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ATTORNEY'S FEES IN LOUISIANA PRODUCTS LIABILITY:
Philippe v. Browning Arms Co.

Dr. Doyle F. Philippe, a practicing dentist, was hunting with friends in February, 1976, using a Browning Double Automatic Shotgun. After a short rest period, the doctor reached for the weapon which he had left leaning against a log. The gun may have been caught or obstructed by something, because Dr. Philippe encountered resistance when he attempted to lift the weapon. His hand slid along the barrel and just as it reached the end, the gun discharged and blew his right thumb off. This products liability suit was brought against the foreign manufacturer, Fabrique Nationale, and the importer, Browning Arms Company, alleging that a defective safety mechanism on the gun had caused the accident and resultant damages. The trial court awarded damages of \$67 for medical bills, \$800,000 for loss of future earnings and \$100,000 for pain and suffering. The defendants appealed, and Dr. Philippe answered with a request for attorney's fees under redhibition, plus additional punitive damages. The court of appeals denied the punitive damages, but did award him \$25,000 in attorney's fees;¹ the supreme court denied attorney's fees.² A rehearing was granted and the supreme court reaffirmed the awards given by both the trial court and the court of appeals, including attorney's fees on the redhibition claim.³

The "American Rule" with regard to attorney's fees is that the prevailing party in a civil action must pay his own attorney's fees.⁴ The "Louisiana Rule" is more specific: Attorney's fees cannot be recovered from any opposing litigant unless provided for by statute or contract.⁵

Tort actions in Louisiana are based on Civil Code article 2315, which does not specifically denote attorney's fees as a permissible

1. *Philippe v. Browning Arms Co.*, 375 So. 2d 151 (La. App. 2d Cir. 1979).

2. *Philippe v. Browning Arms Co.*, 395 So. 2d 310 (La. 1980).

3. *Philippe v. Browning Arms Co.*, 395 So. 2d 310 (La. 1981) (on rehearing).

4. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975); *Fleishmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714 (1967). In contrast, in both the English and French legal systems, attorney's fees are routinely awarded by the court to the prevailing litigant. Statute of Gloucester, 1278, 6 Edw. I, c.1. (plaintiff), 4 Jac. I, c.3 (1607) (defendant), and 17 Rich. II, c. 6 (1394) (equity courts); *NEW CODE OF CIVIL PROCEDURE IN FRANCE*, Bk. 1, arts. 696, 699 & 700 (F. de Kerstrat & W. Crawford trans. 1978); see also Goodhart, *Costs*, 38 *YALE L.J.* 849 (1929).

5. See, e.g., *Vines v. Vines*, 379 So. 2d 1219 (La. App. 2d Cir. 1980); *Sorapura v. Jeffers*, 378 So. 2d 524 (La. App. 4th Cir. 1979); *Haacker v. Keith*, 378 So. 2d 969 (La. App. 3d Cir. 1979); *Shanklin v. Shanklin*, 376 So. 2d 1036 (La. App. 1st Cir. 1979).

element of damages.⁶ Despite the lack of a statute or contract providing for fee recovery, in an early property damage case, the trial court awarded attorney's fees;⁷ however, the appeals court reversed, stating that "[t]he damages allowed are not excessive except in the matter of attorney's fees which are not recoverable in a suit of this character, *where the act complained of is not tainted by fraud or malice.*"⁸ The implication is that the court would have allowed the award to stand if evidence had shown that the tort was intentional. In *Cooper v. Cappel*,⁹ the court did allow recovery of attorney's fees by the successful plaintiff when the court found that his property had been taken from him by *force* and that he should therefore be compensated fully for the expense of litigation.¹⁰ These early cases proved to be aberrations; by 1899 the court declared that plaintiff's attorney's fees are not ordinarily recoverable in tort actions, even as punitive or exemplary damages;¹¹ numerous subsequent decisions have reinforced this last holding.¹²

The redhibition action is a sales remedy, whereby the purchaser of a defective product can recover specified damages against the good or bad faith seller.¹³ In 1968 the Louisiana legislature amended

6. LA. CIV. CODE art. 2315. "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it."

7. *Eatman v. New Orleans Pac. Ry. Co.*, 35 La. Ann. 1018 (1883).

8. *Id.* at 1022 (emphasis added).

9. 29 La. Ann. 213 (1877).

10. *Id.* at 218. The court reasoned that

[i]n a case like this there is no basis upon which the damages can be fixed with absolute certainty; and the jury may well consider the trouble and expense to which the plaintiffs have been subjected by the wrongful act of defendants; and it is proper for them to take into account, as part of the expense, the reasonable fees of attorneys . . . as an element of damages.

Id. at 218.

11. *Bentley v. Fischer Lumber & Mfg. Co.*, 51 La. Ann. 451, 25 So. 262 (1899).

12. *See, e.g., Kendrick v. Garrene*, 233 La. 106, 96 So. 2d 58 (1957); *Winkler v. Ascension Bank & Trust Co.*, 182 La. 69, 161 So. 23 (1935) (the court stated the Louisiana rule, but found that a contractual provision would allow the plaintiff to recover fees); *Gay v. Gay*, 378 So. 2d 609 (La. App. 3d Cir. 1979); *Evans v. Natchitoches Collections, Inc.*, 378 So. 2d 1037 (La. App. 2d Cir. 1979); *But see Newson v. Newson*, 178 La. 699, 146 So. 473 (1933); *Gauthreaux v. Gauthreaux*, 315 So. 2d 402 (La. App. 3d Cir. 1975) (both suits to make alimony or child support payments in arrears executory). Since these decisions, legislation has been enacted recognizing the validity of such awards. LA. R.S. 9:305 (Supp. 1977), *as amended by* 1978 La. Acts, No. 693, § 1 & 1979 La. Acts, No. 326, § 1.

