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Olsen v. Shell Oil: Expanded Liability for Offshore Oil Platform Owners

Rand Dennis

Olsen v. Shell Oil: EXPANDED LIABILITY FOR OFFSHORE OIL PLATFORM OWNERS

Plaintiff's decedent was killed as a result of the explosion of a hot water heater located in a modular living unit owned by the deceased's employer but attached to an offshore oil platform owned by defendant. The United States District Court for the Eastern District of Louisiana denied recovery to the plaintiff, holding that an employee of an independent contractor cannot recover from the owner of the premises under article 2322 of the Louisiana Civil Code[1] unless performance of the work is intrinsically dangerous. On appeal, the United States Court of Appeals for the Fifth Circuit certified certain questions of state law to the Louisiana Supreme Court, which held that the defendant platform owner may be held strictly liable under article 2322 for injuries caused by a defective appurtenance of the platform. *Olsen v. Shell Oil Co.*, 365 So. 2d 1285 (La. 1978).

Although offshore oil well drilling is a relatively recent development,[2] this nation's shortage of energy resources has prompted rapid expansion of the practice. Attendant with this expansion and the inherent danger of offshore drilling has been an increase in personal injury litigation arising out of offshore oil platform accidents. A survey of the jurisprudence in this area illustrates that the determination of the law applicable to such cases has posed no small problem for the courts.[3]

The most important piece of federal legislation affecting offshore platforms was passed in 1953 in the form of the Outer Continental Shelf Lands Act (Lands Act).[4] This Act provides that the Longshoremen's and Harbor Workers' Compensation Act (LHCA)[5] shall apply to workers on fixed offshore platforms located over three miles from a state's coastline.[6] The LHCA, like most workmen's compensation plans, provides that compensation is the exclusive remedy against the worker's employer, while reserving the employee's tort action against any third party who might be

1. LA. CIV. CODE art. 2322 provides: "The owner of a building is answerable for the damages occasioned by its ruin, when this is caused by neglect to repair it, or when it is the result of a vice in its original construction."

2. The first producing far offshore oil well was drilled off the coast of Louisiana in 1947. *See* AMERICAN PETROLEUM INSTITUTE, HISTORY OF PETROLEUM ENGINEERING 13 (1961).

3. See text at notes 9-15, *infra*.

4. 43 U.S.C. § 1332 (1953). This act was established for the purpose of asserting federal ownership and control of the outer continental shelf. *See* 43 U.S.C. § 1332 (1953), comment.

5. 33 U.S.C. §§ 901-50 (1972).

6. 43 U.S.C. § 1333(c) (1970).

responsible for his injury.[7] The Lands Act further provides that "[t]o the extent that they are applicable and not inconsistent with" federal laws, the laws of the adjacent state are to apply to these platforms.[8] Therefore, state law will apply to the third party claim if there is no inconsistent federal law.

In 1961, the fifth circuit concluded in *Pure Oil Co. v. Snipes*[9] that indeed there was applicable federal law, the federal maritime law. The court felt this conclusion was mandated by the fact that Congress, in promulgating the Lands Act, committed to the United States Coast Guard, a maritime agency, the authority to issue regulations involving these platforms. Further, the court believed the Land Act's express adoption of the LHCA illustrated a congressional concern for a uniform federal policy.[10] Subsequent cases[11] adopted the position taken in *Pure Oil Co.* and for a period of time no state law was applied to offshore platform injuries.

In 1969, the United States Supreme Court changed the entire complexion of the law affecting offshore platforms with its decision in *Rodrigue v. Aetna Casualty and Surety Co.*[12] which held that pursuant to the Lands Act state law was applicable to artificial islands.[13] The Court noted that actions arising out of platform accidents could not automatically be considered of a maritime nature, requiring the application of federal maritime law. Rather, Justice White, who delivered the Court's opinion, noted:

> Careful scrutiny of the Hearings which were the basis for eliminating from the Lands Act the treatment of artificial islands as vessels convinces us that the motiviation for the change, together with the adoption of state law as surrogate federal law, was the view that maritime law was inapposite to these structures.[14]

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7. 33 U.S.C. § 905 (1972).

8. 43 U.S.C. § 1333(a)(2) (1970).

9. 293 F.2d 60 (5th Cir. 1961).

10. *Id.* at 66-67.

11. *See* Loffland Bros. Co. v. Roberts, 386 F.2d 540 (5th Cir. 1967); Movible Offshore Co. v. Ousley, 346 F.2d 870 (5th Cir. 1965).

12. 395 U.S. 352 (1969). The opinion involved two consolidated cases, one in which a man was killed when he fell to the platform from a derrick and the other in which the operator of a crane attached to the platform was killed when the crane fell over, striking the vessel.

