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# A Functional Purpose for Comparing Faults: A Suggestion for Reexamining "Strict Liability"

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have suggested, were not intended to be the enactment's essence;<sup>127</sup> the duty of the courts and administrative agencies under NEPA was arguably designed to be a substantive one: to insure, through careful analysis, that "important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy"<sup>128</sup>—to insure, in short, that NEPA's vital goals do not remain unattained—and unattainable.

The *Stryckers' Bay* Court has constructed a model of statutory compliance with NEPA that leaves these laudable goals as merely empty aims; and the Court has deprived these aims of realization by undermining the juridical definition of NEPA as a statutory directive which compels the substantive, analytic implementation of NEPA's objectives. The remnants of this decision are emasculated procedural, judicial, and administrative processes as well as a persistent legal query: Are solely procedural processes sufficient to bridge the gap between the aims of NEPA—and their reification?

*John Milkovich*

A FUNCTIONAL PURPOSE FOR COMPARING FAULTS:  
A SUGGESTION FOR REEXAMINING "STRICT LIABILITY"

While working in a dimly lighted area on an offshore drilling rig owned by the defendant, the plaintiff was injured when he fell through a hole on one level to the floor of the next level. In plaintiff's suit against Dixilyn seeking recovery in strict liability<sup>1</sup> based on Louisiana Civil Code article 2317,<sup>2</sup> the trial judge instructed the jury as to the requirements of strict liability and also as to the availability of contributory negligence as a defense.<sup>3</sup> A jury

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127. *Id.*

128. 449 F.2d at 1111.

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1. The plaintiff also brought an action in negligence. The jury found the defendant negligent, but also found the plaintiff contributorily negligent, thus barring recovery. While the negligence action is not at issue in this appellate opinion, it does provide an example of when, if contributory negligence is not allowed as a defense in the strict liability action, the plaintiff may avoid a denial of recovery by bringing the action under strict liability.

2. LA. CIV. CODE art. 2317: "We are responsible, not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or of the things which we have in our custody. This, however, is to be understood with the following modifications."

3. The instruction given to the jury provides in pertinent part: "any negligence on the part of the plaintiff which was a proximate cause of the accident bars the plain-

verdict found that the requisite elements of strict liability were present and also that the plaintiff was contributorily negligent.<sup>4</sup> The Court of Appeals for the Fifth Circuit reversed and *held* that under Louisiana law ordinary contributory negligence<sup>5</sup> was not an available defense to a strict liability action based on article 2317. *Rodrigue v. Dixilyn Corp.*, 620 F.2d 537 (5th Cir. 1980).

Under the current interpretation of Louisiana Civil Code article 2317, the owner or custodian of a thing is liable for the damage caused by it, regardless of any lack of negligence on his part.<sup>6</sup> However, this use of article 2317 is a relatively recent development in Louisiana law. Traditionally,<sup>7</sup> not only was 2317 interpreted as only a transitional article with little substantive value,<sup>8</sup> but fault in the form of negligence was required if liability was to be found under article 2315 and the articles providing instances of fault which follow it.<sup>9</sup> The Louisiana courts slowly repudiated the traditional approach in a series of cases<sup>10</sup> which developed a new concept of

tiff's recovery as a matter of law, *even though the defendant may also be found to have been negligent or at fault as the custodian of the rig in question.*" 620 F.2d at 540 (emphasis in original).

4. The plaintiff's contributory negligence consisted of working in an area with insufficient illumination. In order to arrive at the issue of the applicability of contributory negligence, the court conceded that "[e]vidence in the record may support the jury finding." *Id.* at 539.

5. The court was careful to distinguish "ordinary contributory negligence" from the contributory negligence that overlaps with assumption of the risk, "voluntary encountering a known unreasonable risk." *See* W. PROSSER, *LAW OF TORTS* 440-41 (4th ed. 1971).

6. *See* notes 16-21, *infra*.

7. For a concise statement of the traditional rules of interpretation of article 2317 and its surrounding provisions, *see* Comment, *Tort Law in Louisiana—The Supplementary Tort Articles 2317-2322*, 44 TUL. L. REV. 119, 120 (1969).

8. The structure and placement of article 2317 between articles 2315 and 2316, on one hand, and articles 2318 to 2322, on the other, as well as its vagueness and its last sentence make article 2317 appear transitional. Tunc, *Louisiana Tort Law at the Crossroads*, 48 TUL. L. REV. 1111, 1112 (1974). *See, e.g.*, *Adams v. Golson*, 187 La. 363, 174 So. 876 (1937); *Arrington v. Hearin Tank Lines, Inc.*, 80 So. 2d 167 (La. App. 2d Cir. 1955). *But see* *Southern Air Transp. v. Gulf Airways, Inc.*, 215 La. 366, 40 So. 2d 787 (1949).

9. *Cartwright v. Firemen's Ins. Co.*, 254 La. 330, 213 So. 2d 822 (1969); *Samson v. So. Bell Telephone and Telegraph*, 205 So. 2d 496, 502 (La. App. 1st Cir. 1967); *Helgason v. Hartford Ins. Co.*, 187 So. 2d 140, 143 (La. App. 2d Cir. 1966); *Lyons v. Jahneke Service, Inc.*, 125 So. 2d 619, 627 (La. App. 1st Cir. 1960). *See* Barham, *A Renaissance of the Civilian Tradition in Louisiana*, 33 LA. L. REV. 357, 384 (1973).

10. A discussion of every case in this series is beyond the scope of this paper. However, for the interested reader, the cases are as follows, in order of chronological development: *Dupre v. Travelers Ins. Co.*, 213 So. 2d 98 (La. App. 1st Cir. 1968); *Cartwright v. Firemen's Ins. Co.*, 213 So. 2d 154, 156 (La. App. 3d Cir. 1968) (Tate, J., concurring); *Langlois v. Allied Chem. Corp.*, 258 La. 1067, 249 So. 2d 133 (1971); *Theriot v. Transit Co.*, 263 La. 106, 267 So. 2d 211 (1972); *Simon v. Ford Motor Co.*, 282 So. 2d at

"fault" and transformed article 2317 from a mere introductory article into one which provided for legal responsibility for things in one's custody.

