Ramirez v. Fair Grounds Corporation: The Harm in Holding Harmless

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I. INTRODUCTION

On September 30, 1984, Mr. Henry William Ramirez completed an application for a permit to use the Fair Grounds' stall facilities to stable his horses for the upcoming racing season. There was no charge to Mr. Ramirez for the use of these facilities. Contained in this agreement was a stipulation that Mr. Ramirez would assume all risks arising from his use of the premises and agree to indemnify and hold harmless the Fair Grounds Corporation.1

This particular facility consisted of two levels. The lower level was used to stable horses and the upper level was used to store hay and food for the animals.2 Since it was the common practice to throw hay down from the upper level, there was no railing or bannister along the edge of the loft.

1. The agreement is found in Appellee's Brief at 21, Ramirez v. Fair Grounds Corp., 563 So. 2d 570 (La. App. 4th Cir. 1990) (No. 89-CA-2256), rev'd 575 So. 2d 811 (La. 1991). The pertinent clauses are as follows:
8. It is agreed that neither Fair Grounds Corp., nor any of its officers or agents shall be in any way liable for any loss, damage, death or injury of any kind to any person, animal, vehicle or other property arising out of or connected with the presence on or use of Fair Grounds premises by said Applicant and all employees, agents, jockeys, members of the families, property and animals of said Applicant, whether such injury, loss, death or damage is claimed to be caused by the condition of said premise or any act or negligence or omissions to act of Fair Grounds or of its agents or servants or from any other cause, and the undersigned Applicant hereby specifically assumes all such risks fully and completely.
9. The undersigned Applicant hereby agrees to indemnify and save harmless Fair Grounds Corp. and its respective officers, employees and agents from and all liabilities, claims and demands for damages, injuries, deaths or losses or costs or expenses of any kind resulting from or arising out of or claimed to result from or arise out of the presence on or use of said premises at Fair Grounds by said Applicant and all employees, agents, jockeys, members of the families, property and animals of Applicant and Applicant agrees to defend any claim or suit which may arise from the foregoing and to pay all attorneys [sic] fees and costs thereof.

On February 10, 1985, Mr. Ramirez was on the upper level throwing alfalfa down to the horses. In the process, he lost his balance and fell to the ground, sustaining injuries to his heels and feet. Mr. Ramirez filed suit against the Fair Grounds Corporation, alleging strict liability. The Fair Grounds filed a motion for summary judgment pursuant to the permit agreement. The trial court granted this motion and dismissed the suit. The fourth circuit court of appeal affirmed the trial court's decision based on its determination that Louisiana Civil Code article 2004 did not nullify the hold harmless agreement entered into by the parties as alleged by Mr. Ramirez. Another factor that weighed in this decision was the fact that the plaintiff had been a horse trainer at the Fair Grounds for over ten years, which indicated to the court that Mr. Ramirez was indeed familiar with the stall facilities at the Fair Grounds.

The Louisiana Supreme Court, in a unanimous opinion, reversed. The basis of this opinion was that Louisiana Civil Code article 2004 nullified the agreement because there was physical injury involved. In the opinion, the supreme court noted that the official comments to Article 2004 state that the article does not apply to such hold harmless agreements or indemnity clauses. However, the court went on to say that the comments to the article "have no legislative effect on the statute because they are not part of the law." Looking at Article 2004, the court said that the statute was "clear and unambiguous with respect to the issue in this case" and, "[a]ccordingly, there is no justification

3. For a detailed description of the plaintiff's fall, see Relator's Original Brief at 2, Ramirez (No. 90-C-1632).
7. La. Civ. Code art. 2004 provides:
   Any clause is null that, in advance, excludes or limits the liability of one party for intentional or gross fault that causes damage to the other party.
   Any clause is null that, in advance, excludes or limits the liability of one party for causing physical injury to the other party.
8. 563 So. 2d at 572.
11. Id. at 812.
12. Id. at 813. Official comment (e) to art. 2004 states:
   This Article does not govern "indemnity" clauses, "hold harmless" agreements, or other agreements where parties allocate between themselves, the risk of potential liability towards third persons.
13. 575 So. 2d at 813.
for ... considering the comments even as persuasive sources or interpretive aids ... ."""

The rapid disposition of this case and the broad language that the court used will serve as the basis of this note. First, this note will examine the general freedom to contract theory. Second, the status of express assumption of risk will be analyzed. Third, cases will be analyzed where the courts have upheld similar hold harmless agreements. Fourth, the difference, or lack thereof, between strict liability and negligence will be presented. Fifth, specific examples of areas where the courts and the legislature have barred such agreements will be analyzed. Sixth, a study of where such agreements have expressly been sanctioned will be conducted. Finally, the reasons why Article 2004 should not act to nullify the agreement in this case will be presented.

In examining the court's decision, one must remember that it was by contract that the Fair Grounds sought to rid itself of liability toward Mr. Ramirez, and it is the validity of this contract that brought about the present litigation. However, the question of validity encompasses many different policy concerns. Therefore, the appropriate place to begin is with the basic principles involved.

II. GENERAL FREEDOM TO CONTRACT THEORY

Persons of proper capacity may contract for all objects that are lawful, possible, and determined or determinable. The effect of such an agreement is that the agreement becomes the law between the parties. There are even some instances where such a contract may have the effect of law even as to third persons that are not parties to the agreement. However, such contractual agreements must stay within the parameters set by the legislature and our courts.

The legislature has stated this policy in the following manner:

Individuals can not by their conventions, derogate from the force of laws made for the preservation of public order or good morals.

