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Beyond Food and Drink: Added Protection for the Injured Consumer?

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ated. Legislatures in other states have taken steps to clarify their financial responsibility laws following similar decisions.[36] Perhaps, this would be an appropriate response in Louisiana as well.

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BEYOND FOOD AND DRINK: ADDED PROTECTION FOR THE INJURED CONSUMER?

Suit was brought on behalf of two minors by their father against the defendant insurer and its insured claiming damages for the death of cattle sprayed with defendant's arsenic-based product. The dip had been allegedly administered in substantial compliance with published directions. The trial court allowed recovery. The appellate court reversed, finding that the plaintiff failed to establish by a preponderance of the evidence that the spray was properly mixed by plaintiffs and, further, that the plaintiff offered no proof of negligence on the manufacturer's part. In reversing the appellate court's decision, the supreme court *held*, that the mixture was proper and that no proof of particular negligence was necessary. *Weber v. Fidelity & Casualty Insurance Co.*, 259 La. 599, 250 So.2d 754 (1971).

At common law, three modes of recovery have been granted to the injured consumer. The first is under a contractual warranty of "merchantable quality," or fitness for intended purpose. If this warranty is not express, it is considered to be implied in the sale or delivery of all products. Recovery in warranty, however, is encumbered by the availability to the manufacturer of the defenses surrounding the law of contracts: no reliance, privity, notice, and disclaimer. Since a great deal of contract law precludes recovery under warranty, common law jurisdictions have resorted to many fictions in order to circumvent established rules.[1] Moreover, beginning with the decision of the New Jersey court in *Henningsen v. Bloomfield Motors, Inc.*,[2] which did away with the privity requirement in warranty re-

36. At least two state legislatures have passed laws specifically prohibiting "stacking" after courts had reached decisions similar to *Deane* and *Graham*, *see* CALIF. INS. CODE § 11580.2 (West 1955); IOWA CODE ANNO. § 516A.2 (1946).

1. This history of warranty is thoroughly discussed in Prosser, *Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960).

2. 32 N.J. 568, 161 A.2d 69 (1960).

covery, many courts have abrogated the contractual requisites surrounding a manufacturer's liability for its products. This has led at least one eminent authority to suggest that in due time, through this abrogation, strict liability with regard to manufacturers might have come in warranty.[3]

A second traditional mode of recovery, an action in negligence, requires proof of fault or lack of reasonable care on the part of the defendant. The difficulty in maintaining and succeeding in this manner is evident when one considers the ordinary consumer's lack of knowledge of modern day manufacturing processes and the customary distance which products must travel from the manufacturing location to the marketplace. The problem has been well summarized by Chief Justice Traynor of the California Supreme Court: "An injured person, however, is not ordinarily in a position to refute such evidence or identify the cause of the defect, for he can hardly be familiar with the manufacturing process as the manufacturer himself is."[4] While courts have permitted liberal use of res ipsa loquitur and negligence per se to aid the consumer, the tort cause of action necessarily puts the plaintiff-consumer at a disadvantage difficult to overcome.

Unsatisfied with both the theoretical shortcomings of warranty and the practical results of negligence-based actions, common law courts have created a sound and equitable action for the consumer—strict liability for manufactured goods which, due to some defect, cause injury to the consuming public. The case which established the doctrine of strict liability in tort, *Greenman v. Yuba Power Products, Inc.*, contains the following statement by Justice Traynor: "A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being."[5]

With the imposition of strict liability, the plaintiff need no longer establish negligence on the manufacturer's part, and, since

3. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 801 (1966): "Whether, given enough time—say another decade—the sales law of warranties might have worked out a method of dealing effectively with these problems [*i.e.*, contractual rules surrounding warranty] . . . must always be a matter of speculation."

4. Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 463, 150 P.2d 436, 441 (1944) (concurring opinion).

