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Repository Citation
Bruce V. Schewe and Martha Quinn Thomas, Prescribing Solidarity: Contributing to the Indemnity Dilemma, 41 La. L. Rev. (1981) Available at: https://digitalcommons.law.lsu.edu/lalrev/vol41/iss2/21
COMMENT

PRESCRIBING SOLIDARITY: CONTRIBUTING TO THE INDEMNITY DILEMMA

During the last supreme court term two decisions\(^1\) were handed down that have the potential to affect profoundly Louisiana law governing solidary obligors. The first case, *Thomas v. W & W Clarklift, Inc.*,\(^2\) presented a complex factual situation. The plaintiff, an employee of Dennis Sheen Transfer Company, was injured when a forklift fell on him. The machine had been purchased as a used item from W & W Clarklift, which had overhauled it.\(^3\) Suit was instituted against W & W Clarklift and its insurer, under theories of negligence and breach of warranty.\(^4\) Some twenty-nine months after the employee’s action had been filed, the defendants brought third party demands\(^5\) against officers and supervisory personnel of Dennis Sheen Transfer, averring negligence in failing to discover the forklift’s unsafe condition and seeking contribution or indemnity.\(^6\) After the trial court dismissed the demands, the fourth circuit affirmed\(^7\) by sustaining the peremptory exception of prescription\(^8\) of one year’s lapse.\(^9\) The Louisiana Supreme Court reversed and ruled that

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2. 375 So. 2d 375 (La. 1979).
3. *Id.* at 377.
4. *Id.*
5. LA. CODE Civ. P. art. 1111 provides, in pertinent part: “The defendant in a principal action . . . may bring in any person, including a codefendant, who is his warrantor, or who is or may be liable to him for all or part of the principal demand.” (Emphasis added).
6. 375 So. 2d at 377.
8. LA. CODE Civ. P. art. 927 states that “[t]he objections which may be raised through the peremptory exception include . . . (1) Prescription . . . .”
9. LA. Civ. Code art. 3536 provides:
   The following actions are also prescribed by one year:
   That for injurious words, whether verbal or written, and that for damages caused by animals, or resulting from offenses or quasi offenses.
   That which a possessor may institute, to have himself maintained or restored to his possession, when he has been disturbed or evicted.
   That for the delivery of merchandise or other effects, shipped on board any kind of vessels.
   That for damage sustained by merchandise on board ships, or which may have happened by ships running foul of each other.
As should be apparent from the other types of actions limited by article 3536 to one
W & W Clarklift may have been a solidary obligor with the Dennis Sheen Transfer supervisory employees. Since further development of the facts could result in a finding that a relationship in solido existed, the court reasoned that the intra-debtor action might not have prescribed.

year's life, the time period stated is somewhat arbitrary.

In addition, the court of appeal maintained the exception of no cause of action. 365 So. 2d at 915. The Supreme Court of Louisiana stated that “[t]he crux of the Court of Appeal holding . . . [was] that W & W Clarklift and . . . [the supervisory personnel of Dennis Sheen Transfer] are not joint tortfeasors and thus not solidary obligors.” 375 So. 2d at 377. Moreover, the supreme court believed that the court of appeal so reasoned on the assumption that the allegedly concurrent negligence was that of the supervisory personnel and one or more of the W & W Clarklift employees. Additionally, “in their view an employer only vicariously liable because of employee negligence is solidarily liable neither with its employees nor with the concurrently negligent tortfeasor.” Id.

10. Id. at 378. The qualification of the court's decision stems from the procedural posture of the lower court rulings. The facts necessary to establish that W & W Clarklift and Dennis Sheen Transfer's supervisory personnel were solidarily bound had yet to be developed. But the court noted that:

[i]f the record evidence at the trial of the instant cases disclose that negligence on the part of an employee . . . of W & W Clarklift is the only negligence for which W & W Clarklift is liable, but also establishes negligence on the part of . . . [Dennis Sheen Transfer's supervisory officers], solidarity will result, notwithstanding W & W Clarklift is only vicariously liable.

Id. (emphasis added). The court's choice of language is confusing. The solidarity that should obtain between the employer, answerable for his employee-debtor, and the third person concurrently negligent with the employee is for the benefit of the plaintiff-creditor; the categorization does not control the intra-debtor relationships. Among the obligors, after the creditor has been satisfied, the vicariously liable employer should be permitted recovery from the third party, who was personally negligent. If the third person is a corporation, difficulties arise; a corporation cannot be personally negligent. And if the third party's obligation to the primary plaintiff is a function of respondeat superior, the confrontation between the debtors pits vicarious liability versus vicarious liability. Surely then neither party may be totally reimbursed. However, when one of the corporate obligors may be termed “negligent” as a result of the actions of executive officers that speak for the corporate entity, the obligor indebted to the primary plaintiff solely as a matter of social policy may be allowed an indemnity action against the “negligent” corporate obligor. See notes 263-73, infra, and accompanying text.


12. 375 So. 2d at 378. Justice Calogero, writing for the majority, summarized the court's view:

We determine that the claim for contribution may not prescribe before the right to contribution vests. The right to enforce contribution is not complete until payment of the common obligation; thus, prescription does not begin to run against a claim for contribution until the cast co-tortfeasor has been required to pay the common debt.

Id., citing Appalachian Corp., Inc. v. Brooklyn Cooperage Co., 151 La. 41, 91 So. 339 (1922). The court's reference to Appalachian Corporation seems inaccurate since it
Foster v. Hampton, the second ground-breaking opinion rendered last term, also treated the employer's legal responsibility for the wrongful acts of his employees. In Foster, the plaintiff suffered authorized an indemnity action. See notes 263-73, infra, and accompanying text. However, the issue raised is significant. Classifying the defendants as solidarily bound for the debt is a benefit to the plaintiff since a suit against one solidary obligor interrupts prescription as to all so liable. La. Civ. Code art. 2097. Indeed the secondary effects of solidarity in the creditor's favor are numerous.

Classifying the debtors as obligors in solidum, or imperfectly bound solidary obligors, is more consistent with the Civil Code. The Civil Code does not expressly hold the Thomas-type of debtors to be solidarily liable nor do they answer by reason of performing the same act; hence, perfect solidarity should not be the rule. Yet, the desired result would not have been reached through use of the in solidum doctrine, since longstanding Louisiana jurisprudence holds that a legal action instituted against one imperfectly bound obligor does not interrupt prescription as to all. See, e.g., Cline v. Crescent City R.R. Co., 41 La. Ann. 1031, 6 So. 851 (1889); Gay & Co. v. Blanchard, 32 La. Ann. 497 (1880); Britton & Moore v. Bush, 31 La. Ann. 264 (1879); Corning & Co. v. Wood, 15 La. Ann. 168 (1860); Hickman v. Stafford, 2 La. Ann. 792 (1847); Jacobs v. Williams, 12 Rob. 183 (La. 1845); 2 M. Planiol, Civil Law Treatise pt. 1, nos. 777-79 at 416-17 (11th ed. La. St. L. Inst. trans. 1959); J. Smith, Louisiana and Comparative Materials on Conventional Obligations 352 (4th ed. 1973); Comment, Solidary Obligations, 25 Tul. L. Rev. 217, 230 (1951). Thus, the end sought in Thomas could have been reached, in this instance, by overruling this line of cases. After all, the proposition was well accepted then that the only difference between perfect and imperfect solidarity pertained to prescription. The Work of the Louisiana Appellate Courts for the 1973-1974 Term—Obligations, 35 La. L. Rev. 280, 297 (1975) [hereinafter cited as 1973-1974 Term]. Furthermore, a holding that commencement of suit against one imperfectly bound solidary obligor interrupts the running of prescription as to the other would have obviated the rather unfortunate reference made by the court regarding the rights of contribution and co-tortfeasors. Concluding that debtors are solidarily bound for the creditor's benefit does not necessarily mean that the obligors are co-tortfeasors or that contribution is the rule between them. Perhaps the citation of Appalachian Corporation is more telling than the court's terminology.

13. 381 So. 2d 789 (La. 1979).

14. Previously, the supreme court had decided another issue in this lengthy, protracted litigation. In 1977 the court ruled that a sheriff is not personally liable for the tortious acts of a deputy committed during the course and scope of his duties. Foster v. Hampton, 352 So. 2d 197, 200-01 (La. 1977). Additionally, the parish was not responsible for the deputy's wrongdoing. Id. at 203. But the court realized that the "doctrine of respondeat superior might be available to hold the State vicariously liable for the negligent torts of its employee in the course and scope of his employment." Id. at 201-02. While the majority stated that Louisiana law is "well settled that the deputy sheriff is an officer of the state," id. at 201 (emphasis added), the court apparently assumed that "officer" was but a synonym for servant under the particular circumstances. Consequently, the state could be held answerable under Civil Code article 2320 for the deputy's acts. The recent Foster opinion does not dwell on this issue but simply summarizes that:

In Foster v. Hampton . . . plaintiff . . . was held to have no cause of action against the Sheriff and Parish of East Baton Rouge. This court there stated that the defendant deputy sheriff . . . was an officer and employee of the State of Louisiana.

381 So. 2d at 790 (La. 1980) (emphasis added).

Given the court's hint in its first opinion that the state was the solvent debtor that
damages claimed to have been caused by an East Baton Rouge Parish deputy sheriff's negligent driving. The plaintiff's petition stated that the deputy had been driving a vehicle belonging to the sheriff's department while "acting in his official capacity." More than a year after the accident, the plaintiff amended his pleading to name the state as a defendant. Predictably, the state raised the peremptory exception of prescription, which the trial and the intermediate appellate courts maintained. Specifically, the first circuit held that "the deputy sheriff and the State were not solidary obligors . . . ." Consequently, bringing suit against the deputy sheriff failed to interrupt the running of prescription against the state." With Justice Watson writing for the majority, the supreme court reversed and held:

When a servant's actions during his employment create an unreasonable risk of harm to another, any resulting liability is solidary with that of his master. The injured party has only one cause of action against both, and suit against either the employer or employee will interrupt prescription as to the other. Moreover, while the Foster court recognized that the relationship between the master and servant vis-à-vis the plaintiff for the employee's delicts has been characterized as imperfect solidarity,

the plaintiff was seeking, it is of little wonder that, as Professor Murchison points out, "Foster took the court's suggestion and sued the state." The Work of the Louisiana Appellate Courts for the 1977-1978 Term—Local Government Law, 39 LA. L. REV. 843, 875 n.155 (1979). And, viewing the history of Foster's woes, it is no surprise that the court was especially receptive to his case. A less attractive factual situation well may have produced a different result. Foster's approach and tenor should be compared with the analysis employed in Wooten v. Wimberly, 272 So. 2d 303 (La. 1972). 15. 352 So. 2d at 199. 16. 381 So. 2d at 790. 17. Id. 18. Id. at 791. However, the opinion clearly states that the employer and the employee are not joint tort-feasors. Id. at 790. The master's responsibility is purely by reason of his contractual relationship with the employee. Id. Foster implicitly distinguishes between obligations imposed under article 2320 and those under article 2324 by reason of a joint tort-feasor's participation in a wrongful act. LA. CIV. CODE art. 2320 provides in pertinent part that "[m]asters and employers are answerable for the damages occasioned by their servants . . . in the exercise of the functions in which they are employed." (Emphasis added). By contrast, article 2324 states: "He who causes another person to do an unlawful act, or assists or encourages in the commission of it is answerable, in solido, with that person for the damage caused by such act." 19. 381 So. 2d at 791, citing Cline v. Crescent City R.R. Co., 41 La. Ann. 1031, 6 So. 851 (1889). The characterization, in theory, seems accurate. Imperfect solidarity connotes solidary responsibility and not true solidarity since the debtors are not bound for the same reasons or the same policy. J. SMITH, supra note 12, at 351.
distinctions between perfect and imperfect solidarity were termed "untenable" and were rejected. This comment examines the historical foundations of the doctrine of solidarity, its treatment by the Louisiana bench, and the application of the doctrine in non-contractual instances, specifically contribution and indemnity problems among tort defendants.

The Origins of Solidarity

Roman Law

Roman law recognized solidarity in two forms: correality and simple solidarity. The theoretical distinction between the two is that a correal obligation arose from one cause, while a simple solidary obligation arose from plural causes, distinct to each obligor: "In both cases there was only one subject, one thing due, but in correality there was also only one obligation, so that what ended it for one ended it altogether, while in [simple] solidarity the obligations were distinct, and what happened to one need not affect the others." Correality most often arose from contract and had to be stipulated expressly, but the law imposed correal liability in some instances.

20. Imperfect solidarity is a doctrine which appears to have no basis in legislation but which has surfaced from time to time, often unexpectedly. 1973-1974 Term, supra note 12, at 291-92. Invoking the doctrine in Foster would have been manifestly unjust. The issue that the court found determinative was the jurisprudential policy that "suit against one party [imperfectly bound] does not interrupt prescription as to the other." 381 So. 2d at 791. Since that quirk is the only difference between perfect and imperfect solidarity, at least from the creditor's standpoint, the court's attempt to reach a fair conclusion in Foster cannot be too harshly criticized.

21. 381 So. 2d at 791. Specifically, Cox v. Shreveport Packing Co., 213 La. 53, 34 So. 2d 373 (1948), was overruled.

22. The term "solidarity" is "a name coined from the Roman expression, in solidum, which has no technical force, but is applied when it is wished to emphasize the fact that a man is liable for the whole." W. Buckland, A Text-Book on Roman Law 452 (2d ed. 1950). To avoid confusion, in the section on Roman law the authors will use "solidarity" to refer to solidary obligations in general, "correality" to refer to perfect solidarity, and "simple solidarity" to refer to imperfect solidarity.


24. But see J. Wylie, Solidarity and Correality 21 (1923): "We may with confidence assert that anything in the nature of solidarity without unity of originating cause was abhorrent to the civil law."

25. W. Buckland, supra note 22, at 454.

26. Id. at 452; Comment, supra note 12, at 221. Savigny believed that correality arose only from the will of parties to a transaction or from the indivisible nature of an obligation. A. Brown, supra note 23, § 16, at 26.

27. Comment, supra note 12, at 221.
Examples of correality included heirs charged by their testator to discharge a legacy, debtors to a contract with the *stipulatio*, co-owners of a slave for the slave's delicts or contracts, the superior and the inferior for the latter's delicts, and defendants cast in judgment together. Simple solidarity originally had a delictual basis but was later imposed by law on relationships created by contract. The most common examples were the liability imposed on joint tortfeasors, the personal duties incumbent on co-tutors and co-mandataries, obligations arising from contracts with collateral requirements, and the liability of joint occupiers of a building from which something fell and injured a passerby.

Although the theoretical differences between correality and simple solidarity were not clear, the differences in effect were well-defined.

The principal effects applied to both types of solidary obligations: 1) The obligee could claim the whole of the debt from any obligor; 2) Payment of the debt by one obligor extinguished the debt

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28. A. Brown, supra note 23, § 17, at 28; W. Buckland, supra note 22, at 453; Comment, supra note 12, at 221 n.39.
29. A. Brown, supra note 23, § 17, at 28; W. Buckland, supra note 22, at 452, 453. The *stipulatio*, a verbal contract, was "the most solemn and formal of all the contracts . . . [and] was entered into by question and corresponding answer thereto, by the parties, both being present at the same time . . . ." Black's Law Dictionary 1268-69 (5th ed. 1979).
30. W. Buckland, supra note 22, at 453.
31. Id.
32. A. Brown, supra note 23, § 17, at 28.
33. Buckland asserts that simple solidarity was imposed in certain praetorian delicts, such as *metus* (negligence), *dolus* (deceit), and the *actio de rationibus distrahen-dis* (action against tutor for misuse of minor's funds). W. Buckland, supra note 22, at 456. It was later imposed as the result of contract or quasi-contract, when persons in a common undertaking breached a duty through common fault; e.g., co-tutors, co-mandataries, or perhaps co-negotiorum gestors. Id. See also A. Brown, supra note 23, § 20, at 33-34; J. Muirhead, An Outline of Roman Law 195 (2d ed. 1947); Comment, supra note 12, at 221. Savigny said that simple solidarity arose only passively, never among creditors. A. Brown, supra note 23, § 20, at 33.
34. A. Brown, supra note 23, § 20, at 33; J. Muirhead, supra note 33, at 195. See note 33, supra.
35. A. Brown, supra note 23, § 20, at 35; W. Buckland, supra note 22, at 456; J. Muirhead, supra note 33, at 195; Comment, supra note 12, at 222 n.49.
36. Such contracts included the *emptio vendito* (purchase and sale), *locatio conductio* (letting out of things), *commodatum* (loan for use), and *depositum* (deposit). A. Brown, supra note 23, § 20, at 34.
37. J. Muirhead, supra note 33, at 195.
38. Correality and simple solidarity are often defined in terms of their effects, rather than by their essential qualities or theoretical bases. See text at notes 24-25, supra.
for all. There were also some secondary effects, including those which were the equivalent of payment: 1) Deposit of the sum owed in court by one debtor benefitted all; 2) A dation by one applied to all; 3) A novation as to one applied to all. Other secondary effects were: 4) Release (acceptilatio) of one debtor released all; 5) The making of a pact not to sue with one applied as if made with all; 6) Compromise of the debt by one benefitted all.

All of these secondary effects applied to correal obligations. None applied to simple solidary obligations arising from joint delicts or the breach of shared personal duties. The secondary effects which were equivalents of payment applied to simple solidary obligations arising from contracts with collateral obligations. Extinction of a debt by compensation or confusion was always purely personal. Since there was only one obligation upon which to sue, bringing of suit (litis contestatio) against one correal debtor released the others. Because simple solidary obligors were bound by distinct obligations, the litis contestatio on one obligation did not release the obligors not sued. In early Roman law, the interruption of prescription was purely personal to each obligor, but Justinian decreed that prescription would be interrupted as to all correal obligors when suit was filed against one.

