**Louisiana Law Review**

Volume 48 | Number 5
*May 1988*

# Ross v. La Coste de Monterville: An Unwarranted Extension of Strict Liability for the Act of Things

Megan Shemwell

# *Ross v. La Coste de Monterville*: An Unwarranted Extension of Strict Liability for the Act of Things*

Borrower sued gratuitous lender of a ladder for injuries sustained from the ladder's collapse. The trial court awarded the plaintiff damages, concluding that the owner of a ladder is liable for damage occasioned by its structural defect, despite his lack of knowledge of the existence of the defect. On appeal to the fourth circuit, the defendant argued that strict liability requires not merely ownership of a thing, but actual custody of it.[1] The court of appeal, reasoning that the defendant did in fact relinquish custody of the ladder by gratuitous loan and thereby releived himself from strict liability, reversed the trial court decision.[2] The court further reasoned that because the defendant had entered into a contract of loan, he could be held liable for injuries caused by a defect only if he knew of it and failed to warn of its existence.[3] The Louisiana Supreme Court, in an opinion written by Justice Dennis, reversed. The owner of the ladder did not transfer custody ("garde") of its structure by gratuitous loan, and thus he was strictly liable for damages caused by its structural defects. This obligation was considered to be entirely independent from any obligation that could be incurred through the lender's negligence. *Ross v. La Coste de Monterville*, 502 So. 2d 1026 (La. 1987).

The purpose of this note is to examine the supreme court's rationale in holding a gratuitous lender strictly liable for damage occasioned by defects in the thing lent. This will be achieved by analysis of the opinion in light of French and Louisiana jurisprudence in the areas of strict liability and loan for use.

## PRIOR JURISPRUDENCE

### *1. Responsibility For Act of Things Under French Law*

French Civil Code article 1384(1),[4] the parallel to Louisiana Civil Code article 2317, imposes liability for damage caused by things in one's

---



* The author would like to express her gratitude to Bachir Mihoubi of the Louisiana Civil Law Institute for his time and patience in translating French law.

1. See La. Civ. Code art. 2317 which provides in pertinent part: "We are responsible . . . for the damage . . . caused by the act . . . of the things which we have in our custody."

2. Ross v. La Coste de Monterville, 482 So. 2d 671 (La. App. 4th Cir. 1985), rev'd, 502 So. 2d 1026 (1987).

3. Id. at 673 (citing La. Civ. Code art. 2909).

4. French Civ. Code art. 1384(1) provides: "On est responsable non seulement du

garde.[5] Initially this article was construed as imposing responsibility for things under one's care.[6] Because of a rise in industrial accidents, in which fault became increasingly more difficult to prove, the Court of Cassation re-interpreted the words "ou des choses que l'on a sous sa garde"[7] so as to impose a presumption of fault upon the custodian of a thing which caused damage.[8] Use of the article for this purpose, however, was greatly restricted by the passage of workmen's compensation laws in 1898.[9]

In the early twentieth century, frequent use of the article again occurred when automobile accidents increased. The seminal case in this area, *Jand'heur v. Les Galeries Belfortaises*,[10] transformed the presumption of fault into a *presumption of liability*.[11] The Court of Cassation interpreted French Civil Code article 1384(1) as affording a unique basis of tort liability which is entirely independent of fault. This theory of strict liability for damage caused by things "sous sa garde" is still in use today. Mere proof of a defect, resulting damage, and garde of the thing constitutes a prima facie case of liability which can only be discharged upon evidence of victim fault, fault of a third party, or fortuitous event.[12] The principle supporting imposition of such a harsh standard upon the guardian is that one who creates a risk with the expectation of reaping benefits from it must answer for resulting damage.[13] This creates a legal duty to care for one's possessions in such a way that they cause no injury to others.

It should be noted that the words "sous sa garde" imply more than mere physical custody of a thing. Garde, a word which has no equivalent

---

dommage que l'on cause par son propre fait, mais encore de celui qui est causé par le fait des personnes dont on doit repondré, ou des choses que l'on a sous sa garde." The first sentence of La. Civ. Code art. 2317 is an exact translation of this article.

