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William Powers Jr.

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I. INTRODUCTION

A foreigner's viewpoint can be at once fresh and naive. Unencumbered by conventional wisdom, he can see contours in the terrain that natives overlook. Unfamiliar with local custom and idiom, however, he can fail to recognize important landmarks right in front of his nose. Thus, it is with some trepidation and much humility that I offer some observations—I would be honored if a few of you considered them to be ruminations[1]—on strict liability in Louisiana. I hope only that my observations are, on balance, more fresh than naive.

Controversy over strict liability in tort law has not, of course, been confined to Louisiana. Primarily in the context of products liability,[2] but also in the context of animals[3] and abnormally dangerous activities,[4] courts and scholars have grappled both with the propriety of using strict liability and with the meaning and contours of strict liability when it is used. In most states, strict liability is used in pockets, as an exception to the "normal" rule of negligence. In fact, one aspect of the debate about strict liability in most states is why it should be used *selectively* to govern some types of cases but not others.[5] In Louisiana, however, the use of strict liability to define the contours of *garde* gives the debate additional importance. It is my hope that lessons about strict liability learned in other jurisdictions—especially in the context of products li-

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* Hines H. Baker and Thelma Kelley Baker Chair in Law, The University of Texas School of Law; B.A. 1967, University of California (Berkeley); J.D. 1973, Harvard Law School. This paper was originally presented to the Louisiana Judicial College. I am grateful to Professor Frank Maraist for suggesting the topic. I am grateful to Professor David Robertson for helpful comments on an earlier draft.

1. See, e.g., Malone, Ruminations on Liability for the Acts of Things, 42 La. L. Rev. 979 (1982); Malone, Ruminations on the Role of Fault in the History of the Common Law, 31 La. L. Rev. 1 (1970).

2. See Restatement (Second) of Torts § 402A (1965).

3. See Restatement (Second) of Torts § 507 (1977).

4. See Restatement (Second) of Torts §§ 519, 520 (1977).

5. See, e.g., Powers, A Modest Proposal to Abandon Strict Products Liability, 1991 U. Ill. L. Rev. 639 (1991); Powers, Distinguishing Between Products and Services in Strict Liability, 62 N.C.L. Rev. 415 (1984).

ability—can clarify some of the problems Louisiana courts have encountered applying strict liability in cases involving *garde*.[6]

The debate about strict liability has (at least) two points of focus. *First*, should we use strict liability at all, either across the board or selectively[7] for certain types of cases, such as product cases, animals, ultrahazardous activities, and so on? In the context of Louisiana personal injury law, this debate takes on the added dimension of whether certain articles of the Code—such as Article 2315 (general liability for fault), Article 2317 (liability for defective things), Article 2318 (liability of keepers of animals), Article 2320 (liability of an employer), Article 2321 (liability of parents), Article 2322 (liability of building owners), and Articles 667 through 669 (legal servitudes to limit an owner's use of immovable property)—incorporate elements of strict liability. It is not my intention to enter these debates, as they have been ably addressed by others.[8]

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6. To the extent that Louisiana still uses *some* aspects of strict liability in products liability cases under the new Louisiana Products Liability Act, my analysis of strict liability can clarify some issues in products liability as well. See La. R.S. 9:2800.51-.59 (1991). Louisiana courts clearly relied on aspects of strict liability before the Act, and still apply these principles to cases that arose prior to September 1, 1988. See, e.g., Gilboy v. American Tobacco Co., 582 So. 2d 1263 (La. 1991); Halphen v. Johns-Manville Sales Corp., 484 So. 2d 110 (La. 1986); Walker v. Babcock Industries, Inc., 582 So. 2d 258 (La. App. 1st Cir. 1991). The Act itself relies on standards of liability that are very close to negligence, though they are not necessarily identical to negligence. See, e.g., Galligan, The Louisiana Products Liability Act: Making Sense of It All, 49 La. L. Rev. 629, 672 (1989) (noting that the Act's state of the art standard in La. R.S. 9:2800.59(A)(1) is not identical to negligence, because it asks whether the defendant *could* have known of a danger, not whether it *should* have known). See also, Kennedy, A Primer on the Louisiana Products Liability Act, 49 La. L. Rev. 565 (1989).

7. *Selective* use of strict liability raises special problems. Do adequate reasons exist for treating some types of cases differently than others? Even if they do, sometimes cases involve multiple defendants and multiple theories of liability. For example, a products liability case involving an allegedly defective automobile might also involve another driver and a doctor who treated the plaintiff. Applying different rules to different claims in the same lawsuit can create administrative problems, especially when the jury is asked to make a single comparison under comparative fault. I have addressed these issues elsewhere. See Powers, A Modest Proposal to Abandon Strict Products Liability, 1991 U. Ill. L. Rev. 639 (1991).

8. For general discussions of the relative merits of strict liability and negligence, see W. Landes & R. Posner, The Economic Structure of Tort Law (1987); S. Shavell, Economic Analysis of Accident Law (1987); Brown, Toward an Economic Theory of Liability, 2 J. Legal Stud. 323 (1973); Cowan, Some Policy Bases of Products Liability, 17 Stan. L. Rev. 1077 (1965); Epstein, Products Liability: The Gathering Storm, Regulation, Sept.-Oct. 1977, at 15; Montgomery & Owen, Reflections on the Theory and Administration of Strict Tort Liability for Defective Products, 27 S.C.L. Rev. 803 (1976); Posner, Strict Liability: A Comment, 2 J. Legal Stud. 205 (1973); Powers, A Modest Proposal to Abandon Strict Products Liability, 1991 U. Ill. L. Rev. 639 (1991); Note, Strict Liability

Second, even if courts adopt some version of strict liability for all tort law or for portions of tort law, what does strict liability look like? Specifically, how does strict liability differ from negligence? This has been a recurring problem for courts that apply strict liability in product cases,[9] and it has been a problem for Louisiana courts applying various versions of strict liability under the concept of *garde*.[10] It is this part of the debate—what does strict liability *mean* in cases where it is used—that I will address.[11]

II. Possible Meanings of "Strict" Liability

The term "strict liability" refers to a variety of legal standards. All of them purport to be different from negligence, but they are different from negligence in different ways. It is useful to examine six theoretical versions of potential liability, three of which would plausibly qualify as versions of "strict liability," on a spectrum defined by the types of arguments each theory makes available to the defendant. I will call these types:

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in Hybrid Cases, 32 Stan. L. Rev. 391 (1980).

