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Halphen v. Johns-Manville Sales Corp. - A New Product In the Area of Products Liability

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Halphen v. Johns-Manville Sales Corp.—A New Product In the Area of Products Liability

A widow brought a strict products liability action in federal district court in Louisiana for the wrongful death of her husband, who contracted cancer after being exposed to asbestos manufactured by the defendant, Johns-Manville. After a trial on the merits, the jury rendered a verdict for the plaintiff, finding that the asbestos was an unreasonably dangerous product, exposure to which was the proximate cause of the decedent's death.[1]

On appeal to the fifth circuit, Johns-Manville contended that it could not be held strictly liable for dangers which were unforeseeable at the time it manufactured the asbestos insulation products. The fifth circuit certified to the Louisiana Supreme Court the question raised by the defendant's contention—i.e., whether a manufacturer in a strict products liability case could be held liable for injuries caused by an unreasonably dangerous product, which it manufactured, even though it could not have foreseen the dangers posed by the product at the time the product was designed and manufactured.[2] The Louisiana Supreme Court, in an opinion written by Justice Dennis, held that a manufacturer could be liable under those circumstances. In so holding, the court created a new category of dangerous products—those which are "unreasonably dangers per se." *Halphen v. Johns-Manville Sales Corp.*, 484 So. 2d 110, 113 (La. 1986).

This note will examine the Louisiana Supreme Court's answer to the fifth circuit's question in light of prior Louisiana strict products liability decisions, identify the impact of *Halphen* on the relevance of the manufacturer's knowledge of the dangers created by its product and

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1. Mr. Halphen died from malignant mesothelioma, a rare form of cancer commonly caused by exposure to asbestos. Halphen v. Johns-Manville Sales Corp., 737 F.2d 462, 464 (5th Cir. 1984) (the first opinion which the fifth circuit rendered in this matter, affirming the trial court's unreported judgment in favor of the plaintiff).

2. Halphen v. Johns-Manville Sales Corp., 755 F.2d 393, 394 (5th Cir. 1985). The court of appeals had originally affirmed the trial court's judgment for the plaintiff. 737 F.2d 462. However, the court subsequently recalled its affirmation in Halphen v. Johns-Manville Sales Corp., 752 F.2d 124 (5th Cir. 1985), and then posed its certified question for the Louisiana Supreme Court in Halphen v. Johns-Manville Sales Corp., 755 F.2d 393 (5th Cir. 1985). The subject of this casenote is the Louisiana Supreme Court's opinion responding to the certified question. It is this opinion that is referred to in the notes and text when the case name *Halphen* is cited.

on the status of the "state of the art" defense, discuss the practical ramifications of *Halphen* on fact pleading and jury instructions, and attempt to define the scope of the "unreasonably dangerous per se" category.

I. BACKGROUND OF LOUISIANA PRODUCTS LIABILITY

The legal principles regulating delicts and quasi-delicts in Louisiana are compiled in articles 2315-2324 of the Louisiana Civil Code. Civil Code article 2315 sets forth the basic principle of assigning liability based on fault,[3] while the remaining articles in the chapter of the Code detail the liability of a person based on his legal relationship with the thing or person causing damage. These articles provide a basis for the courts in Louisiana to expound theories of recovery for persons damaged through the fault of another; in fact, the redactors of the Civil Code have left the task of defining fault to the judiciary.[4]

Civil Code articles 2315-2324, in addition to providing a basis for traditional causes of action, such as negligence, also provide the foundation for the application of strict liability in Louisiana. By using the liberal term "fault," which includes more than negligence, the codal scheme attaches liability when there is a legal relationship between the defendant and the act, person, or object causing injury. Louisiana courts have derived from this codal foundation the cause of action in strict liability. The courts have stated that this type of liability is "strict" in the sense that no proof of negligence is required.[5]

The first time the Louisiana Supreme Court recognized a cause of action in strict products liability based on article 2315 was in 1971, in the prolific case of *Weber v. Fidelity & Casualty Insurance Co.*[6] By doing so, the court added a new dimension to the term "fault" found in article 2315.

