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David Dugas

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NOTES

THE "DISCOVERY" OF ARTICLE 2317

Plaintiff's automobile was demolished by a falling magnolia tree which grew on the defendant's lot. The trial court and the First Circuit Court of Appeal determined that since the defendant had not been proven negligent, the plaintiff was not entitled to recover damages. The supreme court reversed, *holding* that under Louisiana Civil Code article 2317,¹ proof of negligence is not required to establish liability when injury is caused by a defective thing in the custody of the defendant. *Loescher v. Parr*, 324 So. 2d 441 (La. 1976).

The scheme of delictual responsibility in Louisiana is contained in Louisiana Civil Code articles 2315-2322. Article 2315² establishes that every person is bound to repair damage caused by his fault. Fault is defined by article 2316³ as encompassing not only deliberately harmful actions, but also negligent ones. Article 2317 states that a person is liable for damage caused not only by his own actions, but also by the actions of "persons for whom we are answerable, or of the things which we have in our custody."⁴ Traditionally, Louisiana courts restricted the application of this article by construing it as merely an introduction to the following articles, 2318-2322,⁵ which provide specific instances when a person is responsible for damage caused by persons or things in his custody.⁶ Consequently, article 2317 was not interpreted as an independent basis for liability, and insomuch

1. LA. CIV. CODE art. 2317 states *inter alia*: "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."

2. LA. CIV. CODE art. 2315 states *inter alia*: "Every act whatever of man that causes damage to another obliges him by whose *fault* it happened to repair it" (Emphasis added).

3. LA. CIV. CODE art. 2316: "Every person is responsible for the damage he occasions not merely by his act, but by negligence, his imprudence, or his want of skill."

4. LA. CIV. CODE art. 2317.

5. See, e.g., *Adams v. Golson*, 187 La. 363, 368, 174 So. 876, 878 (1937); *Arrington v. Hearin Tank Lines, Inc.*, 80 So. 2d 167, 173 (La. App. 2d Cir. 1955); Tunc, *Louisiana Tort Law at the Crossroads*, 48 TUL. L. REV. 1111 (1974); Comment, *Tort Law in Louisiana—The Supplementary Tort Articles 2317-2332*, 44 TUL. L. REV. 119, 147-49 (1969).

6. These specific instances include: liability of parents for minor children, LA. CIV. CODE art. 2318; liability of curators for insane persons, LA. CIV. CODE art. 2319; liability of employers for employees, LA. CIV. CODE art. 2320; liability of owners for animals, LA. CIV. CODE art. 2321; liability of owners for the ruin in of buildings, LA. CIV. CODE art. 2322.

as article 2316 was viewed as the exclusive definition of fault under the code,⁷ Louisiana jurisprudence traditionally held that liability could not be imposed under articles 2317-2322 without proof of negligence, since these articles were read in light of articles 2315 and 2316.⁸

The first indication that article 2317 might serve a more important role in Louisiana tort law came in 1968 when the First Circuit Court of Appeal held in *Dupre v. Traveler's Insurance Co.*⁹ that when a thing causes damage, article 2317 can be used to create a rebuttable presumption of negligence on the part of the owner of that thing.¹⁰ However, the requirement that negligence be established before liability could be imposed under this article was not abandoned. In fact, a year later, in *Cartwright v. Fireman's Insurance Co. of Newark, N.J.*,¹¹ the Louisiana Supreme Court specifically reaffirmed that article 2317 had to be read in light of articles 2315 and 2316.¹²

Under most legal systems, including Louisiana's, negligence is considered an acceptable standard for assessing delictual responsibility. In modern crowded and industrialized societies, however, there is a growing tendency to expand the liability of those causing injury.¹³ This tendency

7. *Moses v. Butts*, 70 So. 2d 203, 206 (La. App. 1st Cir. 1954): "When a person, by his fault, causes damage to another, either by his act, his negligence, his imprudence, or his want of skill, he is obliged to repair it" (Emphasis added). Cf. *Brown v. Liberty Mut. Ins. Co.*, 234 La. 860, 866, 101 So. 2d 696, 698 (1958); *Samson v. Southern Bell Tel. & Tel. Co.*, 205 So. 2d 496, 502 (La. App. 1st Cir. 1967); *Helgason v. Hartford Ins. Co.*, 187 So. 2d 140 (La. App. 2d Cir. 1966).

