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Comparative Negligence and Strict Tort Liability

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COMPARATIVE NEGLIGENCE AND STRICT TORT LIABILITY

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Strict liability[1] in tort occupies a prominent place in Louisiana jurisprudence. Chief Judge Hunter of the United States District Court for the Western District of Louisiana has recently written: "The Louisiana Civil Code is replete with instances of liability based on breach of duty where there is neither negligence nor intentional misconduct by the party liable."[2] Such liability has been applied in cases in which defendant has engaged in blasting,[3] crop spraying,[4] and pile driving.[5] In a 1971 case, the defendant, having stored poisonous gas, conceded initial liability for the escape of the gas despite the absence of any negligence on its part.[6] In that same year the Louisiana Supreme Court adopted a strict tort liability approach with respect to manufacturers of defective products.[7] Recently, there has been further expansion of the areas of human conduct that are to be governed by the principles of strict tort liability. In 1974 article 2321 of the Louisiana Civil Code, relating to the liability of the owner of an animal, was construed to impose liability on the owner "in the nature of strict liability."[8] In 1975 there were similar interpretations of article 2318, relating to parents' liability for

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1. It is recognized that use of the term "strict liability" may be questioned by some. In the sense in which the term is used here, it refers to the imposition of liability on a defendant whose conduct, though harmful, was neither criminal, intentionally wrongful, nor negligent. Judge Sartain of the First Circuit Court of Appeal once referred to the expression as "sacramental" but went on to say that even without the use of the words, "[s]trict liability in and of itself is nothing new to Louisiana." Dixon v. Gutnecht, 339 So. 2d 1285, 1289 (La. App. 1st Cir. 1976).

2. Hastings v. Dis Tran Prod., Inc., 389 F. Supp. 1352, 1355 (W.D. La. 1975).

3. *E.g.*, Fontenot v. Magnolia Petroleum Co., 227 La. 866, 80 So. 2d 845 (1955).

4. *E.g.*, Gotreaux v. Gary, 232 La. 373, 94 So. 2d 293 (1957).

5. *E.g.*, Craig v. Montelepre Realty Co., 252 La. 502, 211 So. 2d 627 (1968).

6. Langlois v. Allied Chem. Corp., 258 La. 1067, 249 So. 2d 133 (1971). The Louisiana Supreme Court associated liability with article 2315 of the Louisiana Civil Code, which reads in part: "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it."

7. Weber v. Fidelity & Cas. Ins. Co., 259 La. 599, 250 So. 2d 754 (1971). For a discussion of the background of *Weber* and manufacturers' liability in tort, *see* Robertson, *Manufacturers' Liability for Defective Products in Louisiana Law*, 50 TUL. L. REV. 50, 51-57 (1975).

8. Holland v. Buckley, 305 So. 2d 113 (La. 1974) (dog bite).

damage occasioned by their minor children,[9] and article 2317, relating to the liability of the owner or possessor of a thing.[10]

Whenever doctrinal developments of such importance take place, many questions arise that can only be answered definitively by future litigation and judicial decisions.[11] One such question involves the extent to which contributory fault on the part of the injured person will be allowed as a defense in an action based on strict tort liability.[12] A related question, and the one to which the ensuing discussion is devoted, is how the new Louisiana comparative fault statute will function in these cases. It is the thesis of this article that, to the extent that plaintiff's contributory fault is allowed as a defense, the comparative fault statute should be incorporated into the juridical structure of strict tort liability. Furthermore, it is contended that Louisiana jurisprudence is in a posture to permit this to be done without the confusion, uncertainty, and injustice experienced in some common law states that have faced the problem.

EXPERIENCE IN COMMON LAW STATES

In recent years, a number of state courts (and federal courts applying state law) have been confronted with the question whether the state's comparative negligence statute (or court doctrine) should be applied in cases in which strict tort liability is the basis of the action. Conceptual and theoretical difficulties have been encountered in each instance. The courts have found these difficulties insurmountable in a few cases and have rejected application of comparative negligence principles. In the majority the ultimate result has been in favor of such application, but some of the opinions have been characterized by strained reasoning or judicial improvisation. The following is a brief summary of these developments outside Louisiana.

Oklahoma was one of the first states whose supreme court rejected application of its comparative negligence statute in a case of strict tort liability. In *Kirkland v. General Motors Corp.*[13] plaintiff had been injured by a defect in the car she was driving. The court's attention focused principally on establishing the state's framework for manufacturers' strict tort liability for defective products. There was evidence of plaintiff's heavy drinking which convinced the court

9. Turner v. Bucher, 308 So. 2d 270 (La. 1975) (child riding a bicycle).

10. Loescher v. Parr, 324 So. 2d 441 (La. 1975) (fall of a tree).

11. *See* George, *Strict Liability in Tort—Will the Weber Rule be Extended to Non-manufacturers?*, 23 LA. B.J. 191 (1975); Robertson, *supra* note 7.

12. *See* Comment, *Fault Of The Victim: The Limits of Liability Under Civil Code Articles 2317, 2318 and 2321*, 38 LA. L. REV. 995 (1978).

