THE LOUISIANA 1988 PRODUCTS LIABILITY REFORM ACT: THE CHANGES AND THEIR EFFECTS

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I. Introduction 130

II. Background 132

A. Codal Basis for Products Liability 132

1. The Code: Tort Law and Warranty . . 132

2. The Court's Struggle with Tort Principles 135

B. Pre-*Halphen* Jurisprudence 136

C. Other Approaches to the Problem 141

1. *Borel v. Fibreboard Paper Products Corp.* 141

2. *Beshada v. Johns-Manville Products Corp.* 145

III. The Stage is Set: *Halphen v. Johns-Manville Sales Corp.* 149

A. The Underlying Federal Litigation 149

B. The Response to the Certified Question . . 151

C. The *Halphen* Progeny 156

IV. The 1988 Louisiana Products Liability Act 160

A. Impact on *Halphen* 161

B. Societal Impact 162

1. Will the New Legislation Stimulate the Economy? 162

2. The Liability Insurance Crisis 165

V. Conclusion 169

I was promised on a time,
To have reason for my rhyme;
From that time until this season,
I received nor rhyme nor reason.[1]

I. Introduction

In 1986, the Louisiana Supreme Court in *Halphen v. Johns-Manville Sales Corp.* rewrote Louisiana's products liability law and set forth several theories by which an injured party can recover from a manufacturer of a product.[2] The court in *Halphen* answered a certified question from the United States Fifth Circuit Court Appeals as to whether a manufacturer could assert as a defense that it could not have known of the defect in its product at the time it was manufactured. In delineating theories of recovery, the *Halphen* court crystallized a collage of prior Louisiana jurisprudence with current trends in the common law. The *Halphen* court rejected the "state-of-the-art defense"[3] that is made under certain theories of strict liability and held that a manufacturer's knowledge of the risks presented by its product at the time the product was manufactured makes no difference.[4] Thus, under *Halphen*, there are circumstances under which a manufacturer

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1. T. Fuller, *The Worthies of England* 366 (J. Freeman ed. 1952) (Edmund Spenser presented this stanza in the form of a petition to the queen for the pension he was promised for his poetry.).

2. Halphen v. Johns-Manville Sales Corp., 484 So.2d 1110 (La. 1986); *see* F. Stone, *Tort Doctrine* § 433 (12 Louisiana Civil Law Treatise 1977 & Supp. 1988). The supreme court's opinion was a response to a certified question from the United States Fifth Circuit Court of Appeals. Halphen v. Johns-Manville Sales Corp., 755 F.2d 393 (5th Cir. 1985).

3. The concept of a "state-of-the-art defense" has been the subject of many interpretations. *See* Wade, *On the Effect in Products Liability of Knowledge Unavailable Prior to Marketing*, 58 N.Y.U. L. Rev. 734, 750-51 (1983); *see, e.g.*, Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1088 (5th Cir. 1973) ("[T]he manufacturer is held to the knowledge and skill of an expert. . . . The manufacturer's status as an expert means that at a minimum he must keep abreast of scientific knowledge, discoveries, and advances and is presumed to know what is imparted thereby.") (citing Keeton, *Product Liability--Problems Pertaining to Proof of Negligence*, 19 S.W.L.J. 26, 30-33 (1965)); Wiska v. St. Stanislaus Social Club, Inc., 7 Mass. App. Ct. 813, 390 N.E.2d 1133, 1138 n.8 (1979) ("the level of pertinent scientific and technical knowledge existing at the time").

4. *Halphen*, 484 So.2d at 114.

can be liable even if it could not have discovered the risks by using the then current technology. In response to the *Halphen* opinion, the Louisiana Legislature in 1988 enacted the Louisiana Products Liability Act[5] "to provide for the liability of manufacturers for damage caused by their products."[6] The "reform" legislation reestablished "the four traditional ways under traditional products liability doctrine that a product may be unreasonably dangerous" and also "provides for a state of the art defense for manufacturers."[7]

The recently enacted products liability law was aimed at providing predictability for manufacturers so that they would not be discouraged from entering Louisiana.[8] "Reform" legislation such as the recent Louisiana Products Liability Act has traditionally been directed at stabilizing insurance premiums by establishing predictable standards for tort recovery.[9] These *raisons d'etre* must be questioned from several perspectives: (1) Will manufacturer's alter their behavior and rush into Louisiana because the legislature overruled *Halphen*? (2) Do insurance companies actually consider localized laws in setting premiums? And (3) will "reform" legislation on a state level make any

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5. La. Rev. Stat. Ann. §§ 9:2800.51-:2800.59 (West Supp. 1990).