But in all cases in which it is not expressly or impliedly prohibited, they can renounce what the law has established in

When a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature.

15. 575 So. 2d at 813.
their favor, when the renunciation does not affect the rights of others, and is not contrary to the public good.19

The Louisiana Supreme Court recognized these principles in Salles v. Stafford, Derbes and Roy20 when it pronounced that "[t]he policy of the law is that all men of lawful age and competent understanding shall have the utmost liberty of contracting, and their contracts, when freely and voluntarily made, are not lightly to be interfered with by the courts."21 The courts are to hold the agreements sacred unless the intent is clearly unlawful.22

The contractual agreement in this particular case was the permit agreement signed by Mr. Ramirez. Mr. Ramirez voluntarily signed the agreement, which relieved the Fair Grounds of liability, to acquire the free use of the stall facilities. It is this agreement that the court nullified in the present decision.

III. HOW DOES EXPRESS ASSUMPTION OF RISK FIT INTO LOUISIANA LAW?

The part of the permit agreement at issue in the Ramirez decision pertained to Mr. Ramirez assuming responsibility for damages arising from his use of the premises. This type of agreement is known as an express assumption of risk. A general statement of how the common law has treated such agreements is found in the Restatement (Second) of Torts:

A plaintiff who by contract or otherwise expressly agrees to accept a risk of harm arising from the defendant's negligent or reckless conduct cannot recover for such harm, unless the agreement is invalid as contrary to public policy.23

The hold harmless agreement that is the subject of the present case is subject to the limits of public policy concerns as expressed in the Restatement.

The comments to the Restatement provide the reader with examples of certain agreements that would be invalid because of public policy concerns. One such example is when an employee agrees to hold an employer harmless for injuries sustained in the course of his employ-

19. La. Civ. Code art. 11 (1870). This article was subsequently replaced by La. Civ. Code art. 7 (1988). Article 7 states:
   Persons may not by their juridical acts derogate from laws enacted for the protection of the public interest. Any act in derogation of such laws is an absolute nullity.
20. 173 La. 361, 137 So. 62 (1931).
21. Id. at 364, 137 So. at 63.
22. Id., 137 So. at 63.
23. Restatement (Second) of Torts § 496B (1965).
ment.\textsuperscript{24} Another impermissible situation occurs when the party relieving himself from liability is an entity charged with a duty of public service.\textsuperscript{25} The last example of an area where such agreements are not enforced is when there exists a wide disparity of bargaining power between the parties.\textsuperscript{26} The disparity must be of such degree that the agreement does not represent the free choice of the injured person.\textsuperscript{27}

The Louisiana courts have struggled with the effect of assumption of risk on plaintiff recovery. Since there is very little civilian doctrine on the subject, the Louisiana courts have looked to the common law for development of the theory.\textsuperscript{28} In doing so, the courts have had to divide potential plaintiffs into identifiable classes so that they can be analyzed in a manner similar to the common law.\textsuperscript{29}

In \textit{Murray v. Ramada Inns, Inc.},\textsuperscript{30} the court said that assumption of risk no longer had a place in Louisiana.\textsuperscript{31} This theory was to be absorbed into the comparative fault doctrine.\textsuperscript{32} However, the court realized that a \textit{contractual} assumption of risk should occupy a special place in Louisiana tort law. In barring the term assumption of risk from being used to refer to plaintiff conduct, the court recognized that their "answer\textsuperscript{33} . . . does not change the law in those cases where the plaintiff, by oral or written agreement, expressly waives or releases a future right to recover damages from the defendant."\textsuperscript{34} Under the duty/risk analysis,\textsuperscript{35} this principle would be expressed by saying that the

\begin{itemize}
\item \textsuperscript{24} Id. comment f.
\item \textsuperscript{25} Id. comment g (1965).
\item \textsuperscript{26} Id. comment j (1965).
\item \textsuperscript{27} Id.
\item \textsuperscript{28} Murray v. Ramada Inns, Inc., 521 So. 2d 1123, 1130 (La. 1988).
\item \textsuperscript{29} Id. at 1131. The common law categories are:
  \begin{enumerate}
  \item express consent (when the plaintiff has expressly agreed with the defendant, in writing, to accept the risk of injury),
  \item implied primary (when the plaintiffs have participated in certain activities, or placed themselves in situations which involve inherent and well known risks),
  \item implied secondary (when the plaintiff is found to have disregarded a risk created by the defendant's fault).
  \end{enumerate}
\item \textsuperscript{30} Id. at 1132.
\item \textsuperscript{31} See \textit{La. Civ. Code} art. 2323.
\item \textsuperscript{32} The court decision was an answer to a Certified Question from the United States Court of Appeals for the Fifth Circuit. Murray v. Ramada Inns, Inc., 821 F.2d 272 (5th Cir. 1987). The Louisiana Supreme Court accepted certification in Murray v. Ramada Inns, Inc., 514 So. 2d 21 (1987).
\item \textsuperscript{33} See \textit{Forest v. State}, 493 So. 2d 563 (La. 1986), for an analysis of the duty/risk method. The court develops the method through the following questions:
  \begin{enumerate}
  \item Was defendant's conduct a cause in fact of the accident?
  \end{enumerate}
\end{itemize}
defendant was relieved by contract of the duty he owed to the plaintiff.\textsuperscript{36} The conclusion to be reached here is that \textit{contractual} transfer of liability is still alive and well in Louisiana after the \textit{Murray} decision.

