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Continued Conflation Confusion in Louisiana Negligence Cases: Duty and Breach

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Abstract

Negligence has five elements: duty, breach, cause-in-fact, scope of risk, and damages. Logic dictates that courts, lawyers, scholars, and law students should keep them separate. But they consistently fail to do so. Courts continue to conflate or collapse elements; they combine duty and scope of risk and they combine duty and breach. In combining duty and breach courts purport to determine duty based on the facts of the particular case but, in fact, they are really deciding a question of breach-whether the defendant exercised the care of a reasonable person under the circumstances. In conflating duty and breach courts are turning a mixed question of fact and law—breach—into a question of law. Concomitantly, those courts are taking the breach question away from the factfinder—often the jury--and improperly making it a judicial decision. Even Justice Oliver Wendell Holmes, Jr. notoriously combined duty and breach in his writings and in his articulation of the short-lived stop, look, and listen at grade-crossings "rule." Sadly, Louisiana courts have frequently followed Justice Holmes' perilous lead and combined duty and breach in a number of significant instances. The most unfortunate line of jurisprudence manifesting this conflation of duty and breach is the Louisiana Supreme Court's "open and obvious" risk cases. Herein, building on my prior work on separating duty and scope of risk, I

[1] Professor of Law, LSU Paul M. Hebert Law Center; Dodson and Hooks Endowed Chair in Maritime Law; James Huntington and Patricia Kleinpeter Odom Professorship; LSU President Emeritus. I am indebted to my colleague and friend, Professor William Corbett; my son, Patrick Galligan; and my friend, Ed Walters for reviewing drafts of this piece and making very helpful suggestions and edits. This article is a companion piece to Thomas C. Galligan, Jr., Let the Jury Decide! A Plea for the Proper Allocation of Decision-Making Authority in Louisiana Negligence Cases, 94 Tul. L. Rev. 769 (2020)[hereinafter cited as, Galligan, Let the Jury Decide!], in which I analyzed the allocation of decision-making authority between judge and factfinder regarding duty and scope of duty. Herein, I deal with the judicial conflation of duty and breach.

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review the jurisprudence from Holmes to the Louisiana open and obvious cases to other Louisiana decisions manifesting the same error. I propose that henceforward courts and scholars clearly separate duty and breach thereby properly allocating the breach decision to the factfinder, unless reasonable minds could disagree.

I. Introduction

Negligence has five elements: duty, breach, cause-in-fact, scope of risk, and damages.[2] Logic dictates that courts, lawyers, scholars, and law students should keep them separate. After all, each element has its own function and definition. But, sadly over the years courts have conflated some of the elements. Originally, courts conflated cause-in-fact and proximate cause as one "causation" element.[3] Happily, twentieth century torts scholars succeeded in separating the two prongs of cause into two separate elements and they also recharacterized proximate cause as "scope of the risk."[4] But even now, courts and scholars continue to conflate cause-in-fact and scope of the risk.[5] Not stopping there, they also combine other elements.

For instance, they have conflated duty and scope of duty. I have written about how Louisiana courts, in adopting a duty/risk method of analyzing negligence combined duty and scope of duty and how that combination has turned out be neither justified nor helpful in most garden variety tort suits.[6] Instead, in a garden variety tort suit, I urged the states' courts to entrust the scope of duty question to the jury or judge as factfinder. I did so because, in most tort cases,

[2] Dan B. Dobbs, Paul T. Hayden, and Ellen Bublick, Dobbs Law of Torts, §§ 124, 125 (2d ed. June 2020 update) [hereinafter, Dobbs Law of Torts]; *see also*, Galligan, Let the Jury Decide!, *supra* note 1 at 774.
[3] *See, e.g.,* The Nitro-Glycerine Case, 82 U.S. 524, 537 (1872).
[4] Galligan, *Let the Jury Decide,* supra *note 1* at 778.
[5] For a discussion of conflation in Federal Employer Liability Act and Jones Act cases, *see,* Thomas C. Galligan, Jr., "Even the Slightest": Causation in FELA and Jones Act Cases, 15 Charleston L. Rev. 253 (2021).
[6] CSX Transportation, Inc. v. McBride, 564 U.S. 685 (2011).; Galligan, Jr., Let the Jury Decide!, *supra* note 1 at 774 (2020).

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the scope of duty inquiry is not based on any broad policy analysis but on fairness, common sense, and the facts of the particular case. And my anti-conflation crusade did not conclude with duty and scope of the risk.

In addition to combining duty and scope, our courts in Louisiana have also regularly conflated duty and breach.[7] But as Professors Dobbs, Jayden, and Bublick have stated, other courts in the nation have made the same mistake.[8] In doing so, courts may state that there is no duty to engage in certain conduct or no duty to take certain protective actions under the circumstances. When making detailed duty decisions in a garden variety tort suit, the court essentially articulates a so-called rule of law, applicable to all similar cases.[9] Unfortunately, there are usually not very many, if any, similar cases. Additionally, some Louisiana courts have decided that there is no duty owed in the case before the court because there is no breach of the standard of care. That is conflation--pure and simple! But that is exactly what Louisiana courts have done in a series of "open and obvious cases."[10] In all these instances, by combining duty and breach, the courts err.

They err because in making particularistic no duty determinations they are ignoring the fact that there is a general duty to exercise reasonable care under most circumstances. The duty to exercise reasonable care is the default rule. The background, basic, underlying principle of negligence is that one person generally has a duty to exercise reasonable care to avoid injury to others. The Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 7(a)

[7] Frank L. Maraist, H. Alston Johnson III, Thomas C. Galligan, Jr., & William R. Corbett, *Answering a Fool According to His Folly: Ruminations on Comparative Fault Thirty Years On,* 70 La. L. Rev. 1105, 1107 (2011).
[8] Dobbs Law of Torts, *supra* note 1 at § 145.
[9] *Id.* stating: "*A no-duty variant.* In another version of specific rules that depart from the reasonable person standard, the court may declare a rule of law that the defendant owes no duty to the plaintiff in specific circumstances."
[10] For a very good discussion of the issue as it had developed up to that point, *see,* Broussard v. State of Louisiana, Through the Office of State Buildings Under the Division of Administration, 113 So. 3d 175 (La. 2013).

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provides: "An actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm."[11] Section 7 (b) recognizes that there may be policy reasons not to recognize a duty in a "class of cases" but those are no-duty rules for broad categories of similar claims, not fact-specific-no-duty determinations.[12] Those broad no-duty rules are based on some overarching policy or policies. Examples include the no-duty-to-act rule,[13] the traditional refusal to recognize a duty to protect against negligently inflicted economic distress,[14] the failure to impose a duty to protect against negligently caused pure economic loss,[15] the refusal to impose a duty to exercise reasonable care to protect the unborn,[16] and the failure to impose a duty to protect against third-party criminal acts,[17] the failure to impose a duty upon a third person to guard against negligent spoliation of evidence.[18] But, as I have written, in these broadly applicable no-duty cases: "the courts perform the policy analysis at a broad level of generality. The decision not to recognize a duty or to create a conditional duty applies to all similar cases; it does not turn on the facts of the particular case."[19]

When a judge merges or conflates the duty and breach elements and decides there is no duty under the particular circumstances, the court is not engaging in a broad analysis of policy at the case specific level; the court is generally deciding that there is no breach, and then tautologically determining that because there is no breach then there is no duty. How could such a thing happen? Rather simply, given human nature. Let me attempt to illustrate.

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[11] Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 7(a).
[12] Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 7(b).
[13] Dobbs Law of Torts, §400.
[14] *Id.* §390.
[15] *Id.* § 647.
[16] *Id.* §366.
[17] *Id.* §423.
[18] Reynolds v. Bordelon, 172 So. 3d 589 (2015).
[19] Galligan, Let the Jury Decide, *supra* note 1 at 776.

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Suppose Arya was driving down the street in a rainstorm, at 30 m.p.h. when Arya came upon a puddle that was deeper than one might have anticipated because of the town's failure to maintain the road safely. Moving through the puddle, Arya lost control of the vehicle, left the road, vaulted onto the sidewalk and hit Sansa, who was walking her pet dire wolf, Lady. Sansa was not hurt but the dire wolf was grievously injured. Sansa sued Arya for negligence for the damage to Lady.[20] Sansa alleged that Arya was driving too fast given the conditions. Arya denied the allegation and argued that she was driving at a perfectly safe speed.

Here is how the conflation can occur. If the defendant moved for summary judgment and claimed that there was no "duty" to drive any slower and presented expert testimony, a court might conclude that Arya owed Sansa no duty to drive slower than 30 m.p.h. and, thus, Arya owed Sansa no duty under the circumstances. That no duty conclusion would be wrong. In fact, Arya owed Sansa (and generally all pedestrians and drivers) a duty to exercise reasonable care. The question was not whether Arya owed Sansa a duty—she did. The question was: did Arya exercise reasonable care when she drove 30 m.p.h. in the rainstorm? That is a question of breach, not a question of duty. If Arya was not exercising reasonable care by driving too fast, a fact finder would conclude she breached the duty to exercise reasonable care. If she was exercising reasonable care when driving 30 m.p.h., then a fact finder would conclude she did not breach her duty to exercise reasonable care. A court should not hold or conclude that she had no duty to exercise reasonable care; she did have a duty; the issue is breach.

Note again how the error could occur. The judge, at the defense lawyer's behest, took the particular alleged act of negligence—driving too fast under the circumstances—and made the

[20] One sister has no immunity from suit by a sister.

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particular alleged act of negligence a part of the duty inquiry: was there a duty to drive under 30 m.p.h. in the rainstorm. The judge then answered that question—no—and concluded there was no duty, ignoring the generally applicable, overarching duty to exercise reasonable care.

But who cares? So, what? Well…everyone should care! The difference is very important; indeed, it is critical. Why? Because duty is a question of law; it is a question for the court as law giver and law decider. Breach is a mixed question and law and fact, generally entrusted to the jury or judge as factfinder in a non-jury trial. In deciding mixed questions, the law or standard is clear; the factfinder then decides factual issues (where the facts are in contention or where reasonable minds might reach different conclusions on the breach question); and, then, the factfinder must determine whether the facts satisfy the standard.[21] That is the factfinder must decide: "whether the rule of law as applied to the established facts is or is not violated."[22] Of course, the phrase rule of law is really a bit misleading. The rule of law involved is not a specific definition of acceptable behavior, as might appear in a statute. Rather, the rule of law is the general obligation to exercise reasonable care. In a negligence case, the factfinder decides if the defendant[23] violated the so-called "rule of law," i.e., the standard of care of a reasonable person under the circumstances.

But when the court conflates duty and breach, there is a risk that the judge will decide there is no duty to avoid the particular alleged misconduct. In doing so, the court is really making a no-breach decision. And, it is improperly taking the breach question from the jury (or itself as factfinder) and treating a mixed question of fact and law (breach) as a legal question (no duty). When an appellate court conflates duty and breach, it litters the jurisprudence with supposed

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[21] Pullman-Standard v. Swint, 456 U.S. 273, 289n.19 (1982).
[22] *Id.*
[23] And the plaintiff if the defendant alleged comparative fault.

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legal decisions that are, in fact, case specific applications of the reasonable care standard. This jurisprudential detritus confuses all of us. And it has profound practical implications because do-duty decisions on what are really questions of breach may lead judges to grant summary judgments based on conclusions there is no duty owed where the issue is really breach and there are underlying factual questions.

In this article, I shall discuss the historical evolution of the conflation of duty and breach in which Justice Oliver Wendell Holmes, Jr. figured prominently. I will then turn to Louisiana decisions where the courts have ignored, or minimized, the general duty to exercise reasonable care and essentially merged the duty and breach questions, including Louisiana's "open and obvious" jurisprudence. Thereafter, I will briefly discuss how Louisiana's particular duty-risk approach to analyzing negligence cases may have aggravated the conflation problem. Then, I discuss cases in which the plaintiff alleges that the defendant's violation of a statute constitutes a violation of the standard of care negligence cases. I will not attempt to be encyclopedic in any section. I am discussing what I contend is a common error; I am not attempting to plumb the legal depths. In each section, I will critique the relevant jurisprudence and offer my own opinion how the courts might have handled the cases before them. Thereafter, I will briefly conclude.

II. Holmes' Confidence—Misplaced and Misleading

In the classic work, **The Common Law,** Oliver Wendell Holmes, Jr., discussed negligence and said that the "law considers … what would be blameworthy in the average man, the man of ordinary intelligence and prudence, and determines liability by that."[24] Holmes was expressing the standard of care of the reasonable person—the core concept of negligence: the

[24] Oliver Wendell Holmes, Jr., The Common Law 108 (1881).

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duty to exercise reasonable care. Holmes expressly admitted that the reasonable person standard was a rather "vague test."[25] He also noted that one person may have to pay and another may not under similar circumstances depending upon the "different feelings of different juries."[26] Today these things are truisms for the tort lawyers and scholars. Where one jury may find a breach of the duty to exercise reasonable care under the circumstances, another may find no breach.

But Holmes continued; he did not stop and leave well enough alone. He continued:

> [I]t is obvious that it ought to be possible, sooner or later, to formulate these [liability] standards at least to some extent, and that to do so must at last be the business of the court. It is equally clear that the featureless generality, that the defendant was bound to use such care as a prudent man would do under the circumstances, ought to be continually giving place to the specific one, that he was bound to use this or that precaution under the or those circumstances.[27]

One reasonably assumes that the business of the court is different than the business of the jury. And the business of the court is not to decide facts or mixed questions of fact and law but to state and apply the law. But, to Holmes, was the definition of what constituted reasonable care under the circumstances a question of law for the court or a question for the jury based on the facts?

