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Tilting Against Windmills: A Solidary Rejoinder

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TILTING AGAINST WINDMILLS:* A SOLIDARY REJOINDER

Alfred Henry Sampay was seriously injured while riding in a van which was "struck from the rear by a truck driven by James E. Davis."[1] Sampay filed suit against the offending driver and his ostensible employer,[2] the Morton Salt Company.[3] Subsequently, Sampay compromised with Davis[4] and reserved his rights against Morton. The First Circuit Court of Appeals affirmed the trial court's summary judgment[5] in favor of the Morton Salt Company on the ground that the release of the employee exonerated the employer.[6] Reversing, the Louisiana Supreme Court ruled that, in light of the holding in *Foster v. Hampton*[7] that an employer is solidarily liable with a negligent employee in favor of the tort victim, "it follows that, if the victim releases one but reserves his rights to proceed against the other, he may do so by virtue of article 2203."[8] The court specifically overruled[9] *Williams v. Marionneaux*.[10]

The exegetical method used by the court in *Sampay v. Morton Salt Company*[11] in interpreting Civil Code article 2203 may be characterized as perplexing and surprising. This comment examines the foundations for the court's decision and its potentially profound consequences on the Louisiana law of obligations.

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*With apologies to Cervantes.

1. Sampay v. Morton Salt Co., 395 So. 2d 326, 327 (La. 1981).

2. The plaintiff alleged that Davis was employed by the Morton Salt Company at the time of the mishap. The supreme court noted that "[w]hen Sampay instituted the instant lawsuit, he was not sure whether Davis was an employee of Morton or of Davis Truck Service." *Id.* at 327. However, for purposes of this phase of the litigation, the first circuit noted: "We will assume, without deciding, that Davis was Morton's employee." Sampay v. Morton Salt Co., 388 So. 2d 62, 62 (La. App. 1st Cir. 1980).

3. Civil Code article 2320 holds the employer financially responsible for his employees' tortious conduct while acting in the course and scope of their employment. *See, e.g.*, Foster v. Hampton, 381 So. 2d 789 (La. 1980); Jobe v. Hodge, 253 La. 483, 218 So. 2d 566 (1969); Williams v. Marionneaux, 240 La. 713, 124 So. 2d 919 (1960); Costa v. Yochim, 104 La. 170, 28 So. 992 (1900). *See also* Comment, *Prescribing Solidarity: Contributing to the Indemnity Dilemma*, 41 LA. L. REV. 659 (1981); Comment, *Master's Vicarious Liability for Torts Under Article 2320—A Terminological "Tar Baby,"* 33 LA. L. REV. 110 (1972).

4. *See* LA. CIV. CODE arts. 3071 & 3078.

5. LA. CODE CIV. P. arts. 966-68.

6. Sampay v. Morton Salt Co., 388 So. 2d 62, 63 (La. App. 1st Cir. 1980).

7. 381 So. 2d 789, 790 (La. 1980).

8. Sampay v. Morton Salt Co., 395 So. 2d 326, 328 (La. 1981).

9. *Id.* at 329.

10. 240 La. 713, 124 So. 2d 919 (1960).

11. 395 So. 2d 326 (La. 1981).

Williams to Sampay: Too Swift an Evolution?

In 1960 the Louisiana Supreme Court announced the rule in *Williams v. Marionneaux* that a tort plaintiff's settlement with and release of an employee who, while acting in the course and scope of his duties, negligently injured the plaintiff, effected a total discharge of the employer, "who was only secondarily liable."[12] This

12. 240 La. at 724, 124 So. 2d at 923. The court grounded its reasoning upon the employer's indemnification right against the employee for "whatever damages he might have been obliged to pay plaintiff for injuries . . . ." *Id.* Although Civil Code article 2320, which directs the employer's responsibility, does not mention the master's reimbursement right, the Louisiana bench consistently has sanctioned the indemnity action. *See, e.g.*, Jobe v. Hodge, 253 La. 483, 218 So. 2d 566 (1969); Williams v. Marionneaux, 240 La. 713, 124 So. 2d 919 (1960); Costa v. Yochim, 104 La. 170, 28 So. 992 (1900); Little v. State Farm Mut. Auto Ins. Co., 177 So. 2d 784 (La. App. 1st Cir. 1965). *See also* Comment, *The Employer's Indemnity Action*, 34 LA. L. REV. 79 (1973). Despite the ruling in *Foster v. Hampton*, 381 So. 2d 789, 790 (La. 1980), that the employer and the employee are solidarily bound in favor of the plaintiff creditor, it seems that the master's indemnity claim should still be viable. Comment, *Prescribing Solidarity: Contributing to the Indemnity Dilemma*, 41 LA. L. REV. 659, 701 (1981). In fact, "Civil Code article 2106, admittedly cryptic, envisions such a situation . . . ." *Id.* at 702. Morover, Justice McCaleb noted that "[t]here was but one cause of action which the law gave plaintiff in recompense for his injuries," 240 La. at 724-25, 124 So. 2d at 923, a rule *Foster* did not disturb. 381 So. 2d at 790. Consequently, *Williams* recognized that when the servant compromised with the plaintiff "he repaired his wrong and, therefore, was fully acquitted from further liability." 240 La. at 725, 124 So. 2d at 923. In addition, the court found that the acquittance inured to the benefit of Marionneaux, the employer. *Id.* Spurning this reasoning, the supreme court in *Sampay* concluded that because *Foster v. Hampton* held the employer and the employee liable as solidary obligors, the plaintiff creditor may release the employee but still may reserve rights against the master "by virtue of article 2203." 395 So. 2d at 328. Such a conclusion reads too much into *Foster*'s result. Merely categorizing two debtors as solidarily liable does not mean that they are bound in the same degree. LA. CIV. CODE art. 2106. In this situation, the employee's share of the obligation is the entire debt. While Civil Code article 2091 permits the plaintiff-creditor to demand full payment from either the servant or the employer, the *in solido* classification does not in and of itself allow the plaintiff to compromise with the employee and to retain rights against the master. Properly read, article 2320 establishes a scheme in which the employer is required to answer in a surety-like capacity. The employer is financially responsible to the plaintiff-creditor, primarily to insure that the loss will be compensated should the servant prove insolvent. T. BATY, VICARIOUS LIABILITY 154 (1916). However, in the event that the plaintiff-creditor settles with the employee, the reason for the master's liability ceases to exist. By contractually compromising with the employee, LA. CIV. CODE art. 3071, the plaintiff-creditor has discharged the principal obligor, and thus the creditor's rights should be extinguished. LA. CIV. CODE art. 2130 provides that "[o]bligations are extinguished: . . . By voluntary remission . . . ." *See* LA. CIV. CODE art. 2205.

