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It should be noted that the significance of the present position taken by the circuit courts in denying applicability of the United States Arbitration Act to collective bargaining agreements is lessened because of the fact that there are comparatively few breaches between labor and management of agreements to arbitrate and the fact that the courts will award damages for such breaches.

William A. L. Crowe

## Torts—Recovery by Aggressor for Personal Injuries Received in Encounter

Article 2315<sup>1</sup> of the Louisiana Civil Code of 1870 is the general tort article, and as such is the ultimate foundation of the action wherein a party seeks recovery for personal injuries received in an encounter with a fellow. Because of this article recovery is predicated upon the finding of "fault." Thus, for example, in *LaFleur v. Dupre*<sup>2</sup> plaintiff, when held "not at fault,"<sup>3</sup> was allowed damages, and in *Fontenelle v. Waguespack*<sup>4</sup> it was concluded that "Either plaintiff or defendant, in order to recover, would have to prove that he was without fault in provoking the difficulty."<sup>5</sup> In the dissenting opinion in *Ogden v. Thomas*<sup>6</sup> the plaintiff was held not entitled to recovery because he was not "without fault."<sup>7</sup> Nevertheless the number of cases wherein "fault" is mentioned is quite restricted, the probable reason for this being the formulation by the courts of what might appropriately be called the "aggressor rule."<sup>8</sup>

The "aggressor rule" is: One who provokes a difficulty with another cannot recover damages for injuries inflicted upon him as a result thereof, even though the conduct of the one who

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1. "Every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it. . . ."

2. 41 So. 2d 717 (La. App. 1949).

3. Id. at 720.

4. 1 La. App. 230 (1924).

5. Id. at 232.

6. 150 La. 316, 90 So. 662 (1922).

7. 150 La. 316, 320, 90 So. 662, 663.

8. The "aggressor rule" itself received a "fault" transfusion in *Randall v. Ridgley*, 185 So. 632 (La. App. 1939), wherein the court stated: ". . . one who is himself in fault cannot recover damages for a wrong resulting from such fault, although the party inflicting the injury was not justified under the law."

inflicts the injuries was not justified in law.<sup>9</sup> Virtually every case on the subject cites this rule and it may be considered well settled.

There are, however, deviations from the rule. The cases usually relied upon by counsel who challenge the rule are *Oakes v. H. Weil Baking Company*<sup>10</sup> and *Randall v. Ridgley*.<sup>11</sup> In the *Oakes* case the manager gruffly addressed Oakes, a discharged employee. Oakes cursed the manager, whereupon the latter seized Oakes by the nape of the neck, carried him out to the loading platform and kicked him off, plaintiff being injured by the kick. The court cited the rule and several paragraphs later stated, "Under no theory can it be said that defendant was warranted in using any greater force than was necessary in ejecting plaintiff from the premises."<sup>12</sup> This language is contrary to the aggressor rule. The courts have construed this decision in various ways. The first circuit court of appeal held in *Esnault v. Richard*<sup>13</sup> that even though the reasonableness of the force was considered by the court in the *Oakes* case, that court also stated that the aggressor rule was well settled.<sup>14</sup>

In *Bacas v. Laswell*<sup>15</sup> the Orleans court of appeal held that the *Oakes* case did not announce a new principle of law, that case merely holding that "where plaintiff and defendant are equally guilty of fault in provoking a difficulty, plaintiff is not to be regarded as the aggressor and that defendant is liable in damages where he uses undue force not justified by the occasion."<sup>16</sup> It is submitted that if the court in the *Oakes* case had held as the court in *Bacas v. Laswell* said it did, then a new and somewhat contradictory principle of law would have been announced.<sup>17</sup> However, the supreme court, in the *Oakes* case,

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9. *Vernon v. Bankston*, 28 La. Ann. 710 (1876); *Johns v. Brinker*, 30 La. Ann. 241 (1878); *Bankston v. Folks*, 38 La. Ann. 267 (1886); *Miller v. Meche*, 111 La. 143, 35 So. 491 (1903); *Masset v. Keff*, 116 La. 1107, 41 So. 330 (1906); *Bonneval v. American Coffee Co.*, 127 La. 57, 53 So. 426 (1910); *Fontenelle v. Waguespack*, 150 La. 316, 90 So. 662 (1922); *Lide v. Parker*, 6 La. App. 648 (1927).

10. 174 La. 770, 141 So. 456 (1932).

11. 185 So. 632 (La. App. 1939).

12. 174 La. 770, 774, 141 So. 456, 457 (1932).

13. 53 So. 2d 494 (La. App. 1951).

14. For the precise language of the court, see *id.* at 501.

15. 22 So. 2d 591 (La. App. 1945).

16. *Id.* at 594.

17. Even though the court states that the situation is one where both parties are equally at fault, its subsequent language does not support that conclusion. "Defendant is liable in damages where he uses undue force not justified by the occasion" is pregnant with the converse that there is due force which the defendant could use and be justified. If defendant could

can be said to have given full effect to the "aggressor rule" in holding the initial encounter to have terminated, and that defendant was liable for force in the new undertaking, that is, for kicking plaintiff off the loading platform.<sup>18</sup>

In *Randall v. Ridgley* the plaintiff, after having been put out of defendant's bar for being disorderly, remained in an adjacent parking lot and cursed Ridgley, who fired a revolver either at Ridgley or to scare him, the bullet striking Ridgley in his private parts. The court, after stating the aggressor rule in essence, held "the use of firearms in this situation was unwarranted"<sup>19</sup> and defendant was cast in judgment.<sup>20</sup>

*Bacas v. Laswell* held that the *Randall* case, as well as the *Oakes* case, announced no new principle of law. That same court, however, in *Wade v. Gennaro*,<sup>21</sup> decided three years earlier, acknowledged that the *Randall* case followed a rule of law<sup>22</sup> diametrically opposite the "aggressor rule." It is submitted that the *Randall* case is not in harmony with the body of the jurisprudence; but its treatment in later cases compels the conclusion that no new line of jurisprudence will start therefrom.

