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Redhibition as a Twentietb Century Remedy: A Discussion of Louisiana Solutions to General Motors Ltd v. Kravitz

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Introduction

A comparative analysis of the legal aspects of *General Motors Products of Canada Ltd* v. *Kravitz*[1] would be incomplete without a discussion of the Louisiana doctrine and jurisprudence in the area of manufacturers' liability for defective products.[2] The study of any field of civil law in Louisiana, however, invariably reveals the constant battle to maintain the integrity of this jurisdiction's civilian legal system in the face of omnipresent common law doctrine and

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[1] [1979] 1 S.C.R. 790.

[2] Louisiana, like Quebec, is a civilian jurisdiction of predominantly French origin where the Civil Code dates from the Digest of the Civil Laws (generally known as the Civil Code) of 1808. See Batiza, *The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance* (1971) 46 Tul. L. Rev. 4; Sweeney, *Tournament of Scholars over the Sources of the Civil Code of 1808* (1972) 46 Tul. L. Rev. 585; Batiza, *Sources of the Civil Code of 1808, Facts and Speculation: A Rejoinder* (1972) 46 Tul. L. Rev. 628. But see Pascal, *Sources of the Digest of 1808: A Reply to Professor Batiza* (1972) 46 Tul. L. Rev. 603, reflecting the opinion of certain historians in Louisiana that "the Digest of 1808, though written largely in words copied from, adapted from, or suggested by French language texts, was intended to, and does for the most part, reflect the substance of the Spanish law in force in Louisiana in 1808": *ibid.*, 604.

The Digest of the Civil Laws of 1808 was followed by the Civil Code of 1825 and the Revised Code of 1870. See Batiza, *The Actual Sources of the Louisiana Projet of 1823: A General Analytical Survey* (1972) 47 Tul. L. Rev. 1. It is significant, however, that almost 50% of the provisions of the Digest of 1808 still survive in the Revised Code of 1870: Batiza, *The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance* (1971) 46 Tul. L. Rev. 4, 5. For an excellent summary of the scholarly battle concerning the sources of the Digest of 1808, see Hoff, *Error in the Formation of Contracts in Louisiana: A Comparative Analysis* (1979) 53 Tul. L. Rev. 329, 331, n. 12.

jurisprudence.[3] The field of products liability reflects clearly the many facets of this struggle[4] as well as a most remarkable effort to profit from the recent renaissance of French influence[5] in order to respond in civilian terms to the demands of an increasingly consumer oriented society.[6]

If the question were asked: "Would the Louisiana Supreme Court have rendered the same decision as the Supreme Court of Canada in the *Kravitz* case?", the answer would most probably be in the affirmative. It is significant, however, that one finds in the relevant doctrine and some jurisprudence the elements of a co-

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[3] Louisiana, as the only civilian jurisdiction in the United States, suffers from such obvious disadvantages as language barriers with European civilian systems, the relative difficulty of acquiring information and materials from abroad, the plethora of common law materials available within the United States, and the virtual monopoly of case reporting by common law publishers.

[4] Many difficulties result from Louisiana's membership in the federal system of the United States. Although the federal courts are obliged to apply state law in matters outside of the federal competence, federal judges often restate Louisiana law in common law terms. See *Lartigue* v. *R. J. Reynolds Tobacco Co.* 317 F. 2d 19, 32 (5th Cir. 1963) which treats *Doyle* v. *Fuerst & Kraemer, Ltd* 129 La 838, 56 So. 906 (1911) as a tort case rather than a case in redhibition. The obvious result is the assimilation of decisions into the common law fabric when they are cited as the rule of law by subsequent jurisprudence. For a discussion of federal legislation affecting Louisiana in the area of consumer protection, see Hersbergen, *On the Necessity or Desirability of Consumerism — Inspired Revision of the Louisiana Civil Code — A Summary of Research Undertaken and Conclusions and Tentative Conclusions Reached* (1979) 10 R.G.D. 20. See also Comment, *Louisiana's Consumer Protection Law — Three Years of Operation* (1976) 50 Tul. L. Rev. 375.

[5] In recent years there has been a serious effort to re-establish contacts with other civilian jurisdictions and particularly with France. The Louisiana State Law Institute has arranged for the translation of numerous French commentators: *e.g.*, Planiol, *Traité élémentaire de droit civil* 11th ed. (1959), La State L. Inst. (transl.); Gény, *Méthode d'interprétation et sources en droit privé positif* 2d ed. (1963), La State L. Inst. (transl.); Aubry & Rau, *Cours de droit civil français* 6th ed. (1971), La State L. Inst. (transl); *Louisiana Civil Law Treatise* (1972), vol. 5, La State L. Inst. (transl.), containing articles by Baudry-Lacantinerie & Tissier, Aubry & Rau, Carbonnier; David, *French Law: Its Structure, Sources and Methodology* (1972), Kindred (transl.).

In celebration of the 150th anniversary of the Civil Code of 1825, some members of the Louisiana Bar Association met in France with distinguished French jurists. From this meeting came a number of interesting papers on subjects of common interest which were published in (1976) 50 Tul. L. Rev. 457-629.

[6] Compare the reasoning in *Weber* v. *Fidelity & Cas. Ins. Co.* 259 La 599, 250 So. 2d 754 (1971) with that in *Chappuis* v. *Sears Roebuck & Co.* 358 So. 2d 926 (La 1978).

herent civilian theory of contractual responsibility for the manufacture of defective products.

The decision in *General Motors* v. *Kravitz* involved the responsibility of a manufacturer to a remote purchaser under the legal warranty provided in articles 1522 and 1527 of the Quebec Civil Code.[7] It is very interesting to note the similarity between the Quebec articles concerning legal warranty and the analogous Louisiana provisions.

The articles of the Louisiana Civil Code respecting the obligations of a vendor in a sales contract provide that the seller "is bound to two principal obligations, that of delivering and that of warranting the thing which he sells".[8]

> The warranty respecting the seller has two objects: the first is the buyer's peaceable possession of the thing sold, and the second is the hidden defects of the thing sold or its redhibitory vices.[9]

Article 2520 of the Louisiana Civil Code defines the action in redhibition:

> *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.[10]

The redhibitory defect[11] cannot be apparent "such as the buyer might have discovered [it] by simple inspection",[12] and it must have existed before the sale.[13] The purchaser has the right to tender the

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[7] See also Perret, *La garantie du manufacturier: Récents développements et perspectives futures en droit québécois* (1979) 10 R.G.D. 156, 168-72.