13. 521 P.2d 1353 (Okla. 1974).

that her undertaking to drive constituted a misuse of the product, and for that reason her cause of action was barred. In reaching that result the court added, in dictum phrased in strong terms, that the relatively new comparative negligence law[14] had no bearing on the case because its application "is specifically limited to *negligence actions*" and "manufacturers' product liability is not negligence, nor is it to be treated as a negligence action . . . ."[15]

In 1976 the United States Court of Appeals for the Eighth Circuit, applying Nebraska law, expressed its disapproval of permitting comparative negligence to be considered in a strict liability case, saying that to do so would be "extremely confusing and inappropriate."[16] A similar view was taken that year by the Colorado Court of Appeals.[17] The United States Court of Appeals for the Ninth Circuit, in a case involving Oregon law, took the same position.[18] The New Jersey Supreme Court in 1969 expressed a favorable attitude toward the application of comparative negligence in strict product liability cases,[19] but the court has left the question open after the adoption in 1973 of a comparative negligence statute in that state.[20]

In all of these cases the insuperable difficulty was the use of the term "negligence" in the comparative negligence statute's description of the kind of conduct on the part of defendant with which plaintiff's contributory negligence was to be compared, or in the

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14. OKLA. STAT. tit. 23, § 11 (1973) provides in pertinent part: "Contributory negligence shall not bar recovery of damages for any injury, property damage or death where the negligence of the person injured or killed is of lesser degree *than the negligence* of any person, firm, or corporation causing such damage." (Emphasis added.)

15. 521 P.2d at 1367 (emphasis added).

16. Melia v. Ford Motor Co., 534 F.2d 795, 802 (8th Cir. 1976). The Nebraska statute was restricted to "all actions brought to recover damages . . . *caused by the negligence* of another." NEB. REV. STAT. § 25-1151 (1975) (emphasis added). The result in *Melia* was legislatively overruled in 1978 when the Nebraska legislature amended the statute to make it applicable to actions for damages for injuries caused by "the negligence or act or omission giving rise to strict liability in tort of another." NEB. REV. STAT. § 25-1151 (Supp. 1978).

17. Krinard v. Coats Co., 553 P.2d 835 (Colo. App. 1976). COLO. REV. STAT. § 13-21-111 (1973) provides in pertinent part: "(1) Contributory negligence shall not bar recovery *in any action . . . for negligence* resulting in death or injury." (Emphasis added.)

18. Brown v. Link Belt Corp., 565 F.2d 1107, 1113 (9th Cir. 1977). The statute that governed the action, OR. REV. STAT. § 18.470 (1971), contained terms similar to those of the Oklahoma statute set out in note 14, *supra*. Oregon has since amended the statute to allow comparison of plaintiff's contributory negligence with defendant's *fault* rather than with his *negligence*. The court's opinion in *Brown* suggests that under the new terms the statute would apply to strict tort liability actions. *See* 565 F.2d at 1112.

19. Ettin v. Ava Truck Leasing, Inc., 53 N.J. 463, 474, 251 A.2d 278, 284 (1969).

20. N.J. STAT. ANN. 2A:15-5.1 to .2 (1973). *See* Cepeda v. Cumberland Eng. Co., 76 N.J. 152, 189, 386 A.2d 816, 834 (1978); Cartel Capital Corp. v. Fireco of New Jersey, 161 N.J. Super. 301, 311, 391 A.2d 928, 933 (1978).

description of the kind of action in which the statute was to be applied. The concept of negligence as a distinct tort apart from the other nominal torts is deeply ingrained in common law jurisprudence. The concept of "strict liability" involves holding defendant responsible without any showing of negligence or despite a showing of his exercise of the utmost care; it is commonly regarded as a separate basis for a tort action. This dichotomy makes it theoretically impossible for the two to be compared. In the words of one commentator, "no comparison of conduct is possible, since the bases of imposition of strict and negligent liability are dissimilar."[21] Other writers' metaphors include allusions to "square pegs in round holes,"[22] comparing a quart of milk to a three foot metal bar,[23] and inquiries whether oil and water can mix[24] or whether apples and oranges can be compared.[25]

Despite these conceptual and theoretical difficulties, the majority of those common law jurisdictions that have faced the issue have found some way to allow the state comparative negligence statute to function in strict tort liability cases. However, in certain instances the means have been questionable. The earliest judicial effort was by the Wisconsin Supreme Court. That state has had a comparative negligence statute since 1931.[26] In 1967, in *Dippel v. Sciano*,[27] the court determined that a manufacturer's liability for an unreasonably dangerous product was not based on warranty but on strict tort liability. At the conclusion of its analysis, in remarks admittedly obiter dicta, the court stated that contributory negligence could be a defense and that the comparative negligence statute should have its usual role in such cases. It reached this result by the extraordinary reasoning that the imposition of liability without negligence was "akin to negligence per se" as that doctrine operates when a penal

21. Note, *Products Liability, Comparative Negligence, and the Allocation of Damages Among Multiple Defendants*, 50 S. CAL. L. REV. 73, 102 (1976).

