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## Recent Developments: *Broussard v. State* and the Not So Obvious Application of the Open and Obvious Doctrine

John M. Church\*

### INTRODUCTION

Every jurisdiction must determine the circumstances in which a tort defendant may be relieved of liability because of the nature of the fault or defect. In *Broussard v. State*,<sup>1</sup> the Louisiana Supreme Court restricted one of the defenses available to defendants when it revisited the open and obvious doctrine announced in 1996 in *Pitre v. Louisiana Tech*.<sup>2</sup> While the *Broussard* Court purportedly preserved the open and obvious doctrine, the case represents a significant and important limitation on the availability of the defense. Indeed, it could be argued that the limitation announced in *Broussard* effectively eliminates the open and obvious nature of the defect as an independent defense. Thus, *Broussard* could be one of the most important Louisiana tort cases decided in more than a decade.

### I. *BROUSSARD V. STATE*: RESTRICTING THE SCOPE OF THE OPEN AND OBVIOUS DOCTRINE

#### A. *Factual Background*

Paul Broussard, a United Parcel Service (UPS) deliveryman, sued the State of Louisiana for damages he sustained in an accident on January 23, 2001, while loading a dolly into a misaligned elevator in Wooddale Tower in Baton Rouge.<sup>3</sup> The Wooddale Tower is a state-owned office building with 12 stories and two elevators in the lobby.<sup>4</sup> In 1998, Wooddale Tower's roof was repaired, and the repair efforts generated a large volume of dust and debris.<sup>5</sup> Over time, the construction dust and debris settled and accrued in the elevator relay, triggering the elevators to "operate

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1. See *Broussard v. State ex rel. Office of State Bldgs.*, 113 So. 3d 175, 178–79 (La. 2013).

2. *Pitre v. La. Tech Univ.*, 673 So. 2d 585 (La. 1996).

3. *Broussard*, 113 So. 3d at 178–80.

4. *Id.* at 179.

5. *Id.*

erratically” for a period of several years.<sup>6</sup> The built-up dust and debris caused the elevators to stop in between floors, forming an offset of space between the elevator floor and the building floors.<sup>7</sup> The space would range from a few inches to a few feet.<sup>8</sup> The malfunctioning of the elevators and offset space did not go without notice by the tenants of Wooddale Tower, and several tenants expressed their concern of a future accident between 1999 and 2000.<sup>9</sup> The State proposed plans to fix the elevators in response to the complaints; however, the bidding was not completed until June 20, 2001.<sup>10</sup>

Prior to the accident, Broussard was an employee of UPS for 11 years, and he worked as a delivery-truck driver for 7 of those years.<sup>11</sup> Broussard made daily deliveries to Wooddale Tower and was fully aware of the building’s elevator problems.<sup>12</sup> On the day of the accident, Broussard was attempting to deliver six boxes of computer paper on a dolly, weighing 300 pounds, to the eighth floor.<sup>13</sup> One of the elevators was already open when Broussard entered the lobby, and the elevator was elevated between one and a half to three inches above the lobby floor.<sup>14</sup> Two people had entered the elevator prior to Broussard, and one of the occupants testified that Broussard initially put the dolly in front of his body and tried to push the dolly into the elevator.<sup>15</sup> The misalignment of the elevator and the ground floor prevented Broussard from being able to push the dolly in, so he turned around, stepped backward into the elevator, and attempted to pull the dolly into the elevator shaft.<sup>16</sup> As he was pulling the dolly backward, Broussard cleared the gap, but he soon lost control of the dolly and was forcefully propelled back into the elevator.<sup>17</sup> As a result of the accident, Broussard suffered a serious back injury, was diagnosed with a centrally-herniated,

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6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.* Employees of the Department of Social Services, one of the tenants of Wooddale Tower, even sent a memorandum to their supervisor on July 10, 2000, in which they expressed their concern that the elevators (1) would not stop in a position level with the building floors, causing employees to trip upon entering or exiting the elevator shaft and (2) would drop between a few inches and feet when people would enter or exit the elevator shaft. *Id.*

10. *Id.* at 179–80.