Correal debtors enjoyed no right of contribution, but, because
Correality arose by contract or among persons whose relationship predated the debt, debtors avoided the harsh results of the rule by contractual provisions giving rise to contribution, such as suretyship or partnership.\textsuperscript{54} Scholars agree that contribution existed among simple solidary obligors,\textsuperscript{55} but some commentators believe that a joint tort-feasor guilty of dolus\textsuperscript{56} could not obtain contribution, while one who had acted merely with metus\textsuperscript{57} could recover from his accomplice.\textsuperscript{58}

The argument has been advanced that there is no logical basis for the distinction between correal and simple solidary obligations.\textsuperscript{59} One scholar described the distinction as "an illogical relaxation, gradually extended, expressing the idea that those who do wrong ought not to be released from their obligation to compensate, except by satisfaction."\textsuperscript{60} However, the distinction has persisted in legal systems derived from Roman law, and the framework of solidarity remains relatively unchanged.\textsuperscript{61}

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54. W. Buckland, supra note 22, at 454-55; Comment, supra note 12, at 222.
55. A. Brown, supra note 23, § 24, at 40-41; Comment, supra note 12, at 222.
56. A tortfeasor who acted with dolus can be described as having committed an intentional tort. Dolus is equivalent to craft, deceit, or fraud. W. Buckland, A Manual of Roman Private Law § 97, at 252 & § 130, at 329 (1928).
57. Metus "may be roughly described as negligence, or with more apparent precision as failure, in any given relation, to observe the standard of conduct which the law requires . . . ." Id. § 135, at 337.
58. A. Brown, supra note 23, § 24, at 40-41.
59. W. Buckland, supra note 22, at 457. Buckland argued that the theoretical basis "does not show why those who combined in a contract of stipulatio created only one obligation, while those who combined in a wrong created more than one." Id.
60. Id.
61. German law recognizes an imperfect solidarity similar to the Roman simple solidity. A. Brown, supra note 23, § 27, at 48. Scholars have argued that imperfect solidarity exists in French law. See text at notes 92-94, infra. The doctrine has been mentioned in Louisiana jurisprudence. See text at notes 162-67, infra. The notion of imperfect solidarity was rejected recently in Foster v. Hampton, 381 So. 2d 789 (La. 1980). See notes 13-21, supra, and accompanying text.
French Law

The Louisiana Civil Code articles on solidarity are almost identical to those of the Code civil. Article 1200 of the Code civil defines solidarity in terms of its principal effects; debtors are solidarily liable “when they are bound, in connection with a same thing, in such a way that each one of them may be held for the whole and payment made by a single one releases the others as against the creditor.” Commentators have advanced several theories to explain the effects of solidarity, the most acceptable being the unity of object. However, some commentators “found it convenient to assume a special tacit mandate between co-debtors whereby they represented one another.” According to Planiol, the concept of mandate became the dominant theory. He rejected the idea of implied mandate, arguing that no basis exists for assuming a contract between co-debtors, but he asserted that co-debtors can be considered reciprocal representatives by operation of law.

Although Roman law created the institution of solidarity, there are substantial differences between that early concept and the notion of solidarity in French law. Roman correality was based on the nature of the relationship existing between persons before they together entered into an obligation, while French mutual representation is derived from the existence of solidarity, i.e., the fact that both debtors are liable for the whole. Planiol stated that the Romans used solidarity only to determine the recourse open to one co-debtor who paid the debt but that the French employ solidarity to affect the relations between the co-debtors and the creditor.

62. 3 LOUISIANA LEGAL ARCHIVES, COMPILED EDITION OF THE CIVIL CODES OF LOUISIANA 2088-91 (1940).
65. 2 M. PLANIOL, supra note 12, no. 751, at 404.
66. “This idea of mandate, originally conceived by the commentators, found its way into the jurisprudence little by little and has been finally adopted as the basis of all recent decisions on the subject.” Id. no. 752, at 404.
67. Id. no. 753, at 405. Aubry and Rau rejected representation as a theoretical basis and contend that the idea did not appear in French jurisprudence until the seventeenth century. 1 C. AUBRY & C. RAU, supra note 64, § 298b, at 21 n.6. To refute scholars who reject the theory of mutual representation on the ground that it has no foundation in the ancient works, Planiol argued that a theoretical explanation can appear after the creation of the institution: “If the idea is in conformity with the consequences, if it explains the solutions given by the positive law, why not accept it?” 2 M. PLANIOL, supra note 12, no. 753, at 405.
68. 2 M. PLANIOL, supra note 12, no. 755, at 406.
69. Id. However, the secondary effects produced by correality could have great
The theoretical constructs, even the concept of reciprocal representation implied by law, could not justify the application of the secondary effects of solidarity in all instances of solidary responsibility. Scholars proposed a dual system similar to the coreality/simple solidarity of Roman law, classifying solidarity as perfect or imperfect. The principal effects of solidarity, by definition, apply to both categories of liability. Secondary effects flow only from perfect solidarity; broadly stated, an action by or as to one co-debtor applies to all co-debtors. The interruption of prescription by filing a suit against one co-debtor interrupts prescription as to all. Pothier explained that result by reasoning that the creditor's claim is the same personal right against all co-debtors; the creditor who pursues one co-debtor into court expends the whole of his right. Another commentator stated that the interruption operates with regard to one co-debtor as if he were the agent of the others, since the creditor can demand the whole debt from any one. Putting one co-debtor in default has the effect of putting all in default, and, if the thing owed the creditor is damaged, all are liable for the value, even if only one co-debtor caused the damage. The Code civil introduced a secondary effect unknown in Roman law: The demand of interest made against one debtor causes interest to run against all.

Some secondary effects not found in the Code civil have been admitted by the jurisprudence. The operation of res judicata for or against one solidary debtor may be pleaded by or against the others, unless the judgment was obtained through an exception personal to impact on the creditor; e.g., the release of one co-debtor deprived the creditor of recourse against the others, who were also released. See text at notes 20-31, supra.

70. 1 C. Aubry & C. Rau, supra note 64, § 298b, at 20; 2 M. Planiol, supra note 12, no. 777, at 417.
72. French Civ. Code art. 1206 (J. Crabb trans. 1977). This effect is extended by article 2249 to include interruption of prescription as to all co-debtors by an admission made by one. 2 M. Planiol, supra note 12, no. 756, at 406.
74. Id.
75. 2 M. Planiol, supra note 12, no. 756, at 406. In Roman law, putting in default had a purely personal effect. Id. no. 757, at 407 n.6.
76. French Civ. Code art. 1205 (J. Crabb trans. 1977). However, only the debtor at fault is liable for damages beyond the value of the thing. See also 2 M. Planiol, supra note 12, no. 756, at 406 & no. 757, at 407.
77. French Civ. Code art. 1207 (J. Crabb trans. 1977); 2 M. Planiol, supra note 12, no. 759, at 408.
78. 2 M. Planiol, supra note 12, no. 760, at 408-09.
that debtor or was the result of collusion between the litigants.\textsuperscript{79} Also, an appeal from judgment by one co-debtor or a cassation at the instance of one co-debtor benefits the others.\textsuperscript{79} The idea of representation as the justification for the secondary effects has been rejected by the jurisprudence in several instances.\textsuperscript{80}

Imperfect solidarity was created as a matter of public policy to protect certain interests\textsuperscript{81} or to guarantee public safety.\textsuperscript{82} Imperfect solidary liability has existed between joint tort-feasors,\textsuperscript{83} co-tenants of a house in which a fire breaks out,\textsuperscript{84} the tutor and surviving spouse who fail to inventory the property of the former community for judgments rendered in favor of minor children,\textsuperscript{85} the widow who remarries and her second husband for the improperly retained tutorship of minor children of the first marriage,\textsuperscript{86} signers of a bill of exchange,\textsuperscript{87} co-heirs,\textsuperscript{88} co-owners of goats for damage caused by the

\textsuperscript{79} Id. at 409. A cassation is the reversal of a lower court decision.
\textsuperscript{80} The Cour de cassation has held that creditor can appeal against debtors who do not signify the judgment in their favor, although one co-debtor has signified, and that an answer by one co-debtor does not always prevent a default judgment against the others. Id. at n.8.

\textsuperscript{81} 1 C. Aubry & C. Rau, supra note 64, § 298b, at 19.
\textsuperscript{82} This is the reason advanced by Laurent. Comment, supra note 12, at 226. The author says that imperfect solidarity is imposed upon persons who usually are strangers to each other; however, an examination of the examples of imperfect solidarity, see text at notes 83-91, infra, reveals that this is rarely the case. More properly speaking, imperfect solidarity is imposed upon persons who did not expect to be bound together as a result of their actions.

\textsuperscript{83} No explicit provision in the Code civil imposes solidary responsibility on joint tort-feasors. However, scholars and the courts have created solidarity by analogizing article 1382, which establishes liability for delicts and quasi-delicts and is similar to Louisiana Civil Code article 2315, to article 55 of the French Penal Code, which prescribes solidarity liability for co-criminals. Aubry and Rau approved the analogy in the case of offenses, committed with intent, but posited a different basis for imperfect solidarity in cases of quasi-offenses: "[W]e cannot justify extension of the notion of obligation in solidum for the reparation of a simple quasi-offense except by the principle of identity of the obligation to repair the damage . . . ." 1 C. Aubry & C. Rau, supra note 64, § 298b, at 25 n.15b. Planiol suggested that a counterpart of Penal Code article 55 was inadvertently omitted from the Code civil. 2 M. Planiol, supra note 12, no. 901, at 504.

\textsuperscript{84} French Civ. Code art. 1734 (J. Crabb trans. 1977). Planiol stated that solidarity is no longer imposed in this case. 2 M. Planiol, supra note 12, no. 777, at 417.
\textsuperscript{85} French Civ. Code art. 1442 (J. Crabb trans. 1977); Comment, supra note 12, at 226-27 n.93. See also 1 C. Aubry & C. Rau, supra note 64, § 298b, at 19.
\textsuperscript{86} C. civ. art. 395 (as it appeared prior to Act of March 20, 1917). See 1 C. Aubry & C. Rau, supra note 64, § 298b, at 19; R. Beudant, Cours de Droit Civil Francais VIII no. 850, at 632 (1936).
\textsuperscript{87} C. com. art. 151.
\textsuperscript{88} R. Beudant, supra note 86.
animals, and the owner and charterer of an airplane for damage caused by the plane.

The distinction between the types of solidarity has been criticized by commentators, and Planiol stated that it has succumbed in the doctrine and jurisprudence. Conversely, Aubry and Rau strongly defended the distinction:

The distinction we have made between solidary obligations (oligatio correalis) and solidary responsibility (obligation in solidum) was known in Roman law. All instances of obligations in solidum are instances of responsibility founded on fault, a legal responsibility, foreign to any conventional preexisting obligation. And it is only because of this distinction of ideas that it is possible, within the framework of our law, to add to the principle of unity of object—idem debitum—of the solidary obligation the explanation of the so-called secondary effects of the solidary obligation based on the concept of reciprocal representation among solidary co-debtors. But this explanation is absent from all instances of obligations in solidum where the right of the creditor to sue all co-debtors is merely founded on the indivisibility of the injurious result produced by the common fault of all the co-debtors; no concept of representation in their relations with the creditor, no concept of reciprocal mandate could be artificially introduced into this juridical relation of legal origin, which is completely foreign to any idea of warranty of performance voluntarily given to the creditor. The perfect solidarity today merely corresponds to the idea of a conventional warranty for the performance of an obligation.

Other interpretations of French law on solidarity are relevant to a consideration of solidary obligations in Louisiana. Article 1202 of the Code civil, which corresponds to article 2093 of the Louisiana

89. 1 C. Aubry & C. Rau, supra note 64, § 298b, at 19 n.42; R. Beudant, supra note 86.
90. R. Beudant, supra note 86.
91. 1 C. Aubry & C. Rau, supra note 65, § 298b, at 19 n.4.
92. F. Laurent, Principes de droit civil français XVII nos. 313-14, at 311-12 (1876). Planiol was particularly critical:
The distinction which was made is purely arbitrary and would have constituted an innovation in relation to our juridical tradition. Its basis is false: it is not from a mandate to contract the debt, that the secondary effects result, but rather from a sort of community of interest which, once created, establishes the solidarity between them; this kind of association of solidary co-debtors can exist no matter what the source of the debt.
93. 2 M. Planiol, supra note 12, no. 778, at 417.
94. 1 C. Aubry & C. Rau, supra note 64, § 298b, at 20-21 n.6.
Civil Code, provides that a solidary obligation cannot be presumed and must be stipulated expressly. The second paragraph of that article states that the general rule does not apply when solidarity "exists, as a matter of right, in consequence of a provision of the law." French jurisprudence and doctrine hold that an express stipulation is required only in cases of conventional solidarity, not legal solidarity, while Louisiana courts have refused to find solidarity in the absence of an express statutory declaration.

The French code article on contribution parallels article 2103 of the Louisiana Civil Code, as that article read prior to 1960, and engenders some problems because it speaks of obligations "contracted" in solido. Some commentators believe that the specific reference to conventional obligations precludes interpretation of the article as extending the right of contribution to debtors bound solidarily by law. However, these scholars argue that contribution should be allowed among joint tort-feasors to avoid the burden of payment's falling on a particular debtor at the whim of the creditor. The two theories proffered to explain contribution are the action of mandate and legal subrogation to the creditor's claim.

**Louisiana Law**

**Solidarity: More than Just Protection for the Creditor**

The Louisiana Civil Code scheme of regulating relations between the creditor and the debtor and among the debtors themselves closely resembles French law. Article 2091 identifies

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96. 1 C. Aubry & C. Rau, *supra* note 64, § 298b, at 24; 2 M. Planiol, *supra* note 12, no. 901, at 504.
97. See text at notes 114-26, *infra*.
99. "The obligation contracted in solido towards the creditor, is of right divided amongst the debtors, who, amongst themselves, are liable each only for his part and portion." *La. Civ. Code* art. 2103 (as it appeared prior to 1960 La. Acts, No. 30).
101. *Id.* no. 1304-05, at 389-91.
102. 2 M. Planiol, *supra* note 12, no. 769, at 414. He stated that the theory of mandate is proper only when the debtors obligated themselves in solido by voluntary act. In other cases, contribution exists by virtue of the legal subrogation of paragraph three of article 1251.
103. See note 62, *supra*.
104. "There is an obligation in solido on the part of the debtors, when they are all obliged to the same thing, so that each may be compelled for the whole, and when the payment which is made by one of them, exonerates the others toward the creditor." *La. Civ. Code* art. 2091.
solidary obligations by their principal effects, and the articles following specify secondary characteristics of solidarity. Although solidarity is intended to be an added protection for the creditor, allowing recovery of the whole debt from any one co-debtor, the secondary effects are often equally important to him in prosecuting his claim. The debtors themselves may be as concerned as the creditor with whether they are liable in solido, since defenses such as exceptions of prescription and improper venue and rights of contribution may hinge on the issue of solidarity. The secondary effect with perhaps the most import for both solidary debtors and their creditors, which has engendered much litigation, is contained in article 2097: A suit against one debtor in solido interrupts prescription as to all. Article 3552 provides that acknowledgment by one debtor has the same effect.

Other secondary characteristics may influence the positions of parties on the issue of solidarity. Putting one debtor in default puts all in default and shifts the risk of loss of the thing owed to the debtors. Article 2161(3) has been interpreted as requiring solidarity

105. Commentators emphasize the importance of defining solidarity by its principal effects. One author has emphasized that the “definition of solidarity obligations consists of three elements: multiple debtors; liability of each for the whole debt; and release of all by one’s payment. The logical import of this article [2091] is that any obligation containing these three elements should be an obligation in solido.” Note, The Non-solidness of Solidarity, 34 LA. L. REV. 648, 648 (1974). See also Professor Johnson’s criticism of Wooten v. Wimberly, 272 So. 2d 303 (La. 1972), in The Work of the Louisiana Appellate Courts for the 1972-1973 Term—Obligations, 34 LA. L. REV. 231, 235 (1974) [hereinafter cited as 1972-1973 Term].

106. LA. CIV. CODE arts. 2092-107. One writer emphasized the importance of distinguishing between principal and secondary effects: “These requisite elements of solidarity [article 2091] should be distinguished from other characteristics described in articles 2091 through 2107, which do not help to identify an obligation as solidary or not, but rather determine the legal effects of solidarity.” Note, supra note 105, at 649. However, courts have considered whether the secondary effects of solidarity should apply in a particular situation in deciding whether or not an obligation was solidary. See text at notes 139-44, infra.


108. “A citation served upon one debtor in solido, or his acknowledgment of the debt, interrupts the prescription with regard to all the others and even their heirs.” LA. CIV. CODE art. 3552.

109. LA. CIV. CODE art. 2096:

If the thing due has perished, through the fault of one or more debtors in
for legal subrogation to operate.\textsuperscript{110} The Louisiana Code of Civil Procedure allows the creditor to sue all solidary debtors in a parish of proper venue for any one.\textsuperscript{111} Contribution among solidary obligors is provided by article 2103,\textsuperscript{112} although application of the article to obligors bound solidarily by law, \textit{e.g.}, joint tort-feasors, has been accomplished only recently.\textsuperscript{113}

\textit{solido}, or while he or they delayed to deliver it, the other codebtors are not discharged from the obligation of paying the value of the thing, but the latter are not liable for damages.

The creditor can claim damages only from the debtors by whose fault the thing was lost, and from those who delayed to deliver it.

110. "Subrogation takes place of right: . . . 3. For the benefit of him who, being bound with others, or for others, for the payment of the debt, had an interest in discharging it." \textsc{La. Civ. Code} art. 2161(3). \textsc{See}, \textit{e.g.}, Pringle-Associated Mortgage Corp. v. Eanes, 254 La. 705, 741, 226 So. 2d 502, 515 (1969): "Clearly this language ['being bound with others'] presupposes the existence of a solidary obligation."