For excellent discussions of the history and propriety of reading strict liability into various codal articles, see Malone, Ruminations on Liability for the Acts of Things, 42 La. L. Rev. 979 (1982) (Article 2317); Tomlinson, Tort Liability in France for the Act of Things: A Study of Judicial Lawmaking, 48 La. L. Rev. 1299 (1988) (general); Yiannopoulos, Civil Responsibility in the Framework of Vicinage: Articles 667-69 and 2315 of the Civil Code, 48 Tul. L. Rev. 195 (1974); Perkins v. F.I.E. Corp., 762 F.2d 1250 (5th Cir. 1985) (Articles 2315 and 667); Boyer v. Seal, 553 So. 2d 827 (La. 1989) (Article 2321); Loescher v. Parr, 324 So. 2d 441 (La. 1975) (Article 2317); Holland v. Buckley, 305 So. 2d 113 (La. 1974) (Article 2321).

9. See generally Powers, A Modest Proposal To Abandon Strict Products Liability, 1991 U. Ill. L. Rev. 639 (1991); Powers, The Persistence of Fault in Products Liability, 61 Tex. L. Rev. 777 (1983); Keeton, Manufacturer's Liability: The Meaning of "Defect" in the Manufacture and Design of Products, 20 Syracuse L. Rev. 559 (1969); Keeton, The Meaning of Defect in Products Liability Law—A Review of Basic Principles, 45 Mo. L. Rev. 579 (1970); Wade, Strict Tort Liability of Manufacturers, 19 Sw. L.J. 5 (1965).

10. Although "*garde*" might technically refer only to liability for defective things under Article 2317, I will use it loosely also to apply to liability for keepers of domestic animals under Article 2320 and liability for owners of buildings under Article 2322. As I will demonstrate, the analysis under these sections is structurally similar, whatever terminology is used.

11. I will not address in detail certain important collateral issues that arise in applying the concept of *garde* to specific cases, such as the extent to which the defendant must have control of the animal, employee, building, or thing to trigger *garde* in the first place. See, e.g., Daughty v. Insured Lloyds Ins. Co., 576 So. 2d 461 (La. 1991) (wife of lumber mill operator did not have *garde* over mill); King v. Louviere, 543 So. 2d 1327 (La. 1989) (secretary who drove her employer's automobile did not have *garde* over it); Olson v. Shell Oil Co., 365 So. 2d 1285 (La. 1979) (defendant was "owner" of building under Article 2322).

(1) unconditional liability,
(2) "real" strict liability,
(3) "so-called" strict liability,
(4) negligence,
(5) intent, and
(6) no liability.

We could add more points on the spectrum, such as "recklessness" or "gross negligence" between "intent" and "negligence," but these six types will suffice for our present purposes.

"Unconditional liability" would make the defendant liable any time his conduct *caused* injury to the plaintiff—no ifs, ands, or buts. We could call this type of liability "absolute," but I have avoided this term because it is sometimes used to describe a Louisiana liability theory available in cases involving ultra-hazardous activities or dangerous animals,[12] which is not, under this scheme, a form of unconditional liability. My "unconditional" liability is not truly unconditional because the plaintiff must still prove that the defendant caused the harm. For all practical purposes, however, this type of liability is at the end of the spectrum, because no one has suggested causation be eliminated from the plaintiff's prima facie case. The hallmarks of unconditional liability are that (1) the "propriety" of the defendant's conduct is not an issue, and (2) there are no defenses. Of course, the second hallmark makes unconditional liability an archetype, because *all* existing liability theories have *some* defenses, if only defenses such as the statute of limitations.

"Real strict liability" would make the defendant liable if he caused harm to the plaintiff, *without inquiring into the propriety of the defendant's conduct*, but it might permit the defendant to raise defenses (such as contributory negligence). It might also have *other* requirements in the plaintiff's prima facie case that do not focus on the propriety of the defendant's conduct, such as proximate (legal) causation. Under "real" strict liability, the plaintiff would not always win, but the defendant could never escape liability on the ground that his conduct in the specific case was socially desirable (or "worth it"), all things considered. "Real" strict liability is as strict as liability ever gets in actual legal systems.

"So-called strict liability" adds another factor into the calculus. Although the plaintiff need not prove that the defendant's conduct was *negligent*, the plaintiff must prove more than that the defendant's conduct caused injury. The plaintiff must *also* prove that *something*—a product, the defendant's building, the defendant's animal, and so on—

12. See, e.g., Galligan, A Theoretical (and Occasionally Practical) Examination of Absolute Liability, Strict Liability, and (Necessarily) Negligence, Louisiana Judicial College (December 7, 1990).

created an inappropriate[13] risk of harm. It is *this* type of strict liability that dominated strict products liability in Louisiana until passage of the Louisiana Products Liability Act in 1988[14] and that has dominated strict products liability in other jurisdictions under Section 402A of the Restatement (Second) of Torts.[15] More to the point for our current discussion, it is this type of strict liability that Louisiana courts have used to define liability in cases involving *garde*.[16]

"Negligence" makes the defendant liable if the plaintiff can prove, among other things, that the defendant's conduct in the specific case fell short of what a reasonably prudent person would have done. This, in turn, requires the plaintiff to prove *roughly* that the defendant created a risk of injury that was both reasonably foreseeable and unreasonable in the cost-benefit sense of the Learned Hand formula ($B < pL$).[17] Negligence law is much more complex than this, and no one reasonably thinks the Hand formula is a precise algebraic calculation.[18] The precise

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13. I use the word "inappropriate" to avoid committing this *type* of theory to a specific *content*. Usually "inappropriate" is articulated as "unreasonable." See, e.g., Boyer v. Seal, 553 So. 2d 827 (La. 1989) (animal created "unreasonable" risk of harm); Entrevia v. Hood, 427 So. 2d 1146 (La. 1983) (house did not create "unreasonable" risk of harm); Loescher v. Parr, 324 So. 2d 441 (La. 1975) (tree created "unreasonable" risk of harm).

14. La. R.S. 9:2800.51-.59 (1991). Liability under the Act is based *nearly* on negligence, but the standard of liability is not precisely negligence. See Galligan, The Louisiana Products Liability Act: Making Sense of It All, 49 La. L. Rev. 629, 672 (1989) (noting that the Act's state of the art standard is not identical to negligence, because it asks what the defendant *could* have known, not what the defendant *should* have known).

15. See Powers, A Modest Proposal to Abandon Strict Products Liability, 1991 U. Ill. L. Rev. 639 (1991).

16. See, e.g., Boyer v. Seal, 553 So. 2d 827 (La. 1989); Entrevia v. Hood, 427 So. 2d 1146 (La. 1983); Seals v. Morris, 410 So. 2d 715 (La. 1982); Loescher v. Parr, 324 So. 2d 441 (La. 1975).

17. See United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947); Allien v. Louisiana Power & Light Co., 202 So. 2d 704 (La. App. 3d Cir. 1967).

18. In fact, Hand did not himself consider his formula to be more than a heuristic device. See Moisan v. Loftus, 178 F.2d 148, 149 (2d Cir. 1949).

