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Torts

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In *Bell v. Jet Wheel Blast*,[1] the Louisiana Supreme Court, after more than a decade, spoke to the question of how the plaintiff's fault affects his cause of action in products liability. During that decade, the courts of appeal have frequently attempted to deal with the problem.[2] The weight of those opinions was to view contributory negligence as applicable to a claim in products liability. There was good ground to argue that the *Weber* opinion itself provided for contributory negligence when it used the phrase, "who, without fault on his part."[3] The United States Fifth Circuit Court of Appeals, however, had expressly held that contributory negligence was not applicable to products liability claims under Louisiana law,[4] settling the question in the federal system. Subsequently, the advent of the comparative negligence legislation in 1980[5] sharpened the issue, because the rule of contributory negligence historically was not favored by the courts when its effect was to completely bar the plaintiff's claim. Comparative negligence allows contributory negligence to diminish rather than defeat recovery and does not have as harsh an impact on the plaintiff's action as the rule of contributory negligence, so that there is no longer so great a reluctance to recognize a plaintiff-detrimental rule.

The *Bell* court wrote its opinion in response to a question certified to the court by the United States Fifth Circuit Court of Appeals,[6] as follows: "Does the Louisiana Civil Code permit the defense known as contributory negligence to be advanced to defeat or mitigate a claim of strict liability based upon a defective product, the theory of liability commonly known as 'product liability?' "

The Louisiana Supreme Court characterized the plaintiff's circumstances as follows:

> The plaintiff was injured while performing a repetitive operation with a defective industrial machine as required by his employer.

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1. 462 So. 2d 166 (La. 1985).
2. See cases cited id. at 169.
3. Weber v. Fidelity & Casualty Ins. Co., 259 La. 599, 602, 250 So. 2d 754, 755 (1971).
4. Khoder v. AMF. Inc., 539 F.2d 1078 (5th Cir. 1976).
5. 1979 La. Acts No. 431 (effective August 1, 1980).
6. 717 F.2d 181, 183 (5th Cir. 1983).

> His hand got caught in the chain and sprocket drive of the conveyor system of the machine because of the lack of an adequate guard at the particular place on the drive that the injury occurred. His ordinary contributory negligence in combination with the machine's defect caused the accident.[7]

Expressing its philosophical concern, the court then stated that contributory negligence does not apply as a complete bar to recovery in products liability cases, because such a rule would defeat the primary objective of the entire body of products liability law as developed by the courts. The court said, however, that pure comparative fault principles would meet those objectives, though comparative negligence should not be applied in the case before the court because diminishing plaintiff's recovery would not serve to improve the performance of workers similarily situated and the reduction of damages owed by the manufacturer would not serve the goal of deterring further manufacture of defective products. This is the heart of the opinion.

The court established comparative negligence for products liability by finding that Civil Code article 2323 had always provided for a doctrine of comparative negligence, which the courts had allowed to "fall into oblivion." The principles of comparative negligence found in article 2323, as amended, are to be applied by *analogy* to products liability claims (presumably because article 2323, as amended, applies only "[w]hen contributory negligence is applicable,"[8] and the court here finds that contributory negligence as a bar has not been applicable to products claims).

The recognition of the applicability of comparative negligence in this fashion is a declaration that the law has always been to this effect. The Louisiana First Circuit Court of Appeal recognized this in *Maybelline*,[9] using the phrase "it has always been the law." Thus, comparative negligence in products matters refers at this instance to all pending products claims, even if the injuries occurred prior to the date of the opinion. The statutory comparative negligence scheme, on the other hand, was effective only to those claims arising subsequent to the effective date of the legislative act. The effect of recognizing legal doctrines or theories by the court, as contrasted to their establishment by the legislature, is the express subject of *Ardoin v. Hartford Accident & Indem. Co.*[10]

There is an even more interesting possibility in this vein. If Civil Code article 2323 is indeed the foundation in our civil law heritage of

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7. 462 So. 2d at 172.
8. La. Civ. Code art. 2323.
9. Walker v. Maybelline Co., No. 84-CA-0225 (La. App. 1st Cir. Oct. 8, 1985).
10. 360 So. 2d 1331, 1338 (La. 1978).

the doctrine of comparative negligence, and if, as in *Maybelline*, it has always been our law, then would not comparative negligence apply to *all* claims, whether products or not, and particularly, would the doctrine not apply to those claims arising prior to 1980 (the effective date of statutory comparative negligence), but still pending in the court? Logically, this result would follow.

The *Bell* opinion accomplishes another much needed improvement in the products liability jurisprudence of this state, in declaring that assumption of risk as to products liability claims would also be subject to the rule of comparative fault. Often the distinction between assumption of risk and contributory negligence is one without a difference. It would be abhorrent to allow the affirmative defenses of contributory negligence and assumption of risk to have different effects, with the one promising only at most a diminution of the plaintiff's claim, and the latter carrying with it an absolute defeat of the action. Any modern scheme of products liability law shaped to achieve its inherent objectives requires that comparative negligence apply to both defenses.

