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Fault of the Victim: The Limits of Liability Under Civil Code Articles 2317, 2318, and 2321

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FAULT OF THE VICTIM: THE LIMITS OF LIABILITY UNDER CIVIL CODE ARTICLES 2317, 2318, AND 2321

In 1974 and 1975, the Louisiana Supreme Court re-examined three tort articles[1] which have been part of the Louisiana Civil Code in their present form for over 150 years and found within them the basis for a type of strict liability predicated on non-negligent fault.[2] In each case the court reached its results through painstaking elucidation of the statutory meaning and legislative intent at the time of enactment, in the process overturning jurisprudence of long standing. Further, the justices found this intent in harmony with the needs and realities of Louisiana society[3] in the late twentieth century and therefore justified their holding on the basis of prevailing policy notions as well as faithful and accurate statutory construction.

In *Holland v. Buckley*,[4] article 2321[5] was construed to provide liability based on a presumption of fault for animal owners when their animals cause an unreasonable risk of harm to others. In *Turner v. Bucher*,[6] an old jurisprudential rule[7] construing article 2318[8] was rein-

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1. LA. CIV. CODE arts. 2317, 2318, and 2321.

2. The results were foreshadowed by the 1971 decision in *Langlois v. Allied Chem.*, 258 La. 1067, 249 So. 2d 133 (1971), which held that violation of Civil Code article 669 constituted fault under article 2315 sufficient to hold the defendant liable even absent proof of negligence.

3. The perception of congruence between the legislative intent and modern needs was acknowledged in *Holland v. Buckley*, 305 So. 2d 113 (La. 1974), as follows: "[T]he ancient intention best serves modern needs. In the crowded society of today, the burden of harms caused by an animal should be borne by his master who keeps him for his own pleasure or use rather than by an innocent victim injured by the animal." *Id.* at 120. The view is implicit in *Turner v. Bucher*, 308 So. 2d 270 (La. 1975), where the court recognized that innocent victims should not go uncompensated when there is a source of financial responsibility, 308 So. 2d at 276, and in *Loescher v. Parr*, 324 So. 2d 441 (La. 1975), where the court reasoned that liability should attach to the person to whom society allots the care or guardianship of the risk-creating person or thing. 324 So. 2d at 446.

4. 305 So. 2d 113 (La. 1974) (summarized in Loescher v. Parr, 324 So. 2d 441, 446 (La. 1975)).

5. LA. CIV. CODE art. 2321 states:

> The owner of an animal is answerable for the damage he has caused; but if the animal had been lost, or had strayed more than a day, he may discharge himself from this responsibility, by abandoning him to the person who has sustained the injury; except where the master has turned loose a dangerous or noxious animal, for then he must pay for all the harm done, without being allowed to make the abandonment.

6. 308 So. 2d 270 (La. 1975).

7. Mullins v. Blaise, 37 La. Ann. 92 (1885).

8. LA. CIV. CODE art. 2318 states: "The father, or after his decease, the mother, are responsible for the damage occasioned by their minor or unemancipated children, residing

stated through a similar presumption of fault to extend the liability of parents for the damage occasioned by their minor children to those acts which do not constitute fault on the part of the child. In *Loescher v. Parr*,[9] the owner or possessor of a thing which by its defect caused harm to another was again presumed at fault and hence liable through application of Civil Code article 2317.[10] In each case the liability imposed was termed a type of strict liability; consequently, the lack of personal negligence was not a defense.

The new-found presumptions of fault rely on almost identical mechanisms: each requires a finding of (1) a defect in a thing or a deficiency in the conduct of a person or animal and (2) defendant's duty of guard based on a custodial relationship to the deficient entity. The existence of a defect or deficiency in conduct is evidently to be measured by a standard of "creation of unreasonable risk of harm."[11] In effect, the responsible individual has a duty to have such guard[12] over the person or thing

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with them, or placed by them under the care of other persons, reserving to them recourse against those persons. The same responsibility attaches to the tutors of minors."

9. 324 So. 2d 441 (La. 1975).

10. LA. CIV. CODE art. 2317 states: "We are responsible, not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or of the things which we have in our custody. This, however, is to be understood with the following modifications."

While article 2317 was the last of the three to be interpreted as a basis for strict liability, it is actually the broadest article and encompasses within its meaning the specific applications of articles 2318 and 2321 which the court addressed in *Holland* and *Turner*. For many years the broad language of article 2317 has been viewed as merely introductory to the "modifications" stated in articles 2318 through 2322, and as therefore having no independent force. Adams v. Golson, 187 La. 363, 174 So. 876 (1937); Arrington v. Hearin Tank Lines, 805 So. 2d 167 (La. App. 2d Cir. 1955); Loescher v. Parr, 324 So. 2d 441, 450 (La. 1975) (Marcus, J., dissenting). The *Loescher* ruling is noteworthy not only for its strict liability holding, but also because it established article 2317 as a provision having content and effect beyond the particularizations treated in the five following articles. *Loescher* indicates that articles 2318 through 2322 define the applications of the general principle of 2317 within their respective ambits but do not exhaust the scope of the general article. Earlier signs that a new reading of article 2317 would be forthcoming are discussed in Note, *The "Discovery" of Article 2317*, 37 LA. L. REV. 234 (1976).

11. Loescher v. Parr, 324 So. 2d 441, 446 (La. 1975). Andrus, *Strict Liability Under Civil Code Articles 2317, 2318, and 2321; An Initial Analysis*, 25 LA. B.J. 105, 110, 112 (1977).

12. The word "guard" is used here to indicate the *duty* of one who has care or custody. It should be noted that the word "guard" in these strict liability opinions has two related, but separable, meanings. The first meaning is the one noted above. Guard is also used to refer to the *fact* that a person or thing is under one's care or custody, since the concept of custody comes from a translation of the French "garde." The *Loescher* opinion quoted Verlander, *We are Responsible. . .*, 2 TUL. CIV. L.F., No. 2, 64 (1974), as suggesting: "[T]he things in one's care are those things to which one bears such a relationship

as to prevent it from causing an unreasonable risk of injury to others.

The liability imposed by each article is not absolute but is subject to limited defenses which are enumerated in the opinions. Each presumption can be defeated by a finding that the harm was caused by the victim's fault, a third person's fault or an irresistible force.[13] The limits of these defenses are nowhere enunciated in the *Holland, Turner,* and *Loescher* decisions and have yet to be developed by the state's highest court. Since lack of negligence has been eliminated as an effective escape from liability, the enumerated defenses assume particular importance.

Victim fault will likely be the most often attempted means of exculpation raised by the strict liability defendant, since fortuitous events will seldom be factually available and third parties will likewise not always be implicated. This comment will attempt to discern the probable bases of this defense, as they can be inferred from the reasoning of the supreme court in these strict liability decisions, and as they have been announced in later decisions of the circuit courts of appeal.

Supreme Court Language on the Victim Fault Defense

The supreme court stated clearly that the strict liability imposed by these articles rests on a decision regarding the proper allocation of risks in society—a decision that risks should shift from an innocent victim to one who has guard over and derives the benefit from the person or thing causing damage.[14] It is also clear from the opinions that for victim fault to prevail as a defense, some conduct of the victim must substantially,[15] though certainly not solely, contribute to his injury. Thus, a non-innocent victim might still recover if his fault did not actually cause his injury. Likewise, of course, an innocent victim might not recover if he were unable to prove some element of his strict liability action—*e.g.*, unrea-

as to have the right of direction and control over them. This relationship will ordinarily be associated with ownership, but the guardianship will also belong to the bailee, the lessee, the usufructuary, the borrower for use and the repairman, among others . . . ." 324 So. 2d at 449 n.7.

13. Loescher v. Parr, 324 So. 2d 441, 447 (La. 1975).

14. Loescher v. Parr, 324 So. 2d at 446; Turner v. Bucher, 308 So. 2d at 155; Holland v. Buckley, 305 So. 2d at 120.

15. Loescher v. Parr, 324 So. 2d 441, 449 (La. 1975). It may be noted that *Loescher* dealt briefly with the third defense of irresistible force. It appears that such force must be more than a substantial factor: "The wind was not, for instance, of hurricane force, so as to permit its being classified as a reasonably unforeseeable violent manifestation of nature causing the damage independent of any defect of the tree, *since a healthy tree as well as a diseased one might be overblown.*" 324 So. 2d at 449 (emphasis added).

sonable risk of harm, or causation by the defect or deficient conduct. The three opinions provide only this skeletal image of the defense—that it must include a coincidence of causation and behavior definable as fault—and have left the corpus to be added by the clarification of reasoning and policy by courts in subsequent litigation.

