Personal Injury and the Louisiana Law of Lease

P. Ryan Plummer

Repository Citation

Available at: https://digitalcommons.law.lsu.edu/lalrev/vol64/iss1/11
INTRODUCTION: THE BALLAD OF BUDDY BOUDREAUX

Meet Buddy Boudreaux. Buddy does not have an exciting job. He does not live in an eventful town. Buddy does, however, have a fishing camp. Like many other Louisianians, Buddy lives for the weekends. Every Friday, like clockwork, he makes an hour-long trip to Grand Isle to the modest quarters he rents along the Gulf shores. There, he fishes in the mornings, sleeps in the afternoons, and plays his mandolin at night. This routine has been the same for the past ten years, since Buddy started renting his cabin from his sister’s on-again, off-again, boyfriend.

Buddy’s routine was recently broken, however, by necessity, after a stair in front of his camp collapsed beneath him as he headed out for his morning excursion. A colony of Formosan termites moved in beneath Buddy’s porch some months ago, and had slowly been feasting on the sweet, delicious pine of which the steps were constructed. The termites, having left only the shell of what had once been a well built stair case, were the only witnesses to Buddy’s fateful fall, which sent him crashing through the stairs, flailing helplessly for something to grab a hold of, before he landed on the tree stumps below, nearly impaling himself with his Shakespeare™ fishing pole. Buddy has not been back to Grand Isle since. He has been laid up at home with a broken leg. The only thing uglier than his x-rays has been his disposition since the injury. Buddy’s situation is entirely unenviable; he can not work, can not fish, and can not do half of the things he had for so long taken for granted as a fully mobile man. He is further agitated by an uneasy feeling that he may not gain any redress from his landlord, because a review of his lease agreement revealed that he had assumed liability from his lessor for the condition of the fishing camp. His situation is also frustrated by the fact that his sister is not talking to him anymore, since Buddy has found himself representation, and filed a hefty personal injury suit against her boyfriend.

Unfortunately, fact patterns like Buddy’s illuminate inherent problems in Louisiana jurisprudence when personal injury collides with the law of lease. Causes of action for personal injury based in premises liability generally cause few problems to those adjudicating the issue. Once a contract of lease is introduced into the equation, however, some of Louisiana’s legal warts are exposed.

Strict premises liability based in tort was eliminated eight years ago, yet, in certain circumstances, contractual strict liability remains.¹
Public policy for the retention of one after the abrogation of the other is unclear. Clauses transferring premises liability from landlord to tenant are still common in lease agreements, yet the sporadic modification of tort and contract law in the Civil Code has nearly eliminated the utility of such clauses, and calls into question the contemporary efficacy of the Revised Statute allowing such transfers.¹

The work that follows highlights those unsettled areas in the realm of personal injury and Louisiana law of lease, as well as the intrinsic tension between certain statutes governing causes of action that encompass both areas of law, and analyzes proposed legislation that could settle these problems. Part I specifically addresses the issues, and explains the historical course which has lead Louisiana law to its current state of consternation. Part II reviews the continued application of contractual strict liability since the abolition of its delictual brethren. Part III analyzes transfers of liability through lease agreements, and acknowledges their severely limited utility in light of the changing law around them. Finally, Part IV takes an abbreviated look at proposed revisions to the Civil Code Title on Lease written by the Louisiana Law Institute, and discusses the relative weight these revisions hold in settling this narrow, but disconcerted, area of our law.

I. HOW DID WE GET HERE?

Between 1975 and 1996, property owners within the state were held strictly liable for personal injuries caused by defects in their property, whether or not the owner knew or should have known of the damage-causing defect.³ In 1975, the landmark decision by the Louisiana Supreme Court in *Loescher v. Parr*⁴ "breathed the substantive life of strict liability into Article 2317,"⁵ and thereby imposed a hefty burden on landowners across the state to watch their collective backs. By virtue of Articles 670,⁶ 2317,⁷ and 2322⁸ of the

Louisiana Civil Code of 1870, liability was strictly imposed upon the custodian of a thing when such thing caused damage to another, "despite the fact that no personal negligent act or inattention on the [custodian's] part [was] proved." Moreover, "[t]he liability [arose] from his legal relationship to the . . . thing whose . . . defect [created] an unreasonable risk of injuries to others."

Strict liability was similarly imposed upon landowners who doubled as lessors, when defects in their property caused any of various injuries to tenants, by virtue of Article 2695 of the Civil Code. Like a plaintiff bringing a cause of action under Articles 670, 2317, and 2322, the injured tenant, suing under Article 2695, needed only to prove simple elements of causation to recover from his landlord, and could avoid completely the far more daunting task of proving negligence on the part of the lessor. With reference to Article 2695, it has been held that,

To recover under this article, the lessee must prove by a preponderance of the evidence that a defect existed on the premises, and that such defect was the cause of her damages or losses. The landlord's liability is not based upon his personal fault, but rather his status as a landlord; thus, liability attaches whether or not the landlord had knowledge of the defect.

Facing the prospect of potentially expensive liability, even without fault, savvy property owners and lessors frequently utilized a legislatively created shield for owner-lesser strict liability, in the

---

comment (b).