11. *Id.* at 180.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

degenerative disc, and could no longer perform his duties as a UPS deliveryman because his doctors advised him against heavy lifting.<sup>18</sup>

### *B. Procedural History*

After a three-day trial on August 23–26, 2010, the jury found in Broussard’s favor, concluding that the space between the lobby and elevator floors created an unreasonable risk of harm and Broussard was 38% at fault.<sup>19</sup> The jury found that Broussard suffered \$1,589,890.23 in damages but reduced this number to \$985,732.56 to account for his comparative fault.<sup>20</sup> On appeal by the State, the First Circuit reversed, finding that the district court’s conclusion that the offset created an unreasonable risk of harm was manifestly erroneous.<sup>21</sup> The First Circuit applied the four-prong, risk–utility balancing test<sup>22</sup> to determine that the offset did not create an unreasonable risk of harm because the social utility of the elevator offset the risk of the faulty but readily apparent condition of the elevator.<sup>23</sup> The Louisiana Supreme Court reversed the decision of the First Circuit finding that the offset of space represented an unreasonable risk of harm and the faulty condition of the elevator was not an open and obvious hazard.<sup>24</sup>

### *C. Law and Analysis*

In *Broussard*, the Louisiana Supreme Court noted that the owner of the building was only responsible for injuries caused by conditions that create an unreasonable risk of harm.<sup>25</sup> Whether a condition creates an unreasonable risk of harm is a mixed question of law, fact, and policy; the Court in *Broussard* determined that the question was for the trier of fact and should be determined at the breach and not the duty stage.<sup>26</sup> The trier of fact utilized a four-prong, risk–utility balancing test to determine whether the condition was unreasonably dangerous:

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18. *Id.* Specifically, Broussard was advised not to lift more than 70 pounds. *Id.*

19. *Id.* at 180–81.

20. *Id.* at 181.

21. *Id.* See also *Broussard v. State*, No. 11–0479, 2012 WL 1079182 (La. Ct. App. Mar. 30, 2012).

22. See, e.g., *Pryor v. Iberia Parish Sch. Bd.*, 60 So. 3d 594, 597 (La. 2011) (per curiam); *Pitre v. La. Tech Univ.*, 673 So. 2d 585, 591–93 (La. 1996).

23. *Broussard*, 113 So. 3d at 181.

24. *Id.* at 194.

25. *Id.* at 183 (citing *Entrevia v. Hood*, 427 So. 2d 1146, 1148–49 (La. 1983)).

26. *Id.* at 183–85.

- (1) the utility of the complained-of condition;
- (2) the likelihood and magnitude of harm, including the *obviousness and apparentness* of the condition;
- (3) the cost of preventing the harm; and
- (4) the nature of the plaintiff's activities in terms of its social utility or whether it is dangerous by nature.<sup>27</sup>

In discussing the magnitude of the harm and the open and obviousness of the risk, the Court concluded that the “elevators presented a significant and likely risk of harm” and that “the State had a heightened degree of care precisely because these elevators were malfunctioning and had become dangerous instrumentalities.”<sup>28</sup> In examining whether the open and obvious doctrine applied, the Court emphasized that the plaintiff's individual knowledge of the risk is not the proper standard but knowledge by all who might use the elevator is required.<sup>29</sup> Otherwise, the Court noted that the individual plaintiff's awareness or knowledge of a condition is just one *Watson* factor to be considered in the assessment of comparative fault.<sup>30</sup> The Court concluded that even though Broussard and the other occupant of the elevator at the time of the accident knew of the elevator problems, there were enough recorded instances of employees tripping or falling on the misaligned elevator that could lead a reasonable jury to conclude that the misalignment of the elevators was not open and obvious to all.<sup>31</sup>

## II. THE LOUISIANA OPEN AND OBVIOUS DOCTRINE: FROM *MURRAY* TO *PITRE*

The open and obvious doctrine has its beginnings in the notion that landowners were immune from liability related to their land.<sup>32</sup> Landowners had no duty to protect invitees from obvious conditions because “invitees [were], in most circumstances, expected to protect

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27. *Id.* at 184 (emphasis added).

28. *Id.* at 187. The Court noted that this heightened duty made this case different from an ordinary slip and fall case. *Id.*

29. *Id.* at 188.

30. *Id.* at 188–89. See *Watson v. State Farm Fire & Cas. Ins. Co.*, 469 So. 2d 967, 974 (La. 1985) (adopting the Uniform Comparative Fault Act for the fact finder to assess the nature of the conduct of the parties through a set of five factors and to aid in assigning fault percentages to the parties).

31. *Broussard*, 113 So. 3d at 190.

