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Does Louisiana Really Have Strict Liability Under Civil Code Articles 2317, 2318, and 2321?

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DOES LOUISIANA REALLY HAVE STRICT LIABILITY UNDER CIVIL CODE ARTICLES 2317, 2318, AND 2321?

Recently, within a span of thirteen months, the Louisiana Supreme Court announced in three major cases[1] that owner-custodians are liable for the damage caused by people or things in their custody under a theory in the nature of "strict liability."[2] Although this change in the law was dramatic, it was not a total surprise.[3] Over ten years ago, Louisiana courts were urged to impose a type of strict liability upon custodians of certain things.[4] The justification for such a change is that, in today's crowded society, the owner or custodian who keeps a thing for his pleasure or enjoyment, thus creating a risk, should bear the loss caused by the thing in his custody, rather than placing that burden on the innocent bystander who is thereby injured.[5]

Although called strict liability, there are indications in the Louisiana jurisprudence that Louisiana courts will look to negligence principles when they encounter problems with the new theory.[6] One reason for the reference to negligence terminology is that, as will be discussed subsequently, the language used by the supreme court in *Loescher v. Parr*,[7] the latest statement on the subject of owner-custodian strict liability, may encourage courts to turn to negligence

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1. Loescher v. Parr, 324 So. 2d 441 (La. 1975); Turner v. Bucher, 308 So. 2d 270 (La. 1975); Holland v. Buckley, 305 So. 2d 113 (La. 1974).

2. Holland v. Buckley, 305 So. 2d at 119. In *Loescher* Justice Tate states that this type of liability has been referred to as strict liability. 324 So. 2d at 447. See text at notes 22-25, *infra*.

3. For a summary of the law in this area before 1974, *see* Note, *The "Discovery" of Article 2317*, 37 LA. L. REV. 234 (1976); Note, *Introducing Strict Liability to Article 2317*, 22 LOY. L. REV. 625 (1976); Note, *Strict Liaibility for Damage Caused by Animals*, 21 LOY. L. REV. 785 (1975); Note, *Tort—Strict Liability for Damage Done by Things in One's Possession*, 51 TUL. L. REV. 403 (1977); Note, *Tort—Damage Caused by Animals—Louisiana Adopts Strict Liability*, 49 TUL. L. REV. 719 (1975); Note, *Tort—Damage Caused by Minors Under the Age of Discretion—Strict Vicarious Liability Imposed on Parents*, 49 TUL. L. REV. 1194 (1975).

4. As early as 1965, then Judge Tate expressed the opinion that the owner of a car should be strictly liable for damage caused by an accident due to brake failure. Dore v. Hartford Accident & Indem. Co., 180 So. 2d 434 (La. App. 3d Cir. 1965). *See also* Simon v. Ford Motor Co., 282 So. 2d 126 (La. 1973); Theriot v. Transit Cas. Co., 263 La. 106, 267 So. 2d 211 (1972); Cartwright v. Firemen's Ins. Co. of Newark, N.J., 213 So. 2d 154 (La. App. 3d Cir. 1968).

5. Holland v. Buckley, 305 So. 2d at 119-20.

6. In addition to using language similar to that used in negligence cases, the courts seem willing to equate victim fault and contributory negligence. *See* Herbert v. United Serv. Auto Assoc., 355 So. 2d 575 (La. App. 3d Cir.), *cert. denied*, 356 So. 2d 1002 (La. 1978); Parker v. Hanks, 345 So. 2d 194 (La. App. 3d Cir.), *cert. denied*, 346 So. 2d 224 (La. 1977). *See generally* Comment, *Fault of the Victim: Limits of Liability under Civil Code Articles 2317, 2318 and 2321*, 38 LA. L. REV. 995 (1978).

7. 324 So. 2d 441 (La. 1975).

principles. In fact, that language causes one to wonder whether Louisiana really has strict liability under Civil Code articles 2317, 2318, and 2321. The following discussion is intended to aid the reader in forming an opinion as to the true nature of Louisiana's theory of strict liability.

