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Vicarious Liability and Intentional Torts: LeBrane Redefined

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from warranty. This is indeed an absurd result which could not possibly have been intended; yet *Zapata* would seem to require vendors to list all such contracts.

In the instant case, the outstanding mineral lease was created by the landowner in 1930, forty-one years before the creation of the mineral servitude. Nevertheless, the mineral servitude owner became the successor in interest of the landowner as to the minerals and the mineral lessor as to the outstanding mineral lease at the time the mineral servitude was created. Thus the source of the eviction was the outstanding mineral servitude from which flowed the mineral lessees's contractual right to conduct mineral operations.[52] In future cases the court should find that in listing the mineral servitude in the act of sale, the vendor is relieved of any obligation in warranty for evictions caused by the exercise of contractual rights subordinate to the mineral servitude.[53]

Zapata poses a threat to the warranty provisions of the Civil Code by breaking down conceptual barriers to the extension of the exception to warranty where apparent servitudes are the source of eviction. If future purchasers of land are to be fully protected by warranty, the court must re-evaluate its analysis of the function and scope of the traditional exception to warranty.

Richard Keith Colvin

VICARIOUS LIABILITY AND INTENTIONAL TORTS: *LeBrane* Refined

Defendant, the president and majority stockholder of a closely held corporation, purchased additional insurance on the life of the plaintiff, a former vice-president of the corporation, and made the corporation the beneficiary. Shortly thereafter, the defendant and two corporate employees brutally beat the plaintiff late one evening outside of his home. The Third Circuit Court of Appeal held that the tortious acts were not committed during the course and scope of the defendant's employment. The Louisiana Supreme Court reversed and *held* that the defendant's actions were in large part motivated by his desire to improve the corporation's

52. LA. R.S. 31:114 (Supp. 1974).
53. LA. CIV. CODE art. 2501.

finances. Hence the corporation and its insurer were answerable in damages under article 2320 of the Louisiana Civil Code.[1] *Miller v. Keating*, 349 So. 2d 265 (La. 1977).

Article 2320 imposes liability on a master for the damage occasioned by his servants in the exercise of their employment,[2] but contains an exculpatory clause which limits the master's responsibility to those acts which he could have prevented.[3] The article has its source in article 1384 of the Code Napoleon.[4] French jurists have differed in their conceptualizations of the basis for the master's responsibility,[5] and various

1. LA. CIV. CODE art. 2320 states: Masters and employers are answerable for the damage occasioned by their servants and overseers, in the exercise of the functions in which they are employed.

Teachers and artisans are answerable for the damage caused by their scholars or apprentices, while under their superintendence.

In the above cases, responsibility only attaches, when the masters or employers, teacher and artisans, might have prevented the act which caused the damage, and have not done it.

2. *Id.*

3. *Id.* ¶ 3. Early cases strictly interpreted the exculpatory clause of article 2320 with the result that only certain torts committed in the physical presence of the master would fall within the ambit of the article. Ware v. Barataria & Lafourche Canal Co., 15 La. 169 (1840); Burke v. Clarke, 11 La. 206 (1837); Palfrey v. Kerr, 2 Mart. (N.S.) 503 (La. 1830). Professor Stone has pointed out that a possible reason for the inclusion of the literal restriction in article 2320 is that "in 1825 we should recall that Louisiana was a slave holding economy, a source of raw materials rather than manufactured goods, commercial as regarded its port, but argicultural as regarded its basic economy. It may have been the redactor's or legislator's wish to encourage rather than to discourage entrepreneurs employing contract labor." F. STONE, TORT DOCTRINE, in 12 LOUISIANA CIVIL LAW TREATISE § 89, at 125 (1977).

Gradually, this strict limitation was abandoned. The erosion of the applicability of the exculpatory clause was in large part due to the position that the limitation on liability had never applied to masters under the Code Napoleon and should not apply in Louisiana. Nelson v. Crescent City R.R., 49 La. Ann. 491, 21 So. 635 (1897).

Currently, the exculpatory clause is not interpreted as a literal restriction. It has been suggested that the literal code restriction has fallen into desuetude. Blanchard v. Ogima, 253 La. 34, 215 So. 2d 902 (1968).

