Premises Liability - The Comparison of Fault Between Negligent and Intentional Actors

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COMMENTS

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I. INTRODUCTION

In 1979, Louisiana adopted a pure comparative fault system by amending Louisiana Civil Code article 2323. Article 2323 was specifically designed to reduce the harshness of the contributory negligence doctrine, which previously acted as a complete bar to an at-fault plaintiff’s recovery. Revised Article 2323 does not, however, offer any guidance about the circumstances in which it is to be used, except by its plain language: “When contributory negligence is applicable to a claim for damages . . . .”

One of the most troubling questions left open by this statutory language was whether fault should be apportioned between negligent and intentional wrongdoers. Several appellate court decisions addressed this issue, but none were dispositive. Finally, on November 30, 1994, the Louisiana Supreme Court
rendered the decision that was supposed to answer this question. While answering the initial question that the comparison can be made, the court did not specify under what circumstances the comparison would be appropriate, leaving the analysis primarily to considerations of public policy.

This article addresses the rationale behind the Veazey court's ruling. It further analyzes the comparison of fault between negligent and intentional parties in the area of premises liability. To better understand the ramifications of Veazey, the article offers existing law as it relates to intervening medical malpractice, as a guide. Further, the article discusses the circumstances that make comparing fault between a negligent and an intentional actor equitable.

II. THE COMPARISON OF NEGLIGENT FAULT AND INTENTIONAL FAULT

Christi Veazey was brutally raped and beaten on October 3, 1988, when an intruder entered her second-floor apartment through her bedroom window. Ms. Veazey instituted a negligence action against Southmark Management Corporation (Southmark) based on its negligent failure to provide adequate security and on its misrepresentation of the amount of security and past criminal history at the complex. Southmark filed a third-party demand against Tonti Management Corporation (Tonti), who had leased the apartment to Ms. Veazey approximately two weeks before Southmark acquired the apartment complex. Tonti was dismissed on summary judgment. Thereafter, Southmark, pursuant to Louisiana Code of Civil Procedure article 1812(C)(2), moved that special interrogatories be issued to the jury to permit allocation of fault to the unknown rapist. The trial court denied this motion.

After trial on the merits, the jury's answer to the interrogatories on the verdict form were inconsistent. In Interrogatory No. 1, the jury found Southmark at fault with respect to the incident. In Interrogatory No. 2, the jury found Christi Veazey free from fault. Then, in Interrogatory No. 3, the jury listed Southmark 60% at fault and Christi Veazey 40% at fault. The trial court adopted the verdict with the 60/40 apportionment of fault. Later, the trial court entered a clarification of judgment and a JNOV, allocating 100% of fault to Southmark. The Louisiana Fifth Circuit Court of Appeal affirmed the JNOV because the

852 (1993); Jones v. Thomas, 557 So. 2d 1015 (La. App. 4th Cir. 1990); and Morris v. Yogi Bear's Jellystone Park Camp Resort, 539 So. 2d 70 (La. App. 5th Cir.), writ denied, 542 So. 2d 1378 (1989).

Appellate courts holding that the comparison cannot be made include: Hebert v. First Guar. Bank, 493 So. 2d 150 (La. App. 1st Cir. 1986); Broussard v. Lovelace, 610 So. 2d 159 (La. App. 3d Cir. 1992), writ denied, 615 So. 2d 343 (1993); Bradford v. Pias, 525 So. 2d 134 (La. App. 3d Cir. 1988).

5. Veazey, 650 So. 2d at 712.

6. In cases to recover damages for injury, death, or loss, the court may submit to the jury special written questions inquiring as to: ... (2) If appropriate, whether another person, whether party or not, other than the person suffering injury, death, or loss, was at fault ...

record was devoid of any evidence of Christi Veazey's negligence for her own rape. The court of appeal also affirmed the trial court's refusal to submit a special charge to the jury for allocation of fault to the unknown rapist. The court of appeal, however, addressing the issue of comparison of fault stated in dicta, "it is permissible to assess fault between intentional and negligent tortfeasors."  

The Louisiana Supreme Court reviewed the appellate court decision and likewise found Southmark at fault for misrepresenting the extent of security at the complex, inadequate window locks, poor lighting and substandard security. Justice Kimball, writing for the majority, then addressed the comparison of fault issue. She stated that in certain situations involving negligent and intentional tortfeasors, the principles of comparative fault will apply. She, nevertheless, specified that under this factual situation, Southmark's negligent conduct could not be legally compared to the intentional conduct of the unknown rapist.