22. Robinson, *Square Pegs (Products Liability) In Round Holes (Comparative Negligence)*, 52 CAL. ST. B.J. 16 (1977).

23. Daly v. General Motors Corp., 20 Cal. 3d 725, 751, 144 Cal. Rptr. 380, 396, 575 P.2d 1162, 1177 (1978) (Jefferson, J., dissenting).

24. Feinberg, *The Applicability of a Comparative Negligence Defense in a Strict Products Liability Suit Based on Section 402A of the Restatement of Torts 2d*, 42 INS. COUNSEL J. 39 (1975).

25. This expression was mentioned in the majority opinion of the California Supreme Court in *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 734, 144 Cal. Rptr. 380, 385, 575 P.2d 1162, 1167 (1978), but the court refuted the argument.

26. WIS. STAT. ANN. § 895.045 (West 1979) provides: "Contributory negligence shall not bar recovery in an action by any person . . . if such negligence was not greater than *the negligence* of the person against whom recovery is sought, but any damages shall be diminished in the proportion to the amount of negligence attributable to the person recovering." (Emphasis added.)

27. 37 Wis. 2d 443, 155 N.W.2d 55 (1967).

statute is violated. This approach was reiterated and elaborated seven years later in *Powers v. Hunt-Wesson Foods, Inc.*[28] No other court has followed that course of reasoning in addressing the problem under consideration.[29] This "strange" Wisconsin approach has led the court into a doctrinal morass, and in the years following *Powers* the court has made several attempts to extricate itself. Its efforts are discussed thoroughly and entertainingly elsewhere by Professor Twerski.[30]

Another device that has been used to avoid the theoretical and conceptual difficulties of comparing negligent and non-negligent conduct is the concept of "comparative causation."[31] The fact finder determines the comparative causal effect of defendant's non-negligent conduct and that of plaintiff's negligence. To the degree that plaintiff's negligence contributed to his injury, his damages are reduced in conformity with the state's comparative methods. This kind of reasoning may not only solve the theoretical problem, but may also overcome the limitations in a state's comparative negligence statute. That is apparently what happened in Texas in *General Motors Corp. v. Hopkins*.[32] The Texas comparative negligence statute allows contributory negligence as a complete defense if it is more than 50% of the total negligence in the case. Texas also imposes strict tort liability on manufacturers of defective products.[33] The supreme court held that if a defective product is misused, a comparison should be made of the causative effects of the defect and of the misuse and the respective percentages thereof (totalling

28. 64 Wis. 2d 532, 535-37, 219 N.W.2d 393, 395 (1974).

29. In *Busch v. Busch Construction, Inc.*, 262 N.W.2d 377 (Minn. 1977), the Minnesota Supreme Court paid homage to the Wisconsin result because "our adoption of the Wisconsin comparative negligence statute [in 1969] presumed our adoption of the Wisconsin Supreme Court's interpretation of the statute up to that point." *Id.* at 393. The Minnesota opinion, however, reflects greater sympathy with the "comparative causation" analysis. The Minnesota statute, MINN. STAT. ANN. § 604.01 (1969), was amended in 1978 to change to comparative *fault* terminology and to define "fault" to include conduct that subjects a person to strict liability.

30. *See* Twerski, *From Defect to Cause to Comparative Fault—Rethinking Some Products Liability Concepts*, 60 MARQ. L. REV. 297, 319 (1977).

31. The United States District Court of Idaho was one of the first to suggest the innovative doctrine of comparing causation. Sun Valley Airlines, Inc. v. Avco-Lycoming Corp., 411 F. Supp. 598 (D. Idaho 1976). The district judge wrote that the rationale of that state's comparative negligence statute "extends to a comparison of all legal causes of the plaintiff's injuries and results in a sensible and fair method of loss allocation." *Id.* at 603.

The Idaho statute provides for comparison of plaintiff's contributory negligence "if such negligence was not as great as the negligence or gross negligence of the person against whom recovery is sought." IDAHO CODE § 6-801 (1971).

32. 548 S.W.2d 344 (Tex. 1977).

33. TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon 1973).

100%) determined. Plaintiff's damages are then reduced by the percentage of causation attributable to the misuse. The court then wrote: "This comparison and division of causes is not to be confused with the statutory scheme of modified comparative negligence which bars all recovery to the plaintiff if his negligence is greater than the negligence of the parties against whom recovery is sought."[34]

The Court of Appeals for the Ninth Circuit in an admiralty case[35] held that strict liability applied to products supplied by manufacturers and that the concept of comparative fault, long applicable to personal injury cases under the Jones Act[36] and the Death on the High Seas Act,[37] would also be applied to products liability. The court uses the term "comparative causation," stating that it "is a conceptually more precise term than 'comparative fault' since fault alone without causation does not subject one to liability." At the end of the discussion the court states, "It comes down to this: the defendant is strictly liable for the harm caused from his defective product, except that the award of damages shall be reduced in proportion to the plaintiff's contribution to his own loss or injury."[38]

