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Howard v. Allstate Insurance Co.-Louisiana's Attempt at Comparative Causation

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INTRODUCTION

Recently, in *Howard v. Allstate Insurance Co.*,[1] the Louisiana Supreme Court had the opportunity to decide whether Louisiana courts should apply comparative fault principles found in Louisiana Civil Code article 2323 to animal cases that arise under Louisiana Civil Code article 2321. This note will explore the important aspects of the decision in that case, placing particular emphasis on the *Howard* court's introduction of the concept of comparative causation.

This casenote is organized into two sections. The first section contains an analysis of all issues raised in the *Howard* case and examines the court's handling of those issues. One particular issue—comparative causation—is the focus of the second section, which explores that issue with particular thoroughness.

ANALYSIS OF THE *HOWARD* CASE

Facts and Disposition by the Courts

The *Howard* case arose when eleven-year-old Tina Holloway was attacked by a neighbor's dog. Tina had been playing with her neighbor Christi Barcelona near the Barcelona yard, when Christi invited the children to play on her backyard swing set. Two areas comprised the Barcelona's backyard, a small first yard, which adjoined the home, and a larger second yard, which contained the swing set. The dog lived in the second yard, in the area beyond two gates, and a "Beware of Dog" sign greeted visitors to the first gate. As a result of the dog's attack, Tina sustained fairly severe injures.[2]

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1. 520 So. 2d 715 (La. 1988).

2. The various children's testimony conflicted as to whether Christi told the children to wait before entering the second yard. "Whatever the instruction given Tina, she preceded the younger children into the yard where she was immediately attacked by [the dog], whom she had not seen before he attacked her." Id. at 717.

The jury found the Barcelonas liable under Louisiana Civil Code article 2321,[3] but reduced Tina's recovery in proportion to her "fault."[4] The trial judge, however, refused to allow the reduction and gave Tina full recovery. The case was appealed, and the court of appeal reversed the trial judge, reinstating the jury's findings.[5] Both parties then appealed to the Louisiana Supreme Court.

The Louisiana Supreme Court addressed four issues. The first issue the court considered was whether the Barcelonas could be liable under Louisiana Civil Code article 2321 without proof of negligence. The court found that the article created liability without proof of negligence based solely on the ownership of the animal.[6] Hence, the Barcelonas were liable as owners even though no negligence had been proven.

The court next considered the second issue, whether the court had the discretion to apply article 2323, the comparative fault statute, to this situation. The supreme court found that since the legislature had not specified the range of situations covered by the comparative fault of article 2323, the judiciary had the authority to designate situations in which it applied.[7]

After determining that it had the discretion to apply article 2323 to this case, the court focused on the prior jurisprudence to resolve the third issue: the applicability of article 2323 to animal cases. The supreme court looked to two previous cases that applied the comparative fault article to strict liability cases, *Bell v. Jet Wheel Blast*[8] and *Landry v. State*.[9] Based on *Bell* and *Landry*, the court held that comparative fault principles could also be applied to animal cases arising under article 2321.[10]

The final issue addressed by the court, and the most important, was whether the conceptual difficulty in comparing strict liability and negligence prevented reduction in damages. In *Howard*, the defendant sought to introduce the plaintiff's negligence in order to reduce the

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3. Id. La. Civ. Code art. 2321 states:
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.

4. 520 So. 2d at 718.

5. Id.

6. Id. at 717.

7. Id. at 718.

8. 462 So. 2d 166 (La. 1985). *Bell* was heard by the Supreme Court on a certified question from the Fifth Circuit.

9. 495 So. 2d 1284 (La. 1986).

10. 520 So. 2d at 718-19.

damage award. The defendant's liability, however, was strict liability. Faced with the prospect of comparing the plaintiff's negligence to the defendant's strict liability, the court introduced the concept of "comparative causation" to resolve the question of reduction. In the court's view, this comparative causation principle avoided this conceptual conflict between negligence and strict liability.[11] However, this comparative causation concept, which will be discussed later in greater length, does not solve the conceptual problems of the court, and in fact creates new problems.