13. The term "artificial islands" as used by the Court is synonymous with fixed offshore platforms. It is this characterization which distinguishes these stationary platforms from submersible drilling rigs which are treated as vessels by the courts. *See id.* at 355.

14. *Id.* at 363. In support of this position the Court also noted: "The accidents in question here involved no collision with a vessel, and the structures were not navigational aids. They were islands, albeit artificial ones, and the accidents had no more connection with the ordinary stuff of admiralty than do accidents on piers." *Id.* at 360.

The Court found that the legislative history of the Lands Act, which indicated a congressional awareness of the close relationship of workers on rigs to the adjoining states, further evidenced congressional intent to permit application of state law to fixed platforms.[15]

The *Rodrigue* holding was to have quite an effect on platform-related litigation. As the law now exists, a worker injured on a fixed rig located beyond the three miles limit may recover LHCA benefits from his employer and also has available to him any remedy against a third party that the laws of the adjacent state will allow. Inside three miles the injured worker may generally recover state workmen's compensation from his employer[16] and again any relief against a third party that the laws of the adjacent state allow.[17]

When an oil company which owns a platform hires an independent contractor to conduct drilling operations, the oil company becomes the injured worker's most likely third party defendant. Because the company does not directly employ the worker, it is unable to claim the workmen's compensation exclusive remedy defense.[18] Moreover, as the platform owner is the enterprise beneficiary, the entity for whose gain the activity is undertaken, it is seemingly the appropriate party to look to for compensation for injuries resulting from such activity. However, workers have rarely succeeded in such actions because, by hiring an independent contrac-

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15. *Id. See also Hearings on S. 1901 before the Senate Comm. on Interior and Insular Affairs*, 83d Cong., 1st Sess. 22 (1953).

16. The Lands Act automatically brings the workers on offshore platforms over three miles out within the coverage of the LHCA, while a platform worker on a rig within the three mile limit would have to first meet the status and situs tests of the LHCA in order to be covered by that Act. *See* 33 U.S.C. § 902(3) to (4) (1972).

17. Under the Louisiana workmen's compensation plan, executive officers and fellow employees come within the employer's immunity from "third party" suits, unless the act of the officer or fellow employee was intentional or committed outside of the scope of employment. LA. R.S. 23:1101 (1950), 23:1032 (1950 & Supp. 1976).

18. However, inside three miles, platform owners may be afforded the protection of the "statutory employer" defense provided by the Louisiana Workmen's Compensation Act. LA. R.S. 23:1061 (1950). If found to be the worker's "statutory employer," an owner has available to him the exclusive remedy defense provided by that Act.

Two competing theories have emerged as to the test to be applied in determining whether a particular employee is a "statutory employee." One test asks simply if the worker is engaged in employment "essential to the business" of the principal employer. *See* Arnold v. Shell Oil Co., 419 F.2d 43 (5th Cir. 1969), and cases cited therein; Vincent v. Ryder Enterprises, Inc., 352 So. 2d 1061, 1069 (La. App. 3d Cir. 1977). The other test is whether the activity is "in that business, normally carried on through employees rather than independent contractors." A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 49.12 (1973). The issue has been squarely presented to the Louisiana Supreme Court recently by certification from the fifth circuit in *Blanchard v. Engine & Gas Compressor Services*, 575 F.2d 1140 (5th Cir. 1978).

tor and relinquishing the premises to him, the owner insulates himself from any imputed negligence.[19]

Some injured workers, unable to base a claim against the platform owner on a negligence theory, have sought to recover by claiming a civil remedy for violations of certain federal regulations. One case granted such a remedy,[20] but the fifth circuit in *Olsen v. Shell Oil Co.*[21] refuted the reasoning of the prior case holding that under the test laid down by the Supreme Court in *Cort v. Ash*,[22] there is no basis for inferring a federal cause of action for a breach of the Secretary of the Interior's regulations.[23] Another recent case, *Bourg v. Texaco Oil Co.*,[24] indicates that these regulations may at most provide a standard by which to determine the duty of care owed under *Louisiana* law.[25]

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19. A plaintiff who invokes the doctrine of respondeat superior in order to recover from an employer for the negligent acts of his independent contractor is confronted with the Louisiana Supreme Court's holding in *Cole v. Louisiana Gas Co.*, 121 La. 771, 46 So. 801 (1908). In *Cole*, the court stated: "The general rule is that the servants of an independent contractor must look to him (and not to the person with whom he has contracted) for injuries which they receive through his fault or negligence." *Id.* at 779, 46 So. at 804.

20. Armstrong v. Chambers & Kennedy, 340 F. Supp. 1220 (S.D. Tex. 1972), *aff'd on other grounds sub nom., In re* Marine Service, Inc., 499 F.2d 263 (5th Cir. 1974).

21. 561 F.2d 1178 (5th Cir. 1977).

22. 422 U.S. 66 (1975).

