

EXECUTIVE SUMMARY OF
REBUTTAL OF VERNON PALMER'S THESIS, TAKE TWO

BY

KEVIN R. TULLY AND E. PHELPS GAY

This article again rebuts the contentions Vernon Valentine Palmer first made in *The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function*, which he revisits in his on-line publication, “The Recusal of American Judges in the Post-Caperton Era: An Empirical Assessment of the Risk of Actual Bias in Decisions Involving Campaign Contributors.” Readers who followed the controversy surrounding Palmer’s initial article will recall the substantial errors these authors pointed out in “The Louisiana Supreme Court Defended: A Rebuttal of *The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function*” which errors led the Dean of Tulane Law School to apologize to the Justices of the Louisiana Supreme Court.

In his current Internet article, Palmer invokes *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. ___, 129 S.Ct. 2252 (2009), and claims his study expands upon that decision. But Palmer’s underlying thesis is wrong, and his attempt to recycle his discredited arguments onto *Caperton* is unconvincing. Palmer’s latest attempt to tie modest campaign contributions to a Supreme Court Justice’s reelection committee to decisional outcomes in a selection of 177 cases decided over a fourteen year period again fails upon examination.

Palmer refuses to acknowledge or apologize for his prior mistakes, mistakes repeated in his current article. He fails to admit that when he authored his first article he did not know the Louisiana Supreme Court had *eight*, not *seven*, Justices for a significant part of the time

encompassed in his study. This inexcusable oversight led Palmer repeatedly to attribute a “vote” to a Justice recused from the decision-making in many of Palmer’s selected cases.

In his current Internet article, Palmer claims he builds “upon the approach chartered in *Caperton*” by focusing “in depth upon one state supreme court’s experience with contributor cases over a fourteen year period.” As with every other case he cites, Palmer ignores *Caperton*’s extreme facts and does not equate *Caperton* to any of the Louisiana cases he selected for his “study.”

Caperton involved millions of dollars flowing directly and indirectly to a single candidate for judicial office by a litigant with a case pending before the West Virginia Supreme Court. Recusing this Judge from hearing the case, the Supreme Court noted: “[n]ot every campaign contribution by a litigant or attorney creates a probability that requires a judge’s recusal, *but this is an exceptional case.*” *Caperton*, 129 S.Ct. at 2263. (Emphasis added.)

Rather than acknowledge *Caperton*’s unique and extreme facts or recognize his “study” fails to include any Louisiana Supreme Court case remotely similar, Palmer tries to exploit *Caperton* to impugn the integrity of the Justices of the Louisiana Supreme Court. A careful scholar would have read *Caperton* closely and distinguished it from cases not rising to its level.

Palmer never addresses, much less solves, the criticism leveled at the methodology employed in his original article, a methodology repeated in his new effort. Proper empirical research must recognize the probable simultaneity between the effect of campaign contributions on judicial decisions and the effect of judicial decisions on campaign contributions. Palmer assumes away the question whether contributions influence voting

behavior or whether expected voting behavior influences contributions, a fatal error in his analysis.

Not one of the fourteen hypothesis tests in Palmer's revised study, supposedly conducted to determine whether there was a cause-and-effect relationship between campaign contributions and the probability of a favorable vote, had a probability value small enough for Palmer to conclude this cannot be the result of chance alone. Yet Palmer asserts this thesis in his Summary Findings.

Palmer implies that cases will be decided 50% of the time for a plaintiff and 50% of the time for a defendant, in the manner of a coin toss. Although Palmer recognizes his hypothesis assumes an even split between *meritorious* claims of plaintiffs and defendants, he presents no evidence that any of the cases he selected represent an "even split" between *meritorious* claims of plaintiffs and defendants. Palmer provides no information about any of the cases in his data set to show whether the Justices did or did not follow established law. Nor does Palmer address the not unusual scenario where the deciders of cases simply see the facts differently.

Palmer recognizes that deciding a case requires subjective judgment, stating "[o]f course it is true that 'unanimous' cases are sometimes quite significant. To determine their significance, however, would involve subjective judgments and inevitably would cause reasonable minds to disagree." Palmer thus acknowledges that reading a case calls for exercising subjective judgment, which could lead reasonable minds to differ. But, Palmer shies away from reading cases and evaluating facts and law. This failure compounds the fundamental problems underlying his flawed statistical assumptions.

A review of only a small portion of Palmer's data set reveals that he did not read the cases. Palmer errs in designating how a Justice "voted" or glosses over how a seemingly favorable "vote" for a plaintiff or a defendant actually worked against the supposed victor's interests. Palmer believes a Justice either votes for a plaintiff or a defendant. His simplistic approach ignores the complex procedural histories, litigants, and legal issues facing the Supreme Court. After explaining his rationale underling his selection of "significant" and "difficult" cases, Palmer ignores the significance and difficulty of any of the cases.

Palmer's campaign contribution analysis likewise is simplistic and misleading. Apart from questions of factual accuracy in the data, Palmer's method of attributing campaign contributions by different law firms to different campaign committees, over a span of many years, and then ascribing such contributions to every attorney of that law firm, makes little sense. Palmer imputes such contributions to every litigant (in Palmer's terminology either a "plaintiff" or a "defendant") represented by that attorney or firm and to a specific Justice who participates in deciding a case. Exacerbating this flaw, Palmer fails to account for law firms which, over an extended period of time, made campaign contributions to almost all of the Justices' respective campaign committees. Lawyers, not litigants, made almost all of the campaign contributions Palmer cites in his article. To equate such a remote campaign contribution to either a "defendant" or a "plaintiff," and then to connect a Justice's "vote" in a case to that particular party, is to wander far afield from the "extraordinary" facts of *Caperton*, the case upon which Palmer claims his latest effort ostensibly builds.

Palmer suggests a campaign contribution made immediately before the decision is announced may influence a Justice's decision. If Palmer had read any of the cases, he would realize these opinions are not written overnight. Justices need sufficient time to write and

review draft opinions in “significant and difficult” cases. Time is required to research and draft concurrences or dissents. Adequate time must elapse between when a Justice casts his or her “vote” on a case and the time when the opinion is rendered to allow the Clerk’s office to prepare the opinion for public dissemination, including having copies available to counsel of record, posting the decision on the Court’s website, and having copies available for the public. Palmer’s suggestion that a Justice may cast or change his vote within days or hours of a decision’s publication is foolish, if for no other reason other than the work necessary to publish court opinions.

Professor Palmer does not admit to making many profound errors nor does he apologize for those mistakes and for the harm caused to the Court as an institution. Rather, he repeats his mistakes and casts the same unwarranted aspersions. Palmer’s thesis remains unsupported, unfair and unworthy of publication in any serious journal.

REBUTTAL OF VERNON PALMER’S THESIS, TAKE TWO

BY

KEVIN R. TULLY AND E. PHELPS GAY

INTRODUCTION

The purpose of this article is to rebut the contentions Vernon Valentine Palmer first made in *The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function*,¹ which he revisits in his on-line publication, “The Recusal of American Judges in the Post-Caperton Era: An Empirical Assessment of the Risk of Actual Bias in Decisions Involving Campaign Contributors.”² Readers who followed the controversy surrounding Palmer’s initial article will recall that due to its substantial errors the Dean of Tulane Law School sent a letter of apology to the Justices of the Louisiana Supreme Court.³

¹ Vernon Valentine Palmer & John Levendis, *The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function*, 82 TUL. L. REV. 1291 (2008). In response to the allegations Palmer and Levendis made against the Justices of the Louisiana Supreme Court, the Court asked these authors to review and respond to the article, which these authors did in “The Louisiana Supreme Court Defended: A Rebuttal of *The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function*,” 69 LA. L. REV. 281 (2009).

² Vernon V. Palmer (2010) “The Recusal of American Judges in the Post-Caperton Era: An Empirical Assessment of the Risk of Actual Bias in Decisions Involving Campaign Contributors,” *Global Jurist*: Vol 10: Iss. 3 (Frontiers), Article 4.

³ Dean Lawrence Ponoroff’s letter of September 10, 2008, expressed, on behalf of Tulane Law School, “our sincere regret for the errors that we now know appeared in the above-referenced study written by Professors Vernon Palmer and John Levendis and published in the *Tulane Law Review*.”

In his revised article, Palmer invokes the United States Supreme Court decision in *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 129 S.Ct. 2252 (2009), and claims his study expands upon that decision. Quoting from Palmer,

The present study, building upon the approach chartered in *Caperton*, focuses in depth upon one state supreme court's experience with contributor cases over a fourteen year period. It carries the analysis beyond the relatively easy *Caperton* facts and examines the risk of actual bias in every day cases before the courts.

The Recusal of American Judges in the Post-Caperton Era, *Global Jurist*, p. 1.⁴

As will be demonstrated, Palmer's underlying thesis is wrong, and his attempt to piggyback his recycled arguments onto *Caperton* is unconvincing. Like his first, Palmer's second attempt to tie modest campaign contributions to a Supreme Court Justice's reelection committee to decisional outcomes in a selection of 177 cases the Louisiana Supreme Court decided over a fourteen year period fails upon examination.

PALMER FAILS TO ACKNOWLEDGE HIS SERIOUS ERRORS

It is the duty of a scholar, I believe, to admit and correct his errors. The important thing is to set the record straight and to advance the truth.

– Vernon Valentine Palmer⁵

Palmer fails to do what he says he should. Rather than acknowledge the flaws in his prior work (which carry over into this recycled article), Palmer attempts to minimize his

⁴ Palmer describes his study as examining “everyday cases,” yet later in his article describes his data set as representing cases before the Louisiana Supreme Court “likely to be significant and difficult.” Like so much else in Palmer's writing, it is unclear whether he considers the cases listed in his Appendix I: The Database of the Study as “everyday” or “significant and difficult” ones. Compounding the reader's confusion is the lack of analysis by Palmer of a *single* case in his data listed in Appendix I, a defect noted in response to the first article but still repeated in the second.

⁵ Quoted from Palmer's e-mail introduction entitled “New Corrected Study on the Louisiana Supreme Court and Campaign Contributions Published in *Global Jurist* – November, 2010.”

mistakes, going so far as to say “[Tully and Gay] claimed that our data base contained 44 errors (out of a data base containing more than 11,000 entries.)⁶ These authors did not just point out 44 glaring errors; they exposed significant shortcomings in Palmer’s analysis. More to the point, Palmer fails to admit that when he authored *The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function*, he – a law professor and a Louisiana attorney – simply did not know the Louisiana Supreme Court had *eight*, not *seven*, Justices for a significant part of the time encompassed in his study.⁷ Thus, for those cases within his data pool decided before September 2000 (when the Court reverted to its present seven-Justice makeup), Palmer often attributed a “vote” to a Justice when the particular Justice had recused himself or herself from the decision-making. The Reader must wonder what grade Professor Palmer would give one of his law students who, in writing an essay about the Louisiana Supreme Court, overlooked this most important fact.

In similar fashion, Palmer never addresses, much less solves, the criticism leveled at the methodology employed in his original article, a methodology he repeats in this new effort. According to Professors Newman, Speyrer, and Terrell, Palmer and Levendis

⁶ *The Recusal of American Judges in the Post-Caperton Era*, *Global Jurist*, p. 4, n.11.

⁷ In part to settle a federal discrimination action, the Louisiana Legislature enacted Act 512 in 1992. This Act created an additional judgeship for the Court of Appeal for the Fourth Circuit to be elected from the First District of that Court. The new judge was “immediately assigned to the Louisiana Supreme Court” and remained on the Supreme Court until a special election was held for a newly-created Orleans Parish Supreme Court district. To accommodate this eighth Justice until the Court returned to seven Justices, the Supreme Court adopted amendments to Rule IV of the Court which remained in effect until 2000. Under those rules, a panel of seven Justices would decide a given case. The Justice who had been rotated off of the panel considering a specific case would not vote on the case. LA. SUP. CT. R. IV, pt. II (1993)(repealed 2000).

originally failed to follow the “accepted approach for empirical research on this topic.” Such an approach “must recognize the probable simultaneity between the effect of campaign contributions on judicial decisions and the effect of judicial decisions on campaign contributions.” Succinctly stated, the issue “is whether contributions influence the voting behavior or whether the expected voting behavior influences the contributions.” The Palmer and Levendis effort to “assume away” this issue represents “a fundamentally fatal error.”⁸ To get this methodology wrong on the first attempt was incompetent; to repeat the error is indefensible.

Also, by “naming specific justices and incorrectly asserting they have produced statistically valid evidence that campaign contributions influenced decisions of the Louisiana Supreme Court,” Palmer and Levendis risk “tarnishing the reputations of longstanding judges with no scientifically valid evidence to support their claims.”⁹

⁸ Robert Newman, Janet Speyrer & Dek Terrell, *A Methodological Critique of The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function*, 69 LA. L. REV. 307, 309. *Also see* Bopp and Woudenberg, *Extreme Facts, Extraordinary Case: The Sui Generis Recusal Test of Caperton v. Massey*, 60 Syracuse Law Rev. 305, 314 (2010):

. . . even assuming that votes by elected officials are correlated with campaign contributions this does not tell us anything about the direction of causation. An elected official might be influenced to vote in a certain way by a contribution; alternatively, a contributor might donate to a candidate because she perceives (correctly) that the candidate shares her position on a given issue. [Citations omitted.] Any attempt to show a corrupting effect on the judiciary caused by campaign contributions, therefore, must show not only that judicial decisions are correlated with campaign contributions, but also that this correlation is due to contributions influencing votes, rather than the other way around.

⁹ Robert Newman, Janet Speyrer & Dek Terrell, *A Methodological Critique of The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function*, 69 LA. L. REV. at 310.

Criticism of the Palmer-Levendis methodology did not merely rest upon the factual errors they made in constructing their data. Even if – as was hardly the case – Palmer had assembled an accurate data set, these reputable economists completely discredited the method Palmer and Levendis employed to analyze the data. Thus, Palmer and Levendis produced “a rather confusing and contradictory paper.”¹⁰ On the one hand, they purported to show a statistical correlation between campaign contributions and judicial voting. On the other hand, the authors explicitly stated “this Article does not claim that there is a cause and effect relationship between prior donations and judicial votes in favor of donors’ positions.”¹¹

According to Dr. L. W. Shell, Distinguished Service Professor of Management (retired), at Nicholls State University, Palmer’s statistical methods and interpretations in his new article remain unchanged. Palmer continues to assume that if a Justice’s “vote” on the merits of a case, based on the evidence presented and the applicable law, happens to fall on the side of an attorney or a law firm which, at some earlier point in time, contributed to that Justice’s campaign committee, the Justice must have abandoned his or her integrity and “voted for his contributor.” In Palmer’s *Weltanschauung*, Justices do not decide cases on evidence and law; instead, they look to see who may have made a past contribution and “vote” accordingly. Palmer’s core assumption, reflecting his unproven hypothesis, contaminates his ability to present any clear-eyed commentary about cases decided by the Louisiana Supreme Court.

As a matter of statistical interpretation, the Reader is referred to the Comments of Dr. L. W. Shell, attached in Appendix 1. Dr. Shell notes that the “regression results” in Palmer’s

¹⁰ *Id.*, at 307.

¹¹ Palmer & Levendis, *supra* note 9, at 1294, n.14.

new Figures and Tables “are all ‘not significant.’” Insignificant findings “happen quite frequently in academic research,” but “there is something wrong with making claims based on what was found to be not significant.” According to Dr. Shell, *not one* of the fourteen hypothesis tests in Palmer’s revised study, supposedly conducted to determine whether there was a cause-and-effect relationship between campaign contributions and the probability of a favorable vote, had a probability value small enough to conclude “this cannot be the result of chance alone.” Yet Palmer asserts this thesis in his Summary Findings. Dr. Shell notes that the article’s graphs “have no meaning” and “should not have been produced.” Palmer should have concluded: “The statistical evidence did not support a positive relationship between size or timing of contribution and probability of a favorable vote.”

Attached as Appendix 2 is a statement entitled *Second Paper/Second Critique: Same Conclusion* by Professors Robert Newman and Dek Terrell of Louisiana State University. These economists affirm that Professor Palmer’s second article “still contains a fundamentally flawed set of conclusions from correlation and regression analysis.” Palmer fails to correct the key methodological error which rendered his first article, and now his second, meaningless. In fact, the new article contains figures which, these distinguished economists note, should lead to this statement: “This article provides no evidence on whether a \$1000 contribution increases odds of a favorable vote for either the defendant or plaintiff by any justice.”

This article will not repeat in detail the points previously made in “The Louisiana Supreme Court Defended: A Rebuttal of *The Louisiana Supreme Court in Question*,” 69 LA. L. REV. 281, or which economics professors Robert Newman, Janet Speyrer and Dek Terrell observed in *A Methodological Critique of The Louisiana Supreme Court in Question*: An

Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function, 69 LA. L. REV. 307. Suffice it to say the observations made in those articles apply with equal force to Palmer's current selection which, to be charitable, is a rehash of his prior, discredited work. Palmer's latest installment, like his first, reflects a failure to read, let alone analyze, any particular case the Louisiana Supreme Court decided. It is questionable whether this new version deserves any response at all. Nevertheless, for the record, this article will describe the misjudgments and misreadings which still mar Palmer's misguided attempt to impugn the integrity of the members of his state's highest court.

CAPERTON IS IRRELEVANT

Attempting to paint his work with a patina of intellectual relevance, Palmer asks the reader to believe his "study" builds "upon the approach chartered in *Caperton*" by focusing "in depth upon one state supreme court's experience with contributor cases over a fourteen year period." *The Recusal of American Judges in the Post-Caperton Era, Global Jurist*, p. 1.¹² As with every other case, Palmer ignores the facts of *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 129 S.Ct. 2252. A synopsis of *Caperton* follows.

After a trial in 2002, a West Virginia jury found A.T. Massey Coal Co. liable for fraudulent misrepresentation, concealment, and tortious interference with existing contracts. The jury awarded plaintiff Caperton \$50 million in compensatory and punitive damages.

West Virginia then held its 2004 judicial elections. Knowing the Supreme Court of Appeals of West Virginia would consider the appeal in the Caperton case, Massey's CEO

¹² It is hard to figure how Palmer's study "builds" upon the approach the Court took in 2009 in deciding *Caperton*. Palmer's ill-fated study and conclusions – mirrored in his electronically-published article – predate the *Caperton* decision.

decided to support attorney-candidate Brent Benjamin to replace Justice McGraw who was running for reelection.

In addition to contributing the \$1,000 statutory maximum to Benjamin's campaign committee, the CEO donated almost \$2.5 million to "And For The Sake Of The Kids," a §527 political organization. The §527 organization opposed McGraw and supported Benjamin. The donations accounted for more than two-thirds of the total funds "And for The Sake Of The Kids" raised. The CEO also spent over \$500,000 on independent expenditures for direct mailings and letters soliciting donations and on television and newspaper advertisements to support Benjamin. Benjamin won the election.

Caperton sought to recuse newly-elected Justice Benjamin three times based upon the financial support Massey's CEO had provided to support his election. The recusal motions were denied. Ultimately, a divided West Virginia Supreme Court of Appeals reversed the \$50 million verdict against Massey.

With the backdrop of these extraordinary facts, the United States Supreme Court granted *certiorari* to decide whether – due to the enormity of the amounts involved – the Due Process Clause of the United States Constitution required Justice Benjamin's recusal. After acknowledging this "exceptional case," the Supreme Court recused Justice Benjamin:

We find that [CEO] Blankenship's significant and disproportionate influence – coupled with the temporal relationship between the election and the pending case – "offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true." [Citations omitted.] On these extreme facts the probability of actual bias rises to an unconstitutional level.

Our decision today addresses an extraordinary situation where the Constitution requires recusal. Massey and its amici predict that various adverse consequences will follow from recognizing a constitutional violation here—ranging from a flood of recusal motions to unnecessary interference with judicial elections. We disagree. The facts now before us are extreme by any

measure. The parties point to no other instance involving judicial campaign contributions that presents a potential for bias comparable to the circumstances in this case. [Emphasis added.]

Caperton, 129 S.Ct. at 2265. In deciding to recuse Justice Benjamin, the Court pointedly said “[n]ot every campaign contribution by a litigant or attorney creates a probability that requires a judge’s recusal, *but this is an exceptional case.*” *Id.*, 2263 (emphasis added.)

Rather than acknowledge the extreme facts of *Caperton* and recognize his “study” fails to include any Louisiana Supreme Court case of a remotely similar nature, Palmer tries to exploit *Caperton* to impugn the integrity of the Justices of the Louisiana Supreme Court. A careful scholar would have read *Caperton* closely and distinguished it from cases not rising to a level requiring judicial recusal. Indeed, post-*Caperton* cases decided by the lower courts, and scholarly articles discussing *Caperton*, are quick to cite the extraordinary facts *Caperton* presented. *See, e.g., E.I. DuPont De Nemours and Company, Inc. v. Aquamar, S.A.*, 24 So.3d 585, 585-586 (Dist. Ct. of App. Fla, 4th Dist. 2009)(“The contributions from attorneys in the firms representing the plaintiffs in this case were all within the statutory permitted amounts, and the cumulative total of \$4650 which the attorneys in the firms contributed to the Judge’s reelection campaign does not approach the \$3 million contribution at issue in *Caperton* [citation omitted]. Contrary to DuPont’s argument, the circumstances of this case are not equivalent, or anywhere close, to those presented in *Caperton*”); *U.S. v. Rodriguez*, 627 F.3d 1372, 1382 (11th Cir. 2010)(“The Court’s holding [in *Caperton*], however, was narrow It noted the ‘extreme facts’ of that case and limited its holding to the ‘extraordinary situation’ where the ‘probability of actual bias rises to an unconstitutional level”); Bopp and Woudenberg, *Extreme Facts, Extraordinary Case: The Sui Generis Recusal Test of Caperton v. Massey*, 60 Syracuse Law Rev. 305 (2010)(*Caperton* “ought to

be extremely limited—indeed, limited to the facts of the Caperton case itself—in light of the extraordinary nature of the case, the structure and language of the decision, and prior Supreme Court precedent”); Todt, *Caperton v. A.T. Massey Coal Co.: The Objective Standard for Judicial Recusal*, 86 Notre Dame L. Rev. 439, 467-468 (2009)(“As of yet, not a single court has found the facts before them to have risen to the extraordinary standard of the three million dollar campaign contribution to Justice Benjamin and required that another judge be disqualified. This illustrates that lower courts will only apply constitutional objective due process standards when *the facts meet the ‘extreme facts’ level of Caperton and that such an outcome will be understandably rare.*”) (Emphasis added.)

