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# Workmen's Compensation - Employers' Rights Against Third Persons - Nature of Claim

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right to have cumulated in one suit the deceased's surviving action and the wrongful death actions proper, vested in the statutory beneficiaries.<sup>25</sup> No legislation compelled the court to reach this result. A similar right of joinder might be given the defendant in actions for wrongful injury and actions by others for their moral injury, caused by the incapacity of the physically injured. Then, as now, only one suit would follow each wrongful injury and the defendant would have his wrongdoing and financial responsibility brought before the trier of fact only once. The remaining question would then be, should the family's interests in each other's well being be protected by allowing recovery for the moral injury suffered by them as a result of the physical injury of one member. This addresses itself purely to one's sense of natural justice. The question has been answered in the affirmative by our Supreme Court in the area of wrongful death.<sup>26</sup> Surely the moral impact of a dear one's death is not necessarily greater or of longer duration than that of his physical or mental mutilation. Nor does it seem that the harm suffered by the injured party's family is more directly or proximately caused by the defendant's fault when death ensues than when it does not. The Louisiana Constitution provides that "every person for injury done him in his rights, lands, goods, person or reputation shall have adequate remedy by due process of law and justice administered without denial, partiality, or unreasonable delay."<sup>27</sup> Even to allow nominal damages to the aggrieved family would seem more consistent with this provision than complete denial of recovery.

*Donald J. Tate*

WORKMEN'S COMPENSATION—EMPLOYERS' RIGHTS  
AGAINST THIRD PERSONS—NATURE OF CLAIM

Plaintiff's employee had been fatally injured during the course of and within the scope of his employment due to the alleged negligence of the defendant. An action was brought under La. R.S. 23:1101 by the employer against the defendant, a third person tortfeasor, for amounts paid and to be paid under the Louisiana Workmen's Compensation Law to the dependent il-

25. *Reed v. Warren*, 172 La. 1082, 136 So. 59 (1931); *Norton v. Crescent City Ice Mfg. Co.*, 178 La. 135, 150 So. 855 (1933).

26. See note 12 *supra*.

27. LA. CONST. Art. I, § 6.

legitimate, minor daughter of the plaintiff's deceased employee. Defendant filed exceptions of no right and no cause of action, contending that plaintiff's suit depends entirely on the fact that there is an outstanding cause of action in tort, and that plaintiff's rights arise only through subrogation to the rights of the dependent illegitimate child; that since the illegitimate child could not bring a tort action, neither could the plaintiff as mere subrogee of the rights of the illegitimate child to such action.<sup>1</sup> The trial court entered judgment for the plaintiff. The Court of Appeal, Orleans Circuit, reversed and maintained the exceptions of no right and no cause of action.<sup>2</sup> On plaintiff's application the Louisiana Supreme Court granted a writ of certiorari. *Held*, defendant's liability, if any, is in tort. However, La. R.S. 23:1101 grants to the blameless employer a separate right of action when an injury, for which he has paid compensation, has been sustained under circumstances creating in a third party a legal liability to pay damages in respect thereto. The separate right of action granted to the employer vests at the moment that there arises in the third party a legal liability to the injured employee. *Board of Com'rs of Port of New Orleans v. New Orleans*, 223 La. 199, 65 So.2d 313 (1953).

When an injury has occurred under conditions which create in a third party a "legal liability" to pay damages, La. R.S. 23:1101 contemplates recovery by the blameless employer for any compensation which he is forced to pay.<sup>3</sup> The employer's right under this provision arises by reason of the legal liability of the third party to the injured employee under the basic Louisiana tort law, Article 2315 of the Civil Code.<sup>4</sup> Because of

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1. Under Art. 2315, LA. CIVIL CODE of 1870, the illegitimate cannot bring action in tort for injury and death of a parent. *Youchican v. Texas & P. Ry.*, 147 La. 1080, 86 So. 551 (1920). However, under the Workmen's Compensation Law the illegitimate is allowed recovery for the death of a parent. *Thompson v. Vestal Lumber and Manufacturing Co.*, 208 La. 83, 22 So.2d 842 (1944).

2. *Board of Com'rs of Port of New Orleans v. Public Belt R. Commission for City of New Orleans*, 58 So.2d 306 (La. App. 1952).

3. "When an injury for which compensation is payable under this chapter has been sustained under circumstances creating in some person [in this Section referred to as third person] other than the employer a *legal liability* to pay damages in respect thereto. . . . Any employer having paid or having become obligated to pay compensation . . . may bring suit against *such third person* to recover any amount which he has paid or become obligated to pay as compensation to any injured employee or his dependents." LA. R.S. § 23:1101 (1950). (Italics supplied.)

4. Art. 2315, LA. CIVIL CODE of 1870, as amended, La. Acts 1948, No. 333, § 1, p. 808: "Every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it; the right of this action shall survive in case of death in favor of the children, including adopted children and children given in adoption, or spouse of the deceased, or either of them, and in default of these in favor of the surviving father and mother or either

previous decisions interpreting La. R.S. 23:1101, there had been speculation whether or not it granted a separate right of action to the employer or made him a mere subrogee to the rights of the employee or his dependents under Article 2315.<sup>5</sup> Had the court in the instant case found the plaintiff's right of action to depend solely upon subrogation, his recovery would have been precluded, since it is well settled that the illegitimate child cannot recover in tort for the injury or death of a parent.<sup>6</sup> The reason for this appears from the development of Article 2315.