[8] La Civ. Code, art. 2475 (1870). *Cf.* Que. Civ. Code, art. 1491 and Fr. Civ. Code, art. 1603.

[9] La Civ. Code, art. 2476. *Cf.* Que. Civ. Code, art. 1506 and Fr. Civ. Code, art. 1625.

[10] *Cf.* Que. Civ. Code, art. 1522 and Fr. Civ. Code, art. 1641. For a detailed discussion of the Roman origins of the redhibitory action, see Morrow, *The Warranty of Quality: A Comparative Survey — I* (1940) 14 Tul. L. Rev. 327, 347 *et seq.*

[11] The question of what constitutes a defect sufficiently serious to resolve the contract has been the subject of much study. See Redmann, *Redhibition in Louisiana: Its Uses and Its Problems Today* (1976) 50 Tul. L. Rev. 530, 535; Robertson, *Manufacturers' Liability for Defective Products in Louisiana Law* (1976) 50 Tul. L. Rev. 50, 88. It is safe to assume that the Louisiana courts would have found redhibitory defects in a fact situation comparable to *Kravitz;* see jurisprudence cited *infra,* note 64.

[12] La Civ. Code, art. 2521. *Cf.* Que. Civ. Code, art. 1523 and Fr. Civ. Code, art. 1642. For a discussion of the buyer's obligation to inspect, see Comment, *The Nature of the Redhibitory Action* (1930) 4 Tul. L. Rev. 433, 438.

[13] La Civ. Code, art. 2530 (1870). This article also provides that the defect which appears within three days immediately following the sale is presumed

object[14] and to institute the redhibitory action for the resolution of the sale; alternatively, he may demand a reduction in the price.[15] Since 1974 the good faith seller is "only bound to repair, remedy or correct the [redhibitory] vices"; if he is unable or fails to repair, he is then obliged to restore the price and reasonable expenses.[16] The bad faith seller is responsible for "restitution of the price and repayment of the expenses, [and he] is answerable to the buyer in

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to have existed before the sale. Some jurisprudence suggests that proof that the defect was more likely than not caused by the manufacturer (and thus in existence before the sale) is sufficient: see *Moreno's, Inc.* v. *Lake Charles Catholic High Schools, Inc.* 315 So. 2d 660 (La 1975).

[14] La Civ. Code, art. 2536 allows the action in redhibition even after the loss of the object "if that loss was not occasioned by the fault of the purchaser". "If the thing affected with the vices has perished through the badness of its quality, the seller must sustain the loss": La Civ. Code, art. 2532. However, if it has perished by fortuitous event before institution of the redhibitory action, the buyer must bear the loss. "But if it has perished, even by a fortuitous event, since the commencement of the suit, it is for the seller to bear the loss": La Civ. Code, art. 2533. *Cf.* Que. Civ. Code, art. 1529 and Fr. Civ. Code, art. 1647.

The difficulty lies in proving that the defect existed before the sale when the object is no longer intact. The recent Louisiana jurisprudence is favorable to the plaintiff: see *Margan* v. *Precision Motors, Inc.* 360 So. 2d 621 (La App. 4th Cir. 1978); *Burns* v. *Lamar-Lane Chevrolet, Inc.* 354 So. 2d 620 (La App. 1st Cir. 1977); *Sam's Diesel Repair Service, Inc.* v. *Davis* 348 So. 2d 1309 (La App. 3d Cir. 1977). But when the object has been resold or cannot be returned for other reasons, the buyer can only proceed in *quanti minoris: Bendana* v. *Mossy Motors, Inc.* 347 So. 2d 946 (La App. 4th Cir. 1977).

[15] La Civ. Code, arts. 2531, 2541. *Cf.* Que. Civ. Code, art. 1526 and Fr. Civ. Code, art. 1644.

[16] La Civ. Code, art. 2531 as am. by La Acts 1974, No. 673, § 1. The text of the amended article provides, in part:

> The seller who knew not the vices of the thing is only bound to repair, remedy or correct the vices as provided in Article 2521, or if he be unable or fails to repair, remedy or 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 credit for the value of any fruits or use which the purchaser has drawn from it.

See Note, (1975) 49 Tul. L. Rev. 484. This amendment overrules in part *Prince* v. *Paretti Pontiac Co.* 281 So. 2d 112 (La 1973) where the Supreme Court held that the facility of repairing a defect was not a criterion in deciding whether it constituted a redhibitory vice. After the amendment there was some fear that the good faith seller might be allowed to repair forever; however, the subsequent jurisprudence has been quite favorable to the purchaser: *Moran* v. *Willard E. Robertson Corp.* 372 So. 2d 758 (La App. 4th Cir. 1979). But see *Jordan* v. *LeBlanc & Broussard Ford, Inc.* 332 So. 2d 534 (La App. 3d Cir. 1976).

damages".[17] The prescriptive period for the redhibitory action is one year from the date of the sale in the case of a good faith seller and one year from the discovery of the defect for a bad faith seller.[18]

For the purpose of this discussion let us compare the following elements of the *Kravitz* opinion with the analogous solutions in Louisiana:

I. The Supreme Court in *Kravitz* abandoned the classical rules of "privity" in allowing the purchaser of a defective automobile to proceed directly against the manufacturer under the theory of the legal warranty of article 1522 of the Quebec Civil Code.

II. The Court invoked the presumption of the manufacturer's knowledge of defects in the product he places on the market to preclude a waiver of the legal warranty by means of a conventional warranty agreement.

III. The Court granted the redhibitory action under articles 1526 and 1528. The difference between the retail and wholesale price plus additional heads of damage were recovered under article 1527(2) of the Quebec Civil Code.