8. See, e.g., *Tripiani v. Meraux*, 184 La. 66, 74-75, 165 So. 453, 455-56 (1936); *Johnson v. Butterworth*, 180 La. 586, 593-610, 157 So. 121, 122-30 (1934); *Martinez v. Bernhard*, 106 La. 368, 30 So. 901 (1901); *Tunc*, *supra* note 5, at 1120. In some instances, however, strict liability was imposed under articles 2320 and 2322. See *Blanchard v. O'Gima*, 253 La. 34, 42-44, 215 So. 2d 902, 904-05 (1968) (supreme court recognized that Louisiana had long used under article 2320 a type of "respondeat superior" doctrine similar to that found at common law, even though such an interpretation was considered a derogation from the codal scheme). See also *Barham, A Renaissance of the Civilian Tradition in Louisiana*, 33 LA. L. REV. 357, 384 (1972); *Note*, 43 TUL. L. REV. 907 (1969); *Note*, 32 TUL. L. REV. 146, 149 (1959).

9. 213 So. 2d 98 (La. App. 1st Cir. 1968).

10. *Id.* at 100. The court found that the defendant had successfully sustained his burden of proof and had therefore rebutted the presumption which had been raised. *Id.* See also *Duplechin v. Pittsburgh Plate Glass Co.*, 256 So. 2d 787, 793 (La. App. 3d Cir. 1972).

11. 254 La. 330, 223 So. 2d 822 (1969).

12. "Except in the food and drink cases . . . the courts of this state have consistently rejected any deviation from the theory that Revised Civil Code Article 2317 must be read in connection with Revised Civil Code Articles 2315 and 2316." *Id.* at 338, 223 So. 2d at 825.

13. W. PROSSER, LAW OF TORTS 494-96 (4th ed. 1971) [hereinafter cited as PROSSER];

manifests itself most clearly in the imposition of strict liability¹⁴ in several areas of tort law.¹⁵ In other instances where strict liability is not applicable, aids such as *res ipsa loquitur*, negligence per se for violation of penal statutes, or various presumptions of negligence are often available.¹⁶

Another theory which reaches results similar to the imposition of strict liability has evolved in several civilian jurisdictions, notably France and Belgium. This theory imposes liability without proof of negligence on persons charged with the care of things for the damage caused by those things.¹⁷ This liability is based on codal provisions equivalent to Louisiana's article 2317 and in France has reached the point where it can properly be termed absolute liability.¹⁸

Although Louisiana has also expanded the available scope of delictual responsibility in several areas,¹⁹ article 2317 had not been used for this purpose prior to *Loescher*. Instead, strict liability was imposed in several areas on the basis of code articles that exist independently of the code

Harris, *Liability Without Fault*, 6 TUL. L. REV. 337 (1932); Pound, *The End of Law as Developed in Legal Rules and Doctrine*, 27 HARV. L. REV. 195, 233 (1914).

14. This term is most often defined as "liability without fault." BLACK'S LAW DICTIONARY 1591 (4th ed. rev. 1968). In Louisiana, fault has recently been given a very expanded meaning and often fault has been found in situations where the traditional concept of strict liability would seem to be applicable. See notes 30 & 32, *infra*. Consequently, "non-negligent liability" would be a more accurate term when dealing with Louisiana law.

15. Some examples are strict liability for damage caused by animals, fire and abnormally dangerous things and activities. PROSSER at 492-516.

16. Crabb, *Res Ipsa Loquitur and Article 1384 of the French Civil Code*, 4 INTER. AMER. L. REV. 257 (1962): "... Another and less drastic device for securing justice for the innocent plaintiff . . . is to retain the theory of fault liability, but accord the plaintiff certain procedural advantages." See PROSSER at 190-204, 208-21.

