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Steven E. Spires

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* J.D. candidate 2020, Paul M. Hebert Law Center, Louisiana State University. I want to thank my entire family, especially my parents and siblings, for sharing a love of books, music, and learning; my wife Kelly for her partnership; Dean Thomas Galligan, a great torts teacher, law review advisor, mentor, and all-around example of how to be; Prof. Anna Scardulla for her invaluable editing skills and suggestions; Prof. Lee Ann Lockridge for her guidance and encouragement; and my fellow *Louisiana Law Review* members for their help with the writing process (Mary Grace and Brooke) and for their solidarity (Missy and Sam). Special thanks to Ray Dawson and Troy McCullen. Errors are my own.

INTRODUCTION

Ralph Kampen was just trying to be a good father. His daughter complained of a strange noise coming from underneath her 1989 Isuzu Impulse, so Kampen jacked up the car with the manufacturer-provided tire jack and slid his body under the car to inspect the undercarriage.[1] The jack failed, and the falling car crushed Kampen, breaking both of his collarbones.[2] Kampen brought suit against Isuzu under the Louisiana Products Liability Act (LPLA), alleging that the jack was defective in construction.[3]

To recover under the LPLA, Kampen first had to prove the threshold element that his damages "arose from a reasonably anticipated use of the product."[4] The federal district court granted summary judgment in favor of Isuzu, but a panel of the Fifth Circuit reversed, reasoning that a jury could find Kampen's use of the jack was "reasonably anticipated" because the jack was being used to elevate the car—the exact use Isuzu surely intended when it made the jack.[5] The Fifth Circuit en banc reheard the case and redefined Kampen's "use" to include the placing of his body under the car.[6] The court then held that although a reasonably anticipated use of the jack was to change a tire, it was not a reasonably anticipated use to jack up the car to inspect the undercarriage.[7] The court dismissed Kampen's claim.[8]

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1. Kampen v. American Isuzu Motors, Inc., 157 F.3d 306, 308 (5th Cir. 1998).
2. *Id.* at 309.
3. *Id.* at 308.
4. LA. REV. STAT. § 9:2800.54 (2018).
5. *Kampen*, 157 F.3d at 308–10.
6. *Id.* at 310–11.
7. *Id.* at 317–18.
8. *Id.* at 318.

Kampen demonstrates the power of the judiciary to dismiss a case by defining reasonably anticipated use as a matter of law.[9] In Kampen's case, a jury never had a chance to hear the evidence, decide whether the jack was, in fact, unreasonably dangerous under the LPLA, or determine whether Isuzu was liable.[10] The Fifth Circuit's shift of decision-making power from the jury to the judge is inconsistent with Louisiana tort law, and its consequences can be far-reaching.[11] Not only do trial courts frequently grant summary judgment based on a determination that the plaintiff's use of a product was not reasonably anticipated, but even when a case goes before a jury, appellate courts can redefine "reasonably anticipated use" on appeal and effectively overturn jury verdicts.[12]

Kampen shows that fact-specific definitions of "reasonably anticipated use" are more likely to incorporate aspects of a plaintiff's negligence, which further skews the LPLA analysis.[13] There is no doubt that Kampen's negligent conduct contributed to the existence and severity of his injuries, but Louisiana law dictates that analysis of a defendant's fault and a plaintiff's contributory negligence should be separate.[14] Yet the court dismissed Kampen's claim based on a "reasonably anticipated use" definition built around his negligence.[15] In choosing a fact-specific product use definition, the *Kampen* court not only usurped the jury's decision-making power, but also arguably barred the plaintiff's recovery on account of his negligence in a manner inconsistent with Louisiana's comparative fault regime.[16]

Over the last 30 years, both state and federal courts have struggled to apply the LPLA's reasonably anticipated use requirement in a straightforward manner that best comports with Louisiana law.[17] Courts

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9. *See* Butz v. Lynch, 762 So. 2d 1214, 1218 (La. Ct. App. 1st Cir. 2000).

10. *See* LA. REV. STAT. § 9:2800.54(B) (2018).

11. *See* Broussard v. State *ex rel*. Office of State Bldgs., 113 So. 3d 175, 184–85 (La. 2013). *See generally* Maraist et al., *Answering a Fool According to His Folly: Ruminations on Comparative Fault Thirty Years On*, 70 LA. L. REV. 1105 (2010).

12. *See, e.g.*, Hunter v. Knoll Rig & Equip. Mfg. Co., 70 F.3d 803 (5th Cir. 1995).

13. *Kampen*, 157 F.3d at 310–11.

14. *See* LA. CIV. CODE art. 2323 (2018); Murray v. Ramada Inns, Inc., 521 So. 2d 1123, 1136 (La. 1988).

15. *Kampen*, 157 F.3d at 310–11.

16. *See generally* DAVID W. ROBERTSON, THE LOUISIANA LAW OF COMPARATIVE FAULT: A DECADE OF PROGRESS 9, 21–28 (1991) (arguing that judges should not use duty/risk or the "sole proximate cause" doctrine to conclude that a plaintiff's injury is outside the scope of the defendant's duty because the plaintiff is at fault and thereby override percentage fault determinations by the jury).

17. *See infra* Part IV.

have conflated legal analysis of product use with questions of breach, proximate cause, and comparative fault, resulting in serious consequences for litigants.[18] The Louisiana Supreme Court must unambiguously reject improper applications of "reasonably anticipated use" in the existing case law and provide a detailed method for analyzing an LPLA claim by drawing, in part, on its premises-liability jurisprudence and general negligence law.[19] The Court should further provide guidance on how to define the scope of "reasonably anticipated use" in a general manner that prevents analytical confusion. Moreover, the Louisiana Supreme Court should clarify that "reasonably anticipated use," despite defining the manufacturer's duty, is usually a mixed question of fact and law for the jury to decide, unless the judge determines that reasonable minds could not differ.[20] Finally, the Court should draw on a recent Louisiana appellate case for an example of how to properly review an LPLA claim.[21]

Part I of this Comment provides background on products liability law, both nationally and in Louisiana, and summarizes the basic structure of the LPLA. Part II examines the meaning of "reasonably anticipated use," beginning with a textual analysis, followed by a review of the legal commentary and a comparison with the pre-LPLA jurisprudence's "normal use" standard. Part III considers how courts should apply "reasonably anticipated use" by referring to both the common law and Louisiana duty/risk frameworks for analyzing negligence. Part III also discusses how Louisiana's recent premises liability jurisprudence can be applied by analogy to LPLA claims and notes that disagreement over the proper application of "reasonably anticipated use" is part of a larger debate in Louisiana tort law regarding duty/risk principles and comparative fault. Part IV traces state and federal case law that has applied "reasonably anticipated use" and identifies significant trends. Finally, Part V proposes jurisprudential rules that the Louisiana Supreme Court should adopt to help guide lower courts in proper analysis of reasonably anticipated use.

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18. *See, e.g.*, Matthews v. Remington Arms Co., 641 F.3d 635 (5th Cir. 2011).

19. *See, e.g.*, Broussard v. State *ex rel.* Office of State Bldgs., 113 So. 3d 175 (La. 2013). *See also* Part III.

20. *Broussard*, 113 So. 3d 175. For example, reasonable minds could not differ that using a soda bottle to hammer nails is not a reasonably anticipated use.

21. *See* Marable v. Empire Truck Sales of La., LLC, 221 So. 3d 880 (La. Ct. App. 4th Cir. 2017).

I. BACKGROUND

Products liability law originated at the intersection of contracts and torts.[22] Historically, the common law severely limited a plaintiff's ability to bring an action when a defective product caused damage.[23] Under the doctrine of *caveat emptor*, product users bore the cost when defective products caused their injuries.[24] As the law developed, the privity of contract doctrine limited both warranty and negligence actions to situations where the parties had a contract, meaning an injured consumer could rarely recover against the manufacturer directly.[25] During the middle of the 20th century, courts began to liberalize products liability law.[26] Judges discarded the privity doctrine and embraced tort-based theories of strict liability and negligence, which more readily enabled consumers to sue manufacturers directly for damage caused by defective products.[27] Today, jurists classify products liability law as a unique subset of tort.[28]

The Louisiana Supreme Court first recognized an action for products liability in the 1971 case of *Weber v. Fidelity & Casualty Insurance*.[29] In *Weber*, the Court held the manufacturer of an arsenic-based "cattle dip"[30] liable for the death of a farmer's seven cattle and the temporary illness of his sons.[31] The Court found that the farmer's sons had prepared and applied the dip in accordance with the instructions, but the evidence showed that the dip contained an excessive amount of arsenic, rendering

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22. 1 LOUIS FRUMER & MELVIN FRIEDMAN, PRODUCTS LIABILITY, § 1.02 at 8 (Matthew Bender 2010).

23. DAVID OWEN, PRODUCTS LIABILITY LAW § 1.2, at 13–20 (2005).

24. *Id.* at 17–18 (2005). "Caveat emptor" is Latin for "let the buyer beware." *Caveat*, BLACK'S LAW DICTIONARY (10th ed. 2014).

25. *See* FRUMER & FRIEDMAN, *supra* note 22, § 1.02 at 8–15; *see also* OWEN, *supra* note 23, at 19–23.

26. *See* OWEN, *supra* note 23, at 23–24.

27. *Id.*

28. *See* FRUMER & FRIEDMAN, *supra* note 22, § 1.02 at 8; OWEN, *supra* note 23, at 23–24.

29. Weber v. Fidelity & Casualty Ins., 250 So. 2d 754, 757–58 (La. 1971). Louisiana was relatively late to develop a robust products liability cause of action; most states' laws modernized by the 1960s. *See* OWEN, *supra* note 23, at 23; FRUMER & FRIEDMAN, *supra* note 22, § 1.02 at 37–49.

30. The "cattle dip" at issue was designed "for destroying ticks and biting lice on cattle" and other livestock. According to the instructions, the user needed to mix the dip with water and then either briefly submerge the cattle in the mixture or spray the mixture directly on the cattle. *Weber*, 250 So. 2d at 762.

31. *Id.* at 757–58.

the product "unreasonably dangerous to normal use."[32] The Court did not elaborate further on the phrase.

From *Weber* until 1988, Louisiana products liability law remained judge-made law.[33] According to the pre-LPLA case law, a plaintiff in a products liability case had to prove the following: (1) a condition of the product caused the plaintiff's harm; (2) the condition made the product unreasonably dangerous to normal use; and (3) the condition existed at the time the product left the manufacturer's control.[34] The case law defined normal use as "a term of art that includes all intended uses, as well as all foreseeable uses and misuses of the product."[35]

Nationally, by the 1970s, many manufacturers were unhappy with perceived unfairness in the judicial approach to products liability and started to push for statutory reforms more favorable to defendants.[36] In Louisiana, the push for a products liability statute intensified after the Louisiana Supreme Court's decision in *Halphen v. Johns-Manville Sales Corp.*, an asbestos case.[37] In *Halphen*, the Court recognized an

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32. *Id.*

33. *See* John Kennedy, *A Primer on the Louisiana Products Liability Act*, 49 LA. L. REV. 565, 566–67 (1989).

34. *See id.*; *Weber*, 250 So. 2d at 755–56; Halphen v. Johns-Manville Sales Corp., 484 So. 2d 110, 113 (La. 1986).

35. Bloxom v. Bloxom, 512 So. 2d 839, 854 (La. 1987).

36. *See* OWEN, *supra* note 23, at 24; *see also* FRUMER & FRIEDMAN, *supra* note 22, § 1.08[4] at 212–17 (explaining how critics claimed that liberal judges and juries, biased in favor of plaintiffs, imposed exorbitant judgments on manufacturers that resulted in a lack of affordable liability insurance and rising business uncertainty). Today, most state legislatures have taken products liability law from the common law and codified parts or all of it in special statutes. *See* DAVID OWEN & MARY DAVIS, OWEN & DAVIS ON PROD. LIAB. § 1.12, Appendix I (4th ed. May 2018 update).

37. *See* Thomas Galligan, Jr., *The Louisiana Products Liability Act: Making Sense of It All*, 49 LA. L. REV. 629, 635 (1989) ("The [Louisiana Association of Business and Industry] rejected an approach that relied upon case-by-case development of the law after *Halphen*."). In contrast to the post-*Halphen* reform climate, in 1983, the Louisiana State Law Institute drafted a products liability bill that did not pass. *See* H.B. 711, 1983 Leg., Reg. Sess. (La. 1983). Although different in many respects, the 1983 bill included the term "reasonably anticipated use," later reproduced in the LPLA. *Id.* §§ 9:2800.2, 2800.3. The 1983 bill, in turn, was partly inspired by the Model Uniform Products Liability Act (UPLA), developed by a United States Department of Commerce task force on products liability. *See* Model Uniform Products Liability Act, 44 Fed. Reg. 62714 (Oct. 31, 1979); William Crawford, *The Louisiana Products Liability Act*, 36 LA. B.J. 172, 173 (1988). The UPLA defined product use in terms of "reasonably anticipated conduct," not "use." UPLA § 102(G), 44 Fed. Reg. at 62717.

"unreasonably dangerous per se" theory of recovery under which a manufacturer could be liable for the damage its product caused if the product's "danger-in-fact" outweighed its utility, even if the manufacturer did not know nor could have known of the risk of harm.[38] Notably, this theory of recovery precluded the manufacturer from relying on the "state-of-the-art" defense, which otherwise allowed a manufacturer to defend against liability by showing that it neither knew nor could have known the product was unreasonably dangerous based on the technical knowledge available at the time.[39]

In 1988, with Louisiana in the nadir of a decade-long economic slump and a new governor promising a wave of reform, the legislature codified the entirety of products liability law in the Louisiana Revised Statutes when it passed the LPLA.[40] Similar in spirit to prior case law, the LPLA requires a plaintiff to prove four things: (1) the defendant manufactured the product; (2) the damages were "proximately caused by a characteristic of the product"; (3) the characteristic made the product "unreasonably dangerous," as defined by the LPLA; and (4) the damages "arose from a reasonably anticipated use of the product."[41] The LPLA states that it contains the "exclusive theories of liability" by which a plaintiff can recover against a manufacturer when a defective product causes damage; it therefore provides statutory definitions of what would constitute "fault" under Louisiana Civil Code article 2315 in a products liability action.[42]

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38. *See* Halphen v. Johns-Manville Sales Corp., 484 So. 2d 110 (La. 1986). Manufacturers perceived the decision as favorable to plaintiffs and hostile to defendants. *See generally* William Crawford, Halphen v. Johns-Manville Sales Corp.—*Products Liability Rewritten*, 47 LA. L. REV. 485 (1986).

39. Crawford, *supra* note 38, at 488; *see also* Michelle M. Hoss, Halphen v. Johns-Manville Sales Corp.—*A New Product in the Area of Products Liability*, 47 LA. L. REV. 637, 640–44 (1986).

