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# Celestine v. Union Oil Company of California: Repairmen and the Unreasonable Risk Determination In Louisiana Strict Liability Jurisprudence

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## NOTES

### ***Celestine v. Union Oil Company of California: Repairmen and the Unreasonable Risk Determination in Louisiana Strict Liability Jurisprudence***

*Author's Note:* In the Spring of 1996, the Louisiana Legislature reformed several Civil Code articles on delictual liability.<sup>1</sup> House Bill number 18 contained revisions to Louisiana Civil Code articles 660, 667, 2321, and 2322.<sup>2</sup> The bill also enacted Civil Code article 2317.1.<sup>3</sup> Governor "Mike" Foster signed this bill into law on April 16, 1996. Only the provision revising Article 2322 is of interest to the discussion in this article. Revised Civil Code article 2322 provides that:

The owner of a building is answerable for the damage occasioned by its ruin, when this is caused by neglect to repair it, or when it is the result of a vice or defect in its original construction. *However, he is answerable for damages only upon a showing the he knew or, in the exercise of reasonable care, should have known of the vice or defect which caused the damage, that the damage could have been prevented by the exercise of reasonable care, and that he failed to exercise such reasonable care.*<sup>4</sup>

Revised Article 2322 essentially eliminates strict liability in Louisiana absent a showing that the owner knew or should have known of the damage-causing risk, that the damage could have been prevented by the exercise of reasonable care, and that the building owner failed to exercise such reasonable care. What effect these revisions, and the revision of Article 2322 in particular, will have on strict liability in Louisiana is beyond the scope of this article and will depend on the interpretation given to the revised articles by Louisiana courts.<sup>5</sup>

Luckily, at least for the purposes of this article, the revision of Article 2322 does not drastically change the result or analysis in the case that is the subject of this article. First, the topic of this article deals with the narrow issue of a repairman's remedies against a building owner when that repairman is injured by some risk presented by the building. Presumably, the owner, having already

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1. See 1996 La. Acts No. 1 (Ex. Sess.).
2. *Id.*
3. *Id.*
4. *Id.* (emphasis added) (emphasized text represents language added to article 2322 in the revision).
5. Whether these revised articles will have retroactive or prospective application remains to be seen. It is this author's opinion that these laws will probably be applied prospectively only. However, there remains an argument that the revisions are allocations of the burden of proof and thus procedural. In that case, one could argue that the laws apply retroactively. For a discussion of retroactive/prospective application of laws in general, see *Ardoin v. Hartford Accident & Indem. Co.*, 360 So. 2d 1331, 1335-41 (La. 1978).

realized that the building needs to be repaired (evidenced by the call to the repairman), knows of the vice or defect in the building. Thus, the owner seems to have the requisite knowledge of the vice or defect required in revised Civil Code article 2322. Whether the damage could have been prevented by the exercise of reasonable care and whether the building owner failed to exercise such reasonable care are merely factual determinations, the resolutions of which depend on the particular case.

Second, the unreasonable risk determination should arguably still be applicable in cases involving revised Civil Code article 2322. Once the plaintiff proves that an unreasonable risk of harm existed, he need only prove that the building owner knew or should have known of the unreasonable risk of harm, that the exercise of reasonable care could have prevented the damage, and that the building owner failed to exercise such reasonable care. The element of the damage being prevented by the exercise of reasonable care seems to be an issue of cause-in-fact: but for the failure of the building owner to exercise reasonable care, the accident would not have happened. The element of the building owner's failure to exercise such reasonable care seems to be a question of breach. Where the unreasonable risk determination fits will be discussed in the text of the paper.

Furthermore, the pre-revision articles on strict liability will probably still apply to causes of action that arose prior to April 16, 1996.<sup>6</sup> In addition, the reader should keep in mind that "[n]othing is more subject to change than the laws."<sup>7</sup> Thus, as the law regarding strict liability was changed by the legislature in 1996, who is to say that one day in the future the law regarding strict liability will not change again, perhaps to the same principles in use prior to the 1996 revision?

## I. INTRODUCTION

In *Celestine v. Unlon Oil Company of California*,<sup>8</sup> the Louisiana Supreme Court considered whether "Louisiana law recognizes a 'repairman' exception to an owner's strict liability for injury caused by a vice, defect or ruin on his premises."<sup>9</sup> *Held*: Louisiana does not recognize a blanket "repairman" exception to an owner's strict liability, but the injured party's status as a repairman hired to fix the defect is a relevant factor in assessing whether the defect posed an unreasonable risk of harm.<sup>10</sup>

Leroy Celestine was a thirty-two year old welder working for Gulf Coast Marine Fabricators, Incorporated. Pursuant to a contract between Gulf Coast and

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6. See *supra* note 5.

7. Michel De Montaigne, quoted in Bruce Nash and Allan Zullo, *Lawyer's Wit and Wisdom* 198 (1995).

8. 652 So. 2d 1299 (La. 1995).

9. *Celestine*, 652 So. 2d at 1300.

10. *Id.*

Union Oil Company for maintenance and repair services, Celestine found himself on one of Union's offshore oil rigs. Although the job required a variety of maintenance and repair work, Celestine's work was limited to the replacement of handrails which were in disrepair. According to the estimates of a Gulf Coast employee overseeing the repair work, approximately eighty percent of all of the handrails on the rig were in need of replacement.<sup>11</sup> The handrails consisted of three horizontal pipes connected by vertical pipes inserted into sockets on plates which were attached to the platform.

Celestine, apparently with some appreciation of the potential danger of his work, wore a safety belt and life jacket. While repairing a handrail, he leaned out across the bottom pipe and over the water in order to cut the pipe with his blowtorch. During the repair work, another Gulf Coast employee helped Celestine by supporting one end of the handrail. In retrospect, Celestine acknowledged that there should have been more than one man assisting him and that on previous occasions two men always assisted by supporting the handrail.<sup>12</sup> However, according to Celestine, this handrail seemed to be in fairly good shape and he believed that additional help was unnecessary.<sup>13</sup>

Celestine began to cut the socket attached to the bottom of one vertical rail with his torch, but a weld on the far end of the horizontal rail broke causing the vertical rail at the far end to fall out of the socket connected to the platform. Simultaneously, the socket on which Celestine was working disconnected, and the horizontal pipe rail fell onto his back.<sup>14</sup> The Gulf Coast employee holding the other end of the rail was unable to prevent its fall. As a result of the accident, Celestine suffered two herniated discs. He underwent two surgeries to fuse the spine at the herniations and now suffers a ten to fifteen percent whole body impairment.<sup>15</sup>

Celestine filed suit against Union and two Union employees, asserting negligence and strict liability under Louisiana Civil Code articles 2317 and 2322.<sup>16</sup> After a trial on the merits, a jury found no negligence on the part of

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11. *Id.* at 1301.

12. *Id.*

13. *Id.* In an interesting bit of foreshadowing, a somewhat similar incident had occurred while Celestine was at work on another handrail. The other end of a handrail broke and began to fall. It was caught by the two workmen who were helping Celestine at the time, thus preventing any injury. *Id.*

14. While the exact cause of the weld at the far end of the rail breaking loose was not disclosed, the weld had probably rusted and the pipe was not able to withstand any additional pressure. There was undisputed evidence that Celestine's body weight rested against the bottom pipe rail. *Celestine v. Union Oil Co. of Cal.*, 636 So. 2d 1138, 1143 (La. App. 3d Cir. 1994). Celestine alleged that the weld was defective, not that it had rusted. *Id.* at 1143. However, at trial, Celestine testified that he understood that one of the reasons why the rails were being replaced was the "accumulation of moisture and resulting rust damage." *Celestine*, 652 So. 2d at 1301.

15. *Celestine*, 652 So. 2d at 1301.

16. La. Civ. Code art. 2317 (1870) provides that:

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

any of the defendants. The jury did find however, "that the condition of Union's platform created an unreasonable risk of injury which was a cause of Celestine's accident and injury"; thus Union was strictly liable.<sup>17</sup> Furthermore, the jury concluded "that Celestine was negligent and such negligence was a contributing factor" to the accident.<sup>18</sup> In assessing fault, the jury found Union sixty percent at fault and Celestine forty percent at fault.

Both parties filed motions for judgment notwithstanding the verdict. Celestine argued that comparative fault was not applicable to a strict liability case. The trial judge rejected Celestine's argument, finding that "the jury was free to compare Union's non-negligent strict liability and Celestine's negligent conduct to determine the extent to which each contributed to his [Celestine's] injuries."<sup>19</sup> Union argued that strict liability should not apply to a repairman injured due to a risk inherent in making repairs. The trial judge denied this motion, noting that bars to recovery under strict liability, such as whether Celestine was aware of the danger, whether the danger was obvious, and whether the manner of repair was unsafe, were questions of fact for the jury to answer.<sup>20</sup>

Both Celestine and Union appealed. The Louisiana Third Circuit Court of Appeal reversed the jury's finding that Union was strictly liable and affirmed the finding of no negligence on the part of Union or its employees.<sup>21</sup> The Third Circuit held that an owner cannot be strictly liable under Article 2322 if the vice, defect, or ruin being repaired is the *sole cause* of the repairman's injury.<sup>22</sup>

The Third Circuit Court of Appeal found the following facts significant: that the handrail upon which Celestine was working when he was injured was one marked for repair, that Celestine knew of the instability of most of the handrails, and that it had "crossed his mind that one of the handrails might fall."<sup>23</sup> These facts suggested, at least to the court of appeal, that Celestine was not presented with an unreasonable risk of harm, a prerequisite to finding a building owner strictly liable under the code articles.<sup>24</sup> Therefore, with no unreasonable risk of harm, Celestine could not prevail in a strict liability action.

we have in our custody. This, however, is to be understood with the following modifications [articles 2318-2322].

La. Civ. Code art. 2322 (1870) provides that:

The owner of a building is answerable for the damage occasioned by its ruin, when this is caused by neglect to repair it, or when it is the result of a vice in its original construction.

17. *Celestine*, 652 So. 2d at 1302.

