Self-Service Slip and Falls: Is the Storekeeper's Burden Too Great?

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SELF-SERVICE SLIP AND FALLS: IS THE STOREKEEPER'S BURDEN TOO GREAT?

Picture yourself strolling down the aisle of your local grocery store. Unexpectedly you slip on a banana peel and find yourself lying on the floor. Feeling embarrassed and humiliated, you get up, finish buying groceries, and head for home. Later that day you realize that you suffered an injury because of the fall. As a result of the injury, you are likely to do two things: seek medical advice, and file a lawsuit against the storeowner.

The above scenario typifies a great number of the slip and fall cases that have flooded the courts over the past few decades.¹ A major reason for the large number of slip and fall accidents is the fact that local grocery stores have increasingly given way to giant self-service supermarkets. The giant self-service store gives rise to more traversing of the aisles, and more people are injured as a result. Prior to 1975, Louisiana placed a duty on the storeowner to keep the aisles in a reasonably safe condition, while placing the burden of proof on the plaintiff.² A plaintiff had to prove "a breach of duty of the owner to use reasonable care"³ in order to recover. To carry this burden, most courts held that the plaintiff was required to prove that the owner had either actual or constructive notice of a foreign object on the floor.⁴

In 1975 the Louisiana Supreme Court, in Kavlich v. Kramer,⁵ altered the analysis used in slip and fall cases occurring in self-service stores. The court held that a plaintiff need only prove that the injuries suffered resulted from slipping on a foreign object. After an initial showing that the customer fell and was injured, the burden shifts to the storeowner,

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5. 315 So. 2d 282 (La. 1975).
who must prove by a preponderance of the evidence that there was no negligence contributing to the accident. The court decided to shift the burden of proof to the storeowner because of the plaintiff’s inability to protect himself and the plaintiff’s difficulty in proving negligence on the part of the storeowner.

A chronological study of self-service slip and fall cases follows, emphasizing the Kavlich test as it has been expanded by recent cases. Next, the theory of strict liability under Civil Code article 2317 is explained, followed by an examination of policy reasons which support switching the analysis in self-service slip and fall cases from the one used in Kavlich to strict liability, as well as examples of how specific cases would be analyzed under a strict liability theory. Last, an argument is made that the courts should reevaluate their analyses of comparative fault in these cases.

**Historical Development of Louisiana Self-Service Slip and Fall Cases**

Until the late 1960's, Louisiana courts applied a general negligence theory to self-service slip and fall cases. The courts imposed a duty on the storekeeper to use reasonable care in keeping aisles safe. The appellate courts, however, interpreted the scope of that duty in a number of different ways.

One of the interpretations is illustrated by *Lofton v. Travelers Insurance Company,* which was the commonly accepted rule. In *Lofton,* the third circuit required the plaintiff to prove either that the storeowner or his employees created the hazard or that the storeowner had actual or constructive knowledge of the condition. Because the burden of proof rested on the plaintiff, a burden difficult to overcome under the circumstances, cases relying on the *Lofton* rationale were usually decided in favor of the defendant-storeowner.

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7. "The burden then shifts to the defendant to go forward with the evidence to exculpate itself from the presumption that it was negligent." 315 So. 2d at 285.
8. "Numerous items displayed upon shelving along the aisles or walkways in self-service stores entice the customers to focus their eyes upon the display rather than on the surface upon which they walk." 315 So. 2d at 284.
10. 208 So. 2d 741-42.
The *Lofton* case can be contrasted with the first circuit's decision in *Lang v. Winn-Dixie Louisiana, Inc.* In that case the court held that:

While the burden is on the plaintiff to show that ... [the] substance remained on the floor for a longer time than that in which it should have been discovered and removed[,] this burden on the plaintiff is subject to the requirement that the defendant first show in a preliminary way that the foreign substance was not discovered in spite of reasonably careful and frequent inspection.

The decision in *Lang*, requiring the storeowner to prove reasonable inspections cuts against the generally accepted rule, illustrated by *Lofton*. The determinations made by the *Lang* court "tended to shift the risk of self-service shopping from the shopper to the proprietor."

The Louisiana Supreme Court resolved this difference among the circuits in *Kavlich v. Kramer*. In *Kavlich*, the court adopted a method for analyzing slip and falls similar to that used in *Lang*. Justice Barham, writing for the majority, stated that once the plaintiff proves that he slipped on a foreign object and that the fall caused his injuries, the burden shifts to the defendant to absolve himself from any negligence.

The supreme court reaffirmed its position on self-service slip and falls in *Gonzales v. Winn-Dixie Louisiana, Inc.*, which is cited frequently for its explanation of the *Kavlich* test.

There are numerous reasons for placing the burden on storeowners. One major reason is the increased hazards created by the self-service system relative to those that existed in prior times. The court in *Kavlich* explained, "Numerous items displayed upon shelving along the aisles and walkways in self-service stores entice the customers to focus their eyes upon the display rather than on the surface upon which they

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13. 230 So. 2d at 388.
14. Note, supra note 6, at 635.
15. 315 So. 2d 282 (La. 1975).
17. Id.
18. 326 So. 2d 486 (La. 1976).
Because of this distraction, storeowners can protect their patrons better than the unobserving patrons can protect themselves.20

In addition to the superior ability of the storekeeper to avoid the hazard, other policy considerations demanded a risk-shifting mechanism like the one used in *Kavlich*. In a law review article written several years later, Justice Tate, in discussing self-service slip and fall cases, articulated this policy consideration:

> The conscious or unconscious judicial response has been to devise rules, at least in specialized instances where otherwise great unfairness is perceived, that will tend to fix the loss upon the actor who creates or maintains the hazard, through whom the loss will be passed to and shared by society at large, by such mechanisms as prices to consumers or insurance premiums charged to the class of ratepayers afforded liability coverage for the hazard.21

The court in *Kavlich* concluded that storekeepers are much better spreaders of the cost of consumer accidents and, as a result, more risk was placed on them.