Furthermore, since the plaintiff-creditor's single cause of action against both the master and the servant, Foster v. Hampton, 381 So. 2d 789, 790-91 (La. 1980), arose solely from the employee's quasi-delictual behavior, the release of the employee should operate to expunge the action; the cause of action cannot be split. LA. CODE CIV. P. art.

result obtained despite the plaintiff's attempted reservation of his rights against the employer and the liability insurer. Clearly setting forth its rationale, the court reasoned that when the employee compromised with the plaintiff, "he repaired his wrong and, therefore, was fully acquitted from further liability."[13] Furthermore, the release of the tortfeasor-employee inured to the benefit of the employer, since the employer's liability was merely vicarious in nature and "derived solely from his legal relation to the wrongdoer."[14] Thus, the employer's peremptory exception of no cause of action[15] was well-founded.[16] Additionally, Marionneaux, the employer, raised the peremptory exception of res judicata,[17] contending that Williams' settlement agreement with the offending employee had the force of a thing adjudged[18] which barred further litigation.[19] However, Justice McCaleb, writing for the *Williams* majority, rejected this exception. Reversing the district court and the intermediate appellate court, the supreme court concluded that the "plea of res judicata is not tenable."[20] Strictly speaking, the court was correct. Civil Code article 2286 enumerates three essential elements for the plea of res judicata to be maintained.[21] The thing is adjudged only when there has been a prior suit or compromise[22] that involved the same parties[23] with same object demanded.[24] In addition, the prior action

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425: "An obligee cannot divide an obligation due him for the purpose of bringing separate actions on different portions thereof." *See* Williams v. Marionneaux, 240 La. 713, 726, 124 So. 2d 919, 923 (1960); P. Olivier & Sons v. Board of Commissioners, 181 La. 802, 160 So. 419 (1935); Norton v. Crescent City Ice Mfg. Co., 178 La. 135, 150 So. 855 (1933).

13. 240 La. at 725, 124 So. 2d at 923.

14. *Id.*

15. LA. CODE CIV. P. art. 927: "The objections which may be raised through the peremptory exception include, but are not limited to . . . . (4) No cause of action . . . ."

16. 240 La. at 722, 124 So. 2d at 922.

17. LA. CODE CIV. P. art. 927.

18. LA. CIV. CODE art. 3078: "Transactions have, between the interested parties, a force equal to the authority of things adjudged."

19. 240 La. at 719, 124 So. 2d at 921.

20. *Id.*

21. LA. CIV. CODE art. 2286:

> The authority of the thing adjudged takes place only with respect to what was the object of the judgment. The thing demanded must be the same; the demand must be founded on the same cause of action; the demand must be between the same parties, and formed by them against each other in the same quality.

22. LA. CIV. CODE art. 3078; Matthew v. Melton Truck Lines, Inc., 310 So. 2d 691 (La. App. 1st Cir. 1975); Carney v. Hartford Accident & Indem. Co., 250 So. 2d 776 (La. App. 1st Cir. 1970).

23. *See, e.g.*, Bordelon v. Landry, 278 So. 2d 173 (La. App. 4th Cir. 1973); *The Work of the Louisiana Supreme Court for the 1957-1958 Term—Civil Procedure*, 19 LA. L. REV. 388 (1959); Comment, *Preclusion Devices in Louisiana: Collateral Estoppel*, 35 LA. L. REV. 158 (1974).

24. *See, e.g.*, Sliman v. McBee, 311 So. 2d 248 (La. 1975); Quarles v. Lewis, 226 La.

must have been based on the same juridical cause or legal theory.[25] And, unfortunately, Louisiana procedure does not admit of the chief common law preclusionary device, collateral estoppel.[26] Consequently, in *Williams* one of the requisites for sustaining the res judicata exception was missing: the demand was "not between the same parties who entered into the compromise settlement which is said to have had the force of the thing adjudged."[27]

The *Williams* decision remained undisturbed for two decades. However, its underpinnings were shaken in 1979[28] and then withdrawn in 1980[29] by the supreme court. In *Thomas v. W & W Clarklift, Inc.*[30] the supreme court concluded that an employer could be

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76, 75 So. 2d 14 (1954); Comment, *Res Judicata—"Matters Which Might Have Been Pleaded,"* 2 LA. L. REV. 347 (1940).

25. *See, e.g.*, Mitchell v. Bertolla, 340 So. 2d 287 (La. 1976). The *Mitchell* court concluded that the cause of action language in Civil Code article 2286 was an incorrect translation. The proper translation from the French is *cause*, meaning legal theory. *Id.* at 291. The effect of *Mitchell* has been described by Professor Maraist as sounding "the death knell for estoppel by judgment (collateral estoppel) in Louisiana . . . ." *The Work of the Louisiana Appellate Courts for the 1977-1978 Term—Civil Procedure*, 39 LA. L. REV. 903, 914 (1979) [hereinafter cited as *1977-1978 Term—Civil Procedure*].

26. *See, e.g.*, Welch v. Crown Zellerbach Corp., 359 So. 2d 154 (La. 1978); Mitchell v. Bertolla, 340 So. 2d 287 (La. 1976); Dixon, Booksh & Zimmering, *Res Judicata in Louisiana Since Hope v. Madison*, 51 TUL. L. REV. 611 (1977); Kerameus, *Res Judicata: A Foreign Lawyer's Impressions of Some Louisiana Problems*, 35 LA. L. REV. 1151 (1975); *1977-1978 Term—Civil Procedure*, *supra* note 25; Comment, *supra* note 23; Comment, *The Louisiana Concept of Res Judicata*, 34 LA. L. REV. 763 (1974); Note, *The End of Collateral Estoppel in Louisiana: Welch v. Crown Zellerbach Corporation*, 40 LA. L. REV. 246 (1979). Justice Dixon, writing for the majority in *Welch*, gave little pause before stating that the collateral estoppel device is "a doctrine of issue preclusion *alien* to Louisiana law." 359 So. 2d at 156. Professor Maraist, commenting on the *Welch* decision, noted that the court intended to "finally and fully bury the doctrine of collateral estoppel." *1977-1978 Term—Civil Procedure*, *supra* note 25, at 915.

