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Comments

LESSOR'S LIABILITY FOR PERSONAL INJURIES

The liability of the lessor in Louisiana for personal injuries to the tenant or third persons caused by the defective condition of the premises is in marked contrast to liability at common law. Under common law principles the landlord enjoys a virtual immunity. His liability is dependent upon the fact that at the time the lease was entered into he knew of defects which he was aware the lessee could not discover for himself. In brief the landlord owes the tenant only the duty of good faith and fair dealing.

On the other hand, the liability of the lessor in Louisiana is based on Article 2695,¹ which reads as follows:

"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."

This article was adopted from Article 1721 of the French Civil Code. As this article originally appeared in Pothier's treatise the lessor guaranteed the lessee against all vices and defects of the thing which might prevent its being used *entirely*.² Under this view it seems clear that it was not intended that there be recovery for personal injuries to the tenant or others. Although the word "entirely" was deleted when this was adopted as Article 1721 of the French Civil Code, it still appears that there was no intent to create a cause of action when the thing leased is capable of being used for its intended purpose although it contains a defect which might result in physical injury. The reasonable interpretation, therefore, is that the purpose of the article was merely to assure the lessee against a disadvantageous lease and permit him to avoid the contract or to secure damages which would compensate him for his loss of bargain. This view is fortified by the general position of the French law that liability for injury (*responsabilité*) is dependent on the existence of fault. The notion of guaranty expressed in Article 1721³ is inconsistent with this basic position. For that reason the commentators have generally expressed disapproval of the use of the article for consequential damages to the person or property in cases when the lessor was blameless.⁴ Nevertheless, the courts seem to have permitted recovery for consequential damages without reference to the fault of the lessor.⁵

1. Louisiana Civil Code of 1870.

2. 10 Planiol et Ripert, *Traite Pratique de Droit Civil Francais* (1932 ed.) 655, n° 537.

3. French Civil Code, corresponding to Article 2695 of the Louisiana Civil Code of 1870.

4. 2 Planiol, *Traite Elementaire de Droit Civil* (11 ed. 1937) 617, n° 1689; 2 Colin et Capitant, *Cours Elementaire de Droit Civil Francais* (1935) 595, n° 654.

5. Req., 23 juin 1874, Sirey 75.1.120.

The Louisiana courts have adopted the same position by imposing on the lessor the obligation of keeping his building in a safe condition. The result has been to impose absolute liability, since the fact that the premises do contain defects is sufficient proof that that he has not performed this duty. Several cases illustrate that the court does not consider the reasonableness of the defendant's conduct.⁶ In *Badie v. Columbia Brewing Company*,⁷ the plaintiff was injured a few hours after an inspection by the lessor had revealed the defect. Since ignorance of the defect itself would not relieve the defendant under Article 2695,⁸ the court rejected the defendant's plea that he be allowed a reasonable time after the discovery in which to make the repairs. Liability was based on a failure to maintain the premises in a safe condition, but the court seemed to disregard the defendant's efforts to discharge his duty. Other Louisiana decisions contain similar language,⁹ although it is noteworthy that in most cases in which such statements occur the courts would have been justified in finding negligence on the part of the landlord.

It is apparent that the notion of absolute liability cannot be indiscriminately imposed on the landlord in each and every instance for each and every defect. In many instances the defect may be too trivial, or the conduct of the lessee may indicate that he, rather than the lessor, is more appropriately chargeable with the loss. Fair play often demands that the landlord be exonerated from liability, and there thus arises a need for some means whereby the situations can be individualized by the courts. Of course the simplest and most easily administered device for this purpose is the concept of negligence, or fault. But when, as with the plight of the Louisiana landlord, fault is not available as a means of mediation, other restrictions can be brought into play to prevent unfairness.

One way of restricting liability is to impose disqualifications on the plaintiff. The defective condition may be regarded by the court as one which the tenant, rather than the landlord, should

6. *Wise v. Lavigne*, 138 La. 218, 70 So. 103 (1915); *W. J. Gayle and Co. v. Atkins*, 3 Orl. App. 513 (1906); *Kelly v. Daring*, 6 La. App. 91 (1927); *Byrd v. Spiro*, 170 So. 384 (La. App. 1936).