40. *See* Galligan, *supra* note 37, at 632. *See generally* Ronald Smothers, *Governor's Swearing in Is Modest Affair for Louisiana*, N.Y. TIMES (Mar. 15, 1988), https://www.nytimes.com/1988/03/15/us/governor-s-swearing-in-is-modest-affair-for-louisiana.html [https://perma.cc/5SYV-C4UZ]; Lisa Belkin, *The Nation: 'Revolution' in Louisiana; Picaresque to Pragmatic*, N.Y. TIMES (Aug. 14, 1988), https://www.nytimes.com/1988/08/14/weekinreview/the-nation-revolution-in-louisiana-picaresque-to-pragmatic.html [https://perma.cc/W6GY-VPUF]. The codification of products liability law is part of a broader codification trend in Louisiana tort law. *See generally* Maraist et al., *supra* note 11, at 1134–44.

41. LA. REV. STAT. § 9:2800.54(A) (2018); *see* Kennedy, *supra* note 33, at 583.

42. LA. REV. STAT. § 9:2800.52; Galligan, *supra* note 37, at 632. *See* LA. CIV. CODE art. 2315 (2018) ("Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.").

The LPLA broke with prior law, in part, by dispensing with the term "defective" and instead defining four ways that a product can be "unreasonably dangerous."[43] The LPLA also substituted the term "reasonably anticipated use" for "normal use."[44] Specific LPLA provisions generated disagreement,[45] but contemporary commentators agreed on the law's main substantive changes, including: (1) elimination of the "unreasonably dangerous per se" theory recognized in *Halphen*; (2) prohibition on recovery of attorneys' fees in LPLA cases; and (3) detailed statutory treatment of the "dangerous design" liability theory and "state of the art" defense.[46]

Contemporary commentators generally agreed that the LPLA's definition of "reasonably anticipated use" was not intended to substantively change the law.[47] At the time the legislature passed the LPLA, the majority view among commentators was that "reasonably anticipated use" served the same purpose as "normal use," but would

43. *See also* Kennedy, *supra* note 33, at 571. The four theories of liability are: (1) unreasonably dangerous in construction or composition; (2) unreasonably dangerous in design; (3) unreasonably dangerous because an adequate warning about the product was not provided; or (4) unreasonably dangerous because the product does not conform to an express warranty. LA. REV. STAT. § 9:2800.54(B). *See infra* Section III.B.

44. LA. REV. STAT. § 9:2800.53(7).

45. Particularly contentious were the details of the burden of proof regarding the "state of the art" defense. Galligan, *supra* note 37, at 637–38. Indeed, there was also disagreement over whether the legislature should have passed a products liability statute at all. The goal of the LPLA's proponents—led by the Louisiana Association of Business and Industry (LABI)—was to overrule *Halphen* and protect industry from the perceived threat of liberal courts, large judgments, and unaffordable liability insurance. Governor "Buddy" Roemer's stated goals were to clarify products liability law and align Louisiana's law with the perceived national "mainstream." Opponents—led by the Louisiana Trial Lawyers Association (LTLA, now known as the Louisiana Association for Justice, or "LAJ")—favored a broad and short statute, or none at all, over the bill that was introduced. *Id.* at 634. LABI and the LTLA agreed to a compromise amendment on the Senate floor regarding the state-of-the-art defense. As a result, neither side opposed the bill in the House of Representatives, clearing the way for its final passage. *Id.* at 637–38.

46. Kennedy, *supra* note 33, at 582, 587, 602, 606–08; Galligan, *supra* note 37, at 638, 644, 675; William Crawford, *Developments in the Law, 1987–1988—Torts*, 49 LA. L. REV. 543, 544 (1988).

47. *See* Kennedy, *supra* note 33, at 585–86; Galligan, *supra* note 37, at 639 ("The new phrase does not appear to change the law in this area.").

perhaps express the concept more clearly.[48] Only a minority of commentators took the opposing view that "reasonably anticipated use" intentionally restricted manufacturer liability.[49] By 1996, however, one commentator declared that "the area most significantly altered" by the LPLA was "the construction of 'product use.'"[50]

II. THE MEANING OF "REASONABLY ANTICIPATED USE"

The LPLA defines "reasonably anticipated use" as "a use or handling of a product that the product's manufacturer should reasonably expect of an ordinary person in the same or similar circumstances."[51] The civilian tradition dictates that legislation and custom are the primary sources of law.[52] Therefore, an examination of "reasonably anticipated use" should begin with a close reading of the definition.[53] The statutory language

48. *See* Kennedy, *supra* note 33, at 585–86 (1989) ("[T]he drafters of the LPLA believed that 'reasonably anticipated use' would serve the same purpose as 'normal use,' but do so more efficiently.").

49. *See* Crawford, *supra* note 46, at 543 ("[T]he new term [reasonably anticipated use] is specifically defined in the Act and suggests a more restrictive scope of liability than would have attached under the 'normal use' or 'foreseeable use' provisions.").

50. Andrew Hammond, Hunter *ex. rel.* Hunter v. Knoll Rig & Equipment Manufacturing Company: *The Fifth Circuit Narrows the Scope of "Reasonably Anticipated Use" Under the Louisiana Products Liability Act*, 70 TUL. L. REV. 1659, 1664 (1996). According to this argument, any judicial derivation from general tort principles like comparative fault in LPLA application is a reflection of legislative will. *See* Crawford, *supra* note 46, at 544; LeBreton v. Rabito, 714 So. 2d 1226, 1229 (La. 1998) ("Rules of statutory construction provide that where two statutes deal with the same subject matter, they should be harmonized if possible; however, if there is a conflict, the statute specifically directed to the matter at issue must prevail as an exception to the statute more general in character."). *But see* John Kennedy, *Highlights for Lawyers of the 1988 Regular Legislative Session*, 36 LA. B.J. 164, 165 (1988) ("The LPLA is not as broad as it may seem at first glance. The statute deals primarily with theories of liability. Nor does it affect current Louisiana legal doctrines that pertain generally to tort litigation," including comparative fault.).

51. LA. REV. STAT. § 9:2800.53(7) (2018).

52. LA. CIV. CODE art. 1 (2018).

53. The Louisiana Civil Code instructs the judge that "[w]hen a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature." *Id.* art. 9. Words "must be given their prevailing meaning," but "words of art and technical terms must be given their technical meaning when the law involves a technical matter." *Id.* art. 11.

contains at least three phrases in need of further defining: (1) "reasonably expect"; (2) "ordinary person in the same or similar circumstances"; and (3) "use or handling."

A. Definition of "Reasonably Anticipated Use" Is Fact-Specific

The dictionary definition of "expect"—"to anticipate or look forward to"[54]—adds little to the understanding of the synonymous term "anticipated," defined as "expected or looked forward to."[55] Both "expect" and "anticipate" do, however, address concerns that "normal use" was improperly analyzed with post-accident hindsight because both words evoke consideration of future potential uses from a set point in time in the past.[56] The modifier "reasonably"—defined in Merriam-Webster's dictionary as "being in accord with reason"[57] and in Black's Law Dictionary as "fair, proper, or moderate under the circumstances"[58]—is also of little help because these definitions are subjective to each individual or community. Notions of what is "fair" or "proper" are likely influenced by each person's life experience, cultural background, personal beliefs, and customs.[59] Perhaps it is fair to conclude that "reasonably expect" and "reasonably anticipated" are equally opaque, with the definitions lying in the eye of the beholder.[60]

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54. *Expect*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/expect [https://perma.cc/QY64-5B5S] (last visited Oct. 14, 2018).

55. *Anticipated*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/anticipated [https://perma.cc/HL2Q-87PQ] (last visited Oct. 14, 2018).

56. *See* Kennedy, *supra* note 33, at 586. The "normal use" critics claimed that judges and juries were unfairly expanding the scope of manufacturer liability by using hindsight—applying the concept of "normal use" not from the manufacturer's point of view at the time the product was made, but from the point of view of the time of trial. *Id.*; *infra* Section II.B.

57. *Reasonable,* MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/reasonably [https://perma.cc/L2P9-P6V5] (last visited Oct. 14, 2018).

58. *Reasonable*, BLACK'S LAW DICTIONARY (10th ed. 2014).

59. Because different people will often come to different conclusions when presented with the same evidence, the question of what is "reasonably anticipated use" may be best answered by the jury. *See infra* Section III.B.

60. Incidentally, a search of Black's Law Dictionary for any reference to variations of the phrase "reasonably anticipated" leads one to "foreseeability," defined as "the quality of being reasonably anticipatable." *Foreseeability*, BLACK'S LAW DICTIONARY (10th ed. 2014). The definition further notes that

The concept of "an ordinary person in the same or similar circumstances" provides more guidance because it suggests a flexible standard tied to the nature of the product.[61] For example, one should analyze the uses expected of an ordinary worker in an industrial setting for a piece of expensive industrial machinery differently than uses expected of an ordinary consumer for a widely available and inexpensive product like an electric clothing iron. The dictionary defines the adjective "ordinary" as "of a kind to be expected in the normal order of events; routine; normal."[62] As specifically applied to people, "ordinary" is "typical of the population or a particular group; average; without exceptional experience, knowledge, etc."[63] The phrase "ordinary person in same or similar circumstances" may thus be evocative of the hypothetical "reasonable person under the circumstances" standard commonly used in many areas of the law, but with the important caveat that an "ordinary person," for purposes of the LPLA, is not a "reasonable person" because ordinary people are sometimes negligent.[64]

Finally, "use or handling" is, somewhat oddly, the most difficult part of the term's definition. The dictionary definition provides little help.[65] On

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"foreseeability, along with actual causation, is an element of proximate cause in tort law." *Id. See also infra* Section III.D.

61. LA. REV. STAT. § 9:2800.53(7) (2018).

62. *Ordinary*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/ordinary [https://perma.cc/5BW3-QS9A] (last visited Oct. 14, 2018).

63. *Ordinary*, OXFORD ENGLISH DICTIONARY (3d ed. 2004).

64. *Reasonable Person*, BLACK'S LAW DICTIONARY (10th ed. 2014); *see also* RESTATEMENT (SECOND) OF TORTS § 283 (AM. LAW INST. 1965) ("Unless the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like circumstances."). Commentators writing about the LPLA have noted that "reasonably anticipated use" includes misuse, which surely can encompass negligent use. *See* Kennedy, *supra* note 33, at 584 ("The purpose of both terms is to express the types of product uses and misuses by a consumer that a manufacturer must take into account when he designs a product, drafts instructions for its use and provides warnings about the product's dangers in order that the product not be unreasonably dangerous."); Galligan, *supra* note 37, at 639 ("'[R]easonably anticipated use,' like 'normal use,' should include foreseeable or expected misuse where the court decides that the misuse is within the scope of the manufacturer's duty to make a safe product.").

65. "Use" means "the act or practice of employing something: employment, application," or "a method or manner of employing or applying something." *Use*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/use [https://perma.cc/W7QV-TXZS] (last visited Oct. 14, 2018). The noun

some level, no definition could be helpful because what constitutes "use or handling" for the purposes of the LPLA is dependent on what is "reasonably expect[ed] of an ordinary person in the same or similar circumstances."[66] Another facet of product "use" is the specificity of the definition and the degree to which it should include environmental factors or user attributes.[67] For example, the use of riding a bicycle could be defined generally as bike riding. More specifically, one's use of the bike could be defined, in part, in relation to the environment or the conditions under which the rider is using it—for example, bike riding on pavement could be defined as a different use than bike riding on sand, or bike riding in the rain as a different use than riding on a sunny day. Theoretically, one could further define use to include the user's specific attributes or conduct—for example, riding with or without a helmet—or the user's purpose, such as riding to the library versus riding to the liquor store. The text of the LPLA gives no clear answer on how generally or specifically to define the scope of use.[68] Having found no answer through examination of the text, one may look next to outside sources—scholarly commentary and case law—for additional guidance.[69]

"handling" means "the action of one that handles something" or "the manner in which something is treated." Synonyms of "handling" include "administration," "conduct," "control," "management," and "stewardship." *Handling*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/handling [https://perma.cc/7SBN-55GD] (last visited Oct. 14, 2018). The Model UPLA employed "reasonably anticipated conduct" in place of "reasonably anticipated use." Model Uniform Products Liability Act § 102(G), 44 Fed. Reg. 62714, 62717 (Oct. 31, 1979). If the LPLA drafters had intended "handling" to mean "conduct," presumably they would have followed the UPLA and used the word "conduct." The more likely interpretation is that "handling" is meant in the more mechanical sense of the verb "handle": "to act on or perform a required function with regard to." *Handle*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com /dictionary/handles [https://perma.cc/99VN-QKEN] (last visited Oct. 14, 2018).

66. LA. REV. STAT. § 9:2800.53(7) (2018).

67. *See, e.g.*, Kampen v. American Isuzu Motors, Inc., 157 F.3d 306, 310 (5th Cir. 1998) ("Under the liability scheme set up by the LPLA, then, Kampen's injuries must have arisen from a reasonably anticipated use of the jack. But that begs the following questions: which of Kampen's actions on the day of his injury should we consider as 'use' of the jack? . . . At the outset, we note that the level of generality at which a plaintiff's 'use' of a product is defined will bear directly on whether the plaintiff satisfies the LPLA's reasonably anticipated use requirement.").

68. *See* LA. REV. STAT. §§ 9:2800.53(7), 2800.54(A).

69. *See* LA. CIV. CODE art. 1, cmt. b (2018) ("According to civilian doctrine, legislation and custom are authoritative or primary sources of law. They are

B. No Difference Between "Normal" and "Reasonably Anticipated" Use

According to commentators, the phrases "reasonably anticipated use" and "normal use" serve the same purpose: to define the product uses that fall within the scope of the manufacturer's duty to make a reasonably safe product.[70] But if the terms are meant to serve the same purpose and the legislative intent was not to change the law, then why did the LPLA not retain "normal use," if only to reduce confusion?[71] Critics of the pre-LPLA jurisprudence claimed that courts struggled with application of the "normal use" standard.[72] According to this argument, courts improperly employed post-accident hindsight at the time of trial to decide whether the plaintiff's use was "normal," instead of considering whether the use was reasonably foreseeable from the manufacturer's point of view at the time it made the product.[73] By applying foreseeability with the benefit of hindsight, courts supposedly expanded the concept of "normal use" to hold manufacturers liable for damages that arose from "every conceivable foreseeable use."[74] The LPLA drafters chose "reasonably anticipated use"

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contrasted with persuasive or secondary sources of law, such as jurisprudence, doctrine, conventional usages, and equity, that may guide the court in reaching a decision in the absence of legislation and custom.").

70. Kennedy, *supra* note 33, at 584; Galligan, *supra* note 37, at 639.

71. Usually, a legislative deviation from the prior jurisprudence is deemed to be intentional, and it is the proper role of the judiciary to give effect to that legislative intent.

72. *See* Kennedy, *supra* note 33, at 586. One criticism was the lack of a consistent definition of "normal use," with courts describing the term as "foreseeable use or misuse," "not limited to intended use," "reasonably foreseeable use," "probable use," use that "the manufacturer may reasonably expect," "normal application," and "foreseeably dangerous use," among other descriptors. *Id.* (citations omitted).

