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THE ABILITY TO PAY DOCTRINE IN LOUISIANA

One of the most established principles in the civil law is that one who does damage to another must make full reparation.¹ In Louisiana, the principle is embodied in Civil Code articles 1934 and 2315, which the courts have interpreted as requiring that in matters *ex contractu*² and *ex delicto*³ quantum should be commensurate with the degree of harm sustained. Louisiana courts have established, however, an exception to the otherwise well-accepted rule: in certain cases, the amount of judgment will be reduced because of the defendant's inability to pay.⁴ In a recent case,⁵ the First Circuit Court of Appeal explained the rationale of the "ability to pay" doctrine:

It is well settled that, in awarding damages, a trial court may consider the ability of a defendant to respond in judgment. The foregoing rule is based on the equitable principle that courts will not grant vain and useless relief or render a judgment incapable of execution.⁶

1. See *Black v. Carrollton R.R.*, 10 La. Ann. 33, 43-46 (1855) (thorough discussion of French doctrine regarding full reparation) and Code Napoleon arts. 1149, 1151-52, 1382 (1804); Marr, *The Punitive Damages Heresy*, 2 SO. L. Q. 1-4 (1917); *Urk v. Southern Farm Bureau Cas. Ins. Co.*, 181 So. 2d 69, 70 (La. App. 2d Cir. 1965).

2. *Womack v. Sternberg*, 247 La. 566, 172 So. 2d 683 (1965). Full reparation in contractual situations is also indicated by the language in LA. CIV. CODE arts. 1928, 2769.

3. *E.g.*, *Jordan v. Travelers Ins. Co.*, 257 La. 995, 1006, 245 So. 2d 151, 155 (1971); *Black v. Carrollton R.R.*, 10 La. Ann. 33, 43-46 (1855). See also Janvier, *Punitive Damages in Louisiana*, 10 LOYOLA L. J. 26 (1929); Note, 17 TUL. L. REV. 658 (1943).

4. See *Jagers v. Royal Indemn. Co.*, 276 So. 2d 309 (La. 1973); *Jackson v. Briede*, 156 La. 573, 100 So. 722 (1924); *Rogers v. Hiram J. Allen Lumber Co.*, 129 La. 900, 57 So. 166 (1912); *Daly v. Kiel*, 106 La. 170, 30 So. 254 (1901); *Loyacano v. Jurgens*, 50 La. Ann. 441, 23 So. 717 (1898); *Williams v. McManus*, 38 La. Ann. 161 (1886). See also *Becnel v. Ward*, 286 So. 2d 731 (La. App. 4th Cir. 1973), *cert. denied*, 290 So. 2d 900 (1974); *Tabb v. Norred*, 277 So. 2d 223 (La. App. 3d Cir.), *cert. denied*, 279 So. 2d 694 (1973); *Williams v. Garner*, 268 So. 2d 56 (La. App. 1st Cir. 1972); *Nicholas v. Aetna Cas. & Sur. Co.*, 240 So. 2d 568 (La. App. 2d Cir.), *cert. denied*, 256 La. 1144, 241 So. 2d 251 (1970), *on appeal following remand*, 254 So. 2d 159 (La. App. 2d Cir. 1971), *cert. denied*, 261 La. 229, 259 So. 2d 75 (1972).

5. *Williams v. Garner*, 268 So. 2d 56 (La. App. 1st Cir. 1972).

6. *Id.* at 61.

Source of the Doctrine

Louisiana's "ability to pay" doctrine is not derived from civilian sources of Louisiana law as no ancestral French or Spanish doctrine similar to the Louisiana rule existed. In France, the amount of damages has always been determined by the amount of loss sustained, without regard to the defendant's financial status.⁷ Absence of a French exception to the rule of complete reparation is consistent with the failure of the Code Napoleon to grant the trial court discretionary authority in assessing damages.⁸ French law protected an impoverished defendant only after judgment, in the form of a "delay of grace"⁹ and cession.¹⁰ Similarly, the only protection accorded a low-income defendant under Spanish law was post-judgment relief.¹¹

The Louisiana practice of considering the defendant's financial condition in determining compensatory damages could be an outgrowth of the common law doctrine of punitive damages. Traditionally, common law courts have considered the defendant's financial condition in determining the amount of punitive damages.¹² Before 1917 Louisiana courts also awarded punitive damages,¹³ although such awards were

7. See Code Napoleon arts. 1149, 1151-52, 1382; 6 & 7 PLANIOL ET RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS* n° 681 at 922 & n° 855 at 159 (1930).