4. Blanchard v. Ogima, 253 La. 34, 41,.215 So. 2d 902, 904 (1968). The French article provides in part: "Masters and trustees [are responsible] for the injury caused by their servants and managers in the functions in which they have employed them . . . ." FR. C. CIV. art. 1384 (Barristers of the Inner Temple trans. 1924). *See also* Comment, *Master's Vicarious Liability for Torts under Article 2320—A Terminological "Tar-Baby,"* 33 LA. L. REV. 110 (1972).

5. Planiol seemingly favored the industrial risk concept. When the rule is applied to persons engaged in industry or commerce, that is to people who speculate and employ agents and workmen, the responsibility for faults of the personnel can be justified by the industrial risk concept in the same way as the risks of accidents which happen to the personnel itself: The employer receiving the profit for himself should support the risks of the

reasons for the master's liability are propounded to the present day.[6] Louisiana courts have relied upon both French doctrine and the common law in interpreting the master-servant doctrine.[7] The common law counterpart to the master-servant doctrine is "respondeat superior." The term, which literally means "let the master answer,"[8] depicts the master's vicarious liability for the torts of his servants committed within the course and scope of their employment.[9] Louisiana jurisprudence has drawn upon the common law in interpreting article 2320 to such a great extent that it is difficult to sever the civil and common law theories.[10] It has even been said that "there is a parallel development and history of vicarious liability in both jurisdictions with almost simultaneous extensions or limitations of responsibility by statute or jurisprudence."[11] Consequently, Louisiana courts have construed the first paragraph of article 2320[12] to mean that the employer is liable for the tortious acts committed by his employees while acting within the course and scope of his business.[13]

Beginning with the landmark case of *Williams v. Pullman's Palace Car Co.*,[14] article 2320 has been construed to embrace intentional physical torts. In *Williams* the court decided that an earlier doctrine holding a master liable for a servant's fault or negligence but not for his intentional

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enterprise, and among these risks one may include the accidents due to maladroitness of an agent." 2 M. PLANIOL, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL § 911 (11th ed. La. St. L. Inst. trans. 1959). Planiol, citing R. POTHIER, OBLIGATIONS, No. 121, pointed out that "bad choice or lack of surveillance was, for Pothier, the basis for the responsibility of the master." 2 M. PLANIOL, *supra*, at 510.

6. *See* W. PROSSER, LAW OF TORTS 459 (4th ed. 1971); F. STONE, *supra* note 3, § 89, at 125.

7. Blanchard v. Ogima, 253 La. 34, 43, 215 So. 2d 902, 904-05 (1968).

8. BLACK'S LAW DICTIONARY 1591 (4th ed. 1968).

9. *See, e.g.*, James v. Williams & Son, 177 La. 1033, 1039, 150 So. 9, 11 (1933).

10. *See* Blanchard v. Ogima, 253 La. 34, 43, 215 So. 2d 902, 904-05 (1968); O.W. HOLMES, COLLECTED LEGAL PAPERS, *Agency* 67-68 (1952).

11. Blanchard v. Ogima, 253 La. 34, 43 n.3, 215 So. 2d 902, 905 n.3 (1968). The common heritage of the doctrine apparently is the reason underlying the similar usage by civilian and common law courts. Holmes traced the development of the doctrine back to the frankpledge of Saxon origin and to the responsibility of the Roman paterfamilias for his slave's tortious acts. Holmes, *Agency*, 4 HARV. L. REV. 345, 350-64 (1891). Further analysis of Roman law vicarious liability may be found in W. BUCKLAND, A MANUAL OF ROMAN PRIVATE LAW 38-60 (1928).

12. LA. CIV. CODE art. 2320; see text of article in note 1, *supra*.

13. LeBrane v. Lewis, 292 So. 2d 216 (La. 1974); Romero v. Hogue, 77 So. 2d 74 (La. App. 1st Cir. 1954). There is no vicarious liability on a principal under article 2320 for the physical torts of a non-servant agent. Blanchard v. Ogima, 253 La. 34, 44, 215 So. 2d 902, 906 (1968).