13. LA. CIV. CODE arts. 2520-48. The redhibition action has come a long way from its historical roots, which involved, for the most part, the rescission of sales of slaves and animals which were alleged to have vices or defects rendering them unsuitable to

Civil Code article 2545¹⁴ to include attorney's fees as an item of damages when redhibition of a sale is claimed against a seller who knows of the defect in the product sold and fails to declare it to the buyer.¹⁵ Because the redhibition articles deal with the breach of a particular contractual relationship, the court has uniformly applied Civil Code article 1934.¹⁶ This application has the effect of limiting damages in redhibition actions to the amount of loss for the product itself and profit loss and of denying non-consequential, non-pecuniary damages such as mental anguish or loss of future income.¹⁷ The two

the buyer. *See, e.g.*, *Galt v. Herndon*, 16 La. App. 239, 133 So. 800 (2d Cir. 1931); *Riggs v. Duperrier*, 19 La. 418 (1841); *Blondeau v. Gales*, 8 Mart. (O.S.) 313 (La. 1820). With the industrial revolution, however, these rural transactions were gradually displaced by those involving the purchasers of "lemons." *See, e.g.*, *Savoie v. Snell*, 213 La. 823, 35 So. 2d 745 (1948); *Wade v. McInnis-Peterson Chevrolet, Inc.*, 307 So. 2d 798 (La. App. 1st Cir. 1975); *Beneficial Fin. Co. v. Bienemy*, 244 So. 2d 275 (La. App. 4th Cir. 1971); *Port Fin. Co. v. Campbell*, 94 So. 2d 891 (La. App. 1st Cir. 1957).

14. LA. CIV. CODE art. 2545: "The seller, who knows the vice of the thing he sells and omits to declare it, besides the restitution of the price and repayment of expenses, including reasonable attorney's fees, is answerable to the buyer in damages." This legislation, introduced as House Bill 617 (La. H.B. 617, § 1, 31st Reg. Sess. (1968)), passed the House by unanimous vote and the Senate with only eight dissenting votes. 1968 La. Acts, No. 84, § 1.

15. Since this amendment, many cases have awarded attorney's fees to the successful plaintiff in redhibition actions. *See, e.g.*, *Alexander v. Burroughs Corp.*, 359 So. 2d 607 (La. 1978); *Avoyelles Country Club, Inc., v. Walter Kidde & Co.*, 338 So. 2d 379 (La. App. 3d Cir. 1976); *Aucoin v. Fontenot*, 334 So. 2d 773 (La. App. 3d Cir. 1976); *Schamens v. Crow*, 326 So. 2d 621 (La. App. 2d Cir. 1976); *Gonzales v. Southwest Mobile Homes, Inc.*, 309 So. 2d 780 (La. App. 3d Cir.), *writ denied*, 313 So. 2d 239 (La. 1975); *Fox v. Am. Steel Bldg. Co., Inc.*, 299 So. 2d 365 (La. App. 3d Cir. 1974).

16. LA. CIV. CODE art. 1934: "Where the object of the contract is any thing but the payment of money, the damages due to the creditor for its breach are the amount of loss he has sustained and the profit of which he has been deprived. . . ." LA. CIV. CODE art. 1778 states that "[c]ertain contracts are regulated by particular rules which are established in the parts of the Code which treat of those contracts." The contract of sale is one of these, as pointed out by Professor Levasseur in *The Work of the Appellate Courts for the 1976-1977 Term—Sales*, 38 LA. L. REV. 360, 361 (1978): "The sale of any product, in a consumer protection-oriented society such as ours, immediately triggers in one's mind the issue of warranty to such an extent that one may be led to forget that a sale is first and foremost a convention or contract. . . ."

17. *Meador v. Toyota*, 332 So. 2d 433 (1976). The court interpreted Civil Code article 1934(3) to preclude recovery of non-pecuniary damages unless the object of the contract was primarily or exclusively intellectual gratification, as opposed to physical gratification. LA. CIV. CODE art. 1934(3) provides: "Where the contract has for its object the gratification of some intellectual enjoyment, whether in religion, morality or taste, or some convenience or other legal gratification, although these are not appreciated in money by the parties, yet damages are due for their breach." *See Ostrowe v. Darensbourg*, 377 So. 2d 1201 (La. 1979) (the principal object of a contract to build an architecturally designed home is not intellectual, therefore mental pain, anguish and

theories, tort and redhibition, have thus been treated as separate causes of action, each with specific remedies appropriate to one or the other, but not to both.¹⁸

