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Torts

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TORTS

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Kent v. Gulf States Utilities Co.[1] effectively overrules *Loescher v. Parr*[2] in a dramatic and largely unexplained philosophical about-face by the Louisiana Supreme Court.

A workman using a long, metal-handled rake to groove a just-poured concrete roadway touched the handle to an overhead high-voltage electric line and suffered severe injuries, for which the jury unanimously found Gulf States liable. The court of appeal found that the plaintiff had assumed the risk and that the jury was "clearly wrong" in finding otherwise.[3] The supreme court found Gulf States to be nonnegligent, without mentioning whether the jury was "clearly wrong," and affirmed the court of appeal.

Loescher is effectively overruled because *Kent* now requires proof of a defendant's failure to use reasonable care[4] in order to support a finding of his liability for injury created by a defective thing under his control. *Loescher* had specifically dispensed with any requirement that the plaintiff prove personal negligence on the part of the defendant.

This philosophical about-face is left unexplained. The only reason given in the opinion for this drastic revision of the burden of proof under *Loescher* is that the meaning of *Loescher* has been "misunderstood." There is no discussion in *Kent* of the societal values sought to be served by turning to negligence for the foundation of the action under Civil Code articles 2317, 2318, 2319, 2320, 2321, and 2322. In sharp contrast, *Turner v. Bucher*,[5] *Holland v. Buckley*,[6] and *Loescher* each explicitly stated that its theory of liability was chosen to balance the interest of an innocent injured party against the custodian whose thing, child, or animal caused the injury through an

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1. 418 So. 2d 493 (La. 1982).
2. 324 So. 2d 441 (La. 1976).
3. 398 So. 2d 560 (La. App. 1st Cir. 1980), *aff'd* 418 So. 2d 493 (La. 1982).
4. It is not clear from the opinion whether the defendant's failure to use care is an element of the plaintiff's burden of proof in making a prima facie case, or whether the defendant's failure to use care is presumed, allowing the defendant to make out a defense by proving due care.
5. 308 So. 2d 270 (La. 1975).
6. 305 So. 2d 113 (La. 1974).

unreasonable risk of harm, while the custodian enjoyed the benefits of the thing.

The sole reason given in *Kent* for the reinterpretation of *Loescher* is that the case "has largely been either misunderstood or completely disregarded."[7] The opinion cites no examples or cases of the misunderstanding or disregard. One who has followed closely the evolution of the *Loescher* action through the Louisiana Supreme Court and the courts of appeal could reasonably regard the jurisprudence thus developed as following closely the scheme laid down in *Loescher*. The only aberrations or missteps have been well within the parameters of the lurching and rumbling ordinarily attendant upon the courts' application of new legal doctrine to specific cases.

To illustrate, numerous cases have correctly focused on the fact that a flaw or vice may be present in a thing such as a street, and yet the flaw or vice, even though causing injury, does not constitute an unreasonable risk of harm.[8] The courts of appeal and the Louisiana Supreme Court have demonstrated fully that they are masters of the technique of utilizing the *Loescher* doctrine of strict liability, while showing sufficient flexibility to differentiate among defects that cause harm but do not carry strict liability, as opposed to those which in the sound judgment of the court constitute too much risk for society to tolerate. The mind of the juror or judge assessing the unreasonable risk of harm presented by a thing exercises precisely the same value judgments as does the juror or judge evaluating a defendant's personal conduct to determine if an unreasonable risk has been created under ordinary negligence theory. The important difference in the original *Loescher* theory is that the plaintiff need only prove the unreasonable risk presented by the thing, without having to prove that the conduct of the custodian in allowing the thing to get into that shape was also unreasonable. The essence of the *Loescher* doctrine, overlooked in *DeBattista v. Argonaut-Southwest Insurance Co.*,[9] is that the flexibility of a balancing process is available to the courts in the examination of the unreasonableness of the risk presented by the thing, just as it is in an examination of the unreasonableness of conduct.

