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A Return to Negligence or Something More? Proving Knowledge in "Strict Liability" Cases in Louisiana Under Civil Code Article 2317.1

I. INTRODUCTION

Consider what has become a classic (albeit overused) example¹ of Louisiana's former law of strict liability: George owns a vacant piece of property. On the land is a tree that, unbeknownst to George, has begun to rot. George's accident-prone neighbor, Daniel, parks his car under the rotting tree. The ailing tree falls and demolishes Daniel's car. Under Louisiana's civilian notion of strict liability,² George was liable for the damage despite the fact that he did not know and had no reason to know of the defect in his tree.

This well-known fact pattern is borrowed from the Louisiana Supreme Court's landmark decision in *Loescher v. Parr*,³ which ushered in an era of strict liability for custodians of things under Louisiana Civil Code article 2317.⁴ Relying on French and Belgian interpretations of articles analogous to Article 2317, Justice Tate reversed a long line of prior jurisprudence⁵ and imposed strict liability on George Parr for the damage occasioned by his falling magnolia.⁶

The concept of strict liability embodied in *Loescher* would prove to be short-lived, however. Twenty years after Justice Tate breathed the substantive life of strict liability into Article 2317, Governor Murphy J. "Mike" Foster led the charge to snuff out that life with his Civil Justice Reform.⁷ With the passage of Act One of the First Extraordinary Session of 1996, the Louisiana Legislature enacted Louisiana Civil Code article 2317.1.⁸ Proponents of Act One sought what they hoped would be a fairer standard for determining the liability of homeowners and businesses through the abolition of strict liability.⁹

This comment focuses not on the politics and policies underlying the change in strict liability law, difficult as such issues are to divorce from the discussion of allocation of fault. Rather, what follows is intended as a pragmatic guide for the practitioner faced with the problems of proof presented under Article 2317.1

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1. Susan Finch, *Foster Seeking to Limit Liability; Frivolous Suits Hurt Business*, Times-Picayune, Mar. 20, 1996, at A1.

2. La. Civ. Code art. 2317.

3. 324 So. 2d 441 (La. 1975).

4. Frank L. Maraist & Thomas C. Galligan, Jr., *Louisiana Tort Law* 331 (1996).

5. See, e.g., *Cartwright v. Firemen's Ins. Co. of Newark, N.J.*, 223 So. 2d 822 (La. 1969); *Metzger v. Scot*, 244 So. 2d 671 (La. App. 4th Cir. 1971).

6. *Loescher*, 324 So. 2d at 449.

7. Christopher Cooper, *Tort Reform Signed Into Law; Foster Credits Regular Folks*, Times-Picayune, Apr. 17, 1996, at A1.

8. 1996 La. Acts No. 1.

9. Kevin McGill, *Senate Panel Oks Foster's Tort Reform*, Times-Picayune, Apr. 3, 1996, at A2.

II. APPLICABLE LAW

A. *Codal Provisions*

Prior to *Loescher*, Article 2317 was regarded as merely a transitional article, prefacing the principles of liability laid out in Articles 2318-2322.¹⁰ Article 2317 provides:

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. This, however, is to be understood with the following modifications.¹¹

Tort reformers and the Legislature chose to abrogate the jurisprudential notion of strict liability under Article 2317 not by altering that article, but rather by enacting a totally new provision.¹² That new provision is Article 2317.1, which 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.¹³

The clear purpose of this statute is to change the standard of liability imposed on the owners and custodians of things from strict liability to negligence, a goal that appears to have been achieved.¹⁴ While this change may resolve some social and political policy questions, it raises a new set of legal questions.

B. *Jurisprudential Interpretation*

The process for proving liability under Article 2317 after *Loescher* was well-established.¹⁵ The plaintiff bore the burden of proving: (1) the thing that

10. *Loescher*, 324 So. 2d at 448. Article 2318 deals with liability for the acts of minors. Article 2319 deals with liability for the acts of insane persons. Article 2320 covers liability for the acts of students, servants, or apprentices. Article 2321 concerns liability for damage caused by domestic animals. Article 2322 governs liability for damage caused by the ruin of a building.

11. La. Civ. Code art. 2317.

12. Frank L. Maraist & Thomas C. Galligan, Jr., *Burying Caesar: Civil Justice Reform and the Changing Face of Louisiana Tort Law*, 71 Tul. L. Rev. 339, 345 (1996).