Two cases contain statements from which one might infer

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justifiably use some force, then he could not in the beginning be equally at fault with plaintiff. Only the plaintiff's action in this fact situation could justify defendant's action against him, and that is provocation by plaintiff, making plaintiff the aggressor and this calls the "aggressor rule" into operation, relieving defendant of any liability even though the force is unjustified. But the court approves the rule that defendant would be liable, thus changing the rule. This same court in *Patterson v. Kuntz*, 28 So. 2d 278 (La. App. 1946), reaffirmed the position taken in *Bacas v. Laswell* that the aggressor rule will not be applied when there is mutual fault respecting the difficulty where the defendant uses undue force (such as a dangerous weapon) not justified by the occasion.

18. This view is supported by the language which the writer believes to be the ratio decidendi. "But, if it be conceded that plaintiff was at fault, and that Goldenberg had ample provocation for physically ejecting him from the premises, the final assault, the 'parting kick,' which was inflicted out on the platform, after plaintiff had been put out of the building, was not necessary and wholly unjustified." 174 La. 770, 773, 141 So. 456, 457 (1932).

19. 185 So. 632, 633 (La. App. 1939).

20. In support of its conclusion the court cited *American Jurisprudence*, Vol. 4, verbo "Assault and Battery," 153, § 51.

21. 8 So. 2d 561 (La. App. 1942).

22. "Counsel for plaintiff recognizes the effect of these authorities, but contends that the present case is one which is controlled by the principle that 'a person defending himself from an attack becomes liable as an aggressor where the force employed is in excess of that which the law will tolerate in a given case for defensive purposes, and for the use of such excessive force he is liable both civilly and criminally.'

"In the *Randall* case we reached the conclusion that the latter principle of law applied." *Id.* at 562.

that the "aggressor rule" is not settled. In *Ponthieu v. Coco*<sup>23</sup> the rule was referred to as "majority jurisprudence of this State,"<sup>24</sup> and the court in *Esnault v. Richard*<sup>25</sup> was of the opinion that it "should strictly adhere to the old line of jurisprudence until it is changed."<sup>26</sup>

There are a number of cases which, although espousing the rule, for no apparent reason fail to follow it. Thus in *Landry v. Himel*<sup>27</sup> the fact that only "reasonably necessary"<sup>28</sup> force was used was determinative, and in *Newman v. Southern Kraft Corporation*<sup>29</sup> recovery was allowed when the "force used was excessive and unnecessary under the circumstances."<sup>30</sup> In *McCurdy v. City Cab Company*<sup>31</sup> the court considered as decisive the answer to the question "If Sullivan was not the aggressor, did he employ more force than was necessary, under the circumstances, to protect himself . . . ?"<sup>32</sup> In *Stoehr v. Payne*<sup>33</sup> "unnecessary brutality . . . was wholly inexcusable"<sup>34</sup> and permitted plaintiff recovery. An "unprovoked, ferocious, and inexcusable"<sup>35</sup> attack in *McVoy v. Ellis*<sup>36</sup> was the basis of recovery and even when on rehearing the court concluded that the attack was provoked, damages were merely diminished. One case<sup>37</sup> indicated that certain kinds of aggressors can recover. And even when defendant "might be considered"<sup>38</sup> the aggressor because he got a shotgun and sought out plaintiff's deceased husband, plaintiff did not prevail.

Perhaps the most usual way in which the courts contradict their professed adherence to the rule is in seeking "justification" for the acts of the aggressed, whereas the "rule" denies recovery

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23. 18 So. 2d 351 (La. App. 1944).

24. *Id.* at 356.

25. 53 So. 2d 494 (La. App. 1951).

26. *Id.* at 503.

27. 176 So. 627 (La. App. 1937).

28. *Id.* at 629.

29. 197 So. 197 (La. App. 1940).

30. *Id.* at 199. The strength of this holding on this particular point may be weakened by the court's simultaneous application of the "aggressor rule" and the "trespasser-owner doctrine."

31. 32 So. 2d 720 (La. App. 1947).

32. *Id.* at 721.

33. 132 La. 213, 61 So. 206, 44 L.R.A. (N.S.) 604 (1913).

34. 132 La. 213, 220, 61 So. 206, 209, 44 L.R.A. (N.S.) 604, 607.

35. 148 La. 247, 250, 86 So. 783, 784 (1921).

36. *Ibid.*

37. *Newman v. Southern Kraft Corp.*, 197 So. 197 (La. App. 1940): ". . . plaintiff was not an aggressor such as would bar his recovery of damages." *Id.* at 199.

38. *Esnault v. Richard*, 53 So. 2d 494, 502 (La. App. 1951).

even though the force used is unjustified. Thus, plaintiff's "obnoxious"<sup>39</sup> conduct in *Ogden v. Thomas*<sup>40</sup> did not "justify"<sup>41</sup> defendant's subsequent acts; and the crux of the problem presented in *Conley v. Travelers Insurance Company*<sup>42</sup> was found, said the court, in the answer to this question: "Was the plaintiff employee guilty of such words or actions as would be expected to provoke *justified physical retaliation* by a fellow employee?"<sup>43</sup> (Italics supplied.) Similarly lack of "sufficient provocation to justify defendant in the eyes of the law"<sup>44</sup> permitted plaintiff to recover in *Antley v. Davis*.<sup>45</sup> Other cases<sup>46</sup> make similar findings, though the search for justification is not so pronounced.

An interesting confusion is created when the aggressor rule is applied simultaneously with other rules of law. In *Sheppard v. Causey*<sup>47</sup> a tacit joinder of the trespasser-owner rule<sup>48</sup> and the aggressor rule restricted the aggressor to "only the force necessary"<sup>49</sup> in putting the aggressor out of the store. The same combination in *Young v. Broussard*<sup>50</sup> limited the force so as not to "exceed the necessities and circumstances of the situation."<sup>51</sup> A subtle infusion of the trespasser-owner rule in *Wade v. Gennaro*<sup>52</sup> permitted the proprietor of a barroom to escape liability for shooting deceased because deceased was hurling bricks at the

39. 41 So. 2d 717, 718 (La. App. 1949).

