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TORTS

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THE PRESENT STANCE OF STRICT LIABILITY IN LOUISIANA

Strict liability appeared on the Louisiana scene in 1975 when the supreme court announced a new interpretation of Civil Code articles 2317 through 2324 in *Turner v. Bucher*.[1] The reliance on French doctrine which prompted that announcement was made complete and fully articulated in *Loescher v. Parr*.[2] The court in *Loescher* declared failure to use reasonable care to no longer be an element of a cause of action in the broad segment of circumstances covered by these code articles when an "unreasonable risk of harm" is found.

Preceding the *Loescher* doctrine somewhat was the doctrine of strict liability for manufactured products under *Weber v. Fidelity & Casualty Insurance Co.*[3] This theory of strict products liability is based on a finding that the condition of a product made it "unreasonably dangerous to normal use," which under *Weber* made the product "defective."

Under Civil Code article 667, strict liability for damage done to neighboring property is based upon the fact of damage caused by an ultrahazardous activity, without reference to the defendant's exercise of care. This provision for strict liability has been a part of Louisiana law since the Civil Code of 1808. The doctrine differs from *Loescher* and *Weber* since it is based upon the fundamental concept of enterprise liability, while *Loescher* and *Weber* are based upon an allocation of risk theory, which is perhaps most simply described as the deep-pocket theory.

Evolution of Loescher

1. Unreasonable Risk of Harm

Liability under *Loescher* requires, beyond causation, either a vice or defect in the thing or deficient conduct in the person or animal, and the defendant's garde of the person, thing, or animal.[4] A vice or defect

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1. 308 So. 2d 270 (La. 1975).
2. 324 So. 2d 441 (La. 1976).
3. 259 La. 599, 250 So. 2d 754 (La. 1971).
4. 324 So. 2d at 446.

is a condition posing an unreasonable risk of harm.[5] There may be a dangerous aspect of the thing, but if it is not unreasonable, then it is not actionable.[6] A risk is unreasonable when thus characterized under the balancing process, which is a risk-utility analysis definitively explained in *Entrevia v. Hood*,[7] and consistent with the balancing process set forth in the Restatement of Torts[8] and in the jurisprudence of numerous other states.[9] The most recent and significant application of the balancing process is the case of *Meyers v. State Farm Mutual Automobile Insurance Co.*[10] In this case, the Louisiana Supreme Court accepted an argument on behalf of the state that the cost of maintaining all parts of the state highway system in a modern design would be financially impossible, thus rendering the risk of that particular road design not "unreasonable."

Should the attorneys at trial be permitted to introduce evidence relevant to the factors involved in the balancing process, as the state did in the highway case? For instance, in another falling tree case, such as *Loescher*, should the parties be allowed to introduce evidence of the cost of keeping trees in safe condition? In the same vein, in circumstances such those as involved in *Entrevia*, where the allegedly defective thing was an abandoned farm building, should the parties be allowed to introduce evidence showing the cost and other economic consequences that would be encountered if farmers were required to keep all buildings in habitable, safe condition, regardless of their location on the farm premises? There are no cases directly addressing this point. It is submitted that the answer is found by analogy with the requirement for, and allowance of, expert testimony in a given case.

Expert testimony is required or allowed when an understanding of a subject matter would not be within the ordinary juror's acumen, as has long been found in medical malpractice, engineering, and products liability cases. Thus, an ordinary jury could be presumed to know the relative expense and difficulty of maintaining trees on residential premises. Depending on the makeup of the particular jury, it might or might not be familiar with the economics of maintaining outlying farm buildings in habitable condition. Beyond question, a jury would not be possessed of the knowledge necessary to determine whether the state had the financial capacity to fully maintain all roads in a modern design, and evidence on the balancing process factors should be received.

