I'm A Lawyer Too--Memoirs of the Ambitious Legal Writing Professor

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In the Spring of 2005, I was given the privilege of teaching the negligence portion\(^2\) of Louisiana Tort Law to first-year law students. As a legal writing instructor\(^3\) for over five years, an opportunity to advance my teaching skills by teaching more substantive areas of law is definitely something I can not refuse.\(^4\) This was also a chance for me to offer my students a structured writing scheme that they could use in answering tort questions for my final examination as well as Louisiana bar examination. Immediately after getting this assignment, I literally thought of several fact patterns and essay questions I could use during the course. This was both exciting and overwhelming all at the same time.

It is not unusual for legal writing instructors to be anxious to explore new academic opportunities. In the past, I have willingly accepted teaching assignments

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\(^2\) According to the Southern University course catalog, personal injury law is divided into two distinct categories: Torts I (intentional torts) and Torts II (negligence). In the Torts I course, first-year law students are introduced to the common-law definitions for several intentional torts. In addition to learning intentional torts definitions, the students learn how to conduct a thorough legal analysis by juxtaposing each element of a specific tort with a given fact pattern. A common-law casebook is used in the Torts I course since the civilian definition for these intentional torts are similar to the common-law definitions. However, in the Torts II course, first-year (second semester) law students discover several new negligence theories except these new theories are based on the civilian perspective. The law students also realizes that the civilian court’s interpretation of negligence and its analytical methods of determining liability are unique and differ from the common-law approach learned in the previous semester.

\(^3\) In no way is this writer voicing dissatisfaction with teaching legal writing. In fact, I consistently tell all first-year law students that the legal writing course is by far their most important course in law school. It is in the legal writing course that the student learns how to conduct thorough legal analysis, produce quality case briefs and memorandums, and write final examination answers that would make their professors shed tears of joy. See Mary Dunnewold, *Long-Term Job Satisfaction as a Legal Writing Professional*, 13 PERSPECTIVES 1 (2004), [hereinafter referred to as LONG-TERM SATISFACTION].

\(^4\) Id.
outside of Legal Writing, not because I wanted to abandon my first love\textsuperscript{5} (Legal Writing)—supposedly for greener pastures—instead, I welcomed these opportunities so that I could expand my areas of interest for scholarship\textsuperscript{6} purposes while at the same time sharpen my teaching skills with several other courses on my curriculum vitae.

More importantly, I wanted to illustrate to second and third year law students that a strong writing\textsuperscript{7} methodology can guarantee them success on any law school examination—especially Louisiana’s essay bar examination. Consequently, rather than lecture the students exclusively on abstract concepts, principles and theories; I designated a substantial part of my classroom sessions towards instructing them on how to organize the fact patterns so that their answers would be readable, logical and legal.

When I initially accepted the position of Legal Writing professor, I did so with the agenda of highlighting the importance of writing in the practice\textsuperscript{8} of law—not just law school. What a great opportunity to illustrate my point! Naturally, my experience\textsuperscript{9} as an appellate attorney, former Assistant District Attorney as well as a solo practitioner qualifies\textsuperscript{10} me to teach much more than just legal writing or appellate advocacy. Unlike most professions, the legal profession exposes attorneys to so many different and complex worlds of study (medicine, engineering, architecture, electronics, banking, insurance, corporate investments, commercial and residential construction practices, etc.). The list is truly endless.

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\textsuperscript{5} Id.

\textsuperscript{6} See generally, Melissa Marlow, Scholarship Buddies, 56 J. LEGAL EDUC. 56 (2006).

\textsuperscript{7} See Jennifer Jolly-Ryan, Coordinating a Legal Writing Program With the Help of Course Webpage: Help For Reluctant Leaders and the Technologically-Challenged Professor, 22 QLR 479, 481 (2004), [hereinafter referred to as COORDINATING A LEGAL WRITING PROGRAM], (arguing that “[g]ood legal writing is a virtual necessity for good lawyering [because] without good legal writing, good lawyering is wasted”) (quoting John D. Feerick, Writing Like a Lawyer, 21 FORDHAM URB. L. J. 381 (1994)).

\textsuperscript{8} Id., p. 481, (stating that the overall goal of any legal institution is to train its graduates to be able to effectively communicate, both in writing and orally, in order to provide competent representation to their future clients).

\textsuperscript{9} Bethany Rubin Henderson, Asking the Lost Question: What is the Purpose of Law School?, 53 J. LEGAL EDUC. 48 (March 2003), (asserting that law school is the first and most appropriate forum to instill professional norms and teach future attorneys that law is a noble public profession).

\textsuperscript{10} Id., (stating that many law teachers attempt to offer their students a broader, more contextualized perspective of the law).
Though our clientele are as diverse as ice cream flavors, our motto remains the same—everything must be in writing. In other words, no matter how complex or boring the subject area, we must find a way to educate and persuade the judges and juries in favor of our clients by our written communication (i.e. petitions, answers, discovery requests, depositions, interrogatories, motions, memorandums in support of those motions, stipulations, judgments, jury instructions legal journals and law reviews).

Unfortunately, Legal Writing professors are not necessarily held in high esteem among the casebook faculty. Yet, as a Legal Writing professor I treasure every moment of my academic career especially when my former students return to the law school to offer their kudos on my teaching style and the practical writing assignments I offered them in the course. According to their comments, my assignments were identical to the work they had to do in their judicial clerkships positions or with their private clients.

Despite the joy I receive from my students, I must remain cognizant of the reservations my colleagues have about offering such academic goldmines to contract employees. Legal institutions, (regardless of their intentions) consistently demean our purpose and minimize our value to the students by offering its Legal Writing faculty low salaries, vague and meaningless titles, and short-term contracts, which ultimately impedes on our longevity with the very institution that we helped to cultivate.

Mary Beth Beazley captured the contentions of many legal writing professionals who longed to be accepted and appreciated for their contributions to those students who have successfully matriculate through law school.

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11 See Mary Beth Beazley, Better Writing, Better Thinking: Using Legal Writing Pedagogy in the “Casebook” Classroom (Without Grading Papers), 10 LEGAL WRITING: J. LEGAL WRITING INST. 23 (2004) [hereinafter referred to as BETTER THINKING] (noting that the only distinction between Legal Writing faculty and the regular faculty members is the fact that the regular faculty uses a casebook in their courses; hence, the term casebook faculty).
12 See generally, R. Michael Cassidy, Why I Teach (A Prescription for the Post-Tenure Blues), 55 J. LEGAL EDUC. 381 (Fall 2005).
14 See Beazley, supra, pp. 81-82 (referring to an AALS speech given by former Attorney General Janet Reno, claiming that the creation of tenure-track positions would be a start to resolving some of the problems in legal writing departments and towards meaningful scholarship).
15 Mary Beth Beazley, Riddikulus!: Tenure-Track Legal-Writing Faculty and the Boggart in the Wardrobe, 7 SCRIBES J. LEGAL WRITING 79, 81 (2000).
Legal writing courses aren’t the dirty diapers of legal education. Instead, they embody the very essence of what lawyers do: identify relevant authorities, synthesize legal rules from those authorities, and apply those rules to the relevant facts, all in a particular jurisdictional and procedural context. This is what “thinking like a lawyer” is all about, and it is what legal writing professionals teach their students every semester.\(^\text{16}\) (Emphasis added).

Pamela Edwards indicated that “once a law school has made a commitment to faculty teaching, it must ensure that its [Legal Writing professors] are integrated into the faculty and treated as regular members of the institution with identical opportunities in terms of salary, benefits, tenure and promotion.”\(^\text{17}\)

Temporarily forgetting this internal conflict between casebook faculty and the Legal Writing faculty, I began to focus my attention towards something with more promise and with more rewards—giving my students a thorough, yet practical understanding of Louisiana tort law.

Ideally, every new teaching assignment\(^\text{18}\) should be interpreted as a new opportunity for academic growth and development—especially for those of us who are willingly embark upon new academic territory. Unfortunately, the one obvious disadvantage to employing a trial attorney to teach a first-year Tort class is that while law students are overwhelmed with the process of learning theories, abstract principles, concepts and analytical methods, the Legal Writing professor, trial litigator—now Tort professor—is focused upon disclosing to these law students the practical\(^\text{19}\) aspects of prosecuting\(^\text{20}\) a liability claim from start to finish.\(^\text{21}\)

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\(^{19}\) See David E. Van Zandt, *Discipline-Based Faculty*, 53 J. LEGAL EDUC. 332, 333 (2003) (asserting that “a law teacher’s strongest comparative advantage vis-à-vis a practicing lawyer is that the teacher can examine problems involving law and legal institutions at a largely independent standpoint without clients or potential clients looking over her shoulder”).

\(^{20}\) Leslie Bender stated:

Most of our students will be practicing attorneys, business people, consumers, homeowners, employees, or automobile drivers in the twenty-first century. They
Such concerns include making the students aware of the political agendas of various district and appellate court judges, informing them of the roadblocks involved in collecting or pursuing large damages awards, and discussing the ulterior motives behind large settlement awards between commercial litigants. Law students might also be interested in discussing the various procedures trial attorneys use to screen potential clients and their respective liability claims. Jennifer Howard strongly suggested that the overall mission of any accredited law school should not be to just teach the letter of the law, but to teach students how to practice law so that they can become strong, zealous advocates for their future clients.

In essence, a litigator’s concerns could very well overwhelm the average law student’s understanding of tort law and possibly drown the learning process altogether. Therefore, a good professor knows that he must be able to not only teach the substantive areas of law to their students, but also construct an academic bridge that moves the need to understand the contemporary dynamics and complex stories of negligently or intentionally caused personal injury and tort claims. If we tell the right stories, our students can learn how to think about law today, how to strategize about remedying injury problems, how to frame issues, how plaintiffs and defendants engaged in litigation, and how and why cases are resolved the way they are.

See Leslie Bender, Teaching Tort Stories, 55 J. LEGAL EDUC. 108 (Summer (2005).

23 See J.T.H. JOHNSON, OUR LIABILITY PREDICAMENT: THE PRACTICAL AND PSYCHOLOGICAL FLAWS OF THE AMERICAN TORT SYSTEM 20-21 (indicating that the adversarial system in civil courts is a “complex and belligerent legal mechanism that[ is designed to reward] gamesmanship”. The petition for damages is saturated in “highly embellished grievances” and “fanciful non-economic complaints—all done to increase the plaintiff’s leverage and bargaining purposes).

20 This writer’s experiences in appellate litigation made the decision to become a legal writing instructor a no-brainer. See e.g. Long-Term Satisfaction, supra.; Maureen J. Arrigo, Hierarchy Maintained: Status and Gender Issues in Legal Writing Programs, 70 TEMPLE L. REV. 117 (1997); Jo Anne Durako, A Snapshot of Legal Writing Programs at the Millennium, 6 LEGAL WRITING 95 (2000); Emily Grant, Toward a Deeper Understanding of Legal Research and Writing as a Developing Profession, 27 VT. L. REV. 371 (2003).

24 See Graham Brown, Should Law Professors Practice What They Teach? 42 S. Tex. L. Rev. 316, 330 (2001) [hereinafter referred to as PRACTICE WHAT THEY TEACH], asserting that an experienced lawyer who has built a successful practice should be one of the most important credentials a law school should consider when hiring its professors because, after all, the professor must be able to communicate—firsthand—to law students what it means to practice law well).

25 See Van Zandt, supra., pp. 333-334
students from the theoretical aspects of law to the more practical side of practicing in this area.

For instance, first-year law students are interested in learning the elements for proving liability for building owners, and distinguishing this particular theory of negligence from the basic custodial liability claim. After learning the theories, the students turn their attention towards constructing a writing methodology that would exhibit to both the law professor and/or bar examiner that they possess a sufficient knowledge of tort law so much so that they could represent a member of the general public in a court of law.

The trial attorney, on the other hand, not only has to balance his knowledge of tort law with the particular facts of his client’s case, but he must also evaluate the appellate courts’ temperament to reverse, amend or affirm a specific damage award for the type of injuries his client may wish to pursue. The personal injury attorney must also evaluate whether his client’s personality is amenable to a jury trial. In other words, would a jury return a favorable judgment for his client based on the client’s appearance, profession and demeanor? Or, would the jury tend to see his client as nothing more than an unemployed blue-collar claimant who is seeking his jackpot win against a deep-pocket defendant?

Although the practical concerns of the average trial attorney do not necessarily mesh with the expectations of a first-year law student, the new professor must still strive to effectively connect with his students by illustrating to them that there is a vast difference between knowing tort law and practicing tort law. After all, I was a lawyer before I became a Legal Writing professor. In fact, it was only after I accepted the challenge to teach Legal Writing that I understood the magnitude of my decision to train

26 LA. CIVIL CODE ARTICLE 2322 (WEST 2007).
27 LA. CIVIL CODE ARTICLE 2317 (WEST 2007).
28 See LONG-TERM SATISFACTION, p. 10 (stating that legal writing instructors “must first consciously and realistically examine the benefits and drawbacks of the job, and then…deliberately incorporate creative and challenging new opportunities into [their] careers to offset some of the very real downsides).
29See PRACTICE WHAT THEY TEACH p. 328-329 (2001), (suggesting that law school should envision hiring law professor who are not only excellent scholars and teachers, but also good lawyers).
others how to think like a lawyer. Nevertheless, I was determined to give my students a healthy dose of theory and practicality—this, I believe, would produce successful and productive members of the bar. This was my agenda when I walked through the classroom doors in January 2005.

As luck would have it, the rumor mill was in full force on the day that classes started. Rather than the students entering the classroom with open minds to the things that I intended to teach them about Louisiana tort law, many of them seemed to be dumbfounded that a Legal Writing professor was going to lecture them regarding tort law. More concern seemed to be given to testing my knowledge of tort law rather than exhibiting an overall eagerness to learn this subject.

Generally speaking, all new law professors undergo some form of initiation when they enter the classroom to teach their first law course—my experience was no different. In fact, my particular teaching experience was riddled with challenges—none of which I found to be particularly arduous, just overly frustrating. It was these challenges and my responses to them that inspired me to put pen to paper.

30 See Judith Wagner, Better Writing, Better Thinking: Thinking Like a Lawyer, 10 LEGAL WRITING: J. LEGAL WRITING INST. 9 (2004), [hereinafter referred to as BETTER WRITING] (maintaining that training others to think like lawyers actually entails having them to deal with uncertainty in a very profound way).

31 See COORDINATING A LEGAL WRITING PROGRAM, note 6, (stating that the roles of Legal Writing professors are of teacher, lawyer, coach, editor, artist and writer).

32 See BETTER WRITING, supra., p. 12 (Law Professors and Legal Writing professors especially must have their students to understand that uncertainty is inevitable whenever they are confronted with abstract situations, but the uncertainty decreases when a clients’ individual circumstances converts the abstract into reality).

33 See Beazley, supra, p. 82, (asserting that many legal writing professionals seek to expand, not replace their teaching repertoire by accepting other teaching assignments).

34 See generally Hartung, supra.

35 “It is through trial and error, of course, that the instructor eventually settles into a unique teaching routine, an approach to the materials which differs in some manner from every other instructor’s approach.” See R. Perry Sentell, Jr., Torts In Verse: The Foundational Cases, 39 GA. L. REV. 1197 (2005) [hereinafter TORTS IN VERSE].

