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DISCERNING THE PARENT'S LIABILITY FOR THE HARM INFLICTED BY A NONDISCERNING CHILD

Charles A. Marvin*

Since *Turner v. Bucher*,¹ Louisiana stands alone in imposing vicarious liability on parents for damage inflicted by their child of tender years, under the age of discernment.² *Turner* was the second in a trilogy of cases³ that have been much discussed and sometimes criticized for injecting strict liability⁴ into the fault concept of Louisiana Civil Code articles 2315-2324 for the reparation of damage that is caused to another by persons for whom we are responsible or by things which we have in our custody.⁵

Ms. Turner, a sixty-two-year-old pedestrian, was injured when she was struck from behind by a bicycle which six-year-old Gregory Bucher

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1. 308 So. 2d 270 (La. 1975).

2. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 123, at 871 (4th ed. 1971); Crawford, *The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Torts*, 36 LA. L. REV. 400, 404 (1976); Malone, *Ruminations on Liability for the Acts of Things*, 42 LA. L. REV. 979, 993 n.30 (1982). See generally RESTATEMENT (SECOND) OF TORTS §§ 283A, 316 (1965); Annot., 54 A.L.R.3d 964 (1973).

3. These cases were rendered in a 13-month period beginning October 28, 1974. *Holland v. Buckley*, 305 So. 2d 113 (La. 1974) (the dog-bite case); *Turner*, see *supra* text accompanying notes 1-2; *Loescher v. Parr*, 324 So. 2d 441 (La. 1975) (the rotten, "defective" tree case).

4. See Crawford, *supra* note 2; Malone, *supra* note 2; Comment, *Does Louisiana Really Have Strict Liability Under Civil Code Articles 2317, 2318, and 2321?*, 40 LA. L. REV. 207 (1979); see also Crawford, *Developments in the Law, 1981-1982—Torts*, 43 LA. L. REV. 607 (1982); Palmer, *In Quest of a Strict Liability Standard Under the Code*, 56 TUL. L. REV. 1317 (1982). *Holland v. Buckley*, 305 So. 2d 113, 119 n.10 (La. 1974) said, however, that strict liability was not "absolute" liability. Most of the criticism arose after *Loescher v. Parr*, 324 So. 2d 441 (La. 1975).

5. See F. STONE, TORT DOCTRINE, § 61 in 12 LOUISIANA CIVIL LAW TREATISE 85 (1977). Civil Code article 2317, applied in *Loescher v. Parr*, 324 So. 2d 441 (La. 1975), reads:

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. This, however, is to be understood with the following modifications.

Civil Code article 2318, applied in *Turner*, reads:

The father, or [and] after his decease, the mother, are responsible for the damage occasioned by their minor or unemancipated children, residing with them, or placed by them under the care of other persons, reserving to them recourse against those persons.

The same responsibility attaches to the tutors of minors.

Civil Code article 2321, applied in *Holland v. Buckley*, 305 So. 2d 113 (La. 1974), reads:

The owner of an animal is answerable for the damage he has caused; but if the animal had been lost, or had strayed more than a day, he may discharge himself from this responsibility, by abandoning him to the person who has sustained the injury; except where the master has turned loose a dangerous or noxious animal, for then he must pay for all the harm done, without being allowed to make the abandonment.

was riding on a city sidewalk. Both the district court and the court of appeal had denied her recovery, concluding that the accident was not reasonably foreseeable and that Gregory's parents had not failed to provide reasonable supervision over him.⁶ Although it agreed with the lower courts that the parents had not been negligent in the supervision of the child, the Louisiana Supreme Court permitted recovery on other grounds. The court held:

[A]lthough a child of tender years may be incapable of committing a legal delict because of his lack of capacity to discern the consequences of his act, nevertheless, if the act of a child would be delictual except for this disability, the parent with whom he resides is legally at fault and, therefore, liable for the damage occasioned by the child's act.

This legal 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. It is legally imposed strict liability.