The practical effect of the *Kent* version of *Loescher* is to make

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7. *Kent*, 418 So. 2d at 497.

8. The following cases found no "unreasonable risk:" Broussard v. Pennsylvania Millers Mut. Ins. Co., 406 So. 2d 574 (La. 1981); Miller v. Smith, 402 So. 2d 688 (La. 1981); Shipp v. City of Alexandria, 395 So. 2d 727 (La. 1981); Walker v. James W. Salley, Inc., 412 So. 2d 159 (La. App. 3d Cir. 1982); Goodlow v. City of Alexandria, 407 So. 2d 1305 (La. App. 3d Cir. 1981); Usry v. Louisiana Dept. of Highways, 402 So. 2d 240 (La. App. 4th Cir. 1981).

9. 403 So. 2d 26 (La. 1981).

recovery by the plaintiff less frequent. The plaintiff now has the burden of showing not only that the condition of the thing posed an unreasonable risk, but that there was also a failure to take reasonable care to prevent its getting into that condition and causing injury. Concomitantly, the defendant is given the powerful defense of showing that even though the thing presented an unreasonable risk, he exercised reasonable care and hence should suffer no liability.

The introduction of the concept of reasonable care is far more than mere tinkering with legal theory. Tort theory is without purpose except for its effect on the compensation of injury. Compensation must be adjudicated in the adversary process of litigation. The increasing or diminishing of the defendant's or the plaintiff's burden of proof often has more effect on the compensation of a given injury than does the statement of the legal theory itself. For instance, if the facts in *Loescher* were to be adjudicated now under the *Kent* standard, the plaintiff, under an increased burden of proof not present when *Loescher* was written, could lose because of a finding that his evidence of the defendant's lack of care is inadequate, or the court or the jury might find that the defendant's showing of due care carried his burden on that issue even if the plaintiff originally had made a prima facie showing on the same point. Specifically, under *Kent*, had the owner of the magnolia tree in *Loescher* shown that a tree surgeon examined the magnolia and advised him that there was no danger of the tree's falling, that would be a sufficient offering of evidence of due care to put to the jury the question of whether the defendant had taken "reasonable steps" to prevent injury from the decayed condition (unreasonable risk) of the tree.

The foregoing problem in the *Kent* version of *Loescher* is deeper than it first appears. The *Kent* theory of liability is logically impossible to apply if "traditional notions of blameworthiness" are preserved. The opinion includes the following summary of the court's interpretation of *Loescher*:

> Accordingly, in a strict liability case in which the claimant asserts that the owner's damage-causing thing presented an unreasonable risk of harm, the *standard for determining liability* is to presume the owner's knowledge of the risk presented by the thing under his control and then to determine the reasonableness (according to traditional notions of blameworthiness) of the owner's conduct, in the light of that presumed knowledge.[10]

Assuming that the phrase "according to traditional notions of

10. 418 So. 2d at 497. (emphasis in original).

blameworthiness" refers to the theory of negligence as conventionally stated, it is practically and theoretically impossible to have *reasonable conduct* creating an *unreasonable risk.*

One of the original and definitive writings on the concept of negligence defines negligence in the following manner: "Negligence is conduct which involves an unreasonably great risk of causing damage. Due care is conduct which does not involve such a risk."[11]

The same article later states a corollary to this definition: "The test of reasonableness is what would be the conduct or judgment of what may be called a standard man in the situation of the person whose conduct is in question. . . . Anything that a standard man would do is reasonable."[12] It follows from the quoted analysis that under conventional negligence theory, it is impossible to say that reasonable conduct created an unreasonable risk, for it is the risk that gives character to the conduct; hence, it is a complete departure from traditional notions of negligence to say that the tree in *Loescher* presented an unreasonable risk of harm, but that the judge or jury could find the conduct that created the unreasonable risk to be reasonable. Conversely, if conduct is found to be reasonable, the risk, by definition, cannot be unreasonable. Therefore, *Kent* introduces a totally novel theory of liability, departing even from traditional concepts of negligence.