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5. Id. at 446-47.
6. Entrevia v. Hood, 427 So. 2d 1146 (La. 1983).
7. Id.
8. Restatement (Second) of Torts, § 291-93 (1986).
9. See Prosser and Keeton on Torts, § 31, at 169-73 (5th ed. 1984).
10. 493 So. 2d 1170, 1173 (La. 1986).

2. Garde

Loescher clearly states that legal responsibility for a defective thing accompanies the "garde" of the thing. This term is distinguished from "custody," so that the owner of a thing may have the garde even when the thing is in the custody of another. This was the case in *Sikes v. McLean Trucking Co.*,[11] in which the owner of a car permitted it to be used by another, with the result that the driver of the car had the garde, since he had the custody thereof, and the owner also had the garde, which flowed from his relationship as owner of the car.

The rule is the same with animals, as in *Rozell*,[12] in which a syndicate owner of a bull turned the animal over to the Louisiana State University animal department for study. Liability for injury caused by the bull settled upon the owners even though they very clearly did not have the custody of the animal.

The very recent *Ross*[13] case shows that the owner of a defective stepladder under gratuitous loan to another private individual retained the garde, which rendered the owner of the ladder liable for the injuries suffered by the plaintiff when the ladder collapsed.

3. Defenses to Loescher *Liability*

Although *Loescher* strict liability is based on a vice or defect in a thing over which the defendant has garde, there are defenses which the defendant may assert which will defeat recovery. *Loescher* itself sets out that the three defenses to *Loescher* strict liability are victim fault, fault of a third party, and force majeure.[14]

There has been great debate about the type of conduct which will qualify as victim fault, as seen in *Dorry v. Lafleur*,[15] which held that ordinary contributory negligence would satisfy the requirement. The United States Fifth Circuit Court of Appeals, in *Hyde v. Chevron U.S.A., Inc.*,[16] reviewed *Dorry* and adopted its holding that contributory negligence does qualify as a victim fault defense to *Loescher* liability.

A second defense which may allow a defendant to escape *Loescher* strict liability is third party fault. Third party fault was definitively explained in *Olsen v. Shell Oil Co.*,[17] which held that in order for the fault of a third party to relieve a primary defendant of liability, the

11. 383 So. 2d 111 (La. App. 3d Cir. 1980). See also Arceneaux v. Domingue, 365 So. 2d 1330 (La. 1978).
12. Rozell v. Louisiana Animal Breeders Co-op, 434 So. 2d 404 (La. 1983).
13. Ross v. La Coste de Monterville, 502 So. 2d 1026 (La. 1987).
14. 324 So. 2d at 447.
15. 399 So. 2d 559 (La. 1981).
16. 697 F.2d 617 (5th Cir. 1983).
17. 365 So. 2d 1285 (La. 1978).

fault must be one-hundred percent of the cause of the damage, for then there could be no causal relationship between the defendant and the damage at all. It should be noted parenthetically that proof of those causal relationships would result in exoneration of the primary defendant whether or not it were captioned "third party fault" because in any tort suit, the showing of one-hundred percent causation in another person will *a fortiori* relieve the primary defendant of liability, since no causation at all can be attributed to him. This raises the further question of whether evidence of causation by another party may be introduced even though third party fault is not pleaded as an affirmative defense. The evidence should be admissible in rebuttal-contradiction of plaintiff's allegations of material fact constituting causation.[18]

Another defense which may be raised to preclude a finding of strict liability under *Loescher* is force majeure or act of God. The defense of force majeure is illustrated in the case of a tree blown over in a high wind, which the court classified as force majeure or an act of God, and which operated to relieve the owner of the tree of liability.[19] One may speculate, although it has not been raised in a case, that if a basis existed to apportion the cause of the damage between the force majeure and the primary defendant there would be no exoneration under the rule of *Olsen* (i.e., if third party fault is not the sole cause, then defendant, for that reason, is not exonerated). It would appear that third party fault and an act of God should be applied in a parallel fashion, so that the act of God would be required to be one-hundred percent of the cause of the harm, otherwise the defendant would bear liability.

