Ruminations on Liability for the Acts of Things

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Recent years have witnessed a ferment in Louisiana tort law. Turmoil has centered around the required showing of negligence traditionally imposed under article 2315 of the Civil Code. Although disquiet in this area was discernible in the opinions as early as 1971 in Langlois v. Allied Chemical Corp.¹ and became increasingly obvious in several decisions shortly thereafter,² the tide of revolt did not reach flood stage until 1975 with the opinion of Justice Tate in Loescher v. Parr.³ After an extensive review of both French and Louisiana jurisprudence and doctrinal writing, Justice Tate announced a new construct of tort liability under which the element of personal wrongdoing is obviated in a very substantial number of litigated cases. This liability attaches as a result of harm inflicted through the acts of "defective" things. The attention of the court in the Loescher case was centered on article 2317 of the Civil Code. This provision follows close on the heels of the Fault article. It reads in part:

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. . . .⁴

This article was interpreted by the Loescher court as affording a unique source of tort liability which is quite independent of the presence or absence of any showing of fault on the part of the custodian. Under this article it need only be shown, first, that the cause of the harm was the act of a thing, second, that the thing was defective, and, finally, that the defective thing was in the custody of the defendant when the harm was occasioned. When these requisites have been established all the prima facie essentials to a recovery are

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¹ 258 La. 1067, 249 So. 2d 133 (1971).
² See, e.g., Turner v. Bucher, 308 So. 2d 270 (La. 1975); Holland v. Buckley, 305 So. 2d 113 (La. 1974).
³ 324 So. 2d 441 (La. 1975).
⁴ Emphasis added. The full text of Civil Code article 2317 reads as follows:

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. This, however, is to be understood with the following modifications.
satisfied. Thereafter if the defendant seeks to escape liability he must do so by demonstrating that the cause of the mishap was something foreign to the defect.

The following pages are devoted to a very compressed discussion of the strengths and weaknesses of this novel thesis. No effort will be made in these pages to present a detailed consideration of the many complexities that arise in interpreting and administering the new doctrine. Such matters have been treated extensively by others. The only justification offered for the pages of discussion here added is the interest of the writer in exploring along a more critical vein than he has discovered elsewhere. I venture to question the wisdom of recognizing and attempting to put into operation a thesis of liability for the acts of things. I want to discover what prompted the courts to make this choice, and whether by so doing they have improved or have handicapped the administration of tort law. Does the new thesis mark a return to some forgotten tradition? Does it come as a belated response to some underlying dictate of the Civil Code which heretofore has been neglected? Does it emerge as the inevitable conclusion at which a reasonable court must arrive when the provisions of article 2317 are subjected to close examination? Or, instead, is the new approach to be justified simply because it is believed to serve as a much needed expedient? Do the courts feel that it offers a more acceptable means of affording recognition of the everchanging needs of our industrialized society? If this is the case (and I suspect that it is), can it be anticipated that such an ap-


proach (with its heavy stress on the sheerly mechanical means whereby the harm was inflicted) is a pragmatic procedure that is to be commended for courtroom use? Is it a good administrative tool—one that is calculated to attain the desired social result with the greatest possible fluency and at a minimum of confusion, friction and waste within the judicial process? Or does it merely clutter up the decisional machinery by interjecting a host of irrelevant and inconsistent issues? These are the questions that bother me and which I hope may be of interest to the reader.

Preliminary to our discussion of the French article 1384' and its Louisiana counterpart, article 2317, we may well bear in mind that under the literal language of both articles the “thing” for whose acts the custodian is made responsible appears as a term that is not qualified in any way. There is no mention of “dangerous” thing or “defective” thing or a thing that is “negligently” made or kept or handled by its custodian. Accordingly, the French courts have chosen to accept “thing” as a comprehensive term without any qualification whatsoever, and the only remaining requirement in France is that the act of the thing serve as the cause of the damage. When this has been shown a presumption of liability follows. The only available means by which the defendant in France can exonerate himself is to persuade the trier that the injury was caused, not by the act of the thing, but rather by the act of the victim himself or the act of a third person. Hence the determination of liability under French Civil Code article 1384 becomes resolved wholly into a matter of establishing causation, rather than “fault” or blameworthiness on the part of the defendant.

The interpretation to be accorded the corresponding provision (article 2317) in Louisiana is not clear. The leading case, Loescher v. Parr, contains several expressions which cannot be readily reconciled. The opinion consistently speaks throughout of liability only for “defective” things. The following observation is especially significant: [T]he injured person must “prove” the vice (i.e., an unreasonable risk of injury to another) in the thing whose act causes the damage, and that the damage results from the vice.9

7. French Civil Code article 1384 provides:

A person is responsible not only for the damage which he causes owing to his own act, but also for that which is caused by the acts of persons for whom he is answerable or by things which are in his custody.

8. See 2 H. Mazeaud & A. Tunc, supra note 5, at no. 1209; Tunc, supra note 7, 14 INTL & COMP. L.Q. at 1095.

9. 324 So. 2d at 446.
This excerpt indicates that the court does not recognize liability indiscriminately for the acts of all things, but only for those things that are defective. Further, we are to gather that the thing is not defective unless it contains a vice. A vice, in turn, appears to be characterized as a quality that in some way exposes another to an "unreasonable risk."

We learn, however, from the same opinion that this cannot be precisely what the court meant. The opinion continues with the observation that the person legally responsible for the supervision, care or guardianship may be held liable
despite the fact that no personal negligent act or inattention . . .
is proved . . . .[T]he fault of the person thus liable is based upon his failure to prevent the "thing" for which he is responsible from causing such reasonable risk of injury to others. . . . 10

I propose to defer discussion of this apparent inconsistency within the Louisiana approach. It is mentioned here only to alert the reader to the fact that in one vital respect the French and the Louisiana provisions have not received identical treatment. The fact remains, however, that they share a common feature in that both purport to recognize a distinction between the treatment to be accorded liability arising out of "faulty" human conduct, on the one hand, and liability based upon an "act" of a thing, (or, as in Louisiana, a "defective" thing) on the other hand.

In seeking to uncover some rational basis in support of the newly recognized liability, we propose the question as to why a special provision for the act of things should have been added as a separate article of the French Civil Code if liability for things was indeed already comprehended under the earlier "fault" article. Should we conclude that a contradiction or qualification of some kind was intended by the addition? The answer, I believe, lies with history. At the time when the French Civil Code was contemplated there probably was no clear distinction in the minds of the redactors between fault and no-fault. Most harms with which they were familiar were intentional, and those that were merely inadvertent were usually occasioned within a simple rural or domestic setting. The draftsmen, of course, had no familiarity with the dangers of an industrialized mechanized society such as prevails today. 11 The principles that came to be expressed in the Code were very likely reflections of an

10. Id.
effort to adjust Roman and ecclesiastic materials at hand, to reconcile these with existing customary law and to obviate discrepancies. One progenitor of modern delictual law was the Lex Aquilia. Under the Lex a distinction was recognized between the direct Aquilian action for damages done corpore corpori, on the one hand, and the Actio in Factum, on the other. The former contemplated a direct application of force by one person to another (similar to the Trespass of the common law), while the Actio in Factum was a proceeding for damages inflicted indirectly (as in the familiar Trespass on the Case). Lawson observes that it has always been accepted doctrine that Roman Law gave an action for omissions only in exceptional cases.18