An interesting evolution of this nature took place in New Hampshire. In 1969 the New Hampshire legislature adopted a modified comparative negligence statute.[39] For several years thereafter it was assumed by the federal courts in the first circuit that the New Hampshire Supreme Court would extend the principles of that statute to strict liability cases.[40] In 1978, however, that court refused to do so.[41] Instead, it held that "strict liability" is a judicially created doctrine, to which the principle of comparative causation should be applied. This principle, said the court, will avoid the difficulties of semantics, which become extremely important when the trial judge attempts to convey these concepts to a jury in his charge. The effect of the doctrine is that if plaintiff establishes the basis for a strict liability claim, "the jury must weigh the plaintiff's misconduct, if any, and reduce the amount of damages by the percentage that the plaintiff's misconduct contributed to cause his loss or injury so long as it is not greater than fifty percent."[42]

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34. 548 S.W.2d at 352.

35. Pan-Alaska Fisheries, Inc. v. Marine Constr. and Design Co., 565 F.2d 1129 (9th Cir. 1977).

36. 46 U.S.C. § 688 (1976).

37. 46 U.S.C. §§ 761 & 766 (1976).

38. 565 F.2d at 1139.

39. N.H. REV. STAT. ANN. § 507:7-a (1969 & Supp. 1970).

40. Cyr v. B. Offen & Co., Inc., 501 F.2d 1145 (1st Cir. 1974); Stevens v. Kanematsu-Gosho Co., 494 F.2d 367 (1st Cir. 1974); Hagenbuch v. Snap-On Tools Corp., 339 F. Supp. 676 (D. N.H. 1972).

41. Thibault v. Sears, Roebuck & Co., 395 A.2d 843 (N.H. 1978).

42. *Id.* at 850.

A number of courts that have applied comparative negligence statutes in strict tort liability cases have not found it necessary to resort to unique reasoning processes. They have disposed of the theoretical difficulties adequately, but the principal factors influencing them seem to be certain pragmatic considerations and their conviction that justice and desirable public policy call for the result reached.

In 1976 the Alaska Supreme Court concluded that its judge-made "pure" comparative negligence doctrine would apply to strict products liability cases.[43] It emphasized the anomalous situation that would exist if damages were reduced when a negligent plaintiff won against a negligent manufacturer, but would not be reduced if the same plaintiff won against a non-negligent manufacturer.

One of the most helpful opinions in this area is that issued in 1978 by the California Supreme Court in *Daly v. General Motors Corp.*[44] The California court had previously adopted a "pure" comparative negligence system by judicial decision.[45] In *Daly* it extended that doctrine to strict liability cases. The court answered squarely opposing arguments of a conceptual and semantic nature,[46] but laid particular stress on the point that among the "felicitous" results of its decision would be equitable apportionment of loss. In agreeing with the Alaska court concerning the peculiar result that an opposite decision would bring, it observed that such a juridical arrangement "rewards adroit pleading and selection of theories" and would be a "bizarre anomaly."[47]

The United States District Court for Kansas held that the Kansas comparative negligence statute applies to strict tort liability in products cases.[48] It expressly disagreed with the Oklahoma Supreme Court's decision in *Kirkland* and pointed to the result in that case (complete barring of plaintiff's action) as an illustration of the harsh outcome that follows if comparative negligence does not enter into the decision. The opinion contains an excellent discussion of the considerations entering into the application of comparative fault principles.

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43. Butaud v. Suburban Mar. & Sporting Goods, Inc., 555 P.2d 42 (Alas. 1976). The Alaska Supreme Court adopted "pure" comparative negligence in *Kaatz v. Alaska*, 540 P.2d 1037 (Alas. 1975).

44. 20 Cal. 3d 725, 144 Cal. Rptr. 380, 575 P.2d 1162 (1978).

45. Li v. Yellow Cab Co., 13 Cal. 3d 804, 119 Cal. Rptr. 858, 532 P.2d 1266 (1975).

46. To the "apples and oranges" argument the court replied that the term "contributory negligence" may itself be a misnomer, "since it lacks the first element of the classical negligence formula, namely, a duty of care owing to another. . . . Contributory fault would be a more descriptive term." 20 Cal. 3d at 735, 144 Cal. Rptr. at 386, 575 P.2d at 1168.

47. *Id.* at 738, 144 Cal. Rptr. at 387, 575 P.2d at 1169.

