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The Demise of the Latent Brake Defect Doctrine in Louisiana

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THE DEMISE OF THE LATENT BRAKE DEFECT DOCTRINE IN LOUISIANA

The plaintiff brought a negligence suit against both the non-owner driver and the owner of an automobile that struck the plaintiff's car from the rear. The jury returned a verdict for the two defendants, apparently[1] finding that the defendants' conduct was not negligent because of a latent defect in the braking system of the car. The Third Circuit Court of Appeal affirmed the judgment. The Louisiana Supreme Court reversed,[2] stating that in the future, cases involving brake defects will be dealt with under Louisiana Civil Code article 2317,[3] which makes persons responsible for damages caused by things in their custody. Application of this article, and the jurisprudence construing it,[4] makes the custodian and owner of an automobile liable for injuries caused by the defective car, absent a showing of victim fault, third-party fault, or an irresistible force. *Arceneaux v. Domingue*, 365 So. 2d 1330 (La. 1978).

Louisiana, as well as most other states, has long recognized the latent brake defect doctrine as a valid defense to an allegation of a defendant's negligence.[5] This doctrine stands for the proposition that the owner of a car is not liable for damages resulting from a collision if "such accident is occasioned solely by latent defects in materials . . . of the automobile which the usual and well recognized tests afforded by science and art for the purpose fail to detect."[6]

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1. The plaintiff alleged negligence in the trial court, and the defendants countered with a latent brake defect defense. It must be assumed that the defense was the factor which determined the jury's verdict.

2. The supreme court was not concerned only with the subject of latent brake defects. The primary point of interest under scrutiny in the case was the standard of appellate review of facts. The court of appeal chose not to disturb the trial jury's verdict, saying it found no manifest error. The supreme court *held* that in order to determine if manifest error was present, an appellate court is under a duty to scrutinize *all* the evidence to determine whether a verdict is manifestly erroneous. The appellate court had refused to overturn the jury verdict, apparently because there was *some* evidence in the record that supported the jury finding. The supreme court found the verdict clearly wrong, and thus reversed. *See The Work of the Louisiana Appellate Courts for the 1978-1979 Term—Civil Procedure*, 40 LA. L. REV. 761 (1980). This casenote shall not discuss this holding.

3. LA. CIV. CODE art. 2317 provides in pertinent part: "We are responsible, not only for the damage occasioned by our own act, but for that which is caused by the act of persons for which we are answerable, or for the things which we have in our custody."

4. *See, e.g.*, Loescher v. Parr, 324 So. 2d 441 (La. 1976); Note, *The "Discovery" of Article 2317*, 37 LA. L. REV. 234 (1976).

5. *Hassell v. Colletti*, 12 So. 2d 31 (La. App. Orl. Cir. 1943), is the first appearance of the latent brake defect doctrine in the jurisprudence of this state.

6. 1 BLASHFIELD'S CYCLOPEDIA OF AUTOMOBILE LAW AND PRACTICE § 672 (perm. ed. 1935). Black's Law Dictionary defines a latent defect as "[o]ne which could not be

Thus, it can be seen that the defense is simply an application of the traditional tort principle of no liability without fault[7]—if the defense is valid, the defendant is not at fault. In Louisiana, the doctrine was employed by defendants to refute an allegation of negligence, which, if proved, would establish fault under the Louisiana Civil Code articles dealing with delictual responsibility.[8] The defense is employed similarly in some other jurisdictions as a simple denial of negligence.[9]

Despite the presence of the latent brake defect doctrine as a defense in Louisiana,[10] it was many years before a latent brake

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discovered by reasonable and careful inspection; one not apparent on [the] face of goods, product, document, etc." BLACK'S LAW DICTIONARY 794 (5th ed. 1979). The latent defect doctrine is not limited solely to brake cases. *See, e.g.*, Ross v. Tynes, 14 So. 2d 80 (La. App. Orl. Cir. 1943) (where a wheel detached, and the defense was rejected); Westlund v. Iverson, 154 Minn. 52, 191 N.W. 253 (1922) (where a wheel detached, and the defense was successful). Nor is the defense limited only to automobile cases. *See, e.g.*, Coryell v. Phipps, 317 U.S. 406 (1943) (boats); Schon v. James, 28 So. 2d 531 (La. App. Orl. Cir. 1946) (water heater); Sack v. Ralston, 220 Pa. 216, 69 A. 671 (1908) (elevators).

7. W. PROSSER, LAW OF TORTS 492 (4th ed. 1971). Prosser states that at the close of the nineteenth century, a tendency towards "the recognition of 'fault' . . . [existed] . . . [and that] [t]his tendency was so marked that efforts were made by noted writers to construct a consistent theory of tort law upon the basic principle that there should be no liability without fault." *Id.*

Louisiana has based its tort law on this "basic principle" as it is set forth in article 2315. See note 8, *infra*. A statement of the principle may be seen in *Delisle v. Bourriague*, 105 La. 84, 29 So. 731 (1901), wherein the court declared that "there is no responsibility when there is no fault . . . ." *Id.* at 87, 29 So. at 734.

