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# **Answering a Fool According to His Folly: Ruminations on Comparative Fault Thirty Years On**

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“Answer a fool according to his folly, lest he be wise in his own eyes.”<sup>1</sup>

## INTRODUCTION

Tort law does not always heed biblical admonitions, but it generally has adhered to this one whether the fool, for purposes of litigation, appears as a plaintiff or a defendant. In this piece, our primary focus will be on the faulty plaintiff except insofar as the defendant’s level of fault might affect the recovery of the faulty plaintiff. From the early development of intentional torts to the modern applications of negligence and strict or absolute liability, tort law generally has often denied recovery to the victim whose conduct was not merely negligent but foolhardy—whether that foolhardiness was expressed as recklessness, wantonness, or willfulness. Traditional intentional tort law denied recovery to the victim who consented to the intentionally harmful conduct of the tortfeasor. With the advent of negligence in the nineteenth century, the law generally denied any recovery for the foolhardy victim of the negligent acts of another, but it went further under contributory negligence and denied recovery to the merely negligent plaintiff whose fault did not rise to the level of foolhardiness. In addition, the traditional negligence rule was that a victim who assumed the

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1. *Proverbs 26:5.*

risk—one who voluntarily encountered a known risk—was denied any recovery through application of the defense of assumption of the risk. Conveniently, but misleadingly, what constituted contributory negligence often overlapped with what courts called assumption of the risk. Because the result—no recovery for the victim—was the same in either case, the overlap did not matter.

As noted, in most cases, the foolhardy plaintiff also was deemed contributorily negligent, a conclusion that the plaintiff had failed to act reasonably under the circumstances for his or her own protection. Such contributory negligence, like assumption of the risk, was an affirmative defense that denied the victim any recovery. In the twentieth century, usually by legislative action, most states abandoned contributory negligence as an affirmative defense<sup>2</sup> and now allow the victim, who failed to act as a reasonable person to protect his or her safety, to recover some of the damages from the tortfeasor under a form of comparative fault, either of the so-called “pure” variety or in some modified form. Thus, in most cases the foolhardy victim theoretically could recover some damages under the theory of comparative fault, although he would be barred from any recovery for the same conduct by application of the other theory—assumption of the risk.

After the advent of comparative fault, some jurisdictions have retained all or some part of assumption of the risk as an affirmative (and complete) defense, either by legislation or by jurisprudential rule. Others, like Louisiana, have recognized that in most instances the same conduct that is contributory negligence is also properly called “secondary” or “implied” assumption of the risk, and, logically, because the legislature has said that a plaintiff’s conduct that contributes to the harm only reduces recovery, it would be improper to apply assumption of the risk generally to bar all recovery. Notwithstanding the demise of contributory negligence as a bar to recovery and the rise of comparative fault, courts and legislatures adhere to the belief that there is some conduct that is worse than comparative fault. A tort victim’s conduct may not be merely the failure to act as a prudent person for his own safety, but may be so foolhardy that, some would argue, the law should not allow any recovery at all. But such an arguable policy—so appealing in its simplicity—brings with it knotty questions regarding how to implement it without drifting back to a bar to recovery by the merely negligent plaintiff under theories of negligence or strict liability.

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2. See *infra* note 105 (discussing the few states that retain the contributory negligence bar).

The Louisiana legislature addressed this problem in 1979, for effect in 1980, adopting pure comparative negligence as the rule to govern recovery by a “faulty” plaintiff. It thereby eschewed modified comparative fault regimes that other states had adopted, such as the “equal to” comparative negligence approach (when the plaintiff’s fault equals that of the defendant or defendants, there is no recovery at all) or the “greater than” approach (same result when the plaintiff’s fault is greater than that of the defendant or defendants).<sup>3</sup> At the same time, the legislature did not address the jurisprudential defense of assumption of the risk.<sup>4</sup> Later, the Louisiana Supreme Court promptly concluded that in the area in which conduct could be considered both contributory negligence and secondary or implied assumption of the risk, the latter defense is subsumed into the new comparative fault rules. The court, however, has recognized two situations in which conduct falls within traditional assumption of the risk principles but does not overlap with the conduct that customarily is considered contributory negligence. One, of course, is express assumption of the risk by contract. The effect of express assumption of the risk in Louisiana is governed by the Louisiana Civil Code.<sup>5</sup>

The other situation is the one in which the victim voluntarily encounters a known risk that is “obvious to all comers,” sometimes also referred to as an “open and obvious risk.” Attending a hockey game and sitting in seats higher than the protective barrier around the rink is probably conduct that will be construed as voluntarily encountering the risk of being struck by an errant puck. The same may be said of sitting down the third-base line at a baseball game, beyond the protective fencing, with respect to the risk of being hit by a foul ball. In pre-comparative fault days, the plaintiff who complained of being struck by an errant puck or ball would very likely have been barred from recovery, and whether his conduct was called “contributory negligence” or “assumption of the risk” was largely immaterial. Barring recovery on the basis of the plaintiff’s conduct often made it unnecessary for the court to delve

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3. See generally DAN B. DOBBS, *THE LAW OF TORTS* 505 (2001) (discussing the “pure or complete system” of comparative fault and the “two incomplete systems”).

4. The legislature also provided that percentages of fault were to be assigned to other involved persons, whether parties to the litigation or not. See LA. CIV. CODE art. 2323 (2009). This was not essential to the comparative negligence enactment, but was fateful in many ways.

5. See LA. CIV. CODE art. 2004 (2009) (nullifying any clause in a contract that “in advance, excludes or limits the liability” of one party for causing physical injury to the other party or for damages to the other party resulting from “intentional or gross fault”).

into the knotty question of the duty owed by the defendant to the plaintiff. Regardless of whether the basis was plaintiff conduct or lack of defendant duty, the result was the same: the plaintiff recovered nothing. Now, it might be more appropriate to say that the defendant either had no duty to protect against the risk that occurred or did not breach any duty that was owed.

The cases described in the preceding paragraph are not really the same as the claim of a "foolhardy" plaintiff, although perhaps persons who choose seats at an athletic event without considering the potentially injurious consequences of their choices could be described by some as foolhardy, even though this seems to strain the plain meaning of the word. Are there instances in a pure comparative fault scheme in which a plaintiff's conduct can be the basis of a total bar to recovery rather than merely a diminution of the amount of recovery? And if so, how is the court to conduct its analysis?

This has been an uneven effort at best in the thirty years since the enactment of pure comparative negligence in Louisiana. Some of the effort has been judicial in nature, and some of it has been legislative. For their part, the courts have struggled with the task of defining what conduct falls within the "no recovery" category as opposed to the "diminished recovery" category and in formulating a theory of law that is just, easy to understand, and useful in predicting future outcomes in litigation. Generally speaking, conduct that is not merely contributing negligence subject to comparative fault principles, but rather is foolhardiness or other conduct that could arguably justify denial of any recovery, may be addressed by concluding that: (1) the defendant did not owe a duty to protect the plaintiff from this harm; or (2) the defendant's conduct was not unreasonable in light of the plaintiff's conduct; or (3) the defendant's conduct, if otherwise wrongful, was not the legal or proximate cause of the plaintiff's damages. The extent to which the courts are willing to construct a body of law that essentially circumvents the principle of pure comparative negligence effective in 1980, by concluding either that there should be a total bar to recovery based on the plaintiff's conduct or perhaps that there should be a full recovery despite the plaintiff's conduct, is a major part of our discussion in this Article. There is certainly an argument to be made that the legislature created an overarching pure comparative fault regime and that, except where provided by statute, the courts should not bar the recovery of a faulty plaintiff, but merely reduce that recovery. The strength of the argument derives from the legislature's express statement in

Civil Code article 2323, and that interpretation is consistent with the Louisiana Civil Code and with the legal positivist tradition.<sup>6</sup>

The courts have not been alone in crafting circumventions of comparative fault. Since the adoption of comparative negligence thirty years ago, the legislature has adopted statutes that deny all recovery to a plaintiff under certain situations that might otherwise fall under the principles of diminished recovery inherent in a pure comparative fault scheme. In other words, having passed the pure comparative negligence scheme thirty years ago, the legislature thereafter has been periodically engaged in providing exceptions to it without an obvious blueprint for doing so. This, too, is a major part of our discussion here. These statutes, when coupled with the judicial tendency in some cases to deny recovery to the foolhardy plaintiff under the various schema mentioned above, have arguably resulted in a species of patchwork modified comparative fault scheme, where in some cases, or some types of cases at least, a plaintiff's fault can result in no recovery.

Thus, as much as we might prefer to say that the law is clear and consistent, we know otherwise. As noted, the judicial and legislative tinkering with pure comparative negligence principles, though, is impossible to deny. The purpose of this Article is to evaluate where Louisiana law is today in its treatment of the foolhardy victim or other victims whose conduct might be such that the law could logically and fairly deny recovery. Sometimes, Louisiana law has answered the fool according to his or her folly and permitted no recovery, but the results are not consistent, and the theoretical basis is unclear and perhaps even incoherent. All four of the authors have contributed to this Article in various ways, summarizing for the interested reader how Louisiana arrived at its present situation, thirty years on; how these conclusions have been reached; who bears the burden of producing evidence; and the role of presumptions in evaluating the conduct. We may profitably begin with the judicial experience.

### I. JUDICIAL REACTION TO COMPARATIVE FAULT

The primary issue considered in this part of the Article will be the relationship between the duty-risk analysis and what has been called the defense of open and obvious risk in the wake of Louisiana's adoption of pure comparative fault, effective in 1980.<sup>7</sup> That is, does a defendant's duty to protect a plaintiff from a

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6. See generally FREDERICK SCHAUER & WALTER SINNOTT-ARMSTRONG, *THE PHILOSOPHY OF LAW* 29-32 (1996).

7. 1979 La. Acts No. 431.

foreseeable risk of harm extend to an open and obvious risk? If not, then, by definition, a court has the power to decide, as a matter of law, that the defendant owes no duty to protect a particular plaintiff from a foreseeable but open and obvious risk. Alternatively, may a court conclude that while the defendant owes a duty to protect the plaintiff from a foreseeable and open and obvious risk, because the risk is open and obvious, the defendant does not breach that duty by failing to obviate the risk? Or, might the court conclude that the defendant does owe a duty to protect the plaintiff against an open and obvious risk but that the plaintiff's recovery may be reduced by her fault under ordinary comparative fault principles?<sup>8</sup> And finally, could a court, after the adoption of comparative fault, determine that the plaintiff assumed the risk when she voluntarily encountered an open and obvious risk, thereby barring recovery (as opposed to reducing recovery under comparative fault principles)? It is this interlocking series of questions to which we now turn and consider in light of Louisiana Supreme Court jurisprudence since the adoption of comparative fault.