18. *Id.*

19. *Id.*

20. *Celestine v. Union Oil Co. of Cal.*, 636 So. 2d 1138, 1145 (La. App. 3d Cir. 1994).

21. *Id.* The court cited as reversible error the trial judge's failure to properly instruct the jury "on the principles involved in strict liability concerning a repairman." *Id.* at 1145.

22. *Id.* at 1138 (emphasis added).

23. *Id.* at 1143.

24. *Id.* See generally *Entrevia v. Hood*, 427 So. 2d 1146 (La. 1983).

Even less satisfied than before, Celestine applied for a writ of review. Celestine cited as error the court of appeal's holding that strict liability was inapplicable in the case and the reversal of the jury's finding that Celestine was exposed to an unreasonable risk of injury on the offshore platform.<sup>25</sup> The Louisiana Supreme Court granted the writ<sup>26</sup> in order "to address this question of first impression: Does Louisiana law recognize a 'repairman' exception to an owner's strict liability for injury caused by a vice, defect or ruin on the premises?"<sup>27</sup>

The Louisiana Supreme Court refused to adopt a "blanket 'repairman' exception to strict liability under La.C.C. arts. 2317 and 2322."<sup>28</sup> The court held, however, that "an owner is strictly liable to a repairman for injury caused by a vice, defect or ruin on his premises *only* where the defect therein poses an unreasonable risk of harm vis-a-vis the repairman," and the "plaintiff's status as a repairman is a significant factor in [the] determination of whether a risk is unreasonable."<sup>29</sup> Finally, the supreme court affirmed the court of appeal's reversal of the trial court judgment because the supreme court found that the risk of harm posed to Celestine was not unreasonable.<sup>30</sup>

The following sections examine how the *Celestine* decision fits into the prior jurisprudence and how, if at all, it may affect the theory of strict liability. Part II begins by presenting the methods of analysis that the courts have used to determine a building owner's strict liability under Articles 2317 and 2322. Next, Part II discusses the emergence and applicability of the "repairman" exception in the jurisprudence. Finally, Part II presents other cases involving contributory negligence and comparative fault in the strict liability setting.

Part III includes an analysis of the court of appeal's and the supreme court's reasoning in *Celestine*. Next, Part IV discusses how *Celestine* affects the prior jurisprudence concerning strict liability, including the unreasonable risk determination, under Articles 2317 and 2322. In addition, Part IV analyzes

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25. *Celestine v. Union Oil Co. of Cal.*, 652 So. 2d 1299, 1303 (La. 1995). After the writ was granted, Celestine argued to the court that it had jurisdiction to address, among other things, the jury's assessment of comparative negligence. In his motion for judgment notwithstanding the verdict, Celestine argued that comparative fault was inapplicable in cases involving strict liability, no doubt relying on what can be termed the "apples and oranges" argument. Simply stated, the comparison of a defendant's strict liability with a plaintiff's negligence is like comparing apples to oranges because negligence focuses on the plaintiff's *conduct* while strict liability focuses on the defendant's *relationship* to the thing or person. This, proponents of the argument contend, hinders apportionment of fault by "requir[ing] a necessarily crude and essentially arbitrary allocation." See *Lewis v. Timco, Inc.*, 716 F.2d 1425, 1429-32 (5th Cir. 1983), and especially the dissenting opinion of Politz, J., *id.* at 1433. See also Mack E. Barham, *The Viability of Comparative Negligence As a Defense to Strict Liability in Louisiana*, 44 La. L. Rev. 1171, 1184 (1984). The "apples and oranges" argument will be analyzed later in the text in light of the decision in *Celestine*. See *infra* part IV.E.

26. *Celestine v. Union Oil Co. of Cal.*, 644 So. 2d 660 (La. 1994).

27. *Celestine*, 652 So. 2d at 1303.

28. *Id.* at 1300.

29. *Id.* at 1300, 1305 (emphasis added).

30. *Id.*

*Celestine* with reference to contributory negligence, comparative fault, and, most importantly, assumption of the risk. The respective roles of the judge and jury in strict liability cases will also be addressed in light of *Celestine*.

## II. PRIOR LAW

### A. *The Basis for an Owner's Strict Liability Under Article 2322*

Louisiana Civil Code articles 2317 and 2322 provide the basis for imposing strict liability upon building owners.<sup>31</sup> Simply stated, strict liability is identical to negligence except that the defendant's knowledge of the risk created is presumed.<sup>32</sup> Negligence cases in Louisiana consist of four basic elements: duty/risk, cause-in-fact, breach, and damages.<sup>33</sup> The judge answers the duty/risk question while the jury is responsible for answering the questions of cause-in-fact, breach, and, if applicable, damages.<sup>34</sup> The respective roles of the judge and jury are the same in strict liability cases and negligence cases.

In *Loescher v. Parr*,<sup>35</sup> the Supreme Court of Louisiana examined the fault scheme of the Civil Code and the "legal fault arising from our code provisions" which has "been referred to as strict liability."<sup>36</sup> Justice Tate, writing for the majority, noted that the underlying principle of delictual responsibility is found in Article 2315<sup>37</sup> and that the remaining articles are "amplifications as to what constitutes 'fault' and under what circumstances a defendant may be held liable for his act or that of a person or thing for which he is responsible."<sup>38</sup> With this main principle in mind, Justice Tate stated that legal fault, or strict liability, under Articles 2317 and 2322 is "founded upon the breach of [the owner's] obligation to maintain or repair his building so as to avoid creation of risk of

31. For the text of these two code articles, see *supra* note 16.

32. *Kent v. Gulf States Util. Co.*, 418 So. 2d 493, 497 (La. 1982); See also Thomas C. Galligan, Jr., *Strict Liability in Action: The Truncated Learned Hand Formula*, 52 La. L. Rev. 323, 333-34 (1991). This, however, is no longer true. Revised Civil Code article 2322 now provides that the plaintiff must prove that the building owner knew or should have known of the vice or defect which caused the damage, that the damage could have been prevented by the exercise of reasonable care, and that the building owner failed to exercise such reasonable care. See *supra* Author's Note discussing the 1995 revision of Louisiana Civil Code article 2322. Thus, negligence and liability under revised Article 2322 are virtually the same.

33. See Thomas C. Galligan, Jr., *A Primer on the Patterns of Negligence*, 53 La. L. Rev. 1509, 1521-28 (1993).

34. *Id.*

35. 324 So. 2d 441 (La. 1975).

36. *Id.* at 446-47.

37. La. Civ. Code art. 2315 provides in relevant part that:

Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.

38. *Loescher*, 324 So. 2d at 445. For a discussion of the "legal fault" announced by Justice Tate and liability without fault in general, see Wex S. Malone, *Ruminations On Liability For The Acts Of Things*, 42 La. L. Rev. 979 (1982).

undue injury to others."<sup>39</sup> An owner could escape this liability only by proving that either the fault of the victim, the fault of a third person, or an irresistible force not usually foreseeable caused the "ruin."<sup>40</sup>

Almost three years later, in *Olsen v. Shell Oil Co.*,<sup>41</sup> Justice Tate, writing for the Louisiana Supreme Court, reexamined strict liability under Article 2322 when the United States Fifth Circuit Court of Appeals certified certain questions of state law involving a building owner's strict liability to the court.<sup>42</sup> The opinion listed the requirements for imposing strict liability under Article 2322: (1) There must be a building; (2) the defendant must be its owner; and (3) there must be a "ruin" caused by a vice in construction or a neglect to repair, which occasions the damage sought to be recovered.<sup>43</sup> As to what constituted a "ruin" for purposes of strict liability,<sup>44</sup> the court noted that owners of buildings have a non-delegable duty to keep their buildings in such a condition as to avoid *unreasonable* risks of injury to others.<sup>45</sup> However, the court gave no advice concerning how to determine what risks should or could be deemed unreasonable.

In *Kent v. Gulf States Utilities Co.*,<sup>46</sup> the supreme court approached the issue of strict liability in a somewhat different manner. The court stated that in strict liability cases, the owner's knowledge of the damage-causing risk is presumed.<sup>47</sup> The owner's responsibility for the damage-causing thing includes an absolute duty to discover the risks presented by the thing in custody.<sup>48</sup> In considering whether the owner breached this duty or not, the court should focus on the reasonableness of the owner's conduct in light of the presumed knowledge.<sup>49</sup> This seems to suggest that the unreasonable risk determination should

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39. *Loescher*, 324 So. 2d at 444.

40. *Id.* at 445.

41. 365 So. 2d 1285 (La. 1978).

42. *Id.* In a footnote, Justice Tate alluded to the two competing ideas which form the basis for strict liability. These are the "risk" theory, in which the building owner is held responsible as a *quid pro quo* for deriving benefits from owning the building, and the "fault" theory, in which liability is imposed as a result of the owner's failing to keep his building in a condition so as not to cause damage to another. *Id.* at 1291 n.13. For a discussion of these competing theories, see Boris Starck, *The Foundation of Delictual Liability in Contemporary French Law: An Evaluation and a Proposal*, 48 Tul. L. Rev. 1043, 1055-61 (1974).

43. *Olsen*, 365 So. 2d at 1289.

44. In *Olsen*, the defendant Shell argued that the explosion of a water heater, caused by negligent maintenance performed by a third party occupier of Shell's offshore platform, did not constitute a "ruin" resulting from a neglect to repair or a vice in original construction. *Id.* at 1292.

45. *Olsen*, 365 So. 2d at 1292 (emphasis added).

46. 418 So. 2d 493 (La. 1982). The case involved an employee of a contracting company who was electrocuted when a tool which he was using came into contact with a power line. The plaintiff asserted that Gulf States was strictly liable under Louisiana Civil Code article 2317.

47. *Kent*, 418 So. 2d at 497-98.

48. *Id.* at 497.

49. *Id.* Reasonableness should be determined "according to traditional notions of blameworthiness" used in negligence cases. *Id.* See *Desormeaux v. Audubon Ins. Co.*, 611 So. 2d 818, 820-21 (La. App. 3d Cir. 1992), *writ denied*, 613 So. 2d 1002 (1993) (stating that in both negligence and



be used to determine if the owner breached this absolute duty: if the risk created by the owner was reasonable, the owner has not breached any duty and vice versa.