Continuing, Holmes stated that if the courts did no more than state the general definition of negligence—the failure to exercise ordinary care—"and left every case, without rudder or compass, to the jury they would simply confess their inability to state a very large part of the law which they required the defendant to know, and would assert, by implication, that nothing could

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[25] *Id.* at 110.
[26] *Id.* at 111.
[27] *Id.*

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be learned by experience."[28] Holmes then confidently proclaimed that neither courts nor legislatures had been so helpless. Instead, both had defined the "precautions to be taken in certain familiar cases…substituting for the vague test of the care exercised by a prudent man, a precise one of specific acts and omissions."[29] Thus, the law became more concrete without sacrificing the idea that a person must behave reasonably under the circumstances. Holmes believed that where there was a more concrete rule expressing what a reasonable person would do under the circumstances, the specific substituted for the general. Holmes saw this concretization taking place through legislative enactment.[30] I have no general objection to that claim and will return to it in the penultimate section of this piece. Legislatures enact rules and they are sometimes rather specific. If the court adopts those rules as the standard of care of the reasonable person, which they may, the statute may well concretize the reasonable person standard.[31]

But Holmes also believed that this concretization of the reasonable person standard took place "through the growth of judicial decisions."[32] In **The Common Law***,* Holmes discussed a series of cases dealing with the development of the common law of torts in certain areas. He said that in many cases the disagreement between the parties was about what had occurred, not about the standard of care.[33] He also noted that in many of the cases he considered, the issue was the sufficiency of the evidence and when a judge decided that there was insufficient evidence of negligence, the judge was deciding that the acts or omissions alleged did "not constitute a ground

[28] *Id.* at 112.
[29] *Id.*
[30] *Id.* at 113-14
[31] Of course the extent to which this concretization takes place depends, in part, on the procedural effect of violation of statute in a particular jurisdiction.
[32] The Common Law at 114.
[33] *Id.* at 114-15.

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of legal liability, and in this way the law is gradually enriching itself from daily life as it should."[34] Holmes stated that this was different than merely concluding that there was no evidence of a fact.[35]

It is important to pause here for a moment because, to the 21st century lawyer, Holmes might have been saying one of two things. He might have meant that when a judge decided that there was insufficient evidence of negligence the judge was deciding that no reasonable juror could find that there was negligence. That would form the bases today for a judgment as a matter of law (a directed verdict or j.n.o.v.) or possibly a summary judgment.[36]

Or Holmes might have been saying that when the facts were not in dispute, it was the judge, not the jury, who decided if those facts were sufficient to constitute negligence—a failure to exercise ordinary care under the circumstances. That is, in modern parlance, that the judge decides whether the conduct at issue constitutes a breach of the standard of care. That would be more alarming to the modern lawyer and judge—or at least it should be.

Holmes moved on to point out that the more difficult cases were those where the court found that there was *prima facie* evidence of negligence or sufficient evidence of negligence to go to the jury.[37] Here, he pointed to the "confusion of thought implied in speaking of mixed

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[34] *Id.* at 120-21.
[35] *Id.* at 120.
[36] On the difference between articulating a rule of law and assessing evidence Dobbs and his co-authors state:

> A rule of law specifying a particular item of conduct is different from an assessment of the evidence in the particular case. Courts frequently assess the evidence to determine whether it warrants submission to the jury. If the evidence is so strong that reasonable people could not differ but would be compelled to find in a particular way on the negligence issue, courts are fully authorized to exclude any jury decision to the contrary. A rule of law, however, is just the opposite of an assessment of evidence. A rule of law that it is negligent not to stop, look, and listen actually *forbids* any assessment of the evidence to determine whether it was negligent in the particular circumstances or not. A rule of law like this will get the right results in many cases, but excludes some cases too promptly, refusing to consider evidence that might lead to a different result

Dobbs on Torts § 145 (citations omitted).
[37] *Id.* at 122.

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questions of fact and law."[38] Holmes again pointed out the complexity of negligence: (1) did the defendant commit the alleged act and, if so, (2) was it a violation of the appropriate standard of care? If the dispute was about the second question then, to Holmes, a judge could give a series of hypothetical instructions based on the factual possibilities and then the judge "may still take their opinion as to the standard."[39] Courts submitted issues as to the standard of care to the jury when the court felt that it did not have sufficient practical experience with the matters presented and wanted the common sense of the community to "aid in its judgment."[40] But, to Holmes, where the judge had sufficient experience it was up to the judge to decide. That is, in terms of the question I raised earlier, the judge (to Holmes) decided breach, apparently as a matter of law, unless the judge felt the judge did not have the practical experience to do so.[41] Thus, Holmes claimed, the law of negligence would become clearer, more precise, more detailed, and more concrete, over time. Exceptions would typically arise in areas where community standards were changing. Thus:

> Facts do not often exactly repeat themselves in practice; but cases with comparatively small variations from each other do. A judge who has long sat at *nisi prius* ought gradually to acquire a fund of experience which enables him to represent the common sense of the community in ordinary instances far better than an average juror. He should be able to lead and instruct them in detail, even when he thinks it desirable, on the whole to take their opinion. Furthermore, the sphere in which he is able to rule without taking their opinion at all should be continually growing.[42]

[38] *Id.*
[39] *Id.* at 123.
[40] *Id.*
[41] *Id.*
[42] *Id.* at 124.

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Holmes then opined that the argument that the jury had a more extensive role in negligence cases was based on the need to continually conform the legal standard of liability to experience.[43] And, Holmes said precedents can be overruled—a clear, if not explicit, recognition that a judge's decision on a question of the standard of care was a legal conclusion.

Thus, to Holmes, in **The Common Law**, breach of the standard of care was a question for the judge. But if the facts involved an area with which the judge was unfamiliar, then the judge could submit the standard of care question to the jury. As society became more familiar with a type of case, one would have expected less (or no) need for jury input on the standard of care. Likewise, an inexperienced judge might submit standard of care questions to the jury more frequently than one who had long been on the bench. In all events, the law of negligence, i.e., the definition or concreteness of the standard of care of the reasonable person would become more certain in common case types over time. Thus, the law might expect more judicial rules concerning the standard of care of the reasonable person in certain commonly arising fact patterns. But the entire scheme was problematic.

Did the questions of whether the jury or judge decided breach depend upon the subjective experience of the judge? That seems an odd way to determine the allocation of decision-making responsibility. And what if the judge believed they were sufficiently experienced? I assume an appellate court could disagree but based on what? Its assessment of the trial judge's life, education, worldview? And, what impact would a decision on breach by an experienced judge have on similar cases before other judges? Were they binding? If the decision on breach was really law then wouldn't they be or at least couldn't they be? And, even if not binding if the

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[43] *Id.* at 125.

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experienced judge sat on the same level court as the inexperienced judge could the inexperienced judge rely on the experienced judge's prior decision even though the current, deciding judge lacked that same experience? And, most basically, isn't the common sense of the community concerning what constitutes reasonable care in a garden variety negligence case exactly the reason the issue of breach should be for the jury? Holmes' troublesome notions raised more questions than he answered.

And, problematically, Holmes carried his ideas about negligence with him to the United States Supreme Court where he had the chance to put them into national practice in Baltimore & O.R. Co. v. Goodman.[44] In doing so, the folly of his thesis became manifest.

The advent of the railroad caused a transportation and commercial revolution, but it also took a serious toll in human life and injury.[45] One place where people paid that toll was at grade crossings where trains met people, wagons, and other vehicles. The ensuing collisions led to death, injury, and damage. In one such tragic incident, Goodman, in daylight, was driving his truck towards a grade crossing, with which he was familiar, at about 10-12 miles per hour.[46] A building obstructed his view of the train tracks so he slowed to 4-6 miles per hour.[47] It was not until he was 16-18 feet from the track[48] that he could see a train traveling at over 60 miles per hour. The train, in question, struck and killed him. Goodman's surviving spouse sued the railroad, which contended that the decedent was contributorily negligent and thus recovery was

[44] 275 U.S. 66 (1927).
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[46] 275 U.S. 66, 69 (1927).
[47] *Id.*
[48] Baltimore & O.R. CO. v. Goodman, 10 F. 2d 58, 59 (6th Cir. 1926).

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barred.[49] The trial court denied defendant's motion for a directed verdict on the contributory negligence issue. The lower court found in plaintiff's favor and the court of appeals affirmed.[50]

The United States Supreme Court, in a three-paragraph opinion written by Justice Holmes reversed. Justice Holmes wrote:

> We do not go into further details as to Goodman's precise situation, beyond mentioning that it was daylight and that he was familiar with the crossing, for it appears to us plain that nothing is suggested by the evidence to relieve Goodman from responsibility for his own death. When a man goes upon a railroad track he knows that he goes to a place where he will be killed if a train comes upon him before he is clear of the track. He knows that he must stop for the train not the train stop for him. In such circumstances it seems to us that if a driver cannot be sure otherwise whether a train is dangerously near he must stop and get out of his vehicle, although obviously he will not often be required to do more than to stop and look. It seems to us that if he relies upon not hearing the train or any signal and takes no further precaution he does so at his own risk. If at the last moment Goodman found himself in an emergency it was his own fault that he did not reduce his speed earlier or come to a stop. It is true… that the question of due care very generally is left to the jury. But we are dealing with a standard of conduct, and when the standard is clear it should be laid down once for all by the Courts.[51]

Justice Holmes decided that every driver at every grade crossing must stop, look, and perhaps do more than listen. If the driver cannot see, the driver must get out of the vehicle and check for a

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[49] 275 U.S. at 69.
[50] *Id.*
[51] *Id.* at 69-70.

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train. To fail to do so was contributory negligence as a matter of law. In the absence of any statute or regulation, Justice Holmes defined the standard of conduct. He apparently did so based on his experience and, to use his own words, the standard would apply to all grade crossing cases even if individual cases had "comparatively small variations from each other."[52] Holmes' rule of law happily did not have a long life.

In 1934 in Pokora v. Wabash Ry. Co.,[53] seven years after its decision in *Goodman,* the United States Supreme Court again considered contributory negligence in the context of a grade crossing collision between a train and a motor vehicle. Pokora, an iceman, driving his truck, approached a grade crossing.[54] He stopped as he neared the crossing.[55] A group of box cars on a railroad switch blocked his view.[56] He listened but there was "neither bell nor whistle."[57] Pokora proceeded and a train traveling between 25 and 30 miles per hour struck Pokora,[58] who sued the railroad.[59] The railroad contended that Pokora was contributorily negligent and moved for a directed verdict which the trial court granted, based on *Goodman.*[60] He had not gotten out of his truck and looked up and down the tracks.

The United States Supreme Court, in an opinion by Justice Cardozo, reversed.[61] Pokora had no view of the train at a place where he could have stopped. It was up to the jury (the factfinder) to determine whether Pokora acted reasonably in relying upon what he heard or did

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[52] The Common Law, at 124.

[53] 292 U.S. 98 (1934).
[54] *Id.* at 99.
[55] *Id.* at 100.
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] *Id. at* 99.
[60] *Id.*
[61] *Id.* at 106.

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not hear before proceeding. But what about *Goodman*? Justice Cardozo paid lip service to the earlier decision when he said:

> There is no doubt that the opinion in that case is correct in its result. Goodman, the driver, traveling only five or six miles an hour, had, before reaching the track, a clear space of eighteen feet within which the train was plainly visible. With that opportunity, he fell short of the legal standard of duty established for a traveler when he failed to look and see. This was decisive of the case.[62]

So, Goodman's failure to look was a breach of the standard of care. The conclusion is subject to some debate. Could he have stopped if he had been able to see the train? But let us not quibble because Justice Cardozo continued, and said:

> It [the Court[added a remark, unnecessary upon the facts before it, which has been a fertile source of controversy. 'In such circumstances it seems to us that if a driver cannot be sure otherwise whether a train is dangerously near he must stop and get out of his vehicle, although obviously he will not often be required to do more than to stop and look.'[63]

Pokora had, of course, stopped but it was up to the jury to decide if he could or should have safely stopped again when he had passed the box cars in the switch track.[64] Should he have gotten out of his vehicle to look for a train? Had he gotten out and looked, the track might have

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[62] *Id.* at 103. One will note that the 18 feet figure came from the court of appeals decision, *id.* at 102n.2, which had actually said 16-18 feet. Baltimore & O.R. Co. v. Goodman, 10 F. 2d 58, 59 (6th Cir. 1926).
[63] 292 U.S. at 102. Immediately after that quote, Justice Cardozo noted that some courts required vehicles approaching grade crossings to stop and others did not. Justice Cardozo did not find it necessary to resolve that issue because Pokora had stopped. *Id.* at 103. He then proceeded to discuss the *Goodman* language apparently requiring a vehicle driver to get out of the vehicle.
[64] *Id.* at 104.

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been clear but a train might have appeared before he was back in his vehicle.[65] Then, he could be worse off. Or what if the railroad had begun to move the box cars? It all depended upon the facts and circumstances.[66] Recognizing the factual complexity, Justice Cardozo concluded:

> Illustrations such as these bear witness to the need for caution in framing standards of behavior that amount to rules of law. The need is the more urgent when there is no background of experience out of which the standards have emerged. They are then, not the natural flowerings of behavior in its customary forms, but rules artificially developed, and imposed from without. Extraordinary situations may not wisely or fairly be subjected to tests or regulations that are fitting for the commonplace or normal. In default of the guide of customary conduct, what is suitable for the traveler caught in a mesh where the ordinary safeguards fail him is for the judgment of a jury. … The opinion in Goodman's Case has been a source of confusion in the federal courts to the extent that it imposes a standard for application by the judge, and has had only wavering support in the courts of the states. We limit it accordingly.[67]

[65] *Id.* at 104-05.
[66] *Id.* at 105.
[67] *Id.* at 105-06. While *Pokora* limited the particular rule it did not kill the tendency of courts to continue to occasionally articulate rules of law. As professor Dobbs and his co-authors state:

> [Some] courts say they adhere to the reasonable person standard of care but they attempt to create specific rules of conduct that they then declare to be the rule the reasonable person will always follow. One result in these cases is that the general standard is left behind and specific rules are put in its place. The insistence that circumstances are important in judging conduct, seen in the emergency or special danger cases, disappears in the face of a specific rule that brooks no breach. This relatively rigid approach may be less common than once it was, but it still occurs.
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> …
>
> Many courts now recognize that the problem is usually to assess the evidence in the case, not to make a specific rule of law that covers all cases. So some courts have now said that, after all, you are not invariably negligent if you fail to stop, look, and listen,[14] or if you cannot stop your car within the range of your headlights, or you are struck as you step off the curb instead of in the middle of the street.

Dobbs on Torts § 145 (citations omitted).

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Thus, Justice Cardozo, while bowing to custom, which is not binding when deciding whether one is negligent but merely evidentiary,[68] indicated that rules of law defining what is and what is not required are risky things. They are risky because facts and circumstances vary. Thus, it is best to get the common sense of the community on what is reasonable care under the circumstances. That is, let the factfinder decide breach, as a mixed question of fact and law.

In the parlance of this piece, negligence has five elements: duty, breach, cause-in-fact, scope of the risk, and damages. Generally, duty is simple: there is a duty to exercise reasonable care under the circumstances. That is a matter of law. In some cases, there are broad policy reasons why a court might conclude that a person does not owe a duty to exercise reasonable care, but those conclusions are applicable to categorical types of injury, not based on the facts of particular cases.[69] In the garden variety case, whether someone behaved reasonably under the circumstances is a question of breach for the factfinder.

