Liability of Innkeepers, Judicial Amendment of Statutes, and Theory-of-the-Case Pleadings: Kraaz v. La Quinta Motor Inns, Inc.

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LIABILITY OF INNKEEPERS, JUDICIAL AMENDMENT OF STATUTES, AND THEORY-OF-THE-CASE PLEADING: Kraaz v. La Quinta Motor Inns, Inc.

Two men approached the seventeen-year-old desk clerk at the La Quinta Motor Inn at 4 a.m. One of them, identifying himself as Benson in room 233, claimed that he had lost his key. The desk clerk handed the man a hotel passkey without making any attempt to verify his identity. With the aid of the passkey, the men entered the room in which Mr. and Mrs. Kraaz were staying and robbed them of $23,000. An elderly security guard slept through the entire event. The Louisiana Supreme Court, in allowing the Kraazes full recovery of the stolen amount, held that Louisiana Civil Code article 2971, which limits the liability of innkeepers to $100 for property lost by their guests, did not apply to an innkeeper's delictual liability. Kraaz v. La Quinta Motor Inns, Inc., 410 So. 2d 1048 (La. 1982).

At first glance, Kraaz appears to be a relatively simple case involving the proper interpretation of article 2971. A recent legislative act, however, has made the Kraaz case part of an interesting pattern of judicial and legislative action and reaction. Additionally, the case forms a part of another more important and disturbing pattern: a retreat in the recent jurisprudence to the use of "theory-of-the-case" pleading.

At common law, innkeepers were considered insurers of the property of their guests. Several articles of the Louisiana Digest of 1808 treated innkeepers similarly. The statutes designated innkeepers as necessary depositaries and held them strictly liable for the loss of their guests' property, regardless of whether such property was actually delivered into their hands. Losses due to "extraordinary violence" were the lone exception to this imposition of strict liability.

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1. LA. CIV. CODE § art. 2971 (as it appeared prior to 1982 La. Acts, No. 382, § 1) read as follows:

   No landlord or innkeeper shall be liable under the provisions of the foregoing six articles to any guests or party of guests occupying the same apartments for any loss sustained by such guests or party of guests by theft or otherwise, in any sum exceeding one hundred dollars, unless by special agreement in writing with the proprietor, manager or lessee of the hotel or inn a greater liability has been contracted for.

   Provided that no guest shall be held bound by the limitation of value established in this Article unless this Article is conspicuously posted in the guest room.


The statutory scheme subsequently was amended to limit the innkeeper's exposure to liability.\textsuperscript{6} One article of the Louisiana Digest of 1808 was reenacted and amended to provide that innkeepers were responsible for the property of their guests which was not delivered into their hands only if the property was delivered into the care of one of their servants.\textsuperscript{7} Two articles, which first appeared in the Revised Civil Code of 1870, grant further relief to innkeepers. Louisiana Civil Code article 2968 requires the innkeeper to provide a safe for valuables and to post notices of its availability. Article 2969 provides that innkeepers who comply with article 2968 will not be liable for the loss of valuables not deposited in the safe unless the loss occurs through their fraud or negligence. In 1912, article 2971 was amended and reenacted to limit the liability of innkeepers for losses sustained by their guests "by theft or otherwise" to $100.

This 1912 amendment to article 2971 was first interpreted in \textit{Pfennig v. Roosevelt Hotel},\textsuperscript{8} in which the plaintiff's $750 fur coat was delivered to a bell boy for shipping and the coat subsequently disappeared. The hotel had provided a safe and had posted the statutorily-required notices. The issue presented was whether the innkeeper was required to prove a lack of negligence on its part in order to obtain the benefits of the statutory limitation. The court, holding that such proof was unnecessary, stated that the provisions of article 2971 "indicated a plain intention that no matter how the loss is occasioned, the limitation is available to the innkeeper."\textsuperscript{9}

The Fourth Circuit Court of Appeal considered the scope of the article 2971 limitation in \textit{Zurich Insurance Co. v. Fairmont Roosevelt Hotel}.\textsuperscript{10} The plaintiff, a fur salesman, brought an action against the hotel to recover the value of fifty-one pieces of fine fur which allegedly were stolen from his hotel room. The salesman contended that the