Another consideration is the relative difficulty as between the parties in meeting the burden of proof. A plaintiff in a slip and fall case may have a difficult time proving that the storekeeper was negligent. One commentator, discussing Florida law (which followed a traditional negligence theory for slip and fall cases), suggested a reason why the plaintiff has such difficulty in meeting the burden of proof. "Proof of [a prima facie case in negligence] is severely hampered in most cases because of the lack of disinterested witnesses. Often, the plaintiff is the only witness to the fall or the object causing it."22 Foreign substances can be moved about easily, making proof of their existence more difficult than that of other, more stationary objects.23 In addition, the storeowner will be unlikely to cooperate in disclosing information about the incident.

19. 315 So. 2d at 284. The *Gonzales* court repeated the same type of reason: "The system [self-service stores] increases the risk of harm from objects dropped on the floor by customers and, correspondingly, the duty to minimize the risk by frequent inspections and cleanups." 326 So. 2d at 488.

20. One court has suggested that a patron has the right to presume that the aisles will be free from dangerous conditions because of the storeowner's intent and knowledge that the customer will devote his attention to the merchandise and displays. *Whittaker v. Schwegmann Bros. Giant Supermarkets*, 334 So. 2d 756, 757 (La. App. 4th Cir.), writ denied, 338 So. 2d 300 (1976). See also Note, supra note 6, at 639.


22. Note, supra note 1, at 443.

23. Id. at 444.
These policies justify the courts’ desire to correct the analysis used prior to Kavlich. Since Kavlich placed the burden of proof on the storekeeper, the question that he must answer is what proof it will take to meet that burden. While shifting the burden, the Kavlich and Gonzales cases did not tamper with the duty of reasonable care placed on the storekeeper. This duty includes efforts “to keep objects off the floor which might give rise to a slip and fall.” On this theme, the court in Gonzales stated that “[t]he circumstances that determine the reasonableness of protective measures include the type and volume of merchandise, the type of display, the floor space utilized for customer service, the nature of customer service, and the volume of business.”

The Louisiana Supreme Court recently reconsidered the proof a storekeeper must present in order to exculpate himself in a slip and fall case. In Brown v. Winn-Dixie Louisiana, Incorporated, the plaintiff slipped and fell on rice that had spilled on the floor. The defendant proved at trial that fifteen minutes prior to the accident, the store manager had walked down the same aisle and had not seen anything. The court of appeal held that by proving that the rice had not been on the floor long enough to give him constructive notice of the substance’s presence, the defendant had exonerated himself.

The supreme court reversed, holding that the more appropriate inquiry is whether the storekeeper took reasonable steps “to discover and to correct dangerous conditions reasonably anticipated in its business activity.” The court explained, “[a]n operator who never conducts inspections is unlikely to discover unreported hazards. Under such circumstances, the lack of inspections and other preventive measures results in the failure to discover dangerous conditions and contributes substantially to the causation of the ensuing fall and injury.” Because the storeowner’s proof consisted only of the fact that the manager walked down the aisle “with other things on his mind” fifteen minutes prior to the accident, the supreme court held that there was not an “inspection” sufficient to relieve the storeowner of the burden. Since no evidence was presented that any other inspection had been conducted, the storeowner was liable.

Brown v. Winn-Dixie, then, stands for the proposition that the storeowner must conduct periodic inspections if he hopes to meet the

24. 315 So. 2d at 284.
25. 326 So. 2d at 488.
27. Id. at 687.
28. Id.
29. Id.
30. Id.
burden of proof placed on him by Kavlich and exculpate himself from liability. The Louisiana Supreme Court, however, recently clarified the Brown v. Winn-Dixie test. In McCardie v. Wal-Mart Stores, Incorporated, Chief Justice Dixon said that mere proof of reasonable inspections would not absolve a storeowner in a self-service slip and fall case. Relying on language in Brown v. Winn-Dixie, the court added another condition to meeting the burden. In addition to proving reasonable inspections, the storeowner must also prove that none of his employees created the hazard.

The two-part test established by the McCardie court increases the burden on storeowners, and each element must be considered separately to determine if the storeowner has exculpated himself. While the reasonableness of inspections is ultimately fact specific, some cases do suggest the extent of the storeowner’s duty. The court in Brown v. Winn-Dixie held that the degree of vigilance used in the inspections must be “commensurate with the risk involved, as determined by the overall volume of business, the time of day, the section of the store, and other such considerations.”

Two appellate decisions also help illustrate what constitutes a reasonable inspection system and what does not. In Nettles v. Winn-Dixie Louisiana, Inc., the acts of the storeowner were not sufficient to meet the inspection requirement. The plaintiff in Nettles slipped on a white seedless grape. The defendant proved that his store manager had cleaned up a spill in the same area five to ten minutes prior to the accident and had looked up and down the aisle for other misplaced produce. The defendant had no scheduled inspection system, but argued that the

31. The Brown decision has been adhered to by the lower courts with only a slight departure found in Nettles v. Winn-Dixie La., Inc., 496 So. 2d 1296 (La. App. 3d Cir. 1986). In that case, the court noted that “where the record shows that the substance rested on the floor but for a few minutes before discovery, proof of periodic inspections would be superfluous.” 496 So. 2d at 1299.

32. 511 So. 2d 1134 (La. 1987).

33. The supreme court in Brown v. Winn-Dixie had said, “Under the new evidentiary burden, the store operator is required to prove that his employees did not cause the hazard and that he exercised such a degree of care that he would have known under most circumstances of a hazard caused by customers.” 452 So. 2d at 687. The language above appears to require a twofold burden, but the appellate courts generally had seized only upon the inspection requirement. See, e.g., McCardie v. Wal-Mart Stores, Inc., 504 So. 2d 111 (La. App 2d Cir.), rev’d, 511 So. 2d 1134 (1987); Bonnette v. K-Mart, Inc., 502 So. 2d 202 (La. App. 3d Cir. 1987); Batiste v. Joyce’s Supermarket, 488 So. 2d 1318 (La. App. 3d Cir. 1986).