13. La. Civ. Code art. 2317.1.

14. Maraist & Galligan, *supra* note 12, at 348.

15. *McAllister v. Coats*, 691 So. 2d 305 (La. App. 1st Cir. 1997), *writ denied*, 700 So. 2d 513 (La. 1997).

caused the damage was in the care, custody, and control of the defendant; (2) there was a vice, ruin, or defect in the thing that presented an unreasonable risk of harm; and (3) the vice, ruin, or defect was the cause-in-fact of the plaintiff's damages.¹⁶ The sole distinction between a negligence action and an Article 2317 strict liability action was that, in a strict liability situation, the plaintiff was not required to prove that the defendant knew or should have known of the defect that caused the damage.¹⁷ Evidence that the risk of harm was unknown or not foreseeable, or that the defendant had acted with reasonable care was irrelevant.¹⁸

Article 2317.1 can be broken down into five elements of proof. The plaintiff must make a *prima facie* showing that: (1) the defendant was the owner or custodian of the thing; (2) the plaintiff's damage was occasioned by some ruin, vice, or defect in the thing; (3) the defendant knew, or in the exercise of reasonable care, should have known of the ruin, vice or defect; (4) "the damage could have been prevented by the exercise of reasonable care"; and (5) the defendant failed to exercise reasonable care.¹⁹

Clearly, the intent behind the enactment of Article 2317.1 was to impose a negligence standard where there was once strict liability. And certainly, most of the above elements of the *prima facie* case under Article 2317.1 have been widely dealt with by the courts in other contexts.²⁰ However, the intent to move from a strict liability to a negligence standard does not in itself answer all questions or solve all problems.

Specifically, what standards should apply to determine whether the plaintiff has made a sufficient showing as to whether the defendant "knew or, in the

16. *Sistler v. Liberty Mut. Ins. Co.*, 558 So. 2d 1106, 1112 (La. 1990).

17. *Kent v. Gulf States Util. Co.*, 418 So. 2d 493, 497-98 (La. 1982).

18. *Entrevia v. Hood*, 427 So. 2d 1146, 1148 (La. 1983).

19. *Maraist & Galligan*, *supra* note 12, at 345-48 (internal citations omitted).

20. For a general discussion of these elements of proof, see *id.*

Much of the discussion of ownership and custody has centered on the distinction between those two principles. Article 2317 required custody, not ownership, of the object causing injury. *Saurage v. Palermo*, 672 So. 2d 351 (La. App. 1st Cir. 1996). The custodian of the object was thus subject to strict liability while the mere owner was not. *Id.* at 354. Custody is based on the French concept of "garde," obligating the "proprietor of a thing, or one who avails himself of it, to prevent it from damaging others." *Royer v. Citgo Petroleum Corp.*, 53 F.3d 116, 119 (5th Cir. 1995). The concept of *garde* embraced by Article 2317 is custody of the structure of the object itself and damages caused by the object's structure. *Ellison v. Conoco*, 950 F.2d 1196, 1208 (5th Cir. 1992), *cert. denied*, 507 U.S. 907, 113 S. Ct. 3003 (1993). While the *garde* jurisprudence remains viable for determining whether or not a defendant had *garde* of the thing, the distinction between owner and custodian is no longer so important, since Article 2317.1 applies to the "owner or custodian of a thing."

Article 2317.1 also deals with damage caused by "ruin, vice, or defect" in a thing. "Ruin is a term of art contained in article 2322 and heretofore has been reserved for determining strict liability of owners of buildings." *Maraist & Galligan*, *supra* note 12, at 345. As used in Article 2322, "ruin" "means the fall or collapse of a more or less substantial component of the structure." *Sumner v. Foremost Ins. Co.*, 417 So. 2d 1327, 1332 (La. App. 3d Cir. 1982).

exercise of reasonable care, should have known of the ruin, vice, or defect"²¹ that injured the plaintiff? The problem for the former strict liability plaintiff in an Article 2317.1 action is thus to determine how to go about proving that the defendant-owner/custodian had either actual or constructive knowledge²² of the defect that caused the plaintiff's damages.²³

Furthermore, while it seems clear that the Legislature hoped to replace Article 2317 strict liability with a more defendant-friendly negligence standard, did it succeed in doing so? That is, does the plain wording of Article 2317.1 lend itself to a negligence interpretation or to some other method of analysis?

While these distinctions may seem to be subtle at best, the importance of settling these questions should not be underestimated. It is worthwhile to recall that, in a negligence action, the plaintiff bears the burden of making a prima facie showing on each element of his claim if he wants to avoid summary judgment.²⁴ If a plaintiff fails to offer proof that the owner of a thing knew, or in the exercise of reasonable care should have known of the defect that caused his damage, he presumably will be thrown out of court.²⁵ Determining just what sort of proof will be required in an Article 2317.1 action will be crucial for those hoping to recover.

III. PROBLEMS OF PROOF

In order to make a prima facie case under Article 2317.1, the plaintiff must prove that the defendant actually knew or in the exercise of reasonable care should have known of the defect that caused the plaintiff's damage. What follows is a survey of various tests, methods, and statutes that have been employed to determine whether a party "knew" or "in the exercise of reasonable care should have known" of the existence of a given fact or facts. While the modes of analysis discussed here might not all be easily adaptable to an Article 2317.1 action, they remain useful as indicators of how the courts deal with the problem of proving what a party knew.

21. La. Civ. Code art. 2317.1.

22. "If one by exercise of reasonable care would have known a fact, he is deemed to have had constructive knowledge of such fact[.]" Black's Law Dictionary 314 (6th ed. 1990).