The brevity of the court's treatment of the defense also leaves unarticulated the reasons for allowing the three particular limitations on strict liability. Why exclude liability in instances of victim fault? The answer is probably not simply the operation of a clean hands doctrine, since the opinions evidently require the victim's fault-infected behavior to be substantially causative. Although couched as a defense, the finding of exculpating victim fault functions as a determination that the risk presented was not "unreasonable."

The General Concept of Fault

Before assessing the status of the victim fault defense three years and a handful of cases after the three landmark decisions, it is helpful to examine the concept of fault in its present configuration in Louisiana jurisprudence and doctrine. As Ferdinand Stone discusses fault in his treatise on Louisiana tort doctrine,[16] it has traditionally included the notions of unlawful conduct, intentional causing of harm, and negligence. There is extensive jurisprudence indicating that liability attaches for each of these types of fault. Additionally, there is the form of liability which ensues through application of a standard from the Civil Code or other positive law in cases such as those here discussed, which is sometimes referred to as liability without fault.[17] The reasoning of the court, however, has kept this type of liability within the fault-based framework by applying a *presumption* of fault when certain factual requisites are met. These legal developments are better viewed as emancipating the fault concept from the strictures of moral blameworthiness, rather than as imposing liability without fault.[18] Fault, for modern tort law purposes, must be seen as a social rather than a moral concept; fault can be found whenever one acts as he ought not to, according to some societal standard.[19] The concept is not amenable to a general definition, though

16. F. STONE, LA. CIVIL LAW TREATISE: TORT DOCTRINE, §§ 59-61 (1977).

17. *Id.* at § 61.

18. Stone, *Touchstone of Tort Liability*, 2 STAN. L. REV. 259, 283 (1950).

19. See Justice Barham's discussion of fault in Langlois v. Allied Chem., 258 La. 1067, 1076, 249 So. 2d 133, 137 (1971), citing the French jurists, Colin and Capitânt. 2 COLIN ET CAPITÂNT, COURS ÉLÉMENTAIRE DE DROIT CIVIL FRANCAISE § 190 (8th ed. 1935). *See also* Stone, *Tort Doctrine in Louisiana*, 27 TUL. L. REV. 1, 18 (1952), where it is noted that:

it is possible to categorize various ways in which it may arise—as for example, through intentional misconduct, negligence, or failure to prevent harm caused by a thing in one's custody. All conduct which falls within these categories will not be liability-attaching fault for all times and purposes.[20] The final determination of where the cost of a risk must lie is made by the courts in light of the manner in which each factual situation poses the interests and conduct of the parties as they relate to societal interests and standards of conduct.

Victim Fault: Traditional and Possible Bases

The defense of victim fault, not so-called but as manifested in several precise defenses, has long been a part of Louisiana law. For example, with respect to the intentional torts of battery and defamation, proof of mutual combat and mutual vituperation will defeat the plaintiff's cause of action.[21] Likewise, when the defendant is charged with negligence, proof of the plaintiff's contributory negligence will defeat recovery, unless that result is circumvented by the application of the doctrine of last clear chance.[22] There appears, in fact, to be a clear pattern: the victim will defeat his cause of action by conduct that matches the defendant's conduct in type of fault, even if not in degree.

Traditionally, the victim fault defenses have been expressed in terms of precise doctrines, each encompassing a specific type of behavior. The *Holland, Turner,* and *Loescher* decisions deviate from this pattern by speaking of a broad and general defense of victim fault. The most forthright reason for this breadth of language would be to indicate that any form of behavior which has been held to constitute fault is a possible basis for denying recovery.

This paper will attempt to discern whether the court intended to promulgate such a broad standard of victim fault. To members of the legal profession who have become comfortable with dealing with liability based on negligence, the inevitable first inquiry is whether the traditional defenses to a negligence action constitute exculpating victim fault under these three articles. Consequently, the use of contributory negli-

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The experience of almost a century and a half has shown that Louisiana judges can find in the term a sufficient mirror of the times to adjust to an age of increased industrialization. As the jurisprudence shows, the courts have not considered "fault" to be merely moral blameworthiness; they have appreciated the fact that in this age the concepts of economic utility and social good have come perilously close to overshadowing the concept of moral blame.

20. Langlois v. Allied Chem., 258 La. 1067, 1076, 249 So. 2d 133, 137 (1971).

21. Stone, *supra* note 19, at 15, 16.

22. F. STONE, *supra* note 16, at §§ 50, 58.

gence or assumption of risk as victim fault has received early attention from the courts and commentators.[23] It is also logical to inquire whether presumed fault will exonerate the strict liability defendant, a possibility that has received almost no attention.[24]

A survey of the case law to date suggests that no categorical answers to these questions will be given by the supreme court. Although the decisions describe the available defenses for each article in nearly identical terms, the policy relationships grounding liability under each vary. The facts of specific cases may also warrant varying the scope of defendant's liability to include or exclude certain risks created in part by the victim. A case by case (rather than categorical) approach is thus the proper method for defining the boundaries of exculpating victim fault in strict liability cases. This comment will nevertheless discuss cases in terms of specific defense doctrines, in order to address more directly the confusion about their potential application as victim fault.

Liability for an Animal Under Article 2321

Negligence and Related Conduct

Liability under Civil Code article 2321 has been defeated by a finding of victim fault in three cases, one of the earliest of which arose in the dog bite context.[25] The nine-year-old plaintiff in *Dotson v. Continental*

23. *See, e.g.*, Thibo v. Aetna Ins. Co., 347 So. 2d 20 (La. App. 3d Cir.), *cert. denied*, 350 So. 2d 674 (La. 1977); Parker v. Hanks, 345 So. 2d 194 (La. App. 3d Cir. 1977); Fontenot v. Soileau, 336 So. 2d 1006 (La. App. 3d Cir. 1976); Andrus, *supra* note 11; *The Work of the Louisiana Appellate Courts for the 1974-75 Term—Torts*, 36 LA. L. REV. 400, 401 (1976); Note, *The "Discovery" of Article 2317*, 37 LA. L. REV. 234, 240 (1976).

24. Interestingly, an attempt was made to use a presumption of fault under one of these codal articles as a defense in two negligence actions. In *Woodward v. First of Georgia Ins. Co.*, 333 So. 2d 709 (La. App. 2d Cir. 1976), the defendant was held liable for accidently shooting his friend, who was the pistol owner. One defense raised was that the pistol was defective and therefore the plaintiff-owner was contributorily negligent in bringing it to defendant's home. While the court was not satisfied with the expert testimony establishing a defect, it chose to assume the existence of a defect and disposed of the argument by reference to *Loescher* and to the fact that a third person's fault would defeat a presumption of fault based on Civil Code article 2317. The court considered defendant's lack of extraordinary care in handling the pistol to be fault of a third person. In *Maus v. Schouest*, 342 So. 2d 715 (La. App. 4th Cir. 1977), the defendant injured a five-year-old child while driving with due care. The trial judge had instructed the jury with respect to possible contributory negligence on the part of the child. The Fourth Circuit Court of Appeal held the instructions to be erroneous, terming them an "overzealous" application and interpretation of the *Turner* rule.