40. *Ibid.*

41. *Id.* at 718.

42. 53 So. 2d 681 (La. App. 1951).

43. *Id.* at 683.

44. 199 So. 450 (La. App. 1940).

45. *Ibid.*

46. *Bankston v. Folks*, 38 La. Ann. 267 (1886) ("not justifiable," *id.* at 269); *Bernard v. Kelley*, 118 La. 132, 42 So. 723 (1907) ("defendant was not justified in striking a witness in open court," 118 La. 132, 136, 42 So. 723, 725); *Burnecke v. O'Neal*, 139 La. 208, 71 So. 395 (1916) ("it was not sufficient to have justified defendant in beating plaintiff in the way that he beat him," 139 La. 208, 210, 71 So. 395, 396); *McVay v. Ellis*, 148 La. 247, 86 So. 783 (1921) ("not justification," 148 La. 247, 253, 86 So. 783, 785); *Oakes v. H. Weil Baking Co.*, 174 La. 770, 141 So. 456 (1932) ("not necessary and wholly unjustified," 174 La. 770, 774, 141 So. 456, 457); *Young v. Broussard*, 189 So. 477 (La. App. 1939) ("could not justify the shooting," *id.* at 481); *Randall v. Ridgley*, 185 So. 632 (La. App. 1939) ("unwarranted" and "not justified," *id.* at 633); *Wade v. Gennaro*, 8 So. 2d 561 (La. App. 1942) ("defendant was justified in killing the deceased negro," *id.* at 562).

47. 8 So. 2d 86 (La. App. 1942).

48. A lawful owner or occupant of property may use such force as may be reasonably necessary to prevent an unlawful entry thereon or to remove trespassers or intruders therefrom.

49. *Id.* at 95.

50. 189 So. 477 (La. App. 1939).

51. *Id.* at 481.

52. 8 So. 2d 561 (La. App. 1942).

barroom.<sup>53</sup> In *Newman v. Southern Kraft Corporation*<sup>54</sup> the "aggressor rule" was subordinated when the court held "His ejection from the premises could have been accomplished in a manner less severe than that used,"<sup>55</sup> and plaintiff received damages. The court in *Patterson v. Kuntz*<sup>56</sup> reached its conclusion after the influence of three rules had been felt: (1) aggressor rule, (2) trespasser-owner rule, and (3) the rule that a defendant using force under a reasonable apprehension of danger is not civilly liable to one whom he has cause to believe is his assailant though it subsequently appears that he is mistaken. The aggressor rule was not specifically disposed of by the court, but it may be inferred that the rule was held inapplicable, both parties being held equally at fault.<sup>57</sup> The third rule was deemed controlling.

None of these cases have expressly subordinated the aggressor rule to another rule, but attention is called to the possibility of circumventing the former rule by invoking another.

The problem of determining who is the aggressor or what constitutes aggression is one which encompasses many factors. It is the purpose of the remainder of this article to isolate those factors and to treat each one in detail insofar as the jurisprudence permits. This is essentially an artificial process, because in each case any number of these factors may have contributed to the court's decision; but because it is believed that such a delineation may be of value to practitioners having cases including only certain of these factors, such an approach is utilized.

#### TERMINATION OF DIFFICULTY

There are certain acts which are clearly aggressive, but which do not prevent recovery because of the termination of

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53. "He was not obliged to witness the destruction of his property without attempting to prevent it." *Id.* at 562.

54. 197 So. 197 (La. App. 1940).

55. *Id.* at 199.

56. 28 So. 2d 278 (La. App. 1946), noted in 22 Tulane L. Rev. 349 (1947).

57. The writer believes that the rule of law which denies the application of the aggressor rule when both parties are equally at fault is an unnecessary complication of the rule. Premitting those cases where the conflict is mutually premeditated, the conclusion that both parties are equally at fault is merely a *conclusion*, and as such is arrived at only after deciding that certain acts of one party are not *sufficient* provocation for the acts of the opponent, and those reciprocal acts of the opponent are not *sufficient* provocation for the acts of the first party. But by merely holding that neither party "provoked" the difficulty, which indeed is true in these situations, the aggressor rule is *ipso facto* inapplicable. In those cases where the conflict is mutually premeditated, provocation certainly could not be found.

that difficulty and the onset of a new one, wherein the injury is sustained. It is difficult to reconcile all the cases on the requisites for termination. In *Starnes v. Monsour's No. 4*<sup>58</sup> the "bouncer" told plaintiff that he would be put out for mooching; plaintiff called him a "G-- d--- liar" and immediately after the exchange plaintiff sat at a table. The bouncer pulled plaintiff from his chair and ejected him. The court held that the question of who was the aggressor had virtually passed from the case, since plaintiff had certainly "evinced a disposition on his part to withdraw from the unpleasantness."<sup>59</sup> It was held in *Conley v. Travelers Insurance Company*<sup>60</sup> that a morning cursing of another by plaintiff was definitely terminated at the noon hour when a second encounter occurred. The court in *Smith v. New Orleans Public Service, Incorporated*,<sup>61</sup> concluded that the initial episode, in which plaintiff had forced his way into the streetcar and past the conductor, was terminated when plaintiff proceeded to remove a screen with which to assault the conductor and was struck by the latter. In *Chisholm v. DeFrancis*<sup>62</sup> plaintiff attempted to deliver some sandwiches but received no reply when knocking; he walked to the window and addressed the men on the inside in an offensive manner and was told to return the sandwiches to the restaurant, to which he agreed and turned away. The court held the incident was closed at this point insofar as plaintiff was concerned, and defendant was held liable for coming out of the house and striking plaintiff. In *Ogden v. Thomas*<sup>63</sup> plaintiff, after insulting defendant's wife, left defendant's cafe and crossed the street; defendant walked across the street and hit plaintiff with a bottle. The court held that the previous difficulty was terminated before defendant's attack. The facts in *Young v. Broussard*<sup>64</sup> were: Deceased was encountered by a watchman three times and put out each time, twice peacefully and the third time after an altercation. After putting deceased out the third time, defendant took twenty steps inside the building from the door, turned and saw a shadow at the door, and events transpired in which decedent was killed. Twenty steps was the measure of termination here. The court held that the previous difficulty had

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58. 30 So. 2d 135 (La. App. 1947).

