Louisiana Law Review

Volume 49 | Number 4
March 1989

Murray v. Ramada Inns, Inc.: The Expansion of Duty: A Step Towards the Reestablishment of Proximate Cause

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> The contrast of individual-group offers a related perspective on the character of modern social vision. The question posed is how the court imagines the litigants. Does it view the defendant and the accident victim as individuated and unique social actors? Or do courts understand them primarily as participants in, or even representatives of, groups of social actors that are themselves in some sense the litigants? To the extent that the second interpretation is accurate, the nature of accident law changes. The court visualizes interaction between groups, and tort norms regulate group conflict.[1]

Ramada Inns maintained a swimming pool without statutorily required "no diving" signs. After warning his brothers to "be careful," Greg Murray, an experienced diver, dove into the shallow end of the pool. Unfortunately, he struck his head on the bottom, suffered instant paralysis, and died five months later. His wife and son later filed a wrongful death action in federal district court, charging Ramada Inns with negligence. At trial, the district court denied the defendant's request for instructions regarding assumption of the risk on the ground that Louisiana had replaced that defense with comparative negligence. When the case reached the Fifth Circuit on appeal, that court certified the assumption of the risk question to the Louisiana Supreme Court.[2]

In *Murray v. Ramada Inns, Inc.*,[3] the supreme court responded by announcing that assumption of the risk no longer has a place in Louisiana tort law.[4] In the course of its opinion, the court exhaustively discussed the relationship between assumption of the risk and Louisiana's comparative fault system.[5] The court concluded that "the survival of assumption of risk as a total bar to recovery would be inconsistent with

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1. H. Steiner, Moral Argument and Social Vision in the Courts: A Study of Tort Accident Law 115 (1987).

2. The question addressed to the court is as follows: "Does assumption of risk serve as a total bar to recovery by a plaintiff in a negligence case, or does it only result in a reduction of recovery under the Louisiana comparative negligence statute?" Murray v. Ramada Inns, Inc., 521 So. 2d 1123, 1124 (La. 1988).

3. Id.

4. Id. at 1132.

5. Eleven of the thirteen pages pages in the opinion are devoted to discussing the validity of assumption of the risk in light of Louisiana Civil Code article 2323.

article 2323's mandate that contributory negligence should no longer operate as a bar to recovery."[6] Despite its detailed analysis of the assumption of the risk issue, the court confined its discussion of the duty/risk questions posed by the case to two paragraphs of the opinion. In addressing the scope of the duty owed by the defendant, the court summarily stated that Ramada Inns owed a duty to the decedent, as it owed a duty to all potential users of the pool.[7] This approach to determining the duty owed by a defendant, an approach that focuses on the defendant's obligations toward general classes of persons, represents a radical shift from the approach that the court had theretofore followed.[8] Previously, the court had always required, as a prerequisite to the imposition of any liability, a determination that the defendant owed a duty to the particular plaintiff under the facts of the particular case.

The purpose of this comment is to consider the implications of the supreme court's handling of the duty/risk issues in *Murray* for the future of duty/risk analysis in Louisiana. The conceptual nature of the subject

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6. *Murray*, 521 So. 2d at 1133.

7. "[T]he defendants owed a duty to *all* potential users of the pool to operate that facility in a reasonably safe fashion." Id. at 1136.

8. See Johnson, Comparative Negligence in Louisiana, 1980-1981—Comparative Negligence and the Duty/Risk Analysis, 40 La. L. Rev. 319 (1980).

In its 1979 Regular Session, the Louisiana Legislature embraced the doctrine of comparative negligence with the enactment of Louisiana Acts No. 431. Effective August 1, 1980, Act 431 amends the Louisiana Civil Code and the Code of Civil Procedure articles relative to liability for offenses and quasi-offenses to implement the pure form of comparative negligence. See Introduction, Comparative Negligence in Louisiana, 40 La. L. Rev. 289 (1980).

Civil Code article 2323 was amended by Act 431 to provide as follows, "When contributory negligence is applicable to a claim for damages, its effect shall be as follows: If a person suffers injury, death, or loss as a 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."

Professor Alston Johnson explains the dispute of the effect of the new fault apportionment system on the duty/risk analysis as follows:

> [T]he introductory clause to the basic comparative negligence provision reads: *When contributory negligence is applicable to a claim for damages*, its effect shall be as follows. . . . Nowhere does the Act answer the question of when contributory negligence *is* applicable to a claim for damages. . . . In each instance, the duty/risk analysis is the proper vehicle by which to determine the issue of applicability of contributory or comparative negligence. This inquiry must be complete, in fact, before the tenets of Act 431 can be used. If defendant is not liable because plaintiff's conduct has created a situation such that defendant could not possibly be expected to protect him against such risks, then Act 431 is inapplicable.

Johnson, supra, at 339.

matter makes it difficult to draw clear lines between the topics in this comment. Although some overlap between the topics is unavoidable, the comment is arranged into five sections. The initial section of this comment explores the concepts of duty/risk and proximate cause. The section following this compares the *Murray* decision to earlier positions on duty/risk. The next section discusses the two competing theoretical views on the relationship between victim fault and duty/risk. The section following that one examines the *Murray* court's views of the integrity of those two concepts. The final section considers *Murray* as part of a trend in Louisiana tort law.

Duty/Risk and Proximate Cause

Louisiana's approach to the limitation of liability in negligence cases is the duty/risk analysis.[9] Defining this approach, one prominent scholar has stated,

> Under the duty-risk method of analysis the determination of the scope of the legal system's protection is entirely a court function—the jury plays no part in this aspect of the case. The issue for the court is whether the risk to which the plaintiff has been subjected is within the scope of the defendant's duty. If the answer is in the affirmative, the court is then obligated as part of its duty function to set the standard with which the defendant must have complied to avoid liability. The jury has the burden of determining if the standard was breached.[10]

The duty/risk approach forces the court to make what is, in essence, a policy determination in light of the unique facts of the case. The factors that the court must consider in making this determination include ease of association, administrative convenience, economic factors, risk spreading, deterrence, predictability, and moral considerations.[11] The primary moral consideration is victim fault.