5. For a description of the word "garde" see infra notes 14-16 and accompanying text.

6. Verlander, We Are Responsible. . . ., 2 Tul. Civ. L. F. No. 2, 1, 31 (1974). See also Tunc, A Codified Law of Tort—The French Experience, 39 La. L. Rev. 1051, 1053 (1979).

7. French Civ. Code art. 1384(1). These words correspond to the words "of the things which we have in our custody" in La. Civ. Code art. 2317.

8. Verlander, supra note 6, at 31-32; Tunc, supra note 6, at 1067-68.

9. Verlander, supra note 6, at 33.

10. Cass ch. réun., 13 fév. 1930: D. 1930, 1, 57 (reprinted in English in A. von Mehren & J. Gordley, The Civil Law System: An Introduction to the Comparative Study of Law 629-31 (1977)).

11. See Tunc, supra note 6, at 1068-69; Verlander, supra note 6, at 34-35.

12. See Tunc, supra note 6, at 1069-70.

13. K. Ryan, An Introduction to the Civil Law 123 (1962); Verlander, supra note 6, at 35. See also 2 M. Planiol, Treatise on the Civil Law pt. 1, no. 931(2) at 524-25 (11th ed. La. St. L. Inst. trans. 1939).

in the English language, connotes responsibility for care or control.[14] It is possible for more than one person to have garde of a thing. One person may have garde of the structure of an object, usually the owner, while the physical custodian ordinarily has garde of its conduct.[15] This dual-guardianship theory has been applied to manufacturers, lessors, and even gratuitous lenders of automobiles.[16]

*2. Responsibility For Act of Things Under Louisiana Law*

Louisiana tort law has similarly undergone a vast transformation. *Loescher v. Parr*[17] was the landmark case in the reinterpretation of Louisiana Civil Code article 2317, which 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." The *Loescher* court, relying strongly on French jurisprudence,[18] held the owner-custodian of a tree strictly liable for damage caused by its structural defect.[19] Fault was not an issue.[20] Consistent with liability imposed by other code articles[21] and with French jurisprudence, liability under Louisiana Civil Code article 2317 can be avoided only upon proof of victim fault, third party fault, or fortuitous event.[22] Social policy dictates that one who creates a risk with the expectation of reaping some benefit from it bear the risk of loss rather than an innocent third party.[23]

The *Loescher* court also recognized the distinction between the meanings of the words "garde" and "custody" in noting that "one may lose the custody of a thing without losing its 'garde.'"[24] This comment has been jurisprudentially interpreted as meaning that one may lose the physical custody of an object, while still having a legal duty to ensure

---

14. See Verlander, supra note 6, at 61.

15. See Tunc, La Determination du Gardien dans la Responsabilité du Fait des Choses Inanimées, J.C.P. 1960, I, 1592 (translated in A. von Mehren, supra note 10, at 676-77).

16. See, e.g., Société Commerciale Européene des Brasseries "Brasseries de la Meuse" v. Etablissements Boussoirs-Souchon-Neuvesel, Cass. civ. II, 5 juin 1971: Bull. civ., II. n.204. (translated in A. von Mehren, supra note 10, at 676-77); Cass. ch. reun., 13 fev. 1930: D. 1930, 1, 57.

17. 324 So. 2d 441 (La. 1975).

18. Id. at 447-48 (citing Tunc and Verlander, among other authorities).

19. The defective condition of the tree was its rotten interior, which was not apparent from the outside.

20. Plaintiff was required to prove merely damage, defect, and custody to recover from the custodian. Id. at 446-47.

21. See La. Civ. Code arts. 2318-2322.

22. *Loescher*, 324 So. 2d at 447-48.

23. Verlander, supra note 6, at 35.

24. 324 So. 2d at 447 n.6.

its safety. For example, a lessor who has transferred custody of a thing warrants the lessee against all vices and defects of the thing, regardless of his knowledge of them.[25] Similarly, a manufacturer guarantees the user against all defects in the thing manufactured.[26] Both lessors and manufacturers profit from the transfer of physical custody of the thing, and thus they are held liable for damage caused by its structural defects.

