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"Rethinking" After Comparative Fault - Baumgartner Overruled in Turner v. N.O.P.S.I.

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NOTES

*"Rethinking" After Comparative Fault— Baumgartner Overruled in Turner v. N.O.P.S.I.**

A pedestrian, Mrs. Turner, was struck by a New Orleans Public Service bus while rushing to catch the bus near the neutral ground of Canal Street.[1] Mrs. Turner sued New Orleans Public Service, Inc. and the driver of the bus for injuries she sustained. The trial court found both the driver and the pedestrian negligent, but the court, following the holding of *Baumgartner v. State Farm Mutual Automobile Insurance Co.*,[2] held that the contributory negligence of Mrs. Turner would not bar or reduce her recovery. The court of appeal affirmed.[3] The Louisiana Supreme Court, in the 7-0 plurality[4] decision of *Turner v. N.O.P.S.I.*,[5] held that *Baumgartner* is overruled and is no longer applicable under the comparative fault doctrine of Louisiana Civil Code article 2323. *Turner* was consolidated with *Drum v. United States Fidelity and Guaranty Company*, although *Drum* was distinguished from *Turner* and summarily decided.[6]

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* The writer respectfully dedicates this Note to his father, the late Mr. James Ivy Barron, Jr.

1. At least three witnesses testified that Mrs. Turner apparently did not see the bus because she ran right up to it. The bus driver testified the he was driving at about 3-5 mph during the rush hour traffic. Mrs. Turner stated that she was startled by a fellow pedestrian and realized that she was in the path of a bus. While attempting to escape, she slipped and the bus ran over her foot.

2. 356 So. 2d 400 (La. 1977). *Baumgartner* held that the contributory negligence of a pedestrian during a motorist-pedestrian accident which occurred in a crosswalk, would not bar the pedestrian's recovery.

3. 449 So. 2d 139 (La. App. 4th Cir. 1984).

4. The *Turner* decision consists of an opinion written by Chief Justice Dixon which Justice Calogero joined, four concurrences with reasons from Justices Dennis, Marcus, Lemmon and Blanche, and a concurrence in the result only by Justice Watson.

5. *Turner* is cited in several reporters: 471 So. 2d 709 (La. 1985) contains the entire case except Justice Dennis' concurrence, 475 So. 2d 765 (La. 1985) contains only Justice Dennis' concurrence, and 476 So. 2d 800 (La. 1985) contains the entire opinion. Therefore, 476 So. 2d 800 will be the cite used throughout this Note. The supreme court, after determining that comparative negligence applied, accessed the percentages of fault at ten-percent to Mrs. Turner and ninety-percent to the driver.

6. In *Drum*, the plaintiff's employer sent him on an errand into a warehouse where warehouse employees were parking trucks. Plaintiff was injured when a truck travelling in reverse hit him. The trial court applied comparative fault and found Drum to be fifty-percent at fault. The court of appeal reversed and awarded plaintiff one-hundred percent of his damages, 454 So. 2d 267 (La. App. 4th Cir. 1984). The court held that the

The significance of *Turner* cannot be properly understood until one briefly remembers the foundation upon which it lies. This foundation consists of at least three major historical developments: (1) the rule of no recovery to a plaintiff who is found to be contributorily negligent; (2) the various jurisprudential exceptions that were created to abrogate the rule; and (3) the legislative enactment (or perhaps clarification)[7] of comparative negligence in Louisiana Civil Code article 2323.

After a brief discussion of these foundational issues, this casenote will examine the rationale of *Turner* in order to predict the possible future course of comparative negligence in Louisiana. The writer will briefly discuss the future of the various jurisprudential exceptions to the absolute bar rule which were created by the court prior to the enactment of Civil Code article 2323, and will also seek to pinpoint the crucial issue of "jurisprudential methodology" that lies at the heart of these exceptions.

According to fundamental tort law, "contributory negligence" is a defense that can be raised by a negligent defendant. In Louisiana, prior to 1980,[8] an injured plaintiff's recovery would have been barred if the plaintiff's conduct had fallen below the standard of care expected of a reasonably prudent man of ordinary sensibilities, and if that conduct was both a cause in fact and a legal or proximate cause of the plaintiff's injury. Thus, under the absolute bar rule, an otherwise negligent defendant would be released from *any liability* for injuries sustained by the contributory negligence of a plaintiff. As a result, the plaintiff would bear the full amount of his damages.[9]

Because of the obvious harshness of this rule, the courts responded with various jurisprudential exceptions which included last clear chance,[10]

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pedestrian's fault, in *Drum*, was not a legal cause of the accident and thus comparative negligence was inapplicable. The supreme court found no evidence of negligence on the part of Drum and therefore affirmed the court of appeal's decision on different grounds. The court stated that comparative negligence was not applicable because Drum was not negligent.

7. Wex Malone argued unsuccessfully that Article 2303 of the Civil Code of 1825 contained a form of comparative fault. Malone, Comparative Negligence—Louisiana's Forgotten Heritage, 6 La. L. Rev. 125, 129 (1945).