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9. See Dixie Drive It Yourself System v. American Beverage Co., 242 La. 471, 137 So. 2d 298 (1962). Note that E. Wayne Thode argues that Justice Cardozo's decision in Palsgraf v. Long Island R., 248 N.Y. 339, 162 N.E. 99 (1928), can be looked upon as a pioneer case in the employment of the duty/risk analysis. Thode, Tort Analysis: Duty-Risk v. Proximate Cause and the Rational Allocation of Functions Between Judge & Jury, 1977 Utah L. Rev. 1, 22.

10. Thode, supra note 9, at 26.

11. See, e.g., Comment, Proximate Cause in Louisiana, 16 La. L. Rev. 391 (1956). In Pitre v. Opelousas General Hospital, 530 So. 2d 1151, 1161 (La. 1988), the supreme court stated the policy considerations as follows: "[T]his court has identified the policy sources informing the conception of the duty in a tort case to be those moral, social, and economic considerations that a conscientious, objective policy maker would advert to in formulating a rule to govern the case." The duty/risk analysis is structured to

As is true of many legal doctrines, duty/risk analysis is not susceptible of concise description.[12] One helpful means of defining the duty/risk doctrine is to compare it with the doctrine that it in some sense replaced, namely, proximate cause. Proximate cause has been defined as follows:

> The term "proximate cause" means a cause which in a direct, unbroken sequence produces the damage complained of and without which the damage would not have occurred. Negligence is the proximate cause of the damage when the damage is the natural or probable result of the negligence. Such negligence need not be the only cause, but it must be one of them and such as might have been reasonably foreseen as leading to damage of the general nature claimed in this case.[13]

At common law, the proximate cause doctrine performed the same function as does duty/risk analysis, namely, the limitation of negligence liability; only those harms that were the "natural consequence,"[14] "direct

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afford to the law a greater degree of predictability. This predictability is achieved by meeting certain "goals" that our courts set as guidelines. Justice Dennis called these guidelines the "basic goals of accident law." According to Dennis:

> Accident law generally should pursue four primary goals: (1) reduction of the total costs of accidents by deterrence of activity causing accidents; (2) reduction of societal costs of accident by spreading the loss among large numbers; (3) reducing the cost of administering the accident system; and (4) doing all of these by methods consistent with our sense of justice. It should be noted that these goals are not fully consistent with each other. There cannot be more than a certain amount of reduction in one category without foregoing some of the reduction in the other. One aim must be to find the best combination of cost reduction in all categories while considering what must be given up in order to achieve that reduction. In other words, the overall goal should be the maximum reduction of the sum of the accident costs and the cost avoiding accidents that can be accomplished in a just way.

Turner v. Nopsi, 476 So. 2d 800, 807 (La. 1985).

12. As an illustration, consider the number of different definitions of the "reasonable man."

13. Stoneburner v. Greyhound Corp., 232 Ore. 567, 575, 375 P.2d 812, 816 (1962) (Goodwin, J., concurring) (quoting Instruction No. 15.01, Oregon Jury Instructions for Civil Cases, Oregon State Bar (1962)).

14. See Marshall v. Nugent, 222 F.2d 604, 610 (1st Cir. 1955), in which the court stated, "[T]he effort of the courts has been, in the development of the doctrine of proximate causation, to confine liability of a negligent actor to those harmful consequences which result from the operation of the risk, or of a risk, the foreseeability of which rendered the defendant's conduct negligent."

result,"[15] or "foreseeable result"[16] of the defendant's acts were compensable. As these terms suggest, the proximate cause doctrine invited the court to draw a somewhat arbitrary line in the chain of physical causation in order to limit the defendant's liability. The inquiry was primarily "metaphysical" in nature; it did not require the court to engage in policy analysis.

Beginning in the early part of this century, legal scholars began to express skepticism about the ability of courts to draw the line between proximate and nonproximate causes on a principled basis and, further, to question whether the vague terminology of proximate cause has any determinate content. Some charged that by using these vague phrases, the courts were masking the policy decisions that they used to reach their decision and thereby the necessity to articulate their reasons for finding liability. The late Professor Wex Malone characterized these phrases as "little more than gaudy ribbons with which the package of liability may be decorated once its contents have already been fixed by the courts through resort to some other mystique."[17] Commentators have offered several reasons for the development of proximate cause. These include: 1) the difficulty that courts have articulating the considerations that influence their decisions; 2) the courts' reluctance to announce the crucial underlying considerations; and 3) the acceptance of legal terminology to explain liability.[18]

One important consequence of the proximate cause doctrine was that it shifted the responsibility for limiting liability to the jury. At common law, the jury was charged with the duty of determining what harms were the "foreseeable" or "direct" result of the defendant's acts. Thus, the "gaudy ribbons" of proximate cause allow the court to avoid their obligation to address questions of law. As one writer states, "courts simply converted a question of law into a question of policy and shifted the responsibility of decision onto the shoulders of the jury. They accomplished this result by developing the doctrine of proximate cause."[19]

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15. See Petition of Kinsman Transit Co., 388 F.2d 821, 824 (2d Cir. 1968), in which the court stated, "[W]e nevertheless conclude that recovery was properly denied on the facts of this case because the injuries to [the shippers] were too 'remote' or 'indirect' a consequence of defendants' negligence."

16. See Derdiarian v. Felix Contracting Corp., 51 N.Y.2d 308, 315, 434 N.Y.S.2d 166, 169, 414 N.E.2d 666, 670 (1981), in which the court stated, "[L]iability turns upon whether the intervening act is a normal or foreseeable consequence of the situation created by the defendant's negligence."