The gratuitous lender of an automobile may be held responsible for damage caused by defects, regardless of whether he is in physical custody of the vehicle. Louisiana Revised Statutes 32:52 provides in pertinent part: "No person shall . . . cause or knowingly permit any vehicle owned or controlled by him to be driven or moved . . . which is in such unsafe condition as to endanger any person or property, or which does not contain . . . equipment as required in this chapter. . . ." Lack of knowledge of the unsafe condition does not relinquish this duty. All automobile owners, unless dispossessed by theft, are subject to these requirements. Thus, despite the gratuitous nature of loans, the automobile lender has a statutory duty which imposes upon him garde of the structure of his vehicle.[27] In addition to the vehicular safety laws, the legislature has enacted mandatory insurance laws[28] to ensure that innocent victims of automobile accidents are protected.

The realm of strict liability has been expanded by the frequent use of Louisiana Civil Code article 2317.[29] This expansion recently culminated in *Ross*, in which strict liability was imposed on a purely gratuitous[30]

---

25. La. Civ. Code art. 2695 provides in pertinent part: "The lessor guarantees the lessee against all the vices and defects of the thing . . . even in case it should appear he knew nothing of the existence of such vices and defects . . . ." See Louisiana Nat'l Leasing Corp. v. ADF Serv., Inc., 377 So. 2d 92 (La. 1979).

26. Although there is no general article which states the manufacturer's duty, there are many statutes which set forth specific duties. See, e.g., La. R.S. 51:911 (1987) (safety specifications for eyeglasses), La. R.S. 51:1941 (1987) (motor vehicle warranties), and La. R.S. 51:1600 (1987) (Fuel Protection Act). Louisiana courts have applied La. Civ. Code art. 2317 by analogy. A manufacturer, as the constructor of a thing, is in a better position to detect and eliminate its defects. See generally Halphen v. Johns-Manville Sales Corp., 484 So. 2d 110 (La. 1986).

27. See, e.g., Arceneaux v. Domingue, 365 So. 2d 1330, 1335 (La. 1978).

28. La. R.S. 32:861 (Supp. 1987).

29. See generally Malone, Ruminations on Liability For the Acts of Things, 42 La. L. Rev. 979 (1982); Verlander, Article 2317 Liability: An Analysis of Louisiana Jurisprudence Since *Loescher v. Parr*, 25 Loy. L. Rev. 263 (1979).

30. The word purely, as modifying gratuitous, is necessary because the French recognize the "loan for interest," which is explained infra note 47. In *Ross* the court of appeal made it clear that although the defendant was a landlord, he made a purely gratuitous loan to his tenant's father. Ross v. La Coste de Monterville, 482 So. 2d 671, 673 (La. App. 4th Cir. 1985). The Louisiana Supreme Court accepted this finding. *Ross*, 502 So. 2d 1026, 1027.

lender for the borrower's personal injuries caused by unknown defects in the thing lent.

*3. Loan for Use Under French Law*

In France, loan for use, "prêt à usage," is governed by French Civil Code articles 1875 through 1891. French Civil Code article 1891[31] delineates a gratuitous lender's liability to a borrower: the lender is not liable for the borrower's injuries occasioned by a defect in the thing lent unless he knows of the defect and fails to warn of its existence. This article has been interpreted to mean that the lender is not responsible if he lacked knowledge of a vice in the thing lent, even if he was otherwise negligent.[32] Further, the lender will not be held liable, notwithstanding the fact that he possessed knowledge, if the defect was apparent or the borrower also had knowledge of it.[33]

The concept of such limited liability for gratuitous lenders originated in Roman law.[34] The gratuitous nature of the loan for use, the lack of any benefit reaped by the lender, dictates such a result. As Planiol indicates, one who enters into a gratuitous contract deserves lighter responsibility.[35]

There is some question regarding whether the liability imposed by French Civil Code article 1891 is contractual or delictual. Andre Tunc[36] shares the majority view that it is contractual. Consequently, he believes that the parties to a loan for use are bound by the article's restrictive clauses.[37] It is presumed that the parties agreed to adopt the suppletive

---

31. French Civ. Code art. 1891 provides: "Lorsque la chose prêtée a des défauts tels, qu'elle puissque causer du préjudice à celui qui s'en sert, le prêteur est responsable, s'il connaissait les défauts et n'en a pas averti l'emprunteur." The language of this article is identical to that of La. Civ. Code art. 2909.