Weber involved an action against a manufacturer of cattle dip for injuries to the plaintiff's sons and for the loss of seven of the plaintiff's cattle, both of which allegedly resulted from the use of the defendant's product.[7] The court found the manufacturer liable for a manufacturing defect, although no specific negligence was proven:

> A manufacturer of a product which involves a risk of injury to the user is liable to any person, whether the purchaser or a third person, who without fault on his part, sustains an injury

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3. Article 2315 provides in part that "[e]very act whatever of man that causes damage to another obliges him by whose *fault* it happened to repair it." (emphasis added).

4. Bell v. Jet Wheel Blast, 462 So. 2d 166, 168 (La. 1985).

5. Langlois v. Allied Chem. Corp., 258 La. 1067, 249 So. 2d 133, 137 (1971); Kent v. Gulf States Utils. Co., 418 So. 2d 493, 496 (La. 1982).

6. Weber v. Fidelity & Casualty Ins. Co., 259 La. 599, 250 So. 2d 754 (1971).

7. Id. at 602, 250 So. 2d at 755-56.

> caused by a defect in the design, composition, or manufacture of the article, if the injury might reasonably have been anticipated. However, the plaintiff claiming injury has the burden of proving that the product was defective, i.e., unreasonably dangerous to normal use, and that the plaintiff's injuries were caused by reason of the defect.
>
> If the product is proven defective by reason of its hazard to normal use, the plaintiff need not prove any particular negligence by the maker in its manufacture or processing; for the manufacturer is presumed to know of the vices in the things he makes, whether or not he has actual knowledge of them.[8]

In providing a base for the formation of strict products liability law in Louisiana, *Weber* defined "fault" in terms of a defect in the product, and reasoned that a product was defective if it was "unreasonably dangerous to normal use."[9] The opinion also imputed knowledge of any vices in a product to the manufacturer, thereby relieving the plaintiff from having to prove negligence.[10]

In the fifteen years after *Weber* was written, it was the basis for all actions in strict products liability in Louisiana. *Weber* and its progeny[11] allowed persons to recover without proof of negligence, but gave manufacturers an avenue for avoiding liability if the particular injury was not foreseeable (i.e., could not be reasonably anticipated).[12] The supreme court's opinion in *Halphen*, however, seems to narrow this avenue for escaping liability in some instances, and thus could be used to broaden the basis of recovery for persons injured by defective products.[13]

II. THE *Halphen* Opinion

A. The Classifications of Unreasonably Dangerous Products

The Louisiana Supreme Court, in answering the question posed by the fifth circuit, detailed the elements required in a plaintiff's strict

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8. Id. at 602-03, 250 So. 2d at 755-56 (citations omitted).

9. Id.

10. Id. at 603, 250 So. 2d at 756.

11. Welch v. Outboard Marine Corp., 481 F.2d 252 (5th Cir. 1973); *Bell*, 462 So. 2d 166; Hebert v. Brazzel, 403 So. 2d 1242 (La. 1981); DeBattista v. Argonaut-Southwest Ins. Co., 403 So. 2d 26 (La. 1981); Hunt v. City Stores, Inc., 387 So. 2d 585 (La. 1980); Chappuis v. Sears Roebuck & Co., 358 So. 2d 926 (La. 1978).

12. See, e.g., *Weber*, 259 La. 599, 250 So. 2d 754; *Welch*, 481 F.2d 252; *DeBattista*, 403 So. 2d 26; *Hebert*, 403 So. 2d 1242. Cf. *Chappuis*, 358 So. 2d 926. Contra Kent v. Gulf States Utils. Co., 418 So. 2d 493, 497 (La. 1982), in which the court said: "*Under strict liability concepts, the mere fact of the owner's relationship with and responsibility for the damage-causing thing gives rise to an absolute duty to discover the risks presented by the thing in custody.*" (emphasis in original).