8. See Code Napoleon arts. 1149, 1151-52 (1804); 4 AUBRY & RAU, *DROIT CIVIL FRANÇAIS* § 308 (6th ed. Bartin 1965) in A.N. YIANNPOULOS, 1 *CIVIL LAW TRANSLATIONS* 110-15 (1965). Louisiana's unique principle of trial court discretion in measuring damages had its beginning in the Civil Code of 1825. Compare LA. CIV. CODE art. 1928 (1825) with La. Digest of 1808 arts. 49, 51-52. See also McGary v. City of Lafayette, 4 La. Ann. 440 (1849).

9. Code Napoleon art. 1244 (1804). "The period or delay of grace is used to moderate the pressure which a relentless creditor may exercise against a debtor in good faith but in financial difficulties. When the debt is due, or where there has never been a term either legal or contractual, the judge may grant a delay to the debtor in consideration of his position." 2 M. PLANIOL, *CIVIL LAW TREATISE* pt. 1, nos. 369-73(A), 435 at 213-15 (12th ed. La. St. L. Inst. transl. 1939).

10. Code Napoleon arts. 1265-70 (1804). "The insolvent debtor ceased to be subject to imprisonment by abandoning his property to his creditors in payment of what he owed them." 2 M. PLANIOL, *CIVIL LAW TREATISE* pt. 1, no. 178 at 107-08 (12th ed. La. St. L. Inst. transl. 1939).

11. LAS SIETE PARTIDAS, bk. 5, tit. 14, L. 12 & bk. 5, tit. 15 (Scott transl. 1931).

12. *E.g.*, Hinson v. Dawson, 244 N.C. 23, 92 S.E.2d 393, 62 A.L.R. 806 (1956).

13. Louisiana courts apparently began awarding punitive or exemplary

unknown in French and Spanish law.¹⁴ Perhaps in borrowing the doctrine of punitive damages from the common law, Louisiana courts also incorporated the related practice of considering the defendant's economic status in setting the punitive amount. Since Louisiana courts frequently failed to specify whether the quantum awarded was punitive or compensatory,¹⁵ a defendant's inability to pay, relevant at common law for assessing punitive damages only,¹⁶ may have been considered in Louisiana for reducing a lump sum consisting of both compensatory and punitive damages. Following the abolition of punitive damages in Louisiana,¹⁷ the practice of considering the defendant's ability to pay may have been retained with respect to fixing compensatory damages.

However, two considerations weaken the theory that the ability to pay doctrine evolved from the common law doctrine of punitive damages.¹⁸ First, the confused state of the law regarding punitive damages prior to 1917¹⁹ makes it uncertain whether Louisiana courts used the doctrine in assessing *punitive* damages.²⁰ Second, the reason for considering the

damages in the 1830's. See *McGary v. City of Lafayette*, 4 La. Ann. 440 (1849); *Summers v. Baumgard*, 9 La. 161 (1836); *Carlin v. Stewart*, 2 La. 73 (1830). In 1917, the Louisiana Supreme Court held awards of punitive damages for personal injuries to be invalid under Louisiana law. *Vincent v. Morgan's La. & T.R. & S.S. Co.*, 140 La. 1027, 74 So. 540 (1917). The principle of punitive damages still remains in Louisiana law but in less obvious form. *Marr, The Punitive Damages Heresy*, 2 SO. L.Q. 1 (1917).

14. French and Spanish law treated damages only as a means of reparation. See information at notes 10, 11, *supra*.

15. *E.g.*, *Vincent v. Morgan's La. & T.R. & S.S. Co.*, 140 La. 1027, 1043, 74 So. 540, 546 (1917).

