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VICTIM FAULT AND COMPARATIVE FAULT IN STRICT LIABILITY

In 1971, the Louisiana Supreme Court in *Langlois v. Allied Chemical*¹ departed from a negligence-restricted concept of fault under Louisiana Civil Code article 2315 and moved toward a more inclusive concept of fault. In *Langlois*, the court held the defendant liable for injuries caused by a leak at defendant's chemical plant based upon "fault as analogized from the conduct required under Civil Code article 669 and others."² The court further noted that "proof of lack of negligence and lack of imprudence [would] not exculpate the defendant."³ Although *Langlois* did not confront article 2317, the court's recognition of a non-negligent type of fault was important to the development of relational responsibility strict liability. In 1974 and 1975 the Louisiana Supreme Court did address articles 2317, 2318, and 2321 and found within them the basis for non-negligent strict liability.⁴

Since *Langlois* and its progeny, three areas of strict liability have evolved. The first is strict liability, sometimes called absolute liability, for land related hazardous activities. The second is strict products liability. The third is termed "relational responsibility" liability, which includes Louisiana Civil Code articles 2317 (things), 2318 (children), 2321

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1. 258 La. 1067, 249 So. 2d 133 (1971).

2. *Id.* at 1084, 249 So. 2d at 140.

3. *Id.*

4. In *Loescher v. Parr*, 324 So. 2d 441 (La. 1975), the owner or possessor of a thing which contained a defect and caused harm to another was held liable under article 2317. La. Civ. Code art. 2317 provides, in pertinent part: "We are responsible . . . 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." In *Turner v. Bucher*, 308 So. 2d 270 (La. 1975), the court applied article 2318 to impose liability upon parents for their children's tortious acts. La. Civ. Code art. 2318 provides, in pertinent part: "The father and mother and, after the decease of either, the surviving parent, are responsible for the damage occasioned by their minor or unemancipated children" In *Holland v. Buckley*, 305 So. 2d 113 (La. 1974), the court imposed liability upon animal owners for the damage caused by their animals. In *Holland*, the court applied article 2321 which provides that "[t]he owner of an animal is answerable for the damage he has caused." In *Olsen v. Shell Oil Co.*, 365 So. 2d 1285 (La. 1978), the court applied article 2322 to hold owners of a building responsible when the building created an unreasonable risk of harm to others which resulted in injury. La. Civ. Code art. 2322 states, in pertinent part: "The owner of a building is answerable for the damages occasioned by its ruin"

(animals) and 2322 (buildings).⁵ Liability in relational responsibility cases is imposed on the person legally responsible for the supervision, care, or guardianship of a person or thing creating an unreasonable risk of harm when injury results from that person or thing. This liability may be avoided by showing that the damage was caused by the fault of the victim (victim fault), by the fault of a third person, or by an irresistible force.⁶

Irresistible force and fault of a third person do not involve an application of comparative negligence and are beyond the scope of this paper. However, a discussion of the applicability of comparative negligence in a strict liability situation necessarily involves a plunge into the confusing parameters of "victim fault" and discussion of whether the doctrine is consistent with comparative negligence. If contributory negligence is included within victim fault, the argument can be made that comparative negligence is applicable to strict liability situations because of the "[w]hen contributory negligence is applicable" condition in the comparative negligence statute.⁷

The purpose of this article is to discuss whether comparative negligence is applicable in relational responsibility strict liability situations regardless of the classification of plaintiff's fault. This will be accomplished through a brief examination of the various strict liability defenses encompassing victim fault and their applicability to comparative negligence.

Victim Fault

Prior to the development of legal fault, a tortfeasor could assert the traditional defenses of contributory negligence or assumption of the risk when the victim's conduct contributed to his injury.⁸ However, the jurisprudence has refined these defenses and has employed the term

5. Robertson, *Ruminations On Comparative Fault, Duty-Risk Analysis, Affirmative Defenses, and Defensive Doctrines in Negligence and Strict Liability Litigation in Louisiana, Ruminations on Tort Law: A Symposium in Honor of Wex Malone*, 44 *La. L. Rev.* 1341, 1353 (1984).

6. 324 So. 2d at 447.

7. La. Civ. Code art. 2323 provides:

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 a result partly of his own negligence and partly as a result of the fault of another person or persons, the claim for damages shall not thereby be defeated, but the amount of damages recoverable shall be reduced in proportion to the degree or percentage of negligence attributable to the person suffering the injury, death or loss.

8. Contributory negligence is that conduct which falls below the standard of care to which a reasonable man would conform for his own safety. Assumption of the risk is a voluntary encountering of a known and appreciated risk. *Loescher*, 324 So. 2d 441.