17. For an excellent comparative discussion of the developments in this area see Stone, *Liability For Damage Caused by Things*, 11 INT'L ENCYCLOPEDIA OF COMP. LAW 3 (1971). See also F. LAWSON, *NEGLIGENCE IN THE CIVIL LAW* 46-50 (1950); Deak, *Automobile Accidents: A Comparative Study of the Law of Liability in Europe*, 79 U. PA. L. REV. 271 (1931).

18. Tunc, *supra* note 5, at 1119. Referring to article 1384 of the French Civil Code (LA. CIV. CODE art. 2317), Professor Tunc stated: "Two things, at least, are reasonably clear, and they relate to the main points of interest in Louisiana: (a) article 1384, as construed, is applicable to all things; (b) article 1384, as construed, contains a rule of absolute liability bearing on the 'guardian' of a thing for the damage resulting from a defect of that thing." *Id.* See Crabb, *supra* note 16, at 261-64; Malone, *Damage Suits and the Contagious Principle of Workmen's Compensation*, 12 LA. L. REV. 231 (1951); Starck, *The Foundation of Delictual Liability in Contemporary French Law—An Evaluation and Proposal*, 48 TUL. L. REV. 1043 (1974); Stone, *supra* note 17, at 7.

19. Prominent examples are: (1) liability for damage caused by ultrahazardous activities, *e.g.*, *Craig v. Montelepre Realty Co.*, 252 La. 502, 211 So. 2d 627 (1968);

section on delictual responsibility.²⁰ Two such articles, Civil Code articles 667²¹ and 669,²² were used as the basis for imposition of strict liability for damage caused by ultrahazardous activities.²³ These articles deal primarily with property rights, however, and the inconsistency of imposing tort liability on the basis of property statutes created problems.²⁴ In an attempt to solve these problems the supreme court in *Langlois v. Allied Chemical Corp.*²⁵ held that article 2315 is in fact the basis for all delictual responsibility in Louisiana, including strict liability for ultrahazardous activities. This is so, according to the court, because the term "fault" in that article refers to more than merely moral wrongs.²⁶ The Court further noted that the examples of fault provided by article 2316 are merely illustrative of a much broader concept.²⁷

Gotreaux v. Gary, 232 La. 373, 94 So. 293 (1957); and (2) liability for damage done by defective products, e.g., *Media Prod. Consultants, Inc. v. Mercedes-Benz of North America, Inc.*, 262 La. 80, 262 So. 2d 377 (1972); *Weber v. Fidelity & Cas. Ins. Co.*, 259 La. 599, 250 So. 2d 754 (1971).

20. See, e.g., *Craig v. Montelepre Realty Co.*, 252 La. 502, 211 So. 2d 627 (1968); *Gulf Ins. Co. v. Employer's Liab. Assurance Co.*, 170 So. 2d 125, 127 (La. App. 4th Cir. 1965): "While negligence is an example of 'fault' within the meaning of article 2315, it is well settled that the obligation upon proprietors imposed by Article 667 is absolute and that proof of negligence is not required in order to recover for a breach thereof."

21. LA. CIV. CODE art. 667: "Although a proprietor may do with his estate whatever he pleases, still he can not make any work on it, which may deprive his neighbor of the liberty of enjoying his own, or which may be the cause of any damage to him."

22. LA. CIV. CODE art. 669: "If the works or materials for any manufactory or other operation, cause an inconvenience to those in the same or in the neighboring houses, by diffusing smoke or nauseous smell, and there be no servitude established by which they are regulated, their sufferance must be determined by the rules of the police, or the customs of the place."

23. E.g., *Craig v. Montelepre Realty Co.*, 252 La. 502, 211 So. 2d 627 (1968); *Gotreaux v. Gary*, 232 La. 373, 94 So. 293 (1957); *The Work of the Louisiana Supreme Court for the 1956-1957 Term—Torts and Workmen's Compensation*, 18 LA. L. REV. 63 (1957).

24. The problems arose from difficulty in determining: (1) whether the article applied only to landowners or to others using the land, and (2) what prescriptive period would apply. See W. MALONE & L. GUERRY, *STUDIES IN LOUISIANA TORT LAW* 456-70 (1970).