One of these cases, *Langlois v. Allied Chemical Corp.*,<sup>11</sup> marked a significant departure from a negligence-restricted concept of fault and toward a more inclusive concept of fault. Therein, the Louisiana Supreme Court held that the defendant had injured the plaintiff through his "fault as analogized from the conduct required under Civil Code Article 669 and others" and that "responsibility for the damage attaches to defendants under Civil Code Article 2315."<sup>12</sup> The court further noted that "proof of lack of negligence and lack of imprudence [would] not exculpate the defendant."<sup>13</sup> Although the court was not confronted with article 2317 in that case,<sup>14</sup> the decision was important to the development of article 2317 because of its recognition of a non-negligent type of fault.<sup>15</sup>

The transformation of article 2317 from a transitional article into one with autonomous substance culminated in the last case of the series, *Loescher v. Parr*.<sup>16</sup> In that case the plaintiff sought recovery for the damage caused when the defendant's tree fell onto and demolished the plaintiff's automobile; the Louisiana Supreme Court reversed the appellate court's denial of recovery. The appellate court had based its denial on a lack of proof that defendant had acted negligently. Following two of its previous decisions<sup>17</sup> decided

129-32, 136 (La. 1973) (Tate, J., dissenting) (Barham, J., dissenting) (Barham, J., dissenting on rehearing); *Holland v. Buckley*, 305 So. 2d 113 (La. 1974); *Turner v. Bucher*, 308 So. 2d 270 (La. 1975); *Loescher v. Parr*, 324 So. 2d 441 (La. 1975). See generally, Tunc, *supra* note 8; Comment, *Does Louisiana Really Have Strict Liability Under Civil Code Articles 2317, 2318, and 2321?*, 40 LA. L. REV. 207 (1979); Note, *The "Discovery" of Article 2317*, 37 LA. L. REV. 234 (1976); Note, *Introducing Strict Liability to Article 2317*, 22 LOY. L. REV. 625 (1976); Note, *Things in One's Custody—Louisiana Civil Code Article 2317*, 43 TUL. L. REV. 907 (1969).

11. 258 La. 1067, 249 So. 2d 133 (1971).

12. 258 La. at 1083, 249 So. 2d at 140.

13. *Id.*

14. The liability the court confronts in *Langlois* is liability for an ultrahazardous activity. 258 La. at 1083, 249 So. 2d at 139. See W. PROSSER, *supra* note 5, § 78, at 505. This is to be contrasted with the relational responsibility liability involved in article 2317.

15. For the court's analysis on the expansion of fault beyond negligence, see 258 La. at 1074-84, 249 So. 2d at 136-40. If the court had not expanded fault beyond negligence, article 2317 would have been restricted to only negligent fault on the part of the custodian. See Barham, *supra* note 9, at 384.

16. 324 So. 2d 441 (La. 1975).

17. In *Holland v. Buckley*, 305 So. 2d 113 (La. 1974), the Louisiana Supreme Court held, on the basis of Louisiana Civil Code article 2321, that "[w]hen a domesticated animal harms another, the master of the animal is presumed to be at fault." *Id.* at 119. The court also added that "[t]he fault so provided is in the nature of strict liability . . ." *Id.* The court also found *legal fault*, which it termed "legally imposed strict liability,"

under similar responsibility provisions, the Louisiana Supreme Court found fault under article 2317, based not on negligence, but rather on "legal fault." The legal fault developed by the court in these three responsibility decisions is similar to strict liability<sup>18</sup> and arises from the "legal relationship to the person or thing whose conduct or defect creates an unreasonable risk of injuries to others."<sup>19</sup> Thus, after *Loescher* the requirement of fault in article 2315 can be satisfied by the "legal fault" imposed upon the relationship under article 2317<sup>20</sup> without necessitating a finding of negligence on the part of the owner or custodian.<sup>21</sup>

However, this liability is not absolute in nature.<sup>22</sup> There are situations wherein a portion or all of the damage is attributable to a cause other than the defendant's fault. Therefore, liability may be avoided by a showing that the harm was caused by the fault of the victim, by the fault of a third person, or by an irresistible force.<sup>23</sup>

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on the part of the parent in *Turner v. Bucher*, 308 So. 2d 270, 277 (La. 1975), for the delictual acts of the child below the age of discernment on the basis of Louisiana Civil Code article 2318.

18. 324 So. 2d at 447.

19. *Id.* at 446.

20. For a thorough discussion of the fault system that has developed and the principles of legal fault, see *id.* at 445-48. In order to understand better the nature of legal fault in the context of relational responsibility, it is important to understand why the court chose to develop the legal fault concept. The court was influenced greatly by the fact that nearly identical provisions had been interpreted in this manner by the French and other civilian jurisdictions. *Id.* at 447-48; *Holland v. Buckley*, 305 So. 2d 113, 117-18 (La. 1974). Even more influential may have been certain policy considerations. The court felt that the risk of harm should be placed upon the owner who kept the thing or animal for his own pleasure or gain, rather than borne by an innocent third person. *Loescher v. Parr*, 324 So. 2d 441, 446 (La. 1975); *Turner v. Bucher*, 308 So. 2d 270 (La. 1975); *Theriot v. Transit Cab Co.*, 263 La. 106, 267 So. 2d 211 (1972). The court also decided that the limited liability which may have been justified in the days of the expanding frontier was no longer appropriate for a crowded, urban, developed society. *Holland v. Buckley*, 305 So. 2d 113, 119 (La. 1974); *Simon v. Ford Motor Co.*, 282 So. 2d 126, 130 (La. 1973) (Tate, J., dissenting). See *Cartwright v. Firemen's Ins. Co.*, 213 So. 2d 154, 158 (La. App. 3d Cir. 1968) (Tate, J., concurring). Although unarticulated as a reason in these decisions, implicit in the finding of legal fault for things in one's custody under article 2317 is the prevalence of liability insurance in contemporary America, which permits risks to be spread through society at large. See Tate, *The Interpretation of Written Rule of Law*, 27 LA. B.J. 79, 82 (1979).

