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LIMITING STRICT LIABILITY OF GOVERNMENTAL DEFENDANTS: THE NOTICE REQUIREMENT OF THE 1985 LEGISLATION

When Loescher v. Parr\(^1\) introduced strict liability under Louisiana Civil Code article 2317 for the custody of defective things, few could have foreseen the far-reaching implications it would have with respect to the liability of state and local governments. Four years after Loescher, the Louisiana Supreme Court first held a municipal defendant strictly liable under article 2317 in Jones v. City of Baton Rouge.\(^2\) The possibility of such strict liability claims prompted fears for the fiscal well being of state and local government in a time of escalating insurance rates,\(^3\) which in turn moved the legislature in 1985 to enact several bills\(^4\) limiting governmental liability. Among them was Act 454, enacting Louisiana Revised Statutes (La. R.S.) 9:2800, which provides:

A. A public entity is responsible under Civil Code Article 2317 for damages caused by the condition of buildings within its care and custody.

B. Except as provided for in Subsection A of this Section, no person shall have a cause of action based solely upon liability imposed under Civil Code Article 2317 against a public entity for damages caused by the conditions of things within its care and custody unless the public entity had actual or constructive notice of the particular vice or defect which caused the damage.

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1. 324 So. 2d 441 (La. 1976).
2. 388 So. 2d 737 (La. 1980).
3. One illustration of these fears is a report stating: “For the municipalities covered by the liability insurance program of the Louisiana Municipal Risk Management Agency (the insurance component of the [Louisiana Municipal Association]), claims based on strict liability alone averaged 30 percent of all claims paid for in 1981-1984.” 2 La. Mun. Rev. 5 (March-April 1985).
4. These bills included Act 450, which enacted La. R.S. 13:5114(D) providing for structured payment plans in certain circumstances; Act 451, which enacted La. R.S. 42:1441.1 through 1441.4 and La. R.S. 29:23.1 establishing interlocal risk management programs and limiting the master-servant liability of the state; Act 452, which reenacted La. R.S. 13:5106 and 5109(A) limiting the amount recoverable in personal injury and wrongful death suits against the state to $500,000, not including medical care and past and future earnings and/or support; Act 453, which enacted La. R.S. 9:2798.1 precluding liability of public entities or their employees for the performance of discretionary acts; and Act 509, which amended and reenacted La. R.S. 13:5112 and 5117 providing for court costs and interest on suits against the state or its political subdivisions.
prior to the occurrence, and the public entity has had a reasonable opportunity to remedy the defect and has failed to do so.

C. Constructive notice shall mean the existence of facts which infer actual knowledge.5

This comment will examine this statute from three perspectives: the need for this type of legislation, the possible constitutional problems, and the alternatives to this legislative solution available within the context of Louisiana law on tort liability.

I. THE NEED FOR LEGISLATION

Assessing the need for this legislation requires an examination of the development of article 2317 liability. The Louisiana Supreme Court in Loescher set out the elements of an article 2317 claim: (1) the existence of a vice or defect (i.e., an unreasonable risk of injury to another), (2) the defendant's custody of the defective thing, and (3) damage resulting from the vice.6 At the same time, the court recognized three defenses available to defeat such a claim: "[T]he owner or guardian . . . can escape liability only if he shows the harm was caused by the fault of the victim, by the fault of a third person, or by an irresistible force."7 The court based this form of liability not on the negligent conduct of the defendant, but rather on his legal relationship to the risk-creating thing.

The extent of governmental liability prior to the enactment of La. R.S. 9:2800 turned, then, upon the jurisprudentially defined parameters of a "vice" or "defect." In Jones v. City of Baton Rouge,8 the plaintiff was injured when she stepped onto a catch-basin cover which collapsed. The Louisiana Supreme Court found that the plaintiff failed to establish the duty on the part of the city necessary to support a claim of negligence, because "a municipality has a duty to correct a dangerous street or highway condition — where that condition was not actually caused by the negligence of its own employees — only if it has actual

5. Subsections D & E provide:

D. A violation of the rules and regulations promulgated by a public entity is not negligence per se.

E. "Public entity" means and includes the state and any of its branches, departments, offices, agencies, boards, commissions, instrumentalities, officers, officials, employees, and political subdivisions and the departments, offices, agencies, boards, commissions, instrumentalities, officers, officials, and employees of such political subdivisions.