6. *Id.* at 109.

7. *House Committee on Civil Law and Procedure Hearing on Senate Bill No. 684*, at 4 (June 7, 1988) [hereinafter *Committee Hearing*] (statement of John Kennedy, spokesman for Governor Buddy Roemer) (transcribed by Laurie Gehling, House Committee on Civil Law and Procedure Secretary).

8. *Id.* at 10 (statement of Wayne Fontana, Chairman of the Liability Task Force). Mr. Fontana stated,

> In manufacturing jobs alone, since 1981, we've lost fifty-five thousand jobs. The sole competition that Louisiana is in can not simply be to look every month to see [who], [either] West Virginia or Louisiana, has the highest unemployment rate. It's time for us to take some steps to try to stimulate this economy. We believe the passage of this particular bill[, Senate Bill No. 684,] is the one of those necessary steps.

Id.

9. *See* U.S. Department of Justice, Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability 45-51 (1986) [hereinafter *Justice Department Report*] (insurance crisis attributed to increases in both tort claims and the sizes of awards); *see generally* Achampong, *The Liability Insurance Capacity Crunch and Tort Reform Liability*, 16 Cap. U.L. Rev. 621 (1987); Hensler, *Trends in Tort Litigation: Findings from the Institute for Civil Justice's Research*, 48 Ohio St. L. J. 479 (1987); McKay, *Rethinking the Tort Liability System: A Report From the ABA Action Commission*, 32 Vill. L. Rev. 1219 (1987); O'Connell, *Balanced Proposals for Product Liability Reform*, 48 Ohio St. L. J. 317 (1987); Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 Yale L. J. 1521 (1987).

difference given there will be fifty different standards, or will federal legislation be required to establish predictability through a uniform standard? While the recent Louisiana legislation will establish more predictability in products liability law, it is questionable whether the legislation will serve to encourage manufacturers to come to Louisiana and allow insurers to appraise more precisely risks associated with a product in order to stabilize insurance premiums.

This article will first review the codal roots of products liability and the application of these principles prior to the supreme court's decision in *Halphen*. The paper will then analyze *Halphen*, its categorization of products liability theories, and the errant results which some of those theories have produced. Finally, the paper will study the new legislation's impact on *Halphen* and the societal impact with respect to Louisiana's economy and the insurance industry.

II. Background

A. Codal Basis for Products Liability

1. The Code: Tort Law and Warranty

Under the Louisiana Civil Code, products liability law can be approached either from tort principles or from contract warranty principles. The tort analysis can be approached from two perspectives: (1) negligence-based liability[10] and (2) custodial liability.[11] With respect to negligence-based liability, article 2315 reads in pertinent part, "Every act whatever of man that causes damage to another obliges him

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10. *See, e.g.*, Whitacre v. Halo Optical Prods., Inc., 501 So.2d 994 (La. Ct. App. 2d Cir. 1987) (manufacturer liable for failure to provide a warning--an omission); *see also* F. Stone, *supra* note 2, §§ 11(A), 59-61.

11. *See, e.g.*, Ross v. La Coste de Monterville, 502 So.2d 1026 (La. 1987) (actor liable for object which remained *sous sa garde*); *see also* Note, *ROSS V. LA COSTE DE MONTERVILLE: The Extension of LOESCHER V. PARR*, 62 Tul. L. Rev. 276 (1987). In one French decision, the manufacturer of a bottle of lemonade was found liable for injuries caused when the bottle exploded although the bottle had passed through the hands of several parties, because manufacturer had retained custody--or *garde*--of its structure. *See* Judgment of June 5, 1971, Cass. civ. 2e, Fr., 1971 Bulletin des arret de la Cour de cassation, chambres civile, Deuxieme section civile [Bull. Civ. II] 146.