8. 1979 La. Acts No. 431 amending La. Civ. Code arts. 2103, 2323, 2329 and La. Code Civ. Proc. art. 1811 became effective on August 1, 1980. Section 4 provided that: "The provision of this act shall not apply to claims arising from events that occurred prior to the time this act becomes effective." La. Civ. Code art. 2323 (comments) (West Supp. 1985).

9. For a discussion of the history of contributory negligence and the absolute bar rule, see Johnson, Comparative Negligence and the Duty/Risk Analysis, 40 La. L. Rev. 319 (1980); Note, Abrogation of the Contributory Negligence Bar in Cases of Disparate Risks, 39 La. L. Rev. 637 (1979); Comment, *Baumgartner* Revisited, 29 Loy. L. Rev. 383 (1983); Note, Abolition of Defense of Contributory Negligence in Motorist-Pedestrian Cases, 53 Tul. L. Rev. 296 (1978).

10. See Dufrene v. Dixie Auto Ins. Co., 373 So. 2d 162 (La. 1979); Starks v. Kelly,

the sudden emergency doctrine,[11] the rescuer doctrine (related to sudden emergency),[12] and momentary forgetfulness.[13] The court also developed exceptions for special factual situations, such as, motorist-pedestrian accidents,[14] highway shoulder accidents,[15] and cases involving the negligence of a minor.[16] In addition, the court has utilized the traditional causation analysis and duty/risk analysis to find the plaintiff *not* to be contributorily negligent.

The Louisiana Legislature responded to the inequity of the absolute bar rule and the general trend of the common law[17] by enacting Act 431 of 1979 which amended Civil Code article 2323, as well as other related articles. Article 2323 states:

> 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 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.[18]

This enactment set the stage for the evaluation of the effect of the new legislation on the prior jurisprudential exceptions to the absolute bar

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435 So. 2d 552 (La. App. 1st Cir. 1983); Jenkins v. Dearee, 405 So. 2d 1141 (La. App. 1st Cir. 1981); Palmer v. State, 393 So. 2d 141 (La. App. 3d Cir. 1980); Mitchell v. Sigrest, 345 So. 2d 141 (La. App. 1st Cir. 1977); and Comment, The Last Clear Chance in Louisiana—An Analysis and Critique, 27 La. L. Rev. 269 (1967).

11. Fiducci v. Sherwood Nursery & Garden Ctr., Inc., 448 So. 2d 201 (La. App. 1st Cir. 1984); McAllister v. St. Paul Fire & Marine Ins. Co., 445 So. 2d 771 (La. App. 3d Cir. 1984); Russo v. City of New Orleans, 446 So. 2d 331 (La. App. 4th Cir. 1984); Baptiste v. Granada, 387 So. 2d 1235 (La. App. 1st Cir. 1980); Salemi v. St. Paul Fire & Marine Ins. Co., 339 So. 2d 1264 (La. App. 1st Cir. 1976); Layfield v. Altazan, 255 So. 2d 363 (La. App. 1st Cir. 1977).

12. Leconte v. Pan American World Airways Inc., 736 F.2d 1019 (5th Cir. 1984); Inesco v. Cambridge Mut. Fire Ins. Co., 447 So. 2d 606 (La. App. 3d Cir. 1984); Hebert v. Perkins, 260 So. 2d 15 (La. App. 3d Cir. 1972) and cases cited therein.

13. Soileau v. South Central Bell Tel. Co., 406 So. 2d 182 (La. 1981); Kechen v. Missouri Pac. R.R. Co., 678 F.2d 619 (5th Cir. 1982); Delahoussaye v. City of New Iberia, 35 So. 2d 417 (La. App. 1st Cir. 1948).

14. See supra note 2. See also Bays v. Lee, 432 So. 2d 941 (La. App. 4th Cir. 1983); Sullivan v. St. Cyr, 457 So. 2d 800 (La. App. 1st Cir. 1984) and cases cited therein.

15. Rue v. State Department of Highways, 372 So. 2d 1197 (La. 1979); Pitre v. Aetna Life & Cas. Co., 434 So. 2d 191 (La. App. 3d Cir. 1983); Quinn v. State Dept. of Highways, 464 So. 2d 357 (La. App. 3d Cir. 1985); Murphy v. State, 475 So. 2d 24 (La. App. 4th Cir. 1985), and cases cited therein. See also infra note 62.

16. Boyer v. Johnson, 360 So. 2d 1164 (La. 1978).

17. For a list of the states which adopted a comparative fault system as of 1981, see Alvis v. Ribar, 421 N.E. 2d 866, 890 (Ill. 1981).

18. La. Civ. Code art. 2323.

rule of contributory negligence. Article 2323 begins with the words "*[w]hen contributory negligence is applicable to a claim for damages.*" The issue presented by the enactment is the exact legislative meaning of the term "applicable."[19] The wording of article 2323 seems to invite at least three possible interpretations.

First, it could be read as the legislature's desire to freeze the prior jurisprudence, with all of the various exceptions, and to start a new rule of comparative fault for all future cases. This interpretation would mean that the various exceptions, including *Baumgartner*, had been legislatively approved by the amendment of article 2323. Thus, the court would only be able to recognize contributory negligence, and compare fault in those cases that would have recognized contributory negligence as an available defense prior to the enactment of Act 431 of 1979.

