Louisiana Law Review

Volume 49 | Number 2
Developments in the Law, 1987-1988: A Faculty Symposium
November 1988

Torts

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TORTS

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*Products Liability***

The "Louisiana Products Liability Act" (the Act) was enacted by Act 64 of 1988 and was codified as Louisiana Revised Statutes 9:2800.51 through 2800.59. The Act sets forth the exclusive theories of liability that can be brought against manufacturers for damage caused by their products.[1] Therefore, recovery for damages caused by a product in an ordinary negligence or redhibition action is precluded.

Circumstances or conduct that will trigger liability of a manufacturer under the Act constitute fault under Louisiana Civil Code article 2315,[2] so that the products action against the manufacturer continues to be in tort. Thus, all the peripheral characteristics of tort actions not specifically governed by the Act continue to be applicable, such as comparative fault, contribution, indemnity, judicial interest, cause-in-fact, proximate cause, in solido liability, and others not inconsistent with the specific provisions of the Act.

Superficially, the cause of action established by the Act[3] sounds very similar to the traditional products liability cause of action first stated in *Weber v. Fidelity & Casualty Insurance Co.*[4] However, upon close analysis of the elements of the cause of action, it becomes evident that significant changes have been effected in the law of products liability as set forth under *Weber* and *Halphen v. Johns-Manville Sales Corp.*[5] For example, under the Act the damage occasioned by the product must have arisen out of its "reasonably anticipated use,"[6] instead of "normal use." The new term is specifically defined in the Act and suggests a more restrictive scope of liability than would have attached under the "normal use" or "foreseeable use" provision.

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** This commentary will be brief since the Act will be covered thoroughly in a lead article in a forthcoming issue of this law review.

1. La. R.S. 9:2800.52, as enacted by 1988 La. Acts No. 64.
2. Id.
3. La. R.S. 9:2800.54, as enacted by 1988 La. Acts No. 64.
4. 259 La. 599, 250 So. 2d 754 (1971).
5. 484 So. 2d 110 (La. 1986).
6. La. R.S. 9:2800.53(7), as enacted by 1988 La. Acts No. 64.

The new cause of action is comprised of four theories of liability: construction or composition, design, warning, and express warranty.[7] The warning and construction or composition theories have remained substantially the same as the *Weber* and *Halphen* actions.[8]

However, the action in design has changed substantially. It now requires the plaintiff to show an *existing* alternative design, which was developed and in being at the time the product left the manufacturer's control, that could have prevented the claimant's damage.[9] Under section 2800.59 A(3) the defendant may defeat liability by showing that the existing alternative design was not feasible or economically practicable. The defendant may also escape liability by showing that he did not know and in light of existing technology could not have known of the alternative design established by the plaintiff.[10] This is the traditional state-of-the-art defense.

The most significant change in products liability law effected by the Act is in section 2800.59 A(1): the manufacturer shall not be liable if he did not know and in light of existing technology could not have known of the dangerous design characteristic that caused the damage. Traditionally, Louisiana jurisprudence has eliminated the foreseeability of risk element in products actions.[11] This provision is apparently a legislative disavowal of that concept. In a sense, proof by the manufacturer under this provision simply trumps the plaintiff's action in design. The structure of the Act and the plain wording of the provision allows the manufacturer to take this line of defense and defeat liability entirely.

Section 2800.59 A(1) apparently has its origin in *Halphen*, in which the court stated, "[D]iscouragement to produce new products or to discover safety improvements will be mitigated by the manufacturer's ability to defend failure to warn cases, alternative design cases and alternative product cases on the basis of scientific unknowability and inability."[12] The Act, in the *Halphen* tradition, clearly rejects the notion that the essential element of strict liability is the irrelevance of foreseeability of risk. The more practical characterization of the distinction between actions in strict liability and negligence is that a general showing of reasonable care is not a defense to the action in strict liability. This distinction remains unchanged by the Act, even though reasonable care is the particular standard for providing adequate warnings.