The victim fault—scope of the risk issue is at the heart of a long-standing academic debate between our co-author Professor and Practitioner H. Alston Johnson and our friend Professor David Robertson. Shortly after the adoption of pure comparative fault in Louisiana, Professor Johnson contended that a court still has the power to conduct a case-specific duty—risk analysis and decide whether, in a tort case, one of three situations might be present. The first is a situation in which the defendant's duty extends to protect the plaintiff against his own fault, and thus there should be no reduction in recovery by virtue of the plaintiff's fault. The second is a situation in which the plaintiff's conduct is such that it has removed the plaintiff completely from the ambit of protection spread by the defendant's duty, and thus there should be no recovery, even at a diminished level. And the third are the very commonplace situations—thought to be the great bulk of the cases—in which it would be appropriate to quantify the plaintiff's fault and permit it to serve as a diminution of recovery.<sup>9</sup> What Johnson argued was that the court could still, even in victim fault cases, conduct a case-specific duty—risk analysis. To Johnson, a court always has the obligation to define the scope of the duty in

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8. Portions of this section are adapted from THOMAS C. GALLIGAN, JR., "HILL V. LUNDIN & ASSOCIATES" REVISITED: DUTY RISKED TO DEATH? (1993) [hereinafter GALLIGAN, DUTY RISKED TO DEATH].

9. H. Alston Johnson, *Comparative Negligence and the Duty-risk Analysis*, 40 LA. L. REV. 319 (1980).

the case before it. He argued that even under comparative fault principles, there are still Louisiana cases where the defendant's duty is such that even the negligent plaintiff is entitled to recover 100% of her damages. That is, in such cases the defendant's duty includes the risk of the plaintiff's contributing fault, and the duty is so important from a societal standpoint that the negligent plaintiff still ought to recover 100%.<sup>10</sup> Naturally, according to Johnson, there could also be cases where the plaintiff's conduct is so egregious or the risk so open and obvious that the defendant's duty does not extend to protect against the risk that transpired even though the defendant may have violated some duty designed to protect other members of society.

Professor Robertson disputed Johnson's view of the law on the interrelationship between comparative fault and duty-risk.<sup>11</sup> Robertson argued that the defendant's duty ought to be defined by the court, not in reference to a particular negligent plaintiff, but in reference to a blameless plaintiff.<sup>12</sup> He basically said that the legislature created a pure comparative fault regime and that the courts should not use a no-duty holding to bypass that legislative intent. But how should the court merge duty-risk and pure comparative fault? In essence, the court under Robertson's model would engage in a duty-risk analysis at a higher level of generality than would the court under Johnson's model. In the open and obvious risk context, Robertson would contend that the duty should not be negated because the risk is open and obvious. To Robertson, if the duty extends to a blameless plaintiff, it would extend to the blameworthy plaintiff who encountered an open and obvious risk as well. The plaintiff's blameworthiness would reduce, rather than bar, recovery.

It is worth reiterating some critical components of the arguments. Johnson's argument contemplates and relies on a case-specific duty-risk application. He asks: in this case does the defendant's duty protect this plaintiff from this risk that occurred in this manner through, in part, this plaintiff's own particular negligence? He deals with the specific facts before the court. To Johnson, justice is meted out at the case-specific level with the judge doing a lot of the meting as a matter of law. Robertson's duty-risk analysis deals with a hypothetical case. He would ask: does the defendant owe a duty to a blameless plaintiff to refrain from the conduct that injured this plaintiff? If the answer to that

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10. *Id.* at 333-34.

11. DAVID ROBERTSON, *THE LOUISIANA LAW OF COMPARATIVE FAULT: A DECADE OF PROGRESS* 22 (1991).

12. *Id.* at 29.



question is "yes," then the defendant owes a duty to the particular plaintiff, and the jury must allocate fault between the plaintiff and the defendant.<sup>13</sup> Robertson's method is a broader application of the duty-risk method, arguably to categories of cases involving hypothetical blameless plaintiffs rather than to the actual facts of a particular case. The judge analyzes generally in deciding duty; the jury analyzes more specifically when comparing fault.

Of course, Johnson's method gives the judge the primary responsibility to decide whether the alleged duty encompasses the plaintiff's negligence, and the intent of his article thirty years ago was to preserve the duty-risk analysis with respect to such questions rather than assume that the legislature meant to discard the analysis without ever mentioning it. That is, under the Johnson approach, the court, in part, decides the case-specific scope of the duty question by determining whether the plaintiff's contributory negligence is within the scope of the defendant's duty. As noted, the judge has three options according to Johnson: (1) determine that there is a duty under the facts involved and that the duty is such that the plaintiff ought to recover 100%; (2) determine that there is no duty under the involved facts and that the plaintiff would recover nothing; or (3) in the vast majority of cases, determine that there is a duty involved but that it ought to be left to the jury to allocate fault under the comparative negligence statute.<sup>14</sup> Stated differently, in the third group, the law is indifferent to the precise result as a matter of policy, and, therefore, it is permissible to let lay persons mete out "rough justice" in allocating fault among all involved persons.

Alternatively, to Robertson, duty is more general, and fault allocation, which is the jury's job, becomes a sort of case-specific scope of duty question relating to the plaintiff's negligence. That is, once the court determines that the defendant owes a duty to a hypothetical blameless plaintiff (really to a class of blameless plaintiffs), the jury then basically decides the scope of the duty question (regarding this plaintiff's fault) as part of its allocation of fault.

The early judicial resolution of the Johnson-Robertson debate was evolving and uncertain.<sup>15</sup> Then, in 1988, the Louisiana Supreme Court decided *Murray v. Ramada Inns, Inc.*,<sup>16</sup> one of the most significant tort cases the court has ever decided, which,

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13. Of course the jury would first have to determine that both the defendant and the plaintiff are at fault.

14. Johnson, *supra* note 9, at 332.

15. See, e.g., GALLIGAN, DUTY RISKED TO DEATH, *supra* note 8, at 77.

16. 521 So. 2d 1123 (La. 1988).

appropriately, was partially argued by Robertson and Johnson for amicus curiae entities on either side. In *Murray*, a young man, who was aware of the risks of diving into shallow water, dove into shallow water at a Ramada Inn swimming pool, hit his head, was paralyzed, and eventually died from his injuries.<sup>17</sup> To the decedent, the risk of injury from shallow water diving was open and obvious. In this context, the precise legal issue before the court was whether the doctrine of assumption of risk as a bar to recovery survived the passage of the comparative fault statute.<sup>18</sup> Prior to the enactment of the statute, the case would have been decided under secondary assumption of the risk principles and likely would have resulted in no recovery.

The court, in a careful and thorough opinion by then-Justice Calogero, determined that implied secondary assumption of the risk did not survive the adoption of comparative fault as a bar to the plaintiff's recovery.<sup>19</sup> Implied secondary assumption of the risk arises where, even "though the defendant . . . is found to be at fault, the plaintiff is barred from recovery on the ground that he knew of the unreasonable risk created by the defendant's conduct and voluntarily chose to encounter that risk."<sup>20</sup> In jettisoning the concept of secondary implied assumption of the risk, the court reasoned that most secondary implied assumption of the risk cases were basically nothing but contributory negligence cases.<sup>21</sup> Thus the legislative decision to abrogate contributory negligence as a bar also abrogated a bar to recovery under the moniker of assumption of the risk, at least when that assumption of the risk was of the secondary implied variety.<sup>22</sup> Critically, the court decided that secondary implied assumption of the risk did not survive the adoption of comparative fault, whether the plaintiff actually knew

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17. *Id.* at 1125.

18. *Id.* at 1124.

19. *Id.* at 1129.

20. *Id.* at 1129. Implied secondary assumption of the risk must be contrasted with implied primary assumption of the risk, where the plaintiff voluntarily encounters a situation that involves "inherent and well known risks." *Id.* Implied primary cases are those where everyone knows of the risk in general. Foul ball cases, where spectators at baseball games are hit by wayward balls, falls into this implied primary category. In *Murray*, the court said it is best to think of such implied primary cases as no-duty or no-breach cases. *Id.* In Robertson's terms, in an implied primary case, no duty would be owed even to the blameless plaintiff. Implied primary assumption of the risk survives *Murray*. Finally, express assumption of the risk, which occurs where the plaintiff expressly contracts with another not to sue for future injuries, also survives. *But see* LA. CIV. CODE art. 2004 (2009).

21. *Murray*, 521 So. 2d at 1129.

22. *Id.* at 1129-30.

of the risk he voluntarily encountered or merely should have known of the risk he voluntarily encountered.<sup>23</sup> Thus, secondary assumption of the risk did not survive even where the plaintiff had actual, subjective knowledge of the risk encountered.

In *Murray*, after losing the assumption of the risk argument, the defendants argued that even if assumption of the risk no longer existed, a court might still hold, under the facts before it, that the defendants did not owe a duty to the plaintiff who had actual knowledge of the risk encountered.<sup>24</sup> The defendants pointed out that when the plaintiff dove into the shallow water of the swimming pool, he admittedly knew the dangers of shallow water diving.<sup>25</sup> Of course, this is, in essence, Johnson's argument that a court can employ a case-specific duty-risk analysis to bar recovery (by holding that under the circumstances the defendants did not owe any duty to the plaintiff). The defendants argued that, even if it might have owed a duty to a blameless plaintiff, it did not owe a duty to this plaintiff because this plaintiff actually knew of the very risk that transpired.<sup>26</sup> In fact, right before the fateful dive, the plaintiff had warned his brothers of the dangers of shallow water diving.<sup>27</sup>

The court refused the defendants' invitation to hold that there was no duty owed to Murray and, in doing so, stated:

If accepted, defendants' [no duty] argument would inject the assumption of risk doctrine into duty/risk analysis "through the back door." . . . 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>28</sup>

The language seems to be an endorsement of Robertson's view and a rejection of Johnson's theory. That is, the court seemed to say: look at the defendant's hypothetical duty to all potential plaintiffs, including blameless plaintiffs, and determine whether or not there is a duty owed to them. If there is a duty owed to the blameless plaintiff, then there is a duty owed to the blameworthy plaintiff. If there is a duty owed to the blameless plaintiff, then there is a duty owed to the blameworthy plaintiff who was subjectively aware of the risk that she voluntarily encountered. The

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23. *Id.* at 1134.

24. *Id.* at 1135.

25. *Id.*

26. *Id.*

27. *Id.* at 1125.

