

5-1-2014

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### Repository Citation

Thomas E. Richard, *Jones v. Robbins: The Rhyme and Reason of Duty–Risk*, 74 La. L. Rev. (2014)  
Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol74/iss3/9>

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## ***Jones v. Robbins: The Rhyme and Reason of Duty–Risk***

*Thomas E. Richard\**

We start with Leon's<sup>1</sup> learned books<sup>2</sup>  
That prompted Wex<sup>3</sup> to take a look<sup>4</sup>  
At negligence analysis,  
And what we know as duty–risk.<sup>5</sup>

The teachings of these pedagogues<sup>7</sup>  
Spawned David<sup>6</sup> and his Dialogues<sup>7</sup>

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\* Clyde C. Tidwell Endowed Professor of Law, Southern University Law Center. The author greatly appreciates the kind support and encouragement of Hodge O'Neal, III of the Monroe, Louisiana Bar, Professor Paul R. Baier of the Louisiana State University Paul M. Hebert Law Center, and Professor Baier's wife, Barbara Baier, of the Baton Rouge, Louisiana Bar who read an earlier draft of this work.

1. Leon A. Green (1888–1979), late Professor of Law, University of Texas, and former Dean, Northwestern University School of Law, is the creative force behind the duty–risk analysis.

2. See generally LEON GREEN, RATIONALE OF PROXIMATE CAUSE (1927); LEON GREEN, JUDGE AND JURY (1930); LEON GREEN, THE JUDICIAL PROCESS IN TORT CASES (1931).

3. Wex S. Malone (1906–1986), late Boyd Professor of Law, Louisiana State University Paul M. Hebert Law Center, espoused and refined the duty–risk analysis and enriched the lives of his torts students through his instruction.

4. By letter dated January 13, 1936, to Leon Green, a copy of which is in the author's possession, Wex Malone, a young torts professor at the University of Mississippi, acknowledged having met Leon Green at the 1936 Association of American Law Schools meeting in New Orleans and expressed a desire to adopt Green's casebook for use in his torts class.

5. Leon Green's method of negligence analysis utilizes cause in fact, duty, scope of duty, breach, and damages to eliminate the obfuscatory language of proximate cause. James M. Treece, *Leon Green and the Judicial Process: Government of the People, by the People, and for the People*, 56 TEX. L. REV. 447, 459 (1978); William L. Crowe, Sr., *The Anatomy of a Tort—Greenian, as Interpreted by Crowe Who Has Been Influenced by Malone—A Primer*, 22 LOY. L. REV. 903–06, 912, 916 (1976), reprinted in William L. Crowe, Sr., *The Anatomy of a Tort—Greenian, as Interpreted by Crowe Who Has Been Influenced by Malone—A Primer*, 44 LOY. L. REV. 647 (1999); Leon Green, *The Causal Relation Issue in Negligence Law*, 60 MICH. L. REV. 543, 546 (1962).

6. David W. Robertson, W. Page Keeton Chair in Tort Law, University Distinguished Teaching Professor, University of Texas School of Law, is a former student of Wex Malone, a former colleague of Leon Green, and a renowned torts scholar in his own right.

7. David W. Robertson, *Reason Versus Rule in Louisiana Tort Law: Dialogues on Hill v. Lundin & Associates, Inc.*, 34 LA. L. REV. 1 (1973).

About the celebrated *Hill*,<sup>8</sup>  
A case that lives within us still.<sup>9</sup>

But there's one case that's even dearer  
With analysis that's even clearer.  
It sends the duty-risk heart throbbin'.  
It's the case of *Jones v. Robbins*.<sup>10</sup>

Robbins sold four cents of gas  
To Penny, a six-year-old lass.<sup>11</sup>  
She took the gas home after sale  
And placed it on a water well.<sup>12</sup>

Four-year-old Candy<sup>13</sup> did dispatch  
Into the gas a well-struck match.  
The flames burned hot, and we learned sadly  
The fire burned Candy rather badly.<sup>14</sup>

Candy's suit was based in tort  
In DeSoto Parish court.<sup>15</sup>  
'Though she lost, she was not shaken,  
To Shreveport an appeal was taken.<sup>16</sup>

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8. *Hill v. Lundin & Assocs., Inc.*, 256 So. 2d 620 (La. 1972). Although previous Louisiana Supreme Court duty-risk decisions had been rendered, *Hill* was the first Louisiana Supreme Court duty-risk decision to employ a non-statutory duty. *See id.*; *see also* THOMAS C. GALLIGAN, JR., *HILL V. LUNDIN & ASSOCIATES REVISITED: DUTY RISKED TO DEATH* (1993).