I do not believe that we can completely reduce negligence to the cost-benefit analysis of the Hand formula. For example, courts are sometimes willing to let individuals value their own interests above those of other people. See, e.g., Lucchese v. San Francisco-Sacramento R.R., 106 Cal. App. 242, 244, 289 P. 188, 189 (1930) (finding no negligence when train motorman chose a method of stopping train that would not jostle passengers, even though he was not successful in avoiding collision with plaintiff's truck); Noll v. Marian, 347 Pa. 213, 215-16, 32 A.2d 18, 19 (1943) (finding no negligence when defendant bank teller jumped below counter after robbers ordered everyone to remain still, and plaintiff customer was injured by resulting gunfire). I do believe, however, that the requirement of foreseeability is often just a version of the Hand formula, because the issue is whether the risk was *reasonably* foreseeable, which in turn asks whether the defendant invested reasonable time, energy, and resources anticipating risks. My point here is that the Hand formula captures a *predominant* feature of the prevailing negligence standard.

content of negligence, however, is not the point here. The point for our current inquiry is that negligence asks for a case-by-case evaluation of whether the defendant's conduct in the specific instance was socially desirable under the prevailing standard of social desirability. The fact that negligence law's standard of social desirability is complex or controversial is not crucial to the structure of negligence along a spectrum of types of liability.

"Intent" requires the plaintiff to prove that the defendant intentionally invaded a protected interest, such as bodily security in battery or exclusive possession of property in trespass to land. Formal exceptions in the form of privileges are available to the defendant, such as self-defense, defense of property and, in the case of trespass to land or chattels, necessity. These exceptions, however, are relatively narrow and well defined. The defendant cannot argue merely that, under the specific circumstances of the case, his invasion of the plaintiff's interest was "reasonable," "worth it," or otherwise desirable. For example, a defendant cannot argue that he had a more important reason to use the defendant's swimming pool than did the defendant who, for example, was out of town.[19] Such an argument might be appropriate under negligence, but it is not relevant under an intentional tort.

Finally, a "no liability" rule absolves the defendant of liability in a certain category of case, regardless of what the plaintiff can prove about the defendant's conduct. For example, the "no-duty-to-act" doctrine immunizes a defendant from liability for failure to rescue, even when the defendant intended (in the sense of knowing with a substantial certainty)[20] that his failure to rescue would result in injury to the plaintiff.[21] Similarly, immunity rules protect defendants from certain types of liability, regardless of the "social propriety" of the defendant's conduct in the individual case.

This spectrum of liability rules, going from "unconditional liability" to "no liability," goes roughly from no-fault bases of liability to increasingly fault-based theories of liability. We might also analyze these types of liability in terms of their "formality" or the extent to which they use "entitlements" or "property rights." One way of resolving conflicting social claims is to give people well-defined "entitlements" or "property rights" to use as they see fit and then hold anyone who invades these rights liable, without a detailed analysis of the competing

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19. That is, the defendant cannot make this type of argument *generally*. He must fit it into a formal exception, such as the privilege of necessity to save life or limb. See, e.g., Ploof v. Putnam, 81 Vt. 471, 71 A. 188 (1908).

20. See, e.g., Garratt v. Dailey, 46 Wash. 2d 197, 279 P.2d 1091 (1955).

21. See, e.g., Traudt v. City of Chicago, 98 Ill. App. 2d 417, 240 N.E.2d 188 (1968). Of course, this rule has exceptions. See, e.g., Florence v. Goldberg, 44 N.Y.2d 189, 375 N.E.2d 763, 404 N.Y.S.2d 583 (1978).

interests in each case. Such a system is "formal" because it screens from the decision-maker data that would be relevant to evaluating the competing interests but that is not triggered by the formal rule.[22] For example, I can refuse to let you use my car by merely pointing out that I own it, without engaging in an argument about who has a more worthy use of it.[23] The formal property right might have some complexity or well-defined exceptions, but its essence is that it trumps a general appeal to community welfare in individual cases.[24]

A second way of adjudicating conflicting social claims is to make an individualized determination in each case about who behaved "appropriately," using some ultimate standard of propriety. In this type of scheme, neither party has a pre-existing "entitlement" or "property right." The scheme is "non-formal" because the court can consider all relevant evidence to determine whose claims are worthier in the individual case. For example, in a simple automobile accident the court can weigh a complex variety of information to decide who acted "reasonably."

Good reasons exist for each type of scheme: formal, pre-existing entitlements or property rights promote stability, facilitate market transactions, and are easy to apply; non-formal, *ad hoc* adjudication is flexible and does not require a complex, pre-existing set of rights. My purpose here, however, is not to resolve the comparative merits of schemes; it is to clarify the meaning and structure of various types of liability rules.

In these terms, liability rules fall on a spectrum between pure, formal entitlements and *ad hoc* adjudication that evaluates the propriety of each party's conduct, all things considered. These alternatives are ideals (even negligence has some formal structure), but as ideals they can clarify the nature of different liability schemes. From this perspective intentional torts and no liability rules are, ironically, similar to strict liability. In their present form, intentional torts give one party an entitlement that cannot be intentionally invaded by another, regardless of general welfare in the individual case. Although intentional torts rely on fault, they also depend on pre-existing distribution of entitlements. Intentional tort rules are similar to strict liability and no liability rules because, rather than asking in an individual case who was promoting welfare or behaving reasonably, courts enforce the entitlement formally (subject, of course, to its own *formal* exceptions). One does claim that

22. See Powers, On Positive Theories of Tort Law, 66 Tex. L. Rev. 191, 205-211 (1987) (review of W. Landes & R. Posner, The Economic Structure of Tort Law (1987)); Kennedy, Legal Formality, 2 J. Legal Stud. 351, 377-82 (1973).

23. This is what Ted Turner had in mind when he answered critics as to why he had colorized certain old black and white movies: "I wanted to, and they are mine."

24. The *existence* of the right might serve general welfare in the long run, such as by enhancing security, but the right still purports to foreclose appeals to general welfare in the particular case.

an intentional tortfeasor behaves *wrongly*, but one says this only in the sense that the tortfeasor has violated an entitlement. The court and jury do not evaluate general welfare in an individual case.

From this perspective, then, we can evaluate liability schemes by identifying the extent to which they give one party a formal entitlement rather than depend on an after-the-fact, *ad hoc* evaluation of individual conduct. "Real" strict liability rules, no liability rules, and intentional torts are on the formal entitlement side of the line, even though they do have some (formal) defenses or exceptions. Negligence is on the non-formal, *ad hoc* side of the line. "So-called" strict liability is somewhere in between.[25] This is where "strict" products liability falls in most states, where it used to fall in Louisiana, and where *garde* seems to fall in Louisiana today.

It is not surprising that courts look for this middle ground. Arguments abound that favor strict liability and negligence, respectively.[26] Feeling these competing tugs, courts look for compromises that do not stray too far from either pole. In doing so, however, courts have encountered serious problems in determining precisely where this middle ground lies. This difficulty has been a defining feature of American products liability law.[27] It appears to be a significant problem in Louisiana jurisprudence with respect to *garde*.

