Ruminations on Comparative Fault, Duty-Risk Analysis, Affirmative Defenses, and Defensive Doctrines in Negligence and Strict Liability Litigation in Louisiana

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RUMINATIONS ON COMPARATIVE FAUL T, DUTY-RISK ANALYSIS, AFFIRMATIVE DEFENSES, AND DEFENSIVE DOCTRINES IN NEGLIGENCE AND STRICT LIABILITY LITIGATION IN LOUISIANA

David W. Robertson*

I. COMPARATIVE FAULT AND DUTY-RISK ANALYSIS: THE (MALONE)-JOHNSON VIEW

Learning torts from Wex Malone is a process that has no end. When I first encountered Malone in 1959 in his high-energy torts classroom, I knew that here was a man with much to say who said it with exemplary clarity and conviction. Since that time, I have devoted considerable effort to the task of keeping up with Malone and his torts thinking.

Leon Green once wrote that “somehow everything in life conspires against courage.” He was not thinking of Malone; no one has been less timid than Malone about altering viewpoints to reflect changing conditions and to respond to new problems. For many years, Malone cried out against the network of tort rules whereby the victim’s contributory negligence totally barred recovery, arguing the massive superiority of the comparative fault approach. Recently, however, he is less sanguine about the virtues of comparative fault. Malone now states that legally relevant fault on the part of both tortfeasor and victim should not be enough to justify quantification of the parties’ fault and damages-reduction on the basis of that quantification. Before these matters can properly be entrusted to triers of fact, judges must be careful to impose a control. The degree of fault of the parties should never be assessed until the judge has first satisfied himself that the victim’s faulty conduct did not create

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1. Malone and torts are inseparable concepts to thousands of his once and future students. At Louisiana State University Law School in the early 1960’s, Tom Currier put it to music and to the tune of “Sweet Molly Malone,” sang: “In East Baton Rouge Parish, with galluses garish, there once lived a man named Wex Smathers Malone.” The chorus followed: “He wondered why Rome had no Torts of her own.”

2. Green, Must the Legal Profession Undergo a Spiritual Rebirth?, 16 IND. L.J. 15, 28 (1940).


5. Mistrust of juries is implicit. In his famous “Louisiana’s Forgotten Heritage” article, Malone noted the rarity of jury trials in Louisiana tort cases and stressed the virtues of trial judges as triers of fact. Malone, Comparative Negligence, supra note 3, at 144. Nowadays jury trials are far more frequent. Malone may never have been too happy about supposed jury predilections. See Malone, The Formative Era, supra note 3, at 156.
a risk that is beyond the scope of protection of the defendant's duty. The idea is that in cases in which the judge concludes that the plaintiff's conduct removed him from the scope of the defendant's duty, there should be no recovery, and there is no occasion for assessing the degree of fault of the parties. Malone adds that the converse of the foregoing proposition is also true: If the judge determines that the risk of the victim's fault is "the specific reason why the defendant is burdened by law with the particular duty whose breach is chargeable against him," then once again there is no occasion for assessing the degree of fault of the parties, because such a defendant should be liable for the entire loss. In both types of cases—those in which the plaintiff's faulty conduct removed him from the scope of protection of the defendant's duty, and those in which the plaintiff's faulty conduct is the core risk that generated the defendant's duty—the "matter . . . can [not] be solved felicitously by merely making an adjustment in terms of dollars and cents. Either the defendant should be charged for the full loss, or he should not be answerable at all."

Malone cites Professor Alston Johnson as the principal expositor of these proposed duty-risk limitations on comparative-fault assessment. In this paper, the term "the Johnson view" is used to designate the argument that duty-risk analysis should sometimes lead the courts to conclude either that the plaintiff's fault means he should recover nothing or that the plaintiff's fault should not count against him at all. Several recent comparative fault decisions have cited the Johnson view with approval.

I believe that the Johnson view is mistaken. Virtually all of the considerations Johnson would relegate to judges as part of the duty-risk question of law are properly left to triers of fact as part of their assessment of the degree of fault of the parties. It will be a rare case indeed in

7. Id.
8. Id.
10. See Dulaney v. Travelers Ins. Co., 434 So. 2d 578, 582 (La. App. 1st Cir. 1983); Bays v. Lee, 432 So. 2d 941, 944 (La. App. 4th Cir. 1983); Frain v. State Farm Ins. Co., 421 So. 2d 1169, 1172 (La. App. 2d Cir. 1982). These cases are discussed infra text accompanying notes 130-33.
11. The central thrust of Johnson's article is regard for the virtues of duty-risk analysis as a control of juries. See Johnson, supra note 9, at 326 n.31, 328, 332, 333 n.56, 337, 340-41; see also Frain v. State Farm Ins. Co., 421 So. 2d 1169, 1171-74 (La. App. 2d Cir. 1982). For this and other reasons, it is easier to conceptualize the problems treated in this article by hypothesizing that the typical trial is before a jury. Article 1812(C) of the Louisiana Code of Civil Procedure sets forth the jury issues required in a comparative fault case. Article 1917 of the Code of Civil Procedure requires a judge in a bench trial to make specific findings of fact corresponding to the required jury issues. Hence, the analysis is technically the same for a bench as for a jury trial.
which the victim's fault should not diminish recovery, and an even rarer case in which the victim's fault should remove him entirely from the scope of protection of a duty that a defendant would have owed a similarly-situated but fault-free victim. The Johnson view and its natural ramifications have unfortunate implications for the reasoned development of comparative fault principles, especially in multiparty cases and strict liability cases.

No one should question the appropriateness of my joining this tribute to Professor Malone with an article attacking a view he has espoused. Reasoned disputation about tort law is perhaps Malone's favorite daytime activity, and I look forward to his response to this paper. The title I have chosen should itself guarantee a response. The advantage of a "ruminations" title is probably not an important instance of the myriad of Malone gifts to the scholarly community, but it is an entertaining instance. As I understand it, the word "ruminations" in the title of an article permits the author to exhaust himself (and possibly his readers) on the subject without necessarily claiming that the treatment is exhaustive. This paper offers speculation and argument about five problems that significantly overlap one another: (1) the proper interpretation of Louisiana's comparative fault legislation in multiparty cases generally; (2) the appropriate application of duty-risk analysis in comparative fault cases; (3) the impact of the comparative fault legislation on defendants sued in strict liability; (4) the treatment under comparative fault of affirmative defenses based on victim misconduct that were traditionally treated as distinct from contributory negligence, such as assumption of risk and misuse of a product; and (5) the analytics of distinguishing between affirmative defenses and defensive doctrines. "Ruminations" serves my purposes because multiparty difficulties not considered here will undoubtedly

12. I also expect to hear from Johnson.
14. For example, how should comparative fault assessment work in a case against defendant A in intentional tort and defendant B in negligence? For another example, should the fault of the plaintiff's employer be quantified in tort cases in which the employer or the compensation carrier intervenes to recover workers' compensation benefits? For negative answers to that question in other comparative fault systems, see Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256 (1979); Varela v. American Petrofina Co., 658 S.W.2d 561 (Tex. 1983). The Louisiana law prior to comparative fault held that employer fault did not affect the tort recovery. See Vidrine v. Michigan Millers Mut. Ins. Co., 263 LA. 300, 268 So. 2d 233 (1972); W. MALONE & A. JOHNSON, WORKERS' COMPENSATION LAW AND PRACTICE § 371 in 14 LOUISIANA CIVIL LAW TREATISE 198 (1980). I have found no
arise and because most of the problems discussed in this article await judicial consideration.

II. THE "STANDARD" OPERATION OF THE LOUISIANA COMPARATIVE FAULT STATUTES

Effective August 1, 1980, Louisiana adopted a "pure" comparative fault system. Act 431 of 1979 amended Louisiana Civil Code articles 2103, 2323, and 2324, and articles 1811 and 1917 of the Louisiana Code of Civil Procedure, to effect that change. Louisiana's is a "pure" system because a plaintiff's negligence short of 100% does not defeat but only diminishes recovery. By contrast, "modified" systems provide that a plaintiff is barred if his negligence exceeds 49% (in some systems) or 50% (in most modified systems) of the total fault found. Whether Louisiana's system is properly termed "comparative fault" rather than "comparative negligence" is a closer question. All of the relevant Louisiana statutes use the term "fault" when referring to tortfeasor conduct and "negligence" when referring to victim conduct. The term "comparative fault" is used here because it is consistent with the arguments (1) that quantification of the parties' fault is appropriate in strict liability as well as in negligence cases, and (2) that forms of victim misconduct other than traditional contributory negligence should be quantified (in both strict liability and negligence cases) and the resultant percentage used to diminish (but not defeat) recovery.

In cases in which negligence is the only form of fault charged against the alleged tortfeasors or plaintiff and there are no duty-risk complications, the proper operation of the comparative fault statutes is neither difficult nor controversial. The essential features of the Louisiana comparative fault system are: (1) The plaintiff's negligence, even post-comparative fault Louisiana decisions, but see no reason to expect that Louisiana law will diverge from Edmonds and Varela.

15. Article 1811 of the Code of Civil Procedure was further amended in 1983 and renumbered as article 1812. 1983 La. Acts, No. 534, § 8. Aside from the renumbering, the relevant changes were altering the "proximate cause" inquiry to "legal cause" and rewording the provision (now article 1812(C)(2)) on quantifying the fault of tortfeasors who are not parties to the suit. See infra notes 26, 28.

16. LA. CIV. CODE art. 2323.


18. Civil Code article 2103 provides for dividing solidary obligations arising from offenses and quasi-offenses among the "debtors . . . in proportion to each debtor's fault." Civil Code article 2323 speaks of plaintiff's "negligence" and defendants' "fault." Article 1812(C) of the Code of Civil Procedure uses the term "fault" when referring to parties defendant, LA. CODE CIV. P. art. 1812(C)(1), and to other tortfeasors, LA. CODE CIV. P. art. 1812(C)(2), and the term "negligence" when referring to parties plaintiff, LA. CODE CIV. P. art. 1812(C)(3).

19. I argue that victim-fault-avoidance doctrines such as "last clear chance" are part of the network of duty-risk complications. See infra notes 103-13 and accompanying text.
if 99% of the total fault found by the trier of fact, does not bar the action but diminishes recovery by the percentage of negligence found against the plaintiff;\(^2\) (2) solidary liability of tortfeasors obligated for the same injuries persists,\(^3\) but a defendant whose fault is less than the plaintiff's owes only his percentage (as determined by his percentage of the total fault) of plaintiff's damages;\(^2\) (3) contribution rights among defendants are based upon the defendants' percentages of fault;\(^3\) and (4) a tortfeasor who settles with the plaintiff continues to be insulated against liability to the plaintiff and against claims for contribution.\(^4\) The nonsettling tortfeasor's contribution rights, defeated by the settlement, are replaced by his right to have the plaintiff's recovery against him diminished in proportion to the settling tortfeasor's percentage of fault.\(^5\)

The following hypothetical case\(^2\)\(^6\) demonstrates the operation of the foregoing features of the comparative fault statutes. Assume that the plaintiff was injured by the combined negligence of A, B, and C. Before filing suit, the plaintiff settled with and released C,\(^2\)\(^7\) and then brought a

21. The test for tortfeasor solidarity under the current jurisprudence is whether they are obligated for the same thing. This test results in a broader category than traditional "joint tortfeasors," and includes, for example, a vicariously liable employer and his tortfeasor employee. See **Sampay v. Morton Salt Co.,** 395 So. 2d 326 (La. 1981); **Foster v. Hampton,** 381 So. 2d 789 (La. 1980). Preexisting criteria for solidarity are implicated in the amended Civil Code article 2103. Further, amended Civil Code article 2324 provides that persons whose concurring fault causes harm are solidarily liable, with the proviso noted infra text accompanying note 22.
25. **Id.** at 210. This case demonstrates that the principle of **Harvey v. Travelers Ins. Co.,** 163 So. 2d 915 (La. App. 3d Cir. 1964), continues to obtain under the comparative fault system. That principle is changed only in that the judgment in favor of a plaintiff who has settled with one of several tortfeasors is now reduced according to the settling tortfeasor's percentage of fault rather than, as formerly, his virile share.
26. In all of the examples used in this paper, the parties are presumed to have properly asserted and protected their rights. Hence, the example in the text assumes that the plaintiff, when settling with and releasing C, properly reserved his rights against the other tortfeasors. See **La. Civ. Code** art. 2203. The example also assumes that defendants A and B properly pleaded the plaintiff's negligence, their contribution rights against each other, and their right to have any judgment against them reduced to reflect the plaintiff's settlement with C.
27. The amount of the settlement with C is irrelevant to determining the liabilities of the other tortfeasors.
negligence action against A and B. The trier of fact found as follows:

Plaintiff's total damages: $100,000

Plaintiff's negligence: 30%
A's fault: 40%
B's fault: 20%
C's fault: 10%28

On those findings, the plaintiff should recover $60,000, of which A should ultimately bear $40,000 and B, $20,000. The plaintiff's potential recovery of $100,000 is diminished by his own percentage of negligence (30%)29 and the percentage of fault found against C, the settling tortfeasor (10%).30 A's and B's ultimate shares of the $60,000 liability are determined by their percentages of fault.31 The judgment should provide that A and B are solidarily liable to plaintiff for $20,000 and that A is individually liable for an additional $40,000.32 It should also provide that A is entitled to contribution from B up to a ceiling of $20,000 should more than $40,000 be collected from A.33

28. All of these findings are procedurally proper. Article 1812(C)(4) of the Code of Civil Procedure provides for the damages finding. Article 1812(C)(3) provides for finding the percentage of the plaintiff's negligence. Article 1812(C)(1) provides for finding the defendants' percentages of fault. Article 1812(C)(2) provides for finding the percentage of fault of "another person"—i.e., other than plaintiff(s) and defendant(s)—"whether party or not," "if appropriate." In its pre-1983 amendment state, this subsection, then numbered as article 1811(B)(2), used the term "another involved person," and omitted the language "whether party or not." I do not think that Act 534 of 1983 changed or clarified anything. Commentators agree that article 1812(C)(2) is intended to provide for quantifying the fault of a settling tortfeasor who is never made a party to the litigation. See Wade, Comparative Negligence—Its Development in the United States and Its Present Status in Louisiana, 40 LA. L. REV. 299, 312 & n.61 (1980); Chamallas, supra note 9, at 393-94. One court of appeal has so held. Garrett v. Safeco Ins. Co., 433 So. 2d 209, 210 (La. App. 2d Cir. 1983).

Probably article 1812(C)(2) should be limited in its application to the nonparty settling tortfeasor situation. Unless the nonparty's fault is imputable to or otherwise chargeable against one or more of the parties to the lawsuit, a percentage fault finding as to a non-party other than a settling tortfeasor can only produce confusion. However, one case holds that 1812(c)(2) mandates quantifying the fault of an absent and unknown tortfeasor. Varnado v. Continental Ins. Co., 446 So. 2d 1343, 1345 (La. App. 1st Cir. 1984). The commentators are not in agreement on this point. See Chamallas, supra note 9, at 398, 393-94 (the Louisiana legislation requires quantifying nonparty fault and such quantification is a good idea); Pearson, supra note 17, at 354 & n.49 (quantifying nonparty fault should be avoided, but the Louisiana legislation seems to require it); Wade, supra, at 311 (appearing to agree with this writer). Section 2(a)(2) of the Uniform Comparative Fault Act, 12 U.L.A. 39 (Supp. 1979), reprinted in 40 LA. L. REV. 419, 425 (1980), expressly provides for quantification of the fault of parties and nonparty settling tortfeasors only.

29. LA. CIV. CODE art. 2323.
31. LA. CIV. CODE art. 2103.
32. Under Civil Code article 2324, A and B are solidarily liable, but B, whose negligence was less than the plaintiff's, cannot be held for more than his percentage share of the loss.
33. LA. CIV. CODE art. 2103.
III. AN EXAMPLE OF MULTIPARTY LITIGATION

COMPLICATED BY STRICT LIABILITY AND DUTY-RISK ISSUES

The proper operation of comparative fault principles in the hypothetical case discussed in Part II is not controversial because that example involved no duty-risk complications and negligence was the only form of fault asserted against any of the actors. A hypothetical case combining allegations of negligence and other fault and including representative duty-risk issues would involve greater complications. Assume that the plaintiff was a pedestrian. Before stepping into the path of the automobile that struck him, he was warned by a friend that the oncoming automobile was dangerously near, and responded, "Let him look out for me."

The plaintiff was struck and injured by the automobile and sought redress. The potential defendants were A, who manufactured the automobile which was defective by reason of faulty brakes; B, the driver, who was negligently exceeding the speed limit while failing to keep a proper lookout; and C, who owned the automobile and negligently loaned it to B. Before filing suit, the plaintiff settled with and released C. The plaintiff then sued A in strict products liability asserting no negligence, and B in negligence.