4. Comparative Negligence

Numerous cases have applied comparative negligence to *Loescher* liability cases involving victim fault in the form of contributory negligence.[20] This is an entirely logical application of comparative negligence which follows from the finding in *Dorry* that contributory negligence satisfies victim fault under Civil Code article 2323, since article 2323 applies comparative negligence "when contributory negligence is applicable." It follows that victim fault in the form of contributory negligence is properly subject to comparative.

Courts have acknowledged since the beginning of the *Loescher* line of cases that assumption of risk is a proper defense to *Loescher* liability. Indeed, some cases indicate that certain members of the supreme court

18. Keller v. Amedeo, No. 87-0444, slip op. (La. Sept. 9, 1987).

19. Kirsch v. Kappa Alpha Order, 373 So. 2d 775 (La. App. 3d Cir. 1979).

20. LaJaunie v. Metro Property & Liability Ins., 481 So. 2d 1357 (La. App. 1st Cir. 1985).

felt that assumption of risk was the only defense qualifying as victim fault,[21] and comparative negligence has been applied to assumption of risk defenses in some *Loescher*-type cases.[22]

In *Bell v. Jet Wheel Blast*,[23] which was written ostensibly on products liability, the court dealt in very broad terms with the defense available in strict products liability and construed the Civil Code provisions broadly enough so that the language in *Bell* can easily be interpreted to apply not only to products cases but to all cases in which comparative fault might be applicable. The *Bell* opinion put both negligence and assumption of risk under the comparative fault principle and it seemed entirely logical that the holding in Bell would be applicable to *Loescher* strict liability as well. The Louisiana First Circuit Court of Appeal so found in *Aguillard*,[24] but some doubt has been raised by other opinions.[25] It seems to this writer that *Bell* settled the matter and that contributory negligence and assumption of risk are both subject to the comparative fault principle, whether in *Loescher* liability, strict products liability, or negligence.

Bell also set up what amounts to an ad hoc application of victim fault.[26] The same ad hoc scheme was adopted for *Loescher* liability in *Landry v. State*.[27] Under that scheme, the court, before applying comparative negligence, must determine whether the application of the victim fault defense in the case before the court will act to deter future victims from being careless and whether it will deter or encourage future defendants in the creation of dangerous conditions. It appears that the determination of the applicability of contributory negligence should be made by the court, not the jury, at the outset of trial in order to have uniformity of the law in that regard, which would not be true if each jury made the determination anew in every case.

Products Liability

While there were earlier rumblings of the approach of strict products liability, Louisiana was without a comprehensive scheme until the writing of *Weber v. Fidelity & Casualty Insurance Co.*[28] in 1971 by the late Justice Albert Tate. In *Weber*, the court considered the existing products

21. Hebert v. Maryland Casualty Co., 369 So. 2d 708 (La. 1979) (Tate, J., concurring in the denial).

22. See Aguillard v. Langlois, 471 So. 2d 1011 (La. App. 1st Cir. 1985).

23. 462 So. 2d 166 (La. 1985).

24. 471 So. 2d at 1015-16.

25. Goutierrez v. R & J Quarterhorse Stables, 509 So. 2d 551 (La. App. 3d Cir. 1987); Brown v. Harlan, 468 So. 2d 723 (La. App. 5th Cir. 1985).

26. 462 So. 2d at 171-72.

27. 495 So. 2d 1284 (La. 1986).

28. 250 So. 2d 754 (La. 1971).

liability jurisprudence from around the country and adopted a short definitive statement concluding that such liability is based upon harm caused by the condition of a product rendering it unreasonably dangerous to normal use, the condition having existed in the hands of the manufacturer. The *Weber* opinion clearly put traditional negligence, or failure to use reasonable care, outside the scheme of strict products liability.[29]

The phrase "unreasonably dangerous" is ultimately founded upon the balancing process, which is also the foundation of the *Loescher* doctrine, and of the basic notion of negligence itself. While the appellate courts may take the balancing process apart with a scalpel and evaluate it with the very finest measuring devices, the term "unreasonably dangerous" can be applied by a lay jury without further explanation, as is the case in many jurisdictions. The balancing process is brought into sharpest focus in design cases, where historically the courts have been reluctant to impose what would result in absolute liability if the manufacturer were not exonerated for having made a reasonable design choice.

