Joint Custody and Parents' Liability Under Civil Code Article 2318

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Introduction

Louisiana has followed the national trend in accepting joint custody of minor children in divorce and separation proceedings as the norm rather than the exception.¹ Many commentators have considered the sociological implications of joint custody on the family environment, but the interaction of joint custody with other laws in Louisiana must also be considered.² One potential conflict is the interaction of joint custody with Civil Code article 2318, under which parents are responsible for the damage caused by their minor children.³ More specifically, the issue is under what circumstances a divorced or separated spouse under a joint custody plan should be liable for damage caused by the minor child in the physical custody of the other spouse.

To properly resolve this issue it is necessary to examine whether parental liability for the child's acts stems from a failure to supervise or correct the child, whether it arises purely out of the relationship between the parent and child without regard to supervision or custody, or whether it arises from the power of a parent to enforce his or her authority over the child by demanding physical custody of the child.

The origin of paternal authority over the child, when that authority terminates, the terms used in article 2318, and most importantly the influence of the articles surrounding article 2318 are major factors in determining how liability should be imposed on a parent under a joint custody plan for damage caused by a minor child.

The Effects of Custody

The term "custody" is usually broken down into two components: physical or "actual" custody and legal custody. A typical joint custody plan will allocate time periods for physical custody between parents so as to promote the sharing of the care and custody of the child in such a way as to ensure the child of frequent and continuing contact with both parents.⁴

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² See Schulman, Second Thoughts on Joint Custody: Analysis of Legislation and Its Implications for Women and Children, 12 Golden Gate U.L. Rev. 538 (1981). It is beyond the scope of this article to discuss in detail joint custody plans. The new joint custody law has been analyzed in two excellent articles in previous issues of the Louisiana Law Review. See Comment, Joint Custody in Louisiana, 43 La. L. Rev. 85 (1982) and Note, Louisiana's New Joint Custody Law, 43 La. L. Rev. 759 (1983).


Legal custody, by contrast, has been defined as "the right or authority of a parent or parents, to make decisions concerning the child's upbringing." Under the typical joint custody plan, both parents remain legal custodians of the child regardless of which parent has physical custody of the child at a given time. Joint legal custody thus involves a sharing of the responsibilities concerning the child including decisions about education, medical care, discipline and other matters relating to the upbringing of the child. Joint legal custody is equated with tutorship in article 250, which states that "if the parents are awarded joint custody of a minor child, then the cotutorship of the minor child shall belong to both parents with equal authority, privileges and responsibilities." This natural cotutorship includes tutorship over both the person and the property of the minor.

Origins of Paternal Responsibility

The code articles on paternal authority give parents many rights over their children. Foremost among these rights is the right of the parents to demand the physical custody of the child and demand that the child live in the parental home. As a corollary, the parents must fulfill many obligations including the responsibility for the damage their minor children

5. La. Civ. Code art. 146(D); see supra note 2; see also La. R.S. 13:1569(11) (1983). Legal custody may be granted in several ways, including: (1) a public parental unfitness action in juvenile court, La. R.S. 13:1580 (1983); (2) a habeas corpus proceeding under La. R.S. 9:291 while the parents are not living together, though not judicially separated, La. R.S. 9:291 (Supp. 1983); (3) an incidental proceeding in a suit for separation or divorce (custody pendente lite), La. Civ. Code art. 146 (Supp. 1984); and (4) a custody award granted after a judgment of separation or divorce has been granted (permanent custody), La. Civ. Code art. 157.


7. Although the authority over minor children is given both to the mother and the father, under Civil Code article 216 that authority is termed "paternal" since the father prevails when there is disagreement between the parents concerning the child, and the father unless interdicted or absent is given power to administer the child's estate under article 221. The term "paternal" is also an appendage of the Roman law concept that the pater familias or father was the head and master of the Roman family. However, the words "paternal" and "parental" are used synonymously. See 1 M. Planiol, Treatise on the Civil Law pt. 2, no. 1637, at 15 (11th ed. La. St. L. Inst. trans. 1959).

8. Examples of those rights or powers are found in article 218 (custody and correction), article 219 (appointment of tutors), article 220 (delegation of authority), article 221 (administration of child's estate), article 223 (enjoyment of usufruct over certain property of the minor).

9. La. Civ. Code art. 218 declares that the: "unemancipated minor can not quit the parental house without the permission of his father and mother, who have the right to correct him, provided it be done in a reasonable manner." This is probably the reason for article 39, under which the minor can have no other domicile than that of his father, mother, or tutor. Planiol states "the custody of a child is the right of keeping it at one's home. The father, guardian of his son, may force him to live at the paternal home, and if necessary, have him brought there by the police." 1 M. Planiol, supra note 7, pt. 2, no. 1660, at 29.
cause. Article 237, the last article in the chapter on paternal authority, states, "Fathers and mothers are answerable for the offenses or quasi-offenses committed by their children, in the cases prescribed under the title: Of Quasi-Contracts, and of Offenses and Quasi-Offenses."

The reference in article 237 leads to article 2318, which states:

The father and the mother and, after the decease of either, the surviving parent, 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.

Although article 2318 is placed in the chapter on offenses and quasi-offenses, conceptually, through the reference in article 237, it is a correlative obligation arising out of paternal authority analogous to liability imposed because of relationships between persons and other persons or things in articles 2317 through 2322.

