Louisiana Law Review

Volume 48 | Number 1
September 1987

Lafleur v. John Deere Co.: No Recovery of Delictual Damages for Sale of a Useless Product

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NOTES

Lafleur v. John Deere Co.: No Recovery of Delictual Damages for the Sale of a Useless Product

Two plaintiffs, the purchaser and the user of an allegedly defective grain drill, sued the manufacturer, John Deere, and the seller, F. Hollier & Sons, seeking both pecuniary and non-pecuniary damages. In addition to damages for crop losses and expenses, the lower courts awarded $125,000 and $10,000, respectively, for mental anguish damages. The Louisiana Supreme Court reversed this portion of the judgment, holding that the plaintiffs were not entitled to their non-pecuniary damage awards. The court stated that the plaintiffs had produced only "scant" proof to support a mental pain and anguish award and that "such worry is not within the scope of the risk to which is extended Deere's duty to deliver a *useful* grain drill." *Lafleur v. John Deere Co.*, 491 So. 2d 624, 631 (La. 1986).

In finding insufficient proof to support the non-pecuniary damage award, the supreme court admittedly sidestepped the "tough questions" raised by this case.[1] Specifically, the court left unanswered the question of whether the manufacturer of a product which is not unreasonably dangerous[2] but merely useless[3] has breached a tort duty as well as a contractual duty.[4] An affirmative answer to this question would allow

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1. Lafleur v. John Deere Co., 491 So. 2d 624, 631 (La. 1986).

2. In Weber v. Fidelity Casualty Ins. Co., 259 La. 599, 250 So. 2d 754 (1971), the supreme court, in applying the doctrine of strict liability in tort to manufacturers of unreasonably dangerous products, stated:

> 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 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.

Id. at 602-03, 250 So. 2d at 755.

3. La. Civ. Code art. 2520 provides:

> Redhibition is the avoidance of a sale on account of some vice or defect in the thing sold, which renders it either absolutely useless, or its use so inconvenient and imperfect, that it must be supposed that the buyer would not have purchased it, had he known of the vice.

4. Since the word "defect" will be used throughout this note, the unmodified use of "defect" will refer to the *Weber*-strict liability tort defect (see supra note 2). Any other defects, such as redhibitory defects (see supra note 3) will be specified.

any person having a redhibition or quanti minoris claim also to assert a tort action against the bad faith seller[5]. Allowing these multiple grounds for recovery, it is submitted, would confuse the already blurred distinction between tort and redhibition and would ignore the code articles governing sales which specifically provide for the recovery of damages arising from the buyer/seller relationship.

This note will analyze both the appellate court and supreme court opinions in *Lafleur*. Before discussing the opinions, the traditional civilian distinction between contractual fault and delictual fault will be examined, as well as the development of the idea of unity of fault, particularly with reference to the Louisiana jurisprudence. This discussion is necessary to adequately develop the background from which the *Lafleur* case arose.

Contract vs. Delict

An obligation is a legal relationship whereby a person is bound to render a performance in favor of another.[6] Historically, a distinction has been drawn between contractual obligations, which arise from the will of the parties in the form of consent, and delictual obligations, which are imposed by law regardless of the parties' will.[7]

The violation of any obligation requires fault on the part of the obligor. Planiol, in discussing the distinctions between contractual fault and delictual fault, stated: "Contractual fault is that which is committed on the occasion of the execution of a contract. It consists in violating a contractual obligation. As to the delictual fault, most authors say that it is 'an act productive of obligations which takes place between persons juridically strangers to each other.'"[8] Thus, contractual fault is said to arise from the inexecution of a pre-existing obligation, whereas delictual fault arises from an act which creates an obligation where one previously did not exist.

Another important distinction between contractual fault and delictual fault is the manner in which each fault is proved. Delictual fault must be specifically proved.[9] An injured victim must show that the tortfeasor was at fault and that this fault caused him injury. Contractual fault, however, may be presumed in certain instances. In an obligation to

5. La. Civ. Code art. 2545. Since a manufacturer is presumed to have knowledge of defects in its products, it is characterized as a bad faith seller under art. 2345. See, e.g., Philippe v. Browning Arms Co., 395 So. 2d 310, 318 n.15 (La. 1980).

6. La. Civ. Code art. 1756.

7. Tete, Tort Roots and Ramifications of the Obligations Revision, 32 Loy. L. Rev. 47, 54 (1986). See also La. Civ. Code art. 1757.

8. 2 M. Planiol, Treatise on the Civil Law, No. 873, at 485. (11th ed. L. S. L. Inst. transl. 1939).

9. 2 S. Litvinoff, Obligations § 182, at 344, in 7 Louisiana Civil Law Treatise (1975).

provide a particular result, for instance, contractual fault can be presumed from the material fact of non-performance.[10] Once an obligee establishes that a contract to provide a certain result was not performed, the burden of justifying the non-performance rests with the obligor. Thus the obligee can prevail without "hav[ing] to prove the obligor's fault in a distinct manner."[11]

The Louisiana Civil Code has maintained distinctions between contract and delict. These differences are most noticeable in the areas of prescription and damages. The Civil Code establishes a prescriptive period of one year for delicts,[12] while contracts, which are considered personal actions, are subject to a ten year prescriptive period.[13] The characterization of an action as contractual or delictual is therefore determinative of the appropriate prescriptive period.