32. J.-Cl. civil, Art. 1888 à 1891 ou Notarial Répertoire, V° Prét à Usage, Fasc. 3, n.41.

33. Id. at n.42 (citing Planiol, among other authorities).

34. Id. at n.40.

35. 2 M. Planiol, supra note 13, pt. 1, no. 953 at 553. Planiol discusses the issue of whether a gratuitous guest in a vehicle may avail himself of French Civ. Code art. 1384(1) to hold the driver, as guardian of the vehicle, strictly liable as a matter of law. He notes that the jurisprudence was divided, but the Cour de Cassation ruled that the article does not protect an injured victim who was transported gratuitously. The decision was followed in many other cases. Id., no. 931(11) at 531. The issue has since been mooted in both France and Louisiana by the passage of vehicle safety laws and mandatory insurance laws. See Tunc, supra note 6, at 1071, and supra note 28 and accompanying text.

36. The words of Planiol and Tunc were used in the *Ross* opinion in support of a finding of strict liability. However, both believe that gratuitous lenders should be held liable only for failure to warn of known defects.

37. See J.-Cl. Civil, supra note 32, at n.52.

rule of the article, and hence the burden of establishing an intent to exclude this implied provision rests upon the borrower.[38] Others, such as Planiol, maintain that a loan for use is a unilateral contract which creates obligations for the borrower alone.[39] The liability of the lender would then be delictual since his obligation to compensate the borrower for his injuries cannot result from the loan contract.

The question of the source of liability is of no practical matter, however, because a borrower is unable to avail himself of French Civil Code article 1384(1).[40] If the liability of the lender is contractual, the noncumulative theory[41] forbids recourse to the rules of delictual liability.[42] If on the other hand it is delictual, then article 1891 aims to lighten the stringent requirements of article 1384(1) in the field of loan for use.[43] Regardless, it is widely accepted that the rule of French Civil Code article 1891 has not expanded with the ever growing field of delictual obligations.[44] The jurisprudence indicates that the courts are reluctant to impose a general obligation of safety upon the lender. Accordingly, they remain faithful to the text of the article.[45] For instance, in a French case similar to *Ross*, a landlord who loaned his tenant a defective ladder was held not liable for the ladder's collapse because he lacked knowledge of its defective condition.[46]

This limited liability of a gratuitous lender, however, does not leave all borrowers without recourse. The courts are inclined to grant relief when the lender has such a substantial interest in the loan that, for all practical purposes, the interest removes the contract from the category

---

38. Id. at n.53.

39. Id. at n.52. See 2 M. Planiol, supra note 13, pt. 2, no. 2057 at 206.

40. Differing opinions on the source of liability relate to the issue of whether foreseeable or all direct damages may be recovered. There is little controversy over the theory that the lender may be held liable only for his negligent failure to warn. See J.-Cl. Civil, supra note 32, at n.52.

41. The French noncumulative theory dictates that one who has a contract with another may sue him only for the breach of that contract. Thus, delictual principles do not apply to most contractual arrangements. See R. David, English Law and French Law 163 (1980); B. Stark, The Foundation of Delictual Liability in Contemporary French Law: An Evaluation and a Proposal, 48 Tul. L. Rev. 1043 (1974). In a loan for use, the requirements of French Civ. Code art. 1891 are seen as terms of the contract, thereby rendering the gratuitous lender liable only for his negligent failure to warn. J.-Cl. Civil, supra note 32, at n.54.

42. J.-Cl. Civil, supra note 32, at n.54.

43. Id.

44. Id. at n.43.

45. Id.

46. Cas. civ. II, 26 oct. 1960: Bull. Civ. I, n.463.

of gratuitous loan.[47] In these instances, the courts simply employ a presumption of knowledge of the defects, analogous to the presumption in the field of sales or manufacture,[48] thereby equating such a lender's liability to that under article 1384(1).