8. "The denial of a jury charge can only constitute reversible error if the jury was misled to such an extent as to prevent it from doing justice. In other words, the trial judge necessarily and commonsensibly possesses wide discretion in assessing which charges are appropriate." 625 So. 2d at 679. "[Gauthier v. O'Brien, 618 So. 2d 825 (La. 1993), rev'd sub nom. Cavalier v. Cain's Hydrostatic Testing, Inc., 657 So. 2d 975 (1995), and Lemire v. New Orleans Public Service, Inc., 458 So. 2d 1308 (La. 1984)] involved comparisons of negligence. Hence, Gauthier and Lemire mandate the submission of such special interrogatory, when appropriate." Veazey, 650 So. 2d at 720 n.13.

9. Veazey, 625 So. 2d at 679.

10. Chief Justice Calogero, concurring in denial of rehearing, confirmed the judgment on original hearing, but disagreed with the legal rationale. He agreed the plaintiff was entitled to 100% recovery from the defendant, Southmark, but he based this finding on Louisiana Civil Code article 1804. He believes Article 1804 obviates the need to allocate fault between the intentional and negligent tortfeasors. Under his analysis, the allocation of fault between the tortfeasors is based on their "virile portion," rather than on principles of comparative fault. While Chief Justice Calogero is correct that the allocation of fault is based on virile portion, his assertion that the principles of comparative fault do not apply is erroneous. The comments to Article 1804 clearly state, "If the obligation originates in an offense or quasi-offense . . . , each obligor's virile portion is proportional to his fault, which is consistent with the idea of comparative negligence." La. Civ. Code art. 2323 cmt. b. How else would virile portion be determined if comparative fault principles were not used?

Further, Chief Justice Calogero asserted that the negligent premises owner was the surety of the intentional tortfeasor based on the third paragraph of Article 1804 which states: "If the circumstances giving rise to the solidary obligation concern only one of the obligors, that obligor is liable for the whole to the other obligors who are then considered only as his sureties." This analysis is incorrect for at least two reasons. First, the circumstances do not concern only one of the obligors, but rather both of them. A surety secures the principle obligation owed to the creditor (victim/plaintiff) by the debtor. Under Chief Justice Calogero's analysis, the premises owner would be securing the principle obligation not to commit the intentional tort. This is not the case. The premises owner's liability for the intentional act is based on his breach of the principle obligation to provide a reasonably safe premises. Absent his own negligence, the premises owner would have no legal responsibility at all for the intentional tort. Second, Louisiana Civil Code article 3038 mandates that suretyship must be express and in writing. Even though suretyship may be qualified, conditioned, or limited in any
The supreme court based this specific ruling on three principles. First, Southmark was unable to benefit from the intentional tortfeasor's conduct because they owed a duty of protection to Christi Veazey that clearly encompassed the exact risk of harm that occurred. Second, the court stated, "Given the fact that any rational juror will apportion the lion's share of the fault to the intentional tortfeasor," the result of allowing the jury to apportion fault to the intentional rapist would be a reduction in the lessor's incentive to protect against this harm in the future. Third, the court ruled intent and negligence are not only different in degree, but also in kind—causing the intentional conduct in this case to be of a fundamentally different nature than Southmark's negligence, rendering a true comparison of fault impossible.

III. APPORTIONMENT OF FAULT BETWEEN ORIGINAL AND INTERVENING TORTFEASORS

The first issue, concerning the scope of Southmark's duty, could have decided the case without the necessity of a comparative fault analysis. A premises owner's duty to protect against the intentional criminal acts of third parties is limited. A business invitor must perform reasonably necessary acts to guard against the predictable risk of assaults, in order to provide a reasonably safe place for business invitees entering the premises. A higher duty of care is owed by an innkeeper, such as Southmark, than is owed by an ordinary business.

Foreseeability is the benchmark of the premises owner's liability and is defined narrowly: (1) a crime is foreseeable if the business owner knows or should know that it is about to occur; or (2) a crime is foreseeable if the business owner knows a high number of prior similar incidents has occurred on the business premises. To fall within the ambit of the duty of protection, the harm suffered by the plaintiff must be foreseeably associated with the negligent breach of the duty and must be the type of harm the duty was designed to prevent.
Whether an intervening tortfeasor is within the scope of the original tortfeasor's legal duty is not a res nova issue in Louisiana. This issue has also arisen in the typical medical malpractice situation. That encompassed within an original tortfeasor's duty is the risk that the injured person will require medical treatment, resulting in improper medical care or medical malpractice is well established in Louisiana. Because intervening medical malpractice and intervening criminal acts in a Veazey-type situation are theoretically similar, the same apportionment of fault rules should apply to both.