Secondly, the article could be read to mean that the court has been granted the authority by the legislature to determine whether the contributory negligence of the plaintiff should be considered in a particular case. If the court decides that it should *not* be considered, then contributory negligence would not be applicable and article 2323 comparative fault would not be implemented. This interpretation finds support in the duty/risk analysis. When the court determines that a defendant's duty encompasses the risk of a negligent plaintiff's conduct, the plaintiff's negligence is not considered to be contributory. However, if the defendant's duty does not encompass the negligence of the plaintiff, then the plaintiff is said to be contributorily negligent. The result of this second interpretation is a type of "selective incorporation."[20] When the defend-

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19. "Applicable" is defined as: "1. capable of being applied: having relevance, . . . 2. fit, suitable, or right to be applied: appropriate. . . ." Webster's Third New International Dictionary Unabridged 105 (G. & C. Merriam Co., Springfield, Massachusetts 1969). The definition offers little help, but merely restates the issue of when contributory negligence is *appropriate* or *relevant* to a claim for damages. Thus, "applicable" seems to be used as a legal term of art meaning everything and yet nothing, and deriving its substance from policy considerations and expediency. Professor Johnson noted that, "[n]owhere does the Act answer the question of when contributory negligence *is* applicable to a claim for damages." Johnson, Comparative Negligence and the Duty/Risk Analysis, 40 La. L. Rev. 319, 339 (1980).

20. The writer is aware that selective incorporation, a term used to describe the theory that some of the first eight amendments to the U.S. Constitution are incorporated into the 14th Amendment and thus applicable to the states, is foreign to traditional tort law. However, in this situation, the judicial methodology is "inversely similar." The scope of the due process clause, in Constitutional law analysis, determines whether the "right" is protected through the 14th Amendment in the states. If the right is encompassed in the term "due process," then the due process clause is activated. In Louisiana comparative fault law, the scope of defendant's duty, in an inverse way, determines whether a case is subjected to comparative fault. If the defendant's duty encompasses the substandard conduct of the plaintiff, then there is *no* contributory negligence and comparative fault is *not* implemented. "Selective incorporation" was intentionally used here to highlight the

ant's duty encompasses the risk of the plaintiff's negligent conduct, the case is not incorporated into article 2323. The crucial issue under this interpretation is that *the court* rather than the legislature makes the selection by defining the duty.[21]

Finally, the article could be interpreted to state that when a plaintiff's negligence contributes to his injuries, that is, when the legal concept of "contributory negligence of the tort victim" is present, the result will be the comparison of each party's fault. The Uniform Comparative Fault Act (UCFA) of 1979[22] seems to espouse this view by stating: "(a) In an action based on fault seeking to recover damages . . . *any contributory fault chargeable to the claimant* diminishes proportionally the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault. . . ."[23] Thus, under the UCFA, the existence of any fault of the claimant that contributes, as a cause in fact and a legal cause, to the claimant's injuries triggers the comparative fault scheme. The result of this interpretation would be a "total incorporation" of all cases into article 2323. One problem that immediately becomes evident with this interpretation is the wording of the article itself. If the legislature had intended this interpretation of total incorporation, the first clause, "[w]hen contributory negligence is applicable to a claim for damages, its effect shall be as follows" seems superfluous. This is so because the remaining portion of the article, if read *without* the first clause, seems to mandate a total incorporation. But to this mandate, the legislature has placed a condition that presumably limits the article to some degree. Another problem with this interpretation is that it fundamentally alters the duty/risk analysis. If the total incorporation theory is followed, the situation in which the scope of a defendant's duty encompasses the risk of a careless or negligent plaintiff, resulting in the plaintiff's negligence not being considered in the computation of damages, would be eliminated. The disparity in the duties of each party would not go unnoticed by the court, but the disparity would be utilized in the apportionment of fault.

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control that the court exercises upon the implementation of comparative fault in Louisiana. If its use promotes a new way of seeing an old duty/risk issue, then the purpose is achieved.

21. Traditionally the judge has retained the power to determine the question of law regarding the scope of a legal duty. This procedure is not a new development in the law. Comment, Problems in the Application of Duty/Risk Analysis to Jury Trials in Louisiana, 39 La. L. Rev. 1079, 1089 (1979).

22. The Uniform Comparative Fault Act, 12 Unif. L. Annot. (West Supp. 1975). See also, Appendix, 40 La. L. Rev. 419 (1980) for text of Act. The Louisiana Supreme Court has cited section 2(b) of the Act and adopted the factors to determine the percentage of fault for each party contained in the section. See Watson v. State Farm Fire & Cas. Ins. Co., 469 So. 2d 967, 973 (La. 1985). See also *Watson*, 469 So. 2d at 973, n. 16 for a brief explanation of the Act.