17. Malone, Ruminations on Dixie Drive It Yourself versus American Beverage Co., 30 La. L. Rev. 363, 364 (1970).

18. Comment, supra note 11, at 392.

19. McNamara, The Duties and Risks of the Duty/Risk Analysis, 44 La. L. Rev. 1227, 1228 (1984).

Since the Louisiana Supreme Court first adopted the duty/risk analysis in *Dixie Drive It Yourself System v. American Beverage Co.*,[20] this approach to limiting negligence liability has gradually replaced proximate cause and its vague phrases.[21] Under this approach, the limitation of liability is a *legal* matter and, for that reason, the court, rather than the jury, is primarily responsible for the decision. Unlike proximate cause doctrine, duty/risk analysis forces the courts to confront squarely the particular policy questions that the case presents.[22] Stated briefly, the question that the court must address is this: Does the defendant owe a legal duty to the plaintiff, and if so, does the duty extend to the particular risk encountered by this particular plaintiff?[23] In summarizing how courts should answer this question, Justice Dennis made the following remarks in *Entrevia v. Hood*,[24]

> [T]he judge is called upon to decide questions of social utility that require him to consider the particular case in terms of moral, social and economic considerations, in the same way that the legislator finds the standards or patterns of utility and morals in the life of the community.[25]

Through the consistent and proper application of duty/risk analysis, the courts can render negligence law more predictable than it was when proximate cause ruled the day. As Professors Prosser and Wade have noted, "Generally speaking, each . . . proximate cause decision turns on its own facts and has little value as precedent. A judicial declaration of duty, in contrast, may amount to a statement of law and thus create precedent, more or less influential according to its factual proximity to the case at hand."[26] Yet another virtue of the duty/risk approach is that it forces courts to expose their policy judgments to public scrutiny, thereby making it easier for attorneys and scholars to discover errors in those judgments and to press the courts for change.[27]

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20. 242 La. 471, 137 So. 2d 298 (La. 1962).

21. See Harris v. Pizza Hut, Inc., 455 So. 2d 1364 (La. 1984); Pence v. Ketchum, 326 So. 2d 831 (La. 1976); Callais v. Allstate Ins. Co., 334 So. 2d 692 (La. 1975); Jones v. Robbins, 289 So. 2d 104 (La. 1974); Laird v. Travelers Ins. Co., 263 La. 199, 267 So. 2d 714 (La. 1972); Hill v. Lundin & Assoc., 260 La. 542, 256 So. 2d 620 (La. 1972).

22. McNamara, supra note 19, at 1230.

23. Id. at 1232.

24. 427 So. 2d 1146 (La. 1983).

25. Id. at 1149-50. See also B. Cardozo, The Nature of the Judicial Process 105 (1921); Green, The Causal Relation Issue in Negligence Law, 60 Mich. L. Rev. 543 (1962).

26. W. Prosser, J. Wade & V. Schwartz, Cases and Materials on Torts 416 (7th ed. 1982) (quoting Judge Friedman).

27. In his concurring opinion in Turner v. NOPSI, 476 So. 2d 800, 808 (La. 1985), Justice Dennis explained this advantage:

> Under such an approach, even if we were in error, the basis for our decision

DUTY/RISK UNDER *MURRAY*

In answering the scope of the duty question in *Murray*, that is, whether the defendant's duty extended to the decedent, the court stated that "[t]he defendants owed a duty to all potential users of the pool to operate that facility in a reasonably safe fashion."[28] The court's term "user" is broad enough to include those who had knowledge of the danger as well as those who did not. In determining that the defendant owed a duty to this broad class of persons, the court did not consider the particular qualities of the victim or the unique risk to which he was exposed. In order to appreciate fully the significance of the *Murray* court's approach to the scope of duty determination, one must first understand the approach that the courts had previously followed. The pre-*Murray* approach to scope of duty was summarized by Professor Wex Malone,[29] the champion of the duty/risk approach,[30] in these terms:

> All rules of conduct, irrespective of whether they are the product of a legislature or are a part of the fabric of the court-made law of negligence, exist for purposes. They are designed to protect *some* person under *some* circumstance against *some* risks. Seldom does a rule protect every victim against every risk that may befall him, merely because it is shown that the violation of the rule played a part in producing the injury. The task of defining the proper reach or thrust of a rule in its policy aspects is one that must be undertaken by the court in each case as it arises. How appropriate is the rule to the facts of this controversy? This is a question that the court cannot escape.[31]

The following cases exemplify the approach described by Professor Malone.

I. The defendant negligently stopped his car in violation of a statute prohibiting stopping on a traveled portion of the highway. The plaintiff

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is open to public examination and mistake can be easily detected and corrected by lawyers in future cases. If we fail to assess our decisions in terms of its effects and the goals of our law, or if we shield such reasoning from public and professional scrutiny, the adjustments of any mistake will be made tortious and problematical.

28. *Murray*, 521 So. 2d at 1136.

29. Wex S. Malone (1906-1987): Louisiana State University Law School, assistant professor 1939-1945; associate professor 1945-1948; Professor 1948-1966; Boyd Professor 1966-1987.

30. Professor Alston Johnson states of Malone, "We acknowledge the unparalleled accomplishment of replacing the concept of proximate cause in Louisiana as a risk-exclusion or risk-inclusion device with the more candid device of the duty/risk analysis, perhaps his greatest single achievement." Johnson, Reminiscing About the Great Ruminator, 44 La. L. Rev. 1167 (1984).