16. At common law, evidence of the defendant's ability to pay has been frequently admitted so that the trial court may decide what amount of damages will justly *punish* the defendant. Conversely, common law courts have steadfastly refused to admit such evidence for the purposes of fixing the amount of *compensatory* damages. *Eisenhauer v. Burger*, 431 F.2d 833 (6th Cir. 1970); *Thornburg v. Perleberg*, 158 N.W.2d 188 (N.D. 1968); *Wilmoth v. Limestone Prod. Co.*, 255 S.W.2d 532 (Tex. Civ. App. 1953).

17. See note 13, *supra*.

18. The doctrine of considering the defendant's financial condition in setting quantum "is clearly an atavistic outcropping of the rule of punitive, or exemplary, damages . . ." McMahon, *Damages Based Upon What the Traffic Will Bear*, 11 LOYOLA L. REV. 115, 116 (1930). *Accord*, Note, 19 TUL. L. REV. 626 (1945). See also Janvier, *Punitive Damages in Louisiana*, 10 LOYOLA L. REV. 26 (1929).

19. See note 13, *supra*.

20. The author discovered no cases where a Louisiana court explicitly

defendant's ability to pay in fixing punitive damages²¹ differs from the purpose served in considering the factor in the assessment of compensatory damages,²² making it unlikely that the courts would have continued the practice after the abolition of punitive damages in 1917.

Another explanation for incorporation of the ability to pay doctrine into Louisiana law is found in article 1934(3) of the Louisiana Civil Code, which grants broad discretion to the judge or jury in determining the amount of damages.²³ Such discretion serves to modify the general rule that damages should be commensurate with the actual loss sustained by the plaintiff.²⁴ In exercising their discretion, Louisiana courts may simply have thought it appropriate to add the defendant's ability to pay to the other factors considered in the assessment of damages. For example, in the early case of *Williams v. McManus*,²⁵ the Louisiana Supreme Court diminished a money judgment against a defendant of "limited means," holding that "the jury did not make a proper and commensurate allowance and went beyond the limits to be observed in such cases."²⁶ The court implied that a jury should consider a poor defendant's ability to respond in compensatory damages when exercising its discretion in making an award.²⁷

considered the defendant's economic situation in the assessment of punitive damages.

21. The reason is that the amount which would adequately punish one man might be inadequate in punitive effect upon another by reason of their difference in financial condition. *See, e.g.,* *Suzore v. Rutherford*, 35 Tenn. App. 678, 251 S.W.2d 129 (1952); *Whitfield v. Westbrook*, 40 Miss. 311, 320 (1866).

22. The defendant's economic means is considered in Louisiana in awarding compensatory damages so a "defendant may not be bankrupted and left destitute upon society and the state." *Benoit v. International Harvester Co.*, 251 So. 2d 389, 390 (La. App. 3d Cir. 1971).

23. LA. CIV. CODE art. 1934(3) provides: "In the assessment of damages under this rule [regarding contractual obligations], as well as in the case of offenses, quasi offenses and quasi contracts, much discretion *must be left to the judge or jury . . .*" (emphasis added).

24. LA. CIV. CODE art. 1934; text at notes 1-3, *supra*.

25. 38 La. Ann. 161 (1886).

26. *Id.* at 163.

27. Because *Williams* was decided before 1917, arguably the court's application of the ability to pay doctrine to compensatory damages (instead of to punitive damages as at common law) did not result from Louisiana's abolition of punitive awards.

Requisites for Diminution

Diminution is generally proper when the record conclusively shows the defendant's inability to respond fully in damages.²⁸ Louisiana jurisprudence is unclear, however, as to the type of damages susceptible to diminution. For example, the Third Circuit Court of Appeal mentioned that the doctrine is available to a defendant sued in tort,²⁹ but the Fourth Circuit in *Becnel v. Ward*³⁰ implied that the applicability of the doctrine is coextensive with the discretion granted the trial court by stating that "special damages may not be reduced [based on the defendant's meager means], since they are not a matter of the trial court's discretion like general damages are."³¹ Since article 1934 allows discretion in cases of offenses, quasi offenses, contracts where the object is anything but the payment of money, and quasi contracts, the *Becnel* decision indicates that the defendant's ability to pay is properly considered in all tort and contract cases except those involving contracts for the payment of money. Finally, the *Becnel* court specifically excludes special damages from reduction based on a defendant's meager means, as only "general damages [are] clearly within the range of the trial judge's . . . discretion. . . ."³²