In *Entrevia v. Hood*,<sup>50</sup> the Louisiana Supreme Court expanded on the principles of what constituted an unreasonable risk of harm. The court began by noting that recovery in strict liability under Articles 2317 and 2322 was predicated upon proof that the building or its appurtenances posed an unreasonable risk of injury to others and that the damage was caused by this risk.<sup>51</sup> In order to determine what qualified as an unreasonable risk of harm to others, the judge was "to decide which risks are encompassed by the codal obligations from the standpoint of justice and social utility."<sup>52</sup> The judge should approach the situation "from the same standpoint as would a legislator regulating the matter," and "consider the moral, social and economic values as well as the ideal of justice in reaching an intelligent and responsible decision."<sup>53</sup> In *Entrevia*, the court found that defective steps in an abandoned farmhouse did not present an unreasonable risk of harm to others in light of the considerations listed above.<sup>54</sup> Because of the references to the "moral, social and economic" considerations and approaching the matter as a legislator, *Entrevia* suggests that the unreasonable risk determination should be used by the court to determine the scope of the owner's duty and the risks included within this duty.

In sum, a plaintiff seeking to recover under a strict liability theory must prove three elements.<sup>55</sup> First, the plaintiff must prove the legal relationship<sup>56</sup> between the defendant and the risk-creating thing. Second, the plaintiff is required to show that the defect or vice of the thing posed an unreasonable risk of harm to others.

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strict liability, the reasonableness of the risk is determined by balancing the probability and magnitude of the risk against the utility of the thing). See also Galligan, *supra* note 32, at 323-34.

50. 427 So. 2d 1146 (La. 1983). The court was presented with the question of whether defective steps, which caused injury to a trespasser in an abandoned farmhouse, presented an unreasonable risk of harm to others.

51. *Entrevia*, 427 So. 2d at 1148.

52. *Id.* at 1149.

53. *Id.*

54. *Id.* at 1150. In a concurring opinion, Justice Watson agreed with the result, but not with the reasoning. Watson argued that the building clearly was a ruin which presented an unreasonable risk of harm. However, the trespassing plaintiff assumed the risk of her injury and was barred from recovery by victim fault. *Id.* at 1151. For another discussion of the unreasonable risk analysis, see *Landry v. State*, 495 So. 2d 1284 (La. 1986).

55. See, e.g., *Sistler v. Liberty Mut. Ins. Co.*, 558 So. 2d 1106 (La. 1990). Now, after the 1996 revisions to the strict liability code articles, the plaintiff must also prove that the building owner knew or should have known of the vice or defect which caused the damage, that the damage could have been prevented by the exercise of reasonable care, and that the building owner failed to exercise such reasonable care. See *supra* Author's Note discussing the revision of Louisiana Civil Code article 2322.

56. By this I mean that the plaintiff must establish a link between the risk-causing thing and the defendant. For example, the child who caused harm is the defendant's; or the building which caused harm was owned by the defendant.

Third, the plaintiff must prove a causal relationship between the defect and the damages. If the plaintiff meets this burden of proof, the defendant can raise the following defenses: that the damage was caused by victim fault, by the fault of a third person, or by an irresistible force. However, these cases do not make clear who is to make the unreasonable risk determination, judge or jury. *Entrevia* seemed to suggest that the determination was in the hands of the judge: the unreasonable risk determination determined whether the defendant owed a duty to the injured plaintiff or whether the risk which occurred was within the defendant's duty.<sup>57</sup> On the other hand, *Kent* stated that an owner had an absolute duty to prevent harm to others: the existence of an unreasonable risk determined whether the owner breached this duty, a question for the jury to answer.<sup>58</sup>

### B. The "Repairman" Exception

To avoid strict liability, a building owner can prove that the damages were caused by the fault of the victim, by the fault of a third person, or by an irresistible force.<sup>59</sup> Based on the defense of victim fault, the repairman exception was used to bar a person who had been hired to perform repair work upon the building from recovering damages resulting from an injury occasioned during the repair work. However, as the cases below will illustrate, the exception was more of a "no duty" determination by the judge (or judges) than a true defense asserted by the defendant/owner.

In *Oliver v. Aminoil, U.S.A., Inc.*,<sup>60</sup> the plaintiff, a welder, was injured while performing repairs on defendant's offshore platform and sued in federal district court under Article 2322, a strict liability provision. The district court ordered judgment for the defendant, finding "no factual basis for liability under Article 2322."<sup>61</sup> The United States Fifth Circuit Court of Appeals affirmed this judgment, noting that the plaintiff was an experienced welder who had performed this type of work on platforms many times before and knew what risks were present in performing his job.<sup>62</sup> The plaintiff failed to prove an essential element of strict liability: that his injury was a result of a ruin caused by a neglect to repair or a vice in construction rather than his own negligence.<sup>63</sup> Thus, the plaintiff was barred from recovery based, in part, on his status as a repairman and the knowledge attributed to him as a repairman.

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57. *Entrevia*, 427 So. 2d at 1149-50.

58. *Kent v. Gulf States Util. Co.*, 418 So. 2d 493, 497 (La. 1982).

59. See, e.g., *Sittler*, 558 So. 2d at 1113; *Entrevia*, 427 So. 2d at 1148; *Loescher v. Parr*, 324 So. 2d 441, 445 (La. 1975).

60. 662 F.2d 349 (5th Cir. 1981), cert. denied, 456 U.S. 916, 102 S. Ct. 1770 (1982). Plaintiff, Oliver, was injured while working on one of the platform's legs under the deck. He placed his foot on a light fixture which gave out under the extra weight. Oliver fell 70 feet into the sea.

61. *Oliver*, 662 F.2d at 350.

62. *Id.* at 353.

63. *Id.* at 351.

*Mason v. Liberty Mutual Insurance Co.*<sup>64</sup> involved an employee of a renovation contractor who was injured while working on the roof of a residence. The employee asserted strict liability under Article 2322, claiming that the accident was caused by the ruin of the building. The trial court stated that "it was never intended that a repairman could recover against an owner if said repairman is attempting to respond to the call to make repairs."<sup>65</sup> The Louisiana Fourth Circuit Court of Appeal found as error the trial judge's limiting the plaintiff from proceeding under theories of strict liability. While the building owner may have used the plaintiff's fault as a defense, his "status as a repairman d[id] not prohibit him from advancing strict liability theories at trial."<sup>66</sup> However, the court did not comment on the merits of the plaintiff's case.

The Louisiana Third Circuit Court of Appeal visited the same issue of a repairman seeking recovery under a theory of strict liability in *Eldridge v. Bonanza Family Restaurant*.<sup>67</sup> Plaintiff was injured while removing a grease trap on the roof of defendant's restaurant. He slipped while descending a ladder. The plaintiff alleged that he slipped because of some grease in which he had stepped while working on the roof. The grease had leaked from the grease trap. The plaintiff repairman alleged that the spilled grease posed an unreasonable risk of harm.<sup>68</sup> The trial court granted summary judgment for the defendant without written reasons. The Louisiana Third Circuit Court of Appeal affirmed the trial judge's decision and found that the existence of the grease on the roof did not pose an unreasonable risk of harm. To support this holding, the court noted that the plaintiff was a repairman who was hired for the very purpose of removing a grease trap which had been leaking grease.<sup>69</sup> The court also emphasized that the plaintiff was a "knowledgeable and experienced repairman who was fully aware of the presence of the grease leakage on the defendant's roof and who was also aware that the existence of the grease leakage on the roof was the very reason he was hired to work on the roof."<sup>70</sup>

*Ladue v. Chevron, U.S.A., Inc.*<sup>71</sup> involved a roustabout employed to repair deck gratings on one of the defendant's offshore platforms. Ladue, the roustabout, was injured when the piece of grating upon which he was standing and which had already been cut loose from the structural beams, broke loose

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64. 423 So. 2d 736 (La. App. 4th Cir. 1982), writ denied, 425 So. 2d 773 (1983).

65. *Mason*, 423 So. 2d at 737. At trial, plaintiff advanced alternate theories of recovery, one in negligence and one based on Articles 2317 and 2322. Defendant's motion for summary judgment was denied. However, in his written reasons denying summary judgment (quoted in text above), the trial judge effectively granted the defendant summary judgment on the matter of strict liability by stating that Article 2322 was inapplicable where a repairman was injured while responding to an owner's request for repairs. *Id.*

66. *Id.* at 738.

67. 542 So. 2d 1146 (La. App. 3d Cir. 1989).

68. *Eldridge*, 542 So. 2d at 1147-48.

69. *Id.* at 1151.

70. *Id.* at 1149.

71. 920 F.2d 272 (5th Cir. 1991).

causing Ladue to fall and injure himself. The United States Fifth Circuit Court of Appeals affirmed the district court's granting of the defendant's motion for summary judgment and held that the owner owed no duty under Louisiana strict liability law to the plaintiff repairman injured by the very condition he was hired to repair.<sup>72</sup> Regarding the determination of whether a risk was reasonable, the court stated that: "We need only determine whether the grating was unreasonably dangerous with respect to Ladue and those similarly situated."<sup>73</sup> The court reasoned that the purpose of Article 2322 was to give owners an economic incentive to make repairs to their buildings. Therefore, it would be counterproductive if owners were held liable when a repairman injured himself while repairing the building.<sup>74</sup> The court concluded by noting that "[s]ubjecting repairmen to the risks . . . is a reasonable course of action, for they are presumptively cognizant of those and are able to minimize them."<sup>75</sup>

Not long after *Ladue*, the Fifth Circuit confronted once again the applicability of a repairman exception to Article 2322 strict liability in *Gary v. Chevron, U.S.A., Inc.*<sup>76</sup> Gary was a pipe fitter and welder working for a company that had contracted to renovate one of Chevron's offshore platforms. Gary injured himself when he stepped on a "defectively short and misfit grate" and fell.<sup>77</sup> Chevron argued as a defense that Article 2322 contained a "construction/repair exception" to strict liability.<sup>78</sup> The court refused to accept "such a broad exception," and affirmed the district court judgment holding Chevron strictly liable.<sup>79</sup> The *Gary* opinion distinguished the case from *Ladue* because the repair agreement between Acadian, Gary's employer, and Chevron apparently did not include any repair work involving the grating in the area where Gary fell. The agreement stated only that Acadian's employees would report any defects they discovered that were not included in the original agreement. The court reasoned that Acadian's employees, by simply agreeing to report additional things in need of repair, were not in the same position as Ladue, who knew exactly what required repair, regarding what safety precautions were necessary.<sup>80</sup>

In *Desormeaux v. Audubon Insurance Co.*,<sup>81</sup> the plaintiff roof repairer injured himself in the attic of a home he was repairing. The trial court found the building owner strictly liable. On appeal, the judgment was reversed. The third circuit court of appeal found error in the trial court's conclusion regarding the

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72. *Ladue*, 920 F.2d at 272-73.