Strict liability is not a recent development in the law of torts. Under the laws of early England, a defendant was held strictly liable if he injured the plaintiff by applying force directly against him.[8] There was no need for the plaintiff to prove any type of fault or moral blameworthiness on the part of the defendant.[9] This rule governed in cases of intentional and unintentional harm.[10] In the seventeenth century it was first suggested that in instances of unintentional harm a defendant would be absolved from liability if he could prove that he was utterly without fault.[11] Fault, in this context, apparently meant intended harm or harm resulting from a lack of due care on the part of the defendant.[12]

Gradually, as society became more and more complex, courts found it necessary to compromise between the various interests present in society.[13] For example, courts had to compromise between a laborer's interest in safe working conditions and that of the public in economic and industrial growth.[14] The tool used in the effort to compromise among these interests was the principles of negligence theory.[15] By the end of the nineteenth century, fault had become a major determinant in the imposition of liability for unintentional harm.[16] The early twentieth century saw the negligence, *i.e.*, fault, requirement becoming accepted as if it had never been questioned.[17] There remained, however, certain types of harm for which no showing of fault on the part of the defendant was required.[18]

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8. This type of action was brought under a writ of trespass while an action for damage caused by indirect force was brought under trespass on the case. Malone, *Ruminations on the Role of Fault in the History of the Common Law of Torts*, 31 LA. L. REV. 1 (1970).

9. *Id.* at 11.

10. *Id.* at 12-13.

11. Weaver v. Ward, 80 Eng. Rep. 284 (1616).

12. Malone, *supra* note 8, at 17-18.

13. *Id.* at 40.

14. *Id.*

15. *Id.*

16. Malone, *supra* note 8, at 41.

17. *Id.*

18. Strict liability was often imposed where certain types of harm were greatly feared. Thus, these harms were suppressed by the courts. In early England, fire was one of the most feared hazards, justifying the imposition of strict liability for damage caused by fire. Strict liability for harm done by escaping cattle is more difficult to justify. *Id.* at 24-25.

Most writers agree that negligence theory, as well as the theory of strict liability, as a method of imposing liability, was based on socio-economic policy considerations.[19] Strict liability worked well when most harms were intended and involved only two actors, the plaintiff and the defendant. Negligence was used to compromise the various interests emerging in an increasingly complex society. As one writer has stated, "the conception of negligence or liability upon a flexible standard of care is not likely to come into being until society has reached a stage where diverse economic and social needs have emerged and are in lively competition with each other."[20] Today, the pendulum may be swinging back toward the use of strict liability as a major determinant of liability in many areas of tort law.[21]

Strict liability has been called liability without fault.[22] This definition is more than adequate for most jurisdictions, but it presents a problem in Louisiana. Jurisprudence construing Louisiana Civil Code article 2315 requires that there be no liability without fault.[23] As previously mentioned, the common law recognized fault as negligence or intended, wrongful conduct. The civil law has also defined fault in terms of wilful, unlawful conduct, as well as imprudence or want of skill.[24] Curiously enough, despite its prominent role in determining liability in Louisiana, fault is not clearly defined in the Louisiana Civil Code.[25]

There being no legislative definition of fault, courts in Louisiana defined fault as negligent or intentional conduct which caused injury. Then, after years of jurisprudence equating fault and negligence,[26] the courts developed a definition of fault under which a person could be held liable without being negligent, thus obtaining the same result as that reached in other jurisdictions under the

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19. *See* Fleming, *The Role of Negligence in Modern Tort Law*, 53 VA. L. REV. 815 (1967); Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359 (1951); Peck, *Negligence and Liability Without Fault in Tort Law*, 46 WASH. L. REV. 225 (1971).

20. Malone, *supra* note 8, at 27.

21. Peck, *supra* note 19, at 225.

22. *Id.*

23. LA. CIV. CODE art. 2315 states in part: "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." *See, e.g.*, Luke v. Morgan's Louisiana & T.R. & S.S. Co., 147 La. 30, 84 So. 483 (1920).

24. Moses v. Butts, 70 So. 2d 203 (La. App. 1st Cir. 1954); Stone, *Tort Doctrine in Louisiana: The Concept of Fault*, 27 TUL. L. REV. 1 (1952). *See also* LA. CIV. CODE arts. 2316 & 3556(13).

25. Stone, *supra* note 24, at 9; Stone, *Tort Doctrine in Louisiana: The Materials for the Decision of a Case*, 17 TUL. L. REV. 159, 187-88 (1942).

