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Contribution Among Joint Tortfeasors

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course, he should be permitted to do so, provided he did not substantially reduce its value upon termination of the usufruct.

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Contribution Among Joint Tortfeasors

Where contribution is permitted among joint tortfeasors bound in solido, each may recover any amount he has paid in excess of his proportionate share.[1] This Comment will examine the Louisiana law pertaining to the right of contribution among joint tortfeasors, with particular attention to Article 2103 of the Louisiana Civil Code as recently amended.[2]

The State of the Law Prior to 1960

The common law denies the right of contribution.[3] The rationale of this rule seems to be that one should not be able to allege his own turpitude as the basis of a right to recover from another.[4] However, the courts in some jurisdictions have deviated from this, where the basis of joint liability is simple negligence, and deny contribution only where the liability was incurred through the commission of an intentional tort or gross negligence.[5] Furthermore, a significant number of states have adopted statutes permitting contribution where one of two or more defendants cast jointly and severally has paid more than his proportionate share of the judgment.[6]

1. PROSSER, TORTS 246, § 46(f) (1951); Hodges, *Contribution and Indemnity Among Tortfeasors*, 26 TEX. L. REV. 150 (1947). Contribution among joint tortfeasors should be distinguished from the doctrine of comparative negligence which is applied in most civil law jurisdictions and in admiralty law. The doctrine of comparative negligence is best exemplified where the court or jury apportions the loss between two tortfeasors in proportion to their relative fault. Malone, *Comparative Negligence—Louisiana's Forgotten Heritage*, 6 LOUISIANA LAW REVIEW 125 (1945); Philbrick, *Loss Apportionment in Negligence Cases*, 99 U. PA. L. REV. 742 (1951); Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465 (1953).

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

3. 1 HARPER & JAMES, TORTS § 10.2 (1956). This rule was first announced in the case of Merryweather v. Nixan, 101 Eng Rep. 1337 (1799).

4. See Reath, *Merryweather v. Nixan*, 12 HARV. L. REV. 176 (1898).

5. Advanced Refrigeration v. United Motors Service, 69 Ga. App. 783, 26 S.E.2d 789 (1943); Constantive v. Scheidel, 249 Iowa 953, 90 N.W.2d 10 (1958); East Coast Freight Lines v. Mayor and City Council of Baltimore, 190 Md. 256, 58 A.2d 290 (1948). Kentucky and Virginia have limited contribution by adopting identical statutes providing: "Contribution among wrongdoers may be enforced where the wrong is a mere act of negligence and involves no moral turpitude." KY. REV. STAT. § 412.030 (1953); VA. CODE ANN. § 8-627 (1950).

6. Commercial Casualty Ins. Co. v. Leonard, 210 Ark. 575, 196 S.W.2d 919 (1946); Brown Hotel Co. v. Pittsburg Fuel Co., 311 Ky. 396, 224 S.W.2d 165

In Louisiana the basis for permitting contribution among joint tortfeasors[7] is found in the Civil Code. Article 2324 makes joint tortfeasors liable in solido.[8] Article 2103,[9] prior to its amendment, permitted contribution among individuals bound in solido, and in at least one instance was clearly construed to apply to obligations *ex delicto* as well as those arising *ex contractu*.[10]

The necessity to be cast in judgment. In *Quatray v. Wicker*[11] the Louisiana Supreme Court held that the right of contribution exists where two or more joint tortfeasors have been solidarily cast in a judgment and one of them has paid it. Although this case left some doubt as to whether a solidary *judgment* against both tortfeasors is a prerequisite to the enforcement of the right of contribution, later cases have clearly taken this position.[12]

(1950); Anstine v. Pennsylvania R.R., 352 Pa. 547, 43 A.2d 109 (1945); Sandley v. Pilsner, 269 Wis. 90, 68 N.W.2d 808 (1955). Statutes of this nature generally provide for the right of co-defendants to enforce contribution only where a solidary judgment is rendered and one of the defendants pays the whole or at least more than his pro rata share. State *ex rel.* McClure v. Dinwiddie, 358 Mo. 15, 213 S.W.2d 127 (1948). But at least one jurisdiction has taken the position that while the statute literally applies to judgments rendered against two or more wrongdoers, its purpose was to relieve the harshness of the common law, and its benefits extend to cases where the injured party does not elect to sue all the tortfeasors, and allows a defendant to bring in other wrongdoers provided the injured party's case is not prejudiced. Union Bus Lines v. Byrd, 142 Tex. 257, 177 S.W.2d 774 (1944); Goldstein Hat Mfg. Co. v. Cowen, 136 S.W.2d 867 (Tex. Civ. App. 1939); Lottman v. Cuilla, 288 S.W. 123 (Tex. Civ. App. 1926).

