Louisiana Law Review

Volume 52 | Number 3
January 1992

Torts

William E. Crawford
Louisiana State University Law Center

Torts

*William E. Crawford**

Consent to Intentional Harm—Bazley *Action*

The court in *Fricke v. Owens-Corning Fiberglas Corp.*[1] introduced into the *Bazley*[2] action the notion that consent bars recovery for an alleged intentional harm when it is alleged that an employer intentionally inflicted harm upon an employee or knew with substantial certainty that the harm would occur.

George Fricke saw fellow employee Melvin Davillier lying unconscious at the bottom of an eighteen-foot deep mustard tank. Fricke voluntarily descended a rope ladder inside the tank to rescue Davillier, having first consulted with Baumer, a supervisor. The supervisor went for help and when he returned Fricke was also unconscious at the bottom of the tank. Davillier died of his injuries, and Fricke sustained severe brain damage.

After reviewing the *Bazley* intentional harm doctrine and the basic law of intentional harm, including the effect of consent thereon, the court noted that:

> It is uncontroverted that neither Fricke nor Baumer knew that the mustard tank contained lethal or gravely damaging vapors; and that neither knew what had felled Davillier at the bottom. The evidence indicates without dispute that, although there had been some indication that the vapors had caused breathing difficulty to a few employees, in approximately 57 years of operations prior to the accident no employee had been rendered unconscious or seriously injured by the mustard tanks' vapors.[3]

The trial court granted summary judgment in favor of the defendant, and the court of appeal reversed, concluding that genuine issues of material fact existed so as to make summary judgment improper.

The supreme court found that Fricke "consented to whatever offensive or harmful contact that Baumer desired or believed to [be] a

---

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

1. 571 So. 2d 130 (La. 1990).
2. Bazley v. Tortorich, 397 So. 2d 475 (La. 1981).
3. 571 So. 2d at 133 (footnote omitted).

substantial certainty would befall Fricke when he descended to rescue Davillier."[4]

Section 892 of the Restatement (Second) of Torts provides the following definitions and explanations of the consent necessary to negate intentional harm: "Consent is willingness in fact for conduct to occur."[5]

Comment (b) to Section 892 states that "[c]onsent means that the person concerned is in fact willing for the conduct of another to occur."[6]

Section 892A(2)(b) states that "[t]o be effective, consent must be to the *particular* conduct or to substantially the same conduct."[7]

Conduct is the act of the tortfeasor resulting in the harm. The conduct of the employer in this case would be the exposure of employees to lethal mustard gas. Since Fricke did not know there was lethal mustard gas in the tank, it seems impossible that he was able to have consented to this conduct.

Prosser's hornbook states that:

> The defendant's privilege is limited to the conduct to which the plaintiff consents, or at least acts of a substantially similar nature. A consent to a fight with fists is not a consent to an act of a different nature, such as biting off a finger, or stabbing with a knife. Permission to dump "a few stones" upon property is not a permission to cover it with boulders. If the defendant goes beyond the consent given, and does a substantially different act, he is liable.[8]

Perhaps if Fricke had fallen from the rope ladder it might be argued that he had consented to an intentional harm in that respect, but it seems very difficult to argue that he consented to exposure to lethal gas when the opinion itself states that it is an uncontroverted fact that neither the supervisor nor Fricke knew of this lethal danger.

Fricke's voluntarily descending into the tank would not even qualify as assumption of risk under the old doctrine.[9] The essence of assumption of risk is awareness of the risk.[10] Without this knowledge of the lethal vapors, it would be impossible to say that Fricke was aware that there was a danger of death at the bottom of the tank.

The tendency of the court in recent years has been to lessen the consequence upon the employee of going to work in a hazardous work-

---

4. Id.

5. Restatement (Second) Torts, American Law Institute, § 892.

6. Id. at § 892, comment (b).

7. Id. at § 892A(2) (emphasis added).

8. W. Prosser and W. Keaton, The Law of Torts, § 18 (5th ed. 1984) (footnotes omitted).

9. Lytell v. Hushfield, 408 So. 2d 1344 (La. 1982).

10. Dorry v. Lafleur, 399 So. 2d 559 (La. 1981). Assumption of risk as a separate doctrine was abolished by Murray v. Ramada Inns, Inc., 521 So. 2d 1123 (La. 1988).

place.[11] His voluntary appearance at work amidst the hazards of his job has been specifically held not to be assumption of risk. The circumstances found by the court to comprise consent were so vague that this application of the theory of consent would eliminate virtually all the cases under the *Bazley* action.