The question arises, why is this middle ground so difficult to locate? One possible answer is that no stable middle ground exists between negligence and "real" strict liability. Another possible answer is that *everything* is middle ground. I will suggest that *both* of these answers are, to some degree, true. From either perspective, a search for a *natural* and *stable* middle position between "real" strict liability and negligence is futile. Courts would do well to abandon an attempt to search for this middle ground (and thereby abandon an attempt to construct a qualitative division between "so-called" strict liability and negligence)

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25. See generally Powers, On Positive Theories of Tort Law, 66 Tex. L. Rev. 191, 210-11 (1987) (review of W. Landes & R. Posner, The Economic Structure of Tort Law (1987)).

26. See W. Landes & R. Posner, The Economic Structure of Tort Law (1987); S. Shavell, Economic Analysis of Accident Law (1987); Brown, Toward an Economic Theory of Liability, 2 J. Legal Stud. 323 (1973); Cowan, Some Policy Bases of Products Liability, 17 Stan. L. Rev. 1077 (1965); Epstein, Products Liability: The Gathering Storm, Regulation, Sept.-Oct. 1977, at 15; Montgomery & Owen, Reflections on the Theory and Administration of Strict Tort Liability for Defective Products, 27 S.C.L. Rev. 803 (1976); Posner, Strict Liability: A Comment, 2 J. Legal Stud. 205 (1973); Powers, A Modest Proposal to Abandon Strict Products Liability, 1991 U. Ill. L. Rev. 639 (1991); Note, Strict Liability in Hybrid Cases, 32 Stan. L. Rev. 391 (1980).

27. See Powers, The Persistence of Fault in Products Liability, 61 Tex. L. Rev. 777 (1983); Powers, A Modest Proposal to Abandon Strict Products Liability, 1991 U. Ill. L. Rev. 639 (1991).

and instead use the inherent flexibility of negligence itself to make fine-tuned adjustments in specific types of cases.[28]

III. The Illusion of a Middle Ground

A. *Products Cases*

Most states' version of strict products liability purports to occupy a middle ground between "real" strict liability and negligence. The plaintiff need not prove that the defendant's *conduct* was unreasonable (negligent). The plaintiff must, however, prove more than that the defendant's product caused injury: the plaintiff must prove that the *product* was defective. Similarly, under the concept of *garde* the plaintiff need not prove that the defendant's *conduct* was unreasonable (negligent). The plaintiff must, however, prove more than that the "thing" under the defendant's *garde* caused injury: the plaintiff must prove that the "thing" (be it an animal, building, car, and so on) was "unreasonably dangerous."[29] An examination of how this middle ground dissolves in products liability can teach us something about *garde*.[30]

A prevalent approach to defectiveness is the risk-utility test.[31] Under it, a product is defective if it has a feature whose risks outweigh the feature's benefits. Because the risk-utility test is obviously very similar to the Learned Hand formula for negligence,[32] courts have expended considerable energy trying to explain how defectiveness under the risk-utility test differs from negligence. The effort has been far from successful.[33]

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28. See infra section IV.

29. See, e.g., Boyer v. Seal, 553 So. 2d 827 (La. 1989) (animal created "unreasonable" risk of harm); Entrevia v. Hood, 427 So. 2d 1146 (La. 1983) (house did not create "unreasonable" risk of harm); Loescher v. Parr, 324 So. 2d 441 (La. 1975) (tree created "unreasonable" risk of harm). Again, I am using the term "garde" loosely to include liability for domestic animals and buildings. See supra note 10.

30. The analysis of strict products liability that follows is taken from Powers, A Modest Proposal to Abandon Strict Products Liability, 1991 U. Ill. L. Rev. 639, 654-59 (1991).

31. Some courts also use the consumer expectation test. It has problems of its own, which are not relevant to our discussion. See Powers, A Modest Proposal to Abandon Strict Products Liability, 1991 U. Ill. L. Rev. 639, 652-54 (1991).

32. See United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (defendant is negligent if the burden (B) of taking precautions would have been less than the probability of harm (P) times the magnitude of harm(L): $B < pL$).

33. Cost-benefit analyses of accidents pose analytical difficulties, regardless of whether they occur in the context of negligence or defectiveness. For example, it is extraordinarily difficult to quantify costs and benefits, especially costs and benefits of intangible items such as pain and suffering. But my purpose here is not to explicate fully the way in

Many courts that use the risk-utility test of defectiveness claim that it is different from negligence because it focuses on the *product*, not on the manufacturer's *conduct*.[34] Thus, negligence asks whether a manufacturer adopted manufacturing procedures with a reasonable balance between risk and utility, whereas defectiveness asks whether the product as it was made actually has risks that outweigh its benefits. In fact, however, this distinction is difficult to maintain.

The supposed distinction between negligence and defectiveness under the risk-utility test depends on the role foreseeability plays in each theory. In negligence only reasonably foreseeable risks count against a defendant, whereas in defectiveness all actual risks known at the time of trial count against the manufacturer, whether or not the manufacturer could reasonably have foreseen them at the time of sale. Thus, we are told, negligence employs a foresight test, whereas defectiveness employs a hindsight test.[35]

Under the foresight test of negligence, a manufacturer is responsible only for risks that were *reasonably* foreseeable when the product was sold. In the context of product cases based on negligence, *reasonable* foreseeability turns on whether the manufacturer used reasonable care in finding out about product risks, that is, whether the manufacturer engaged in reasonable research, development, and testing. A manufacturer can argue that the burden of engaging in more extensive testing was not cost-justified.

Under the hindsight test of defectiveness, however, a manufacturer cannot count in its favor the burden of finding out about a risk. A manufacturer can still argue that the risk was worth imposing, because the product has offsetting advantages, but the manufacturer cannot count in its favor the burden of finding out about the risk.

A second approach distinguishing between negligence and defectiveness defined in risk-utility terms is sometimes plausible in cases involving manufacturing defects. In negligence cases—in which the jury is asked

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which courts can or should apply a cost-benefit analysis to personal injury cases. Instead, it is to determine whether the supposed differences between a cost-benefit analysis of defectiveness and a cost-benefit analysis of negligence are real. For further discussion of the cost-benefit analysis generally, see Powers, The Persistence of Fault in Products Liability, 61 Tex. L. Rev. 777, 784-87 (1983).

34. See Caterpillar Tractor Co. v. Beck, 593 P.2d 871, 889 (Alaska 1979); Phipps v. General Motors Corp., 278 Md. 337, 344, 363 A.2d 955, 958-59 (1976); Phillips v. Kimwood Machine Co., 269 Or. 485, 491-92, 525 P.2d 1033, 1036 (1974). See also Keeton, The Meaning of Defect in Products Liability—A Review of Basic Principles, 45 Mo. L. Rev. 579, 592 (1980); Keeton, Products Liability—Liability Without Fault and The Requirement of A Defect, 41 Tex. L. Rev. 855 (1963).