73. *See, e.g.*, Kennedy, *supra* note 33, at 586. This criticism is part of a larger debate in tort law over how to analyze proximate cause. *See, e.g.*, Overseas Tankship (U.K.) Ltd. v. Morts Dock & Eng'g Co. Ltd. (The Wagon Mound) [1961], A.C 388; *see also* RESTATEMENT (SECOND) OF TORTS § 435 (AM. LAW INST. 1965).

74. Kennedy, *supra* note 33, at 586. ("It is foreseeable that a consumer might use a soft drink bottle for a hammer, might attempt to drive his automobile across water or might pour perfume on a candle to scent it. If he does, however, the manufacturer of the product should not be and under the LPLA is not liable because the uses in the illustrations are not the sort that a manufacturer should reasonably expect of an ordinary consumer.").

rather than "normal use" to prohibit the fact-finder from expanding the scope of liability beyond what the drafters intended.[75]

If courts were supposed to apply "normal use" with foresight, not hindsight, then the change in terminology, somewhat paradoxically, did not change the substantive law.[76] Rather, the term "reasonably anticipated use" was the legislature's attempt to describe the proper method of analyzing product use, instead of redefining product use.[77] According to Governor Roemer's executive counsel, John Kennedy,[78] reasonably anticipated use is "narrower" than normal use specifically because "unlike 'normal use,' the LPLA term does not address the issue of post-manufacturer changes to the product or improper maintenance."[79] Courts routinely cite Kennedy's phraseology out of context, however, stating that "reasonably anticipated use" is "narrower" than "normal use" in an axiomatic manner, suggesting that the LPLA term was meant to restrict manufacturer liability across the board.[80]

Interestingly, a review of pre-LPLA cases shows that courts did not struggle to apply the concept of "normal use" in the same way they have grappled with the LPLA's "reasonably anticipated use" requirement.[81]

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75. *Id.*

76. By contrast, the LPLA's elimination of the "unreasonably dangerous per se" theory of liability was a clear change in the law that restricted manufacturer liability. *See id.* at 587; Galligan, *supra* note 37, at 640.

77. Incidentally, in the same year the LPLA was passed, the Louisiana Supreme Court held in a medical malpractice case that when determining proximate cause, the fact-finder should apply foreseeability with foresight, not hindsight, so as to not unfairly hold the defendant liable for risks that he could not have foreseen. Pitre v. Opelousas Gen. Hosp., 520 So. 2d. 1151, 1161 (La. 1988).

78. Currently, John Kennedy is the junior U.S. Senator from Louisiana.

79. Kennedy, *supra* note 33, at 586. Rather, the issue of post-manufacturer changes is addressed in a separate part of the LPLA using the "reasonably anticipated alteration or modification" concept. *See* LA. REV. STAT. §§ 9:2800.53(8), 2800.54(C) (2018).

80. *See, e.g.*, Payne v. Gardner, 56 So. 3d 229, 231 (La. 2011) ("Notably, this definition [of reasonably anticipated use] is narrower in scope than its pre-LPLA counterpart, 'normal use'. . . .").

81. *See* Whiteacre v. Halo Optical, 501 So. 2d 994 (La. Ct. App. 2d Cir. 1987) (holding that playing racquetball fell within "normal use" of protective sportswear glasses and that the manufacturer was liable for failing to warn that a ball moving at high speed could fit through the rim and strike an eye); LeBouef v. Goodyear, 623 F.2d 985, 989, 989 n.4 (5th Cir. 1980) (holding that driving a sports car at nearly 100 miles per hour fell within "normal use": "It was not simply foreseeable, but was to be readily expected, that [the car] would, on occasion, be driven in excess of the 85 mile per hour proven maximum safe operating speed of its

Rather, debate in the pre-LPLA jurisprudence largely focused on issues concerning the definition of "defective,"[82] product modification and poor maintenance,[83] or the sufficiency of the plaintiff's causation evidence.[84]

Theoretically, then, little meaningful difference exists between "normal use" and "reasonably anticipated use." In practice, however, courts have applied the concepts differently, not by substitution of foresight for hindsight, but rather by defining "use" more specifically under the LPLA.[85] The LPLA cases show that the more precisely a court defines "reasonably anticipated use," the more likely that court will formulate a definition that excludes a particular plaintiff's negligent use, resulting in a finding of no liability because the plaintiff's use is purportedly outside the scope of the manufacturer's duty.[86] Further,

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Goodyear tires"); Cobb v. Insured Lloyds, 387 So. 2d 13 (La. Ct. App. 3d Cir. 1980) (holding that the manufacturer should have anticipated that a gun owner would carry a weapon fully loaded with the hammer in the full-forward position because this is the typical "safety" position on many handguns); *cf. infra* Part IV.

82. *See* Norris v. Bell Helicopter, 495 So. 2d 976 (La. Ct. App. 3d Cir. 1986); Stevens v. Rex Chainbelt, 349 So. 2d 948 (La. Ct. App. 1st Cir. 1977); Scott v. White Trucks, 669 F.2d 714 (5th Cir. 1983).

83. *See, e.g.*, Winterrowd v. Travelers Indem. Co., 452 So. 2d 269 (La. Ct. App. 2d Cir. 1984).

84. *See* Bloxom v. Bloxom, 512 So. 2d 839, 850–51 (La. 1987) (holding the manufacturer not liable for a barn fire because, although failure to warn that the catalytic converter system could ignite a fire if the car was parked in high grass rendered the car "unreasonably dangerous to normal use," the plaintiff failed to show an essential element of causation, that is, that an adequate warning would have in fact prevented him from parking his car in the barn and starting the fire); Quattlebaum v. Hy-Reach Equipment Inc., 453 So. 2d 578 (La. Ct. App. 1st Cir. 1984) (holding the manufacturer of a hydraulic crane basket truck operated without outriggers not liable for failure to warn because it had provided warnings and alterative safety equipment to the owner that leased the machine to the user who was injured).

85. *See* Myers v. American Seating Co., 637 So. 2d 771 (La. Ct. App. 1st Cir. 1994) (defining use of standing on a folding chair as standing on the back of a folding chair); Kampen v. American Isuzu Motors, Inc., 157 F.3d 306 (5th Cir. 1998) (defining use of a tire jack as using a jack to elevate a car for the purpose of inspecting the undercarriage instead of changing a tire); Hunter v. Knoll Rig & Equip. Mfg. Co., 70 F.3d 803 (5th Cir. 1995) (defining use of a rack for stacking pipes as stacking pipe with a "negative lean" instead of with a "positive lean").

86. The dynamic of defining duty to exclude a plaintiff's negligence is one facet of a larger debate among Louisiana's legal commentators about judicial techniques that define duty in relation to plaintiff negligence, and whether those techniques are consistent with Louisiana's system of pure comparative fault. *See* David W. Robertson, *Ruminations on Comparative Fault, Duty-Risk, Affirmative*

reliance on specific "reasonably anticipated use" definitions to decide cases as a matter of law has shifted power from jury to judge.[87] Lack of analytical clarity in the case law has obscured this shift in power, but consistent application of traditional tort concepts to LPLA cases would help to uncover it.

III. THEORETICAL APPROACHES TO APPLYING "REASONABLY ANTICIPATED USE" IN THE LPLA CONTEXT

The judiciary has interpreted and applied the LPLA as a special statutory cause of action with its own unique elements of reasonably anticipated use, unreasonably dangerous characteristic of the product, and proximate cause.[88] The LPLA is clearly a tort-based statute to which basic tort law applies, but reference to traditional elements of duty or breach does not appear in the LPLA cases in an organized fashion.[89] Instead, the legal analysis is inconsistent, with courts often over-relying on "reasonably anticipated use" to simultaneously analyze multiple tort concepts of duty, breach, and causation.[90] Understanding the LPLA in terms of the well-known elements of common law negligence and Louisiana duty/risk will help to clarify the analysis.

Under the common law approach, the plaintiff must prove five elements: (1) duty, (2) breach, (3) cause-in-fact, (4) proximate cause, and (5) damages.[91] In Louisiana, however, the duty/risk analysis is the preferred method for analyzing negligence.[92] To recover under the duty/risk approach, the plaintiff must prove: (1) cause-in-fact; (2) scope of the duty, (that is, whether the specific risk the plaintiff would incur the

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Defenses, and Defensive Doctrines in Negligence and Strict Liability Litigation in Louisiana, 44 LA. L. REV. 1341 (1984); Alston Johnson, *Comparative Negligence and the Duty/Risk Analysis*, 40 LA. L. REV. 319 (1980); Maraist et al., *supra* note 11.

87. *See generally* Broussard v. State *ex rel*. Office of State Bldgs., 113 So. 3d 175 (La. 2013).

88. *See, e.g.*, Marable v. Empire Truck Sales of La., LLC, 221 So. 3d 880 (La. Ct. App. 4th Cir. 2017).

89. *See infra* Part IV.

90. Ironically, this misapplication of "reasonably anticipated use" is reminiscent of pre-LPLA criticisms of supposed misapplication of "normal use." *See, e.g.*, Kennedy, *supra* note 33, at 586.

91. *See, e.g.*, Naifeh v. Valley Forge Life Ins., 204 S.W.3d 758, 771 (Tenn. 2006); *see also* Thomas Galligan, *A Primer on the Patterns of Negligence*, 53 LA. L. REV. 1509, 1510 (1993).

92. *See, e.g.*, Harris v. Pizza Hut of La., Inc., 455 So. 2d 1364, 1369–70 (La. 1984).

type of damage he suffered falls within the scope of the defendant's duty); (3) breach; and (4) damages.[93] Finally, under either approach, only after the jury establishes the defendant's fault should it apply comparative fault principles, determine the percentage of fault of each person who contributed to the damages, and reduce the amount of the plaintiff's recovery in proportion to the plaintiff's percentage of fault, if any.[94] The key difference between the approaches is that the duty and proximate cause elements are kept separate at common law but are combined into a single element under duty/risk.[95]

A. Duty

"Reasonably anticipated use" is best understood as part of the definition of the manufacturer's duty to design, produce, and provide warnings and instructions for a product such that it is not "unreasonably dangerous."[96] A manufacturer does not have a duty to protect all persons from all harm related to all uses of its product; rather, a manufacturer's duty is limited to making a product that is not unreasonably dangerous for reasonably anticipated uses.[97] Courts often treat duty as the threshold element in analyzing any LPLA claim.[98]

Traditionally, whether a general duty exists is a legal question for the judge to decide.[99] In the LPLA context, the key issues are: (1) the level of specificity at which to define use—that is, duty—and (2) whether the judge or the jury should have to power to decide the specifics.[100] Consider *Kampen* again.[101] The court could have defined duty broadly, as "don't make a jack that is unreasonably dangerous for reasonably anticipated

93. *Id.*; *see also* Galligan, *supra* note 91, at 1526. Alternatively, duty/risk could be divided into five elements if the question of whether the defendant owed a duty in general is considered separately from the duty/risk or "scope of the duty" element, focusing on the whether the specific risk fell within that duty. *See, e.g.,* Jones v. Robbins, 289 So. 2d 104 (La. 1974). Arguably, this latter approach makes more sense for a products liability claim because it better tracks with the LPLA's elements.

94. LA. CIV. CODE art. 2323(A) (2018).

95. Galligan, *supra* note 91, at 1529.

96. Kennedy, *supra* note 33, at 584; *see also* Galligan, *supra* note 37, at 639.

97. *Id.*

98. *See, e.g.*, Kampen v. American Isuzu Motors, Inc., 157 F.3d 306, 314 (5th Cir. 1998).

99. Galligan, *supra* note 91, at 1510–11.

100. *See supra* Section II.B. *See generally* Broussard v. State *ex rel*. Office of State Bldgs., 113 So. 3d 175 (La. 2013).

101. *Kampen*, 157 F.3d at 306; *see also* Introduction.

uses," and allowed the jury decide whether Kampen's use fell within that definition. Instead, the court defined duty more narrowly, as "don't make a jack that is unreasonably dangerous *for jacking up your car to change a tire*" and thereby dismissed Kampen's claim on the grounds that Isuzu had no duty as a matter of law.[102] The importance of the duty determination cannot be overstated—a judge's finding of no duty prevents the plaintiff's case from progressing to the jury for a determination of whether there was a breach, as seen in *Kampen*.[103]

B. Breach

Breach occurs when a product is "unreasonably dangerous" as defined by the LPLA.[104] A product can be "unreasonably dangerous," meaning a manufacturer can breach its duty, in four ways: (1) construction or composition;[105] (2) design;[106] (3) inadequate warning;[107] or (4) non-conformity to an express warranty.[108] To constitute a breach, the "unreasonably dangerous" characteristic of the product usually must have existed at the time the product left the manufacturer's control.[109] In the case of a dangerous design or failure to warn claim, however, the characteristic can also result from a "reasonably anticipated alteration or modification of the product."[110]

Breach is a question for the fact-finder, unless reasonable minds could not differ, in which case a directed verdict would be appropriate.[111] A clear analytical overlap exists between the duty and breach elements.[112] Defining one element necessarily defines the other, such that each element can be thought of as the inverse of the other. Reflecting back on *Kampen*,

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102. *Kampen*, 157 F.3d at 309–10; *see* LA. CODE CIV. PROC. art. 966 (2018).

103. *Kampen*, 157 F.3d at 318.

104. LA. REV. STAT. § 9:2800.54 (2018). Four of the LPLA's ten sections are dedicated to describing the breach element. *See id.* §§ 9:2800.55–58.

105. *Id.* § 9:2800.55.

106. *Id.* § 9:2800.56.

107. *Id.* § 9:2800.57.

108. *Id.* § 9:2800.58.

109. *Id.* § 9:2800.54(C).

110. *Id.* The construction of the LPLA suggests that issues of product alteration and modification are to be treated as part of the breach question, not as part of the manufacturer's duty, because the concept is located alongside the "unreasonably dangerous" section of the LPLA and not with "reasonably anticipated use." *Id.*

111. Galligan, *supra* note 91, at 1512. The jury is usually considered as the fact-finder, but the judge can also sit as trier of fact during a bench trial.

112. *See generally* Maraist et al., *supra* note 11.

the mere fact that the jack failed would not automatically result in a breach.[113] Rather, whether there is an "unreasonably dangerous" breach under the LPLA depends on how the court defines the manufacturer's duty.[114]

The key difference between duty and breach is the procedural power of whether the judge or the jury has the power to decide.[115] The textbook rules dictate that duty is a question of law for the judge, and breach is a question of fact for the jury.[116] The reality is more complicated, however, and requires recognizing a distinction between purely legal duty questions for the judge to decide and duty questions that are a mix of law and fact and therefore more appropriate for the jury.[117]

The LPLA answers most legal duty questions by broadly defining who can bring an LPLA claim and what damages are recoverable.[118] In most LPLA cases, however, the question of whether a use was reasonably anticipated does not involve similarly far-reaching policy questions.[119] Instead, the analysis is focused on defining the manufacturer's duty in that specific case based on a multitude of factual determinations, including: (1) what the manufacturer knew or should have known about product use

113. *See supra* Introduction; Kampen v. American Isuzu Motors, Inc., 157 F.3d 306 (5th Cir. 1998).

