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ASSUMPTION OF THE RISK, COMPARATIVE FAULT AND STRICT LIABILITY AFTER ROZELL

John Kennedy*

"Assumption of the risk" has generally been a comfortable concept to most members of the bench and bar. The majority of us encountered it, initially, as students in first year torts. The attraction was immediate. It was less obtuse than "motive," "usufruct" and "The Rule in Shelley's Case," it satisfied our visceral feelings about free will and responsibility and it seemed a certain way to score points come exam-time. Torts was supposed to be the easiest subject and assumption of the risk was confirmation.

A recent decision by the Louisiana Supreme Court may have changed these circumstances. In Rozell v. Louisiana Animal Breeders Cooperative, Inc., the court addressed the meaning of assumption of the risk as an affirmative defense to strict liability for domesticated animals under Civil Code article 2321. The court's effort is subject to two interpretations. If the first interpretation is correct, the court applied the proper legal standard yet reached the wrong conclusion. If the second interpretation is correct, the court not only reached the wrong conclusion but so misapplied the law that assumption of the risk no longer exists as a defense. Under either interpretation, it is evident that Rozell is not limited to article 2321 liability, and that the usefulness of assumption of the risk, both as a defense and as a legal abstraction, has been jeopardized no matter what type of fault is at issue.

Rozell also touches upon two other subjects that are fundamental to Louisiana tort law. The first is comparative fault. The facts of Rozell arose before the Louisiana legislature adopted a comparative fault system. The opinion is, once again, ambiguous, but the court may have applied comparative fault anyway. If that is so, the court's conclusion and the law made in reaching it are also unsatisfactory. So, too, are

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* John N. Kennedy is a member of the Louisiana Bar. He has a B.A. degree from Vanderbilt University, a J.D. degree from the University of Virginia and a B.C.L. degree from Oxford University. He is a member of Phi Beta Kappa and Order of the Coif and was Executive Editor of the Virginia Law Review. He also served as law clerk to the late Judge Robert A. Ainsworth, Jr. of the United States Court of Appeals for the Fifth Circuit. Since 1985, he has practiced law with Chaffe, McCall, Phillips, Toler and Sarpy in New Orleans. The opinions expressed in this article are his alone, and he is solely responsible for any mistakes.

1. 496 So. 2d 275 (La. 1986) (hereinafter Rozell IV).
the court's result and reasoning if Rozell is viewed as a pre-comparative fault case.

The final subject treated in Rozell is strict liability as a fault concept. The court's remarks on this topic are brief, but they manage to cast doubt on what, before Rozell, was considered settled and sensible law. In short, Rozell's observations on strict liability are no less disturbing than the rest of the decision.

This article will examine Rozell in detail. It will consider each possible interpretation of the opinion and the effect of such interpretation on assumption of the risk, comparative fault and strict liability, as the case may be, under Louisiana law. The article will conclude that Rozell is so ambiguous and such an unimpressive effort, no matter which construction is correct, that the decision should be ignored as a precedent until the supreme court clarifies its directives and better substantiates them.

I. THE FACTS

Edward R. Rozell was an employee of the Louisiana State University Dairy Improvement Center. He handled bulls for a living. More specifically, he fed them and generally cared for and tended to them while they were housed at the Center for breeding purposes. 2

The Center is a state-financed program designed to assist Louisiana's farmers with artificial insemination of their cattle at minimum cost. Privately-owned bulls are brought to the Center, which is situated on land owned by Louisiana State University, for collection and storage of the bulls' semen. The Center also sells the semen commercially, with proceeds going to the bulls' owners. 3

On March 14, 1980, Mr. Rozell was working at the Center alone. The Center's rules forbade this and Mr. Rozell knew it, but it was not an entirely unusual practice among the bull handlers employed there, especially when the Center was short-handed as on this particular day. 4

About 7:00 a.m., Mr. Rozell began feeding a bull named Dixie Lee Fashion Designer. Dixie Lee's owners were the Louisiana Animal Breeders Cooperative, Inc. ("LABC"), which owned a one-third interest, and

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3. Rozell IV at 276; Rozell III at 405; Rozell II at 969; Rozell I at 436 (original opinion); Rozell I at 438 (on rehearing). The Louisiana Animal Breeders Cooperative, Inc. owns wholly or an interest in about seventy per cent of the bulls at the center, and L.S.U. owns wholly or an interest in the remainder. Rozell III at 405.

4. Rozell IV at 277; Rozell III at 406; Rozell II at 969.
the Atlantic Breeders Cooperative, Inc. ("ABC"), which owned a two-thirds interest. The bull was "young and 'feisty'" but had never before injured anyone.5

While Dixie Lee ate from a trough in his pen and Mr. Rozell watched from behind a retaining wall, Mr. Rozell noticed that someone or something had closed the gate between the pen and the water and pasture outside. This concerned Mr. Rozell. He had learned that bulls like to go out to pasture after they eat, and Mr. Rozell feared that Dixie Lee might injure himself butting the gate in an attempt to get through.7 Mr. Rozell analyzed the situation. One way of opening the gate would require him to leave the safety of the retaining wall, venture into Dixie Lee's pen and, at some point, take his eyes off the bull. Testimony at trial would later indicate there were at least four safer alternatives, but the record is unclear whether Mr. Rozell was aware of them.8

Mr. Rozell assessed the risk of entering Dixie Lee's pen. He knew bulls and their propensities.9 He knew, for instance, that "a man with good sense just wouldn't turn his back to a bull."10 The Center's rules also prohibited a handler from entering a pen with a bull unless the bull was secured and at least one other person was present.11 On the other hand, Mr. Rozell realized that bulls become engrossed in feeding and rarely are distracted from it. In Mr. Rozell's own words,

"Doing the same thing prior to that time, I've never been attacked. With the bull in the situation with his head in the feed trough and his eyes below the level of the concrete where he could not see me, I had reason to believe through prior experience that I could get that gate dislodged."12

Mr. Rozell also said later that

"I didn't think there was a risk when I did it. I felt I had that bull in a position to where I could do the job that I had to

5. Rozell III at 406.
6. Id. at 405-06.
7. Rozell IV at 277; Rozell III at 406; Rozell II at 969-70; Rozell I at 436 (original opinion).
8. Rozell IV at 277; id. at 280 (Lemmon, J., dissenting); Rozell III at 406; Rozell II at 969-72; Rozell I at 436 (original opinion).
9. Rozell IV at 277-78; Rozell II at 970, 972.
10. Rozell II at 970.
11. Rozell IV at 277; Rozell III at 406; Rozell II at 972. Mr. Rozell testified that he was unaware of this rule. The Center's manager testified that Mr. Rozell had been informed of it. Rozell I at 436 (original opinion).
12. Rozell IV at 279. See id. at 278; Rozell II at 970.
do without any danger to myself... I considered doing what 
I had to do safe. I had sufficient time to do it."  

Mr. Rozell decided to enter the pen. Upon entering, he moved 
cautiously so as not to startle the bull. He had taken about three steps 
and had turned his back to Dixie Lee when, somehow, the animal 
managed to front Mr. Rozell and butt him in the chest, crushing his 
 sternum. His injuries required corrective surgery and Mr. Rozell no 
longer could work as a bull keeper. 

II. LOWER COURT AND PREVIOUS SUPREME COURT DECISIONS 

Mr. Rozell sued LABC and ABC, Dixie Lee's owners, for his 
injuries. ABC third-partied L.S.U., seeking indemnification if ABC was 
held liable. L.S.U.'s worker's compensation carrier, Continental Insur-
ance Company, intervened to recover the compensation benefits it had 
paid. The legal basis for Mr. Rozell's suit was article 2321 of the Civil 
Code, which, as interpreted by the Louisiana Supreme Court in Holland 
v. Buckley, provides that the owner of a domesticated animal is strictly 
liable for the damage caused by the animal, and the owner of a wild 
animal is absolutely liable.
LABC and ABC moved for summary judgment on the ground that Dixie Lee was not in their custody at the time of the accident, and the trial court granted the motions.\(^1\) The court of appeal affirmed as to ABC but reversed as to LABC.\(^2\) A writ was taken,\(^3\) and the Louisiana


Under the current interpretation of Louisiana Civil Code article 2317, the owner or custodian of a thing is liable for the damage caused by it, regardless of any lack of negligence on his part. However, this use of article 2317 is a relatively recent development in Louisiana law. Traditionally, not only was 2317 interpreted as only a transitional article with little substantive value, but fault in the form of negligence was required if liability was to be found under article 2315 and the articles providing instances of fault which follow it. The Louisiana courts slowly repudiated the traditional approach in a series of cases [e.g., Loescher, Turner, Holland and Langlois] which developed a new concept of “fault” and transformed article 2317 from a mere introductory article into one which provided for legal responsibility for things in one’s custody.