The issues suggested by this hypothetical case are best identified by assuming the case is tried to a jury and by particularizing the pleadings and evidence as follows:

(1) Plaintiff's case in chief against A, the manufacturer:
   (a) The petition asserts A's strict liability for promulgating a car with defective brakes. Negligence is not pleaded.
   (b) The evidence supports submission of the elements of the strict liability case to the jury.

(2) Plaintiff's case in chief against B, the driver:

34. This fact raises an assumption of risk issue. But cf. Dofflemyer v. Gilley, 384 So. 2d 435 (La. 1980) (reversing an assumption of risk verdict for defendant on very similar facts). This article treats the issue of the continued validity of affirmative defenses such as assumption of risk as part of the network of duty-risk complications. I do not believe that Malone or Johnson would argue for retention of assumed risk as a bar to recovery. But cf. Johnson, supra note 9, at 332 & n.48, 336 n.65. However, as explained infra at notes 161-67, 184-86 and accompanying text, applying duty-risk reasoning to issues of victim fault has the potential of perpetuating defenses such as assumed risk.

35. See supra notes 26-27.

36. See supra note 11.

37. The elements of a strict products liability case in Louisiana are: (1) the product was defective, i.e., unreasonably dangerous in normal use; (2) the product was in normal use at the time of the injury; and (3) the injuries were caused by the defect. See, e.g., Khoder v. AMF, Inc., 539 F.2d 1078, 1079 (5th Cir. 1976); Oatis v. Catalytic, Inc., 433 So. 2d 328, 332 (La. App. 3d Cir. 1983); Harris v. Atlanta Store Works, 428 So. 2d 1040, 1042 (La. App. 1st Cir.), cert. denied, 434 So. 2d 1106 (La. 1983).
(a) The petition asserts the elements of a case in negligence against B for exceeding a safe speed and failing to maintain a proper lookout.

(b) The evidence warrants submitting the negligence issues to the jury.

(3) Affirmative defenses raised by A and B:
(a) Each answer pleads assumption of risk\(^{38}\) and contributory negligence.\(^{39}\)
(b) The evidence shows that the plaintiff’s only fault was stepping into the path of the oncoming car in the face of his friend’s warning, and warrants submission of the issue of plaintiff’s fault to the jury.

(4) Defendant’s contribution claims:
(a) A and B each plead that the fault of the other is wholly or partially responsible for the plaintiff’s injuries, and that they are consequently entitled to indemnity or in the alternative contribution against each other.\(^{40}\)
(b) As indicated above, jury issues are presented as to the fault of each defendant.

(5) Defendant’s claims to judgment-reduction to reflect plaintiff’s settlement with C:\(^{41}\)
(a) A and B plead that C knew or should have known that the car’s brakes were faulty and was consequently guilty of negligence such that he would have been wholly or in the alternative partially responsible for plaintiff’s injuries. They further plead that any recovery by plaintiff must be diminished by the degree of fault of which C was guilty.
(b) The evidence supports submitting the negligence issues as against C to the jury.\(^{42}\)

The issues that must be resolved by the trial judge before he can decide how to submit the foregoing case to the jury represent the range of prob-

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38. See supra note 34.
39. Under one view, “comparative negligence” is just one form of “contributory negligence.” See Johnson, supra note 9, at 325, n.30. In any event, pleading “contributory negligence” should suffice to raise the comparative negligence issue. See Crawford, Comparative Negligence, Strict Liability and Pleading Problems in Louisiana Tort Law, Seminar on Torts, Comparative Negligence and Products Liability (Center of Continuing Prof. Dev. Oct. 21-22, 1983).
40. For discussion of the Louisiana tort law on indemnity, see infra text accompanying notes 212-29.
41. See supra notes 24-25 and accompanying text & note 28.
42. For an explanation of why it is proper to secure a fault finding as to a settling nonparty tortfeasor, see supra note 28.
lems that, if not properly resolved, promise to retard the reasoned development of comparative fault principles. Those issues are the following:

(1) In the action against A, the strict liability defendant, does any "negligence" of which plaintiff may be found guilty operate to bar or to diminish his recovery? What is the proper role of victim negligence in a strict liability case?

(2) Should the fault of A, the strict liability defendant, be quantified:
   (a) For purposes of determining A's liability to plaintiff?
   (b) For purposes of determining contribution rights between A (the strict liability defendant) and B (the negligence defendant)?
   (c) For purposes of giving the appropriate effect to the settlement between plaintiff and C (the nonparty tortfeasor)?

(3) In the action against B, the negligent motorist, does any fault of which plaintiff may be found guilty operate to diminish his recovery? Or is such negligence to be forgiven under the duty-risk analysis set forth in the Baumgartner case? 43

(4) In the actions against each defendant, does any "assumption of risk" of which the plaintiff may be found guilty operate to bar recovery? To diminish recovery?

(5) Is either defendant entitled to indemnity from the other? From C, the settling tortfeasor? Is either defendant entitled to reduce the plaintiff's judgment to zero because of a right of indemnity against C that was defeated by plaintiff's settlement with C?

These issues will be discussed in the sections that follow.

IV. APPLICATION OF COMPARATIVE FAULT PRINCIPLES TO CASES OF STRICT LIABILITY

A. Louisiana's Strict Liability Doctrines

In Langlois v. Allied Chemical Corp., 44 the Louisiana Supreme Court articulated a broad civilian approach to strict liability questions. 45 I believe the court intended Langlois as a basis for the development of general principles of strict liability along non-doctrinal lines, and that the fun-

43. Baumgartner v. State Farm Mut. Auto. Ins. Co., 356 So. 2d 400 (La. 1978), held that a negligent pedestrian is not barred from recovering from a negligent motorist, reasoning that the motorist's duty should be construed to embrace the risk of negligence by pedestrians. In its initial and most obvious application, Baumgartner was a hedge against the perceived harshness of contributory negligence operating as a complete bar to recovery. Professor Johnson, however, strongly contends that the Baumgartner principle should have continuing vitality in the comparative fault system. See Johnson, supra note 9, at 330-32.

44. 258 La. 1067, 249 So. 2d 133 (1971).

45. 258 La. at 1071-78, 1086-88, 249 So. 2d at 136-37, 140.
damental idea of the decision is inconsistent with the existence of distinct legally-recognized categories of conduct giving rise to strict liability. Be that as it may, such categories have developed. First, Langlois has come to stand for strict liability for ultrahazardous activities. Second, what is now regarded as a separate category of strict liability applies against the manufacturer of a defective product. A third category of strict liability is currently termed "relational responsibility," embracing Louisiana Civil Code articles 2317 (things), 2318 (children), 2321 (animals), and 2322 (buildings).

B. Is "Contributory Negligence" an Available Defense in Strict Liability Cases?

Presently, the jurisprudence contains only hints as to whether a plaintiff's negligence will be quantified to diminish recovery in strict liability cases arising after August 1, 1980, the effective date of the comparative

46. Ultrahazardous activities are currently defined as those producing situations "where the risk is such that the harm results from the very nature of the activity itself, irrespective of protective measures taken by the enterpriser." Hebert v. Gulf States Utils. Co., 426 So. 2d 111, 114 n.6 (La. 1983). See also O'Neal v. International Paper Co., 715 F.2d 199, 201-02 (5th Cir. 1983); CNG Producing Co. v. Columbia Gulf Transmission, 709 F.2d 959, 961-62 (5th Cir. 1983); Richman v. Charter Arms Corp., 571 F. Supp. 192, 199 (E.D. La. 1983); Kent v. Gulf States Utils. Co., 418 So. 2d 493, 498 (La. 1982); Smith v. Formica Corp., 439 So. 2d 1194, 1200 (La. App. 1st Cir. 1983); Deville v. Calcasieu Parish Gravity Drainage Dist. # 5, 422 So. 2d 631, 635 (La. App. 3d Cir. 1982); Dunson v. Triad Chem. Co., 360 So. 2d 223, 224-25 (La. App. 1st Cir. 1978). The traditional examples are pile driving, storage of toxic gas, blasting with explosives, and crop dusting with airplanes. Activities which have been excluded from the operation of this theory include venting of natural gas, see CNG Producing Co., 709 F.2d 959, and transmitting electricity over high tension lines. See Hebert, 426 So. 2d 111; Kent, 418 So. 2d 439. The courts have taken to calling this variant of strict liability "absolute liability." See Hebert, Kent, Smith, 439 So. 2d 1194; Deville, 422 So. 2d 631.


52. The leading case is probably Olsen v. Shell Oil Co., 365 So. 2d 1285 (La. 1979).
fault statutes. Hence, an examination of the pre-comparative fault jurisprudence for characterizations of victim fault is relevant. In the more recent decisions, courts have often confronted the issue whether a plaintiff's contributory negligence bars recovery in strict liability actions. For ultrahazardous activity liability, the answer was clearly no. As to strict products liability, the jurisprudence was divided, with a preponderance of the cases answering no. In relational responsibility cases, there was also a split in the jurisprudence, with the numerical weight favoring an affirmative answer.

53. See infra note 58 and accompanying text.


Cases suggesting that contributory negligence may be a bar to recovery in products liability cases include Chappuis v. Sears Roebuck & Co., 358 So. 2d 926, 930 (La. 1978); Oatis v. Catalytic, Inc., 433 So. 2d 328, 332 (La. App. 3d Cir. 1983); Lovell v. Earl Grissmer Co., 422 So. 2d 1344, 1352 (La. App. 1st Cir. 1982), writ denied, 427 So. 2d 871 (La. 1983).


Cases suggesting that contributory negligence is not an available defense in relational responsibility cases include Alford v. Pool Offshore Co., 661 F.2d 43, 45 (5th Cir. 1981);
C. Should Plaintiff’s Negligence Reduce Recovery in Strict Liability Cases Arising Under Comparative Fault?

Because Civil Code article 2323 states that a plaintiff’s negligence shall be quantified and reduce recovery “when contributory negligence is applicable to a claim for damages,” the pre-comparative fault jurisprudence on the relevance of contributory negligence in strict liability cases is obviously significant on the question of how a plaintiff’s negligence should be treated in strict liability cases decided under the comparative fault legislation. However, the predecessor jurisprudence should not be controlling. Article 2323 neither states nor should be taken to mean that the issue of the applicability of contributory negligence in strict liability cases is frozen according to the weight of the pre-comparative fault cases.”

Several decisions have suggested that plaintiff negligence should and probably will be quantified to reduce recovery in strict products liability and/or relational responsibility cases decided under the comparative fault statutes. Obviously, the legislature has in fact left this determination to the courts. In Bell v. Jet Wheel Blast, the Fifth Circuit, en banc, has certified the following question to the Louisiana Supreme Court: “Does the Louisiana Civil Code permit the defense known as contributory negligence to be advanced to defeat or mitigate a claim of strict liability based upon a defective product, the theory of liability commonly known as ‘product liability’?” The supreme court has not yet indicated whether


Cases treating the question as unsettled include Deville v. Calcasieu Parish Gravity Drainage Dist. No. 5, 422 So. 2d 631, 635 (La. App. 3d Cir. 1982); Sumner v. Foremost Ins. Co., 417 So. 2d 1327, 1333-34 (La. App. 3d Cir. 1982). In Guillot v. Fisherman’s Paradise, Inc., 437 So. 2d 840 (La. 1983), both lower courts held that contributory negligence does not bar recovery in relational responsibility cases; the supreme court did not reach the issue.

57. Professor Johnson perhaps disagrees. While he believes that the quoted portion of Civil Code article 2323 leaves the courts free to use duty-risk analysis to determine on a case-by-case basis whether victim negligence should be quantified, Johnson, supra note 9, at 338, and that this duty-risk analysis is applicable to strict liability cases, (id. at 332, 336 n.66), he also states that the 1979 legislature probably meant to exclude strict liability cases from the operation of article 2323. Id. at 339 n.70.

58. See Lewis v. Timco, Inc., 716 F.2d 1425, 1431-32 (5th Cir. 1983) (en banc); Hyde v. Chevron USA, 697 F.2d 614, 628-29 (5th Cir. 1983); Kent v. Gulf States Util. Co., 418 So. 2d 493, 500 n.10, 502 n.1 (La. 1982); Buchanan v. Tangipahoa Parish Police Jury, 426 So. 2d 720, 726-27 (La. App. 1st Cir. 1983); Lovell v. Earl Grissmer Co., 422 So. 2d 1344, 1352 n.4 (La. App. 1st Cir. 1982), writ denied, 427 So. 2d 871 (La. 1983); Verrett v. Cameron Tel. Co., 417 So. 2d 1319, 1323 (La. App. 3d Cir. 1982); cf. Rodriguez v. Dixilyn Corp., 620 F.2d 537, 544 n.11 (5th Cir. 1980). In Abraham v. Hanover Ins. Co., 420 So. 2d 526 (La. App. 2d Cir. 1982), a premises hazard case that might well have been tried under Civil Code article 2317 was evidently pursued as a negligence action, and the court of appeal upheld the trier-of-fact’s assessment of the plaintiff’s negligence at 10%.

59. 717 F.2d 181, 183 (5th Cir. 1983) (en banc).
Because the facts of Bell occurred before the effective date of the comparative fault legislation, the case may not be a suitable one to answer the comparative fault inquiry. However, if the supreme court accepts the certification, this writer believes the court should and will answer that "contributory negligence" mitigates strict product liability claims arising after August 1, 1980, according to the principles of comparative fault.

If the supreme court answers the certified question as suggested, its answer will almost certainly control relational responsibility cases as well as products liability cases, whether or not the court specifically addresses relational responsibility. On the other hand, the effect of a plaintiff's negligence in ultrahazardous activity cases will not be resolved until the supreme court directly addresses that issue, because the considerations supporting ultrahazardous activity strict liability have been viewed by the courts as significantly different from other strict liability theories. The better view would treat plaintiff negligence alike in all strict liability cases. However, the ultrahazardous activity category is rather narrowly confined under the present law, and the number of cases involving the issue correspondingly smaller than under the other two theories. For these reasons, the remainder of this discussion will focus on products liability and relational responsibility cases.

At least six arguments support treating plaintiff negligence as a percentage reduction of recovery in products liability and relational

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61. Id.

62. The policy and doctrinal arguments for excluding relational responsibility cases from the application of the comparative fault statutes are considerably weaker than the arguments for excluding products liability cases.

63. Ultrahazardous activity liability is currently being termed "absolute" as a way of signalling these differences. See supra note 46.

64. See supra note 46.

65. Lawyer/economists are currently debating these matters on a somewhat different level. Judge Higginbotham's opinion for the en banc court in Lewis v. Timco, Inc., 716 F.2d 1425, 1432-33 (5th Cir. 1983), argued that a comparative fault defense in strict products liability law is economically more efficient than the absence of any victim-fault defense. The argument is that the absence of a victim-fault defense charges manufacturers with costs, and induces safety expenditures, that should properly be charged to the negligent user. Some lawyer/economists make a similar argument for the economic superiority—"allocative efficiency" superiority—of contributory negligence as opposed to comparative negligence. See, e.g., Landis & Posner, The Positive Economic Theory of Tort Law, 15 Ga. L. Rev. 851, 919 (1981); Landis & Posner, Joint and Multiple Tortfeasors: An Economic Analysis, 9 J. Legal Stud. 517, 537-39 (1980). The assumptions involved in these arguments include perfect rationality of all relevant actors (including perfect foresight as to the future behavior of other relevant actors) and the absence of any litigation costs.

66. The countervailing argument, that diminishing the products liability plaintiff's recovery in the amount of his negligence offends the basic premises of strict products liability,
responsibility strict liability cases. (1) Any other resolution disagreeably complicates multiple-defendant cases. (2) It is anomalous to treat negligent defendants more favorably than strict liability defendants. (3) It is fairer as between the plaintiff and the strict liability defendant to take the plaintiff's fault into account. (4) To the extent that tort law deters accident-productive behavior, an arguable deterrent effect is built into the reduction of the plaintiff's recovery on the basis of his own fault. Even if one believes it unlikely that tort law has any real deterrence function, the symbolism of wholly forgiving substandard conduct is unhealthy. (5) To the extent that refusal to take plaintiff fault into account yields large recoveries against strictly liable defendants in favor of negligent plaintiffs, the strict liability theories themselves are brought into disrepute, and a considerable incentive is created for the courts or legislature to abolish or curtail the operation of those doctrines. (6) The absence of a percentage-reduction defense based on contributory negligence invites the courts to treat serious victim misconduct in the guise of duty-risk limitations or other defensive doctrines or affirmative defenses so as to bar recovery altogether.

As will be detailed hereinafter, the first argument alone should carry the day. Unless comparative fault works across the board, multiparty litigation can become well-nigh impossible to administer.