73. *Id.* at 277.

74. *Id.* at 277-78.

75. *Id.* at 278.

76. 940 F.2d 139 (5th Cir. 1991).

77. *Gary*, 940 F.2d at 141.

78. *Id.*

79. *Id.*

80. *Id.* at 142.

81. 611 So. 2d 818 (La. App. 3d Cir. 1992), writ denied, 613 So. 2d 1002 (1993).

cause-in-fact of the accident.<sup>82</sup> The court noted that the plaintiff was a skilled repairman who was fully aware of the condition of the attic. The plaintiff "voluntarily chose to [make the repairs] in an unsafe manner," and "[t]his was the cause-in-fact of the accident."<sup>83</sup> The court did not spend much time discussing the reasonableness of the risk other than to state that it is "determined by balancing the probability and magnitude of the risk against the utility of the thing."<sup>84</sup>

The cases involving the repairman exception are neither clear nor consistent, except that the plaintiff's status as a repairman is a significant factor in the unreasonable risk determination. The respective roles of the judge and jury (factfinders) are not consistently defined. Three different approaches are evident. First, the defendant has no duty as a matter of law if the plaintiff is a repairman injured by the very defect he was hired to repair.<sup>85</sup> The second approach, similar to the first, states that the defendant has a duty when the repairman is injured by a defect that he does not know about.<sup>86</sup> Third, the defendant has a duty to prevent harm, even to repairmen, and the question becomes whether the defendant breached this duty.<sup>87</sup> In the first and second approach, the unreasonable risk determination is part of duty/risk; in the third approach, the unreasonable risk determination is part of the breach question. Under the first two approaches, the plaintiff's status as a repairman is a factor considered by the judge in the duty/risk question; in the third approach, the plaintiff's status is a factor the jury considers when determining breach.

### C. Other Cases Involving Victim Fault

Plaintiffs, other than repairmen, seeking recovery under a strict liability theory could also be barred from recovery.<sup>88</sup> However, courts were hesitant to use a victim's contributory negligence to completely bar that plaintiff from

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82. *Desormeaux*, 611 So. 2d at 821.

83. *Id.*

84. *Id.* at 820 (citing *Eldridge v. Bonanza Family Restaurant*, 542 So. 2d 1146 (La. App. 3d Cir. 1989)). See Galligan, *supra* note 32, for a thorough treatment of this balancing determination in the strict liability setting.

85. See *supra* discussions of *Ladue v. Chevron, U.S.A., Inc.* in text accompanying notes 71-75, and *Eldridge v. Bonanza Family Restaurant* in text accompanying notes 67-70. In *Ladue*, the unreasonable risk determination was a duty/risk question answered by the judge. See *supra* discussion of *Entrevia v. Hood* in text accompanying notes 50-57.

86. This is similar to the first approach because the unreasonable risk determination is still a duty/risk question answered by the judge. The only difference is that the lack of the repairman's knowledge of the risk leads to the conclusion that the defendant owed a duty to the injured repairman. See *supra* discussion of *Gary v. Chevron, U.S.A., Inc.* in text accompanying notes 76-80.

87. See *supra* discussion of *Mason v. Liberty Mutual Ins. Co.* in text accompanying notes 64-66. In the third approach, the unreasonable risk determination is a breach question answered by the jury. See *supra* discussion of *Kent v. Gulf States Utilities Co.* in text accompanying notes 46-49.

88. See, e.g., *Smiley v. Sikes*, 543 So. 2d 1084 (La. App. 2d Cir.), *writ denied*, 548 So. 2d 326 (1989).

recovering.<sup>89</sup> Thus, courts generally required something more than contributory negligence, such as assumption of the risk or voluntarily encountering a known risk, in order to bar an at-fault plaintiff from recovery.<sup>90</sup>

In *Murray v. Ramada Inns, Inc.*,<sup>91</sup> the Louisiana Supreme Court considered whether assumption of the risk served as a total bar to recovery or only resulted in a reduction of recovery under the comparative negligence statute.<sup>92</sup> In *Murray*, the plaintiff dove into the shallow end of a pool owned by the defendant. Murray's head struck the bottom of the pool and he suffered instant paralysis. Several months later, Murray died from the injuries sustained. Murray's wife and son brought wrongful death actions against Ramada Inns.

At trial, Murray's brother Carl, who was swimming with Murray at the time of the accident, testified that Murray was aware of the dangers associated with diving into shallow water.<sup>93</sup> The jury found Murray fifty percent at fault, with Ramada at fault for the other fifty percent under Article 2317 strict liability. Defendants appealed and urged as error the trial court judge's refusal to instruct the jury on assumption of the risk and the judge's failure to hold the defense of assumption of the risk as a total bar to recovery.<sup>94</sup> The United States Fifth Circuit Court of Appeals found that Murray had assumed the risk of his injury.<sup>95</sup> However, the court noted that the recent adoption of a new comparative fault statute by the Louisiana Legislature may have cast doubt upon "the impact of an assumption of risk."<sup>96</sup> The Fifth Circuit certified the question of the role of the assumption of the risk defense in Louisiana law to the Louisiana Supreme Court.<sup>97</sup>

Thus, the Louisiana Supreme Court was to decide whether assumption of the risk still served as a total bar to recovery. After discussing in great detail the development and application of the assumption of the risk defense,<sup>98</sup> the court answered the certified question:

Our response is that the common law doctrine of assumption of risk no longer has a place in Louisiana tort law. The types of plaintiff conduct which the defense has been used to describe are governed by civilian concepts of comparative fault and duty/risk. Assumption of risk should

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89. See, e.g., *Fonseca v. Marlin Marine Corp.*, 410 So. 2d 674 (La. 1981).

90. See, e.g., *Alford v. Pool Offshore Co.*, 661 F.2d 43, 45 (5th Cir. 1981) (citing *Rodrigue v. Dixilyn Corp.*, 620 F.2d 537, 544 (5th Cir. 1980)).

91. 521 So. 2d 1123 (La. 1988).

92. *Murray*, 521 So. 2d at 1124.

93. *Id.* at 1125. Specifically, Murray's brother testified that Murray had told him that shallow water diving was dangerous and that Murray had warned his brothers to "be careful" while diving into the pool. *Id.*

94. *Id.* at 1126.

95. *Murray v. Ramada Inns, Inc.*, 821 F.2d 272 (5th Cir. 1987).

96. *Murray*, 521 So. 2d at 1126.

97. *Murray*, 821 F.2d at 276.

98. *Murray*, 521 So. 2d at 1126-32.

not survive as a distinct legal concept for any purpose, and certainly can no longer be utilized as a complete bar to the plaintiff's recovery.<sup>99</sup>

Therefore, the plaintiff's negligence would result in a comparative reduction of recovery under Article 2323,<sup>100</sup> not in a total bar to recovery.<sup>101</sup> Returning its focus to the case at hand, the supreme court concluded that the allocation of fault by the jury was consistent with the principles of comparative fault.<sup>102</sup>

The court also considered the defendant's argument that even if the assumption of risk defense was not valid, it owed no duty to protect Murray from the danger of which he had knowledge. In rejecting this argument, the supreme court stated that:

If accepted, defendants' argument 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.

A defendant's duty should not turn on a particular plaintiff's state of mind, but instead should be determined by the standard of care which the defendant owes to *all potential plaintiffs*.<sup>103</sup>

*Murray* rejected using the knowledge of the injured plaintiff to determine the scope of the defendant's duty. However, an injured plaintiff's knowledge was a factor to be considered in assessing percentages of fault.<sup>104</sup>

*Washington v. Louisiana Power and Light Co.*<sup>105</sup> also involved a situation where the injured plaintiff knew of the risk which caused his injury. The plaintiff Washington was electrocuted when the citizens' band radio antenna he was carrying through his backyard came too close to the power lines. Washington died from the electrocution. Some five years before the fatal accident, Washington had a similar accident involving the power lines. Thus, Washington was aware of the danger the power lines presented, particularly regarding the movement of his antenna. The court of appeal set aside a jury

99. *Id.* at 1132-33.

100. La. Civ. Code art. 2323 provides in pertinent part that:

When contributory negligence is applicable to a claim for damages, its effect shall be as follows:

... the 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.

101. *Murray*, 521 So. 2d at 1133.

102. *Id.* at 1135.

103. *Id.* at 1136 (emphasis added).

104. See *supra* note 97 and accompanying text.

105. 555 So. 2d 1350 (La. 1990).

verdict for Washington.<sup>106</sup> The Louisiana Supreme Court affirmed this decision. The court reasoned that the location of the power lines "could not be characterized as an unreasonable risk."<sup>107</sup> The court took notice of the fact that Washington "continued to be aware of the danger and [took] exemplary precautions to avoid it until his fatal accident."<sup>108</sup> In *Washington*, the unreasonable risk determination was a question of breach: if the risk to Mr. Washington was unreasonable, then the defendant breached its duty to him.<sup>109</sup> The risk was reasonable however, and the defendant breached no duty to Mr. Washington.