This liability may be escaped when a parent shows the harm was caused by the fault of the victim, by the fault of a third person, or by a fortuitous event.⁷

The scholarly criticism which followed was not directed at *Turner's* result, but at what Professor Malone has called a drastic renovation of the theory of the fault concept of the Civil Code.⁸ This drastic renovation of the fault concept was not necessary to permit recovery in *Turner*. No disagreement has yet surfaced to the suggestion of Professor Malone that Ms. Turner could have recovered under the pre-*Turner* interpretation of Civil Code article 2318 because Mr. Bucher had not overcome his *presumed* fault in failing to exercise reasonable supervision of the child to guard against the particular "tortious" conduct of the child.⁹ Indeed, Professor Malone's observation that there is "nothing in [*Turner*] to suggest that the parents were unaware of their child's operation of the bicycle on a public sidewalk"¹⁰ is a modest understatement. The fourth circuit's opinion in the case mentions that Ms. Bucher testified that Gregory had regularly ridden on the sidewalk near his home during the two years he had had the bicycle.¹¹ This article will not attempt a *Malonesque* rumination on this renovation of the fault concept,¹² but will reflect briefly

6. *Turner v. Bucher*, 293 So. 2d 535 (La. App. 4th Cir. 1974).

7. 308 So. 2d at 277 (paragraphed here for clarity).

8. Malone, *supra* note 2, at 992.

9. *Id.* at 993.

10. *Id.*

11. 293 So. 2d at 536.

12. Those who were students of Professor Malone 30 years ago would have expected him to include in a typical lecture criticizing the trilogy some characteristic remarks such

on the strict liability established by *Turner*, on the defenses it mentions and on the effect of the trilogy in situations in which a tender-aged child has caused injury.

THE ELEMENTS OF THE LIABILITY

Unlike the first two cases, the third case of the trilogy, *Loescher v. Parr*,¹³ undertook to relate its strict liability for the "act" of a thing under Civil Code article 2317 with the general concept of fault under the section of the Code entitled "Of Offenses and Quasi Offenses." That concept was summarized as follows:

When harm results from the *conduct* or defect of a person or thing *which creates an unreasonable risk of harm* to others, a *person legally responsible* under these code articles *for the supervision*, care, or guardianship of the person or thing may be held liable for the damage thus caused, despite the fact that no personal negligent act or inattention on the former's part is proved. The liability arises from his *legal relationship to the person* or thing *whose conduct* or defect *creates an unreasonable risk of injuries* to others.

. . . .
The legal fault thus arising from our code provisions has sometimes been referred to as *strict liability*.¹⁴

This summary was later reaffirmed in *Entrevia v. Hood*.¹⁵ In that case, Ms. Entrevia disregarded a fence and "no trespassing" signs to go upon the porch of an abandoned and dilapidated farmhouse. She was injured when the steps collapsed as she was leaving. After adopting the *Loescher* summary, *Entrevia* then balanced the particular risk, the existence of the dilapidated steps under article 2317, against their societal value¹⁶ and held that, under the circumstances, the dilapidated steps did not constitute an unreasonable risk of harm to others. *Entrevia* explained that the manner in which it resolved the strict liability problem was similar to the process employed in determining whether a risk is unreasonable in a traditional negligence problem and in deciding the scope of duty or legal (proximate)

as: "You can imagine that when a woman gives birth to triplets—especially if they are larger than averaged sized babies and are born as the result of intermittent, rather than continuous labor—the effect on her procreative system is terribly devastating and is not readily curable." After our beloved professor enhanced his fame by his ruminations, we who read him reminisce with a *Malonesque* remark that "only he 'cud' have phrased it as he did."

13. 324 So. 2d 441 (La. 1975).

14. *Id.* at 446-47 (emphasis added).

15. 427 So. 2d 1146 (La. 1983).

16. *Id.* at 1150.

cause under the duty-risk analysis.¹⁷ Under the strict liability concept explained in *Entrevia*, the primary inquiry where the conduct of a child of tender age is at issue should be whether that *conduct* presented an unreasonable risk of harm to a particular victim.

Turner impliedly suggested such an inquiry by requiring that the conduct of the child be "tortious [or 'delictual'] when measured by normal [or usual] standards."¹⁸ The *Turner* opinion, however, left unanswered other questions concerning a parent's liability for the acts of a nondiscerning child. First, *Turner* furnished little guidance as to when a child would be considered below the age of discernment under article 2318's strict liability. The language of *Turner* carefully limits its effect to the parent of a child of tender years,¹⁹ but article 2318 contains no such limitation and applies to a parent of any minor or unemancipated child that resides with the parent.²⁰ Next, the opinion in *Turner* gave no more than passing consideration to the problem of exactly who might be strictly liable for the conduct of a nondiscerning child. *Turner* further failed to discuss the extent to which the *normal* or *usual* knowledge and experience of a child of tender age might come into play in deciding whether that child's conduct posed an unreasonable risk of injury. *Turner* also did not elaborate on the standard of care for a *victim* who is injured by the conduct of a child or explain whether the failure of the victim to exercise some standard of care might affect the determination as to whether the child's conduct posed an unreasonable risk of harm. The court stated that its holding was limited to a situation in which the victim was unwarned and unsuspecting of any impending harm from the acts of a child.²¹ Finally, the court in *Turner* did not elaborate on the defenses that it suggested would serve to defeat a strict liability claim under article 2318. Each of these problems with strict liability under article 2318 will be considered in this article.