21. All that is required is that "the injured person must prove the vice (i.e., unreasonable risk of injury to another) in the person or thing whose act causes the damage, and that the damage resulted from this vice." *Loescher v. Parr*, 324 So. 2d 441, 446-47 (La. 1975).

22. *Holland v. Buckley*, 305 So. 2d 113, 119 n.10 (La. 1974). Cf. *Briley v. Mitchell*, 238 La. 551, 115 So. 2d 851 (1959) (absolute liability imposed under article 2321 for damages caused by wild animals).

23. *Loescher v. Parr*, 324 So. 2d 441, 447 (La. 1975); *Turner v. Bucher*, 308 So. 2d 270, 277 (La. 1975); *Holland v. Buckley*, 305 So. 2d 113, 119 (La. 1974). For a com-

Focus in this discussion will be restricted primarily to the defense of victim fault.

The term "victim fault" is one the court began using upon entering the legal fault area.<sup>24</sup> Before the legal fault cases, the court classified the victim's contributory conduct by using specific doctrines (e.g., contributory negligence and assumption of the risk). Various reasons may have prompted the court's choosing to use the different and broader term, "victim fault." The court may have followed the French use of the term. Since the court was influenced greatly by the French authority when interpreting the responsibility articles,<sup>25</sup> it is logical to assume that the court also found the defenses used by the French<sup>26</sup> persuasive. The court also may have chosen the term because it is broad enough to encompass many types of victim conduct.<sup>27</sup>

The limits of this defense in the strict liability area have not yet been delineated fully.<sup>28</sup> During the period in which Louisiana's judiciary developed the legal fault concept, the doctrine of contributory negligence was used in negligence actions.<sup>29</sup> The use of the con-

parative and historical examination of the three defenses, see F. STONE, TORT DOCTRINE §§ 44-58 in 12 LOUISIANA CIVIL LAW TREATISE 57-81 (1977).

24. E.g., *Loescher v. Parr*, 324 So. 2d 441, 447 (La. 1975); *Turner v. Bucher*, 308 So. 2d 270, 277 (La. 1975); *Holland v. Buckley*, 305 So. 2d 113, 119 (La. 1974). See Comment, *Fault of the Victim: The Limits of Liability Under Civil Code Articles 2317, 2318 and 2321*, 38 LA. L. REV. 995, 999 (1978).

25. See note 20, *supra*.

26. See F. STONE, *supra*, note 23, § 44, at 59.

27. See generally Comment, *supra* note 24, at 999-1000.

28. This discussion is confined to consideration of the victim fault defense when the victim's conduct was negligent. Whether legal fault on the part of the victim will serve as a defense is an interesting question, though outside the scope of this paper. See Comment, *supra* note 24.

29. There is serious question as to whether the Louisiana courts should have used the common law doctrine of contributory negligence. Provisions of the Louisiana Civil Code, article 2315 and, prior to its recent repeal, article 2323, could have been interpreted to provide for a victim fault defense in the nature of comparative negligence.

Article 2315 states that "[e]very act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." The author suggests that the logical extension of this principle is that one is not obliged to pay that which did not happen through his fault and that, therefore, liability should be reduced by the amount attributable to the plaintiff's fault.

Article 2323, repealed by Act 431 of 1979, provided: "the damage caused is not always estimated at the exact value of the thing destroyed or injured; it may be reduced according to circumstances, if the owner of the thing has exposed it imprudently." Many scholarly writers have urged that this article expressly provided a victim fault defense in the nature of comparative negligence. See Malone, *Comparative Negligence—Louisiana's Forgotten Heritage*, 6 LA. L. REV. 125 (1945); Comment, *Comparative Negligence in Louisiana*, 11 TUL. L. REV. 112 (1936); Note, *Negligence—Last Clear Chance—Apparent Peril—Comparative Negligence—Article 2323, Louisiana*

tributory negligence doctrine in negligence actions continued until the recent passage of the comparative negligence statute.<sup>30</sup> Whether contributory negligence is available as a form of victim fault in actions based on legal fault<sup>31</sup> and whether the comparative negligence statute is to be applied are uncertain. Since contributorily negligent conduct is relatively commonplace in most situations that involve legal fault, the issues of whether contributory negligence constitutes victim fault and whether the comparative negligence statute should apply are significant.

The court's treatment of the victim fault defense to date should indicate what types of conduct will be considered victim fault in strict liability actions. While the cases do not address directly the defense of victim fault under article 2317, they do provide some insight as to what the court will deem to bar recovery.

In *Langlois*, which involved strict liability for ultrahazardous activities, the Louisiana Supreme Court found contributory negligence not to be a defense.<sup>32</sup> However, the court did comment that under appropriate factual circumstances assumption of the risk would be a defense.<sup>33</sup> The only reason given by the court for not finding contributory negligence applicable was that "[t]he defense of con-

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*Civil Code of 1870*, 15 TUL. L. REV. 480 (1941). However, the Louisiana judiciary chose to ignore article 2323. *Vidrine v. Missouri Farm Ass'n.*, 339 So. 2d 877, 800 (La. App. 3d Cir. 1976); *Inman v. Silver Fleet of Memphis*, 175 So. 436, 438-39 (La. App. 1st Cir. 1937).

