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TORTS

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PRODUCTS LIABILITY

In *Chappuis v. Sears Roebuck and Co.*[1] the plaintiff, an employee of a contractor, sought damages for an eye injury caused by a chip of metal which flew from the hammer he was using to drive ordinary nails. The hammer, which had seven other chips around the circumference of its face, bore the tattered remnants of a label that warned the user to wear goggles and to refrain from using the hammer to strike objects made of steel harder than the hammer itself.

The Louisiana Supreme Court, reversing the court of appeal[2] and the trial court, held that the defendants, the manufacturer and the retailer of the hammer, had breached a duty under Civil Code articles 2474[3] and 2545[4] to warn of the danger of the propensity of a chipped hammer to chip further. This breach constituted fault resulting in liability under article 2315 of the Civil Code.[5]

The opinion is troublesome both in its application of legal doctrine and in the substantive policy it reflects. Turning first to the issue of causation, a plaintiff's burden of proving the casual relationship between his injury and the absence of a warning traditionally has been met by a showing that more probably than not the injury would not have occurred but for defendant's failure to warn. In *Chappuis* the court found that burden to have been satisfied in a novel way: "It would be an unjustified assumption to say that store clerks, builders, tradesmen and hammer users of all kinds would be ignorant of

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1. 358 So. 2d 926 (La. 1978).

2. 349 So. 2d 963 (La. App. 1st Cir. 1977), *rev'd*, 358 So. 2d 926 (La. 1978).

3. "The seller is bound to explain himself clearly respecting the extent of his obligations: any obscure or ambiguous clause is construed against him." LA. CIV. CODE art. 2474.

4. "The seller, who knows the vice of the thing he sells and omits to declare it, . . . is answerable to the buyer in damages." LA. CIV. CODE art. 2545.

5. 358 So. 2d at 929. In describing "fault" under Civil Code article 2315, the court cited *Langlois v. Allied Chem. Corp.*, 258 La. 1067, 249 So. 2d 133 (1971).

the fact that a chipped hammer should be discarded if the warning were disseminated with each sale (at the rate of two million a year from one manufacturer alone)."[6] Although one might interpret that language as the equivalent of "but for the absence of the warning, plaintiff would have been aware of the danger and would have discarded the chipped hammer," it is difficult to find in the court's statement the satisfaction of the "more probable than not" burden. Apparently the court found as a fact that if all hammers had a warning, all hammers users would have known of this danger and would not have used a chipped hammer; but this is hardly so self-evident a fact as to be subject to assumption or to judicial notice. If it is *unjustified* to assume that hammer users would be *ignorant* of the danger, it seems equally *unjustified* to assume that with a warning hammer users would *know* of the danger and act responsibly. The evidential leap seems all the more serious if one emphasizes that the court merely negated *ignorance,* which should not be found to establish knowledge; it is the positive finding of knowledge or awareness, whether actual or assumed, that may be used in satisfying the burden of proof, not the mere *absence* of ignorance.

The circumstances under which the injury occurred, as recited in the opinion, are ones which a jury could easily interpret as lacking the requisite link of causation by concluding that the plaintiff more probably than not would have used the hammer as he did regardless of the warning originally attached to it or to two million other hammers. It is clear to this writer that, by finding causation and by stating that a reasonable warning would have removed dangerous hammers from use,[7] the court was more concerned with enunciating a statement of policy concerning hammer manufacturers than with deciding whether this particular hammer, in its particular condition, with the warning it bore at the time of sale, more probably than not wrongfully caused the injury to this plaintiff.

As to the defense of possible plaintiff-fault, the court concluded that the plaintiff "did not know and could not reasona-

6. 358 So. 2d at 930.
7. *Id.*

bly have been expected to know" of the hammer's dangerous propensity to chip.[8] The court noted that neither the plaintiff, his immediate supervisor, nor his employer was aware that the hammer had been damaged before the accident. Yet, the court stated that the damage-causing chip was fitted into a larger chipped place on the edge of the hammer and that experts had located seven other chipped places in the edge of the face of the hammer. Surely the court should require the reasonable user of a hammer to note existing chipped spots and be aware of the danger of further chipping if it assumes that he has the common sense to heed a warning attached to the handle at the time of sale alerting him to that danger. The court should have found that plaintiff, as a matter of law, was aware of what was plain to see. For the future, if, as the court found, an adequate warning on all hammer handles would imbue all hammer users with knowledge of the danger, it seems to follow that within a given time after such warnings have been disseminated, all actions for chip-injuries will be barred.