The characterization of an action is also important with respect to damages. Civil Code article 2315, the fundamental source of delictual liability in Louisiana, requires a person to repair the damage that his fault has caused. The obligation of repair requires the injuring party to put the victim in the position that he would have occupied if the injury complained of had not been inflicted.[14] This restoration has been held to include reparation for items such as physical suffering and inconvenience, permanent injuries, loss of earnings and services, impaired earning capacity, expenses incurred, and mental suffering. Furthermore, much discretion is left to the judge or jury in the assessment of delictual damages.[15]

Regarding contractual liability, an obligor is liable for the damages caused by his failure to perform a conventional obligation.[16] Damages are measured by two elements: the loss sustained by the obligee and the profit of which he has been deprived.[17] The obligor in good faith is liable only for the damages that were reasonably foreseeable at the time the contract was made, while the obligor in bad faith is liable for all damages, foreseeable or not, that are a direct (i.e. necessary) consequence of the failure to perform.[18] Furthermore, damages for non-pecuniary losses are recoverable only if the principal object of the

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10. Id.
11. Id.
12. La. Civ. Code art. 3492.
13. La. Civ. Code art. 3499. See also infra text accompanying notes 59 and 60 discussing prescriptive periods in a redhibitory action.
14. Coleman v. Victor, 326 So. 2d 344 (La. 1976).
15. La. Civ. Code art. 2324.1.
16. La. Civ. Code art. 1994.
17. La. Civ. Code art. 1995.
18. La. Civ. Code arts. 1996, 1997.

contract is intended to gratify a non-pecuniary or intellectual interest.[19]

Professor Litvinoff, discussing the contractual theory of damages, has stated:

> [T]he obligor is bound to make reparation for the damage that his faulty nonperformance has caused the obligee, as every man is held to repair the damage that he causes to another through his fault. There is thus a contractual responsibility as there is a delictual; and the similarity is oftentimes striking. Contractual damages are the projection of an organized pre-existing relation between obligee and obligor, while delictual damages may be due between strangers placed in the presence of each other by mere fate.[20]

Unity of Fault

While Planiol acknowledged that the dualistic theory of fault was firmly entrenched in French legal doctrine, he believed that the difference between contractual fault and delictual fault was superficial and lacked foundation. Both faults create an obligation of repairing the damage caused and both consist of an act which violates a pre-existing obligation. "Only, the case in which the fault is called delictual, the obligation violated is a legal obligation, having ordinarily as its object a negative act, an abstention."[21] Following his refutation of dualistic fault, Planiol asserted the idea of unity of fault:

> We must understand: if one wishes to speak of a distinction to be made in the practice between contractual obligations and legal obligations, perhaps one may find some provision of the positive law which makes such distinction desirable; but if one tries to establish a specific difference between the faults from the rational or doctrinal point of view, the distinction commonly admitted is not only contestable; it has neither sense nor reason for being. The nature of the obligation violated has no bearing on the fault.[22]

The basic idea behind unity of fault is that contractual and delictual fault are fundamentally similar. In either case, a court will not hold a person civilly liable for damages unless it finds 1) fault (i.e. a breach of duty) on the part of the defendant; 2) pecuniary or non-pecuniary

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19. La. Civ. Code art. 1998. See also La. Civ. Code art. 1934(3) (1870), discussed infra in note 73.

20. 2 S. Litvinoff, Obligations § 179, at 336-37, in 7 Louisiana Civil Law Treatise (1975) (emphasis added).

21. Planiol, supra note 8, No. 876 at 487.

22. Id., No. 877 at 488.

damages sustained by the plaintiff; and 3) a causal link between the defendant's fault and the plaintiff's damages.[23] "These three conditions are essential in any civil claim and this [is] irrespective of the judicial basis of the action."[24] A proponent of unity of fault has summarized the theory by stating, "[c]ivil responsibility rests essentially on the violation of a juridical obligation, be it contractual or legal, and . . . basically there is no intrinsic difference between a fault, be it voluntary or involuntary, according to whether it arises from the breach of a contractual obligation or from the violation of a legal duty."[25]

Under unity of fault, it is easy to see how courts can justify an award of damages based on multiple grounds of recovery. If delictual and contractual fault are "fundamentally one and the same"[26] then "[t]he same acts or omissions may constitute breaches of both general duties and contractual duties giving rise to actions in both tort and contract."[27]

Unity of Fault in Louisiana

A survey of the Louisiana jurisprudence reveals not only a theoretical recognition of unity of fault but an evolution of the idea as well.[28] One of the earliest Louisiana decisions recognizing the unity of fault theory was *Illinois Central Railroad Co. v. New Orleans Terminal Co.*[29] The defendant had contracted with Illinois Central to provide for the safe movement of Illinois Central's trains. The negligence of the defendant's employee resulted in a head on collision, and Illinois Central sued for damages more than a year after the accident. The defendant, contending that the cause of action was in tort, pled prescription. Justice Provosty, speaking for the court, stated:

> There is no doubt that the action of the defendant . . . amounted to a tort; but there is no reason why the breach of a contract

23. Crepeau, *Civil Responsibility: A Contribution Towards Rediscovery of Contractual Liability*, in Essays on the Civil Law of Obligations 86 (J. Dainow ed. 1969).