I. The "privity" requirement in redhibitory actions

The question of lack of privity is one of the most controversial aspects of the *Kravitz* decision; indeed, in Louisiana, the concept

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[17] La Civ. Code, art. 2545. *Cf.* Que. Civ. Code, art. 1527 and Fr. Civ. Code, art. 1645. Following the 1974 amendment of article 2531, there was speculation as to whether the manufacturer would have the right to repair also. The jurisprudence has not allowed this, however, holding that the right to repair does not apply to the bad faith seller: *Moran* v. *Willard E. Robertson Corp., supra,* note 16; *Bernard* v. *Bradley Automotive* 365 So. 2d 1382 (La App. 2d Cir. 1978); *Burns* v. *Lamar-Lane Chevrolet, Inc., supra,* note 14.

[18] La Civ. Code, arts. 2534, 2546. *Cf.* Que. Civ. Code, art. 1530: "L'action rédhibitoire ... doit être intentée avec diligence raisonnable" and Fr. Civ. Code, art. 1648: "L'action résultant des vices redhibitoires doit être intentée par l'acquéreur, dans un bref délai".

The courts are often lenient where pleas of prescription are concerned; the prescription may not begin to run until the seller abandons his attempts to repair the product he has sold. See *Weaver* v. *Fleetwood Homes* 327 So. 2d 172, 176 (La App. 3d Cir. 1976); noted in Day, *The Work of the Louisiana Appellate Courts for the 1975-1976 Term — Prescription* (1977) 37 La L. Rev. 386, 388. See also *Rey* v. *Cuccia* 298 So. 2d 840 (La 1974); *Robertson* v. *Jimmy Walker Chrysler-Plymouth* 368 So. 2d 747 (La App. 3d Cir. 1979); *Fleur de Leis Apts* v. *Davidson Sash & Door Co.* 364 So. 2d 234 (La App. 3d Cir. 1978); *Alexander* v. *Burroughs Corp.* 350 So. 2d 988 (La App. 2d Cir. 1977) *rev'd* in part, 359 So. 2d 607 (La 1978).

of privity constituted, until quite recently, a bar to the action of a remote purchaser against the manufacturer. Article 1889 of the Louisiana Civil Code,[19] the counterpart of article 1165 of the French Civil Code and article 1023 of the Quebec Civil Code, was the basis for the long accepted theory that the legal warranty which flows from the contractual obligation of sale can only be invoked between parties to the same contract.[20]

In the very important case of *Media Production Consultants, Inc.* v. *Mercedes Benz of North America, Inc.*,[21] however, the Supreme Court of Louisiana allowed the purchaser of a defective automobile to proceed directly against the North American distributor who was treated as the manufacturer.[22] The Court did not decide whether the recovery was delictual or contractual but invoked the public policy criterion of consumer protection, expressly aligning itself with the jurisprudence of common law neighbors.[23] Nevertheless, the distributor as manufacturer was held liable *in solido* with the dealer for the pecuniary loss[24] resulting from an "unusable vehicle ... when there is an ... *implied* warranty without privity".[25]

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[19] La Civ. Code, art. 1889 provides:

> No one can, by a contract in his own name, bind anyone but himself or his representatives; but he may contract, in his own name, that another shall ratify or perform the stipulation which he makes, and in this case he shall be liable in damages, if the contract be not ratified or performed by the person for whose act he stipulates.

[20] See Campbell, *The Remedy of Redhibition: A Cause Gone Wrong* (1974) 22 La B.J. 27, 29 and cases cited therein.

[21] 262 La 80, 262 So. 2d 377 (1972).

[22] This finding was necessary because the local dealer was defunct and the German manufacturer was not a corporation licensed to do business within the U.S. The Court stated that the supplier, by placing the vehicle on the market, represented to the public that it would be suitable for use. The intervention of a dealer would not mitigate the supplier's responsibility; the dealer served "only as a conduit" for marketing the automobile: *ibid.*, 381.

[23] *Ibid.*, 381: "Louisiana has aligned itself with the consumer-protection rule, by allowing a consumer without privity to recover whether the suit be strictly in tort or upon implied warranty". The Court cited decisions based upon art. 2315 (delict), and in a footnote referred to French authorities for the transmission of warranty with the object of sale.

[24] The purchaser in *Media* recovered the purchase price paid the dealer and expenses: *ibid.* The Court does not explain the basis upon which the dealer and the distributor-manufacturer were held solidarily liable. For an argument in favor of solidary liability in a redhibitory action, see Barham, *Redhibition: A Comparative Comment* (1975) 49 Tul. L. Rev. 376, 385; Litvinoff, *The Work of the Louisiana Appellate Courts for the 1973-1974 Term — Sales* (1975) 35 La L. Rev. 310, 315. But see Campbell, *supra*, note 20, 24-25.

[25] *Ibid.*

If the theoretical basis of the *Media* case was unclear, the subsequent Supreme Court decision in *Rey* v. *Cuccia*,[26] allowing the purchaser of a defective camper trailer to recover the price and damages from the remote manufacturer, was not:

> 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.[27]

Since the *Rey* interpretation of *Media*, there is no question as to the purchaser's right to proceed directly in redhibition against the remote manufacturer.

Although *Media* was stated in common law terms, the similarity between the Louisiana Civil Code articles in the field of obligations and those of the French Civil Code is such that a civilian analysis of the *Media* "direct action" (already the rule in France for some years) was quick to follow in the doctrine.[28] There are at least three possible theories under the Louisiana Civil Code upon which the Supreme Court in *Media* might have relied to achieve the result so desirable from a public policy perspective.

A. *The theory of transmission*

Louisiana Civil Code article 2461 provides:

> The sale of a thing includes that of its accessories, and of whatever has been destined for its constant use, unless there be a reservation to the contrary.

It has been suggested that this article, combined with its companion article 2490,[29] could well justify the theory that the legal warranty for redhibitory defects is transmitted "as an accessory" of the object of sale from the manufacturer to the ultimate purchaser.[30] This theory finds support in French doctrine and jurisprudence[31]

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[26] *Supra*, note 18.

[27] *Ibid.*, 845, citing *Media*.

[28] See Redmann, *supra*, note 11; Barham, *supra*, note 24; Note (1973) 47 Tul. L. Rev. 473.