On a broader note, the court came tantalizingly close to settling the question whether contributory negligence is a defense in so-called products liability cases.[9] The court stated that if plaintiff had known or should have known of the danger and had "[chosen], nevertheless, to use the dangerous instrument,"[10] he would not be entitled to recover because he would then share the fault of the manufacturer. This language would be a clear recognition of the defense of contributory negligence except for the court's use of the words "knew" and "chose." These words suggest the subjective awareness of a risk and a voluntary encounter with it that are customarily associated with assumption of risk rather than contributory negligence. On balance, however, the recurrence of the phrase "share the fault" lends weight to the interpretation that both defenses are recognized.

The well-settled *Weber* rule[11] defining "defect" in products

8. *Id.*

9. *See, e.g.*, Khoder v. AMF, Inc., 539 F.2d 1078 (5th Cir. 1976).

10. 358 So. 2d at 930.

11. A manufacturer of a product which involves a risk of injury to the user is liable to any person, whether the purchaser or a third person, who without

liability cases received a somewhat unsettling jolt in *Chappuis*. As a foundation for overturning the trial and appellate courts' decisions the supreme court held the following jury interrogatory to be inadequate: "Do you find any defect in the design or manufacture of the hammer or do you find the defendants otherwise at fault which caused plaintiff's injury?" The *Weber* standard for a defect should be satisfied by the foregoing interrogatory since that standard should be construed to include that which might be found unreasonably dangerous for lack of an adequate warning. Since the jury answered the interrogatory in the negative, it is a fair inference that the jury felt that ordinary users could not complain about the potential for harm from that particular hammer.

It is difficult to understand why the court reversed the finding of the court of appeal that the hammer had been abused or misused. It was uncontroverted that the hammer had seven chips on the edge of its face at the time the injury-producing chip flew into plaintiff's eye, a showing of abuse that the supreme court negated by finding that "[t]he evidence is uncontradicted that Chappuis did not abuse the hammer . . . ."[12] It is irrelevant whether Chappuis or someone else abused the hammer. The showing of abuse subsequent to the hammer's leaving the hands of the manufacturer negates a crucial element of plaintiff's burden, *i.e.*, to show that the product left the control of the manufacturer in its defective condition.[13] The court of appeal found that the expert testimony was unanimous to the effect that misuse had produced those various chips and even that the particular chip which caused the injury had been loosened by some previous misuse of the hammer. It may be that the jury thought the expert opinion was more probative than the plaintiff's testimony. The Louisiana system of appellate review of fact would have been

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fault on his part, sustains an injury caused by a defect in the design, composition, or manufacture of the article, if the injury might reasonably have been anticipated. 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.

Weber v. Fidelity & Cas. Ins. Co., 259 La. 599, 602-03, 250 So. 2d 754, 755 (1971).

12. 358 So. 2d at 929.

13. *See* Stevens v. Rex Chainbelt, Inc., 349 So. 2d 948 (La. App. 1st Cir. 1977).

well-served if this case had been returned to the trial court for submission to a jury on proper interrogatories and on the issues of causation[14] and misuse, as well.

The legal theory on which recovery was based is even more troublesome than the treatment of the foregoing factual issues. The term "unreasonably dangerous to normal use," which figures prominently in *Weber*,[15] was used by the court in *Chappuis* in conjunction with the requirement of Civil Code article 2474 that the seller explain himself as to the extent of his obligation. The court then quoted article 2545 of the Civil Code as furnishing the standard of care and Civil Code article 2315 as the basis for liability of the defendant to the plaintiff. Article 2474 is found in the chapter concerning "the obligations of the seller," and article 2545, a principal basis for actions in redhibition,[16] is in the chapter dealing with "the vices of the thing sold." The courts of Louisiana have not, until this case, extended the obligations of articles 2474 and 2545 to a non-purchasing consumer. It is true that *Media*[17] made clear that *privity* was not required for an action in redhibition, but no court has seen fit to abolish the requirement that there be a sale.

In the instant case the purchase was made by the contractor-employer and not by the plaintiff. It would stretch things rather far if all the employees of large industrial concerns had actions in redhibition against the sellers of the industrial equipment to their employers. It would be a value judgment expansion of liability in sales far beyond anything the court has done to date. In *Weber*, the court, through Justice Tate, carefully avoided founding the plaintiff's action on the sales articles by using the presumption of knowledge on the part of the manufacturers as a foundation for negligence,

14. Another troublesome aspect of the causation issue is that the warning still attached to the handle of the hammer admonished the user to wear goggles to avoid the risk of injury. 358 So. 2d at 928. If the warning had been heeded, the injury would not have occurred. Since plaintiff did not heed the warning that was given, is it fair to believe that he would have heeded some different warning?

15. 259 La. 599, 250 So. 2d 754 (1971). See note 11, *supra*.

16. *See* Crawford, *Products Liability, The Cause of Action*, 22 LA. B. J. 239, 242-43 (1975).

17. Media Prod. v. Mercedes-Benz, 262 La. 80, 262 So. 2d 377 (1972).

thereby basing recovery on negligence-fault under article 2315.