48. Stueve v. American Honda Motors Co., 457 F. Supp. 740, 750 (D. Kan. 1978).

The Florida Supreme Court in response to an inquiry received from the United States Court of Appeals for the Fifth Circuit ruled that manufacturers of defective products were strictly liable in tort and that the comparative negligence statute applied.[49] Upon receipt of this answer the court of appeals adjusted a judgment in favor of plaintiff to reflect the comparison, reducing it by 35%.[50]

The fifth circuit, applying Mississippi law, reached a similar result.[51] The court noted that the issue had not been considered by the Mississippi Supreme Court but based its decision on its belief that that court would follow the urging of Professor Wade in his 1973 article in the *Mississippi Law Journal*.[52]

THE DOCTRINAL SITUATION IN LOUISIANA

The extent to which plaintiff's conduct is a defense in actions based on strict tort liability has not been developed fully in Louisiana. In the recently announced areas of such liability under articles 2317, 2321, and 2318, it seems quite clear that contributory fault is a defense. In each of the cases, *Holland v. Buckley*,[53] *Turner v. Bucher*,[54] and *Loescher v. Parr*,[55] the court expressly stated that three defenses are available to exculpate defendant from liability, the first one being a showing "that the harm was caused by the fault of the victim." Since those decisions, there have been three cases denying liability under article 2321, two of them based on contributory negligence[56] and one on assumption of risk.[57] Under article 2318 there has been one case in which liability was defeated by the victim's negligent act[58] and one recognizing assumption of risk as defeating liability.[59] Under article 2317 two cases have denied recovery to the injured person because of contributory fault,[60] and one

49. West v. Caterpillar Tractor Co., 336 So. 2d 80, 90 (Fla. 1976).

50. West v. Caterpillar Tractor Co., 547 F.2d 885, 887 (5th Cir. 1977).

51. Edwards v. Sears, Roebuck & Co., 512 F.2d 276, 290 (5th Cir. 1975).

52. Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825 (1973).

53. 305 So. 2d 113 (La. 1974).

54. 308 So. 2d 270 (La. 1975).

55. 324 So. 2d 441 (La. 1975).

56. Parker v. Hanks, 345 So. 2d 194 (La. App. 3d Cir.), *cert. denied*, 346 So. 2d 224 (La. 1977); Dotson v. Continental Ins. Co., 322 So. 2d 284 (La. App. 1st Cir. 1975), *cert. denied*, 325 So. 2d 606 (La. 1976).

57. Fontenot v. Soileau, 336 So. 2d 1006 (La. App. 3d Cir. 1976).

58. Hebert v. United Serv. Auto. Ass'n, 355 So. 2d 575 (La. App. 3d Cir. 1978).

59. Thibo v. Aetna Ins. Co., 347 So. 2d 20 (La. App. 3d Cir.), *cert. denied*, 350 So. 2d 674 (La. 1977).

60. 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).

has denied it on the basis of assumption of risk.[61]

In the area of strict tort liability for ultrahazardous activities the situation is less clear. In *Langlois v. Allied Chemical Corp.*,[62] involving the escape of poisonous gas, defendant admitted it was responsible for the damage caused by the escape of the gas and that negligence was not the criterion for determining its responsibility. Nevertheless, it argued that under either the theory of contributory negligence or that of assumption of risk plaintiff could and should have avoided the damage he suffered. In the course of his opinion, Justice Barham made the following pertinent remarks: "The defense of contributory negligence which is urged here presupposes original negligence on the part of the defendant. This case is not a case where negligence is an ingredient of fault, and contributory negligence is not a defense."[63] However, as to assumption of risk he wrote: "A plaintiff who with full knowledge and appreciation of the danger voluntarily exposes himself to the risks and embraces the danger cannot recover damages for injury which may occur."[64] Thus, it would appear that in this category of cases inadvertent contributory negligence, involving only a failure to use due care to observe or discover a danger or to guard against its existence, would not be a defense, whereas the voluntary encountering of a known danger could be a defense.

In the area of strict tort liability for defective products, the extent to which plaintiff's contributory negligence or assumption of risk may be a defense has yet to be answered definitively.[65] Generally, common law jurisdictions follow a similar approach: while the kind of contributory fault that involves use of the product with full realization of the defect and resultant danger (assumption of risk) is a defense, inadvertent contributory fault in the sense of failure to identify the danger or guard against the possibility of its existence is not.[66] In *Hastings v. Dis Tran Products, Inc.*,[67] United States District Judge Hunter, after examining the Louisiana cases and relying

61. Richards v. Marlow, 347 So. 2d 281 (La. App. 2d Cir. 1977). For a thorough analysis and discussion of the above cases *see* Comment, *supra* note 12.

62. 258 La. 1067, 249 So. 2d 133 (1971).

63. *Id.* at 1086, 249 So. 2d at 140.

64. *Id.* In some states the comparative negligence system has prompted the incorporation of assumption of risk doctrines into contributory negligence. *E.g.*, Li v. Yellow Cab Co., 13 Cal. 3d at 829, 119 Cal. Rptr. at 875, 532 P.2d at 1243; Gilson v. Drees Bros., 19 Wis. 2d 252, 258-59, 120 N.W.2d 63, 67 (1963).

65. Consideration is not given here to misuse or alteration of the product since that defense goes to establishing that the product was not defective in the first instance.