7. 142 La. 853, 77 So. 768 (1918). Although a third party was involved here the result would probably have been the same if the tenant had not received warning of the defect and been injured.

8. Louisiana Civil Code of 1870.

9. *Breen v. Walters*, 150 La. 578, 91 So. 50 (1922); *Davis v. Hochfelder*, 153 La. 183, 95 So. 598 (1923).

repair. Article 26^o which gives the tenant the right to make repairs and deduct the cost thereof from the rent, has been seized upon by the court as a basis for relieving the landlord of liability. It interpreted this article as imposing on the tenant the duty of making necessary repairs at the landlord's expense, and the tenant's failure to take the initiative was a defense available to the landlord.¹¹ In *Brodman v. Finerty*¹² the lessee who had been injured by a defective hinge was denied a recovery on the basis of this article. The court was obviously influenced by the minor nature of the defect, and in justifying its decision it drew a distinction between ordinary repairs and the serious defects contemplated by Article 2695.¹³ Thus the court succeeded in avoiding a complete commitment to the idea that where the tenant can repair he must do so or lose his rights against the landlord. The seriousness of the defect was made the touchstone upon which recovery could be allowed or denied. For example in *Boutte v. New Orleans Terminal Company*¹⁴ the plaintiff sued for personal injuries sustained when a rotten balustrade fell with her. She was permitted to recover despite the defendant's reliance on the *Brodman* case. The court emphasized the different nature of the alleged defect in the two cases. Other decisions illustrate the same tendency to regard the practical situation attendant on the accident as of controlling importance. When the tenant's goods were injured through persistent localized leakage in the roof of the leased premises the court held that failure by the tenant to repair precluded recovery.¹⁵ It is clear that in such a case means of alleviating the situation were at the easy disposal of the tenant and that to permit recovery would violate common ideas of fairness.

10. Louisiana Civil Code of 1870: "If the lessor do not make the necessary repairs in the manner required in the preceding article, the lessee may call on him to make them. If he refuse or neglect to make them, the lessee may himself cause them to be made, and deduct the price from the rent due, on proving that the repairs were indispensable, and that the price which he has paid was just and reasonable."

11. *Bianchi v. Del Valle*, 117 La. 587, 42 So. 148 (1906); *Singleton v. Singer*, 13 Orl. App. 31 (1915).

12. 116 La. 1103, 41 So. 329 (1906).

13. Louisiana Civil Code of 1870.

14. 139 La. 945, 72 So. 513 (1916).

15. *Scudder v. Paulding*, 4 Rob. 428 (La. 1843); *Westemeier v. Street*, 21 La. Ann. 714 (1869); *Pesant v. Heartt*, 22 La. Ann. 292 (1870); *Diggs v. Maury*, 23 La. Ann. 59 (1871); *Winn v. Spearing*, 26 La. Ann. 384 (1874); *Welham v. Lingham*, 28 La. Ann. 903 (1876). For a later case, however, in which a recovery was allowed because damage was not caused by a continuing leak but an extra hard rain, see *May v. Schepis*, 147 So. 717 (La. App. 1933).

However, the failure of the tenant to repair was urged with increasing insistency by defendants and it soon became apparent that the failure to repair by the tenant should not be recognized as a reason to defeat recovery. As a result the interpretation of Article 2694¹⁶ as made in the *Brodman* case was renounced.¹⁷ Other means of precluding recovery for minor defects, however, were still available to the court. For example, Article 2716¹⁸ enumerates certain minor repairs which the tenant was required to make for himself. There can be no recovery for injuries flowing from these enumerated items.¹⁹ This applies whether the injury is to the tenant himself or to members of his family.²⁰ The result in most cases is the same as that accomplished by the *Brodman* decision since most of the trifling repairs which arise to harass the court will fall into the enumerations of this article. In one respect Article 2716²¹ is more advantageous to the landlord than any other means of escaping liability for minor defects,

16. Louisiana Civil Code of 1870.

17. *Frank v. Suthon*, 159 Fed. 174 (E. D. La. 1908); *Boutte v. New Orleans Terminal Co.*, 139 La. 945, 72 So. 513 (1916); *White v. Juge*, 142 So. 851 (La. App. 1932), affirmed 176 La. 1045, 147 So. 72 (1933); *Landry v. Monteleone*, 150 La. 546, 90 So. 919 (1922).