13. One commentator has stated that *Halphen* rewrites the law of strict products liability in Louisiana. See Crawford, Developments in the Law, 1985-1986—Part I—Torts, 47 La. L. Rev. 485 (1986).

products liability case. The court, following prior Louisiana jurisprudence, stated that a plaintiff in a strict products liability case had the burden of proving that he was injured by the product's condition, that the product left the manufacturer's control in this condition, and that the product was unreasonably dangerous to normal use.[14]

The court then described four classifications of products which are unreasonably dangerous to normal use.[15] These classifications include: products which are "unreasonably dangerous per se"; products which are unreasonably dangerous in construction or composition; products which are unreasonably dangerous due to failure to warn; and products which are unreasonably dangerous due to a design defect.[16] The court said that negligence is not an element in a case in which recovery is sought under either the "unreasonably dangerous per se" or manufacturing defect theories, because the manufacturer could still be liable even if it could prove that it had used reasonable care in manufacturing the product.[17]

1. "Unreasonably Dangerous Per Se" Products

In addition to the traditional classes of unreasonably dangerous products recognized in most states, the *Halphen* court created a new class of products which it described as "unreasonably dangerous per se." This classification represents the purest form of strict products liability, because the product's condition, and not the manufacturer's conduct, must be impugned for liability to arise.

The court said that "for products in this category liability may be imposed solely on the basis of the intrinsic characteristics of the product irrespective of the manufacturer's intent, knowledge or conduct."[18] Prior to *Halphen*, a manufacturer was able to defend some products liability cases by proving that, under the technology existing at the time the product was manufactured, it could not have known of the dangerous propensities of the product. This "state of the art" defense was available to the manufacturer despite his being held to the knowledge and skill of an expert.[19]

Under *Halphen*, a determination that a product is unreasonably dangerous per se is to be made after a balancing of the risks involved

14. 484 So. 2d at 113.

15. The phrases "defective products" and "unreasonably dangerous products" are used interchangeably throughout this note. Also, "unreasonably dangerous to normal use" and "unintended defect" are used interchangeably.

16. *Halphen*, 484 So. 2d at 113.

17. Id.

18. Id.

19. See generally, *Halphen*, 484 So. 2d at 115; Carter v. Johns-Manville Sales Corp., 557 F. Supp. 1317, 1318 (E.D. Tex. 1983).

in the use of the product against the benefits of the product, regardless of whether the dangers (risks) were foreseeable. The court called this balancing test a risk-utility or danger-utility test.[20]

In creating the category of products which are "unreasonably dangerous per se," the court envisioned products which are so inherently unsafe that they should not have been sold under any conditions. Professor Keeton has recognized this "unreasonably dangerous per se" category as creating another basis for an injured plaintiff to recover. Keeton defined an "unreasonably dangerous per se" product as one which was "defective and unreasonably dangerous . . . under any marketing circumstances."[21] In defining this theory, Professor Keeton disregarded the manufacturer's conduct totally, focusing instead on the dangerous propensities of the product itself. Therefore, under this theory, as in the corresponding category identified by the court in *Halphen*, a manufacturer could not escape liability by showing that he was not negligent, and that he had used due care, or that he could not have known of the dangers posed by the product under existing technology.

The irrelevance of the manufacturer's knowledge removes any consideration of his conduct from a case brought under this classification. Thus, the "unreasonably dangerous per se" classification may be categorized as a pure strict liability theory.[22]

Two noted commentators have contended that the state of the art defense has no relevance in strict products liability cases. Professor Keeton has stated that it is irrelevant that a manufacturer could not discover a risk associated with his product; a manufacturer should not escape liability because the danger-in-fact was scientifically unknowable.[23] He suggests that "if inability to discover a risk or hazard . . . were a defense, then, as a substantive matter, negligence becomes the basis for recovery," rather than strict liability.[24]

Professor Wade reached the same conclusion as Professor Keeton, although he advocates a different method to hold a defendant liable regardless of his lack of knowledge. Under Professor Wade's approach, the court should *assume* "that the defendant knew of the dangerous condition of the product and ask whether he was then negligent in

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20. *Halphen*, 484 So. 2d at 114 n.2.

21. W. Keeton, Products Liability—Inadequacy of Information, 48 Tex. L. Rev. 398, 407 (1970).

22. A "pure" strict liability theory is one where a manufacturer may be held liable despite his having used reasonable care in manufacturing the product, i.e., the manufacturer's conduct is totally irrelevant to his liability. *Halphen*, 484 So. 2d at 114.