35. Most courts use a foresight test for warnings defects. This makes the theory of liability functionally identical to negligence, a point that most jurisdictions acknowledge. See, e.g., USX Corp. v. Salinas, 818 S.W.2d 473 (Tex. Ct. App. 1991).

to evaluate the manufacturer's conduct—the manufacturer can argue that the additional (marginal) cost of quality control procedures necessary to eliminate the flaw outweighed the risk of having a few flawed products. For example, a soft drink bottler can argue that existing quality control procedures, such as filters and random inspection, are adequate to eliminate impurities in all but a very few instances. To reduce the risk even further would not be worth the additional expense of more sophisticated quality control measures. Under the risk-utility standard of defectiveness—which purports to evaluate the product instead of the manufacturer's conduct—the manufacturer could not use this argument. The relevant inquiry would be whether the product feature itself—here the impurity—had utility that outweighed its risks. Since the value of a flaw is usually zero, flaws that increase a product's risks (nearly) always make the product defective under this analysis.

In other words, in both the foreseeability and quality control contexts, the difference between negligence and the risk-utility test of defectiveness is that in negligence the manufacturer can rely on certain burdens to justify a product's risks—the burden of research, development, and testing and the burden of quality control respectively—that it cannot rely on under the risk-utility test of defectiveness. By removing these arguments of justification from the defendant, the risk-utility test of defectiveness is more favorable to the plaintiff than is negligence. Consequently, the two theories of liability supposedly are distinct.

A question remains, however, whether distinguishing between the issue of a product's defectiveness and the reasonableness of a manufacturer's conduct actually makes sense. In fact, the distinction between evaluating a product and evaluating the manufacturer's conduct (and the concomitant distinctions between the respective treatment negligence and defectiveness give to the burdens of discovering a product's risks and of implementing quality control measures) does not withstand closer scrutiny.[36]

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36. Some courts have encountered *linguistic* confusion when they have tried to distinguish between defectiveness under the risk-utility test and negligence. Sometimes this linguistic confusion occurs when courts try to develop jury instructions, but sometimes even the courts themselves have become confused. See, e.g., Newman v. Utility Trailer & Equip. Co., 278 Or. 395, 564 P.2d 674 (1977) (holding that reasonable seller must weigh foreseeable risk of harm); Johnson v. Clark Equip. Co., 274 Or. 403, 547 P.2d 132 (1976) (arguing that assumption of risk in strict liability is a negligence hybrid); Phillips v. Kimwood Mach. Co., 269 Or. 485, 525 P.2d 1033 (1974) (commenting on confusion experienced by other courts). One source of this confusion has been a heuristic device by which courts have explained the risk-utility test of defectiveness. These courts have defined defectiveness by referring to the conduct of a reasonably prudent manufacturer who is *actually aware of the risks the product imposes.* See Phillips v. Kimwood Mach. Co., 269 Or. 485, 492, 525 P.2d 1033, 1036 (1974); Keeton, Manufacturer's Liability:

Every product imposes risks, and nearly every product could be made safer. Most products are not defective, however, because they impose risks that are socially worthwhile. For example, automobiles impose risks, but they provide a valuable means of transportation. This type of balancing is the essence of the risk-utility test of defectiveness.

Some risks are acceptable because they are concomitants of socially desirable product features. The speed of automobiles and the sharpness of knives provide concomitant risks and benefits. Other risks are acceptable because products that avoided them would be inordinately expensive. Consequently, product cost is an appropriate factor in a risk-utility balance.[37] In fact, if courts ignored product cost, nearly every product that imposes risks would be defective, because nearly every product could be made safer at some cost.

Product cost, however, is merely a reflection of the product's manufacturing process; a court that considers product cost *ipso facto* evaluates the manufacturer's conduct. Consequently, including product cost in a determination of defectiveness intrinsically undermines the distinction between evaluating the product and evaluating the manufacturer's conduct. This, in turn, undermines the supposed distinction between defectiveness and negligence.

Consider a compact automobile that imposes a greater risk of injury during a crash than does a larger sedan. Under the risk-utility test of defectiveness, a manufacturer could argue that the risks of small cars are outweighed by benefits such as fuel economy and ease of handling. The manufacturer could also argue that small cars are less expensive to build because they require less labor and materials. Since even the cost of materials reflects the labor necessary to produce them, a risk-utility justification for compact cars based on cost is largely based on labor savings. The risk-utility test provides no justification for excluding these labor costs from its ambit.

The Meaning of "Defect" in the Manufacture and Design of Products, 20 Syracuse L. Rev. 559, 568 (1969); Wade, Strict Tort Liability of Manufacturers, 19 Sw. L.J. 5, 15-16 (1965). This formulation of the risk-utility test is analytically different from negligence because it assumes foreseeability and ignores the burden of discovering product risks. It is not surprising, however, that some courts have seized upon the reference to a "reasonably prudent manufacturer" as a reference to negligence.

Linguistic confusion has been an important practical problem, but it does not itself undermine the *analytical* distinction between defectiveness and negligence. Jury confusion can be mitigated by careful jury instructions, and judicial confusion can be avoided by careful analysis. The problem of maintaining a distinction between negligence and defectiveness under the risk-utility test reflects a problem that is more fundamental than mere linguistic confusion.

37. See, e.g., Caterpillar Tractor Co. v. Beck, 593 P.2d 871, 886 (Alaska 1979); Turner v. General Motors Corp., 584 S.W.2d 844, 846 (Tex. 1979); Keeton, Product Liability and the Meaning of Defect, 5 St. Mary's L.J. 30, 38 (1973).

A problem arises with this line of analysis, however, because foreseeability is also reflected in a product's cost. Almost any risk is foreseeable if a product is tested sufficiently. In negligence the issue is whether a risk is *reasonably* foreseeable. This, in turn, depends on the reasonableness of the manufacturer's decision to forego further testing. If a reasonably prudent manufacturer would believe that additional research would not be cost-effective, a decision to forego the research would be reasonable, and the risks it would have disclosed would not have been *reasonably* foreseeable. Risks that are not *reasonably* foreseeable do not count against a manufacturer in a cost-benefit analysis to determine negligence.

But the analysis is identical under defectiveness when product cost is taken into account. The burden of testing is reflected as a cost of the product in the same way that the cost of labor and material is reflected in the cost of the product. A manufacturer's decision to forego further testing would make a compact car cheaper, just as would a decision to save other labor and material costs. Since product cost is a factor in the risk-utility test for determining defectiveness, the burden of testing could be considered precisely to the same extent in strict liability as in negligence. This is just an example of a general problem. Because product cost simply reflects the burdens of the manufacturing process, the entire distinction between evaluating a product and evaluating a manufacturer's conduct in the design context is illusory.

