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Putting an End to This B-S Standard: Resolving Louisiana Courts' Problematic Application of a Burden-Shifting Standard in Slip-and-Fall Cases Against Medical Institutions

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INTRODUCTION

A two-year-old child falls through the defective floor of a leased residence in New Orleans and is severely injured.[1] A New Orleans woman climbs the outside stairs to her apartment, but the improperly attached staircase detaches completely, swinging off to the side and causing the woman to fall to the ground injured.[2] A construction worker falls through the skylight on the roof of a mausoleum and is paralyzed from the fall.[3] A woman steps out of an elevator into a busy hallway in a Shreveport hospital,[4] where she slips on a small wet spot on the floor, falls, and is injured.[5]

Under present Louisiana law, those who are legally responsible for the house with the defective floor, the apartment with the detached staircase, and the mausoleum are not held strictly liable for the injuries sustained by the pedestrians on their property.[6] But a current jurisprudential interpretation of the law *would* hold the hospital strictly liable for the small spill, despite the fact that the spill could have been caused by any person at any time.[7] These hypothetical situations are based on the facts of real

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1. *See* Ward v. Conn., 344 So. 2d 60 (La. Ct. App. 4th Cir. 1977).
2. *See* Jackson v. Tyson, 526 So. 2d 398 (La. Ct. App. 4th Cir. 1988).
3. *See* Sanders v. Woodlawn Cemetery, Inc., 311 So. 3d 496, 497–98 (La. Ct. App. 3d Cir. 2021).
4. Holden v. La. State Univ. Med. Ctr.-Shreveport, 690 So. 2d 958, 960 (La. Ct. App. 2d Cir. 1997).
5. *Id*.
6. *See Ward*, 344 So. 2d 60.
7. *See infra* Section II.A.

tort lawsuits in Louisiana and reflect a problematic and unjust inconsistency in Louisiana premises-liability law.

Historically, fault in Louisiana was based on negligence.[8] In the 1970s, however, the Louisiana Supreme Court began to impose a unique strict-liability standard on property owners for injuries to patrons caused by hazardous conditions, vices, ruin, and other defects on or in their premises.[9] In the 1990s, the Louisiana Legislature took action to reverse the Louisiana Supreme Court's permissive stance on strict premises-liability, amending the Louisiana Civil Code and passing new statutory provisions that set out express negligence standards for nearly all instances of premises liability.[10] However, the legislative action failed to address the legal standard for slip-and-fall cases that arise out of hazardous conditions on the premises of non-merchants, including medical institutions[11] such as hospitals and nursing homes, and the Louisiana Supreme Court has not since addressed the issue. Today, Louisiana courts have fallen down a slippery slope by applying inconsistent standards of fault to slip-and-fall cases brought against defendant medical institutions.[12] Many courts apply a burden-shifting framework that reflects the outdated strict-liability standard imposed by the Louisiana Supreme Court before the legislature restricted the imposition of strict premises liability.[13] This Comment

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8. Cartwright v. Firemen's Ins. Co. of Newark, N.J., 223 So. 2d 822, 824 (La. 1969).

9. *See* Loescher v. Parr, 324 So. 2d 441, 444 (La. 1975); Kavlich v. Kramer, 315 So. 2d 282 (La. 1975).

10. Frank Maraist & Thomas C. Galligan, Jr., *Burying Caesar: Civil Justice Reform and the Changing Face of Louisiana Tort Law*, 71 TUL. L. REV. 339 (1996); *see* LA. CIV. CODE art. 2317.1 (1996); *see* LA. REV. STAT. § 9:2800.6 (1990).

11. The issue presented in this Comment regards mostly slip-and-fall litigation involving hospitals and medical care clinics. However, Louisiana courts have held that a nursing home's duty to its patrons is similar to the standard of care hospitals owe their patrons. *See* Robinson v. Gulf Ins. Co., 434 So. 2d 487, 489 (La. Ct. App. 2d Cir. 1983); *see also* Williams v. Finley, 900 So. 2d 1040, 1043 (La. Ct. App. 3d. Cir. 2005). Accordingly, the term *medical institution* in this Comment refers to any medical care facility to which Louisiana courts apply similar premises-liability standards.

12. *See generally* Holden v. La. State Univ. Med. Ctr.-Shreveport, 690 So. 2d 958 (La. Ct. App. 2d Cir. 1997); Terrance v. Baton Rouge Gen. Med. Ctr., 39 So. 3d 842 (La. Ct. App. 1st Cir. 2010); Blount v. E. Jefferson Gen. Hosp., 887 So. 2d 535 (La. Ct. App. 5th Cir. 2004).

13. *See generally* Terrance v. Baton Rouge Gen. Med. Ctr., 39 So. 3d 842, 844 (La. Ct. App. 1st Cir. 2010); Harkins v. Natchitoches Par. Hosp., 696 So. 2d 19, 21 (La. Ct. App. 3d Cir. 1997); Neyrey v. Touro Infirmary, 639 So. 2d 1214,

serves two primary purposes. First, it illustrates the impropriety of courts' continued reliance on the burden-shifting approach in light of Louisiana's prevailing premises-liability law. Next, it proposes and explains the suitability of a negligence-based legislative resolution to the problem.

Part I of this Comment will discuss the concept of and legal bases for premises-liability law. Specifically, this Part will survey the past and present applications and developments of negligence, strict liability, and slip-and-fall law in Louisiana. Next, Part II will explain the present jurisprudential inconsistency regarding the application of Louisiana premises-liability law to slip-and-fall claims against medical institutions, outlining the different approaches and rationales used by Louisiana's appellate courts—including the popular burden-shifting approach and the conflicting negligence-based approach. Further, this Part will explain the issues created by the judicial inconsistency, including uncertainty among slip-and-fall litigants regarding the applicable standard, inconsistent adjudications of similar claims, and the resulting legal and financial burdens on medical institutions. Next, Part III of this Comment will discredit the burden-shifting standard, explaining its present inapplicability within Louisiana premises-liability law, courts' improper reliance on caselaw through which the standard still exists, and the lack of policy support for the standard. Finally, Part IV will propose an amendment to Louisiana Revised Statutes § 9:2800.6 that will codify the negligence-based approach and resolve the issues created by the inconsistent adjudications of slip-and-fall claims against medical institutions in Louisiana.[14]

I. HISTORY AND DEVELOPMENT OF LOUISIANA PREMISES-LIABILITY LAW

According to the Louisiana Supreme Court, Louisiana Civil Code articles 2315 and 2316 are the "fountainhead of responsibility" in tort-related lawsuits.[15] Louisiana Civil Code article 2315 states, "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it,"[16] and Code article 2316 states, "Every person is responsible for the damage he occasions not merely by his act, but by his

1216 (La. Ct. App. 4th Cir. 1994); LeBlanc v. Alton Ochsner Med. Found., 563 So. 2d 312, 315 (La. Ct. App. 5th Cir 1990).

14. *See generally* LA. REV. STAT. § 9:2800.6 (2021).

15. Langlois v. Allied Chem. Corp., 258 So. 2d 1067, 1077 (La. 1971).

16. LA. CIV. CODE art. 2315 (2021).

negligence, his imprudence, or his want of skill."[17] The term *fault* within article 2315 is commonly associated with negligence cases; however, fault is not limited to negligence.[18] In fact, fault subsumes negligence—while all those who are found negligent are at fault, not all those at fault are negligent.[19] The concept of fault also encompasses the principle of strict liability.[20] Where strict liability is found, a party can be held at fault even though he or she was not negligent.[21]

A. Traditional Negligence and Strict Liability in Louisiana

In a negligence context, the owner or legal guardian of a thing that poses an unreasonable risk of harm has a duty to exercise reasonable care to prevent that harm, so long as the owner knows or should know of the risk posed by the thing.[22] The owner's actual or constructive knowledge of the risk gives rise to his or her legal duty.[23] A plaintiff seeking to recover for the owner's negligence must prove by a preponderance of the evidence that (1) the defendant owed the plaintiff a duty of reasonable care under the circumstances, (2) the defendant breached the duty of reasonable care, (3) the risk and resulting harm to the plaintiff was within the scope of the defendant's duty to the plaintiff, (4) the defendant's breach of legal duty was the cause-in-fact of the plaintiff's damage or injury, and (5) the plaintiff incurred actual damage.[24]

In a strict-liability context, a property owner's duty does not arise out of his or her knowledge of the risk posed by the thing.[25] Rather, the owner of the thing is presumed to have actual or constructive knowledge of the risk solely based on his or her relationship with the thing.[26] If a thing causes harm, a person strictly liable for the thing can be held at fault merely because he or she owns or is legally responsible for the thing.[27] As

17. *Id.* art. 2316. It is well settled that "fault is basic to recovery" in Louisiana tort law. *See* Gonzales v. Winn-Dixie La., Inc., 326 So. 2d 486, 489 (La. 1976).

18. Kent v. Gulf States Util. Co., 418 So. 2d 493, 496 (La. 1982).

19. *See id*.

20. *See id*.

21. *See id.*

22. *See id.* at 497. This rule applies to owners of a thing and any person who is legally responsible for the thing. *Id*.

23. *Id.* "Actual or constructive knowledge" signifies that a person knew or should have known of the risk posed by the thing. *Id.*

24. Myers v. Dronet, 801 So. 2d 1097, 1104 (La. Ct. App. 3d Cir. 2001).

25. *Kent*, 418 So. 2d at 497.

26. *Id.*

27. *Id.*

such, in a strict-liability case, the plaintiff has the burden of proving by a preponderance of the evidence only that (1) the thing that caused damage was in the defendant's legal custody, care, or control, (2) the thing had a vice, ruin, defect, or condition that presented an unreasonable risk of harm, and (3) the vice, ruin, defect, or condition was the cause-in-fact of the injury or damage that he incurred.[28]

Negligence-based burdens of proof are inherently more defendant-friendly than those applicable to strict liability, especially in circumstances where limited or circumstantial evidence exists.[29] For example, a man sustains injuries after slipping and falling in a puddle of water in a hospital hallway, so he brings a personal injury suit against the hospital, alleging that the hospital is at fault for the incident and seeking to recover damages. In his case-in-chief, the plaintiff presents undisputed factual evidence that he slipped, fell, and was injured as a result of a puddle of water on the floor, but is unable to produce any evidence regarding the origin of the puddle nor the length of time it existed before the accident occurred. A plaintiff seeking recovery under a traditional negligence analysis would not have evidence sufficient to meet his burden of proof.[30] Without any evidence regarding the origin of the spill, the plaintiff would be unable to prove that the defendant had a legal duty of care to protect the plaintiff from injury.[31] An unproven duty cannot be breached; therefore, the plaintiff's negligence claim would not survive the defendant's motion for summary judgment.[32] Conversely, in a strict-liability context, the court presumes the defendant's duty.[33] The same plaintiff would satisfy his burden of proof by showing that the puddle of water posed an unreasonable risk of harm, the hospital hallway was in the custody of the medical institution, and the puddle was the cause-in-fact of his injuries.[34]

B. Premises Liability and the Judicial Reform of Louisiana's Fault Scheme in the 1970s

As illustrated, a person who has legal custody over a piece of property and its premises can be held at fault for injury to persons or things resulting from unreasonable risks of harm present on the premises.[35] This particular

28. Lasyone v. Kansas City S. R.R., 786 So. 2d 682, 689 (La. 2001).
29. *See generally* Maraist & Galligan, *supra* note 10.
30. *See generally Kent*, 418 So. 2d at 497.
31. *Id.*
32. *See* LA. CODE CIV. PROC. art. 966 (2021).
33. *See generally Kent*, 418 So. 2d at 497.
34. *Id.*
35. *Id.*

subset of tort law is called premises liability.[36] Louisiana Civil Code articles 2317, 2317.1, and 2322 are the codal bases for premises liability in Louisiana.[37] Before the 1970s, the Louisiana Supreme Court interpreted articles 2317 and 2322 to require negligence-based standards of fault unless a particular statute explicitly required a strict-liability standard.[38] However, beginning with the 1971 case of *Langlois v. Allied Chemical Corporation*, the Louisiana Supreme Court gradually uprooted the traditional negligence-based interpretation of the custodial-liability code articles, which effectively superseded Louisiana's traditional negligence-based premises-liability fault scheme in favor of a unique, Louisiana-specific version of strict-liability-based fault.[39]

For example, in the landmark case of *Loescher v. Parr*, a 60-foot magnolia tree on the defendant's land fell and demolished the plaintiff's Cadillac.[40] The tree looked healthy but was completely rotten on the inside—unbeknownst to the defendant-landowner.[41] The plaintiff sued the landowner for the damages to his vehicle, alleging that the landowner was responsible for the harm caused by the tree.[42] Under the Court's previous negligence-based interpretation of Louisiana Civil Code article 2317, the plaintiff would only have recovered if he proved that the defendant knew or should have known of the danger posed by the rotten tree.[43] The

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

37. *See generally* LA. CIV. CODE arts. 2317, 2322 (2021). Louisiana Civil Code articles 2317–2322 are known collectively as the "custodial articles." *See* Joseph S. Piacun, *The Abolition of Strict Liability in Louisiana: A Return to a Fairer Standard or an Impossible Burden for Plaintiffs?*, 43 LOY. L. REV. 215, 217 (1997). Louisiana Civil Code article 2317 states, "We are responsible, not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or of the things which we have in our custody," and the following articles provide specific instances of liability for "custodians" of persons or things within their control. LA. CIV. CODE arts. 2317–2322 (2021).