5. 59 Cal. 2d 57, 377 P.2d 897, 900, 27 Cal. Rptr. 697, 700 (1963).

it is an action in tort, the law of contractual warranties is inapplicable. The essential elements of a plaintiff's case are the defendant's relationship with the product in question, a defective or unreasonably dangerous condition of the product, and a causal relationship between the defect and the plaintiff's injury.[6] Showing the existence of a defect is the primary burden of the plaintiff, and no set definition of what constitutes a defect has been accepted. Justice Traynor has suggested that "no single definition of defect has proved adequate to define the scope of the manufacturer's strict liability in tort for physical injuries . . . ."[7] An examination of the major cases establishing strict liability provides the general definition that a defect exists when a product is unsafe for its intended purpose.[8] The *Restatement (Second) of Torts* defines a defective product as one which is "in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him."[9]

Although no universally accepted definition exists, the preceding examples illustrate the breadth and scope of a manufacturer's liability. At present, strict tort liability, in its various forms, is the primary mode of recovery available for modern consumers injured due to a defect in a manufacturer's product. A recent federal court decision concludes that Louisiana law provides a recovery for the consumer in strict tort liability.[10] With deference, the writer submits that no Louisiana court has arrived at this conclusion.

In assessing the impact of *Weber*, it is necessary to review Louisiana law concerning a manufacturer's liability for defective products. Recovery of damages from manufacturer-vendors by purchasers of defective foodstuffs has been available in Louisiana since 1911.[11] The liability imposed requires proof that the food or drink in question was unwholesome and that, due to this quality, the plaintiff suffered injury. If the plaintiff can establish these two propositions, a prima facie case has been

6. *Id.* For further consideration, *see* Annot., 13 A.L.R.3d 1066 (1967), which contains an excellent digest of the current cases and jurisprudential rules surrounding strict liability in every state.

7. Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 373 (1965).

8. 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 16A(4e) (Cum. Supp. 1968).

9. RESTATEMENT (SECOND) OF TORTS § 402-A, comment g (1965).

10. Soileau v. Nicklos Drilling Co., 302 F. Supp. 119 (W.D. La. 1969).

11. Doyle v. Fuerst & Kramer Ltd., 129 La. 838, 56 So. 906 (1911).

created against the defendant,[12] and the courts hold him liable under an implied warranty of wholesomeness of food and drink.[13] To extend plaintiff's recovery for this breach of warranty beyond rescission of the sale and return of the purchase price, Louisiana courts impute knowledge of the unwholesomeness to defendant.[14] A second line of decisions, beginning with the holding in *Le Blanc v. Louisiana Coca Cola Bottling Co.*,[15] extends this liability beyond the vendor-vendee relationship.[16] Thus, liability without any proof of negligence exists in Louisiana for makers of food and drink products under a theory of implied warranty, and the contractual rules surrounding this warranty have been substantially abrogated.[17] A federal court case suggests that this liability also applies to products designed for "intimate bodily use."[18]

Beyond foodstuffs, the decisions in Louisiana cases prior to *Weber* have centered around proof of a defect. Some cases

12. Le Blanc v. Louisiana Coca Cola Bottling Co., 221 La. 919, 923, 60 So.2d 873, 874 (1952).

13. Doyle v. Fuerst & Kramer Ltd., 129 La. 838, 846, 56 So. 906, 909 (1911). After quoting the authorities relied upon, the court states: "It will be noted from the foregoing that the vendor of food to be consumed by the purchaser is conclusively presumed to know the condition of the food he sells, and to represent to the purchaser that such food is wholesome. In other words, the representation which he is thus presumed to make to the purchaser is not merely that he has been careful in the selection, preparation, and preservation of the food, but that the food is, as a matter of fact, wholesome. When, therefore, the food proves to be unwholesome the warranty is breached, and he is responsible."