8. Civil Code articles 2315-22 comprise the rules of delictual responsibility in Louisiana. Article 2315 states in part: "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." "Fault" is defined in article 2316, which states, in part: "Every person is responsible for the damage he occasions not merely by his act, but by his negligence, his imprudence, or his want of skill." Thus negligence came to be viewed as the exclusive definition of fault in Louisiana. *See, e.g.*, Helgason v. Hartford Ins. Co., 187 So. 2d 140 (La. App. 2d Cir. 1966). In *Helgason*, the court said: "Article 2315 predicates liability for damages upon a finding of 'fault' on the part of another. In determining fault a common sense test is to be applied: that is, how would a reasonable, prudent person have acted . . . if faced with similar conditions and circumstances?" *Id.* at 143.

The law changed, however, in *Langlois v. Allied Chemical Corp.*, 258 La. 1067, 249 So. 2d 133 (1971), wherein the court held that "fault" under article 2315 *is not limited to negligence*, but that negligence is simply illustrative of fault. See notes 41-44, *infra*, and accompanying text.

9. In Louisiana and many other jurisdictions, evidence of a latent brake defect is simply evidence favorable to a defendant challenging a negligence allegation and inferences of negligence. In effect, the defense is simply a denial of negligence, as opposed to being a rebuttal to a presumption of negligence, or a legal excuse for ordinarily negligent conduct. See note 36, *infra*.

10. See note 5, *supra*, and accompanying text. Other cases following *Hassell* have also recognized the defense. *See, e.g.*, Robinson v. American Home Assurance Co., 183 So. 2d 77 (La. App. 3d Cir. 1966); Dowden v. Jefferson Ins. Co., 153 So. 2d 162 (La. App. 3d Cir. 1963).

defect defense was actually upheld at the appellate court level in Louisiana.[11] In fact, the supreme court did not hear a successful latent brake defect case until 1969.[12] Since the defense was a jurisprudentially established doctrine,[13] it was the province of the courts to fix the standards required to invoke the defense successfully. As announced by the Orleans Circuit Court of Appeal in *Hassell v. Colletti*,[14] the first reported Louisiana latent brake defect case, "the proof submitted by the alleged tortfeasor must be of a most convincing nature."[15] This evidence "should be such to exclude any other reasonable hypothesis in respect to the cause of the accident except that it resulted solely from the alleged defect."[16] Obviously, this standard imposes a rigid and onerous burden on the defendant employing the defense—a burden so demanding that it could be satisfied in very few instances.

The Louisiana courts were reluctant to make the defense more readily available, "perhaps . . . [out of] a fear that such a defense would be abused."[17] As a consequence of the court's hesitancy, only four Louisiana cases at the appellate court level[18] can be found in which the defense was sustained. A brief analysis of these cases reveals certain factors that distinguish them from the many other cases in which the latent brake defect defense failed.[19]

In *Delahoussaye v. State Farm Mutual Automobile Insurance Co.*,[20] the first of the cases in which the defense was successful, a fact which is recurrent through all the successful cases manifests

11. Delahoussaye v. State Farm Mut. Auto. Ins. Co., 202 So. 2d 287 (La. App. 4th Cir. 1967).

12. Cartwright v. Firemen's Ins. Co., 254 La. 330, 223 So. 2d 822 (1969).

13. *See* Mallett v. State Farm Mut. Auto. Ins. Co., 240 So. 2d 413, 416 (La. App. 3d Cir. 1970) (Fruge, J., concurring) (wherein Judge Fruge stated that the court should not ignore innocent victims any longer by "supporting this jurisprudentially created rule further"); Towner v. Milligan, 234 So. 2d 500, 504 (La. App. 3d Cir. 1970) (Tate, J., dissenting) (wherein then Judge Tate referred to "the jurisprudential rule [being] developed in an unbroken line of decisions").

14. 12 So. 2d 31 (La. App. Orl. Cir. 1943).

15. *Id.* at 32.

16. *Id.* Nearly all Louisiana latent brake defect cases quote or paraphrase this fundamental statement. *See, e.g.*, Trascher v. Eagle Indem. Co., 48 So. 2d 695 (La. App. Orl. Cir. 1950).

17. Delahoussaye v. State Farm Mut. Auto. Ins. Co., 202 So. 2d 287, 289 (La. App. 4th Cir. 1967).

18. Cartwright v. Firemen's Ins. Co., 254 La. 330, 223 So. 2d 822 (1969); Mallett v. State Farm Mut. Auto. Ins. Co., 240 So. 2d 413 (La. App. 3d Cir. 1970); Towner v. Milligan, 234 So. 2d 500 (La. App. 3d Cir. 1970); Delahoussaye v. State Farm Mut. Auto. Ins. Co., 202 So. 2d 287 (La. App. 4th Cir. 1967).

19. For a detailed summary of the requirements needed to invoke a successful latent brake defect defense, *see* Ryan v. Rawls, 260 So. 2d 137 (La. App. 2d Cir. 1972).