Yet Palmer seems uninterested in such distinctions.¹³ He has, it appears, an agenda.

CASES ARE NOT DECIDED ON A COIN-TOSS

Palmer implies that a fair judge would rule for the plaintiff 50% of the time and for the defendant 50% of the time, in the manner of a coin toss. Quoting from Palmer,

Consider flipping a coin to see whether it is balanced and fair. If it is a fair coin, it lands on heads or tails with equal probability, that is, the probability of landing on heads (or tails) is 50%. We give the coin the presumption of being a fair coin.

* * *

Consider a hypothetical judge who hears 100 cases, received many varied donations, and never takes these donations into account. *Presume, for the sake of argument, that this judge cannot be labeled a ‘defendant’s judge’ or a ‘plaintiff’s judge’ so that he or she votes roughly 50% of the time for the defendant.*

¹³ Under Louisiana law, donors can give no more than \$5000 to a judicial campaign committee. Political action committee contributions are capped at \$10,000. See LSA—R.S. 18:1505.2(H)(2)(b)(i) and 1505.2(H)(1)(a)(i), (2)(a)(i).

Palmer, *The Recusal of American Judges in the Post-Caperton Era*, pp. 14 and 21. (Emphasis added.)

Although in passing Palmer recognizes this hypothesis “assumes an even split between meritorious claims of plaintiffs and defendants,” *id.*, p. 14, he presents no evidence that any of the cases he selects represents an “even split” between the claims of “plaintiffs” and “defendants.” While “like cases should be treated alike,”¹⁴ Palmer provides no information about any of the cases in his data set to show whether the Justices did or did not follow established law. Nor does Palmer address the not unusual scenario where the deciders of cases “simply see the facts differently.”¹⁵

Contrary to his implication, Judges who have decided cases on the basis of coin flip have been sanctioned for misconduct. For example, in *In re Judge William H. Daniels*, 340 So.2d 301 (La. 1976), the Louisiana Supreme Court censured a City Court Judge who had, among other things, seemingly decided cases by the flip of a coin. Frowning on such conduct and the appearance it gave to the litigants and the public generally, Justice Walter Marcus, writing for the Louisiana Supreme Court, wrote:

COIN FLIPPING

We find that on numerous occasions during the period in question, respondent engaged in conduct in open court that gave the appearance he was deciding the guilt or innocence of defendants upon the toss of a coin. However, evidence does support respondent’s position that, prior to the coin flipping, a decision of guilt or innocence had already been made by respondent and transmitted by him to his bailiff either on a slip of paper or by a pre-arranged signal. Nevertheless, we agree with the commission that respondent’s conduct gave a

¹⁴ John E. Coons, *Consistency*, 75 CA. L. REV. 59 (1987), citing Aristotle, ETHICA NICOMACHEA V. 3 1131a-1131b (W. Ross trans. 1925), in which Aristotle repeatedly defined justice in terms of equality.

¹⁵ *Id.* at n. 25.

contrary appearance to the public. Such unjudicial conduct cannot be condoned.

Id. at 307.

Palmer's notion of an even 50-50 chance of "winning" a case, as in a coin toss, has been widely criticized in scholarly circles. Professor Adam M. Samaha of the University of Chicago Law School noted:

Assuring adverse parties a 50-50 chance of victory happens to conflict with several conventional commitments in adjudication. A straightforward conflict occurs with respect to the imposition of proof burdens attached to particular elements of a claim or defense. Requiring proof more likely than not on relevant evidence is plainly different from offering a 50 percent chance of victory regardless. This is true whether the elements at issue are hard-line rules or vague standards, and even if litigated cases are more likely to be hard cases. When demand for judgment based on evidence relevant to a given law is strong, the plausibility of randomization fades.

See Adam M. Samaha, *Randomization in Adjudication*, 51 WMMLR 1, 32-33 (October 2009).

Palmer himself recognizes that deciding a case to some degree requires subjective judgment. In his footnote 30, addressing a point these authors made in *The Louisiana Supreme Court Defended: A Rebuttal of The Louisiana Supreme Court in Question*, 69 LA. L. REV. 281, Palmer offers this rationale for excluding from his data set cases unanimously decided:

Of course it is true that 'unanimous' cases are sometimes quite significant. *To determine their significance, however, would involve subjective judgments and inevitably would cause reasonable minds to disagree.* We accordingly sought an objective means of throwing up significant cases that excluded subjective evaluation.

Palmer, *The Recusal of American Judges in the Post-Caperton Era*, p. 11, n. 30 (emphasis added.) In other words, Palmer acknowledges that reading a case may call for the exercise of

subjective judgment, and this could cause reasonable minds to differ on whether a case was or was not “significant.” Oddly, however, the professor shies away from the laborious but essential task, engaged in daily by good lawyers and judges, of reading cases closely and making careful evaluations of the facts and the law. That exercise would impair Palmer’s statistical assumptions.

Palmer likewise ignores the effect statutes and established law play in any of the cases included in his data set. As stated by Justice Benjamin Cardozo, “[o]ne of the most fundamental social interests is that the law shall be uniform and impartial. There must be nothing in its action that savors of prejudice or favor or even arbitrary whim or fitfulness.” Cardozo, Benjamin, *The Nature of the Judicial Process*, Lecture III (New Haven: Yale University Press, 1921). Nowhere in his current tract or in his earlier article does Palmer discuss a single case in any detail, theorize how a case was decided, or consider the settled law that guided any Justice in reaching the conclusion he or she did.

EXAMPLES OF CASES PALMER GOT WRONG

Unconcerned with facts and legal issues, Palmer errs in ascribing how a Justice “voted” in a given case.

A review of only a small portion of Palmer’s data set reveals that he, or possibly one of his “assistants,” did not read the cases in it. Palmer makes errors in designating how a Justice “voted” or glosses over how a seemingly favorable “vote” for a plaintiff or a defendant actually worked against the supposed victor’s interests. Palmer believes a Justice either votes “for a plaintiff” or “for a defendant.” His simplistic approach ignores the complex procedural histories, litigants, and legal issues facing the Supreme Court. Palmer describes his data set as one containing “significant and difficult” issues and cases before the

Court. See *The Recusal of American Judges in the Post-Caperton Era*, *Global Jurist*, p. 10. Yet after explaining the basis for his selection of cases, Palmer never again considers how such “significant” or “difficult” issues may have influenced any Justice in deciding a case. The Reader is left to wonder why Palmer sought to create a data set of “significant and difficult” cases whose significance and difficulty are ignored. Instead, Palmer’s exercise is reduced to coin-tossing and “vote” counting.

As any lawyer knows, in a case with multiple “significant and difficult” issues at stake a Justice may rule in favor of *both* a “plaintiff” and a “defendant.” Additionally, a Justice may side with the majority but indicate he or she would rehear an issue that could change the entire outcome of the decision, niceties Palmer ignores. Thus, to say a Justice definitively sides or “votes” with one party is simplistic and ignores how Louisiana’s highest court actually decides the many and varied issues of a lawsuit.

For example, Palmer’s data set contains the 1994 decision *Steptoe v. Lallie Kemp Hospital*, 93-1359 (La. 3/21/94); 634 So.2d 331. He claims Justice Kimball “voted for defendant.” Justice Kimball dissented from the majority and assigned reasons. Palmer makes the leap that by dissenting, Justice Kimball “voted for” the legal theories presented by the case’s medical malpractice defendants. This merely shows Palmer did not read the case. Justice Kimball did not “vote for” the medical malpractice defendants in *Steptoe* or for the legal arguments they postulated.

In *Steptoe*, survivors of the victim of an automobile accident sued the tortfeasors and the hospital and physician who negligently treated the victim. The survivors obtained a judgment against the tortfeasor drivers. The hospital and physician (medical malpractice defendants) filed peremptory exceptions of no right and no cause of action claiming that the

satisfaction of judgment against the tortfeasor driver released their solidary liability. The trial court denied the malpractice defendants' exceptions and awarded judgment against them for negligently treating the accident victim. The Court of Appeal reversed and maintained the medical malpractice defendants' exceptions, finding the satisfaction of judgments by the tortfeasor driver extinguished the medical malpractice defendants' indebtedness to the survivors. The survivors sought a writ of review.

The majority opinion reinstated the trial court's decision and held that the hospital and physicians were liable for the full extent of the aggravation of the accidental injury caused by their medical treatment. The Supreme Court ruled that the accident tortfeasors' satisfaction of judgment did not extinguish the malpractice defendant's indebtedness to the plaintiffs.

Palmer's data set indicates Justice Kimball "voted for" the medical malpractice defendants, leading the reader to believe she would have adopted the defendants' legal theories and sustained their exceptions of no right and no cause of action. This is not the case. Justice Kimball dissented because, while finding the medical malpractice defendants liable for their negligent treatment of the victim, she would have allowed them a credit to the extent the accident tortfeasor performed the solidary obligation existing between the defendants. Justice Kimball would not have sustained the medical malpractice defendants' exception nor would she have released them from liability. To say that Justice Kimball "voted for" the medical malpractice defendants in *Steptoe* is a mischaracterization of her ruling. It ignores the facts and the holding of the case.

Cases before the Louisiana Supreme Court involve a myriad of "significant and difficult" issues. A majority decision by the Court may involve many separate concurring

decisions and rulings favoring both or either “plaintiffs” and “defendants.” Nor is there always a clear “winner” or “loser” as Palmer simplistically asserts. Such was the case in *BP Oil Company v. Plaquemines Parish Government*, 93-1109 (La. 9/6/94); 651 So.2d 1322. Summarizing the complex facts, BP sued Plaquemines Parish seeking a refund for overpayments of local use taxes on its materials and byproducts. BP also sought to take advantage of several tax exemptions, including the Refinery Gas and Coke-on Catalyst Exclusion. The Supreme Court was called upon to decide novel issues relating to a parish’s taxing authority.

Palmer says Justice Kimball “voted for” the plaintiff in *BP Oil*. But this ignores the facts, the issues at stake, and the case’s actual outcome. The majority opinion, which included Justice Kimball’s “vote,” disposed of many legal issues, some of which favored BP and some of which favored the Parish. For example, the Court ruled Plaquemines Parish exceeded its authority in its valuation method for taxing BP’s refinery gas. This ruling favored BP and gave it a tax refund. On the other hand, the Court rejected BP’s argument that the Refinery Gas and Coke-on Catalyst Exclusion applied to exclude tax. As to that part of the Court’s ruling, BP lost and could not avail itself of the tax break the Refinery Gas and Coke-on Catalyst Exclusion provided. That part of the Court’s ruling clearly did not favor BP. To say Justice Kimball, by joining the majority, “voted for” BP is therefore incorrect. Both sides “won” or “lost” depending upon which taxing issue was decided. *BP Oil* and the many significant and difficult cases like it expose another flaw in Palmer’s thinking: a Justice does not necessarily side with a specific party by joining the majority opinion or by writing a dissent. One has to read and consider carefully each opinion to understand what a Justice or the Court decided or ruled. Palmer fails to perform this basic analysis.

PALMER’S CAMPAIGN CONTRIBUTION ANALYSIS
IS SIMPLISTIC AND MISLEADING

As before, our review of the campaign contribution data Palmer or his assistants assembled indicates his figures are suspect. But, apart from questions of factual accuracy in the data, Palmer’s method of attributing campaign contributions by different law firms to different campaign committees, over a span of many years, and then ascribing such contributions to every attorney of that law firm, makes little sense. Palmer then imputes such contributions to every litigant (in Palmer’s terminology either a “plaintiff” or a “defendant”) represented by that attorney or firm and to a specific Justice who participates in deciding a case. Exacerbating this flaw, Palmer fails to account for law firms which, over an extended period of time, made campaign contributions to almost all of the Justices’ respective campaign committees. Our admittedly non-exhaustive review of Palmer’s data immediately reveals three law firms which donated to six of the seven Justices’ election campaign committees over the fourteen-year time period. Another law firm made campaign contributions to five of the Justices’ campaign committees during the same time period. Under Palmer’s scenario each law firm contribution to each of the Justices’ campaign committees is attributed to each of the firm’s attorneys and then, in turn, to each of the attorney’s clients. To equate such a remote campaign contribution to either a “defendant” or a “plaintiff,” and then to connect a Justice’s “vote” in a case to that particular party, is to wander far afield from the “extraordinary” facts the U. S. Supreme Court faced in *Caperton*, the case Palmer claims his latest effort builds upon.

Further, the manner in which Palmer allocates campaign donations among and between law firms, attorneys, clients (“plaintiffs” or “defendants”) and Justices disregards

the methodology employed in an earlier study to which Palmer repeatedly refers. Although he cites and relies upon an Ohio study *The New York Times* undertook in 2006, Palmer fails to tell his readers that the newspaper *excluded* attorney contributions. Why? Because attorneys “are far more likely than other contributors to give to judges across the ideological spectrum, and they *generally do not have the direct and consistent interest in the outcomes of cases that their many and varied clients do.*” (Emphasis added.)¹⁶ Lawyers, not litigants, have made almost all of the campaign contributions Palmer cites in his article. Simply put, Palmer’s tying a campaign contribution from a law firm to a campaign committee; then to an attorney in the firm; then to a client (“plaintiff” or “defendant”) of the attorney; and then to a Justice is much too tenuous to support the inference Palmer would like his readers to reach.

CAMPAIGN CONTRIBUTIONS MADE WHILE A DECISION IS PENDING

Palmer adds a new twist to his argument on contributions to a Justice’s campaign committee while a case is pending before the Supreme Court. While he never outright alleges *quid pro quo*, Palmer makes the not-too-subtle suggestion that a campaign contribution right before a case is decided influences a Justice’s decision. Examining one case undermines Palmer’s proposition.

On page 27 of his latest article, Palmer cites *Bujol v. Entergy Services, Inc.*, 2003-0492 (La. 5/25/04); 922 So.2d 1113. He notes that within three to five days of the Court’s release of a lengthy written opinion, three law firms contributed to the campaign committee of Justice Victory. But anyone who reads the complicated facts and procedural history of *Bujol* will realize that Justice Victory did not cast a belated “vote” *and then research and*

¹⁶ *How Information Was Collected*, N.Y. Times, Sept. 30, 2006, <http://www.nytimes.com/2006/09/30/us/01judges.web.html>.

write a thirty-four page opinion in Bujol in four or five days. Clearly, the opinion – infused with case law and legal analysis – was months in the writing. Although the internal operating procedures of the Louisiana Supreme Court are confidential, it is obvious that the Justices need sufficient time to write and review draft opinions in “significant and difficult” cases. They need time to research and draft concurrences or dissents. In addition, adequate time must elapse between when a Justice casts his or her “vote” on a case and the time when the opinion is rendered to allow the Clerk’s office to prepare the opinion for public dissemination, including having copies available to counsel of record (over one hundred in the *Bujol* case), posting the decision on the Court’s website, and having copies available for the public. Palmer’s suggestion that a Justice could write a lengthy opinion, and that the other Justices could consider and vote on that opinion, all within days or hours of the decision’s publication, is ludicrous.

Moreover, if one reads *Bujol*, Palmer’s postulate is revealed as impracticable and absurd. Although Palmer prefers to keep his readers in the dark about the facts, the authors of this paper want the fair-minded reader to reach his or her own conclusion. Attached to this article as Appendix 3 is the Supreme Court’s thirty-four page decision in *Bujol*, along with sixteen pages of dissenting opinions. The Reader can decide for himself or herself whether a last-minute contribution to a campaign committee influenced the outcome of *Bujol*.

Finally, Palmer’s reckless comments undermine the basis upon which our legal foundation rests: a “presumption of honesty and integrity in those serving as adjudicators.” *Withrow v. Larkin*, 421 U.S. 35, 47, 95 S.Ct. 1456 (1975). All judges take an oath to uphold the Constitution and apply the law impartially, and our legal system must trust they will live

up to this promise. *See Republican Party of Minn. v. White*, 536 U.S. 765, 796, 122 S.Ct. 2528 (2002) (KENNEDY, J., concurring) (“We should not, even by inadvertence, ‘impute to judges a lack of firmness, wisdom, or honor’” (quoting *Bridges v. California*, 314 U.S. 252, 273, 62 S.Ct. 190 (1941))). Palmer’s *ipso facto* conclusions reveal more about his agenda than they do about the real-world workings of the Louisiana Supreme Court.

CONCLUSION

Errors in the Palmer’s first article, noted in our original rebuttal, remain uncorrected in this second go-round. These errors include, but are not limited to: excluding unanimous cases as “simple and routine;” making flatly wrong or misleading classifications about which party “won” and which party “lost;” and omitting factual or legal analysis of any particular case. In his new version, Palmer concedes that taking into account unanimous decisions would require him to do something he does not wish to do: *read* a Supreme Court decision and fashion an opinion about how it was decided – an opinion on which reasonable minds may differ.

Palmer never addresses the central problem with his proposal for automatic recusal of judges whose respective election committees received contributions from a party’s attorney or a party – namely, that the proposed “solution” would give rise to “strategic contributions” designed to recuse a judge whom a particular litigant or attorney did not want to serve on a judicial panel *because of the judge’s perceived judicial philosophy*.

In the end, there is nothing wrong with honest debate regarding the circumstances under which a judge should be called upon to recuse himself or herself from a particular case. As Palmer notes, certain states have adopted a monetary threshold of campaign contributions beyond which they believe judicial recusal is appropriate. Others, like

Louisiana, have had in place reasonable monetary limits on campaign contributions for a substantial period of time, and therefore judicial elections are not subject to the extreme circumstances presented by *Caperton*. But such honest discussion need not be contaminated by unproven — and reckless — insinuations. Put another way, the integrity of the Justices of the Louisiana Supreme Court should not be called into question by someone possessing no evidence upon which to question their integrity. Based on the available record, it is Professor Palmer who has much to answer for, but who does not appear willing to admit that he has made many and profound errors or to apologize for those mistakes and the harm they caused. Rather, we deal with a professor who persists in making the same mistakes and in casting the same unwarranted aspersions. The objective reader must conclude, as we do, that Palmer's thesis remains unsupported and unfair, and that it is unworthy of publication in any serious journal.

APPENDIX 1

Comments of Dr. L. W. Shell

Distinguished Service Professor of Management, retired

Nicholls State University

Comments on Vernon V. Palmer's "The Recusal of American Judges in the Post-Caperton Era: An Empirical Assessment of the Risk of Actual Bias in Decisions Involving Campaign Contributions, in Global Jurist, Vol. 10 [2010], Issue 3 (Frontiers).

By L. W. Shell

Distinguished Service Professor of Management, retired
Nicholls State University

What's Wrong with Palmer's Analysis?

Palmer has made false statements in his Summary of Findings. In his summary points 5, 6, 7, and 9, he claims that campaign contributions influence judicial behavior without noting that his underlying regression results are not significant. Palmer has produced and interpreted graphs as though they were meaningful, even though the graphs resulted from hypothesis tests that were not statistically significant. The graphs have no meaning and should not have been produced.

Let's examine how statistical testing works. Palmer's research asks a reasonable question: are judicial votes influenced by campaign contributions? He formulates "hypotheses"—claims that he will test with numerical evidence—that larger campaign contributions lead to a higher probability of favorable votes. Such a cause-and-effect relationship is a regression of campaign contributions on judicial voting behavior.