Analysis of the Howard *Opinion*

The Louisiana Supreme Court began its analysis of the case by reviewing the liability of an owner under article 2321. The court found the Barcelonas liable without proof of negligence under this article because they owned the dog. The court, by simply assuming the case involved strict liability, overlooked the fact that the case may have been properly classified as an absolute liability case.[12]

Animal cases in the past have been classified not only as strict liability cases, but also as absolute liability cases.[13] The confusion stems from the history of the liability for animals. At common law, owners were absolutely liable for the damages caused by their animals because the animal presented an unreasonable risk of harm.[14] Regardless of the precautions taken by the owner, he could not be relieved of his liability. In Louisiana, article 2321 creates liability for animals. The Louisiana Supreme Court has defined this article as encompassing both "strict liability" and "absolute liability."[15] Hence, it is unknown which term correctly describes liability for animals in Louisiana.

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11. Id. at 719.

12. The court states in *Howard* that it is "review[ing] the court of appeal's holding that comparative fault should apply to this *strict liability case*. . . ." The court thus unequivocably assumes that this case arose in a strict liabilty rather than absolute liability context.

13. Rozell v. Louisiana Animal Breeders Coop., 434 So. 2d 404 (La. 1983); Briley v. Mitchell, 238 La. 551, 115 So. 2d 851 (1959); Vrendenburg v. Behan, 33 La. Ann. 627 (1881).

14. At common law, the defendant must pay damages although he neither intentionally injured the plaintiff nor failed to live up to the objective standard of reasonableness that is at the root of negligence. This liability has been termed both strict liability and absolute liability at common law. It is referred to in the text as absolute liability to distinguish it from the strict liability that is imposed in Louisiana only in statutorily mandated situations. For a discussion of the development of liability for animals in common law states, see W. Prosser, J. Wade & V. Schwartz, Torts 705-09 (7th ed. 1982).

15. Holland v. Buckley, 305 So. 2d 113 (La. 1974), held that the fault of the master, when his domesticated animal harms another, is in the nature of strict liability. Id. at 117. In contrast, the supreme court in Rozell v. Louisiana Animal Breeders Coop., 434

The classification as strict or absolute liability carries significant practical consequences. One consequence is that there are limited defenses to strict liability,[16] whereas there are no defenses under absolute liability. Since the applicability of comparative fault presented the most important issue of the case, the classification as absolute or strict liability was essential to the decision of the case. If *Howard* had been decided under an absolute liability theory, the defendant could not have raised the plaintiff's fault at all. Nonetheless, the court simply termed the liability "strict" without any discussion of the question, allowing the defendant to assert his defense.[17]

The distinction between strict and absolute liability in animal cases is a sufficiently important one that the supreme court should not have ignored it. By allowing the defense of comparative fault to be asserted against the plaintiff, however, the court impliedly resolved the question in favor of strict liability. Yet the question remains open since the court devoted no discussion to this crucial issue.

The supreme court next turned its attention to the second issue: the discretion of the court in applying article 2323. The supreme court resolved the issue in favor of discretion, reasoning that since the article does not designate the cases in which the courts "can or cannot allow a defense of contributory negligence," the judiciary has the authority to decide when the article does apply.[18] In so resolving the issue, the court failed to recognize that the article itself may have implicit limitations.

Article 2323 clearly states, "[w]hen contributory negligence is applicable" comparative fault principles may be applied. Contributory negligence, a defense in Louisiana prior to 1980, applied in negligence cases to reduce a plaintiff's recovery from a negligent defendant. However, contributory negligence was not a defense in strict liability cases when the legislature adopted the comparative fault regime of article 2323. The fact that the legislature limited comparative fault principles to cases in which contributory negligence would have been applicable is strong evidence that the legislature did not envision the application

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So. 2d 404 (La. 1983), found that liability was imposed under article 2321 on the basis of ownership alone. This seems akin to absolute liability, and has been placed in absolute liability sections in torts textbooks. See Maraist, Tort Supplement (1986).

