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The Nonsolidness of Solidarity

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NOTES

THE NONSOLIDNESS OF SOLIDARITY

Plaintiff's child was struck by a car driven by defendant, a minor. In the original suit between plaintiff and defendant's father, the defendant was found free of negligence and the case dismissed. While that suit was pending on application for certiorari to the supreme court, defendant reached majority, and plaintiff initiated against him a second suit based on the same facts. Defendant excepted to the suit on the basis of prescription,[1] and the court maintained this exception over plaintiff's contention that defendant and his father were debtors *in solido* and that plaintiff's first suit had therefore interrupted prescription. In affirming the dismissal, the supreme court *held* that the father was not solidary codebtor with his minor son for the son's alleged tortious conduct, and that consequently, bringing suit against the father did not interrupt prescription against the son. *Wooten v. Wimberly,* 272 So. 2d 303 (La. 1972).

The concept of solidary obligations originates in Civil Code article 2091 which states that

> [t]here is an obligation *in solido* on the part of the debtors, when they are all obliged to the same thing, so that each may be compelled for the whole, and when the payment which is made by one of them, exonerates the others toward the creditor.[2]

This definition of solidary obligations consists of three elements: multiple debtors; liability of each for the whole debt; and release of all by one's payment. The logical import of this article is that any obligation containing these three elements should be an obligation *in solido*. However, this broad definition is significantly limited by article 2093[3] which declares that solidarity cannot be presumed: it must be either expressly stipulated or provided by law. Consequently, solidarity can occur in only two situations: where the parties themselves have indicated either by use of the term *in solido* or otherwise that the obligation contains the required three elements; or where the law

1. Defendant also raised exceptions of res judicata, improper division of a cause of action and a plea of collateral estoppel, but the trial court and court of appeal maintained only the pleas of prescription. Wooten v. Wimberly, 272 So. 2d 303, 304 (La. 1972).

2. LA. CIV. CODE art. 2091.

3. LA. CIV. CODE art. 2093: "An obligation *in solido* is not presumed; it must be expressly stipulated.

"This rule ceases to prevail only in cases where an obligation *in solido* takes place of right by virtue of some provisions of the law."

provides that these elements exist relative to an obligation. These requisite elements of solidarity should be distinguished from other characteristics described in articles 2091 through 2107, which do not help to identify an obligation as solidary or not, but rather determine the legal effects of solidarity.

Most of the characteristics or legal effects of solidarity are based on the notion that codebtors *in solido* are mandataries of one another.[4] Solidary codebtors can be bound either directly or conditionally, depending upon the terms of the agreement or the provision of law.[5] For example, a man may obligate himself solidarily as surety for his codebtor on the condition that his liability not arise until payment first be demanded from the principal debtor and not received. Another characteristic resulting from this mutual mandatary relationship is that suit against one debtor interrupts prescription for his codebtors,[6] as well as serves to put all the codebtors in default.[7] Furthermore, even though the creditor may demand the whole debt from any of the debtors,[8] that debtor retains the right of contribution against his codebtors. Therefore, unless the debt is principally his concern,[9] he can force his codebtors to reimburse him for their virile portion of the debt.[10]

The issue in the instant case centered upon identifying the nature of the father and son's obligation in order to determine whether the legal effect of solidarity concerning interruption of prescription applied to the situation. The determination reached by the court was that the dual liability of the father and son[11] was not solidary and that prescription of the suit against the son was not interrupted by the original suit against the father. However, in reaching this decision, the court seems to have confused some of the legal effects of solidarity with its requisite elements, thereby basing its decision essentially on the inverse argument that, "[t]he legal consequences attaching to solidary obligations properly-so-called do not necessarily extend to the legal responsibilities of the father for the torts of his minor child."[12]

4. 4 MARCADE, EXPLICATION THEORIQUE ET PRATIQUE DU CODE CIVIL n°592, at 490. (7eme ed., 1873).

