Supreme Court of Louisiana

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FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the **10th day of December, 2021** are as follows:

BY Weimer, C.J.:

2021-C-00209 ***LUIGI MALTA, INDIVIDUALLY AND ON BEHALF OF HIS MINOR CHILD, GIOVANNI MALTA VS. HERBERT S. HILLER CORPORATION, HILLER OFFSHORE SERVICES, INC., THE HILLER COMPANIES, INC., HELIS ENERGY, L.L.C. AND HELIS ENTERPRISES, INC. (PARISH OF ORLEANS CIVIL)***

AMENDED IN PART. AFFIRMED AS AMENDED. REMANDED. SEE OPINION.

Hughes, J., dissents and assigns reasons.
Griffin, J., concurs in part, dissents in part and assigns reasons.

SUPREME COURT OF LOUISIANA

No. 2021-C-00209

LUIS MALTA, INDIVIDUALLY AND ON BEHALF OF HIS MINOR CHILD, GIOVANNI MALTA

VS.

HERBERT S. HILLER CORPORATION, HILLER OFFSHORE SERVICES, INC., THE HILLER COMPANIES, INC., HELIS ENERGY L.L.C. AND HELIS ENTERPRISES, INC.

On Writ of Certiorari to the Court of Appeal, Fourth Circuit, Parish of Orleans

WEIMER, C.J.

This case arises from injuries sustained by the plaintiff when a cylinder that forms part of a fire-suppressant system discharged while the plaintiff was moving the cylinder after it had been offloaded from a jack-up boat onto an oil production platform. At issue in this case is: (1) whether the company hired to inspect the platform's fire suppression systems owed a duty of care and, if so, whether it breached that duty; (2) whether the inspection company's actions were the cause-in-fact and legal cause of the plaintiff's injuries; (3) whether the inspection company was solely at fault; and (4) whether the general damage awards and the loss of consortium award are excessive.

For the foregoing reasons, this court finds that, under the facts of this case, the trial court did not err in finding that the inspection company is liable for the plaintiff's injuries; however, because there are multiple causes of the accident, the trial court

manifestly erred in allocating all of the fault to the inspection company. Furthermore, based on the evidence of the plaintiff's injuries, this court finds the trial court abused its discretion in fixing the plaintiff's general damage awards for physical and psychological injuries and the loss of consortium award of the plaintiff's son. The trial court's judgment is amended to allocate fault to the operator of the platform and the plaintiff and to reduce the challenged damage awards. As amended, the trial court's judgment is affirmed, and the matter is remanded for further consideration by the trial court.

FACTS AND PROCEDURAL HISTORY

Luigi Anthony Malta (Plaintiff) was employed by Wood Group Production Services, Inc. (Wood Group), which operated a fixed oil production platform in the Gulf of Mexico within Louisiana territorial waters. The platform is known as the Black Bay Central Facility (Facility). Facility, which is owned by Helis Oil and Gas Company, LLC, Helis Energy, LLC, and Helis Enterprises, Inc. (collectively Helis), is surrounded by 16 satellite platforms, including Central Battery (Platform). In his job as a warehousemen for Wood Group, Plaintiff's responsibilities included shipping, receiving, warehousing, and dispatching tools and supplies.

Pursuant to Wood Group's Master Service Agreement with Helis, Wood Group supervised all operations at Facility and its satellite platforms, including services performed there by other contractors. In 1998, Helis contracted separately with various companies affiliated with Herbert S. Hiller Corporation (collectively Hiller)[1] for periodic safety inspections and/or service of its fire fighting equipment at Facility and its satellite platforms. Pursuant to that contract, Hiller performs annual

[1] The Hiller defendants are Herbert S. Hiller Corporation, Hiller Offshore Services, Inc., and The Hiller Companies, Inc.

inspections, submits reports on its findings and on any discovered deficiencies, and meets with Wood Group's personnel to review those findings and deficiencies. In April 2012, Hiller tasked safety inspector, Dray Hebert,[2] with conducting a series of scheduled inspections of certain fire safety suppression systems and life-saving equipment at Facility and its satellite platforms. The purpose of the inspection was to determine whether the suppression equipment could extinguish fires or was in need of service. Hebert had not previously performed an inspection at this location, but had inspected similar systems in the past. At the direction of Lilton Joseph Harvey (Wood Group's foreman since 2002), John Wayne Lowery (an electrician of 12 years working for Wood Group) accompanied Hebert during the course of the three-day inspection.

During the inspection of the clean agent system located in a generator building on Platform, Hebert and Lowery observed that the presssure gauge on one of the two clean agent cylinders[3] showed zero pounds per square inch (PSI). However, based on the results of the liquid indicator level[4] on that cylinder, Hebert discerned that the cylinder was still full of the fire suppressant agent. Because the work order in question was for inspection services only and because industry regulations do not permit the removal of a cylinder during the course of an inspection when a replacement is not available, the cylinder was placed back into service once fully inspected. Hebert placed a red tag on the tie wrap attached to the manual actuator's safety pin to indicate its need for servicing.

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[2] Although Hebert had prior experience in this field, he had only been working for Hiller for approximately one year.

[3] These cylinders discharge a fire suppression agent at a high pressure to fully extinguish a fire without residue.

[4] The liquid level indicates the amount of agent in the cylinder.

After the inspection was completed, Hebert prepared reports consisting of approximately 70 pages, including a Clean Agent Cylinder Report and a Deficiencies Report for Platform. On the Clean Agent Cylinder Report, Hebert indicated the "Stamped Full" weight of the cylinder to be 244 pounds of which 110 pounds is attributable to the cylinder itself when empty and 134 pounds to the fire suppressant agent. Notably, the cylinder is designed to hold 150 pounds of agent; however, in light of the hazard level involved with the agent in question, the cylinder is specified for only 134 pounds. In the Clean Agent Cylinder Report, Hebert further stated that "Actual Full" for the cylinder was "245" pounds with "135" pounds of "Actual Agent." These notations indicate that the cylinder exceeded the specified weight by one pound. In the "Comments" section of this report, Hebert stated that the "[c]ylinder has 0 PSI." Due to this deficiency, Hebert reported on Platform's Deficiencies Report that "Generator #1 Halon cylinder has 0 PSI needs to be sent in for recharge."[5]

At the post-inspection safety meeting attended by Hebert and Wood Group's employees, including Harvey (the foreman), Lowery (the electrician), and Plaintiff, Hebert's reports were discussed.[6] Rather than obtain a work order to have Hiller return to Platform to disconnect and transport the cylinder for servicing, Harvey (without providing instructions or realizing that a specialized cylinder was involved)

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[5] The cylinder in question did not contain Halon (a type of fire suppressant agent) as reflected on Hebert's report. Nonetheless, Hebert's improper Halon reference did not affect the results of the inspection as the cylinder contained a similar type of propellant.

[6] Lowery testified that he never looked at Hebert's report, but instead "relied on the two gauges that said it was empty" and on Hebert's representation that "the liquid level was empty." Lowery interpreted an empty cylinder to mean the cylinder did not have any pressure; however, Lowery subsequently conceded that a cylinder could be pressurized even if it read empty on the gauge. Stated differently, Lowery was aware that an empty cylinder could contain pressure.

Relative to Lowery's testimony on the absence of liquid in the cylinder, Plaintiff's expert, David Stahl, testified that Lowery did not know how to read the liquid level indicator and that contrary to Lowery's testimony, based on the liquid level indicator reading, Hebert found that the cylinder was full.

instructed Lowery, who had never before disconnected this type of cylinder, to remove the cylinder from Platform's generator building and transport it to Facility's main platform so it could be brought ashore for servicing by Hiller.

Two days after the inspection had been completed, Lowery disconnected the cylinder and removed the electrical solenoid. Donald Colton Crain, a roustabout for Wood Group, who had no training or experience with fire suppression systems and had never before handled this type of cylinder, then removed the bolts from the bracket holding the cylinder. After Lowery checked the cylinder's manual actuator to ensure that its safety pin was still in place, as he was aware that a discharge would occur if the safety pin was pulled from the manual actuator, Crain bear-hugged the cylinder to move it from the generator building. Lowery, Crain, and Mike Burgess (an instrument and electrical technician for Wood Group) then carried the cylinder to the crane area. They wrapped one nylon strap around the cylinder in a double choke so it could be lowered by the crane to the waiting jack-up boat. Once in the boat, the cylinder was tied by the boat's captain to a handrail on the boat's stern.