25. A fourth case in which strict liability under article 2321 was urged but not found by the court is *Alfonso v. Market Facilities of Houston, Inc.*, 356 So. 2d 86 (La. App. 1st Cir.), *cert. denied*, 357 So. 2d 1169 (La. 1978). The opinion focuses on the victim in

Insurance Co.[26] had accompanied a friend to the home of defendant's insured to get a puppy. The young plaintiff was bitten when he entered a fenced yard, alone, where two adult dogs and the puppies were kept. There was conflicting testimony as to whether the dog owner had invited the child to enter the yard or had instructed him to wait outside. The First Circuit overturned the trial court's finding of liability on the basis of victim fault, but declined to characterize the precise nature of the fault beyond noting that "Young Kinchen . . . was given specific instructions to wait there until he could be accompanied by the owner's young son" and that he had "reached the age of reason and should have remained on the patio as he was instructed."[27]

Since there was no evidence in the case indicating that plaintiff had a subjective knowledge of the risks in entering a yard with adult dogs and puppies or a voluntary acceptance of these risks, there is probably no arguable basis for founding victim fault on assumption of risk.[28] Further, while plaintiff's conduct might easily have been termed contributory negligence in an adult, the contributory negligence of a child is to be measured by a special standard attuned to the age, intelligence and experience of the individual.[29] The factual finding that the child entered the yard after having been instructed to wait outside, however, may be sufficient to make the conduct contributory negligence and is suffi-

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denying recovery though it does not explicitly hold that victim fault is the bar. The plaintiffs were injured while returning from a horseback trail ride offered by defendants when lightning and thunder caused their horses to bolt and throw them. The court concluded that the plaintiffs "were active participants in the trail ride and cannot be considered as innocent third parties. Further, they were in control of the two horses at the time of the accident. They are therefore not entitled to recover under the strict liability provisions of the Code." 356 So. 2d at 89. The second sentence quoted is evidently a statement that the harm-producing animals were under the guard of the victims rather than the defendants—a conclusion which, if warranted, is a sound basis in itself for denial of recovery. It is not clear whether the first statement that the plaintiffs cannot be considered innocent third parties is based on the guard notion or whether it implies some form of victim fault. It perhaps bears some cryptic relationship to the conclusion reached later in the opinion, during discussion of negligence as a ground for liability, that "one who voluntarily utilizes such [recreational] facilities *assumes the reasonably foreseeable risks* which are inherent in the use thereof." *Id.* at 89 (emphasis added).

26. 322 So. 2d 284 (La. App. 1st Cir. 1975), *cert. denied*, 325 So. 2d 606 (La. 1976).

27. *Id.* at 286. The supreme court denied writs, on the basis of a correct result on the factual findings of the court of appeal. 325 So. 2d 606 (La. 1976).

28. *But see* Andrus, *supra* note 11, at 118.

29. *See, e.g.*, Plauche v. Consolidated Cos., 235 La. 692, 105 So. 2d 269 (1958); Arata v. Orleans Capitol Stores, 219 La. 1045, 55 So. 2d 239 (1951); Mitchell v. Ill. Cent. R.R., 110 La. 630, 34 So. 714 (1903); Westerfield v. Lewis, 43 La. Ann. 63, 9 So. 52 (1891); Freeman v. Wilcox, 303 So. 2d 840 (La. App. 1st Cir. 1974), *cert. denied*, 307 So. 2d 630 (La. 1975).

cient to render it fault. It is reasonable for society to expect an average nine-year-old to respect the wishes of an adult and homeowner with regard to entrance onto part of his property, even though the child cannot fully appreciate the adult's reason or the possible risks. It was also important that the dogs were fenced within defendant's yard, which afforded no easy access to the public. Both the deference traditionally accorded to a property owner and the behavior-shaping function of tort law bore upon the ruling of this case.

The defendant's liability for injuries caused by his dog was defeated in *Parker v. Hanks*[30] by the trial court's finding of contributory negligence. In affirming, the Third Circuit again declined to label plaintiff's conduct more specifically than victim fault, but argued in dictum that contributory negligence should be considered adequate proof of victim fault. Defendant operated a small fish market on his premises, which Mrs. Parker, arriving around 5 p.m., had found closed. The defendant's labrador retriever bit the plaintiff as she knocked on defendant's kitchen door to see if he had any fish for sale. The court found Mrs. Parker at fault "inasmuch as she approached the rear of the Hanks' home unannounced, she knew a dog was customarily kept on a chain, the chain ran under the door she approached and, as the trial court found, she opened the door."[31]

The discussion in *Parker* of contributory negligence as a proper form of victim fault bears examination, for this is the only case to discuss the issue at any length. The court noticed that *Holland* quoted the 1901 case of *Delisle v. Bourriague*[32] in which the presumption of fault against the owner of the animal that caused damage was said to give way in the presence of proof of "the imprudence of the one injured."[33] Judge Stoker argued in *Parker* that imprudence is much like negligence, which should therefore be considered victim fault under article 2321. He further pointed out that the animal owner can be exculpated from liability in an article 2316 negligence action[34] by contributory negligence and that the defendant under strict liability should have the same escape.[35] The argument has a ready appeal when it is considered that the strict liability defendant lacks much of the moral culpability of the negligence

30. 345 So. 2d 194 (La. App. 3d Cir.), *cert. denied*, 346 So. 2d 224 (La. 1977).

31. *Id.* at 200. Writs were denied by the supreme court on the basis of a correct result. 346 So. 2d 224 (La. 1977).

32. 105 La. 77, 29 So. 731 (1901).

33. *Id.* at 84-85, 29 So. at 734, *quoted in* Holland v. Buckley, 305 So. 2d at 116.

34. LA. CIV. CODE art. 2316 states: "Every person is responsible for the damage he occasions not merely by his act, but by his negligence, his imprudence, or his want of skill."

35. 345 So. 2d at 199.

defendant. However, the very fact that will create negligence on the part of the owner—that the dangerous nature of the animal was known or knowable—will also generally add to the culpability of the victim. Furthermore, contributory negligence as a total bar to recovery has been severely criticized;[36] its harshness has inspired support for comparative negligence as a standard of loss distribution and has led to ameliorating doctrines in non-comparative negligence jurisdictions.[37] That a potentially unjust defense is available in one type of action hardly justifies extending its application to another area.

In *Parker*, the victim fault could as easily have been called contributory negligence. It is important, though, to recognize that this does not mean that this defense should have full and unrestricted application in every article 2321 case. In the final analysis, the defendant whose dog was on a chain in defendant's own home had an adequate guard over his animal; his duty did not include anticipating the imprudent intruder. On the other hand, the guard might not be adequate, and an imprudent bystander might recover, if the dog were loose in the streets—simply because the balance of interests shifts. In the first situation, the interests are much like those discussed with respect to *Dotson*. In the second instance, the concern is no longer an individual's free use of his property and there is a new and significant issue of the plaintiff's freedom to use the public streets and walks, even in a mildly distracted state.

Assumption of Risk

In *Fontenot v. Soileau*,[38] the 16-year-old plaintiff was employed as an exercise boy for race horses and was injured when thrown by a highly spirited animal. Young Fontenot had worked previously in the same capacity at Evangeline Downs and had been in defendant's employ for three months before the incident occurred. His own testimony established that the behavior of the injuring horse was not unusual and was a risk well within the scope of the position he occupied. Thus, the factual situation dictated a finding of a knowing and voluntary encounter with the risk of the exact harm that occurred. Potential recovery under the presumption of fault attributable to the horse's owner under *Holland* was

36. *See, e.g.*, Green, *Illinois Negligence Law*, 39 ILL. L. REV. 36, 116, 197 (1944); James, *Last Clear Chance: A Transitional Doctrine*, 47 YALE L.J. 704 (1938); Lowndes, *Contributory Negligence*, 22 GEO. L.J. 674 (1934).

37. *See, e.g.*, James, *Contributory Negligence*, 62 YALE L.J. 691 (1953); Leflar, *The Declining Defense of Contributory Negligence*, 1 ARK. L. REV. 1 (1946).

38. 336 So. 2d 1006 (La. App. 3d Cir. 1976).

therefore defeated, with assumption of risk as one of the alternate holdings.

It is evident at the outset that the assumption of risk defense does not neatly fit the conceptual skeleton of the victim fault defense. It is not a clearly causal defense,[39] since only in a remote way can the plaintiff's conduct be said to have caused his injury: no conduct of plaintiff caused the horse to throw him—though, of course, the exercise of his will three months earlier did put plaintiff in contact with the animal. Likewise, when the assumption of risk is reasonable, it is difficult to find fault in the plaintiff. Both the elements of causation and fault are more readily seen if the situation is viewed as follows: the plaintiff, in accepting the particular employment, was presumably aware of and competent to deal with the risks inherent in the occupation, yet he failed adequately to handle those risks when they arose and therefore suffered injury. This failure can be viewed as causative and as fault in his conduct, just as the defendant's non-negligent failure to prevent injury in a strict liability context is fault. This approach is fortified by its desirability in policy terms. One might say that the plaintiff in this situation, by his qualifications and willingness to accept the particular job, had induced defendant to alter the nature of his guard over his animal with respect to plaintiff. Defendant relied on plaintiff's skill, or at least on plaintiff's willing encounter with a manageable risk, in permitting contact between plaintiff and the animal. The injury occurred, furthermore, while the victim was pursuing his living—that is, benefit from the injuring animal had accrued to both defendant and plaintiff. In short, the defendant had not created an "unreasonable" risk to this particular plaintiff. In balancing interests and evaluating conduct according to societal standards, the court can justly leave the risk where it originally fell—on the victim.