In Lambert v. USF&G, the Louisiana Supreme Court, in a per curiam decision, reaffirmed the holding of Weber v. Charity Hospital that original tortfeasors are liable for the acts of intervening tortfeasors. In Lambert, the plaintiff was involved in an automobile accident. Following the accident, the plaintiff's injuries required the care of a neurosurgeon who committed medical malpractice. The plaintiff filed separate suits against the original tortfeasor (the tortious driver), and the intervening tortfeasor (the neurosurgeon). The original tortfeasor (driver) filed an amended answer alleging the fault of the intervening tortfeasor (neurosurgeon) and requesting the plaintiff's recovery be reduced by the neurosurgeon's percentage of fault. The plaintiff filed and was granted a motion to strike the amended answer. The trial court further ordered that the parties be prohibited from apprising the jury of the existence of the plaintiff's claim against the intervening tortfeasor and that the jury verdict form not allow the jury to apportion fault to the intervening tortfeasor.

The Louisiana First Circuit Court of Appeal reversed the ruling of the trial court. Relying on Louisiana Civil Code article 2324(B) and Weber, the court

same general type of harm that falls within the scope of the duty. Carter v. City Parish Gov't, 423 So. 2d 1080 (La. 1982); Ballew v. Southland Corp., 482 So. 2d 890 (La. App. 2d Cir. 1986).


19. 629 So. 2d 328 (La. 1993).
20. 475 So. 2d 1047 (La. 1985). The court held the driver's negligence was the legal cause of the automobile accident and the driver was liable for any damages resulting from the victim's subsequent blood transfusion, along with any other parties whose fault caused the victim to contract hepatitis. The driver was therefore liable not only for the direct injuries caused by the accident, but also for any additional suffering caused by inappropriate treatment of those injuries, whether or not rendered in a negligent manner.
22. A. He who conspires with another person to commit an intentional or willful act is answerable, in solido, with that person, for the damage caused by such act.
B. If liability is not solidary pursuant to Paragraph A, or as otherwise provided by law, then liability for damages caused by two or more persons shall be solidary only to the extent necessary for the person suffering injury, death, or loss to recover fifty percent of his recoverable damages; however, when the amount of recovery has been reduced in accordance with the preceding Article, a judgment debtor shall not be liable for more than
found solidary liability between the original tortfeasor and the intervening health care provider who negligently treated the plaintiff’s injuries sustained in the original accident. The court found Louisiana Civil Code article 2324(B) limited the original tortfeasor’s solidary liability to the extent necessary for the plaintiffs to recover 50% of recoverable damages. The court was further influenced by Gauthier v. O’Brien2 and its application of Louisiana Code of Civil Procedure article 1812(C).24 Based on the above authority, the first circuit found the trial court erred in prohibiting the defendants from apprising the jury of the plaintiff’s claim against the intervening health care provider and in refusing to allow the jury to apportion his fault.

The Louisiana Supreme Court reversed the ruling of the court of appeal and reinstated the judgment of the trial court. The supreme court analyzed the relationship between “Weber-like”25 cases and Article 2324(B) and held the original tortfeasor’s liability for 100% of the tort victim’s injuries is based on more than the imposition of a solidary obligation between joint tortfeasors.26 Liability was placed on the original tortfeasor for 100% of the victim’s damages because he was the legal cause of 100% of the victim’s harm.27 The 1987 revision to Article 2324 does not change the obligation of the original tortfeasor in a “Weber-like” situation, because to rule otherwise, “could relieve the [original] tortfeasor of responsibility for damages for which he is the legal cause and result in the victim receiving less than the full amount of the judgment.”28 Any unfairness to the original tortfeasor from holding him liable for the full

the degree of his fault to a judgment creditor to whom a greater degree of fault has been attributed. Under the provisions of this Article, all parties shall enjoy their respective rights of indemnity and contribution. Except as described in Paragraph A of this Article, or as otherwise provided by law, and hereinafore, the liability for damages caused by two or more persons shall be a joint, divisible obligation, and a joint tortfeasor shall not be solidarily liable with any other person for damages attributable to the fault of such other person, including the person suffering injury, death, or loss, regardless of such other person’s insolvency, ability to pay, degree of fault, or immunity by statute or otherwise. . . .


23. 618 So. 2d 825 (La. 1993), rev’d sub nom. Cavalier v. Cain’s Hydrostatic Testing, Inc., 657 So. 2d 975 (1995). “True apportionment cannot be achieved unless that apportionment includes all tortfeasors guilty of causal negligence . . . whether or not they are parties to the case.” Id. at 830.


26. An interesting result occurs because the court imposes damages of 100% on the original tortfeasor as the legal cause of the victim’s harm. Plaintiff escapes the 50% cap on solidarity because the original tortfeasor’s liability goes beyond solidarity. The court then recognizes the original tortfeasor’s right of contribution against the negligent health care provider for the enhanced injuries based on the imposition of solidarity on the parties.