24. Id.

25. Id. at 87.

26. Id.

27. Franklin v. Able Moving and Storage Co., 439 So. 2d 489, 491 (La. App. 1st Cir. 1983). See also Free v. Franklin Guest Home, Inc. 397 So. 2d 47 (La. App. 2d Cir.), writ denied, 401 So. 2d 975 (La. 1981); Federal Ins. Co. v. Insurance Co. of N. A., 262 La. 509, 263 So. 2d 871 (1972).

28. "French law in principle will not allow an action in delict where the alleged fault arises from the non-performance or bad performance of a contractual obligation." If a contractual remedy is available, French law will not allow a delictual action. Herbots, *Economic Loss In The Legal Systems Of The Continent*, in The Law of Tort 139 (M. Furmston ed. 1986).

29. 143 La. 467, 78 So. 738 (1918).

> by means of a tort should not furnish ground for an action for breach of contract. . . . Because a certain act of omission or commission violates the general duty which a person owes to society not to injure another is no reason why it should not, at the same time, violate a special duty owing to this other by virtue of a contract to do or not to do that particular thing, and why the violation of the latter duty should not furnish a cause of action. *The measure of damages may be different for the injury caused by an act accordingly as the act is viewed as a breach of contract or as a tort; and, clearly, the party injured should be entitled to the one or the other action accordingly as his interest may dictate.* For breach of contract without fraud or bad faith only those damages which entered into the contemplation of the parties at the time of making the contract may be recovered. Whereas for tort all and whatever damages resulting directly from the act or negligence complained of may be recovered.[30]

In explaining this position, the court quoted an excerpt from Fuzier-Herman, Repertoire du Droit Francais, Vo. Responsabilite, No. 4, which contained language virtually identical to that of Planiol.[31] Additionally, it is important to note that the court allowed the injured party to *elect* which action he would pursue. This election of remedies notion was followed in subsequent cases,[32] occasionally to the detriment of the injured party.[33]

An important step in the development of Louisiana's unity of fault theory occurred in *Federal Insurance Co. v. Insurance Co. of North America*,[34] a suit for damage to leased equipment. Federal Insurance,

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30. Id. at 473, 78 So. at 740 (emphasis added).

31. Id. at 475-76, 78 So. at 741. See supra text accompanying note 22.

32. See Kramer v. Freeman, 198 La. 244, 3 So. 2d 609 (1941); American Heating & Plumbing Co. v. West End Country Club, 171 La. 482, 131 So. 466 (1930); Wilson v. Scurlock Oil Co., 126 So. 2d 429 (La. App. 2d Cir. 1960); Spencer v. West, 126 So. 2d 423 (La. App. 2d Cir. 1960); Olinde Hardware & Supply Co. v. Ramsey, 98 So. 2d 835 (La. App. 1st Cir. 1957).

33. See Importsales, Inc. v. Lindeman, 231 La. 663, 92 So. 2d 574 (1957) (Action against the widow of a former sales agent for the value of merchandise that the agent allegedly refused to return. The court considered the allegations and prayer of the plaintiff's petition and concluded that the action was "clearly ex delicto for damages to the amount of the value of the merchandise (not one ex contractu for restitution of the property or for the proceeds of sales thereof)," and sustained the defendant's plea of prescription.); Parro v. Fifteen Oil Co., 26 So. 2d 30 (La. App. 1st Cir. 1946) (Action against the assignee of a mineral lease for damages to surface land. After considering the entire petition, the court concluded that the plaintiff had based his action in tort and upheld the defendant's plea prescription.).

34. 262 La. 509, 263 So. 2d 871 (1972).

the subrogee of the lessor, sued the lessee and the lessee's insurance company more than a year after the date of the alleged negligent act. Both the trial court and the court of appeal maintained the defendants' plea of prescription, based on the conclusion that the "petition sounded in tort and . . . was prescribed under Civil Code Article 3536."[35]

The supreme court, finding that the suit was based on the contract of lease, reversed. The court recognized its numerous decisions which had allowed a party who was damaged by the conduct of another arising from a contractual relationship to recover damages in either a suit in contract or an action in tort. "In such cases, the prescription applicable is determined by the character which plaintiff gives his pleadings and the form of his action."[36] Although the petition contained allegations of particular acts of negligence, the court found that these "were necessary to plaintiff's action in contract" and that the petition's language "specifically and plainly" stated that the action was in contract.[37]

Of particular importance in the *Federal Insurance* decision is the often cited concurrence by Justice Tate. He emphasized that the majority opinion was in accordance with the basic rationale of the 1960 Code of Civil Procedure.