36 An instructor not consistently engaged in a struggle over how to more successfully teach a particular case the next time around is an instructor who should not be teaching Torts. Id. p. 1201.


38 See COORDINATING A LEGAL WRITING PROGRAM, supra, (explaining that the Legal Writing professor’s demanding schedule with first-year law students makes it difficult for them to devote
For purposes of brevity, I have narrowed the number of challenges\(^39\) I faced in teaching this course to three distinct *initiation* phases. Phase one was outlining the course with an explanation of how the various tort terms were interrelated. Phase two was my discussion of the duty-risk analysis. Phase three, the most memorable phase of all, was my explanation of strict liability wherein I expressed my reservations about classifying this theory\(^40\) as no-fault liability. Rather, in my lectures, strict liability was categorized as just another category of fault-based liability. But the essence of my struggle, was overcoming the prejudices my students had because of the title as Legal Writing professor.

Actually, this Article echoes\(^41\) the sentiments of other legal scholars\(^42\) who have written that strict liability is basically another form of fault-based liability.\(^43\) However, unlike these scholars, this Article chronicles my adventures as a professor *pro tempore*. This Article also highlights the research I used to prepare my lectures, and it discloses several of the fact patterns I used to illustrate the various applications of strict liability. Finally, at the conclusion of this Article, I offer a model answer\(^44\) to two different fact

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\(^39\) Michael Sean Quinn states:

> In general, scholarship is not designed to recommend conclusions to readers on the basis of the authority of the person of the writer. Indeed, an appeal to authority is, in many contexts, fallacious. The real function of scholarship is to generate conclusions based on evidence and reliable inference.


\(^40\) “Strict Liability is *liability without personal fault* which is based upon the status as owner or custodian.” See *Cortez v. Zurich*, 752 So. 2d 957, 961 (La. Ct. App. 1999) (Emphasis added); see also *Celestine v. Union Oil Co. of California*, 652 So. 2d 1299, 1303 (La. S. Ct. 1995).

\(^41\) “Although called strict liability, there are indications in the Louisiana jurisprudence that Louisiana courts will look to negligence principles when they encounter problems with the new theory.” Samuel N. Poole, Jr., *Does Louisiana Really Have Strict Liability Under Civil Code Articles 2317, 2318, and 2321?*, 40 LA. L. REV. (1979).


\(^43\) See generally Frank L. Maraist and Thomas C. Galligan, Jr., *Burying Caesar: Civil Justice Reform and the Changing Face of Louisiana Tort Law*, 71 TUL. L. REV. 339 (1996), [hereinafter referred to as BURYING CAESAR].

\(^44\) Susan Hanley Kosse and David T. ButleRitchie, How Judges, Practitioners, and Legal Writing Teachers Assess the Writing Skills of New Law Graduates, 53 J. LEGAL EDUC. 80, 93 [hereinafter referred to as WRITING SKILLS], (arguing that a rigorous legal writing course can be invaluable to a law student’s performance on exams as well as in legal internships).
patterns I have used to test my students’ comprehension of various strict liabilities theories, including parental liability, premise liability and two forms of products liability.

PHASE ONE
ARE YOU SURE ABOUT THAT?
(EXPLAINING THE DYNAMICS OF THE TORTS COURSE)

On the first day of the course, I gave a brief introduction of myself, and discussed my syllabus by outlining the various chapters that would be addressed and the sequence I intended to use in addressing each subject. I also indicated that since this was the negligence portion of Louisiana tort law, “everything that I planned to cover during the semester would be a form or category of negligence”.

Before I could gather my next thought, a student (whom I will referred to by the fictitious name of Michael) raised his hand and asked me to clarify my statement that “everything topic intended to be discussed in the course would be a form of negligence”. Michael impression was that negligence and the other topics mentioned in my syllabus (i.e. strict liability, absolute liability and products liability) were dissimilar. His questions seemed to have awakened the consciousness of every student in the classroom because all eyes suddenly fell on me in anticipation of my response to their fellow classmate’s concerns. Internally, I realized that my students were not questioning my syllabus, but rather they doubted my knowledge of tort law since I was just a Legal Writing instructor and I did not appear to be as astute in this particular field as some of my more experienced/mature colleagues.

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46 When strict liability and negligence are urged as alternate grounds of recovery, the plaintiff must prove that the thing which caused the injury or damage was in the custody of the defendant, that the thing was defective because its condition created and unreasonable risk of harm, that the defendant knew or should have known of the defect and failed to take corrective measures within a reasonable time and that the defect was a cause-in-fact of the plaintiff’s injuries. See LA. REV. STAT. ANN. 9 :2800; see also Haile v. City of Monroe, (La. Ct. App. 1998).
47 Deleo v. Bayou LaFourche Fresh Water Dist., 846 So. 2d 17 (La. Ct. App. 2003), (defining negligence as “that conduct falling below the standard of care established by law for the protection of others against an unreasonable risk of harm”).
Immediately, I knew that my initiation had started, and in order for me to maintain my credibility as a professor I could not simply evade the question and proceed with my planned lecture. I needed to find a way to silence the hecklers while at the same time connect with those students who were genuinely interested in learning tort law than with opposing the new tort professor. John Attanasio put it more succinctly when he stated:

Legal education and the law are both by nature self-critical processes. After all, from the time students first attend law school, the legal academy trains them to criticize appellate court decisions [and sometimes a professor’s decision], which represent the analysis of [those individuals] exponentially more experienced in the law than a budding first-year student.48

With this in mind, I stepped away from the podium, slipped off my jacket, grabbed a piece of chalk and answered his question by using some familiar49 concepts. Instead of seeing these topics as abstract principles and theories, let’s presume that each theory is a tangible entity50 like a person.51 With this in mind, let’s assume that Negligence and his long-time girlfriend,52 Duty-Risk, were married in 1962.53 From their union, they had three children: General Liability,54 Strict Liability55 and Products Liability.56

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48 John B. Attanasio, Out-of-the-Box Dialogs, 52 J. LEGAL EDUC. 473 (December 2002).
49 See PRACTICE WHAT THEY TEACH, supra, p. 342 (indicating that a law professor’s scholarly views are shaped by his prior experience, namely by what he has been taught, what he has read, where and from whom he has worked and sometimes with whom he has had intimate encounters). See also Richard Zitrin & Carol M. Langford, THE MORAL COMPASS OF THE AMERICAN LAWYER (1999).
50 See TORTS IN VERSE, supra., (stating that law student’s attention span is greatly increased if the instructor humanizes the materials used in the course).
51 See David W. Robertson, The Vocabulary of Negligence Law: Continuing Causation Confusion, 58 LA. L. REV. 1 (1997) (stating that “[n]egligence[,] like a cat[,] has many lives (or models) and, there’s more than one way to skin a cat; when dealing with something as amorphous as negligence; flexibility seems to me to be the most attractive virtue”), [hereinafter referred to as VOCABULARY OF NEGLIGENCE LAW].
52 See COORDINATING A LEGAL WRITING PROGRAM supra, p. 481-482 (asserting that Legal Writing professors are exceptional artists, who create both visual and auditory pictures in class to show students how to tackle a hypothetical client’s legal problems).
54 LA. CIVIL CODE ARTICLES 2315 AND 2316 ET SEQ. (WEST 2006).
55 LA. CIVIL CODE ARTICLES 2317-2322 (WEST 2006).
56 LA. STAT. ANN. 9: 2800.56 ET SEQ. (WEST 2006).
As the oldest of three, General Liability is the only descendent without children. Strict liability, on the other hand, is the second oldest child and the father of three children of his own: custodial liability, vicarious liability and absolute liability. Custodial liability’s children are animal owner’s liability and premises liability. Likewise, vicarious liability had two children: parental liability and employer’s liability. Because employer’s liability is more popular of the two, he is sometimes referred to by his nickname, respondent superior.57

Absolute Liability did not have any biological children, but he did adopt58 two children named: pile driving59 and blasting of explosives.60 Because they were both adopted, they would have to specifically prove their entitlement to Absolute Liability’s estate.61

Finally, the youngest sibling, Products Liability,62 was the most fertile of the three siblings because he had four children. Their names are unreasonably dangerous63 by design,64 unreasonably dangerous because of an inadequate warning,65 unreasonably

58 The only purpose in using the adoption language in my discussion was to spark interest and encourage interaction.
59 LA. CIVIL CODE ARTICLE 667 (WEST 2006).
60 Id.
61 See footnotes 30 and 31.
62 LA. REV. STAT. ANN. SEC. 9:2800.52 (commonly referred to as Louisiana Products Liability Act (LPLA), which outlines the exclusive remedies available to any claimant, seeks compensation for damages as a result of a defective product.
63 The history of strict liability in Louisiana indicates that the requirement that a defective product must be ‘unreasonably dangerous’ came into our jurisprudence due to the pervasive influence of section 402(A) of the Restatement of Torts after its publication in 1965. See INNER STRUCTURE OF STRICT LIABILITY P. 1339 (citing Justice Dennis’ dissent in Kent v. Gulf States supra p. 501).
64 LA. REV. STAT. ANN. SEC. 9 :2800.56 (defining a product that is unreasonably dangerous by design because at the time it left the manufacturer’s control there existed an alternative design which could have prevented the plaintiff’s damage and the cost of using or implementing this alternative design does not outweigh the risk imposed on the claimant. See Johnson v. T.L. James & Co., 809 So. 2d 287 (La. Ct. App. 2001) in which the appellate court reversed the district court’s ruling in favor of the defendant/manufacturer on a Motion for Summary Judgment after the victim was run over by a construction vehicle because the back-up alarm was disconnected.
65 LA. REV. STAT. ANN. SEC. 9 :2800.57 (defining a product as being unreasonable dangerous because of inadequate warning because at the time such product left the manufacturer’s control the product contained a dangerous characteristic that may cause damage to the claimant, yet, the manufacturer failed to disclose such danger to users or potential handlers of said product. Such a warning, however, is not required if the user or handlers used said product beyond its intended use or if potential users or handlers of the product are sophisticated users of such products. See generally, American. Cent. Ins. Co. v. Terex Crane, 861 So. 2d 228 (La. Ct. App. 2003) holding
dangerous due to construction or composition, and unreasonably dangerous for nonconformity to an express warranty.

In conclusion, I indicated that “this is the genealogy of Louisiana’s negligence law. As you can see from the family tree, every subject area I intend to discuss in this course is related to negligence.” I ended my lecture with less than three minutes remaining before the end of class. I then asked for questions concerning my explanation; rather than a question, Michael, the student who initially asked for the explanation, offered the following comment, “Were there any illegitimate children?” I, along with several students in the class, rewarded Michael with a light chuckle for his off-hand comment. Oddly enough, Michael was not so humorous in our next session when I asked him to brief the first four cases in the chapter. Go figure!

PHASE TWO
CAN YOU REPEAT THAT?
(WISDOM IS KNOWLEDGE PLUS EXPERIENCE)

Phase two of my initiation occurred when I began my discussion of Louisiana’s duty-risk analysis, which is a jurisprudential test used to determine whether a defendant’s actions were substandard and ultimately a cause of the plaintiff’s damages. During the manufacturer liability under LPLA because a prior incident with one of its cranes gave the manufacturer a duty to warn when the claimant in this case was injured by the same defect in virtually the same manner.

66 LA REV. STAT. ANN Sec. 9:2800.55 (defining a product as being unreasonably dangerous in construction or composition because at the time it left the manufacturer’s control, the product itself substantially deviated from both the manufacturer’s specifications of performance standards for this product and from other similar products made by this manufacturer. See Coulon v. Wal-Mart Stores, Inc., 734 So. 2d 916 (La. Ct. App. 1999), wherein the defendant was held liable for the injuries sustained by a minor who purchased a bicycle from the defendant store after said defendant had pre-assembled said bicycle. The evidence at trial indicated that the left pedal to the bicycle had been cross-threaded, causing the minor to fall and break his wrist. See Coulon, 734 So. 2d at 921.

67 La. Rev. Stat. Ann. Sec. 9:2800.58 (defining a product as being unreasonably dangerous for not conforming to an express warranty because the manufacturer made a statement about its product that induced the user or handler to purchase the product but the statement is later discovered to be false and the proximate cause of the claimant’s injuries. See generally, Scott v. American Olean Tile Co., 706 So. 2d 1091 (La. Ct. App. 1998).

68 Oliver Wendell Homes, Sr., likened the study of law to “eating sawdust without butter”; therefore even the slightest efforts at humor is sure to spark a student’s interest. See TORTS IN VERSE, supra.
first week of the course, I gave the students a brief overview of general liability and its impact on Louisiana tort law. During the first three minutes of my lecture on duty-risk, I noticed that my students seemed to be bored and somewhat apathetic about the subject as though they had already gotten a copy of my lecture from the internet two days ago.

They were not taking notes. They did not have any questions and, quite frankly, they were simply disinterested in my lecture altogether. Detecting a strong hint of assurance in their mannerisms, I wanted to know how well they understood this analytical method. Alice (another fictitious name) was seated directly in front of the podium and in the middle of a deep yawn when I focused my attention on her and gave her the following fact pattern.

Two weeks ago, I purchased the movie *Troy*, and being so amazed with Brad Pitt’s portrayal of Achilles, I decided to go to a local antique store and purchase a sword and shield similar to the one Pitt used in the movie. After several days of practicing, I noticed that my skills as a swordsman were gradually improving. In fact, this morning I decided to bring my sword and shield to class and to illustrate my *best* moves. I took my sword out of a duffle bag and casually walk down the isle while mimicking some of the moves I saw in the movie.

For three minutes, I performed several moves and attempted to put each student in awe of my skills. Everything seemed to go well until a student behind me lets out a loud sneeze. His sneeze startled me, and caused me to make an awkward move. With one clumsy twist, I severed the electrical cord to Student A’s laptop and struck Student B in

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69 Because LA. STAT. ANN. CIVIL CODE ARTICLES 2315 and 2316 refers to compensation for the plaintiff’s harm as a result of a negligent act by the defendant, this writer shall use the terms general liability and personal liability interchangeably throughout this Article.

70 See BETTER WRITING, supra., p. 14 (finding that the key to successful advocacy is the ability to know that the truth is within us and how we see things [the facts]).

71 The movie, *Troy*, is a Warner Bros. Pictures film that was released in 2004, depicting the legendary Greek Warrior, Achilles. Wolfgang Petersen directed this film, and Brad Pitt gave a commanding performance of this ancient warrior.

72 Id.

73 See TORTS IN VERSE, supra., p. 1202 (finding that an instructor’s decision to humanize the facts of a popular event in the present culture can be an effective method with students since the overall goal is to have the student retain the analysis employed to resolve the issues presented in the lecture).

74 See COORDINATING A LEGAL WRITING PROGRAM, supra, (declaring that Legal Writing professors are unique creative writers who can skillfully weave several realistic tales of clients’ legal problems for their students to solve).
the face with my shield. Student B started to bleed profusely from his nose, causing Student C, who is seated directly across the isle, to regurgitate on the desk.75

Hoping that Alice would amaze me with her understanding of duty-risk, I asked her to analyze Student A’s negligence claim against me using the elements of duty-risk analysis—as she understood it. Alice cleared her throat76 several times and flipped through her notes until her stall tactics caused me to ask Paul (another fictitious name) the same question.77

Paul scratched his head and managed to tell me that the elements necessary to evaluate Student A’s claim are: (1) cause-in-fact; (2) duty; (3) breach; and (4) legal78 cause. Paul eventually leaned back in chair and let out a sigh79 of relief80 as if someone whispered in his ear that he was guaranteed a passing grade in the class because of his outstanding answer.

