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DEFECTIVE PRODUCTS—VENDOR'S LIABILITY

The principle that one harmed by a defective product may generally recover damages from the manufacturer of the product is well settled in Louisiana.¹ Whether the same plaintiff can recover damages from the vendor of the product is a question with no certain answer.² The purpose of this Note is to illustrate the confused state of Louisiana law concerning the vendor's liability for harm caused by a defective product.

Sale of Foodstuffs

Louisiana Civil Code Article 2545³ limits the vendor's liability for damages to cases where he knows of the defects in the product and fails to disclose them. This obstacle to recovery from the seller was first overcome in the food cases. In *MacLehan v. Loft Candy Stores*,⁴ the court allowed recovery from a manufacturer-vendor of food. Using the articles on redhibition, the court said: "There is an implied warranty in every sale. The vendor guarantees the vendee against the hidden defects of the thing sold."⁵ From this genesis, courts have used the redhibition articles to allow recovery from fabricator-vendors of foodstuffs harmful to consumers.⁶ Courts are aided in such

1. For recovery from manufacturer in tort, see Malone, *Res Ipsa Loquitur and Proof by Inference—A Discussion of the Louisiana Cases*, 4 LA. L. REV. 70 (1941); for recovery from manufacturer in warranty, see Note, 13 LA. L. REV. 624 (1953) (author points out that the requirement of privity in such actions is removed due to the "implied warranty"); Note, 26 LA. L. REV. 447 (1966).

2. The difference between a vendor and manufacturer should be kept in mind:

Vendor: "One that offers goods for sale esp. habitually or as a means of livelihood."

Manufacturer: "One who changes the form of a commodity or who creates a new commodity."

WEBSTER, THIRD NEW INTERNATIONAL DICTIONARY (1961).

3. LA. CIVIL CODE art. 2545 (1870): "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 the expenses, is answerable to the buyer in damages."

4. 172 So. 367 (La. App. Ori. Cir. 1937).

5. *Id.* at 369.

6. Comment, 22 LA. L. REV. 435 (1962); *Deris v. Finest Foods, Inc.*, 198 So.2d 412 (La. App. 4th Cir. 1967), where plaintiff recovered damages for harm resulting from eating a banana split prepared and served by defendant which contained particles of glass. The court cited *Arnaud's Restaurant v. Cotter*, 212 F.2d 833 (5th Cir. 1954), *cert. denied*, 348 U.S. 915 (1955), where it was said: "Under Louisiana law, the proprietor of a public eating place who serves food fabricated by him and containing a foreign substance to a paying guest for immediate consumption on the premises is under an absolute liability for damages proximately resulting from the impurity, under the theory of an implied warranty of fitness." *Id.* at 887.

findings by the jurisprudential rule that a manufacturer is presumed to know the defects of his product.⁷

Whether a vendor of foodstuffs, who is not also the fabricator, will always be held liable is not at all clear. In *Gilbert v. John Gendusa Bakery, Inc.*,⁸ the court allowed recovery by a young boy who bought pre-packaged doughnuts from defendant which contained foreign matter that made him ill. However, in *McCaughey v. Manda Brothers Provisions Co.*,⁹ the court held that a vendor of a pre-packaged barbecue sandwich did not know of the defect in it that caused harm, and therefore allowed no recovery from the seller.

In addition to "implied warranty," courts also have used the mechanisms of tort law to find a seller of food liable, the doctrines and jargon of negligence having been used extensively to allow recovery.¹⁰ Some courts have even implied strict liability of the vendor of foodstuffs though couching the decisions in terms of negligence.¹¹

7. See *Doyle v. Fuerst & Kraemer, Ltd.*, 129 La. 838, 840, 56 So. 906, 907 (1911): "The principle which governs in this case is that every one ought to know the qualities, good or bad, of the things which he fabricates in the exercise of the art, craft, or business of which he makes public profession, 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." See also *LeBlanc v. Louisiana Coca-Cola Bottling Co.*, 221 La. 919, 60 So.2d 873 (1952); *Tuminello v. Mawbry*, 220 La. 733, 57 So.2d 666 (1952); *Givens v. Baton Rouge Coca-Cola Bottling Co.*, 182 So.2d 532 (La. App. 1st Cir. 1966); *Reine v. Baton Rouge Coca-Cola Bottling Co.*, 126 So.2d 635 (La. App. 1st Cir. 1961); *Morrow v. Bunkie Coca-Cola Bottling Co.*, 84 So.2d 851 (La. App. 2d Cir. 1956); *Comment*, 22 LA. L. REV. 535, 537 (1962); *Note*, 13 LA. L. REV. 624, 627 (1953).