*4. Loan for Use in Louisiana*

The loan for use, or commodatum, is governed by Louisiana Civil Code articles 2893 through 2909. Article 2909, which stemmed from French Civil Code article 1891, specifically defines the nature of a lender's liability: "When the thing lent has defects of such a nature that it may occasion injury to the person who uses it, the lender is answerable for the consequences, if he knew [of] the defects and did not apprise the borrower of them."[49] Although there is a dearth of Louisiana case law in this area, until *Ross* the courts had held that a gratuitous lender is not liable for injury caused by a structural defect of which he has no knowledge.[50] Because the contract was gratuitous in nature, liability was imposed when the lender alone had the opportunity to prevent the harm.[51] Thus the gratuitous lender's *sole duty* was to warn the borrower of all known defects, and only his failure to do so rendered him liable for injuries arising therefrom.[52]

The Louisiana Supreme Court, in *Mudd v. Travelers Indemnity Co.*,[53] basing its conclusion on the theory that obligations imposed upon a gratuitous lender are governed solely by the commodatum articles, held that a gratuitous lender was not liable for a borrower's personal injuries occasioned by an unknown defect in the thing lent.[54] As Louisiana Civil Code article 2909 provides, the lender is not liable to the borrower unless he possessed actual knowledge of the defect in the thing lent.

---

47. For example, a car dealer who lends a buyer a car until the buyer's car is manufactured falls under the application of French Civ. Code art. 1384(1). A legal duty of care is imposed upon the dealer/lender because he is compensated by the sale itself. This is called a "loan for interest." J.-Cl. Civil, supra note 32, at n.46. The jurisprudence in this area, however, is not fixed. In one case a French court found that a supermarket proprietor was not liable for damage caused by caddies loaned to his customers, as no knowledge of defect in the caddies had been proven. J.-Cl. Civil, supra note 32, at n.51.

48. J.-Cl. Civil, supra note 32, at n. 57.

49. In fact this article is an exact duplication of French Civ. Code art. 1891. See supra note 31.

50. See Bell v. Marriott Hotels, Inc., 411 So. 2d 687 (La. App. 4th Cir.), writ denied, 413 So. 2d 908 (1982); Mudd v. Travelers Indem. Co., 309 So. 2d 297 (La. 1975).

51. See Comment, Beware! The Commodatum Lurks, 58 Tul. L. Rev. 342, 367 (1983).

52. See id.

53. 309 So. 2d 297.

54. Id. at 301-02.

> *Because of the gratuitous nature of the loan*, the lender is not held responsible for injuries incurred by the borrower as a result of defects in the thing lent unless he possessed *actual knowledge* of them. Thus, *the gratuitous lender is favored over one who lets a movable for compensation*; in the latter case, the lessor must guarantee the lessee against all vices and defects of the thing and must indemnify the lessee for losses caused thereby, even if ". . . he [the lessor] knew nothing of the existence of such vices and defects."[55]

Thus, because of the gratuitous nature of a loan for use, the lender was treated differently than other owners who transfer physical custody of a thing.

In deciding *Bell v. Marriott Hotels, Inc.*,[56] which involved a factual pattern similar to that of *Ross*, the court of appeal relied in part upon *Mudd*. Plaintiff sued for injuries sustained when he fell from a ladder which he had borrowed from defendant hotel. Pretermitting the question of whether the ladder was defective, the court held that the defendant, *as gratuitous lender*, was subject only to the obligations imposed by the commodatum articles, rather than the delictual articles.[57] Because there was no evidence of knowledge on the part of the lender, there was no liability for injuries sustained.[58] Until *Ross* there has been no decision to the contrary.

### THE *Ross* OPINION

The Louisiana Supreme Court examined two issues in the *Ross* opinion: (1) whether custody of a thing is lost for the purpose of Louisiana Civil Code article 2317 when the owner lends it to another, and (2) whether the owner's lack of knowledge of a defect in the thing is a defense to strict liability when he loaned it gratuitously.

The court began by analyzing the concept of garde. Basing its analysis upon the premise that the redactors of the Louisiana Civil Code did not intend to derogate from the meaning of the words "sous sa garde" when translating French Civil Code article 1384(1), the court interpreted the words "in our custody" of Louisiana Civil Code article 2317 in light of French authority.[59] Consequently, the word "custody" was considered to be synonymous with "garde."

---

55. Id. at 301 (citing Planiol) (emphasis added).

56. 411 So. 2d 687 (La. App. 4th Cir. 1982).