by whose fault it happened to repair it."[12] Article 2316 continues, "Every person is responsible for the damage he occasions not merely by his act, but by his negligence, his imprudence, or his want of skill."[13] These two Civil Code articles form the basis of liability for the negligent acts or omissions of a seller[14] or manufacturer[15] in the design or construction of a product. Article 2315 fault consists of conduct which does not meet the standard of conduct of a prudent and diligent person under the circumstances.[16] When a party has superior knowledge, skill and intelligence, "the law will demand of that person conduct consistent with it."[17]

The custodial liability approach is rooted in articles 2317 through 2322.[18] Article 2317 reads, "We are responsible, not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or the things which we have in our custody."[19] Articles 2318 through 2322 delineate specific examples for strict liability due to the custody of the damage-causing object.[20] The principle embodied in article 2317 and its companion articles is that there is legal fault due to "a legal relationship [between the tortfeasor and] a person or thing whose conduct or defect creates an unreasonable risk of injuries to others."[21] If injuries are caused by a reasonable risk, the custodian is not liable for any damages caused.[22]

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12. La. Civ. Code art. 2315 (West Supp. 1990).

13. *Id.* art. 2316 (West 1979).

14. *See, e.g.*, Jones v. Robbins, 289 So.2d 104, 106-07 (La. 1974); Coignard v. F. W. Woolworth & Co., 175 So. 123, 124-25 (La. Ct. App. Orleans 1937); *see also* F. Stone, *supra* note 2, § 425, at 554.

15. *See, e.g.*, Purvis v. American Motors Corp., 538 So.2d 1015 (La. Ct. App. 1st Cir. 1988); *see also* F. Stone, *supra* note 2, § 437, at 564-65.

16. *See* Colin & Capitant, *Cours Elementaire de Droite Civil Francais* no. 190, at 179 (8th ed. 1935); *see also* W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on Torts* § 32 (5th ed. 1984) [hereinafter *Prosser and Keeton*].

17. *Prosser and Keeton*, *supra* note 16, § 32, at 185; *see also* Restatement (Second) of Torts § 289 comment m (1965).

18. *Halphen*, 484 So.2d at 116; *see also* Palmer, *A General Theory of the Inner Structure of Strict Liability: Common Law, Civil Law, and Comparative Law*, 62 Tul. L. Rev. 1303, 1334 n. 126, 1334-35 (1988).

19. La. Civ. Code Ann. art. 2317 (West 1979).

20. *See* La. Civ. Code Ann. arts. 2318 (child in custody of parent); 2319 (insane person in custody of curator); 2320 (servants, students or apprentices in custody of masters or employers); 2321 (animal in custody of owner); 2322 (building in custody of owner) (West 1979 & Supp. 1990).

21. Palmer, *supra* note 18, at 1337 (emphasis in original); *see also id.* 1337 n. 149 (quoting Loescher v. Parr, 324 So.2d 441, 446 (La. 1975)).

22. *Id.*

The analysis of products liability from a contract perspective involves the theory of redhibition, which is rooted in the sales articles of the Louisiana Civil Code.[23] Article 2520 of the Civil Code defines redhibition as "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."[24] The seller is not responsible for "apparent defects,"[25] but only for latent defects not declared to the buyer by the seller.[26] If the seller is in good faith and does not know of the latent defects, he must either repair the item sold to the buyer or restore the purchase price and reimburse reasonable expenses "occasioned by the sale, as well as those incurred for the preservation of the thing, subject to credit for the value of any fruits or use which the purchaser has drawn from it."[27] If the seller knows of the vice in the product sold and does not declare it to the buyer, he is also liable for reasonable attorney's fees and damages.[28]

For a buyer to recover damages in a redhibition action, the seller must have been in bad faith. Damage actions against manufacturers, however, were facilitated by the doctrine that the manufacturer was presumed to know of defects in his product and therefore was presumed to be a bad faith vendor.[29] Thus damage actions in redhibition were a significant feature of products liability in Louisiana. The Products Liability Reform Act, however, now establishes itself as the exclusive remedy for damage actions against manufacturers by providing: "A claimant may not recover from a manufacturer for damage caused by a product on the basis of any theory that is not set forth in this Chapter."[30] The effect will be to cut back upon the Civil Code's role in products liability and to channel

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23. *See* La. Civ. Code Ann. arts. 2520-2548 (West 1952 & Supp. 1989).
24. *Id.* art. 2520 (West 1952).
25. *Id.* art. 2521 (West 1952).
26. *Id.* art. 2521-2522 (West 1952).
27. *Id.* art. 2531 (West Supp. 1990).
28. *Id.* art. 2545 (West Supp. 1990).
29. Doyle v. Fuerst & Kramer, 8 Orl. App. 408 (1911)). George v. Shreveport Cotton Oil Co., 38 So. 432 (1905); Philippe v. Browning Arms Co., 395 So.2d 310 (1980).
30. *Supra* note 5, at § 2800.52.

these important cases into the sphere of tort. Thus this article will limit discussion to the tort analysis.

