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TORTS

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THE APPLICATION OF ARTICLE 2317 TO LATENT BRAKE DEFECTS

The death knell for the latent brake failure defense was sounded by the Louisiana Supreme Court in *Arceneaux v. Domingue.*[1] Having collided with the plaintiff's car from the rear, the defendant maintained that the cause of the acccident was the unexplained failure of the car's brakes. A jury found in favor of the defendant, and the court of appeal affirmed. In reversing the decision, however, the supreme court observed that the evidence did not support a finding of latent brake defect. The court apparently relied on a presumption of fault on the part of the driver causing the rear-end collision, the presumption being analogous to that established in *Simon v. Ford Motor Co.*,[2] in which the supreme court announced that a driver going into the lane of another automobile and colliding with it had the burden of exculpating himself from the slightest fault. At the same time, the court found that a latent brake failure renders an automobile "defective" within the contemplation of Civil Code article 2317 and the *Loescher* rule.[3] Although the court found as a fact that the brakes were not defective, it nevertheless held that the defendant was subject to the rule of liability for custodianship of defective things. Additionally, in its discussion of the *Loescher* rule, the court, through apparent inadvertence, omitted the requirement that the thing have a defective condition that creates an unreasonable risk of injury.[4]

In view of the court's application of *Loescher* to defective brake cases, potential defendants should be aware in actual brake failure cases that the pleading or admission of the brake failure may well be construed as an admission of liability to the same extent as an admission of negligence. The defenses which will be recognized are the traditional *Loescher* defenses of victim fault, third-party fault, or irresistible force.

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1. 365 So. 2d 1330 (La. 1978). For a detailed analysis of the tort issue in *Arceneaux*, *see* Note, *The Demise of the Latent Brake Defect Doctrine in Louisiana*, 40 LA. L. REV. 847 (1980).

2. 282 So. 2d 126 (La. 1973).

3. Loescher v. Parr, 324 So. 2d 441 (La. 1976).

4. Justice Dennis pointed out this omission in his concurring opinion. 365 So. 2d at 1336.

The court in *Arceneaux* also announced that, in a case of brake failure, "the owner, charged with responsibility of maintenance, should not escape liability merely because another person was driving the car."[5] In a concurring opinion, Justice Dennis reiterated this position by maintaining that "if the cause of the injury was due to a defect or vice in the automobile, the owner, who has custody or care of the vehicle even while it is in his friend's possession, is liable . . . ."[6] Although article 2317 speaks only of one who has the custody of the thing, Justice Tate in the *Loescher* opinion concluded that the word "custody" contained in the English translation of the French Civil Code article was not as broad a term as the French word "garde."[7] French treatise writers are also clearly of the opinion that the owner of a thing remains responsible for injuries resulting from its defective condition, even though another who had custody of it may also be liable.[8] The owner in this situation, however, is not liable if the thing had been stolen.[9]

Another important aspect of *Arceneaux* that should be noted is that the liability of the owner of the car with defective brakes, being driven in a permitted-use situation, accords with the car owner's liability insurance coverage.

LIABILITY OF AN OWNER FOR DAMAGE CAUSED BY THE RUIN OF HIS BUILDING

In *Olsen v. Shell Oil Co.*,[10] the Louisiana Supreme Court added yet another category to Louisiana's so-called strict liability law. Shell Oil Company was the owner of a fixed drilling platform situated in the Gulf of Mexico, with a modular drilling rig and modular living unit attached to the platform. A water heater in the living quarters exploded because of a malfunctioning pressure relief valve and caused the injuries made subject of the federal litigation. The supreme court held the following:

1) Shell's platform was a "building" within the meaning of Civil Code article 2322.

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5. 365 So. 2d at 1335.

6. 365 So. 2d at 1337 (Dennis, J., concurring).

7. The *Loescher* court noted in a footnote that the word "garde" includes the owner as well as the one in custody of the thing. 324 So. 2d at 447 n.6.

8. *E.g.*, 2 H. MAZEAUD, J. MAZEAUD ET L. MAZEAUD, TRAITÉ THÉORIQUE ET PRATIQUE DE LA RESPONSABILITÉ CIVILE DÉLICTUELLE ET CONTRACTUELLE n° 1160 (6th ed. 1970).