D. Should the Fault of a Strict Liability Defendant Be Quantified?

Concluding that a plaintiff's negligence should be quantified to diminish recovery in strict liability cases would not necessarily entail concluding that a strict liability defendant's fault should also be quantified. In a pure strict liability case involving only one tortfeasor, overtly quantifying the defendant's fault will be unnecessary; simply assigning a negligence percentage to the plaintiff will permit resolution of such a case. But when more than one tortfeasor is involved, solidary liability questions must be decided and contribution rights have to be worked out,

well stated by Judge Politz in the panel opinion in Lewis v. Timco, Inc., 697 F.2d 1252 (5th Cir. 1983), and in his dissent from the en banc reversal, 716 F.2d at 1433 (5th Cir. 1983) (en banc). Lewis involved the question of the availability of a comparative negligence reduction in maritime products liability litigation, but the policies involved are the same as under Louisiana law.

67. See infra text accompanying notes 230-66.

68. The wisdom of some of Louisiana's strict liability theories is being furiously debated. See, e.g., Malone, supra note 49. But each of the theories has a genesis and justification independent of the issue of the proper effect of plaintiff misconduct in actions under the theory, and each should be judged on the basis of the justifications for imposing non-negligence liability upon defendants, not upon the issue of the available affirmative defenses.

69. See infra notes 161-67, 184-86, 189-211 and accompanying text.

70. If the plaintiff sues a single defendant in products liability, and the facts establish $100,000 in damages, the defendant's liability, and the plaintiff's negligence at 25%, the plaintiff should recover $75,000. For the trier of fact to conclude specifically that the defendant's fault constituted the other 75% would be unnecessary.
and it will often be necessary to decide whether the fault of strict liability defendants can be quantified for purposes of comparison with other strict liability defendants, negligent defendants, and/or negligent plaintiffs.

The comparative fault statutes appear to require the quantification of strict liability fault in multiple tortfeasor cases. Civil Code article 2103 states that a solidary obligation arising from an offense or a quasi-offense "shall be divided in proportion to each debtor's fault." By its terms, this provision clearly applies to strict liability tort defendants. Civil Code article 2324 states that persons whose concurring fault causes damages are solidarily liable, but that a defendant whose fault is less than that of the plaintiff is not liable beyond his percentage share of the damages. This provision, too, applies by its terms to strict liability defendants.

Courts and commentators around the country have sometimes contended that assigning a percentage to the fault of a strictly liable tortfeasor, who by hypothesis is guilty of no negligence, is a conceptual impossibility. Ultimately these arguments are unpersuasive. The commentary accompanying the Uniform Comparative Fault Act (Uniform Act) includes a persuasive discussion of methods for quantifying fault, suggesting that there is no insuperable difficulty with assessing the percentage of fault of a strictly liable defendant and comparing that fault with the negligence of the plaintiff or another defendant. Circumstances that should be considered in assessing the fault of any party include: (1) whether the actor's conduct was mere inadvertence or involved an awareness of the danger; (2) the magnitude of the risk created by the conduct, including the number of persons endangered and the seriousness of the injuries threatened; (3) the importance of what the actor was trying to accomplish by his conduct; (4) the actor's superior or inferior capacities; (5) the particular circumstances of the events in suit, such as the existence of an emergency; (6) the policy behind the rule or rules of law violated by the actor's conduct; and (7) the relative closeness of the causal relationship of the actor's conduct and the harm to the plaintiff. The considerations suggested by the commentary to the Uniform Act provide an acceptable basis for assigning a percentage to the fault of the automobile manufac-

71. See Chamallas, supra note 9, at 375. Under the current jurisprudence, multiple defendants are solidarily liable if obligated to the same damages. See supra note 21. Further, solidarity has been expanded by amended Civil Code article 2324.

72. For a discussion of authorities arguing such, see Pearson, supra note 17, at 345-49; Plant, Comparative Negligence and Strict Tort Liability, 40 LA. L. REV. 403, 406-10 (1980). See also Wade, supra note 28, at 314-15.


74. ¶ 2 commissioners' comment id. at 39-41 reprinted in 40 LA. L. REV. at 426-27. Much ink has been spilled over whether comparative fault assessment involves comparing blameworthiness or closeness of causal connection or both. See generally Pearson, supra note 17. Seemingly, such assessment is bound to involve both; the Uniform Act takes that approach.
Fault is never assessed or compared in a vacuum; the causal contribution and blameworthiness of all of the parties to a tortious event provide a basis for assessment and comparison. If the facts surrounding the conduct of the parties do not provide an emotionally satisfying basis for arriving at a percentage, the trier of fact is free to assess fault equally as among the causally contributing parties. Ultimately, the argument is that any reasonable apportionment is "far superior to that ultimate crudity—the all-or-nothing position." 76

Most of the commentators and courts considering the problem have concluded that, somehow or other, the fault of a strictly liable defendant can be quantified and compared with the negligence or other fault of other parties to the litigation. 77 Hence, the clearest answer to the argument that strict liability fault cannot be quantified is probably similar to the one given by the religious skeptic who, when asked if he believes in infant baptism, responds: "Believe in it? Hell, I've seen it done!"

V. APPLICATION OF DUTY-RISK REASONING IN COMPARATIVE FAULT CASES

In general terms the duty-risk approach that came into Louisiana tort law via the Dixie Drive It Yourself decision 78 and its progeny 79 is easy to describe: It supplanted and replaced the "proximate cause" grab bag of defensive theories. Rather than asking whether the defendant's conduct was a proximate cause of the plaintiff's injuries, the duty-risk approach has courts asking whether the plaintiff's injuries were within the scope of protection of a duty owed by the defendant. 80 That simple shift in vocabulary and analysis has profound consequences: It might be called a small revolution in torts thinking. 81

75. With specific reference to products liability defendants, the commissioners' comment to § 2 of the Uniform Act states:

[A]n automobile manufacturer putting out a car with a cracked brake cylinder may, even in the absence of proof of negligence in failing to discover the crack, properly be held to a greater measure of fault than another manufacturer producing a mechanical pencil with a defective clasp that due care would have discovered.


76. Wade, supra note 28, at 314.

77. See Plant, supra note 72, at 406-10; Pearson, supra note 17, at 345-49, and authorities cited therein; see also Lewis v. Timeco, Inc., 716 F.2d 1425, 1427-32 (5th Cir. 1983) (en banc).


80. The ease of translating proximate cause articulations into duty-risk articulations is discussed in Robertson, supra note 79, and is illustrated by Judge Tate's opinion in Dartez v. City of Sulphur, 179 So. 2d 482 (La. App. 3d Cir. 1965).

81. See authorities cited supra note 79.
The shift from proximate cause to duty-risk was not centrally motivated or fueled by judicial concern over victim-fault issues. While it had not been unusual for courts to intermingle proximate cause and victim-fault issues, in most such cases victim fault was clearly enough the "real reason" for nonliability. The uses of proximate cause to limit liability in cases unaffected by the victim-fault defenses was the principal target of the shift to duty-risk.

Once duty-risk reasoning was established, however, it soon commended itself to courts as relevant to victim-fault problems. In some cases in which victim fault barred recovery, courts articulated that conclusion in duty-risk terms: the victim's conduct took him outside the scope of protection of the defendant's duty. Much more frequently and much more importantly, courts concerned to avoid barring a negligent victim began to use duty-risk reasoning as a way around the victim-fault problem. The hypothetical case set forth in Part III raised both sorts of duty-risk possibilities. One issue was whether the duty-risk reasoning exemplified by *Baumgartner v. State Farm Mutual Insurance Co.* should continue to apply to forgive the negligence of a pedestrian in a suit against a negligent motorist. Another was whether conduct constituting assumption of risk should bar a plaintiff's recovery in either the negligence or the strict liability action or both.

The Johnson view is that duty-risk reasoning should continue to be applied to victim-fault problems arising in comparative fault cases, sometimes as a way of stating that victim fault totally bars recovery and sometimes as a way of stating that victim fault is wholly forgiven. This section of this article argues against that view.

As a preliminary to addressing the wisdom of these duty-risk approaches to victim fault in comparative fault cases, the Johnson view

82. Cf. Johnson, supra note 9, at 328.
83. For articulations that the plaintiff's fault was the "sole proximate cause" of the injuries, see Lemelle v. State, 435 So. 2d 1162, 1164 (La. App. 3d Cir. 1983); Ford v. Allstate Ins. Co., 434 So. 2d 559, 562 (La. App. 4th Cir. 1983).
84. See Johnson, supra note 9, at 334-37.
85. See infra notes 110-22 and accompanying text.
86. 356 So. 2d 400 (La. 1978).
87. See supra note 34.
88. Preliminarily to the preliminary, two analytical points that Johnson, probably correctly, does not consider important to his thesis should be isolated and set aside. First, broadly speaking, the issue Johnson addresses is whether victim-fault issues should almost always be handled according to jury quantification of the fault of the parties, or whether many victim-fault issues should be handled by judges under the duty-risk analysis. In treating the methods whereby he believes judges should often handle these matters, i.e., the duty-risk principles, Johnson frequently lumps the scope of duty issue with the breach of duty issue. See Johnson, supra note 9, at 322, 330, 335, 339 & nn.71-72. (Johnson's text and note 71 make the scope/breach distinction; note 72 and accompanying text ignore it). However, breach of duty is traditionally a jury issue. In Louisiana, appellate review of facts means...
needs elaboration. The following seems to be a fair summary: Contributory negligence originated and for many years served as an important means of controlling juries. It also served as a means of appellate control of trial courts. These controls should not be abandoned. The duty-risk analysis, which has already emerged as an important jury-control device in its own right, should encompass the victim-fault issue so that the judicial control formerly provided by contributory negligence is retained. Duty-risk is a flexible and sophisticated approach to retention of such control by judges. In cases in which the defendant’s conduct is greatly more undesirable than the plaintiff’s conduct, fairness and/or important legal policies may well demand that the plaintiff’s fault not reduce his recovery. Conversely, if the plaintiff’s conduct is greatly more undesirable than the defendant’s, the same considerations should lead to the conclusion that the defendant is not liable at all. These questions are too important to be left to juries. Juries are doubtful fact-finders, of limited wisdom and subject to prejudice. Furthermore, the process of quantifying fault in even those cases in which it should be done probably cannot be accomplished with any acceptable degree of rationality, and the better approach in those cases may well be equal or pro rata division of

the distinction between judge issues and jury issues is hard to keep straight and often does not particularly need to be kept straight. Still, it will aid understanding of the Johnson view and my criticisms of the view to point out that, as used by Johnson and in this article, “duty-risk reasoning” includes any judge-made determination that victim fault should not be quantified, either because it should not count against plaintiff at all or because it entirely defeats the plaintiff. Secondly, victim fault is traditionally treated as an affirmative defense, whereas the want of any duty owed by the defendant is a defensive doctrine, i.e., a negation of one of the elements of the plaintiff’s case in chief. For a discussion of the distinction between affirmative defenses and defensive doctrines, see infra text accompanying notes 70-77. The defendant has the burden of proof of affirmative defense issues, whereas the plaintiff has it on the existence of each element of the case in chief. Johnson states that the burden of proof point is unimportant because in practice defendants will have to raise and offer evidence on the duty-limitation issue in order for it to come up. Johnson, supra note 9, at 331 n.44. However, that observation overlooks the fact that the “burden of proof” traditionally entails not only the burden of raising an issue and of producing evidence, but also the ultimate burden of persuasion. The point may be too subtle for most practical purposes, but I count it a minor criticism of the Johnson view that it may entail shifting from the defendant to the plaintiff the burden of persuasion on some affirmative defensive issues.

89. See Johnson, supra note 9, at 320-21, 323.
90. Id. at 324.
91. Id. at 326-27 & n.31, 340-41.
92. See id. at 328.
93. See id. at 328 n.36, 341.
94. See id. at 340-41.
95. See id. at 326, 332, 333 n.56, 339-40, 341.
96. See id.
97. See id. at 334-35, 336-37.
98. See id. at 340.
damages.  If considerable judicial control is not retained over the victim-fault issue, "[w]e will have transformed duty questions into damage questions; we will have replaced legal issues with dollars-and-cents estimates." 100

On the fundamental level of preference for resolutions by trial courts and juries rather than appellate courts, I disagree with the Johnson view. 101 The more important disagreement addresses the Johnson view's potential for retarding resolution of the proper role of comparative fault in strict liability 102 and multiparty cases.

A. Should Duty-Risk Reasoning "Forgive" a Plaintiff's Fault in Certain Comparative Fault Cases?

Professor Johnson clearly summarizes the various exceptions to and circumventions of the contributory negligence doctrine that developed as courts lost respect for it. 103 These included doctrines such as last clear chance, 104 momentary forgetfulness, 105 and sudden emergency. 106 Also included were principles of occasional application, such as the idea that the conduct of child plaintiffs should be judged by a forgiving standard, that plaintiff conduct in general should be judged lessstringently than would be appropriate if the same actor were a defendant, 107 and a presumption that plaintiffs can be counted on to have taken great care for their own safety. Probably none of these avoidance devices should

99. See id. at 338.
100. See id. at 340. For a similar statement by Malone, see supra text accompanying note 8.
101. For the many expressions of Leon Green on the unwisdom of the shift of control from trial to appellate courts, see Robertson, The Legal Philosophy of Leon Green, 56 Tex. L. Rev. 393, 430-34 (1978).
102. Johnson believes that the duty-risk approach should resolve many strict liability victim-fault issues. See Johnson, supra note 9, at 332, 336 n.66.
103. Johnson, supra note 9, at 324-25, 330-32, 334 n.57; see also Robertson, Comparative Negligence, 24 La. B.J. 180 (1976).
104. In most comparative fault jurisdictions, last clear chance has been abolished. See, e.g., French v. Grigsby, 571 S.W.2d 867 (Tex. 1978) (per curiam); Annot., 78 A.L.R. 3d 339 (1977); In two Louisiana comparative fault cases, last clear chance has been raised, but neither court found it necessary to address whether the doctrine is still valid. See Starks v. Kelly, 435 So. 2d 552, 556 (La. App. 1st Cir. 1983); Sampy v. Roy Young, Inc., 425 So. 2d 284, 286 (La. App. 3d Cir. 1982).
105. In Lombard v. Winn Dixie, Inc., 423 So. 2d 1281, 1282 (La. App. 4th Cir. 1982), the court appears to suggest that momentary forgetfulness might not survive in the comparative fault era.
106. Garsee v. Western Casualty & Sur. Co., 437 So. 2d 933, 936 (La. App. 2d Cir.), writ denied, 440 So. 2d 762 (La. 1983), seems to hold that the sudden emergency exception is still valid in comparative fault cases.
survive adoption of comparative fault legislation. They have no apparent virtue except to avoid the gross injustice frequently worked by applying the contributory negligence bar, and they have been notoriously unpredictable in their application. Professors Malone and Johnson would presumably not disagree with the prevailing view that the adoption of comparative fault should obviate the necessity for continuing to use such doctrinal and/or ad hoc approaches to forgive plaintiff negligence.

Alongside the foregoing approaches to avoiding contributory negligence in deserving cases, duty-risk approaches to the victim-fault problem also developed. One such approach was to conclude that the plaintiff's duty did not embrace the risk of the type of negligence of which the defendant was guilty. More frequently, the approach was to conclude that the defendant's duty did embrace the risk of the type of negligence of which the plaintiff was guilty. Whether the duty-risk avenue to forgiveness of victim negligence should remain open in a comparative fault system is the question under consideration. Examination of that question should begin with the realization that any of the devices for avoiding contributory negligence can without much difficulty be translated into a duty-risk articulation. For example, rather than stating that a defendant is liable to the negligent plaintiff because the defendant had the last clear chance, the judge could state that the duty defendant violated embraced the risk of the form of negligence of which the plaintiff was guilty. Plainly, retention of the duty-risk approach to victim negligence questions entails the likelihood of the survival of the (by hypothesis disapproved) avoidance doctrines under another name.

Furthermore, the duty-risk approach to forgiveness of victim fault had in its own right many of the demerits of the avoidance doctrines

108. See supra notes 103-06. Section 1 of the Uniform Comparative Fault Act attempts to abolish such devices: "This rule [reduction of damages based on plaintiff's degree of fault] applies whether or not under prior law the claimant's contributory fault constituted a defense or was disregarded under applicable legal doctrines, such as last clear chance." § 1(a), 12 U.L.A. 36 (Supp. 1979), reprinted in 40 LA. L. Rev. at 421.

109. In pure comparative fault systems, no good argument exists for retaining doctrines like last clear chance. In modified systems in which the plaintiff's negligence above a certain percentage continues to bar recovery, the matter is not as clear. Nevertheless, most of the modified systems that have considered the point, like the pure systems, have abolished devices like last clear chance.

110. See Johnson, supra note 9, at 325 n.27; see also Brantley v. Brown, 277 So. 2d 141 (La. 1973).

111. See Johnson, supra note 9, at 333-34 & n.57.

112. Johnson states that the last clear chance family of avoidance doctrines have in fact been largely subsumed under broad duty-risk principles and reasoning in the recent jurisprudence. Johnson, supra note 9, at 332.