Thus, the generally applicable law of duty is that a person has a duty to exercise reasonable care to protect others from harm, based upon the particular circumstances at issue. Whether the defendant satisfied that duty or breached it is a matter for the factfinder to decide based upon those particular circumstances and the factfinder's common sense and experience. But that experience is not the experience of Holmes' judge who had long sat at *nisi prius.* It is the experience of the factfinder as a human being who has lived in the world.

What Holmes counselled and what he did in *Goodman* was to turn the general standard of care into a rule of law defining the standard of care as a judge, not as a factfinder. That is, Holmes said that the general duty of reasonable care became a duty to stop, look, listen, and

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[68] The T. J. Hooper, 60 F. 2d 737 (2d Cir. 1932).
[69] See text accompanying notes - , *supra.*

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possibly get out of one's vehicle at grade crossings. He essentially fashioned the required conduct as a duty. Everyone, per Holmes in *Goodman*, had a duty to stop, look, listen, and possibly get out of one's vehicle at a grade crossing. In articulating his rule of law, Holmes conflated duty and breach; he combined them. By defining the duty specifically, Holmes essentially decided the breach question.

As Cardozo made clear in *Pokora* the duty and breach questions are best kept separate because what constitutes reasonable care under the circumstances generally depends upon those circumstances. To not allow the factfinder to tailor the breach decision to the circumstances (where reasonable minds could differ) risks ridiculous results, such as where the vehicle operator who got out of the vehicle did not have time to both get back to the vehicle safely and avoid an oncoming train which a reasonable inspection did not reveal. Equally disturbing, a proliferation of rules of law, articulated by various courts at various levels from trial to appellate to supreme, inevitably results in conflicting results which, because they are masquerading as law, lead to procedural posturing aimed at dismissing cases as a matter of law where those cases are not exactly like the case which gave rise to the so-called rule of law in the first place.

No, judges who have long sat at *nisi prius* should not use their experience to articulate rules of law, or, more particularly, instruct juries with fact specific special interrogatories. The judge should exercise judicial restraint, and, unless no reasonable person could disagree on the question of breach,[70] leave the question of reasonable care to the jury, or, in a non-jury trial,

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[70] In federal court if no reasonable person could find that the defendant breached the standard of care then the defendant may be entitled to a summary judgment, Fed. R. of Civ. Pro. 56, or a judgment as a matter of law, Fed. R. of Civ. Pro. 50, if the case has proceeded to trial. In Louisiana, the defendant might be entitled to summary judgment pursuant to La. Code of Civ. Pro. art. 966, a directed verdict, La. Code of Civ. Pro. art 1810, or a judgment notwithstanding the verdict. La. Code of Civ. Pro. art. 1811. Concomitantly, if no reasonable person could fail to conclude that the defendant breached the standard of care, the plaintiff would be entitled to the relief pursuant to the same procedural articles just cited.

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decide breach as a factfinder, not as a rule of law giver. In the next section, I shall turn to Louisiana cases that are Holmesian in their detailed analysis of duty and, in adopting that approach, conflate duty and breach.

III. Some Louisiana Duty/Breach Conflation Cases

Justice Holmes was certainly not alone in articulating so-called rules of law. The *Goodman*, stop, look, listen, and maybe get out of your vehicle rule of law imposed a duty by saying what someone must do. But courts often use a similar logic to conclude that there are essentially rules of law that no not impose a duty because there is no duty to do what the plaintiff alleges the defendant should have done to satisfy the general duty to exercise due or reasonable care. Let me unpack that sentence. In the hypothetical posed in the introduction, Sansa claimed that Arya should have driven slower than 30 m.p.h. under the conditions. The trial court hypothetically concluded that because due care did not demand Sansa should drive slower that there was thus no duty to drive slower. This hypothetical decision employs spurious logic: whether Arya should have driven slower was a question of breach, not duty. By saying there was no duty to drive slower the (hypothetical) court conflated or merged the duty and breach decisions. Perhaps no reasonable factfinder could have concluded there was a breach of the standard of care under the circumstances, but that only means the (no) breach decision justified summary judgment or a judgment as a matter of law. It does not mean there was no duty owed, as a matter of law. There was a duty to exercise reasonable care—it just may not have been breached. There are Louisiana decisions that make this same mistake and in this section I will review some of them beginning with decisions that seem to ignore the near universal rule that one person owes another a duty to exercise reasonable care.

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A. No Duty Decisions—Lest We Forget Due Care

In *Lowe v. Noble, L.L.C.*,[71] defendant was the owner of marshland south of Interstate 10 between Bayou Sauvage and Interstate 510.[72] In August 2011, a marsh fire was detected on the land and the owner contacted the New Orleans Fire Department.[73] The source of the fire was unknown but defendant contended that the only possible cause of the fire was a lightning strike.[74] In any event, the fire department's efforts to control the fire were unsuccessful and it continued to burn, even after a storm dumped 10 inches of rain on the area.[75] Then, in December 2011, several serious accidents occurred when motorists encountered a dense mixture of blinding smoke and fog and several pile-ups ensued.[76] Plaintiff, seriously injured in one of the collisions, contended that the blinding cloud was caused by smoke from the fire or the smoke from the fire in combination with fog and sued defendant landowner.[77]

The claims against the defendant included a claim that the defendant had failed to exercise reasonable care because it did not conduct controlled burns on the property.[78] Defendant moved for summary judgment. The plaintiffs, in opposition to defendant's motion for summary judgment, presented the affidavit of an expert in wetlands management.[79] The expert stated, based on his review of the relevant evidence, that defendant's land consisted primarily of "scrub shrub," wetland made up of "shrubs, emergent, and other woody plants and small trees."[80] Scrub

[71] 233 So. 3d 28 (La. App. 1st Cir. 2017), *reversed,* 235 So. 3d 1095 (La. 2018).
[72] *Id.* at 32.
[73] *Id.* at 33.
[74] *Id.* at 40.
[75] *Id.* at 39.
[76] *Id.* at 33.
[77] *Id.*
[78] *Id.* at 41. On a related issue, the court of appeal held that the defendant landowner had no duty to extinguish the fire once it began burning, beyond notifying the fire department. Lowe. v. Noble, L.L.C., 233 So. 3d 28, 39-40 (La. App. 1st Cir. 2017).
[79] 235 So. 3d at 33.
[80] *Id.*

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shrub plants, as part of their normal lifecycle, produce a quantity of fuel, which "can and should be controlled by burning to prevent excess accumulation."[81] This was particularly important where the scrub shrug was close to housing or a highway because of the risks a fire would pose.[82]

According to the expert, a scrub shrub landowner should conduct controlled burns every one to five years.[83] There had not been a controlled burn on the relevant land for at least fifty years.[84] The expert said that if a large amount of organic peat or other vegetative material accumulated, a lightning strike or spontaneous combustion could cause a fire. Such a fire can go subterranean and not burn out, even with an accompanying rain storm; the fire could burn for months.[85] He also opined that "a marsh fire that ignites woody scrub shrub and accumulated woody byproduct tends to burn much longer than a fire in a peat covered marsh, and the woody byproduct and scrub shrub will often continue to smolder, generating thicker smoke and possibly causing re-ignition of the fire."[86] That is, the expert was saying that the failure to do any controlled burns on scrub shrub land was a failure to exercise reasonable care: a breach of the standard of care of the reasonable person.

Despite the expert's affidavit, the trial court granted the defendant's motion for summary judgment, finding that the defendant had no duty to conduct controlled burns. The plaintiff appealed and the First Circuit Court of Appeal reversed on the controlled burn issue.[87] Based on

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[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] 233 So. 3d 28 (La. App. 1st Cir. 2017), *reversed,* 235 So. 3d 1095 (La. 2018). The court of appeal affirmed the summary judgment insofar as it held that the defendant, once it had summoned the fire department had no further duty to attempt to extinguish the fire.

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the expert's testimony, the court concluded that there were factual issues which precluded a summary judgment in defendant's favor. The factual issues were whether:

> under the facts and circumstances of this case, performing periodic controlled burns is an exercise in reasonable care and had Little Pine performed said burns, the marsh fire would have been less intense, easier to control, and would have been extinguished by accompanying rain showers and by the amount of rain falling.[88]

To put it in the parlance of this piece, the court found that there were material issues which prevented summary judgment on the question of whether the defendant had breached its duty to exercise reasonable care. Another way to put it would be to ask whether the defendant had failed to exercise reasonable care to protect against an unreasonable risk of harm. What was the relevant duty? The duty to exercise reasonable care.[89]

Defendant landowner sought a writ of certiorari from the Louisiana Supreme Court. The Court granted that writ and reversed the Court of Appeal, reinstating the trial court's judgment in a *per curiam* opinion.[90] The substance of the Court's ruling is contained in two sentences:

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[88] *Id.* at 42. The court also found that the defendant could not avoid responsibility if it was found to be negligent because the fire was the result of an Act of God (lightning) because the Act of God defense is only available to a defendant who is not negligent.

[89] In addition to a general negligence claim the plaintiff brought suit under La. Civ. Code art. 2317.1, which provides:

> The owner or custodian of a thing is answerable for damage occasioned by its ruin, vice, or defect, only upon a showing that he knew or, in the exercise of reasonable care, should have known of the ruin, vice, or defect which caused the damage, that the damage could have been prevented by the exercise of reasonable care, and that he failed to exercise such reasonable care.

But that claim really adds nothing as La. Civ. Code art. 2317.1, since 1986, is a basic negligence claim. The plaintiff must prove that the responsible party knew or should have known of the problem with the relevant thing, could have been prevented by the responsible party's exercises of reasonable care, and that the responsible party failed to exercise reasonable care.

[90] 235 So. 3d 1095 (La. 2018).

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> There is no duty on the part of the defendants to conduct controlled burning. Absent a duty, there can be no breach of duty. Consequently, the court of appeal erred in reversing the trial court's judgment, and denying the defendants' motion for summary judgment.[91]

There is no citation of authority. What about the general duty to exercise reasonable care? The Court did not mention it—at all. And it is not because Louisiana is somehow different than her common law neighbors for there are several Louisiana decisions recognizing the near "universal" duty to exercise reasonable care.[92]

Returning to the hypothetical with Sansa and Arya, the Louisiana Supreme Court in *Lowe* essentially did what the hypothetical judge in Sansa v. Arya did. The Court took the allegation that it was a breach of the obligation to exercise reasonable care to fail to conduct controlled burns and turned it into a duty question: was there a duty not to conduct controlled burns? It then concluded there was not with no citation nor discussion of the expert's affidavit.

Perhaps, a defender of the decision would say that the Court truly was making a generalized no duty determination applicable to all cases. That is, there is never a duty to conduct controlled burns. But why not? One would hope for an extensive discussion of the relevant policies of tort law before drawing that conclusion, akin to the analysis Justice Clark and the court conducted in *Reynolds v. Bordelon*.[93] There, the issue was whether Louisiana would

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[91] *Id.* at 1096.

[92] Boykin v. Louisiana Transit Co., Inc., 707 So. 1225, 1231 (La. 1998) ("There is an almost universal duty on the part of the defendant in negligence cases to use reasonable care so as to avoid injury to another."); Hoffman v. Theriot, 249 So. 3d 297, 301 (La. App. 5th Cir. 2018) ("universal duty" to exercise reasonable care); Lichti v. Schumpert Medical Center, 750 So. 2d 419, 423 (La. App. 2d Cir. 2000) ("Duty can be stated generally as the obligation to to conform to the standard of conduct of a reasonable man under like circumstances."). Others state that each negligence case must be decided on its own facts. Coleman v. Riley, 780 So. 2d 1071, 1074 (La. App. 4th Cir. 2001) ("No fixed rule exists for determining what conduct constitutes negligence; thus, the facts and environmental characteristics of each case must be considered and treated individually.")

[93] 172 F. 3d 589 (La. 2015).

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recognize a claim for negligent spoliation of evidence. The court's consideration of the issue was categorical; it applied to all negligent spoliation cases and was not dependent upon the particular facts before it. Before concluding that Louisiana would not recognize a claim for negligent spoliation, Justice Clark analyzed: deterrence, compensation, satisfaction of the community's sense of justice, proper allocation of resources, and deference to legislative will.[94] The Court decided that there were other avenues of relief available to a party impacted by negligently lost or destroyed evidence. The *Lowe* court discussed none of those policies. *Reynolds* is a case where, even though there is a general duty to exercise due care, the Court concluded that broadly applicable policy concerns dictated not recognizing a duty in the negligent spoliation context. Again, the decision in *Reynolds* is categorical. It did not depend upon the specific facts of the case before the Court and the discussion is extensive.

Even absent a policy analysis, might the per curium opinion in *Lowe* be read as a no duty rule applicable to a broad category of cases—controlled burn cases?[95] I think that would be a strained reading, especially given the rather conclusory no-duty determination. First, there are not very many cases involving allegations of failure to conduct controlled burns. Second, each case would seem to turn on its own particular facts. How large was the scrub shrub area? Should the owner or manager of a large parcel of scrub shrub be absolved of responsibility in every case? Where was the land located? Should someone owning scrub shrub land by a school or subdivision be absolved of any responsibility? Once again, the issue is one of breach of the general duty to exercise reasonable care, not duty. By treating the question as a duty question,

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[94] *Id.* at 597-99.
[95] And in those cases, particular conditions and expert analysis would be more important than any overriding, broad policy considerations. In short, using Holms' parlance, a trial judge would never be able to develop sufficient experience with controlled burn cases to articulate a rule of law.

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the court confuses things. Must a plaintiff come up with a particularized, fact-based duty in every case? If so, what about the general duty to exercise reasonable care?