"victim fault" to describe the plaintiff's contributing conduct in strict liability cases. "Victim fault" appears to have been chosen as a corollary to the French use of the term, "*la faute de la victime*," since French authority was prevalent in interpreting the relational responsibility articles, or it may have been chosen to articulate a term broad enough to encompass many types of victim conduct.⁹

Today, the victim's conduct must be a cause-in-fact of the harm to serve as a defense for the tortfeasor.¹⁰ In *Langlois*, assumption of the risk, unlike contributory negligence, was recognized as a defense to article 669 strict liability situations.¹¹ The court stated that strict liability "is not a case where negligence is an ingredient of fault and contributory negligence is not a defense"¹² This common law rule endured in Louisiana, as the courts at first held that victim fault encompassed assumption of the risk but not contributory negligence.¹³ Although some appellate circuits applied contributory negligence to strict liability actions, these decisions were ignored by the rest of the courts and by the United States Fifth Circuit.

The Louisiana Supreme Court squarely faced the issue in *Dorry v. Lafleur*.¹⁴ *Dorry* involved a plaintiff who was injured when water leaking through a defective roof in a skating rink caused plaintiff to fall while skating. The supreme court found that the statement in *Langlois* that contributory negligence is not a defense to strict liability actions was

9. Note, A Functional Purpose for Comparing Faults: A Suggestion for Reexamining "Strict Liability", 41 La. L. Rev. 1374, 1378 (1981).

10. See *American Road Ins. Co. v. Montgomery*, 354 So. 2d 656 (La. App. 1st Cir. 1977) which specifically states that "victim fault" need not be the sole cause of the injury. Substantial factor language is used in *Loescher v. Parr*, 324 So. 2d 441 (La. 1975); *Ruffo v. Schwegmann Bros. Giant Supermarkets, Inc.*, 424 So. 2d 470 (La. App. 5th Cir. 1982), and substantial cause is used in *Rozell v. Louisiana Animal Breeders Coop.*, 496 So. 2d 275 (La. 1986); *Mouton v. Southern Pac. Transp. Co.*, 509 So. 2d 479 (La. App. 3d Cir. 1987); *Dupre v. Saenger Arts Center, Inc.*, 508 So. 2d 837 (La. App. 4th Cir. 1987); *Duvalle v. Lake Kenilworth, Inc.*, 503 So. 2d 49 (La. App. 4th Cir. 1987); *Daniel v. Cambridge Mut. Fire Ins. Co.*, 368 So. 2d 810 (La. App. 2d Cir. 1979). For a criticism of the court's use of substantial cause see Kennedy, *Assumption of the Risk, Comparative Fault and Strict Liability After Rozell*, 47 La. L. Rev. 791 (1987).

11. 258 La. 1067, 1086, 249 So. 2d 133, 140 (1971).

12. *Id.*

13. *Alford v. Pool Offshore Co.*, 661 F.2d 43 (5th Cir. 1981); *Rodrigue v. Dixilyn Corp.*, 620 F.2d 537 (5th Cir. 1980), cert. denied, 449 U.S. 1113, 101 S. Ct. 923 (1981); *Langlois v. Allied Chem. Corp.*, 258 La. 1067, 249 So. 2d 133 (1971); *Payne v. Louisiana Dept. of Transp.*, 424 So. 2d 324 (La. App. 1st Cir. 1982); *Verrett v. Cameron Tel. Co.*, 417 So. 2d 1319 (La. App. 3d Cir. 1982); see also Barham, *The Viability of Comparative Negligence as a Defense to Strict Liability in Louisiana*, *Ruminations on Tort Law: A Symposium in Honor of Wex Malone*, 44 La. L. Rev. 1171, 1173 (1984).

14. 399 So. 2d 559 (La. 1981).

too broad.¹⁵ The plurality opinion, revealing the lack of policy to substantiate such a rule, suggested that a plaintiff's contributing negligence should bar his recovery from a strictly liable defendant when the activity involved was neither unnatural to the locality nor a commercial enterprise.¹⁶ This determination would be made on a case by case basis. Contributory negligence was not applied in *Dorry* since the plaintiff had paid the admission price, qualifying the defendant as a commercial enterprise.

Subsequently, the majority of strict liability cases followed the *Dorry* holding.¹⁷ Courts began to question those decisions which had found contributory negligence not applicable to strict liability;¹⁸ the decisions stressed that since the ultimate duty which arises under strict liability and negligence is the same, with the only difference in foreseeability, the plaintiff's contributing conduct should be analyzed the same way under either theory.¹⁹

At this point, the prevailing jurisprudence considered both contributory negligence and assumption of the risk, when they were substantial factors in causing the injury,²⁰ as encompassed within victim fault. Then came *Rozell v. Louisiana Animal Breeders Corp., Inc.*,²¹ which seemed to dispel the belief that contributory negligence was a bar applicable to a pre-comparative relational responsibility case. The Louisiana Supreme Court, in a case which should have applied pre-comparative law, stated that contributory negligence as a bar is not recognized as a defense to relational responsibility strict liability cases.²² The court supported its position with the Restatement (Second) of Torts § 484, stating that "the use of the strict liability doctrines leaves no room for contributory negligence as we have known it."²³ This language has frequently been

15. *Id.* at 560.