That liability under article 2318 is based on a specific relationship between parent and child is evident from the historical development of article 2318. In Article 20 of the Projet du Gouvernement (1800) (the source of the present article 2318) and in the Louisiana Digest of 1808, liability was imposed on the father and after his decease the mother for the delinquency of their minor children. Furthermore, liability was imposed only if the parents could have prevented the delinquency and failed

12. See infra text accompanying notes 46-68. As one court has stated, "paternal responsibility is the consequence and offspring of the paternal authority." Coats v. Roberts, 35 La. Ann. 891, 892 (1883).
13. Projet du Gouvernement bk. III, tit. III, art. 20 (1800). Compare this with the language in article 1384 of the Code Napoleon; see also I M. Planiol, supra note 7 pt. 1, no. 909-910, at 507-08.
14. La. Digest of 1808 bk. III, tit. IV, art 20. This article followed the language of the Projet du Gouvernement but grouped several of the delict articles into one paragraph. The Digest of 1808 reads as follows:

    Art. 20. Every person is responsible not only for the damage which he causes by his own act, but also for that which is caused by the act of any person for whom he is answerable, or by any thing which is in his keeping.

    The father, and after the death of the husband, the mother is responsible for the delinquency of their minor children.

    Masters and principals are responsible for the delinquency of their servants and agents in the functions in which they have employed them.

    Institutions of youth or artisans are answerable for the delinquency of their scholars or apprentices.

    The above responsibility takes place only when the parents, masters or prin-
to do so. When the code of 1825 was adopted, the word *delinquency* was changed to *damage* and the exculpating clause was deleted. The language in the 1825 code is identical to the first paragraph of the current article 2318.

The two changes in the language of the article depart from a requirement of parental fault and appear to create a species of vicarious liability growing out of the parent-child relationship. Thus, a shift in policy to financial recovery for an innocent victim without regard to parental supervision seems apparent. The deletion of the exculpating clause appears to de-emphasize the significance of the right of the parent to demand the physical custody of the minor child as a basis for imposing liability on the parent. Arguably, under this analysis, the noncustodial parent under a joint custody plan, who does not have the right to physical custody for a certain period, could be liable for damage caused by the minor child while in the physical custody of the other parent.

The case of *Turner v. Bucher* supports the conclusion that actual physical custody of the child may be irrelevant to a determination of parental liability under article 2318. In *Turner*, the father was held liable for the child's acts in the absence of fault on his part and without fault on the part of a child below the age of discernment. The court in *Turner* held that the father was strictly liable for the nondiscerning child's act if the child's act when judged by a normal standard would have been negligent. The court departed from prior jurisprudence and ruled that principals could have prevented the delinquency and have failed to do it.

They are considered to have been able to prevent the delinquency when it was committed through their neglect to watch over the conduct of those for whom they are answerable, or when it was committed in their presence.

The owner of an animal is responsible for the trespass or damage that the animal has caused, whether the animal was in his keeping or was strayed or runaway.

17. This shift in policy actually appears to be a return to the Roman view that the *pater familias* was financially responsible for the delicts of children under his power regardless of whether or not the father was at fault. Stone, Liability for Damage Caused by Minors: A Comparative Study, 5 Ala. L. Rev. 1, 7-9 (1952); see also W. Buckland, A Textbook of Roman Law from Augustus to Justinian 101 (1932).
18. 308 So. 2d 270 (La. 1975).
20. Turner, 308 So. 2d at 277. See also Ryle v. Potter, 413 So. 2d 649 (La. App. 1st Cir. 1982).
the "language [of article 2318] is clear and unambiguous that it was the legislative intent to impose a sort of strict liability upon parents as a responsibility flowing from paternal authority."21 The court reasoned that

[an innocent victim should not be denied reparation if there exists a source of financial responsibility; therefore, the parents of an infant of tender years . . . should be required to respond for the acts of those within their "garde" because of their legal relation to and legal responsibility for these nondiscerning persons.22

The decision in Turner is evidence that the basis for parental liability under article 2318 is not a failure to control and supervise the child, since the parent need not be at fault; rather the court considered the parent-child relationship as paramount in determining liability. However, as will be discussed below, the use of the word garde may imply that the right to demand physical custody of the child, which is not available to a non-custodial parent under a joint custody plan, may also be a prerequisite to parental liability.23

Termination of Paternal Authority

Since paternal authority is the conceptual basis of parental liability under article 2318, the point at which paternal authority terminates becomes important. While the marriage is still in existence, the regime of paternal authority continues under article 2318, and if the father and mother are still living both are answerable for the child's acts.24 If the