20. 202 So. 2d 287 (La. App. 4th Cir. 1967).

itself—the defect resulted in a fluid leak which left a visible trail on the road leading to the accident.[21] This fact is notable in that it proved that a defect truly did exist;[22] the defendant did not depend solely on his unsupported testimony of brake failure (*e.g.*, "my pedal went to the floor"). As stated in an unsuccessful latent brake defect case, "[i]n addition to his own statement, the driver should by testimony of a mechanic *or other competent* evidence prove that the defect in the brakes really existed . . . ."[23] The four successful cases support the conclusion that it is imperative that the defendant have "other competent evidence,"[24] in addition to his own testimony, to carry the defense. The fluid trail fulfills this requirement.

Also common to the successful cases is the existence of proof of the following: the defect was concealed such that a proper inspection would not have revealed it, and such an inspection had been conducted within a reasonable time prior to the accident.[25] All four cases include a finding that the brakes had been properly inspected,[26] with the resultant conclusion that the defect was indeed concealed.[27] Additionally, there exists throughout the cases a recognized principle requiring the attempted use of an emergency brake if reasonable

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21. It is the sudden loss of fluid that causes the brakes to fail. Defective hoses (fluid lines) caused the leak in all the cases except *Mallett*, in which a brake cylinder leaked. Cartwright v. Firemen's Ins. Co., 254 La. at 334, 223 So. 2d at 823; Mallett v. State Farm Mut. Auto. Ins. Co., 240 So. 2d at 415; Towner v. Milligan, 234 So. 2d at 501; Delahoussaye v. State Farm Mut. Auto. Ins. Co., 202 So. 2d at 289.

22. Whether the defect is *justified* as being *latent* is to be determined from other facts. See notes 25-29, *infra*, and accompanying text.

23. Dowden v. Jefferson Ins. Co., 153 So. 2d 162, 164 (La. App. 3d Cir. 1963) (emphasis added). In *Dowden*, the defendant claimed his brakes failed to hold, but no other facts supporting his contention were raised.

24. *Id.* at 164. *See also* W. MALONE & L. GUERRY, STUDIES IN LOUISIANA TORT LAW 652-56 (1970).

25. The terms "proper inspection" or "reasonable inspection" are found in virtually all of the Louisiana latent brake defect cases. *See, e.g.*, Dowden v. Jefferson Ins. Co., 153 So. 2d 162 (La. App. 3d Cir. 1963). In *Towner v. Milligan*, 234 So. 2d 500 (La. App. 3d Cir. 1970), the court said that a driver must take *reasonable care* in having brakes inspected. In *Towner*, an inspection three months prior to the accident was considered to be within a reasonable time. *Id.* at 502.

26. Cartwright v. Firemen's Ins. Co., 254 La. at 334, 223 So. 2d at 823; Mallett v. State Farm Mut. Auto. Ins. Co., 240 So. 2d at 415; Towner v. Milligan, 234 So. 2d at 502; Delahoussaye v. State Farm Mut. Auto. Ins. Co., 202 So. 2d at 289.

27. Judge (later Justice) Tate dissented in *Towner v. Milligan*, 234 So. 2d 500, 504 (La. App. 3d Cir. 1970), claiming that the jurisprudential requirements of the defense were not met. Certainly, of these cases, *Towner's* showing of facts in favor of the defense is the weakest: the brake inspection said to be reasonable prior to the accident was a cursory inspection given for a Louisiana inspection sticker, and the rotted fluid line may well have been found with proper inspection. Judge Tate also argued that the defendant failed to carry the emergency brake requirement of the defense. See note 28, *infra*, and accompanying text.

time existed in which to apply one. The unreasonable failure to apply the brake, or an emergency brake failure due to a negligently maintained system, constitutes negligence as a matter of law in Louisiana and was fatal to a latent brake defect defense.[28] The emergency brake requirement was met in all four successful cases.[29]

Despite the fact that the defense had seldom been raised successfully, a call was made to abandon it in Louisiana. Judge Tate was the first to voice opposition to the use of the defense.[30] He espoused his theory in an "especially concurring"[31] opinion in *Cartwright v. Firemen's Insurance Co.*[32]—the opinion was "for the benefit of the higher reviewing court,"[33] and it was largely due to this opinion that the supreme court eventually reviewed the case.[34] Judge Tate argued that Revised Statutes 32:341 (the safe brakes statute),[35] requiring the proper maintenance of brakes on cars, provided a basis for strict liability in brake failure cases.[36] He claimed

28. *See* Robinson v. American Home Assurance Co., 183 So. 2d 77 (La. App. 3d Cir. 1966). In *Robinson*, the court stated "the failure of a motorist to use the emergency brake on the automobile . . . after he realizes that the first brake is not holding and while he still has an opportunity to control the vehicle by using the emergency brake, constitutes negligence." *Id.* at 79.