23. Clearly, the actual/constructive knowledge question is not the only issue raised by Article 2317.1. The plaintiff must still cope with issues such as whether the ruin, vice, or defect in the defendant's thing presented an unreasonable risk of harm. *See, e.g.,* Sistler v. Liberty Mut. Ins. Co., 558 So. 2d 1106 (La. 1990); Maraist & Galligan, *supra* note 4, at 333-38. The remainder of this comment, however, will focus on the issues involved in proving either actual or constructive knowledge of the ruin, vice, or defect that caused the damage.

24. Dan B. Dobbs and Paul T. Hayden, *Torts and Compensation* 93 (1997).

25. Louisiana Code of Civil Procedure article 966 lays out the procedure for a motion for summary judgment. It provides, in pertinent part, that: "The judgment sought *shall* be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact, and that mover is entitled to judgment as a matter of law." (emphasis added).

A. "Knew"

1. Preliminary Matters

The problem associated with proving that the owner of a thing knew of the defect that caused the plaintiff's damage is an obvious one. Absent some objective evidence, a defendant is unlikely to admit on cross-examination that he knew his tree was rotten but decided not to do anything about it. A plaintiff will presumably need to rely on something more than the defendant's honesty in proving that the defendant had actual knowledge. The plaintiff might then rely on circumstantial evidence of the defendant's actual knowledge, or instead, choose to offer proof that the defendant should have known of the defect through the exercise of reasonable care.

There might be some temptation for plaintiffs to rely on the doctrine of *res ipsa loquitur*²⁶ in place of proof of the defendant's knowledge, i.e. to argue that the defendant must have known of the defect.²⁷ However, it seems that the appropriate role of the *res ipsa loquitur* analysis in the Article 2317.1 context is to prove either that a defect existed in the defendant's thing or that the defect caused the plaintiff's damage. In other words, the doctrine exists to allow the inference that a defendant was somehow negligent, not to create a presumption of knowledge. Given the existence of the more lenient "should have known" standard in Article 2317.1, it would be inappropriate to allow a plaintiff to substitute *res ipsa loquitur* for proof of the defendant's knowledge.

2. Assumption of the Risk

a. General Principles

The doctrine of assumption of the risk is an affirmative defense in tort actions.²⁸ Basically, the defendant attempts to prove that the plaintiff knew of

26. The last sentence of Louisiana Civil Code article 2317.1 reads: "Nothing in this Article shall preclude the court from the application of the doctrine of *res ipsa loquitur* in an appropriate case."

27. Black's Law Dictionary defines *res ipsa loquitur* as follows: "The thing speaks for itself. Rebuttable presumption or inference that defendant was negligent, which arises upon proof that instrumentality causing injury was in defendant's exclusive control, and that the accident was one which ordinarily does not happen in the absence of negligence." Black's Law Dictionary, *supra* note 22, at 1305.

28. The doctrine of assumption of the risk, also known as *volenti non fit injuria*, means legally that a plaintiff may not recover for an injury to which he assents, i.e., that a person may not recover for an injury received when he voluntarily exposes himself to a known and appreciated danger. The requirements for the defense of *volenti non fit injuria* are that: (1) the plaintiff has knowledge of facts constituting a dangerous condition, (2) he knows the condition is dangerous, (3) he appreciates the nature or extent of the danger, and (4) he voluntarily exposes himself to the danger.

Black's Law Dictionary, *supra* note 22, at 123.

the risks of his actions and consented to them. The rationale behind the defense is that because the plaintiff was aware of the risk of injury, he consented to the risk and has only himself to blame for the harm he has suffered.²⁹

Since the Louisiana Supreme Court's decision in *Murray v. Ramada Inns, Inc.*,³⁰ assumption of the risk has ceased to exist as a self-contained affirmative defense and is no longer a total bar to recovery; it now figures into the negligence analysis as part of the apportionment of fault between the plaintiff and the defendant.³¹ Regardless of its new role, however, the assumption of the risk doctrine remains useful as an illustration of the burden involved in proving the actual knowledge possessed by a party.

In *Lytell v. Hushfield*,³² the Louisiana Supreme Court articulated a standard for determining whether a plaintiff had assumed the risks of his conduct: "It is fundamental that, in order to assume a risk, one must knowingly and voluntarily encounter a risk which caused him harm. Plaintiff must understand and appreciate the risk involved and must accept the risk as well as the inherent possibility of danger because of the risk."³³

The Restatement (Second) of Torts adheres to the view that whether the plaintiff assumed the risk "knowingly and voluntarily" is to be measured subjectively,³⁴ i.e., did this particular plaintiff know of and appreciate the risks of his conduct? This subjective standard has also met with approval in Louisiana courts.³⁵

What, then, are the implications of the requirement that actual knowledge must be proven? The facts of *Lytell* and *Dorrey v. LaFleur*³⁶ are illustrative. In *Lytell*, an employee who had been with the shipping company for sixteen years, was injured in an accident while he was operating a forklift with an oil leak problem.³⁷ The employee knew that the forklift was at least ten years old, that it had a history of oil leaks, and that it lacked certain safety features that might have prevented or lessened his injuries.³⁸ Despite the fact that the forklift operator "was aware of the various defects in the forklift,"³⁹ the court nonetheless found that the employee "did not know or understand the risk involved nor

29. Ferdinand F. Stone, Tort Doctrine § 294, in 12 Louisiana Civil Law Treatise (1977).

30. 521 So. 2d 1123 (La. 1988).