59. Id. at 138.

60. 53 So. 2d 681 (La. App. 1951).

61. 127 So. 16 (La. App. 1930).

62. 27 So. 2d 467 (La. App. 1946).

63. 41 So. 2d 717 (La. App. 1949).

64. 189 So. 477 (La. App. 1939).



"ceased, or at least became of no great importance,"<sup>65</sup> saying in effect that even an abating of the prior difficulty renders a defendant liable for excessive force. This is an extension of those cases permitting recovery when the prior difficulty had terminated. There are a number of cases in which the court does not expressly consider termination, but wherein it is apparent that that factor was influential.<sup>66</sup>

#### OVERT ACT

The contention that there must be an overt act if aggression be found was expressly made in *Esnault v. Richard*<sup>67</sup> and rejected with the statement that "we should strictly adhere to the old line of jurisprudence."<sup>68</sup> The court apparently was of the opinion that the "old line of jurisprudence" held that aggression can be found without there being an overt act. Although there is language in some cases to the contrary, the opinion has much authority in support of it.<sup>69</sup> It was held in *Walsh v. Schriener*<sup>70</sup> that it is not "essential to exonerate a defendant . . . that there should have been a belligerent gesture or a blow." In *Britt v. Merritt*<sup>71</sup> the court indicates that an overt act is necessary if aggression be found.<sup>72</sup>

Pretermitted the question of whether or not an overt act is required, certainly an overt act *can* be aggression, and the following acts have been so held: making the movement the person would have made if he were about to draw a pistol from his pocket, though in fact he had none, then instantly reaching out and asking for a pistol;<sup>73</sup> drawing a pistol and attempting to shoot;<sup>74</sup> drawing back a sample case and making a motion to

65. *Id.* at 481.

66. *Munday v. Landry*, 51 La. Ann. 303, 25 So. 66 (1899); *Harvey v. Harvey*, 124 La. 595, 50 So. 592 (1909); *McVay v. Ellis*, 148 La. 247, 86 So. 783 (1920); *Sloane v. Franchebois*, 8 La. App. 395 (1928); *Di Giovanni v. Brodtkman*, 128 La. 665 (La. App. 1930); *Oakes v. H. Weil Baking Co.*, 174 La. 770, 141 So. 456 (1932); *Welch v. Van Walkenburgh*, 189 So. 297 (La. App. 1939); *Antley v. Davis*, 199 So. 450 (La. App. 1940); *Manuel v. Ardoin*, 16 So. 2d 72 (La. App. 1943); *Smith v. Freeman*, 31 So. 2d 524 (La. App. 1947); *Broussard v. Citizen*, 44 So. 2d 347 (La. App. 1950); *Esnault v. Richard*, 53 So. 2d 494 (La. App. 1951); *Beaucoudray v. Hirsch*, 49 So. 2d 770 (La. App. 1951).

67. 53 So. 2d 494 (La. App. 1951).

68. *Id.* at 503.

69. *Infra* p. 479.

70. 168 So. 346 (La. App. 1936).

71. 45 So. 2d 902 (La. App. 1950).

72. "Anyway, the trial judge decided there was no overt act or hostile demonstration against Merritt by Britt and we fully agree with this conclusion." *Id.* at 906.

73. *Bankston v. Folks*, 38 La. Ann. 267 (1886).

74. *Vernon v. Bankston*, 28 La. Ann. 710 (1876).

strike defendant in the stomach;<sup>75</sup> pulling up of sleeves and grabbing down at his pants;<sup>76</sup> threatening defendant, refusing to leave defendant's place of business and advancing on defendant;<sup>77</sup> cursing defendant and attempting to get into the small space used as an office;<sup>78</sup> going back into foyer and remonstrating with manager.<sup>79</sup> But even though there be an overt act, it must be directed toward the other party to the altercation<sup>80</sup> in order to create liability. Furthermore, the opposite party must have knowledge of the overt act.<sup>81</sup>

Overt acts which were held not to be aggression include passing an automobile on the wrong side,<sup>82</sup> refusing entrance to a bus,<sup>83</sup> throwing wood on disputed ground,<sup>84</sup> slapping defendant's son,<sup>85</sup> striking defendant,<sup>86</sup> parking car in entrance to parking lot and refusing to permit its removal,<sup>87</sup> and failing to return a salutation.<sup>88</sup>

Overt acts which were clearly aggressive created no liability when done in anticipation of aggression. Such acts were found in placing the foot against the plaintiff's chest and shoving, when the other party sought to come into a small space used as an office;<sup>89</sup> knocking plaintiff down and continuing to punch him after plaintiff approached defendant in a menacing attitude;<sup>90</sup> striking plaintiff with an iron handle when plaintiff was removing a screen with intention to assault conductor;<sup>91</sup> hitting plaintiff with a hatchet handle when plaintiff advanced on defendant;<sup>92</sup> striking deceased with a "hickey" when it appeared that deceased would have struck defendant with a conduit pipe;<sup>93</sup> shooting deceased when deceased's companion was walking behind deceased

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75. *Lide v. Parker*, 6 La. App. 648 (1927).

76. *Welch v. Van Walkenburgh*, 189 So. 297 (La. App. 1939).

77. *Hartfield v. Thomas*, 45 So. 2d 216 (La. App. 1950).

78. *McCurdy v. City Cab Co.*, 32 So. 2d 720 (La. App. 1947).