17. *Id.* at 1149. See Comment, *supra* note 4, at 211; *cf.* RESTATEMENT (SECOND) OF TORTS § 402A (1965). Although the balancing process used to determine whether a thing or some conduct poses an unreasonable risk of harm may be similar to the balancing process employed in deciding scope of duty or negligence questions, the questions involved should not be confused. The inquiry as to whether the thing or conduct involved in a strict liability situation itself poses an unreasonable risk of harm differs from the scope of duty inquiry in the ordinary case. Under Civil Code articles 2317, 2318, and 2321, if it is concluded that the thing or conduct posed an unreasonable risk of harm, then the person having custody of the thing or the actor *is* liable and there is no need to further inquire as to the scope of the custodian's duty or to determine whether the unreasonable risk posed by the thing or conduct resulted from some breach of that duty by the custodian as in article 2315 fault cases. See *Turner*, 308 So. 2d at 277.

18. 308 So. 2d at 277.

19. *Id.* at 277. *But see* Gremillion v. State Farm Mut. Ins. Co., 334 So. 2d 205 (La. 1976) (dissents from denial of writ).

20. LA. CIV. CODE art. 2318, quoted *supra* note 5.

21. 308 So. 2d at 277.

THE AGE OF DISCERNMENT

Louisiana courts have held with some consistency that children above ten years of age are "discerning," while those under seven are not, insofar as the child's negligence is concerned.²² These statements should certainly be read with caution and in context because such statements have usually been made in situations in which a court was considering a child's *contributory* negligence as a bar to that child's recovery. Where the child's primary negligence has been at issue, the courts have shown a less solicitous regard for the age of the child, particularly where the child was engaged in an activity normally reserved for more mature persons.²³ *Faia v. Landry*,²⁴ in which an eight and one-half-year-old child appropriated and drove an automobile causing injury, recognized a "twilight zone" of discernment encompassing minors between the ages of seven and ten years.²⁵ *Faia* correctly observed that age alone is not determinative of the issue and that a plaintiff must show the capability and appreciation of the particular child in the light of the risk of danger under the circumstances of each case. *Faia's* observations correspond to the *Restatement (Second) of Torts* and to Prosser's observations.²⁶

22. See, e.g., *Ryle v. Potter*, 413 So. 2d 649 (La. App. 1st Cir. 1982) (ten-year-old); *Hebert v. United Servs. Auto. Ass'n*, 355 So. 2d 575 (La. App. 3d Cir.), *writ denied*, 356 So. 2d 1002 (La. 1978) (two-year-old); *Thibo v. Aetna Ins. Co.*, 347 So. 2d 20 (La. App. 3d Cir.), *writ denied*, 350 So. 2d 674 (La. 1977) (three-year-old); *Gremillion v. State Farm Mut. Ins. Co.*, 331 So. 2d 130 (La. App. 3d Cir.), *writ denied*, 334 So. 2d 205 (La. 1976) (ten-year-old); *Frank v. Great Am. Ins. Co.*, 196 So. 2d 50 (La. App. 3d Cir.), *writ denied*, 250 La. 739, 199 So. 2d 180 (1967) (two and one-half-year-old and one and one-half-year-old); *Scottish Union & Nat. Ins. Co. v. Prange*, 154 So. 2d 623 (La. App. 4th Cir. 1963) (six-year-old).

23. Professor Malone writes:

Statements affirming an infant's lack of capacity to behave negligently have made their appearance chiefly in cases involving accidents in which some child was struck by an adult motorist who has sought to avoid liability by insisting that the child's own contributory negligence should operate as a defense. In such situations courts everywhere have understandably shown themselves ready to minimize any claim of wrongdoing by the child. However, where it is the child itself that has inflicted the harm, and particularly where it has done so by engaging in some activity normally reserved for more mature persons, such as driving a motor vehicle or (as in one case) playing golf on a public course, the courts have shown a less solicitous regard for the youth of the offender.

Malone, *supra* note 2, at 993.

24. 249 So. 2d 317 (La. App. 4th Cir. 1971). See also *White v. Nicosia*, 351 So. 2d 234 (La. App. 4th Cir. 1977).

25. 249 So. 2d at 320.

