

# Treacherous Territory:

## Lessor Liability for the Condition of Premises and Its Proper Limitation by Contract

By Melissa T. Lonegrass

**F**ew aspects of lease law are as anxiety provoking as liability for defective premises. A landlord's responsibility for damages caused by defects in the premises can significantly increase the cost of doing business. And for tenants, the prospect of injury to person or property can be sobering. As a result, clauses in a lease that attempt to shift or otherwise limit this liability are critical. However, the law governing these clauses is not optimized for most leases. Arguably, the current regime fails to sufficiently protect both commercial landlords and residential tenants. Perhaps more disturbing, the law governing the parties' power to waive or transfer landlord liability is not only unbalanced, but also confusing and unsettled. This article provides guidance for practitioners attempting to navigate the treacherous territory of landlord premises liability.<sup>1</sup>

### Lessor Liability in Contract and Tort

A lessor's liability for defects arises from two sources: the lease contract and the law of delict, or tort. First, implied in every lease is a warranty against vices and defects, according to which a lessor's liability is "strict" — the warranty extends to all defects whether known or unknown to the lessor.<sup>2</sup> Second, the lessor's delictual liability arises principally from the lessor's custody of the leased thing or the lessor's status as the owner of a building.<sup>3</sup> Since 1996, a lessor's tort liability requires negligence — failure to exercise reasonable care to prevent damage caused by a defect of which the lessor knew or should have known.<sup>4</sup> Because the law imposes contractual and delictual obligations upon landlords concurrently, injured tenants may recover under either theory, or both.<sup>5</sup> Non-tenants instead have only the tort theory at their disposal, although an exception to this rule exists for family members and roommates of a residential lessee.<sup>6</sup> Thus, in general, a lessor is strictly liable to tenants for damages caused by defects in the premises, and liable to third parties only for negligence.

### Louisiana Revised Statutes 9:3221

However, the contractual and delictual responsibilities described above are not unalterable. Instead, a lessor may shift some liability for the condition of the premises to a lessee who agrees to hold the lessor harmless for any injury to the lessee or third parties. The primary provision governing these liability-shifting clauses is La. R.S. 9:3221, which was first enacted in 1932. In pertinent part, the statute reads as follows:

[T]he 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.<sup>7</sup>

By its letter, this statute appears to permit a lessor-owner to shift liability for defective premises to the lessee, provided the lessor did not act negligently by failing to remedy



a defect of which the lessor knew or should have known. For decades, courts have applied this statute to nearly all cases involving lessors' attempts to shift both contractual and delictual responsibility for the condition of the premises to their lessees.<sup>8</sup>

Unfortunately, since 9:3221 was first enacted, courts, legislators and practitioners have struggled to appreciate the statute's proper role and application within the broader framework of the law. In particular, recent legislative reforms of tort and lease law have caused this statute to operate in a manner far different from what the Legislature initially intended. Its continued application impedes both the contractual freedom of the parties to a lease and important public policies embedded in the Civil Code. Indeed, when read *in pari materia* with basic principles of obligations law, this statute is impossible to sensibly apply.

### Shifting a Lessor's Liability in Tort

The Legislature's aim in enacting 9:3221 was narrow. By the 1930s, the jurisprudence on lessor premises liability and its susceptibility to waiver was well settled. Relying on French jurisprudence, Louisiana courts held uniformly that parties to a lease were free to broaden or restrict the lessor's liability by contract, even with respect to the warranty against vices and defects.<sup>9</sup> Furthermore, according to the Supreme Court, a lessor's tort liability could be negated by the victim's assumption of the risk.<sup>10</sup> The obligations of the lessor, no matter the source, were therefore freely waivable by any party who might suffer harm. However, the Supreme Court jurisprudence placed an important limitation on this waiver — the rule of contractual privity.<sup>11</sup> Thus, a lessee's agreement to assume responsibility for the premises could have no effect on a lessor's responsibility to a *third party*.

The Legislature's response to this limitation was to enact 9:3221. According to that rule, when a lessee assumed responsibility for the condition of the premises, the lessor could not be held liable for injuries suffered by the lessee or anyone on the premises with the lessee's consent *unless* the lessor knew or should have known of the defect and failed to remedy it within a reasonable

time.<sup>12</sup> Therefore, when the lease contained a liability-shifting clause, the statute reduced a lessor's delictual premises liability from strict liability to negligence.