75 Howell E. Jackson, Analytical Methods for Lawyers, 53 J. LEGAL EDUC. 321 (2003) (arguing that aspiring lawyers need to develop skills beyond the traditional legal analysis; further they need to understand “how to present analysis in a variety of interpersonal settings”).
76 See Gerald F. Hess, Heads and Hearts: The Teaching and Learning Environment in Law School, 52 J. LEGAL EDUC. 75, 77 (2002) (discussing the many psychological, physical and emotional symptoms law school students endure during the law school experience such as: obsessive-compulsive behavior, anxiety, paranoia, inability to sleep, headaches, allergies, lethargy, weight gain and loss, and the inability to concentrate).
77 See BETTER WRITING, supra, p. 14 (specifying that posing difficult questions to future lawyers is part of shaping the analytical process; more importantly, however, it’s the law student’s ability to develop a formula for dissecting those questions that creates knowledge and the ability to give competent legal representation in the future).
78 See Scott v. Pyles, 770 So. 2d 492, 500 (La. Ct. App. 2000), wherein the reviewing court defined legal cause as being synonymous with the defendant’s breach of a duty that extends to protect the plaintiff from the type and manner of harm of which he complains. See also Jones v. Johnson, 572 So. 2d 150 (La. Ct. App. 1990).
79 See Hess, supra note 20.
80 Although it has been more than fifteen years since I was a first-year law student, I still remember the personality of my first-year law school class. We were so frightened of the possibility of failing in the first semester that studying was more natural to us than eating. We felt as though we were walking targets to both the faculty and to the second and third year law students. In fact, after the orientation, we thought it was sacrilegious for us to even sleep during the first two weeks of law school. But it was our Contracts professor who intimated us more than any other professor we had. Our Contracts professor totally crushed whatever egos we had the minute he walked into the classroom. According to his appearances, he was the least intimidating person in the entire law school because he looked more like an undergraduate History professor than a law professor. But unlike the other professors, he had a calm demeanor and his voice was so soft that you would think he was talking to only three people in the entire class. But, when he walked into the class, it was as if God pressed the “mute” button on every conversation that was going on at the time, and if anyone ever thought to interrupt his lectures with a question or comment, it would have been better for them to simply drop out of school than to raise their hand.
I, on the other hand, was not fully satisfied with his answer and attempted to explore the depths\textsuperscript{81} of his understanding on this subject when another student interrupted my exploration by raising her hand. When I acknowledged her raised hand she told me (almost apologetically)\textsuperscript{82} that the class was only introduced to the duty-risk analysis during the full week of the prior course. In addition, she told me that their Torts I professor did not explain to them how to conduct a thorough analysis using duty-risk because the Torts I course was limited to addressing only intentional torts.

While I appreciated this student’s honesty, I wondered if the reason for her honesty was to stop the mental\textsuperscript{83} torture\textsuperscript{84} that she and her classmates were feeling by my questions. Or, was her confession an acknowledgment that the class was not as astute on this issue as I had hoped. Regardless of her intent, duty-risk was definitely going to be a mountain that I (along with this class) would have to conquer. Unbeknownst to them, my discussion of duty-risk was definitely going to rupture the little that they knew.

Jurisprudence, as well as many civilian legal scholars, dictate that the first element of the duty-risk analysis should involve a discourse on determining whether the defendant’s actions were a cause-in-fact of the plaintiff’s injuries. Like most legal terms, duty-risk is susceptible to various meanings\textsuperscript{85} and a variety of writing styles. Originally, the duty-risk analysis was designed to establish whether a defendant’s action created an

\textsuperscript{81}See LEARNING TO THINK, supra., (arguing that while the Socratic method has been an accepted and well recognized form of teaching in law school, it is nothing more than an unyielding game of advanced-hide-the-ball that is geared towards placing students in the awkward position of doing impromptu analytical thinking through an endless question-and-answer segment with the law professor).

\textsuperscript{82} See Id., p.175 describing the Socratic Method as debilitating and utterly intimidating to a first-year law student who is already overwhelmed with the scenery of large classes, fierce competition, mandatory grading curve and few women faculty).

\textsuperscript{83} See Lisa G. Lerman, \textit{First Do No Harm: Law Professor Misconduct Toward Law Students.} 56 J. LEGAL EDUC. 86 (2006), (warning law professors to reduce their emotional reactions to student behavior because such reactions can be psychologically harmful to their students and because there is no pedagogical merit to their behavior).

\textsuperscript{84} See LEARNING TO THINK, supra p. 172.

\textsuperscript{85} Sarah E. Ricks, \textit{Teaching [First-Year Students] to Think Like Lawyers by Assigning Memo Problems with No Clear Conclusions}, 14 PERSPECTIVES: TEACHING LEGAL RESEARCH AND WRITING, 10 (Fall 2005) (indicating that thinking like a lawyer involves the student’s recognition that factual nuances can multiply the legal results of the typical fact pattern); see also David T. ButlerRitchie, \textit{Situating “Thinking Like Lawyer” Within Legal Pedagogy}, 50 CLEV. ST. L. REV. 29, 38 (2002-2003).
unreasonable risk of harm—preventable only by the use of due diligence or reasonable care. 86

According to Leon Green87 and Wes Malone, the initial inquiry in any negligence claim should begin with a discussion of cause-in-fact88 because the plaintiff must be able to articulate with some degree of certainty that the named defendant contributed to the plaintiff’s harm.89 It is at this juncture that the plaintiff must allege particular facts, which would employ either the but for90 or the substantial factor inquiries to support his prima facie claim.91

Secondly, the analysis develops into an examination of the presence (or absence) of a particular duty the defendant might owe to the injured plaintiff or individuals within the plaintiff’s class. Enveloped within this element is the plaintiff’s obligation to identify the named duty as either: (1) administrative; (2) easily associated with the defendant’s action; (3) economic; (4) moral; (5) specific to the activity; or (6) precedent or historical.92 This writer would also add statutory93 duty to this list of necessary94 ingredients.

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87 Id.
88 Id.
90 “Cause-in-fact” is generally a “but for” inquiry; if the plaintiff probably would not have sustained injuries but for defendant’s substandard conduct, such conduct is cause in fact. See Robert v. Benoit, 605 So. 2d 1032 (La. S. Ct. 1991). This “legal causation” test requires that there be a substantial relationship between the conduct complained of and [the] harm incurred. See Nicholas v. Nicholas, 556 So. 2d 876 (La. Ct. App. 1990).
91 Causation does not require a discussion of intent or lawfulness, rather is a neutral examination that is “free of the entanglements of policy considerations—morality, culpability, or responsibility—involving in the duty risk analysis. See Hutzler v. Cole, 633 So. 2d 1319, 1325 (La. Ct. App. 1994); see also Roberts v. Benoit, 605 So. 2d 1032, 1042 (La S. Ct. 1991).
92 See Crow, supra.
93 See Dugas v. Derouen, 824 So. 2d 475 (La. Ct. App. 2002), wherein the plaintiff filed suit against the defendant motorist, his employer and the employer’s insurer for injuries she sustained when she was rear-ended by the defendant after she forcibly applied her brakes to avoid hitting two children riding on a bicycle. In using the duty-risk analysis, the trial court determined that the following motorist violated his legal duty to not follow another vehicle more closely that is reasonable and prudent. The children riding on the bicycle violated their legal duty to not ride against traffic (see La. REV. STAT. ANN SEC. 32:197(A) and their legal duty to not ride two persons on a bicycle that is not equipped for two people (see La. REV. STAT. ANN. 32: 195).
94 See Dixie Drive It Yourself System New Orleans v. American Beverage Co., 137 So. 2d 298 (La. S. Ct. 1962), wherein the driver of the defendant’s vehicle failed to set out the signal flags
Not only must the plaintiff identify the duty the defendant owed to him and others within his class, but the injured plaintiff has to also consider if his actions, the action of a third party or an irresistible force\(^{95}\) could have intervened and possibly superseded the defendant’s duty to prevent the harm. Incredibly, within the same context, duty-risk and/or proximate cause—as it is sometimes referred to—must also be scrutinized.

Finally, the plaintiff must bear the burden of convincing the trier of fact that the duty, which was identified and articulated upon in the second element of the analysis, was actually breached. Likelihood of harm, gravity of harm, burden of prevention and the social utility of the defendant’s conduct would be sub-categories in this section of the analysis.

Although this writer is acquainted with the Green/Malone interpretation of duty-risk, I prefer\(^{96}\) to subscribe to a more traditional discussion of duty-risk.\(^{97}\) Comparatively, the version I elected\(^{98}\) to use for this course was more comprehensible to the novice law student and easier to recall when performing an analysis on a basic tort fact pattern.\(^{99}\) My reservation with using the Green/Malone interpretation—at least as it relates to this class—stemmed from the fact that this particular interpretation incorporates too many components into a single element. In essence, the student’s ability conceptualize duty-risk using the Green/Malone interpretation would be severely

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\(^{95}\) Strict liability reasoning requires that once factual causation has been proven by the plaintiff, the defendant can only escape or diminish his liability by establishing a defense—by showing that the harm was caused by the fault of the victim, by the fault of a third person or by an irresistible force. See Vernon Palmer, *A General Theory of the Inner Structure of Strict Liability: Common Law, Civil Law, and Comparative Law*, 62 Tul. L. Rev. 1303 (1988). [hereinafter referred to as *INNER STRUCTURE OF STRICT LIABILITY*].

\(^{96}\) See *VOCABULARY OF NEGLIGENCE LAW* pp. 4-5.

\(^{97}\) See *Hutzler*, supra note 36 (indicating that ting that several members of Louisiana’s First Circuit Court of Appeal also appreciate the duty-risk test as encompassing five essential elements).

\(^{98}\) Steven D. Jamar, *Aristotle Teaches Persuasion: The Psychic Connection*, Scribes J. Legal Writing 61 (2001-2002) (reflecting that people would classify reason as persuasive once they understand that such reason is *grounded in the common knowledge and understandings of the audience*). (Emphasis added).

encumbered. Practically speaking, juries could experience mental fatigue while trying to
decide liability during its deliberations if the Green/Malone interpretation was employed.

Although some legal scholars may differ on the language for each element, I
chose to use a version of the duty/risk test that would help my students not only
remember how to structure their analysis, but would be easier to memorize and to
communicate on the exam. Theoretically, my version of the duty-risk test is not uniquely
different from the version adopted by other legal scholars—except for the insertion of
proximate cause as a separate element of duty-risk.

In my lectures, proximate is a separate a distinct element to the duty/risk test. However, in the Green/Malone test, proximate cause\(^\text{100}\) is integrated in the fourth and last
element of the test. My version [or my revision] was not well received by the students;
however, they soon came to appreciate my decision to break from the crowd later in the
course.

Rather than start with the cause-in-fact element, I preferred using the five-prong
test\(^\text{101}\) for duty-risk because each element is individually addressed in the analysis. The
five prongs are: (1) duty; (2) breach of duty;\(^\text{102}\) (3) cause-in-fact; (4) proximate cause; and
(5) damages. For final exam and bar exam purposes, each element for this test has to be
written in question form. Using the above mentioned fact pattern, the law
student/examinee would state the elements of duty/risk as follows: (1) did the defendant
owe a duty of care to the injured party/plaintiff? (2) If so, did the defendant’s actions
breach his duty of care? (3) Was the breach of duty a cause-in-fact in the plaintiff’s
injuries? (4) Were the plaintiff’s injuries foreseeable in light of the defendant’s breach?
And (5) did the plaintiff suffer actual damages as a result of the defendant’s breach of
duty?

\(^{100}\) In *Traders & General Insurance Company v. Robinson*, 289 So. 2d 178, 183 (La. Ct. App. 1973), the First Circuit Court of Appeal defined proximate cause as the foreseeable action which formed the natural and probable consequence of the accident or resulting harm.

\(^{101}\) See *Sacco v. Allred*, 845 So. 2d 528 (La. Ct. App. 2003), wherein the reviewing court articulated the elements of duty-risk by stating that in order for the plaintiff to prevail in a negligence claim, “he must prove that the defendant had a duty to conform his conduct to a specific standard of care; [the defendant] failed to conform his conduct to that standard; that
substandard conduct was a cause-in-fact of the injury or the substandard conduct was a legal
cause of the injury [sometimes referred to as proximate cause]; and damages”.

\(^{102}\) See *Deleo*, supra., (stating that the defendant’s breach of a duty of care is the catalyst in the plaintiff’s negligence claim).
If the student/examinee can answer “yes” to each of the questions posed in this analysis, then the defendant’s liability could be established. Unfortunately for the examinee, a discussion of the duty/risk analysis is only 70% of a complete answer to any tort question. A more complete answer would include not only a definition of the specific negligence theory the examinee intends to use to support the plaintiff’s claim of liability, but it should also include any and all relevant defenses or exceptions.

First of all, each of my students must begin their answer to my tort question by identifying who is the injured party and who is the negligent party. Identifying the parties helps the student to structure his answer and to focus his analysis only on the two parties identified. Secondly, the student must indicate the damages the negligent party would be responsible for in the event a cause of action is filed and maintained. In most tort exams, the injured party could sue for physical injuries as well as property damages, loss wages, loss of consortium, etc. Knowing that a party can be sued is irrelevant unless the student/examinee can articulate the specific items that the injured party could possibly collect in his lawsuit.

Thirdly, the examinee must indicate the particular theory of negligence that the injured party may use to maintain his cause of action against the named tortfeasor. Since the entire course was composed of three categories of negligence: Personal Negligence, Strict Liability and Product Liability, not only should the theory be identified, but a definition of this theory must be included in their answers.

For the person taking the bar examination, a definition is not necessary because it is presumed that the examinee understands the various legal terms and their meaning when they take the Louisiana bar examination. However, if the fact pattern involves a discussion of Strict Liability or Product Liability, then the examinee’s definition of the theory must include the actual category that the injured party will use to endorse his claim. For instance, if the fact pattern involves a defective bookcase, which collapses on the injured party, the theory of negligence would be Strict Liability/Custodial Liability.

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103 See Sacco, supra, (stating that each inquiry must be answered affirmatively); see also Mathieu v. Imperial Toy Corp., 646 So. 2d 318, 322 (La. Ct. 1994).
104 A negative answer to any of the inquiries results in a determination of no liability. See Carroll v. State Farm Fire & Casulaty Co., supra.
105 The law obliges us to do what is proper, not simply what is just. GROTIUS, DeJure Belli ac Pacis, bk 1, ch. 1 (1625).
Of course, the examinee needs to develop their answer with a rich and flavorful analysis that combines the elements of the identified theory and the specific facts that can be used to satisfy each element. Following the analysis, the examinee must then determine if there are any relevant defenses available to the defendant that could either exonerate or limit the defendant’s liability.