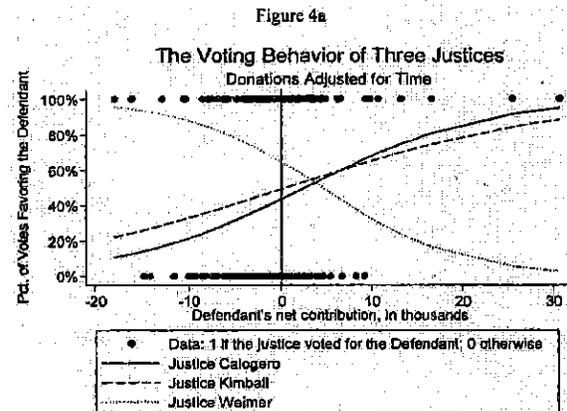
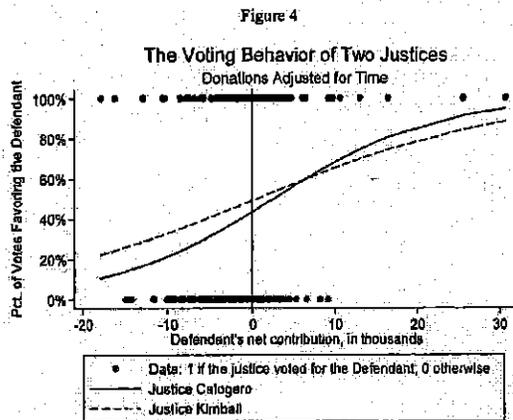
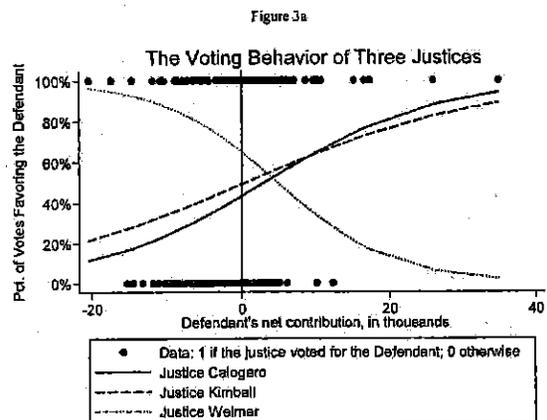
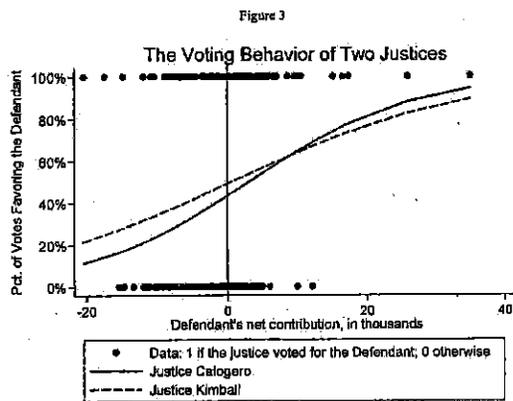
But data underlying tests such as these are rarely orderly and perfectly in line. Data values (voting behavior) may be affected by any manner of outside influences, not just the single variable (campaign contributions) set forth in the hypotheses. For all we know, there are influences of unknown size from weather, delays in postal service, who won the LSU football game the week before, and perhaps even the price of tea in China. These seemingly random elements contribute "noise" to the data. The more noise, the more difficult it is to see the sought-after variable's influence above the noise. That's what statistical hypothesis testing is about—it is a standardized method for determining whether the sought-after variable's influence is strong enough to stand above the noise and therefore be "significant." In Palmer's case, the effect of campaign contributions does not rise sufficiently above the noise. The measured effects of campaign contributions on judicial behavior could just as easily be explained by chance alone. He cannot "prove" that campaign contributions influence judicial voting behavior. His regression results as shown in Tables 4 and 5, and in Figures, 3, 3a, 4, and 4a are all "not significant".

There's nothing wrong with conducting hypothesis tests and finding that the results are not significant. That happens quite frequently in academic research. But there is something

wrong with making claims based on what was found to be not significant. To claim that there is an increased probability of a vote for a defendant, when there is no valid regression on which to base that increase, is in error.

Palmer conducted 14 hypothesis tests (seven justices, two versions of the contribution database) to determine whether there was a cause-and-effect relationship between campaign contributions and the probability of a favorable vote. His evidence—which was the logit-regressions and the prob-values for each—found no relationships, no cause-and-effect. None of the 14 tests had a prob-value small enough (that is, under 0.05 or 5%) to conclude “this cannot be the result of chance alone.” But that is not what he wrote in his Summary of Findings.

Figures 3, 3a, 4, and 4a (displayed below for ease of reference) each display S-shaped curves that are purported to show possibly inappropriate behavior by individual justices or by the court. The upward slope of (most) curves seems to show that greater contribution leads to higher probability of favorable vote. The regression calculations are done by standardized formulas—there will be a slope and a curvature. But that does not establish that the results are significant.



In fact, none of the 14 underlying regressions is significant! Despite the apparent S-shape and upward slope, the curves that appear in these figures have no more meaning than the baseline figure that Palmer created from purely random numbers in his Figure 2. The curves do not look flat, but they are no different from flat in the mind of a statistician, because no cause-and-effect is established. To use Palmer's own logic from the bottom of page 21, the S-curves of Figure 3 and 3a should also be identified as not distinguishable from random error.

An interesting aside should be noted here. Palmer shows two justices' patterns in Figure 3, and adds a third justice in Figure 3a; this is repeated in Figure 4 and 4a. Palmer's explanation is that he was correcting a miscalculation in the 2008 manuscript. He concludes that the third justice's voting pattern has "a downward slope, and therefore without a time-adjusted correlation to contributions." This is simply not so. The justice's behavior is not without a correlation; it has a negative correlation. The interpretation of a downward slope (if it were significant!) would be that larger contributions result in a smaller probability of a favorable vote. None of the fourteen tests were significant; none of the six drawn curves is meaningful. But did Palmer dismiss two calculations that seem to contradict his hypotheses, claiming "no correlation"?

Palmer appears to have forgotten that his regression results were "not significant" when he wrote the "Summary of the Findings" section of the manuscript. For each of his findings 5, 6, 7, and 9, he claims that a donation is estimated to increase the probability of a favorable vote by a specific percent (which varies from Finding to Finding). But his stated increase in probability comes from the "not significant" and therefore meaningless regression slope. Palmer's claims 5, 6, 7, and 9 are simply false claims, not supported by his research. Palmer has no findings to report in these four areas. Here is what Palmer could have concluded, but did not: "The statistical evidence did not support a positive relationship between size or timing of contribution and probability of a favorable vote. If there is such a relationship, the evidence was not sufficient to prove it."

APPENDIX 2

Second Paper/Second Critique: Why Does Causality Matter?

Robert Newman, Professor of Economics,
Louisiana State University

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Louisiana State University

Second Paper/Second Critique: Why does Causality Matter?

Robert Newman
Professor of Economics
Louisiana State University

Dek Terrell
Professor of Economics
Louisiana State University

Professor Vernon Palmer has updated an earlier paper that he co-authored with Professor John Levendis.¹ The original article suffered from numerous errors in the data set and an inaccurate interpretation of statistical /econometric techniques. This article purports to correct the data issues, but still contains a fundamentally flawed set of conclusions from correlation and regression analysis.

The major challenge for Prof. Palmer's article is a failure to accurately define the topic of interest. A portion of the article focuses on a court case, the Caperton decision,² related qualitative discussion of the decision by justices to recuse themselves in particular cases, and its impact on public opinion. The focus then shifts to a rather odd empirical study.

In our critique of the first paper, we pointed out the fundamental error in their methodology.³ That is, a failure to explicitly (or implicitly) recognize the probable simultaneity between the effect of campaign contributions on judicial decisions and the effect of judicial decisions on campaign contributions. Econometrically, this means that the level of campaign contributions is *jointly endogenous* and absolutely requires the estimation of a second equation. Prof. Palmer's method of addressing this issue is puzzling at best.

Simply stated the empirical work by Palmer is logically inconsistent. On page 5, the new article states:

"It should be emphasized that these conclusions do not purport to be a causal demonstration of actual bias on the part of the justices."⁴

Footnote 12 accurately points out a similar statement in the Palmer and Levendis original article:

¹ Vernon V. Palmer, "The Recusal of American Judges in the Post-Caperton Era: An Empirical Assessment of the Risk of Actual Bias in Decisions Involving Campaign Contributors," *Global Jurist* (2010). Vernon Valentine Palmer & John Levendis, "The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function," 82 *Tulane Law Review* (2008).

² Caperton v. A.T. Massey Coal Co. 556 U.S. ____ (2009) (decided June 8, 2009)

³ Robert Newman, Janet Speyrer & Dek Terrell, "A Methodological Critique of *The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function*," 69 *Louisiana Law Review* (2009).

⁴ Vernon V. Palmer, "The Recusal of American Judges in the Post-Caperton Era: An Empirical Assessment of the Risk of Actual Bias in Decisions Involving Campaign Contributors," *Global Jurist* (2010, page 5)

“It is worth observing that the Article does not claim that there is a cause and effect relationship between prior donations and judicial votes in favor of donor’s positions. It asserts instead that there is evidence of a statistically significant correlation between the two.”

Why is causality even an issue given a clear statement in both articles that neither attempts to establish a causal relationship? The answer is that both the logistic regression technique used in the article and the interpretation of results in the paper clearly does imply causation. Consider the following:

“The odds that Justice Calogero would vote for the defendants position increase by 9% with each donation of \$1000.”

“The odds that Justice Kimball would take the defendant’s position increase by 6% with each donation of \$1000.”

“A donation within a month of the decision is estimated to increase the odds of a favorable vote by Justice Johnson by 21%, by Justice Calogero by 11% and from Justice Kimball by 7%.”

“An extra \$1000 of net donations increased the odds of a favorable vote by 11%.”

There is no complex statistical concept embedded the statements above. Odds in the logistic model are interpreted the same as odds on a sporting event. Perhaps economists and statisticians have a different notion of causality than legal scholars, but it is difficult for us to see the statements above as anything but a claim of a cause and effect relationship.

To understand how the article arrives at these erroneous statements, it is worthwhile to consider the discussion of basic ideas behind regression in a textbook. The textbook cited by the article, Gujarati (1995), introduces regression with the statement:

“Regression analysis is concerned with the study of the dependence of one variable, the dependent *variable*, on one or more other variables, the explanatory variables, with a view to estimating and/or predicting the (population) mean or average value of the former in terms of the known or fixed (in repeated sampling) values of the latter.”

In layman’s terms, regression models seek to use explain the value of one variable based on others. Implicitly bedded in the basic regression model is an assumption of one way causality. In Prof. Palmer’s model, the assumption is that contributions influence the decisions of justices and that donors are not influenced by the voting record of justices. The use of regression implies an assumption of one way causality – one not supported by the literature and also an assumption that the author directly states that he is not making.

The importance of causality is rather obvious to econometricians. As Woolridge states in the Introduction of his textbook,

“Simply finding an association between two or more variables might be suggestive, but unless causality can be established, it is rarely compelling.”⁵

Consider the implications of taking the author at his word (or correctly interpreting these results in light of the literature) and not asserting causality. Without the assumption of causality the results do not imply that a \$1000 contribution has any impact on the decisions of any justice. All of the above statements on the relationship between contributions and odds should then be replaced by the more accurate statement:

“This article provides no evidence on whether a \$1000 contribution increases odds of a favorable vote for either the defendant or plaintiff by any justice.”

Before leaving the topic of causality, one may ask whether it is possible to determine whether reverse causality exists in the data. A careful analysis would require specifying a second equation for contributions and collecting the data to estimate that equation as well. However, there is one simple idea that could shed light on the subject. The central idea is that donors would prefer to contribute to those who share their worldview. Justices become better known with more time on the Court -- thus, we should find that correlations are stronger for longer serving justices if they reflect reverse causation.

Given that the erroneous treatment of causation biases Prof. Palmer towards finding that contributions do influence decisions of Justices, one would expect strong results in the logistic regressions. That is not the case. In fact, one cannot reject at a 5% significance level that the author finds no evidence of any relationships between contributions and voting behavior in Tables 4 and 5.

The S-Curves presented lack one crucial piece of information. For every Justice, a 95% confidence interval includes both upward sloping and downward sloping curves. Using Prof. Palmer's interpretation, the reduction in the probability of Justice Weimer voting for the defendant after a \$1000 contribution is even larger than the increase in Justice Kimball's probability of voting for the defendant. When one considers the margin of error, both results are meaningless.

The Palmer article can perhaps be divided into legal discussion, anecdotal evidence from Louisiana cases and an empirical study based on 425 instances over a roughly 14 year period where Louisiana Justices ruled on a case involving a contributor. The paper suffers from severe problems in terms of both model specification and interpretation of results. Overall, the empirical work fails to make any meaningful contribution to our understanding of the relationship between campaign contributions and voting behavior of Justices or other elected officials.

⁵ Woolridge, Jeffrey M., *Introductory Econometrics*, p. 13.

APPENDIX 3

Bujol v. Entergy Services, Inc., 2003-0492 (La. 5/25/04);
922 So.2d 1113

922 So.2d 1113, 2003-0492 (La. 5/25/04)

(Cite as: 922 So.2d 1113, 2003-0492 (La. 5/25/04))



Supreme Court of Louisiana.

Joseph BUJOL, III, et al.

v.

ENTERGY SERVICES, INC., et al.

Don A. Perkins, et al.

v.

Entergy Services, Inc., et al.

Nos. 2003-C-0492, 2003-C-0502.

May 25, 2004.

Rehearing Granted Oct. 29, 2004.

Opinion Granting Rehearing Jan. 19, 2006.

Order Denying Consideration March 10, 2006.

Background: Injured air-separation plant employees and survivors of plant employee who died as a result of his injuries from oxygen flash fire sued insurers of plant owner's parent company and sister company. After jury verdict for plaintiffs, the 18th Judicial District Court, Parish of Iberville, No. 47095 c/w 47096, Jack T. Marionneaux, J., partially granted motion for judgment notwithstanding the verdict (JNOV) and reduced compensatory damages. Insurers appealed and survivors answered appeal. The Court of Appeal, 833 So.2d 947, affirmed in part, amended in part, reversed in part, and remanded.

Holdings: Insurers filed separate applications for certiorari. After granting both writ applications and consolidating the matters, the Supreme Court, Victory, J., held that:

[1] parent company did not affirmatively undertake any duty to provide subsidiary's employees with a reasonably safe place to work by issuing any mandatory safety standards requiring establishment of barrier walls around valves;

[2] parent company's alleged failure to exercise reasonable care in requiring subsidiary to erect barrier walls did not increase risk of harm to employees;

[3] parent company did not intend to supplant sub-

subsidiary's duty to provide its employees with a reasonably safe place to work; and

[4] harm to employees was not suffered due to any reliance on any undertaking by parent corporation to provide for safety at plant.

Reversed; cases dismissed; rehearing granted; consideration denied.

Johnson, J., dissented and assigned reasons, and dissented on rehearing and assigned reasons.

Knoll, J., dissented on rehearing and assigned reasons, and dissented on denial of consideration.

See also *Perkins v. Entergy Corp.*, 782 So.2d 606.

West Headnotes

[1] Corporations and Business Organizations 101 ↪1011

101 Corporations and Business Organizations
 1011 Nature and Theory of Incorporation
 101k1010 Corporation as Distinct Entity
 101k1011 k. In general. Most Cited Cases
 (Formerly 101k1.3)

Corporations and Business Organizations 101 ↪1640

101 Corporations and Business Organizations
 101VI Shareholders and Members
 101VI(D) Liability for Corporate Debts and Acts
 101k1640 k. In general. Most Cited Cases
 (Formerly 101k215)

Corporations and Business Organizations 101 ↪1645

101 Corporations and Business Organizations

922 So.2d 1113, 2003-0492 (La. 5/25/04)
 (Cite as: 922 So.2d 1113, 2003-0492 (La. 5/25/04))

101VI Shareholders and Members

101VI(D) Liability for Corporate Debts and Acts

101k1643 Nature and Grounds in General

101k1645 k. Parent and subsidiary corporations. Most Cited Cases

(Formerly 101k215)

A corporation is a legal entity distinct from its shareholders and the shareholders of a corporation organized after January 1, 1929 shall not be personally liable for any debt or liability of the corporation; the same principle applies where one corporation wholly owns another. LSA-R.S. 12:93(B).

[2] Corporations and Business Organizations

101 ↪1535

101 Corporations and Business Organizations

101VI Shareholders and Members

101VI(B) Rights and Liabilities as to Corporation and Other Shareholders or Members

101k1534 Management of Corporate Affairs in General

101k1535 k. In general. Most Cited

Cases

(Formerly 101k180)

Corporations and Business Organizations 101

↪1645

101 Corporations and Business Organizations

101VI Shareholders and Members

101VI(D) Liability for Corporate Debts and Acts

101k1643 Nature and Grounds in General

101k1645 k. Parent and subsidiary corporations. Most Cited Cases

(Formerly 101k215)

While generally a parent corporation, by virtue of its ownership interest, has the right, power, and ability to control its subsidiary, a parent corporation generally has no duty to control the actions of its subsidiary and thus no liability for a failure to control the actions of its subsidiary.

[3] Corporations and Business Organizations

101 ↪1001

101 Corporations and Business Organizations

101I Nature and Theory of Incorporation

101k1001 k. In general. Most Cited Cases (Formerly 101k1)

The fundamental purpose of the corporate form is to promote capital by enabling investors to make capital contributions to corporations while insulating separate corporate and personal asset from the risks inherent in business.

[4] Corporations and Business Organizations

101 ↪2505

101 Corporations and Business Organizations

101IX Corporate Powers and Liabilities

101IX(E) Torts

101k2505 k. Negligence. Most Cited Cases

(Formerly 101k488)

A parent corporation, just like any other person or entity, can be held liable for its own direct acts of negligence.

[5] Labor and Employment 231H ↪2750

231H Labor and Employment

231HXVII Employer's Liability to Employees

231HXVII(A) In General

231HXVII(A)1 Nature and Scope of Employer's Duty

231Hk2750 k. In general. Most Cited Cases

Under Louisiana jurisprudence, parties who voluntarily assume certain duties for workplace safety must perform those duties in a reasonable and prudent manner.

[6] Negligence 272 ↪218

272 Negligence

272II Necessity and Existence of Duty

272k217 Voluntarily Assumed Duty

272k218 k. In general. Most Cited Cases

An assumption of duty arises when the defendant (1) undertakes to render services, (2) to another,

922 So.2d 1113, 2003-0492 (La. 5/25/04)
 (Cite as: 922 So.2d 1113, 2003-0492 (La. 5/25/04))

(3) which the defendant should recognize as necessary for the protection of a third person. Restatement (Second) of Torts § 324A.

[7] Negligence 272 ↪218

272 Negligence

272II Necessity and Existence of Duty

272k217 Voluntarily Assumed Duty

272k218 k. In general. Most Cited Cases

Negligence 272 ↪371

272 Negligence

272XIII Proximate Cause

272k371 k. Necessity of causation. Most Cited Cases

Negligence 272 ↪1010

272 Negligence

272XVII Premises Liability

272XVII(B) Necessity and Existence of Duty

272k1010 k. In general. Most Cited Cases

Even if a plaintiff proves the assumption of a duty and proves that the defendant failed to exercise reasonable care to perform this undertaking, he can only recover if he further proves that either (1) the defendant's failure to exercise reasonable care increased the risk of such harm, or (2) the defendant has undertaken to perform a duty owed by the employer to the injured employee, or (3) harm is suffered because of reliance of the employer or the injured employee upon the undertaking. Restatement (Second) of Torts § 324A.

[8] Appeal and Error 30 ↪893(1)

30 Appeal and Error

30XVI Review

30XVI(F) Trial De Novo

30k892 Trial De Novo

30k893 Cases Triable in Appellate

Court

30k893(1) k. In general. Most Cited

Cases

Supreme Court reviewed issue of parent cor-

poration's alleged assumption of duty of safety at subsidiary under de novo standard of review, as jury could not have applied correct law due to lack of jury instructions on issue and that could have affected outcome of employees' personal injury action against parent corporation. Restatement (Second) of Torts § 324A.

[9] Negligence 272 ↪1692

272 Negligence

272XVIII Actions

272XVIII(D) Questions for Jury and Directed Verdicts

272k1692 k. Duty as question of fact or law generally. Most Cited Cases

Whether a duty is owed is a question of law.

[10] Appeal and Error 30 ↪999(1)

30 Appeal and Error

30XVI Review

30XVI(I) Questions of Fact, Verdicts, and Findings

30XVI(I)2 Verdicts

30k999 Conclusiveness in General

30k999(1) k. In general. Most Cited

Cases

The manifest error rule assumes that the trier of fact applied the correct law in reaching its conclusion.

[11] Appeal and Error 30 ↪893(3)

30 Appeal and Error

30XVI Review

30XVI(F) Trial De Novo

30k892 Trial De Novo

30k893 Cases Triable in Appellate

Court

30k893(3) k. Trial in appellate court on reversal. Most Cited Cases

Appeal and Error 30 ↪999(1)

30 Appeal and Error

30XVI Review

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30XVI(I) Questions of Fact, Verdicts, and Findings

30XVI(I)2 Verdicts

30k999 Conclusiveness in General

30k999(1) k. In general. Most Cited

Cases

If the trier of fact applied the incorrect law because of erroneous and prejudicial jury instructions, and if the appellate court determines the error could have affected the outcome below, the manifest error rule does not apply, and the appellate court makes an independent determination of the facts from the record on appeal.

[12] Corporations and Business Organizations

101 ↪1645

101 Corporations and Business Organizations

101VI Shareholders and Members

101VI(D) Liability for Corporate Debts and Acts

101k1643 Nature and Grounds in General

101k1645 k. Parent and subsidiary corporations. Most Cited Cases

(Formerly 101k215)

Labor and Employment 231H ↪2764

231H Labor and Employment

231HXVII Employer's Liability to Employees

231HXVII(A) In General

231HXVII(A)1 Nature and Scope of Employer's Duty

231Hk2763 Relationship Between Parties

231Hk2764 k. In general. Most Cited Cases

The court will not lightly assume that a parent corporation has agreed to accept the subsidiary-employer's duty to provide a safe workplace absent proof of an affirmative undertaking of that duty by the parent corporation. Restatement (Second) of Torts § 324A.

[13] Corporations and Business Organizations

101 ↪1654

101 Corporations and Business Organizations

101VI Shareholders and Members

101VI(D) Liability for Corporate Debts and Acts

101k1654 k. Participation in unauthorized or wrongful acts of corporation. Most Cited Cases (Formerly 101k223)

Labor and Employment 231H ↪2764

231H Labor and Employment

231HXVII Employer's Liability to Employees

231HXVII(A) In General

231HXVII(A)1 Nature and Scope of Employer's Duty

231Hk2763 Relationship Between Parties

231Hk2764 k. In general. Most Cited Cases

Neither a parent's concern with safety conditions and its general communications with the subsidiary regarding safety matters, nor its superior knowledge and expertise regarding safety issues, will create in the parent corporation a duty to guarantee a safe working environment for its subsidiary's employees. Restatement (Second) of Torts § 324A.

