

# SUPREME COURT OF LOUISIANA

*No. 97-C-1938 c/w No. 97-C-1967*

MICHELLE AUCOIN ET AL.

Versus

STATE OF LOUISIANA THROUGH THE DEPARTMENT  
OF TRANSPORTATION AND DEVELOPMENT

LEMMON, J., Subscribing to the Opinion and Assigning Additional Concurring  
Reasons

I write separately only to express a slightly different reasoning for reversing the appellate court's reduction in recovery of the medical expenses incurred on behalf of the minor.

The court of appeal reduced the recovery by the degree of the mother's comparative fault because the medical bills incurred on behalf of the child were "the responsibility of and recoverable by the parent." 96-1047 (6/20/97) at p. 19. The apparent reasoning is that since the mother becomes obligated to pay the medical bills of the minor who had no contractual capacity, only the mother has the right of action under La. Code Civ. Proc. art. 681 to recover those damages, and the mother's recovery of her damages therefore should be reduced under La. Civ. Code art. 2323 by the degree of her contributory negligence.

The reasoning of the court of appeal failed to take into account the difference between the contributory negligence of the tort victim under La. Civ. Code art. 2323 and the comparative fault of co-tortfeasors under La. Civ. Code art. 2324B, and is at odds with the basic concept of solidary liability among co-tortfeasors (which existed at the pertinent time).

Solidary liability is based on the theory that (1) a tort victim should be made whole by the tortfeasor who caused the victim's injuries and (2) when there is concurring fault by two or more tortfeasors without whose concurrent substandard behavior the injuries would not have occurred, each blameworthy tortfeasor should be responsible to the innocent tort victim for the whole (or, after the 1987 amendment to La. Civ. Code art. 2324B, for one-half) of the victim's injuries, although the tortfeasors as between themselves are entitled to contribution or indemnity based on the respective degrees of fault.

Solidary liability between co-tortfeasors is applicable in the present case. As to the minor's general damages, everyone agrees that the mother is only a representative of the tort victim asserting a right of action that actually belongs to the child who would be the plaintiff except that she lacks procedural capacity. Both co-tortfeasors are therefore solidarily liable to the estate of the minor tort victim for at least fifty percent of her general damages.

The result should be no different for the medical expenses incurred on behalf of the minor just because the mother may be personally liable to the health care providers for payment of the medical bills. These bills are really a debt of the minor's estate, and the mother is primarily a representative of the minor's estate in asserting the claim against DOTD (although the mother also may be personally liable to the health care providers).<sup>1</sup>

This case is complicated by the fact that the mother was both a tort victim and a co-tortfeasor. As to the mother's own injuries, she was a tort victim whose

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<sup>1</sup>Indeed, if the mother had been killed in the accident and a grandparent had become the representative plaintiff as a tutor, surely the recovery of the minor's medical expenses would not have been reduced. It is difficult to see a logical difference in the present case just because the representative plaintiff was a co-tortfeasor.

contributorily negligence under La. Civ. Code art. 2323 limits her recovery as a tort victim to the degree of the tortfeasor's fault (irrespective of any claims by other tort victims against one or both at-fault parties). As to the minor's injuries, however, the mother was a co-tortfeasor whose liability was governed by Article 2324, and the minor was the true tort victim whose recovery, governed by Article 2323, was not reduced because the minor was free from fault. The mother's fault as a tortfeasor simply cannot be imputed to the minor to make her, in effect, contributorily negligent.<sup>2</sup>

Although the mother was technically "damaged" because she became legally responsible to third parties (health care providers) for medical expenses incurred by the minor (who did not have the capacity to become contractually liable to the health care providers), she still appeared in the minor's action as a plaintiff only in a representative capacity. Article 2323, which pertains to the reduction of the plaintiff-tort victim's recovery by the degree of contributory negligence, is therefore not applicable to this representative claim. The minor, who was free from fault, should suffer no reduction in the recovery of any of her damages. It is the minor who suffered the injuries and who has needed, and will need in the future, medical treatment for those injuries. In the event of the mother's death or insolvency, the minor's estate (being enriched by recovery of general damages against DOTD) ultimately will be liable for payment of medical expenses to the health care providers, and the minor's recovery of these expenses from either co-tortfeasor should not be reduced unless the minor herself was contributorily negligent.

In summary, the fault of the tortfeasor-mother is not relevant to the damages

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<sup>2</sup>If the mother and father had been married and living together with the child, the father would have been the proper party plaintiff under La. Code Civ. Proc. art. 4501, and the mother's fault as a tortfeasor clearly would have been irrelevant to the non-negligent child's recovery through a representative plaintiff.

claim of the minor tort victim who was not at fault and whose recovery is not mandated for reduction by Article 2323, which governs the contributory negligence of the plaintiff-tort victim. The mother's fault is only relevant to the rights and liabilities of the co-tortfeasors to each other under Article 2324B, which governs the comparative fault of solidary coobligors.