Louisiana Law Review

Volume 21 | Number 1
Law-Medicine and Professional Responsibility: A Symposium
Symposium on Civil Procedure
December 1960

Torts

Wex S. Malone

Torts

*Wex S. Malone**

CONTRIBUTION AMONG TORTFEASORS

At the last session the legislature effected a conspicuous change with respect to the rights of contribution among solidary tortfeasors. Formerly the Louisiana law on this subject differed in only one respect from the majority common law position which wholly denies the right of one tortfeasor to contribution from another who was jointly liable for the same harm.[1] In this state if the victim actually secured a solidary judgment against both wrongdoers, one of them, by satisfying the judgment, was entitled to proceed against the other for his pro rata share. But a solidary judgment against both defendants was essential.[2] As a result, the right to contribution depended upon the caprice of the victim who was free to proceed against both, or either.

Article 2103 of the Civil Code has now been amended so as to read as follows:

> "When two or more debtors are liable in solido, whether the obligation arises from a contract, a quasi contract, an offense, or a quasi offense, it should be divided between them. As between the solidary debtors, each is liable only for his virile portion of the obligation.
>
> "A defendant who is sued on an obligation which, if it exists, is solidary may seek to enforce contribution, if he is cast, against his solidary co-debtor by making him a third party defendant in the suit, as provided in Articles 1111 through 1116 of the Code of Civil Procedure, whether or not the third party defendant was sued by the plaintiff initially, and whether the defendant seeking to enforce contribution if he is cast admits or denies liability on the obligation sued on by the plaintiff."[3]

---

*Professor of Law, Louisiana State University.

1. The leading common law case is Merryweather v. Nixon, 101 Eng. Rep. 1337 (1799). 1 HARPER & JAMES, THE LAW OF TORTS § 10.2 (1956). It is important to note, however, that almost half the common law states have statutes permitting contribution under varied circumstances.

2. Quatray v. Wicker, 178 La. 289, 151 So. 208 (1933); Aetna Life Ins. Co. v. DeJean, 185 La. 1074, 171 So. 450 (1936). The same result is produced by contribution statutes in Georgia, Kansas, Michigan, Mississippi, Missouri, New Jersey, New York, Texas and West Virginia.

3. LA. CIVIL CODE art. 2103 (1870), as amended, La. Acts 1960, No. 30, § 1.

As I understand this provision, a tortfeasor whose liability is in fact solidary can, upon satisfying more than his pro rata share of the claim, proceed for contribution against the other solidary obligor or obligors. Judged in the light of the jurisprudence prior to the amendment and assuming that the purpose of the new provision is to be gathered from a perusal of both paragraphs, it is not unlikely that it will be construed as entitling one solidary tortfeasor to claim contribution only in the instance where a suit for damages has been instituted against him and when he faces the prospect of a judgment subjecting him to liability for the entire claim. The language of the amendment, however, is also susceptible to the interpretation that the right to contribution arises whenever there is solidary tort liability irrespective of whether or not this liability is ever reduced to a judgment in favor of the victim.[4] Under this view the tortfeasor who has satisfied the claim through compromise would have a claim for contribution. In this connection it is noteworthy that the contribution claim of the settling tortfeasor is expressly recognized in the Model Uniform Contribution Among Tortfeasors Act,[5] which deliberately includes the phrase, "whether or not judgment has been recovered against all or some of them."

Since this latter suggested interpretation would have considerable support in policy and would be entirely rational from the language of the Louisiana provision, it may be profitable to conjecture concerning the problems that could arise should it be adopted.

In each of the following instances it may be assumed that *A* and *B* have injured *X* through their combined tortious conduct and that *X* has lost wages, incurred medical bills, and has experienced pain and suffering.

(1) *X* makes a settlement with *A*, who pays $5,000 in return for a release in which *X* reserves the right to proceed against *B*.[6] *A* then files suit for pro rata contribution against *B*.

4. This conclusion is based upon the assumption that the defendants become solidary debtors whenever the victim's cause of action against them arises, and that a plaintiff judgment is merely the means of enforcing the obligation and is not a condition precedent to the existence of the obligation itself.

5. 9 U.L.A. 156, § 1 (1951).

6. Note that in some states the statute provides that one tortfeasor who pays through voluntary settlement is entitled to proceed for contribution if his co-wrongdoer is also released by the settlement, but not otherwise. Trampe v. Wisconsin Tel. Co., 214 Wis. 210, 252 N.W. 675 (1934). This is also true under the Uniform Act, note 5 *supra*.

Presumably *A* must establish both that he (*A*) was liable for damages to *X* and also that *B* was solidarily liable with him. He must also show that the damages that would have been assessable in favor of *X* would have equaled or exceeded $5,000 if he is to secure *full* contribution of *B's* pro rata share of $2,500.[7] The showing that he must make in this independent claim for contribution is substantially the same that would have been required of *X* if the latter had sued both *A* and *B* for damages. If, following *A's* recovery from *B*, *X* thereafter institutes suit against *B*, *B* is presumably liable for any damages in excess of $5,000, and *B* can make a call upon *A* as a third party defendant. For example, if the total damage is found to be $10,000, *B* can be held to *X* for $5,000 ($10,000 less the $5,000 already paid by *A*). *B* will then be entitled to a judgment over against *A* for $2,500 upon satisfaction of *X*'s claim. Each party will have paid $5,000 (his virile share of the total liability). *A*'s original settlement will not have afforded him protection against *B's* later claim for contribution.