23. The regulations involved were general safety mandates. Oil and Gas and Sulfur Operations in the Outer Continental Shelf, 30 C.F.R. §§ 250.30, 250.45 & 250.46 (1978). The fifth circuit in *Olsen* interpreted *Cort* as requiring four main considerations in the determination of whether a civil remedy is implied for the breach of a federal regulation: (1) Is plaintiff one of the class for whose especial benefit the statute was enacted? (2) Is there any indication of a legislative intent to either create or deny a remedy? (3) Is it consistent with the underlying purpose of the legislative scheme to imply such a remedy? (4) Is the cause of action one traditionally relegated to state law? 561 F.2d at 1185. The fifth circuit held that Olsen's claim did not satisfy any of these considerations necessary in order to find an implied civil remedy for the breach of a federal regulation.

Note, however, that a recent addition to the Lands Act which imposes on platform owners a duty to maintain certain safety standards may be interpreted to support a cause of action based on a violation of this duty. *See* 43 U.S.C. § 1348(a) to (b) (1978), *added by* Pub. L. 95-372, tit. 2, § 208, 92 Stat. 655.

24. 578 F.2d 1117 (5th Cir. 1978).

25. *Id.* at 1121. The court in *Bourg* conceded that the regulations might be admissible for the duty-determinative purpose alone, but nevertheless declined to find error in the lower court's refusal to instruct the jury on this theory, stating that the jury had been adequately charged as to the legal obligations imposed on a platform owner.

The court distinguished *Dyson v. Gulf Modular Corp.*, 338 So. 2d 1385 (La. 1976), and *Benley v. Louisiana Power and Light*, 319 So. 2d 334 (La. 1975), by indicating that the regulations involved in those cases carried some sort of vicarious liability for the negligence of others while the regulations here did not. Actually, there was no need to distinguish the *Dyson* and *Benley* cases because, as those cases pointed out, under Louisiana law the statutes are admissible only as evidence of the duty owed.

Even if the scope of the duty of care owed by a platform owner is expanded by application of federal regulations, Louisiana's contributory negligence doctrine presents a further obstacle.[26] Under the federal maritime law with its rule of comparative negligence, any contributory negligence on the part of the plaintiff reduces the amount of his recovery, while under Louisiana law, the contributory negligence of the plaintiff is a complete bar to recovery. Although some defense attorneys feared that federal judges would be reluctant to apply this and other Louisiana defenses,[27] several federal courts have already utilized the contributory negligence concept to defeat the plaintiff's right to recovery.[28]

Because of these problems, the few cases allowing an injured worker recovery from a platform owner have usually been premised upon a theory of strict liability, or liability without fault. In *McIlwain v. Placid Oil Co.*[29] the fifth circuit upheld a jury verdict which declared the owner strictly liable under Civil Code article 2322 for injuries sustained by a worker when a section of a grated deck on which he was standing gave way. In another recent case, *Mott v. Odeco,*[30] the fifth circuit was again presented with a claim which necessitated interpretation of the "ruin" requirement of article 2322. The proximate cause of plaintiff's injury in that case was determined to be a missing rung on a ladder. Relying on the Louisiana Supreme Court's definition of "ruin" in *Davis v. Royal Globe Insurance Co.,*[31] the court reversed the district court's directed verdict for the plaintiff, holding that this was not damage occasioned by the "ruin"[32] of the building as contemplated by article 2322.[33] In *Moczygemba v. Danos & Curole Marine Contractors,*[34] the fifth circuit once more noted the applicability of article 2322 to platform ac-

26. This obstacle may soon be removed through the application of a recently passed act which substitutes comparative negligence for the contributory negligence doctrine in Louisiana. However, it does not become effective until August 1, 1980. 1979 La. Act, No. 431.

27. *See e.g.*, Diaz, *Onshore and Offshore Platforms Rights to Recovery, in* RECENT DEVELOPMENTS IN THE LAW OF MARITIME TORTS, 37, 46 (G. Boland & L. Dodd eds. 1972).

28. *See* Bertrand v. Shell Oil Co., 489 F.2d 293 (5th Cir. 1973); Dickerson v. Continental Oil Co., 449 F.2d 1209 (5th Cir. 1971). *Bertrand* also discussed the application of the doctrine of "last clear chance." 489 F.2d at 295.

29. 472 F.2d 248 (5th Cir. 1973).

30. 577 F.2d 273 (5th Cir. 1978).

31. 242 So. 2d 839 (1970).

32. In *Davis* the Louisiana Supreme Court held that the word "ruin" in article 2322 contemplated the actual fall or collapse of a building or one of its components. *Id.* at 841.

33. 577 F.2d at 276. It is interesting to note that the district court had held that contributory negligence was no defense to an action based on article 2322. *Id.* at 274.