27. Lambert v. USF&G, 629 So. 2d 328 (La. 1993). “An original tortfeasor may be liable not only for the injuries he directly causes, but also for the tort victim’s additional suffering caused by inappropriate medical treatment by the health care provider who treats the initial injuries.” Id. at 328.

28. Lambert, 629 So. 2d at 329.
amount of the damages is cured by his right to seek contribution from the intervening tortfeasor. In that action, apportionment of fault would be necessary since, as between the parties, each is liable only for his virile share.29

The original tortfeasor had the duty to act reasonably to prevent harm to the plaintiff. The duty encompassed the risk that the injured plaintiff would require medical treatment, resulting in improper medical care or medical malpractice. The court allowed the plaintiff to bring separate actions against the two defendants and disallowed the original tortfeasor from apportioning fault to the intervening tortfeasor. After the original tortfeasor was held in judgment for the entire damages, he was allowed the right of contribution for the intervening tortfeasor's virile share of the injuries.30

The Louisiana Supreme Court again faced the issue of intervening health care providers' medical malpractice in Steptoe v. Lallie Kemp Hospital.31 In that case, the plaintiff brought separate actions against the original tortfeasor and the intervening health care providers. After final judgment was rendered in the trial against the original tortfeasor, the health care providers filed peremptory exceptions of no right and no cause of action based on the satisfaction of the solidary obligation by the original tortfeasor. The Louisiana Supreme Court held that the health care providers were liable for the full extent of the enhanced injuries caused by the tortious medical treatment, that plaintiff could institute separate actions against the original and intervening tortfeasors, that satisfaction of judgment by the original tortfeasor did not bar plaintiff from litigating his damages against the intervening health care providers,32 and that the trier of fact was at liberty to determine the degree of fault of the health care providers and the amount of damages caused by them without regard to any findings of the trier of fact in the action against the original tortfeasor.33

The court relied on Lambert and Weber to find the original tortfeasor liable for the plaintiff's enhanced injuries suffered because of medical treatment of the original injuries. The court found an "ease of association between the original injury and the negligent treatment which creates solidary liability between the

29. Id. at 329; La. Civ. Code art. 1804, provides in pertinent part: "Among solidary obligors, each is liable for his virile portion. . . . If the obligation arises from an offense or quasi-offense, a virile portion is proportionate to the fault of each obligor." Comment (b) to that article provides: "If the obligation originates in an offense or quasi-offense, however, each obligor's virile portion is proportional to his fault, which is consistent with the idea of comparative negligence adopted in C.C. Arts. 2323 and 2324 as amended by Acts 1979, No. 431." La. Civ. Code art. 1804 cmt. b.
30. Lambert, 629 So. 2d 328.
31. 634 So. 2d 331 (La. 1994). This case is a procedural nightmare because the medical malpractice defendants failed to request a reduction in damages by the virile portion of the original tortfeasor for the enhanced injuries.
32. La. Civ. Code art. 1795 provides: "Unless the obligation is extinguished, an obligee may institute action against any of his solidary obligors even after institution of action against another solidary obligor."
33. Steptoe, 634 So. 2d at 331.
tortfeasor and those guilty of medical malpractice."34 Because the medical malpractice defendants' fault was not considered at the original tortfeasor's trial, however, the plaintiff's action against these defendants was not precluded by the judgment.35 The judgment determined only the merits of the claim against the original tortfeasor.36 The supreme court held the original tortfeasor and the health care providers were not solidary obligors at the time of the judgment37 because the health care providers were only potentially liable at that time.38 The court held that absent express renunciation, plaintiff reserved his rights against the intervening tortfeasors, even after satisfaction of judgment by the original tortfeasor.39

While in the medical malpractice situation the two distinct tortious acts both involve negligent conduct, the original tortfeasor's liability for the intervening intentional tortfeasor's acts in Veazey, Lambert and Steptoe is identical from the perspective of legal theory. In both the medical malpractice and the criminal act situations, the act of the intervening party falls within the scope of the legal duty of the original tortfeasor. Therefore, no logical obstructions exist to applying the fault apportionment rules from Lambert and Steptoe to Veazey-type situations.40

The premises owner (original tortfeasor) is liable if he breaches his duty to provide reasonably safe premises for the invitee, while the third party criminal

34. Id. at 334.
35. Id. at 335 (citing Safeco Ins. Co. v. Palermo, 436 So. 2d 536 (La. 1983)).
36. 634 So. 2d at 335 (citing La. Code Civ. P. art. 1841, which provides in pertinent part: "A judgment is the determination of the rights of the parties in an action and may award any relief to which the parties are entitled. It may be interlocutory or final.").
37. 634 So. 2d at 335. See Taylor v. USF&G, 630 So. 2d 237 (La. 1993).