113. In Pence v. Ketchum, 326 So. 2d 831 (La. 1976), the majority used last clear chance in favor of a negligent plaintiff, and Justice Dixon, concurring, used a duty-risk articulation. See Johnson, supra note 9, at 328-30.
like last clear chance. First, the duty-risk principles were like the doctrinal avoidance doctrines in that they could not change the all-or-nothing nature of the contributory negligence system. All that could be accomplished was to shift the entire loss from the plaintiff to the defendant, or to leave all of it on the plaintiff. It frequently does not seem very fair to do either. If possible, a legal system should avoid having to decide cases on the basis of determining which result is less unjust.\(^{114}\) Second, the duty-risk approaches to victim fault resembled the doctrinal avoidance doctrines in a fundamental unpredictability of application.\(^{115}\) Courts have frequently rejected the reasoning that a defendant’s duty should embrace the risk of the plaintiff’s negligence.\(^{116}\) Other courts, determined to forgive the plaintiff’s negligence, have resorted to the doctrinal devices like last clear chance, or to simply indicating that the plaintiff’s negligent conduct was not enough of a cause in fact to bar recovery.\(^{118}\)

Nor can it be answered that duty-risk reasoning is but the enunciation of the principle that lies behind the doctrinal avoidance devices. To a considerable degree, the application of duty-risk analysis to victim-fault issues has itself become "rulified." The process of turning general-principles reasoning into rules seems inevitable. Courts often seem to perceive Baumgartner\(^{119}\) as a rule: In an action against a negligent motorist, pedestrian negligence does not count.\(^{120}\) Other similar rules have emerged from duty-risk approaches, and some of them are quite implausible. For example, the idea seems to have developed that the inattentiveness of a customer who falls over an obstruction inside a store does not count.\(^{121}\)

\(^{114}\) See Kent v. Gulf States Utils. Co., 418 So. 2d 493, 500 n.10 (La. 1982).

\(^{115}\) Duty-risk reasoning developed in the present context precisely as a way of avoiding barring a plaintiff’s recovery under the contributory negligence doctrine in cases in which the court perceived that doctrine’s injustice as too harsh. See Bays v. Lee, 432 So. 2d 941, 943-45 (La. App. 4th Cir. 1983); Frain v. State Farm Ins. Co., 421 So. 2d 1169, 1173 (La. App. 2d Cir. 1982). Hence, it is not surprising that there has not been much uniformity of application. A fairly typical example of duty-risk reasoning on behalf of a negligent plaintiff is Berry v. City of Monroe, 439 So. 2d 465 (La. App. 2d Cir. 1983), in which a child who negligently ran into a pillar was forgiven. Compare Wilkinson v. Hartford Accident & Indem. Co., 411 So. 2d 22 (La. 1982), reversing the lower court’s contributing negligence finding on the facts.

\(^{116}\) For cases which distinguish the duty-risk cases and hold the plaintiff barred, see CNG Producing Co. v. Columbia Gas Transmission, 709 F.2d 959, 964 (5th Cir. 1983); Martin v. Louisiana Power & Light Co., 546 F. Supp. 780, 784-85 (E.D. La. 1982), aff’d, 719 F.2d 403 (5th Cir. 1983).

\(^{117}\) See Dofflemyer v. Gilley, 384 So. 2d 435, 439 (La. 1980).

\(^{118}\) See Payne v. Louisiana Dep’t of Transp. & Dev., 424 So. 2d 324, 329 (La. App. 1st Cir. 1982).

\(^{119}\) 356 So. 2d 400 (La. 1978).

\(^{120}\) See, e.g., Bays v. Lee, 432 So. 2d 941 (La. App. 4th Cir. 1983).

\(^{121}\) See Dulaney v. Travelers Ins. Co., 434 So. 2d 578, 582-83 (La. App. 1st Cir. 1983); Lombard v. Winn Dixie, Inc., 423 So. 2d 1281, 1282 (La. App. 4th Cir. 1982).
but the same inattentiveness in the parking lot bars or diminishes recovery.\textsuperscript{122}

The most important criticism of retention of the duty-risk approach to forgiving some victim fault is the potential confusion that will result in multiparty cases.\textsuperscript{123} Johnson furnishes an example of such confusion.\textsuperscript{124} Assume that Minor, hired by Employer to drive a truck in violation of a "child labor" statute, negligently collides with a negligent other Driver. (The example assumes workers' compensation law does not preclude a tort suit against Employer.) In Minor's tort action against Employer and Driver, the jury makes the following findings:

- Minor's total damages: $100,000
- Minor's negligence: 10%
- Employer's fault: 70%
- Driver's fault: 20%

Treated straightforwardly as a comparative fault case, the resolution is simple: Minor should recover $90,000, of which Employer should bear $70,000 and Driver $20,000.\textsuperscript{125}

But Johnson believes the judge should apply duty-risk reasoning to conclude that Minor's negligence should be forgiven in the action against Employer. By hypothesis, however, there is no reason for Minor's negligence not to count in the action against Driver. On those assumptions, Johnson posits several possible solutions: (1) Employer owes $100,000 and Driver owes nothing. The theory would be that Employer's statutory duty is so broad and stringent as to protect both Minor and Driver. Johnson rejects this solution as placing too many consequences within the scope of Employer's duty. (2) Minor should recover $98,000, of which Employer should bear $80,000 and Driver $18,000.\textsuperscript{126} The theory would be that Minor's 10% fault should be applied to reduce the $20,000 Driver would owe if the case were treated as a straightforward comparative fault case, without the duty-risk complication. Johnson does not say this, but note that this resolution entails the conclusion that the duty violated by Employer protects Driver to the tune of $2000.

\begin{itemize}
\item \textsuperscript{122} See Dulaney v. Travelers Ins. Co., 434 So. 2d 578, 582-83 (La. App. 1st Cir. 1983); Abraham v. Hanover Ins. Co., 420 So. 2d 520, 528-29 (La. App. 2d Cir. 1982).
\item \textsuperscript{123} See infra text accompanying notes 230-66 (designed as a full demonstration of that confusion).
\item \textsuperscript{124} Johnson, supra note 9, at 337 n.67.
\item \textsuperscript{125} The judgment should provide that Employer and Driver are solidarily liable to Minor for $90,000, and that they have contribution rights against each other such that Employer's ultimate share is $70,000 and Driver's is $20,000.
\item \textsuperscript{126} The judgment should provide that Employer and Driver are solidarily liable for $98,000, and that they have contribution rights against each other such that Employer's ultimate share is $80,000 and Driver's is $18,000.
\end{itemize}
Under Johnson's duty-risk assumptions, still other resolutions are possible. For example: (3) Minor should recover $100,000, of which Employer should bear $80,000 and Driver $20,000. The theory would be that Driver, being unafflicted by duty-risk complexities, should owe exactly what he would owe absent the duty-risk issue affecting Employer, and the Employer should owe the remainder of Minor's recoverable damages in order to reflect the decision that Minor's recovery against Employer is not diminished by Minor's negligence. (4) Minor should recover $100,000, of which Employer should bear $77,778 and Driver $22,222. The theory would be that Minor is entitled to his full $100,000, and that contribution rights between Employer and Driver should be worked out according to their degrees of fault as between themselves. As between Employer and Driver, the fault findings were 7/9 and 2/9. This solution is dubious because it has Driver owing more than he would absent the duty complication as between Employer and Minor. It cannot be the case that the duty Employer violated, is designed to penalize Driver, or that the duty Driver violated includes within its scope of protection the risk that Driver will encounter an illegally employed negligent Minor who is the beneficiary of someone else's duty that forgives the Minor's negligence.

Probably other solutions are imaginable. Obviously such complexity is undesirable. Johnson's own example illustrates that comparative fault will be unworkable in multiparty cases if judges must frequently determine that a particular party's fault counts as against some of the litigants but not others.

Several judges have suggested that these duty-risk approaches to victim fault should be jettisoned with the adoption of the comparative fault system. Others, influenced by the Johnson view and/or the argument that article 2323's "[w]hen contributory negligence is applicable" language means that all the old avoidance doctrines should persist, have indicated that duty-risk reasoning will sometimes continue to apply so as to forgive victim fault in comparative negligence cases. The latter suggestions seem

127. The judgment should be tailored along the lines suggested supra notes 125-26.
128. See supra note 127.
129. For explanation of why the judge should mathematically interpret, rather than slavishly follow, the jury-found percentages see infra note 235 and accompanying text.
131. See Starks v. Kelly, 435 So. 2d 552, 556 n.2 (La. App. 1st Cir. 1983) (apparent assumption that Baumgartner will continue to mean pedestrian negligence does not count in an action against a motorist); Dulaney v. Travelers Ins. Co., 434 So. 2d 578, 582-83 (La. App. 1st Cir 1983) (full discussion and approval of the Johnson view as applied to falls by store customers); Bays v. Lee, 432 So. 2d 941, 943-45 (La. App. 4th Cir. 1983) (full discussion and approval of the Johnson view and the article 2323 argument, holding that Baumgartner still forgives pedestrian negligence); Frain v. State Farm Ins. Co., 421
plainly wrong. In his dissent in *Bays v. Lee*, Judge Ward cogently stated the arguments for refusing to apply these duty-risk avoidance devices in comparative fault cases:

To say that *Baumgartner* is consistent with a duty-risk analysis is to say that a motorist has a duty to protect a pedestrian from his own carelessness, but a pedestrian has no duty to protect himself by not acting carelessly. . . . The safety of the public demands that both motorists and pedestrians share the responsibility to avoid accident or injury, and it is not inconsistent with duty-risk analysis for each of the parties to owe a duty.

. . . . I do not believe that the duty of a pedestrian to look out for his own safety is so miniscule as to be ignored.

. . . . It is inconsistent with any theory of comparative negligence to ignore the negligence of one of the parties.

Judge Ward’s view seems correct. To let the negligent victim go scot-free usually is neither fair nor sensible. And I believe it counts as an extremely telling argument against the Johnson view that, as his own example illustrates, the continued applicability of duty-risk approaches to victim fault will make many multiparty problems virtually insoluble.

B. Should Duty-Risk Reasoning Lead Courts to Conclude that Certain Instances of Victim Fault Entirely Defeat Recovery in Comparative Fault Cases?

The foregoing subsection of this article seeks to demonstrate why applying duty-risk reasoning to forgive certain instances of victim fault is both unnecessary and an affirmatively bad idea in a comparative fault system. The other prong of the Johnson view would use duty-risk reasoning to bar some plaintiffs entirely because of their fault. This subsection seeks to demonstrate why that is an even worse idea.

Barring injury victims because of their fault was the core meaning of contributory negligence. As a general proposition, the main idea of comparative fault is to abolish that feature of tort law. The question under discussion is whether courts should interpret the comparative fault legislation to effectuate that purpose, or whether exceptions to it, vestiges of the old system, should remain in place.

So. 2d 1169, 1172-84 (La. App. 2d Cir. 1982) (full discussion and approval of the Johnson view and suggestion that negligence of the decedent, emotionally disturbed borrower of the defendant’s automobile, would not reduce recovery in action by survivors for negligent loaning of auto).

132. 432 So. 2d 941 (La. App. 4th Cir. 1983).
133. *Id.* at 945-46 (Ward, J., dissenting).
I do not contend that Johnson's purpose is to cause judges to retain portions of the law of contributory negligence in the guise of duty-risk principles, only that such retention is a key effect of his view. Johnson's main concern is doctrinal integrity. His view is predicated on the belief that duty-risk reasoning beneficially enriches tort law by providing the courts a vehicle for articulating principled non-liability conclusions. The question is whether duty-risk reasoning is a useful vocabulary for that purpose. In considering this question, one must be careful to distinguish between appraisal of the justice of a particular outcome and evaluation of the usefulness and integrity of the doctrinal basis for that outcome. The Johnson view should be assessed from both perspectives. If the view points toward results of which most would approve, that is certainly a valid argument in its favor. On the other hand, if the favored results would almost certainly be achieved independently of the Johnson view (i.e., if plenty of doctrine already supports them), then Johnson may have proposed something that is at best unnecessary and at worst a potentially frustrating source of confusion and uncertainty.

Professor Johnson suggests several examples of cases for which he apparently believes duty-risk reasoning is the only or best way to achieve or articulate the desirable no-liability conclusion. Each of these cases should be examined to see whether applying duty-risk reasoning to the issue of victim fault is a necessary or useful way to achieve a desirable outcome.

In *Muse v. W.H. Patterson & Co.*, the plaintiff lost control of his vehicle after dropping both right wheels off the paved surface of the road onto the shoulder. The defendant, a highway contractor engaged in the paving work, was sued for negligence in not providing adequate warnings of the shoulder drop-off. The court concluded that the warnings provided were probably inadequate and that the defendant was probably negligent, but stated that the plaintiff's fault was "the sole proximate cause" of the accident. *Muse* is perhaps a cause-in-fact case. The plaintiff testified that he knew construction work was in progress and that the shoulders were low; the court stated that, given that

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134. See Johnson, supra note 9. Three of Johnson's examples of the utility of duty-risk reasoning for articulating no-liability conclusions did not involve victim-fault issues and will not be considered here. See Dunn v. Bolden, 372 So. 2d 785 (La. App. 2d Cir. 1979), discussed in Johnson, supra note 9, at 335 & n.61; Stigler v. Bell, 276 So. 2d 799 (La. App. 4th Cir. 1973), cited in Johnson, supra note 9, at 336 n.65; and Martin v. State Dept. of Hwys., 175 So. 2d 441 (La. App. 4th Cir. 1965), cited in Johnson, supra note 9, at 328 n.35.

135. 182 So. 2d 665 (La. App. 1st Cir. 1965), cited in Johnson, supra note 9, 328 n.35.

136. 182 So. 2d at 668, 670.

137. The pre-comparative fault jurisprudence is replete with "sole proximate cause" cases. See, e.g., Lemelle v. State, 435 So. 2d 1162 (La. App. 3d Cir. 1983); Ford v. Allstate Ins. Co., 434 So. 2d 559 (La. App. 4th Cir. 1983). What is usually meant is either simply contributory negligence, or no negligence of the defendant.
knowledge, a warning device would not have helped the plaintiff. More likely, *Muse* is a standard contributory negligence decision, and as such was arguably disapproved by the subsequent supreme court decision in *Rue v. State*. For present purposes, it is sufficient to note that *Muse* is neither an outcome that is intuitively and obviously correct in some important way nor a case in which comparative fault principles would compel a recovery. If *Muse* arose today and the court believed that the plaintiff's injuries would have been sustained had the defendant exercised reasonable care, the plaintiff's case would still fail on cause in fact. On the other hand, careful articulation of the problem as presenting a cause-in-fact issue would aid and sharpen the focus and the analysis, and would call for the court to consider whether an adequate warning might not have reminded and further alerted the plaintiff to the dangers of getting his wheels off the paved surface or to the lack of wisdom in trying to come back up on the paved surface without slowing greatly. In neither event would there be any virtue or necessity of saying that the plaintiff's own fault removed him from the scope of protection of the defendant's duty.

_Dartez v. City of Sulphur_ was a suit against the city by a sidewalk user who tripped on a piece of baling wire and fell across a bent parking meter post. The plaintiff sued the city for negligence in not repairing the meter post. The court concluded that the defendant was probably negligent and that his conduct was a cause in fact of the injuries. But the court denied recovery because defendant's conduct was not a legal cause of the harm. Judge Tate, writing for the majority, defined legal cause in duty-risk terms, and set forth several reasons why the plaintiff's injuries were not within the scope of protection of the defendant's duty to remove the bent post from sidewalk travel lanes. First, the plaintiff's fall resulted from the negligence of a third person in leaving baling wire in his path, not from the meter post. Second, the city's duty was designed to protect sidewalk users who needed the space occupied by the bent meter post for passage, not for falling free of the post so as to hit the sidewalk. The plaintiff was no more within the scope of protection of that duty

138. 182 So. 2d at 670.
139. 372 So. 2d 1197 (La. 1979).
140. 179 So. 2d 482 (La. App. 3d Cir. 1965), discussed in Johnson, supra note 9, at 335-36.
141. See supra note 80.
142. 179 So. 2d at 485. Compare Justice Tate's treatment of the "fault of a third person" defense in relational responsibility strict liability cases in Olsen v. Shell Oil Co., 365 So. 2d 1285, 1293-94 (La. 1978) ("The fault of a 'third person' which exonerates a person from his own obligation . . is that which is the sole cause of the damage, of the nature of an irresistible and unforeseeable occurrence—i.e., where the damage resulting has no causal relationship whatsoever to the fault of the [defendant] . . . .") (footnote omitted).
than would have been someone who fell from the second floor of a nearby building and happened to strike the meter post in falling. Finally, the court reasoned that the plaintiff passed the bent post several times a day to and from his home. Knowing that it was a hazard to passage, he simply went around it every time he passed. The evidence is clear that he would not have fallen onto the post had he not stumbled upon the nearby piece of wire.

. . . . [T]he duty to remove the bent post from travel lanes existed in order to prevent injury to those who might proceed into it unaware of its existence; not to prevent injury to those who fully aware of it might nevertheless happen to fall upon it.