> The 1960 Code of Civil Procedure, which has as its aim ultimate and substantial justice rather than procedural technicality, sought to suppress "the harsh and unduly technical 'theory of the case' doctrine in Louisiana, under which the litigant must select a theory of his case or defense and adhere to it throughout the litigation.
>
> In cases such as this one, a plaintiff who pleads and proves the necessary facts should be allowed to recover under any available theory, whether tort, quasi contract, or contract. To bar recovery simply by strictly construing the pleadings is to abandon the spirit of the 1960 Code of Civil Procedure.[38]

Rather than forcing a plaintiff to elect and adhere to a theory of the case, he is only required to allege the material facts constituting a cause of action. These facts are then liberally construed in his favor.[39] In situations akin to the instant case, in which both contractual and delictual actions are available, Justice Tate opined, "The better view of our Louisiana jurisprudence is that the plaintiff retains the *right of*

35. Id at 512, 263 So. 2d at 872.
36. Id.
37. Id. at 515, 263 So. 2d at 873.
38. Id. at 515-18, 263 So. 2d at 874 (Tate, J., concurring) (citations omitted).
39. Id.

election between concurrent remedies, when the facts pleaded justify either."[40]

Two landmark "consumer protection" decisions, *Weber v. Fidelity Casualty Ins. Co.*[41] and *Media Production Consultants, Inc. v. Mercedes-Benz of North America*,[42] laid the foundation for the next significant movement in Louisiana's unity of fault theory. *Weber* applied the doctrine of strict liability in tort to all manufactured products and extended the right of action to any user of the product. *Media* eliminated the traditional lack of privity defense by extending the manufacturer's implied warranty to ultimate purchasers. The supreme court further elaborated on the *Media* holding in *Rey v. Cuccia*:[43] "In effect, the consumer's cause of action, which is based upon the breach of the sale's implied warranty, is enforceable directly against the manufacturer, who himself is by law bound to the same implied warranty."[44]

Cases following *Weber* and *Media* have allowed the injured purchaser of an unreasonably dangerous product two causes of action—a strict liability action in tort and a redhibition action.[45] A strict liability action obviates the plaintiff's burden of proving negligence, since a manufacturer is presumed to have knowledge of his product's defects.[46] The injured party is only required to show that 1) the product is defective (i.e. unreasonably dangerous to normal use); 2) the injury was foreseeable; and 3) the injury was caused by the defect while the product was in normal use.[47] Damages recoverable in a strict liability action are delictual in nature.[48]

Redhibition is the avoidance of a sale due to a vice or defect in the thing sold which renders it either absolutely useless or so inconvenient to use that, had the buyer known of the defect, he would not have purchased it.[49] A sale is a nominate contract and, while subject to the rules governing conventional obligations,[50] is governed by special rules applying to sales.[51] "The redhibition action is highly structured and described with great specificity in the appropriate articles of the Civil

40. Id. at 518-19, 263 So. 2d at 875 (Tate, J., concurring) (emphasis added).
41. 259 La. 599, 250 So. 2d 754 (1971), discussed supra in note 2.
42. 262 La. 80, 262 So. 2d 377 (1972).
43. 298 So. 2d 840 (La. 1974).
44. Id. at 845.
45. See infra text accompanying notes 62-71.
46. *Weber*, 259 La. at 603, 250 So. 2d at 756. For a good discussion of this presumption see Robertson, Manufacturers' Liability For Defective Products in Louisiana Law, 50 Tul. L. Rev. 50, at 56.
47. Crawford, Products Liability—The Cause of Action, 22 La. B. J. 239, 246 (1975).
48. See supra text accompanying notes 14 and 15.
49. La. Civ. Code art. 2520. For text of the article, see supra note 3.
50. La. Civ. Code art. 1915.
51. La. Civ. Code art. 1916.

Code; a significant body of jurisprudence has further refined and delineated its requirements."[52]

To maintain a redhibition action, a buyer must show that the thing he purchased contained a non-apparent redhibitory defect[53] which existed before the sale was made.[54] The Code distinguishes between a good faith seller (one who does not know of the vice)[55] and a bad faith seller (one who knows the vice of the thing he sells and fails to declare it).[56] A good faith seller is only bound to repair, remedy or correct the vice. This implicitly requires the buyer to tender the item for repair. If the seller is unable or fails to correct the vice, then he must restore the purchase price, and reimburse the reasonable expenses occasioned by the sale, as well as those incurred for the preservation of the thing, subject to a credit for the value of any fruits or use which the purchaser has drawn from it.[57] The bad faith seller, besides the restitution of the price and repayment of expenses, including reasonable attorneys' fees, is answerable to the buyer in damages.[58] The action against the good faith seller must be commenced within a year from the date of the sale,[59] while the action against the bad faith seller may be commenced at any time within a year from the discovery of the vice.[60]

Since, according to *Weber* and *Media*, the purchaser of an unreasonably dangerous product has concurrent remedies, the rationale of *Federal Insurance* would require the court to liberally construe the facts pleaded to determine the character of the purchaser's action. If the facts pleaded justify recovery under each remedy, the plaintiff would retain the right of electing the remedy that his interests dictate. However, rather than allowing the plaintiff to recover under *either* one theory *or* the other, the subsequent jurisprudence has allowed recovery under both theories simultaneously.[61]

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52. Note, Attorney's Fees in Louisiana Products Liability: Philippe v. Browning Arms Co., 42 La. L. Rev. 298, 305 (1981).