However, in the burgeoning field of products liability, a trend toward convergence of the two theories has begun, in large part because the factual circumstances which give rise to a products liability suit can contain elements of both tort and redhibition.¹⁹ In both, a defective product²⁰ causes damage of some kind to the purchaser,²¹

anxiety damages are not recoverable); *Gale v. Markey*, 379 So. 2d 763 (La. App. 4th Cir.) writ granted, 380 So. 2d 623 (La. 1979) (no recovery for mental anguish when a ceiling collapsed because a lease does not have intellectual gratification as its principal object), *aff'd on other grounds*, 387 So. 2d 1162 (La. 1980) (the court suggested that the rigid tort/contract classification was not always necessary, but denied recovery because mental anguish was not sufficiently proven). *But see Schamens v. Crow*, 326 So. 2d 621 (La. App. 2d Cir. 1976) (in addition to attorney's fees, the court awarded damages under article 2545 for inconvenience, deprivation and embarrassment against the builder of a house with an inadequate air conditioning system); *Fox v. American Steel Bldg. Co., Inc.*, 299 So. 2d 364 (La. App. 3d Cir. 1974) (the plaintiff recovered the replacement of a damaged crane system and doors, plus inconvenience, down time, cost of additional work time and attorney's fees in an article 2545 redhibition action). For an excellent discussion of Civil Code article 1934, see Comment, *Damages "Ex Contractu": Recovery of Nonpecuniary Damages for Breach of Contract Under Louisiana Civil Code Article 1934*, 48 TUL. L. REV. 1160 (1974).

18. See Percy, *Products Liability—Tort or Contract or What?*, 40 TUL. L. REV. 715 (1966). "A products liability case is either a tort or a sales case. As the song goes: It's 'Gotta be This or That.'" *Id.* at 726.

19. Crawford, *Products Liability—The Cause of Action*, 22 LA. B.J. 239, (Mar. 1975); Robertson, *Manufacturer's Liability for Defective Products in Louisiana Law*, 50 TUL. L. REV. 50 (1975). See also Murray, *Implied Warranty Against Latent Defects: A Historical Comparative Law Study*, 21 LA. L. REV. 586 (1961). "When one considers the vendor's liability for consequential damages . . . it becomes apparent that this whole concept of an implied warranty against latent defects is now a hybrid of the law of sales and torts . . ." *Id.* at 587.

20. *Weber v. Fidelity & Cas. Ins. Co.*, 259 La. 599, 250 So. 2d 754 (1971) (tort action in which a defective product is defined as one unreasonably dangerous to normal use); LA. CIV. CODE art. 2520 (redhibitory defect defined as some vice which renders the thing either absolutely useless, or its use so imperfect that it must be supposed that the buyer would not have purchased it if he had known of the vice). Presumably, no reasonable buyer would purchase something which he knows is unreasonably dangerous to normal use; in this sense a tort "defect" is the same as a redhibition "defect."

21. *Weber v. Fidelity & Cas. Ins. Co.*, 259 La. 599, 250 So. 2d 754 (1971). "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 fault on his part, sustains an injury caused by a defect in the design, composition, or manufacture of the article . . ." *Id.* at 755. See LA. CIV. CODE art. 2545: "The seller, who knows the vice of the thing he sells and omits to declare it, besides restitution of price and repayment of the expenses, including reasonable attorney's fees, is answerable to the buyer in damages."

and the manufacturer or seller of the product²² is held to have breached a duty²³ to the consumer. The line between the two has been drawn on the basis of the types of damage incurred and the types of remedies available.²⁴

Early in the development of products liability tort law, the doctrine of constructive or imputed knowledge of defects was applied to the manufacturer of a product.²⁵ The nature and limitations of the manufacturer's duty were defined in terms of implied warranty, similar to those used in the redhibition articles.²⁶ Redhibition,

Under both tort and redhibition actions, one's status as a purchaser carries with it the right to recover from the manufacturer. The tort action also requires proof of causation to the extent that circumstantial evidence must indicate that the defect was the most probable cause of the injury sustained. The redhibition action carries no similar causation requirement; however, article 1934(2) imposes liability for "not only . . . such damages as were, or might have been foreseen at the time of making the contract, but also . . . such as are the immediate and direct consequence of the breach of that contract. . . ." Damages which are the "direct consequence" of a contractual breach could also be described as "caused by" such breach; in this respect, both the tort and redhibition actions require a minimal showing of a causal relationship between the defect and the damage.

22. *Media Prod. Consultants, Inc. v. Mercedes-Benz of North America, Inc.*, 262 La. 80, 262 So. 2d 377 (1972) (finding that Mercedes-Benz of North America occupied the position of manufacturer and that the privity requirement should not preclude recovery for breach of implied warranty, the court held Mercedes solidarily liable with the vendor for the refund of the purchase price and expenses); *Weber v. Fidelity & Cas. Ins. Co.*, 259 La. 599, 250 So. 2d 754 (1971) (the manufacturer of the defective product is liable).

23. *Penn v. Inferno Mfg. Co.*, 199 So. 2d 21 (La. App. 1st Cir.), writ denied, 251 La. 27, 202 So. 2d 649 (1967); LA. CIV. CODE arts. 2475 & 2476. In every contract of sale, the seller must warrant the title or "peaceable possession" of the object of the sale and also its freedom from redhibitory vices or defects.

24. Judge Redmann stated in *Atchison v. Archer-Daniels-Midland Co.*, "'Products liability' is but a catch-word, a descriptive categorization, like 'slip and fall' or 'medical malpractice.' The liability that arises in any of these categories is the result of fault causing damage; La. CC 2315." 360 So. 2d 599, 600 (La. App. 4th Cir. 1978). Such a categorization is not absolute, however, for according to Joseph Dainow, "[i]t is neither necessary nor correct to classify as ex delicto all actions which claim damages or which allege negligence." *The Work of the Appellate Courts for the 1965-1966 Term—Prescription*, 26 LA. L. REV. 459, 540 (1966).