27. 240 La. at 720, 124 So. 2d at 921.

28. Thomas v. W & W Clarklift, Inc., 375 So. 2d 375 (La. 1979). By holding that an employer and a third person, concurrently negligent with an employee in causing tortious damage to another, may be solidary obligors, troubling questions of indemnity and intra-debtor rights were raised. *See* Comment, *Prescribing Solidarity: Contributing to the Indemnity Dilemma*, 41 LA. L. REV. 659, 684 (1981). Since the foundation for the *Williams* result was the supreme court's recognition of the master's vicarious responsibility and his indemnity right, see notes 3 & 12, *supra*, *Thomas* necessarily called *Williams'* fundamental tenets to task.

29. Foster v. Hampton, 381 So. 2d 789 (La. 1980). With Justice Watson announcing the majority's opinion, the *Foster* court held that "[w]hen 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.*" *Id.* at 791 (emphasis added). While "suit against either the employer or employee will interrupt prescription as to the other," *id.*, the plaintiff-creditor "has only one cause of action against both . . . ." *Id. See* Comment, *supra* note 28, at 662.

30. 375 So. 2d 375 (La. 1979).

solidarily liable with a third person who was concurrently negligent with the employer's servant,[31] even though according to then-governing law[32] the employer was not liable *in solido* with the employee.[33] The justification for refusing to hold the employer and the servant solidarily liable in favor of the plaintiff-creditor was that a relationship *in solido* is never presumed;[34] it must be express.[35] Consequently, the jurisprudence[36] developed the concept of liability *in solidum*, or imperfect solidarity.[37] *Foster v. Hampton*[38] served as the Louisiana Supreme Court's vehicle to reverse this trend. Although *Foster* noted that the relationship between the master and servant vis-à-vis the plaintiff for the employee's quasi-offenses had been termed imperfect solidarity,[39] the differences between perfect and imperfect solidarity were deemed "untenable";[40] and the court removed this "quirk"[41] in Louisiana law by negating the authority of

31. *Id.* at 378.

32. Cox v. Shreveport Packing Co., 213 La. 53, 34 So. 2d 373 (1948).

33. Cox v. Shreveport Packing Co., 213 La. 53, 60, 34 So. 2d 373, 375 (1948). The specific question raised in *Cox* dealt with Civil Code article 3552. Article 3552 states that the acknowledgment of the obligation by one solidary obligor interrupts prescription as to all bound *in solido*. Examining a circumstance in which the employer was not personally at fault, the *Cox* court refused to apply article 3552 in the master-servant context with respect to the employer's answerability for the employee's torts. The reason for the court's refusal was that the two were not solidary obligors. *Id.*

34. LA. CIV. CODE art. 2093.

35. LA. CIV. CODE art. 2093: "An obligation *in solido* is not presumed; it must be expressly stipulated . . . ."

36. *See, e.g.*, Wooten v. Wimberly, 272 So. 2d 303 (La. 1972); Cox v. Shreveport Packing Co., 213 La. 53, 34 So. 2d 373 (1948); 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); Commercial Ins. Agency, Inc. v. Wilson, 293 So. 2d 246 (La. App. 3d Cir. 1974); Granger v. General Motors Corp., 171 So. 2d 720 (La. App. 3d Cir. 1965); 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).

37. *See* 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); *The Work of the Louisiana Appellate Courts for 1974-1975 Term—Obligations*, 36 LA. L. REV. 375 (1976); *The Work of the Louisiana Appellate Courts for the 1973-1974 Term—Obligations*, 35 LA. L. REV. 280, 297 (1975); *The Work of the Louisiana Appellate Courts for the 1972-1973 Term—Obligations*, 34 LA. L. REV. 231, 231 (1974); Comment, *supra* note 28, at 681; Comment, *Solidary Obligations*, 25 TUL. L. REV. 217, 230 (1951).

38. 381 So. 2d 789 (La. 1980).

39. *Id.* at 791, *citing* Cline v. Crescent City R.R. Co., 41 La. Ann. 1031, 6 So. 851 (1889).

40. *Id.*

41. Comment, *supra* note 28, at 663 n.20.

Cox v. Shreveport Packing Company.[42] Properly read, the *Foster v. Hampton* holding is precise: the employer and employee are solidarily bound in favor of the tort-plaintiff injured through the employee's negligence.[43] Writing for the majority in *Foster*, Justice Watson specifically pointed out that the master and the servant are not joint tort-feasors and that the plaintiff-creditor has but one cause of action.[44] Still, "characterizing debtors as solidarily bound, without limiting the effects of the label to those required to benefit the creditor, portends serious consequences"[45] for future cases.

Classifying the employer as liable *in solido* with the employee seriously disturbed the *Williams v. Marionneaux*[46] idea that the master's responsibility under Civil Code article 2320 was secondary or accessory in all instances in which the master himself was not at fault.[47] The evolution from *Cox v. Shreveport Packing Company*[48] and *Williams* to *Foster v. Hampton*[49] was certainly dramatic. Perhaps it was too sudden, for concepts long internalized were abandoned[50] without certainty as to what might follow. For example, once the supreme court concluded that imperfect solidarity had no basis in legislation[51] and was to be dismissed,[52] the inevitable question is whether all solidary obligors are really bound *in solido*. In other words, a rejection of the doctrine of imperfect solidarity could

42. 213 La. 53, 34 So. 2d 373 (1948).

43. 381 So. 2d at 790.

44. *Id.* See note 12, *supra*.

45. Comment, *supra* note 28, at 684.

46. 240 La. 713, 124 So. 2d 919 (1960).

47. 240 La. at 723-25, 124 So. 2d at 922-23.

48. 213 La. 53, 34 So. 2d 373 (1948).

49. 381 So. 2d 789 (La. 1980).