The consequences of allowing the plaintiff an action under article 2545 are also quite serious in other respects: attorney's fees are available to the plaintiff under article 2545, but not under article 2315, and interest in the redhibitory action runs from the date of judgment rather than from judicial demand as in tort.[18] If, as the court seems to have intended, the analysis employed in *Chappuis* is an application of article 2545 implemented through article 2315, great violence is done to the scheme of the Civil Code.

The authority cited for this theory of liability is Professor Stone's writing concerning article 667 of the Civil Code.[19] The situation envisioned in article 667 in the Civil Code is quite different from that in article 2545. The former article has no accompanying implementation scheme for the assessment of damages, while article 2545 contains the phrase "is answerable to the buyer in damages." Even if that were not so, since redhibition occurs in the title on sale, Civil Code articles 1930 and following, which specify the manner of assessing damage for the violation of contract, should regulate damages for violations of sale provisions.

In finding causation and defect as easily as it did in *Chappuis,* the court pushed the liability of the manufacturer beyond the realm of fault and into the realm of insurance. The court in the opening paragraphs of its opinion acknowledged most candidly that the hammer was well-made. It is also clear that hammers made by the manufacturer and distributed by Sears had for years contained a warning that hammers chip and that safety goggles should be worn while using them. Little more can be required of a manufacturer if the standard of care imposed by the court is intended to be one which the manufacturer may comply with and rely upon to discharge its legal duty. If the almost undischargeable burden that this decision

18. Crawford, *supra* note 16, at 244.

19. 358 So. 2d at 929 n.2, *quoting* Stone, *Tort Doctrine in Louisiana: The Concept of Fault,* 27 TUL. L. REV. 1, 2-3 (1952). LA. CIV. CODE art. 667 provides: "Although a proprietor may do with his estate whatever he pleases, still he can not make any work on it, which may deprive his neighbor of the liberty of enjoying his own, or which may be the cause of any damage to him."

represents is to be placed on manufacturers, should not a burden of equal weight be on the consumer? The plaintiff in *Chappuis* was not wearing goggles as the warning which had been on hammers for years demanded. Should not the consumer be as heavily burdened with a duty of responsible care as the manufacturer? The answer appears to be that he is not, and it follows that product liability in truth is far closer to insurance than one might surmise from viewing the elaborate fictions of defect and causation now used by courts in products liability litigation.

As has been suggested concerning the concept of no-fault insurance for automobiles, a system of insurance administered by the court within a structure of adversary litigation ostensibly based on fault is excessively expensive for the public.[20] If fault is to be dispensed with in products liability, as it has been in the area of workmen's compensation, there should be a reduced measure of damages to balance the scales.

CHILD LABOR STATUTE

In *Boyer v. Johnson*[21] the supreme court held that the death of a fifteen-year-old boy driving a commercial motor vehicle in violation of child labor laws[22] gives rise to a wrongful death action on behalf of the decedent's parent under Civil Code article 2315. The opinion is of great interest for both the analytical approach used and the substantive result reached.

The decedent was hired by defendant to drive a Volkswagen panel truck in the course of defendant's business. Revised Statutes 23:161(10) prohibits the employment of a minor under eighteen years of age as a driver of a motor vehicle used for commerical purposes. Decedent apparently lost control of the vehicle and had the fatal accident.

The case bears no imprint of wretched exploitation of the young. The decedent had his driver's license, and the defendant had very carefully supervised his initial driving of the

20. *See* J. O'CONNELL & R. HENDERSON, TORT LAW, NO-FAULT AND BEYOND 185-88 (1975).

21. 360 So. 2d 1164 (La. 1978).

22. The statutes at issue were Revised Statutes 23:161(4) (Supp. 1976); 23:161(10) (Supp. 1976); 23:163 (1950); 23:166 (1950); 23:211.1 (Supp. 1972).

truck. Seemingly great care had been taken to insure decedent's safe handling of the van.

The court construed the Child Labor Law as giving an action for civil damages in favor of a minor injured in this fashion. It further held, in keeping with the jurisprudence nationally, that the contributory negligence of the minor is not relevant because the public policy reflected in the enactment of the Child Labor Law is the protection of the minor against the risk of that very negligence.[23]

The defense argued vigorously that the Child Labor Law could in no way be construed to grant a wrongful death action on behalf of a parent of a deceased minor. The opinion points out correctly, analytically, that it is unnecessary to construe the Child Labor Law as conferring that action. It suffices to find that the minor died by defendant's fault, the fault being found in the violation of the Child Labor Law; article 2315, not the Child Labor Law, confers the wrongful death action upon the parent. Of course, the counter-analysis is that the fault scheme of article 2315 does not encompass the risk of a minor being injured through conduct made wrongful solely by the Child Labor statute. It should follow, then, that the granting of the wrongful death action was a value judgment on the part of the court that was not predetermined by legal analysis, as the opinion itself says in clear language.