[29] La Civ. Code art. 2490 provides: "The obligation of delivering the thing includes the accessories and dependencies, without which it would be of no value or service, and likewise everything that has been designed to its perpetual use". *Cf.* Que. Civ. Code, art. 1499 and Fr. Civ. Code, art. 1615.

[30] See Barham, *supra*, note 24, 381.

[31] Aubry & Rau, *Droit Civil Français* 7e éd. (1975), t. 6, no 414, 638-42; Mazeaud, *Leçons de Droit Civil* 4e éd. (1974), t. 3, no 985-2, 253-54; Planiol & Ripert, *Traité Pratique de Droit Civil Français* (1956), t. 10, no 138, 157-58; Huc, *Commentaire Théorique et Pratique du Code Civil* (1897), t. 10, no 154, 209; Baudry-Lacantinerie & Saignat, *Traité théorique et pratique de droit civil*

although it presents the disadvantage that it is only available at any given moment to the owner of the object.[32] This theory might well explain the direct recourse available to Mr Kravitz in Quebec.[33]

B. *The "stipulation pour autrui"*

There is French authority for the proposition that the manufacturer may be held to have stipulated a legal warranty in favor of an ultimate purchaser, under the theory of a stipulation in favor of a third party beneficiary.[34] This theory is more difficult of application in Louisiana. Although article 1890 allows for the *stipulation pour autrui*[35] in terms analogous to the French Civil Code article 1121,[36] there is a strong judicially-created presumption that a stipulation in favor of a third party will not be inferred from the contract but must figure expressly therein.[37]

C. *The theory of subrogation*

Article 2503 as amended in 1924[38] provides that "whether warranty be excluded or not the buyer shall become subrogated to the seller's rights and actions in warranty against all others". Although this article is found among the articles dealing with the warranty against eviction, the Louisiana jurisprudence has in fact applied it in cases of warranty for redhibitory defects.[39]

3e éd. (1908), t. 19, no 432, 450; Malinvaud, *Select Problems in the Civil Law: The Law of Redhibition in France and Louisiana* (1975) 49 Tul. L. Rev. 372, 374; Morrow, *The Warranty of Quality: A Comparative Survey — II* (1940) 14 Tul. L. Rev. 529.

[32] See Ghestin, *L'arrêt Kravitz et le droit positif français sur la garantie des vices cachés* (1980) 25 McGill L.J. 315.

[33] See Haanappel, *La responsabilité civile du manufacturier en droit québécois* (1980) 25 McGill L.J. 300.

[34] *Cf.* Mazeaud, *Leçons de Droit Civil* 5e éd. (1973), t. 1, 802, 806; Starck, *Droit Civil, Obligations* (1972), nos 2576, 2580; Weill & Terré, *Droit Civil, Les obligations* 2e éd. (1975), no 859.

[35] La Civ. Code, art. 1890 provides: "A person may also in his own name, make some advantage for a third person the condition or consideration of a commutative contract, or onerous donation; and if such third person consents to avail himself of the advantage stipulated in his favor, the contract can not be revoked". *Cf.* Que. Civ. Code, art. 1029.

[36] See Ghestin, *supra*, note 32.

[37] See Smith, *Third Party Beneficiaries in Louisiana, The Stipulation Pour Autrui* (1936) 11 Tul. L. Rev. 18 and jurisprudence cited therein; Barham, *supra*, note 24, 380.

[38] La Acts 1924, No. 116.

[39] See Barham, *supra*, note 24, 382-83; Litvinoff, *supra*, note 24, 312-14. See generally Morrow, *supra*, note 31.

There is theoretical justification for extending this article, by analogy, to the warranty for hidden defects, for both warranties are indivisible elements of the obligation to deliver.[40] The subrogation theory presents problems of a practical order, however, for the vendee only accedes to the rights of his vendor. Not only is it possible, then, for the vendee to lose the warranty protection due to a prior valid waiver, but also Louisiana's short prescriptive period for the redhibitory action[41] may well mean that the vendee accedes to a prescribed right. Nevertheless, this theory has been invoked by some some post *Media* jurisprudence[42] and some commentators.[43]

Since *Media* and *Rey*, there has been no unanimity as to the appropriate theory in either the doctrine or the jurisprudence. This is due in part to the facility of continuing the common law language in *Media* but equally to the multiplicity of civilian theories — none of which is entirely satisfactory. A difference of opinion subsists in France for the same reasons[44] and it is reasonable to assume that there will be similar uncertainty in Quebec.[45]

II. Waiver of warranty in the presence of constructive knowledge

In *Kravitz*, the Supreme Court of Canada was faced with the possibility of a purchaser's waiver of the legal warranty.[46] In applying the articles concerning a bad faith seller to the manufac-

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[40] *Ibid.*

[41] See *supra*, note 18.

[42] *Moreno's Inc.* v. *Lake Charles Catholic High Schools, Inc.*, *supra*, note 13; noted in *The Work of the Louisiana Appellate Courts for the 1975-76 Term* (1977) 37 La L. Rev. 353; *Cotton States Chemical Co.* v. *Larrison Enterprises* 342 So. 2d 1212, 1215 (La App. 2d Cir. 1977), noted in Levasseur, *The Work of the Louisiana Appellate Courts for the 1976-1977 Term — Sales* (1978) 38 La L. Rev. 360.

[43] See *supra*, note 39; Levasseur, *supra*, note 42, 365-66.

[44] See Ghestin, *supra*, note 32.

[45] The following language in *Kravitz*, *supra*, note 1, 799, suggests that the Court is not relying on subrogation:

"Dans des circonstances appropriées, Kravitz aurait pu exercer lui-même ce recours au moyen de l'action subrogatoire.

Mais, ce n'est pas ce que Kravitz a choisi de faire: Il prétend exercer contre G.M. un droit propre qui lui permettrait d'invoquer directement contre le fabricant la garantie légale des vices cachés résultant de la vente faite par celui-ci à son concessionnaire et dont Kravitz serait devenu le titulaire en sa qualité de propriétaire de l'automobile".