8. 144 So.2d 760 (La. App. 4th Cir. 1962).

9. 202 So.2d 492 (La. App. 1st Cir. 1967): "[I]n the absence of negligence or knowledge of the defect or unwholesomeness of the product sold, a retailer of a pre-packaged food product, which is not the manufacturer thereof, sold for public consumption, cannot be held liable for injuries resulting from the consumption thereof.

"We are aware that strict liability has been imposed on retailers in a situation such as this in a great many jurisdictions. See William L. Prosser, 'The Fall of the Citadel,' 50 *Minnesota Law Review* 791. However, in this state, under our civil law regime, we are bound by the legislative provisions relative to such matters." *Id.* at 497.

10. See *Ortego v. Nehi Bottlings Works*, 199 La. 599, 6 So.2d 677 (1942); *Bonura v. Barq's Beverages of Baton Rouge*, 135 So.2d 338 (La. App. 1st Cir. 1961); *Auzenne v. Gulf Public Service Co.*, 181 So. 54 (La. App. 1st Cir. 1938); *Lee v. Smith*, 168 So. 727 (La. App. 1st Cir. 1936); notes 1 and 6 *supra*; *Note*, 26 LA. L. REV. 447 (1966).

11. See *Lee v. Smith*, 168 So. 727, 729 (La. App. 1st Cir. 1936): "There can be no doubt about the strict duty which the law imposes on those engaged in preparing and selling food for human consumption to the public . . ."; *Lartigue v. R. J. Reynolds Tobacco Co.*, 137 F.2d 19 (5th Cir. 1963), *cert. denied*, 375 U.S. 865 (1963): "[I]n Louisiana a manufacturer of

Sale of Other Products

Any trend in the vendor's liability for sale of products other than food is even harder to discern in the Louisiana jurisprudence. Courts in other states began by using the same approach as in the food cases,¹² first to products intended for intimate bodily use, and then to highly dangerous products. In some jurisdictions, any product sold renders the seller strictly liable if the product causes harm.¹³

The Civil Code redhibition articles,¹⁴ requiring vendor's knowledge of the defect, have presented the biggest hurdle in Louisiana to recovery by those harmed by defective products. Because it is extremely difficult to impute knowledge of the defect to the vendor, plaintiffs have relied on tort theories to recover from the seller. Even this method has proved arduous because of plaintiff's problem sustaining the burden of proof. There are indications, however, that the trend in this state is changing.

In cases involving highly dangerous products, Louisiana courts have used tort-negligence language to find a manufacturer-vendor liable for damage caused by the product. In *Hake v. Air Reduction Sales Co.*,¹⁵ the manufacturer-seller of an acetylene gas cylinder was found liable for damages from fire caused by a defect in the cylinder. The basis for recovery was framed in terms of *res ipsa loquitur*. In *Home Gas & Fuel Co. v. Mississippi Tank Co.*,¹⁶ only contributory negligence prevented the plaintiff from recovering from the manufacturer-vendor who was shown to be negligent.

The inception of a trend allowing recovery in Louisiana from the seller of products not inherently dangerous can be

food and cigarettes is strictly liable for foreseeable harm resulting from a defective condition in the product when the consumer uses the product for the purposes for which it was manufactured and marketed." *Id.* at 39; *Gilbert v. John Gendusa Bakery, Inc.*, 144 So.2d 760 (La. App. 4th Cir. 1962).