It had been held in *Hubgh v. New Orleans & C.R.R.*, decided in 1851,<sup>7</sup> that the action for personal injuries abates upon death unless survival of the action is specifically granted by statute. That decision also held that in the absence of statutory provisions the wrongful death of a human being does not give rise to a cause of action. It was therefore necessary to amend Article 2315 to prevent an abatement of the cause of action upon the death of the victim. An amendment in 1855<sup>8</sup> authorizing the survival of tort actions designated two classes of members of the family who would be entitled to maintain the action, and the

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of them, and in default of any of the above persons, then in favor of the surviving blood brothers and sisters, or either of them, for the space of one year from the death. However, should the deceased leave a surviving spouse, together with minor children, the right of action shall accrue to both the surviving spouse and the minor children. The right of action shall accrue to the major children only in those cases where there is no surviving spouse or minor child or children.

"If the above right of action exists in favor of an adopted person, it shall survive in case of death in favor of the children or spouse of the deceased, or either of them, and in default of these in favor of the surviving adoptive parents, or either of them, for the space of one year from the death. However, this right of action shall survive in favor of the blood parent or parents to the exclusion of the adoptive parent or parents when at the time of the adoption the adopted was a major, or emancipated minor whose adoption was effected without the consent of the blood parent or parents evidenced in the act of adoption. In default of these, it shall survive in favor of the surviving blood brothers and sisters of the adopted person, or either of them, for the space of one year from the death.

"The survivors above mentioned may also recover the damages sustained by them by the death of the parent or child or husband or wife or brothers or sisters or adoptive parent, or parents, or adopted person, as the case may be."

5. In the cases of *Metropolitan Casualty Ins. Co. of New York v. Bowdon*, 181 La. 295, 159 So. 394 (1935); *Chauvin v. Louisiana Power & Light Co.*, 177 La. 193, 148 So. 23 (1933), the court held the employer, under La. R.S. § 23:1101 (1950), to be a statutory subrogee. *Contra*: *Foster & Glassell Co. v. Knight Bros.*, 152 La. 596, 93 So. 913 (1922).

6. *Thompson v. Vestal Lumber and Manufacturing Co.*, 208 La. 83, 22 So.2d 842 (1944); *Youchican v. Texas & P. Ry.*, 147 La. 1080, 86 So. 551 (1920); *Green v. New Orleans, S. & G.I.R.R.*, 141 La. 120, 74 So. 717 (1917).

7. *Hubgh v. New Orleans & C.R.R.*, 6 La. Ann. 495 (1851). For a good discussion of this case, see Voss, *The Recovery of Damages for Wrongful Death at Common Law, at Civil Law, and in Louisiana Law*, 6 TULANE L. REV. 218 (1932).

8. La. Acts 1855, No. 223, p. 270.

illegitimate child was not included. A further amendment to the article in 1884 created an independent cause of action in favor of the same group of persons for damages suffered by reason of a wrongful death.<sup>9</sup>

Thus the court in the instant case could depend on neither the survival claim nor the wrongful death action.<sup>10</sup> It relied instead upon the initial liability which came into being when the injury was inflicted.<sup>11</sup> This liability, even though later extinguished by the death of the injured worker, was sufficient to bring into operation the employer's right of action under La. R.S. 12:1101.<sup>12</sup>

The damages recoverable by the employer under the subrogation theory have generally been limited to the amount which his subrogor could have recovered had he brought suit. Therefore, the amount of damages, if based upon the personal suffering of the victim, could well vary with the length of time the victim lived after the accident.<sup>13</sup> On the other hand, damages would likely be large in a wrongful death action. In the instant case, by the mere fact of the victim's employment the third party becomes liable to the employer for the compensation which the employer has been forced to pay for the death of the employee. Thus the measure of damages under La. R.S. 23:1101 is found in the provisions of the Workmen's Compensation Law, rather than in the provisions of Article 2315.

*Herbert Lee Leonard*

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9. La. Acts 1884, No. 71, p. 94.

10. When there are no enumerated dependents in existence it appears that the *Hubgh* decision would control. *Hubgh v. New Orleans & C.R.R.*, 6 La. Ann. 495 (1851).

11. The repudiation of the subrogation theory would seem to run contrary to the decision of *Chauvin v. Louisiana Power & Light Co.*, 177 La. 193, 148 So. 23 (1933), where the constitutionality of La. R.S. § 23:1101 (1950) was upheld on the grounds that the statute did not go beyond its title by adversely affecting the rights of third persons. This decision was based upon the theory that the employer was only a subrogee to the rights of the employee or his dependents. It would therefore appear that the court, in the instant case, by overruling the defendant's allegation of subrogation has in effect made La. R.S. § 23:1101 (1950) unconstitutional. It is submitted, however, that had the court been squarely presented with this problem, it would have been circumvented.

12. See note 3 *supra*. This would also anticipate cases where the employee was contributorily negligent, for then the third party would have no legal liability to pay damages.

13. The amount of damages on survival of a personal injury claim depends upon the injury sustained and suffering endured by the deceased himself and in cases of immediate death is usually nominal. *Van Amburg v. V.S. & P. Ry.*, 37 La. Ann. 650 (1885).