23. Uniform Comparative Fault Act, supra note 22, at § 1 (emphasis added).

Therefore, a shift would occur in this situation from an emphasis of determining the scope of a defendant's duty to an emphasis of the factors to be considered when determining the percentage of fault for each party. The factors considered would include the nature and extent of the duties owed to each party.[24]

In *Turner v. NOPSI*, the Louisiana Supreme Court was asked to interpret article 2323 in light of one of the special factual exceptions to the absolute bar rule—motorist-pedestrian accidents. Since *Turner* specifically reevaluates the *Baumgartner* exception, the rationale of the court is significant in determining the future validity of the various other exceptions to the absolute bar rule. The court's willingness to reevaluate explicitly gives the legal community fair warning that the other exceptions will also be subjected to judicial scrutiny. *Baumgartner*[25] involved a negligent pedestrian, who, while crossing in a pedestrian crosswalk, was killed by a negligent driver. The court held that the contributory negligence of a pedestrian did not bar his recovery.[26]

In *Turner*, Chief Justice Dixon wrote what is termed the "majority" opinion, even though only Justice Calogero joined. After briefly discussing *Drum*[27] and outlining the facts of *Turner*, Dixon focused on "[t]he issue of whether comparative negligence (or comparative fault) principles apply in motorist-pedestrian cases like *Baumgartner*, or whether a pedestrian injured by a negligent motorist can recover his damages without reduction based on comparison of fault of the parties."[28] He began his analysis by examining Act 431 of 1979, which established comparative fault in Lou-

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24. In Watson v. State Farm Fire & Cas. Ins. Co., 469 So. 2d 967, 973 (La. 1985), the supreme court adopted the Uniform Comparative Fault Act, 2(b) and comment (as revised in 1979), which suggests a standard for determining percentages of fault. It states:

> In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed.
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> In assessing the nature of the conduct of the parties, various factors may influence the degree of fault assigned, including: (1) whether the conduct resulted from inadvertence or involved an awareness of danger, (2) how great a risk was created by the conduct, (3) the significance of what was sought by the conduct, (4) the capacities of the actor, whether superior or inferior, and (5) any extenuating circumstances which might require the actor to proceed in haste, without proper thought. And, of course, as evidenced by concepts such as last-clear chance, the relationship between the fault/negligent conduct and the harm to the plaintiff are considerations in determining the relative fault of the parties.

It is suggested that either in a total incorporation or a selective incorporation view, the nature and extent of the duties should also be considered.

25. *Baumgartner*, 356 So. 2d 400 (La. 1977).

26. See articles cited supra, note 9 for a thorough discussion of *Baumgartner*.

27. *Drum*, 454 So. 2d 267 (La. App. 4th Cir. 1984).

28. 476 So. 2d 800, 803 (La. 1985).

isiana.[29] Dixon concluded his search for a legislative intent by stating, "Legislative intent, frequently employed by courts in statutory interpretation, is so obscure and uncertain as to C.C. Art. 2323 that caution should be employed in attributing any intention to the legislature not expressed in the statute."[30] Dixon did note, however, that the legislature has declared with clarity that the "complete bar to recovery, was eliminated. . . ."[31] Justice Dennis in his concurrence supported this position by quoting from *Bell v. Jet Wheel Blast*:[32]

> A plaintiff's claim for damages no longer can be barred totally because of his negligence. At most his claim may be reduced in proportion to his fault. Thus, the net effect of Article 2323, as amended, is to prevent the courts from applying any defense more injurious to a damage claim than comparative negligence.[33]

The entire court seems to agree as to the demise of the absolute bar to recovery rule of contributory negligence. In other words, the court interprets article 2323 in favor of a negligent plaintiff. The worst that can happen to a plaintiff who is negligent is that his negligence will be compared against the defendant's fault, thus reducing his recovery by that comparison. Therefore, the plaintiff will always receive compensation if the defendant is "at fault."

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29. Chief Justice Dixon first noted that in article 2323, a distinction seems to be made between "fault" and "negligence." When referring to the injured plaintiff's conduct, the term "negligence" is used twice. Yet when reference is made to the defendant or other person other than the plaintiff, *fault* is used. This same distinction is employed in Code of Civil Procedure Article 1812. The Chief Justice noted that nothing in Act 431 of 1979 explains the distinction, but he did not further discuss the ambiguity. He also noted that "contributory negligence" was used instead of "contributory fault," thereby possibly indicating a legislative intent to continue the effect of the prior jurisprudence which employed this term. However, he stated that the legislature did not say "*[o]nly* when contributory negligence is applicable," and, therefore, the use of the term "when" leaves question of the precise legislative intent open as to the future validity of prior jurisprudence.

30. 476 So. 2d at 804 (emphasis in original).

31. Id.

32. 462 So. 2d 166 (La. 1985). *Jet Wheel Blast* involved a legal issue that was certified by the United States Court of Appeals for the Fifth Circuit to the Louisiana Supreme Court. 709 F.2d 6 (1983). The issue presented was: "Does the Louisiana Civil Code permit the defense known as contributory negligence to be advanced to defeat or mitigate a claim of strict liability based upon a defective product, the theory of liability commonly known as 'product liability?'" Justice Dennis, writing for the majority, answered by stating:

> Where the threat of a reduction in recovery will provide consumers with an incentive to use a product carefully . . . comparative principles should be applied . . . The recovery of a plaintiff . . . should not be reduced . . . [when such reduction would] not serve realistically to promote careful product use or where it drastically reduces the manufacturer's incentive to make a safer product.