Although the \textit{Murray} decision did indicate that Article 2004 may serve as a limitation on express assumption of risk,\textsuperscript{37} it is the purpose of this note to explain why Article 2004 should not apply to these facts. Such a contractual agreement was signed by Mr. Ramirez in the present case, and, therefore, the \textit{Murray} decision should not serve to nullify the agreement between the parties.

IV. CASES WHERE THE COURTS HAVE UPHELD SIMILAR AGREEMENTS

Since the comments to Article 2004 tell us that it does not change the law,\textsuperscript{38} it is appropriate to look at Louisiana jurisprudence where the courts have upheld agreements similar to the one at issue in the \textit{Ramirez} decision. Though all of these decisions were decided under the prior law, before the enactment of Louisiana Civil Code article 2004,\textsuperscript{39} from a reading of these decisions, one may gain a better understanding of the public policy concerning exculpation from liability when physical injury is involved.

In \textit{Battig v. Hartford Accident and Indemnity Co.},\textsuperscript{40} suit was filed for injuries sustained by a retarded child at a school for the mentally retarded in Louisiana. The child suffered injuries from a burst appendix, and the parents alleged that the school failed to provide adequate medical care. Since the plaintiff had let the tort claim prescribe, he had to rely on a claim in quasi contract.\textsuperscript{41} The court granted summary judgment for the defendant based on a release executed by the plaintiff accompanying the child's application to the school.\textsuperscript{42} The agreement in \textit{Ramirez}
is very similar to this in that it operated as a pre-release. Presumably, such agreements are taken into account when the parties are bargaining as to the price to be charged for the service provided. Therefore, this case supports the proposition that there is nothing contra bonos mores\(^\text{43}\) in contracting away liability for physical injury prior to the enactment of Louisiana Civil Code article 2004.

_Forsyth v. Jefferson Downs, Inc._\(^\text{44}\) is another appellate court decision where the court had to struggle with an agreement similar to the one in the present case. In _Forsyth_, the race track was being repaired and the management did not want activity on the track for fear of injury. Trainers who wished to exercise their horses were required to sign an agreement that they were doing so at their own risk.\(^\text{45}\) A trainer signed the agreement and his horse was injured. The horse's owner then brought suit against the race track. The court proclaimed that "it is not in contravention of public policy for a party to assume the risk of injuring himself or his property in consideration for his being allowed to use the premises of a race track."\(^\text{46}\) This court was clearly able to see the importance of the race track requiring the trainers to be liable for their own damages because Jefferson Downs did not want them on the racing area unless the liability for injury could be shifted from the race track to the racing participants. The trainers showed their willingness to deny themselves a tort claim in exchange for being allowed to use the racing facilities.

In similar fashion, Mr. Ramirez waived his tort claim for the _free_ use of the facilities. In essence, this was a bargained-for exchange by two capable and willing parties. Surely the Fair Grounds would not give the trainers free use of the facilities if in doing so, the Fair Grounds placed itself in a position of potential liability for claims arising from the trainers' use of the premises.

Another case decided by the Louisiana appellate courts did indeed

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\(^\text{44}\) 152 So. 2d 369 (La. App. 4th Cir.), writ refused, 244 La. 895, 154 So. 2d 767 (1963).

\(^\text{45}\) For text of release see 152 So. 2d at 374: "We, the undersigned Horsemen, agree that our horses are exercising or training on the race track at our own risk and that any injury to the exercise boy, jockey, or trainer or any injury to the horses will be at our own risk . . . ." 

\(^\text{46}\) Id. at 375 (emphasis added).
involve physical injury. *Robillard v. P & R Racetracks, Inc.*47 involved physical injuries sustained by a drag racer when he collided with a disabled vehicle on the track. The injured racer sued the owner of the drag strip, the track operator, two major stockholders of the companies that owned and operated the track, and several individual track employees. Prior to racing his car, the claimant had signed an agreement containing a release clause.48 The court held that the release clause signed by the participant acted to nullify liability on behalf of the defendants because ‘Robillard knew of the inherent dangers involved in drag racing. He was an experienced drag car racer. He was aware of the risk, understood it, and appreciated it before he signed the assumption of risk release clause . . . ’49

Applying this rationale to the *Ramirez* case, Mr. Ramirez realized what tasks his job would encompass on the premises. He knew that he would have to retrieve hay for his horses. After all, Mr. Ramirez had been in the training business for many years, and a great many of those years were spent at the Fair Grounds.

V. STRICT LIABILITY AS OPPOSED TO NEGLIGENCE; WHAT IS THE DIFFERENCE IN EXCULPATING ONESelf FROM LIABILITY?

The liability for which Mr. Ramirez is seeking relief is strict liability. Therefore, it is appropriate to look at strict liability and negligence and see where the differences lie.