9. *Id.* at n° 1170.

10. 365 So. 2d 1285 (La. 1978). *See* Note, *Olsen v. Shell Oil: Expanded Liability for Offshore Oil Platform Owners*, 40 LA. L. REV. 233 (1979). *Olsen* was given in response to questions certified to the Louisiana Supreme Court by the United States Court of Appeals for the Fifth Circuit.

2) Shell was the owner of the modular living unit attached to its drilling platform.
3) The explosion of the water heater constituted a "ruin" of the building under article 2322.
4) Shell's obligation to third parties (the employees of an independent contractor working on the platform) was nondelegable.
5) Consistent with the foregoing finding, the traditional independent contractor defense is not recognizable either by name or in the form of "fault of a third party."
6) Shell is the owner of a "building," in owning the drilling platform, even though it does not own the soil underlying the building.

Olsen is notable because of its application of the term "building" to a drilling rig and because of its further development of the Louisiana strict liability rule under the Civil Code. In laying the foundation for liability, the court defined "ruin" of the building as a condition representing an unreasonable risk of injury, which serves for the finding of non-negligent fault on the part of the owner. As is consistent with both *Loescher* and the general theory of so-called strict liability, the showing of due care on the owner's part to avoid the ruin is irrelevant. According to the majority's opinion in *Olsen*, the only defenses allowed are fault of a third party and irresistible force. It may be of significance to note that "victim fault" as set out in *Loescher* and in related cases was omitted by the court from the defenses to article 2322. It is difficult to ascertain if the omission represents a narrowing of defenses permitted for actions under article 2322 as contrasted with those allowed under article 2317.

Since the "victim fault" defense has been omitted, one wonders whether assumption of risk would be a defense in behalf of Shell if the facts satisfied the traditional requirements of assumption of risk. The rush toward strict liability and the steady chopping away of traditional defenses are so clear and forceful that this writer believes the elimination of victim fault, even assumption of risk, was probably intended by the court. This inference is drawn in part from Justice Tate's desire to limit victim fault as described in *Loescher* to assumption of risk, apparently eliminating contributory negligence as acceptable victim fault.[11] It is also of significance that the court pointed out that even if the drilling platform did not qualify as a "building" within the meaning of article 2322, liability would have been found under article 2317, which provides a rule of strict liability for defective "things."

11. *See* Hebert v. Maryland Cas. Co., 369 So. 2d 708 (La. 1979).

The opinion contains a puzzling explanation of third-party fault. The court stated that "[a]n owner may be exculpated from liability under article 2322 for a premise-defect, if the victim is injured not by reason of the defect, but instead because of the fault of some third person."[12] It would seem *a fortiori* that if there were no defect or ruin in the premises, then article 2322 would not be applicable and no affirmative defense would be required. The requirements for the "fault of a third person" defense are drawn so tightly that an owner satisfying that defense would seem to be not liable even without the defense, since it would not have been a ruin of his building or a vice therein that caused the damage. The interpretation of third-party fault in *Olsen* is significant because this writer sees no reason to interpret the defense differently for article 2322 than for article 2317.

EXPANSION OF THE *LOESCHER* "DEFECT" RULE

In the same vein of expanding liability, the Louisiana Supreme Court in *Marquez v. City Stores Co.*[13] held that the fact that a child clad in tennis shoes caught his foot in the space between an escalator's moving steps and the side of the escalator established that the escalator was defective within the contemplation of article 2317. The court correctly characterized *Loescher* as requiring the showing of defect before invoking article 2317. Recognizing that the court of appeal found that the plaintiff in the trial court had not proved a defect, Justice Dixon, as author of the majority opinion, concluded that the fact the child's shoe was caught in the escalator proved, in and of itself, that the escalator was defective. He further observed in an ominous statement in his opinion that "[i]f this escalator were safe for small children with small feet, then James' shoe could not have been caught in this opening."[14]

Otis Elevator Co., the manufacturer of the escalator, attempted to show that the opening in which the shoe got caught was not more than three-sixteenths of an inch in size and that the national standards for safe escalator construction allow three-eighths of an inch. Justice Dixon maintained that a showing of those measurements was "insufficient to rebut the inference that there was a vice or defect in this escalator which caused an unreasonable risk of harm to another."[15]

12. 365 So. 2d at 1293.
13. 371 So. 2d 810 (La. 1979).
14. *Id.* at 814.
15. *Id.* at 813-14.