Relational responsibility strict liability is one of three types of strict liability under Louisiana law. The other two types are strict products liability, see, e.g., Halphen v. Johns-Manville Sales Corp., 484 So. 2d 110 (La. 1986); Weber v. Fidelity & Casualty Ins. Co., 250 So. 2d 754 (La. 1971), and strict liability for ultrahazardous activities, such as pile driving, storage of toxic gas, blasting with explosives and crop dusting with airplanes, see, e.g., Robertson, supra, at 1350 & n.46 and cases cited in n.46, “where the risk is such that harm results from the very nature of the activity itself, irrespective of protective measures taken by the enterpriser.” Hebert v. Gulf States Util. Co., 426 So. 2d 111, 114 n.6 (La. 1983). Strict liability for ultrahazardous activities approaches absolute liability. See Kent v. Gulf States Util. Co., 418 So. 2d 493, 498 & n.7 (La. 1982). For an elegant and thoughtful discussion of Louisiana’s law of strict liability for ultrahazardous activities, see Perkins v. F.I.E. Corp., 762 F.2d 1250, 1254-68 (5th Cir. 1985), where the federal Fifth Circuit concluded that an activity is not ultrahazardous under Louisiana law unless (a) the activity relates to land or other immovables; (b) the activity itself caused the damages and the defendant was directly engaged in the damage-producing activity; and (c) the activity does not require the substandard conduct of a third party to cause the damages. Id. at 1267-69. See Matthews v. Ashland Chem., Inc., 770 F.2d 1303, 1307-08 (5th Cir. 1985).

\(^1\) Rozell IV at 276.

\(^2\) Rozell I at 438 (on rehearing).

\(^3\) 426 So. 2d 175 (La. 1983).
Supreme Court held that the basis for liability under article 2321 is ownership, not custody. The district court retried the case and found that Mr. Rozell was guilty of contributory negligence, which, according to the court, constituted "victim fault" within the meaning of the victim fault defense to article 2321 as set forth in *Holland v. Buckley*. Mr. Rozell's suit, ABC's third-party demand and Continental Insurance Company's third-party intervention were dismissed. The court of appeal affirmed, but found that Mr. Rozell's conduct was assumption of the risk, which, according to the appellate court, also is victim fault for the purpose of article 2321 liability. The supreme court once again granted a writ.

24. The jurisprudential custody requirement of Article 2317 which has been grafted onto Article 2321 liability has no statutory basis in the Louisiana codal scheme. Since an animal is also a thing, Civil Code Article 2321 would be superfluous if liability for things in one's custody under Article 2317 were incorporated into Article 2321. It is not necessary that the owner of an animal also have control or "garde" of the animal. *Rozell III* at 408. See also *Rozell IV* at 277-78.

25. "Victim fault" is the term the supreme court used in *Loescher, Holland* and *Turner* to refer to plaintiff fault in cases of relational responsibility strict liability. See supra note 20 and infra note 26 and accompanying text. The term "plaintiff fault" will be used in this article to refer to the plaintiff's substandard conduct insofar as it defeats or diminishes his recovery in all cases of strict liability, including relational responsibility strict liability. For a discussion of why the supreme court began using the term "victim fault," see Note, supra note 20, at 1378.

26. *Rozell IV* at 971. In *Holland v. Buckley*, 305 So. 2d 113 (La. 1974), the court said:

We hold, therefore, that the correct interpretation of Civil Code Article 2321 is as follows: When a domesticated animal harms another, the master of the animal is presumed to be at fault. The fault so provided is in the nature of strict liability, as an exception to or in addition to any ground of recovery on the basis of negligence, Article 2316. The owner may exculpate himself from such presumed fault only by showing that the harm was caused by the fault of the victim, by the fault of a third person for whom he is not responsible, or by a fortuitous event.

Id. at 119 (footnote omitted). Victim fault is also a defense to strict liability under articles 2317 through 2320 and 2322, e.g., *Loescher v. Parr*, 324 So. 2d 441, 446-47 (La. 1975); *Turner v. Bucher*, 308 So. 2d 270, 277 (La. 1975); Comment, supra note 20, 38 La. L. Rev. at 995-1000, and to strict products liability, though in products liability cases it is called plaintiff negligence, assumption of the risk and misuse of the product. *Bell v. Jet Wheel Blast*, 462 So. 2d 166, 172-73 (La. 1985). Cf. Comment, supra note 20, 38 La. L. Rev. at 999 (discussing victim fault as a defense to negligence and the intentional torts of battery and defamation).

27. *Rozell II* at 971.

28. Id. at 972.

29. 488 So. 2d 1014 (La. 1986).
III. THE HOLDING AND DICTA

Chief Justice Dixon wrote the majority opinion in Rozell. He was joined by Justices Calogero, Dennis, Watson and Cole. Justices Marcus and Lemmon dissented.

The majority divided its opinion into two parts. The first deals with the basis for liability. It essentially is a review of the supreme court’s prior decision in the case that Civil Code article 2321 subjects the owner of a domesticated animal to strict liability even when the owner transfers custody of the animal to another party.

The second part of the majority opinion is more significant for present purposes. It is entitled “Defenses” and may best be analyzed in three sub-parts.

A. Assumption of the Risk

The bare-bones holding of Rozell is that the court of appeal was wrong in concluding that Mr. Rozell assumed the risk of his injuries. According to the majority, “[t]he determination of whether a plaintiff assumed a risk is made by subjective inquiry.” A plaintiff, to assume a risk, “must knowingly and voluntarily encounter a risk which caused

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30. Justice Dennis concurred and indicated that he would assign reasons, but the reasons are not published. See Rozell IV at 280 (Dennis, J., concurs and will assign reasons).
31. Id. (Marcus, J., dissenting); id. (Lemmon, J., dissenting).
32. Id. at 277-78. See Rozell III; supra note 24 and accompanying text.
33. Rozell IV at 278.
34. [T]he term [assumption of the risk] has been used to describe a number of very different legal concepts. The form of assumption of risk that is easiest to understand is express assumption of risk. When a plaintiff expressly assumes a risk, he specifically agrees, prior to the time of the injury-causing event, to hold defendant blameless with regard to his negligence . . . .

The form of assumption of risk that presents the greatest confusion . . . is implied assumption of risk. This defense developed at common law in master-servant cases during the middle of the nineteenth century. In effect, where an individual knowingly and voluntarily encounters a risk, he is treated as if he has agreed to look out for himself and to relieve the defendant of any duty toward him.

The defense has been analogized to consent, and that has been suggested as its basis. In actual cases this basis is usually fictional because the injured party has not truly manifested his consent to hold the defendant blameless; rather, the law treats him as if he had done so.

V. Schwartz, Comparative Negligence § 9.1, at 154 (2d ed. 1986). See, e.g., Keegan v. Anchor Inns, Inc., 606 F.2d 35, 37-38 (3d Cir. 1979); Restatement (Second) of Torts §§ 496A-C and comments thereto (1965); Robertson, supra note 20, at 1371.
35. Rozell IV at 278 (citing Langlois v. Allied Chem. Corp., 249 So. 2d 133 (La. 1971)).
him harm and must understand and appreciate the risk involved and accept it as well as the inherent possibility of danger because of the risk.\textsuperscript{36} He also must appreciate the unreasonable character of the risk.\textsuperscript{37} Appreciation of "the unreasonable character of the risk" is a requirement of Section 496D of the Restatement (Second) of Torts,\textsuperscript{38} which the supreme court adopted in 1981 in \textit{Dorry v. Lafleur}.\textsuperscript{39}
Mr. Rozell, in the majority's view, did not appreciate the unreasonable character of the risk. That is, "Rozell clearly recognized that the unreasonable character of the risk, which means appreciation of the possibility of danger, see infra notes 55-58 and accompanying text, is a requirement of both reasonable and unreasonable assumption of the risk. See Restatement (Second) of Torts § 496A, D and comments thereto (1965); infra notes 62, 88, 117 and 119 and accompanying text.

One final distinction must also be understood. Restatement Section 496D pertains to assumption of the risk in cases of negligence and reckless conduct. Restatement (Second) of Torts § 496A (1965); id., Scope Note to Chapter 17A at 560. Section 515 of the Restatement defines assumption of the risk as a defense to strict liability for possession of animals, and Restatement Sections 523 and 524 define assumption of the risk as a defense to strict liability for abnormally dangerous activities. Restatement (Second) of Torts §§ 515, 523, 524 (1977); see also Restatement (Second) of Torts Scope Note to Chapter 17A at 560 (1965). Section 515 provides that both reasonable and unreasonable assumption of the risk are defenses to strict liability for possession of animals, but that contributory negligence is not, except to the extent that unreasonable assumption of the risk is contributory negligence. Restatement (Second) of Torts § 515 and comments thereto (1977). Sections 523 and 524 say essentially the same thing for strict liability for abnormally dangerous activities. Id. §§ 523, 524 and comments thereto. However, because the risk of an abnormally dangerous activity, such as blasting with explosives, is so great, assumption of such a risk will rarely, if ever, be reasonable. See id. Finally, comment n to Restatement Section 402A defines assumption of the risk for products liability actions. Restatement (Second) of Torts § 402A, comment n (1965). Comment n provides that unreasonable assumption of the risk is a defense to products liability, but that reasonable assumption of the risk and contributory negligence are not, except to the extent that unreasonable assumption of the risk is contributory negligence. Id.