The complications of diminution increase when several defendants are liable. If the defendants are liable *in solido*, the evidence must establish that *all* defendants are unable to respond financially before diminution is proper.³³ Such

28. *Seither v. Poter*, 194 So. 467 (La. App. Orl. Cir. 1940). Cf. *Nichols v. Aetna Cas. & Sur. Co.*, 240 So. 2d 568, 578-79 (La. App. 2d Cir. 1970). Because application of the principle of diminution is in the trial judge or jury's discretion, LA. CIV. CODE art. 1934(3), any attempt to suggest an absolute list of requisites for diminution would be futile.

29. In *Tabb v. Norred*, 277 So. 2d 223, 233 (La. App. 3d Cir.), *cert. denied*, 279 So. 2d 694 (1973), the court said, "Our jurisprudence is established that the defendant in a *tort* action may present evidence which tends to show his inability to pay general damages" (emphasis added).

30. 286 So. 2d 731 (La. App. 4th Cir. 1973), *cert. denied*, 290 So. 2d 900 (1974).

31. *Id.* at 733.

32. *Id. Accord*, *Tabb v. Norred*, 277 So. 2d 223 (La. App. 3d Cir.).

33. In *Howell v. Knight*, 193 So. 2d 282 (La. App. 1st Cir. 1966), the plaintiff sued two defendants. Based on his finding that one defendant was impecunious, the trial judge diminished the judgment *in solido* against both co-defendants. However, on appeal, the First Circuit held that while diminution would have been proper if only the impecunious defendant were involved, the trial judge committed manifest error by imputing the same condi-

a requirement eliminates the problems that could arise if judgment were reduced only as to one defendant liable *in solido* and the other defendant later demands contribution.³⁴ However, when one defendant's solidary liability is based upon his contractual obligation to indemnify the other defendant, no subsequent contribution problems can develop and diminution should be allowed when the award surpasses the maximum limits of indemnification and the indemnitee is unable to pay the balance.³⁵

If evidence of the defendant's limited means is made part of the record, the trial court must consider the evidence. For example, in *Davis v. McKey*,³⁶ the Fourth Circuit Court of Appeal held that the trial court erred in failing to consider evidence of the defendant's limited ability to respond in damages, and quantum was reduced accordingly.³⁷

If the defendant does not raise the issue of his inability to pay, the trial judge arguably may raise the issue on his own motion. Such judicial initiative is consistent with the discretionary power given to the court by Louisiana Civil Code article 1934(3) and does not undermine the purpose of the doctrine, which is equitable treatment of the impoverished defendant.³⁸ In *Davis*, the trial judge on his own volition

tion to the other defendant. The same rationale was applied in *Seither v. Pater*, 194 So. 467 (La. App. Or. Cir. 1940), where the appeal court allowed diminution in a solidary judgment against two impecunious defendants.

34. In *Ryan v. Allstate Ins. Co.*, 86 So. 2d 126, 130 (La. App. Or. Cir. 1956), *rev'd on other grounds*, 232 La. 831, 95 So. 2d 328 (1957), the trial court held two defendants, one a natural person and the other a corporation, to be liable in solido. The lower court reduced the judgment in solido because the natural defendant was impecunious. In modifying the trial court's judgment, the Court of Appeal stated that the rule of diminution "cannot have application in this case if for no other reason than that Allstate Ins. Co. is liable in solido with Leslie Evans for the damages sustained by the plaintiffs. If one amount were to be assessed against Leslie Evans on account of his impoverished condition and a higher amount assessed against the other solidary debtor, much confusion and legal difficulties might possibly arise in the future as at some time or other the question of contribution as between the solidary debtors might come in for discussion."

35. See *Becnel v. Ward*, 286 So. 2d 731 (La. App. 4th Cir. 1973), *cert. denied*, 290 So. 2d 900 (1974); *Nichols v. Aetna Cas. & Sur. Co.*, 254 So. 2d 159 (La. App. 2d Cir. 1971), *cert. denied*, 261 La. 229, 259 So. 2d 75 (1972).

