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Torts

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I. "DERIVATIVE CLAIMS"

The term "derivative claim" has been used to describe several different causes of action in which the claimant's harm flows from the harm to another person, the primary victim. For instance, a claim for loss of consortium arises when the claimant has lost the benefit of society and service in his relationship with the primary victim due to the injuries suffered by the primary victim.[1] An action for wrongful death is derivative in the sense that the claimant beneficiary suffered his loss as the result of the death of the primary victim.[2] The action of one person for suffering mental anguish caused by witnessing the injury to another (the *Lejeune*[3] claim) also is derived from the injury to the primary victim.[4]

A common characteristic among these derivative claims is that some defenses against the primary victim's action may be urged against the derivative claimant's action. Notably, the comparative fault of the primary victim will reduce the recovery by the derivative claimant.[5] Also, the finding that the defendant was not at fault or did not proximately cause the harm to the primary victim will defeat the derivative claim.[6]

Several recent cases have held loss of consortium is a derivative claim of the primary victim's injury and is, therefore, restricted to the single person policy limits of a defendant's liability insurance policy.[7] As such, if the primary victim's injuries exhaust those policy limits, there is no coverage left for the loss of consortium claimant. This limitation to the single person policy limits occurs because of the construction the courts have given the relevant liability insurance policy provisions, *not* because the derivative nature of the loss of consortium claim makes it merely a part of a single claim or cause of action (i.e., the primary victim's).

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1. La. Civ. Code art. 2315.
2. La. Civ. Code art. 2315.2.
3. Lejeune v. Rayne Branch Hosp., 556 So. 2d 559 (La. 1990).
4. La. Civ. Code art. 2315.6.
5. Clark v. Ark-La-Tex Auction, Inc., 593 So. 2d 870 (La. App. 2d Cir. 1992); Thomas v. Hartford Ins. Co., 540 So. 2d 1068 (La. App. 1st Cir. 1989).
6. Hardy v. Cumis Ins. Co., 558 So. 2d 625 (La. App. 1st Cir. 1990); Olinde v. American Employers Ins. Co., 376 So. 2d 1027 (La. App. 1st Cir. 1979).
7. Glankler v. Rapides Parish Sch. Bd., 610 So. 2d 1020 (La. App. 3d Cir. 1992); Aldredge v. Whitney, 591 So. 2d 1201 (La. App. 2d Cir. 1991); Sharff v. Ohio Casualty Ins. Co., 584 So. 2d 1223 (La. App. 2d Cir. 1991).

The claim for loss of consortium is almost indistinguishable from the claim for wrongful death in that both causes of action are dependent on a primary tort to another person. Nonetheless, both claims are, beyond question, causes of action separate from any claim of the primary victim.[8] The loss of consortium and wrongful death claims are thus derivative only in the sense that the damages suffered by these claimants flow from their relationship with the primary tort victim.[9] Neither claim, however, is the assertion of the primary victim's cause of action itself, as is the case with a survival action. Closely related, in their derivative nature, are claims for wrongful infliction of mental anguish, *Lejeune* claims.

Even though these claims are properly classified as "derivative," it is a completely separate issue to determine whether the claimant's action for loss of consortium, wrongful death, or the *Lejeune* harm is restricted under the wording of an applicable liability insurance policy provision to the *single person/injury* policy limits. (An inquiry into the complexities of the insurance policy provisions is beyond the scope of this tort inquiry.) That issue is controlled by the terms of the policy, usually those defining "bodily injury," which in turn requires an analysis of the nature of the damage in light of the wording of the policy, not a cause of action analysis.

In *Crabtree v. State Farm Insurance Co.*,[10] the Louisiana Supreme Court faced the question whether a *Lejeune* claim is by its nature derivative of the harm to the primary victim. Further, the question was raised whether, in keeping with the current courts of appeal jurisprudence as to loss of consortium claims, this mental anguish claim was confined to the single person policy limits. The *Crabtree* court held mental anguish can constitute a separate "bodily injury" to the mental anguish claimant within the meaning of typical liability insurance policy provisions. The court, however, did not undertake the question whether the *Lejeune* claim is derivative,[11] as the courts of appeal have classified loss of consortium claims.[12] Nonetheless, the implication from the decision is that the court would not be receptive to an argument that the *Lejeune* claim is derivative to the extent that the injury to the primary victim and the resulting mental anguish to the *Lejeune* claimant are, under the policy provisions, simply a harm to one person. Again, at this point the analysis is one of the meaning of the policy provisions, and *Crabtree* was careful to restrict its interpretation to the term "bodily injury" as defined in the policy before it.[13]

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8. Guidry v. Theriot, 377 So. 2d 319 (La. 1979).

