

# Louisiana Law Review

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Volume 39 | Number 3

*The Work of the Louisiana Appellate Courts for the  
1977-1978 Term: A Faculty Symposium  
Spring 1979*

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## Private Law: Obligations

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### Repository Citation

H. Alston Johnson III, *Private Law: Obligations*, 39 La. L. Rev. (1979)  
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## OBLIGATIONS

*H. Alston Johnson III\**

### LEGAL SUBROGATION OF INSURER TO INSURED'S RIGHTS UPON PAYMENT OF CLAIM

The decision in *Courtney v. Harris*<sup>1</sup> perpetuates a curious dichotomy in Louisiana law on the question of legal subrogation of an insurer to the rights of its insured against a wrongdoer upon payment of the insured's claim. One finds a series of cases rather firmly announcing the rule that legal subrogation does not take place upon such payment, another series of cases insisting that it does, and quite a number of pronouncements as dicta on the subject. Though there are purported distinctions between some of these cases, it does not appear that the differences are so significant that inconsistent rules should obtain. In fact, it seems that legal subrogation should be the rule and that cases holding the contrary should be disapproved.

The *Courtney* matter was of a very common variety. Mrs. Courtney suffered injuries in an automobile accident, for which it appeared that an employee of Fogleman Truck Lines (Harris) was responsible. Mr. and Mrs. Courtney brought suit against the employee, the employer and their insurer, the husband for special medical expenses and the wife for general personal injury damages. Allstate Insurance Company, which had paid \$1,000.00 to the Courtneys under the medical payments clause of their automobile policy, intervened to seek reimbursement for that amount. Allstate asserted that it was entitled to be reimbursed either on the basis of conventional subrogation, legal subrogation, an independent cause of action in tort, or prevention of unjust enrichment.<sup>2</sup> It seemed conceded at the

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1. 355 So. 2d 1039 (La. App. 4th Cir. 1978).

2. The court concluded that there was no conventional subrogation, and the rest of the opinion discussed legal subrogation. It did not address the theory of an independent cause of action in tort or the unjust enrichment claim.

appellate level that no conventional subrogation had taken place.<sup>3</sup>

Citing numerous decisions reaching conflicting results on the question, the Fourth Circuit Court of Appeal held that legal subrogation had not taken place and that the trial court had properly dismissed the intervention. The court noted with approval the statement in another case<sup>4</sup> that medical payments of the type owed by Allstate to the Courtneys "were owned by the insured regardless of liability on the part of anyone else, and the insurer thus was not bound with or for any other person for those payments. Article 2161 of the Civil Code did not apply . . . ."<sup>5</sup> The court also opined that the rationale supporting those decisions denying legal subrogation was that expressed by a legal encyclopedia: "subrogation arises only in favor of one who pays the debt of another, and not in favor of one who pays the debt in performance of his own covenants."<sup>6</sup>

While it is not difficult to understand why the court reached its conclusion in light of the conflicting jurisprudence on the issue, it is believed that the decision reaches an unjust result which will only serve to make this and other types of insurance more expensive for those who purchase it. Moreover, there appears to be ample authority in the Civil Code to support the opposite conclusion. Article 2134 in fact expresses a rule precisely the opposite of that quoted by the court from the legal encyclopedia:

An obligation may be discharged by any person concerned in it, such as a coobligor or a surety.

The obligation may even be discharged by a third person no way concerned in it, provided that person act in the name and for the discharge of the debtor, or that,

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3. Obviously, a conventional subrogation is clearly the best way for an insurer to proceed, and in fact most do so, probably because of the doubtful nature of a legal subrogation claim. But this is additional inconvenience, paperwork and time which is adding to the cost of insurance, perhaps unnecessarily if legal subrogation through payment alone could be recognized.

4. *Harris v. Huval Baking Co.*, 265 So. 2d 783 (La. App. 3d Cir.), *cert. denied*, 263 La. 103, 267 So. 2d 210 (1972).