The boat captain notified Facility's crane operator (Robert Fleming) by radio that the cylinder was en route to Facility and advised him of the need for a crane. Afterwards, Plaintiff received radio instructions from Fleming regarding the cylinder's arrival and the need for assistance. According to Harvey, Fleming and Plaintiff made the decision to put the cylinder in a cargo basket; however, Fleming testified that the boat captain most likely requested a cargo basket.[7] Plaintiff was

[7] According to Fleming, cylinders would be loaded and unloaded in many different ways, involving the use of a strap, a cargo basket, or a rack.

responsible for rigging and unrigging the cargo basket. After Plaintiff hooked the collapsible cargo basket[8] to the crane, Fleming lowered it to the jack-up boat.

Lowery, Crain, and Burgess, who were in the jack-up boat, lifted and placed the cylinder into the cargo basket so the cylinder could be raised by the crane to Facility's warehouse deck. According to Lowery, the safety pin was still in the manual actuator at this point. As the collapsed cargo basket was lifted, the top portion of the cylinder came to rest on the cargo basket.

As the cargo basket was nearing the warehouse deck, Plaintiff, who was Fleming's spotter, observed the cylinder for the first time and noticed a cap had not been placed on the top portion of the cylinder and that the cylinder had not been placed in a protective metal rack. Plaintiff grabbed the rope, guided the cargo basket onto the warehouse deck, and signaled for Fleming to set the load on the deck. Plaintiff then stood up the cylinder, and Fleming allowed the cargo basket to collapse. Without requesting assistance, Plaintiff got into the cargo basket and bear-hugged the canister part of the 245-pound cylinder to lift it from the cargo basket and place it on the deck grating. After getting out of the cargo basket, Plaintiff grabbed the neck part of the cylinder and attempted to pull the cylinder back to "roll [the cylinder] on a 45" to the staging area. The cylinder began to hiss. Suddenly, the cylinder started "hissing louder and faster." Plaintiff tried to push it out of the way, but the cylinder "went ballistic" and started spinning, striking Plaintiff in the heel and throwing him approximately seven feet into the air. Plaintiff landed on the deck grating on his left shoulder.

Plaintiff suffered shoulder fractures, a fractured heel, a sprained ankle, disk herniation, and bruising of the arm and chest. He underwent shoulder surgery, a

[8] When collapsed, the cargo basket was approximately six inches high.

laminectomy/diskectomy, and conservative treatment for his heel. Subsequently, Plaintiff was diagnosed with post traumatic stress disorder (PTSD) and major depressive disorder. Notably, Plaintiff was scheduled to get married six days after the accident; the couple could not reschedule their wedding without forfeiting the money that had been spent on the event. Because of his injuries, Plaintiff was in a wheelchair on his wedding day.

Plaintiff asserted a workers' compensation claim against his employer, Wood Group, and filed the instant personal injury action against Helis (Facility's owner) and Hiller (the inspection company). Helis settled with Plaintiff, leaving Hiller as the sole defendant in this proceeding. Relative to Hiller, Plaintiff alleged that it: (1) failed to "properly determine that the cylinder was not empty," (2) "[i]mproperly mark[ed] the cylinder as empty," (3) failed "to ensure that [the] cylinder was in proper working order," and (4) failed "to warn [Plaintiff] of any danger posed by the cylinder."

The case went to trial. Once Plaintiff rested his case, a motion for an involuntary dismissal by Hiller on the issue of liability was denied. At the conclusion of the bench trial, the trial court found that "[i]t is undisputed that this accident was the cause of [Plaintiff's] injuries." After finding that "Wood Group's foreman, Lilton Harvey testified that Mr. Hebert specifically told him that the cylinder was empty," the trial court held:

> Several expert and fact witnesses testified that all pressurized cylinders, regardless of the reading on the pressure gauge, must be treated as if under pressure. However, the Court finds that the testimony of several witnesses, including the Plaintiff, to be credible in that the Wood Group employees relied upon Mr. Hebert's representations and believed that they were removing and transporting a cylinder that was no longer pressurized. Specifically, Mr. Harvey testified that had Mr. Hebert advised that the gauge could be faulty, and that the cylinder might still

> be under pressure, he would not have let his employees remove the cylinder.
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> The Court finds from all of the evidence introduced at trial that Hiller's employee Dray Hebert's discussion with Wood Group's foreman Lilton Harvey, led directly to the chain of events that resulted in [Plaintiff's] injuries, and is at fault for the cause of this accident.

For these reasons, the trial court assessed 100 percent of the fault to Hiller.

Plaintiff's testimony was found by the trial court to be "credible as to the physical and emotional injuries he sustained." According to the trial court's findings, Plaintiff "suffered substantial physical injuries that manifested themselves in permanent impairments that have prevented Mr. Malta from returning to his previous line of work." Based on the "serious fractures of his shoulder" (that was surgically repaired), "a fractured heel and sprained ankle" (that bound him to a wheelchair for months), "disk herniation" (resulting in a laminectomy/diskectomy and significant physical therapy), "severe bruising of his arm and chest," and "a diagnosis of PTSD and major depressive disorder" (for which he is still undergoing treatment), judgment was entered in Plaintiff's favor, awarding the following damages:[9]

> $1,000,000 in general damages for physical injury;
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> $350,000 in general damages for psychological injury;
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> $154,903.43 in past medicals and $27,053.58 for future medicals;
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> $300,000 in damages for lost wages and future earning capacity;
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> $50,000 in damages for loss of consortium to Plaintiff's son.

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[9] Ace American Insurance Company, Wood Group's workers' compensation insurer, intervened in this action, seeking to recover payments made to Plaintiff or on Plaintiff's behalf, totaling $241,071.92. The trial court ultimately awarded this amount to the workers' compensation insurer. In a post-trial motion for new trial or to alter or amend the judgment, Hiller urged that the damage awards to Plaintiff and to the workers' compensation insurer resulted in double recovery to Plaintiff. Pursuant to this motion, the trial court amended the judgment to prevent double recovery relative to the award to the workers' compensation insurer.

On appeal by Hiller, the appellate court found no legal error in the trial court's finding that under the facts of this case, Hiller owed a duty to Plaintiff "to competently perform a safety inspection" and "accurately report the results from the inspection." **Malta v. Herbert S. Hiller Corp.**, 20-0250, p. 9 (La.App. 4 Cir. 11/25/20), __ So.3d __. Additionally, the appellate court was unable to find manifest error in the trial court's findings relative to breach of that duty, as Hebert "failed to warn of the possibility of a defective gauge and that the cylinder was still fully pressurized," and "Mr. Hebert's report made erroneous conclusions, [that is, the 'cylinder has 0 PSI and needs to be sent in for recharged,'] which Mr. Hebert further communicated to Wood Group employees." ***Id.***, 20-0250 at 10, ___ So.3d at __. Based on the evidence offered surrounding Harvey's decision to have Wood Group employees remove and transport the cylinder, the appellate court found that "[t]he trial court ... could have reasonably concluded that Mr. Hebert's failure to report his findings accurately was the cause in fact of Mr. Malta's injuries." ***Id.***, 20-0250 at 12, ___ So.3d at __. In light of "Hebert's inaccurate reporting and express representations," the appellate court found that "[t]he events that transpired after Mr. Hebert performed his inspection were readily foreseeable" and that "the evidence supports a finding that the risk and harm Wood Group encountered fell squarely within the scope of protection of Hiller's duty to provide competent inspections and accurate reporting." ***Id.***, 20-0250 at 15, ___ So.3d at __.

After recognizing that the trial court considered evidence of comparative fault and noting that it "may have apportioned fault differently," the appellate court found no manifest error in the trial court's allocation of all of the fault to Hiller. **Malta**, 20-0250 at 18, __ So.3d at __. As to the award of damages, the appellate court found no abuse of discretion as the awards were not "beyond that which a reasonable trier of

fact could assess." ***Id.***, 20-0250 at 22, ___ So.3d at __. Accordingly, the trial court's judgment was affirmed.[10] ***Id.***, 20-0250 at 25, ___ So.3d at __.

Relative to the trial court's allocation of fault, Judge Daniel Dysart dissented in part, listing all of the negligent acts by Plaintiff and Wood Group (Plaintiff's employer).[11] See **Malta**, 20-0250 at 5-15, __ So.3d at __ (Dysart, J., dissenting in part). According to Judge Dysart, because "the testimony and exhibits, and the totality of the circumstances of this case, support a finding that Wood Group and Mr. Malta both bear fault," "the trial court manifestly erred in determining that Hiller was solely at fault." ***Id.***, 20-0250 at 2, ___ So.3d at __.

Hiller's writ application to this court was granted[12] for consideration of the following issues: (1) does an inspection company not contracted to perform inspections implicating personal safety have a duty to a subsequently-injured third party; (2) if so, was there a breach of that duty here; (3) if there was a breach, was that breach the cause-in-fact or legal cause of Plaintiff's injuries; (4) did the trial court manifestly err in assessing 100 percent of the fault to the inspection company when considering the possibility of multiple causes; and (5) are general damages of $1.35 million and loss of consortium for Plaintiff's son of $50,000 excessive?