Louisiana case law rarely distinguishes among these various Restatement sections. That is, even though Section 496D applies to assumption of the risk in cases of negligence and reckless conduct only, Louisiana courts apply Section 496D, and not Sections 515, 523 and 524 and comment n to Section 402A, when assumption of the risk is at issue in cases of strict liability. For instance, Dorry and Rozell, both of which applied Section 496D, were relational responsibility strict liability disputes, see Dorry v. Lafluer, 399 So. 2d 559, 560 (La. 1981); supra notes 18-20 and accompanying text, and other Louisiana courts have followed Dorry and Section 496D in negligence and products liability claims. See, e.g., Bourgeois v. Jones, 481 So. 2d 145, 149, 151 (La. App. 5th Cir. 1985), writ denied, 484 So. 2d 136 (La. 1986) (negligence); Lanclos v. Rockwell Int'l Corp., 470 So. 2d 924, 927, 931-32 (La. App. 3d Cir. 1985) (products liability); Giarrantano v. Krewes of Argus, Inc., 449 So. 2d 530, 532-33 (La. App. 5th Cir. 1984) (negligence); Hills v. Skate Country East, Inc., 430 So. 2d 1036, 1037, 1039-40 (La. App. 4th Cir. 1983) (negligence). See also Chatelain v. Project Square 221, No. CA-5422, LEXIS slip op. at 3-9 (La. App. 4th Cir. March 24, 1987) (negligence and relational responsibility strict liability); id., LEXIS slip op. at 13 (Byrnes, J., concurring); id., LEXIS slip op. at 16-17 (Lobrano, J., dissenting). But cf. Rozell IV at 279 n.2, citing Restatement (Second) of Torts § 494 (1965); Rozell III at 406 n.2, citing Restatement (Second) of Torts § 494 (1965). This circumstance may be analytically untidy, but it is not of great consequence once it is understood, because, as explained above, Restatement Section 515 and Sections 523 and 524, when read together, are substantially the same as Section 496D. These sections all provide that both reasonable and unreasonable assumption of the risk are a defense. Only comment n to Section 402A is different by allowing unreasonable but not reasonable assumption of the risk as a defense. See generally infra notes 62, 88, 117 and
there was a risk in entering the bullpen, but he strongly believed that it was not an unreasonable risk. The majority also found that "an objective evaluation would classify [Mr. Rozell's] chance of being attacked in this situation as remote," because of the trial court's observation that "I don't see how the bull got his head out of the trough, came out behind the pipes and came around, traversed the area and caught the person who would, I assume, be making a hasty trip over to the gate."

B. Comparative Fault

The majority next turned to a discussion of plaintiff fault in general and Louisiana's law of comparative fault. The court made several points. It said that until Louisiana adopted the doctrine of "comparative negligence," a plaintiff's slightest contributory negligence totally barred his recovery. However, "[n]othing in the code, statutes or known jurisprudence requires the application of such a doctrine under C.C. 2321 (or C.C. 2317)." In this latter sentence, the court presumably meant the doctrine of contributory negligence and not the doctrine of comparative fault.

The majority then stated that "[a]ssumption of the risk and contributory negligence are common law defenses to negligence actions." On the other hand, "are based on neither negligence nor fault, but the obligations arising from custody and ownership." Thus, according to the Rozell court, the defense of victim fault in cases of Articles 2317 and 2321 liability "is a causation defense and differs from negligence of the injured person."

At this juncture, the court's analysis becomes opaque. The majority said that "[v]ictim fault must rise to the level of causing the accident before it will bar recovery," and, because "Rozell did nothing to cause the bull to attack him," Mr. Rozell's recovery should not be barred.

119 and accompanying text (discussing reasonable and unreasonable assumption of the risk).
40. Rozell IV at 278.
41. Id. at 279.
42. Id.
43. Id.
44. Id.
45. Id.
46. Id.
47. Id.
48. Id. (emphasis in original).
49. Id.
50. Id.
In conclusion, however, the majority stated that "the use of the strict liability doctrines leaves no room for contributory negligence as we have known it,"51 and "victim fault, to be a defense, must be at least a substantial cause."52

C. Strict Liability

The final proposition that Rozell sets forth is about strict liability as a fault concept. The court stated that "[v]ictim fault must rise to the level of causing the accident before it will bar recovery"53 because "[o]therwise, the doctrine of strict liability would have no utility" for the reason that "[t]he liability would not be 'strict.'"54

IV. Analysis

A. Assumption of the Risk

The court held that Mr. Rozell did not assume the risk of his injuries because he did not appreciate the unreasonable character of the risk. This holding and the reasons for it have at least two possible meanings. Neither is very satisfying.

1. Proper Standard; Improper Result

First, the court may have meant that Mr. Rozell did not assume the risk because he did not appreciate and accept the possibility of danger that the risk represented. This requirement is well-settled under Louisiana law.55 Under our jurisprudence, a plaintiff who assumes a
risk must voluntarily encounter the risk, know of and appreciate it and accept it. One cannot know of, appreciate and accept a risk, however, unless he also knows of, appreciates and accepts the possibility of danger that the risk represents, because "risk" means "possibility of danger." The majority in Rozell does not say so, but appreciation of the possibility of danger is also what appreciation of the unreasonable character of the risk means, as articulated in Section 496D of the Restatement (Second) of Torts, explained in comment b to Section 496D and construed in case law.


56. See authorities cited in supra note 55.
57. See supra note 36 and accompanying text; authorities cited in supra note 55; V. Schwartz, supra note 34, § 9.5 at 179 ("On the other hand, when plaintiff assumes a risk, he volunteers to be subject to a possible injury.") (emphasis in original). See also VIII The Oxford English Dictionary 714 (1933) (definition of "risk"); Webster's New International Unabridged Dictionary 2154 (2d ed. 1960) (definition of "risk").
58. Comment b to Section 496D provides:

The basis of assumption of risk is the plaintiff's consent to accept the risk and look out for himself. Therefore he will not be found, in the absence of an express agreement which is clearly so to be construed, to assume any risk unless he has knowledge of its existence. This means that he must not only be aware of the facts which create the danger, but must also appreciate the danger itself and the nature, character, and extent which make it unreasonable. Thus the condition of premises upon which he enters may be quite apparent to him, but the danger arising from the condition may be neither known nor apparent, or, if known or apparent at all, it may appear to him to be so slight as to be negligible. In such a case the plaintiff does not assume the risk. His failure to exercise due care either to discover or to understand the danger is not properly a matter of assumption of risk, but the defense of contributory negligence.

Restatement (Second) of Torts § 496D, comment b (1965) (emphasis added). In other words, "[c]omment 'b' states that the whole concept of implied assumption is based on the actor's consent to accept the risk and look out for himself, which necessarily entails, according to comment 'b', that the actor understand the 'nature, character and extent of the danger in addition to the facts which create the danger (comment 'b').'" — Rutter v. Northeastern Beaver County School Dist., 496 Pa. 590, 437 A.2d 1198, 1204 (1981) (emphasis in original). See, e.g., Merced v. Auto Pak Co., 533 F.2d 71, 77 (2d Cir. 1976) ("it is the precise danger which must be patent.") (emphasis in original); Chavez v. Pima County, 107 Ariz. 358, 360-61, 488 P.2d 978, 980-81 (1971); Weaver v. Clabaugh, 255 Pa. Super. 532, 334-35, 388 A.2d 1094, 1096 (1978); authorities cited in supra note 55. See also Keegan v. Anchor Inns, Inc., 606 F.2d 35, 37-38 & 38 n.3 (3d Cir. 1979) (suggesting that Section 496D explains the phrase "fully understands" in Section 496C). The Rozell court implied as much itself, when it said that, to assume a risk, one "must
It is difficult to believe that Mr. Rozell did not understand the dangerous possibilities of entering an enclosed space with a 2700 pound bull and, once there, of turning his back to the animal. Mr. Rozell was a professional bull keeper. He knew bulls and their propensities. He testified that "a man with good sense just wouldn't turn his back to a bull." His employer forbade him and all the other keepers from entering a pen unless the bull was secured and at least one other person was present. The reason why is obvious. Mr. Rozell entered Dixie Lee's pen anyway, moving "cautiously." There was a reason for that, too. Mr. Rozell feared that the bull would butt him, and that is exactly what happened.