Instead of interpreting the Civil Code to provide for comparative negligence, the Louisiana judiciary decided at an early stage to import the common law doctrine of contributory negligence. It is interesting to note that the court cited directly an English common law decision to support the use of contributory negligence and gave no explanation as to why the common law doctrine should apply within a civilian jurisdiction. *Fleytas v. Ponchartrain R.R. Co.*, 18 La. 339 (1841).

30. 1979 La. Acts, No. 431, *amending and reenacting* LA. CIV. CODE arts. 2103, 2323 & 2324; & LA. CODE CIV. P. arts. 1811 & 1917. It is perplexing that Louisiana continued to cling to the common law defense of contributory negligence in the face of the growth of comparative negligence in other civilian jurisdictions. See Malone, *supra* note 29, at 130 (those listed include France, Puerto Rico, the Phillipine Islands, and Germany). Moreover, it is anomalous that Louisiana utilized the doctrine after it was abandoned in England, see Law Reform, Contributory Negligence, Act of 1945, 8 & 9 Geo. VI c. 28, and in various American jurisdictions as well. See note 40, *infra*. Perhaps the contributory negligence doctrine had become so entrenched in Louisiana law that the judiciary felt that it was not within the scope of its role to change from the established defense, even though the doctrine was judicially created. See F. STONE, *supra* note 23, § 54, at 74.

31. The Louisiana Supreme Court has yet to deal directly with this defense, and the appellate decisions are unclear. See *Rodrigue v. Dixilyn*, 620 F.2d 537, 542-43 (5th Cir. 1980). *But see Sullivan v. Gulf States Utilities Co.*, 382 So. 2d 184, 189 (La. App. 1st Cir. 1980).

32. *Langlois v. Allied Chem. Corp.*, 258 La. 1067, 1086, 249 So. 2d 133, 140 (1971).

33. 258 La. at 1086-89, 249 So. 2d at 140-41.

tributory negligence . . . urged here presupposes original negligence on the part of the defendant," while "[t]his case is not a case where negligence is an ingredient of fault."<sup>34</sup> It seems that the court could have provided a more penetrating analysis of why another type of fault, negligence, was not to be considered. It is submitted that the court took its approach to avoid the harshness of the total bar to recovery which accompanies the contributory negligence defense. However, the decision may illustrate the Louisiana court's attitude toward contributory negligence in strict liability cases.

The court in *Loescher v. Parr* faced the irresistible force defense to a strict liability action under article 2317,<sup>35</sup> but force sufficient to bar recovery was not presented. The court said that such an intervening force must be "an event which happens from an irresistible cause or force not foreseeable, usually a *vis major* or act occasioned exclusively by the violence of nature without the contribution by legal fault of any human."<sup>36</sup> While the defenses of fault of the victim and irresistible force are distinguishable, the court in *Loescher* gives an indication of the high degree to which the intervening force, whether it be an irresistible force, victim fault, or third party fault, must cause damage to exculpate defendants.

A sole cause approach to intervening cause was posited by the court in *Olsen v. Shell Oil Company*,<sup>37</sup> which dealt with the defense of fault of a third person in a strict liability action under article 2322. There the court said:

The fault of a "third person" which exonerates a person from his own obligation importing strict liability as imposed by articles 2317, 2321, and 2322 is that which is *the sole cause of the damage*, of the nature of an irresistible and unforeseeable occurrence—i.e., where the damage resulting has no causal relationship whatsoever to the fault of the owner in failing to keep his building in repair . . . .<sup>38</sup>

Thus, the treatment of the fault of a third party defense, like the intervening force defense, if analogous to victim fault, would seem to indicate that only conduct so blatant as to seem a sole cause would qualify as victim fault.

The issue of contributory negligence as victim fault in strict liability actions under the responsibility articles has not been

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34. 258 La. at 1086, 249 So. 2d at 140.

35. *Loescher v. Parr*, 324 So. 2d 441, 449 (La. 1975).

36. *Id.*

37. 365 So. 2d 1285 (1979).

38. *Id.* at 1293.



treated directly by the Louisiana Supreme Court. However, it seems that *if* the principle established in other cases is applied to victim fault, the conduct must be such that it would be virtually the sole cause of the damage.

The last development that should be discussed in a preliminary examination of victim fault is Louisiana's recent legislative adoption of comparative negligence.<sup>39</sup> Louisiana followed the lead of many other states<sup>40</sup> and civilian jurisdictions<sup>41</sup> by enacting a comparative negligence statute which went into effect August 1, 1980. Whether it will be applied by Louisiana courts to strict liability/responsibility actions remains to be seen. The wording of the statute lends itself to the possibility of either finding. The pertinent article provides:

*When contributory negligence is applicable to a claim for damages, its effect shall be as follows: If a person suffers injury,*

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39. 1979 La. Acts No. 431, *amending and reenacting* LA. CIV. CODE arts. 2103, 2323 & 2324; & LA. CODE CIV. P. arts. 1811 & 1917. *See generally* Chamallas, *Comparative Fault and Multiple Party Litigation in Louisiana: A Sampling of the Problems*, 40 LA. L. REV. 373 (1980); Johnson, *Comparative Negligence and the Duty/Risk Analysis*, 40 LA. L. REV. 319 (1980); Malone, *Prologue (Symposium: Comparative Negligence in Louisiana)*, 40 LA. L. REV. 293 (1980); Pearson, *Apportionment of Losses Under Comparative Fault Laws—An Analysis of the Alternatives*, 40 LA. L. REV. 343 (1980); Plant, *Comparative Negligence and Strict Tort Liability*, 40 LA. L. REV. 403 (1980); Wade, *Comparative Negligence—Its Development in the United States and Its Present Status in Louisiana*, 40 LA. L. REV. 299 (1980); Comment, *Prescribing Solidarity: Contributing to the Indemity Dilemma*, 41 LA. L. REV. 659 (1981).