DISCUSSION

A. Liability as to Hiller

Hiller challenges the trial court's finding of liability. "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair

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[10] Relative to the award in favor of the workers' compensation insurer, the appellate court amended "the trial court's judgment to clarify the manner by which credits are to be assessed for lost wages and medical expenses." **Malta**, 20-0250 at 1, 24, __ So.3d at __, __.

[11] Judge Dysart agreed with the majority's finding that Hiller had a duty, as Hebert failed to clarify that the cylinder's "gauge read 0 PSI" instead of the cylinder "has 0 PSI."

[12] **Malta v. Herbert S. Hiller Corp.**, 21-0209 (La. 4/13/21), 313 So.3d 1220.

it." La. C.C. art. 2315(A). Whether liability exists under a particular set of facts is determined using a duty/risk analysis. **Posecai v. Wal-Mart Stores, Inc.**, 99-1222, p. 4 (La. 11/30/99), 752 So.2d 762, 765. Under the duty/risk analysis, the plaintiff must prove five separate elements: (1) the defendant had a duty to conform his conduct to a specific standard (the duty element); (2) the defendant's conduct failed to conform to the appropriate standard (the breach element); (3) the defendant's substandard conduct was a cause-in-fact of the plaintiff's injuries (the cause-in-fact element); (4) the defendant's substandard conduct was a legal cause of the plaintiff's injuries (the scope of duty element); and (5) proof of actual damages (the damages element). **Boykin v. Louisiana Transit Co., Inc.**, 96-1932, pp. 8-9 (La. 3/4/98), 707 So.2d 1225, 1230 (citing DAVID W. ROBERTSON ET AL., CASES AND MATERIALS ON TORTS 83-84 (1989)). If the plaintiff fails to prove any one element by a preponderance of the evidence, the defendant is not liable. See **Mathieu v. Imperial Toy Corp.**, 94-0952, p. 4 (La. 11/30/94), 646 So.2d 318, 322.

1. Duty Element

The threshold issue in any negligence action is whether the defendant owed the plaintiff a duty. **Posecai**, 99-1222 at 4, 752 So.2d at 766. A duty is "an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another." **Morris v. Orleans Parish School Bd.**, 553 So.2d 427, 429 (La. 1989) (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 53 at 356 (5th ed.1984)). Whether a duty is owed presents a question of law. **Posecai**, 99-1222 at 4, 752 So.2d at 766. The inquiry is whether the plaintiff has any law (statutory, jurisprudential, or arising from general principles of fault) to support the claim that the defendant owed him a duty. **Faucheaux v. Terrebonne Consol. Government**, 615 So.2d 289, 292 (La. 1993). Duty presents

a legal question subject to *de novo* review on appeal. See **Ferrell v. Fireman's Fund Insurance Co.**, 94-1252, p. 7 (La. 2/20/95), 650 So.2d 742, 747.

On appeal, the appellate court found no legal error in the trial court's finding that Hiller owed a duty of care to Plaintiff. In this respect, Hiller urges that the lower courts erred. According to Hiller, the trial court's finding improperly expands the limited legal duty of an inspection company and makes it a guarantor of a customer's workplace safety.

Pursuant to its contract with Helis, Hiller maintains that its sole obligation was to determine whether Helis's fire suppression systems could put out fires and, if not, to tag the equipment for servicing. Relying on the decision in **Morcos v. EMS, Inc.**, 570 So.2d 69 (La.App. 4 Cir. 1990),[13] Hiller asserts that since its inspection did not involve personal safety, it is exonerated from liability as a matter of law. However, the courts have not adopted such a bright-line test for determining to whom a duty is owed in connection with the inspection services provided. Notably, the inquiry into whether a duty is owed is made on a case-by-case basis. See **Gresham v. Davenport**, 537 So.2d 1144, 1147 (La. 1989).

At issue in this case are the services to be rendered by Hiller in connection with a work order for an annual inspection. Under the work order in question, Hiller had not been engaged to provide maintenance services, such as removing and transporting a cylinder for servicing. Clearly, Hiller was contractually obligated to inspect Helis's fire suppression equipment to determine whether it could extinguish fires or was in

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[13] The **Morcos** court found the company which inspects a piece of equipment for a hospital or employer pursuant to a contract generally owes no duty to a subsequently injured third party (patient or employee). ***Id.***, 570 So.2d at 76. The inspection contract at issue in **Morcos** involved the inspection of a crane to certify that it satisfied certain government regulations. Because the inspection contract did not obligate the inspection company to make a safety inspection for the benefit of the crane owner's employee, the inspection company did not owe a duty to the plaintiff. ***Id.***

need of service. The goal of Hiller's inspection service was to protect the rig and the employees working thereon in the event of a fire. Because the incident in question does not involve a fire, it is necessary to determine if Hiller's contractual obligation required Hebert to do more than simply inspect the fire suppression equipment and tag the equipment identified as needing to be serviced.

The totality of evidence establishes, and Hiller does not dispute, that Hiller's inspection obligation also required that, upon completion of an inspection, Wood Group be provided with an inspection report that sets forth the inspector's findings and identifies detected deficiencies. The report is to be reviewed with the person in charge of Facility. For this reason, Hiller's reliance on **Morcos** is misplaced. Hiller's contractual duty to inspect (the equipment that, as the appellate court noted, is "specifically used for safety purposes")[14] and to report would be meaningless if Helis and Wood Group could not rely on Hiller's expertise to competently conduct the inspection and accurately report the results.[15] Such a finding does not create a blanket rule or make an inspection company, like Hiller, a guarantor of the personal safety of all individuals for anything related to the fire suppression system. Under the facts of this case, the trial court did not legally err in finding that Hiller owed a duty to Plaintiff.

2. Breach of Duty Element

Hiller contends that the trial court manifestly erred in finding that Hiller breached a duty of care owed to Plaintiff. Relative to the breach of duty issue, the appellate court observed that Hebert's report establishes his failure to properly

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[14] See **Malta**, 20-0250 at 9, __ So.3d at __.

[15] Noteworthy is the fact that Hiller's operations manager, James Guidry, testified that Hiller, as licensed fire-safety and suppression contractors, must provide accurate information to its customers; otherwise, they have not done their job.

diagnose and accurately report the cylinder's status. **Malta**, 20-0250 at 10, __ So.3d at __.

During the inspection, the cylinder's contents were checked by Hebert for pressure and weight. Pressure is reported on a gauge on the cylinder. The gauge in question indicated zero PSI. There are two options available for determining a cylinder's weight: a scale or the liquid level indicator on the cylinder.[16] Despite Lowery's testimony that he observed from the liquid level indicator that the cylinder did not contain any liquid,[17] Hebert reported that (based on the liquid level indicator reading) the cylinder actually weighed 245 pounds and that the cylinder was in fact full of liquid.[18]

Hebert testified that a zero PSI reading does not mean that the cylinder is completely empty or that, if the cylinder discharges, nothing will happen because there is residual pressure.[19] According to Hebert, it is not uncommon to get a liquid level reading of full and a zero PSI reading, a situation that generally indicates the nitrogen in the tank has leaked out or is low. Although Hebert testified that a cylinder must be brought into the shop for a manual discharge to determine if the gauge is defective or if there is still pressure in the cylinder despite a zero PSI reading, the fact that the cylinder contained liquid, according to Plaintiffs expert, David Stahl, means

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[16] A table is used to convert the liquid level into weight. Plaintiff's expert, David Stahl, testified that most inspectors used the liquid level indicator to determine weight because it is much safer to handle and more effective.

[17] Stahl questioned whether Lowery knew what he was seeing when he looked at the liquid level indicator.

[18] The liquid in the tank consists of a fire suppression agent and nitrogen, which helps with the discharge of the fire suppression agent. A full cylinder contains 4 to 4.5 pounds of nitrogen. These agents are stored under pressure as a liquid and, when the cylinder is activated, the agents vaporize and turn into a gas.

[19] According to Hebert, the only time a cylinder can be treated as having no pressure is if the "head was completely off of it."

that the cylinder was still pressurized because "[w]here there's liquid or product, there's pressure."[20] Based on Hebert's training and considering the liquid level indicator reading,[21] Stahl opined that Hebert should have recognized that the cylinder did not have zero PSI, but rather had a faulty gauge and was still under pressure. Stahl and Hiller's expert (Michael Brast) agreed that rather than incorrectly reporting the cylinder had zero PSI, Hebert should have reported that the gauge read zero PSI and advised of the possibility of a faulty gauge.[22] This evidence provides a reasonable basis for a finding that by failing to warn of the possibility of a defective gauge or to clear up any misconception that Lowery and Plaintiff had that the cylinder was empty, Hebert gave Wood Group's employees "an incorrect impression that the cylinder at issue was empty and no longer pressurized." **Malta**, 20-0250 at 11, __ So.3d at __.