Model Answer

Using the above-mentioned outline, the analysis for the fact pattern I gave to Alice would be used as follows:

Student B can bring a cause of action against the professor (i.e. me) under general negligence for the physical injuries the student incurred after he was struck in the face with the professor’s sword. Student B’s claim would include general damages (pain and suffering and emotional distress) as well as special damages (medical expenses).

General liability is a theory of negligence whereby a defendant is held accountable for any and all damages that are directly caused by the defendant’s substandard, deficient actions. Pursuant to Louisiana jurisprudence, the duty-risk analysis is employed to ascertain whether the defendant’s conduct legally resulted in the injuries complained of in the plaintiff’s action. Here, Student B can establish a prima facie claim under general liability against the professor only if he can render an affirmative answer to each of the five questions encompassed in the duty-risk analysis. The relevant questions in this inquiry are: (1) Did the professor owe Student B a duty of reasonable care?; (2) Did the professor breach his duty of care to Student B?; (3) Was the professor’s breach a cause-in-fact of Student B’s injuries?; (4) Was the professor’s breach of duty a

106 See note 99.
107 Id.
108 See LEARNING TO THINK, supra p. 173 (finding that teaching law students by using abstract principles and concepts has little value when compared to examining the law within the context of a realistic client-matter situation).
109 No court has ever given, nor do we think ever can give, a definition of what constitutes a reasonable or an average man. LORD GODDARD, C.J., R. V. McCarthy [1954] 2 Q.B. 105, 112.
110 The risk of harm is unreasonable when a reasonable prudent person would foresee that harm might result and would avoid conduct that creates the risk. See DAN B. DOBBS AND PAUL T. HAYDEN, TORTS AND COMPENSATION 126(1997).
proximate or legal cause of Student B’s injuries in light of said breach?; and (5) Did Student B incur actual damages as a result of said breach?

Here, the professor owed Student B a legal duty of care not to bring any known weapons into the classroom, which might harm or intimidate his students. The fact that the professor ignored his duty and brought a medieval sword and shield into the classroom indicates that he breached his duty of care. Because the facts reflect that there was only one possible cause for Student B’s injuries, the but for test would be most appropriate to use to determine whether the professor’s actions in twirling the sword in an occupied classroom was a cause-in-fact of Student B’s injuries. But for the professor’s decision to bring a sword in the classroom and to recklessly swing this weapon among fifty unsuspecting students, Student B would not have been injured.

The second phase of causation obligates Student B to prove not only that the professor’s breach was a cause-in-fact, but also that this breach was the proximate or legal cause of his injuries. To establish this facet of the analysis, Student B must utilize the this test. In other words, was the professor’s duty of care intended to protect Student B and others like him? More specifically, does the professor’s duty extend to protect this plaintiff from this harm, which has occurred in this manner? It is undisputed that since the statute prohibits anyone from bringing a weapon onto school grounds, it would naturally follow that anyone who violates the statute would also be jeopardizing the health and well being of any person who is legally on school property. Thus, the professor’s breach was the proximate or legal cause of Student B’s injuries.

Finally, Student B can seal his prima facie case with a showing that he indeed suffered actual damages as a result of the professor’s careless actions. Here, Student B was struck in the face with this weapon. The amount of bleeding from Student B’s nose

112 See VOCABULARY OF NEGLIGENCE LAW p. 7.
114 See Scott v. Pyles, 770 So. 2d at 500 (indicating that “legal cause or scope of duty inquiry is fact sensitive and ultimately turns on a question of policy as to whether a particular risk falls within the scope of the duty”).
115 See Galligan, supra at p. 1525.
117 See footnote 82.
would indicate that the damages for medical costs, pain and suffering as well as future medical expenses could be real and substantial.

Student A’s claim would follow the same analytical process except Student A’s claim would be limited to the replacement of his power cord to his laptop computer and perhaps any costs associated with the lost of important documents, notes or papers that resulted from the professor’s negligence.

On the other hand, Student C, may have some difficulty in establishing that the professor’s conduct was a direct cause of his upset stomach and the regurgitation of food on the desk. Assuming arguendo that Student C can support the fact that the professor’s action was a cause-in-fact (using the substantial factor test) of his sickness, he would still have to logically, and legally connect the professor’s actions to his sickness by indicating that the professor’s duty was intended to protect him from getting an upset stomach and regurgitating on the desk. Such a reaction is too remote and may encourage the courts to limit Student C’s recovery because of the policy implications such a ruling could cause potential plaintiffs who are similarly situated. Therefore, Student C’s claim for damages may be denied.

After writing a few notes on the chalkboard, I turned to the students to solicit any questions or comments on duty-risk. Rather than comments or questions, I received blank stares\(^{118}\) and the musical sound of hundreds of crickets in the background. Andrew Watson stated that he has not seen another group of persons with more manifest anxieties under normal circumstances than what is visible in first year law students.\(^{119}\)

Duty-risk analysis was definitely a Goliath in this course, but nothing compared to the resistance I encountered when I attempted to get my students to understand the theory behind strict liability and the practical aspects of this concept.

Under general liability, the defendant’s actions which causes harm to another is classified as fault. However, under Strict Liability, the defendant who is presumed to be liable under either vicarious or custodial liability is also at fault; but his fault is based on

\(^{118}\) See LEARNING TO THINK, supra p. 176 (noting that the tradition law school education deprives these future lawyers of an opportunity to convince themselves that they are capable of meeting the demands of the practice).

his neglect of duty or, in other words, his failure to act. Regardless of what tort claims the plaintiff files, fault remains the main ingredient to any recipe for a Louisiana negligence lawsuit. My students did not readily understand this new facet of negligence until I was able to illustrate my position through the cases listed below.

Perhaps this Article may convince also Louisiana jurists to reframe from classifying Strict Liability as Negligence without Fault or Liability without Fault. Perhaps the third phase of my initiation may explain my justification for making such a bold statement.

**PHASE THREE**

**PROFESSOR, THAT CAN’T BE RIGHT. COULD YOU BE MISTAKEN? (WHEN THEORY MEETS PRACTICE)**

After completing my discussion of duty-risk, I gave the students a brief overview of the next topic—strict liability, or, as I referred to it in my lectures, negligence without fault. Thinking that I escaped the hardest challenge in this course, when I concluded my lectures on the duty-risk section of the course, I began my lectures in a more relaxed posture considering that the rest of the course would be a breeze—or so I thought.

“Strict Liability,” I began, “is the process of imposing liability on a defendant based solely on his legal relationship with a defective thing or with the negligent person… imposing this form of liability is done despite the defendant’s use of reasonable care.” With this one statement, everyone rushed to take notes, hoping to avoid any follow-up questions from me. There were no sarcastic looks or bored gestures. “In the typical strict liability claim,” I went on to say, “plaintiffs are relieved of their obligation to prove that the named defendant was negligent because the plaintiff’s injuries were actually caused by something or someone under that defendant’s care rather than from

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120 Negligence has been clearly described by Louisiana courts as the creation, maintenance, or failure to guard against an unreasonable risk of injury to another. See Poole, supra. (citing Pence v. Ketchum, 326 So. 2d 831 (La. S.Ct. 1976); Musso v. St. Mary Parish Hosp. Serv. Distr. No. 1, 345 So.2d 129 (La. Ct. App. 1977); and Traders & General Ins. Co. v. Robinson, 289 So. 2d 178 (La. Ct. App. 1973)).

121 See generally, BURYING CAESAR, supra, note 40.

122 “Physical imperfection in a thing causing injury.” See Poole, supra p. 216.

123 See WILLIAM R. BUCKLEY AND CATHY J. OKREN'T, TORT AND PERSONAL INJURY LAW 326 (1997) (reflecting that the terms strict liability and absolute liability are interchangeable because both these types of lawsuit do not require a showing of fault on behalf of the named defendant). [Hereinafter referred to as TORTS AND PERSONAL INJURY].
the defendant himself.” “In essence,” I said, “this theory waives the plaintiff’s obligation to prove the defendant’s fault because it was the defective thing or the negligent person causing the harm, not the defendant.”

After my brief introduction to strict liability,\(^\text{124}\) several students approached me after class, seeking further explanation on the difference between general and strict liability. Initially, I did not have any reservations about using either of the two definitions mentioned above until one of these students indicated that, according to his reading, strict liability only pertained to dog\(^\text{125}\) owners. Before I could digest the first student’s question, another student stated that he became confused when on the cases in the assigned readings implied that there was a difference between negligence and strict liability.\(^\text{126}\) He then asked, “if strict liability is part of the negligence family, how is it different from negligence?”

Inadvertently, I opened Pandora’s Box without being fully prepared to explain the difference between these two categories in such an impromptu setting like the one here. Therefore, I requested that the students reserve their questions for our next class and that I would then explain the difference between general and strict liability at the beginning of our next session.

Strict liability’s importance in the study\(^\text{127}\) of tort law has caused many legal scholars to struggle with finding a definition that would clarify/simplify the meaning of this legal term for their students. One legal scholar defined strict liability as liability for

\(^{124}\) See KENNETH S. ABRAHAM, THE FORMS AND FUNCTIONS OF TORT LAW 159 (1997) stating that “the theory supporting the imposition of liability for negligence is that such liability is designed to promote optimal deterrence of accidents and to achieve corrective justice). [Hereinafter referred to as FUNCTIONS OF TORT LAW].


\(^{126}\) See Kent v. Gulf States Utilities Company, 418 So. 2d 493 (La. Ct. App. 1982), wherein the Louisiana Supreme Court opined that plaintiff was not entitled to recover damages from a local utility company after he was electrocuted while finishing a concrete highway. The student became confused when the court evaluated the legitimacy of the plaintiff’s strict liability claim by juxtaposing the plaintiff’s burden under a claim in strict liability with the requirements in a general liability claim.

\(^{127}\) See JOSEPH W. GLANNON, THE LAW OF TORTS: EXAMPLES AND EXPLANATIONS 218 (1995) (recalling that strict liability is considered a controversial, recent development in the law of torts, because at one time all early common law causes of action were classified as “strict”).
defendants who engage in high-risk activities whereas other scholars view strict liability as implied negligence or negligence without fault. Still other scholars tend to examine strict liability as a tacit form of liability, finding that the defendant did not exhibited any degree of independent, contributory fault.

Nevertheless, a claim under strict liability, in its purest form, occurs when the defendant’s negligence is presumed because of his legal relationship to the thing or person that first created the unreasonable risk of harm. Therefore, the owner’s knowledge of the harm-causing agent is presumed because of this relationship; thereby making the owner primarily responsible for the plaintiff’s injuries without a showing of his individual fault.

Despite the various definitions for this ever-changing legal term, the overall consensus appears to be that the definition for strict liability centers around a liability based on either a relationship the defendant enjoys with the harm-causing instrumentality or the presumption of the defendant’s knowledge regarding the unreasonable risk of harm caused by this dangerous instrumentality.

In other words, the defendant is accountable without any proof of his fault. In Louisiana, however, the landscape of strict liability has drastically changed from the perception of strict liability in a common-law jurisdiction. In fact, some legal scholars

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128 Id.
129 See Mack E. Barham, The Viability of Comparative Negligence as a Defense to Strict Liability in Louisiana, 44 LA. L. REV. 1172(1984) (stating that “in traditional common law jurisdictions, strict liability has generally been imposed when activity giving rise to liability falls into the broad categories of either ultrahazardous activity or some type of products liability).
131 See LA. CIVIL CODE ARTICLE 2323.
132 See Barham, supra.; see also Glannon, and TORT & PERSONAL INJURY, supra.
133 See Loescher v. Parr, 324 So. 2d 441 (La. 1976), wherein the Louisiana Supreme Court, for the first time, declared that a defendant in a strict liability case is liable for the resulting harm, not because the plaintiff proved the defendant’s negligence or inattention, but because the code articles identifies him as the legally responsible party because of his unique, legal relationship. See also Elizabeth Baucum, Ruminations on Tort Law: a Symposium in Honor of Wes Malone Entrevia v. Hood: Back to Loescher v. Parr, 44 LA. L. REV. 1485 (1984)
134 See Baucum, supra.
may argue that proof of the defendant’s negligence or fault\textsuperscript{135} has always been the linchpin in a strict liability claim.\textsuperscript{136}

Since strict liability is classified as liability based on the defendant’s relationship to the defective thing or the negligent person, it stands to wonder why the Louisiana Legislature decided to incorporate the plaintiff’s burden of proof into the language\textsuperscript{137} of its strict liability statutes—especially for the animal owner’s\textsuperscript{138} liability statute. According to Louisiana jurisprudence, the plaintiff still must prove the defendant’s fault in order to prevail. Strict liability, in theory, is supposed to waive such requirement. Vernon Palmer wrote that “the presumption is that the knowledge of risk constitutes a prerequisite of fault, and strict liability results when such knowledge is legally unnecessary.”\textsuperscript{139} Or does it?

Looking at the animal owner’s liability statute, one could easily conclude that the plaintiff’s burden of proof extends far beyond the defendant’s relationship to the person or thing that caused the harm. In fact, every strict liability statute in Louisiana virtually mandates that the defendant/animal owner carry a percentage or degree of fault in the causation of the plaintiff’s injuries.

\textbf{A. RE-DEFINING THE MEANING OF STRICT LIABILITY}

As I mentioned earlier, my quest to find the true meaning for strict liability came as a result of my students’ confusion over the various terms in the case law. These students reasoned that since the term \textit{strict liability} only appears in the statute for animal

\textsuperscript{135} “The phrase ‘liability without fault’ now contains the seeds of an inevitable misunderstanding, because fault may be taken either in a subjective or an objective sense.” See Palmer, note 90, p. 1305.

\textsuperscript{136} See \textit{Cartwright v. Firemen’s Ins. Co. of Newark, N.J.}, 254 La. 330, 223 So. 2d 822 (La. S. Ct. 1969), in which the Louisiana Supreme Court held that motorist who rear-ends the preceding vehicle because his brakes suddenly failed was not strictly liable for the injuries to the lead motorists because he used every precaution possible to properly maintain his vehicle. The Louisiana Supreme Court granted certiorari in this case only because the concurring opinion from an appellate judge in a prior appeal (i.e. \textit{de la Houssaye v. State Farm Mutual Automobile Insurance Co.}, 202 So. 2d 287 (La. Ct. App. \textit{)}) revealed some concerns about the plaintiff having to show the defendant’s fault in a strict liability claim.

\textsuperscript{137} The need for interpretation arises when our conventional ways of understanding break down…resolving this tension is the activity of legal interpretation.” See Dennis Patterson, \textit{Interpretation in Law}, 42 SAN DIEGO L. REV. 685, 696 (2005).

\textsuperscript{138} See 1996 LA. ACTS 1 (EFFECTIVE APRIL 16, 1996).

\textsuperscript{139} See \textit{INNER STRUCTURE OF STRICT LIABILITY} p. 1341.
owner’s liability,\textsuperscript{140} strict liability could only be applied to this category of defendants. Well, not exactly!

Immediately after my encounter with these students, I canvassed several law review articles and the statutes looking for a definition or some type example from recent cases to use to in order to clarify the meaning of strict liability and ultimately quench my bewildered students’ thirst for knowledge. However, after reading the statute concerning animal owner’s liability, I realized that strict liability actually involves more than just animal owners; in fact, a strict liability claim can be supported against \textit{any} animal owner; the person who owns a gerbil and the owner of a basset hound would be treated the same as the person who owns a pit bull.