53. La. Civ. Code art. 2521. See also Demars v. Natchitoches Coca-Cola Bottling Co., 353 So. 2d 433 (La. App. 3d Cir. 1977), writ denied, 354 So. 2d 1384 (La. 1978).

54. La. Civ. Code art. 2530.

55. La. Civ. Code art. 2531.

56. La. Civ. Code art. 2545.

57. La. Civ. Code art. 2531.

58. La. Civ. Code art. 2545.

59. La. Civ. Code art. 2534.

60. La. Civ. Code art. 2546.

61. Louisiana courts' definition of "either theory" has evolved from an interpretation of the term to mean "one theory or the other" to an interpretation of the term to mean "each or both." This progression can be noted in the following cases: Illinois Cent. R.R. Co. v. New Orleans Terminal Co., 143 La. 467, 78 So. 738 (1918); American Heating & Plumbing Co. v. West End Country Club, 171 La. 482, 131 So. 466 (1930); Lafleur v. Brown, 223 La. 976, 67 So. 2d 556 (1953); Federal Ins. Co. v. Insurance Co. of N. A., 262 La. 509, 263 So. 2d 871 (1972); Harris v. Bardwell, 373 So. 2d 777 (La. App. 2d Cir. 1979); Philippe v. Browning Arms Co., 395 So. 2d 310 (La. 1980).

In *Harris v. Bardwell*,[62] the plaintiff sought recovery in redhibition and alternatively in tort for permanent injuries sustained due to a defectively installed boat seat. The seat came loose during an abrupt turn and the plaintiff was thrown into the water where he was run over twice by the circling boat. The Louisiana Second Circuit Court of Appeal, after referring to "*Weber-Media* and their progeny" and noting that "the damage caused a buyer by a defective thing he has purchased smacks of both contract and tort,"[63] stated, "Recovery under one theory should not preclude recovery under another theory where the circumstances warrant. Personal injury damages, whether under 2315, *Weber*, or 2545, and attorney fees under CC 2545, are recoverable here."[64]

The supreme court went a step further in *Philippe v. Browning Arms Co.*[65] *Philippe* involved a suit by a purchaser of a shotgun against the manufacturer and importer for injuries sustained when the shotgun accidentally discharged, severing the purchaser's right thumb. On original hearing the court denied the plaintiff's request for attorneys' fees, reasoning that "in this case, in which rescission of the sale was not sought by plaintiff, but only damages arising from his personal injuries, attorneys' fees under Article 2545 are not payable."[66] Upon rehearing, the court reversed its view and awarded attorneys' fees, stating that its original analysis represented "a return to the requirement of pleading the theory of the case, which we reject on rehearing."[67] In justifying the combination of tort and rehibition recovery, Justice Lemmon stated:

> There is no compelling reason to require a person injured by a defective product he has purchased to proceed either in contract or tort. *The seller's (manufacturer's) act of delivering a defective thing, when he knows of the defect, gives rise to delictual, as well as contractual, liability*. . . . [T]he right and the extent of recovery by the purchaser of a thing against the seller or manufacturer is governed by the codal articles providing for responsibility in the seller-purchaser relationship, as applied through C.C. art. 2315.[68]

This language has led to confusion. The recognition of unity of fault was the initial departure from Louisiana's codal scheme, which

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62. 373 So. 2d 777 (La. App. 2d Cir. 1979).

63. Id. at 783. The court cited both the majority and concurring opinions of *Federal Insurance* for the proposition that the purchaser of a defective thing may recover damages under either theory— tort or contract.

64. Id. at 784.

65. 395 So. 2d 310 (La. 1980).

66. Id. at 313.

67. Id. at 318.

68. Id. at 319 (emphasis added).

provides distinct remedies for a breach of duty based upon the source of the obligation giving rise to the duty. These practical distinctions[69] recognized in the Louisiana Civil Code are what Planiol referred to as "some provision of the positive law which makes such distinctions [between contractual and delictual fault] desirable."[70] *Philippe* wanders further by applying a delictual liability provision to a contractual duty, thus circumventing the code articles which provide a contractual remedy and ignoring the codal and jurisprudential requirements for maintaining a redhibitory action. Although this holding may be desirable from a consumer protection standpoint, the broad language has presented difficulties. A prime example of these problems appears in *Lafleur v. John Deere Co.*

The Third Circuit's View in Lafleur v. John Deere Co.[71]

Larry Fontenot purchased a John Deere 8300 grain drill from F. Hollier & Sons to plant his and Arlen Lafleur's soybean crops. Due to an improperly working gauge wheel (which regulated the planting depth), the seeds were planted too shallowly. As a result, Fontenot's and Lafleur's crops yielded only thirty percent of the parish average. The crop was Fontenot's first, and he had borrowed over $84,000 to plant and harvest it. Due to the disastrous yield, Fontenot was unable to pay his debts and ultimately lost his farming business. The entire situation caused both him and Lafleur great anxiety.