6. 324 So. 2d at 446-47.

7. Id. at 447.

8. 388 So. 2d 737.
or constructive notice of the existence of the condition.”

Nevertheless, the court found that she had adequately established the elements of liability under article 2317: the municipal defendant had custody of the catch-basin cover, a defect therein caused plaintiff’s injury, and “the risk of falling four or five feet into a catch-basin as a result of stepping upon a presumably solid, firm metal surface is unreasonable.”

The decision in Jones produced fears that governmental defendants would be subject to virtually unlimited liability for things in their custody. Nevertheless, just one year later, the Louisiana Supreme Court in Shipp v. City of Alexandria demonstrated that liability will not automatically result from an injury on governmental property. The court emphasized that “[t]he fact that Mrs. Shipp fell does not elevate the condition of the street to that of an unreasonably dangerous vice or defect.” Specifically, the court determined that the plaintiff failed to show “that the area in the street where Mrs. Shipp fell was a defect in the sense that the risk of falling and suffering an injury due to this imperfection in the street pavement was so unreasonable as to justify the imposition of non-negligent liability.”

Although the court in Shipp did not fully explain its rationale, the result can perhaps be understood in light of the balancing approach utilized by the supreme court in two cases not involving governmental defendants. In Hunt v. City Stores, Inc., a products liability case, the court compared negligence and article 2317 liability, finding that both incorporate the concept of unreasonableness in a balancing approach:

In both negligence and strict liability cases, the probability and magnitude of the risk are to be balanced against the utility of the thing. The distinction between the two theories of recovery lies in the fact that the inability of a defendant to know or prevent the risk is not a defense in a strict liability case but precludes a finding of negligence.

The court employed this same kind of balancing test in Entrevia v. Hood, where it found the owner of a rural farmhouse to be free from liability under articles 2317 and 2321 for injuries sustained by a trespasser. The court once again compared negligence with article 2317 liability:

9. Id. at 739 (citing Pickens v. St. Tammany Parish Police Jury, 323 So. 2d 430 (La. 1975)).
10. Id. at 740.
12. Id. at 729.
13. Id.
14. 387 So. 2d 585 (La. 1980).
15. Id. at 588.
In both delictual areas the judge is called upon to decide questions of social utility that require him to consider the particular case in terms of moral, social and economic considerations, in the same way that the legislator finds the standards or patterns of utility and morals in the life of the community. The court in *Entrevia* focused on the thing that creates the risk and its relative value in terms of social utility. In contrast, the *Hunt* test merely imputed knowledge to the defendant and then measured his conduct under a reasonableness standard. Perhaps the difference can be explained in that *Hunt* was a products liability case whereas *Entrevia* presented a pure custodial issue under articles 2317 and 2321.

In several cases, the courts of appeal have used a balancing approach to refuse to hold a governmental defendant strictly liable when the social utility of the thing outweighed its risk. In *Goodlow v. City of Alexandria,* for example, the plaintiff's car was damaged when it struck an uncovered manhole. Citing *Hunt,* the court found the risk not unreasonable. The court balanced the extremely high utility of manholes against the remote possibilities that "vandals . . . might . . . remove the cover, or that a heavy vehicle might . . . strike the cover in precisely the wrong way and kick it off." In sum, because of the high utility, the low risk, and the fact that "there was no crack, design error, or other imperfection in the manhole or its cover," the balance was struck in favor of the defendant. Although the court cited *Hunt,* it did not choose to employ the imputed knowledge standard of that case. Instead, it emphasized balancing the risk of the defective thing against its utility, thus anticipating the *Entrevia* approach.

In *Jones v. Sewerage and Water Board of New Orleans,* the plaintiff was injured when she stepped into a drain clean-out hole in a sidewalk. The fourth circuit recognized the balancing approach used in *Goodlow,* but reached a different result. The court found that the easy removability of the cover constituted an unreasonable risk of harm. The court

17. Id. at 1149-50. The court in *Entrevia* also rejected the approach of Kent v. Gulf States Utilities Co., 418 So. 2d 493 (La. 1982), which had added to the elements of an article 2317 claim an examination of the reasonableness of the defendant's conduct. *Entrevia* brought the jurisprudence back into line with *Loescher* by making the focal point of the inquiry the defendant's legal relationship with an unreasonably dangerous thing and not the defendant's conduct. See Note, Entrevia v. Hood: Back to Loescher v. Parr, 44 La. L. Rev. 1485 (1984).
19. Id. at 1308-09.
20. Id.
22. Id. at 1065.
distinguished Goodlow on the ground that the drain clean-out had not been used for years, thus altering the equation so that the risk of injury outweighed the utility of the cover.\textsuperscript{23} Although both the manhole cover in Goodlow and the clean-out cover in Jones provided access for maintenance purposes, the cover in Jones had a much lower social utility because of its nonuse.