31. Malone, Ruminations on Cause in Fact, 9 Stan. L. Rev. 60, 73 (1956).

carelessly collided with the defendant. The Louisiana Supreme Court in *Laird v. Travelers Insurance Co.*[32] held that the duty owed by the defendant was not intended to protect against the risk of this plaintiff's careless driving under the specific circumstances of this case.[33] Using the duty/risk analysis, the court looked to the various aspects of the relationship between this plaintiff and this defendant, and concluded that the defendant did not owe a duty to protect against the risk of the accident.[34]

II. The defendant maintained a borrow pit in violation of a city ordinance. While the victim, a seventeen year old youth, was swimming across the pit, he developed a cramp and drowned. This was the factual situation in *Jackson v. Beechwood, Inc.*[35] In *Jackson*, the court cited *Dixie Drive It Yourself System v. American Beverage Co.*[36] and found that the defendant had been negligent in maintaining the pit, and that this negligence was the cause-in-fact of the unfortunate accident.[37] But, upon further inquiry, the court also found that the risk and harm to this particular victim fell outside the scope of protection owed by this defendant. In so ruling, the court stated that

> [t]he ordinance was intended to guard against concealed or hidden hazards which so frequently exist in excavations of this nature. Likewise, it protects against the hazards of children of tender years who may fall or venture into the pit. However, the ordinance does not make a landowner an insurer, nor does it protect against the hazard that a trespasser capable of looking after his own safety and an excellent swimmer will intentionally use the artificial lake and drown therein.[38]

Once again the court addressed the specific circumstances of the accident before making the legal determination of the scope of duty. The court emphasized the fact that the victim was an excellent swimmer and was almost seventeen years old at the time of the accident. These factors alone were sufficient to place the victim's conduct outside the scope of the defendant's duty, even though the defendant had not posted "keep

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32. 263 La. 199, 267 So. 2d 714 (La. 1972).

33. *Id.*, at 215-16, 267 So. 2d at 720.

34. Id. See Rowe v. Travelers Ins. Co., 253 La. 659, 219 So. 2d 486 (La. 1969); see also Note, Duty-Risk in the Lower Courts: Flexibility or Rigidity? 35 La. L. Rev. 871 (1975). In *Rowe*, the plaintiff parked her car with the left wheel intruding marginally onto the highway. Plaintiff's car was struck by defendant's truck approaching from the rear. The court concluded that plaintiff was negligent in not moving her car completely off the highway and denied recovery.

35. 180 So. 2d 732 (La. App. 1st Cir. 1965).

36. 242 La. 471, 137 So. 2d 298 (1962).

37. *Jackson*, 180 So. 2d at 733.

38. Id.

out" signs and had had knowledge that the pit was being used as a swimming pool.[39]

The court's reasoning in *Jackson* and *Laird* "illustrates that the duty/risk formulation is not narrow and rigid in application but . . . may be used to deny as well as sustain liability."[40] Clearly, in light of the reasoning in *Jackson*, the case would undoubtedly have been decided differently had the plaintiff been a seven year old novice swimmer. In factual situations similar to *Murray* a court using the pre-*Murray* analysis could have found that the scope of the defendant's duty did not encompass the risk of a party who dove into unknown waters. Indeed, courts have performed this very process numerous times in our jurisdiction.[41]

III. The defendant, a home repair contractor, after completing his work, left a ladder upright against the side of the plaintiff's house. Later, a third party moved the ladder and laid it in the yard. The plaintiff tripped over the ladder and sustained damages. The supreme court addressed this fact pattern in *Hill v. Lundin and Associates, Inc.*[42] In holding that the defendant was under no duty to protect the plaintiff from the risk that gave rise to her injuries,[43] the court stated:

> [I]f the defendant's conduct of which the plaintiff complains is a cause in fact of the harm, *we are then required* in a determination of negligence to ascertain whether the defendant breached a legal duty imposed to protect against the *particular risk* involved.[44]

Hill is important because it demonstrates that scope of duty is a question of law and therefore that the judiciary must make the determination.[45]

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39. Id.

40. See Note, supra note 34, at 874.

41. See Van Pelt v. Morgan City Power Boat Ass'n, 489 So. 2d 1346 (La. App. 1st Cir.), writ granted, 493 So. 2d 627 (1986) (dismissed on motion of appellant); Lacroix v. State, 477 So. 2d 1246 (La. App. 3d Cir.), writ denied, 478 So. 2d 1237 (1985); Jolivette v. City of Lafayette, 408 So. 2d 309, 313 (La. App. 3d Cir. 1981), writ denied, 413 So. 2d 495, 459 U.S. 867, 103 S. Ct. 147 (1982) "The primary duty of care to ascertain whether or not it is safe to dive falls upon the diver."); Caillouette v. Cherokee Beach & Campgrounds, Inc., 386 So. 2d 666, 667 (La. App. 1st Cir.), writ denied, 387 So. 2d 597 (1980) (Defendant was not "required by law to warn persons of the obvious dangers attendant to diving into an unknown body of water.").

42. 260 La. 542, 256 So. 2d 620 (La. 1972). It should be noted that *Hill* is easily distinguishable from *Murray*, because of the intervention of a third party. However, the court's duty/risk analysis makes *Hill* relevant.

43. *Id.*, at 548, 256 So. 2d at 622.

44. Id. (emphasis added).

45. The language of the court, especially the phrase, "we are required", unequivocally suggests that scope of duty is a mandatory determination to be made by the bench. In addition, notice that the duty/risk analysis is once again addressed in terms of the "particular risk."

The above cases demonstrate how courts ascertain the scope of duty prior to *Murray*.[46] Under the approach to duty/risk analysis used in each of these cases, the court must examine the duty of the particular defendant, the risk to which the particular plaintiff was exposed, and the circumstances of the particular accident. For example, in *Laird*,[47] the court considered the plaintiff's careless driving in defining the scope of the duty owed to the plaintiff. Similarly, in *Jackson*, the court took the decedent's voluntary behavior into account in making this determination.[48]

This approach to the scope of duty determination stands in stark contrast to that adopted by the supreme court in *Murray*. Indeed, *Murray* represents an effort on the part of the court to escape its responsibility for making this determination, a responsibility that Professor Malone described as "defining the proper reach or thrust of a rule in its policy aspects."[49] In *Murray*, the court did not even mention, much less examine, the general policies of accident law in determining whether to impose liability. Nor did the court conduct a "particularized inquiry," that is, it did not consider the relationship between the defendant and the victim or the unique risk to which the victim had been exposed. In fact, the court never acknowledged why or how it reached the conclusion that the defendant owed a duty to the victim.