40. Thirty-five states may be classified as comparative negligence states. *See* Kaatz v. Alaska, 540 P.2d 1037 (Alas. 1975); ARK. STAT. ANN. §§ 27-1763-65 (1975); Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); COLO. REV. STAT. ANN. § 13-21-111 (1978); CONN. GEN. STAT. ANN. § 52-572(h) (West 1979) (general); 1979 CONN. LEGIS. SERV., PUB. ACT No. 79-483, § 4 (West 1979) (products liability); Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973); GA. CODE ANN. §§ 66-402, 94-703, 105-603 (1979); HAW. REV. STAT. § 663-31 (1976); IDAHO CODE §§ 6-801 to -806 (1979); KAN. STAT. ANN. §§ 60-258a to -258b (1976); 1979 La. Acts, No. 431; ME. REV. STAT. ANN. tit. 14, § 156 (1978); MASS. GEN. LAWS ANN. ch. 231, § 85 (Law. Co-op. 1978); Placek v. City of Sterling Heights, 405 Mich. 638, 275 N.W.2d 511 (1979); MINN. STAT. ANN. §§ 604.02 (West 1978); MISS. CODE ANN. § 11-7-15 (1972); MONT. CODE ANN. § 27-1-702 (1978); NEB. REV. STAT. § 25-1151 (1978); NEV. REV. STAT. § 41-141 (1979); N.H. REV. STAT. ANN. § 507:7-a (1977); N.J. STAT. ANN. §§ 2A:15-5.1 to -5.3 (West 1973); N.Y. [CIV. PRAC.] LAW § 1411 (McKinney 1975); N.D. CENT. CODE § 9-10-07 (1973); OKLA. STAT. ANN. tit. 23, §§ 11-12 (West 1979); OR. REV. STAT. § 18-470 (1977); PA. CONS. STAT. ANN. tit. 42, § 7102 (1979); R.I. GEN. LAWS §§ 9-20-4 to -4.1 (1978); S.D. COMPILED LAWS ANN. § 20-9-2 (1978); TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon 1978); UTAH CODE ANN. §§ 78-27-37 to -43 (1977); VT. STAT. ANN. tit. 12, § 1036 (1973); WASH. REV. CODE ANN. § 4.22.010 (1979); Bradley v. Appalachian Power Co., 256 S.E.2d 879 (W. Va. 1979); WIS. STAT. ANN. § 895.045 (West 1979); WYO. STAT. ANN. § 1-1-109 (1977). *See also* United States v. Reliable Transfer Co., 421 U.S. 397 (1975) (admiralty); 45 U.S.C. § 53 (1976) (FELA); 46 U.S.C. § 688 (1976) (Jones Act); 46 U.S.C. § 766 (1976) (Death on the High Seas Act).

41. *See* note 30, *supra*.

death or loss as the result partly of his own negligence and partly as a result of the fault of another person or persons, the claim for damages shall not thereby be defeated, but the amount of damages recoverable shall be reduced in proportion to the degree or percentage of negligence attributable to the person suffering the injury, death or loss.<sup>42</sup>

Thus, the controlling issue is whether contributory negligence is applicable to a claim for damages based on legal fault. Under the *Langlois* approach,<sup>43</sup> comparative negligence would not be used, because contributory negligence is not applicable. Also, under the "sole cause" approach used in *Loescher*<sup>44</sup> and *Olsen*<sup>45</sup> requiring that the victim conduct constitute the sole cause of the injury, contributory negligence would be inapplicable unless it constituted the sole cause of the injury. However, the language of the article in light of the total concept of fault suggests that the intent of the legislature in using the wording, "as the result partly of his own negligence and partly as a result of the fault of another person or persons,"<sup>46</sup> was to apply this article to legal fault situations, as well as to negligent fault. Supportive of the application of comparative negligence in the strict liability area is the fact that other civilian jurisdictions, most notably France,<sup>47</sup> and other states,<sup>48</sup> have applied comparative negligence to strict liability.

In *Rodrigue* the Court of Appeals for the Fifth Circuit faced the question of whether contributory negligence constituted victim fault exculpating the defendant in a 2317 action.<sup>49</sup> Judge Tate, writing for

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42. LA. CIV. CODE art. 2323 (emphasis added).

43. See notes 32-34, *supra*, and accompanying text.

44. See notes 35-36, *supra*, and accompanying text.

45. See notes 37-38, *supra*, and accompanying text.

46. LA. CIV. CODE art. 2323.

47. See generally F. STONE, *supra* note 23, §§ 48-49, at 69-71.

48. Three states which adopted comparative negligence judicially also extended it judicially to apply to strict liability actions in the products liability context. *Butaud v. Suburban Marine & Sport. Goods, Inc.*, 555 P.2d 42, 46 (Alas. 1976); *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 144 Cal. Rptr. 380, 575 P.2d 1162 (1978); *West v. Caterpillar Tractor Co., Inc.*, 336 So. 2d 80, 89-90 (Fla. 1976). At least five states have adopted comparative fault statutes which, in their language, are not limited to negligence actions. See ARK. REV. STAT. §§ 27-1763-65 (1975); ME. REV. STAT. ANN. tit. 14, § 156 (1965); MISS. CODE ANN. § 11-7-15 (1917); N.Y. [CIV. PRAC.] LAW art. 14A, § 1411 (1975); R.I. GEN. LAWS § 9-20-4 (1971). At least three jurisdictions have applied comparative negligence statutes to strict liability actions, despite language arguably limiting the statute's application to negligence. *Sun Val. Airlines, Inc. v. Avco-Lycoming Corp.*, 411 F. Supp. 598, 602-03 (D. Idaho 1976); *Hagenbuch v. Snap-On Tools Corp.*, 339 F. Supp. 676, 681-83 (D.N.H. 1972); *Dippel v. Sciano*, 37 Wis. 2d 443, 155 N.W.2d 55, 64 (1967).