An analogous problem arises when the risk-utility test is applied to manufacturing defects. As indicated above, manufacturing defects appear to present easy cases under the risk-utility test, because the utility of a flaw appears to be zero. In a negligence case a manufacturer could try to justify its failure to prevent or discover a flaw by relying on the burden of improved quality control procedures. In an analysis of a product's defectiveness, however, the reasonableness of foregoing quality control improvements is normally not relevant. But a decision to forego additional quality control expenses is reflected in the product's cost, so an indirect benefit of a flaw is cheaper product cost. Because product cost is relevant to determine defectiveness, defectiveness seems to account for the burden of quality control to the same extent as does negligence.[38]

The distinction between defectiveness and negligence can be maintained by *specifically* excluding research and development costs and quality control costs from the risk-utility test of defectiveness. In fact,

38. Because the distinction between negligence and defectiveness in warnings cases turns almost entirely on the issue of foreseeability, the analysis in warnings cases is similar to the analysis in design cases. In fact, most courts use a foreseeability test for warnings, which makes the analysis even nominally identical to negligence. See, e.g., USX Corp. v. Salinas, 818 S.W.2d 473 (Tex. Ct. App. 1991).

to preserve the distinction between negligence and defectiveness in cases involving manufacturing defects and design defects, courts have effectively done this without expressly distinguishing research and development costs and quality control costs from other components of a product's cost. Courts have not, however, articulated reasons for permitting manufacturers to justify risks with reference to certain components of product cost but not with reference to others. The values that motivate courts to permit manufacturers to justify risks with reference to labor and material costs seem to be just as applicable to research and development costs and quality control costs. But without this arbitrary distinction, product cost is merely a reflection of the burdens of the manufacturing process, and the distinction between defectiveness and negligence disappears.

It is important to reiterate that recognizing the tension between courts' reliance on general product cost, but not research and development and quality control costs, when applying the risk-utility test does not mean that courts cannot or have not maintained a distinction between negligence and defectiveness. They can do so and have done so by ignoring the burdens of research and development and of quality control when applying the risk-utility test under defectiveness. Nor does it mean that it would not be *possible* to develop rationales for ignoring these burdens but not others. Maybe the burdens of research and development or quality control are more difficult to prove or more difficult for a jury to evaluate. Nor does it mean that different jury instructions do not have a psychological impact on a jury's deliberations.

What this recognition does highlight, however, is that courts have not expressly decided to differentiate between strict products liability and negligence by allowing manufacturers to justify product risks with reference to certain components of product cost but not others. Instead, they have made the distinction without analysis. Moreover, no powerful reasons exist for making such a distinction. Understanding the strength of current commitment to strict products liability on the basis of these fine distinctions among various components of product cost is difficult.

B. Garde Cases

The instability of the "middle ground" in products liability is replicated under the concept of *garde*. Louisiana courts ask not whether the defendant's *conduct* was negligent. On the other hand, they do not ask merely whether the "thing" under the defendant's *garde* caused injury. Instead, they ask the "middle ground" question, whether the "thing" under the defendant's *garde* posed an unreasonable risk of harm. Supposedly this is different from negligence because it makes a risk-utility analysis of the *thing*, not of the defendant's *conduct*.

Just as in the products liability cases, one possible difference is that negligence employs foresight, whereas strict liability under *garde* employs

hindsight. In *Kent v. Gulf States Utilities Co.*,[39] the court drew this precise distinction:

> Under traditional negligence concepts, the knowledge (actual or constructive) gives rise to the duty to take reasonable steps to protect against injurious consequences resulting from the risk, and no responsibility is placed on the owner who acted reasonably but nevertheless failed to discover that the thing presented an unreasonable risk of harm. . . . *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.[40]

Culpable foreseeability of the risk depends on whether the defendant has made enough effort to discover the risk. This, in turn, affects the "value" of the thing to the owner. Thus, the value to the owner of the house in *Entrevia v. Hood*[41] and the tree in *Loescher v. Parr*[42] is greater if the owner does not have to inspect it for defects. Because the value of the thing is part of the risk-utility analysis *of the thing* under strict liability, the burden of discovering the risk can affect the risk-utility analysis of the thing under strict liability to *exactly* the same extent that it affects the risk-utility analysis of the defendant's conduct under negligence.

Similarly, in the cases *not* involving foreseeability, such as *Boyer v. Seal*,[43] the distinction between a risk-utility analysis of the *thing* and a risk-utility analysis of the defendant's *conduct* is difficult to maintain. The court gave the following analysis of whether the defendant's cat,

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39. 418 So. 2d 493 (La. 1982).

40. Id. at 497 (emphasis in original). See also Entrevia v. Hood, 427 So. 2d 1146, 1150 (La. 1983):

> Because of the similarities in these aspects of the negligence and strict liability inquiries, it has been suggested that a useful approach in a case under article 2317 might be to ask the following: If the custodian of the thing is presumed to have knowledge of its condition before plaintiff's injury, would he then have been acting reasonably by maintaining it and exposing others to it? . . . There is a major distinction between the two theories of recovery which lies in the fact that the inability of a defendant to know or prevent the risk is not a defense in a strict liability case but precludes a finding of negligence.

41. 427 So. 2d 1146 (La. 1983).

42. 324 So. 2d 441 (La. 1975).

43. 553 So. 2d 827, 835 (La. 1989).

which the plaintiff had tripped over, imposed an unreasonable risk of harm:

> Applying these precepts to the present case, we conclude that the risk created by the defendant's cat, Magique, that resulted in the plaintiff's injuries was not an unreasonable risk of harm. We do not believe that a legislator or other objective policymaker regulating this case, after weighing all social, economic, moral and other considerations, would decide that the behavior of the cat in either rubbing the legs of a visitor in its home or accidentally getting in the way or underfoot is an unreasonable risk of harm. Magique's behavior was innocuous, especially when compared with other cat-created risks widely tolerated by our society. . . . Further, it does not appear that the likelihood of injury resulting from such cat-like behavior multiplied by the gravity of the harm threatened by it would outweigh the utility of keeping a cat as a pet in a home where she may be displayed and exposed to visiting relatives and guests. Although a detailed discussion of the content and application of the unreasonable risk concept is not necessary in the present case, as the behavior of this particular cat clearly did not present an unreasonable risk of harm, more thorough analyses and applications can be found in previous cases.[44]

It is difficult to ascertain how this language would have changed if the court had thought it was applying negligence. This is especially so

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44. Id. at 835. See also Entrevia v. Hood, 427 So. 2d 1146, 1150 (La. 1983):

> The trial court found that the plaintiff entered the premises unlawfully as a trespasser. Although the wholesale immunities from civil responsibility resulting from the common law classification of a person as a trespasser are not recognized by our law, *Cates v. Beauregard Electric Inc.*, 328 So. 2d 367 (La. 1978), a knowingly unauthorized entry of another's fenced and posted immovable property is legally and morally reprehensible conduct. La.R.S. 14:63. An owner of property has valid economic and privacy interests which our law seeks to protect from intruders such as the plaintiff.
>
> The building in question was isolated, unproductive, rural property. Owners of such property having little current worth or utility typically are in a poor position to absorb the costs of premises risks and to redistribute them among the community. Laws or rules which tend to impose a burden requiring either the total destruction or high level restoration of obsolescing farm buildings does not seem socially or economically desirable.
>
> The steps which collapsed were located in the rear of the fenced and posted property, and the property itself was remotely located on a country road. The evidence does not suggest that the property posed any dangers other than those typically associated with a somewhat rundown old farm house. These facts indicate that the magnitude of the risk posed and the gravity of the harm threatened were small in comparison with that of other risks presented by things in our society.

because, as described above, the value of the cat to the defendant was affected by the extent to which the defendant was required to supervise or restrain the cat.