[14] Corporations and Business Organizations

101 ↪1654

101 Corporations and Business Organizations

101VI Shareholders and Members

101VI(D) Liability for Corporate Debts and Acts

101k1654 k. Participation in unauthorized or wrongful acts of corporation. Most Cited Cases (Formerly 101k223)

Explosives 164 ↪10

164 Explosives

164k6 Injuries from Accidental Explosions

164k10 k. Illegal or negligent use. Most Cited Cases

Parent corporation, whose subsidiary owned

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plant at which explosion occurred, did not affirmatively undertake any duty to provide subsidiary's employees with a reasonably safe place to work by issuing any mandatory safety standards requiring establishment of barrier walls around valves; parent corporation only established safety recommendations, not mandatory guidelines, parent corporation did not issue safety recommendation to particular subsidiary where employees worked, and recommendations did not require use of barrier walls around valves at issue. Restatement (Second) of Torts § 324A.

[15] Corporations and Business Organizations
101 ↪1654

101 Corporations and Business Organizations
 101VI Shareholders and Members
 101VI(D) Liability for Corporate Debts and Acts

101k1654 k. Participation in unauthorized or wrongful acts of corporation. Most Cited Cases (Formerly 101k223)

Explosives 164 ↪10

164 Explosives
 164k6 Injuries from Accidental Explosions
 164k10 k. Illegal or negligent use. Most Cited Cases

Parent corporation's alleged failure to exercise reasonable care in requiring subsidiary to erect barrier walls at air-separation plant did not increase risk of harm to subsidiary's employees who were injured in explosion, as lack of walls existed for many years before parent acquired subsidiary and there was no physical change resulting from the lack of barrier walls. Restatement (Second) of Torts § 324A(a).

[16] Corporations and Business Organizations
101 ↪1654

101 Corporations and Business Organizations
 101VI Shareholders and Members
 101VI(D) Liability for Corporate Debts and

Acts

101k1654 k. Participation in unauthorized or wrongful acts of corporation. Most Cited Cases (Formerly 101k223)

A plaintiff must prove that a parent corporation's breach of its assumed duty resulted in an increased risk of harm; this requires some change in conditions that increases the risk of harm to the plaintiff over the level of risk that existed before the defendant became involved. Restatement (Second) of Torts § 324A.

[17] Corporations and Business Organizations
101 ↪1654

101 Corporations and Business Organizations
 101VI Shareholders and Members
 101VI(D) Liability for Corporate Debts and Acts

101k1654 k. Participation in unauthorized or wrongful acts of corporation. Most Cited Cases (Formerly 101k223)

Explosives 164 ↪10

164 Explosives
 164k6 Injuries from Accidental Explosions
 164k10 k. Illegal or negligent use. Most Cited Cases

Parent corporation did not intend to supplant subsidiary air separation company's duty to provide its employees with a reasonably safe place to work with regard to either the entire plant or the specific valves and pipelines at issue in employees' action for injuries suffered in explosion at plant, where subsidiary had its own safety management in place and its own safety rules, parent corporation exercised no authority to compel subsidiary to comply with safety recommendations regarding barrier walls and never sought to do so, and parent corporation never audited or inspected plant. Restatement (Second) of Torts § 324A(b).

[18] Corporations and Business Organizations
101 ↪1654

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 101VI Shareholders and Members
 101VI(D) Liability for Corporate Debts and Acts
 101k1654 k. Participation in unauthorized or wrongful acts of corporation. Most Cited Cases (Formerly 101k223)

Explosives 164 ↪10

164 Explosives
 164k6 Injuries from Accidental Explosions
 164k10 k. Illegal or negligent use. Most Cited Cases

Harm to employees injured in valve explosion at subsidiary's air separation plant was not suffered because of reliance on any undertaking by parent corporation to provide for safety at plant, so as to make parent corporation liable for injuries due to assumption of duty of safety at subsidiary, as subsidiary relied solely on prior owner and subsequently itself to provide for safety at its own plant. Restatement (Second) of Torts § 324A(c).

[19] Damages 115 ↪87(1)

115 Damages
 115V Exemplary Damages
 115k87 Nature and Theory of Damages Additional to Compensation
 115k87(1) k. In general. Most Cited Cases
 When a statute authorizes the imposition of punitive damages, the statute is subject to strict construction.

[20] Appeal and Error 30 ↪999(1)

30 Appeal and Error
 30XVI Review
 30XVI(I) Questions of Fact, Verdicts, and Findings
 30XVI(I)2 Verdicts
 30k999 Conclusiveness in General
 30k999(1) k. In general. Most Cited Cases
 Absent a finding that the trier of fact applied

the incorrect law because of erroneous and prejudicial jury instructions, an appellate court should not upset a jury verdict unless it finds that it is manifestly erroneous or clearly wrong.

[21] Appeal and Error 30 ↪893(3)

30 Appeal and Error
 30XVI Review
 30XVI(F) Trial De Novo
 30k892 Trial De Novo
 30k893 Cases Triable in Appellate Court
 30k893(3) k. Trial in appellate court on reversal. Most Cited Cases

When an appellate court finds prejudicial error that has affected the factfinding process at trial, the jury verdict is not due any deference, de novo review applies, and the appellate court is at liberty to make an independent decision based on the record evidence.

[22] Corporations and Business Organizations 101 ↪1654

101 Corporations and Business Organizations
 101VI Shareholders and Members
 101VI(D) Liability for Corporate Debts and Acts
 101k1654 k. Participation in unauthorized or wrongful acts of corporation. Most Cited Cases (Formerly 101k223)

Generally, a parent corporation may be liable for unsafe conditions at a subsidiary only if parent corporation assumes a duty to act by affirmatively undertaking to provide a safe working environment; communication or concern over safety matters is not enough. Restatement (Second) of Torts § 324A.

[23] Corporations and Business Organizations 101 ↪1654

101 Corporations and Business Organizations
 101VI Shareholders and Members
 101VI(D) Liability for Corporate Debts and Acts

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101k1654 k. Participation in unauthorized or wrongful acts of corporation. Most Cited Cases (Formerly 101k223)

A parent corporation's liability for a voluntary assumption of duty owed by subsidiary to provide employees with a reasonably safe place to work cannot be based on a failure to assume a duty, but is instead created when parent corporation assumes a duty to act by affirmatively undertaking to provide a safe working environment to the extent that by its actions it has totally supplanted and taken over subsidiary's duty and then breaches duty it has affirmatively undertaken. Restatement (Second) of Torts § 324A(b).

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*1119 James Anthony Babst, New Orleans, Counsel for Louisiana Association/Business & Industry (Amicus Curiae), on Rehearing.

VICTORY, J.^{FN*}

FN* Retired Judge Phillip C. Ciaccio, assigned as Associate Justice *ad hoc*, sitting for Associate Justice John L. Weimer, recused.

**1 We granted these writ applications to determine (1) whether the evidence presented was sufficient to support the jury's conclusion that a parent corporation, Air Liquide, S.A. ("ALSA"), assumed the duty for the safety of a plant owned by a subsidiary corporation, Air Liquide America Corporation ("ALAC"), and, if so, (2) whether the parent corporation may be cast in judgment for exemplary damages pursuant to the provisions of repealed La. C.C. art. 2315.3, as interpreted by this Court in *Ross v. Conoco*, 02-0299 (La.10/15/02), 828 So.2d 546. After a review of the record and the applicable law, we reverse the jury's finding that ALSA assumed the duty for safety at ALAC's plant and therefore reverse the award of compensatory damages for breach of that duty. We further reverse the jury's award of exemplary damages as the plaintiffs are not entitled to such damages under the applicable law.

FACTS AND PROCEDURAL HISTORY

ALSA has a worldwide air-separation business, headquartered in France, with facilities in more than 60 countries. In 1986, American Air Liquide, an ALSA subsidiary, acquired Big Three Industries, Inc. ("Big Three"), a major oxygen pipeline **2 systems operator in the United States which oper-

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ated air-separation plants throughout the Gulf South, including a plant in Plaquemine, Louisiana. The Plaquemine plant was constructed in 1977, and was operated under the Big Three name until 1994, when Big Three was merged with another ALSA subsidiary, Liquid Air Corporation. As a result of the merger, the newly formed company became ALAC. Though ALSA is the ultimate majority shareholder of ALAC, it is not its direct parent. Through a mechanism described as "cascading ownership," ALSA owns the majority of shares of Air Liquide International, S.A., which owns the majority of shares of American Air Liquide, Inc., which owns the majority of shares of AL American Holdings, which owns the shares of ALAC.

On April 6, 1994, a power failure occurred at the air-separation facility located in Plaquemine, owned and operated by ALAC.^{FN1} The facility, which consisted of four air separation plants, was temporarily shut down as a result of the "voltage sag," and efforts were made to restart the plants once the power was restored. Plaintiff, Don Perkins, was working at the facility when the facility shut down. Plaintiff, Joseph Bujol and decedent, Ray Hracek, were among the employees who were called in to restart the plants.

FN1. The nature of the air separation business was to draw air into "air machines," where the oxygen, nitrogen, and argon is separated via a cryogenic process. The air is then liquified and sold. The core business of the Air Liquide conglomerate is to supply oxygen, nitrogen, hydrogen, and other gases and services to various industries.

The evidence reveals that three of the four plants had been restarted when a malfunction was noted in an automatic pressure control valve of an oxygen pipeline distribution system located in the facility's let-down station.^{FN2} The automatic *1120 control valve was regulating differential pressures between a 700 psi oxygen pipeline supplying Exxon and a 400 psi pipeline supplying oth-

er customers. In order to address the problem with the automatic control valve, typically workers would close the manual valve which would cut the flow from the 700 psi pipe upstream from the automatic pressure control valve. This manual valve was a backup to the automatic pressure **3 control valve. The automatic valve and the manual valve were located a few feet apart between the 400 and the 700 psi systems.

FN2. The purposes of the let-down station were two-fold: (1) to control the flow and pressure of gaseous oxygen into separate pipelines with different pressures, and (2) to facilitate the distribution of oxygen from the facility's oxygen backup system.

Hracek, the plant manager, went to the letdown station to attempt to correct the malfunctioning automatic control valve, and instructed Bujol and Perkins to close the manual valve, which was done by turning a large wheel. The wheel was difficult to turn and the manual valve normally took ten minutes for two people to close. Perkins and Bujol had turned the wheel approximately 180 degrees, when Hracek advised them to stop. They stepped toward the automatic valve and Hracek climbed inside the loop of piping that formed the let-down station while the other two men watched. They were close enough to the automatic control valve for Bujol to see it cycle open and then abruptly close. A flash fire immediately erupted from the automatic valve and all three employees were severely burned. Hracek, Bujol, and Perkins were transported to a local hospital in Plaquemine. Because of the severity of their injuries, they were immediately transported to the Burn Unit at Baton Rouge Medical Center. Hracek died of his injuries on April 11, 1994 and Perkins and Bujol suffered severe physical injuries as a result of the explosion. Following the accident, ALAC enlisted a team of investigators to delve into the matter and determine the cause of the flash fire, which revealed that the presence of foreign material and/or debris found within the oxygen piping system most likely con-

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tributed to the cause of the flash fire.^{FN3}

FN3. After determining the cause of the flash fire, the investigators made certain recommendations, which were later promulgated as rules by Compressed Gas Association (the "CGA"), including the following:

7.1.0 [CGA] pamphlet number G-4.4, revision 1993, INDUSTRIAL PRACTICES FOR GASEOUS OXYGEN TRANSMISSION AND DISTRIBUTION PIPING SYSTEMS, should be considered the minimum acceptable standard document when designing an oxygen piping system.

...

7.11.0 Barrier walls must be utilized around all oxygen control valve stations in high velocity pressure reducing service. Such walls are to be designed and constructed to withstand the expected forces involved in any oxygen pipeline fire and resulting rupture.

...

7.13.0 Manual isolation valves, isolating pressure regulating control valves, are to be within the barrier wall. Their operating hand wheels must project and be accessible outside the barrier wall.

**4 ALAC paid workers' compensation benefits, but within a year of the accident, on March 10, 1995, Bujol, Perkins, and their families, and the adult children of Hracek^{FN4} filed individual suits against Entergy Corporation, Gulf States Utilities Company, Louisiana Power and Light, ALAC, and Big Three Industries, Inc. ("Big Three"),^{FN5} alleging, among other things, that ALAC and Big Three were liable for punitive damages under *1121 *Billiot v. B.P. Oil*, 93-1118 (La.9/29/94), 645 So.2d 604.^{FN6} The three suits were later consol-

ated. On the day that case was set for trial, the plaintiffs settled their *Billiot* claims with Big Three's liability carriers for \$34,500,000. All claims against Big Three and their insurers were subsequently dismissed with prejudice. Plaintiffs also agreed to release the "uninsured liabilities" of ALAC "and any past or present parent, subsidiary of affiliated companies of any of them," while reserving their rights against the insurers.^{FN7}

FN4. Hracek's wife was deceased at the time of the accident.

FN5. Other defendants named in the original suit were Dresser Industries, Inc., Masoneilan International, Exxon Corporation, and Highlands Insurance Company, who were subsequently dismissed from the suit.

FN6. *Billiot* had held that employers, otherwise immune from tort liability under La. R.S. 23:1032, could be liable to their employees for punitive damages under Article 2315.3. Civil Code Article 2315.3 was added by Acts 1984, No. 335, § 1, effective September 4, 1984. It was repealed by Acts 1996, 1st Ex.Sess. No. 2, § 1, effective April 16, 1996. This Court overruled *Billiot* in *Adams v. J.E. Merit Const., Inc.*, 97-2005 (La.5/19/98), 712 So.2d 88.

FN7. Plaintiffs proceeded to trial against the utility companies. On September 24, 1997, the trial court entered judgment against the defendants, apportioning fault as follows: Big Three-20%, ALAC-40%, the utility companies-40%. The court of appeal reversed the judgment as to the utility companies. *Perkins v. Entergy Corp.*, 98-2081 (La.App. 1 Cir. 12/28/99), 756 So.2d 388. This Court affirmed the court of appeal's ruling, holding that the plaintiffs failed to prove that the flash fire was caused by the power disturbance. 00-1372, 00-1387, 00-1440 (La.3/23/01),

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782 So.2d 606.

While the *Perkins* suit was pending, on March 7, 1996, the Bujol plaintiffs and the Perkins plaintiffs each filed suit against Entergy Services, Inc., a separate entity from the utility defendant sued in *Perkins*.^{FN8} On March 10, 1997, the plaintiffs amended their petition to add as defendants ALSA and Liquid Air Engineering Corporation (“LAEC”),^{FN9} and those parties’ insurers, National Union Fire Insurance **5 Company of Pittsburgh, Pennsylvania (“National Union”) and X.L. Insurance Company, Ltd. (“X.L.”). The Hracek survivors intervened in the suit, which is the instant consolidated suit we are ruling on today.

FN8. These plaintiffs also asserted *Billiot* claims against ALAC’s liability carriers pursuant to their settlement agreement in *Perkins*. These claims against ALAC’s insurers were dismissed with prejudice when this Court overruled *Billiot* in *Adams* on May 19, 1998.

FN9. LAEC, one of ALAC’s “sister corporations” built the Number 4 plant, an addition to the Plaquemine facility. In their petition for damages, plaintiffs alleged that LAEC, *inter alia*: (1) failed to properly design the Number 4 plant installed in the Plaquemine facility; (2) failed to properly examine the letdown station; (3) failed to require the installation of a filter in the letdown station; (4) failed to prescribe proper maintenance practices for the plant; and (5) failed to properly supervise construction at the plant.

Plaintiffs alleged that ALSA was negligent in: (1) failing to properly supervise the activities of the Plaquemine facility; (2) failing to prescribe proper maintenance and management practices at the facility; (3) failing to provide technical assistance to the facility; and (4) failing to provide proper management services to the facility.

The consolidated cases proceeded to trial, which commenced on April 12, 1999, and ended on April 22, 1999. In support of its theory that ALSA assumed the duty for safety at ALAC’s plant and breached that duty resulting in plaintiffs’ damages, plaintiffs introduced a document known as “Technical Instruction 84” (“TI 84”)^{FN10}, issued by the “Direction Technique”^{FN11} of *1122 ALSA to its subsidiaries in 1984 and entitled “*Design, Fabrication, Operation and Maintenance of Oxygen Pipeline Networks.*”

FN10. Sometimes referred to within the document as “IT 84.”

FN11. As the ultimate parent of plants located throughout the world, ALSA collected information about the operations of its subsidiaries and served as a clearinghouse for operational information that might be useful to other ALSA entities. This function was carried out by the “Direction Technique,” an internal ALSA department that examined accident data (among other things) from various subsidiaries and periodically drafted and disseminated recommendations to all of the ALSA subsidiaries, which summarized the findings of the Direction Technique and offered suggested solutions to various operational and safety problems of potential interest to all ALSA subsidiaries worldwide.

The introductory section of TI 84 sets forth the following:

“Three factors are essential to ensure the reliability and safety of pipeline networks, namely:

Choice of materials and components,

Thorough cleanliness of installations

Strict compliance with fabrication guidelines and ad hoc procedures during construction, commissioning, operation, and maintenance,

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Strict compliance with safety rules.

Some countries lay down statutory requirements and compliance with these is an absolute priority.

In some countries or groups of countries, professional bodies may also lay down guidelines based on common experience in the field and making for better pipeline construction and operation. Such bodies include:

CGA in the USA and Canada,

IGC in Europe,

BCGA in the UK,

BCI in West Germany,

**6 SK in Japan.

In early 1983 in Europe, the IGC brought out a document 13/82 entitled THE TRANSPORTATION AND DISTRIBUTION OF OXYGEN BY PIPELINE. It is fairly complete and matches the rules to be respected throughout our Group. In the event of incompatibility with rules in force locally, the DIRECTION TECHNIQUE may be consulted to decide on the attitude to adopt.

IT 84 sets the minimum requirements to be met throughout the AL Group as regards oxygen pipeline networks.”

IT 84 contained numerous other provisions, including a section entitled “*Protective walls and screens,*” which provided as follows:

“Following a number of serious accidents some years ago, we called for the use of a sophisticated system of walls forming protective walls and screens.

Today, less stringent solutions are possible in light of the following factors:

Experience acquired, especially with networks at 64 bars,

Confirmation that choice of equipment is correct,

Installation procedures ensuring high-quality clean installations,

Analysis of accidents since 1970 (when protective wall system was introduced).

For new installations which are up to standard, the only requirement is that operating personnel should be protected during manual opening or closing of gate valves when:

$$P D^2 > 3\,000$$

where:

P = effective pressure in bars

D = nominal diameter in cm.

In this case, provision must be made for a protective wall between the gate valve and the hand-wheel (see Figure 27 showing Type A Protection and Figure 29 in IGC Document 13/82).

*1123 Walls or screens have different protective functions. The measures to be taken in each case are set below:

a) *Protection of operating personnel*

As mentioned above, personnel opening or closing gate valves must be adequately protected. This problem may be obviated by using remote control systems.

b) *Protection of maintenance personnel*

Pipelines should be designed so that maintenance is readily possible after decompression of the sections in question.

The question of regular maintenance checks carried out with the pipeline still pressurized must be examined and strict procedural guidelines laid down.

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**7 ...

e) *Protection between pipelines*

Protection between pipelines is not indispensable. However, for the same reason as there are several different pipelines, it may be sensible to provide for shielding walls between each (possible reasons include the large size of a pipeline, its key role, security of supply, possibility of maintenance and repairs, etc.)."

Various ALSA witnesses testified regarding the provisions of TI 84 and regarding whether ALSA had assumed the duty for safety at the ALAC plant. Louis Butherol, a longtime ALSA employee, now retired, was designated to testify at trial as the corporate representative for ALSA. At trial, Butherol testified that although "IT 84 sets the minimum requirements to be met throughout the AL Group as regards oxygen pipeline networks," barrier walls were never "required," they were merely "recommended in certain circumstances." Butherol testified that the phrase "minimum requirements" was an incorrect translation of the French phrase "*regle minimal*," which means "minimum rule" or "guide." Butherol declined to render an opinion of whether barrier walls should have been installed at the Plaquemine plant because he was unfamiliar with the facility, as he had never visited the plant. He further testified that protective walls or screens were used around manual valves in oxygen let-down stations in the European plants but were never utilized in the United States. He testified that plants in Europe started using protective walls in the 1960's and 70's following a series of accidents, and the walls were put up while they obtained sufficient knowledge to better prepare and guard the installations. He further testified that each country has its own guidelines, such as the CGA in the U.S., which does not recommend the use of protective walls.

Claude Tronchon, the General Manager of Risk Management for ALSA at the time of trial and the CEO of ALAC from 1991-1993, testified that the

general managers of each subsidiary all around the world have the full responsibility for safety at their respective subsidiaries. He testified that the general management of ALSA selects the CEO of each subsidiary, and therefore, if ALSA wanted to impose a particular safety or technical standard upon a subsidiary that refused to do so itself, it could dismiss the CEO of that subsidiary. However, he testified that ALSA never imposed any **8 safety standard upon a subsidiary in this or any other manner because the subsidiary's management did so itself.

Tronchon also testified that TI 84 was not a requirement, stating that he had never applied the document as a requirement on any subsidiary. He further testified that when ALSA purchased Big Three, ALSA was not concerned with whether Big Three complied with the ALSA guidelines because Big Three was the number one pipeline systems operator in the U.S., had no accidents in 30 years of *1124 operations, was thought by ALSA to be the best in its class in terms of safety, and was complying with CGA guidelines. Finally, he testified that when he was president of ALAC, he knew Big Three and LAEC were not following the same safety guidelines as the ALSA plants in Europe, and never thought that they should because he had confidence in their level of safety and the fact that they were following the same safety guidelines as the rest of the U.S. companies. ALSA decided to completely rely on the quality of Big Three's engineers, personnel and safety record. He reasserted that each subsidiary is responsible for its own safety, made its own safety plan, had a blank check to spend money on safety, never needed approval from ALSA to spend money on safety or implement safety procedures, followed the safety rules of the country where it was located, and followed ALSA guidelines and recommendations if the subsidiary felt they were necessary.