The Louisiana Civil Code differentiates between degrees of fault.50 Policy concerns allow for a greater ability to contract away from slight fault than to exculpate oneself from liability caused by gross fault. For example, if the law allowed individuals to contractually avoid liability imposed because of intentional acts, the obligation would be subject to a condition that depended solely on the whim of the obligor.51 The effect of such a condition is to render the obligation null.52

The liability that the plaintiff seeks to impose on the defendant in the *Ramirez* case is strict liability. The Louisiana Civil Code imposes strict liability based on custody53 and ownership,54 and Louisiana jurisprudence has likened the duty of strict liability to the duty that arises from ordinary negligence.55 The only difference in determining whether a duty was owed is that, in proving strict liability, the claimant is

47. 405 So. 2d 1203 (La. App. 1st Cir. 1981).
48. For complete text of agreement, see id. at 1208.
49. Id. at 1208.
50. La. Civ. Code art. 3556(13). The three degrees of fault are: gross fault, slight fault and very slight fault.
relieved of proving that "the owner knew or should have known of the risk involved."\textsuperscript{56}

In the case of \textit{Loescher v. Parr},\textsuperscript{57} the Louisiana Supreme Court pronounced that strict liability was imposed based solely on the relationship between the person legally responsible and the object that causes the harm.\textsuperscript{58} Given that the duty arising from strict liability and ordinary negligence is similar and that strict liability merely alleviates the need for the claimant to prove knowledge on behalf of the defendant, it would appear that agreements transferring strict liability would be closely scrutinized by the courts—much like the scrutiny applied when ordinary negligence is shifted between the parties. However, that is not the indication given by the Louisiana Supreme Court. The court has chosen to provide for a lesser burden on potential defendants in strict liability to prove that the liability has indeed been shifted to another party. This theory was brought to light in \textit{Sovereign Insurance Co. v. Texas Pipe Line Co.}\textsuperscript{59}

When the Louisiana First Circuit Court of Appeal was faced with an indemnity agreement that purported to allow indemnity for a strict liability claim, the court applied the standard test used for finding indemnity agreements in ordinary negligence cases.\textsuperscript{60} That is, such an intent to indemnify must be expressed in "unequivocal terms."\textsuperscript{61} However, this conclusion was subsequently reversed by the Louisiana Supreme Court.\textsuperscript{62} The court held that the presumption against finding an indemnity agreement as used in ordinary negligence actions does not apply to strict liability under Civil Code article 2317.\textsuperscript{63} Instead, the general rules for contract interpretation should apply.\textsuperscript{64} Further, the court explained that the reason behind this was that in strict liability

\[\text{The indemnitor usually is in as good a position as the indemnitee to evaluate and protect against the risk. Correlatively, indemnity against liability for the custodianship of dangerous things does not provide as great a disincentive to careful and}\]

\textsuperscript{56}. Id. This illustrates the doctrine of imputed knowledge as it relates to strict liability.
\textsuperscript{57}. 324 So. 2d 441 (La. 1976).
\textsuperscript{58}. Id. at 446.
\textsuperscript{59}. 488 So. 2d 982 (La. 1986).
\textsuperscript{60}. Sovereign Ins. Co. v. Texas Pipeline Co., 470 So. 2d 969 (La. App. 1st Cir. 1985), amended and aff'd, 488 So. 2d 982 (1986).
\textsuperscript{61}. Id. at 974. See also Polozola v. Garlock, Inc., 343 So. 2d 1000 (La. 1977); Green v. Taca Int'l Airlines, 304 So. 2d 357 (La. 1974).
\textsuperscript{63}. Id. at 983.
\textsuperscript{64}. La. Civ. Code art. 2045 provides:

Interpretation of a contract is the determination of the common intent of the parties.
prudent conduct as does indemnity against the consequences of the indemnitee's own negligence. 65

This theory can be clearly illustrated by the Ramirez decision. Had the Fair Grounds required Mr. Ramirez to indemnify and hold them harmless for negligent acts of the Fair Grounds, Mr. Ramirez would have been in the arduous situation of keeping the Fair Grounds and its employees from acting negligently. This is to be contrasted with the strict liability for which Mr. Ramirez did agree to be responsible. True, the initial obligation of maintaining the premises is on the owner. However, by shifting this liability to Mr. Ramirez, the burden is shifted to the party present on the premises daily. This does not occasion an unjust burden on Mr. Ramirez. He must merely keep a watchful eye for dangerous conditions on the premises. There is no duty to prevent the negligent acts of others. Therefore, the shifting of the strict liability to Mr. Ramirez is a much lesser burden than it may first appear to be.

VI. AREAS WHERE LIABILITY MAY NOT BE TRANSFERRED

In certain instances, the courts have made it known that any attempt to transfer the liability imposed by law will be disregarded. When making this determination, the courts should look at the inequities fostered by such agreements, the relative bargaining power of the parties, and the overall public policy that is sought to be enforced. Two such areas where attempts to transfer liability have been nullified are the areas of employer-employee relationships and the oil industry.

A. Employer-Employee Relationships

1. Jurisprudential Creation

The courts have unequivocally refused to recognize contracts where employers require employees to hold them harmless for tort damages and workers' compensation claims. This policy is illustrated in the case of Gatheright v. United States Fidelity and Guaranty Co. 66 In Gatheright, the claimant reported on his application for employment that he had an existing back condition. Since the job included lifting heavy objects, the claimant's employer required, as a condition of employment, that the claimant sign a waiver of liability in favor of the employer. This

65. 488 So. 2d at 986 (emphasis added).
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waiver extended to any "back injury directly connected with a pre-
existing injury." The defendant interpreted the agreement to extend to
both tort claims and workers' compensation claims. The court une-
quivocally stated that "[s]uch waivers are contrary to public policy and
are void." Based on the invalidity of the waiver, the third circuit court
of appeal affirmed the trial court's award of total and permanent
workers' compensation benefits to the claimant.

There are several reasons why this policy is good for society. Com-
mentators have stated:

Where the defendant and the plaintiff are employer and em-
ployee, and the agreement relates to injury to the employee in
the course of his employment, the courts are generally agreed
that it will not be given effect. The basis for such a result
usually is stated to be the disparity in bargaining power and
the economic necessity which forces the employee to accept the
employer's terms, with the general policy of the law which
protects him against the employer's negligence and against un-
reasonable contracts of employment.