18. Louisiana Civil Code of 1870: "The repairs, which must be made at the expense of the tenant, are those which, during the lease, it becomes necessary to make:

"To the hearth, to the back of chimneys and chimney casing.

"To the plastering of the lower part of interior walls.

"To the pavement of rooms, when it is but partially broken, but not when it is in a state of decay.

"For replacing window glass, when broken accidentally, but not when broken either in whole or in their greatest part by a hail storm or by any other inevitable accident.

"To windows, shutters, partitions, shop windows, locks and hinges, and everything of that kind, according to the custom of the place."

19. *Moore v. Aughey*, 142 La. 1042, 78 So. 110 (1918) (defective door knob caused plaintiff to fall); *Hutchins v. Pick*, 164 So. 173 (La. App. 1935) (hinge on door facing). For cases wherein a recovery was permitted despite reliance on this article see *Herbert v. Herrlitz*, 146 So. 65 (La. App. 1933) (landlord had assumed to make the repairs); *Washington v. Rosen*, 165 So. 473 (La. App. 1936) (iron sink breaking loose from the wall); *Wilcox v. Lehman*, 12 So. (2d) 641 (La. App. 1943) (slippery pavement due to leaky hydrant).

In view of the decision rendered in several cases it may be doubted that the tenant would be obligated to repair where the defect was in existence before the lease commenced. In *Cornelio v. Viola*, 161 So. 196 (La. App. 1935) the court relied on Article 2693 to the effect that the lessor is bound to deliver in good condition in order to allow a recovery. See also *Lowe v. Home Owners' Loan Corp.*, 1 So. (2d) 362 (La. App. 1941), affirmed 119 La. 672, 6 So. (2d) 726 (1942); *Tesoro v. Abate*, 173 So. 196 (La. App. 1937).

20. *Harris v. Tennis*, 149 La. 295, 88 So. 912 (1921); *Douglas v. Pettit*, 120 So. 793 (La. App. 1929); *Tesoro v. Abate*, 173 So. 196 (La. App. 1937); *Farve v. Danna*, 181 So. 823 (La. App. 1938); *Vignes v. Barbarra*, 5 So.(2d) 656 (La. App. 1942); *Lowe v. Home Owners' Loan Corp.*, 199 La. 672, 6 So.(2d) 726 (1942).

21. La. Civil Code of 1870.

since under this article it is immaterial that the tenant was ignorant of the defect.²²

Intimately connected with the obligation of the tenant to repair and often disposed of in the same terms is the doctrine of contributory negligence.²³ Although the action by the tenant is essentially one based on a guaranty, the defense of the tenant's carelessness is sometimes made available to the landlord. It appears, however, that this defense is not one that may be asserted against every tenant whose conduct might be subject to reproach. Certainly the tenant is under no obligation to make an inspection of the premises to determine their safety. Even though he is aware that a portion is in a generally unsafe condition, if it appears that the portion can be used with reasonable care, the tenant is not required to forego the benefits of occupancy.²⁴ only where the plaintiff's disregard of his own safety has been Defective material is usually involved in these cases, and the court has rarely allowed the doctrine to defeat recovery. It is so shocking to the court that it feels the plaintiff invited disaster that the doctrine has been applied to this type of defect.²⁵ When, however, the defect is obvious and at a determinable place and when the danger of a mishap is imminently in the tenant's mind the choice of encountering the risk usually precludes recovery.²⁶ Similarly, a tenant who has placed the premises to an improper use and has thereby imposed on the landlord a burden which he could not reasonably be expected to meet will be denied re-

22. *Moore v. Aughey*, 142 La. 1042, 78 So. 110 (1918).

23. *Ciaccio v. Carbajal*, 145 La. 869, 83 So. 73 (1919); *Plescia v. Le Roy*, 148 La. 316, 86 So. 824 (1921) (plaintiff said to be without "fault" in failing to make the repairs).