Tronchon further testified about the differences between the valve systems used in Europe and the U.S. He testified that systems in the U.S. were simpler, had less components and used different types

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of valves. Plants in Europe used manual valves which were always under pressure and therefore barrier walls may be needed around them. Plants in the U.S. used automatic valves that were ordinarily operated by remote from the control room and should not be worked on while under pressure. He further testified that whether a barrier wall is necessary depends on many circumstances, and that one drawback of using a barrier wall is that a person cannot see the condition of the valve, so if there is a leak, it can not be seen and a wall could prevent escape in case of a fire.

****9** Tronchon was cross-examined using an ALSA document that stated "The [ALSA] Safety Director is responsible for reducing work-related accidents and developing illness prevention within the [ALSA] group of companies" and that "in addition, he checks with each subsidiary manager that the health and safety policy of the subsidiary is properly implemented and that the necessary inspections and orders are properly performed." Tronchon testified he was surprised to hear that the ALSA safety director did not do this at ALAC and he answered affirmatively when asked whether he was "shocked" that there were no such ALSA audits of the Plaquemine plant from 1986 to the time of the accident. He later explained that he meant he was surprised that no one from ALSA had gone to ALAC or Big Three to check that they had a safety organization within ALAC in place or had safety action plans which were consistent with the general guidelines of the ALSA group. He clarified that ALSA does not do technical safety audits, that each subsidiary does their own safety audits, and that ALSA audits each subsidiary only to see that they have rules and procedures in place which insures that safety is managed in the subsidiary. He further explained that ALSA does not "go in each and every site in order to check the safety of the site."

Gerard Campion, the Safety Director for ALSA, testified that after a plant explosion at one of its plants in Mons, Belgium in 1968, in which a

plant manager was killed at a manual valve station, ALSA saw to it that barrier walls were built around manual valves at its subsidiaries' let-down stations. FN12 He also testified about a fire at a *1125 let-down station in a Canadian-subsidiary which had manual valves, and where the barrier wall protected the employee from injury. He further testified that it was the responsibility of ALSA's Direction Technique to insure that the TI 84 was distributed to ALSA's subsidiaries.

FN12. Campion was asked on cross-examination:

Q. Sir, I mean Air Liquide, S.A., the company, eventually saw to it that their subsidiaries or they themselves had walls, barrier walls, built around these let-down stations, correct?

A. Around the let-down stations, yes.

At his deposition, which was admitted into evidence as an exhibit, Campion testified that as Safety Director for ALSA, he was in charge of collecting accident data ****10** and making statistics to propose a safety policy for ALSA, but that he did not have the authority to make the safety policy for each subsidiary, as each subsidiary exercised that authority. He testified that although he met with the safety director of ALAC, Dennis Mucha, several times, he never told him that ALAC should be following ALSA guidelines, as he exercised no authority over him. He further testified that ALAC never asked for assistance with a safety audit of the Plaquemine plant. Finally, he testified that if a CEO of a subsidiary decides not to follow an ALSA guideline, they do not need to notify ALSA.

Campion further explained why barrier walls were not necessary even under the ALSA guidelines. He testified that ALSA does not recommend barrier walls around automatic valves because workers do not go around automatic valves to work while they are under pressure. He testified that even though manual valves are located near the

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automatic valves, the manual valves are not made to operate there during normal conditions and are there to do the maintenance on those automatic valves. If a worker needs to work on an automatic valve, the worker needs to have a special working permit and follow a precise procedure from the plant manager. He testified that even if there had been barrier walls around the valve at the Plaquemine plant, the employees would still have suffered injury because they were working on the automatic valve under pressure and would have been between the valve and the wall when the flash fire occurred. He testified that he knew that the Big Three plants in the U.S. did not have barrier walls around the valves because the plants used automatic valves rather than manual valves.

Additionally, Eric Fortuit, the Director of ALSA's Direction Technique at the time of the accident, described the function of the Direction Technique as follows:

We write recommendations, and effectively for us it is important to know whether the recommendations are understood. Therefore, we make visits to the subsidiaries, we also help the subsidiaries to make the audits of their ... plant, because in the entire function they are responsible to make the audit of their ... own plant.

After the Plaquemine plant accident, ALSA made a "[Recommendation of Technical Safety] for all the subsidiaries, to remind them of the former technical instructions concerning the [barrier] walls ..."

**11 He testified that "[t]he policy of the group is that each subsidiary is responsible for the decisions taken, including safety. The ALSA group gives information and makes recommendations to help the subsidiary in all areas and we apply this policy. It consists of writing up recommendations to help the subsidiary to have better safety results and this policy has been shown to be efficient." ALSA "gives this information to the subsidiaries so that they can use them to the best, and by taking in-

to account the local considerations, environment and the national regulations." He testified that it would be impossible for ALSA to write mandatory rules for its subsidiaries because of the "environment of each country, the evolution of the technology, and that the technology in the *1126 States and in Europe is not always the same." He testified that CGA supplied the local rules for U.S. plants and that, based on their expertise, CGA did not recommend barrier walls. Finally, he testified that in France, barrier walls were required by the technical standards and local rules and that therefore ALSA's French subsidiary was required to have barrier walls around its manual valves.

John Baird, the vice-president of legal and corporate affairs at ALAC, testified about the general corporate structure of ALAC and ALSA. He testified that the ALAC directors and officers act independently of ALSA and that ALAC pays its own salaries and sustains its own losses. He testified that ALSA has no control over the safety of ALAC employees or ALAC's safety operations, and that ALSA has done no safety audits of ALAC. He testified that ALSA does issue safety recommendations, which are sent to the CEO of the subsidiaries, who then sends them off to the various departments within his subsidiary, but that the subsidiaries outside of France have no obligation to follow the ALSA recommendations.

Following the presentation of the evidence, the jury returned a verdict form finding that (1) ALSA assumed a duty for safety at ALAC's Plaquemine plant; (2) ALSA was negligent, which negligence was a legal cause of the injuries suffered by plaintiffs; (3) plaintiffs' injuries were caused by ALSA's wanton or reckless disregard for public safety in the storage, handling or transportation of hazardous substances; (4) LAEC was negligent, which negligence was a legal cause of the injuries suffered by plaintiffs; (5) the other defendants were not at fault for plaintiffs' injuries; and (6) **12 Hracek was not guilty of comparative fault. The jury apportioned 80% of the fault to ALSA and

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awarded almost \$40,000,000 in compensatory damages and \$120,000,000.00 in punitive damages to plaintiffs.^{FN13}

FN13. The trial court granted defendants' motions for JNOV in part and reduced Perkins' awards for past mental anguish, Hracek's damages for pre-death pain and suffering and pre-death mental anguish, and Hracek's surviving children's awards. Exemplary damages were reallocated accordingly. The court granted in part the Bujol and Perkins plaintiffs' motions and reallocated the exemplary damages among the plaintiffs.

The court of appeal applied Section 324A of the Restatement (Second) of Torts to affirm the jury's finding that ALSA assumed a duty to provide for the safety of the employees at the Plaquemine plant. *Bujol v. Entergy Services, Inc.*, 00-1621 c/w 00-1622 (La.App. 1 Cir. 8/14/02), 833 So.2d 947. The court of appeal affirmed the jury's determination that ALSA had assumed a duty for safety at the plant, stating:

The evidence satisfies the introductory portion of section 324A of the Restatement (Second) of Torts: ALSA undertook to render technical advice and impose requirements on its subsidiaries worldwide, including subsidiary ALAC. ALSA should have, but wantonly failed to, recognize its advice and safety requirements were necessary for the protection of ALAC's employees. As in *Miller [v. Bristol-Myers Company]*, 168 Wis.2d at 890, 485 N.W.2d at 41, we conclude the parent corporation assumed a duty owed by the subsidiary to provide a safe workplace.

...

The liability of ALSA arose when it assumed the duty of developing and imposing mandatory safety requirements and then failed to exercise reasonable care in disseminating its safety requirements to ALAC and in enforcing its mandat-

ory regulations in the former Big *1127 Three plants. We emphasize that ALSA's liability arises not because of a duty to control its subsidiary, but from its failure to enforce its mandatory safety requirements at the Plaquemine plant. ALSA voluntarily assumed a duty owed by ALAC to its employees for their safety.

Bujol, 833 So.2d at 964. The court of appeal also affirmed the finding that ALSA was liable for punitive damages.^{FN14} Judge Lanier dissented from the portion of the decision which imposed liability for exemplary damages, opining that the evidence does not support the conclusion that ALSA was involved in the handling and/or transportation of the oxygen that caused the explosion. 833 So.2d at 985-993 (Lanier, J., dissenting).

FN14. The court of appeal also concluded that LAEC was not liable as it did not owe a duty to plaintiffs. The 15% fault allocated to LAEC was reallocated to ALAC, after the court of appeal concluded that the jury was clearly wrong in finding that ALAC was not at fault. Additionally, the court of appeal found no manifest error in the trial court's decision to reduce the award of the Hracek's survival action, finding that the awards of \$3,000,000.00 for Hracek's pre-death pain and suffering and \$2,000,000.00 for his pre-death mental anguish were abusively high.

**13 The court of appeal denied defendant's applications for rehearing, finding that the application "raised no new issues that were not previously addressed and properly resolved in this court's decision...." 833 So.2d at 995. The appellate court granted plaintiffs' request for rehearing, finding that it committed legal error when it reduced the exemplary damages award by the percentage of the fault allocated to the Entergy defendants. Instead, the court of appeal cast ALSA with the full amount of exemplary damages. The court also reconsidered the award for exemplary damages, in light of this court's decision in *Ross v. Conoco, Inc.*, 02-0299

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(La.10/15/02), 828 So.2d 546, and concluded that the award was justified. 833 So.2d at 993-995 (on rehearing). On rehearing, Judge Lanier again dissented from the majority's treatment of the issue of exemplary damages, opining that the majority refused to follow this Court's decision in *Ross*. 833 So.2d at 996-999 (Lanier, J., dissenting on rehearing).

National Union and X.L., ALSA's insurers, filed separate applications for certiorari in this Court. By order dated May 16, 2003, this Court granted both writ applications and consolidated the matters. *Bujol v. Entergy Services, Inc.*, 03-0492, 03-0502 (La.5/16/03), 843 So.2d 1115.

DISCUSSION

Liability for compensatory damages

[1][2][3] The mere fact that ALSA is the ultimate parent corporation of ALAC, albeit through four corporate levels of ownership, does not result in the imposition of a duty upon ALSA to provide the employees of ALAC with a safe place to work. The law has long been clear that a corporation is a legal entity distinct from its shareholders and the shareholders of a corporation organized after January 1, 1929 shall not be personally liable for any debt or liability of the corporation. *Buckeye Cotton Oil Co. v. Amrhein*, 168 La. 139, 121 So. 602 (1929); La. R.S. 12:93(B). The same principle applies where one corporation wholly owns another. See *Joiner v. Ryder System Inc.*, 966 F.Supp. 1478, 1483 (C.D.Ill.1996). While generally a parent corporation, by virtue of its ownership interest, has the right, power, and ability to control its subsidiary, a parent corporation generally has no duty to control the actions of its subsidiary and thus no liability for a failure to control the actions of its subsidiary. See **14 *Joiner*, *supra* at 1489-1128 90 and cases cited therein.^{FN15} The fundamental purpose of the corporate form is to promote capital by enabling investors to make capital contributions to corporations while insulating separate corporate and personal asset from the risks inherent in business. *Smith v. Cotton's Fleet Serv., Inc.*, 500 So.2d 759,

762 (La.1987); *Glazer v. Commission on Ethics for Public Employees*, 431 So.2d 752, 757 (La.1983). Louisiana courts have declared that the strong policy of Louisiana is to favor the recognition of the corporation's separate existence, so that veil-piercing is an extraordinary remedy, to be granted only rarely. Glenn G. Morris and Wendell H. Holmes, *Louisiana Civil Law Treatise, Vol. 8, Business Organizations* (1999), § 32.02, p. 55 (cites omitted). "If the plaintiffs do not allege shareholder fraud, they bear a 'heavy burden' of proving that the shareholders disregarded corporate formalities to the extent that the corporation had become indistinguishable from them." *Id.* (Cites omitted).

FN15. As stated in *Joiner*, no case has imposed upon a parent corporation a duty to control the acts of its subsidiaries. See also *Fletcher v. ATEX, Inc.*, 861 F.Supp. 242, 247 (S.D.N.Y.1994), *order aff'd*, 68 F.3d 1451 (2d Cir.1995) (absent a special relationship between the parent and the subsidiary there is no duty to control the subsidiary's conduct to prevent harm to third persons).

In this case, plaintiffs do not seek to pierce the corporate veil in order to impose liability upon ALSA. Instead, plaintiffs advocate a departure from this established, though extraordinary, exception to limited shareholder liability and assert instead that ALSA breached a duty it voluntarily undertook, that is to provide its subsidiaries with safety requirements based upon its own specialized and highly-developed knowledge about the need for barrier walls around manual oxygen valves, and then failed to enforce these requirements at ALAC. According to the jury interrogatories, the jury found that ALSA "assumed a duty for safety at ALAC's Plaquemine Air Separation Plant." The court of appeal affirmed the jury's determination that ALSA had assumed a duty for safety at the plant by applying the "Good Samaritan Doctrine" found in Section 324A of the Restatement (Second) of Torts to the facts of this case.^{FN16} § 324A provides as fol-

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lows:

FN16. The court of appeal and the parties herein refer to this section of the Restatement as the “Good Samaritan” Doctrine. However, this characterization of this section is not to be confused with Louisiana’s “Good Samaritan” Doctrine set forth in La. R.S. 9:2793, which refers to persons who gratuitously in good faith render emergency care or transportation to another.

****15** One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect [perform] his undertaking, if

(a) his failure to exercise reasonable care increases the risk of harm, or

(b) he has undertaken to perform a duty owed by the other to the third person, or

(c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

This common law doctrine has existed for centuries and has traditionally been used to impose liability upon an actor who has failed to exercise reasonable care when it undertook to perform a duty owed to a third party. See Annette T. Crawley, *Environmental Auditing and the “Good Samaritan” Doctrine: Implications for Parent Corporations*, 28 G.L.Rev. 223, 234 ***1129** (1993) (“Recognition of the Good Samaritan doctrine as an exception to the traditional restriction of liability traces its origin to the seminal eighteenth century case of *Coggs v. Bernard*,” 92 Eng. Rep. 107 (K.B.1703) (citations omitted)). However, in recent years, employees of subsidiary corporations have begun to employ the doctrine to establish the tort liability of a parent corporation as an alternative to piercing the corpor-

ate veil.

While this Court has twice cited § 324A to hold that, where a duty to protect others against criminal misconduct has been assumed, liability may be created by a negligent breach of that duty, see *Mundy v. Department of Health and Human Resources*, 620 So.2d 811 (La.1993) and *Harris v. Pizza Hut of Louisiana, Inc.*, 455 So.2d 1364 (La.1984), we have never discussed whether such a cause of action is available in the parent-subsidary context under Louisiana law, or analyzed the elements required to set forth a cause of action against a parent corporation under § 324A.

[4][5] It is clear that a parent corporation, just like any other person or entity, can be held liable for its own direct acts of negligence. Further, under Louisiana jurisprudence, parties who voluntarily assume certain duties for workplace safety must perform those duties in a reasonable and prudent manner. See, e.g., *Moore v. Safeway, Inc.*, 95-1552 (La.App. 1 Cir. 11/22/96), 700 So.2d 831, *writs denied*, 97-2921, ****16** 97-3000 (La.2/6/98), 709 So.2d 735, 740 (holding that Shell Chemical, a plant premises owner, assumed and violated a duty to protect an employee of one of its independent contractors); *Crane v. Exxon Corp.*, 613 So.2d 214 (La.App. 1 Cir.1992) (holding that Exxon, through its field contract coordinator, assumed a duty of care to an employee of one of its contractors). This Court has decided numerous cases by applying this voluntary assumption of duty doctrine as a basis for the existence of a duty of reasonable care, though it has only cited § 324A in two of them, *Harris, supra*, and *Mundy, supra*.^{FN17} However, we do not believe it to be contrary to Louisiana law to discuss the principles established in § 324A in the parent-subsidary context for the following reasons: (1) a parent corporation can be held liable just as any other entity or person for its own acts of negligence independent of the parent-subsidary relationship and can voluntarily assume a duty not otherwise owed; (2) this Court has previously referred to § 324A in negligence cases; and (3) courts

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throughout the country are applying this doctrine in the parent-subsidiary context.

FN17. See, e.g., *LeBlanc v. Stevenson*, 00-0157 (La.10/17/00), 770 So.2d 766; *Rick v. State Dept. of Transportation and Development*, 93-1776 (La.1/14/94), 630 So.2d 1271; *Blair v. Tynes*, 621 So.2d 591 (La.1993).

[6][7] The plain language of the introductory portion of § 324A establishes that an assumption of duty arises when the defendant (1) undertakes to render services, (2) to another, (3) which the defendant should recognize as necessary for the protection of a third person. Even if a plaintiff proves the assumption of a duty under that standard and that the defendant failed to exercise reasonable care to perform this undertaking, he can only recover if he further proves that either (a) the defendant's failure to exercise reasonable care increased the risk of such harm; or (b) the defendant has undertaken to perform a duty owed by the employer to the injured employee; or (c) harm is suffered because of reliance of the employer or the injured employee upon the undertaking. *1130 *Tillman v. Travelers Indemnity Co.*, 506 F.2d 917 (5th Cir.1975).^{FN18}

FN18. Courts have differed on exactly what the subsections of § 324A determine. Some courts have held that these subsections determine the existence of a duty. See, e.g., *Zabala Clemente v. U.S.*, 567 F.2d 1140, 1145 (1st Cir.1977) (applying § 324A to hold no duty existed), cert. denied, 435 U.S. 1006, 98 S.Ct. 1876, 56 L.Ed.2d 388 (1978); *Ricci v. Quality Bakers*, 556 F.Supp. 716, 720 (D.Del.1983) (holding plaintiff must establish defendant's duty under one element of § 324A). Other courts have held that the subsections of § 324A establish proximate cause. See, e.g., *Canipe v. National Loss Control Serv. Corp.*, 736 F.2d 1055, 1061 (5th Cir.1984) (using subsections to find proximate cause); *Patentas v. U.S.*, 687

F.2d 707, 716 (3rd Cir.1982) (noting that § 324A specifies three circumstances in which negligent performance of undertaking may proximately cause injury). Whether used to establish a duty or proximate cause, the analysis of § 324A remains the same. Annette T. Crawley, *Environmental Auditing and the "Good Samaritan" Doctrine: Implications for Parent Corporations*, 28 Ga. L.Rev. 223, 236, n. 69 (1993)

[8][9][10][11] **17 In order to consider whether plaintiffs met the burden of proof set out in § 324A, we must first determine whether ALSA "undertook" to render services for ALAC which ALSA should have recognized was necessary for the protection of ALAC's employees, i.e., whether ALSA undertook to provide a safe work place for ALAC's employees. Whether a duty is owed is a question of law. *Faucheaux v. Terrebonne Consolidated Government*, 92-0930 (La.2/22/93), 615 So.2d 289. The court of appeal cites *Schulker v. Roberson*, 91-1228 (La.App. 3 Cir. 6/5/96), 676 So.2d 684, 688 for the proposition that whether ALSA assumed a duty to the injured employees at the Plaquemine plant is a factual question to be determined by the fact finder and thus subject to the manifest error rule. 833 So.2d at 959. However, the manifest error rule assumes that the trier of fact applied the correct law in reaching its conclusion. Frank L. Maraist and Harry T. Lemmon, *Louisiana Civil Law Treatise, Vol. 1, Civil Procedure*, § 14.14, p. 395 (1999). "If the trier of fact applied the incorrect law because of erroneous and prejudicial jury instructions ... and if the appellate court determines the error could have affected the outcome below, the manifest error rule does not apply, and the appellate court makes an independent determination of the facts from the record on appeal." *Id.*, at pp. 395-96; *Gonzales v. Xerox Corp.*, 320 So.2d 163 (La.1975). In this case, the jury could not have applied the correct law in determining whether ALSA assumed a duty to the employees at ALAC's plant because it was given no instructions whatso-

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ever on the law of assumption of duty or any of the elements required under § 324A.^{FN19} As this *1131 **18 obviously could have affected the outcome, we will review the issue of whether ALSA assumed a duty for safety at ALAC's plant pursuant to § 324A under the *de novo* standard of review.^{FN20} See, e.g., *Torrington Co. v. Stutzman*, 46 S.W.3d 829 (Tex.12/21/00) (reversing judgment of trial court in favor of plaintiffs against successor corporation and remanding case where broad form negligence charge the trial court submitted to the jury omitted the elements necessary to impose liability upon the successor under a negligent undertaking theory under § 324A). Nevertheless, as the rest of this opinion demonstrates, even if we were to review this case under the manifest error standard, our result would be the same.

FN19. The entire jury charges relating to defendants' liability included the following:

In this particular case, the plaintiffs allege that the defendant has committed the kind of fault which the law calls negligence, but this is only one of the elements of plaintiffs' case. And I previously told you that in order to be successful, the plaintiffs must establish all the essential elements of their case.

The other elements are the following: One, that the injury the plaintiff suffered were in fact caused by the conduct of the defendant and, two, that there was actual damage to the plaintiff's person or their property.

...