31. *Id.* at 1133-34.

32. 408 So. 2d 1344 (La. 1982).

33. *Id.* at 1348.

34. "Except where he expressly so agrees, a plaintiff does not assume a risk of harm arising from the defendant's conduct unless he then knows of the existence of the risk and appreciates its unreasonable character." Restatement (Second) of Torts § 496D (1965); see also Maraist & Galligan, *supra* note 4, at 205.

35. *Lytell*, 408 So. 2d at 1348-49; *Dorrey v. LaFleur*, 399 So. 2d 559 (La. 1981); *Langlois v. Allied Chem. Corp.*, 258 La. 1067, 249 So. 2d 133 (La. 1971).

36. 399 So. 2d 599 (La. 1981).

37. *Lytell*, 408 So. 2d at 1346.

38. *Id.*

39. *Id.* at 1348.

did he accept the risk as well as the inherent possibility of danger because of the risk."⁴⁰ The court focused on the fact that the employee had "operated this machine for many years without injury."⁴¹

In *Dorrey v. LaFleur*,⁴² a father was out for an evening of roller skating with his family.⁴³ Rain began to fall, and the skater soon noticed two puddles of water that had accumulated on the floor of the rink; he successfully avoided these puddles for an hour.⁴⁴ However, the skater did not notice a third, smaller puddle of water that had accumulated until he slipped and fell in it.⁴⁵

The court of appeal found that the skater had assumed the risk of skating under less-than-ideal conditions; after all, the skater admitted that he had noticed two of the puddles.⁴⁶ Based on the facts of which the plaintiff was aware, the lower court reasoned that he should have known of the third, injury-causing puddle.⁴⁷ The supreme court rejected this argument, however, finding that the lower court had "erroneously incorporated in [assumption of the risk] an objective element foreign to [assumption of the risk]."⁴⁸ The court noted that it was irrelevant to assumption of the risk whether the skater should have known of the third puddle; rather, the crucial question was whether he had actual knowledge of the existence of the puddle that actually caused his damage.⁴⁹

b. Application

Because assumption of the risk is an affirmative defense, the defendant (the party asserting that his opponent had knowledge) bears the burden of proving the facts that illustrate that knowledge.⁵⁰ If this model were applied to the plaintiff's action under 2317.1, the plaintiff would bear the burden of proving that the defendant had actual knowledge of the defect that caused the damage, not merely that he should have known of the defect.

However, the use of the disjunctive in Article 2317.1 gives a plaintiff the option of either trying to prove that the defendant had actual

40. *Id.* at 1348-49.

41. *Id.* at 1349.

42. 399 So. 2d 559 (La. 1981).

43. *Id.* at 560.

44. *Id.*

45. *Id.*

46. *Id.* at 561.

47. *Id.*

48. *Id.*

49. *Id.* at 562.

50. This is not to say that the plaintiff's disclaimer of knowledge or appreciation must be taken at face value. This is a fact question. And there are some risks that every man *must* be held to appreciate. There is a plain difference, however, between what one man *must* have known (a finding of actual knowledge) and what one *should* have known (the imposition of an objective standard of care).

Dorrey, 399 So. 2d at 563 (internal citations omitted).

knowledge of the defect or attempting to prove that the defendant should have known of the defect through the exercise of reasonable care. *Lytell* and *Dorry* highlight the difficulties inherent in proving the actual, subjective knowledge of a party opponent. Given this weighty burden, there would seem to be little incentive for a plaintiff to plead the defendant's actual knowledge due to the availability of the less-stringent "should have known" standard.⁵¹

B. "In the Exercise of Reasonable Care Should Have Known"

There is ample methodology under Louisiana law for the analysis of whether a party should have known of a fact or set of facts. Some of these standards are referred to as constructive notice,⁵² while others can be categorized as simple negligence formulas.⁵³

1. *Contra Non Valentem*

a. *General Principles*

It is a well-established principle of Louisiana law that prescription runs against all persons unless legislation expressly provides otherwise.⁵⁴ Despite this fact, courts continue to rely on the doctrine of *contra non valentem agere nulla currit praescriptio*⁵⁵ (hereinafter *contra non valentem*) to suspend the running of prescription in exceptional circumstances.⁵⁶

The doctrine of *contra non valentem* operates to interrupt or suspend prescription in four instances,⁵⁷ but only the fourth is important for our purposes: When "[t]he cause of action is not known or reasonably knowable by the plaintiff, even though his ignorance is not induced by the defendant."⁵⁸ The

51. It may still be advantageous for a plaintiff to aver that the defendant had actual knowledge of the defect that caused plaintiff's injuries for the purpose of damages. A defendant with actual knowledge, for example, might be considered more morally blameworthy by the jury. See Maraist & Galligan, *supra* note 4, at 330 n.8.