14. LA. CIV. CODE art. 2531, the basic damage article for breach of warranty, provides: "The seller who knew not the vices of the thing, is only bound to restore the price . . . ." However, article 2545, which was amended in 1968, extends this responsibility in cases where "[t]he seller, who knows the vice of the thing he seels and omits to declare it, because the restitution of price and repayment of the expenses, including reasonable attorneys' fees, is answerable to the buyer in damages." A comparison of these two articles makes clear the judiciary's motive for imputing knowledge of defective food and drink to the manufacturer-vendor: Recovery of the purchase price by a plaintiff injured by unwholesome foodstuffs would rarely be adequate or just compensation for damages suffered. For cases which broaden the definition of manufacturer-vendor's liability, *see* Radelac v. Automatic Firing Corp., 228 La. 116, 81 So.2d 830 (1955); Tuminello v. Mawby, 220 La. 773, 57 So.2d 666 (1952); Penn v. Inferno Mfg. Corp., 199 So.2d 210 (La. App. 1st Cir. 1967).

15. 221 La. 919, 60 So.2d 873 (1952).

16. *Id.* at 926 n.3, 60 So.2d at 875 n.3: "In 22 Am.Jur. 'Food' § 105, it is stated that, according to the weight of authority, the basis of liability of the manufacturer is negligence but it is recognized therein that there are respectable and strong opinions grounding the liability upon an implied warranty of wholesomeness of the product, notwithstanding the absence of any privity of contract. This, we think, is the better view . . . ."

17. McCauley v. Manda Bros. Provisions Co., 202 So.2d 492 (La. App. 1st Cir. 1967).

18. Lartigue v. R. J. Reynolds Tobacco Co., 317 F.2d 19 (5th Cir. 1963).

cite the following principle, which has its origin in the common law:

> "A manufacturer or seller of a product which involves a risk of injury to the user is liable to any person, whether purchaser or a third person, who without fault on his part sustains an injury caused by a defect in the design or manufacture of the article, if the injury might have been reasonably anticipated."[19]

Notwithstanding the apparent adoption of this principle, proof of negligence has still been required as a prerequisite to recovery. In the major Louisiana products liability cases beyond food and drink, plaintiffs have succeeded only when the existence of a defect which indicated negligence on the manufacturer's part could be established by a preponderance of the evidence. Thus, in *Arnold v. United States Rubber Co.*,[20] the plaintiff was held not to have established the existence of a defect because of his failure to use the product as intended, and in *Meche v. Farmers Drier & Storage Co.*,[21] the court held that the manufacturer could show intervening negligence on the part of the defendant. An appellate court, summarizing the plaintiff's burden of proof, has stated that "in order to show negligence it was necessary for the plaintiff to introduce testimony that the weld in question was defective . . . ."[22]

The most comprehensive review of warranty and tort liability by a Louisiana court is found in *Penn v. Inferno Manufacturing Corp.*,[23] where the principles relied upon to create liability in *Weber* were foreshadowed.[24] Although the basis of liability

19. Meche v. Farmers Drier & Storage Co., 193 So.2d 807, 811 (La. App. 3d Cir. 1967). *See also* Solieau v. Niklos Drilling Co., 302 F. Supp. 119 (W.D. La. 1969); Dean v. General Motors Corp., 301 F. Supp. 182 (E.D. La. 1969); Cartwright v. Chrysler Corp., 255 La. 598, 232 So.2d 285 (1970); Stelly v. Quick Mfg. Co., 246 So.2d 302 (La. App. 3d Cir. 1971); Thomas v. Gillette Co., 230 So.2d 870 (La. App. 3d Cir. 1970); Foy v. Ed Taussig, Inc., 220 So.2d 229 (La. App. 3d Cir. 1969); Arnold v. United States Rubber Co., 203 So.2d 764 (La. App. 3d Cir. 1967).

20. 203 So.2d 764 (La. App. 3d Cir. 1967), *cert. denied*, 251 La. 739, 206 So.2d 91 (1968).

21. 193 So.2d 807 (La. App. 2d Cir. 1967).