25. 258 La. 1067, 249 So. 2d 133 (1971). See *The Work of the Louisiana Appellate Courts for the 1970-1971 Term—Property*, 32 LA. L. REV. 165, 185 (1971); Note, 43 TUL. L. REV. 907 (1971).

26. *Id.* at 1074, 249 So. 2d at 136, 137.

27. *Id.* The court further explained: "The activities of man for which he may be liable without acting negligently are to be determined after a study of the law and customs, a balancing of claims and interests, a weighing of the risk and gravity of harm, and a consideration of individual and societal rights and obligations." *Id.* In accord with this rationale, the court noted that article 669 establishes a standard of care which can be used under article 2315 by analogy to determine fault in the circumstances at hand. The expansive potential of this method is illustrated by the court's statement: "Just as we have

This concept of fault did not alter the scope of liability for ultrahazardous activities but merely changed its basis. The concept did, however, provide a method for removing the restrictive requirement of proving negligence that had previously limited the application of article 2317.²⁸ After *Langlois* doctrinal attention was focused on the possibility of imposing liability without negligence on the basis of article 2317, as France and Belgium had already done through the use of similar articles.²⁹

This application of article 2317 was made possible by *Langlois* and foreshadowed by the supreme court in two decisions that preceded *Loescher*. In *Holland v. Buckley*³⁰ the court held that under article 2321 the owner of an animal was liable for damage it caused even though the owner had no knowledge of its dangerous propensities and was not negligent in his care of the animal.³¹ Several months later, in *Turner v. Bucher*,³² the court held that the parent of a minor child was liable for damage caused by the wrongful act of the child, even though the child was too young to be considered negligent and the parent had not been negligent in his supervi-

found in the Code many standards of conduct, many statutes and local ordinances also detail standards of conduct which courts may apply per se, impliedly or by analogy. Criminal laws, traffic regulations, zoning laws, health laws, and others may and often do set the standard for lawful conduct in personal relationships, although they are designed for societal protection and incorporate penalties and specific consequences for their mere breach." *Id.* at 137.

28. Barham, *supra* note 8, at 384: "Before *Langlois v. Allied Chemical Corp.*, fault under article 2315 was defined as negligence. Therefore, we could not remove the jurisprudential stricture upon article 2315, until we held in *Langlois* that fault, as expressed in article 2315, encompassed acts which cause damage other than negligent acts."

29. Tunc, *supra* note 5; Barham, *supra* note 8; *Tort Law in Louisiana*, *supra* note 5; Note, 43 TUL. L. REV. 907 (1969). See Note, 48 TUL. L. REV. 754 (1974), for a discussion of the influence of Justices Barham and Tate in this area.

30. 305 So. 2d 113 (La. 1974).

31. Prior to *Holland*, cases in this area had allowed recovery on three theories: (1) proof of the dangerous propensities of the animal and a presumption of knowledge on the part of the owner, *Tamburello v. Jaeger*, 249 La. 25, 184 So. 2d 544 (1966); *Serio v. American Brewing Co.*, 141 La. 290, 74 So. 988 (1917); *Beach v. Allstate Ins. Co.*, 234 So. 2d 215 (La. App. 2d Cir. 1970); (2) a rebuttable presumption of fault raised when the animal caused harm, *Bentz v. Page*, 115 La. 560, 39 So. 599 (1905); *Granger v. United States Fidelity & Guar. Co.*, 266 So. 2d 256 (La. App. 3d Cir. 1972); (3) proof of the dangerous propensities of the animal and actual knowledge of them on the part of the owner, *Cox v. Reliance Ins. Co.*, 284 So. 2d 370 (La. App. 2d Cir. 1973); *Losch v. Traveler's Ins. Co.*, 264 So. 2d 240 (La. App. 4th Cir.), *cert. denied*, 262 La. 1106, 266 So. 2d 450 (1972); *Rolen v. Maryland Cas. Co.*, 240 So. 2d 42 (La. App. 2d Cir.), *cert. denied*, 256 La. 1149, 241 So. 2d 252 (1970). In each instance the basis for imposing liability was proof of negligence, 305 So. 2d at 116, 117.