50. Although *Foster* overruled *Cox v. Shreveport Packing Co.* with respect to master-servant solidarity, at least for prescriptive purposes, *see* LA. CIV. CODE art. 2097, *Cox* was not recognized to have been incorrect in classifying the employer's responsibility as statutory in origin. The master's answerability is dictated by Civil Code article 2320 by virtue of the contractual relationship with the employee. 381 So. 2d at 790. If that is the case, then the cause for the employer's obligation is different from the reason for the servant's liability. According to traditional doctrine, C. AUBRY & C. RAU, DROIT CIVIL FRANCAIS § 298b, at 20-21 (La. St. L. Inst. trans. 1965), such solidarity could not be perfect or correality. If properly classified as an *in solido* relationship, simple or imperfect solidarity would be the appropriate name. Yet, when *Foster* rejected as unwarranted the distinctions between perfect and imperfect solidarity, 381 So. 2d at 790, the supreme court ruled that what had been termed previously imperfect solidarity might be perfect solidarity. This action was taken without providing an explanation of the dramatic consequences which might follow.

51. "[T]here is no legislative ground for the distinction drawn between perfect and imperfect solidarity." Foster v. Hampton, 381 So. 2d 789, 791 (La. 1980), *citing* Wooten v. Wimberly, 272 So. 2d 303, 307 (La. 1972) (Tate, J., concurring).

52. Foster v. Hampton, 381 So. 2d 789, 791 (La. 1980).

mean that all debtors carrying the *in solido* label were bound equally for virile shares. Yet, the *Foster* court could not have intended such a notion. Civil Code articles 2103[53] and 2106 envision that some solidary debtors may owe more than a proportionate share.[54] Civil Code article 2106 provides that if the situation in which the solidary obligation has been incurred concerns "only one of the coöbligors *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 [sureties].*"[55]

Sampay—A Simplistic Solution

After "initial pretrial sparring,"[56] Alfred Sampay settled his claims with the assumed employee[57] of the Morton Salt Company but reserved his rights against Morton. When the case reached the supreme court, Chief Justice Dixon succinctly framed the issue presented: "whether a plaintiff may, after settling with the tortfeasor and reserving his rights, proceed against the torfeasor's employer."[58] Noting that the *Williams* decision had relied upon *Cox v. Shreveport Packing Company*, the *Sampay* court pointed out that *Cox's* tenure had been stormy; it had been criticized[59] and expressly overruled.[60] In contrast, *Williams* was recognized as perceptive "in characterizing the employee's liability as primary and the employer's liability as secondary or derivative."[61] The employer's responsibility is solely

53. Civil Code article 2103 treats the matter of debtors sharing liability among each other. Once the creditor, who may demand the whole of the debt from any one solidary obligor, LA. CIV. CODE art. 2091, has been paid, the debtors may institute contribution claims. "If the obligation arises from a contract or a quasi-contract, *each debtor is liable for his virile portion.*" LA. CIV. CODE art. 2103 (emphasis added). By contrast, "[i]f the obligation arises from an offense or quasi-offense, it shall be divided in proportion to each debtor's *fault.*" LA. CIV. CODE art. 2103 (emphasis added).

54. In the employer-employee situation it seems that the master's "fault" is merely constructive or non-existent. Consequently, the technically liable obligor may be reimbursed by the actual wrongdoer—the tortious actor. *See* Appalachian Corp., Inc. v. Brooklyn Cooperage Co., Inc., 151 La. 41, 91 So. 539 (1922); Sutton v. Champagne, 141 La. 469, 75 So. 209 (1917). Obviously, the employer's share of the debt is not identical to the servant's portion.

55. (Emphasis added).

56. Sampay v. Morton Salt Co., 388 So. 2d 62, 63 (La. App. 1st Cir. 1980).

57. See note 2, *supra.*

58. Sampay v. Morton Salt Co., 395 So. 2d 326, 327 (La. 1981).

59. Concurring in *Wooten v. Wimberly*, 272 So. 2d 303, 307 (Tate, J., concurring), Justice Tate viewed *Cox* as a "misinterpretation in 1948," *id.* at 308, which "may be excused by the dearth then of translated doctrinal explanations of the reason for the Article . . . [Civil Code article 2093] and its function in our code." *Id.*

60. Foster v. Hampton, 381 So. 2d 789, 791 (La. 1980).

61. 395 So. 2d at 327.

a function of the employment contract.[62] Nevertheless, the court wrote that "[t]he terms primary and secondary . . . can be misleading. The employer's situation is not analogous to that of the simple surety, for unlike the simple surety, the employer does not have the benefit of discussion."[63] Analyzing this statement is difficult; it is uncertain why the *Sampay* majority mentioned simple suretyship. The employer has been likened to a surety[64] since the master is answerable to the plaintiff merely by virtue of an accessory relationship.[65] But, it is clear that the employer is not a simple surety, since *Foster v. Hampton*[66] held that the employer and the employee are solidary obligors for the creditor's benefit.[67] Rather, the employer is very much like a solidary surety; and, by analogy, Civil Code article 3045 is applicable. Article 3045 clearly states that should the surety be bound *in solido* with the debtor, "the effects of his engagement are to be regulated by the same principles which have been established for debtors *in solido*."[68] Paramount in the rules governing solidary obligors[69] is the principle that when the obligors "are all obliged to the same thing, . . . each may be compelled for the whole."[70] In view of Civil Code article 2091, the solidary surety necessarily has waived the plea of discussion.[71] With respect to the

62. "[I]t is a consequence of the employment relationship." *Id.* at 328.

63. *Id.*

64. Comment, *supra* note 28, at 703 & n.287.

65. LA. CIV. CODE art. 2320; Sampay v. Morton Salt Co., 395 So. 2d 326, 327 (La. 1981); Foster v. Hampton, 381 So. 2d 789, 790 (La. 1980); Jobe v. Hodge, 253 La. 483, 218 So. 2d 566 (1969); Williams v. Marionneaux, 240 La. 713, 124 So. 2d 919 (1960); Costa v. Yochim, 104 La. 170, 28 So. 992 (1900); Brannan, Patterson & Holiday v. Hoel, 15 La. Ann. 308 (1860); LeBlanc v. Roy Young, Inc., 308 So. 2d 443 (La. App. 3d Cir.), *cert. denied*, 313 So. 2d 240 (La. 1975); Johnson v. Dabbs, 194 So. 2d 816 (La. App. 1st Cir. 1967); Little v. State Farm Mut. Auto Ins. Co., 177 So. 2d 784 (La. App. 1st Cir. 1965).

