannopoulos, *Civil Responsibility in the Framework of Vicinage; Articles 667-69 and 2315 of the Civil Code*, 48 TUL. L. REV. 195 (1974).

33. From a procedural standpoint, if the case had been decided otherwise it would be difficult for a plaintiff claiming under article 667 to overcome an exception of no cause of action, because the essential allegations are that the defendant performed works on his land which caused injury to plaintiff's adjoining land.

34. 296 So. 2d 257 (La. 1974).

35. *See also* Bitoun v. Landry, 302 So. 2d 278 (La. 1974).

36. 245 La. 239, 158 So. 2d 149 (1963).

37. 153 So. 2d 165 (La. App. 3d Cir. 1963).

function of the reviewing court is "simply to determine whether the present trial court award is manifestly excessive or manifestly insufficient under all the circumstances in the present case."[38]

In *Walker v. Champion*,[39] Chief Justice Sanders dissented from the court's approval of an award of $100,000 to plaintiff, pointing out that an extensive survey of comparable cases involved awards running from $12,000 to $50,000. He concluded that accounting for all pertinent factors, including the decreased purchasing power of the dollar, a reduction to $50,000 would bring the award within the range of discretion.[40] It seems to be a necessary inference from the foregoing that if an abuse of discretion is to be shown, it must be on the basis of prior awards in similar cases. Since the award in *Walker* exceeded any prior award by $50,000, or 200%, it is difficult to say that any consistent proportion can be relied upon as a basis for asserting excessiveness.

Factual Conclusions

As to factual conclusions, the bracket of discretion within which the lower court's finding must fall in order to be honored by the appellate courts is that the evidence must furnish "a reasonable factual basis for the trial court's finding."[41] In *Anderson v. Welding Testing Laboratory, Inc.*,[42] Justice Tate cited *Dinvaut v. Phoenix of Hartford Insurance Co.*[43] and further concluded that a trial court determination of causation should not be set aside under the manifest error principle "if there is a reasonable basis for the finding under reasonable trial court evaluation of the evidence and reasonable inferences therefrom."[44]

It is submitted that trial court determination of factual matters should be honored if there is evidence in the record to support the factual determinations of the trial court. Under the facts in *Dinvaut*, it seems difficult to say that the trial court's conclusions were not reasonably predicated upon the evidence. The issue there was whether the accident in ques-

38. *Id.* at 167.
39. 288 So. 2d 44 (La. 1973).
40. *Id.* at 48.
41. Dinvaut v. Phoenix of Hartford Ins. Co., 302 So. 2d 294, 296 (La. 1974).
42. 304 So. 2d 351 (La. 1974).
43. 302 So. 2d 294 (La. 1974).
44. 304 So. 2d at 354 n.1.

tion caused the medical disability that had persisted in the plaintiff since the time of the accident, or whether the effect of the accident had ceased at a given point in time and the disability from that point forward was caused by other physical conditions in the plaintiff having no connection to the accident. The trial court and the court of appeal found that the effect of the accident terminated at a given point and gave a rather low award for that reason. The supreme court, with Justice Dixon writing the opinion, reversed both the trial court and the court of appeal, holding that the finding of lack of causation was erroneous. Justice Dixon pointed out that in thus finding that a higher award of damages for the disability was warranted, the court was not changing the award of *damages*, which would have rested within the "much discretion" rule of article 1934, but rather was changing an erroneous *factual conclusion*. Hence, the factual conclusion was subject to the "manifest error" rule rather than the "much discretion" rule, although the "manifest error" rule carries with it much the same protection for the trial court's finding of fact as the other for its award of damages.