21. 308 So. 2d at 273 (emphasis added).
22. Id. at 274. Turner labeled this paternal responsibility "a sort of strict liability," since when the child was below the age of discernment neither the parent nor the child need have been at fault. The liability is certainly not "direct liability" because the parents cannot escape liability by claiming they could not have prevented the act. Other cases have termed the liability "vicarious" since the parents must answer for the acts of another, their child who must have been negligent under an adult standard. See Deshotel v. Traveler Indem. Co., 257 La. 567, 243 So. 2d 259 (1971); Williams v. City of Baton Rouge, 252 La. 770, 214 So. 2d 138 (1968); Taylor v. State Farm Mut. Auto. Ins. Co., 248 La. 246, 178 So. 2d 238 (1965); Audubon Ins. Co. v. Fuller, 430 So. 2d 343 (La. App. 3d Cir. 1983); Deshotel v. Cas. Reciprocal Exch., 350 So. 2d 283 (La. App. 3d Cir. 1977); Guidry v. State Farm Mut. Auto. Ins. Co., 201 So. 2d 534 (La. App. 3d Cir. 1967). One writer has termed it strict vicarious liability. Note, Tort-Damage Caused By Minors Under the Age of Discretion—Strict Vicarious Liability Imposed on Parents, 49 Tul. L. Rev. 1194, 1198 (1975).
23. For a discussion of garde, see infra text accompanying note 48.
24. The Louisiana legislature in the 1984 Regular Session amended article 2318 to provide for the liability of both the mother and the father for the damage occasioned by their minor children. 1984 La. Acts No. 326 § 1. Prior to the 1984 amendment, article 2318 placed the liability upon the father, and not until his decease did the mother become liable. The constitutionality of the prior language was questionable when viewed in light of the equal protection clause. The legislature keenly perceived the constitutional issue and wisely amended the article.
mother and father are separated in fact without a judicial decree, the jurisprudence has held that paternal authority continues and the father will remain liable for the minor's acts regardless of which parent has physical custody. If the husband and wife are judicially separated or divorced, paternal authority is terminated, and the regime of tutorship begins.

The regime of tutorship is the close equivalent of paternal authority in that the tutor takes the place of the father. The tutor has the right to demand the minor's custody in exchange for the responsibility for caring for his person and for properly rearing and educating the minor. This legal responsibility for supervising the child may be equated with the garde of the child as discussed in Turner. Given these similarities between paternal authority and tutorship, the tutors (father and mother as cotutors under a joint custody plan) should share the primary responsibility for damage occasioned by the minor. Indeed, article 2318 states: "[t]he same responsibility attaches to the tutors of minors."

In essence, joint legal custody is designed to continue as nearly as possible the same parental authority that existed before separation or divorce as well as the joint authority and responsibility that is usually taken from one parent and given to the other under a sole custody award. However, the parent lacking physical custody under a joint custody plan does not have the power to compel the minor to live with him, which power the parent possesses under article 218 before separation or divorce and presumably has under Code of Civil Procedure article 4261 after separation or divorce and a sole custody award.

The jurisprudence has decided who bears responsibility for the minor's acts under sole custody awards, and these cases may provide insight in determining whether the parent without physical custody under a joint custody plan should be held liable for the child's acts. In Flannigan v. Valliant, the mother and father were divorced, terminating the father's paternal authority, and the legal custody was granted to the mother. The

25. Deshotel v. Casualty Reciprocal Exch., 350 So. 2d 283 (La. App. 3d Cir. 1977). Since paternal authority is not suspended the father still has the right to demand physical custody of the child.
26. La. Civ. Code arts 246, 250. Article 246 states: "The minor not emancipated is placed under the authority of a tutor after the dissolution of the marriage of his father and mother or the separation from bed and board of either one of them from the other."
The termination of the father's authority by separation or divorce assumes that a custody award is made in the separation or divorce decree. See Guidry v. State Farm Mut. Auto. Ins. Co., 201 So. 2d 534 (La. App. 3d Cir. 1967).
28. One distinction is that the tutor does not enjoy a usufruct over the minor's property.
30. 400 So. 2d 225 (La. App. 4th Cir. 1981).
plaintiff, after being assaulted by the minor, sued both the mother and father to recover damages under article 2318. At the time of the incident the minor lived with neither the father nor the mother. The court held that the mother was responsible for the child’s acts as the natural tutor of the minor, relieving the father of liability since his liability terminated with the award of legal custody to the mother in the divorce decree. If the reasoning of *Flannigan* is extended to joint custody plans, both parents arguably should be held liable for the child’s acts regardless of which parent has physical custody of the child, since both parents, as cotutors, remain legal custodians of the child.

However, the mother in *Flannigan*, as sole legal custodian of the child, possessed the right to demand physical custody of the child at any time, and thus imposition of liability upon her may well have been appropriate even though her child did not live with her at the time of the child’s assault. The mother’s liability may be derived from the same principle that imposes the responsibility upon the father who has “placed [his children] under the care of others” in article 2318. Under a typical joint custody plan, by contrast, although both parents remain cotutors and legal custodians of the child, a parent lacks the right to demand physical custody of the child during the time period physical custody is assigned to the other parent. The *Flannigan* court may not have contemplated the imposition of liability upon a tutor or legal custodian who does not have the right to demand the physical custody of the child.

Imposition of liability upon a parent who has no power to discipline the child by demanding his physical custody would be a harsh and arguably inappropriate result. An analogy can be drawn to cases where either paternal authority or tutorship has been considered to be superseded and suspended by some force or operation of law, thus relieving the parent or tutor of responsibility under article 2318. In *Redd v. Bohannon*, the issue presented was the liability of a mother, a Florida resident, for a tort committed by her son, an unemancipated minor in the military. The court concluded that even though the mother remained the tutor of the child, she was not responsible for the child’s acts since she had no legal right to control the child. The court ruled that the liability of the parent does not continue when the parental authority over the minor has been destroyed or suspended by operation of law, as where the minor is inducted into the military. The court reasoned that the basis of parental

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32. 166 So. 2d 362 (La. App. 3d Cir. 1964).
33. Id. at 364. See Coats v. Roberts, 35 La. Ann. 891 (1883); Jackson v. Ratliff, 84
liability is the parent's right to control and supervise the actions of the minor in his legal custody. The courts have also ruled that parental authority may be suspended by the child's being temporarily called into service as a member of a *posse comitatus.*

By analogy, the joint custody plan could be interpreted as a force of law denying the noncustodial parent the right to demand physical custody of the minor during the interval in which the other parent enjoys physical custody. During this time period, the noncustodial parent has no power to enforce disciplinary decisions and has no right to supervise or control the child physically. Under the *Redd* analysis, the parent's liability as tutor and legal custodian might be considered to be suspended during the time interval that the other parent enjoys physical custody of the child.