66. 381 So. 2d 789 (La. 1980).

67. *Id.* at 791.

68. LA. CIV. CODE art. 3045.

69. LA. CIV. CODE arts. 2088-107.

70. LA. CIV. CODE art. 2091.

71. Civil Code article 2094 is particularly germane: "The creditor of an obligation contracted *in solido* may apply to any one of the debtors he pleases, without the debtors' having a right to plead the benefit of division." *See* Central Bank v. Winn Farmers Co-Operative, 299 So. 2d 442 (La. App. 2d Cir. 1974). Reading article 3045's reference to the rules of solidarity as negating the benefit of discussion to the solidary surety in conjunction with article 2104, denying the plea of division in instances of multiple solidary sureties, seems to be appropriate. "The solidary surety waives the pleas of discussion and division." Louisiana Bank and Trust Co., Crowley v. Boutte, 309 So. 2d 274, 278 (La. 1975), *citing* La. Civ. Code art. 3045; Brock v. First State Bank & Trust Co., 187 La. 766, 175 So. 569 (1937); Hibernia Bank & Trust Co. v. Succession of Cancienne, 140 La. 969, 74 So. 267 (1917); Home Ins. Co. v. Voorhies Co., 168 So. 724 (La. App. 1st Cir. 1936); 2 M. PLANIOL, TRAITE ELEMENTAIRE DE DROIT CIVIL no. 2352

employer who is a personal security imposed by law,[72] the plea of discussion is unavailable, since the master may be compelled to satisfy the whole of the solidary debt.

In addition, the *Sampay* court read article 2203 as permitting the tort plaintiff to compromise with and release the employee and still reserve rights against the employer.[73] Civil Code article 2203 allows a creditor to discharge conventionally one of the solidary codebtors and to reserve expressly rights against the debtor or debtors not released.[74] But the court failed to consider the second paragraph of article 2203, which precludes the creditor from claiming the obligation from the debtors not released "without making a deduction of the *part* of him to whom he has made the remission."[75] Instead, Chief Justice Dixon concluded that when "the creditor reserves his rights to proceed against the other solidary obligors, . . . the release does not inure to the benefit of the other solidary obligors."[76] With all deference, the court could not have intended to erase effectively from the Civil Code the second paragraph of article 2203. The creditor's remittance in favor of one solidary obligor must operate in favor of the other solidary debtors. In this situation, the solidary debt is at issue and not the number of obligors. The creditor has reduced the single obligation in the amount of the part owed by the released debtor.[77] Consequently, the obligee has no right to demand from the other debtors more than the remaining part. If that is the case, as the Civil Code seems to provide, then the appropriate determination is what *part* of the debt the remaining obligors owe. Again, the Civil Code provides an answer. Article 2106 indicates that the principal debtor-employee's part is all of the debt. Thus, the employer, as a secondary or accessory obligor akin to a surety, owes nothing if the principal has been released.[78]

(La. St. L. Inst. Trans. 1959). *See The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Security Devices* 36 LA. L. REV. 437, 443-44 (1976) [hereinafter cited as *1974-1975—Security Devices*].

72. See note 12, *supra*, and accompanying text.

73. 395 So. 2d at 328.

74. LA. CIV. CODE art. 2203. One problem with applying article 2203 to any principal debtor-surety situation is that the article appears to anticipate perfectly bound, solidary obligors since ratable shares seem to be presumed. When classic *in solidum* debtors are involved the principles of article 2203 are confounding. After all, what part of the debt is attributable to the accessory debtor? The *Sampay* confusion is not one of first impression, however. *See* Louisiana Bank and Trust Co., Crowley v. Boutte, 309 So. 2d 274 (La. 1975).

75. LA. CIV. CODE art. 2203 (emphasis added).

76. 395 So. 2d at 328.

77. LA. CIV. CODE art. 2203. *See* LA. CIV. CODE art. 2205.

78. LA. CIV. CODE art. 2205: "The remission or even conventional discharge granted to a principal debtor, *discharges the sureties*." (Emphasis added).

Apparently, without consideration of the interplay between Civil Code articles 2106, 2203, and 2205, the supreme court announced that "[b]y reserving his rights, the creditor makes clear that he is not fully compensated and that he will proceed against the other solidary obligors."[79] Factually, this may be the case, but zealous pursuit of a claim by the plaintiff-creditor should not expand the rights which the positive law grants.[80] The *Sampay* court concluded that "[b]ecause *Foster v. Hampton* . . . recognized that the employee and the employer are solidary obligors, it follows that, if the victim releases one but reserves his rights to proceed against the other, he may do so by virtue of article 2203."[81]

Unless it is presumed that the employer and the employee are bound for virile shares vis-à-vis the creditor, it does not follow that Civil Code article 2203 authorizes the tort victim to release the principal debtor and then to reserve the right to proceed against the employer. In that event, the plaintiff-creditor may release the employee and reserve his rights against the master for one-half of the obligation. Perhaps the *Sampay* majority's *Foster v. Hampton* citation is telling in this regard. If the *Foster* court did mean to obliterate all distinctions between perfect and imperfect solidarity, at least with respect to the plaintiff creditor,[82] then the application of the concept of virile shares to the employer and employee is consistent. The argument might be advanced that after *Foster*, the supreme court will interpret the Civil Code to provide only one type of solidarity favoring creditors—perfect solidarity. Then the Code articles providing that not all solidary obligors are liable for the same amount[83] may operate "only in relation to the ultimate allocation of the obligation between the employer and the employee."[84] Bolstering this reading of *Sampay*, Chief Justice Dixon wrote that "[f]rom the *viewpoint of the victim*, the employer and the employee are solidary obligors."[85]

The judicial approach of treating the answerable employer, who is basically a surety, as a principle obligor in calculating the portion of the debt remitted for article 2203 purposes, while inferring that

79. 395 So. 2d at 328.

80. LA. CIV. CODE arts. 1, 13 & 17.

81. 395 So. 2dat 328.