66. RESTATEMENT (SECOND) OF TORTS § 402A, comment n (1965).

67. 389 F. Supp. 1352 (W.D. La. 1975).

heavily on Justice Barham's language quoted above, wrote "The direction, tone and attitude of the Louisiana cases persuade me that the Louisiana Supreme Court will continue its development of the doctrines of strict liability in conformance with the Restatement."[68] Accordingly he reached the conclusion that contributory negligence is not a defense to strict tort liability when such negligence consists merely in a failure to discover the defect or to guard against the possibility of its existence, nor is contributory negligence "in a broad sense (the ordinary prudent man test)" a defense. A defense does exist if plaintiff's conduct takes the form of voluntarily and unreasonably proceeding to encounter a known danger, "which commonly passes under the name of assumption of risk."[69] The same view was taken in two subsequent federal cases.[70]

THE EFFECT OF THE LOUISIANA COMPARATIVE NEGLIGENCE STATUTE

It seems apparent from the foregoing that plaintiff's conduct contributing to his injury has played and will continue to play an important defensive role in strict tort liability litigation in Louisiana. We turn then to the effect that the comparative negligence statute is likely to have.

The Statutory Language

The material provisions of the Louisiana comparative negligence statute enacted during the regular session of 1979 consists of amendments to article 2323 of the Civil Code and article 1811 of the Code of Civil Procedure.

Amended article 2323 provides as follows:

> When contributory negligence is applicable to a claim for damages, its effect shall be as follows: If a person suffers injury, death or loss as the result partly of his own negligence and partly as a result of the *fault* of another person or persons, the claim for damages shall not thereby be defeated, but the amount of damages recoverable shall be reduced in proportion to the degree or percentage of *negligence* attributable to the person suffering the injury, death or loss.[71]

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68. *Id.* at 1358.

69. *Id.* at 1359.

70. Khoder v. AMF, Inc., 539 F.2d 1078 (5th Cir. 1976); Le Bouef v. Goodyear Tire & Rubber Co., 451 F. Supp. 253 (W.D. La. 1978). For a complete discussion of the entire subject matter *see* Robertson, *supra* note 7. *See also* Comment, *Defense to a Louisiana Products Liability Action*, 25 LOY. L. REV. 93 (1979).

71. 1979 La. Acts, No. 431, § 1, *amending* LA. CIV. CODE art. 2323 (emphasis added).

Implementation of the provision under amended article 1811 of the Code of Civil Procedure is by means of a special verdict. The special verdict will serve to determine whether the defendant was at *fault*, whether such fault was a proximate cause of the damages, and the degree of such fault expressed in percentage. Similarly, with respect to any party claiming damage, the jury must make a finding as to the existence of *negligence* attributable to him, whether it was a proximate cause of the damages, and the degree of such negligence expressed in percentage.

This is a so-called "pure" comparative negligence statute. Such a statute is differentiated from the limited or qualified statutes, which cut off plaintiff's claim entirely if his negligence is equal to or in some states greater than the fault attributable to defendant.

The terminology of the statute evidences commendable craftsmanship, particularly with respect to its effect on the issue with which this article is concerned. It will be noted that the statute is designed to function in any case in which "contributory negligence is applicable to a claim for damages." It does not purport to designate the classes of actions in which contributory negligence is applicable; that is left to the courts. Further, the elements in the case that are to be compared are found in the terms prescribing that the statute applies where plaintiff's injury is incurred "as the result partly of his own (plaintiff's) *negligence* and partly as a result of the *fault* of another person or persons." The reference to "negligence" on the part of the plaintiff and "fault" on the part of defendant is carried through into the procedural provisions of the statute. The special verdict of the jury must identify the percentage of "fault" on the part of the defendant and the percentage of "negligence" on the part of plaintiff.

The statutory language mentioned is of crucial significance to the problem we are considering. As indicated in the previous discussion, the comparative negligence statutes of many common law states refer to defendant's "negligence" and plaintiff's "negligence," or apply to actions for damages based on defendant's "negligence." Such language has caused their courts' conceptual and semantic difficulties. The terminology of the Louisiana statute ought to free its courts of any such troubles. The concept of "fault" in Louisiana law is a broad one.[72] Justice Barham's opinion in *Langlois* includes an informative discussion of the nature of fault.[73] After pointing out

72. In two cases involving pile driving damage, negligence was referred to as "an example of fault." *See* Craig v. Montelepre, 252 La. 502, 513, 211 So. 2d 627, 631 (1968); Gulf Ins. Co. v. Employers Liab. Assurance Corp., 170 So. 2d 125, 127 (La. App. 4th Cir. 1964).

73. 258 La. at 1076, 249 So. 2d at 136.

that the term as used in article 2315 includes more than "negligence," "imprudence," or "want of skill" as enumerated in article 2316, Justice Barham articulates the theory of the imposition of liability as follows:

> Here we find that proof that the gas escaped is sufficient, and proof of lack of negligence and lack of imprudence will not exculpate the defendant. The defendant has injured this plaintiff *by its fault* as analogized from the conduct required under Civil Code Article 669 and others, and responsibility for the damage attaches to defendants under Civil Code Article 2315.[74]