23. W. Keeton, The Meaning of Defect in Products Liability Law—A Review of Basic Principles, 45 Mo. L. Rev. 579, 595 (1980).

24. W. Keeton, Torts, 35 Sw. L.J. 1, 15 (1981).

putting it on the market."[25] Thus, "scienter is supplied as a matter of law, and there is no need for the plaintiff to prove its existence."[26] Although Wade used the term "negligence," he did not seem to do so in the traditional sense, in that his focus was on the product and not the manufacturer's conduct. Other states and several commentators have also recognized that state of the art should not always be a viable defense in strict products liability, as is shown by the citation of other states' jurisprudence in the *Halphen* opinion.[27]

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25. J. Wade, On the Nature of Strict Tort Liability for Products, 44 Miss. L.J. 825, 834-35 (1973).

26. Id. at 835.

27. In Texas, strict liability focuses on the condition of the product, not the conduct of the manufacturer, and, thus, evidence of its knowledge is irrelevant. Texas products liability law does not recognize an "unreasonably dangerous per se" category as Louisiana now does. However, it does have an "unreasonably dangerous due to design defect" theory which is similar to Louisiana's "per se" theory, in that the state of the art defense is not allowed. In Carter v. Johns-Manville Sales Corp., 557 F. Supp. 1317 (E.D. Tex. 1983), another asbestos products liability case, the court stated that "liability in a strict liability case rests on whether a prudent manufacturer, *if* it were aware of the dangers involved in using its products *as those dangers are now known, from hindsight*, would have placed the products into the stream of commerce." Id. at 1319 (emphasis in original). Therefore, the *Carter* court would impute knowledge to the manufacturer. The court summarized the status of the state of the art defense in Texas products liability law by stating that:

> A strict liability case based on lack of adequate warning may be defended by an assertion that the manufacturer, held to the knowledge and skill of an expert, could not have reasonably foreseen the danger. In a strict liability case based on defective design, however, such an assertion, called by state of the art or by whatever name, is irrelevant and impermissibly prejudicial; to permit such an assertion would encourage the jury's focus for liability to improperly stray from the condition of the product to the conduct of the manufacturer.

Id. at 1321. The court was in effect saying that, if the manufacturer, at the time he had manufactured the product, had the technological capabilities which are available to him today, and with this knowledge would not have put the product on the market, then he cannot escape liability under the design defect theory. This category seems to conform to the "unreasonably dangerous due to design defect" theory of *Halphen* under the first subcategory of that theory (where the risk outweighs the utility of the product). Also, the *Halphen* opinion is in accord with Texas products liability law in regard to the irrelevance of evidence of the manufacturer's knowledge and evidence of technological capabilities.

California and Missouri courts have also adopted the rule that a manufacturer cannot escape liability by showing that he could not have known of the dangerous propensities of the product under certain theories, such as in design defect cases. See, e.g., Barker v. Lull Eng. Co., 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (Cal. 1978); Elmore v. Owens-Illinois, Inc., 673 S.W.2d 434 (Mo. 1984). The justification for adherence to this rule was "to insure that the costs of injuries resulting from defective products are borne by the manufacturers [and sellers] that put such products on the market rather than by the injured persons who are powerless to protect themselves." *Elmore*, 673 S.W.2d at 438. Accord, Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897,

The plaintiff has an easier case under the "unreasonably dangerous per se" theory because evidence of the manufacturer's conduct and evidence of the state of the art at the time of design and manufacture is irrelevant. However, the plaintiff is still required to prove that the danger-in-fact of the product outweighs its benefits, under the risk-utility test.[28] A similar balancing test has been used to determine whether a product is unreasonably dangerous in Louisiana products liability cases prior to *Halphen*. In *Hunt v. City Stores, Inc.*,[29] the Louisiana Supreme Court held an escalator manufacturer liable because its product was found to be unreasonably dangerous to normal use. The court imposed liability after finding that, because the "likelihood and gravity of harm outweigh[ed] the benefits and utility of the manufactured product, the product . . . [was] unreasonably dangerous."[30] This test is different from the one in *Halphen* because the *Hunt* test does not consider whether liability would still be imposed if the risk was unforeseeable. In *Hunt*, because the manufacturer knew of the risk of danger, the court did not have to address the implications of the manufacturer's inability to foresee the risk.[31]