#### D. Summary

The cases above illustrate that repairmen were generally barred from recovering in strict liability against an owner for injuries resulting from attempting to repair the owner's building. The plaintiff's status as a repairman led to the conclusion that the defendant/owner owed no duty to the plaintiff/repairman.<sup>110</sup> The courts have justified this result by citing the policy behind Article 2322 of encouraging owners to make necessary repairs to their buildings.<sup>111</sup> Making owners strictly liable for repairman's injuries would be counterproductive to this policy.<sup>112</sup> However, *Murray* cautioned against determining a defendant's duty with reference to the particular plaintiff's knowledge or status.<sup>113</sup> Furthermore, the cases conflict regarding whether the unreasonable risk determination is part of the duty/risk question or part of the breach question.<sup>114</sup> These cases represent the three approaches discussed above. Now this casenote returns to the *Celestine* decision and determines what approach the supreme court used.

### III. REASONING

#### A. Lower Court Ruling

After the jury found Union strictly liable for Celestine's injuries, Union appealed to the Louisiana Third Circuit Court of Appeal. The court of appeal overturned the jury verdict which had found Union strictly liable. The court held that the owner could not be strictly liable if the vice, defect, or ruin being

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106. *Washington v. Louisiana Power and Light Co.*, 532 So. 2d 798 (La. App. 4th Cir. 1988).

107. *Washington*, 555 So. 2d at 1353.

108. *Id.* at 1354.

109. *Id.* at 1353.

110. *See Ladue v. Chevron, U.S.A., Inc.*, 920 F.2d 272 (5th Cir. 1991).

111. *Id.* at 276.

112. *Id.*

113. *See supra* text accompanying note 103.

114. *See supra* text accompanying notes 85-87.



repaired was the sole cause of the repairman's injuries.<sup>115</sup> Celestine argued unsuccessfully that the handrail had a hidden defect because the weld holding the handrail to the socket did not show any signs of rust.<sup>116</sup> Celestine compared his situation with that of the plaintiff in *Gary v. Chevron, U.S.A., Inc.*<sup>117</sup> In essence, Celestine contended that the welds holding the handrails were inadequate and posed an unreasonable risk of harm for which Union was strictly liable.

In its arguments to the court, Union relied heavily on *Ladue v. Chevron, U.S.A., Inc.*,<sup>118</sup> arguing "that the strict liability articles should not be read to extend an owner's liability to the employee/repairman of an independent contractor who is injured by the condition he was hired to repair."<sup>119</sup> Agreeing with the rationale of *Ladue*, the court marked out the boundaries of an owner's strict liability under Article 2322 and alluded to the "repairman" exception:

The body of jurisprudence that has developed under this issue does not favor a repairman claiming damages from an owner under strict liability for injuries caused directly from the defect, vice or ruin being repaired, as this would have a discouraging effect upon owners to make necessary repairs. As observed by Judge Rubin [in *Ladue*], this rationale is implied in LSA-C.C. Art. 2322 when it states: "[t]he owner of a building is answerable for the damage occasioned by its ruin, when this is caused by the neglect to repair it . . . ."<sup>120</sup>

A focus on the cause of Celestine's injuries was central to the court of appeal's rationale. After emphasizing the knowledge Celestine had of the defective condition of the platform handrails, the court concluded that "Celestine was injured from the manner he chose to repair the handrailing which caused the handrailing welds to break from the I-beam."<sup>121</sup> The fact that handrails which were in a state of disrepair gave way as a result of Celestine's chosen method of repair did not pose an unreasonable risk of harm for the purposes of strict liability.<sup>122</sup>

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115. *Celestine v. Union Oil Co. of Cal.*, 636 So. 2d 1138 (La. App. 3d Cir. 1994).

116. *Id.* at 1143-44.

117. 940 F.2d 139 (5th Cir. 1991). See *supra* discussion in text accompanying notes 76-80.

118. 920 F.2d 272 (5th Cir. 1991). The case involved a roustabout, employed by an independent contractor, injured while repairing deck grating on an offshore rig. The Fifth Circuit, noting that one of the primary policies behind strict liability is to encourage owners to make repairs on their property, held that the rig owner "owed no duty under Louisiana strict liability statutes to [a] roustabout injured by [the] very condition which he was hired to repair." *Id.* at 272, 276. See *supra* discussion in text accompanying notes 71-75.

119. *Celestine*, 636 So. 2d at 1141.

120. *Id.* at 1142.

121. *Id.* at 1143-44 (emphasis added).

122. *Id.*

### B. *The Louisiana Supreme Court's Reasoning*

The Louisiana Supreme Court in *Celestine* addressed the issue of whether Louisiana law recognizes a "repairman" exception to an owner's strict liability for injury caused by a vice, defect or ruin on his premises. The Louisiana Supreme Court held "that an owner is strictly liable to a repairman for injury caused by a vice, defect or ruin on his premises *only* where the defect therein poses an unreasonable risk of harm vis-a-vis the repairman."<sup>123</sup> Chief Justice Calogero, author of the opinion, refused to "recognize a blanket 'repairman' exception to strict liability under [Articles] 2317 and 2322."<sup>124</sup> However, the Chief Justice acknowledged that the plaintiff's status as a repairman hired to fix the defect is a relevant factor to consider when assessing whether the defect posed an unreasonable risk of harm, because that determination is "context specific."<sup>125</sup>

After detailing the facts and procedural history of the case, Chief Justice Calogero outlined an owner's liability under Articles 2317 and 2322. To recover under Article 2317, the plaintiff need only prove: 1) that he was injured by a thing which was in the care and custody of the defendant, and 2) that the thing was defective.<sup>126</sup> To recover against an owner under Article 2322, the plaintiff must prove: 1) that the building posed an unreasonable risk of injury to others, and 2) that the damage was caused by this risk.<sup>127</sup>

In the case at hand, *Celestine* would have to show that the condition of the handrail he was hired to repair exposed him to an unreasonable risk of harm.<sup>128</sup> Chief Justice Calogero proceeded to present the "methodology" for the unreasonable risk of harm determination.<sup>129</sup> Citing *Entrevia v. Hood*, the Chief Justice stated that:

[W]e cautioned that the unreasonable risk of harm criterion was not a simple rule of law which could be applied mechanically to the facts of a case. Justice and social utility must serve as guideposts and moral, social

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123. *Celestine v. Union Oil Co. of Cal.*, 652 So. 2d 1299, 1300 (La. 1995) (emphasis added).

124. *Id.* at 1300.

125. *Id.*

126. *Id.* at 1303 (citing *Fonseca v. Marlin Marine Corp.*, 410 So. 2d 674 (La. 1981), and *Loescher v. Parr*, 324 So. 2d 441 (La. 1975)). After the 1996 revision of the Civil Code articles relating to strict liability, the plaintiff must now also prove that the owner or custodian of a thing knew or should have known of the ruin, vice, or defect which caused the damage, that the damage could have been prevented by the exercise of reasonable care, and that the owner or custodian failed to exercise such reasonable care. La. Civ. Code art. 2317.1. See 1996 La. Acts No. 1 (Ex. Sess.) and Author's Note, *supra*, discussing the revisions to the Civil Code articles on strict liability.

127. *Celestine*, 652 So. 2d at 1303 (citing *Entrevia v. Hood*, 427 So. 2d 1146 (La. 1983)). Under revised Civil Code article 2322, the plaintiff must also prove that the building owner knew or should have known of the vice or defect which caused the damage, that the damage could have been prevented by the exercise of reasonable care, and that the building owner failed to exercise such reasonable care. La. Civ. Code art. 2322. See *supra* Author's Note.

128. *Celestine*, 652 So. 2d at 1303.

129. *Id.* at 1303-04.

and economic values must be considered in a determination of whether the risk is unreasonable. Claims and interests should be balanced, risk and gravity of harm should be weighed, and individual and societal rights and obligations must be considered.<sup>130</sup>

The court then emphasized that the unreasonable risk of harm determination is "personal to the particular plaintiff."<sup>131</sup> The determination "is a matter wed to the facts of the case," and would be "impossible and improper . . . without consideration of the surrounding circumstances."<sup>132</sup> Considering these factors, the court rejected any *per se* rule exempting owners from strict liability for injuries suffered by a repairman while repairing an alleged defect. Such a rigid rule would be "unworkable and contrary to the fact intensive nature of the definition of 'unreasonable risk.'"<sup>133</sup> Implying that the court of appeal's decision may have adopted an inappropriate *per se* repairman exception to strict liability, the supreme court found the court of appeal's decision to be incorrect.<sup>134</sup>

The *Celestine* opinion presented an illustrative list of factors to consider in the unreasonable risk determination: 1) the social, moral, and economic considerations; 2) the degree of knowledge of the repairman; 3) the incentive or disincentive to the owner to repair the vice or defect; 4) the reasonableness of presuming that a particular repairman is cognizant of the particular risks; and 5) the ability of the repairman to minimize such risks.<sup>135</sup> The owner would not be strictly liable if the factual analysis led to the conclusion that the risk of harm was reasonable under the circumstances.<sup>136</sup>

The court then proceeded to determine whether the risk of harm was unreasonable *vis-a-vis* *Celestine*. The court concluded that the defective handrail did not pose an unreasonable risk of harm to *Celestine*.<sup>137</sup> Specifically, applying the factors listed above, the court found that: presumably *Celestine* possessed certain knowledge and skill as a repairman; as the only welder on the job, *Celestine* had the skills and knowledge of a specialized repairman; the handrail involved in the accident was specifically selected for repair; *Celestine* knew that the risk existed as the result of an earlier incident involving a handrail falling; and finally, *Celestine* knew how to minimize the risks of repair, evidenced by his testimony regarding the number of helpers for adequate assistance.<sup>138</sup> The court also noted that "the offshore platform was a structure with obvious social and economic utility and

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130. *Id.* at 1304.

131. *Id.* (citing *Ladue v. Chevron, U.S.A., Inc.*, 920 F.2d 272 (5th Cir. 1991)).