114. *See generally* LA. REV. STAT. § 9:2800.54 (2018); *supra* Section III.A.

115. Galligan, *supra* note 91, at 1510–12.

116. *Id.*

117. *See, e.g.*, Broussard v. State *ex rel*. Office of State Bldgs., 113 So. 3d 175 (La. 2013). Legal duty questions are often general, asking whether the defendant and the plaintiff had the type of relationship that should impose a duty on the defendant, or whether any defendant should be liable for a certain type of damages. *See* Galligan, *supra* note 91, at 1510−11. In products liability, a historical example is whether a defendant's duty was limited to those with whom it had privity of contract, but a more contemporary example is the question of whether the plaintiff can recover for emotional damages or attorneys' fees. *See supra* Part I. The answer to these legal questions are "rules" that are applicable to entire categories of cases. Given the need for consistency, judges are arguably in a better position than juries to consider the policy implications of "rule" questions. *See generally* Frank Maraist, *Of Envelopes and Legends: Reflections on Tort Law*, 61 LA. L. REV. 153, 163 (2000). By contrast, mixed questions are usually more appropriate for the jury because they are dependent on factual determinations. *See, e.g.*, *Broussard*, 113 So. 3d 175.

118. *See* LA. REV. STAT. § 9:2800.53 (defining "claimant" and "damage"). "The manufacturer of a product shall be liable to a claimant for damage . . . [arising from] a reasonably anticipated use of the product by the claimant or another person or entity." *Id.* § 9:2800.54(A).

119. *But see infra* Section IV.C.

at the time of manufacture; (2) whether the product's warning or instructions were adequate; (3) whether the use would be considered obviously dangerous by potential users; (4) whether actual uses and misuses existed and were prevalent; and (5) other thorny issues not solvable by mechanical application of a legal rule.[120] Because the definition in a given case is likely to be heavily dependent on the facts surrounding a particular product at a particular time, courts should consider reasonably anticipated use as a mixed question.[121]

The Louisiana Supreme Court's recent premises liability jurisprudence offers guidance for properly navigating the duty/breach overlap and can be applied by analogy to the LPLA.[122] In *Broussard v. State*, a deliveryman ruptured a disk in his back while pulling a dolly loaded with boxes onto an elevator that stopped several inches above the floor.[123] The State, which owned the building, knew the elevator routinely stopped inches or feet above or below the floor.[124] A jury found the State liable for the plaintiff's injury and also apportioned a percentage of fault to the plaintiff for not exercising due care.[125] The appellate court reversed the jury verdict as manifestly erroneous, finding the defective condition of the elevator was "open and obvious" and therefore not unreasonably dangerous, reasoning that the State had no duty to protect the deliveryman.[126]

The Louisiana Supreme Court reversed and reinstated the jury verdict.[127] The Court characterized the question of whether a defect was unreasonably dangerous as a mixed issue of fact and law that is "peculiarly a question for the jury or trier of the facts."[128] Further, the Court stated that although there is in theory no duty to guard against a defective condition that is "open and obvious," whether the condition is "open and obvious"

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120. *See infra* Part IV.

121. *See infra* Part IV.

122. *Broussard*, 113 So. 3d 175. *See generally* John M. Church, *Recent Developments:* Broussard v. State *and the Not So Obvious Application of the Open and Obvious Doctrine*, 74 LA. L. REV. 857 (2014).

123. *Broussard*, 113 So. 3d at 180.

124. *Id.* at 179–80.

125. *Id.* at 178–79.

126. *Id.* at 181. The appellate court further noted that Broussard admitted he knew of the defect and suggested he could have avoided the injury by calling a different elevator or breaking his delivery up into smaller loads. *Id.* (citing Broussard v. State *ex rel.* Office of Bldgs., No. 2011 CA 0479, 2012 WL 1079182 (La. Ct. App. 1st Cir. 2011)).

127. *Id.* at 179.

128. *Id.* at 183.

is a factual question for the jury to decide as part of its breach inquiry.[129] In other words, in these cases, it is proper for the jury, not the judge, to decide whether the defendant owed no duty as part of the determination of whether a duty was breached.[130] According to the Court, to hold otherwise would conflate the duty and breach elements in a manner that causes an inappropriate transfer of jury power to judges.[131]

Broussard can be applied by analogy to a typical LPLA claim as such: a manufacturer is only liable for injuries caused by a product characteristic that is unreasonably dangerous, much like a building owner is only liable for damage caused by a condition that presents an unreasonable risk of harm.[132] Manufacturers have no duty to protect against unreasonably dangerous characteristics when the use is not reasonably anticipated, just as building owners theoretically have no duty to guard against "open and obvious" defective conditions.[133] In both situations, however, the issue of whether a defect is "open and obvious" or a use is reasonably anticipated presents a mixed question of law and fact.[134] Therefore, because fact-specific questions are involved, the jury should decide if the use was reasonably anticipated as part of its breach determination, just as the jury should decide whether the defect was open and obvious.[135] To otherwise have the judge decide that the use was not reasonably anticipated risks usurping the jury's fact-finding power.[136] Nonetheless, a jury determination that a product was defective is not, on its own, sufficient to impose liability on the manufacturer—the plaintiff must establish that the defect caused his injuries.

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129. *Id.* at 184–85.

130. *Id.* ("Thus, while a defendant only has a duty to protect against unreasonable risks that are not obvious or apparent, the fact-finder, employing a risk-utility balancing test, determines which risks are unreasonable and whether those risks pose an open and obvious hazard. In other words, the fact-finder determines whether defendant has breached a duty to keep its property in a reasonably safe condition by failing to discover, obviate, or warn of a defect that presents an unreasonable risk of harm.") *Id.* at 185. *See generally* Maraist et al., *supra* note 11.

131. *Broussard*, 113 So. 3d at 184–85.

132. *See* LA. REV. STAT. § 9:2800.54(A) (2018). *See generally* Church, *supra* note 122, at 859–60.

133. *See Broussard*, 113 So. 3d at 184–85.

134. *See id.* at 183.

135. *See id.* at 184–85.

136. *See id.*

C. Cause-in-Fact

Factual causation between the defendant's breach of a duty and the plaintiff's damages is essential to establishing liability.[137] As the name suggests, cause-in-fact is a question of fact and is thus reserved for the jury.[138] Generally, cause-in-fact is explained in terms of whether the plaintiff's damage would have occurred "but for" the defendant's negligence.[139] Considering *Kampen* again: "but for" the jack allegedly failing, his car would not have fallen and crushed him.[140] A finding of cause-in-fact does not automatically result in liability; rather, proximate cause permits or limits liability in any given case.[141]

D. "Proximate Cause"

Proximate cause[142] is notoriously difficult to define, a problem that has generated much argument—and, in Louisiana, inspired the creation of duty/risk as an alternative.[143] The LPLA requires a plaintiff to show that his or her damages were "proximately caused" by an unreasonably dangerous characteristic of the product, but it provides no guidance for what "proximately caused" means.[144] Adding to the confusion, some commentators have suggested the LPLA's use of "proximate cause"

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137. Galligan, *supra* note 91, at 1512. In the LPLA, the words "arose from," preceding "reasonably anticipated use," also evoke the necessity of factual causation between the plaintiff's damages and reasonably anticipated use. LA. REV. STAT. § 9:2800.54(A) (2018). This is not an additional causation requirement, but a matter of logic because a connection between breach and damages would necessarily include a connection back to the breached duty.

138. Galligan, *supra* note 91, at 1512.

139. *Id.* (noting that cause-in-fact can also be established under some circumstances by showing the defendant's negligence played a "substantial factor" in causing the damage—something more than just a loose association).

140. Imagine another scenario where Kampen was jacking up his car to change the tire on the side of the road when the jack failed, but it did not injure him. Immediately thereafter, he was hit by a negligent driver who was texting instead of watching the road. In that case, there would be no cause-in-fact between the failure of the jack and the injury because the negligent driver would have hit Kampen regardless.

141. LA. REV. STAT. § 9:2800.54(A).

142. "Proximate cause" is also sometimes referred to as "legal cause" in Louisiana. *See* Galligan, *supra* note 91, at 1513; *see, e.g.*, Pitre v. Opelousas Gen. Hosp., 520 So. 2d. 1151 (La. 1988).

143. *See* Galligan, *supra* note 91, at 1521–24.

144. LA. REV. STAT. § 9:2800.54(A).

terminology was not meant to displace duty/risk analysis in products liability cases.[145]

In the common law, proximate cause can be considered as a decision to impose or limit liability that is essentially made on the basis of the fact-finder's sense of fairness.[146] Societal policy choices of who should bear the cost of certain risks under certain circumstances are at the root of proximate cause determinations.[147] More literally, proximate cause is often explained in terms of whether a plaintiff's injuries were a natural, probable, or foreseeable result of the defendant's negligence, as opposed to being unforeseeable, bizarre, or caused by an "intervening cause" rising to the level of a "superseding cause" that should relieve the defendant of liability.[148] At common law, the duty question is separate from the proximate cause question, which is for the jury to decide as fact-finder.[149] Under duty/risk, however, duty and proximate cause merge into the single "duty/risk" element, theoretically giving the judge more power to decide when and how to draw the outer bounds of liability.[150]

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145. H.B. 711, 1983 Leg., Reg. Sess., § 9:2800.3, cmt. c. (La. 1983) ("The duty/risk analysis of proximate cause enunciated by the Louisiana Supreme Court in *Dixie Drive It Yourself System v. American Beverage Co.*, 137 So. 2d 298 (La. 1962) is not rejected by use of the term 'proximate cause,' nor is it intended that the jurisprudential concept of 'cause-in-fact' be changed."). LPLA supporters have suggested that the Law Institute's comments to the 1983 bill are a valuable source of interpretive authority for understanding the LPLA. *See also* Kennedy, *supra* note 33, at 569. Despite the comment to the contrary, the inclusion of the term "proximate cause" only adds confusion given the term's close historical association with the concept of "foreseeability." *See* Galligan, *supra* note 91, at 1513–14.

146. Galligan, *supra* note 91, at 1513.

147. *Id.* ("What is proximate cause? Well it is really a way of deciding whether society ought to hold this defendant, whose negligent acts were a cause-in-fact of the plaintiff's damages, liable under these circumstances . . . .").

148. *Id.* at 1513–14 ("Such questions are generally not susceptible to purely rational responses."). For example, consider if the tire jack collapses while Kampen is changing a flat tire. He is not injured, but his elderly mother, standing nearby, is so startled by the commotion that she faints, falls, and breaks her hip. Absent any proximate cause limitation, the manufacturer should be liable for the mother's broken hip if she establishes reasonably anticipated use, breach, and cause-in-fact. A jury applying proximate cause concepts, however, may deny liability because of the unforeseen or bizarre manner of the injury and its disconnect from the more foreseeable risk that the falling car would crush Kampen's foot.

149. Galligan, *supra* note 91, at 1513.

150. *Id.* at 1524–27.

The text of the LPLA states "proximately caused," but commentators argue that duty/risk principles should apply.[151] As with duty and breach, the Louisiana Supreme Court's *Broussard* holding provides guidance on the proper allocation of decision-making responsibility between judge and jury.[152] Applying the logic of *Broussard*, the jury should normally decide the proximate cause question because it looks like a mixed question given its fact-specific nature.[153] Following *Broussard*, it would be inconsistent to have the jury decide the contours of the duty as part of its breach inquiry while allowing the judge to contract or expand the scope of the duty under the guise of duty/risk.[154] There may be instances where the judge should do so for policy reasons, similar to the judge's authority to answer legal duty questions, but these occurrences should be rare.[155]

Finally, it is important to keep consideration of proximate cause separate from reasonably anticipated use because the language of the statute suggests that each concept is a separate potential limit on a manufacturer's liability.[156] The statute asks whether the plaintiff's *product use* is "reasonably anticipated" but whether his *injuries* are "proximately caused" by the unreasonably dangerous product characteristic.[157] Reasonably anticipated use places a limit on duty that the jury should decide as part of its breach determination.[158] Proximate cause places a potential limit on the extent or type of injuries for which the plaintiff can recover, as regulated by the jury's decision of whether the unreasonably dangerous condition "proximately caused" the injury, subject to the LPLA's statutory definition of "damage."[159] Consider, theoretically, that a jury could have found that Kampen's use was reasonably anticipated and

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151. LA. REV. STAT. § 9:2800.54(A) (2018).

152. *See* Broussard v. State *ex rel*. Office of State Bldgs., 113 So. 3d 175, 179 (La. 2013); *supra* Section III.B.

153. *See Broussard*, 113 So. 3d at 183–85.

154. *Id.* at 184–85.

155. *See infra* Section IV.C.

156. *See* Kampen v. American Isuzu Motors, Inc., 157 F.3d 306, 323 (5th Cir. 1998) (Benavides, J., dissenting) (explaining that foreseeable risk of harm is a proximate cause concept distinct from reasonably anticipated use).

157. LA. REV. STAT. § 9:2800.54(A) (2018). By contrast, many of the pre-LPLA cases asked whether the injury was reasonably anticipated. *See, e.g.*, Weber v. Fidelity & Casualty Ins., 250 So. 2d 754, 755 (La. 1971) ("A manufacturer of a product which involves a risk of injury to the user is liable to any person, whether the purchaser or a third person, who without fault on his part, sustains an injury caused by a defect in the design, composition, or manufacture of the article, if the injury might reasonably have been anticipated.").

158. *See* LA. REV. STAT. § 9:2800.54(A).

159. *Id.* § 9:2800.53.

the jack was unreasonably dangerous, but the jury could still retain the ability to deny liability on proximate cause grounds. Finally, only after determining the manufacturer's potential liability should the jury consider the comparative fault of other parties, including the plaintiff.

E. Comparative Fault

The Louisiana Legislature adopted a comparative fault system in 1979 that clearly overruled the doctrine of contributory negligence, under which any plaintiff negligence created a total bar to recovery.[160] In 1984, the Louisiana Supreme Court further clarified that the legislative adoption of comparative fault abolished the judicial doctrine of "assumption of the risk."[161] In 1985, however, the Louisiana Supreme Court in *Bell v. Jet Wheel Blast* endorsed a policy of selectively applying comparative fault in strict liability cases.[162] *Bell,* a pre-LPLA products liability case, allowed a negligent plaintiff to recover 100% of his damages if the court determined that the risk of the plaintiff's negligent conduct fell within the scope of the manufacturer's duty.[163]

The legislature amended the Civil Code in 1996 to apply comparative fault to "any action for damages" arising under "any law" or "theory of liability."[164] The broad reference to "any law" clearly includes the LPLA, passed eight years earlier.[165] The amendment effectively overruled *Bell*, as

160. Act No. 431, 1979 La. Acts 1165 (current version LA. CIV. CODE art. 2323 (2018)).

161. *See* Murray v. Ramada Inns, Inc., 521 So. 2d 1123, 1136 (La. 1988) (rejecting "assumption of the risk" as inconsistent with comparative fault). Using the doctrine, courts denied recovery to negligent plaintiffs under the guise that the plaintiffs' "assumption of the risk" removed that risk from the scope of the defendant's duty. In reality, it was often impossible to meaningfully differentiate behavior that constituted contributory negligence from behavior that constituted assumption of the risk. *See generally* ROBERTSON, *supra* note 16.

