Louisiana Law Review

Volume 44 | Number 5
Ruminations on Tort Law: A Symposium in Honor of Wex Malone
May 1984

The Viability of Comparative Negligence as a Defense to Strict Liability in Louisiana

Mack E. Barham

THE VIABILITY OF COMPARATIVE NEGLIGENCE AS A DEFENSE TO STRICT LIABILITY IN LOUISIANA

*Mack E. Barham**

Judges, lawyers and professors of law are indebted to Professor Wex Malone for his many contributions to the law of delicts in Louisiana. Moreover, so many of us are deeply indebted to him for the stimulus he has supplied to our efforts toward attaining professional fulfillment. I personally feel a great debt of gratitude for his teaching and writing which gave the Louisiana Supreme Court insight into the duty-risk analysis which he and Professor Green fostered. This simplified and clear approach to causation was of great assistance to me personally in many opinions rendered on the Supreme Court of Louisiana. Dean Prosser prognosticated that the duty-risk analysis would eventually eclipse and replace the proximate cause approach. Unfortunately, the intermediate appellate courts of Louisiana did not respond to the supreme court's challenge in this area. Had the courts of appeals so responded, the growth of this judicial tool for problem solving in the area of delicts might very well have spread nationwide.

The courts of this state also owe Professor Malone gratitude for his clarity of thinking, his scholarly direction and his supreme effort to avoid the pitfalls of "strict liability." Even with his guidance, the following article will illustrate that the lawyers and judges have not been capable of making a stable determination of or even a fair direction for the multifaceted problem. Professor Wex Malone was the first to recognize that in the subtlety of the opinion in *Reymond v. State*[1] was the beginning of a judicial realization that liability for ultra-hazardous activities, nuisances and other related matters should be removed from the law of property and resolved under the delictual articles 2315 through 2324. Professor Malone has been many things to many people. His teachings and writings have challenged my best efforts. With this in mind, I offer the following in his honor.

Reacting to the inequitable results arising from a strict application of the doctrine of contributory negligence, the Louisiana Legislature, in 1980, passed Act 431, commonly known as the comparative negligence statute. A portion of Act 431 has been codified in Civil Code article 2323, which states:

> When contributory negligence is applicable to a claim for

---

* Member, Louisiana Bar Association; former Associate Justice, Supreme Court of Louisiana. The author expresses his thanks to Robert E. Arceneaux, member, Louisiana State Bar Association, and Yvonne Chalker, senior, Loyola University School of Law, for their editorial and research assistance.

1. 255 La. 425, 231 So. 2d 375 (1970).

> damages, its effect shall be as follows: If a person suffers injury, death or loss as the result partly of his own negligence and partly as a result of the fault of another person or persons, the claim for damages shall not thereby be defeated, but the amount of damages recoverable shall be reduced in proportion to the degree or percentage of negligence attributable to the person suffering the injury, death or loss.

The comparative negligence statute has no effect whatsoever on a determination of liability; its application is limited solely to the computation of damages. While the statute's limited function would seem, at first glance, to imply easy implementation, this is not so in the strict liability context. A problem is created in that the language of the statute ties the application of comparative negligence in computing damages to situations in which contributory negligence would be a defense.

Three defenses to a claim premised on strict liability have developed through judicial rule. The seminal case in the strict liability area, *Loescher v. Parr*,[2] decided by the Louisiana Supreme Court in 1975, set out three defenses to a strict liability action. The *Loescher* court stated that the defendant would be relieved from liability when the harm resulted from (1) an irresistible force, (2) the fault of a third party, or (3) the fault of the victim.[3] The first two defenses do not bring questions of comparative negligence into play. An inquiry into the applicability of the comparative negligence statute must therefore necessarily focus upon the defense of victim fault.

The search for the contours of "victim fault" is complicated by the expansive imposition of strict liability. Louisiana, through its Civil Code, has chosen to impose a form of "strict" liability in areas in which the common law has not traditionally imposed strict liability. In traditional common law jurisdictions, strict liability has generally been imposed when the activity giving rise to liability falls into the broad categories of either ultrahazardous activity or some type of products liability. Louisiana, on the other hand, bases strict liability on an elaborate codal scheme which premises liability on specific legal relationships and not on the basis of fault. In *Loescher*, the Louisiana Supreme Court summarized the principle of legal fault imposed under articles 2317 through 2322 in the following manner:

> When harm results from the conduct or defect of a person or thing which creates an unreasonable risk of harm to others, a person legally responsible under these code articles for the supervision, care, or guardianship of the person or thing may be held liable for the damage thus caused, despite the fact that no per-

2. 324 So. 2d 441 (La. 1975).
3. *Id.* at 447.

sonal or negligent act or inattention on the former's part is proved.[4]

Several post-*Loescher* cases have extended Louisiana concepts of strict liability. In *Turner v. Bucher*,[5] strict liability was imposed under Civil Code article 2318 upon parents for harm caused by their children. In *Holland v. Buckley*,[6] the court abandoned its long standing line of decisions which held that there had to be some negligence on the part of an animal owner before imposing liability for harm caused by the animal and, instead, found owners to be strictly liable under Civil Code article 2321 for harm caused by their animals. Utilizing Civil Code article 2322, the court in *Olsen v. Shell Oil Co.*[7] imposed a nondelegable duty upon an owner to keep his building in such a state of repair that it would not create an unreasonable risk of harm to others. Then, in *Jones v. City of Baton Rouge*,[8] the court extended principles of strict liability to public bodies.[9]

In none of the previous cases did the court equate contributory negligence with victim fault such that a defendant could be relieved from liability on the basis of a plaintiff's mere contributory negligence. Victim fault was limited to assumption of the risk, which was recognized as a defense to strict liability in *Langlois v. Allied Chemical Corp.*,[10] a case which preceded *Loescher* and its progeny by several years. The scope of *Langlois* was somewhat different from that of *Loescher* and the cases that followed *Loescher* in that *Langlois* involved an untrahazardous activity. When ultrahazardous activity is involved, a much more stringent standard of liability is imposed. In fact, the liability imposed for ultrahazardous activity has been termed "absolute liability" as opposed to the strict liability set out in Civil Code articles 2317 through 2322 for which the court has created the three defenses previously mentioned. A decision to apply the doctrine of absolute liability is demanded when, after a balancing of the interests involved, it is determined that although the activity in question is highly dangerous, the benefit of the activity in ques-

4. *Id.* at 446.