In *Entrevia v. Hood*[32] and *Langlois v. Allied Chemical Corp.*,[33] the Louisiana Supreme Court also applied a type of risk-utility test. In *Langlois*, the court spoke of balancing societal rights and obligations in addition to applying the risk-utility test.[34] The *Entrevia* court also spoke of social utility as well as the need to consider moral and economic factors. Further, in *Entrevia*, the court found the risk-utility test in strict liability to be similar to that used in negligence problems.[35]

In *Halphen*, the court modified the risk-utility test as applied in earlier cases, when it created the "unreasonably dangerous per se" category, by imposing liability even if the risk of harm was unforeseeable at the time that the product was manufactured. Therefore, under the *Halphen* risk-utility test, the plaintiff must prove that the product's condition created a risk of harm that outweighs the benefits which flow from it, regardless of whether the danger was foreseeable. Consequently,

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901, 27 Cal. Rptr. 697 (1963); Keener v. Dayton Elec. Mfg. Co., 445 S.W.2d 362, 364 (Mo. 1969). Missouri has implied that state of the art evidence is irrelevant, as is the manufacturer's standard of care, because the product is on trial, not the manufacturer's conduct.

28. *Halphen*, 484 So. 2d at 114.
29. 387 So. 2d 585 (La. 1980).
30. Id. at 589.
31. Id.
32. 427 So. 2d 1146 (La. 1983).
33. 258 La. 1067, 249 So. 2d 133 (1971).
34. Id. at 1075, 249 So. 2d at 140.
35. *Entrevia*, 427 So. 2d at 1149-50.

the court has expanded the scope of recovery under Louisiana strict products liability.

2. Unreasonably Dangerous in Construction or Composition

In addition to creating the new category of products which are "unreasonably dangerous per se," the court in *Halphen* retained categories of products which prior jurisprudence characterized as unreasonably dangerous to normal use. One such category involves products which possess unintended defects or abnormalities which make them "more dangerous than [they were] designed to be."[36] The court set forth the elements of this category of strict products liability based on a manufacturing defect[37] by reiterating the principles espoused in *Weber v. Fidelity & Casualty Insurance Co.*[38]

In this category of unreasonably dangerous products, the product left the manufacturer's control in an unintended condition that made it more dangerous than it was designed to be. For imposition of liability under this category, the plaintiff is not required to prove specific negligence on the part of the manufacturer. All that the plaintiff is required to show is that the product was defective, and that he was injured by using it. Therefore, the manufacturer cannot escape liability by showing that he used reasonable care in manufacturing the product.[39]

Because no showing of negligence is required, the manufacturer cannot introduce evidence of his knowledge (or lack thereof) of the risks created by the defective construction. Furthermore, evidence of the state of the art existing at the time the product was manufactured is irrelevant "because the product, by definition, failed to conform to the manufacturer's own standards."[40]

3. Unreasonably Dangerous Due to Failure to Warn

If a product is not "unreasonably dangerous per se" or unreasonably dangerous due to a defect in construction or composition, a manufacturer could still be held liable if he failed to adequately warn about a danger created by a product. The product would be unreasonably dangerous because it lacks a warning about the dangers inherent in its design.[41] However, the manufacturer is required to warn only about dangers that are not within the knowledge of the consumer. Likewise, the manufacturer is not required to warn about open or obvious dangers, of which

36. *Halphen*, 484 So. 2d at 114.
37. This defect is also commonly referred to as a construction or composition defect.
38. 259 La. 599, 250 So. 2d 754; see supra notes 6-8 and accompanying text.
39. *Halphen*, 484 So. 2d at 114; *Weber*, 259 La. at 603, 250 So. 2d at 755-58.
40. *Halphen*, 484 So. 2d at 114.
41. Id. at 114-15.