By the time the Civil Code was in contemplation such distinctions as these had ceased to be acceptable. Instead, a single principle of liability based on fault had come into recognition as a controlling feature. This, we are told, was probably a reflection of the Natural Law thinking prevalent in the seventeenth and eighteenth centuries. Prominent natural law jurists in the Age of Reason had pointed out that fault is to be discovered equally in both acts and omissions.19 Accordingly, it was not unexpected that the redactors would be at pains to make clear that a person is chargeable with fault whenever he neglects to care for a thing, just as he is chargeable with fault when he applies force to the person or the possession of another. Thus it was expectable that technical distinctions, such as those of the Lex Aquilia, should be avoided. Article 1384 (and its offspring article 2317 of the Louisiana Civil Code) may be readily explained as provisions designed to assure that the fault principle should be regarded as universal in its operation without regard to the means or agency employed.20 Certainly there can be no doubt that for nearly a century after the adoption of the Civil Code it did not occur either to courts or writers that liability "par les faits . . . des choses que l'on a sous sa garde" might be accepted in its literal sense in recognition that fault was a matter to be ignored whenever suit was based on the guardianship of a thing.21

12. Id. at 26.
13. Fault creates the obligation to make good the loss. . . . By a wrong we here mean every fault, whether by commission or omission, which is in conflict with what men ought to do.
H. Grotius, De Iure Belli ac Pacis, bk. II, c. XVII, sec. I.
15. See F. Lawson, supra note 11; 2 H. Mazeaud & A. Tunc, supra note 5, at no. 1140; Starck, supra note 6, at 1044. The Court de Cassation flatly rejected the no-fault
It was not until 1896 that the Court of Cassation ventured an observation that the explosion of an unattended boiler that resulted in the death of a worker had the effect of creating under article 1384 a presumption of liability for the act of the thing, irrespective of a conceded shortcoming in the proof of fault. The best explanation of this decision is the fact that it involved an injury to an industrial worker. Several years before the decision was handed down the neighboring Germans had adopted the first workmen's compensation act in history, and at the very moment the boiler case was under consideration the English were favorably debating a similar statute which was adopted the following year. It is fairly to be expected that the French court should be inclined similarly to protect the French worker from the dangers of industrial machinery by interpreting this article of the French Civil Code so as to produce a result similar to that which would have been reached under the compensation acts in neighboring countries. The very next year witnessed the adoption of the French Workmen's Compensation Act, and many of the more conservative French scholars entertained the hope that the exploding boiler case would be regarded as an anomaly that attested the need for a compensation statute, and would now promptly be forgotten. Indeed, the matter lay virtually dormant until the onset of traffic accidents that followed in the wake of the advent of the motor vehicle a quarter century later.

It is significant that in France the new liability for the acts of things came to be recognized first in litigation arising out of industrial and transportation accidents. It is a widely recognized fact that the conception of negligence was nurtured in the soil of dangerous enterprise during the latter half of the nineteenth century. Negligence came as a judicial response to a need to reconcile the conflict between the interest in safety of life and property, as opposed to the pressing interest in freedom of action in a young industrial society that was becoming increasingly dependent on fac-

18. The cause célèbre was Jand'heur c. Les Galeries Belfortaises, D.1930.129, D.1930.1.57. See Malone, supra note 17, at 243-44.
tories and transporation. With these two interests in conflict the idea of negligence emerged as an inviting compromise: Let the enterpriser do all that he can to avoid a mishap (that is, behave as a reasonably prudent individual) and if an accident nevertheless occurs, it will be regarded as unavoidable. Thus both the term "fault" in France and "negligence" in the Anglo-American world are abstractions that have little strictly moral content. They are devices that perform their function as mirrors whose mission is to reflect the ever-changing pattern of civilization in conflict.

For a while the claims in furtherance of industrial freedom of action gained the upper hand in the balance. But, by the turn of the century the social and economic equation began shifting. Enterprise was thriving. At the same time it was becoming increasingly dangerous, and the cost in terms of human safety was becoming intolerable. Furthermore, a new economic institution, liability insurance, emerged as an effective means of absorbing the immediate impact of accident costs and distributing such costs in dilution among all those who benefit from a given enterprise and its dangers. Also, various new means of minimizing accidents were under continuous development, and judges came to feel the need to make certain that these modern methods and devices were put into effective operation by industry. In short, courts became increasingly cognizant of the demand that enterprise be made more responsive to the public for the growing aggregate of harms it was creating. The face of the fault concept was undergoing significant renovation.

Still another feature of accident litigation came to be recognized and demanded reform. This was an obvious inequality that prevailed between the predicaments of the plaintiff and defendant respective-ly. This inequality appeared under two separate aspects: First there is frequently noticeable an absence of mutuality of the exposure to risk that obtains between the parties involved in an accident. An outstanding example is the ordinary pedestrian injury. Here the operation of a motor vehicle imposes a serious threat to the safety of any pedestrian, while, conversely, the presence of the pedestrian serves in no way to endanger the safety of the operator of the car. A similar inequality obtains in the case of the helpless homeowner whose premises may be rendered wholly unusable by reason of smoke, glare or noise emitted by some neighboring industry. Where, as in such instances, the risk is clearly one-sided, the notion of negligence loses much of its essential appeal as an instrument of fair play, and the plight of the helpless victim elicits the greater sympathy of the court.
A second and different kind of inequality prevails with reference to the procedural disadvantage under which the tort victim frequently suffers in the courtroom because of the fault system. So long as both parties to a mishap are so situated that they have equal access to the facts upon which liability must depend the trial procedure appears fair enough. One's sense of justice is not offended by the fact that the victim who is in court seeking to saddle the defendant with the cost of his accident is obliged by law to come forward with proof and to establish affirmatively that the defendant was to blame. The picture, however, assumes a different aspect when the agency through which the injury was brought about is some complicated piece of machinery within the exclusive control of the defendant or where it is some thing of which the defendant has superior knowledge and control because he was its maker, supplier or exclusive possessor, while the endangered person neither knows nor has adequate means of knowing the nature of the defect or how it might have been remedied. The usual burden of proof with which the plaintiff is encumbered frequently proves fatal to his claim and our sense of injustice is accordingly aroused. Negligence when strictly administered tends to lose favor.

Despite these weaknesses in the fault structure a wise court would hesitate to discard the test of blameworthiness unless something could be discovered better suited to the needs of society. Any shift away from fault must be so tempered as not to ignore the human reactions of the man of the street when faced with litigation. In our everyday thinking, we are thoroughly accustomed to cast responsibility upon whichever person was "to blame" for a mishap, and, conversely, we are at pains to relieve the innocent. Such reactions are a cherished part of our sense of fair play and we expect to find the same philosophy in the courtroom. We remain confident that we can distinguish right from wrong in simple terms, and this sentiment is not one that can be left out of account in the courtroom: Hence unevenness of decision is inevitable so long as the climate prevailing is that of conflict within our thinking. The need to respond to our conventional urging is as strong as our yearning for reform. Law must devise language that in some way will tend to accommodate both impulses.

Another complicating feature that must be taken into account is a marked change in the popular attitude toward the feasibility of spreading accident costs through the medium of liability insurance. Until recently many courts appeared to welcome the expedient of shifting liability onto the shoulders of whatever person is best situated to pass the accident cost along so that it would ultimately
be absorbed in dilution throughout the public in the form of modestly increased costs. The fountain of wealth that could be made available through insurance must have appeared luxuriant at first. But as time has gone on and the harsh effects of inflation are being increasingly felt, the once lush fund provided by insurance premiums is now in constant need of repletion. Its limits are being continuously tested by an ever increasing flood of generous awards. The motoring public has begun to feel the pinch, and the clamor for rate relief must be clearly audible in the courtroom.