24. *Pardee Co. v. Austin*, 58 F.(2d) 967 (C.C.A. 5th, 1932); *Boutte v. New Orleans Terminal Co.*, 139 La. 945, 72 So. 513 (1916); *Price v. Florsheim*, 127 So. 22 (La. App. 1930); *Thompson v. Moran*, 19 La. App. 343, 140 So. 291 (1932); *White v. Juge*, 176 La. 1045, 147 So. 72 (1933); *Labat v. Gaerthner Realty Co.*, 146 So. 69 (La. App. 1933); *Chutz v. Bergeron*, 147 So. 112 (La. App. 1933); *Estes v. Aetna Casualty and Surety Co.*, 158 So. 25 (La. App. 1934); *Thomas v. Catalanatto*, 164 So. 171 (La. App. 1935); *Thompson v. Donald*, 169 So. 242 (La. App. 1936); *Danove v. Mahoney*, 176 So. 404 (La. App. 1937).

25. *Parker v. Kreber*, 153 La. 191, 95 So. 601 (1923); *Caulfield v. Saba*, 144 So. 907 (La. App. 1932); *Wright v. Jones*, 193 So. 197 (La. App. 1939); *Redd v. Sokoloski*, 2 So. (2d) 266 (La. App. 1941).

26. *Torres v. Starke*, 132 La. 1045, 62 So. 137 (1913) (hole in the floor); *Richard v. Tarantino*, 131 So. 701 (La. App. 1931) (Court remanded to determine exactly under what conditions accident happened); *Johnson v. Lucy Realty and Dev. Co.*, 187 So. 325 (La. App. 1939); *Coulton v. Caruso*, 195 So. 804 (La. App. 1940); *Fontenot v. Angel*, 2 So. (2d) 475 (La. App. 1941).

covery.²⁷ A landlord cannot be expected to construct a balcony rail sufficiently strong that it can be used in the raising or lowering of furniture,²⁸ nor to provide screens of such strength as will protect an infant from the danger of a fall.²⁹ In such cases it can be said that the tenant is barred from recovery because of his own misconduct, or that the premises were not in fact defective.³⁰

Liability of the Owner to Third Persons

The guarantor's liability under Article 2695³¹ has generally been restricted to the parties to the contract of lease.³² Although the Louisiana decisions have not been too consistent on this point, it has become current practice for all injured persons other than the tenant to proceed against the landlord under Article 2322,³³ which reads as follows:

"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 in its original construction."

In a line of decisions, culminating in *Klein v. Young*,³⁴ it was established that the rights of the tenant's family and guest are independent of those of the tenant. In *Klein v. Young*³⁵ the tenant had relieved the landlord of his obligation to repair. Upon the institution of suit by a lodger who was injured through the defective condition of the premises the court held that the release by the tenant did not operate to absolve the landlord of the liability imposed by Article 2322.³⁶ This distinction between

27. *Brown v. Pons*, 147 So. 560 (La. App. 1933). But see *Donatt v. Segretta*, 161 So. 38 (La. App. 1935); *Mosher v. Burglass*, 170 So. 416 (La. App. 1936), reinstated 172 So. 124 (La. App. 1937).

28. *Glain v. Sparandeo*, 119 La. 339, 44 So. 120 (1907).

29. *Yates v. Tessier*, 5 La. App. 214 (1926).

30. A somewhat similar problem is raised when the defect alleged is one as to the particular type of construction the landlord has furnished. *Potter v. Soady Bldg. Co.*, 144 So. 183 (La. App. 1932) (step which gave $\frac{1}{2}$ of an inch not a defect); *Guidry v. Hamlin*, 188 So. 662 (La. App. 1939) (railing consisting of two horizontal pieces with no vertical pickets not deemed a defect); *Chaix v. Viau*, 15 So. (2d) 662 (La. App. 1943) (one board in flooring $\frac{1}{2}$ of an inch below level of other flooring not deemed a defect); *Golden v. Katz*, 11 So. (2d) 412 (La. App. 1943) (stairs unprovided with a bannister is not a defect).

31. Louisiana Civil Code of 1870.

32. *Klein v. Young*, 163 La. 59, 111 So. 495 (1926).