14. 40 La. Ann. 87, 3 So. 631 (1888).

wrong had been altered by modern jurisprudence.[15] The court refused to base vicarious liability on the servant's motives or the character of the wrong. Rather, the test of the master's liability was whether the act of the servant "was something which his employment contemplated, and something which, if he should do it lawfully, he might do in the employer's name."[16] Later cases have extended the scope of the master's vicarious liability with respect to his servant's intentional torts. The acts of the servant need not be proper and lawful to hold the master liable under article 2320,[17] but the master will not be held liable unless the intentional act was committed in furtherance of his business.[18]

Although a master may be liable for the intentional torts of his servants, several Louisiana appellate courts have narrowly construed the scope of the term "in furtherance of his employer's business" when intentional torts were involved.[19] They have required the plaintiff to demonstrate that the employee was acting within "the ambit of his assigned duties and also in furtherance of his employer's objectives."[20] However, the recent Louisiana Supreme Court decision in *LeBrane v. Lewis*[21] refused to recognize that a strict interpretation is necessary.[22] The court applied an analysis which it refined into four criteria: the dispute should be "primarily employment rooted"; it should be reasonably incidental to the performance of employment duties; it must occur on the employment premises; and it must occur during the hours of employment.[23] This four-point analysis has been applied in several subsequent

15. *Id.* at 91, 3 So. at 634.

16. *Id.*

17. *See, e.g.*, Strawder v. Harrall, 251 So. 2d 514 (La. App. 1st Cir. 1971); Jefferson v. Rose Oil Co. of Dixie, 232 So. 2d 895 (La. App. 2d Cir. 1970); Bradley v. Humble Oil & Ref. Co., 163 So. 2d 180 (La. App. 4th Cir. 1964).

18. Strawder v. Harrall, 251 So. 2d 514 (La. App. 1st Cir. 1971).

19. Terito v. McAndrew, 246 So. 2d 235 (La. App. 1st Cir. 1971); Bradley v. Humble Oil & Ref. Co., 163 So. 2d 180 (La. App. 4th Cir. 1964); Wills v. Correge, 148 So. 2d 822 (La. App. 4th Cir. 1963).

20. Bradley v. Humble Oil & Ref. Co., 163 So. 2d 180, 184 (La. App. 4th Cir. 1964). The court noted that in absence of the quoted criteria the master would not be held vicariously liable for the intentional torts of his servant merely because the tort occurred on the business premises during working hours.

21. 292 So. 2d 216 (La. 1974).

22. The court noted in dictum that "aside from isolated expressions in intermediate opinions, we find no modern authority to support the holding that the requirement be strictly construed in favor of the employer in tort cases." 292 So. 2d at 218 n.3. The court failed to distinguish between a rule of strict interpretation in all tort cases, and the rule suggested by the cases cited in note 19, *supra*, to the effect that courts should be reluctant to find than an *intentional* tort was in the furtherance of an employer's business.

23. 292 So. 2d at 218. The court was also careful to distinguish "a risk of harm fairly

cases.[24]

The fact that the employer is a corporation does not alter its vicarious liability under the master-servant doctrine.[25] A corporation is vicariously liable for the acts of its officers performed in the exercise of their assigned functions and within the scope of their employment.[26] A corporation, like any other employer, will only be held vicariously liable after an analysis of the motive of the employee committing the act.[27] One recent case, although it found no liability on the part of the corporate servant, expressly applied the four-point *LeBrane* analysis in reaching its conclusion.[28] Moreover, there seem to be no cases which suggest the use of a different standard to determine vicarious liability for the acts of corporate officers.[29] It therefore appears that the identity of the master under article 2320 is immaterial to his vicarious liability.

In the instant case the court required the plaintiff to show that the defendant's actions were employment rooted, although not exclusively so, and that the tort of the defendant was reasonably incidental to the performance of his official duties.[30] However, the supreme court then held that the last two prongs of *LeBrane* were largely irrelevant in evaluating the conduct of a corporation's chief executive officer.[31] This hold-

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attributable to the employer's business" from "conduct motivated by purely personal considerations entirely extraneous to the employer's interests."

24. Mays v. Pico Fin. Co., 339 So. 2d 382 (La. App. 2d Cir. 1976), *writ refused*, 341 So. 2d 1123 (La. 1977); Robinson v. Empire Gas Inc. of Lake Charles, 334 So. 2d 813 (La. App. 3d Cir. 1976). *See also* Honeycutt v. Town of Boyce, 327 So. 2d 154 (La. App. 3d Cir.), *reversed on other grounds*, 341 So. 2d 327 (La. 1976); Boudreaux v. Yancey, 319 So. 2d 805 (La. App. 1st Cir. 1975) (*LeBrane* is distinguished but reference is made to the four-part test).