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\item \textsuperscript{6} Historically, innkeepers were made insurers of their guests' property because travelers were "obliged to rely almost implicitly on the good faith of inn-holders, who might have frequent opportunities of associating with ruffians or pilferers." Profilet v. Hall & Hildreth, 14 La. Ann. 524, 525 (1859). As travel became more common and the value of objects which travelers took with them increased, "the least negligence on [the innkeeper's] part [could] permit the commission of thefts of considerable amount, capable of ruining with a single blow an unfortunate hotel keeper." 2 M. Planiol, \textit{Civil Law Treatise} pt. 2, no. 2222 at 280 (11th ed. La. St. L. Inst. trans. 1959). The statutes regulating the liability of innkeepers were amended to protect innkeepers from exposure to such "excessive risks." \textit{Id. See also} Laubie v. Sonesta Int'l Hotel Corp., 398 So. 2d 1374 (La. 1981).
\item \textsuperscript{7} \textit{La. Digest} of 1808, bk. III, tit. XI, art. 31 was amended and reenacted in 1825 as \textit{La. Civ. Code} art. 2937. This article subsequently was reenacted in 1870 as \textit{La. Civ. Code} art. 2968.
\item \textsuperscript{8} 31 So. 2d 31 (La. App. Orl. 1947).
\item \textsuperscript{9} \textit{Id. at 34.}
\item \textsuperscript{10} 250 So. 2d 94 (La. App. 4th Cir.), \textit{writ denied}, 259 La. 875, 253 So. 2d 213 (1971).
\end{itemize}
innkeeper was grossly negligent in not providing adequate security and that the innkeeper should not be allowed to invoke the limitation of liability provided by article 2971. The innkeeper maintained a vault sufficiently large to accommodate the furs and had complied with the notice requirements. The court reasoned that the hotel's strict liability had been modified by its compliance with the codal requirements and held that regardless of whether the hotel was negligent, its liability was limited to $100.

In *Laubie v. Sonesta International Hotel Corp.*,\(^\text{11}\) the Louisiana Supreme Court, considering for the first time whether the legislative intent behind the amendment was to limit the innkeeper's liability for property which was not deposited in the hotel safe and which was lost through the innkeeper's negligence, overruled both the *Pfennig* and *Zurich* interpretations of article 2971. While the Laubies were guests at the Royal Sonesta, valuable jewelry was stolen from their room. The court held that "the legislative aim of Article 2971, as amended by Act 231 of 1912, was only to limit the contractual liability of an innkeeper as depositary" and that "Article 2971 [had] no application to the question of an innkeeper's delictual responsibility."\(^\text{12}\) Relying heavily on the historical development of the innkeeper's liability as a depositary in the codal scheme and the placement of article 2971 in the Code under the chapter "Of Necessary Deposit," the court stated that it found no indication of a legislative intent "to place innkeepers . . . in a more favored position than ordinary members of the public who must respond fully for breach of a delictual duty imposed by general law."\(^\text{13}\) The court concluded that article 2971 was "merely another step to reduce [the innkeeper's] onerous contractual burden as a depositary."\(^\text{14}\) The opinion in *Kraaz*, then, was little more than an affirmation of the earlier *Laubie* holding as to the duty of an innkeeper to respond for a violation of a "delictual duty."

In a recent session, the legislature amended article 2971 to provide that "no . . . innkeeper . . . shall be liable contractually or delictually . . . to any guests . . . for any loss . . . in any sum exceeding five hundred dollars."\(^\text{15}\) This amendment overruled both *Kraaz* and *Laubie* and reinstated the interpretation given the article by the courts of appeal in *Pfennig* and *Zurich*.

Such tension between the judicial and legislative branches has

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12. Id. at 1376.
13. Id. at 1377.
14. Id. at 1378.
become increasingly common. The legislature recently has reinstated interpretations of a Civil Code article made by courts of appeal, but overruled by the Louisiana Supreme Court, in cases involving the liability of blood banks under article 1764 for supplying defective blood. The courts of appeal, on four occasions, had considered the effect of this article on the strict liability of distributors of blood. In each case, the court of appeal rejected the plaintiff's strict liability claim, reasoning that the legislative intent behind article 1764, which removes the implied warranty of fitness from the sale of blood and classifies blood as a service rather than a product, was to deny recovery to the plaintiff under any legal theory other than negligence. Writs were applied for and denied in three of these cases.