The inaccuracy in Hebert's reporting is further perpetuated in his Deficiencies Report in which he again incorrectly stated "cylinder has 0 PSI" and incorrectly advised that the "cylinder needs to be sent in for recharge," as well as in his discussions with Lowery during the course of the inspection and with Plaintiff afterward during which Hebert reportedly told them that the cylinder was empty. For these reasons, the appellate court properly found that the trial court did not manifestly err in finding that Hiller breached its duty to properly diagnose the condition of the cylinder and to provide accurate information relative to its inspection.

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[20] Notably, Hiller's expert, Michael Brast, testified that there is no direct relationship between the liquid level or weight and the pressure measurement.

[21] Stahl testified that based on the liquid level indicator reading, the chart used in determining the weight indicates the cylinder had not lost its nitrogen and was fully charged.

[22] According to Stahl, pressure gauges are cheaply made which makes them subject to cracking and breaking; however, not many of them are faulty.

3. Cause-in-fact Element

Cause-in-fact usually is a "but for" inquiry, which tests whether the accident would have happened but for the defendant's substandard conduct. **Boykin**, 96-1932 at 9, 707 So.2d at 1230; see **Perkins v. Entergy Corp.**, 00-1372, 00-1387, 00-1440, p. 8 (La. 3/23/01), 782 So.2d 606, 611. Whether the defendant's conduct was a cause-in-fact of the plaintiff's injuries is a factual question to be determined by the factfinder based on the preponderance of the evidence and may not be set aside absent manifest error. See **Perkins**, 00-1372 at 8-9, 782 So.2d at 612.

Harvey (Wood Group's foreman) testified that based on Hebert's reports, which indicated the cylinder had zero PSI and was in need of recharging, Harvey believed the cylinder had mistakenly discharged, like others had in the past, and was empty.[23] Harvey explained that an accidental discharge generally results from a malfunction in an electronic component and allows for release of the entire contents in the cylinder. See **Malta**, 20-0250 at 11-12, ___ So.3d at __. The evidence shows that there is no way to detect if a cylinder of this type has accidentally discharged, as the discharged substance dissipates entirely, leaving no trace of the discharge. Stahl testified that "[o]nce the ice-crystal cloud [that forms on discharge] dissipates, within minutes, the room would appear as if nothing had ever happened."

According to Harvey, "no one with Hiller ever suggested that the cylinder was still under pressure." **Malta**, 20-0250 at 12, ___ So.3d at __. Harvey testified that had Hebert indicated that the cylinder might still be pressurized, "he would not have instructed Wood Group employees to remove it." ***Id.*** Rather, the services of Hiller would have been engaged to disconnect and transport the cylinder. This information

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[23] In the past, Wood Group had experienced problems with cylinders of this type that had accidentally discharged, and that were successfully disconnected and transported by Wood Group employees. However, in those instances, the cylinders were actually empty.

provided the basis for Harvey's decision to have Wood Group employees disconnect and transport the cylinder.

The evidence lends support to a finding that Hebert communicated directly to Lowery and Plaintiff[24] that the cylinder was "empty." **Malta**, 20-0250 at 12, ___ So.3d at __. Notably, it was Lowery (rather than Hebert) who advised Crain that the cylinder was empty. Although the trial court found that "Harvey testified that Hebert specifically told him that the cylinder was empty," that finding is not supported by the record and is clearly wrong. However, there is no indication that the trial court's error in this regard interdicted its factfinding on this issue.

Based on the evidence establishing Harvey would not have had Wood Group employees disconnect and transport the cylinder had he believed the cylinder was still pressurized and considering the trial court's credibility determination in this regard, the appellate court properly found that the trial court could have reasonably concluded that Hebert's failure to properly diagnose and accurately report his findings was the cause-in-fact of Plaintiff's injuries. In light of the relevant evidence, this finding is not clearly wrong.

4. Scope of the Duty

Hiller contends that the trial court erred as a matter of law in finding that its actions were the legal cause of Plaintiff's injuries or did not fall within the scope of its duty.

There is no rule for determining the scope of the duty. **Roberts v. Benoit**, 605 So.2d 1032, 1044 (La. 1991). The scope-of-the-duty inquiry is fact sensitive and ultimately turns on a question of policy as to whether the particular risk falls within

[24] Plaintiff stated that during a conversation, Hebert told him the cylinder "was certified and deemed empty with zero pressure.'"

the scope of the duty. ***Id***. The determination of legal cause/scope of the duty involves a purely legal question. **Todd v. State, Department of Social Services, Office of Community Services**, 96-3090, p. 6 (La. 9/9/97), 699 So.2d 35, 39.

In some instances a risk may not be found within the scope of a duty where the circumstances of that particular injury to that plaintiff could not be reasonably foreseen or anticipated because there was no ease of association between that risk and the legal duty. **Todd**, 96-3090 at 7, 699 So.2d at 39. Foreseeability, as the determining test, is neither always reliable nor the only criterion for comparing the relationship between a duty and a risk. Some risks that arise because of a defendant's conduct are not within the scope of the duty owed to a particular plaintiff simply because they are unforeseeable. ***Id.*** Ease of association is the proper inquiry. ***Id.*** Such an inquiry questions how easily one associates the plaintiff's complained of harm with the defendant's conduct. **Roberts**, 605 So.2d at 1045. Although ease of association encompasses the idea of foreseeability, it is not based on foreseeability alone. ***Id.***

As previously indicated, Hiller's inspection technician (Hebert) owed a duty to competently conduct the inspection and accurately report the results. Thus, the question presented is whether this duty encompassed the risks visited upon Plaintiff. In light of the evidence presented,[25] despite the industry standard that workers should

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[25] Stahl (Plaintiff's expert) testified that if individuals lack training in the proper usage of high-pressure cylinders, there are risks that they are unaware of and that those risks are foreseeable. When questioned further, Stahl confirmed that, because of the associated risks, companies, like Helis, hire licensed experts to inspect these systems and provide advice and reports on their findings. Additionally, Hiller's expert, Brast, testified that Hiller's technician (Hebert) was required to ensure that Hiller's customers are aware of the risks and issues associated with handling specialized high-pressure cylinders and that Hebert had a duty to conform his actions to those of other inspectors. Brast further stated that Hebert should have made sure Wood Group understood the nature of the deficiency and the pros and cons of handling the removal and transport of the cylinder under these conditions. Hiller's operation manager (Guidry) testified that discussing the risks involved with removing and transporting these types of cylinders is important because it is foreseeable that, if someone does not know what they are doing, someone could get hurt or killed.

always treat cylinders as if they are pressurized, the appellate court properly found that it was readily foreseeable that: (1) Harvey would elect to have Wood Group employees disconnect and transport the cylinder; (2) Wood Group employees, like Lowery and Plaintiff, would not have reservations about their ability to perform the assigned work; and (3) someone might get hurt if a high-pressure cylinder unexpectedly discharged. See **Malta**, 20-0250 at 13-14 , __ So.3d at __. Based on these facts, this court is unable to find legal error in the trial court's obvious finding that the risks encountered by Wood Group's employees fell within the scope of Hiller's duty to provide competent inspections and accurately report findings.[26]

B. Allocation of Fault

Hiller contends that the trial court manifestly erred in ignoring admitted instances of legal fault in violation of La. C.C. arts. 2323 and 2324 in finding it to be 100 percent at fault. According to Hiller, under the concept of comparative fault, the trial court should have attributed some of the fault to Wood Group (and its employees) and to Plaintiff.

1. Wood Group's Fault

Wood Group, as Plaintiff's employer, was under a statutory duty to provide Plaintiff a reasonably safe place to work. See La. R.S. 23:13.[27] "In any action for

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[26] Because Wood Group had complete control over the operations at Facility and the surrounding satellite platforms and there is no evidence that the cylinder was damaged by ruin, vice or defect, or that the owner knew or should have known about it, the appellate court rejected Hiller's claim that Helis, the owner, is liable under La. C.C. art. 2317.1 (premises liability). **Malta**, 20-0250 at 15-16, __ So.3d at __

[27] In pertinent part, 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.

damages where a person suffers injury, death, or loss, the degree or percentage of fault of **all persons causing or contributing to the injury**, death, or loss shall be determined, regardless of whether the person is a party to the action or a nonparty, and regardless of the person's insolvency, ability to pay, immunity by statute, including but not limited to the provisions of La. R.S. 23:1032, or that the other person's identity is not known or reasonably ascertainable." La. C.C. art. 2323(A) (emphasis added). Thus, La. C.C. art. 2323 clearly requires that the fault of every person responsible for a plaintiff's injuries be compared, whether or not they are parties, regardless of the legal theory of liability asserted against each person.[28] **Dumas v. State ex rel. Dept. of Culture, Recreation & Tourism**, 02-0563, p. 11 (La. 10/15/02), 828 So.2d 530, 537. Accordingly, the fault of Wood Group, an employer that is immune from tort liability, is to be quantified in Plaintiff's action against Hiller, a third-party tortfeasor.[29] See **Grayson v. R.B. Ammon & Associates, Inc.**, 99-2597, pp. 25 & 27 (La.App. 1 Cir. 11/3/00), 778 So.2d 1, 18 & 19 (citing **Lacrouts v. Future Abrasives, Inc.**, 99-583, p. 10 (La.App. 5 Cir.11/10/99), 750 So.2d 1063, 1068-69)). In allocating fault, the trial court must consider the nature of each party's conduct and the causal relationship between that conduct and the damages claimed. **Watson v. State Farm Fire and Cas. Ins. Co.**, 469 So.2d 967, 974 (La. 1985).