The court's position reflects society's concern about situations where
employers involved in risky industries require employees to agree not
to hold the employer liable for their injuries sustained. The basis of
this reasoning is the prevailing need for all to earn a living.

In Ramirez there was no such employer-employee relationship. There
was no requirement that the horses be stabled on the premises. Owners
of horses which were stabled elsewhere merely had to get written au-
thorization to race at the Fair Grounds. Therefore, Mr. Ramirez's
ability to earn a living was not hindered by the permit agreement.

The Ramirez decision can also be contrasted with the decision in
Wolf v. Louisiana State Racing Commission. In Wolf, the jockeys
were forced to accept workers' compensation coverage even though they
were independent contractors and not employees. Jockeys that failed to
sign the agreement were excluded from race meetings. The court held
the waiver to be invalid. Unlike Wolf, Mr. Ramirez's sanction for not
signing the agreement was merely losing his right to the free use of the
stalls, not being barred from training.

67. Id. at 577.
68. Id. at 579 (citing Haven v. Munson, 169 So. 819, 820 (La. App. 1st Cir. 1936)).
69. 267 So. 2d at 577.
70. Restatement (Second) of Torts § 496B comment f (1965).
71. Condition of Stall Allocation, contained in Appellee's Brief at 21, Ramirez (No.
    89-CA-2256).
72. 545 So. 2d 976 (La. 1989).
73. Id. at 977.
There are two further distinguishing factors between Wolf and Ramirez. First, the jockeys in Wolf signed only after a clause was added allowing them to sign under protest. Mr. Ramirez did not protest the agreement that he signed and returned to the Fair Grounds. Second, the Louisiana State Racing Commission has the exclusive power to determine who is to be excluded from the grounds. Mr. Ramirez would suffer no such exclusion. Therefore, Mr. Ramirez was not faced, as were the jockeys in Wolf, with the possibility of impairing his right to earn a living by refusing to sign the agreement.

2. Legislative Creation

Given the policy concerns, the Louisiana legislature has also taken steps to protect employees from employers. The legislature enacted a statute providing that the release of an employee-tortfeasor by the plaintiff acts to bar the employer from seeking indemnity for the vicarious liability that the employer incurred. The fourth circuit court of appeal recently held that the immunity was personal to the employee and did not extend to the employer's insurer. The importance of this holding is that it places emphasis on protecting the employee. The second circuit court of appeal has stated that if employers could get indemnity from employees, they would subvert the "notion that the employer, who reaps the ultimate gain from the toil of his employee, should bear the ultimate cost of the enterprise." The underlying policy is that all in our society should be free to be employed and such actions by a well-heeled employer will be unfair to employees. In addition, such indemnity provisions are contrary to modern practices of risk redistribution.

Given the actions of the courts and the legislature, it is readily apparent that the underlying policy is to protect the employee. This includes both an employee-victim and an employee-tortfeasor. However, in the Ramirez decision there exists no employer-employee relationship that demands such public policy concerns. Therefore, this limitation on employers exculpating themselves from liability should not apply to the Ramirez decision.

74. Id.
79. Id.
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B. Oil Industry

Another specific area where the Louisiana legislature has disallowed the transfer of liability is in the oil industry. The legislation is widely known as the Louisiana Oilfield Indemnity Act of 1981, and it states, in pertinent part:

[A]n inequity is foisted on certain contractors and their employees by the defense or indemnity provisions . . . contained in some agreements . . . to the extent those provisions apply to death or bodily injury to persons. It is the intent of the legislature by this Section to declare null and void and against public policy of the state of Louisiana any provision in any agreement which requires defense and/or indemnification, for death or bodily injury to persons, where there is negligence or fault (strict liability) on the part of the indemnitee, or an agent or employee of the indemnitee, or an independent contractor who is directly responsible to the indemnitee.

The legislature passed the statute in response to the oilfield contractors' concern over widespread use of such provisions in oilfield service contracts. The effect of this provision is to place the burden on the major oil companies that are in a much better position to spread the loss than the drilling contractors. This is a valid policy under both the general tort compensation theory of loss spreading and the idea that workers in a specific hazardous industry are getting injured while a much broader spectrum of society benefits from the production. The most viable reason for such a risk distribution scheme in the oil industry is the tremendous economic impact the industry has on the Louisiana economy.

Given these illustrations, one can see that the legislature has made certain policy decisions in enacting the statutes that prohibit the free transfer of liability. These policies include the right of employees to earn a living and preserving the scheme of risk distribution as evidenced by the Louisiana Oilfield Indemnity Act.

VII. Legislature Expressly Provides for Free Shifting of Liability Between Lessors and Lessees

In other situations, the legislature has expressly provided for the free transfer of liability. An example of this is the transfer of liability between the owner of the premises and the lessee of the premises as

83. Meloy, 504 So. 2d at 837.
provided by Louisiana Revised Statutes 9:3221. The owner may contractually exculpate himself from liability "unless the owner knew or should have known of the defect or had received notice thereof and failed to remedy it within a reasonable time." Prior to the enactment of this legislation in 1932, the lessor and lessee could agree that the lessor would not be liable for injuries sustained by the lessee. However, the lessor was not allowed to escape the liability imposed upon him as to third parties. The basis for this prior jurisprudence was the distinction between rights and obligations imposed by law, and those imposed by contract. Since the obligation of the property owner is imposed by law and the obligation of the owner to let another have the use of his premises is imposed by contract, the obligation imposed by law cannot be dispensed with by the obligation created by the lease contract. This jurisprudence was overruled by the new lessor/lessee statute in 1932.