111. \textsc{La. Code Civ. P.} art. 73:

An action against joint or solidary obligors may be brought in any parish of proper venue, under Article 42, as to any obligor who is made a defendant.

If the action against this defendant is compromised prior to judgment, or dismissed after a trial on the merits, the venue shall remain proper as to the other defendants, unless the joinder was made for the sole purpose of establishing venue as to the other defendants.

112. When two or more debtors are liable in \textit{solido}, whether the obligation arises from a contract, a quasi-contract, an offense, or a quasi-offense, the debt shall be divided between them. If the obligation arises from a contract or quasi-contract, each debtor is liable for his virile portion. If the obligation arises from an offense or quasi-offense, it shall be divided in proportion to each debtor's fault.

A defendant who is sued on an obligation which, if it exists, is solidary may seek to enforce contribution, if he is cast, against his solidary co-debtor by making him a third party defendant in the suit, as provided in Article [sic] 1111 through 1116 of the Code of Civil Procedure, whether or not the third party defendant was sued by the plaintiff initially, and whether the defendant seeking to enforce contribution if he is cast admits or denies liability on the obligation sued upon by the plaintiff.

\textsc{La. Civ. Code} art. 2103. This section was amended by Act 431 of 1979 to encompass the legislature's adoption of comparative negligence.

113. Article 2103 originally read: "The obligation \textit{contracted in solido} towards the creditor, is of right divided amongst the debtors, who, amongst themselves, are liable each only for his part and portion." \textsc{La. Civ. Code} art. 2103 (as it appeared prior to 1960 \textsc{La. Acts}, No. 30 § 1) (emphasis added). The courts held that no right of contribution existed among joint tort-feasors, whose solidarity arose by law, because the article spoke only of obligations "contracted \textit{in solido}." Sincer v. Bell, 47 \textsc{La. Ann.} 1548, 18 \textsc{So.} 755 (1895). However, contribution was enforced if joint tort-feasors were cast in the same judgment. Quatray v. Wicker, 178 \textsc{La.} 289, 151 \textsc{So.} 208 (1939). The \textit{Quatray} court questioned past construction of article 2103:

It is true that the article refers to an obligation \textit{contracted in solido}; but the rules relating to obligations in solido, or joint obligations, are the same with regard to obligations arising ex delicto as with regard to obligations arising ex contractu, especially when they are fixed by judicial decree.

178 \textsc{La.} at 301, 151 \textsc{So.} at 212.

The legislature apparently attempted to provide rights of contribution to all solidary
No Presumptions in the Law

Article 2093, contained in the section "Of the Rules Which Govern Obligations with Respect to Debtors in Solido," appears to be central to the determination of whether an obligation is in solido but has never been construed consistently by the courts. Article 2093 reads:

An obligation in solido is not presumed; it must be expressly stipulated.

This rule ceases to prevail only in cases where an obligation in solido takes place of right by virtue of some provisions of the law. The text states clearly that a contractual obligation in solido must be stipulated expressly; what has not been clear is whether a solidary obligation arising by law, e.g., the solidary responsibility of the employer and employee in Foster and Thomas must be stipulated expressly in some provision of law. Solidarity has been found in a number of cases in which it is not expressly provided in any law, but the courts have addressed directly the meaning of article

obligors by enacting what now comprise articles 1111 through 1116 of the Louisiana Code of Civil Procedure. The attempt was circumvented by the decision in Kahn v. Urania Lumber Co., 103 So. 2d 476 (La. App. 2d Cir. 1958), holding that the legislature evinced no intent to change the substantive law by enacting a procedural statute. The legislature was finally successful in granting rights of contribution by passing Act 30 of 1960 which amended article 2103 to read as follows:

When two or more debtors are liable in solido, whether the obligation arises from a contract, a quasi contract, an offense, or a quasi offense, it should be divided between them. As between the solidary debtors, each is liable only for his virile portion.

A defendant who is sued on an obligation which, if it exists, is solidary may seek to enforce contribution, if he is cast, against his solidary co-debtor by making him a third party defendant in the suit, as provided in Article 1111 through 1116 of the Code of Civil Procedure, whether or not the third party defendant was sued by the plaintiff initially, and whether the defendant seeking to enforce contribution if he is cast admits or denies liability on the obligation sued on by the plaintiff.

LA. CIV. CODE art. 2103 (as it appeared prior to 1979 La. Acts, No. 431).
114.  LA. CIV. CODE art. 2093.
117. The problem does not arise in the case of joint tort-feasors, since article 2324 of the Louisiana Civil Code provides that joint tort-feasors are liable in solido. For a discussion of what persons properly can be said to be joint tort-feasors, see text at notes 178-97, infra.
118. The employee-tortfeasor and his employer have been held to be solidarily liable to the injured party, the most recent case being Foster. Article 2320, while providing that "masters and employers are answerable for the damage occasioned by their servants and overseers" nowhere mentions that the "answerability" is solidary
2093 in only a few cases. In *Cline v. Crescent City Railroad Company*, the supreme court held that the railroad and the City of New Orleans could be liable *in solido* for death caused by their employees’ failure to correct a dangerous condition on the tracks. Speaking of liability under articles 2317 and 2320, the court said: “All of these obligations have been recognized as being solidary in effect, though not so stipulated”; thus, the court refuted the defendants’ contentions that the parties could not be solidarily bound under the requirement of article 2093. Later, in *Cox v. Shreveport Packing Company*, the supreme court held that the employer and employee-tortfeasor were not solidarily bound, basing the decision in part on the fact that no provision of law declares that the liability of the master is *in solido* with the servant. *Cox* was overruled by *Foster*, which, though not discussing article 2093, may have rejected that portion of the reasoning of *Cox* which held that solidary responsibility in non-contractual situations had to be provided specifically in some provision of law. The most recent mention of article 2093 in connection with the responsibility of persons bound solidarily by law occurred in *Wooten v. Wimberly*. The court inter-
Interpreted the first paragraph of article 2093 as requiring an express stipulation of solidarity in contracts and laws and interpreted the second paragraph as waiving the requirement that solidarity be stipulated in writing when stipulated in a law. This creative interpretation of the article has not met with approval, and the authors submit that this construction cannot be sustained under the words of the text.

272 So. 2d at 305. Although the language of the court does not say that solidarity imposed by law must be "expressly stipulated," but only that it "may not be presumed," the wording of the article seems to indicate that solidarity is "presumed" (wrongly) if it is not "expressly stipulated." Therefore, in saying that legal solidarity cannot be presumed, the court must be saying that solidarity must be stipulated expressly.

125. Professor Johnson argues that persons liable for an entire debt, e.g., the father and son for the son's torts, should be solidarily bound for the creditor's benefit, so that he can compel any one of the solidary debtors to pay the entire debt. 1972-1973 Term, supra note 105, at 233. In criticizing the Wooten decision, Professor Johnson wrote, "The majority opinion recognizes that both father and son are bound for the same debt, either can be compelled for the whole and that payment by one exonerates the other and presumably these characteristics result from some provisions of law, but then it rejects solidarity." Id. at 235. A student, also writing on Wooten, stressed the importance of identifying a solidary obligation on the basis of article 2091 and of not confusing the determination with the application of the secondary effects. See Note, supra note 105.

126. Note, supra note 105.

However, the court's interpretation of article 2093, as applicable to a situation like the instant case where solidarity liability is provided by law, seems inconsistent with both grammatical construction and traditional interpretation. . . . Certainly an obvious construction of this article, if not the most apparent, is that the entire rule of the first paragraph is inapplicable when solidarity results from provision of law rather than by contract, and that consequently no express stipulation of solidarity is necessary in such cases.

Id. at 651-52. The plaintive question of Justice Miller expressed in Zeigler v. His
An Elusive Existence

One decision that has not been made in Louisiana jurisprudence is precisely how the existence of solidarity will be determined. Despite the language of article 2093 and its proposed constructions, courts have found obligations to be solidary in many instances in which solidarity is not specified in a contract or statute. The jurisprudence has developed two discernible methods for determining whether an obligation is solidary: the court may decide that an obligation is solidary because all debtors are bound for the same thing to the same creditor, who may collect the whole debt from any one. This “principal effects” standard classifies an obligation as solidary because it matches article 2091's definition of solidarity.

Or, the court may decide that solidarity exists when its secondary effects, e.g., the interruption of prescription or the right of contribution, apply to the parties.

Foster decided that the employee-tortfeasor and his employer are solidarily liable because “both master and servant are nonetheless obligated for the same thing, repair of the damage to the third party,” and because article 2091 declares that the obligation is in solido in such a situation. In Thomas, the court decided that the employer and his employee's concurrently negligent tortfeasor are solidarily responsible because they are joint tort-feasors. However, Justice Dennis, in a concurring opinion, stressed his belief that solidarity exists because the requirements of article 2091 are met.

Credits, 49 La. Ann. 144, 21 So. 666 (1897), seems appropriate: “After all, on this question, is not the Code itself enough?” 49 La. Ann. at 188, 21 So. at 684. However, the authors' viewpoint is buttressed by the interpretations of article 1202 of the Code civil, the French counterpart of article 2093. See notes at 95-97, supra, and accompanying text.

127. See the representative cases collected in note 118, supra.
128. For the text of article 2091, see note 104, supra.
129. LA. CIV. CODE art. 2097.
130. LA. CIV. CODE art. 2103.
131. 381 So. 2d at 790-91.
132. 375 So. 2d at 378. Note the express reliance on Quatray v. Wicker, 178 La. 289, 151 So. 208 (1933) (holding that a party can be a joint tort-feasor even though his liability arises only by virtue of the fact that he is answerable for another's negligence).
133. “Either the employer or the employee can be made to satisfy the obligation, therefore, the requirement of article 2091 that either obligor may be held to pay the whole debt is met here.” 375 So. 2d at 379 (Dennis, J., concurring). Justice Dennis criticized the majority for failing to “confront” the holding of Cox that an employer and employee cannot be solidarily liable because the Cox court felt that certain secondary effects (the interruption of prescription) could not be applied justly to the employer. In light of the express rejection of Cox in the Foster case, it is arguable that the supreme court has adopted a “principal effects” test, i.e., if the obligation
In *Dupre v. Consolidated Underwriters*, the first circuit held that an injured employee and the employer's workers' compensation insurer were solidarily liable to a doctor who treated the employee because they were both liable for the debt. In *Granger v. General Motors*, the third circuit held that a negligent driver, the dealer, and the manufacturer of an automobile could be solidarily liable to an injured person for the sole reason that all could be made to pay the damages awarded to the plaintiff. In another case, the supreme court found that a building owner and subcontractor were solidarily bound for wages owed laborers of the subcontractor, because the subcontractor was liable by reason of his status as employer, and the owner was liable under the privilege granted to laborers in the Revised Statutes. The decision was reversed on rehearing, but the court indicated that, given the proper circumstances, it might find the parties solidarily bound. The courts long have held the maker and endorsers of a note solidarily liable simply on the grounds that each is liable for the whole amount of the note.

This practice of basing the existence of solidarity on whether the creditor can recover the entire debt from one of the obligors has been advocated by scholars and appears to accord with the basic notion of solidarity, that the creditor be provided with a greater number of debtors from whom to collect.

An equally obvious trend of decisions, the most notable of which

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134. 99 So. 2d 522 (La. App. 1st Cir. 1957).
135. Granger v. General Motors Corp., 171 So. 2d 720 (La. App. 3d Cir. 1965). The decision may have been motivated by the equities of the case. The plaintiff had sued and recovered judgment from the negligent driver, who paid the judgment. The plaintiff then brought suit against the dealer and the manufacturer of the negligent driver's vehicle, alleging a breach of warranty. The defendants' exceptions of no cause of action and of judicial estoppel were sustained by the district court and affirmed on appeal, on the grounds that all defendants were solidary obligors and that payment of the judgment by the driver extinguished the debt of all obligors. The court obviously felt that it was unjust to allow the plaintiff to recover separate awards in separate suits against the parties who were responsible, in some way, for the accident.
136. Pringle-Associated Mortgage Corp. v. Eanes, 254 La. 705, 226 So. 2d 502 (1969) (on original hearing). On rehearing the court reversed, holding that the contractor was not liable to the laborers until the liens were filed, and thus, he and the subcontractor could not be liable *in solido*. But, the decision indicated that the two parties would have been held liable *in solido*, had the laborers filed their liens and provoked the contractor's liability. The court made no mention of any reason for holding the parties bound *in solido*, other than the fact that both were liable for the wages.
137. Allain v. Longer, 4 La. 151 (1832); Rhys v. Moody, 163 La. 1039, 113 So. 367 (1927); Barnett v. Sandford, 137 So. 566 (La. App. 2d Cir. 1931).
is Wooten,39 is based on whether the secondary characteristics of solidarity apply to parties in a particular relationship. In holding that a father and his minor son are not solidarily bound for payment of damages occasioned by the latter’s torts, the court stated that the fact that both parties can be made to pay the entire debt is not always sufficient to establish solidarity. The court stated that the father and son were not solidarily responsible “because nothing in the relationship enables the son to avail himself of the advantages stipulated for co-debtors in solido by article 2104.”140 The court reasoned: Solidary obligors are entitled to contribution from their co-debtors under article 2103; the son cannot claim contribution from his father; therefore, the two must not be bound in solido.141 In Cox,142 the court declined to find solidarity between the employer and employee, although both were liable for damages caused by the employee’s negligence. The court stated that allowing a suit against the employee to interrupt prescription as to the employer, who “often has no knowledge of the wrong committed by the servant,” would be “unjust and unfair.”143 Clearly the court based its decision against solidarity on the fact that the secondary effect of interrupting prescription should not apply to the parties, rather than on the fact that the principal effect of solidarity obtains.144

From a survey of judicial decisions, one may conclude that Louisiana does not have an ordered doctrine of solidarity; few of the decisions reveal an adequate theoretical foundation. One of the earli-

140. “If one of the co-debtors in solido pays the whole debt, he can claim from the others no more than the part and portion of each.” LA. CIV. CODE art. 2104(1).
141. 272 So. 2d at 307. The court followed its reasoning to the ultimate conclusion that since the father is not solidarily bound with the son, he cannot claim contribution from his son. However, the court suggested that the father might be subrogated to the plaintiff’s rights under article 2161(3) or some theory of indemnity or unjust enrichment. Id. The court apparently failed to recognize that article 2161(3) requires solidarity for subrogation to take place. Pringle-Associated Mortgage Corp. v. Eanes, 254 La. 705, 226 So. 2d 502 (1969); Commercial Ins. Agency v. Wilson, 293 So. 2d 246 (La. App. 3d Cir. 1974).
142. Cox v. Shreveport Packing Co. 213 La. 54, 34 So. 2d 373. The Cox case was overruled by Foster. See text at notes 13-21, supra.
143. 213 La. at 61, 34 So. 2d at 376.
144. Each of the joint tortfeasors possesses knowledge of the facts and circumstances attending the wrong committed; and when a suit to recover damages is instituted against one of them before prescription has accrued, the others, by reason of such knowledge, are in position to adequately protect themselves in defense of the action even though cited after the expiration of the one year prescriptive period. There appears no justification . . . for applying . . . Article 3552 [interruption of prescription], to the obligation of the master.
213 La. at 60, 34 So. 2d at 375.
est decisions which attempted a doctrinal explanation of solidarity is Union National Bank v. Legendre.\textsuperscript{146} Legendre and Morris, bookkeeper and teller, respectively, at the bank, embezzled $15,000. When the escapade was discovered, the bank demanded repayment. Morris had died, and the sureties on his security bond paid $10,000 of the debt and were discharged. The bank later instituted suit against Legendre and his sureties, alleging that Morris' sureties and Legendre's sureties were liable \textit{in solido}. Holding that the parties were not liable \textit{in solido} and affirming the trial court's sustaining of an exception of no cause of action, the supreme court analyzed the situation as "presenting three \textit{groups} of solidary obligations for the same \textit{object}, but each having a different juridical cause."\textsuperscript{147} The court said Legendre and his sureties were liable \textit{in solido}, Morris and his sureties were similarly bound, and Legendre and Morris "perhaps" were solidarily liable as "co-trespassors."\textsuperscript{147} Although each was responsible for the whole debt, the court held that they were not all liable \textit{inter sese} because their obligations arose from different causes.

The question of whether prescription running against the endorser of a note is interrupted by an acknowledgment in the form of payment by the maker was considered in Jacobs v. Williams.\textsuperscript{148} The court held that prescription was not interrupted, because the maker and the endorser were not bound solidarily within the intention of the Civil Code.\textsuperscript{149} The court reasoned:

When . . . several debtors bind themselves for the same debt, in the same contract, they create among themselves a kind of partnership as regards that debt; they mutually charge each other by a tacit, yet real proxy to pay it. . . . \textsuperscript{150} It is easy to perceive how different is the solidarity which exists between the drawer and endorsers of a promissory note, and how inapplicable to them are the provisions of our Code in relation to debtors in solido.\textsuperscript{150}

\textsuperscript{146} 35 La. Ann. 787 (La. 1883).
\textsuperscript{147} Id. at 793.
\textsuperscript{148} The court hesitated to characterize Legendre and Morris as liable \textit{in solido}, but as joint trespassers, the bank employees would clearly come within the ambit of article 2324.
\textsuperscript{149} However, in the Code of 1825, the article was translated erroneously from the French and read that the tortfeasors were "jointly" answerable.
\textsuperscript{149} 12 Rob. 183 (La. 1845).
\textsuperscript{149} Later cases have held the maker and endorser to be solidarily liable. See, e.g., Dupre v. Consolidated Underwriters, 99 So. 2d 522 (La. App. 1st Cir. 1957).
\textsuperscript{150} 12 Rob. at 185. The court noted that "this indebtedness of each of them for the whole debt creates, to be sure, a kind of imperfect solidarity between them, but it is not that contemplated by the Code." Id. at 186. The reference to "imperfect solidar-
The Cox court also attempted to find some theoretical basis, such as the concept of a joint enterprise, for its decision that the employer and employee were not liable *in solido* for the employee's torts. The court spoke of the interruption of prescription as to solidary debtors by the filing of a suit against one:

Each of the joint tort-feasors possesses knowledge of the facts and circumstances attending the wrong committed; and when a suit to recover damages is instituted against one of them before prescription has accrued, the others, by reason of such knowledge, are in a position to adequately protect themselves in defense of the action even though cited after the expiration of the one year prescriptive period.\(^{151}\)

The justices concluded that the master did not occupy this position with regard to the employee-tortfeasor.