5. 308 So. 2d 270 (La. 1975).

6. 305 So. 2d 113 (La. 1974).

7. 365 So. 2d 1285 (La. 1978).

8. 388 So. 2d 737 (La. 1980).

9. Louisiana courts have not felt constrained to utilize the strict liability approach to resolve disputes between persons whose relationship is not established by statutory mandate. For example, in Baumgartner v. State Farm Mut. Auto. Ins. Co., 356 So. 2d 400 (La. 1978), the court imposed a liability closely akin to strict liability in pedestrian-motorist situations. The court couched the duty owed by a motorist to a pedestrian in terms of "more than ordinary care." *Id.* at 404. The court studiously avoided using traditional strict liability, and opted instead to phrase its decision in terms of negligence. Despite the conflicting terminology, the practical effect of the decision was to institute strict liability in pedestrian-motorist cases.

10. 258 La. 1067, 249 So. 2d 133 (1971).

tion is such that it should be allowed to take place; however, the risks inherent in the performance of the activity dictate that the risk creator bear all costs of whatever damage might result. Thus, according to *Langlois*, in settings which give rise to absolute liability, the only factor which will rebut the presumption that an affirmative duty has been breached is a showing of victim fault in the form of assumption of the risk. Notably, the court found this to be so since contributory negligence presupposes original negligence on the part of the defendant, and negligence is not an ingredient of fault in a strict liability action.

However, in *Dorry v. Lafleur*,[11] a plurality of the Louisiana Supreme Court, speaking through *ad hoc* Justice Fedoroff, made a sharp departure from the *Langlois* line of decisions. The *Dorry* decision distinguished *Langlois*, finding that *Langlois* involved ultrahazardous activity, which is a special circumstance. *Dorry* left the *Langlois* decision intact to the extent that it found contributory negligence not to be a defense to an action involving ultrahazardous activity. Moreover, the *Dorry* plurality suggested that contributory negligence would not constitute victim fault so as to be a defense to a strict liability action where the activity involved was either unnatural to the locality or a commercial enterprise where a business could support the loss. However, in all other instances, the *Dorry* court found that the circumstances under which a plaintiff's contributory negligence should bar his recovery in a strict liability action should be developed on a case-by-case basis.[12] Thus, *Dorry* held that contributory negligence may in certain cases be a defense to strict liability actions.

The *Dorry* position was strengthened by the Louisiana Supreme Court's decision in *Kent v. Gulf States Utilities Co.*[13] The court, through Justice Lemmon, attempted to establish a workable structure for the task of imposing strict liability. The *Kent* decision put strict liability on an equal footing with negligence in that the test used in determining strict liability was to be the same as that used for determining liability in negligence cases. Justice Lemmon found that, in a typical negligence case against the owner of a thing which causes injury, the plaintiff must prove that under the circumstances the thing presented an unreasonable risk of harm which resulted in the damage and that the owner knew or should have known of the risk, but nevertheless failed to render the thing safe or to take steps to prevent the damage caused. When a cause of action is premised upon strict liability, the elements are the same except that the plaintiff is relieved of proving that the owner knew or should have known of the risk involved. According to the court:

11. 399 So. 2d 559 (La. 1981). *Dorry* involved a patron of a skating rink injured by a slip in a puddle of water under a leaking roof. Strict liability was imposed on the owner of the rink under Civil Code article 2322.

12. *Id.* at 561.

13. 418 So. 2d 493 (La. 1982). *Kent* involved strict liability under Civil Code article 2317, the liability of custodians for things.

> *Under strict liability concepts, the mere fact of the owner's relationship with and responsibility for the damage-causing thing gives rise to an absolute duty to discover the risks presented by the thing in custody.* If the owner breaches that absolute duty to discover, he is presumed to have discovered any risks presented by the thing in custody, and the owner accordingly will be held liable for failing to take steps to prevent injury resulting because the thing in his custody presented an unreasonable risk of injury to another.[14]

Thus, according to *Kent*, in a strict liability action the standard for determining liability is to presume the owner's knowledge of the risk presented by the thing under his control and then to determine the reasonableness of the owner's conduct in light of that presumed knowledge.

In view of *Kent*'s revelation that negligence and strict liability are so closely related to each other, there seemed to be no barrier left to a decision that contributory negligence is a defense to strict liability. This was precisely the position taken by Justice Dennis in his concurring opinion in *Kent*. Accepting the *Dorry* holding insofar as *Dorry* found that *Loescher* strict liability is much broader than the common law doctrine of strict liability for abnormally dangerous conditions and activities, Justice Dennis stated that most of the circumstances which give rise to strict liability under articles 2317 through 2322 have been neither ultrahazardous nor unnatural to the locality. He also noted that the *Loescher* opinion has been criticized for disregarding the traditional test of blameworthiness by imposing liability upon a defendant who had neither actual nor constructive knowledge of the defective condition of the thing in his custody. Justice Dennis suggested that the harshness resulting from this application of strict liability may be ameliorated to a large degree if the doctrine of comparative negligence is found to be applicable to articles 2317 through 2322.[15]

While there have been no Louisiana Supreme Court cases specifically affirming the *Dorry/Kent* rationale, intermediate courts of appeal which have had to develop the doctrine of victim fault as a defense in strict liability cases have accepted the *Dorry* holding that contributory negligence may be equivalent to victim fault. Perhaps one reason intermediate courts have been inclined to follow the *Dorry* reasoning is their desire to avoid the sometimes inequitable results to the defendant of a refusal to allow contributory negligence as a defense when the plaintiff's conduct has clearly been a cause in fact of the harm but falls short of constituting assumption of the risk.