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7. La. R.S. 9:2800.54 B, as enacted by 1988 La. Acts No. 64.
8. *Weber*, 259 La. 599, 250 So. 2d 754; *Halphen*, 484 So. 2d 110.
9. La. R.S. 9:2800.56, as enacted by 1988 La. Acts No. 64.
10. La. R.S. 9:2800.59 A (2), as enacted by 1988 La. Acts No. 64.
11. *Halphen*, 484 So. 2d at 113.
12. Id. at 118.

The Act's express warranty theory of recovery is self-contained and distinct from the general express warranty action found in the Civil Code.[13] It is possible that jurisprudence under the Code warranty action may be relevant. However, since the theory of express warranty is now one of the exclusive theories of recovery in products liability, the definition of express warranty in the Act, particularly with respect to the allowance of recovery in cases where the express warranty was made to a third party, must be derived solely from the Act's provisions.

There seems to be no reason why Louisiana's existing comparative fault system, whether under *Bell v. Jet Wheel Blast*[14] or Civil Code article 2323, should not continue to apply to actions under the Act, since under the pre-Act jurisprudence the action against a manufacturer was a form of fault under Article 2315, and remains so in the Act.

The opinion in *Ardoin v. Hartford Accident and Indemnity Co.*[15] creates the prospect that the Act is retroactive. In brief, *Ardoin* states that if a statute neither creates actions nor abolishes them, but only changes the burden of proof, then it is procedural, and therefore retroactive in effect. Prior to the Act there existed an action against manufacturers for damage proximately caused by their unreasonably dangerous products, and under the Act that action continues to exist, though it is subject to different requirements of proof on the part of the plaintiff. In that light, the Act is retroactive. There would, of course, be the traditional inquiry into legislative intent, including a review of the committee hearings on the bill. Such a review will show a considerable amount of discussion concerning the prospective or retroactive effect of the bill. But the final outcome must await the actual transcription of those proceedings, allowing for an evaluation of the legislative intent revealed as measured against the actual form in which the bill was ultimately adopted.

The provisions of the Act were derived substantially from House Bill 711 in the 1983 Regular Session, which was the Louisiana State Law Institute proposal for a Products Liability Act in that year. Although the elaborate comments contained in the Institute's proposal are not, strictly speaking, legislative antecedents, they should nonetheless prove very helpful in interpreting the provisions of the Act.

Civil Code Article 667

Butler v. Baber[16] may have effected deep and significant changes in the recent jurisprudential application of Louisiana Civil Code article

13. La. Civ. Code arts. 2529, 2547.
14. 462 So. 2d 166 (La. 1985).
15. 360 So. 2d 1331 (La. 1978).
16. 529 So. 2d 374 (La. 1988).

667. Generally, the effect of having an action under article 667 was very desirable to a plaintiff because it gave him the advantage of the burden of proof in a strict liability action. The application of article 667 was, however, not only restricted to adjoining land owners, but was further restricted to damage-causing activities classified as ultrahazardous. The strict liability character of the action thus was consonant with the common law strict liability action for abnormally dangerous activities. It is difficult to find clear examples in Louisiana jurisprudence where strict liability under article 667 was applied to non-ultrahazardous activity. This does not mean that damage from a non-ultrahazardous activity was non-actionable, but instead means that the activity was subject to a negligence standard of care, which, apart from the provisions of article 667, was the standard ordinarily associated with such activity.

Under *Butler*, the literal language of the opinion indicates that article 667 liability should attach without proof of negligence fault, requiring only that damage and causation be proved. While the court points out that the damage resulted from defendant's dredging operations, there is no suggestion in the opinion that the dredging operation was ultrahazardous. If liability without fault extends to any activity on property that damages the neighboring property, anomalous results will occur. The neighbor spray painting his house with all due care who, nonetheless, allows spray to drift to his neighbors house and cause damage, is strictly liable, or liable without fault, or liable without negligence fault. A stranger spray painting his automobile parked in the street, not on his own property, whose paint also drifted to the unfortunate victim's property, would be liable only if negligence were proved.