34. 561 F.2d 1149 (5th Cir. 1977), *cert. denied,* 412 U.S. 923 (1978).

cidents. In that case, a crane which had been welded to the surface of the platform toppled over, killing the operator. Although the court stated that the trial court had erred in refusing to instruct the jury as to the applicability of article 2322, it characterized that error as harmless, noting that the plaintiff had been found contributorily negligent.[35]

These cases illustrate that although the federal courts have been willing to apply article 2322 and its concomitant strict liability to the platform owner, they have had considerable difficulty interpreting that article and the accompanying jurisprudence. This was the problem confronting the fifth circuit in *Olsen v. Shell Oil Co.*[36] The case involved an accident which occurred in federal waters off the Louisiana coast on a platform owned by Shell Oil Co. Drilling from the platform was conducted by an independent contractor, Movible Offshore, Inc. In addition to the drilling rig, Movible had permanently attached its modular living quarters to the platform, such that cutting and burning would be required to remove it. Movible retained ownership of this unit by express contractual provision and intended to remove it after the job was completed. On May 6, 1970, a hot water heater located in the modular unit exploded, resulting in many deaths and injuries. Although the exact cause of the explosion could not be determined, it was conclusively shown that the accident would not have occurred had Movible not placed the wrong type pressure valve on the heater.[37]

The federal district court,[38] having determined that Movible was immune from suit because of the LHCA exclusive remedy provision, further held that Shell too was free from liability.[39] Plaintiff appealed, asserting two theories of recovery against Shell. In a lengthy opinion, the fifth circuit rejected plaintiff's first argument which was based on Shell's alleged breach of certain safety regulations issued by the Secretary of the Interior.[40] However, the court found itself unable to reach a verdict as to plaintiff's second theory of recovery, that Shell was strictly liable under article 2322. After a survey and comment on the inconsistency of the existing jurisprudence as to the

35. *Id.* at 1152 & n.8. However, whether mere contributory negligence is a defense to an action based on article 2322 is certainly not a settled question. See note 67, *infra*, and accompanying text.

36. 561 F.2d 1178 (5th Cir. 1977).

37. *Id.* at 1181. A safety representative of Pacific Employers Insurance Company, Movible's insurer, had earlier recommended that the pressure values on the water heaters be replaced by pressure-temperative valves. *Id.* at 1180.

38. *Id.* at 1181.

39. *Id.*

40. See note 23, *supra*, and accompanying text.

extent of the owner's liability under article 2322, the court chose to certify certain questions to the Louisiana Supreme Court.[41]

In addressing the questions, the Louisiana Supreme Court first noted the three requirements for the application of article 2322: "(1) There must be a building; (2) the defendant must be its owner; and (3) there must be a "ruin" caused by a vice in construction or a neglect to repair, which occasions the damage sought to be recovered."[42]

The court easily disposed of the first requirement. Noting that it had never specifically addressed the issue of what constituted a building within the meaning of article 2322, the court cited *Vinton Petroleum Co. v. Seiss Oil Syndicate,*[43] an appellate court decision, which had treated an oil derrick as a building for this purpose.[44]

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41. These questions were:

(1) Whether the owner of an offshore drilling platform can be held strictly liable pursuant to Article 2322 of the Louisiana Civil Code absent the existence of intrinsically dangerous work and absent the exercise of control of the premises—when employees of an independent contractor hired by the owner are injured while on the platform by the explosion of a hot water heater located in the living module which caused part of the platform to fall or collapse, and when the employees are on the platform for the purpose of conducting drilling operations and not for the purpose of repairing or constructing the platform or any appurtenances or attachments thereto.

(2) Assuming that an owner cannot be held strictly liable to employees of an independent contractor without the existence of an intrinsically dangerous activity, whether drilling for oil on an offshore drilling platform constitutes "intrinsically dangerous work" within the meaning of *Vinton Petroleum Co. v. L. Seiss Oil Syndicate, Inc.*, 19 La. App. 179, 139 So. 543 (1st Cir. 1932), and as applied to Article 2322 of the Louisiana Civil Code.

(3) Whether injuries sustained by an employee of an independent contractor are the result of "ruin" of the building within the meaning of Article 2322 of the Louisiana Civil Code, when the fall or collapse of the building is caused by the explosion of a hot water heater attached to the living module of the platform.

(4) Whether a module and movable drilling rig which is attached to an offshore drilling platform in such a manner that cutting and burning would be required to remove it, and which is not owned by the owner of the platform to which it is attached, constitutes an "immovable by attachment" within the meaning of *Cothern v. LaRocca*, 255 La. 673, 232 So. 2d 473, 477 (1970), and as applied to Article 2322 of the Louisiana Civil Code.

(5) Whether an owner of an offshore drilling platform can be held strictly liable pursuant to Article 2322 of the Louisiana Civil Code for injury sustained upon the platform, even though ownership of the underlying soil is not vested in the owner of the platform.