This opinion may also settle the issue of whether assumption of risk in ordinary negligence claims is subject to the comparative fault doctrine of article 2323. Note the precise words of the opinion itself:

> Thus, the net effect of article 2323, as amended, *is to prevent the courts from applying any defense more injurious to a damage claim than comparative negligence.* The article does not, however, state when the courts shall permit a defense of contributory or comparative negligence to affect a plaintiff's recovery, *nor does it prohibit the courts from applying comparative negligence to a claim previously insusceptible to the bar of contributory negligence.*[11]

This writer interprets the court's statement to mean that assumption of risk in ordinary negligence claims is subject to the rule of comparative fault. The quoted statement further bolsters the established application of comparative fault to the defense of victim fault in strict liability claims under articles 2317 through 2322, when victim fault is comprised of ordinary contributory negligence. Logically the statement is broad enough to require that victim fault comprising assumption of risk also be subjected to the comparative doctrine.

The remaining *Loescher v Parr*[12] defenses, third-party fault and *force majeure*, are not defenses in the sense of contributory negligence and assumption of risk, for if they are established by a defendant, they carry a finding of non-liability, since under the rule of *Olsen v. Shell*

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11. 462 so. 2d at 170 (emphasis added).
12. 324 So. 2d 441 (La. 1975).

Oil Co.,[13] there would have been no wrongdoing whatsoever on the part of the defendant. It would follow that third-party fault and *force majeure* do not diminish a plaintiff's claim but rather show that the defendant is not liable at all, usually for lack of causation.

The *Bell* court went further still and subjected the defense of "misuse" to comparative negligence, or, perhaps more accurately, merged the defense into comparative negligence. It is important to distinguish misuse in the sense probably intended by the opinion, which ought to be equated with contributory negligence, from a misuse which in reality is an "abnormal use." When the plaintiff fails to establish that his injury occurred as a result of "normal use" of the product (often because the defense, in its case, shows that the use was an abnormal one), the prima facia case under *Weber* has not been established. If the use was abnormal, then there was no defect and hence no liability. It is not that the damages should be diminished, but that there should no award because the defendant breached no duty to the plaintiff, in that there was no defect that was the cause of plaintiff's injury. It would be important to the defense, if the misuse in question is in fact abnormal use, to have jury instructions to this effect because the question of normal or abnormal use is for the jury.

The term "misuse" originated in the common law states where products liability was implemented through strict liability, which historically had not been subject to the defense of contributory negligence. This problem is best illustrated in the New York case of *Codling v. Paglia*,[14] in which the court announced that "misuse in the manner" would be a defense in products liability claims and quite candidly noted that there was no difference between that term and "contributory negligence."

Lastly, is it for the court or for the jury to decide the question of whether the work or occupation of the plaintiff at the time of injury should be characterized as "repetitive" and hence not subject to comparative negligence. It is submitted that in theory the question is one of duty, i.e., did the plaintiff, under the circumstances, owe himself a duty of care to protect against the risk of injury from this defective machine? Questions of duty are for the court, not for the jury, because they are in truth questions of law, not of fact. There are pragmatic benefits to be achieved by allocating this question to the court, rather than to the jury. It is easy to envision two factory workers each doing the same job, each being injured by the same machine, and each trying their claims before separate juries. Depending on all the vagaries of litigation, i.e., the particular qualifications of the jury, of the various

13. 365 So. 2d 1285 (La. 1978).

14. 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (N.Y. 1973).

attorneys, and of the court, the claim of one plaintiff could be subjected to comparative negligence on a finding of repetitive character, while the other jury could find to the contrary and apply comparative negligence, thus leading to very undesirable inconsistencies.

A more difficult issue procedurally will be encountered when an astute plaintiff's attorney attempts to have the affirmative defense of comparative negligence stricken from the answer because of the alleged non-repetitive character of the work, and thus attempts to establish in advance of trial that the affirmative defense is not viable. His purpose in doing this will be to keep from the jury's ears all of the testimony as to the supposed wrongdoing of the plaintiff, which is bound to have effect on the jury if they hear it during trial, even if the judge rules that the affirmative defense is not viable. The defendant will with good reason suggest that the question of repetitive character should be resolved by the court only after hearing the evidence as a whole and that it is pointless to extract one major issue of the trial and hear it twice. The wiser course may well be to allow the jury to hear all the evidence and the law as charged by the judge, and then to follow its conscience in arriving at a just verdict. The procedural grounds for hearing the question preliminarily, however, are also well-established, as would have been the case under *Baumgartner v. United States*[15] in which a motion to strike the affirmative defense of contributory negligence would certainly have been allowed. As the case-by-case jurisprudence grows, the question may well resolve itself, since the non-applicability will be apparent by mere identification of the occupation which the plaintiff was engaged in at the time of injury.

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15. 322 U.S. 665, 64 S. Ct. 1240 (1944).