462 So. 2d 166, 170.

33. 476 So. 2d at 806.

But how does article 2323 affect a defendant who is "at fault?" Does the article similarly guarantee that the worst that can happen to a defendant "at fault" is that the court will find him "at fault" but that the plaintiff's negligence will always be compared to the defendant's fault before judgement is rendered? Or could the worst that can happen to the defendant "at fault" be the court's finding both parties "at fault" but refusing to reduce defendant's liability by plaintiff's proportionate fault? This issue of whether article 2323 *guaranteed* that the plaintiff's fault would *always* be compared to the defendant's fault divided the court and was the focal point of *Turner*.

Because Chief Justice Dixon found the legislative intent as to this issue to be "obscure and uncertain,"[34] he stated: "C.C. art. 2323 does not command the court to adhere to or select any particular rule to apply in pedestrian cases."[35] He then wrote of the particular jurisprudential exception before the court, the motorist-pedestrian accident: "We conclude, however, that the '*Baumgartner*' exception is no longer necessary to accomplish all its legislative purposes, and one's sense of justice requires its removal."[36] It is significant to note that Chief Justice Dixon's view reserves to the court the right to choose which cases will be subjected to comparative fault and which will not.

Specifically, he noted: "C.C. art. 2323 does not . . . prohibit the complete protection of an injured plaintiff, without regard to his fault, in the appropriate case," and added that "[c]are should be taken, however, to note that we do not hold that the victim's fault shall always reduce his compensation."[37] He then cited *Bell v. Jet Wheel Blast* as an example of a contributorily negligent plaintiff whose recovery was not diminished by the application of comparative fault.[38]

The entire court has evidently rejected the "freeze prior jurisprudence interpretation" by overruling the *Baumgartner* exception.[39] Chief Justice Dixon, Justice Dennis and apparently Justice Calogero hold to the second

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34. Id. at 804.

35. Id.

36. Id.

37. Id.

38. However, citing this particular case to support so broad a declaration produces several difficulties. First, *Jet Wheel Blast* involved a product liability case where "victim fault" was the legal terminology and not "contributory negligence." The court has historically avoided the issue of whether victim fault is the same concept as contributory negligence, presumably to avoid the absolute bar rule of contributory negligence. Thus, for this reason alone, *Jet Wheel Blast* has limited meaning to negligence cases. Additionally, as Justice Blanche points out in his concurrence, *Jet Wheel Blast* was a "lame duck certification case that concerned a product liability action that occurred prior to the passage of the comparative fault statute." 476 So. 2d at 805.

39. In fact, the plaintiffs in *Turner* made the same basic argument to the court and lost. 476 So. 2d at 802.

view, that cases are selectively incorporated into Civil Code article 2323. Justices Marcus and Blanche espouse the view that all cases should be incorporated into article 2323, and apparently concurred for this precise reason with Justice Marcus writing: "I consider that Art. 2323 does require that plaintiff's recovery be reduced to the extent of his fault in all cases arising under comparative fault."[40]

Clearly, both Justices Dixon and Dennis seem to be more cautious about the jurisprudential creations of the past. Justice Dennis interprets Act 431 of 1979 as follows:

> The enactment of the statute, however, indicates that this court will be required to rethink its previous decisions to decide whether each was a mere strategium for avoiding the complete bar to recovery of contributory negligence or whether it was based on independent policy considerations that now militate against the application of comparative fault to reduce plaintiff's recovery.[41]

It is important to understand exactly what Justice Dennis meant when he spoke of "rethinking" prior decisions. He advocated that in each case, the court should analyze the situation in light of the "different mixture of policy considerations"[42] for that particular case to determine whether the defendant's duty should be expanded (or continue to be expanded) to encompass the contributory negligence of the plaintiff. If the duty is expanded, then comparative negligence would not be applied. Thus, in *Turner*, Justice Dennis assumed that the plaintiff was negligent and that she contributed to her own injuries, and yet he still analyzed the case to determine whether comparative negligence should apply.

This "selective incorporation"[43] method of dealing with article 2323 has already come under attack. In *Walker v. Maybelline Co.*, Judge Crain of the first circuit commented on Justice Dennis's approach as follows:

> Indications now are that the *court* decides when contributory negligence and consequently comparative negligence apply, and this decision rests not solely on what is just, but what deters accidents, spreads costs, and reduces costs. The traditional appellate court function of establishing rules where lawyers and litigants can predict what will occur given a set of facts might just be a thing of the past.[44]

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40. Id. at 805.
41. Id. at 807.
42. Id.
43. See discussion supra note 20.
44. 477 So. 2d 1136, 1141 n. 1 (La. App. 1st Cir. 1985) (emphasis in original). Undoubtably, Judge Crain espouses the total incorporation interpretation of article 2323. Professor Johnson stated his view that "nowhere does the Act answer the question of when

Professor Alston Johnson, who espouses the selective incorporation interpretation, commented on the total incorporation interpretation, as follows:

> An alternative interpretation of Act 431 seems undesirable. If the courts refuse to address the basic question of *whether* contributory negligence is applicable to the case, and choose rather to submit all questions of victim fault to juries, the result is virtual abandonment to juries of critical legal policy questions and surrender of all hope of uniformity in the law. We will have transformed duty questions into damage questions; we will have replaced legal issues with dollars-and-cents estimates.[45]