34. 452 So. 2d at 687 (La. 1984). Note the similarity between this test and the general test given in Gonzales for the standard of care of a storekeeper. See supra text accompanying notes 24-25.

35. 496 So. 2d 1296 (La App. 3d Cir. 1986).
manager's independent actions satisfied the inspection requirement. The trial court found otherwise, and the third circuit agreed. The court made it clear that a cursory look down the aisle will not meet the inspection requirement set out in Brown v. Winn Dixie.36

The facts of the McCardie case, by contrast, did present reasonable inspection in the opinion of both the second circuit and the supreme court. In that case, the storeowner proved that a "safety sweep" was conducted every morning and evening, and that the manager of each department walked back and forth along the aisles as many as twenty times an hour.37 In other words, someone was checking the floor as often as once every three minutes, enough, in the two courts' view, to be reasonable.

While the inspections in McCardie constituted a diligent effort by the storeowner to keep foreign objects off the floor, as well as to avoid liability for consumer falls, the Louisiana Supreme Court did not end the inquiry at reasonable inspections. In addition to his duty to provide reasonably safe premises, a storeowner may also be liable under a respondeat superior theory for the negligence of his employees in creating the condition. Therefore, as Chief Justice Dixon wrote in McCardie, "Merely proving adequate clean up procedures is insufficient to prove a spill was not caused by one of the store's own employees."38 Thus, the next step a storeowner has to take in meeting his burden of proof is a showing that none of his employees created the hazard.

Since the requirement that the storeowner prove that none of his employees caused the hazard is fairly new, uncertainty remains as to what proof will be sufficient to meet the burden. One of the reasons the storeowner in McCardie did not meet the requirement was that "[m]any of the employees who could have caused the spill were not asked to testify."39 In his dissent, Justice Cole indicated that the majority's pronouncement did not imply that all of the employees must be called to testify.40 Justice Cole's point follows logically since there may be no reason to call employees who are rarely, if ever, in the area where the accident occurred. From the majority's opinion, however, it seems that at least those employees who are responsible for the area of the accident must testify in order to meet this burden of proof.

36. "The lightly colored grape on the lightly colored floor would be easily missed if not observed under close quarters. A true inspection was not made." Id. at 1299.
37. 511 So. 2d at 1135.
39. 511 So. 2d at 1136.
40. Id.
41. 511 So. 2d at 1136 (Cole, J. dissenting).
Decision by decision, the Louisiana Supreme Court has increased the burden on storeowners. Even before the supreme court's decision in *McCardie*, it was recognized how onerous that standard was. Justice Tate wrote that the storeowner's burden was "a most difficult if not impossible burden for him to carry." Now, with the apparent increase of the storeowner's burden by the *McCardie* decision, a few of the justices of the supreme court are questioning the severity of the shifted burden. Dissenting in *McCardie*, Justice Marcus considered it "unreasonable for a defendant to have to prove additionally that none of its employees caused the spill." He noted that the majority opinion requires the storeowner to prove a negative, a difficult task at best. Justices Cole and Lemmon also dissented, agreeing that reasonable inspection *vel non* should be the only inquiry.

The analysis developed in *Kavlich*, and recently expanded by *Brown v. Winn Dixie* and *McCardie*, was a response to difficulties in proving negligence on the part of the storeowner, dangers created by the self-service system, and the public policy of spreading risk. These are defensible justifications for placing a greater burden on the storekeeper. They may not, however, justify the extreme burden which courts now place on storeowners, which indicates that there may be a better solution.

**Self-Service Slip and Fall Cases and Strict Liability**

One solution that might be better would be found in a theory of strict liability. One basis for strict liability in Louisiana can be found in article 2317 of the Louisiana Civil Code, which provides: "We are responsible, not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or of the things which we have in our custody. This is to be understood with the following modifications." This article could cover a storeowner's liability for a slip and fall, because a customer could be viewed as suffering damage by a thing that is in the custody of the storeowner. Louisiana courts, however, have not yet applied the article to slip and fall cases.

42. Tate, supra note 21, at 1411. See also Note, supra note 6, at 637.
43. It is significant to note that there was dissent to the *McCardie* majority's opinion, since none of the justices had dissented in *Kavlich* or *Brown v. Winn-Dixie*.
44. 511 So. 2d at 1136 (Marcus, J. dissenting).
46. The broad concept given the term custody or "garde" by the Louisiana Supreme Court in *Ross v. La Coste de Monterville*, 502 So. 2d 1026 (La. 1987), would apparently encompass anything in the store owned by the proprietor. See Note, Ross v. La Coste de Monterville: An Unwarranted Extension of Strict Liability for the Act of Things, 47 La. L. Rev. 1285 (1988).
Until the late 1960's, article 2317 was not interpreted as having any substantive content because "[i]ts structure and its placement between articles 2315 and 2316, on the one hand, and articles 2318 and 2322, on the other, make it appear merely transitional." In 1968, an attempt was made to give the article some substantive force. In Dupre v. Travelers Insurance Company, the first circuit held that although article 2317 does not impose absolute liability for damages caused by one's property, it does create a "refutable presumption of negligence.

The seldom referred to Dupre case was not an authoritative interpretation of Civil Code article 2317 for long. In 1975, the Louisiana Supreme Court announced a decision that set the course for strict liability under article 2317. Justice Tate, writing for the majority in Loescher v. Parr, drew upon French and Louisianä jurisprudence as well as doctrinal writings to develop a new construct of tort liability. In Loescher, the plaintiff sued the defendant to recover for damage caused when the defendant's tree fell on top of the plaintiff's automobile. The court held that the plaintiff's recovery could be based on article 2317. The test developed in Loescher allowed recovery if the defendant had custody of the thing that caused the damage, and if that thing had a vice or a defect that caused the loss. The court allowed recovery because the tree was rotten (the defect), owned by the defendant (custody), and the rottenness of the tree caused the damage. The Loescher decision did, however, provide the defendant with the defenses of fault of the victim, fault of third party, or an "irresistible force."