Nonetheless, the Rozell majority stated that the determination of whether a plaintiff has assumed a risk is a subjective inquiry and pointed to Mr. Rozell's testimony that he believed he could enter the bull's pen and close the gate without sustaining injury. The majority is correct that the applicable standard is largely a subjective one that focuses on the particular plaintiff in the particular situation, rather than the more objective reasonable man standard of plaintiff negligence. The inquiry cannot be wholly subjective, however, as one commentator explains:

[It is evident that a purely subjective standard opens a very wide door for the plaintiff who is willing to testify that he did not know or understand the risk; and there have been a good many cases in which the courts have said in effect that he is not to be believed, so that in effect something of an objective element enters the case, and the standard applied does not always differ greatly from the reasonable person. Thus, the plaintiff

understand and appreciate the risk involved and accept it as well as the inherent possibility of danger because of the risk." Rozell IV at 178. See supra note 36 and accompanying text.

59. Rozell II at 970. See id. at 972; supra note 10 and accompanying text.
60. Rozell II at 971; supra note 14 and accompanying text. See Restatement (Second) of Torts § 496C, comment h (1965); Restatement (Second) of Torts § 515, comment e (1977). Comment h to Section 496C provides:

The basis of assumption of risk is consent to accept the risk. In order for assumption of risk to be implied from the defendant's conduct, it must be such as fairly to indicate that the plaintiff is willing to take his chances. Implied consent is consent which exists in fact, but is manifested by conduct rather than by words.

Restatement (Second) of Torts § 496C, comment h (1965) (emphasis added).

61. See, e.g., Dorry v. Lafleur, 399 So. 2d 559, 561-63 (La. 1981), and authorities cited therein; Langlois v. Allied Chem. Corp., 249 So. 2d 133, 141 (La. 1971), and authorities cited therein; V. Schwartz, supra note 34, § 9.1, at 155-57, § 12.6, at 206-07; 12 F. Stone, Louisiana Civil Law Treatise § 51(A), at 72, § 297 at 405 (1977); Restatement (Second) of Torts § 496D and comments b and c (1965); Crowe, The Anatomy of a Tort—Greenian, As Interpreted by Crowe Who Has Been Influenced by Malone—A Primer, 22 Loy. L. Rev. 903, 915 (1976).
will not be heard to say that he did not comprehend a risk which must have been quite clear and obvious to him. There are some things, as for example the risk of injury if one is hit by a baseball driven on a line, which are so far a matter of common knowledge in the community, that in the absence of some satisfactory explanation, a denial of such knowledge is simply not to be believed.

As in the case of negligence itself, there are certain risks which anyone of adult age must be taken to appreciate: the danger of slipping on ice, of falling through unguarded openings, of lifting heavy objects, of being squeezed in a narrow space, of inflammable liquids, of driving an automobile whose brakes will not operate, of unguarded circular saws or similar dangerous machinery, and doubtless many others. Furthermore, a plaintiff who has confronted a dangerous situation over a substantial length of time will be taken to have discovered it and to understand the normal, ordinary risks involved in that situation, such as the danger of trains in motion in a railroad yard, or the risk of slipping on a dangerous stairway used everyday. Once the plaintiff fully understands the risk, the fact that he has momentarily forgotten it may not protect him. In the usual case, his knowledge and appreciation of the danger would be a question for the jury; but where it is clear that any person in his position must have understood the danger, the issue may be decided by the court.62

62. W. Prosser & W. Keeton, supra note 38, § 68, at 487-88 (footnotes omitted). Consider the court's comments in Richards v. Marlow, 347 So. 2d 281 (La. App. 2d Cir.), writ denied, 350 So. 2d 676 (La. 1977), a relational responsibility strict liability case in which the court of appeal reversed the trial court's judgment for the plaintiff:

Rose Marie was an intelligent thirteen year old. She should be expected to understand and avoid a danger as obvious as that of "tightroping" a wet pipe with wet feet. Furthermore, although her testimony indicates that she did not believe she would fall from the pipe, it also indicates that she recognized there was an element of risk. A fair summary of Rose Marie's attitude is that she did not find the degree of danger sufficient to deter her from walking the pipe. She was taking what she thought was a reasonable risk.

Id. at 283. See 3 S. Speiser, C. Krause & A. Gans, The American Law of Torts § 12.53, at 655-57 (1986); 12 F. Stone, supra note 61, § 294, at 400-01.

The issue of plaintiff negligence, like the issue of assumption of the risk, is also a question for the trier of fact. See, e.g., McCaskill v. Welch, 463 So. 2d 942, 950 (La. App. 3d Cir.), writ denied, 466 So. 2d 469 (La. 1985); Triangle Trucking Co. v. Alexander, 451 So. 2d 638, 642 (La. App. 3d Cir. 1984); Varnado v. Continental Ins. Co., 446 So. 2d 1343, 1345 (La. App. 1st Cir. 1984). The trial court in Rozell, as the trier of fact, found that Mr. Rozell was guilty of negligence. Rozell IV at 276; id. at 280 (Lemmon, J., dissenting); Rozell II at 969-71. See supra note 26 and accompanying text. However, in some circumstances the same conduct may be both negligence and assumption of the risk. See supra note 38 and infra notes 88, 117 and 119 and accompanying text.
ASSUMPTION OF THE RISK

Comment d to Restatement Section 496D, which (Section 496D) the court in Dorry and Rozell embraced with a warmth verging on rapture, also illustrates the point:

In cases of assumption of risk, however, the plaintiff’s own testimony as to what he knew, understood, or appreciated, is not necessarily conclusive. There are some risks as to which no adult will be believed if he says that he did not know or understand them. Thus an adult who knowingly comes in contact with a fire will not be believed if he says that he was unaware of the risk that he might be burned by it; and the same is true of such risks as those of drowning in water or falling from a height, in the absence of any special circumstances which may conceal or appear to minimize the danger. One who has spent a substantial time upon particular premises ordinarily would be found in fact to understand and appreciate the normal, ordinary risks of those premises, such as the danger from moving trains in a railroad switching yard.

Additionally, the supreme court itself in Dorry said:

This is not to say that the plaintiff’s disclaimer of knowledge or appreciation must be taken at face value. This is a fact question. And there are some risks that every man must be held to appreciate (see Restatement, supra, comment d).

The risk that injured Mr. Rozell, it is submitted, is just the sort that “every man must be held to appreciate.” For this reason, and under this possible meaning of the court’s decision, the result in Rozell is incorrect.

2. Improper Standard; Improper Result

The other possible interpretation of the Rozell court’s holding and reasoning is that appreciation of the unreasonable character of the risk

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63. See Rozell IV at 278-80; Dorry v. Lafleur, 399 So. 2d 559, 562-63 (La. 1981).
means that the plaintiff, to assume the risk, must know that the danger represented by the risk is certain to occur, not merely that it is possible. Such an interpretation would be consistent with the facts, because, as explained, Mr. Rozell surely contemplated the possibility that he would be hurt, but testified in effect that he was not certain that he would be.

 Practically, such an interpretation also would mark the virtual abolition of assumption of the risk as an affirmative defense. To require a defendant to prove that the plaintiff knew he would be hurt would be next to impossible—few plaintiffs would ever give such testimony. It also would be tantamount to requiring a defendant to prove that the plaintiff acted deliberately in injuring himself, which precludes recovery anyway.66 Such an interpretation would mean, for instance, that a high wire artist who fell while walking a wire between two skyscrapers could recover from the buildings' owners under Civil Code articles 2317 and 2322 (if the wire or buildings were found to be "defective"),67 so long as he believed and testified that he could safely make it across.68 Recovery would be similarly available to the plaintiff who was injured, for example, while dashing into a burning building to save his hat, if the plaintiff felt and contended it was an acceptable risk.69 Other possibilities are limited only by one's imagination.

 If this construction of Rozell accurately represents the court's thinking, the majority's erroneous conclusion that Mr. Rozell did not assume the risk was predictable, because the court based its result on a legal standard that has no foundation in Louisiana law.70 Nor should it have.71

B. Comparative Fault

 One will recall that the majority next turned to a discussion of comparative fault, saying first that "[n]othing in the code, statutes or


68. See, e.g., Richards v. Marlow, 347 So. 2d 281, 282-84 (La. App. 2d Cir.), writ denied, 350 So. 2d 676 (La. 1977); Crowe, supra note 61, at 915; Johnson, supra note 66, at 334-37 (discussion of plaintiff conduct that creates a situation as to which the defendant has no duty of protection).

69. See Restatement (Second) of Torts § 496A, comment d (1965); Johnson, supra note 66, at 334-37 (discussion of plaintiff conduct that creates a situation as to which the defendant has no duty of protection).

70. See authorities cited in supra note 55.

71. See supra notes 55-58 and accompanying text.
known jurisprudence" requires the application of contributory negligence as a total bar to recovery under articles 2317 and 2321. By mentioning article 2317, the court presumably meant to include all forms of relational responsibility strict liability in this statement. The court then said that plaintiff negligence and assumption of the risk, insofar as they operate as elements of the victim fault defense to such liability, are causation defenses, and must "rise to the level of causing the accident before [they] will bar recovery" or "to be a defense, must be at least a substantial cause."