162. *See* Bell v. Jet Wheel Blast, 462 So. 2d 166, 171–72 (La. 1985) (holding that comparative fault should apply in a strict liability case only when it will provide product users with an incentive to improve safety).

163. *See id.* at 172. In *Bell*, the plaintiff was injured by an industrial machine while performing a repetitive motion as required by his employer. The Court held that comparative fault should not apply because it would not effectively deter such "ordinary" negligence by workers but would reduce the incentive for manufacturers to design and produce machines with additional safety feature. *Id.*

164. LA. CIV. CODE art. 2323(A) (2018).

165. Dumas v. Dept. of Culture, Recreation & Tourism, 828 So. 2d 530, 537 (La. 2002) ("We find the language of Articles 2323 and 2324(B), as amended by Act 3, is clear, unambiguous, and does not lead to absurd consequences. . . . 'The

well as other judicially created doctrines that courts used to either fully compensate a negligent plaintiff or to control the apportionment of fault in multi-defendant situations.[166]

Courts should follow the clear legislative preference for comparative fault and not apply the "reasonably anticipated use" requirement in a manner that risks barring recovery to a plaintiff on account of his negligence.[167] Courts instead should completely separate the question of manufacturer fault from the issue of plaintiff negligence and comparative fault.[168] Unfortunately, the case law shows the courts have frequently done the opposite, denying recovery to negligent plaintiffs by defining "use" in an unusually specific manner that excludes a particular plaintiff's negligent conduct.[169]

IV. APPLYING "REASONABLY ANTICIPATED USE" IN STATE AND FEDERAL COURT

Early judicial applications of "reasonably anticipated use" correctly focused on product use, but, over time, courts have had increasing difficulty in separating analyses of product use and plaintiff negligence.[170] Two trends are evident throughout the cases: (1) increasingly specific definitions of "reasonably anticipated use" that conflate the elements of duty, breach, and proximate cause; and (2) application of the "reasonably anticipated use" element in a manner that consistently undermines Louisiana's pure comparative fault system.[171]

[foregoing] provisions . . . *shall* apply to *any claim* . . . asserted under *any law or legal doctrine or theory of liability, regardless of the basis of liability.*'").

166. *See id. See generally* ROBERTSON, *supra* note 16.

167. *See generally* ROBERTSON, *supra* note 16.

168. *See* Kampen v. American Isuzu Motors, Inc., 119 F.3d 1193, 1199, *rev'd in part*, 157 F.3d 306 (5th Cir. 1998) (panel opinion) ("The 'reasonable' in the phrase 'reasonably anticipated use' does not refer to the plaintiff's behavior, but rather to the manufacturer's anticipation . . . . Applying the reasonably anticipated use element to preclude recovery by a negligent plaintiff would 'inject' a contributory negligence bar 'through the back door' . . . . If the Louisiana legislature had intended the reasonably anticipated use requirement to function as a contributory negligence bar, it could have said so."). *See generally* Maraist et al., *supra* note 11.

169. *See* cases cited *infra* Sections IV.B, IV.D.

170. *See* cases cited *infra* Sections IV.A, IV.B.

171. *See* cases cited *infra* Sections IV.B, IV.D.

A. Early No-Duty Cases: Daigle *and* Lockart

Initial appellate decisions in both state and federal courts involved uses of the product itself that were either strange or obviously dangerous given the circumstances.[172] In these cases, courts held that the manufacturer owed the plaintiff no duty because the use was not reasonably anticipated.[173] A truly unanticipated use resulting in no duty must be contrasted with the plaintiff's negligent use or misuse that is nonetheless reasonably anticipated and, therefore, within the scope of the manufacturer's duty.[174] In a misuse case, comparative fault principles should apply, but courts often fail to draw a clear line between the two categories.[175] Professor David W. Robertson—an established critic of judicial use of creative duty determinations that subvert pure comparative fault—has suggested that a useful analytical tool for deciding whether a duty exists is to imagine whether a fault-free plaintiff in the same situation as a negligent plaintiff should recover.[176]

The first Louisiana appellate court decision to address "reasonably anticipated use" was *Daigle v. Audi of America* in 1992.[177] In *Daigle*, the plaintiff attempted to open the hood on a used car he was interested in buying.[178] Unable to locate the latch in the typical location at the front of the hood, Daigle kneeled and reached under the bumper without looking, believing that the cars may have a latch in that location.[179] The engine was

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172. As noted above, such functional misuse of the product itself should be contrasted with the negligent conduct of an individual product user whose functional use is nonetheless anticipated.

173. *See supra* Part III.

174. *See* Kennedy, *supra* note 33, at 584; Galligan, *supra* note 37, at 639. *See generally* Robertson, *supra* note 86, at 1381.

175. *See* cases cited *infra* Sections IV.B, IV.D.

176. *See* Robertson, *supra* note 86, at 1381. ("In a comparative fault case, the fault of the victim should be relevant solely as an affirmative defense. It should not negate the existence of any element of the case in chief; victim-fault issues should not be intermingled with defendant-fault issues. If the defendant would be liable to a fault-free and otherwise identically situated victim, then he should also be liable to the faulty plaintiff, whose recovery would be reduced by his percentage of fault.").

177. Daigle v. Audi of America, Inc., 598 So. 2d 1304 (La. Ct. App. 3d Cir. 1992). The First Circuit discussed the scope of "reasonably anticipated use" in an earlier case, but it did not apply the law because the claim in the case had arisen prior to the effective date of the LPLA. *See* Walker v. Babcock Ins., 582 So. 2d 258 (La. Ct. App. 1st Cir. 1991).

178. *Daigle*, 598 So. 2d at 1305.

179. *Id.*

running, however, and a moving belt pulley mangled his hand.[180] The plaintiff relied on the pre-LPLA language of *Halphen* to argue that, under the "normal use" standard of foreseeability, his injury was reasonably anticipatable.[181] During the subsequent bench trial, the district judge granted the manufacturer's motion to dismiss after Daigle presented his evidence, finding that the manufacturer should not have reasonably anticipated the plaintiff's unusual "use" of the car.[182]

After noting the LPLA's "reasonably anticipated use" standard was the correct standard, Louisiana's Third Circuit affirmed the trial court's ruling.[183] Without elaborating, the court asserted that reasonably anticipated use was "narrower in scope" than "normal use," though it is not at all clear that Daigle's use would have fallen within "normal use."[184] Nevertheless, the court held that the risk someone would stick his hand into the engine while it was running did not fall within the manufacturer's duty to design and produce a reasonably safe car.[185] If one imagines Robertson's hypothetical fault-free plaintiff, the result in *Daigle* is understandable as a case of "no duty" on the part of the manufacturer.[186] Even with a blameless plaintiff, there would still be no recovery because no evidence suggested that the manufacturer should have reasonably anticipated that someone would reach up under the car and into the engine

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180. *Id.*

181. *Id.*

182. *Id.* at 1305–07. The trial judge's granting of the motion for involuntary dismissal resulted in the same outcome as granting a motion for directed verdict in favor of the manufacturer. *See* LA. CODE CIV. PROC. art. 1810 (2018).

> In evaluating the motion for directed verdict, the judge should consider all of the evidence (and not only the evidence offered by the plaintiff), and should make all credibility determinations and draw all inferences in a manner most favorable to the plaintiff. If reasonable minds could differ, the judge must overrule the motion.

FRANK L. MARAIST, CIVIL PROCEDURE § 11:8, *in* 1 LOUISIANA CIVIL LAW TREATISE (2nd ed. 2008). The standard for granting a directed verdict is similar to the standard for granting a motion for summary judgment. *See* LA. CODE CIV. PROC. art. 966 (motion for summary judgment).

183. *Daigle*, 598 So. 2d at 1307.

184. *Id.* (quoting Walker v. Babcock Indus., 582 So. 2d 258 (La. Ct. App. 1991)).

185. The court approvingly cited the trial court's written reasons for judgment: "In this instance, the manufacturer did not . . . or does not have to anticipate . . . that a person will stick his fingers beyond the flair of the front of the vehicle . . . . Especially is this true when the engine is running." *Id.*

186. *See generally* Robertson, *supra* note 86, at 1381.

while it was running.[187] One can easily distinguish use of the car that should be clearly reasonably anticipated—such as driving, conducting routine maintenance, and even misuse like speeding or getting into a car accident—from Daigle's bizarre use of reaching under the front of the car while the engine was running.[188]

The first significant federal appellate case addressing reasonably anticipated use also involved an unusual use of a product.[189] In *Lockart v. Kobe Steel*, one worker was injured and another was killed when a pontoon they had suspended with a chain from the teeth of an excavator bucket slipped off and crushed them.[190] A panel of the federal Fifth Circuit affirmed the trial court's ruling on summary judgment that the workers' use of the excavator was not reasonably anticipated, in part because the manufacturer expressly warned against this use in the operator's manual.[191] Admitting, however, that the workers never saw the manual, the court still found that the use was not reasonably anticipated because suspending a pontoon from excavator teeth would have been obviously dangerous to an "ordinary consumer in the same or similar circumstances."[192] Finally, the plaintiffs presented no compelling evidence

187. It is interesting to consider whether the use would be reasonably anticipated if the manufacturer knew that others were making the same error as Daigle. At some point, knowledge of actual misuse by product users must logically impact what is reasonably anticipated from the manufacturer's point of view. *See infra* Section IV.C.

188. Surely, reasonable people could not disagree that the manufacturer must anticipate that a user of the car will drive it, conduct maintenance, or even speed or drive distracted and get into an accident. Recall again that "reasonably anticipated use" includes misuse that is reasonably anticipated. *See* Kennedy, *supra* note 33, at 584; Galligan, *supra* note 37, at 639; *supra* text accompanying note 64.

189. Lockart v. Kobe Steel, 989 F.2d 864 (5th Cir. 1993).

190. *Id.* at 865.

191. *Id.* at 866–67. The court rejected the plaintiffs' argument that inclusion of the warning in the manual was proof the use was reasonably anticipated: "When a manufacturer expressly warns against using the product in a certain way in clear and direct language accompanied by an easy to understand pictogram, it is expected that an ordinary consumer would not use the product in contravention of the express warning." *Id.* at 867. The mere presence of a warning does not end the inquiry, and the court then added that "this would be a different case if the plaintiffs had presented evidence that despite the warnings, Kobelco should have been aware that the operators were using the excavator in contravention of certain warnings. No evidence suggests such a scenario." *Id.* at 868.

192. *See* LA. REV. STAT. § 9:2800.53(7) (2018); *Lockart*, 989 F.2d at 868. The court's language on this point was not the most precise, but it seems the proper

to show that the use was reasonably anticipated.[193] The Fifth Circuit affirmed the trial judge based on this particular constellation of facts, explicitly noting that granting such a motion in a products liability case was "not usually appropriate."[194]

In both *Lockart* and *Daigle*, the courts focused on the use of the product itself, as opposed to the plaintiffs' attendant negligent behavior.[195] Hypothetically, even if the plaintiffs in *Lockart* were fault-free, the manufacturer would still have no duty.[196] *Lockart* would have been decided differently, however, if the workers had hung the pontoon from a hook on the excavator bucket that was designed for that purpose, rather than from the teeth.[197] In that circumstance, had the pontoon fallen off the hook and injured or killed the workers, the issue would not have been

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interpretation is that the danger should have been obvious to the "ordinary consumer in the same or similar circumstances," meaning an industrial user, which included the experienced workmen, each of whom had years of experience working with heavy machinery. The court maintained an objective standard in evaluating use by considering what the "ordinary consumer" would find dangerous and did not base its finding on any subjective knowledge of the danger on the part of the specific plaintiffs. This objective approach is consistent with Louisiana law. *See, e.g.*, Murray v. Ramada Inns, Inc., 521 So. 2d 1123 (La. 1988).

193. *Lockart*, 989 F.2d at 869.

194. *Id. See also* 10A CHARLES ALAN WRIGHT & ARTHUR MILLER ET AL., FEDERAL PRACTICE AND PROCEDURE § 2729.1 (West, 4th ed. 2018) ("The nature of the claims that underlie products-liability actions commonly present complicated factual questions that are inappropriate for resolution without a full trial . . . that commonly cannot be determined on summary judgment.").

195. For other examples of "no duty" cases where courts focused primarily on functional product use instead of plaintiff negligence, see Blanchard v. Midland Risk Ins., 817 So. 2d 458, 461 (La. Ct. App. 3d Cir. 2002) (holding a truck manufacturer not liable for death of unsecured passenger who was riding in the front of a milk delivery truck that had been designed and manufactured with only one seat for the driver because "use" of truck by an unsecured passenger riding in the front compartment was not "reasonably anticipated"); Sturlese v. Six Chuster, Inc, 822 So. 2d 173, 181–82 (La. Ct. App. 3d Cir. 2002) (holding manufacturer of automobile seatbelt not liable for injuries sustained by the pilot of a "powered parachute" flight device who claimed the seatbelt failed to work properly during a crash because the manufacturer did not reasonably anticipate or know that the seatbelt had been purchased from a third-party distributor for installation in a "powered parachute," for which it was not designed).

196. Rather, in this hypothetical, whoever negligently suspended the pontoon from the bucket might be held at fault.

197. The manufacturer reasonably anticipated such use because the operator manual included instructions on how to properly suspend objects from the hook. *Lockart*, 989 F.2d at 867.

reasonably anticipated use, but instead breach or causation.[198] Under these hypothetical facts, if a product defect was the proximate cause of the accident, the fact-finder would still have considered the comparative fault of the workers and reduced their recovery if they contributed to the accident by incorrect operation of the excavator or by negligently standing under the pontoon—neither issue is addressable on a motion for summary judgment if there were genuine disputes of material fact.[199]

The *Daigle* and *Lockart* courts properly granted the motions following the courts' conclusions that no reasonable jury could disagree that the use was unanticipated.[200] Thinking in the terms of *Broussard*, it is worth considering that the no duty conclusion should be based on an understanding that no reasonable jury could find facts to support a breach.[201] *Daigle* and *Lockart* might be considered simple because the facts presented did not require the courts to manipulate the use definition to justify the motions to dismiss. Courts in subsequent cases with more complicated fact patterns, however, responded by utilizing more creative use definitions that skewed the trajectory of the reasonably anticipated use analysis.[202]

B. Plaintiff Negligence Muddies the Waters: Myers, Delphen, *and* Hunter

The analysis employed in *Daigle* and *Lockart* correctly keeps the reasonably anticipated use inquiry focused on the actual use of the product and not the plaintiff's attendant negligence, but *Myers v. American Seating Co.*, a 1994 Louisiana appellate decision, started to blur the line.[203] The plaintiff, Carole Myers, attempted to use a folding chair as a step stool.[204] Instead of putting her foot onto the front of the seat, she stepped on the

198. For example, whether the pontoon fell because of an unreasonably dangerous characteristic of the product (breach) or solely because of operator error (causation). *See supra* Part III.