Fontenot and Lafleur sued the manufacturer and the seller of the defective implement. Following the trial, the jury awarded Fontentot $6,178 as a return of the purchase price, $15,678.75 for expenses incurred, $60,820 for crop loss, $69,225 for attorneys' fees, and $125,000 for mental anguish. The trial judge awarded Lafleur, the user of the implement, $55,388.03 for crop loss and $10,000 for mental anguish, stress and inconvenience.

On appeal, the third circuit upheld the trial court's award of mental anguish damages despite the defendants' contentions that 1) the plaintiffs did not receive bodily injury, and 2) non-pecuniary damages are not allowed in contract cases unless the contract has as its principal object

69. See supra text accompanying notes 12-19 and 52-60.

70. See full quotation in supra text accompanying note 22. For a general discussion, see Crepeau, supra note 23.

71. Lafleur v. F. Hollier & Sons, 478 So. 2d 1390 (La. App. 3d Cir. 1985), which was affirmed by the third circuit for reasons assigned in its companion case, Fontenot v. F. Hollier & Sons, 478 So. 2d 1379 (La. App. 3d Cir. 1985). For this reason, the *Fontenot* opinion will be discussed.

"the gratification of some intellectual enjoyment."[72] It dismissed the first contention on the authority of its own precedent which allowed recovery for mental anguish when property was damaged even though no bodily injury was sustained.[73] As to the second contention, the court reviewed the jurisprudence since *Meador v. Toyota of Jefferson*[74] and concluded that "the *Meador* rule is no longer inflexibly applied to preclude awards of non-pecuniary damages."[75] This conclusion was based on several post-*Meador* cases,[76] in particular *Philippe v. Browning Arms Co.*[77] and *Bourne v. Rein Chrysler-Plymouth, Inc.*[78]

Philippe, as discussed earlier, stands for the proposition that the manufacturer's act of delivering a defective product gives rise to both contractual and delictual liability.[79] *Bourne* was a suit for the reduction of the purchase price of an automobile. Following the trial court's award of $5000 for mental anguish, the first circuit faced the question of whether non-pecuniary damages were "clearly not recoverable" in a redhibition or quanti minoris action. The court, after reviewing both

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72. This is known as the Meador rule, and was derived from the supreme court's interpretation of former civil code article 1934(3) in Meador v. Toyota of Jefferson, 332 So. 2d 433 (La. 1976). In *Meador*, the automobile owner sought to recover damages caused by undue delay (approximately seven months) in the repair of the auto. The court interpreted article 1934(3) as allowing non-pecuniary damages for a breach of contract only when the principal object of the contract is intellectual enjoyment. Since the procurement of intellectual enjoyment was not the principal object of the contract of repair, the court reversed the plaintiff's award of damages for aggravation, distress and inconvenience. Justice Dixon dissented, being of the opinion that recovery of damages for which justice requires compensation should not be denied for the superficial reason that the plaintiff's action is in contract, not tort.

> There is no logical reason to allow recovery of such damages when property is involved in cases delineated as "tort," and yet deny recovery of similar damages when property is involved (as in this case), simply because the action is delineated as "contract." Both involve a duty and a breach. . . . In the instant case, plaintiff has proved, to the satisfaction of the trier of fact, that she suffered inconvenience, distress and aggravation because of defendant's breach of duty. She should recover therefore.

Id. at 439 (Dixon, J., dissenting).

73. See Carroll v. State Farm Ins. Co., 427 So. 2d 24 (La. App. 3d Cir. 1983).

74. See supra note 72.

75. *Fontenot*, 478 So. 2d at 1386.

76. Pike v. Stephens Imports, 448 So. 2d 738 (La. App. 4th Cir. 1984); Franklin v. Able Moving & Storage Co., 439 So. 2d 489 (La. App. 1st Cir. 1983); Ducote v. Arnold, 416 So. 2d 180 (La. App. 4th Cir.), writ denied, 421 So. 2d 238 (La. 1982); Gele v. Markey, 387 So. 2d 1162 (La. 1980). For a discussion of these cases, see Comment, Recovering Non-Pecuniary Damages for Breach of Contract Under Louisiana Law, 47 La. L. Rev. 541 (1987).

77. 395 So. 2d 310 (La. 1980).

78. 463 So. 2d 1356 (La. App. 1st Cir. 1984), writ denied, 468 So. 2d 570 (La. 1985).