16. In the past there were three defenses to strict liability—victim fault, fault of a third person, and irresistible force—as articulated in Rozell v. Louisiana Animal Breeders Coop., 496 So. 2d 275, 279 (La. 1986). The doctrines of assumption of the risk and contributory negligence also barred the plaintiff's recovery prior to *Rozell*. Now, arguably, comparative causation has replaced these defenses. Assumption of the risk was abrogated as a defense recently in Murray v. Ramada Inns, Inc., 521 So. 2d 1123 (La. 1988). The defenses of irresistible force and third party fault remain untested.

17. See supra note 12 and accompanying text.

18. 520 So. 2d at 719.

of comparative fault principles to strict liability cases. Under this interpretation, article 2323 should apply only when the plaintiff based his claim on the defendant's negligence. The supreme court, however, inferred broad judicial discretion from the fact that the legislature did not specify the cases to which article 2323 applied. The court ignored the argument that the article did limit itself to cases in which contributory negligence had previously applied.

The third issue before the court involved determining the applicability of comparative fault in cases arising under article 2321. Previous animal cases had recognized and applied available defenses,[19] but none had used comparative fault. Since the adoption of article 2323, the court has not had an opportunity to apply article 2323 to an animal case.[20] Therefore, the *Howard* court looked at the issue for the first time. The court formulated a blanket rule: comparative fault applies to all animal liability cases arising under article 2321.[21]

The court's analysis of the issue is not persuasive. The holding was based on two earlier cases, *Bell v. Jet Wheel Blast*[22] and *Landry v. State*,[23] in which the supreme court applied comparative fault to other theories of liability. The *Howard* court, however, rested its holding on a loose analogy to those cases and failed to follow the reasoning of either case. The first case, *Bell*, involved the question whether comparative fault principles apply to strict products liability cases. In his plurality opinion, Justice Dennis applied comparative fault, but outlined the limitations on the application of comparative fault in a strict products liability case. Justice Dennis found that article 2323 governed strict products liability cases only when a reduction in the plaintiff's recovery would serve to increase his awareness in using the product, and would not decrease the manufacturer's incentive to produce a safe product.[24] Had the *Howard* court followed the reasoning of *Bell* rather than relying on the fact that the situation was roughly similar—in both cases a strictly liable defendant sought reduction for the plaintiff's negligence—

19. The available defenses were (1) fault of the victim, (2) fault of a third person, and (3) irresistible force.

20. Prior to the adoption of the revised comparative fault provision, article 2323, the court declined to apply comparative fault principles in any case, relying on the defense of contributory negligence. Since the adoption of article 2323, effective in 1980, the court has not had an opportunity to apply article 2323 to an animal case. The facts in *Rozell*, 434 So. 2d 404, occurred before the adoption of that article.

21. 520 So. 2d at 718-19.

22. 462 So. 2d 166 (La. 1985).

23. 495 So. 2d 7284 (La. 1986).

24. *Bell*, 462 So. 2d at 170. "Where the threat of a reduction in recovery will provide consumers with an incentive to use a product carefully, without exacting an inordinate sacrifice of other interests, comparative principles would be applied for the sake of accident prevention." Id.

the court would have balanced the effect of reduction of recovery on the plaintiff's and defendant's behavior. Arguably, if the *Bell* test had been used, article 2323 would not have been applied to reduce Tina's recovery. Tina was an eleven year old with a diminished mental capacity, and a reduction would not serve to make her more aware of the danger.