199. *See* FED. R. CIV. PROC. 56 (2018); WRIGHT & MILLER ET AL., *supra* note 194.

200. *See* LA. CODE CIV. PROC. art. 966 (2018); FED. R. CIV. PROC. 56.

201. *See* Broussard v. State *ex rel*. Office of State Bldgs., 113 So. 3d 175 (La. 2013). *Lockart* is especially analogous to *Allen v. Lockwood*, which explicitly clarified that *Broussard* did not preclude the possibility of a motion for summary judgment on the basis of no duty if there was no genuine issue of material fact as to whether the condition was unreasonably dangerous or not. 156 So. 3d 650 (La. 2015).

202. *See, e.g.*, Hunter v. Knoll Rig & Equip. Mfg. Co., 70 F.3d 803 (5th Cir. 1995); Kampen v. American Isuzu Motors, Inc., 157 F.3d 306 (5th Cir. 1998).

203. Myers v. American Seating Co., 637 So. 2d 771 (La. Ct. App. 1st Cir. 1994).

204. *Id.*

rear, causing the chair to suddenly "jackknife" closed, seriously injuring her leg.[205] Myers sued the chair manufacturer, claiming the chair was unreasonably dangerous in design.[206] At the conclusion of the jury trial, the trial court granted a directed verdict for the manufacturer rather than submitting the case to the jury.[207] The trial judge found that Myers's use of the chair—specifically, standing on the rear of the seat—was not reasonably anticipated.[208]

Much like *Daigle*, one understandable reaction to the trial court's ruling in *Myers* is approval because it intuitively feels like the right decision—chairs are obviously made for sitting, not standing. Myers, however, is surely a sympathetic plaintiff. Everyone understands that it is dangerous to stand on a chair and it is safer to use a stepladder instead, but many people take the shortcut and stand on a chair for the sake of convenience. Perhaps the correct response is to say that sometimes people make mistakes and should have to live with the consequences.

Given the ubiquity of folding chairs in our society and the tendency of humans to take shortcuts, however, standing on folding chairs in general is a reasonably anticipated use, and testimony in *Myers* showed that the manufacturer was aware of this use and expected that users would stand on its chairs.[209] The manufacturer's production engineer testified that he anticipated people would stand on the front of the chair, but he did not expect anyone to stand on the back of the chair.[210] Offering conflicting testimony, another employee in the manufacturer's development department said the "jackknifing problem" of chairs slamming shut was recognized across the industry.[211] Indeed, that employee testified he had created and patented an alternative chair design to solve the problem.[212]

The conflicting testimony from the defendant's employees caused the court of appeals to reverse the trial court, finding that "reasonable people could have reached a different conclusion" as to whether Myers's use of the chair was reasonably anticipated and whether the chair was unreasonably dangerous.[213] Then, the court of appeals used de novo

205. *Id.* at 776–77.
206. *Id.* at 772.
207. *Id.* at 773. An opponent may move for a directed verdict at the close of a party's case in chief. *See* LA. CODE CIV. PROC. art. 1810 (2018); MARAIST, *supra* note 182.
208. *Myers*, 637 So. 2d at 778.
209. *Id.* at 777.
210. *Id.*
211. *Id.*
212. *Id.*
213. *Id.* at 778.

review[214] to consider the facts of the case itself and decided that Myers's use was not reasonably anticipated.[215] The court concluded that the chair was not unreasonably dangerous because it only jackknifed when a user stood on the rear of the seat, but was otherwise safe for sitting and standing.[216] The court distinguished the "conceivable" use of standing on the rear of a folding chair from the reasonably anticipated use of standing on the front of the chair and further noted that the dangers of standing on the rear of a folding chair are "obvious" to a reasonable person.[217]

The odd specificity of the court's definition of use—not just standing on the chair, but specifically standing on the rear of the chair—begs the question of whether Myers's negligence influenced the court's analysis of the manufacturer's liability.[218] The decision is not so clear-cut under the test of whether a hypothetically fault-free plaintiff should recover.[219] One might consider whether the outcome would be the same if Myers had been a student at the school and not an employee; it is arguably not obvious to children that a folding chair has a danger of "jackknifing" if stood on incorrectly.[220]

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214. *See* Rosell v. ESCO, 549 So. 2d 840 (La. 1989).

> The Louisiana Constitution provides that the appellate jurisdiction of a court of appeal extends to law and facts. LA. CONST. 1974, Art. V Sec. 10(B). This provision, resulting from Louisiana's history as a civilian jurisdiction, has been interpreted as giving appellate courts the power to decide factual issues *de novo.* The exercise of this power is limited, however, by the jurisprudential rule of practice that a trial court's factual finding will not be upset unless it is manifestly erroneous or clearly wrong. Nevertheless, when the court of appeal finds that a reversible error of law or manifest error of material fact was made in the trial court, it is required to redetermine the facts *de novo* from the entire record and render a judgment on the merits.

Id. at 844 n.2 (citing Gonzales v. Xerox Corp., 320 So. 2d 163 (La. 1975)).

215. *Myers*, 637 So. 2d at 778–79.

216. *Id.* at 779. The court's key finding that the chair was not unreasonably dangerous is a factual finding of no breach, yet the subsequent discussion focuses on whether the plaintiff's use was reasonably anticipated, showing the close relationship between the duty and breach elements. *Id.*

217. The court did not clarify the standard for differentiating "conceivable" from "reasonably anticipated," saying only that, "Most people who use a folding chair as a stepladder utilize the front portion of the seat upon which to stand." *Id.*

218. *See id.* at 778–79.

219. *See generally* Robertson, *supra* note 86, at 1381.

220. *See Myers*, 637 So. 2d at 777. At the root of the question exists a policy choice regarding who should bear the cost of the hypothetical child's injury: (1) the manufacturer that is aware of the danger and could reduce the risk with a

Delphen v. Department of Transportation & Development, a 1995 Louisiana appellate decision that both state and federal courts have heavily cited in subsequent cases,[221] is another case decided under de novo review. The decision contains more blatant conflation of elements in the reasonably anticipated use analysis.[222] In *Delphen*, the plaintiff borrowed a racing bicycle that had a quick-release mechanism on the front wheel.[223] While riding across a drawbridge, Delphen hit a change in elevation in the roadway, and the front wheel fell off the bike, sending him face first onto the pavement.[224] The plaintiff filed suit against the Department of Transportation and Development (DOTD) and the bike manufacturer.[225] At trial, the jury found the manufacturer 30% at fault for a defective design of the bike, the DOTD 45% at fault for not maintaining the bridge, and Delphen 25% at fault for his own negligent operation.[226]

On appeal, the manufacturer argued that the trial judge gave improper jury instructions by following a recitation of the LPLA's statutory definition of "reasonably anticipated use" with the statement that "normal use includes reasonable, foreseeable misuse."[227] The appellate court agreed that the jury instructions possibly resulted in an incorrect application of the law and reviewed the facts de novo.[228] The court then held that Delphen's use was not reasonably anticipated because the "sophisticated bicycle" presented an obvious danger to inexperienced users like Delphen, who admitted he was unfamiliar with the quick-release mechanism and had adjusted the front wheel before the accident after it "wobbled" on a prior ride.[229]

The outcome in *Delphen* may be a case in which the result was correct, but the court's reasoning includes three errors.[230] First, it is unlikely the

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known alternative chair design; (2) the school, for not adequately supervising the child; or (3) the parents of the child (and perhaps their health insurer).

221. *See, e.g.*, Kampen v. American Isuzu Motors, Inc., 157 F.3d 306, 311–12 (5th Cir. 1998); Payne v. Gardner, 56 So. 3d 229, 231 (La. 2011).

222. Delphen v. Dep't of Transp. & Dev., 657 So. 2d 328 (La. Ct. App. 1995).

223. *Id.* at 331.

224. *Id.*

225. *Id.*

226. *Id.* The trial judge then reapportioned fault as 50% to DOTD, 40% to the bike manufacturer, and 10% to Delphen. *Id.* at 332.

227. *Id.* at 332–33.

228. *Id.* ("The jury instructions in the present case did not reflect the correct applicable law because they allowed the jury to infer that the term 'reasonably anticipated use' constitutes 'normal use,' including all 'foreseeable misuses.'").

229. *Id.* at 333–34.

230. Based on the facts, maybe the "right" outcome would have been to find that Delphen was engaged in the reasonably anticipated use of bike riding, but the

jury instructions resulted in improper application of the law because there is no meaningful difference between the definitions of "normal use" and "reasonably anticipated use."[231] Even though the appellate court clearly disagreed with the jury verdict and believed the bike manufacturer was not liable, absent legal error, the court should have left the verdict undisturbed unless it was "manifestly erroneous."[232]

Second, the court's reasonably anticipated use analysis focused almost exclusively on the plaintiff's negligence.[233] At a general level, Delphen clearly utilized the bike for its intended use of bike riding, yet the court defined his use as not reasonably anticipated because of his lack of experience and his failure to secure the quick-release mechanism after the front wheel had already wobbled.[234] As a matter of analysis, it is by refashioning the plaintiff's negligence as part of his use that the court found such use was not reasonably anticipated, even though negligent use can clearly be reasonably anticipated.[235] The court's analysis is inconsistent with Louisiana's comparative fault system.[236]

Third, the court unnecessarily conflated duty, breach, and causation by citing facts that were more relevant to breach and causation to support

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manufacturer was not liable because either the product had no unreasonably dangerous characteristic, or due to lack of causation. *See id.* at 334. Such questions are for the jury.

231. *See supra* Section II.B.

232. *See* Rosell v. ESCO, 549 So. 2d 840, 844 (La. 1989).

233. *Delphen*, 657 So. 2d at 333–34.

234. *Id*. *See also* Dunne v. Wal-Mart Stores Inc., 679 So. 2d 1034 (La. Ct. App. 1996) (holding that use of a brand-new exercise bike by the plaintiff, who weighed between 450 and 500 pounds, was reasonably anticipated use and that bike was unreasonably dangerous for failure to warn of weight limit; the court rejected the manufacturer's argument that plaintiff was not a reasonably anticipated user because the LPLA standard is "use," not "user").

235. *Delphen*, 657 So. 2d at 333–34. *See* Kennedy, *supra* note 33, at 584 ("The purpose of both ['normal use' and 'reasonably anticipated use'] is to express the types of product uses and misuses by a consumer that the manufacturer must take into account when he designs a product, drafts instructions for its use and provides warnings about the product's dangers in order that the product not be unreasonably dangerous.").

236. *See* LA. CIV. CODE art. 2323(A) (2018). Also, because the finding of no duty is partly based on the plaintiff's subjective knowledge, it is inconsistent with Louisiana jurisprudence abolishing the "assumption of the risk" defense as well. *See* Murray v. Ramada Inns, Inc., 521 So. 2d 1123, 1136 (La. 1988).

a finding of no reasonably anticipated use.[237] Rather than focus on Delphen's inexperience, the court could have relied on its finding that the wheel mechanism itself was not unreasonably dangerous to decide the case on grounds of no breach. Alternatively, the court could have decided that Delphen's failure to secure the wheel properly—along with DOTD's negligent maintenance of the bridge—was the cause of the accident, as opposed to an alleged product defect.[238]

Before moving past *Myers* and *Delphen*, it is important to reiterate that the court in each case used de novo review power to make conclusions of fact, not interpretations of the law.[239] In *Myers*, the court stepped into the role of fact-finder only after holding that the trial court's directed verdict was improper because reasonable minds could have differed in answering the duty and breach question. In other words, the court believed that the jury should address the question of reasonably anticipated use.[240] In *Delphen*, the court similarly found legal error at the trial court level.[241] Unfortunately, later courts somewhat lost this critical procedural distinction and inadvertently looked to the specificity of the product use

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237. *Delphen*, 657 So. 2d at 333–34. For example, a factual finding that Delphen failed to secure the wheel mechanism is highly relevant to supporting findings of no breach and no causation, but not to reasonably anticipated use. *Id.*

238. The appellate court upheld the jury's verdict of liability on the part of DOTD and reapportioned fault 50 – 50 between Delphen and DOTD. *Id.* at 33 – 35.

239. *See* Myers v. American Seating Co., 637 So. 2d 771, 778–79 (La. Ct. App. 1st Cir. 1994). Judge Dennis noted the problem this creates for federal courts in *Ellis v. Weasler Eng'g, Inc*., 258 F.3d 326 (5th Cir. 2001):

> Thus, in diversity cases, a federal court or jury can be bound by a Louisiana court's creation of interpretation of state law but not by a state court's finding or decision on the facts of a particular case. Indeed, it is an error of law for a federal district court in a diversity case to base its ruling on a motion for judgment as a matter of law . . . on the findings of Louisiana courts on facts as distinguished from their decisions on law.

Id. at 333. Judge Dennis then went on to assert that:

> [*Myers*] illustrates that the Louisiana courts regard the question of whether a particular use of a product was reasonably anticipated as a question of fact for the jury when reasonably people could disagree as to the answer; and that if the trial judge errs in not sending the issue to the jury, the court of appeal will decide that question of fact as the trier of the facts in a trial de novo on the entire record. Thus, the court of appeal in *Myers* made a finding of fact, and did not make or interpret state law, on the issue of reasonably expected use of a product.

Id. at 335.

240. *Myers*, 637 So. 2d at 778.

241. *Delphen*, 657 So. 2d at 332–33.

definition in both cases for guidance when deciding product use *as a legal question*.[242]

The federal Fifth Circuit's 1995 decision in *Hunter v. Knoll Equipment* is an example of the harsh consequences of a court relying on *Myers* and *Delphen* to decide the scope of reasonably anticipated use as a matter of law.[243] In *Hunter*, workmen on an oil rig were stacking 55- to 60-foot drilling pipes in a "racking board" when the pipes fell and crushed derrickman Claude Hunter to death.[244] Hunter's survivors filed suit against his employer and the manufacturer of the rig, alleging that the racking board was dangerously designed.[245] The judge denied multiple motions for judgment by the rig manufacturer as a matter of law, both during and after trial.[246] The jury returned a verdict of liability and apportioned fault as such: 35% to Hunter's employer; 30% to the rig manufacturer; 30% to the prior owner of the rig, who had made modifications; and 5% to Hunter.[247] Significant evidence in the record showed that Hunter and the other workers on the rig were stacking the pipes with a "negative" instead of a "positive" lean, which was against industry best practices and known by workers to be dangerous.[248]

On appeal, the Fifth Circuit held that Hunter was not killed during a reasonably anticipated use of the racking board and overturned the jury's

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242. "We have thoroughly reviewed the merits of this matter using a de novo standard of review . . . . [B]ased upon the evidence of record, we find that the [plaintiff] failed to prove by a preponderance of the evidence that the chair was unreasonably dangerous in design or because of an inadequate warning." *Myers*, 637 So. 2d at 777 (punctuation omitted). Although the court's key finding was a factual finding of no breach, the subsequent discussion of whether the use was reasonably anticipated is what later courts have cited. For example, *Myers* is cited approvingly, among other cases, in Kampen v. American Isuzu Motors, Inc., 157 F.3d 306, 309–10 (5th Cir. 1998) and Hunter v. Knoll Rig & Equip. Mfg. Co., 70 F.3d 803, 807 (5th Cir. 1995).