7. La. Civ. Code art. 2317. Article 2317 provides, in pertinent part: "We are responsible, not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or of the things which we have in our custody . . . ."

8. La. Civ. Code art. 2322 (1870). Prior to 1996, the text of La. Civ. Code art. 2322 read: "The owner of a building is answerable for the damage occasioned by its ruin, when this is caused by neglect to repair it, or when it is a result of a vice in its original construction." *Loescher*, 324 So. 2d at 444.

9. *Loescher*, 324 So. 2d at 446.

10. La. Civ. Code art. 2695. The article provides:

   The lessor guarantees the lessee against all the vices and defects of the thing, which may prevent its being used even in case it should appear he knew nothing of the existence of such vices and defects, at the time the lease was made, and even if they have arisen since, provided they do not arise from the fault of the lessee; and if any loss should result to the lessee from the vices and defects, the lessor shall be bound to indemnify him for the same.

(Emphasis added).

form of "hold-harmless" clauses of lease contracts, allowed by Louisiana Revised Statutes 9:3221, through which the lessee absorbs the brunt of such liability. Louisiana Revised Statutes 9:3221 was undoubtedly designed to relieve the owner-lessee of some of the burdens legally imposed on him in cases where he has turned all control throughout his property over to a tenant under a lease. By allowing owners to contractually defer a portion of their potential liability, Revised Statutes 9:3221 ostensibly promoted business within the state by encouraging property owners to enter into residential and commercial lease agreements, free of concern arising from the potential of liability for injuries they could not have prevented because of lack of knowledge of the defect causing such injuries. If a landowner was to worry constantly about the condition of all of his leased premises, despite having contractually assigned responsibility for their maintenance to his tenants, such vexation could very conceivably result in hesitancy on the part of that landowner to enter into certain lease agreements. Consequently, the owner would be forced to avoid leasing the property altogether, or drive up rental prices as a form of insurance meant to cover potential litigation and damages caused by defects in the property that he never knew of, nor had reason to know about. Such a result was clearly contrary to business interests of the state, and thus the Louisiana Legislature created Revised Statutes 9:3221 as a protection against strict liability in 1932.

As a result, the owner-lessee of immovable property could rely on this exception to strict liability, provided the lessee: 1) assumed responsibility for the condition of the premises under contract of lease, 2) the injury occurred either to the lessee or anyone on the premises with the permission of the lessee, and 3) the owner did not know nor should have known of the defect.

This final requirement signifies both the utility and the limitations of these agreements. While the lessee in such cases assumes liability for the condition of the premises, the owner-lessee's liability does not end there. The extent to which liability may be transferred is limited

12. La. R.S. 9:3221 (1997). The statute provides:
   The owner of premises leased under a contract whereby the lessee assumes responsibility for their condition is not liable for injury caused by any defect therein to the lessee or anyone on the premises who derives his right to be thereon from the lessee, unless the owner knew or should have known of the defect or had received notice thereof and failed to remedy it within a reasonable time.

only to strict liability without fault. That is, the requirement that the owner neither knew nor should have known of the damage-causing defect of the premises (that he had neither actual nor constructive knowledge of its existence), practically means that the owner is still liable for negligent behavior. This type of negligence arises when the owner has been charged with knowledge of the defect and failed to rectify the situation in a reasonable time before the occurrence of the accident. Though limited in nature, hold-harmless clauses pursuant to Revised Statutes 9:3221 were frequently utilized by owner-lessors to defer contractually to their tenants, through the lease agreement, strict liability for injuries caused by defects in the property, and alleviate their burden of care from one of strict liability without fault, to one of simple negligence. Clauses pursuant to the Title 9 provision\textsuperscript{16} effectively deferred strict liability to tenants for injuries to both the tenants themselves, as well as third parties on the land by invitation of those tenants.\textsuperscript{17} With few exceptions,\textsuperscript{18} properly executed clauses pursuant to the Title 9 provision\textsuperscript{19} allowed property owners to drop strict liability squarely in the laps of their lessees.

A. The 1996 Civil Justice Reform: A Louisiana Tort Face-Lift

In 1996, however, the necessity of such “not my problem” clauses was arguably eliminated, at least with respect to liability stemming from injuries to third parties. With the advent of Act One of the First Extraordinary Session of 1996, the Louisiana Legislature introduced