16. *Id.* at 560-61.

17. *Hyde v. Chevron USA, Inc.*, 697 F.2d 614 (5th Cir. 1983); *Buchanan v. Tangipahoa Parish Police Jury*, 426 So. 2d 720 (La. App. 1st Cir. 1983); *Falgout v. Wardlaw*, 423 So. 2d 707 (La. App. 2d Cir. 1982); *Williams v. New Orleans Pub. Serv., Inc.*, 421 So. 2d 278 (La. App. 4th Cir. 1982); *Carpenter v. State Farm Fire and Casualty Ins. Co.*, 411 So. 2d 1206 (La. App. 4th Cir. 1982).

18. *Hyde*, 697 F.2d at 628 (citing Gaudet, *The Application of Louisiana's Strict Liability Law on the Outer Continental Shelf: A Quandary for Federal Courts*, 28 *Loy. L. Rev.* 101, 127 (1982)).

19. *Buchanan*, 426 So. 2d at 725.

20. *CNG Producing Co. v. Columbia Gulf Transmission Corp.*, 709 F.2d 959 (5th Cir. 1983); *Gordon v. City of New Orleans*, 430 So. 2d 234 (La. App. 4th Cir. 1983); *Buchanan*, 426 So. 2d 720; *Ruffo v. Schwegmann Bros. Giant Supermarkets, Inc.*, 424 So. 2d 470 (La. App. 5th Cir. 1982).

21. 496 So. 2d 275 (La. 1986).

22. *Id.* at 279 n.2, (citing *Rodrigue, Alford, Verrett, and Payne*; see *supra* note 20).

23. *Id.* at 280. For an extensively analyzed critique of *Rozell*, see Kennedy, *supra* note 10.

used in comparative negligence cases to indicate that contributory negligence as a bar to relief is no longer applicable.

Indeed, it has been submitted that despite the fact that *Rozell* is a pre-comparative case, the supreme court applied comparative negligence in an attempt to posit the *Bell v. Jet Wheel Blast* scheme onto relational responsibility cases.²⁴ If such is the case, contributory negligence as a bar would not exist, and the courts would apply a *Bell* analysis to determine if plaintiff's recovery should be reduced. Alternatively, the court was stating that, contrary to *Dorry*, contributory negligence is not applicable to relational responsibility situations.

The interpretation of *Rozell* is important when considering whether comparative negligence is applicable to relational responsibility strict liability situations. If the comparative negligence statute is interpreted and applied literally, then only in those situations in which contributory negligence was an available defense before the effective date of Civil Code article 2323 would the plaintiff's contributing negligence reduce his recovery. To this extent, pre-comparative application of contributory negligence to strict liability situations is still relevant.²⁵

Landry v. State,²⁶ decided the same day as *Rozell*, resolved this dispute and supports the view that *Rozell* applied post-comparative law. In *Landry*, the plaintiff was climbing seawall steps while carrying a fish hamper and nets in front of his body, blocking his vision of the steps. While attempting to avoid a hole in the steps, he fell down the seawall and injured his knee. The supreme court found that the hole in the steps presented an unreasonable risk of harm and held the defendant liable under article 2317 strict liability. The court then considered whether comparative negligence should reduce the plaintiff's recovery. Citing *Bell v. Jet Wheel Blast*, the court concluded that comparative negligence should be applied to reduce the plaintiff's recovery in relational responsibility cases if it would "give similarly situated plaintiffs a motivation for exercising reasonable care in the circumstances" and yet not diminish the defendant owner's incentive to protect against unreasonable

24. Under *Bell*, where the threat of a reduction in recovery would provide the consumers with an incentive to use a product more carefully comparative principles should be applied. The plaintiff's recovery should not be reduced, however, in those cases where it does not promote careful product use or where it reduces the manufacturer's incentive to make a safer product. *Bell v. Jet Wheel Blast*, 462 So. 2d 166, 171-72 (La. 1985).

25. In *Rodrigue*, in which the court held contributory negligence not applicable to strict liability, Justice Tate stated that the holding was restricted to pre-comparative law and that adoption of comparative negligence might involve a reevaluation of the traditional rules. 620 F.2d at 544 n.11. Therefore, even if contributory negligence was not applicable to strict liability in pre-comparative, policy could dictate that it be applied by analogy anyway. This is what occurred in *Bell*.