Renunciation of solidarity by the obligee in favor of one or more of his obligors must be express. An obligee who receives a partial performance from an obligor separately preserves the solidary obligation against all his obligors after deduction of that partial performance.


40. The Louisiana Supreme Court in Lambert opened an "escape hatch" in Article 2324(B) which allows plaintiffs to maximize recovery in "Weber-like" situations. What exactly are "Weber-like" situations? The Weber analysis has been extended to areas of tort law other than intervening health care providers committing medical malpractice.

In Miller v. Great Atl. & Pac. Tea Co., 510 So. 2d 695 (La. App. 1st Cir.), writ denied, 513 So. 2d 1213 (1987), the appeal court cited Weber as authority for holding an original tortfeasor responsible for subsequent medical complications as a result of a fall, injuring plaintiff's left ankle. Due to the undue tension and strain on her right ankle because of the injury to the left ankle, a pre-existing medical problem in her right ankle was aggravated and required surgery. This medical complication was considered a consequence of the original tort; thus, the defendant was liable for the complications. Likewise, in Moore v. Chrysler Corp., 596 So. 2d 225 (La. App. 2d Cir.), writs denied, 599 So. 2d 316, 317 (1992), the court applied Weber's scope of the risk analysis to a driver's duty to stay on the road and to avoid injuring others. Encompassed within the scope of the risk was the risk that her passenger's injuries might be worsened because of a defect in the automobile. The court ruled, "[the driver] cannot be absolved of responsibility just because someone else's fault served to worsen the injury."
(intervening tortfeasor) is liable for his intentional act that causes harm to the plaintiff. Whether the premises owner is the legal cause of plaintiff's harm depends on whether the particular harm that occurred is within the scope of protection extended by the imposition of the duty. The duty on the premises owner is to provide reasonably safe premises to protect against the very harm of an intentional criminal act of a third party. Two torts are, therefore, committed against the plaintiff: first, the negligence of the premises owner for failing to provide reasonably safe premises and to protect against this foreseeable risk of harm; and second, the intentional criminal act of the third party.

The plaintiff can institute an action against the original tortfeasor (premises owner). The original tortfeasor should not be entitled to an apportionment of fault to the intervening tortfeasor because, as the legal cause of the victim's harm, the premises owner is liable for 100% of the plaintiff's damages. His liability for 100% of the tort victim's injuries is "based on more than the imposition of a solidary obligation between joint tortfeasors; his liability for 100% of the victim's damages results because he is the legal cause of 100% of the victim's harm." The premises owner should then be allowed to sue the criminal tortfeasor for contribution upon proof that they are solidary obligors.

In this suit, the premises owner may seek to have the criminal actor pay his virile portion of the solidary obligation. This allows the plaintiff to be compensated fully for his injuries and places any loss by reason of insolvency of the criminal tortfeasor on the negligent premises owner who breached the original duty of protection.

IV. APPORTIONMENT OF FAULT AS INCENTIVE TO PROTECT AGAINST HARM

The second principle supporting the Veazey court's ruling is the deterrent effect on the original tortfeasor. This principle finds some of its roots in strict liability jurisprudence in which the Louisiana courts have also extended the reach of comparative fault beyond the former boundaries of contributory negligence.
The underlying principle of strict liability imposes liability on the defendant without the necessity of finding fault or moral wrongdoing because of the defendant's behavior in exposing those in his vicinity to the risk of harm.\footnote{W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 75, at 536-37 (5th ed. 1984).} Strict liability is thus imposed on defendants based on constructions, activities or by reason of relationships, without requiring an actual finding of negligence by the person responsible for the damages.\footnote{Bell, 462 So. 2d at 170.} The law also assumes such a defendant is in a better position than an innocent victim to absorb the loss.\footnote{Keeton et al., supra note 45, at 537.}

In \textit{Bell v. Jet Wheel Blast},\footnote{Bell, 462 So. 2d at 171.} the court stated contributory negligence, as a bar to plaintiff's recovery, would not apply to strict products liability cases. Barring recovery, the court reasoned, would encourage manufacturers to breach their duty to manufacture reasonably safe products and would result in less incentive to make and market safer products. With the replacement of contributory negligence by comparative fault, in most cases, the incentive for manufacturers to produce safe products was maintained, yet the threat of a reduction in recovery provided consumers with incentive to use products more carefully. The court, therefore, found comparative fault acceptable in strict products liability cases, except "in those types of cases in which it does not serve realistically to promote careful product use or where it drastically reduces the manufacturer's incentive to make a safer product."\footnote{Id. at 171, 172.} Comparative fault should, therefore, not be applied unless it provides greater incentive to any person to guard against momentary neglect or inattention to prevent harm.\footnote{Id. at 172.}