... In summary, let me recall to you the essence of my remarks. The plaintiff has the burden of proving the following elements by a preponderance of the evidence:

He must demonstrate, one, that the injury which he says he suffered was in fact caused by the conduct of the defendant; two, that the conduct of the defendant was below the standards which I have told you are applicable to the defendant's conduct; and, three, that there was actual damage to the plaintiff's person or his property.

If you are satisfied that the plaintiff has established these three elements, then plaintiff is entitled to recover and you should return a verdict for the plaintiff, unless the defendant has proved by a preponderance of the evidence that the plaintiff contributed to his own injury by his own substandard conduct.

FN20. At the close of the case, X.L. and National Union moved for directed verdicts on the ground that plaintiffs had failed to establish any legal basis for holding ALSA liable. The district court denied defendant's motions, saying that ALSA had "assumed the responsibility of safety when they started sending those recommendations, as they called them. It's mandatory regulation. And not enforcing them." Further, during discussions regarding jury instructions, the trial judge agreed to give defendants' requested instructions on assumption of duty. However, either the trial court erroneously and inadvertently failed to give the jury as the fact-finder the proper instructions regarding voluntary assumption of duty, or, the trial court ruled as a matter of law the ALSA voluntarily undertook to perform ALAC's duty for the safety of their employees. Either way, the jury did not make a factual finding using proper jury instructions in finding that ALSA assumed ALAC's duty of safety; therefore, the manifest error rule is not appropriate under either circumstance.

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In determining whether a parent corporation affirmatively undertook the duty of safety owed by its subsidiary, courts have looked to the scope of the parent's involvement, the extent of the parent's authority, and the underlying intent of the parent to determine whether the parent corporation affirmatively undertook the duty owed by the subsidiary. Annette T. Crawley, *Environmental Auditing and the "Good Samaritan" Doctrine: Implications for Parent Corporations*, 28 Ga. L.Rev. 223, 243 (1993). In *Muniz v. National Can Corp.*, 737 F.2d 145 (1st Cir.1984), a seminal case on this issue, the parent corporation's involvement with industrial safety at its subsidiary's plant included the issuance of general safety guidelines which the parent intended would be implemented by local management and the provision of assistance **19 with safety matters upon request by a subsidiary's local management. The plaintiff maintained that the parent's involvement in safety matters at the subsidiary corporation imposed an independent duty on the parent to provide a safe working environment for the plaintiff and that the parent breached this duty by failing to correct the faulty industrial safety system at the subsidiary's plant. The court held, as a matter of law, that the parent's actions were not "undertakings" sufficient to impose a duty under § 324A:

Because an employer has a non-delegable duty to provide safe working conditions for its employees, we do not lightly assume that a parent corporation has agreed to accept this responsibility. Neither mere concern with nor minimal contact about safety matters creates a duty to ensure a safe working environment for employees of a subsidiary corporation. To establish such a duty, the subsidiary's employee must show some proof of a positive undertaking by the parent corporation.

737 F.2d at 148. *Muniz* holds that "[a] parent corporation may be liable for unsafe conditions at a subsidiary only if it assumes a duty to act by affirmatively undertaking to provide a safe working

environment."**1132 *Id.* Communication or concern over safety matters is not enough. *Id.*

In reaching this determination, the *Muniz* court relied on other cases involving the liability of a parent corporation under § 324A for unsafe working conditions at its subsidiary's plant:

An employer has a nondelegable duty to provide for the safety of its employees in the work environment. See *Love v. Flour Mills of America*, 647 F.2d 1058, 1063 (10th Cir.1981). The parent-shareholder is not responsible for the working conditions of its subsidiary's employees merely on the basis of parent-subsidiary relationship.^{FN21} *Id.*; see also *Heinrich v. Goodyear Tire & Rubber Co.*, 532 F.Supp. 1348, 1354-56 (D.Md.1982); *Rick v. RLC Corp.*, 535 F.Supp. 39, 42-43 (E.D.Mich.1981). A parent corporation may be liable for unsafe conditions at a subsidiary only if it assumes a duty to act by affirmatively undertaking to provide a safe working environment at the subsidiary. *Love*, [*supra*]; see also *Treece & Zuckerman, A Parent Corporation's Liability for the Torts of its Subsidiary in the Context of Exclusive Remedy Provision of the Workers' Compensation Laws*, 50 Ins. Counsel J. 609, 613-15 (1983).

FN21. In refusing to premise liability solely on the basis of a parent-subsidiary relationship, the Tenth Circuit reasoned that imposing liability on such a basis would treat the parent-shareholder as an employer without providing it with the shield of employer immunity under workers' compensation laws. *Love v. Flour Mills of America*, 647 F.2d 1058, 1063 (10th Cir.1981).

**20 Such an undertaking may be express, as by contract between the parent and the subsidiary, or it may be implicit in the conduct of the parent.
Id.^{FN22}

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FN22. The *Muniz* court also relied on *Davis v. Liberty Mutual Insurance Co.*, 525 F.2d 1204 (5th Cir.1976), where the insurer provided recommendations to aid the insured in fulfilling its duty to provide a safe workplace and occasionally assisted in safety inspections at the insured's plant. In *Davis*, the court held that the insurer had not assumed a duty to provide for safety at the insured's plant, because the insured did not delegate any part of its direct and primary duty to discover unsafe conditions to the insurer. 525 F.2d at 1208.

Under the *Muniz* standard, other courts have held that it is not proof of an affirmative "undertaking" to show merely that a parent: (1) hired the safety director to work for the subsidiary;^{FN23} (2) assisted a subsidiary in "evaluating and inspecting the safety conditions" at the subsidiary's plant;^{FN24} or (3) conducted a negligent inspection.^{FN25}

FN23. *Sanders v. MAPCO, Inc.*, 1987 WL 5895 (D.Md., 1987) (holding that "cases are uniform that the mere fact that a parent corporation is the major shareholder of a subsidiary, or that the parent provides incidental services for the subsidiary, cannot be the sole basis for liability"); accord *Abdel-Fattah v. Pepsico Inc.*, 948 S.W.2d 381, 385 (Tx.App.1997) (parent's hiring of subsidiary's CEO was not an "undertaking" to oversee "the daily management of the employees in each and every [subsidiary] in the country.")

FN24. *Pomales v. Becton Dickinson & Co., S.A.*, 839 F.2d 1,7 (1st Cir.1988) (evidence that the parent was aware of the safety problems at subsidiary's plant, provided subsidiary with assistance in evaluating and inspecting the safety conditions, and was involved in the initial design of the plant, was insufficient proof under *Muniz* that "the parent corporation

has assumed primary responsibility for industrial safety at [the] subsidiary corporation's plant").

FN25. See *Santillo v. Chambersburg Eng'g Co.*, 603 F.Supp. 211, 214 (E.D.Pa.1985) ("It is well-settled that under § 324A negligent inspection does not meet the requirements of § 324A(a)") (citing *Canipe v. Nat'l Loss Control Serv. Corp.*, 736 F.2d 1055, 1062 (5th Cir.1984) (where the employer hired an independent safety inspection company to inspect for OSHA compliance, § 324A can be satisfied if a plaintiff proves that the employer has delegated any part of its duty to discover and remedy unsafe working conditions or if, in relying on the defendant's undertaking, the employer neglects or reduces its own safety program); *Patentas*, 687 F.2d at 707, 717 (3rd Cir.1982) (Coast Guard not liable for negligent inspection of vessel where plaintiffs failed to prove that the negligent inspection increased the risk, i.e., meaning some physical change to the environment or some other material alteration of circumstances, and failed to prove that knowledge of the inspection induced the cargo operators to forgo other remedies or precautions against the risk); *Davis v. Liberty Mut. Ins. Co.*, *supra* at 1207).

*1133 [12][13] In this case, there is no question that ALAC, as plaintiffs' employer, was under a statutory duty to provide its employees with a reasonably safe place to work.^{FN26} Further, as a matter of general corporate law, ALSA had no duty as a parent **21 corporation to control the activities of any of its subsidiaries, to insure that its subsidiaries were complying with their duty to provide a reasonably safe place to work, nor any independent duty to notify its subsidiaries of any safety recommendations.^{FN27} Because of these well-established legal rules by which employers and corporations are governed, we will not "lightly as-

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sume” that a parent corporation has agreed to accept the subsidiary-employer's duty to provide a safe workplace absent proof of an affirmative undertaking of that duty by the parent corporation. As the above cited cases hold, neither a parent's concern with safety conditions and its general communications with the subsidiary regarding safety matters, nor its superior knowledge and expertise regarding safety issues, will create in the parent corporation a duty to guarantee a safe working environment for its subsidiary's employees under § 324A

FN26. La. R.S. 23:13 provides:

Every employer shall furnish employment which shall be reasonably safe for the employees therein. They shall furnish and use safety devices and safeguards, shall adopt and use methods and processes reasonably adequate to render such employment and the place of employment safe in accordance with the accepted and approved practice in such or similar industry or places of employment considering the normal hazard of such employment, and shall do every other thing reasonably necessary to protect the life, health, safety and welfare of such employees. Nothing in this Section shall apply to employment in private domestic service or to agriculture field occupations.

FN27. *Love, supra* at 1063 (“When the only negligence alleged against the shareholder owner of a corporation is failure to see that directors take appropriate safety measures, the same policy that frees directors and officers from personal tort liability to worker injured on the job is necessarily applicable to shareholders.”); *Maki v. Copper Range Company*, 121 Mich.App. 518, 328 N.W.2d 430 (1982) (“To hold a parent corporation responsible for injuries to employees of the subsidiary merely because

of the control inherent in the parent-subsubsidiary relationship would destroy the long established protection afforded shareholders by incorporation.”); *Joiner v. Ryder System, Inc.*, 966 F.Supp. 1478, 1489 (C.D.Ill.1996) (noting that arguments to hold parent corporations accountable for a subsidiary's torts merely on the basis of the parent's right, power or ability to control the subsidiary are not tenable).

[14] In this case, the evidence presented did not establish that ALSA affirmatively undertook to provide ALAC's employees with a reasonably safe place to work under § 324A, with regard to the entire plant or with regard to providing barrier walls around oxygen valves. The only evidence presented at this trial that ALSA undertook to issue safety requirements concerning barrier walls to its subsidiaries was the one sentence relied on by the court of appeal from the English translation of TI 84, i.e., that “TI 84 sets the minimum requirements to be met throughout the AL Group as regards oxygen pipeline networks.” However, not a single witness *1134 testified that the provisions of TI 84 were, in fact, mandatory guidelines that ALSA subsidiaries had to follow. To the contrary, every single witness with knowledge of the document, including the person who drafted the document, testified that the provisions of TI 84 were merely safety recommendations and that each subsidiary could chose to follow or not, depending on many factors relevant to each plant. The witnesses explained why it would be **22 impossible to impose the same safety factors upon each of its more than 100 subsidiaries in over 60 countries, based on the different local rules and practices, types of equipment used, varying statutory requirements, and numerous other factors. Likewise, the court of appeal's reasoning would mean that by virtue of issuing TI 84, ALSA undertook the duty of safety owed by each of its subsidiaries at hundreds of plants in over 60 countries.

Secondly, the evidence was uncontroverted that

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when ALSA sent TI 84 to its subsidiaries in 1984, the Plaquemine plant was owned by Big Three and therefore ALSA did not send TI 84 to Big Three as it was not then an ALSA subsidiary. There was no evidence that ALSA ever distributed TI 84 to ALAC when it began ownership and operation of the plant, or at any time. In spite of this, the court of appeal held ALSA liable for undertaking to impose safety requirements upon ALAC but then failing to do so, i.e. “affirmatively undertaking to provide safety requirements” that it never provided to ALAC. A failure to impose safety recommendations that it never even sent to a subsidiary can hardly be characterized as an “affirmative undertaking.” Further, the fact that ALSA sent TI 84 to other subsidiaries and not ALAC does not establish an affirmative duty to send it to all its subsidiaries as parent corporations do not have a duty to treat all subsidiaries equally. The witnesses testified that when ALSA purchased Big Three, an American company, they chose to rely on Big Three's expertise in safety matters and did not intercede in any way into Big Three's duty to provide a safe workplace for its employees. Big Three had an excellent safety record, was complying with CGA standards, and was a leader in the United States in this industry. Thus, plaintiffs did not prove that by sending TI 84 to its subsidiaries, it affirmatively undertook to send TI 84 to ALAC, such that its failure to do so breached its assumed duty to provide a safe working environment at the ALAC plant.

Further, the language of TI 84 does not require the use of barrier walls around the valves involved, even if the issuance of TI 84 could be considered an affirmative “undertaking” to provide mandatory safety requirements. TI 84 explains that, while ASLA “called for the use of a sophisticated system of walls forming protective walls **23 and screens” following a series of accidents in the 1960s and 70s, “today, less stringent solutions are possible” because of experience acquired since that time, installation procedures ensuring high quality clean installations and analysis of the accidents since 1970 when the protective wall system was introduced.

This clearly indicates solutions other than protective walls and screens were then considered safe and acceptable. The next sentence of TI 84 provides that “for new installations which are up to standard, the only requirement is that operating personnel should be protected during manual opening or closing of gate valves ...” under certain circumstances by a protective wall between the gate valve and the handwheel. As seen by the evidence presented, the valve where the flash fire occurred was an automatic valve, which was ordinarily operated through the use of remote control and which was not normally worked on while *1135 under pressure. While there was no barrier wall between the manual valve that Bujol and Perkins first attempted to close and the handwheel that they turned two times in an attempt to close it, the manual valve is not the valve that exploded and caused their injuries. TI 84 did not even suggest that a wall be placed around automatic valves. The witnesses testified about the drawbacks that would entail if a wall were placed around an automatic valve, i.e., the automatic valve could not be viewed from the control room where it was operated remotely.^{FN28} Further, because by definition an automatic valve is not opened or closed manually, a wall would have prevented the workers from determining what was wrong with the automatic valve and they would have had to go around the wall in order to do so had one been there. TI 84 did provide however that “[t]he question of regular maintenance checks carried out with the pipeline still pressurized must be examined and strict procedural guidelines laid down.” Accordingly, it was ALAC, not ALSA, that had safety procedures in place in order for work to be performed on an automatic valve under pressure. Finally, the provisions of TI84 recognized that local rules in force, in this case the CGA which did not require barrier walls, might conflict with the provisions of TI84 (requiring barrier walls) and that in such case, “the Direction **24 Technique *may* be consulted to decide on the attitude to adopt.” (Emphasis added.) This reaffirms the witnesses' testimony that the provisions of TI84 regarding barrier walls were not mandates, but merely recommendations that may or

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not be applicable depending on the circumstances of each plant, and that ALSA was available to offer advice if requested by a subsidiary.

FN28. The only evidence presented about the benefits of a wall around the valve in this case was that perhaps the workers would not have approached the valve as closely if a wall had been placed around it.

However, even if TI 84 were considered an undertaking on the part of ALSA to provide ALAC's employees with a safe place to work, plaintiffs still cannot prevail in this case. For even proof of an affirmative undertaking to assume a duty of safety owed by the subsidiary is not enough to impose liability on a parent for its breach, as liability can only be imposed under § 324A if one of the requirements of § 324A(a)-(c) are also met.

[15][16] Under § 324A(a), a plaintiff must prove that the parent's breach of its assumed duty resulted in an increased risk of harm. This section requires "some change in conditions that increases the risk of harm to the plaintiff over the level of risk that existed before the defendant became involved." *Canipe v. Nat'l Loss Control Serv.*, 736 F.2d 1055, 1062 (5th Cir.1984). The comments to § 324A(a) reveal that "increased risk" means "some physical change to the environment or some other material alteration of circumstances." *Patentas v. U.S.*, 687 F.2d 707, 717 (3rd Cir.1982). ALSA's failure to send TI 84 to ALAC and subsequent failure to compel ALAC to erect barrier walls did not increase the risk of harm to plaintiffs as required by § 324A(a), as the lack of barrier walls existed many years before ALSA ever became involved with ALAC, and there was no "physical change to the environment or some other material alteration of circumstances" resulting from the lack of barrier walls.^{FN29}

FN29. Plaintiffs' argument that the addition of Plant # 4 increased the oxygen production at the plant and therefore increased the pressure at the automatic valve at issue

does not meet this requirement. That section clearly speaks of the undertaking increasing the risk, and the addition of Plant # 4 had nothing to do with the undertaking.

*1136 [17] Under § 324A(b), a plaintiff must show that the parent undertook to perform a duty owed by the subsidiary to the plaintiff. This is a more stringent requirement than the "positive undertaking" requirement of the introductory paragraph. The majority **25 of cases that have held that a parent, or other entity, will only be liable for a voluntary assumption of duty under § 324A(b) where that corporation's undertaking was intended to supplant, not just supplement, the subsidiary's duty. See e.g., *Heinrich, supra* ("Liability under section 324A(b) arises in the workplace setting only if the actor's undertaking was intended to be in lieu of, rather than as a supplement to, the employer's own duty of care to the employee") (citing *Davis, supra*; *Stacy v. Aetna Casualty & Surety Co.*, 484 F.2d 289, 294 (5th Cir.1973); *Blessing v. U.S.*, 447 F.Supp. 1160, 1193-95 (E.D.Pa.1978)); cf. *Boggs v. Blue Diamond Coal Co.*, 590 F.2d 655, 663 (6th Cir.), cert. denied, 444 U.S. 836, 100 S.Ct. 71, 62 L.Ed.2d 47 (1979) (parent liable in tort because it had negligently undertaken to design and install a ventilation system at subsidiary's mine that caused the death of fifteen miners because the parent had the primary responsibility for the safety program in the mine); *In re Norwest Bank Fire Cases*, 410 N.W.2d 875 (Minn.Ct.App.1987).^{FN30} This requirement is especially compelling in the parent-subsubsidiary context where the subsidiary is an employer required by law to provide its employees with a reasonably safe workplace. In this case, there was no evidence presented that would indicate that ALSA intended to supplant ALAC's duty to provide its employees with a reasonably safe place to work, with regard to the entire plant or the specific valves and pipelines at issue. To the contrary, ALAC retained the final responsibility for fulfilling its duty of safety in that it had its own safety management in place and its own safety rules, ALSA exercised no authority to compel ALAC to comply with the

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guidelines of TI 84 and never sought to do so, leaving it up to each subsidiary to manage its own plant. In addition, ALSA never audited nor inspected the ALAC plant or the valve that exploded in this case and never even made any safety recommendations specific to this plant at all.

FN30. Plaintiffs cite *Canipe v. Nat'l Loss Serv. Corp.*, *supra* at 1062-63 for the proposition that subsection (b) only requires that “the party who owes the plaintiff a duty of care has delegated to the defendant any particular part of that duty,” such “supplementing” the subsidiaries duty, rather than “supplanting” that duty is sufficient. However, while § 324A(b) might be met if a parent only takes over one aspect of the subsidiary's duty to provide a safe workplace, such as for instance the safety for a particular piece of equipment rather than the safety of the entire plant, it is still necessary that the parent supplant the subsidiary's duty with respect to that aspect completely.

[18] Finally, § 324A(c) requires that the harm was suffered because of reliance by the plaintiff or the subsidiary on the parent's undertaking to provide for safety at the **26 subsidiary's plant. *See Johnson v. Abbe Engineering Co.*, 749 F.2d 1131, 1133 (5th Cir.1984) (subsidiary's plant manager testified that he relied on parent for accident prevention and safety training, thus meeting the requirements of § 324A(c)); *see also Gaines v. Excel Industries, Inc.*, 667 F.Supp. 569 (M.D.Tenn.1987) (summary judgment reversed for failure to rebut assertions of reliance on parent's safety inspections). Plaintiffs cannot prevail under § 324A(c) as no evidence was presented to prove reliance by ALAC or plaintiffs on ALSA's alleged undertaking. In fact, the evidence presented proved just the opposite, that ALSA relied solely on Big Three and subsequently ALAC to provide for safety at its own *1137 plant. ALAC certainly did not rely on ALSA's guidelines, nor did they rely on ALSA,

based on ALSA's expertise and experience in the industry, to provide them with any safety advice relative to the safety of the valves at issue or any other aspect of plant safety.^{FN31}

FN31. The court of appeal relied solely on *Miller v. Bristol-Myers Company*, 168 Wis.2d 863, 485 N.W.2d 31 (Wis.1992), to support its holding that ALSA assumed ALAC's duty for safety under § 324A, although it is unclear upon what basis, i.e., § 324A (a), (b), or (c), the court found ALSA to be liable, as they cited quotations from *Miller* dealing with both (a) and (b). 833 So.2d at 965. In any event, we disagree with the court of appeal's application of *Miller* to conclude that ALSA assumed a duty owed by the subsidiary to provide a safe workplace. The facts of *Miller* indicate that the parent exercised significant authority over the subsidiary in affecting changes in safety-related and other day-to-day matters, known as “line authority,” exercised the power to compel the subsidiary to comply with the parent's safety mandates, and exercised financial control over the subsidiary's ability to install safety related equipment, etc. In addition, the parent physically inspected the subsidiary's plant, made a detailed audit of the safety features needed in the particular place where the accident occurred, and the subsidiary was mandated to follow the audit's requirements. To the contrary, the evidence was clear that ALSA exercised no financial control over ALAC's spending, exercised no authority to compel ALAC to implement any suggested safety recommendations, and had never physically audited or inspected the plant, or the valves involved in the accident, prior to the accident or made recommendations specific to that plant.

After careful review of the record, we find that

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the evidence presented does not establish, under the § 324A of the Restatement (Second) of Torts, that ALSA affirmatively undertook to provide ALAC's employees with a reasonably safe place to work, with regard to either the entire plant or the valves and pipelines at issue, and that either (a) ALSA's failure to exercise reasonable care increased the risk of harm; or (b) ALSA's undertaking was intended to supplant ALAC's duty to provide its employees with a reasonably safe place to work; or (c) the accident occurred because of reliance by ALAC or the injured employees upon the undertaking. Accordingly, we reverse the jury's award of compensatory damages in favor of plaintiffs.