[46] In principle, the good faith seller has the right to renounce the legal implied warranty: La Civ. Code, arts. 1764(2), 2522. *Cf.* Que. Civ. Code, arts. 1507, 1524 and Fr. Civ. Code, arts. 1626, 1627, 1643. See generally Litvinoff, *Stipulations as to Liability and as to Damages* (1978) 52 Tul. L. Rev. 258.

turer to preclude a waiver,[47] the *Kravitz* decision has gone further than the Louisiana jurisprudence, although the Louisiana solution would probably be the same.[48]

It is well settled in Louisiana that the manufacturer is held to know of the defects in his product.[49] Although it has been suggested

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[47] In the *Kravitz* case, the Supreme Court found that the seller-dealer's renunciation of the legal warranty in the sales contract was invalid because knowledge of the defect could be imputed to him as a professional vendor. The manufacturer's argument that the legal warranty had been waived by a conventional agreement contained in documents (the "Owner's Manual" and the "Owner Protection Plan and New Vehicle Warranty") delivered to the plaintiff-buyer with the automobile was rejected on the basis of the manufacturer's imputed knowledge of the defect. In both instances of liability, the Court invoked para. 2 of art. 1527, Que. Civil Code: "[Le vendeur] est tenu de la même manière [de tous les dommages-intérêts] dans tous les cas où il est légalement présumé connaître les vices de la chose". There is no comparable provision either in the French Civil Code or in the Louisiana Civil Code. It is to be noted that the Court did not decide whether or not the presumption of knowledge would be irrebuttable as it is in France.

[48] In *Media, supra,* note 21, the Court was faced with a contractual agreement of warranty between the North American distributor (in the position of manufacturer) and the dealer-seller. The dealer-seller delivered to the purchaser a "Mercedes-Benz Owner's Service Policy" containing both a warranty that the vehicle was "free from defects in material and workmanship" and the dealer's agreement to repair or replace defective parts. In the document, the distributor and the dealer purported to renounce all other warranties. The purchaser was instructed to send a postcard to the distributor to activate the warranty. The Court disposed of the waiver claims, citing the jurisprudential rule that waivers contained in automobile manuals and similar documents have no effect on the warranty of fitness: *ibid.*, 380. See also *infra,* note 52.

[49] *Doyle* v. *Fuerst & Kraemer, supra,* note 4; *George* v. *Shreveport Cotton Oil Co.* 114 La 498, 38 So. 432 (1905). Note the following language from *Doyle*: "[E]veryone ought to know the qualities, good or bad, of the things he fabricates in the exercise of the art, craft, or business of which he makes public profession, and ... lack of such knowledge is imputed to him as a fault, which makes him liable to the purchasers of his fabrications for the damage resulting from the vices or defects thereof which he did not make known to them and which they were ignorant of": *ibid.*, 907. The Court goes on to cite Pothier and other French authorities: *ibid.*, 908. For a discussion of this rule see Babst, *Redhibition and Tort: Are They Enough?* (1974) 22 La B.J. 19, 23, n. 21; Campbell, *supra,* note 20, 32-33.

It is interesting to note that in Louisiana, although there is some doctrinal support for holding the professional vendor to the same presumption of knowledge as the manufacturer (Barham, *supra,* note 24, 387; Note, (1973) 47 Tul. L. Rev. 473, 477), this is not the general rule. The jurisprudence has imputed the knowledge of a manufacturer only to such vendors as place their names on the product or are so closely connected therewith that the buyer would have reason to consider them the actual manufacturer. See the *Media* case, *supra,* note 21; *Bernard* v. *Bradley Automotive, supra,*

that the presumption of knowledge on the part of the manufacturer renders any stipulation of waiver of the legal warranty *contra bonos mores*,[50] the courts hesitate to follow this theory.[51] Nevertheless, as a practical matter, it is virtually impossible to waive the warranty for redhibitory defects.[52]

A serious dilemma in Louisiana concerns article 2545's requirement that the bad faith seller *know* of the vice and *omit* to declare it.[53] Article 2548 then provides that the "renunciation of warranty

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note 17; *Fairburn* v. *Montgomery Ward & Co. Inc.* 349 So. 2d 1280 (La App. 1st Cir. 1977). But see *Reeves* v. *Great Atlantic & Pacific Tea Co.* 370 So. 2d 202 (La App. 3d Cir. 1979) (the manufacturer of cola syrup was not the manufacturer of the bottle of defective cola); *Burns* v. *Lamar-Lane Chevrolet, Inc., supra,* note 14 (contracting to install a stereo in a van did not render the dealer a manufacturer).

The presumption of a manufacturer's knowledge of defects is cited indiscriminately in cases in redhibition and suits for delictual recovery: see *infra,* note 78. If, indeed, the courts are applying the same criteria in both contractual and delictual recovery, it is interesting to note the reasons advanced by the Supreme Court in the delictual proceeding, *Chappuis* v. *Sears Roebuck & Co., supra,* note 6, 930, for holding Sears to be a professional vendor: "The relationship between a retailer like Sears and its manufacturer on the other hand, *with its capabilities for controlling the quality of its merchandise,* justifies the imputation to Sears of knowledge of its defects" [emphasis added].

[50] See *American Hoist & Derrick Co.* v. *Frey* 127 La 183, 53 So. 486 (1910) (*dicta*). In *Aetna Insur. Co.* v. *General Electric* 362 So. 2d 1186 (La App. 4th Cir. 1978), Redmann J. suggests that a manufacturer may never be able to waive a warranty but he is careful to distinguish *Aetna* as a case of fraud under art. 2547 (express warranty).

[51] See *A.A. Gilbert Pipe & Supply Co.* v. *Cassard* 240 La 180, 121 So. 2d 736 (1960); *FMC Corp.* v. *Continental Grain Co.* 355 So. 2d 953 (La App. 4th Cir. 1977); *California Chem. Co.* v. *Lovett* 204 So. 2d 633 (La App. 3d Cir. 1967) where waivers were allowed. See generally Litvinoff, *supra,* note 46, 287. However, the courts in the great majority of cases disallow the waiver, either by distinguishing the case on the basis of fraud (*Aetna Insur. Co.* v. *General Electric Inc., supra,* note 50; *Edwards* v. *Port AMC/Jeep, Inc.* 337 So. 2d 276 (La App. 2d Cir. 1976)), or by finding an absence of the clarity required by La Civ. Code, art. 2474.