28. *Id.* at 1136.

plaintiff's knowledge of the risk does not negate the duty but, rather, may reduce recovery under the comparative fault statute. Thus, the scope of the risk, in relation to the plaintiff's fault is, in essence, decided by the jury in reducing recovery, not by the court in defining the defendant's duty.<sup>29</sup> Furthermore, under the supreme court's language, a trial court would seem to be without power to decide that the defendant's duty does not extend to a particular plaintiff who, because of his particular and peculiar knowledge, knew of the risk but still engaged in a dangerous activity. Language in some Louisiana court cases subsequent to *Murray* was consistent with the Robertson view. For instance, in *Socorro v. City of New Orleans*,<sup>30</sup> the court said:

Therefore, *Murray* requires a review of the City's duty separate and apart from any knowledge the plaintiff had or should have had of the danger he was encountering. The group of appellate court cases cited by the City for the proposition that it had no duty to warn of the obvious danger of diving into unknown waters, all barred recovery by a partially negligent plaintiff under the label "contributory negligence," "assumption of risk," or "no duty owed by defendant." These opinions focused on the knowledge and conduct of the plaintiff in concluding that no duty was owed by the defendant. This method of analysis has now been rejected by *Murray*, which explains that the plaintiff's knowledge and conduct is considered only to determine the extent of his comparative negligence.<sup>31</sup>

Thus, after *Murray*, one might have thought that the duty-risk analysis in a case involving an open and obvious risk would not involve any judicial inquiry or consideration of the plaintiff's actual knowledge of the risk. Certainly, that was the initial reaction to *Murray*. However, in negligence cases there is often more than

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29. It should be noted that, customarily, scope of the risk is not a question for the jury. Thus, it is appropriate to ask what it is about the enactment of a pure comparative negligence statute that converted scope of the risk into a jury question.

30. 579 So. 2d 931 (La. 1991).

31. *Id.* at 941; see also *Molbert v. Toepfer*, 550 So. 2d 183, 186 (La. 1989) ("[T]he fact that the plaintiff may have been aware of the risk created by the defendant's conduct should not operate as a total bar to recovery." *Murray*, 521 So.2d at 1134. Instead, the plaintiff's appreciation of the danger is among the factors to be considered in assessing percentages of fault."). For an enduringly important piece on *Murray*, see James Michael Chamblee, *Murray v. Ramada Inns, Inc.: The Expansion of Duty: A Step Towards the Reestablishment of Proximate Cause*, 49 LA. L. REV. 1003 (1989).

one way to skin a cat, and that reality became apparent soon thereafter in *Washington v. Louisiana Power & Light Co.*<sup>32</sup> In *Washington*, the supreme court did not waver from its duty analysis in *Murray*; instead, it focused on another element of negligence to deny recovery—breach.

Washington was a CB radio buff who had a tall antenna in his backyard.<sup>33</sup> Alongside the antenna was an uninsulated 8000-volt electrical distribution line.<sup>34</sup> In 1980, Washington and his son were moving the antenna when it contacted the uninsulated electrical line.<sup>35</sup> Washington and his son received shocks and burns.<sup>36</sup> After the accident, Washington said to his son, "That could have killed me."<sup>37</sup> Washington also related to others the impression the accident had made upon him concerning safety.<sup>38</sup> Thereafter, Washington was meticulously careful.<sup>39</sup> However, in 1985, Washington was found dead in his backyard with the antenna lying nearby.<sup>40</sup> Apparently, Washington had moved the antenna and again come in contact with the distribution line, but this time the consequences were fatal.<sup>41</sup>

Washington's survivors sued Louisiana Power and Light (LP & L), and a jury found for the plaintiffs.<sup>42</sup> The appellate court reversed, concluding that LP & L had not breached any duty owed to the deceased.<sup>43</sup> Critically, the appellate court grounded its holding in the failure to establish a breach of the duty to exercise reasonable care, rather than holding that the defendant owed no duty to protect the plaintiff. The appellate court pointed to the accident five years earlier as well as to the fact that Washington, since 1980, had been extremely careful to avoid the distribution line.<sup>44</sup> The supreme court, in an opinion by then-Justice Dennis, affirmed the result in the intermediate appellate court.<sup>45</sup>

Justice Dennis analyzed the case under Judge Learned Hand's negligence formula—balancing costs and benefits in light of the

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32. 555 So. 2d 1350 (La. 1990).

33. *Id.* at 1352.

34. *Id.* at 1351.

35. *Id.* at 1352.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 1353.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

likelihood of the occurrence of the accident.<sup>46</sup> Justice Dennis apparently only used the formula to determine whether the possibility of injury, or loss, constituted an unreasonable risk of harm in light of the social benefits of the line and the cost to insulate.<sup>47</sup> Thus, he employed the Learned Hand formula only to determine breach. But careful consideration of exactly what the court said is apt. Specifically, whenever a court sets aside a jury verdict (as the appellate court had done) and its opinion is based on the failure to establish breach, the opinion necessarily resembles a “duty or no duty” situation, especially when there is no discussion of the applicable standard of review of jury verdicts. For instance, in rejecting a jury decision, one would expect the appellate court to state how and why the jury was manifestly erroneous in reaching its decision. Moreover, it seems somewhat ironic to adopt Robertson’s approach to duty, looking at the blameless plaintiff, and then have the court go back to a case-specific approach to decide, contrary to the jury, that there was no breach. That is why the cynic might interpret *Washington* as a no-duty case posing as a no-breach case.

In *Washington*, the court held that the burden of insulating, or otherwise protecting against electrocution risks from the electrical line, was greater than the probability of the occurrence of an accident multiplied by the loss that might have occurred if an accident arose.<sup>48</sup> Justice Dennis stated:

Under the circumstances, there was not a significant possibility before the accident that Mr. Washington or anyone acting for him would detach the antenna and attempt to carry it under or dangerously near the power line. Standing alone, Mr. Washington’s 1980 accident might have caused an objective observer to increase his estimate of the chances that this particular antenna might be handled carelessly. The other surrounding circumstances, however, overwhelmingly erase any pre-accident enlargement of the risk at that site. Except for the single occasion of the 1980 accident, the antenna was stationed safely in the corner of the backyard for many years, one to three years before the 1980 mishap and five years afterwards. Most of that time it was maintained safely in the pipe receptacle which, by Mr. Washington’s design, allowed it to be lowered only in a safe direction. Between

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46. *Id.* at 1353–54.

47. *See id.*

48. *Id.*

his close call in 1980 and his fatal accident in 1985, Mr. Washington had never been known to handle the antenna carelessly. Indeed, after he and his son narrowly escaped death or serious injury in 1980, his remarks to friends and relatives indicated that the experience had convinced him to keep the antenna far away from the power line. That he continued to be aware of the danger and take exemplary precautions to avoid it until his fatal accident was further illustrated by the care that he and his friend took when they lowered and laid it next to the fence several days before the accident.

The likelihood that the antenna in this case would be brought into contact with the power line was not as great as the chances of an electrical accident in situations creating significant potential for injuries to victims who may contact or come into dangerous proximity with the powerline due to their unawareness of or inadvertence to the charged wire.<sup>49</sup>

One can see that, in deciding that there was no breach of the applicable standard of care, the court considered Washington's actual knowledge of the risk of danger from the distribution line in his backyard to conclude that the probability of an accident occurring was extremely low. This low probability led to the no-breach (or no-duty?) conclusion. The plaintiff's knowledge essentially entered the case "through the back door," not to simply reduce recovery, but to bar it. One may argue that the decision in *Washington* is technically consistent with the *Murray* duty analysis because the court was not considering actual knowledge to define duty. However, actual knowledge was considered to conclude that there had been no breach of the relevant duty. The result in either case was the same: no recovery. Likewise, note that if *Washington* is a breach case, the court made the decision about breach, not the jury; the jury had concluded that, in fact, there was liability, including breach.<sup>50</sup> And, there was no extensive analysis of the applicable standard of review of jury decisions.

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49. *Id.*

50. In some ways the flipside of *Washington* was presented in *Dobson v. Louisiana Power & Light*, 567 So. 2d 569 (La. 1990). In *Dobson*, the Louisiana Supreme Court held that the family of an electrocuted tree trimmer could recover from the electrical utility. *Id.* at 576. One of the main issues was whether *Dobson* knew the risk posed by the distribution line that electrocuted him. *Id.* at 573-74. The majority thought that he did not, while the dissenters thought that he did. *Id.* at 577-81 (Cole, J., dissenting).

Measuring *Washington* against *Murray*, as lawyers and courts are compelled to do, would lead one to conclude that, after *Murray*, a court cannot use the plaintiff's subjective, individualized actual knowledge of a risk (knowledge that would make the risk open and obvious to the plaintiff) to hold that the defendant did not owe a duty to the plaintiff to protect against an unreasonable risk. At the same time, after *Washington*, one can persuasively argue that a fact-finder, or a judge reviewing a fact-finder's opinion, can consider the plaintiff's subjective, individualized actual knowledge of a risk to conclude that the risk is not unreasonable, and therefore that the defendant did not breach the duty to the particular knowledgeable plaintiff, even if the duty was owed to the blameless plaintiff who was not aware of the risk. Therefore, after these two cases, one might conclude that the plaintiff's actual knowledge is irrelevant to the duty determination but relevant to the breach determination. Finally, after *Washington*, it is analytically possible that the plaintiff's actual knowledge of an open and obvious risk might also be relevant in allocating fault, assuming the jury gets that far. The fact-finder might find that, even given the plaintiff's actual knowledge of the risk, the defendant still breached its duty of care to the plaintiff. Then, the plaintiff's actual knowledge would be relevant to the fact-finder's allocation of fault.

The supreme court's next major foray into the open and obvious morass came in *Pitre v. Louisiana Tech University*.<sup>51</sup> *Pitre* involved a tragic sledding accident on the campus of Louisiana Tech in Ruston, Louisiana.<sup>52</sup> During a rare ice and snow storm, a student using a large plastic garbage can lid approximately five-to-six feet in diameter as a sled collided with the concrete base of a light pole located in a campus parking lot and suffered paralysis.<sup>53</sup> He had been joined on the lid by three other individuals, all in a prone position, facing head first down a hill and launched by a push from another individual.<sup>54</sup>

The student and his family filed suit, contending that the university had a duty to warn of the risks associated with sledding near the parking lot or to protect against the injury by barricading or otherwise covering the concrete base.<sup>55</sup> Interestingly, in the first paragraph of the opinion, Justice Victory, writing for the court, stated: "Under the circumstances, we find that Tech had no duty

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51. 673 So. 2d 585 (La. 1996).

52. *Id.* at 586.

53. *Id.* at 587-88.

54. *Id.*

55. *Id.* at 588.



since the light pole was obvious and apparent and the risks of colliding with it while sledding are known to everyone.”<sup>56</sup> Here, the court seems to be applying *Murray* and Robertson’s approach. That is, the court said that the defendant owed the plaintiff no duty because the risk was apparent to all and not merely to the plaintiff. While that is the case, the method by which the court made that determination merits further attention.