52. See, e.g., La. R.S. 9:2800.1 (1997); see *infra* text accompanying note 74.

53. See, e.g., the "Learned Hand Formula"; see *infra* text accompanying note 101.

54. La. Civ. Code art. 3467.

55. "No prescription runs against a person unable to bring an action." Black's Law Dictionary, *supra* note 22, at 327.

56. La. Civ. Code art. 3467, cmt. (d).

57. The four instances are: "(1) Some legal cause prevents the courts or their officers of taking cognizance of the plaintiff's action; (2) Some condition coupled with the contract or connected with the proceedings prevented the creditor from suing; (3) The debtor himself has done some act effectually to prevent the creditor from availing himself of his cause of action; (4) The cause of action is not known or reasonably knowable by the plaintiff, even though his ignorance is not induced by the defendant." *Kavanaugh v. Long*, 698 So. 2d 730, 736 (La. App. 2d Cir. 1997), *writ denied*, 719 So. 2d 67 (La. 1998).

58. *Kavanaugh*, 698 So. 2d at 736.

"reasonably knowable" language raises two important questions. First, is the plaintiff's reasonable knowledge based on a subjective or an objective standard? And, second, at what point are we to determine that the plaintiff should reasonably know?

i. Subjective vs. Objective

In determining whether a cause of action was "reasonably knowable" to the plaintiff, should the court consider the plaintiff's unique characteristics, or hold the plaintiff to the standard of a reasonable man? Both the Legislature⁵⁹ and the courts have dealt with this question in the context of legal malpractice.⁶⁰

In *Taussig v. Leithead*, a legal malpractice plaintiff sought to defeat an exception of prescription under the doctrine of *contra non valentem*.⁶¹ The former client asserted that the court, in determining whether she reasonably should have known of her attorney's negligent misrepresentation, should consider factors such as her background, education, and intelligence.⁶² The court rejected this view, holding that a plaintiff is barred from asserting that her ability to discern the existence of a cause of action is less than that possessed by a reasonable man.⁶³ In short, the question of what is reasonably knowable by the plaintiff, at least in the *contra non valentem* context, is an objective one, based on the ability of a reasonable man.⁶⁴

ii. Reasonable Knowledge

Still, a question remains: when do the facts giving rise to the cause of action become reasonably knowable to the reasonable man? Is the only requirement a mere suspicion that something may be amiss, or does the doctrine demand more?

The constructive knowledge sufficient to defeat an assertion of *contra non valentem* requires "more than a mere apprehension that something might be wrong"; a plaintiff must have facts sufficient to indicate that he has a reasonable cause of action against the defendant.⁶⁵ In other words, a plaintiff need not have actual, subjective knowledge, but merely "information sufficient to incite

59. La. R.S. 9:5605(D) (Supp. 1999).

60. *Taussig v. Leithead*, 689 So. 2d 680 (La. App. 3d Cir. 1997).

61. *Id.* at 685-86.

62. *Id.* at 684.

63. *Id.*

64. See also *Griffin v. Kinberger*, 507 So. 2d 821, 823 (La. 1987) (the plaintiff's ignorance of his cause of action must not be "willful, negligent, or unreasonable").

65. *Kavanaugh v. Long*, 698 So. 2d 730, 738 (La. App. 2d Cir. 1997).

curiosity, excite attention, or put a reasonable person on guard to call for inquiry."⁶⁶

In *Cordova v. Hartford Accident and Indemnity Co.*,⁶⁷ a patient asserted the defense of *contra non valentem* to an exception of prescription in a medical malpractice action. The patient underwent a vasectomy and experienced some pain following the procedure.⁶⁸ His problems worsened, and plaintiff eventually suffered a complete loss of sex drive and learned that he would lose both of his testicles.⁶⁹ The court concluded that the "[p]laintiff's failure to connect the gradual shrinkage of his left testicle and decline of interest in sex with an operation performed ten months previously was not" unreasonable.⁷⁰

b. Application

Given the reluctance of the courts to accept the plaintiff's personal, subjective ignorance as a basis for the *contra non valentem* defense to prescription,⁷¹ it seems unlikely that a defendant's assertion that he was too ignorant to know of the defect in his thing would meet with much approval as a defense to an Article 2317.1 action. However, the article itself does not refer to the reasonable man; it provides that the plaintiff must show that "the owner or custodian of [the] thing" (i.e., *that* defendant) "in the exercise of reasonable care, should have known" of the defect in his thing.⁷²

The language of the statute thus leaves open the possibility that a court could apply the "should have known" standard subjectively. In other words, the plain wording of the article does not seem to proscribe a defendant from arguing that *he personally* should not have known of the defect in his thing because he is too ignorant, uneducated, or inexperienced to have discovered it in the exercise of reasonable care.

As to when the defendant in an Article 2317.1 action should have known of the defect in his thing, the *contra non valentem* doctrine suggests that the appropriate point in time would be when the defendant has facts sufficient to put him on notice of the defect.⁷³

66. *Anderson v. Beauregard Mem'l Hosp.*, 709 So. 2d 283, 285 (La. App. 3d Cir. 1998) (citing *Boyd v. B.B.C. Brown Boveri, Inc.*, 656 So. 2d 683, 688 (La. App. 2d Cir.), *writ not considered*, 664 So. 2d 417 (1995)).