The second case relied on by the *Howard* court, *Landry v. State*,[25] addressed the application of comparative fault to the article 2317 strict liability of a custodian for damage caused by things in his custody.[26] The court in *Landry* held the state strictly liable for injuries sustained when Landry slipped because of the erosion of a seawall upon which he was walking. The supreme court, however, allowed reduction of Landry's recovery because of his negligence—he was carrying fish nets and a hamper in front of him and could not see where he was walking.[27] The court added a qualification, however, noting that "[a] reduction in plaintiff's recovery [would] not diminish the defendant-owner's incentive to remove unreasonable risks from his property,"[28] while the reduction would give similarly situated plaintiffs a motivation for exercising reasonable care in the circumstances.[29] On the *Howard* facts it would be almost impossible to argue that a reduction in the recovery of an eleven-year-old girl with diminished mental capacity would serve to increase awareness in other similarly situated plaintiffs. In sum, neither *Bell* nor *Landry*, therefore, stands for the proposition for which they are cited—that comparative fault principles should apply to all animal liability cases arising under article 2321.

The final issue before the supreme court was whether the theoretical inconsistency between negligence and strict liability prevented the application of article 2323 to reduce recovery. The court attempted to resolve this inconsistency by introducing a new concept in Louisiana, comparative causation. In adopting comparative causation, the court relied upon an earlier case, *Watson v. State Farm Insurance Co.*[30] and that opinion's reliance on the Uniform Comparative Fault Act. The *Howard* court's reliance on *Watson* is unjustified for two reasons.

First, the court in *Howard* overlooked the apparent conflicts between its reasoning and language in the Uniform Comparative Fault Act, the

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25. 495 So. 2d 1284.

26. Article 2317 contemplates liability for things or people in the custody of a caretaker. It is thought to be an introductory article that is modified by the subsequent, more specific articles that follow. As article 2321, a subsequent article, is more specific in its focus of liability, the liability under article 2321 should prime the liability that would attach under article 2317. The specific should include the general, and in this case, the specific is article 2321 and the general is article 2317.

27. *Landry*, 495 So. 2d at 1290.

28. Id. at 1290-91.

29. Id.

30. 469 So. 2d 967 (La. 1985).

basis of the *Watson* decision. The Uniform Comparative Fault Act provides in part that "[i]n 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."[31] The Act uses "nature of the conduct" to indicate that the blameworthiness of the parties will be evaluated in apportioning the damages among the parties. The *Howard* court, however, seeks to ignore the plaintiff's blameworthiness, as this is part of the conceptual conflict. Thus, reliance on the Act is patently inconsistent with the supreme court's reasoning. The supreme court concluded that "the extent to which each party contributed to the damages should be the measure by which the loss is apportioned."[32]

The court overlooked a second inconsistency in using *Watson*, and hence the Uniform Comparative Fault Act, to support its position. The Act uses the terms "fault" and "cause" in the same sentence, both describing aspects of the method of apportioning damages under the Act. "Fault" is used as a criteria for determining whose conduct will be considered, while "cause" is used to assess the damages arising from the conduct considered. Thus, the terms are interdependent, and the method for apportioning damages would fail without determining "fault" and "cause."

The Louisiana Supreme Court, however, sought to use only "cause" in apportioning damages. The court relied on the Uniform Comparative Fault Act as a means of apportioning damages based on "cause." That reliance though, is erroneous, as the court failed to adopt "fault" as the other criteria under the Act. The court simply adopted the segment of the Act that is favorable to its reasoning and ignored the rest. This action by the court is a misuse of the "cause" language, as it does not show the interdependence of "fault" and "cause" under the Act. Thus, reliance on the Uniform Comparative Fault Act for apportionment of damages based on cause is misplaced.

In sum, the supreme court should not have relied on *Watson* without delving into the policies behind the opinion in that case. Cursory analysis of *Watson* reveals fundamental inconsistencies between that court's reasoning and the *Howard* court's conclusions.

COMPARATIVE CAUSATION

Conceptual Problems with Comparative Causation

The court in *Howard* used comparative causation to resolve the conceptual conflict that arose when comparative fault principles were

31. *Howard*, 520 So. 2d at 719 (quoting the Uniform Comparative Fault Act, § 2(b) (emphasis added)).