In a recent case the third circuit appeared to adopt the analysis in *Flannigan* that the status of the parent in relation to the child is all-important. In *Audubon Insurance Co. v. Fuller,* the mother and father were divorced in Oklahoma, thus dissolving the marriage and terminating paternal authority. The judgment awarded custody to the mother but also stated that the father should have reasonable visitation rights and custody for a period not to exceed three months per year. It is difficult to determine whether the custody plan involved was a joint custody plan giving the parents shared legal custody and cotutorship of the child. When the court granted "custody" to the father for three months annually, it arguably meant physical custody rather than legal custody with its attendant authorities and responsibilities. Audubon Insurance Company sued the father with whom the minor was residing during the three month period for damages caused when the child allegedly committed a burglary. The trial court held the father liable for damages caused by the child. The third circuit, in remanding the case to determine whether the father had

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So. 2d 103 (La. App. Orl. 1955); Simmons v. Sorenson, 71 So. 2d 377 (La. App. 1st Cir. 1954); see also Toca v. Rojas, 152 La. 317, 93 So. 108 (1922).


35. However, the decision in *Turner* may reach a contrary result by imposing strict liability on the parent to insure the victim a source of financial responsibility, thus making the right to physical custody irrelevant and instead basing liability on the relationship between the parent and child.

The analysis in *Redd* may be applied when custody has been granted *pendente lite* or under La. R.S. 9:291 (1983). In these two cases paternal authority has not terminated because no separation or divorce has occurred. See La. Civ. Code art. 246. However, a force of law has taken the right to physical custody away from the father thus relieving him of liability under article 2318.

36. 430 So. 2d 343 (La. App. 3d Cir. 1983).
legal custody of the child, apparently adopted the Flannigan reasoning that status, not physical custody, is the determining factor under article 2318. However, the court did not have to consider a situation such as that in Redd, where a parent lost the right to demand physical custody, because in Audubon the father had physical custody of the child. Thus, Audubon, although helpful, did not address the undecided situation in which the parent has legal custody as cotutor under a joint custody plan but does not have physical custody or the right to demand physical custody.

Statutory Construction of Civil Code Article 2318

The above conceptual analysis of paternal authority can be supported by jurisprudential application of the specific language of article 2318. The phrase “residing with,” under which the father is held responsible for the minor who resides with him, commonly means to “live, dwell, abide or lodge”—suggesting a requirement of physical custody or simply residence. Given this definition, under a joint custody plan one would look to see which parent the child was presently living with in order to determine liability. However, a problem arises when the child actually lives with neither parent or when the minor commits an act when an intermediary such as an aunt or uncle is transporting the minor from one parent to another for a change in physical custody.

In Toca v. Rojas, the Louisiana Supreme Court departed from this literal interpretation and decided that the residence of the minor referred to in article 2318 is the legal residence or domicile of the minor, which according to the civil code is the domicile of the father (during marriage) or tutor (after termination of paternal authority). The court stressed that the imputation of domicile was derived from the paternal authority over the child, which could not be divested voluntarily by the father but only by some force or operation of law. Hence, the imposition of liability based on legal residence of the minor hinges upon parental authority during marriage and legal custody or tutorship after separation or divorce. Thus, under a joint custody plan, both parents arguably should be held liable as cotutors of the child.

However, at the time this case was decided, it probably was not contemplated that a parent or tutor would not have the right to physical custody of the child. Thus, under a joint custody plan, where the non-custodial parent has no right to physical custody, an imputation of legal domicile to that parent might well be inappropriate.

37. Id.
40. Id. at 324, 93 So. at 110; La. Civ. Code art. 39.
41. Id. at 325-26, 93 So. at 110.
Article 146 allows the plan for joint custody to provide for the "designation of the child's legal domicile." By designating the domicile of the minor, the parents may be able to shift the responsibility for the child's acts to either the father or the mother. However, the courts are more likely to find some other purpose for the provision, such as designating the domicile to determine which school the child will attend.

The principle of *Tocas v. Rojas*, that "residing with" means legal residence or domicile, provides a much easier criterion for determining parental liability than mere physical custody of the child. A determination of physical custody hinges upon arbitrary factual findings such as how long the child lived with one parent, where he kept his clothing and with whom he ate most of his meals. If liability is determined solely by whether the child comes under the parent's paternal or tutorial authority, these factual problems can be avoided.

The text of article 2318, which holds the parent liable for the minor's acts while residing with him or "placed by them under the care of other persons," may provide a method by which the courts could hold the noncustodial parent liable for the minor's acts. Under a joint custody plan it may be argued that the noncustodial parent has voluntarily placed the care of the child with the other spouse and thus should not be relieved from the responsibility for the child. However, in a joint custody plan the spouse is ordered by a court to place the child in the care of the other spouse for a certain period of time, although the noncustodial spouse remains a cotutor of the child. It should be noted that the parents may voluntarily agree to a particular joint custody plan which is then incorporated into the court's judgment. However, once the court renders the judgment, the allocation of custody has the force and effect of law which cannot be voluntarily revoked by the parents. As discussed above, this involuntary, court-ordered assignment of custody to the other spouse may suspend the liability of the parent lacking physical custody.