36. 167 So. 2d 416 (La. App. 4th Cir.), *cert. denied*, 246 La. 910, 168 So. 2d 822 (1964).

37. See also *Smith v. Girley*, 242 So. 2d 32 (La. App. 1st Cir. 1970), *partially rev'd on other grounds*, 260 La. 223, 255 So. 2d 748 (1971).

38. *Benoit v. International Harvester Co.*, 251 So. 2d 389 (La. App. 3d Cir. 1971).

offered the defendant the opportunity to introduce evidence showing his financial condition, even though the defendant had not previously introduced such evidence nor alleged his inability to pay in his pleadings.³⁹ The judge explained the situation to the defendant in this manner:

I'm just trying to get into the record whatever you're entitled to under the law, but I want to make it clear to you that this is not compulsory on your part. I won't require that you give this information if you don't want to give it. . . . If you do want to give it, then you must give it all.⁴⁰

Following his *sua sponte* request for "ability to pay" evidence, the district judge chose not to diminish damages. On appeal, the Fourth Circuit sanctioned the trial judge's request by diminishing quantum based on the evidence solicited by the lower court judge.⁴¹ The appellate court's implicit sanction of the trial judge's action indicates that the only limitation on a judge's power to raise the issue of a defendant's inability to pay is the defendant's right to choose whether to open up his financial affairs to the court.

While Louisiana courts desire to protect an impecunious defendant from judgments that would destroy his capacity to adequately support himself, they do not clearly indicate how much diminution is proper. Courts have generally held that diminution "should not be carried to extremes,"⁴² and the second circuit has observed that the "principle is not intended to completely relieve a defendant of liability for reparation of damages . . . nor should it be considered as justifying the reduction of the allowance of damages to a bare minimum. . . ." ⁴³ Even with these limitations a disparity

39. Trial record of *Davis v. McKey*, Civil District Court for the Parish of Orleans, Division "C", No. 380-411, at 291.

40. *Id.* at 294.

41. *Davis v. McKey*, 167 So. 2d 416 (La. App. 4th Cir.), *cert. denied*, 246 La. 910, 168 So. 2d 822 (1964).

42. *E.g.*, *Smith v. Freeman*, 31 So. 2d 524, 526 (La. App. 2d Cir. 1947). See *Tabb v. Norred*, 277 So. 2d 223 (La. App. 3d Cir.), *cert. denied*, 279 So. 2d 694 (1973); *Williams v. Garner*, 268 So. 2d 56 (La. App. 1st Cir. 1972).

43. *Lacaze v. Horton*, 100 So. 2d 252, 255 (La. App. 2d Cir. 1958). The court further stated: "Either of these alternatives, in our opinion, would be an extreme application of the principle and would result in effecting a gross injustice toward a plaintiff, under the guise of the application of a humane consideration for the plight of an impecunious defendant." *Id.* at 255. The latter language suggests grounds for constitutional attack based on the due

exists between cases where quantum was lowered slightly to aid a defendant not quite able to pay a full judgment⁴⁴ and cases where a plea of poverty resulted in substantial relief to the defendant.⁴⁵ Perhaps the disparity results from the broad discretion which Louisiana Civil Code article 1934(3) gives the trial court in fixing quantum.⁴⁶ Louisiana courts have attempted to maintain uniformity in the assessment of damages by referring to the amounts set by past decisions in cases of a similar nature.⁴⁷ However, the courts recognize that no hard and fast rule exists for fixing damages and that other cases serve merely as guides for the trial court in exercising its discretion.⁴⁸