**The Demise of Imperfect Solidarity**

Imperfect solidarity, the only area of joint liability in which decisions have been based on doctrinal reasoning, has been abrogated by the *Foster* decision.\(^{152}\) The doctrine was introduced into the jurisprudence in 1880 in *Gay v. Blanchard*,\(^{153}\) which considered whether suit against the endorser of a note interrupted prescription as to the maker. Basing its comments on French works, the court said:

Solidarity may be perfect or imperfect. It is perfect, and the obligors are mandataries of each other, when by the same act, at the same time, they bind themselves to the performance of the same thing. It is imperfect (and they are not mandataries of each other) when they bind themselves to the same thing by different acts or at different times.\(^{154}\)

\(^{151}\) It probably was not intended to adopt the class of "imperfect" solidary obligations found in later cases, since the Jacobs court expressly stated that this type of solidarity was not found in the Code. References to imperfect solidarity in later cases consider it to be solidarity within the meaning of article 2091, but a type which does not carry some effects of "perfect" solidarity. See text at notes 152-67, infra. Although the decision concerned contractual obligations, the court based its decision on a partnership, or perhaps a mandate, theory.

\(^{152}\) 213 La. at 60, 34 So. 2d at 375.

\(^{153}\) "The solidarity is described as imperfect, when the parties are bound for the same thing but not on the same basis, as in the case here of master and servant. . . . The distinction drawn between perfect and imperfect solidarity is untenable and must be rejected." 381 So. 2d at 791.

\(^{154}\) Id. at 502.
The Civil Code provides no basis for imperfect solidarity, and the only difference between perfect and imperfect solidarity, other than their modes of creation, is supposed to be that prescription is not interrupted as to all debtors when one is sued upon or acknowledges the obligation. Therefore, in all cases other than those deciding a prescription issue, any classification of an obligation as imperfect or perfect is dictum.

The only significant case in which a finding of imperfect solidarity determined the outcome was *Jacobs v. Williams*, which held that the maker and endorser of a note are not bound in perfect solidarity; and it has not been followed. Other cases have found the following parties bound in imperfect solidarity: an insurance agency and the insured for payment of premiums to the insurer; the negligent driver, manufacturer, and seller of an automobile for damages arising from an accident; an employee and the workers' compensation insurer of the employer for medical services rendered to the employee; the owner and purchaser of property for the real estate broker's commission; and a railway company and city for injuries caused by dangerous trackage under the jurisdiction of both. In none of the cases would a finding of perfect solidarity have changed the outcome.

The relation of solidarity to the interruption of prescription was
considered specifically in Grigsby v. Morgan & Lindsey. The second circuit held that the lessor and lessee of a store were bound in perfect solidarity for injuries arising from the failure to keep the premises in a safe condition. However, the court classified the defendants as joint tort-feasors whose negligence was concurrent and whose duty arose from the same act, the lease. By so classifying the parties, the court brought the case within the ambit of Civil Code article 2324. Courts have held prescription to be interrupted as to solidary obligors in other circumstances, but the decisions did not mention the issue of perfect or imperfect solidarity.

Had Louisiana followed a consistent doctrinal scheme in classifying solidary obligations as solidary or not and as perfect or imperfect, the distinction abolished in Foster might have been warranted to preserve doctrinal purity. As a practical matter, the distinction would have been useful in some cases in which parties were bound for the whole but were not bound so intimately that the interruption of prescription by suit against one was justified. A logical system would be one in which solidarity exists between persons individually bound for the whole of the same debt when the law desires to extend added protection to the creditor. Such a rule would be desirable in cases of joint tort-feasors or of persons bound by virtue of articles 2317-20. Solidary obligations could then be classified as perfect or imperfect according to whether the parties have a relationship sufficiently close to justify the application of secondary effects, such as the interruption of prescription. Lastly, rights of contribution should not exist among solidary obligors merely because the obligors are bound in solido, but might also rest on independent rules. However, the state of the law does not appear to furnish a means for untangling the jurisprudential confusion and for fashioning a rational system with sound doctrinal underpinnings. The courts must work with a jurisprudence that sometimes finds obligations solidary because all obligors are bound for the same thing, and

165. 148 So. 506 (La. App. 2d Cir. 1933).
166. True joint tort-feasors are liable in perfect solidarity, by the express terms of article 2324. However, the duty of the parties arose under different rules of law, that of the lessor under articles 670 and 2322, and that of the lessee under the general provisions of article 2315. Yet, the breach of duty consisted of the same act, the failure to repair the building.
167. Rhys v. Moody, 163 La. 1039, 113 So. 367 (1927); Allain v. Longer, 4 La. 151 (1823) (all holding that prescription interrupted as to makers and endorsers of note when suit filed against or acknowledgment made by one); Hidalgo v. Dupuy, 122 So. 2d 639 (La. App. 1st Cir. 1960) (prescription interrupted as to insured by filing suit against insurer); Barnett v. Sandford, 137 So. 566 (La. App. 2d Cir. 1931).
168. For example, the use of the doctrine of imperfect solidarity might have been useful in Wooten. See 1973-1974 Term, supra note 12, at 294.
at other times finds obligations not solidary because secondary characteristics, such as contribution or the interruption of prescription, do not, or should not, exist. And, with the demise of imperfect solidarity, when an obligation is found to be solidary, the court must apply to the parties all the effects enumerated in the Civil Code.

Another First Look at Solidarity in Louisiana Tort Law

Undoubtedly, both Thomas and Foster illustrate result-oriented justice by permitting fair recourse to one wrongfully harmed. And the relatively short prescriptive period for Louisiana tort actions has encouraged the court to employ solidarity as a tool for preserving plaintiffs' claims. But characterizing debtors as solidarily bound, without limiting the effects of the label to those required to benefit the creditor, portends serious consequences for future adjustment of rights among obligors. More precisely, as rights between co-debtors are defined by their relationship, whether the Thomas or Foster opinions intend the incantation of solidarity to encompass debtor versus debtor issues is uncertain. Furthermore, because confusion long has reigned over Louisiana jurisprudence and doctrine regarding the imposition of solidarity, the proper application of Civil Code articles 2318 and

169. LA. CIV. CODE art. 3536. See note 9, supra.
170. LA. CIV. CODE art. 2097: "A suit brought against one of the debtors in solido interrupts prescription with regard to all."
171. If the employer and the employee are truly solidarily liable for the wrongs perpetrated by the employee, the Civil Code structures the adjustment of rights between the debtors in terms of contribution. See, e.g., LA. CIV. CODE art. 2103; Holloman, Contribution Between Tort-Feasors: Treatment By the Courts of Louisiana, 19 Tul. L. Rev. 254, 263 (1944). This, however, is not the only plausible conclusion. From the creditor's perspective, debtors may be solidarily liable, but among the debtors one obligor may be liable for the whole. LA. CIV. CODE art. 2106.
172. Prior to Thomas and Foster, Judge Tate was at one and the same time an erstwhile advocate of the principle, see, e.g., Dupre v. Consolidated Underwriters, 99 So. 2d 522 (La. App. 1st Cir. 1957); Bonacorso v. Turnley, 98 So. 2d 295 (La. App. 1st Cir. 1957), and an author of its eulogy. Wooten v. Wimberly, 272 So. 2d at 310 n.7 (1973) (Tate, J., concurring). Undeniably, however, Professor H. Alston Johnson has been the writer most bemused by the idea and its Louisiana applications. See The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Obligations, 36 LA. L. Rev. 375 (1976) [hereinafter cited as 1974-1975 Term]; 1973-1974 Term, supra note 12; 1972-1973 Term, supra note 105, at 231.
173. Despite the clear ruling in Deshotel v. Travelers Indem. Co., 257 La. 567, 243 So. 2d 259 (1971), that a parent is liable for the tortious conduct of minor children because article 2318 imposes responsibility and not because negligence is imputed, intermediate appellate courts have persisted in their struggle with the question. See, e.g., Lopez v. Buras, 321 So. 2d 792 (La. App. 4th Cir. 1975); Lovett v. South Central Bell Telephone Co., 308 So. 2d 801 (La. App. 4th Cir. 1975); Tabb v. Norred, 277 So. 2d 223 (La. App. 3d Cir. 1973); Scott v. Behrman, 273 So. 2d 661 (La. App. 4th Cir. 1973). Quite likely, the confusion stems from numerous older decisions which indicated that,
and 2320,\textsuperscript{174} and the true principle of joint tort-feasors under article 2324,\textsuperscript{175} a recital that an employer is solidarily responsible with both his employee\textsuperscript{176} and a third party concurring in the employee's negligence\textsuperscript{177} is hardly surprising. Yet, the predictability of this jurisprudential approach has not obviated the difficulties in attempting to make sense of the whole. An understanding of certain fundamental policies is essential to implementing the doctrine properly. This section examines a few of the difficult problems that arise in dealing with delictual and quasi-delictual obligations and solidarity, particularly with respect to contribution and indemnity.

\textit{Express Solidarity—A Joint Tort-Feasor is a Joint Tort-Feasor}

The only instance in the Civil Code chapter “Of Offenses and Quasi Offenses” that specifies when obligors are bound in solido for their acts is in the case of joint tort-feasors.\textsuperscript{178} Unlike the general common law notion of joint tort-feasors (including the situation of two or more negligent entities concurring to injure another rendering joint and several liability for damages caused),\textsuperscript{179} Louisiana's rule, properly read, is considerably more narrow. Article 2324's text evinces the redactors' intent with language couched in conspiratorial

\textsuperscript{174} Like parental responsibility resulting from family relationship, the nature of an employer's liability for the conduct of employees has often seemed mysterious. See, \textit{e.g.}, Polozola v. Garlock, Inc., 343 So. 2d 1000 (La. 1977); Jobe v. Hodge, 253 La. 483, 218 So. 2d 566 (1969); Williams v. Marlineaux, 240 La. 713, 124 So. 2d 919 (1960); Cox v. Shreveport Packing Co., 213 La. 53, 34 So. 2d 373 (1948); Egan v. Hotel Grunewald Co., Ltd., 129 La. 163, 55 So. 750 (1911); Caldwell v. Montgomery Ward & Co., Inc., 271 So. 2d 363 (La. App. 2d Cir. 1972); Johnson v. Dabbs, 194 So. 2d 816 (La. App. 1st Cir. 1967); Little v. State Farm Mut. Ins. Co., 177 So. 2d 784 (La. App. 1st Cir. 1965); Matsler v. Jones Motor Co., Inc., 128 So. 721 (La. App. 2d Cir. 1930).

\textsuperscript{175} See notes 178-97, infra, and accompanying text.

\textsuperscript{176} Foster v. Hampton, 381 So. 2d 789 (La. 1980).

\textsuperscript{177} Thomas v. W & W Clarklift, Inc., 375 So. 2d 375 (La. 1979).

\textsuperscript{178} Louisiana Code art. 2324.

terms—assisting, encouraging, or jointly participating in the commission of unlawful acts. By conniving together or acting in concert according to a plan, joint tort-feasors are viewed statutorily as either coaching or participating in the wrongful deed. Thus, perfect solidarity of all culpable parties is not only logical but also socially beneficial. As a matter of common sense, it is obvious that two working together might occasion greater damage than one operating alone; consequently, the law's sanctions represent the societal view that multiple party actions directed toward unlawful aims should be deterred. Furthermore, society deems joint action in carrying out a wrongful mission reprehensible. The members of the group that planned the scheme or aided in its execution are punished; the punishment is that each person who planned, assisted, or acted is liable to the plaintiff-creditor for the full amount of the debt. This notion of punishing wrongdoing not only favors the plaintiff-creditor, but benefits society as a whole.

Additionally, the conclusion of perfect solidarity meshes with the civilian concept that solidary obligors are mandataries of one another. By joining in the perpetration of the unlawful act, each

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181. A classic example is the holding of all persons participating in the tarring and feathering of another to be joint tort-feasors and liable in solido. Newsom v. Starns, 142 So. 704 (La. App. 1st Cir. 1932).

182. However, the blameworthiness rationale for the civilian idea of joint tort-feasors cannot explain why two or more concurrently negligent persons are deemed answerable in solido to a plaintiff incurring harms not attributable to either individual defendant. Clearly, the concurrently negligent actors do not act in concert; rather, mere chance joined the two debtors’ substandard conduct.

183. See, e.g., Shield v. F. Johnson & Son Co., 132 La. 773, 61 So. 787 (1913); Cunningham v. Penn Bridge Co., 131 La. 196, 59 So. 119 (1912); Dixon v. Gutnecht, 339 So. 2d 1285 (La. App. 1st Cir.), cert. denied, 342 So. 2d 673 (La. 1976); Abrego v. Tri-State Transit Co., 332 So. 2d 681 (La. App. 1st Cir. 1976). However, the mandate theory may exist in name only; in practice Louisiana jurisprudence has found perfect solidarity under circumstances in which mandate could not be assumed. See, e.g., Canal Bank & Trust Co. v. Greco, 177 La. 507, 48 So. 693 (1933); Rhys v. Moody, 163 La. 1039, 113 So. 367 (1927); Wilks v. Allstate Ins. Co., 195 So. 2d 390 (La. App. 3d Cir. 1967);
person a party to its commission has admitted responsibility and has
tacitly consented to be held liable to repair the damage occasioned.
Viewed in this light, the imposition of solidarity under article 2324
is both conceptually sound and fair. Justice is obtained by present-
ing the harmed individual with a number of debtors against whom
he may proceed for the entire loss.

However, at some point in the jurisprudential evolution of Louis-
iana tort law, the lucid and cogent theory underlying article 2324
was obscured; common law reasoning perforated the Code's tidy con-
fines. As the prevalent problem posed (two or more negligent par-
ties concurring to damage another) is one which the common law
long has treated as one involving joint tort-feasors, the improper
use of article 2324 is understandable, if unfortunate. Beyond the
theoretical constructs of solidarity, the effects of perfect solidarity
constitute tools sought by the courts in classifying debtors as joint
tort-feasors and, hence, bound for the benefit of the plaintiff-
creditor. Principally, the solidary effects judicially chosen to aid tort
plaintiffs include the rules that suit brought against one debtor
solidarily bound interrupts prescription as to all other solidary
obligors and that each obligor liable in solido can be compelled to
pay the debt in full. Consequently, courts may have looked initially
to the plaintiff-favoring qualities of solidarity in making classifica-
tions—regarding the conceptual underpinnings only as a matter of
secondary importance.

A simple automobile collision illustration may clarify the difficulty:
Driver A and driver B each fail to exercise reasonable care in
operating their vehicles and collide. The two automobiles crash into
C's building, located just off the roadway. The extent of the harm to
C's structure is a single hole in one wall. A Louisiana court hearing
suit brought by C against A and B probably would hold the two in-
advertent drivers to be responsible in solido; quite possibly, A and
B would be referred to as "joint tort-feasors." While the determina-
tion of ultimate liability would be correct, neither the mention of sol-
idarity nor the joint tort-feasor nomenclature is really accurate.

Hidalgo v. Dupuy, 122 So. 2d 639 (La. App. 1st Cir. 1960). In these situations, "the
court rarely refers to 'perfect' solidarity, only to solidarity, but it gives to these in-
stances of what ought to be 'imperfect' solidity ... effects which are the same as
those which would follow a conclusion of perfect solidarity." 1973-1974 Term, supra
note 12, at 295.

184. See note 180, supra.
185. LA. CIV. CODE art. 2097.
186. LA. CIV. CODE art. 2091.
187. However, as of August 1, 1980, the classification of A and B as solidary
obligors is correct under amended article 2324. 1979 La. Acts, No. 431, amending LA.
Certainly A and B are not the conspiratorial-type of obligors portrayed by article 2324. However, both have caused damage to C by their fault and they are obliged to repair it.\textsuperscript{188} Because each debtor is bound for a separate act of negligence, the rationale for each obligation is not identical; hence, the debtors are not truly solidary obligors.\textsuperscript{189} Still, C may compel full compensation from either A or B, since the damage caused is indivisible.\textsuperscript{190} The reason that both debtors are bound to repair all of C's injury is that allocating delictual responsibility by attributing shares to A and B is impossible.\textsuperscript{191} A more satisfactory approach resolves this problem by identifying the nature of the obligation from the obligee's perspective, avoiding terminology that colors unnecessarily the rights among the debtors.\textsuperscript{192}

Notwithstanding this proposed analysis, Louisiana courts will continue to label concurrently negligent persons causing a single indivisible harm as "solidary obligors." Act 431 of 1979 insures the validity of this statement by amending article 2324 to hold persons whose concurring fault causes harm to another liable as debtors in solido.\textsuperscript{193} Nothing is inherently wrong with such a classification; the common law has managed well with it. But, it is essential to the maintenance of a cohesive system under the Civil Code that solidarity is recognized as something other than a passkey. One of the

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\textsuperscript{188} See \textit{LA. CIV. CODE} art. 2315.

\textsuperscript{189} Professor Stone has expressed the view that the concurrent negligence of two tortfeasors, culminating in a single damage or harm to another, does not produce solidarity. Although, if the injury sustained by the victim cannot be separately attributable to the concurrently negligent defendants, each is liable for the whole, the concurrent action is not an example of solidary responsibility. F. STONE, \textit{TORT DOCTRINE} § 113 in \textit{12 LOUISIANA CIVIL LAW TREATISE} 157 (1977).