9. They may be dependent upon the primary tort in that there must be a tort cause of action to the primary victim for the loss of consortium or wrongful death claimant to have an action. However, even though derivative in that sense, they are separate causes of action. The jurisprudence on wrongful death holds that even with a settlement of his action by the primary victim or with the running of prescription thereon, the cause of action for wrongful death remains viable. *See* Guidry v. Theriot, 377 So. 2d 319 (La. 1979).

10. 632 So. 2d 736 (La. 1994).

11. It is submitted that classification as derivative is largely irrelevant.

12. *See supra* note 7.

13. *Crabtree*, 632 So. 2d at 741.

From a tort analysis standpoint, loss of consortium seems more properly classified as an independent harm proximately caused to another, just as there may be a tort inflicted upon a primary victim which, in turn, proximately causes the injury of a rescuer who has no action unless there was a tort to the primary victim. There seems to be no difference between inflicting injury on a claimant through loss of consortium, causing the wrongful death of a loved one, inflicting mental anguish through a harm to another as in *Lejeune*, or harming a rescuer whose injury is brought about by the wrongful act of the defendant towards the primary victim. All of these are independent causes of action even though derived from harm to another. They have in common that, while the present claimant's cause of action arises from the tort inflicted on the primary victim, the damage and thus the tort to the derivative claimant is separate, even though it may or may not constitute an independent "bodily harm" under applicable liability insurance policy provisions. In holding a mental anguish claim to be a separate bodily injury claim for insurance purposes, *Crabtree* is on the right track.

II. CONTRA NON VALENTEM AND SEXUAL ABUSE

The tragic volume of sexual abuse incidents appearing in the supreme court and courts of appeal opinions has engendered a reaction by the courts to shape the law of prescription more equitably to fit these unfortunate circumstances. In *Bouterie v. Crane*,[14] the plaintiff had been in the custody of the Department of Health and Human Resources (DHHR) until her eighteenth birthday and was unable, procedurally, to file suit for sexual abuse which had occurred over a two-year period that ended more than a year prior to her release from DHHR. The Louisiana Supreme Court found, while her claim did not fit squarely into any of the four general contra non valentem situations, "equity demands the harshness of prescription should be suspended in this suit for damages for the sexual abuse of a minor through the period she was in the legal custody of DHHR."[15] The doctrine of contra non valentem is not restricted by statute, and the court is free to shape the doctrine jurisprudentially. This innovation seems to be completely well-founded.

In *Bustamento v. Tucker*,[16] the plaintiff endured almost daily incidents of sexual harassment over a two-year period. Her subsequent suit was on its face subject to prescription for those incidents occurring more than a year prior to the filing of the suit. The court, however, found this was a pattern of incidents, rather than a series, such that prescription on the earliest incident did not begin to run until the date of the last incident. This scenario is not quite what the law has come to characterize as a continuing tort, although it is very similar. It was

14. 616 So. 2d 657 (La. 1993).
15. *Id.* at 662.
16. 607 So. 2d 532 (La. 1992).

wise for the court to call this a package of harm and run the prescriptive period only from the date of the last harm rather than to fit it into the continuing tort theory. Again, it is a very equitable application of the law of prescription in view of the nature of the harm.

Wimberly v. Gatch[17] is a third example of an equitable resolution of the prescription problem that sexual abuse victims face. A young child was sexually molested over a three-year period. Any acts occurring more than a year prior to the filing of this suit would have prescribed if the doctrine of contra non valentem were not available to the plaintiff. The victim, a minor, could bring the action only through his parents, who were unable to file suit because the emotional impact of the defendant's tortious conduct on the victim, according to psychiatric testimony, created a syndrome of silence, a normal behavior for an abused child. Thus, the contra non valentem theory that applies when the debtor prevents the creditor from bringing the action was invoked. The court also noted that equity required the application of contra non valentem.[18] Again, the court was fashioning the theory and application of contra non valentem to fit what has become a rapidly expanding and extremely serious social problem.

