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TORTS

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LOESCHER, KENT, AND ENTREVIA

When the Louisiana Supreme Court issued its opinion in *Kent v. Gulf States Utilities Co.*,[1] serious questions were raised as to the viability of the so-called strict liability theory set forth in *Loescher v. Parr*.[2] In particular, the *Kent* opinion allowed a defendant to introduce evidence of reasonable care in his defense after a plaintiff had established that the "thing" in defendant's control posed an unreasonable risk of injury.[3] Under *Loescher*, such evidence is inadmissible because the crux of *Loescher* is the statement that liability may arise for injury resulting from an unreasonable risk of harm, "despite the fact that no personal negligent act of inattention"[4] on the part of the defendant is proved. The *Loescher* opinion then sums up the burden on the plaintiff as one requiring proof of the vice, or unreasonable risk of injury, and that the damage resulted from the vice. Addressing the defendant's posture, the court writes: "Once this [unreasonable risk plus damage resulting therefrom] is proved, the owner or guardian responsible for the person or thing can escape liability *only* if he shows the harm was caused by the fault of the victim, by the fault of a third person, or by an irresistible force."[5]

The literal language of *Kent* expanded the defensive possibilities available to a defendant found to be the owner or custodian of a defective thing. Kent added to the three foregoing possibilities the additional defense of the reasonableness of the defendant's conduct, which, in the words of *Kent* itself, made the defendant's duty (to use reasonable care) the same in the strict liability cases under Civil Code article 2317 and in the ordinary negligence cases. The removal of the issue of reasonable care from an action based on article 2317 was virtually the entire innovation of *Loescher* and is the essence of the "strict liability" character of the action. To allow a defendant to introduce the issue of reasonable care, with supporting evidence, as proposed in *Kent*, was thus antithetical to *Loescher* in the most basic sense.

It appears to this writer that the court in *Entrevia v. Hood*[6] restored

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1. 418 So. 2d 493 (La. 1982).
2. 324 So. 2d 441 (La. 1976).
3. *See* Crawford, *Developments in the Law, 1981-1982—Torts*, 43 LA. L. REV. 607, 609 (1982).
4. 324 So. 2d at 446.
5. *Id.* at 447 (emphasis added).
6. 427 So. 2d 1146 (La. 1983).

the *Loescher* theory to its pure and original form, through the simple means of explaining the principles of fault under article 2317, by literally quoting, and thus adopting anew, the essential passages of *Loescher*. The court concluded its summary of the law under *Loescher* by writing:

> [T]he injured person must prove that the building or its appurtenances posed an unreasonable risk of harm to others, and that his damage occurred through this risk. *Upon proof of these elements, the owner is responsible for the damages, unless he proves that the damage was caused by the fault of the victim, by the fault of a third person, or by an irresistible force.*[7]

Entrevia thus removed the defendant's showing of due care as a permissible defense by omitting it from the enumerated options available to a defendant. Later in its opinion, the court also made specific reference to *Kent* and categorized the *Kent* analysis of *Loescher* as a suggestion for, or an indirect way of, furthering thoughtful insight into the strict liability balancing process.[8]

The *Entrevia* opinion itself is a model of analysis under the *Loescher* theory. A thing may be defective in form (rotten steps, hole in street) and may still not pose an unreasonable risk of injury if the magnitude of the risk and the likelihood of harm do not outweigh the utility of the thing and the burden of preventing the risk. Under the *Entrevia* facts, the likelihood of injury or harm was low because no persons were likely to use the building with its fence and "no trespassing" signs; while rotten steps are hazardous, they do not carry the same gravity of harm as one might assign to uninsulated, high voltage electrical lines; the utility of such old buildings is high, for if hay is stored there, another storage building need not be constructed; and if all such buildings have to be either torn down or maintained in a safe condition, the economic burden on farmers would be intolerable. Hence, even though the steps were rotten, they did not pose an unreasonable risk under the scrutiny of the balancing process.