29. Cartwright v. Firemen's Ins. Co., 254 La. at 340-41, 223 So. 2d at 826; Mallett v. State Farm Mut. Auto. Ins. Co., 240 So. 2d at 415; Towner v. Milligan, 234 So. 2d at 503; Delahoussaye v. State Farm Mut. Auto. Ins. Co., 202 So. 2d at 289.

30. *See* Cartwright v. Firemen's Ins. Co., 213 So. 2d 154, 156 (La. App. 3d Cir. 1968) (Tate, J., concurring), *aff'd*, 254 La. 330, 223 So. 2d 822 (1969).

31. *Id.* Judge Tate wrote the majority opinion applying traditional latent brake defect standards. Being opposed to the doctrine, however, he added an "especially concurring" opinion in which he offered strict liability as an alternative to the latent brake doctrine, which he considered unfair. *Id.*

32. 213 So. 2d 154, 156 (La. App. 3d Cir. 1968) (Tate, J., concurring), *aff'd*, 254 La. 330, 223 So. 2d 822 (1969).

33. *Id.*

34. Cartwright v. Firemen's Ins. Co., 254 La. 330, 223 So. 2d 822 (1969). The court stated that Judge Tate's "observations tended to create uncertainty in this area . . . and that a definitive expression by the court would serve to resolve the unsettling effect." *Id.* at 335-36, 223 So. 2d at 824.

35. LA. R.S. 32:341 (1950) provides in pertinent part: "[E]very motor vehicle, other than a motorcycle . . . when operated on a highway of this state, shall be equipped with brakes adequate to control the movement of and to stop and hold such vehicle, including two separate means of applying the brakes . . . ." This statute's provisions are very similar to safe brakes statutes in most states. *See, e.g.*, MINN. STAT. ANN. § 169.67 (1959); WIS. STAT. ANN. § 347.35(1) (1965).

36. 213 So. 2d at 156 (Tate, J., concurring). According to Judge Tate, the application of Revised Statutes 32:341 may "require a stricter degree of liability on the part of an owner of such an abnormally dangerous thing as a powerful motor vehicle with brakes that fail." *Id.* He wrote further: "[A]n owner is presumed as a matter of law to know of his defective brakes, because of his statutory duty not to operate a vehicle without proper brakes . . . ." *Id.* at 157. Another rationale was also offered: "[O]ne who engages in abnormally dangerous activities . . . is held to strict liability for damages

that the provisions of the statute are mandatory and do not allow for an excused violation;[37] thus, any violation of the statute, regardless of negligence fault, imposes liability on the defendant.

Instead of adopting Judge Tate's proposal, the supreme court issued what it called a "definitive expression by the court,"[38] rejecting the theory and reaffirming the notion that "there can be no recovery without fault except in those instances where strict liability is provided by legislative action."[39] The court evidently felt

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thereby occasioned." *Id.* (Citations omitted.) For a similar view, wherein Judge Fruge follows Judge Tate's reasoning closely, *see* Mallett v. State Farm Mut. Auto. Ins. Co., 240 So. 2d at 416 (Fruge, J., concurring).

Though strict liability concerning brake defect cases has been considered in other jurisdictions, the vast majority of states do not have strict liability in this area. Presently only two states apply strict liability to break defect cases—Connecticut and Ohio. *See* Smith v. Finkel, 130 Conn. 354, 34 A.2d 209 (1943); Spalding v. Waxler, 2 Oh. St. 2d 1, 205 N.E.2d 890 (1965). The general rule is that safe brakes statutes and the latent brake defect defense coexist peacefully. The standard of care created by the safe brakes statutes of other states is adopted, in many cases, to establish a vehicle operator's duty. W. PROSSER, *supra* note 7, at 190.

A violation of the safe brakes statute in these jurisdictions will produce one of three results. In some jurisdictions, violation of the statute raises a rebuttable presumption of negligence. However, violation might be justified. One justification is concealed (latent) defects which could not reasonably be found and corrected. *See, e.g.*, Maloney v. Rath, 69 Cal. 2d 442, 71 Cal. Rptr. 897, 445 P.2d 513 (1968); Eddy v. McAninach, 141 Colo. 223, 347 P.2d 499 (1959); Smith v. Glesing, 248 N.E.2d 366 (Ind. App. 1969). A successful rebuttal may be found in *Bartlett v. Bryant*, 166 Colo. 113, 442 P.2d 425 (1968). Some jurisdictions hold that a violation of the statute constitutes negligence, but a legal excuse may absolve the defendant. *See, e.g.*, Dubuque Area Chamber of Commerce v. Adams, 225 N.W.2d 147 (Iowa 1973) (defendant successfully offered a latent brake defect as a legal excuse for the violation); Peters v. Reick, 257 Iowa 12, 131 N.W.2d 529 (1964) (showing of due care alone will not absolve defendant, but he may be exculpated if he can show that it was *impossible* to have discovered that the brakes would fail). Finally, a large number of jurisdictions hold that a violation of the statute is simply one fact to be considered in a determination of negligence. In these jurisdictions, a violation is merely a fact raising a possible inference of negligence. *See, e.g.*, Yarnell Ice Cream Co. v. Williamson, 244 Ark. 893, 428 S.W.2d 86 (1968); Mintzer v. Miller, 249 Md. 506, 240 A.2d 262 (Ct. App. 1968). For a successful latent defect defense, *see, e.g.*, Larsen v. Romeo, 254 Md. 220, 255 A.2d 387 (Ct. App. 1969). Louisiana, prior to the instant case, was a member of the class of jurisdictions that considered a violation a fact raising an inference. The inference could be countered by a latent brake defect defense, which would relieve the defendant of possible liability. *See generally* Cartwright v. Firemen's Ins. Co., 254 La. at 335-36, 223 So. 2d at 824.