The supreme court recently elaborated on a part of the Loescher test. In Entrevia v. Hood, the court held that the defect of the thing must be one that presents an unreasonable risk of harm in order for a plaintiff to recover under article 2317. In that case, the plaintiff injured herself when she fell through the steps to an unoccupied farmhouse. The steps, although defective in practical terms, were not defective for the purposes of article 2317, because the farmhouse was "located in the rear of the fenced and posted property, and the property itself

48. 213 So. 2d 98 (La. App. 1st Cir. 1968).
49. Id. at 100. See also Dickerson v. Continental Oil Co., 449 F.2d 1209 (5th Cir. 1971), cert. denied, 405 U.S. 934, 92 S. Ct. 942 (1972); Duplechin v. Pittsburgh Plate Glass Co., 265 So. 2d 787 (La. App. 3d Cir. 1972).
50. 324 So. 2d 441 (La. 1975).
52. 324 So. 2d at 449.
53. Id. at 447.
54. 427 So. 2d 1146 (La. 1983).
was remotely located on a country road.” In this setting, the defective steps did not present an unreasonable risk of harm. Justice Dennis explained that in order to determine whether a thing presents an unreasonable risk of harm, the judge must use a balancing process that is “similar to that employed in determining whether a risk is unreasonable in a traditional negligence problem.” The Entrevia court said that the balancing test, done by the judge in determining social utility, is similar to the process by which “the legislator finds the standards or patterns of utility and morals in the life of the community.” Entrevia clarifies the Loescher test by holding that a thing defective in fact does not give rise to liability under article 2317 unless that thing presents an unreasonable risk of harm, or, in other words, unless the thing is defective in law.

Although strict liability under article 2317 may suggest difficulties for many defendants, an analysis of recent slip and fall jurisprudence makes the strict liability scheme more attractive than the expanded Kavlich approach. One reason this is so can be found in the unreasonable risk of harm criteria of strict liability under Entrevia. In that case the court held that if a custodian’s defective thing injures someone, that custodian may not be held liable unless the thing presented an unreasonable risk of harm. Under slip and fall jurisprudence, however, even if the thing did not present an unreasonable risk, a storeowner will be liable, unless it is proven that reasonable inspections were conducted and that the hazard was not created by the storekeeper’s employees.

A hypothetical situation, analyzed under the Kavlich reasoning (followed to its logical end) and under strict liability, illustrates the problem in the slip and fall area and demonstrates that strict liability results in a more rational solution. Suppose that a mischievous youth overturns a grocery cart in the middle of aisle six. A shopper then comes up the aisle and runs into the overturned cart, suffering injuries. Under the current slip and fall analysis, the storeowner will be liable unless reasonable inspections and lack of employee causation is proven, even though the shopping cart is a large, visible object which presents a

55. Id. at 1150. The court may have also been influenced by the fact that Entrevia was a trespasser.
56. Id. at 1149.
57. Id. at 1150.
58. Id. at 1149.
59. One might illustrate this using the facts of Lewis v. Piggly Wiggly of Ferriday, Inc., 403 So. 2d 95 (La. App. 3d Cir. 1981). In this case the plaintiff slipped and fell in a large puddle of bright orange salad dressing that was on a light colored floor. The court recognized that the substance was “readily observable” but still held that the storeowner did not prove he acted reasonably.
minimal risk to shoppers. Under a strict liability analysis, however, a negligence-type balancing test done pursuant to *Entrevia* should lead to the conclusion that the shopping cart presented no unreasonable risk of harm, and thus the storeowner will not be liable. Although many things in a self-service store may present an unreasonable risk, things like the shopping cart above do not. The cart does not present an unreasonable risk of harm because of its size and a duty on the part of reasonable persons to see certain things. This illustrates the problems associated with the slip and fall test compared with the reasonableness of strict liability.

A second reason the *Loescher-Entrevia* strict liability test is preferable derives from the shift of the burden of proof to the defendant under *Kavlich*. In a slip and fall case, if the storeowner cannot prove by a preponderance of the evidence that he acted reasonably and that his employees did not cause the fall, the decision will have to be for the plaintiff since the storeowner will not have carried the burden of proof. The opposite is true in a strict liability case. If the plaintiff cannot prove by a preponderance of the evidence that the thing presented an unreasonable risk of harm, the decision will have to favor the defendant, since the plaintiff has not carried his burden.

The courts shifted the burden of proof in slip and fall cases to prevent the plaintiff from having to prove that there was a foreseeable risk of harm. This was partially because of the difficulty of proving that the storeowner had actual or constructive knowledge of the risk, as he did under pre-*Kavlich* slip and fall jurisprudence. Using a strict

60. Although comparative fault principles would operate to decrease the plaintiff's recovery under this hypothetical, the failure of the storeowner to carry his burden of proof would necessitate a finding of some degree of fault, and thus liability, on his part. If, however, the courts in dealing with slip and fall cases follow the recent Louisiana Supreme Court pronouncement in Murray v. Ramada Inns, Inc., 521 So. 2d 1123 (La. 1988), the storeowner may not be liable to a plaintiff who runs into a shopping cart. The Murray court held that the duty/risk test should be applied in "cases where it may not be reasonable to require the defendant to protect the plaintiff from all of the risks associated with a particular activity." Id. at 1135. Murray can be interpreted as holding that for conditions that are open and obvious to most reasonable persons (like the shopping cart), the risk that a person will injure himself because of that condition is not encompassed within the defendant's duty to protect against that condition. Following Murray might lead to the conclusion that the storekeeper is not liable because it is reasonable to say that the risk that a shopper will run into an "open and obvious" shopping cart is not encompassed within the duty of the storekeeper to protect his patrons.

