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Torts

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Products Liability

On August 13, 1990, the United States Court of Appeals, Fifth Circuit, issued its opinion[1] holding that the Louisiana Products Liability Act[2] is, in part, retroactive. The case was before the appeals court to review the granting by the district court of a summary judgment in favor of the manufacturer defendant.

Plaintiff employee suffered severe injuries to his hands during the course of his employment while working with an electric powered industrial press owned by his employer and manufactured by the defendant, Niagara. The press was manufactured by Niagara about 1966, and was purchased in used condition in 1978 by plaintiff's employer. Plaintiff stated, as his cause of action against Niagara, that the press lacked a proper safeguard and was therefore defectively designed. Niagara met the complaint with a motion for summary judgment accompanied by affidavits alleging that it was not possible for them to have provided a safeguard suitable for all the possible applications of the press.

The first summary judgment was denied, but a supplemental motion was granted, the district court relying upon a new memorandum of authorities setting forth recent applicable Louisiana jurisprudence. Plaintiff's responsive affidavits principally set forth the notion that Niagara could have designed and installed a safeguard that would have been effective in 85% of the possible applications of the press, and that the technology necessary for doing this had been available to Niagara prior to the manufacture of the press.

A substantial part of the opinion concerns itself with the procedural complications of an original motion for summary judgment, a reconsideration of the original motion with supplemental material offered on the reconsideration, and the receiving and considering of supplemental affidavits filed by plaintiff after rulings had been handed down on mover's motion for summary judgment.

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1. Lavespere v. Niagara Mach. & Tool Works, Inc., No. 89-4208 (5th Cir. August 13, 1990) (rehearing pending).

2. La. R.S. 9:2800.51-.59 (Supp. 1990) [hereinafter Act].

As to the substantive law applied in the opinion, the court acknowledged that the products liability law of Louisiana in force at the time of the injury was that set out in *Halphen v. Johns-Manville Sales Corp.*[3] The court correctly concluded that the plaintiff was proceeding on the *Halphen* theory of recovery for defective design, i.e., that there was a feasible way to design the product with less harmful consequences.[4]

The court noted that *Halphen* was silent regarding the necessity for including the risk-utility balancing test in a determination of feasibility of alternative design. However, the Fifth Circuit doubted that the Louisiana Supreme Court could in good conscience have intended a viable defective design theory without including the balancing test even though the test was not provided for by the *Halphen* court. The court noted in the central issue, however, that while the balancing test was surely an integral part of the *Halphen* theory of action for defective design, there was no guidance from the *Halphen* opinion as to whether plaintiff or defendant bore the burden as to the test.

The court then noted the arrival of the Act and its explicit requirements that specifically placed on the plaintiff the burden of proving that an alternative design was *in existence* and that the balancing test favored the alternative design, i.e., that the risk avoided by use of the alternative design exceeded the burden upon the manufacturer of adopting the alternative design. The court observed that plaintiff's affidavits were devoid of evidence bearing upon the risk-utility test, so it became imperative to determine whether the law governing the case was the law of *Halphen*, which was silent on the subject, or the Act, which specifically placed that burden on the plaintiff.

After reference to the appropriate authorities in the Louisiana Civil Code and taking note of the legislative history of the Act, the court concluded that the only change for the design theory of action under the Act was as to the burden of proof, which is traditionally classified as a procedural matter, so that the prevailing law in Louisiana gave retroactive effect to the legislation. Thus defendant's motion for summary judgment was properly granted because the plaintiff's opposing affidavits failed to contain any evidence bearing on a crucial element of the burden of proof in his case.

The intriguing speculation raised by the opinion is the extent to which the rest of the Act is retroactive, considering the very precise and thorough reasoning employed by the court in reaching its conclusion of retroactivity in the case before it based upon the procedural character of the change of the burden of proof in the design theory of recovery.

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3. 484 So. 2d 110 (La. 1986).
4. Id. at 115.

There is ample jurisprudence to find the other theories of recovery retroactive or to find the entire Act itself retroactive, as shown by the law review comment[5] cited in *Lavespere* and inquiring into the retroactivity vel non of the Act. The comment makes the interesting point that the Act is interpretive legislation supplanting judicial theories of recovery set forth in *Halphen*, and thus falls into a well-established retroactive class. This theory is based on the premise that *Weber v. Fidelity & Casualty Insurance Co.*[6] and *Halphen* are simply judicial interpretations of Article 2315 which sets forth the basic cause of action in tort in Louisiana. Several Louisiana Supreme Court cases hold that legislation of this interpretive nature, correcting jurisprudential pronouncements, is to be given retroactive effect. The Act is very susceptible of this view since it explicitly provides that circumstances giving rise to liability under the Act are to be construed as "fault" under Louisiana Civil Code article 2315.

