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## CASE COMMENTARY

### COMPARATIVE NEGLIGENCE IN A MARITIME PRODUCTS LIABILITY CASE: *Lewis v. Timco, Inc.*

David R. Owen\* and J. Marks Moore, III\*\*

The March 1983 issue of the *Louisiana Law Review* contained an article by the authors entitled "Comparative Negligence in Maritime Personal Injury Cases."<sup>1</sup> The article expressed the opinion that the admiralty rule of comparative negligence is applicable in a maritime products liability case,<sup>2</sup> citing several authorities for this statement. Indeed the authors were not aware of any admiralty case reaching a different result. On February 14, 1983, however, shortly after that issue was set in type, the United States Court of Appeals for the Fifth Circuit held that comparative negligence was not applicable in a maritime products liability case. *Lewis v. Timco, Inc.*, 697 F.2d 1252 (5th Cir. 1983), *rehearing en banc granted*, No. 81-3022 (Apr. 18, 1983) (*en banc rehearing* June 7, 1983). The authors respectfully suggest that the case was wrongly decided.<sup>3</sup>

The plaintiff, Alfred Lewis, was injured while working on a jackup drilling barge in the coastal waters of Louisiana. He was operating a power tong device in an attempt to retrieve a piece of equipment that had been accidentally dropped into the drilling hole. The device had been manufactured by defendant Joy Manufacturing Company and was owned by defendant Rebel Rentals, Inc. A representative of defendant Edwards Rental and Fishing Tools, Inc. was in direct charge of the "fishing" operation in which plaintiff was participating at the time of his accident. Lewis also sued his employer, Timco, Inc., but that defendant was dismissed because Lewis' exclusive remedy against his employer was under the Longshoremen's Act.<sup>4</sup>

The power tong unit had a design defect that could create a situation in which the "snubbing line" could wrap around the operator if the operator did not manipulate the controls in precisely the right sequence. Joy's instruction manual gave no warning of this severe hazard, but it was well known to the representatives of Rebel and

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1. 43 LA. L. REV. 941 (1983).
2. *Id.* at 947-49.
3. The editors of the *Review* have graciously afforded the authors the opportunity to supplement their earlier article by commenting in some detail on the *Lewis* decision.
4. Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1976).

Edwards who were thoroughly experienced in this operation. For Lewis, on the other hand, this job was only his second full-time assignment as a power tong operator. Although he was having obvious problems in synchronizing the controls, the Rebel and Edwards representatives did not advise him to shorten the snubbing line, an action which would have prevented the injury.

After a bench trial, the United States District Court for the Western District of Louisiana found Joy liable both in strict products liability and in negligence and found Rebel and Edwards each liable in negligence. The court assessed financial responsibility among them on a 40%-40%-20% basis. It also found Lewis 50% contributorily negligent for failing to adjust the length of the snubbing line. The District Court therefore entered judgment for only one-half of plaintiff's damages. Lewis appealed on the ground that the doctrine of comparative negligence has no place in strict liability cases. The Fifth Circuit Court of Appeals agreed and reversed.<sup>5</sup>

The authors maintain that the admiralty rule of comparative negligence is applicable in a maritime strict liability case such as *Lewis*. They further submit, with all due respect, that neither the reasoning nor the authorities cited by the Court of Appeals supports its conclusion.

The issue of comparative negligence in strict liability cases has been much discussed by courts and commentators. Those who believe that the damages suffered by a plaintiff in a strict products liability case should not be reduced to the extent of his negligence have generally argued that negligence cannot be compared with no-fault. Such analogy, they contend, would be like comparing "apples and oranges," trying to fit "square pegs in round holes," or attempting to "mix oil and water." This purported analysis is little more than a play on words, and the *Lewis* court engages in just such an exercise.<sup>6</sup> These opponents of comparative negligence in strict liability cases, including this panel of the Fifth Circuit, also argue that public policy demands that the burden of injuries caused by defective products should be treated as a cost of production and spread among all consumers of the product. It is readily apparent that this analysis is incomplete; public policy certainly does not require that consumers generally should contribute to the social cost incident to the negligence of individual consumer-plaintiffs.

Most courts and most commentators have *avored* the application of comparative negligence principles in strict liability cases.<sup>7</sup> Although

5. The panel consisted of Circuit Judges Garza, Politz, and Williams with Judge Politz writing for the court.

6. 697 F.2d at 1255 n.7.

7. See *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 740-41, 575 P.2d 1162, 1171, 144 Cal. Rptr. 380, 389 (1978), and authorities cited therein; see also Note, *Contributing*

no purpose would be served by citing all the cases and articles reaching this conclusion, no commentary on this subject would be complete without two references. Professor Schwartz in his treatise on comparative negligence summarizes the issue and expresses the opinion that comparative negligence is quite compatible with strict liability.<sup>8</sup> The *Lewis* court fails to cite this leading text or any court decisions opposed to the Schwartz thesis.