[52] See Comment, *Modification or Renunciation of Warranty in Louisiana Sales Transactions* (1972) 46 Tul. L. Rev. 894. See generally Barham, *supra,* note 24, 386. The courts require that any waiver be (1) express, (2) consented to by both parties, (3) made in good faith, and (4) consistent with public policy.

[53] La Civ. Code art. 2545 as am. by La Acts 1968, No. 84, § 1, provides: "The seller, who knows the vice of the thing he sells and omits to declare it, besides the restitution of price and repayment of the expenses, including reasonable attorneys' fees, is answerable to the buyer in damages". *Cf.* Que. Civ. Code, art. 1527, which only requires that the seller "know" of the defect. See Fr. Civ. Code, art. 1645 to the same effect.

by the buyer is not obligatory where there has been *fraud* on the part of the seller".[54] While article 1847 suggests that either assertion or suppression is tantamount to fraud,[55] the question remains whether it is fair to treat imputed knowledge as having been "suppressed" in the absence of actual knowledge.[56] The courts do, however, systematically award attorneys' fees against manufacturers under article 2545.[57] Presumably, they are finding that imputed knowledge has been suppressed.[58] If, however, there is a conflict between the codal provisions and the courts' evident desire to protect the public in this area, it might be preferable to find an obligation of safety on the part of the manufacturer rather than to presume knowledge of the defects in the object of a sales contract.[59]

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[54] [Emphasis added.] The rule of the analogous article respecting the warranty against eviction, art. 2504, which holds the seller accountable for the consequences of his personal act, would have been more appropriate for present day purposes, for there is some difficulty in finding fraud in cases of imputed knowledge. See Morrow, *supra,* note 31, 533-35; and jurisprudence cited *supra,* note 51.

[55] La Civ. Code, art. 1847 defines fraud thus: "Fraud, as applied to contracts, is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantages to the one party, or to cause an inconvenience [detriment] or loss to the other. From which definition are drawn the following rules:... 5. [Error] must be caused or continued by artifice, by which is meant either an assertion of what is false, or a suppression of what is true".

[56] See Redmann, *supra,* note 11, 546; Campbell, *supra,* note 20, 32-33; Comment, *supra,* note 52. See also *Aetna Insur. Co.* v. *General Electric, supra,* note 50.

[57] See the jurisprudence cited *infra,* note 64, and the text of La Civ. Code, art. 2545, *supra,* note 53.

[58] It could be argued that, historically, the obligation to declare the defect followed logically from the knowledge in fact of its existence and was not a supplemental criterion for holding the bad faith seller responsible for damages. The impossibility of declaring what is not in fact known under modern imputation of knowledge theories would not, then, become an argument in favor of the manufacturer to avoid liability.

[59] La Civ. Code, arts. 1764 and 1930, concerning the subject matter of contracts and obligations incident thereto, may be susceptible of the same development as Que. Civ. Code, art. 1024 and Fr. Civ. Code, art. 1135. See Crépeau, *Le contenu obligationnel du contrat* (1965) 43 Can. Bar Rev. 1. Thus, the view may be advanced that the parties, in agreeing to a sale, implicitly impose upon the seller as one of his obligations the duty to know of defects and to eliminate them. For a discussion of the French theory that the jurisprudence has established an obligation of knowledge rather than a presumption of knowledge, sce Malinvaud, *Redhibitory Defects and their Importance in Contemporary Society* (1976) 50 Tul. L. Rev. 517, 522. For a comparison of the obligation of security and the warranty against redhibitory defects, see Mazeaud, *supra,* note 31, no 993, 262-63.

The 1974 amendment of article 2534 suggests that a waiver would have no effect as between manufacturer and dealer.[60] Some commentators see this as a general policy statement against waivers,[61] others are not sure.[62]

III. Damages under article 2545 of the Louisiana Civil Code

The recovery of the purchase price of the defective object plus incidental costs, the solution in *Kravitz*,[63] certainly conforms to the Louisiana jurisprudence which allows a purchaser to recover from the manufacturer (as a bad faith seller), *inter alia*, the purchase price,[64] attorneys' fees,[65] interest on the price,[66] finance charges,[67]

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[60] See *supra*, note 16. By the same amending act, a second paragraph was added to article 2531 as follows: "In any case in which the seller is held liable because of redhibitory defects in the thing sold, the seller shall have a corresponding and similar right of action against the manufacturer of the thing for any losses sustained by the seller", and further provided that "any provision of any franchise or manufacturer-seller contract or agreement attempting to limit, diminish or prevent such recoupment by the seller shall not be given any force or effect". See Note, *supra*, note 16, 489-90. This paragraph was intended to overrule one aspect of the holding in *Anderson* v. *Bohn Ford, Inc.* 291 So. 2d 786 (La App. 4th Cir. 1973).

[61] Barham, *supra*, note 24, 388. See *Robertson* v. *Jimmy Walker Chrysler-Plymouth, Inc., supra*, note 18.

[62] See *supra*, note 56.

[63] Kravitz sought as damages against G.M. the difference between the retail price and the wholesale price of the automobile, the automobile insurance costs, damages for inconvenience, and loss of income. The trial court essentially granted this relief although it reduced the quantum, and the appellate courts confirmed.

[64] *Alexander* v. *Burroughs Corp., supra*, note 18; *Rey* v. *Cuccia, supra*, note 18; *Media Production Consultants, Inc.* v. *Mercedes-Benz, supra*, note 21; *Harris* v. *Bardwell* 373 So. 2d 777 (La App. 2d Cir. 1979); *Reeves* v. *Great Atlantic & Pacific Tea Co., supra*, note 49; *Robertson* v. *Jimmy Walker Chrysler-Plymouth, Inc., supra*, note 18; *Bernard* v. *Bradley Automotive, supra*, note 17; *Burns* v. *Lamar-Lane Chevrolet, Inc., supra*, note 14.

[65] *Ibid.* But see *Perrin* v. *Read Imports, Inc.* 359 So. 2d 738 (La App. 4th Cir. 1978) where the manufacturer was not held responsible for attorneys' fees incurred by the dealer in conjunction with the latter's obligation to repair.