Louisiana Civil Code article 2321 reads as follows:

\begin{quote}
The owner of an animal is answerable for the damage caused by the animal. However, he is answerable for the damage caused by the animal. However, he is answerable for the damage only upon a showing that he knew or, in the exercise of reasonable care, should have known that his animal’s behavior would cause damage, that the damage could have been prevented by the exercise of reasonable care, and that he failed to exercise such reasonable care. \textit{Nonetheless}, the owner of a dog is strictly liable for damages for injuries to persons or property caused by the dog and which the owner could have prevented and which did not result from the injured person’s provocation of the dog. Nothing in this Article shall preclude the court from the application of the doctrine of \textit{res ipsa loquitur} in an appropriate case.
\end{quote}

Giving this statute a cursory review, one would notice that the Louisiana Legislature intended to place a higher degree of responsibility on dog owners as oppose to owners of other domesticated animals.\textsuperscript{141}

Legislative bodies (including state and federal legislatures, administrative agencies, and governmental subdivisions) create, modify, and limit torts. When statutes expressly create tort actions, courts routinely follow legislative intent and recognize such actions. In contrast, whether a legislature intends to create torts when it fails to expressly do so is a more controversial question.\textsuperscript{142}

\begin{footnotes}
\item[140] See LA. CIVIL CODE ARTICLE 2321.
\item[141] See footnote 109.
\end{footnotes}
The statute, initially, starts by indicating that animal owners are *answerable* for damage caused\textsuperscript{143} by their particular pets, whereas dog owners are *strictly liable* for damage caused by their dogs.\textsuperscript{144} Because there appears to be a distinction\textsuperscript{145} between the two types of animal owners, an exploration\textsuperscript{146} of the legislative intent behind the wording of the statute is necessary before there is a determination on how strict liability is to be applied.

Animals owners are answerable if the plaintiff can prove the following: (1) damages by the defendant’s animal (not a dog); (2) the defendant’s knowledge of the animal’s propensity for violence; and (3) the defendant’s failure to protect the general public from his animals’ dangerous behavior.

Dog owners, on the other hand, are considered *strictly* liable to the plaintiff if the plaintiff can prove: (1) damage caused by the defendant’s dog; (2) the defendant’s ability to prevent said damage; and (3) that the plaintiff did not provoke\textsuperscript{147} the dog to react in a dangerous manner. Because of the 1996 revision to Louisiana Civil Code Article 2321, there is no longer\textsuperscript{148} any reason for the court, in determining liability, to consider whether the dog owner knew or should have known that the dog’s behavior\textsuperscript{149} would cause

\textsuperscript{143} “Outside of determining who the [custodian] is, the central issue is that of causation (the thing must play an active role in causing damage) and not of distinguishing between dangerous and non-dangerous things.” See INNER STRUCTURE OF STRICT LIABILITY p. 1338.

\textsuperscript{144} Id.

\textsuperscript{145} See Jamar, note 93, (revealing that lawyers created newly minted, and synthesized rules from several sources).

\textsuperscript{146} The fundamental form of expression in law is assertion. Argument in law begins with an assertion that something is the case—true—as a matter of law. See INNER STRUCTURE OF STRICT LIABILITY, note 90.

\textsuperscript{147} See *McCoy v. Lucius*, 839 So. 2d 1050 (La. Ct. App. 2003), wherein the Louisiana Second Circuit Court of Appeal held that the defendants were not liable for the injuries caused by their dogs to the plaintiff’s dog because the defendants’ dogs were provoked to attack when the plaintiff’s dog came onto the defendants’ property.

\textsuperscript{148} Id.

\textsuperscript{149} See *Becker v. Keasler*, 950 So. 2d 92 (La Ct. App. 2007). In this case, the plaintiff filed a strict liability claim against the defendant/dog owner after she was bitten by the defendant’s dog while she was standing in front of the fenced area where the dog was tied up. The facts of the case revealed that the defendant’s tied up his dog because the dog was known to charge the fence and bark at passing children. Even though the dog was tied up, the defendant’s roommate testified that the dog was able to come within a foot of the fence “maybe closer if he’s really going for it.” The reviewing court concluded by affirming the district court’s judgment because the dog presented an unreasonable risk of harm because of the dog’s history of aggression and because there was no evidence to suggest that the plaintiff provoked the dog before it bit her.
damage or whether the dog owner failed to exercise reasonable care as would have prevented said damage.\textsuperscript{150} I agree in part with the court’s pronouncement of strict liability following the 1996 revisions, but I discovered that these strict liability principles actually overshadow both dog owners and generic animal owners alike.

First of all, there is an obvious similarity between the two types of animal owners. According to the statute, the plaintiff has to satisfy three separate categories of proof in order to prevail. The non-dog owners must establish damage, knowledge of possible damage, and prevention. On the other hand, dog owners are required to prove damage, prevention, and lack of provocation by the plaintiff. The obvious distinction is that the plaintiff in a dog liability case does not have to prove the defendant’s knowledge of the dog’s dangerous history in order to prevail in his claim, rather, the plaintiff need only support his cause of action by showing that the dog owner could have prevented\textsuperscript{151} the harm from occurring by taking some form of evasive action—but chose not to.\textsuperscript{152}

The first inquiry that surfaced during my research was why was the knowledge\textsuperscript{153} requirement eliminated from the plaintiff’s burden in dog liability claims, but not in the general animal liability claims? Is it because a dog is understood to be a danger to the general public than a hamster? If this is true, then would it also be true that in order for the plaintiff to show that the dog owner could have prevented the harm from occurring he would have to question the owner’s knowledge\textsuperscript{154} of his dog’s propensity to harm or injure the general public?

In other words, is it not true that in order to prove prevention, the plaintiff would naturally have to show that the owner had reason to believe that his dog could cause harm? In essence, to satisfy the prevention requirement, the plaintiff would have to delve

\textsuperscript{150} See also Pepper v. Triplet, 834 So. 2d 624 (La. Ct. App. 2002).
\textsuperscript{151} See generally, BURYING CAESAR, supra.
\textsuperscript{152} See George P. Fletcher, Negligence in the Law, 3 Theoretical Inquiries L. 265, 270 (2002) (stating that fault is equivalent to breaching a duty to act otherwise and amounts to no more than acting in a way that is properly subject to blame).
\textsuperscript{153} See INNER STRUCTURE OF STRICT LIABILITY, note 90 (questioning whether the defendant’s knowledge is a characteristic of all strict liability claims).
\textsuperscript{154} See Kent, supra. p. 497 (stating “in a strict liability case in which the claimant asserts that the owner’s damage-causing thing presented an unreasonable risk of harm, the standard for determining liability is to presume the owner’s knowledge of the risk presented by the thing under his control and then to determine the reasonableness (according to traditional notions of blameworthiness) of the owner’s conduct, in light of that presume knowledge. (Emphasis theirs).
into the defendant’s knowledge of the harm-causing thing (i.e. the dog), making scienter\textsuperscript{155} a mandatory element for both types of animal liability claims.

In \textit{Pepper v. Triplet},\textsuperscript{156} the plaintiff, a thirty-year old man who had domiciliary custody of his two minor children and lived with his parents, was bitten by the defendant’s dog after he entered the defendant’s fenced yard to retrieve his son’s favorite football that was accidentally thrown into the defendant’s yard. The district court found in favor of the plaintiff, explaining that the language used in Article 2321 was ambiguous as it relates to the defendant/dog owner’s duty to the general public. It concluded that the defendant failed to take some preventive steps to warn the plaintiff and the plaintiff’s family not to enter his yard.

For example, the district court, in dicta, stated that the defendant could have placed a “beware of dog” sign on his fence or he could have restrained his dog inside the fence—especially since the defendant’s dog had bitten a child several weeks prior to this incident after the child climbed over the defendant’s fence with a ladder and entered the defendant’s yard.\textsuperscript{157} The appellate court affirmed the district court’s judgment, but the Louisiana Supreme Court decided to grant the writ of certiorari to clarify the parameters of Article 2321 and settle the discrepancy between the five appellate circuits regarding strict liability for dog owners.\textsuperscript{158}

It is undeniably evident that the Louisiana legislature specifically intended to place a higher burden on dog owners because of the large number of dog owners in the State of Louisiana and because of the proportion of dog-bite cases occupying the dockets of the judiciary.

Unfortunately, the language that the legislature elected to use to communicate to the general public the distinction between liability for dog owners and liability for owners of other animals was too ambiguous.\textsuperscript{159} In essence, while the legislature was attempting to make dog owners strictly liable for the tortuous acts of its pets, it inevitably made the

\begin{itemize}
  \item \textsuperscript{155}See \textit{Burying Caesar}, supra p. 346 (asserting that the knowledge element following the 1996 revisions to Article 2317 of the Louisiana Civil Code has now converted the once strict liability claim into a negligence claim).
  \item \textsuperscript{156}See \textit{Pepper v. Triplet}, 864 So. 2d 181 (La. S. Ct. 2004).
  \item \textsuperscript{157} See \textit{Pepper}, 864 So. 2d at 185-186.
  \item \textsuperscript{158} See \textit{Pepper}, 864 So.2d at 184.
  \item \textsuperscript{159}See Frank L. Maraist, Thomas C. Galligan, \textit{Louisiana Tort Law}, Sect. 14-7, p. 346 (Michie 1996).
\end{itemize}
plaintiff’s strict liability claim contingent on proving that the dog owner acted negligently; thereby disrupting the ordinary meaning of strict liability, which does not involve an inquiry into negligence.

The Louisiana Supreme Court in Pepper noted that the overall intent behind making animal owners liable for the dangerous actions of their pets was based on the presumption that the responsibility for the animals actions should be placed on the person who keeps the animal for his own pleasure rather than on the innocent victim who was injured by said animal. Here, the Holland court’s interpretation of Article 2321 was actually in harmony with the ordinary meaning of strict liability.

However, the Louisiana Supreme Court decided that continuing its interpretation of Article 2321 as it did in Holland would make dog owners “insurers against loss from any risk” the plaintiff may incur regardless of “how insignificant or socially tolerable the risk might be.” Therefore, it determined that using the unreasonable risk of harm analysis in animal cases—whether it pertained to dogs or other animals—would allow some animal owners to escape liability for unforeseeable harm that they could not have anticipated based on their animal’s previous behavior.

In theory, I do not oppose the rationale behind the Louisiana Supreme Court’s decision to instruct the district court to use the unreasonable risk of harm test for 2321

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161 See Howard v. Allstate Ins. Co., 520 So. 2d 715 (La. S. Ct. 1988), (ruling that strict liability arises once the plaintiff adequately proves the legal relationship between the defendant and the animal, which caused the plaintiff’s harm).
162 See Touchard v. Williams, 617 So. 2d 885 (La. S. Ct. 1993), (classifying the function of statutory interpretation and the construction to be given to said interpretation rests with the judicial branch of government).
163 See Pepper, 864 So. 2d 181, 190.
164 Id.
165 The unreasonable risk of harm terminology was originally coined by the Louisiana Supreme Court in Loescher v. Parr, 324 So. 2d 441 (La. S. Ct. 1975), when it formulated a test for determining liability for building owners. Using the unreasonable risk of harm inquiry, the Loescher court ruled that the district court should resolve the unreasonable risk of harm inquiry by ascertaining whether the risk of harm created by the condition of the building outweigh the social, moral and economic considerations of keeping said condition in the building in question. Because the Louisiana Supreme Court concluded that all plaintiffs filing 2321 strict liability claims should also meet the unreasonable risk of harm standard, it inevitably continued the relational responsibility aspect of strict liability claims, and provided a mechanism whereby the district court can limit dog owners from being accountable for every tortuous act of their animals.
166 See BURYING CAESAR, supra.
strict liability claims, but, as a civ trial attorney, it appears that the practitioner who is 
prosecuting a claim under Article 2321 must present evidence of the defendant/dog 
owner’s fault or negligence before recovery can be awarded to his client. In this Author’s 
opinion, the Louisiana Supreme Court’s interpretation would undermine the premise 
behind strict liability by giving insurmountable leverage to the defendant, who actually 
exposed the plaintiff to harm in the first place.

For example, in *Dubois v. Economy Fire & Casualty, Co.*, the plaintiff filed 
suit against the dog owner and the dog owner’s insurer when she was bit by the 
defendant’s dog while she cared for the animal at a local animal clinic.

The defendant/dog owner brought his pet, a Siberian Husky, to be sheltered while 
he went out of town. The plaintiff, a veterinary technician, took the dog to a large pen 
behind the clinic so that the dogs could exercise and eat their food. After taking the dog 
for a short stroll around the clinic, the dog stopped and looked at the plaintiff as though 
he would bite her. The plaintiff detected something different with the dog and attempted 
to talk to the dog when the dog bit her three times on her right forearm.

The plaintiff’s lawsuit alleged that the dog owner was liable pursuant to Louisiana Civil Code Article 2321. During the course of the trial, the district court received 
evidence, showing that this dog had been a patient at this clinic since he was a puppy. The veterinarian testified that the dog was “not mean” and she testified that the dog had 
not given her problems in the past when she brought him to the backyard. The 
veterinarian testified that it was not unusual to grab the dog by its collar even though the clinic’s policy was to use a lead when moving dogs around the clinic. The veterinarian 
further testified that the dog was protective of his food, and had been reluctant on some occasions to come inside from the backyard; however, this dog has *never demonstrated any dangerous propensities*. (Emphasis added).

Rather than focusing on what preventive measures the dog owner could have used 
to avoid the instant hazard, the appellate court noted that the dog had not demonstrated 
any dangerous propensities in the past while he was being boarded at this particular 
clinic. The appellate court also quoted the plaintiff’s trial testimony wherein she stated

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168 Id.
that the dog was gentle and easy to handle,\textsuperscript{169} was not aggressive\textsuperscript{170} and that she was not scared\textsuperscript{171} of the dog while working with it at the clinic. Without some indication of the dog’s propensity to injury, the appellate court refused to find the dog owner liability since it did not present an unreasonable risk of harm to this plaintiff.\textsuperscript{172}

The dissent in \textit{Dubois}, criticizes the majority for straying from the clear wording of the revised statute by being persuaded with the dog’s non-violent history as opposed to his violent act of biting this plaintiff three times on her forearm.

Therefore, because the plaintiff failed to show that the defendant knew of the dog’s propensity to harm the general public, she was unable to establish a prima facie claim under strict liability. However, if the plaintiff in \textit{Dubois} were bitten by a boa constrictor as opposed to a Siberian Husky, then liability would have been certain since knowledge of possible harm and the prevention of that harm would have been relatively simple. Unlike this Siberian Husky, a snake is a known predator and takes little, if any, provocation to strike. Therefore, if the defendant in \textit{Dubois} intended to shelter a snake at this particular clinic, he would have definitely had to deliver this animal to the veterinary in a protective cage or box.