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[28] "The provisions of [La. C.C. art. 2323(A)] shall apply to any claim for recovery of damages for injury, death, or loss asserted under any law or legal doctrine or theory of liability, regardless of the basis of liability." La. C.C. art. 2323(B).

[29] The allocation of fault to an employer pursuant to La. C.C.P. art. 1812(C)(2) serves to implement Louisiana's comparative fault scheme.

In reviewing the issue of comparative fault, the appellate court stated that it "may have apportioned fault differently"; however, it was unable to find manifest error in the trial court's allocation of fault, explaining:

> The trial court acknowledged that testimony was presented to establish that it is common practice to treat all cylinders, regardless of the pressure gauge reading, as if they are pressurized. Having heard the testimony of experts and fact witnesses, including Mr. Malta, the trial court weighed the evidence and made certain credibility determinations. Notably, Hiller's employees are licensed and trained experts, and therefore in the best position to identify hazards associated with the fire suppression system. Mr. Hebert's failure to provide accurate reporting of his findings created the risk Hiller was hired to mitigate.

Malta, 20-0250 at 17-18, __ So.3d at __.

The trial court's allocation of fault is a factual determination. **Duncan**, 00-660 at 10, 773 So.2d at 680 (citing **Clement v. Frey**, 95-1119 (La. 1/16/96), 666 So.2d 607, 609, 610)). As with other factual determinations, the trier of fact is vested with much discretion in its allocation of fault. ***Id.*** Therefore, a trier of fact's allocation of fault is subject to the manifestly erroneous or clearly wrong standard of review. ***Id.*** 00-66 at 10-11, 773 So.2d at 680-81. The allocation of fault is not an exact science or the search for one precise ratio, instead it is the search for an acceptable range; an allocation by the factfinder within that range cannot be clearly wrong. **Wiltz v. Bros. Petroleum, L.L.C.**, 13-332 (La.App. 5 Cir. 4/23/14), 140 So.3d 758, 781 (citing **Foley v. Entergy La., Inc.**, 06-0983 (La. 11/29/06), 946 So.2d 144, 166)).

After reviewing the particular facts of the case, this court is convinced that the trial court manifestly erred in failing to assign any fault to Wood Group and its employees. Despite Hiller's role as a trained expert and Hebert's negligence in failing to properly diagnose the condition of the cylinder and to provide accurate information relative to his inspection, the preponderance of the evidence provides reasonable support for a finding that the substandard conduct of Wood Group and its

employees in disconnecting and transporting the cylinder was also a substantial factor in bringing about the accident. See **Perkins**, 00-1372 at 8, 782 So.2d at 611.

It is undisputed that Wood Group had not provided its employees, including its foreman (Harvey), with the training required by National Fire Protection Association (NFPA) standards concerning the handling of this type of high-pressure cylinder.[30] Although not directly addressed by the lower courts, Wood Group's lack of training in this regard in this court's opinion substantially contributed to Plaintiff's accident.[31]

Because of the inherent dangers presented by a pressurized cylinder,[32] Wood Group's employees, like others who work in this industry, are fully aware that a pressurized cylinder should always be treated with extreme caution and as if it contains pressure,[33] as observed by the trial court:

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[30] NFPA Standard on Clean Agent Fire Extinguishing Systems (2012 edition) standard 7.6.1 of 2012 provides that "[a]ll persons who could be expected to inspect, test, maintain, or operate fire extinguishing systems" should "be thoroughly trained and kept thoroughly trained in the functions they are expected to perform." Stahl (Plaintiff's expert) testified that pursuant to this standard, Wood Group employees who were involved with maintenance should have received some type of training. Pursuant to the appendix of the NFPA standards provision A.7.8(1), only "qualified fire service personnel, trained and experienced in the type of equipment installed, should be engaged to do the work."

[31] Stahl explained that customers are not in violation of industry regulations and standards by moving the cylinder. Under such circumstances, the only question is whether the customer has qualified people in the facility who know how to handle the cylinder. According to Stahl, a supervisor (like Harvey) is responsible for the safety of the employees working under him. In the opinion of Stah (Plaintiff's expert), Harvey sent an unqualified and untrained crew to disconnect the cylinder and transport it from Platform to Facility.

[32] Although Hebert never mentioned the possibility of a faulty gauge or that the cylinder might still be under pressure, Harvey testified that pressurized cylinders pose significant dangers. When discharged, they are like a missile; therefore, extreme precautions must be taken when handling a cylinder.

[33] Notably, Harvey's testimony that if Hebert had advised him that the gauge could be faulty, and that the cylinder might still be under pressure, Harvey would not have let his employee remove the cylinder, but would have hired Hiller to disconnect and transport the cylinder for servicing, is difficult to reconcile with this known industry standard and Harvey's awareness of the dangers associated with a cylinder and his personal belief that gauges are never to be trusted.

> Several expert and fact witnesses testified that all pressurized cylinders, regardless of the reading on the pressure gauge, must be treated as if under pressure.

Possession of this knowledge is obviously insufficient when the employees have not been trained in the proper procedure for "treat[ing]" a cylinder "as if under pressure," as required by NFPA standards, when it is being disconnected and transported for servicing.

Notably, according to James Guidry (Hiller's operations manager), because United States Coast Guard requirements for cylinder removal prohibits the removal of a cylinder when a replacement is not immediately available, Hebert was not in position to remove the cylinder during the inspection. Furthermore, as previously indicated, the annual inspection that Hiller was engaged to perform does not include maintenance work. Any maintenance work requested of Hiller would have to be performed pursuant to a separate work order. For these reasons, although the cylinder was disconnected during the course of the inspection for testing, it was placed back into service after it was tagged.

In finding no manifest error in the trial court's allocation of fault, the appellate court emphasized Harvey's reliance on portions of Hebert's Clean Agent Cylinder Report and Deficiencies Report. See **Malta**, 20-0250 at 11, __ So.3d at __. However, the appellate court did not address Harvey's failure to properly review all of the pertinent portions of Hebert's report (that bear on the allocation of fault issue) prior to tasking Wood Group's employees with disconnecting and transporting the cylinder.

As stated previously, during the inspection, the pressure and weight measurements are recorded for the purpose of determining whether a cylinder is functioning properly. As noted by the lower courts, Harvey reviewed the pressure

portion of Hebert's Clean Agent Cylinder Report that indicated "Cylinder has 0 PSI" in the "Comment" section. On that same row of the Clean Agent Cylinder Report, Hebert also reported the following regarding the cylinder's weight:

STAMPED FULL	STAMPED EMPTY	REGISTERED AGENT	ACTUAL FULL	ACTUAL AGENT
244	110	134	245	135

Although Harvey reviewed and signed each page of the Clean Agent Cylinder Report and indicated that he relied on Hiller's reporting, he was not questioned about the reported weight measurements that dispel a finding that the cylinder was in fact empty. Hebert's reporting indicates that he found the cylinder to be full of liquid, as the cylinder's "Actual Full" weight exceeded its "Stamped Full" weight by one pound.[34] Plaintiff's expert, Stahl, explained that if a cylinder's weight shows that it contains agent, the cylinder has to contain pressure. Harvey knew to "[n]ever trust a gauge"; he reportedly relied on the zero PSI reading to mean that the cylinder had accidentally discharged, like others in the past, and did not contain any pressure despite knowing that this particular cylinder could very well be pressurized even though the gauge read zero.[35] Had Harvey reviewed the pressure and weight

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[34] Although Lowery (Wood Group's electrician) and Plaintiff testified that Hebert informed them that the cylinder was empty, that testimony is contradicted by Hebert's reporting, which indicates from a weight perspective the cylinder was actually full. Notably, Lowery testified that during the course of the inspection, Hebert stated (and Lowery observed) that the gauge and the "strap"/liquid level indicator reflected that the cylinder was empty. According to Lowery, when Hebert pulled the tape to check the liquid level, Hebert stated that the cylinder was empty; yet, Lowery elaborated that the only way to tell if a cylinder contains liquid is to weigh it, which he stated did not occur here as there was no scale available. According to Lowery, Hebert reported to Harvey (Wood Group's foreman) at the post-inspection safety meeting that the "strap" and gauge indicated the cylinder was empty and that the cylinder had to be removed and sent in to be filled. Later, Lowery testified that he had no reason to think the cylinder was still pressurized since both gauges said it was empty. Yet, when questioned about what Hebert actually told him, Lowery stated that Hebert "did not say anything about pressure. He just said the bottle was empty."