Presumed Fault

In two other dog bite cases, the defendant's allegations of victim fault failed to exonerate him from strict liability under article 2321. In *Babin v. Zurich Insurance Co.*,[40] the defendant was held liable for injuries caused when his dog bit three-year-old Guy Babin. Defense counsel raised the defense of victim fault since there was competent evidence indicating that the child had pulled the dog's tail and provoked the attack. Acknowledging the child's incapacity for contributory negligence,

39. *See* Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 J. LEG. ST. 165, 185 (1974). *See also* 65A C.J.S. *Negligence* § 174 (1), where the basis of the defense in consent is discussed.

40. 336 So. 2d 900 (La. App. 4th Cir. 1976).

counsel argued that, as a result of recent jurisprudence, "fault" is not synonymous with negligence and is broader in meaning than that concept. The Fourth Circuit affirmed the trial court judgment for the plaintiff, however, stating that "in effect, a three and one half-year-old child can never be other than an innocent victim."[41] The denial of application for writs significantly stated that there was no error of law in the court of appeal judgment.[42]

In *Vidrine v. White*,[43] the ten-year-old plaintiff had an I.Q. of 55 and experienced difficulty in learning and obeying instructions. Against the instructions of the adults who accompanied him, the child entered defendant's fenced yard in which two adult dogs were kept, and went to the door to try to sell some canteloupes. Defendant's wife, seeing the dogs at his heels, accompanied him back toward the gate, but the child was bitten when he became frightened and broke away from the adult to run for the gate. The Third Circuit upheld the jury's finding of liability because there was a *reasonable basis* for the decision that contributory negligence, assumption of risk or fault on the child's part was not proven. In discussing the matter Judge Watson noted as possible bases the boy's lack of capacity or the possibility that his behavior did not cause his injury.

It is significant that both of these cases involved victims with impaired capacity or total incapacity for fault. The decisions seem to rest on this and therefore do not reach the question whether the conduct, in one of greater discernment, would have been fault. The analysis seems too facile (though it may have adequately responded to the arguments briefed to the court), for it ignores the facts that (1) there are two victims to a tort against a child—the child himself and the parent or person with financial responsibility for him; and that (2) there is precedent for assigning fault to a parent or guardian based on conduct of a child which would have been fault in an adult.[44] *Turner* did not address its applicability to a parent suing for injuries to his child, though such an extension of the holding would be logically consistent. There is no inherent unfairness in allowing a presumption of fault under the Civil Code to defeat a plaintiff's recovery in the same manner that it created defendant's liability.[45] In cases where these strict liability articles are factually ap-

41. *Id.* at 902.

42. 339 So. 2d 847 (La. 1976).

43. 352 So. 2d 776 (La. App. 3d Cir. 1977).

44. Turner v. Bucher, 308 So. 2d 270 (La. 1975).

45. Language in *Turner* may seem to preclude its application as a defendant's doctrine: "This opinion in no way affects the long line of jurisprudence which holds that certain minor children are incapable of *contributory* negligence. We do not here set the

plicable to both parties, plaintiff and defendant are, in a sense, equally "innocent" and should be considered legally equally at fault. The parent-child relationship, however, is one strongly fostered by society and children are additionally afforded special protection by the law. One form of that protection, the heightened standard of care to which the jurisprudence holds tort defendants with respect to children,[46] probably supports the premise that only under very aggravated circumstances would the courts find fault in the parent-victim through a legal presumption to defeat his portion of the requested recovery. Moreover, the conduct of the children in *Babin* and *Vidrine* may not have constituted fault even when measured by an adult standard.[47]

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standard of care to which a victim is subject with regard to such a nondiscerning person." 308 So. 2d at 277. The import of these two sentences is far from clear. It is not surprising that *Turner* does not change the legal capacity of children for contributory negligence, since it in no way alters their capacity for primary negligence. *Turner's* holding does not change either the standard of care or the liability of a nondiscerning child; it merely places a heavier duty on that child's parent. Nor does the ruling in *Deshotel v. Travelers Indem. Co.*, 257 La. 567, 243 So. 2d 259 (1971), preclude use of presumed fault as a defendant's doctrine. *Deshotel* held that the negligence of a child was not imputed to the father to bar the father's personal injury claim against his insurer based on the negligence of his son. The case is inapposite to the speculated use of article 2318 here, since there is no negligence on the part of the child and the only possible plaintiff fault at issue is presumed fault on the part of the father. *Deshotel* rests on a pre-*Turner* understanding of article 2318 which continues to be viable only with respect to the negligent acts of minor children—*i.e.*, that "[a]rticle 2318 does not create negligence in the father because of the minor's negligent acts; it merely attaches financial responsibility to the father for the delicts of his minor child." 243 So. 2d at 261. With respect to minor children below the age of discernment and minor children whose conduct is not negligent, any liability rests on a *presumption* of fault in the parent (due to the unreasonable risk created by the child) and imputation of fault is not at issue. Language in a footnote in *Deshotel* is also supportive of the distinction between the parent as plaintiff for recovery of his losses and as plaintiff seeking recovery for the benefit of the minor. The footnote clarifies the court's holding by stating that "[t]his suit does not involve a claim for a debt which would inure to the benefit of the negligent child, such as a debt for that child's medical expenses for which the father is responsible. In such a case we might be concerned with derivative negligence rather than with imputed negligence." 243 So. 2d at 261 n.3.

46. For example, the attractive nuisance doctrine places a special duty on property owners with respect to certain artificial conditions or dangerous activities if the presence of young children can be expected. Comment, *The Attractive Nuisance Doctrine in Louisiana*, 10 LA. L. REV. 469 (1950). Likewise, in Louisiana and many other jurisdictions, motorists have a heightened standard of care when the presence of children is evident in the vicinity of the street. Maus v. Schouest, 342 So. 2d 715 (La. App. 4th Cir. 1977). *See also* RESTATEMENT (SECOND) OF TORTS, §§ 283(A), 339, 343(B), 369 (1966).

47. In *Babin*, for example, the conduct pleaded as victim fault was pulling the dog's tail. While such an act by an adult might be considered both undesirable and rude behavior, it might not, under the circumstances, be either negligence or any other form of fault. The testimony at trial adequately portrayed the offending "Spot" as gentle, accustomed to

The cases thus far decided on the victim fault issue are most consistent and best explained in terms of their undercurrent of policy notions. Similar policy considerations are inherent in the dog bite statutes in the states which have repudiated the "one free bite" rule to impose liability in the *Holland* sort of situation.[48] It is instructive that those statutes do not permit "mere negligence" of the plaintiff to exculpate the dog owner, although assumption of risk and unlawful acts of the plaintiff will.[49] They also restrict the imposition of strict liability in some circumstances—for example, one who keeps a dog enclosed or fettered on his own premises will not be liable to an interloper whose presence and exposure to the dog he has no reason to anticipate.[50]

The writ denials in several of these recent animal liability decisions indicate that the lower courts are frequently reaching appropriate results, whether or not the supreme court would endorse their rationales. It is reasonable to conclude, then, that under certain circumstances negligence of the victim will exonerate the strict liability defendant. This will be more likely when the injury or damage occurs on defendant's own property. Again, recovery would almost certainly be barred if unlawful conduct of the plaintiff contributed causally to his harm. When assumption of risk is clearly indicated, as in employment situations, injuries which are reasonably within the risk assumed will normally be excluded from the scope of defendant's liability. While no case has yet so held, presumed fault presents an additional possibility of victim fault.

Parental Liability Under Article 2318

Negligence and Related Conduct

There is specific language in the *Turner* opinion bearing upon what conduct may defeat a plaintiff's cause of action, with special reference to

children (defendant had six of his own) and having no prior history of causing injury. His violent reaction was not foreseeable, and tort law has normally required only reasonable prudence and interest in one's own safety, not dignity and courtesy, of the tort plaintiff.