79. *Russo v. Orpheum Theatre and Realty Co.*, 136 La. 24, 66 So. 385 (1914).

80. *Derouen v. Fontenot*, 8 La. App. 652 (1928).

81. *Ogden v. Thomas*, 41 So. 2d 717 (La. App. 1949).

82. *Beaucoudray v. Hirsch*, 49 So. 2d 770 (La. App. 1951).

83. *Betz v. Teche Lines*, 7 So. 2d 656 (La. App. 1942).

84. *Capdevielle v. Christina*, 3 La. App. 455 (1926).

85. *Derouen v. Fontenot*, 8 La. App. 652 (1928).

86. *Stoehr v. Payne*, 132 La. 213, 61 So. 206, 44 L.R.A. (N.S.) 604 (1913).

But here the aggressor rule itself was perverted.

87. *Bacas v. Laswell*, 22 So. 2d 591 (La. App. 1945).

88. *Turnbow v. Wimberly*, 106 La. 259, 30 So. 747 (1901).

89. *McCurdy v. City Cab Co.*, 32 So. 2d 720 (La. App. 1947).

90. *Di Giovanni v. Brodman*, 128 So. 665 (La. App. 1930).

91. *Smith v. New Orleans Public Service, Inc.*, 127 So. 16 (La. App. 1930).

92. *Sheppard v. Causey*, 8 So. 2d 86 (La. App. 1942).

93. *Jenkins v. Cities Service Refining Corp.*, 44 So. 2d 719 (La. App. 1950).

with drawn gun;<sup>94</sup> shooting deceased when deceased was reaching for a loaded pistol;<sup>95</sup> shooting plaintiff when advanced on by plaintiff and his brother;<sup>96</sup> reaching for flashlight when being pursued by a man with a stick;<sup>97</sup> striking plaintiff after plaintiff called defendant a "robber," and stood menacingly with two companions;<sup>98</sup> drawing back right hand while holding a pocket knife in it, when defendant was approaching with a bottle in hand;<sup>99</sup> hitting plaintiff on the head with a beer bottle after plaintiff used provoking language and otherwise made defendant apprehensive for his safety.<sup>100</sup>

#### WORDS<sup>101</sup>

The cases are not uniform that words do or do not constitute aggression. Certainly words have been held to be aggression, but the status of these decisions in particular is uncertain. The current trend might overrule them.

In *Gross v. Great Atlantic and Pacific Tea Company*,<sup>102</sup> decided in 1946, the Orleans court of appeal concluded, "As we have said, we have found no cases which throw any real light upon the question of what effect should be given to the fact that insulting and abusive words are the forerunner of an affray."<sup>103</sup> The second circuit court of appeal seems to have been of a different opinion one year later when it stated, "It has generally been held by the Courts of Appeal that where the plaintiff is proven to be the aggressor, even by the use of obscene words and highly offensive epithets applied to the defendant, no recovery can be had. However, cases of this character last decided by the Supreme Court . . . do not go that far."<sup>104</sup>

*Landry v. Himel*<sup>105</sup> states the rule<sup>106</sup> that words constitute aggression, and several court of appeal decisions hold to that

94. *Sloane v. Franchebois*, 8 La. App. 395 (1928).

95. *Smith v. Haas*, 9 La. App. 147 (1928).

96. *Ponthieu v. Coco*, 18 So. 2d 351 (La. App. 1944).

97. *Chisholm v. DeFrancis*, 27 So. 2d 467 (La. App. 1946).

98. *Massett v. Keff*, 116 La. 1107, 41 So. 330 (1906).

99. *Ogden v. Thomas*, 41 So. 2d 717 (La. App. 1949).

100. *Manuel v. Ardoin*, 16 So. 2d 72 (La. App. 1943).

101. See Note, 5 LOUISIANA LAW REVIEW 617 (1944).

102. 25 So. 2d 837 (La. App. 1946).

103. *Id.* at 840.

104. *Starnes v. Monsour's No. 4*, 30 So. 2d 135, 138 (La. App. 1947).

105. 176 So. 627 (La. App. 1937).

106. "Where a plaintiff provokes a difficulty by insults, abuse, threats or other conduct calculated to arouse resentment or fear on the part of the defendant, the plaintiff cannot recover for an assault and battery, although the defendant may not have been justified in law in his conduct." *Id.* at 629.

effect. Aggression was found in calling a man's wife a "G-- d-- liar";<sup>107</sup> calling a cashier a thief;<sup>108</sup> telling a twelve year old boy "I am going to tell the teacher on you."<sup>109</sup> The court in *Gross v. Great Atlantic and Pacific Tea Company*<sup>110</sup> seemed to recognize that words can be aggression by holding that since certain words were not spoken, there was no aggression.<sup>111</sup> One early supreme court decision<sup>112</sup> held that offering to fight defendant, after attempting to fight another, and cursing, was aggression. In *Bonneval v. American Coffee Company*<sup>113</sup> the supreme court held that plaintiff's words were provoked by defendant's words, and plaintiff therefore could recover for defendant's assault on him, thus giving the rule a new twist.

The latest expression by a court of appeal on this question was by the second circuit in *Conley v. Travelers Insurance Company*:<sup>114</sup> "[I]t is well established that mere words, unaccompanied by any physical act or even by a threat of physical violence, are insufficient to be construed as provocation justifying a physical attack."<sup>115</sup> This statement is preceded by equally categorical holdings in other cases.<sup>116</sup> No aggression was found in plaintiff saying that he would rather believe a negro than defendant's son;<sup>117</sup> saying "It looks like you are guilty";<sup>118</sup> saying that one is master of his enemies and that although one is a minor, his pistol is of age;<sup>119</sup> plaintiff's calling defendant the "biggest rascal in the whole country";<sup>120</sup> calling out that he would not "come back into the darned store any more";<sup>121</sup> asking plaintiff if he had any whiskey left;<sup>122</sup> ordering a boy away from in front of defendant's place of business;<sup>123</sup> asking defendant "with

107. *Walsh v. Schriener*, 168 So. 345 (La. App. 1936).