The "normal use" terminology has come to mean any foreseeable use or misuse.[30] If the use is foreseeable, it is within the duty of the manufacturer to guard against harm from that use when the thing is in an unreasonably dangerous condition.

There is of course a large difference between the "policy" foreseeability and the foreseeability which arises from actual knowledge. It should be noted that liability does not follow from foreseeability alone. Many bizarre misuses or uses of a product are certainly foreseeable, but it is for the appellate court to determine whether the manufacturer bears the financial responsibility for those bizarre uses. Typically, if the court decides that the manufacturer is not to bear the responsibility, then it would simply be held that the use is not foreseeable.

The terms "misuse" and "abnormal use" must be distinguished. The term "misuse" evolved in the common-law jurisdictions as a means of avoiding the prohibition against applying contributory negligence to action in strict liability. In the noted case of *Codling v. Paglia*,[31] the court in New York noted that while a finding of contributory negligence would have defeated the claim, that this defense was doctrinally unattainable in an action based on strict liability. Therefore, the court simply

29. The *Weber* case is as interesting as a study of evidence and logical inference as it is for the origins of Louisiana products liability theory. In *Weber* a farmer's cattle died after they were treated with defendant's arsenic dip at the hands of the farmer's sons. The dip was unavailable for chemical analysis and the court concluded that the most reasonable inference was that since the cattle died with the dip in normal use, the dip must have been defective.

30. Bloxom v. Bloxom, No. 86-2108, slip op. (La. Sept. 9, 1987).

31. 298 N.E. 2d 622 (N.Y. 1973).

made available the characterization of "misuse" as faulty conduct attributable to the plaintiff and weighing against his claim, and which would serve the same purpose as contributory negligence. On the other hand, an abnormal use is one that is not a "normal use" and lies beyond the scope of the manufacturer's duty.

There are important practical consequences that flow from the correct classification of "misuse," as opposed to "abnormal use," for not all defensive responses are affirmative defenses in the proper sense.[32] Properly analyzed, "abnormal use" amounts to a finding of non-defect, or non-unreasonably dangerous, since it is a use that the manufacturer simply had no duty to protect against. It is not an affirmative defense, but simply a rebuttal or contradiction of normal use as an essential element of plaintiff's prima facie case. But if "misuse" is being applied as a substitute for contributory negligence, then "misuse" is an affirmative defense, which must be pleaded and proved by the defendants. Likewise, the affirmative defense of "misuse" does not defeat, but only diminishes, the plaintiff's claim, whereas a finding of "abnormal use" would be the complete rebuttal of plaintiff's cause of action and would result in no recovery by plaintiff whatsoever. With the advent of comparative negligence, the distinction between the terms becomes crucial, because it makes the difference between the defeat of the plaintiff's case in its entirety and the mere diminution of his recovery.

Defenses to Strict Products Liability

For fourteen years the Louisiana Supreme Court remained silent about the proper defenses for strict products liability. Numerous court of appeal decisions discussed contributory negligence, and on occasion applied assumption of risk, but not until *Bell v. Jet Wheel Blast*[33] was the question settled. The *Bell* opinion converted traditional contributory negligence into comparative negligence and merged assumption of risk with it, along with misuse. However, there was an innovation introduced when the court announced that these defenses would not be applicable in a case where the effects of applying them would not beneficially influence the conduct of other consumers in similar circumstances, nor would they be applied where the absence of liability might encourage manufacturers to continue turning out unreasonably dangerous products. As noted above, it seems that in order to have consistency and uniformity in the law, the question of whether comparative negligence applies in a given products case is to be determined at the outset by the court, not by the jury.