132. *Celestine*, 652 So. 2d at 1304.

133. *Id.*

134. *Id.*

135. *Id.*

136. The court cited *Mason v. Liberty Mut. Ins. Co.*, 423 So. 2d 736 (La. App. 4th Cir. 1982), *writ denied*, 425 So. 2d 773 (1983), as recognizing that there is no *per se* rule excepting repairmen from an owner's strict liability. *Celestine* had argued that the court of appeal's decision conflicted with *Mason*.

137. *Celestine*, 652 So. 2d at 1305.

138. *Id.*

corresponding benefits," and that "[t]he community as a whole and the community occupying the platform are served by the owner's efforts to maintain the handrails in a safe condition."<sup>139</sup> Therefore, the risk of harm posed by the handrails was not unreasonable and Union, as owner of the offshore platform, was not strictly liable to Celestine.<sup>140</sup>

#### IV. ANALYSIS

##### A. The Unreasonable Risk Determination

Perhaps the biggest impact of the *Celestine* decision is on the determination of what risks are and are not unreasonable for purposes of strict liability. Before *Celestine*, courts determined the reasonableness of a risk based on whether the thing or defect posed an unreasonable risk of harm to others.<sup>141</sup> In *Celestine*, however, the focus shifted to whether the risk of harm was unreasonable vis-a-vis this particular plaintiff, or those similarly situated.<sup>142</sup> The significance of this shift is not entirely clear. The line of jurisprudence involving repairmen seeking recovery under Articles 2317 and 2322 is quite consistent. In one form or another, the courts tended to except the repairman from recovering under strict liability. In *Celestine*, the supreme court attempted to provide guidance to lower courts confronted with a repairman seeking recovery under a strict liability theory by giving an illustrative list of factors relevant to determining the reasonableness of a risk.<sup>143</sup> However, the extent of the emphasis on the knowledge and experience of the particular plaintiff is uncertain. On one hand, the fact that the plaintiff is a repairman could be considered as triggering the consideration of the plaintiff's

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139. *Id.*

140. The supreme court also addressed the adequacy, or lack thereof, of the trial court's jury instructions. The jury instructions given at trial stated that in deciding the reasonableness of the plaintiff's (*Celestine's*) conduct, the jury should consider all of the circumstances of the case. The trial court gave no instruction concerning the significance of plaintiff's status as a repairman in determining the reasonableness of the risk. *Celestine*, 652 So. 2d at 1305. The court of appeal found inadequate the jury instructions concerning the jurisprudential interpretation of when an owner is or is not strictly liable for injuries suffered by a repairman in the course of making repairs. Reemphasizing that it was not adopting a repairman exception, the supreme court agreed with the court of appeal and deemed the jury "not adequately instructed so as to facilitate a reasoned judgment under the applicable legal principles." *Id.* at 1305-06. The supreme court, however, did not give an example of what it would consider an adequate jury instruction.

141. See, e.g., *Olsen v. Shell Oil Co.*, 365 So. 2d 1285, 1292 (La. 1978); *Entrevia v. Hood*, 427 So. 2d 1146, 1148 (La. 1983); *Sistler v. Liberty Mut. Ins. Co.*, 558 So. 2d 1106, 1112 (La. 1990).

142. *Celestine*, 652 So. 2d at 1300. In *Ladue v. Chevron, U.S.A., Inc.*, 920 F.2d 272 (5th Cir. 1991), the court narrowed the determination of whether the risk was unreasonable to the particular plaintiff and those similarly situated. *Id.* at 277.

143. *Celestine*, 652 So. 2d at 1304. These factors are: 1) the social, moral, [and] economic considerations; 2) the degree of knowledge of the repairman; 3) the incentive or disincentive to the owner to repair the vice or defect; 4) the reasonableness of presuming that a particular repairman is cognizant of the particular risks; and 5) the ability of the repairman to minimize such risks. *Id.*

knowledge and experience. Alternatively, and what seems to be the more logical position since Articles 2317 and 2322 do not specify classes of plaintiffs able to recover, the emphasis on the plaintiff's knowledge and experience would apply to all who attempt to recover under Article 2322.<sup>144</sup>

Facts loosely based on a recent case involving strict liability provide an interesting hypothetical.<sup>145</sup> Suppose that X is a carpenter hired by O, the owner of a building. While X is not a repairman, he is in a similar position to the repairman in terms of knowledge and skill. X is to perform certain work consisting of building an addition to O's home. Now, assume that one day while in the process of building the addition, X falls through the roof of O's home. O had previously warned X that part of the roof was in a state of disrepair. Although X is not in the act of repairing the roof, he presumably possesses the same knowledge of the risks presented by the roof. If the focus is solely on X's knowledge and experience, it would seem that O would not be strictly liable. Specifically, in relation to the *Celestine* factors, X presumably possessed certain knowledge and skill as a carpenter, X had knowledge of and was cognizant of the particular risk presented by the roof, and, presumably, would have been able to minimize the risk by not going onto the roof, or at least avoiding the part of the roof in disrepair.

However, the inquiry does not stop there. According to the *Celestine* decision, the relevant social, moral, and economic considerations, as well as the incentive or disincentive for the owner to repair are also significant.<sup>146</sup> The incentive for the owner to repair is clear. One of the main policies behind Article 2322 strict liability is to encourage owners to make repairs in order to avoid unreasonable risks of harm to others. In the hypothetical situation, holding O liable would encourage O to make the needed repairs as quickly as possible. Since X is not a repairman, the policy consideration of discouraging owners from making necessary repairs if they are held strictly liable for the repairman's injuries is not applicable. That is the easy part. The moral, social, and economic considerations seem, at least at first glance, to be quite intimidating. Furthermore, it is not clear where the unreasonable risk determination fits: does the judge consider the above mentioned factors as part of the duty/risk analysis; or does the jury consider the factors as part of the breach question.

### B. The Unreasonable Risk Determination: Duty/Risk or Breach?

Remember that in strict liability cases, as in negligence cases, the judge answers the duty/risk question and the jury decides the questions of cause-in-fact,

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144. See *Washington v. Louisiana Power and Light Co.*, 555 So. 2d 1350 (La. 1990) (plaintiff's knowledge of the risk resulted in no recovery).

145. The case, *Touchet v. Estate of Bass*, 653 So. 2d 83 (La. App. 3d Cir. 1995), involved a carpenter injured while involved in the construction of a boathouse. The carpenter sued under Article 2317 but failed to prove that the defendant had garde of the defective thing.

146. *Celestine*, 652 So. 2d at 1304.

breach, and damages.<sup>147</sup> What is unclear is where the unreasonable risk determination belongs.<sup>148</sup> Some cases suggest that the risk determination should be used to define duty and risk.<sup>149</sup> Other cases indicate that the risk determination is part of the breach question.<sup>150</sup> The *Celestine* decision may calm this sea of uncertainty. By stating that the risk of harm presented to Celestine was reasonable, in part because of Celestine's knowledge and skill, the supreme court either decided that: 1) as a matter of law, Union owed no duty to Celestine to protect him from this risk; or 2) as a factual matter, Union did not breach its duty to prevent harm to Celestine. First, I will analyze the unreasonable risk determination as part of the duty/risk question.

Commentators and judicial opinions have frequently stated that the determination of whether a risk is unreasonable in strict liability mirrors the determination of whether a defendant owed a duty to protect against a damage-causing risk in cases involving alleged negligence.<sup>151</sup> The risk determination in strict liability cases is analogous to the duty/risk analysis in traditional negligence cases. The duty/risk analysis, with its inherent flexibility, can be contracted or expanded to determine the extent of a person's liability.<sup>152</sup> One

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147. See *supra* discussion part II.A.

148. After this article was completed, the Louisiana Supreme Court decided *Pitre v. Louisiana Tech Univ.*, 673 So. 2d 585 (La. 1996). In this case, the debate about where the unreasonable risk determination belongs continued. Justice Victory's majority opinion found that the unreasonable risk determination was a question of duty. *Id.* at 591 (citing *Murray v. Ramada Inns, Inc.*, 521 So. 2d 1123, 1137 (La. 1988)). The concurring opinion of Justice Lemmon, which Justice Kimball joined, disagreed with the majority and thought that the unreasonable risk determination was a question of breach. *Id.* at 596. See *infra* section V.

149. See *Ladue v. Chevron, U.S.A., Inc.*, 920 F.2d 272 (5th Cir. 1991); *Celestine v. Union Oil Co. of Cal.*, 636 So. 2d 1138, 1141-43 (La. App. 3d Cir. 1994).

150. See *Kent v. Gulf States Utilities Co.*, 418 So. 2d 493 (La. 1982); *Mason v. Liberty Mut. Ins. Co.*, 423 So. 2d 736 (La. App. 4th Cir. 1982), *writ denied*, 425 So. 2d 773 (1983).

151. See, e.g., *Entrevia v. Hood*, 427 So. 2d 1146, 1149 (La. 1983); *Ladue*, 920 F.2d at 275; *Kent*, 418 So. 2d at 498; William Powers, Jr., *Some Observations on Strict Liability in the Louisiana Law of Garde*, 52 La. L. Rev. 365, 378-82 (1991); Barham, *supra* note 25, at 1177-79. See also Wex S. Malone, *Ruminations on Dixie Drive It Yourself Versus American Beverage Company*, 30 La. L. Rev. 363 (1970), for a thorough treatment of the duty/risk analysis.

152. For example, the duty/risk question can be phrased very broadly, so as to include even negligent plaintiffs within the defendant's duty to protect against risks. See, e.g., *Boyer v. Johnson*, 360 So. 2d 1164 (La. 1979) (defendant's duty included the risk of minor employee's own negligence). This is an example of what Alston Johnson would call an "A" case. See Alston Johnson, *Comparative Negligence and the Duty/Risk Analysis*, 40 La. L. Rev. 319 (1980). In these instances, comparative fault should not be used to reduce the plaintiff's recovery.