For similar reasons of expense the medical profession is impelled to resort to defensive medical practices as a counter to the ever-increasing wave of exhausting malpractice claims. One result here is that the public discovers with dismay that it is subjected to batteries of expensive medical tests and referrals to specialists, much of which would probably be unnecessary under less frenetic conditions. On an even broader base, the increased price of automobiles, drugs and other commodities reflects the enlarged numbers and increased quantum of products liability judgments.

Finally, it is well to consider that the ordinary award of damages through tort litigation is only one of several means for shifting the brunt of accident costs off the shoulders of the victim. Social security, workmen's compensation and group insurance afford increasingly available resorts for financial relief against accident costs. The picture is dramatically broadening in scale with respect to motor vehicle compensation. We find legislatures giving serious consideration to innovative schemes under which the now familiar suit for full damages is being largely replaced by a statutory procedure that ignores fault put prescribes modest compensation to cover only medical costs and lost earnings. Generous awards in the courtroom for pain and suffering are destined for substantial reduction at the hands of the legislatures.

The above observations are offered here solely as reminders that the social and economic demands on tort law today are in a


snarl, and a healthy solution cannot come through easy resort to some attractive phrase. In light of the ever shifting background the choice of doctrine available to courts should not be viewed outside its proper perspective. The choice must be fairly in tune with the range of other remedies available. The more often courts elect to depart from the fault concept, the more sharply looms the obvious similarity between the damage claim and other forms of social insurance. The need for some measure of conformity among remedies is becoming increasingly evident.

We have observed that the concept of unrestricted liability for the acts of things arose in France as the product of an effort by courts to meet the need of a growing mechanized and traffic-laden society, and the approach adopted should be judged in terms of how well it can perform that function. The object is to serve a society that is seeking to find its way while undergoing a sharp transition in life style and in wealth and also with regard to the prevailing expectations of its members. In view of the fact that the atmosphere within which tort law must operate today is characterized by persistent trial and retrial, it follows that any legal doctrine that ignores the need to accommodate the prospect of continuous change will not fare well. Words are the only tools of the law. When expressions become arbitrary and extravagant they will be seized upon in the future by later litigants and will be pressed to the breaking point. All too frequently courts discover that they must temper or correct some past overshot or dramatic leap by resorting in desperation to tenuous distinctions drawn with respect to some inconsequential trivia.

When the French version of the thesis of liability for the acts of things is considered from a functional point of view its weaknesses become apparent. First, there is to be noted a complete absence of focus. The new thesis does not have as its domain any specific and definable area whose peculiar needs can serve as a testing ground for the merits and demerits of a novel approach. In this important respect it is wholly unlike other "no fault" schemes, such as workers' compensation and products liability. Consider, for example, workers' compensation. This scheme was designed in an effort to provide a solution for the specific problem of the risks that are characteristic of employment, and it is geared so as to afford some limited measure of compensation to the injured worker in light of the inequality of wealth that obtains between enterprise and those who serve it. Hence we have a determinable objective to which the provisions of a compensation measure can be referred. The same is true—although to a lesser extent—of products liability. Here, as in
workers' compensation, is found a specific problem area. The need to protect the safety of consumers and users comes frequently into conflict with the need of suppliers to avoid excessive costs and encumbrances in producing and merchandising their wares. Hence the complex of rules that make up the law of products liability can be referred readily to the prevailing conflict between consumer needs and the need to facilitate production.

But how is it possible to isolate for separate treatment a group of harms that can be distinguished from other harms solely by referring to the mechanical means that were employed to bring such harms about? What moral, economic or social considerations are brought into play in any undertaking to distinguish harms caused by the act of things from harms brought about by acts of persons or harms brought about in any other way? Such a distinction appears to be entirely unrelated to any value scheme whatever.

We are confounded at the very outset when we attempt to fathom what can be meant by the phrase, an act of a thing. Things can be regarded as being either in existence or not in existence; but they must be looked upon only as passive scenery until they are put into motion by some person or by an extraneous force of some kind. Although things can serve as instruments of some outside active agency, it is difficult to regard them as being active participants themselves in a human tragic happening. It is hard to discover any reason of policy why the mere passive presence of an object at the scene of injury should serve without more ado to saddle the innocent keeper of the object with legal responsibility. If simply "being there" were indeed enough, the result would be universal liability of bankrupting proportions. There would be no remaining field in which the fault principle could operate, unless perchance a court were faced with an injury arising from a struggle between nudists in midair. Even then, as Ripert has suggested, the body might be regarded as a thing under the control of the will. After consideration the French judges are in agreement that the thing must have played an active, rather than a passive role in producing the harm. But at this point there is a sharp disagreement to what is active and what is passive. We can hardly avoid the conclusion that we are faced with a purely mechanical distinction exceeding in its marvelous complexity even the long discarded artificialities that once obtained between Trespass and the Action on the Case. Such distinctions are not

only specious: It appears that they bear no resemblance whatsoever to any consideration of policy.\textsuperscript{22}

Once it is conceded that a given accident situation falls within the province of article 1384 of the French Civil Code the defendant has only one available avenue of escape. He cannot defeat the plaintiff's prima facie case by establishing that he was blameless in every respect. He can save himself only by assuming the burden of showing affirmatively that the mishap was caused by the act of the victim, the act of a third party or the occurrence of a fortuitous event. The unhappy result is that the outcome of the controversy is made to depend upon an issue of causality—the most deceptive and elusive concept known to tort law.\textsuperscript{23}

It is obvious that the extraneous "cause" thus brought into issue by the defendant is not something which has the effect of precluding the act of the thing from also serving as a factual cause of the injury; to give it such an effect would bring about a contradiction of the very existence of the basic postulate underlying plaintiff's prima facie claim under article 1384. If the act of the thing cannot be regarded as a cause, the controversy passes outside the purview of the article. Thence the conclusion is inescapable that when a prima facie case has been established under article 1384 and a competing cause has then been asserted in defense, the existence of liability must be recognized as dependent on a policy judgment rather than a finding of fact. The court must decide which extraneous causes have the legal effect of eliminating the act of the thing as a source of responsibility. Thus the French court finds itself floundering in the same morass of proximate cause that has be-deviled courts on this side of the Atlantic for more than a century. Indeed the predicament of the French courts in this respect is a matter of more serious concern than proximate cause at common law, for under the French approach the causation issue must support unaided the entire burden of giving effect to all policy considerations that arise. There is no other vehicle such as fault or negligence or duty to assist in affording the elbow room needed for discriminate torts engineering. Professor Andre Tunc who, more than perhaps anyone else, has explored the ramifications of cause under article 1384 comments as follows on the three extraneous causes the defendant can assert by way of defense:

These three factors discharged the custodian of the thing, only to the extent to which they could neither have been fore-
seen nor avoided. As a matter of fact, our courts usually discharge the custodian when he can give evidence that he, or the person who was actually in control of the thing, has not committed any fault. Our law in this field remains largely based on the concept of fault, with one important exception: the custodian of the thing can be discharged only to the extent to which the damage was caused by an external circumstance; if, on the other hand, the damage is the result of a defect in the thing, he will not be discharged, even though he could not have known of the defect.\textsuperscript{24}

The concluding part of the above observation is of special interest for Louisiana in light of the position of the supreme court of this state which would uniformly require a showing that the thing that caused the injury was “defective.” If the thing causing the harm is “defective,” the custodian remains liable in both jurisdictions supposedly despite his exercise of skill and care. If, however, the thing is not “defective,” the reasonableness of the defendant’s behavior can serve to preclude his liability in both France and Louisiana.