48. ALA. CODE tit. 3, §§ 6-1, 6-2, 6-3; ARIZ. REV. STAT. § 24-521; CAL. CIV. CODE § 3342; FLA. STAT. ANN. §§ 767.01, 767.04 (West); ILL. ANN. STAT. Ch. 8, § 366 (Smith-Hurd); IND. CODE ANN. § 15-5-12-1 (Burns); IOWA CODE ANN. § 351.28 (West); KY. REV. STAT. ANN. § 258.275 (Baldwin); ME. REV. STAT. tit. 7, § 3651; MASS. ANN. LAWS Ch. 140, § 155 (Michie/Law Co-op); MICH. STAT. ANN. § 12.544; MINN. STAT. ANN. § 347.22 (West); MONT. REV. CODES ANN. § 17.409; NEB. REV. STAT. § 54-601; N.H. REV. STAT. ANN. § 466.19; OHIO REV. CODE ANN. § 955.28 (Page); OKLA. STAT. ANN. tit. 4, § 42.1 (West); R.I. GEN. LAWS § 4-13-16; UTAH CODE ANN. § 18-1-1; WASH. REV. CODE ANN. § 16.08.040; W. VA. CODE § 19-20-13; WIS. STAT. ANN. § 174.02 (West).

49. 3A C.J.S. *Animals* §§ 187, 201 (1973).

50. *Id.* at § 189.

negligence as victim fault. Justice Barham narrows his holding with the statement that it is "limited to a situation such as the one before us where the victim is unwarned and unsuspecting of any impending harm from the acts of the child."[51] The limitation may possibly be taken as an indication that some lesser degree of victim fault will exculpate the strict liability defendant under article 2318 than would suffice under articles 2321 and 2317. Sound policy would support such a distinction. It is noteworthy, for example, that Louisiana stands alone in American jurisdictions in holding parents liable for the non-tortious conduct of a child.[52] Other jurisdictions, in fact, do not hold parents liable even for ordinary negligence of a child but require intentional or "wanton and wilful" conduct before liability attaches.[53] In contrast, at least some applications of the law announced in *Holland* and *Loescher* have counterparts in the remaining states of the union.[54] Further, parenthood is a valued relationship which society will avoid penalizing except in the face of stronger countervailing societal values (*e.g.*, compensation of an innocent victim, with perhaps an even greater degree of innocence required here than in other situations); ownership (or custodianship) of animals or property is protected and valued but with lesser societal priority.

The characterization of the innocent victim as "unwarned" as well as "unsuspecting" indicates that victim fault under *Turner* may include much conduct classifiable as contributory negligence. Presumably a victim can be warned by some visible or audible human communication or by something reasonably communicative about a situation (*e.g.*, a child barreling toward one on a tricycle, within one's line of vision, is communicative of risk whether or not any warnings are verbalized). A victim's failure actually to perceive a warning—so that he continues to be unsuspecting, even though warned—would seem to be irrelevant, if a person of normal attentiveness would have seen or heard it. Although victim fault under *Turner* would overlap with the contributory negligence defense, perfect congruence between the two concepts cannot be assumed.

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51. 308 So. 2d at 277. One might query whether this language in *Turner* is applicable to the victim fault defense under 2317 and 2321 as well—for example, as an implied elaboration of the words "innocent victim" which are used in all three cases. Presumably, however, if that was the intent, it would have been manifested in *Loescher*, which appears to have made a studied attempt to summarize the prior two allied holdings and relate the three aspects of codal responsibility.

52. *See* Kent, *Parental Liability for the Torts of Children*, 50 CONN. B.J. 452, 465 (1976); 59 AM. JUR. 2d *Parent and Child* § 130 (1971).

53. Kent, *supra* note 52, at 465; 59 AM. JUR. 2d *Parent and Child* § 137 (1971).

54. *See, e.g.*, the dog bite statutes cited in note 48, *supra*.

Negligence that arises other than by failure to perceive or heed a warning, for example, would not necessarily be victim fault.

The one case in which liability was defeated by victim fault of a negligent nature involved circumstances in which the element of warning was clearly present. In *Hebert v. United Services Automobile Association*,[55] the plaintiff was injured when she slipped in a puddle of dishwashing liquid poured on the floor by the two-year-old child of defendant's insured. Mrs. Hebert was a housekeeper whose responsibilities included babysitting with the child while both parents were away at work. The accident occurred while the plaintiff was alone with the child and after she had observed him pouring the fluid on another part of the floor only minutes earlier. The Third Circuit reversed the trial court's holding of liability on two grounds. It first concluded that Mrs. Hebert's conduct was "substandard"[56] and fell within the ambit of exculpating victim fault. Having earlier quoted the language in *Turner* discussed above, the court carefully reinforced its result with the alternate holding:

> Even if the meaning which we attribute to victim fault in the context of strict liability under *Turner v. Bucher* . . . is not precisely that which was intended by our Supreme Court, in any event, we find the holding of *Turner v. Bucher* . . . clearly inapplicable to the instant case because of our finding that plaintiff was warned and suspecting of impending injury.[57]

The result in *Hebert* conforms with prevailing societal policy and the above interpretation of particular language in *Turner*. Its correctness is also supported, at least by implication, by the language of article 2318 which permits the responsible parent recourse (for reimbursement of damages paid out) against any person with whom he has placed the child for long term care.[58] The principle of indemnification thus included is an established one in tort law and well within the meaning of article 2315.[59] The import of its restatement in article 2318, therefore,

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55. 355 So. 2d 575 (La. App. 3d Cir. 1978).

56. It is clear that the court considered the substandard conduct to be negligence though it carefully refrained from calling it such in connection with strict liability. Later in the opinion, the court curtailed its discussion of other issues, such as a negligence theory of liability, since "Mrs. Hebert's negligence will bar plaintiff's recovery under any theory." 355 So. 2d at 578.

57. *Id.*

58. For the text of article 2318, see note 8, *supra*. The "care of other persons" evidently refers to some sort of permanent or long term "guardianship" since the phrase is posed disjunctively to residence with the parent. The intent is that the parent not be relieved of primary responsibility for his child by placing him in residence with another.

59. LA. CIV. CODE art. 2315 reads in part: "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." The obligation to

must be to ensure that this article's assignment of primary liability to the parent not be viewed as a grant of immunity to the guardian from the consequences of any fault on his part which contributed to the injury. In effect, it clarifies that article 2318 does not alter the law of indemnification. Thus, under general principles of tort law, Mrs. Hebert could have been required to reimburse the parents if a third person had slipped in the dishwashing liquid. She could also have been liable for reimbursement of her own award, so her recovery may actually be defeated by the effective equivalent of a process whereby an obligation in her was created that extinguished by compensation the obligation of her employer.

Assumption of Risk

One case has recognized non-negligent assumption of risk as exculpating victim fault under article 2318. In *Thibo v. Aetna Insurance Co.*,[60] the plaintiff was employed as a housekeeper whose duties included the care of her employer's strong, hyperactive, three-year-old mentally retarded son. She suffered back injuries when the child jerked her, while she was off balance, as she was dressing him. As in *Fontenot v. Soileau,*[61] the plaintiff had been employed by the defendant for several months, and her testimony revealed that she had often had to wrestle with and chase the boy. The Third Circuit reversed the trial court's holding of liability under *Turner* and held that plaintiff's recovery was barred by her fault, in assuming the risk, with *Fontenot* governing. The court noted that the holding in *Turner* is limited to the situation where the victim is unwarned and unsuspecting of impending harm.

The *Thibo* court's reliance on *Fontenot* seems well-placed, since in both cases the assumption of risk was employment-related and the factors to be balanced under article 2318 were similar to those under article 2321. In fact, the language of *Turner* noticed by the court also strongly supports the use of assumption of risk as a defense, since plaintiff's experience during her employment would make it nearly impossible for her to be "unwarned" and "unsuspecting" that she might suffer injury in the

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pay a tort claim is damage under article 2315; that action which causes another to incur such liability is therefore an act that causes damage within the meaning of article 2315. The jurisprudence has so held. *See, e.g.*, Bewley Furniture Co. v. Maryland Cas. Co., 285 So. 2d 216 (La. 1973).

60. 347 So. 2d 20 (La. App. 3d Cir.), *cert. denied*, 350 So. 2d 674, (La. 1977) (The result was "correct" on the facts found by the court of appeal's majority opinion.).

61. See text at note 38, *supra*.

precise manner in which this occurred. Likewise, the policy considerations noted above are clearly applicable.