This statute encountered constitutional attack in the case of Paul v. Nolen. In upholding the statute, the court stated that "[t]here is nothing fundamentally wrong in permitting lessees to undertake the upkeep of the property at their own risk..." The court also noted that no one has a vested right to sue another; the right has to be provided for by statute. "But in this case it [the statute] has not taken it [the right] away; it has left the right and has merely permitted transfer of the obligation from one person to another." Since the agreement in Ramirez is so similar to a lease, it is appropriate to look at cases interpreting this lessor/lessee statute.

There are numerous cases in Louisiana jurisprudence that allow the lessor to transfer liability of the premises to the lessee. This transfer

84. La. R.S. 9:3221 (1991) provides:

The owner of premises leased under a contract whereby the lessee assumes responsibility for their condition is not liable for injury caused by any defect therein to the lessee or anyone on the premises who derives his right to be thereon from the lessee, unless the owner knew or should have known of the defect or had received notice thereof and failed to remedy it within a reasonable time.
85. Id.
86. Klein v. Young, 163 La. 59, 111 So. 495 (1926).
87. Id. at 69, 111 So. at 499.
88. Id., 111 So. at 499.
89. See supra text accompanying notes 84-86.
91. Id. at 511.
92. Id. See also State v. Stanford Oil Co. of La., 188 La. 978, 1009, 178 So. 601, 611 (1937) (citing the Corpus Juris: "[T]here is no vested right to a particular remedy.") 12 C.J. Constitutional Law § 558 (1917).
93. 166 So. at 511.
has included liability for both physical injury\textsuperscript{94} and property damage.\textsuperscript{95}

In \textit{Davis v. Copeland Enterprises, Inc.},\textsuperscript{96} a worker sustained serious burns while recharging the refrigeration system in a warehouse. The lessee of the premises, also the employer of the injured party, had assumed responsibility in the lease agreement for such a defect as authorized by Louisiana Revised Statutes 9:3221. The court stated that the lease provision released the owner of the premises from ""legal liability for the condition of the premises and from liability for injuries caused by defects therein . . . ."\textsuperscript{97}

A later Louisiana Supreme Court case examining the effect of Louisiana Revised Statutes 9:3221 is \textit{Tassin v. Slidell Mini-Storage, Inc.}\textsuperscript{98} In \textit{Tassin}, the court was faced with a property damage claim arising from water damage in a storage unit. The court discussed the owner/lessor's liability for damages from vices and defects, and then went on to state: ""Nevertheless, the owner can shift responsibility for condition of the premises including liability for injury caused by any defect therein to the lessee pursuant to La. R.S. 9:3221.""\textsuperscript{99}

\textbf{VIII. WHY ARTICLE 2004 SHOULD NOT APPLY TO THIS DECISION}

Given the history of jurisprudence and legislation allowing and disallowing contractual transfer of liability, a close examination of Louisiana Civil Code article 2004 is now in order. Louisiana Civil Code article 2004 states:

\begin{quote}
Any clause is null that, in advance, excludes or limits the liability of one party for intentional or gross fault that causes damage to the other party.

Any clause is null that, in advance, excludes or limits the liability of one party for causing physical injury to the other party.
\end{quote}

The second clause of the article was at issue in the \textit{Ramirez} decision. The Louisiana Supreme Court nullified the hold harmless agreement based on an application of this clause. Article 2004 is new to Louisiana

\textsuperscript{94} \textit{Davis v. Copeland Enter., Inc.}, 390 So. 2d 891 (La. 1980), rev'g \textit{Davis v. Morrow}, 381 So. 2d 1258 (La. App. 4th Cir. 1980) (plaintiff sprayed with ammonia and suffered serious burns).

\textsuperscript{95} \textit{Meyers v. Drewes}, 196 So. 2d 607 (La. App. 4th Cir. 1967) (plaintiff sustained damage to clothing and furniture due to condition of the premises).

\textsuperscript{96} 390 So. 2d 891 (La. 1980).

\textsuperscript{97} Id. at 893, rev'g \textit{Davis v. Morrow}, 381 So. 2d 1258 (La. App. 4th Cir. 1980).

\textsuperscript{98} 396 So. 2d 1261 (La. 1981).

\textsuperscript{99} Id. at 1264. However, in this case, the court held the defendant-lessee to be liable because he knew or should have known of the defects. This defect was that the door would not seal properly on the bottom. Id.
and the source articles are found in both the Louisiana Civil Code of 1870 and in codes of foreign jurisdictions. The apparent reasoning behind the article is to protect the physical integrity of human beings.

No matter how broadly this article is interpreted, commentators suggest that there should be exceptions to the general rule. One commentator has stated that "a clause excluding liability for slight fault is valid even if it contemplates damage to the physical or moral integrity of a person; at least it must be regarded as valid when there has been an assumption of risk by the injured party." In Louisiana, one such exception to the general principle can be found in Louisiana Revised Statutes 9:3221. Further, one of the source articles for Article 2004 expresses a similar concept. The Quebec Draft Civil Code states the principle in the following manner:

No person may exclude or limit his responsibility for injury to the person, subject to express provision of law.

This indicates that, perhaps, the redactors of Article 2004 did not intend for the article to absolutely nullify all provisions that exclude liability for injury to the person.