37. Judge Tate focused on the word "shall" in the statute and concluded that the use of "shall" creates a "statutory duty" that "does not, applied literally at least, admit of an avoidance by attempted but unsuccessful compliance." 213 So. 2d at 156. See note 35, *supra*.

38. 254 La. at 336, 223 So. 2d at 824. See note 34, *supra*.

39. 254 La. at 337, 223 So. 2d at 824.

that the safe brakes statute was *not* intended to establish strict liability.[40]

The supreme court's position concerning no liability without fault (*i.e.*, negligence) under article 2315 changed in *Langlois v. Allied Chemical Corp.*[41] The court determined that article 2315 fault is not restricted to *negligence* fault, but rather that negligence is merely illustrative of fault under the Civil Code.[42] Justice Barham, in a concurring opinion in *Simon v. Ford Motor Co.*,[43] claimed that the language in *Cartwright* asserting that there could be no liability without negligence fault under article 2317 was overruled by *Langlois*.[44] Justice Barham, like Judge Tate in *Cartwright*, took the position that strict liability should apply in automobile defect cases.

The trend toward the expansion of the traditional meaning of fault in some areas[45] culminated in the case of *Loescher v. Parr*,[46] in which the court, interpreting article 2317, held that a custodian or owner of a thing which creates an unreasonable risk of injury is liable for those injuries caused by it (the defective thing).[47] The amount of care taken by the custodian is not relevant in this inquiry—the custodian is liable because of his legal relationship to the thing;[48]

40. The court stated that "it would require much more positive and specific legislative expression than is contained in the Highway Regulatory Act" to make the court abandon the prerequisite of fault for liability. *Id.* at 339, 223 So. 2d at 825.

41. 258 La. 1067, 249 So. 2d 133 (1971).

42. "Article 2316 is not all-inclusive or definitive of fault, but rather illustrative of fault." *Id.* at 1078, 249 So. 2d at 136. The court found an alternate source for fault in the standard of conduct mandated by article 669, concerning a landowner's duties in relation to his neighboring landowners. By violating the provision of article 669, the landowner is at fault for damages caused by his violation, without regard to any negligence on his part.

43. 282 So. 2d 126, 163 (La. 1973) (Barham, J., concurring).

44. *Id.* at 136. "That case [*Langlois*] overruled Cartwright . . . insofar as it held that . . . article 2317 required negligence under the court's interpretation . . . of fault in . . . article 2315." *Id.*

45. *Dupre v. Traveler's Insurance Co.*, 213 So. 2d 98 (La. App. 1st Cir. 1968), was the first step toward a new interpretation of article 2317. In *Dupre*, the injury caused by a thing created a *refutable presumption* of negligence on the part of the custodian. In *Holland v. Buckley*, 305 So. 2d 113 (La. 1974), the court held that under article 2321, the owner of an animal was liable for damages caused by the animal regardless of the owner's standard of care—negligence need not be shown. In *Turner v. Bucher*, 308 So. 2d 270 (La. 1975), the court found the parent of a minor child liable under article 2318 for the acts of the child that were deemed wrongful, again with no regard to the parents' standard of care. Negligence fault was not required. These latter two decisions opened the way for the *Loescher* court's interpretation of article 2317.

46. 324 So. 2d 441 (La. 1975).

47. For an excellent treatment of *Loescher* and its effect on Louisiana tort law, *see* Note, *supra* note 4.

48. 324 So. 2d at 446.

negligence is not at issue in determining this "legal fault."[49] Once the essential determination that the thing is defective has been made, only by proving that victim fault, third-party fault, or an irresistible force caused the harm can the defendant escape liability.[50] *Loescher* specifically overruled the *Cartwright* language dealing with negligence as an essential for article 2317 fault.[51] With the advent of *Loescher* and its explicit partial overruling of *Cartwright*, the latent brake defect doctrine was rendered extremely vulnerable.