38. Cartwright v. Firemen's Ins. Co. of Newark, N.J., 223 So. 2d 822, 824 (La. 1969).

39. *See* Piacun, *supra* note 37, at 217–18. According to Frank L. Maraist and Thomas C. Galligan, Jr., "the Louisiana brand of strict liability—requir[ed] a thing to have presented an unreasonable risk of harm, and presume[ed] the custodian of the thing to have known of its defect." *See* Maraist & Galligan, *supra* note 10, at 344.

40. Loescher v. Parr, 324 So. 2d 441, 444 (La. 1975).

41. *Id*.

42. *Id*.

43. *Cartwright*, 223 So. 2d at 824.

Loescher Court, however, offered a new interpretation of fault under Louisiana Civil Code article 2317—if the plaintiff proved that the thing presented an unreasonable risk of harm, the owner of the thing was presumed to have known of its defect.[44] The *Loescher* Court ultimately held the defendant at fault for the damage caused by the tree, despite the fact that he had no knowledge of the risk it posed.[45]

In the *Loescher* opinion, the Court noted that Louisiana Civil Code article 2317 dates back to the original Louisiana Civil Code of 1808 and is a direct translation of French Civil Code article 1384(1), which French commentators and courts interpreted and applied to hold that a person who is legally responsible for a thing is liable for damage caused by the thing regardless of his negligence in maintaining it.[46] The *Loescher* Court also noted that both Belgium and Quebec adopted the French codal scheme as Louisiana did, and the courts of each country interpreted the custodial-liability articles to enforce strict premises liability.[47] The rationale underlying the strict-liability interpretation is policy based; it favors the innocent, injured plaintiff.[48] That is, if a third party is injured on another's property and both the injured party and the property owner were unaware of the risk of the harm, the property owner—not the innocent third party—should carry responsibility for the risk and resulting damages.[49]

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44. *Loescher*, 324 So. 2d at 449; *see generally* Maraist & Galligan, *supra* note 10.

45. *Loescher*, 324 So. 2d at 449.

46. *Id.* at 447–48. The *Loescher* Court stated:

> Articles 2315 through 2322 express the same concepts and represent the same scheme as French Civil Code Articles 1382 through 1386, of which they are to a large part verbatim translations. . . . In this context, in applying the French verbatim counterpart code provision, the liability of the guardian of a thing for damages caused through the vice or defect of the thing has been interpreted as providing for liability of the guardian without personal negligence on his part, his legal fault . . . being based upon the breach of his legal obligation to keep his thing in such condition or in such control that it does no damage to others.

Id.

47. *Id.* at 448.

48. *See id.* at 446.

49. *See* Piacun, *supra* note 37, at 220. The *Loescher* Court explained, "[T]he person to whom society allots the supervision, care, or guardianship (custody) of the risk-creating person or thing bears the loss resulting from creation of the risk, rather than some innocent third person harmed as a consequence of his failure to prevent the risk." *Loescher*, 324 So. 2d at 446. The Louisiana Supreme Court further elaborated on this principle in *Kent v. Gulf States Utilities Company*, stating,

C. Away with Strict Premises Liability: Legislative Reform of the Fault Scheme in the 1990s

The Louisiana Supreme Court's version of strict premises liability prevailed until the Louisiana Legislature passed the Civil Justice Reform Act of 1996, an expansive tort reform bill implemented to supplant the Louisiana Supreme Court's plaintiff-friendly interpretation of the Louisiana Civil Code as used in *Loescher* and its progeny.[50] The Act implemented this change by adding negligence provisions into the Code's custodial-liability articles, including the premises-liability articles.[51] For example, the Act abolished strict liability for premises owners for vices, defects, or ruin on their property that cause damage to another by enacting Code article 2317.1, which states:

> The owner or custodian of a thing is answerable for damage occasioned by its ruin, vice, or defect, only upon a showing that he knew or, in the exercise of reasonable care, should have known of the ruin, vice, or defect which caused the damage, that the damage could have been prevented by the exercise of reasonable care, and that he failed to exercise such reasonable care.[52]

To provide another example, before the Act, Louisiana Civil Code article 2322 stated, "The owner of a building is answerable for the damage occasioned by its ruin, when this is caused by neglect to repair it, or when it is the result of a vice in its original construction."[53] In 1996, the Act amended article 2322, which now states:

> The owner of a building is answerable for the damage occasioned by its ruin, when this is caused by neglect to repair it, or when it is the result of a vice or defect in its original construction. However, he is answerable for damages only upon a showing that he knew or, in the exercise of reasonable care, should have known

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> The theory is that the owner-guardian is regarded as the risk-creator because of his relationship with the thing which presents the risk. As between him and the faultless victim injured as a result of the risk, the owner-guardian theoretically should bear the loss, because he was in the best position to discover the risk and to prevent the injury.

Kent v. Gulf States Util. Co., 418 So. 2d 493, 497 n.5 (La. 1982).

50. *See generally* Maraist & Galligan, *supra* note 10, at 345; *see* Piacun, *supra* note 37.

51. *See* Piacun, *supra* note 37, at 230.

52. LA. CIV. CODE art. 2317.1 (2021).

53. LA. CIV. CODE art. 2322 (1995).

> of the vice or defect which caused the damage, that the damage could have been prevented by the exercise of reasonable care, and that he failed to exercise such reasonable care.[54]

Louisiana courts have adhered to the Act since its passage, holding property owners to negligence standards rather than strict-liability standards in personal injury lawsuits arising out of ruin, vices, defects, or other conditions on their property.[55] For example, in *Myers v. Dronet*, the plaintiff brought a negligence action against a property owner to recover damages after she was injured using a defective power tool while performing yard work on the owner's property.[56] In determining the appropriate standard of fault, the court noted the changes brought about by the Act.[57] The *Myers* court stated that "article 2317.1 changed the *Loescher* strict liability [standard] by infusing 'actual or constructive knowledge' . . . into article 2317, [t]herefore, in effect, the 1996 amendments overruled *Loescher* and its progeny, replacing its strict liability concept with a negligence-based rule."[58] The *Myers* court went on to apply a traditional duty-breach negligence analysis, concluding that the defendant-landowner did not owe a legal duty to the plaintiff.[59]

D. Slip-and-Fall Law

Within the realm of premises liability is "slip-and-fall" tort litigation, in which a patron who slips, falls, and is injured as a result of a dangerous condition or hazard on a business's premises alleges that the business is at fault for his or her injury.[60] Generally, a business owes a duty of reasonable care to protect customers from hazards or dangerous conditions on its premises.[61] The duty can encompass protection from hazards caused by

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54. LA. CIV. CODE art. 2322 (2021).

55. Myers v. Dronet, 801 So. 2d 1097, 1101 (La. Ct. App. 3d Cir. 2001). Louisiana courts presently disagree as to the applicability of Civil Code articles 2317.1 and 2322 to slip-and-fall cases. *See infra* note 185. Regardless of their applicability in slip-and-fall cases, an understanding of the negligence-based provisions in articles 2371.1 and 2322 is integral to the arguments set forth in the later sections of this Comment. *See infra* Section III.A.

56. *Myers*, 801 So. 2d at 1101.

57. *Id.* at 1103–08.

58. *Id.* at 1105.

59. *Id.* at 1112.

60. 107 AM. JUR. *Proof of Facts 3d* § 1 (2021).

61. *Myers*, 801 So. 2d at 1112.

the business's own employees as well as those created by patrons.[62] In slip-and-fall cases, a business's legal duty to its customers is a fact-intensive inquiry.[63] Once a slip-and-fall defendant is found to have a duty, the court must evaluate case-specific factors such as the location of the spill, patron traffic in the area at the time of the spill, and the adequacy of the business's cleanup procedures in order to determine the scope of the duty and whether or not the business breached its duty to keep the patron safe from harm.[64] Oftentimes, the origin of an injury-causing hazard on a business's premises is unknown.[65] However, courts have often determined that these hazards are created inadvertently by employees or by third-party patrons.[66] Accordingly, the evidentiary burden of proof is of great significance in slip-and-fall litigation because such cases often turn on circumstantial evidence.[67]

*E. The Slip-and-Fall Burden of Proof Pre-*Kavlich

Historically, Louisiana courts applied negligence analyses to slip-and-fall cases.[68] A plaintiff bringing a slip-and-fall suit under Louisiana law was required to prove by a preponderance of the evidence that he or she slipped, fell, and was injured as a result of a dangerous condition on the premises, and that the business had actual or constructive knowledge of the hazardous condition and failed to exercise reasonable care to protect the plaintiff from injury relating to the condition.[69] Courts using this approach reasoned that business owners are not strict insurers of their customers' safety.[70] Rather, businesses should exercise reasonable care in

62. Dever v. George Theriot's, Inc., 159 So. 2d 602, 604 (La. Ct. App. 3d Cir. 1964).

63. Holden v. La. State Univ. Med. Ctr.-Shreveport, 690 So. 2d 958, 962 (La. Ct. App. 2d Cir. 1997).

64. *Id.*

65. *See generally id.*; McCardie v. Wal-Mart Stores, Inc., 511 So. 2d 1134 (La. 1987).

66. *See generally Holden*, 690 So. 2d at 962; *McCardie*, 511 So. 2d 1134.

67. *Holden*, 690 So. 2d at 962.

68. *E.g.*, Welch v. Winn-Dixie La., Inc., 655 So. 2d 309, 314 (La. 1995).

69. *E.g.*, Broussard v. Nat'l Food Stores of La., Inc., 233 So. 2d 599, 601 (La. Ct. App. 3d Cir. 1970).

70. *See generally* Levine v. Hartford Accident & Indem. Co., 149 So. 2d 433, 434 (La. Ct. App. 3d Cir. 1963); Wisckol v. Ct. Fire Ins. Co., 145 So. 2d 89 (La. Ct. App. 4th Cir. 1962); Meyerer v. S.H. Kress & Co., 89 So. 2d 475, 479 (La. Ct. App. 1st Cir. 1956); Boucher v. Paramount-Richards Theatres, Inc., 30 So. 2d 211, 214 (La. Ct. App. 4th Cir. 1947).

safeguarding their premises to protect patrons from injuries.[71] Businesses are then only liable for injuries to a patron if the patron can prove that the business had a duty to protect the patron from harm and breached that duty by failing to adequately maintain its premises.[72]

F. The Louisiana Supreme Court Addresses the Slip-and-Fall Burden of Proof: The Kavlich *Line of Cases*

Negligence-based fault governed slip-and-fall cases until the Louisiana Supreme Court first addressed the issue in the 1975 case of *Kavlich v. Kramer*.[73] In *Kavlich*, the plaintiff filed suit against a neighborhood grocery store after slipping on a piece of banana just after she entered the store.[74] The plaintiff severely injured her left knee and sought to recover damages against the grocery store.[75] The *Kavlich* Court noted that grocery store patrons injured as a result of hazards on the premises are often in no position to prove who caused the hazard or how long the hazard existed prior to the fall.[76] Inherent in the Court's reasoning was the policy consideration that grocery stores should be held to a standard of care higher than that of the average business with regard to slip-and-fall cases.[77] The *Kavlich* Court considered the fact that grocery stores, in the interest of increasing sales, exacerbate slip-and-fall risks for customers by drawing patrons' attention to the shelves and away from their walking path.[78] Thus, the Court reasoned, slip-and-fall plaintiffs should not be held responsible for proving that a defendant grocery store knew or

71. *See Levine*, 149 So. 2d at 434; Benton v. Conn. Fire Ins. Co., 145 So. 2d 89 (La. Ct. App. 4th Cir. 1962); *Meyerer*, 89 So. 2d at 479; *Boucher*, 30 So. 2d at 214.