The \textit{Veazey} court also recognized this problem. As common sense dictates, "how can a rapist (or virtually any intentional tortfeasor) not be 100% liable for his actions?"\footnote{Veazey v. Elmwood Plantation Assocs., 650 So. 2d 712, 719 n.11 (La. 1994).} Common sense would further dictate that a premises owner would have no reason to guard against the risk of injury to its invitees from third parties if the jury were allowed to apportion the "lion's share" of the fault to the intentional wrongdoer. While it would seem unfair, at first glance, to hold the premises owner liable for the entire amount of the damages, \textit{Lambert} and \textit{Steptoe} allow a reservation of the premises owner's right to contribution against the criminal actor. However, as in \textit{Veazey}, where the criminal actor is unknown, the premises owner has no one against whom to bring his action for contribution and when the Louisiana Law Institute first proposed the comparative negligence legislation. At that time, the majority of strict liability claims were instituted under negligence theories with the primary defense of contributory negligence. Comparative fault, therefore, encompasses fault both under negligence and strict liability.

51. Id. at 172. Application of comparative fault in this case will reduce economic incentive for product quality control and will force the injured individual to underwrite a loss which could be more efficiently distributed by the manufacturer through insurance and price adjustments.
must therefore bear the weight of the entire judgment. This result is not entirely unreasonable because the owner can absorb the risk through market practices such as insurance and pricing. Further, the risk is better placed on the premises owner who seeks and receives financial benefit from the invitee on his premises.

V. INTENT AND NEGLIGENCE: DIFFERENT IN KIND V. DIFFERENT IN DEGREE

The final issue in Veazey dealt with the legal conception of fault. The inclination to apportion more fault to the intentional wrongdoer than to the negligent actor simply reinforces the legal premises that intentional wrongdoing “differs from negligence not only in degree but in kind.”52 While some commentators argue that negligence and intent were merely different degrees of legal culpability,53 the Louisiana Supreme Court has now stated that negligence and intent are not merely different in degree, but are fundamentally different in kind. This different-in-kind argument is rooted in the moral culpability involved in intentional acts, which is objectively absent from the mind of a negligent actor.

To commit an intentional tort, a person must either desire to bring about the physical results of his act or believe they are substantially certain to follow from his act.54 Acting with actual desire or with substantial certainty that harm will occur is much different than failing to act as a reasonably prudent person under the circumstances. In the words of one scholar in this area of law:

The law of intentional torts constitutes a separate world of legal culpability. It is a system that balances specific rights and obligations, and imposes liability on the basis of a party’s intent, rather than the moral blameworthiness of that party’s conduct by societal standards. The real qualitative distinctions between intentional torts and other forms of culpable conduct share a single origin—the duty concept. Intentional torts are dignitary by nature. They are designed to protect one’s right to be free from unpermitted intentional invasions of person or property. Alternatively, the duty underlying an action in negligence or strict products liability is to avoid causing, be it by conduct or by product, an unreasonable risk of harm to others within the range of proximate cause foreseeability. These distinct worlds of culpability cannot be reconciled.55

52. Id. at 719 n.11.
The “different-in-kind” pronouncement in Veazey is not the first time such language has surfaced in Louisiana jurisprudence. When contributory negligence was an absolute bar to an at-fault plaintiff’s recovery, the plaintiff’s negligence was also considered different in kind from an intentional act committed against him. Thus, contributory negligence was never successfully plead as a defense to an intentional tort.

The mens rea of an intentional actor causes the different-in-kind, and not just degree, distinction from the “very careless” negligence standard. Determining culpability for intentional acts demands inquiry into the wrongful mental state of the defendant: “evil motive,” “conceived in the spirit of mischief or of criminal indifference,” or “design of intention” to do injury. This is because the conduct is actually intended to inflict harm upon the plaintiff. It is, therefore, better for the victim’s unexpected losses to fall upon the intentional wrongdoer than upon the innocent victim; and it is, likewise, impossible to make a comparison of the intentional wrongdoer’s conduct to that of a negligent co-wrongdoer.

Some commentators believe that because strict liability and negligence can be compared in a comparative fault analysis, so should intent and negligence. This premises, while theoretically correct as recognized in Veazey, is practically incorrect.

The application of comparative fault to strict liability torts is straightforward. Strict liability is nothing more than negligence without knowledge. This species of legal fault is conceptually similar to negligence based on imputed knowledge to the defendant of the defect in the thing in his custody. The harshness of strict liability can only be cured by the application of comparative fault.