108. *Jumonville v. Frey's Inc.*, 173 So. 227 (La. App. 1937).

109. *Graham v. McCrory*, 8 La. App. 22 (1928).

110. 25 So. 2d 837 (La. App. 1946).

111. "The words which were spoken were obviously not seriously spoken and neither the word 'thief' nor the word 'steal' was used." *Id.* at 840.

112. *Hingle v. Myers*, 135 La. 383, 65 So. 549 (1914).

113. 127 La. 57, 53 So. 426 (1910).

114. 53 So. 2d 681 (La. App. 1951).

115. *Id.* at 683.

116. *Richardson v. Zuntz*, 26 La. 313 (1874); *Munday v. Landry*, 51 La. Ann. 303, 25 So. 66 (1899); *Harvey v. Harvey*, 124 La. 595, 50 So. 592 (1909); *Beaucoudray v. Hirsch*, 49 So. 2d 770 (La. App. 1951).

117. *Guillory v. Fontenot*, 2 La. App. 189 (1925).

118. *LaFleur v. Dupre*, 1 La. App. 230 (1924).

119. *Miller v. Meche*, 111 La. 143, 35 So. 491 (1903).

120. *Burnecke v. O'Neal*, 139 La. 208, 71 So. 395 (1916).

121. *Webb v. Rothschild*, 49 La. Ann. 244, 21 So. 258 (1897).

122. *Fontenot v. Tremie*, 139 So. 558 (La. App. 1932).

123. *Picatacci v. Palermo*, 3 La. App. 465 (1926).

warmth, by what right he had come to disturb the settlement";<sup>124</sup> saying "If you are going to take the money by force, then do it and get out of here";<sup>125</sup> cursing defendant,<sup>126</sup> saying "You are a damned liar";<sup>127</sup> plaintiff's circulating rumors that defendant was having intimate relations with plaintiff's daughter-in-law.<sup>128</sup>

#### THREATS

In *Bankston v. Folks*<sup>129</sup> plaintiff's threats were held to have caused the encounter and he was denied recovery. Threats were contributory to denying plaintiff damages in *Hartfield v. Thomas*.<sup>130</sup> One may infer from the holding in *Conley v. Travelers Insurance Company*<sup>131</sup> that threats can be aggression, such being affirmatively stated in *Landry v. Himel*.<sup>132</sup> Promiscuous threats, in *Britt v. Merritt*,<sup>133</sup> were held to be non-aggression.

#### STATE OF MIND

The party's state of mind at the time of encounter has been influential in the courts, usually in denying recovery to the party creating the special mental predisposition. Decisions expressly recognizing the state of mind factor have considered the following: Evidence that on two or three prior occasions the father and daughter had engaged in a wordy controversy,<sup>134</sup> an altercation on the previous day,<sup>135</sup> defendant's being informed that decedent had said, as he was leaving the premises, that he was going to get a gun,<sup>136</sup> deceased's drunkenly declaring that he would kill defendant before "the moon rises before day in the morning" and deceased's aggressive acts.<sup>137</sup> Other cases<sup>138</sup> present fact situations in which the courts probably were influenced by this factor, though not expressly so.

124. *Scheen v. Poland*, 34 La. Ann. 1107 (1882).

125. *Sheppard v. Causey*, 8 So. 2d 86 (La. App. 1942).

126. *Randall v. Ridgley*, 185 So. 632 (La. App. 1939).

127. *McVay v. Ellis*, 148 La. 247, 86 So. 783 (1921).

128. *Broussard v. Citizen*, 44 So. 2d 347 (La. App. 1950).

129. 38 La. Ann. 267 (1886).

130. 45 So. 2d 216 (La. App. 1950).

131. 53 So. 2d 681 (La. App. 1951).

132. 176 So. 627 (La. App. 1937).

133. 45 So. 2d 902 (La. App. 1950).

134. *Landry v. Himel*, 176 So. 627 (La. App. 1937).

135. *Herrington v. Magee*, 131 So. 490 (La. App. 1930).

136. *Welch v. Van Walkenburgh*, 189 So. 297 (La. App. 1939).

137. *Esnault v. Richard*, 53 So. 2d 494 (La. App. 1951).

138. *Bankston v. Folks*, 38 La. Ann. 267 (1886); *Garma v. Galmiche*, 130 So. 862 (La. App. 1930); *Young v. Broussard*, 189 So. 477 (La. App. 1939); *Healey v. Playland Amusements*, 199 So. 682 (La. App. 1941); *Wade v. Genaro*, 8 So. 2d 561 (La. App. 1942); *Ponthieu v. Coco*, 18 So. 2d 351 (La. App. 1944); *Smith v. Freeman*, 31 So. 2d 524 (La. App. 1947).

The fact that deceased likely was not fully recovered from wounds received in an encounter seventeen days earlier with his assailants, in *Sloane v. Franchebois*,<sup>139</sup> was held to give deceased a virtual license to take action when his assailants approached him.

Lack of immediate danger to defendant allowed plaintiff recovery in *LaFleur v. Dupre*.<sup>140</sup> Plaintiff was given damages in *Randall v. Ridgley*<sup>141</sup> when it was found that defendant was in no danger of bodily harm. Conversely, in *Esnault v. Richard*<sup>142</sup> the fact that defendant was in danger of great bodily harm permitted him to seek out and kill deceased without liability. In *McVay v. Ellis*<sup>143</sup> the doing of the act in "heat of passion" caused a diminution of damages. Defendants' premeditation in *Newsom v. Starns*<sup>144</sup> influenced the court in awarding damages to plaintiff for being tarred and feathered.