More recently, the fourth circuit in \textit{Landry v. State}\textsuperscript{24} found that the Levee Board of New Orleans was not liable under either negligence or article 2317 for plaintiff's injury caused by his attempt to avoid a partially hidden hole in a lakefront seawall. The court rejected the negligence claim for lack of the defendant's actual or constructive knowledge of the defect. Citing \textit{Entrevia}, the court also rejected the strict liability claim, finding the social utility of the recreational area to be unquestionable and a requirement of daily inspections for seawall erosion to be unduly burdensome.\textsuperscript{25}

Though not exhaustive, these cases indicate a judicial flexibility in defining the limits of "defect" which arguably makes the statutory notice requirement in La. R.S. 9:2800 unnecessary. Without this notice requirement, a public entity may still escape the imposition of article 2317 strict liability if it successfully advocates that the social utility of the thing outweighs the risk that the thing will cause injury. The courts have treated the issue as one of risk absorption and distribution.\textsuperscript{26} The additional notice requirements imposed by La. R.S. 9:2800 seem to speak to the threat raised by \textit{Jones v. City of Baton Rouge} rather than to the reality of current jurisprudential standards.

The definition of constructive notice in La. R.S. 9:2800—"facts which infer actual knowledge"—is unclear, especially in light of the notice standards utilized in negligence cases. Constructive notice in a negligence action has been defined as "the fact that the defect . . . had existed for such a period of time that it would have been discovered and repaired if the public body had exercised reasonable care."\textsuperscript{27} Likewise, in cases purporting to apply an "actual" notice standard, Lou-

\textsuperscript{23} But see Rigao v. Sewerage & Water Bd., 467 So. 2d 1263 (La. App. 4th Cir.), cert. denied, 469 So. 2d 988 (La. 1985) (uncovered meter box); Baker v. Sewerage & Water Bd., 466 So. 2d 720 (La. App. 4th Cir. 1985) (uncovered water valve box). Both cases cited Goodlow and found no unreasonable risk of injury.

\textsuperscript{24} 483 So. 2d 162 (La. App. 4th Cir.) (on remand), writ granted 488 So. 2d 190 (La. 1986).

\textsuperscript{25} Id. at 165.

\textsuperscript{26} See, e.g., \textit{Entrevia}, 427 So. 2d at 1150.

\textsuperscript{27} Bell v. Sewerage & Water Bd., 235 So. 2d 164, 165 (La. App. 4th Cir. 1970). See also Swain v. Sewerage & Water Bd., 413 So. 2d 233 (La. App. 4th Cir. 1982), where the court found constructive notice of a missing cover to a water meter box in which trash had accumulated and a neighbor testified that it had been open for over two weeks.
Louisiana courts have been willing to infer notice from factual circumstances such as the mere passage of time.\textsuperscript{28} That the courts have applied essentially the same test no matter what standard they claim to use, indicates that the statutory definition of constructive notice will, in spite of its ambiguity, in all probability be given the same jurisprudential parameters currently utilized in negligence cases.

II. CONSTITUTIONAL ISSUES

Equal Protection

Even if there exists a need for this kind of legislation, its constitutionality is questionable. State classification schemes are vulnerable to constitutional challenges on the basis that they deny equal protection of the law. Federal jurisprudence presently delineates three distinct standards of review in equal protection analysis: strict, minimal, and intermediate. Strict scrutiny applies when the classification limits fundamental constitutional rights or discriminates against persons who are members of a suspect class.\textsuperscript{29} A statutory classification must promote a compelling state interest to survive this standard of review. Minimal scrutiny, on the other hand, represents a highly deferential approach to the legislative branch. Classifications examined under this standard need only be rationally related to a legitimate state goal. Early cases utilized these two levels of review, but a two-tiered scrutiny was found inadequate to accommodate the complexity of equal protection problems. Scrutiny that was supposed to be strict in theory turned out to be fatal in practice, while minimal scrutiny turned out to be nonexistent in practice.\textsuperscript{30} As a result, a third standard emerged: intermediate scrutiny. A classification will survive this test if it is \textit{substantially related} to an \textit{important} governmental interest.\textsuperscript{31} Intermediate scrutiny has been used to judge classifications founded on gender and illegitimacy.\textsuperscript{32}