Furthermore, the Supreme Court of California in *Daly v. General Motors Corp.*,<sup>9</sup> after fully discussing all of the arguments both for and against, held that comparative negligence is applicable in a strict liability case. This decision takes on added authority because that court originated the strict liability doctrine<sup>10</sup> and was a leader in judicial adoption of pure comparative negligence.<sup>11</sup> The court recognized "the theoretical and semantic distinctions between the twin principles of strict products liability and traditional negligence, [but maintained that] they can be blended or accommodated."<sup>12</sup> In fact it referred to the "apples and oranges" argument as "conceptually suspect."<sup>13</sup> Eschewing "the simple expedient of matching linguistic labels," the court discussed in detail the policy considerations briefly, but inaccurately, mentioned by the *Lewis* court and found no "foundational reasons" for holding that the doctrine of strict products liability would be "defeated or diluted by adoption of comparative principles."<sup>14</sup> In addition, the California court felt "strengthened in the foregoing conclusion by the federal experience under the maritime doctrine of 'unseaworthiness,'"<sup>15</sup> noting the close similarity between unseaworthiness and strict products liability.

The authors of this commentary similarly felt strengthened in their previous treatment of the subject by three decisions of the United States Supreme Court applying comparative negligence in unseaworthiness cases.<sup>16</sup> The *Lewis* court cites, without comment, only one of the Supreme Court decisions<sup>17</sup> and then reaches the opposite result.

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*Negligence—When Should it be a Defense in a Strict Liability Action?*, 43 LA. L. REV. 801 (1983).

8. V. SCHWARTZ, *COMPARATIVE NEGLIGENCE* 195-209 (1974 & Supp. 1981).

9. 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978) (4-3 decision).

10. *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

11. *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

12. 20 Cal. 3d at 734, 575 P.2d at 1167, 144 Cal. Rptr. at 385.

13. 20 Cal. 3d at 735, 575 P.2d at 1167, 144 Cal. Rptr. at 385.

14. 20 Cal. 3d at 736, 575 P.2d at 1168, 144 Cal. Rptr. at 386.

15. 20 Cal. 3d at 738, 575 P.2d at 1170, 144 Cal. Rptr. at 388.

16. *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 1954 A.M.C. 1 (1953); *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424, 1939 A.M.C. 1 (1939); *The Arizona v. Anelich*, 298 U.S. 110, 1936 A.M.C. 627 (1936). See *Owen & Moore, Comparative Negligence in Maritime Personal Injury Cases*, 43 LA. L. REV. 941, 948 & n.56 (1983).

17. *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 1954 A.M.C. 1 (1953).

Since unseaworthiness is also "a species of liability without fault,"<sup>18</sup> a United States Court of Appeals should have felt bound to follow the Supreme Court decisions.

The *Lewis* court cites the decisions of three United States Courts of Appeals and indicates that at least one implicitly declined to apply comparative negligence in products liability cases in admiralty. The court, however, recognizes that the Ninth Circuit, in *Pan-Alaska Fisheries, Inc. v. Marine Construction & Design Co.*,<sup>19</sup> explicitly and fully held that comparative negligence applies in maritime products liability and that the Sixth Circuit, in *Schaeffer v. Michigan-Ohio Navigation Co.*,<sup>20</sup> has so held without discussion on the basis of *Pope & Talbot, Inc. v. Hawn*.<sup>21</sup> The third decision cited is that of the Eighth Circuit in *Lindsay v. McDonnell Douglas Aircraft Corp.*<sup>22</sup> Although comparative negligence was not involved in that case of strict liability in admiralty, the court in dictum indicated that the doctrine was applicable, citing the Death on the High Seas Act (DOHSA).<sup>23</sup> This conclusion would necessarily be true because section 766 of DOHSA specifically incorporates the doctrine of comparative negligence. In short, in a strict liability case involving death on the high seas a federal court is *required* under DOHSA to apply the comparative negligence rule.

It is thus apparent that the *Lewis* court does not cite any decision supporting its conclusion but does in fact cite one Supreme Court decision and three decisions of Courts of Appeals all of which reach the opposite conclusion. Indeed there is an odd omission in that the Fifth Circuit itself has previously approved a jury charge in a non-maritime strict liability case requiring a reduction of damages in proportion to the plaintiff's contributory negligence.<sup>24</sup> The array of law review articles cited in the opinion is equally puzzling. The articles by Plant<sup>25</sup> and Feinberg<sup>26</sup> and the note in the *Southern California Law*

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18. *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 94, 1946 A.M.C. 698, 704 (1946).

19. 565 F.2d 1129, 1978 A.M.C. 2315 (9th Cir. 1977).

20. 416 F.2d 217 (6th Cir. 1969).

21. 346 U.S. 406, 1954 A.M.C. 1 (1953).

22. 460 F.2d 631, 1974 A.M.C. 1341 (8th Cir. 1972).

23. 46 U.S.C. §§ 761-768 (1976).