32. See 65A C.J.S. *Negligence* § 741 (“A landowner is not liable for injury resulting from a condition which should have been observed by an individual in the exercise of reasonable care or which was as obvious to a visitor as to the landowner.”).

themselves from obvious dangers.”<sup>33</sup> Moreover, a victim who “assumed the risk” or voluntarily embraced the risk was unable to recover from the tortfeasor,<sup>34</sup> and the defendant could use this argument as an affirmative defense.<sup>35</sup> Similarly, at common law, a tortfeasor who was negligent in any way or assumed the risk was deemed to have been “contributorily negligent,” and any amount of negligence would completely bar recovery.<sup>36</sup> However, the doctrine of contributory negligence has been abandoned in most states, including Louisiana, and Louisiana has now opted for a pure comparative fault system in which both the tort victim and tortfeasor are assigned a percentage of fault.<sup>37</sup> Under a comparative fault system, the plaintiff’s recovery is not completely barred but limited by his or her own contributory negligence.<sup>38</sup> There is necessarily an overlap between conduct that would be classified as negligent and conduct that would be classified as an assumption of the risk. So as many states began to turn away from contributory negligence to a comparative fault system, the question remained whether assumption of the risk would be an affirmative and complete defense to any recovery from the tortfeasor or merely reduce or limit the plaintiff’s ability to recover.<sup>39</sup> The Louisiana experience is described below.

A. *Murray v. Ramada Inns, Inc.*

In 1988, in *Murray v. Ramada Inns, Inc.*, the Louisiana Supreme Court determined the continued viability of the assumption of the risk doctrine in a certified question from the U.S. Fifth Circuit.<sup>40</sup> Although the Louisiana Legislature had eliminated contributory fault, it did not specifically address the role of assumption of the risk

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33. James P. End, *The Open and Obvious Doctrine: Where Does It Belong in Our Comparative Negligence Regime?*, 84 MARQ. L. REV. 445, 457–58 (2000).

34. See RESTATEMENT (SECOND) OF TORTS § 496A (1965).

35. See *id.* cmt. b.

36. See, e.g., *Soileau v. S. Cent. Bell Tel. Co.*, 398 So. 2d 648 (La. Ct. App. 1981).

37. For a thorough discussion of the development of comparative fault in Louisiana, see Frank L. Maraist, H. Alston Johnson III, Thomas C. Galligan, Jr. & William R. Corbett, *Answering a Fool According to His Folly: Ruminations on Comparative Fault Thirty Years On*, 70 LA. L. REV. 1105 (2010). A pure comparative fault system is one in which the plaintiff’s ability to recover is not barred if the plaintiff’s fault exceeds or equals the defendant’s percentage of fault. *Id.* at 1108.

38. See LA. CIV. CODE art. 2323 (2014).

39. *Murray v. Ramada Inn, Inc.*, 821 F.2d 272, 273 (5th Cir. 1987), certifying question to 521 So. 2d 1123, 1132 (La. 1988).

40. 521 So. 2d 1123 (La. 1988).

in the new comparative fault regime.<sup>41</sup> In *Murray*, the Louisiana Supreme Court held that the assumption of the risk doctrine is not a discrete, affirmative defense but its application is embraced in the comparative fault system.<sup>42</sup> In *Murray*, the plaintiff twice dove into a shallow motel pool and on his third dive, suffered a serious injury that eventually led to his death.<sup>43</sup> The Court determined that Murray's decedents' recovery was not barred by whether he knew or should have known of the risk that he assumed.<sup>44</sup> The type of assumption of the risk embraced by the comparative fault system is known as "implied secondary."<sup>45</sup> The Court reasoned that because the Legislature abolished contributory negligence and implied secondary assumption of the risk was "in reality a form of contributory negligence," implied secondary assumption of the risk should not operate as an affirmative defense.<sup>46</sup>

However, there are two situations where the *Murray* Court suggested that the plaintiff's conduct would apply as an affirmative and complete defense.<sup>47</sup> The first is an "express consent" case when the plaintiff explicitly releases the defendant from any liability.<sup>48</sup> The second type of conduct is when a plaintiff places him or herself in a situation to face "virtually unpreventable risks," which the *Murray* Court noted was called "implied primary" assumption of the risk by many jurisdictions.<sup>49</sup> Implied primary cases involve a "particular activity or situation" in which the plaintiff is deemed to have consented to the risk, although no "express" waiver was given.<sup>50</sup> In *Murray*, the Supreme Court offered the "textbook example" of a sports spectator who is struck by a fly ball at a baseball game.<sup>51</sup> In such a situation, the plaintiff would be deemed to have assumed the risk by his or her attendance at the game, and his or her ability to recover would be completely barred by the theory of implied primary assumption of the risk.<sup>52</sup> Although the Court effectively removed assumption of the risk as a defense, the

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41. *See id.* at 1132; *Murray*, 821 F.2d at 273.

42. *Murray*, 521 So. 2d at 1124 (holding that a swimmer's knowledge of the dangerousness of diving into a shallow pool did not bar recovery against the Ramada Inn motel owner and operator who failed to provide a lifeguard in violation of Louisiana law or signs warning against shallow water).

43. *Id.* at 1125.

44. *Id.* at 1134.

45. *Id.* at 1129.