These observations also are subject to several possible interpretations. Once again, none is appealing.

1. Rozell as a Comparative Fault Case

Mr. Rozell was injured before the Louisiana legislature adopted comparative fault. The opinion is not entirely clear, but the Rozell majority implied in its statements about the doctrine of contributory negligence that the court intended to apply comparative fault anyway. This construction of the court's approach is consistent with Bell v. Jet Wheel Blast, where the supreme court did more than imply. The court

72. Rozell IV at 279.
73. See supra notes 43-45 and accompanying text. The majority also said later that "the use of the strict liability doctrine leaves no room for contributory negligence as we have known it." Rozell IV at 280.
74. See supra note 20.
76. Rozell IV at 279.
77. Id. at 280. See supra notes 46-52 and accompanying text. Once again, it seems clear that the court is speaking of all forms of relational responsibility strict liability. See Rozell IV at 279-80.
there said expressly that old Civil Code article 2323 has always provided for comparative fault\(^7\) and seemed to say that new article 2323,\(^8\) Louisiana's comparative fault statute as amended by the legislature, does not prohibit the statute's application retroactively.\(^\)\(^9\)

If Rozell is, in this sense, a comparative fault case, the majority's declaration that victim fault must be a substantial cause of the accident to be a defense\(^2\) is disconcerting. It suggests that comparative fault does

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Before the legislature amended it, article 2323 provided: "The damage caused is not always estimated at the exact value of the thing destroyed or injured; it may be reduced according to circumstances if the owner of the thing has exposed it imprudently." See Malone, Comparative Negligence—Louisiana's Forgotten Heritage, 6 La. L. Rev. 125 (1945).

80. La. Civ. Code art. 2323 now provides:

When contributory negligence is applicable to a claim for damages, its effect shall be as follows: If a person suffers injury, death or loss as the result partly of his own negligence and partly as a result of the fault of another person or persons, the claim for the damages shall not thereby be defeated, but the amount of damages recoverable shall be reduced in proportion to the degree or percentage of negligence attributable to the person suffering the injury, death or loss.


81. See Bell v. Jet Wheel Blast, 462 So. 2d 166, 170 (La. 1985), where the court said that new article 2323 "does not, however, state when the courts shall permit a defense of contributory or comparative negligence to affect a plaintiff's recovery, nor does it prohibit the courts from applying comparative negligence to a claim previously insusceptible to the bar of contributory negligence." Did the court mean "susceptible" as well as "insusceptible"? The context in which the statement was made suggests that the court may have. See id. at 169-70. Compare Walker v. Maybelline Co., 477 So. 2d 1136, 1140 (La. App. 1st Cir. 1985), writ denied, 481 So. 2d 1333 (La. 1986), with Crawford, supra note 79, at 719. If so, how does one resolve the statement with the legislative directive that "[t]he provisions of this act [which amended article 2323] shall not apply to claims arising from events that occurred prior to the time this act becomes effective [August 1, 1980]?" 1979 La. Acts No. 431, § 4. See, e.g., Fulgium v. Armstrong World Indus., Inc., 645 F. Supp. 761, 762 (W.D. La. 1986); Hutson v. Madison Parish Police Jury, 496 So. 2d 360, 367 n.1 (La. App. 2d Cir. 1986); Bourgeois v. Jones, 481 So. 2d 145, 151-52 (La. App. 5th Cir. 1985), writ denied, 484 So. 2d 136 (La. 1986); S. Speiser, C. Krause & A. Gans, supra note 62, §§ 13.14-.20, at 740-52; supra note 78 and accompanying text. See also Ardoin v. Hartford Accident & Indem. Co., 360 So. 2d 1331, 1338-39 (La. 1978) (discussion of general principle of nonretroactivity of statutes and exceptions to the principle).

82. One cannot be certain, but the majority seems to have finally settled on this statement about victim fault and causation, see Rozell IV at 280 n.3; supra note 52, as opposed to its earlier statement that victim fault, to be a defense, must cause the accident. The court also presumably is speaking of cause-in-fact, as opposed to proximate cause. The terms are, of course, different: "Assuming that plaintiff's or defendant's negligence
ASSUMPTION OF THE RISK

not apply unless victim fault substantially causes the plaintiff's damages. The obvious threshold question is how much is "substantial." The court provides no guidance. Moreover, the statement is at odds with Landry v. State, a decision that the supreme court handed down the same day it decided Rozell. In Landry, the court held that a plaintiff's negligence, of whatever amount or degree, may in appropriate circumstances apply comparatively to reduce his recovery against an article 2317 defendant, the determination to be made on a case-by-case basis according, inter alia, to the policy and precepts set forth in Jet Wheel Blast. Surely the Rozell court was cognizant of Landry.

was a physical cause of the accident [cause-in-fact], was it a proximate, or legal, cause? At this juncture, considerations of policy, either expressed or unexpressed, enter into a court's decision." V. Schwartz, supra note 34, § 4.2, at 79. See Note, When Cause-In-Fact Is More Than A Fact: The Malone-Green Debate on the Role of Policy in Determining Factual Causation in Tort Law, 44 La. L. Rev. 1519 (1984). Cause-in-fact is not an easy concept to grasp, see id. at 1519; infra note 101 and accompanying text, but proximate cause is even tougher. See Johnson, supra note 66; Robertson, supra note 20; Note, supra; infra notes 97-102 and 112 and accompanying text.

83. See infra note 112 and accompanying text.
84. 495 So. 2d 1284 (La. 1986).
85. Id. at 1290. See Bell v. Jet Wheel Blast, 462 So. 2d 166, 171-72 (La. 1985) ("Where the threat of a reduction in recovery will provide consumers with an incentive to use a product carefully, without exacting an inordinate sacrifice of other interests, comparative principles should be applied for the sake of accident prevention. The recovery of a plaintiff who is injured by a defective product should not be reduced, however, in those types of cases in which it does not serve realistically to promote careful product use or where it drastically reduces the manufacturer's incentive to make a safer product."). See, e.g., Haas v. Atlantic Richfield, 799 F.2d 1011, 1015-16 (5th Cir. 1986); Fulgium v. Armstrong World Indus., Inc., 645 F. Supp. 761, 762-63 (W.D. La. 1986). The main teaching of Jet Wheel Blast is that the amount of a plaintiff's recovery should be reduced by the total fault percentage of his negligence, assumption of the risk and product misuse, at least in products liability cases, but only if such reduction will encourage plaintiffs and defendants to act more carefully. See, e.g., Bell v. Jet Wheel Blast, 462 So. 2d 166, 167, 171-73 (La. 1985); Note, Bell v. Jet Wheel Blast: More Confusion in an Already Confused Area, 46 La. L. Rev. 1107, 1107-09 (1986). For a more thorough discussion of Jet Wheel Blast, its policy and its progeny, see Note, supra. One of the theses of this article is that Louisiana's comparative fault principles should be uniformly applied to all products liability actions, without the necessity of having to consider the policy directives of Jet Wheel Blast. Id. passim. Justice Blanche, dissenting in Jet Wheel Blast, would go even further. "It would be a simple matter," he wrote, "to apply comparative negligence in all cases where the fault of both parties contributes [sic] to the injury, whether under Civil Code Article 2315 or Article 2317 or any other conceivable theory of liability." Bell v. Jet Wheel Blast, 462 So. 2d 166, 174 (La. 1985) (Blanche, J., dissenting). See Turner v. New Orleans Pub. Serv., Inc., 471 So. 2d 709, 715 (La. 1985) (Marcus, J., concurring); id. (Blanche, J., concurring); Bell v. Jet Wheel Blast, 462 So. 2d 166, 173 (La. 1985) (Watson, J. concurring); id. at 174 (Marcus, J., dissenting); Jamail, The Damage Award in a Maritime Personal Injury Case, 45 La. L. Rev. 837, 869 n.51 (1985); Comment, Use of Comparative Fault in Strict Products Liability: Bell v. Jet Wheel Blast, Division of Ervin Industries, 31 Loy. L. Rev. 1030, 1038-42 (1986).
If the court was aware of Landry—and it had to have been—one must wonder why the court did not consider Mr. Rozell’s negligence as an ingredient of victim fault to reduce his recovery. The trial court, of course, found that Mr. Rozell’s negligence completely barred his recovery, but the trial court did not apply comparative fault. The lower court nonetheless found that the plaintiff was negligent and documented his substandard conduct in detail. The supreme court has before re-

86. The majority justices in Rozell and Landry are identical, except for Justice Marcus, who dissented in Rozell but voted with the majority in Landry. Compare Rozell IV at 275, 280, with Landry v. State, 495 So. 2d 1284, 1285, 1291 (La. 1986). The majority in Rozell reversed the trial court, which found that Mr. Rozell’s contributory negligence barred his recovery, and the court of appeal, which held that Mr. Rozell could not recover because he assumed the risk of his injuries, and remanded the case to the court of appeal for further proceedings consistent with the supreme court’s opinion. The supreme court gave no direction to the court of appeal to reduce Mr. Rozell’s damages by the percentage of his negligence, and, of course, the supreme court held that Mr. Rozell did not assume the risk. Presumably, the only task remaining for the court of appeal is to fix the amount of damages that Mr. Rozell will be entitled to recover.

