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# Torts: Recent Developments

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## I. DERIVATIVE CLAIMS-LIMITATION OF RECOVERY

In *Ferrell v. Fireman's Fund Insurance Co.*,[1] the court held that a claim for loss of consortium is derivative of the primary victim's injuries and is therefore recoverable only out of the one-person limits of liability under the insurance policy.[2] The court said, ". . . we do not believe that loss of consortium is covered as a separate bodily injury under the per accident bodily injury limits of the policy. Coverage for loss of consortium exists solely under the per person bodily injury limits of the policy because loss of consortium is derivative of the primary victims [sic] injuries and not a separate bodily injury."[3]

There are other significant claims calling for this same kind of analysis. Perhaps the most comprehensive definition of a derivative claim is to say that it is one that is viable only if it arises from the injury to a primary victim whose claim itself is viable, i.e. a defendant not liable to the primary victim for his injury would not be liable to the derivative claimant. Accepting that definition, the derivative analysis and limitation should apply to claims for loss of consortium, wrongful death, or mental anguish under Louisiana Civil Code article 2315.6 (the LeJeune claim), the general medical malpractice limitation of liability, the limitation of the State for medical malpractice, and very importantly, the derivative claim restriction in the Governmental Claims Act.[4]

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1. 696 So. 2d 569 (La. 1997).

2. A crucial distinction in this analysis as to coverage under the insurance policy is that the court concluded that loss of consortium is not a separate bodily injury. Contrast this to the analysis in *Crabtree v. State Farm Ins. Co.*, 632 So. 2d 736 (La. 1994), in which the Supreme Court found that a mental anguish claim by itself without injury to the body as such, constituted "bodily injury" under the terms of the State Farm policy and was therefore a bodily injury separate from that of the primary victim which gave rise to the claimant's mental anguish. In footnote 14 of the Crabtree opinion the court said the definition of bodily injury "turns on the *type of injuries suffered, not the source of that 'bodily injury.*'" (emphasis added).

3. *Ferrell*, 696 So. 2d at 576.

4. Louisiana Revised Statutes 13:5106(B)(1), which provides: "[i]n all suits for personal injury to any one person, the total amount recoverable, including all *derivative claims*, . . . shall not exceed [$500,000]." (emphasis added).

There is in that same section the following restriction as to wrongful death:

> IN ALL SUITS FOR WRONGFUL DEATH OF ANY ONE PERSON THE TOTAL AMOUNT RECOVERABLE, . . . SHALL NOT EXCEED [$500,000].

La. R.S. 13:5106(B)(2) (Supp. 1999). Even though Crabtree held that LeJeune mental anguish constituted a bodily injury, and was thus covered by the court's interpretation of the policy provisions, the LeJeune claim is clearly derivative of the primary victim's injury because if the defendant were not liable to the primary victim, it is difficult to imagine any hypothesis in which the defendant would nonetheless be liable to the LeJeune claimant. The Crabtree court went to great

An action for wrongful death is derivative of the wrong that caused the death of the primary victim. If the defendant is not at fault in causing the primary victim's death, then he has no liability to wrongful death claimants.[5] The elements of a wrongful death claim are virtually identical to those for loss of consortium. The loss of consortium claim is for damage to the relationship with a living person, while the claim in a wrongful death action arises from the damage to relationships caused by the death. It would be most difficult to hold that loss of consortium is a derivative claim, but a wrongful death action is not.

The classification of loss of consortium, the LeJeune claim, and the wrongful death claim as derivative claims must be faced squarely in fundamental tort analysis, not just in terms of the definitional language of an insurance policy, because of the inclusion of the phrase "derivative claims" in the limitation of recovery in the Governmental Claims Act. The term "derivative claim" is now a well-defined term of art. It is submitted that under the above analyses any claim under the Governmental Claims Act for LeJeune damages, loss of consortium, or wrongful death, must come within the limitations of the $500,000 cap for personal injury to any one person.

The problem arises again in the application of the statutory cap on damages for medical malpractice against the State. In 1976 the term "patient" in the Medical Malpractice Liability for State Services Act was statutorily defined as "a natural person who receives or should have received care from a person covered by this Part."[6] The current language of the statute defines *patient* as "a natural person who receives, or should have received, health care from a person covered by this part *and any other natural person or persons who would or may have a claim or claims for damages under applicable law arising out of, or directly related*

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lengths to say that it was not deciding the derivative issue although several Courts of Appeal had made the decision. The Crabtree court noted the language in *LeJeune v. Rayne Branch Hospital*, 556 So. 2d 559, 568-69 (La. 1990) (footnote 11 of the Crabtree opinion), "this court found the defendant hospital owed an *independent* duty to protect the plaintiff from mental pain and anguish occasioned by the negligent infliction of injury to the plaintiff's husband."