As stated in footnote 12 in Veazey, the nature of strict liability and negligence is not fundamentally different because of the strictly liable defendant’s imputed knowledge of the risk of harm. The primary benefit to a plaintiff in a strict liability case is the absence of the burden of proving the defendant’s knowledge. The plaintiff must still prove all other elements of negligence,

58. Id.
59. Keeton et al., supra note 45, at 462; Ryland, 496 So. 2d at 542; Theriot v. Damson Oil Corp., 512 So. 2d 584 (La. App. 3d Cir. 1987).
however, before liability is imposed. Thus, the comparison of fault between a negligent and a strictly liable party is nothing more than a comparison between negligence with knowledge and negligence with imputed knowledge.

For the same reasons that comparing a victim’s negligence to a defendant’s intentional fault is inequitable and impossible, it is also inequitable and impossible to do what the *Veazey* court recognized as possible: compare one codefendant’s negligence to another codefendant’s intentional tort. In [*South Texas Lloyds v. Jones*](#), the Louisiana Second Circuit Court of Appeal stated:

> Ordinarily, where willful or wanton conduct for which defendant is responsible is a proximate cause of the injuries complained of, contributory negligence does not bar recovery. . . . Thus, the doctrine of contributory negligence has no application in actions founded on intentional violence, or in actions founded on wrongful acts done purposely, or in malicious disregard of the rights of others, or on acts exhibiting an indifference to the rights of others and a reckless disregard of whether or not injury is done.⁶⁷

The supreme court in *Veazey* was most concerned with the comparison of fault between an intentional and a negligent tortfeasor. Certain situations, however, exist in which *Veazey* will apply to allow comparative fault to be used to reduce an at-fault plaintiff’s recovery from injuries resulting from an intentional tort. It is well established, in suits involving intentional torts, “that words or actions calculated to provoke and arouse to the point of physical retaliation may serve to mitigate damages.”⁶⁸ In such cases, the factors that determine comparative fault provide a better method to determine the plaintiff’s recovery than do the principles of mitigation.⁶⁹ The courts, therefore, use comparative fault and the *Watson* factors⁷⁰ to reduce a plaintiff’s recovery in situations where mitigation of damages was previously appropriate.⁷¹

The applicability of comparative fault to intentional torts because the words or actions of the one party were found to have provoked the other into committing the wrong is the touchstone of the *Veazey* opinion. Comparison of fault when an intentional tort is provoked is consistent with the general principle

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66. 273 So. 2d 853 (La. App. 2d Cir. 1973) (insured was not contributorily negligent for leaving his keys in his car in violation of statute prohibiting such conduct, for the intentional conversion of the automobile by a juvenile thief).
67. *Id.* at 855 (quoting 65A C.J.S. *Negligence* § 131 (1966)).
68. *Jones v. Thomas*, 557 So. 2d 1015 (La. App. 4th Cir. 1990). “This court has already held that the epithet ‘motherfucker’ is one of the most offensive and is included among . . . words which are calculated to provoke and arouse to the point of physical retaliation . . . .” *Id.* at 1017.
70. *See supra* note 3.
71. *Jones*, 557 So. 2d at 1015; *Robinson v. Hardy*, 505 So. 2d 767 (La. App. 2d Cir.), *writ denied*, 508 So. 2d 825 (1987); *Harris*, 499 So. 2d at 499.
that comparative fault does not apply in intentional tort cases. In a typical
provocation case, even though the courts considered the victim's conduct
negligent, the victim is actually acting in a manner that is substantially certain
to bring about the harm. So, in essence, the comparison of fault is a comparison
between two types of intentional conduct: the victim's intentional conduct of
substantial certainty and the defendant's conduct of actual desire.

The Veazey court did not close the door on such a comparison of fault by
making a "blanket ruling" that comparative fault is not applicable between
negligent and intentional wrongdoers. To rule comparative fault inapplicable to
any case involving an intentional tortfeasor and a negligent tortfeasor would open
the floodgates of provocation tort lawsuits. It is too easy in today's society to
provoke another to the point of physical retaliation. The provoking party has
been unable, and after Veazey will continue to be unable, to benefit wholly by
a resulting intentional battery. However, Veazey's public policy consideration
will still be the determining factor as to whether to compare the victim's conduct
with the tortfeasor's conduct.

In many other cases involving intentional acts committed against a party, there
is no culpability on the part of the victim. No equitable comparison of fault or
causation can be made between the negligent and intentional parties. No concern
for imposing excess liability on an "otherwise innocent" intentional tortfeasor exists
because the intentional tortfeasor either actually desired the consequences or was
substantially certain the consequences would occur. Because of the level of mental
awareness of the consequences, the intentional tortfeasor should not benefit by
another party's negligence. A negligent victim merely fails to act as a reasonably
prudent person under the circumstances and to objectively foresee the consequences
of his act. This objective foreseeability of an unreasonable risk of harm is
different-in-kind from the subjective desire or substantial certainty of harm.