An example of this reasoning may be found in the pre-*Dorry* case

14. *Id.* at 497.
15. *Id.* at 502 (Dennis, J., concurring).

of *Sullivan v. Gulf States Utilities Co.*[16] The plaintiff was a security guard employed by a company occupying premises owned by Gulf States Utilities Company. The plaintiff was injured when he drove his truck into a concrete pier on the premises. Several piers had been constructed on the grounds, and at the time of the accident they were not marked, painted or barricaded. The greyish color of the pier in question blended imperceptibly into the asphalt that covered the parking lot which was unlit. The plaintiff was temporarily blinded by the headlights of an oncoming vehicle in the parking lot which caused him to become distracted and run head on into the pier. The plaintiff knew that a number of piers had been constructed in the parking lot and that protective barrels had been removed from around most of the structures. The plaintiff stated, however, that he did not see the pier that he hit until an instant before impact. The trial court denied plaintiff's recovery on the basis of plaintiff's contributory negligence. In the ensuing appeal, it was asserted that contributory negligence did not apply to a claim based on strict liability under article 2317. The first circuit affirmed the trial court's decision and held that victim fault directly encompassed mere contributory negligence. According to the court:

> It would be ironic in this case for the defendant to be able to escape liability in a negligence action because of the plaintiff's contributory negligence, yet be held liable under a strict liability theory when the plaintiff has been equally at fault in bringing about the harm. We think the policy reasons underlying *Loescher v. Parr* point away from such an ironic result. *Loescher* was based on a proposition that, out of two innocent parties, the owner or guardian of a thing should pay for any damage caused by that thing. We do not have two innocent parties in this case, as the word innocent is understood in strict liability law. For purposes of this case, we think the measure of conduct necessary to achieve the appellation "contributory negligence" is the same measure necessary to amount to "victim fault" under Article 2317.[17]

The fourth circuit also departed from a strict application of *Langlois* in *Carpenter v. State Farm Fire & Casualty Co.*[18] Following Justice Dennis' rationale in *Kent*, the *Carpenter* court found that social policy alone was the factor which traditionally prevented courts from recognizing contributory negligence as a defense to strict liability. The court found, however, that the Civil Code imposes strict liability for conduct which would not necessarily warrant the imposition of strict liability under the common law tradition. The court went on to state that in situations such

16. 382 So. 2d 184 (La. App. 1st Cir.), *writ denied*, 384 So. 2d 447 (La. 1980).

17. *Id.* at 189-90. *See also* Stewart v. Sam Wallace Indus. Co., 409 So. 2d 335 (La. App. 1st Cir. 1981), *writ denied*, 413 So. 2d 497 (La. 1982).

18. 411 So. 2d 1206 (La. App. 4th Cir. 1982).

as these, there is no policy basis for applying the social policy borrowed from the common law which prohibits contributory negligence as a defense to an action in strict liability. Citing *Dorry* with approval, the court held that contributory negligence may indeed be a defense to an action in strict liability where the defendant's conduct concerns neither ultrahazardous activity nor the liability of a manufacturer for its product.

The first circuit adhered to its decision in *Sullivan* in *Buchanan v. Tangipahoa Parish Police Jury*.[19] Citing *Dorry, Kent, Sullivan* and *Carpenter* as the bases of its holding, the court reaffirmed that contributory negligence may be the equivalent of victim fault so as to bar an action in strict liability. The court found that the Louisiana concept of fault encompassed both strict and negligent liability claims; therefore, it is not theoretically inconsistent under Louisiana law to hold that the fault of contributory negligence is a bar to recovery even though the defendant's liability is premised on some legal fault other than negligence. The *Buchanan* court went on to state that where both parties are free from negligence, strict liability places the burden of the loss on a person legally responsible for the thing which caused the loss. Thus, where the conduct of the plaintiff contributed to his damage, this conduct should be judged in the same manner whether the standard of liability applied is strict liability or negligence because the duty imposed on the defendant is the same in both cases. The court concluded that "[w]ith the advent of comparative negligence . . . the harsh effect of the 'all or nothing' contributory negligence rule will be substantially tempered."[20] By this statement, the first circuit indicated, as did Justice Dennis, that comparative negligence principles should apply to apportion damages in a strict liability action.

When the supreme court granted writs in *Entrevia v. Hood*,[21] final resolution of the question of contributory/comparative negligence as a defense to at least "relational" strict liability under articles 2317 through 2322 appeared probable. The case involved an abandoned farmhouse located in a remote, rural area. Although the building was surrounded by a fence and posted with "No Trespassing" signs, the plaintiff and her friend entered the premises and ascended the steps to the building. The plaintiff was seriously injured when the steps to the house collapsed as she descended. The court of appeal had reversed a finding of no liability because the plaintiff had proved the steps were defective and the defendant had failed to prove any affirmative defense.[22] Thus, the court, confronted with a claim of strict liability asserted by a trespasser, clearly had the opportunity to add another chapter to the "victim fault" story; but the court declined to do so. Perhaps motivated by the near hysteria

19. 426 So. 2d 720 (La. App. 1st Cir. 1983).
20. *Id.* at 726 (footnote omitted).
21. 427 So. 2d 1146 (La. 1983).
22. *Entrevia v. Hood*, 413 So. 2d 954 (La. App. 1st Cir. 1982).

and confusion generated by *Kent*,[23] the court chose instead to paint with a broader brush and to lay to rest the ambiguities involved in the decision-making process in strict liability actions. The result is an opinion masterful both in its clarity as to the nature of strict liability and in its instructive value to the lower courts as to how to properly resolve a strict liability dispute. Moreover, while the court sidestepped the victim fault question, it did lay the seeds for its final resolution.[24]

The court, through Justice Dennis, stated that a plaintiff may recover in strict liability under article 2317 or 2322 only if the injured person shows that the building or its appurtenances posed an "unreasonable risk of injury to others, and that his damage occurred through this risk."[25] If these elements are proven, the owner will not be absolved of his liability due to his lack of knowledge of the condition of the building. Neither will the owner be relieved from his liability by showing that the defect was not easily detectable.[26]

The majority emphasized that the owner could not be held responsible for all injuries resulting from any risk posed by his building; he will be responsible only for those injuries caused by an unreasonable risk of harm to others. Moreover, it was the responsibility of the court to assess whether particular risks were encompassed within the owner's obligations from the standpoint of justice and social utility. In making such a decision, the judge must consider "moral, social and economic values as well as the ideal of justice."[27] Such a consideration would lead the trial judge to an intelligent and responsible decision.