#### INEQUALITY IN THE ENCOUNTER

##### *Physical Capacity*

There are statements in a number of the cases which indicate the courts' consideration of the difference in physical capacity of the combatants. The following inequalities have been noted: plaintiff was an old man, weighing about 125 pounds and was maimed in both hands; defendant was very vigorous, weighing about 180 or 190 pounds;<sup>145</sup> five years' difference between the two, the minor being about twenty years old, plaintiff being the larger and stronger man;<sup>146</sup> defendant was more powerful than plaintiff;<sup>147</sup> plaintiff was "an old man, 55 years of age, sick, weak, and very feeble";<sup>148</sup> defendant weighs 230 pounds, is a strong, robust, muscular man, while plaintiff is 46 years old, weighs 135 pounds, is a store keeper, has been in bad health, suffering from asthma for 25 years and is a frail man;<sup>149</sup> "Sullivan's back is broken and his left leg and side are partially paralyzed. He is fifty years old. Plaintiff is forty-six years of age and

139. 8 La. App. 395 (1928).

140. 1 La. App. 230 (1924).

141. 185 So. 632 (La. App. 1939).

142. 53 So. 2d 494 (La. App. 1951).

143. 148 La. 247, 86 So. 783 (1921).

144. 136 So. 743 (La. App. 1931).

145. *Burnecke v. O'Neal*, 139 La. 208, 71 So. 395 (1916).

146. *Miller v. Meche*, 111 La. 143, 35 So. 491 (1903).

147. *Oakes v. H. Weil Baking Co.*, 174 La. 770, 141 So. 456 (1932).

148. *Jumonville v. Frey's Inc.*, 173 So. 227 (La. App. 1937).

149. *Chauvin v. Caldwell*, 122 La. 709, 48 So. 159 (1909).

is a strong vigorous man";<sup>150</sup> plaintiff is about 38 years of age, five feet ten inches tall and weighs 157 pounds, the defendant is 64 years of age;<sup>151</sup> defendant was not of disproportionate strength with the young man.<sup>152</sup> It was held in *Welch v. Van Walkenburgh*<sup>153</sup> that the possession of a loaded and accessible pistol "would have ably and satisfactorily offset the difference in size that existed between him and defendant."<sup>154</sup>

#### *Man-Woman*

Defendant who "slapped this high-tempered and disrespectful grown daughter," after a verbal exchange, was not liable in *Landry v. Himel*.<sup>155</sup> *Harvey v. Harvey*,<sup>156</sup> however, held contrawise in the absence of the family relationship and in its stead, a business relationship, the male defendant's slapping of the female plaintiff made him liable though plaintiff followed and vilified defendant. There was no recovery by the female plaintiff against the male defendant in *Johns v. Brinker*<sup>157</sup> when plaintiff had picked up a large lump of coal with which to strike defendant.<sup>158</sup> In *Broussard v. Citizen*<sup>159</sup> the male defendant was cast in damages for placing his hands on female plaintiff's shoulder and turning her toward him.

#### *White-Negro*

*Johns v. Brinker*<sup>160</sup> was probably decided on the fact that the suit was by a Negro against a white person, the court stating that "Suits of this character were of somewhat frequent occurrence about the time this arose."<sup>161</sup> Other cases give less, if any, weight to this factor.<sup>162</sup>

150. *McCurdy v. City Cab Co.*, 32 So. 2d 720 (La. App. 1947).

151. *Sheppard v. Causey*, 8 So. 2d 86 (La. App. 1942).

152. *Hingle v. Myers*, 135 La. 383, 65 So. 549 (1914).

153. 189 So. 297 (La. App. 1939).

154. *Id.* at 299.

155. 176 So. 627 (La. App. 1937).

156. 124 La. 595, 50 So. 592 (1909).

157. 30 La. Ann. 241 (1878).

158. But the case was decided on other grounds.

159. 44 So. 2d 347 (La. App. 1950).

160. 30 La. Ann. 241 (1878).

161. *Id.* at 244.

162. *Bernard v. Kelley*, 118 La. 132, 42 So. 723 (1907) (plaintiff, Negro, struck by defendant, white man, while plaintiff was testifying; plaintiff recovered); *Holmes v. Warren*, 126 So. 259 (La. App. 1930) (Negro caddy recovered for blow by white man golfer); *Smith v. New Orleans Public Service*, 127 So. 16 (La. App. 1930) (plaintiff, Negro, denied recovery for blow struck by white man conductor when plaintiff prepared to attack conductor); *Randall v. Ridgley*, 185 So. 632 (La. App. 1939) (plaintiff, Negro, recovered from defendant, white man(?), when the latter shot the plaintiff).

*Inebriation*

In *Welch v. Van Walkenburgh*<sup>163</sup> the court stated that the fact that defendant was sober and plaintiff drunk did not influence a decision favorable to plaintiff. Deceased's drunkenness and his meanness when drunk were influential in *Esnault v. Richard*.<sup>164</sup> In other cases<sup>165</sup> this factor was adverted to, but apparently was not too important.

*Reputation*

The fact that defendant was a "peaceable man" apparently influenced the court in *Hingle v. Myers*;<sup>166</sup> a similar finding was made in *Smith v. Haas*<sup>167</sup> and was even more decisive there. Deceased's reputation of being a dangerous person when drunk was partially decisive in justifying defendant's killing of deceased in *Welch v. Van Walkenburgh*.<sup>168</sup> But even though a person has no character, or even bad character, he has a right to be let alone.<sup>169</sup>

## OTHER FACTORS AND ASPECTS

Taking the law into his own hands caused defendant to be cast in damages in *Bacas v. Laswell*.<sup>170</sup> Plaintiff's duty in *Banks-ton v. Folks*<sup>171</sup> was to make an oath before an officer of the law and have plaintiff bound over to keep the peace. In *Derouen v. Fontenot*<sup>172</sup> defendant should "have appealed to the law or the court along the pathways of civilization for redress"<sup>173</sup> when defendant saw plaintiff slap defendant's son.

"... a sudden break; an outburst of temper on a warm day in August"<sup>174</sup> when coupled with the fact that about fifteen white persons and forty-five Negroes were in a twenty by thirty room, was given weight in *Bernard v. Kelly*.<sup>175</sup>

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163. 189 So. 297 (La. App. 1939).