72. *Boucher*, 30 So. 2d at 214.

73. Kavlich v. Kramer, 315 So. 2d 282 (La. 1975). In fact, the Court decided *Kavlich* months before it decided the renowned *Loescher* case. Unlike *Loescher*, the *Kavlich* opinion does not examine the nature of liability under the premises-liability provisions of the Louisiana Civil Code. However, *Kavlich* foreshadows the Court's plaintiff-friendly interpretation of the Code's custodial-liability articles. *See Kavlich*, 315 So. 2d 282; Loescher v. Parr, 324 So. 2d 441, 441 (La. 1975).

74. *Kavlich*, 315 So. 2d at 284.

75. *Id.*

76. *Id.* at 285.

77. *Id.*

78. *Id.* at 284.

should have known of a dangerous condition on its premises.[79] Rather, grocery stores should carry the burden of disproving negligence.[80]

Consequently, the *Kavlich* Court set out a new standard for slip-and-falls in grocery stores.[81] Under the new *Kavlich* analysis, a plaintiff bringing a slip-and-fall suit against a grocery store carried the burden of proving that he or she slipped, fell, and was injured as a result of a dangerous condition on the defendant's premises.[82] Once the plaintiff met this burden, the burden of proof shifted to the defendant to rebut the presumption that it breached its duty of reasonable care to the plaintiff.[83] A defendant could exculpate itself from the negligence presumption by introducing evidence to show that it or its employees were "reasonably prudent in their exercise of duty and care owed to a customer . . . ," including evidence or testimony of adequate custodial procedures and the business's adherence thereto.[84]

In the years following *Kavlich*, the Louisiana Supreme Court took on three more slip-and-fall cases, all involving grocery-store defendants.[85] Through this line of cases, the Court intensified the new evidentiary burden it created in *Kavlich*.[86] For example, in *Gonzales v. Winn-Dixie Louisiana, Inc*., the plaintiff sued a Winn-Dixie grocery store after slipping and falling on olive oil in a store aisle.[87] The *Gonzales* Court followed the *Kavlich* standard, holding that the plaintiff met her burden of proof by showing that there was a spill of olive oil on the store's floor, that she slipped and fell in the olive oil, and that she sustained injuries as a result.[88] The *Gonzales* Court then shifted the burden of proof to Winn-Dixie, which offered evidence of its standard cleanup protocol in an attempt to rebut the

79. *Id.* at 285.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* In shifting the burden of proof to the defendant, the *Kavlich* Court effectuated its policy consideration that "the person to whom society allots the supervision, care, or guardianship (custody) of the risk-creating person or thing bears the loss resulting from the creation of the risk, rather than some innocent third person harmed as a consequence of his failure to prevent the risk." Loescher v. Parr, 324 So. 2d 441, 446 (La. 1975).

84. *Kavlich*, 315 So. 2d at 285.

85. *See* Gonzales v. Winn-Dixie La., 326 So. 2d 486 (La. 1976); Brown v. Winn-Dixie La. Inc., 452 So. 2d 685 (La. 1984); McCardie v. Wal-Mart Stores, Inc., 511 So. 2d 1134 (La. 1987).

86. *See Gonzales*, 326 So. 2d 486; *Brown*, 452 So. 2d 685; *McCardie*, 511 So. 2d 1134.

87. *Gonzales*, 326 So. 2d at 487.

88. *Id.* at 488.

presumption of negligence.[89] The *Gonzales* Court ultimately found Winn-Dixie at fault for the plaintiff's injuries, specifically noting that Winn-Dixie failed to provide evidence that its employees followed the protocol or that its employees did not cause the spill.[90] Thus, the store had not overcome the presumption of negligence.[91]

Eight years later, in *Brown v. Winn Dixie Louisiana, Inc.*, another Winn-Dixie shopper sought damages from Winn-Dixie after she slipped on rice, fell, and was injured in the store.[92] The *Brown* Court found the defendant at fault, applying the *Kavlich* burden-shifting approach and adding new, specific evidentiary requirements for the defendant to rebut the presumption of negligence.[93] Specifically, the *Brown* Court held that a grocery store defendant could only exculpate itself from the presumption of negligence upon proving both that "[its] employees did not cause the hazard and that [the store] exercised such a degree of care that [it] would have known under most circumstances of a hazard caused by customers."[94]

Finally, in the 1987 case of *McCardie v. Wal-Mart Stores, Inc.*, a Wal-Mart shopper slipped on a liquid substance on the floor, fell, and was injured.[95] The *McCardie* Court cited to *Brown* for the proposition that—in order for a grocery store defendant to exculpate itself from the presumption of negligence—the grocery-store defendant must prove both that the store's employees did not cause the hazard[96] and that they exercised a degree of care sufficient to detect a customer-created hazard under most circumstances.[97] The Court held that Wal-Mart failed to exculpate itself from the presumption of negligence because it "failed to prove that none of its employees caused the spill."[98]

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89. *Id.*

90. *Id.* at 489.

91. *Id.*

92. Brown v. Winn-Dixie La. Inc., 452 So. 2d 685, 686 (La. 1984).

93. *Id.* at 687.

94. *Id.*

95. McCardie v. Wal-Mart Stores, Inc., 511 So. 2d 1134 (La. 1987).

96. *Id.* at 1135-36 (Cole, J., dissenting). The burden of proving a negative—that the store's employees did not cause the hazard—was notably onerous for grocery-store defendants because it required such defendants to produce testimony from all on-duty employees that could have encountered the hazard about their awareness thereof. *Id.*

97. *Id.* at 1135.

98. *Id.* at 1136. *McCardie* was a 4-3 decision. In dissent, Justices Cole and Marcus argued that the Court's requirement that grocery store defendants prove that none of their employees caused the spill was too stringent. Both expressed concern that the evidentiary burden imposed on the defendant grocery stores had

In *Kavlich*, the Louisiana Supreme Court established a new plaintiff-friendly standard for slip-and-fall cases involving grocery-store defendants.[99] The Court further escalated its burden-shifting approach through *Brown* and *McCardie*, where it restricted the means by which a slip-and-fall defendant could rebut the negligence presumption.[100] After *McCardie*, a grocery store defendant could not avoid liability unless it proved both that (1) none of its employees caused the hazard and (2) it exercised such a degree of care that it would have detected a customer-created hazard under most circumstances.[101] The *McCardie* standard, fueled by the policy considerations on which it was created, was a drastic deviation from the traditional negligence burdens of proof applied in the pre-*Kavlich* era.[102] The elevated standard was notably onerous for grocery-store defendants seeking to avoid liability for patrons' slip-and-fall injuries.[103] Ergo, the legislators sought reform.

G. Legislative Slip-and-Fall Reform: Louisiana Revised Statutes § 9:2800.6

The Louisiana Supreme Court's adoption of the burden-shifting standard for slip-and-fall liability gave rise to widespread concern and frustration among Louisiana's retailers and restaurants.[104] These brick-and-mortar establishments were upset by the legal implications of the unprecedented, plaintiff-friendly standard set by *Kavlich* and its

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expanded too far beyond *Kavlich*. They agreed that a defendant should be able to exculpate itself from the negligence presumption by showing adequate cleanup procedures. Justice Cole warned that the Court's new standard "might well suggest the imposition of an impracticable and almost insurmountable burden of proof every time someone is unfortunate enough to fall in these large market places." *Id.*

99. *See generally* Kavlich v. Kramer, 315 So. 2d 282 (La. 1975).

100. *See Brown*, 452 So. 2d at 687; *McCardie*, 511 So. 2d at 1135.

101. *McCardie*, 511 So. 2d at 1135.

102. *Id.*

103. Minutes of Meeting, Senate Comm. on Judiciary A, at 3 (June 14, 1988) (on file with Louisiana Senate Docket). The *Brown* and *McCardie* standard was controversial because it required grocery-store defendants to prove that none of their employees caused the spill. This required grocery-store defendants to call each of their employees as witnesses to testify as to whether they caused the spill. *Id.*

104. *See generally* Minutes of Meeting, Civ. L. & Proc. Comm. 10–11 (June 17, 1988) (on file with Louisiana Senate Docket) [hereinafter 1988 Minutes, Civ. L. & Proc.]

progeny.[105] Specifically, Louisiana businesses opposed the stringent evidentiary burden created by *Brown* in 1984 and *McCardie* in 1987.[106] As a result, industry representatives backed Senate Bill 452 of Louisiana's 1988 Regular Session—a proposal intended to abolish the two-fold evidentiary hurdle for slip-and-fall defendants.[107] Upon passage, the bill was promulgated as Louisiana Revised Statutes § 9:2800.6, commonly known as "the Merchant Liability Statute."[108] The 1988 Merchant Liability Statute effectively codified the *Kavlich* burden-shifting approach for slip-and-fall cases against "merchants," stating:

> In a suit for damages by a person who has suffered damages as the result of a hazardous condition while on the merchant's premises, the person must prove that the accident was caused by a hazardous

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105. *Id.*

106. *Id*; *see* Brown v. Winn-Dixie La. Inc., 452 So. 2d 685, 687 (La. 1984); *McCardie*, 511 So. 2d at 1135.

107. S. 452, 1988 Leg., Reg. Sess. (La. 1988). Upon passage, the language of the statute provided:

> A. A merchant owes a duty to persons who use his premises to exercise reasonable care to keep his aisles, passageways, and floors in a reasonably safe condition. This duty includes a reasonable effort to keep the premises free of any hazardous conditions which reasonably might give rise to damage.
>
> B. In a suit for damages by a person who has suffered damages as the result of a hazardous condition while on the merchant's premises, the person must prove that the accident was caused by a hazardous condition. The burden of proof then shifts to the merchant to prove that he acted in a reasonably prudent manner in exercising the duty of care he owed to the person to keep the premises free of any hazardous conditions.
>
> C. In exculpating himself from liability under this Subsection, the merchant need not introduce the testimony of every employee of the merchant or any particular proportion thereof, but is only required to introduce the testimony of any employee shown to have actually created the hazardous condition and those employees and management personnel whose job responsibilities included inspection or cleanup of the area where the accident giving rise to the damages occurred.
>
> D. "Merchant" means one whose business is to sell goods, foods, wares, or merchandise at a fixed place of business.

LA. REV. STAT. § 9:2800.6 (1988). In the words of Senator Robert T. Garrity, presenting the bill to the Senate Civil Law and Procedure Committee, "This bill is aimed at *McCardie v. Wal-Mart*." 1988 Minutes, Civ. L. & Proc., *supra* note 104, at 10–11.

108. *See generally* LA. REV. STAT. § 9:2800.6(B) (1988).

> condition. The burden of proof then shifts to the merchant to prove that he acted in a reasonably prudent manner in exercising the duty of care he owed to the person to keep the premises free of any hazardous conditions.[109]

In accordance with the lobbyists' concerns, the 1988 Merchant Liability Statute also explicitly abolished the elevated evidentiary hurdles for defendants set forth in *McCardie*, providing:

> In exculpating himself from liability under this Subsection, the merchant need not introduce the testimony of every employee of the merchant or any particular proportion thereof, but is only required to introduce the testimony of any employee shown to have actually created the hazardous condition and those employees and management personnel whose job responsibilities included inspection or cleanup of the area where the accident giving rise to the damages occurred.[110]

The standard set by the 1988 Merchant Liability Statute was defendant-friendly in comparison to the Louisiana Supreme Court's *McCardie* standard.[111] However, Louisiana merchants were still frustrated with the burden-shifting standard to which they were held in slip-and-fall cases.[112] In 1990, only two years after the enactment of the original Merchant Liability Statute, Louisiana merchants backed Senate Bill 478 of the 1990 Louisiana Regular Session.[113] The bill proposed an amendment that repealed the burden-shifting standard set forth in the original Merchant Liability Statute in favor of a traditional negligence standard.[114] During committee deliberations regarding the bill, legislators

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109. LA. REV. STAT. § 9:2800.6(B) (1998).