It should be noted that the legislature has reacted to the burgeoning cases of sexual molestation and abuse by enacting Louisiana Civil Code article 2315.7, which provides for exemplary damages for criminal sexual activity on a child seventeen or younger. Likewise, in the prescriptive sense, Louisiana Revised Statutes 9:2800.9 provides for a prescription of ten years after the victim reaches the age of majority in actions for sexual abuse of a minor. The statute requires an elaborate pre-filing procedure by the attorney and an affidavit of a licensed mental health practitioner.

III. UNCONSTITUTIONALITY OF STATUTES LIMITING STATE LIABILITY FOR TORT DAMAGE

What is the status of a statute declared unconstitutional by the Louisiana Supreme Court? Has it been erased, as though repealed; or is it still a law, though quiescent and barred from application? In *Chamberlain v. State*,[19] the Louisiana Supreme Court declared unconstitutional the cap on damage awards against the state and governmental entities under Louisiana Revised Statutes 13:5106. Soon thereafter, in *Rick v. State*,[20] the supreme court found Louisiana Revised Statutes 13:5112(C) unconstitutional because it set a lower rate of prejudgment interest in suits against governmental entities than applied in suits against other defendants.

In another case related to the state limitation of liability statutes, the Louisiana Second Circuit Court of Appeal, in *Johnson v. Department of Public*

17. 635 So. 2d 206 (La. 1994).
18. *Id.* at 217.
19. 624 So. 2d 874 (La. 1993).
20. 630 So. 2d 1271 (La. 1994).

Safety,[21] refused to consider the plea that Louisiana Revised Statutes 9:2798.1[22] was unconstitutional because the unconstitutionality had not been pleaded in the trial court, as is uniformly required by current jurisprudence.[23] The *Johnson* opinion further noted that the liability-limiting statute was not unconstitutional on its face, which may be a basis for attacking the constitutionality for the first time in the appellate court.[24]

To complete the scenario, in *Thibodeau v. Mayor & Councilmen*,[25] the Louisiana First Circuit Court of Appeal faced the question whether to apply Louisiana Revised Statutes 13:5112(C), which had been found unconstitutional, not by the trial court in the case before it, but by the Louisiana Supreme Court in the *Rick* opinion. The *Thibodeau* court noted the admonition in *Segura v. Frank*,[26] in which the supreme court declared "where the law has changed during the pendency of a suit and retroactive application of the new law is permissible, the new law applies on appeal . . . ." The *Thibodeau* court then applied the holding in *Rick*, that the interest-limiting statute was unconstitutional, and awarded interest in the case before it in light of their recognition of the prior decree of unconstitutionality of the interest statute.[27]

The following question must therefore be posed: Is a statute held unconstitutional by one court thereafter unconstitutional in cases before other courts, so that, in effect, those other courts can take judicial notice of the prior holding of unconstitutionality? The answer may be different depending on whether the court that originally declares the statute unconstitutional is a trial court, a court of appeal, or the supreme court. A closely related question also may be asked: If a specific statute (e.g., Louisiana Revised Statutes 9:2798.1[28]) is closely related to a statute previously declared unconstitutional by the supreme court (e.g., Louisiana Revised Statutes 13:5106 or :5112(C)), does that make the second statute unconstitutional on its face? This character of common or related

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21. 627 So. 2d 732 (La. App. 2d Cir. 1993).

22. La. R.S. 9:2798.1 (1991) provides, in relevant part:

> B. Liability shall not be imposed on public entities or their officers or employees based upon the exercise or performance or the failure to exercise or perform their policy-making or discretionary acts when such acts are within the course and scope of their lawful powers and duties.
>
> C. The provisions of Subsection B of this Section are not applicable:
>
> (1) To acts or omissions which are not reasonably related to the legitimate governmental objective for which the policy-making or discretionary power exists; or
>
> (2) To acts or omissions which constitute criminal, fraudulent, malicious, intentional, willful, outrageous, reckless, or flagrant misconduct.

23. *See* Lemire v. New Orleans Pub. Serv., Inc., 458 So. 2d 1308, 1311 (La. 1984) ("The constitutionality of a statute must first be questioned in the trial court, not the appellate court."); Summerell v. Phillips, 282 So. 2d 450 (La. 1973).

24. *Johnson*, 627 So. 2d at 740 n.4.

25. 640 So. 2d 830 (La. App. 1st Cir. 1994).

26. 630 So. 2d 714, 725 (La. 1994).

27. *Thibodeau*, 640 So. 2d at 831.