After reviewing the facts, the court turned to its legal analysis and began as follows:

A landowner owes a plaintiff a duty to discover any unreasonably dangerous condition and to either correct the condition or warn of its existence. It is the court’s obligation to decide which risks are unreasonable, based upon the facts and circumstances of each case. Whether a particular risk is unreasonable is a difficult question which requires a balance of the intended benefit of the thing with its potential for harm and the cost of prevention.

In making this determination in negligence actions, the “obviousness” and “apparentness” of the complained of condition have historically been taken into consideration.<sup>57</sup>

The court was stating apparent legal truisms. However, the court seems to say that whether a duty is owed depends upon whether the risk is unreasonable and that such a determination involves a balancing of benefits and costs. If the risk is unreasonable, the court seems to be saying that a duty is owed. Alternatively, if the risk is not unreasonable, the court seems to be saying that no duty is owed. Of course, that cost–benefit analysis is precisely the cost–benefit analysis employed in *Washington*. But in *Washington* the court employed a cost–benefit analysis to determine breach. In *Pitre*, the cost–benefit analysis is particularly interesting because the court used it to determine duty. Of course, one might persuasively argue that the cost–benefit analysis used to determine whether a risk is reasonable or unreasonable is the heart of the breach decision and is one that should be conducted by the fact-finder, rather than by the court as lawgiver in determining duty.

Thereafter, the *Pitre* court turned to the portion of the *Murray* opinion stating that the defendant’s duty should not turn on a particular plaintiff’s state of mind, but must be gauged by

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56. *Id.* at 586.

57. *Id.* at 590 (citations and footnote omitted).

determining the standard of care that the defendant owes to all potential plaintiffs.<sup>58</sup> Concluding that discussion, the court said:

Thus, the obviousness and apparentness of a potentially dangerous condition are relevant factors to be considered under the duty-risk analysis. If the facts of a particular case show that the complained of condition should be obvious to all, the condition may not be unreasonably dangerous and the defendant may owe no duty to the plaintiff.<sup>59</sup>

This language is consistent with *Murray*'s admonition about the duty to all and with the court's initial statement regarding the lack of a duty in the case before it, but tying in the unreasonably dangerous concept seems to mingle duty and breach. Justice Victory then went on to apply the cost-benefit analysis to the facts, considering, among other things: the utility of the light pole, the likelihood and magnitude of harm in light of the obviousness and apparentness of the risk, the cost to prevent the harm, and the nature of the activity.<sup>60</sup>

In the final paragraph before its decree, the court stated, in part:

When deciding whether a condition is unreasonably dangerous, the obviousness or apparentness of the complained of condition is a factor to be considered as part of the likelihood of the harm element. Under the facts of this case, we find sledding is not inherently dangerous and that the light pole and the danger of sliding down the hill into the pole were obvious and apparent to all on the evening of the accident. Thus the light pole did not present an unreasonably dangerous condition and Tech had no duty to warn of the apparent danger or take steps to protect

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58. *Id.* at 590–91 (citing *Murray v. Ramada Inns, Inc.*, 521 So. 2d 1123, 1136 (La. 1988)).

59. *Id.* at 591.

60. When considering the nature of the activity, the court stated:

It is common knowledge that one must be able to steer to avoid colliding with fixed objects while sledding. Despite his familiarity with the campus and the parking lot, Pitre chose to sled, on his back, head first, down a hill on a device over which he had no control. While Pitre claims not to have perceived the danger, if true, he clearly was unreasonable in not doing so and taking simple measures, such as sledding feet first and on a sled not so slippery, to protect himself.

*Id.* at 593. Of course, if the plaintiff did not perceive the danger and behaved unreasonably, then would it be more appropriate for recovery to be reduced rather than barred? The answer would seem to be “yes,” unless any and every reasonable person would have perceived the danger, in which case there would be no duty owed to the blameless plaintiff under the *Murray* approach.

against injury. . . . Since Tech had no duty to Pitre under these facts, the defendants cannot be held liable.<sup>61</sup>

Once again, here, the court is considering knowledge of everyone on campus that evening, i.e., knowledge of all. This focus is consistent with *Murray*'s duty analysis. By concluding that the risks of sledding near the unguarded light pole were obvious to all, the court determined that the defendant owed no duty to the plaintiff to protect against that obvious risk.<sup>62</sup> In this regard, its analysis is consistent with *Murray*. At the same time, the court engaged in a balancing of costs and benefits that is arguably conducted when answering the breach question (as it was in *Washington*, albeit in rejecting a jury determination of breach), rather than the duty question. Critically, it was precisely the cost-benefit balancing at the breach level that justified the no-liability decision in *Washington*, albeit based on *Washington*'s particular knowledge rather than the knowledge of all.

There were a number of dissents and concurrences in *Pitre*. Perhaps most relevant for present purposes is Justice Lemmon's concurrence in which he argued that the decision was justified as a decision that the defendant did not breach its duty to the plaintiff, rather than as a no-duty determination.<sup>63</sup>

What was becoming apparent, after *Pitre*, was that the so-called open and obvious risk issue involves deciding how to treat legally the plaintiff's actual knowledge of a particular risk—irrelevant to duty under *Murray* and *Pitre*, arguably relevant to breach under *Washington*, and clearly relevant to comparative fault allocation if the case goes that far. Additionally, what was becoming opaque was the overlap between duty and breach decisions. To further recap in midstream, implied secondary assumption of the risk did not survive the adoption of comparative fault in Louisiana. Thus, if the defendant's conduct poses a risk of unreasonable harm to a blameless plaintiff or class of plaintiffs, then the defendant owes a duty to a particular plaintiff who is aware of the risk that the defendant's harm posed to him. The fact that the plaintiff is aware of the risk and still encounters it will result in reduced recovery rather than no recovery. This seems to be the lesson of *Murray*.

Alternatively, in *Washington*, the court seems to have held that a plaintiff's knowledge of a particular risk can be taken into account in determining whether the defendant breached any duty

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61. *Id.* at 596.

62. *Id.*

63. *Id.* (Lemmon, J., concurring).

owed to the plaintiff. Thus, after *Washington*, the adept defense lawyer knows that the plaintiff's particular knowledge is not relevant to a duty determination but is relevant to a breach determination. After *Pitre*, things did not change significantly, although the court's approach to analyzing duty involved a balancing of costs and benefits, the same balance used in *Washington* to determine breach. Of course, the *Pitre* court's emphasis on global knowledge (knowledge of all), rather than the plaintiff's particular knowledge, is consistent with *Murray*. In that regard then, perhaps the court's analysis indicates that it is appropriate for courts to engage in a global cost-benefit analysis at the duty stage of the case, as in *Pitre*—costs and benefits to all in light of risks known to all—and to leave it to the fact-finder to engage in more a specific cost-benefit analysis at the case-specific breach level, as in *Washington* (albeit in rejecting a jury decision).

It might be said that *Pitre* closed the initial group of open and obvious post-comparative fault cases. However, it is inevitable that cases involving what defendants claim are obvious risks will continue to be grist for the judicial mill. And, since 2004, the Louisiana Supreme Court has considered several open and obvious risk cases. The first was *Hutchinson v. Knights of Columbus, Council No. 5747*,<sup>64</sup> involving a slip and fall at a festival. In March 1998, Mr. and Mrs. Hutchinson visited the Crawfish Festival in Chalmette, Louisiana.<sup>65</sup> They entered the festival grounds between two amusement rides and exited the same way.<sup>66</sup> As they exited, Mrs. Hutchinson tripped and fell on electric cables that were being used to power the rides.<sup>67</sup> The defendant moved for summary judgment, arguing that the plaintiffs were not on a pedestrian walkway.<sup>68</sup> At the time of the fall, the defendant contended that there were barricades in place for the purpose of restricting access to the area and that in order for the plaintiffs to access the area they would have had to circumvent the barricades.<sup>69</sup> The plaintiffs responded by claiming that they had looked for an entrance to the fairgrounds and, seeing none, followed others onto the fairgrounds between the two rides.<sup>70</sup> They also stated that they did not cross any barricades to enter or exit the festival.<sup>71</sup> Despite these factual differences of opinion, the trial court granted the defendant's

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64. 866 So. 2d 228 (La. 2004).

65. *Id.* at 230.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 230–31.

70. *Id.* at 231.

71. *Id.*

motion for summary judgment, and the appellate court reversed.<sup>72</sup> In considering the scope of the defendant's duty, the supreme court said:

It is accurate to state that defendants generally have no duty to protect against an open and obvious hazard. If the facts of a particular case show that the complained of condition should be obvious to all, the condition may not be unreasonably dangerous and the defendant may owe no duty to the plaintiff [citing *Pitre*]. Specifically, in the trip and fall case, the duty is not solely with the landowner. A pedestrian has a duty to see that which should be seen and is bound to observe whether the pathway is clear. The degree to which a danger may be observed by a potential victim is one factor in the determination of whether the condition is unreasonably dangerous. A landowner is not liable for an injury which results from a condition which should have been observed by the individual in the exercise of reasonable care or which was as obvious to a visitor as it was to the landowner.

However, as the Court of Appeal in the instant case noted, whether a condition is unreasonably dangerous requires consideration of (1) the utility of the complained of conditions; (2) the likelihood and magnitude of harm, which includes the obviousness and apparentness of the conditions; (3) the cost of preventing the harm; and (4) the nature of the plaintiff's activities in terms of its social utility or whether it is dangerous by nature. From the affidavits in the record, a genuine issue of material fact remains as to whether a tripping hazard extended through a pedestrian pathway.<sup>73</sup>

In essence then, the court noted that if the condition is open and obvious to all, the condition may not be unreasonably dangerous, and no duty may be owed. The court's language concerning the pedestrian's duty to see that what should be seen might be read to apply not just to the particular pedestrian, but to all. This reading would be consistent with *Murray*. Of course, the court also seems to tie the existence of the duty to a determination of whether or not the risk is unreasonable, as the court did in *Pitre*. Again, this analytical focus may conflate the duty and breach elements of negligence, thereby transferring the jury's power to determine breach to the court to determine duty or no duty. Of

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72. *Id.*

73. *Id.* at 234–35 (citations omitted).

course, the court's conclusion that genuine issues of material fact prevented summary judgment gives solace to those who may be concerned that the court's opinion in *Pitre* might deprive the jury of its important decision-making power concerning breach.