It is difficult to conceive that without negligent infliction of injury to the husband, the wife could have recovered even though an independent duty is owed to her. The independent duty seems to be simply an overstatement of the term "duty." Stated another way, in negligently injuring husband, defendant proximately caused emotional distress to the wife. But without negligence to the primary victim, certainly there would be no viable action for mental anguish by the wife.

5. The Supreme Court of West Virginia held to that effect in *Dairyland Ins. Co. v. Westfall*, 484 S.E.2d 217 (W. Va. 1997). While making the statement that "[t]he damages in a wrongful death action arise out of the death of the decedent thereby making a wrongful death action a derivative claim," the issue before the court was whether loss of consortium was restricted to single person limits of coverage. The particular insurance policy defined bodily injury as loss of services. The court held that under that particular language the wife and the son were each entitled to the per person limits because of the definition in the policy itself.

6. 1976 La. Acts No. 66, §1.

*to, the claim or claims of the natural person who receives, or should have received, health care from a person covered by this Part.*"[7]

It would have been difficult to amend the original definition to include more clearly in the limitation of liability those who would have claims derivative of the wrongfully treated person, the primary victim. The general limitation of liability under the Act states that "no judgment shall be rendered and no settlement or compromise shall be entered into for the injury or death of any patient in any action or claim for an alleged act of malpractice in excess of five hundred thousand dollars. . . ."[8] The writer of the statute simply redefined "patient" to include derivative claims so that the limitation of recovery by "any patient" would cover not only the treated person, but anyone having a derivative claim. The statute as now written is unambiguous; yet, in *Conerly v. State*,[9] the parents' wrongful death claims against the State for the malpractice death of their newborn were held by the court of appeal not subject to the single cap. "The injuries to these parents were distinct from the injury suffered upon the child and each parent is entitled to damages arising out of their daughter's wrongful death."[10]

It seems very difficult to apply that analysis in light of the revised definition of "patient" applicable at the time of the suit. The court of appeal relied heavily on an analysis that simply separated survival and wrongful death actions as being separate and distinct. As a fundamental analysis of the survival and wrongful death actions, that is obviously correct; but it does not address the statute's obvious classification of the wrongful death claimants as "patients" with derivative claims, thereby being subject to the limitation of liability cap. Even without fundamental tort analysis as to the nature of a "derivative" claim, a wrongful death claim is included within the liability cap by the statutory definition of "patient."

The Supreme Court reversed[11] the court of appeal and held that the statutory definition of "patient" as including all claims arising from the victim's injury was clear, so that only one cap was available, precluding the parents' claims.

What then should be the disposition for claims for wrongful death or for loss of consortium arising under the general Medical Malpractice Act? *Hollingsworth v. Bowers*[12] squarely held that a mother's claim for loss of consortium was relegated to the single medical cap of $500,000. Since her injured infant was entitled to damages in excess of the cap, the mother received nothing for her loss of consortium claim. Her claim was classified as derivative of the primary victim's injury.

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7. La. R.S. 40:1299.39(A)(3) (1992) (emphasis added).
8. La. R.S. 40:1299.39(F) (1992).
9. 690 So. 2d 980 (La. App. 2d Cir. 1997).
10. *Id.* at 993.
11. Conerly v. State, 714 So. 2d 709 (La. 1998).
12. 690 So. 2d 825 (La. App. 3d Cir. 1996).

## II. *BILLIOT* OVERRULED

The Supreme Court, in *Adams v. J.E. Merritt Construction Inc.*,[13] overruled their *Billiot* opinion,[14] in which the court held that the exclusivity provision of the Worker's Compensation Act did not preclude an employee from recovering punitive damages from their employer under Louisiana Civil Code article 2315.3 for exposure to hazardous or toxic substances in the course of their employment. The effect of *Billiot* was to allow an employee whose recourse for his primary harm was restricted to the Worker's Compensation Act to recover nonetheless from his employer in tort for punitive damages.