61. See, e.g., Orgeron v. Home Town Supermarket, 311 So. 2d 494 (La. App. 4th Cir. 1975); Frederic v. Winn-Dixie La., Inc., 227 So. 2d 387 (La. App. 4th Cir.), writ denied, 254 La. 866, 227 So. 2d 598 (1969); Lofton v. Travelers Ins. Co., 208 So. 2d 739 (La. App. 3d Cir. 1968). The supreme court in Brown v. Winn-Dixie La., Inc., 452 So. 2d 685, 686 (La. 1984) said that "[t]he critical effect of the partial shifting of the evidentiary burden was the virtual elimination of proof of actual or constructive knowledge as an element of the plaintiff's case."
liability approach, this end can be accomplished without the burden shift. Under that theory, the plaintiff need only prove that the thing presented an unreasonable risk and need not prove foreseeability. This would make the plaintiff's burden less onerous than it was prior to Kavlich, while simultaneously easing the burden on storeowners, who would no longer have the burden of proof.

A third reason flows from the susceptibility to fraud of the approach used in the Kavlich line of cases. This possibility arises because the shifted burden relieves the plaintiff of most of the proof requirements in a slip and fall case, thereby requiring the plaintiff to come forward with very little hard evidence to win. All that the plaintiff need prove is that he slipped on a foreign object and was injured. In theory, it would be easy for a plaintiff with a preexisting injury to walk into a self-service store, place a foreign object on the floor while no one was looking, and allege he slipped on it. Because there would be no witnesses, the only evidence of the fall would be the plaintiff's perjured testimony. This, however, would be sufficient to carry the plaintiff's burden of proof and would shift the burden to the storeowner. If the storeowner could not prove reasonable inspections and that none of his employees created the condition, he would lose.

Switching to strict liability would help solve this fraudulent plaintiff problem, because the plaintiff would have to prove by a preponderance of the evidence not only that he slipped and fell on a foreign object, but also that the object presented an unreasonable risk of harm. Placing this burden of proof on the plaintiff would facilitate a finding in favor of the storeowner when the circumstances surrounding the plaintiff's case suggest fraud.

Analyzing self-service slip and fall cases under a strict liability theory would be fairer to the storekeeper because he would not have the burden of proof. At the same time, the plaintiff's burden would be lighter than in pre-Kavlich times, because he would not have to prove actual or constructive knowledge on the part of the storekeeper. Because strict liability would be fairer to the storekeeper, while at the same time placing the plaintiff in a better situation than that prior to Kavlich, the courts should switch to an analysis of these cases under article 2317.

With the proposition that self-service slip and fall cases should be analyzed under strict liability, it is now important to show the ways in which a typical case might be analyzed under a strict liability approach.


63. See cases cited supra note 61.
According to Loescher, as clarified by Entrevia, a person may be strictly liable under article 2317 for a thing that causes damage to another when he has the custody or "garde" of the thing, and the thing has a defect that presents an unreasonable risk of harm. To apply this test to a self-service slip and fall case, two steps are required.

The first step is to ascertain whether or not the storeowner had custody of the thing which caused the damage. The term custody or "garde" as used in Loescher was said to apply to "those things to which one bears such a relationship as to have the right of direction and control over them, and to draw some kind of benefit from them." The above would most obviously include things that are owned and in the physical possession of the defendant. This was the defendant's situation in Loescher, since he had ownership as well as possession of the rotten tree.

Since the premises and all things therein are usually owned by the storekeeper, the custody question in most slip and fall cases would be a simple determination. The great majority of cases will involve items owned by the storeowner. Since these things will be considered in the storeowner's custody, a plaintiff will usually never have to resort to negligence at this stage of the inquiry. The cotton candy or ice cream bought next door and brought inside by a third person may not fall within the scope of the term custody. These items could, however, arguably be within the storekeeper's custody because he has control and can remove them. He may also derive a benefit from these items, because allowing customers to bring these into the store may enhance his business.

The main problem in analyzing these cases under strict liability will lie in the defect requirement, because it is difficult to conceptualize a

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64. In Loescher v. Parr, 324 So. 2d 441 (La. 1975), the supreme court noted that the French term "sous sa garde" or "garde" was not fully expressed by the English translation of "custody," and that one could "lose the custody of a thing without losing its 'garde.'" 324 So. 2d at 447 n.6.
65. Id. at 449 n.7.
66. Id. at 449.
67. If negligence is resorted to, it should be applied using the test prior to Kavlich, or in other words, with no shifting of the burden. Since strict liability provides plaintiffs with a reasonable burden, there is no reason to also provide them with the pro-plaintiff test in Kavlich.
68. The seemingly broad interpretation of the custody or "garde" concept in Ross v. La Coste de Monterville, 502 So. 2d 1026 (La. 1987), may not give the storeowner custody of a thing brought into his store by a third party. The Louisiana Supreme Court, interpreting the French law behind article 2317, held that "an owner of a thing who transfers its possession, but not its ownership to another, continues to have the garde of its structure . . . ." 502 So. 2d at 1032. This broadens the scope of the term "custody" as it relates to ownership; however, it may or may not grant a storeowner the custody of things which he does not own and are brought into the store by third parties.
self-service store as "defective." Contributing to this problem is the first circuit’s opinion in Brown v. Winn-Dixie. In that case, the plaintiff slipped and fell on some rice in the defendant’s supermarket. The plaintiff argued that "the presence of rice on the floor renders the store premises defective and presents an unreasonable risk of harm to the public, rendering defendant liable under Article 2317 of the Civil Code." The court did not agree, saying, "the temporary presence of a foreign substance on the floor is not a defect within the meaning . . . of the law. A defect is some flaw or fault existing or inherent in the thing itself."

The first circuit in Brown v. Winn-Dixie apparently based its analysis on a defect-in-fact rather than a defect-in-law theory. The choice between these theories will be critical in the analysis of slip and fall cases under strict liability. As the Entrevia court suggested, a thing may be defective in fact without being defective-in-law, that is, creating an unreasonable risk of harm. In some instances, Louisiana courts have held that a thing was defective because it presented an unreasonable risk of harm even though it was not necessarily defective in practical terms. In other cases, however, courts have required a factual defect in addition to the unreasonable risk of harm.

