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Torts

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TORTS

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Halphen v. Johns Manville Sales Corp.[1]—Products Liability Rewritten

Tort suits are won or lost according to how the parties discharge their respective burdens of persuading the jury of the merits of their causes. The principal function of appellate decisions in tort is to frame these burdens in such language that the trial judge may clearly and accurately communicate his charges to the jury. As a necessary consequence of framing these burdens, the appellate decisions also control the evidence that is to be relevant in discharging the burdens.

Experience has shown that juries pay close attention to the law as charged to them by the court. The words chosen by the court often can mean the difference between winning and losing for a given party, for the words can alter dramatically the degree of difficulty of persuasion that a party faces in convincing the jury. Skilled artisans of the craft of jury trial advocacy have as the very heart of their professional capacity the ability throughout the trial and in closing argument to focus all of the evidence to fit their cause favorably under the burden of persuasion portrayed in the judge's charge to the jury. These simple truths underlie all jury trials in tort.

In order to grasp the full impact of *Halphen* on the law of Louisiana product liability, one must view each sentence of the opinion in light of the foregoing truths, particularly with respect to the jury charges which *Halphen* mandates and the evidence it deems relevant or irrelevant, for if the opinion is to have any meaning, it must lie in its application to jury trials. Viewed in this context, it can be seen immediately that the opinion will have an enormous effect on the relative ease or difficulty of the burdens of persuasion of the plaintiff and defendant.

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1. 484 So. 2d 110 (La. 1986). The opinion was in response to a question certified to the Louisiana Supreme Court by the United States Court of Appeals for the Fifth Circuit. 755 F.2d 393 (5th Cir. 1985). The trial court entered judgment for plaintiff for the wrongful death of her husband. The U.S. Fifth Circuit Court of Appeals affirmed that judgment, 737 F.2d 462 (5th Cir. 1984), then vacated the panel opinion, 752 F.2d 124 (5th Cir. 1985) and certified the question.

In its final opinion, the court again affirmed the trial court in its rejection of the preferred state-of-the-art defense, placing asbestos in the unreasonably dangerous per se category, 788 F.2d 274 (5th Cir. 1986).

Defects in Design

To give a concrete example of how new and different the burden of persuasion is under *Halphen*, first regard the new test it sets forth for finding a product unreasonably dangerous in its design. Prior to *Halphen* our basic product liability law was found in *Weber*,[2] under which liability was cast in terms of defectiveness, which in turn was based upon a finding of "unreasonably dangerous to normal use." The determination of "unreasonably dangerous" was resolved through the balancing process as laid down in *Hunt*[3] and *Entrevia*.[4] Perhaps the most prevalent product liability jury charge in our district courts was the reading of the principal paragraph in *Weber* setting forth the "unreasonably dangerous" requirement. In essence, such a jury charge permitted finding the manufacturer liable because the product was defective, because it was unreasonably dangerous to normal use, or because the magnitude of the risk outweighed the utility and benefits of the thing. *Entrevia* demonstrated that this balancing process also underlies the determination of defect and unreasonable risk of harm in the *Loescher*[5] theory of strict liability.

To a jury of ordinary persons, the *Weber* test conveyed the notion that, to find liability, the jury must find that it just was not right for a product to be made as it was, that it was wrong to have the product on the market where it might injure people.[6] To reach that state of mind, to reach a finding of wrongfulness of the product, the jury in evaluating the evidence under the admonition of "unreasonably dangerous" simply relied upon its conscience and judgment as a group of ordinary people in the community. Though in some cases the judge may choose to further define the term "unreasonable," it is not essential to a valid jury charge that he do so. Any further definition would not be error so long as it did not create a charge so burdensome as to be noncommunicative to the jury of the standards it ought to apply. For instance, the balancing factors certainly may be added to the charge to explain the term "unreasonably dangerous" in a design feasibility case.

In the context of finding a product unreasonably dangerous because of its design, it is sufficient under the rule of *Halphen* to charge the jury to find for the plaintiff if "alternative products were available to

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2. Weber v. Fidelity & Casualty Ins. Co., 250 So. 2d 754 (La. 1971).
3. Hunt v. City Stores, Inc., 387 So. 2d 585 (La. 1980).
4. Entrevia v. Hood, 427 So. 2d 1146 (La. 1983).
5. Loescher v. Parr, 324 So. 2d 441 (La. 1975).
6. 1982 Southern Methodist University Products Liability Institute, The Trial of a Product Liability Case, Ch. 3, § 3.01, at 3-2: "[B]ut, where a lawyer is relying upon the technical law of strict liability in tort, and he does not satisfy the jury that somebody did something wrong, somebody was negligent, he will probably lose."