82. Chief Justice Dixon intimated that the *Sampay* decision may not affect the employer's reimbursement action once the plaintiff-creditor is satisfied fully. He reasoned: "That the employer's liability is vicarious is important only in relation to the *ultimate allocation* of the obligation between the employer and the employee." *Id.* at 329 (emphasis added).

83. *See, e.g.*, LA. CIV. CODE arts. 2103 & 2106.

84. Sampay v. Morton Salt Co., 395 So. 2d 326, 329 (La. 1981).

85. *Id.* at 329 (emphasis added).

different rules might govern the final adjustment of rights among the solidary debtors, is not novel.[86] With Justice Dixon writing for the majority, the supreme court in *Louisiana Bank and Trust Company, Crowley v. Boutte*[87] held that a compromise and release of the principal debtor when the creditor reserved rights against a surety did not discharge a surety bound *in solido* with the principal obligor.[88] The court's rationale was that the surety's obligation to the creditor was controlled by the Civil Code rules of solidarity.[89] It is unfortunate that the court regarded an *in solido* classification as a passkey for ruling that all debtors are bound for ratable shares. The court overlooked the fundamental distinction between principal obligors and accesory debtors. By virtue of the accessory nature of his obligation,[90] the surety has stated both that the principal debt is not his affair[91] and that his obligation is contingent upon the principal's failure to perform.[92] Similarly, the employer answers for the tortious damage caused by the employee's negligence in the course and scope of the employment, not because of participation in the wrong, but simply for the reason that article 2320 requires it.[93]

Although *Boutte* has been uniformly criticized,[94] it still articulates the present law of solidary suretyship in the creditor vis-à-vis solidary debtors context.[95] As significant a decision as *Boutte*

86. *See* Louisiana Bank and Trust Co., Crowley v. Boutte, 309 So. 2d 274 (La. 1975).

87. 309 So. 2d 274 (La. 1975). *See Developments in the Law, 1979-1980—Security Devices*, 41 LA. L. REV. 389, 390 (1981) [hereinafter cited as *1979-1980—Security Devices*]; *The Work of the Louisiana Appellate Courts for the 1978-1979 Term—Security Devices*, 40 LA. L. REV. 572, 572 (1980); *1974-1975 Term—Security Devices*, supra note 71: Note, *Green Garden: Short Shrift for the Solidary Surety*, 41 LA. L. REV. 968 (1981); Note, *Aiavolasiti: A Conflict Resolved, a Conflict Ignored*, 40 LA. L. REV. 483 (1980); Note, *Rights of the Solidary Surety: Louisiana Bank & Trust Co. v. Boutte*, 36 LA. L. REV. 279 (1975); Note; *Security Rights—Suretyship—Release of Principal Debtor Does Not Discharge Solidary Surety*, 49 TUL. L. REV. 1187 (1975).

88. Succinctly the court held that "the compromise and release of the principal debtor . . . did not operate to release the solidary surety . . . ." 309 So. 2d at 279.

89. "[A]s between the creditor and the solidary surety, the obligations of the surety are governed by the rules of solidary obligors." *Id.* at 278.

90. *See* LA. CIV. CODE arts. 1771, 2205 & 3035.

91. *See* LA. CIV. CODE art. 2106.

92. The employer, standing as a surety for the tortious servant, has liability that should be contingent in that if the plaintiff-creditor no longer has an action against the employee, the employer should not be required to respond. LA. CIV. CODE art. 2205.

93. Comment, *supra* note 28, at 689-90.

94. *See 1974-1975 Term—Security Devices*, supra note 71; Note, *Rights of the Solidary Surety: Louisiana Bank & Trust Co. v. Boutte*, 36 LA. L. REV. 279 (1975); Note, *Security Rights—Suretyship—Release of Principal Debtor Does Not Discharge Solidary Surety*, 49 TUL. L. REV. 1187 (1975).

95. "In *Louisiana Bank And Trust Co., Crowley v. Boutte* . . . this court . . . held that the effect of the application of articles 2106 and 3045 of the Civil Code is that, as

was, and remains today, if *Sampay* withstands future challenges, its impact will be even more monumental. The *Boutte* court interpreted only one suretyship contract, albeit one in prevalent use.[96] The decision is a determination of contractual intent and language,[97] and the terms of the suretyship contract may be varied[98] if the parties desire to avoid a *Boutte*-type judicial interpretation. By contrast, the *Sampay* decision is a matter of law for obligations arising from the fact[99] of the employee's negligence. Hence, the difficult problems that *Sampay* raises will confront the bench and bar with little flexibility. A sampling of the problems raised by *Sampay* and suggestions for working within the bounds of the court's decision are offered.

Res Judicata—Wooten Again?

One need not be overly imaginative to read *Foster v. Hampton* and *Sampay v. Morton Salt Company* as reviving the baffling problems presented in *Wooten v. Wimberly*.[100] In *Wooten*, the plaintiff's son allegedly was injured by the negligence of another minor, Howard Wimberly, Jr.[101] Suit was filed against the boy's father, but Howard Wimberly, Jr. was not named as a defendant.[102] The district court ruled that young Wimberly was not at fault and denied re-

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between the creditor and the surety bound in solido with the debtor, the obligations of the surety are governed by the rules of solidary obligors." Aiavolasiti v. Versailles Gardens Land Dev. Co., 371 So. 755, 758 (La. 1979) (citation omitted) (footnotes omitted).

96. Nearly identical suretyship contracts were in dispute in three recent supreme court decisions: First Nat'l Bank of Crowley v. Green Garden Processing Co., Inc., 387 So. 2d 1070 (La. 1980); Aiavolasiti v. Versailles Gardens Land Dev. Co., 371 So. 2d 755, 758 (La. 1979); Louisiana Bank and Trust Co., Crowley v. Boutte, 309 So. 2d 274 (La. 1975).

97. Writing for the *Aiavolasiti* court, Justice Dennis noted the fundamental nature of the suretyship agreement—it is a contract. Aiavolasiti v. Versailles Gardens Land Dev. Co., 371 So. 2d 755, 758 (La. 1979). *See* LA. CIV. CODE art. 3035 (suretyship is an accessory contract); *1979-1980—Security Devices, supra* note 87.

98. *See* Aiavolasiti v. Versailles Gardens Land Dev. Co., 371 So. 2d 755, 758 (La. 1979); Note, *Aiavolasiti: A Conflict Resolved, A Conflict Ignored*, 40 LA. L. REV. 483 (1980).

