Louisiana Law Review

Volume 50 | Number 2
Developments in the Law, 1988-1989
November 1989

Torts

William E. Crawford
Louisiana State University Law Center

TORTS

*William E. Crawford**

ELECTRICAL UTILITY LIABILITY FOR ELECTROCUTIONS**

"What's in a name? That which we call a rose
By any other name would smell as sweet."[1]

Has the Louisiana Supreme Court, in *Levi v. Southwest Louisiana Electric Membership Coop.*,[2] applied strict liability, called by the name of negligence, to electrical utility companies in electrocution cases? While retaining ostensibly the name of negligence for the standard of care governing the companies, the court has structured the plaintiff's burden of proof so that it fits nicely into the court's own definition of strict liability[3] by effectively eliminating plaintiff's burden to prove foreseeability of risk. The opinion appears to be tailored to those cases in which the company has no actual knowledge of the risk.

The duty of the power company under *Levi* is:

1. "[W]hen the power company realizes or should realize that the transmission of electricity through its line presents an unreasonable risk of causing physical harm to another, it is under a duty to exercise reasonable care to prevent the risk from taking effect."[4]
2. "A power company is *required* to recognize that its conduct involves a risk of causing harm to another if a reasonable person would do so. . . ."[5]
3. The power company further has the "*obligation to make reasonable inspections of wires and other instrumentalities in order to discover and remedy hazards and defects.*"[6]

---

* James J. Bailey Professor of Law, Louisiana State University.

** Electrocution is used here to apply generally to injury from electricity.

1. W. Shakespeare, Romeo and Juliet, Act II, Scene II, 2.43.
2. 542 So. 2d 1081 (La. 1989).
3. Hunt v. City Stores, Inc., 387 So. 2d 585 (La. 1980). "The distinction between the two theories of recovery lies in the fact that the inability of a defendant to know or prevent the risk is not a defense in a strict liability case but precludes a finding of negligence." Id. at 588.
4. 542 So. 2d at 1084.
5. Id. (emphasis added).
6. Id. (emphasis added).

> 4. "[A] company will be considered to have *constructive knowledge* of an electrical hazard which has existed for a period of time which would reasonably permit discovery had the company adequately performed its duties."[7]

It is on the point of foreseeability (recognizing, realizing) of the particular risk that most of the battle has occurred in prior electrocution litigation. Typically the utility prevailed in a case when it convinced the trier of fact that the risk was unforeseen or unforeseeable or, in more practical terms, that the company had no notice of the existence of the dangerous condition. Under the rule of *Levi*, if the accident is found to have been the result of a hazard that has existed for a period of time that would reasonably permit discovery, the company will be deemed as a matter of law to have constructive knowledge of the risk. Foreseeability of the risk will thus be established as a matter of law and the company will as a matter of law be negligent.[8]

The establishment of foreseeability as a matter of law occurs through still another rule in *Levi*. If the company "is *required* to recognize that its conduct involves the risk of causing harm to another if a reasonable person would do so,"[9] then the court's finding of an unremedied hazard carries with it the finding of foreseeability, because the company, as a matter of law, "recognized" the risk.

With foreseeability of the risk established, the next issue is whether the risk was unreasonable (and if it is so found, then liability follows).

> If the risk which took effect as plaintiff's injuries was an unreasonable one, and the power company failed to comply with a duty or standard of care requiring it to take precautions against that danger, the risk was within the scope of the defendant's duty and defendant's substandard conduct was a legal cause of the injuries.[10]

It seems that any electrocution is the result of a predetermined unreasonable risk, if the elements of the balancing process are evaluated in accordance with *Levi*.

> Since there are occasions when high voltage electricity will escape from an uninsulated transmission line, and since, if it does, it becomes a menace to those about the point of its escape, the

---

7. Id. at 1084-85 (emphasis added).

8. "Accordingly, the power company was guilty of negligence that was a legal cause of plaintiff's injuries, or, in other words, the company breached its duty to take precautions against the risk that took effect as those injuries, and the lower courts committed manifest error in not reaching this conclusion." Id. at 1089.