An important distinction still remains, however. In France the plaintiff is able to establish his prima facie case merely by showing a cause-in-fact relation between the act of the thing and the ensuing harm. Establishing the existence of a defect or the absence thereof is not essential under the French approach until after the defendant undertakes to attribute the harm to some extraneous cause. Even then it is obvious from Professor Tunc’s observation that the fault element operates only from ambush behind the facade of causation. In Louisiana, on the other hand, it seems clear that the existence of a vice (defect) in the thing is a matter to be demonstrated by the victim as a part of his initial showing under article 2317.

THE LOUISIANA DOCTRINE

Following the French commitment in 1930 to liability for the acts of things, almost a half century elapsed before the Louisiana Supreme Court evidenced an interest in the corresponding article 2317 of this state’s Civil Code. In nineteenth century Louisiana, even more than in France, liability had been recognized entirely as a concomitant of fault.\textsuperscript{25} This was to be expected in a pioneer American

\textsuperscript{24} Tunc, supra note 5, 14 INTL & COMP. L.Q. at 1096.

\textsuperscript{25} A good illustration is Dupre v. Travelers Insurance Co., 213 So. 2d 98 (La. App. 1st Cir. 1968), noted in Note, Things in One’s Custody—Louisiana Civil Code Article 2317, 43 TUL. L. REV. 907 (1969).
community whose growth and prosperity has been attributed almost entirely to trains and heavy industrial development. Here in nineteenth century Louisiana, as in France, negligence was doing yeoman's service as an agent to effect a compromise between the needs of safety on the one hand and the needs of increasingly dangerous enterprise on the other. Again, as in France, the Louisiana panorama of values began shifting gradually with the turn of the century. The interest in safety and a healthy environment came to be recognized as the uppermost need and the condition of inequality and lack of mutuality between the litigating parties, already observed with respect to France, became increasingly apparent here. Hence the courts of this state, like those in France, began to turn a skeptical eye upon the traditional fault requirement, which may have been so administered in the past as to unduly favor enterprise.

It is interesting to note that the three decisions which led eventually to the act-of-things doctrine were all controversies over occurrences typical of a rural nonmechanized society. The three offending objects were, in turn, a frisky dog, a child on a bicycle, and a falling tree. In the case of the dog, the animal's playful instinct prompted it to bite a bystander who was attempting to rescue a smaller dog annoyed by the animal in question. Had the injury been inflicted by a person we would be tempted to call it inadvertent (certainly it was not the kind of behavior to be expected of a reasonably prudent dog). In this connection, however, it may be noted that a substantial number of courts have managed, without departing from ordinary notions of negligence, to impose liability on the owners of friendly dogs who may clumsily knock down bystanders without meaning to harm them. Similarly, successful suits by motorists against the owners of automobile-chasing dogs are frequent. At any rate one would be reluctant to conclude that any drastic renovation of theory was necessary in order to prevent a palpable injustice in this case. The same may be said concerning the six-year-old child whose operation of a bicycle doubtless left much to be desired, causing him to strike and injure an elderly lady on the sidewalk. The supreme court observed that the child was too young to be condemned as negligent, but it nevertheless imposed liability upon the

28. See authorities cited in note 27, supra.
parents without reference to any fault on their part. This it did only after a thorough reappraisal of article 2318 of the Civil Code. It appears doubtful that so drastic an attack on the problem was necessary. Statements affirming an infant's lack of capacity to behave negligently have made their appearance chiefly in cases involving accidents in which some child was struck by an adult motorist who has sought to avoid liability by insisting that the child's own contributory negligence should operate as a defense. In such situations courts everywhere have understandably shown themselves ready to minimize any claim of wrongdoing by the child. However, where it is the child itself that has inflicted the harm, and particularly where it has done so by engaging in some activity normally reserved for more mature persons, such as driving a motor vehicle or (as in one case) playing golf on a public course, the courts have shown a less solicitous regard for the youth of the offender.  

There is nothing in the instant case to suggest that the parents were unaware of their child's operation of the bicycle on a public sidewalk. It can be noted that both cases share common features - that anticipate liability for an act-of-things doctrine: In each instance there was an injury caused by something other than the act of a responsible person. In the one case the actor was an animal, and in the other, an infant. Second, in each instance the offending agency was under the control (garde) of the defendant, and, finally in each instance the guardian was found to be blameless.

However, in neither of the two controversies discussed above does there appear any general observation confirming the existence of a special liability for acts of things. Instead, the reference in each instance was to some specific code provision that governed the controversy (article 2321, dealing with the liability of a keeper of animals and article 2318 concerning the liability of parents). In each instance the showing made by the plaintiff was flawed by some shortcoming that forestalled his right to recover under previously accepted interpretations of the specific articles on which he relied.

As noted earlier, the Louisiana cause celebre that ushered in the doctrine of unqualified liability for the acts of defective things is Loescher v. Parr. The facts are uncomplicated: A tree standing in the yard of the defendant's urban residence fell onto the plaintiff's

30. Children often are liable for injuries inflicted by their operation of motor scooters; liability usually does not attach for their operation of bicycles. See W. Prosser, supra note 27, at § 32, at 157. Cases in other jurisdictions are limited to the delict by the child himself, since vicarious parental liability is not recognized outside Louisiana.  
31. 324 So. 2d 442 (La. 1975).
car parked in a neighboring lot and demolished it. The tree was 90 percent rotten. The immediate force that brought it down was a wind which "although high and gusty was not so abnormal as to be unforeseeable." No mention is made as to why the situation would not be entirely appropriate for recovery under res ipsa loquitur.

The lengthy and thoughtful opinion of Justice Tate suggests that the author already had been attracted by what he regarded as the advantages of unqualified liability. In several earlier decisions he had warmly espoused strict liability in traffic accidents attributable to defective equipment. It is not surprising that Loescher, with its rotten tree which superficially appeared safe, should have suggested to Justice Tate that here was an ideal opportunity to put his thoughts to the test. Indeed, the facts of Loescher were so disarming for Tate's purpose that the many complications that inhere in his thesis of liability for the acts of defective things were obscured. For instance, in Loescher there was no need to ponder the problem as to what should be regarded as a defect. The almost entirely rotten state of the tree afforded a convincing and dramatic illustration. Equally at hand was an answer to the question, what is an act of a thing? The tree obligingly accommodated this requirement by falling down upon the neighbor's car without human intervention. Finally, the attraction afforded by Tate's proposal to dispense with the fault requirement was heightened when presented in the company of facts that almost screamed of negligence on the part of the tree owner. I feel that most readers when they have become acquainted with the facts would readily agree that Parr should be made to pay under any view of the matter. As a result, the edge of any temptation to deal critically with Tate's thesis becomes somewhat dulled.

At the outset of our discussion we emphasized that doubts advanced against the soundness of the French position under article 1384 should be substantially moderated when directed toward the newly emerged Louisiana doctrine. This is so, we noted, because of the unique requirement stressed in Loescher that the injurious thing must be shown by the victim to be defective. Hence "defective thing" is a term of paramount importance which must be explored.

We may begin by exploring for possible sources from which the idea of defect may have been derived. Does "defect" express some basic notion that is implicit in the Civil Code? Is it a description

32. Id. at 449.
whose meaning must be determined in the interest of preserving doctrinal unity? Or, on the other hand, does it owe its justification to some practical need of legal engineering? Is its purpose to serve in part at least as a substitute for some other concept such as fault or negligence? If so, what purpose is served by the replacement? Again, in what areas of accident law is the term "defective thing" intended to operate, and to what point in a legal dispute does it play the dominant role? The inquiries that spring from such uncertainties are many and perplexing.