79. See supra text accompanying notes 65-68.

Meador and *Philippe*, decided that *Philippe* "mandates judicial repudiation of the blanket exclusion" of non-pecuniary damages in redhibition or quanti minoris actions. "To knowingly sell a redhibitorily defective product, such knowledge being imputed to a manufacturer, is to do a tortious act."[80]

Adopting the *Bourne* interpretation of *Philippe*, the court of appeal upheld the jury's award of non-pecuniary damages to Fontenot. The court noted that a strict application of the *Meador* rule would lead to an unfair and illogical result—that is, the purchaser of the implement, Fontenot, would be denied recovery for mental anguish simply because his action was "intertwined with a redhibition action," while the user of the implement, Lafleur, would be entitled to mental anguish damages since his action was based solely in tort.[81]

Lafleur v. John Deere Co., *the Supreme Court's View*

The supreme court granted writs primarily to consider the award of non-pecuniary damages for a contract that did not have intellectual enjoyment as its principal object. The court of appeal's position that "the *Meador* rule is no longer inflexibly applied" in contract cases was "not well taken."[82] The court emphasized that "no opinion of this Court after *Meador* has repudiated its holding, despite criticism by some Law Review commentators."[83] The court distinguished *Philippe* as "a products liability case with the *significant delictual aspects which attend such cases*" and discounted *Bourne* as a nonauthoritative denial of a writ.[84] The court also stressed that efforts to overrule *Meador* in the 1984 revision of the code articles on obligations had failed. "With minor language change the *Meador* interpretation of La. Civ. Code art. 1934(3) . . . has been incorporated in La. Civ. Code art. 1998. . . ."[85]

After going to great lengths to reaffirm *Meador*, the court stated that the *Meador* rule would not resolve the legal question at issue in this case. In the court's opinion, *Lafleur*, which involved a sale, contained both delictual as well as contractual elements, whereas *Meador*, which involved a service contract, had no delictual element. A distinction was made between "a normal breach of contract not involving delictual conduct" which is governed by current Civil Code art. 1998 and "contract situations where there occur damages by reason of fault which are *distinct from and/or in addition to* breach of a conventional obliga-

80. *Bourne*, 463 So. 2d at 1360.
81. *Fontenot*, 478 So. 2d at 1386.
82. *Lafleur*, 491 So. 2d 628.
83. Id. (citations omitted).
84. Id. at n.3 (emphasis added).
85. Id. at 629.

tion."[86] This latter category was a distinct reference to *Weber*[87] and its progeny which hold, according to the *Lafleur* court, that:

> [The] breach of the obligation (to produce and deliver a product which is reasonably safe for its intended use) gives rise to a cause of action in favor of the purchaser of the product not only to demand return of the purchase price, but also, *because the manufacturer is presumed to know of defects in its products*, to demand all damages caused by the defect.[88]

The problem faced by the court was that the facts in *Lafleur* did not fit comfortably into either category. Due to the "delictual" aspects (i.e., the seller/manufacturer's delivery of a defective thing) *Lafleur* was not what the court considered to be a "normal breach of contract" situation. However, due to the lack of personal injury—the plaintiffs suffered only economic and non-pecuniary loss—it would be hard to equate Deere with "the *Weber* type manufacturer, essentially a tortfeasor with obligation to pay tort damages including mental pain and anguish."[89]

Confronted with the difficult question of whether Deere should be treated as a *Weber* type tortfeasor or simply as a vendor of a useless product, the court opted to "leave that decision for another day."[90] Due to the scant evidence presented by the plaintiffs in support of their non-pecuniary damage claim, the court decided that there was "simply no way" to allow the plaintiffs their respective awards of $125,000 and $10,000 for mental pain and anguish. The court stated, "Even if we were to . . . conclude that Deere was akin to a *Weber* . . . type 'tortfeasor'. . . we would have to conclude, and we do so conclude, that such worry is not within the scope of the risk to which is extended Deere's duty to deliver a *useful* grain drill."[91]

Proposed Resolutions to "Tough Questions"

The court's decision to postpone the resolution of this troubling issue preserves the current state of legal uncertainty. Louisiana's products liability law is largely a jurisprudential creation. While cases such as *Phillippe* further advance the interests of consumers, they conflict with the code articles governing redhibition and create the confusion illustrated in *Lafleur*.

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86. Id. at 630 (emphasis added).
87. See supra note 2.
88. *Lafleur*, 491 So. 2d at 630.
89. Id. at 631.
90. Id.
91. Id.

The supreme court's unwillingness to impose delictual liability for John Deere's "tortious act" of delivering a redhibitorily defective product to a purchaser intimates a retreat from the broad language of *Philippe*. The court's reluctance stems from two aspects of the case. First, *Lafleur* did not involve what the court referred to as "a significant delictual aspect"—presumably a personal injury. This distinction is not completely satisfying, for it would seem to imply that damage to property is not delictual. Such an idea is contrary to prior jurisprudence. *Weber*, Louisiana's seminal products liability case, was a suit against the manufacturer of cattle dip for the loss of cattle and for the illness of the plaintiff's sons. Although personal injury was involved (the court awarded $100 to each son for temporary nausea and physical distress), the brunt of the action concerned the damage to property (the loss of seven head of cattle) for which the court awarded $2,650. Surely the present court does not intend to draw a line which would categorize the marketing of an unreasonably dangerous product that causes only property damage as nondelictual.