\begin{enumerate}
\item[17.] \textit{Wallace}, 641 So. 2d at 628 (citing holding from Gilliam v. Lumbermens Mut. Cas. Co., 124 So. 2d 913 (La. 1960) (the transfer of liability by virtue of a La. R.S. 9:3221 clause extends to injuries to third parties on the property with the lessee’s blessing, as well as injuries to the tenants themselves)).
\item[18.] See \textit{Wallace}, 641 So. 2d 624 and \textit{Haley v. Calcasieu Parish Sch. Bd.}, 753 So. 2d 882 (La. App. 3d Cir. 1999). In these cases, the Third Circuit Court of Appeal judicially created an exception to the shifting of responsibility to the tenant when such tenant is a commercial lessee, and employer of the injured third party-plaintiff. In such arrangements, the injured party was precluded from bringing suit against the lessee who had assumed strict liability from the owner, because that lessee was also the plaintiff’s employer, granted immunity from suit by all employees through the worker’s compensation statutes, specifically La. R.S. 23:1032. As a result, the court in \textit{Wallace} cited La. Civ. Code art. 2004 as implicitly denying owners the ability to dodge liability by squatting in the Worker’s Compensation fox hole, dug exclusively for employers. In \textit{Haley}, the court also added that such an arrangement is constitutionally unallowable. In such cases, the injured employees were able to maintain their action in strict liability against the owners of the premises, despite clauses in the lease agreements attempting to shift such responsibility to the lessee-employers.
\end{enumerate}
Article 2317.1, and revised and reenacted Article 2322, effectively eliminating strict liability of property owners and replacing it with what was hoped to be a fairer standard of liability grounded in negligence alone. New Article 2317.1 and reformed Article 2322 mirror the language which, for 64 years, had been in place in Revised Statutes 9:3221, holding property owners responsible for injuries only when they had some form of knowledge of the premises defect which caused the damages. As such, each article similarly mirrors the others, and serves the intended purpose of overruling Loescher and its progeny, replacing strict liability with a fault-based negligence regime. Commenting on the about-face change wrought by what was tabbed the 1996 "tort reform," professors Frank L. Maraist and Thomas C. Galligan wrote,

[T]he 1996 legislation shifted nearly all categories of "blameless" liability to negligence. Thus, [Louisiana has] moved from a tort regime with significant pockets of "no blame" liability to one in which liability generally requires blameworthiness. The post–1996 liability regime in Louisiana, dominated as it will be by negligence and intentional torts, is a true "fault-based" system, and "fault" in Article 2315 generally no longer has its former technical connotation, but returns to its colloquial meaning—blameworthiness.

---

20. La. Civ. Code art. 2317.1. The article provides:
The owner or custodian of a thing is answerable for damage occasioned by its ruin, vice, or defect, only upon a showing that he knew or, in the exercise of reasonable care, should have known of the ruin, vice, or defect which caused the damage, that the damage could have been prevented by the exercise of reasonable care, and that he failed to exercise such reasonable care. Nothing in this Article shall preclude the court from the application of the doctrine of res ipsa loquitur in an appropriate case. (Emphasis added).

The owner of a building is answerable for the damage occasioned by its ruin, when this is caused by neglect to repair it, or when it is the result of a vice or defect in its original construction. However, he is answerable for damages only upon a showing that he knew or, in the exercise of reasonable care, should have known of the vice or defect which caused the damage, that the damage could have been prevented by the exercise of reasonable care, and that he failed to exercise such reasonable care. Nothing in this Article shall preclude the court from the application of the doctrine of res ipsa loquitur in an appropriate case. (Emphasis added).

23. Maraist & Galligan, supra note 3, at 342.
24. Id. at 344.
25. Id. at 342.
B. So What’s the Problem?

While it remains clear that strict premises liability died with the 1996 Legislation, what the jurisprudence since then has not addressed satisfactorily is how such a change in the state tort regime has affected causes of action arising out of injuries caused by unreasonably dangerous defects in premises that are the objects of various lease agreements. Harkening back to the plight of our ill-fated protagonist, Buddy Boudreaux, it is simple enough to see that if Buddy loses his left ear, and 50% of the brain function in his frontal lobe, as the victim of a nasty plaster and spackle collapse at his aunt’s home during her annual Arbor Day festival, that Buddy will only receive redress through the courts provided he, in his now limited cranial capacity, can prove that his aunt knew or should have known of the unreasonably dangerous risk posed by the defect which caused the ceiling to collapse, in a hailstorm of wire mesh and petrified joint compound, on his unfortunate dome.

What is not so simply determinable, however, is whether or not Buddy would retain the luxury of strict liability in a suit against his Aunt Jane, by virtue of Article 2695, if the accident occurred in his own decrepit apartment, that he happened to be renting from his slumlord aunt. Do the tort revisions affect the action in strict liability provided contractually to a tenant both specifically through Article 2695, and implicitly through the warranty of peaceable possession26 guaranteed by the Civil Code in all lease agreements? And if not, what will Buddy’s burden of proof be, and what sort of damages may he recover from the accident? Is the continued existence of the final provision of Article 2695 intended by the Legislature, or is it simply an oversight? Do the public policy reasons which drove the tort reform into law not extend to the lessor/lessee relationship?

Furthermore, what if such a nightmarish fate befell Buddy in his rented apartment, only after he had assumed all responsibility for the condition of the premises, and all liability stemming from such condition, through a hold-harmless clause in the contract of lease, between himself and his aunt, pursuant to Revised Statutes 9:3221?27

26. La. Civ. Code art. 2692. The article provides: “The lessor is bound from the very nature of the contract, and without any clause to that effect: 1. To deliver the thing leased to the lessee. 2. To maintain the thing in a condition such as to serve for the use for which it is hired. 3. To cause the lessee to be in a peaceable possession of the thing during the continuance of the lease.” (Emphasis added).