A search for some underlying jurisprudential support for the "defect" requirement within the pattern or arrangement of the various code articles on Delicts affords little comfort. Not much is gained if we attempt to discover any analogy to those provisions we have previously considered dealing with the tort liability of parents or the owners of animals.\textsuperscript{34} Paradoxically, the troublesome feature the Louisiana courts were obliged to face with reference to the instances of the young bicyclist and the friendly tempered dog was the difficulty of discovering any defect that could be attributed to either offender.\textsuperscript{35}

Article 2322, in the same chapter, subjects the owner of a building to liability 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."\textsuperscript{36} Similarly, article 670 requires the owner to keep his buildings in repair so that neither their fall nor that of any part of the material composing them may injure the neighbors or passersby. Both these articles have been regarded by the Louisiana courts as imposing absolute liability within their special fields of operation. But like many other provisions for specific catastrophes with which lawyers everywhere have long been familiar, they are of ancient origin. A mention of harms inflicted by falling buildings was found in the Code of Hammurabi and in the Roman Institution of \textit{Cautio Damni Infecti}. They far antedate any distinctions drawn by lawyers between fault and no-fault liability. They look backward toward the dawn of history and certainly can-

\textsuperscript{34} See notes 26-29, supra, and accompanying text.
\textsuperscript{35} Id.
\textsuperscript{36} \textsc{La. CIV. CODE} art. 2322 (emphasis supplied). The text of article 2322 provides:

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.
not be thought of realistically as harbingers of a radical shift in tort ideas yet to come.\(^{37}\)

The *Loescher* opinion calls attention to the interpretation accorded by the courts of Belgium to article 1384 of the Belgian Civil Code. The accepted interpretation in that jurisdiction is in accord with the Louisiana position requiring that a defect must be established by the victim.\(^{38}\) This Belgian development began as late as 1904,\(^{39}\) and it has elicited considerable discussion. Of the Belgian scholars, M. De Page,\(^{40}\) MM. Pirson and De Ville\(^{41}\) and M. Van Ryn\(^{42}\) have each arrived at a different version with respect to the essential nature of a "defect." Professor Dalcq observes that in reality the meaning must be regarded as in a continuing process of evolution as the jurisprudence progresses.\(^{43}\) It appears appropriate to regard the Belgian position as a modern innovation which parallels the change in Louisiana, rather than as a source from which our position was derived. Even a casual review of the Belgian decisions and literature indicates that judges and writers in that country are experiencing difficulties very similar to those discussed in the following pages dealing with the Louisiana situation.

One common use of the word "defective" is the frequent reference in products liability decisions to "defective product." The responsibility imposed by modern law on makers or sellers for harm resulting from the use of a "defective" product is commonly regarded as a no-fault type liability. Indeed the similarity between the term "defect" under article 2317 and "defective product" under products liability law may suggest on first impression that whatever administrative advantage can be gained by employing the term "defective product" in products liability disputes might be equally ex-

\(^{37}\) Under archaic law the principal object was to reach the offending thing itself and to secure its deliverance over to the victim so that he could wreak his vengeance on it. Animals and even inanimate objects which had harmed persons were attainted and had to be abandoned by their owners. See Malone, supra note 19, at 4. The claim under article 2322 for damage due to the ruin of a building apparently was an outgrowth from the noxal surrender of Roman law. 1 R. DALCQ, TRAITE DE LA RESPONSABILITE CIVILE no. 2014 (1959).

\(^{38}\) R. DALCQ, supra note 37, at no. 2138.

\(^{39}\) Id. no. 2028.

\(^{40}\) II DEPAGE, TRAITE, COMPLEMENT, no. 1007, noted in R. DALCQ, supra note 37, at no. 2140.

\(^{41}\) I PIRSON ET DE VILLE, TRAITE no. 137, noted in R. DALCQ, supra note 37, at no. 2141.

\(^{42}\) VAN RYN, LA RESPONSIBILITE DU FAIT DES CHOSES 164 (1946), noted in R. DALCQ, supra note 37, at no. 2142.

\(^{43}\) R. DALCQ, supra note 37, at nos. 2144-2146.
pected to flow from a use of the term "defective thing" in controversies under article 2317 of the Louisiana Civil Code.

The similarity of wording shared by the two terms, however, could not justify a conclusion that they perform functions that are similarly useful when placed at work in the resolution of controversies. This may be better understood when we consider the wide range of matters with which the court may be obliged to deal in article 2317 controversies when compared with the restricted range of contests leading to products liability suits. The term "defective product" is still understood only imperfectly and is mistrusted by many judges and writers. Nevertheless, the standards by which the defectiveness of a product is determined are standards that can be brought into fair focus by a consideration of acceptable practices prevailing among makers and merchants. These practices, in turn, can be appraised as being adequate or inadequate by referring to the needs of the marketplace. Whatever possibilities for product improvement may exist can be explored in the courtroom with fair success. Hence, the phrase "defective product" tends to acquire a graspable meaning through its repeated use in lawsuits between two classes of litigants: commercial producers, on the one hand, and consumers, on the other. Defectiveness of a product is frequently defined as a failure to meet reasonable consumer expectations.

By contrast, the wide variety of subject matter presented for litigation in situations in which the term, defective thing, becomes controlling is an area virtually without any boundary whatever. For example, on one occasion a judge may be called upon to assign a meaning to "defect" when there is at issue the decayed condition of a fallen tree. Thereafter the same problem may arise in a setting where the dispute is centered on the failure of a parking lot operator to provide adequate lighting. Again, the judge may be called on to decide whether the term "defect" includes a board that was so positioned across the rafters of a barn that it could not be used as a footway with full safety, or whether human blood provided by a hospital for transfusion should be branded as defective in

45. See, e.g., Restatement (Second) of Torts § 402(A) (1965).
46. See Loescher v. Farr, 324 So. 2d 441 (La. 1975).
the event that hepatitis develops from its use. It is apparent that whatever policy considerations are brought into play in any one instance litigated under article 2317 will probably bear no resemblance to considerations appropriate for the disposition of any other litigated instance. Hence a continuous progression of litigation may serve only to heighten the confusion that surrounds the term.

The wide variety of litigated situations that must be crowded under the umbrage of the term, defective thing, has been stressed here only to suggest the complications certain to arise whenever a wide variety of conflicts must be referred indiscriminately to a single term that is as obscure and out of focus as "defective thing." The trouble lies with the phrase, which has no discernible content of its own and which must acquire its meaning solely from the environment attendant on each of the variety of disputes in which it is put to use.

By way of contrast we should note that there are other expressions which are endowed with great fluidity of meaning and which readily lend themselves to effective use in a wide variety of controversies. Negligence is a ready example: It serves as a good working term in disputes arising from such varied mishaps as automobile accidents, falling structures, miscarriages of medical, legal or architectural practices, et cetera. This success must be attributed to its facility as a tool which is flexible while at the same time tending to channel the creative instinct of the judge. It calls upon him to balance a wide range of moral, social and economic values, and to formulate a judgment dictated by that balance. Negligence does not itself perform the function of balancing and judging, but it does serve to suggest the path that he should follow. The true value of the negligence conception is twofold: First, it functions as a constant reminder to the trier that the balancing function must prevail as the controlling feature of the judging operation. The conception of negligence does this by obliging him to think in terms of "reasonable" versus "unreasonable" conduct or risk.

