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Torts and Workmen's Compensation

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IV. TORTS AND WORKMEN'S COMPENSATION

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TORTS

Nuisance and Fault

Professor Prosser in his excellent text on torts observed: "There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.'"[1] The lengthy decision in the recent case *Devoke v. Yazoo and Mississippi Valley Railroad Company*[2] did little to dissipate this confusion as to the nature of nuisance. The court, however, did make clear the fact that an annoyance arising from the use of neighboring land may be actionable without a showing of the kind of mismanagement or fault that is characteristic of the average negligence case. This is in line with the course of decisions both here in Louisiana and elsewhere.[3] The opinion, however, relies upon an observation to the effect that nuisance cases imposing liability without fault are sui generis and that they differ in kind from torts controversies. This can serve only to confuse an area of the law that is in drastic need of illumination.

This is no place to launch into a diatribe on the relationship between fault and tort liability, although it is appropriate to observe that moralistic theology (of which the dogma of fault is likely to be regarded as a part) furnishes a thoroughly inadequate approach to the balancing processes that the courts must effect in the vast field of conflicting social and economic interests that parade under the name of torts. The term, fault, may, of course, be expanded until it is synonymous with "common sense" or "intuitive feeling."[4] When so used it is still a useful tool in our legal vocabulary. It describes the tilt of the scale in balancing the interests involved without committing the judge for the future. Nevertheless, the term, fault, because of its moralistic connotation does sometimes force the court into an embarrassing corner, as in the present case.

Even if the language of morals is essential, the average nuisance cases are thoroughly in line with such an approach. The facts of

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1. Prosser, A Handbook of the Law of Torts (1941) 549.

2. 211 La. 729, 30 So. (2d) 816 (1947). See also O'Neal v. Southern Carbon Co., 31 So. (2d) 216 (La. 1947).

3. Friedmann, Negligence and the Overlapping of Torts (1940) 3 Modern L. Rev. 305; Smith, Reasonable Use as Justification of Damage to a Neighbor (1917) 17 Col L. Rev. 383.

4. See, for example, the excellent treatment in Stone, Tort Doctrine in Louisiana: The Materials for the Decision of a Case (1942) 17 Tulane L. Rev. 159, 213-215.

the *Devoke* case, itself, afford an ideal illustration. For many years the defendant railroad had deposited smoke and soot on adjoining property despite the long continued protest of neighboring home owners, who had even secured an injunction as far back as 1910. This was an intentional wrong—the doing of an act with full knowledge that the consequences were injurious to other persons. The fact that there was no desire to hurt is quite immaterial. The defendant simply answers that his purposes were more important than the interests of his neighbors, and the court is thus required to balance the conflicting claims.[5]

This balancing of claims is what is done in *every* torts controversy. If I should enter on your property to recapture my lost golf ball, my defense is the asserted privilege that my purpose to regain my property is more important than your interest in having your land free from invasion. The court may or may not agree with me, but our controversy is nevertheless over a tort. The same is true of the present nuisance case; the defendant sends his smoke across the border and claims the privilege of doing so because running railroads is so valuable to society that the neighbors must suffer their loss without redress, even though defendant knows he is injuring them and he proposes to continue doing so. The court's problem is to weigh the conflicting needs of society and give its answer. The notion that we must find a "bad man" lurking in the woodpile before we can call this area "tortious" is entirely too narrow as a working premise.

In *Borgnemouth Realty Company v. Gulf Soap Corporation*[6] the court was faced with the demand that an injunction and damages be granted the owners of residential property against a rendering establishment in the neighborhood that was emitting nauseous fumes. The court concluded that the plant was a nuisance in view of the place of its location and the manner of its operation. In passing it observed that a rendering plant is not a nuisance per se (or an absolute nuisance), and, if relief were to be allowed, it would be obliged to balance the conveniences and burdens attendant upon the particular situation.