87. See Rozell IV at 276; Rozell II at 971. In Justice Lemmon’s view, the trial court found that Mr. Rozell’s fault totally caused the accident, not merely that Mr. Rozell was less than totally at fault, but that the doctrine of contributory negligence barred his recovery. See Rozell IV at 280 (Lemmon, J., dissenting).

88. See Rozell IV at 276; id. at 280 (Lemmon, J., dissenting); Rozell II at 969-71; supra note 26 and accompanying text; supra notes 38 and 62; infra notes 117 and 119 and accompanying text. The conclusion of the Rozell majority also establishes Mr. Rozell’s negligence. If Mr. Rozell did not appreciate the unreasonable character of the risk, as the court contended, Mr. Rozell should have, because the nature of the risk is obvious. Mr. Rozell’s failure to appraise the risk correctly was, therefore, negligence. See, e.g., American Mut. Liab. Ins. Co. v. Firestone Tire & Rubber Co., 799 F.2d 993 (5th Cir. 1986); Restatement (Second) of Torts § 496A, comment b (1965). See id. § 402 A, comment n; id. § 515 and comments thereto (1977); id. § 524 and comments thereto (1977); Crowe, supra note 61, at 915. In other words, unreasonable assumption of the risk is plaintiff negligence. See supra note 38. If, therefore, the findings of Rozell on assumption of the risk are wrong and this article’s analysis regarding the issue of whether Mr. Rozell appreciated and assumed the risk is correct, see supra notes 57-71 and accompanying text, Mr. Rozell also was guilty of negligence, at least according to Restatement principles, because the danger of entering an enclosed space with a 2700 pound bull and turning one’s back to the bull in order to open a gate, when safer alternatives were available, is certainly disproportionate to the interest sought to be advanced. See Johnson v. Clark Equip. Co., 274 Or. 403, 410-13, 547 P.2d 132, 138-39 (1975); Richards v. Marlow, 347
apportioned plaintiff fault in a manner different from the trial court in spite of the "manifestly erroneous" standard of appellate review for findings of fact,\footnote{See, e.g., Watson v. State Farm Fire & Casualty Ins. Co., 469 So. 2d 967, 972 (La. 1985); Canter v. Koehring Co., 283 So. 2d 716, 724 (La. 1973). See also Triangle Trucking Co. v. Alexander, 451 So. 2d 628, 642 (La. App. 3d Cir. 1984) (trier's findings as to percentage of fault under article 2323 are factual just as findings of contributory negligence under prior law). Cf. McLean v. Hunter, 495 So. 2d 1298, 1303-05 (La. 1986) (manifestly erroneous or clearly wrong standard of review applies only to jury verdicts that follow properly conducted trials).} and has done so when the trial court found that the plaintiff was totally at fault.\footnote{See Landry v. State, 495 So. 2d 1284, 1288-91 (La. 1986); Bell v. Jet Wheel Blast, 462 So. 2d 166, 172 (La. 1985). See also Scott v. Hospital Serv. Dist. No. 1, 496 So. 2d 270, 274 (La. 1986) (jury findings on comparative fault accorded great weight).}

\textit{Rozell}, therefore, was an appropriate candidate for similar supreme court treatment. Additionally, by ignoring the nature of Mr. Rozell's conduct, the court has violated its own teachings in \textit{Landry} and \textit{Jet Wheel Blast} about the importance of a trial court's findings of plaintiff and defendant fault in comparative fault settings.\footnote{Pending future judicial or legislative developments, we are content for the present to assume the position taken by the California court which scrupulously abstained from issuing a detailed guidebook to the new area of comparative negligence, preferring to adopt a view 'that ... the trial judges of this State are capable of applying [a] comparative negligence rule without our setting guidelines in anticipation of expected problems. The problems are more appropriately resolved at the trial level in a practical manner instead of a theoretical solution at [sic] the appellate level. The trial judges are granted broad discretion in adopting such procedure as may accomplish the objectives and purposes expressed in this opinion.'\footnote{462 So. 2d at 172-73. (citation omitted). See Note, supra note 85, at 1108.}}

The issue of Mr. Rozell's assumption of the risk as an element of victim fault in a comparative fault case is a slightly different matter. In light of \textit{Landry}, perhaps the majority meant that victim fault in the form of assumption of the risk, rather than victim fault as plaintiff

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\footnote{So. 2d 281, 282-84 (La. App. 2d Cir.), writ denied, 350 So. 2d 676 (La. 1977); V. Schwartz, supra note 34, § 9.1, at 155-57; id. § 12.6, at 206-07; James, Assumption of Risk: Unhappy Reincarnation, 78 Yale L.J. 185 passim (1968); Comment, supra note 20, 38 La. L. Rev. at 1017; supra notes 38 and 62 and infra notes 117 and 119 and accompanying text. Such a conclusion—that Mr. Rozell's conduct was both assumption of the risk and plaintiff negligence—would be consistent with the findings of both the trial court and the court of appeal. See supra notes 26 and 28 and accompanying text.}

\footnote{See, e.g., Watson v. State Farm Fire & Casualty Ins. Co., 469 So. 2d 967, 972 (La. 1985); Canter v. Koehring Co., 283 So. 2d 716, 724 (La. 1973). See also Triangle Trucking Co. v. Alexander, 451 So. 2d 628, 642 (La. App. 3d Cir. 1984) (trier's findings as to percentage of fault under article 2323 are factual just as findings of contributory negligence under prior law). Cf. McLean v. Hunter, 495 So. 2d 1298, 1303-05 (La. 1986) (manifestly erroneous or clearly wrong standard of review applies only to jury verdicts that follow properly conducted trials).}

\footnote{See, e.g., Watson v. State Farm Fire & Casualty Ins. Co., 469 So. 2d 967, 973-74 (La. 1985). See also, e.g., Perret v. Webster, 498 So. 2d 283, 286-87 (La. App. 4th Cir. 1986); Jeansonne v. Corbett, 496 So. 2d 1346, 1347-49 (La. App. 3d Cir. 1986). According to Justice Lemmon, the trial court in \textit{Rozell} also found that Mr. Rozell's fault totally caused the accident. See \textit{Rozell IV} at 280 (Lemmon, J., dissenting); supra note 87.}

\footnote{See Landry v. State, 495 So. 2d 1284, 1288-91 (La. 1986); Bell v. Jet Wheel Blast, 462 So. 2d 166, 172 (La. 1985). See also Scott v. Hospital Serv. Dist. No. 1, 496 So. 2d 270, 274 (La. 1986) (jury findings on comparative fault accorded great weight). In \textit{Jet Wheel Blast}, the court said:}

Pending future judicial or legislative developments, we are content for the present to assume the position taken by the California court which scrupulously abstained from issuing a detailed guidebook to the new area of comparative negligence, preferring to adopt a view 'that ... the trial judges of this State are capable of applying [a] comparative negligence rule without our setting guidelines in anticipation of expected problems. The problems are more appropriately resolved at the trial level in a practical manner instead of a theoretical solution at [sic] the appellate level. The trial judges are granted broad discretion in adopting such procedure as may accomplish the objectives and purposes expressed in this opinion.'
negligence, must be a substantial cause of an accident before comparative fault will apply in an article 2317 case. Bell v. Jet Wheel Blast seems to say otherwise, \(^9\) and, even more explicitly, so do numerous courts of appeal decisions\(^9\) and decisions by the federal judiciary.\(^4\) But Jet Wheel Blast was a products liability case\(^5\) and decisions of lower appellate courts and federal courts are not binding on the supreme court. It also makes some sense, analytically, to say as Rozell may have that the plaintiff's assumption of the risk should not apply in a purely comparative fashion, because one either assumes a risk or he does not.\(^6\)

The disadvantages of an approach that would require assumption of the risk to be a substantial cause of an accident in order to trigger application of comparative negligence are considerable, however. First, such a rule obfuscates the issue by ignoring the simple logic that an accident can have more than one cause, substantial or otherwise.\(^7\) Second, it negates the purpose and essence of comparative fault:

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92. Bell v. Jet Wheel Blast, 462 So. 2d 166, 172 (La. 1985) ("Furthermore, the adoption of a system of comparative fault should, where it applies, entail the merger of the defenses of misuse and assumption of risk into the general scheme of assessment of liability in proportion to fault."). See Williams v. New Orleans Pub. Serv., Inc., 421 So. 2d 278, 280-81 (La. App. 4th Cir. 1982); infra note 95 and accompanying text.