9. *Hill*, 256 So. 2d 620 is frequently cited as authority in Louisiana cases and is included for study in torts textbooks. *See, e.g.*, FRANK L. MARAIST, ET AL., *TORT LAW: THE AMERICAN AND LOUISIANA PERSPECTIVES* 211-13 (2d ed. 2012).

10. 289 So. 2d 104 (La. 1974).

11. *Id.* at 106. Henry Robbins owned, and George Robbins managed, the Robbins Gulf Service Station in Mansfield, Louisiana. George Robbins either sold four cents of gas or gave a small amount of gas to six-year-old Penny Wyatt. *Id.* at 105-06.

12. *Id.* at 106.

13. *Id.* Candy Jones is the half-sister of Penny Wyatt. *Id.*

14. *Id.*

15. *Id.* Candy's father, Willie Leon Jones, filed suit on behalf of his minor daughter in the Eleventh Judicial District Court, DeSoto Parish, Louisiana. *Id.* at 104-05.

16. Appeal was filed in the Second Circuit Court of Appeal, Shreveport, Louisiana. *Id.* at 105.

When her appeal was soon denied,<sup>17</sup>  
To the Supremes writs were applied.  
A smile returned to Candy's face,  
When they ordered up her case.<sup>18</sup>

Oral arguments were tendered;  
Followed by decision rendered.<sup>19</sup>  
Opinion couched in language brisk  
Applied pure Greenian duty-risk.<sup>20</sup>

Where did it start? How did it end?  
Saul would say, "Let's see, my friend."<sup>21</sup>  
The opinion's author, Barham, J.<sup>22</sup>  
Wrote cause in fact must start the fray.<sup>23</sup>

The gasoline that Robbins sold  
Burned and hurt the four year old.  
Thus, the sale of gas must be  
A cause of Candy's injury.<sup>24</sup>

Now having found a cause in fact,  
The opinion took a different tack

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17. The Second Circuit affirmed the trial court's judgment in favor of the defendants. *Jones v. Robbins*, 275 So. 2d 812, 816 (La. Ct. App. 2d 1973).

18. Writs were granted. *Jones v. Robbins*, 277 So. 2d 671 (La. 1973).

19. *Jones v. Robbins*, 289 So. 2d at 104, was decided January 14, 1974.

20. See Treece, *supra* note 5, at 459; Crowe, *supra* note 5, at 904; Green, *supra* note 5, at 546.

21. Saul Litvinoff, late Boyd Professor of Law, Louisiana State University Paul M. Hebert Law Center, referred to everyone as "my friend."

22. *Jones*, 289 So. 2d at 105. Justice Mack E. Barham was an Associate Justice on the Supreme Court of Louisiana from 1968 to 1974.

23. *Id.* at 106. Cause in fact, the causal connection issue, is the initial issue to be decided in duty-risk analysis. Treece, *supra* note 5, at 459; Crowe, *supra* note 5, at 904; Green, *supra* note 5, at 549.

24. *Jones*, 289 So. 2d at 106. Justice Barham's discussion of cause in fact asks if the sale of the gasoline to six-year-old Penny "ha[d] something to do with" the burns suffered by four-year-old Candy. *Id.* This analysis is more in line with Leon Green's views on cause in fact rather than Wex Malone's. Green believed that cause in fact is nothing more than a factual determination, free from any evaluation of right or wrong, that the defendant's conduct contributed to the victim's harm. Green, *supra* note 5, at 548. Malone, on the other hand, professed that cause in fact is a policy and fact-driven process requiring the trier of fact to engage in matters of evaluation and judgment. *Id.*; Wex S. Malone, *Ruminations on Cause-in-Fact*, 9 STAN. L. REV. 60, 60 (1956).