26. *E.g.*, Samson v. Southern Bell Tel. & Tel. Co., 205 So. 2d 496 (La. App. 1st Cir. 1967); Lyons v. Jahncke Serv. Inc., 125 So. 2d 619 (La. App. 1st Cir. 1960).

theory of strict liability. This was accomplished in the case of *Langlois v. Allied Chemical Corp.*,[27] in which former Justice Barham stated that fault as used in article 2315 includes more than negligence, in fact encompassing conduct for which one could be held liable without being negligent.[28] Thus, fault in Louisiana was redefined to include both negligent and non-negligent conduct, thereby clearing the way for the supreme court in *Holland v. Buckley*,[29] *Turner v. Bucher*,[30] and *Loescher v. Parr*[31] to hold owner-custodians liable for the damage caused by persons or things in their custody, without requiring a plaintiff to prove that the owner-custodian was negligent.

Loescher is the most important case of the three not only because it is the latest of the cases chronologically, but also because it summarizes Louisiana jurisprudential developments in this area, including *Holland* and *Turner*.[32] However, the language used by the court in *Loescher* indicates that it may not represent as clean a break with negligence concepts as some may think. The court in *Loescher* clearly specified that before the owner-custodian of a person or thing could be held strictly liable, the person or thing in the defendant's custody must present an unreasonable risk of injury to the plaintiff.[33] The use of the phrase "unreasonable risk of injury" could represent an introduction of negligence concepts into an area of the law in which such concepts are presumably inapplicable.[34] In order to determine whether *Loescher* embraces certain elements of a negligence action, it is helpful to examine the way in which negligence actions have been described in the Louisiana jurisprudence.

Negligence has been clearly described by Louisiana courts as the creation, maintenance, or failure to guard against an unreasonable risk of injury to another.[35] Compare this description with that used by the court in *Loescher* in speaking of liability which is to be determined without regard to negligence, *i.e.*, strict

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27. 258 La. 1067, 249 So. 2d 133 (1971).

28. 258 La. at 1084, 249 So. 2d at 140; Barham, *A Renaissance of the Civilian Tradition in Louisiana*, 33 LA. L. REV. 357, 382 (1973).

29. 305 So. 2d 113 (La. 1974).

30. 308 So. 2d 270 (La. 1975).

31. 324 So. 2d 441 (La. 1975).

32. *Id.* at 446.

33. *Id.* at 449.

34. Note, *The "Discovery" of Article 2317*, 37 LA. L. REV. 234, 240 (1976).

35. *See, e.g.*, Pence v. Ketchum, 326 So. 2d 831 (La. 1976); Musso v. St. Mary Parish Hosp. Serv. Dist. No. 1, 345 So. 2d 129 (La. App. 1st Cir.), *cert. denied*, 347 So. 2d 262 (La. 1977); Traders & General Ins. Co. v. Robinson, 289 So. 2d 178 (La. App. 1st Cir. 1973).

liability: "The *fault* of the person thus liable is based upon his failure to prevent the person or thing for whom he is responsible from causing such unreasonable risk of injury to others."[36] The similarity in the language describing each action is evident. Under both theories a person must be responsible in some way for an unreasonable risk of harm before he can be held liable. In traditional negligence theory, in order to determine the reasonableness of a risk, a balancing test is performed[37] weighing the probability, magnitude, and cost of preventing the risk against the social utility of the conduct or thing causing the injury.[38]

One of the best examples of this balancing test in Louisiana jurisprudence is the case of *Allien v. Louisiana Power & Light Co.*[39] There, the plaintiff's husband was standing near a drilling mast and was killed when the mast touched an electric line erected by the defendants. Although the wire had been raised to a height which exceeded professional standards, the third circuit held that the defendants were negligent.[40] The court noted that the wire, though highly charged, was uninsulated and had been placed in an area where drilling masts were likely to touch it.[41] Perhaps the most decisive factors noted by the court were that the wire served no useful purpose and could have been removed at minimal cost.

Given these stated factors, it can be seen that the court balanced the probability, magnitude, and cost of preventing the risk created by the erection of the line against the line's utility. The court used this balancing test to determine whether the defendant was negligent. It is interesting to note that the court defined negligence as "conduct which creates an unreasonable risk of foreseeable harm."[42]

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36. 324 So. 2d at 446.