serve the same needs or desires with *less risk of harm*."[7] This substantially lessens the plaintiff's burden in a design defect case. Under the court's express language, liability can be found in this context "although balancing under the risk-utility test leads to the conclusion that the product is not unreasonably dangerous per se."[8] Consider the application of this rule to a BMW automobile equipped with shoulder straps and seat belts, as opposed to the airbag restraint system used in a Mercedes. It would seem impossible under the balancing test to find the BMW's design unreasonably dangerous under a risk-benefit balancing test (it seems doubtful that any jury would find the automobile and the restraint system alone to be unreasonably dangerous), yet under the *Halphen* standard, a jury could impose liability. It is problematical whether under this design category the term "unreasonably dangerous" need even appear in the charge, because under the express terms of the opinion, if the "less risk of harm" is found, then the product is unreasonably dangerous as a matter of law.

The same analysis flows with reference to a design case based upon there being a feasible way to design the product "*with less harmful consequences.*"[9]

Defects in Construction

Weber provided no distinct rule for defects attributable to construction or composition; apparently the balancing test was the basis for finding a product unreasonably dangerous under this theory also. Under *Halphen*, however, the product need only be found to contain "an unintended abnormality or condition which makes the product *more dangerous than it was designed to be.*"[10] This again is a comparative, or relative, test, rather than a balancing test, as required by *Weber*.

Failure to Warn

The test set forth in *Halphen* for finding a product unreasonably dangerous for failure to warn does not seem to be a balancing test, since a product may be found to be unreasonably dangerous

> if the manufacturer fails to adequately warn about a *danger* related to the way the product is designed. A manufacturer is required to provide an adequate warning of any *danger inherent* in the normal use of its product which is not within the knowledge of or obvious to the ordinary user.[11]

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7. *Halphen*, 484 So. 2d at 115 (emphasis added).
8. Id.
9. Id. (emphasis added).
10. Id. at 114 (emphasis added).
11. Id. at 114-15 (emphasis added).

An analysis of the precise basis for liability under this theory is more difficult than under the above theories, since the wording of the requirement to warn does not make it clear whether a jury must consider both the danger and the failure to warn thereof and conclude through a balancing process that the net result is one of unreasonable danger. The language simply does not require a balancing test.

Unreasonably Dangerous Per Se

Turning to the theory of "unreasonably dangerous per se," *Halphen* provides that a product may be thus classified "if a reasonable person would conclude that the danger-in-fact of the product, whether foreseeable or not, outweighs the utility of the product."[12] In a footnote,[13] the court points out that the risk-utility test is to be invoked for this theory of liability. The footnote further clarifies that the consumer expectation test is not accepted. It thus appears that this theory of liability is subjected to the traditional balancing test. The opinion explicitly provides that design defect or other type defect cases can be tried under this theory. It is enlightening to note that, under the section of the opinion dealing with "Empirical Elements,"[14] the evidence admissible under the per se theory would be very limited. It would not be admissible to introduce into evidence the date when the product's danger became scientifically knowable. The evolution of the science and technology and the dates on which improvements were feasible would also be inadmissible. The state-of-the-art defense is thus eliminated in a case tried solely under the per se theory. It may be that, other than the traditional evidence of causation, the only expert evidence allowed would be testimony regarding the danger-in-fact and the utility of the product.

There remain some risks for a plaintiff trying a case under the per se theory, even if he were basking in the apparent advantage of the unavailability of a state-of-the-art defense. If the product in question had been in use for a number of years and had been manufactured prior to the manufacture and marketing of machines containing safety devices, the plaintiff relying on the per se theory exclusively would not be able to introduce a more recently manufactured machine for purposes of a comparison. The opinion specifically precludes this when it says: "Under this theory, the plaintiff is not entitled to impugn the conduct of the manufacturer for its failure to adopt an alternative design or affix a warning or instruction to the product."[15]

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12. Id. at 114.
13. Id. at 114 n.2.
14. Id. at 118.
15. Id. at 114.

Overview

What practical effect will the new statement of these theories of liability have on the win-loss record of plaintiffs and defendants? Referring to the truths of jury trials set out at the beginning of this writing, a plaintiff has a vastly lessened burden of persuasion before the jury under both the design theory dealing with "less risk of harm," and the design theory dealing with "less harmful consequences."