the consumer should have knowledge.[42] With respect to these elements of this category of products liability law, the *Halphen* court followed prior Louisiana jurisprudence.[43]

The *Halphen* court went on, however, to require that a manufacturer be held in its duty to warn to the knowledge and skill of an expert. In this regard, the manufacturer is required to test its product as well as to stay informed of scientific developments regarding its product.[44] This additional requirement was not explicitly imposed by prior Louisiana jurisprudence, although other jurisdictions have included it.[45]

Under this theory of recovery, the manufacturer, while being held to the knowledge of an expert, can take advantage of the state of the art defense, and can escape liability by showing that under the technology existing at the time the product was manufactured, it could not have known of the dangers involved in the design of the product, and therefore it could not have warned about those dangers. In short, the manufacturer, despite having the knowledge of an expert, can escape liability for failure to warn, if he is found not to have breached the duty because the danger could not have been scientifically discerned.[46]

4. Unreasonably Dangerous Due to Design Defect

The fourth category of products cited in *Halphen* as unreasonably dangerous to normal use are those containing a design defect. The court identified three grounds for finding that a product was designed in such a way as to make it unreasonably dangerous. Each of these three subcategories have different criteria which can be used in proving a design defect. In two of them, the knowledge of the manufacturer and the state of the art defense are relevant.[47]

The first subcategory that the court described overlaps with the "unreasonably dangerous per se" category. The court used the danger-utility test explained in the "per se" category, and stated that evidence regarding the state of the art defense was not admissible under this subcategory of defectively designed unreasonably dangerous products.[48]

In the second subcategory, the court said that, although the danger does not outweigh the utility of a product under the danger-utility test, a product could still be defective as designed, if there were alternative

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42. Id. at 115.

43. See Winterrowd v. Travelers Indemnity Co., 462 So. 2d 639 (La. 1985); *Hebert*, 403 So. 2d 1242; *Chappuis*, 358 So. 2d 926.

44. W. Keeton, Products Liability—Problems Pertaining to Proof of Negligence, 19 Sw. L.J. 26, 30-33 (1965).

45. Id.

46. *Halphen*, 484 So. 2d at 115, 119.

47. Id. at 115.

48. Id.

products available to serve the same needs with less risk of harm.[49] Under this subcategory, the manufacturer can raise the state of the art defense, i.e., that under the technology existing when the product was manufactured there was no alternative product available. Under the alternative product subcategory, the defendant manufacturer is held to the skill of an expert.[50]

The final subcategory under the design defect theory relates to feasibility of alternative *designs*. Under this method of proving a design defect, the plaintiff must show that, even though the utility of the product is not outweighed by the harm, there was a feasible safer way to design the product. However, the court said that a manufacturer, while still held to the knowledge of an expert, could introduce evidence of his lack of knowledge of feasible alternative designs.[51]

B. Possible Procedural Problems Created by Halphen

The court in *Halphen* said that a plaintiff could bring a products liability suit against a manufacturer under any or all of the theories which it set forth, and would be entitled to a jury instruction that evidence under one theory is admissible only under that theory.[52] Therefore, if a plaintiff elected to try his case under both the "unreasonably dangerous per se" and failure to warn theories, the manufacturer would be able to introduce evidence that under the technology existing at the time that the product was manufactured, he had no way of knowing that the product would cause harm, and thus he did not know that he needed to warn about its (unknown) dangers. This state of the art evidence would not be admissible under the "unreasonably dangerous per se" theory, and the plaintiff could have the jury instructed to disregard the evidence under this theory but to consider it under the failure to warn theory. This would probably be confusing to the jury, and at the very least, it seems unrealistic to think that the jury would ignore this state of the art evidence under one theory and consider it under the other. This type of instruction would likely result in the jury either considering the evidence in determining liability under both theories, or disregarding the evidence altogether.

C. Answer to the Certified Question

After stating the elements of a strict products liability case, analyzing the categories of unreasonably dangerous products, and laying out the

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49. Id.

50. Id. See also W. Keeton, supra note 24, at 8-10; W. Keeton, Products Liability—Design Hazards and the Meaning of Defect, 10 Cum. L. Rev. 293, 297-99 (1979); Brady v. Melody Homes Mfr., 121 Ariz. 253, 589 P.2d 896 (Ariz. Ct. App. 1978).