The second value in the use of negligence arises from the opportunity it affords the judge to avail himself of a wide assortment of auxiliary aids for his decision. These may take the form of corollary rules or procedural devices that control the mechanics needed for the conduct of the operation. Other auxiliaries are perhaps best thought of as the accepted reaction patterns made available for the judge's guidance. They are the attitudes and tendencies of feeling.

which exert a powerful influence upon his thinking. But, whatever
form these auxiliaries may assume, they are vital parts of the judg-
ing process—parts that have become integrated into it by accretion
after a century of intensive judicial use and reuse. Repeated ex-
perience in dealing with negligence so sensitizes the judge that he
acquires an instinctive familiarity with many rudimentary assump-
tions that underlie every balancing operation. These assumptions
are so deeply imbedded within the professional personality of the
judge that they exert their influence largely below the language
level. They may be referred to by him casually as mere matters of
"common sense." But their persuasive force is no way diminished for
that reason. Just one example: Whenever the consequence to be an-
ticipated from a mishap is viewed by the trier as a matter of serious
concern, the chance that such consequence may turn into a reality
must be correspondingly reduced. Otherwise the chance cannot be
tolerated in law because it has become an unreasonable chance. A
host of other familiar postulates that have become second nature for
any experienced judge will readily occur to the reader.50 They all are
amalgam in the makeup of negligence. Hence the true nature of
negligence is best understood when it is viewed as an operating net-
work of many varied components, all of which are dedicated to the
reconciliation of conflicting interests through the attainment of a
balance.

If this broad and accommodating formula of negligence is to be
abandoned whenever the injury was inflicted through the act of a
thing, it becomes essential to determine what is meant by the adjecti-
ve, "defective." A few definitions that might be advanced and be
dismissed at the outset: First, a thing is not to be condemned as
defective solely by reason of the fact that it gave rise to an injury
on the particular occasion in question. If the mere existence of a
causal relation between an act of the thing and the injury complained
of were regarded as sufficient to entail liability on the part of
the guardian, the result would be a return to the French position
under article 1384, which was criticized earlier,51 and the qualifying
term "defective" would be deprived entirely of all significance.

Again, we cannot classify a thing as defective merely because it
is of such a nature that it would tend to cause injury. The terms,
"dangerous" thing, and "defective" thing should not be regarded as

50. An excellent, compact treatment of the array of factors that must be con-
sidered in determining "unreasonableness" may be found at RESTATEMENT (SECOND) OF
TORTS §§ 291-293 (1965).
51. See discussion in text at pp. 981, 988, supra.
synonymous. Few are the objects that are wholly incapable of inflict-
ing harm under appropriate circumstances. Pure water can produce
damage by fire if it is poured over sodium, and an infant can drown
in a shallow bathtub or cut itself with a pair of shears. At least we
are obliged to qualify the damaging tendency of the object in some
way. Is a reference to the apparent size of the tendency helpful at
this point? Can we conclude that a thing is defective if it involves
great danger, but not otherwise? The extent of the chance of danger
to which a thing may expose those in its vicinity would very likely
depend on the location where it is placed or the use to which it has
been put. These characteristics must be attributed to human
behavior which, in turn, must be appraised as foolish or wise—reasonable or unreasonable. At this point it is hard to escape
the conclusion that the familiar conception of negligence (absence of
reasonable care) is lurking in the immediate background. At any
rate, there is little or no evidence that the degree or extent of the
danger inherent in an object itself, when considered alone, has had
any appreciable influence on the results reached in the Louisiana
decisions. The lethal voltage of an electric powerline did not have
the effect of making the line "defective," and the same was true of
the motorcycle resting on a kickstand, which fell over upon a child.
On the other hand, a small puddle of rainwater in a remote corner of
a skating rink prompted the court to regard the premises as defec-
tive. Also defective was a board which fell due to its position
across the rafters in the upper part of a barn where only rarely
would the presence of a person be expected.

The opinion in Loescher affords one clue to the meaning of
"defective." We have already observed Justice Tate's statement
that a thing becomes defective when it is tainted with a "vice," and
"vice" is immediately characterized in the opinion as the presence of
"an unreasonable risk of injury to another." Hence we gain the im-
pression that the existence of defect is determined by reference to
some quality of human behavior that brought the risk about. The
term "unreasonable" bears the connotation of being unacceptable or
falling short of expectations. However, conduct that exposes the ac-

53. See Carter v. Salter, 351 So. 2d 312 (La. App. 3d Cir.), writ denied, 352 So. 2d
1045 (La. 1977).
54. See Dorry v. LaFleur, 399 So. 2d 559 (La. 1981).
55. See Fonseca v. Marlin Marine Corp., 385 So. 2d 341 (La. App. 1st Cir.), writ
granted, 392 So. 2d 666 (La. 1980).
56. See the quoted material in text at note 9, supra.
tor or another to a sizeable chance of injury may nevertheless meet with the full approval of society, and hence it remains reasonable.\(^{57}\) Conversely, the taking of even a slight chance of inflicting a serious harm may be entirely unreasonable because it was unnecessary or it served no useful purpose.\(^{58}\) The terms "unreasonable," "faulty," and "blameworthy" appear to be virtually indistinguishable in the minds of most persons.

A review of the decisions rendered pursuant to article 2317 leaves the impression that in a substantial majority of the accidents involved, liability for damages could have easily been imposed on a negligence basis. Often this will be expressly noted in the opinion.\(^ {59}\) Conversely, where the facts strongly suggest that there was no negligence on the part of the defendant, the court will very likely conclude that the thing was not "defective."\(^ {60}\)

Although there remain cases in which recovery cannot readily be identified with the presence of negligence,\(^ {61}\) most such instances represent situations that deserve special attention. Frequently the situation in question falls just at or beyond the outer fringe of an area in which access to recovery by way of negligence principles could be recognized. Usually the plaintiff in these cases has succeeded in pointing out that something within the exclusive control of the defendant "went wrong"—that safety conditions were not as they

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57. See Restatement (Second) of Torts § 291 & comment (d) (1965).
58. Id.
61. See, e.g., Fonseca v. Marlin Marine Corp., 385 So. 2d 341. This case is difficult to approve. A repairman was injured when he attempted to walk over boards laid over the rafters of a barn. He stepped on a board that failed to reach the rafter ahead and sustained injury. The facts indicated that use of the barn attic was anticipated only for occasional workers, who could be expected to realize that no preparation had been made for their presence there.
were intended—but the court is not satisfied that any specific default that could be charged against the defendant has been established with convincing clarity. A few instances of this kind from the decisions are illustrative: A child's foot is caught in the narrow space between the side and the moving step of an escalator in a department store. Ordinarily the mere occurrence of such an accident carries the inference of negligence under res ipsa loquitur. In the case at hand, however, the proprietor is able to show that the national safety standards for escalators would permit a one-eighth inch clearance at this location, while the clearance in question was only one-sixteenth inch. The trier's likely reaction here could be that if this kind of thing nevertheless happens, the existing standards are not acceptable in so defining reasonable safety. But the availability of article 2317 makes such an observation unnecessary and offers the most attractive route to recovery.\(^6\) Again suppose that the roof of a skating rink is leaking; the proprietors have diligently cleared one wet spot on the floor, but another small leak develops which management has not yet been able to discover. A patron slips on this spot and is injured.\(^6\) Should the showing that there were strenuous efforts on the part of management preclude a finding of negligence? Perhaps management should have excluded child skaters while the roof was leaking or perhaps they should provide a watertight roof for the protection of their patrons. Is it not arguable that with respect to places of this sort the standard of care necessary should be hoisted up to top notch? This can be achieved through a manipulation of negligence doctrine as well as through a resort to article 2317, while at the same time retaining a broad latitude for individualized judgment in future decisions.