2. The Court's Struggle With Tort Principles

The Louisiana Supreme Court has struggled to draw a line between negligence-based liability and strict liability in products liability cases.[31] The court's opinion in *Entrevia v. Hood* identifies the analysis under article 2317 as "similar to that employed in determining whether a risk is unreasonable in a traditional negligence problem . . . and in deciding the scope of duty or legal cause under the duty/risk analysis."[32] The opinion continues, "This [similarity] is not because strict liability under Article 2317 is equivalent to liability for negligence, but because in both delictual areas the judge is called upon to decide questions of social utility that require him to consider the particular cases in terms of moral, social and economic considerations . . . ."[33] However, even if there is a hypertechnical or even academic distinction between the two delictual theories, and if the analysis of the negligence calculus is the same as that under the strict liability approach, the question remains whether the criteria for liability under each theory are the same? If the answer is yes, then is superior knowledge a relevant factor under both theories?

The court in *Kent v. Gulf States Utilities Co.* stated that to determine liability, the owner's knowledge must be presumed and the reasonableness of the owner's conduct would be determined "in light of that presumed knowledge."[34] Thus, as noted by Professor Vernon V. Palmer, "[u]ltimately liability will not attach [under the strict liability analysis] unless the risks presented are *unreasonable* risks, as determined by the negligence calculus."[35] The only distinction between strict liability based on custody and the traditional negligence analysis under article 2315 "pertains to the knowledge of the condition creating the unreasonable risk of injury. The assumption is that the

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31. Palmer, *supra* note 18, at 1340.
32. 427 So.2d 1146, 1149 (La. 1983) (citations omitted).
33. *Id.*
34. 418 So.2d 493, 497-98 (La. 1982) (citing *Wade, Strict Liability for Manufacturers*, 19 Sw. L.J. 5, 15 (1965)
35. Palmer, *supra* note 18, at 1341 (emphasis in original).

knowledge of risk constitutes a prerequisite of fault, and strict liability results when such knowledge is legally unnecessary."[36]

This distinction--whether knowledge of a risk is necessary for liability--is at the heart of the confusion. The distinction is important for clarity in the jurisprudence because if knowledge is not necessary, the analysis should consist of pure strict liability theory. If knowledge is necessary, the analysis is then directed to the well-established duty-risk analysis[37] under ordinary negligence law. The Fifth Circuit's certified question in *Halphen* centered on whether knowledge was a factor under Louisiana products liability law.[38] The 1988 reform legislation is directed at the criterion of knowledge.[39] For the purposes of this article, three classifications of knowledge are considered: (1) known risks; (2) unknown risks, but knowable under the then current technology; and (3) unknowable risks, given the technology at the pertinent time.

Before analyzing *Halphen* and the new legislation, it is necessary to look at the birth of products and custodial liability in Louisiana and the motley jurisprudence which grew from it. This hybrid jurisprudence developed during the late 1970s and early 1980s, and it served as a gyroscope for the court's decision in *Halphen*.[40]

B. Pre-*Halphen* Jurisprudence

Products liability achieved prominence in Louisiana with Justice Albert Tate, Jr.'s decision in *Weber v. Fidelity & Casualty Insurance*

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36. *Id.* (footnote omitted).

37. *See* Hill v. Lundin & Assocs., Inc., 260 La. 542, 547-48, 256 So.2d 620, 622 (La. 1972) ("[I]f [a] defendant's conduct is a cause in fact of the harm, we are then required in a determination of negligence to ascertain whether the defendant breached a legal duty imposed to protect against the risk involved.").

38. The Fifth Circuit certified the following question:

> In a strict products liability case, may a manufacturer be held liable for injuries caused by an unreasonably dangerous product if the manufacturer establishes that it did not know and reasonably could not have known of the inherent danger posed by its product?