In the three relatively recent cases imposing strict liability the concept of "fault" is further elaborated. *Holland* held the owner of a domesticated animal strictly liable for the damage it caused. According to the court, in that circumstance "the master of the animal is presumed to be at fault."[75] In *Turner*, holding a parent strictly liable for the delicts of his minor child, the court stated that the parent was "legally at fault" and that such fault "is determined without regard to whether the parent could or could not have prevented the act of the child, *i.e.*, without regard to the parent's negligence."[76] Similarly in *Loescher*, in which the owner of land was held strictly liable for the fall of a tree, the court indicates that the "fault" of the defendant is based upon his failure to prevent the person or thing for which he is responsible from causing unreasonable risk of injury to others. According to Justice Tate, the defendant's "fault rests upon his failure to prevent the risk-creating harm and upon his obligation to guard against the condition or activity (by the person or thing for which he is responsible) which creates the unreasonable risk of harm to others."[77]

Almost thirty years ago Professor Ferdinand F. Stone listed the three traditional touchstones of tort liability as criminal conduct, intentional wrong, and negligence, and suggested a fourth to be denominated "legal fault."[78] Stone expressed his analysis as follows:

> It is suggested that the new touchstone of tort liability which is emerging is *legal fault* or a falling below the standard of conduct set by those forces in society which have powers of social control. It is as yet too early (even if it were ever advisable) to state the precise content of the touchstone of legal fault. Certain it is, however, that within it may be contained the

74. *Id.* at 1083, 249 So. 2d at 140 (emphasis added).
75. 305 So. 2d at 119.
76. 308 So. 2d at 277.
77. 324 So. 2d at 446.
78. Stone, *Touchstones of Tort Liability*, 2 STAN. L. REV. 259 (1950).

> earlier touchstones of unlawfulness, intention, and negligence, and yet these do not comprise the whole. There is more. It is a wide term and purposely so.[79]

The modern thinking of the Louisiana Supreme Court seems to parallel that of Professor Stone.

The conclusion suggested by the foregoing authorities seems clear. There are no conceptual or semantic barriers to the application of the Louisiana comparative negligence statute in cases involving strict tort liability. The legislative directive is to compare plaintiff's contributory "negligence" with defendant's "fault" in any claim for damages in which contributory negligence is applicable. The Louisiana Supreme Court has already decided that in certain actions for damages based on strict tort liability contributory negligence is applicable. Perhaps the only remaining point for inquiry is whether any consideration of public policy should prevent application of the statute.

Policy Considerations

It is in the field of strict tort liability for defective products that the strongest policy differences have surfaced with respect to application of comparative principles. Those who oppose their application argue that enterprise liability is the primary underlying policy; "public policy demands that the burden of accidental injuries caused by products intended for consumption be placed on those who market them, and be treated as a cost of production against which liability insurance can be obtained."[80] This basic policy is defeated to the extent that plaintiff's recovery is reduced by comparative negligence, for only a part of the loss falls on the party who can distribute it and the other part is borne by the consumer or bystander who cannot do so.[81]

The argument advanced by those who favor application of comparative principles is that enterprise liability was not intended solely as a loss distribution mechanism. In the words of Justice Traynor in *Greenman v. Yuba Power Products, Inc.*,[82] the fountainhead of strict products liability, "The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by

79. *Id.* at 283. *See also* F. STONE, TORT DOCTRINE § 61, in 12 LOUISIANA CIVIL LAW TREATISE 89 (1977).

80. RESTATEMENT (SECOND) OF TORTS § 402A, comment c (1965).

81. *See* Hickey, *Comparative Fault and Strict Products Liability: Are They Compatible?*, 5 PEPPERDINE L. REV. 501 (1978).

82. 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1963).

the injured persons *who are powerless to protect themselves.*"[83] A plaintiff who is contributorily negligent, at least in the sense of assuming a known risk, can scarcely be said to be "powerless" to protect himself.

Furthermore, it is unreasonable to expect other consumers of a product to bear the *total* cost of losses attributable in part to plaintiff's misconduct.[84] Indeed, from the standpoint of general social welfare it would seem desirable to encourage due care and prudence on the part of consumers and users as well as manufacturers.[85]

The conventional economic theory underlying strict products liability is that defendants, who are manufacturers or sellers, are in a position to distribute the loss among the consuming public through insurance or product pricing. Over twenty years ago, before the fall of the citadel, this writer questioned the soundness of that theory as a generality.[86] In the case of the industrial giant, such as General Motors, with millions of product units each carrying a relatively high price tag, the theory may have some merit. In the case of the small manufacturer or other business facing strong competition, the theory has not worked well. One has only to examine the Report of the Federal Interagency Task Force on Product Liability to realize the havoc the theory has caused in some fields and the reason for the attacks on the product liability reparation system that have developed at the federal and state levels.[87] Comparative negligence is one mechanism by which there may be mitigation of some degree of the destructive effects that have developed.[88]

The California Supreme Court, which many consider the parent of the entire structure of strict products liability, has consistently taken the position that the primary policy involved is simply one of relieving the plaintiff from the unfair or impossible problem of proof inherent in pursuing negligence.[89] Reducing plaintiff's recovery in

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83. *Id.* at 63, 27 Cal. Rptr. at 701, 377 P.2d at 901 (emphasis added).