110. *Id.* § 9:2800.6(C).

111. *Id.*; *McCardie*, 511 So. 2d 1134.

112. *See generally* Minutes of Meeting, Senate Comm. on Judiciary A, at 11–12 (June 5, 1990) (on file with Louisiana Senate Docket) [hereinafter 1990 Minutes, Judiciary A].

113. S. 478, 1990 Leg., Reg. Sess. (La. 1990).

114. *Id.* Upon passage, the language of the statute provided:

> (A) A merchant owes a duty to persons who use his premises to exercise reasonable care to keep his aisles, passageways, and floors in a reasonably safe condition. This duty includes a reasonable effort to keep the premises free of any hazardous conditions which reasonably might give rise to damage.
>
> (B) In a negligence claim brought against a merchant by a person lawfully on the merchant's premises for damages as a result of an injury,

and parties representing Louisiana's merchant community pointed out multiple shortcomings created by the 1988 Merchant Liability Statute and its burden-shifting approach.[115]

For example, in advocating for the amendment, Senator Larry Bankston argued that the elevated burden of proof that the 1988 Merchant Liability Statute imposed on merchant-defendants increased legal expenses for merchants, which ultimately resulted in higher prices for shoppers.[116] Representatives from the Louisiana Retailers Association addressed the Senate Committee on Judiciary A to express their disdain for the new evidentiary burden, arguing that the 1988 Merchant Liability Statute unfairly discriminated against merchants.[117] The industry representatives argued that the burden-shifting standard of fault subjected merchant-retailers to excessive litigation and frivolous slip-and-fall claims from patrons who sought to take advantage of the plaintiff-friendly standard of fault.[118] Further, in the House Committee of Civil Law and Procedure, Representative James Donelson noted that the burden-shifting

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> death, or loss sustained because of a fall due to a condition existing in or on a merchant's premises, the claimant shall have the burden of proving, in addition to all other elements of his cause of action, all of the following: (1) The condition presented an unreasonable risk of harm to the claimant and that risk of harm was reasonably foreseeable; and (2) The merchant either created or had actual or constructive notice of the condition which caused the damage, prior to the occurrence; and (3) The merchant failed to exercise reasonable care.
>
> (C) Definitions: (1) "Constructive notice" means . . . the condition existed for such a period of time that it would have been discovered if the merchant had exercised reasonable care. (2) "Merchant" means one whose business is to sell goods, foods, wares, or merchandise at a fixed place of business.

LA. REV. STAT. § 9:2800.6 (1990).

115. *See generally* 1990 Minutes, Judiciary A, *supra* note 112, at 11–12. The bill was supported by Louisiana retailers, grocery stores, and other businesses that were adversely affected by the burden of proof implemented by the 1988 Merchant Liability Statute. *Id.*

116. *Id.* The original version of Senate Bill 478 stated, "Claims against merchants for premise liability [to] increase, the cost of which is borne by consumers. Therefore, the legislature's intention is to remedy this inequitable situation." *Id.*

117. 1990 Minutes, Judiciary A, *supra* note 112, at 11–12 (statements by Nick Perez & James Fernandez).

118. *Id.*

approach skewed the value of plaintiffs' claims, making slip-and-fall claims more difficult to settle.[119]

In response to the lobbyists' efforts, the Louisiana Legislature passed Senate Bill 478, amending the 1988 Merchant Liability Statute and reinstating the traditional requirement that a plaintiff seeking damages against a merchant for a slip-and-fall claim prove that the defendant had actual or constructive notice of the condition.[120] Specifically, the 1990 amendment added a negligence burden of proof into the statute, stating:

> [i]n a negligence claim brought against a merchant . . . for damages as a result of an injury, death, or loss sustained because of a fall due to a condition existing in or on a merchant's premises, the claimant shall have the burden of proving, and in addition to all other elements of his cause of action, all of the following:
> (1) The condition presented an unreasonable risk of harm to the claimant and that risk of harm was reasonably foreseeable; and
> (2) The merchant either created or had actual or constructive notice of the condition which caused the damage, prior to the occurrence; and
> (3) The merchant failed to exercise reasonable care.[121]

The Louisiana Supreme Court first recognized the new slip-and-fall standard in the 1995 case of *Welch v. Winn-Dixie Louisiana, Inc*.[122] Citing the 1990 Merchant Liability Statute, the *Welch* Court recognized that the legislature abrogated the burden-shifting approach it had previously developed, and applied the negligence standard set out by the 1990 Merchant Liability Statute.[123] Specifically, the *Welch* Court noted, "In 1990, the Legislature changed direction completely and enacted the current version of the [Merchant Liability] statute which, according to one commentator, codifies the 'traditional' rule of liability requiring actual or constructive knowledge and places the burden of proof squarely on the plaintiff."[124] The 1990 Merchant Liability Statute, with its traditional

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119. Minutes of Meeting, Civ. L. & Proc. Comm. 11 (June 12, 1990) (on file with Louisiana Senate Docket) (statements by S. Donelson).

120. LA. REV. STAT. § 9:2800.6 (1990).

121. *Id.*

122. Welch v. Winn-Dixie La., Inc., 655 So. 2d 309 (La. 1995).

123. *Id.*

124. *Id.* at 314. The *Welch* Court followed the new statutory slip-and-fall standard but ultimately ruled in favor of the plaintiff despite the fact that the plaintiff introduced no evidence suggesting the amount of time the hazard existed before she slipped and fell. *Id.* Two years later, in *White v. Wal-Mart Stores*, the Louisiana Supreme Court overruled *Welch*, noting that:

negligence approach, still operates as the exclusive standard for slip-and-fall suits against merchants today.[125]

In sum, the Louisiana Legislature, backed by representatives of the Louisiana merchant community, reformed the plaintiff-friendly burden-shifting standard developed by the Louisiana Supreme Court in *Kavlich*, *Brown*, and *McCardie*. The 1988 Merchant Liability Statute did away with the two-fold evidentiary burden from *Brown* and *McCardie*, and the 1990 amendments eliminated the burden-shifting standard altogether—effectively restoring the negligence-based burden from the pre-*Kavlich* era.

II. LOUISIANA'S JURISPRUDENTIAL INCONSISTENCY REGARDING THE BURDEN OF PROOF IN SLIP-AND-FALL CASES AGAINST MEDICAL INSTITUTIONS

The evolution of Louisiana's premises-liability- and slip-and-fall-specific standards occurred through distinct lines of jurisprudence and statutory refinements. However, they were analogous in that they occurred

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> [b]ecause La. R.S. 9:2800.6(B) clearly and unambiguously requires the claimant to prove each of its three subsections with no shifting of the burden, and because in order to prove constructive notice the statute clearly and unambiguously requires that the claimant prove that the damage causing condition existed for some period of time prior to the occurrence, we overrule *Welch*, 655 So. 2d 309, which allowed for a finding of constructive notice absent a showing that the condition existed for some period of time prior to the occurrence and which provided for a shifting of the burden to the defendant merchant to prove it exercised reasonable care.

White v. Wal-Mart Stores Inc., 699 So. 2d 1081, 1085 (La. 1997).

125. LA. REV. STAT. § 9:2800.6 (2021). The Merchant Liability Statute was amended to its present form in 1996. The 1996 amendment added three material changes. First, the 1996 version added to paragraph (B)(3) and clarified that "[i]n determining reasonable care, the absence of a written or verbal uniform cleanup or safety procedure is insufficient, alone, to prove failure to exercise reasonable care." Second, the amendment expanded the definition of *constructive notice* in section paragraph (C)(1), clarifying that "[t]he presence of an employee of the merchant in the vicinity in which the condition exists does not, alone, constitute constructive notice, unless it is shown that the employee knew, or in the exercise of reasonable care should have known, of the condition." Finally, the amendment added to the definition of *merchant* in section (C)(2), stating, "For purposes of this Section, a merchant includes an innkeeper with respect to those areas or aspects of the premises which are similar to those of a merchant, including but not limited to shops, restaurants, and lobby areas of or within the hotel, motel, or inn." *Id.*

during the same time period and reflected the changing judicial and legislative stances on premises-liability standards of fault at the time they occurred. Louisiana Civil Code articles 2317.1 and 2322 apply generally to all premises, so the negligence-based premises-liability principles implemented by the Act were all encompassing.[126] Contrarily, slip-and-fall tort reform was not as comprehensive. The Merchant Liability Statute only clarified the burden of proof applicable to slip-and-fall suits brought against merchants, presumably because Louisiana's merchant community vehemently advocated for statutory protection from the *Kavlich* burden-shifting approach.[127] As a result, the burden of proof for slip-and-fall cases against non-merchants remains unaddressed by both the Louisiana Supreme Court and the Louisiana Legislature.[128] Absent statutory guidance, Louisiana courts rely on caselaw to set the standard of fault for slip-and-fall cases against medical institutions—resulting in disagreement among Louisiana's appellate courts over the proper standard applicable to such cases.[129]

A. Louisiana's Appellate Courts Apply Inconsistent Standards of Fault to Slip-and-Fall Suits Brought Against Medical Institutions

Louisiana's appellate courts inconsistently adjudicate slip-and-fall suits against medical-institution defendants, considering different jurisprudential standards and statutes to set the standard of fault.[130] The jurisprudential dispute over the applicable standard can be divided into two different approaches, both of which have roots in the aforementioned history of custodial- liability and slip-and-fall jurisprudence in Louisiana. Some appellate courts adhere to the burden-shifting standard first set out in the *Kavlich* line of cases, in which an injured plaintiff satisfies his

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126. LA. CIV. CODE arts. 2317.1, 2322 (2021).

127. *See supra* Section I.G. The Merchant Liability Statute defines *merchant* as:

> one whose business is to sell goods, foods, wares, or merchandise at a fixed place of business. For purposes of this Section, a merchant includes an innkeeper with respect to those areas or aspects of the premises which are similar to those of a merchant, including but not limited to shops, restaurants, and lobby areas of or within the hotel, motel, or inn.

LA. REV. STAT. § 9:2800.6 (2021).

128. Holden v. La. State Univ. Med. Ctr.-Shreveport, 690 So. 2d 958, 963–94 (La. Ct. App. 2d Cir. 1997).

129. Connelly v. Veterans Admin. Hosp., 23 F. Supp. 3d 648, 659 (E.D. La. 2014).

130. *Id.*

evidentiary burden by showing that he fell and was injured as a result of a dangerous or hazardous condition on the medical institution's premises.[131] The burden then shifts to the defendant medical institution to exculpate itself from a presumption of negligence.[132] The burden-shifting approach has been used by each of Louisiana's appellate courts in evaluating slip-and-fall negligence claims against medical-institution defendants; however, it is used most consistently in the Third and Fifth circuits.[133] None of the appellate courts have exclusively adopted the burden-shifting approach.[134]

Other appellate courts have abided by a seemingly defendant-friendly standard that reflects the burden of proof in traditional negligence cases, as illustrated in *Holden v. Louisiana State Medical Center in Shreveport*.[135] This approach requires the plaintiff to prove not only that he or she slipped, fell, and was injured as a result of a foreign substance on a medical institution's premises, but also that the defendant either caused the hazardous condition or breached its duty by failing to adequately inspect its premises for hazards.[136] In applying the *Holden* standard or one similar, both the First and Second circuits have expressly rejected the popular burden-shifting approach.[137] Proponents of the

131. *Connelly*, 23 F. Supp. 3d at 656.

132. *Id.*

133. *See, e.g.*, Terrance v. Baton Rouge Gen. Med. Ctr., 39 So. 3d 842, 844 (La. Ct. App. 1st Cir. 2010); Harkins v. Natchitoches Par. Hosp., 696 So. 2d 19, 21 (La. Ct. App. 3d Cir. 1997); Neyrey v. Touro Infirmary, 639 So. 2d 1214, 1216 (La. Ct. App. 4th Cir. 1994); LeBlanc v. Alton Ochsner Med. Found., 563 So. 2d 312, 315 (La. Ct. App. 5th Cir 1990).