Obviously, Judge Tate’s third point at most barely suggests a victim-fault issue. The other points contain no such suggestion. Ample duty-risk reasons clearly supported the no-liability conclusion independently of any consideration of the plaintiff’s prior knowledge of the bent post. Professor Johnson agrees that duty-risk reasoning is not confined to victim-fault issues. \textit{Dartez} would yield the same result today, without any necessity of addressing duty-risk reasoning to victim fault as such.

\textit{Cates v. Beauregard Electric Cooperative} is a well-known and controversial decision in which the supreme court upheld summary judgment on the basis of contributory negligence against a sixteen-year-old boy who climbed a twenty-nine-foot pole and came into contact with the defendant’s electric line, carrying 7620 useless volts and leading nowhere. Johnson suggests that the decision can best be justified as concluding that the plaintiff’s wrongful conduct took him out of the scope of the defendant’s duty. I disagree. \textit{Cates} appears to be an unfortunate application

\begin{itemize}
\item \textit{Id.} Judge Tate’s reasoning at this point is consistent with my view, explained infra notes 197-211 and accompanying text, that one can often isolate the victim-fault issue from issues pertinent to the case in chief by hypothesizing a relevant fault-free victim or by analogizing the plaintiff to a relevant fault-free victim.
\item 179 So. 2d at 483-85.
\item 146. Johnson, \textit{supra} note 9, at 327 n.32; see also \textit{supra} notes 79-83 and accompanying text. 147. 328 So. 2d 367 (La.), \textit{cert. denied}, 429 U.S. 833 (1976), \textit{discussed in} Johnson, \textit{supra} note 9, at 330.
\item 148. Justice Tate, dissenting in \textit{Cates}, pointed out several ways of avoiding the application of the contributory negligence bar against the plaintiff, including labelling the defendant as grossly negligent and invoking the standard “gross or aggravated negligence” exception to contributory negligence. He also suggested that the injuries were not within the scope of the plaintiff’s duty. 328 So. 2d at 372 (Tate, J., dissenting)
\item 149. \textit{Cates} involved a landowner defendant as well as the main defendant, the power company. The line had once led to the landowner’s farmhouse, which had long since been abandoned. Exoneration of the landowner might be seen as consistent with the recent deci-
of contributory negligence at its worst. It is certainly the kind of case that comparative fault was designed to cure. Addressing a very similar problem in Kent v. Gulf States Utilities Co., Justice Lemmon recently expressed his relief that comparative fault will avoid the necessity of such harsh determinations.

The plaintiff in Richards v. Marlow was a thirteen-year-old girl who slipped while trying to "tightrope" a horizontal pipe that was part of the substructure of the defendants' pier. The decking of the pier had washed away several years before the accident. The court held that the plaintiff was barred by contributory negligence and assumption of risk. The trial court had found the pier unreasonably dangerous, but the appellate court's disposition made it unnecessary to address the correctness of that conclusion. Assuming the trial court was correct, Richards is a case that ought to turn out differently in a comparative fault system. If the decrepit pier was dangerous at all, one of the central risks was injuries to children, whose frequent presence in the area was known to the defendants. Thus, it is difficult to view Richards as a case in which duty-risk reasoning should exonerate the defendants.

Johnson's final example of a case in which duty-risk reasoning should wholly exonerate defendant is a hypothetical rather than a reported decision.

Consider the situation of a grocery-store operator and his patrons. There is certainly a non-statutory duty imposed on the operator to keep his aisles reasonably clear of obstructions such as boxes, displays, and foreign objects. Suppose that he has done so and has only an occasional overflow box or display well against the side of the aisle so as to present no hazard to the ordinary shopper. But suppose that a patron, finishing an animated conversation with another shopper, is taking a few steps backward down the aisle and falls over the box. Should it not be said that although the operator has a duty to protect his patrons, he has no duty to protect this particular patron against the product of his own conduct?
My answer is no. If the court feels that the obstruction presented no foreseeable hazard to aisle-users, what should be said is that the defendant was not negligent. However, if the defendant was negligent, that would be so precisely because of the risk that some patron would manage not to look where he was going even on the side of the aisle, and it would be improper to conclude that merely walking backward should take the plaintiff out of the class of protected persons. This hypothetical, in fact, well illustrates the reasons for excluding duty-risk reasoning from the focus on the victim's fault as such. If the defendant owes a duty to any shopper not to have the obstruction where it was, then a trip by a backward-walking shopper is not outside the scope of that duty. This shopper is not Judge Tate's unexpected faller from the sky; he is just another shopper, at fault in a somewhat unusual way, but certainly not completely outside the range of protected victims or risks. His fault should diminish, not bar, his recovery.

The foregoing examples do not demonstrate any need for duty-risk reasoning to be applied to the victim-fault issue in order to provide the courts a means of articulating desirable and principled results. In each case in which judgment for the defendant seems justified, ample doctrine exists to facilitate and explain that conclusion, without any necessity of stating that the plaintiff's fault removed him from the scope of protection of the defendant's duty. The legitimate reasons for non-liability in these cases are more straightforward, less abstract, closer to the facts, and more suitable for alerting and focusing counsel in future cases on the kinds of facts that matter. In appropriate cases, for example, the courts may conclude that the defendant's conduct was not a cause in fact of the harm (e.g., Muse), or that the defendant was not negligent, or that the accident was the product of fault of a third person that outweighed and eclipsed the defendant's relatively minuscule fault (e.g., Dartez).

Further, legitimate duty-risk reasoning should continue to be available when focused on factors other than victim fault. Forsaking the habit of applying duty-risk reasoning to the issue of victim fault would not entail forsaking the duty-risk analysis itself. As Judge Tate indicated in Dartez, a court may quite legitimately conclude that the accident was not within the scope of the defendant's duty. This conclusion, however, was not and should not be based upon the plaintiff's fault having taken him outside the scope of protection of the defendant's duty. Rather, it should be based on general duty-risk reasoning of a type recognized and approved by Johnson. In Dartez, the accident was beyond the scope of the defendant's duty because the court felt that the plaintiff might as well have

155. See supra notes 135-39 and accompanying text.
156. See supra notes 140-46 and accompanying text.
157. Id.
158. Johnson, supra note 9, at 327 n.32.
fallen from the sky; pedestrians falling on that bent parking meter were simply not foreseeable. The plaintiff in *Dartez* failed to recover, and would still fail to recover in a comparative fault case, because he was in essence the “unforeseeable plaintiff” so well known to tort law. The duty-risk reasons for denying recovery had little if anything to do with the victim’s fault.

Thus, ample doctrine is available to argue for and articulate the no-liability conclusion in all of the examples considered in which that conclusion seems correct. It is certainly true that the facts of some of the foregoing cases do not seem to allow for the persuasive articulation of a no-liability conclusion on any other basis than the fault of the victim. When that is true, it is because the only remaining potential obstacle to recovery is the fault of the victim. In such cases, recovery should be granted. Comparative fault should be allowed to do its intended work.

If duty-risk reasoning need not be applied to the victim-fault issue in order to provide the courts with sufficient doctrine to reach and articulate just results, then such reasoning should be avoided. Several reasons support this conclusion. In the first place, too much doctrine is a hindrance to the proper operation of the injuries litigation system. It increases the potential for confusion, multiplies litigation points, and obfuscates the necessary inquiry by counsel and court into the facts that matter. Further, in this context, the duty-risk approach is not a precise or evocative tool. It is too open-ended, too general, and too unpredictable in its operation. For example, as acknowledged by Professor Johnson, the defense of assumption of risk is easily translated into a statement that the plaintiff’s conduct removed him from the scope of protection of defendant’s duty. Indeed, duty-risk reasoning closely resembles the “undif-

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160. The *Dartez* duty-risk reasoning is reminiscent of *Hill v. Lundin & Assocs., Inc.*, 260 La. 542, 256 So. 2d 620 (1972), in which the court concluded that the defendant’s duty encompassed risks created by ladders as vertical objects of danger but not as horizontal objects of danger. See generally Robertson, *supra* note 79. In *Dartez*, the defendant’s fault created a protected risk of impact with the meter post from the horizontal, but not from the vertical. The *Hill* and *Dartez* cases take a narrow view of the scope of protection of the duties involved in those cases, and there would be nothing importantly wrong about the cases turning out the other way. The important present point, however, is that if *Dartez* arose today, and the court was in fact entirely satisfied with its duty-risk analysis, the same outcome should be obtained. If, on the other hand, victim fault was in fact a subliminal influence in the case, it should be surfaced and quantified. Submerging victim fault into the array of considerations that have traditionally removed injuries from the scope of protection of the defendant’s duty is detrimental to clarity of analysis, because it fails to insist upon or point toward criteria of general application that would distinguish those faulty plaintiffs who should lose outright from those who should merely have their recoveries reduced.

163. For discussion of assumption of risk, see *infra* text accompanying notes 169-86.
differentiated concept of assumption of risk in that it fails to delineate between the types of conduct which will defeat recovery and those which will merely reduce it. When a court states that a plaintiff loses because he assumed the risk, or that he loses because his conduct removed him from the scope of protection of the defendant’s duty, all we really know is that the plaintiff lost the case. I would subject duty-risk reasoning as applied to the question whether victim fault removes the plaintiff from the reach of the defendant’s duty to the same kinds of criticisms so frequently levelled by eminent torts scholars at assumption of risk: It is “obfuscatory”; it does not reveal its criteria for application; it makes it possible for the court to cherish the illusion that it has taken the easy way out.” Such a doctrine “may either prevent an accurate analysis by the court of the real problems involved in reaching the decision, or permit the court to write an opinion which elides or covers up the real basis of the decision.”

The foregoing criticisms of permitting courts to state that the defendant is not liable because the plaintiff’s fault removed him from the protection of the defendant’s duty seem apt. But even if these criticisms are wrong, the application of duty-risk reasoning to the victim-fault issues clearly makes multiparty cases too difficult. That criticism alone should suffice to carry the argument.

C. Assumption of Risk

In the torts literature generally, much has been made of the fact that assumption of risk has many meanings. The term has sometimes meant express consent, manifested before the injury (waiver, release) or after it (settlement, receipt and release). It has also been used to mean implied consent through consensual arrangement or through conduct (old landlord-tenant, employer-employee, landowner-invitee cases); the absence of any duty owed by defendant (old land occupier-licensee cases, land occupier-trespasser cases); or the absence of defendant negligence (the “ballpark cases”). Most often, however, assumption of risk denotes a particular form of victim negligence, i.e., proceeding unreasonably in the face of a known danger.

Even as a matter of abstract analysis, any attempt to separate meanings (2) through (4) is hopeless. Further, in practice the pre-comparative fault courts had no meaningful impulse to distinguish among meanings

167. See Wade, supra note 165, at 15.
168. See infra text accompanying notes 230-66.
(2) through (5). In a pre-comparative fault system, the effect of assumption of risk in any of the above forms was the same: plaintiff was denied recovery. That neither the courts nor the commentators succeeded in achieving much clarification is therefore not surprising.

In a comparative fault system, however, clarification is required. Essential clarification includes deciding which forms of assumption of risk "really" denoted victim fault as a bar to recovery, and whether all victim fault is to be quantified so as to reduce rather than bar recovery. When assumption of risk signals something other than victim fault (i.e., some defect in the plaintiff's case in chief), a further and highly desirable clarification would result from abolition of the term assumption of risk in favor of a more precise description of the particular problem (e.g., the defendant was entitled to rely on plaintiff's express consent to the conduct in question).

The vast majority of assumption of risk cases involve nothing more than a particular form of plaintiff negligence. In the Louisiana jurisprudence, assumption of risk has repeatedly been defined as follows: "It is fundamental that, in order to assume a risk, one must knowingly and voluntarily encounter a risk which caused him harm. Plaintiff must understand and appreciate the risk involved and must accept the risk as well as the inherent possibility of danger because of the risk." That form of victim fault has traditionally barred recovery, in both negligence and strict liability cases. It operated as an affirmative defense, which defendant must plead and prove.

The comparative fault adoption should be interpreted to abolish this form of assumption of risk as a bar to recovery. Most comparative

171. See generally Symposium, supra note 169.
172. See also infra notes 189-211 and accompanying text.
173. See generally Symposium, supra note 169.
174. See Dofflemeyer v. Gilley, 384 So. 2d 435, 438 (La. 1980), and cases cited therein.
176. Occasional cases have suggested that assumption of risk as defined above is a negation of the defendant's duty. In Dorry v. LaFleur, 399 So. 2d 559, 561 (La. 1981), the court stated: "As used here, assumption of risk does not merely bar plaintiff from recovery; rather it says in effect that because of a relationship voluntarily engaged by plaintiff, as to him the defendant has done nothing wrong." In a pre-comparative fault system—in which the affirmative defense of assumption of risk bars recovery—such reasoning is entirely circular unless intended to suggest that the burden of pleading and proof on the assumed risk issue has been shifted to the plaintiff. The courts never seem to mean that. The idea that the defendant owes no duty to one who assumes the risk should not survive in a comparative fault system for the same reason that duty-risk articulations that the defendant's duty does not protect the negligent victim should not survive: Both would be potentially arbitrary and ad hoc judicial exceptions to the effects of comparative fault.
177. It is hoped that the supreme court will so state in its response to the certification in Bell v. Jet Wheel Blast, 717 F.2d 181 (5th Cir. 1983). See supra notes 59-62 and accompanying text.
fault jurisdictions are moving in that direction.\textsuperscript{178} This movement is a desirable development because the distinction between assumption of risk and contributory negligence is notoriously obscure;\textsuperscript{179} because the courts have often found ways to avoid barring plaintiffs who from all appearances did assume the risk,\textsuperscript{180} thus importing an undesirable unpredictability into the jurisprudence; because victims who proceed in the face of a known danger may frequently be less blameworthy than victims who fail to discover the danger; and because resolution of complex multiparty cases in a comparative fault system is made too difficult by retention of victim-fault defenses that bar recovery.\textsuperscript{181}

I have found no Louisiana decisions addressing the status of the assumption of risk defense under comparative fault. The only agreeable resolution is abolition of assumed risk as a defense separate from comparative fault, and provision for quantifying the degree of fault attributable to the plaintiff’s proceeding in the face of a known danger so as to diminish but not bar recovery. In a case presently before the supreme court on proposed certification,\textsuperscript{182} it will not be a useful outcome for the court to answer that contributory negligence mitigates damages in products liability actions unless the court at the same time deals with assumed risk. The court should interpret the terms “contributory negligence” and “negligence” in Civil Code article 2323 generically rather than as narrow

\textsuperscript{178} See Farley v. M M Cattle Co., 529 S.W.2d 751 (Tex. 1975); Annot., 16 A.L.R. 4th 700 (1982).

\textsuperscript{179} The traditional effort at maintaining that distinction has been insistence that assumption of risk inquires into the plaintiff’s subjective awareness of the danger, whereas contributory negligence is an objective inquiry. See, e.g., Langlois v. Allied Chem. Corp., 258 La. 1067, 1088-89, 249 So. 2d 133, 141 (1971). The effort does not succeed, as suggested by the discussion in Dorry v. LaFleur, 399 So. 2d 559, 562-63 (La. 1981), as to whether an objective “should have known” element has crept into the recent assumption of risk decisions.


\textsuperscript{181} Other defenses exist to certain types of injury cases that, like assumed risk, occasioned are articulated as limits upon the defendant’s duty rather than as affirmative victim-fault defenses. See infra notes 188, 199-201 and accompanying text. These doctrines should likewise be abandoned. For example, courts have said that the products liability defense of “misuse” really means that the product defendant owes the plaintiff no duty because the product is not required to be designed, manufactured, and marketed so as to be reasonably safe in such use. See, e.g., Jones v. Menard, 559 F.2d 1282, 1285 n.4 (5th Cir. 1977). In other words, misuse is not an affirmative defense at all, but is rather a negation of the “product in normal use” element of the plaintiff’s case in chief in strict products liability cases. That usage of the “misuse” term can be abandoned without any loss to the body of useful doctrine. The courts can simply say that the plaintiff failed to show that the product was dangerous in normal use. If the court cannot plausibly so state on the facts before it, then the defendant should be liable, and the plaintiff’s recovery should be reduced by the percentage of fault found against him. Misuse, like assumption of risk, should never function as a victim-fault affirmative defense that bars recovery.

\textsuperscript{182} See supra notes 59-61 and accompanying text.
doctrinal categories, recognizing that assumption of risk in its standard use merely denotes a particularized form of plaintiff negligence. 183

The recent court of appeal decisions indicating sympathy for or acceptance of the Johnson view 184 should also be scrutinized by the supreme court. While the Johnson view does not frontally assert that assumption of risk should be retained as an affirmative defense, 185 retention is unavoidably implicated: Stating that the plaintiff who proceeded unreasonably in the face of a known danger is beyond the scope of protection of the defendant's duty 186 is precisely equivalent to stating that the plaintiff is barred because he assumed the risk. If one is convinced that retention of all-or-nothing affirmative defenses like assumption of risk seriously detracts from the rational operation of a comparative fault system, then the Johnson view should be rejected.