The *Billiot* decision was met with alarm and surprise on many fronts. Its principal reasoning was that when the Worker's Compensation Act was first enacted in 1914, Louisiana law did not recognize punitive damages, therefore the exclusivity provision could not have meant to exclude them.

The *Adams* court based its overruling on the express language of Louisiana Revised Statutes 23:1032(A), providing for exclusivity of all other rights and remedies than Worker's Compensation, and "because the underlying reasoning supporting its [*Billiot*] holding [was] erroneous."[15]

The *Adams* court simply looked to the jurisprudence prior to 1914 and cited many cases in which punitive damages were awarded, as early as 1836. In those days it was referred to as "smart money" because the award of those damages "smarted."

The *Adams* court would have been willing to overturn *Billiot* on the simple basis of the plain language of the current statute, but the court further noted that in 1995 the legislature specifically included punitive damages as prohibited under the exclusivity rule. The court also noted that Louisiana Civil Code article 2315.3 itself did not lend itself to the *Billiot* ruling, because the punitive damages there provided were "in addition to general and special damages. . . ." The court also was careful to note, in footnote 5, that the *Adams* case did not address whether a plaintiff successfully proving an intentional act under Louisiana Revised Statutes 23:1032 would be able to recover punitive damages under former Louisiana Civil Code article 2315.3, which was repealed by Acts 1996, No. 2, though the repeal was not retroactive.

## III. THE BRIERPATCH OF THE RELATIONSHIP OF INTENTIONAL AND NEGLIGENT TORTFEASORS

The legal relationship of the separate intentional and negligent tortfeasors, who both are a cause of harm to the plaintiff, has created a rapidly growing and very serious brierpatch. The most common current example is the negligent

13. 712 So. 2d 88 (La. 1998).
14. Billiot v. B.P. Oil Co., 645 So. 2d 604 (La. 1994).
15. *Adams*, 712 So. 2d at 90.

wrongdoer whose negligence consists of a breach of duty to prevent a subsequent intentional harm such as a failure to furnish security measures in its apartment complex, parking lot, or garage. This was the pattern in *Veazey*[16] and *Peterson*.[17]

At the heart of the problem is the proposition that the degree of culpability of an intentional wrongdoer is so disparate from that of a negligent wrongdoer that the two will not mix, or concur, as oil does not mix with water, resulting in a mathematical impossibility of joint tortfeasorship between the two.[18]

There are tangible manifestations of the basic truth of non-concurrence. Louisiana Civil Code article 2324A[19] specifies that intentional wrongdoers are in solido if they conspire, i.e., it takes more than the mere harm to the same victim by two intentional wrongdoers to create a relationship of solidarity between the wrongdoers. The solidarity arises not from the concurrence of the wrongs, but from the act of conspiracy.

A further manifestation is the recent amendment to Louisiana Civil Code article 2323[20] forbidding the comparative fault negligence reduction of the plaintiff's claim against an intentional wrongdoer.

As a way out of this brier patch it is submitted that the negligent wrongdoer and intentional wrongdoer, as in the two above cited cases, are certainly not joint tortfeasors, but should nonetheless be in solido because they each are responsible for the same debt under Louisiana Civil Code article 1797:

> An obligation may be solidary though it derives from a different source for each obligor.

Since the two are not joint tortfeasors, the extensive restrictions of Louisiana Civil Code article 2324B[21] against solidarity do not apply.

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16. Veazey v. Elmwood Plantation Assocs., Ltd., 650 So. 2d 712 (La. 1994).

17. Peterson v. Gibraltar Sav. and Loan, 711 So. 2d 703 (La. App. 5th Cir. 1998).

18. The disparate degree of culpability problem was faced in *Howard v. Allstate Ins. Co.*, 520 So. 2d 715 (La. 1988), when the disparity of culpability was recognized between a negligent plaintiff and a strictly liable defendant. Because of the disparity, the court compared relative *causation* rather than *fault*, to effect a reduction of recovery for the plaintiff.

19. La. Civ. Code art. 2324(A): "He who conspires with another person to commit an intentional or willful act is answerable, in solido, with that person, for the damage caused by such act."

20. La. Civ. Code art. 2323(C): "Notwithstanding the provisions of Paragraphs A and B, if a person suffers injury, death, or loss as a result partly of his own negligence and partly as a result of the fault of an intentional tortfeasor, his claim for recovery of damages shall not be reduced."