49. 620 F.2d 537, 539 (5th Cir. 1980).

the court, held that contributory negligence was not a defense,<sup>50</sup> but commented that assumption of the risk will constitute victim fault when the facts justify a finding that a plaintiff has knowingly and voluntarily assumed the risk.<sup>51</sup>

Since the Louisiana Supreme Court had never dealt directly with the victim fault defense in the strict liability responsibility context, Judge Tate resorted to analogizing from the court's treatment of the other two defenses in *Loescher* and *Olsen*.<sup>52</sup> He reasoned that in order to be consistent with the criteria stated for the other two defenses, "the victim's fault should be in the nature of an independent and superseding cause of his damages."<sup>53</sup> Thus, in applying the criteria of the other defenses, contributory negligence was judged not to be a defense because contributorily negligent conduct is not sufficient to be an independent, superseding cause. Judge Tate found further support for rejecting contributory negligence in the language used by the *Langlois* court. He declared that this "reasoning [was] clearly applicable to all strict liability theories."<sup>54</sup> Additional support was found both in scholarly authority<sup>55</sup> and in the recognized law of some other American jurisdictions.<sup>56</sup> Both sources support the rule that a strict liability action is not barred by the plaintiff's ordinary negligence.

Judge Tate was careful to note that the accident which was the source of the *Rodrigue* litigation occurred before the comparative negligence statute went into effect and that, therefore, the issue of the statute's applicability to strict liability claims was not before the court.<sup>57</sup> However, he did comment that the adoption of comparative

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50. *Id.* at 544.

51. *Id.* at 539. In dicta, the court seems to assume that assumption of the risk is a defense. However, if one accepts the criteria used by the courts, it is conceivable that in some situations, even if the plaintiff has knowingly and voluntarily encountered the risk, the risk will still be imputable to the defendant, and hence assumption of the risk will not be a defense.

52. *Id.* at 542.

53. *Id.*

54. *Id.*

55. *Id.* at 542-44. The court found Professor Stone's work very supportive. See F. STONE, *supra* note 23, § 50, at 71. The basic theme of the cited statements is that contributory negligence is properly pleaded only to an action based on negligence. The main support for this proposition is in section 50 wherein the author cites two cases. The first case, *Steinmetz v. Kelley*, 72 Ind. 552, 37 Am. Rep. 170 (Ind. 1880), is distinguishable from the strict liability area in that it involves an intentional tort, assault and battery (one is traditionally under no duty to retreat). The second case referred to was *Langlois v. Allied Chem Corp.*, 258 La. 1067, 249 So. 2d 133 (1971). See notes 32-34, *supra*.

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

57. 620 F.2d at 544 n.11.

negligence in other states had resulted in reevaluation of the traditional rule that contributory negligence did not affect the strict liability plaintiff's recovery; he noted "[a] trend toward allowing such conduct to reduce recovery . . . ."<sup>58</sup>

It is submitted that the court in *Rodrigue* was incorrect in its exclusion of contributory negligence from victim fault under article 2317. There is no significant reason why contributory negligence should be allowed as a defense in negligence fault actions and yet be denied as a defense in legal fault actions. This distinction involves the illogical position that the fault of the victim will relieve the defendant of liability when he is negligent, but not when his liability is based on legal fault.<sup>59</sup> This distinction seems especially inconsistent with the broad concept of fault Louisiana has developed. If different types of fault invoke liability, it is logical that they should also be considered to relieve liability as well. The court in *Rodrigue* attempts to justify its position by turning to the court's language in *Langlois* and by trying to interpret the victim fault defense to be consistent with the prior jurisprudence of the other defenses. However, neither approach really justifies the distinction in defenses available under the two types of fault.

The court in *Langlois* merely stated that in that case negligence was not "an ingredient of fault" and concluded that "contributory negligence [was] not a defense."<sup>60</sup> This does not explain why the same court that had just expanded the concept of fault beyond negligence now was limiting fault as regards defenses. The court seems to argue that contributory *negligence* is only relevant in actions based on negligent fault, reiterating an old common law rule of questionable continued validity.<sup>61</sup> Not only does the court's position ig-

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58. *Id.*

59. In *Parker v. Hanks*, 345 So. 2d 194, 199 (La. App. 3d Cir. 1977), a third circuit decision involving article 2321 (owner's responsibility for the damage caused by his animal), the court said that the victim fault defense should be given a "reasonable and common-sense construction." The court also pointed out that "if the victim should be barred from recovery in a negligence dog-bite," there was "no reason why the same bar should not be applied in a case where the fault of the owner is non-negligent fault." *Id.* The same reasoning was used by the first circuit in *Sullivan v. Gulf States Utilities*, 382 So. 2d 184, 189 (La. App. 1st Cir. 1980), a case involving article 2317, which noted that "[i]t would be ironic . . . for the defendant to be able to escape liability in a negligence action because of the plaintiff's contributory negligence, yet be held liable under a strict liability theory when the plaintiff has been equally at fault in bringing about the harm."

60. 258 La. 1087, 1086, 249 So. 2d 133, 140 (1971).

61. The position that negligence cannot be examined in strict liability actions, because square pegs do not fit into round holes, has been rejected in the recent application of comparative *negligence* in *strict liability* actions. See note 48, *supra*, and accompanying text.

nore the fact that fault is still involved, but also as one scholar commented, contributory negligence is not best termed negligence, because the traditional duty owed to another is not present, but is better termed "contributory fault."<sup>62</sup> *Langlois* also can be distinguished, because it involves nonnegligent fault for ultrahazardous activities, rather than the legal fault based upon relational responsibility. Thus, *Langlois* provides little guidance as to why contributory negligence is inapplicable.<sup>63</sup> The sole cause standard articulated in *Loescher* and *Olsen* does not provide much assistance either. These decisions do not support the proposition that contributory negligence, which is a defense in negligence actions, is not victim fault in legal fault/strict liability actions.