[66] *Alexander* v. *Burroughs Corp., supra*, note 18; *Cangelosi* v. *McInnis Peterson Chevrolet, Inc.* 373 So. 2d 1346 (La App. 1st Cir. 1979); *Burns* v. *Lamar-Lane Chevrolet, Inc., supra*, note 14.

[67] *Robertson* v. *Jimmy Walker Chrysler-Plymouth, Inc., supra*, note 18; *Alexander* v. *Burrough Corp., supra*, note 18.

and other expenses,[68] including, on occasion, loss of profit.[69]

The question which *Kravitz* may well raise in Quebec, and which has indeed been debated in Louisiana since *Media* and *Rey*, concerns the extent of "damages" for which the bad faith seller may be liable. The issue is all the more important because Louisiana has not expanded contractual liability to create the virtually parallel system of contractual and delictual recovery which exists in France.[70] The theory of *cumul* is almost ignored in Louisiana, and the jurisprudence, with few exceptions,[71] has long followed the approach of suing in contract for economic loss, suing in tort for personal injury or property damage.[72]

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[68] *Bernard* v. *Bradley Automotive, supra,* note 17 (transportation charges); *White* v. *Martin G.M.C. Trucks, Inc.* 359 So. 2d 1094 (La App. 3d Cir. 1978) (insurance premiums); *Neck* v. *Coleman Oldsmobile, Inc.* 356 So. 2d 532 (La App. 1st Cir. 1977) (costs for a substitute vehicle); *Fox* v. *American Steel Bldg Co.* 299 So. 2d 364 (La App. 3d Cir. 1974) (inconvenience).

It is interesting to note that the seller is allowed a credit for the buyer's use of the defective object where the utility to the buyer can be proven: *Robertson* v. *Jimmy Walker Chrysler-Plymouth, Inc., supra,* note 18. But see *Alexander* v. *Burroughs Corp., supra,* note 18 (inconvenience outweighed utility). See also Note, *The Rights of the Vendor in Redhibition* (1970) 30 La L. Rev. 509.

[69] *White* v. *Martin G.M.C. Trucks, Inc., supra,* note 68. But see *Albritton* v. *McDonald* 363 So. 2d 925 (La App. 2d Cir. 1978). In *Alexander* v. *Burroughs Corp., supra,* note 18, the Court suggests that it considered as damages under art. 2545 the consequences of inefficient business operations (*e.g.,* late and inaccurate customer billing, overtime pay to accounting personnel) and costs of repairing the computer.

[70] See Malinvaud, *supra,* note 59, 518 and authorities cited therein; Mazeaud, *supra,* note 31, no 988, 256-58; Aubry & Rau, *supra,* note 31, 638-42.

[71] See *Doyle* v. *Fuerst & Kraemer, supra,* note 4, and jurisprudence cited *infra,* note 78. See also *Fox* v. *American Steel Bldg Co., supra,* note 68; *Richard* v. *Smith Engineering Works, Inc.* 297 So. 2d 437 (La App. 3d Cir. 1974); *Breaux* v. *Winnebago Industries Inc.* 282 So. 2d 763 (La App. 1st Cir. 1973).

[72] See Robertson, *supra,* note 11, 82 *et seq.,* 111 *et seq.* In this connection it is interesting to note the partial dissent of Peters J. in *Seely* v. *White Motor Co.* 403 P. 2d 145, 45 Cal. Rptr 17, 28 (1965), suggesting that the choice of tort or contract depends on the relationship between the parties rather than the nature of the damages. *Cf.* Johnson, *The Work of the Louisiana Appellate Courts for the 1976-1977 Term — Obligations* (1978) 38 La L. Rev. 345, 347: " 'Contract' and 'tort' are labels which we give to causes of action to enforce an obligation which it is alleged the defendant had toward the plaintiff. In our Civil Code, an obligation may arise from a conventional agreement between the parties, or as a result of a delictual act by one of them toward the other, or from certain other sources. Whatever the source, the obligation is synonymous with a duty which the obligor has toward the obligee. If the source is a convention between the two parties, that convention takes the place of law between them, and must be performed in good faith. If it is not damages are awardable for the breach".

The interest in expanding the damages available in redhibition against the bad faith seller has greatly increased since the 1968 amendment of article 2545 to allow the recovery of attorneys' fees as a component of damages.[73] Indeed, the historical preference for proceeding in "tort" in all cases of damages caused by defective products[74] is hardly necessary, since *Media* extended the liability in redhibition of the bad faith seller-manufacturer to remote purchasers.[75] But the tradition of proceeding in "tort" and the common law influence which reinforces theories of delictual recovery in this area[76] are formidable adversaries in any attempt to create a comprehensive theory of contractual responsibility.

At least the courts have not lost sight of their mandate in *Media* — the adoption of a uniform consumer protection rule.[77] It is now clear that a court will not distinguish between contractual and delictual recovery where the rights of a consumer might thereby

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[73] *Supra,* note 53.

[74] For a comprehensive analysis of the history of delictual recovery in Louisiana, see Robertson, *supra,* note 11, 51 *et seq.* and authorities cited therein. Because of the requirements of privity in redhibition, the majority of the injured consumers proceeded in delict. In step with the changing times, the recourse available to the consumer became increasingly advantageous — see *Le Blanc* v. *Louisiana Coca-Cola Bottling Co.* 221 La 919, 60 So. 2d 873 (1952) — until *Weber* v. *Fidelity & Cas. Ins. Co., supra,* note 6, 755 and 756, where the Louisiana Supreme Court held: "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 ... 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".

The case has been cited as creating a conclusive presumption of negligence on the part of the manufacturer for placing into commerce products which are unreasonably dangerous in normal use where the injuries and the causal relationship have been shown. See *Chappuis* v. *Sears Roebuck & Co., supra,* note 6; and the partial dissent of Tate J. (Barham J. concurring) in *Spillers* v. *Montgomery Ward & Co.* 294 So. 2d 803, 810 (La 1974). See also Laborde, *Defences to a Louisiana Products Liability Action* (1979) 25 Loyola L. Rev. 95.

[75] See Robertson, *supra,* note 11, 101.