The shift in scope of duty analysis represented by *Murray* is significant for several reasons. First, the new approach strips scope of duty determinations of precedential value. This is so because under *Murray* a court apparently need not articulate for the record the reasons and policy considerations that underlie its finding of a duty. Second, and more importantly, the *Murray* decision suggests that the supreme court has come full circle on the theory of limiting negligence liability. Originally, under the doctrine of proximate cause, trial courts avoided resolving the legal question of scope of duty by converting the inquiry into a question of "proximate causation" and letting the jury wrestle with the problem. As one writer has put it, under proximate cause trial courts did not "recognize that they have a function to perform by way of defining the limits of the rule involved . . ." and placed the "burden on the jury under the guise of determining proximate cause."[50] The proximate cause doctrine further allowed appellate courts to "mask" their decisions regarding the proper scope of the duty, decisions based

46. These cases are not presented because of their results, but rather to show how the courts openly supported their decisions by factors particular to the parties in the action.

47. 263 La. at 215-16, 267 So. 2d at 720.

48. 180 So. 2d at 733.

49. Malone, supra note 31, at 73.

50. L. Green, Rationale of Proximate Cause 76 (1927).

upon policy considerations, behind the vague and countless expressions of "foreseeability" and "natural consequence." In *Dixie*,[51] the supreme court adopted the duty/risk analysis in order to force trial courts to reassume responsibility for determining the limits on negligence liability and to force both trial and appellate courts to articulate the policy considerations that determine the result in each particular case. Accordingly, one writer has stated of duty/risk that,

> instead of masking the court's intention behind a charade of fact tortuously constructed from the evidence to fit into one of the holes in the doctrine of proximate cause . . . , the methodology utilized by the court offered the opportunity for an honest and courageous statement of exactly why and what the court is doing and what it intended.[52]

Under *Murray*, however, courts once again have the opportunity to "mask" the considerations that underlie their decisions.[53] This is so because the court evidently must no longer articulate the policy considerations and particular factual findings that underlie its conclusion regarding scope of the duty. Furthermore, *Murray* in effect shifts the responsibility for limiting negligence liability from the trial court back onto the jury, at least in those cases in which the trial court finds that the defendant did owe a duty. Under a comparative fault system like Louisiana's, once the trial court finds a duty, the jury then must apportion fault between the defendant and the victim. Thus, the limitation of negligence liability is performed by the jury under the aegis of comparative fault. For these reasons, *Murray* represents a shift in analysis away from duty/risk towards an approach that is the effective equivalent of proximate cause.

Scope of Duty and Victim Fault: Two Distinct Views

Louisiana's adoption of comparative fault in 1980[54] raised the question of how the courts would integrate that system with the preexisting duty/risk analysis. This section will examine the two prominent theories concerning the proper relationship between the scope of duty and victim

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51. 242 La. 471, 137 So. 2d 298 (1962). As Wex Malone once stated, "I beg the reader's indulgence if, for the sake of brevity (and without regional or political implications), I refer to the decision hereafter simply as *Dixie*." Malone, supra note 17, at 364.

52. McNamara, supra note 19, at 1249. See Rue v. State, 372 So. 2d 1197 (La. 1979); Boyer v. Johnson, 360 So. 2d 1164 (La. 1978); Baumgartner v. State Farm Mut. Ins. Co., 356 So. 2d 400 (La. 1978); Shelton v. Aetna Casualty & Sur. Co., 334 So. 2d 406 (La. 1976); Jones v. Robbins, 289 So. 2d 104 (La. 1974).

53. The case is totally devoid of any policy, social, or economic considerations.

54. See supra note 8.

fault under duty/risk analysis. These two theories are the "Johnson view," reflected in the writings of Professors Alston Johnson;[55] Wex Malone,[56] and Leon Green,[57] and the "Robertson view," reflected in the writings of Professor David Robertson.[58] These commentators differ on both the relevance of victim fault to the delineation of duty and who should determine victim fault's ultimate effect on liability. An examination of these opposing theories illuminates the significance of the supreme court's treatment of victim fault in *Murray*.

The Johnson view calls for the court to consider victim fault in defining the scope of the defendant's duty to the plaintiff. Professor Johnson postulates three categories of cases: (a) those in which the defendant's duty extends to the protection of a plaintiff against his own carelessness;[59] (b) those in which the plaintiff's substandard conduct creates a situation that falls outside the scope of the defendant's duty;[60] and (c) those in which both the fault of the plaintiff and the fault of the defendant are considered and compared.[61] Under this approach, in some circumstances a negligent plaintiff would recover full damages, in others he would recover nothing, and in still others his recovery would be reduced. Professor Johnson bases this view on a general policy of avoiding the decision of legal issues, such as the scope of a defendant's duty, by jurors.[62] He argues that the duty/risk analysis requires judges to decide the defendant's responsibilities, rather than justifying jurors' conclusions with "the shibboleths of 'proximate cause' and 'last clear chance' and others of the same ilk."[63]

Professor Robertson takes the position that victim fault should be irrelevant to the determination of the defendant's duty.[64] He argues that the use of definitions of duty to justify either total recovery or no recovery by a negligent plaintiff is itself similar to "last clear chance":

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55. Johnson, supra note 8, at 327 n.32.

56. Malone, supra note 17.

57. L. Green, Judge and Jury 60 (1930). The Johnson view owes a tremendous amount to the theories and writings of Leon Green and Wex Malone, but for that matter so does all of tort law.

58. David Robertson is the Albert Sidney Burleson Professor of law at the University of Texas.

59. Johnson, supra note 8, at 333.

60. Id. at 334.

61. Id. at 339. Because these three categories have come to be known as (a), (b), and (c) cases, respectively, these designations will be preserved for the purposes of this article.