****27 Liability for Punitive Damages**

[19] The trial court awarded punitive damages under former article 2315.3 of the Louisiana Civil Code, and the court of appeal affirmed that award. FN32 Former article 2315.3 provided, in pertinent part:

FN32. The article was repealed in 1996, but "only as to causes of action which arise on or after the effective date hereof." La. Acts 1996, 1st Ex.Sess., No. 2, § 1.

In addition to general and special damages, exemplary damages may be awarded, if it is proved that plaintiff's injuries were caused by the defendant's wanton or reckless disregard for public safety in the storage handling, or transportation of hazardous or toxic substances. (Emphasis added).

When a statute authorizes the imposition of punitive damages, the statute is subject to strict construction. *Ross v. Conoco, supra* at 556 (citing *International Harvester Credit v. Seale*, 518 So.2d 1039, 1041 (La.1988)). For this reason, this Court has held that damages under former La. C.C. art. 2315.3 are recoverable on a derivative basis where a plaintiff is entitled to recover tort damages. *Corbello v. Iowa Production*, 02-0826 (La.2/25/03), 850 So.2d 686, 707; *Adams v. J.E. Merit Construction, Inc., supra* (employee not entitled to recover punitive damages from his em-

ployer under 2315.3 because the first phrase of 2315.3 providing that "in addition to general and special damages, punitive damages may be awarded ...," *1138 implies that punitive damages are only available to those persons who are eligible to recover general damages and special damages).

Because the plaintiffs in this case are not entitled to general and special damages from ALSA, as we have ruled today that ALSA is not liable to plaintiffs under § 324A of the Restatement (Second) of Torts, plaintiffs are not entitled to punitive damages under former La. C.C. art. 2315.3.

CONCLUSION

Under Louisiana law, the duty to provide workplace safety rests by statute with the employer, ALAC. The evidence presented does not establish that ALSA affirmatively assumed ALAC's duty to provide a safe workplace under § 324A of the Restatement (Second) of Torts. Finally, because plaintiffs are not entitled to general **28 or special damages against ALSA, the award of punitive damages under former La. C.C. art. 2315.3 cannot stand.

DECREE

For the foregoing reasons, the judgment of the court of appeal is reversed, and plaintiffs' cases are dismissed with prejudice at their costs.

REVERSED; CASES DISMISSED.

JOHNSON, J., dissents and assigns reasons.

JOHNSON, J. dissenting.

I dissent from the majority's conclusion that the jury's verdict was manifestly erroneous. The evidence at trial showed that Air Liquid, S.A. ("ALSA") is the corporate ancestor of Air Liquide America Corporation ("ALAC") via a "cascading ownership" scheme. ALSA owns the majority shares of Air Liquide International, S.A., which owns the majority shares of American Air Liquide, Inc., which owns the majority shares of AL American Holdings, which owns the shares of ALAC.

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Plaintiffs do not argue that ALSA, as a parent corporation, is automatically accountable for ALAC's liabilities. Rather, plaintiffs contend that ALSA is liable in its own right because it assumed the duty to control the transportation and handling of oxygen at the Plaquemine facility and breached that duty.

If a person undertakes a task which he otherwise has no duty to perform, he must nevertheless perform that task in a reasonable and prudent manner. *Harris v. Pizza Hut*, 455 So.2d 1364 (La.1984); *McGowan v. Victory and Power Ministries*, 99-0235 (La.App. 1 Cir. 3/31/00), 757 So.2d 912. A negligent breach of a duty which has been voluntarily or gratuitously assumed may create civil liability. *McGowan, supra*. The RESTATEMENT (SECOND) OF TORTS § 324A (1966)^{FN1} provides:

FN1. The court of appeal and the parties herein refer to this section of the Restatement as the "Good Samaritan" Doctrine. However, this characterization of this section is not to be confused with Louisiana's "Good Samaritan" Doctrine set forth in LSA R.S. 9:2793, which provides:

A. No person who in good faith gratuitously renders emergency care, first aid or rescue at the scene of an emergency, or moves a person receiving such care, first aid or rescue to a hospital or other place of medical care shall be liable for any civil damages as a result of any act or omission in rendering the care or services or as a result of any act or failure to act to provide or arrange for further medical treatment or care for the person involved in the said emergency; provided, however, such care or services or transportation shall not be considered gratuitous, and this Section shall not apply when rendered incidental to a business relationship, including but not limited to that of employer-employee, exist-

ing between the person rendering such care or service or transportation and the person receiving the same, or when incidental to a business relationship existing between the employer or principal of the person rendering such care, service or transportation and the employer or principal of the person receiving such care, service or transportation. This Section shall not exempt from liability those individuals who intentionally or by grossly negligent acts or omissions cause damages to another individual.

B. The immunity herein granted shall be personal to the individual rendering such care or service or furnishing such transportation and shall not inure to the benefit of any employer or other person legally responsible for the acts or omissions of such individual, nor shall it inure to the benefit of any insurer.

Certainly, a person who renders emergency care or aid to a stranger is incomparable to a parent corporation issuing safety mandates to subsidiary corporations.

*1139 One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if

(a) his failure to exercise reasonable care increases the risk of such harm, or

(b) he has undertaken to perform a duty owed by the other to the third person, or

(c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

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Whether a duty is assumed is a factual question to be determined by the fact finder. *Schulker v. Roberson*, 91-1228 (La.App. 3 Cir. 6/5/96), 676 So.2d 684. A trial court's findings of fact may not be reversed absent manifest error or unless clearly wrong. *Stobart v. State of Louisiana, through Dep't of Transp. and Dev.*, 92-1328 (La.4/12/93), 617 So.2d 880. This court has a constitutional duty to review facts. *Ambrose v. New Orleans Police Dep't Ambulance Serv.*, 93-3099, 93-3110, 93-3112 (La.7/5/94), 639 So.2d 216. Because we have this duty, we must determine whether the verdict was clearly wrong based on the evidence, or clearly without evidentiary support. *Id.* The reviewing court must do more than just simply review the record for some evidence which supports or controverts the trial court's findings; it must instead review the record in its entirety to determine whether the trial court's finding was clearly wrong or manifestly erroneous. *Id.* at 882. The issue to be resolved by a reviewing court is not whether the trier of fact was right or wrong, but whether the factfinder's conclusion was a reasonable one. *Id.* The reviewing court must always keep in mind that "if the trial court's or jury's findings are reasonable in light of the record reviewed in its entirety, the court of appeal may not reverse, even if convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Id.* at 882-83 (citing *Housley v. Cerise*, 579 So.2d 973 (La.1991)) (quoting *Sistler v. Liberty Mutual Ins. Co.*, 558 So.2d 1106, 1112 (La.1990)).

To support their contention that ALSA was liable for the safety of ALAC's employees because ALSA assumed the duty, plaintiffs relied upon *Miller v. Bristol-Myers Company*, 168 Wis.2d 863, 485 N.W.2d 31 (1992). In that case, the plaintiff was injured in a flash fire while working for the subsidiary. The plaintiff sued the parent corporation, Bristol-Myers Corporation, which was the sole stockholder of the subsidiary, Medical Engineering Corporation, alleging that the parent corporation assumed a duty to the subsidiary's employees. The evidence revealed that the parent corporation man-

aged and *1140 monitored the subsidiary's performance through the subsidiary's board of directors. The Wisconsin Supreme Court concluded that the parent company had, as a matter of law, assumed a duty of the subsidiary for the safety of its employees. That Court stated:

The introductory portion [of section 324A] establishes when an assumption of duty arises. The elements for an assumption of duty to arise are that the actor must: (1) undertake to render services, (2) to another, (3) which such actor should recognize as necessary for the protection of a third person.

Miller, 168 Wis.2d at 883, 485 N.W.2d at 38.

In this case, plaintiffs introduced into evidence a document known as "Technical Instruction 84" ("TI 84"), which was the technical instruction utilized by ALSA and its related entities, and was implemented to protect against various hazards presented by oxygen. It is important to note that TI 84 was implemented following a series of similar explosions and fatalities at ALSA facilities in Europe. TI 84 acknowledges that the Compressed Gas Association, Inc. ("CGA") "may also lay down guidelines ..." in the United States and Canada.^{FN2} TI 84 contains the following statements:

FN2. The CGA published a pamphlet entitled, INDUSTRIAL PRACTICES FOR GASEOUS OXYGEN TRANSMISSION AND DISTRIBUTION PIPING SYSTEMS, which contained "a summary of the current industrial practices used in gaseous oxygen transmission and distribution piping systems..." The document stated in pertinent part:

This document is not intended to be a mandatory standard or code. It is based upon the combined knowledge, experience, and practices of the major oxygen producers in this country as represented by their members on the CGA Pipeline

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Committee.

CGA pamphlet number G-4.4, revision 1993, p. 5, INDUSTRIAL PRACTICES FOR GASEOUS OXYGEN TRANSMISSION AND DISTRIBUTION PIPING SYSTEMS .

In early 1983 in Europe, the [Industrial Gas Committee ("IGC")] ^{FN3} brought out a document 13/82 entitled THE TRANSPORTATION AND DISTRIBUTION OF OXYGEN BY PIPELINE. It is fairly complete and matches the rules to be respected throughout our Group.

FN3. The IGC is the European counterpart of the CGA, and it is charged with the task of setting the industrial practices in Europe.

* * *

TI 84 sets the minimum requirements to be met throughout the AL Group as regards oxygen pipeline networks.

TI 84 also acknowledges that after the European explosions, ALSA adopted an industry standard that required the erection of protective walls and screens in compressed gas facilities. Under this new standard, when a plant worker was required to operate a valve which is in operation, he must be protected by a barrier wall or screen.

It is undisputed that there were no protective walls or screens surrounding the pressurized valves at the Plaquemine plant. It is also clear that such barrier walls are utilized routinely in ALSA's European subsidiaries. Following the accident, ALAC enlisted a team of investigators to delve into the matter and determine the cause of the flash fire. After determining the probable cause of the fire, the investigators made certain recommendations, which were later promulgated as rules by CGA, including the following:

7.1.0 [CGA] pamphlet number G-4.4, revision 1993, INDUSTRIAL PRACTICES FOR

GASEOUS OXYGEN TRANSMISSION AND DISTRIBUTION PIPING SYSTEMS, should be considered the minimum acceptable *1141 standard document when designing an oxygen piping system (fn.omitted).

* * *

7.11.0 Barrier walls must be utilized around all oxygen control valve stations in high velocity pressure reducing service. Such walls are to be designed and constructed to withstand the expected forces involved in any oxygen pipeline fire and resulting rupture.

* * *

7.13.0 Manual isolation valves, isolating pressure regulating control valves, are to be within the barrier wall. Their operating hand wheels must project and be accessible outside the barrier wall.

Louis Butherol, a longtime ALSA employee, now retired, was designated to testify at the trial as the corporate representative for ALSA. At trial Butherol testified that contrary to the language of the TI 84, barrier walls were never "required;" they were merely "recommended." Butherol testified that the phrase "minimum requirements" was an incorrect translation of the French phrase "*regle minimal*," which means "minimum rule" or "guide." Butherol declined to render an opinion of whether barrier walls should have been installed at the Plaquemine plant because he was unfamiliar with the facility, as he had never visited the plant. Butherol further admitted that protective walls or screens were used for oxygen let-down stations in the European plants but were never utilized in the United States.

Claude Tronchon, formerly the CEO of ALAC, testified that he is the General Manager of Risk Management. Tronchon admitted that when he was CEO of ALAC, all of the Canadian and American subsidiaries reported to him. He acknowledged that he was aware that ALAC and Big Three were not following the same technical safety guidelines as the European counterparts. He was equally aware

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that Big Three was not following ALSA's technical recommendations with respect to safety and design, but "we didn't feel that it was necessary to do anything about that" due to Big Three's good safety record. Tronchon testified that when he visited the Plaquemine plant, he met with Hracek, but he did not discuss any technical changes that should be implemented. Tronchon conceded that ALSA's safety policy states that the absence of accidents does not necessarily mean that a good safety situation exists, and that ALSA could impose any particular safety or technical standard upon ALAC or Big Three if it had chosen to do so.

Gerard Campion, the Safety Director for the Air Liquide world group, testified that after a plant explosion at one of its plants in Mons, Belgium in 1968, in which a plant manager was killed at a manual valve station, ALSA saw to it that barrier walls were built around its let-down stations at its subsidiaries. Campion testified that it was the responsibility of ALSA's Direction Technique to insure that the TI 84 was distributed to the subsidiaries in the United States. He also admitted that he was responsible for making sure that ALSA's safety policy was applied.

Additionally, Eric Fortuit, who was the Director of the Direction Technique at the time of the accident at issue, described the function of the Direction Technique as follows:

We write recommendations, and effectively for us it is important to know whether the recommendations are understood. Therefore, we make visits to the subsidiaries, we also help the subsidiaries to make the audits of their ... plant, because in the entire function they are responsible to make the audit of their ... own plant.

*1142 After the Plaquemine plant accident, ALSA made a "[Recommendation of Technical Safety] for all the subsidiaries, to remind them of the former technical instructions concerning the [barrier] walls...."

Fortuit testified that prior to plaintiffs' accident, he had never visited the Plaquemine plant, so he was unaware of the condition of the letdown station there. Fortuit admitted that he did not know that Big Three was not using protective walls and screens, although he knew that all of the ALSA plants in France have them. Moreover, Fortuit admitted that the safety standards set forth in TI 84 are the minimum safety standards for ALSA and that the AL Group instructs the subsidiaries and makes written recommendations to them regarding safety measures. Like Butherol, Fortuit testified that the guidelines set forth in TI 84 were merely recommendations, not requirements.

Defendants contended that ALSA did not "undertake to perform a duty owed" by ALAC. According to defendants, ALSA was not obligated to enforce TI 84 because TI 84 is not a "mandate." Defendants maintained that each subsidiary, outside of France, was responsible for its own safety regulations. Butherol testified that the procedures outlined in the TI 84 are not requirements, and Campion testified that ALSA issues periodic safety recommendations to its subsidiaries, but the implementation of those recommendations are at the discretion of the manager of each subsidiary.

Moreover, defendants maintained that even if TI 84 may be construed as an order, a parent corporation is not liable for workplace injuries under section 324A of the RESTATEMENT (SECOND) OF TORTS. In *Muniz v. National Can Corp.*, 737 F.2d 145 (1st Cir.1984), the subsidiary's employee sued the parent corporation, seeking damages for injuries he sustained allegedly as the result of exposure to toxic lead fumes while employed by the subsidiary. The plaintiff alleged that the parent corporation was liable for his work-related injuries because it was "involved" with safety measures at the subsidiary. The sole issue before the court was whether the parent corporation had assumed responsibility for the safe working conditions at the subsidiary. The district court ruled in favor of the parent corporation, finding that the "duty and con-

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trol [of safety matters] were primarily in the hands of the subsidiary's local management, [and] ... [the parent corporation] had no independent duty" to provide safe working conditions at the subsidiary plant. *Muniz v. National Can Corp.*, No. 81-0435(TR), slip. Op. at 4 (D.P.R. July 14, 1983).

The court of appeal, citing *Love v. Flour Mills of America*, 647 F.2d 1058 (10th Cir.1981), noted that a parent corporation may be liable for unsafe conditions at a subsidiary only if it assumes a duty to act by affirmatively undertaking to provide a safe working environment at the subsidiary. Such an undertaking may be express, as by contract between the parent and the subsidiary, or it may be implicit in the conduct of the parent. *Muniz*, 737 F.2d at 148. After reviewing the evidence presented, the *Muniz* court concluded:

There is no evidence in this case that [the parent corporation] assumed responsibility for safety at [the subsidiary plant]. Nor does the evidence show that [the subsidiary] relied on [the parent corporation] for this purpose by lessening or omitting its own safety measures. (Citations omitted). Rather, the evidence shows that [the parent corporation] provided general safety guidelines, not specifically directed to the concentration of lead in the workplace (fn.omitted), and that [the parent corporation] *1143 intended for these general guidelines to be implemented by local management (fn.omitted.)

Muniz, 737 F.2d at 149.

Liability under 324A(b) of the RESTATEMENT (SECOND) OF TORTS arises in the workplace setting only if the actor's undertaking was intended to be in lieu of, rather than as a supplement to, the employer's own duty of care to the employees. *Davis v. Liberty Mutual Ins. Co.*, 525 F.2d 1204 (5th Cir.1976); *Stacy v. Aetna Casualty & Surety Co.*, 484 F.2d 289 (5th Cir.1973); *Blessing v. United States*, 447 F.Supp. 1160 (E.D.Pa.1978). In *Boggs v. Blue Diamond Coal Co.*, 590 F.2d 655 (6th Cir.), cert. denied, 444 U.S. 836, 100 S.Ct. 71,

62 L.Ed.2d 47 (1979), fifteen coal miners were killed when methane gas exploded in a mine in Kentucky. The miners were employed by a subsidiary corporation owned by the defendant, the parent corporation. The parent corporation operated several coal mines and related businesses, and described itself as a "multi-unit enterprise consisting of a group of wholly owned subsidiary corporations controlled by a central holding company...." *Boggs*, 590 F.2d at 657. The wives of the men filed a wrongful death action against the parent corporation, alleging that it provided management, engineering and safety services to the subsidiary, including advice and assistance in mine ventilation. The management of the parent corporation recognized that improvements were needed in order to minimize the accumulation of methane gas, but it delayed construction of the improvements. The court of appeal affirmed the district court's denial of the parent corporation's motion for summary judgment, finding that the management structure was such that the parent had the "primary" responsibility for the safety program in the mine operated by the subsidiary.

Similarly, in *Oliver v. St. Clair Metal Products Co.*, 45 Mich.App. 242, 206 N.W.2d 444 (1973), an injured employee sued the parent of his employer as a third party, claiming that negligence by the employees of the parent had caused his work-related injury. Each of the parent corporation's plants were separately incorporated as subsidiaries. The court held that the suit could be maintained, as the evidence showed that a management official of the parent corporation, who was in charge of supervising production at various plants, had become aware of the lack of safety features on a machine operated by the plaintiff.

In the instant case, the jury was presented with ALSA's own document, the TI 84, which clearly provides that it "sets the minimum requirements to be met throughout the AL Group ...," which encompasses facilities throughout the United States, including the one in Plaquemine. The TI 84 went on

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to state that the ICG document entitled THE TRANSPORTATION AND DISTRIBUTION OF OXYGEN BY PIPELINE, the European counterpart to CGA pamphlet entitled INDUSTRIAL PRACTICES FOR GASEOUS OXYGEN TRANSMISSION AND DISTRIBUTION PIPING SYSTEMS, "is fairly complete and matches the rules to be respected *throughout our Group*." (Emphasis added). The TI 84 further stated, "In the event of incompatibility with rules in force locally, the DIRECTION TECHNIQUE may be consulted to decide on the attitude to adopt."

After considering the testimony and the documentary evidence, the jury concluded that ALSA had assumed a duty for safety at the plant. After reviewing the record in its entirety, I am convinced that the jury was correct in its determination that ALSA assumed the duty for safety at the Plaquemine facility and that ALSA's negligence was a legal cause of plaintiff's injuries.*1144 The jury was presented with two permissible views of the evidence of whether the procedures set forth in the documents were mandates or mere guidelines or recommendations. The TI 84 clearly described the instructions contained therein as "minimum requirements." Apparently, the jury convinced that ALSA, as the parent corporation, had set forth minimum requirements for safety at its various subsidiaries around the world, not just in Europe.

For the foregoing reasons, I respectfully dissent.

ON REHEARING

PER CURIAM.^{FN*}

FN* Judge Philip C. Ciaccio, retired, sitting pro tempore, for Justice John L. Weimer, recused.

[20][21] We granted plaintiffs' application for rehearing in this case because at least some of the justices in the original majority were concerned about the propriety of the majority's decision in the

original opinion to review the jury verdict in favor of the plaintiffs under a *de novo* standard, as opposed to a manifest error standard of review.^{FN1} The majority's decision to apply the *de novo* standard was based on its conclusion that "the jury could not have applied the correct law in determining whether ALSA assumed a duty to the employees at ALAC's plant because it was given no instructions whatsoever on the law of assumption of duty or any of the elements required under [Restatement (Second) of Torts] § 324A. *Bujol v. Entergy Services, Inc.*, 2003-0492 (La.5/25/04), at 1130. In their application for rehearing, the plaintiffs challenged the majority's decision to apply the *de novo* standard of review and give no deference to the jury verdict, arguing that defendants waived their right to complain about the jury instruction when they failed to object to the overall instruction at trial. As plaintiffs correctly point out, La.Code of Civil Proc. art. 1793(C) provides that "[a] party may not assign as error the giving or the failure to give an instruction unless he objects thereto either before the jury retires to consider its verdict, or immediately after the jury retires, stating specifically the matter to which he objects and the grounds of his objection."

FN1. Absent a finding that the trier of fact applied the incorrect law because of erroneous and prejudicial jury instructions, the court of appeal should not upset a jury verdict unless it finds that it is manifestly erroneous or clearly wrong. *See Gonzales v. Xerox Corp.*, 320 So.2d 163 (La.1975). When an appellate court finds prejudicial error that has affected the factfinding process at trial, the jury verdict is not due any deference, *de novo* review applies and the appellate court is at liberty to make an independent decision based on the record evidence.

Following a careful review of our original decision in this case, in light of the plaintiffs' arguments made in their application for rehearing, and the defendant's contrary contentions, we reinstate

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our original decision. Although the court did apply a *de novo* standard of review, we also specifically noted that “even if we were to review this case under the manifest error standard, our result would be the same.” *Id.* At this juncture, after grant of rehearing and presentation of oral arguments anew, we find no need to decide whether *de novo* is the appropriate standard of review (that is, giving no deference to the jury’s finding), for we resolve this case upon finding correct our alternate conclusion on original hearing that, under the manifest error standard, the jury’s verdict cannot stand and must be reversed.