In *Arceneaux*, the court was faced with a situation in which it found as a fact that a genuine brake defect did not exist.[52] Thus, it was not essential for the court to deal with the status of the latent brake defect doctrine at all; the court need not have gone any further than its conclusion that the court of appeal applied an incorrect standard of review, and that the jury finding of a latent brake defect was clearly wrong.[53]

The court, however, did not limit its analysis to the appellate review question. "[T]o prevent a repetition of errors in other appeals of jury cases,"[54] the court went on to discuss how latent brake defect cases should subsequently be treated in Louisiana. The court first analogized the rear-end collision in *Arceneaux* to the head-on collision occurring when one driver leaves his own lane and strikes an oncoming car, which was the situation presented in *Simon v. Ford Motor Co.*[55] In *Simon*, the court held that there is a presumption of negligence on the part of an errant driver who left his lane of traffic and struck another motorist, who was without fault, and that the defendant must rebut the presumption with evidence proving him free of "*any* dereliction *however slight*."[56] The *Arceneaux* court stated that this burden shift applies in "exceptional cases when a plaintiff-motorist is without fault."[57] The court then appeared to change its emphasis, saying "it *might* also be said . . . that it seems

49. *Id.* at 447. This "legal fault" is really fault without negligence. The court states that it has "sometimes been referred to as strict liability." *Id.*

50. *Id.*

51. *Id.* at 448.

52. In *Arceneaux*, there was no evidence of a fluid loss or expert testimony indicating any specific defect. The defendant's testimony stated that the pedal, without forewarning, went to the floor. 365 So. 2d at 1332. This uncorroborated testimony could not carry the heavy burden placed on the defendant, as the history of the defense indicates. See notes 19-24, *supra*, and accompanying text.

53. 365 So. 2d at 1333. See note 2, *supra*.

54. 365 So. 2d at 1334.

55. 282 So. 2d 126 (La. 1973).

56. *Id.* at 133 (emphasis in original). *Simon* followed the rationale of *Rizley v. Cutrer*, 232 La. 655, 95 So. 2d 139 (1957).

57. 365 So. 2d at 1335.

only reasonable that a motorist should not run into an automobile ahead of him, when the driver of that automobile is without fault."[58]

The court then chose to digress from *Simon* and turn to the standards established by Civil Code article 2317.[59] Finding that the defendants were the custodians of the automobile, the court stated that the requirements of article 2317 are met when the plaintiff proves "that his damages were caused when he was struck from the rear by defendants' automobile."[60] At that point, the defendant owner is found not liable, only because the damage was caused by the non-owner driver's negligence and not because of a brake failure.[61]

With this utilization of article 2317 in *Arceneaux*, the court effectively applies strict liability to brake defect cases in Louisiana.[62] Had the court not gone beyond the application of the *Simon* presumption to the case, strict liability would not have been effectuated. There would have been a presumption of negligence on the part of the defendants which they would have had the burden of rebutting. Given the facts of *Arceneaux*, the defendant would not have been able successfully to overcome the presumption of negligence by invoking the latent brake defect defense.[63] Thus, the status of the defense in Louisiana would not have been significantly changed had the court limited its decision to the presumption.[64]

The application of article 2317 to latent brake defects deals a death blow to the use of the doctrine as a defense to a negligence allegation, since a defendant's standard of care is no longer relevant. Moreover, there is language in the opinion that arguably expands

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58. *Id.* (Emphasis added.)

59. The court stated that "[i]t is more appropriate, however, to resort to the standards established in the Civil Code." *Id.*

60. *Id.*

61. *Id.* at 1335-36. The court concludes that the owner "therefore has sustained his burden of proving that the harm was caused by the fault of a third person." *Id.* at 1336. One may question the need to discuss third-party fault, as the court found that no defect existed. See text at note 50, *supra*.

62. This is achieved by eliminating the requirement of negligence fault from the latent brake defect cases. The court in *Arceneaux* stated: "[R]esponsibility did not necessarily depend upon negligent acts, but upon fault . . . ." 365 So. 2d at 1335.

63. See note 52, *supra*. The facts of the *Arceneaux* case did not support a latent brake defect defense. The court stated that if the jury's verdict was predicated "on the existence of a latent defect [it] was clearly wrong." 365 So. 2d at 1333.

64. See text at note 7, *supra*. The latent brake defect defense, if supported by the necessary evidence, would still have been recognized as a defense had the court not applied article 2317 to latent brake defects. It would be used to rebut the presumption of negligence.

the application of article 2317 beyond *Loescher*.[65] It is submitted, however, that *Arceneaux* is merely an extension of the *Loescher* principle into the field of automobile brake defect cases, and not a broadening of the *Loescher* principle itself. Because of an inaccurate restatement of the *Loescher* principle by Justice Dixon, one could interpret *Arceneaux* as abandoning the requirement of a *defect* in the thing which caused the injury. Although the finding of a defect was essential in *Loescher*,[66] the *Arceneaux* court stated that the plaintiff satisfied the requirements of article 2317 by "proving that his damages were caused when he was struck from the rear by defendants' automobile. Defendants were the custodians of the automobile, and were *therefore* responsible for the damages it caused."[67] This is an incorrect restatement of the *Loescher* rule—Justice Dixon's formulation does not require proof of an unreasonable risk of injury created by the thing, *i.e.*, a defect. A plaintiff could, under Justice Dixon's reframing of the *Loescher* principle, invoke article 2317 in *all* car accidents, whether caused by vehicle defect or negligent operation of the vehicle.[68]