process clause. Judicial application of the doctrine represents state action and restricts a plaintiff's ability to claim a pecuniary interest to which he is otherwise fully entitled. *Fuentes v. Shevin*, 407 U.S. 67, 86 (1972) (defining pecuniary interest); *New York Times v. Sullivan*, 376 U.S. 254, 265 (1964) (court action is included within the definition of "state action"); *Shelley v. Kraemer*, 334 U.S. 1, 17 (1947); text at notes 1-4, *supra* (under Louisiana law a plaintiff is entitled to a full reparation for damage sustained). Under traditional fourteenth amendment analysis, the due process clause requires that the "challenged [state action] be a rational means of advancing a valid state interest." *Thompson v. Gallagher*, 489 F.2d 443, 447 (5th Cir. 1973). Louisiana courts have stated that the ability to pay doctrine prevents the courts from granting "vain and useless" judgments and thus presumably preserves the integrity of the courts and promotes judicial efficiency. However, the stated objective will only be achieved if the court is able to precisely calculate at the time of trial the defendant's potential for future wealth. An impecunious defendant might obtain future wealth by way of unsuspected inheritance, salary increase, or other means. Absent the "ability to pay" obstacle, a plaintiff unable to satisfy his judgment by immediate execution could seize such future wealth at any time during the life of the judgment. Since even the most destitute defendant might obtain future wealth, arguably the presumption that a full judgment is incapable of execution does not reasonably promote either judicial integrity or efficiency, and therefore violates the fourteenth amendment. Furthermore, if the ability to pay doctrine is viewed primarily as a means to afford relief to the impecunious defendant, although application of the doctrine may be a rational means of furthering that objective, the purported state interest may conflict with federal bankruptcy law and be considered as preempted by federal law and policy.

44. *Aetna Cas. & Sur. Co. v. Nichols*, 254 So. 2d 161 (La. App. 2d Cir. 1971).

45. *Urk v. Southern Farm Bureau Cas. Ins. Co.*, 181 So. 2d 69 (La. App. 2d Cir. 1965); *Termini v. Aetna Life Ins. Co.*, 19 So. 2d 286 (La. App. 1st Cir. 1944).

46. In *Jordan v. Travelers Ins. Co.*, 257 La. 995, 1006-07, 245 So. 2d 151, 155 (1971), the Louisiana Supreme Court held: "Where there is a legal right to recovery but the damages cannot be exactly estimated, the courts have reasonable discretion to assess same based upon all the facts and circumstances of the case."

47. *E.g.*, *Gaspard v. LeMaire*, 245 La. 239, 158 So. 2d 149 (1963).

48. *E.g.*, *Wilcox v. B. Olinde & Sons Co.*, 182 So. 149, 154 (La. App. 1st Cir. 1938).

Evidence and Procedure

Louisiana courts have not required the defendant to plead facts concerning his limited financial position as a requisite for introduction of such evidence at trial.⁴⁹ Their leniency apparently hinges on the belief that inability to pay is not an affirmative defense, because it does not defeat the plaintiff's cause of action but rather allows only a limited recovery.⁵⁰ In *Williams v. Garner*,⁵¹ the plaintiff urged that the trial court erred by allowing the defendant to introduce evidence of his inability to pay when the issue had not been brought to plaintiff's attention by defendant's pleadings. The first circuit found no error on the part of the trial court, observing that the remedy for surprise in such a case is to move for a continuance to afford the plaintiff an opportunity to investigate.

Louisiana courts have further enhanced the possibility of surprise to the plaintiff by refusing to allow him to investigate, via pretrial discovery, the possibility of a belated defense of inability to pay. In *Benoit v. International Harvester Co.*,⁵² the third circuit pointed out three reasons for refusing discovery of the defendant's financial situation: "lack of relevancy of the defendant's financial condition to the nature of this case,"⁵³ invasion of the defendant's "right to privacy and right to refrain from disclosing his confidential affairs,"⁵⁴ and absence of prejudicial surprise to the plaintiff.⁵⁵ The court's failure to find relevancy and prejudicial surprise is itself surprising since any evidence introduced concerning defendant's ability to pay must be considered in assessing damages,⁵⁶ regardless of whether the plaintiff has been forewarned of the defense via the defendant's pleadings.⁵⁷

The defendant's inability to respond in quantum cannot

49. *E.g.*, *Williams v. Garner*, 268 So. 2d 56 (La. App. 1st Cir. 1972).

50. *Id.* See also LA. CODE CIV. P. art. 1005.

51. 268 So. 2d 56 (La. App. 1st Cir. 1972).

52. 251 So. 2d 389 (La. App. 3d Cir. 1971).

53. *Id.* at 390.

54. *Id.*, citing *Hillman v. Penny*, 29 F.R.D. 159 (1962).