Offering an explanation  
About the duty's bifurcation.<sup>25</sup>

This issue was a legal beauty.<sup>26</sup>  
Did the Robbins owe a duty  
To protect four-year-old Candy  
From a risk that might be handy?<sup>27</sup>

A prudent person it would seem  
Would not sell the gasoline  
To a child who might not know  
That up in flames the gas would go.<sup>28</sup>

Although this duty is "good stuff,"<sup>29</sup>  
Finding it is not enough.<sup>30</sup>  
Duty's more important question:  
What's the scope of its protection?<sup>31</sup>

Now Wex signals this alarm  
No duty saves one from all harms.  
Only certain risks sometime  
Are within the duty's rhyme.<sup>32</sup>

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25. *Jones*, 289 So. 2d at 107. In the duty-risk analysis, once defendant's conduct is determined to be a cause in fact of the victim's injury, the next step in the analysis is the duty issue. This is a bifurcated issue determining (1) if defendant owes a duty and (2) if so, the scope of protection of that duty. Crowe, *supra* note 5, at 905-06.

26. The duty issue in duty-risk analysis is generally a legal issue decided by the judge. See Allen E. Smith, *Some Realism About a Grand Legal Realist*, 56 TEX. L. REV. 479, 491 (1978).

27. The opinion uses the phrase "in the hands of" six times in a single page. *Jones*, 289 So. 2d at 107.

28. *Id.*

29. George W. Pugh, Emeritus Professor of Law, Louisiana State University Paul M. Hebert Law Center, frequently referred to jurisprudence and legal reasoning that he regarded highly as "good stuff."

30. The determination that a defendant owes a legal duty to a victim does not fully satisfy the duty issue. The second and more important part of the duty issue is whether the duty provides protection to this victim from this risk of harm arising in this manner. See Crowe, *supra* note 5, at 906; Green, *supra* note 5, at 546.

31. *Id.* See also *Jones*, 289 So. 2d at 107.

32. Malone, *supra* note 24, at 73. Although intended by Malone to be applicable to cause in fact, the principle has been extended judicially to the scope of the duty issue. See *Hill v. Lundin & Assocs., Inc.*, 256 So. 2d 620, 622 (La. 1972).

So the Court was forced to ask:  
Does a duty to not sell gas  
To a child of tender years  
Protect 'gainst burns encountered here?<sup>33</sup>

One through ease of association<sup>34</sup>  
Should understand a conflagration  
Could result from children's play  
Misusing gasoline that day.<sup>35</sup>

A prudent one with care aplenty  
Would not have sold the gas to Penny.  
The very risk that harmed poor Candy  
Was in the duty plain and dandy.<sup>36</sup>

With most of duty-risk now reached  
The Court asked was the duty breached?<sup>37</sup>  
This question of liability:  
Did Robbins act unreasonably?<sup>38</sup>

Robbins breached the duty owed.  
This was fault as per the Code<sup>39</sup>  
Both for George and his brother.<sup>40</sup>  
Thus, poor Candy could recover.

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33. *Jones*, 289 So. 2d at 107.

34. *Id.* Ease of association is one of several socioeconomic factors that may be considered, either consciously or subconsciously, by the court in determining duty and its scope. Ease of association asks whether the injury or harm sustained by the victim is easily associated with the conduct of a defendant that violates the duty owed. *See Crowe, supra* note 5, at 906; Robertson, *supra* note 7, at 9.

35. *Jones*, 289 So. 2d at 108.

36. *Id.* The precise risk that Candy encountered, the risk of being burned by the gasoline possessed by her half-sister, Penny, was exactly the type of risk the duty was intended to protect against. *Id.* at 107–08.

37. *Id.* at 108.

38. *See Crowe supra* note 5, at 912. Justice Barham's opinion indicates that "a determination of negligence and liability" is only reached after a finding that defendant's conduct is a cause in fact of the victim's harm and that defendant "owed a legal duty which encompassed the particular risk that caused the harm." *Jones*, 289 So. 2d at 106.

39. LA. CIV. CODE art. 2315 (1961).

40. *Id.* arts. 2315 (1961), 2316, 2320 (1870). George Robbins' fault arises under articles 2315 and 2316. Under article 2320, Henry Robbins is vicariously liable for the tort committed by his employee-brother, George, who, in the course and scope of employment, negligently sold gasoline to six-year-old Penny Wyatt. *Jones*, 289 So. 2d at 108.