D. Necessity of Distinguishing Between "Affirmative Defenses" and "Defensive Doctrines"

Running through the foregoing criticisms of the Johnson view is the assertion that the view contributes to obscuring a necessary distinction between affirmative defenses and defensive doctrines. This matter must now be addressed frontally.

Any plaintiff in a tort suit must establish certain elements in order to recover. The standard elements of the plaintiff's case in chief are: (1) the existence of a duty owed by the defendant; (2) breach of that duty; (3) that the plaintiff's injury was within the duty's scope of protection; (4) that the defendant's conduct was a cause in fact of the harm. Except for certain intentional torts permitting recovery of nominal damages, the plaintiff must also establish the existence and amount of his damages. 187

183. The commentators addressing the question whether Civil Code article 2323 can be read to permit quantification of forms of victim fault other than traditional "contributory negligence" have split. Professor Wade believes that such a reading is possible. Wade, supra note 28, at 313-14. Professor Chamallas disagrees. Chamallas, supra note 9, at 375 n.5. However, neither commentator analyzes the point.
184. See supra notes 130-33 and accompanying text.
185. But cf. Johnson, supra note 9, at 336 n.65.
186. See id. at 336-37.
187. The elements set forth in the text apply to intentional tort and strict liability cases as well as negligence cases, the only difference being that those bodies of law have "captured" the elements in various statements of doctrine. For example, the scope of protection issue in intentional torts is usually handled by the "transferred intent" fiction.

Stating that the plaintiff must establish these elements implies that he must plead and prove them. However, it is obvious that in many cases, the existence of several of the elements will not rise to the stature of a contested issue. Consider, for example, the case set forth in the Federal Rules of Civil Procedure's Form 9. 28 U.S.C. App. of Forms (1982). The form of complaint recommended in that Official Form states that the plaintiff was crossing a public highway when injured in specified ways by the defendant's negligent operation of an automobile. That statement adequately pleads existence of duty, scope of protection of
The defendant can defeat the plaintiff's recovery by negating any one of the requisites of the case in chief. Frequently the attempted negation takes the form of invoking a defensive doctrine. The term defensive doctrine refers to any matter which the defendant can raise to rebut one or more of the elements of the plaintiff's case in chief. In negligence litigation, an example of a defensive doctrine is "unavoidable accident," which can negate the element of breach of duty. In products liability litigation, an example of a defensive doctrine is "misuse," which can negate the elements of the existence of duty or causation. 184

The defendant can also defeat the plaintiff's recovery by establishing the elements of an affirmative defense. The term affirmative defense refers to any matter which, if properly pleaded and proved by the defendant, will defeat the plaintiff's recovery despite the strength of the plaintiff's case in chief. The standard examples of affirmative defenses were contributory negligence and assumption of risk.

In a system in which the affirmative defenses operate to bar recovery, courts frequently have no reason to distinguish between affirmative defenses and defensive doctrines. Unless the particular litigation raises a difficulty respecting which party has the burden of pleading and proving the matter, the distinction need not be made. 189 Professor Johnson is accurate and insightful in pointing out that many of the early contributory negligence cases are decided in such a way as to leave entirely unclear whether the court thought the defendant's duty was negated by victim fault, or whether victim fault was operating as an affirmative defense. 190

Hence, confusion as to the distinction between defensive doctrines and affirmative defenses might be said to be endemic to the pre-comparative fault jurisprudence. In a comparative fault system, however, erstwhile contributory negligence has a new effect: It does not defeat but only reduces recovery. Hence, it is now necessary to distinguish that affirmative defense from a defensive doctrine such as Johnson's no-duty approach, because the effects are now different. Furthermore, all comparative fault adoptions raise questions respecting how other victim-fault doctrines—treated in the former jurisprudence almost willy-nilly, sometimes as defensive doctrines and sometimes as affirmative defenses—should be treated. The problem is how to distinguish those applications of the doc-

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188. See Jones v. Menard, 559 F.2d 1282, 1285 n.4 (5th Cir. 1977).
189. Professor Johnson appears to acknowledge that his recommendations have the effect of transmuting affirmative defenses into defensive doctrines, and that one logical consequence of that transmutation might be a shifting of the burden of proof. He deals with that problem by stating that he does not mean for the burden to shift. Johnson, supra note 9, at 331 n.44; see also supra note 88.
190. See Johnson, supra note 9, at 319-23; see also Annot., 78 A.L.R. 3d 339, 345 (1977).
trines which should only diminish recovery from those which should defeat recovery.

One context in which it is easy to see the necessity for distinguishing between affirmative defenses and defensive doctrines is the case in which the principal allegation of fault against the defendant is failure to warn of the danger that befell the plaintiff. In such a case, the defendant will usually seek to show that the plaintiff either had or should have had the requisite knowledge on his own. In a comparative fault system, should such a showing defeat or only diminish recovery? If the plaintiff's knowledge (or faulty failure to acquire knowledge) negates any element of the case in chief, recovery will be defeated. On the other hand, if the plaintiff's knowledge or faulty failure to acquire knowledge is treated as an affirmative defense, such fault will be quantified and reduce but not eliminate recovery.

No clear approach has emerged in the jurisprudence. Many decisions suggest that a showing that the plaintiff knew or should have known of the danger means that the defendant owed no duty, or breached no duty, or that the defendant's conduct was not a cause in fact of the injuries. Under that analysis, the result, no liability, would be the same under comparative fault as under the previous system. However, other cases indicate that a plaintiff who knew or should have known of the danger "would have shared the fault" of the defendant. Under this analysis, the plaintiff's recovery would be diminished but not defeated. No case has focused squarely on the question. It is not unusual for courts to use the plaintiff's knowledge (or faulty failure to acquire knowledge) as both a defensive doctrine and an affirmative defense within the same case.


192. Chappuis v. Sears Roebuck & Co., 358 So. 2d 926 (La. 1978), was a pre-comparative fault case in which the court stated that such a plaintiff would have shared the defendant's fault "and could not recover." Id. at 930. Jowers v. Commercial Union Ins. Co., 435 So. 2d 575 (La. App. 3d Cir. 1983), was a comparative fault case in which the court cited Chappuis for the proposition that a plaintiff who knew or should have known of the danger would share the defendant's fault, id. at 579, but significantly omitted the Chappuis indication that such a plaintiff could not recover.

193. See, e.g., LeBlanc v. Wall, 430 So. 2d 1130, 1132-34 (La. App. 1st Cir.), cert. denied, 438 So. 2d 571 (La. 1983); Lovell v. Earl Grissmer Co., 422 So. 2d 1344, 1350-53 (La. App. 1st Cir. 1982), writ denied, 427 So. 2d 871 (La. 1983); Sumner v. Foremost Ins. Co., 417 So. 2d 1327, 1331-34 (La. App. 3d Cir. 1983). The Lovell court also suggested that "[i]nasmuch as comparative negligence is a doctrine intended to ameliorate some of the inequities in the present system of tort law, a failure to apply the doctrine across the board in strict liability cases would be enigmatic." 422 So. 2d at 1352, n.4.
Many of the pre-comparative fault cases in which the plaintiff’s knowledge or faulty failure to acquire knowledge defeated recovery would doubtless turn out the same way under comparative fault, because the bottom line in such cases is actually the court’s perception that the defendant was guilty of no actionable fault. But closer analysis is required by the comparative fault legislation. Peyton v. Bogan\textsuperscript{194} presents a useful example of the problem, and its facts suggest a potential solution. Several men, including the plaintiff, an experienced mechanic, were helping the defendant get his car started. Somehow the plaintiff’s finger was amputated by the fan blade or belt. He alleged that the defendant was negligent in trying to start the engine while the plaintiff had his hand on or near the fan. A key fact was that, when the defendant tried to start the car on instructions from another of the helpers, everyone was clear of the engine; however, “in the brief interval between the instruction and defendant’s attempt to start the engine, [plaintiff] stepped forward and placed his right hand near the alternator belt.”\textsuperscript{195}

The Peyton court denied recovery and provided an explanation that seems to invoke virtually every available defensive doctrine and affirmative defense.

In considering a defendant’s duty to a particular person consideration should be given to the latter’s age, maturity, experience, familiarity with the danger and other such factors. . . .

The record shows that [plaintiff] is an experienced and knowledgeable mechanic. As such he must have been fully aware of the danger presented by moving engine parts. A person of [plaintiff’s] age and experience did not need a warning of the danger with which he was already fully familiar. [Plaintiff not within the scope of protection of defendant’s duty? Defendant’s conduct not a cause in fact of plaintiff’s injury?] Defendant’s duty to [plaintiff] could be fulfilled by providing notice of when the danger would be present, that is, when he would attempt to start the car.

The defendant was assisted by Curry White in attempting to start the car. White, who stood by the engine, instructed defendant when to attempt to start the engine. White gave this instruction only when all were clear of the engine. The instructions by White also served as notice to the others present of when defendant would attempt to start the car.

In enlisting the assistance of White, who was outside the car and could determine when it would be safe to start the engine, defendant fulfilled the duty of care he owed to plaintiff. [Defen-

\textsuperscript{194} 434 So. 2d 540 (La. App. 2d Cir. 1983).
\textsuperscript{195} Id. at 541.
When White instructed defendant to "try it" and, thus, gave notice that the car was about to be started, all were clear. The plaintiff placed his hand in a position to be injured only because he ignored the notice or did not hear what all the others did hear, and what he should have heard. [Plaintiff's fault bars recovery?]

The defendant breached no duty owed to plaintiff to protect against the injury suffered. [No negligence? Plaintiff's injury not within duty's scope of protection?] Defendants are not liable for injuries caused by [plaintiff's] failure to hear what he should have heard or his disregard of it. [Plaintiff's fault bars recovery?] The district judge properly found that defendant was not negligent.

On the facts found, Peyton seems correctly decided. The analytical problem is created by the victim-fault language in the opinion. As the case was actually decided, the fact that the plaintiff was an experienced mechanic seems irrelevant. The nub of the decision is that the defendant did nothing wrong: a warning sufficient to the group of helpers was provided. The defendant would not have been liable to any of the other men either. (If there had been a child or a mentally deficient person in the crowd, the defendant might have been found negligent in not affording that person a special warning if he knew or should have known of the foreseeability of foolishness on that person's part.) The Peyton facts suggest a useful approach to the defensive doctrine versus affirmative defense distinction: On otherwise identical facts, would a fault-free victim be entitled to recovery? If not, the plaintiff's case in chief contains a fatal flaw. If so, the plaintiff's fault should be quantified and reduce, but not bar, recovery.

The problem under discussion and the suggested solution transcend the failure-to-warn cases. The problem is largely one of a pre-comparative fault vocabulary that wove considerations of victim fault throughout the elements of the case in chief and the affirmative defenses. Examples include statements that the plaintiff's negligence was the sole proximate cause of the injuries; applying duty-risk reasoning to conclude that the plain-

196. Id. at 542-43 (citation & footnote omitted).
197. That one can sensibly posit otherwise identical facts—i.e., isolate the faulty character of the victim's conduct from all other factors in the case—is the thrust of the Uniform Comparative Fault Act approach to the problem under consideration. See infra text accompanying notes 202-04. The approach is also suggested by Judge Tate's opinion in Dartez v. City of Sulphur, 179 So. 2d 482 (La. App. 3d Cir. 1965). See supra note 144 and accompanying text. The approach is implicated in the opinions of Justices Watson, Entrevia v. Hood, 427 So. 2d 1146 (La. 1983), and Lemmon, Kent v. Gulf States Utils. Co., 418 So. 2d 493 (La. 1982). See infra notes 205-09 and accompanying text; see also infra text accompanying note 211.
tiff's fault removed him from the scope of protection of the defendant's duty; treatments of the plaintiff's "misuse" of a product without clarifying whether misuse is a victim-fault affirmative defense or a negation of an element of the case in chief; and treatments of "assumption of risk" that fail to clarify whether it is a victim-fault affirmative defense or a negation of an element of the case in chief. Professor John Wade's discussion of the Louisiana comparative fault legislation states the difficulty as follows:

What about other forms of plaintiff's fault, such as assumption of risk, misuse of a product, or avoidable consequences? These concepts raise difficult problems of verbalization since the terms cover various meanings in different situations, such as plaintiff's fault, consent to the conduct, lack of duty or breach of duty on the part of the defendant, or lack of proximate cause.

Wade also suggests an approach to a solution:

Reduction of damages for comparative fault should be confined to the meaning of those terms involving plaintiff's fault and should not apply to the others. The problem is how to say this clearly. The Louisiana provisions resolve the problem by ignoring it and leaving it for the courts to solve without direction. The Uniform [Comparative Fault] Act meets the problem by saying in section 1(b) that the Act covers and includes "unreasonable assumption of risk not constituting an enforceable express consent, misuse of a product for which the defendant otherwise would be liable, and unreasonable failure to avoid an injury or to mitigate damages." The language may perhaps be improved upon, but it at least gives the court useful guidance. Failure to make provi-

199. In Martin v. Louisiana Power & Light Co., 546 F. Supp. 780, 784-85 (E.D. La. 1982), aff'd, 719 F.2d 403 (5th Cir. 1983), the court held that the plaintiff's fault removed him from the scope of the defendant's duty, and then translated that into a statement that the plaintiff's fault was the sole proximate cause of the injuries.


sion has given some other states considerable trouble and the Louisiana legislature should seriously consider the matter.\footnote{Id. at 313-14.}

The Wade/Uniform Act suggestion is similar to the one asserted by this writer: if the defendant would "otherwise" (i.e., otherwise than victim fault) be liable, then he is liable, and the plaintiff's fault diminishes recovery.\footnote{See supra note 197.}

The suggested analysis is compatible with important language in two recent supreme court decisions. In \textit{Entrevia v. Hood},\footnote{427 So. 2d 1146 (La. 1983).} the plaintiff, an adult trespasser, fell through the rotten steps of the defendant's dilapidated vacant rural house. The house was fenced and posted with "no trespassing" signs. Recovery was denied on the conclusion that the defendant's property presented no unreasonable risk of harm. Justice Watson's concurring opinion notes the difficulty:

Clearly, the building was a "ruin." As such, it had little utility and it was likely that children, tramps or others straying on the premises might be injured. The owner could not reasonably be required to destroy or restore his rural ruin. Faced with the owner's reasonableness and an unsympathetic plaintiff, the majority solves the dilemma by finding no unreasonable risk of injury. This conclusion is questionable. If a small child were the "trespasser", would not an unreasonable risk of harm be found? However, the majority reaches a correct result. Plaintiff was at fault. Ignoring the fence and sign, she elected to enter an obviously unsafe structure and to walk on some dilapidated steps. ... Plaintiff assumed the risk of her injury and is barred from recovery by her victim fault.\footnote{Id. at 1151 (Watson, J., concurring) (footnote omitted).}

Justice Watson's analysis is persuasive. It means \textit{Entrevia} should have a different outcome under comparative fault. On the hypothesis that the defendant would have been in violation of a duty to an innocent victim such as a child, the \textit{Entrevia} plaintiff lost because of her own fault. Victim fault should no longer figure into the elements of the case in chief: it should be treated as a recovery-reduction affirmative defense.

The supreme court in \textit{Kent v. Gulf States Utilities Co.}\footnote{418 So. 2d 493 (La. 1982).} denied recovery for an electrocution death on the theory that the defendant's power lines did not present an unreasonable risk of harm. Justice Lemmon's opinion for the court viewed the issue as requiring balancing the respective duties and conduct of the various involved entities, including the decedent. Justice Lemmon added what amounts to a special concurrence:

203. \textit{Id.} at 313-14.
204. See supra note 197.
205. 427 So. 2d 1146 (La. 1983).
206. \textit{Id.} at 1151 (Watson, J., concurring) (footnote omitted).
207. 418 So. 2d 493 (La. 1982).
As between Gulf States [defendant] and Kent [decedent], the analysis of the comparative duties and conduct is particularly difficult in a setting in which the fault of one gives rise to total liability and the fault of the other totally bars recovery. To make such an abrupt cut-off, Gulf States’ duty (on which its fault is measured) must be deemed to begin at roughly the same point where Kent’s duty ends, and this solution is neither practical nor conceptually possible.

Substantial justice can only be accomplished by quantifying the fault of each party and assigning proportionate responsibility for the occurrence. Since the Legislature had not yet adopted a comparative fault system when this accident occurred, and since this court has previously been disinclined to recognize this system judicially, this case must be decided under the recognized deficiencies of an all-or-nothing system.

Justice Lemmon seems to be saying that comparative fault is a great improvement because it avoids the necessity of treating victim-fault questions as part and parcel of determining the defendant’s duty.