26. 495 So. 2d 1284 (La. 1986)

risks of harm to others.²⁷ This result is, therefore, consistent with *Dorry* and *Rozell* and with most post-*Bell* cases which applied comparative negligence to all strict liability cases when policy so dictated.²⁸

The jurisprudence therefore indicates that contributory negligence does not operate as a bar in relational responsibility strict liability cases, but should reduce the plaintiff's recovery if policy so dictates under the *Bell* analysis. The applicability of assumption of the risk²⁹ to comparative negligence cases will be discussed below. The remainder of this discussion will address the differing methods for interpreting the comparative negligence statute.

Comparative Negligence

Comparative negligence first emerged under Justinian in 533 A.D. in his Great Digest, which provided that "a party should assume damages in proportion to his fault."³⁰ Justinian's influence on the civil law is arguably credited with the modern prevailing civil law rule of comparative negligence.³¹ In Louisiana, the first comparative negligence scheme was Louisiana Civil Code article 2303 (1825) which provided: "The damage caused is not always estimated at the exact value of the thing destroyed or injured: it may be reduced according to circumstances, if the owner of the thing has exposed it imprudently." This provision was readopted as article 2323 of the 1870 Civil Code. But the Louisiana courts chose to ignore this provision. Instead, the judiciary applied the common law concept of contributory negligence as a bar to recovery.³²

27. *Id.* at 1290.

28. In the recent case of *Howard v. Allstate Ins. Co.*, No. 87-C-2117 (La. Feb. 29, 1988), an eleven year old girl was attacked and bitten by a dog belonging to the insured when she entered a fence where the dog was occupied. The supreme court found the insured strictly liable under article 2321 and held that "comparative fault applies where . . . [an] owner is held liable under art. 2321." Recognizing the difficulty of comparing culpability where the insured was strictly liable and the plaintiff was negligent, the court compared *causation* to arrive at the appropriate level of damages. A discussion of the principles of comparative causation is beyond this article.

29. It has been recognized that assumption of the risk is encompassed within victim fault and is therefore a defense to strict liability actions. This has been well stated and is not generally disputed. See *Dufrene v. Fournier*, 420 So. 2d 1178 (La. App. 5th Cir. 1982); *Verrett v. Cameron Tel. Co.*, 417 So. 2d 1319 (La. App. 3d Cir. 1982); *Sumner v. Foremost Ins. Co.*, 417 So. 2d 1327 (La. App. 3d Cir. 1982); *Daniel v. Cambridge Mut. Fire Ins. Co.*, 368 So. 2d 810 (La. App. 2d Cir. 1979); *Tri-State Ins. Co. v. Fidelity & Casualty Ins. Co.*, 364 So. 2d 657 (La. App. 2d Cir. 1978).

30. Justinian, Great Digest (533).

31. H. Woods, Comparative Fault § 1:9 (2d ed. 1987).

32. Note, *supra* note 9, at 1378-79 n.29.

In 1979 the Louisiana Legislature reacted to the harsh, all-or-nothing doctrine of contributory negligence by enacting Civil Code article 2323, the comparative negligence statute, effective August 1, 1980.³³

*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 a result partly of his own negligence and partly as a result of the fault of another person or persons, the claim for damages shall not thereby be defeated, but the amount of damages recoverable shall be reduced in proportion to the degree or percentage of negligence attributable to the person suffering the injury, death or loss.*³⁴

The statute has no application to the issue of determining liability of the parties but is limited solely to the computation of damages. While it would seem to be a relatively easy task to apply this statute, such is not the case in strict liability actions. Because of different interpretations by the courts and conflicting policy considerations,³⁵ problems are created by the "[w]hen contributory negligence is applicable" clause. The different interpretations given article 2323 will now be probed, concentrating on the article's applicability to relational responsibility strict liability under these different interpretations. The three different interpretations are: (1) strict construction of the statute, (2) emphasis upon the authority of the courts to decide when comparative negligence will apply, and (3) application of comparative negligence to all situations.³⁶

Strict Construction

This approach involves application of comparative negligence to those actions in which contributory negligence was a defense in pre-comparative jurisprudence.³⁷ One might argue that the statute was passed at a time when the defense of contributory negligence was not available as a defense in strict liability actions and, therefore, comparative negligence should also not be applicable in those circumstances. Although

33. Id. at 1381.

34. La. Civ. Code art. 2323 (emphasis added).

35. Barham, *supra* note 13, at 1172.

36. Note, "Rethinking" After Comparative Fault-*Baumgartner* Overruled in *Turner v. N.O.P.S.I.*, 46 La. L. Rev. 1071, 1074-75 (1986). Many of the arguments applicable to one interpretation will overlap to apply to other interpretations as well.