The Louisiana Supreme Court considered the issue for the first time in *DeBattista v. Argonaut-Southwest Insurance Co.* The plaintiff there contracted serum hepatitis following a blood transfusion and brought suit against the blood bank. The court found that the blood which the plaintiff received was defective and had caused the plaintiff's injuries. The defendant blood bank contended that it could not be held liable absent proof that the plaintiff's injuries resulted from negligence on its part. The blood bank's argument against strict liability was based on the interpretation given to article 1764 by the courts of appeal. The court, although acknowledging that strict liability could be based on a theory of implied warranty, held that a distributor of defective blood was strictly liable in tort.

The *DeBattista* court reasoned that article 1764 was a rule of contractual warranty, "developed to meet the needs of commercial transactions," which did not govern tort liability and stated that the court of appeal decisions did not "represent correct interpretations

16. For a variation of this pattern, see Gulf Ref. Co. v. Glassell, 186 La. 190, 171 So. 846 (1936), in which the Louisiana Supreme Court distinguished several of its own decisions and held that "a lessee of [a] mineral . . . lease has no real right in the leased land." 186 La. at 214, 171 So. at 854. The legislature's reaction was unfavorable: "Oil, gas, and other mineral leases . . . are classified as real rights." *Id.* at 32. For a case in which the Louisiana Supreme Court correctly enforced a statutory limitation which the court of appeal had misconstrued, see Bazley v. Tortorich, 397 So. 2d 475 (La. 1981), and text at notes 62-63 infra.


19. *Id.* at 32.
of our law." The legislature disagreed and enacted Louisiana Civil Code article 2322.1 and Louisiana Revised Statutes 9:2797, which exempt blood distributors from "strict liability or liability of any kind without negligence."

In addition to its role in the struggle between the judiciary and the legislature, the Kraaz opinion is part of a recent judicial trend in Louisiana toward the use of theory-of-the-case pleading. Louisiana employs fact pleading as opposed to theory-of-the-case pleading. Under a fact pleading system, the plaintiff should not be required to characterize his cause of action as he is entitled to relief under any legal theory which may be justified by the proven facts.

Theory-of-the-case pleading, on the other hand, requires the plaintiff to characterize his cause of action. The doctrine of theory-of-the-case pleading was derived from the common law writ system, which required the plaintiff to bring his action under a specific writ or form of action. The courts denied relief if the plaintiff chose the wrong writ, regardless of the validity of his substantive claim. The injustice of the writ system led to the adoption of procedural codes which substituted fact pleading systems for the complex and highly technical forms of action. The new fact pleading systems, however, were not

20. Id. at 33.
22. LA. CODE Civ. P. art. 891 provides that the petition "shall contain a short, clear, and concise statement of the object of the demand and of the material facts upon which the cause of action is based."
23. LA. CODE Civ. P. art. 862 provides that "final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings and the latter contain no prayer for general and equitable relief."
24. LA. CODE Civ. P. art. 2164 provides: "The appellate court shall render any judgment which is just, legal, and proper upon the record on appeal."
27. In 1848, New York, under the leadership of David Dudley Field, adopted the New York Code of Procedure which introduced the system of fact pleading, N.Y. CODE OF PROC. OF 1848 § 142, as amended by 1851 N.Y. LAWS ch. 479 ("The complaint shall contain . . . [a] plain and concise statement of the facts constituting a cause of action without unnecessary repetition . . .") and abolished the writ system, N.Y. CODE OF PROC. OF 1848 § 69, as enacted by 1848 N.Y. LAWS ch. 379 ("The distinction between actions at law and suits in equity, and the forms of all such actions and suits, heretofore existing, are abolished . . .") (emphasis added).

[In a grand procession various states have followed the lead of New York, until
accepted by the courts. Prompted by their desire to cling to the abolished writ system, the courts developed the theory-of-the-case doctrine. Under this doctrine, the plaintiff, although he need not proceed under any of the old writs, is required to characterize his case under a specific legal theory, with recovery contingent upon that characterization. Thus, the theory-of-the-case doctrine "is nothing but the writ system without labels."