Just one last matter to address:  
 How much damage to assess?  
 This task the Second Circuit landed  
 When the matter was remanded.<sup>41</sup>

Some judges disagreed with Mack.<sup>42</sup>  
 Sure, Robbins was a cause in fact.<sup>43</sup>  
 But duty owed? Dissenters laughed.  
 Wasn't this case like *Palsgraf*?<sup>44</sup>

George Robbins gas to Penny sold.  
 To Candy he no duty owed.<sup>45</sup>  
 Another thing that seemed to chafe;  
 Was Robbins bound to keep her safe?

Surely one should recognize  
 That mommy failed to supervise.<sup>46</sup>  
 And so dissenters had their say,  
 But they did not win the day.<sup>47</sup>

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41. *Jones*, 289 So. 2d at 108. On remand, the Second Circuit Court of Appeal took into consideration the extent of Candy's burns, scarring, and medical expenses, awarding \$23,000 in general damages and \$1,000 in special damages. *Jones v. Robbins*, 296 So. 2d 361, 363 (La. Ct. App. 2d 1974). The author was informed by Hodge O'Neal III, plaintiffs' counsel, that the judgment was never paid. After receiving a draft of this rhyme, Mr. O'Neal replied,

The victory was ever so thrilling  
 Never was justice more willing  
 But Robbins had not  
 A window nor pot  
 The rest of the story's unfulfilling  
 We never got a single shilling.

42. Justices Summers and Culpepper dissented. Justice Summers assigned written reasons. *See Jones*, 289 So. 2d at 108.

43. Applying the "but for" test, Justice Summers reasoned that but for the sale of gasoline by Robbins, Candy would not have been injured. Like the majority, Justice Summers also recognized that the existence of cause in fact did not establish defendants' legal liability. *Id.* at 109.

44. *See Palsgraf v. Long Island R.R.*, 162 N.E. 99 (N.Y. 1928).

45. Justice Summers argued that no direct duty was owed to Candy because Robbins's substandard conduct, the sale of gasoline to an incompetent minor child, was directed solely toward Penny. *Jones*, 289 So. 2d at 109.

46. Justice Summers would place all fault for Candy's injuries on Alberta Jones, Candy's mother, the individual "most duty-bound to protect and supervise the child[]." *Id.* at 109.

47. The Court decided the case 5–2 in favor of the plaintiffs. *Id.*

When *Jones v. Robbins*<sup>48</sup> was reported,  
Admiration was recorded.  
Bill Crowe took the lead, of course,<sup>49</sup>  
Then came Timmy’s “*tour de force*.”<sup>50</sup>

Neither cared who won the case.  
What mattered was the Court embraced  
This method of analysis  
That we all know as duty–risk.<sup>51</sup>

It’s been around for 50 years.<sup>52</sup>  
So raise your glass and give a cheer  
Duty–risk is still in season.<sup>53</sup>  
Now you know the rhyme and reason.

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48. *Id.*

49. Crowe, *supra* note 5, at 903.

50. Timothy McNamara, *The Duties and Risks of Duty-Risk Analysis*, 44 LA. L. REV. 1227 (1984). This exceptional piece, which skillfully discusses duty–risk methodology and its development in the jurisprudence of Louisiana, states that the *Jones v. Robbins* opinion “is a *tour de force* by the court and an excellent example of the methodology in action.” *Id.* at 1245.

51. *Id.*; Crowe, *supra* note 5, at 922.

52. The Louisiana Supreme Court’s seminal duty–risk decision was *Dixie Drive-It-Yourself System v. American Beverage Co.*, 137 So. 2d 298 (La. 1962).

53. Louisiana courts continue to utilize duty–risk analysis. *See, e.g.*, *Granger v. Christus Health Central La.*, No. 2012-C-1982, 2013 WL 3287128, at \*41 (La. June 28, 2013); *Joseph v. Dickerson*, 754 So. 2d 912, 916 (La. 2000); *Barrie v. V.P. Exterminators, Inc.*, 625 So. 2d 1007, 1015 (La. 1993); *Roberts v. Benoit*, 605 So. 2d 1032, 1041–42 (La. 1991); *Estate of Loveless ex rel. Loveless v. Gay*, 945 So. 2d 233, 238 (La. App. 2d Cir. 2006). Should these courts ever need to resort to a clear application of duty–risk methodology, *Jones v. Robbins* provides a sterling example.