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32. La. Code Civ. P. art. 1005; see also Keller v. Amedeo, No. 87-0464, slip op. (La. Sept. 9, 1987).

33. 462 So. 2d 166 (La. 1985).

The Halphen *Case*

In 1986, the Louisiana Supreme Court, in *Halphen v. Johns-Manville Sales Corp.*,[34] outlined the theories of recovery for an action based on strict products liability. A casual reading of the *Halphen* opinion would lead one to say that little has changed since *Weber*, except for the introduction of the concept of "unreasonably dangerous per se." A closer reading shows that the standards for a finding of "unreasonably dangerous to normal use" have been changed from the balancing process to a relative test, or a test by comparison of the product in question with other products on the market.

The words themselves of the *Halphen* opinion portray the "per se" category simply as a streamlined mode of trial that precludes introduction of evidence of knowledge or reasonable development of the products. While there is no language in the opinion to support the view, it has been speculated that the category is reserved for super-dangerous products, so that unreasonably dangerous per se describes a high degree of dangerousness, and, eventually, various products could be classified as such and become irrevocably a member of this deplorable species. The Louisiana Third Circuit Court of Appeal in *Brown v. Sears Roebuck & Co.*[35] did exactly that. The supreme court granted writs, but the opinion as of this writing has not been handed down, and we must await what may be an explanation of the per se category.

As the opinion in *Halphen* points out, the scheme of products liability therein adopted was announced principally by Professor W. Page Keeton of the University of Texas Law School, set forth in his law review articles and perpetuated in the Prosser and Keeton hornbook on torts.[36] There is thus little jurisprudence, in fact none, to furnish guidance in this analytical structure. Louisiana is the pioneer, and in truth our source of guidance is no more than the very fully written *Halphen* opinion itself.

Toups v. Sears Roebuck & Co.[37] is the most significant case as of this writing to come from the supreme court under the *Halphen* structure. The presence of *Halphen* in our jurisprudence made little difference in the *Toups* opinion itself, which is more remarkable as an example of appellate review of fact than as an analysis of liability based on a failure to warn.

The *Toups* court found that Sears was liable for the burns inflicted upon a young boy who suffered his injuries when a flame burst upon him in a shed containing both the hot water heater and a can of gasoline

34. Halphen v. Johns-Manville Sales Corp., 484 So. 2d 110 (La. 1986).
35. 503 So. 2d 1122 (La. App. 3d Cir. 1987).
36. Prosser & Keeton on Torts, § 99 at 699, n.31 (5th ed. 1984).
37. 507 So. 2d 809 (La. 1987).

stored nearby. Although the jury and the court of appeal had found in favor of the defendant, the supreme court pointed out errors in the instructions to the jury and in the failure to admit evidence as to subsequent warnings, and then gave judgment from the bench for the plaintiff and remanded to the court of appeal to fix damages. It is implicit in the rendering of judgment from the bench that the court was of the opinion that the jury could not have found other than for the plaintiff, under the evidence properly admitted and under charges properly given. In other words, it would have been error for the trial court to refuse a directed verdict for the plaintiff, or, at the close of the entire trial, it would have been similar error to refuse a motion for judgment notwithstanding the verdict in favor of the plaintiff.

It is doubtful that the application of traditional standards for the granting of directed verdicts or motions for judgment notwithstanding the verdict[38] would have resulted in judgment for plaintiff in the *Toups* case under the evidence portrayed in the opinion. A jury within its province certainly could have found that even without the subsequent warning, there had been no compelling showing to them that a hot water heater is unreasonably dangerous because its pilot flame ignites the vapors from a can of gasoline stored nearby; or it could have found that even with another warning, the accident still would have occurred.

At the heart of the *Toups* opinion is the presumption that if a proper warning had been given, it would have been read and heeded, and the accident thus avoided. *Bloxom v. Bloxom*,[39] rendered on September 9, 1987, shows that this presumption is rebuttable when "an adequate warning or instruction would have been futile under the circumstances."