\textsuperscript{190} \textit{LA. CIV. CODE} art. 2109: "The obligation is indivisible, though the thing or the fact which is the object of it, be by its nature divisible, if the light, in which it is considered in the obligation, does not admit of its being partially executed." \textit{See LA. CIV. CODE} art. 2113.

\textsuperscript{191} The tort victim has but one injury. Once the damage has been repaired or compensated, the rights arising among the debtors is of no moment to the creditor. Thus, the courts have called A and B solidary obligors to permit the tort plaintiff-creditor to take and execute judgment against any one debtor. A more thoughtful approach might have been to recognize the practical indivisibility of the debt; the identical desirable end would have been achieved. \textit{LA. CIV. CODE} art. 2113.

\textsuperscript{192} The Civil Code is clear in acknowledging only two kinds of intra-debtor relationships. One calls for contribution. \textit{LA. CIV. CODE} art. 2103. The other provides indemnity. \textit{LA. CIV. CODE} art. 2106. With the limited flexibility allowed by the Civil Code, accurate characterization of the obligors’ relationships is extremely important when speaking of solidarity for the creditor’s benefit.

essential tenets of perfect solidarity is that it must be stipulated expressly. The mere fact that courts have ruled that debtors in certain circumstances are solidarily bound though not joint tort-feasors further indicates that the term “solidarity,” in the context of the short Civil Code chapter of delictually based obligations, may have several meanings. The invocation of the rules of solidarity based upon contractual relationship necessitates examination of some of those meanings.

Relational Answerability—Whys and Wherefores and a Reason for Article 2320

The Louisiana Civil Code provides a clear basis for holding an employer financially responsible for his employees’ tortious acts if

194. See notes 117-26, supra, and accompanying text.
195. The Foster court carefully pointed out that an employer and his employee, while solidarily liable, are not joint tort-feasors. 381 So. 2d at 791.
196. LA. CIV. CODE arts. 2315-24.
197. From an exigtetical perspective, Civil Code article 2091 originates the concept: [t]here is an obligation in solido on the part of the debtors when they are all obliged to the same thing, so that each may be compelled for the whole, and when the payment which is made by one of them exonerates the others toward the creditor. This definition has been described as consisting of “three elements: multiple debtors; liability of each for the whole debt; and release of all by one’s payment.” Note, supra note 105, at 648. But, in addition, article 2093 provides that solidarity is not presumed; it must be stipulated or imposed by law.

Louisiana Civil Code articles 2315 through 2324 govern the principles of imposing delictual and quasi-delictual obligations. A tortfeasor is liable for the damage he has done through his fault. LA. CIV. CODE art. 2315. Arising from a fact, wrongful conduct, the obligation is imposed by law. LA. CIV. CODE arts. 1760 & 2292. But of the tort articles only article 2324 mentions solidarity. Naturally, courts, in an effort to aid plaintiffs, have applied article 2324 expansively. The concurrently negligent tortfeasors illustration dramatizes the problem. Given that a single hurt is occasioned upon a victim, solidarity is not the correct tool to favor the plaintiff. The debtors are obliged to pay one and the same thing, but for different reasons. See LA. CIV. CODE art. 2092. Properly speaking, the obligation is one of imperfect solidarity. Yet, the courts have seized upon article 2324 for purposes not intended nor consistent with its rationale. This continued jamming of square pegs into round holes is unfortunate. What may be desirable in the instant case often spells ominous consequences for the future. Probably Judge Tamm has best articulated the evils inherent in the “present case” judicial method:

it is obvious that the gravamen of the exercise results in a long series of inconsistent, conflicting and confusing opinions predicated not upon fixed principles, but upon a subjective determination of what is best in a particular case. The evil in the system is, of course, that as heresies have a habit of turning into newly minted dogma, the individual subjective ruling becomes “case law” and is the springboard from which the next ad hoc ruling springs, like Prometheus unbound. Each such legal exercise reduces the stability of principles to a whiter shade of pale and reveals the void of logic at the core of such procedure.

committed within the course and scope of the relationship. But as sure as is the existence of the employer’s ultimate liability, the redactors failed to enunciate its theoretical components. Arguments can be marshalled that the master’s answering capacity is a function of the concept of imputed negligence or is purely statutory in origin. Descriptive phrases, however, are not helpful, as the terms “vicarious responsibility” and “respondeat superior” lack substantive meaning. Answers, if they are to be found at all, will come only after a close study of the underlying structure of Civil Code relational liability.

At common law the employee’s negligence is imputed to the employer; the two are regarded as joint tort-feasors. Since the employer has engaged in the enterprise creating the risk to the tort plaintiff, the law has demanded that the employer assume responsibility for that which benefits his interests. Thus, the master escapes liability when the damage was caused by the employee’s engaging in activities not for the employer’s gain, i.e., beyond the course and scope of the employee’s duties. In the absence of a statute requiring the employer to make amends, the imputation of negligence served as a fault-finding mechanism.

By contrast, the Louisiana Civil Code specifically notes the employer’s liability, eliminating the need to fictionalize the passage of the servant’s negligence to the employer. Although examples of imputed negligence may be extracted from reported decisions, they do not represent a correct application of governing law. In several instances, opinions that appear to apply imputation are solely a consequence of peculiar factual circumstances.

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199. See notes 204-09, infra, and accompanying text.
201. The term respondeat superior is defined as meaning “let the master answer.” BLACK’S LAW DICTIONARY 1475 (5th ed. 1979).
202. W. PROSSER, supra note 179, at 311.
203. See, e.g., Egan v. Hotel Grunewald Co., Ltd., 129 La. 163, 55 So. 750 (1911).
204. For example, in Egan v. Hotel Grunewald Co., Ltd., 129 La. 163, 55 So. 750 (1911), an injured person instituted suit to recover damages from the hotel company and from Charles Sicard, who at the time of the event complained of was in the hotel’s employ. 129 La. at 174, 55 So. at 754. The plaintiff’s building was damaged by pile driving vibrations, Sicard’s construction activities in renovating the hotel. Id. While the court reasoned that “[t]he hotel company and Mr. Sicard were joint tort-feasors, ...
Even after potentially confusing cases are distinguished, certain inferences of negligence imputation are difficult to explain. In *Polozola v. Garlock, Inc.* the supreme court used language which indicated that imputation may be a viable notion. The plaintiff, a pipefitter, sustained injuries when a spume of liquid propylene oxide struck his face as he repaired a valve flame. Principally at issue was the construction of an indemnity agreement between Dow Chemical Company and National Maintenance Corporation to "hold harmless Dow, its agents, servants and employees from and against any . . . claims against Dow [or] its agents, servants and employees," even when the losses of Dow employees resulted from their own negligence. Interpreting the contract to provide an affirmative answer, Justice Marcus wrote that "Dow, the corporation, cannot . . . itself be negligent, except under the doctrine of respondeat superior for the negligent acts of its agents, servants or employees committed within the scope of their . . . employment."

The court's equating the doctrine of respondeat superior with an imputation of negligence is incorrect. In all probability, the *Polozola* court intended to do no more than to rule on the contract at issue and not to reverse abruptly longstanding ideas respecting the reason for the employer's answerability for his employees' tortious conduct. In this context, *Polozola* was rightly decided; apparently the intent of the parties to the contract was to include employee negligence, as well as corporate fault through executive officer decisions, within the agreement's ambit.

While the imputation problem has retarded greatly close examination of the basis for employer responsibility, the issue finally appears settled, because *Foster* is unambiguous in stating that a
master and his servant are not joint tort-feasors. The supreme court adopted a view that necessarily rejects the imputation theory. However, the rationale articulating why an employer is liable for the servant's acts is disturbing; the basis of the master's liability is significant, since article 2320 does not explain why the liability exists. Certainly policy plays a dramatic role. However, since identifying the reason for the employer's liability may affect the rights among the debtors, a probing analysis is desired.

At one time, the generally accepted view in Louisiana was that negligence constituted the exclusive definition of fault; thus, many older decisions attempted to construct and invoke an imputed negligence formula. The "[fault . . . is negligence . . . [and] [n]egligence is . . . fault" view underwent a dramatic change in the last decade because of the supreme court's reassessment of obligations with respect to ownership, relationship, or neighborhood. In Langlois v. Allied Chemical Corp. the court ruled that the scope of article 2315 is not limited to negligence but that negligence simply illustrates fault. Following Langlois, the evolution of the legal

211. That article 2320 does not explain its rule is not surprising; articles 2317, 2318, 2321, and 2322 are similarly silent as to the social policy each summarizes. An argument can be made that the imprecision of the Civil Code's nine tort articles is what was desired by the redactors, and is accepted by present legislative authority as a codification of what is just and reasonable in each particular lawsuit. In this tort arena judicial authority is at its highest. See Tate, The Law-Making Function of the Judge, 28 LA. L. REV. 211 (1968).
213. This statement constituted part of Federal District Judge E. Gordon West's jury charge in Khoder v. AMF, Inc., 539 F.2d 1078, 1080 (5th Cir. 1976). As the action was a diversity case, Louisiana law was applied.
214. See LA. CIV. CODE arts. 2317 & 2321.
215. See LA. CIV. CODE arts. 2318 & 2320.
216. See LA. CIV. CODE arts. 667-69.
217. 258 La. 1067, 249 So. 2d 133 (1971).
218. Negligence fault is defined in article 2316 which provides in part: "Every person is responsible for the damage he occasions not merely by his act, but by his negligence, his imprudence, or his want of skill."
219. "Article 2316 is not all-inclusive of fault, but rather illustrative of fault." 258 La. at 1078, 249 So. 2d at 136. The Langlois court found an alternative fault-finding source in the standard of conduct mandated by Civil Code articles 667 through 669, relative to a landowner's duties to neighbors. In violating the Code duty, the landowner is at fault for damages caused, irrespective of negligence. One commentator has noted that "Justice Barham viewed article 2316 as an illustrative, rather than definitive, statement of fault. Accordingly, fault could be found in acts or events not involving . . . negligence. This expanded definition of fault gave rise to what must be termed strict liability based on 'non-negligent fault' . . . ." Note, Tort—Traffic Accidents—Theory of
fault, or non-negligent fault, principle was swift. *Holland v. Buckley*\(^2\) held that article 2321 renders the owner of an animal liable for damages caused, without regard to the owner's exercise of due care, since negligence does not constitute an element of the plaintiff's action.\(^2\) Shortly thereafter, *Turner v. Bucher*\(^2\) ruled that the parent of a minor child is responsible under article 2318 for the acts of a minor so youthful that he could not be negligent.\(^2\) Succinctly, the court did not require negligence fault.\(^2\) The rapid development of the legal fault principle culminated in the landmark *Loescher v. Parr*\(^2\) opinion. Former Justice Tate, as the court's writer, stated that ownership of a *thing* that creates an unreasonable risk of foreseeable injury is a relation imposing upon the owner

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liability for the damages caused by the defective article. Again, the degree of care exercised by the owner is unimportant, since his responsibility is an effect flowing from the relationship.

Since the master-servant relationship arises out of contract, similar reasons exist for holding an employer responsible for the employee's acts. More than thirty years ago in Cox v. Shreveport Packing Company, the state supreme court concluded that the master's obligation under article 2320 was merely secondary when he was not personally negligent. Perhaps even more helpful in

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226. 324 So. 2d at 446. The court was of the opinion that Louisiana law was well settled that article 2320 requires an employer to answer for his employee's tortious acts despite the absence of personal negligence. Id., citing Blanchard v. Ogima, 253 La. 34, 215 So. 2d 902 (1968). The policy reasons for the strict liability doctrine were superbly articulated: The entity to whom the law recognizes the relationship to the risk-creating person should bear the loss resulting from the occurrence of the risk. Id. The law provides this mechanism for the benefit of the innocent person harmed—the creditor. Therefore, in the interface of plaintiff-creditor vis-à-vis responsible relation obligor:

The liability arises from his legal relationship to the person or thing whose conduct or defect creates an unreasonable risk of injury to others.

The fault of the person thus liable is based upon his failure to prevent the person or thing for whom he is responsible from causing such reasonable risk of injury to others.

Id. (emphasis added).

227. Justice Barham's Langlois opinion was predictive. In a footnote, he remarked that the structure of the Civil Code, principally articles 2318 through 2322, indicates that the imposition of liability for fault not premised upon negligence was within the redactors' intendment. The duty to respond in damages is legislatively mandated as a matter of social order "by reason of relationships." 258 La. at 1084 n.14, 249 So. 2d at 140 n.14. Former Justice Barham has long been fascinated with this concept. See Barham, Liability Without Fault, 17 LA. B.J. 271 (1970). Other commentators have made similar observations. See Verlander, We Are Responsible, 2 TUL. CIV. L.F. 1 (1974).

228. See, e.g., New Amsterdam Cas. Co. v. Soileau, 167 F.2d 767 (5th Cir. 1948). The answerability of the employer for damages caused by the servant, acting within the scope of employment, is derived from this relationship. Loescher v. Parr, 324 So. 2d 441, 446 (La. 1975); Comment, The Employer's Indemnity Action, 34 LA. L. REV. 79, 81 (1973).

229. Liability is a by-product of the benefit which the employer enjoys from the employee's engaging in activities which promote the business enterprise. Comment, supra note 228, at 85.


231. The precise issue presented was whether Civil Code article 3552 (providing that the acknowledgement of the debt by one obligor bound in solido interrupts prescription as to all solidary debtors) was applicable in the master-servant context. In a situation in which the employer was not independently at fault, the Cox court saw no justification for applying article 3552 to the debt of the master for damages arising from a tort committed by an employee. 213 La. at 60, 34 So. 2d at 375. Although subsequently criticized as a misinterpretation due in part to "the dearth of . . . translated doctrinal explanations," Wooten v. Wimberly, 272 So. 2d at 308 (La. 1973) (Tate, J.,
characterizing the reason for the master's liability is Justice Mc-
Caleb's statement, writing for the *Williams v. Marionneaux* major-
ity:

"The liability imposed on the master by Article 2320 of the code
in favor of third persons for the damages ... rests solely on the
principle of respondeat superior and is derivative or secondary
in all cases where the master himself is not at fault."

On balance, it appears that the employer's fault, purely legal or
statutory in nature, functions in practice to provide the plaintiff-
creditor with an answerable entity. But the policy of providing the
plaintiff-creditor with a solvent obligor, even if accomplished by
classifying the debtors as solidarily bound, does not necessarily
mean that the rights among the debtors are thereby dictated. In
short, the *Foster* court's conclusion that the employer and
employee are solidary obligors vis-à-vis the plaintiff does not re-
quire that the legal categorization control the rights between the
debtors. The reason for each obligor's indebtedness must be re-
membered. When obligors are responsible to the creditor for dif-
ferent reasons, they may not be equally liable. Two old Louisiana

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232. *240 La. 713, 124 So. 2d 919 (1960).*

233. *240 La. at 722-23, 124 So. 2d at 922, citing Cox v. Shreveport Packing Co., 213 La. 53, 34 So. 2d 373 (1948).* The recognition of the employer's responsibility as Code-based is correct; a finding of responsibility on any other basis is inaccurate, in the absence of independent negligence. Comment, *supra* note 46. Furthermore, *Williams* points out that "[u]nder our law, unlike some common law states . . . , the master is not considered a joint tortfeasor with his servant when his liability . . . is based solely on the doctrine of respondeat superior." *240 La. at 723, 124 So. 2d at 922, citing Costa v. Yochim, 104 La. 170, 28 So. 992 (1900); Brannan, Patterson & Holiday v. Hoel, 15 La. Ann. 308 (1860).*

234. See note 226, *supra,* and accompanying text.

235. In *Wooten v. Wimberly,* 272 So. 2d 303 (La. 1973), the Louisiana Supreme Court, interpreting article 2918, noted that the father was "answerable" for the minor's torts. *Id.* at 307.


237. *Id.*

238. While the fact that the employer and the employee are bound differently to do the same thing does not determine whether their obligation is solidary after *Foster v. Hampton,* 381 So. 2d 789 (La. 1980), and *Thomas v. W & W Clarklift, Inc.,* 375 So. 2d 375 (La. 1979), it should be noted that when the debt is principally the concern of one obligor, the normal effects of solidarity should not follow. *La. Civ. Code* art. 2106. Contribution between debtors is not a necessary consequence of solidarity for the creditor's favor.

239. See notes 276-99, *infra,* and accompanying text.
decisions aid in developing the problem and in providing a solution.

In *Sutton v. Champagne* two youths were shooting birds with a small caliber rifle within the New Orleans city limits. The rifle and cartridges had been given to one of the boys by his father. The friend of the boy with the dangerous weapon tried his aim, and the unfortunate result was the mortal wounding of a third child. The decedent’s parents instituted suit. When the case reached the supreme court, Justice Provosty, in announcing the court’s view, determined that the father who had provided his son with the risk-creating instrument was liable. In addition, the mother of the boy who wrongfully discharged the rifle was responsible. Clearly the decision appears correct, and justice was served. But *Sutton* is of much greater import. The father who had given the weapon to the child was liable for two distinct reasons. However, the mother

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241. 141 La. 469, 75 So. 209 (1917).
242. Both boys were fourteen years old. 141 La. 470, 75 So. at 210.
243. *Id.*
244. The language the court used in its opinion is significant:

> We have no difficulty in deducing the liability of defendant Champagne. He, under the above quoted codal provision [Civil Code article 2318] is answerable for the acts of his boy; hence the legal situation as to him is precisely as if he, and not his boy, had handed this rifle to inexperienced young Sill . . . . Thereby he assumed the risks incidental to the inexperience and unskillfulness of the boy in handling this dangerous instrument.