22. Samaha v. Southern Rambler Sales, Inc., 146 So.2d 29, 30 (La. App. 4th Cir. 1962).

23. 199 So.2d 210 (La. App. 1st Cir.), *cert. denied*, 251 La. 27, 202 So.2d 649 (1967).

24. *Id.* at 240. The court, after quoting the language from *Doyle* presuming knowledge by a manufacturer of vices or defects in his product, reemphasizes the duty of a manufacturer to the consumer in making a

required by the court in *Penn* is unclear, the decision is noteworthy because of its exposition of the burden of proof necessary in cases of this nature. Under the facts of the case, a "siteglass" exploded while being operated under normal conditions and within warranted pressure, seriously injuring a gauge inspector. The injured plaintiff, unable to take advantage of any presumption of negligence arising from the facts of the explosion, had to produce tangible evidence of the manufacturer's negligence which had resulted in the defect. If the doctrine of strict liability had been applied, the plaintiff would have been relieved from proving particular negligence once the defect was shown by proving the product was not fit for its intended purpose. Thus, it can be seen that the key problem with recovery in tort for defective products, other than foodstuffs, has been the burden of proving negligence, which the plaintiff must sustain and which he is at a distinct disadvantage to prove.

It is the writer's opinion that the court in *Weber* changes that burden.[25] The majority opinion utilizes two legal principles of Louisiana law to effect this change. First, after reiterating the standard tort duty owed by a manufacturer, Justice Tate adds: "However, the plaintiff claiming injury has the burden of proving that the product was defective, *i.e.*, unreasonably dangerous to normal use, and that the plaintiff's injuries were caused by reason of the defect."[26] As shown by later language in the case, this new definition closely correlates the plaintiff's burden in this non-food case with that required in cases involv-

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product, relying on the same common law source the court in *Meche* did to articulate this duty. The court then concludes that the manufacturer knew but failed to warn of these defects, and was negligent in failing to do so.

25. The product involved in this case was 15 percent arsenic, and the brevity of the decision makes it impossible to ascertain the role played by such a dangerous product in the court's decision. Although the language of the case seems to encompass any product "which involves a risk of injury," the inherent danger and high risk of injury which accompany certain products may move judges toward less stringent standards of proof as an unspoken matter of policy. To conclude this from *Weber* would be inaccurate, for the decision seems to be unconcerned with the type of product involved; but attention should be called to this possible limitation of the case. For an appellate court's handling of a harmless household product before *Weber*, *see* Thomas v. Gillette Co., 230 So.2d 870 (La. App. 3d Cir. 1970).

26. Weber v. Fidelity & Cas. Ins. Co., 259 La. 599, 603, 250 So.2d 754, 755 (1971).

ing food.[27] Evidently, the court is willing to conclude that a defect exists if the product, used in its intended manner, causes harm and if the manufacturer can produce no evidence to rebut this conclusion beyond the precautionary measures taken in the manufacturing process.[28] Such a broad definition of defect establishes a reasonable burden of proof more within the plaintiff's capabilities and places the responsibility on the manufacturer to refute the prima facie case of liability. Moreover, *Weber* allows more latitude in the type of evidence which proves the existence of a defect by permitting circumstantial evidence to establish proof by a preponderance.

The second legal principle used by the majority has been the basis for recovery of damages under implied warranty since 1911, namely, that "the plaintiff need not prove any particular negligence by the maker in its manufacture or processing; for the manufacturer is presumed to know of the vices in the things he makes, whether or not he has actual knowledge of them."[29] In warranty, this imputation of knowledge is necessary to establish liability on the part of the manufacturer for damages beyond a return of the purchase price.[30] Use of this principle raises the question of whether the recovery granted by

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27. After accepting the trial court's determination that plaintiffs mixed the dip properly, the court adds: "[T]he plaintiff has made out at least a prima facie case that the cause of the cattle's death and of his boys' sickness was excessive arsenic in the batch of the manufacturer's dip purchased by them: For, if the plaintiff's sons had prepared the spraying-solution in the manner described, the cattle would not have died from such normal spraying, *if* the dip had contained *only* the normal amount of arsenic. *Id.* at 608, 250 So.2d at 755.