Louisiana has never operated under the writ system, because its procedural system is not based upon the common law. The theory-of-the-case doctrine, however, was applied in several cases prior to 1960. In 1960, Louisiana Code of Civil Procedure articles 862 and 2164 were enacted with the express purpose of abolishing the theory-of-the-case doctrine in Louisiana.

Several recent decisions indicate that this legislative intent has not been fully realized. In Meador v. Toyota of Jefferson, Inc., the plaintiff sought recovery of nonpecuniary damages caused by undue delay in the repair of her car. The court held that nonpecuniary damages were not recoverable in an action for breach of contract, the object of which was physical gratification. The court completely ignored the possibility that the plaintiff's factual allegations might have authorized recovery in tort for which, as acknowledged by the court, nonpecuniary damages are available.

In Philippe v. Browning Arms Co., the plaintiff, who had been...
injured when a shotgun accidentally discharged, sued the manufacturer of the shotgun demanding damages for personal injury and attorney’s fees under Louisiana Civil Code article 2545. On original hearing, the Louisiana Supreme Court acknowledged that when the purchaser of a defective product is injured, “there arises a redhibitory action, for the rescission of the sale, and a tort action for the personal injuries suffered.” The court held, however, that attorney’s fees under article 2545 were not recoverable because “rescission of the sale was not sought by plaintiff, but only damages arising from his personal injuries.” On rehearing, the court reversed itself, reasoning that their previous analysis represented “a return to the requirement of pleading the theory of the case.”

In DeBattista v. Argonaut-Southwest Insurance Co., the plaintiff’s petition included allegations of both breach of implied warranty and strict liability in tort. Louisiana Civil Code article 1764, which provides that the implied warranty of fitness does not apply to the sale of blood, prevented the court from allowing recovery under the theory of implied warranty. However, since the plaintiff also had alleged a cause of action based on strict liability in tort, the court was allowed, unhindered by article 1764, to grant her the relief she requested. Conceivably, if the plaintiff had alleged only breach of the implied warranty of fitness, the court would have denied recovery by applying article 1764. In so doing, the court would have been applying the doctrine of theory of the case because the plaintiff’s right to recover would have depended upon the plaintiff’s characterization of the case in his pleadings.

The doctrine of theory of the case should be distinguished from the classification of the cause of action by the court in order to determine “some subsidiary issue, such as applicable prescriptive periods, or the effect of restrictive non-codal provisions.” Ultimately, every case is decided upon some legal theory, and “the nature of the theory which prevails has important consequences.” Two court of appeal

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34. LA. CIV. CODE art. 2545 provides: “The seller, who knows the vice of the thing he sells and omits to declare it, besides the restitution of price and repayment of the expenses, including reasonable attorneys’ fees, is answerable to the buyer in damages.”
35. 395 So. 2d at 313.
36. Id.
37. Id. at 318.
38. 403 So. 2d 26 (La. 1981).
41. Hubert, supra note 26, at 68.
decisions involving Louisiana Revised Statutes 22:655, which allows a direct action against insurers in tort actions only, are illustrative examples. In both cases, the defendant insurer filed a peremptory exception of no cause of action on the ground that the plaintiff's cause of action was in contract, not tort, and thus the plaintiff had no direct action. In overruling the exceptions, both courts found that the plaintiffs had stated a cause of action in tort as well as in contract.

In the instant case, Mr. and Mrs. Kraaz, residents of Chicago, were staying at the La Quinta Motor Inn while attending the horse races at the Fair Grounds. The Kraazes were carrying a large amount of money, allegedly intended for the purchase of race horses. As described previously, two men gained access to their room with a passkey supplied by the young desk clerk and fled with about $23,000. The trial court held that the motel was liable for the full amount of the cash stolen because of the gross negligence of its employee, the desk clerk. This holding was based not on an interpretation of the applicability of the $100 limitation in article 2971, but rather on the trial court's conclusion that La Quinta had failed to comply adequately with the notice requirements. The court of appeal affirmed on the same grounds.

The supreme court granted writs, stating that the "primary issue" was "the delictual liability of an innkeeper for an employee's negligence." The court analyzed this "primary issue" in two parts, addressing both the liability vel non of an innkeeper for the fault of his employee and the effect of article 2971 on the extent of this liability.