561 F.2d at 1194.

42. 365 So. 2d at 1285, 1289. *See also* Comment, *Article 2322 and the Liability of the Owner of an Immovable*, 42 TUL. L. REV. 178 (1967).

43. 19 La. App. 179, 139 So. 543 (1st Cir. 1932).

44. *Vinton* had been cited by the fifth circuit in earlier cases as authority for labeling drilling platforms as buildings for purposes of article 2322. *See* Mott v. Odeco,

Summarizing the applicable jurisprudence, the court concluded that it was sufficient that the structure be of some permanence, though not necessarily intended for habitation, and that a drilling platform was such a structure.[45] Significantly, at this point, the court indicated in a footnote that even if the platform were not a "building," the defendant could possibly be held liable under article 2317.[46]

The court then turned to ownership, the issue most heavily contested by the parties. Although Shell owned the platform, Movible and Shell had, by contract, stipulated that Movible was to remain the owner of the modular living unit attached to the platform's surface. Therefore, Shell argued, it was free from liability because it was not the "owner" of the living unit. Justice Tate, writing for the majority, indicated that this argument missed the point.[47] In the court's view, the living unit and all its component parts constituted an appurtenance of the building. As such, it was included within the term "building" for purposes of determining the building owner's delictual responsibility under article 2322; any ruin of an appurtenance may be considered a ruin of the building.[48] The court cited several cases which it indicated had maintained liability under article 2322 based on the "appurtenance doctrine" and stated that those cases had done so "without consideration of whether there is unity of ownership of the building and its appurtenance."[49] Proceeding from this assertion, the court held that absent a statute, the owner has a non-delegable duty to keep his building *and its appurtenances* free of injury-causing defects.[50]

Shell also argued that the third requirement for the imposition of liability based on article 2322 was not satisfied because the ex-

577 F.2d 273 (5th Cir. 1978); Moczygemba v. Danos & Curole Marine Contractors, 561 F.2d 1149 (5th Cir. 1977); McIlwain v. Placid Oil Co., 472 F.2d 248 (5th Cir. 1973), *cert. denied*, 412 U.S. 923 (1973).

45. 365 So. 2d at 1290.

46. *Id.* at 1290 n.8. For the possible implications of such a consideration, see text at notes 68-72, *infra*.

47. *Id.* at 1290.

48. *Id.* at 1291.

49. *Id.* The cases cited in support of this assertion were: Moczybemba v. Danos & Curole Marine Contractors, 561 F.2d 1149 (5th Cir. 1977); Cothern v. La Rocca, 255 La. 673, 232 So. 2d 473 (1970); Dunn v. Tedesco, 235 La. 679, 105 So. 2d 264 (1958); Adamson v. Westinghouse Electric Corp., 236 So. 2d 556 (La. App. 4th Cir. 1970); Fontenot v. Sarver, 183 So. 2d 75 (La. App. 3d Cir. 1966); Murphy v. Fidelity and Cas. Co., 165 So. 2d 497 (La. App. 2d Cir. 1964). However, see discussion of these cases in text at notes 60-63, *infra*.

50. 365 So. 2d at 1291. It was on this issue that Justice Marcus, joined by Chief Justice Sanders, based a portion of his dissenting opinion. Since Movible was the undisputed owner of the living quarters module, Justice Marcus argued that to hold Shell liable would be in direct "contravention of the intent and express language of article 2322." 365 So. 2d at 1297 (Marcus, J. & Sanders, C.J., dissenting).

ploding hot water heater did not constitute ruin within the intendment of that article. Over the dissents of Justice Marcus and Chief Justice Sanders,[51] the majority opinion summarily disposed of this argument, stating that an explosion did, indeed, fall under the definition of ruin.[52] In so doing, however, the court found it necessary to almost completely retract the restrictive requirements of "actual fall or collapse" which it had mandated in *Davis*, a case which had been heavily relied upon by other courts.[53]

Having found that the explosion of the hot water heater placed Shell within article 2322's scope of liability, the court next turned to the defenses available to Shell. In this regard, the court had earlier noted that the owner of a building may be exculpated from the strict liability imposed by article 2322 only if the victim is injured not because of the defect, "but rather because of the fault of some third person or of the person injured thereby, or because the fault is caused by an irresistible cause or force not usually foreseeable."[54] In response to Shell's argument that the negligence of Movible, the independent contractor, gave rise to the third person fault defense, Justice Tate's opinion shed new light on this relatively unexplored area:

> The fault of a "third person" which exonerates a person from his own obligation importing strict liability as imposed by articles 2317, 2321, and 2322 is that which is the sole cause of the damage, of the nature of an irresistible and unforeseeable occurrence—i.e., where the damage resulting has no causal relationship whatsoever to the fault of the owner in failing to keep his building in repair, and where the "third person" is a stranger rather than a person acting with the consent of the owner in the

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51. 365 So. 2d at 1297 (Marcus, J. & Sanders, C.J., dissenting).