95. Bell v. Jet Wheel Blast, 462 So. 2d 166, 167-68 (La. 1986). However, a strict products liability decision, insofar as it addresses the subject of strict liability, may be relevant to other forms of strict liability, such as relational responsibility strict liability. See, e.g., Comment, supra note 20, 40 La. L. Rev. at 212-15. The converse is also true. See, e.g., Landry v. State, 495 So. 2d 1284, 1288-91 (La. 1986); Kent v. Gulf States Utilis. Co., 418 So. 2d 493 (La. 1982); Hunt v. City Stores, Inc., 387 So. 2d 585 (La. 1980); Marquez v. City Stores Co., 371 So. 2d 810 (La. 1979).

96. See, e.g., Dorry v. Lafleur, 399 So. 2d 559, 561 (La. 1981); 12 F. Stone, supra note 61, § 51(A) at 72 ("The establishment of the defense of voluntary assumption of known risk (which as a pleading is not limited to actions based on negligence) means juridically that no tort was committed by the defendant and for that reason the plaintiff's action against him fails."); (footnote omitted) (emphasis in original); Restatement (Second) of Torts § 496C, comment c (1965).

97. See, e.g., Forest v. State, 493 So. 2d 563, 571 (La. 1986) ("Rather the [acts of the two [defendants] were concurrent causes."); id. at 563-71; Bell v. Jet Wheel Blast, 462 So. 2d 166, 172 (La. 1986) ("[The defendant's] ordinary contributory negligence in combination with the machine's defect caused the accident and injury."); V. Schwartz, supra note 34, § 4.1, at 77-79; S. Speiser, C. Krause & A. Gans, supra note 62, § 11.5, at 394; Crowe, supra note 61, at 904 ("One is warned not to seek the cause of the plaintiff's harm. No event results from a single cause; cause and effect are endless and timeless."); (emphasis in original); Johnson, supra note 66, at 325 n.30; Note, supra note 20, at 1385-86; supra note 82 and infra note 112 and accompanying text. See generally Note, supra note 82.
[T]he comparative negligence reduced recovery system is by its nature designed to consider conduct which falls short of constituting an independent and superseding cause. Reduced recovery, as opposed to a total bar, enables courts to consider contributory conduct which is less than the sole cause without frustrating recovery completely.\(^9\)

Third, such a procedure emphasizes “causation” at the expense of “fault.” Certainly causation is important—plaintiff fault, to apply, must at least have contributed to the plaintiff’s damages as a cause-in-fact of the accident\(^9\)—but to focus on causation exclusively suggests that the inquiry is solely one of metaphysics. It is not. Equally important is the nature of the parties’ conduct—both plaintiff and defendant—in moral, social and economic terms.\(^10\) Additionally, even the keenest legal minds agree that the issue of causation is “the most deceptive and elusive concept known to tort law.”\(^11\) Any analysis that is concerned only with causation as a benchmark for liability is virtually preordained to fail.\(^10\)

Fourth, assumption of the risk applies in Louisiana in a purely

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98. Note, supra note 20, at 1387. See Gadman v. State, 493 So. 2d 661, 666 (La. App. 2d Cir. 1986); V. Schwartz, supra note 34, § 4.1, at 79, § 4.5, at 86-89; Johnson, supra note 66, 319, 326 n.30 (1980); supra note 82 and infra note 112 and accompanying text. The author also points out that “[e]arlier case law developed under the ‘all or nothing’ system, which resulted in addressing whether the plaintiff’s conduct was an independent, superseding cause.” Note, supra note 20, at 1387. It was this case law on which the Rozell majority relied for support. See Rozell IV at 279.

99. See, e.g., V. Schwartz, supra note 34, § 4.1, at 78; supra note 82 and infra note 112 and accompanying text.


102. See V. Schwartz, supra note 34, §§ 4.1-.6, at 77-94; supra note 82 and infra note 112 and accompanying text.
comparative manner in appropriate cases of strict products liability.\textsuperscript{103} Rozell articulates no sound reasons of policy why assumption of the risk should not apply in a similar fashion to relational responsibility strict liability as well. In fact, the case for a purely comparative application under article 2317 is even more compelling, because Louisiana is relatively unique among the several states in imposing such liability.\textsuperscript{104} Finally, reasonable men may differ about the meaning of article 2323, and indeed have,\textsuperscript{105} but a persuasive argument can be made that the legislature did not intend to distinguish between plaintiff negligence and assumption of the risk insofar as plaintiff and comparative fault are concerned.\textsuperscript{106}

The better view, then, is to allow the fact-finder to consider the question of a plaintiff's assumption of the risk as one factor in assessing his total comparative fault, and to do so in all cases of strict liability.\textsuperscript{107} Whether the risk acceptance is the sole cause, a substantial cause or merely one of several causes-in-fact of the accident should make no difference, except insofar as the amount of reduction of the plaintiff's recovery is concerned.\textsuperscript{108} This is the approach adopted in other states.\textsuperscript{109}

\begin{thebibliography}{9}
\bibitem{103} See Bell v. Jet Wheel Blast, 462 So. 2d 166, 172 (La. 1985).
\bibitem{104} Barham, supra note 100, at 1172, 1189. See Carpenter v. State Farm Fire & Casualty Co., 411 So. 2d 1206, 1210 (La. App. 4th Cir. 1982).
\bibitem{105} See, e.g., Landry v. State, 495 So. 2d 1284, 1288-91 (La. 1986); Turner v. New Orleans Pub. Serv., Inc., 471 So. 2d 709, 712-14 (La. 1985); id. at 715 (Marcus, J., concurring); id. (Lemmon, J., concurring); id. (Blanche, J., concurring); Bell v. Jet Wheel Blast, 462 So. 2d 166, 169-73 (La. 1985); id. at 173 (Watson, J., concurring); id. at 174 (Dixon, C. J., concurring); id. (Marcus, J., dissenting); id. (Blanche, J., dissenting); Barham, supra note 100; Crawford, supra note 79; Johnson, supra note 66; Robertson, supra note 20; Note, supra note 85.
\bibitem{106} See, e.g., Turner v. New Orleans Pub. Serv., Inc., 471 So. 2d 709, 713 (La. 1985) ("Are we to believe that a policy permitting all-or-nothing recovery was intended to be retained [by the legislature] in cases in which a defendant, guilty of fault, raises the defense of assumption of the risk?"); Bell v. Jet Wheel Blast, 462 So. 2d 166, 172 (La. 1985); Crawford, supra note 79, at 719. See generally Comment, Comparative Negligence in the United States—The Advent of its Adoption in Louisiana, 51 Tul. L. Rev. 1217, 1229-31 (1977).
\bibitem{107} This assumes that neither the plaintiff nor defendant waives the application of comparative fault, see La. Code Civ. P. arts. 852-865, 891-92, 1005, which a litigant might wish to do for purpose of trial strategy.
\bibitem{108} See, e.g., V. Schwartz, supra note 34, § 12.6 at 207-08, § 12.8 at 214; Comment, supra note 106, at 1230-31; Uniform Comparative Fault Act § 1 and comments thereto, reprinted in 40 La. L. Rev. 419, 421-25 (1980); supra note 85. A similar argument, equally persuasive, can be made that assumption of the risk should be considered as an ingredient of plaintiff fault in all cases of negligence as well. See, e.g., V. Schwartz, supra note 34, § 9.5, at 179-80; Uniform Comparative Fault Act § 1 and comments thereto, reprinted in 40 La. L. Rev. 419, 421-25 (1980); supra note 85. But see V. Schwartz, supra note 34, § 9.5, at 179 (arguments for retention of assumption of the risk as an absolute bar to recovery). However, for an interesting discourse on why assumption of the risk should
\end{thebibliography}
It is similar to the approaches of Landry for plaintiff negligence as victim fault in article 2317 cases and of Jet Wheel Blast for plaintiff negligence and assumption of the risk in products liability controversies.\textsuperscript{110} The contention in Rozell that a contrary procedure should be be abolished altogether, see James, supra note 88. Certainly the simplest and probably the best solution would be to follow what in effect is Justice Blanche’s advice in Jet Wheel Blast: apply plaintiff fault, in its several forms, comparatively in all cases of negligence and strict liability. See Bell v. Jet Wheel Blast, 462 So. 2d 166, 174 (La. 1985) (Blanche, J., dissenting); supra note 85.

109. These states include California, Florida, Idaho, Iowa, Minnesota, New Hampshire, Texas, Washington and Wisconsin. V. Schwartz, supra note 34, § 13.5, at 207-08 & 207 n.82; Comment, supra note 106, at 1230-31. See also V. Schwartz, supra note 34, § 9.4, at 167-73 (discussion of states that have merged assumption of the risk into plaintiff negligence in negligence actions); S. Speiser, C. Krause & A. Gans, supra note 63, §§ 13.3-5, at 693-710; Flemming, Forward: Comparative Negligence at Last—By Judicial Choice, 64 Calif. L. Rev. 239, 262 (1976); Note, Contributory Negligence and Assumption of Risk—The Case for Their Merger, 56 Minn. L. Rev. 47 (1971); Note, Assumption of Risk as a Defense in Nebraska Negligence Actions Under the Comparative Negligence Statutes, 30 Neb. L. Rev. 608 (1951); Comment, supra note 85, at 1036-37.