The position of the court in refusing to outlaw arbitrarily a rendering plant is commendable. The concept of an absolute nuisance has little, if any, validity. It is, in practice, restricted to two types of situations: first, where the legislature has outlawed the

5. Prosser, op. cit. supra note 1, at 554.
6. 31 So. (2d) 488 (La. 1947).

business of defendant, at least insofar as it may be conducted in urban areas; second, certain activities which are nearly everywhere required to pay their own way (such as the storage of explosives or the conduct of blasting operations). In both classes the balance of claims has been made in advance either by the legislature or by an established course of judicial decision.

The idea that one landowner's interests are so valuable that his neighbor's use of his own property will be precluded without any effort to strike a balance between the two has proved too costly; and resort is usually made to such terms of compromise as "negligence," "reasonable use," et cetera. Only in the field of surface waters is there a remaining tendency to solve all disputes between neighboring landowners in advance through the use of crystallized rules that give one contestant an arbitrary priority over the other. Even there the courts in this country are sharply divided as to whether the defendant may make an unrestricted use of waters,[7] or, at the other extreme, is entirely precluded from interfering with the natural flow.[8] It has been observed that neither position represents a healthy state of law, and the doctrine of reasonable user is coming into increasing favor even in these contests.[9]

Negligence and Absolute Liability

Our supreme court has confirmed again its determination to hold those who traffic in explosive substances to a high degree of responsibility. Although cases against these defendants parade under the banner of negligence, they reflect an insurer's liability. Sometimes the judgment is supported by resort to res ipsa loquitur, and an inference of "negligence" is readily drawn from the mere occurrence of the accident. This inference, the unhappy defendant discovers, is virtually impossible of rebuttal.[10]

The most recent instance of the use of res ipsa loquitur in imposing liability against the purveyor of gas is *Hake v. Air Reduction Sales Company*.[11] Defendant supplied carbide gas in containers for

7. This is the so-called "common enemy" or "common law" rule, although there is little evidence that such a rule has ever prevailed in England. Kinyon and McClure, Surface Waters (1940) 24 Minn. L. Rev. 891.

8. This is the so-called "civil law" rule which prevails in many American jurisdictions. Cf. Art. 660, La. Civil Code of 1870. Kinyon and McClure, supra note 7.

9. Kinyon and McClure, supra note 7.

10. Symposium, The Work of the Louisiana Supreme Court for the 1944-1945 Term, Torts and Workmen's Compensation (1946) 6 LOUISIANA LAW REVIEW 601; Malone, Res Ipsa Loquitur and Proof by Inference—A Discussion of the Louisiana Cases (1941) 4 LOUISIANA LAW REVIEW 70, 95.

11. 210 La. 810, 28 So. (2d) 441 (1946).

use in plaintiff's business. For some unexplained reason, gas escaped from the top of one container and ignited the plaintiff's establishment, which was destroyed by the resulting fire. The plaintiff received a judgment for more than thirty-five thousand dollars despite defendant's showing that the cylinder in question conformed with the safety regulations of the National Board of Fire Underwriters and the introduction of evidence of an inspection just prior to the release of the container to plaintiff. The only positive evidence upon which plaintiff could rely was the fact that the container was twenty years old. Plaintiff did not, however, attempt to show that this fact made the container dangerous nor that containers of that age are not in current usage. Typical of this sort of case, however, the plaintiff did negative its own carelessness, and thus succeeded in pointing an accusing finger directly at defendant. The court had no difficulty in disposing of the contention that defendant was not in control of the cylinder at the time of the accident.[12]

The disposition to hold those who deal in gas and other explosive substances is made all the firmer where the hazard affects those who use the public highways. Thus, in the recent case, *Raphael Brothers v. Cerophyl Laboratories*,[13] the court had no difficulty in imposing liability despite the rather unusual nature of the accident. The defendant ran a pipe containing gas along a ditch adjacent to a public road. This pipe made a turn and crossed under the road at a place where there was a narrow culvert over a shallow ditch. Plaintiff's truck ran off the edge of the culvert and onto the pipe, breaking it. The gas which was thus caused to escape was ignited in some manner, and the resulting conflagration destroyed the plaintiff's truck. The defendant's reliance on the unforeseeable nature of this kind of occurrence and the high speed at which the truck was allegedly being driven served to no avail.