5. 355 So. 2d at 1041.

6. *Id.*, citing *Medical Insurer's Right of Subrogation*, 73 A.L.R. 3d 1140, 1148 (1976).

if he act in his own name, *he be not subrogated to the rights of the creditor.* (Emphasis added.)

It will be observed that the basic rule here is that though a person may pay the debt of another, he is not subrogated to the rights of the creditor. Articles 2160 and 2161 make exceptions to that rule. Article 2160, which does not concern us here, permits parties to contract for subrogation upon a payment.<sup>7</sup> Article 2161 lists four specific exceptions in which legal subrogation will take place upon payment.<sup>8</sup> Pertinent to this discussion is subparagraph (3), which reads: "Subrogation takes place of right: . . . (3) For the benefit of him who, being bound with others, or for others, for the payment of the debt, had an interest in discharging it."

The redactors thus provided for a special case of payment, as to which a rule of legal subrogation was thought necessary to grant to the person paying the debt a cause of action: if the person paying the debt was "bound with others, or for others" and therefore had himself an interest in discharging it. The article is not more specific than that, and the question to be

7. LA. CIV. CODE art. 2160 provides:

The subrogation is conventional:

1. When the creditor, receiving his payment from a third person, subrogates him in his rights, actions, privileges, and mortgages against the debtor; this subrogation must be expressed and made at the same time as the payment.
2. When the debtor borrows a sum for the purpose of paying his debts, and intending to subrogate the lender in the rights of the creditor. To make this subrogation valid, it is necessary that the act of borrowing and the receipt be executed in the presence of a notary and two witnesses; that, in the act of borrowing, it be declared that the sum was borrowed to make the payment, and that in the receipt it be declared that the payment has been made with the money furnished for the purpose by the new creditor. That subrogation takes place independently of the will of the creditor.

8. LA. CIV. CODE art. 2161 provides:

Subrogation takes place of right:

1. For the benefit of him who, being himself a creditor, pays another creditor, whose claim is preferable to his by reason of his privileges or mortgages.
2. For the benefit of the purchaser of any immovable property, who employs the price of his purchase in paying the creditors, to whom this property was mortgaged.
3. For the benefit of him who, being bound with others, or for others, for the payment of the debt, had an interest in discharging it.
4. For the benefit of the beneficiary heir, who has paid with his own funds the debts of the succession.

answered in this context is whether an insurer is "bound with" the wrongdoer to the insured, so that upon payment it is entitled of right to the insured's rights as creditor of the wrongdoer.

Some background is necessary to understand how the jurisprudential dichotomy came about. The earliest decision usually cited for the proposition that legal subrogation does not take place is *D. R. Carroll & Co. v. New Orleans, J. & G. N. R. R.*<sup>9</sup> Certain cotton brokers shipped cotton on the defendant railroad, but the cotton was destroyed by fire. An insurer paid to the consignees the amount of the loss under appropriate policy provisions and then instituted an action against the railroad, though in the names of the brokers. In a very brief opinion to which there were two dissents, the court said:

There was no contract between [the insurer and the railroad]; consequently there was no obligation from the one to the other. There was no conventional subrogation from the assured to the assurers, and there was certainly no legal subrogation by which payment by the one entitled them to payment from the other. The insurance company paid the loss for which they received a premium for insuring against to the persons who suffered the same. As there was no contract between it and the railroad company, and as no obligation existed towards them from the railroad company, they have no claim against it.<sup>10</sup>

These remarks, without further authority, constituted virtually the entire reasons given by the court for its judgment. The dissenting justices, noting that the destruction by fire made the railroad primarily liable to the consignees unless it could exonerate itself, said:

The insurance company was bound to make good a loss arising from a casualty against which it had expressly insured the owners. It chose to pay the indemnity and look to the common carriers for reimbursement. If the latter were bound to make good the loss, what difference to them whether they paid the owners or the insurers? . . . Being

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9. 26 La. Ann. 447 (1874).