84. Pinto, *Comparative Responsibility—An Idea Whose Time Has Come*, 45 INS. COUNSEL J. 115 (1978); Schwartz, *Strict Liability and Comparative Negligence*, 42 TENN. L. REV. 171, 179 (1974); Note, *Comparative Negligence in a Strict Products Liability Action*, 14 IDAHO L. REV. 723 (1978).

85. Pinto, *supra* note 84.

86. Plant, *Strict Liability of Manufacturers for Injury Caused by Defects in Products—An Opposing View*, 24 TENN. L. REV. 938 (1957).

87. *See Executive Summary for the Final Report of the Federal Interagency Task Force on Product Liability*, 1977 INS. L.J. 686; Epstein, *Products Liability: The Search for Middle Ground*, 56 N.C. L. REV. 643 (1978); Schwartz, *Proposed Remedies for the American Problem: U.S. Government Activity*, 29 MERCER L. REV. 437, 440 (1978).

88. *See* Kroll, *Comparative Fault: A New Generation in Products Liability*, 1977 INS. L.J. 492.

89. *See, e.g.*, Daly v. General Motors Corp., 20 Cal. 3d at 736, 144 Cal. Rptr. at 386, 575 P.2d at 1168.

proportion to his own fault would seem entirely consistent with that purpose.

Another policy argument in opposition to applying comparative principles to products liability relates to the effect strict tort liability is thought to have on manufacturers in inducing them to produce products that are free from defect. Professor Twerski fears that by utilizing comparative principles, "we may be reducing the defendant's financial exposure to the point where maintaining the design defect becomes economically prudent."[90] This argument has been discounted as not convincing[91] and as "more shadow than substance."[92]

If the weight of the policy arguments is measured on the basis of their reception by the courts, the score is decidedly in favor of those who advocate application of comparative principles. Not only have the majority of decisions applied such principles but those that have rejected application have not based their position on policy grounds. The refusal has been for conceptual or semantic reasons rather than policy considerations.[93]

With respect to other kinds of human conduct in which strict tort liability is imposed, there does not seem to be any basic or pervasive public policy that would compete with the policy underlying comparative negligence. Adoption of a comparative negligence statute represents a legislative purpose that the harsh, complete bar to recovery imposed by the old contributory negligence rule should be put aside in favor of an equitable allocation of loss between plaintiff and defendant. Certain abnormally dangerous activities which are socially desirable are so likely to harm others that the law tells the one pursuing them that he is free to do so, but must pay for the harm he causes despite his use of due care or the utmost care. To the extent that contributory negligence in whatever form is a defense he is relieved of that obligation. But there is nothing in the basic strict liability policy that requires that defendant pay all and plaintiff fault be ignored. A similar view is warranted as to parents, owners of animals, and owners or custodians of things. For reasons that have roots deep in the history of the Louisiana Civil Code such persons carry the burden of strict liability; but the Louisiana courts have repeatedly held that the obligation is not absolute and can be extinguished by plaintiff's negligence.[94] If contributory negligence is

90. Twerski, *The Use and Abuse of Comparative Negligence in Products Liability*, 10 IND. L. REV. 797, 802 (1977).

91. Wade, *Products Liability and Plaintiff's Fault—The Uniform Comparative Fault Act*, 23 MERCER L. REV. 373, 387 (1978).

92. *See* Daly v. General Motors Corp., 20 Cal. 3d at 737, 144 Cal. Rptr. at 387, 575 P.2d at 1169.

93. See section entitled "Experience in Common Law States," *supra.*

94. See section entitled "The Doctrinal Situation in Louisiana," *supra.*

pertinent in such cases it seems to follow that comparative negligence as legislatively imposed is also pertinent.

If comparative principles are not allowed to function there will be the paradoxical situation in strict liability areas in which a defendant who admits or is proved to be negligent will be liable for only part of the damages caused to a contributorily negligent plaintiff, whereas a defendant who is entirely innocent and has done his best, albeit unsuccessfully, to avoid causing injury will be liable for all damages including the portion caused by the negligent plaintiff. This and similar possibilities, as recognized by some courts, will promote adroit gamesmanship in pleading and practice that decades of reform effort have sought to eliminate from our system of justice.[95]

Finally, the most compelling policy reason for extending comparative principles to strict tort liability areas was well stated by the California Supreme Court in the following language:

> We conclude, accordingly, that the expressed purposes which persuaded us in the first instance to adopt strict liability in California would not be thwarted were we to apply comparative principles. What would be forfeit is a degree of semantic symmetry. However, in this evolving area of tort law in which new remedies are judicially created, and old defenses judicially merged, impelled by strong consideration of equity and fairness we seek a larger synthesis. If a more just result follows from the expansion of comparative principles, we have no hesitancy in seeking it . . . .[96]

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95. Butuaud v. Suburban Mar. & Sporting Goods, Inc., 555 P.2d 42, 46 (Alas. 1976); Daly v. General Motors Corp., 20 Cal. 3d at 738, 144 Cal. Rptr. at 387, 575 P.2d at 1169.

96. Daly v. General Motors Corp., 20 Cal. 3d at 737, 144 Cal. Rptr. at 387, 575 P.2d at 1169.