33. Louisiana Civil Code of 1870.

34. 163 La. 59, 111 So. 495 (1926); *Hero v. Hankins*, 247 Fed. 664 (C. C. A. 5th, 1917); *Schoppel v. Daly*, 112 La. 201, 36 So. 322 (1904); *Gardiner v. De Salles*, 126 So. 739 (La. App. 1930).

35. 163 La. 59, 111 So. 495 (1926).

36. Louisiana Civil Code of 1870.

actions arising under Article 2322³⁷ and those arising under Article 2695³⁸ has been maintained by the court only for the purpose of allowing a third person to recover where the tenant has relieved the owner of responsibility. It has not resulted in the application of different rules of liability, although the language used in Article 2322³⁹ would indicate that the action should be based on negligence rather than guaranty. Indirectly the court has granted third persons the benefits of Article 2695⁴⁰ by applying the notion, expressed in that article, that the owner is bound to keep his building safe for its intended use.⁴¹ In several cases it has been deemed unnecessary to decide whether the plaintiff was a tenant or not since he was lawfully on the premises.⁴²

It may be well to note that the liability of Article 2322⁴³ is directed at the owner rather than the lessor, and thus a third person would have no cause of action against a lessor not the owner of the building.⁴⁴ With the exception of the ruling in *Klein v. Young*,⁴⁵ however, the liability of the owner has been restricted in much the same manner as that of the lessor. The same considerations of justice and fair play have led the court to restrict liability where the plaintiff has been guilty of misconduct,⁴⁶ or where the tenant was obligated to repair⁴⁷ under Article 2716.⁴⁸

Act 174 of 1932⁴⁹

The decision of *Klein v. Young*,⁵⁰ that the third person's cause of action under Article 2322⁵¹ was not affected by the ten-

37. *Ibid.*

38. *Ibid.*

39. *Ibid.* Although the wording of the article is subject to both interpretations, it would seem that the court would choose to base liability on fault, since that is the normal basis of liability for personal injuries.

40. Louisiana Civil Code of 1870.

41. *Thomson v. Cooke*, 147 La. 922, 86 So. 332 (1920); *Breen v. Waiters*, 150 La. 578, 91 So. 50 (1922); *Lasyone v. Zenoria Lumber Co.*, 163 La. 185, 111 So. 670 (1927); *Crawford v. Magnolia*, 4 So. (2d) 48 (La. App. 1941); *Staes v. Terranova*, 4 So. (2d) 453 (La. App. 1941).

42. *Allain v. Frigola*, 140 La. 982, 74 So. 404 (1917); *Pierre v. Levy*, 3 La. App. 769 (1926); *Wallace v. Meyer*, 4 So. (2d) 784 (La. App. 1941); *Coleman v. Rein*, 4 So. (2d) 622 (La. App. 1941).

43. Louisiana Civil Code of 1870.

44. *Duplain v. Wiltz*, 194 So. 60 (La. App. 1940).

45. 163 La. 59, 111 So. 495 (1926).

46. *Parker v. Kreber*, 153 La. 191, 95 So. 601 (1923).

47. *Harris v. Tennis*, 149 La. 295, 88 So. 912 (1921); *Lowe v. Home Owners' Loan Corp.*, 199 La. 672, 6 So. (2d) 726 (1942).

48. Louisiana Civil Code of 1870.

49. *Dart's Stats.* (1939) § 6595.

50. 163 La. 59, 111 So. 495 (1926).

51. Louisiana Civil Code of 1870.

ant's contract in which he assumed the obligation of repairing, was overruled by the legislature in 1932 by an act⁵² which provides:

"the owners of buildings or premises which have been leased under a contract whereby the tenant or occupant assumes responsibility for the condition of the premises shall not be liable in damages for injury caused by any vice or defect therein to any tenant or occupant, nor to anyone in the building or on the premises by license of the tenant or occupant, unless the owner knew of such vice or defect, or should within reason have known thereof, or had received notice of such vice or defect and failed to remedy same within a reasonable time thereafter."