10. *Id.*

bound to the owners to indemnify them for the loss that occurred, and having discharged that obligation I am clearly of the opinion the insurance company stands subrogated by law to all the rights of the owners against the carriers, as they certainly are upon general principles of equity. Civil Code, articles 2160, 2161.<sup>11</sup>

These two positions remain the core of the dispute. Should there be a rule of law (legal subrogation) which would require that a proven wrongdoer eventually bear the loss caused by his wrongdoing, by reimbursing an insurer which may have born that loss because of a contract with the injured party? Or, on the other hand, should the wrongdoer escape eventual responsibility for any of the loss because he had the good fortune to injure a party who had provided for the loss through a contract of insurance? The majority opinion seems to place great stock in the fact that the insurance company was merely paying a loss for which it had received a premium, and certainly one can agree that the company should not be able to deny payment under the policy because someone was at fault in causing the loss. But the opinion seems to ignore the fact that if the insurance payment is made and shifting of the loss to the wrongdoer is denied, the premium charged for that insurance must necessarily increase. This casts the loss eventually on those purchasing the insurance, and not on the wrongdoers. Such a result should be more clearly explained, and more obviously supportable in the legislation, before it is accepted.

Some years later, the supreme court reached exactly the opposite conclusion. In *London Guarantee & Accident Insurance Co. v. Vicksburg, S. & P. R.R.*,<sup>12</sup> the plaintiff insurer had paid \$515.00 in workmen's compensation payments to an employee of its insured, allegedly injured during employment but by the negligence of the defendant railroad. The language of the Compensation Act at that time granted subrogation rights to the employer, but not specifically to an insurer of the employer.<sup>13</sup> Arguing that the Act could nonetheless be read to

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11. *Id.* at 448-49.

12. 153 La. 287, 95 So. 771 (1923).

13. Shortly thereafter, 1926 La. Acts, No. 85 added to what is now LA. R.S.

grant it such rights, the insurer proceeded against the railroad for \$5,000.00, the total damages the worker had allegedly suffered and could himself have recovered from the railroad, and to which the insurer claimed to be subrogated.

The court rejected the reading of the Act that would permit the insurer to proceed for the full \$5,000.00 claimed and limited recovery to the \$515.00 paid in compensation. But the court was of the opinion that since the Act did not expressly grant the insurer these subrogation rights, the basis for recovery had to be article 2315. The court reasoned that if the fault of the railroad company had caused the insurer damage (\$515.00 paid in compensation to the injured employee), then the article granted the insurer the right to proceed directly against the railroad for that amount.<sup>14</sup> The insurer's alternative argument that it was subrogated of right under article 2161(3) was not reached in light of the court's disposition of the case under article 2315. Other decisions about the same period of time reached the conclusion that insurers were entitled to legal subrogation upon payment to an insured, but there was no discussion or citation of any significant authority.<sup>15</sup> A number of others followed the *London Guarantee* decision and its article 2315 rationale.<sup>16</sup>

The court's disposition of the matter under article 2315 without reaching article 2161(3), though achieving a just result, was a fateful one. Casting the issue in terms of general tort

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23:1162 (1950) a specific subrogation of the insurer to all rights of the employer under the Act.

14. Part of the rationale was the rather famous decision of *Appalachian Corp. v. Brooklyn Cooperage Co.*, 151 La. 41, 91 So. 539 (1922), to the effect that when one of two persons who are solidarily liable for an injury to a third person is primarily responsible because his fault was the proximate cause of the injury, and the other of the obligors is only technically liable, the latter is entitled to indemnity from the one whose fault caused the injury or damage.

15. *Monteleone v. Royal Ins. Co.*, 47 La. Ann. 1563, 18 So. 472 (1895); *Miller v. Newark Fire Ins. Co.*, 125 So. 150 (La. App. Orl. Cir. 1929).