44. 410 So. 2d at 1052.
45. Regarding the cash actually stolen from the room of the Kraazes, however, this court would necessarily, due to our prior ruling in Zurich Insurance Co. v. Fairmont Roosevelt Hotel, Inc., have to declare that the defendant's liability was limited to $100, if it had complied with the applicable codal articles in posting a notice requesting the deposit of valuables. The trial judge, however, was not convinced that such a notice had actually been posted in the room of the Kraazes, and we do not find manifest error in that finding of fact. . . . [W]e must hold that since it was the court's finding the defendant did not comply with the [notice] provisions . . . he is strictly liable to the plaintiffs . . . for the loss of their stolen money.
396 So. 2d 455, 459 (La. App. 4th Cir. 1981).
46. 410 So. 2d at 1049.
47. According to the court, a "secondary issue [was] the quantum of damages awarded plaintiffs." Id. Although by no means clear, it seems that the court apparently was referring to the large damage awards granted the plaintiffs for physical injury and mental distress. The court, citing Louisiana Civil Code article 1934, held that the trial court had not abused its discretion in granting these awards. Id. at 1053.
The court first discussed the effect of article 2971 on the extent of an innkeeper's delictual liability. Relying on its holding in Laubie that "the limitation of liability in LSA-C.C. art. 2971 only applies to the innkeeper's contractual liability as a depositary," the court concluded that the innkeeper was fully liable for "damages resulting from fault on the part of him or his employees." Having reached this conclusion, the court further found that the desk clerk was at fault in giving a passkey to armed robbers, that this fault was a direct cause of the plaintiff's financial loss, and that, under Louisiana Civil Code article 2320, the innkeeper was liable for the loss. Thus, the Kraaz court held both that an innkeeper is liable for the fault of his employee and that the innkeeper's liability for such fault is not limited by article 2971 to $100.

Perhaps the Louisiana Supreme Court's treatment of article 2971 in Kraaz can be explained best as an effort to resolve the ambiguity in that statute by forcing the legislature to provide a clear statement of its intent. Prior to 1912, every statutory change had resulted in the relaxation of the innkeeper's liability as a depositary. Thus, the legislature conceivably may have meant for article 2971 to have a similar effect. Although the words "by theft or otherwise" in the article appear to be all-inclusive, one court has suggested that the liability limitation is inapplicable where the innkeeper has "appropriated the articles or has enriched himself at the expense of the guest." Additionally, the innkeeper is unable to avail himself of the freedom from liability provided by article 2969 if the loss is a result of his fraud or negligence. These facts support the proposition that the legislature intended that losses due to the innkeeper's negligence be exempted from the $100 limitation in former article 2971. However, any ambiguity in article 2971 may be resolved by reading it in pari materia with the other applicable articles.

Article 2971 appears in the Code immediately after six articles which specify the instances in which the innkeeper is liable for losses sustained by his guests. The article, before its recent amendment,
clearly provided that "no innkeeper shall be liable under the provisions of the foregoing six articles for losses in excess of $100." This $100 limitation clearly was intended to apply to article 2969, which provides that the innkeeper is liable for a loss, due to its negligence or fraud, of valuables not deposited with the innkeeper.

In cases such as *Kraaz*, where considerable loss has occurred because of patent negligence, the court’s unwillingness to apply a statute which limits liability to what seems to be (in comparison to the actual loss) a paltry sum is understandable. As one judge has stated, “[E]ven in the performance [of determining those policy-choices and values reasonably intended by the legislation], it is a mistake to conceive of the judge as an impersonal computer routinely clicking out abstract answers uninfluenced by ideals of fairness for fellow human beings.”

In both *Kraaz* and *DeBattista*, the Louisiana Supreme Court’s “ideals of fairness” apparently led it to superimpose its conception of current societal needs upon two statutes which, when given a fair interpretation, indicate a contrary legislative intent.

In a modern republic, the legislature—representative of and responsive to the people—is considered to be better equipped than the courts to determine societal needs and to have the flexibility necessary to balance those needs against economic realities. Thus it

for the loss of valuables which are not delivered into his care only if the loss is a result of the fraud or negligence of the innkeeper.

53. *LA. CIV. CODE* art. 2971 (as it appeared prior to its amendment by 1982 La. Acts, No. 382, § 1) (emphasis added).