The *Entrevia* court found that the judicial process involved in deciding whether a risk is unreasonable in a strict liability sense is similar to the process used to determine whether a risk is unreasonable in a traditional negligence setting. In *Kent*, the court suggested that a proper approach was to presume the owner's knowledge of the defective condition, then to evaluate the owner's actions in light of this presumed knowledge. *Entrevia* rejected this approach, stating that such a method is "indirect and entirely unnecessary once the judge understands that the standards or patterns of utility and morality which he must consider in deciding if a risk is unreasonable will be found in the life of the community."[28]

The methods of determining negligence as opposed to strict liability under article 2317 are not identical in all respects. The major distinction between the two theories is that a defendant in a strict liability case can-

23. Crawford, *Developments in the Law, 1981-1982—Torts*, 43 LA. L. REV. 607 (1982).
24. *See infra* text accompanying note 67.
25. 427 So. 2d at 1148.
26. *Id.*
27. *Id.* at 1149.
28. *Id.* at 1150.

not defend by showing his inability to know or prevent the risk. Such a showing would preclude a finding of negligence.[29]

Using this analysis, the *Entrevia* majority found that "a knowingly unauthorized entry of another's fenced and posted immovable property is legally and morally reprehensible conduct."[30] The court noted that the building in question was isolated and unproductive and that the only dangers posed by this property were those typically associated with a run-down old farmhouse. Based on these facts, the majority reasoned that the magnitude of risk posed and the gravity of the harm threatened "were small in comparison with that of other risks presented by things in our society."[31] It was held, therefore, that the building posed no unreasonable risk of harm, and plaintiff's recovery was denied.[32]

The analysis of the court in *Entrevia* is in fact similar to the garden variety "duty-risk" approach. The plaintiff was injured at an abandoned building used by her for a secret rendezvous. The peril complained of was the very quality which attracted and exposed her to the risk: the deserted, dilapidated and isolated nature of the building made it unlikely that her encounter would be interrupted. Under these circumstances, the owner of the building cannot be said to have a duty to protect this plaintiff from this risk. Another plaintiff, perhaps a child, exposed to the risk for reasons other than the existence of the risk itself, might be covered by a duty imposed on the defendant.

As *Entrevia* makes clear, the policy reasons for imposing strict liability, at least as concerns article 2317 actions, are basically the same as those operative in negligence cases. Moreover, the judicial process involved in resolving both of these types of dispute is similar. Armed with such realities, there should be an easy transition from the unsatisfactory compromise of *Dorry*, which limits the equation of victim fault with contributory negligence to a case-by-case determination, to a more workable approach which would further refine the understanding of the concept of strict liability by recognizing the application of contributory/comparative negligence in disputes under Civil Code articles 2317 through 2322. In

---

29. *Id.*

30. *Id.*

31. *Id.*

32. Justice Watson concurred in the decision but found that the plaintiff's injury was caused by her own fault. He found, therefore, that the plaintiff was barred from recovery due to her assumption of the risk. *Id.* at 1151 (Watson, J., concurring). Justice Dennis, however, chose not to go the traditional route taken by Justice Watson. He opted instead to continue the process of refining and re-defining the concept of strict liability in Louisiana. Justice Lemmon, in assigning additional concurring reasons, characterized the question in more traditional duty-risk terms. Strict liability gives rise to the presumption of knowledge of the defect, and, given this knowledge, what is the duty of the owner to remedy the defect and protect this plaintiff from the particular risk incurred? *Id.* at 1151 (Lemmon, J., concurring).

speaking to the bar about the ramifications of *Entrevia*, Justice Dennis observed:

> A majority of the Louisiana Supreme Court has not decided whether victim fault, which is a defense to [article] 2317 strict liability, includes contributory negligence. But the policy reasons for refusing to recognize contributory negligence as a defense to some forms of strict liability do not appear to be present in [article] 2317 strict liability. The conventional economic theory underlying strict products liability is that defendants, who are manufacturers or sellers, are in a position to distribute the loss among the consuming public by insurance or product pricing and they are in a position to reduce losses by marketing a better product. In the other forms of strict liability at common law, there is an element of *willful* creation of an unreasonable risk to others by abnormally dangerous conditions and things. But most of the things covered by [article] 2317 strict liability, such as the magnolia tree in *Loescher v. Parr*, are neither ultrahazardous nor unnatural to the locality, and many of their custodians, such as the owner of the vacant farmhouse in *Entrevia*, are not engaged in an enterprise which permits them to spread the cost of risks among others. Moreover, comparative negligence is being applied increasingly even in strict liability cases by other states, most notably by California, the originator of this type of strict liability. If we recognize that the policy reasons for imposing [article] 2317 strict liability are primarily the same as those for negligence liability, and further accept the reality that the judicial process for determining the unreasonableness of a risk or the imposition of a duty is the same in both of these areas of law, it would seem that a just result would require the expansion of comparative [negligence] principles to include [article] 2317 strict liability. This result would be consistent with the foundation principle of our delictual responsibility law that a person must repair the damage caused another by his fault, but only so much as is caused by his fault. And it would more fully restore Louisiana's civilian heritage of comparative negligence which was lost when the Supreme Court ignored the former version of Civil Code Article 2323 and imported the exclusively common law idea of contributing fault as a bar to recovery.[33]

In *Hyde v. Chevron*,[34] the United States Fifth Circuit Court of Appeals has already made this transition. In an attempt to discover the current state of contributory negligence as a defense to strict liability in Loui-

33. J. Dennis, Address at the Annual Meeting of the Louisiana Association of Defense Counsel 10-11 (May 1983) (emphasis added) (on file with *Louisiana Law Review*).