Justice Dennis addressed this misstatement of *Loescher*, in his concurring opinion, and disagreed with the "verbiage"[69] used by Justice Dixon. Justice Dennis recognized the requirement of a *defect* to employ article 2317, and refused to depart from the principles set down in *Loescher*.[70] It is likely, however, that the inaccuracies of the rephrasing of the *Loescher* rule in *Arceneaux* were inadvertent misstatements, and not an effort to broaden or change article 2317 law as interpreted by *Loescher*.[71]

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65. See notes 66-71, *infra*, and accompanying text. Justice Dixon also misstates the language in *Loescher* which stated that custodians are responsible for the damage caused by things "*creating* an unreasonable risk of harm to others." Loescher v. Parr, 324 So. 2d at 446 (emphasis added). Justice Dixon states that custodians are responsible for "an instrumentality which *causes* an unreasonable risk of injury." 365 So. 2d at 1335 (emphasis added).

66. For example, the court in *Loescher* stated that the "owner-guardian of the defective tree is therefore liable for his legal fault in maintaining the *defective* tree . . . ." 324 So. 2d 441 at 449 (emphasis added).

67. 365 So. 2d at 1335 (emphasis added).

68. Without the requirement of defect under article 2317, the theory could be used against defendants who were simply negligent in conduct. This would result in a shifting of the traditional burden of proof from the plaintiff to the defendant.

69. 365 So. 2d at 1337 (Dennis, J., concurring in part).

70. "*Loescher* limited the concept of 'things' which would form the basis of Article 2317 strict liability to *defective* things which 'create an unreasonable risk of harm to others.'" *Id.* Justice Dennis stated that "[i]nsofar as the language of the Court's opinion seems to depart from these principles, I disagree . . . ." *Id.*

71. The abandonment of the defect requirement under *Loescher* would be a drastic change in the law. It is submitted that so drastic a change would certainly have been accompanied by explicit language stating that the requirement was being abandoned and why the change was made.

A simple illustration demonstrates how the latent brake defect doctrine has been effectively eradicated by the *Arceneaux* decision: The plaintiff, *A*, is rear-ended by the defendant, *B*, who is custodian of his automobile. *A* sues *B*, alleging negligent operation of the vehicle, and proves that *B* struck him from the rear. Under the *Simon* presumption, which the plaintiff could attempt to invoke,[72] the defendant would have to rebut the plaintiff's prima facie case of negligence. If the defendant attempts to rebut this charge by contending that a latent brake defect was the cause of the accident, the defendant has inadvertently invoked article 2317. By admitting that a defective thing in his custody caused the injury to *A*, the requirements of *Loescher/Arceneaux* are met. The defendant has locked himself into liability, absent a showing of victim fault, third-party fault, or an irresistible force.[73]

The only logical defense in a genuine brake defect case will be that of third-party fault. This defense may be pivotal, as many cases can exist in which a mechanic is at fault for negligent maintenance work. In California, however, the duty of maintaining sufficient brakes is non-delegable.[74] A non-delegability theory could conceivably be applied in Louisiana to article 2317 defect cases if the courts feel that social justice calls for the custodians to be liable in spite of third-party fault.[75] However, in *Tardo v. New Orleans Public Service, Inc.*,[76] a case in which a drainage gutter contractor negligently installed gutters on defendants' house, the court followed the *Loescher* holding and found that the contractor's third-party fault exculpated the defendant custodian under article 2317.[77] Con-

72. It is not entirely clear if *Arceneaux* holds that the *Simon* presumption will be in effect in cases of rear-end collision. See text at notes 54-58, *supra*. Still, the plaintiff would be wise to seek to invoke the presumption, as it shifts the burden of proof to the defendant.

73. See text at note 50, *supra*.

74. *See* Maloney v. Rath, 69 Cal. 2d 442, 71 Cal. Rptr. 897, 445 P.2d 513 (1968). The court in *Maloney* rejected strict liability in brake defect cases, but ruled that if negligence causes the defect, even if a third party's, the owner is liable because his duty cannot be delegated.

75. *Id.* The court in *Maloney* stated that non-delegability operates "to assure that when a negligently caused harm occurs, the injured party will be compensated by the person whose activity caused the harm and who may therefore properly be held liable for the negligence of his agent." *Id.* In *Tardo v. New Orleans Public Service, Inc.*, 353 So. 2d 409 (La. App. 4th Cir. 1977), the court stated that there

> may be an inherent contradiction between holding an owner liable for maintaining a defective thing and exonerating him from liability where he can prove that the fault was caused by a third person because the imposition of liability without fault would seem to make irrelevant the fault of a third person.

Id. at 414.

76. 353 So. 2d 409 (La. App. 4th Cir. 1977).