24. *Edwards v. Sears, Roebuck & Co.*, 512 F.2d 276, 290 (5th Cir. 1975). See also *West v. Caterpillar Tractor Co.*, 547 F.2d 885 (5th Cir. 1977), wherein the Fifth Circuit certified to the Florida Supreme Court the question of whether "simple negligence" is, under Florida law, a comparative defense to a strict liability action. The Florida court replied that it was, and the Fifth Circuit referred to that finding as "sensible." *Id.* at 887.

25. Plant, *Comparative Negligence and Strict Tort Liability*, 40 LA. L. REV. 403 (1980).

26. Feinberg, *The Applicability of a Comparative Negligence Defense in a Strict Products Liability Suit Based on Section 402A of the Restatement of Torts 2D (Can Oil and Water Mix?)*, 42 INS. COUNS. J. 39 (1975).

*Review*<sup>27</sup> all reach the conclusion that a negligent plaintiff should not recover full damages from a defendant in a products liability case. The recommendation that comparative negligence should not apply in strict liability cases, contained in the article by Robinson<sup>28</sup> and in a comment,<sup>29</sup> both in California law journals, preceded the decision in *Daly v. General Motors Corp.* in which the California Supreme Court rejected such views.

The *Lewis* court seeks to justify the recovery by the plaintiff of his full damages on the basis that he was guilty of only "simple negligence."<sup>30</sup> No attempt is made to reconcile this label with the district court's finding of fact, accepted on appeal, that Lewis was 50% at fault. On a quantitative basis, this finding of fault would seem to be considerably more than "simple negligence." The authors, however, would argue that plaintiff's negligence should reduce plaintiff's recovery even if the negligence is only 5%.

By dismissing the plaintiff's negligence as merely "simple," the court is in effect recognizing the much-criticized jurisprudence of degrees of negligence, a concept that fortunately has never found favor in admiralty. The maritime law provides a flexible mechanism for apportioning fault.<sup>31</sup> It originated in collision cases but recently has been employed in a maritime products liability case.<sup>32</sup> The procedure is to evaluate a party's negligence separately as to the nature and extent of his culpability and as to the causal connection thereof with the casualty. These two preliminary judgments are then factored into an overall percentage of contributing fault. For example, the culpability of an inexperienced workman guilty of only "simple negligence, ineptness or inadvertence"<sup>33</sup> would seem to be of a very low order. However, Lewis's failure to properly adjust the snubbing line was active negligence that led directly to his injury. If the court of appeals disagreed with the finding of 50% negligence, its proper options were to set aside the finding as clearly erroneous<sup>34</sup> and fix a percentage of its own or, preferably, to remand the case to the district court with instructions as to the proper rationale for apportioning fault.<sup>35</sup>

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27. Note, *Products Liability, Comparative Negligence, and the Allocation of Damages Among Multiple Defendants*, 50 S. CAL. L. REV. 73 (1976).

28. Robinson, *Square Pegs (Products Liability) in Round Holes (Comparative Negligence)*, 52 CAL. ST. B.J. 16 (1977).

29. Comment, *Comparative Fault and Strict Products Liability: Are They Compatible?*, 5 PEPPERDINE L. REV. 501 (1978).

30. 697 F.2d at 1255.

31. See Owen & Moore, *supra* note 16, at 956-58.

32. *Pan-Alaska Fisheries, Inc. v. Marine Constr. & Design Co.*, 565 F.2d 1129, 1978 A.M.C. 2315 (9th Cir. 1977).

33. 697 F.2d at 1255.

34. See FED. R. CIV. P. 52(a).

35. Judge Gordon of the Eastern District of Louisiana has said: "In calculating

What the Fifth Circuit has created in *Lewis v. Timco, Inc.* is a form of *absolute liability* in strict products liability cases. It is both practically and theoretically important to distinguish between absolute liability and strict liability. As the Supreme Court of California noted in the *Daly* case: "From its inception, however, strict liability has never been, and is not now, *absolute liability*."<sup>36</sup> In *Lewis*, for example, Timco, Inc. was absolutely liable to its employee Lewis under the Longshoremen's Act. His negligence did not reduce his benefits under the Act.<sup>37</sup> Such absolute liability without bar or diminution by reason of the plaintiff's negligence has been created by other than workers' compensation statutes.<sup>38</sup> Strict products liability, afloat as well as on shore, bears no resemblance to such forms of absolute liability. Rather, it is in the admiralty closely similar to liability for unseaworthiness and should likewise involve the application of comparative negligence principles.

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the degree of fault, the court must consider, under basic common law tort principles, the blameworthiness of each vessel and the extent to which the vessel contributed to the accident." *Southern Pac. Transp. Co. v. Tug Captain Vick*, 443 F. Supp. 722, 732 n.1, 1979 A.M.C. 1404, 1417 n.1 (E.D. La. 1977).

36. 20 Cal. 3d at 733, 575 P.2d at 1166, 144 Cal. Rptr. at 384.

37. See Owen & Moore, *supra* note 16, at 950.

38. See, e.g., *Koenig v. Patrick Constr. Corp.*, 298 N.Y. 313, 83 N.E.2d 133 (1948).