Presumed Fault

A difficult aspect of victim fault within the parental liability situation arises when there are potential presumptions of fault on both sides of the courtroom. The situation in which two children are playing and one gets hurt through the interacting acts or omissions of both can hardly be deemed unusual. Such a case arose in the Third Circuit in 1976, but was disposed of without reaching the potential victim fault argument. In *Gremillion v. State Farm Mutual Insurance Co.*,[62] nine-year-old Rob Gremillion was seriously hurt when hit in the face by a golf club swung by ten-year-old Kenny Brechtel. The injury occurred when Kenny was swinging the club on one side of a shop shed and Rob, playing chase with other children, ran around the side of the building directly into Kenny's swing.[63] The court distinguished *Turner* as being applicable only to children below the age of discernment, and found Kenny's father not liable because Kenny's conduct was not negligent when measured by the standard of conduct expected of a child of the same age, intelligence and experience. The holding foreclosed consideration of the victim fault defense; it has, however, been justly criticized,[64] as it creates a bizarre and intolerable gap in the law by its narrow reading of *Turner* and probably does not represent a correct interpretation of the state of parental liability under article 2318.

The court's opinion is no doubt correct in its assessment of Kenny's conduct as not negligent (and implied assessment of Rob's as also not negligent).[65] However, if Kenny's conduct had been measured by an adult standard so that a presumption of fault would attach to his father (as it probably should have been), it would seem only fair that an allega-

62. 331 So. 2d 130 (La. App. 3d Cir. 1976).

63. Testimony was conflicting with respect to the exact conduct of the two children which led to the injury. The court found that the preponderance of evidence supported this version of the sequence of events. 331 So. 2d at 132.

64. *See*, Andrus, *supra* note 11, at 116; Gremillion v. State Farm Mutual Ins. Co., 334 So. 2d 205 (La. 1976) (Tate, J., dissenting to writ denial): "Although the result may be correct (in that plaintiff child's own fault may bar recovery), the law announced conflicts with Civil Code article 2318 and *Turner v. Bucher*." *Id.*

65. The holding that Kenny was not negligent was essential to the court's ruling and obviated the necessity of determining whether Rob had been negligent. However, it is apparent that the court did not consider Rob's conduct to be negligent either, since it characterized children as "not cognizant of each other's rash, impetuous and careless acts" and regarded Rob's actions as "evidencing a child's natural failure to anticipate or foresee consequences." 331 So. 2d at 133.

tion of victim fault be handled in the same manner. Unlike the cases where dog liability and child liability collide, the protective public policies seem to be poised equally on both sides. Perhaps in this situation more than any other it will be impossible to justify restricting presumed fault to application as a plaintiff's doctrine.[66]

Because of the traditionally strong public interest in promoting parenthood and the family as well as the general leniency with which the law views the misconduct of children, it seems likely that courts will be more ready to find victim fault in article 2318 cases than in other areas of strict liability. The few cases in point illustrate that when the victim fault defense is raised it is well-received by the courts. This broader ambit for the defensive doctrine does not presuppose, however, that every instance of contributory victim behavior will exonerate the defendant. It is always possible that under a particular set of circumstances those especially commanding values which usually favor a defendant parent will be supportive of the plaintiff as well. Again, the particular facts of each case will define the scope of the risks for which the defendant may be held liable and will determine whether any particular victim behavior falls within the protected area.

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66. However, it would perhaps seem as unfair to deny totally recovery to the victim-father as it would be to attach full liability to the defendant-father. This type of case amply illustrates the desirability of applying Louisiana's long suppressed heritage of comparative fault. For discussion of the applicability of the comparative negligence doctrine in a strict liability action, see Brewster, *Comparative Negligence in Strict Liability Cases*, 42 J. AIR LAW & COM. 107 (1976); Firnberg, *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. COUNSEL J. 39 (Jan. 1975); Schwartz, *Strict Liability and Comparative Negligence*, 42 TENN. L. REV. 171 (1974).

The practical equivalent of a comparative negligence type of distribution of losses was achieved by the Fourth Circuit Court of Appeal in the pre-*Turner* article 2318 case of *Scott v. Behrman*, 273 So. 2d 661 (La. App. 4th Cir. 1973). The father claimed the $100 deductible portion of his property damage claim in an accident caused by the concurrent negligence of his son and the other party. The court followed *Deshotel v. Travelers Indem. Co.*, 257 La. 567, 243 So. 2d 259, in holding that the negligence of the son was not to be imputed to the father to defeat his recovery. However, the father, as the individual with financial responsibility for the negligent minor son, was held liable for contribution to the other party for one-half of his own claim. The court declared that "as a practical matter . . . confusion extinguishes that half of the father's personal claim which is owed both by and to defendant driver." Scott v. Behrman, 273 So. 2d at 664-65. Such a circuitous means of effecting comparative negligence would also be available in an article 2318 strict liability action if the court chose to apply presumed fault to the plaintiff father and then call that fault a concurrent cause instead of exculpating victim fault. Though such a use of plaintiff fault is not mentioned or hinted at in the supreme court strict liability rulings, there is interesting language in a writ denial that suggests that at least one member of the supreme court would be hospitable to such an argument. See note 74, *infra*.

Liability for a Defective Thing Under Article 2317
Negligence and Related Conduct

Three cases have found victim fault to deny recovery under Civil Code article 2317 strict liability. In *Korver v. City of Baton Rouge*,[67] the plaintiff was injured when she tripped over a crack in the sidewalk at night. She sued the city and parish for negligent maintenance of the walk, and the abutting property owner on the basis of *Loescher v. Parr*. The trial court found the abutting property owner to have no duty of maintenance and repair of public walks, and therefore no liability,[68] but found the parish negligent in maintenance of the walk. Plaintiff's recovery was barred, however, by her contributory negligence. Evidence of the adequacy of lighting and the obvious nature of the irregularity in the sidewalk was introduced, as well as testimony indicating that there had been no similar accidents in that location. The court of appeal affirmed the holding of contributory negligence and dismissed the alleged liability of the abutting property owner under Civil Code article 2317 as follows: "We do not reach this contention in view of our above holding regarding plaintiff's contributory negligence as *Loescher* recognizes that liability can be avoided by a showing that the damage was caused by the fault of the victim."[69] The holding of this case is unenlightening as an application of strict liability law, perhaps partly because that aspect of tort law arose only as a secondary theory of liability against a secondary defendant. An interesting but undeveloped aspect of the case is whether the considerations that made the sidewalk the source of an "unreasonable"[70] risk for purposes of holding the parish negligent in its maintenance are identical to those used in determining the presence of a defect (also defined in terms of unreasonableness of risk) for purposes of strict liability under article 2317. The constituent elements of "unreasonableness" would seem to be the same, except that inability to know of or prevent the risk would not absolve the strict liability defendant, though it would preclude a finding of negligence. It would logically follow that once negligence was found against any defendant, the presence of a "defect"

67. 348 So. 2d 708 (La. App. 1st Cir. 1977).

68. Responsibility of the property owner under a theory of strict liability was not alleged until appeal.

69. 348 So. 2d at 711.

70. Judge Learned Hand in *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) referred to three variables as determining the defendant's duty: (1) the probability of the risk occurring, (2) the gravity of the consequences if it does, and (3) the burden of adequate precautions. These have come to be seen as traditional considerations in assessing whether any specific conduct is negligence; certainly the first two are also useful, if not essential, to finding an unreasonable risk for purposes of strict liability.

would have been amply established against a strict liability co-defendant—since an unreasonable risk would have been requisite to the holding of negligence. However, insofar as different theories of liability are advanced against different defendants, it is possible that variations in the applicable social policy (*i.e.*, of each theory with respect to each party) will expand or constrict the scope of each defendant's duty. The juxtaposition of a private property owner and a political subdivision of the state as co-defendants in this case may be a good example of a situation where the policies with respect to the parties could militate toward different outcomes. The policies implicated in applying each theory of liability might likewise lead to divergent conclusions: perhaps it is misleading to say that knowledge of and ability to prevent a risk are irrelevant to the determination of strict liability; more accurately, the absence of knowledge or ability to control, while insufficient to assure a judgment for defendant, may cause a subtle re-calibration of the scales upon which the various interests are weighed. In some, but not all, instances this might result in a ruling for the defendant where the presence of scienter would have permitted liability to accrue.