Turner does help to clarify the two different interpretations of article 2323 and thus gives a glimpse into the future of comparative fault in Louisiana. However, it offers little help to the practitioner or scholar as to the future validity of the various jurisprudential exceptions. Justice Dennis, recognizing that the majority opinion did not furnish "the considerations underlying its decision," offered, in his concurrence, several factors that should be considered in "rethinking" the decisions of the past. These factors are generally accepted to be the four primary goals of accident law:

> (1) reduction of the total cost of accidents by deterrence of activity causing accidents;
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> (2) reduction of societal cost of accidents by spreading the loss among large numbers;
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> (3) reducing the cost of administering the accident system; and
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> (4) doing all of these by methods consistent with our sense of justice.[46]

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contributory negligence *is* applicable to a claim of damages." Johnson, Comparative Negligence and the Duty/Risk Analysis, 40 La. L. Rev. 319, 339 (1980) (emphasis in original). Judge Sexton in Frain v. State Farm Ins. Co., 421 So. 2d 1169 (La. App. 2d Cir. 1983) responded to that view by stating:

> The author, while being forced to agree with Professor Johnson's analysis because of the context in which Act 431 of 1979 was passed and the wording thereof, believes it would be much simpler and fairer, if our law allowed our tort analysis in *every* instance to be grounded in comparative negligence. Why not, in every case, simply compare the extent that the conduct of each party to the incident contributed to the causation thereof, and reduce that party's recovery accordingly? We would then return to a simple fault concept, precluding the necessity of the initial duty/risk analysis to determine what type duty/risk case we have in order to determine whether or not comparative negligence should be applied.

421 So. 2d at 1173 n. 1 (emphasis in original).

45. Johnson, supra note 19, at 340.

46. 476 So. 2d at 807. It is significant that three of the four factors enumerated by

Using these factors as analytical guides, Justice Dennis suggested that the court must "rethink" the various expanded duty situations to determine if they were "based on independent policy considerations" in *addition* to being rules fashioned by the court to avoid the absolute bar rule. If the independent policy considerations exist, then presumably comparative negligence would not be implemented.

The criteria articulated by Justice Dennis can be easily understood when another pre-article 2323 fact situation is analyzed. In *Boyer v. Johnson*,[47] a corporate officer had hired a minor to drive a delivery van. Although the fifteen year old boy had a valid driver's license, state law prohibited the employment of a minor to drive a vehicle for commercial purposes or to work around machinery. The minor lost control of the van during a delivery and was killed in the accident. The father of the minor brought a wrongful death action. The supreme court held that the purpose of the statute was to protect the minor "against the risk of his own negligence,"[48] and thus, the minor's contributory negligence did not constitute a bar to recovery.

Applying Justice Dennis's reasoning to *Boyer*, it is seen that *Boyer* was based on "independent policy considerations" in addition to being an abrogation of the absolute bar rule. The legislature has clearly announced a strong policy of protection of minors from the rigors of the work place.[49] *Boyer* followed and strengthened legislative policy in at least two ways. First, it continued the theme of the child labor laws by protecting a minor from his own negligence. Second, it encouraged employers to obey those laws, thus furthering the protection of minors, by not allowing a minor's cause of action to be barred as a result of his contributory negligence. *Boyer* should not be affected after the *Turner* decision merely by the amendment of article 2323 because the policy considerations are

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Justice Dennis involve economic considerations. When Justice Dennis applied his factors to the *Turner* case he noted that the economic considerations weighed against imposing liability upon a negligent plaintiff. He predicted that *Turner* "may not be the judgment of the future," and cited that "people have tended to prefer the superior economic alternative to the traditional fault system." 476 So. 2d at 808. Wex Malone commented in the Prologue to Volume 40 of the Louisiana Law Review about this "violent shift . . . away from the notion of an ethical penalty and toward the best economic risk bearer. . . ." 40 La. L. Rev. 293, 295 (1980). The answer to this issue is beyond the scope of this Note but the total shift from a traditional fault system where fault means "something done wrong" to a system based on economic risk distribution is advocated by Justice Dennis with reliance on G. Calabresi's book, The Costs of Accidents, (New Haven and London, Yale University Press 1979) pp. 24-31. 476 So. 2d 800, 807, 808 (La. 1985). One aspect of this issue is whether the people of Louisiana are aware of and approve of this shift.

47. 360 So. 2d 1164 (La. 1978).

48. Id. at 1169.

49. See La. R.S. 23:151-274 (West 1985) for extensive statutory scheme regulating the employment of minors.

clearly "independent" from the abrogation of the absolute bar rule. Factual situations such as *Boyer* seem to be the reason why the selective incorporation interpretation of article 2323 was espoused by the *Turner* court.