46. *Id.* at 1125.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 1129.

51. *Id.* at 1125.

52. *See id.*

*Murray* Court's language preserves a class of cases where the defendant will be completely relieved from liability. The recognition in *Murray* that no-liability cases persist after the abolition of the assumption of the risk defense ultimately led to the open and obvious doctrine.

B. *Washington v. Louisiana Power & Light Co.*

Two years after *Murray*, “one might have thought that the duty-risk analysis in a case involving an open and obvious risk would not involve any judicial inquiry or consideration of the plaintiff’s actual knowledge of the risk.”<sup>53</sup> However, in *Washington v. Louisiana Power & Light Co.*, the Court took the plaintiff’s knowledge of the unreasonably dangerous condition to determine that the defendant–power company had a duty to the plaintiff but there was no breach of that duty.<sup>54</sup> In *Washington*, the victim, Washington, was electrocuted when his radio antenna came into contact with a high voltage wire in his backyard.<sup>55</sup> Five years prior to that fatal accident, Washington’s antenna had come into contact with the power line, shocking and burning Washington and his son.<sup>56</sup> After that first accident, “he expressed concern for his life and afterward exercised great caution” when dealing with the antenna.<sup>57</sup> After “his close call,” Washington requested that the power company insulate the power line or move it underground, but the power company told Washington that this action could only be undertaken at Washington’s expense.<sup>58</sup> The trial court found in favor of Washington; however, the Fourth Circuit determined that because of Washington’s past experience with the power line and his carefulness in handling the antenna after the first accident, the power company did not breach its duty.<sup>59</sup> Then Justice Dennis, writing for the Louisiana Supreme Court, affirmed the Fourth Circuit’s determination and applied a cost–benefit analysis to determine that the defendant was not liable because of the low probability that the antenna would make contact with the power line (and the resulting damage) was outweighed by the benefits of the line and the cost to insulate.<sup>60</sup> While Justice Dennis characterized the case as a “no-breach” case, at least one scholar has argued that it was really a “no-

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53. Maraist, et al., *supra* note 37, at 1115.

54. 555 So. 2d 1350 (La. 1990).

55. *Id.* at 1351.

56. *Id.*

57. *Id.*

58. *Id.* at 1352.

59. *Id.* at 1353.

60. *Id.* at 1353–55.

duty” case.<sup>61</sup> Moreover, the consideration of Washington’s actual knowledge in determining breach seems to be contrary to the holding in *Murray*.

In deciding that there was no breach of the applicable standard of care, the Court considered Washington’s actual knowledge of the risk of danger from the distribution line in his backyard to conclude that the probability of an accident occurring was extremely low.<sup>62</sup> This low probability led to the no-breach (or perhaps no-duty) conclusion.<sup>63</sup> The plaintiff’s knowledge essentially entered the case “through the back door,” not to simply reduce recovery but to bar it.<sup>64</sup> One may argue that the decision in *Washington* is technically consistent with the *Murray* duty analysis because the Court was not considering actual knowledge to define duty. However, actual knowledge was considered to conclude that there had been no breach of the relevant duty.<sup>65</sup> The result in either case was the same: no recovery. Likewise, note that if *Washington* is a breach case, the Court made the decision about breach, not the jury; the jury had concluded that, in fact, there was liability, including breach.<sup>66</sup>

### C. *Pitre v. Louisiana Tech University*

The open and obvious doctrine was most clearly defined in *Pitre v. Louisiana Tech University*.<sup>67</sup> In *Pitre*, a rare winter ice and snowstorm occurred in Ruston, Louisiana.<sup>68</sup> Pitre and three other Louisiana Tech students arranged themselves on top of a trashcan lid, head first, and another student pushed them, launching the “sled” down the hill.<sup>69</sup> Pitre hit a concrete light pole in Tech’s

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61. See Maraist et al., *supra* note 37, at 1117–18.

62. See *Washington*, 555 So. 2d at 1353–54.

63. See *id.* at 1353–55.

64. *Murray v. Ramada Inns, Inc.*, 521 So. 2d 1123, 1136 (La. 1988) (noting that if the plaintiff’s knowledge were used to define the duty that assumption of the risk would be retained as a total and complete bar to recovery).

If accepted, defendants’ argument [that the tort victim’s knowledge barred recovery] would inject the assumption of risk doctrine into duty/risk analysis “through the back door.” By that, we mean that the argument attempts to define the defendant’s initial duty in terms of the plaintiff’s actual knowledge, and thereby seeks to achieve the same result which would be reached if assumption of risk were retained as a defense, i.e., a total bar to the plaintiff’s recovery.