7. To be joint tortfeasors, the parties must either act together in committing the wrong, or their acts, if independent of each other, must unite in causing a single injury. BLACK'S LAW DICTIONARY (4th ed. 1951). For a discussion of the various definitions of this term see PROSSER, TORTS § 46 (1951).

8. LA. CIVIL CODE art. 2324 (1870), which provides: "He who causes another person to do an unlawful act, or assists or encourages in the commission of it, is answerable, *in solido*, with that person, for the damage caused by such act."

9. *Id.* art. 2103: "The obligation contracted *in solido* towards the creditor, is of right divided amongst the debtors, who, amongst themselves, are liable each only for his part and portion."

10. American Employers' Ins. Co. v. Gulf States Utilities Co., 4 So.2d 628 (La. App. 1st Cir. 1941).

11. 178 La. 289, 151 So. 208 (1933).

12. Aetna Life Ins. Co. v. DeJean, 185 La. 1074, 171 So. 450 (1936). In this case DeJean and Sandoz, the latter a guest passenger in DeJean's automobile, sued Aetna and its assured as the result of an automobile accident. Sandoz recovered judgment but DeJean failed to recover after being found guilty of *contributory negligence*. In denying Aetna's right of contribution from DeJean, the court announced that no right of contribution existed notwithstanding the fact that DeJean has been judicially declared *contributorily* negligent. See Sincer v. Bell, 47 La. Ann. 1548, 18 So. 755 (1895); Kahn v. Urania Lumber Co., 103 So. 2d 476 (La. App. 2d Cir. 1958). Often confused with contribution is the right of indemnification. A party only "technically" or "constructively" at fault, who is sued and pays a judgment, may be reimbursed for the entire amount by another who actually caused the injury. In this instance it is immaterial whether both parties are cast solidarily in a judgment. Appalachian Corp. v. Brooklyn Cooperage Co., 151 La. 41, 91 So. 539 (1922). In the *Appalachian* case the owner of a building, who was sued for injuries sustained by a night watchman while the

The Third-Party Practice Act. In 1954 the legislature enacted the Third-Party Practice Act,[13] which provides in part:[14]

> "In any civil action presently pending or hereafter filed, the defendant in a principal action may by petition bring in any person (including a co-defendant) who is his warrantor, or who is or may be liable to him for all or part of the principal demand."

This act, while considerably broader than the call in warranty,[15] which it replaced, was insufficient, of itself, to permit a defendant tortfeasor to join another who was not sued. The Second Circuit Court of Appeal, in *Kahn v. Urania Lumber Company*,[16] construed the act as being procedural in character and as affording a defendant no right to enforce contribution from a joint tortfeasor not sued at the instance of the injured party. The language of this opinion indicates that no substantive right existed to enforce contribution regardless of the procedural remedy which might have been enacted.[17] A later case, commenting on the *Kahn* decision, contains language to the effect that a joint tortfeasor has the substantive right *not* to be impleaded by another tortfeasor who is sued.[18] As a practical consequence, these decisions would seem to permit the plaintiff not only to determine whom he will sue, but whether or not the defendant would be entitled to contribution from a joint tortfeasor.[19]

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building was still in possession of the owner's vendor, was allowed to sue for indemnity from his vendor on the theory that the vendor was primarily responsible for the injuries. See London Guarantee & Accident Ins. Co. v. Vicksburg, S. & P. R.R., 153 La. 287, 95 So. 771 (1923); American Employers' Ins. Co. v. Gulf States Utilities Co., 4 So.2d 628 (La. App. 1st Cir. 1941).

13. La. Acts 1954, No. 433, incorporated as LA. R.S. 13:3381-3386 (Supp. 1954). This act was repealed by La. Acts 1960, No. 32, § 2, effective January 1, 1961, and replaced by LA. CODE OF CIVIL PROCEDURE arts. 1031-1040, 1111-1116, (1960).