Halphen v. Johns-Manville Sales Corp., 755 F.2d 393, 394 (5th Cir. 1985) (en banc).

39. *See infra* section IV.

40. For a thorough discussion of the interaction between the pure strict liability analysis and the duty-risk analysis, *see* Palmer, *supra* note 18, at 1334-50.

Co. of New York.[41] The court's opinion in *Weber* was based on defectiveness.[42] In a concise distillation of principles which had developed in Louisiana, Justice Tate established the foundation for products liability law in Louisiana:

> 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 design, composition, or manufacturer of the article, if the injury *might have been reasonably anticipated.*[43]

Under *Weber*, a plaintiff needed to prove "that the product was defective, *i. e.*, unreasonably dangerous to normal use."[44] However, proof of "any particular negligence by the maker" of the thing was not necessary; Justice Tate stated that "the manufacturer is presumed to know of the vices in the things he makes, whether or not he has actual knowledge of them."[45]

Although Justice Tate dispensed with any requirement of actual knowledge, the standard he established implied that knowledge with respect to the defect was available to the manufacturer--*i.e.*, knowable even if unknown by the tortfeasor. How could a manufacturer reasonably anticipate a risk if experts or academicians had not pushed the frontier of knowledge past the level required to anticipate the risk? Thus, although *Weber* did not address a state-of-the-art defense as did *Halphen*, the general theory of products liability in Louisiana implicitly allowed for such a defense in its genesis.

Seizing on *Weber's* requirement that a product be "unreasonably dangerous to normal use," the court in *Chappuis v.*

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41. 259 La. 599, 250 So.2d 754 (La. 1971). The underlying dispute in *Weber* concerned the death of plaintiff's son's seven cattle after the application of cattle dip. *Id.* at 602, 250 So.2d at 755. The plaintiff's two minor sons also became ill. *Id.* The chief factual issue in the case was whether there was an excessive amount of arsenic in the dip due either to a defective batch or to improper mixing by plaintiff's two sons. *Id.* at 604, 250 So.2d at 756.

42. F. Stone, *supra* note 2, § 433, at 157 (Supp. 1988).

43. *Weber*, 259 La. at 602-03, 250 So.2d at 755 (emphasis added).

44. *Id.*

45. *Id.* at 603, 250 So.2d at 756.

Sears Roebuck & Co. considered whether a manufacturer was liable for the failure to warn that a chipped hammer should be discarded without further use.[46] In this context, the court immediately looked to "fault" under article 2315.[47] The court stated "that the knowledge [that a chipped hammer is dangerously likely to chip once again in normal use] is peculiarly with the manufacturer and the experts."[48] However, in the underlying dispute, there was little or no dispute that this knowledge was available to the manufacturer. The court found that because industry literature concerning the risks posed by a chipped hammer was readily available, "[i]t would have been reasonable, in this case, for the manufacturer to add to the warning label the words 'discard the hammer if it becomes chipped.'"[49] Thus, because the information was readily available, the court had no problem in holding the manufacturer liable under a fault-based analysis. If such information had not been readily available, would the court have stretched its analysis to hold a chipped hammer inherently dangerous? Given the court's preoccupation with fault in the opinion,[50] it probably would not have done so if the risks were unknowable.

The court added another interesting twist to products liability law in *Hunt v. City Stores, Inc.*[51] In *Hunt*, a twelve-year-old boy was injured when his right tennis shoe was caught in an escalator.[52] The court considered the store owner's liability under article 2317.[53] After quoting the *Weber* rule, the court shifted its analysis to the following balancing test: "if the likelihood and gravity of harm outweigh the benefits and utility of the manufactured product, the product is unreasonably dangerous."[54] The court explained, "If the product is unreasonably dangerous to normal use, the manufacturer is ultimately responsible to one injured in the course of that use."[55] The court then

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46. 358 So.2d 926, 929 (La. 1978).
47. *Id.*
48. *Id.*
49. *Id.* at 930.
50. *Id.* at 929-30 n.2.
51. 387 So.2d 585 (La. 1980).
52. *Id.* at 587.
53. *Id.*
54. *Id.* at 589.
55. *Id.* (citing Phillips, *A Synopsis of the Developing Law of Products Liability*, 28 Drake L. Rev. 317, 322-325 (1978-1979)).