At least as viewed by Justices Watson and Lemmon, Entrevia and Kent are decisions in which victim fault negated liability. Under that view, the decisions are (pre-comparative fault) applications of the Johnson view. (For present purposes it is not important whether the no-liability conclusion is stated in terms of breach of duty or scope of protection of duty. The important distinction is between using the plaintiff’s fault as a determinant of one or more of the elements of the case in chief and refusing to do so.) Such cases should turn out differently in a comparative fault system. Comparative fault will not work properly unless the courts are careful not to weave victim-fault considerations into the case in chief. Justices Watson and Lemmon seem sensitive to this necessity.

To recapitulate: In a comparative fault case, the fault of the victim should be relevant solely as an affirmative defense. It should not negate the existence of any element of the case in chief; victim-fault issues should not be intermingled with defendant-fault issues. If the defendant would be liable to a fault-free and otherwise identically situated victim, then he should also be liable to the faulty plaintiff, whose recovery would be reduced by his percentage of fault. The analysis is workable. The facts of Oliver v. Aminoil, USA are illustrative. An experienced offshore welder rested part of his weight on a light fixture which collapsed, and

208. Id. at 500 n.10.
209. See also Jenkins v. St. Paul Fire & Marine Ins. Co., 422 So. 2d 1109, 1113 & n.7 (La. 1982) (Justice Lemmon writing for the court that comparative fault will avoid the necessity of inquiring whether the defendant’s duty so thoroughly embraces the risk of the plaintiff’s fault that the plaintiff’s fault should be forgiven).
210. See supra note 88.
211. 662 F.2d 349 (5th Cir. 1981), cert. denied, 456 U.S. 916 (1982).
the welder fell. He sued the platform owner under Civil Code article 2322. The court denied liability, concluding both that there was no unreasonable risk of harm and that the plaintiff was guilty of victim fault. The suggested analysis would not alter the outcome in Oliver; victim fault did not enter into the court's determination of whether there was an unreasonable risk of harm. What is needed is a decisional technique to insure that victim-fault issues do not intermingle with defendant-fault issues. Perhaps, on facts like Oliver, the following question should be asked: Would the defendant have been liable to a worker on the floor below, injured by the falling welder or the falling light fixture? If not, then the unreasonable risk of harm determination was uncontaminated by victim-fault considerations and is correct. However, if that innocent worker would be entitled to a recovery, then the plaintiff should also be entitled to recover, subject to a substantial reduction because of his own fault. Any other outcome amounts to retention by judges of the power to select some instances of victim fault as sufficient to deny recovery, while leaving other victim fault to the quantification system. I am not persuaded that judges need to have that power. And if they are to have it, the criteria for "victim fault as bar" versus "victim fault as diminution" must be set forth. Intermingling victim-fault issues with defendant-fault issues—which is the essence of the Johnson view—would virtually guarantee that the criteria would not be set forth.

VI. TORT INDEMNITY

Traditionally, Louisiana tort law provided that solidarily liable tortfeasor A is entitled to indemnity from solidarily liable tortfeasor B if "actual fault" is attributable to B and A is "only technically or constructively at fault for failure or omission to perform some legal duty."212 This test was more easily articulated than consistently applied. The jurisprudence abounds with seemingly inconsistent applications. Two cases raising the issue whether a defendant liable under Civil Code article 2317 is entitled to indemnity from a products liability defendant reached seemingly divergent conclusions.213 One recent decision held that a defendant liable solely on the basis of article 2317 was entitled to indemnity from a negligent codefendant.214 But another decision, in which a writ has been granted, appeared to hold that the article 2317 defendant is not entitled to indemnity from the negligent codefendant unless the codefendant's

negligence would qualify as fault of a third person such that article 2317 liability would be defeated.\textsuperscript{215} A railroad liable under the Federal Employer's Liability Act was permitted to seek indemnification from the manufacturer of the defective equipment that injured the plaintiff.\textsuperscript{216} But a marine employer liable under the Jones Act was held not to be entitled to indemnity from a negligent physician who treated the employee.\textsuperscript{217} A vicariously liable employer was held to be entitled to indemnity from his tortfeasor employee.\textsuperscript{218} But a defendant vicariously liable for the negligence of his employee was held not to be entitled to indemnity from a negligent co-tortfeasor.\textsuperscript{219}

Despite the perception that employers do not frequently seek indemnity from their errant employee-tortfeasors,\textsuperscript{220} the vicariously liable employer's right to indemnity from the negligent employee-tortfeasor was probably the clearest application of the theory of and test for tort indemnity. The recent supreme court decision in \textit{Sampay v. Morton Salt Co.},\textsuperscript{221} which in an indirect but powerful way suggests that the employer no longer has any such indemnity right, is therefore highly significant across the law of tort indemnity.

The holding in \textit{Sampay} was that, because the negligent employee and the vicariously liable employer are solidary obligors, the plaintiff can settle with and release the negligent employee while effectively reserving his right to proceed against the employer. Commentators have recognized that the \textit{Sampay} court either overlooked or intended to alter the indemnity doctrine.\textsuperscript{222} The problem is as follows: The tortfeasor employee is protected by the release from a contribution or indemnity action.\textsuperscript{223} Ordinarily,
a defendant who has been deprived by a settlement of a contribution or indemnity right he would otherwise have had against the settling tortfeasor asserts that right by reducing (contribution) or entirely offsetting (indemnity) the plaintiff's recovery. But if the vicariously liable employer in the Sampay situation can plead indemnity against the plaintiff and offset any recovery, the right granted by Sampay is entirely meaningless. Hence, the Sampay decision makes no sense except as having implicitly overruled the right of indemnification.

On that view, Sampay has demoted the vicariously liable employer's indemnity right to one of contribution. Under the pre-comparative fault law, such contribution could perhaps be achieved on a virile share basis, i.e., 50-50. But the supreme court and the commentators have suggested that the comparative fault statutes will probably apply to apportion liability among tortfeasors heretofore in indemnity relationships. It is extremely difficult to see how comparative fault apportionment could work as between a vicariously liable employer and his negligent employee. The comparative fault adoption will make the solution to the Sampay puzzle more difficult.

However, aside from the present confusion as to the status of indemnity in the employer-employee (and presumably in other vicarious liability) situations, the suggestion that comparative fault principles will apply to apportion ultimate liabilities between most defendants, regardless of the previous law on indemnity, is welcome. The adoption of that view would put Louisiana in line with what appears to be a growing trend in other states. It would also greatly simplify the treatment of most multiparty cases. For example, in the hypothetical case presented in Part III, adoption of that point of view would mean that A's and B's rights against one another would depend upon the percentages of fault assigned to each of those defendants, and no question of indemnity would arise.

by the receipt and release from an indemnity action. That suggestion seems too radical to take seriously. Surely the last thing the court would want is to leave settling tortfeasors exposed to indemnity (and, it would probably follow, contribution) actions. In any event, the receipt and release will virtually always contain "hold harmless" provisions whereby any indemnity or contribution right asserted against the settling tortfeasor would have to be met by the settling plaintiff.

225. Another possibility might be a dollar for dollar credit under La. Civ. Code art. 2203.
227. See Johnson, supra note 222, at 396 n.28; Comment, supra note 220, at 706.
228. C. Heft & C. Heft, COMPARATIVE NEGLIGENCE MANUAL §§ 4A.160, 4A.190 (rev. ed. 1983) (suggesting that there is a growing trend to translate former indemnity situations into comparative apportionment situations, except in the situation in which a vicarious liability relationship exists between the defendants); see V. Schwartz, COMPARATIVE NEGLIGENCE § 16.9 (Supp. 1981); see also B & B Auto Supply v. Central Freight Lines, 603 S.W.2d 814 (Tex. 1980).
229. See supra text accompanying notes 34-42.
Concluding that comparative fault principles adequately take care of situations that formerly gave rise to indemnity rights would also simplify resolution of cases in which the plaintiff has settled with and released one of several tortfeasors. In the hypothetical case presented in Part III, adoption of this view would mean that neither A nor B could successfully assert that the plaintiff’s settlement with C deprived the remaining defendant(s) of an indemnity right that would otherwise have been asser-table against C, and that, therefore, any judgment recovered by the plaintiff against the remaining defendant(s) must be reduced to zero. Instead, A and B would be entitled to reduce the plaintiff’s judgment in an amount representing the percentage of fault of which C was found guilty.

VII. COMPLEX HYPOTHETICAL RECONSIDERED

Parts IV, V, and VI of this article assert that all forms of victim and tortfeasor fault should be quantified in strict liability and negligence cases for purposes of determining the rights and liabilities of all parties to the litigation. Chief among the arguments is that confusion would otherwise result in complex multi-party cases. Part III presented a hypothetical case of that type and listed the open questions involved in its resolution. I argue for resolving each of those questions in such a way as to yield the conclusion that the fault of the plaintiff and all three tortfeasors should be quantified, and the resulting percentages used to determine the defendants’ liabilities to plaintiff and the defendants’ contribution rights against each other.

If the open questions are resolved in that way, the hypothetical case in part III yields the same kind of solution as the “straightforward” case presented in part II. If the trial judge in the part III case can conclude in favor of quantification across the board, he can submit the case to the jury in such a way as to elicit findings such as the following:

- Total damages: $100,000
- P’s fault: 30%
- A’s fault: 40%
- B’s fault: 20%
- C’s fault: 10%

On those findings the plaintiff should have a recovery of $60,000. His recovery is diminished by his own percentage of fault under Civil Code article 2323, and by C’s percentage of fault under Civil Code article 2103 and the relevant jurisprudence on partial settlements. The judgment should provide that A and B are solidarily liable for $20,000, and that

230. This hypothetical assumes that the jury properly found fault and legal cause as to each actor. See supra note 26.
231. See supra notes 24-25 and accompanying text & note 28.
$A$ is individually liable for an additional $40,000. (Under Civil Code article 2324, $A$ and $B$ are solidarily liable, but $B$’s share cannot exceed his percentage of fault since he was less negligent than the plaintiff.) The judgment should also provide that $A$ has a contribution right, under Civil Code article 2103, against $B$ up to a ceiling of $20,000 should more than $40,000 be collected from $A$.

If the open questions are not resolved in such a way as to permit the foregoing solution, grave difficulties are in store. For example, suppose the trial judge concluded that the plaintiff’s conduct may well constitute assumption of risk; that assumption of risk would be a bar to recovery against $A$, the strict liability defendant; but that the Baumgartner reasoning means that the plaintiff’s conduct should not count against him at all in the case against $B$, the negligent motorist. On those assumptions, the judge would elicit a jury finding as to whether the plaintiff was guilty of assumption of risk, but there would be no reason to require the jury to quantify the plaintiff’s fault. (On the assumptions under consideration, plaintiff fault, if found by the jury, would bar recovery against $A$ but would be wholly forgivable as against $B$.) On the other hand, the trial judge might decide not to make up his mind about the effects of assumed risk until the jury had spoken. If so, he might submit the case as suggested above, and thereafter have to worry about what to do with the 30% finding of plaintiff fault.

The trial judge can work with the jury’s findings either way. The important point is that once he determines that quantified plaintiff fault is not part of the analysis, the judge should thereafter look to the degrees of fault among the tortfeasors only. If the jury made percentage findings only as to the tortfeasors, the percentages would be used. But if the jury in addition made a percentage finding as to the plaintiff, the judge should ignore that percentage and treat the jury verdict as though the jury had assigned 100% of the relevant fault to the three tortfeasors. Take, for example, the hypothesized jury findings of $A$’s fault at 40%, $B$’s at 20% and $C$’s at 10%. As among the tortfeasors, the degrees of fault are 4/7 for $A$, 2/7 for $B$, and 1/7 for $C$. If not mathematically adjusted in

232. See cases cited supra note 55.

233. See supra note 43.

234. In Dofflemeyer v. Gilley, 378 So. 2d 440, 442 (La. App. 3d Cir. 1979), rev’d on other grounds, 384 So. 2d 435 (La. 1980), the court suggested that the Baumgartner principle would not sweep victim fault amounting to assumption of risk into the scope of protection of the defendant’s duty. But the trial judge in the Part III hypothetical could conclude that the plaintiff’s conduct might amount to assumption of risk as against the products liability defendant, see supra notes 24-25 and accompanying text & note 28, while counting as Baumgartner-forgivable negligence only in the case against the negligent motorist.

235. The Uniform Comparative Fault Act provides for this kind of redistribution of jury findings. See § 2(d) & commissioners’ comment, 12 U.L.A. 39 (Supp. 1979), reprinted in 40 LA. L. REV. at 427-28. Comparative fault commentators generally agree that such
this way, the jury percentage findings cannot be used to determine rights and liabilities without having the effect of attributing the plaintiff’s 30% fault to the plaintiff. On the hypothesis under consideration, the plaintiff’s 30% fault was not to count against him in the action against one of the defendants.

Theoretically, at least thirty possible solutions exist for resolution of the Part III hypothetical. Some of the possibilities are less plausible than others, but all are imaginable. The following presentation sets forth those possibilities, together with a summary of the arguments that (on the basis of the indicated assumptions) could be made for each. Each of the following possible solutions is based upon the hypothetical jury findings set forth above: damages at $100,000, plaintiff’s negligence—30%, A’s negligence—40%, B’s negligence—20%, C’s negligence—10%.²³⁷

(1) The plaintiff’s fault constituted assumption of risk which bars recovery against both A and B.

(2) The plaintiff’s fault constituted assumption of risk which bars recovery against A. But the plaintiff’s fault should be quantified and only diminish recovery in the action against B. (The jurisprudence affords some support for arguing that assumption of risk bars recovery in strict products liability cases,²³⁸ and for arguing that assumption of risk is merely another form of comparative fault in negligence cases.)²³⁹

But by what amount should the plaintiff’s recovery against B be diminished? There are at least three possibilities.

(a) B might argue that the plaintiff’s recovery should be limited to $20,000 under Civil Code article 2324, which states that a defendant whose fault is less than that of the plaintiff is “not . . . liable for more than the degree of his fault.” B would argue that his degree of fault has been fixed at 20%. (The flaw in this argument is that it entails a functional imputation of A’s 40% fault to the plaintiff.)

(b) The plaintiff might argue for a recovery of $60,000, basing his argument on Civil Code article 2323, which limits diminution of the plain-

redistribution is appropriate. See Wade, supra note 28, at 310; Chamallas, supra note 9, at 383, 390. Professor Johnson argues persuasively that the Louisiana comparative fault statutes clearly contemplate that such redistribution is appropriate. Johnson, supra note 9, at 337 n.67. But see Varnado v. Continental Ins. Co, 446 So. 2d 1343, 1346 & n.4, asserting that it is not.

236. Probably solutions other than the thirty set forth in the text can be imagined. I have tried to set forth the ones that have enough plausibility that they can be seriously argued. My purpose is to show how complex multiparty cases become if fault quantification across the board is not available. A secondary purpose is to comment on how these cases should be worked out in the event the law develops to preclude quantification across the board.

237. See supra note 230.

238. See supra note 55.

239. See supra note 234.
tiff's recovery to his "degree or percentage of negligence" (here 30%), and Civil Code article 2103 and the partial settlement jurisprudence, which warrant reduction of a further 10% representing the negligence of C, the settling tortfeasor. (This argument is flawed by imputing A's 40% fault to B. It probably offends Civil Code article 2324.)

(c) The soundest resolution here would permit a recovery of $33,333. As the plaintiff is not entitled to recover against A, the finding of A's percentage of fault is not relevant to the adjustment of damages between the plaintiff and B. The relevant fault percentages found by the jury are plaintiff's 30%, B's 20%, and C's 10%. As among those three actors, the degrees of fault are thus plaintiff—3/6, B—2/6, and C—1/6. The plaintiff should have his recovery reduced under Civil Code article 2323 by his own 3/6 degree of fault. Under article 2103 and the partial settlement jurisprudence, a further reduction of 1/6 should be made representing the degree of fault of C, the settling tortfeasor. Civil Code article 2324 provides further justification for this result; B, whose fault is less than that of the plaintiff, cannot be responsible for more than the share of the damages represented by his degree of fault, here 2/6.

(3) The plaintiff's fault constituted assumption of risk that bars recovery against A. However, the principle of the Baumgartner case means that the plaintiff's fault should be forgiven in the action against B.

Here again, several resolutions are possible.

(a) B might argue that the plaintiff's recovery should be limited to $28,571. The argument would be that the plaintiff's fault has become irrelevant to the determination, being forgiven by Baumgartner, and that therefore, the relevant fault percentages are A's 40%, B's 20%, and C's 10%. As among these three actors, the degrees of fault are thus A—4/7, B—2/7, and C—1/7. B would argue that he should not pay for A's or C's share, but only his own 2/7 share. (This argument is flawed in that, on the assumptions under consideration, the percentage findings as to both the plaintiff and A have become irrelevant: the plaintiff's, because forgiven by Baumgartner; A's, because not productive of any liability. The argument charges the plaintiff with fault properly attributable to A.)