32. 308 So. 2d 270 (La. 1975).

sion of the child.³³ Although in neither case did the court find the defendant negligent, it did find in accord with its holding in *Langlois*, that both defendants were at fault.³⁴

Following the trend initiated by *Holland* and *Turner*, the supreme court in *Loescher v. Parr*³⁵ held that a person having custody of a defective thing which creates an unreasonable risk of harm to others is liable for damages caused by that thing even though he was not negligent.³⁶ The fault required under article 2315 is found in his allowing the thing over which he has custody to create such an unreasonable risk of harm.³⁷ The court also held that no liability attaches if the damage was caused by the fault of the victim, the fault of a third person, or by a fortuitous event.³⁸

The decision in *Loescher* is an indication of the effect which the fault concept initiated by *Langlois* has had and will have on Louisiana tort law. Moreover, it is a recognition of the potential of article 2317, a heretofore untapped source of tort liability.³⁹ The decision appears to align Louisiana tort law with Belgian law which has similarly interpreted its corresponding article. However, *Loescher* is only a first step, and many questions remain concerning article 2317 and its effect on Louisiana law.

One serious question left unanswered by *Loescher* is the definition of the term "defect." Other than holding that a ninety percent rotten tree is defective,⁴⁰ the court did little to explain the term except to refer to the creation of an "unreasonable risk of harm" to others.⁴¹ "Defect" is most often associated with products liability law,⁴² but the definitions usually

33. Prior to *Turner* a parent was not liable for damage done by a minor child of such tender years that he lacked the capacity for discernment, *Johnson v. Butterworth*, 180 La. 586, 157 So. 121 (1934), unless liability could be based on the parent's negligence in failing to supervise the child.

34. See, e.g., *Holland v. Buckley*, 305 So. 2d 119 (La. 1974): "Article 2321 places the master of the animal under a legal obligation to keep his animal under such guard that it does no damage to others. A fault in this obligation to control the animal and guard others from harm by it entitles the victim to recover damages sustained thereby" (Emphasis added).

35. 324 So. 2d 441 (La. 1976).

36. *Id.* at 446.

37. *Id.*

38. *Id.* at 447. See text at note 47, *infra*.

39. Belgian law also requires that the thing be defective before the owner can be held liable for damage caused by it. Tunc, *supra* note 5, at 1120; Stone, *supra* note 17, at 7.

40. 324 So. 2d at 449.

41. *Id.* at 446.

42. "One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused . . ." RESTATEMENT (SECOND) OF TORTS § 402A (1966). See also *Weber v. Fidelity & Cas. Ins. Co.*, 259 La. 599, 250 So. 2d 754 (1971); PROSSER at 659.

applied in that context would not seem applicable under article 2317.⁴³ Further, the court's use of the phrase "creating an unreasonable risk of harm" threatens a return to negligence concepts.⁴⁴ A further explanation of this term is needed to clarify the extent to which the requirement of proving defectiveness will limit the application of article 2317.

The Court did explain rather extensively its interpretation of the term "custody." It noted that this term should apply to ". . . those things to which one bears such a relationship to as to have the right of direction and control over them, and to draw some kind of benefit from them."⁴⁵ However, the definition of this term has created difficulties for the Belgian courts in administering a conceptual framework very similar to the type elucidated in *Loescher*.⁴⁶

A unique problem arises in the court's statement that a defendant may avoid liability by showing that the damage was caused by the fault of the victim or of a third person. It is not clear what the term "fault" will mean in that context, in light of the expansive definition given to it in *Loescher*. Also, the court did not state whether the fault of the victim must be the sole cause of the damage, or merely a contributing factor.⁴⁷

43. The most often used definition of defect is a failure to ". . . meet the reasonable expectations of the ordinary consumer as to the product's safety." PROSSER at 659; Traynor, *The Ways and Means of Defective Products and Strict Liability*, 32 TENN. L. REV. 363 (1965). This definition is obviously inapplicable in situations covered by the *Loescher* holding. Defining a defect as a condition that is unreasonably dangerous, as the court appeared to do in *Loescher*, 324 So. 2d at 447, would not seem to be any more appropriate, since this would revert to negligence concepts. See note 44, *infra*.