52. The court supported its conclusion that the exploding heater was a "ruin" by citing cases which had involved water heaters and window fans. 365 So. 2d at 1292. However, the majority failed to mention that these cases preceded *Davis* and that two courts of appeal relying on the *Davis* interpretation of article 2322, see note 32, *supra*, decided that a defective heater or a burst hot water heater was not a "ruin" under its guidelines. *See* Parker v. Brawley, 306 So. 2d 793 (La. App. 2d Cir. 1975); Jarvis v. Proust, 247 So. 2d 244 (La. App. 4th Cir. 1971). It is interesting to note, also, that in *Mott v. Odeco*, 577 F.2d 273 (5th Cir. 1978), cited earlier in the *Olsen* opinion for its characterization of a platform as a building, the fifth circuit indicated that it felt that *Fontenot* had been overruled by *Davis*.

53. *See, e.g.*, Tardo v. New Orleans Public Service, Inc., 353 So. 2d 409 (La. App. 4th Cir. 1978); Straley v. Calogne Drayage & Storage, Inc., 337 So. 2d 887 (La. App. 4th Cir. 1976); Parker v. Brawley, 306 So. 2d 793 (La. App. 2d Cir. 1975); Crawford v. Wheless, 265 So. 2d 661 (La. App. 2d Cir. 1972); Jarvis v. Proust, 247 So. 2d 244 (La. App. 4th Cir. 1971).

54. 365 So. 2d at 1289.

> performance of the owner's non-delegable duty to keep his building in repair.[55]

The court found that Shell relied upon cases decided under article 2320, dealing with master-servant responsibility, a "totally distinct theory of liability" from that of article 2322.[56]

Similarly, the court found little merit in Shell's final contention that article 2322 liability could not attach because Shell did not own the soil beneath the platform. The court noted that the 1978 reenactment of Civil Code article 464[57] and the jurisprudential interpretation of the former version of that article provide that a building may be an immovable separate and distinct from the land on which it is situated when owned separately.[58] Thus, the majority in *Olsen* concluded that the applicable certified questions should all be answered affirmatively, indicating its opinion that Shell should be held strictly liable.[59]

The holding in *Olsen* raises several interesting questions with regard to the liability of offshore oil platform owners for injuries sustained by workers on platforms. For example, the court indicated that unity of ownership of the building and the defective appurtenance is not a prerequisite to the imposition of liability under article 2322, yet the several cases cited with approval may not support this proposition.[60] Although four of the cited cases were, indeed, decided "without consideration" of whether there was unity of ownership of the building and the appurtenance, it was not because the court in each instance thought the question was immaterial, but rather, because the appurtenance at issue in each case was undisputedly owned by the owner of the building. Thus, the court in each of those instances had no occasion to address the question of whether unity of ownership was required. However, in another of the cited cases, *Murphy v. Fidelity and Casualty Co.*,[61] the second circuit held the owner of a building liable to the widow and son of a worker who had been electrocuted by exposed wires in the building, although the owner of the building did not own the wires. But the

55. *Id.* at 1293-94. In a footnote, the court equated third person fault with the common law concept of superseding cause. *Id.* at 1293 n.15.

56. *Id.* at 1294.

57. 1978 La. Acts, No. 728, § 1.

58. 365 So. 2d at 1294-95.

59. Of the five questions certified to it from the fifth circuit, the court found it necessary to answer only four. The unanswered question concerned the possibility of viewing offshore oil drilling as an intrinsically dangerous activity. See note 73, *infra*, and accompanying text. For a complete list of the certified questions, see note 41, *supra*.

60. See note 49, *supra*.

61. 165 So. 2d 497 (La. App. 2d Cir. 1964).

court there specifically noted that liability was predicated on article 2317, finding that the wires were "in the custody" of the building owner.[62] In *Fontenot v. Sarver*,[63] involving personal injury caused by a window fan, the defendant argued he did not own the fan and hence was not liable under article 2322. That the third circuit affirmed liability only after approving of the trial court's factual finding of unity of ownership indicates a conviction that such unity is required.

Justice Tate apparently breaks new ground in asserting that article 2322 does not require unity of ownership of the building and its appurtenance. However, whether such a holding is contrary to the express language of article 2322, as Justice Marcus' dissenting opinion contends,[64] is also a questionable assertion. If, indeed, as in the instant case, the injury-causing appurtenance is incorporated into the building at the owner's instigation and for his advantage, it would seem entirely consistent with the intended scope of article 2322 to hold the owner of the "building" liable for the resulting injury.