The fate of the various jurisprudential exceptions, however, should not fare as well. What should happen to last clear chance, the sudden emergency doctrine, the rescuer doctrine, and momentary forgetfulness exceptions is not clear. The writer suggests that the last clear chance doctrine is no longer needed as an equitable escape from the absolute bar rule. Last clear chance analysis does not become applicable until the defendant is found to be negligent.[50] At this point, comparative fault should be implemented. If an independent policy consideration is involved which warrants the defendant's duty to encompass the risk of plaintiff's negligence, then the court should clearly state this fact without resorting to last clear chance verbiage. Wisdom would encourage us to "clean house" of excess doctrines that are no longer needed. The result would be a new clarity of expression and uniformity in the law. It is important to note that the last clear chance doctrine is not a *Boyer*-type fact situation, but a mere tool to circumvent the absolute bar rule. Now that the legislature has replaced that tool with Civil Code article 2323, the "old tool" is no longer necessary.[51] At least twelve of our sister states who have implemented a comparative fault system have announced the death of the last clear chance doctrine.[52] Four others use it only as a proximate cause device.[53] This usage is unnecessary under the duty/risk analysis. Once the decision to compare fault has been made, however, the last clear chance analysis may be used to determine the degree of fault attributable to each party.[54]

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50. Starks v. Kelly, 435 So. 2d 552 (La. App. 1st Cir. 1983) and cases cited in note 10.

51. "The doctrine [of last clear chance] thus appears to be a dying one, particularly in many of the jurisdictions which have adopted a system of comparative fault." 5 W. Prosser & W. Keaton, Torts § 66 at 468 (1984).

52. Kaatz v. State of Alaska, 540 P.2d 1037 (Alaska 1975); Li v. Yellow Cab Co., 13 Cal. 3d 804, 532, P.2d 1226, 119 Cal. Rptr. 858 (1975); Donculovich v. Brown, 593 P.2d 187 (Wyo. 1979); Ratlief v. Yokum, 280 S.E.2d 584 (W. Va. 1981); French v. Grigsby, 571 S.W.2d 867 (Tex. 1978); Davis v. Butler, 602 P.2d 605 (Nev. 1978); Alvis v. Ribar, 85 Ill. 2d 1, 421 N.E.2d 886 (1981); Burns v. Ottai, 513 P.2d 469 (Colo. App. 1973); Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973); Cushwan v. Perkins, 245 A.2d 846 (Me. 1968); By statute, Connecticut, Conn. Gen. Stat. § 52-572L(c) (1975), and Oregon, Or. Rev. Stat. § 18:475 (1979) ("The doctrine of last clear chance is abolished.").

53. Southland Butane Gas Co. v. Blackwell, 211 Ga. 665, 88 S.E.2d 6 (1955); Whitehouse v. Thompson, 150 Neb. 370, 34 N.W.2d 385 (1948); Hanson v. New Hampshire Pre Mix Concrete, Inc., 110 N.H. 377, 268 A.2d 841 (1970); Vlach v. Wyman, 78 S.D. 504, 104 N.W.2d 817 (1960).

54. The Louisiana Supreme Court, in *Watson*, has apparently sanctioned this use of the doctrine by adopting UCFA § 2(b) and comment which states in part: "And of

The sudden emergency doctrine should encounter a shift in use instead of being totally discarded as useless. This doctrine simply states that the contributory negligence of the plaintiff may be excused if the plaintiff can show that another party created an emergency which the plaintiff encountered, and that plaintiff exercised the best judgment under the circumstances.[55] The courts have also stated that the plaintiff must not "be guilty of any conduct which contributed to the creation of the emergency."[56] In reality, this doctrine does not abrogate the absolute bar rule for contributory negligence. Instead, it merely clarifies the traditional standard of care from which negligent conduct is determined. "The conduct of the reasonable person will vary with the situation with which he is confronted . . . negligence is a failure to do what the reasonable person would do 'under the same or similar circumstances.'"[57]

Thus, what appears to be contributorily negligent conduct of the plaintiff is re-evaluated under the auspices of the sudden emergency doctrine and found to be "excused." Actually, all that has occurred is the acknowledgement by the court of the special circumstances, i.e., the emergency, that was encountered by the plaintiff. Once again, the court could clarify this area of tort law by simply stating that the plaintiff was not contributorily negligent, rather than using the "excused" language.

The "rescuer doctrine" is very similar to the sudden emergency doctrine, for it concerns the conduct of one who renders aid during an emergency. The jurisprudence has established that "a rescuer is only excused from such oversights or imprudences as the situation requiring rescue might reasonably have caused."[58] This merely restates the reasonable man standard "under the circumstances." However, unlike the treatment of the "sudden emergency doctrine," the legislature has specifically modified the "rescuer doctrine" and thus affected its relationship to the comparative fault scheme. In 1975, the legislature enacted Louisiana Revised Statutes 9:2793 which provided civil damages immunity to those who gratuitously and in good faith "render emergency care, first aid or rescue . . .," and that "[t]he section shall not exempt from liability those who . . . by grossly negligent acts or omissions cause damages. . . ."[59] Arguably, the rescue

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course, as evidenced by concepts such as last-clear chance, the relationship between fault/negligent conduct and the harm to the plaintiff are considered in determining the relevant fault of the parties."

55. See cases cited supra note 11.

56. Id.; but see especially, Hightower v. Dixie Auto Ins. Co., 247 So. 2d 912 (La. App. 2d Cir. 1977).

57. 5 W. Prosser & W. Keaton, Torts § 32, at 175 (1984).