37. A classic example of the negligence balancing test is found in Judge Learned Hand's opinion in *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947). *See* Chicago B. & Q.R. Co. v. Krayenbuhl, 65 Neb. 889, 91 N.W. 880 (1902), *aff'd*, 70 Neb. 766, 98 N.W. 44 (1904).

38. *See* United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947). *See also* Guilbeau v. Liberty Mut. Ins. Co., 338 So. 2d 600 (La. 1976); Pence v. Ketchum, 326 So. 2d 831 (La. 1976); Helminger v. Cook Paint and Varnish Co., 230 So. 2d 623 (La. App. 3d Cir. 1970); Taylor v. National Indem. Co., 215 So. 2d 203 (La. App. 3d Cir. 1968). The negligence balancing test is performed in order to determine what a reasonably prudent man would have done under the circumstances. *See* Pitre v. Employers Liab. Assurance Corp., 234 So. 2d 847 (La. App. 1st Cir.), *cert. denied*, 256 La. 617, 237 So. 2d 398 (1970).

39. 202 So. 2d 704 (La. App. 3d Cir.), *cert. denied*, 251 La. 392, 204 So. 2d 574 (1967).

40. *Id.* at 711.

41. *Id.* at 710.

42. This definition of negligence is the one generally used by authorities on the subject. W. PROSSER, THE LAW OF TORTS § 31 (4th ed. 1971); RESTATEMENT (SECOND) OF TORTS § 282 (1965).

There are no cases in Louisiana where a court has expressly used a negligence balancing test approach in a *Loescher*-type strict liability situation. However, courts in other jurisdictions applying another form of strict liability have resorted to a balancing test when faced with "reasonbleness" language similar to that used in *Loescher*. An examination of why these courts have resorted to a balancing test may prove useful in determining the extent to which, if any, *Loescher* sanctions the use of a balancing test in the application of strict liability.

Under section 402(A) of the Restatement (Second) of Torts, a manufacturer is held strictly liable for the damage caused by his product if that product is in a "defective condition unreasonably dangerous."[43] The resemblance between this language and the "unreasonable risk of injury" language of *Loescher* is obvious. It was never intended that manufacturers be insurers of the safety of their products,[44] and it was thought that the phrase "unreasonably dangerous" would prevent such a burden from being placed upon manufacturers. For example, a distillery should not be held liable for a consumer's ill health brought on by the prolonged excessive consumption of whiskey.[45] Other examples include consumers who are cut by sharp knives or hatchets while such items are being used improperly.[46]

In spite of the laudatory purpose of the "unreasonably dangerous" requirement, courts have had difficulty using the phrase in a strict liability context. There are two major problems that have arisen in applying section 402(A). The first problem encountered by the courts has been the difficulty of determining whether a plaintiff must prove both that the product causing the injury is defective and that the product is unreasonably dangerous, or whether proof by the

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43. Section 402(A) states: "One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property . . . ." RESTATEMENT (SECOND) OF TORTS § 402(A) (1965).

44. *See* Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.J. 5 (1965).

45. Comment (i) to section 402(A) states:

> Good whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics; but bad whiskey, containing a dangerous amount of fusel oil, is unreasonably dangerous. Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous. Good butter is not unreasonably dangerous merely because, if such be the case, it deposits cholesterol in the arteries . . . .

RESTATEMENT (SECOND) OF TORTS § 402(A), comment (i) (1965).

46. *See* Wade, *On the Nature of Strict Liability for Products*, 22 MISS. L.J. 825, 833 (1973).

plaintiff that a product is unreasonably dangerous is sufficient in itself to make the product per se defective.[47]

At least one court viewing the Restatement as requiring a bifurcated test of strict liability has eliminated the unreasonably dangerous language from its law of products liability.[48] The reason given is that the unreasonably dangerous requirement places upon the plaintiff the burden of proving negligence on the part of the defendant, a burden which the introduction of strict liability presumably lifted.[49]

Other courts retaining the unreasonably dangerous requirement interpret the phrases "defective condition" and "unreasonably dangerous" as synonymous.[50] However, these courts have used two methods which strongly resemble the negligence-type balancing tests in determining whether a product is unreasonably dangerous. One method for determining unreasonable danger is suggested by the Restatement comments.[51] This method is commonly referred to as the consumer expectation test. Under this test, a product is unreasonably dangerous if the risk of injury exceeds that contemplated by an ordinary and reasonable consumer.[52] Notice that this ordinary reasonable consumer closely resembles the reasonably prudent man of the negligence cases.[53] A variant of the consumer expectation test focuses on the actions of the manufacturer. This manufacturer test even more closely resembles negligence determination criteria. This test states that a product is unreasonably

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47. Wade, *supra* note 44, at 14-15.

48. Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972). In those jurisdictions which view the Restatement as requiring a bifurcated test and which have, therefore, retained the unreasonably dangerous requirement, it is difficult to determine just how the requirement is being used. *See* Mather v. Caterpillar Tractor Corp., 23 Ariz. App. 409, 533 P.2d 717 (1975); Kleve v. General Motors Corp., 210 N.W.2d 568 (Iowa 1973).

49. Cronin v. J.B.E. Olson Corp., 8 Cal. 3d at 133, 501 P.2d at 1162, 104 Cal. Rptr. at 442.

50. *E.g.*, Reyes v. Wyeth Lab., 498 F.2d 1264, 1272 (5th Cir.), *cert. denied*, 419 U.S. 1096 (1974); Borel v. Fibreboard Paper Products Corp., 493 F.2d 1076, 1087 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974).

51. Comment (i) to section 402(A) states: "The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." RESTATEMENT (SECOND) OF TORTS § 402(A), Comment (i) (1965).

52. This test has been criticized by some writers. *See, e.g.*, Fischer, *Products Liability—The Meaning of Defect*, 39 MO. L. REV. 339 (1974); Keeton, *Manufacturer's Liability: The Meaning of "Defect" in the Manufacture and Design of Products*, 20 SYRACUSE L. REV. 559 (1969).

53. See note 38, *supra*.

dangerous when a reasonable manufacturer would not sell the product if he knew of the risk involved.[54]

One can easily see the similarity between the manufacturer test and a negligence determination. In fact, at least one writer has stated the manufacturer test as follows: "Thus, assuming that the defendant had knowledge of the condition of the product, would he then have been acting unreasonably in placing it on the market?"[55] Consider also how the test for strict liability tracks the balancing test utilized in negligence theory: "Proof of unreasonableness involves a balancing process. On one side of the scale is the utility of the product and on the other side is the risk of its use."[56]

The second difficulty faced by courts applying Restatement section 402(A) is how to define defective condition or defect. Of course, those jurisdictions which find a defective condition to be equivalent to an unreasonably dangerous one are not faced with this problem since a defect is defined as any flaw in a product which makes the product unreasonably dangerous.[57] However, those courts which read the Restatement as requiring a bifurcated test are still faced with the dilemma of defining the term "defect." Even those jurisdictions that have ignored the unreasonably dangerous requirement of the Restatement are left with the task of determining whether the product in question is defective. Once the determination that the product is defective is made, then the defendant is liable. However, these courts have failed to develop a suitable definition of defect.[58]

Although the analogy between strict products liability and the

54. *E.g.*, Welch v. Outboard Marine Corp., 481 F.2d 252 (5th Cir. 1973); Olsen v. Royal Metals Corp., 392 F.2d 116 (5th Cir. 1968).

55. Wade, *supra* note 44, at 15.

56. Aller v. Rodgers Machinery Mfg. Co. Inc., 268 N.W.2d 830, 835 (Iowa 1978). *See also* Hagans v. Oliver Mach. Co., 576 F.2d 97 (5th Cir. 1978). Some courts, as in *Aller*, although recognizing the similarity of the two actions, have maintained that they are in fact different. *See* Barker v. Lull Eng. Co., Inc., 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978). At least one commentator has stated that the tests are the same except for the element of scienter. Wade, *supra* note 44, at 15. *See generally* Keeton, *Product Liability and the Meaning of Defect*, 5 ST. MARY'S L.J. 30 (1973); Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825 (1973); Note, *Torts—Products Liability—Theory of Strict Tort Liability Under Restatement (Second) of Torts § 402A Held Applicable in Maryland When Complaint Alleged That Defendant Manufactured and Placed on the Market an Automobile in a Defective Condition Not Reasonably Safe for its Intended Use*, 6 U. BALT. L. REV. 295 (1977). The distinction between the tests for negligence and strict products liability is especially hard to define in design cases. *See* Garrison v. Rohm & Haas Co., 492 F.2d 346 (6th Cir. 1974); Frericks v. General Motors Corp., 274 Md. 288, 336 A.2d 118 (1975), *rev'd*, 278 Md. 304, 363 A.2d 460 (1976).