27. Assume, for purposes of this argument, that Buddy’s Aunt Jane has been renting living quarters of dubious quality for many years, and has simply applied the necessary signatures again and again to the same form lease agreement drawn up by her attorney well over a decade ago, before the abolition of strict premises liability stemming from Governor Murphy “Mike” Foster’s Civil Justice Reform
Could Buddy successfully argue that the clear and unambiguous provisions\(^2\) of Article 2004,\(^2\) declaring that any clause is null that, in advance, excludes or limits liability of one party for causing physical injury to the other, trumps contractual clauses pursuant to the Title 9 provision?\(^3\) Or could his aunt argue the exact opposite?\(^3\)

Finally, assume that Buddy’s head has remained uninjured, but that he lost all use of his left leg when a balcony collapsed beneath him at his aunt’s home, and that she was a residential lessee at the time who had contractually assumed responsibility for all liability arising from the condition of the premises, through a clause constructed around Revised Statutes 9:3221, in her lease agreement. Now that the owner-lessee of the defective property no longer faces strict liability, does it matter that she included such a clause in her contract, as it relates to injured third parties, such as Buddy? Has the owner actually derived any benefit from including such a clause in his lease agreement?

These and other questions have arisen since Louisiana tort law was given a drastic face-lift in 1996, and have yet to be answered satisfactorily. In the work that follows, this author modestly attempts to clarify these questions, specifically those regarding the continued efficacy of both Article 2695 and Revised Statutes 9:3221, statutes which have remained unaltered for over seventy years, when viewed in light of the recently reformed tort regime, as well as newly promulgated Article 2004, with which they are unquestionably intertwined. In the process, it becomes necessary to examine the relationship between contract and tort, and causes of action that hesitate between them. Finally, this article takes a cursory look at the revisions to the Louisiana Civil Code title on Lease, as proposed by the Louisiana Law Institute, and whether or not those revisions will sufficiently settle this narrow, but disconcerted, area of our law.

\(^{28}\) La. Civ. Code art. 9. The article provides: “When a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature.”

\(^{29}\) La. Civ. Code art. 2004 (1985). The article provides, in pertinent part: “Any clause is null that, in advance, excludes or limits the liability of one party for causing physical injury to the other.”

\(^{30}\) Such an argument was successfully made by the plaintiff in Ramirez v. Fairgrounds Corp., 575 So. 2d 811 (La. 1991), though the agreement at issue was, arguably, not technically a lease. This decision will be discussed further, below.

\(^{31}\) The Third Circuit Court of Appeals discredited the Ramirez decision somewhat, in Guillory v. Foster, 634 So. 2d 1372 (La. App. 3d Cir. 1994). This decision will also be discussed further in later sections.
II. CONTRACTUALLY IMPLIED WARRANTY: A LAST BASTION OF STRICT LIABILITY

The 1996 Legislature enacted Article 2317.1 and amended Article 2322 to abolish the imposition of strict liability on landowners for damages caused by their property, and placed a previously absent burden of proof upon the injured plaintiff to prove general negligence on the part of the landowner. The Senate Panel bolstered their decision to pass Act One by stating that the reform would usher in an era of fairer standards of tort liability for the entire spectrum of Louisianians, from homeowners and small businesses to large corporations and chemical companies, by reserving liability only to those property owners found guilty of negligent acts. However, in furthering this “fairer standard” of determining liability, pushed hard by the Louisiana Association of Business and Industry, the Legislature left Article 2695 on the books. That article, though located in Title IX: Of Lease, some 100 pages outside of the Title V provisions that were amended in 1996, governing Obligations Arising Without Agreement, still expresses, in unequivocal language, a remaining bastion of strict liability legally imposed on property owners. In certain instances, such liability can be imposed without fault or negligent behavior by virtue of this article, for injuries caused by defects in premises, whether or not the owner had actual or constructive knowledge of the damage-causing defect. This strict liability is only imposed on the owner, however, in situations where he is also a lessor of the property, and the injured party is the lessee. Article 2695 provides, in part, that “The lessor guarantees the lessee against all the vices and defects of the thing... and if any loss should result to the lessee from the vices and defects, the lessor shall be bound to indemnify him for the same” (emphasis added). This “any loss” language clearly encompasses personal injuries—a conclusion repeatedly supported by the jurisprudence. The broad language of Article 2695 at issue dates back to statutes created before the Civil Code of 1870, and even before its source article in the Code Napoleon. Its roots can be traced all the way back to the Projet du Government (1800), Book III, Title XIII, Article

32. Lee, supra note 5, at 1225.
34. Id.
The fact that the article remains unaltered, despite the abolition of all other forms of strict premises liability, is likely not an oversight of the Redactors, but rather a fact grounded in the very nature of the article. Article 2695 rules from the Civil Code title governing Lease Agreements, not delictual liability arising without agreement. It expresses a legislative intent to provide all lessees with an implied warranty against all vices and defects of the object of the lease, primarily those that prevent the object from being used for its intended purpose, but also those that cause any loss to the lessee. The article further expounds upon the warranty implicit in all lease agreements introduced by Article 2692. As such, it is clear that the strict liability imposed upon property owner-lessees for personal injuries to tenants caused by defects in the property, by virtue of the catch-all final clause of Article 2695, is derivative of a contractual duty, largely unaffected by the tort revisions of 1996.