Perhaps the most striking instances of resort to the "defective thing" approach involve injuries sustained by reason of defects in public highways. Here is an area of litigation in which courts have formerly curbed liability with a short leash. Until recently, recovery against public bodies has proved difficult. The public defendants either enjoyed complete immunity\(^6\) or if subject to suit they were able to claim the benefit of special protective conditions. Among

63. See, e.g., Dorry v. LaFleur, 399 So. 2d 559 (La. 1981) (court found a floor defective).
64. It is interesting here to compare Prosser's view of public immunity in W. PROSSER, THE LAW OF TORTS § 125 (3d ed 1964), with his discussion of the more restrictive status of public immunity in the 1974 fourth edition at section 131. See also the introductory note to RESTATEMENT (SECOND) OF TORTS ch. 45A (1974).
such protections was the classic requirement that knowledge (actual or constructive) of a defect in a public way must be established by anyone sustaining injury from such a defect. Thus the usual duty of an affirmative reasonable inspection imposed on the shoulders of other proprietors of premises thrown open to the public has been toned down in favor of public bodies. But in recent years the path to recovery against public bodies has been opening rapidly. Resort to article 2317 in these cases can be appropriately viewed as another evidence of a general expansion of public liability. The writer suggests that a commitment to an affirmative requirement of reasonable care in the maintenance of public highways would have led to a recovery in most of the instances in which the drain, curb or paving was branded as a “defective thing.”

There remains a plausible version of the term “defective thing”: A thing might be regarded as defective whenever something went wrong during the process of creating it. In such cases the thing did not turn out to be as it was intended or it developed an unexpected flaw. Perhaps faulty material was used or some process in the course of fabrication fell short. Perhaps some harmful foreign material or object found its way into the product, or perhaps a necessary inspection was overlooked, with the result that dangerous spoilage or deterioration set in. The essence of a defect as thus conceived is an inadvertence that brings about a departure from the intention of the maker or supplier of the thing or the guardian who is charged with its maintenance. A defect, when so restricted in meaning, stands in contrast with other kinds of inadvertent injury which should be attributed to some shortcoming in judgment on the part of the defendant as he planned the object or selected the environment in which it should be used. The situation where something went wrong is recognized readily. Under the circumstances it is not necessary that the trier undertake to appraise the defendant’s foresight or his good judgment. He need not determine what advance measures could or should have been taken in order to adjust the thing safely to its expected environment or its intended use. Nor need he speculate concerning the anticipated cost or difficulty that would be involved for the defendant in assuring a greater safety than was in fact offered. When the error is one that occurred only during the course of making, distributing or using an object that had been conceived by the defendant with a due regard for safety,

the trier is spared most of the complexity involved in an effort to arrive at a fair balance of the conflicting interests at stake. In such cases the need to tailor the standard of care to the special needs of the occasion is less exacting.

Whenever the controversy is one that falls within the boundaries suggested above, the theory of liability for defective things can be viewed in its most favorable aspect. The duty of the defendant to avoid error in carrying out his intentions comes to be treated under that theory as an unqualified duty, rather than merely a duty requiring reasonable care. By far the greater number of accidents in which the Louisiana courts have resorted to article 2317 have involved only this variety of error. In most instances that could not be so characterized the court has indicated that the existence of negligence had appeared to its satisfaction.

One is tempted to doubt, however, whether resort to unqualified liability is a sound approach even under the limited circumstances set forth above. In favor of the new approach is the fact that the controversies that arise whenever something "goes wrong" are likely to be controversies in which the victim is at a procedural disadvantage in his attempt to establish how the error occurred. The absence of mutuality mentioned earlier is likely to obtain here, and the defendant is usually in a better position than the victim to account for what went wrong and why it did so. If a bottle explodes, if brakes fail to hold or there is a collapse at a welded joint, or if a dead mouse appears in a soft drink, the victim should not be obliged to explain the occurrence in such a way as to point the finger of responsibility toward the defendant. The impulse to come to the victim's assistance under such circumstances probably accounts for the

66. The leading case of Loescher v. Parr, involving the fall of a decayed tree, is of this type. See also Olsen v. Shell Oil Co., 365 So. 2d 1285 (La. 1978) (defective valve in a water heater); Jones v. City of Baton Rouge—Parish of East Baton Rouge, 388 So. 2d 737 (La. 1980) (broken top to a catch basin in a street); Foggan v. Louisiana Dept. of Transp. & Dev., 402 So. 2d 154 (La. App. 1st Cir. 1981) (large hole in a highway); Leaber v. Jolley Elevator Co., 354 So. 2d 746 (La. App. 4th Cir.), wirts refused, 356 So. 2d 1004, 1010 (La. 1978) (hydraulic elevator developed slippage).

67. See, e.g., Morgan v. Hartford Accident & Indem. Co., 402 So. 2d 640 (La. 1981) (a stepdown in a church building was in violation of a city building code; confusion of colors surrounding the step increased the chance of someone falling down step); Sullivan v. Gulf States Util. Co., 382 So. 2d 184 (La. App. 1st Cir. 1980) (a concrete pier in a parking lot was treated as defective because the defendant had not undertaken to provide sufficient lighting, nor was adequate warning given of the presence of the pier).

68. See text at p. 985, supra.
position prevailing in many jurisdictions that whenever res ipsa loquitor applies, the burden of explanation shifts to the defendant. Other courts, without abandoning the negligence concepts, venture to affirm that whenever the plaintiff has shown that the accident is attributed to some cause such as defective brakes or a rupture of a welded spot in the structure of a vehicle, it then becomes incumbent on the defendant to establish that he was utterly without fault or that the condition could not be avoided through the exercise of even the highest degree of care. Although it must be conceded that these are departures from traditional negligence procedure, they are nevertheless familiar and they leave the negligence concept intact. The writer suggests that the wide range of situations to which the negligence network can be adjusted serves to recommend it as the most suitable approach for this group of situations.

A court would encounter serious difficulties if it should attempt, as suggested, to restrict the no-fault approach so as to limit its application to those cases where something "went wrong" in carrying out the defendant's undertaking while at the same time it retains the traditional negligence attack for other "acts of things." Accidental happenings do not readily submit to any such classification. The kind of difficulties that would face the court can be illustrated by a commonplace situation where the plaintiff, a patron of the defendant's parking lot, runs into an object that is obscured by inadequate lighting and is injured. If the shortage of illumination should be attributed to a defective electric transformer or a bulb that "went bad," the accident would fall neatly within the classification suggested above for no-fault treatment of harms through defective things. But the same would not be true if the shortage of light must be blamed on a failure by the defendant to supply sufficient lamps or to turn them on at the proper time, or his neglect to select bulbs of adequate wattage for the need at hand. Here the reasonableness of the defendant's judgment would necessarily come under attack.


70. See Simon v. Ford Motor Co., 282 So. 2d 126, 133 (La. 1973) (Tate, J., on rehearing). The best illustration of this treatment is Samaha v. Southern Rambler Sales, Inc., 146 So. 2d 49 (La. App. 4th Cir. 1962). The case concerned the tort liability of a car manufacturer for a defective weld which caused a collision in which the plaintiff was injured. The plaintiff had purchased the vehicle from the defendant Southern Rambler. See also Rizley v. Cutrer, 232 La. 655, 663, 95 So. 2d 139, 142 (1957).

and hence under the arrangement suggested the appropriate approach would be through the issue of negligence. Or again, suppose that in the past the parking lot owner had experienced frequent unavoidable failures of transformers or bulbs, and yet he had failed to provide alert attendants with adequate replacements? There will doubtless occur to the reader's mind numerous instances such as these where the attack to be selected must depend upon the trier's conclusion with respect to the specific cause of the mishap. Hence, although there is much to commend the distinction suggested above, its advantages may be more than offset by awkwardness in its attempted administration.