[35] Harvey's pet saying "[n]ever trust a gauge" is admittedly based on the fact that a gauge can show zero pressure when it still contains pressure. Based on the general training provided by Wood Group it is known by Wood Group's employees that they are to always assume that a cylinder is pressurized.

information that appeared on the same line in Hebert's Clean Agent Cylinder Report, he would have realized that his belief "that the cylinder had erroneously discharged, like others had in the past, and was empty" was faulty.[36] See **Malta**, 20-0250 at 12, __ So.3d at __.

Had the cylinder in fact been empty, it would have weighed 110 pounds, as opposed to 245 pounds. Crain, who single-handedly lifted the cylinder from the generator building, testified that the cylinder "was a little heavy." The evidence further shows that three Wood Group employees thereafter transported the 245-pound cylinder to Platform's crane area, accompanied the cylinder while it was being transported by the jack-up barge, and lifted the cylinder to place it into the cargo basket that had been lowered into the jack-up boat when it reached Facility.[37] Upon realizing how much manpower was needed to safely transport the cylinder on Platform and in the jack-up boat, Lowery should have notified Harvey and/or Fleming, who would be unloading the cylinder by crane at Facility. Additionally, upon seeing three men place the cylinder in the cargo basket, Fleming should have

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[36] See **Malta**, 20-0250 at 4, __ So.3d __ (Dysart, dissenting in part):

> Mr. Hebert noted in his report that the cylinder was full, with a weight of 245 pounds. The cylinder, when it is empty, weighs 110 pounds. It is considered full when it is filled with 134 pounds of fire-suppressant agent. In his report, Mr. Hebert indicated the cylinder's weight to be "stamped full" with a weight of 245 pounds, a significant difference from an empty 110 pound cylinder. This, alone, would indicate to anyone with any knowledge of these cylinders that it had not accidentally discharged and was not empty. While Mr. Harvey "read [Mr. Hebert's] report" and "understood" (i.e., assumed) that it had discharged erroneously because of the 0 PSI reading, a proper reading of the report would have alerted him to the fact that the cylinder was, in fact, full of the fire suppressant agent. Having signed off on all of Mr. Hebert's reports, Mr. Harvey is legally presumed to have read and understood its contents. [Footnote and citations omitted.]

[37] Harvey stated that the Wood Group's employees erred in not using a rack to remove the cylinder from Platform and to lift the cylinder from the jack-up boat to Facility's warehouse deck. His sentiment was echoed by Brast, who testified that there were problems with how Wood Group's employees disconnected and handled the cylinder.

realized that Plaintiff could not safely handle the 245-pound cylinder alone and radioed for assistance.[38]

Harvey's erroneous belief that the cylinder was empty based on the reported PSI triggered a series of negligent actions by him and other Wood Group employees. Furthermore, even if the cylinder was in fact empty, proper procedure and protocol in the industry regarding the handling of a cylinder still required that the cylinder be disconnected and transported in a certain manner. As Harvey testified, "none of [the Wood Group employees] handled the cylinder the way they should have handled it." Based simply on the fact that they were handling a cylinder, Harvey stated that Wood Group's employees should have handled the cylinder differently.

The decision as to who would perform the transfer work was made by Wood Group. Although Lowery testified that Harvey told Hebert that "we would remove the bottle," Hebert testified that, when he left Facility after the inspection, he did not know who would be transporting the cylinder. Harvey, who was not properly trained in the removal and transportation of this type of cylinder, made the decision to have Wood Group's employees disconnect and transport the cylinder without realizing that a specialized cylinder was involved, without inquiring of Hebert or Hiller about the transportation of the cylinder or the proper procedures and risks involved in handling the cylinder, and without providing instruction to the Wood Group employees who were charged with handling the cylinder. Prior to tasking Lowery, an electrician who was mistaken in his reading of the liquid level indicator,[39] with disconnecting and transporting the cylinder, Harvey failed to confirm that Lowery knew how to properly

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[38] From the warehouse deck, Plaintiff could not see the jack-up boat that was sitting in the water approximately 60 feet below.

[39] Lowery further communicated his mistaken belief to another Wood Group employee, Crain.

disconnect and transport this type of cylinder. Due to his lack of proper training, Lowery did not know how to properly disconnect this type of cylinder for transportation and did not question the absence of a cap that is usually in place when a cylinder is transported. In disconnecting the cylinder, Lowery relied solely on his observations of Hiller's inspectors during the course of an inspection to determine what needed to be done;[40] however, the evidence demonstrates that the procedure for disconnecting a cylinder for inspection purposes and disconnecting for transportation purposes differ. Although removal of the solenoid valve[41] from the cylinder and use of the safety pin in the manual actuator, as was done by Lowery, may be sufficient to disconnect a cylinder for testing purposes during the course of an inspection, the evidence establishes that additional precautions must be taken in disconnecting the cylinder when transportation is involved to protect against an accidental discharge: (1) the manual actuator must be removed[42] and (2) the cylinder's discharge port/opening must be plugged using an anti-recoil device, also known as a "safety diffuser cap,[43] as instructed by the manufacturer on the label attached to the

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[40] Lowery testified that he felt comfortable handling the cylinder because he believed he had sufficient knowledge to do so based on what he had seen Hebert and other Hiller inspectors do during an inspection.

[41] The solenoid valve is the electrical portion of the cylinder's discharge head.

[42] Hebert explained that to completely disable the head of the cylinder, the electrical solenoid and manual actuator must be removed. Lowery was unaware that it was unsafe to transport the cylinder with the manual actuator in place. Initially, Lowery testified that he would not have removed the manual valve even if instructed because he only deals with electrical solenoids; however, he later testified that had Hebert told him to take off the manual actuator and used an anti-recoil device to plug the discharge port, he would have done so.

Stahl testified that Lowery's failure to remove the manual actuator caused the cylinder to discharge. According to Stahl, people who are not properly trained are unlikely to start unscrewing things, like the manual actuator, from the cylinder.

[43] An anti-recoil device/safety diffuser cap is placed on the discharge port and, in the event of an accidental discharge, allows for a safe discharge of the cylinder's contents through four orifices, thus, preventing the cylinder from spinning out of control. Although neither Harvey nor Lowery was familiar with an anti-recoil device, both were aware that a cap is generally placed on cylinder that is being transported. As stated by Fleming, cylinders being moved without a protective cap are prone

cylinder.[44] Instead, to prevent against an accidental discharge, Lowery and other Wood Group employees relied on the placement of the safety pin in the manual actuator, which could be hit and displaced while the cylinder is being moved. The testimony of expert and lay witnesses indicates that the performance of either of these tasks would have made an accidental discharge virtually impossible, absent the cylinder's head being broken off in a fall. Clearly, under the facts of this case, Harvey was negligent in deciding to service the cylinder internally rather than outsourcing the task to Hiller or someone else and, due to their lack of proper training, other Wood Group employees were negligent in their handling of the cylinder. Furthermore, the team transporting the cylinder should have known that cylinders must be transported in a protective rack,[45] which prevents the cylinder from being damaged and limits the cylinder's ability to spin out of control in the event of an accidental discharge. Instead, the cylinder was wrapped in a nylon strap to be lowered in the jack-up boat and placed in a cargo basket to be taken from the jack-up boat to Facility's warehouse deck.

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to having the valve on the top damaged.

[44] Harvey acknowledged that the warning label affixed to the cylinder by the manufacturer provided clear instructions for transportation that advised of the need for an anti-recoil device. According to Harvey, Wood Group's employees were not trained to read the manufacturer's instruction label. Admittedly, Lowery did not read the manufacturer's label.

[45] Despite Fleming's testimony that it was not unusual to use a cargo basket to unload cylinders and that Wood Group had never prohibited the moving of a cylinder without a rack, Harvey confirmed that, based on then-existing Wood Group procedures, cylinders were supposed to be moved with a protective rack and that Wood Group's pressurized cylinders are all normally moved in racks. According to Harvey, the crew should have known that a rack was needed. Harvey testified that it was a mistake for the crew to move the cylinder without a rack since all cylinders are to be treated as though they are pressurized.