67. 387 So. 2d 574 (La. 1980).

68. *Id.* at 575.

69. *Id.*

70. *Id.* at 577.

71. *See supra* text accompanying note 61.

72. La. Civ. Code art. 2317.1

73. *See supra* text accompanying note 65.

2. Claims Against Merchants

a. General Principles

Constructive notice is an element of proof in "slip and fall" cases against merchants.⁷⁴ For the purpose of merchant liability cases, a finding that the merchant had constructive notice means that "the claimant has proven that the condition existed for such a period of time that it would have been discovered if the merchant had exercised reasonable care."⁷⁵

The crucial factor in proving constructive notice in merchant liability cases is a temporal one; the plaintiff bears the burden of proving that the condition existed for long enough that a defendant exercising reasonable care would have discovered it.⁷⁶ A plaintiff who fails to put on evidence as to the length of time that the unsafe condition existed has not met his prima facie burden under the statute.⁷⁷

In *Delahoussaye v. Delchamps, Inc.*,⁷⁸ a shopper sued a supermarket for injuries he allegedly suffered when he slipped on a banana peel in the store. Standard procedure followed by the supermarket indicated that the managers were to "[make] a perimeter walk each hour looking for hazards and other possible problems."⁷⁹ Evidence introduced at trial established that the banana peel had been on the floor for only five minutes and that the supermarket manager had inspected the aisle in question just five minutes before the plaintiff's fall.⁸⁰ The court rejected the shopper's claim, finding that the merchant had no constructive knowledge of the defect.⁸¹

In *Barton v. Wal-Mart Stores, Inc.*,⁸² a shopper alleged that he had fallen on a wet spot on the merchant's floor on a rainy day. The trial court's findings revealed that the accident had occurred in a high-traffic, high-risk area for a rainy day (the front entrance to the store).⁸³ Although the court recognized the importance of the temporal element in proving a merchant's constructive

74. La. R.S. 9:2800.6 (1997).

75. *Id.* at C(1). Section 2800.6 was amended during the 1996 Civil Justice Reform to add the language: "The presence of an employee of the merchant in the vicinity in which the condition exists does not, alone, constitute constructive notice, unless it is shown that the employee knew, or in the exercise of reasonable care should have known, of the condition." See 1996 La. Acts No. 8, § 1.

76. *Walthall v. E-Z Serve Convenience Stores, Inc.*, 988 F. Supp. 996 (E.D. La. 1997), *aff'd*, 146 F.3d 868 (5th Cir. 1998).

77. La. R.S. 9:2800.6(C)(1) (1997); *Diez v. Schwegmann Giant Supermarkets, Inc.*, 709 So. 2d 243 (La. App. 1st Cir. 1998).

78. 693 So. 2d 867 (La. App. 3d Cir. 1997).

79. *Id.* at 869.

80. *Id.* at 869-70.

81. *Id.*

82. 704 So. 2d 361 (La. App. 3d Cir. 1997).

83. *Id.* at 367.

notice,⁸⁴ it seemed to focus more on the increased risk to shoppers due to puddles accumulating on rainy days in upholding the plaintiff's claim.⁸⁵

b. Application

Were these principles applied in the context of a 2317.1 action, it seems clear that the plaintiff would bear the burden of proving that the defect in the thing causing injury "existed for such a period of time that it would have been discovered if the [owner or custodian] had exercised reasonable care."⁸⁶ However, the Legislature was familiar with the language of the merchant liability statute long prior to the passage of Act One.⁸⁷ If the Legislature had intended to impose this temporal requirement, could it not have easily adapted the language of the merchant liability statute into Article 2317.1? In other words, couldn't the Legislature have included a temporal requirement in Article 2317.1?

It seems more likely that the courts would take a hybrid approach to constructive notice, similar to the court's rationale in *Barton*.⁸⁸ Thus, while the length of time that the ruin, vice, or defect had existed would be a concern, so would the gravity of the risk involved.

3. Claims Against Public Bodies

a. General Principles

Constructive notice also exists as a prerequisite to claims "against a public entity for damages caused by the condition of things within its care and custody."⁸⁹ The definition found in the public entities statute is, however, somewhat less explicit than that found in the statute governing merchant liability: "Constructive notice shall mean the existence of facts which infer actual knowledge."⁹⁰

The jurisprudential analysis of Louisiana Revised Statutes 9:2800, though, breaks down the burden of proof in public entity liability cases into elements that sound remarkably similar to the five elements of proof involved in an Article 2317.1 action.⁹¹ In order to prove public entity liability for a thing, a plaintiff must establish: (1) "custody or ownership of the defective thing by the public entity"; (2) that "the defect created an unreasonable risk of harm"; (3) "actual or

84. *Id.* at 364.

85. *Id.* at 367.