WORKMEN'S COMPENSATION

The distinction between employee and contractor has long afforded ground for dispute in compensation cases. Several of the earliest decisions manifested an obvious disposition toward regarding the claimant as a contractor in all doubtful situations.[14] In an effort to liberalize the courts' attitude and perhaps also in the hope of relieving the prevailing uncertainty, the legislature of 1926

12. Cf. Motor Sales & Services, Inc. v. Grasselli Chemical Co., 131 So. 623 (La. App. 1930), noted in (1931) 4 So. Calif. L. Rev. 400.

13. 211 La. 354, 30 So. (2d) 116 (1947).

14. Clark v. Tall Timber Lumber Co., 140 La. 380, 73 So. 239 (1916); Ryland

amended the act by supplying a definition of the term "independent contractor" as follows:

> "The term 'independent contractor' shall be considered to mean, for the purpose of this act, any person who renders service, *other than manual labor,* for a specified recompense for a specified result either as a unit or as a whole, under the control of his principal as to the result of his work only, and not as to the means by which such result is accomplished." (Italics supplied.)[15]

This legislative intervention proved to be unnecessary. Even before 1926 the tide of sentiment had turned. Early unfortunate decisions such as *Helton v. Tall Timber Lumber Company*[16] were abandoned, and a more liberal attitude (manifested by *Bell v. Albert Hanson Lumber Company,*[17] *Dick v. Gravel Logging Company,*[18] and *Burt v. Davis Wood Lumber Company*[19]) was adopted. The general language of the amendment did not materially affect the course of decision, and it was generally regarded as merely declaratory of the state of the jurisprudence being developed at that time.[20]

One aspect of the 1926 amendment, however, has been a source of chronic trouble. The legislature seems to have excluded any person who renders manual labor from the term "independent contractor." This restriction, if put into indiscriminate operation by the court, would virtually eliminate the concept of independent contractor from the picture.[21]

Fortunately, the first case in which this feature of the amendment was urged upon the court (*Clements v. Luby Oil Company*[22]) was one where nearly every indicia pointed clearly to the status of contractor. Complainant was a member of a partnership in the regular business of making derricks. The firm employed a crew of workers, and on the occasion in question it had made a lump sum contract to construct a derrick for defendant out of material furnished by the latter. In view of the fact that complainant performed

v. Harve M. Wheeler Lumber Co., 146 La. 787, 84 So. 55 (1919); Helton v. Tall Timber Lumber Co. of Louisiana, Inc., 148 La. 180, 86 So. 729 (1920).

15. La. Act 58 of 1926 [Dart's Stats. (1939) § 4392 et seq.]; La. Act 20 of 1914, § 3, Par. 8, as amended.

16. 148 La. 180, 86 So. 729 (1920).

17. 151 La. 824, 92 So. 350 (1922).

18. 152 La. 993, 95 So. 99 (1922).

19. 157 La. 111, 102 So. 87 (1924).

20. See James v. Hillyer-Deutsch-Edwards, Inc., 130 So. 257, 258 (La. App. 1930).

21. See Cobb v. Long Bell Lumber Co., 134 So. 310, 312 (La. App. 1931).

22. 125 So. 510 (La. App. 1929), reversed 170 La. 910, 129 So. 526 (1930).

the work personally the court of appeal felt constrained by the amendment to regard him as an employee. This was reversed on appeal. The supreme court pointed out that so long as the contract does not specifically *require* the doing of manual work by the complainant himself, the fact that he performs the labor is only one consideration in determining his status. That position has been subseqently confirmed in several decisions.[23]

The most recent case is *Allgood v. Loeb*.[24] The facts of the *Allgood* case were strikingly similar to those of an earlier court of appeal decision, *Heine v. Hill-Harris & Company, Incorporated*.[25] Complainant and his brother were regularly employed by the Higgins Industries as carpenters. During their spare time they installed siding on dwellings for the defendant, a building contractor. Every indicia pointed to the status of contractor for Allgood. He was given exclusive rights with reference to each dwelling upon which he worked. No supervision was exercised, and the job was inspected only for the purpose of seeing that the completed work conformed with the contract. Allgood worked at such times as he chose and he was free to employ helpers if he wished. Most important, perhaps, was the fact that he agreed to correct all defective work without cost to defendant.