*Id.*

65. See *Washington*, 555 So. 2d at 1353–55.

66. See *id.* at 1353; see also Maraist, et al., *supra* note 37, at 1118.

67. 673 So. 2d 585 (La. 1996).

68. *Id.* at 586–87.

69. *Id.* at 586–88.

parking lot on his descent and sustained serious spinal injuries.<sup>70</sup> The Court clarified that a relevant inquiry of the duty–risk analysis of negligence is the obviousness and apparentness of the potentially dangerous condition, and if that condition “should be obvious to all,” the defendant does not owe a duty to the plaintiff.<sup>71</sup> Therefore, Justice Victory concluded, “Tech had no duty since the light pole was obvious and apparent and the risks of colliding with it while sledding are known to everyone.”<sup>72</sup>

In *Pitre*, the majority determined that the issue of potential negligence for Tech was an issue of “no duty.”<sup>73</sup> However, Justice Lemmon in his concurrence reasoned that this was actually a case in which there was a general duty, but there was no breach.<sup>74</sup> Moreover, scholars have noted that in *Pitre* the Court focused on the question of duty but still performed the cost–benefit analysis that is used when determining whether there has been a breach.<sup>75</sup> However, it was this same cost–benefit analysis that was used to determine that the power company in *Washington* did not breach its duty.<sup>76</sup> Moreover, in the wake of *Murray*, *Washington*, and *Pitre*, the Louisiana Supreme Court continued to tie the question of whether a duty existed to a duty–risk analysis for breach of a duty.<sup>77</sup> The *Pitre* Court then relied on its opinion in *Murray* to determine that the individual plaintiff’s state of mind is not the correct measurement of the defendant’s duty, but the duty should be determined by that which the defendant owes to *all* people who were on campus on the evening of the accident and not just to *Pitre* himself.<sup>78</sup>

### III. APPLYING *PITRE*: APPLICATION OF THE OPEN AND OBVIOUS DOCTRINE IS NOT SO OBVIOUS

In *Pitre*, the Court signaled that defendants could avoid liability where, as a result of a risk or defect being open and obvious, the

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70. *Id.* at 587–88.

71. *Id.* at 591.

72. *Id.* at 586.

73. *Id.* at 590–91.

74. *Id.* at 596.

75. See Maraist, et al., *supra* note 37, at 1122; Thomas C. Galligan, Jr., *Revisiting the Patterns of Negligence: Some Ramblings Inspired by Robertson*, 57 LA. L. REV. 1119, 1121 (1997).

76. See *Washington v. La. Power & Light Co.*, 555 So. 2d 1350, 1353–54 (La. 1990).

77. See Maraist et al., *supra* note 37, at 1125 (citing *Hutchinson v. Knights of Columbus*, Council No. 5747, 866 So. 2d 228 (La. 2004)).

78. *Pitre v. La. Tech Univ.*, 673 So. 2d 585, 590–91 (La. 1996) (citing *Murray v. Ramada Inns, Inc.*, 521 So. 2d 1123, 1136 (La. 1988)).

condition did not represent an unreasonable risk of harm.<sup>79</sup> However, the lower courts applied the doctrine inconsistently. Rather than developing a consistent standard, lower courts struggled to apply an uncertain doctrine. By analyzing a number of lower court cases that applied a version of the open and obvious doctrine, some patterns are revealed. First, the number of cases appeared to be increasing. From 1998 to 2005, there were 26 cases discussing the open and obvious doctrine.<sup>80</sup> From 2006 to 2013, there were 55.<sup>81</sup> Thirty cases relied on the doctrine to relieve the defendant of liability.<sup>82</sup> However, only 20 of the cases applying the open and obvious doctrine utilized a detailed risk–utility analysis like that performed in *Pitre* and, ultimately, *Broussard*.<sup>83</sup> While this statistic is far from scientific, it does reveal that lower courts were uncertain about the proper application of the open and obvious doctrine.

As a result, the *Broussard* Court took the opportunity to clarify the doctrine.<sup>84</sup> First, the Court clarified that the standard for defining an “open and obvious” risk is that it must be actually open and obvious to all.<sup>85</sup> The actual knowledge of the plaintiff is irrelevant because such a standard would be the equivalent of assumption of the risk, a doctrine eliminated by the Legislature, as interpreted by the Court in *Murray*.<sup>86</sup> Second, the Court clarified that the fact that the defect was open and obvious is just a part of the larger risk–utility analysis, the analysis applied in virtually all fault-based cases to determine if the condition represented an unreasonable risk.<sup>87</sup> The notion of the open and obvious risk analysis as a part of the unreasonable risk analysis is consistent with *Pitre* but, as revealed above, was not universally applied by the lower courts or even the

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79. See *supra* Part II.C.