34. 697 F.2d 614 (5th Cir. 1983).

siana, Judge Wisdom went through a case-by-case analysis of decisions made by intermediate Louisiana appellate courts subsequent to *Dorry*, and made an exhaustive review of the *Kent* decision and its effect on contributory negligence as a defense to strict liability in Louisiana. This exercise resulted in the court's finding that previous decisions by the Fifth Circuit,[35] and the district court decision in *Hyde*, had misinterpreted the law in Louisiana in asserting that only victim conduct amounting to assumption of risk would relieve the defendant of liability in a strict liability action under Louisiana law. The Fifth Circuit held that contributory negligence does constitute a defense to a strict liability claim under the present law of Louisiana. In dicta, the *Hyde* court stated that the comparative negligence statute should apply to the defense of contributory negligence in strict liability cases. The court quoted Professor Plant:

> [T]here is nothing in the basic strict liability policy that requires that defendant pay all and plaintiff fault be ignored. A similar view is warranted as to parents, owners of animals, and owners or custodians of things. For reasons that have roots deep in the history of the Louisiana Civil Code such persons carry the burden of strict liability; but the *Louisiana courts have repeatedly held that the obligation is not absolute and can be extinguished by plaintiff's negligence.*[36]

At present, the Fifth Circuit is following *Dorry* with regularity as it relates to actions other than those involving products liability or ultrahazardous activities. For example, *CNG Producing Co. v. Columbia Gulf Transmission*[37] involved the venting of natural gas, which the court found not to be an ultrahazardous activity giving rise to absolute liability. The plaintiff's alternative theory of recovery was strict liability under article 2317. The court found that liability could not be imposed under article 2317, since the plaintiff was contributorily negligent and thus barred from recovery.

Barring any unforeseen developments, the application of contributory/comparative negligence in most strict liability cases seems imminent. However, the products liability area seems to be posing some difficulty for the courts. With no Louisiana guidance in the area, the federal courts have grappled with the question and have failed to reach a definitive answer. In *Coburn v. Browning Arms Co.*,[38] Judge Politz reviewed recent Louisiana authority on strict liability, including *Dorry* and *Kent*. He summarized his conclusion as follows:

---

35. *See* Rodrigue v. Dixilyn Corp., 620 F.2d 537 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981).

36. *Id.* at 629 (quoting Plant, *Comparative Negligence and Strict Tort Liability*, 40 LA. L. REV. 403, 417 (1980)).

37. 709 F.2d 959 (5th Cir. 1983).

38. 565 F. Supp. 742 (W.D. La. 1983).

> [T]he teachings of *Dorry* and its progeny do not undermine the doctrinal basis for strict products liability first explicated in the seminal case of *Weber v. Fidelity & Cas. Ins. Co.*, 259 La. 599, 250 So.2d 754 (1971). . . . [Thus], contributory negligence is not a defense in a strict products liability case . . . . The policy reasons warranting application of the contributory negligence defense in article 2317 and 2322 cases do not obtain in products liability litigation, where the manufacturer's affirmative act of distributing its unreasonably dangerous product in the stream of commerce eventually culminates in consumer injury . . . .[39]

In another very recent products liability case, *Bell v. Jet Wheel Blast*,[40] the Fifth Circuit completely ignored both *Dorry* and *Kent*, citing only *Langlois* and *Loescher* for the proposition that assumption of the risk alone is equivalent to the "victim fault" which defeats a strict liability claim. The *Bell* majority could have easily reached the same decision by citing *Dorry* for the proposition that contributory negligence does not constitute a defense to an action grounded in products liability due to the policy reasons underlying the products liability action.[41]

In *Lewis v. Timco, Inc.*,[42] the Fifth Circuit has taken the opposite approach under federal law. There, plaintiff Lewis was injured while working on a jack-up drilling barge in the coastal waters of Louisiana. A piece of equipment that plaintiff was operating malfunctioned, causing the accident. The district court found that the equipment had a design defect which rendered it defective and unreasonably dangerous. The district court also found that plaintiff was negligent in his use of the equipment, and on that basis, plaintiff's recovery was reduced according to the extent of his negligence. In the appeal which followed, the Fifth Circuit faced the issue of whether the general maritime law rule of comparative negligence applies to a strict products liability case. On original hearing, the court found that while comparative fault has long been the generally accepted doctrine in maritime torts, in a strict products liability action comparative negligence principles should not apply because public policy demands that the burden of injuries caused by defective products be placed on the manufacturer.[43] On rehearing *en banc*, the Fifth Circuit reversed this holding.

---

39. *Id.* at 748 (citations omitted).

40. 709 F.2d 6 (5th Cir. 1983).

41. Rehearing was granted in *Bell* on October 14, 1983. Bell v. Jet Wheel Blast, 717 F.2d 181 (5th Cir. 1983). The Fifth Circuit has certified to the Louisiana Supreme Court the question of whether contributory negligence is a defense to products liability. *Id.* at 183. Thus, it may soon be seen whether the Louisiana Supreme Court will stand behind the *Dorry* decision as it relates to products liability and hold that contributory negligence is not a defense.

42. 697 F.2d 1252 (5th Cir.), *rehearing en banc*, 716 F.2d 1425 (5th Cir. 1983).

43. *Id.* at 1254-55.

The decision handed down by the court on rehearing is of special interest because the court addressed policy reasons for imposing a comparative fault scheme. The plaintiff argued that the concepts involved in negligence and strict liability were not comparable, and that application of comparative negligence principles to this case would thwart the public policy of the State of Louisiana. The court addressed these issues, but first found it helpful to review the doctrine of comparative fault as applied under maritime law. The court first recognized that admiralty courts have applied comparative negligence principles to both fault and non-fault based liability cases for many years. Since a major objective of maritime law is to achieve uniformity, the maritime law has traditionally resisted any doctrinal change which might interfere with this objective. The court pointed out that under the Death on the High Seas Act (DOHSA) the court must "take into consideration the degree of negligence attributable to the decedent and reduce the recovery accordingly."[44] DOHSA encompasses claims for deaths caused by defects in products. If comparative negligence principles were not applied to maritime products liability cases, anomalous results would be achieved. For example, if a worker's death on the high seas was caused by a defective product, the recovery would be reduced on account of the worker's negligence. If the worker was only injured by the defective product, then his recovery would not be reduced. Also, since DOHSA applies only to accidents occurring more than a marine league from shore, if comparative negligence principles were not applied uniformly to all maritime products liability cases, plaintiffs would be treated differently depending upon where a fatal accident occurred.[45]