26. RESTATEMENT (SECOND) OF TORTS § 283A (1965); W. PROSSER, *supra* note 2, § 32, at 155; see also F. STONE, *supra* note 5, at § 274, at 382.

STANDARD OF CARE

Entrevia correctly suggests that whether a child's conduct (or a thing) presents an unreasonable risk of harm under the strict liability trilogy cannot be pronounced in the abstract, but only after careful duty-risk analysis and a weighing or balancing of the particular risk against the societal value of the child's *conduct*.²⁷ The normal or usual knowledge and experience of children of a given age, as well as the type of activity in which the child is engaged, also bear upon whether the child's conduct should be considered unreasonably dangerous; age is but one factor. The relationship of the *victim* to the child, as *Turner* suggests, should also be considered in determining whether the child's conduct presents an unreasonable risk of harm to *that victim*.²⁸

If the activity is typically a *childhood* activity affecting only children, the inquiry should be whether that conduct is reasonably to be expected of children of like age, intelligence, and experience. If so, the conduct will probably not be held to represent an unreasonable risk of injury. If the activity is a typically adult activity, whether the child's conduct poses an unreasonable risk of injury will probably be decided with reference to an adult standard, *i.e.*, whether that conduct would be considered to pose an unreasonable risk of harm had it been engaged in by a reasonably prudent adult.²⁹ Where the activity may fall into either category, another problematical twilight zone may be created.³⁰ *Entrevia* properly labels this problem as one of deciding the scope of the duty and the *legal* cause of the injury that is caused in fact by the thing or the conduct in question. This is the duty-risk or proximate cause issue, the most deceptive and elusive concept in tort law and one which is not new to the courts.³¹

At this juncture, it is appropriate to consider the requirement in a strict liability claim based on the conduct of a nondiscerning child that the defendant must possess the requisite legal relationship to the child.

27. *ENTREVIA* cautions that liability should not be found simply because the thing "caused" the injury. 427 So. 2d at 1149.

28. 308 So. 2d at 277; see F. STONE, *supra* note 5, § 289, at 397-98.

29. W. PROSSER, *supra* note 2, § 32, at 155.

30. See *id.* § 32, at 155-60; Malone, *supra* note 2, at 993. Some recreational pursuits attract adults *and* children. Families engage in some activities with other families. Some very young children ride powered bicycles and go-carts, ride horses, fish and hunt, with and without adults or their supervision. Other young children, without experience, may attempt these things on their own during unsupervised play. Whether the activity poses an unreasonable risk of harm simply cannot be stated other than on a case by case basis, in the light of the circumstances of the particular child and the particular victim.

31. Malone, *supra* note 2, at 990-91.

RESIDING WITH?

In *Turner*, the supreme court stated that only those persons charged "with the legal 'garde' or care"³² of a nondiscerning child would be strictly liable for the conduct of the child. In order to recover in a strict liability action under article 2318, then, the plaintiff must establish that the defendant has the requisite legal relationship to the child. *Turner* involved the liability of both parents, who were married and residing together with the child, for the conduct of their nondiscerning minor child—a situation in which the requisite legal relationship was clearly present. The court did not address the question of exactly who could be held strictly liable under article 2318 or under what circumstances the necessary legal relationship would be found to exist. Article 2318 indicates that parents will be strictly liable only for the conduct of their unemancipated minor children residing with them. In cases of separation or divorce, however, questions may arise as to which parent a child "resides with" to whom the strict liability may attach.

The domicile of an unemancipated minor is that of his father, mother, or tutor, at least until such time as the legal custody of that child is placed with another person.³³ A child may temporarily reside with another person, but the parents are not thereby relieved of liability for the child.³⁴ Where the parent has informally placed the child "under the care of" another, however, article 2318 reserves to the parent recourse against that person, who may or may not be independently liable under articles 2316 or 2320 for the tortious conduct of the child.³⁵

Under Act 307 of 1982, the joint custody law, the father and the

32. 308 So. 2d at 274.

33. LA. CIV. CODE arts. 39, 250; *Flannigan v. Valliant*, 400 So. 2d 225 (La. App. 4th Cir. 1981); *White v. LeGendre*, 359 So. 2d 652 (La. App. 1st Cir.), writ denied, 360 So. 2d 1176 (La. 1978); *Deshotel v. Casualty Reciprocal Exch.*, 350 So. 2d 283 (La. App. 3d Cir.), writ denied, 352 So. 2d 1037 (La. 1977); *Martin v. Sanders*, 163 So. 2d 923 (La. App. 1st Cir. 1964).