Robinette v. Old Republic Insurance Co. [96] is another case in which the court does not recognize that there is a general duty to exercise reasonable. *Robinette* is the story of a truncated lunch date gone bad. Zeno picked up Robinette at her college for lunch. An argument broke out instantaneously, with Zeno contending that Robinette, the passenger, "became verbally abusive, screaming and cursing at him as he attempted to exit the parking lot of the school,"[97]--a most unpleasant affair. Apparently deciding lunch would be inevitably dyspepsic, Zeno put his vehicle in reverse and proceeded to collide with the vehicle behind him. Robinette sued, claiming she was injured in the collision. Zeno replied that the accident was caused either solely, or partially, by Robinette's negligence in distracting him. Robinette then moved for and was granted summary judgment on the liability question.[98] Defendant appealed and the core issue for the appellate court was whether Robinette's fault was either the sole cause[99] of the accident thus relieving Zeno of any responsibility or liability or whether it was at least a partial cause which would mean a reduction in her recovery under comparative fault.[100]

The court noted the allegations that Robinette had screamed and cursed but noted that she had not hit Zeno or obstructed his vision or physically interfered with his operation of the vehicle.[101] Of course, whatever Robinette did not do, plaintiff had alleged that her screaming and

[96] 229 So. 3d 61 (La. App. 3rd Cir. 2017), *writ denied,* 231 So. 3d 648 (La. 2018).
[97] *Id.* at 63.
[98] *Id.* at 63-64.
[99] The phrase "sole cause" always makes me say "ouch." There is no such thing as a sole cause. When a party says someone else is a sole cause of an accident what they really mean is that the party's duty did not include the risk which occurred because the alleged "sole" cause's conduct was so bizarre or unforeseeable that they are not responsible for the ensuing injuries.
[100] La. Civ. Code art. 2323.
[101] 229 So. 3d at 65.

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cursing while he was driving were negligent—a failure to exercise reasonable care. The appellate court stated the truism that, in Louisiana, a driver's negligence is not imputed to a passenger.[102] It is not clear what relevance that rule had to the case as Zeno was not trying to impute his negligence to Robinette; he was saying she was negligent all on her own. Next, the court said that in Louisiana "a passenger in a motor vehicle can have fault imposed where there is a joint venture, an independent negligent act by the passenger, or a showing that the rider had actual or constructive knowledge of a driver's incompetence or impaired ability to operate the vehicle."[103] Granted, but that was not what Zeno was arguing! He was, once again, saying that Robinette was negligent in her own right—all by herself. The court then distinguished several tangentially related cases from other jurisdictions, which defendant had cited.[104]

Finally, the court got to the gist of the argument: Zeno's claim that Robinette had a duty not to yell and scream at him while he was driving in a manner which might distract him. I would put it slightly differently: Robinette had a duty to exercise reasonable care and yelling and screaming at a driver is an arguable breach of that duty. The court rejected Zeno's contention, stating:

> It is the primary responsibility of the driver to obey the law and to avoid distractions. Imposing a duty on a passenger to avoid any conduct that might theoretically distract the driver would open too broad a swath of potential liability in ordinary and innocent circumstances. Courts must be careful not to create a broadly worded duty and run the risk of unintentionally imposing liability in situations far beyond the parameters we now face. The Louisiana Supreme Court has shown that it intends to move with caution in

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[102] *Id.*
[103] *Id.* at 66.
[104] *Id.* at 66-68.

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> expanding new areas of delictual responsibility. Edwards v. Louisville Ladder Co., 796 F.Supp. 966, 971 (W.D. La.1992). Acceptance of defendants' assertion that Robinette's actions of screaming and yelling breached a duty and place her at fault for causing the accident would require the adoption of a cause of action for comparative fault of a guest passenger more expansive than any recognized in any jurisdiction in this country.[105]

I fear the court made a doctrinal mountain out of what was essentially a factual mole hill. Whatever the driver's duty, every person, including a passenger, has a duty to exercise reasonable care. In the comparative fault context, plaintiffs have a duty to exercise reasonable care to protect themselves from foreseeable risks of harm posed by their (mis)conduct. Zeno alleged Robinette failed to behave reasonably when she yelled and screamed at him. Was that a breach of the standard of care? I would let the factfinder decide. The court's concern with broadly worded duties neglects to consider the broad near universal duty to exercise reasonable care. Sometimes, Louisiana courts do not overlook or neglect to consider the general duty to exercise reasonable care, they simply merge the duty and breach elements a la Oliver Wendell Holmes and the stop, look, and maybe do more than listen rule. I will now turn to a significant decision doing exactly that.

B. Breaking New Ground and Further Conflation Confusion

A significant example of a court essentially merging duty and breach while breaking new ground in Louisiana legal doctrine is *Posecai v. Wal-Mart Stores, Inc.*.[106] *Posecai* is a most

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[105] *Id.* at 67-68. Interestingly, in stating that the Louisiana Supreme Court counseled moving slowly in recognizing new theories of tort liability, the court cited a federal district court decision, not the Louisiana Supreme Court. That district court decision does, in fact, make the same statement about the Louisiana Supreme Court that the *Robinette* court makes and it cites a Louisiana Supreme Court decision: Great Southwest Fire Ins. Co. v. CNA Ins., Cos., 557 So. 2d 966 (La. 1990). In that case, the Louisiana Supreme Court refused to recognize a claim for negligent interference with contract in the insurance context. That is a far cry from a garden variety automobile collision.
[106] 752 So. 2d 769 (1999).

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significant decision because it was the first Louisiana Supreme Court modern decision recognizing a merchant's duty to protect against negligent criminal conduct, even when the merchant did not assume the duty.[107] At common law, courts generally held that merchants[108] did not have an obligation to protect against third-party criminal acts. Courts deemed the third-party criminal act either unforeseeable as a matter of law or a superseding cause, relieving the merchant of any responsibility.

Ms. Posecai was robbed in a Sam's parking lot in Metarie. The thief made off with her wallet and best jewels, which she had been wearing that day at a "downtown luncheon."[109] Ms. Posecai sued Wal-Mart. The lower courts essentially found in the plaintiff's favor.[110] Justice Marcus of the Louisiana Supreme Court began his analysis with the following statement: "The sole issue presented for our review is whether Sam's owed a duty to protect Mrs. Posecai from the criminal acts of third parties under the facts and circumstances of this case."[111] Justice Marcus said that most state supreme courts had recognized a duty to protect against third-party criminal conduct in certain circumstances.[112] He then wrote:

> We now join other states in adopting the rule that although business owners are not the insurers of their patrons' safety, they do have a duty to implement reasonable measures to protect their patrons from criminal acts when those acts are foreseeable. We emphasize, however, that there is generally no duty to protect others from the criminal activities of third persons. … This duty only arises under limited circumstances, when the criminal act

[107] Harris v. Pizza Hut of Louisiana, Inc., 455 So. 2d 1364, 1370 (La. 1984).
[108] Some businesses, like innkeepers Dobbs on Torts, n. 2, *supra,* at § 261or common carriers, *Id. at* § 262, owed a higher duty of care, which might well include the duty to protect against certain criminal acts. *Id.* at §§ 266 and 264.
[109] 752 So. 2t at 764.
[110] *Id.* at 765.
[111] *Id.*
[112] *Id.* at 766.

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> in question was reasonably foreseeable to the owner of the business. Determining when a crime is foreseeable is therefore a critical inquiry.[113]

The first sentence seems to impose a rather general duty on a merchant to protect patrons against **foreseeable** criminal acts. But the second seems to undermine the first. The third repeats what the first sentence said—there is a duty to protect against foreseeable criminal acts—but uses foreseeability somehow as a limit on the duty itself. Then, the final fourth sentence states that the key is determining which acts are foreseeable. Is the foreseeability of a criminal act somehow different than how law defines or analyzes foreseeable events in general negligence cases? The way the paragraph is written implies that in the third-party criminal act context, foreseeability has a more limited definition.

Justice Marcus then surveyed jurisprudence from other states and the approaches[114] their courts took before settling on the approach Louisiana would take: the so-called balancing test.[115] Justice Marcus articulated Louisiana's third-party criminal act negligence balancing test as follows:

> The foreseeability of the crime risk on the defendant's property and the gravity of the risk determine the existence and the extent of the defendant's duty. The greater the foreseeability and gravity of the harm, the greater the duty of care that will be imposed on the business. A very high degree of foreseeability is required to give rise to a duty to post security guards, but a lower degree of foreseeability may support a duty to implement lesser security measures such as using surveillance cameras, installing improved lighting or

[113] *Id.*
[114] The four approaches Justice Marcus found were: (1) the specific harm rule; (2) the prior similar incidents test; (3) the totality of the circumstances test; and (4) the balancing test. *Id.* at 766-68.
[115] *Id.* at 768.

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fencing, or trimming shrubbery.[116]

The reader will immediately recognize the familiar risk/utility balancing test, derived from Judge Learned Hand's "economic" formula for negligence.[117] But, and this is a point we will revisit below, the application of a risk utility test at the case specific level is a question of breach, not a question of duty. But in *Posecai*, Justice Marcus clearly contemplated that the application of the balancing test to the specific facts at issue would be for the court and part of the duty question. As he noted: "The foreseeability and gravity of the harm are to be determined by the facts and circumstances of the case."[118] In fact, he then went on to consider the precise facts of the case under the balancing test and found that there was not a sufficiently high level of foreseeability and that Sam's "owed no duty to protect Mrs. Posecai from the criminal acts of third parties under the facts and circumstances of this case."[119] Sam's owed no duty but, in making that decision Justice Marcus conflated or merged the duty and breach questions.

Interestingly, in a pattern that would repeat itself, Justice Lemmon concurred. He agreed with the result and he agreed with the recognition of a patron's claim against a merchant for negligent failure to prevent a foreseeable criminal act. He thought the prior criminal activity in the area was a cause for concern but:

because defendant had experienced virtually no criminal activity in the exterior area of this

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[116] *Id.*

[117] United States v. Carroll Towing, 159 F. 2d 169, 173 (2d Cir. 1947)("[T]to provide against resulting injuries is a function of three variables: (1) The probability that she will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions. Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether B less than PL.").The cost of prevention is implicit in Justice Marcus' statement of the balance as the cost of security guards or other devices will always be relevant in the balance. The California Supreme Court's articulation of the balancing test was more explicit in recognizing the relevance of cost in determining when and what security measures are appropriate and Justice Marcus previously cited and recited California's approach. *Id.*

[118] *Id.*

[119] *Id.* at 769.

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particular store during the past six years, defendant did not act unreasonably by failing to provide outside security guards and surveillance cameras, at least in daylight hours.[120]

The reader will note that Justice Lemmon did not say that the defendant did not owe the plaintiff a duty. He said that the defendant "did not act unreasonably."[121] Justice Lemmon is saying that there was no breach.[122] That is the proper way to analyze the matter.

Before moving on, one could conclude that broadly, what was happening in *Posecai* was a shift from a broad no-duty rule—no duty to protect against third party criminal acts-to a limited recognition of a duty. Courts in moving from no duty rules to nascent recognition of a duty in the types of relevant cases are often cautious. They are concerned that moving from no duty to a general duty to exercise reasonable care to protect against a certain type of harm (third-party criminal acts, emotional distress, prenatal injuries, economic harm, injuries arising from a failure to act, etc.) will strain the courts' ability to deal with the relevant claims or strain the ability of factfinders to make correct decisions. That is no doubt part of what was happening with *Posecai* but the point about conflating duty and breach still stands. The way in which the Court recognized a limited duty to protect against third-party criminal acts turned what is essentially a breach question, based on peculiar, individual specific facts, into a duty question.[123]

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[120] *Id.* at 769 (Lemmon, J., concurring).
[121] *Id.*
[122] While breach is normally a question for the factfinder; if no reasonable person could have found a breach, then the court may decide.
[123] In Pinsonneault v. Merchants & Farmers Bank & Trust Co., 816 So. 2d 270 (La. 2002), the Court applied the *Posecai* balancing test and while it did not find that a bank had a duty to provide heightened security, such as having security guards at a night depository where a murder occurred, it did have a duty to provide a reasonably safe place for its patrons to conduct normal banking business. But that duty was not breached. S*ee also,* St. Peters v. Hackbarth Delivery Service Inc., 204 So. 3d 1157 (La. App. 5th Cir. 2016). There, the court reversed a summary judgment in a third-party criminal act case holding that there was no duty to protect against the third-party criminal acts because there was compelling evidence that the criminal acts were foreseeable. But it is not crystal clear whether the court treated the question as one of duty or breach as it said: "we find that the trial court erred as a matter of law in its application of the balancing test adopted by the Supreme Court in *Posecai* and *Pinsonneault* when it failed to adequately consider the compelling evidence presented by Mr. St. Peters concerning whether Hackbarth should have reasonably foreseen the occurrence of the criminal acts in question ***in determining whether Hackbarth had a duty*** to protect Mr. St. Peters from such third-party criminal conduct." *Id.* at 1166 (emphasis added).

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Louisiana's development of bystander emotional distress recovery in negligence cases is an example where the Louisiana Supreme Court and later the legislature abrogated the traditional no-duty rule, recognized a limited duty, but did not turn the duty question into a breach decision. Prior to *LeJeune v. Rayne Branch Hospital,*[124] Louisiana did not recognize the right to recover for witnessing the negligently caused injury of another, no matter how closely the viewer and witness and the victim were related.[125] In *LeJeune,* Chief Justice Calogero carefully reviewed the history of bystander emotional distress claims in Louisiana and across the nation and the trend of an "increasing disinclination to bar, outright, mental anguish damages to a party not directly injured."[126] Chief Justice Calogero noted that courts premised recovery in bystander emotional distress claims on foreseeability and general tort principles but also noted that fears of flooding courts with fraudulent claims, problems of proof regarding damages, exposure o limitless claims, and avoiding economic burdens on industry justified "setting limits or administrative boundaries" on the duty to avoid negligently causing bystander emotional distress.[127] Persuaded by those courts that Louisiana should not bar all claims for bystander mental anguish damages,[128] but also determined to limit the circle of plaintiffs who could recover and to otherwise "move restrictively."[129] In articulating the Louisiana duty owed to protect against bystander emotional distress the Court said:

> 1. A claimant need not be physically injured, nor suffer physical impact in the same accident in order to be awarded mental pain and anguish damages arising out of injury to another. Nor need he be in the zone of danger to which the directly injured party is

[124] 556 So. 2d 559 (La. 1990).
[125] Black v. Carrollton R.R. Co., 10 La. Ann. 33 (1955); Brinkman v. St. Landry Cotton Oil. Co., 43 So. 458 (La. 1907).
[126] 556 So. 2d at 566.
[127] *Id.* at 567.
[128] *Id.* at 569.
[129] *Id.*

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exposed. He must, however, either view the accident or injury-causing event or come upon the accident scene soon thereafter and before substantial change has occurred in the victim's condition.

2. The direct victim of the traumatic injury must suffer such harm that it can reasonably be expected that one in the plaintiff's position would suffer serious mental anguish from the experience.