This idea is reinforced by the comments to the article. For example, the official comments to the article state that the article is new, but it does not change the law. The comments also state that the article "does not govern 'indemnity' clauses, 'hold harmless' agreements, or other agreements where parties allocate between themselves, the risk of potential liability towards third persons."

Prior to Ramirez, another Louisiana appellate decision, Banner Chevrolet v. Wells Fargo Guard Services, discussed the application of Louisiana Civil Code article 2004. The Banner Chevrolet case dealt with a car being stolen while the defendant was contractually obligated to

100. The source articles are: La. Civ. Code arts. 11, 19, 1901, 1930, 2504, and 3556(13) (1870); Italian Civil Code art. 1229; Quebec Draft Civil Code arts. 300-303 (1977); Argentine Civil Code art. 507; Swiss Code of Obligations art. 100; Greek Civil Code art. 332. See La. Civ. Code art. 2004.
101. For a brief discussion of how physical integrity of persons directly affects the public order, see Saul Litvinoff, Stipulation As To Liability and As To Damages, 52 Tul. L. Rev. 258, 281 (1978) [hereinafter Litvinoff].
102. Litvinoff, supra note 101, at 281-282. Commentator Demogue maintains that a sign put up by an innkeeper excluding liability for damages caused by horses would be valid even if the injury is to the person. Litvinoff, supra note 101, at 282 n.139.
103. See supra text accompanying notes 84-86. La. Civ. Code art. 2004 comment (f) states: "This article does not supersede R.S. 9:3221."
107. 508 So. 2d 966 (La. App. 4th Cir. 1987).
provide security services. In passing, the court recited the language of the article. This was mere dicta as there was no physical injury involved, and the court went on to say that recovery was based on a breach of a contract claim, not a negligence claim for damages. When this same court of appeal was later faced with the Ramirez case, the court held that "La. Civil Code article 2004 has no effect on the release of liability or indemnity and hold harmless agreements found in the contract herein." Given the applicable background, Article 2004 should not nullify the hold harmless agreement between Mr. Ramirez and the Fair Grounds. There are several reasons for this result. First, the liability that the Fair Grounds sought to avoid is strict liability. The Louisiana Supreme Court has already stated that avoiding strict liability does not give rise to the same public policy concerns as does exculpating oneself from ordinary negligence. When one is relieved of liability for his negligent acts, he no longer has an incentive to be non-negligent. For example, if one party agrees to indemnify another for the indemnitee's own negligent acts, there would be a problem regarding the principles of equity. Part of the reason for this is the indemnitor's inability to "evaluate, predict, or control the risk which may be created by the indemnitee's future conduct..."

The same concerns are not implicated when one party contracts away his or her liability which may arise under Louisiana Civil Code article 2317. When strict liability is shifted from one party to another, there are no personal acts to evaluate, predict, or control. The hazards are conditions of the premises. Therefore, either party is usually in as good a position as the other to evaluate the hazards and protect against the risk.

Next, custody of the stall was turned over to Mr. Ramirez. This placed him in the best position to discover such defects. Finally, this

108. Id. at 967.
109. Id. at 968.
112. Id. at 986.
113. Id.
114. Id.
115. See generally, Diamond Crystal Salt Co. v. Thielman, 395 F.2d 62, 65 (5th Cir. 1968), ("There is clearly a distinction between holding that public policy forbids a contract whereby an attempt is made to prospectively absolve one of liability for injuries negligently caused through instrumentalities in his 'exclusive control' and holding that public policy allows a contract whereby one agrees to assume the risk of injuring himself when he is apprised of the nature of a dangerous condition and voluntarily continues to act.") (emphasis added).
Since strict liability is concerned with the condition of the premises, not a particular negligent act, anyone that is on the premises is in as good a position as another to protect against such risks. In this particular case, Mr. Ramirez was the person who was on the premises everyday; he could best identify the risks and take the proper precautions. In addition, when it is strict liability that is transferred, there still exists a person or entity with an incentive to maintain the premises in a safe condition. Mr. Ramirez, knowing he had assumed responsibility, had good reason to keep a watchful eye. This is opposed to the situation where two persons agree that one will hold the other harmless for any injury received to that person through the negligence of the other. The person who knows he will not be responsible for his acts will have no incentive to act in a reasonable manner.

Given the applicable background of strict liability, Article 2004 should not apply to injuries caused by a condition of the premises for which the defendant is strictly liable. This theory is reinforced in Louisiana Revised Statutes 9:3221, which allows the lessor and the lessee to freely transfer liability for the condition of the premises. Though the lessor may be initially obligated under Article 2317, he may transfer this liability to the lessee who then has an incentive to maintain a safe premises.

As to the actual agreement entered into by the parties, it was a lease for all practical purposes. The necessities for a contract of lease are thing, price, and consent. Given the facts, there is no disputing that the parties agreed on the thing. Also, with the alternatives available to Mr. Ramirez, there are no facts to indicate his consent being vitiated. Since the price need not consist of money, perhaps the surrendering of a possible tort claim is the "price" Mr. Ramirez paid for the "free" use of the stall facilities.