In addition, consider \textit{Andrus v. L.A.D. Corp.},\textsuperscript{173} wherein the Louisiana Fifth Circuit Court of Appeal reversed the plaintiff’s damage award from a strict liability claim against the defendant/dog owner. Here, the plaintiff, a patron at a gas station, went to a dumpster on the side of the gas station and was subsequently bit by a dog who was kept behind a fence on the defendant’s property.\textsuperscript{174} The plaintiff alleged that the defendant was liable for his injuries because the owner of the gas station was the dog’s owner and this dog was positioned behind a dilapidated fence. The plaintiff alleged that he fell and was later bit after the dog was able to get through the fence.\textsuperscript{175}

On appeal, the defendant argued that the district court did not properly instruct the jury that it was the plaintiff’s obligation to show that his dog posed an unreasonable risk

\begin{flushleft}
\textsuperscript{169} See \textit{Dubois}, 715 So. 2d at 134.
\textsuperscript{170} Id.
\textsuperscript{171} Id.
\textsuperscript{172} Id.
\textsuperscript{173} See 875 So. 2d 124 (La. Ct. App. 2004).
\textsuperscript{174} Id.
\textsuperscript{175} Id.
\end{flushleft}
of harm. In reversing the district court’s judgment, the Fifth Circuit referred to several sections of the record describing the dog’s history and disposition to cause the harm. The Louisiana Fifth Circuit noted that the fence, which was used to retain the dog, was not regularly inspected because the owner had not had a problem with his dog escaping in the past. Further, the fence was still in tact following the plaintiff’s accident.

In addition, both the co-owner of the gas station and the co-owner’s wife testified that the dog had not gotten out of the fenced area since they purchased the gas station ten years earlier. Moreover, an employee at the gas station testified that on the day of the incident, he saw the plaintiff getting up off of the ground and when he asked if the plaintiff needed anything (i.e. medical assistance) he refused and left the premises. The reviewing court further noted that the employee specifically indicated that the dog has not bitten anyone in the six years that she has worked at this gas station.

Though some legal scholars would argue that knowledge is no longer an essential requirement in a strict liability claim, the Louisiana judiciary might disagree. In Andrus, the defendant prevailed on appeal because the plaintiff’s prima facie case lacked the ability to connect his injuries from the dog to the defendant’s knowledge that his injuries were foreseeable. The reviewing court conducted a thorough exploration of the dimensions of the fence, the dog’s history, and the plaintiff’s condition following the alleged incident before determining whether the plaintiff satisfied his burden of proving that the dog posed an unreasonable risk of harm.

In reality, the required elements under Louisiana Civil Code article 2321 are just a play on words because if you were to replace the animal in a general animal liability case with a dog, you would discover that the judgment on liability would be the same.

176 Id.
177 Id.
178 See Andrus, supra. p. 128.
179 Another employee at the gas station testified the he saw the plaintiff lying on the ground, breathing heavily; however, the plaintiff refused medical attention even though he had a heart condition. He also recalled seeing the dog behind the fence after he left the plaintiff and went back into the gas station. See Andrus, 875 So. 2d at 128, 129.
180 Id.
181 Id.
For instance, in *Honeycutt v. State Farm Fire & Casualty*, the plaintiff filed suit against the owner of a cow and the cow owner’s insurer after the livestock wandered away from a fenced pastured area onto the highway where it was struck by the plaintiff’s vehicle. Despite the plaintiff’s best efforts, she ultimately hit the cow and was severely injured. During pre-trial hearings, the defendants requested in their motion *in limine* that all references to strict liability be eliminated from the record of this proceeding and that the defendant’s alleged negligence be evaluated under a general negligence analysis. Hearing no objections from the plaintiff, the district court granted the defendants’ motion.

Nevertheless, the district court found that the cow owner and his insurer were negligent for allowing the cow to escape under the doctrine of *res ipsa loquitur*. The district court concluded that its use of common sense permitted an inference of negligence on the part of the cow owner. The reviewing court agreed with this inference, stating that the cow owner could not explain his livestock’s escape other than to say that neither he nor any of his family members left the gates open on the night of the incident. More specifically, the reviewing court stated:

> Absent negligence, a cow confined within fencing of proper height and maintenance will not wander into the center of the roadway in the middle of the night, endangering motorists.

Interestingly, the reviewing court also noted that the cow owner admitted on the record that the fence he used the restrict the cow had drooped and even new fencing would droop to some extent within a short time. Assuming that the cow owner’s statements were true, this fact implied negligence on behalf of the cow owner. In other words, for the cow owner to erect a fence that would droop or sway, even in new condition, would constitute neglect of his duty of care, especially if the livestock escaped because of the condition of this fence. Thus, it should have been expected that such a fence would not be appropriate for livestock that weighed in excess of five hundred pounds.

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183 *Res ipsa loquitur* is a permissible doctrine under LSA-C.C. art. 2321, which allows a plaintiff to fill in the legal gap in a negligence case with reasonable inferences when there is no direct evidence as to the cause of the plaintiff’s injuries. See *Honeycutt*, 890 So. 2d 759.
184 See *Honeycutt*, 890 So.2d at 759.
185 Id.
 pounds.\textsuperscript{186} This neglect of duty constitutes fault, which is sufficient enough to prove negligence under either general or strict liability. In other words, the plaintiff in \textit{Honeycutt} could have decided to file his claim against the cow owner under either LSA-C.C. arts. 2321 or 2316. Fortunately for the plaintiff, this was a win-win situation.

To further support my proposition that the liability standards for general animal owners and dog owner’s are synonymous; let’s assume that the livestock at issue was a golden Retriever instead of cow. If this minor adjustment were made to the fact pattern in \textit{Honeycutt}, would the result be different? The answer is a resounding yes. Although the agility of a dog is much greater than that of a cow, such argument would not exonerate the dog owner from liability because the dog owner \textit{could have prevented} the collision with the plaintiff’s vehicle if he had only erected a fence that would prevent his dog from escaping the secured area. Therefore, regardless of the claim, the burden of proof for both types of animal owners (general and dog owners) would be the same since the prevention element would still be in controversy and liability would be evident.

In \textit{Bradford v. Kaster},\textsuperscript{187} the plaintiffs, parents of a deceased child, sued the lessees of a pastureland and the owners of the horses on said land for the death of their son who was killed when one of the defendants’ horses stepped on their son’s head. According to the facts of this case, the minor child went onto the defendant’s land to retrieve a ball that rolled on to the defendant’s land. In their lawsuit, the plaintiffs alleged that the defendants were liable for their son’s death because the horses posed an unreasonable risk of harm because they were an attractive nuisance to their son and because the defendants permitted their horses to roam within the pasture unsupervised. Further, the plaintiffs alleged that the fencing erected around the pasture was inadequate.

The defendants responded by filing a Motion for Summary Judgment, but the district court denied their motion. Subsequently, the defendants applied for supervisory writs, alleging again that a genuine issue of material fact as to the issue of liability did not exist when the plaintiffs filed their lawsuit. The reviewing court agreed and summarized the issues presented in this case as follows:

\textsuperscript{186} According to \textit{Honeycutt}, the cow involved in the accident weighed approximately 700 pounds. See \textit{Honeycutt}, 890 So. 2d at 758.

\textsuperscript{187} 732 So. 2d 827 (La. Ct. App. 1999).
This case presents no genuine issue of material facts about the accident. It was night. Harrison (the minor child) climbed over the fence to retrieve a ball. He was found approximately five or six feet into the pasture. The horse stepped on the child. When the child was found, the horse was standing still next to the child. [The decedent’s father] had no other facts to give, and no other facts can be known. Therefore, the only questions of fact are whether the three-strand fence or the horse presented an unreasonable risk of harm.\textsuperscript{188}

In reversing the district court’s judgment on the Motion for Summary Judgment, the appellate court determined that the horses in question were not unreasonable risks of harm\textsuperscript{189} because the horses were roaming over historical pastureland and that the fencing that was used prevented the horses’ egress from the pastureland. In other words, the defendants were using the land as it was intended—for livestock to graze and roam. The defendants had used this land in this manner for approximately fourteen\textsuperscript{190} years before the accident in question. The fencing was used to keep the horses from leaving the pastureland, not to prevent children or trespassers from intruding onto the pastureland. Thus, the appellate court opined that it would not be just, equitable, or reasonable to require the defendants to erect a taller and more restrictive fence or to child-proof the general public from all risks\textsuperscript{191} of harm—especially those risks created by a naïve and unsupervised child.

\textsuperscript{188}See \textit{Bradford}, 732 So. 2d at 830.
\textsuperscript{189}See \textit{Clark v. White}, 758 So. 2d 370 (La. Ct. App. 2000). In this case, the plaintiff’s personal injury action was dismissed because she failed to present sufficient evidence that a horse was an unreasonable risk of harm to her when the horse somehow stuck its head over a four and one-half foot barbed-wire fence and bit the plaintiff on her breast. Since this was a rather rare occurrence, the reviewing court noted that the risk that someone would be injured in this manner (i.e. risk of injury) was quite low compared to the social and economic utility of horses in the community).
\textsuperscript{190}Id.
\textsuperscript{191}See \textit{Florice v. Brown}, 679 So. 2d 501 (La. Ct. App. 1996). In this case, the plaintiff filed suit against the owner of a horse and the horse’s trainer after the horse trainer told her to ride the horse, knowing that the plaintiff was an inexperienced horse rider. Believing that the horse trainer would not mislead her, the plaintiff got on the horse and was subsequently thrown from the horse, causing her severe injuries. The district court dismissed the plaintiff’s cause of action, and the appellate court affirmed, finding that the horse did not present an unreasonable risk of harm based on the risk-utility balancing test. However, the dissenting opinion in \textit{Florice} stated that the majority totally misapplied the risk-utility test as well as the meaning of strict liability. The dissenting opinion indicates that the fact that an animal’s behavior is unpredictable is one of the
Again, let’s assume that instead of horses on pastureland, this same incident took place with Great Danes at a large kennel. Would the outcome be different if the decedent climbed over a fence to this kennel and was bitten by one of these dogs? This writer asserts that the outcome would be same as in *Bradford*. First of all, the erected fence was designed to keep the dogs from escaping and injuring the general public, not to keep the general public from coming onto the land where the dogs were. Secondly, if an unsupervised three-year old were to climb over this fence and was subsequently bitten by one of the dogs then the child’s behavior could be classified as provocation, which would be sufficient enough to defeat the parent’s claim of strict liability. Accordingly, if this particular fact pattern were presented to the *Bradford* court, the Motion for Summary Judgment would have been granted at the trial level.

In conclusion, this writer strongly believes that the Louisiana legislature’s classification of dog owners as being *strictly* liable while referring to the liability of other animal owners as being only *generally* liable is both a misnomer and statutorily incorrect. In fact, there is no real distinction between the two classifications; both types of animal owners can be considered *strictly* liable for the damage caused by their primary reasons the legislature chose to impose strict liability on the owners. In other words, the dissent asserts that strict liability is based on responsibility which requires no finding of negligence. The dissent went on to say that the fact that the horse trainer was the person who delivered the animal to the plaintiff does not exonerate the horse’s owner from strict liability. See *Florice*, 679 So. 2d at 505.

192 In *Verdun v. Hebert*, 848 So. 2d 138 (La. Ct. App. 2003), the Louisiana Fifth Circuit Court of Appeal refused to hold an independent contractor responsible for the plaintiff’s injuries when a dog owned by the contractor’s sister ran out in front of the plaintiff’s bicycle and caused him to flip over the handle bars, striking his head, left knee and left shoulder on the pavement. Moreover, the appellate refused to impose liability on this named defendant because he was not the dog’s *owner*. (Emphasis added). Interestingly, the court noted—in dicta—that if the plaintiff had established that the contractor/brother had *knowledge of the dog’s propensity* then he might subject himself to liability under general negligence standards. See *Verdun v. Hebert*, 848 So. 2d at 141. (Emphasis added).

193 See *INNER STRUCTURE OF STRICT LIABILITY*, p. 1354. (stating that liability without fault is both misleading and unenlightening).

194 The insertion of the phrase “unreasonable risk of injury into the analysis of a strict liability claim “could represent an introduction of negligence concepts into an area of the law in which such concepts are presumably inapplicable”. See Poole, supra, p. 210.
animals. The legislature’s wording\textsuperscript{195} of the statute is what makes the interpretation more confusing for first-year law students learning this new area of law.

The term strict liability—as it is used in LSA-C.C. art. 2321—does not relate at all to the plaintiff’s burden of proof in an animal liability claim, but does reflect the owner’s classification as being the statutorily responsible party for the hazardous actions of his pets. Accordingly, this writer concludes that the term strict liability actually refers to all animal owners, not just dog owners. While I am aware that my discussion of strict liability totally disrupted my students’ common-law understanding of this concept, but, as I will clarify later in this Article, the defendant’s fault is always present\textsuperscript{196} in every strict liability claim in which the plaintiff has prevailed—even if the court overlooked or ignored it.

In the meantime, unless the Louisiana legislature decides to appoint another name to this area of tort law, this Author would suggest that the judiciary cease from referring to strict liability as liability without fault. Instead, it should consider coining the phase negligence by operation of law.

B. THE APPLICATION OF STRICT LIABILITY TO A REAL-LIFE HYPOTHETICAL

Strict liability is immensely important to a complete understanding of tort law—especially for law students in a civil law jurisdiction. Originally, strict liability was created (at least as it relates to civil law) to relieve the plaintiff of the obligation of proving that the defendant was responsible for his injuries when the facts undeniably support the conclusion that it was the defendants, dog, animal, employee, child or building that caused him harm. Because the plaintiff’s harm resulted from the defective thing or negligent person, knowledge of the harm-causing agent was presumed. Some legal scholars would argue that such knowledge is immaterial to such a claim.

\textsuperscript{195} See Walter Sinnott-Armstrong, *Word Meaning in Legal Interpretation*, 42 San Diego L. Rev. 465, 466 (stating that there exists a middle ground between judicial textualists and judicial intentionalists. Judicial textualists claims believe that the common meaning of words in laws must guide judicial interpretations of those laws whereas judicial intentionalists support the process of looking to legislative intent when deciphering the meaning of statutes or regulations).

\textsuperscript{196} See Torts AND PERSONAL INJURY LAW p. 346 (signifying that negligence is irrelevant to strict liability; therefore, the duty of reasonable care (as used in negligence’s proximate cause analysis) is also irrelevant).
Nevertheless, whatever theory you endorse, the conclusion would be the same—strict liability is a form of negligence in which liability can be established without fault.

However, the Louisiana legislature was reluctant to continue imposing liability upon an otherwise innocence party without first establishing that this party possessed some degree of fault in the causation of the plaintiff’s damages. The Louisiana Supreme Court in *Loescher v. Parr* initially interpreted strict liability as liability without fault, but the strict liability concept moved further and further away from its original meaning. I would even venture to say that Louisiana has only given lip service to the true meaning of strict liability. Initially, *Loescher v. Parr*, obligated the plaintiff to only prove that his damage was proximately caused either by the negligent person or dangerous thing in the defendant’s care.

Then, in *Kent v. Gulf States*, the Louisiana Supreme Court modified this standard of proof by presuming the defendant’s knowledge of the risk presented by the thing and then weighing that knowledge against *traditional notions of blameworthiness* to ascertain reasonableness. This modification gave tremendous leverage to the defendant by increasing his available defenses while making the plaintiff’s burden heavier, costlier and virtually impossible to manage.

Finally, the Louisiana legislature ultimately decided to just incorporate the plaintiff’s burden in the wording of the statute while still classifying the plaintiff’s cause of action as one under strict liability. In summary, the plaintiff burden of proof graduated from *no fault* to *presumed fault* and then to *quasi-fault*. Ideally, strict liability can be characterized as “non-negligent fault”, but this characterization would not be appropriate because fault is generally used to fix delictual responsibility under civilian principles, and more specifically in article 2315.