134. *See, e.g.*, *Terrance*, 39 So. 3d at 844; *Harkins*, 696 So. 2d at 21; *Neyrey*, 639 So. 2d at 1216; *LeBlanc*, 563 So. 2d at 315. For example, in the 2015 case of *Smith v. Northshore Regional Medical Center*, the First Circuit stated, "As the plaintiff in this slip-and-fall case, [the plaintiff] must show that she slipped, fell, and was injured because of a foreign substance on the hospital's premises. The burden then shifts to the hospital to exculpate itself from the presumption of negligence." Smith v. Northshore Reg'l Med. Ctr., 170 So. 3d 173, 176 (La. Ct. App. 1st Cir. 2015). Yet five years later, the same court applied a negligence-based burden of proof in a separate hospital slip-and-fall case. Rixner v. Our Lady of Lake Hosp., Inc., 306 So. 3d 444, 449 (La. Ct. App. 1st Cir. 2020).

135. Holden v. La. State Univ. Med. Ctr.-Shreveport, 690 So. 2d 958, 964 (La. Ct. App. 2d Cir. 1997). In *Holden*, the Second Circuit reversed the trial court's application of the burden-shifting approach in favor of a negligence-based approach. *Id.*

136. *Id.*

137. *See id.* The First Circuit has applied both standards mentioned above inconsistently. For example, the court applied the burden-shifting approach in

negligence-based standard take the position that the policy-driven burden-shifting standard was created exclusively for grocery stores or merchant-type businesses, and that the traditional negligence burden should never have been removed from slip-and-fall cases involving hazardous conditions on the premises of non-merchant defendants, including medical institutions.[138]

B. Inequities Created by the Judicial Inconsistency

The uncertainty in Louisiana as to the proper burden of proof in slip-and-fall cases against medical institutions gives rise to at least three issues. First, parties to slip-and-fall cases are often uncertain as to the applicable burden of proof.[139] For example, in *Connelly v. Veterans Administration Hospital*, the plaintiff acknowledged that she "[was] in a quandary as to how to carry her burden of proof."[140] In *Bell v. Carencro Nursing Home, Inc*., plaintiff's counsel argued to the trial court that the defendant was required to show evidence that the facility implemented and practiced proper custodial procedures.[141] The judge then responded, "Ma'am, *that's your burden*."[142] To promote efficiency, it is in the best interest of the Louisiana court system to make litigants aware of the evidentiary and procedural standards to which they will be held.

Second, the differing evidentiary burdens can provide for inconsistent adjudications of otherwise indistinguishable slip-and-fall claims.[143] For example, in the Second Circuit's *Holden* case, both the plaintiff and the defendant, LSU Medical Center, rested their cases without introducing any evidence as to LSU Medical Center's custodial procedures for the area where the plaintiff fell.[144] The *Holden* court applied a negligence-based approach and ruled in favor of LSU Medical Center, noting that the plaintiff had not alleged facts sufficient to prove that LSU Medical Center

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Toussaint v. Baton Rouge General Medical Center and applied a negligence standard in *Rixner v. Our Lady of the Lake Hospital*. *See* Toussaint v. Baton Rouge Med. Ctr., 251 So. 3d 1151 (La. Ct. App. 1st Cir. 2018); *Rixner*, 306 So. 3d 444.

138. *Holden*, 690 So. 2d at 964.

139. *See, e.g.*, Connelly v. Veterans Admin. Hosp., 23 F. Supp. 3d 648, 657 (E.D. La. 2014).

140. *Id.* at 659.

141. Bell v. Carencro Nursing Home, Inc., 202 So. 3d 499, 503 (La. Ct. App. 1st Cir. 2016).

142. *Id.*

143. *See, e.g.*, *Holden*, 690 So. 2d at 963.

144. *Id.* at 961.

breached its duty of care.[145] However, had a different court decided the *Holden* case and applied the burden-shifting approach, LSU Medical Center likely would not have had sufficient evidence to rebut the negligence presumption and the plaintiff would have prevailed.[146]

Further, in the case of *Mosely v. Methodist Health System Foundation, Inc.*, a plaintiff brought a slip-and-fall negligence suit against Pendleton Memorial Hospital in New Orleans after slipping in a puddle on the floor of a hospital room, falling, and injuring herself.[147] The plaintiff and her grandmother testified that they saw a small tube disconnected from the patient's catheter leaking urine onto the floor.[148] The patient's nurse testified for Pendleton, stating that she emptied the urine bag less than an hour before the accident and saw no liquid on the floor at the time.[149] However, she did notice liquid on the floor upon responding to the accident.[150] The trial court ruled in favor of the defendant hospital for two reasons.[151] The plaintiff failed to prove that the condition on the premises posed an unreasonable risk of harm and also failed to prove that the hospital either created the condition or had actual or constructive knowledge of the condition.[152] However, on appeal, the Fourth Circuit rejected the trial court's application of the negligence-based burden of proof and applied the burden-shifting approach, citing to a prior case in which the Fourth Circuit deemed the burden-shifting approach the proper standard for slip-and-fall claims against hospitals.[153] The *Mosely* court reversed the trial court and ruled in favor of the plaintiff, stating, "Applied to this case the proper burden of proof renders a different outcome."[154]

Finally, the burden-shifting standard of fault causes unwarranted financial and legal problems for medical institutions. Legislative committee meeting notes from the bill that later became the 1990 amendment to the Merchant Liability Statute show that representatives from Louisiana's merchant community presented statistics showing that Louisiana merchants subjected to the elevated evidentiary burden incurred

145. *Id.* at 964.
146. *Id.*
147. Mosely v. Methodist Health Sys. Found., Inc., 776 So. 2d 21, 22 (La. Ct. App. 4th Cir. 2000).
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id*. at 23.
152. *Id.*
153. *Id.*
154. *Id.*

expenses higher than merchants in surrounding states.[155] Part of the rationale behind the 1990 amendment to the statute was that the resulting increased expenses for merchants were being passed onto the merchant's customers.[156] The lobbyists also argued that cases in which the plaintiff does not need to prove actual or constructive knowledge on part of the defendant have skewed settlement values because plaintiffs were much more likely to prevail on their personal injury claims.[157]

Similarly, Louisiana medical institutions that are unfairly subjected to the burden-shifting approach likely face higher legal and financial costs as a result of the elevated standards of fault they face in court. For example, the medical institution defendant in *Mosely* would have escaped liability for the plaintiff's injuries had the Fourth Circuit not changed the applicable standard of fault.[158] Further, as indicated by the lobbyists who argued for the 1990 amendment to the Merchant Liability Statute, diminished legal burdens for plaintiffs implicitly promote frivolous litigation, decrease the settlement likelihood, and skew the value of slip-and-fall personal injury claims.[159] Without legislative or judicial policy justifications, medical institutions do not deserve the onerous legal burdens that result from the burden-shifting standard of fault.

The Louisiana Legislature enacted extensive codal and statutory premises-liability-reforming legislation in the 1990s to resolve all of the Louisiana Supreme Court's controversial changes to premises-liability burdens of proof. However, this tort reform left behind a gap through which the controversy over the burden-shifting standard persists in cases against medical institutions. In order to best effectuate its previous tort-reform legislation, the legislature should amend Louisiana Revised Statutes § 9:2800 to clarify the standard of fault for slip-and-fall cases brought against medical institution defendants. Express statutory guidance would clarify the uncertainty among litigants, ensure consistent application of Louisiana premises-liability law, and mitigate the legal and financial burdens for medical institution defendants.

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155. 1990 Minutes, Judiciary A, *supra* note 112, at 11–12 (statements by Nick Perez & James Fernandez).

156. *Id.*

157. *Id.*

158. *Mosely*, 776 So. 2d at 23.

159. 1990 Minutes, Judiciary A, *supra* note 112, at 11–12 (statements by Nick Perez & James Fernandez).

III. STUCK IN THE PAST: EXAMINING THE IMPROPRIETIES OF THE BURDEN-SHIFTING APPROACH

The burden-shifting standard of fault is an antiquated legal standard of Louisiana premises-liability law, which the Louisiana Legislature replaced through the tort reform legislation of the 1990s.[160] The Louisiana courts that have applied the burden-shifting approach in slip-and-fall cases against medical institutions have failed to consider the standard's contextual impropriety, thus perpetuating a continuing chain of unfounded caselaw that is unsupported by Louisiana policy.[161] For these reasons, the burden-shifting approach is improper and actively misrepresents Louisiana law to the detriment of Louisiana's medical institutions.

A. The Burden-Shifting Approach is Akin to Strict Liability, Which No Longer Fits Within Louisiana's Premises-Liability Scheme

Courts that have favored the burden-shifting approach have often failed to evaluate the standard's jurisprudential history.[162] Other courts have mislabeled the burden-shifting standard as a form of "elevated standard of care" for medical institutions to which it applies.[163] This description, however, is inconsistent with Louisiana's fault scheme under Louisiana Civil Code article 2315.[164] In reality, an elevated standard of care and a presumption of legal duty are separate concepts that implicate different elements of the negligence analysis.[165] In a negligence action, plaintiffs carry the burden of proving that the defendant owed them a duty of care.[166] Once the plaintiff proves the defendant's duty, courts have discretion to modify the standard of reasonable care commensurate with

160. *See id.*

161. *See, e.g.*, LeBlanc v. Alton Ochsner Med. Found., 563 So. 2d 312, 316 (La. Ct. App. 5th Cir. 1990); Reynolds v. St. Francis Med. Ctr., 597 So. 2d 1121, 1123–24 (La. Ct. App. 2d Cir. 1992); Neyrey v. Touro Infirmary, 639 So. 2d 1214, 1216 (La. Ct. App. 4th Cir. 1994).

162. *See, e.g.*, *LeBlanc*, 563 So. 2d at 316; *Reynolds*, 597 So. 2d at 1123–24; *Neyrey*, 639 So. 2d at 1216.

163. Rixner v. Our Lady of Lake Hosp., Inc., 306 So. 3d 444, 451 (La. Ct. App. 1st Cir. 2020).

164. *See* Parfait v. Hosp. Serv. Dist. No. 1, 638 So. 2d 1140, 1142 (La. Ct. App. 1st Cir. 1994); LA. CIV. CODE art. 2315 (1996).

165. Oster v. Dep't of Transp. & Dev., State of La., 582 So. 2d 1285 (La. 1991).

166. *See id.* at 1288.

the circumstances.[167] Conversely, the burden-shifting approach relieves the plaintiff of proving the defendant's duty, so long as the plaintiff proves that his or her injury was caused by a dangerous condition on the defendant's premises.[168]

According to the Louisiana Supreme Court, "the only difference between the negligence theory of recovery and the strict liability theory of recovery is that the plaintiff need not prove the defendant was aware of the existence of the 'defect' under a strict liability theory."[169] Thus, the burden-shifting approach is not a derivation of negligence-based fault.[170] In fact, the "presumption of negligence" is not indicative of a negligence analysis at all; instead, it is congruent to fault based on Louisiana's version of strict premises liability, as first implemented by the Louisiana Supreme Court in the 1970s.[171]

Yet Louisiana courts that apply the burden-shifting approach do not refer to it as a standard of or similar to strict liability.[172] These courts often cite to precedent in implementing the burden-shifting approach without analyzing the nature of the standard.[173] However, courts that have opposed the use of the burden-shifting approach in slip-and-fall cases against medical institutions have raised concerns about the standard's strict-liability nature.[174] For example, the *Holden* court rejected the trial court's application of the burden-shifting standard and instead required that the plaintiff present evidence to prove LSU Medical Center's duty and breach.[175] The *Holden* court ruled in favor of the hospital, stating, "Since fault cannot be based upon strict liability, defendant's fault for a negligent

167. FRANK L. MARAIST, JOHN M. CHURCH, WILLIAM R. CORBETT, ET AL., TORT LAW – THE AMERICAN AND LOUISIANA PERSPECTIVES 145 (3rd ed. 2017).

168. *See generally Oster*, 582 So. 2d 1285; Terrance v. Baton Rouge Gen. Med. Ctr., 39 So. 3d 842, 844 (La. Ct. App. 1st Cir. 2010).

169. *Oster*, 582 So. 2d at 1288.

170. *Id.*

171. Rixner v. Our Lady of the Lake Hosp., Inc., 306 So. 3d 444, 451 (La. Ct. App. 1st Cir. 2020).

172. *See, e.g.*, *Terrance*, 39 So. 3d at 844; Harkins v. Natchitoches Par. Hosp., 696 So. 2d 19, 21 (La. Ct. App. 3d Cir. 1997); Neyrey v. Touro Infirmary, 639 So. 2d 1214, 1216 (La. Ct. App. 4th Cir. 1994); LeBlanc v. Alton Ochsner Med. Found., 563 So. 2d 312, 316 (La. Ct. App. 5th Cir. 1990).