(2) Suppose the same set of facts, except that *X*, after having settled with *A* for $5,000, as above, now separately settles with and releases *B* for $1,000. What are the respective rights of *A* and *B* against each other? Are we to assume that each is entitled from the other to one-half of what he has paid? If so, *A* will be entitled to $2,500, and *B* will be entitled to $500, leaving a net difference owed by *B* to *A* of $2,000. This must be true even though as a result *A* will not receive a full one-half of what he paid *X* in settlement. The reason is that *A*, with reference to *B*, did not discharge the full solidary obligation ($6,000) by payment to *X*. Hence, he must surrender to *B* one-half of the latter's payment which discharges the remainder of the solidary debt. Of course, it must appear in the suit for contribution that at least a total of $6,000 was owed to *X* by the solidary obligors. If it had been made to appear by *A* that *X*'s damages were only $5,000, then *A*, by the compromise payment, discharged the entire obligation and *B*'s later payment was "by mistake," thus entitling him to no contribution.

It is noteworthy that several contribution statutes do not

7. If the amount of the solidary liability to *X* established in the contribution claim is less than the amount paid by *A* in settlement, *A* should still recover one half of the amount for which both could have been held. For example, if the total liability were found to be only $2,500, *A's* recovery against *B* should be $1,250, because *A*, having discharged the obligation in full, has placed *B* in the position where, in any suit by *X*, he can set up *A's* payment in full satisfaction.

entitle a solidary obligor to claim contribution unless he paid the common claim pursuant to a judgment in favor of the victim of the tort. This has the advantage of simplicity, since the questions of liability, damage, and right to contribution will necessarily be determined in a single proceding (under modern third party practice rules). But it is also to be considered that this position may substantially deter the making of amicable settlements, for the settling defendant deprives himself of all rights to contribution. It is noteworthy, however, that even under the Louisiana procedure one of two or more solidary defendants who settles may still thereafter remain subject himself to a claim for contribution if the remaining solidary tortfeasor later pays by way of settlement or pursuant to judgment. His only protection here is either to insist that all possible defendants participate in the settlement, or to insist in his private settlement that a release be given to all parties who may be solidarily responsible.

The recognition of a tortfeasor's claim to contribution would seem to make it highly advisable in the interest of fairness that contributory negligence be abandoned and that comparative negligence be substituted in lieu thereof. A moment's reflection will show why this is so. Assume that an automobile accident is attributable to the combined negligence of *A*, *B*, and *C*. Only *A*, however, is injured. If the principle underlying contribution (equality of burdens and damages) were applied, each of the three parties who were equally at fault should shoulder his virile share of the damage incurred. The proper solution, then, would be that *A*'s damages should be reduced by one-third because of his own contributing fault, and that the cost of the remaining two-thirds should ultimately rest in equal shares upon *B* and *C*. But, under the doctrine of contributory negligence, *A*, despite the contributing faults of *B* and *C*, must shoulder the entire loss himself. The only justification that can be asserted for this incongruous conclusion is that *A*'s negligence contributed to his *own* injury, rather than to an injury to *B* or *C*. Once the legislature has recognized the principle of apportionment of loss between the wrongdoers, it is difficult to appreciate how the courts could fail to apply the same principle to the negligent victim as well as to negligent co-defendants.

Wrongful Death and Survivorship of Tort Claims

Article 2315 was amended at the last session of the legislature so as to effect one important change and also to simplify

and make clearer the classes of persons designated as claimants or beneficiaries.[8] Formerly the death of a beneficiary of a wrongful death claim prior to final judgment served to extinguish the claim completely. The right of the beneficiary is by the amendment designated a "property right, which, on the death of the survivor in whose favor the right of action survived, is inherited by his legal, instituted, or irregular heirs, whether suit has been instituted thereon by the survivor or not."[9]

8. "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.

"The right to recover damages to property caused by an offense or quasi offense is a property right which, on the death of the obligee, is inherited by his legal instituted, or irregular heirs, subject to the community rights of the surviving spouse.

"The right to recover all other damages caused by an offense or quasi offense, if the injured person dies, shall survive for a period of one year from the death of the deceased in favor of: (1) the surviving spouse and child or children of the deceased, or either such spouse or such child or children; (2) the surviving father and mother of the deceased, or either of htem, if he left no spouse or child surviving; and (3) the surviving brothers and sisters of the deceased, or any of them, if he left no spouse, child, or parent surviving. The survivors in whose favor this right of action survives may also recover the damages which they sustained through the wrongful death of the deceased. A right to recover damages under the provisions of this paragraph is a property right which, on the death of the survivor in whose favor the right of action survived, is inherited by his legal, instituted, or irregular heirs, whether suit has been instituted thereon by the survivor or not.

"As used in this article, the words 'child,' 'brother,' 'sister,' 'father,' and 'mother' includes a child, brother, sister, father, and mother, by adoption, respectively. *(As amended Acts 1960, No. 30, § 1.)*

9. LA. CIVIL CODE art. 2315 (1870), as amended, by La. Acts 1960, No. 30, § 1.