\textsuperscript{28} See Jerry Joseph Fontenot, Inc. v. State, 346 So. 2d 849 (La. App. 1st Cir. 1977), where the court found the defendant negligent for failing to discover and remedy a missing stop sign which had been down for at least three weeks; and Jones v. Louisiana Dept. of Highways, 338 So. 2d 338 (La. App. 3d Cir. 1976), where the court found the defendant negligent for failure to discover and/or remedy a dangerous highway defect in existence for at least two weeks before the accident in question.

\textsuperscript{29} See, e.g., United States v. Carolene Products Co., 304 U.S. 144, 58 S. Ct. 778 (1938).


The Louisiana Supreme Court has found that "[t]he equal protection guarantee of the constitution essentially requires that state laws affect alike persons and interests similarly situated."33 Two recent Louisiana Supreme Court cases support Professor Gunther's observation that strict scrutiny is fatal to a classification, whereas minimal scrutiny tends to be no scrutiny at all.34 Interpreting both federal and state equal protection guarantees, the Louisiana Supreme Court in Detraz v. Fontana35 wavered between strict and intermediate scrutiny before invalidating a statute that required a party suing a public official to post a bond for attorney's fees. The court found that the statute divided tort victims into two classes—victims of governmental tortfeasors and victims of private tortfeasors. Only the first class of victims suffered the statutory burden of a bond for attorney's fees.36 The court noted that, although not apparent on the face of the statute, racially discriminatory purposes may have motivated its enactment.37 If so, "[t]he purported purpose of protecting public officers from litigation brought solely for its harassment value would not satisfy the requirement of a compelling governmental interest."38 In addition, the court found that even under the reasonableness test (intermediate scrutiny), the statute violated equal protection because no reasonable justification for the statute's disparate treatment had been supplied.39 Like the statute involved in Detraz, La. R.S. 9:2800 divides tort victims into those injured by private defendants and those injured by governmental defendants. The latter have the additional burden of proving that the defendant had actual or constructive notice of the alleged defect.

Rudolph v. Massachusetts Bay Insurance Co.,40 a 1985 decision, illustrates the deferential nature of the minimal scrutiny rationality review. In Rudolph, the Louisiana Supreme Court upheld a statute under the federal equal protection standard exempting the state and its subdivisions from civil jury trials. The court found no suspect class and no infringement of a fundamental right since the United States Supreme Court has declined to incorporate the Seventh Amendment's right to

33. Succession of Robins, 349 So. 2d 276, 278 (La. 1977).
34. See supra note 30.
35. 416 So. 2d 1291 (La. 1982).
36. Id. at 1296.
37. The court cited a legislative joint resolution "to maintain segregation of the races in all phases of our life." Id. "The statute . . . would further this purpose by making it extremely costly, if not prohibitive, for minority groups or individuals to bring suit against any public official . . . for the redress of grievances suffered because of race." Id. at 1296-97.
38. Id. at 1294.
39. Id. at 1296.
40. 472 So. 2d 901 (La. 1985).
The court refused to apply intermediate scrutiny because "the classification of plaintiffs injured by governmental tortfeasers was not the sort of suspect or quasi-suspect category which would require the courts' heightened review." Therefore, the court examined the classification under the most deferential standard of review, and determined that "the Legislature could have rationally believed that this classification of tort victims, who cannot require a jury trial, is related to achieving the legitimate state objectives of the protection of the state treasury and the facilitation of the judicial process."

The application of different standards of review in Detraz and Rudolph may be explained by the nature of the private interests at stake. The effect of the bond requirement in Detraz was to make suits against public officials prohibitively expensive. The statute in Rudolph, on the other hand, merely eliminated the jury as fact finder in suits against the state or its subdivisions. Moreover, appellate review of facts is available in Louisiana to correct errors made by a judge sitting as fact finder. Thus, there was a difference in the degree to which the statutes affected prospective plaintiffs. Because La. R.S. 9:2800 so dramatically alters the substantive cause of action for certain plaintiffs, it arguably deserves the higher level of scrutiny applied in Detraz.