14. La. Acts 1954, No. 433, § 1.

15. The call in warranty was derived from French law. The notes of the redactors of the Louisiana Code of Practice of 1825 cite "Pothier, civil procedure, chap. 2, art. 2, § 1" as the source of the call in warranty. *Projet of the Code of Practice of 1825*, 2 LOUISIANA LEGAL ARCHIVES 65 (1937). Its use as a procedural device was jurisprudentially limited by the Louisiana Supreme Court to cases involving warranty based upon a contract of warranty or upon a statutory provision expressly permitting the defendant in warranty to be called in. Bank of Baton Rouge v. Hendrix, 194 La. 478, 193 So. 713 (1940); H. W. Bond & Bro. v. New Orleans, 186 La. 60, 171 So. 572 (1936); Girouard v. Agate, 44 So.2d 388 (La. App. 1st Cir. 1950).

16. 103 So.2d 476 (La. App. 2d Cir. 1958).

17. *Id.* at 479: "[T]here is no substantive law in this State granting or conferring a right upon a joint tortfeasor to contribution from another tortfeasor as such and simply because of such relationship."

18. Brown v. New Amsterdam Casualty Co., 136 So.2d 283 (La. App. 3d Cir. 1962).

19. See, *e.g.*, Spanja v. Thibodaux Boiler Works, 37 So.2d 615 (La. App. Orl.

The 1960 Amendment to Civil Code Article 2103

Article 2103 of the Civil Code as amended in 1960 reads as follows:

> "When two or more debtors are liable in solido, whether the obligation arises from a contract, a quasi contract, an offense, or 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 codebtor 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."[20]

Although one court has acknowledged that the 1960 amendment effects a change in the substantive law relative to contribution among joint tortfeasors, the extent of this change has not as yet been delineated in a decision.[21] It is clear from the amendment that contribution may be enforced by calling a joint tortfeasor as a third party defendant in the original action. Less clear, however, is the question whether the right of contribution also exists where the party cast has failed to call in his joint tortfeasor, and later seeks contribution in a separate action. Article 1113 of the Code of Civil Procedure provides that "a defendant who does not bring in as a third party defendant a person who is liable to him for all or part of the principal demand does not on that account lose his right or cause of action against" that person.[22] Since the amendment incorporates Articles 1111 through 1116 of the Code of Civil Procedure by refer-

Cir. 1948). In this case the court emphasized that an injured party could sue either or both joint tortfeasors, while neither had any right against the other. Furthermore, it was held that defendants against whom an injured party recovered no judgment were not parties to a co-defendant's appeal from a judgment against the co-defendant in favor of the injured party, where all the defendants had been alleged to be solidarily liable and the injured party had not appealed. See Waggonner v. Allstate Insurance Co., 128 So.2d 214 (La. App. 2d Cir. 1961); Haindel v. Sewerage & Water Board, 115 So.2d 871 (La. App. Orl. Cir. 1959); DeCuers v. Crane Co., 40 So.2d 61 (La. App. Orl. Cir. 1949).

20. La. Acts 1960, No. 30, § 1.

21. Brown v. New Amsterdam Casualty Co., 136 So.2d 283 (La. App. 3d Cir. 1961).

22. LA. CODE OF CIVIL PROCEDURE art. 1113 (1960).

ence as the means to enforce contribution, it seems that there is sufficient substantive basis for a separate cause of action.[23] However, in this instance the right could not be asserted if the person from whom contribution is sought proves that he had means of defeating the action which were not utilized.[24]

Compromise by a joint tortfeasor. Article 2203 of the Civil Code provides that the release of one solidary obligor discharges all others, unless the creditor has expressly reserved his rights against the other obligors.[25] Thus the release of one tortfeasor by settlement does not discharge the others liable in solido where a right of action against them is expressly reserved.[26] In effect, the tortfeasor, who enters into a settlement agreement in exchange for his release from liability under these circumstances, satisfies only his virile portion of the obligation. Since this is contemplated by the language of the amendment to Article 2103, it would seem that the principal of contribution would not be applicable to this situation. However, there is considerable uncertainty about the effect of a compromise settlement by one joint tortfeasor upon the rights of contribution of those remaining who are later sued and held liable in solido.

Prior to the amendment of Article 2103 the only effect of a compromise by one tortfeasor on a judgment rendered against another solidarily liable was the reduction of the amount of the judgment by the amount received by virtue of the compromise agreement.[27] Thus, for example, where one joint tortfeasor entered into a settlement agreement and paid $1,000 for his discharge from further liability, the effect on a judgment of $10,000

23. See *ibid.*, and accompanying text.

24. *Ibid.* This article provides in part: "A defendant who does not bring in as a third party defendant a person who is liable to him for all or part of the principal demand does not on that account lose his right or cause of action against such person, *unless* the latter proves that he had means of defeating the action which were not used." (Emphasis added.)