proceeded to hold the store owner and the manufacturer of the escalator liable because they *knew* of the risks posed.[56]

On its face, the balancing test in *Hunt* did not require an inquiry into the knowledge of the tortfeasors. If the likelihood and gravity of a known harm with respect to the escalator outweighed the benefits and utility of the escalator, then the escalator was simply unreasonably dangerous. However, such a conclusion would have been unreasonable in and of itself.[57] Would store owners then be required to remove all escalators from their establishments? The answer is obviously no. Although *Hunt* left these implications, the supreme court has since exercised sound judgment and has clearly stated that escalators are not unreasonably dangerous as a matter of law.[58]

In 1981 in the context of a case arising out of hepatitis- infected blood, Louisiana products liability law took a turn toward the common law and the *Restatement (Second) Torts* § 402A. Justice Dennis, a member of the court's civilian majority,[59] in *DeBattista v. Argonaut-Southwest Insurance Co.* looked to section 402A in an attempt to define the "unreasonably dangerous" limitation of *Weber*.[60] *DeBattista* addressed the issue of whether a blood bank was liable for the distribution of diseased blood though it was not negligent.[61]

Justice Dennis began his analysis under article 2315 to determine whether the blood bank was negligent in distributing the infected blood.[62] He concluded that the blood bank was not

56. *Id.* at 588-89.

57. Under the *Halphen* regime, however, one Louisiana Court of Appeal has held an escalator to be unreasonably dangerous per se. Brown v. Sears Roebuck & Co., 503 So.2d 1122, 1129 (La. Ct. App. 3d Cir.), *aff'd on other grounds*, 514 So.2d 439 (La. 1987). Although the supreme court affirmed the lower court's decision, it realized the folly of the Third Circuit and of the implications in *Hunt* and emphatically stated that "*Hunt* did not hold that escalators are unreasonably dangerous as a matter of law." Brown, 514 So.2d at 442.

58. Brown v. Sears Roebuck & Co., 514 So.2d 439 (La. 1987); *see also infra* notes 150-60 and accompanying text.

59. Murchison, *The Judicial Revival of Louisiana's Civilian Tradition: A Surprising Triumph for the American Influence*, 49 La. L. Rev. 1, 12 (1988).

60. 403 So.2d 26, 30-31 (La. 1981).

61. *Id.* at 28.

62. *Id.* at 29.

negligent.[63] Justice Dennis then turned to Civil Code articles 2317 through 2324 to determine if the blood bank could be liable without a finding of negligence.[64] To define fault in this context, Justice Dennis turned to the analysis in *Weber* and aligned Louisiana products liability law with the common-law approach under section 402A.[65] Justice Dennis recognized that the "unreasonably dangerous" limitation in *Weber* had been extended to determine legal fault under articles 2317, 2318, 2320, 2321 and 2322.[66]

The comments of section 402A explain that a "defective condition" is one "not contemplated by the ultimate consumer, which will be unreasonably dangerous to him."[67] Comment "i" of section 402A defines "unreasonably dangerous" as "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics."[68] Thus, Justice Dennis judicially incorporated the standard of "ordinary knowledge" under section 402A into Louisiana's products liability law. *Weber*'s implicit requirement that knowledge of the risk be available obtained some substance under *DeBattista*, albeit thanks to a common-law infusion.

The relevance of the *DeBattista* opinion with respect to the state-of-the-art defense is that Comment "j"[69] of section 402A stipulates that some state-of-the-art knowledge must be available to the manufacturer before it is held liable for any alleged defectiveness in the product.

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63. *Id.*

64. *Id.*

65. *Id.* at 30. Justice Dennis succinctly wrote for the court, "Defining fault is a logomachy. Because of the difficulty in finding fault for all times and purposes and instead of defining fault by listing numerous activities which constitute fault (much as we enumerate the activities which constitute criminal conduct in our criminal code) our law has left this determination in the hands of the court." *Id.* at 29 (citing Langlois v. Allied Chem. Corp., 258 La. 1067, 1076, 249 So.2d 133, 137 (1971)).

66. *Id.* at 30.

67. Restatement (Second) of Torts § 402A comment g (1965).

68. *Id.* comment i.