57. Id. at 689. Commodatum, a contract, is governed by La. Civ. Code arts. 2893-2909. Delictual obligations, on the other hand, are governed by La. Civ. Code arts. 2315-2322.1.

58. *Bell*, 441 So. 2d at 690. See also *Mudd*, 309 So. 2d 297, 302 (La. 1975).

59. *Ross*, 502 So. 2d 1026, 1029.

The court then explained the French theory of duality of garde, stating that one person may be responsible for the structure of an object while another is responsible for its behavior.[60] Professor Esmein's note to *Florens v. Valls*,[61] a French case involving an automobile accident, was used as an example. Esmein stated the following:

> The case law relative to the guardian of an object or of an animal is based on the idea that the person presumed responsible is he who, governing in fact the object or animal, has the power by his prudence and skill to prevent an accident. This alone explains why the guard is transferred to a lessee, to one who borrows, etc. and does not remain with the owner, except in the case of responsibility for defects.[62]

Esmein pointed out that although the *Florens* court did not hold the owner of the car responsible for its conduct, as physical custody had been transferred to a parking garage attendant, the result would have been different if the damage had been caused by a defect in the vehicle.[63]

The works of Professor Tunc were also used to illustrate the duality of garde theory.[64] Tunc, as indicated in the opinion, views responsibility for damage caused by a thing as resting cumulatively upon the guardian of its structure and the guardian of its behavior. Hence, a victim may sue both guardians in solido, one of which may have an action against the other upon proof that the accident was caused either by a defect in the object or the use made of it.

The court also drew an analogy between the guardian of an object, as is contemplated by Louisiana Civil Code article 2317, and the manufacturer of an object.[65] Neither, it was said, loses garde of the structure of an object when it leaves his possession while containing a defect. The view espoused by the court was that an owner should be held strictly liable, as is a manufacturer, because he is in a better position

---

60. Id. at 1029-30. The court noted that Louisiana does not utilize the French concept of garde with respect to the conduct of an object. Id. at 1032.

61. Cass. civ II, 13 oct. 1965: J.C.P. 1966, II, 14503 (noted in A. von Mehren, supra note 10, at 670-71).

62. A. von Mehren, supra note 10, at 670. It should be noted that Esmein is referring to an automobile case. *Florens* was decided in 1965, after the passage of vehicular safety laws and mandatory insurance laws. See Tunc, supra note 6, at 1071. It is well accepted today that gratuitous lenders of automobiles should be held strictly liable. See supra notes 19, 29, and 30 and accompanying text.

63. A. von Mehren, supra note 62, at 670.

64. *Ross*, 502 So. 2d at 1031. It should be noted that Tunc does not believe that a gratuitous lender should be held strictly liable. See notes 36-38 and 41-42 and accompanying text.

65. *Ross*, 502 So. 2d at 1032.

to detect and eliminate defects that arose in an object before leaving his physical possession.

After examining the concept of garde, the court discussed the effect of lack of knowledge, as is contemplated by Louisiana Civil Code article 2909.[66] Based on Planiol's theory that the obligation created by that article originates in the deception by the lender[67] and Professor Stone's theory that the duty it imposes is based on fault,[68] the court viewed the article as establishing a negligence standard. The court concluded that this right of action in negligence was separate and apart from that in strict liability; the defeat of one action does not render the other inoperative.[69]

The opinion then turned to the viability of strict liability. First, the court stated the general common law definition of strict liability given by Prosser and Keeton.[70] Under this view strict liability is actionable

---

66. It is interesting to note that the court did not mention any of the prior Louisiana or French jurisprudence in the area of loan for use. As Justice Marcus stated in his dissent, the majority's decision renders Louisiana Civil Code article 2909 meaningless. Id. at 1034.

67. See id. at 1033. It is important to note that Planiol, although disagreeing with Tunc on the source of liability, agrees with him on the theory that a gratuitous lender should be held liable only for his negligent failure to warn. See supra notes 37-39 and accompanying text.