The supreme court's two most recent decisions dealing with allegedly open and obvious risks were both per curiam opinions and, in many ways, have muddied the analytical waters even further. The first is *Dauzat v. Curnest Guillot Logging Inc.*<sup>74</sup> In that case, an experienced logging truck driver sued various parties, including a landowner, for injuries he suffered when he struck a hole in a logging road.<sup>75</sup> The landowner, who had no part in building or maintaining the road, moved for summary judgment.<sup>76</sup> The plaintiff admitted that he could have avoided the hole if he had seen it, that it was a sunny day when the accident occurred, and that the road was wet and muddy.<sup>77</sup> He stated that although there was no standing water over the hole, he did not see it.<sup>78</sup> The plaintiff also stated that the logging road at issue got worse with every load, and he had told the logging company to fix it, but no one ever smoothed the road.<sup>79</sup> The plaintiff also said, "[I]f anybody knows anything about logging, you are coming out with a thousand pounds every time you come out on a soft road, the road does nothing but get worse."<sup>80</sup> The plaintiff acknowledged that he had no contact with the landowner and that no one from the landowner's office ever came to the job site.<sup>81</sup> The trial court denied the motion for summary judgment, the court of appeal affirmed, but the supreme court reversed.<sup>82</sup>

The court began its analysis by citing and relying upon the *Hutchinson* language quoted above. Then, the court, reminiscent of its analysis in *Pitre* and *Hutchinson*, analyzed the social utility of the logging road, noted that the evidence conclusively established that logging roads are normally not paved or improved, and found that driving a logging truck is dangerous by nature.<sup>83</sup> To the court, the crucial factor for consideration was the substantial likelihood and magnitude of harm from the hole, including consideration of

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74. 995 So. 2d 1184 (La. 2008).

75. *Id.* at 1185.

76. *Id.*

77. *Id.* at 1185–86.

78. *Id.* at 1186.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 1185–86.

83. *Id.* at 1187.

whether the hole was apparent or obvious.<sup>84</sup> In light of all the evidence, the court went on to state that:

Taken as a whole, this evidence establishes that [the] plaintiff was aware of the condition of the logging road, having traveled over it several times on the day of the accident. Moreover, the hole was not unusually large, as shown by [the] plaintiff's testimony that he "never even thought twice about it" after he hit it. Under these circumstances, we must conclude that the presence of the hole in the logging road was an obvious danger which did not create a significant likelihood of injury.

In the instant case, Lake Pearl [landowner] established through deposition testimony and affidavits that it did not breach its duty to protect [the] plaintiff against an unreasonably dangerous condition in the road. [The p]laintiff failed to produce any evidence which would establish a material factual dispute. Accordingly, the district court erred in denying Lake Pearl's motion for summary judgment.<sup>85</sup>

The language is somewhat puzzling, although perhaps one may sensibly read it in light of *Murray, Washington*, and *Pitre*. First, let us deal with the puzzling aspects of the language and approach. In the first sentence quoted immediately above, the court focuses on what this particular plaintiff knew about the road and his personal travel earlier in the day, even though it had earlier—in citing *Hutchinson*—referred to what was obvious to all. Then, the court notes that the hole was not particularly large, a fact that would seem to make the hole less obvious rather than more so. This is important because the plaintiff testified that he did not know about the hole. Thus, in essence, perhaps he should have known but did not, for purposes of the motion, actually know. Finally, in the second paragraph the court concludes that there was no breach; it apparently does not decide the case on a no-duty basis, but rather held there was no breach.

Turning to *Murray, Washington*, and *Pitre, Dauzat* is really not a *Washington*-type case because *Dauzat*, unlike *Washington*, did not have actual knowledge of the risk. But, could it be said that the risk was obvious to all? Perhaps not, if it was a small risk. However, what may have been open and obvious to all experienced logging truck drivers, a class to which *Dauzat*

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84. *Id.*

85. *Id.*

belonged, was that logging roads are frequently wet, muddy, and riddled with holes. As such, one might say *Dauzat* could be understood to hold that if the plaintiff is a member of a class of people who, because of their profession or experience, have knowledge of a general risk that would be open and obvious to all members of the group, then a member of the group who encounters the risk may not recover because there is no duty owed to members of the group because of the obviousness of the risk vis-à-vis the group, a reading that would be consistent with *Murray*. Alternatively, one could read *Dauzat* as consistent with *Pitre* because since the risk was obvious to all experienced logging truck drivers, the road and the hole did not present an unreasonable risk of harm.

*Eisenhardt v. Snook*<sup>86</sup> is more challenging. Don Eisenhardt was Dorles Snook's live-in boyfriend.<sup>87</sup> On the day in question, Eisenhardt was working outside, and Ms. Snook was working inside.<sup>88</sup> When Eisenhardt finished his outside work, he went inside to take a bath.<sup>89</sup> While he was inside, Ms. Snook attempted to take a full bag of trash outside, but the bag broke on the steps, emptying its contents, including eggs, squash, and other trash.<sup>90</sup> Ms. Snook swept the steps and sprayed them with water.<sup>91</sup> In the meantime, Eisenhardt had finished bathing and had dressed to go to the store.<sup>92</sup> As he exited the front door with a soda in one hand and his wallet in the other, he slipped and fell on what he claimed was a slick film of eggs and squash—the remains of the spilled garbage.<sup>93</sup> Eisenhardt filed suit against Ms. Snook and her insurer.<sup>94</sup> At the conclusion of the trial, the court entered judgment for the defendants.<sup>95</sup> The trial judge explained as follows:

Aside from the credibility issues that I don't think it's necessary to get into, I do think that he was probably injured, probably fell, but we just don't live in a perfect world. And just because somebody gets hurt that doesn't mean that somebody gets paid a big chunk of money.

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86. 8 So. 3d 541 (La. 2009).

87. *Id.* at 542. This fact does not seem particularly determinative of anything, except perhaps the plaintiff's familiarity with the defendant's home; however, the court does mention that.

88. *Id.*

89. *Id.*

90. *Id.* at 542–43.

91. *Id.* at 543.

92. *Id.* at 542.

93. *Id.* at 543.

94. *Id.* at 542.

95. *Id.* at 543.



That's just the way it is. Now when you go into a grocery store the standards are a little bit higher, and the reason for that is because the grocery stores have on, and stores in general, have on display items that they want you to purchase. So they draw your attention intentionally to those items on the shelf and the customers are in there and they're not necessarily looking down at their feet. But all of us have to look where we're going. I mean you learn that when you're two years old and walking that you have got to watch where you're going. And he was not looking where he was going. She had washed down the steps. He should have seen the water and known that there was a hazard. I almost slipped down the other day when it was raining at my house[,] that I've lived all my life practically in[,] on some steps that were wet. Whose fault was it? It was my fault. I wasn't careful enough. I knew it was wet, could look and see that it was wet, and I wasn't careful enough. If I would have fallen it would have been my fault. You have to watch where you're going. And based on that I just do not think that liability-that there's liability present here because I think it's all Mr. Eisenhardt's fault.<sup>96</sup>

Clearly, the trial court found for the defendants, but it is not clear exactly which element of the negligence analysis he concluded that the plaintiff did not establish. No duty? No breach? And if the obligation of the plaintiff was to watch where he was going, is that because the eggs and squash would be open and obvious to all? In the end, the trial judge said that he found that the accident was "all" the plaintiff's fault.<sup>97</sup> Does that mean that the judge was allocating 100% of the fault to the plaintiff or that he was resuscitating the doctrine of plaintiff's negligence as a bar to recovery? On appeal, the appellate court reversed, concluding that the trial court made a factual determination that the slime presented a hazard and that the trial court concluded that the plaintiff was 100% at fault.<sup>98</sup> Disagreeing with that conclusion, the court of appeal reallocated fault at seventy percent to the plaintiff and thirty percent to Ms. Snook.<sup>99</sup>

Then, the supreme court reinstated the trial court's judgment, relying upon language from *Dauzat* that was based on language from *Hutchinson*.<sup>100</sup> Next the court said:

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96. *Id.* at 543-44.

97. *Id.* at 544.

98. *Id.*

99. *Id.*

100. *Id.* at 544-45.

In the case at bar, the court of appeal premised its opinion on a finding that the district court made a factual determination that an unreasonably dangerous condition was created when Ms. Snook washed the steps after spilling trash on them. However, a complete reading of the district court's reasons for judgment reveals that it made no such finding. Although the district court referred to a "hazard," it did so in the context of explaining that Mr. Eisenhardt "should have seen the water and known that there was a hazard." The court further stated, "I think it's all Mr. Eisenhardt's fault." From these statements, it was obvious that the district court made a finding that Ms. Snook was not liable for Mr. Eisenhardt's injuries because the condition of the steps should have been observed by Mr. Eisenhardt in the exercise of reasonable care.

An appellate court may not set aside a district court's finding of fact in the absence of manifest error or unless it is clearly wrong. On review, an appellate court must be cautious not to re-weigh the evidence or to substitute its own factual findings just because it would have decided the case differently.

Although the court of appeal purported to affirm the district court's factual findings, it is readily apparent that the court of appeal actually rejected these findings. Based on our review of the record, we find no manifest error in the district court's factual determination that the condition of the steps should have been open and obvious to Mr. Eisenhardt. While the steps may have been slippery due to water, not every minor imperfection or defect in a thing will give rise to delictual responsibility. The record further supports the district court's finding that Mr. Eisenhardt, who walked out of the house carrying items in both of his hands, was not acting with sufficient care at the time of the accident.

In summary, we find the record supports the district court's determination that Mr. Eisenhardt should bear all of the fault for this accident. The court of appeal erred in holding otherwise. Accordingly, we will reverse the judgment of the court of appeal insofar as it reverses and amends the district court's judgment, and reinstate and affirm the district court's judgment in its entirety.<sup>101</sup>

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101. *Id.* at 545.

This language raises more questions than it answers. In the first paragraph, the court seems to be saying that the appellate court erred in reading the trial court's reasons for judgment as finding that the slime presented an unreasonable risk of harm. But why was that an unreasonable risk of harm? It was unreasonable because the slime should have been observed by the plaintiff—not what was actually observed or would have been observed by all, but what should have been observed by that plaintiff. In the next paragraph the court appropriately notes an appellate court's obligation to give deference to a trial court's factual findings but that giving deference is less appropriate on legal questions, such as duty. Then, the court says that the trial court was not manifestly erroneous in finding that the condition of the steps should have been open and obvious to the plaintiff. But would it be open and obvious to all, as *Murray* seems to require? Or actually known to the plaintiff, as in *Washington*? Or obvious to a particular class of plaintiffs because of their profession or experience, as in *Dauzat*? The class of live-in boyfriends? Then the court states that when the plaintiff walked out of the house, he was not acting with sufficient care. But should that fact result in a reduction of recovery, rather than no recovery? Finally, the court says that the plaintiff should "bear all of the fault." But that reads as if the plaintiff is 100% at fault. However, for the plaintiff to be properly allocated 100% of the fault, that would mean that it was analytically possible to allocate some fault to the defendant, but that would require a breach of the appropriate standard of care, and the court seemed to reject that possibility in the first three paragraphs quoted above.