25. *Doyle v. Fuerst & Kraemer, Ltd.*, 129 La. 838, 56 So. 906 (1911).

The principle which governs in this case is that everyone 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 resulting from the vices or defects thereof which he did not make known to them and which they were ignorant of.

129 La. at 839, 56 So. at 907.

26. *LeBlanc v. La. Coca-Cola Bottling Co.*, 221 La. 919, 60 So. 2d 873 (1952); *McCauley v. Manda Bros. Provisions Co., Inc.*, 202 So. 2d 492 (La. App. 1st Cir. 1967), *aff'd*, 252 La. 528, 211 So. 2d 637 (1968); *McAvin v. Morrison Cafeteria Co. of La.*, 85 So. 2d 63 (La. App. Or. Cir. 1956).

however, was limited to actions by the purchaser against his immediate vendor;²⁷ so despite the similarities in the bases for liability, these articles were not helpful to the consumer injured by a defectively *manufactured* product in an action against the manufacturer. Consequently, the only feasible remedy was in an action *ex delicto*; since attorney's fees were *not* authorized in the articles dealing with delictual liability,²⁸ successful litigants in products liability actions were denied these fees as an element of damages.²⁹

In 1972 *Media Production Consultants, Inc. v. Mercedes-Benz of North America, Inc.*³⁰ extended the reach of the redhibition articles to include the manufacturer's liability to the ultimate purchaser.³¹ Applying the tort concept of presumptive knowledge of defects, the court held in *Rey v. Cuccia*³² that Civil Code article 2545 is applicable to manufacturers and that manufacturers are liable with the immediate vendor for attorney's fees.³³ These decisions opened the way for the potential combination of the two theories in a case containing aspects of both tort and redhibition³⁴—a case in which a defectively manufactured product causes damages in the nature of economic loss and personal injury to the ultimate consumer. The literal language of Civil Code article 2545 allows such a plaintiff to seek reimbursement from "the seller"/manufacturer (*Media*),³⁵ "who knows the vice of the thing he sells and omits to declare it," (*Rey*),³⁶

27. LA. CIV. CODE arts. 2520, 2522, 2530, 2538, 2539 & 2545. The articles are phrased in terms of a direct buyer-seller relationship which is enforceable between the parties. See generally Comment, *Torts—The Emergence of Strict Liability in Products Cases*, 26 LA. L. REV. 447 (1966). An early "chipping away" at the privity requirement began in *Weathermasters Parts & Serv., Inc. v. McKay*; the court found a direct connection between the manufacturer and the ultimate consumer in the form of the manufacturer's warranty. 242 So. 2d 306 (La. App. 4th Cir. 1970).

28. LA. CIV. CODE arts. 2315-24.

29. *Dubroc v. W.T. Grant & Co.*, 591 F.2d 299 (5th Cir. 1979); *Chappuis v. Sears Roebuck & Co.*, 358 So. 2d 926 (La. 1978); *Demars v. Natchitoches Coca-Cola Bottling Co., Inc.*, 353 So. 2d 433 (La. App. 3d Cir.), *writ denied*, 354 So. 2d 1384 (La. 1978).

30. 262 La. 80, 262 So. 2d 377 (1972).

31. See Note, "Manufacturer" Warranty in Louisiana, 33 LA. L. REV. 724 (1973).

32. 298 So. 2d 840 (La. 1974).

33. *Id.* at 847. This rationale was followed in *Riche v. Krestview Mobile Homes, Inc.*, 375 So. 2d 133 (La. App. 3d Cir. 1979).

34. *Ross v. John's Bargain Stores Corp.*, 464 F.2d 111 (5th Cir. 1972) (the court indicated that both tort and redhibition theories of recovery were possible, but declined to classify the action as one or the other); *Smith v. Max Thieme Chevrolet Co.*, 315 So. 2d 82 (La. App. 2d Cir. 1975) (Judge Dennis recognized the "conceptual difficulties in this marriage of the modern consumer protection policy and the redhibition action . . .") *Id.* at 86. See also Robertson, *supra*, note 19.

35. *Media Prod. Consultants, Inc. v. Mercedes-Benz of North America, Inc.*, 262 La. 80, 262 So. 2d 377 (1972); LA. CIV. CODE art 2545.

36. *Rey v. Cuccia*, 298 So. 2d 840 (La. 1974); LA. CIV. CODE art. 2545.

recovering, "besides the restitution of price and repayment of the expenses, including reasonable attorney's fees, . . . damages." (*Weber*).³⁷

*Philippe*³⁸ is just such a case.³⁹ The Second Circuit Court of Appeals affirmed the trial court's finding that "defects in the manufacture and design of the safety mechanism caused the accident,"⁴⁰ and that Dr. Philippe's actions constituted neither contributory negligence nor assumption of risk.⁴¹ On the issue of attorney's fees as an item of damages, the court reasoned that, given Louisiana's procedural rules allowing fact pleading,⁴² sufficient facts had been alleged

37. *Weber v. Fidelity & Cas. Ins. Co.*, 259 La. 599, 250 So. 2d 754 (1971); LA. CIV. CODE art 2545.

38. *Philippe v. Browning Arms Co.*, 375 So. 2d 151 (La. App. 2d Cir. 1979).