110. See supra notes 84, 85, 92, 93 and 103 and accompanying text. See generally Williams v. New Orleans Pub. Serv., Inc., 421 So. 2d 278, 280-81 (La. App. 4th Cir. 1982) (“Under the facts of the instant case, plaintiffs are precluded from recovery by their own fault no matter how that fault is measured, i.e., contributory negligence or assumption of the risk.”).

The advantages of comparing plaintiff fault, whether negligence or assumption of the risk, with the fault of the defendant and apportioning damages accordingly, and doing so in all cases of strict liability, are well documented. One commentator lists six:

1. Any other resolution disagreeably complicates multiple-defendant cases [See Robertson, supra note 20, at 1385-95].
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 deterrent 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 under 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 court 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.

Robertson, supra note 20, at 1354 (footnotes omitted). See Lewis v. Timco, Inc., 716 F.2d 1425 (5th Cir. 1983) (on rehearing en banc); Sullivan v. Gulf States UTILS. Co., 382 So. 2d 184, 189-90 (La. App. 1st Cir. 1980); V. Schwartz, supra note 34, § 12.7, at 209-14, § 12.8, at 214-15, § 21.2, at 357-58; S. Speiser, C. Krause & A. Gans, supra note 62, § 13.2, at 692-93; Note, supra note 20, at 1384, 1388; id. at 1386 (“However, the policy underlying Loescher was that, as between two innocent parties, the owner or guardian of a thing should pay for any damages it causes. This consideration evaporates
used when assumption of the risk is asserted as a defense to relational responsibility strict liability is yet another unfortunate aspect of the decision.

2. Rozell as a Pre-Comparative Fault Case

The possibility exists that Rozell is a pre-comparative fault case and that the Rozell majority did not intend to apply comparative fault at all, inasmuch as the opinion is ambiguous in this regard. If that is the case, the result and reasoning in Rozell are still suspect. The court's assertion that victim fault must be a substantial cause of an accident to be a defense in a pre-comparative fault case is difficult to reconcile with other precedent that suggests it need only be a cause-in-fact.

When the victim is negligent, rather than innocent ("at least a substantial cause," to be a defense, Rozell IV at 280;
Additionally, it may be true, as the majority points out, that several pre-comparative fault decisions have rejected contributory negligence insofar as it constitutes victim fault as a defense to relational responsibility strict liability, but many other decisions have accepted contributory negligence as a defense, and the fact remains that the trial court found that Mr. Rozell was contributorily negligent. The Rozell majority never said the lower court was clearly wrong. The majority did observe, on the other hand, that the Restatement adopts assumption of the risk as a total bar to the strict liability of the possessor of an animal, so long as the plaintiff’s conduct in assuming the risk was unreasonable. This means that Mr. Rozell should not have been entitled...
to recover if the analysis set forth above about Mr. Rozell’s acceptance of the risk is correct.\textsuperscript{118} In any event, unreasonable assumption of the risk also constitutes contributory negligence under the Restatement analysis of which the court is so fond.\textsuperscript{119}

C. Strict Liability

The Rozell majority’s last assertion is that strict liability is “strict” because “[v]ictim fault must rise to the level of causing the accident before it will bar recovery.”\textsuperscript{120} This suggestion also is incongruent with other supreme court precedent. Before Rozell, it was considered axiomatic that the fundamental distinction between negligence and strict liability was “the fact that the inability of a defendant to know or prevent a risk is not a defense in a strict liability case but precludes a finding of negligence.”\textsuperscript{121} After Rozell, one can no longer be sure. This circumstance is especially remarkable considering that the Rozell majority did not even acknowledge the authority on which it cast doubt.

V. Conclusion

The subjects treated by the majority opinion in Rozell—assumption of the risk, comparative fault and strict liability—are at the heart of Louisiana tort law. Unfortunately, the supreme court’s remarks about them are so obtuse that one must speculate as to the court’s meaning, and the result of such speculation is disagreeable at best. In light of these difficulties, the best way, perhaps, to view the decision is as a “lame duck”\textsuperscript{122} pre-comparative fault case about assumption of the risk as a defense to article 2321 liability, in which the majority simply believed

\begin{enumerate}
\item \textsuperscript{118} See supra notes 55-65 and accompanying text.
\item \textsuperscript{119} See supra notes 38, 62 and 88 and supra note 117 and accompanying text.
\item \textsuperscript{120} \textit{Rozell IV} at 279. See id. at 279-80; supra notes 53 and 54 and accompanying text.
\item \textsuperscript{122} See Turner v. New Orleans Pub. Serv. Inc., 476 So. 2d 800, 805 (La. 1985) (Blanche, J., concurring) (“Jet Wheel Blast was a lame duck certification case . . . .”); Bell v. Jet Wheel Blast, 462 So. 2d 166, 174 (La. 1985) (Blanche, J., dissenting) (“Finally, I would not have overruled 150 years of jurisprudence with this lame duck certification case . . . .”).
\end{enumerate}
that the plaintiff in this instance should be compensated for his injuries. Even that perspective and the ramifications of it are not trouble-free, but it is the best posture for Rozell as a precedent until the court explains its decision in other case law.

Rozell should not be ignored completely, however. If one or more of the constructions examined in this article are correct, the decision indicates that a majority of the Louisiana Supreme Court is or may be about to make some very important law on assumption of the risk, comparative fault and strict liability in this state. If that is the case, one can only hope it will be better reasoned and produce a more satisfying result than Rozell.

123. See supra notes 55-71 and accompanying text. This is not the place to enter upon a discourse on the purpose of tort law or to debate the relative importance of those purposes. Compensation of deserving victims is certainly one objective, and undoubtedly it is and should be predominant. See, e.g., Halphen v. Johns-Manville Sales Corp., 484 So. 2d 110, 118-19 (La. 1986); Turner v. New Orleans Pub. Serv. Inc., 476 So. 2d 800, 806-08 (La. 1985) (Dennis, J., assigning additional reasons); Bell v. Jet Wheel Blast, 462 So. 2d 166, 170 (La. 1985); V. Schwartz, supra note 34, § 12.7, at 210-11, 213-14; Fleming, Is There a Future for Tort?, 44 La. L. Rev. 1193 passim (1984); Malone, Prologue to Symposium: Comparative Negligence in Louisiana, 40 La. L. Rev. 293, 295-96 (1980). See also Calabresi, The Decision for Accidents: An Approach to Nonfault Allocation of Costs, 78 Harv. L. Rev. 713 (1965); Calabresi, Some Thoughts on Risk Distribution and the Law of Torts, 70 Yale L. J. 499 (1961); Coase, The Problem of Social Cost, 3 J. L. & Econ. 1 (1960); Posner, The Economic Approach to Law, 53 Tex. L. Rev. 757 (1975). But there also are other moral, social and economic considerations that play a legitimate role. They include deterrence, punishment, efficient loss allocation, minimization of the legal system's transaction costs, fair allocation of losses and costs and moral blameworthiness. See, e.g., Halphen v. Johns-Manville Sales Corp., 484 So. 2d 110, 118-19 (La. 1986); Turner v. New Orleans Pub. Serv. Inc., 476 So. 2d 800, 806-08 (La. 1985) (Dennis, J., assigning additional reasons); Bell v. Jet Wheel Blast, 462 So. 2d 166, 171-73 (La. 1985); Entrevia v. Hood, 427 So. 2d 1146, 1149 (La. 1983); V. Schwartz, supra note 34, § 12.7, at 210-11, 213-14; Barham, supra note 100, at 1190-91; Fleming, supra, at 1193 passim; Johnson, supra note 66, at 319-25; Malone, supra note 101, at 980-81, 986-88, 1001, 1004-06; Robertson, supra note 20, at 1347-85; Stone, Tort Doctrine in Louisiana: The Concept of Fault, 27 Tul. L. Rev. 1, 18 (1952); Note, supra note 20, at 207-08; Comment, supra note 20, 38 La. L. Rev. at 998-99 & 998 n.19. These concerns, as well as the goal of compensation, represent a panorama of values that necessarily compete for attention in a pluralistic society and its legal system. See, e.g., Fleming, supra, at 1193 passim; Malone, supra note 101, at 992, 996-99, 1008-09. The point here is not to suggest that the supreme court in Rozell failed to consider each such interest, but that the court should have articulated in clearer terms the dialectic by which the court mediated these interests within the parameters of the specific case. See Entrevia v. Hood, 427 So. 2d 1146, 1149 (La. 1983).