37. This strict construction approach will mainly discuss whether comparative fault is applicable to strict liability when contributory negligence is not found to be a defense to such action. Naturally, if we take a literal reading of the statute and contributory negligence is applicable to strict liability (*Dorry*), then comparative negligence would be also.

they never specifically articulated it, at one time court of appeal decisions seemed to have taken this approach.³⁸

Bell, however, states that article 2323 does not prohibit the courts from applying comparative negligence to a claim previously unsusceptible to the bar of contributory negligence.³⁹ "[T]he predecessor jurisprudence should not be controlling. Article 2323 neither states nor should be taken to mean that the issue of the applicability of contributory negligence in strict liability cases is frozen according to the weight of pre-comparative fault cases."⁴⁰

The statute taken as a whole is ambiguous as to its intent in that it contemplates a balancing of the contributing negligence of the plaintiff and the fault (including legal fault) of the defendant in its wording: "[I]njury, death or loss as a result partly of his own negligence and partly as a result of the fault [negligence and strict liability] of another person or persons."⁴¹ Thus, while the first sentence seems to deny comparative negligence applicability in strict liability situations, the subsequent statutory language seems to demand the opposite result.

A strict construction reading may have some merit since strict liability was being imposed in some situations at the time the statute was being drafted, although none of our current strict liability theories existed. Arguably, the statute intended to include within the term "fault" all claims for personal injury or property damage under both negligence and strict liability theories. Therefore, to give the statute this scope, a plaintiff's contributory negligence should be used to reduce his recovery in all strict liability situations, whether contributory negligence was a defense to such a situation in pre-comparative cases or not.⁴²

Courts in comparative negligence jurisdictions need not forego the benefits of comparative negligence simply because the statute appears to be restricted to claims based on negligence.⁴³ "Even in the absence of specific statutory direction, negligence of the plaintiff should be compared with that of the defendant in a strict liability case."⁴⁴ These arguments are supported by authority which suggests that the limitation of comparative negligence by pre-comparative jurisprudence would "pre-

38. *McCaskill v. Welch*, 463 So. 2d 942 (La. App. 3d Cir. 1985); *Efferson v. State*, 463 So. 2d 1342 (La. App. 1st Cir. 1984); *Wesley v. City of Denham Springs*, 455 So. 2d 1183 (La. App. 1st Cir. 1984).

39. 462 So. 2d at 170.

40. *Robertson*, supra note 5, at 1352.

41. La. Civ. Code art. 2323.

42. Note, *Contributing Negligence—When Should it be a Defense in a Strict Liability Action?*, 43 La. L. Rev. 801, 808 (1983).

43. V. Schwartz, *Comparative Negligence* § 12.2 (2d ed. 1986).

44. H. Woods, *Comparative Fault*, § 14.49, at 327-328 (1978).

vent the expansion of comparative principles as a complement to new emphases in tort law. For example, the shift from negligence to strict liability theories by the Louisiana Supreme Court might be retarded if the comparative negligence statute cannot be invoked⁴⁵ because "the very policies sought to be furthered by the statute will be frustrated."⁴⁶

Limiting comparative negligence to those situations in which contributory negligence was a defense at the time the statute was drafted does not seem to be the best interpretation to be given article 2323. This interpretation would limit expansion into strict liability. Other civilian jurisdictions, most notably France, and other states have not followed this strict construction approach.⁴⁷

*Court's Authority to Determine Applicability*⁴⁸

Another interpretation of article 2323 is that the courts have the authority to decide when contributory negligence is applicable.⁴⁹ Under this analysis, the court will determine if the defendant owed a duty to the plaintiff at all or if his duty encompassed plaintiff's misconduct. This will determine whether the defendant can apply contributory negligence and reduce plaintiff's recovery under article 2323.

Contributory negligence is not applicable and a plaintiff's recovery will not be reduced in those cases in which the defendant's conduct or activity encompasses the duty to protect the plaintiff against his own carelessness. Such a defendant is usually a person or entity whose conduct exposes a large number of people to a risk of harm whereas plaintiff's conduct exposes only himself to harm. The defendant's conduct is, therefore, more undesirable than the plaintiff's, and the defendant must protect plaintiff from this exposure.⁵⁰

Comparative negligence is also not applied when the plaintiff has removed himself from the scope of defendant's duty.⁵¹ Comparative negligence is applied in all other cases in which the plaintiff has been negligent and the defendant has a duty.

Basically, the approach involves a policy determination on each issue. Arguably, this is exactly what the court did in *Bell v. Jet Wheel Blast*.⁵²

45. *Howard v. Allstate Ins. Co.*, 510 So. 2d 685, 693 (La. App. 4th Cir. 1987)(citing Note, supra note 42, at 809).

46. Note, supra note 42, at 809.

47. Note, supra note 9, at 1382.

48. See generally Johnson, *Comparative Negligence and the Duty/Risk Analysis*, 40 La. L. Rev. 319 (1980).

49. Barham, supra note 13.

50. Johnson, supra note 48, at 333.

51. Robertson, supra note 5, at 1358.

52. 462 So. 2d 166 (La. 1985).