99. Articles 2315 through 2324 of the Civil Code provide the principles for categorizing delictual and quasi-delictual obligations. Fault is the fundamental standard; a tortfeasor is liable for the injury he has caused through his fault. LA. CIV. CODE art. 2315. Since the tortious conduct is a matter of fact, the obligation is legally imposed. LA. CIV. CODE arts. 1760 & 2292.

100. 272 So. 2d 303 (La. 1972). *See 1972-1973 Term, supra* note 37; Note, *The Nonsolidness of Solidarity*, 34 LA. L. REV. 648 (1974); Note, *Parent and Child Not Bound in solido for the Minor's Tort?*, 19 LOY. L. REV. 758 (1973).

101. 272 So. 2d at 304.

102. *Id.*

covery against his father. Subsequently, the third circuit affirmed[103] and the supreme court denied certiorari.[104] Prior to the supreme court's writ refusal, the plaintiff commenced a second suit against Howard Wimberly, Jr., who had attained majority during the course of the first litigation.[105] Ultimately, the supreme court held that the plaintiff's claim had prescribed,[106] since the father and the son were not solidary obligors under Civil Code article 2318, and since the initial suit did not operate to interrupt prescription as to young Wimberly.[107] The fundamental objection to the second suit was "that it was an attempt at relitigation of the identical issue already decided adversely to the plaintiff: was there actionable negligence on the part of the minor?"[108] Concurring in the court's decision, Justice Tate noted that "the plaintiff should not twice vex the court system and the same family and liability insurer with the identical claim."[109] Certainly Justice Tate was correct. But *Wooten's* premise for barring the second claim no longer seems to exist. The *Wooten* majority had relied specifically on *Cox v. Shreveport Packing Company*,[110] which was overturned in *Foster*.[111] Although the Louisiana Supreme Court has not yet addressed the question, there seems little reason to doubt that it will hold the parent and child solidarily bound for the damage caused by the minor's negligence, just as in the master-servant situation.[112]

Exactly what consequences may follow from the implications of *Sampay* is uncertain. Perhaps a plaintiff-creditor, alleging injury at the hands of a negligent employee or minor, could file suit against the master or parent, try the case and lose, yet still be able to sue the employee or minor.[113] Or the converse might be possible, given

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103. Wooten v. Wimberly, 233 So. 2d 682 (La. App. 3d Cir. 1970).

104. Wooten v. Wimberly, 256 La. 359, 236 So. 2d 496 (1970).

105. 272 So. 2d at 304.

106. Civil Code article 3536 provides that actions for damages "resulting from offenses or quasi offenses" are prescribed by one year's lapse.

107. "[T]he father in this instance was not a solidary co-debtor with his minor son for the alleged tortious conduct of the son." Wooten v. Wimberly, 272 So. 2d 303, 307 (La. 1972).

108. *1972-1973 Term*, *supra* note 37, at 232.

109. 272 So. 2d at 310 (Tate, J., concurring).

110. 213 La. 53, 34 So. 2d 373 (1948).

111. Foster v. Hampton, 381 So. 2d 789, 791 (La. 1980).

112. Comment, *supra* note 28, at 709.

113. Procedurally, an unemancipated minor lacks the capacity to be sued. Instead, "[t]he father, as administrator of the estate of his minor child, is the proper defendant in an action to enforce an obligation against an unemancipated minor . . . ." LA. CODE CIV. P. art. 732. Strange as it may seem, *Sampay* could permit a suit against a father in his capacity as administrator of his child's estate on a cause of action arising from the alleged negligence of the minor even though a previous suit against the father personally had been defeated.

that suit against one solidary obligor interrupts prescription as to all so classified;[114] thus, the peremptory exception of prescription[115] could not be raised successfully. Nor is collateral estoppel available.[116] Strictly speaking, res judicata[117] could not be pleaded;[118] however, the second defendant could argue that the plaintiff impermissibly divided his cause of action.[119]

In view of the *Sampay* court's overruling[120] of *Williams v. Marionneaux*,[121] *Wooten's* "parade of horribles"[122] may have been granted full license. Inconsistent results probably will plague the courts for some time. And, if inconsistent decisions obtain in what should be the same lawsuit, insoluble practical problems arise. For example, suppose *A* is injured through the alleged negligence of *X*, an employee acting in the course and scope of his duties for *Z*. If *A* sues *X* in a negligence action, loses in the trial court, and allows appeal delays to pass,[123] a final and definitive judgment has been rendered in *X*'s favor. Yet, since *A*'s suit against *X* interrupted prescription against *Z*,[124] who is a potential solidary obligor with *X*, *A* might be allowed to commence proceedings again. *Williams* would not have allowed this scenario,[125] but *Williams* is no longer author-

114. LA. CIV. CODE art. 2097.

115. LA. CODE CIV. P. art. 927.

116. Welch v. Crown Zellerbach Corp., 359 So. 2d 154 (La. 1978); Mitchell v. Bertolla, 340 So. 2d 287 (La. 1976).

117. LA. CODE CIV. P. art. 927.

118. The triple identities test of Civil Code article 2286 would not be satisfied; the defendant parties differ in the two suits. *See, e.g.*, Bordelon v. Landry, 278 So. 2d 173 (La. App. 4th Cir. 1973).

Dissenting in *Wooten*, Justice Barham rebutted the conclusion that the res judicata peremptory exception would be inapplicable. 272 So. 2d at 311-12 (Barham, J., dissenting). Justice Barham postulated that "[a] suit against one bound solidarily for the debt with another satisfies the requirements of a plea of res judicata under Civil Code Article 2286." *Id.* at 312. He reasoned that "[t]he demand is the same, the demand is founded on the same cause of action, and the demand is between the same parties, for as to the plaintiff in a suit on a solidary debt one solidary obligor is the same as the other solidary obligor." *Id.*

119. LA. CODE CIV. P. art. 425. *See* Quarles v. Lewis, 226 La. 76, 75 So. 2d 14 (1954).

120. 395 So. 2d at 329.

121. 240 La. 713, 124 So. 2d 919 (1960).