62. Id. at 340.

63. Id. at 341.

64. Robertson, Ruminations on Comparative Fault, Duty-Risk Analysis, Affirmative Defenses, and Defensive Doctrines in Negligence and Strict Liability Litigation in Louisiana, 44 La. L. Rev. 1341, 1341-42, 1357 (1984).

it is a method developed by courts to evade the perceived injustices of contributory negligence as a complete bar to recovery. As such, it also should be eliminated with the advent of comparative fault.[65] Robertson advocates performing a duty/risk analysis in victim fault cases by hypothesizing a fault-free victim.[66] He argues that the cases used by Johnson to justify the consideration of victim fault in determining duty can be resolved doctrinally by a proper analysis of the other necessary elements of the plaintiff's case, such as cause in fact or breach of duty.[67]

Thus, the ultimate difference between the two approaches is the extent to which each considers the facts of the individual case in determining the scope of the duty. The Johnson view is consistent with the development of the duty/risk analysis. Duty/risk requires the judge to undertake a particularized analysis of the facts to resolve the difficult, policy-laden issue of the scope of the defendant's duty. Ideally, when judges set the bounds of liability, they articulate their reasoning. This enables everyone to see the basis of the court's decision. The role of the jury is to decide purely factual questions, such as whether there was a breach of the duty. Because the effect of victim fault is a question of law, it remains in the hands of the judge.[68]

The Johnson view, however, does present some practical problems. Robertson argues that it increases the potential for confusion,[69] multiplies litigation points,[70] and obfuscates the necessary inquiry into the facts that matter,[71] particularly in multi-party litigation. His most serious criticism, however, is that the use of this analysis transfers the burden of proof on the issue of victim fault to the plaintiff. Instead of the defendant being required to prove comparative negligence as a defense, the plaintiff must disprove victim fault to a certain degree in order to establish a necessary element of his case-in-chief, the defendant's duty.[72]

In contrast, the Robertson view is at least partially based on an explicit preference for resolutions by juries over judges, and by trial judges over appellate judges.[73] Calling for a more generalized analysis of duty, Robertson states, "Virtually all of the considerations Johnson would relegate to judges as part of the duty-risk question of law are properly left to triers of fact as part of their assessment of the degree

65. Id. at 1360-62.
66. Id. at 1378.
67. Id. at 1369-70.
68. Johnson, supra note 8, at 340-41.
69. Robertson, supra note 64, at 1370.
70. Id.
71. Id.
72. Id. at 1374-82.
73. Id. at 1359.

of fault of the parties."[74] Under the Robertson formulation, victim fault is a factual question for the jury.

The primary problem of the Robertson approach is that its narrow definition of the legal issue of duty combined with its broad definition of facts to be decided by the jury defeats the primary purpose of the duty/risk analysis. Since the court does not address the pertinent facts of the victim's conduct in its determination of duty, it is bound, absent clear factual error, by the jury's determination of liability. This will require judges to rationalize results, rather than control them. By leaving so much in the hands of the fact-finder, the Robertson view invites a return to something resembling a proximate cause analysis.[75]

These two approaches reflect something more than simply the question of whether victim fault is relevant to the scope of the defendant's duty. Under the Johnson view, the court considers the specific facts of the case at hand in determining the ultimate duty of the defendant to the plaintiff. This continues the jury-controlling function of the duty/risk analysis. In contrast, the Robertson view calls for the court to generalize the facts and make broader decisions on duty. This decrease in the judge's control over the particular case is matched by an increase in the power of the jury. Thus the resolution of the victim fault issue has broad implications for the future development of the duty/risk analysis generally.

VICTIM FAULT AND *MURRAY*

In *Murray*, the court eliminated the consideration of the plaintiff's conduct, or victim fault, from the duty/risk analysis. As the court explained,

> in any case where the defendant would otherwise be liable to the plaintiff under a negligence or strict liability theory, the fact that the plaintiff may have been aware of the risk created by defendant's conduct should not operate as a total bar to recovery. Instead, comparative fault principles should apply, and the victim's "awareness of the danger" is among the factors to be considered in assessing percentages of fault.[76]

As this language reveals, the *Murray* court's treatment of victim fault removes consideration of victim fault from the determination of the bounds of duty. In so doing, the court's approach eliminates any need

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74. Id. at 1342.

75. Of course, appellate review of facts in Louisiana "means the distinction between judge issues and jury issues is hard to keep straight and often does not particularly need to be kept straight." Id. at 1357 n.88.

76. *Murray*, 521 So. 2d at 1134.

for Professor Johnson's type (a) and type (b) cases. Under *Murray*, there is no room for a finding that the plaintiff's own negligent conduct fell within or outside the scope of defendant's duty. Upon the trial court's finding a legal relationship between the classes represented by the parties, the case must go to the jury for an assessment of each party's proportion of the fault. Therefore, under *Murray* juries will decide virtually all scope of duty questions.[77]

The *Murray* decision is troubling in several other respects as well. For one thing, the decision may reflect a sentiment on the part of the court that because of recent developments in Louisiana's tort law, particularly the institution of a scheme of comparative fault, duty/risk analysis is no longer of critical importance. The primary purpose of the development of duty/risk analysis, the court seems to imply, was to avoid the harshness of contributory negligence. In a pre-comparative system, courts could use duty/risk analysis to find that the risk posed to the plaintiff by his own contributory negligence was within the scope of the defendant's duty, thereby allowing the plaintiff to obtain recovery. *Murray* seems to suggest that because contributory negligence has been eliminated, duty/risk should no longer play such a major role in the apportionment of fault. Defining duty broadly and transferring responsibility for fault apportionment to the jury implements this tacit judgment.

Perhaps more troubling is the fact that the *Murray* approach does not require the trial court to focus on the individual characteristics of the particular plaintiff, or to differentiate classes of plaintiffs that should, from the standpoint of sound policy, be treated differently. What if the plaintiff is a trespasser or a thief?[78] Is any plaintiff entitled to go to the jury simply because the defendant breached its duty of "reasonableness" to that class of plaintiffs? Do defendants owe a duty to the world? The *Murray* approach provides no guidance regarding how, or even whether, distinctions between types or classes of plaintiffs should be drawn.