The liability ascribed to the offshore platform owner through the court's interpretation of article 2322 will arise in connection with all such structures and their appurtenances. A literal application of the court's interpretation of article 2322's "ruin" requirement would make the platform owner strictly liable for any and all defects of the building and its appurtenances. Cases such as *Mott v. Odeco*[65] which had relied on *Davis* in refusing to apply article 2322 to an accident resulting from a missing rung on a ladder, would almost certainly be decided differently. Additionally, although in the instant case the modular living unit and the faulty hot water heater were more or less permanent attachments, the opinion does not define "appurtenance," nor does it speak to the degree of attachment, if any, necessary to constitute an appurtenance. If appurtenance is defined to include any apparatus or gear which performs a necessary or useful function in relation to the building,[66] movable as well as immovable objects could then be considered as appurtenances to the building. Such a holding would obviously greatly expand the platform owner's scope of liability.

The majority's incomplete treatment of the defenses available to a platform owner who is allegedly responsible under article 2322 for another's injury also leaves many unanswered questions. Of the

62. *Id.* at 501.
63. 183 So. 2d 75, 76 (La. App. 3d Cir. 1966).
64. 365 So. 2d at 1295 (Marcus, J. & Sanders, C.J., dissenting).
65. 577 F.2d 273 (5th Cir. 1978).
66. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 107 (1969).

three defenses, *i.e.*, victim fault, third party fault, and force majeure, the court addresses only the third party fault defense and notes that to constitute a valid defense such fault must be the sole cause of the damage. What about victim fault? Will an injured party's simple negligence act as an absolute bar, or will such negligence also have to be the sole cause of his injury in order to free the owner from liability?[67]

Finally, a footnote in the *Olsen* opinion[68] adverts to a possible application of strict liability that could conceivably have an even more significant impact on platform-related injuries. It points out that even if article 2322 did not apply, the owner might be held liable under article 2317[69] which provides a general rule of strict liability for "things" in one's "custody." As "things" is certainly general enough to include all tangible objects, the real debate in such cases would center around the concept of "custody."[70] If this

67. Although the very early case of *Barnes v. Beirne*, 38 La. Ann. 280 (1886), implied that only an outside force could absolve the owner from liability, subsequent cases clearly applied the rule of contributory negligence. *See* Thompson v. Commercial Nat'l Bank, 156 La. 479, 100 So. 688 (1924); Wise v. Lavigne, 138 La. 218, 70 So. 103 (1915); Tucker v. Illinois Cent. R. Co., 42 La. Ann. 114, 7 So. 124 (1890).

Other cases have recognized that although negligence on the part of the plaintiff will defeat his recovery, such negligence must be evidenced by more than mere knowledge of the defect or ruinous condition. These cases have held that in order to support a defense of contributory negligence in such an instance, it must be shown that the condition is so dangerous that using the premises constitutes negligence. *See* Turner v. Aetna Cas. & Sur. Co., 175 So. 2d 304, *on rehearing*, 175 So. 2d 308 (La. App. 2d Cir. 1965); Anselm v. Travelers Ins. Co., 192 So. 2d 599 (La. App. 3d Cir. 1966). *But see* Barnes v. Pick, 311 So. 2d 609 (La. 1975). The *Barnes* approach would seem to be better categorized under the assumption of risk doctrine which, indeed, has been held to be a valid defense to strict liability under article 2322. *See* Wunstell v. Crochet, 325 So. 2d 727 (La. App. 4th Cir. 1976). *See also* Langlois v. Allied Chem., 258 La. 1067, 249 So. 2d 133 (1971).

It seems very unlikely that the courts will require that the injured party's fault rise to the level of "sole cause" of the accident in order to relieve the owner of liability under article 2322 for the obvious reason that the plaintiff who is guilty of negligence is not an innocent victim as is the case when the intervening negligence is that of a third party.

One must also consider the effect on these defenses to strict liability of the application of comparative negligence as required by recent legislation which becomes effective on August 1, 1980. 1979 La. Act, No. 431. See an upcoming issue of volume 40 of the Louisiana Law Review for a comparative negligence symposium, including an article discussing the effect of the adoption of comparative negligence on the theory of strict liability.

68. 365 So. 2d at 1290 n.8.

69. LA. CIV. CODE art. 2317 states in pertinent part: "We are responsible, not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or of the things which we have in our custody."

70.