In *Bell*, a factory worker was injured when his hand got caught in the large shot blast machine which he was operating. The Louisiana Supreme Court, after finding that contributory negligence as a bar is not a defense to strict products liability, articulated that the policies which strict products liability attempts to impose⁵³ allow for comparative negligence applicability in strict liability. The plaintiff's contributing negligence is apportioned with the defendant's fault unless application would provide no incentive for an employee to guard himself or when it would decrease the manufacturer's incentive to build a safer product.⁵⁴

Courts may use such an interpretation of article 2323 as a jury control device to keep the final decision in the hands of the judges.

[T]o submit all questions of victim fault to juries, . . . 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.⁵⁵

Application Across The Board

A third method of interpreting the comparative negligence article emphasizes that the legislature intended fault to be allocated in all cases in which a plaintiff's negligence contributes to his injuries.

Opponents of this position argue that the statute is clear in placing a condition, that contributory negligence is applicable, on the usage of comparative negligence. This view is supported by Justice Dennis' conclusion in *Turner v. New Orleans Public Service Inc.*⁵⁶ that "[l]egislative intent, frequently employed by the courts in statutory interpretation, is so obscure and uncertain as to C.C. 2323 that caution should be employed in attributing *any* intention to the legislature not expressed in the statute."⁵⁷ However, the desire to alleviate the harsh, complete bar to recovery, in favor of an "equitable allocation of loss between plaintiff and defendant,"⁵⁸ is a legislative purpose that cannot be disputed. Arguably this allocation should occur in all cases of plaintiff fault.

53. "(a) [T]he reduction of the incidence of injuries by providing an incentive for manufacturers to produce safer products; (b) the placing of the burden of accidental injuries caused by defective products on those who market them, to be treated as a cost of production against which liability insurance can be obtained." *Id.* at 171.

54. *Id.* at 172.

55. Johnson, *supra* note 48, at 340.

56. 476 So. 2d 800 (La. 1985).

57. *Id.* at 804 (emphasis in original).

58. Plant, Comparative Negligence and Strict Liability, Symposium: Comparative Negligence in Louisiana, 40 La. L. Rev. 403, 417 (1980).

Some courts find that since negligence and strict liability (which holds a defendant liable without negligence) are theoretically distinct concepts, they cannot be compared, preventing comparative negligence applicability in strict liability situations.⁵⁹ Such conceptual problems with application should not be controlling; “[f]ixed semantic consistency at this point is less important than the attainment of a just and equitable result.”⁶⁰

If comparative principles are not allowed to function there will be the paradoxical situation in strict liability areas in which a defendant who admits or is proved to be negligent will be liable for only part of the damages caused to a contributorily negligent plaintiff, whereas a defendant who is entirely innocent and . . . [may have] done his best, albeit unsuccessfully, to avoid causing injury will be liable for all damages including the portion caused by the negligent plaintiff.⁶¹

If this should happen, it most certainly would not be a just and equitable result. In *Watson v. State Farm Fire & Casualty Insurance Co.*,⁶² Louisiana adopted the Uniform Comparative Fault Act's methods for quantifying fault. This act quantifies the fault of both the plaintiff and defendant and suggests that there is no insuperable difficulty with comparing the fault of a strictly liable defendant with that of a negligent plaintiff or another defendant.⁶³

The purpose of placing the burden of liability on the defendant is to protect the innocent and powerless plaintiff from bearing the cost of an injury which he could do little to prevent. Obviously, a plaintiff who is contributorily negligent can seldom be described as innocent or powerless.⁶⁴ Moreover, it is unreasonable to force a defendant or society to bear the total cost of losses which are partly attributable to plaintiff's negligence. Society wants to encourage, not discourage, “due care and prudence on the part of consumers and users as well as manufacturers”⁶⁵ and custodians of things.

59. Note, *supra* note 42, at 810. See also Plant, *supra* note 58, and *Lewis v. Timco, Inc.*, 697 F.2d 1252 (5th Cir.), and *reh'g en banc*, 716 F.2d 1425, 1433 (5th Cir. 1983) (Politz, J., dissenting) for the proposition that comparative causation should be applied instead of comparative negligence to avoid the theoretical difficulties.

60. Note, *supra* note 42, at 810 (quoting *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 734, 575 P.2d 1162, 1167-68, 144 Cal. Rptr. 380, 385 (1978) (emphasis added)).

61. Plant, *supra* note 58, at 418.

62. 469 So. 2d 967, 973 (La. 1985). See *Watson* for factors to be considered when apportioning fault.