Second, the court was troubled by the fact that the grain drill was simply useless under article 2520 and not unreasonably dangerous. This distinction is much more convincing. It seems quite logical that while all *Weber* defects (unreasonably dangerous products) are redhibitorily defective (so useless, inconvenient or imperfect to use that had the buyer known of the defect he would not have purchased it), all redhibitory defects are not *Weber* defects. If the resolution of the "tough questions" in *Lafleur* "may ultimately involve line drawing by [the] Court,"[92] then a line between the unreasonably dangerous product and the useless product might be appropriate.

If the court is intent on maintaining the principle enunciated in *Philippe*, it could simply narrow the holding by stating that the manufacturer's act of delivering an unreasonably dangerous thing, when he knows of the defect, gives rise to delictual, as well as contractual, liability. This would keep a manufacturer's delivery of a useless product well within the contractual realm.

As previously mentioned, the legislature has provided specific statutes governing both contractual and delictual relationships and the corre-

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92. *Lafleur*, 491 So. 2d at 631. The court stated that line drawing may be the ultimate resolution,

> for in theory at least there is legal justification for deciding a) especially if personal injury is not involved, that the Legislature has clearly spoken to contract cases and said in C.C. art. 1998 that nonpecuniary damages are to be allowed only when the contract is intended to gratify a non-pecuniary interest, or conversely, b) although contractual, the manufacturer's duty is in tort as well, even where the fault is simply in performance of a contract and the attending damages merely pecuniary.

sponding duties and remedies associated therewith. The jurisprudence reveals a slow erosion of these distinctions, an erosion which has caused certain statutory differences between contract and tort to be disregarded. The growth of products liability law, an area which is closely related to both contractual actions and delictual actions, increases the difficulty of preserving the distinctions between the two actions. It has been suggested that:

> [T]he encroachment of the field of delict into that formerly occupied . . . by contract has not been due to inherent faults in the institution of contract but to the fact that *in use* it became inflexible, standardized, and too often a tool in the hands of the powerful to coerce the weaker party . . . . The injured consumer of defectively made products, who for so long had been unable to get redress from the seller on the manufacturer because of contract restrictions, is now given protection in the field of tort . . ."[93]

Louisiana courts have responded to the "modern" theory of products liability by allowing the purchaser of an unreasonably dangerous product to recover attorneys' fees as allowed by the redhibition articles and non-pecuniary damages as allowed by the articles governing torts.

As the late Justice Tate stated, "[i]t is the genuine desire of almost every judge to achieve an individually fair and socially practical result, within (he hopes) the bounds of self-restraint respecting the limitations of statute, doctrine, procedure, and theory."[94] However, this quest for justice is so strong that on occasion a solution is adopted which appears to be in contravention to the express will of the legislature.[95] *Philippe* was just such a situation, where the court, in an effort to reach a just result, applied a delictual damage provision to a contractual duty. The broad language of *Philippe* has led to a further derogation of the contract/tort distinction. In *Lafleur*, the *Philippe* language provided a basis for awarding delictual damages for the sale of a useless grain drill, a situation for which the code articles governing sales provide a clear and precise remedy. Although delictual (i.e., non-pecuniary) damages were not awarded, the possibility of such an award remains.

The code articles governing sales could provide a sufficient basis to adequately remedy a purchaser who sustains personal injury from an unreasonably dangerous product. Had the legislature opted to allow for

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93. Stone, *Comments* to Civil Responsibility: A Contribution Towards a Rediscovery of Contractual Liability, in Essays on the Civil Law of Obligations 104, 105-06 (J. Dainow ed. 1969).

94. Tate, The "New" Judicial Solution: Occasions for and Limits to Judicial Creativity, 54 Tul. L. Rev. 877, 909 (1980).

95. Id.

the recovery of non-pecuniary damages "in *all* contract cases, with the only reservation being that recovery be 'according to the nature of the contract, or according to the circumstances surrounding the obligor's failure to perform,'"[96] the field of contract would have the "flexibility" required to redress a purchaser's injuries, regardless of whether the damage was to property or person.[97] However, in the recent obligations revision,[98] the legislature declined to expand contractual damages. Thus, personal injuries resulting from the purchase of an unreasonably dangerous product will continue to spawn both delictual actions and redhibitory actions in order to fully redress the buyer's injury. Although the sale of an unreasonably dangerous product may continue to overlap into the realm of tort, the sale of a merely useless product is well within the realm of contract and should be treated as such in future cases. The application of a delictual remedy to the sale of a useless product is not necessary to adequately redress the injured purchaser and overlooks the recent legislative pronouncement maintaining the limitations on contractual damages.

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96. *Lafleur*, 491 So. 2d at 629.

97. For a thorough discussion of allowing non-pecuniary damages in contract cases see Litvinoff, Moral Damages, 38 La. L. Rev. 1 (1977).

98. 1984 La. Acts No. 331.