Third-party fault cannot be analogized to victim fault in strict liability actions.<sup>64</sup> In *Sullivan v. Gulf State Utilities*,<sup>65</sup> a first circuit decision addressing circumstances nearly identical to those in *Rodrigue*, the court considered the *Olsen* analogy and replied that "[t]he Supreme Court in *Olsen* made no indication that it was speaking of victim fault when it held that third party fault must be the sole cause of an accident in order to relieve an owner of liability . . . ."<sup>66</sup> The first circuit noted further that "[i]f anything victim fault is more closely analogous to contributory negligence than it is to third party fault under the strict liability articles . . . ."<sup>67</sup> The two defenses, third party fault and victim fault, can be distinguished readily according to their natures. In situations involving third-party fault, the plaintiff is an innocent party, and the issue is who will bear the liability. Assuming that both parties' actions are causative and that they would otherwise both be liable, it is logical to require a showing from the defendant that the third party's actions were the *sole cause* of the damages in order for the defendant to relieve himself of liability and to shift it to the third party.<sup>68</sup> A different situation

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62. W. PROSSER, *supra* note 5, § 65, at 418-19.

63. It has been suggested that the *Langlois* decision does not apply to the availability of the contributory negligence defense in strict liability responsibility situations because later decisions mention victim fault as a defense. An example is the language in *Holland v. Buckley*, 305 So. 2d 113, 119 (1974), listing victim fault as a defense under article 2321. See *Parker v. Hanks*, 345 So. 2d 194, 198 (La. App. 3d Cir. 1977).

64. *Sullivan v. Gulf States Utilities*, 382 So. 2d 184, 189 (La. App. 1st Cir. 1980).

65. 382 So. 2d 184 (La. App. 1st Cir. 1980).

66. *Id.* at 189.

67. *Id.* The court also found, for purposes of the case before them, "the measure of conduct necessary to achieve the appellation 'contributory negligence'" to be "the same measure necessary to amount to 'victim fault' under 2317." *Id.* at 190.

68. Requiring less than a showing of *sole cause* would enhance the possibility that each party could argue successfully the fault of the other as a defense and leave the innocent plaintiff with no one from whom to recover. Another possible justification for

arises when the plaintiff has contributed to his own damages and yet, under the sole cause approach, would be able to recover unless the defendant could meet the difficult burden of showing that the plaintiff's actions were the sole cause of his damage.

Analogizing the irresistible force defense to victim fault is also questionable. One important distinction is that in the case of an irresistible force defense, an innocent plaintiff is being denied recovery for damage he has suffered; thus, it may be desirable to provide him with greater protection before denying recovery. When victim fault is urged as a defense, the plaintiff has contributed to his damage.

There may be certain policy reasons which may have been implicitly considered in *Rodrigue*. One may be the potential for unfairness when recovery is denied totally. However, this potential unfairness is not unique to strict liability actions, but was present in negligence actions when *Rodrigue* was decided, and thus provides no reason for differential treatment. Another reason may be that allowing a defendant to escape all liability would be inconsistent with the desire expressed in *Loescher* to hold people responsible for the harm caused by things under their control.<sup>69</sup> However, the policy underlying *Loescher* was that, as between two innocent parties, the owner or guardian of a thing should pay for any damage it causes. This consideration evaporates when the victim is negligent, rather than innocent.<sup>70</sup>

Thus, in light of the then-existing law, the doctrine of contributory negligence still in effect in negligence actions, contributory negligence should have been considered as victim fault under article 2317 by the *Rodrigue* court. However, an unanswered question is whether the comparative negligence statute would apply under those circumstances.<sup>71</sup>

The comparative negligence statute is ambiguous because it purports to apply: "When contributory negligence is applicable to a

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requiring the defendant to meet a greater burden and for providing the plaintiff with more protection is that, as a practical matter, it may be impossible for the plaintiff to recover from the third party under certain circumstances, e.g., insolvency of the third party.

69. See note 20, *supra*.

70. *Sullivan v. Gulf States Utilities*, 382 So. 2d 184, 189-90 (La. App. 1st Cir. 1980).

71. It is important to note that this question, at least as treated by Judge Tate, is unanswered, regardless of whether contributory negligence is applicable in *that* case. This implies that there may be a difference in the applicability of contributory negligence under a comparative negligence system. See *generally* *Rodrigue v. Dixilyn*, 620 F.2d 537, 544 n.11 (5th Cir. 1980).

claim for damages . . . ."<sup>72</sup> The question is whether contributory negligence is applicable to a claim for damages in a strict liability action. In light of the previous discussion, three possible statutory constructions are available to resolve the issue.

First, one might argue that at the time the statute was passed, the view accepted by the courts was that the defense of contributory negligence was not available in strict liability actions and, therefore, that the comparative negligence statute is not operative.<sup>73</sup> This view could be supported by the decision of *Langlois* and the persuasive reasoning of *Rodrigue*.

Second, one might contend that the defense of victim fault, posited by the Louisiana Supreme Court as a defense to strict liability, does encompass contributory negligence and thus that the comparative negligence statute is operative. This position is viable, as pointed out in the above discussion of *Rodrigue*, since the distinction between the two types of fault for purposes of the victim fault defense is both illogical and lacking in support.