There is no apparent societal need to apply liability without fault to the ordinary activities of man that have not been classified as ultrahazardous, things found to import an unreasonable risk of harm under *Loescher v. Parr*.[17] The rule of *Butler* will apply not only in the oil fields, but among all neighboring properties, whether suburbia or farmland. While it is possible that the court seeks to impose liability without fault upon all ordinary activities in those environments, it is hoped that the fabric of strict liability will not be woven to stretch so far.

Comparative Fault-Assumption Of Risk

Murray v. Ramada Inns, Inc.[18] abolishes the theory of assumption of risk and seems to establish comparative fault, which encompasses both contributory negligence and those circumstances formerly com-

17. 324 So. 2d 441 (La. 1975).
18. 521 So. 2d 1123 (La. 1988).

prising assumption of risk, as the sole theory of victim conduct that reduces recovery. However, it is difficult to abolish a state of mind. The state of mind constituting traditional assumption of risk is clearly distinguishable factually from the state of mind and circumstances constituting negligence. In order to find assumption of risk, the trier of fact always has been required to step across a sharp line to infer that the plaintiff had a subjective awareness of a risk he was voluntarily embracing. That factual distinction will persist even though the *Murray* opinion has summarily abolished the legal theory resting upon it.

A better approach may have been to retain the theory of assumption of risk, but to classify the plaintiffs who assume the risk as negligent, and thus invoke the effect of comparative fault. The value of that scheme would lie in the candor of pleading facts constituting the affirmative defense of comparative fault. The bald caption of comparative fault will be of no effect when pleaded by a defendant unless it is supported by facts that will invoke the doctrine of comparative fault. Those facts must constitute either contributory negligence or assumption of risk, since those two theories remain as the only species of plaintiff fault cognizable as comparative fault, even victim fault, as set forth in *Loescher v. Parr*.[19] The states of mind required for the two theories are clearly distinct from each other.

The *Murray* opinion does point out that the plaintiff's awareness of the impending risk may be a relevant factor in the assessment of the relative weights of plaintiff and defendant fault as set forth in *Watson v. State Farm Fire & Casualty Insurance Co.*[20] While the scheme set forth in *Murray* is perhaps analytically useful to Louisiana's fact-reviewing appellate judiciary, the retention of assumption of risk as a question of fact, with its legal consequences under comparative fault, would have been easier for the practicing bar, the trial court, and the jury to administer.

Howard v. Allstate Insurance Co.,[21] indicates that culpability under the *Loescher*-style strict liability is different in kind from culpability accompanying contributory negligence and, hence, is insusceptible of comparison for comparative fault purposes. *Howard* requires that in such disparate culpability cases the jury must compare causation rather than fault. The opinion cites provisions of the Uniform Comparative Fault Act[22] as the source of such a comparison. This Act admonishes that the trier of fact should always consider both causation and fault

19. 324 So. 2d 441.

20. 469 So. 2d 967 (La. 1985).

21. 520 So. 2d 715 (La. 1988).

22. Adopted by the National Conference of Commissioners on Uniform State Laws in 1977.

in comparing culpability because it is intellectually impossible to separate the two for the purpose of allocating responsibility to the various parties.

It seems theoretically impossible for a party to be only sixty percent negligent. Negligence ought to be a character of fault that is entered into and achieved wholly or not at all. If one is said to be sixty percent negligent, we might also say he is very nearly at fault. On the other hand, as between a wrong-turning motorist and a non-observant oncoming motorist, it is apparent that each is one hundred percent negligent, but that each in some factually determinable degree shared in the causation. Thus, realistically, it is the causation that should be apportioned between the two, not the fault.

Whether fortuitously or through uncanny prescience, the redactors of Code of Civil Procedure article 1812(C)(1), (2) and (3) covered, in a very practicable sense, the possibilities for the juries. The article provides that the jury should find whether a party was at fault, and if they were, whether such fault was a legal cause of the damage. It further provides that the degree of fault should be expressed in a percentage. Even though the article calls for the degree of fault as a percentage, the evaluation of whether such fault was a legal cause probably blends these two concepts in the jury's mind.