21. La. Civ. Code art. 2324(B):

> B. If liability is not solidary pursuant to Paragraph A, then liability for damages caused by two or more persons shall be a joint and divisible obligation. A joint tortfeasor shall not be liable for more than his degree of fault and shall not be solidarily liable with any other person for damages attributable to the fault of such other person, including the person suffering injury, death, or loss, regardless of such other person's insolvency, ability to pay, degree of fault, immunity by statute or otherwise, including but not limited to immunity as provided in R.S. 23:1032, or that the other person's identity is not known or reasonably ascertainable.

It is submitted as a matter of policy that no plea of victim fault should be permitted, even for the tortfeasor guilty only of negligence, because the negligence harmed the victim solely through the instrumentality of an intentional wrongdoing, albeit the wrongdoing of another. To allow victim fault as comparative fault would allow the tortfeasors to benefit indirectly in a way that they could not benefit directly because of the rule of Louisiana Civil Code article 2323C, which precludes applying comparative negligence (fault) to reduce a victim's claim against an intentional wrongdoer.

Contribution under Louisiana Civil Code article 1804 would apply between the tortfeasors, however hollow that remedy might be on many occasions of primitive and barbaric assault, noting here that most liability policies exclude coverage for intentional wrongs.

Can there be an allocation of responsibility between the two under Louisiana Code of Civil Procedure 1812? The writer has no clear authority, though it seems incongruous to allocate to a negligent tortfeasor any part of the intentional wrong, under the principle of disparity. If classified under Louisiana Civil Code article 1797 as obligors in solido they would each be liable for 100% to the obligee, and liable in contribution to each other for their virile share,[22] which would be in proportion to fault. To implement this rule the court would instruct under Louisiana Code Civil Procedure 1812 that the proportion of responsibility among the wrongdoers is equal.

The alternative is to allocate responsibility on the proportion of causation, which also makes a lot of sense in carrying out contribution, while allowing each defendant to remain in solido for 100% as to the plaintiff.

## IV. HAS THE RULE OF *LAMBERT V. UNITED STATES FIDELITY & GUARANTY CO.* FALLEN?

Under *Lambert*,[23] the Louisiana Supreme Court pronounced in detail the long-standing tort theory that if an initial tortfeasor puts the victim in position to suffer further harm, the initial tortfeasor pays both for the damage he did originally and for the damage the victim suffered in the second occurrence. It is submitted that this rule of liability has been placed in serious doubt with the adoption of the 1996 version of Louisiana Civil Code article 2324B.[24] The article now says with great clarity that a tortfeasor pays only for that portion of the damage that he caused. That portion is identified with an allocation of fault. The allocation is implemented under Louisiana Code of Civil Procedure article 1812C.[25] The allocation of a portion of responsibility to a party or nonparty

22. La. Civ. Code art. 1804.

23. Lambert v. United States Fidelity & Guar. Co., 629 So. 2d 328 (La. 1993).

24. *See supra* note 21.

25. La. Code Civ. P. art. 1812(C):

> C. In cases to recover damages for injury, death, or loss, the court at the request of any party shall submit to the jury special written questions inquiring as to:

depends upon legal causation, or proximate cause. Legal causation includes the "but for" test.

In a typical automobile accident with resulting traumatic injuries, the victim has medical treatment, and in the course of it he may be injured further through medical malpractice.

It can hardly be said that if as a result of the automobile trauma a leg must be amputated that the automobile caused the medical personnel to amputate the wrong leg. That just does not make sense, and it is doubtful that any jury under proper instructions would say that the negligent automobile driver was the cause-in-fact of the medical personnel's committing such drastic medical malpractice. This example is a simple one because the damage caused by the medical malpractice is easily separated from the damage arising from the automobile accident.

The forerunner of *Lambert* is *Weber v. Charity Hospital at New Orleans.*[26] *Weber* is the more definitive statement of the basis for this sort of liability. It pitches the basis for the liability entirely on legal or proximate cause. The risk of further injury is within the duty of the original tortfeasor, whether the second injury be from medical malpractice or otherwise. The second injury need not arise from a second tortfeasor's fault, i.e., a weakened ankle causing victim to stumble into the path of a car in an incident much later than the original accident. *Weber* even makes the point that under the Restatement of Torts, 2d, section 457, comment A, the medical treatment that causes further damage need not be malpractice or negligence. It can be the result ordinarily inherent in medical treatment with the "human fallibility of physicians, surgeons, nurses and

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(1) Whether a party from whom damages are claimed, or the person for whom such party is legally responsible, was at fault, and, if so:

(a) Whether such fault was a legal cause of the damages, and, if so:

(b) The degree of such fault, expressed in percentage.