32. Id. at 719.

applied to strict liability cases and to prevent the reintroduction of negligence in a strict liability action.[33] Under a strict liability theory, the defendant is liable for damages regardless of any blameworthiness or culpability. In fact, proof of blameworthy conduct is not allowed, so the court does not know whether the defendant is culpable.[34] Negligence, on the other hand, requires a showing of blameworthiness or culpability. In *Howard*, the defendant sought to introduce evidence of the plaintiff's blameworthy conduct.[35] Hence, article 2323, which uses the term "fault" led to a comparison of two unlike things: culpable conduct (the negligence of the plaintiff) and conduct not known to be culpable (the basis for the defendant's strict liability).

The court's analytical distinction between the culpability on the plaintiff's behalf and no known culpability on the defendant's behalf is correct. The court's solution, the introduction of the concept of comparative causation, is not really helpful. First of all, the implementation of comparative causation does not eliminate the conceptual conflict. Second, the plaintiff will be allowed to benefit from his own mistake if his recovery cannot be reduced.

Despite the court's expectations, comparative causation does not eliminate the conceptual conflict between the application of comparative fault principles to negligent plaintiffs and strictly liable defendants. The court believed that comparative causation would allow the trier of fact to compare the causal conduct of the parties without reference to the "fault," negligent or nonnegligent, of the parties. The factfinder could then allocate the plaintiff's recovery according to the respective causal contribution of each party.

The problem with this approach is that fault must still be considered. To invoke the principles of comparative causation, the defendant must initially show that the plaintiff was guilty of some fault. If the defendant

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33. There are actually two problems that the court attempted to resolve: a conceptual problem and a practical problem. The conceptual difficulty involves comparing strict liability and negligence. The two types of legal fault are distinct, and attempting to compare them is akin to comparing apples and oranges. The court, however, glosses over this conceptual problem and focuses on the practical difficulty.

This practical difficulty arises because the court did not wish to allow the introduction of the plaintiff's negligence in a strict liability action. The court analyzed this difficulty by first recognizing that the defendant's strict liability does not include "fault" in the sense of blameworthiness or culpability. Next, the court correctly stated that the theory of strict liability does not lend itself to a comparison of culpability. Finally, the court stated that if the defendant were allowed to mitigate damages by showing the plaintiff's negligence, this would force the plaintiff to show the defendant's culpability. This reintroduction of negligence, concluded the court, would be inappropriate and should not be allowed. *Howard*, 520 So. 2d at 719.

34. The supreme court termed this "nonnegligent fault" in the *Howard* case. Id.

35. Howard v. Allstate Ins. Co., 510 So. 2d 685, 687 (La. App. 4th Cir. 1987).

offers no proof of the plaintiff's fault, the defendant cannot show the plaintiff's causal contribution. In short, the introduction of comparative causation still requires a consideration of the plaintiff's fault, and thus, the conceptual conflict between negligence and strict liability remains.

One might argue that the concept of comparative causation does resolve the conflict, at least in the abstract. The factfinder theoretically could separate the considerations of the plaintiff's contribution to the cause from the consideration of the culpability of the plaintiff's conduct. From a practical standpoint though, no juror will be able to ignore the blameworthiness of the plaintiff. The plaintiff's blameworthiness, then, may cause his recovery to be reduced, rather than his causal conduct. If so, then the *Howard* court's introduction of comparative causation has solved nothing. The court in *Howard* does not reach or resolve this very real problem. The court merely accepts the comparative causation principle without delving into the analytical difficulties.