34. *Watkins v. Cupit*, 130 So. 2d 720 (La. App. 1st Cir. 1961); cf. *Pizzo v. Graves*, 83-CA-606 (La. App. 5th Cir. May 30, 1984); *Rozell v. Louisiana Animal Breeders Co-op*, 434 So. 2d 404 (La. 1983) ("custody" of animal).

35. "Every person is responsible for the damage he occasions not merely by his act, but by his negligence, his imprudence, or his want of skill." LA. CIV. CODE art. 2316.

Masters and employers are answerable for the damage occasioned by their servants and overseers, in the exercise of the functions in which they are employed.

Teachers and artisans are answerable for the damage caused by their scholars or apprentices, while under their superintendence.

In the above cases, responsibility only attaches, when the masters or employers, teachers and artisans, might have prevented the act which caused the damage, and have not done it.

LA. CIV. CODE art. 2320.

mother under a decree of joint custody may be appointed co-tutors of their child of tender age, and the child then may "reside" sometimes with one parent and sometimes with the other.³⁶ The "residing with" issue should not present difficulty because the child will reside with one or the other parent after a separation or divorce, and one or both parents will be a tutor of the child.

STRICT LIABILITY DEFENSES

Each of the cases in the trilogy states that its respective strict liability may be avoided if the defendant can establish that the fault of the victim, the fault of a third person, or a fortuitous event caused the harm.³⁷

Victim Fault

The courts of appeal have not hesitated to state that the victim fault defense to the strict liability pronounced by the trilogy may encompass either assumption of the risk *or* contributory negligence or both, in some circumstances.³⁸ The supreme court has not made such an unconditional pronouncement,³⁹ although it has "accepted" certification of the question from a federal court in a defective product case.⁴⁰ After noting that contributory negligence is not a defense to strict liability at common law,⁴¹ the supreme court observed in a plurality opinion in *Dorry v. Lafleur*⁴² that this was not the law in Louisiana and that no reason existed to deny a defendant in a strict liability case the defense of contributory negligence.⁴³ However, the plurality in *Dorry* qualified this assertion with the statement that the circumstances under which a plaintiff's contributory negligence will affect his recovery should be developed case by case.⁴⁴

36. This Act amends Civil Code articles 146, 157, and 250. See Comment, *Joint Custody in Louisiana*, 43 LA. L. REV. 85 (1982).

37. *Holland v. Buckley*, 305 So. 2d 113, 118 (La. 1974) cites 2 H. MAZEAUD, TRAITÉ Théorique et Pratique de la Responsabilité Civile Delectuelle et Contractuelle §§ 107-1137 (1973) and *Turner* cites *Holland*. 308 So. 2d at 276. *Loescher* simply states the defenses. As Professor Malone has cautioned: "[Some] defenses . . . cannot be divorced from the remainder of the negligence complex without confusion, for they are integral parts of the balancing operation." Malone, *supra* note 2, at 1008.

38. See, e.g., *Falgout v. Wardlaw*, 423 So. 2d 707 (La. App. 2d Cir. 1982).

39. See *Brown v. White*, 430 So. 2d 16 (La. 1983). The court granted writs in *Brown* to consider whether contributory negligence was a defense to strict liability for a defective product under article 2317, but after reviewing the record, determined that the issue was not truly presented. *Id.* at 19; see also *infra* note 40.

40. The United States Fifth Circuit Court of Appeals has recently certified the question of whether contributory negligence is a defense to strict liability for defective products. *Bel v. Jet Wheel Blast*, 717 F.2d 181 (5th Cir. 1983), granted at 448 So. 2d 109 (La. 1984).

41. W. PROSSER, *supra* note 2, § 79, at 522.

42. 399 So. 2d 559 (La. 1981).

43. *Id.* at 561.

44. *Id.* Justice Watson concurred in the result in *Dorry*, but as Judge Watson in *Thibo*

In *Entrevia* the court stated that Ms. Entrevia's unauthorized entry on the posted property was "legally reprehensible," but did not use that statement as a basis to deny recovery.⁴⁵ A statement by the third circuit in *Hebert v. United Services Automobile Association*,⁴⁶ earlier made in *Parker v. Hanks*,⁴⁷ is appropriate at this juncture.