As discussed above, the phrase "[t]he same responsibility attaches to the tutors of minors" indicates that responsibility should be placed upon tutors where the power of the tutor is substituted for paternal authority after paternal authority is terminated by separation or divorce. Article 2318 adds no qualifying statement, indicating that the liability should be imposed as though paternal authority were still in existence. Significantly, the last sentence of article 2318 imposes liability upon both cotutors (for example, under a joint custody plan) simultaneously after the marriage.

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42. La. Civ. Code art. 146(A)(1)(a), as amended by 1983 La. Acts, No. 695, § 1, provides in part: "The plan may also include such considerations as the following: (a) Designations of the child's legal domicile."
44. La. Civ. Code art. 146.
ends and the regime of tutorship commences; the liability of one tutor (mother) does not depend upon the prior death of the other (father).

**Analogy to Surrounding Articles—Article 2317**

The articles surrounding Article 2318 may be a helpful guide in determining parental liability for children under a joint custody plan. Article 2317 introduces the following articles by stating that liability attaches for damage caused by "persons for whom we are answerable, or of the things which we have in our custody." Article 2317 creates two categories: (1) damage caused by things (things generally in article 2317, animals in article 2321 and buildings in article 2322) and (2) damage caused by persons (minors in article 2318, insane persons in article 2319 and servants, scholars, and apprentices in article 2320). Notably, the requirement of custody in article 2317 literally applies only to things and not to persons. Thus, under article 2318, which illustrates the concept of article 2317 that certain persons are "answerable" for other persons, liability may be based purely on the relationship between the parent or tutor and the child, and physical custody of the child under a joint custody plan or otherwise may be irrelevant to determining parental liability. The concept of imposing liability upon one who is "answerable" for another arguably contemplates strict or vicarious liability based upon a specific relationship between persons rather than upon custody or control.

However, the jurisprudence has not distinguished between persons and things in applying the concept of custody. Indeed, the court in *Turner* held the father responsible for the child's act because he had the "garde" over the child." Since *Turner* employs the concept of garde in explaining parental liability for minors' torts, the articles attaching liability to those who have garde over a thing may give some insight in determining who should bear liability under article 2318 in the context of a joint custody plan.

*Loescher v. Parr,* one of the leading cases on strict liability under article 2317, defines the concept of garde in a footnote as "the things in one's care . . . to which one bears such a relationship as to have the right of direction and control over them, and to draw some kind of benefit from them." Analogizing things to children is a callous comparison, but the two may have some similarities. A definite relationship continues between the joint legal custodian lacking physical custody and the child, since under article 146 this parent retains the right to make decisions con-

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47. *Turner*, 308 So.2d at 275.
48. 324 So.2d 441 (La. 1975)
49. Id. at 449 n.7 (quoting Verlander, We Are Responsible, 2 Tulane Civil Law Forum 64 (1974)). See also Note, Things in One's Custody—Louisiana Civil Code Article 2317, 43 Tul. L. Rev. 907 (1969).
cerning the child's upbringing even though under the particular joint custody plan he may not enjoy physical custody of the child during certain extended intervals. This parent remains the cotutor of the child, and, as discussed above, tutorship is the close equivalent of the parental authority that existed before the judgment of separation or divorce. Loescher indicates that liability arises from this legal relationship to the person or thing.\textsuperscript{10}

However, the definition in Loescher also speaks of the owner's "right of direction and control" over the thing. Under a joint custody plan the legal custodian without physical custody retains the right to make decisions concerning the child's education, discipline and other related matters. It might be argued that these contacts constitute sufficient control such that the noncustodial parent retains garde over the child and consequently liability. However, since the noncustodial parent has no right to demand the physical custody of the child, he lacks the immediate physical ability to enforce the disciplinary decisions. Arguably it would be improper to impose strict liability upon a noncustodial parent who is unable to demand physical custody of the child. This consideration in part justifies the result in Redd v. Bohannon,\textsuperscript{51} discussed above. Although the mother remained the tutor of the child, she had no right to demand his physical custody to enforce that right of tutorship because her son was in the military. Thus, she was appropriately relieved of liability for his torts.

In another footnote in Loescher, the court in dicta discussed the possibility of retaining garde although the person has lost physical custody of the thing. The court stated:

\textit{At this point, however, we should note that the English translation of "sous sa garde" as "in our custody" does not fully express the concept of the "garde" of a thing—the legal responsibility for its care or, keeping—so that one may lose the custody of a thing without losing its "garde."}\textsuperscript{52}

This principle may be applied to persons: the parent may lose physical custody of the child for a certain period of time under a joint custody plan, but arguably, since that parent retains "legal custody" or "garde" over the child, he should remain liable for the child's acts. Cases subsequent to Loescher have held that a lessor will under certain circumstances retain garde and consequently liability under article 2317 when he leases the thing to another person.\textsuperscript{53} However, the courts, in deciding whether

\begin{itemize}
  \item \textsuperscript{50} Id. at 446.
  \item \textsuperscript{51} 166 So. 2d 362 (La. App. 3d Cir. 1964).
  \item \textsuperscript{52} Loescher, 324 So. 2d at 447 n.6 (La. 1975). (emphasis added). See also 2 H.L. Mazeaud & J. Mazeaud, Traite Theorique et Pratique de la Responsabilite Civile no. 1160 (6th ed. 1979); Verlander, supra note 49.
\end{itemize}
the lessor's "garde" over the thing had been terminated, considered it important to determine whether the lessor retained any right to maintain, repair, or inspect the thing while in the possession of the lessee and the amount of time the lessee had the thing in his physical possession before the damage occurred. Thus, the courts seemed to place heavy emphasis on the lessor's continuing ability to prevent the thing from causing harm even though in the hands of the lessee.