16. *Aetna Cas. & Sur. Co. v. Allen*, 132 So. 2d 240 (La. App. 3d Cir. 1961); *American Bankers Ins. Co. v. Costa*, 107 So. 2d 76 (La. App. Orl. Cir. 1958); *Lumbermen's Mut. Fire Ins. Co. v. Kemp*, 102 So. 2d 248 (La. App. 1st Cir. 1958); *Lumbermen's Mut. Ins. Co. v. Ruiz*, 77 So. 2d 84 (La. App. 1st Cir. 1954); *John M. Walton, Inc. v. McManus*, 67 So. 2d 130 (La. App. 1st Cir. 1953); *Hansen v. Hickenbotham*, 61 So. 2d 620 (La. App. Orl. Cir. 1952).

principles rather than choosing the special rule of the Civil Code intended for this precise situation was to lead to confusion. In 1957 the supreme court decided the case of *Forcum-James Co. v. Duke Transportation Co.*<sup>17</sup> The plaintiff company had built a temporary bridge under contract to the Department of Highways; the defendant's overweight truck damaged the bridge. One of plaintiff's arguments in seeking recovery was that the defendant was liable in tort for the conduct of its driver. The court rejected this argument, reasoning that the Department was the owner of the bridge and thus the injured party and that the plaintiff merely stood in a contractual relationship with the Department. This was in keeping with the rationale that the tortfeasor is liable only for proximate damages caused by his act, which would not include damages done to a person who suffered loss only because of a contractual relationship with the injured party. The court also rejected the plaintiff's legal subrogation argument, noting that article 2161 contained no provision for a case of this nature.

Subsequent cases took this pronouncement to mean that the supreme court had rejected article 2315 as a basis for a possible cause of action by an insurer.<sup>18</sup> After all, it was reasoned, the insurer is merely a person who stands in a contractual relationship with the injured party, and the wrongdoer could not be asked to respond to such a person. These cases also saw the decision as having weakened any argument that legal subrogation under article 2161(3) could take place, although in fact the case merely holds that article 2161 did not apply to the factual situation at hand.<sup>19</sup>

The general principle of *Forcum-James* has been applied in numerous other cases, but all of these decisions have a common thread: the person suing the wrongdoer is one whose only claim to a cause of action is that the wrongdoer's conduct in injuring the victim caused loss of a contractual benefit which

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17. 231 La. 953, 93 So. 2d 228 (1957).

18. *American Indem. Co. v. New York F. & M. Underwriters, Inc.*, 196 So. 2d 592 (La. App. 1st Cir. 1967); *McDaniel v. Hearn*, 158 So. 2d 348 (La. App. 2d Cir. 1963).

19. See *American Indem. Co. v. New York F. & M. Underwriters, Inc.*, 196 So. 2d 592 (La. App. 1st Cir. 1967).

would otherwise have inured to the plaintiff.<sup>20</sup> The statement of law in article 2315 might well not grant a cause of action in such a case, as a general matter. But in none of those cases could it be said that the plaintiff was bound along with the wrongdoer for a part of the injured person's loss and, after having paid that part, was seeking reimbursement from the wrongdoer. Such a case is specifically provided for in article 2161(3), and it is that article which grants to the plaintiff a cause of action.

But the excursion into, and perhaps back out of, article 2315 was largely responsible for the dichotomy one finds in the jurisprudence. Recent cases, relying largely upon *Forcum-James*, have rejected legal subrogation for insurers having paid medical expenses;<sup>21</sup> others have permitted legal subrogation for insurers having made payments under uninsured motorist, property or collision coverage.<sup>22</sup> The announced distinction between the two lines of jurisprudence is that the insurers having paid medical expenses are bound without regard to the fault of anyone else, but those having paid uninsured motorist claims or collision claims are bound "with" the wrongdoer. This seems largely a question of semantics, since all of these insurers are "bound" to make the agreed payments to the insured because of the conduct of the wrongdoer who, if proven to have been at fault, is "bound" with the insurance company for these very same payments.