Under the *Kent* theory, what criteria can be used to assess the reasonableness of a defendant's conduct? Throughout the legal treatises and analyses on the subject, there is but one criterion: *i.e.*, whether or not the conduct created an unreasonable risk.[13] This goes to the very nature of negligence. If the *Kent* double incident of assessable reasonableness (the defendant's conduct and the condition of the thing) is to be maintained, then the court must give the bench and bar new criteria for determining the reasonableness of a defendant's conduct in light of factors other than the nature of the risk created, for the traditional criterion has been stricken.

Whatever may be the societal objective of *Kent*, it should have been achieved within the Civil Code, rather than within the still unsolved mysteries of the fictions of the common law of negligence, burdened as it is with its evolutionary history of the writ-thinking English courts. Professor Prosser assesses that character of common law torts in express terms:

> The shadow of the past still lies rather heavily on the law of

11. Terry, *Negligence*, 29 HARV. L. REV. 40, 40 (1915).

12. *Id.* at 47.

13. *See* 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 16.1 (1956); RESTATEMENT (SECOND) OF TORTS §§ 291-293 (1965); Terry, *supra* note 11.

> torts. When the common law first emerged, its forms of procedure were rigidly prescribed, and the plaintiff could have no cause of action unless he could fit his claim into the form of some existing and recognized writ. These "forms of action we have buried, but they still rule us from their graves."[14] . . .
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> . . . The fundamental basis of tort liability may first be divided into three parts — not because that number is traditional, but because *every case* in which liability has been imposed has rested upon one of three, *and only three*, grounds for imposing it. These are:
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> 1. Intent of the defendant to interfere with the plaintiff's interest.
> 2. Negligence.
> 3. Strict liability, "without fault," where the defendant is held liable in the absence of any intent which the law finds wrongful, *or any negligence, very often for reasons of policy.*[15]

The peril of interpreting the Civil Code by application of common law theories is illustrated in *Kent* by the pointless presumption of knowledge of the risk to establish scienter. The element of fault under the Civil Code is the parallel of scienter in the common law and, as manifested in the *Loescher* concept, is found in the *custodianship* of the thing afflicted with a condition presenting an unreasonable risk of harm. *Loescher* is clear in that it is this relationship and the enjoyment of the benefits from the thing, along with the failure to prevent the thing from being an unreasonable risk, that constitutes fault. It is unnecessary to reach into common law history, with its endless fictions, to form a structure of presumptions and foresight that would result in fault through knowledge of the risk. The Civil Code provides that fault flows from the custodial relationship, as clearly explained in *Loescher*. It is therefore simple misdirection to establish scienter, when the Civil Code relies on fault and provides fully for establishing it in a given case.

The *Kent* majority and concurring opinions express a longing for a return to the principles of negligence in order to utilize the flexibility that is built into that notion. That flexibility already is built into the *Loescher* theory in the concept of "unreasonable risk." In negligence, flexibility is found in the elements of the balancing process: *i.e.*, gravity of harm, likelihood of harm, utility of the act, and burden of prevention. The same flexible balancing process is used to determine whether a thing presents an unreasonable risk. The Loui-

14. W. PROSSER, HANDBOOK ON THE LAW OF TORTS 19 (4th ed. 1971).
15. W. PROSSER, *supra* note 14, at 26-27 (emphasis added).

siana Supreme Court has demonstrated a clear awareness of this flexibility in *Hunt v. City Stores, Inc.*[16] The *Loescher* theory, properly applied, allows the court all the flexibility it needs for finding liability in one activity, but not in another, although the two activities are very similar. The finely tuned conscience of the court, seeking to allocate the risk of injury, has a fully adequate mechanism in *Loescher*. The *Kent* approach, by returning to the morass of common law negligence, will only hamper the court's implementation of societal values.

16. 387 So. 2d 585 (La. 1980).