(2)(a) If appropriate under the facts adduced at trial, whether another party or nonparty, other than the person suffering injury, death, or loss, was at fault, and, if so:

(i) Whether such fault was a legal cause of the damages, and, if so:

(ii) The degree of such fault, expressed in percentage.

(b) For purposes of this Paragraph, nonparty means a person alleged by any party to be at fault, including but not limited to:

(i) A person who has obtained a release from liability from the person suffering injury, death, or loss.

(ii) A person who exists but whose identity is unknown.

(iii) A person who may be immune from suit because of immunity granted by statute.

(3) If appropriate, whether there was negligence attributable to any party claiming damages, and, if so:

(a) Whether such negligence was a legal cause of the damages, and, if so:

(b) The degree of such negligence, expressed in percentage.

(4) The total amount of special damages and the total amount of general damages sustained as a result of the injury, death, or loss, expressed in dollars, and, if appropriate, the total amount of exemplary damages to be awarded.

26. Weber v. Charity Hosp. of Louisiana, 475 So. 2d 1047 (La. 1985).

hospital staffs which is inherent in the necessity of seeking medical treatment."[27]

*Weber* states that the question is essentially one of legal causation.[28] The necessity of establishing causation in fact is recognized. The cause-in-fact question should be for the jury to determine whether an earlier injury was the but-for cause-in-fact of the subsequent injury.

At this point of the analysis, our appellate courts' jurisdiction of fact looms over us with great importance. It is vastly different for the appellate court to say, as it did in *Lambert*,[29] that an original tortfeasor *is* liable for subsequent damage such as that caused by medical treatment, as distinguished from saying that a jury *may* find as a question of fact that the tortfeasor's original injury to the victim was a cause-in-fact of subsequent injury. Reading *Weber* and *Lambert*, one has the impression that the court is finding as a fact, particularly in *Lambert*, that the original tortfeasor is, even as a matter of law, liable for the second injury. It would be comforting if a defendant knew that he might avoid responsibility for the secondary injuries if his causal connection to the subsequent injury was weak in a legal cause or proximate cause cause-in-fact sense, so that a jury of ordinary reasonable persons might find under a proper set of jury instructions that the defendant was not liable for the subsequent injury.

As a matter of policy, this liability situation should be seriously reviewed because there is no longer an action in contribution between the original defendant and the perpetrator of the second harm. The possibility of contribution seems to be offered by the court in *Weber* and *Lambert* as a palliative to this extended liability on the original tortfeasor, to comfort him with the prospect that he may recover part of his liability with contribution from the subsequent wrongdoer.

Certainly, if the second injury is by a negligent tortfeasor, Louisiana Civil Code article 2324B forbids assessing any liability on the original tortfeasor for the second injury because as joint tortfeasors each pays only his allocated share.[30]

Looking at this category of tort liability in a broad sense, then, the situations giving rise to the claim fit into at least three different situations: (1) the initial wrong causes a weakness which in itself causes the subsequent injury without the intervention of another factor; (2) the subsequent injury by a second tortfeasor exacerbates the very same injury inflicted by the original tortfeasor; (3) the subsequent actor inflicts injuries completely separate and apart and distinguishable from that inflicted by the original tortfeasor (an over zealous Samaritan, or the amputator of the wrong leg).

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27. *Id.* at 1050.

28. *Id.*

29. *Lambert*, 629 So. 2d at 329 ("his liability for 100% of the victim's damages results because he is the legal cause of 100% of the victim's harm.").

30. La. Civ. Code art. 2324(B).

It is submitted that under example 1, it would be for the jury to find whether the original tortfeasor was the legal cause of the subsequent injury, because he created the physical condition leading to the second injury. As to example 2, there should be no liability on the first tortfeasor for this relationship, because Louisiana Civil Code article 2324B, provides that each joint tortfeasor should pay only his allocated share. As for example 3, this situation should always be the subject of an argument for directed verdict for the first tortfeasor, if he can show that the scope of foreseeability that controls legal and proximate cause simply did not extend to this type harm.