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197 See *Kent v. Gulf States*, supra.
199 Id.
199 See BURYING CAESAR, supra p. 342 (reiterating that Louisiana has now moved from a tort regime with significant pockets of *no blame* liability to one in which liability generally requires blameworthiness—resulting from the 1996 Civil Justice Reform package). (Emphasis theirs).
If the civilian interpretation of strict liability—as I have discussed above—is premised on the fact that all strict liability claims involve situations where a specific person is appointed as the responsible party for damages based solely on his legal relationship then the rules of constructivism\(^{201}\) mandate that I test the veracity of such interpretation. Therefore, the next hurdle in my research was to apply my strict liability policy to the liability that parents\(^{202}\) bear for the negligent acts of their children.

According to Louisiana Civil Code article 2318, parents are responsible for damage occasioned by their minor or unemancipated children, either residing with them or placed by them under the care of other persons. Vicarious liability is another unique aspect of strict liability because this form of strict liability holds the defendant liable for another person’s actions, rather than for the dangerous behavior of an animal or a defective object.

Unlike the liability for animal owners, building owners, pile drivers and/or explosive experts, the statutory language for parental and employer liability does not include a formula by which the plaintiff must prove liability. Because the plaintiff does not have this specific burden of proof, the student must find some mechanism to support the plaintiff’s cause of action against the alleged vicariously-liable defendant.\(^{203}\)

Although the statute is void of any reference to the plaintiff’s burden of proof, the Louisiana Civil Code as well as the related jurisprudence does offer the duty-risk test as a method for evaluating the negligent acts of persons in strict liability claims.

\(^{201}\) See Lysaght, et al. pp. 90-91 (stating that Constructivism is a specific learning theory which is premised on the fact that knowledge is constantly under construction because true constructivists believe that learners create knowledge from their own interpretation of instruction in light of their experiences and the social environment in which they learn). See also Marie Larochelle & Nadine Bednarz, *Construction and Education: Beyond Epistemological Correctness*, in *Constructivism and Education* 3, 3 (Marie Larochelle, Nadine Bednarz & Jim Garrison eds., Cambridge U. Press 1998); see also Dale H. Schunk, *Learning Theories: An Educational Perspective* 23 (Merrill Prentice Hall 2000).

\(^{202}\) See INNER STRUCTURE OF STRICT LIABILITY, supra (classifying parental liability as “legally imposed strict liability”).

\(^{203}\) See BURYING CAESAR, p. 357 (arguing that Louisiana parents can be exposed to strict liability claims for damages caused by a nondiscerning child who resides with them if the child’s conduct would have been a tort under normal standards).
Using this form of analysis, the plaintiff has to display some degree of fault\textsuperscript{204} on behalf of the name defendant before liability can be attached.\textsuperscript{205} As was illustrated earlier, the fault of a strictly liable defendant is visible even though the courts claim that a showing of the defendants fault is not required.\textsuperscript{206}

The strict liability definition has been altered to such an extent that a showing of fault is now a major ingredient in all strict liability claims in this state. Hence, labeling strict liability as liability without fault is no longer appropriate in this jurisdiction.

Consequently, strict liability should no longer be dependent on the type of activity the defendant was engaged in nor should it be contingent on the defendant’s knowledge that the person or thing in his care possessed the ability to cause harm. Rather, in this Author’s opinion, strict liability should refer to any tort claim wherein the statute has designated a particular person as being indirectly responsible for the plaintiff’s damages.

Memorizing and reciting a statute to apply to a generic set of facts comprises less than ten percent of the overall process of writing an answer to an essay question on a law school examination. Rather, it is more impressive to the examiner/professor if the examinee can not only recall the appropriate, applicable statute but can also communicate in well-organized sentences how each element of the statute, defense or exception can be utilized to resolve the issue posed in the fact pattern.\textsuperscript{207}

Therefore, since the application of strict liability principles to a practical\textsuperscript{208} fact pattern is the best indicator\textsuperscript{209} of the examinee’s knowledge and comprehension of the

\textsuperscript{204} Under both [negligence and strict liability], a person must be responsible in some way for an unreasonable risk of harm before he can be held liable. See Poole, supra, p. 211.

\textsuperscript{205} See generally, Powers, supra., note 39.

\textsuperscript{206} See generally FUNCTIONS OF TORT LAW P. 160-162.

\textsuperscript{207} See BETTER WRITING, supra, p. 15 (explaining that a law student’s ability to read, think and write like a trained barrister happens when he/she is given an actual scenario that places them within a specific boundary; this procedure forces them to learn about protocols for preparing pleadings or writing client letters or filing appellate briefs).

\textsuperscript{208} John Kleefeld, Rethinking “Like a Lawyer”: An Incrementalist’s Proposal for First-Year Curriculum Reform, 53 J. LEGAL EDUC. 2 (June 2003) (declaring that many first-year law students carve a practical application of the many concepts, principles and theories they learn in law school—especially in the first year).

\textsuperscript{209} See Mary Beth Beazley, Better Writing, Better Thinking: Using Legal Writing Pedagogy in the “Casebook” Classroom (Without Grading Papers). 10 LEGAL WRITING: J. LEGAL WRITING INST. 23 (2004) [hereinafter referred to as BETTER THINKING] (arguing that the Legal Writing pedagogy can greatly benefit casebook (regular) faculty by allowing the casebook faculty to “see”
subject, I chose to test my students’ analytical and writing techniques by using the fact pattern listed below for their mid-term examination. We eventually identified the various strict liability principles discussed in this hypothetical and formed a structured answer system that could be used to analyze this real-life scenario.

1. Vicarious Liability
   (Parent-Child)

   Last week, Rick decided to take his five-year old son, Martin, into the backyard and play. Because it was extremely warm outside, Rick pulled out their black garden hose and began spraying water on Martin as Martin ran around the yard. After ten-minutes of water play, Michelle, Rick’s wife, pulled into the driveway. Rick grabbed Martin and whispered into his ear, “Everyone loves to have water sprayed on them”. As soon as Martin heard these words, Rick jumped up and began spraying Michelle with a healthy dose of water from the water hose. Michelle dropped her grocery bags and chased Rick across the backyard for five minutes. Martin could not stop laughing at his funny parents.

   Later that afternoon, Rick decided to take his son to the Baton Rouge Zoo. He packed Martin’s lunch bag and went to the local gas station to pick up some potato chips, soft drinks and water. Because there wasn’t a long line in the convenience store to this gas station, Rick left Martin inside the car while he quickly ran inside to get these few items. While in the store, Rick ran into a former classmate and the two of them engaged in a brief conversation.

   Meanwhile, Martin sat inside the car extremely bored until he noticed the black rubber hose connected to this big machine. Thinking

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their students’ thoughts through vicariously-critiqued writing, thinking and meta-thinking exercises).

210 Leslie Bender captured the full essence of my purpose in using practical fact patterns in my course that it is worthy of quoting.

Our immersion in torts as teachers gives us a peculiar view of what is important or interesting. But most of our students will not be law professors or historians. Most of our student will be practicing attorneys, business people, consumers, homeowners, employees, or automobile drivers in the twenty-first century. They need to understand the contemporary dynamics and complex stories of negligently or intentionally caused personal injuries and tort claims. If we tell the right stories, our students can learn how to think about law today, how to strategize about remedying injury problems, how to frame issues, how plaintiffs and defendants become engaged in litigation, and how and why cases are resolved the way they are.

See Bender, Teaching Tort Stories, supra., p. 115.

211 Pamela Lysaght and Cristina D. Lockwood, Writing-Across-the-Law-School Curriculum: Theoretical Justifications, Curricular Implications, 2 J. ALWD 73 (2004) (stating the law schools offer few opportunities for students to practice and hone the newly acquired skills learned in their first-year legal writing courses). See also WRITING SKILLS, supra. p. 91.
that this was the same water hose his father used in the backyard, Martin exited the vehicle and unhooked the hose from the machine. At the same time, Tanya pulled up in her SUV to get some gas before traveling to work. When she saw this little boy playing with the gas hose, she immediately parked her vehicle, and walked over to Martin with a lit cigarette in her mouth. Martin saw Tanya approaching him and suddenly recalled what his father told in the backyard about how everyone loves to have water sprayed on them. Instantly, Martin pulled the trigger on the gas nozzle and soaked Tanya with unleaded gas.

As she was being sprayed with gas, Tanya suddenly ignited into flames. Rick saw the flames and ran to his son to take the gas hose out of his hand. Coincidentally, a fire truck was passing this gas station and noticed that Tanya was in flames. The firemen leaped into action, putting the flames out and stopping the flames from igniting the underground tanks located directly beneath Tanya. Tanya suffered second and third-degree burns over 80% of her body from this incident.

Please explain all causes of actions Tanya may have in this case.

As I mentioned earlier in this Article, the key to having a complete, thorough answer to an essay question on a Tort examination is to indicate who can sue whom and what specific damages the injured party can claim. Secondly, identify the theory under which the injured party can claim entitlement to the said damages. Under this section, the examinee must list the elements that must be satisfied in order for the plaintiff to meet his specific burden. Thirdly, give a concise analysis of the facts and the elements of the tort theory. Finally, complete the analysis by determining whether the prospective tortfeasor can either reduce or eliminate his liability with at least one of the basic three defenses—fault of the victim,212 fault of a third party or an Act of God.

Here, Tanya can present a sufficient liability claim against Rick for the second and third degree burns she sustained to her body using a sub-category to strict liability, called vicarious liability.

Vicarious liability is a form of strict liability whereby the named defendant is legally responsible for the negligent acts of either the person he cares for or employs. Under this specific category of strict liability, the injured party must show the named

212 Victim fault may not be an appropriate defense for a defendant in a strict liability claim (i.e. parental liability), especially if the defendant intends to reduce or eliminate his liability by showing that the child failed to mitigate his damages by using reasonable care. See Ryle v. Potter, supra p. 651.
defendant failed to either supervise or train this person and that his neglect of duty caused the harm.

In the instant case, Louisiana Civil Code Article 2318 allows the injured party to bring a cause of action against the father of a child who injures another due to the child’s negligent acts. However, in order for Rick to be held accountable for Martin’s actions, Tanya will have to show that Rick’s lack of supervision caused Tanya’s injuries to occur.  

In order to establish Rick’s liability, Tanya must answer yes to each of the five inquiries: (1) did the defendant owe a duty of care to the plaintiff/injured party?; (2) did the defendant’s actions breach his duty of care to the plaintiff?; (3) was the defendant’s breach of duty the cause in fact of the plaintiff’s injuries?; (4) was the defendant’s breach of duty the legal cause or proximate cause of the plaintiff injuries?; and (5) did the plaintiff suffer actual damages as a result of the defendant’s breach of duty?

Here, Rick owed a duty of reasonable care to the general public in that he would insure that his child, Martin, would not create an unreasonable risk of harm to others as well as to himself. Rick breached his duty of care by leaving his six-year old son unattended in his vehicle for such a period of time that Martin ultimately became bored and exited the vehicle without Rick’s knowledge.

In ascertaining whether a defendant’s breach was a cause-in-fact of the plaintiff’s injuries, the plaintiff can implement the “but for” test if there is one general cause for his/her injuries or the substantial factor test if there are multiple causes for the plaintiff’s injuries. Here, because Martin’s actions may not have been the sole cause of the incident, the substantial factor test is most appropriate. Tanya can alleged that Rick’s breach of duty was a substantial factor in causing Tanya’s injuries because if Rick had not left Martin unattended in his car for such a long period of time, Martin would not have exited the car and sprayed gasoline all over Tanya’s clothing.

213 “In treating the subject of causation, the jurisprudence has applied the causal tests associated with negligence rather than those associated with strict liability.” INNER STRUCTURE OF STRICT LIABILITY p. 1345.
214 See Hutzler v. Cole, supra note 42.
215 See INNER STRUCTURE OF STRICT LIABILITY p. 1345. (arguing that “legal cause requires a proximate relation between the actions of a defendant and the harm which occurs and such relation must be substantial in character”).
Even though Martin’s actions were a substantial factor in Tanya’s injuries, it may be difficult to prove that Rick’s breach of duty was the proximate\(^{216}\) cause of her injuries. In other words, it may not have been foreseeable to Rick that Martin, who was left unattended in a vehicle at a gas station, would get out off the car and spray someone with gasoline, and that person would also have a lit cigarette in her mouth.

Since Martin was at an impressionable age where he would take his father’s statements literally, it would not be surprising that Martin would take a statement his father made to him earlier that day and apply it to an unsuspecting person at the gas station. Yet, it would be to remote and virtually unconscionable\(^{217}\) for Rick to assume that an adult smoking a lit cigarette would approach Martin who was also holding a gasoline hose that was pointed in their direction. Such behavior is specifically prohibited at all gasoline stations nationwide.

Further, it is undisputed that Tanya suffered actual damages for this incident (i.e. pain and suffering, present and future medical expenses and loss wages). Nevertheless, since Martin’s actions only contributed to—not caused—Tanya’s injuries, Rick would be vicariously liable for a portion of Tanya’s injuries pursuant to Louisiana’s comparative negligence laws\(^{218}\).

Generally speaking, casebook faculty do not witness\(^{219}\) their students’ ability (or inability) to analyze a complex fact pattern and write a coherent and concise answer to this fact pattern until they open their students blue books at the end of the semester. Professor Beazley indicated that since most casebook faculty reserved their criticisms of their students’ analytical and writing proficiencies (or deficiencies) until the final examination, “it is not surprising that these professors have some difficulty seeing a

\(^{216}\) Negligence is only actionable where it is both a cause in fact of the injury and a legal cause of the injury. See INNER STRUCTURE OF STRICT LIABILITY p. 1345.

\(^{217}\) Some courts have elected to interpose proximate cause analysis in order to short circuit the risk-utility weighing process altogether. INNER STRUCTURE OF STRICT LIABILITY P. 1349.

\(^{218}\) See LA. CIVIL CODE ARTICLE 2324.

\(^{219}\) See BETTER THINKING, supra, p. 44, (indicating that one of the most rewarding aspects of teaching the Legal Writing Courses is not only seeing the student’s writing skills increase, but also that each student participates in the thinking process, along with the professor, as opposed to how the Socratic method is implemented in the other courses).
cause-and-effect between the process of their classroom teaching and the product\textsuperscript{220} of the final examination.\textsuperscript{221}

The Legal Writing professor can tolerate typographical errors in the student’s written work, but errors in analysis, errors in use of authority, and errors in thinking are insufferable.\textsuperscript{222} However, not giving the law student a chance to display his analytical and writing skills before the dreaded final examination, is synonymous with a parent telling a child that they will never become a renowned pianist simply based on their first recital.

Consequently, the students’ negative impression of legal writing as well as their biased beliefs about Legal Writing professors will continue\textsuperscript{223} unless a truce\textsuperscript{224} is reached between Legal Writing faculty and casebook faculty regarding salary, title, and the universal importance of teaching good, sound legal writing principles and techniques.