In the opinion of this writer, Justice Dixon has found in *Marquez* the existence of a defect, not from a flaw in the manufacture or maintenance, but in the policy-conclusion that the escalator was unreasonably dangerous. This defect under article 2317 was proven, therefore, in precisely the same fashion as the defect in *Weber v. Fidelity & Casualty Insurance Co.*[16] It does not appear from the origin of *Loescher*, or from the cases applying *Loescher* prior to *Marquez*, that this mode of proof of defect was intended. It eliminates, or changes entirely, the notion that something is physically *wrong* with the product. Under Justice Dixon's standard in *Marquez*, it is only necessary for the court to conclude as a policy matter that the thing was unreasonably dangerous; the existence of a defect is then inferred. This certainly appears to be absolute liability.

The important consideration missing from the *Marquez* opinion is an inquiry into whether this was, in truth, an "unreasonable risk." Our vast body of tort law, both in Louisiana and in the common law states, contains a rich collection of resources for the evaluation of conduct as an unreasonable risk. Perhaps the most comprehensive and succinct statement is found in sections 291, 292, and 293 of the Restatement (Second) of Torts, which read as follows:

> 291. Unreasonableness: How Determined; Magnitude of Risk and Utility of Conduct
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> Where an act is one which a reasonable man would recognize as involving a risk of harm to another, the risk is unreasonable and the act is negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done.
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> 292. Factors Considered in Determining Utility of Actor's Conduct
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> In determining what the law regards as the utility of the actor's conduct for the purpose of determining whether the actor is negligent, the following factors are important:
>
> (a) the social value which the law attaches to the interest which is to be advanced or protected by the conduct;
>
> (b) the extent of the chance that this interest will be advanced or protected by the particular course of conduct;
>
> (c) the extent of the chance that such interest can be ad-

16. 259 La. 599, 250 So. 2d 754 (1971).

equately advanced or protected by another and less dangerous course or conduct.

293. Factors Considered in Determining Magnitude of Risk

In determining the magnitude of the risk for the purpose of determining whether the actor is negligent, the following factors are important:

(a) the social value which the law attaches to the interests which are imperiled;

(b) the extent of the chance that the actor's conduct will cause an invasion of any interest of the other or of one of a class of which the other is a member;

(c) the extent of the harm likely to be caused to the interests imperiled;

(d) the number of persons whose interests are likely to be invaded if the risk takes effect in harm.

Justice (then Judge) Tate used these criteria in deciding the case of *Goff v. Carlino.*[17] Judge Culpepper of the third circuit also used the Restatement criteria in his opinion in *Allien v. Louisiana Power & Light Co.*[18] It would not seem to be a rash assumption that when Justice Tate wrote the *Loescher* opinion and used the concept of unreasonable risk, he had in mind the same criteria which he applied in *Goff* and which Judge Culpepper subsequently used in *Allien.*

It is summitted that an application of those criteria to the *Marquez* case would result in a finding that the escalator did not represent an unreasonable risk of injury. The court found as a fact that it was a rare occurrence, though not a "freak" accident. Certainly, under a *Weber* evaluation, Otis would have been able to pose a state of the art defense on the grounds that the escalator was made as well as possible, given the industry's then current state of technology.

The *Marquez* fact-of-the-accident theory for proving defect was utilized by the court in previous cases, notably *Moreno's, Inc. v. Lake Charles Catholic High Schools, Inc.*,[19] which was a redhibition case based upon the failure of an air conditioning unit. The unit was found to be defective because it failed mechanically prior to the end of the period for which it was designed to last in proper functioning order. The other case, of course, is *Weber*, the foundation products

17. 181 So. 2d 426 (La. App. 3d Cir. 1965).
18. 202 So. 2d 704 (La. App. 3d Cir. 1967).
19. 315 So. 2d 660 (La. 1975).

liability case in which the court based its chain of legal theory upon the fact that, since the cattle treated with defendant's cattle dip died, the most reasonable hypothesis was that the cattle dip was defective. Such evidentiary presumptions expand liability just as easily as a significant change of policy in substantive duty.