Finally, the *Murray* approach is troubling in that it strips scope of duty determinations of predictive value for judges and lawyers. Ironically, in a jurisdiction that champions duty/risk,[79] our highest court in *Murray* shields its reasoning from public and professional scrutiny.

The determination of scope of duty can be likened to a mathematical examination. When taking a mathematical examination, if one does not

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77. If the jury decides that plaintiff's conduct places him outside the accountability of the defendant, it will affix the plaintiff's recovery at 0%.

78. See, e.g., Entrevia v. Hood, 427 So. 2d 1146 (La. 1983).

79. As stated by E. Wayne Thode in 1977, "only the Supreme Court of Louisiana has fully embraced this method of analysis. It is now building a body of duty-risk case law." Thode, supra note 9, at 23.

show the reasoning employed to obtain the answer, one fails. In determining scope of duty the same holds true. The court in *Murray* does not show its reasoning, therefore it fails. If the result reached is incorrect, the effects are extremely detrimental, in that, since no discourse is shown it is not evident where exactly the mistake was made. As a result, the process must begin anew. If the result reached is correct, the effect is also harmful, in that one can ever be sure that the correct reasoning was employed. Either way, the omission of the means results in a failure of the end. For lawyers and judges this failure eliminates a case's predictive value except in the broadest of terms.

THE EXPANSION OF DUTY: FUTURE IMPLICATIONS

As Professor Steiner has said, "[t]he tendency in recent decades is for courts to understand and refer to the parties to an accident less in personal or individualized ways and more in general, abstract, and categorical terms."[80] A natural result of this type of classification is a broadening of the scope of duty.[81] The *Murray* court, by placing the plaintiff within a class of "users" and the defendant within a class of pool owners, followed the trend of defining litigants in a more general and categorical manner. Accordingly, the court did not address the specific characteristics of the parties or the particular policies implicated in the case. Whether and to what extent the supreme court will continue to follow the trends reflected in *Murray* is, of course, an open question. Two recent decisions handed down by the supreme court, both of which involved difficult scope of duty problems, may provide an answer.

In the first of these cases, *Pitre v. Opelousas General Hospital*,[82] the parents of an albino child filed suit for themselves and on behalf of their child for damages caused by the alleged negligence of a doctor who failed to sterilize the mother properly.[83] The court, which addressed each claim separately, applied duty/risk analysis to the child's action,[84] and the doctrine of proximate or "legal" cause to the parent's action.[85]

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80. Steiner, supra note 1, at 106.
81. Id.
82. 530 So. 2d 1151 (La. 1988).
83. Id. at 1153.
84. Id.
85. Id. at 1156. In so doing the court states,

> "[w]e conclude that, when the case presents difficult issues as to the nature and extent of damages ascribed to the defendant, once it has been decided that the defendant's breach of a duty in fact caused damage to the plaintiff, it may be helpful to use a 'legal cause' analysis which affords the application of 'foreseeability' rules and other concepts of limitation. Although indistinct, these rules and concepts are more determinate that the abstract idea of 'duty' based on various 'policy considerations' and may prove helpful to triers of fact, at

The child's claim was for damages for "wrongful life." Although the court did apply duty/risk analysis to the claim, it is not entirely clear which variety of that analysis—the pre-*Murray* approach or the post-*Murray* approach—the court actually employed. In some respects, the analysis was clearly traditional. Commenting on the specific birth defect upon which the child's claim was based, albinism, the court stated that "[t]he plaintiff's petition did not contain any allegation that the defendant physician knew or should have known of the risk of the abnormality."[86] For this reason, the court concluded that "in the present case the physician did not owe a duty to the unconceived child to protect her from the risk of being born with albinism."[87] Thus, the court did limit the defendant's duty and apparently did so on the basis of a "particularized" inquiry. This appearance, however, may be deceiving. In many respects the court's analysis bore the earmarks of the *Murray* approach. Explaining its decision to apply duty/risk analysis to the claim, the court stated that "duty risk is most helpful . . . in cases where the only issue is in reality whether the defendant stands in any *relationship* to the plaintiff as to create any legally recognized obligation of conduct for the plaintiff's benefit."[88] The court's point, apparently, is that courts should use duty/risk analysis only to determine if the relationship between the parties is substantial enough to warrant imposing a duty upon the defendant. Further, the court's remarks strongly suggest that the relevant relationship is not that obtaining between the particular plaintiff and the particular defendant, but rather is that obtaining between the classes to which the plaintiff and the defendant belong. As the court stated, "[t]he time has come when we can and should say that each person owes a duty to take reasonable care to avoid acts or omissions which he can reasonably foresee would be likely to injure a present or future member of society. . . ."[89] Thus, the court's position apparently was that all doctors who perform sterilizations owe some general duty of reasonable care to all unborn children of their female patients, or at least those who suffer from foreseen physical defects. To the extent that the court delimited the defendant's duty by reference to the relationship between the plaintiff's class and the defendant's class, its analysis was consistent with the approach developed in *Murray*.

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least as starting points for legal reasoning."

From this text, it is apparent that the court is stating that legal cause, which is the same as proximate cause, will apply when duty/risk is not applicable. Note that the choice between duty/risk and proximate cause is left to the will of the court with no indication of when each method will be employed.

86. Id. at 1158.

87. Id.

88. Id. at 1155 (emphasis added). It should be noted that duty/risk is not referred to as an analysis for limiting liability, only as a method for determining relationship.