The conclusion appears inescapable that no-fault liability for the acts of "defective" things offers no demonstrable advantage over the familiar negligence approach, excepting the possibility of some slight gain in preserving a procedural balance for the litigating parties. Even here, I suggest that whatever advantage may be realized through resort to a no-fault attack could be realized equally well through a liberalized administration of the prerequisites for making out a prima facie case of negligence. The advantages of adhering consistently to the negligence attack appear to this writer to be overwhelming. By so proceeding the court is enabled to refer each controversy to one single broad inquiry: Is the game worth the candle? By contrast, any attempt to adopt one approach when the harm was caused by an allegedly defective thing and another quite different approach when the harm was caused by a person (an unreasonable man) serves only to introduce a complicating element that is difficult to justify. Especially is this true when, as we have already noted, the "thing" nearly always acquires the "defect" with which it is tainted solely because of the unreasonable conduct of the defendant who was charged with its custody or control. Thence negligence is the essential default that must be established irrespective of whether the harm should be attributed to a person or to a thing. If negligence remains the vital ingredient under either attack, is it not preferable to avoid a bifurcated assault and proceed directly and openly to explore the factors that go into the makeup of the risk and determine whether it is reasonable or unreasonable?

In the introductory pages of this article the reader's attention was called to an apparent inconsistency in Justice Tate's opinion in *Loescher v. Parr*. After observing that the victim must prove that the thing in question caused an "unreasonable risk of injury" the

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72. See text at pp. 981, 982, *supra*. 
opinion then proceeds to deny that the victim need establish any personal negligent act or inattention on the part of the defendant. This judicial concept of a risk that is unreasonable although it is untainted by any negligence on the part of its guardian is certain to afford difficulty. Especially is this true when its administration is entrusted to a lay juryman. The following excerpt from the recent opinion in Kent v. Gulf States Utilities Co. is interesting:

The initial decision of whether a thing poses an unreasonable risk of harm is one of law for the court to make and must be based upon the court's appreciation of whether reasonable minds can differ on the point. If the court believes the thing does present an unreasonable risk of harm, or that reasonable minds could differ, only then is it appropriate to instruct the jury on the law set forth in Article 2317 of our Civil Code. Even in this instance, the jury should be cautioned that if it finds the thing does not pose an unreasonable risk of harm, negligence must be proved in order to permit recovery. . . .

Finally, a recent attempt by the supreme court to fathom the mystery of the unreasonable risk existing without any actionable negligence betrays the uncertainty with which the conception is fraught. The case in question, Shipp v. City of Alexandria, arose from an injured ankle sustained by an elderly plaintiff as she stepped unassisted off the curb into the street. Her foot landed in a "hole or crack," resulting in the injury complained of. The nature of the physical condition of the street was not clearly detailed in the testimony. It was described by the victim as a "'hole about an inch and a half to two inches deep.'" The opinion conceded without question that a defect existed, but the majority of the court was of the opinion that the defect was not "so unreasonable as to justify the imposition of non-negligence liability." The court failed to indicate what additional feature was needed in order to render the risk unreasonable. However, a concurring opinion by Justice Lemmon undertook to explain: "[W]hen the risk is weighed against the utility of the City's operation of public streets, I cannot say that the risk of harm was unreasonable." It appears clear from this observation that Justice Lemmon is engaging in the kind of balancing operation that is typical of an administration of negligence. The game, he

75. Id. at 729.
76. Id.
77. Id. at 730 (Lemmon, J., concurring).
concluded, was worth the candle. A dissenting opinion by Justice Dennis insisted that the defect did involve an unreasonable risk of injury, and he added significantly that the plaintiff might properly recover under a theory of negligence.\textsuperscript{78}

The Louisiana court, by adopting an approach based on liability for the acts of defective things commits itself to a change with far-reaching implications. The departure from negligence amounts to more than a slighting of the familiar standard of reasonable care. The shift works an abandonment of the entire operating network upon which negligence depends. Negligence, when viewed in its full breadth, embraces an elaborate assemblage of rules, doctrines and procedures: It contemplates a body of diverse duties. These vary with the standing of the parties involved, with the nature of the interest invaded by the defendant and with the manner in which the alleged invasion took place (whether by act or omission). The scope of protection afforded by these duties is brought under continuous review by the courts as they administer successive controversies, and enlargements are constantly being recognized. The negligence network also encompasses a series of accepted procedures for the establishment of claims in the courtroom. These, too, undergo improvements as the stream of litigation continues. Other functioning parts that go into the makeup of the negligence system include the defenses of contributory (or comparative) negligence and assumption of risk. These defenses, as we are learning,\textsuperscript{79} cannot be divorced from the remainder of the negligence complex without confusion, for they are integral parts of the balancing operation.

In contrast with this array of machinery and doctrine stands the new approach under which liability is tackled initially through resort to a mechanical inquiry concerning the existence or non-existence of an act of a thing which serves as the source of a harm. The court must then undertake to determine whether the injurious thing could be regarded as defective. Thereafter, assuming that these inquiries are answered in the affirmative, the attention of the court must be shifted toward a consideration of these possible defenses. The purpose here is to afford the defendant the opportunity to show that the injury complained of was not caused by the act of the thing, as contended, but was the result of the act of the vic-

\textsuperscript{78} Id. (Dennis, J., dissenting).

\textsuperscript{79} Note the difficulties in determining a proper role for contributory negligence whenever a theory of no-fault liability is employed. See, e.g., Dorry v. LaFleur, 399 So. 2d 559 (La. 1981).
tim himself, or the act of a third person, or that it was caused by a *force majeure*. This search obliges the court to struggle anew with the problem of proximate cause. The unhappy result is that the trier is obliged to select the "real" or "substantial" cause of the plaintiff's harm. He must devise some mystique to determine when and under what circumstances the victim's own behavior or the act of the third person should be accepted as the responsible cause and thus relieve the defendant of liability.

In conclusion, this writer confesses that he is sorely perplexed by the co-existence of two sharply contrasting doctrinal networks. He finds it difficult to discover any substantial gain in the administration of justice that can justify the complications and artificialities that beset the newly emerged doctrine of liability for the acts of things. One would not question that the administration of tort law in the past has stood in need of considerable reform. But within recent years gratifying reforms have been put into effect at a healthy pace. The changes have been candid: Immunities are disappearing, many previously recognized interests such as privacy, mental suffering and prenatal injury have attained a fully protected status; persons injured on the premises of others are now receiving a more generous legal protection; previously recognized defenses such as contributory negligence and assumption of risk are either giving way or have been honed down to a more modest proportion; the proper quantum of damage to be awarded for hurts is being revised upward; the strategic situation of the plaintiff with reference to the proof he must afford to justify recovery has been liberalized substantially. These and numerous other changes in torts administration are achieving recognition in the regular course of administration while at the same time no violent upset in the basic structure of negligence has been necessary. Quite to the contrary, the plasticity of the negligence concept and its capacity to adjust itself to an everchanging world strongly recommends it as a vehicle that should not lightly be cast aside.