28. La. R.S. 9:2798.1 (1991).

genesis would not be a difficult legal analysis as to the package of six statutes limiting state liability.[29] With the reasoning in *Chamberlain*, that the cap on damages unconstitutionally resurrected sovereign immunity, no other court would have difficulty declaring the other five statutes unconstitutional for containing the same fatal flaw and applying the same analysis and reasoning of *Chamberlain*.

The *Thibodeau* court's reliance on the language from *Segura*[30] is misplaced. The *Segura* opinion dealt with a *statute* that had been changed during the pendency of an action, while the change in law in *Thibodeau* is a jurisprudential declaration of unconstitutionality.[31] The *Thibodeau* court was treating the expression in *Segura*, as to an amended statute, as though it were the rule applicable to a new jurisprudential interpretation of substantive law. However, a new jurisprudential interpretation of substantive law is always retroactive in the sense that it overrules all pre-existing statements of law inconsistent with it.[32] Nevertheless, it seems clear that the rule as to the pronouncement of a new interpretation of substantive law by an appellate court is not applicable when the declaration by the court is the unconstitutionality of a statute. Such a declaration of unconstitutionality is not an edict of the court having the force of a rule of law. Thus, the *Thibodeau* court based its finding of unconstitutionality on what amounts to judicial notice of the *Chamberlain* decision, in viewing that decision as a changed interpretation of law when it was not that at all.

The only available authority holds that when a state statute is declared unconstitutional it does not disappear from the books as though repealed; it remains a law of the state, but is subject to the impediment creating the unconstitutionality.[33] When the impediment is removed, the statute can come back to life. In *Dr. G.H. Tichenor Antiseptic Co. v. Schwegmann Bros. Giant Super Markets*,[34] the contention was that a Louisiana statute, when enacted, violated certain provisions of the United States and Louisiana Constitutions. The opposing argument was made that Congress had removed the constitutional problems by passing certain legislation after the enactment of the Louisiana statute. The counterargument was then made that the Louisiana statute could not be effective unless it was re-enacted after the passage of the congressional legislation. The Orleans Court of Appeal phrased that contention in the following language:

> One of the contentions is that the Louisiana . . . Statute was unconstitutional when enacted and that the [congressional] Act, if it made such

29. La. R.S. 9:2798.1 (1991), :2800 (1991 & Supp. 1995); 13:5106(B)(1) (1991), :5112(C) (1991 & Supp. 1995), :5114(D) (1991), :5117, *repealed by* 1989 La. Acts No. 754, § 1; 29:23.1 (1989); 42:1441.1-:1441.4 (1990).

30. *See supra* text accompanying note 25.

31. The statute at issue in *Segura* was enacted by Act 237 of 1992, which had not been passed by the legislature at the time the action came before the court of appeal.

32. Norton v. Crescent City Ice Mfg. Co., 178 La. 135, 150 So. 855 (1933).

33. *See infra* notes 35-38 and accompanying text.

34. 83 So. 2d 502 (La. App. Orl. 1955).

> legislation constitutional, came after the enactment of the Louisiana . . . Law, and that therefore the Louisiana law, being unconstitutional when enacted, could not be effective unless re-enacted after the passage of the [congressional] Act.[35]

The court of appeal then quoted from the United States Supreme Court's opinion in *Wilkerson v. Rahrer*:[36] "[The congressional] act . . . removed the obstacle, and we perceive no adequate ground for adjudging that a re-enactment of the state law was required before it could have . . . effect . . . ."[37] Other federal cases have followed the *Rahrer* opinion.[38]

Thus, it is suggested that each party intending to rely on the unconstitutionality of the statutes limiting state liability should be required to plead the unconstitutionality initially in the trial court as it is very questionable that the courts of appeal, or the trial courts, have the authority to take judicial notice of the *Chamberlain* holding.[39]

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35. *Id.* at 508.

36. 140 U.S. 545, 565, 11 S. Ct. 865, 870 (1891).

37. *Tichenor*, 83 So. 2d at 508.

38. Central Pac. R.R. v. Nevada, 162 U.S. 512, 16 S. Ct. 885 (1896); Butler v. Goreley, 146 U.S. 303, 13 S. Ct. 84 (1892); Buder v. First Nat'l Bank, 15 F.2d 990 (8th Cir. 1927).

39. *See* Summerell v. Phillips, 282 So. 2d 450 (La. 1973).