Though the jurisprudence is without a completely clear holding to this effect, the Fifth Circuit, in holding that an injured tenant had failed to prove any defect in his landlord’s property which had actually caused his injuries, implicitly agreed with the plaintiff’s assertion that Article 2695 would have ruled, had he been able to meet his burden of proof. In the denied application for writ to the Louisiana Supreme Court, Chief Justice Calogero, in a concurring opinion, makes the clearest statement to date regarding the effect of the 1996 revisions on the continued existence of Article 2695: “I agree with the implicit reasoning of the court of appeal that La. Civ. Code art. 2317.1 does not impinge upon the lessee’s cause of action in strict liability against the lessor under La.Civ.Code art 2695.”

With this statement, Article 2695 is likely still a viable option for injured tenants seeking to invert the burden of proof in actions against the owners of their leased property. An action built on this article, though, is intrinsically different than one formulated on grounds of the delictual articles imposing premises liability. This presents to the injured party various advantages and disadvantages. In his favor is the fact that a strict liability suit built on Article 2695 is a contractual action, subject to the luxurious 10-year liberative

39. La. Civ. Code art. 2692. The article provides:
   The lessor is bound from the very nature of the contract, and without any clause to that effect: 1. To deliver the thing to the lessee. 2. To maintain the thing in a condition such as to serve for the use for which it is hired. 3. To cause the lessee to be in peaceable possession of the thing during the continuance of the lease.
   (Emphasis added).
41. Driscoll, 793 So. 2d at 201.
prescription afforded causes of action in contract, far more appealing than the one-year period imposed on causes of action based in delict. Unfortunately, though such a plaintiff has more time to bring suit, he practically has little chance of recovering the same type of damages he could recover in a tort action, if he could only prove negligence through actual or constructive knowledge of the owner lessor. Non-pecuniary damages are only recoverable in contractual actions when the agreement at issue was one meant to fulfill a non-pecuniary interest of the obligee, and the obligor knew or should have known that his failure to perform would cause such a loss. Meanwhile, recovery of damages in tort is often, for better or worse, defined by the sometimes superfluous awarding of non-pecuniary damages.

The question which now must be answered is whether the public policy reasons which drove the 1996 tort reform abolishing strict premises liability should logically extend to injuries incurred by lessees, or whether such causes of action are completely separate from actions built on tort doctrine. It seems clear that the two causes of action are intrinsically separate, and with good reason. As such, Article 2695 does not logically oppose its delictual brethren, but rather has its place amid warranties, which are by law implicitly provided in all lease agreements. This is not to say, however, that the broad language of the article is completely necessary. A close look at Article 2692 reveals that an obligation to protect a lessee from injuries due to defects in the property is implicit in that article. If an injured lessee brings an action against his lessor, he can bring an action for breach of contract without Article 2695, though the clear language of that article would certainly help. Article 2692 reads in part, "The lessor is bound by the nature of the contract ... to cause the lessee to be in a peaceable possession of the thing during the continuance of the lease." Peaceable possession should certainly entail freedom from danger, vexation, or the chance of injury from defects in residential or commercial property.

42. La. Civ. Code art. 3499.
45. There also may be an argument that, at least for residential lessees, recovery of non-pecuniary damages may be possible through a suit built on contract by virtue of article 1998, since a great deal of a residential lease is arguably meant to gratify the non-pecuniary interest of peaceable living. In this way, an injured lessee can theoretically recreate the recovery under strict liability once available to him before the 1996 tort revisions, with the added bonus of a 10-year liberative prescription. The Buddy Boudreaux hypothetic becomes important here, because a fishing camp is even more likely to be the object of a lease agreement, the cause of which is the fulfillment of non-pecuniary interests.
The Legislature's failure to amend Article 2695 when eliminating other forms of strict premises liability does not interrupt the logical cohesiveness of the Louisiana Civil Code, a problem risked with almost every revision to its articles. Practically speaking, however, the broad language of the final clause of Article 2695 is largely redundant, and offers a plaintiff little productive utility by shifting the burden of proof to the defendant owner-lessee, if he indeed hopes to secure damages similar to those possible in a tort action.

III. TITLE 9 TRANSFERS OF LIABILITY: USELESS FOR THIRD PARTY INJURIES, AND "CONTRA BONOS MORES" FOR INJURIES TO TENANTS

Transfers of premises liability to lessees in lease agreements, pursuant to Revised Statutes 9:3221, no longer mean what they used to, but are very likely still regularly employed by cautious lessors. With the movement of general premises liability, with respect to third parties to lease agreements, from strict liability to general negligence, and the emergence of jurisprudence strictly enforcing Article 2004 in agreements featuring hold-harmless clauses in the lessor's favor, the efficacy of such Title 9 transfers of liability, at least with relation to personal injuries resulting from defects in the leased premises, has been cast into serious doubt. This author asserts that such doubt is more than justified, and clauses pursuant to Revised Statutes 9:3221 are now useless to protect a property owner from any form of personal injury liability he would not otherwise encounter in the absence of such an agreement.