3. The emotional distress sustained must be both serious and reasonably foreseeable to allow recovery. Serious emotional distress, of course, goes well beyond simple mental pain and anguish. Compensation for mental pain and anguish over injury to a third person should only be allowed where the emotional injury is both severe and debilitating. For instance, held that "serious emotional distress may be found where a reasonable person, normally constituted, would be unable to cope adequately with the mental distress engendered by the circumstances of the case." A non-exhaustive list of examples of serious emotional distress includes neuroses, psychoses, chronic depression, phobia and shock.

4. A fourth restriction concerns the relationship of the claimant and the direct victim. Considering the significant delimiting effect of the first three requirements, a plausible argument can be made for allowing these damages at least to all claimants having a close relationship with the victim. For instance, Professor Ferdinand Stone has stated that: "The test (for recovery) should not be blood or marriage, but rather whether the judge or jury is convinced from all the facts that there existed such a rapport between the victim and the

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one suffering shock as to make the causal connection between the defendant's conduct and the shock understandable."[130]

While there are factual questions whether the duty is triggered, i.e, did the plaintiff view the accident or come upon the scene, etc., they answers do not turn the duty question into a breach decision about the failure to exercise reasonable care. The breach question is answered independently of what one may call the predicate duty issues. Later the Legislature essentially codified *LeJeune* in Louisiana Civil Code Article 2315.6.[131]

Let us now turn to what is arguably Louisiana law's most egregious conflation of duty and breach: the open and obvious risk cases.

C. Open and Obvious: No Duty? No Breach? Take Your Pick

The twisted and tortuous tale of the open and obvious risk defense[132] in Louisiana does not

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[130] *Id.* at 570.

[131] La. Civ. Code art. 2315.6 provides:

> A. The following persons who view an event causing injury to another person, or who come upon the scene of the event soon thereafter, may recover damages for mental anguish or emotional distress that they suffer as a result of the other person's injury:
> (1) The spouse, child or children, and grandchild or grandchildren of the injured person, or either the spouse, the child or children, or the grandchild or grandchildren of the injured person.
> (2) The father and mother of the injured person, or either of them.
> (3) The brothers and sisters of the injured person or any of them.
> (4) The grandfather and grandmother of the injured person, or either of them.
> B. To recover for mental anguish or emotional distress under this Article, the injured person must suffer such harm that one can reasonably expect a person in the claimant's position to suffer serious mental anguish or emotional distress from the experience, and the claimant's mental anguish or emotional distress must be severe, debilitating, and foreseeable. Damages suffered as a result of mental anguish or emotional distress for injury to another shall be recovered only in accordance with this Article.

[132] The "open and obvious" defense in other jurisdiction arose, in part, out of the common law's approach to landowner liability and, initially applied to the duty a landowner owed (or did not owe) to invitees. As Dobbs, et al report, in part:

> The Second Restatement, in line with general negligence law, adopted a more cautious view. It provided that when the allegedly dangerous condition is open and obvious, the landowner is not liable to invitees for harm from known or obvious dangers except where the landowner should anticipate harm in spite of the knowledge or obviousness. The Third Restatement is in accord, except it extends this rule not only to invitees but to all entrants onto land, except non-flagrant trespassers. Putting this rule other way around, the landowner is subject to liability if he can foresee harm in spite of the fact that the danger was obvious. In recent years, this view has commanded substantial acceptance where it has been expressly

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begin with *Pitre v. Louisiana Tech University*,[133] but it is an appropriate place for us to pick up the narrative because the decision does exactly what I object to in this piece: it conflates the duty with breach. *Pitre,* involved a rare snowstorm in North Louisiana and a horrible accident at Louisiana Tech University. Earl Garland Pitre, Jr., was a twenty-year old third year student at Louisiana Tech who suffered paralysis from the mid-chest down in a sledding accident. He and three friends were riding a plastic garbage can lid down a hill. On their eighth such trip, they were lying on their backs which their heads facing downhill when they struck the concrete base of a light pole in a parking lot, causing Pitre's horrific injuries.[134] He and his parents sued Louisiana Tech for negligence alleging that Louisiana tech was negligent in:

> (1) encouraging students, by way of the Winter Storms Bulletin, to engage in sledding activities in areas which Tech knew or should have known were hazardous; (2) failing to erect cushions around solid objects to prevent sledding injuries; (3) failing to warn students of the hazards which might be encountered in the area in which sledding took place; and

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> considered. Whether a defendant should have foreseen the plaintiff's encounter with a particular "obvious" hazard will present a jury issue where reasonable people can differ.
>
> *Basis for the Restatement rule.* For the Restatement and its adherents, the basis of the rule is that the landowner is not negligent at all if he can foresee no harm, and that is the case if he can reasonably believe that the invitee will (a) know or see the danger and (b) avoid it. On the other hand, he is indeed negligent if he can foresee that the plaintiff will encounter the danger in spite of its obvious character and fails to take reasonable steps to protect the plaintiff from that danger. As the Utah court said, the old no-duty version of the open and obvious danger rule in effect excused the defendant's negligence, while the Restatement's rule defines it, yoking it firmly to the ordinary foreseeability test.

Dobbs Law of Torts, *supra* note 2, § 276 (citations omitted).

[133] 673 So. 2d 585 (La. 1996). For a discussion of the post-comparative fault discussion of the open and obvious risk jurisprudence, *see,* Frank L. Maraist, H. Alston Johnson, III, Thomas C. Galligan, Jr., and William R. Corbett, Answering a Fool According to His Folly: Ruminations on Comparative Fault Thirty Years On, 70 La. L. Rev. 1105, 1109-33 (2010) [hereinafter cites as "Answering a Fool]. There, the primary focus of analysis was on how the open and obvious risk factor meshed with comparative fault after the death of assumption of the risk. We did note that the way the court handled the open and obvious risk issue conflated duty and breach—my focus here—and, as the discussion of Broussard v. State of Louisiana, 113 So. 3d 174 (La. 2013), *supra,* will make clear, the Court was aware of that criticism.

[134] 673 So. 2d at 588.

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(4) failing to prohibit sledding in the area where the accident occurred.[135]

The case made its way to the Louisiana Supreme Court.

I will not go into the analysis in great detail but suffice it to say that Tech argued that the risks of sledding and of the clearly visible light pole were open and obvious[136] and that meant that it owed no duty to Pitre. Ultimately, Justice Victory, writing for the Court agreed. As he said: "Under the circumstances, we find that Tech had no duty since the light pole was obvious and apparent and the risks of colliding with it while sledding are known to everyone."[137] While one may certainly quibble with the conclusion and statement that the defendant owed no duty because the light pole was obvious and apparent, or open and obvious, the way in which the Court reached that conclusion was, for present purpose, more troublesome than the conclusion itself. In his opinion, Justice Victory stated that Louisiana employs a duty/risk method of analysis in negligence cases and that the second issue (after cause-in-fact) is whether the defendant owed a duty to the

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[135] *Id.*

[136] In Murray v. Ramada Inns, Inc., 521 So. 2d 1123 (La. 1988), the Louisiana Supreme Court in rejecting the continued viability of the assumption of the risk defense in post-comparative fault negligence cases did entertain the notion that if a risk was open and obvious to all then the defendant, may, under certain circumstances, not owe a duty to the plaintiff to protect against the risk. *See,* Answering a Fool, supra note 7 at 1109-1123. It has turned out to be an unfortunate development. Whether a particular risk is open and obvious to all has the ring of stating a rule that is applicable beyond the facts of a particular case but that is rarely so. Whether a particular risk is open and obvious to all usually turns on the facts of the particular case and the particular risk. *See, e.g.,* Hutchinson v. Knights of Columbus, Council No. 5747, 833 So. 2d 228 (La. 2004) (factual questions precluded summary judgment as to whether a cable on the ground at a fair constituted an unreasonable risk of harm); Minix v. Pilot Travel Centers, Inc., 277 So. 3d 810 (La. App. 1st Cir. 2019) (considering the opened and obviousness of a particular pot hole at a filling station). Openness and obviousness is relevant to breach but should not be part of the duty decision. The duty generally is to exercise reasonable care. And what about a case where the plaintiff cannot avoid a risk even though it is open and obvious? If that is the situation the fact that a risk is open and obvious should not absolve the defendant of the obligation to exercise reasonable care. *See, e.g.,* Cox v. Baker Distributing Co., 244 So. 3d 681, 685-86 (La. App. 2d Cir. 2017) (finding that the lack of a dock plate at a loading area presented factual questions precluding summary judgment where the plaintiff was unable to use proper equipment because of the crowded nature of the area and received no assistance). *Compare*, Romain v. Brooks Restaurants, Inc., 311 So. 3d 428 (La. App. 4th Cir. 2020)(involving a slip and fall which at the entry/exit to a fast food restaurant as the plaintiff was exiting; there, the plaintiff informed a restaurant employee about the ice after entering the restaurant; the employee went out and poured water on the ice despite other patrons telling her not do so; and, finally, one of the other patrons who went to help plaintiff after the slip and fall also fell on the ice).

[137] 673 So. 2d at 586.

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plaintiff; the third issue is breach.[138] But, in analyzing the duty question he said:

> A landowner owes a plaintiff a duty to discover any unreasonably dangerous condition and to either correct the condition or warn of its existence. It is the court's obligation to decide which risks are unreasonable, based upon the facts and circumstances of each case. Whether a particular risk is unreasonable is a difficult question which requires a balance of the intended benefit of the thing with its potential for harm and the cost of prevention…. If the facts of a particular case show that the complained of condition should be obvious to all, the condition may not be unreasonably dangerous and the defendant may owe no duty to the plaintiff.[139]

As a lawyer, I must say: "I object!" The first sentence is right on, but the second sentence is not: whether a risk is unreasonable is not for the court to decide unless reasonable minds could not disagree. Whether a risk is unreasonable is for the factfinder: it is a breach question. The third sentence is likewise unobjectionable but not if the judge—as law giver, not factfinder--is the one engaging in the balancing. And that is exactly what the court did in *Pitre.*[140]

The *Pitre* court, like other Louisiana courts before it, analyzed the following four factors to determine whether a risk was unreasonable: utility, likelihood (to which openness and obviousness are relevant) and magnitude of the harm, cost of prevention, and the nature of the plaintiff's activity.[141] But then the court applied the four factors to the specific facts and concluded, as indicated above, that the "condition was not unreasonably dangerous and that Tech had no duty to Pitre."[142] To reiterate, it conflated the duty and breach questions. It turned a breach question

[138] *Id.* at 589-90

[139] *Id.* at 590-591 (citations committed).

[140] It is, of course reminiscent of *Posecai.*

[141] 673 So. 2d at 591-93.

[142] *Id.* at 593.

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into a no-duty holding.[143]

Justice Lemmon concurred, as he had done in *Posecai,* but with a crucial qualification, saying: "In my view, the pivotal issue in the duty-risk analysis in this case is not the existence of a duty, but the breach of duty."[144] My view is the same as Justice Lemmon's. As my co-authors and I wrote about *Pitre:* "what was becoming opaque was the overlap between duty and breach decisions."[145]

The issue in *Pitre*--whether the light pole, under the circumstances, posed an unreasonable risk of harm--was an issue of breach for the fact finder, not a question of law for the judge. If the question really was a duty question that is a legal question. And, if it is, then the "law" of the State of Louisiana is that a university does not have a duty to protect a sledding student from a visible light pole with a concrete base. Such a rule of law is even more specific than Holmes' stop, look, and do more than listen.[146] There will never be another case to which it precisely applies. Because it is a question of breach, it is not law and the finding of no breach is limited to the facts of the case. After *Pitre,* the Court would continue to wrestle with the open and obvious issue on multiple

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[143] Courts in other jurisdiction make similar mistakes. As Dobbs, et al, state:

> *Case analysis vs. rule of law.* Another level of potential confusion in open and obvious danger cases arises because it is all too easy to confuse a finding for the defendant on the facts of a particular case with a rule of law for all cases. In some particular cases, the obviousness of danger is compelling, so that the court might take the case from the jury by directed verdict or summary judgment.43 The court might conclude that the defendant was not negligent at all because he could expect the plaintiff to avoid the danger and thus avoid injury, and further that reasonable jurors could not reach a contrary conclusion. Such a conclusion would be plausible if, for example, the plaintiff injured herself by walking into the checkout counter at a grocery store. Holding that the particular defendant was not negligent would not be a rule of law but an analysis of the evidence in the particular case.

Dobbs on Torts, note 2, *supra,* § 276.

[144] *Id.* at 596 (Lemmon, J., concurring).

[145] Answering a Fool, *supra* note 7 at 1122.

[146] Of course, it is rather frightening to think that the law of Louisiana is that a university does not owe a duty to its students to protect against open and obvious risks if the university should anticipate that its students will encounter those obvious risks. Such a result would be contrary to modern American law. *See* note 132, *supra.* As a former dean and college/university president, I speak from experience when I say that parents are justifiably despondent when they feel a school has not adequately cared for their children.

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occasions.[147] The next, most significant decision dealing with the duty/breach confusion would be *Broussard v. State of Louisiana*.[148] In *Broussard,* the Court brought clarity to the matter, only to have the fog of confusion fall once again soon thereafter.

Broussard was a delivery person for United Parcel Services who for seven years had made virtually daily deliveries to Wooddale Tower, a state-owned office building. Broussard frequently rode the elevators, which because of dirt and debris in their inner workings frequently did not align with the floor at which they were stopping. On the day in question, Broussard was delivering about 300 pounds of copier paper, which was loaded on a dolly. As he approached the elevator, the elevator had stopped approximately one and one-half to three inches above the lobby floor. Broussard initially attempted to push the dolly into the elevator but failed. Then, Broussard switched tactics and pulled the dolly onto the elevator. While he succeeded, the effort caused him to lose control of both the dolly and his balance. Broussard was pushed up against the back wall of the elevator, suffering injuries in the process.[149] Broussard sued, claiming that the state was negligent and the elevator presented an unreasonable risk of harm. The jury which heard the case held in plaintiff's favor, allocating 62% of the fault to the state and 38% of the fault to Broussard. The defendant appealed.[150] The First Circuit Court of Appeal reversed, concluding that the jury was manifestly erroneous in concluding that the elevator presented an unreasonable risk of harm.[151] That is, in the vernacular of this piece, the Court of Appeal found that the jury was manifestly erroneous in concluding that the defendant breached the applicable standard of care. The Louisiana Supreme Court granted a writ of certiorari, and, in an opinion by Justice Knoll,

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[147] *See, id.* 1123-31.
[148] 113 So. 3d 175 (La.2013).
[149] *Id.* at 179-80.
[150] *Id.* at 180-81.
[151] *Id.* at 181.