Stahl testified that cargo nets should not be used to transport cylinders; cylinders must be upright and strapped in when being transported. Stahl opined that had this cylinder been in a rack, it would not have hit anything.

Under the facts of this case, this court finds that the trial court was clearly wrong in failing to apportion any fault to Wood Group. This court, like Judge Dysart, finds that Wood Group's failure to "train its employees, and particularly, those tasked with handling the cylinder in the instant case,"[46] which prevented Wood Group's employees from understanding the risks involved with transporting this type of cylinder, "was the most significant factor in the events which led to the incident." See **Malta**, 20-0250 at 3, __ So.3d at __ (Dysart, J., dissenting in part).

2. Plaintiff's Fault

Hiller also contends that the trial court manifestly erred in failing to assess any fault to Plaintiff.

"If a person suffers injury, death, or loss as the result partly of his own negligence and partly as a result of the fault of another person or persons, the amount of damages recoverable shall be reduced in proportion to the degree or percentage of negligence attributable to the person suffering the injury, death, or loss." La. C.C. art. 2323(A).

According to Plaintiff, he did what Harvey instructed him to do. Although Plaintiff had prior experience in moving cylinders, he had never before handled the type of cylinder involved in this case. According to Plaintiff, other cylinders are capped and generally placed in a protective rack for transportation. As the cylinder was being brought to Facility's warehouse deck, Plaintiff recognized that he was moving a cylinder that had not been capped or placed in a rack. Plaintiff ignored these warning signs and proceeded without questioning the absence of these protective measures, notifying his supervisor, radioing for assistance, or issuing a

[46] Notably, Harvey (Wood Group's foreman) testified that the accident was caused by the untrained personnel employed by Wood Group.

stop-work order, despite knowing that even an empty cylinder may contain residual pressure, requiring all cylinders to be treated as though pressurized.[47] Plaintiff testified that he believed it was safe to handle the cylinder because he had been told by Hebert that it was empty; however, Plaintiff confused the cylinder's pressure and liquid level/weight. As previously stated, those in the industry are aware that a cylinder may not be empty even though the gauge shows zero PSI; therefore, cylinders should be handled with extreme caution.

Although Plaintiff may not have been privy to the weight measurements on Hebert's report that indicated the cylinder was full, upon lifting the cylinder to remove it from the cargo basket, Plaintiff should have questioned his ability to single-handedly handle the cylinder, which had been previously transported by three Wood Group employees, especially since the cylinder had not been capped or placed in a rack. Yet, Plaintiff, who weighed 253 pounds, alone handled the 245-pound cylinder rather than issuing a stop-work order and radioing for assistance.[48] Although Plaintiff succeeded in removing the 245-pound cylinder from the cargo basket with a bear-hug grasp,[49] the safety pin obviously came out of the manual actuator[50] when Plaintiff attempted to handle the cylinder a second time by grabbing its top and tilting it at a

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[47] Plaintiff testified that he knows that every cylinder should be treated as if full, whether it was empty or not, because a cylinder of compressed gas always has pressure in it. For that reason, a cylinder must always be handled "in the safest manner possible."

[48] Harvey testified that Plaintiff probably felt safe removing the cylinder from the cargo basket since it had been safely placed in the basket. However, Harvey admitted that in light of the cylinder's size, Plaintiff should have used a stop-work order and asked Harvey to come assess the situation. Harvey also acknowledged that Wood Group employees "don't get trained to pick up a hundred-pound or 200-pound cylinder out of a basket." Harvey testified that Plaintiff "could have asked for more help."

[49] According to Harvey, "Wood Group training is not to bear-hug a cylinder and grab it."

[50] According to Stahl, the cylinder likely discharged because Plaintiff hit the cylinder's discharge head. It is unknown whether the safety pin placement was checked after the accident.

45 degree angle to roll it to the staging area on the warehouse deck. As a result, the cylinder discharged.

In these regards, Plaintiff's actions were negligent and were a substantial factor in bringing about the accident, and the trial court manifestly erred in failing to allocate any fault to Plaintiff.

3. Reapportionment of Fault

Having found the trial court was clearly wrong in assessing all of the fault to Hiller and failing to assess any fault to Wood Group and Plaintiff, fault should be reallocated in accordance with **Toston v. Pardon**, 03-1747, p. 17-18 (La. 4/23/04), 874 So.2d 791, 803; that is, the percentages of fault shall be adjusted to the extent of lowering or raising it to the highest or lowest point respectively which is reasonably within the trial court's discretion. See **Duncan**, 00-0066 at 11, 773 So.2d at 680-81; see also **Clement v. Frey**, 95-1119, 95-1163 (La. 1/16/96), 666 So.2d 607, 60911.

In reallocating fault, this court must consider the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed. See **Watson**, 469 So.2d at 974. In assessing the nature of the conduct of the parties, various factors may influence the degree of fault assigned, including: (1) whether the conduct resulted from inadvertence or involved an awareness of the danger, (2) how great a risk was created by the conduct, (3) the significance of what was sought by the conduct, (4) the capacities of the actor, whether superior or inferior, and (5) any extenuating circumstances which might require the actor to proceed in haste, without proper thought. And, of course, as evidenced by concepts such as last clear chance, the relationship between fault/negligent conduct and the harm to the plaintiff are considerations in determining the relative fault of the parties. ***Id.***

Reviewing the record as a whole, this court finds that the highest amount of fault that a reasonable factfinder could have assessed Hiller is 40 percent, and the lowest amount of fault that a reasonable factfinder could have assessed to Wood Group (Plaintiff's employer) is 55 percent. The remaining 5 percent is the lowest amount that a reasonable factfinder could have found attributable to Plaintiff.

C. Quantum

Hiller argues that based on the severity and duration of Plaintiff's injuries, the trial court's awards of $1,000,000 in general damages for Plaintiff's physical injuries, $350,000 in general damages for Plaintiff's psychological injuries, and $50,000 in loss of consortium to Plaintiff's son are excessively high.

The role of an appellate court in reviewing general damages is not to decide what it considers to be an appropriate award, but rather to review the exercise of discretion by the trier of fact. **Youn v. Maritime Overseas Corp.**, 623 So.2d 1257, 1260 (La. 1993). Because each case is different, the adequacy or inadequacy of the award should be determined by the facts or circumstances particular to the case under consideration. ***Id.*** It is only when the award is, in either direction, beyond that which a reasonable trier of fact could assess for the effects of the particular injury to the particular plaintiff under the particular circumstances so as to constitute an abuse of discretion that the appellate court should resort to prior awards in determining what would be an appropriate award for the present case. ***Id.***. at 1261; **Reck v. Stevens**, 373 So.2d 498, 501 (La. 1979).

The trial court found that as a result of the accident, Plaintiff suffered from a fractured heel, an ankle sprain, a fractured shoulder, a herniated disk, and severe bruising to his arm and chest. Before the accident, Plaintiff lived a very active lifestyle, which involved riding different types of motorcycles. Regarding Plaintiff's

shoulder injury, following surgery, Plaintiff underwent 11 to 12 weeks of rehabilitation. According to Plaintiff, his shoulder has still not reached 100 percent. Concerning Plaintiff's disk herniation, Plaintiff experienced bilateral, radiating leg pain. Initially, Plaintiff was treated conservatively with steroid injections and medication without relief. A little over a year after the accident, on May 17, 2013, Plaintiff underwent a laminectomy/diskectomy. On June 3, 2013, Plaintiff reported that his leg pain and numbness had resolved, but he still had some back pain for which he was prescribed medication and referred to physical therapy. He engaged in physical therapy for a few months. Plaintiff reached maximum medical improvement on April 17, 2014. Plaintiff's heel injury healed in approximately 10 months. Because of his heel injury, Plaintiff had to wear a compression boot and was in a wheelchair for 8 to 10 months, which included his wedding day six days after the accident.[51] According to Plaintiff, his heel injury still limits his mobility, and he still experiences some swelling after being on his feet for a long time, which he treats with rest, elevation, and ice.

Approximately a year after the accident, Plaintiff saw a doctor certified in neurology and psychiatry for complaints of anger, depression, poor sleep, nightmares of the accident, irritability, and conflict with his family. The doctor's diagnosis was PTSD, major depressive episode related to the accident. At trial, Plaintiff testified that his PTSD has improved, but that he is still not at 100 percent. The evidence shows that at the time of trial, Plaintiff was still being treated for PTSD with medication and weekly therapy with a clinical psychologist and neuropsychologist (which began in August 2018). Notably, in February 2019, Plaintiff's orthopedic

[51] For financial reasons, Plaintiff's wedding could not be rescheduled. The couple had to forgo their scheduled honeymoon.

surgeon, who had referred Plaintiff for the psychiatric evaluation within a year of the accident, reported that Plaintiff did not have any fever, night sweats, shortness of breath when walking, or depressed mood. Plaintiff's therapist testified that Plaintiff's quality of life improved in the six months during which Plaintiff had received counseling prior to trial and that Plaintiff will not likely need weekly treatment for the rest of his life. For his future medical expenses, Plaintiff was awarded $27,053.58.