It is understandable that the First Circuit did not choose to adopt a facially inconsistent holding by calling the same factual situation unreasonably risky for negligence purposes but not unreasonably risky in terms of a strict liability defect. The court was nevertheless plowing new ground in calling the plaintiff's simple contributory negligence victim fault under article 2317.[71] A simpler resolution of the strict liability issue appears to have been available in that the court could have concluded that the sidewalk adjoining one's property is not under the property owner's guard.[72]

A second case in which contributory negligence constituted victim fault and barred plaintiff's recovery under article 2317 is *American Road Insurance Co. v. Montgomery*.[73] Mrs. Montgomery was involved in an intersectional collision when she proceeded in the face of a traffic signal that showed red and green at the same time. She and the other driver sued the Highway Department for maintenance of a defective traffic light, grounding the claim on article 2317 strict liability rather than negligence since there was no evidence of either actual or constructive

71. This is apparently the first appellate case to hold that contributory negligence is equivalent to victim fault for purposes of exonerating a strict liability defendant under article 2317. The applicability of contributory negligence as a defense under any of these strict liability articles is by no means settled law.

72. *See* F. STONE, *supra* note 16, at § 328.

73. 354 So.2d 656 (La. App. 1st Cir. 1977), *cert. denied*, 356 So. 2d 430 (La. 1978).

knowledge. Mrs. Montgomery was sued by the other driver, by his insurer for its subrogation claim, and by the Highway Department for indemnity or contribution.

The First Circuit affirmed, holding the Highway Department not liable for any of the claims,[74] and awarding the other driver and her insurer recovery against Mrs. Montgomery—all based upon the defendant's negligence in proceeding in the face of the self-contradicting traffic light. The court first determined, significantly, that the *Loescher* ruling was applicable to the Highway Department because the department "had control or custody or *garde* of the light, the light had a defect, and the defect was a cause of damage."[75] Further holding that Mrs. Montgomery's negligence was a cause in fact, the court concluded: "We do not believe that the duty of the Highway Department to Mrs. Montgomery extended to guarding her against the consequences of her proceeding when faced with a yellow light, a red light or both a green and a red light."[76] In order to affirm the trial court's ruling, the appellate court was necessarily considering defendant's negligence to constitute victim fault for purposes of her claims and fault of a third person[77] with respect to the claims of the others against the Highway Department.[78]

74. *Id.* at 658. But see Justice Tate's dissent to denial of writs to the Montgomerys: "The highway department is solidarily liable because of its concurrent fault under Louisiana Civil Code article 2317." 356 So. 2d at 430. The minority view expressed in this statement by the author of the *Loescher* majority opinion is interesting for at least two reasons. It reveals a willingness to hold a public body strictly liable under article 2317. It also suggests that conduct arguably sufficient to establish victim fault (or fault of a third person) could be interpreted, under some circumstances, as only a concurrent cause of the damage rather than as totally exculpating victim fault—with a resultant distribution of the burden of damages between two or more persons.

75. 354 So. 2d at 658. *But see* Gallien v. Commercial Union Ins. Co., 353 So. 2d 1127 (La. App. 3d Cir. 1977), where the court refused to apply article 2317 strict liability to a gravity drainage district. The court was of the opinion that "until the doctrine of actual or constructive notice is overruled, it is still the law, despite the theoretical similarity of *Loescher* to a case such as the one at bar." *Id.* at 1131. It found support for this ruling in the belief that "to impose the *Loescher* rule on public bodies would have chaotic results because of their vast operations and the extensive properties owned, supervised, or in their custody and control." *Id.*

76. 354 So. 2d at 658-59.

77. Evaluation of the propriety of holding this behavior to be fault of a third person in order to defeat the other parties' claims against the Highway Department is beyond the scope of this paper.

78. This is clearly implied but not explicitly stated in the pertinent portion of the opinion which states:

> The owner or custodian of the thing is absolved from liability if he proves that the harm was caused by the fault of the victim, by the fault of a third person, or by an

It is evident that the court was anxious to absolve the Highway Department of all claims, although it felt constrained to apply the strict liability of article 2317 under the facts presented. Since it did not feel free simply to hold strict liability of this sort inapplicable to a public body, the court was perhaps too eager to embrace the only other available means of exonerating the Highway Department. It can be questioned whether the defendant's conduct under the circumstances is properly tagged negligence at all, and, secondarily, whether, if negligence, it is of a sufficient degree and kind to be exculpating victim fault.

The court did not sufficiently analyze the fact that defendant was stopped at the light, which was red, and only proceeded when, according to her testimony, she "saw" it turn green. It was established that a defect caused the light to show both red and green at that point. The failure to discuss the reasonableness of plaintiff's perception and judgment in the face of this defect is unsatisfactory. There may be a considerable difference between proceeding in the face of a red/green light which follows a simple red light and proceeding through a red/green light which is the only signal encountered at that location—a difference based on arguably disparate perceptions.[79]

It might have been possible to show that the dual traffic signal was not only visible, but also perceivable—that the red light should have "registered" in the plaintiff's mind. The question would still remain what would be the judgment of a reasonably prudent person—*e.g.*, whether that ideal person would consider the defective signal to mean "green" in the context in which it occurred. No doubt it would be negligent to proceed without extra caution through any ambiguous signal, but the nature and degree of such negligence as the basis of both victim and

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irresistible force. We have found no authority that this cause must be the sole one. A quotation from *Loescher v. Parr* . . . indicates that it need be only a substantial factor.

We find that the negligence of Mrs. Montgomery was a cause in fact.

354 So. 2d at 658.

79. Human visual perception includes selection and interpretation of the vast quantity of "raw" sensory data received by the eyes. Such selection and interpretation is largely based on prior experiences and the informational needs of the brain at the time. R. GREGORY, EYE AND BRAIN: THE PSYCHOLOGY OF SEEING 8, 11, (1969). It is perfectly possible that Mrs. Montgomery did in fact perceive (*not* actually *see*) a change to a plain green light and that any other driver would have experienced, under those circumstances, the same perception. The uncountable prior occasions in which a green light followed red with undeviating predictability and the slight shift in focus that would automatically occur when the green light became visible would be two factors which could lead one's "senses to be deceived." To hold one at fault when acting upon deceived perception is substituting strict liability of the victim for strict liability of a defendant who is custodian of the defective thing creating the erroneous perception.

third person fault in this case was given much too casual attention by the court.

Assumption of Risk

A 1977 Second Circuit case, *Richards v. Marlow*,[80] held plaintiff's assumption of risk to defeat possible liability of a landowner and lessor under Civil Code article 2317. Defendant's property included a network of pipes that had been part of the substructure for a pier. Plaintiff slipped and injured her mouth when tight-roping a wet pipe with wet feet. The evidence at trial showed the plaintiff to be a 13-year-old of above average intelligence who was familiar with the structure and aware of its potential danger, but confident of her ability to avoid injury. In handling plaintiff's allegation of fault under article 2317 the court assumed arguendo the defective nature of the structure but found the claim barred by plaintiff's fault in "voluntarily encountering a known danger."[81]

Richards involves the second traditional form of assumption of risk, one not inferrable from the person's employment but dependent upon facts which indicate a voluntary encounter with a known risk. The conduct need not be negligent since the plaintiff may be acting perfectly reasonably in assuming a risk.[82] Here the court found plaintiff's conduct also to be contributory negligence (in the course of discussing the trial court's erroneous application of the attractive nuisance doctrine[83]) since it constituted an unreasonable assumption of risk—*i.e.*, one which a reasonably prudent person, applying here a standard adjusted to the child's age, intelligence and experience, would not make. This case is not especially helpful in assessing the potential of assumption of risk/contributory negligence as victim fault since the court eventually ruled that the pipe structure was not defective for purposes of determining lessor liability under article 2695.[84]

80. 347 So. 2d 281 (La. App. 2d Cir. 1977).

81. *Id.* at 284.

82. Crowe, *Anatomy of a Tort*, 22 LOY. L. REV. 903, 915 (1976).

83. 347 So. 2d at 283.

84. *Id.* at 284. LA. CIV. CODE art. 2695 states:

> The lessor guarantees the lessee against all the vices and defects of the thing, which may prevent its being used even in case it should appear he knew nothing of the existence of such vices and defects, at the time the lease was made, and even if they have arisen since, provided they do not arise from the fault of the lessee; and if any loss should result to the lessee from the vices and defects, the lessor shall be bound to indemnify him for the same.