In addition to the difficulties of evaluating a "thing's" value without reference to the burden of discovering its risks, the court's analyses in *Boyer* and *Entrevia v Hood*[45] raise another problem. If the decision about whether even to apply strict liability or if the method of applying strict liability itself is identical to negligence, then negligence and strict liability are different in name only.[46] But the court's language in *Boyer*[47] and *Entrevia*,[48] analyzing whether the cat or the house imposed an unreasonable risk of harm, appeared to be identical to negligence. The court in *Boyer stated* that it was applying the analysis to the *cat*, not to the defendant's *conduct*, and the court in *Entrevia stated* that it was applying the analysis to the *house* from a position of hindsight, not to the defendant's *conduct* from a position of foresight. But as the analysis above demonstrates, the value of the cat or the house to the owner depends on how much effort the defendant must make to supervise the cat or inspect and repair the house.

In fact, the language in *Entrevia* suggests an analysis that is even *more ad hoc* than negligence. The court relied on the fact that owners of "isolated, unproductive, rural property . . . typically are in a poor position to absorb the costs of premises risks and to redistribute them among the community."[49] The ability of defendants to absorb costs and spread them throughout the community is a policy reason that might be used to determine whether to adopt one liability rule or another. It is not, however, usually thought to be part of the *internal content* of a liability rule. It is a relevant policy reason to use strict liability rather than negligence or *vice versa*, but it is not usually *part of* strict liability or negligence in individual cases.[50]

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45. 427 So. 2d 1146 (La. 1983).

46. The distinction *might* affect whether the trial judge or jury applies the "negligence" factors to the case.

47. See supra quotation in text accompanying note 44.

48. See quotation in supra note 44.

49. 427 So. 2d at 1150.

50. A similar problem, in a different context, is presented by Bell v. Jet Wheel Blast, 462 So. 2d 166 (La. 1985). The court relied on the policy goal of giving both parties appropriate incentives for safety, not just as a reason for adopting pure comparative negligence in products liability cases *as a general matter*, but as a criterion for determining whether or not to apply it *in one individual case*:

> Comparative fault may not be applied to reduce a claim for damages in a case such as the present one giving rise to the certified question. The plaintiff was injured while performing a repetitive operation with a defective industrial machine as required by his employer. His hand got caught in the chain and sprocket drive of the conveyor system of the machine because of the lack of

In short, the distinction between applying a risk-utility analysis to the "thing"—a cat, a building, an automobile, and so on—and applying a risk-utility analysis to the defendant's conduct under negligence is illusory. Similarly, the use of a hindsight test in strict liability and a foresight test in negligence is at odds with applying the risk-utility test to the "thing." This is because the value of the "thing" to the owner is affected by the owner's burden of supervising, controlling, or inspecting the "thing," just as these burdens affect an analysis of the defendant's conduct under negligence.

This is not to say that a foresight test and a hindsight test are not different. It is only to say that a hindsight test is inconsistent with a complete risk-utility analysis of the "thing," *unless the burden of inspection is ignored as a component of the "thing's" value.* Courts have not offered a rationale why this one component of a "thing's" value should be excluded from the analysis. Without such an explanation, the distinction between a risk-utility analysis of the "thing" (strict liability) and a risk-utility analysis of the defendant's conduct (negligence) is unstable.

IV. Negligence Has Aspects of Strict Liability

In the previous section, I argued that "so-called" strict liability, which most jurisdictions use in products liability and Louisiana uses under the concept of *garde*, is not "naturally" distinct from negligence. In this section, I argue that negligence itself has many features of strict liability. That is, negligence is not really a pure, *ad hoc* evaluation of the defendant's conduct, all things considered. Negligence itself has significant pockets of formal entitlements, which are the hallmark of strict liability.

For example, negligence law contains several specific "no duty" or "limited duty" rules, such as the rules that a stranger has no general duty to rescue someone in distress,[51] that a landowner has no duty to

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an adequate guard at the particular place on the drive that the injury occurred. His ordinary contributory negligence in combination with the machine's defect caused the accident and injury. Under these circumstances, the application of comparative fault would not serve to provide any greater incentive to an employee to guard against momentary neglect or inattention so as to prevent his hand from being mangled by machinery. Reduction of the plaintiff's award in this type of case would only tend to defeat the basic goals of strict products liability doctrine by reducing economic incentive for product quality control and by forcing the injured individual to underwrite a loss himself which could be more efficiently distributed by the manufacturer through insurance and price adjustments.

462 So. 2d at 172.

51. See, e.g., Buchanan v. Rose, 138 Tex. 390, 159 S.W.2d 109 (1942).

prevent natural conditions on his land from causing injury to his neighbor's land,[52] and that a defendant sometimes has no duty to protect plaintiffs from pure economic[53] or emotional[54] harm. On the plaintiff's side, the "egg-shell skull" rule sometimes permits a plaintiff to recover damages beyond what would be foreseeable in the specific case.[55] Moreover, in evaluating whether a specific defendant was negligent, courts ignore certain specific attributes of the defendant that would affect his ability to take precautions.[56] For example, a person of low mental ability might have to expend more effort than a normal person to be careful, but the rest of us are entitled to his exercising the same care of a reasonable person of normal intelligence, without regard to his actual condition.

Each of these rules is a departure from a global analysis of reasonable care *under all of the circumstances.* In one way or another, each rule involves a formality that creates a "mini-entitlement" in favor of one party. There are good policy justifications, based on the specific context, for departing from a case by case analysis of foreseeability and reasonableness in each of these areas,[57] but the rules do represent pockets of strict liability or no liability rules embedded within negligence.