This emphasis upon the lessor's ability to prevent the thing from causing harm supports the argument that a parent should not be held liable if he does not have the power to enforce his authority over the child by demanding his physical custody. Significantly, in the lease cases, the lessor voluntarily surrendered the leased item to the lessee. Yet the court nevertheless examined remnants of physical custody in the lessor. As discussed above, although in some cases the joint custody plan simply embodies a voluntary agreement between the parents allocating physical custody between them, in most cases the parents are unable to agree on physical custody and therefore the allocation of custody is imposed by the court on an involuntary basis. If the court in the lease cases, which involved voluntary surrender of custody, stressed remnants of physical custody retained by the lessor, then by even stronger reasoning physical custody, or the right to demand physical custody, should be essential to parental liability under a joint custody plan mandating involuntary surrender of custody.

Arguably, the inclusion of the "residing with" clause in article 2318, holding parents liable for the damage caused by children "residing with them," was originally intended to impose liability on the parent only if he had the right and physical ability to discipline the child. Furthermore, the court's policy in applying article 2317 was that the guardian of the thing should bear the loss rather than an innocent person; but under a joint custody plan there are two guardians or tutors, and arguably it is more equitable to impose liability upon the physical custodian since he or she is best able to prevent the child from causing harm.

However, the argument against the necessity of physical custody as a prerequisite to liability under article 2318 is that the language in the Digest of 1808 relieving the parents of liability if they could not have prevented the act was deleted when the code of 1825 was adopted. Additionally, as discussed above, the language of article 2317 imposes liability for "things in our custody" while liability for persons is placed on those

54. Goudchaux, 407 So. 2d at 1320; Cardwell, 379 So. 2d at 257.
55. Loescher, 324 So. 2d at 446. The court in Loescher declared, "Thus, the person to whom society allots the supervision, care, or guardianship (custody) of the risk-creating person or thing bears the loss resulting from creation of the risk, rather than some innocent third person harmed as a consequence of his failure to prevent the risk."
56. See supra note 16.
who are "answerable," implying liability based purely on relationships between persons without regard to issues of custody.

Furthermore, as discussed above, the "residing with" clause in article 2318, which literally can be interpreted to mean physical residence or custody, has been interpreted by the courts to mean legal residence or domicile, thus implying that physical custody is irrelevant. Even though arguably the custodial parent in fairness should bear the full loss caused by the child since he or she can enforce disciplinary decisions, that equity can still be achieved by imposing liability on both parents and allowing the noncustodial parent to seek indemnification from the custodial parent. In view of the modern tort policy of insuring maximum sources of financial responsibility to the innocent victim, the better policy appears to be that of placing liability on the noncustodial parent for damage caused by his minor children and then determining independently the liability of the parents inter se based upon relative parental negligence, which parent had physical custody at the time of the tortious act, or agreement in the joint custody plan apportioning liability.

Article 2321

An analogy can also be drawn between article 2318 and article 2321, which imposes liability for damage caused by animals. The language in article 2321 that "[t]he owner of an animal is answerable for the damage he has caused" parallels the language in article 2318: "damage occasioned by their minor unemancipated children."

The most recent Louisiana Supreme Court decision interpreting article 2321, Rozell v. Louisiana Animal Breeders Coop., Inc., held the owner of a bull strictly liable even though the animal was not in the owner's physical custody. The court stated that since an animal is a thing, article 2321 is a modification of article 2317, and that if custody or garde were a prerequisite to an owner's liability for damage caused by his animal then the language of article 2321 would be superfluous. The court did not discuss the ability or inability of the owner to supervise and prevent the damage, basing its decision on the policy that the owner (risk-creator) should bear the loss caused by the animal rather than an innocent third party victim.

By analogy, the parents' physical custody, or more importantly, the right to demand physical custody of the child, may be irrelevant in determining parental liability under article 2318. The court in Rozell stressed that under article 2321 liability for damage caused by an animal is derived from the fact of ownership, not custody, and concluded that "by en-

59. 434 So. 2d 404 (La. 1983).
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trusting the animal to another custodian the owner does not escape responsibility." The court in Rozell stated: "One who entrusts his animal to another does so at his own risk, although any fault or negligence on the part of the custodian would entitle the owner to indemnity." Thus, again by analogy, the noncustodial parent could be held liable and allowed indemnification from the custodial parent.

60. Id. at 408.
62. Id. at 409.
between parent and child rather than upon supervision is even stronger. As with article 2318 vis-a-vis children who have reached the age of discernment, article 2320 imposes vicarious liability upon a class of persons (employers) for the acts of other persons "for whom they are answerable."

Article 2319

A very close analogy can be drawn between the parent or tutor in article 2318 and the curator in article 2319 who is responsible for the acts of insane persons under his care. The functions of the curator and the tutor are quite similar; both care for persons who in the eyes of the law are incapable of caring for themselves. Code of Civil Procedure article 4554 states that "the relationship between an interdict and his curator is the same as that between a minor and his tutor, with respect to the person and property of the interdict."