A third approach is to distinguish the role of contributory negligence in an "all or nothing" system from its function in a reduced recovery system.<sup>74</sup> Earlier case law developed under the "all or nothing" system, which resulted in addressing whether the plaintiff's conduct was an independent, superseding cause. On the other hand, the comparative negligence reduced recovery system is by its nature designed to consider conduct which falls short of constituting an independent and superseding cause. Reduced recovery, as opposed to a total bar, enables courts to consider contributory conduct which is less than the sole cause without frustrating recovery completely. This approach reasons that *even if* contributory negligence was not applicable under prior case law, it is applicable to a claim for damages under the comparative negligence statute. In addition to the validity of its reasoning, this approach seems to be desirable because it avoids the conflict caused by the lack of absolute clarity as to whether contributory negligence was a defense in the strict liability/responsibility area. Thus, following either of these two constructions, the statute should be interpreted to operate.

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72. LA. CIV. CODE art. 2323.

73. It could be argued that *even if* the comparative negligence statute were found inapplicable in legal fault actions, comparative negligence would be applied on the basis of 2315. See note 29, *supra*. However, a possible counter-argument is that if the legislature expressly provided for comparative negligence in negligence actions only, the legislative intent was to exclude the application of comparative negligence in legal fault actions.

74. See Wade, *supra* note 39, at 313.

Close examination of the wording of the statute reinforces the contention that it applies in cases based on strict liability. The wording: "injury, death or loss as the result partly of his own negligence and partly as a result of the fault of another person or persons,"<sup>75</sup> contemplates balancing the negligence (contributory negligence) of the plaintiff and the fault (including legal fault) of the defendant.<sup>76</sup> Thus, while the first sentence of the statute is ambiguous, subsequent statutory language indicates that comparative negligence is applicable in strict liability responsibility actions.

Both the statute, when considered by itself, and its interpretation in light of the whole fault system seem to demand such a result. The underlying rule in this system is that a person is liable for damage caused by his fault. Therefore, he should not be liable for that damage which his fault did not cause; nor should a plaintiff recover for injury his own fault produced.<sup>77</sup> This principle is as valid in the context of legal fault as in the setting of negligent fault.

The application of comparative negligence not only is more desirable theoretically, but also is the most fair approach. The application of the statute would avoid the unfair result which would occur if a negligent defendant is liable for a reduced amount while a defendant who may have exercised the utmost care, but who was guilty of legal fault, is liable for the entire loss. This fairness will not thwart the policy of holding a person liable for the damage caused by things in his custody, because he still will be responsible for the damage *the thing did* cause (but not the damage caused by the victim himself).

Many other civilian jurisdictions and states have faced this problem and have chosen to apply comparative negligence to strict liability, and their experience is relevant to the question of applicability in Louisiana. In other states the substitution of comparative negligence for the "total bar" system was soon extended to apply to strict liability as well. The application of comparative negligence to strict liability should be even easier in Louisiana, with its generalized concept of fault, than in the common law jurisdictions of other states.

Thus, in light of these considerations, the correct result seems to be the operation of the comparative negligence statute in actions based on legal fault. Therefore, it is important that the holding of

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75. LA. CIV. CODE art. 2323.

76. See Plant, *supra* note 39, at 413.

77. The principle is implicit in article 2315, was expressed in the 1870 version of article 2323, and is the basis for the current article 2323.



*Rodrigue*, that contributory negligence is not a defense to strict liability actions in Louisiana, is not followed in Louisiana's future jurisprudence.

Thomas G. Smart

WHAT'S IN A NAME?—LOUISIANA'S "PROTECTION" OF TRADENAMES:  
*Elle, Ltd. v. Elle Est*

The plaintiff, *Elle, Ltd.*, a Louisiana corporation<sup>1</sup> engaged in the sale of women's clothing, claimed violations of the principles of unfair competition and tradename infringement.<sup>2</sup> The plaintiff sought to enjoin the defendant,<sup>3</sup> a nearby clothing store, from using the word "elle" in its tradename. The Civil District Court for the Parish of Orleans, while criticizing its own decision,<sup>4</sup> adhered to precedent<sup>5</sup> and denied injunctive relief. The Fourth Circuit Court of Appeal affirmed the trial court decision and *held* that the word "elle" was a common noun and as such could not be protected by injunction absent a showing of the defendant's fraudulent intent. *Elle, Ltd. v. Elle Est*, 388 So. 2d 1166 (La. App. 4th Cir. 1980).

A tradename is a word, name, or symbol used to distinguish one business from another.<sup>6</sup> The federal government and some states, including Louisiana, allow by statute the reservation of tradenames.<sup>7</sup>

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1. *Elle, Ltd.* was incorporated on May 17, 1977, in Book 318 of the Secretary of State of the State of Louisiana.

2. The name "*Elle, Ltd.*" was trademarked in June, 1977, pursuant to the requirements of LA. R.S. 51:212-18 (Supp. 1968).

3. *Elle Est* reserved its tradename on June 25, 1979.

4. No. 79-12656 (D. La. Oct. 17, 1979). Judge Plotkin felt that the jurisprudence was clear, *Straus Frank Co. v. Brown*, 246 La. 999, 1007, 169 So. 2d 77, 80 (1964), that in Louisiana, a plaintiff must establish the defendant's fraudulent intent in order to obtain an injunction. However, he suggested that the supreme court reconsider the standards set forth in *Straus* and adopt the more reasonable approach of allowing injunctive relief upon a showing of public confusion.

5. Louisiana courts consistently have held that the prerequisite for granting relief to the plaintiff is proof of fraud on the part of the defendant. The reigning case in this area is *Straus Frank Co. v. Brown*, 246 La. 999, 1007, 169 So. 2d 77, 80 (1964).

6. Tradenames are to be distinguished from trademarks in that the latter are used to identify goods made or sold by the owner. See LA. R.S. 51:211(A)&(D) (Supp. 1968).

7. The federal treatment of trademarks and tradenames may be found in what is generally called the "Lanham Act." 15 U.S.C. § 1127 (1976).

Louisiana allows reservation of tradenames (i.e., registration with the Secretary of State) under trademark law and corporate law. See LA. R.S. 51:213 (Supp. 1968); 12:23 (Supp. 1968).