68. *Ross*, 502 So. 2d at 1033. In using the word fault, Stone by no means restricts this to obligations incurred through negligence. He states that those who object to the use of the word fault on grounds that it does not include strict liability are mistaken. Fault, he believes, includes the "legal fault" or "statutory fault" of strict liability, not merely the fault contemplated by La. Civ. Code arts. 2315 and 2316. Stone, Tort Doctrine in Louisiana: The Concept of Fault, 27 Tul. L. Rev. 1, 19-20 (1952). In fact the sentence in the Stone article which the court relied upon in discussing the lender's fault also includes references to lessors and tutors, among others, whose fault obviously is not predicated solely on a general negligence standard. Stone, Tort Doctrine in Louisiana: The Materials for the Decision of a Case, 17 Tul. L. Rev. 159, 210-12. Thus La. Civ. Code art. 2909 may be equally applicable to any attempt to impose strict liability.

69. There is no doubt that actions in negligence and those in strict liability are distinct. But if the court uses that premise to conclude that article 2909 relates only to negligence and not to strict liability, then this analysis must extend to other statutes which also appear to set forth a negligence standard. For example, La. R.S. 9:2799 (Supp. 1988) provides that a manufacturer, among others, who donates to food banks is not liable for injuries "unless the damages result from the intentional omission or negligence of the donor." Under *Ross*, such manufacturer's liability for negligent acts would not be exclusive, and strict liability could still be imposed. Thus, La. R.S. 9:2799, which was apparently designed to lighten the delictual responsibility of gratuitous donors and thereby encourage such donations, not only would be rendered superfluous, but also would not accomplish its obvious objectives. In his dissent, Justice Marcus noted this concern relating to article 2909. See supra note 66 and accompanying text.

70. Prosser and Keeton, however, also except gratuitous lenders from strict liability, stating that they are only liable for failure to disclose known defects. Prosser and Keeton On Torts § 104 (5th ed. 1984).

negligence or liability without fault. Second, relying upon Louisiana jurisprudence, the court explained that a guardian's responsibility under Louisiana Civil Code article 2317 is imposed regardless of whether or not he had knowledge of any defect.[71] Finally, the court noted a point that was made by both Tunc and Verlander, namely, that the strict liability principle under French Civil Code article 1384(1)—and its Louisiana counterpart—was developed because of the increasingly difficult burden of accident victims in attempting to prove fault.[72] Based on these three premises, the supreme court concluded that the gratuitous lender of the ladder, as guardian of the structure of a defective object causing damage, was strictly liable. Thus, his lack of knowledge of the defective condition was no defense.

### ANALYSIS OF THE CASE

The basic rationale of the court can be divided into three parts. At the outset, the court established that as Louisiana Civil Code article 2317 is a virtually identical translation of its French counterpart, it should be applied as the French authorities apply French Civil Code article 1384(1). The court then discussed in depth the French use of the concept of garde, citing such authorities as Planiol and Tunc. Finally, based on Louisiana jurisprudence and the policy of compensating innocent victims, the court noted that strict liability is a right of action entirely distinct from negligence. It is not disputed that each argument is correct. It is the conclusion derived therefrom, however, that is unjustified.

Clearly, many French commentators have adopted an expansive application of the theory of garde. Ordinarily an owner continues to be the guardian of the structure of an object whether or not he is in physical custody of it. Further, even those who have transferred the ownership of an object, such as manufacturers or vendors, may retain guardianship of the structure of an object. For various policy reasons, each guardian has a legal duty imposed upon him to ensure the structural safety of an object. Equally as clear, however, is the fact that these authorities agree that gratuitous lenders are excepted from such stringent requirements.[73] Because an owner reaps no benefit from the transfer of

---

71. *Ross*, 502 So.2d at 1033. This jurisprudence, however, deals with those who have had legal guardianship imposed on them. See supra notes 24-28 and accompanying text.

72. Id. Verlander states specifically that a borrower for use, among others who are in physical possession, has legal guardianship of those things in his possession rather than the true owner. Verlander, supra note 6, at 37.

73. As indicated, none of the French authorities cited in the opinion support the conclusion that a gratuitous lender is subject to the stringent requirements of strict liability. Planiol and Tunc specifically except gratuitous lenders from the realm of strict liability.

an object through gratuitous loan, he is held liable for a structural defect only if he had actual knowledge of it and failed to warn of its existence.