In the face of such an argument for retroactivity is the complaint that it would destroy vested substantive rights. The comment cited in *Lavespere* points to Louisiana Supreme Court jurisprudence holding that the elimination of a judicially-created rule does not destroy such rights because civilian theory provides that the rights must arise from the legislature. Rights arising from erroneous judicial interpretation are not of such dignity as to have protection against subsequent corrective legislation.[7] There is clear authority that a claim ex delicto does not become a vested right until reduced to judgment.[8]

It has been accepted without question that a new statement of law in judicial opinion is retroactive,[9] on the theory that it declares what the law always has been; hence, the very considerable changes in Louisiana law, particularly since the strict liability explosion beginning with *Loescher v. Parr*,[10] changed the outcome of cases already submitted for decision, even on appeal,[11] from what would have obtained under the prior jurisprudence. The retroactive effect of *Lavespere*, or the effect

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5. Comment, Retroactive Application of the Louisiana Products Liability Act: A Civilian Analysis, 49 La. L. Rev. 939, 950-51 (1989).

6. 259 La. 599, 250 So. 2d 754 (1971).

7. Comment, supra note 5, at 951-53.

8. Bernard v. State ex rel Dept. of Transp. and Dev., 563 So. 2d 282, 288 (La. App. 4th Cir. 1990) (on rehearing); Norton v. Crescent City Ice Mfg. Co., 178 La. 135, 146, 150 So. 855, 858 (1933) ("and there can be no vested right on a claim for damages ex delicto until judgment is rendered thereon.").

9. *Norton*, 178 La. at 146, 150 So. at 858. This case also says that there is no vested right in a claim *ex delicto* until judgment is rendered on the claim.

10. 324 So. 2d 441 (La. 1975).

11. See, e.g., Butler v. Baber, 529 So. 2d 374 (La. 1988), announcing new rule of absolute liability under La. Civ. Code art. 667, and holding defendant liable under new rule of law.

of holding the whole Act to be retroactive, would be similar, though in reverse.

Unreasonable Animals

Loescher decreed that the owner of an animal was responsible for harm resulting from the animal's deficient conduct. *Holland v. Buckley*[12] had just announced the strict liability concept, but had not supplied a criterion of conduct or requisite behavior for finding liability. As written in *Holland*, the owner would have been liable for any harm inflicted by an animal regardless of the circumstances or provocation prompting the animal to do harm.

Under *Loescher*, it is obvious that the conduct of the animal must be deficient or unreasonable to support liability. It follows, therefore, that a dog bite in response to sufficient provocation would not be unreasonable canine conduct. One might speculate that a dog has a legally protected interest in dignity and freedom from provocation that could be roughly analogized to the privilege of self-defense in humans.

The supreme court in *Boyer v. Seal*[13] shed further welcome enlightenment on the criterion of unreasonableness. An elderly plaintiff was injured in her daughter's home when the daughter's cat rubbed against plaintiff's leg (as cats will frequently do), causing plaintiff to trip. The supreme court said that the behavior of the cat in either rubbing against the legs of the visitor or in accidentally getting in the way or under foot was not an unreasonable risk of harm. The behavior was "innocuous, especially when compared with other cat-created risks widely tolerated by our society."[14] The court then observed that the determination of unreasonable risks involving cats would be governed by the risk-utility test set forth in *Entrevia v. Hood*.[15]

It is unlikely that the trier of fact, whether judge or jury, would need the rather complex analysis of the risk-utility test to determine whether a cat-created risk was unreasonable. The burden of prevention might be infinitely high if to eliminate the risk of cat-rubbing one must de-program a cat of its most basic feline instincts. As Justice Dennis indicated, a jury should reason no further than to determine whether the conduct causing the harm is usually tolerated or rejected by society, a determination that jurors can make relying upon their ordinary experience in life.

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12. 305 So. 2d 113 (La. 1974).
13. 553 So. 2d 827 (La. 1989).
14. Id. at 835.
15. 427 So. 2d 1146 (La. 1983).