55. *Id.*

56. See text at notes 49-52, *supra*.

57. *Id.* Although the court realized that the defense of inability to pay could be raised at trial, it apparently felt that since liability was the central issue, allowing pretrial discovery of the defendant's ability to pay would merely permit the plaintiff to exploit the defendant's financial resources.

be presumed;⁵⁸ rather, the defendant has the burden, as with his other defenses, to prove his inability to respond fully in damages.⁵⁹ Courts will allow a defendant to introduce virtually any evidence relevant to his ability to pay. Factors which have been considered are the defendant's earning capacity,⁶⁰ financial responsibility,⁶¹ financial worth,⁶² insurance coverage,⁶³ potential future income,⁶⁴ debts,⁶⁵ family expenses,⁶⁶ and living expenses.⁶⁷ The defendant's burden of proof may be tempered by the judge's option⁶⁸ to elicit such evidence at trial even though the defendant failed to raise the issue.

Grounds for Attack

At least two avenues of attack are available to a plaintiff confronted with a defendant's plea of inability to pay. First, application of the ability to pay doctrine may be an abuse of judicial discretion, contrary to the spirit of Louisiana Civil Code articles 2315 and 1934(3). Traditionally, article 2315 has required complete reparation of an aggrieved party,⁶⁹ but when applied, the ability to pay doctrine precludes full indemnity for the plaintiff's loss. Although one might argue that the general rule of complete reparation in article 2315 is modified by the trial court's discretion in article 1934(3) and that such discretion permits the reduction of quantum based on the defendant's meager means, the more persuasive argument is that the court's discretionary power was added to article 1934 solely for the purpose of providing a fair means of

58. *Howell v. Knight*, 193 So. 2d 282 (La. App. 1st Cir. 1966).

59. *Hilburn v. Johnson*, 240 So. 2d 767 (La. App. 2d Cir. 1970).

60. *Nichols v. Aetna Cas. & Sur. Co.*, 254 So. 2d 159 (La. App. 2d Cir. 1971), *cert. denied*, 261 La. 229, 259 So. 2d 75 (1972).

61. *Termini v. Aetna Life Ins. Co.*, 19 So. 2d 286 (La. App. 1st Cir. 1944).

62. *Trahan v. Continental Ins. Co.*, 237 So. 2d 425 (La. App. 3d Cir. 1970); *Cole v. Sherrill*, 7 So. 2d 205 (La. App. 2d Cir. 1942).

63. *Trahan v. Continental Ins. Co.*, 237 So. 2d 425 (La. App. 3d Cir. 1970).

64. *Jagers v. Royal Indemn. Co.*, 257 So. 2d 806 (La. App. 3d Cir. 1972), *aff'd*, 276 So. 2d 309 (La. 1973); *Williams v. Garner*, 268 So. 2d 56 (La. App. 1st Cir. 1972).

65. *See Smith v. Girley*, 242 So. 2d 32 (La. App. 1st Cir. 1970), *rev'd on other grounds*, 260 La. 223, 255 So. 2d 748 (1971); *Danove v. Mahoney*, 176 So. 404 (La. App. Or. Cir. 1937).

66. *DeShazo v. Cantrelle*, 165 So. 2d 893 (La. App. 4th Cir.), *cert. denied*, 246 La. 860, 167 So. 2d 674 (1964).

67. *Nichols v. Aetna Cas. & Sur. Co.*, 254 So. 2d 159 (La. App. 2d Cir. 1971).

68. *See text at notes 39-41, supra.*

69. *See cases cited in notes 2, 3, supra.*

determining the amount of *complete* reparation when the value of harm sustained is indefinite.⁷⁰

The ability to pay doctrine may also conflict with the National Bankruptcy Act,⁷¹ which preempts conflicting state laws.⁷² Because of its insolvency characteristics, Louisiana's jurisprudential ability to pay doctrine may well fit within the category of state laws suspended due to conflict with the federal bankruptcy power. In *International Shoe v. Pinkus*,⁷³ the United States Supreme Court struck down an Arkansas insolvency statute because it interfered with the Bankruptcy Act. The court held that intolerable inconsistencies and confusion would develop if the state statute were given effect while the federal act is in force.⁷⁴ Louisiana's ability to pay doctrine also causes inconsistencies subject to attack under the reasoning of *International Shoe*. For example, if a defendant is allowed the prejudgment relief of diminution based on his inability to pay and the postjudgment relief of bankruptcy, the plaintiff's claim is twice exposed to diminution while the claims of the defendant's other creditors are exposed to diminution only in the bankruptcy proceeding.⁷⁵ The purpose of the federal bankruptcy system⁷⁶ would be better served if the plaintiff were initially awarded his full rights of recovery,