25. LA. CIVIL CODE art. 2203 (1870), reads in part: "In the latter case, he can not claim the debt without making a deduction of the part of him to whom he has made the remission." For an excellent discussion of the distinction between remission of the debt and remission of the solidarity under this article, see Comment, 14 LOUISIANA LAW REVIEW 828 (1954).

26. Orr & Lindsley v. Hamilton, 36 La. Ann. 790 (1884); Irwin v. Scribner, 15 La. Ann. 583 (1860); Crowell & Spencer Lbr. Co. v. Lacaze, 188 So. 446 (La. App. 1st Cir. 1939); Recile v. Southern United Ice Co., 136 So. 769 (La. App. 1st Cir. 1931). No particular form is required for such a reservation if the intention to reserve the right is clearly shown. Landry v. New Orleans Pub. Service, Inc., 177 La. 105, 147 So. 698 (1933); Cusimano v. Ferrara, 170 La. 1044, 129 So. 630 (1930). If a written release is given without a reservation, parol evidence is inadmissable to show such a reservation. Reid v. Lowden, 192 La. 811, 189 So. 286 (1939).

27. Wilson v. Scurlock Oil Co., 126 So.2d 429 (La. App. 2d Cir. 1961).

subsequently rendered against another joint tortfeasor rendered it collectible only in the amount of $9,000. Payment of the $9,000 did not confer the right of contribution since contribution was allowed only where both parties were cast solidarily by a judgment and where one party cast had paid more than his virile share.[28] By contrast, a creditor, desiring to release one solidary debtor, may reserve his rights against the remaining co-debtors, but must deduct the discharged debtor's portion from the total debt.[29] Thus where *A* and *B* are bound conventionally in solido to *C* for $10,000, the discharge of *A* for $1,000 would operate as a full discharge of *A's* virile share, making *B* liable only for $5,000, his virile portion. The rationale of this interpretation of Article 2203 seems to be that by discharging one solidary co-debtor the creditor deprives the other co-debtor of his recourse against the one discharged.[30]

It would seem that the 1960 amendment to Article 2103 has given tortfeasors, liable in solido, the same status and rights which previously were limited to conventional solidary obligors.[31] Therefore the discharge of one tortfeasor under Article 2203 should result in a pro rata diminution of the liability of those not released.[32] Under this view, the question of contribution among those tortfeasors cast solidarily in judgment and one who has settled and been released will not arise. Since the one who is released leaves the remaining tortfeasors liable for the total damage caused, less his discharged pro rata portion, there would be no basis for a claim of contribution, since he has discharged his virile portion.

Conclusions

It seems that the principal substantive change in the law effected by the amendment to Article 2103 is that one sued in tort may now seek contribution by utilization of the third party demand. It is also possible, although less certain, that the one who has been adjudicated liable in a tort action may institute a subsequent separate suit against one whom he alleges to have

28. Aetna Life Ins. Co. v. DeJean, 185 La. 1704, 171 So. 450 (1936). See note 12 *supra* and accompanying text.

29. LA. CIVIL CODE art. 2100 *et seq.*, 2203 (1870). See Comments, 2 LOUISIANA LAW REVIEW 365, 371 (1940), 25 TUL. L. REV. 217, 231 (1951).

30. See, *e.g.*, Lynch v. Leather, 17 La. Ann. 118 (1865).

31. LA. CIVIL CODE art. 2103 (1870), as amended, La. Acts 1960, No. 30, § 1. The article makes no distinction between obligations *ex delicto* and *ex contractu*.

32. See notes 29 and 30 *supra*, and accompanying text.

been a joint tortfeasor. Since the right of contribution is founded on the theory that payment by one discharges another, its use should not be extended to compromise agreements where there has been a reservation of rights against the other tortfeasors, the effect of which should reduce the prospective judgment by the virile share of the party who enters the compromise. However, if the court follows its earlier decisions, whereby a settlement and release for a certain sum of money merely reduces the liability of the remaining obligees by the amount of the settlement rather than the discharged party's proportionate share, then it is submitted that contribution should be allowed against the compromising tortfeasor, so that those cast will not have to pay more than their virile shares. For the court to follow its earlier decisions on this question would be objectionable for two reasons: first, it would hamper settlements and compromises of tort claims since the one who settles would have no assurance that he would not later be called upon to contribute to the payment of a judgment rendered against the remaining tortfeasors; secondly, the purpose of the amendment to Article 2103 seems to be the removal of the distinction that existed between solidary obligors *ex delicto* and *ex contractu;* therefore prior distinctions between the two should no longer exist.

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