If indeed the court seeks to slow the volume of employee suits against the employer in tort, the easier solution would be to eliminate the "substantial certainty" element of the action. The great majority of the *Bazley* cases, such as the instant one, would have little hope of carrying the burden of showing that the employer actually intended or desired the injury suffered by the plaintiff. The interpretation of the phrase "intentional act" would be analogous to the interpretation of the exclusionary clause in insurance policies for intentional harms. The court in *Breland*[12] concluded that the intentional harm exclusion should be interpreted as a contractual provision, not as a reference to traditional intentional torts. It would seem logical to interpret the workers' compensation phrase[13] in the same fashion, restricting the action to injuries intended and desired by the employer.[14]

Products Liability Act Is Not Retroactive—Cigarettes May Be Unreasonably Dangerous Per Se

In *Gilboy v. American Tobacco Co.*,[15] the Louisiana Supreme Court reversed a summary judgment granted by the court of appeal in favor of defendant tobacco company and held that substantial issues of fact existed as to whether cigarettes were unreasonably dangerous per se, whether plaintiff was subject to comparative fault, whether it could be shown that cigarette smoking caused plaintiff's condition, and whether the warnings required on cigarettes were effective.

The principal statements of law contained in the opinion were that the Louisiana Products Liability Act[16] is not retroactive and that cigarettes could be found to be unreasonably dangerous per se under *Halphen v. Johns-Manville Sales Corp.*[17] by a jury. Another significant statement was that the Federal Cigarette Labeling and Advertising Act[18] does not expressly preempt state tort remedies and that plaintiff's *Hal-*

---

11. Bell v. Jet Wheel Blast, Div. of Ervin, Ind., 462 So. 2d 166 (La. 1985).

12. Breland v. Schilling, 550 So. 2d 609 (La. 1989).

13. See W. Malone & A. Johnson, Workers' Compensation Law and Practice, § 365 nn. 3.5, 3.35, & 3.40, in 14 Louisiana Civil Law Treatise (2d ed. Supp. 1991).

14. Note, *Breland v. Schilling*: Louisiana's Approach to "Injuries Expected or Intended From the Standpoint of the Insured," 52 La. L. Rev. 199 (1991).

15. 582 So. 2d 1263 (La. 1991).

16. La. R.S. 9:2800.51 et seq. (1991).

17. 484 So. 2d 110 (La. 1986).

18. Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331-40 (1988).

phen per se action would exist even if there were a 1966 federal preemption of the failure to warn issue. This point was further included in the causation issue as to the effectiveness of the warning, the court pointing out that plaintiff became addicted at an early age before the warnings on cigarette packages reached their current very specific state.

Burden of Prevention of Unreasonable Risk—Highway Right of Way

In *Oster v. Department of Transportation & Development*,[19] plaintiff's sixteen year old son was injured when he rode his dirt bike into a drainage ditch located approximately seventeen feet off a Louisiana highway. The claim for damages was based on both negligence and strict liability. For both theories of recovery it was necessary for plaintiff to establish that the ditch constituted an unreasonable risk of harm. The supreme court noted that the determination of unreasonable risk is determined by balancing the likelihood and magnitude of harm against the utility of the thing, including "the cost to the defendant of avoiding the risk and the social utility of plaintiff's conduct at the time of the accident."[20]

The court further wisely pointed out that even under the strict liability theory of Article 2317, the duty-risk analysis must be observed in order to determine whether the risk and injury complained of falls within the duty of care imposed upon the defendant. In furtherance of this analysis, the court observed that use of this particular area of the right of way for riding a dirt bike was not an intended use of that area, and the state accordingly is "simply *not* under a duty to maintain the grassy area off the shoulder of the road in a condition reasonably safe for recreational, off-road vehicular use."[21]

Perhaps the most impressive point of the opinion was the court's out-right limitation of the burden on the state:

> We think the question is not so much whether the grass was useful; rather, the question is whether it is reasonable to impose a rule of law which would require DOTD to maintain every inch of property within its control neatly mowed or face the prospect of tort liability. DOTD's jurisdiction extends over thousands of miles of roads in this state. Considering the effect of Louisiana's climatic conditions upon the rate at which grass grows, especially during the spring and summer months, maintaining in a well-mowed condition the grass along all of the highways in this state would require a Herculean effort on the

19. 582 So. 2d 1285 (La. 1991).
20. Id. at 1289.
21. Id. at 1291 (emphasis in original).

> part of DOTD, as well as a Herculean budget. We do not believe the law requires such efforts.[22]

The court thus found that the unmowed condition of the grass around the ditch did not constitute an unreasonably dangerous condition, further found that there was no duty to maintain that area for recreational use, and rejected plaintiff's claim.

---

22. Id. at 1291.