Civil Code Articles 667-669

The Civil Code provides in article 667 that one should not cause damage to neighboring property. The courts have held a proprietor strictly liable under this article for damage inflicted upon a neighbor only when the activity causing the damage was ultrahazardous in nature.[40] The breach of the duty imposed by article 667 constitutes fault, cognizable under article 2315, which in turn requires that an obligation be imposed to repair the harm.[41] If the harm can be classified as an inconvenience, rather than damage, then Civil Code article 668 provides that it is not actionable.

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38. La. Code Civ. P. art. 1811.
39. No. 86-2108, slip op. (La. Sept. 9, 1987).
40. 4 A. Yiannopoulas, Louisiana Civil Law Treatise, § 50, at 141.
41. Langlois v. Allied Chem. Corp., 258 La. 1067, 249 So. 2d 133 (1971).

1. Land-Based Activity Required Under Article 667

While article 667 imposes liability for harm caused by an ultrahazardous activity, the courts have made it clear that an ultrahazardous activity separate and apart from land is not a source of strict liability in Louisiana.[42] This refinement of our tort doctrine was brought clearly into focus when, in two recent cases, liability for the providing of handguns was sought to be based upon strict liability for an ultrahazardous activity (the indiscriminate distribution of the guns).[43] The courts held that in Louisiana, ultrahazardous activities must be land-connected to give rise to strict liability.

2. Proprietor's Duty is Non-Delegable Under Article 667

Liability under article 667 for ultrahazardous activity appears to be grounded in the defendant's ownership of the property on which the activity was done. Therefore the proprietor may not interpose his independent contractor to escape liability for the harm caused to a neighbor by the independent contractor's activity; i.e., the duty of the proprietor is non-delegable.[44] While there is some language to the contrary, the majority of the cases do not apply article 667 to the independent contractor himself, since he is not a proprietor. Also the standard of care applicable to the contractor is drawn from the rules governing the activity in which the contractor was engaged at the time he inflicted the harm.[45]

3. Contributory Negligence is Inapplicable Under Article 667

The Louisiana Supreme Court has clearly excluded contributory negligence as a defense to article 667 liability.[46] It has with equal clarity recognized assumption of risk as a valid defense.[47] It can be reasoned that the liability under article 667 is a form of enterprise liability and, hence, different in kind from the strict liability of *Loescher* or *Weber-Halphen*. Therefore, it would seem inappropriate to change the rule of non-applicability as to contributory negligence on the grounds that the advent of comparative negligence should render contributory negligence no longer an absolute bar. Indeed, the present language of Civil Code article 2323, invoking comparative negligence "when contributory neg-

42. Perkins v. F.I.E. Corp., 762 F.2d 1250 (5th Cir. 1985); Strickland v. Fowler, 499 So. 2d 199 (La. App. 2d Cir. 1986).

43. Id.

44. Yiannopoulas, supra note 38, § 46.

45. Id.

46. Langlois v. Allied Chem. Corp., 258 La. 1067, 249 So. 2d 133 (1971).

47. Id.

ligence is applicable," seems to be precisely tailored to fit the article 667 action, in which contributory negligence is not applicable. The excellent analysis of the relative degree of reprehensibility of activity set forth by Judge Federoff in *Dorry v. Lafleur*[48] bolsters this reasoning, and *Dorry* may, in fact, be a complete set of reasons to reach this conclusion.

4. Nuisance Under Article 669

When the harm caused is to non-neighboring property, the provisions of Civil Code article 669 may be invoked.[49] There is no requirement that an ultrahazardous activity be found, and the article is used to provide in Louisiana the relief that is founded upon the common-law action of nuisance in other jurisdictions.

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48. 399 So. 2d 559 (La. 1981).
49. Yiannopoulas, supra note 38, §§ 53-65.