In its most recent foray into the equal protection field, the Louisiana Supreme Court chose to distinguish the federal and state guarantees. Echoing much critical commentary, the court in Sibley v. Board of Supervisors expressed dissatisfaction with the federal three-tier approach. Among the systemic faults which the court noted in the federal approach were internal inconsistency, rigidity, and an emphasis on abstract standards of review rather than on the merits of the case. The court chose instead to utilize the equal protection guarantee found in article I, section 3 of the Louisiana Constitution, which it interpreted

41. Id. at 904-05.
42. Id. at 905. The court noted in footnote 8 that "[c]lassifications such as gender and illegitimacy have been characterized as quasi suspect and subjected to a middle tier of scrutiny ...." Id. at 904.
43. Id.
45. 477 So. 2d 1094 (La. 1985) (on rehearing).
46. Id. at 1106.
47. No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations. Slavery and involuntary servitude are prohibited, except in the latter case as punishment for crime. La. Const. art. 1, § 3.
as "going beyond the decisional law construing the Fourteenth Amendment." The court stood on firm ground in its expansive interpretation of this provision. As one commentator has reported: "The equal protection guarantee that emerged [from the Louisiana constitutional convention] is a broad one and was intended to be so. Surely the breadth of the provision will produce far-reaching changes . . . ." From the tripartite structure of the constitutional text, the court discerned three types of classifications. First, those based on race or religious beliefs were banned absolutely. Secondly, classifications based on the enumerated categories of birth, age, sex, culture, physical condition, and political ideas and affiliations were permissible if the state could show that the classifications were not arbitrary, capricious, or unreasonable, and that the statute substantially furthered an appropriate state purpose. Finally, a challenge to a classification based on any other grounds would have to show that the law was unreasonable or that it did not further any appropriate state interest.

The plaintiff in Sibley brought a medical malpractice action to recover damages in excess of the $500,000 statutory limit imposed by La. R.S. 40:1299.39. Plaintiff asked the court to invalidate this statutory cap on equal protection grounds. The supreme court remanded the case for a determination of whether the state could meet the burden of showing a substantial furtherance of an appropriate state interest, stating: "[T]he statutory prohibition against a malpractice judgment in excess of $500,000 classifies individuals because of their physical condition. The law on its face . . . impose[s] different burdens on different classes of persons according to the magnitude of damage to their physical condition." In contrast to the few categories warranting the federal middle-tier scrutiny, Sibley interpreted the Louisiana Constitution as extending heightened scrutiny to birth, age, sex, culture, physical condition, and political ideas or affiliations. It is unclear just how broadly these terms will be defined, but potentially their scope could be far reaching.

The classification drawn by La. R.S. 9:2800, unlike that involved in Sibley, is not according to the quantum of physical injury suffered.

48. 477 So. 2d at 1108 (quoting Hargrave, The Declaration of Rights of The Louisiana Constitution of 1974, 35 La. L. Rev. 1, 6 (1974)).
50. 477 So. 2d at 1108.
51. Id.
52. Id.
53. Act No. 239 of 1985 repealed the limit with regard to the recovery of medical expenses.
54. 477 So. 2d at 1108.
Thus, it is unlikely that La. R.S. 9:2800 will be construed as a classification based on physical condition. Furthermore, none of the other enumerated categories seems to encompass the limitations imposed by La. R.S. 9:2800. Nevertheless, it has been suggested that:

_The decision to list specific grounds, however, does not mean the listing is exclusive_, for the first sentence provides the general rule, "no person shall be denied the equal protection of the laws." This paraphrase of the fourteenth amendment gives the courts the basis for developing the equal protection guarantee with respect to types of discrimination other than those listed. Had the grounds for discrimination in the second and third sentences been meant to be exclusive, those sentences would have stood alone, and the first sentence would have been superfluous.55

Louisiana's equal protection guarantee, therefore, could conceivably be extended to a plaintiff challenging La. R.S. 9:2800.