Presumed Fault

There are no reported cases in which presumed fault has been raised as a defense to strict liability under article 2317. It is easy, however, to imagine a factual situation in which such an argument would be available to the defendant. The number and variety of things that might be defective and cause injury, as the limited cases so far illustrate, are myriad and met daily in common experience—sidewalks, streets, cars, traffic lights, appliances, food products, farm or manufacturing machinery, and elevators are but a few. It is not unlikely that in some instances the person injured by these defective things will be a child behaving in a manner which would have been negligent in an adult. Similarly, the plaintiff could be the owner of a valuable animal. What, for example, would the court have ruled if Mr. Parr had lived in rural Louisiana and his treacherous magnolia tree had felled a prized bull, defectively on the lam in a closed range area (through no negligence of the plaintiff), rather than Mr. Loescher's Cadillac? No doubt the resolution of conflicting fault presumptions will depend heavily on appropriate policy considerations. On occasions when the relevant interests are closely aligned or of similar weight, the courts may want to re-examine their continued resistance to application of Civil Code article 2323.[85]

The breadth of the potential application of article 2317 makes generalization about likely boundaries for victim fault in this area almost impossible. However, some tentative conclusions can be ventured.

It may be factually difficult to find victim fault through such traditional defenses as assumption of risk or contributory negligence when liability for injury caused by a thing is alleged under article 2317 rather than 2316. One cannot have a voluntary encounter with full knowledge of the risks when the defect is latent; likewise, failure to discover and avoid a harm-producing defect is hardly fault if the defect was not discoverable. Defects of a sufficiently observable nature to permit application of one of these defenses will frequently not present unreasonable risks by the very fact that they are readily seen and avoided. Thus, plaintiff would lose on his prima facie case and relieve the court of considering the victim fault defense. Cases not resolved on the defect ques-

85. LA. CIV. CODE art. 2323 states: "The damage caused is not always estimated at the exact value of the thing destroyed or injured; it may be reduced according to circumstances, if the owner of the thing has exposed it imprudently." This article is one of the first statutory provisions for what is now called the doctrine of comparative negligence yet it is not applied by Louisiana courts to apportion damages between a plaintiff and defendant who have each exhibited some fault. Malone, *Comparative Negligence—Louisiana's Forgotten Heritage*, 6 LA. L. REV. 125 (1945).

tion might still, in certain circumstances, leave the defendant with the potential defense of presumed fault on the part of the victim.

One issue that will be largely peculiar to defenses under article 2317 may render the entire victim fault question moot with respect to certain defendants—the question whether strict liability for defective things applies to public bodies. Presumably the defendant's public or private status is one variable to be weighed with other interests in defining the scope of defendant's duty; to hold article 2317 strict liability uniformly inapplicable to public bodies, however, is a resurrection of the rule of governmental tort immunity and is vulnerable to the same attacks that have led to widespread abrogation of the rule.[86]

Conclusion

If the cases decided to date give no other guidance, they at least illustrate two negative points with respect to the victim fault defense: (1) there will not be uniformity in the conduct necessary to prove the defense under each of the articles; and (2) the defenses applicable to other actions cannot be adopted in their entirety for the strict liability action.

The victim fault defense must necessarily be viewed as a means of implementing the policies underlying the *Holland, Turner*, and *Loescher* decisions. In each decision, explicit reference is made to the fairness of providing recovery to the innocent victim. When the plaintiff is not an innocent victim, much of the rationale supporting his recovery is lost. There are instances, however, in which the social policies advanced by these decisions will impose on the strict liability defendant a duty which includes protection of a victim who is imprudent or worse.

Much of the victim fault analysis, then, involves a determination of whether some conduct of the plaintiff has stripped him of his innocence. Each case, however, also embodies concepts of societally assigned responsibility and, at least with respect to articles 2317 and 2321, a price paid for benefits derived. Thus the enterprise liability rationale is pertinent, directly or by analogy, to many of these strict liability situations. In fact, many factors will bear upon the outcome of these cases, some having greatest relevance to the plaintiff's case (*e.g.*, in showing unreasonable risk, defect, or custody) and some directly concerning the viability of the defendant's answer of victim fault. Among these would be at least the following: the social priorities attached to the particular relationship upon which the liability is predicated; the degree of moral cul-

86. *See, e.g.*, LA. CONST. art. XII, § 10; Board of Comm. v. Splendour Shipping & Enterprises Co., 273 So. 2d 19 (La. 1973).

pability, if any, assignable to each party's conduct; the economic ability of the parties; the economic relationship of the parties to the instrumentality of injury; the severity and likelihood of the risk; the relationship of the damage incurred to the risk (*i.e.*, in a sense, the foreseeability of this injury had the defect or deficiency been known or expected); the location of the incident; the voluntariness or deliberateness with which the victim encounters the risk-creating person or thing; and the voluntariness and deliberateness with which the defendant permits contact between the victim and the person or thing.[87] The victim fault consideration, in which so many of these concerns play an implicit role, functions largely to express the reasonableness or unreasonableness of risk. In short, it is a means of defining the scope of defendant's duty.

Such continuous sifting of facts and weighing of interests produces that unsatisfying uncertainty that is so prevalent in tort law, but the lesson of years of experience with negligence law (as well as the early historical version of strict liability at common law) is that application of hard and fast rules often leads to unjust results. The inevitable response is an outbreak of exceptions, ameliorating doctrines and occasional purposive judicial obtuseness in ignoring what is most unambiguously the applicable "rule of law." A response to the problem in negligence has been the method of analysis called "duty-risk,"[88] which encompasses a multifactor consideration such as suggested herein. The approach is characterized by flexibility and a policy-orientation and is not intrinsically restricted to a negligence action. It would appear to be the best available, if not an ideal, method for handling the victim fault defense in a strict liability action under articles 2317, 2318, and 2321.

There would really be two duty questions to be asked in analyzing the plaintiff's allegations and the defendant's answer. The first inquiry would be whether the duty of the defendant included protection against the precise type of injury or damage incurred. This relates to Malone's concept of the "ease of association of the injury with the rule relied

87. Some of these factors are mentioned in *Langlois v. Allied Chem. Corp.*, 258 La. 1067, 1084, 249 So. 2d 133, 140 (1971). *See also*, Johnson, *Death on the Callais Coach: The Mystery of Louisiana Wrongful Death and Survival Actions*, 37 LA. L. REV. 1, 43-44 (1976), and Malone, *Contributory Negligence and the Landowner Cases*, 29 MINN. L. REV. 61, 68-69 (1945), for an analysis of victim fault in terms of the defendant's duty in other contexts.

88. The landmark case applying this method of analysis in Louisiana is *Hill v. Lundin & Assoc., Inc.*, 260 La. 542, 256 So. 2d 620 (1972). The earlier case of *Dixie Drive It Yourself System v. American Beverage Co.*, 242 La. 471, 137 So. 2d 298 (1962), used an analogous approach in addressing the scope of protection of a statute. In *Holland v. Keaveney*, 306 So. 2d 838 (La. App. 4th Cir. 1975), the court used a duty-risk analysis in a strict liability action based on Civil Code articles 667, 669 and 2315.

upon"[89] and a negative answer would make it unnecessary to consider the victim's behavior. In effect, even an innocent victim under such circumstances would not recover. The second duty question would be whether the duty of the defendant encompassed a plaintiff engaged in the conduct of the particular victim, since "rules of conduct . . . are designed to protect *some* persons under *some* circumstances . . . ."[90] Answers to these two questions should permit a satisfactory determination of whether a presumption of fault is to attach to the defendant and whether it can be rebutted by the plaintiff's conduct. As David Robertson evaluates the advantages of the duty formulation,[91] they are

> myriad and formidable: (1) As a theory designed to account for and predict judicial outcomes, it is clearer and infinitely more cogent. (2) As a vehicle for suggesting the inevitability of human choice, it is far more honest. (3) As a means of indicating the range of policy factors that should be considered in reaching judgments of the sort in question, it is more evocative. ("Evocative," because it is rare that the duty formulation will lead to very extensive discussion of the underlying policy factors; but at least the importance of "policy" gets mentioned.) (4) In its function of allocating the respective decision-making powers and responsibilities of judge and jury, it makes more sense.

A fifth advantage might be added—it is adaptable and appropriate to analysis of the victim's fault under codal strict liability. It in fact permits reliance upon valuable experience in handling negligence-based liability without a clumsy transplanting of doctrines wholly inappropriate and, in some instances, of limited value even in the context in which they developed.

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89. Robertson, *Reason v. Rule in Louisiana Tort Law: Dialogues on Hill v. Lundin & Assoc., Inc.*, 34 LA. L. REV. 1, 8 (1973). The author uses this phrase to describe the concept advanced by Professor Malone in *Ruminations on Cause-in-Fact*, 9 STAN. L. REV. 60 at 73 (1956).

90. Malone, *supra* note 89, at 73.

91. Robertson, *supra* note 89, at 14-15.