This act permits the landlord to relieve himself of liability to all persons where, as part of the consideration of the lease, the tenant has assumed responsibility for the condition of the premises.⁵³ It does not grant him the immunity to be expected in a common law jurisdiction, but instead makes his liability dependent upon whether he knew or should have known of the defect. When this stipulation is included in the contract, the application of the statute does much to eliminate the unfairness often manifested by the flat application of the codal articles. It would seem in this case that the landlord owes only the duty of reasonable care.⁵⁴

Whether any obligation should be placed on the landlord is a matter which may well be disputed. Common law courts have imposed a very limited liability, while at the other extreme the Louisiana court has been imposing absolute liability.⁵⁵ Between these two positions a middle ground could be selected

52. La. Act 174 of 1932 [Dart's Stats. (1939) § 6595].

53. *McFlynn v. Crescent Realty Corp. of Del.*, 160 So. 454 (La. App. 1935); *Paul v. Nolen*, 166 So. 509 (La. App. 1936); *Atkinson v. Stern*, 175 So. 126 (La. App. 1937).

54. The act makes the landlord's obligation to repair depend on knowledge of the defect. Notice may be given by the tenant, but the statute makes another provision by including those defects of which the landlord should have known. In *Mitchal v. Armstrong*, 13 So. (2d) 506 (La. App. 1943) the court held where the defendant had conducted an inspection that he should have known of the defect and a recovery was allowed. In view of this case perhaps the court will interpret 'should have known of the defect' as *requiring* a reasonable inspection by the landlord.

55. For discussion of the common law approach see *Harkrider, Tort Liability of a Landlord* (1928) 26 Mich. L. Rev. 260 and *Eldredge, Landlord's Tort Liability for Disrepair* (1936) 84 U. of Pa. L. Rev. 467.

whereby the landlord would not be unduly burdened nor the lessee placed at the mercy of his lessor. The court can achieve this by considering the reasonableness of the defendant's conduct, the nature of the repair, and the extent to which the plaintiff has disqualified himself by his own misconduct—in other words, by the operation of ordinary principles of negligence. To a certain extent this has been accomplished in Louisiana, not on the simple framework of negligence, however, but by the interpretations placed upon the various codal articles by the court.

JOHN C. MORRIS, JR.

HAZARDOUS BUSINESSES AND EMPLOYMENTS UNDER THE LOUISIANA WORKMEN'S COMPENSATION ACT

Today forty-seven of the forty-eight states have workmen's compensation acts, Mississippi being the only exception. Such legislation also exists in the territories of Alaska, Hawaii, and Puerto Rico.¹ Although all workmen's compensation acts seek to achieve the same result, that is, shifting the basis of liability for industrial injury from the concept of fault to the more humanitarian premise of industrial responsibility regardless of fault, the various federal, state, and territorial acts differ widely in scope and detail of coverage. In this respect the topic of hazardous employments is illustrative. The compensation acts of some eleven states apply only to hazardous or extra-hazardous employment.² The purpose of this type of act is to protect workmen employed in industries which according to custom and experience are recognized as threatening greater and more constant danger of physical injury to their employees than that ordinarily encountered by the working population at large. The protection is not against the common uncertainties which affect all walks of life, but rather against those additional hazards to which a person is subjected solely on account of the nature of his em-

1. Horovitz, *Injury and Death under Workmen's Compensation Laws* (1944) 7.

2. Illinois: Ill. Rev. Stat. (1943) c. 48, § 139; Louisiana: La. Act 20 of 1914, § 1 [Dart's Stats. (1939) § 4391]; Maryland: Md. Ann. Code (Bagby, 1924) Art. 101, § 32; Montana: Mont. Rev. Codes Ann. (Anderson & McFarland, 1935) § 2847; New Hampshire: N.H. Rev. Laws (1942) c. 216, § 1; New Mexico: N.M. Stat. Ann. (1941) c. 57, § 902; New York: N.Y. Workmen's Compensation Law, § 3; Oklahoma: Okla. Stat. Ann. (1938) tit. 85, § 2; Oregon: Ore. Code Ann. (1930) § 49-1810; Washington: Wash. Rev. Stat. Ann. (Remington, 1932) § 7674; Wyoming: Wyo. Rev. Stat. Ann. (Courtwright, 1931) § 124-102.