The expansive theory of garde has been applied in both French and Louisiana case law. An owner in physical custody of a thing is, by the essence of the strict liability doctrine, held liable for damage occasioned by its structural defects. He reaps a benefit, no matter how slight, from mere ownership of the thing. Thus, as its physical custodian, the owner is the better risk bearer than an innocent victim who receives no benefit from the thing.

The owner as physical guardian can be contrasted, however, from one who transfers the physical custody of a thing to another, regardless of whether or not he retains its ownership. Manufacturers, vendors, and lessors reap an economic benefit from the transfer of physical custody of a thing. Consequently, either by statute or by a long line of jurisprudence, they have had a legal duty imposed upon them to guarantee against structural defects. That duty brings them within the provisions of Louisiana Civil Code article 2317.

Likewise, although a gratuitous lender of an automobile derives no economic benefit from the transfer, a statutory duty to keep his vehicle free from all defects is imposed upon him. Such legislation is widely accepted because automobiles are expensive and dangerous instrumentalities which often cause injury. In fact the expansion of the doctrine of strict liability and the requirement of mandatory automobile insurance were precipitated by such a problem.

Louisiana unjustifiably departs from French authority, however, in holding a gratuitous lender of a ladder strictly liable for damage occasioned by its structural defects. Gratuitous lenders of things other than automobiles are distinguishable from owners in physical custody, those who transfer possession for a profit, and lenders of vehicles. The gratuitous lender drives no economic benefit from the transfer of a thing. Neither is the borrower an innocent victim; rather, he directly

---

See supra notes 33, 36-43, 64 and 67 and accompanying text. Verlander states that all who relinquish possession are relieved from legal guardianship. See supra note 72. Stone indicates that fault, whether negligence or strict liability, is delineated by the relevant code articles and never implies that strict liability would also be applicable to those whose liability is limited to a negligence standard. See supra note 68. Finally, Eisman's note relates only to automobile lenders and it was written after vehicular safety and mandatory insurance laws were enacted. See supra notes 10, 11, 16, and 61-62 and accompanying text. In short, gratuitous lenders in France are subject only to French Civ. Code art. 1891, the counterpart to La. Civ. Code art. 2909, which limits a gratuitous lender's liability to damage caused by defects of which the lender knew but failed to disclose to the borrower.

benefits from use the of a thing without owing any compensation for that use. Finally, unlike the automobile loan situation, there is no strong societal interest in holding other gratuitous lenders to the harsh standard of strict liability.

The holding of this case should be limited to its facts. As the lender was the landlord of the borrower's son, it may be said that he derived an economic benefit from the borrower's use of the ladder while redecorating the rented apartment.[74] This loan for improvement of the premises could benefit the landlord to an extent sufficient to destroy the gratuitous nature of the loan. Thus, the landlord would justifiably be held to the stringent requirements of strict liability under a theory paralleling the French notion of "loan for interest."[75]

## CONCLUSION

It is not disputed that the strict liability imposed by Louisiana Civil Code article 2317 should apply, directly or by analogy, to owners in possession of a thing, manufacturers, vendors, lessors, and even gratuitous lenders of automobiles. A legal obligation of safety is imposed upon each of them for various reasons of public policy. Louisiana jurisprudence parallels French law to this point.

The Louisiana Supreme Court departed from French authority in *Ross*, however, with no apparent legal justification. Despite the specific delineation of a gratuitous lender's obligation for unknown defects in Louisiana Civil Code article 2909, the court held a lender strictly liable. Such a result is purportedly based upon French law, but is actually diametrically opposed to it. In fact, such sources as Planiol and Tunc, relied upon in the opinion, specifically state that a gratuitous lender is liable only for his negligent failure to warn. Moreover, the various policy reasons for holding other owners strictly liable under Louisiana Civil Code article 2317 simply do not exist in relation to gratuitous lenders.

Since Roman times it has been accepted that gratuitous lenders are excepted from the doctrine of strict liability. Imposition of such standards now will greatly reduce the frequency of gratuitous loans. Nothing warrants an extension of the realm of strict liability to gratuitous lenders.

*Megan Shemwell*

---

74. See infra note 73. Additionally, one may argue that a landlord has a commercial interest in keeping his tenant happy.

75. See supra note 50.