25. C.H. Rice & Son v. Payne, 151 La. 949, 92 So. 395 (1922).

26. Bright v. Bell, 113 La. 810, 37 So. 764 (1905); Young v. Broussard, 189 So. 477, 481 (La. App. 1st Cir. 1939).

27. *See* Gann v. Great Southern Lumber Co., 131 La. 400, 59 So. 830 (1912); Mays v. Pico Fin. Co., 339 So. 2d 382 (La. App. 2d Cir. 1976), *writ refused*, 341 So. 2d 1123 (La. 1977). In *Mays* the court noted that the motive of the employee was of paramount importance in determining whether the tortious act was committed within the course and scope of employment. Arguably, this is not an additional test ignored by *LeBrane*. Surely the motive of the employee is embraced within the first criterion of *LeBrane*. It would appear to be an impractical and impossible exercise to differentiate the test of the motive of the employee from whether the employee's act is employment rooted.

28. Mays v. Pico Fin. Co., 339 So. 2d 382 (La. App. 2d Cir. 1976), *writ refused*, 341 So. 2d 1123 (La. 1977).

29. The instant case is probably the first case in which the supreme court has stated that standard tests to determine whether an act falls within the course and scope of employment are not wholly applicable to certain corporate officials. See text at notes 30-32, *infra*.

30. 349 So. 2d at 269.

31. *Id.*

ing was predicated upon the belief that the authority presumably granted to a corporation's chief functionary is much broader than that responsibility and discretion enjoyed by lower echelon employees.[32]

In *Miller* the defendant had almost exclusive control and direction over the corporation's finances.[33] According to the court, the battery was in large part committed by the defendant to improve the corporation's financial outlook,[34] because in the event of plaintiff's death the corporation stood to receive $87,500 in insurance proceeds.[35] In light of these facts, the court concluded that the defendant's intentional tort was committed within the course and scope of his employment, thus making the corporation liable.[36] The court also noted that the corporation was covered by a general liability insurance policy which made the insurer liable to the plaintiff.[37] Due to the liability of the corporation and its insurer for the defendant's tortious act, the court found it unnecessary to consider whether the torts of the two corporate employees who assisted Keating were committed in the course and scope of their employment.[38]

Initial appraisal of the *Miller* holding indicates that prior jurisprudence concerning the master-servant doctrine is not affected by its holding. The court's adherence to the position that the defendant's actions were partly employment rooted, albeit seriously criminal, is consistent in principle with other cases concerning the application of article 2320.[39] The case does depart, however, from the four-point analysis of

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32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 268.

36. *Id.* at 269. The corporation's vicarious liability may give rise to indemnification. "According to the jurisprudence, where the Master's liability is purely secondary or vicarious, he is entitled to reimbursement from his servant, the one primarily responsible, in the event he is required to pay a third person damages." Caldwell v. Montgomery Ward & Co., 271 So. 2d 363, 364 (La. App. 2d Cir. 1972). *See also* Williams v. Marionneaux, 240 La. 713, 124 So. 2d 919 (1960); Little v. State Farm Mut. Auto Ins. Co., 177 So. 2d 784 (La. App. 1st Cir. 1965); F. STONE, *supra* note 3, § 92, at 128; Comment, *The Employer's Indemnity Action*, 34 LA. L. REV. 79 (1973). In the instant case indemnification might have little practical effect since the servant is also the chief stockholder.

37. 349 So. 2d at 269-70. The provision actually provided that the insurer will pay on behalf of the corporation "all sums which the insured shall become legally obligated to pay as damages" because of bodily injury caused by an occurrence.

38. 349 So. 2d at 269-70. It is submitted that had the court found it necessary to resolve this question the full test of *LeBrane* would be applicable. After all, it was expressly noted within *Miller* that the four prongs of *LeBrane* are especially applicable to lower echelon employees.

39. *See* cases cited in note 17, *supra.*

LeBrane,[40] probably due to the unique position of the defendant. Although the court's disposition of *Miller* probably does not signal severe departure from traditional interpretations of article 2320, the possibility exists that *Miller* may create future problems and changes.