5. LA. CIV. CODE art. 2092; *cf.* LA. CIV. CODE art. 3045.

6. *Id.* art. 2097.

7. *Cf.* LA. CIV. CODE arts. 1912, 2046, 2047, 2096.

8. LA. CIV. CODE art. 2094.

9. *Id.* art. 2106.

10. *Id.* art. 2104.

11. The law holds both the minor and his father liable for the minor's offenses and quasi-offenses. LA. CIV. CODE arts. 237, 2227, 2315 and 2318.

12. Wooten v. Wimberly, 272 So. 2d 303, 307 (La. 1972).

One of the legal consequences of the father's liability under article 2318[13] found by the court to be inconsistent with the nature of solidarity concerned article 3552[14] which provides that acknowledgement of a debt by one debtor *in solido* interrupts prescription against the debt for his codebtors.[15] The court determined in this case that the minor's admission of fault would not constitute acknowledgement serving to interrupt prescription, basing its decision primarily on a 1948 case, *Cox v. Shreveport Packing Co.*,[16] which held that a master is not solidarily liable with his servant for the latter's torts. Even though *Cox* in no way involved the liability of the parent and child, the court in that case analogized the master's liability to that of the father and found them both not solidary on the basis that solidarity was not expressly stipulated as required by article 2093. Regardless of whether this characteristic is applicable,[17] the court's reverse reasoning is evident: it attempted to identify the obligation according to its legal effects when in actuality the legal consequences of an obligation can properly be determined only after the obligation is identified.

Another argument advanced by the court was that the son could not avail himself of the advantages of debtors *in solido* granted by article 2103,[18] which ordinarily extends to a debtor having satisfied a debt *in solido* the right to force his codebtors to contribute their virile portions, even to the extent of making them third party defendants in a suit on the debt by the creditor:

> [I]t is plain that a minor son who discharges a debt created by his own independent tortious conduct cannot claim contribution

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13. LA. CIV. CODE art. 2318: "The father, or after his decease, the mother, are responsible for the damage occasioned by their minor or unemancipated children, residing with them, or placed by them under the care of other persons, reserving to them recourse against those persons. The same responsibility attaches to the tutors of minors."

14. LA. CIV. CODE art. 3552: "A citation served upon one debtor *in solido*, or his acknowledgment of the debt, interrupts prescription with regard to all the others and even to their heirs."

15. Wooten v. Wimberly, 272 So. 2d 303, 306 (La. 1972).

16. 213 La. 53, 34 So. 2d 373 (1948).

17. The court in *Cox v. Shreveport Packing Co.*, 213 La. 53, 59, 34 So. 2d 373, 375 (1948), gave no basis for its decision that article 3552 was inapplicable to the dual obligation of parent and child for the child's torts, and even suggested that the article might apply only to contractual obligations.

18. LA. CIV. CODE art. 2103: "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." (Emphasis added).

> from his father, who had no part in the tortious action but who is nevertheless responsible under Article 2318.[19]

The court's observation is certainly correct, but the unavailability of contribution is not, in this case, inconsistent with the nature of solidarity. Though the right of contribution is generally available to co-debtors *in solido*, article 2106 notes an exception to this rule:

> If the affair for which the debt has been contracted *in solido*, concern only one of the coöbligors *in solido*, that one is liable for the whole debt towards the other codebtors, who, with regard to him, are considered only as securities.[20]

Instead of the reverse reasoning applied by the court, a more pertinent consideration would seem to be whether the father's liability under article 2318 contained the requisite elements of solidarity prescribed in articles 2091 and 2093. Since the law holds both the father and minor son liable for the son's torts, the first three elements given in article 2091 are easily evident,[21] and not discussed by the court. However, the other requirement, that solidarity not be presumed unless provided by law, is more questionable, and the court did attempt to determine whether it was present in this case.