28. Another factual aspect of this case which could limit the result is the testimony elicited from the defendant's veterinary director. The batch of defendant's product in question was mixed in 1963 and records concerning various batches were only kept for three years. Since the director had been in the defendant's employ (1965), he could recall no other complaints or any record of inadequacy in the 1963 batch, but there was no evidence to prove this. It seems to this writer that had the defendant been able to establish by documented records that plaintiff's mishap was the sole complaint from a 2700 gallon batch, this factor would have greatly enforced the defendant's allegation that the cattle dip was improperly mixed and, perhaps, forced a different conclusion from the court.

29. Weber v. Fidelity & Cas. Ins. Co., 259 La. 599, 603, 250 So.2d 754, 756 (1971). The language of *Doyle v. Furest & Kramer* [129 La. 838, 56 So. 906, 1911)], which first imputed knowledge to a manufacturer of a defective product, provides: "The principle which governs in this case is that every one ought to know the qualities, good or bad, of the things which he fabricates . . . , and that lack of such knowledge is imputed to him as a fault, which makes him liable to the purchasers of his fabrications for the damage . . . ." *Id.* at 843, 56 So. at 907.

30. *See* note 14 *supra.*

the court lies in warranty, tort, or in a subtle blend of both. A certain answer must await decisions and opinions subsequent to *Weber*, as the court does not make this entirely clear. This writer submits that the recovery is in tort, not warranty, and therein lies the ultimate value of *Weber* in Louisiana jurisprudence. This conclusion is buttressed by the fact that Justice Tate begins the case with a reiteration of the principle which has provided a tort cause of action in suits concerning products other than food and drink since 1963.[31] This principle establishes a duty owed, an integral part of any tort liability, and the restatement of this duty seems to signal a cause of action in tort. By imputing to a manufacturer knowledge of a product's defectiveness, the court seems to create fault—as required in articles 2315 and 2316 of the Louisiana Civil Code—on the manufacturer's part and to remove the plaintiff's burden of proving particular negligence. This imputation of fault by establishment of foreseeable risk seems to serve the ultimate purpose of the majority opinion. Instead of using the traditional warranty approach, where liability exists without proof of negligence, the majority has undertaken to redefine defect in tort phraseology and rely on imputation of knowledge to eliminate the plaintiff's burden of proving particular negligence. Such an undertaking is persuasive proof of an intent to establish a cause of action in tort.

If subsequent cases should relegate this cause of action to warranty, this writer submits that it will be the type of warranty action recognized in the *Restatement (Second) of Torts* which, after endorsing strict liability of a manufacturer in tort, states:

> "There is nothing in this section which would prevent any court from treating the rule stated as a matter of 'warranty' to the user or consumer. But if this is done, it should be recognized and understood that the 'warranty' is a very different kind of warranty from those usually found in the sale of goods, and that it is not subject to the various contract rules which have grown up to surround such sales."[32]

Such a warranty, unencumbered by contract rules, has also been

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31. Smith v. New Orleans & Northeastern R.R., 153 So.2d 533 (La. App. 1st Cir. 1963).