Nevertheless, if this agreement is not termed a lease, it should be treated the same. That is, the concept of free transfer of strict liability

117. W. Prosser & W. Keaton, Torts 25 (5th ed. 1984). (One reason for imposing liability is to provide incentive to prevent the occurrence of the harm.) See also, Seavey, Speculations As To "Respondent Superior", in Harvard Legal Essays, 433, 448 (1934). (A specific example of this is that respondent superior results in greater care in the selection and instruction of servants than would be used otherwise.) (emphasis in original).
120. The permit agreement reads as follows: "Said Applicant hereby agrees, as a condition precedent to and in consideration of, the acceptance of this Application and Agreement and to induce you to grant the free use of said stall space and facilities..." Appellee's Brief at 21, Ramirez (No. 89-CA-2256).
stemming from Louisiana Revised Statutes 9:3221 should be applied to these facts. This should be treated as an exception to the general rule pronounced in Louisiana Civil Code article 2004, and the Fair Grounds should be able to freely transfer the strict liability of the premises to Mr. Ramirez.

The facts of this case indicate that Mr. Ramirez was much like a lessee. Mr. Ramirez had the exclusive right to stable his horses in the stall, much like the lessee is guaranteed peaceful possession during the term of the lease. Another similarity is that Mr. Ramirez could only make additions and alterations to the facility after receiving written permission from the Fair Grounds. The comparable lease provision states that the lessor may not make alterations in the thing during the term of the lease.

This is not to say that Article 2004 should be written out of the civil code. An example of a correct application of Article 2004 is expressed in the following hypothetical. Suppose a building contractor and a subcontractor (sub) are working alongside each other in the construction process. As a requirement to allowing the sub to bid on the job, the contractor required that the sub sign a hold harmless agreement for any injury caused to the sub by the negligent acts of the contractor. While working together, the negligence of the contractor causes the sub to suffer a severed arm. Article 2004 should apply and nullify the agreement. The basis of this conclusion is that the liability here is ordinary negligence and the two contracting parties were both the party that caused the injury and the party that sustained the injury. We do not want to place one party in the particularly harsh situation of requiring him to police the actions of another party. This fits the language of Louisiana Civil Code article 2004: "Any clause is null that, in advance, excludes or limits the liability of one party for causing physical injury to the other party." Thus, the injured party should be able to recover for the injuries sustained.

Another scenario will adequately demonstrate that there is another problem with Article 2004 as interpreted by the court in Ramirez. This problem comes about when a third party becomes involved and sustains injury. Suppose that Mr. Ramirez invited a friend over to the stall to

122. The pertinent part of the permit agreement is as follows:
7. Additions or alterations to any Fair Grounds buildings, painting or construction of any kind, will be permitted ONLY with written permission of the General Superintendent.
(Emphasis in original). Appellee’s Brief at 21, Ramirez (No. 89-CA-2256).
124. For purposes of this example, the pertinent employer immunities available under the Worker’s Compensation Statutes are ignored.
help him feed the horses. While getting down hay, the friend falls in exactly the same manner that Mr. Ramirez fell in the current case. Now this third person, not a party to the permit agreement, seeks to recover from the Fair Grounds. Since Article 2004 only contemplates two parties,\textsuperscript{125} it should not act to nullify the agreement entered into by the parties since the injury was sustained by a third party. Instead, this situation should be governed by the theory of Louisiana Revised Statutes 9:3221. That is, the Fair Grounds and Mr. Ramirez should be able to freely allocate the risk of injury on the premises between themselves with their permit agreement.

In the above scenario, this injured third party would have no cause of action against the Fair Grounds. Such a result would surely be unjust. Allowing the party that signed the agreement to recover and then not allowing an innocent third person the same action is surely an absurd consequence\textsuperscript{126} not intended by the legislature in promulgating the article.

A better approach to the agreement in \textit{Ramirez} would have been to rely on the underlying rationale of Louisiana Revised Statutes 9:3221 and allow the transfer of liability from the Fair Grounds to Mr. Ramirez. This would be adhering to the prior jurisprudence that in certain situations there may be a transfer of liability even though physical injury is involved.

\section*{IX. Conclusion}

The \textit{Ramirez} decision has the potential to destroy the validity of all contractual agreements to transfer liability when physical injury is involved. The broad language in the opinion may be read to nullify any agreement when there exists an injury to a person. A very interesting scenario will unfold when the court has to decide a case involving physical injury when there is a lease agreement and the lessee has agreed to assume liability pursuant to Louisiana Revised Statutes 9:3221 for injuries sustained on the premises. The court will be forced to choose between Louisiana Revised Statutes 9:3221 and Louisiana Civil Code article 2004. Although the official comments to Article 2004 state that the statute does not supersede 9:3221, the supreme court has stated that the comments are not the law and that this article is clear and unambiguous; therefore, there is no need to look for interpretive aids. If Article 2004 is held to apply to leases, there will be a substantial

\textsuperscript{125} See La. Civ. Code art. 2004: "the liability of one party for causing physical injury to the other party." (emphasis added).

\textsuperscript{126} La. Civ. Code art. 9 (1988) provides:

When a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature.
shift in responsibility between lessors and lessees. The reasoning is that numerous leases have been contracted with this stipulation of liability with the parties having full expectation they would be given effect. This notion of responsibility is taken into account when the terms, including the price, are being negotiated. In many situations, the lessor is many miles away from the premises and relies on the lessee to keep the premises in good repair.

In short, the Ramirez decision tells us that the entity charged with liability cannot contractually release itself of that liability when physical injury is involved. As such, lessors who have these provisions in their leases should keep the Ramirez decision in mind when they are negotiating the price to be paid for the lease. An alternative idea is that the lessor could require the lessee to purchase an insurance policy in favor of the lessor should such liability arise. This would serve to protect the lessor should he be held responsible in spite of the exculpating clause in the lease.

Neal Joseph Kling