The court found that, if comparative negligence principles did not apply to maritime products liability cases, non-uniformity would also result in the area of multiparty litigation. For example, if a negligent plaintiff, negligent defendant, and the manufacturer of a defective product were all held jointly liable for injuries, the plaintiff's negligence would reduce his recovery from the negligent defendant but *not* from the manufacturer. In the case of defendants held jointly and severally liable, the negligent plaintiff would be able to recover full damages from the manufacturer, so that in effect the result would be as if there were no doctrine of comparative negligence with regard to the negligent defendant.[46]

The court listed the traditional doctrine of unseaworthiness as a final example of an area in which uniformity would be adversely affected by failure to apply comparative negligence principles. Should a vessel be rendered unseaworthy due to a defective product, the manufacturer of the product would be held to a stricter standard of liability than the vessel owner, since the plaintiff's negligence would be a factor in determining

44. 46 U.S.C. § 766 (1982).
45. 716 F.2d at 1428.
46. *Id.*

recovery against the vessel owner but not against the manufacturer. The court also predicted that seamen would attempt to escape the comparative fault principles applicable to the doctrine of unseaworthiness by styling their cases "products" cases. If comparative negligence principles were rejected in products cases, the court felt that "many maritime torts of our circuit will become products cases with the companion problem that the courts of this circuit would be favored over more convenient courts by seamen with a choice of forum."[47] The court clearly believed that a rejection of comparative negligence principles in maritime products liability cases would lead to inconsistent and anomalous results throughout the entire field of maritime law.

The Fifth Circuit next addressed Lewis' argument that a plaintiff's negligence cannot be compared with a defendant's fault for strict liability purposes because the two concepts are incongruous. This argument surfaces often in cases involving contributory or comparative negligence and strict liability. A review of cases from common law jurisdictions which had decided whether to apply comparative negligence principles in strict products liability cases[48] convinced the Fifth Circuit that the majority of courts were moving towards applying comparative fault in such cases. The court, therefore, found no reason not to apply comparative negligence in maritime products liability cases. The conceptual problems of comparing negligence and strict liability did not bar the application of comparative negligence principles in the *Lewis* case.

The final argument made by the plaintiff was that an application of comparative negligence principles to a products liability action would frustrate the policy of the State of Louisiana, in whose territorial waters the accident occurred. The court noted that it had recently certified to the Louisiana Supreme Court the question whether Louisiana law recognized contributory negligence as a defense to a products liability action.[49] In spite of this fact, the Fifth Circuit stated: "While Louisiana courts do not appear to have applied comparative fault principles to strict products liability cases, the state has no 'significant policy' against doing so."[50] After a brief discussion of the Louisiana comparative negligence statute, the Fifth Circuit concluded: "While we may be uncertain in this reading of Louisiana law, we are confident that recognition of comparative fault in products cases will not 'frustrate' a dedicated policy of Louisiana."[51]

---

47. *Id.* at 1429.

48. *Id.* at 1429-31. The court discusses, *inter alia*, the leading cases of Edwards v. Sears, Roebuck & Co., 512 F.2d 276 (5th Cir. 1976) (Mississippi); Butaud v. Suburban Marine & Sporting Goods, 555 P.2d 42 (Alaska 1976); Daly v. General Motors Corp., 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978).

49. *See supra* note 41.

50. 716 F.2d at 1431.

51. *Id.* at 1432.

The court summarized by stating that general considerations of fairness and efficiency require that comparative negligence be a defense in maritime products liability actions. The court stated that such a defense is essential to maintaining uniformity in the maritime law. The court therefore reinstated the decision of the district court.

Judge Politz, who wrote the original Fifth Circuit decision which held that comparative negligence did not apply in maritime products liability cases, authored a strong dissent. Judge Politz stated his belief that the majority opinion was at odds with the principles underlying strict liability. In his opinion, strict liability and comparative fault are not compatible concepts. He stated that historically strict liability did not develop alongside of the law of negligence, but rather evolved separately and was derived from the law of warranty. Strict liability is a species of liability without fault, neither based in negligence nor contract. Judge Politz stated that the principles of maritime strict liability and strict products liability are based on the rationale that the injured person is unable to protect himself adequately from the potential harm.[52]

Judge Politz stated that products liability actions focus not on the quality of the act causing the injury, but on the product itself. The purpose behind strict products liability is the reduction of the risks imposed on society by defective products. Liability is imposed upon the manufacturer because it is felt that the "manufacturing enterprise" is better equipped to bear the cost of injuries occasioned by defective products through including this cost as an element of product cost. Strict products liability is designed to protect society as a whole, and Judge Politz found that the "relationship between specific plaintiffs and defendants is of secondary importance; it is considered subservient to the interest of the public as a whole."[53]

After his consideration of the policies underlying strict products liability, Judge Politz considered the policies behind the comparative fault doctrine. He found that the term "fault" implies some blame and is the equivalent of negligence. The concept of fault presupposes a duty or obligation to conform to a certain standard of conduct: the focus is upon the nature of the act itself. In a negligence action, there is no problem with comparing the fault of the parties; indeed, the state of the law today is that such comparisons should be made, as this is seen as the most equitable method for apportioning liability. However, there is no requirement of traditional fault in a strict liability situation. Judge Politz likened the comparison of a plaintiff's fault with the defendant's strict liability to "an attempt to measure the amount of water in an empty glass."[54]

52. *Id.* at 1433 (Politz, J., dissenting).
53. *Id.* at 1434 (Politz, J., dissenting).
54. *Id.* at 1435 (Politz, J., dissenting).