63. Robertson, *supra* note 5, at 1355. See also V. Schwartz, *supra* note 43, §12.7, at 212-13.

64. Plant, *supra* note 58, at 416.

65. *Id.*

In the past, six arguments have been urged in support of the application of comparative negligence to both products liability and relational responsibility cases. (1) Complication of multiple defendant cases would result otherwise. (2) It is inconsistent to treat negligent defendants more favorably than strictly liable defendants. (3) Between the plaintiff and strictly liable defendant, it is fairer to take the plaintiff's negligence into account. (4) A deterrent effect to substandard conduct is built into a comparative fault system. (5) Lack of a reduction in recovery when the plaintiff has been negligent causes disrespect for the law. (6) Courts would treat plaintiff misconduct as a bar to recovery, contrary to the legislative intent to alleviate all-or-nothing recovery when both parties are at fault.⁶⁶

The courts have apparently taken heed of these arguments, as they rely on *Bell* in determining whether comparative negligence is applicable on a case by case basis. The supreme court has also made it clear that it reserves the right to determine when comparative negligence is applicable by saying that "[c]are should be taken, however, to note that we do not hold that the victim's fault shall always reduce his compensation."⁶⁷

At this juncture, we have determined that assumption of the risk is encompassed within victim fault and contributory negligence probably is applicable to relational responsibility strict liability situations. Comparative negligence is applicable to strict liability on a case by case basis using the *Bell* rationale, although strong policy factors point to its application in all circumstances in which plaintiff is negligent. The next question we must ask is: if assumption of the risk is applicable to strict liability as victim fault and comparative negligence is applicable to strict liability on a case by case basis, then is assumption of the risk subsumed into comparative negligence or does it maintain a life of its own as a bar to recovery?

Assumption of the Risk/Comparative Negligence

In torts literature generally, assumption of the risk has taken on many meanings. It may represent a form of negligence in which the plaintiff/victim proceeds unreasonably in the face of a known danger.⁶⁸ In Louisiana, assumption of the risk has been defined as a subjective inquiry where "one must knowingly and voluntarily encounter a risk which caused him harm and must understand and appreciate the risk

66. Robertson, *supra* note 5, at 1354.

67. Turner v. New Orleans Pub. Serv. Inc., 476 So. 2d at 804.

68. Robertson, *supra* note 5, at 1371.

involved and accept it as well as the inherent possibility of danger because of the risk."⁶⁹

In pre-comparative situations, both assumption of the risk and contributory negligence were bars to plaintiff's recovery, and to distinguish whether a plaintiff had assumed the risk or was contributorily negligent was irrelevant since the result was the same. However, under Louisiana's comparative negligence system, clarification is required because of the language of article 2323 which seems to tie its application to the condition that contributory negligence be applicable. A determination must be made whether assumption of the risk remains as a bar to recovery or is subsumed into the comparative negligence statute either by abrogating that defense or by merging it with contributory negligence.

It is argued that in those jurisdictions in which comparative negligence has been adopted, the common law defenses should blend into the apportionment doctrine.⁷⁰ Indeed, many states have allowed the concept of assumption of the risk to become subsumed into comparative fault.⁷¹ The Louisiana Supreme Court in *Bell v. Jet Wheel Blast*⁷² initially discussed the problem in Louisiana. After finding contributory negligence not applicable as a bar in a strict products liability case, the court suggested that "the adoption of a system of comparative fault should, where it applies, entail the merger of . . . assumption of risk into the general scheme of assessment of liability in proportion to fault."⁷³

Bell was followed by the first circuit court of appeal in *Aguillard v. Langlois*,⁷⁴ where comparative negligence was applied to reduce the recovery of a plaintiff who assumed the risk of an eye injury by standing within forty-five feet of an operating bushhog. In addition, the *Aguillard* court applied the factors for comparing fault set forth in the Uniform Comparative Fault Act (UCFA),⁷⁵ which were adopted by Louisiana in *Watson v. State Farm Fire & Casualty Insurance Co.*⁷⁶ The UCFA itself expressly indicates that unreasonable assumption of the risk, conduct

69. *Rozell v. Louisiana Animals Breeders Coop.*, 496 So. 2d 275, 278 (La. 1986) (citing *Lytell v. Hushfield*, 408 So. 2d 1344 (La. 1982)).

70. S. Flanagan & J. Palmer, *Comparative Negligence Manual* § 1.160, at 46 (rev. ed. 1971).

71. *Id.* at §1.220, 52-53.

72. 462 So. 2d 166 (La. 1985).

73. *Id.* at 172.

74. 471 So. 2d 1011 (La. App. 1st Cir. 1985). *Contra*, *Brown v. Harlan*, 468 So. 2d 723 (La. App. 5th Cir. 1985), where the plaintiff's decedent, being unable to swim, assumed the risk of wandering into the deep part of an innkeeper's pool, barring plaintiff from recovery.

75. *Aguillard*, 471 So. 2d at 1015 (quoting Uniform Comparative Fault Act §2b (1977)).

76. 469 So. 2d 967 (La. 1985).

which is voluntary and with knowledge of the danger, is included within the claimant's contributing fault and is to be apportioned with the defendant's fault to reduce recovery.