39. Several other cases with similar fact patterns had been heard by the Louisiana appellate courts, with varying results. In 1975, the Second Circuit Court of Appeals denied attorney's fees in a personal injury suit brought against the manufacturer of a defective automobile, but made it clear that the basis of the denial was that "the question of attorney fees against the manufacturer was not raised until after the case was submitted to the trial court for decision. . .," thus not giving fair notice in the pleadings to the manufacturer that this recovery would be sought. *Townsend v. Cleve Heyl Chevrolet-Buick, Inc.*, 318 So. 2d 618, 624 (La. App. 2d Cir. 1975). Also in 1975, the Third Circuit Court of Appeal denied attorney's fees in a products liability case involving personal injuries: "[The plaintiff] . . . seeks only damages [incurred] as a result of injuries. . . . He does not seek rescission of the sale nor reduction in price." *Gordon v. General Motors Corp.*, 323 So. 2d 496, 505 (La. App. 3d Cir. 1975). The clear implication of this narrow holding is that had the plaintiff satisfied these elements of a redhibitory cause of action, the court might have allowed the fees. Faced with this decision in *Reeves v. Great Atl. & Pac. Tea Co., Inc.*, the same court carefully distinguished the personal injury claim of the child injured by broken glass in a bottled drink from his mother's redhibition claim for the 45 cent cost of the drink. The court awarded \$1500 in attorney's fees, with the ingenious disclaimer that the award was only for the redhibition aspects of the case and should not be interpreted as an award in the tort action. 370 So. 2d 202 (La. App. 3d Cir.), *writs denied*, 371 So. 2d 835 (La. 1979) and 372 So. 2d 568 (La. 1979). *Harris v. Bardwell* illustrates this precise fact pattern. 373 So. 2d 777 (La. App. 2d Cir. 1979). In *Harris*, a defectively manufactured and installed boat pedestal seat came loose and threw the owner/buyer of the boat into the water. Damages awarded included \$75,000 for personal injuries, \$100,000 for loss of future earnings, and \$12,500 for redhibition attorney's fees. The court justified combining tort and redhibition damages by stating that "[r]ecovery under one theory should not preclude recovery under another theory where the circumstances warrant." *Id.* at 784. *Harris v. Bardwell* had not been reported when *Philippe* was argued before the same court.

40. *Philippe v. Browning Arms Co.*, 375 So. 2d 151, 155 (La. App. 2d Cir. 1979).

41. *Id.* at 155. The court thus avoided reaching a conclusion as to whether contributory negligence and assumption of risk are valid defenses in a products liability case involving defects in design or manufacture.

42. *Id.* at 156. Though not cited in the opinion, the applicable procedural articles are articles 854, 862, 891 & 1841 of the Code of Civil Procedure.

to establish a cause of action for the damages described in Civil Code article 2545. The court reached this conclusion even though the rescission of the sale and refund of the purchase price had not been formally requested by the plaintiff in his pleadings. This finding seems to ignore prior jurisprudence which had required the pleas for rescission of the sale and return of or reduction of the price as integral parts of the redhibition action.⁴³ The redhibition action is highly structured and described with great specificity in the appropriate articles of the Civil Code; a significant body of jurisprudence has further refined and delineated its requirements.⁴⁴ Perhaps requiring such detail in a "fact pleading" system is anomalous;⁴⁵ nevertheless, the court should have addressed these requirements more directly before applying article 2545.

43. See, e.g., *Gustin v. Shows*, 377 So. 2d 1325 (La. App. 1st Cir. 1979) (the pleadings were sufficient to establish a cause of action, but prescription had run against the "good faith" seller); *Avoyelles Country Club, Inc. v. Walter Kidde & Co.*, 338 So. 2d 379 (La. App. 3d Cir. 1976); *Gordon v. General Motors Corp.*, 323 So. 2d 496 (La. App. 3d Cir. 1975), discussed in note 39, *supra*.

44. LA. CIV. CODE arts. 2520-48. Article 2521 requires that the defect be non-apparent. *Demars v. Natchitoches Coca-Cola Bottling Co., Inc.*, 353 So. 2d 433 (La. App. 3d Cir.), *writ denied*, 354 So. 2d 1384 (La. 1978). Article 2522 states that if latent defects were declared to the buyer, the redhibition action cannot be brought. *Matt v. Laperouse*, 371 So. 2d 1284 (La. App. 3d Cir. 1979). Article 2530 requires that the buyer prove that the vice existed before the sale was made. *Penton v. Budget Rent-A-Car*, 304 So. 2d 410 (La. App. 1st Cir. 1973); *Sinquefield v. Yates*, 197 So. 2d 395 (La. App. 2d Cir. 1967). Article 2534 establishes a one-year prescriptive period for the action which commences at the time of sale and applies only to good faith sellers. *Gustin v. Shows*, 377 So. 2d 1325 (La. App. 1st Cir. 1979); *Weaver v. Fleetwood Homes*, 327 So. 2d 172 (La. App. 3d Cir. 1976). The action against bad faith sellers can be brought at any time within a year after *discovery* of the defect. *Aucoin v. Fontenot*, 334 So. 2d 773 (La. App. 3d Cir. 1976). The jurisprudence has uniformly held that the buyer must tender a return of the thing to the good faith seller; this requirement is not necessary when the seller is in bad faith or when tender is not possible. See *Andrews v. Hensler*, 73 U.S. 254 (1867); *Rausch v. Hanberry*, 377 So. 2d 901 (La. App. 4th Cir. 1979); *Riche v. Krestview Mobile Homes, Inc.*, 375 So. 2d 133 (La. App. 3d Cir. 1979); *Alan Randal Co. v. Quality Oil Co.*, 100 So. 2d 282 (La. App. 1st Cir. 1958). Another jurisprudential rule is that prescription does not begin to run against the buyer until all repair efforts have ceased. *Schamens v. Crow*, 326 So. 2d 621 (La. App. 2d Cir. 1976); *Motorola Aviation Elec., Inc. v. La. Aircraft, Inc.*, 172 So. 2d 118 (La. App. 1st Cir. 1965). See also Note, *Incidents to Redhibition Actions Under Civil Code Article 2531*, 37 LA. L. REV. 1274 (1977).