122. "Credit for promulgating this phrase has been given to Thomas Reed Powell. Arnold, *Professor Hart's Theology*, 73 HARV. L. REV. 1298, 1305 & n.26 (1960). It is a venerable technique, and a good one for evaluating the possible effects of actions which may be irreversible." Comment, *Rescinding Ratification of Proposed Constitutional Amendments—A Question for the Court*, 37 LA. L. REV. 896, 925 n.169 (1977).

123. *See* LA. CODE CIV. P. arts. 2087 & 2123.

124. LA. CIV. CODE art. 2097.

125. 240 La. at 726-27, 124 So. 2d at 923-24.

itative. Moreover, if A is successful against Z in his claim that X's negligence caused his damages, then Z should be allowed full indemnification from X for any amount paid to A.[126] If so, X's prior judicial absolution is defeated.

Difficulties arising from settlement agreements after *Sampay* may affect the fundamental notions of principal and accessory obligations expressed in the Civil Code.[127] If the employee, whose asserted negligence is claimed to have caused the plaintiff-creditor's damage, settles and compromises, two issues are resolved. First, the employee has admitted his wrong, and if it was done in the course and scope of the employment relation, the master will be answerable.[128] Second, the amount of the primary obligation is established; and the accessory obligation cannot be more onerous.[129]

Herein lies the fallacy of the *Sampay* decision. Neither the employer, under article 2320, nor the parent, under article 2318, owes a debt separate and distinct from that of the principal—the actual tortfeasor. Once the plaintiff-creditor perfects a compromise with the principal debtor, his action vanishes; he is unable to reserve any rights against the accessory.[130] The underlying cause of action is merged into the conventional obligation to pay as resolved

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126. *See, e.g.*, Jobe v. Hodge, 253 La. 483, 218 So. 2d 566 (1969); Williams v. Marionneaux, 240 La. 713, 125 So. 2d 919 (1960); Costa v. Yochim, 104 La. 170, 28 So. 992 (1900); Brannan, Patterson & Holiday v. Hoel, 15 La. Ann. 308 (1860); LeBlanc v. Roy Young, Inc., 308 So. 2d 443 (La. App. 3d Cir.), *cert. denied*, 313 So. 2d 240 (La. 1975); Johnson v. Dabbs, 194 So. 2d 816 (La. App. 1st Cir. 1967); Little v. State Farm Mut. Auto Ins. Co., 177 So. 2d 784 (La. App. 1st Cir. 1965); Comment, *The Employer's Indemnity Action*, 34 LA. L. REV. 79 (1973). *See also* La. Civ. Code arts. 2106 & 3052.

127. *See* LA. CIV. CODE art. 1771.

128. LA. CIV. CODE art. 2320. Of course, the master will be allowed to litigate the question whether the employee was operating within the scope of the employment relationship. Since the employer is not a party to the compromise agreement, due process considerations prohibit his rights from being prejudiced to the extent the employee "admits" to acting in the course of his duties. The qualification of the employer's liability upon the premise that the employee's tort must have been committed pursuant to employment authorized activity is akin to the notion that the surety's liability extends only as to those obligations which he agreed to guarantee. If the creditor demands from the surety payment for a debt that the surety did not contract to secure, the surety is not liable. *See* Shreveport Laundries, Inc. v. Sherman, 7 So. 2d 433 (La. App. 2d Cir. 1942).

129. *Cf.* LA. CIV. CODE art. 3037: "The suretyship can not exceed what may be due by the debtor, nor be contracted under more onerous conditions."

130. This author believes that Justice McCaleb stated the correct rule in *Williams v. Marionneaux*, 240 La. 713, 726-27, 124 So. 2d 919, 924 (1960): "[f]urthermore, for the reasons above stated, we do not regard the reservation of his rights against Marionneaux [the employer] contained in the release to be effective. Indeed, since the compromise had the *legal effect of discharging Marionneaux*, plaintiff's reservation of rights against Marionneaux in the release amounted to naught . . . ." (Emphasis added.)

in the compromise agreement.[131] For this amount, the employer or the parent, provided that articles 2320 or 2318, respectively, are applicable, can be required to answer. But not for more.

Conclusion

Sampay v. Morton Salt Company indicates that the Louisiana Supreme Court will presume that all debtors owe virile shares once it has been concluded that they are bound *in solido*. However, this characterization appears to be applicable only from the creditor's perspective.[132] Intra-debtor actions ultimately may prove that the obligors are not liable proportionately.[133] If this is an accurate reading of *Sampay*, great damage has been done to the Civil Code. *Sampay* considers accessory obligors as principals. In addition, the court seems adamant in refusing to examine the reason or cause for the accessory's responsibility. Thus, an employer, made to answer for the quasi-delicts of a servant merely by virtue of the employment relationship, should not be compelled to respond when the employee's debt, the principal obligation, is terminated. Deceptively simple, the rule that the release of the principal operates to discharge the accessory is basic to Louisiana law[134]—notwithstanding classification of the principal and accessory as obligors *in solido*. Insofar as *Sampay* strays from this statutory premise which distinguishes between primary and secondary obligors, a judicial reevaluation is suggested.[135]

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131. *Cf.* Morrison v. Faulk, 158 So. 2d 837 (La. App. 4th Cir. 1963) (obligation of lessee to pay rent in accordance with the lease merged into judgment ruling the lessee liable for rental due on unexpired term of the lease).

132. See notes 83-85, *supra*, and accompanying text.

133. See notes 53-54, *supra*, and accompanying text.

134. See notes 90-92, *supra*, and accompanying text.

135. In any event, it may be that the comparative fault scheme introduced in Louisiana by Act 431 of 1979 negates the court's presumption viewing all solidary obligors as liable for virile shares. Civil Code article 2103 notes that the proper division of a solidary obligation arising from a quasi-delicit is "in proportion to each debtor's fault." Furthermore, one of the amendments to the Code of Civil Procedure indicates that a jury is to return special verdicts listing the percentage of each obligor's fault. LA. CODE CIV. P. art. 1811(B):

> In cases to recover damages for injury, death or loss, the court shall submit to the jury special written questions inquiring as to:
>
> 1. Whether a party from whom damages are claimed, or the person *for whom such party is legally responsible*, was at fault, and, if so:
>
> (a) Whether such fault was a proximate cause of the damages, and, if so:
>
> (b) The *degree of such fault, expressed in* percentage . . . .

(Emphasis added).