141 La. at 472, 75 So. at 210.
245. Article 2318 provides that only after the decease of the father is the mother responsible for her child’s tortious conduct. Evidently, young Sill’s father was deceased, as the mother was held answerable. While article 2318’s expression of proper family order is better suited to a time long passed, the archaic wording rarely controls the decisions. But when it has, such as in *Gaspard v. LeMarie*, 245 La. 239, 250, 158 So. 2d 149, 153 (1963), a question of constitutional dimension arises. Although far beyond the scope of this comment, in light of the recent interest given to legislative classifications by gender by the United States Supreme Court, such categorization is highly doubtful. See, e.g., *Caban v. Mohammed*, 441 U.S. 380 (1979); *Orr v. Orr*, 440 U.S. 268 (1979); *Califano v. Webster*, 430 U.S. 313 (1977); *Califano v. Goldfarb*, 430 U.S. 199 (1977).
246. 141 La. at 472-73, 75 So. at 211.
247. First, if his son’s giving of the rifle to the Sill boy was an act that may be characterized as quasi-delictual, i.e., negligent, then Mr. Champagne was liable for the reasonably foreseeable consequences, including the tragic incident, by virtue of article 2318. On the other hand, Mr. Champagne’s act of giving a young boy a dangerous weapon within the city limits might be said to be conduct so imprudent as to constitute unreasonable or substandard behavior in and of itself. Certainly, it seems foreseeable that a young boy might allow another inexperienced child to fire the rifle with its sad consequences; hence, Mr. Champagne was under a duty to protect against that very risk. Read in this light, the operative principles in *Sutton* are very similar to
of the boy that occasioned the wrong was answerable solely because of her relation with her son. Logically, the court provided her recourse against the person who brought on the event, Mr. Champagne.\footnote{248} Although the parental defendants were cast in judgment in solido,\footnote{249} the court stated that "upon payment of . . . [the] judgment, or any part thereof, the said Mrs. Maggie Sill [shall] have judgment . . . against the said Louis J. Champagne for whatever amount is thus paid by her."\footnote{250}

At first blush, Sutton's analysis seems confounding. To benefit the plaintiffs, the court held the defendants liable in solido.\footnote{251} If the court actually intended to characterize the debtors' relation as one of solidarity, ostensibly intra-debtor contribution claims\footnote{252} should have been in the offing. Yet, the Sutton court specifically projected that should Mrs. Sill have to pay the judgment in its entirety or only in part, her right against Champagne would be in the nature of indemnity. Assuming that the conclusion of solidarity was correct,\footnote{253} the majority's adjustment of rights between the debtors was completely sound. Mrs. Sill's obligation was a function of a technical, statutory decree.\footnote{254} On the other hand, Mr. Champagne was personally negligent in permitting his son to discharge a dangerous weapon within the city limits of New Orleans,\footnote{255} which was in violation of a local ordinance.\footnote{256} Mrs. Sill was bound because she had a

\footnote{248} 141 La. at 473, 75 So. at 211.

\footnote{249} \textit{Id.}

\footnote{250} \textit{Id.} (emphasis added).

\footnote{251} The effect that the court sought is obvious. As an aid to the plaintiffs in executing the judgment, either debtor could be compelled to pay all of the award. \textit{La. Civ. Code} art. 2091.

\footnote{252} \textit{See La. Civ. Code} art. 2103.

\footnote{253} This assumption obviates any differences among doctrinaires over the question whether the proper classification of the obligation with respect to both debtors was of imperfect solidarity.

\footnote{254} The Sutton court may have greatly influenced by the factual circumstances of the case. Weighing the relative blameworthiness of each debtor, the court manifested a distaste for imposing any liability upon Mrs. Sill. Justice Provosty wrote that "[i]t seems illogical and hard that a mother should be liable in damages for the consequences of the act of somebody else in intrusting a dangerous instrument to her inexperienced child out of her presence and without her knowledge." 141 La. at 472, 75 So. at 210.

\footnote{255} \textit{See note 247, supra.}

\footnote{256} 141 La. at 472, 75 So. at 210.
parental relation with her negligent son; Mr. Champagne was obligated since he was personally culpable. Thus, the two debtors were liable for different reasons. But, for the plaintiff-creditor's benefit, the desired end is to present the wronged individual with as many debtors as possible, against each of whom full compensation may be exacted; hence, the solidarity of Mrs. Sill and Mr. Champagne.257

Once the creditor has been satisfied and judgment paid, however, the policy for calling the debtors solidary obligors no longer obtains. At that point, the technically or constructively liable obligor who pays the creditor in full should be permitted to pursue indemnification from the tortfeasor-debtor.258 A conclusion of solidarity for the creditor's advantage should not alter the decision.259 Prior to Foster260 the doctrine of imperfect solidarity might have been employed to achieve the same end. But the indefinite state of the in solidum doctrine, with its "now-you-see-it, now-you-don't"261 qualities, precipitated its demise.262 All one is left with is "solidarity" that is a refraction of literalism.

Appalachian Corporation, Inc. v. Brooklyn Cooperage Company, Inc.263 is the second significant Louisiana decision raising questions similar to those addressed in Sutton. The Appalachian Corporation brought an indemnity action after it had paid the full amount of a tort judgment in favor of George Lincoln.264 The trial court dismissed

257. See LA. CIV. CODE art. 2091.
258. See LA. CIV. CODE art. 2106.
261. 1974-1975 Term, supra note 172, at 382.
263. 1974-1975 Term, supra note 172, at 382.
264. Lincoln, a night watchman at a warehouse owned by the Appalachian Corporation, was injured when an iron door on the premises fell on him. The building had been purchased from the Brooklyn Cooperage Company only two days prior to the accident. Basically, the Appalachian Corporation alleged that the cooperage company was still in possession of the building at the time of the incident and that Lincoln's injury was proximately caused by the negligence of the superintendent of the cooperage company in opening and closing the defective door. 151 La. at 43-44, 91 So. at 540. In addition, the Appalachian Corporation claimed that Brooklyn Cooperage Company had actual knowledge of the dangerous condition of the door and that the night watchman would have to use it—an awareness which the plaintiff denied. Id. From the facts stated in plaintiff's petition, two bases appear to explain why the cooperage company was at fault. On the one hand, the negligence of the Brooklyn Cooperage Company's superintendent and other employees in the course and scope of their duties should dictate a finding of legal fault under article 2320. On the other hand, if the executive officers of the cooperage company knew of the longstanding defect in the door, the fault may be phrased as more direct, even though a juridical person cannot actually be negligent. See note 10. supra. Such direct fault, i.e., negligence fault, is viewed both judicially and as a matter of common sense as more culpable than technical respon-
the case, sustaining the peremptory exception of no cause of action. The supreme court stated that the principal argument in support of the exception was that "one guilty of a fault which causes injury . . . to another and who has been cast in damages for such injury and has paid the same, can have no action for indemnity against his co-adjutor in the wrongful act . . . ." That statement, like many rules of law, is certainly overbroad. Fault is not unidimensional; rather, fault may be seen not only as different in degrees but also different in kind. Reasoning that the plaintiff stated a cause of action, the majority opined that the defendant's exception should have been overruled.

Articulating a legal structure for the appellate court's conclusion is troublesome. Since the court was impressed with the notion that the Appalachian Corporation was only constructively at fault, authorization of an indemnity suit may have been grounded in causation principles; the plaintiff's constructive fault was not the proximate cause of George Lincoln's injuries, but somehow the defendant's fault, regardless of its nature, was. Perhaps a rationale may more plausibly be gleaned from the recognition that the plaintiff previously had been held liable to Lincoln because of "some legal duty." In essence, the legal duty requiring the Appalachian Cor-

Notably, the Appalachian Corporation court saw the liability of the Appalachian Corporation (as it had been compelled to pay for Lincoln's damage) as merely technical in nature—"predicated upon the duty which it owed of providing a safe place for Lincoln to perform his duty . . . ." 151 La. at 45, 91 So. at 541.

Under the modern Code of Civil Procedure, the exception is contained in article 927.

See notes 212-27, supra, and accompanying text.

See note 264, supra.

See note 264, supra.

See note 264, supra.

The plaintiff, a constable, had been put up to arresting a free Negro by the defendant. Subsequently, charges were brought against the constable for false arrest and he was fined, imprisoned, and compelled to pay severe damages. Having endured imprisonment, and following payment of fines and compensation, he instituted suit against the person whose word had caused the arrest. The court sustained a demurrer denying recovery chiefly on the ground that what the plaintiff had done was a crime. After he had been found guilty and punished, the law would not countenance the throwing of the burden of his punishment to another. But the Meunier court indicated that if the constable had been subjected only to civil sanctions, his lawsuit might have been permitted. Id. at 287. Consequently, the Appalachian Corporation opinion notes:

The Appalachian Corporation was, in a civil suit, held liable and compelled to pay damages for an injury caused, not by any crime or criminal negligence on its part, independently of or in combination with defendant, but because of the ownership of the building and its legal duty to keep the building in safe condition.

151 La. at 47, 91 So. at 542.
poration to answer was statutory in origin and not a debt flowing
from a failure to maintain a certain standard of care in its conduct.
The real, tortious fault appears to have been on the cooperage com-
pany's side,\textsuperscript{272} as its executive officers may have been the ultimate
wrongdoers.\textsuperscript{273}

\textit{Sutton} and \textit{Appalachian Corporation} represent difficult cases,
presenting questions that courts grapple with even today. An effort
was made in each instance to strike a sort of rough justice. In doing
so, the \textit{Sutton} and \textit{Appalachian Corporation} decisions are invaluable
as teaching aids; the lesson is that a conclusion that debtors are
solidarily bound for the creditor's benefit does not itself control the
characterization of rights among the debtors. Deceptively simple,

\textsuperscript{272} One bothersome point is in the manner in which the court phrased the source
of the cooperage company's liability. The court found that Lincoln's injury "was due
primarily . . . to the negligence of the employees of the defendant acting within the
scope of their employment . . . ." 151 La. at 50, 91 So. at 543. With all deference, the
court could not have meant what it wrote. As the Appalachian Corporation instituted
its action for the full amount paid to Lincoln, the claim sounded in indemnity. To main-
tain the plaintiff's cause of action, the court necessarily ruled that indemnification
of the plaintiff was permissible. For that to follow in light of the approving reference to
\textit{Sutton} v. \textit{Champagne}, 141 La. 469, 75 So. 209 (1917), the plaintiff's technical fault had
to be outweighed substantially by actual negligence or greater fault. Yet, if the sole
source of the cooperage company's liability was that its employees had been negligent
in the performance of their duties, constructive fault squarely would have met
technical liability.

From a close study of the case and in view of the citations to \textit{Sutton} as direct
authority, it is submitted that the \textit{Appalachian Corporation} court impliedly found the
cooperage company "negligent." See note 264, supra. As between Appalachian Cor-
poration and Brooklyn Cooperage, the cooperage company was the party more at fault
if its executive officers knew of the dangerous condition of the door that injured Lin-
coln but took no corrective measures. But at least one other interpretation of \textit{Ap-
palachian Corporation} is possible. Assuming that the cooperage company was responsi-
ble solely because of its employees' negligent conduct, both the plaintiff and the defen-
dant were only "technically" answerable for Lincoln's damages if the negligence of the
cooperage company's employees was causative of Lincoln's accident. However,
Brooklyn Cooperage was in a position to pursue an action in indemnity against its
employees for any amount it paid for their wrongs. At that time, the Appalachian Cor-
poration was not in an analogous circumstance. Its responsibility flowed from its
ownership of the warehouse, carrying with it a duty to provide Lincoln with a safe
workplace. The building can hardly be said to be a tortfeasor, nor is it subject to suit
by its owner to recover what the owner has paid on a judgment to another injured
because of some dangerous condition of the structure. Brooklyn Cooperage's employees
on the other hand were, ostensibly, tortfeasors and the cooperage company could main-
tain an indemnity suit. Hence, if what the \textit{Appalachian Corporation} court was seeking
to do was to shift the debt in full to those actually to blame or truly at fault, permit-
ting plaintiff to proceed in indemnity against the cooperage company facilitated that
policy—even if the cooperage company was answerable only as a consequence of the
dictates of article 2320.

\textsuperscript{273} 151 La. at 50, 91 So. at 543. See note 272, supra.
the notion is amply supported in the Civil Code and is heartily endorsed by commentators.274

And Now for Contribution or Indemnity

Perhaps the most available indemnity remedy in the tort context is the employer's action against his employee. In common law jurisdictions, the general view is that the master has a right to indemnity from the tortious servant for payments made to third parties, provided the master is without personal fault.276 In short, the "right to indemnity stands upon the principle that everyone is responsible for his own negligence ..."277 While Civil Code article 2320 is clear in holding masters liable for the torts of their servants, the article has no provision for indemnification.278 Yet, Louisiana jurisprudence, unconcerned by the absence of a statutory basis, has sanctioned the employer's reimbursement suit.279

Indemnity principles are not limited to the employer-employee relationship but extend to the parent-child circumstance addressed in article 2318.280 Since solidarity of debtors is a legal device for the creditor's benefit, the relegation of rights among the obligors after the creditor has recovered his due in full is of no concern to the

274. LA. CIV. CODE art. 2106.
276. RESTATEMENT (SECOND) OF AGENCY § 401, comment (d) (1957); W. PROSSER, supra note 179, at 83.
278. Comment, supra note 228, at 83.
280. Professor Johnson has previously noted that the relationships of parent and child or employer and employee permit either member of the relationship to bear full liability to the injured party; but justice acknowledges a recourse or reimbursement by the "answerable" debtor from the real "tortfeasor." 1972-1973 Term, supra note 105, at 233 n.15.

As the answerable parent's suit against the minor child's estate rests on the same theory as the master's indemnity action, the prescriptive period for both suits should be identical. However, it is uncertain what the duration of that term is. The claim seems to be in tort, and article 3536 states a one year period of prescription. See note 9, supra. Arguably the action is grounded in unjust enrichment principles. In Minyard v. Curtis Products, Inc., 251 La. 624, 205 So. 2d 422 (1968), the supreme court ruled that Civil Code article 1965 or the civilian action de in rem verso authorizes an unjust enrichment complaint in Louisiana. Under article 3544, the unjust enrichment action prescribes in ten years.
creditor. If the reason for categorizing the debtors as solidarily bound is to insure that the creditor is satisfied, once one solidary obligor has discharged the debt the need to assess why the debtors were responsible arises. If the reasons are different, quite possibly the obligation concerned only one of the obligors, in which case he should be liable for the whole among the debtors. Civil Code article 2106, admittedly cryptic, envisions such a situation and is helpful in working through the complex problems involved in allocating liability among debtors when solidarity has been imposed for the creditor.

For example, borrowing factual references from Thomas v. W & W Clarklift, Inc., the following hypothetical is illustrative of the problems involved: X, Inc., a distribution company employing drivers to haul its products, hired A. In the course and scope of his driving duties, A failed to signal a left turn at an intersection and crashed into a vehicle operated by B. At the time of the collision, B's automobile was in the intersection because B failed to observe a yield sign. Hence, the negligent acts of both A and B caused the mishap. Additionally, the impetus of the two vehicles carried both into a third, owned and operated by C, who was exercising all due care. Subsequently, C instituted suit against X, Inc., A, and B and took a $5,000 judgment which was enforced singly against X, Inc.

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

282. 375 So. 2d 375 (La. 1979).

283. The left turn is a highly dangerous maneuver requiring the turning driver to use great care. The proper signal must be given, LA. R.S. 32:319 (Supp. 1962), and failure to do so is one instance in which courts are certain to look to the statutory decree as defining the motorist's duty of care. See Comment, Liability in Left Turn Collisions, 22 LA. L. REV. 466, 467 (1962). For extensive treatment of defining duty through an analogy to legislative stipulations, see generally Johnson, Comparative Negligence and the Duty/Risk Analysis, 40 LA. L. REV. 319 (1980); Malone, Ruminations on Dixie Drive It Yourself versus American Beverage Company 30 LA. L. REV. 363 (1970); Robertson, Reason Versus Rule in Louisiana Tort Law: Dialogues on Hill v. Lundin and Associates, Inc., 34 LA. L. REV. 1 (1973); Comment, Entering the Door Opened: An Evolution of Rights of Public Access to Governmental Deliberations in Louisiana and a Plea for Realistic Remedies, 41 LA. L. REV. 192 (1980); Note, Abrogations on Dixie Drive It Yourself versus American Beverage Company 30 LA. L. REV. 637 (1979).

284. The cumulation of these defendants would be permissible. See LA. CODE CIV. P. arts. 463 & 647. However, as X, Inc., A, and B are all solidary obligors vis-à-vis C, C may sue any one or a combination of two without the necessity of joining the others in the suit. LA. CODE CIV. P. art. 643. Of course, the incidental action of third party demand is available for the debtor or debtors sued to join all obligors. LA. CODE CIV. P. art. 1111. See note 5, supra.
Under these circumstances, \( X, \text{Inc.} \) was required to answer for the tortious acts of its employee, \( A \), committed during the course of normal duties because of article 2320. \( A \) and \( B \) were responsible for \( C \)'s indivisible harm\(^{285}\) caused by their concurrent negligence. Certainly, the reasons why each defendant-debtor could have been compelled to repair \( C \)'s damages are distinct and different: \( X, \text{Inc.} \) by reason of its employment relation to \( A \) who was negligent in performing his duties; \( A \) by virtue of his own negligence; and \( B \) because of his personal negligence. However, to aid \( C \) in recovering for the wrong done him, the law states that all three debtors are bound \textit{in solido}.\(^{286}\)

But since \( X, \text{Inc.} \) has discharged the obligation for which all the debtors were liable, the present concern is characterizing the rights among the obligors. The proper view is to allow \( X, \text{Inc.} \) to receive indemnification from either \( A \) or \( B \), following the theory that the debt to \( C \), a consequence of the intersectional accident, was principally the affair of \( A \) and \( B \). \( X, \text{Inc.} \)'s role in the incident is best seen as security which the Civil Code, through article 2320, offers to \( C \) should \( A \) and \( B \) prove unable to pay. Thus, \( X, \text{Inc.} \) should be able to sue either \( A \) or \( B \) for "the principal, interest, and cost of judgment rendered"\(^{287}\) in favor of \( C \).