51. *Halphen*, 484 So. 2d at 115.

52. Id.

procedural aspects of pleading and jury instructions, the court in *Halphen* answered the certified question as to whether evidence of a manufacturer's knowledge is relevant in a strict products liability case. The court basically stated that it depends upon what theory the plaintiff relies. In a case brought under the "unreasonably dangerous per se" theory, or a case under the construction or composition defect theory, the court stated that evidence of the manufacturer's knowledge is not admissible to support the state of the art defense. However, under the remaining theories, evidence of the manufacturer's knowledge is admissible. Therefore, depending on which theories the plaintiff uses in developing his case, the manufacturer may or may not be able to take advantage of the state of the art defense.[53]

After answering the certified question, the court gave policy reasons for its conclusions. The court first compared strict products liability to codal strict liability and concluded that it would be unjust to hold an owner of a harm-causing thing liable while releasing a manufacturer who would be better able to bear the cost. In other words, since a guardian of a thing in his control cannot escape liability by showing that he could not have known of the dangerous propensities of the thing,[54] neither should a manufacturer be able to escape liability. The court seemed to consider it especially important that the manufacturer could spread the cost of defective products to the public.[55]

The court also seemed to think that holding a manufacturer liable under theories which barred the presentation of evidence as to the inability to discern scientifically the dangers of the product would "provide an effective incentive to eliminate all possible dangers before putting the product on the market."[56] Nevertheless, this reasoning seems to mask what is in this author's view the court's true objective of holding liable the one with the deepest pocket. Saying that manufacturers will be more careful if they know they will be liable should their products cause harm may be true. But how can a manufacturer guard against harms created by its products which it cannot possibly foresee? Also, if a potential harm cannot scientifically be discovered, how can companies budget and plan for potential losses? Perhaps the economics of holding manufacturers liable without any defense for lack of knowledge should not be a concern of the court. At any rate, it is evident that the court feels that it is equitable to hold a manufacturer liable for harm caused by its inherently dangerous product which should never have been placed on the market, regardless of whether the manufacturer could have discovered the potential harm.

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53. Id. at 115-16.
54. Loescher v. Parr, 324 So. 2d 441 (La. 1975).
55. See *Halphen*, 484 So. 2d at 116-19.
56. Id. at 118.

D. Justice Watson's Concurring Opinion

Although Justice Watson appeared to agree with the majority opinion's answer to the question presented in *Halphen*, he was unsatisfied with the court's creation of the "unreasonably dangerous per se" category. He felt that this new category "shifts the focus of inquiry from the true purpose of the balancing test which is to determine whether the danger presented by a product is reasonable or unreasonable."[57]

Justice Watson implied that it was unnecessary for the court to create the various classifications of unreasonably dangerous products, because there was no need for differing degrees of unreasonably dangerous products. He also stated that lack of knowledge of the risk on the part of the manufacturer had never been identified as a defense asserted in a reported strict products liability case in Louisiana.[58]

E. The Dissenting Opinion of Justice Marcus

In his dissenting opinion, Justice Marcus stated that there is a "presumption that the manufacturer knew or should have known of the defects in its product," and that this is what "distinguishes all strict products liability cases . . . from negligence cases."[59] He continued by observing that this presumption operates to ease the burden of proof of the plaintiff, but not to make the manufacturer an insurer.[60] Furthermore, he asserted, the Louisiana jurisprudence recognizes that the presumption of the manufacturer's knowledge exists only with regard to what the scientific techniques could have discovered at the time of manufacturing the product. However, in support of this conclusion, Justice Marcus cited two failure to warn cases, and one case which is now moot,[61] where there seemed to be no question that the manufacturer knew of the potential dangers involved in the use of the product.[62] Consequently, the state of the art defense was not even used in these cases.

In its conclusion, the dissent argued that it would be unfair and unduly harsh to impose liability on a manufacturer who could not have known of the danger and consequently could not have prevented the harm.[63]

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57. *Halphen*, 484 So. 2d at 119-20 (Watson, J., concurring).