80. See, e.g., *Hutchinson v. Knights of Columbus, Council No. 5747*, 866 So. 2d 228 (La. 2004); *McGuire v. New Orleans City Park Imp. Ass’n*, 835 So. 2d 416 (La. 2003); *Robertson v. State*, 747 So. 2d 1276 (La. Ct. App. 1999).

81. See, e.g., *Trautmann v. Fitzgerald*, 113 So. 3d 429 (La. Ct. App. 2013); *Watts v. Scottsdale Ins. Co.*, 43 So. 3d 266 (La. Ct. App. 2010); *Jeansonne v. S. Cent. Bell Telephone Co.*, 8 So. 3d 613 (La. Ct. App. 2009); *Leonard v. Ryan’s Family Steak Houses, Inc.*, 939 So. 2d 401 (La. Ct. App. 2006).

82. See, e.g., *Babino v. Jefferson Transit*, 110 So. 3d 1123 (La. Ct. App. 2013).

83. See, e.g., *Smalley v. Ransonet*, No. CA 13-522, 2013 WL 5951509 (La. Ct. App. Nov. 6, 2013).

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

85. *Id.* at 188.

86. *Id.* (“Our ‘open and obvious to all’ principle is not a hollow maxim. Rather, it serves an invaluable function, preventing concepts such as assumption of the risk from infiltrating our jurisprudence.”).

87. *Id.* at 185.

Supreme Court.<sup>88</sup> Finally, the Court ruled that the open and obvious doctrine is a question of breach, rather than duty.<sup>89</sup> This issue had been highlighted in both *Washington* and *Pitre*, with judges and scholars on both sides of the issue.<sup>90</sup> However, the *Pitre* Court unequivocally treated the question of whether the defect was open and obvious as a part of the duty element.<sup>91</sup> The importance of treating the question as part of the breach analysis, which is a question of fact, is that it is much more likely that cases will be submitted to the jury.<sup>92</sup> Whether this benefits plaintiffs or defendants is an open question, but the strategy employed by the parties will clearly change as a result of *Broussard*.

The following Section reveals that the Louisiana experience with the open and obvious doctrine is consistent with the experience in other jurisdictions.

#### IV. OPEN AND OBVIOUS HAZARDS: DEVELOPMENT OF THE COMMON LAW DOCTRINE

With roots in English and early American common law and most likely derived from the political power of landowners prior to the 20th century, the open and obvious doctrine eliminates landowner liability to business visitors resulting from open and obvious dangers.<sup>93</sup> “The rationale of the open and obvious doctrine is that the defendant should not be held liable for harm caused by a danger that was open and obvious to the person suffering the

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88. *Id.* at 191 (“Admittedly, it appears our recent *per curiam* opinions have produced a patchwork of inconsistent jurisprudence. . . . There is no bright-line rule. The fact-intensive nature of our risk-utility analysis will inevitably lead to divergent results.”).

89. *Id.* at 185–86.

90. See Maraist et al., *supra* note 37, at 1110 (describing the long academic debate between professor and practitioner Alston Johnson and Professor David Robertson on victim fault and scope of the risk).

91. *Pitre v. La. Tech Univ.*, 673 So. 2d 585, 590–91 (La. 1996).

92. See *Mundy v. Dep’t of Health and Human Res.*, 620 So. 2d 811, 813 (La. 1993) (opining that whether a duty is owed is a question of law, but whether a defendant has breached a duty is a question of fact).

93. *Michalski v. Home Depot, Inc.*, 225 F.3d 113, 118–19 (2d Cir. 2000) (outlining the transformation of the open and obvious doctrine). See RESTATEMENT OF TORTS § 340 (1934) (providing that “a possessor of land is not subject to liability to his licensees . . . for bodily harm caused to them by any dangerous condition thereon, whether natural or artificial, if they know of the condition and realize the risk involved therein”); James P. End, Comment, *The Open and Obvious Danger Doctrine: Where Does It Belong in Our Comparative Negligence Regime?*, 84 MARQ. L. REV. 445, 457 (2000) (“Landowner sovereignty resulted from the belief that landowners possessed the right to use their land as they so chose.”).

harm.”<sup>94</sup> The open and obvious doctrine was widely criticized by legal scholars and courts as being too harsh, however, and courts began to depart from it in the mid-20th century.<sup>95</sup> In 1965, the Restatement (Second) of Torts was published, recognizing this trend and modifying its assessment of the open and obvious doctrine so that “[a] possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.”<sup>96</sup> As a result, jurisdictions throughout the country have retreated from strict application of the open and obvious doctrine, departing “from the traditional rule absolving, *ipso facto*, owners and occupiers of land from liability for injuries resulting from known or obvious conditions, and [moving] toward the standard expressed in section 343A(1) of the Restatement (Second) of Torts (1965).”<sup>97</sup>