Although Plaintiff's medical history indicates that he suffered from stress, depression, and back pain before the accident, the trial court found that the various conditions for which he was treated after the accident related to injuries he suffered as a result of the accident.

When released to return to work on September 4, 2014, with restrictions, Plaintiff returned to working within his restrictions–medium duty on 8 to 12 hour shifts.[52] Plaintiff alleged in his supplemental petition filed in February 2015 (after being released to return to work) that "since his medical condition has improved," he "has sought to be rehired by Wood Group," as he is once again "qualified and physically able to perform his job duties." However, at the March 2019 trial, Plaintiff testified that he can no longer do offshore work. For his related lost wages and loss of future earning capacity, Plaintiff was awarded $300,000.

Contrary to Hiller's assertion, the record lends reasonable support for the trial court's obvious finding that Plaintiff had not fully recovered from his injuries by the time of trial. Nonetheless, Plaintiff had recovered from his various physical injuries to the extent that he reached maximum medical improvement by April 17, 2014 (approximately two years post-accident and 11 months post-

[52] As of January 2015, Plaintiff could lift 50 pounds below shoulder level and occasionally above.

laminectomy/diskectomy) and returned to work after his September 2014 release to return to work with restrictions.

While this court agrees that Plaintiff suffered multiple, significant, and severe injuries as a result of the accident, those physical injuries, although not completely resolved by the time of trial, had significantly resolved within two years, allowing Plaintiff to return to the work force notwithstanding his lingering psychological injuries. While Plaintiff was still undergoing weekly therapy for his psychological injuries at the time of trial, the evidence shows that Plaintiff made great strides in the six months of therapy that he received prior to trial. Under the facts and circumstances of this case, this court finds that the trial court abused its discretion in awarding $1 million in general damages for Plaintiff's physical injuries and $350,000 for Plaintiff's psychological injuries.

Having found the trial court abused its discretion in fixing the amount of Plaintiff's general damage awards, those damages should be set in accordance with **Coco v. Winston Indus., Inc.**, 341 So.2d 332, 335 (La. 1976), that is, lowering those awards to the highest point which is reasonably within the discretion afforded to the trial court. Considering prior awards for similar injuries, Hiller urges that the maximum general damage award to which Plaintiff is entitled to for his physical and psychological injuries is $365,000 ($315,000 and $50,000, respectively). Based on the totality, severity, and duration of Plaintiff's injuries, this court finds that the highest award reasonably within the trial court's discretion for general damages for physical injuries is $500,000 and for his psychological injuries is $175,000.

An award of loss of consortium in favor of a child compensates for the loss of love and affection; loss of companionship; loss of material services; loss of support; loss of aid and assistance, and loss of felicity. **Baack v. McIntosh**, 20-1054, pp. 13-

14 (La. 6/30/21), __ So.3d __, __. Plaintiff's 12-year old son, who visited Plaintiff every other weekend, was not called to testify. After the accident, Plaintiff was cared for by his wife and could not do anything. Although once very active, Plaintiff now leads a sedentary life. As to the effect that the accident had on Plaintiff's son, the scant evidence related to this issue shows generally that Plaintiff and his son were unable to participate in the some of the same outdoor activities, *i.e.*, dirt bike riding, that they enjoyed before the accident. Plaintiff sold his motorcycles since he was no longer physically able to ride them and for financial reasons. After the accident, Plaintiff became very bitter and angry and treated his family horribly. According to Plaintiff's wife, Plaintiff's relationship with his son has greatly improved.

Based on the facts of this case, this court finds that the trial court abused its discretion in awarding $50,000 for loss of consortium. Considering the evidence related to this issue, this court finds that the highest award reasonably within the trial court's discretion for loss of consortium is $15,000.

CONCLUSION

Pursuant to Helis's contract with Hiller, Hebert was obliged to inspect Helis's fire suppression equipment to determine whether it could extinguish fires or was in need of service, to provide Wood Group with an inspection report that sets forth Hebert's findings and identifies detected deficiencies, and to review that report with Wood Group's foreman. Hebert breached that duty by failing to properly diagnose the condition of the cylinder and failing to provide accurate information relative to his inspection. Hebert's breach was a cause-in-fact of Plaintiff's injuries. The risks encountered by Wood Group's employees fell within the scope of Hiller's duty. The negligent actions of Wood Group, Wood Group's employees, and Plaintiff were also a cause-in-fact of the accident; therefore, the trial court manifestly erred in allocating

all of the fault to Hiller. Given jurisprudential constraints limit the reallocation of fault to lowering or raising it to the highest or lowest point, respectively, which is reasonably within the trial court's discretion, fault is reallocated as follows: 40 percent to Hiller, 55 percent to Wood Group, and 5 percent to Plaintiff. Based on the trial court's abuse of discretion in fixing the damage awards in question, the Plaintiff's excessively high award for general damages for his physical injuries is reduced to $500,000 and general damages for his psychological damages is reduced to $175,000; Plaintiff's son's award for loss of consortium is reduced to $15,000.

In accordance with La. C.C. art. 2324(B), the "liability for damages caused by two or more persons shall be a joint and divisible obligation." Therefore, Hiller is liable only for its own share of the fault, which is 40 percent. See **Dumas**, 02-0563 at 11-12, 828 So.2d at 537.

DECREE

For the foregoing reasons, the trial court's judgment is amended to reallocate fault as follows: 40 percent to Herbert S. Hiller Corporation, Hiller Offshore Services, Inc., and The Hiller Companies, Inc.; 55 percent to Wood Group Production Services, Inc.; and 5 percent to Luigi Anthony Malta. The judgment is further amended to reduce Plaintiff's general damage award for physical injuries from $1 million to $500,000; to reduce Plaintiff's general damage award for psychological injuries from $350,000 to $175,000; to reduce Plaintiff's son's loss of consortium award from $50,000 to $15,000. Hiller is responsible for 40 percent of the awards. As amended, the trial court judgment is affirmed. In light of the reallocation of fault, this matter is remanded to the trial court for further proceedings, if any, consistent with this opinion.

AMENDED IN PART; AFFIRMED AS AMENDED; REMANDED.

SUPREME COURT OF LOUISIANA

No. 2021-C-00209

LUIGI MALTA, INDIVIDUALLY AND ON BEHALF OF HIS MINOR CHILD, GIOVANNI MALTA

VS.

HERBERT S. HILLER CORPORATION, HILLER OFFSHORE SERVICES, INC., THE HILLER COMPANIES, INC., HELIS ENERGY, L.L.C. AND HELIS ENTERPRISES, INC.

On Writ of Certiorari to the Court of Appeal, Fourth Circuit,
Parish of Orleans Civil

Hughes, J., dissenting.

I respectfully dissent. The reallocation of fault by the majority is simply a substitution of its opinion for that of the trial court without any "comparison" of the actions of the parties. We shouldn't lose the forest for the trees. The big picture: But for the negligence of the Inspector, this accident would not have happened. By reporting ambiguous and inaccurate information, the retained expert failed in its basic duty. Pressure is the danger, not weight.

As the majority recognizes, "the appellate court properly found that the trial court could have reasonably concluded that Hebert's failure to properly diagnose and accurately report his findings was the cause-in-fact of Plaintiff's injuries."

Whether the cylinder was "empty" or had "0 psi", the Operator's subsequent actions were "triggered" by inaccurate information. Conjecture about what the Operator's employees should have known or done does not outweigh their belief that the cylinder was safe to move because of the faulty information received from the Inspector. They would not have moved it otherwise.

The majority cites the factors to be considered in its high/low analysis per **Duncan** and **Clement v. Frey**, but does not analyze how those factors apply to the actions of these parties; rather it relies on "the record as a whole." On the whole,

while it is possible that a trier of fact could find some fault on the part of the Operator, I do not see how the Operator's fault can be greater than the negligence of the expert it retained for this specialized service. The Operator should have been properly warned of the danger.

As for damages, the majority again conducts a high/low analysis per **Coco**. Plaintiff had shoulder surgery, back surgery, and was in a wheelchair for 8 to 10 months. It is the job of the trial court to set appropriate damages within reason, and I would defer to the trial court as being in the best position for this task.

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GRIFFIN, J., concurs in part, dissents in part and assigns reasons.

I agree with the majority opinion to the extent it affirms the liability of Hiller. However, I respectfully dissent from its reallocation of fault and adjustment of damages.