However, basing the applicability of assumption of the risk on *Bell* and the UCFA has been attacked as contrary to Louisiana law. It has been suggested that *Bell* should be limited to its facts and that the language above used in *Bell*, indicative of a legislative intent to eliminate all-or-nothing tort recovery by alleviating assumption of the risk, was merely dicta.⁷⁷

The dicta of *Jet Wheel Blast* suggests a result contemplated by the Uniform Comparative Fault Act which deals ". . . with the effect of plaintiff's contributory *fault*, and included the defenses of 'assumption of the risk' and 'misuse of product.'" . . . However, the legislature did not say "plaintiff's contributing fault", it said "as a result partly of his own *negligence*." "Fault and negligence might have been used interchangeably by the legislature, but probably not. It is common knowledge in the legal profession that fault includes more than negligence."⁷⁸

Therefore, it has been urged that, since article 2323 states that comparative negligence is available only if contributory negligence is applicable, it should not be available when assumption of the risk is applicable.⁷⁹

In response to certification by the Fifth Circuit, the Louisiana Supreme Court has definitively addressed the interaction of assumption of the risk and comparative negligence. In *Murray v. Ramada Inns, Inc.*,⁸⁰ the Louisiana Supreme Court held that "assumption of risk should not operate as a total bar to recovery regardless of whether the defendant is found negligent or strictly liable."⁸¹

The court reasoned that "assumption of risk is simply a term that has been used to describe a form of contributory negligence"⁸² and "[t]he statute clearly dictates that contributory negligence shall no longer operate as a complete bar to recovery."⁸³ Since most types of plaintiff conduct described as assumption of risk are indistinguishable from contributory negligence, it would be legally inconsistent to reject contributory

77. *Chatelain v. Project Square 221*, 505 So. 2d 177 (La. App. 4th Cir. 1982) (Lobrano, J., dissenting).

78. *Id.* at 191 (quoting from *Turner v. New Orleans Pub. Serv. Inc.*, 476 So. 2d at 803-04) (emphasis added by the court).

79. 505 So. 2d at 191.

80. No. 87 CQ 1846 (Feb. 29, 1988).

81. *Id.* at 2.

82. *Id.* at 19.

83. *Id.*

negligence as a bar yet at the same time recognize such effects for plaintiff conduct described as assumption of the risk.⁸⁴

The argument that had the legislature intended to alter the application of the doctrine it would have expressly referred to assumption of risk in Civil Code article 2323 likewise did not sway the court. "It is equally plausible to argue that if the Legislature had intended to preserve the defense as a total bar to recovery, it could have easily and expressly stated that intention in article 2323."⁸⁵

The intent of the court to draft a bright line rule was reflected in the statement that "assumption of risk terminology 'is better banished from the scene.'"⁸⁶ The conduct which assumption of risk had been used to describe should now be governed by comparative fault and duty/risk,⁸⁷ and where the defendant is liable under negligence or strict liability, "comparative fault principles should apply, and the victims '*awareness of the danger*' is among the factors to be considered in assessing percentages of fault."⁸⁸

While the court held that assumption of the risk should not survive as a distinct legal concept for any purpose, the law is unchanged in cases "where the plaintiff, by oral or written agreement, expressly waives or releases a future right to recover damages from the defendant."⁸⁹

Conclusion

After examining the defenses of contributory negligence, assumption of the risk, and comparative negligence in strict liability, three facts are clear: (1) Assumption of the risk was included in victim fault; (2) Contributory negligence no longer exists as a bar in Louisiana; (3) Comparative negligence is applicable to strict liability at least on a case by case basis. As Louisiana courts attempt to clarify strict liability defenses, the following pattern emerges. A plaintiff's conduct should be examined in determining whether the defendant owed a duty under Louisiana Civil Code articles 2317-2322. If the defendant is strictly liable and the plaintiff contributed to the injury, the court will apply comparative fault principles if doing so would increase the plaintiff's incentive to act prudently and still not decrease the defendant's incentive to

84. *Id.* at 18.

85. *Id.*

86. *Id.* at 20 (citing *McGrath v. American Cyanamid Co.*, 41 N.J. 272, 196 A.2d 238 (1963)).

87. No. 87 CQ 1846 (Feb. 29, 1988) at 17.

88. *Id.* at 20 (citing *Watson v. State Farm Fire & Cas. Ins. Co.*, 469 So. 2d 967, 974 (La. 1985)).

89. No. 87 CQ 1846 (Feb. 29, 1988) at 20.

maintain reasonably safe premises and animals for which they are responsible (the *Bell* analysis). In applying comparative fault, the court may compare causation and the victim's "awareness of the danger" among the factors to be considered in assessing percentages of fault. Contributory negligence and assumption of the risk no longer operate as a bar but are subsumed into the concept of comparative fault. Whether the courts will adopt this exact analysis is not completely resolved, although it does seem likely.

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