9. Id. at 1084 (emphasis added).

10. Id.

> power company's duty, as in other similar situations, to provide against resulting injuries is a function of three variables: (1) the possibility that the electricity will escape; (2) the gravity of the resulting injury, if it does; and (3) the burden of taking adequate precautions that would avert the mishap. When the product of the possibility of escape multiplied times the gravity of the harm, if it happens, exceeds the burden of precautions, the failure to take those precautions is negligence.[11]

The balancing process as stated above seems to *require* the finding of an unreasonable risk in every instance of electrocution. If the possibility (likelihood?) of escape is given the lowest possible value of "one," (on a scale of one to ten) and since it is life itself, or serious personal injury, that is threatened, a value of "ten" is given to the factor of gravity of harm; and if for burden of precaution, a value of "three" is given (since the court described it as a "minimal" value), it is apparent that *any* electrocution must be found to be the result of an unreasonable risk, because the gravity of harm value by itself will exceed the "minimal" cost of prevention.

Weber v. Fidelity & Casualty Insurance Co. of N.Y.[12] used a very similar structure to establish our first products liability cause of action in what is now recognized as strict products liability. In *Weber*, upon a finding that a product was defective (unreasonably dangerous to normal use), the manufacturer was imputed with knowledge of the defect, this knowledge amounting to foreseeability of the risk of injury in the product, and that foreseeability of risk amounting to negligence. Negligence thus resulted as a matter of law and was not rebuttable.

The same legal effect seems to occur in the *Levi* structure of negligence for power companies and is quite a departure from prior statements of duty binding the power companies. In *Simon v. Southwest Louisiana Electric Membership*,[13] the supreme court said "operators of power lines are not required to anticipate every possible accident which may occur and are not the insurers of safety of persons moving around power lines in the course of everyday living." In *Hebert v. Gulf States Utilities Co.*,[14] the court further stated that power companies "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."[15]

---

11. Id. at 1087.
12. 259 La. 599, 250 So. 2d 754 (1971).
13. 390 So. 2d 1265, 1268 (La. 1980).
14. 426 So. 2d 111 (La. 1983).
15. Id. at 114.

On what issues, then, may the power company offer a possible defense under *Levi*? One point is to attempt to show that the hazard did not exist for a sufficient period of time to permit discovery. The viability of that defense depends upon the amount of time that the court is willing to allow the company to discover and remedy the risks. The supreme court, in *Briggs v. Hartford Ins. Co.*,[16] imposed a similar duty to discover hazards on the state and municipalities. The court said that "[g]overnmental bodies are held to a standard of reasonable prudence and care in discovering hazards. . . . Therefore, DOTD was charged with constructive notice of the hazard."[17] The court found that DOTD had constructive knowledge of the hazardous condition because the traffic controls in question "were regularly inspected."[18] A system of regular inspection might, therefore, further seal the fate of power companies.

Will a defendant power company be permitted to introduce general evidence of reasonable care for consideration by the jury? Will a jury be allowed to find a power company not liable despite the injury if it hears testimony that a thorough and diligent system of inspection and reaction to hazard is regularly enforced by the company? Will a jury still be entitled to find that compliance with the height regulations for electrical transmission lines amounts to reasonable care in the prevention of hazards? The opinion, in a fundamental pronouncement, says that a risk is within the defendant's scope of duty "[i]f the risk which took effect as plaintiff's injuries was an unreasonable one, *and the power company failed to comply with a duty or standard of care* requiring it to take precautions against that danger."[19] This crucial statement may be interpreted two ways: (1) After the finding of unreasonable risk, the company may introduce evidence of reasonable care. But according to basic negligence analysis, unreasonable risk and reasonable care are mutually exclusive,[20] to the extent that a jury verdict on special interrogatories finding both would be an inconsistent verdict. (2) More likely, the statement means that if the injury occurred as the result of an unreasonable risk, as a matter of law the company breached its duty to inspect, discover, and remedy.

There are critical questions yet to be answered to determine whether *Levi* has in fact established strict liability—in the name of negligence—for utility companies.

---

16. 532 So. 2d 1154 (La. 1988).
17. Id. at 1157.
18. Id.
19. 542 So. 2d 1081, 1084 (La. 1989) (emphasis added).
20. Terry, Negligence, 29 Harv. L. Rev. 40 (1915).