The statute's reduction in the standard of care was an important protection for landlords — at least until 1996. In that year, the Louisiana Legislature enacted sweeping tort reform by reducing a lessor's tort liability from strict liability to negligence.<sup>13</sup> After this change in the law, 9:3221, which also reduced a lessor's standard of care from strict liability to negligence, ceased to serve a protective function for lessors. For example, if today a defective stairway railing in a leased building fails, causing the lessee's guest to fall and suffer harm, the lessor is liable only if (1) the lessor knew, or in the exercise of reasonable care, should have known of the defect in the railing, (2) the damage could have been prevented by the lessor's exercise of reasonable care in repairing the defect, and (3) the lessor failed to exercise such reasonable care.<sup>14</sup> Although the lessor may attempt to shift this responsibility in tort to the lessee, 9:3221 negates any such attempt when the lessor (1) knew or should have known of the defect or had received notice thereof, and (2) failed to remedy it in a reasonable time.<sup>15</sup> Thus, under present law, the same showing that gives rise to a third party's action against the lessor likewise negates the effect of any attempt to shift this responsibility to the lessee.<sup>16</sup>

Also by 1996, another reason existed for 9:3221's repeal. In 1985, the Legislature enacted Louisiana Civil Code article 2004, dealing with exculpatory clauses and limitations of liability.<sup>17</sup> Article 2004 places only two limitations on exculpatory provisions, both derived from public policy. First, parties may not agree in advance to exclude or limit a party's intentional or gross fault.<sup>18</sup> Second, parties may not agree in advance to exclude or limit a party's liability for physical injury.<sup>19</sup> The text and structure of the article both suggest that, aside from these limitations, parties are free to waive the obligations of another. The retention of 9:3221 in 1996 perpetuated an important anomaly in lease law. Although under article 2004 parties to a contract are free to negate their liability for negligence, under 9:3221 this is not possible in a lease. Thus, this statute unintentionally became an impediment to

contractual freedom.<sup>20</sup>

Although 9:3221 no longer serves the purpose for which it was originally enacted, it has not been repealed. In 1996, the prevailing belief was that 9:3221 provided important protections for lessors in the realm of contract.<sup>21</sup> This mistaken understanding of the statute resulted in its retention, even after its utility to lessors had ended.

### Shifting a Lessor's Liability in Contract

Whereas 9:3221 was once a sensible rule in the tort setting, the statute has always fit poorly with contract law. In the 1930s, the implied warranty against vices and defects was freely waivable by the parties to the lease.<sup>22</sup> However, 9:3221 negates the effect of a warranty waiver when the lessor knew or should have known of the defect and failed to make timely repairs.<sup>23</sup> Because a broad interpretation of the statute was inconsistent with the law's purpose, in the years following its enactment, courts and commentators applied 9:3221 only to waivers of a lessor's *tort* liability.<sup>24</sup>

In 1981, the Supreme Court altered the trajectory of the statute by applying it to negate a waiver of the warranty against vices and defects. In *Tassin v. Slidell Mini-Storage, Inc.*, lessees of a storage unit sued their lessor, seeking compensation for water damage to their personal property caused by a defect in the storage unit doors.<sup>25</sup> The lessor defended by relying on the lease contracts, which absolved the lessor from any liability resulting from water damage.<sup>26</sup> The court found the waivers invalid, applying 9:3221 and concluding that the lessee knew or should have known that the doors would leak.<sup>27</sup> Following *Tassin*, courts have applied 9:3221 in nearly every case involving an attempted waiver of the lessor's contractual warranty obligations, despite its clear tort-based origins.

While the approach of *Tassin* is certainly contrary to the original intent of 9:3221, it has allowed courts to introduce public policy limitations on warranty waivers where none otherwise existed in the law. The Legislature later introduced its own limitations on warranty waivers in the 2005 revision of the Civil Code title on Lease. Article 2699 now provides that although the lessor's warranty



against vices and defects may be waived, this may be accomplished only “by clear and unambiguous language that is brought to the attention of the lessee.”<sup>28</sup> Moreover, an otherwise valid waiver is ineffective under three distinct circumstances:

- (1) To the extent it pertains to vices or defects of which the lessee did not know and the lessor knew or should have known;
- (2) To the extent it is contrary to the provisions of Article 2004; or
- (3) In a residential or consumer lease, to the extent it purports to waive the warranty against vices or defects that seriously affect health or safety.<sup>29</sup>

Despite Article 2699’s comprehensive regulation of warranty waivers, 9:3221 was not repealed in 2005 and was instead, shockingly, amended and reenacted.<sup>30</sup> Furthermore, an introductory phrase suggests that 9:3221 must operate as an exception to the Civil Code.<sup>31</sup> As in 1996, the statute’s preservation appears to be an error. A comment to 2699 inaccurately claims that 9:3221 applies only to “delictual or quasi-delictual obligations incurred as a result of injury occurring in the leased premises.”<sup>32</sup> While this statement may have been correct at the time of the statute’s enactment, it has not been accurate since 1981, when courts first applied 9:3221 to contract claims.

9:3221’s reenactment resulted in disorder and confusion in the jurisprudence. Courts, reading article 2699 and 9:3221 *in pari materia*, have tended to hold that the statute supersedes the Code.<sup>33</sup> Attempting to find some purpose for this statute in delict, numerous courts have now concluded — quite wrongly — that a case involving personal injuries, even when predicated on the warranty against vices and defects, is necessarily an action in “tort.”<sup>34</sup> Moreover, 9:3221’s application in lieu of 2699 has impeded the carefully constructed policies of the new code provision on warranty waivers. While examples of the conflicts between 9:3221 and article 2699 are numerous, two warrant special mention.