12. See notes 4-7 *supra* and accompanying text.

13. For an excellent study, see Prosser, *The Fall of the Citadel*, 50 MINN. L. REV. 791 (1966).

14. LA. CIVIL CODE art. 2531 (1870): "The seller who knew not the vices of the thing, is only bound to restore the price, and to reimburse the expenses occasioned by the sale, as well as those incurred for the preservation of the thing, unless the fruits, which the purchaser has drawn from it, be sufficient to satisfy the expenses." See also *id.* art. 2545; note 3 *supra*.

15. 210 La. 810, 28 So.2d 441 (1946).

16. 246 La. 625, 166 So.2d 252 (1964).

inferred from *Nettles v. Forbes Motel, Inc.*¹⁷ There an assembler-retailer of a dressing stool was found liable in tort for damages to plaintiff injured when the stool collapsed while she was standing on it. This type of case is analogous to the fabricator-vendor of foodstuffs, although "implied warranty" was not mentioned as it has been in the food cases. Despite the tort negligence language in these cases, Professor Malone points out that the courts are actually using various clichés to hold the manufacturer-vendor *strictly* liable.¹⁸

Recent Developments

The recent case of *Penn v. Inferno Mfg. Corp.*¹⁹ exemplifies the perplexities of the problem.²⁰ There plaintiff was injured by the explosion of defective glass in a high-pressure gauge, which, although not manufactured by Inferno, carried the Inferno label as a part of gauges which were built by Inferno. Plaintiff timely sued Inferno, thinking it was the manufacturer of the glass, and later, more than a year after the accident, sued the true manufacturer upon learning the true facts. Without the prescriptive provisions of Civil Code Articles 3536 and 2546,²¹ plaintiff undoubtedly had a cause of action against the manufacturer, either on the theory of manufacturer's warranty or in tort.²² Since Inferno was only a vendor, however, the court, to grant recovery, had either to impute knowledge of the defect to it, find it negligent in selling a defective product, or find it strictly liable. Plaintiff gave the First Circuit ample theories on which to ground its opinion. Unfortunately, the court adopted plaintiff's brief without designating which theory it favored.

17. 182 So.2d 572 (La. App. 1st Cir. 1966). See also *Larance v. FMC Corp.*, 192 So.2d 628 (La. App. 2d Cir. 1966), where seller was held liable in *solido* with manufacturer for being derelict in his duty to disseminate instructions that, if used in full strength, product would cause harm.

18. *The Work of the Louisiana Supreme Court for the 1958-1959 Term—Torts*, 20 LA. L. REV. 245 (1960); *Id.* for the 1952-1953 Term, 14 LA. L. REV. 182 (1953); *Id.* for the 1949-1950 Term, 11 LA. L. REV. 186 (1951); *Id.* for the 1946-1947 Term, 8 LA. L. REV. 248 (1948); *Id.* for the 1945-1946 Term, 7 LA. L. REV. 246 (1947).

19. 199 So.2d 210 (La. App. 1st Cir. 1967), *cert. denied*, 202 So.2d 649 (1967).

20. On the prescription issue the court held that prescription running against a tortfeasor who is not sued within one year is interrupted when a co-tortfeasor who is solidarily liable with him has been timely sued.

21. For action in tort: LA. CIVIL CODE art. 3536 (1870): "The following actions are also prescribed by one year: That . . . resulting from offenses or quasi offenses."

For action in redhibition: *Id.* art. 2546: "In this case, the action for redhibition may be commenced at any time, provided a year has not elapsed since the discovery of the vice."

22. See note 1 *supra*.

Plaintiff apparently relied on three main theories. He first contended that Inferno labeled the glasses as its own, thus holding itself out as manufacturer. Second, Inferno was a dealer in the goods, represented itself as manufacturer, and thus should have had knowledge of the defects imputed to it.²³ Third, Inferno supplied the molds in which the glasses were made, thus aiding in the manufacturing process and should have known of the defects, by virtue of the Louisiana doctrine of imputing knowledge of defects to the manufacturer. Perhaps because none of these theories had clear-cut precedents in Louisiana law, the court did not say which was most convincing. No doubt the public policy argument that the law should not encourage the mislabeling of products was as strong as any of the arguments based on warranty or negligence. Yet, courts are very reluctant to admit rendering decisions on such a basis.