A. Third Party Injuries and Transfers of Liability

As to injured third parties uninvolved in the lease agreement, such clauses were never able to protect the owner-lessee from

47. See Frank L. Maraist, Of Envelopes and Legends: Reflections on Tort Law. 61 La. L. Rev. 153, at 155. Note 7 reads:
A contract that is contra bonos mores, meaning 'against good morals,' is void. See, e.g., Holliday v. Holliday, 358 So. 2d 618, 620 (La. 1978) (finding a provision of an antinuptial agreement in which a wife waived her right to temporary alimony in the event of judicial separation from bed and board to be null and void as against public policy).
48. La. Civ. Code art. 2004. The article provides: "Any clause is null that, in advance, excludes or limits liability of one party for intentional or gross fault that causes damage to the other party. Any clause is null that, in advance, excludes or limits liability of one party for causing physical injury to the other party."
50. La. R.S. 9:3221.
premises liability when he was negligent. Only strict liability was subject to such a transfer, and that type of strict liability is no longer the norm. As the statute provides, "[t]he owner of premises leased under a contract whereby the lessee assumes responsibility for their condition is not liable for injury caused by any defect therein to the lessee or anyone on the premises who derives his right to be thereon from the lessee, unless the owner knew or should have known of the defect or had received notice thereof and failed to remedy it within a reasonable time" (emphasis added).52 The requirement of "knowledge" is almost perfectly reflected in Article 2317.1 and revised Article 2322. This is no coincidence. Article 2317.1 provides, in part, that "The owner or custodian of a thing is answerable for damage occasioned by its ruin, vice, or defect, only upon a showing that he knew, or in the exercise of reasonable care, should have known of the ruin, vice, or defect which caused the damage."53 Similarly, Article 2322, governing more specifically "Damage caused by ruin of a Building," provides in pertinent part, that an owner of a building "is answerable for the damage occasioned by its ruin . . . only upon a showing that he knew, or in the exercise of reasonable care, should have known of the vice or defect which caused the damage."54

Article 2317 and former Article 232255 previously imposed strict premises liability, and clauses pursuant to Revised Statutes 9:3221 could defer that strict liability from owners to tenants, replacing it with general liability for negligence alone. However, the abolition of strict liability manifested in Article 2317.1 and revised Article 2322 renders hold-harmless clauses in lease agreements, pursuant to Revised Statutes 9:3221, useless as to injured third parties. There no longer exists any strict liability for an owner-lessee to contract away to his lessee; since he has always remained liable for negligent maintenance of his land or buildings causing injury to third parties, he no longer derives any benefit from transferring liability in such instances. There is currently no advantage held by a physically injured third party as to the burden of proof, and as such, an owner-lessee in these cases has no contractual object to transfer to his lessee when incorporating into the lease a clause built upon Revised Statutes 9:3221.

B. Contra Bonos Mores

When injuries befall the lessee, however, the effectiveness of clauses allowed by Revised Statutes 9:3221 is less clear. As established above, an injured lessee still has a contractual action in

52. La. R.S. 9:3221.
strict liability against his lessor, despite his being stripped of a similar
delictual action by the 1996 Legislature. Taking this into account, it
seems as though savvy property owners still have a lot to gain from
transferring responsibility for the condition of their leased premises
to their lessees—namely, shifting the burden of proof back to the
tenant if he should be unfortunate enough to fall victim to injuries
caused by defects to the property.

Such arrangements, however, by allowing a lessor to limit his
liability to his tenant, violate the provisions of Article 2004, and
frustrate the public policy behind it. Article 2004 unequivocally
provides that “[a]ny clause is null that, in advance, excludes or limits
the liability of one party for causing physical injury to the other
party.” This article does not pose a problem in causes of action
brought by injured third parties to the lease agreement, as the
language clearly includes only the two parties to the contract. With
injured lessees, though, clauses pursuant to Revised Statutes 9:3221
appear to be just the sort of clause that the article is trying to
eliminate. Such clauses do not exclude liability, because owners-
lessors are still responsible for their negligence when the injured
tenant can prove that such a lessor either knew, or should have
known, of the defect to the premises that caused his injury. Such
clauses most certainly do, however, limit the liability of the owner-
lessor toward his tenant (“the other party” to the contract protected
by the article) by eliminating the contractual cause of action in strict
liability, and placing the burden of proof back squarely on the
shoulders of the injured lessee in a separate action, based in tort.