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20. *Desormeaux v. Central Indus., Inc.*, 333 So. 2d 431 (La. App. 3d Cir.), *cert. denied*, 337 So. 2d 225 (La. 1976) (no recovery for plaintiff son who had contract with father for water, through ditch on father's property which was damaged by defendant); *Baughman Surgical Assoc., Ltd. v. Aetna Cas. & Sur. Co.*, 302 So. 2d 316 (La. App. 1st Cir. 1974) (plaintiff professional corporation could not recover for its "loss" when its employee physician could not work for it after injury caused by defendant); *Messina v. Sheraton Corp.*, 291 So. 2d 829 (La. App. 4th Cir. 1974) (no recovery for promoter of boxing match when fight was cancelled after alleged negligence of defendant hotel injured fighter).

21. *Harris v. Huval Baking Co.*, 265 So. 2d 783 (La. App. 3d Cir.), *cert. denied*, 263 La. 103, 267 So. 2d 210 (1972); *American Indem. Co. v. New York F. & M. Underwriters, Inc.*, 196 So. 2d 592 (La. App. 1st Cir. 1967).

22. *Volume Shoe Corp. v. Armato*, 341 So. 2d 611 (La. App. 2d Cir. 1977) (property loss); *Hartford Accident & Indem. Co. v. Byles*, 280 So. 2d 624 (La. App. 3d Cir. 1973) (uninsured motorist); *Aetna Cas. & Sur. Co. v. Allen*, 132 So. 2d 240 (La. App. 3d Cir. 1961) (property); *John M. Walton, Inc. v. McManus*, 67 So. 2d 130 (La. App. 1st Cir. 1953) (collision loss).

The source of the insurer's rights, of course, ought to be article 2161(3), which merely requires that the insurer show that it was "bound with others, or for others" for the amount which it paid to the insured. There is no requirement that the obligation shared by the insurer and the wrongdoer be solidary. However, in *Pringle Associated Mortgage Corp. v. Eanes*,<sup>23</sup> the supreme court, in a statement which was probably dicta, stated that if there is no solidary obligation, then there is no subrogation.<sup>24</sup> Several subsequent cases relied upon this statement as authority for rejecting an insurer's claim to legal subrogation, asserting that no solidary obligation was shown between the insurer and the wrongdoer.<sup>25</sup>

The resolution of this question depends upon the meaning of "solidary obligation." The writer has observed in this forum on other occasions that the expression may simply mean that two persons are bound to the same individual for the same debt, even though for different reasons.<sup>26</sup> The jurisprudence has recognized this principle,<sup>27</sup> and it certainly fits the present situation. Suppose that the issue is medical payments under an automobile policy. Due to the occurrence of the insured risk (injury to insured through use or operation of vehicle), the insurer is obligated (by "contract") to pay certain medical expenses, up to a designated amount. If it is proven that a third person (the defendant) is at fault in the occurrence of the insured risk, then he is obligated to pay those same expenses (by "tort"). Thus the insurer is "bound with" the wrongdoer for these expenses and is entitled to legal subrogation from the

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23. 254 La. 705, 226 So. 2d 502 (1969).

24. The court stated: "Clearly this language presupposes the existence of a solidary obligation. If no solidary obligation exists, subrogation does not take place." *Id.* at 741-42, 226 So. 2d at 515.

25. See, e.g., *Harris v. Huval Baking Co.*, 265 So. 2d 783, 785 (La. App. 3d Cir.), cert. denied, 263 La. 103, 267 So. 2d 210 (1972).

26. *The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Obligations*, 36 LA. L. REV. 375 (1976); *The Work of the Louisiana Appellate Courts for the 1972-1973 Term—Obligations*, 34 LA. L. REV. 231 (1974).