Finding a factual defect will be a difficult task, especially since the Brown v. Winn Dixie court’s "inherent defect" language apparently precludes the argument that a floor can be factually defective. There may, however, be conditions of some floors in self-service stores that make them factually defective. Most of these floors are slick in order to facilitate cleaning. This attribute tends to make them even more slippery, and therefore more dangerous if a foreign substance is placed on them. This intentionally slippery surface may make the floor itself factually defective. If this is the case, the slipperiness of the floor presents

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69. 417 So. 2d 44 (La. App. 1st Cir. 1982), rev’d, 452 So. 2d 685 (La. 1984). The supreme court reversed on the grounds that the test used by the lower court in negligence was improper, and therefore the defendant was liable.
70. 417 So. 2d at 45.
71. Id. at 46.
72. See infra text accompanying notes 74-76.
73. See, e.g., Crochet v. Freeman, 504 So. 2d 1064 (La. App. 1st Cir. 1987) (must have a defect "in" the premises, object on the premises will not meet the requirement); Ducote v. State Farm Fire & Cas. Ins. Co., 488 So. 2d 385 (La. App. 3d Cir.), writ denied, 493 So. 2d 637 (1986) (ladder not defective because there was no evidence that it had a vice or defect in its construction or design); Efferson v. State, 463 So. 2d 1342 (La. App. 1st Cir. 1984), writ denied, 465 So. 2d 722 (1985) (road "structurally" defective because of shoulder conditions); Brown v. Winn-Dixie La., Inc., 417 So. 2d 44 (La. App. 1st Cir. 1982), rev’d 452 So. 2d 685 (1985) (rice on floor was not fault inherent "in" the thing so defect requirement was not met).
an unreasonable risk of harm, and the storeowner could be held strictly liable to the injured plaintiff.

Fitting these cases under article 2317 by relying solely on the defective-in-law idea, however, would be much easier. In an analogous case, *Lewis v. Oubre*, the court was confronted with determining whether a wet carport presented an unreasonable risk of harm for the purposes of article 2317. The carport was dangerous because it became slippery when the weather was humid. Nonetheless, the court found that the carport surface did not create an unreasonable risk because the plaintiff had walked across it several times before the slip, and its glossy appearance should have given the plaintiff notice. The defendant in *Lewis* could have been liable under different circumstances.

The surface of the carport in *Lewis* is similar to a floor in a self-service store that has something on it, since both are slippery. Moreover, the floor of a self-service store is more likely to present an unreasonable risk of harm than the carport because of the displays, which direct the attention of the shopper to the shelves and away from the floor. This distraction makes the presence of a foreign substance on the floor even more dangerous, and it might make that danger rise to the level of unreasonableness, triggering strict liability. Thus, a much stronger case for strict liability arises.

Another case that relied on the defect-in-law theory is *Morgan v. Hartford Accident & Indemnity Co.* In that case, the plaintiff tripped and fell because of an unexpected eight-inch drop in a church floor. The stepdown was difficult to discern because each side was standard grey concrete and the lighting was poor. The supreme court found that the floor created an unreasonable risk of harm, thus was defective, and applied article 2317. The importance of this case lies in the fact that the floor was not really practically defective. The floor had not been designed improperly, nor was there any faulty condition. According to the supreme court, it was the circumstances, not the design of some

74. 461 So. 2d 523 (La. App. 3d Cir. 1984), writ denied, 465 So. 2d 735 (1985). In this case, the plaintiff, acting as a substitute sitter for the elderly Mr. Oubre, went through the carport to empty a garbage can. Upon her return, she slipped on the carport, which had become damp in the humid Louisiana climate.

75. The court made certain to say that there were circumstances peculiar to this case and that the carport in this isolated instance was not unreasonably dangerous. 461 So. 2d at 525. Murray v. Ramada Inns, Inc., 521 So. 2d 1123 (La. 1988), might also be applicable here. It could be argued that the wet carport was an "open and obvious" risk and therefore the duty of the homeowner would not extend to the risk that someone would walk across it and injure himself. This finding would absolve the defendant of liability and further distinguish the case from a typical self-service slip and fall case, where the storeowner has a greater duty to protect his patrons.

76. 402 So. 2d 640 (La. 1981).

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later-arising flaw, that created an unreasonable risk. Floors in self-service stores are analogous, because they are designed in a proper manner. However, under certain circumstances, namely when a foreign object is on them, they can be very dangerous, especially where the shopper's attention is diverted by displays. Reasoning from the Morgan case, those floors may be defective because they present a similarly unreasonable risk, and the storeowner could be strictly liable.

An alternative method of fitting these cases under article 2317 is to switch the inquiry from whether the floor is defective to whether the thing on the floor is defective. Relying again on the Morgan case, one can argue that the thing on the floor may itself be defective if it presents an unreasonable risk of harm, even though there is nothing inherently dangerous about it. Things on the shelves do not present any danger, but once they are on the floor they could be unreasonably dangerous because a distracted plaintiff is not likely to see them. As before, the inquiry becomes problematical if the thing in question was brought in from outside the store, for the storeowner may not have the "garde"; but in the usual case it can be fairly argued that the thing on the floor is defective (that is, unreasonably dangerous), thus justifying the application of strict liability.

The best method for analyzing slip and fall cases under strict liability is the defect-in-law theory. This theory eliminates the need for the court to find an actual defect in the floor. By focusing on the floor rather than the foreign object, it also solves the problem of determining custody. This approach to self-service slip and fall cases would best realize the goal of providing a solution that is fairer to storekeepers while not putting the plaintiffs into the objectionable situation which existed prior to Kavlich. Under this approach, the storekeeper would not be required to exonerate himself until the plaintiff first had presented evidence of the fall, the injury, and the unreasonable risk posed by the storekeeper's premises.

**Comparative Negligence and Self-Service Slip and Fall Cases**

The test for the storekeeper's liability, however, is not the only aspect of these cases that needs clarification. The application of comparative negligence in self-service slip and fall claims should also be analyzed and reappraised. The analysis of slip and fall cases under comparative negligence should not be noticeably different using the

77. See supra text accompanying notes 65-68.
78. La. Civ. Code art. 2323 provides in pertinent part:

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
strict liability approach rather than the Kavlich theory, because Louisiana courts have held that comparative negligence is applicable in strict liability cases under article 2317.89 The first inquiry to be made, however, is whether a plaintiff's fault should ever reduce his recovery in a self-service case. Policy reasons based on the storeowner's intent to distract the the consumer, the dangers associated with the self-service system, and the storekeeper's ability to spread the loss more efficiently may suggest that the storeowner should bear all the liability.