In Ramirez v. Fairgrounds Corp., the Louisiana Supreme
Court ruled a “hold-harmless” clause null, pursuant to Article 2004,
in a contract that closely resembled a lease. The defense pointed
out that comment (a) to Article 2004 states that the article “does not
change the law,” and comment (e) provides that the article “does not
govern indemnity clauses, ‘hold harmless’ agreements, or other
agreements where parties allocate between themselves the risk of
potential liability toward third persons.” Furthermore, comment (f)
to the article states clearly that, “[t]his article does not supersede R.S.
9:3221.” The Louisiana Supreme Court, however, pointed out that

57. 575 So. 2d 811 (La. 1991).
58. See Neal Joseph Kling, Ramirez v. Fair Grounds Corporation: The Harm
in Holding Harmless, 52 La. L. Rev. 1061, 1078 (1992) (discussing how, for all
practical purposes, the agreement at issue was indeed a lease, in that there was a
thing being contracted, a price, at least constructively, being paid, and unvitiated
consent).
59. Ramirez, 575 So. 2d at 813.
it "need not determine whether the comments [to Article 2004] were intended to convey a meaning contrary to the plain words of the statute . . . [such comments] have no legislative effect on the statute because they are not part of the law." The court further held that, by virtue of Article 9 (calling for laws to be applied as written when the language of that law is clear and unambiguous, with no further interpretation to be made in search of the intent of the legislature), Article 2004 should be strictly applied in the case, and the Fairgrounds Corporation was held liable for Ramirez's crippling injuries caused by their unsafe stable, despite a prior agreement by the parties intending to hold the race track harmless in just such an instance.

Ramirez raised the question of the continued efficacy of clauses pursuant to Revised Statutes 9:3221 in the face of Article 2004, which is itself a reflection of modern state public policy, enacted in 1985. Because the agreement there was not specifically a contract of lease, with a clause built around Revised Statutes 9:3221, the issue was not satisfactorily resolved by the holding, nor has the jurisprudence since settled the issue. In Guillory v. Foster, the Third Circuit Court of Appeal held that Article 2004 and Ramirez do not nullify Revised Statutes 9:3221, but did so unconvincingly. The cause of action there involved an injured third party plaintiff. Such causes of action do not involve Article 2004, as that article only governs the relationship between the parties to the contract at issue. Furthermore, the judgment stated, "This court believes that if Article 2004 had been intended to negate La. R.S. 9:3221, the latter statute would have been repealed in the act which enacted the former statute." Such a belief, in the opinion of this author, gives too much credit to the Redactors of the Civil Code, as well as the Legislature, in assuming that all risks associated with the promulgation of new articles can be clearly seen before every new statute is introduced to law. The Third Circuit also defended its belief by declaring, "[t]he constitutionality and rationale of La. R.S. 9:3221 have been confirmed in Louisiana Law," and proceeded to cite three cases which were decided before the promulgation of Article 2004. It is difficult to believe that a court could so confidently state that the cited jurisprudence resolves any conflict which might exist between

61. Ramirez, 575 So. 2d at 813.
63. Ramirez, 575 So. 2d at 811.
66. Guillory, 634 So. 2d at 1374.
67. Id.
68. Id.
two statutes, when all of the cited cases were decided before one of the
two statutes had ever been written.69 Finally, just as the comments to
Article 2004 were ineffective as persuasive authority to the Louisiana
Supreme Court in Ramirez, so too is the opinion of the Third Circuit
in Guillory.

The most effective means by which the issue could be resolved is
through a legislative alteration to Revised Statutes 9:3221. Anything
less would result in more indecision, as lessors continue to employ the
clause in lease contracts, uncertain of whether or not it will be effective
if an injury actually does occur, and not knowing whether their asking
price should be adjusted to cover the potential for liability expenses.
While this author has argued that clauses pursuant to Revised Statutes
9:3221 are useless in relation to personal injuries caused by leased
premises, they remain effective to defer liability for certain other
damages. Such damages are those not associated with bodily harm that
occur exclusively to tenants. Specifically, lessors may still defer
liability for damage to the lessee’s property by virtue of a clause built
around Revised Statutes 9:3221, because Article 2004 only declares
null those clauses that limit liability for one party’s causing physical
injury to the other.70 However, with respect to property damage, such
“hold-harmless” clauses are just as ineffective to defer liability to the
tenant for damages to third parties as they are when the damage is in
the form of personal injury. Strict liability for all forms of damage was
eliminated in 1996, and it makes no difference if a defective balcony
falls on a third party’s car or on his back; if he is not a party to the
contract, his recovery for damages will be based on his ability to prove
negligence on the part of the lessor, whether that lessor contractually
shifted responsibility for the premises to his tenant or not. As such,
revision of the language of the statute, bringing it into accord with the
law introduced by Article 2004 by limiting the allowable transfer of
liability from landlord to tenant to encompass only damage caused to
the tenant’s property by general negligence on the part of the lessor,
would be the most effective means of clarifying this murky area of
premises liability.