As the employer's right to seek indemnity from \( B \), the third party concurrently negligent with \( A \), may not be apparent, a fuller explanation is in order. Louisiana law, as noted above,\(^{288}\) is well settled that an employer has a right of full recompense from his employees

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285. See notes 190-91, \textit{supra}, and accompanying text.
287. \textit{Appalachian Corp., Inc. v. Brooklyn Cooperage Co., Inc.}, 151 La. 41, 42, 91 So. 539, 540 (1922). \( X, \text{Inc.} \) may be viewed as subrogated, of right, to \( C \)'s creditor position. Civil Code article 2161(3) provides that subrogation takes place of right "[f]or the benefit of him, who being bound with others . . . for the payment of the debt, had an interest in discharging it." If one accepts the premise that \( X, \text{Inc.} \) should be seen primarily as a security, which comports with the article 2106 authorization of an indemnity suit, the French Civil Code is more specific in guaranteeing \( X, \text{Inc.} \) indemnification. French Civil Code article 2029 states that "[a] surety who has paid the debt is subrogated to all the rights which the creditor had against the debtor." In addition, French Civil Code article 2028 provides:

\begin{quote}
A surety who has paid has his remedy against the principal debtor, \textit{whether the security has been given with or without the knowledge of the debtor.} The remedy exists as well with regard to the principal as to the interests and costs: nevertheless, the surety only has a claim for the expenses he has incurred, since he has given notice to the principal debtor for the proceedings instituted. He also has a claim for damages and interest, according to circumstances. (Emphasis added).
\end{quote}

288. See notes 276-79, \textit{supra}, and accompanying text.
for any damage award the employer is called upon to pay for the employees' delictual acts. Complete reimbursement "in the event he is required to pay damages to the injured party resulting from the servant's negligence" is the rule, so long as the employer was not independently at fault or liable by reason other than article 2320. To the extent which Foster has changed the categorization of the employer and employee relationship as solidary obligors in the creditor's eyes, the fundamental principles of the employer's indemnity claim have not been altered.

Consequently, in the hypothetical situation involving X, Inc., A, and B as debtors, once X, Inc. has paid C, the damaged party, the amount awarded, X, Inc. may pursue a claim for full recovery from A, its employee. Under existing law A and B are solidary obligors for the creditor's benefit, each bound for their respective negligent conduct. Furthermore, solidarity aside, unless the separate negligent acts of A and B caused a harm that can be apportioned, A and B are both bound for the whole loss as debtors to an indivisible obligation. X, Inc., as A's answerable employer, was liable to C for

291. Prior to Foster v. Hampton, 381 So. 2d 789 (La. 1980), a satisfactory approach for courts in articulating the underlying principles of the master's indemnity action has been to conclude that the employer and the employee are not solidary obligors. The following conclusion is that Civil Code article 2103, regarding contribution, is not pertinent; it refers only to debtors in solido. See, e.g., LeBlanc v. Roy Young, Inc., 308 So. 2d 443, 449 (La. App. 3d Cir.), cert. denied, 313 So. 2d 240 (La. 1975); Little v. State Farm Mut. Auto. Ins. Co., 177 So. 2d 784, 785-86 (La. App. 1st Cir. 1965). Of course, in the post-Foster world the "no solidarity" reasoning does not suffice. Yet, the conclusion, permitting indemnity by the employer, should not change. The Civil Code expressly envisions indemnification as a possible recourse by one solidary obligor against another. LA. CIV. CODE art. 2106. Recognition of what the "solidary" obligation means, in this context, is helpful. Using Professor Johnson's words, "the expression may simply mean that two persons are bound to the same individual for the same debt, even though for different reasons." The Work of the Louisiana Appellate Courts for the 1977-1978 Term—Obligations, 39 LA. L. REV. 675, 683 (1979) (emphasis added). The "bound for different reasons" idea is the key phrase. At the core of the employer's indemnity action is the theory of article 2106. The employee's negligent conduct causes him to be the debtor principally concerned with the affair or debt. Simply, the master is a security insuring that the debt is satisfied, a "deep pocket" in cases in which the employee tortfeasor is financially unable to pay. T. BATY, VICARIOUS LIABILITY 154 (1916). For two recent decisions of the indemnity principles in practical application, see Bewley Furniture Co., Inc. v. Maryland Cas. Co., 285 So. 2d 216 (La. 1973); Jinks v. McClure, 344 So. 2d 675 (La. App. 3d Cir. 1977).
any amount that $C$ could have required $A$ to pay, which was the total sum.\(^{293}\) And the amount exacted from $X$, Inc. may be retrieved from $A$ through the indemnity action. Essentially, the presence of $B$, $C$'s additional obligor, is unimportant to the examination of the adjustment of rights between $X$, Inc., the employer, and $A$, its employee.

However, upon $A$'s requital to $X$, Inc., simultaneously a right to contribution should arise\(^{294}\) in $A$ against $B$ either upon a theory of indivisibility of the obligation\(^{295}\) or upon the notion that $A$ and $B$ occupy a status of solidary obligors vis-à-vis $X$, Inc., much in the same fashion as vis-à-vis $C$, the original creditor. Such a solution comports with the idea that $X$, Inc. stands to answer for the wrongs of its employee and those solidarily bound with the employee as a surety provided by law. In practice, $C$ could have exacted full payment from either $A$ or $B$. Then under Civil Code article 2103, the obligation deemed in solido towards the creditor, $C$, is divided of right among the debtors solidarily bound. Article 2103, however, should be inapplicable to $X$, Inc. in the first instance as article 2106 governs its relations with $A$ and $B$.\(^{296}\)

If $C$ proceeded against $B$ for the whole of the judgment, it appears unlikely that article 2320 authorizes $B$ to seek contribution from $X$, Inc. for $A$'s share of the debt. Placed in the Civil Code chapter treating recourse for a tort plaintiff, article 2320 seems to require the employer to answer only to a plaintiff-creditor and not to any person with a claim against the employee. Certainly, a person whose imprudent conduct combines with the employee's negligence may advance only a weak argument that the scope of article 2320 affords aid to his contribution action. The crux of the matter is who is to bear the risk that $A$, the employee, may prove insolvent. If $B$ is required to look directly to $A$ to enforce his contribution right, $B$ is saddled with the risk. This is as it should be; the chance that one of the tortfeasors (e.g., the employee) is insolvent is placed upon a negligent actor and not upon the party (here the employer) who stood to answer to the plaintiff-creditor in a posture similar to that of a surety.

Logically, the same analysis should follow if the tort plaintiff-creditor executes his judgment against $X$, Inc. The operative legal principles should not turn upon the pure happenstance that the

\(^{293}\) LA. CIV. CODE art. 2320.

\(^{294}\) See Williams v. Marionneaux, 240 La. 713, 124 So. 2d 919 (1960).

\(^{295}\) See LA. CIV. CODE arts. 2109 & 2113. See notes 190-91, supra, and accompanying text.

\(^{296}\) See note 291, supra.
plaintiff-creditor sought payment from *X, Inc.* and not from *B*, since both are solidarily liable for the same debt to *C*. Consequently, *X, Inc.*, after satisfying the plaintiff-creditor, should be able to press for indemnification from either *A* or *B*.\(^{297}\)

Between *A* and *B*, article 2103 provides the means for balancing their responsibilities.\(^{298}\) By dividing the debt between *A* and *B*, the same conclusion is reached as when *X, Inc.* is authorized to initiate its indemnity suit against *B*. *B*’s reparation to *X, Inc.* triggers a contribution right against *A*, and *A* and *B* “split” the liability for the award to *C*.\(^{299}\)

The hypothetical situation above should indicate that solidarity is not a magic incantation which may be substituted for careful consideration of the relative rights between the parties. Rather, the foreseeable future problems are numerous. Significantly, they include charting out rationales for solving difficulties in the application of article 2318; probing to understand the effect of the “solidary debtors” characterization in the context of the uncertain state of the Louisiana “strict liability” puzzle; and the potpourri of confusion that the introduction of comparative negligence may cause in attempting to bring consistency and certainty to the application of the concept of solidarity. A sampling of these difficulties is treated below.

**Article 2318—A Basis for Parental Responsibility**

Civil Code article 2318 provides that the parents of a minor child residing with them are answerable for the damage done through the minor’s delictual conduct. Properly read, article 2318’s underlying policy appears to go hand-in-hand with that of article 2320. In some circumstances, the minor’s estate may be able to compensate the tort victim, but the Civil Code represents society’s notion that in more instances than not the solvent parties will be the parents of the wrongdoer. Hence, the parents are made to answer to

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\(^{297}\) See note 287, *supra*.

\(^{298}\) Admittedly, in theory, *A* and *B* are not joint tort-feasors and until the effective date of Act 431 of 1979, Louisiana’s comparative negligence act, they could not properly be called solidary obligations. See 1979 La. Acts, No. 431, *amending* LA. CIV. CODE art. 2324. Yet, in fairness, article 2103 is applied without afterthought so that *A* and *B* share in the whole debt equally.

\(^{299}\) Another matter is whether these principles will obtain under the operation of comparative negligence in Louisiana. The broad ramifications that Act 431 of 1979 will spell by bringing comparative fault to Louisiana are beyond the scope of this comment. Yet, comparative negligence implications are so important in proper assignment of liability among debtors that certain indemnification and contribution problems and suggestions are discussed below. See notes 348-62, *infra*, and accompanying text.
the plaintiff-creditor even though they may not have been personally at fault for his damages.

While some confusion has persisted in the intermediate appellate courts, the supreme court's Deshotel v. Travelers Indemnity Company decision a decade ago clearly articulated the reason for the parent's responsibility—and it is not the product of imputed negligence. Succinctly, the court ruled that "Article 2318 does not create negligence in the father because of the minor's negligent acts; it merely attaches financial responsibility to the father . . . ."

Deshotel's importance lies in its sure delineation between answerability arising from a relationship and liability as a result of imputed negligence. Former Justice Barham, author of the court's opinion, astutely reflected that, while article 2318 imposes financial responsibility on the parent for a third person's injuries as a result of the minor's tortious conduct, the answerability is not synonymous with

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300. Some concepts die hard; the idea that a parent's liability for the wrongful acts of minor children is supported on the grounds of imputed negligence is one of these stubborn notions. Prior to Deshotel v. Travelers Indem. Co., 257 La. 567, 243 So. 2d 259 (1971), the uniform jurisprudence in this state was that a parent was imputed with the negligence of the child as a fault imposing device. For instance, in Bennett v. Employer's Liability Assur. Corp., Ltd., 238 So. 2d 206 (La. App. 1st Cir. 1970), the plaintiff-father stated in his petition that he had sustained injuries in an automobile operated by his son. Id. at 207. The defendant filed the peremptory exceptions of no cause of action and no right of action on the theory that the father is responsible for the negligence of his minor son and that the father's imputed negligence barred his action. Id. Judge Blanche reasoned that while under article 2320 the negligence of the employee is not imputed to the employer the situation envisioned by article 2318 is different. However, the Bennett court concluded that the imputation of negligence runs only in favor of third parties "with the result that . . . the negligence of the minor is imputed to the parent so as to render the parent liable to a third person . . . ." Id. But, "this imputation of negligence . . . does not operate so as to preclude recovery by the parent directly against the son or his liability insurer." Id. As is apparent, the Bennett approach is difficult to understand, much less explain. Fortunately, Deshotel's sound analysis solved the analytic difficulty. For a sampling of decisions noting the problems, see, e.g., Gaspard v. LeMarie, 245 La. 239, 158 So. 2d 149 (1963); Funderburk v. Millers Mut. Fire Ins. Co., 228 So. 2d 169 (La. App. 3d Cir. 1969); Fontenot v. Pan American Fire & Cas. Co., 209 So. 2d 105 (La. App. 3d Cir.), cert. denied, 252 La. 460, 211 So. 2d 328 (1968); Hingle v. Ahten, 43 So. 2d 550 (La. App. Orl. Cir. 1950); Epps v. Standard Supply & Hardware Co., 4 So. 2d 790 (La. App. Orl. Cir. 1941); DiLeo v. Dumontier, 195 So. 74 (La. App. Orl. Cir. 1940); Link v. Shreveport Rys. Co., 153 So. 77 (La. App. 2d Cir. 1934).

301. 257 La. 567, 243 So. 2d 259 (1971).
302. 257 La. at 573, 243 So. 2d at 261.
an imputation of negligence to the parent.\textsuperscript{504} Quite simply, liability arises from the parent-child relationship. If the parent is held to make whole the innocent victim because the Civil Code so states, as a policy reflecting upon the family relationships, the same analysis applicable to the master-servant relationship should obtain. Both answerable entities are responsible in the nature of sureties for the creditor's benefit.

True, the Louisiana Supreme Court held in \textit{Wooten v. Wimberly}\textsuperscript{305} that a parent and child are not solidarily bound for the debt due to the minor's tort victim.\textsuperscript{306} But a second look at \textit{Wooten} may indicate that the foundation for the decision no longer exists. In \textit{Wooten}, the plaintiff sued the father of the alleged tortious actor for injuries done to his child. The minor was found free of negligence, and the case was dismissed.\textsuperscript{307} During the period in which that judgment was suspended by a writ request to the supreme court, the plaintiff instituted a second petition against the child, who had reached majority.\textsuperscript{308} The defendant raised the peremptory exception of prescription,\textsuperscript{309} which was maintained.\textsuperscript{310} Affirming the dismissal, in the second suit the supreme court held that the father, the party defendant in the first suit, and the son, the party defendant in the second action, were not solidary obligors.\textsuperscript{311}

Consequently, the first petition filed against the father did not interrupt the running of prescription on the tort against the son.\textsuperscript{312} Of course, the real objection to the second litigation of the matter

\begin{itemize}
\item \textsuperscript{304} 257 La. at 573, 243 So. 2d at 261.
\item \textsuperscript{305} 272 So. 2d 303 (La. 1973).
\item \textsuperscript{306} The \textit{Wooten} court held that the father was not a solidary co-debtor with his minor son for the child's alleged tortious conduct. Consequently, the bringing of suit against the father did not interrupt prescription against the son. \textit{See Note, supra note 105; Note, supra note 275.}
\item \textsuperscript{307} The trial court found young Wimberly free of fault and denied recovery against the father. The third circuit affirmed, \textit{Wooten v. Wimberly}, 233 So. 2d 682 (La. App. 3d Cir. 1970), and the supreme court ultimately refused writs. \textit{Wooten v. Wimberly}, 256 La. 359, 266 So. 2d 496 (1970).
\item \textsuperscript{308} However, Professor Johnson notes that the defendant's brief pointed out that at the time the first action was filed, the "minor" was of age and could have been sued in his own capacity. \textit{1972-1973 Term, supra note 105, at 231 n.3.}
\item \textsuperscript{309} \textit{La. Code Civ. P.} art. 927. The defendant also raised exceptions of res judicata and improper division of a cause of action, and a plea of collateral estoppel.
\item \textsuperscript{310} The trial court and the court of appeal sustained the exception of prescription without reaching the other exceptions. 272 So. 2d at 304.
\item \textsuperscript{311} \textit{Id.} at 307.
\item \textsuperscript{312} Professor Johnson has summarized the impact of \textit{Wooten} by writing that "[i]n ruling against plaintiff and affirming the dismissal on a plea of prescription, the supreme court held that a parent is not solidarily liable with a minor child for the torts of that child." \textit{1972-1973 Term, supra note 105, at 231-32.}
\end{itemize}
was that the plaintiff attempted to re-try the same question previously decided against him, i.e., whether the minor child’s negligence had caused plaintiff’s injuries. Viewed in this light, it is understandable that the supreme court was highly receptive to an answer that would dismiss the second suit and remain consistent with the Civil Code; Cox v. Shreveport Packing Company provided an instant analogy. In 1948 the Louisiana Supreme Court held in Cox that an employer is not solidarily liable with his servants for the latter’s torts. Given that the policy justifications for both article 2318 and article 2320 are very similar, it was reasonable to look to the interpretation of one for guidance in interpreting the other. At the time Wooten was decided, and even now, the analogy was sound. Neither article specifically stipulates that the parent of the employer is solidarily bound with his familial or contractual relation. In addition, article 2093 provides that a solidary status is not presumed and must be expressly stipulated.

However, once Foster v. Hampton overruled Cox, and held that an employer and an employee are solidarily bound to the tort plaintiff-creditor, victim of the employee’s negligence, Wooten’s future was in doubt. Foster represents the “judicial reconsideration” called for some time ago regarding Wooten’s classification of debtors. Now that Cox, the underpinning for the Wooten court’s analysis, is obsolete, it seems certain that article 2318 places the parents and the minor child in a position of solidarity vis-à-vis the creditor.

But, as between or among the debtors, the child and the parents should be viewed in the same fashion as the employer and the employee: One of the debtors is obliged to the plaintiff by reason of his negligence fault, while the other obligors are answerable merely because the Civil Code so states. Thus, the parent who is made to

313. Id.
314. 213 La. 53, 34 So. 2d 373 (1948).
315. Although Cox did not address a factual situation involving the liability of a parent for a minor child’s actions, the court did analogize the master’s answerability to that of the father and found that neither instance imposed solidarity. Primarily, the conclusion as to no solidarity turned on a reading of article 2093. Article 2093 requires that solidarity be expressly stipulated. Articles 2318 and 2320, while providing the elements of vicarious liability or relational responsibility, do not stipulate solidarity.
316. LA. CIV. CODE art. 2093. See text at note 114, supra. The absence of an express provision of solidarity in article 2318 swayed four justices in Wooten: “the law which creates the solidary obligation should clearly set forth the requisite elements of a solidarity obligation.” 272 So. 2d at 305.
317. 381 So. 2d 789 (La. 1980).
319. Once the creditor has been satisfied, through payment by the entity responsible solely because the Civil Code requires him to be a debtor in the plaintiff’s favor,
pay for damages occasioned by his minor child's delictual behavior has an action against the child's estate for indemnity, if feasible. Furthermore, if a third person's negligence concurred with the wrongful conduct of the minor to cause a single, indivisible damage to the plaintiff, the parent of the child, should he have to make good the entire judgment to the plaintiff, should have an indemnity action against the third person. In all pertinent respects the analysis of the parent-child liability situation under article 2318 should follow the guides suggested for article 2320 examination.