89. Id. at 1157.

The influence of the trends set in motion by *Murray* is even more evident in the *Pitre* court's treatment of the parent's claim. In evaluating that claim the court did not apply duty/risk analysis but instead invoked the doctrine of "legal" cause, a concept that is distinctly reminiscent of "proximate" cause. According to the court, the primary test for determining whether a cause is a "legal" cause of the plaintiff's injuries is foreseeability. As the court stated, "as a general principle . . . the same criterion of foreseeability and risk of harm which determined whether a physician in this kind of situation was negligent in the first instance should determine the extent of his liability for that negligence. . . ."[90] The *Pitre* court has therefore converted both the breach of duty question and the scope of duty question into indistinguishable questions of fact. As has been noted, this kind of development enhances the role of the jury and diminishes the responsibility of the court. Furthermore, by reintroducing the vague phrases of "foreseeability" and "direct consequence" into the law governing the limitation of duty, the *Pitre* court has moved farther along in the journey to the reestablishment of proximate cause that was began in *Murray*.

To summarize, *Pitre* defines and applies duty/risk on a broader basis than classically employed, thus reinforcing the court's rationale in *Murray*. There is a certain antinomy in the *Pitre* decision. On the one hand, the court reaffirmed the principle that "[i]t is the task of bench and the bar not only to ensure that justice is done, but also to demonstrate that it is being done *according to law*, which is essential to preserving public confidence."[91] The court therefore acknowledged the importance of judges' exposing to public scrutiny the policy considerations that underlie their scope of duty determinations, an exposition that is fostered, and indeed required, by traditional duty/risk analysis. On the other hand, the court bluntly asserted that the idea of that "duty" is based on various "policy considerations" in the abstract and not helpful to triers of fact.[92] This statement, coupled with the court's remarks about legal cause, suggests a basic hostility to the core principles of duty/risk analysis and seems to signal a return to allocating risk under the guise of proximate cause, an approach that inevitably leads to the shielding of judicial policy-making from public view. Because the *Pitre* decision gives off such conflicting signals, it is difficult, if not impossible, to determine what implications the decision has for the future of the duty/risk innovations announced in *Murray*.

The future of the new trends in risk allocation signaled by *Murray* is clouded even further by the recent case of *Gresham v. Davenport*,[93]

90. Id. at 1161.
91. Id. at 1156.
92. Id.
93. 537 So. 2d 1144 (La. 1989).

a case in which the supreme court evidently applied the traditional, particularized duty/risk approach. A fifteen year old girl served several beers to James Ford, a sixteen year old boy, while the two of them were at her father's residence. Ford eventually became intoxicated. Later, while Ford was riding as a passenger in a car, he grabbed the steering wheel, and caused the car to run off the roadway into a tree. As a result of the accident, the driver was killed and two passengers other than Ford were injured.[94] The issue before the court was whether the fifteen year old owed a duty to the passengers to protect them from the risks that caused their injuries. In holding for the defendants the court stated, "Even assuming that Molly had a duty not to provide Ford with beer and that she breached that duty, we would nevertheless have to determine whether the particular risk falls within the scope of the duty."[95] According to the court, "the particular risk was not within the scope of whatever duty that Molly, a minor herself, might have owed to Ford."[96] Thus, the court apparently applied the classic, particularized, case by case duty/risk approach. Unfortunately, the court's only explanation for its ruling on the scope of the defendant's duty was that "[n]either teenager was a novice to beer drinking."[97] The court failed to indicate, from the standpoint of sound policy, why the actors' familiarity with beer should have barred recovery by third parties. Therefore, although the court's application of duty/risk was case-focused, the decision has little precedential value.

After *Pitre* and *Gresham*, the future of the trends in duty/risk analysis reflected in *Murray* remains unclear. Are courts to take a class-based, relational approach to duty/risk in those cases that involve victim fault and thereby once again, as they did in the heyday of proximate cause, abdicate their responsibility for risk allocation to jurors? In non-victim fault cases, are courts free to choose between duty/risk and legal cause? How and why should they make this choice? If the case involves a superceding cause, is a traditional, particularized duty/risk approach mandatory? Unfortunately, there are no clear answers to this question. One thing is certain, however: whatever predictability accident law once had in Louisiana has vanished.

CONCLUSION

Under a system in which liability is limited through the doctrine of proximate cause, the jury assesses liability based upon whether a party's injury is foreseeable or direct or a natural or probable consequence of

94. Id. at 1145.
95. Id. at 1147.
96. Id. at 1148.
97. Id. at 1147.

the defendant's action. The central problem with such an approach to risk allocation is that it does not give the law a sufficient degree of predictability and objectivity. It also allows the judge to defer to the jury on important policy matters.

Duty/risk analysis, championed by Wex Malone, offers a better means of risk allocation. The traditional variety of this analysis, which requires the court to take into account the conduct of each individual party and the peculiar circumstances of the case, leaves little room for subjective determinations of the extent of liability. Under this approach, the court is bound to determine the scope of the particular defendant's duty, a determination that is a purely "legal" matter; the jury is confronted only with factual determinations, such as what really took place and whether the defendant's conduct breached its duty to the plaintiff. One critically important feature of this approach is that it requires the judge to articulate the policy rationale underlying his decision regarding the scope of the defendant's duty, thereby providing predictability for future litigants.

Several recent decisions of the Louisiana Supreme Court, beginning with *Murray*, raise serious questions about the future of traditional duty/risk analysis in Louisiana. In that case the court, instead of looking to the particular litigants and the particular relationship between them in order to define the scope of the defendant's duty, focused upon the relationship between the general classes represented by each of the litigants. Following *Murray*, the trial court will no longer be required to set limits on liability before submitting a case to the jury; instead, it will be able to state the duty in broad terms and then allow the jury to set the actual limit of liability, thereby placing the determination of the scope of the duty within the jury's discretion.

The transformation in duty/risk analysis begun in *Murray* clearly entails a number of difficulties. Perhaps the most distressing is that the change will allow both trial and appellate courts to uphold findings of liability without clearly stating their reasoning. Not only would this development shield judicial decisions from scholarly critique; it would also strip accident law of its predictability. In short, the *Murray* decision may ultimately result in reinstituting in Louisiana tort law the mysticism that plagued proximate cause.

James Michael Chamblee