If intermediate scrutiny were used to test the constitutional validity of La. R.S. 9:2800, the state would have to show that the classification reasonably furthers a legitimate state purpose.66 Take, for instance, the person injured by an improperly maintained government automobile, who would have sustained the same injuries if the car had been privately owned, but whose cause of action is altered by the notice requirement of La. R.S. 9:2800. There may well be a justifiable rationale for applying a less demanding standard of review to cases involving types of governmental property which present unique risks not confronted by private defendants.67 Such reasoning, however, does not extend to those things in the government’s custody which present equivalent risks to similar things in private custody. Yet the only exemption in the statute applies to government owned buildings. Thus, the classification appears to be based less on the character of the use (and its concomitant risks) than on the status of the defendant.68 Because the statute may paint with too broad a brush, it is questionable whether this distinction between public and private defendants would survive intermediate level scrutiny of the connexity between the means employed and the ends sought.

On the other hand, if minimal scrutiny were used, the statute would likely survive constitutional attack. A challenger would have to demonstrate that the classification is unreasonable or that it does not further any appropriate state interest.69 One possible state interest is a policy consideration supporting the application of a different standard of li-

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55. Hargrave, supra note 48, at 7 (emphasis added).
56. 477 So. 2d at 1107.
57. See Hargrave, supra note 44 at 555.
58. But see id.
59. 477 So. 2d at 1108.
ability for governmental defendants. For example: "Public entities typically engage in a wide spectrum of activities which have no obvious private counterparts. Many governmental functions involve inherent exposure to potential injurious consequences far in excess of the risks normally encountered in the private sector." An additional difference is that "public entities charged with such duties and responsibilities cannot simply avoid the risk by refusing to act . . . ." Thus, "governmental tort liability . . . may tend to develop rationally grounded functional distinctions quite different from those which characterize private tort liability systems." Apart from these general policy concerns, the court in Rudolph found that the state has a legitimate interest in preserving its financial resources and that the prohibition of civil jury trials against a state governmental defendant prevents "a jury's perceived inclination to dig deeper into state pockets." Protection of state and local fiscal coffers could likewise justify La. R.S. 9:2800.

In sum, a court using minimal scrutiny would most probably defer to the legislative branch, while intermediate scrutiny would pose a much more difficult challenge to the statutory notice requirement.

Sovereign Immunity

Even if permissible on an equal protection basis, La. R.S. 9:2800 faces greater difficulties under the state constitution as a violation of the abrogation of sovereign immunity. Article XII, section 10(A) of the 1974 Constitution provides: "Neither the state, a state agency, nor a political subdivision shall be immune from suit and liability in contract or for injury to person or property." In defining the reach of this constitutional provision, the Louisiana Supreme Court in Segura v. Louisiana Architects Selection Board invalidated a statute exempting the state from payment of court costs. The court determined that to deny plaintiff recovery of costs "would reduce the value of the award" and further that "[t]he consequence would be that the state was relieved of part of its liability. The Constitution makes no such concession." The Segura interpretation was supported in Jones v. City of Baton Rouge where the supreme court refused to exempt governmental defendants from article 2317 liability and stated that "[i]t is not the function of the court to create an exception to this unequivocal constitutional

61. Id. at 923.
62. Id.
63. 472 So. 2d at 905.
64. 362 So. 2d 498 (La. 1978).
65. Id. at 499.
rejection of the doctrine of sovereign immunity.\textsuperscript{66} Finally, the court in its original opinion in \textit{Sibley} stated: "Segura struck down the offending statute, only because it attempted to favor the state with a privilege, that is, exemption from payment of court costs, unavailable to other defendants in similar suits."\textsuperscript{67}

These cases support the conclusion that the State is precluded from granting itself privileges not available to private parties. Because La. R.S. 9:2800 grants a privilege to the State that is not given to a similarly situated private party (a heightened burden of proof imposed on plaintiffs seeking recovery under article 2317), the statute would be constitutionally impermissible under the reasoning of \textit{Segura, Jones, and Sibley}.\textsuperscript{68}

\section*{III. Alternatives}

The legislature has available various options that might achieve the goal of La. R.S. 9:2800 and also survive constitutional scrutiny. One alternative is to amend Civil Code article 2317, adding a constructive notice requirement affecting all defendants. This would solve the equal protection and sovereign immunity challenges, but it would tamper with the interdependent articles of the Civil Code dealing with tort liability. Louisiana courts have spoken of the overall fault scheme to be found in those articles. The judiciary should be entrusted to interpret that scheme with the flexibility thus far shown in "a balancing of claims and interests, a weighing of the risk and the gravity of harm, and a consideration of individual and societal rights and obligations."\textsuperscript{69} The codal distinction between the fault based liability imposed in a negligence action and the liability imposed under article 2317 based on one's legal relationship to things in one's care or custody is well-grounded in the functional intent of article 2317\textsuperscript{70} and within the fault scheme of articles 2315 through 2322. To remove a single aspect of article 2317 liability would threaten the logical consistency of those articles.