Under the Second Restatement, a landowner should anticipate, and is liable for failing to remedy, the risk of harm from obvious hazards when an invitee could be distracted from observing or avoiding the dangerous condition or may forget what he or she has discovered, and the landowner has “reason to expect that the invitee will nevertheless suffer physical harm.”<sup>98</sup> This principle is known as the “distraction exception” to the open and obvious rule.<sup>99</sup> For example, a landowner should anticipate that, in certain circumstances,

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94. Robert A. Sedler, *The Constitution, the Courts and the Common Law*, 53 WAYNE L. REV. 153, 172 (2007).

95. See James Fleming, Jr., *Tort Liability of Occupiers of Land: Duties Owed to Licensees and Invitees*, 63 YALE L.J. 605, 628 (1954); Page Keeton, *Personal Injuries Resulting from Open and Obvious Conditions*, 100 U. PA. L. REV. 629, 642–43 (1952); see, e.g., *Hanson v. Town & Country Shopping Ctr., Inc.*, 144 N.W.2d 870, 874 (Iowa 1966) (“To arbitrarily deny liability for open or obvious defects and apply liability only for hidden defects, traps, or pitfalls, is to adopt a rigid rule based on objective classification in place of the concept of the care of a reasonable and prudent man under the particular circumstances.”).

96. RESTATEMENT (SECOND) OF TORTS § 343A(1) (1965).

97. *Ward v. K Mart Corp.*, 554 N.E.2d 223, 231 (Ill. 1990) (listing cases from state supreme courts that have adopted the Second Restatement approach). See *Kentucky River Med. Ctr. v. McIntosh*, 319 S.W.3d 385, 390 (Ky. 2010) (“[T]he modern trend, as embodied in the Restatement (Second) of Torts, is the better position.”). *But see Jones Food Co., Inc. v. Shipman*, 981 So. 2d 355, 363 (Ala. 2006) (holding that no duty was owed with regard to open and obvious dangers); *Armstrong v. Best Buy Co. Inc.*, 788 N.E.2d 1088, 1091 (Ohio 2003) (holding same).

98. RESTATEMENT (SECOND) OF TORTS § 343A cmt. f (1965).

99. *Id.* See Kenneth R. Swift, *I Couldn't Watch the Ball Because I Was Watching the Ferris Wheel in Centerfield*, 22 ENT. & SPORTS LAW 1, 34 (2005) (noting that comment f has been extensively applied by numerous jurisdictions).

store displays will distract customers and potentially prevent them from discovering and avoiding even conspicuous dangers.

This principle was exemplified in the 2000 U.S. Second Circuit Court of Appeals opinion *Michalski v. Home Depot*.<sup>100</sup> In *Michalski*, a customer of a warehouse store was injured when she tripped and fell over a pallet left on a forklift while walking down an aisle to view and purchase bathroom cabinets.<sup>101</sup> The district court granted summary judgment in favor of the warehouse store, finding that the pallet was an open and obvious danger.<sup>102</sup> In predicting New York law, the Second Circuit applied the reasoning espoused by the Second Restatement and held that the district court erred in granting summary judgment against the patron because questions of material fact existed as to whether the store was liable, either because the condition was made unreasonably dangerous due to the fact that customers would not anticipate encountering it in that location or because it was reasonably foreseeable that customers would be distracted by merchandise from observing the pallet near the floor.<sup>103</sup> The court rejected the traditional approach, stating that “even obvious dangers may create a foreseeable risk of harm and consequently give rise to a duty to protect or warn on the part of the landowner.”<sup>104</sup> The *Michalski* court recognized that:

[T]he open and obvious nature of a dangerous condition on its property does not relieve a landowner from a duty of care where harm from an open and obvious hazard is readily foreseeable by the landowner and the landowner has reason to know that the visitor might not expect or be distracted from observing the hazard.<sup>105</sup>

By relying on the modified rule, the Second Circuit, like courts across the country, upheld the general duty of reasonable care.<sup>106</sup>

The general duty of reasonable care is the focus of the newly adopted Restatement (Third) of Torts: Physical and Emotional Harm section 51:

[A] land possessor owes a duty of reasonable care to entrants on the land with regard to:  
(a) conduct by the land possessor that creates risks to entrants on the land;

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100. *Michalski v. Home Depot, Inc.*, 225 F.3d 113, 115 (2d. Cir. 2000).

101. *Id.* at 115.

102. *Id.* at 116.

103. *Id.* at 121.