57. See note 50, *supra*.

58. Fischer, *supra* note 52, at 341. *But see* Barker v. Lull Eng. Co., Inc., 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978).

Loescher-type strict liability is not perfect, it cannot be dismissed lightly. It can be expected that the Louisiana courts applying strict liability under *Loescher* will face many of the same problems faced by courts applying strict products liability. Since negligence theory in the form of a balancing test has found its way into strict products liability law through the phrase "unreasonably dangerous," it is fairly safe to assume that the same thing will happen in the area of strict liability for damage caused by things in one's possession through the phrase "unreasonable risk of injury," as introduced by *Loescher*.

If indeed Louisiana courts are using a balancing test to determine whether a thing in one's possession presents an unreasonable risk of injury to another, they are not doing so expressly. This is not surprising since *Loescher* gives very little guidance to courts as to the purpose of the unreasonable risk requirement or as to its use.

One recent case points out what alternatives are open to the courts. In *Greene v. Catalytic Inc.*,[59] the plaintiff was injured when he tripped over an airhose in a maintenance shop owned by the corporation. At the time of the injury, the defendant was using the hose. The hose ran across a space which was not a regular passageway but was instead an opening between pieces of equipment. The plaintiff alleged negligence and strict liability. Concerning the strict liability action the court said: "[T]he conduct of [the defendant] cannot be said to create an *unreasonable* risk of harm. While some risk may be created by an airhose on a shop floor, it is not an unreasonable risk and so there is no strict liability in this instance."[60]

According to *Loescher* a plaintiff need only prove "the vice (*i.e.*, unreasonable risk of injury to another) in the person or thing whose act causes the damage, and that the damage resulted from this vice."[61] Once this is proved, the defendant can escape liability only by a showing of fault of the victim, fault of a third person, or causation by a fortuitous event.[62] Thus, although the language of *Loescher* indicates that "vice" is equivalent to the creation of an unreasonable risk, and therefore no physical imperfection in the thing causing injury is needed to impose liability, the facts of *Loescher* reveal that indeed a physical imperfection was present in the thing causing the injury. This may lead to the assumption that, in order for a plaintiff to recover, he must show that the thing contained a physical imperfection and also that the defective thing presented an

59. 341 So. 2d 1172 (La. App. 1st Cir. 1976), *cert. denied*, 344 So. 2d 4 (La. 1977).
60. *Id.* at 1173.
61. 324 So. 2d at 446-47.
62. *Id.* at 447.

unreasonable risk of injury to the defendant. Thus, although in *Greene* the court ruled that there was no unreasonable risk of injury, one might query whether the court really meant that the hose had no physical imperfection, and therefore strict liability did not apply. If the hose had been stretched across an often-used aisle, would the court have concluded that the hose was defective? If strict liability was applicable in *Greene*, what boundaries are there to prevent unlimited liability? These questions point out some of the problems that courts must face given the language of *Loescher*, problems which are analogous to those faced by courts applying section 402(A) in the products liability area. Thus, the experience of these courts may offer some guidance to Louisiana courts.

Louisiana courts could interpret *Loescher* as requiring proof of a vice or defect as well as proof that the defective thing presents an unreasonable risk of injury. The problems that will be encountered if this interpretation is chosen can be compared to those faced by courts which interpret Restatement section 402(A) to require proof of a defective condition which is unreasonably dangerous. Those courts which give a literal interpretation to the Restatement have had difficulty determining when a product is unreasonably dangerous without using a negligence-type balancing test. Similarly, Louisiana courts adopting this interpretation of *Loescher* can also be expected to utilize a negligence-type balancing test to determine whether the risk created by a thing in one's custody is unreasonable. The courts could, as was done in the products liability area in *Cronin v. J.B.E. Olson Corp.*,[63] ignore the unreasonableness language of *Loescher*, applying only the requirement of a defect. But, in this situation, as in *Cronin*, courts are left with the formidable task of defining the term "defect".