58. Id.

59. Id. at 121 (Marcus, J., dissenting).

60. Id.

61. The *DeBattista* opinion is moot because it is now prohibited by statute for a claimant to sue a blood bank for defective blood. See La. Civ. Code art. 2322.1.

62. *Winterrowd*, 462 So. 2d 639; *Chappuis*, 358 So. 2d 926; *DeBattista*, 403 So. 2d 26.

63. *Halphen*, 484 So. 2d at 121 (Marcus, J., dissenting).

III. The Fifth Circuit's Response to the Louisiana Supreme Court's Answer in *Halphen*

The fifth circuit, upon receiving the Louisiana Supreme Court's answer to the certified question, affirmed the trial court's verdict finding Johns-Manville liable. The court held that under Louisiana law, asbestos was an "unreasonably dangerous per se" product, and that therefore the manufacturer's knowledge of the danger was irrelevant as a defense.[64]

In so holding, the court stated that, while they "claim no prescience as to the universe of products which ultimately will be given the cognomen unreasonably dangerous per se, . . . [they] find it apparent from the citations and discussion in the certification response that the Supreme Court of Louisiana places asbestos in that category."[65] This seems to imply that, as a matter of law, asbestos is unreasonably dangerous per se in Louisiana. Nevertheless, the Louisiana Supreme Court nowhere spoke of asbestos in its opinion, and although some of the citations were to asbestos cases from other states, these cases were largely failure to warn cases. Therefore, it seems that the federal court drew conclusions beyond the Louisiana Supreme Court's opinion, because it appears that the Louisiana Supreme Court intentionally declined to determine what products would fall into each of the classifications it created.

In the author's opinion, the Louisiana Supreme Court intentionally left open what products could be classified in each category because the court realized that such a determination would be different in each case, due to the distinct facts under which each claim would arise. The fifth circuit should have used the Louisiana Supreme Court's opinion to determine whether, as a matter of *fact*, the asbestos under the *Halphen* fact situation fell within the "unreasonably dangerous per se" category.

IV. Conclusion

The Louisiana Supreme Court's holding in *Halphen* is at least a clarification of Louisiana strict products liability law. At most, this opinion represents a departure from prior Louisiana law, which, if carried to its fullest extent, could greatly increase a plaintiff's chance of recovery against a manufacturer under a products liability claim in Louisiana.

The greatest uncertainty after *Halphen* appears to be which products will fall into the "unreasonably dangerous per se" category. Will it be limited to products such as asbestos which seem to be almost ultra-hazardous,[66] or could it apply to a normally useful product that is

64. Halphen v. Johns-Manville Sales Corp., 788 F.2d 274, 275 (5th Cir. 1986).

65. Id. at 275.

66. An ultra-hazardous product is a product which, even when manufactured with the greatest of care and prudence, is likely to cause harm to persons who use the product. See Langlois v. Allied Chem. Corp., 258 La. 1067, 249 So. 2d 133 (1971), which explains the liability associated with ultra-hazardous activities.

defective? For example, what about a rocking chair that is designed such that if toes get under its base, they will be severed? Would this rocking chair be unreasonably dangerous per se?

The vague standards which *Halphen* sets forth are likely to make it difficult for the courts of Louisiana in applying its principles. Also, as to the universe of products which fall within the various categories laid out in the opinion, the citations of authority offered by the court furnish little guidance in this area.

Aside from the textbook-like theories advanced by *Halphen*, it seems that Louisiana courts will have other problems in applying its principles. This would seem to be especially true of the issues raised by the court's apparent grant of authority to the pleading of more than one of the theories of unreasonably dangerous products. The courts will have to resolve the practical problems with the jury considering the manufacturer's knowledge under one theory and ignoring it under others, in addition to resolving the problems inherent in pleading any theory at all with Louisiana's system of fact pleading.

Only time will tell how *Halphen* will change Louisiana strict products liability law. However, it seems that the courts may be reluctant to use the new category of "unreasonably dangerous per se," as no Louisiana court has addressed it since the opinion was released in March of 1986.

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