Nevertheless, it was insisted by counsel for defendant (who was seeking to escape tort liability) that since Allgood performed work himself, he must perforce be regarded as an employee at least to the extent that manual labor entered into the services performed. The majority opinion rejected this contention and reasserted the position first adopted in the *Clements* case. This decision makes clear that the courts are determined to reject any interpretation of the 1926 amendment that would encroach upon their prerogative of handling each situation on an individual basis. Strangely enough, *Clements v. Luby Oil Company,* which is generally regarded as the leading case on this problem, was not cited. There is a dissenting opinion by Justice Hawthorne.

There is no need here for another thrashing of old straw on the conflicting provision of Section 8 of the Workmen's Compensation Act. It is well known that at one time the provision for specific

23. Cobb v. Long Bell Lumber Co., 184 So. 310 (La. App. 1931); Myers v. Newport Co., 135 So. 767 (La. App. 1931); Harris v. Louisiana Oil Refining Corp., 137 So. 598 (La. App. 1931); Rodgers v. City of Hammond, 178 So. 732 (La. App. 1938).

24. 210 La. 594, 27 So. (2d) 880 (1946), reversing 22 So. (2d) 568 (La. App. 1945).

25. 2 La. App. 884 (1925).

enumerated injuries [Section 8-1-(d)] prevailed over the general provisions for total and partial disability [Section 8-1-(a), (b), (c)].[26] Preliminary evidence suggesting dissatisfaction with this approach is found as early as 1926,[27] but it was not until *Knispel v. Gulf States Utilities*[28] in 1932 that we find a clearly marked disposition to regard the listed specific injuries as being compensable as partial or total disability. Even the *Knispel* case might be distinguished on the peculiar facts involved. For several years thereafter the proper resolution of the conflict was a subject of considerable speculation.[29] Despite clarifying statements in *McGruder v. Service Drayage Company*[30] and *Barr v. Davis Brothers Lumber Company,*[31] the matter was not conclusively settled by the supreme court until 1940 in *Robichaux v. Realty Operators.*[32] In that case Chief Justice O'Niell, who had dissented both in the *McGruder* and the *Barr* case felt constrained to remark: "The writer of this opinion dissented from the decision in those cases but has concluded now to yield to the majority opinion."[33]

Last year the court of appeal for the second circuit was confronted with a situation where a helper on an ice truck sustained an injury which necessitated the amputation of his hand just above the wrist. It allowed compensation for the loss of the hand, based upon the schedule in Paragraph (d). The decision noted that complainant "should be able to do a number of things classified as common labor. He might still perform the same kind of work he was doing at the time he was injured, though it would be more difficult for him."[34] Thus the argument was pitched on the dispute as to when is a common laborer totally disabled? The supreme court annulled the decision of the court of appeal[35] and reaffirmed the test used in the recent case, *Henry v. Higgins Industries*[36]: Was he able to compete with other able bodied laborers in securing employment? The mere positing of the problem, thus broadly phrased, suggests the answer.

26. James v. Spence & Goldstein, 161 La. 1108, 109 So. 917 (1926). Cf. Norwood v. Lake Bisteneau Oil Co., 145 La. 828, 83 So. 25 (1919).
27. See Black v. Louisiana Central Lumber Co., 161 La. 889, 109 So. 538 (1926).
28. 174 La. 401, 141 So. 9 (1932).
29. Mayer, Workmen's Compensation Law in Louisiana (1937) 85-96.
30. 183 La. 75, 162 So. 806 (1935).
31. 183 La. 1013, 165 So. 185 (1935).
32. 195 La. 70, 196 So. 23 (1940).
33. 195 La. 70, 80, 196 So. 23, 27.
34. Washington v. Independent Ice & Cold Storage Co., 29 So. (2d) 796, 799 (La. App. 1946).
35. Washington v. Independent Ice & Cold Storage Co., 211 La. 690, 30 So. (2d) 758 (1947).
36. 24 So. (2d) 402, 404 (La. App. 1946).