173. *See, e.g.*, *Terrance*, 39 So. 3d at 844; *Harkins*, 696 So. 2d at 21; *Neyrey*, 639 So. 2d at 1216; *LeBlanc*, 563 So. 2d at 316.

174. *See, e.g.*, Holden v. La. State Univ. Med. Ctr.-Shreveport, 690 So. 2d 958, 964 (La. Ct. App. 2d Cir. 1997); *Rixner*, 306 So. 3d at 450–51; Connelly v. Veterans Admin. Hosp., 23 F. Supp. 3d 648, 659 (E.D. La. 2014).

175. *Holden*, 690 So. 2d at 964.

breach of duty was not demonstrated in this instance by some evidence of the defendant's lack of reasonable inspection."[176]

Further, in *Connelly v. Veterans Administration Hospital*, the U.S. District Court for the Eastern District of Louisiana applied Louisiana slip-and-fall law to the plaintiff's suit brought under the Federal Tort Claims Act.[177] The *Connelly* court noted the disagreement among Louisiana appellate courts as to the proper standard of fault applicable in slip-and-fall cases against medical institutions and evaluated both the burden-shifting approach and *Holden*'s negligence-based approach.[178] The *Connelly* court ultimately applied a traditional negligence standard, noting that "[e]liminating the actual or constructive knowledge requirement 'would be to impose strict liability on the defendant.'"[179] Finally, in *Rixner v. Our Lady of the Lake Hospital*, the Louisiana First Circuit discussed the impropriety of the burden-shifting approach as applied to slip-and-fall cases against medical institutions.[180] Notably, Judge McDonald's "agreeing" opinion pointed out that "the use of [the burden-shifting] approach is inconsistent with the purpose of the merchant liability statute, and it places an extremely high standard on hospitals, akin to strict liability, which was never contemplated by either the Supreme Court or the legislature."[181] Given the fundamental characteristics of the burden-shifting standard, *Holden*, *Connelly*, and *Rixner* are correct—the burden-shifting standard is analogous to the Louisiana Supreme Court's strict-liability standard.[182]

Accordingly, Louisiana courts' continuous application of the burden-shifting standard is inappropriate because Louisiana statutes and jurisprudence no longer support strict premises liability as they did during the *Loescher* and *Kavlich* eras.[183] For instance, Louisiana statutory law

176. *Id.*

177. *Connelly*, 23 F. Supp. 3d 648.

178. *Id.*

179. *Id.* at 659 (citing Wiggins v. United States, 2009 WL 2176043, at *6 (E.D. La. July 22, 2009)).

180. Rixner v. Our Lady of Lake Hosp., Inc., 306 So. 3d 444, 451 (La. Ct. App. 1st Cir. 2020) (McDonald, J., agreeing).

181. *Id.* In *Rixner*, Judge McDonald "agree[d] and assign[ed] additional reasons," explaining the history of Louisiana slip-and-fall law and the present-day impropriety of the burden-shifting approach as applied to slip-and-fall cases against medical institutions. *Id.* at 450.

182. Holden v. La. State Univ. Med. Ctr.-Shreveport, 690 So. 2d 958, 964 (La. Ct. App. 2d Cir. 1997); *Connelly*, 23 F. Supp. 3d 648; *Rixner*, 306 So. 3d at 449.

183. Loescher v. Parr, 324 So. 2d 441, 444 (La. 1975); Kavlich v. Kramer, 315 So. 2d 282, 285 (La. 1975).

provides several causes of action to persons who are injured in a building or its premises belonging to another.[184] Since its enactment as part of the Civil Justice Reform Act of 1996, Louisiana Civil Code article 2317.1 sets the standard for premises-liability claims resulting from vices or defects within a premises, such as a loose handrail in a staircase or a defective sidewalk.[185] Louisiana Civil Code article 2322 applies to premises-liability claims for damages occasioned by the ruin of a building—specifically when the damages result from the owner's neglect to repair the building or a vice or defect in the building's original construction.[186] Louisiana Revised Statutes § 9:2800.6, the Merchant Liability Statute, sets the standard for premises-liability claims arising out of hazardous or dangerous conditions on or in the premises of a merchant.[187] Finally, Louisiana Revised Statutes § 9:2800(A)–(C) provides conditions for public-entity liability when damages result from the condition of buildings within the legal custody of a public entity.[188] Each of these four statutory provisions has always required, or was amended to require, that the plaintiff prove the defendant's actual or constructive knowledge of the particular risk that caused damage and that the defendant failed to exercise reasonable care to eliminate the risk.[189] Considering the fact that

184. *See generally* LA. CIV. CODE arts. 2317.1, 2322 (2021).

185. *See Id.* art. 2317.1. Louisiana courts presently disagree as to whether Louisiana Civil Code article 2317.1 applies to hazardous conditions *on* a premises, such as a liquid on the floor or an improperly situated floormat. On the one hand, the Fifth Circuit has applied Louisiana Civil Code article 2317.1 to such defects in cases such as *Blount v. East Jefferson General Hospital* and *Becker v. Jefferson Parish Hospital District Number Two*. On the other hand, the Second Circuit has held that Louisiana Civil Code article 2317.1 applies only to structural vices or defects *in* a premises, as illustrated in *Holden v. Louisiana State Medical Center in Shreveport* and *Adams v. Louisiana State University Health Sciences Center Shreveport*. *See* Blount v. E. Jefferson Gen. Hosp., 887 So. 2d 535 (La. Ct. App. 5th Cir. 2004); Becker v. Jefferson Par. Hosp. Dist. No. 2, 154 So. 3d 537 (La. 2014); Adams v. La. State Univ. Health Scis. Ctr. Shreveport, 19 So. 3d 512 (La. Ct. App. 2d Cir. 2009); Holden v. La. State Univ. Med. Ctr.-Shreveport, 690 So. 2d 958, 962 (La. Ct. App. 2d Cir. 1997).

186. LA. CIV. CODE art. 2322 (2021).

187. *See* LA. REV. STAT. § 9:2800.6 (2021).

188. *See id.* § 9:2800 (A)–(C). Public entity liability under Louisiana Revised Statutes § 9:2800 (A)–(C) is based on the provisions of Louisiana Civil Code article 2317. *See generally id.*

189. *See generally* LA. CIV. CODE arts. 2317.1, 2322 (2021); LA. REV. STAT. §§ 9:2800.6, 9:2800(A)–(C) (2021). Louisiana Revised Statutes § 9:2800(C) has imposed a negligence-based standard for public entity liability since its promulgation in 1985, and Louisiana Revised Statutes § 9:2800.6 has imposed a

Louisiana's current statutory instances of premises-liability unanimously require negligence-based fault, Louisiana courts' continued application of the burden-shifting approach to cases involving medical institutions plainly contradicts Louisiana law.[190]

To illustrate, property owners are likely aware, or at least should be aware, of the structural condition of their building. Vices or defects within a premises can result from its old age, deterioration, lack of maintenance, or physical force caused by weather or accident, and building owners are responsible for maintaining the physical integrity of their properties. Conversely, property owners are much less likely to be aware of spills or hazardous conditions that arise in the everyday course of business because such hazards cannot always be anticipated and are often spontaneously caused by third parties.[191] Property owners are arguably less likely to be aware of spontaneous spills than they are of defects in physical integrity of their building. It logically follows that the standard of fault for cases involving extemporaneous spills or hazards on any premises should be lower than or at least equal to the standard applicable to cases involving vices, defects, or structural flaws in a building. Both Louisiana Civil Code articles 2317.1 and 2322 and the Merchant Liability Statute exclusively mandate negligence standards.[192] *A fortiori*, slip-and-fall cases against medical institutions should be adjudged according to negligence standards.

For example, a hospital visitor who falls through the dilapidated second-story floor of a hospital would not recover damages from the hospital under Louisiana Civil Code article 2317.1 or 2322 unless the visitor introduced evidence sufficient to prove that the hospital owner had actual or constructive knowledge of the dangerous condition of the floor—the court would not presume the hospital's knowledge of the structural condition of the floor.[193] However, under a present judicial interpretation

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negligence-based standard since its amendment in 1990. Both articles 2317.1 and 2322 were previously interpreted to allow property owners to be held strictly liable for injuries caused by defects in their premises. However, both provisions were amended as part of the Civil Justice Reform Act of 1996 to expressly mandate negligence-based fault standards. *See supra* Section I.C; LA. REV. STAT. §§ 9:2800(C), 9:2800.6 (2021).

190. *See* LA. CIV. CODE arts. 2317.1, 2322 (2021); LA. REV. STAT. §§ 9:2800.6, 9:2800(A)–(C) (2021).

191. *See* Holden v. La. State Univ. Med. Ctr.-Shreveport, 690 So. 2d 958, 962 (La. Ct. App. 2d Cir. 1997).

192. LA. CIV. CODE arts. 2317.1, 2322 (2021); *see* LA. REV. STAT. § 9:2800.6 (2021).

193. *See generally* LA. CIV. CODE arts. 2317.1, 2322 (2021).

of the law, the same court might presume the hospital's awareness of a small spill of apple sauce on the hallway floor that had been caused by a hospital visitor and apply a much stricter standard of fault.[194] Within the context of Louisiana's negligence-based premises-liability standards, the burden-shifting approach is disproportionately strict on medical institution defendants, and Louisiana courts' application of the burden-shifting approach to slip-and-fall claims against medical institution defendants is a gross misapplication of Louisiana law. Despite its inapplicability, the strict-liability burden-shifting standard remains relevant, in large part, as a result of courts' repeated reliance on outdated caselaw.[195]

B. The Burden-Shifting Approach Is a Product of Improper Reliance on Outdated Caselaw

As previously stated, the premises-liability reform brought about by the Civil Justice Reform Act of 1996 and the Merchant Liability Statute did not specifically address the standard of fault applicable to slip-and-fall cases involving hazardous conditions on the premises of non-merchants, including medical institutions.[196] Thus, Louisiana courts evaluating slip-and-fall cases against non-merchant entities have relied on caselaw to set the legal standard.[197] Following the premises-liability reform of the 1990s, Louisiana courts adopted the newly mandated negligence standards as the prevailing law applicable to premises-liability cases.[198] However, without statutory guidance regarding the standard applicable to slip-and-fall cases against non-merchants, Louisiana courts continued to apply the burden-shifting standard only to cases against medical institution defendants, seemingly without regard for the negligence-based changes to Louisiana premises-liability law.[199]

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194. *See generally* LeBlanc v. Alton Ochsner Med. Found., 563 So. 2d 312, 316 (La. Ct. App. 5th Cir. 1990); Reynolds v. St. Francis Med. Ctr., 597 So. 2d 1121, 1123–24 (La. Ct. App. 2d Cir. 1992); Neyrey v. Touro Infirmary, 639 So. 2d 1214, 1216 (La. Ct. App. 4th Cir. 1994).

195. *See generally LeBlanc*, 563 So. 2d at 316; *Reynolds*, 597 So. 2d at 1123; *Neyrey*, 639 So. 2d at 1216.

196. *See* LA. CIV. CODE art. 2317.1 (2021); LA. REV. STAT. § 9:2800.6 (2021).

197. *See supra* cases cited note 195.

198. *See generally* Welch v. Winn-Dixie La., Inc., 655 So. 2d 309, 314 (La. 1995); Maraist & Galligan, *supra* note 10.

199. *See supra* cases cited note 195. Medical institutions are the only non-merchant entities that Louisiana courts routinely subject to the burden-shifting approach. Conversely, courts apply negligence-based fault standards to slip-and-fall cases against other non-merchants such as schools, office buildings, and prisons. *See generally* Green v. Orleans Par. Sch. Bd., 780 So. 2d 1082, 1083 (La.