[T]he concept of fault of the victim in the context of cases falling under Article 2321 . . . should be given a common-sense application. . . . Whether fault of the victim in cases of this kind is the same as contributory negligence in fault based on negligence cases, remains to be fully developed. . . . Until the theoretical concept is worked out more precisely, we see no harm in . . . designating it [as contributory negligence]. However, we see no need to so do.⁴⁸

It can be called simply fault of the victim when the circumstances show that the victim was warned and suspecting of impending or foreseeable injury by the conduct of a child of tender age.⁴⁹

It appears, however, that the victim fault defense must be based on actual and substantial fault rather than any form of legally imposed fault similar to that recognized by the trilogy.⁵⁰ The strict liability cases discussing contributory negligence as victim fault often include language more appropriate to assumption of the risk.⁵¹ *Loescher* indicates that the conduct sought to be used as a defense to the strict liability of the trilogy must be a substantial factor in causing the harm-producing event.⁵² That statement suggests real and actual fault to this writer.

Many of the cases involving victim fault have concerned children and animals, and the courts have denied recovery to some nine- and ten-year-old plaintiffs who either provoke the animals to bite them or who unwisely expose themselves to a fenced or a chained animal.⁵³ On the other

v. Aetna Ins. Co., 347 So. 2d 20 (La. App. 3d Cir.), writ denied, 350 So. 2d 674 (La. 1977), he dissented to a ruling that the caretaker of a three-year-old hyperactive child assumed the risk of being injured by that child because she knew of the child's propensities.

45. 427 So. 2d at 1150.

46. 355 So. 2d 575 (La. App. 3d Cir.), writ denied, 356 So. 2d 1002 (La. 1978).

47. 345 So. 2d 194 (La. App. 3d Cir.), writ denied, 346 So. 2d 244 (La. 1977).

48. *Hebert*, 355 So. 2d at 577 (quoting *Parker*, 345 So. 2d at 199).

49. *Id.* at 578.

50. See *Babin v. Zurich Ins. Co.*, 336 So. 2d 900 (La. App. 4th Cir. 1976). For an example of a case in which legally imposed fault was asserted as a defense to strict liability under article 2321, see *Betbeze v. Cherokee Nat'l Ins. Co.*, 345 So. 2d 577 (La. App. 4th Cir. 1977), discussed *infra* text accompanying notes 56-57.

51. See *Richards v. Marlow*, 347 So. 2d 281 (La. App. 2d Cir. 1977); see also cases cited *infra* note 55.

52. 324 So. 2d at 449.

53. *Duplechain v. Thibodeaux*, 359 So. 2d 1058 (La. App. 3d Cir. 1978); *Parks v. Paola*, 349 So. 2d 896 (La. App. 1st Cir.), writ denied, 350 So. 2d 1212 (La. 1977); *Dotson*

hand, where the victims in such situations are three- and four-year-olds, the courts have allowed recovery.⁵⁴ If the plaintiff is a person who is charged with attending to the child, the courts have denied recovery and have sometimes discussed victim fault in the manner in which the ordinary assumption of risk defense is discussed.⁵⁵

Fault of a Third Person

The one case considering third person fault as a defense, *Betbeze v. Cherokee National Insurance Co.*,⁵⁶ involved two children, both aged two, and a dog. One child pulled the dog's tail, causing the dog to bite the other child. The dog owner, who brought her dog to the home where the children were playing in the yard and left him with the children, contended that, under article 2318, the strict liability fault of the father of the child who pulled the dog's tail should absolve the dog owner of her liability under article 2321. The court mentioned that it was foreseeable that young children would be attracted to, and would somehow disturb, the dog, and that the owner should not have left the dog with the children in the yard. The fourth circuit held that the legal fault vicariously imposed in *Turner* on the parent of the child of tender age, in the above circumstances, was not sufficient victim fault to allow the dog owner to escape the vicarious liability imposed upon her.⁵⁷ It seems apparent that the courts will recognize that society's general regard for children outweighs the risk created by a child's conduct when that conduct is sought to be used as a defense to the vicarious liability imposed on a dog owner. Third person fault has not been otherwise considered, and one can only speculate on the course this defense will take.⁵⁸

Fortuitous Event

A fortuitous event is defined in Civil Code article 3556(15) as "that which happens by a cause which we can not resist." *Loescher* also cited article 3556(14) and said that the gust of wind was neither unforeseeable

v. Continental Ins. Co., 322 So. 2d 284 (La. App. 1st Cir. 1975), *writ denied*, 325 So. 2d 606 (La. 1976). *But see* Vidrine v. White, 352 So. 2d 776 (La. App. 3d Cir. 1977), *writ denied*, 354 So. 2d 1376 (La. 1978); Brown v. City of Alexandria, 225 So. 2d 157 (La. App. 3d Cir. 1969).

54. *Babin v. Zurich Ins. Co.*, 336 So. 2d 900 (La. App. 4th Cir. 1976); *Adkins v. Fireman's Fund Ins. Co.*, 313 So. 2d 328 (La. App. 1st Cir. 1975).