On the other hand, the analysis can be so narrow that the defendant owes no duty to a particular plaintiff. The duty/risk analysis is usually phrased in a manner that is case specific: did this particular defendant owe this particular plaintiff a duty to protect from these particular risks which occurred in this particular manner. See, e.g., *Pitre v. Opelousas Gen. Hosp.*, 530 So. 2d 1151 (La. 1988) (defendant owed no duty to protect unborn child from albinism). Or the plaintiff's conduct could be such that the defendant no longer owes any duty to the particular plaintiff. See, e.g., *Entrevia*, 427 So. 2d at 1146 (no duty to a trespassing plaintiff); *Hill v. Lundin & Assocs., Inc.*, 256 So. 2d 620 (La. 1972) (defendant owed no duty to protect plaintiff from risk created by the act of

commentator has stated that in shaping the duty/risk analysis, a judge should consider six factors:<sup>153</sup> 1) ease of association, or is the plaintiff's harm easily associated with defendant's conduct; 2) administrative considerations; 3) economic considerations; 4) moral considerations, or a fundamental sense of justice; 5) type of activity, or is the activity engaged in by the defendant of any social worth; and 6) precedent or historical considerations. Ideally, a consideration of these factors will either lead to the contraction or expansion of the duty/risk analysis.

So how does *Celestine* fit into this duty/risk consideration? By concluding that the risk of harm was reasonable with respect to the particular plaintiff (*Celestine*), the supreme court may have stated that as a matter of law, Union owed no duty to *Celestine* to protect him from the risk he encountered.<sup>154</sup> By referring to *Entrevia v. Hood* and including moral, social and economic considerations as part of the unreasonable risk determination, it seems that the court used the unreasonable risk determination as part of the duty/risk question.<sup>155</sup> Judges are usually seen as making these moral, social and economic considerations.<sup>156</sup> Upon first glance, the *Celestine* decision seems to place the unreasonable risk determination as part of the duty/risk question answered by the judge.<sup>157</sup>

However, the unreasonable risk determination can also be analyzed as part of the breach question.<sup>158</sup> Some of the language in *Celestine* tends to support the proposition that the unreasonable risk determination is part of the breach question.<sup>159</sup> The supreme court as factfinder then concluded that Union may

a third person). These would be "B" cases according to Johnson.

In between these two extremes is the middle ground. These are cases where the duty/risk analysis is somewhat more specific than the broadest inquiry but somewhat less specific than the most narrow inquiry. See, e.g., *Turner v. New Orleans Public Service Inc.*, 476 So. 2d 800 (La. 1985). Johnson labels these "C" cases where comparative fault would be used to reduce recovery. In these types of cases, the defendant owes some duty but the conduct of the plaintiff might also be considered. In this type of case, the defendant and plaintiff are allocated respective percentages of fault according to Article 2323. For factors which should be considered when comparing or allocating fault, see *Watson v. State Farm Fire and Cas. Co.*, 469 So. 2d 967, 974 (La. 1985); *Bell v. Jet Wheel Blast, Div. of Ervin Indus.*, 462 So. 2d 166 (La. 1985).

153. Timothy J. McNamara, *The Duties and Risks of the Duty-Risk Analysis*, 44 La. L. Rev. 1227, 1234-35 (1984).

154. The type of case where the plaintiff's conduct brought him beyond the defendant's duty. See *supra* note 152 and accompanying text.

155. *Celestine v. Union Oil Co. of Cal.*, 652 So. 2d 1299, 1303-05 (La. 1995). See *supra* discussion of *Entrevia v. Hood* in part II.A.

156. See *supra* text accompanying note 153.

157. For potential problems this creates see *infra* section IV.C and specifically the text accompanying note 169.

158. See *supra* discussion of *Kent v. Gulf States Utilities Co.* in part II.A. See also *Mason v. Liberty Mut. Ins. Co.*, 423 So. 2d 736 (La. App. 4th Cir. 1982), writ denied, 425 So. 2d 773 (1983).

159. *Celestine*, 652 So. 2d at 1305. The court concluded that the jury's finding that the risk was unreasonable was erroneous due to inadequate jury instructions and therefore not entitled to the usual deference. This implies that the jury is responsible for making the unreasonable risk determination as part of the breach question but still must be adequately instructed regarding guidelines.

have had a duty to prevent harm to Celestine but that Union did not breach this duty.<sup>160</sup> Celestine's status as a repairman was a significant factor in determining whether the risk was unreasonable.<sup>161</sup> The reference to moral, social and economic values may refer to the collective considerations that any jury contemplates when determining whether to impose liability. In addition, the court emphasized the fact-intensive nature of the unreasonable risk determination.<sup>162</sup> The jury, as the factfinding body, is in the best position to resolve this fact sensitive determination through the breach question. Finally, the court rejected the adoption of any per se repairman exception as being contrary to the fact-driven nature of the unreasonable risk determination.<sup>163</sup> Thus, the court felt that it was improper for a court to state that as a matter of law, the defendant/owner owed no duty to the repairman injured by the very defect he was hired to repair. From the above considerations, it is more likely that in the *Celestine* decision, the unreasonable risk determination, with the plaintiff's status as a repairman being a significant factor, is a part of the breach question answered by the jury.

### C. *Celestine and Assumption of the Risk*

*Murray* expressly rejected the use of assumption of the risk as a total bar to recovery, regardless of whether the defendant was found negligent or strictly liable.<sup>164</sup> Chief Justice Calogero was the author of *Murray* as well as *Celestine*. In *Murray*, then Justice Calogero stated that other established principles of tort law, such as comparative fault and duty/risk, should be used instead of assumption of the risk. In effect, *Celestine* barred a plaintiff who voluntarily chose to encounter a known risk from recovery. In *Murray*, on the other hand, the supreme court rejected the defendant's argument that they were not liable because they had no duty to protect the plaintiff from a danger known to the plaintiff.<sup>165</sup> The court rejected the argument because "[a] defendant's duty should not turn on a particular plaintiff's state of mind, but instead should be determined by the standard of care which the defendant owes to all potential plaintiffs."<sup>166</sup>

The *Celestine* court focused on the risk determination, which was shaped with emphasis on the particular plaintiff and his state of mind.<sup>167</sup> If the repairman's injury is caused solely by the vice, defect, or ruin being repaired, the repairman has assumed the risk of being injured by the vice, defect, or ruin.

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160. *Celestine*, 652 So. 2d at 1305.

161. *Id.* at 1305-06.

162. *Id.* at 1304.

163. *Id.*

164. *Murray v. Ramada Inns, Inc.*, 521 So. 2d 1123, 1125 (La. 1988).

165. *Id.* at 1135.

166. *Id.* at 1136 (emphasis added).

167. *Celestine*, 652 So. 2d at 1304-05.



While not expressly referring to assumption of the risk, the supreme court barred Celestine from recovery by concluding that the risk posed to Celestine was reasonable.<sup>168</sup> At first glance, *Celestine*, which emphasized the plaintiff's knowledge in determining the reasonableness of a risk, and *Murray*, which expressly rejected referring to the plaintiff's knowledge in determining the defendant's duty, seem to conflict. However, this is only true if the unreasonable risk determination was part of the duty/risk question in *Celestine*. If this were the case, the plaintiff's knowledge and skill as a repairman, as part of the unreasonable risk determination, would be used to decide the defendant's duty. In other words, Celestine's knowledge and skill as a repairman would be used to define Union's duty. *Murray* rejected this as assumption of the risk "through the back door."<sup>169</sup>

However, as stated previously, *Celestine* can be read as treating the unreasonable risk determination as a breach question. In this case, the plaintiff's knowledge and skill are not used to define the defendant's duty; rather, they help determine breach and allocate percentages of fault. Under this view, *Celestine* and *Murray* are consistent. In both cases the defendant owed a duty to the plaintiff who knew of the risk. The plaintiff's knowledge of the risk was a factor in determining whether the defendant breached his duty and the allocation of fault.<sup>170</sup>

#### D. Victim Fault, Contributory Negligence, and Comparative Fault

Victim fault was the essence of the doctrine of contributory negligence, which barred any recovery by the plaintiff. Comparative fault purports to abolish contributory negligence.<sup>171</sup> Assumption of the risk likewise should be abolished in light of the adoption of Article 2323 and comparative fault.<sup>172</sup> In light of the changes brought about by the adoption of a comparative fault statute, one commentator, David W. Robertson, emphasizes the need to distinguish between defensive doctrines, used to defeat an element of the plaintiff's case in chief, and affirmative defenses, such as contributory negligence and assumption of the risk which attack the plaintiff's legal right to bring an action.<sup>173</sup> In a pre-comparative fault jurisdiction, the difference was immaterial, as proof of either a defensive doctrine or an affirmative defense would serve to bar the plaintiff's

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168. *Id.* at 1305.

169. *Murray*, 521 So. 2d at 1136.

170. *Murray*, 521 So. 2d at 1133-34; *Celestine*, 652 So. 2d at 1305.

171. David W. Robertson, *Ruminations on Comparative Fault, Duty-Risk Analysis, Affirmative Defenses, and Defensive Doctrines in Negligence and Strict Liability Litigation in Louisiana*, 44 La. L. Rev. 1341, 1364 (1984).

172. Robertson, *supra* note 171, at 1372. *Murray*, 521 So. 2d at 1132-34.

173. Affirmative defense is defined in Black's Law Dictionary as: "[a] response to a plaintiff's claim which attacks the plaintiff's legal right to bring an action, as opposed to attacking the truth of the claim." Black's Law Dictionary 60 (6th ed. 1990).

recovery. However, in a comparative fault jurisdiction, the need to distinguish between the two becomes relevant because of the different effects.<sup>174</sup> The affirmative defense of contributory negligence only serves to reduce the plaintiff's recovery, not completely bar it in a comparative fault jurisdiction.<sup>175</sup> Defensive doctrines can still bar the plaintiff's recovery.