Other situations in which comparative fault remains applicable to intentional
torts can be inferred from the court's ruling in Peacock's Inc. v. Shreveport Alarm
Co., in which Peacock's, Inc. received damages resulting from the burglary of
its jewelry store. The employees of the shopping center where the jewelry store
was located failed to lock the utility system door, enabling the burglars to bypass
Peacock's alarm system and steal merchandise. The court interpreted Louisiana
Code of Civil Procedure article 1812(C) to require that the jury consider, not
only the fault of those who are parties to the action, but also the fault of other
persons, whether parties or not. The court found the premises owner, the

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72. Broussard v. Lovelace, 610 So. 2d 159, 162 (La. App. 3d Cir. 1992), writ denied, 615 So. 2d
343 (1993).

73. For a detailed analysis to the contrary, see Gail D. Hollister, Using Comparative Fault to
Replace the All-or-Nothing Lottery Imposed in Intentional Torts Suits in Which Both Plaintiff and


75. See supra note 6.

76. Peacock's, Inc., 510 So. 2d at 405. This point is further supported by Gauthier v. O'Brien,
installer of the burglar alarm, and the tester of the alarm 95% at fault and the burglars 5% at fault. This ruling supports the argument that a comparison can be made when the intentional act committed does not have the type of intent associated with a rape.

However, it is unclear how courts will now handle cases such as *Morris v. Yogi Bear’s Jellystone Park Camp Resort*,77 in which the Louisiana Fifth Circuit Court of Appeal found no problem with applying the principles of comparative fault between the negligent and intentional parties. Sherry Morris and a friend, while on a family camping trip at Jellystone, met three boys with whom Sherry, although only 13-years-old, willingly engaged in the consumption of beer. Sherry willingly and voluntarily left her friend to go to the secluded “Boo Boo’s Playground” with one of the boys. The other two boys followed them into the playhouse where the three boys engaged in sexual intercourse with Sherry.78 For Sherry’s injuries resulting from the rape, the court apportioned fault as follows: 10% to Yogi Bear’s Jellystone Park for failing to provide a reasonably safe premises; 78% to the three 17-year-old boys for intentionally raping Sherry; and 12% to Sherry for drinking beer with the boys and for voluntarily going to a secluded place with one of the boys.79

Relying on *Morris*, the court in *LK v. Reed*80 found a 13-year-old mentally retarded rape victim 5% at fault for “consenting” to sex with an 18-year-old classmate even though the court said her consent was “almost meaningless.”81 The victim voluntarily went to a secluded building with the defendant twice in the same day. Both times, the two of them engaged in sexual intercourse.

The *Veazey* court found the submission of the Louisiana Code of Civil Procedure article 1812(C) special interrogatory on the apportionment of fault between negligent and intentional parties to be mandated only when appropriate. The interrogatory may be appropriate with provocational torts and torts which have a different type of intent from the intent to commit aggravated rape found in *Veazey*. It remains unclear how the court will handle *Morris* situations in which the victim’s actions were at a level of substantial certainty as in provocational situations, but the resulting harm was that of rape with all its moral and social stigmas.

VI. CONCLUSION

The Louisiana Supreme Court has finally answered the question of apportionment of fault between negligent and intentional parties. We now know a

77. 539 So. 2d 70 (La. App. 5th Cir.), writ denied, 542 So. 2d 1378 (1989).
78. Id. at 72-73.
79. Id. at 72.
81. Id. at 608.
comparison of fault can be made, but we do not know under what circumstances the comparison will be appropriate. Because negligent conduct and intentional conduct differ not only in degree but also in kind, it will be difficult for the court to find any situation in which comparison will be possible. The emphasis will be on the type of intentional tort committed and the conditions under which it was committed. When the intentional tort falls within the scope of a negligent co-tortfeasor's duty to protect, no comparison will be made between the two because the original tortfeasor will be responsible for the entire amount of the damages. However, in situations which do not involve an original and intervening tortfeasor, the principles of comparative fault will be more applicable.

Even though Veazey addressed the issue of negligent and intentional tortfeasors, the same rationale will apply to apportioning fault between a negligent plaintiff and an intentional tortfeasor. In that case, the policy factors will become dominant. If the act is a result of provocation, comparison will be appropriate. However, when the resulting harm is similar to a rape, public policy should dictate that a comparison cannot be made because of the moral stigma attached to the act and the mental element of the tortfeasor. It will be very difficult for the court to find that the victim provoked or even consented to a rape.

B. Scott Andrews