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reversed.

Justice Knoll aptly pointed out that the Court had previously held that whether something presented an unreasonable risk of harm was a mixed question of fact and law for the jury or judge as factfinder to decide.[152] She continued:

> As a mixed question of law and fact, it is the fact-finder's role—either the jury or the court in a bench trial—to determine whether a defect is unreasonably dangerous. Thus, whether a defect presents an unreasonable risk of harm is "a matter wed to the facts" and must be determined in light of facts and circumstances of each particular case.[153]

The decision of whether something presents an unreasonable risk of harm or whether a defendant failed to exercise reasonable care is wed to the facts of a particular case. It is not based on broadly defined characteristics of the parties before the court (i.e., doctors, lawyers, manufacturers, the unborn, etc.) or the general types of injuries which have occurred (emotional distress, economic harm, etc); it is based on the particular and unique circumstances before the factfinder.

Returning to *Broussard*, Justice Knoll said that the Court's four-part risk/utility test—utility of the thing or conduct, likelihood and magnitude of harm, cost of avoidance, and nature of the plaintiff's activity—was a helpful way for factfinders to decide whether something, like an elevator, presented an unreasonable risk of harm.[154] And Justice Knoll pointed out that the apparentness or obviousness of the risk was relevant to the likelihood of injury occurring, a part

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[152] *Id.* 183.

[153] *Id.* Later, in the opinion, in the course of distinguishing and explaining its prior open and obvious jurisprudence, Justice Knoll reiterated that:

> [E]ach case involving an unreasonable risk of harm analysis must be judged under its own unique set of facts and circumstances. There is no bright-line rule. The fact-intensive nature of our risk-utility analysis will inevitably lead to divergent results. Moreover, each defect is equally unique, requiring the fact-finder to place more or less weight on different considerations depending on the specific defect under consideration. What may compel a trier-of-fact to determine one defect does not present an unreasonable risk of harm may carry little weight in the trier-of-fact's consideration of another defect."

Id. at 191.

[154] *Id.* at 184. This is of course the same risk/utility test applied in *Pitre*.

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of the second element of the risk/utility test.[155] The logic is that the more obvious a risk is the less likely it is to cause injury because people will avoid it.[156] Somewhat unfortunately, and inconsistently with the rest of the opinion, Justice Knoll, in the portion of the opinion I am currently discussing said: "Under Louisiana law, a defendant generally does not have a duty to protect against an open and obvious hazard."[157] But, in fairness to Justice Knoll, the Court had previously said exactly what she wrote.

But, in the next paragraph of the opinion, she clearly and explicitly denuded the no-duty language. She said:

> We have stated that if the facts and circumstances of a particular case show a dangerous condition should be open and obvious to all who encounter it, then the condition may not be unreasonably dangerous and the defendant may owe no duty to the plaintiff…. While this statement is consistent with our "open and obvious to all" doctrine, by tethering the existence of a duty to a determination of whether a risk is unreasonable, our prior decisions have admittedly ***conflated the duty and breach elements of our negligence analysis***. *See* Maraist, et. al., *Answering a Fool,* 70 LA. L.REV. at 1121–22, 1124. ***This conflation, in turn, has confused the role of judge and jury in the unreasonable risk of harm inquiry and arguably transferred "the jury's power to determine breach to the court to determine duty or no duty."*** *Id.* at 1124, 1132–33.
>
> ***In order to avoid further overlap between the jury's role as fact-finder and the judge's role as lawgiver, we find the analytic framework for evaluating an unreasonable risk of***

[155] *Id.*
[156] *Id.* Of course, if the plaintiff has no choice but to encounter an open risk, then its obviousness is irrelevant. But I digress.

[157] *Id.* at 184.

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harm is properly classified as a determination of whether a defendant breached a duty owed, rather than a determination of whether a duty is owed ab initio. It is axiomatic that the issue of whether a duty is owed is a question of law, and the issue of whether a defendant has breached a duty owed is a question of fact. [158]

Justice Knoll, continuing, noted that the judge decides the duty question and the factfinder determines breach. She observed that the factfinder determines breach because the decision is based upon a "myriad" of facts."[159] And, " the cost-benefit analysis employed by the fact-finder in making this determination is more properly associated with the breach, rather than the duty, element of our duty-risk analysis. *See* Maraist, et. al., *Answering a Fool,* 70 La. L. Rev. at 1120.*"*[160] Applying the risk/utility test the Court reversed the court of appeal and found that the jury's decision that the elevator presented an unreasonable risk of harm was not manifestly erroneous.[161]

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[158] 113 So. 3d 184-85 (emphasis added).

[159] *Id.* at 185.

[160] *Id.* Justice Knoll then quoted the article as follows: "("[O]ne might persuasively argue that the cost-benefit analysis used to determine whether a risk is reasonable or unreasonable is the heart of the breach decision and is one that should be conducted by the fact-finder, rather than by the court...."). Justice Knoll then noted that since the breach question is for the factfinder an appellate court is in no better position than the factfinder to determine the issue; thus, a court reviews a factfinder's breach decision under the deferential manifest error standard. *Id.* at 185-86.

[161] Critically, the Court expressly stated:

> Because the determination of whether a defective thing presents an unreasonable risk of harm "encompasses an abundance of factual findings, which differ greatly from case to case, followed by an application of those facts to a less-than scientific standard, a reviewing court is in no better position to make the determination than the jury or trial court." *Reed,* 97–1174 at p. 4, 708 So.2d at 364–65. Accordingly, the fact-finder's unreasonable risk of harm determination is subject to the manifest error standard of review and should be afforded deference on appeal. Under the manifest error standard of review, a court of appeal may not set aside a jury's finding of fact unless it is manifestly erroneous or clearly wrong. The reviewing court must only decide whether the fact-finder's conclusion was reasonable, not whether it was right or wrong.

Id. at 185-86 (some citations omitted).

Commentators had previously embraced this position. *See,* Edward Walters, Jr. and Darrel Papillion, Appellate Review of Mixed Questions of Law and Fact: De Deference to the Fact Finder, 60 L. L. Rev. 541 (2000). In that excellent piece, Walters and Papillion pointed out that in *Green v. City of* Thibodaux, 671 So. 2d 399 (La. App. 1st Cir. 1995, *writ denied,* 668 So. 2d 366 (1996), the Louisiana Court of Appeal for the First Circuit (over a dissent from Judge Shortess) concluded that the manifest error standard did not apply to a lower court's determination that a thing presented an unreasonable risk of harm. 60 L. L. Rev. 543. The First Circuit indicated that the appellate court should review pure factual conclusions with deference but that the ultimate conclusion of whether the thing presented an unreasonable risk of harm was not protected by the manifest error rule. *Id*. The logic

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In sum, the *Broussard* Court clearly separated duty and breach. Justice Knoll expressly stated that breach, or whether a thing presented an unreasonable risk of harm (breach), is a mixed question of law and fact for the factfinder to decide. The Court recognized the points my co-authors and I had made in *Answering a Fool* and that I re-urge herein: separate the duty question from the breach question in all negligence cases including, open and obvious cases and allocate the breach decision to the factfinder. *Pitre* had conflated duty and breach and *Broussard* separated them.[162] If *Broussard* was the end of the story, I would stop here and proclaim clarity. Unfortunately, *Broussard's* clarifying tenure would be short.

On the afternoon of December 2, 2011, Royce Bufkin was walking in the French Quarter along Conti Street, a one-way street on which traffic flows towards the river. Bufkin was walking towards the river, with the flow of traffic when he came upon a construction site at which Shamrock Construction was working. There was a barrier blocking the sidewalk and directing pedestrians to cross the street. There was also a dumpster occupying a couple of parking spaces. As Bufkin attempted to cross the street at the site of the dumpster, a delivery person for Felipe's Taqueria Restaurant, who was riding his bicycle the wrong way, hit poor Bufkin, causing injury. Bufkin sued Shamrock, among others, contending, in part, that Shamrock failed to adequately warn him and had created a blind spot that prevented pedestrians from seeing oncoming traffic while crossing the street at the dumpster. Bufkin contended that the warning sign should have told

was Holmesian, as described above. The authors also point out that the Louisiana Supreme Court in *Reed v. Wal-Mart Stores,* 708 So. 2d 362 (1998) reviewed the trial court's conclusion that expansion joints in a parking lot constituted an unreasonable risk of harm under the manifest error standard. Walters and Papillion applauded that result, 40 La. L. Rev. 545-56. *Broussard's* holding on manifest error review of a finding concerning unreasonable dangerousness is consistent with Walters and Papillion and *Reed.*

[162] The *Broussard* decision is also significant because the Court, in applying the risk/utility test, said that an elevator operator owes a heightened duty of care. *Id.* at 186-87. It is also significant because of its place in the evolution of comparative fault in Louisiana. Justice Victory dissented because he believed the condition of the elevator was open and obvious to all. *Id.* at 194-95 (Victory, J., dissenting). Justice Guidry dissented, contending that the defendant did not owe any duty to the plaintiff because the condition was open and obvious. *Id.* at 195-96 (Guidry, J., dissenting).

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pedestrians to cross at the up-road intersection, not at the dumpster, and that defendant should have created a buffer zone around the dumpster. Shamrock moved for summary judgment, arguing that it owed no duty to Bufkin. The trial court denied the motion. The court of appeal did not grant a writ but the Louisiana Supreme Court did and in, *Bufkin v. Felipe's Louisiana LLC*, reversed.[163]

Justice Hughes, writing for the court, said:

> We conclude that the condition presented by the presence of Shamrock's clearly marked and visible construction dumpster, adjacent to a one-way French Quarter street, was obvious, apparent, and did not create an unreasonable risk of harm; thus, no duty was owed.[164]

As in *Pitre,* the Court seemed to be saying that because the construction site did not present an unreasonable risk of harm, there was no duty owed. Of course, in so concluding, the Court (as in *Pitre,* collapsed duty and breach into one question and took the breach question away from the factfinder. Continuing, Justice Hughes said:

> When evaluating the duty owed relative to a sidewalk condition, the facts and surrounding circumstances of each case control and the test applied requires the consideration of whether the sidewalk was maintained in a reasonably safe condition for persons exercising ordinary care and prudence.[165]

But evaluating the duty owed should not be fact specific or require consideration of whether a risk is unreasonable. The duty should be to maintain a reasonably safe sidewalk. Whether the maintenance in fact is reasonable should be a question of breach, not duty.

Justice Hughes then noted that Louisiana has employed the risk/utility test to determine if

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[163] 171 So. 3d 851 (La. 2014).
[164] *Id.* at 854.
[165] *Id.* at 856.

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a risk is unreasonably dangerous and he listed the elements of that test, citing *Broussard*.[166] This is the one of two places in the opinion where *Broussard* is cited[167] but it is not extensively discussed. Justice Hughes then discussed and analyzed the particular facts, in depth, and recognized that there was a duty owed to protect against unreasonably dangerous conditions,[168] before once again saying: "we conclude that Shamrock had no duty to warn of the obstruction presented to pedestrians by its pick-up-truck-sized dumpster, a large inanimate object visible to all."[169] The specificity of the no duty statement after the recitation of the particular facts seems more appropriately a statement that there was no breach of the duty to exercise reasonable care.[170]

In his conclusion, Justice Hughes again merged the duty and breach elements when he said:

> In this case, Shamrock met its burden of producing evidence, on motion for summary judgment, to point out the lack of factual support for an essential element in the plaintiff's case, demonstrating that because the condition complained of by the plaintiff was obvious and apparent and was reasonably safe for pedestrians exercising ordinary care and prudence, it had no duty to extend additional warnings to pedestrians or to create a buffer zone around its dumpster. The burden then shifted to the plaintiff to come forward with evidence (by affidavit, deposition, discovery response, or other form sanctioned by LSA–C.C.P. arts. 966 and 967) to demonstrate that he would be able to meet his burden at trial to show a duty on the party of Shamrock. The plaintiff failed to meet this burden; therefore, the district court erred in failing to grant summary judgment in Shamrock's favor.[171]

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[166] *Id.*
[167] The other is for the proposition that a defendant does not owe a duty to protect against a risk which is open and obvious to all. *Id.*
[168] *Id.* at 858.
[169] *Id.*
[170] Justice Hughes said that under summary judgment procedure, once the defendant put forth evidence that it owed no duty to the plaintiff, the plaintiff bore the burden of coming forward with evidence that a duty was owed and Bufkin did not do so. *Id.*
[171] *Id.* at 859.

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Then, in a footnote, Justice Hughes reiterated the no-duty holding by saying:

> We note that our opinion in *Broussard v. State ex rel. Office of Stat Buildings, supra* should not be construed as precluding summary judgment when no legal duty is owed because the condition encountered is obvious and apparent to all and not unreasonably dangerous.[172]

It seems that the *Bufkin* Court took Louisiana right back to *Pitre* in which duty and breach may be conflated, thereby taking the issue of breach away from the factfinder. And, the Court did so without extensive discussion of *Broussard.* Justice Guidry concurred and he recognized that *Broussard* held that whether a thing presents an unreasonable risk of harm is a question of fact. But, he wrote: "our jurisprudence does not preclude the granting of a motion for summary judgment in cases where the plaintiff is unable to produce factual support for his or her claim that a complained-of condition or thing is unreasonably dangerous."[173] One way to read that statement is that summary judgment was appropriate on the breach question. But later in his concurrence he said that one does not have a duty to protect against an open and obvious risk and that *Broussard* reiterated that statement.

Thus, after *Bufkin,* confusion reigns. The confusion is apparent in the decision itself. The very first line of the opinion is: "This writ presents the issue of whether a building contractor breached any legal duty owed to a pedestrian crossing a street next to the contractor's dumpster, who was struck by an oncoming bicyclist."[174] Thus, at the outset, and quite properly, the reader believed that the issue was breach. But then the very next sentence heads in the direction of returning to *Pitre.* "After a thorough review of the record presented, we conclude that the dumpster was obvious and apparent, and not unreasonably dangerous; thus, there was no duty to warn of the

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[172] *Id.* at 859n.3.
[173] *Id.* (Guidry, J., concurring).
[174] *Id.* at 853.

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clearly visible obstruction."[175] Alas.