The second problem the court ignores is that of fairness and the overcompensation of the plaintiff. The plaintiff's conduct, which the defendant seeks to introduce, was culpable or blameworthy. This problem arises because the court, in its analysis of negligent and nonnegligent fault ignored a key question: Should the court ignore the *plaintiff's* blameworthy conduct simply because evidence of the defendant's blameworthy conduct cannot be introduced? Policy reasons dictate that the strictly liable defendant's culpability may not be known. To allow a plaintiff, however, to be compensated where her culpable conduct *is* known seems to run counter to principles of fairness. The plaintiff's actions had an effect on the extent of her damages. To ignore the plaintiff's conduct would allow the plaintiff to benefit from her mistake and thus overcompensate her. The supreme court recognized in *Bell* and its progeny that a plaintiff should not be allowed to benefit from his own mistake. The court should therefore consider the blameworthy conduct of the plaintiff in apportioning damages, regardless of whether it can consider the defendant's culpability. This comparison, between the plaintiff's culpability and the defendant's strict liability, took place in *Bell* without having to introduce comparative causation. The court in *Bell* reduced the plaintiff's recovery despite the fact that the defendant was strictly liable. Thus, the court in *Howard* should have been able to make the comparison without resorting to a new concept.

Approaches in other states

Comparative causation, as an apportionment concept, is not a new idea. Over the past several years many states[36] have applied the principle.

36. The following states have adopted comparative causation as a means of distributing

The term "comparative causation" does not, however, describe any single, well-defined concept. There are four recognized approaches that fall under the term. It is not at all clear that these approaches will yield identical results. Since comparative causation may produce different results, it is unknown whether the Louisiana Supreme Court, in adopting comparative causation, intended to adopt one of the recognized approaches, none of these approaches, or some hybrid approach.

The first approach usually appears in states that have no comparative negligence statute. In these states, the courts are free to create a fault apportionment scheme without legislative restrictions. Courts in this position may adopt a scheme that encompasses strict liability. California is one such state. Observing that such a rule promotes "the equitable allocation of loss among all parties legally responsible in proportion to their fault,"[37] the California Supreme Court judicially adopted comparative causation. The California Supreme Court, however, erroneously uses the terms "fault" and "causation" interchangeably. The term "causation" is the more accurate in cases where the defendant's liability is strict, since strict liability does not involve "fault" in the traditional sense of culpability.[38]

A second approach[39] called comparative causation includes strict liability in tort within an existing apportionment statute using the term "negligence." Courts achieve this result by characterizing strict liability as negligence per se, "because it arises from a violation of a standard of safety and requires no showing of foreseeability of harm."[40] Using this interpretation, a court can include strict liability under comparative negligence statutes.

One problem with using the negligence per se approach is the question of whether the resulting apportionment is actually comparative causation or merely comparative fault with fault presumed. The difference is not merely semantical. If the resulting scheme is truly comparative causation, the causal conduct of the parties will be compared without regard to their fault. If, on the other hand, the resulting apportionment

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accident costs among negligent plaintiffs, negligent defendants, and strictly liable defendants: Alaska, California, Florida, Montana, West Virginia, Wisconsin, Oregon, Mississippi, New Mexico, Texas, Minnesota, New Jersey, Idaho, Kansas, and New Hampshire; the concept has also been recognized in federal admiralty jurisdiction and the U.S. Virgin Islands. Duncan v. Cessna Aircraft Co., 665 S.W.2d 414, 425-27 (Tex. 1984).

37. Daly v. General Motors Corp., 20 Cal. 3d 725, 575 P.2d 1162, 1172, 144 Cal. Rptr. 380, 387 (1978).

38. *Duncan*, 665 S.W.2d at 427. "The trier of fact is to compare the harm caused by the defective product [the thing or object involving strict liability] with the harm caused by the negligence of the other defendants and . . . the plaintiff. The fault or conduct of the (products) defendant is not an issue." Id.