70. In *Jordan v. Travelers Ins. Co.*, 257 La. 995, 1006-07, 245 So. 2d 151, 155 (1971), the Louisiana Supreme Court stated: "One injured through the fault of another is entitled to full indemnification for the damages caused thereby. Civil Code Art. 2315. Another general principle deduced therefrom and applicable here may be stated as follows: [w]here there is a legal right to recovery but the damages cannot be exactly estimated, the courts have reasonable discretion to assess same based upon all the facts and circumstances of the case. Civil Code Art. 1934(3)"

71. 11 U.S.C. 1-1255 (1970).

72. *Stellwagen v. Clum*, 245 U.S. 605, 613 (1918). Congressional power to preempt state action regarding bankruptcy is implied from the constitutional grant of power to Congress to enact uniform laws on the subject of bankruptcies throughout the United States. *International Shoe Co. v. Pinkus*, 278 U.S. 261 (1929).

73. 278 U.S. 261 (1929).

74. *Id.* See also *Duffy v. His Creditors*, 122 La. 600, 48 So. 120 (1909); *Anderson v. His Creditors*, 33 La. Ann. 1155 (1881).

75. *But cf. Becnel v. Ward*, 286 So. 2d 731 (La. App. 4th Cir. 1973), *cert. denied*, 290 So. 2d 900 (1974) (the ability to pay doctrine was not applied because a reduction of all *general damages* would not save the defendants from bankruptcy respecting special damages). No case other than *Becnel* has discussed the effects of bankruptcy relative to the ability to pay doctrine.

76. The overall purpose of the Bankruptcy Act is to provide an equitable distribution of the bankrupt's estate. *Nathanson v. NLRB*, 344 U.S. 25 (1952).

forcing an impecunious defendant to seek relief in bankruptcy.

Conclusion

If the "ability to pay" doctrine were eliminated from Louisiana law, low-income defendants would be adequately protected since post-judgment relief is available in Louisiana for debtors with financial difficulties. Louisiana law has traditionally aided debtors by exempting from seizure a substantial portion of the property needed by the debtor to care for himself and his family.⁷⁷ Indeed, the legislative purpose of enacting exemptions⁷⁸ is identical with the reason for diminishing judgments based on a defendant's financial condition: protection of a poor defendant's financial capability to provide for himself and his family in order that they will not be left a burden upon society.⁷⁹ Additionally, judgment debtors in Louisiana may obtain relief from federal straight bankruptcy,⁸⁰ cession,⁸¹ and protection from contempt penalties.⁸²

Louisiana should consider as a matter of policy whether the ability to pay device should be abolished. The state policy of protecting impecunious defendants could be carried out satisfactorily absent the ability to pay doctrine in view of the functional problems in its application, the inequity to plaintiffs, and the protective and rehabilitative devices otherwise available to a poor defendant once a judgment has become final.

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77. LA. CONST. art. XII, § 9 and art. XIV, § 34; LA. R.S. 22:647 (Supp. 1958); LA. R.S. 13:3881 (Supp. 1960), *as amended by* La. Acts 1961, No. 25, Sec. 1 and La. Acts 1972, No. 530; LA. R.S. 9:2601-74 (1950).

78. *Lambeth v. Milton*, 2 Rob. 81 (La. 1842). *See also* Note, 11 TUL. L. REV. 145, 146 (1936).

79. *Benoit v. International Harvester Co.*, 251 So. 2d 389 (La. App. 3d Cir. 1971); *Cole v. Sherrill*, 7 So. 2d 205 (La. App. 2d Cir. 1942).

80. 11 U.S.C. §§ 1-1255 (1970).

81. LA. R.S. 9:2601-74 (1950).

82. LA. R.S. 13:4206 (1950).