Clearly, the opinion reflects the Court's desire to make clear that summary judgments were still available even after *Broussard.* But, the better way to have proceeded would have been to recognize that a court could grant a summary judgment on breach,[176] rather than granting it because there was no duty. In such a case, the no-duty determination is an improper conflation of duty and breach. Psychologically, a judge may feel more comfortable granting a summary judgment finding no duty exists because duty is a question of law for the court to decide. A summary judgment that there was no breach would require a court to determine that no reasonable juror could have found that the defendant failed to act reasonably. But, finding no duty based on the particular facts of the case, i.e., really no breach, takes the breach question away from the factfinder and makes the court's decisions look like law when they are not law at all but fact-specific determinations—no-breach decisions. The "law" is not that a contractor does not have a duty to provide additional warnings to a pedestrian crossing a one-way street by the contractor's dumpster, which is placed in the street, who is hit by a bicycle going the wrong way. If there is no liability, it is because on the facts of the case the defendant did not act unreasonably. A no-duty determination is reserved for cases in which broad policy reason dictate no recognizing a duty on a broad, categorical level. What would the Court do next?

In *Allen v. Lockwood*,[177] the Louisiana Supreme Court granted a writ to "provide guidance" concerning the proper interpretation of *Broussard.*[178] *Allen* involved a rural church, nestled in the woods in St. Helena Parish. The Wesley Chapel United Methodist Church parking lot was not

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[175] *Id.*

[176] Predictably, there are cases where courts grant summary judgment finding no breach. *See, e.g.,* Lemann v. Esen Lane Daquiris, Inc., 923 So. 2d 627 (La. 2006); Misuraca v. City of Kenner, 802 So. 2d 784 (La. 5th Cir. 2001).

[177] 165 So. 3d 650 (La. 2015).

[178] *Id.* at 651.

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paved and churchgoers parked amongst the trees. After services one Sunday, an elderly parishioner, Hattie Lockwood, got in her car and inexplicably backed up at a high rate of speed and struck the plaintiff, who was walking behind Ms. Lockwood's car. Plaintiff sued the church, among others, alleging the church defendants "were responsible for all or part of the accident based on various defects in the premises, including defective design of the parking area, improper markings in the parking lot, and improper safety barriers and/or improper safety measures."[179] The church moved for summary judgment, contending that it was not negligent in the design or maintenance of the parking lot. In response, plaintiff admitted she was not able to say what the church did wrong. The church also offered the testimony of a 51-year parishioner, who said that congregants often parked amongst the trees and that there had never been an accident or other parking issue at the church. While plaintiff alleged that there were factual issues, she did not present any evidence to refute the defendant's evidence.[180] Still, the trial court denied the defendant's motion stating: "the allegation of obstacles in the parking lot and the fact that the parking lot either wasn't laid out at all or was half hazardly [sic] laid out, is some evidence of negligence.."[181] The court of appeal denied the defendant's application for a writ because the Louisiana Supreme Court in *Broussard* had said that "the question of whether a defect presents an unreasonable risk of harm is a mixed question of law and fact and, accordingly, should be determined by the fact-finder."[182]

The Supreme Court granted the writ in *Allen* and, in a *per curiam* opinion (like *Lowe*) reversed. The Court first noted that *Broussard* involved a fact-intensive, three-day jury trial, not a

[179] *Id.*
[180] *Id.*
[181] *Id.* at 652.
[182] *Id.* Judge Welch dissented, arguing that no rational fact finder could have found negligence (breach) or cause-in-fact.

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summary judgment.[183] "Any reading of *Broussard* interpreting it as a limit on summary judgment practice involving issues of unreasonable risk of harm is a misinterpretation of the *Broussard* case."[184] Thus, quite properly, the Court was saying that summary judgments are still available after *Broussard.* The way in which the Court referred to "issues of unreasonable risk of harm" indicates the issue on which summary judgments are available in such cases should be breach. But then the Court proceeded to discuss *Bufkin* and quoted the *Bufkin* language stating essentially that no duty is owed where there is no unreasonable risk of harm where a risk is open and obvious to all. And then the Court said that in summary judgment practice involving the unreasonable risk of harm issue it is "the court's obligation is to decide "if there [is] a genuine issue of material fact as to whether the [complained-of condition or thing] created an unreasonable risk of harm...."[185] and cited *Broussard.* That would be a question of breach.

Turning to the facts of the case before it, the Court said that there had never been a previous incident in the church parking lot, that the unpaved grassy parking area was open and apparent,[186] and plaintiff had presented no evidence as to how the alleged defect (unpaved parking lot) caused the accident or anything the defendants did to cause the accident. "Therefore, as there is no genuine issue as to whether the parking area was unreasonably dangerous, the church defendants are entitled to summary judgment in their favor as a matter of law."[187] But, on what issue? Breach? Or no duty? Because of the conflation of duty and breach in *Pitre* and *Bufkin,* which the *Allen* court cited and its citation and reliance on *Broussard*, one cannot be sure exactly what *Allen* means and conflation confusion in Louisiana continues.

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[183] *Id.*
[184] *Id.* at 652-53.
[185] *Id.* at 653.
[186] It is hard for me to see how *Allen* fits into the open and obvious category. The unpaved nature of the parking area was certainly obvious but not the risk of a fast-backing up driver.
[187] *Id.*

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Section Recap and *Boykin*

To sum up the discussion in this section on Louisiana jurisprudence confusing duty and breach, I will make several simple and salient points. First, in several cases, confusing duty and breach, the courts seem to simply forget or ignore the overarching obligation of a person to exercise reasonable care to protect others from foreseeable risks of harm. *Lowe* and *Robinette* fall into this category.

Second, we have seen that in other cases where a court might be concerned that recognition of the general duty to exercise reasonable care in an area where the court had previously held that there was no duty owed to a broad range of persons or for a category of wrong or harm, the Court might engage in case-specific analyses of duty, essentially combining duty and breach. *Posecai* fits this scenario. Prior to that decision, Louisiana courts had not held that a person owed a duty to protect others against third-party criminal acts unless that duty was assumed. In recognizing the possibility of liability in an appropriate case, the court basically analyzed whether the defendant acted reasonably i.e., breached the duty. In doing so the Court was being cautious but it also took the breach question from the factfinder.

Finally, in the open-and-obvious risk cases, the Court simply conflated duty and breach. It determined whether a duty was owed based on whether the thing or conduct at issue presented an unreasonable risk of harm. But, as noted, whether something or some conduct presents an unreasonable risk of harm is a question of breach—a mixed question of fact and law. So, the Court was essentially deciding there was no duty owed because there was no breach of the appropriate standard of care. No doubt, the opinions in *Pitre, Bufkin,* and *Allen* were concerned with preserving the availability of summary judgment in negligence cases, but in doing so the Court has confused the law and that confusion risks improperly taking the breach question from the factfinder in many

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negligence cases.

Before turning to violation-of-statute cases, let me offer some proposed solutions to the problems identified in this section. First, the Court should recognize, state, and reiterate that there is a general duty to exercise reasonable care, except in specified types of cases where policy dictates a broad, categorical no-duty rule,[188] or a limited duty rule.[189] Louisiana courts have said this obligation is near universal; they should continue to do so. Second, courts should be precise in their analysis. When a defendant argues that what the defendant did was not unreasonably risky the issue is breach. It is not duty. And critically, courts can grant summary judgment by finding no breach. If no reasonable juror could find that what the defendant did was unreasonable then the court should grant a summary judgment that defendant cannot prove breach at trial. The decisions in *Posecai, Pitre, Bufkin,* and *Allen* could all have been no-breach decisions. Involving duty in the analysis confuses; it does not clarify.[190] I argue that *Broussard* exemplifies the proper approach I have outlined above, but it is not the only Louisiana Supreme Court decision to do so. Another wonderful example of a decisions recognizing the proper analytical approach is *Boykin v. Louisiana Transit Authority*.[191]

In *Boykin,* plaintiff was struck by a car, which ran a red light, as she was crossing the street. Plaintiff sued, among others, the Louisiana Department of Transportation and Development,

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[188] *See, e.g.,* Reynolds v. Bordelon, 172 So. 3d 607 (La. 2015).

[189] *See, e.g.,* LeJeune v. Rayne Branch Hospital, 556 So. 2d 559 (La. 1990; La. Civ. Doe art. 2315.6.

[190] Another alternative in the open and obvious cases would be to move the open and obvious factor from the breach analysis (as a part of the likelihood of harm factor) and just move it to duty. That is, if a risk is truly open and obvious to all then simply say there is no duty owed—as the courts have repeatedly done—and don't confuse things by also having open and obviousness be relevant to breach as well. I must admit this proposal is an accommodation to the confusion which has ensued in open and obvious cases. I would prefer to leave the open and obvious risk consideration to be part of the breach question. Doing so minimizes the risk that aggressive application of the open and obvious risk factor will undermine the legislature's decision to make Louisiana a pure comparative fault state. The open and obvious risk jurisprudence is a worrisome backdoor back to the day where plaintiff fault was a complete defense and assumption of the risk obviated the defendant's negligent act.

[191] 707 So. 3d 1225 (La. 1998).

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claiming that the timing cycle for the traffic light controlling the relevant intersection was not set to allow pedestrians sufficient time to cross the street. The trial court, in a bench trial held that DOTD was 40% at fault; the court of appeal affirmed, but, in an opinion by Justice Lemmon, the Louisiana Supreme Court reversed[192] and it handled the case perfectly. Notably, Justice Lemmon made the point of this piece when he said:

> Many cases presenting a duty-risk analysis do not adequately distinguish the duty element and the breach of duty element. In a proper duty-risk analysis, it is helpful to identify (1) the duty imposed upon the defendant by statute or rule of law and (2) the conduct by defendant that allegedly constituted a breach of that duty.[193]

When Justice Lemmon turned to the issue of duty he said: "There is an almost universal duty on the part of the defendant in negligence cases to use reasonable care so as to avoid injury to another."[194] He articulated the duty in the particular case as the duty to design an intersection that did not present an unreasonable risk of harm to drivers or pedestrians.[195] That is, the duty was to exercise reasonable care. Justice Lemmon then proceeded to carefully analyze the evidence, applied a risk/utility test, and determined that DOTD did not breach its duty. The decision was grounded in the testimony, including the fact that there was very little pedestrian traffic at the relevant intersection and the fact that a longer light increased the risk of vehicular collisions.[196]

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[192] *Id.* at 1228.

[193] *Id*. at 1230. While I may quibble with the phrase rule of law in a garden variety torts case, the reader will see that Justice Lemmon did not use or apply the concept in a Holmesian matter. In the next subsection, I will make some comments on the rule of law phraseology.

[194] *Id.* at 1231. He did continue and state that: "In some cases, the duty is refined more specifically that the defendant must conform his or her conduct to some specially defined standard of behavior." *Id.* But he did not dally over the statement or expand on it.

[195] *See also,* Cay v. State, 631 So. 2d 393 (La. 1994 where Justice Lemmon described the "duty" as "the duty to construct railings of sufficient height to provide safe crossing for pedestrians or to prohibit pedestrian traffic by signs or access limitations." *Id.* at 398. The statement was a restatement of the plaintiff's allegation concerining how the defendant state and failed to exercise reasonable care.

[196] *Id.* at 1232.

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The no breach decision involved an extensive consideration of the facts, but Justice Lemmon did so in determining breach, not in determining duty. As in his concurrences in *Pitre* and *Posecai,* he adopted the appropriate analytical approach. But why do courts tend to conflate duty and breach and why does it happen in Louisiana? In the next section I will discuss how Louisiana's duty/risk method of analyzing negligence may have aggravate the tendency of courts to conflate the duty and breach elements.[197]

IV. Rules of Law

Louisiana's duty/risk method of analyzing negligence was an outgrowth of the work of many but significantly: Dean Leon Green and Professor Wex Malone. I will not discuss it in depth here as I have done so elsewhere.[198] Arguably, the most significant target for Green and Malone was the courts' tendency to rely on the mumbo jumbo language of proximate cause (foreseeable, direct, natural and probable, intervening and superseding causes, etc.), rather than being more forthright and honest in explaining their decisions. In hitting that target they made great, if not

[197] Professional negligence cases do not present any challenges to the allocation of decision-making authority claimed herein. In professional negligence cases, the professional (doctor, lawyer, accountant, engineer, etc.), Dobbs on Torts, *supra* note 2, § 284, is held to the standard of care of the reasonable profession in their field. *Id.* But as Professor Dobbs and his co-authors have noted: "courts that state limited duties or special standards of care for professionals may really have in mind only a specific application of the general rule that everyone, professional or not, is obliged to use reasonable care under the circumstances." *Id.* Of course, expert testimony is usually required in those cases because the factfinder does not have the knowledge, based on personal experience how a professional should behave under the particular circumstances. But the core question of whether the professional breached the appropriate standard of care is a question of breach for the factfinder, not a question of duty for the judge.

[198] Galligan, Let the Jury Decide! *supra* note 1 at 777-84 (2021).

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universally accepted, strides.[199] However, their method called for a court to decide whether the "rule of law" defendant had allegedly violated included the risk which had occurred in the case.[200] The Louisiana Supreme Court embraced this approach, including the "rule of law" phrase.[201] As noted, even Justice Lemmon used the phrase in *Boykin.*

Sometimes the rule of law might come from a statute;[202] other times it might be what Malone called a "part of the fabric of the court-made law of negligence."[203] This has a ring of Holmes to it. But what is this court-made law of negligence? What court made rules of law are there? For instance, in *Hill v. Lundin & Associates,*[204] the alleged rule of law was not leaving a ladder leaning up against the side of a house. But that is not a rule of law, except perhaps in the Holmesian world of stopping, looking, and potentially doing more than listening.[205] The rule-of-law phraseology inevitably leads one into the Holmesian conflation of duty and breach. And the way that Green and Malone and the Louisiana Supreme Court spoke of such rules of law fostered that conflation and consequent confusion.

In actuality, in garden variety negligence cases, there is no judge-made rule of law. What Green, Malone, and the Louisiana Supreme Court were actually doing in discussing "rules of law" was taking whatever the plaintiff alleged constituted the defendant's negligent act—breach or

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[199] *See, i.e.,* Restatement (Third) of torts: Physical and Emotional Harm, Chapter 6, referring to scope of harm § 29 stating: "An actor's liability is limited to those harms that result from the risks that made the actor's conduct tortious." The section does not use the phrase "Proximate cause." Instead, it essentially adopts a duty/risk approach to negligence.

[200] For Green and Malone, whether the rule of law included the risk which arose in the case was a question for the court. I disagree; I believe, consistent with the Restatement (Third) of Torts: Liability for Physical and Emotional Harm section 29, that the jury should make that decision. Galligan, Let the Jury Decide!, *supra* note 1, at 771, 826-31.