Significantly, liability may well be appropriately imposed on the curator based solely on his relationship to the insane person, without regard to physical custody. The curator usually cannot force the insane person into his physical custody, as a parent may do with his minor child, since the insane person is usually committed to a mental hospital where the curator would have no control over him. Ultimately the court has the power to determine who shall have custody of the interdict, as the judge is given complete discretion in controlling the person of the interdict. He may order the interdict to be attended in his home or a hospital. The court in Turner, in dicta, indicated that liability is imposed on the curator because of the formal, legal relationship between the curator and the insane person. The Turner dicta again emphasized the policy of insuring the injured person of a source of financial responsibility for the damage caused by the insane person. Under the policy of financial responsibility, the curator should retain garde, or legal custody, over the insane person even when the curator loses physical custody of him, and thus should remain liable even when the insane person causes damage while commit-

64. La. Civ. Code art. 2319. This article is unique in Louisiana law. No similar article appeared in the French civil codes, and it did not appear in Louisiana until the enactment of the Civil Code of 1825. Turner, 308 So. 2d at 275. In other states the guardian's liability for the insane is predicated on negligence. 39 Am Jur. Guardian & Ward § 188, at 190 (1968).

65. La. Code Civ. P. art. 4554. See also La. Civ. Code art. 39 (stating that domicile of minor and interdict is that of tutor and curator respectively); Code of Civil Procedure articles 4549, 4550, 4553, and 4555 also make reference to the articles on tutorship.


67. Turner, 308 So. 2d at 274. Turner stated: "Nevertheless an innocent victim should not be denied reparation if there exists a source of financial responsibility; therefore, the . . . curator of an insane person who [is] charged with a legal 'garde' or care of these persons who cannot care for themselves, should also be required to respond for the acts of those within their 'garde' because of their legal relation to and legal responsibility for these nondiscerning persons." Id.
If the curator is held responsible for the acts of the insane person without the right to have him in his custody, by analogy, a cotutor who does not have the right to physical custody of the child for a certain period of time under a joint custody plan should also bear the responsibility for the child's acts. This analogy is supported by the common functions of both curators and tutors (to care for those unable to care for themselves) and by the Code of Civil Procedure articles on curators, which refer to the tutorship articles when detailing the duties of the curator. Additionally, the underlying policy of financial responsibility is common to both articles 2318 and 2319.

Articles 2317-2322 all have different origins for the imputation of liability for damaging acts, but the common thread in the articles, as interpreted, is that liability is not based upon fault; rather liability is imposed based upon a relationship which exists between the person or thing causing the damage and the one held answerable. Under article 2317 the courts have been willing to impose liability on the guardian of a thing even when he has voluntarily surrendered it by leasing it to another. Article 2321 imposes liability on the owner of an animal based on his status as owner even when the animal is not in his physical custody. Article 2320 imposes liability on employers and masters based on their relationship to their employees and servants, without regard to physical supervision. Article 2319 imposes liability on the curator, whose duties are similar to the tutor, for acts caused by an insane person. The common policy underlying the judicial interpretations of these articles is that an innocent third party victim should not be denied sources of financial responsibility. If the above articles impose liability without regard to the right to physical custody of the thing or person, the same principle arguably should be applied to article 2318: the noncustodial parent, as cotutor or legal custodian under a joint custody plan, should be liable for the damage caused by his minor child. Any unfairness or undue hardship placed on the noncustodial parent can be alleviated by allowing that parent to obtain indemnification or contribution from the parent with physical custody.

The Nature of the Liability

If both spouses should be held liable under a joint custody plan for

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68. Writers prior to the decisions of Turner and Loescher disagreed over whether or not the curator should be liable without fault. See Note, Incompetent Persons—Liability of Curator—Custodian Distinguished, 8 La. L. Rev. 144, 146, (1947) (arguing curator should be liable without fault but recognizing that other civil law jurisdictions, including Germany, Japan, Spain, Quebec, hold the curator liable only if he is negligent); see Note, Insane Persons—Liability in Tort—Liability of Guardian, 21 Tul. L. Rev. 679, 683 (1947) (arguing fault should be required).
the damage caused by their minor children, the remaining issue is the
nature of that liability, whether it be joint, several or in solido. Article
2091 states that "[t]here is an obligation in solido on the part of the de-
btors, when they are all obliged to the same thing . . . ."69 Under a joint
custody plan, given the construction of article 2318 above—that as cotutors
both parents should be liable for the damage caused by their uneman-
cipated children—the parents arguably are codebtors liable for the same
debt. However, according to article 2093, solidarity cannot be presumed
but must be either expressly stipulated or provided for by law.70

For solidarity to take place of right some statute must provide for
it. One writer has suggested that such an express provision of law is in
Code of Civil Procedure Article 4262, which states: "Natural cotutors
shall be bound in solido except as to damages arising from the administra-
tion of all or a part of the minor's property by one of the cotutors in-
dividually pursuant to an order of the court or an agreement between
the cotutors approved by the court."71 However, article 4262 concerns
tutorship over the property of the minor, not tutorship over the person,
and apparently concerns only the cotutors' liability to the minor for the
improper administration of the minor's property. It is thus doubtful that
article 4262 could serve as a basis for solidary liability to third persons
for acts of a tutor's ward.