45. Courts often ignore the plaintiff's characterization of an action and instead find sufficient facts alleged to sustain a different cause of action carrying different remedies or different prescriptive periods. Usually, such judicial manipulations allow the plaintiff to recover. See, e.g., *Royal Furniture Co. v. Benton*, 256 So. 2d 614 (La. 1972); *Demars v. Natchitoches Coca-Cola Bottling Co., Inc.*, 353 So. 2d 433 (La. App. 3d Cir.), *writ denied*, 352 So. 2d 1384 (La. 1978); *Castille v. Flock*, 338 So. 2d 328 (La. App. 3d Cir. 1976); *Kegler's, Inc. v. Levy*, 239 So. 2d 450 (La. App. 4th Cir. 1970).

Relying also on its holding in *Harris v. Bardwell*,⁴⁶ the court of appeal stated that article 2545 "damages" do not "exclude personal injury damages which are factually and legally caused by the defective thing."⁴⁷ In *Harris*, the problem presented by the limitations in Civil Code article 1934 was dismissed on the grounds that this article does not apply to *multiple theories* of recovery,⁴⁸ nor is it directly applicable in its entirety to bad faith situations.⁴⁹

However, the Louisiana Supreme Court found in its first hearing that article 1934 precluded "recovery of non-pecuniary damages in suits arising in contract."⁵⁰ The court accepted the defendant's argument that the redhibition action is contractual in nature because it is founded on breach of implied warranty and is therefore limited by article 1934.⁵¹ This reasoning ignores two factors: (1) The breach of implied warranty also served as the basis for products liability actions "ex delicto" for many years,⁵² and (2) no distinction was drawn by the court between the application of article 1934 to bad faith as contrasted to good faith sellers.⁵³

In response to the "fact pleading" issue, the supreme court first took note of the elaborate statutory scheme set out by the redhibition articles⁵⁴ and then stated: "[A]lthough a plaintiff is not required to restrict himself to one theory for recovery, the courts must . . . characterize the cause of action so as to determine the appropriate standard for recovery."⁵⁵ The language of this statement would seem

46. 373 So. 2d 777 (La. App. 2d Cir. 1979).

47. *Id.* at 784.

48. *Id.* See also *Amicus Curiae* Brief in Support of Application for Rehearing in Behalf of Dr. Doyle F. Philippe, Plaintiff-Appellee-Respondent, Wm. E. Crawford, *Amicus Curiae*, at 1-3, [hereinafter cited as *Amicus Curiae*].

49. This reasoning may be circular, because the clear intent of the *Meador* interpretation of article 1934 is to categorize the types of damages available in contract actions and thereby to eliminate "tort-type" damages. LA. CIV. CODE art. 1934. *Meador v. Toyota*, 332 So. 2d 433 (La. 1976) (note particularly the discussion at 436 n.9 and at 438, in which these types of damages are specifically excluded from recovery under article 1934). Perhaps a more satisfactory resolution could be achieved through application of the concept of "moral damages," as described in Litvinoff, *Moral Damages*, 38 LA. L. REV. 1, 6-13 (1977), reprinted in S. LITVINOFF, *THE LAW OF OBLIGATIONS IN THE LOUISIANA JURISPRUDENCE* 457-61 (1979). For a more extensive discussion of this concept, see Note, *Moral Damages for Breach of Contract: The Effect on Recovery of an Obligor's Bad Faith*, 42 LA. L. REV. ____ (1981).

50. *Philippe v. Browning Arms Co.*, 395 So. 2d 310, 313 (La. 1981).

51. *Id.*

52. See cases cited in note 22, *supra*.

53. See *Amicus Curiae*, *supra* note 48, at 1-3.

54. *Philippe v. Browning Arms Co.*, 395 So. 2d at 313.