54. Although *Kraaz* involved an article 2969 situation, the court held that article 2971 was not applicable to situations in which the innkeeper was at fault. Arguably, valuables deposited with the innkeeper and lost because of his negligence also, under this broad holding, would be excepted from the article 2971 limitation. Under the *Kraaz* court’s interpretation of the statutory scheme, the applicability of the limitation in article 2971 is confined to the narrow instance in which property deposited with the innkeeper is lost through no fault of the innkeeper. As evidenced by the recent amendment to article 2971, the legislature did not intend to grant such marginal relief.

55. Perhaps the increase of liability in article 2971, as amended, to $500 will make the application of the article a less painful task. Prior to its amendment, article 2971 arguably was vulnerable to attack on the ground that it violated the due process clause in that the amount of recovery ($100) was not rationally related to the potential losses. While it is questionable whether $500 is sufficient compensation for an average traveler’s loss today, the amount is not so low as to appear obviously inadequate. *Cf. Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59 (1978) (statute limiting liability for a single nuclear accident to $560 million held not a violation of due process).


NOTES

is to be expected that "law" is more commonly "found" these days in statutes than was previously the case in a traditional common-law jurisdiction. There is, however, an interesting current theory which advocates making statutes subject to amendment by the courts after a specified period of time. The proponents of this seemingly heretical theory, however, do not assert that the courts inherently have this power. Absent a statute expressly granting the courts the power to amend legislative acts, when the legislature has made an economic policy decision and has expressed this decision in a clear and unambiguous statute, judges should not begin "casting around in the hope of finding, like so many Houdinis, the way to escape from [a] statutory box" in an effort to effectuate their sense of "fairness for fellow human beings." In reversing the fourth circuit's decision in *Bazley v. Tortorich*, the supreme court stated that in the area of workers' compensation, it was not "empowered" to "second guess" the legislature. This language illustrates the course which the courts probably should follow in all areas where the legislature has expressly limited liability.

In its effort to circumvent the article 2971 limitation, the court in the instant case placed much emphasis on the legal theory under which the plaintiffs were allowed recovery. The plaintiffs were allowed full recovery because their action was in tort. The decision implies that if Mr. and Mrs. Kraaz had brought their suit in contract, alleging only a breach of the innkeeper's duty as depositary, they would have been denied recovery in excess of the statutory limit. Because the extent of recovery was so closely connected with one legal theory (tort) as opposed to another (contract), the decision suggests a return to theory-of-the-case pleading, which was abolished in Louisiana by the enactment of Code of Civil Procedure articles 862 and 2164.


59. Although the scope of this note does not allow an in-depth analysis of this theory, it is interesting to note that its proponent seeks to give the courts this power to "modify and overrule" statutes through the enactment of a statute. Davies, *supra* note 58, at 204 n.7. The Nonprimacy of Statutes Act would apply to statutes which had "been in effect for more than 20 years prior to the event or transaction to which [they were] being applied" and which imposed "rules of private, rather than public law." *Id.*


61. Tate, *supra* note 56 at 171.

62. 397 So. 2d 475 (La. 1981), rev'g 380 So. 2d 727 (La. App. 4th Cir. 1980).

63. 397 So. 2d at 484-85.

64. See text at notes 23-30, *supra*. 
Perhaps the court, in both *Kraaz* and *DeBattista*, was merely finding the plaintiff an “out” from under a statutory limitation by classifying the actions as delictual rather than contractual. Since, under a fact pleading system, the plaintiff is entitled to relief under any theory of law which may be justified by the facts, classification of the cause of action *by the court* in order to enable the plaintiff to recover is a proper method of analysis. However, theory-of-the-case pleading is being employed to the litigant’s detriment when recovery is dependent upon the litigant’s characterization of the case. In the future, courts should be careful when recovery is linked to one theory, as opposed to another, to avoid the implication that it is the litigant who must “at his peril choose [the] particular weapon with which to wage the imminent battle.”

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65. In *DeBattista*, recovery was allowed because the plaintiff based her action on strict liability (tort) as well as on implied warranty of fitness (contract). For a clear example of the court’s tendency to revert to theory pleading, see *Meador v. Toyota of Jefferson, Inc.*, 332 So. 2d 433 (La. 1976).