Since strict liability is essentially liability without fault, Judge Politz found it "simply illogical to attempt to quantify fault where admittedly none exists."[55]

Strict liability has come into being in situations where, as a matter of policy, the risk of damages should fall on the strictly liable party. Thus, strict liability, as perceived by Judge Politz, allows a plaintiff in certain situations to escape his own negligence. As a result, Judge Politz found that the real question faced by the court in the *Lewis* case was "whether to accept strict liability, specifically strict products liability, as meritorious and apply it without reducing plaintiff's recovery for simple negligence, or to signal the demise of strict liability as a basis for legal accountability in tort."[56]

Realizing that inequitable results are often brought about by the application of strict liability, but believing that policy goals require that the basic doctrine be preserved, Judge Politz offered an alternative to the comparing of fault in a strict products liability case. He suggested that *causation* be compared as a basis of apportioning liability. He pointed out that the operative element in every strict liability action is the causal connection between the hazard or defect and the injury. If the plaintiff's actions are partially responsible for *causing* the resulting harm, Judge Politz felt that an appropriate reduction in recovery would be in order. However, the focus of such an inquiry would be on the causal relationship between the plaintiff's conduct and the injury, not on the "normative aspects" of plaintiff's conduct. Judge Politz reasoned that fault and causation are not equivalent because fault relates a specific act to the actor's responsibility, whereas causation relates the act to the result. Questions of causation are not based on the reasonableness of the act but are focused on whether there is a "nexus between the act and the result."[57] Thus, even in a strict liability case, the plaintiff's recovery could be reduced depending upon whether or not the plaintiff contributed to the *cause* of the accident. Judge Politz felt that such an approach would equitably apportion responsibility in a manner consistent with the policies of strict liability.[58]

From the cases reviewed thus far, it appears that the weight of authority (both in Louisiana and the federal Fifth Circuit) would conclude that comparative negligence applies to actions grounded in strict liability. On the basis of *Dorry* and *Kent* and their offspring, it would seem that contributory negligence is a defense to all strict liability actions not involving products liability or ultrahazardous activity. Of course, the Louisiana Supreme Court will soon answer the question with respect to products

55. *Id.*
56. *Id.*
57. *Id.* at 1438 n.11 (Politz, J. dissenting).
58. *Id.* at 1438-39 (Politz, J. dissenting).

liability with its upcoming decision in *Bell*. Additionally, while *Lewis* was a case decided strictly under the general maritime law, it is conceivable that the decision could have some persuasive effect on the Louisiana Supreme Court. At any rate, it *should* be relatively clear in strict liability cases not involving products or ultrahazardous activity that once contributory negligence is found, the comparative negligence statute should necessarily apply to the apportionment of damages. A review of cases decided pursuant to the comparative negligence statute, however, will reflect that in practice this may not be the case.[59]

The cases that have been decided under article 2323 have tended to adopt language from an article by Professor Alston Johnson prepared in conjunction with a comparative negligence symposium compiled by the *Louisiana Law Review* soon after the comparative negligence statute was adopted, but before its effective date.[60] In his article, Professor Johnson divided tort cases into three broad categories: (a) cases in which a defendant's duty extends to the protection of a plaintiff against the plaintiff's own carelessness; (b) cases in which the defendant is not liable because the plaintiff's conduct has produced a situation for which the law should not require a reasonably prudent person to prepare and respond; and (c) those that fall into neither category, in which the victim's fault and the defendant's fault may be weighed in the balance.[61]

The first case decided under the Louisiana comparative negligence statute was *Frain v. State Farm Insurance Co.*[62] The decedent was a patient in a mental hospital who was being treated with drugs for a severe emotional disorder. While out on a temporary pass, the decedent borrowed the defendant's car and was involved in an accident which resulted in her death. The plaintiff filed a wrongful death action on behalf of the decedent's minor daughter, alleging that the defendant negligently contributed to the death of the decedent. The trial court dismissed the suit on the grounds that it stated no cause of action. The second circuit found that a cause of action did exist. The court's decision adopted the language in Professor Johnson's article with respect to the three categories of tort cases. The court found types (a) and (b) to be "strict" duty-risk cases, and agreed with Professor Johnson that contributory negligence does not apply in those types of cases. Thus, the court reasoned that comparative

59. Civil Code article 2323 is applicable only to a cause of action arising after August 1, 1980. 1979 La. Acts, No. 431, § 7. Therefore, there is very little case law interpreting the comparative negligence statute, and none interpreting it as it relates to strict liability.

60. Johnson, *Comparative Negligence and the Duty/Risk Analysis*, 40 LA. L. REV. 319 (1980).

61. Professor Johnson argues that comparative negligence should apply only in type (c) cases. *Id.* at 337-38. *But see* Plant, *supra* note 36, at 412-14 (arguing that comparative negligence principles can apply to the apportionment of damages in strict liability cases, because the statute refers to the "fault" of the defendant).

62. 421 So. 2d 1169 (La. App. 2d Cir. 1982).

negligence did not apply in those cases. The court found that this particular case was a type (a) case in which the defendant had a duty to protect the decedent against her own actions under the circumstances, thereby implying that comparative negligence would not serve to reduce the plaintiff's recovery.[63]

The next case decided under the comparative negligence statute was *Bays v. Lee*.[64] The plaintiff's minor son, a pedestrian, was injured when he was struck by a taxicab driven by the defendant. The trial court, finding for the plaintiff, did not apply the comparative negligence statute. It was contended on appeal that this was an error on the part of the trial court. The fourth circuit quoted, with approval, Professor Johnson's article to the same extent that it was quoted in *Frain*. The court found that this case fell into category (a) in which the defendant's duty extended to protect plaintiff from his own negligence. This holding was based on the fact that *Baumgartner v. State Farm Mutual Automobile Insurance Co.*[65] abolished the defense of contributory negligence in a suit by pedestrians against motorists for injuries. Finding that contributory negligence was not a defense, the court held that comparative negligence likewise did not apply to this situation.[66]