One decision suggested in dicta that owners of self-service stores should assume full responsibility for accidents in their stores, regardless of victim fault. In Dulaney v. Travelers Insurance Co.,80 the first circuit, using a duty-risk analysis, noted that "slip and fall cases occurring in display areas . . . [are cases] where the defendant's duty extends to the protection of a plaintiff against his own carelessness . . . ."81 The first circuit adopted this conclusion because the plaintiff's "attention is presumed to be attracted to the advertised goods on the shelves."82 Since the storeowner intentionally distracts the plaintiff, he cannot hope to have the amount he must pay reduced based on the plaintiff's negligence. A plaintiff's carelessness would therefore not reduce his recovery under Dulaney. Since the accident occurred in a parking lot where there were no distracting displays, the court's finding that comparative fault would be inapplicable in cases involving display area slip and fall cases was merely dicta. Nevertheless, several third circuit decisions have reversed jury findings of victim fault in self-service slip and fall cases, citing Dulaney as authority.83

The United States Fifth Circuit Court of Appeals expressly rejected the Dulaney dicta in Jones v. T.G. & Y. Stores, Inc.84 The court dealt with a fall occurring in a self-service store; however, the plaintiff tripped in a hole instead of slipping on a foreign object, so strict liability was applied along with negligence. The Fifth Circuit reviewed the trial court's application of comparative fault and relied on the principles of Bell v.

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claim for 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.

80. 434 So. 2d 578 (La. App. 1st Cir 1983).
81. Id. at 582.
82. Id.
83. See, e.g., Saucier v. Winn-Dixie La., Inc., 499 So. 2d 1033 (La. App. 3d Cir. 1986); Nettles v. Winn-Dixie La., Inc., 496 So. 2d 1296 (La. App. 3d Cir. 1986); Batiste v. Joyce's Supermarket, 488 So. 2d 1318 (La. App. 3d Cir. 1986).
84. 775 F.2d 663 (5th Cir. 1985).
Jet Wheel Blast. In Jet Wheel, the Louisiana Supreme Court was called upon to decide if comparative fault applied in strict products liability cases. The supreme court held that comparative fault "may be applied in certain categories of cases to reduce the plaintiff's recovery." It also found that comparative fault would be inappropriate in some cases, and the Jet Wheel facts fell into that category. The court pointed out that the "plaintiff was injured while performing a repetitive operation with a defective industrial machine as required by his employer." The supreme court concluded that comparative fault would not significantly increase the employee's incentive to protect his hands, while it would decrease a manufacturer's incentive to produce a safer product. The court thus held that the defendant would be held solely liable.

After discussing Jet Wheel at length, the Fifth Circuit in Jones found that:

Unlike a worker using dangerous machinery to perform repetitive tasks under the direction of his employer, a customer walking down the aisle of a public retail store is fully open to the economic incentives provided by a comparative fault regime. Conversely, to foreclose the use of comparative fault would subject the proprietors of such premises to perverse incentives; expenditures on preventing accidents would tend to rise to an inefficient level and non-negligent customers would inappropriately bear the burden of increased prices.

Seizing upon language from Jet Wheel, the Fifth Circuit was "persuaded that 'the threat of a reduction in recovery will provide consumers with an incentive to use a [retail store's premises] carefully; without exacting an inordinate sacrifice of other interests.'" Currently, some appellate decisions rely on Dulaney, while others follow Jones. One recent and more logical approach attempts to reconcile the two. In Brown v. Great Atlantic & Pacific Tea Co., the plaintiff followed the manager into the store immediately upon its opening and slipped in a puddle. The court of appeal reversed a trial court's finding of fifty-percent fault on the part of the plaintiff because of a lack of evidence as to whether the plaintiff actually saw or should have seen the object that caused the fall.

This decision to reverse the trial court's finding of plaintiff fault appears to follow the Dulaney approach, but the court went on to
suggest that in some cases a plaintiff's recovery should be reduced:

Under certain circumstances a grocery store patron could be negligent in contributing to her own accident and injuries; for instance, where the shopper actually sees a potentially dangerous condition and fails to take reasonable precautions to avoid the danger. Also, it is arguable that, under certain circumstances, a store patron could fail to see a hazard which she reasonably should have seen and that by her failure she negligently caused her own injuries.91

This analysis, which allows the application of comparative negligence in appropriate cases, is better than the unqualified approaches taken in *Dulaney* and *Jones*. Storekeepers and patrons should have variable duties because of the wide variety of circumstances which can result in slips and falls. It should not be said that comparative negligence should always apply; nor should it be said that it should never apply. The analysis in *Brown v. A&P*, however, is insufficient because it lacks adequate detail.

A better approach would be to categorize cases according to the parties' respective duties and the policies applicable to the situations. The following discussion suggests four general categories and explains the application of certain policies and rules to each, which leads to certain outcomes.

The first of these categories is the case of the plaintiff who was distracted by the displays and neither saw nor should have seen the object. This situation can be illustrated by using the facts of *Nettles v. Winn-Dixie Louisiana, Inc.*92 There, the plaintiff slipped and fell on a white seedless grape while pushing a shopping cart along the produce aisle. The grape was on a lightly colored floor and was very hard to see. Under these facts the plaintiff was probably not negligent; even so, *Dulaney* should govern, since the storekeeper's duty should encompass the patron's carelessness. A distracted person should not have a duty to see every object that may be on the floor. The storekeeper's duty should encompass the risk that the patron will not see nonapparent objects. Therefore, comparative fault should not be applied in this category of cases.