(b) B might argue that recovery should be limited to $50,000. This

240. See supra notes 24-25 and accompanying text & note 28.
241. The percentages found by the jury—plaintiff, 30%, B, 20%, C, 10%—translate into 3/6, 2/6, and 1/6, respectively, to maintain proportionality among these three entities. By simple mathematics, the "missing" 40% fault attributed to A is redistributed proportionately among the other three actors. As indicated in the text, failure to make this calculation would have the effect of imputing A's 40% fault to the plaintiff or to B. See supra note 235 (supporting the appropriateness of such redistribution of jury-found percentages).
243. See supra note 43.
244. See supra note 241.
argument would rest on the percentages found by the jury, and \( B \) would contend that he should pay for only his own 20% share and the plaintiff's (Baumgartner-forgiven) 30% share, not for the shares of \( A \) and \( C \). (But this argument has the effect of charging the plaintiff with part of the fault properly attributable to \( A \).)

(c) The plaintiff might argue for a recovery of $90,000. This argument would rest on the percentages found by the jury, and would contend that the only permissible reduction is the 10% representing the degree of fault of \( C \), the settling tortfeasor. (The flaw in this argument is that it effectively charges \( B \) with all of \( A \)'s fault.)

(d) The plaintiff might argue for a recovery of $85,714. This argument would assert that the plaintiff's fault, being forgiven, is irrelevant to the determination, and that the relevant percentages of fault found by the jury are \( A \)'s 40%, \( B \)'s 20%, and \( C \)'s 10%. As among those three actors, the degrees of fault are thus \( A-4/7 \), \( B-2/7 \), and \( C-1/7 \). The plaintiff would argue that recovery should be diminished only by the 1/7 share of \( C \), the settling tortfeasor. (But this argument is also flawed. The percentage findings against both the plaintiff and \( A \) are irrelevant on the assumptions under consideration. The argument charges \( B \) with fault properly attributable to \( A \).)

(e) The soundest resolution here would yield a recovery of $66,667. Neither the plaintiff's percentage of fault nor \( A \)'s percentage of fault is relevant to the adjustment as between the plaintiff and \( B \). (On the assumptions under consideration, the plaintiff's fault is not relevant because Baumgartner has forgiven it; \( A \)'s fault is not relevant because \( A \) is not subject to any liability.) The relevant fault percentages are \( B \)'s 20% and \( C \)'s 10%. \( B \)'s and \( C \)'s degrees of fault are thus 2/3 and 1/3, respectively. \( B \) should owe the plaintiff's full damages less a reduction representing \( C \)'s degree of fault to account for the partial settlement.

(4) The plaintiff's fault should be quantified so as to diminish recovery against \( A \). However, that fault constituted assumption of risk constituting a bar to recovery in the action against \( B \). (This is not a particularly plausible combination; it is included in the interest of a complete account of the comparative fault possibilities.)

Once again, several arguments as to the amount of the reduction are possible.

(a) \( A \) might argue that recovery should be limited to $40,000. This argument would rest on the percentages found by the jury, and \( A \) would assert that he can not be held liable for the negligence of the plaintiff, \( B \), or \( C \). (But why should \( B \)'s fault be imputed to the plaintiff?)

245. *Id.*
246. *Id.*
The plaintiff might argue for a recovery of $60,000. This argument would rest on the percentages found by the jury, and would assert that recovery should be diminished only by the plaintiff’s 30% share and C’s 10% share. (The flaw is that A is being charged with all of B’s fault.)

The best resolution here would limit recovery to $50,000. B’s percentage of fault has become irrelevant, since B is not liable to the plaintiff. The relevant fault percentages are plaintiff’s 30%, A’s 40%, and C’s 10%. The degrees of fault as among those actors are thus plaintiff—3/8, A—4/8, and C—1/8. Damages should be reduced by the plaintiff’s own 3/8 fault and C’s 1/8 fault.

The plaintiff’s fault should be quantified so as to diminish recovery against both A and B. (This is the preferred solution, comparative fault across the board, set forth in the text above.)

The plaintiff’s fault should be quantified so as to diminish recovery against A; under Baumgartner, it should be forgiven in the action against B. (I believe this is the outcome that would be produced by application of the Johnson view to these facts.)

The possible arguments for how the diminution should be achieved include the following.

(a) The plaintiff might argue for a recovery of $90,000. This argument would rest on the percentages found by the jury, and would assert that B is liable for the full damages less a reduction of 10% representing the degree of fault of C, the settling tortfeasor. Presumably the argument would continue that A should be solidarily liable with B up to $60,000 (full damages less the plaintiff’s 30% and C’s 10%). Under this argument, the contribution shares of A and B would presumably be $40,000 and $50,000, respectively. (Assuming full solvency, i.e., that A and B ultimately paid according to their contribution shares, this argument would have B charged with $10,000 attributable to A’s fault. But if the contribution shares were adjusted to alleviate that consequence, A would then bear more of the damages than are attributable to his fault.)

(b) The plaintiff might argue for a recovery of $87,500, asserting that B’s percentage of fault has become irrelevant under the Baumgartner holding and that B is not entitled to a comparative fault reduction. Hence,

247. Id.
248. See supra text accompanying notes 230-32.
249. Johnson argues for the continued applicability of Baumgartner. See Johnson, supra note 9, at 330-33. I do not think he opposes comparative fault application in strict liability cases, although he does suggest that Civil Code article 2323 is worded so as to suggest that strict liability cases may not be covered. Id. at 339 n.70.
250. A’s fault (40%) is twice as great as B’s (20%), but on the assumptions under consideration A is entitled to a reduction for the plaintiff's fault, whereas B is not. Therefore, perhaps A's ultimate exposure should be confined to his 40% share of the jury-found fault.
in the action against $B$, the relevant percentages of fault are plaintiff's 30%, $A$'s 40%, and $C$'s 10%. The degrees of fault among those three actors are thus plaintiff—$3/8$, $A$—$4/8$, and $C$—$1/8$. The plaintiff would argue that his recovery against $B$ should be diminished only by $C$'s $1/8$ share. Presumably the argument would continue that $A$'s liability should be figured on the basis of the percentages found by the jury, and therefore, $A$ should be solidarily liable with $B$ up to $60,000$ (full damages less plaintiff's 30% and $C$'s 10%). Working out the contribution shares of $A$ and $B$ under this argument seems unbearably tricky. Perhaps $A$'s contribution share should be $50,000$—his percentage share of the loss—and $B$'s, $47,500$. After all, $B$ is the one who by hypothesis is being assessed under the more stringent Baumgartner duty. (This argument is flawed since it charges $B$ with part of $A$'s fault.)

(c) The plaintiff might argue for a recovery of $85,714$. He would assert that, in the action against $B$, the plaintiff’s percentage of fault has been rendered irrelevant by Baumgartner, and the relevant percentages of fault are therefore $A$'s 40%, $B$'s 20%, and $C$'s 10%. The degrees of fault as among those three actors are $A$—$4/7$, $B$—$2/7$, and $C$—$1/7$. The plaintiff would argue that his recovery against $B$ should be diminished only by $C$'s $1/7$ share. The argument would continue that $A$'s liability should be figured on the basis of the percentages found by the jury, and therefore, $A$ should be solidarily liable with $B$ up to $60,000$ (full damages less plaintiff’s 30% and $C$'s 10%). Once again, contribution shares under this argument are anybody's guess. Perhaps $A$'s contribution share should be limited to $40,000$, as in the foregoing example. (In whatever way the contribution shares are worked out, this argument erroneously ignores the wrong party’s percentage of fault. In the action against $B$ on the assumptions under consideration, the percentage finding against the plaintiff, rather than against $B$, is what seems most irrelevant.)

(d) Perhaps the best resolution here would conclude that in the action against $B$, the relevant degrees of fault are $B$'s 20% and $C$'s 10%. As between those two actors, the relative degrees of fault are thus $B$—$2/3$, and $C$—$1/3$. Therefore, the plaintiff’s recovery against $B$ should be limited to $66,667$. In the action against $A$, the relevant degrees of fault are plaintiff’s 30%, $A$’s 40%, and $C$’s 10%. As among those three actors, the relative degrees of fault are thus plaintiff—$3/8$, $B$—$4/8$, and $C$—$1/8$. Therefore, the plaintiff’s recovery against $A$ should be limited to $50,000$. But the recoveries against $A$ and $B$ cannot be cumulative. Seemingly, the judgment should provide that $A$ and $B$ are solidarily liable

251. See supra note 241.
252. See supra notes 43 and 249.
253. See supra note 241.
254. Id.
255. Id.
for $50,000 and that B is individually liable for an additional $16,667. Perhaps (because I cannot come up with a more plausible suggestion) A’s and B’s contribution shares should be equal, i.e., $33,333.50 each. While A’s fault is twice as great as B’s, on the assumptions under consideration A is entitled to a reduction for plaintiff fault and B is not.

(7) The plaintiff’s fault constituted “contributory negligence” which is not a defense to strict liability actions, so it does not count against A. As against B, however, the plaintiff’s fault amounts to assumption of the risk which bars recovery. (Again, this is a fairly implausible combination of assumptions, and is included only for the sake of a complete picture of the analytical possibilities.)

The possibilities for resolving the complex hypothetical on these assumptions include the following.

(a) The plaintiff might argue for a recovery of $90,000. The argument would rest on the percentages found by the jury, and would assert that the plaintiff’s recovery against A should be reduced only by the 10% fault found against C, the settling tortfeasor. (But A is being charged for all of B’s fault.)

(b) A might argue for a recovery of $70,000, asserting that the plaintiff’s recovery against A should represent the combination of A’s 40% fault and the plaintiff’s (forgiven as to A) 30% fault. (But the plaintiff is being charged for all of B’s fault.)

(c) A might argue for a recovery of $66,667. This argument would assert that quantification of the fault of strict liability defendants is inappropriate, and therefore, A’s liability should be predicated on the pre-comparative fault jurisprudence that would account for the settlement with C by a 1/3 reduction representing C’s virile share of the obligation. (But plaintiff is being charged for most of B’s fault.)

(d) By a similar argument, a recovery of $50,000 might result. This argument would agree that strict liability fault should not be quantified, but would assert that B, having escaped liability, is totally out of the picture, and therefore, the relevant virile shares are A’s 1/2 and C’s 1/3. (Again, the plaintiff is being charged with most of B’s fault.)

(e) A similar argument by A could conceivably yield a recovery of only $33,333. This argument would assert that strict liability fault cannot be quantified and that plaintiff is entitled to recovery less the 1/3 virile shares of B and C, respectively. (But the plaintiff is being charged for all of B’s fault and some of A’s or his own.)

(f) Probably the best resolution here would yield a recovery of $80,000. On the assumptions under consideration, the percentage findings against the plaintiff and B are irrelevant: plaintiff’s fault is forgiven, and B is not liable at all. The relevant fault percentages are A’s 40% and C’s 10%;
the relative degrees of fault are $A-\frac{4}{5}$, and $C-\frac{1}{5}$. The plaintiff's recovery should be diminished only by $C$'s degree of fault.

(8) The plaintiff's fault constituted "contributory negligence" which is not a defense to strict products liability actions. The plaintiff's fault, however, is quantifiable comparative negligence in the action against $B$. (The supreme court could conceivably decide Bell v. Jet Wheel Blast in such a way as to leave Louisiana law in this posture.)

The possible resolutions under these assumptions include the following.

(a) The plaintiff might argue for a recovery of $90,000. This argument would rest on the percentages found by the jury, and would assert that, in the action against $A$, recovery can be reduced only by the 10% representing the fault of $C$, the settling tortfeasor. Presumably the argument would continue that $B$ should be solidarily liable with $A$ up to $20,000. Under this argument the contribution shares of $A$ and $B$ would be $70,000 and $20,000$, respectively. (This argument results in charging $A$ with all of $B$'s fault.)

(b) The plaintiff might argue for a recovery of $85,714$, asserting that in the action against $A$, the plaintiff's percentage of fault has become irrelevant since $A$ is not entitled to a comparative fault reduction. Therefore, the relevant fault percentages would be $A$'s 40%, $B$'s 20%, and $C$'s 10%, and the degrees of fault as among those three actors are $A-\frac{4}{7}$, $B-\frac{2}{7}$, and $C-\frac{1}{7}$. The plaintiff would argue that his recovery against $A$ should be reduced only by the degree of fault found against $C$, the settling tortfeasor (1/7). The argument would presumably continue that $B$'s liability should be [based on] the percentages found by the jury, and therefore, $B$ should be solidarily liable with $A$ up to $20,000. B$'s contribution share would also be $20,000 under this argument. (This argument charges $A$ with most of $B$'s fault.)

(c) $A$ might argue that recovery should be limited to $50,000. This argument would assert that $A$'s percentage of fault is irrelevant, either because no comparative-fault reduction is available to $A$, or because the fault of strictly liable defendants should not be quantified. Therefore, the relevant percentages of fault would be plaintiff's 30%, $B$'s 20%, and $C$'s 10%, and the degrees of fault as among those three actors are plaintiff-\(\frac{3}{6}\), $B-\frac{2}{6}$, and $C-\frac{1}{6}$. $A$ would argue that its liability

256. Id.
257. See supra notes 59-61 and accompanying text.
258. $B$, whose fault is less than the plaintiff's on the assumptions under consideration, cannot be liable for more than the share of the damages represented by $B$'s degree of fault. La. Civ. Code art. 2324.
259. See supra note 241.
260. See supra note 258.
261. See supra note 241.
should not include the 3/6 share of the accident attributed to B and C. Presumably this argument would entail the conclusion that B is solidarily liable with A up to $33,333 (B's 2/6 share of the accident), and that B's contribution share is $33,333.262 (This argument charges the plaintiff with B's fault.)

(d) Probably the best resolution here would conclude that, in the action against A, the relevant fault percentages are A's 40% and C's 10%. A's and C's degrees of fault are thus 4/5 and 1/5, respectively.263 A should be liable to the plaintiff for $80,000 (full damages less the 1/5 share representing the fault of C, the settling tortfeasor). In the action against B, the relevant fault percentages are plaintiff's 30%, B's 20%, and C's 10%. As among those actors, the respective degrees of fault are thus plaintiff-3/6, B-2/6, and C-1/6.264 The plaintiff's recovery against B would thus be limited to $33,333. But the recoveries against A and B cannot be cumulative. The judgment should provide that A and B are solidarily liable to the plaintiff for $33,333, and that A is individually liable for an additional $46,667. A's and B's contribution shares would also be $46,667 and $33,333, respectively.

(9) The plaintiff's fault does not count in the action against A because "contributory negligence" is not a defense to strict products liability actions. It does not count in the action against B because of Baumgartner. (This is another solution permitted or favored by the Johnson view.)

On these assumptions, the possibilities for solving the complex hypothetical include the following.

(a) The plaintiff might argue for a recovery of $90,000. This argument would rest on the percentages found by the jury, and would contend that the only permissible reduction in recovery is the 10% representing the fault of C, the settling tortfeasor. Presumably, the plaintiff would assert that A and B are solidarily liable for the entire $90,000. Under this argument, the contribution shares of A and B would probably be $60,000 and $30,000, respectively.265 (This argument charges A and B with some of C's fault.)

(b) The defendants might argue for limiting recovery to $66,667. The basis for this argument would be the assertion that, as neither defendant is entitled to a reduction on the basis of the plaintiff's fault, comparative fault has become irrelevant in the case. (The defendants might also assert that the fault of a strictly liable defendant cannot be quantified in any meaningful way.) The argument would continue by asserting that reduction of the plaintiff's recovery to reflect the settlement with C, the non-

262. See supra note 258.
263. See supra note 241.
264. Id.
265. A is twice as faulty as B, and neither is entitled to a reduction for the plaintiff's fault.
party tortfeasor, should be in the amount of 1/3, representing C's virile share. Under this argument, A and B would be solidarily liable for the $66,667, and their contribution shares would be $33,333 each. (This argument charges the plaintiff with some of the fault of A, B, and C.)

(c) Probably the best resolution here would yield a recovery of $85,714. On the assumptions under consideration, the plaintiff's fault has been rendered irrelevant. The relevant fault percentages are therefore A's 40%, B's 20%, and C's 10%. The degrees of fault as among the three tortfeasors are thus A—4/7, B—2/7, and C—1/7. The plaintiff should recover his full damages less a 1/7 reduction representing the fault of C, the settling tortfeasor. Presumably the argument would assert that A and B are solidarily liable for the entire $85,714. Under this argument, the contribution shares of A and B would probably be $57,143 and $28,571, respectively. (A is twice as "faulty" as B.)

CONCLUSION

Part II of this article demonstrates the relative ease and rationality of operation of comparative fault principles in a case presenting no doctrinal obstacle to quantification of the fault of all relevant actors. Parts III and VII show the unsuitable complexity created by doctrines that would preclude such across-the-board quantification. Parts IV through VI argue that courts can and should avoid adopting or resurrecting such doctrines in comparative fault cases. At bottom, the argument is that trusting the trier of fact to achieve principled and equitable fault quantification is the essential premise of any comparative fault adoption. Principles, doctrines, and modes of analysis that stray very far from that philosophy will ultimately prove destructive to the comparative fault system.

266. See supra note 241.