27. *Commercial Ins. Agency, Inc. v. Wilson*, 293 So. 2d 246 (La. App. 3d Cir. 1974) (imperfect solidarity will satisfy Civil Code article 2161(3); legal subrogation found when plaintiff insurance agency and policyholder were each bound, for different reasons and at different times, to pay the same debt to a third person, and insurance agency paid it).

insured to collect them from the wrongdoer. The relationship of the insurer and the wrongdoer, as between themselves, is not governed by the fact that they are "bound together," necessitating a conclusion that they must share the loss. Both the jurisprudence<sup>28</sup> and the Civil Code<sup>29</sup> recognize that, even between persons bound together to a third person for the same debt, indemnity rather than contribution may be the rule. Thus the insurer is entitled to collect the full amount of its loss from the wrongdoer.

This conclusion achieves a salutary policy. The wrongdoer is required eventually to pay the full amount of damage, just as he would if no insurance were in the picture. Certainly he cannot complain that he has not been accorded a reduction in damages which he caused. The victim theoretically receives, from the wrongdoer and from his own insurer, the full amount of his damages. The insurer is reimbursed for a loss caused by the fault of the wrongdoer and will theoretically reflect this success in the calculation of premiums. Although the insured pays for this coverage, the rate structure ought to reflect the record of success of the insurer in casting this loss back on the wrongdoer when possible; and the insured has, for his premium, received two important values: certainty and promptness of recovery, though of limited amounts.

To refuse to reach this conclusion, in the instance in which no conventional subrogation has taken place, is to cast this loss (on what a layman, and perhaps even a heretical lawyer, might term a "technicality") on the insured class, which would have to be reflected in even higher premiums on these types of insurance.

The granting of legal subrogation to an insurer in such a case is not inconsistent with Louisiana law concerning collateral sources of reimbursement to the plaintiff, but in fact properly complements this doctrine. Some of the cases cited as

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28. *Appalachian Corp. v. Brooklyn Cooperage Co.*, 151 La. 41, 91 So. 539 (1922), and its progeny.

29. LA. CIV. CODE art. 2106 states: "If the affair for which the debt has been contracted *in solido*, concern only one of the coobligors *in solido*, that one is liable for the whole debt towards the other codebtors, who, with regard to him, are considered only as his securities."

denying legal subrogation are in fact cases in which no insurer is present in the litigation claiming legal subrogation. Rather, the defendant is asserting that he should be given a deduction in the amount payable to the injured party because a portion of the injured party's loss has been paid by an insurer who has become legally subrogated to the victim's rights, thus leaving the victim without any cause of action on that amount.<sup>30</sup> It is understandable that the court will reject such an argument, often by saying that no legal subrogation has taken place. This is not the issue; whether it has or not is of no concern to the wrongdoer. If it has, then he simply pays the subrogated amount to the subrogee. If it has not, he pays it to the victim. In neither event is he entitled to be relieved of paying it altogether.

The "collateral sources" doctrine simply serves to assure that the defendant does not receive a windfall because the victim has chosen to provide, by contract, other sources of reimbursement for possible injury. The fact that we do not permit the defendant this credit means that we recognize that he is in fact liable for the harms so paid for by others, and to the extent that those others properly present their claims in the litigation, they should be reimbursed.<sup>31</sup> The doctrine of legal subrogation is the proper vehicle for accomplishing this result.

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30. See, e.g., *Lagrué v. Murrhee*, 291 So. 2d 844 (La. App. 4th Cir.), *cert. denied*, 294 So. 2d 829 (La. 1974); *Reynolds v. Hartford Accident & Indem. Co.*, 228 So. 2d 76 (La. App. 2d Cir. 1969), *cert. denied*, 255 La. 148, 229 So. 2d 732 (1970); *Warren v. Fidelity Mut. Ins. Co.*, 99 So. 2d 382 (La. App. 1st Cir. 1957).

31. Any possible problems of "double recovery" can be appropriately resolved when both the subrogor (injured party) and the subrogee (insurer) are before the court.