Not willing to accept any theory offered by plaintiff, the dissent based its strongest objection to the majority ruling on the code provisions allowing only recovery of price and expenses of the sale from an unknowing vendor. It cited the cases of *Boyd v. J. C. Penney Co.*²⁴ and *Hurley v. J. C. Penney Co.*²⁵ where plaintiffs were denied recovery on the basis of lack of knowledge of the defects by the vendor.

Both the majority and dissent rationales have their followers in Louisiana. Yet, *Penn* is the only Louisiana case found in which a vendor, who was not also a manufacturer or assembler of a product other than food, was held liable for damages resulting from the sale. It can be inferred that there may be a trend developing that will allow a plaintiff to recover from a non-manufacturer/assembler-vendor. This suggestion is predicated on the *Penn* case and dictum in *Meche v. Farmer Drier & Storage Co.*²⁶ stating that the "manufacturer or seller of a product

23. Plaintiff cited 65 C.J.S. *Negligence* § 100(3), at 1106 (1966) and several cases from common law jurisdictions as his authority for his first two contentions.

24. 195 So. 87 (La. App. 1st Cir. 1940). Plaintiff bought dress from defendant which had Penney's trademark on it. Toxic material in dress caused serious rash on plaintiff.

25. 140 So.2d 445 (La. App. 1st Cir. 1962). Defective lawnmower caused injury to plaintiff who sought recovery from defendant since Penney published an instructions manual which it sold with machines.

26. 193 So.2d 807, 811 (La. App. 3d Cir. 1967). The court cited *Smith v. New Orleans & Northeastern R.R.*, 153 So.2d 533, 539 (La. App. 1st Cir. 1963): "The duty of the maker or vendor of an article harmless in kind, but dangerous through defect, has been said to be in general a negative duty, that is, not knowingly so to dispose of the article that it may become a trap to the innocent. . . ."

which involves a risk of injury to the user is liable to any person, who without fault on his part, sustains an injury caused by a defect in the design or manufacture of the article, if the injury might have been reasonably anticipated."

Nevertheless, except in cases of fabricator-vendors of food-stuffs, there is no clear picture in Louisiana as to when the vendor will be held liable for damages caused by a defective product.

Conclusion

It is submitted that the courts or the legislature should adopt a workable rule that will guide vendors in protecting themselves. A start in that direction would be to hold any vendor liable who represents himself as the manufacturer of a product which, if defective, involves an unreasonable risk of harm when used for the foreseeable purpose for which it was intended by a consumer. This rule should apply whether or not the vendor had a part in the manufacturing process. *Penn* can be interpreted to establish this rule. Yet, a more explicit and definitive holding on which to base the standard would be desirable.

John M. Madison, Jr.

THE EFFECT OF A DECLARATION OF HOMESTEAD ON A PRE-EXISTING ORDINARY DEBT

Article XI of the Louisiana Constitution exempts from sale and seizure "the homestead, bona fide, owned by the debtor and occupied by him" consisting of lands and other property to the total value of not more than \$4,000.00.¹ It also provides that the exemption exists, without registration, except in cities having a population of more than 250,000.²

1. LA. CONST. art. XI, § 1, *as amended*, La. Acts 1932, No. 142, adopted Nov. 8, 1932; La. Acts 1938, No. 42, adopted Nov. 8, 1938, provides in part: "There shall be exempt from seizure and sale by any process whatever, except as hereinafter provided, the homestead, bona fide, owned by the debtor and occupied by him, consisting of lands, not exceeding one hundred and sixty (160) acres . . . whether rural or urban, of every head of family, or person having . . . a person or persons dependent on him . . . for support; . . . to the total value of not more than Four Thousand Dollars (\$4,000.00)."

2. LA. CONST. art. XI, § 4, *as amended*, La. Acts 1938, No. 42, adopted Nov. 8, 1938; La. Acts 1952, No. 101, adopted Nov. 4, 1952, provides: "The homestead exemptions herein provided shall exist without registration except