39. This approach has been adopted in Wisconsin and Minnesota. See id. at 426.

40. Id. at 426.

is merely comparative fault with a presumption of defendant fault, the jury will not examine the conduct of the parties. Rather, the jury will compare purely the amount of fault. If the defendant is presumed blameworthy, arguably the jury will assume his fault initially is 100%. The fault of the plaintiff in the jury's collective mind will undoubtedly seem less than the defendant's fault. The jury will be subtracting the plaintiff's percentage of fault from the defendant's 100% fault. The jury will be more likely to find a smaller percentage of fault attributable to the plaintiff in this instance because of the assumption that the defendant is solely liable. Although the jurors will recognize the blameworthy conduct of the plaintiff and reduce recovery by some amount, the jurors will probably be hesitant to subtract a large amount. The result will be that a greater percentage of liability will be apportioned to the defendant than would have been apportioned had both parties started with a presumption of no liability.

In a third approach to comparative causation, courts[41] have found negligent fault where there supposedly was none—in strict liability. These courts held that the distribution of an unsafe product, for which manufacturers are strictly liable, was a departure from the required standard of conduct for manufacturers. The courts labeled that departure "fault," meaning negligent fault, and then allowed the comparison of the plaintiff's negligent fault. The comparison made under this approach is essentially a comparison of fault under a negligence standard.[42]

The fourth and final approach separates comparative negligence and comparative causation. Rather than interpreting the statute to include strict liability cases, the courts judicially adopt a separate comparative system for strict liability cases.[43]

The Texas Supreme Court, in adopting this fourth approach, reasoned that the "judicial adoption of a comparative apportionment system, independent of statutory comparative negligence, is a feasible and desirable means of eliminating confusion and achieving efficient loss allocation in strict liability cases."[44] The court made a clear distinction between comparative causation and comparative fault stating that comparative causation is the accurate phrase only for strict liability cases, when the defendant's "fault," in the traditional sense of culpability, is not an issue.[45]

There is a further point that must be noted when discussing comparative causation approaches in other states. Most cases in which the

41. This approach has been adopted in Idaho, Kansas, New Jersey, and Oregon. Id.
42. Id.
43. New Hampshire and Texas recognize this approach. Id.
44. Id. at 427.
45. Id.

statutes have applied comparative causation were products liability cases, the only form of "strict liability" in most states.[46] Louisiana is unique with its statutorily authorized strict liability for actions other than products liability. Other states do not have this "strict liability," although they use the term "strict liability" to refer to actions that Louisiana courts have dubbed "absolute liability."

In other states, the reduction of the plaintiff's recovery in connection with a comparative causation scheme was predicated on the "unforeseeable misuse"[47] of a product by the plaintiff. The "unforeseeable misuse" of the product by the plaintiff was alleged as a defense by the strictly liable defendant. "Unforeseeable misuse" of a product is the misuse of a product in a way which the manufacturer could not have reasonably foreseen. Foreseeable misuse of a product is within the duty of a manufacturer in producing a safe product. "Unforeseeable misuse" is not within that duty. The manufacturer thus is able to use "unforeseeable misuse" as a comparative defense to strict liability. The reduction in recovery based on "unforeseeable misuse" has been applied in jurisdictions irrespective of the approach taken in the implementation of comparative causation.[48]

The Louisiana Supreme Court in *Howard* is not applying comparative causation to a products liability case, but to a strict liability case for animals, a type of statutorily imposed strict liability unknown in other states. In light of the differences in the types of strict liability, it is questionable whether comparative causation should be applied in this case at all.

The Louisiana Approach

Justice Marcus, in one short sentence in *Howard*, adopted the concept of comparative causation in Louisiana,[49] but failed to articulate a

46. Louisiana is the only state that has strict liability imposed statutorily outside the realm of strict products liability. The remaining forty-nine states have actions in negligence or absolute liability, outside of products although most states do term their liability "strict liability." Therefore, comparative causation has only been considered with respect to strict liability in the context of strict products liability in other states.

47. "Unforeseeable misuse" of a product is the misuse of a product in a way that the manufacturer could not have reasonably foreseen. Foreseeable misuse of a product, that is, the misuse of a product which a manufacturer can reasonable foresee, is within the duty of the manufacturer to produce a safe product. Unforeseeable misuse, on the other hand, is not within the manufacturer's duty to the consumer.