55. *Cf. Johnson v. Butterworth*, 180 La. 586, 157 So. 121 (1934); *Thibo v. Aetna Ins. Co.*, 347 So. 2d 20 (La. App. 3d Cir.), *writ denied*, 350 So. 2d 674 (La. 1977); *Hebert v. United Servs. Auto. Ass'n*, 355 So. 2d 575 (La. App. 3d Cir.), *writ denied*, 356 So. 2d 1002 (La. 1978).

56. 345 So. 2d 577 (La. App. 4th Cir. 1977).

57. *Id.* at 579.

58. *But see Richard v. Boudreaux*, 347 So. 2d 1298 (La. App. 1st Cir. 1977) (a negligent homeowner was allowed to claim contribution from the parents of a young child who contributed to the cause of an injury to his one and one-half-year old brother).

nor of irresistible force in holding that the fortuitous event defense to the strict liability of article 2317 was not applicable under those circumstances.⁵⁹ *Loescher* observed that the arguably fortuitous event of wind must be *substantial* to be a defense to article 2317's strict liability.⁶⁰

The fortuitous event defense could conceivably arise in a suit asserting liability for the conduct of a nondiscerning child under article 2318. For example, one can imagine that a three- or four-year-old in the company of his parents might bolt from their protection and supervision when frightened by nearby lightning or thunder and might run into an elderly and perhaps innocent third person, causing injury to the third person. Such a case would squarely present the question whether the child's harm-producing conduct was caused by a fortuitous event, enabling the parents to avoid article 2318's strict liability. The fortuitous event defense remains to be charted, however, and must be considered case by case.

ENTREVIA'S EXPLANATION

The courts have not approached the problem of harm caused by a child as a problem of legal (or proximate) cause. *Turner* requires that the child's conduct be found to be tortious by normal standards,⁶¹ while *Entrevia* cautions that the mere cause in fact of injury by a thing or a person for whom we are responsible does not, of itself, warrant the imposition of the strict liability under articles 2317 and 2318.⁶² *Loescher* and *Entrevia* require that the conduct of the person for whom one is responsible must be found to create an unreasonable risk of injury to others.⁶³ *Entrevia* suggests that this finding can be made only by careful legal analysis to determine whether the thing or the conduct involved posed an unreasonable risk of harm, and by balancing the risk involved in particular conduct with the social utility of that conduct.⁶⁴

Children are encouraged to play with others, in our yards, in playgrounds, parks, and elsewhere, and to participate with family members and friends in varied recreational pursuits and in supervised and unsupervised activity. Some parents are not disturbed that children push each

59. "Superior force. Those accidents are said to be caused by superior force, which human prudence can neither foresee nor prevent." LA. CIV. CODE art. 3556(14). See also *Loescher*, 324 So. 2d at 449.

60. 324 So. 2d at 449.

61. 308 So. 2d at 277. *Turner* indicated that a parent would be strictly liable only for the conduct of a child that would be "delictual except for [the child's] disability" or "tortious when measured by normal standards." *Id.* *Loescher* subsequently attempted to explain and rationalize *Turner* by interpreting *Turner* as requiring only that the child's conduct be found to have presented an unreasonable risk of harm. 324 So. 2d at 447.

62. 427 So. 2d at 1149.

63. *Entrevia*, 427 So. 2d at 1149; *Loescher*, 324 So. 2d at 446.

64. 427 So. 2d at 1149.

other in swings, throw balls, swing bats, chase, climb, tag, tackle, operate pedal or motor powered bicycles or trail bikes, shoot BB guns and sling shots, and do other things (at proper times and places) that create risks of harm to themselves and to others. Society seems to recognize that no one can predict the actions of children, even those who are eight or nine years of age, while playing on a schoolground. In some situations involving a number of children at play, things happen so quickly that unless there is direct supervision of every child (which we recognize as being impossible), some accidents are impossible to prevent.⁶⁵ At the same time, most parents do not allow children of tender age to use inherently dangerous things such as guns at any time or place.

The courts have tacitly recognized and categorized the many factors that bear on the imposition of, or relief from, the liability of the parent for the injury that is caused by the conduct of his child. The several cases have directed inquiry to: (1) whether the instrumentality and the consequences which result from its use by the child are "dangerous;"⁶⁶ (2) whether the instrumentality, although not inherently dangerous, was being used by the child in a place and in a manner which was dangerous;⁶⁷ (3) whether the activity is an adult or childhood activity or both;⁶⁸ (4)

65. *Batiste v. Iberia Parish School Bd.*, 401 So. 2d 1224 (La. App. 3d Cir.), *writ denied*, 405 So. 2d 531 (La. 1981).