First, in commercial leases, 9:3221 unnecessarily restricts the contractual freedom of the parties to the lease. Under the Civil Code, a waiver of the lessor’s warranty is

generally enforceable if it is clear and unambiguous and brought to the attention of the lessee. Once properly executed, the waiver is invalid only if its application violates the rules of public policy articulated in article 2699. Under 9:3221, on the other hand, the lessor remains responsible for damage caused by any defect of which he knew or should have known and failed to timely repair. This excessive limitation undermines the intent of most commercial leases, in which sophisticated parties routinely shift responsibility for the premises to the lessee to the fullest extent permitted by law.

Second, in residential leases, 9:3221 is insufficiently protective of lessees. Article 2699 negates the waiver of any defects that “seriously affect the health or safety” of residential tenants. 9:3221 contains no such restriction, negating a waiver only when the lessor fails to remedy a defect of which he knew or should have known. By holding that 9:3221 supersedes the article 2699, courts have denied lessees the protection of legislation carefully crafted to ensure the safety of residential dwellings.

## Conclusion

Complete clarity will come to the law of the lessor’s premises liability only when the Legislature finally repeals 9:3221. Principles of the Civil Code, and not an outmoded and defunct statutory relic, should govern here. In the interim, courts should apply 9:3221 restrictively so as to minimize confusion and conflict in the law. In the tort setting, article 2004 — not 9:3221 — should regulate liability waivers. And, in light of new article 2699, 9:3221 has no place in the enforceability of waivers of the lessor’s contractual obligations. Coherence and stability must be reintroduced to this vital area of the law and, in turn, to the lessor-lessee relationship.

## FOOTNOTES

1. This essay is adapted from Professor Melissa T. Lonegrass’ article, “The Anomalous Interaction Between Code and Statute — Lessor’s Warranty and Statutory Waiver,” 88 Tul. L. Rev. 423 (2014).
2. La. Civ.C. arts. 2696, 2697.
3. La. Civ.C. arts. 2317.1, 2322.
4. 1996 La. Acts 710. Prior to 1996, owners and custodians were strictly liable in tort.
5. Traditionally, lessees have favored the contract theory. See Lonegrass, *supra* note 1, at 444.

6. La. Civ.C. art. 2698.
7. La. R.S. 9:3221.
8. See generally, *Terrenova v. Feldner*, 28 So.2d 287 (La. App. Orleans 1946); *Tassin v. Slidell Mini-Storage, Inc.*, 396 So.2d 1261 (La. 1981).
9. See, e.g., *Pecararo v. Grover*, 5 La. App. 676, 678 (La. App. Orleans 1927); *Cordona v. Glenny*, 1 Teiss 22, 24 (La. App. 1903).
10. See, e.g., *Clay v. Parsons*, 81 La. 597, 597 (1919).
11. *Klein v. Young*, 111 So. 495, 496-97 (La. 1926).
12. 1932 La. Acts 552.
13. 1996 La. Acts 710.
14. La. Civ.C. arts. 2317.1, 2322.
15. La. R.S. 9:3221
16. Compare La. Civ.C. arts. 2317.1, 2322 with La. R.S. 9:3221.
17. 1984 Acts No. 331.
18. La. Civ.C. art. 2004.
19. *Id.*
20. After 1996, there is no conflict between 9:3221 and article 2004’s limitation on exculpation of liability for physical injury, as the facts giving rise to a lessee’s claim would simultaneously negate any attempted waiver of that right of action.
21. Lonegrass, *supra* note 1, at 464 & n. 256.
22. See *supra* note 9.
23. La. R.S. 9:3221.
24. See Lonegrass, *supra* note 1, at 452-53.
25. 396 So.2d 1261, 1261 (La. 1981).
26. *Id.*
27. *Id.* at 1264.
28. La. Civ.C. art. 2699.
29. *Id.*
30. 2004 La. Acts 2614.
31. La. R.S. 9:3221 (“Notwithstanding the provisions of Louisiana Civil Code Article 2699 . . .”).
32. La. Civ.C. art. 2699, cmt. (h).
33. See, e.g., *Wells v. Norris*, 46,458, pp. 6-7 (La. App. 2 Cir. 8/10/11), 71 So.3d 1165, 1169; *Stuckey v. Riverstone Residential SC, LP*, 2008-1770, p. 10 (La. App. 1 Cir. 8/5/09), 21 So.3d 976-77.
34. See, e.g., *Wells v. Norris*, 46,458 (La. App. 2 Cir. 8/10/11), 71 So. 3d 1165, 1169; *Greely v. OAG Props., LLC*, 44,240 (La. App. 2 Cir. 5/13/09), 12 So.3d 490, 495.

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