55. *Id.* No standards or tests upon which this characterization is based were established or mentioned by the court; therefore, the hearing did not clarify this recur-

to eliminate the "multiple theories" of recovery approach used by the lower court,⁵⁶ but the actual holding was qualified in such a way that the theory may have survived intact. The court held that "in this case, *in which rescission of the sale was not sought by plaintiff, but only damages arising from his personal injuries, attorney's fees under Article 2545 are not payable.*"⁵⁷

On rehearing, the Louisiana Supreme Court reversed its initial holding on the award of attorney's fees and re-affirmed the court of appeals decision on this issue.⁵⁸ In so doing, the court specifically re-

ring problem. In the past when two theories of recovery were available, the plaintiff was uncertain of whether he was to elect a theory or whether the court should assign a classification. The court's customary statement is that the character of the action as revealed by the pleadings determines the classification. But this phrase says nothing about how the court actually determines which classification is appropriate. See *Loew's, Inc. v. Don George, Inc.*, 237 La. 132, 110 So. 2d 553 (1959). See, e.g., *Harper v. Metairie Country Club*, 258 La. 264, 246 So. 2d 8 (1971) (the court classified a subcontractor's negligent conduct as a breach of contract); *American Heating & Plumbing Co. v. West End Country Club*, 171 La. 482, 131 So. 466 (1930) (plaintiff may opt to sue either on the tort or contract); *State ex rel. Guste v. Chemical Applicators of Lafayette, Inc.*, 379 So. 2d 1199 (La. App. 3d Cir. 1980) (plaintiff has option of choosing tort or contract action when he has been damaged by conduct arising out of contract); *Williams v. Lucien J. Caruso, Inc.*, 374 So. 2d 113 (La. App. 4th Cir. 1979) (the plaintiff's carefully drawn petition alleged "badness" of workmanship in a house, thereby avoiding the one-year prescriptive period of art. 2545 and availing himself to the ten-year prescriptive period of art. 2762); *Weathermasters Parts & Serv., Inc. v. McCay*, 242 So. 2d 306 (La. App. 4th Cir. 1970) (the court characterized an action for damages arising out of an unserviceable replacement air-conditioning compressor as a breach of an implied warranty); *Victory Oil Co. v. Perret*, 183 So. 2d 360 (La. App. 4th Cir.), writ denied, 249 La. 65, 184 So. 2d 735 (1966) (the court classified a suit for damages arising out of the delivery of oil poorer in quality than specified as a breach of contract). See generally Comment, *Prescription, Classification & Concurrence of Obligations*, 36 TUL. L. REV. 556 (1962).

56. *Philippe v. Browning Arms Co.*, 375 So. 2d 151, 156 (La. App. 2d Cir. 1979); *Harris v. Bardwell*, 373 So. 2d 777, 784 (La. App. 2d Cir. 1979).

57. *Philippe v. Browning Arms Co.* 395 So. 2d at 313 (emphasis added). An additional holding, not discussed in this note, concerns the manner in which the plaintiff's wife's income was computed in the damages. The supreme court in the first hearing remanded for the wife's contribution to be subtracted from her husband's future earnings in order to more accurately reflect his earnings loss, because she had worked without salary as a receptionist in his office. On rehearing, this portion of the decision was declared erroneous. *Philippe v. Browning Arms Co.*, 395 So. 2d at 316. See note 58, *infra*.

58. "On reconsideration we further conclude that we erred on original hearing in denying attorney's fees against the manufacturer." *Philippe v. Browning Arms Co.*, 395 So. 2d at 318. The supreme court clarified its previous calculations of damages for loss of future earning capacity, affirming the award of \$800,000 granted by the trial court. The wife's contribution to Dr. Philippe's annual income was included in the projections of the experts who testified, was discussed extensively by the trial judge, and was taken into consideration when the award was made. Thus the decision was not an

jected any actual or implied requirement of "pleading the theory of the case" which its original decision may have imposed.⁵⁹ By thus affirming the court of appeals decision, the supreme court gave implicit recognition to the validity of the "multiple theories of recovery" approach used by the second circuit.⁶⁰ Further, the court found "no compelling reason to require a person injured by a defective product he has purchased to proceed either in contract or in tort,"⁶¹ thereby eliminating the necessity for the plaintiff to choose a theory which might limit his recovery. In fact, the court did not find classifying the action necessary in order to reach its decision.

The supreme court analyzed the duty of the manufacturer to the consumer by applying the standard of conduct found in the Civil Code articles on sales, particularly articles 2476 and 2545.⁶² The manufacturer's duty encompasses both the warranty against hidden defects and a duty to warn of such defects.⁶³ According to these articles, the manufacturer who breaches these duties is clearly responsible for attorney's fees.

The manufacturer's additional responsibility for *delictual* damages arising from the same defect, however, has been less obvious in past jurisprudence.⁶⁴ *Philippe* may clear the way for the recovery of a combination of non-pecuniary as well as pecuniary damages in future contract or sales actions, despite past contrary indications found in the *Meador* line of cases.⁶⁵ The rationale given by the court for this combination is a model of brevity, but hardly of clar-

abuse of the trial judge's "much discretion" and was reaffirmed on rehearing. *Id.* at 317.

59. 395 So. 2d at 318.

60. *Philippe v. Browning Arms Co.*, 375 So. 2d 151 (La. App. 2d Cir. 1979); *Harris v. Bardwell*, 373 So. 2d 777 (La. App. 2d Cir. 1979). A potential cumulation of actions problem raised by the varying definitions of "action" in articles 421, 424, 461 and 934 of the Louisiana Code of Civil Procedure was neatly side-stepped by the second circuit in *Harris*. Judge Marvin defined a "true cumulation" as one in which the plaintiff's grounds for recovery have separate factual circumstances. In both *Harris* and *Philippe*, therefore, the court did not have to address the cumulation issue, since both cases involved a *single* factual circumstance which gave rise to multiple claims or theories of recovery.

61. *Philippe v. Browning Arms Co.*, 395 So. 2d at 319 (La. 1981).

62. 395 So. 2d at 318. Article 2476 imposes upon the seller an obligation of warranty against hidden defects in his product, and article 2545 makes such a seller liable for damages and attorney's fees if he fails to warn the buyer of a known vice or defect in his product.