A simple example illustrates the increased leverage of persuasion the plaintiff enjoys under these two burdens. Assume that a rear-end collision has occurred, and the victim is a passenger in the preceding car, which is equipped with traditional stop lights located at the rear of the car above the bumpers, or at the rear fenders. Assume further that causation is satisfied by the following driver's testimony that he simply did not notice the taillights in time to stop. A jury could find the victim's car to be unreasonably dangerous to normal use by showing that other similar passenger cars are equipped with a stop light showing through the rear window, which common experience and most experts would say is a device more likely to attract attention than one traditionally located at the level of the fenders. Although it is not likely that a jury looking at the automobile with the traditionally arranged stop lights would find that car to be unreasonably dangerous under the balancing process, the same jury would very likely find that the alternative vehicle, with the elevated stop light in the rear window, did pose "less risk of harm." Hence, the jury would find that the victim's automobile was unreasonably dangerous to normal use, because there was less risk of harm in an alternative product available on the market.

As a further example, one might consider again the case of a Mercedes automobile with an airbag restraint system contrasted to a BMW equipped only with seat belts and a shoulder harness. In such cases, a knowledgeable plaintiff's trial attorney would undoubtedly ask for special interrogatories to the jury, isolating the criterion of "less risk." If that interrogatory is answered in the affirmative, then it follows *as a matter of law* that the product is unreasonably dangerous to normal use. Based on those simple grounds alone, the court might well find the case ripe for a directed verdict in favor of plaintiff.

On a broader plain, the creation of theories of liability not founded on the balancing process will lead to a divergence between products which are actionable under *Halphen*, but not under *Loescher*, as it is the balancing process which still underlies the finding of defectiveness in the *Loescher* action. Thus, under the *Halphen* theories which do not require the balancing test (design, warning, manufacture), it now seems quite likely that in the traditional grouping of the owner of the thing and the manufacturer of the thing as defendants, the manufacturer may be held liable for his unreasonably dangerous product under a "less

risk" theory, but the owner may well be found not liable under *Loescher*, because the thing was not defective under the balancing process. For instance, in the foregoing examples of the rear window stoplight and the Mercedes airbag restraint, a jury could find each of the vehicles to be unreasonably dangerous to normal use under *Halphen*, but not defective under the *Loescher* balancing process. It would therefore behoove a defense attorney for the individual owner to put special interrogatories to the jury to ensure that their standard for defectiveness was the balancing process, separate from the *Halphen* standard for the manufacturer's liability.

Looking at other traditional theories inherent in the products liability litigation, the state-of-the-art defense has been eliminated under the unreasonably dangerous per se category,[16] and of course was never relevant to the manufacturing or composition defect theory. It does appear to be a defense in a case based on failure to warn or on the design theories.[17] *Halphen* emphasizes that in determining whether the defendant could have known of and avoided the unreasonably dangerous aspect of a product, the defendant will be held to the standard and skill of an expert;[18] thus, if other manufacturers or experts in the field have discovered the danger, this defendant will be held to have known of it.

For the products liability defendant, *Halphen* makes some positive clarifications strengthening the argument that his product was reasonable, when raised in defense against the warning and design theories. The court said, "[I]n fairness the manufacturer should be permitted to introduce evidence and present argument as to the *standard of knowledge* and *conduct* by which its conduct is to be judged."[19] Whether or not this standard for warning and design cases is called negligence, it very effectively bases those theories on a rule of reasonable care. Perhaps that terminology cannot be used in a charge to the jury or in opening and closing arguments, but the evidence underlying and demonstrating reasonable care is certainly admissible and will have a persuasive effect on the jury. It remains to be seen how this latitude of defense will fare in balancing off the "less risk of harm" burden of persuasion of the plaintiff.

To allow the plaintiff the full advantage of the new burdens of proof with the attendant exclusion of evidence not relevant under the *Halphen* theories, the plaintiff may elect to try his case on any one or all of these theories. Accordingly, the plaintiff is entitled to instructions that evidence

16. Id. at 114, 118.
17. Id at 115, 118.
18. Id. at 115.
19. Id. at 118 (emphasis added).

may be considered only with respect to certain theories.[20] This is a serious departure from the fact-pleading theory historically obtaining in Louisiana and set out expressly in the Louisiana Code of Civil Procedure.[21] Multiple plaintiffs injured by the same product in a common accident may well elect to plead their cases on different theories. Third party complaints and cross-complaints certainly may be pleaded according to the plaintiff's wishes, as would also be the case with reconventional demands. As pointed out above, when a *Loescher* defect is involved, it will of course be pleaded differently. It may be difficult to draft jury charges correctly delineating these various paths so that an ordinary jury may apply them accurately.

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20. Id. at 115.
21. La. Code Civ. P. art. 891.