For Robertson, the determination of an unreasonable risk of harm would be phrased in terms of whether the defendant would be liable to a fault-free plaintiff.<sup>176</sup> Robertson objects to the retention of power by the judges to select in which cases victim fault bars recovery, while in other cases victim fault only reduces recovery.<sup>177</sup> In conclusion, Robertson states that he does not believe that judges need to retain this power and if they choose to do so, "the criteria for 'victim fault as bar' versus 'victim fault as diminution' must be set forth."<sup>178</sup> One of Professor Robertson's chief concerns was the retention of power by judges who use victim fault as a basis for barring recovery in some cases while using it to only reduce recovery in others.<sup>179</sup> Robertson would have the duty question phrased in the following manner: would the defendant be liable to a fault-free plaintiff?<sup>180</sup> If not, the unreasonable risk determination would be "uncontaminated by victim fault" issues.<sup>181</sup> If so, then the at-fault plaintiff should also recover and would be subject to a substantial reduction due to his fault. The judge would not be able to use victim fault in defining duty. The plaintiff's recovery would depend on the conclusions of the factfinder regarding the resolution of the breach and cause-in-fact issues.

*Celestine* stands at odds with Robertson's view. Under his view, Union would have probably owed a duty to a fault-free plaintiff and therefore would be strictly liable. Union would allege the affirmative defense of *Celestine's* fault, which would be used to reduce recovery in accordance with Article 2323. In *Celestine*, the plaintiff's status as a repairman factored in the unreasonable risk determination, which was part of the breach question. The unreasonable risk determination was a defensive doctrine. It negated one of the requisites of the plaintiff's case-in-chief: breach of duty. Robertson feared that the criteria for distinguishing between the affirmative defense and the defensive doctrine would not be clearly defined. Thus, judges would be free to decide that an at-fault plaintiff should recover in some cases but not in others. While *Celestine* provides little clarity in this area, at least the jury/factfinder is making the decision as a breach question rather than the judge as a duty/risk question.

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174. Robertson, *supra* note 171, at 1375.

175. *Id.*

176. *Id.* at 1381-82.

177. *Id.* at 1382.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

### E. Apples and Oranges

The supreme court did not address an interesting point raised by Celestine. In his brief and in oral argument before the court, Celestine argued that the supreme court had jurisdiction to address the jury's application of comparative fault.<sup>182</sup> In the motion for judgment notwithstanding the verdict at the trial court level, Celestine had argued that the jury finding of comparative fault was legally erroneous because comparative negligence was not applicable in a strict liability case. Celestine attempted to press this issue to the supreme court.<sup>183</sup>

There has been much debate over the proper role of comparative fault in strict liability cases.<sup>184</sup> In *Lewis v. Timco, Inc.*,<sup>185</sup> the United States Fifth Circuit Court of Appeals held that comparative fault was applicable to a strict products liability case. On the other hand, Judge Politz, dissenting in *Lewis*,<sup>186</sup> thought that the principles of comparative fault were incongruous with the principles of strict liability. Since strict liability does not require a showing of traditional fault, Politz found "it simply illogical to attempt to quantify fault where admittedly none exists."<sup>187</sup> The dissent doubted the ability of the factfinder to comprehend and apply the concept of no-fault liability and to simultaneously compare relative percentages of fault where one party may be free of fault.<sup>188</sup> The dissent suggested resolving the difficulty by assessing comparative responsibility, which focused on a causal apportionment.<sup>189</sup>

Celestine, like Judge Politz, argued that comparing fault in a strict liability case leads to absurd results because the strictly liable defendant is not necessarily at fault by definition. The supreme court noted that Celestine had raised the issues; however, the court did not otherwise address the applicability of comparative fault in a strict liability case. At the end of the opinion, the court stated that "[a]ll other issues are pretermitted."<sup>190</sup> Since there were no issues outstanding other than applicability of comparative fault, the supreme court may have indicated that it did not find Celestine's argument meritorious and that it was satisfied with the current state of the law concerning the application of comparative fault in strict liability cases.<sup>191</sup> Therefore, the "apple and oranges" argument has little or no practical use in Louisiana law.

182. *Celestine v. Union Oil Co. of Cal.*, 652 So. 2d 1299, 1303 n.1 (La. 1995).

183. *Id.* at 1302-03 (evidenced by the brief and oral argument).

184. See, e.g., Marcus L. Plant, *Comparative Negligence and Strict Tort Liability*, 40 La. L. Rev. 403, 410-12 (1980); Raymond L. Brown, Jr., *Victim Fault: Who Are You Really and What Were You Before?*, 42 La. L. Rev. 1393, 1406-10 (1982).

185. 716 F.2d 1425 (5th Cir. 1983) (en banc).

186. *Lewis*, 716 F.2d at 1433-39 (Politz, J., dissenting).

187. *Id.* at 1435.

188. *Id.* at 1436-37.

189. *Id.* at 1438.

190. *Celestine v. Union Oil Co. of Cal.*, 652 So. 2d 1299, 1306 (La. 1995).

191. See *Dorry v. Lafleur*, 399 So. 2d 559 (La. 1981); *Hyde v. Chevron, U.S.A., Inc.*, 697 F.2d 614 (5th Cir. 1983); *Bell v. Jet Wheel Blast Div. of Ervin Indus.*, 462 So. 2d 166 (La. 1985).

## V. CONCLUSIONS

The decision in *Celestine v. Union Oil Co.* illustrates the various competing factors that determine whether a risk is unreasonable for purposes of strict liability. The emphasis on the case-specific and fact-intensive nature of the inquiry<sup>192</sup> seems to suggest that trial courts should be cautious when presented with a defendant's, or a plaintiff's for that matter, motion for summary judgment. *Celestine* will probably reduce the number of successful summary judgments and increase the costs of litigation because the case encourages full development of the specific facts of each case in order to consider whether a risk is unreasonable vis-a-vis the particular plaintiff. The opinion in *Celestine* has already attracted a following. *Carter v. Exide Corporation*<sup>193</sup> involved an appeal of a summary judgment for the defendant. The plaintiff, an auto mechanic, sought recovery under Article 2317 for injuries sustained while "repairing" a car battery. The Louisiana Second Circuit Court of Appeal, citing *Celestine*, stated that factual issues relating to the merits of the case needed to be developed at trial.<sup>194</sup> Therefore, the court of appeal reversed the summary judgment and remanded the case for further proceedings.

As for the unreasonable risk determination, *Celestine* placed the emphasis on the personal nature of the inquiry.<sup>195</sup> The unreasonable risk determination factors in the particular plaintiff's knowledge and skill, among other things. *Murray v. Ramada Inns, Inc.* held that duty should not be determined by referring to the plaintiff's knowledge. *Celestine* is consistent with this view only if *Celestine*'s knowledge and skill were factors in the unreasonable risk determination as part of the breach question. This determination would properly be in the hands of the jury which would resolve the breach question on a case-by-case basis depending on the factual situation. If *Celestine*'s knowledge and skill were factors in the unreasonable risk determination as part of the duty/risk question, then the problems of assumption of the risk "through the back door" and judges selecting, according to their views, which classes of plaintiffs can and cannot recover as a matter of law in certain situations become apparent.

In some circumstances, the *Celestine* analysis yields a fairly obvious conclusion. If a repairman was hired to fix a hole in the floor of a building and the ceiling collapsed upon him, it is not difficult to see that this particular repairman would recover under a theory of strict liability against the owner. The knowledge and experience imputed to *Celestine* would most likely be absent in this situation, for the repairman here only had knowledge of the defect in the floor. The injury was not caused solely by the vice, defect, or ruin being repaired. Rather, the injury was caused by another vice, defect, or ruin, which did present an unreasonable risk

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192. *Celestine*, 652 So. 2d at 1304, 1306.

193. 661 So. 2d 698 (La. App. 2d Cir. 1995).

194. *Id.* at 704.

195. *Celestine*, 652 So. 2d at 1304.

of harm to this particular repairman. Therefore, the defendant breached his duty to the injured plaintiff.

In other circumstances, results of the *Celestine* analysis are far more ambiguous. Take for instance a person hired to repair a roof. Suppose that the owner has not properly maintained this roof for a long period of time and that as a result, the roof is in an utter state of disrepair. He contracts with a roofer who agrees to repair the roof. The owner informs the roofer that the roof is in a state of grave disrepair. While attempting to repair the roof, the roofer falls through a rotten part of the roof. Would this be an unreasonable risk of harm to this particular plaintiff? The repairman likely possessed a certain degree of knowledge and skill. Furthermore, due to his experience on roofs, he probably was cognizant of the possible risks and was in the best position to minimize the risk by taking certain precautions. However, the repairman may not have had any actual knowledge of the risk that was actually present. Furthermore, should the building owner be allowed to profit from his failure to maintain the roof over such a long period of time by escaping liability because the plaintiff is a repairman? The repairman's fault should not absolve the duty of the owner to prevent things in his control from causing damage. This type of case seems to be ripe for the application of comparative fault. In this instance, both parties seem to share in blameworthy conduct resulting in a comparison of fault.<sup>196</sup>

The *Kent*<sup>197</sup> decision seems to suggest this approach. According to *Kent*, the duty imposed on owners in general is an absolute duty to prevent harm caused by things in their control to others. Thus, with a duty already established, the focus then shifts to whether this duty was breached by the owner. This would be a determination left to the trier of fact, with reference to "traditional notions of blameworthiness."<sup>198</sup> Using the *Kent* approach would provide for a more consistent analysis. The focus would not be on the particular status of the plaintiff, with artificial distinctions being drawn among classes of plaintiffs. Rather, the focus would be on whether the defendant acted reasonably in the particular situation—a question for the factfinder to decide. Thus, the respective roles of the judge and jury would be established. The judge answers the duty/risk question without reference to issues of "victim fault" or the victim's status. In turn, the jury answers the questions of cause-in-fact, breach, and damages: the proper place for the defenses of "victim fault", victim status, or victim knowledge to be weighed against the defendant's fault.

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196. This would be an example of Johnson's "C" case. See *supra* note 152 and accompanying text.

197. See *supra* text accompanying notes 46-49.

198. *Kent v. Gulf States Util. Co.*, 418 So. 2d 493, 497 (La. 1982).