58. Hebert v. Perkins, 260 So. 2d 15 (La. App. 4th Cir. 1972), and cases cited supra note 12.

59. La. R.S. 9:2793 provides for "gratuitous service at scene of emergency; limitation on liability":

doctrine has the potential of being a *Boyer*-like situation in which the selective incorporation view will be utilized. The legislature has changed the standard of care applied by the jurisprudence from negligent to "grossly negligent." Also, since immunity was granted to those rescuers who fulfill the statutory requirements, application of the comparative fault scheme to merely contributorily negligent rescuers would defeat clearly expressed legislative policy. Thus, the rescue doctrine seems to contain "independent policy considerations" mentioned by Justice Dennis that will probably prevent the implementation of the comparative fault scheme unless the rescuer's conduct is found to be "grossly negligent."

The final exception is "momentary forgetfulness." The supreme court in *Soileau v. South Central Bell Telephone Co.*[60] described the exception in the following manner:

> [E]ven the "reasonable man" is permitted an occasional lapse of memory. The critical inquiry is whether or not he was exercising ordinary care for his own safety at the time of the accident and whether or not it was reasonable to forget. . . .[61]

Article 2323 changes the analysis by removing the lingering thought that a finding that it is not reasonable to forget acts as an absolute bar to the plaintiff's recovery. With this thought cast aside, the court is free to determine the proper scope of the "reasonable man" standard.

The four jurisprudential exceptions are merely examples of the court's equitable action in the past to avoid the harsh absolute bar rule of con-

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> A. No person who in good faith, gratuitously renders emergency care, first aid or rescue at the scene of an emergency, or moves a person receiving such care, first aid or rescue to a hospital or other place of medical care shall be liable for any civil damages as a result of any act or omission in rendering the care or services or as a result of any act or failure to act to provide or arrange for further medical treatment or care for the person involved in the said emergency; provided, however, such care or services or transportation shall not be considered gratuitous, and this Section shall not apply when rendered incidental to a business relationship, including but not limited to that of employer-employee, existing between the person rendering such care or service or transportation and the person receiving the same, or when incidental to a business relationship existing between the employer or principal of the person rendering such care, service or transportation and the employer or principal of the person receiving such care, service or transportation. This Section shall not exempt from liability those individuals who intentionally or by grossly negligent acts or omissions cause damages to another individual.
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> B. The immunity herein granted shall be personal to the individual rendering such care or service or furnishing such transportation and shall not inure to the benefit of any employer or other person legally responsible for the acts or omissions of such individual, nor shall it inure to the benefit of any insurer.

See, Day v. Coca-Cola Bottling Co., 420 So. 2d 518, 521 (La. App. 2d Cir. 1982).

60. 406 So. 2d 182 (La. 1981).

61. Id. at 184.

tributory negligence. On other occasions, the court has resorted to causation analysis language to achieve the same result. In the interest of equity, the court "bent over backward" to avoid barring a plaintiff's recovery. It is this writer's opinion that a chief concern now facing the court is the replacement of one methodology with another. The court must now replace the equitable jurisprudential exceptions, which are found to be merely tools and not policy vehicles, and the "bending over backward" causation analysis with the new solution pronounced by the legislature—Civil Code article 2323. The equitable concern of the judiciary is commendable; the exceptions stand as proof of this concern for fairness. The legislature acted over five years ago by amending article 2323, but the more difficult action ahead is the acceptance by the court of this new methodology.

This new methodology substitutes the old jurisprudential exceptions and a plaintiff-oriented causation analysis with Civil Code article 2323, and a few *Boyer*-like expanded duty situations. The old exceptions not containing independent policy considerations are to be used in a different way, as in the last clear chance doctrine, or clarified, as in the sudden emergency doctrine.

Turner sends a message that the old rules of the past are not written in stone, rather, they are subject to review and are changeable. It also clearly portrays the divergence of opinions on the court as to the proper application of comparative fault in Louisiana. Perhaps most importantly, in *Turner*, the supreme court announces a new day in Louisiana tort law by commissioning the judiciary of Louisiana to "rethink" the old established rules and to discard all those found to be "mere strategium[s] for avoiding the complete bar to recovery of contributory negligence."[62]

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62. 476 So. 2d at 807. See e.g. Motton v. Traveler's Ins. Co., 484 So. 2d 816 (La. App. 1st Cir. 1986), where the first circuit, following *Turner* and the commission to rethink the prior jurisprudential exceptions to the absolute bar rule, held that Rue v. State Dept. of Highways, 372 So. 2d 1497 (La. 1979) "is no longer viable in light of the subsequent adoption of a comparative fault system in this State by Act 431 of 1979, amending La. Civ. Code art. 2323." *Rue* held that the State's duty to maintain highways encompasses the foreseeable risk that a motorist might inadvertently drive into the shoulder. The court rejected the freeze prior jurisprudence interpretation and followed the selective incorporation interpretation of article 2323 by implying that the court could choose *not* to compare fault. It is significant to note the impact of comparative fault to the *defendant*, for the plaintiff was determined to be fifty-percent at fault in *Motton*.