On another front, courts often evaluate the reasonableness of a defendant's conduct within a narrow context. A surgeon who slips with a scalpel or sews a sponge in a patient cannot normally claim that his procedures prevent these accidents in all but a very few cases. A motorist who changes lanes without looking may not escape liability merely because his driving habits permit this to happen only rarely. Similarly, a court could conclude that a manufacturer's deviation from its own specifications constitutes negligence, even though the manufacturer's quality control procedures usually prevent this from happening. Or under *garde*, a court might exclude certain facts—such as the burden of discovering a defect—from the risk-utility test of a "thing." Doing so may represent a deviation from fault, but no more so than in the case of the surgeon or the motorist.[58]

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52. See Prosser & Keeton on Torts § 57 (5th ed. 1984).

53. See, e.g., State of La. ex rel. Guste v. M/V Testbank, 752 F.2d 1019 (5th Cir. 1985) (en banc), cert. denied, 477 U.S. 903, 106 S. Ct. 3271 (1986).

54. See, e.g., Justus v. Atchison, 19 Cal. 3d 564, 565 P.2d 122, 139 Cal. Rptr. 97 (1977).

55. See, e.g., Steinhauser v. Hertz Corp., 421 F.2d 1169 (2d Cir. 1970).

56. See, e.g., Jolley v. Powell, 299 So. 2d 647 (Fla. Dist. Ct. App. 1974) (insanity); Vaughan v. Menlove, 3 Bing., N.C. 468 (1837) (ignorance).

57. See, e.g., Powers, A Methodological Perspective on the Duty to Act, 57 Tex. L. Rev. 523 (1979).

58. See Powers, On Positive Theories of Tort Law, 66 Tex. L. Rev. 191, 205-07 (1987); W. Landes & R. Posner, The Economic Structure of Tort Law (1987); Powers,

Should we apply the cost-benefit analysis of negligence to global or local conduct of the defendant? For example, should the issue in a surgical malpractice case be whether the surgeon's local conduct during the surgery was optimal (that is, whether he slipped with the scalpel) or whether his global training and preparation were optimal?[59] A global application of negligence would constitute an *actual* negligence system. Limiting the jury's range of inquiry constitutes a pocket of strict liability within negligence law. In practice, however, all issues of negligence are local to some degree. Courts do not, in fact, permit a doctor to justify slips with a scalpel by allowing the doctor to argue that he has led a life that minimizes slips.

Competing liability rules fall on a spectrum between global negligence (which evaluates the totality of the defendant's conduct relative to the risk) and local strict liability (which evaluates only whether the defendant caused the plaintiff's injury). From the perspective of this continuum, ordinary negligence is more global than strict tort liability because it examines a wider range of the defendant's behavior, but even negligence has aspects of strict liability.

The problem of determining whether a risk-utility analysis should be global or narrow is illustrated within the context of *garde* by *Boyer v. Seal.*[60] Even if the court had used negligence, it could have applied negligence globally or narrowly. It could have asked whether the defendant's entire conduct with respect to the cat—purchasing it in the first place, allowing it to come into the house, and so on—was negligent, or it could have asked whether the defendant's conduct at that precise moment—allowing it to become entangled in the plaintiff's feet—was negligent. This flexibility *within* negligence may be as great as the flexibility to choose *between* negligence and the "so-called" strict liability analysis the court applies under *garde*.

Thus, just as so-called strict liability has aspects of negligence, negligence has aspects of strict liability in specific "pockets." This suggests that the general debate between strict liability and negligence is less helpful than asking whether a liability analysis should or should not include a specific type of information in a *specific context*. It may well be that in certain types of cases involving *garde*, certain types of information should be excluded from the analysis.

The Persistence of Fault in Products Liability, 61 Tex. L. Rev. 777, 813-15 (1983); Powers, A Modest Proposal to Abandon Strict Tort Liability, 1991 U. Ill. L. Rev. 639, 641-42 n.5 (1991).

59. If a court applies the negligence standard globally, it should recognize that the optimal selection of preparatory care itself should account for the variable nature of performance: the surgeon should choose a level of preparatory care that recognizes that his actual performance will vary from the median in individual cases.

60. 553 So. 2d 827 (La. 1989).

For example, in a strict products liability case involving a manufacturing defect, a good argument can be made that a plaintiff should not be required to prove specific acts of negligence, because it is especially difficult for the plaintiff to prove what went on in the defendant's factory before the plaintiff bought the product.[61] It may be possible to identify similar areas within *garde* where courts should exclude *certain* types of information from the risk-utility test of the "thing," such as the burden of inspecting it for dangers (converting a foresight test to a hindsight test). This, however, does not appear to have occurred in the analysis of *garde*. Louisiana courts have not justified the exclusion of specific information from the analysis. Instead, they seem to have *started* with the conclusion that *garde* involves some form of strict liability and *then* excluded the burden of inspection (thereby turning a foresight test into a hindsight test) in an effort to construct a system of liability that is distinct from negligence.

V. CONCLUSION

Louisiana courts have grappled with the distinction between negligence and the type of "so-called" strict liability they have applied to *garde*. The difficulty courts have encountered maintaining this distinction replicates the difficulty courts in other jurisdictions have had maintaining the distinction between negligence and defect in strict products liability. In both cases, this is partially a result of the illusory nature of the distinction itself. So-called strict liability—which purports to apply a risk-utility test to a "thing" rather than to the defendant's conduct—collapses into negligence. This is so because the value of the thing reflects the burdens the owner is legally required to take in controlling, inspecting, and maintaining it. The distinction can be maintained only if certain components of the thing's value—such as the burden of inspecting it to foresee dangers—are excluded from the "strict liability" analysis *ipsi dixit*. Good reasons might exist for doing so in certain contexts, but a *general* distinction between strict liability and negligence does not inform this question and indeed seems to beg it.

Negligence itself has significant pockets of strict liability, justified in specific contexts with reference to specific policy goals. Thus, negligence law itself offers courts sufficient flexibility to exclude specific factors from the analysis when good reason exists for doing so. For example, negligence law forces courts to focus on specific issues and specific policy justifications for excluding particular types of arguments from the analysis. Reliance on a *general* commitment to "so-called"

61. See Powers, A Modest Proposal to Abandon Strict Products Liability, 1991 U. Ill. L. Rev. 639 (1991).

strict liability tries to make the labels, rather than careful analysis, do the work.[62]

Of course, it may not be my place to recommend that Louisiana courts abandon "so-called" strict liability under *garde*. Doing so would overturn dozens of Louisiana cases, going back at least as far as *Loescher v. Parr*,[63] and Louisiana courts are constrained by the history of the codal provisions that define *garde*. My hope, however, is that I have helped Louisiana courts clarify one of the sources of the difficulty they have faced in trying to distinguish ordinary negligence from the form of strict liability they apply to guardians.

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62. A few years after the Louisiana Supreme Court's decision in Loescher v. Parr, Professor Malone suggested that negligence was sufficiently flexible to handle liability for the acts of things under Article 2317. See Malone, Ruminations on Liability for the Acts of Things, 42 La. L. Rev. 979 (1982).

63. 324 So. 2d 441 (La. 1975).