243. *Hunter*, 70 F.3d 803. For example, when briefly discussing *Delphen*, the court read the procedural history as "reversing a jury verdict." *Id.* at 807–08. Although the jury verdict was in a real sense reversed, it would be clearer if the court said specifically that the *Delphen* court set aside the verdict and decided the case de novo.

244. *Id.* at 804–05.

245. *Id.* at 804.

246. *Id.* at 806; *see* FED. R. CIV. PROC. 50 (2018).

247. *Hunter*, 70 F.3d at 804–05.

248. *Id.* at 808–09. In industry terms, a "negative lean" occurs when the pipes lean toward the mast of the drilling rig, while a "positive lean" occurs when the pipes lean away from the mast. *Id.* at 804–05.

verdict, finding the manufacturer not liable as a matter of law.[249] The court defined "reasonably anticipated use" as the "particular use" of stacking pipes with a positive lean, instead of stacking pipes in general.[250] The court held that stacking with a negative lean was "conceivable," but the plaintiff had not shown that it was reasonably anticipated by the manufacturer because the evidence did not suggest it was a "common occurrence."[251] Yet the court also said that the evidence showed that the manufacturer "was aware of the possibility of negative lean and the attendant risk" at the time the racking board was made.[252] The court's reasoning suggests that the manufacturer only has a duty to consider risks that arise during "common" uses, but "common" is not the same standard as "reasonably anticipated."[253]

As applied, the court's reasoning is uncomfortably close to stating that the manufacturer's duty does not extend to negligent uses, which is incorrect if the manufacturer reasonably anticipated the negligent use.[254] One could argue that manufacturers should have a duty to take reasonable steps to guard against risks of which they are "aware"—even if the risks are not "common occurrences"—when the probable result of the risk is death.[255] In his dissent, Judge Benavides argued that it was improper for the court to overrule the jury's determination.[256] He contended that the jury appropriately considered fault on the part of Hunter and his co-workers as part of its comparative fault analysis.[257] According to Judge Benavides, "substantial evidence" supported findings that "negative lean itself is common" and the "overall use of the racking board was routine."[258] Judge Benavides stated that the majority's "focus on the 'tree' of negative lean obscures the 'forest' of reasonably anticipated use."[259]

Hunter is a troubling case. A jury determined that the use was reasonably anticipated as part of its breach determination, but the appellate court reversed the jury by declaring the use not reasonably anticipated as

249. *Id.* at 804. In doing so, the court replaced the jury's factual finding of breach with its legal conclusion of no duty.
250. *Id.* at 806.
251. *Id.* at 808–09.
252. *Id.* at 808.
253. *Id.* at 810 n.11.
254. *See supra* Section II.A.
255. *See Hunter*, 70 F.3d at 808–09.
256. *Id.* at 810–11 (Benavides, J., dissenting).
257. *Id.*
258. *Id.* at 811.
259. *Id.* at 812.

a matter of law.[260] To overturn the jury verdict, the court chose a specific definition of "reasonably anticipated use" that reflected the plaintiff's negligence, rather than defining use generally.[261] In doing so, the court blurred the line between the defendant's duty and the plaintiff's negligence in a manner inconsistent with comparative fault.[262]

Redefining reasonably anticipated use as a matter of law is judicial overreach in routine cases like *Hunter*, in which sufficient evidence existed for a jury to find liability and where there was room for reasonable minds to disagree. The ability to define use as a matter of law, however, may be appropriate in rare categories of cases that implicate difficult policy questions.

C. Who Decides Policy Questions? The "Huffing" Cases

In a trio of appellate cases from 1998 and 2000, three of Louisiana's five appellate circuits held as a matter of law that the intentional inhalation, or "huffing," of aerosol sprays or chemicals for the purpose of "getting high" was not a reasonably anticipated use.[263] In *Butz v. Lynch*—the last of the three cases—two teenagers huffed from an aerosol can while driving on Highway 190.[264] The driver, Patrick Lynch, lost consciousness, and the car crossed the center line, colliding head-on with a car driven by Angela Butz.[265] Butz sustained serious injuries and died three years later from ongoing complications.[266]

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260. *Id.* at 804 (majority opinion).

261. *Id.* at 806.

262. LA. CIV. CODE art. 2323(A) (2018); *see* Murray v. Ramada Inns, Inc., 521 So. 2d 1123, 1136 (La. 1988). *See generally* ROBERTSON, *supra* note 16.

263. Peterson v. G.H. Bass & Co., 713 So. 2d 806, 809 (La. Ct. App. 4 Cir. 1998); Kelley v. Hanover Ins. Co., 72 So. 2d 1133, 1136–37 (La. Ct. App. 5 Cir. 1998); Butz v. Lynch, 762 So. 2d 1214, 1218 (La. Ct. App. 1 Cir. 2000). "Huffing" is a generic term for abuse of inhalants, which can include: "huffing" rags soaked in chemicals and held to the nose and mouth; "sniffing" or "snorting" fumes from an aerosol can; spraying or pouring chemical fumes into a bag that is placed of the mouth and nose ("bagging"); and directly "inhaling" fumes. *Inhalant Abuse: Is Your Child at Risk?*, MAYO CLINIC (last updated Jan. 13, 2018), https://www.mayoclinic.org/healthy-lifestyle/tween-and-teen-health/in-depth/inhalant-abuse/art-20044510 [https://perma.cc/8Q9N-EHLK].

264. *Butz*, 762 So. 2d at 1215. The product, Testor Ozone Safe Air Brush Propellant, was designed for a hand-held air brush used for painting and was sold at hobby shops and chain home improvement stores. *Id.* at 1215–16.

265. *Id.* at 1215.

266. *Id.*

Butz's family sued the estate of Patrick Lynch—who died in the accident—and the aerosol spray manufacturer based on evidence that the manufacturer was aware teenagers were huffing the product and knew of a chemical additive that would have allegedly reduced or prevented abuse of the product.[267] The appellate court, affirming the trial court's summary judgment in favor of the manufacturer, held that huffing was not a reasonably anticipated use as a matter of law.[268] In its ruling, the court stated that the manufacturer's knowledge of misuse was irrelevant.[269]

As a logical matter, of course, user behavior—including intentional or even criminal misuse—impacts what uses a manufacturer "should reasonably expect from an ordinary person in the same or similar circumstances."[270] The LPLA standard is not "intended use," but "reasonably anticipated use," and the modifier "reasonably" describes the scope of what is "anticipated," not whether the "use" itself is reasonable.[271] If enough users are actually huffing, then at some point in time, manufacturers must "reasonably anticipate" such use as a matter of fact, even though the activity in itself is not a reasonable, nor intended, use.[272]

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267. *Id.* at 1216. As part of their theory of unreasonably dangerous design, the plaintiffs in *Butz* alleged that the manufacturer knew of an additive (oil of mustard, found in horseradish) that would have deterred huffing, but waited three years to add the chemical to its product. The plaintiffs also put on evidence suggesting it would cost 1.5 cents per can to add the deterrent chemical. *Id.* at 1216–17.

268. *See id.* at 1218–19.

> The [manufacturer] warned of the grave danger of inhaling the contents. The user in this case chose to ignore those warnings and instead intentionally abused the product . . . . It was the users' intentional abuse of the product and illegal conduct that caused the accident to ensue. . . Accordingly, we hold as a matter of law that [plaintiff's] use of [the product] did not constitute a reasonably anticipated use of that product by an ordinary person.

Id. The court clearly says its holding is based on a legal conclusion that there is no duty, though its language that Lynch's "intentional abuse of the product and illegal conduct caused the accident" is also evocative of proximate cause—a demonstration of the conceptual overlap between the two elements. *Id.*

269. *Id.* at 1216. "[W]e find [manufacturer's] knowledge of the potential and actual intentional abuse of its product does not create a question of fact on the question of reasonably anticipated use." *Id.* at 1218.

270. LA. REV. STAT. § 9:2800.53(7) (2018).

271. *Id.*

272. *Inhalants: Letter from the Director*, NAT'L INST. ON DRUG ABUSE, https://www.drugabuse.gov/publications/research-reports/inhalants/letter-director [https://perma.cc/K985-PM7Z] (last updated July 2012).

In holding otherwise as a matter of law, the *Butz* court declared a new judge-made rule of law that states, "intentional misuse of an aerosol product to get high is not reasonably anticipated use, period."[273] Under *Butz*, manufacturers of aerosol sprays have no duty to design a product that effectively deters huffing.[274] This outcome seems reasonable because no manufacturer designed its aerosol product with the intention that a user would abuse it to "get high," and huffing is clearly dangerous.[275] Yet an estimated 21.7 million Americans aged 12 and older have admitted to huffing at least once.[276] Given the dangers and the diminished maturity of potential misusers, anti-drug and product safety advocates may argue that manufacturers should have a duty to take reasonable steps to modify products to prevent or deter huffing.

More than a routine products liability case, the huffing issue raises difficult policy questions that implicate broader societal values of deterrence, personal responsibility, and victim compensation.[277] The common wisdom is that the jury is best situated to bring the community's sense of justice to bear on a difficult issue.[278] An equally strong argument, however, could submit that a court is better situated to weigh the policy consequences of huffing and create a new "rule" for the sake of consistency and predictability.[279] Such exertions of judicial power should be rare because overly aggressive definitions of reasonably anticipated use in routine products cases carry a high risk of usurping jury power and subverting comparative fault, as most starkly seen in two federal Fifth

273. *Butz*, 762 So. 2d at 1218–19.

274. *See id.*

275. Intentionally inhaling aerosol chemicals can lead to sudden and fatal heart failure, seizures, death by asphyxiation or suffocation, and other fatal accidents due to intoxication. Inhalant abuse has also been associated with long-term neurological brain damage. *Inhalants: What Are the Other Medical Consequences of Inhalant Abuse?*, NAT'L INST. ON DRUG ABUSE (last updated July 2012), https://www.drugabuse.gov/publications/research-reports/inhalants/what-are-other-medical-consequences-inhalant-abuse [https://perma.cc/D6TF-7KUX].

276. *Inhalants: Letter from the Director, supra* note 272.

277. *See generally* Maraist, *supra* note 117, at 156–60.

278. *But see, id.* at 164 ("Our respect for the jury system perhaps has led us to give juries too much to do at a great societal cost.").

279. *Id.* at 163 ("The balancing cannot be made *de novo* in the resolution of every dispute that sounds in tort; such a result would undercut one or more of the relevant policies. Without established rules, one could not predict with reasonable accuracy whether certain conduct will trigger the imposition of liability for any damage caused."). *See also supra* Part III.

Circuit decisions: *Kampen v. American Isuzu Motors, Inc.* and *Matthews v. Remington Arms Co*.[280]

D. An Analytical Mess: Kampen *and* Matthews

A large number of LPLA cases are decided in federal court under diversity jurisdiction because many manufacturers sell nationally and are not incorporated in Louisiana.[281] Notably, the federal Fifth Circuit has been even more aggressive in crafting specific "reasonably anticipated use" definitions than Louisiana state courts.[282]

Kampen v. American Isuzu Motors, Inc., decided in 1998, is the definitive federal case on "reasonably anticipated use."[283] In choosing its specific definition of "reasonably anticipated use," the *Kampen* majority cited the fact that the manufacturer put a warning in the owner's manual to never put any part of one's body under the car while it was elevated by the jack.[284] Having thus moved the goalposts on what constituted "reasonably anticipated use" by reference to the owner's manual warning, the court then declared that Kampen failed to put on sufficient evidence to show that the manufacturer should have reasonably anticipated a user to disregard the warning and climb under the car while it was jacked up.[285]

Seven of the sixteen judges in *Kampen* dissented.[286] The dissenters, led by Judge Benavides,[287] argued that Kampen's use of the jack to raise the car was not only reasonably anticipated, but was also the "precise use intended by the manufacturer."[288] In the dissenters' view, the majority's hair-splitting analysis obviously conflated reasonably anticipated use with

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280. *See* Kampen v. American Isuzu Motors, Inc., 157 F.3d 306 (5th Cir. 1998); Matthews v. Remington Arms Co., 641 F.3d 635 (5th Cir. 2011).

281. *See* 28 U.S.C.A. § 1332(a) (West 2018). An online Westlaw search for "Louisiana Products Liability Act" returns a list of 1,553 cases, of which 1,236 are federal decisions (as of Oct. 14, 2019). This number includes cases that focus solely on jurisdictional issues.

282. *See, e.g.*, Hunter v. Knoll Rig & Equip. Mfg. Co., 70 F.3d 803 (5th Cir. 1995).

283. *Kampen*, 157 F.3d 306. The basic facts, procedural history, and holding of *Kampen* are summarized in the Introduction, *supra*.

284. *Kampen*, 157 F.3d at 313–17.

285. *Id.* at 317–18.

286. *Id.* at 318. Of the six judges on the court who hailed from Louisiana, four dissented (Politz, Weiner, Stewart, and Dennis, JJ.), while one wrote the majority opinion, joined by a second (Duhe, J., joined by Davis, J.).

287. Judge Benavides also dissented in *Lockart* on similar grounds. *See supra* Section IV.B.

288. *Kampen*, 157 F.3d at 320.

Kampen's negligent conduct in a manner inconsistent with comparative fault principles.[289] The proper approach, according to the dissenters, would have allowed the jury to decide the case.[290] With the benefit of *Broussard*, the court could have determined that the question of whether the manufacturer warning supported a conclusion of no duty was dependent on factual breach determinations that were clearly for the jury to consider.[291]

In the 2011 case of *Matthews v. Remington Arms Co.*, a split panel of the Fifth Circuit went even further than the *Kampen* majority and addressed nearly every element of an LPLA claim through the lens of "reasonably anticipated use."[292] The plaintiff, Matthews, was permanently injured while shooting a Remington rifle that misfired, causing an explosion that sent pieces of the rifle into his eye and head.[293] The evidence suggested that a prior user had inadvertently left out the bolt-assembly pin when reassembling the rifle.[294] Unlike most Remington rifles, the model at issue had a two-part bolt-assembly connected by a pin instead of a solid bolt.[295] Remington was aware of the risk that the pin would fall out during reassembly and had given special instructions to its factory employees. Unfortunately, this warning was not included in the user manual.[296] The parties agreed that when Matthews loaded the rifle and closed the bolt-assembly, the rifle appeared ready, with no indication that the bolt was not secured.[297]

A majority of the panel upheld the trial court's ruling that it was not a reasonably anticipated use for Matthews to attempt to fire the rifle while the bolt-assembly pin was missing.[298] The panel cited with approval the trial judge's holding that "Remington was entitled to expect that an ordinary user would reassemble the rifle with all its parts, absent special

289. LA. CIV. CODE art. 2323 (2018). *Kampen*, 157 F.3d at 324–25. *See generally* ROBERTSON, *supra* note 16.

290. *Kampen*, 157 F.3d at 325.