Strict Liability and Solidary Obligors

Ten years ago the concept of strict liability was so alien to Louisiana tort law that the seminal products liability decision, *Weber v. Fidelity & Casualty Insurance Company*, was ostensibly a neg-

the respective rights between the debtors may be adjusted according to respective degrees of wrongdoing.

Although the situation may be rare, the minor child's estate could possess sufficient wealth so that an indemnity action would be possible. However, as a matter of public policy the suit would likely fail. A court probably would not permit the action, maintaining an exception of no right of action as intra-family suits are not favored in the law. The practical recourse of the parent seeking indemnity is against the child's insurer and not the minor.

One instance when indemnity would not be available is when the parent is the only debtor to the creditor-plaintiff for the child's wrongful conduct. This is the *Turner v. Bucher*, 308 So. 2d 270 (La. 1975), situation. The financial responsibility of the parent is not predicated upon the child's negligence when the minor is beneath the age of discernment. In short, "[t]he fact that the conduct was tortious when measured by normal standards is enough to render the father liable therefor." *Id.* at 277. The parents and the child are not solidarily bound for the creditor's benefit; the child is not even an obligor. Since the parents are without recourse, they and their insurers must absorb the loss.

Since the minor, whose careless action concurred with the third party's negligence, is likely to be insolvent in nearly all cases, an argument can be made that article 2318 permits a wider range of claimants to demand payment from the parents than article 2320 requires the employer to answer. While article 2318 exists primarily for the benefit of the plaintiff-creditor, it may also be read as stating that parents are liable to all who possess rights against their minor child. This interpretation follows for two reasons. First, the civil law, with its affection for family relationships, views the parent-child relation as more encompassing and closer than the purely contractual relationship between employer and employee. Second, a legislative intent, expressed in article 2103, to permit a tortfeasor to seek contribution from another solidarily bound tortfeasor would be thwarted in almost all instances if the concurrently negligent third person is relegated to seeking contribution from the minor child and not the parents. In the article 2320 context, the likelihood that the employee is impoverished, and unable to contribute, is more remote.

See notes 198-275, supra, and accompanying text.

259 La. 599, 250 So. 2d 754 (1971).
ligence action. Since that time, however, Louisiana courts have developed a type of strict liability through interpretations of the Civil Code to impose responsibility without negligence. Perhaps one of the most significant judicial constructions of the Civil Code in finding strict liability has been with respect to latent brake defects. In *Arceneaux v. Domingue* the plaintiff brought suit for damages resulting from a rear-end collision by the defendant's automobile. The defendants argued that the cause of the accident was the unexplained failure of the car's brakes. A jury verdict for the defendants was affirmed by the third circuit. Reversing the decision, the supreme court extended the *Loescher* rule to cover the non-apparent, flawed brake. As one commentator has written, "[w]ith this utilization of article 2317 in *Arceneaux*, the court effectively applies strict liability to brake defect cases in Louisiana."

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324. See Crawford, *Products Liability, The Cause of Action*, 22 LA. B.J. 239 (1975). Professor Crawford has maintained since Weber was decided that the decision is an application of the law of negligence. Logically, then, contributory negligence should be available as a defense for the manufacturer-defendant. Despite the lapse of nearly ten years since Weber was announced, the issue has not been settled. See Chappuis v. Sears Roebuck & Co., 358 So. 2d 926 (La. 1978). However, the United States Fifth Circuit Court of Appeals, interpreting Louisiana law, has ruled that the action is not based in negligence and that contributory negligence is not a viable defense. Khoder v. AMF, Inc., 539 F.2d 1078 (5th Cir. 1976). For an excellent treatment of Louisiana products liability law, see Robertson, *Manufacturers' Liability for Defective Products in Louisiana Law*, 50 Tul. L. Rev. 50 (1975).


326. Arceneaux v. Domingue, 365 So. 2d 1330 (La. 1978); Note, supra note 212.

327. 365 So. 2d 1330 (La. 1978).

328. Domingue testified that the brake pedal "suddenly and without forewarning" went to the floor when he tried to stop. Id. at 1332.

329. The supreme court noted that the court of appeal affirmation was not published.

330. When harm results from the conduct or defect of a person or thing which creates an unreasonable risk of harm to others, a person legally responsible under these code articles [2317, 2318, 2320, 2321, and 2322] for the supervision, care, or guardianship of the person or thing may be held liable for the damage thus caused, despite the fact that no personal negligent act or inattention on the former's part is proved. The liability arises from his legal relationship to the person or thing whose conduct or defect creates an unreasonable risk of injuries to others.

Loescher v. Parr, 324 So. 2d 441, 446 (La. 1975).

331. Note, supra note 212, at 855.
The result is achieved by deleting the requirement of proof of negligence from the latent brake defect action. In short, the owner of an automobile with brakes that are flawed so as to create an unreasonable risk of injury to another would be liable without negligence on his part when another sustains injury caused by the defective condition of the brakes.

Given the treatment of latent brake defects in Louisiana law, problems in apportioning responsibility among obligors, who may be termed solidarily bound for the creditor's benefit, may arise when the unreasonably dangerous condition of the brakes exists at the time the automobile was purchased. The following situation is illustrative: X purchases a new automobile from Y, the car dealer, which was manufactured by Z. Soon afterwards, while driving, X depresses the brake pedal to no avail, and the vehicle crashes into P's car. In view of the policy articulated in Thomas and Foster, it is not beyond the imagination that a court would classify X, Y, and Z as solidary obligors, bound for P's benefit.

Despite Weber's inclusion of P into the class of persons able to maintain a tort action against the defective product's manufacturer, X may be a more attractive party to sue, particularly if he is insured. The reasons why X is more likely to defend P's action are simple. Against the manufacturer, the plaintiff must demonstrate that the thing, in this situation the brakes, was defective, i.e., unreasonably dangerous beyond the expectations of a reasonable consumer. In addition, the plaintiff must prove that the product was in its defective state when it left the manufacturer's control. Admittedly, the plaintiff's burden of proof is somewhat lessened through the use of analytic evidentiary aids. But, on the whole, the

332. Id.
333. A manufacturer of a product which involves a risk of injury to the user may be liable to "any person, whether the purchaser or a third person . . . ." Weber v. Fidelity & Cas. Ins. Co., 259 La. 599, 602, 250 So. 2d 754, 755 (1971).
334. LA. R.S. 32:861 (Supp. 1977) requires every self-propelled motor vehicle registered in this state to be covered by a motor vehicle liability policy with a limit of not less than $5,000.
336. Professors Noel and Phillips write that an essential element of the plaintiff's case is to show the existence of an injury-causing defect at the time the product left the defendant's control. Id.
337. The Louisiana Supreme Court made it clear in Weber v. Fidelity & Cas. Ins. Co., 259 La. 599, 250 So. 2d 754 (1971), that the plaintiff need not prove any particular defect in the manufacture or design of the product. The plaintiff need only produce sufficient circumstantial evidence that the most reasonable hypothesis for the cause of his damages is a defect in defendant's product. The plaintiff's evidence need not exclude all other possible explanations for his harm, other than a defect, but must exclude other just as reasonable hypotheses.
plaintiff's suit against the owner of the automobile with defective brakes is considerably easier. Against X, P may rely on a presumption of negligence, in addition to arguing that his damage was caused by the unreasonably dangerous condition of a thing, brakes, owned by X. The point in time when the brakes became unreasonably dangerous, or defective, is of no moment to P if the suit is against X. Thus, it is not unlikely that P may take judgment solely against X.339

If such a situation arises, X should be permitted recourse against either Y or Z, or both. Procedurally, X may assert his right via third party demand or after he has satisfied P's judgment. Substantively, X might allege that as the vehicle proved to have a vice in its construction severe in its consequences, it may be presumed that had he known of the flaw he would not have purchased the automobile.342 Against Y, the dealer, the redhibitory claim may prove unsatisfactory unless X can show that Y was aware of the defective condition of the brakes at the time of the sale and was a bad faith seller.343 On the other hand, as a manufacturer of goods is presumed to know of the vices in his products, X's demand from Z appears more plausible. The proper recovery includes, as consequential damages, both the injuries actually sustained by X and the sum he was compelled to pay to P.344 Even aside from a notion of redhibition or tort action by X against the automobile manufacturer, X should be allowed full recovery of any amount he was made to pay P.

338. Note, supra note 212, at 857.
339. In practice, the judgment will be enforced against X's insurer, up to the limits of liability coverage.
340. LA. CIV. CODE art. 2520.
341. LA. CODE CIV. P. art. 1111. Contribution or indemnity may be enforced by calling in the co-debtor in the original action. Additionally, article 1113 of the Code of Civil Procedure provides that a defendant who does not bring in as a third party defendant a person who is liable to him for all or part of the principal demand does not lose his action against that person. Thus, a separate suit is permitted. However, the separate action cannot be asserted if the person from whom contribution or indemnity is sought proves that he had a valid defense to the principal action which was not raised. LA. CODE CIV. P. art. 1113. See Comment, Contribution Among Joint Tortfeasors, 22 LA. L. REV. 818 (1962).
342. LA. CIV. CODE art. 2520.
345. See Appalachian Corp., Inc. v. Brooklyn Cooperage Co., Inc., 151 La. 41, 91 So. 539 (1922).
In the instant situation, X was P's debtor merely because X owned the thing that caused P's damages. But X did not have any part to play in the making of the thing containing the unreasonably dangerous flaw; as the defect, by definition, could not be seen, X was not in a position to protect P from the risk he encountered. Yet, to insure that innocent tort victims are fully compensated for their injuries, article 2317, as an expression of society's sense of justice, says that X is liable to P because X owned the harming instrument, without more. With P satisfied, the reason for requiring X to answer disappears. In fact, society's sense of fairness is offended if the party who is ultimately responsible for the creation of the unreasonable risk of harm, the manufacturer, is not shouldered with the entire debt. Of all the potential obligors, automobile owner, retail vendor, and manufacturer, only one, the manufacturer, has within its power the ability to modify its future conduct and to eliminate the danger which caused injury. Upon this entity, then, the complete loss should fall as a means of encouraging better and safer future behavior.

However, further complicating the scenario is the likely event that X's insurer, and not X, will pay P's award. Although the Civil Code ostensibly provides a right of subrogation to X's rights when the insurer satisfies the judgment, it is uncertain whether the insurer could be subrogated to X's position as a purchaser. Additionally, a court might reason that as the insurer is in the business of spreading risks, it should not be allowed an indemnity claim against the automobile manufacturer. Rather, contribution might be all that is permitted. Such reasoning is incorrect primarily for failing to grasp the fundamental concept of placing the entire loss, as between debtors strictly and solidarily liable to the plaintiff-creditor, upon the entity with the opportunity to prevent future harms. In the case of a insurer, subrogated to the rights of its insured motor vehicle owner bringing suit against the manufacturer, indemnity should be granted just as if the party pursuing recovery were the insured.

While the circumstances in which one or more of a number of obligors strictly liable to the creditor should be allowed indemnity

346. The authors are aware of the somewhat fictional position inherent in rationalizing tort damage awards as a deterrent device preventing future misbehavior. By definition, negligent conduct is unintentional and unthinking. However, as a society, we believe that exacting a sum of money from a defendant will encourage him to act more reasonably in the future. And, in the products liability context, the argument has some merit. One need only think of the product design changes, incorporating safety features, and quality control measures taken by manufacturers to realize the dramatic impact tort law has effected on industrial society in the past two decades.

347. LA. CIV. CODE art. 2161.
actions against one or more debtors appear somewhat limited, the fundamental analysis remains the same. After the creditor is satisfied, a determination should be made about which obligor (or obligors) has the opportunity to modify the dangerous conduct in the future. In addition, an examination should be made to identify which obligor or obligors were answerable to the creditor solely from the happenstance of owning something that harmed the plaintiff. Considering the problem from this perspective, a court might well allow an indemnity claim or claims even among solidarily and strictly bound debtors.

Comparing Faults—The Impact of Act 431 of 1979

Act 431 of 1979, Louisiana's comparative fault legislation, has been described as deceptively simple. And, with respect to determining rights among obligors solidarily bound to the plaintiff-creditor, the effect of comparative fault is rather limited. Yet, the few changes are significant.

Article 2324 has been amended to provide a statutory expression of solidarity for persons whose concurring fault causes harm to another in addition to the express provision of solidarity for joint tort-feasors that has existed previously. Hence, the conceptual problems that arose when the courts described concurrently negligent actors who caused a single injury as "joint tort-feasors" are solved. The Civil Code now provides in express terms that concurrently negligent tortfeasors are solidary obligors. However, when the plaintiff's own fault contributes to his damages, "a judgment debtor shall not be liable for more than the degree of his fault to a


349. Persons whose concurring fault has caused injury, death or loss to another are . . . answerable, in solido; provided, however, when the amount of recovery has been reduced in accordance with the preceding article, a judgment debtor shall not be liable for more than the degree of his fault to a judgment creditor to whom a greater degree of negligence has been attributed, reserving to all parties their respective rights of indemnity and contribution.

350. LA. CIV. CODE art. 2324.

351. See notes 178-97, supra, and accompanying text.
judgment creditor to whom a greater degree of negligence has been attributed. Therefore, in a situation in which the plaintiff is ruled to have been 50 percent at fault and debtors A and B each 25 percent at fault, the plaintiff could not seek all of his award from A or B, even if A and B are solidarily liable.

Additionally, article 2103 has been amended to state that "[w]hen two or more debtors are liable in solido... the obligation... shall be divided in proportion to each debtor's fault." But the statutory language does not resolve the perplexing questions that arise when analyzing the adjustment of rights among the debtors, liable in solido for the creditor's benefit, after the creditor has been satisfied, when one or more of the debtors is answerable to the creditor only in the nature of a security. The following hypothetical situation may aid in clarifying that which has been changed and in identifying those difficulties for which the courts will have to provide resolution. A, while acting in the course and scope of his employment for Z, Co., and B are concurrently negligent in causing C's damages. C brings suit against A, B, and Z, Co. At trial, the jury returns special written findings determining A and B to have been 80 percent at fault, 40 percent each, with C contributing the remaining 20 percent. As noted above, amended article 2324, in accord with prior jurisprudence, holds A and B solidarily liable to C. Furthermore, Louisiana law provides Z, Co. as a solidary obligor with A and B for C's benefit. Thus, the creditor, C, may execute the whole judgment against Z, Co. Once Z, Co. has fully satisfied C, the question arises as to the permissible recourse available against A and B. As B is a party outside of the employment relationship, undoubtedly Z, Co. would desire full recovery from B; in approaching the problem, at least two avenues are open to the Louisiana courts. First, Z, Co. may be allowed in an indemnity action against B recovery of any amount that Z, Co. was compelled to pay the plaintiff-creditor. B could then bring a contribution claim against A. Such a solution seems sound.

While Z, Co. was a solidary obligor in C's favor, its answerability was not the product of its wrongdoing or negligence; rather, Z, Co.'s *fault* was merely technical in nature—Z, Co. employed A, one
of the concurrently negligent tortfeasors. Consequently, it is uncertain whether article 2103's call for debtors liable in solido to divide the obligation according to their respective fault is applicable. Instead, article 2106, authorizing an indemnity action by the security on the creditor's behalf against the obligor who was principally concerned with the debt, seems to govern.

On the other hand, a court might reason that Z, Co. cannot require B to pay more than B's percentage of fault multiplied by the damage award—even though Z, Co. as a debtor solidarily bound to C was compelled to make good the entire award. For instance, if the plaintiff's allowed recovery, after reduction for his 20 percent contributing fault, is $8,000, a court might allow Z, Co. to maintain an action against B for only $4,000, following Z, Co.'s full payment to the plaintiff. Although seemingly incongruous with the notion that the solidary obligor only technically liable should be permitted reimbursement from any one of the other debtors responsible because of his wrongdoing, this second approach may be adopted by the courts for its desirable policy features. If Z, Co., the employer, is allowed an indemnity action against B, the concurrently negligent third party, the result will be the commencement of another lawsuit, since B will certainly seek contribution from A. But, if Z, Co. is permitted only a $4,000 recovery, and is forced to look to A, its employee, the second lawsuit probably will never occur. The judicial policy of limiting litigation is served. Secondly, if the employee, A, proves to be insolvent, his employer, and not the third party, should absorb the loss. After all, the employer's business enterprise created at least part of the risk that injured the plaintiff—a portion measured by the trier of fact to be 40 percent.

These difficulties, and other problem areas in the Louisiana comparative fault scheme, await judicial articulation and resolution. However, when these issues are addressed, one should remember that, in passing Act 431 of 1979, the legislature was concerned primarily with relationships between a creditor and debtor(s) and not

360. In addition, it is unclear whether article 2103's fault reference encompasses non-negligent or legal fault. If it does not, article 2106 provides the only means by which liabilities among debtors solidarily bound can be adjusted, after the creditor is satisfied.

361. One commentator has written that "[i]n the past, employers have rarely brought such actions against their negligent workers." Comment, supra note 228, at 79. See also James, Indemnity, Subrogation, and Contribution and the Efficient Distribution of Accident Losses, 21 NACCA L.J. 360 (1958).

362. But if the employer is viewed only as an aid for the plaintiff-creditor's benefit, then should not the chance that the employee is unable to contribute to his co-debtors fall upon an actual tortfeasor and not upon a security?
the adjustment of rights among debtors, especially when one or more of the obligors is only technically at fault or statutorily responsible. Hence, it is submitted that the better course for future analysis is the application of article 2106—granting the technically answerable debtor indemnity against those obligors whose acts resulted in the obligation itself.

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