The court's analysis of this requirement began with its initial observation that solidarity must be created by either contract, testament or operation of law, and that since the paternal relationship involves neither contract nor testament, the solidarity, if it existed, must have been established by law.[22] The court then determined that even where the elements of solidarity are established by law, article 2093 requires that solidarity be expressly stipulated in the particular provision assigning liability. Therefore, since article 2318 which provides legal basis for the father's liability does not indicate solidarity, his liability cannot be deemed *in solido*.

The disquieting effect of the court's decision is that it has found a situation where the law clearly indicates that two different persons are equally and independently responsible for the same debt, and where payment by one would exonerate the other, but has found the obligation thereby created not to be *in solido* because no statute expressly stipulates its solidarity as provided in article 2093. However, the court's interpretation of article 2093, as applicable to a

19. Wooten v. Wimberly, 272 So. 2d 303, 307 (La. 1972).

20. LA. CIV. CODE art. 2106.

21. Multiple debtors, responsibility of each debtor for the whole debt and exoneration for all debtors upon payment by one.

22. Wooten v. Wimberly, 272 So. 2d 303, 305 (La. 1972).

situation like the instant case where solidary liability is provided by law, seems inconsistent with both grammatical construction and traditional interpretation. The article first states the rule that an obligation *in solido* cannot be presumed and that it must be expressly stipulated; then the second paragraph notes an exception when the solidarity takes place by some provision of law. Certainly an obvious construction of this article, if not the most apparent, is that the entire rule of the first paragraph is inapplicable when solidarity results from provision of law rather than by contract, and that consequently no express stipulation of solidarity is necessary in such cases. Therefore, where the law expressly requires that several persons be equally and independently liable for one debt and provides as well that if one pays the debt, the others are exonerated, then solidarity is provided by law and the rule of express stipulation "ceases to prevail."[23] Furthermore, this latter construction has been given article 1202 of the French Civil Code, of which our article 2093 is a virtually verbatim translation, by both legal commentators and the courts.

> The legal responsibility which may be imposed on several persons jointly is in solidum only in cases expressly or impliedly provided by law.
>
> The first paragraph of Article 1202 dealing with conventional solidarity, requires that it be expressly stipulated. But it is otherwise with regard to the second paragraph of the same article which, dealing with legal solidarity, admits it in all cases where it results from a provision of law, without requiring an express declaration.[24]

Planiol also recognizes this broader construction for legal solidarity, not only in the article itself, but also in the application given it by the courts:

> It is precisely because it is possible to attach several legal solutions to a number of primary principles that the courts have been able to give a very broad extension to the area of passive solidarity, in spite of the rule of article 1202: they have used in a most forceful fashion, the argument of analogue, and have admitted solidarity, because in an analogous situation, it had been established by law.[25]

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23. LA. CIV. CODE art. 2093.

24. 4 AUBREY AND RAU, COURS DE DROIT CIVIL FRANCAIS n°298b (La. St. L. Inst. transl., 1971).

25. 2 PLANIOL, TRAITE ELEMENTAIRE DE DROIT CIVIL n°1856 (12eme ed., 1952). (Translated by the author.)

Not only does this construction of article 2093 appear sounder doctrinally than the court's interpretation, but it also eliminates the inconsistency with the Code's definition of solidarity that plagues the court's analysis.

As ably pointed out and discussed by Justice Tate in his concurring opinion,[26] the court's decision is "probably correct for the wrong reasons,"[27] resulting primarily from the hard facts of the case. In spite of the obviously fair result, however, the decision has misconstrued a principle in the doctrine of solidarity so as to further complicate the use and understanding of the concept in our law. As Justice Tate predicted,[28] the results of this complication have rapidly appeared as courts have tried to apply the principles as interpreted by the supreme court in *Wooten*. For example, in the recent Third Circuit case, *Tabb v. Norred*,[29] plaintiff attempted to argue on the basis of *Wooten* that if the defendant father and son were not solidarily liable for the tort committed by the son, then the father was not entitled to enforce contribution from the son's joint tortfeasor, and thereby reduce his liability to one-half the total damages awarded. In spite of this logical extension of the *Wooten* holding, the court rejected the plaintiff's contention and attempted to describe the parent's liability for a child's torts:

> We believe Article 2318 of the Civil Code imposes liability on the father for the full amount of the damage occasioned by his minor child. The child, of course, is also liable for the full amount of such damages. Either the father or the child may be compelled to pay the whole debt, we think, and payment by one will exonerate the other.[30]

This description of the parent's liability under article 2318 from *Tabb* appears to parallel precisely the definition of obligations *in solido* in article 2091, in spite of the express holding in *Wooten* that such liability is not solidary. As confusing as the doctrine of solidarity is to Louisiana practitioners, it is unfortunate that the court has increased that confusion by adding the inconsistency of its rule in the instant case, that not all obligations conforming to the Code's definition of debts *in solido* in articles 2082 and 2091 are actually solidary,

26. Wooten v. Wimberly, 272 So. 2d 303, 307 (La. 1973) (concurring opinion).
27. *Id.* at 310.
28. *Id.* at 311.
29. 277 So. 2d 223 (La. App. 3d Cir. 1972).
30. *Id.* at 232.

and that to those multiple obligations mentioned in article 2077[31] must be added another type as yet unnamed.

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THE PARTNER AS A THIRD PARTY TORTFEASOR: LIABILITY OR IMMUNITY UNDER THE WORKMEN'S COMPENSATION ACT

Under the Louisiana workmen's compensation law, the employer is afforded immunity from suit brought by an injured employee.[1] In cases where the injury is caused by a third party tortfeasor who is not the employer, however, recovery from the employer or his insurer does not preclude suit by the injured employee against the third party.[2] Thus, a plaintiff seeking recovery in workmen's compensation is encouraged to have his tortfeasor judicially recognized as a "third party."[3] Various problems may arise, however, when "third party

31. LA. CIV. CODE art. 2077: "Where there are more than one obligor or obligee named in the same contract, the obligation it may produce may be either several or joint or *in solido*, both as regards the obligor and the obligee."

1. "The rights and remedies herein granted to an employee or his dependent on account of a personal injury for which he is entitled to compensation under this Chapter shall be exclusive of all other rights and remedies of such employee, his personal representatives, dependents, or relations." LA. R.S. 23:1032 (1950). *See also* Comment, 33 LA. L. REV. 325 (1973).

2. "When an injury for which compensation is payable under this Chapter has been sustained under circumstances creating in some person (in this Section referred to as third person) other than the employer a legal liability to pay damages in respect thereto, the injured employee or his dependent may claim compensation under this Chapter and the payment or award of compensation hereunder shall not affect the claim or right of action of the injured employee or his dependent against such third person, . . . and such injured employee or his dependent may obtain damages from or proceed at law against such third person to recover damages for the injury." LA. R.S. 23:1101 (1950).

3. Assuming plaintiff's only recourse for injuries is workmen's compensation, his potential for recovery is severely limited by statute. For example, the maximum compensation allowed is $65.00 per week for a period of 500 weeks if the injury causes death or permanent disability. LA. R.S. 23:1202 (1950), *as amended by* La. Acts 1973, No. 71; LA. R.S. 23:1221 (1950), *as amended by* La. Acts 1968, Ex. Sess. No. 25 § 5; LA. R.S. 23:1231 (1950), *as amended by* La. Acts 1968, Ex. Sess. No. 25 § 6.

Medical expenses are generally limited to $12,500.00. LA. R.S. 23:1203 (1950), *as amended by* La. Acts 1952, No. 322 § 1; 1956, No. 282 § 1; 1968, No. 103 § 1.

On the other hand, if plaintiff is successful in arguing that his tortfeasor is a third party not his employer, he may recover both workmen's compensation from his employer, *and* he may additionally recover an amount virtually unlimited in tort from his tortfeasor. ("[T]he payment or award of compensation hereunder shall not . . .