48. Unforeseeable misuse has been used to reduce recovery in California, Daly v. General Motors Corp., 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978); New Hampshire, Thibaut v. Sears, Roebuck & Co., 118 N.H. 802, 395 A.2d 843 (1978); New Jersey, Suter v. San Angelo Foundry & Machine Co., 81 N.J. 150, 406 A.2d 140 (1979); and Wisconsin, Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967). These four states have implemented comparative causation using each of the four methods discussed supra text accompanying notes 36-45.

49. Howard v. Allstate Ins. Co., 520 So. 2d 715, 719 (La. 1988).

method of implementation. This results in speculation upon the approach he would use. One of the four approaches used in other states may be consistent with the logic Justice Marcus used in his opinion. The fourth approach, which maintains separation between the concepts of strict liability and negligence, seems to be the most likely candidate. This approach is consistent with the finding by the court that strict liability and negligence are irreconcilable. This argument is furthered by the fact that the Louisiana comparative negligence statute does not specifically include strict liability cases, although it does specifically include negligence actions.[50]

The court also struggles with the distinctions between negligent and nonnegligent fault, hoping to maintain an analytical distinction. A judicially created comparative causation scheme could preserve these analytical differences by carefully formulating and wording opinions to preserve them. However, if the court is using this method of implementation, it must articulate that fact.

The supreme court must also look at the actual comparative causation test that will be used. In *Howard* the court merely apportioned Tina 10% of the fault without stating the basis for this allocation.[51] It is virtually impossible to ascertain what factors the supreme court considered in apportioning the damages. The supreme court must articulate some method of apportionment. Judges, juries, and attorneys must be able to determine how damages are apportioned in the courts of this state.

Although *Howard* sheds little light, it can be said with certainty that some items must be included in the jury instructions. A judge should instruct the jury to determine if the conduct of both parties bears a causal relationship to the harmful result. The jury should then weigh the relative importance of each party's conduct, as if the other party's conduct had not taken place. Finally, the jury should apportion the liability. The judge could submit a form as follows:

> Question 1: Did the defendant's acts contribute to the plaintiff's injuries?
>
> Question 2: Did the plaintiff's acts contribute to his/her own injuries?
>
> If, in answer to Questions 1 and 2, you have found that more than one party's act(s) contributed to *cause* the plaintiff's injuries, and only in that event, then answer the following question.
>
> *Cause* is defined as "that which *in some manner* is accountable

50. See supra text accompanying notes 30-32.

51. *Howard*, 520 So. 2d at 719. At least one leading commentator, Richard Epstein, has developed a method for allocating the damages among the parties. See Arnold and Rizzo, Causal Apportionment in the Law of Torts: An Economic Theory, 80 Colum. L. Rev. 1399, 1406-08 (1980).

for [a] condition that brings about" an injury.
Question 3: What percentage of plaintiff's injuries were caused by the following persons:

Defendant
Plaintiff
TOTAL
100%[52]

This jury instruction sheet follows the goal of comparative causation by instructing the jury to compare the acts of the defendant and plaintiff that caused the plaintiff's injuries and supplying the jury with a definition of cause.

CONCLUSION

The Louisiana Supreme Court, in deciding *Howard*, may have intended to revise the scheme of loss allocation in strict liability cases. While the court should be commended for recognizing the need for loss allocation in strict liability cases, it should also recognize that comparative causation principles do not alleviate the conceptual conflicts incountered by the court, and further, creates new problems. The court should rethink its adoption of comparative causation in light of the problems discussed. If the court chooses to continue applying comparative causation, the court must provide guidelines for its application and a method for its implementation. The court now must elaborate on the doctrine adopted so that it will serve the purposes for which it was adopted.

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52. Compare the jury change implemented in the *Duncan* court, 655 S.W.2d at 427 n.8.