86. La. R.S. 9:2800.6 (1997).

87. The merchant liability statute was enacted in 1988, eight years prior to the 1996 tort reform.

88. See *supra* text accompanying note 82.

89. La. R.S. 9:2800(B) (1997).

90. La. R.S. 9:2800(C) (1997).

91. See *supra* text accompanying note 19.

constructive knowledge of the defect"; (4) that the public entity failed to take "corrective action within a reasonable time"; and (5) "causation."⁹²

Public entities are held to a standard of reasonable care in discovering defects.⁹³ In *Briggs v. Hartford Insurance Co.*,⁹⁴ a motorist was injured in a traffic accident on a state highway when she drove through an intersection because she did not see a stop sign placed by the Louisiana Department of Transportation and Development (DOTD).⁹⁵ The stop sign at issue was partially obscured by foliage.⁹⁶ Noting only that the obstruction was "long-standing," the court concluded that the "DOTD failed to correct the hazardous condition within a reasonable time."⁹⁷ Relying on this temporal analysis, the court concluded that the motorist had established that "DOTD breached its duty to her and therefore is liable under [Louisiana Civil Code article] 2315."⁹⁸

The court's analysis suggests that the duty imposed upon the public entity is the duty to discover and correct defects within a reasonable time. Thus, the defendant's duty and the temporal requirement are intertwined; timing is an element of the public entity's duty.

b. Application

Given the similarity between the elements of proof in a 2317.1 action and those in a public entity liability action, it seems that the jurisprudential interpretation of the public entity liability statute might provide the best guidance on how the courts might apply and interpret the "should have known" language in Article 2317.1. The analysis followed in *Briggs* suggests that an important step for the plaintiff in an Article 2317.1 action might be showing that the defect in the defendant's thing existed for so long that he violated his duty to exercise reasonable care. In other words, if the defendant had exercised reasonable care, he should have known of the ruin, vice, or defect.

As noted in the discussion of the merchant liability cases, however, it seems that the Legislature could easily have included a temporal requirement when drafting Article 2317.1.⁹⁹ However, the language of the article seems to focus solely on whether the defendant exercised "reasonable care." Does the lack of an express temporal requirement indicate that the Legislature intended to remove the length of time that the defect exists from the equation? Or does it mean

92. *Aetna Cas. & Sur. Co. v. Dep't of Transp. and Dev.*, 712 So. 2d 216 (La. App. 1st Cir. 1998), writ denied, 724 So. 2d 209 (La. 1998).

93. *Briggs v. Hartford Ins. Co.*, 532 So. 2d 1154 (La. 1988).

94. *Id.*

95. *Id.* at 1155.

96. *Id.* at 1157.

97. *Id.*

98. *Id.* Louisiana Civil Code article 2315 provides in pertinent part: "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it."

99. See *supra* text accompanying note 86.

simply that more than the mere passage of time is required to impose liability on the defendant owner? In other words, must the breach of some standard of care be established in order for a plaintiff to recover? If a breach of some standard of care is required, it seems that a standard of care must first be established.

4. *The Learned Hand Formula*

a. *General Principles*

Of course, the courts might look no further than simple negligence principles in applying the standard of reasonable care under Article 2317.1. "Negligence is the failure to act reasonably under the circumstances."¹⁰⁰ Under the famous formula articulated by Judge Learned Hand in *U.S. v. Carroll Towing Co.*¹⁰¹ (hereinafter "the Hand Formula"), "one is negligent if the burden (B) of avoiding a risk, or package of risks, is less than the probability (P) of that risk occurring times the gravity or severity of the anticipated harm should the risk arise (L)."¹⁰² In other words, "one is negligent if $B < P \times L$."¹⁰³

The burden involved includes not only the direct costs of avoiding harm, such as chopping down a dead tree or fixing defective brakes; it also includes the cost involved in discovering the existence of the defect.¹⁰⁴ A court might then consider whether the probability of the risk is sufficient to justify the burden of obtaining knowledge, e.g., is the risk that an outwardly healthy magnolia tree might fall on a neighbor's car sufficient to justify forcing the tree's owner to have it examined by an arborist every month? If so, monthly examinations by an arborist might be the applicable standard of care for owners of magnolia trees.

b. *Application*

Louisiana courts have relied on the Hand Formula in assessing whether a defendant breached his duty of care.¹⁰⁵ It is important to remember that the more severe the harm in question, the greater the defendant's duty is to discover and/or prevent that risk, even though the risk of its occurrence may be slight. Conversely, the defendant has a strong duty to prevent even a remote and relatively minor risk of harm where the cost of discovering and/or preventing that harm is slight.

100. Maraist & Galligan, *supra* note 4, at 80.

101. 159 F.2d 169 (2d Cir. 1947), *reh'g denied*, 160 F.2d 482 (2d Cir. 1947).

102. Maraist & Galligan, *supra* note 4, at 81.

103. *Id.*

104. Thomas C. Galligan, Jr., *Strict Liability in Action: The Truncated Learned Hand Formula*, 52 La. L. Rev. 323 (1991).

105. See, e.g., *Levi v. Southwest La. Elec. Membership Coop.*, 542 So. 2d 1081 (La. 1989); *Washington v. Louisiana Power and Light Co.*, 555 So. 2d 1350 (La. 1990).