To illustrate, the Fifth Circuit decided *LeBlanc v. Alton Ochsner Medical Foundation* in May 1990.[200] *LeBlanc* was one of the first cases in which a Louisiana court applied the burden-shifting standard to a slip-and-fall case brought against a medical institution, and courts still frequently rely on the *LeBlanc* holding today.[201] In *LeBlanc*, the plaintiff brought a slip-and-fall suit against Ochsner Foundation Hospital after slipping on a piece of cucumber in a hallway corridor and injuring her back and hip.[202] The *LeBlanc* court found that "*Kavlich* and its progeny govern to the extent that they require the premises owner to exculpate itself from the presumption of negligence."[203] However, the *LeBlanc* court failed to evaluate the applicability of the burden-shifting standard to the hospital defendant.[204]

Two years later, in the Second Circuit case of *Reynolds v. St. Francis Medical Center*, a plaintiff slipped and fell on outdoor steps while exiting St. Francis Medical Center in Monroe, Louisiana.[205] The plaintiff brought a slip-and-fall suit against the hospital, alleging that the stairs were wet and posed an unreasonable risk of harm.[206] The trial court applied the *McCardie* rule, both presuming St. Francis Medical Center's negligence and requiring it to call all of its employees as witnesses to rebut the presumption.[207] On appeal, the *Reynolds* court noted that the *McCardie* evidentiary requirement was overly burdensome for a hospital defendant in light of the changes implemented by the 1988 Merchant Liability Statute.[208] However, the *Reynolds* court relied directly on *LeBlanc* in

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Ct. App. 4th Cir. 2001); Flipping v. JWH Prop., LLC, 196 So. 3d 149 (La. Ct. App. 2d Cir. 2016); Williams v. Foti, 433 So. 2d 406, 407 (La. Ct. App. 4th Cir. 1983).

200. *See LeBlanc*, 563 So. 2d at 316. The 1990 amendment to the Merchant Liability Statute occurred in September. Thus, at the time *Leblanc* was decided, the 1988 original enactment of the Merchant Liability Stature governed, imposing a burden-shifting approach for slip-and-fall claims against merchants. *See* LA. REV. STAT. § 9:2800.6 (1988).

201. *See, e.g.*, Stogner v. Ochsner Clinic Found., 254 So. 3d 1254 (La. Ct. App. 5th Cir. 2018).

202. *LeBlanc*, 563 So. 2d at 313.

203. *Id.* at 316.

204. *Id.*

205. Reynolds v. St. Francis Med. Ctr., 597 So. 2d 1121, 1121 (La. Ct. App. 2d Cir. 1992).

206. *Id.*

207. *Id.* at 1123. *Reynolds* was decided in 1992; however, the applicable law in the case was the 1988 version of the Merchant Liability Statute. *See id.* at n.1.

208. *Id.* at 1123.

declaring the burden-shifting standard to be the proper standard of fault, stating:

> As in any slip and fall lawsuit, to establish a prima facie case against a hospital, the plaintiff must show that she slipped, fell, and was injured because of a foreign substance on the defendant's premises. . . . The burden then shifts to the defendant to exculpate itself from the presumption of negligence.[209]

At the time *LeBlanc* and *Reynolds* were decided, Louisiana's prevailing slip-and-fall standard was the burden-shifting standard set by the original Merchant Liability Statute and supported by the Louisiana Supreme Court in the *Kavlich* line of cases.[210] Moreover, the legislature had yet to amend the custodial-liability articles of the Louisiana Civil Code, so *Loescher* and its progeny also remained good law.[211] Therefore, the application of the burden-shifting standard against hospital defendants in *LeBlanc* and *Reynolds* was, at least, contextually appropriate.[212] However, even after the Louisiana Legislature broadly reformed premises-liability law to require negligence-based burdens of proof, courts continued to rely on *LeBlanc* and *Reynolds* in applying the burden-shifting approach in slip-and-fall cases against medical institutions.[213]

For example, in the 1994 case of *Neyrey v. Touro Infirmary*, the plaintiff brought a slip-and-fall suit against Touro Infirmary arising from injuries she sustained from slipping and falling on vomit in the hallway of the Touro Infirmary.[214] The trial court applied the burden-shifting standard, finding Touro Infirmary at fault for the plaintiff's injuries.[215] On appeal, Touro argued that the burden-shifting standard of fault was unreasonably burdensome for the hospital in light of the negligence-based standard implemented by the 1990 amendment to the Merchant Liability Statute.[216] However, citing directly to both *LeBlanc* and *Reynolds*, the *Neyrey* court stated that the burden-shifting approach was the appropriate standard for evaluating the claim but failed to explain the applicability of

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209. *Id.* at 1122 (citing *LeBlanc*, 563 So. 2d at 315).

210. *LeBlanc*, 563 So. 2d at 316; *Reynolds*, 597 So. 2d 1121.

211. *See* Maraist & Galligan, *supra* note 10.

212. *LeBlanc*, 563 So. 2d at 316. In Section III.C, this Comment discusses the fact that the Louisiana Supreme Court never applied the *Kavlich* standard to a case involving a non-merchant, much less a medical institution.

213. *See generally Reynolds*, 597 So. 2d 1121.

214. Neyrey v. Touro Infirmary, 639 So. 2d 1214, 1215 (La. Ct. App. 4th Cir. 1994).

215. *Id.* at 1216.

216. *Id.*

the burden-shifting approach in light of the 1990 amendment to the Merchant Liability Statute.[217]

In the time after *LeBlanc* and *Reynolds* but before *Neyrey*, the Louisiana Legislature had amended the Merchant Liability Statute to overrule the Louisiana Supreme Court's burden-shifting *Kavlich* standard by replacing it with a "fairer" negligence-based approach.[218] Thus, at the time *Neyrey* was decided, Louisiana law did not support the burden-shifting approach as it did at the time of *LeBlanc* and *Reynolds*.[219] In other words, the *Neyrey* court erred by relying on caselaw without considering the legislative changes to the law on which the cases were based. Louisiana courts have frequently relied on *Neyrey* in using the burden-shifting approach without addressing the *Neyrey* court's misplaced reliance on *LeBlanc* and *Reynolds*, bolstering the chain of legally inconsistent slip-and-fall caselaw through which the burden-shifting approach still exists today.[220]

For example, in the aforementioned *Mosely* case, the Fourth Circuit first noted that the slip-and-fall standard set by the Merchant Liability Statute did not apply to cases against hospitals.[221] The court then quoted *Neyrey* directly in applying the burden-shifting standard and requiring Pendleton Memorial Methodist Hospital to exculpate itself from a presumption of negligence.[222] According to the *Mosely* court: "The proper burden of proof in a claim for injuries caused by a condition in a hospital is set forth in *Neyrey v. Touro Infirmary*."[223] Beyond adopting the *Neyrey* standard, the *Mosely* court provided no analysis as to the jurisprudential basis on which *Neyrey* was decided.[224] Moreover, the *Mosely* court failed to acknowledge that the Civil Justice Reform Act of 1996 had abolished strict premises liability in Louisiana in the time since the *Neyrey* case was

217. *Id.* at 1216–17.

218. *See* LA. REV. STAT. § 9:2800.6 (1990); Piacun, *supra* note 37, at 216.

219. LeBlanc v. Alton Ochsner Med. Found., 563 So. 2d 312, 316 (La. Ct. App. 5th Cir. 1990); Reynolds v. St. Francis Med. Ctr., 597 So. 2d 1121, 1121 (La. Ct. App. 2d Cir. 1992); *Neyrey*, 639 So. 2d at 1217.

220. *Neyrey*, 639 So. 2d at 1217; Mosely v. Methodist Health Sys. Found., Inc., 776 So. 2d 21 (La. Ct. App. 4th Cir. 2000).

221. *Mosely*, 776 So. 2d at 23. Specifically, the *Mosely* court stated, "[T]his is the burden of proof that [the Merchant Liability Statute] establishes, and as such should not have been used in this case where the accident occurred on a hospital's premises, instead of a merchant's premises." *Id.*

222. *See supra* Part II; *see also Mosely*, 776 So. 2d 21, 23.

223. *Mosely*, 776 So. 2d 21, 23.

224. *Id.*

decided, further isolating the burden-shifting standard from all other premises-liability fault standards under Louisiana law.[225]

Mosely illustrates the fact that slip-and-fall cases can turn on the standard of fault applied by the court in circumstances where limited evidence is available.[226] In such circumstances, courts that adopt the burden-shifting approach disadvantage medical-institution defendants without justification. Had the *Mosely* court evaluated the contextual applicability of *Neyrey* and the cases on which *Neyrey* incorrectly relied, perhaps it would have adopted the trial court's application of a negligence-based standard and affirmed the trial court's ruling in favor of the Pendleton Memorial Methodist Hospital.[227]

As another example, in the case of *Terrance v. Baton Rouge General Medical Center*, the plaintiff brought a slip-and-fall case against Baton Rouge General Medical Center after slipping and falling near an ice machine in the hospital.[228] In evaluating the appropriate standard of fault, the *Terrance* court first stated, "The legislature has not specifically addressed the burden of proof applicable in a slip-and-fall claim against a hospital. Consequently, jurisprudence addressing the burden placed on a hospital is not affected by the statute governing merchant liability for slip-and-fall claims found at LSA–R.S. 9:2800.6."[229] The *Terrance* court then cited directly to *Reynolds* and *Neyrey* in declaring the burden-shifting approach as the appropriate standard of fault, again providing no contextual analysis of the premises-liability law on which either case was decided.[230] Specifically, the *Terrance* court stated, "As in any slip-and-fall case against a hospital, Ms. Terrance must show that she slipped, fell, and was injured because of a foreign substance on the hospital's premises. The burden then shifts to the hospital to exculpate itself from the presumption of negligence."[231]

Cases such as *Mosely* and *Terrance* perfectly exhibit the improper adherence to precedent by which the burden-shifting standard still exists

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225. *Id*.

226. *Id.* at 22.

227. *See id.*; *see also supra* Part II.

228. Terrance v. Baton Rouge Gen. Med. Ctr., 39 So. 3d 842 (La. Ct. App. 1st Cir. 2010).

229. *Id.* at 844.

230. *Id.*

231. *Id.* (first citing Neyrey v. Touro Infirmary, 639 So. 2d 1214, 1123 (La. Ct. App. 4th Cir. 1994); and then citing Reynolds v. St. Francis Med. Ctr., 597 So. 2d 1121, 1123 (La. Ct. App. 2d Cir. 1992)).

today.[232] Both courts misapplied the burden-shifting approach—first noting that the Merchant Liability Statute did not apply, then citing to outdated precedent to set the standard.[233] While the inapplicability of the Merchant Liability Statute may have justified the *Mosely* and *Terrance* courts' reliance on jurisprudential standards, both courts failed to consider the fact that the burden-shifting standard used in *Reynolds* and *Neyrey* no longer fit within Louisiana's negligence-based premises-liability scheme.[234] Strict premises liability is a remnant of the past. Yet, the burden-shifting standard—a functional equivalent to strict liability—persists in slip-and-fall cases against only medical institutions as a result of Louisiana courts' continued reliance on outdated and inapplicable slip-and-fall caselaw. Courts' misplaced application of the burden-shifting standard is also rooted in their repeated failure to evaluate whether the business of medical institutions warrants such an onerous strict-liability standard.

C. The Burden-Shifting Approach Is Inconsistent with Louisiana Public Policy

Given the fact that the burden-shifting standard is more stringent than all other premises-liability law in Louisiana, the standard is improper absent a convincing policy rationale to justify its use in cases against medical institutions. Yet judicial policy does not support an elevated legal burden for medical institutions. In fact, it suggests the opposite.[235] Despite the continued application of the burden-shifting standard in some circuits, Louisiana's appellate courts have unanimously agreed that the duty owed by hospitals to patrons "*is less than that owed by a merchant*."[236] For example, the *Terrance* opinion directly quoted this language, yet the court

232. LeBlanc v. Alton Ochsner Med. Found., 563 So. 2d 312, 316 (La. Ct. App. 5th Cir. 1990); *Reynolds*, 597 So. 2d 1121; *Neyrey*, 639 So. 2d at 1217.

233. Mosely v. Methodist Health Sys. Found., Inc., 776 So. 2d 21 (La. Ct. App. 4th Cir. 2000); *Terrance*, 39 So. 3d at 843.

234. *Mosely*, 776 So. 2d 21; *Terrance*, 39 So. 3d at 843.

235. Holden v. La. State Univ. Med. Ctr.-Shreveport, 690 So. 2d 958, 962 (La. Ct. App. 2d Cir. 1997); Blount v. E. Jefferson Gen. Hosp., 887 So. 2d 535, 537 (La. Ct. App. 5th Cir. 2004); Perrin v. Ochsner Baptist Med. Ctr., LLC, No. 2019-0265, 2019 WL 3719546, at *5 (La. Ct. App. 4th Cir. Aug. 7, 2019); Robinson v. Rapides Healthcare Sys., LLC., No. 18-553, 2019 WL 581804, at *3 (La. Ct. App. 3d Cir. Feb. 13, 2019); Rixner v. Our Lady of Lake Hosp., Inc., 306 So. 3d 444, 448 (La. Ct. App. 1st Cir. 2020).