So, where are we with the open and obvious risk dilemma, in light of the Louisiana Supreme Court jurisprudence considered above? We may confidently posit that we are all confused, but we will endeavor to provide some interpretive guidance. First, we know that, per *Murray*, if the risk is open and obvious to all, then a court could properly hold that the defendant owes the plaintiff no duty vis-à-vis that known risk. This is sensible, is consistent with Robertson's approach and, for that matter, Johnson's method, and does not undermine the comparative fault regime by allowing a plaintiff's negligence to operate as a bar to recovery in a case where the defendant's conduct poses a risk of harm to the hypothetical blameless plaintiff.

Second, we can read *Dauzat* to mean that the *Murray* "open and obvious to all" concept may be subject to a somewhat more nuanced reading that looks at whether the risk is open and obvious to a group of plaintiffs who have a particular or heightened awareness of the risk or class of risks because of their profession or experience.

Third, we know that, per *Pitre*, a court may sometimes consider the openness and obviousness of the risk to all in the context of deciding the scope of the defendant's duty by balancing costs and benefits to determine whether the thing or conduct presents an unreasonable risk of harm. One might argue that balance is normally a question for the fact-finder when deciding breach and that conflating the breach and duty elements can result in a potential misallocation of decision-making responsibility, which strengthens the judge's role and potentially weakens the jury's. Of course, one might also conclude that it is appropriate for the court, when analyzing duty, to balance costs and benefits at a general or policy level, leaving it to the jury to conduct a more case-specific cost-benefit analysis as part of the breach element. Be that as it may, even in *Pitre* the court focused on what was known to all, not what was known to the particular plaintiff.

Fourth, we know that confusion continues to abound from the language used in particular cases, and the court's recent opinion in *Eisenhardt* may be the most troubling of all because it seems to deny recovery as a result of what a particular plaintiff should have known rather than what all would know and rather than what the particular plaintiff actually knew. In doing so, the court arguably revives the doctrine of plaintiff negligence as a bar to recovery, although that was probably not its intent.

What are the policy implications of the issue, given the purposes of tort law? We will here briefly consider the issue from the perspective of morality, deterrence, legislative supremacy, and the administration of justice. Morality or fairness provides no singularly persuasive rationale for how to treat the open and obvious risk. From one perspective, if a defendant has, through its fault, created an open and obvious risk, it seems unjust for the defendant to escape liability or responsibility for creating that risk. Likewise, one might argue that it seems unfair for a plaintiff who is aware of an open and obvious risk to recover when he suffers injury after having encountered that risk. But to deny recovery to the plaintiff for moral reasons is to sanction not holding the defendant responsible for the risk it has created, which is not a morally consistent position. Perhaps one could justify denying recovery if one says that the plaintiff was in the best position to avoid the risk at the last relevant moment. However, that seems to say that morally the last negligent actor is somehow worse off than an earlier negligent actor—a judgment that cannot be made on a global moral level, but depends upon particular factual and cultural

contexts.<sup>102</sup> Arguably, it is morally justifiable to deny recovery or responsibility where the risk is known to all because then everyone, not just the plaintiff, would be aware of the risk, and the moral defendant may take that fact into account in deciding how to act because she can rely on people who are aware of the risk not to voluntarily encounter it and place themselves in harm's way.

Deterrence would seem to point toward allowing recovery as a rule. In this context, we use deterrence to mean providing an incentive to actors to take account of the possible costs of their activities before they act. Here, if defendants know they will not be responsible for open and obvious risks, they will not take account of the costs that those risks pose to others when deciding how to act. Likewise, if plaintiffs know they will not recover when they encounter an open and obvious risk, that may have some deterrent effect on them, but none on the defendants. Consequently, an allocation of fault seems to provide some sense of rough deterrence to each party.

Particularly in Louisiana, as a civil law jurisdiction, adherence to the notion of legislative supremacy is appropriate, and here one must give great deference to the 1980 implementation of a (mostly) comparative fault regime, as well as to the 1996 legislation that extended the comparative fault principles to virtually all at-fault actors. Thus, any rule or system of rules that tends to undermine comparative fault principles to either allow the faulty plaintiff to recover 100% (a subject to which we have not addressed much attention because to date the courts have not) or to allow the faulty defendant to escape liability must be viewed with some skepticism and, if allowed to exist at all, must be kept in relative check.<sup>103</sup>

As for the administration of justice, the main concern here may be with simplicity, clarity, and the allocation of responsibility between judge and jury and between trial and appellate courts. The simple rule of *Murray* is clear and easily applied. The gloss that has been applied since brings some confusion. The Johnson approach is likewise clear and transparent because it requires courts to clearly articulate their reasons for decision and preserves the carefully constructed edifice of duty-risk analysis so painstakingly crafted by Louisiana judges over a generation.

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102. Moreover, focusing on a party having the opportunity to avoid the risk "at the last relevant moment" raises the specter of "last clear chance" as a cleansing argument for a faulty plaintiff—a concept happily consigned to the dustbin of legal history by the adoption of pure comparative negligence.

103. Author Johnson observes that it was always his intent that the possibility of full recovery by a faulty plaintiff at one end of the spectrum or the possibility of a faulty defendant escaping liability altogether at the other end of the spectrum would be rare and, thus, would be thereby "kept in relative check."

However, potentially conflating duty and breach could be troublesome because it arguably transfers power from the jury to the court, and it arguably transfers power from the trial court to the appellate court.<sup>104</sup> The more specific the cost-benefit analysis at the duty level, the more conflation and power transfer that may occur.

Finally, we know that there is cannon fodder for both plaintiff lawyers and defense lawyers in the cases we have discussed. There is fodder for those who support Robertson's view of comparative fault and duty-risk and some fodder in *Pitre* for those who support Johnson's view. And, perhaps, most prophetically, there will continue to be cases where defendants argue (sometimes successfully) that the openness and obviousness of the risk involved justifies no recovery, under whatever legal name.

## II. THE LEGISLATURE GETS INTO THE ACT: MODIFYING A PURE COMPARATIVE FAULT SYSTEM

As we have seen in the preceding pages, we in Louisiana have emerged from the benighted days when the affirmative defenses of contributory negligence and assumption of the risk zeroed plaintiffs based on their risky conduct even if the defendant was more blameworthy and engaged in conduct that created far greater risks than the plaintiff.<sup>105</sup> Yet, our pure comparative fault regime represents a swing of the proverbial pendulum to the other extreme position. We now have plaintiffs who can recover whatever percentage is allocated to defendants notwithstanding the determination that the plaintiffs themselves are far more blameworthy or that their conduct created substantially greater risks than the conduct of the defendants. The dissatisfaction with both extremes can be encapsulated in an example. A plaintiff who is five percent at fault arguably should not be barred from recovering from a defendant who is ninety-five percent at fault (reflecting the discomfort with the old rules of contributory negligence and assumption of the risk), and a plaintiff who is

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104. Author Johnson does not necessarily regard this result—if it occurs—as undesirable. Author Galligan is somewhat more concerned, although he recognizes that it happens.

105. Benighted days? In any event, the trend has been away from the contributory negligence bar, with only five jurisdictions (Alabama, the District of Columbia, Maryland, North Carolina, and Virginia) clinging to that approach. See RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY §17 tbls. (2000) [hereinafter RESTATEMENT (THIRD) OF TORTS]. For an instructive history and discussion of contributory negligence and comparative fault, see HARPER, JAMES AND GRAY ON TORTS ch. 22 (3d ed. 2007).

ninety-five percent at fault arguably should<sup>106</sup> not recover anything from a defendant who is a mere five percent at fault (reflecting the dissatisfaction with pure comparative fault).<sup>107</sup> One possible solution to the discomfort at both extremes is to eschew a pure comparative fault regime in favor of a modified comparative fault system that bars a plaintiff's recovery when the plaintiff's fault allocation reaches a certain level relative to the defendant's fault allocation.<sup>108</sup> However, the modified comparative fault regimes are not necessarily a panacea, as elucidated by their detractors.<sup>109</sup>

As discussed in Part I, courts, whether properly or not, have been active in crafting jurisprudential doctrines under which some plaintiffs are denied recovery notwithstanding Louisiana's pure comparative fault regime. The courts' reaction seems to be based on a notion that there are plaintiffs who do such foolish things or create such risks that it is not fair for them to recover. Thus, courts are engaged in creating replacements for the old recovery-barring defenses of contributory negligence and assumption of the risk. While the precise scope and name of these replacements is not yet clear, their existence cannot be denied, even if they cannot be coherently explained or understood. In contrast, modified comparative fault regimes address this issue as part of the basic rules of the system by barring recovery when a plaintiff's allocation of fault reaches a certain level, most commonly fifty percent or greater than fifty percent. Interestingly, pure comparative fault is a system that all courts apparently cannot countenance in all cases for all plaintiffs, as indicated by the Louisiana courts' doctrines, such as open and obvious risk, that bar some plaintiffs' recovery as outlined in Part I of this Article.

Still, there is very little that is concrete or predictable about the courts' application of the open and obvious doctrine or other doctrines that bar plaintiffs' recovery. Enter the legislature. And while the legislation as a whole may not be coherent, individual

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106. Author Galligan parts with his co-authors on the use of the word "should" here and notes that, under Louisiana's pure comparative fault régime, "should" must be replaced with "does."

107. See DOBBS, *supra* note 3, at 506 ("The complete system of comparative fault often strikes casual observers as unfair."); John R. Grier, Comment, *Rethinking the Treatment of Mitigation of Damages Under the Iowa Comparative Fault Act in Light of Tanberg v. Ackerman Inv. Co.*, 77 IOWA L. REV. 1913, 1919 (1992) ("Opponents of pure comparative fault contend it is morally unfair to allow recovery by claimants bearing a majority of fault for an accident.").

108. DOBBS, *supra* note 3, at 505 (discussing the "pure or complete system" of comparative fault and the "two incomplete systems"); Grier, *supra* note 107, at 1919-20 (discussing the pure and modified comparative fault systems).