63. 395 So. 2d at 318.

64. See discussion and cases at notes 16-18, *supra*.

65. *Meador v. Toyota*, 332 So. 2d 433 (La. 1976).

ity. The court stated simply that "[t]he seller's (manufacturer's) act of delivering a defective thing, when he knows of the defect, gives rise to delictual, as well as contractual, liability."⁶⁶ No discussion of Civil Code article 1934 appears in the decision;⁶⁷ no attempt is made to distinguish *Meador*.⁶⁸ Therefore this decision answers affirmatively the question of whether tort damages can be combined with redhibition damages when a single set of factual circumstances gives rise to both. But *Philippe* left unanswered the larger question of whether tort damages are also available when combined with other types of contractual claims for pecuniary damages. The broad language used suggests that the "multiple theories of recovery" analysis can be used in future cases to combine contract and tort damages in situations other than products liability claims. This approach would extensively broaden the possible recoveries for breach of contract.

However, tort damages will not be broadened by the inclusion of attorney's fees in all cases. The Louisiana rule still applies, and the successful plaintiff will still have to find a specific statutory justification in order to recover attorney's fees in a tort action.⁶⁹ In *Philippe* and other products liability cases, that justification is found in Civil Code article 2545.

If *Philippe* is narrowly interpreted in future decisions as applicable solely to products liability cases, its impact on *contract* law can be mitigated. However, the decision may skew sales law by encouraging "combination" actions for the sake of increased attorney's fees. Almost every tort claim involves an instrumentality (product) of some kind in the chain of causation. If all of these are characterized as tort/redhibition combinations, the clear purpose of the redhibition action will become blurred.⁷⁰ A few such attempts have occurred since article 2545 was amended;⁷¹ however, *Philippe* adds impetus to

66. *Philippe v. Browning Arms Co.*, 395 So. 2d at 319.

67. Article 1934(3) was cited, however, when the court gave deference to the "much discretion of the trial court judge." 395 So. 2d at 317.

68. *Meador v. Toyota*, 332 So. 2d 433 (La. 1976).

69. See text and cases at note 5, *supra*.

70. In 1969, the first year after article 2545 was amended, *Mervin v. D.H. Holmes Co.*, 223 So. 2d 878 (La. App. 4th Cir. 1969) illustrated this tendency to classify the action as lying in redhibition in order to recover attorney's fees, despite an obvious difference between the facts and this cause of action. A redhibition claim was brought against the seller of a car wash product when the buyer's minor child was injured by ingesting some of the product. Obviously, the product itself was not defective when used as intended, and the court found no duty to warn of an unknown and unforeseeable situation not attributable to any hidden defect.

71. *Id.*

this tendency by its lack of emphasis on the precise steps necessary to bring a redhibition action.⁷² Louisiana courts will have to reiterate some of these formal requirements in order to keep the redhibition statutes sharply defined.

Whether broadly or narrowly interpreted, however, *Philippe v. Browning Arms Co.* is a milestone in both tort and redhibition law in Louisiana. *Philippe* synthesizes the two procedurally, and adds substantive weight to the increasingly important area of products liability.

Lois E. Hawkins

CONSTITUTIONAL LIMITATIONS ON PATRONAGE PRACTICE:

Branti v. Finkel

Defendant, the newly-appointed Democratic Public Defender of Rockland County, New York, attempted to dismiss the plaintiffs, two Republican¹ assistant public defenders. In an attempt to retain their jobs plaintiffs sought an injunction,² alleging that the sole reason for the attempted discharges was their political affiliation.³ On appeal, the United States Supreme Court *held* that the discharge of an

72. *Philippe v. Browning Arms Co.*, 395 So. 2d at 318 n.13 (La. 1981). Compare this language with the precise scheme discussed at notes 43-45, *supra*.

1. Plaintiff Finkel switched his party registration from Republican to Democrat in 1977 in an apparent attempt to improve his chances of being retained when a new Democratic public defender was appointed. This move failed; the Supreme Court found that the parties still regarded Finkel as a Republican.

2. Suit was brought under 42 U.S.C. § 1983 (1976) and 28 U.S.C. § 1343(3) (1976).

3. As Republicans, the plaintiffs were unable to obtain the recommendation or sponsorship of a Democratic legislator or chairperson, and the defendant Branti sought to replace them with persons who had such sponsorship. Branti also attempted to argue that he would have fired the plaintiffs anyway because they were incompetent, but the Court found the district court's finding that the plaintiffs were satisfactorily performing their jobs was supported adequately by the record. 445 U.S. 507, 512, at n.6. Under *Mount Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977), a plaintiff seeking to prove dismissal for the exercise of his first amendment rights must show that he would not have been dismissed "but for" the protected conduct. For lower court discussions of the *Mount Healthy City* burden of proof in a patronage dismissal case see *Rosaly v. Ignacio*, 593 F.2d 145 (1st Cir. 1979); *Miller v. Board of Educ. of Lincoln*, 450 F. Supp. 106 (S.D. W. Va. 1978); *Tanner v. McCall*, 441 F. Supp. 503 (M.D. Fla. 1977), *aff'd in part, rev'd in part*, 625 F.2d 1183 (5th Cir. 1980); *Lasco v. Koch*, 428 F. Supp. 468 (S.D. Ill. 1977).