44. Negligence is often defined as the failure to act as a reasonable man would act under the circumstances. It is also defined as conduct which falls below the standard established by law for the protection of others against an unreasonable risk of harm. PROSSER at 145-47. In defining a defect it is difficult to see how the court will be able to avoid references to the negligence standard it repudiated unless a more specific definition of defect is given or unless the requirement of a defect is simply ignored.

45. 324 So. 2d at 449 n.6. From that definition custody would include not only ownership, but also bailment, lease, loan for use and possession by repairmen among others. It would not include agency, employment or other situations in which there is a principal who remains responsible. Verlander, *We Are Responsible*. . . in 2 *Tulane Civil Law Forum* No. 2, p. 64 (1974).

46. Tunc, *supra* note 5, at 1120, interpreting 1 R. Dalcq, *Traité de la responsabilité civile* Nos. 2058-126 (2d ed. 1967, Les Nouvelles, Droit Civile, Vol. II).

47. In *Langlois* the Louisiana Supreme Court indicated that contributory negligence would not be a bar to recovery under the fault concept since negligence was not an issue, but that assumption of the risk would bar recovery. 249 So. 2d at 148. Whether this rule would apply to contributory *fault* is not discussed in *Loescher* or *Langlois*. This creates a dual problem of determining the meaning of fault in that context, and of deciding whether that fault must be the (1) sole cause, (2) a superseding cause, (3) a major cause, or merely

Though the questions discussed above are significant, perhaps the most important remaining one is the viability of the *Loescher* holding itself. In a four to three decision the court has chosen a new and potentially confusing method for extending liability under article 2317.⁴⁸ In light of the fact that the use of a presumption of negligence under this article could accomplish similar results while retaining familiar negligence concepts and definitions,⁴⁹ the future of the *Loescher* approach is by no means certain.⁵⁰

David Dugas

SUPERVISORY WRITS: A SOLUTION TO THE CONFLICT BETWEEN APPELLATE
REVIEW OF FACTS
AND THE RIGHT TO A CIVIL JURY TRIAL?

Plaintiffs brought an action to recover for the death of their minor daughter who was struck by a car driven by defendant's employee. After a jury verdict in favor of the defendant, plaintiffs appealed, claiming that the trial judge's refusal to give a requested instruction¹ prevented the jury from applying the correct legal principle to the facts. The appellate court held that this refusal was reversible error and remanded the case for a new trial.² The Louisiana Supreme Court agreed that the jury instruction should have been given but *held* that when a court of appeal is in possession of a full record, it

(4) a link in the causal chain of damage done to the plaintiff in order that the defendant be exonerated from liability.

48. The approach is potentially confusing because of the references to negligence concepts that are made while attempting to move beyond those same concepts. See note 44, *supra*.

49. Using article 2317 to raise a presumption of negligence as done in *Dupre v. Traveler's Ins. Co.*, 213 So. 2d 98 (La. App. 1st Cir. 1968), could accomplish essentially the same end as *Loescher* by merely raising the burden of rebuttal. See text at notes 9 & 10, *supra*. Cf. *Simon v. Ford Motor Co.*, 282 So. 2d 126 (La. 1973).

50. An indication as to how the Louisiana Supreme Court may view *Loescher* in the future may be found in recent "slip and fall" cases in which the court did *not* apply article 2317 to determine a storekeeper's liability, but rather used a presumption of negligence. See *Gonzales v. Winn Dixie*, 326 So. 2d 486 (La. 1976). If *Loescher* is extended to other situations in the future, it will almost certainly be used in automobile "latent defect" cases, since the court expressly overruled *Cartwright v. Fireman's Ins. Co.*, 254 La. 330, 223 So. 2d 822 (1969).

1. *Gonzales v. Xerox Corp.*, 320 So. 2d 163, 164 (La. 1975). The requested instruction concerned a motorist's duty to keep a close watch; the general instruction given by the judge dealt with a motorist's duty when approaching small children.

2. 307 So. 2d 153 (La. App. 1st Cir. 1974).