69. Comment "j" reads in pertinent part:

> [I]f the ingredient is one whose danger is not generally known, . . . the seller is required to give warning against it, if he has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge, of the presence of the ingredient and the danger . . . .

Restatement (Second) of Torts § 402A comment j (1965).

Thus, if Louisiana has adopted the approach taken by section 402A, knowledge cannot be ignored. Under *DeBattista*, if normal use poses risks that are not contemplated by the ordinary consumer, the manufacturer is liable if those "unreasonably dangerous risks" could be anticipated by the manufacturer. Although the manufacturer need not have actual knowledge of them,[70] the court in *DeBattista* implied, as did the court in *Weber*, that the manufacturer could have reasonably ascertained the risk posed by the product--*i.e.*, the risks were knowable under the then current technology. This requirement is significant because it is not realistic that a manufacturer should become "automatically responsible for all the harm that such things do in the world."[71]

C. Other Approaches to the Problem

The Louisiana Supreme Court in *Halphen* did not address a question of law which was *res nova* from a national perspective. *Halphen* must be viewed against the backdrop of two seminal cases representing the different approaches to the problem: *Borel v. Fibreboard Paper Products Corp.*[72] and *Beshada v. Johns-Manville Sales Corp.*[73] Judge John Minor Wisdom in *Borel* considered the knowledge of a manufacturer to be relevant and a part of the strict liability analysis. Diametrically opposite to the analysis in *Borel*, the New Jersey Supreme Court in *Beshada* adopted a stricter view and held that the knowledge of the manufacturer was not relevant.

1. *Borel v. Fibreboard Paper Products Corp.*

Judge Wisdom in *Borel* addressed "the scope of an asbestos manufacturer's duty to warn industrial insulation workers of dangers associated with the use of asbestos."[74] The plaintiff, Clarence Borel, had been exposed to asbestos dust for a period of 33 years beginning in

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70. *See* DeBattista, 403 So.2d at 30 (quoting *Weber*, 259 La. at 603, 250 So.2d at 755-56).

71. Prosser, *Strict Liability to the Consumer in California*, 18 Hastings L.J. 9, 23 (1966).

72. 493 F.2d 1076 (5th Cir. 1973).

73. 90 N.J. 191, 447 A.2d 539 (1982).

74. *Borel*, 493 F.2d at 1081.

1936 and ending in 1969. Borel contracted asbestosis and mesothelioma from his exposure to the asbestos. He sued eleven manufacturers of asbestos (1) for the failure to warn of the danger to which a worker is exposed, (2) for the failure to inform him of safety equipment he could have used, (3) for the failure to test their products to determine the inherent risks, and (4) for the failure to remove their products from the market after they learned of the risks.[75]

Borel filed suit in a Texas federal district court under diversity jurisdiction. Consequently, the substantive law of Texas applied to the suit. Noting that Texas had adopted the theory of strict liability embodied in section 402A, Judge Wisdom proceeded to analyze the case under the *Restatement.*[76] Consistent with common sense and with Professor Prosser's point of view, Judge Wisdom recognized that "[p]roducts liability does not mean that a seller is an insurer for all harm resulting from the use of his product."[77] Equating "defective" to "unreasonably dangerous," Judge Wisdom explained that under the *Restatement,* the requisite for liability that a product be "unreasonably dangerous" "reflects a realization that many products have both utility and danger."[78] Thus, Judge Wisdom concluded that a product would not be unreasonably dangerous unless the magnitude of the danger outweighed the utility of the product.[79] The "fulcrum" for the utility-danger balance was found to be "the reasonable man as consumer or as seller."[80]

However, Borel's claim was not based on the fact that asbestos is unreasonably dangerous in and of itself, but on the theory that the product was unreasonably dangerous "because of the failure [of the manufacturers] to give adequate warnings of the known or knowable dangers involved."[81] Looking to the section 402A's commentary,

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75. *Id.* at 1086.
76. *Id.* at 1087.
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.* at 1088.
81. *Id.*; *see generally* Restatement (Second) of Torts § 402A comment h (1965) ("Where . . . [the manufacturer] has reason to anticipate that danger may result from a particular use, as where a drug is sold which is safe only in limited doses, he may be required to give adequate warning of the danger . . ., and a product sold without such warning is in a defective condition.").