The Electric Utility Cases

In *Hebert v. Gulf States Utilities Co.*,[9] the Louisiana Supreme Court clarified the duty of electrical utility companies in the handling of their high power lines. *Kent* had created a question of whether electrical utility companies were under the standard of negligence or of strict liability, even though the *Kent* decision was rendered on the basis of negligence. *Hebert* makes it very clear that the duty is one of "utmost care": "Electric transmission companies which maintain and employ high powered lines

7. *Id.* at 1148 (emphasis added).
8. *Id.* at 1150.
9. 426 So. 2d 111 (La. 1983).

are required to exercise the utmost care to reduce hazards to life as far as practicable. . . . However, an electric utility is not required to guard against situations which cannot reasonably be expected or contemplated."[10]

The court specified that the practical safety measures that might be required under this high duty of care may include (1) the insulation of the lines, (2) warning adequately of the danger or (3) taking other proper and reasonable precautions to prevent injury.

The court found that the defendant had not satisfied its three-fold duty under the circumstances of this case. The plaintiff was working in the construction of a building which rose closer and closer to existing high power lines as construction progressed. The plaintiff was working on the top of the building and he therefore came closer and closer to the power lines until finally he touched a metal beam to the high power line and was thrown to the ground by the resulting shock.

The court, in determining whether the defendant had discharged its duty, emphasized the actual knowledge of the defendant that the high power lines were a potential hazard (a crane at the same site had previously hit the power line, knocking out service temporarily). The court reasoned that upon obtaining this knowledge, the defendant's duty was to take reasonable measures to assure that workers were able to work without an unreasonable risk of harm. The court found that reasonable measures could include de-energizing the entire line adjacent to the construction site, rerouting the energy supply or placing temporary insulation similar to rubber hoses on the lines. The court emphasized that it was within the power of the defendant to make the workplace safe, and that the defendant had not done so.

The *Hebert* opinion obviously signifies a sharply increased practical burden on defendant electric utility companies. Concomitantly with this increased burden is an apparent tightening of the requirements to prove assumption of risk or contributory negligence on the part of the plaintiff workman. The stringent measure of duty applied by *Hebert* was achieved without application of so-called strict liability, which the court specifically disavowed as the basis for electric utility liability.

In *Meche v. Gulf States Utilities Co.*,[11] the Louisiana Supreme Court went even further in its requirement of care on the part of the electric utilities. A father was killed and his son seriously injured when they attempted to install an antenna nearly twenty-eight feet tall on top of their trailer located in a trailer park. The attempt to erect the antenna took place at night by the light of the headlights of two vehicles. The antenna contacted a high-power electric line running across the park twenty-three feet above the ground, causing the death and injury.

10. *Id.* at 114 (citations omitted).
11. 436 So. 2d 538 (La. 1983).

The jury in the trial court, and the court of appeal, found that the defendant was not negligent; the Louisiana Supreme Court reversed, finding that the defendant failed to take special precautions for the special risk attendant upon extending a high voltage line through the interior of a trailer park. The court found that the lines could have been placed higher and that no effective warning of the presence of wires was given to the occupants of the trailer park.

Meche presents no new legal analysis of the duty of electric utilities, but applies the standards enunciated in *Hebert* which were not satisfied by the defendant. This writer must agree with the dissent of Justice Blanche, in which he observes that it was hardly foreseeable that an individual would raise a twenty-seven foot antenna directly into an electrical line during the hours of total darkness.[12] The majority opinion, in considering the issue of contributory negligence of the victims, found that there was no way the victims could have anticipated that the wire was there above them. It seems equally true that the defendant had no realistic way of knowing that such an antenna-raising would take place in the darkness of night. Contrary to *Hebert*, there was no specific incident whatsoever to put the utility company on notice that the occupants of the park might be endangered by this line. It is the wisdom of the court that is being exercised in determining who should bear this loss, and in light of *Hebert* and *Meche*, it is clear that the court considers the electric utility company a satisfactory risk-distributor.

12. *Id.* at 542 (Blanche, J., dissenting).