164. 53 So. 2d 494 (La. App. 1951).

165. *Hingle v. Myers*, 135 La. 383, 65 So. 549 (1914); *Young v. Broussard*, 189 So. 477 (La. App. 1939); *Betz v. Teche Lines, Inc.*, 7 So. 2d 656 (La. App. 1942); *McCurdy v. City Cab Co.*, 32 So. 2d 720 (La. App. 1947).

166. 135 La. 383, 65 So. 549 (1914).

167. 9 La. App. 147 (1928).

168. 189 So. 297 (La. App. 1939).

169. *Caspar v. Prosdame*, 46 La. Ann. 36, 14 So. 317 (1894); *Smith v. Freeman*, 31 So. 2d 524 (La. App. 1947).

170. 22 So. 2d 591 (La. App. 1945).

171. 38 La. Ann. 267 (1886).

172. 8 La. App. 652 (1928).

173. *Id.* at 653.

174. 118 La. 132, 137, 42 So. 723, 725 (1907).

175. 118 La. 132, 42 So. 723.



Acquittal in a criminal proceeding is not conclusive proof that a person was not the aggressor,<sup>176</sup> nor does conviction of a crime compel civil recovery.<sup>177</sup>

The intention<sup>178</sup> or lack of intention<sup>179</sup> to start a fight is given weight in some of the cases. But even if the act causing injury is done in play, recovery can still be had.<sup>180</sup> The use of a weapon intended to humiliate was considered by the court in *Miller v. Meche*.<sup>181</sup>

The fact that the party makes no defense, or attempts to escape has influenced the court in favor of that party in a number of the cases.<sup>182</sup> But in *Esnault v Richard*<sup>183</sup> this approach was reversed in the holding that deceased "should have . . . stayed where he was or retreated."<sup>184</sup> The lack of an avenue for escape was mentioned in one case.<sup>185</sup>

The "aggressor rule" has been held to apply in workmen's compensation suits<sup>186</sup> and in suits involving a sheriff<sup>187</sup> or town marshal.<sup>188</sup>

Even though one party is held to be the aggressor and is cast in judgment, provocation by the opponent may be considered in

176. *Smith v. New Orleans Public Service*, 127 So. 16, 17 (La. App. 1930).

177. *Ponthieu v. Coco*, 18 So. 2d 351 (La. App. 1944); *Britt v. Merritt*, 45 So. 2d 902 (La. App. 1950).

178. *Scheen v. Poland*, 34 La. Ann. 1107 (1882); *Chauvin v. Caldwell*, 122 La. 709, 48 So. 159 (1909); *Sloane v. Franchebois*, 8 La. App. 395 (1928); *Newson v. Starns*, 136 So. 743 (La. App. 1931); *Walsh v. Schriener*, 168 So. 345 (La. App. 1936); *Antley v. Davis*, 199 So. 450 (La. App. 1940) (though "intention" is not mentioned by the court).

179. *Miller v. Meche*, 111 La. 143, 35 So. 491 (1903); *Britt v. Merritt*, 45 So. 2d 902 (La. App. 1950).

180. *Klinberg v. Grisaffi*, 6 La. App. 14 (1927).

181. 111 La. 143, 35 So. 491 (1903) (a whip was used).

182. *Richardson v. Zuntz*, 26 La. Ann. 313 (1874) (made no defense and tried to escape); *Burnecke v. O'Neal*, 139 La. 208, 71 So. 395 (1916) (plaintiff begged to be permitted to leave the store without fighting); *Oakes v. H. Weil Baking Co.*, 174 La. 770, 141 So. 456 (1932) (plaintiff offered no resistance); *Beaucoudray v. Hirsch*, 49 So. 2d 770 (La. App. 1951) (plaintiff tried to elude defendant).

183. 53 So. 2d 494 (La. App. 1951).

184. *Id.* at 503.

185. *Sloane v. Franchebois*, 8 La. App. 395 (1928).

186. *Gross v. Great Atlantic and Pacific Tea Co.*, 25 So. 2d 837 (La. App. 1946).

187. *Stoehr v. Payne*, 132 La. 213, 61 So. 206, 44 L.R.A. (N.S.) 604 (1913); *Smith v. Haas*, 9 La. App. 147 (1928); *Britt v. Merritt*, 45 So. 2d 902 (La. App. 1950); *Smith v. Clemmons*, 48 So. 2d 813 (La. App. 1950).

188. *Espanan v. Carona*, 179 So. 119 (La. App. 1938).

mitigation of damages.<sup>189</sup> One case<sup>190</sup> held that enough provocation offsets damages entirely, and another<sup>191</sup> that damages were mitigated because of the circulation of rumors by the plaintiff. In *Johns v. Brinker*<sup>192</sup> it was held that "If the defendant was in fault, he has, we think, been sufficiently mulcted and learned a sufficient lesson in the progress of the multifarious and expensive litigation which has followed."<sup>193</sup>

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189. *Richardson v. Zuntz*, 26 La. Ann. 313 (1874); *Caspar v. Prosdame*, 46 La. Ann. 36, 14 So. 317 (1894); *Bernard v. Kelley*, 118 La. 132, 42 So. 723 (1907); *Harvey v. Harvey*, 124 La. 595, 50 So. 592 (1909); *Fontenelle v. Waguespack*, 150 La. 316, 90 So. 662 (1922); *Capdevielle v. Christina*, 3 La. App. 455 (1926); *Derouen v. Fontenot*, 8 La. App. 652 (1928); *Finklestein v. Nalhaus*, 151 So. 686 (La. App. 1933); *Leaman v. Feinman*, 146 So. 71 (La. App. 1933); *Moore v. Blanchard*, 216 La. 253, 43 So. 2d 599 (1949).

190. *Manuel v. Ardoin*, 16 So. 2d 72 (La. App. 1943).

191. *Broussard v. Citizen*, 44 So. 2d 347 (La. App. 1950).

192. 30 La. Ann. 241 (1878).

193. *Id.* at 246.