77. *But see* Maloney v. Rath, 69 Cal. 2d 442, 71 Cal. Rptr. 897, 445 P.2d 513 (1968).

versely, in *Olsen v. Shell Oil Co.*,[78] it was held that the duty to keep a building in repair under article 2322[79] is non-delegable. An application of non-delegability to article 2317 law would result, practically, not only in liability without fault, but absolute liability as well inasmuch as the fault imposing liability would be purely legal fault.

One may question the wisdom of applying article 2317 strict liability to latent brake defect situations. It could be argued that the defense did not exculpate defendants to the degree demanded by "the exigencies of social justice,"[80] which require that losses be shifted from innocent plaintiffs to defendants by "creating liability where there has been no fault."[81] "Exigencies of social justice"[82] typically justify the application of strict liability; but with only four instances in Louisiana jurisprudence of the successful use of the latent brake defect defense, and the difficult burden a defendant has in proving the defense,[83] one may wonder if social justice really requires that strict liability be applied to brake defect cases. However, it could also be argued that the application of strict liability in *Arceneaux* makes for good law, as operators of automobiles possess the knowledge that defects may exist in their cars, and that, as between an innocent victim injured by the defect and the operator whose automobile caused the accident, the car operator should pay.[84]

The application of article 2317 to cases of genuine latent brake defect is a logical extension of the *Loescher* rule.[85] Although it is a

78. 365 So. 2d 1285 (La. 1978). In *Olsen* an explosion on an oil rig (considered to be a building) injured the plaintiffs. The defendants claimed it was the fault of a third party that caused the explosion and sought to escape liability. *See* Note, *Olsen v. Shell Oil: Expanded Liability for Offshore Oil Platform Owners*, 40 LA. L. REV. 233 (1979).

79. LA. CIV. CODE art. 2322 provides in pertinent part: "The owner of a building is answerable for the damage occasioned by its ruin, when this is caused by neglect to repair it, or when it is the result of a vice in its original construction." Fault is based on the owner's failure to maintain his building so as to avoid the creation of unnecessary risk to others. In *Olsen*, the court noted that

> Louisiana jurisprudence interpreting Article 2322 has held that the owner of a building has a nondelegable duty to keep his buildings . . . in repair so as to avoid unreasonable risk of injury to others, and that he is held strictly liable for injuries to others resulting from his failure to perform this duty imposed by law . . . .

365 So. 2d at 1292.

80. W. PROSSER, *supra* note 7, at 494.

81. *Id.*

82. *Id.*

83. See text at notes 10-29, *supra*.

84. One commentator has opined that "[i]t is an aberration of the entire thrust of tort law in automobile cases to force the innocent party to bear the loss for the nonfunctioning of the defendant's brakes." *The Work of the Louisiana Appellate Courts for the 1970-1971 Term—Torts*, 32 LA. L. REV. 213, 216 (1972).

85. For a 1977 prediction that article 2317—*Loescher* law would spread to latent brake defect cases, *see* Note, *supra* note 4, at 241 n.50.

dramatic technical change in the law, the application will not cause any unsettling effects in practice, as the defense had seldom been successfully invoked in Louisiana. However, if later jurisprudence adheres to Justice Dixon's misstatements of the *Loescher* rule as the present state of the law, great practical changes will have occurred as a result of *Arceneaux*: the traditional plaintiff's burden of proof will have been shifted to the defendant in automobile rear-end collision cases, and the concept of defect will have ceased to be a vital element of a plaintiff's case under Civil Code article 2317.

W. H. Parker, III

NEGLIGENT MISREPRESENTATION: CAN AN ATTORNEY RELY ON WHAT THE GOVERNMENT TELLS HIM?

The attorney representing a school lunchroom worker injured by an allegedly defective steam cooker wrote the school board and requested the name of the manufacturer of the equipment. The school board furnished him an incorrect name, information which he used in filing suit. After the one-year prescriptive period had run, the attorney discovered the mistake and amended the plaintiff's petition to sue the school board for its negligence in advising him. The trial court sustained an exception of no cause of action, and the court of appeal affirmed.[1] In affirming the lower court's decision, the Louisiana Supreme Court found that the plaintiff had failed to allege facts which would justify the imposition upon the school board of a duty to exercise care in supplying the information.[2] *Devore v. Hobart Manufacturing Co.*, 367 So. 2d 836 (La. 1979).

Courts in common law jurisdictions have established a general framework of facts necessary for a finding of negligent misrepresen-

1. 359 So. 2d 1108 (La. App. 3d Cir. 1978).

2. The majority cited as reasons for its holding the insufficiency of the defendant's knowledge of the extent to which the plaintiff and her attorney planned to rely on the information and the fact that neither was prevented from personally inspecting the equipment. The opinion implicitly adopted the conclusions of the appellate court, which relied heavily upon section 552 of the Restatement (Second) of Torts, defining the common law cause of action for negligent misrepresentation. The part of the Restatement test not met was the requirement that the defendant have a pecuniary interest in the transfer of the information. The majority's implicit approval of the intermediate court's holding and the dissent's protest of the use of the pecuniary interest test requirement indicate that this segment of the Restatement test was a major bar to the finding of a cause of action.