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SHOULD "LAST CLEAR CHANCE" SURVIVE IN THE WORLD OF DUTY-RISK ANALYSIS?

In *Pierre v. Landry*[1] the supreme court found in favor of the plaintiff, a contributorily negligent pedestrian, by holding that the defendant driver had the last clear chance to avoid the accident. The court's analysis of the facts showed that defendant had a reasonable opportunity to avoid injuring plaintiff after becoming aware of plaintiff's peril.

It is submitted that if the duty-risk analysis is to be used to its fullest extent in our tort law,[2] the doctrine of last clear chance must be abandoned, for the pure atmosphere of the duty-risk world will not support the existence of such a fiction.

The typical last clear chance case, which *Pierre* undoubtedly was, lends itself easily to the duty-risk analysis with the simple statement that the plaintiff's duty to care for himself does not encompass the risk that he will be injured by a party who has observed his peril and failed to seize the opportunity to avoid injuring him. Thus the contributory negligence of the plaintiff is eliminated, for no duty is breached, and the endless badminton game of batting negligences back and forth between plaintiff and defendant is terminated. Happily, the even more ominous briar patch of antecedent negligence and the like would also have had its last clear chance to survive.

PREMISES LIABILITY—THE DUTY OF REASONABLE CARE—INVITEE-LICENSEE-TRESPASSER ABOLITION

Cates v. Beauregard Electric Cooperative Inc.,[3] a Louisiana Supreme Court decision of a prior term, announced in dictum that the traditional categories of invitee, licensee, and trespasser were of little help in applying Civil Code article 2315. More particularly, the court said that the proper test to be applied under Civil Code articles 2315 and 2316 in

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1. 341 So. 2d 891 (La. 1977).
2. *See, e.g.*, Shelton v. Aetna Cas. & Sur. Co., 334 So. 2d 406 (La. 1976).
3. 328 So. 2d 367 (La. 1976).

premises liability cases was to determine whether the defendant acted as a reasonable man in view of the probability of injury to others; and that "although the plaintiff's status as a trespasser, licensee, or invitee may in light of the facts giving rise to such status have some bearing on the question of liability, the status is not determinative."[4]

In *Shelton v. Aetna Casualty & Surety Co.*,[5] the court for the first time disposed of a premises liability case by applying the standard pronounced in *Cates*. The plaintiff in *Shelton* was an elderly woman who slipped and suffered serious personal injuries while on her son's premises. Her accident was caused by a substance collected on the ground as residue from the son's washing the flaking paint from his garage. The court found that the son owed no duty to protect his mother against the condition created by the washing operation because "the landowner is not liable for an injury resulting from a condition which should have been observed by an individual in the exercise of reasonable care or which was as obvious to a visitor as to the landowner."[6]

Under the categories analysis, the court might have disposed of the case on essentially the same basis by saying that there was no duty of the landowner to warn about or to correct a condition which was reasonably apparent to the victim, whether she was classified as an invitee or licensee.

It should be noted that the foregoing analysis was applied as part of the now traditional duty-risk approach. The court here first found that the washing residue was the cause in fact of the injury because all agreed that the plaintiff had slipped on it. Cause in fact alone will not establish liability, however, and the second consideration was whether the landowner was under a duty to protect plaintiff against the risk of injury from the condition which was found to be the cause. Since the court found no duty to protect against injury from this particular condition, it was not necessary to take up what would have been the next consideration, i.e., whether or not a duty to protect the victim was breached.

"NEGLIGENCE PER SE" BY VIRTUE OF HAZARDOUS OCCUPATION

In *Dyson v. Gulf Modular Corp.*[7] the supreme court correctly held that contributory negligence could not be found from the mere fact that

4. *Id.* at 37, *citing* Rowland v. Christian, 69 Cal. 2d 108, 119, 443 P.2d 561, 568, 70 Cal. Rptr. 97, 104 (1968).

5. 334 So. 2d 406 (La. 1976).

6. *Id.* at 410.

7. 338 So. 2d 1385 (La. 1976).

decedent was engaged in the hazardous undertaking of working in close proximity to a high voltage electric line. Decedent was unloading prefabricated house components from a trailer when the cable used for that purpose came in contact with the power line and caused decedent's death by electrocution.

The holding is consistent with the position taken by the court in *Langlois v. Allied Chemical Corp.*[8] There, a fireman failed to put on his gas mask while engaged in rescuing individuals endangered by gas escaping from the defendant's plant. The court said, "Firemen, police officers, and others who in their professions of protecting life and property necessarily endanger their safety do not assume the risk of all injury without recourse against others."[9]

8. 258 La. 1067, 249 So. 2d 133 (1971).
9. *Id.* at 1088, 249 So. 2d at 141.