The third and final case decided to date under the comparative negligence statute, *Dulaney v. Travelers Insurance Co.*,[67] involved a slip and fall. The plaintiff was injured on defendant's premises when he slipped and fell in a one-inch deep drainage trench in which a thin layer of mud had accumulated. The trial court found for the defendant on the basis that the drainage depression was not a premises defect for which the defendant would be liable under article 2317. The trial court reasoned that no liability attached because no unreasonable risk of injury was created. The first circuit did not address the issue of defendant's strict liability since it found that the defendant was negligent. In considering whether to apply the comparative negligence statute, the first circuit followed the lead of the second and the fourth circuits and adopted the language from Professor Johnson's article. The court found that this case was a type (c) case in which the victim's fault and the defendant's fault should be compared. The court found that the plaintiff had the duty to see and avoid any visible hazards, but that in this case the plaintiff had not breached that duty. The court, therefore, found the plaintiff guilty of "[zero] percent negligence."[68]

With respect to whether comparative negligence principles are ap-

63. *Id.* at 1173.
64. 432 So. 2d 941 (La. App. 4th Cir. 1983).
65. 356 So. 2d 400 (La. 1978).
66. 432 So. 2d at 944-45.
67. 434 So. 2d 578 (La. App. 1st Cir. 1983).
68. *Id.* at 583.

plicable to actions grounded in strict liability, the only statement which may be made with certainty is that "the jury is still out." When one initially considers that strict liability is a species of liability without fault, the application of comparative negligence principles appears incongruous. However, when it is also considered that Louisiana imposes strict liability in areas in which strict liability would not traditionally be imposed, it does not appear quite so incongruous to apply comparative negligence principles. The key language of Civil Code article 2323 is "when contributory negligence is applicable." The Louisiana courts, considering that strict liability under Civil Code articles 2317 through 2322 is dissimilar to traditional principles of strict liability, have, in recent times, indicated that contributory negligence is applicable to actions grounded in strict liability. Specifically, the plurality in *Dorry* stated that contributory negligence may be applicable to a claim based on strict liability and that whether it should apply to a specific action will be decided on a case-by-case basis. The *Dorry* plurality excluded cases involving products liability and ultrahazardous activity from its holding. The United States Fifth Circuit Court of Appeals, however, could not decide whether *Dorry* was conclusive as to the products liability issue. As a result, the Fifth Circuit has recently certified to the Louisiana Supreme Court the question of whether contributory negligence is applicable to a products liability case.[69] Thus, it will now be necessary for the high court to review the plurality decision in *Dorry* and make the decision on the contributory negligence/products liability issue, once and for all.

While a decision regarding the issue of whether contributory/comparative negligence applies to a products liability claim is on the horizon, it would seem that with respect to other strict liability claims, namely those arising under articles 2317 through 2322, the answer to the comparative negligence question is evident. To the extent that contributory negligence has been allowed as a defense to such strict liability claims, comparative negligence principles should be used to apportion damages. This solution, which has been espoused by some commentators, would certainly comport with the language of the statute itself.

Moreover, former Civil Code article 2323,[70] largely ignored by Louisiana courts in favor of the common law doctrine of contributory negligence,[71] was not limited by its language to only negligence actions under article 2316. While article 2323 was not applicable to the action imposing liability without regard to want of care by the actor envisioned

69. *See supra* note 41.

70. "The damage caused is not always estimated at the exact value of the thing destroyed or injured; it may be reduced according to circumstances, if the owner of the thing has exposed it imprudently." LA. CIV. CODE art. 2323 (as it appeared prior to its repeal by 1979 La. Acts, No. 431, § 1).

71. F. STONE, TORT DOCTRINE § 49 in 12 LOUISIANA CIVIL LAW TREATISE 69-70 (1977).

by article 2315, article 2323, which clearly embodies a notion of comparative fault, was applicable to cases of presumed or imputed negligence, imprudence, or want of skill under articles 2317 to 2322. Therefore, with the exception of the absolute liability under article 2315 as recognized in *Langlois*, there has always existed authority, codal at least, for the imposition of comparative negligence in all other classes of tort cases, including "strict liability." Articles 2317 to 2322 impute a lack of care, diligence and skill to the keeper or custodian when the persons or things in his custody act to cause damage. It can be said that these articles are founded in a form of negligence by imputation, and cannot be fairly said to give rise to liability without negligent fault or want of care.

Given the apparent inevitability of the application of comparative negligence to some types of "strict liability" actions, the methodology for such an application takes on special significance. The standard for comparing "fault" is ignored by article 2323. Therefore, the best standard for evaluation would appear to be the degree of causation or contribution attributable to each party responsible for the risk. At the same time, the unreasonableness of the contribution in moral, social and economic terms should also be considered.

This is the approach espoused by Justice Dennis, the author of the opinion in *Entrevia*, at least for actions under Civil Code article 2317.

> In comparing the fault of a defendant whose thing has caused damage to a contributorily negligent plaintiff, we should benefit from our dawning realization that the judicial process involved in determining whether a risk is unreasonable under [article] 2317 is very similar to that employed in determining whether a risk is unreasonable in a traditional negligence problem, and in deciding the scope of duty or legal cause under the duty-risk analysis. If we can by this process distinguish risks which are unreasonable from those that are reasonable, certainly in the same way we can judge whether one risk is more unreasonable than another. I suggest, therefore, that the process we should follow in a [article] 2317 case would be something like this:
>
> First, by focusing independently upon the defendant's thing and the plaintiff's conduct, we determine if each created an unreasonable risk of harm.
>
> Second, we determine if each risk contributed to the accident.
>
> Third, if both risks were unreasonable and contributed to the accident, we determine the magnitude of unreasonableness of each risk in terms of the same moral, social and economic considerations we use to determine that each was unreasonable in the first place.
>
> Fourth, we allocate to each party his proportionate responsibility for the injury depending upon his percentage of the combined

unreasonableness of the risks that contributed to the accident.[72]

Entrevia v. Hood provides the foundation upon which rules for the correct application of comparative negligence to strict liability actions can be built. Through its clarity, advocates, judges and jurists are provided a beacon to negotiate the difficult policy questions underlying the risk-shifting process. Certainly, this is better than the *ad hoc* approach of *Dorry v. Lafleur*.

72. J. Dennis, *supra* note 33, at 12-13.