However, the supreme court in Foster v. Hampton72 has drawn into
question the requirement of article 2093 that solidarity must be expressly
stipulated or provided for by law. In Foster, the court held that the
employee who injured a third party was liable in solido with his employer,
who was vicariously responsible for his actions under article 2320, even
though no statute expressly stated that solidarity should be imposed. After
Foster, arguably one should not have to prove that some provision of
law holds the parties liable in solido; one need only show that both par-
ties share liability for the damage the minor child has caused.73

This imposition of solidary liability under the Foster reasoning is sup-
ported by article 250, which provides that parents, as cotutors, are to
share equal responsibility for the child, and by the last sentence in article
2318: "The same responsibility attaches to the tutors of minors."74

71. La. Code Civ. P. art. 4262 (Supp. 1984); Comment, Joint Custody in Louisiana,
43 La. L. Rev. 85, 113 (1982).
72. 381 So. 2d 789 (La. 1980) (adopting Justice Tate's concurring opinion in Wooten
v. Wimberly, 272 So. 2d 303 (La. 1973)).
73. See Kern v. Travelers Ins. Co. 407 So. 2d 2 (La. App. 4th Cir. 1981) (holding
that son who committed the delict and his father were solidary obligors).
Contribution and Indemnification

If both parents are held liable in solido under article 2318 in joint custody situations, various methods of sharing that responsibility as between the parents are possible. First, as discussed above, article 250 states that when joint custody is awarded both parents become cotutors with equal privileges and responsibilities. This implies that the liability of the parents *inter se* should be by virile shares.

However, article 250 also provides that both parents should have equal responsibilities "unless modified by order of the court or by an agreement of the parents approved by the court." For instance, the parents may provide in the joint custody plan that the parent with actual physical custody of the child will be solely liable when the child injures someone. Such a stipulation should affect only contribution rights between the parents and should not affect the right of the injured victim to sue both parents.

If the liability between the spouses is solidary, various combinations of contribution or indemnification may be used. These combinations may arise in the following situations: (1) when neither parent is negligent, (2) when one parent is negligent and not the other, and (3) when both parents are negligent.

The first category, where neither parent is negligent, is the most likely situation to occur. Since in most cases neither parent is at fault for the child's acts, some criterion is needed to allocate the loss between the non-negligent parents. As discussed above, if the noncustodial parent is held liable to third parties for the minor's acts without the practical ability to enforce disciplinary decisions by demanding physical custody, a harsh result is achieved. This harsh result can be alleviated by allowing the noncustodial parent to recover full indemnification from the custodial parent who has the ability to enforce the disciplinary decisions. Thus, as between the parents, the loss should be imposed on the parent or tutor with actual physical custody and control over the minor. Significantly, the language of article 2318 supports this right of full indemnification against the parent with physical custody. The parent without physical custody under the joint custody plan "reserves recourse" under article 2318 against the physical custodian in whose care the child has been placed. At the same time the victim is assured an additional source of financial responsibility by being able to recover from the legal custodian without physical custody.

77. See also Civ. Code art. 2106 ("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 coobligors, who, with regard to him, are considered only as his sureties.")
However, if negligent supervision is involved, clearly equity requires that indemnification should be based on the negligence of the supervising parent. Thus, in the second category, if one parent is not negligent and is cast in judgment and can prove that the damage resulted solely from negligent supervision by the other parent, then the parent cast in judgment should be permitted to seek full indemnification from the other negligent parent. Article 2103 provides that "[i]f the obligation arises from an offense or a quasi-offense, it shall be divided in proportion to each debtor's fault." If the parent ordered to pay can show the other parent was 100 percent at fault, he should be entitled to full indemnification. Again, the language of article 2318 itself—"placed by them under the care of other persons, reserving recourse"—supports full indemnification. If the mother has physical custody and the child injures another due to the mother's negligent supervision of the child, the father should be able to get full recovery from the mother.

In the final category, if both parents are negligent when the minor injures another, article 2103 would require that the parents as codebtors divide the debt according to the proportion of each parent's fault.

**Conclusion**

Since joint custody plans are becoming more popular, the issues presented above are more likely to arise. The underlying policy of joint custody is the sharing of the physical and legal custody of the parent's children. The intent is that even though the parents have terminated their marital relationship, they should not end their relationship with their children. The parents should continue to share the responsibilities of the upbringing of their children, one of which is the responsibility placed upon them by article 2318 as parents or cotutors.

The jurisprudence places paramount importance on the formal legal relationship between the parent or tutor and the child. Also of importance is society's goal of insuring innocent victims adequate sources of financial responsibility. Under this analysis parental liability under a joint custody plan should not depend on physical custody or the right to demand physical custody. Obviously, in achieving these goals neither the legislature nor the courts contemplated a tutor or parent without the right to demand physical custody to enforce continuing parental rights over minor children.

Thus, it is proposed that this problem be confronted and that article 2318 be amended to impose liability on both cotutors under a joint custody plan regardless of who has physical custody of the child at the time the damage occurs. Article 2318 would then be in harmony with article 250

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in that both parents (as cotutors) would share equal responsibilities for the child.

In addition, it is proposed that article 4261 of Code of Civil Procedure be amended to expressly state that cotutors liable under article 2318 be bound in solido. Article 4261 should also be amended to state that cotutors may provide by an agreement approved by the court for indemnification or contribution between them. Such action would clear up any confusion that may exist in the law of joint custody and article 2318 and will ensure that the interaction of joint custody laws and tort law in Louisiana will be harmonious.

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