> The French experience may be helpful here, although . . . the concept of custody does not fully encompass the French concept of "garde" from which

word were given an expansive interpretation, a platform owner could be held strictly liable not only for appurtenances and the equipment or other things which it owns, but also for all injury-causing defective equipment brought onto the platform by independent contractors.[71] The same defenses and the same questions as to their applicability would be raised in actions based on article 2317 as in actions arising under article 2322.[72]

Although the court in *Olsen* found it unnecessary to answer the question posed by the fifth circuit as to whether offshore drilling constitutes intrinsically dangerous work,[73] such a finding could provide an even broader basis of liability for the platform owner. The Louisiana Supreme Court long ago recognized that the protective shield against liability which the use of an independent contractor ordinarily affords the employer could be pierced if a worker is injured in the performance of an inherently dangerous activity.[74] Though liability on this basis would seem a viable alternative, the writer has found no cases involving offshore drilling operations in which such an approach has been maintained.

Clearly, the majority of the Louisiana Supreme Court in *Olsen* seized the opportunity to implement social policy with far-reaching effects. The oil companies for whose benefit the offshore drilling activities are undertaken have in the past consistently avoided personal liability for injuries resulting from those activities. Limited

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custody has been translated. . . . In France, the owner is presumed to have the "garde" of things, although he may lose it due to theft or abandonment, or relinquish it to others who assume control over the thing (e.g. bailees, borrowers, lessees). The fact of physical control or possession of a thing, however, is not determinative of "garde" when maintained by a servant or agent of another. In such cases, the "garde" is imputed to the responsible principal.

Note, *Tort—Strict Liability for Damage Done by Things in One's Possession*, 51 TUL. L. REV. 403, 410 n.43 (1977).

71. Louisiana courts have interpreted "custody" as used in article 2317 to mean "supervision and control." *See* Smith v. Chemical Constr. Corp., 215 So. 2d 530 (La. App. 1st Cir. 1968); Wilcox v. American Oil Co., 215 So. 2d 402 (La. App. 2d Cir. 1968).

72. Presumably, the Louisiana Supreme Court's definition of third party fault in the instant case will also apply to article 2317 actions. Therefore, again, the victim fault defense poses the most serious questions. Recent cases involving article 2317 have held that this defense precludes recovery by the plaintiff. *See* American Road Ins. Co. v. Montgomery, 354 So. 2d 656 (La. App. 1st Cir. 1977), *cert. denied*, 356 So. 2d 430 (La. 1978); Korver v. City of Baton Rouge, 348 So. 2d 708 (La. App. 1st Cir. 1977); Richards v. Marlow, 347 So. 2d 281 (La. App. 2d Cir. 1977). For a discussion of these and other cases involving victim fault as a defense to strict liability, *see* Comment, *Fault of the Victim: The Limits of Liability under Civil Code Articles 2317, 2319, and 2321*, 38 LA. L. REV. 995 (1978).

73. For the complete version of the question as certified by the United States Court of Appeals for the Fifth Circuit to the Louisiana Supreme Court, see question two at note 41, *supra*.

74. *See* Cole v. Louisiana Gas Co., 121 La. 771, 779, 46 So. 801, 804 (1908).

LHCA and workmen's compensation benefits have not been sufficient to meet the costs of these accidents. As a result, the excess costs have been borne by the state in the form of increased services to the injured worker and his dependents. The court's interpretation of article 2322 and its opinion in general illustrate its belief that the Louisiana Civil Code provides ample authority for passing on these costs to the heretofore practically immune, platform-owning oil companies. The decision, though strained in some respects,[75] properly reflects a notion of "enterprise liability," a "determination that the entity that causes risk to the public through some enterprise should be responsible for the damage caused by the enterprise so that the cost of the damage will be allocated as an expense of the enterprise."[76]

Rand Dennis

THE END OF COLLATERAL ESTOPPEL IN LOUISIANA: *Welch v. Crown Zellerbach Corporation*

Plaintiff Welch, an employee of Austin Carpenter, was injured while on the land of defendant, Crown Zellerbach. In his first suit for workman's compensation benefits, plaintiff sought recovery from both Carpenter and Robert Campbell, Inc., alleging that his employer was the subcontractor of the latter. The court of appeal held that such a relationship had not been established.[1] Plaintiff's subsequent litigation against Crown Zellerbach depended upon the status of Robert Campbell, Inc. as plaintiff's statutory employer, which status could only be established by proving the Carpenter-Campbell subcontract and that Campbell was, in turn, the subcontractor of defendant. Crown Zellerbach prayed for dismissal of the suit, arguing that since the subcontractor/contractor relationship between Carpenter and Robert Campbell, Inc. necessary to hold Crown Zellerbach liable had been found nonexistent in the prior litigation, the plaintiff was estopped to relitigate the issue. The lower court agreed with this argument and dismissed the suit. The supreme court reversed and *held*, inter alia, that the collateral estoppel doctrine of issue preclusion does not obtain in Louisiana. *Welch v. Crown Zellerbach Corp.*, 359 So. 2d 154 (La. 1978).

75. *See* 365 So. 2d at 1296 (Marcus, J. & Sanders, C.J., dissenting).
76. 365 So. 2d at 1291 n.13.

1. See note 31, *infra*.