The first problem encountered is whether the dilution of *LeBrane* applies to all future defendants in cases involving the contours of article 2320. The unique position of this particular defendant would seem to justify a finding by the court that the defendant was acting within "the ambit of his assigned duties and also in furtherance of his employer's objectives,"[41] even though the last two tests of *LeBrane* were not met. The defendant was the president of the corporation, the chief stockholder, the corporation's top human functionary, and personally charged with all corporate financial decisions. Apparently no control of any type was exercised by the corporation over Keating, perhaps because the corporate entity could be said to be embodied in Keating. Therefore, one should be wary in attempting to interpret the *Miller* rationale as applying to any corporate officer. The wide latitude of "mission and authority" possessed by Keating, who was in essence the corporate entity, may not be shared by other corporate officers or even corporate presidents who must answer to stockholders or a board of directors. Such future defendants presumably would be examined in accordance with the four-pronged rationale of *LeBrane*.[42] Viewed in this perspective, the dilution of *LeBrane* was cosmetic and done only to meet special problems posed by the defendant's unique status.

Questions also arise concerning what type of behavior will be considered "employment rooted," in cases involving intentional physical torts under article 2320. While no definite criteria were provided in the opinion, it can be argued safely that the actions of employees will not be outside the scope of the master's vicarious liability solely because they are too violent.[43] The *Miller* court went to great lengths to find the attempted murder employment rooted. The court also drew rather summary conclusions about Keating's presumed designs towards Miller. No direct evidence was presented in the opinion to document Keating's al-

40. See text at notes 30-32, *supra*.

41. Bradley v. Humble Oil & Ref. Co., 163 So. 2d 180, 184 (La. App. 4th Cir. 1964).

42. See note 37, *supra*.

43. The instant case serves as a ready example. In another case, *Mays v. Pico Fin. Co.*, 339 So. 2d 382 (La. App. 3d Cir. 1976), *writ refused*, 341 So. 2d 1123 (La. 1977), there was an opportunity to decide if a rape by an employee would fall within the master's vicarious liability. Under proper circumstances, not present in the case, a rape could probably also attach vicarious liability to the master, if all of the elements of *LeBrane* are satisfied. See note 22, *supra*.

leged plot to improve corporate finances by engineering Miller's demise. The court did not deal with the contention that any benefit to the corporation was merely incidental, since the defendant, as chief stockholder, would benefit personally and indirectly by any payment of insurance benefits to the corporation if it was indeed solvent.[44] The court also noted that the possible insolvency of the corporation due to outstanding loans could be a reason for the defendant's actions.[45] This factor perhaps explains the court's conclusion that the battery was employment rooted, but here, too, the court relied on less than solid evidence. In a footnote the court admitted that the facts do not necessarily indicate that the corporation was insolvent.[46] Whether or not a tradition of "strict interpretation" of article 2320 ever existed,[47] the *Miller* court went to the opposite extreme, creating virtual presumptions in favor of employer liability. However, the court's findings were probably justified by the extraordinary circumstances of the instant case. It would have been an exercise in futility for the court to have attempted to isolate the exact source of the defendant's motive and authority to commit this tort because Keating was the corporate entity and not subject to any other corporate officer's directives.

The result in *Miller* is manifestly correct as applied to this particular defendant in light of his broad responsibilities and direct authority. Nevertheless, this case should be restricted to its unusual facts. The four-point analysis of *LeBrane* remains an excellent test for determining whether an act takes place within the course and scope of employment. However, the *LeBrane* test should not be viewed as a concrete determination of what the law is irrespective of peculiar and individual facts. The test of *LeBrane* merely represents a laudable attempt by Louisiana courts to formulate a practical, yet flexible, gauge to determine a master's vicarious liability under article 2320. The holding of *Miller* is an affirmation of the flexibility of Louisiana jurisprudence concerning the master-servant doctrine.

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44. The corporation presented this argument which was noted in the appellate opinion. Miller v. Keating, 339 So. 2d 40, 45 (La. App. 3d Cir. 1976).

45. 349 So. 2d at 267.

46. "As the defendant properly points out, this fact does not necessarily indicate that the corporation was insolvent, for there was evidence that much of the borrowed capital had been employed in purchasing land for residential development, that the land was valuable and that the company still owned it." 349 So. 2d at 267.

47. See notes 19-20, *supra*, and accompanying text. But see note 22, *supra*, and accompanying text.