\section*{2. PREMISES LIABILITY AND PRODUCTS LIABILITY\textsuperscript{225}}

Consider the fact pattern below for some direction on preparing answers for questions pursuant to claims encompassing premises liability and the various areas of liability under the Louisiana Products Liability Act.\textsuperscript{226}

This week marked the second-year anniversary of Tyler Joseph (Tyler) being named senior architect for the George & Stein, architectural firm in Baton Rouge. As Tyler drove his luxury SUV into the parking garage at the Shaw Brothers, Inc. building on Essen Lane, he remembered how just four years ago, his firm moved to the twelfth floor of this building after its was completed. Today, there are now three law firms, nine accounting firms and six physicians’ offices in this twelve-story

\begin{footnotesize}
\textsuperscript{220} Id., p. 35, (finding that a Legal Writing course is a particularly good place for students to learn the process of analytical thought, which is at the heart of “thinking like a lawyer”).

\textsuperscript{221} Id., p. 35

\textsuperscript{222} Id., pp. 33, 58, (maintaining that the more the Legal Writing professor knows about the thinking behind the students’ writing, the more effectively the professor can coach the writing process, offering heuristic strategies to solve the thinking problems that led to the document problems).

\textsuperscript{223} Id., p. 39.

\textsuperscript{224} Id., p. 30, (describing the internal conflict between Legal Writing faculty and the casebook faculty as counterproductive to the law school’s mission because valuable opportunities for sharing teaching methods are lost due to trivial spats over titles and salaries).

\textsuperscript{225} Louisiana’s Products Liability Act is perhaps the last remaining vestiges of strict liability in the civilian state. See BURYING CAESAR, supra p. 357.

\end{footnotesize}
structure. “This building is truly a work of art,” Tyler whispered to himself as he walked through the corridor to this huge edifice.

Tyler stopped at the Star coffee shop on the ground floor. He needed his morning coffee before going to his office to prepare for his 6:00 a.m. meeting with four other architects in his division. Tyler ordered his usual coffee brand and then got on the elevator. Once he reached the twelfth floor, the elevator doors opened and Steven Barker, the janitor for Shaw Brothers, Inc., was backing into the elevator, wearing his usual black and gray uniform and pushing his cart, containing mops, brooms and buckets. Barker, normally, cleans the offices on the top floor and works his way down to the 1st floor offices before his shift is officially over.

Unbeknownst to Barker, Tyler was on the elevator, trying to exit. As Barker was getting into the elevator with his cart, one of the mop handles struck Tyler on his left shoulder. The impact caused Tyler to drop his coffee, but since he placed his coffee into a spill-proof container, the hot java was saved. Barker apologized for hitting Tyler, but Tyler assured Barker that everything was okay. Tyler calmly exited the elevator, and went into the company’s bathroom. At the mirror, Tyler noticed a small bruise on his left shoulder about the size of a dime. Tyler laughed at the bruise, buttoned his tailor-made shirt and went to his office to prepare for the meeting.

At 5:25 a.m., Tyler entered the double doors to his office, dropped his Corinthian leather briefcase on the sofa and sat in his luxurious chair. Tyler gazed towards the ceiling and stared at the fire sprinklers in his office. These sprinklers were not your ordinary sprinklers. In fact, the sprinkler heads were made in the shape of fleurs-de-lis—all twenty-four of them. Five years ago, Shaw Brothers, Inc. requested WaterWorks International to install sprinklers that would compliment Baton Rouge’s unique culture and that would add finesse to the overall décor of the Shaw Brothers, Inc. Building. Of the fifty different models that WaterWorks makes, WaterWorks sold and installed the fleur-de-lis model because it was the best compliment to the building’s décor.

At 5:55 a.m., Tyler woke from his little daydream when the four architects walked into his office for the meeting. First, John walked into Tyler’s office, then Raymond and finally Patrick and Frank. Frank brought a huge coffee maker (approximately three feet tall) into Tyler’s office and asked the gentlemen to sample some coffee that he bought from Miami. All of four of them agreed to sample the coffee—even Tyler who put his Startbuck’s coffee aside so that he could try this new flavor. Within minutes, each of the four men had a steaming hot cup of coffee. Finally, they were finally ready to start the meeting. Tyler spread the plans across the desk and started discussing the electrical layout of the new building the firm was designing for Wal-Mart on Corporate Boulevard.

Suddenly, the sprinklers came on and the men as well as the company’s electrical plans—worth $15,000—were soaked. Tyler was so
startled by the water that his spilled his coffee on his right arm as he was trying to take cover. The steam from the coffee pot and the four coffee mugs in Tyler’s office caused the sprinklers to come on. It started in Tyler’s office then every sprinkler in every office on the twelfth floor came on until everyone in the building had to evacuate. However, only the sprinklers on the twelfth floor (i.e. George & Stein) actually came on.

Tyler’s $2,000 suit was soaking wet. He was embarrassed and extremely frustrated. Tyler and his co-workers paced outside of the Shaw Building for thirty minutes, trying to understand how they were going to explain the loss of three months of work to the CEO. Luckily, an hour later, the CEO of George & Stein, Ivan Hanks, called Tyler and told him that his secretary just informed him of what happened at the office. Hanks assured Tyler that StatePlan Insurance, the firm’s general liability carrier, would pay for all damages once an inventory had been done on all of the company’s damaged assets. Linda, Hank’s secretary, completed the inventory list at 10:30 a.m., and StatePlan promised to deliver a check for $140,000 by the end of business that day.

**SAMPLE ANSWER**

Tyler may file a cause of action against Shaw Brothers, Inc., under strict liability for property damage to his Corinthian leather briefcase, his luxurious office chair, his tailor-made shirt and his $2,000 suit as well as the electrical plans to the mega grocery store. Further, Tyler could claim damages for personal injuries he sustained after he wasted boiling hot coffee on himself once the sprinklers were activated.

Premises liability, the specific theory under which Tyler can claim his damages, allows recovery from a defendant/building owner provided that the plaintiff can establish in his prima facie case the following: (1) the defendant owned or has custody of the building; (2) the building contained a vice or defect which created an unreasonable risk of harm; (3) the defendant knew or, in the exercise of reasonable care, should have known of this defect or vice; and (4) the defect or vice was a cause-in-fact of the plaintiff’s harm. The plaintiff would also have to show that his injuries were proximately caused by the defendant’s actions and that he suffered actual or real damages from the existence of this defect.

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227 See BETTER THINKING, supra, p. 43, (noting that the MacCrate Report recognized the significance of graduating law students possessing both practical and analytical skills in order for them to be competent lawyers); (quoting Alice M. Noble-Allgire, Desegregating the Law School Curriculum: How to Integrate More of the Skills and Values Identified by the MacCrate Report into a Doctrinal Course, 3 NEV. L. J. 32, 33 (2002).
Here, it is undisputed that the building was owned and operated by the defendant, Shaw Brothers, Inc (Shaw Brothers). The fact pattern also indicates that Shaw Brothers specifically requested that WaterWorks International (WaterWorks) install the fleurs-de-lis model sprinklers in its building to compliment the building’s décor. It is possible to assume from the fact pattern that the fleur-de-lis sprinklers were not the most appropriate sprinklers for this edifice since it was triggered by the presence of steam from a coffee machine, and not from fire or extreme heat. Even though Shaw Brothers are not manufacturers of custom-built water sprinklers, it can be presumed that Shaw Brothers should have exercise some degree of reasonable care when requesting this particular type sprinkler system—especially since this system pertained to fire safety.

As it relates to causation, the facts do suggest that Shaw Brothers’ decision to have this sprinkler system installed in its building was a cause-in-fact\(^{228}\) of Tyler’s damages. Because there exist multiple explanations as why the sprinklers malfunctioned (actually two—one of which is manufacturer defect), Tyler, must use the substantial factor\(^{229}\) test to suggest that Shaw Brothers may be jointly\(^{230}\) liable with the manufacturer for said damages.

Finally, Tyler’s proof of damages is undisputed since the facts indicate that his clothing, his briefcase and the electrical plans to the mega grocery store were damaged as a result of the defective sprinkler system. If Tyler is successful in obtaining a favorable judgment for his damages, his employer (or StatePlan, the employer’s general liability carrier) could seek reimbursement for any proceeds received as payment for the electrical plans and office equipment that were destroyed by the sprinkler system.

\(^{228}\) It is quite clear from the events themselves that the defendant’s negligence was the cause in fact of an injury. See JOSEPH W. GLANNON, THE LAW OF TORTS 140 (2005)

\(^{229}\) As it relates to causation, the “inquiry is whether the defendant contributed to the plaintiff’s harm; [however], an alternative method for determining cause in fact, which is generally used when multiple causes are present, is the ‘substantial factor’ test”. See Hutzler, supra note 36. (Emphasis theirs).

\(^{230}\) “The proximate cause of an accident may be the negligence of one person or it may be the negligence of several people; if it is the negligence of several people, that negligence may be their joint negligence, that is, negligence in which they participate jointly, acting together, or it may be separate negligence by each of them which, combining together, produces the unfortunate result: the accident.” See Russo v. Aucoin, 7 So. 2d 744 (La. Ct. App. 1942).
As a defense, Shaw Brother could either exonerate or limit its liability for Tyler’s injuries (not including the electrical plans) by bolstering its third party claim against WaterWorks International for being a major cause or the sole cause of Tyler’s damages.

In addition, Tyler could also file a complaint against WaterWorks, International (WaterWorks) under products liability, claiming that it is a joint tortfeasor with Shaw Brothers for the above-mentioned damages.

Products Liability is a theory of negligence in which a user or handler of a product can hold the manufacturer of said product accountable for any and all damages proximately caused from using this product. Under the Louisiana Products Liability Act, the four element the plaintiff must establish to support a cause of action under this theory are (1) the defendant is a manufacturer; (2) the claimant’s damage was proximately caused by a characteristic of the product; (3) this characteristic made the product unreasonably dangerous (i.e. unreasonably dangerous by construction or composition, by design, by an inadequate warning or by failing to conform to an express warranty); and (4) the claimant’s damage arose from a reasonably anticipated use of the product.

In this case, the facts establish that WaterWorks is a manufacturer of the sprinkler system in controversy, and pursuant to these facts Tyler can allege that his damages were caused by either a faulty design, or by inferior construction or composition. First of all, Tyler can allege that the sprinkler’s design was faulty because there were several different models that WaterWorks sold and install. The fact that the fleur de lis design was chosen simply because it complimented the décor of the building could be viewed as a primary reason the system malfunctioned.

Secondly, Tyler can assert that the sprinkler system was defective because the steam from a coffee maker, not from fire or extreme heat, triggered it. In fact, Tyler can support his claim of faulty construction by showing that it was the sprinkler system on the twelfth floor that was triggered, not the sprinklers on the ground floor where the coffee shop was and had been in operation for the past four years.

231 “The only way that a defendant would ever be liable for more than its share of liability would be if that defendant were jointly and severally liable.” See David W. Holman, Responsible Third Parties, 46 S. TEX. L. REV. 869 (2005).
232 See Johnson, supra note 26.
Again, like Tyler’s cause of action against Shaw Brother, the substantial factor test would be the most appropriate method to use in this case because both Shaw Brothers and WaterWorks bear some responsibility for Tyler’s damages.

Again, Tyler’s claim for damages are supported by the information in the fact pattern and by the arguments listed in his claim against Shaw Brothers. Further, like Shaw Brothers, WaterWorks can use the defense of fault by a third party to either escape or lower its degree of fault.

To say that this examination was complex is an understatement. It tested my students’ knowledge of every facet of Louisiana negligence laws except for absolute liability. Naturally, my examination was more tedious than any bar examination in this particular area. But if my students would heed my instructions, adopt my writing system (or one similar to it), then I would feel more confident about their chances of prevailing on the Louisiana bar examination.

**CONCLUSION**

Teaching is truly an honorable profession. Being an effective teacher, however, is a gift from God because God has classified teaching as one of the spiritual talents that is capable of changing a nation. However, it is also a profession that is graced with lots of rewards and benefits that far surpasses the stigma that society has placed upon it. The same stigma also hovers over Legal Writing professors.

As a Legal Writing professor, I have the distinct pleasure of training first-year law students how to read, think and writing like lawyers. Every year, my motto has been that “Legal Writing is your most important course, because this course lays the foundation that you will use throughout your legal career.” I have also indicated in my lectures that, “your other professors will only change the color of the light bulbs, but I am the one that will provide the electricity.”

Legal Writing professors indeed have the one of the most important positions in the law school, yet, they have the lowest salaries, the smallest offices, the tiniest of titles, (i.e. “Instructor”), and the hardest work schedule. Legal Writing professors—on

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234 See notes 2 and 12.
average—have graded more papers in the first semester than the casebook faculty have graded the entire academic year—including the summer semesters. It is not surprising that most Legal Writing professors desperately run towards the more lucrative tenure-track positions when their institutions open the gates of opportunity. But if I had a second chance to choose a position in the law school, I would remain a humble Legal Writing professor.

In my position, I am able to witness my student’s growth and become a mentor to them much quicker than my colleagues because my course is designed to welcome student interaction and dialogues as oppose to the harsh and abrasive temperaments of my colleagues who teach the casebook courses. My position also allows me to explain and/or clarify certain legal concepts that my students may be struggling to apprehend but are too afraid to approach their professors, who teach the course.

Since I thoroughly enjoy using personal injury fact patterns in my Legal Writing course, I accepted the chance to teach the Torts II course because the experience would (1) sharpen my teaching skills in the casebook courses; (2) broaden the number of potential topics I could use in my legal scholarship; and exhibit to my colleagues as well as to the student body that Legal Writing professors are exceptional law professors who are more than capable of imparting knowledge to their students that is manageable, understandable and enjoyable.

Unfortunately, the students in my Torts II course challenged me a little more than I expected. Most tort professors would be doing summersaults if their students were to fully and correctly discern the difference between negligence and strict liability along with all of the analytical bells and whistles that accompany these theories. But when the tort professor is actually a Legal Writing professor who the students already view as “a fish out of water,” the students use their new found knowledge as a confrontational weapon that can make the process of teaching a monumental task. At that moment, the course because less about torts and more about sticking it to the new guy.

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235 See Practice What They Teach, supra., (urging that law professors have a strong impulse to serve as mentors for students—perhaps even a responsibility to do so).
236 See Torts in Verse, p. 1201 (noting that good, effective instructors are engaged in a consistent battle over how to attract student attention and enhance their understanding regarding the lifeless concepts, theories and principles in the course material).
237 See generally, Durako, supra.
Nevertheless, I treasured\textsuperscript{238} every moment of my initiation because—as the old adage goes—the mark of a wise man is his thirst for knowledge and insight.\textsuperscript{239} Had I not received this initiation, I would not have found such novel\textsuperscript{240} methods of communicating this information to my clever, coy and sometimes confrontational students. The experience of teaching the Torts II course will always be a discussion topic at many Legal Writing conferences I attend and it will always be in my personal memoirs.

\textsuperscript{238}See TORTS IN VERSE, p. 1201 (proclaiming that experienced Torts instructors strives to improve their teaching performance with new, unique teaching routines that adds a difference spice to the classroom than from every other instructor’s approach).

\textsuperscript{239}See PROV. 1:5 (stating that “a wise man will hear and increase learning, and a man of understanding will attain wise counsel”).

\textsuperscript{240}See generally, TORTS IN VERSE, supra.