32. RESTATEMENT (SECOND) OF TORTS § 402-04, comment m (1965).

recognized by noted commentators on the law of products liability.[33]

Whatever cause of action is created, the majority has used recognized and established Louisiana law in a unique manner to grant recovery in this case. While the two basic principles of *Weber* can be found in *Penn*,[34] their usage in the instant case is blurred by an extensive review of warranty and tort liability for defective products. Although the singular effect of the former may be diminished by the presence of the latter, the court's endorsement in *Weber* of imputation of knowledge in tort and its use of defect reveal, in this writer's opinion, an approach analogous to common law strict liability: plaintiff must prove the existence of a defect and a causal relationship between that defect and the injury which he suffers. If the plaintiff can show compliance with the directions or intended usage, the court will conclude that a defect existed and will hold the manufacturer liable absent proof to the contrary.[35] Through this redefining of a defective product as one which is unsafe for its intended purpose (its unsafeness being presumed from resulting harm after following directions), a plaintiff's ability to establish a prima facie case is immeasurably increased, and the burden of proof is more equitably allocated. However, the liability imposed is not absolute liability, and the manufacturer can refute the inference of a defect, as was done in the *Arnold* and *Meche* cases.[36] Further, once the defect is established—*i.e.*, if the manufacturer cannot refute the presumption—the plaintiff need not show negligence, as knowledge of the defect and concomi-

33. *See, e.g.*, Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1134 (1960). After discussing the use of warranty as a mask of courts' true intentions, Dean Prosser predicts: "There are not lacking indications that some of the courts are about ready to throw away the crutch, and to admit what they are really doing, when they say the warranty is not the one made on the original sale, and does not run with the goods, but is a new and independent one made directly to the consumers, and that it does not arise out of or depend upon any contract, but is imposed by the law, in tort, as a matter of policy."

See also 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 16A(4a) (1966): "If a court does not require, *inter alia*, privity of contract, a sale, or notice of a breach of warranty, does it matter that the defendant is being strictly liable in warranty rather than tort. The answer seems obvious. If a court imposes strict warranty liability irrespective of contract and sales rules, then strict liability in warranty and tort are synonymous."

34. *See* note 24 *supra*.

35. Weber v. Fidelity & Cas. Ins. Co., 259 La. 599, 250 So.2d 754 (1971).

36. For a post-*Weber* case applying the above analysis, see Clark v. Sears Roebuck & Co., 254 So.2d 62 (La. App. 3rd Cir. 1971).

tant fault will be imputed to the manufacturer. Thus, the majority in *Weber*, without relying on the *Restatement* or mentioning strict liability, as suggested by plaintiff's attorney[37] successfully meshes established Louisiana legal principles to protect an injured consumer by placing the burden of proof and weight of presumption against the party best able to bear the burden and produce information. The ultimate value of *Weber* will be determined by hindsight alone, but, this writer submits, if the cause of action is deemed to sound in tort and the case is applied widely beyond its facts, the potential protection available to persons injured by defective products is significantly increased.

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CAPITAL GAINS ON PROCEEDS OF TIMBER SALES

Plaintiff's ancestor operated a naval stores business[1] on his land. Subsequent to his death, the land was conveyed to a corporation whose sole shareholders were beneficiaries of the estate and plaintiffs herein. The corporation terminated the naval stores business and, after determining that the land's future lay in the production of trees for sale, implemented a program of site improvement.[2] A county directory listing the corporation as a buyer and seller of timber was the only advertising undertaken. In a single transaction the corporation sold all the timber growing on its land. The corporation later became a Subchapter S corporation,[3] and plaintiffs filed individual income tax returns, treating their distributive shares of the taxable year's payment on the sale price as capital gains.[4] The Commissioner of the Internal Revenue Service determined that the proceeds were taxable as ordinary income. The Fifth Circuit Court of Appeals *affirmed* a jury finding upholding that determination. *Huxford v. United States*, 441 F.2d 1371 (5th Cir. 1971).

The Internal Revenue Code creates a distinction between

37. 259 La. at 628, 250 So.2d at 765.

1. Generally, the term "naval stores" refers to turpentine, tar, pitch, pine oil, rosin, and other products obtained from the resin of pine and other cone-bearing trees.

2. The trees used in the naval stores business and other inferior trees were gradually cleared out, young trees planted, new fire-breaks made and new roads built.

3. INT. REV. CODE of 1954, § 1371.

4. *Id.* § 1378.