104. *Id.* at 119.

105. *Id.* at 121.

106. *Id.* at 120.

- (b) artificial conditions on the land that pose risks to entrants on the land;
- (c) natural conditions on the land that pose risks to entrants on the land; and
- (d) other risks to entrants on the land when any of the affirmative duties . . . is applicable.<sup>107</sup>

The duty espoused in the newest iteration is similar to, and includes, both the general landowner's duty imposed with regard to invitees in the Restatement (Second) of Torts section 343 and the distraction exception to the open and obvious rule reflected in the Restatement (Second) of Torts section 343A.<sup>108</sup> Thus, under the Third Restatement, landowners bear a general duty of reasonable care to all entrants, regardless of the open and obvious nature of dangerous conditions. The "duty issue must be analyzed with regard to foreseeability and gravity of harm, and the feasibility and availability of alternative conduct that would have prevented the harm."<sup>109</sup> While the open and obvious nature of the conditions does not automatically preclude liability, it is part of assessing whether reasonable care was employed.<sup>110</sup> In considering whether reasonable care was taken, the fact-finder must also take into account the surrounding circumstances, such as whether nearby displays were distracting and whether the landowner had reason to suspect that the entrant would proceed despite a known or obvious danger.<sup>111</sup>

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107. RESTATEMENT (THIRD) OF TORTS: PHYSICAL AND EMOTIONAL HARM § 51 (2012).

108. *Id.* § 51 cmts. a and k.

109. *Coln v. City of Savannah*, 966 S.W.2d 34, 43 (Tenn. 1998), *overruled on other grounds by* *Cross v. City of Memphis*, 20 S.W.3d 642, 644 (Tenn. 2000). See RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 51 cmt. i (2012).

110. RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 51 cmt. k (2012).

111. RESTATEMENT (SECOND) OF TORTS § 343A cmt. f (1965). See RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 51 cmt. k (2012) (explaining that a warning ordinarily would be futile when the danger is open and obvious).

Known or obvious dangers pose a reduced risk compared to comparable latent dangers because those exposed can take precautions to protect themselves. Nevertheless, in some circumstances, a residual risk will remain despite the opportunity of entrants to avoid an open and obvious risk.

*Id.*

V. THE LOUISIANA VERSION OF THE OPEN AND OBVIOUS DOCTRINE:  
AN ASSESSMENT

Scholars and judges seem to be in agreement that there is a class of cases where the defendant should be relieved of liability because the defect is so apparent that the defendant's conduct does not represent an unreasonable risk.<sup>112</sup> The relevant question is whether the open and obvious doctrine adequately captures those cases. The corollary question is whether the open and obvious doctrine is even capable of capturing those cases. States that have addressed the issue have answered these questions in a variety of ways, ranging from the elimination of the doctrine, to the preservation of the doctrine with a distraction exception, to the retention of the doctrine in its historical, defendant-friendly form.<sup>113</sup> In *Broussard*, the Louisiana Supreme Court technically retained the rule but signaled that it should simply be a part of the risk–utility analysis that is part of every fault-based case, a result consistent with the latest trend.<sup>114</sup>

The necessity for the change from *Pitre* is demonstrated by the facts and procedure of *Broussard* itself.<sup>115</sup> The facts indicate that others had tripped over and complained about the gap prior to Mr. Broussard's injury, indicating that this was not a defect "known to all."<sup>116</sup> Thus, the desirable result is that the State take some precautionary action and eliminate the defective condition. Similarly, Mr. Broussard certainly bears some share of fault. In fact, the jury allocated a percentage of fault to Mr. Broussard.<sup>117</sup> On the facts, the result in *Broussard* is defensible and, perhaps, correct.

In addition, a significant number of lower courts were applying the open and obvious doctrine without a careful risk–utility analysis, effectively eliminating the distraction exception recognized in most jurisdictions that retain the doctrine.<sup>118</sup>

The more difficult question concerns the implication of the principle announced in *Broussard*. Most jurisdictions recognize that even open and obvious risks may be unreasonable.<sup>119</sup> Thus, most cases should go to the jury to be evaluated under the typical risk–utility standard announced in *Broussard* and *Pitre*.<sup>120</sup> However, the Court may have restricted judicial freedom to the point of

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112. See *supra* Part IV.

113. See *supra* Part IV.

114. See *supra* Parts I, IV.

115. See *supra* Part I.

116. See *supra* Part I.

117. See *supra* Part I.

118. See *supra* Part III.

119. See *supra* Part IV.

120. See *supra* Part III.

effectively eliminating the open and obvious doctrine. Only time will tell whether the standard announced by the Court will properly identify those single-care cases where the defendant should be relieved of liability.