[22] La.Rev.Stat. 23:13 imposes on employers a duty to “furnish employment which shall be reasonably safe for the employees*1145 therein.” That duty is not automatically imposed on parent companies of employers. Generally, “[a] parent corporation may be liable for unsafe conditions at a subsidiary only if it assumes a duty to act by affirmatively undertaking to provide a safe working environment.” *Muniz v. National Can Corp.*, 737 F.2d 145, 148 (1st Cir.1984). Communication or concern over safety matters is not enough. *Id.* In this case, the lower courts applied the provisions of Restatement [Second] of Torts § 324A^{FN2} to find that ALSA assumed a duty to act by undertaking to provide a safe working environment at the plant of its subsidiary, ALAC.

FN2. Restatement [Second] of Torts § 324A provides as follows:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect [perform] his undertaking, if

(a) his failure to exercise reasonable care increases the risk of harm, or

(b) he has undertaken to perform a duty owed by the other to the third person, or

(c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

As we stated in our original decision, under the plain language of the introductory portion of § 324A, an assumption of duty arises only when the defendant (1) undertakes to render services, (2) to another, (3) which the defendant should recognize as necessary for the protection of a third person. Moreover, even if a plaintiff proves the assumption of a duty under that standard and that the defendant failed to exercise reasonable care to perform that duty, he may only recover if he further proves that either (a) the defendant’s failure to exercise reasonable care increased the risk of such harm; or (b) the defendant has undertaken to perform a duty owed by the employer to the injured employee; or (c) harm is suffered because of reliance of the employer or the injured employee upon the undertaking. *Id.* at 1129, citing *Tillman v. Travelers Indemnity Co.*, 506 F.2d 917 (5th Cir.1975).

Our decision on this rehearing, that we correctly found in the original opinion that the jury’s verdict was manifestly erroneous, is based primarily on the fact that the record in this case is devoid of evidence from which the jury could reasonably have concluded that ALSA “affirmatively undertook” to provide a safe working environment at ALAC. At trial, the only evidence presented by the plaintiffs to support their theory that ALSA affirmatively assumed a duty of safety for ALAC’s employees was the introduction of ALSA’s Technical Instruction 84 (“TI 84”), a document that addressed barrier walls, among other things and that was disseminated to all of ALSA’s subsidiaries in 1984. Plaintiffs point to the following excerpt from TI 84, found in a section of the document titled “Protective walls and screens,” as evidence that ALSA acted to require barrier walls around the valve that exploded causing their injuries in this case.

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For new installations which are up to standard, the only requirement is that operating personnel should be protected during manual opening or closing of gate valves when:

$P D^2 > 3 000$

where:

P = effective pressure in bars

D = nominal diameter in cm.

In this case, *provision must be made for a protective wall between the gate valve and the hand-wheel.*

Plaintiffs also point to language in the English translation of TI 84, which was *1146 originally written in French, which stated that “TI 84 sets the minimum requirements to be met throughout the AL Group as regards oxygen pipeline networks,” as well as another statement the rules set forth therein “must be followed” for all ALSA pipelines. Through its preparation and dissemination of TI 84 to its subsidiaries in 1984, plaintiffs argue that ALSA met all the requirements for liability under § 324A because it (1) undertook to render services, (2) to another, (3) which it should have recognized as necessary for the protection of a third person.

On the other hand, ALSA presented the testimony of numerous employee witnesses with direct knowledge about the preparation and dissemination of TI 84 in 1984, including the person who drafted the document, each of whom testified that the provisions of TI 84 were never intended to set any type of minimum standards, as the English translation of the document indicates, but were merely safety recommendations. According to the testimony of ALSA's witnesses, which is summarized in some detail in our original opinion, each ALSA subsidiary could chose to follow TI 84 or not, depending on many factors relevant to each plant. As we stated on original hearing:

The witnesses explained why it would be im-

possible to impose the same safety factors upon each of its more than 100 subsidiaries in over 60 countries, based on the different local rules and practices, types of equipment used, varying statutory requirements, and numerous other factors. Likewise, it would be a ludicrous to hold that by issuing TI 84, ALSA undertook the duty of safety owed by each of its subsidiaries at hundreds of plants in over 60 countries.

Id. at 1133-34.

Based on the testimony summarized above, ALSA asserts that it did not meet any of the requirements for liability under § 324A because, despite its preparation and dissemination of TI 84 to its European subsidiaries in 1984, it never (1) undertook to render services, (2) to another, (3) which it should have recognized as necessary for the protection of a third person. We agree. Our review of the record reveals no evidence from which the jury could reasonably have found that ALSA “assume[d] a duty to act by affirmatively undertaking to provide a safe working environment.” *Muniz*, 737 F.2d at 148. The most that could be said is that in 1984, through its preparation and dissemination of TI 84 in 1984, ALSA communicated concern over safety matters at its subsidiaries to which the document was disseminated. That being the case, we find that the plaintiffs failed to prove, under the legal principles applicable to this case, that ALSA “assumed a duty to act by affirmatively undertaking to provide a safe working environment” at ALAC's plant when it disseminated the document to its 1984 subsidiaries.

Further, the record evidence is uncontradicted that ALAC was never provided with TI 84, as it was purchased by ALSA in 1986, two years after 1984 when TI 84 was disseminated to ALSA's subsidiaries. The reason TI 84 was never disseminated to ALAC was clear in the record in this case. Defense witnesses testified that when ALSA purchased Big Three, an American company which owned ALAC, they chose to rely on the expertise of Big Three and its subsidiary, ALAC, in safety mat-

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ters and did not intercede in any way into Big Three's or ALAC's duty to provide a safe workplace for its employees. Big Three had an excellent safety record, was complying with Compressed Gas Association ("CGA") standards, and was a leader in the United States in this industry. *1147 Given the fact that liability under the first paragraph of § 324A must be premised on some type of "affirmative undertaking," ALSA's failure to disseminate TI 84 to ALAC cannot be sufficient grounds for proving assumption of the duty of safety or for imposing liability under that paragraph.

In addition to the above reasons supporting our finding that ALSA never "assumed a duty to act by affirmatively undertaking to provide a safe working environment" at ALAC, we note that the language of TI 84 does not require the use of barrier walls around the valves involved in this case, even if the issuance of TI 84 could be considered an "affirmative undertaking" and even if the document had been disseminated to ALAC. We explained the record evidence on this issue as follows in our original opinion:

TI 84 explains that, while ASLA "called for the use of a sophisticated system of walls forming protective walls and screens" following a series of accidents in the 1960s and 70s, "today, less stringent solutions are possible" because of experience acquired since that time, installation procedures ensuring high quality clean installations and analysis of the accidents since 1970 when the protective wall system was introduced. This statement indicates solutions other than protective walls and screens were then considered safe and acceptable. The next sentence of TI 84 provides that "for new installations which are up to standard, the only requirement is that operating personnel should be protected during manual opening or closing of gate valves ..." under certain circumstances by a protective wall between the gate valve and the handwheel. As seen by the evidence presented, the valve where the flash fire occurred was an automatic valve, which was or-

dinarily operated through the use of remote control and which was not normally worked on while under pressure. While there was no barrier wall between the manual valve that Bujol and Perkins first attempted to close and the handwheel that they turned two times in an attempt to close it, the manual valve is not the valve that exploded and caused their injuries. TI 84 did not even suggest that a wall be placed around automatic valves. The witnesses testified about the drawbacks that would entail if a wall were placed around an automatic valve, i.e., the automatic valve could not be viewed from the control room where it was operated remotely. Further, because by definition an automatic valve is not opened or closed manually, a wall would have prevented the workers from determining what was wrong with the automatic valve and they would have had to go around the wall in order to do so had one been there. TI 84 did provide however that "[t]he question of regular maintenance checks carried out with the pipeline still pressurized must be examined and strict procedural guidelines laid down." Accordingly, it was ALAC, not ALSA, that had safety procedures in place in order for work to be performed on an automatic valve under pressure. Finally, the provisions of TI84 recognized that local rules in force, in this case the CGA which did not require barrier walls, might conflict with the provisions of TI84 (requiring barrier walls) and that in such case, "the Direction Technique may be consulted to decide on the attitude to adopt." (Emphasis added.) This reaffirms the witnesses' testimony that the provisions of TI84 regarding barrier walls were not mandates, but merely recommendations that may or not be applicable depending on the circumstances of each plant, and *1148 that ALSA was available to offer advice if requested by a subsidiary.

Bujol, 2003-0492, at 1134-35.

[23] As explained in our original decision, the plaintiffs' evidence was also insufficient to establish liability under § 324(A)(b), which, as we stated

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in our original decision, includes an even more stringent requirement than the “positive undertaking” requirement of the introductory paragraph of § 324(A) *Id.* at 1135. In fact, “a parent, or other entity, will only be liable for a voluntary assumption of duty under § 324(A)(b) where that corporation’s undertaking was intended to supplant, not just supplement, the subsidiary’s duty.” *Id.* at 1136. In short, liability under this section cannot be based on a failure to assume a duty, but is instead created when an entity assumes a duty to act by affirmatively undertaking to provide a safe working environment to the extent that by its actions it has totally supplanted and taken over the subsidiary’s duty and then breaches the duty it has affirmatively undertaken. There is absolutely no reasonable factual basis in the record to support such a finding.

In conclusion, the duty to provide workplace safety in this case rests by Louisiana statute with ALAC, the employer. The defendant in this case, ALSA, ALAC’s distant parent, can assume ALAC’s statutory duty for workplace safety only by “affirmatively undertaking to provide a safe working environment.” Plaintiffs’ introduction of TI 84 to prove that ALSA “affirmatively undertook” ALAC’s duty of safety fails for three reasons. First, the preparation and dissemination of TI 84 to ALAC’s subsidiaries in 1984 was more of a communication or concern about workplace safety than the “affirmative undertaking” required to assume a duty of safety. Second, TI 84 was, for good reasons explained above, never even disseminated to ALAC or its direct parent, Big Three, when Big Three was acquired by ALSA years after TI 84 was disseminated in Europe. Third, the language of TI 84 indicates that it was never intended to require barrier walls around automatic valves, like the one that caused the injuries here. Thus, our original decision reversing the jury verdict in favor of the plaintiffs is reaffirmed.

KNOLL, Justice, dissents & assigns reasons.

JOHNSON, Justice, dissents and assigns reasons.

KNOLL, J., dissenting.

This case presented a fact-driven issue resolved by employing a manifest error analysis. In my view, the majority does great violence to the well accepted tenet of this Court that *where a rational basis exists* for the factfinder’s determination, *particularly in light of conflicting testimony*, manifest error review dictates affirmation of the factfinder’s rational assessment of the evidence. Instead, in an effort to shield a parent corporation from liability for having addressed a safety issue, the majority ignores the manifest error doctrine and fails to consider that a *rational basis* existed for the jury verdict. As a result, the majority rewards a parent corporation for opting not to share critical, lifesaving safety information with one of its subsidiary corporations which should have met the requirements established therein, and signals to other similarly structured corporations that this manner of operation is permissible in Louisiana.

It is well established that the issue of whether a duty is owed is a question of law. *Faucheaux v. Terrebonne Consolidated Government*, 615 So.2d 289 (La.1993). However, whether Air Liquide assumed a duty to the injured employees at the Plaquemine plant is a factual question *1149 determined by the factfinder and thus subject to the manifest error rule. *Schulker v. Roberson*, 91-1228 (La.App. 3 Cir. 6/5/96), 676 So.2d 684, 688.

In an action to recover damages for injuries allegedly caused by another’s negligence, the plaintiff has the burden of proving negligence on the part of the defendant by a *preponderance of the evidence*. Proof is sufficient to constitute a preponderance when the entirety of the evidence, both direct and circumstantial, shows that the fact sought to be proved is more probable than not. *Benjamin ex rel. Benjamin v. Housing Authority of New Orleans*, 2004-1058 (La.12/1/04), 893 So.2d 1, 5. Further, in civil cases, the appropriate standard for appellate review of factual determinations is the manifest error-clearly wrong standard, which precludes the setting aside of a district court’s finding of fact unless that finding is clearly wrong in light of the record

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reviewed in its entirety. *Cenac v. Public Access Water Rights Ass'n*, 2002-2660 (La.6/27/03), 851 So.2d 1006, 1023. Thus, a reviewing court may not merely decide if it would have found the facts of the case differently. *Id.* The reviewing court should affirm the trial court where the trial court judgment is not clearly wrong or manifestly erroneous. *Id.* at 9-10, 851 So.2d at 1023. Moreover, a majority of this Court has held the manifest error standard of review not only applies to all factual findings, but also includes sufficiency of the evidence challenges. *Hall v. Folger Coffee Co.*, 2003-1734 (La.4/14/04), 874 So.2d 90, 99.

It is eminently clear in the present case that during this two-week jury trial the parties presented conflicting evidence on the pivotal issue in this case, i.e., whether Air Liquide assumed a duty to provide its subsidiary, the Plaquemine plant, with safety requirements it had acquired from its experiences in Europe, and the evidence was more than sufficient to establish the existence of a duty and Air Liquide's assumption of that duty. In such circumstances, one of the basic tenets of the manifest error standard of review is that "reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review." *Parish Nat. Bank v. Ott*, 2002-1562 (La.2/25/03), 841 So.2d 749, 753. This principle is further explained in *Ott* as follows:

Where there is conflicting testimony, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review, even though the appellate court is convinced that had it been the trier of fact, it would have weighed the evidence differently. *Lirette v. State Farm Ins. Co.*, 563 So.2d 850 (La.1990). The trier of fact is in a better position to evaluate the credibility of witnesses and make factual determinations than is a reviewing court. *Stobart v. State Through DOTD*, 617 So.2d 880 (La.1993).

...

'This court has announced a two-part test for the reversal of the factfinder's determinations: (1)

the appellate court must find from the record that a reasonable factual basis does not exist for the finding of the trial court, and (2) the appellate court must further determine that the record establishes that the finding is clearly wrong (manifestly erroneous). The issue to be resolved by the reviewing court is not whether the trier of fact is right or wrong but whether the factfinder's conclusion was a reasonable one.... The reviewing court must always keep in mind that if the trial court's findings are reasonable in light of the record reviewed in its entirety, the appellate court may not reverse, even if convinced that had it been sitting *1150 as trier of fact, it would have weighed the evidence differently.'

Id. at 753-54, quoting *Stobart v. State Through DOTD*, 617 So.2d 880 (La.1993).

In the present case, the jury, after hearing conflicting testimony on many of the key elements of this case, found Air Liquide "assumed a duty for safety at [Air Liquide America's] Plaquemine Air Separation Plant," and further found Air Liquide breached that duty. To the contrary, the majority now rejects two weeks of trial evidence and summarily adopts *carte blanche* Air Liquide's argument that TI-84 was not mandatory and was inapplicable to automatic valves. My careful, studied review of this record makes it abundantly clear a *reasonable factual basis* exists for the jury's findings and these findings are not manifestly erroneous.

TI-84's existence was rooted in Air Liquide's European experiences, involving horrific flash fires like the one at the Plaquemine plant. As a result of its European investigation, showing barrier walls in let-down stations at oxygen generating plants were essential for the protection of the workers, Air Liquide promulgated TI-84 as a set of minimum requirements to be released to all its subsidiaries and its rule was to be respected throughout its group of companies.

I find the jury fully considered Air Liquide's post-accident characterization of TI-84 as a discretionary, informational communication, and reason-

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ably rejected that in favor of the mandatory nature of the promulgation as fully explained in Air Liquide's own translation. The jury knew the importance of TI-84 and that Air Liquide's English translation went unchallenged for over a decade. As the judge instructed, the jury had to make a credibility determination on this factual issue and was well aware of its duty to assess whether Air Liquide's witnesses' testimonies were simply self-serving. In our system of justice, these questions classically fall within the purview of the jury and are subject to manifest error review. Unlike the majority's new characterization of this seminal document as "a communication or concern about workplace safety," *Op.* at 1148, the jury heard conflicting testimony on this issue and chose not to accept Air Liquide's self-serving testimony. Despite Air Liquide's contrary, self-serving assertion at trial about whether the French edition of this requirement was discretionary, its contemporaneous English translation left no doubt its subsidiaries lacked discretion in the implementation of TI-84. Therefore, I find the jury reasonably interpreted TI-84 against Air Liquide because it was Air Liquide who provided the English translation and never asserted a different interpretation prior to this accident.

I further disagree with the majority's finding that the requirements of TI-84 were inapplicable to automatic valves at let-down stations. First, the majority's adoption of Air Liquide's contention artificially separates the valves contrary to the evidence. Although it cannot be gainsaid that the automatic and manual valves are spatially separated, the distance of separation is small as Bujol and Perkins said they could see the automatic valve suddenly close as they stood nearby at the manual valve. Secondly, the evidence clearly shows that the manual valve functioned as a means to depressurize the line so that the automatic valve could be isolated and safely inspected. Thus, there is a functional connection between the automatic and manual valves. Moreover, as Chester Grelecki, the plaintiffs' expert, testified, not only would the barrier wall have served as a screen for the workers as

they manipulated the manual valve safely behind the wall, it would also have served to *1151 alert persons working in the area of these valves that a danger existed. Therefore, I find it would have been reasonable for the jury to conclude the barrier addressed in TI-84 had direct relevance even though the malfunctioning valve was an automatic one.

I likewise disagree with the majority's emphasis on the fact Air Liquide acquired ownership of the Plaquemine plant after its promulgation of TI-84. Although Air Liquide acquired ownership of the Plaquemine plant after its promulgation of TI-84, it failed to insure this plant's compliance with TI-84 even though it doubled the plant capacity after acquiring its ownership. As the jury learned, Claude Tronchon, the General Manager of Risk Management for Air Liquide, testified he was shocked to find out Air Liquide's safety director, Gerard Champion, had not audited the Plaquemine plant for compliance with Air Liquide's health and safety policies.

I find that with the promulgation of TI-84, Air Liquide assumed a key aspect of its subsidiary's duty with regard to work place safety. Albeit Air Liquide did not supplant the duty of its subsidiary to provide a safe workplace in all respects, Air Liquide's adoption of TI-84 carved out a discrete aspect of safety, namely at let-down stations, for which a subsidiary within the Air Liquide Group was given no discretion.^{FN1} Air Liquide's wording of TI-84 lends itself to no other conclusion.

FN1. The mere fact that Air Liquide is the ultimate parent corporation of Air Liquide America does not impose a duty upon Air Liquide to provide Air Liquide America's employees with a safe place to work. Louisiana law has been clear that a corporation is a distinct legal entity apart from its shareholders and the shareholders of a corporation organized after January 1, 1929, shall not be personally liable for any debt or liability of the corporation. *Buckeye Cotton Oil Co. v. Amrhein*, 168 La. 139,

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121 So. 602 (La.1929); LA.REV.STAT. ANN. § 12:93(B). Although the jurisprudence shows no case has imposed upon a parent corporation a duty to control its subsidiary's acts, *Joiner v. Ryder System Inc.*, 966 F.Supp. 1478, 1483 (C.D.Ill.1996), the present case involves an instance of a party who voluntarily undertakes a task that he otherwise has no duty to perform. To this extent, I take no exception to the majority's general statement that a duty is not automatically imposed on a parent company.

Tronchon admitted the Plaquemine plant was not following the directives of TI-84, and yet he did not attempt to remedy that situation because no accidents or explosions had occurred at a let-down station on those premises. This failure to implement TI-84 at the Plaquemine plant so that safety initiatives adopted in Europe were applied to protect these plaintiffs constitutes Air Liquide's breach of an assumed duty. The jury so found and its findings were reasonably based upon the evidence adduced.

Therefore, I find no error in the appellate court's affirmation of the jury verdict that found Air Liquide and its insurers liable to the plaintiffs for compensatory damages. Manifest error review and this Court's long line of established jurisprudence call for the affirmation of this reasonably considered jury verdict. For these reasons, I respectfully dissent.

JOHNSON, J., dissents and assigns reasons.

The majority acknowledges that the court in its original decision applied the incorrect *de novo* standard of review, but suggests that even if the court had applied the correct manifest error standard of review, the result would be the same.

*1152 In the case *sub judice*, the question before the jury was whether the parent corporation had assumed responsibility for safe working conditions at the subsidiary. The jury was presented with Air Liquid's own document, the TI 84, which clearly provided that it "sets the minimum require-

ments to be met throughout the AL Group ..., " which included the facilities throughout the United States and included the facility in Plaquemine where this event occurred. The jury heard conflicting testimony as to ALSA's responsibility regarding safety. After hearing testimony and reviewing the evidence presented, the jury found that the parent corporation assumed liability for the safety of all employees. Jurisprudence provides that the appellate courts should defer to the findings of the jury as the jury is in a better position to evaluate the credibility of witnesses and make a factual determination than is a reviewing court. *Parish National Bank v. Ott*, 02-1562 (La.2/25/03), 841 So.2d 749. After reviewing the record in its entirety, there is nothing in the record to suggest that 1) a reasonable factual basis does not exist for the jury's verdict or 2) that the jury's findings are clearly wrong (manifest erroneous). After being presented with two permissible views of the evidence of whether the procedures set forth in the TI 84 were mandates, guidelines, or recommendations, the jury ruled in favor of Air Liquid's liability. Applying the manifest error standard, this ruling should not be disturbed.

For these reasons, I respectfully dissent.

On Rehearing

Rehearing not considered.

KNOLL, J., would consider the application and grant it.

La.,2004.

Bujol v. Entergy Services, Inc.

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