Thus, under the Hand Formula, the defendant's duty will vary depending upon the defect that exists in the defendant's thing, the cost of discovering and preventing the defect, and the gravity of risk that the defect poses to the plaintiff.

IV. CONCLUSION

A. *A Refresher Course in Negligence*

After wading through the quagmire of principles and doctrines that make up a freshman Torts course, it is not hard to lose sight of some basic principles. Often lost in all the discussion of proximate cause, vicarious liability, and the rescue doctrine is an understanding of what negligence is: "[C]onduct which falls below a standard established by law for the protection of others against unreasonable risk of harm."¹⁰⁶ The standard of conduct is not based on hindsight; rather, it is based on the reasonable alternatives available at the time the harm occurred.¹⁰⁷ Because determining the appropriate standard of care for each particular harm is often a situational decision, it is frequently difficult to reduce negligence analysis to simple, definite rules.¹⁰⁸

This return to basic negligence principles seems appropriate in light of the apparent similarity between the language used in describing constructive notice¹⁰⁹ and the language of Article 2317.1, which purportedly establishes a negligence standard.¹¹⁰ The "knew or, in the exercise of reasonable care, should have known"¹¹¹ language at issue here raises two questions. First, does this language really establish a negligence standard, or is the new requirement really just constructive notice? And, second, does it really matter?

B. *George and Daniel Revisited*

George and Daniel might be able to help resolve these questions. Recall that George owns a sprawling magnolia tree, under which his accident-prone neighbor Daniel likes to park his car. In keeping with the now-hackneyed hypothetical, consider again that George's tree falls over, demolishing Daniel's automobile. Consider further that there is nothing outwardly wrong with the tree. Finally, suppose that there is a well-established standard of care for magnolia trees: owners of magnolia trees should have them examined by an arborist once per

106. W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 1, at 170 (5th ed. 1984).

107. *Id.*

108. *Id.* at 173.

109. *See supra* text accompanying note 74.

110. *See* William E. Crawford, "The Revision of Tort Law by the Extraordinary Session of 1996," at La. Code Civ. P. ch. 3, § 3: "C.C. art. 2317.1 modifies C.C. art. 2317 by changing the requirement for liability under the article from strict liability to negligence."

111. La. Civ. Code art. 2317.1.

month. George, of course, has failed to comply with this standard. From a liability perspective, how should the court handle this case under Article 2317.1?

1. *Constructive Notice*

It seems that George might escape liability, depending on a few factors. Given the strong temporal nature of constructive notice analysis, the length of time that the defect that caused the tree to fall existed would be important. If the problem has existed for a sufficient length of time, the courts seem willing to accept that the owner of the thing ought to have discovered it.¹¹²

The problem, however, would arise where the defect has not been a long-standing one. If, as the hypothetical assumes, there have been no outward signs of the defect in the tree, how can George be held liable for its fall? Constructive notice operates to impose liability where facts sufficient to put George on notice of the defect in his tree have existed long enough that he should have discovered the defect through the exercise of reasonable care. In other words, after sufficient indicators have existed for a certain time, we are willing to impute knowledge of the defect to George.

2. *Negligence*

The resolution of the liability question under a negligence standard would seem to depend upon just what the standard of reasonable care is for owners of magnolia trees, and whether that standard was followed. Here, the hypothetical standard of care for the tree is a monthly examination by an arborist. With no outward sign of decay in the tree, the resolution of the question seems clear: if George has followed his duty to have the tree examined monthly, he has not been negligent and is not liable; if he has not done so, he is liable. To put it in terms of Article 2317.1, George, in the exercise of reasonable care (the monthly tree examination) should know of the vice, ruin, or defect (the problem with the tree). If George follows this standard of reasonable care and discovers no defect, how can he be held liable?

The implication here should not be taken lightly. As the hypothetical illustrates, there are clearly circumstances under which George might be found liable for the tree's fall under a negligence standard but not under a constructive notice standard, and vice versa. It also seems clear that the words of the article call for some standard of reasonable care to be followed.

The question, then, is how is this standard to be established? Should the courts use an ad hoc situational analysis such as the Hand Formula to evaluate each particular risk in terms of probability and gravity of harm to each particular plaintiff? Should they fall back on a constructive notice-type standard, based more on a time element? Or, must the courts develop a whole new body of law

112. See *Briggs*, *supra* note 94, and accompanying text.

laying out the standards of care for owners of a plethora of things, from trees to cars to golf clubs?

Obviously, each of these options has a down-side. The Hand Formula sounds appealingly scientific, but it gives little practical guidance to prospective defendants as to how they should act in various situations. There would be far more guidance for defendants were the courts to craft standards of care for different types of things, but such standards could take years to develop. A constructive notice standard seems simple to apply but seems not to comport with the pure negligence standard that politicians (and the public) had their hearts set on.

How the question of the applicable standard is resolved with respect to George and Daniel really is not that important. What *is* important is that scholars, practitioners, and the courts recognize that Article 2317.1 leaves lingering questions that will require careful and considered resolutions.

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