66. *See Mullins v. Blaise*, 37 La. Ann. 92 (1885) (parent held liable when his six-year-old shot a roman candle in the direction of others in the street); *Ryle v. Potter*, 413 So. 2d 649 (La. App. 1st Cir. 1982) (parent held liable when his ten-year-old shot an air rifle toward another in his backyard); *see also Phillips v. D'Amico*, 21 So. 2d 748 (La. App. Orl. 1945), *writ denied*.

In spite of the vehement argument of counsel for defendant and in spite of our recollection of our attempts years ago to persuade our parents that air guns are not inherently dangerous instrumentalities, we now find ourselves rather of a view contrary to that which we entertained in those early years, and we cannot be persuaded that air guns are the harmless playthings pictured by counsel for defendant. Surely they are capable of severely injuring anyone who may be struck by a shot discharged from one of them, and certainly they are capable of killing small birds at a considerable distance. We cannot see that the mere fact that they employ compressed air without the use of powder to propel the projectile takes them out of the category of dangerous instrumentalities and justifies their classification as harmless toys.

Id. at 751.

67. *See Turner*, 308 So. 2d 270 (parent held liable when his six-year-old rode his bicycle into the back of an unsuspecting pedestrian); *Lopez v. Buras*, 321 So. 2d 792 (La. App. 4th Cir. 1975) (parent held liable when his ten-year-old ran a powered lawn mower over the foot of another child); *Martin v. Sanders*, 163 So. 2d 923 (La. App. 1st Cir. 1964) (child held liable when he drove an automobile and caused injury; parent not responsible because grandparents had custody).

68. For cases where a child drives an automobile, *see cases cited infra* note 70; *see also Entrevia*, 427 So. 2d 1146; *Tate v. Hill*, 197 So. 2d 107 (La. App. 1st Cir.), *writ denied*, 250 La. 911, 199 So. 2d 919 (1967).

the place where the conduct occurred;⁶⁹ (5) the age and circumstances of the child and the victim;⁷⁰ and (6) the desirability of encouraging or discouraging the conduct in question.⁷¹

These inquiries, which also seem to be demanded by *Entrevia's* language, should be considered in determining blameworthiness or fault under a balancing approach that is traditional and familiar in the difficult negligence case. This is the approach that Wex Malone has suggested should not be unwisely discarded⁷² in favor of some attractive phrase or catchword.⁷³

*Kent v. Gulf States Utilities Co.*⁷⁴ was rendered by the supreme court about the same time that Professor Malone's most recent rumination was published. *Kent* presaged *Entrevia's* later and more specific emphasis that cause in fact alone should not be the basis for imposition of the strict liability created by the trilogy.⁷⁵ While there is no direct reference in *Entrevia* to Professor Malone's ruminations, one can be certain that his four decades of great service and wise counsel to the bench and bar indirectly affected *Entrevia's* reemphasis that the cause in fact of the harm in a strict liability case must also be found to have presented an unreasonable risk of harm.

The judge, the lawyer, and the legal scholar who struggle with resolution of the pressures imposed by a complex society on the fault concept of the Civil Code must appreciate Professor Malone's great contributions and his continued effort to keep the system within reasonably predictable and workable bounds.

69. See *Entrevia*, 427 So. 2d 1146; *Parks v. Paola*, 349 So. 2d 896 (La. App. 1st Cir.), writ denied, 350 So. 2d 1212 (La. 1977); *Dotson v. Continental Ins. Co.*, 322 So. 2d 284 (La. App. 1st Cir. 1975), writ denied, 325 So. 2d 606 (La. 1976).

70. See *Johnson v. Butterworth*, 180 La. 586, 157 So. 121 (1934) (plaintiff failed to state a cause of action when she did not allege that the four-year-old child who bit her had a dangerous disposition and that defendant parents knew of the danger and failed to warn plaintiff); *Thibo v. Aetna Ins. Co.*, 347 So. 2d 20 (La. App. 3d Cir.), writ denied, 350 So. 2d 674 (La. 1977) (the victim who was hired to care for the child and knew of the child's propensities, was denied recovery when a three-year-old severely jerked her).

71. *Entrevia*, 427 So. 2d 1146.

72. Malone, *supra* note 2, at 986.

73. *Id.* at 988.

74. 418 So. 2d 493 (La. 1982).

75. *Id.* at 497.