A better solution would be to redraft La. R.S. 9:2800 in terms similar to other sections of Title 9 of the Louisiana Revised Statutes

\begin{itemize}
\item \textsuperscript{66} 388 So. 2d at 740.
\item \textsuperscript{67} 462 So. 2d 149, 154 (La. 1985). On rehearing the court found the sovereign immunity issue to be moot.
\item \textsuperscript{68} Nevertheless, there is authority for the proposition that these cases go beyond the drafter's intent: "In short, the convention did not adopt broad sovereign immunity in all suits, but it did assume that sovereign immunity existed in some areas. These areas were never defined." Hargrave, "Statutory" and "Hortatory" Provisions of the Louisiana Constitution of 1974, 43 La. L. Rev. 647, 650 (1983). See also Murchison, The Work of the Louisiana Appellate Courts for the 1978-1979 Term—Local Government Law, 40 La. L. Rev. 681, 712-13 (1980).
\item \textsuperscript{69} \textit{Entrevia}, 427 So. 2d at 1149 (quoting \textit{Langlois v. Allied Chemical Corp.}, 258 La. 1067, 1084, 249 So. 2d 133, 140 (1971)).
\item \textsuperscript{70} \textit{Loescher}, 324 So. 2d at 448.
\end{itemize}
which limit liability for property owners. For example, La. R.S. 9:2791 precludes the liability of owners of property used for recreational purposes, absent a showing of willful injury. The third circuit has extended the liability limitation of this section to governmental entities as well as to private landowners. Likewise, La. R.S. 9:2795 provides that owners of land who permit its recreational use (whether or not a fee is charged) incur no liability for injury on their land (provided it is not a commercial facility and excepting a willful or malicious failure to warn of a dangerous condition). While the appellate courts have extended these provisions to the state and its political subdivisions, the Louisiana Supreme Court in *Keelen v. State* and *Landry v. State* managed to avoid the issue.

The third circuit, in *Pratt v. State*, rejected plaintiff's sovereign immunity challenge to La. R.S. 9:2795. The court stated: "By its terms, the grant of immunity is made to any landowner who has made his land available for certain recreational purposes. The State, for the purposes of the statute, stands in the same position as would any other private litigant." Similar limits are extended to Mardi Gras krewes (La. R.S. 9:2796), blood banks (La. R.S. 9:2797 and Louisiana Civil Code article 2322.1), and donated food (La. R.S. 9:2799). These provisions limit a property owner's duty of care in very specific and narrowly defined circumstances. In contrast, La. R.S. 9:2800 affects a blanket waiver of the notice requirement in article 2317 actions against governmental defendants for all things in their custody except buildings. This approach fails to take into account the character of the uses of such property or of the risks involved therewith.

**IV. CONCLUSION**

If the legislature desires to limit governmental liability it should do so in a manner consistent with both the fault scheme of the Civil Code and of Title 9. Specific statutory limitations could be drafted regarding high risk governmental property. To forestall attack on the basis of sovereign immunity, coverage should extend to private defendants as well. A strong correlation between those things which present a high risk of harm and those protected under the statutory scheme should be sought in order to meet the requisites of equal protection. Thus, in the interest of public safety, public entities should still bear the burden of a high degree of care for traffic control devices. In all other cases

71. See Thomas v. Jeane, 411 So. 2d 744 (La. App. 3d Cir. 1982).
72. 463 So. 2d 1287 (La. 1985).
73. 477 So. 2d 672 (La. 1985).
74. 408 So. 2d 336 (La. App. 3d Cir. 1981), cert. denied, 412 So. 2d 1098 (La. 1982).
75. Id. at 342.
76. See, e.g., Bernard v. Campbell, 303 So. 2d 884 (La. App. 1st Cir. 1974).
not covered by a specific liability limit, Louisiana judges possess the flexibility to take into account special risk situations and to make a determination as to what constitutes an unreasonable risk of harm.

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