The word "defect," in light of *Loescher*, could be defined as a physical imperfection in a thing causing injury.[64] This definition works well in situations involving inanimate objects, but it seems inappropriate to refer to animals as having a defect and particularly inappropriate to refer to children as being defective. However, *Turner* does speak of children as sometimes engaging in deficient conduct. According to *Turner*, read in light of the language in *Loescher*, the conduct of a six-year-old child who rides a bicycle on a sidewalk where pedestrians are present is, for the purposes of strict

63. 104 Cal. Rptr. 433, 501 P.2d 1153, 8 Cal. 3d 121 (1972).

64. Generally, a defect is thought of as a physical imperfection in a thing such as a dented fender or crooked bumper on a car. These physical imperfections are generally referred to as manufacturing defects. However, a product may be defective and still be manufactured properly. This kind of defect is called a design defect which results from a lack of planning or testing on the part of the designer.

liability, deficient conduct. However, the court does not explain how it reached the conclusion that the conduct in question was deficient. It is submitted that Louisiana courts after the *Loescher* decision will have to use some type of reasonableness standard in determining whether the conduct of a child is deficient; moreover, whether or not this conduct is deficient will depend upon the outcome of a balancing test by which the utility of the conduct is weighed against the risks involved.[65]

Instead of reading *Loescher* as mandating a bifurcated test requiring a finding of defect plus unreasonable risk of injury, courts could interpret this decision as imposing only a burden of proof of unreasonable risk of injury.[66] This would be analogous to the approach taken by those courts who read the defective condition requirement of Restatement section 402(A) as synonymous with the creation of an unreasonably dangerous risk.[67] This approach would resolve the problem of defining the term defect in one way when the definition is applied to things and another way when applied to children. Thus, the owner-custodian would be held liable whenever a thing or a child in his custody presented an unreasonable risk of injury to another which materializes to cause damage. However, in this approach a balancing test is once again required in order to determine whether the risk created is unreasonable.

The difference resulting from a choice between these two alternatives can be illustrated by a number of factual situations involving damage caused by things in one's custody. In situation number one, assume that a police bloodhound runs into a backwoods hiker and breaks his arm while the hound is hot on the trail of an escaped felon. For situation number two, assume that the friend of a small child is seriously injured while the two are playing. The uninjured child is unable to use the streets to go for help because of congested traffic. Instead, the uninjured child rides his bicycle on the sidewalk where pedestrians are walking. In his haste, the child strikes an elderly woman and injures her. Finally, in situation number three, assume that a piece of medical equipment which is used in an at-

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65. "Is there a parallel between the word 'negligence' as applied to action and the word 'defect' as applied to things?" A. VON MEHREN, THE CIVIL LAW SYSTEM—AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW 622 (2d ed. 1977).

66. In *Arceneaux v. Domingue*, 365 So. 2d 1330 (La. 1978), Justice Dixon, in describing an action brought under *Loescher*, did not mention the requirement of a defect. *Id.* at 1335. This could be seen as an implication that any object or person that presents an unreasonable risk of injury is deficient or defective, thus making the two concepts synonymous.

67. See cases cited at note 50, *supra*.

tempt to save a patient's life malfunctions and causes injury to the patient.

These situations are similar in that, in each case, the utility of the object or conduct causing the injury has been increased to a point which arguably offsets the probability and magnitude of the risk of injury. If the plaintiffs are required to prove the existence of a defect plus unreasonable risk, then none of the plaintiffs should recover because in each instance, the risk created by the conduct or thing causing injury was reasonable. The plaintiff patient could easily prove that the machine which caused injury was defective, but the reasonableness of the risk will probably prevent recovery, assuming there are no grounds for recovery other than *Loescher*-type strict liability. In the situations involving the child and the dog, proving a defect will be difficult because there is no physical imperfection. With respect to a child, determining whether his conduct is deficient will depend upon how his conduct measures up to a given standard, which may well be functionally equivalent to saying that whether his conduct was deficient depends upon whether the child was negligent.[68] Eliminating the unreasonable risk requirement would aid the plaintiff patient who can prove the existence of a defect and does not need to prove the presence of an unreasonable risk. However, as shown above, removing the unreasonableness-of-the-risk requirement as to children will do little to keep this type of strict liability completely free of negligence concepts.