The second category includes plaintiffs who are distracted and do not see the object, but should have under the circumstances. This situation is illustrated by the example of the shopping cart left in the middle of the aisle.93 This was the situation contemplated in *Brown v.*
A&P, where the court said that under certain circumstances a shopper might fail to see what he reasonably should have seen. This distracted-but-should-have-seen category should be governed by Jones, as it is "fully open to the economic incentives provided by a comparative fault regime." Applying comparative negligence here would recognize the duty of the patron to act reasonably in protecting himself, and would produce an incentive on the part of the shopper to use reasonable care. At the same time, it would maintain an incentive for the storeowner to inspect his premises for dangers to shoppers.

The third category is more complicated. It includes plaintiffs who saw the object, but momentarily forgot about it and slipped and fell on it. The problem here is one of deciding whether the storekeeper's duty should encompass the shopper's momentary forgetfulness, and therefore reduction should be precluded under Dulaney, or whether the shopper's recovery should be reduced pursuant to Brown and Jones, because he failed to take reasonable precautions to avoid the hazard. There are persuasive arguments on each side. The displays may have lured the shopper's attention away from the hazard and contributed to the forgetfulness. Since the storekeeper is presumed to intend to lure his shopper's into looking at the displays, his duty to provide safe floors should include the plaintiff's momentary forgetfulness.

On the other hand, the plaintiff may not be lured away, but just be careless. This would be a case in which the plaintiff should be required to act more reasonably, and calls for the application of comparative fault. The outcome of these cases must turn on the factual question of whether the plaintiff was distracted or merely careless. A distracted plaintiff should not have his recovery reduced because of the storekeeper's actions in distracting him. A careless plaintiff, however, should suffer the application of comparative negligence. This would provide an incentive against carelessness.

94. 775 F.2d at 665.
95. It is important to note that with the new developments under Murray v. Ramada Inns, Inc., 521 So. 2d 1123 (La. 1988), the outcomes of some cases in the second category may not be so simple to determine. In some instances it may be proper to hold that a defendant's duty does not extend to "open and obvious" risks. If the shopping cart was found to be "open and obvious" to reasonable persons, the risk that a shopper might run into it may not be encompassed within the storeowner's duty to protect his patrons. If such is the case, the storeowner will owe no duty to the plaintiff. In those cases, comparative fault will not apply since the storeowner escapes liability completely at the duty level.
The last situation is the most extreme. In these cases the plaintiff actually sees the object, but voluntarily encounters it, slips, and falls. This category would seem to fall under the doctrine of assumption of risk, since the plaintiff voluntarily encounters a known risk. Application of that doctrine might have served as a complete bar to the plaintiff's recovery, however, the Louisiana Supreme Court recently in *Murray v. Ramada Inns, Inc.* held that "the assumption of risk defense no longer has a place in Louisiana tort law." The court found that the doctrine was easily replaceable by other tort principles such as comparative fault and the duty-risk analysis. *Murray* says that "the fact that the plaintiff may have been aware of the risk . . . should not operate as a total bar to recovery. Instead, comparative fault principles should apply." Therefore, the plaintiffs in category four, having knowledge of the particular risk, will not be subject to the defense of assumption of risk. Comparative negligence will be applied and "the victim's 'awareness of the danger' is among the factors to be considered in assessing percentage of fault."  

If the plaintiff is found to have acted extremely unreasonably in encountering the risk, then his recovery may be completely barred despite *Murray*. This could be accomplished by finding the plaintiff's action the sole cause of the accident, thus allocating 100% of the fault to him. Alternatively, the court could find that the defendant's duty to provide reasonably safe premises did not encompass the risk of the plaintiff's behavior.

Since self-service slip and fall cases are a special breed, special rules should be developed to deal with comparative negligence. As the *Jones* case reveals, the policies underlying that scheme generally make these cases ripe for the application of the incentives provided by a comparative fault regime. In some instances, however, a storekeeper's duty should encompass the risk of the negligence, and comparative fault should not apply. Since that is the case, the courts should categorize each plaintiff and obtain results based upon the specific policies and rules applicable.

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97. Louisiana courts of appeal had taken divergent views on this issue. Compare Aguillard v. Langlois, 471 So. 2d 1011 (La. App. 1st Cir.), writ denied, 476 So. 2d 356 (1985), which held that under the comparative fault regime, assumption of risk no longer operated as a complete bar, with Brown v. Harlan, 468 So. 2d 723 (La. App. 5th Cir.), writ dismissed, 472 So. 2d 26 (1985), which held that assumption of risk still served as a complete bar to recovery in both negligence and strict liability cases.

98. 521 So. 2d 1123 (La. 1988).

99. Id. at 1125.

100. Id.

101. Id. at 1134.

102. Id.
CONCLUSION

The supreme court's desire to solve a problem for plaintiffs in self-service slip and fall cases was justified because of the potentially dangerous nature of the self-service system, and because the storekeeper was better able to spread costs. The analysis initiated in Kavlich and culminating in the McCardie decision, however, is not the best solution. A test is needed which is fairer to the storeowner but still protects the plaintiff.

Strict liability is such a test. Under this theory, the burden of proof would no longer be on the storeowner, while the plaintiff would not have the difficult burden of proving negligence, as he did prior to Kavlich. Using Entrevia, the determinative issue would be whether the condition of the floor presented an unreasonable risk, with reasonableness based on a social utility test, thus providing a more rational outcomes in slip and fall cases. Finally, the "fraudulent plaintiff" problem will be remedied because the plaintiff will have the burden of proof, decreasing the possibility of his winning fraudulently. These cases would easily fit under strict liability by using the Entrevia unreasonable risk of harm test.

Not only should the theory of legal liability be changed, the way in which these cases are analyzed under comparative negligence should be reconsidered. Two competing theories exist in this area. One is to have the storeowner bear all liability for plaintiff fault in all cases because of the customer's inability to protect himself. The second is to apply comparative fault in all cases because of the incentives created under that scheme. The better approach is to analyze each case according to specific categories which have different policies applicable to them. Recognizing the policies appropriate to each individual case will lead to a variety of outcomes, each based on the facts of the specific case rather than a rigid theoretical rule.

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