291. The relationship between a manufacturer-provided warning and whether the use is reasonably anticipated is similar to the relationship in a premises liability case between whether a defect is open and obvious and, therefore, not unreasonably dangerous such that no duty is owed. *See* Broussard v. State *ex rel*. Office of State Bldgs., 113 So. 3d 175 (La. 2013); *supra* Section III.B.

292. Matthews v. Remington Arms Co., 641 F.3d 635 (5th Cir. 2011).

293. *Id.* at 639.

294. *Id.*

295. *Id.* at 638.

296. *Id.*

297. *Id.* at 639, 649.

298. *Id.* at 647–48.

circumstances not present in this case."[299] Judge Dennis, however, argued in his dissent that Matthews had easily met the threshold burden of showing "reasonably anticipated use."[300] After all, the evidence established that Matthews was injured while shooting a rifle that, in outward appearance, functioned properly.[301] Judge Dennis maintained that Matthews should have therefore been able to present the merits of his claims that his injury occurred because the rifle was unreasonably dangerous in design and because of Remington's failure to provide an adequate warning about the risk of inadvertent, improper assembly.[302]

Three separate arguments are implicit in the majority's bizarre definition of Matthews's "use" of the rifle. First, the primary argument asserts that Matthews himself should have taken more care to ensure that the rifle was properly assembled before firing it.[303] This contention, however, is a comparative negligence argument and is a separate question from whether his use was reasonably anticipated.[304] A second argument is that Remington did not breach its duty because the rifle's design and lack of a warning were not unreasonably dangerous.[305] This assertion is a question of fact for the jury to consider. The third argument is that the unknown third party who improperly reassembled the rifle prior to Matthews's use was the proximate cause of his injuries or was a superseding cause such that Remington should not be held liable.[306] This question should also be reserved for the jury.[307]

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299. *Id.* at 648.

300. *Id.* at 648–49 (Dennis, J., dissenting).

301. *Id.*

302. *Id.*

303. *Id.* at 647–48 (majority opinion).

304. Recall that "reasonably anticipated use" can include negligent use. *See supra* Section II.A.

305. *See Matthews*, 641 F.3d at 647–48.

306. *Id.* In a sense, the court seemed to suggest that Remington should not be liable because the third party's improper reassembly of the rifle was the cause of the accident. The negligent act of a third party, however, does not mean that Remington had no duty or that it did not breach its duty. The court should have kept analysis of the third party's fault in misassembling the rifle separate from analysis of Remington's allegedly unreasonably dangerous design. It is the proper role of the fact-finder to analyze and apportion fault to all parties and non-parties. Additionally, it is possible the fact-finder would have decided, as part of its proximate cause determination, that the third party's negligent reassembly of the rifle was a superseding cause that relieved Remington of any liability, but that is conceptually different than saying that Remington had no duty toward Matthews as a product user.

307. *See supra* Section III.D.

Matthews is an extreme example of an LPLA case where a court aggressively applied the reasonably anticipated use question to answer factual inquiries of breach, causation, and comparative fault as a matter of law, thus denying a permanently injured plaintiff the chance to make his case to a jury.[308] The analytical mess of *Matthews* most dramatically demonstrates the need for the Louisiana Supreme Court to provide definitive guidance on how to properly define and apply "reasonably anticipated use."

V. TOWARD CLARITY

Not until 2011—23 years after the passage of the LPLA—did the Louisiana Supreme Court weigh in on the interpretation of "reasonably anticipated use."[309] The Court's per curium decision in *Payne v. Gardner* is short but nevertheless provides helpful guidance.[310] In *Payne*, a 13-year-old boy climbed on top of an oil well pumping unit to "ride" the pump and was injured when his pants became tangled in the pump's moving parts.[311] The manufacturer claimed the use of the pump as a recreational ride was not reasonably anticipated, and it was therefore not liable.[312] In response, the boy's mother argued that the risk that children would climb on the pump and sustain injuries was foreseeable and presented evidence of similar incidents in four states, including a fatal accident in Shreveport, Louisiana.[313]

Initially, the trial court granted summary judgment in favor of the manufacturer, finding that the plaintiff failed to allege sufficient facts.[314] The appellate court reversed, finding that a genuine issue existed as to whether the boy's use of the pump was reasonably anticipated based on evidence of similar accidents.[315] The Louisiana Supreme Court reinstated the trial court's dismissal on grounds of insufficient evidence to support the finding that the boy's use was "reasonably anticipated" for two reasons: (1) the manufacturer testified that the pump was only designed and intended for pumping oil; and (2) all of the plaintiff's evidence of

308. *See Matthews*, 641 F.3d 635.

309. *See* Payne v. Gardner, 56 So. 3d 229 (La. 2011).

310. *Id.* A per curium decision does not identify the individual judge who wrote it (and is usually relatively short). *Per Curium Opinion*, BLACK'S LAW DICTIONARY (10th ed. 2014).

311. *Payne*, 56 So. 3d at 230.

312. *Id.*

313. *Id.*

314. *Id.*

315. Payne v. Gardner, 49 So. 3d 1013, 1019 (La. Ct. App. 3rd Cir. 2010).

similar incidents occurred after the pump was manufactured.[316] The opinion's reasoning acknowledged, however, that a plaintiff should be able to proffer evidence of actual use to show that even intentional misuses can be reasonably anticipated, potentially creating a question for the jury.[317] In that sense, *Payne* supports the conclusion that product use analysis is a factual question for the jury, in line with the Court's later reasoning in *Broussard*.[318]

Unfortunately, *Payne* provided little guidance on the proper method for approaching an LPLA claim that reduces the risk of confusing and conflating the elements because it narrowly addressed only the issue of whether summary judgment was appropriate under the circumstances.[319] The most straightforward way to prevent the reasonably anticipated use inquiry from subsuming questions of breach, proximate cause, and comparative fault is to intentionally analyze each element of a LPLA claim separately.[320] For example, in the recent case of *Marable v. Empire Truck Sales*, the Louisiana Court of Appeal for the Fourth Circuit clearly separated and considered the analysis of reasonably anticipated use, unreasonably dangerous characteristics, and proximate cause under different headings in its opinion.[321] Deliberate and methodical analysis would help reduce the risk of courts blurring the elements by encouraging judges to explicitly explain their reasoning.[322] In *Marable*, which involved an appeal from a jury verdict for the plaintiff, the court also gave due deference to the jury's findings regarding reasonably anticipated use.[323]

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316. *Payne*, 56 So. 3d at 232. The Court further explained that "because, on the state of the evidence, reasonable persons could reach only one conclusion . . . there is no need for a trial on this issue." *Id.* In its discussion of reasonably anticipated use, the Court cited *Daigle*, *Delphen*, and *Butz*. *Id.* at 231.

317. *Id.* at 232.

318. *See* Broussard v. State *ex rel*. Office of State Bldgs., 113 So. 3d 175, 184–85 (La. 2013).

319. *Payne*, 56 So. 3d at 230.

320. *See* Marable v. Empire Truck Sales of La., LLC, 221 So. 3d 880 (La. Ct. App. 4th Cir. 2017).

321. *Id.*

322. *Id.*

323. *Id.* at 895 ("Based on this evidence presented to the jury, we cannot say that its determination that the accident and Mrs. Marable's damages arose out of a 'reasonably anticipated use' of the tractor was manifestly erroneous or clearly wrong."). Notably, the facts in *Marable* were complicated: the plaintiff suffered permanent brain injuries when she was pinned under a tractor–trailer truck while running alongside it in an attempt to shut off the ignition. *Id.* at 885–86. The truck had been idling in a parking lot while the plaintiff and her husband performed a pre-ride check when the truck mysteriously "popped" into gear and started to

Drawing on the Louisiana appellate cases concerning reasonably anticipated use,[324] as well as the broader negligence jurisprudence,[325] five rules for analysis of LPLA claims emerge. First, courts in most cases should treat reasonably anticipated use as a mixed question of fact and law for the jury to decide as part of its breach determination, unless reasonable minds could not differ. In any given case, whether a use is reasonably anticipated will likely depend on factual determinations that are proper for the jury as fact-finder—for example, the adequacy of warnings or instructions, whether the use was obviously dangerous to a reasonable person, or whether there was evidence that the manufacturer knew or should have known that the use was in fact occurring. This approach is grounded in *Broussard* and is consistent with the better-reasoned LPLA cases.[326]

Second, as the *Lockart* court noted, courts should view motions for summary judgment in LPLA cases skeptically and should typically only grant them in cases where the plaintiff is not able to muster evidence that the use should have been reasonably anticipated at the time of manufacture.[327] In particular, courts should follow the Louisiana Supreme Court's lead and focus on what the manufacturer knew or should have known in regard to use at the time the product was manufactured.[328] In *Payne*, the Court took care to note that the similar accidents the plaintiff relied on to establish that her son's misuse should have been reasonably anticipated all occurred well after the date the pump was manufactured.[329] The Court's reasoning in *Payne* suggests that had the plaintiff been able to cite similar misuse that occurred before the date of manufacture, then a genuine dispute related to a material fact would have existed.[330] The focus on the "time element" of the plaintiff's evidence brings the product use debate full circle because it adequately addresses the "normal use" critics'

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move forward. *Id.* at 886–87. The court could have overturned the jury verdict by finding that the plaintiff's "use" in running next to the truck was not "reasonably anticipated" as a matter of law. Instead, the court did not disturb the jury's verdict, based on evidence that the plaintiffs were carrying out the pre-ride check in a manner that was, or should have been, reasonably anticipated by the manufacturer. *Id.* at 894–95.

324. *See supra* Part IV.

325. *See supra* Part III.

326. *See, e.g.*, *Marable*, 221 So. 3d 880; Payne v. Gardner, 56 So. 3d 229 (La. 2011); Myers v. American Seating Co., 637 So. 2d 771 (La. Ct. App. 3d Cir. 1994); Daigle v. Audi of America, Inc., 598 So. 2d 1304 (La. Ct. App. 1st Cir. 1992).

327. *See, e.g.*, *Payne*, 56 So. 3d 229.

328. *Id.* at 232.

329. *Id.*

330. *See* LA. CODE CIV. PROC. art. 966 (2018).

chief complaint that courts were using the concept of foreseeability with hindsight to unfairly impose liability on manufacturers.[331]

Third, when evaluating reasonably anticipated use, courts should refrain from relying on overly specific product use definitions that invariably manipulate the analysis.[332] Instead, courts should define product use on a general level and should defer to the jury to decide specific product use issues as part of the breach determination. This general approach will help maintain the proper power balance between judges and juries and will ensure that courts do not define duty in relation to plaintiff negligence in a manner that subverts Louisiana's system of pure comparative fault.[333]

Fourth, rarely should courts hold a specific use not reasonably anticipated as a matter of law. The Supreme Court in *Payne* approvingly cited the *Butz* court's holding that "knowledge of the potential and actual intentional abuse" of a product "does not create a question of fact" regarding reasonably anticipated use.[334] The Court in *Payne*, however, in the next paragraph, characterized a 13-year-old "riding" an oil pump as "intentional misuse," not abuse, and reinstated the trial court's dismissal based on insufficient evidence.[335] The Court conceivably could have characterized the use as intentional abuse that was not reasonably anticipated as a matter of law, but it wisely declined to exercise that power absent any pressing policy need to do so.[336]

Finally, appellate courts should emulate the analysis in *Marable*, where the court gave deference to the jury's finding of reasonably anticipated use and reviewed each element of the LPLA claim separately and deliberately.[337] The judicial approach in cases like *Payne* and *Marable* is consistent with the initial reasonably anticipated use cases of *Daigle* and even *Myers*.[338] The *Myers* court's reasoning clearly supports an understanding of reasonably anticipated use as a largely factual question for the jury, something that was unfortunately lost on later courts.[339]

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331. *See supra* Section II.B.

332. *See, e.g.*, Kampen v. American Isuzu Motors, Inc., 157 F.3d 306 (5th Cir. 1998).

333. *See generally* ROBERTSON, *supra* note 16.

334. Payne v. Gardner, 56 So. 3d 229, 231 (La. 2011).

335. *Id.* at 232.

336. *See generally* Maraist, *supra* note 117, at 156–60.

337. Marable v. Empire Truck Sales of La., LLC, 221 So. 3d 880 (La. Ct. App. 4th Cir. 2017).

338. *See* Daigle v. Audi of America, Inc., 598 So. 2d 1304 (La. Ct. App. 1992); Myers v. American Seating Co., 637 So. 2d 771, 778 (La. Ct. App. 1994).

339. *See supra* Section IV.B.

To summarize the recommended approach: (1) in a typical LPLA case, courts should treat the "reasonably anticipated use" element as a mixed question of fact and law for the jury to decide; (2) courts should review motions for summary judgment on the use question with a skeptical eye unless reasonable minds clearly could agree; (3) courts should rely on general definitions when evaluating "reasonably anticipated use" and refrain from redefining use in an overly specific manner in order to prevent analytical confusion; (4) although courts should generally not decide product use as a matter of law, they may do so in rare cases where compelling policy rationales are present; and (5) courts should follow the methodical approach of *Marable* in explaining LPLA analysis.

CONCLUSION

One is tempted to look at the analytical chaos in LPLA cases like *Delphen*, *Kampen*, and *Matthews* and conclude that the LPLA itself is flawed.[340] This diagnosis of the problem has an appealing simplicity—if the statute is the problem, then the "right" statutory change is the best solution. A review of LPLA cases, however, reveals that the problem is not with the statutory definition of "reasonably anticipated use," just as the jurisprudential definition of "normal use" was not problematic.[341] Rather, the problem is the judicial application of the standard and the consequences of that application, particularly in terms of the distribution of power between the judge and the jury and the implications for the integrity of Louisiana's comparative fault regime.[342] These problems are not unique to the LPLA but are present throughout Louisiana tort law.[343]

Thirty years ago, the drafters of the LPLA looked to solve what they saw as a jurisprudential problem with statutory reform.[344] Today, another statutory revision of products liability law could do more harm than good and lead to more confusion rather than clarity. The better approach is to leave the LPLA as it is and focus efforts on clarifying the judicial approach to LPLA claims. Methodical analysis of LPLA cases, informed by general tort law principles and jurisprudence, should result in a more equitable process for both plaintiffs and defendants and should ultimately encourage judicial application of the LPLA that is truer to the statute.

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340. *See supra* Part IV.
341. *See supra* Part II.
342. *See supra* Part IV.
343. *See generally* Maraist et al., *supra* note 11; ROBERTSON, *supra* note 16; *supra* Part III.
344. *See supra* Part II.