Three justices[24] dissented on various grounds: that to extend this action to parents is an unwarranted extension of liability; that the issue of cause-in-fact was too easily resolved in favor of plaintiff; and that the Child Labor Law should be enforced solely by criminal sanction not carrying with it any civil liability.

A footnote pointed out that the wrongful death action was against the defendant in his individual capacity, not in his capacity as president of the small family corporation that was the nominal employer of the decedent.[25] The footnote noted further than the defendant was vulnerable to personal liability

23. 360 So. 2d at 1169-70.

24. Justices Summers and Marcus and Chief Justice Sanders dissented.

25. 360 So. 2d at 1166 n.1.

for his own personal fault, not for imputed or vicarious negligence, since the fatal accident occurred prior to the effective date of Act 147 of 1976,[26] which limits the liability of executive officers when the injured party is covered by workman's compensation.

ABOLITION OF PEDESTRIAN CONTRIBUTORY NEGLIGENCE AS A DEFENSE FOR NEGLIGENT DRIVERS

In *Baumgartner v. State Farm Mutual Automobile Ins. Co.*[27] the supreme court abolished the contributory negligence of a pedestrian-plaintiff as a defense available to the negligent motorist who injured the pedestrian. The abolition of contributory negligence carried with it the abolition of last clear chance as a bar to recovery by the pedestrian. The court in a footnote correctly pointed out that the doctrine of last clear chance had been misapplied when used to bar contributorily negligent plaintiffs.[28] The doctrine was conceived to mitigate the harshness of that defense.

The evidence in *Baumgartner* showed that the driver was clearly negligent in not seeing or attempting to avoid the pedestrian and that the pedestrian was guilty of conduct which could easily be classified as contributory negligence. But the court held that the lack of mutuality of risk between the car-encased driver and the woefully exposed pedestrian renders the contest unfair. The decision will give rise, in this writer's opinion, to greatly strained analyses by lower courts to find the driver not negligent in cases where the pedestrian was truly at fault in bringing about his own injury. Chief Justice Sanders' dissent will prove to be prophetically correct in this regard.[29]

MEDICAL MALPRACTICE

The cases in the area of medical malpractice warrant at-

26. 1976 La. Acts, No. 147, *amending* LA. R.S. 23:1101 (1950).

27. 356 So. 2d 400 (La. 1978).

28. *Id.* at 406 n.8.

29. Already, the First Circuit Court of Appeal has found that the pedestrian ran into defendant's automobile, not vice-versa, and that the crucial element of causation was therefore lacking. Bonfiglio v. Dempsey, 360 So. 2d 237 (La. App. 1st Cir. 1978).

tention. *Ardoin v. Hartford Accident and Indemnity Co.*[30] held that Revised Statutes 9:2794[31] is retrospective in allowing testimony as to the standard of care in a particular specialty to be sought and introduced without regard to the locality of the alleged injury. The opinion contains an exhaustive treatment of the theories of retroactivity under the Civil Code, which turn on whether the legislation at issue establishes new law or is just an interpretive statute supposedly only putting into statutory form the law which already existed.

Everett v. Goldman[32] held the Medical Malpractice Act[33] to be constitutional insofar as it requires the filtering of claims through a medical review panel and proscribes the use of an ad damnum clause in the petition for damages. In keeping with the jurisprudence nationally, *Everett* upheld the constitutionality of what may be termed procedural requirements for a medical malpractice suit against a defendant covered by the Medical Malpractice Act. The issue of limitation of damages was not before the court and hence was not passed on. Every state court which has passed finally on the question of limitation of damages has held such limitation to be unconstitutional.[34]

Vincent v. Voorhies,[35] a decision of the Third Circuit Court of Appeal, held that a medical malpractice suit filed in violation of the provisions of the Medical Malpractice Act, particularly one that has not gone first to a medical review panel, is premature, an objection correctly raised by the dilatory exception of prematurity. The court noted the decision in *Everett* and rejected plaintiff's argument that the Act is unconstitutional.

30. 360 So. 2d 1331 (La. 1978).

31. LA. R.S. 9:2794 (Supp. 1975).

32. 358 So. 2d 1256 (La. 1978).

33. LA. R.S. 40:1299.41-.48 (Supp. 1975 & 1977).

34. *See* Wright v. Central Du Page Hosp. Assoc., 63 Ill. 2d 313, 347 N.E.2d 736 (1976); Jones v. State Bd. of Medicine, 97 Idaho 859, 555 P.2d 399 (1976); Simon v. St. Elizabeth Medical Center, 3 Ohio Op. 3d 164, 355 N.E.2d 903 (1976).

35. 359 So. 2d 1129 (La. App. 3d Cir. 1978).