[76] See Robertson, *ibid.,* 55 *et seq.,* and the great interest in equating recovery in Louisiana to the *Restatement (Second) of Torts* § 402A (1965) and principles of strict liability in tort.

[77] *Media Production Consultants Inc.* v. *Mercedes-Benz, supra,* note 21, 381.

be adversely affected.[78] One common law commentator, writing on Louisiana law, has suggested that the schema of the redhibitory action should be used to create a uniform consumer protection rule.[79] This is a pragmatic solution to a pressing problem and it is a solution which has been advocated in other jurisdictions as well.[80] Judges generally appreciate practical solutions and the commentator in question has been cited often to justify the cumulation of contractual and delictual recovery.[81]

Nevertheless, recent Louisiana jurisprudence, especially in the area of delictual responsibility, reflects an amazing effort to profit from the resurgence of interest in civilian tradition.[82] The influence has also been felt in the area of redhibition. Certain recent cases have awarded damages under article 2545 for the loss of property,[83] and in the very recent case of *Harris* v. *Bardwell*,[84] the Court awarded damages to the purchaser of a motor boat for personal injuries suffered as a result of latent defects in a redhibitory action against the manufacturer.[85] The Court found that there was no

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[78] See *Harris* v. *Bardwell, supra,* note 64; *Albritton* v. *McDonald, supra,* note 69; *Townsend* v. *Cleve Heyl Chevrolet-Buick, Inc.* 318 So. 2d 618 (La App. 2d Cir. 1975); *Hoffman* v. *All Star Insur. Corp.* 288 So. 2d 388 (La App. 4th Cir. 1974); *Loyacano* v. *Continental Insur. Co.* 283 So. 2d 302 (La App. 4th Cir. 1973).

[79] Robertson, *supra,* note 11, 111-13.

[80] For a recent discussion of problems of consumer protection common to Louisiana and Quebec, see the *Congrès Henri-Capitant Québec: Les relations du Code civil et du Droit de la Protection du Consommateur* (1979) 10 R.G.D. 7-211. See also Office de révision du Code civil, *Rapport sur le Code civil du Québec* (1977), livre V, art. 102; *Loi sur la protection du consommateur,* L.Q. 1978, c. 9; Perret, *supra,* note 7, 170-72.

[81] See *Harris* v. *Bardwell, supra,* note 64.

[82] See *Loescher* v. *Parr* 324 So. 2d 441 (La 1975); *Langlois* v. *Allied Chemical Corp.* 258 La 1067, 249 So. 2d 133 (1971). See also Andrews, *Strict Liability under Civil Code Articles 2317, 2318 and 2321: An Initial Analysis* (1977) 25 La B.J. 105; Verlander, *Article 2317 Liability: An Analysis of Louisiana Jurisprudence since Loescher* v. *Parr* (1979) 25 Loyola L. Rev. 263; Note, *The Discovery of Article 2317* (1976) 37 La L. Rev. 234.

[83] See *Avoyelles Country Club* v. *Walter Kidde & Co.* 338 So. 2d 379 (La App. 3d Cir. 1976).

[84] *Supra,* note 64.

[85] The Court stated (*ibid.*, 783) that it was the first to discuss the combination of a demand for personal injury damages and a demand for attorneys' fees under art. 2545 in the case of a defective object *not for consumption. Hoffman* v. *All Star Insur. Corp., supra,* note 78, granted personal injury damages to a plaintiff purchaser proceeding against the manufacturer with injured third parties without giving any theoretical basis for the recovery. See also jurisprudence cited, *supra,* note 78.

difference in the meaning of the word "damage" as it appears in the general article of delictual responsibility[86] and the redhibition article (article 2545) governing the responsibility of a bad faith seller.[87]

It is to be hoped that this reasoning will be carried one step further. Article 1930 of the Louisiana Civil Code provides:

> The obligations of contract extending to whatsoever is incident to such contracts, the party who violates them is liable, as one of the incidents of his obligations, to the payment of the damages, which the other party has sustained by his default.

Article 1934 defines the word "damages" as the amount of the loss sustained and the profit of which the creditor has been deprived:

> When the inexecution of the contract has proceeded from fraud or bad faith, the debtor shall not only be liable to such damages as were, or might have been foreseen at the time of making the contract, but also to such as are the immediate and direct consequence of the breach of that contract ... .[88]

Nothing in this language would preclude the recovery of personal injury damages, nor has French doctrine or jurisprudence interpreted the comparable articles 1149, 1150 and 1151 of the French Civil Code to exclude such damages.[89] On the contrary, the consumer who demands resolution of a sales contract for a manufacturer's failure to perform the legal obligation of warranting the object against latent defects can recover not only property and personal injury damages (as well as damages representing economic loss) but also "moral damages" — damages for inconvenience or mental anguish — which have been denied as a general rule in Louisiana.[90]

Conclusion

It is understandable that a departure from tradition is difficult; nevertheless, the Louisiana judiciary may well be on the way to a re-evaluation of the meaning of article 1934 and a redefinition of

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[86] La Civ. Code, art. 2315 reads as follows: "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it". *Cf.* Que. Civ. Code, art. 1053 and Fr. Civ. Code, art. 1382.

[87] *Supra,* note 64, 784.

[88] *Cf.* Que. Civ. Code, arts. 1073, 1074, 1075. See Mazeaud, *supra,* note 31, 256-58.

[89] See *supra,* note 70.

[90] *Robertson* v. *Jimmy Walker Chrysler-Plymouth, Inc., supra,* note 18; *Albritton* v. *McDonald, supra,* note 69; *Burns* v. *Lamar-Lane Chevrolet, Inc., supra,* note 14. See also Johnson, *supra,* note 72; Comment, *Damages Ex Contractu: Recovery of Non-Pecuniary Damages for Breach of Contract Under Louisiana Civil Code Article 1934* (1974) 48 Tul. L. Rev. 1160.

damages in the case of contractual recovery. In view of the great interest in protecting the Louisiana consumer, it is not unforeseeable that the courts will give full scope to the action in redhibition. It is a compliment to Louisiana's venerable legal heritage that an extensive interpretation of the Civil Code may provide the elements of a solution to one of today's more pressing legal problems.