IV. PROPOSED REVISIONS

The Louisiana Law Institute is currently in the process of revising
Book III, Title IX of the Louisiana Civil Code,71 and has taken steps

69. The Guillory court cites Tassin v. Slidell Mini-Storage, Inc., 396 So. 2d
71. Louisiana Law Institute: Revision of the Louisiana Civil Code of 1870,
to resolve some of the issues outlined above. These proposed articles are still not fully developed, and are likely years from being passed into law by the state Legislature, if at all. However, a quick look at the work being done is worthwhile to understand possible means by which the Louisiana Law of Lease could be brought into accord with those recently revised laws governing delictual responsibilities, with which they have continued to be closely intertwined. Specifically, the proposed articles attempt to relieve the tensions between Articles 2317.1, 2322, 2695, 2004, and Louisiana Revised Statutes 9:3221, which have developed as a result of the promulgation of Article 2004 in 1985, and the Civil Justice Tort Reform of 1996.72

Proposed Article 2696, "Warranty against vices or defects," which retains the substance of Article 2695, reads:

The lessor warrants the lessee that the thing is suitable for the purpose for which it was leased and that it is free of vices or defects that prevent its use for that purpose. This warranty also extends to vices or defects that arise after the delivery of the thing and are not attributable to the fault of the lessee.73

As can be seen, the Law Institute has eliminated the all-inclusive language of Article 2695 (demanding that the lessor be responsible for any loss occurring to the lessee by virtue of defects to the premises),74 from which a great deal of contractual strict liability can be based in premises liability actions. Whether this omission was meant to eliminate such actions, leaving injured lessees only to redress their problems by virtue of delictual actions based in negligence under Articles 2317.1 and 2322, or whether the contractual action in strict liability remains through the warranty of peaceable possession guaranteed by Article 2692, is uncertain.

Proposed Article 2682 restates the substance of Article 2692, and retains the implied warranty of peaceable possession in all lease agreements. It reads, "The lessor is bound . . . [t]o deliver the thing to the lessee; . . . [t]o maintain the thing in a condition suitable for the purpose for which it was leased; and . . . [t]o protect the lessee's peaceable possession for the duration of the lease" (emphasis added). As a result, the omission, in Proposed Article 2696, of the language in Article 2695 specifically placing strict liability on the landlord for

Symeon C. Symeonides, Reporter.
“any loss” incurred by the tenant,\textsuperscript{75} does not theoretically eliminate the contractual strict liability guaranteed to the lessee through the implied warranty of lease. Such strict liability is still assured through the warranty of peaceful possession in both current Article 2692, and Proposed Article 2682. This retention of strict liability by virtue of the lease agreement between the parties is proper. An action in strict liability by an injured tenant against his landlord is a risk the landlord runs by signing a lease agreement. It is contractually guaranteed to the tenant by the lease through the implied warranty of peaceful possession. Such an action should not be revoked by the legislature in an attempt to conform the articles governing lease agreements to those newly reformed articles governing delictual premises liability. Articles 2317.1 and 2322 are outside of the realm of contract law, and should not affect an injured lessee’s right against his lessor.

Finally, proposed Article 2699: “Waiver of warranty,” provides:

In a residential or consumer lease, the warranty provided in the preceding articles may not be waived.
In all other leases, the warranty may be waived, but only by clear and unambiguous language that is brought to the attention of the lessee. Nevertheless, a waiver of warranty is ineffective:

1. to the extent it pertains to vices or defects of which the lessee did not know and the lessor knew or should have known; or to the extent it is contrary to the provisions of Article 2004 .\textsuperscript{76}

This proposed article resolves the conflict between Revised Statutes 9:3221 and Article 2004, as suggested above, by specifically addressing Article 2004 and its place in limiting the ability of landlords to transfer liability for the condition of their premises to their tenants, to the extent that they may not avoid the action in strict liability of an injured tenant, specifically through Article 2695, and implicitly through Article 2692 and proposed Article 2682. As stated above, when a tenant’s cause of action against his landlord is based on a personal injury caused by defects in the leased property, any contractual clause placing responsibility for the condition of the premises solely on the tenant’s shoulders is rendered an absolute nullity by Article 2004, and the tenant retains his action in strict liability. Proposed Article 2699 recognizes this fact, and codifies it.

\textsuperscript{75} La. Civ. Code art. 2695.
The Louisiana Civil Code is a symphony. If an audience hears only a single violinist playing his sheet music for Handel’s “Messiah,” the music would be strange and out of place. The result is the same when each article, title, or chapter of the Civil Code is heard alone. The goal of the Code is to reach a logical whole, with each article playing a small part in building the body of Louisiana law. With every revision, the legislature risks casting the symphony of the code into discord.

The promulgation of Article 2004 in 1985, and the tort reform of 1996, revising Article 2322 and adding Article 2317.1, negatively affected the logical whole of the Civil Code by frustrating the simple adjudication of certain causes of action that fall within the realm of both personal injury and the law of lease, and introduced confusion into Louisiana jurisprudence. If the articles proposed by the Louisiana Law Institute are passed into law by the legislature, and Revised Statutes 9:3221 is revised to reflect its now severely narrowed utility in lease agreements, this agitated area of our law will again be settled.

P. Ryan Plummer*

---

77. 1932 La. Acts No. 174, §§ 1, 2.

* J.D. candidate; Paul M. Hebert Law Center, Louisiana State University. The author would like to thank the venerable Dr. Saul Litvinoff for his invaluable guidance, spanning from the ideological formation of this paper to its conclusion. Special thanks also goes out to Mr. James Carter of the Louisiana Law Institute for generously providing materials and a non-judgmental ear. Finally, the author is forever indebted to his loving family, particularly his parents, for their unwavering support and determined leadership through all academic endeavors, without which no such accomplishment could have been possible.