[201] Hill v. Lundin & Associates, 256 So. 2d 620, 622, 623 (La. 1972).

[202] Indeed, the grandparent of all Louisiana duty/risk cases was a violation of statute case in which the so-called "rule of law" came from a statute. Dixie Drive It Yourself System New Orleans Co. v. American Beverage C., 137 So. 2d 298 (La. 1962).

[203] Wex S. Malone, Ruminations of Cause-In-Fact, 9 Stan. L. Rev. 60, 73 (1956).

[204] 256 So. 2d 620 (La. 1972).

[205] *See,* Galligan, Let the Jury Decide, *supra* note 1 at 782.

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failure to exercise the care of a reasonable person under the circumstances—and then asking: if that act was, in fact, a breach of the duty to exercise reasonable care, would the risk of that conduct include the risk which occurred to the plaintiff in this case.[206] It is what I had the hypothetical court do in the Arya and Sansa hypothetical I concocted in the introduction. As I wrote elsewhere:

> By way of example, assume the plaintiff claimed that the defendant had failed to exercise ordinary care by eating a bagel, drinking coffee, and driving at the same time, resulting in the defendant hitting the plaintiff, a pedestrian, because the defendant was distracted by his various ingestions. The particular alleged act of negligence would morph into the "rule of law:" thou shalt not eat a bagel and drink coffee and drive at the same time. Of course, there really is no rule of law except the duty to exercise reasonable care under the circumstances. The bagel eating and coffee drinking while driving are facts that allegedly rise to the level of a breach. There is no rule and clearly no "law."[207]

There is a breach of the standard of care but no rule of law that reaches beyond the decision of the case before the court. Perhaps, as my colleague and friend Bill Corbett suggests, Green and Malone should have said "rule of law for the particular case." Perhaps that really is what they actually intended[208] but confusion persists.

The lesson is simple: the factfinder decides breach. The judge does not decide breach. While Green, Malone, and the Louisiana Supreme Court have spoken of rules of law; that phrase is really only a shorthand expression in a mode of analysis: if there is a negligent act (a breach) is

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[206] *Id.* at 782-83.

[207] *Id.* at 783.

[208] As Malone wrote: "[T]he *Dixie* decision represents exclusively an approach or a method of attack; there can be no such thing as a *rule* of the *Dixie* decision which might require that the case be distinguished in future litigation." *See, e.g.*, Wex S. Malone, *Ruminations on* Dixie Drive It Yourself Versus American Beverage Company, 30 La. L. Rev. 363, 393 (1970). And it is also clear that Green and Malone did not think scope of risk was a question for the jury so the "rule of law" phrase remains ambiguous. *See,* Galligan, Let the Jury Decide, *supra* note 1 at 781.

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the risk which arose within the scope of risks which made the act negligent? Courts should not expand that approach beyond its intent and usurp the power of the factfinder to determine what is reasonable care under the circumstances, unless no reasonable factfinder could fail to draw a certain conclusion, in which case, the court should enter summary judgment on the issue or enter judgment as a matter of law on the issue of breach. Let us now turn to violation of statute in negligence cases for there the presence of the statute may seem to concretize the general duty to exercise reasonable care. While that concretization may, in fact, occur in some states, it does not do so in Louisiana because of the procedural effect of violation of statute in our state. I will also say a few words about the standard of care in professional negligence cases.

V. Violation of Statute

A court can look to a statute to define the standard of care in a negligence case if it finds that the plaintiff was within the class of persons the statute was designed to protect and the risk which occurred was within the class of risks which the statute was designed to prevent.[209] A statute is inherently more specific than the broad obligation to exercise reasonable care under the circumstances.

Let me return to the hypothetical from the introduction with Arya, Sansa, and Lady. Recall that the speed limit was 30 m.p.h. and Arya was driving under the speed limit when she came upon a deep puddle, lost control of the car, and injured Lady, the dire wolf. Now, let us assume Arya was going 40 m.p.h. in violation of the posted speed limit. Sansa might allege that Arya's violation of the speed limit, a violation of statute, was negligent. Was a pedestrian walking a pet owner within the class of persons the statute was enacted to protect? Was the risk of a speeding driver losing control of a car and causing injury to someone or something on the sidewalk? If the court

[209] Restatement (Third) of the Law of Torts § 14.

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answered both questions affirmatively then the court could adopt the statute as the standard of care of a reasonable person. But what is the effect of that decision? It depends upon the procedural effect of violation of a statute in a negligence case in the particular jurisdiction.

A violation of a statute may be negligence *per se*, a presumption of negligence, or just some evidence of negligence.[210] If the jurisdiction treats violation of a statute as negligence *per se* then the factfinder must find that the defendant who violated the statute[211] was negligent unless the defendant proves a judicially recognized excuse.[212] In such a jurisdiction the statute truly is a "rule of law" defining negligence. Of course, unlike Holmes' rule of law or the *Hill* Court's putative rule of law prohibiting one from leaving a ladder leaning up against the side of a house, the source of the rule is a legislative enactment, rather than a fact specific statement of a court.[213] In a negligence *per se* jurisdiction, one is negligent, absent an excuse, if they violate the statute. In Arya's case, she is negligent (unless excused) for driving over 30 m.p.h.

If the relevant jurisdiction treats violation of statute as a presumption of negligence, then if the court adopts the statute as the standard of care in a particular case, the defendant, who violated the statute, is presumed to be negligent unless the defendant establishes that, despite the violation, defendant acted reasonably under the circumstances.[214] That is, the burden of proof on the issue of whether defendant acted reasonably is shifted from the plaintiff to the defendant. The difference between negligence per se and violation of statute as a presumption of negligence is subtle but significant. In a presumption of negligence jurisdiction the defendant, in order to avoid

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[210] *Id.*
[211] Of course, the plaintiff must prove that the defendant, in fact, violated the statute.
[212] Restatement (Third) of Torts § 14.
[213] It is clear that Green and Malone's duty/risk approach contemplated that the court in a non-violation of statute negligence case would engage in a similar analysis as a judge deciding a violation of statute negligence case, asking whether the plaintiff's alleged act of negligence was negligent vis-à-vis the class of persons to which the plaintiff belonged and whether the risk which occurred was one of the risks that would make the plaintiff's particular alleged act of negligence negligent.
[214] Brandes v. Burbank, 613 F. 2d 658 (7th Cir. 1980) (applying Indiana law)..

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liability, does not have to prove one of a limited number of judicially recognized excuses as in negligence per se; the defendant can avoid liability by proving that it exercised reasonable care. Thus, the violation of the statute is a rule of law defining reasonable care unless the defendant proved that it exercised reasonable care, in which case its violation of statute will not establish breach.

Finally, and most relevant for us in Louisiana, a jurisdiction may treat violation of statute in a negligence case as some evidence of negligence.[215] If the jurisdiction treats violation of statute in a negligence case as merely some evidence of negligence, the court which finds that the plaintiff was within the class of persons the statute was designed to protect and the risk which occurred was within the class of risks which the statute was designed to prevent simply allows the jury or judge as factfinder to hear about the violation of the statute and consider it along with all the other evidence. The factfinder is not required to find that the violation of statute is negligence. The plaintiff's lawyer can say: look defendant violated the law and that is negligence. But the factfinder is not required to find negligence. And the plaintiff keeps the burden of proof throughout.

Louisiana arguably treats violation of statute as some evidence of negligence.[216] Thus, a violation-of-statute negligence case is really no different than any other negligence case. In deciding the fact finder can consider the violation of statute as some evidence of negligence the judge is essentially deciding an evidentiary matter: that the violation of the statute is relevant and can be admitted in evidence. But the statute really does not constitute a rule of law for decision. It just goes into the hopper that the factfinder sifts through as it decides whether the defendant

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[215] Swift v. U.S., 866 F. 2d 507 (1st Cir. 1989) (applying Massachusetts law).

[216] Galloway v. State Through Dept. of Transp. And Development, 654 So. 2d 1345, 1347 (La. 1995) (Louisiana does note recognize negligence per se; violation of a safety statute provides a guideline for civil liability); Faucheaux v. Tterrebonne Consol. Government, 615 So. 2d 289 (La. 1993); Ducote v. Boleware, 216 So. 3d 934 (La. 4th Cir. 2016); Bellsouth Telecommunications, Inc. v. Eustis Engineering Co., Inc., 974 So. 2d 749 (La. App. 4th Cir. 2007). There are some decision stating that violation of a statute creates a presumption of negligence. Nolan v. Jefferson Downs, Inc., 592 So. 2d 831 (La. App. 5th Cir. 1991).

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exercised reasonable care. That is, the statute is some of the evidence which the factfinder may consider in determining whether the defendant breached the standard of care of a reasonable person. Indeed, in a jurisdiction where violation of statute is only some evidence of negligence there seems there should be less confusion regarding the conflation of duty and breach. That is, violation of statute should have no stronger impact than merely evidence of breach. Thus, courts have less reason to confuse their role in garden variety negligence cases because their role is the same in a violation of statute negligence case.

VI. Conclusion

Judges are powerful people. They interpret and develop the law; their decisions define the detailed outlines of our rights as citizens. They preside over trials where lives are at stake. They interpret contracts and other important legal documents. With all that power, they must resist the temptation to exercise powers that do not belong to them. Judicial restraint is why courts deferentially review legislation dealing with commercial matters.[217] They generally defer to the legislature on such matters. Judicial restraint in such cases arises out of the need to respect another branch of government.

But judges should exercise restraint out of respect for other actors in the litigation process—the jury as factfinder and the judge herself as factfinder. When a judge conflates duty and breach, the judge usurps the factfinder's right to decide breach.[218] As noted throughout, breach is a mixed question of fact and law. Its resolution depends upon the facts of the particular case and the factfinder's measure of due care under the peculiar circumstances in front of it. The breach

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[217] *See, e.g.,* Jamal Greene, How Rights Went Wrong 62 (2021).

[218] *See,* Galligan, Let the Jury Decide!, *supra* note 1.This usurpation is as pernicious as the usurpation that occurs when judges decide scope of the risk or proximate cause as a legal decision, rather than a mixed question of fact and law.

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decision in a particular case has no predictive value for future cases. Characteristically lawyers will cite, analogize, and distinguish breach and no-breach cases but those decisions are not controlling. They are not even persuasive authority for how a future case should be decided. The judge normally has no more expertise with a community's sense of reasonability, despite what Justice Holmes believed, than the fact finder has. Merging breach and duty turns what is essentially a factual question into a legal question but law applies beyond the facts of a particular case and a decision that a defendant did or did not breach the standard of reasonable care under the circumstances does not. As Justice Lemmon, calling on the work of the late Professor David Robertson, said in his *Pitre* concurrence:

> The statement that "the defendant had no duty," as noted in Professor David W. Robertson et al, *Cases and Materials on Torts* 161 (1989), should be reserved for those "situations controlled by a rule of law of enough breadth and clarity to permit the trial judge in most cases raising the problem to dismiss the complaint or award summary judgment for defendant on the basis of the rule." Thus, a "no duty" defense generally applies when there is a categorical rule excluding liability as to whole categories of claimants or of claims under any circumstances. In the usual case where the duty owed depends upon the circumstances of the particular case, analysis of the defendant's conduct should be done in terms of "no liability" or "no breach of duty."[219]

Exactly. When a court ignores the general duty to exercise reasonable care and finds there is a duty or no duty based on the particular facts and determines duty or no duty based on the facts of the specific case the court errs and creates confusion. The more jurisprudence we have conflating duty or no duty and breach, the more duty begins to look pointillistic and fact dependent. That weakens

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[219] *Pitre,* 673 So. 2d at 596 (Lemmon, J., concurring).

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the general duty to exercise reasonable care. Moreover, it suggests that people may escape liability by exercising less than reasonable care for the safety and property of others.

Justice Holmes' stop, look, and perhaps do more than listen rule took away the factfinder's ability to determine plaintiff negligence where the facts indicated that stopping, looking, and doing more than listening was, in fact, not reasonably safe. His rule of law was thankfully short-lived.

Louisiana jurisprudence is sprinkled with Holmes-esque decisions conflating duty and breach. I have discussed several herein: *Noble, Robinette, Posecai, Pitre, Bufkin,* etc. Each of those cases involved questions of breach, not duty. In each of them the court could have found that there was no breach. Justice Lemmon's concurrences in *Posecai* and *Pitre* make that point. In Boykin that is exactly what Justice Lemmon did in his majority opinion. And, Justice Knoll in *Broussard*, echoing without citing *Boykin,* clearly noted the separation of duty and breach and the proper allocation of decision-making authority: the factfinder determines breach because it is case specific. It has no impact beyond the particular case.

But, to reiterate, just because the factfinder determines breach at trial does not mean that judges are powerless to grant summary judgment or judgments as a matter of law on the breach issue. Summary judgment or a judgment as a matter of law would be appropriate on breach if no reasonable juror could find that the defendant breached the duty to exercise reasonable care.[220] Of course a judge could also grant a summary judgment or judgment as a matter of law that the defendant did breach the appropriate standard of care if no reasonable juror could fail to find breach. But that standard shows appropriate respect for the factfinder's role—the factfinder decides breach unless the issue is so clear that no reasonable juror could fail to find that there was

[220] Of course, a judge could also grant a summary judgment or judgment as a matter of law that the defendant did breach the appropriate standard of care if no reasonable juror could fail to find breach.

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no breach.[221]

So, what should happen when a defendant moves for summary judgment contending that there is no duty owed based on the particular facts before the court, including the claim that the risk involved was open and obvious?[222] The court should remind the defendant that there is a general duty to exercise reasonable care, except in specific categorical classes of cases, and deny the motion, suggesting that the proper motion would be a motion for summary judgment or judgment as matter of law on the question of breach. The Louisiana Supreme Court could help by stating that is the way to read *Noble, Posecai, Pitre, Bufkin,* and *Allen;* citing *Bufkin* and *Broussard* with approval. In doing so, the Court would respect the proper allocation of decision-making in negligence case, avoid unnecessary confusion for lawyers, law professors, law students, and litigants, and forever separate duty from breach in Louisiana negligence cases.

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[221] Or could fail to find that there was a breach. *See,* note 184.
[222] A defendant could legitimately file an exception of no cause of action, contending that there is no duty owed if, in fact, as Justice Lemmon noted in his *Pitre* concurrence there is a "a categorical rule excluding liability as to whole categories of claimants or of claims under any circumstances." *Pitre,* 673 So. 2d at 596 (Lemmon, J., concurring).

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