109. See, e.g., HARPER, JAMES AND GRAY ON TORTS, *supra* note 105, ch. 22.15, at 464-65.

statutes are clear and must be reckoned with. Since Louisiana's legislative adoption of pure comparative fault, the legislature has not been content to leave entirely to the courts the business of denying recovery to foolish or faulty plaintiffs. The Louisiana legislature has been very active in passing statutes that bar recovery by plaintiffs (or their representatives) in certain defined circumstances. The legislature does this in the form of statutes that create "immunities" for defendants sued by plaintiffs who have engaged in specified risky or blameworthy conduct or activities. Some of these statutes focus on the blameworthy activity of the plaintiff, and others are framed in terms of the defensible conduct of the defendant in responding to a blameworthy plaintiff. These statutes are somewhat more concrete and certain than the jurisprudential doctrines, and they are clearly legislative exceptions to the fundamental concept of pure comparative negligence. That is, although all of the statutes require some fact-finding to determine if the plaintiff's conduct brings her within the bar to recovery, the conduct described in the statutes is more specific than open and obvious risk. What is not apparent is whether the statutes demonstrate any systematic pattern from a policy perspective. Or, are they merely a patchwork of individual statutes that individually deny recovery to the faulty plaintiff *de jour*? If the latter is the case, then they are mere statutes, like common law rules; they are not comprehensive in the spirit of the Louisiana Civil Code.

This part of the Article discusses some of the Louisiana statutes, enacted after comparative fault was adopted, that bar plaintiffs' recovery. These present an interesting mosaic. In most jurisdictions that have adopted comparative fault by legislation, the legislature has opted for a modified system.<sup>110</sup> Louisiana is one of the states in which the legislature has enacted a pure comparative fault system. After considering the array of statutes enacted by the legislature to bar some plaintiffs' recovery, one might posit that the legislature has now chosen to modify substantially its nominally pure comparative fault and has also expressed inferentially the concept that the definition of "duty"—be it by a court or the legislature—still has a role to play alongside pure comparative negligence.

#### *A. Felons—Fleeing or Committing*

There have been a number of cases throughout the nation in which a person was injured while committing a felony or fleeing

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110. RESTATEMENT (THIRD) OF TORTS, *supra* note 105, § 17 tbls.



the commission of a felony and sued someone for her injuries. For example, felons have sued property owners for conditions on their property that injured the felon while she was committing the felony or fleeing the scene.<sup>111</sup> In 1996, the Louisiana Legislature enacted a statute, Louisiana Revised Statutes § 9:2800:10, which immunizes any person from damages suffered by a perpetrator of a felony while the person was committing the felony or fleeing the scene.<sup>112</sup> It includes a provision common to the statutes discussed in this part of the Article providing that it does not apply if the injuries are caused by an intentional act involving excessive force. The statute is like many of the others in that it completely denies recovery to a very blameworthy plaintiff—one who commits a felony.

Another feature of the statute that has been repeated in other such statutes is the invocation of criminal law principles to deny recovery. This is a feature that also renders the statute less predictable and certain than the legislature might have desired. Consider, for example, the case of *Kirkland v. Entergy New Orleans, Inc.*, in which a power company was sued for wrongful death by the family of a person who broke into one of the company's concrete vaults housing electrical equipment, only to be electrocuted.<sup>113</sup> The defendant power company moved for summary judgment, arguing that the family was barred from recovery by operation of the statute.<sup>114</sup> As the court noted, the result depended on whether the decedent was committing a burglary or criminal property damage, which are felonies, or

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111. See, e.g., *Byers v. Radiant Group, LLC*, 966 So. 2d 506 (Fla. Dist. Ct. App. 2007).

112. 1996 La. Acts No. 46, § 1; LA. REV. STAT. ANN. § 9:2800.10 (2009).  
Immunity from liability for injuries sustained while committing a felony offense

A. No person shall be liable for damages for injury, death, or loss sustained by a perpetrator of a felony offense during the commission of the offense or while fleeing the scene of the offense.

B. The provisions of this Section shall apply regardless of whether the injury, death, or loss was caused by an intentional or unintentional act or omission or a condition of property or a building. However, the provisions of this Section shall not apply if injury to or death of a perpetrator results from an intentional act involving the use of excessive force.

C. For purposes of this Section “damages” includes all general and special damages which may be recoverable for personal injury, death, or loss of or damage to property, including those otherwise recoverable in a survival or wrongful death action.

113. See *Kirkland v. Entergy New Orleans, Inc.*, 779 So. 2d 42 (La. App. 4th Cir. 2001).

114. *Id.* at 43.

criminal trespass, which is a misdemeanor.<sup>115</sup> Because that issue could not be determined from the materials filed on the summary judgment, the court decided that summary judgment was properly denied.<sup>116</sup>

The legislature's decision to deny recovery to felons has obvious appeal, but as *Kirkland* demonstrates, the statute's limitation of the bar to those committing felonies reduces the certainty and often will make precise factual inquiries necessary. Thus, if the legislature intended the statute as a vehicle to dispose of such cases at a pretrial stage, such as summary judgment, the statute may not achieve that result.

### *B. Drunk (or Drugged) Drivers, Alcohol Providers, and Social Hosts*

The legislature passed a statute in 1999 that denies recovery to a plaintiff who sustains injuries while operating a "motor vehicle, aircraft, watercraft, or vessel" while (1) legally intoxicated (blood alcohol level of 0.08 or more) or under the influence of a controlled or dangerous substance and (2) receiving an allocation of fault of more than twenty-five percent, when his fault was a contributing factor in causing the damages.<sup>117</sup> A Louisiana court

115. *Id.* at 44.

116. *Id.* at 45.

117. 1999 La. Acts No. 1224, § 1; LA. REV. STAT. ANN. § 9:2798.4 (2009).

Immunity from liability; injuries sustained by persons driving under the influence of alcoholic beverages or drugs

A. Neither the state, a state agency, or a political subdivision of the state nor any person shall be liable for damages, including those available under Louisiana Civil Code Article 2315.1 or 2315.2, for injury, death, or loss of the operator of a motor vehicle, aircraft, watercraft, or vessel who:

(1) Was operating a motor vehicle, aircraft, watercraft, or vessel while his blood alcohol concentration of 0.08 percent or more by weight based on grams of alcohol per one hundred cubic centimeters of blood; or

(2) Was operating a motor vehicle, aircraft, watercraft, or vessel while he was under the influence of any controlled dangerous substance described in R.S. 14:98(A)(1)(c) or R.S. 40:964.

B. The provisions of this Section shall not apply unless:

(1) The operator is found to be in excess of twenty-five percent negligent as a result of a blood alcohol concentration in excess of the limits provided in R.S. 14:98(A)(1)(b), or the operator is found to be in excess of twenty-five percent negligent as a result of being under the influence of a controlled dangerous substance described in R.S. 14:98(A)(1)(c); and

(2) This negligence was a contributing factor causing the damage.

applied this statute to grant summary judgment to a business sued by an eighteen-year-old employee who drank alcohol at the business and then drove away and was injured in a vehicular accident in *Stewart v. Daquiri Affair, Inc.*<sup>118</sup> This statute actually embraces a modified comparative fault approach, setting a threshold level at which recovery is barred, but the bar-to-recovery level is not fifty percent or fifty-one percent, but rather “in excess of twenty-five percent.”<sup>119</sup> This statute also does not seem likely to dispose of cases at an early stage, such as summary judgment, because it requires an allocation of fault, which is a fact-intensive inquiry usually left to the jury.

The *Stewart* case also involved arguments regarding an older Louisiana statute that bars plaintiffs from recovering against alcohol providers and social hosts.<sup>120</sup> Some states have “dram

C. For purposes of this Section, “damages” include all general damages, including those otherwise recoverable in a survival or wrongful death action, which may be recoverable for personal injury, death or loss, or damage to property by the operator of a motor vehicle, aircraft, watercraft, or vessel or the category of persons who would have a cause of action for the operator’s wrongful death.

D. The provisions of this Section shall not apply if the operator tests positive for any controlled dangerous substance covered by the provisions of R.S. 14:98(A)(1)(c) or R.S. 40:964 and the operator is taking that substance pursuant to a valid prescription for the identified substance or a health care provider verifies that he has prescribed or furnished the operator with that particular substance.

E. Unless the operator’s insurance policy provides otherwise, nothing in this Section shall be construed to preclude the operator from making a claim under his or her own policy for first party indemnity coverages.

118. 20 So. 3d 1041 (La. App. 1st Cir. 2009), *writ denied*, 19 So. 3d 477 (La. 2009).

119. It should also be noted that in the Louisiana anti-dram-shop legislation, LA. REV. STAT. ANN. § 9:2800.1 (2009), the purveyor of alcoholic beverages has no responsibility for injury to an intoxicated patron or to a third person, based on the legislative declaration that the “proximate cause” of such injury is not the providing of alcohol, but rather its consumption. The net effect of the statute, of course, is that the purveyor of alcohol does not “share fault” with the imbiber as would be dictated by the comparative negligence statute. Rather, the purveyor has “no duty” to the imbiber, regardless of their relative fault, and has no duty to third persons, either.

120. 1986 La. Acts No. 18, § 1; LA. REV. STAT. ANN. § 9:2800.1 (2009).

Limitation of liability for loss connected with sale, serving, or furnishing of alcoholic beverages

A. The legislature finds and declares that the consumption of intoxicating beverages, rather than the sale or serving or furnishing of such beverages, is the proximate cause of any injury, including death and property damage, inflicted by an intoxicated person upon himself or upon another person.

shop” statutes that impose liability on providers of alcohol under certain circumstances for harm caused by the customer or guest who consumes the alcohol. In contrast, the Louisiana Legislature in 1986 passed a reverse dram shop statute that immunizes a licensed alcohol provider or social host provided that (1) the alcohol is provided to a person of legal age to purchase and consume, (2) there is no fraud or duress involved in the provision and consumption of the alcohol, and (3) the damages that are the subject of the suit occurred off the property of the alcohol provider.<sup>121</sup> The legislature stated in the statute that it was immunizing the alcohol provider because consumption is the “proximate cause” of injuries, and the insurer of the intoxicated person should be primarily liable for injuries to third parties.<sup>122</sup> In *Stewart*, the plaintiff argued that Louisiana Revised Statutes §

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B. Notwithstanding any other law to the contrary, no person holding a permit under either Chapter 1 or Chapter 2 of Title 26 of the Louisiana Revised Statutes of 1950, nor any agent, servant, or employee of such a person, who sells or serves intoxicating beverages of either high or low alcoholic content to a person over the age for the lawful purchase thereof, shall be liable to such person or to any other person or to the estate, successors, or survivors of either for any injury suffered off the premises, including wrongful death and property damage, because of the intoxication of the person to whom the intoxicating beverages were sold or served.

C. (1) Notwithstanding any other law to the contrary, no social host who serves or furnishes any intoxicating beverage of either high or low alcoholic content to a person over the age for the lawful purchase thereof shall be liable to such person or to any other person or to the estate, successors, or survivors of either for any injury suffered off the premises, including wrongful death and property damage, because of the intoxication of the person to whom the intoxicating beverages were served or furnished.