If the plaintiff need only prove that the thing causing the injury presented an unreasonable risk, then the difficulty of ascertaining a definition of defect which can be consistently applied to both things and children is resolved. Notice, however, that a balancing test is still required in order to determine whether the risk was unreasonable. In all three of the hypotheticals mentioned, the plaintiff would be denied recovery since, in each case, the risk which caused the injury was reasonable.

Neither *Holland* nor *Turner* contains the phrase "unreasonable risk of injury." The language of those cases gives the court very little escape in strict liability cases. Although the *Holland* court pointed out that it did not intend to introduce absolute liability in dog-bite cases,[69] *Holland* and *Turner*, absent a consideration of *Loescher*, come very close to holding owner-custodians liable for all harm caused by things in their custody. The unreasonable risk of injury language of *Loescher* seems to be an attempt by the supreme court to inject a

68. See note 65, *supra*.
69. 305 So. 2d at 119, n.10.

limitation, thereby relieving owner-custodians from being held absolutely liable for all harm caused by things in their custody.[70] Thus, the Louisiana appellate courts should not disregard the unreasonable risk language in *Loescher* as some other jurisdictions have done in the products liability area.

Holland and *Turner* could be taken as indications that, in the three hypotheticals previously mentioned, the police department, the parent, and the hospital should all be liable as owner-custodians of things which have caused injury. *Loescher*, however, indicates that there are certain activities which should be engaged in even if they carry a high risk of injury. Thus, *Loescher* seems to allow courts to weigh the social utility of the thing or activity which causes the harm and absolve the custodian of liability if the social utility is great enough. For the sake of uniformity, *Loescher* should be read as defining "defect" as any condition of a thing which presents an unreasonable risk of injury to another. The owner-custodian should be held liable whenever a thing or child in his custody creates an unreasonable risk of injury to another which materializes to cause injury.

If indeed this is the meaning of *Loescher*, inevitably the inquiry becomes: does Louisiana really have strict liability under articles 2317, 2318 and 2321? In answering this question, it must be remembered that the major difference between an action in strict liability and an action in negligence is evidentiary. Basically, strict liability prevents a defendant from defeating a plaintiff's claim by alleging that he did what a reasonable man would have done under the circumstances. In negligence, the plaintiff has the burden of proving that the defendant acted unreasonably in not preventing the risk which caused the injury. In strict liability, the plaintiff need not prove that the defendant acted unreasonably, but that the defendant failed to prevent an unreasonable risk of injury. The focus then is not on the actions of the defendant, but on the risk created by the thing causing the injury.

To the extent that *Loescher* prevents a defendant from alleging due care in response to a plaintiff's action, Louisiana does have strict liability under articles 2317, 2318 and 2321. However, to the

70. Justice Tate, as author of one of the most important products liability cases in Louisiana jurisprudence, *Weber v. Fidelity & Cas. Ins. Co. of N.Y.*, 259 La. 599, 250 So. 2d 754 (1971), was no doubt aware of the strict-liability-for-products language of section 402(A). Thus, *Loescher* presented the court with an opportunity to prevent owner-custodians from becoming insurers of the safety of things in their possession just as the "unreasonably dangerous" requirement of the Restatement was meant to prevent manufacturers from becoming insurers of their products.

extent that *Loescher* requires a determination that the risk created by the thing is unreasonable, thus forcing the court to balance the utility of the thing causing the injury against the magnitude and probability of the risk created by it, a part of negligence theory is still alive in this area. The true meaning of *Loescher* can be illuminated only by the supreme court, for only then can the policy behind Louisiana's strict liability for damage caused by things in one's custody be fully understood and acted upon by the courts.[71]

Samuel N. Poole, Jr.

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71. Even the supreme court has shown some uncertainty as to *Loescher's* scope of application. It does not appear that *Loescher* will be applied, without some modifications, to escaped cattle. *See, e.g.*, Harrington v. Upchurch, 331 So. 2d 506 (La. App. 3d Cir.), *cert. denied*, 337 So. 2d 222 (La. 1976). In *Harrington*, the supreme court denied writs, indicating that the result was correct, after the owner of stray cattle was found not liable. Justice Dixon's response to the denial of writs was, "If we are to have 'cow law' different from 'dog law', we should more adequately explain it." 337 So. 2d at 222 (Dixon, J., dissenting).