236. *Holden*, 690 So. 2d at 962 (emphasis added); *Blount*, 887 So. 2d at 537 (emphasis added); *Perrin*, 2019 WL 3719546, at *5 (emphasis added); *Robinson*, WL 581804, at *3 (emphasis added); *Rixner*, 306 So. 3d at 448 (emphasis added).

proceeded to declare the burden-shifting approach the proper standard for evaluating the slip-and-fall claim against Baton Rouge General Hospital.[237] Given the fact that the Merchant Liability Statute expressly requires negligence-based fault for slip-and-fall cases against merchants, courts' application of the burden-shifting standard in slip-and-fall cases involving medical institutions directly contradicts prevailing policy. As noted in *Rixner*, "Surely, the legislature did not intend to eliminate the burden-shifting approach for claims against merchants, which owe a higher duty of care than non-merchants, while at the same time allowing the burden-shifting approach to be applied in claims against non-merchants."[238]

Moreover, the Louisiana Supreme Court has never supported an elevated standard of fault for medical institutions in premises-liability litigation.[239] In *Kavlich*, the Court created the burden-shifting approach as a policy-based rule; however, the *Kavlich* holding was narrowly tailored to apply only in cases brought against grocery stores.[240] In the 13 years following *Kavlich*, the Court developed the burden-shifting standard in *Gonzales*, *Brown*, and *McCardie*, and eventually overruled the standard in *Welch*—all cases against grocery store defendants.[241] Given the Court's supervisory jurisdiction and the prevalence of slip-and-fall litigation, the Court could have decided to hear a slip-and-fall case against any non-grocery store entity had it intended to expressly extend the application of the burden-shifting approach beyond grocery stores.[242]

However, the Louisiana Supreme Court has never applied the burden-shifting standard in a case involving anything other than a grocery-store defendant, nor did it ever suggest in *Kavlich* and its progeny that the burden-shifting standard was to be applied to slip-and-fall cases against any class of defendants other than grocery stores.[243] Some Louisiana courts have referenced this issue in rejecting the burden-shifting

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237. Terrance v. Baton Rouge Gen. Med. Ctr., 39 So. 3d 842, 844 (La. Ct. App. 1st Cir. 2010).

238. *Rixner*, 306 So. 3d at 452 (McDonald, J., agreeing).

239. *See supra* Section I.F.

240. *See* Kavlich v. Kramer, 315 So. 2d 282, 284–85 (La. 1975).

241. *See generally id.* at 284; Gonzales v. Winn-Dixie La., Inc., 326 So. 2d 486 (La. 1976); Brown v. Winn-Dixie La. Inc., 452 So. 2d 685 (La. 1984); McCardie v. Wal-Mart Stores, Inc., 511 So. 2d 1134 (La. 1987); Welch v. Winn-Dixie La., Inc., 655 So. 2d 309 (La. 1995).

242. LA. CONST. art. V, § 5.

243. *Kavlich*, 315 So. 2d 282; *Gonzales*, 326 So. 2d 486; *Brown*, 452 So. 2d 685; *McCardie*, 511 So. 2d 1134.

approach.[244] For example, the *Holden* court stated, "We have not found that the Louisiana Supreme Court applied the ever-increasing post-*Kavlich* burdens upon non-merchant defendants such as LSUMC between 1975 and 1990."[245] Further, the *Rixner* agreeing opinion stated, "At no point has either the Louisiana legislature or the Louisiana Supreme Court ever applied the burden-shifting approach to hospitals or any other non-merchants."[246]

Notwithstanding the absence of judicial policy support for the application of the burden-shifting approach specifically, it could be argued that public interest warrants some form of elevated legal standard for medical institutions in slip-and-fall cases. After all, medical institutions have regulated monopolies on the local healthcare markets, and they welcome higher-than-average concentrations of physically and mentally handicapped patrons who are much more susceptible to hazard-related injury than other persons. Further, medical institutions often market themselves as cornerstones of human health and wellness, captivating the public trust. For these reasons, it is reasonable that hospital patrons have expectations of cleanliness and physical safety while on the premises. Finally, people visit medical institutions out of necessity, not by choice, so hospital patients and visitors should not be subjected to risk-prone environments.

While such concerns are valid, they do not justify the application of a burden-shifting standard against medical institutions contrary to the negligence standards to which all other brick-and-mortar establishments in Louisiana are held.[247] Unlike merchant-type businesses, medical institutions do not generate revenue by diverting patrons' attention away from their walking paths with colorful product placement and in-store advertising.[248] The *Holden* court concurred with this rationale in rejecting the trial court's application of the burden-shifting approach against the LSU Medical Center in Shreveport.[249] Specifically, the *Holden* court stated, "The economic circumstances which prompted *Kavlich*, including

244. Holden v. La. State Univ. Med. Ctr.-Shreveport, 690 So. 2d 958, 963; Rixner v. Our Lady of the Lake Hosp., Inc., 306 So. 3d 444, 452 (La. Ct. App. 1st Cir. 2020) (McDonald, J., agreeing).

245. *Holden*, 690 So. 2d at 963.

246. *Rixner*, 306 So. 3d 452 (McDonald, J., agreeing).

247. *See generally* LA. CIV. CODE arts. 2317.1, 2322 (2021); LA. REV. STAT. §§ 9:2800.6, 9:2800(A)–(C) (2021).

248. *Kavlich*, 315 So. 2d at 284.

249. *Holden*, 690 So. 2d at 963.

the merchandising distractions and customer volume, are not present in a patient's wing of a hospital."[250]

Further, hazardous or dangerous conditions such as spills on the floor of medical institutions are often collateral incidences that inherently result from the treatment and care of the hospital's guests, such as the spill of bodily fluid in *Mosely* or the alleged spill of juice in *Holden*.[251] Medical institutions should not be penalized merely because patient care sometimes results in the creation of hazardous conditions on the premises, especially considering the fact that many medical institutions are not revenue driven.[252] In fact, many of Louisiana's major medical institutions are non-profit organizations.[253] For example, Touro Infirmary, the defendant in *Neyrey*; Methodist Health System Foundation, the defendant in *Mosely*; and Alton Ochsner Medical Foundation, the defendant in *LeBlanc*, are all non-profit institutions.[254]

IV. RESOLVING THE ISSUE: A STATUTORY NEGLIGENCE STANDARD

Courts' continuous application of the burden-shifting approach in slip-and-fall cases against medical institutions has created confusion within Louisiana premises-liability law and unfairly discriminates against medical institutions. Accordingly, the Louisiana Legislature should stop the judiciary's fall down this slippery slope by adding a provision to the Revised Statutes that expressly establishes a negligence-based standard of fault for lawsuits arising out of hazardous conditions existing in or on a medical institution's premises.

A. Reviewing the Benefits of a Negligence Standard for Slip-and-Fall Cases Against Medical Institutions

As shown, there is neither law nor policy in Louisiana that justifies a strict-liability burden for medical institutions in slip-and-fall litigation.

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250. *Id.*

251. *Id.* at 964; Mosely v. Methodist Health Sys. Found., Inc., 776 So. 2d 21, 22 (La. Ct. App. 4th Cir. 2000).

252. *Facilities in Louisiana*, ASSOC. HEALTH CARE JOURNALISTS (Dec. 25, 2020), http://www.hospitalinspections.org/state/la/ [https://perma.cc/EPV5-SFN3]; *Nonprofit Explorer: Pendleton Memorial Methodist Hosp.*, PROPUBLICA (Dec. 25, 2020), https://projects.propublica.org/nonprofits/organizations/720563965 [https://perma.cc/238D-PUPW].

253. *Facilities in Louisiana*, *supra* note 252.

254. *Id.*

Some courts have acquiesced to this notion.[255] However, the majority of Louisiana's appellate courts have not—creating uncertainty among litigants as to their burdens of proof, resulting in inconsistent adjudications of otherwise similar slip-and-fall claims, and sometimes subjecting medical institutions to costly, unparalleled liability for slip-and-fall injuries to patrons.[256] To remedy these issues, the Louisiana Legislature should amend the Merchant Liability Statute to extend its provisions to medical institutions. Such an amendment would serve to unify Louisiana premises liability law, reinforcing the legislature's stance on negligence-based fault by remediating the archaic burden-shifting standard that slipped through the cracks of the 1990 tort reforming legislation.

B. A Statutory Solution

To properly incorporate medical institutions into the Merchant Liability Statute, the Louisiana Legislature should add medical institutions to the definition of "merchant" in paragraph (C)(2) of the statute. The amendment should read as follows:

> (C) Definitions:
> (2) "Merchant" means one whose business is to sell goods, foods, wares, or merchandise at a fixed place of business. For purposes of this Section, a merchant includes innkeepers and medical institutions with respect to those areas or aspects of the premises which are similar to those of a merchant, including but not limited to shops, restaurants, lobby areas, and hallways of or within the hotel, motel, inn, or medical institution.

CONCLUSION

The Louisiana Legislature codified negligence-based standards for premises liability through the Merchant Liability Statute and the 1996 Civil Justice Reform's enactment of Louisiana Civil Code articles 2317.1

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255. *See generally* Holden v. La. State Univ. Med. Ctr.-Shreveport, 690 So. 2d 958, 962 (La. Ct. App. 2d Cir. 1997); Blount v. E. Jefferson Gen. Hosp., 887 So. 2d 535, 537 (La. Ct. App. 5th Cir. 2004); Perrin v. Ochsner Baptist Med. Ctr., LLC, No. 2019-0265, 2019 WL 3719546, at *5 (La. Ct. App. 4th Cir. Aug. 7, 2019); Robinson v. Rapides Healthcare Sys., LLC., No. 18-553, 2019 WL 581804, at *3 (La. Ct. App. 3d Cir. Feb. 13, 2019); Rixner v. Our Lady of the Lake Hosp., Inc., 306 So. 3d 444, 452 (La. Ct. App. 1st Cir. 2020) (McDonald, J., agreeing).

256. *See supra* Section II.B.

and 2322.[257] In both instances, the legislature took action to reverse the Louisiana Supreme Court's expansive strict-liability interpretation of the Louisiana Civil Code, which presumed a premises owner's negligence for injuries to patrons caused by ruin, vices, or defects, or hazardous conditions on or within the premises.[258] However, present Louisiana law provides no specific standard for negligence cases arising out of injury to a patron resulting from hazardous conditions on the premises of a non-merchant, nor has the Louisiana Supreme Court addressed the issue.[259] Consequently, Louisiana courts apply differing standards to slip-and-fall claims against defendant medical institutions.[260] The jurisprudential inconsistency causes confusion among litigants and often results in inconsistent adjudications of otherwise similar claims.[261]

The majority of Louisiana appellate courts today improperly apply a burden-shifting, strict-liability standard to slip-and-fall cases against medical institutions—the very same standard that was the target of Louisiana tort reform in the 1990s.[262] The burden-shifting standard is improper under present Louisiana premises-liability law, but it remains alive in caselaw as a result of courts' misplaced reliance on outdated precedent, lack of contextual reasoning, and lack of policy consideration.[263] Medical institutions should not be subjected to strict-liability standards while all other Louisiana businesses are held to negligence-based standards.[264] To correct this problem and restore the connection between practice and policy, the Louisiana Legislature should codify a negligence-based standard for slip-and-fall premises-liability claims against medical institutions.

257. *See generally* LA. REV. STAT. § 9:2800.6 (2021); LA. CIV. CODE arts. 2317, 2317.1, 2322 (2021).

258. *See generally* LA. REV. STAT. § 9:2800.6 (2021); LA. CIV. CODE arts. 2317, 2317.1, 2322 (2021).

259. *See supra* Section II.A.

260. *See id.*

261. *See supra* Section II.B.

262. *See generally* Kavlich v. Kramer, 315 So. 2d 282 (La. 1975); LA. REV. STAT. § 9:2800.6 (2021).

263. *See supra* Section III.B.

264. *See generally* LA. REV. STAT. § 9:2800.6 (2021); LA. CIV. CODE arts. 2317, 2317.1, 2322 (2021).