(2) No social host who owns, leases, or otherwise lawfully occupies premises on which, in his absence and without his consent, intoxicating beverages of either high or low alcoholic content are consumed by a person over the age for the lawful purchase thereof shall be liable to such person or to any other person or to the estate, successors, or survivors of either for any injury suffered off the premises, including wrongful death and property damage, because of the intoxication of the person who consumed the intoxicating beverages.

D. The insurer of the intoxicated person shall be primarily liable with respect to injuries suffered by third persons.

E. The limitation of liability provided by this Section shall not apply to any person who causes or contributes to the consumption of alcoholic beverages by force or by falsely representing that a beverage contains no alcohol.

121. *Id.*

122. *Id.* § 9:2800.1(A); see *supra* note 119.

9:2798.4 did not apply to her situation to bar her from recovering from the daiquiri shop because she was underage, and thus Louisiana Revised Statutes § 9:2800.1 did not immunize the shop.<sup>123</sup> The court rejected that rationale because the legislature was aware of the earlier reverse dram shop statute when it passed the later statute and did not engraft an exception based on the earlier statute.<sup>124</sup>

### *C. Criminal Trespassers*

In 2003, the legislature passed another statute barring recovery by plaintiffs who are injured while engaged in blameworthy criminal conduct. Louisiana Revised Statutes § 14:63 provides that owners, lessees, and custodians are not liable to a person injured while trespassing on a structure, watercraft, or property.<sup>125</sup> Again, there is an exception, making the bar to recovery inapplicable, this time if the owner, lessee, or custodian causes injury by “intentional acts” or “gross negligence.”<sup>126</sup>

### *D. Defendants Using Reasonable Force in Defense of Person or Property*

A statute enacted in 2006 immunizes a person who uses reasonable force to prevent a forcible offense against person or property.<sup>127</sup> The legislation invokes the criminal statutes on

123. *Stewart*, 20 So. 3d at 1042.

124. *Id.* at 1045–46.

125. 2003 La. Acts No. 802, § 1; LA. REV. STAT. ANN. § 14:63 (2009). The statute provides in part that:

The provisions of any other law notwithstanding, owners, lessees, and custodians of structures, watercraft, movable or immovable property shall not be answerable for damages sustained by any person who enters upon the structure, watercraft, movable or immovable property without express, legal or implied authorization, or who without legal authorization, remains upon the structure, watercraft, movable or immovable property after being forbidden by the owner, or other person with authority to do so; however, the owner, lessee or custodian of the property may be answerable for damages only upon a showing that the damages sustained were the result of the intentional acts or gross negligence of the owner, lessee or custodian.

*Id.*

126. LA. REV. STAT. ANN. § 14:63(H) (2009).

127. 2006 La. Acts No. 786, § 1; LA. REV. STAT. ANN. § 9:2800.19 (2009).

Limitation of liability for use of force in defense of certain crimes

A. A person who uses reasonable and apparently necessary or deadly force or violence for the purpose of preventing a forcible offense against the person or his property in accordance with R.S. 14.19 or 20

reasonable force (Louisiana Revised Statutes § 14:19)<sup>128</sup> and justifiable homicide (Louisiana Revised Statutes § 14:20)<sup>129</sup> to determine whether a defendant in a civil case used reasonable force in defense of person or property.<sup>130</sup> Before the legislation was enacted, courts actually had used the criminal statutes to determine use of reasonable force in tort cases, but Louisiana Revised Statutes § 9:2800.19 requires the use of the criminal statutes. Moreover, the statute not only immunizes the defendant from liability, but it also provides that a defendant who is sued and prevails on the defenses established by the statute can recover from the plaintiff attorneys' fees and other costs associated with the litigation.<sup>131</sup> This, of course, negates the so-called "American rule," under which each litigant is to bear his own costs of litigation.

This legislation seems particularly significant in light of the Louisiana Supreme Court's pre-statute decision in *Landry v. Bellanger*.<sup>132</sup> In *Landry*, the plaintiff was hit and seriously injured by the defendant, whom the drunken plaintiff had berated and verbally provoked for a period of time in a bar.<sup>133</sup> Finally, the defendant asked the plaintiff to step outside, and the defendant knocked him down to the concrete parking lot with one punch.<sup>134</sup> Although suggesting that comparative fault could apply to reduce the plaintiff's recovery, the court finally concluded that the defendant used reasonable force in self-defense because the plaintiff had committed a battery by bumping the defendant with his chest prior to the punch.<sup>135</sup> The result was that the plaintiff was barred from recovering.<sup>136</sup>

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is immune from civil action for the use of reasonable and apparently necessary or deadly force or violence.

B. The court shall award reasonable attorney fees, court costs, compensation for loss of income, and all expenses to the defendant in any civil action if the court finds that the defendant is immune from suit in accordance with Subsection A of this Section.

128. LA. REV. STAT. ANN. § 14:19 (2007 & Supp. 2010).

129. *Id.* § 14:20.

130. *Id.* § 9:2800.19 (2009).

131. *See id.*

132. 851 So. 2d 943 (La. 2003).

133. *Id.* at 947-48.

134. *Id.* at 947.

135. *Id.* at 955-56.

136. *Id.* at 956.

*E. Defendants Permitting Guns to Be Stored in Cars*

Perhaps the most unusual statutory bar to recovery is included in Louisiana's "bring your gun to work" statute, enacted in 2008.<sup>137</sup> The statute actually has much broader application than to employers, listing "property owner(s), tenant(s), public or private employer(s), or business entit(ies)" as being covered.<sup>138</sup> The statute essentially bans covered entities from prohibiting people who legally possess guns from transporting them and storing them in

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137. 2008 La. Acts No. 684, § 1; LA. REV. STAT. ANN. § 32:292.1 (Supp. 2010).

Transportation and storage of firearms in privately owned motor vehicles

A. Except as provided in Subsection D of this Section, a person who lawfully possesses a firearm may transport or store such firearm in a locked, privately-owned motor vehicle in any parking lot, parking garage, or other designated parking area.

B. No property owner, tenant, public or private employer, or business entity or their agent or employee shall be liable in any civil action for damages resulting from or arising out of an occurrence involving a firearm transported or stored pursuant to this Section, other than for a violation of Subsection C of this Section.

C. No property owner, tenant, public or private employer, or business entity shall prohibit any person from transporting or storing a firearm pursuant to Subsection A of this Section. However, nothing in this Section shall prohibit an employer or business entity from adopting policies specifying that firearms stored in locked, privately-owned motor vehicles on property controlled by an employer or business entity be hidden from plain view or within a locked case or container within the vehicle.

D. This Section shall not apply to:

(1) Any property where the possession of firearms is prohibited under state or federal law.

(2) Any vehicle owned or leased by a public or private employer or business entity and used by an employee in the course of his employment, except for those employees who are required to transport or store a firearm in the official discharge of their duties.

(3) Any vehicle on property controlled by a public or private employer or business entity if access is restricted or limited through the use of a fence, gate, security station, signage, or other means of restricting or limiting general public access onto the parking area, and if one of the following conditions applies:

(a) The employer or business entity provides facilities for the temporary storage of unloaded firearms.

(b) The employer or business entity provides an alternative parking area reasonably close to the main parking area in which employees and other persons may transport or store firearms in locked, privately-owned motor vehicles.

138. LA. REV. STAT. ANN. § 39:292.1(C) (Supp. 2010).

their vehicles while in parking lots.<sup>139</sup> In exchange for depriving covered entities of the power to forbid guns in cars, the statute gives them an immunity, providing that they will not be liable in any civil action for “damages resulting from or arising out of an occurrence involving a firearm transported or stored [in compliance with the statute].”<sup>140</sup> Although it has not been applied yet, this statute potentially creates a very broad immunity or bar to recovery. Interpreted broadly, a covered entity could be immune in any situation involving a person who transports a gun in a car to a covered entity, retrieves it, and causes injury. About nine states have enacted similar statutes in the past two years or so, and the scope of the immunity is uncertain.<sup>141</sup>

### III. IN SUM: LEGISLATIVE AND JUDICIAL MODIFICATION OF PURE COMPARATIVE FAULT

The combination of jurisprudence and legislation immunizing defendants or barring recovery by plaintiffs who have engaged in particular types of conduct leads to the conclusion that neither Louisiana’s judicial system nor its legislature has been content with the pure comparative fault system articulated in article 2320, although their manifested lack of content has been case-specific and focused rather than broadly policy-based. As noted, rather than the legislature replacing pure comparative fault with a modified comparative fault regime, the courts and the legislature have episodically chipped away at the statutory pure comparative negligence system. Would it be better for the legislature to acknowledge the obvious discomfort that the two government branches have demonstrated with pure comparative fault and replace it with a modified scheme? The answer may depend on whether one favors a corrective justice approach to tort law or an instrumentalist approach.<sup>142</sup> If one prefers a corrective justice approach to see justice done in each particular case, then a modified comparative approach would vest the jury with the power to allocate fault, thus barring recovery if a certain relative level of fault is assigned. If, on the other hand, one prefers an instrumentalist approach, one may prefer for a legislature to carve

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139. *See id.* § 39:292.1.

140. *Id.* § 32:292.1(B).

141. *See, e.g.,* Stefanie L. Steines, Comment, *Parking-Lot Laws: An Assault on Private-Property Rights and Workplace Safety*, 93 IOWA L. REV. 1171 (2008).

142. *See, e.g.,* Frank L. Maraist, *Of Envelopes and Legends: Reflections on Tort Law*, 61 LA. L. REV. 153, 159 (2000) (discussing the different schools of thought regarding tort law).



out immunities based on societal policies rather than reaching the "right" result on a case-by-case basis. More cynically, one may favor the legislative approach because special interests may be able to use their political clout to obtain immunities.

#### CONCLUSION

Louisiana is not unique in its evolution from tort doctrines that completely bar plaintiffs' recovery to a comparative fault regime that favors allocation of fault and reduction of recovery for blameworthy plaintiffs. Nor is Louisiana unique in clinging to the notion that there are some plaintiffs in some situations who should be barred from recovery, based on their fault, even when a blameworthy defendant causes them harm. Louisiana may be unique in the nation, however, in the way it has reached this result. After the legislature adopted pure comparative fault and the state supreme court recognized that this was an all-subsuming regime that left no room for implied secondary assumption of the risk, the courts and the legislature began carving out exceptions to pure comparative fault, barring recovery for some plaintiffs in some situations. This has been Louisiana's journey. As it stands now, one may ask whether this piecemeal approach to denying foolhardy plaintiffs recovery followed by the courts and the legislature is a just, coherent, and reasoned approach. In our attempts to answer some fools according to their folly, have we been wise or, in our efforts to achieve justice, fallen to folly?