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A. The Concepts

- Art. 50 CO
  1 Lorsque plusieurs ont causé ensemble un dommage, ils sont tenus solidairement de le réparer, sans qu’il y ait lieu de distinguer entre l’instigateur, l’auteur principal et le complice.
  2 Le juge appréciera s’ils ont un droit de recours les uns contre les autres et déterminera, le cas échéant, l’étendue de ce recours.
  3 Le receleur n’est tenu du dommage qu’autant qu’il a reçu une part du gain ou causé un préjudice par le fait de sa coopération.

- Art. 51 CO
  1 Lorsque plusieurs répondent du même dommage en vertu de causes différentes (acte illicite, contrat, loi), les dispositions légales concernant le recours de ceux qui ont causé ensemble un dommage s’appliquent par analogie.
  2 Le dommage est, dans la règle, supporté en première ligne par celle des personnes responsables dont l’acte illicite l’a déterminé et, en dernier lieu, par celle qui, sans qu’il y ait faute de sa part ni obligation contractuelle, en est tenue aux termes de la loi.

- Art. 50 OR
  1 Haben mehrere den Schaden gemeinsam verschuldet, sei es als Anstiffter, Urheber oder Gehilfen, so haften sie dem Geschädigten solidarisch.
  2 Ob und in welchem Umfange die Beteiligten Rückgriff gegeneinander haben, wird durch richterliches Ermessen bestimmt.
  3 Der Begünstiger haftet nur dann und nur soweit für Ersatz, als er einen Anteil an dem Gewinn empfangen oder durch seine Beteiligung Schaden verursacht hat.

1 We are grateful to Mesdames A.S. Dupont, S. Meregalli, MM. Ch. Delétréaz, G. Etier, P. Fleury, M. Oural, B. Prensilevich, assistants at l’Université de Genève, for their valuable help.

Art. 51 OR
1 Haften mehrere Personen aus verschiedenen Rechtsgründen, sei es aus unerlaubter Handlung, aus Vertrag oder aus Gesetzesvorschrift dem Verletzten für denselben Schaden, so wird die Bestimmung über den Rückgriff unter Personen, die einen Schaden gemeinsam verschuldet haben, entsprechend auf sie angewendet.

2 Dabei trägt in der Regel derjenige in erster Linie den Schaden, der ihn durch unerlaubte Handlung verschuldet hat, und in letzter Linie derjenige, der ohne eigene Schuld und ohne vertragliche Verpflichtung nach Gesetzesvorschrift haftbar ist.

Art. 50 CO
1 Se il danno è cagionato da più persone insieme, tutte sono tenute in solido verso il danneggiato, senza distinguere se abbiano agito come istigatori, autori o complici.

2 È lasciato al prudente criterio del giudice il determinare se e in quali limiti i partecipanti abbiano fra loro un diritto di regresso.

3 Il favoreggiatore è responsabile solo del danno cagionato col suo personale concorso o degli utili ritratte.

Art. 51 CO
1 Quando più persone siano responsabili per lo stesso danno, ma per diverse cause, atto illecito, contratto o disposizione di legge, si applica per analogia la disposizione relativa al regresso fra le persone che han-no cagionato insieme un danno.

2 Di regola la responsabilità incombe in prima linea a colui che ha cagionato il danno con atto illecito, in ultima a colui che senza propria colpa né obbligazione contrattuale ne risponde per legge.

Art. 50 \(^2\) CO
1 Where several persons have jointly caused damage, whether as instigators, principals, or accessories, they shall be jointly and severally liable to the damaged party.

2 The judge, in his discretion, shall determine whether and to what extent they have a right of recourse against one another.

3 An abettor shall be liable only if, and only to the extent that, he shall have received a share of the profit or shall have caused damage by his participation.

Art. 51 CO
1 If several persons are liable to the damaged person for the same damage based on different legal grounds, whether due to tort, in contract, or as the result of a legal requirement, then the provision regarding recourse among persons who have jointly caused a damage shall be applied accordingly.

In this context, as a rule, the damage shall primarily be compensated by the person who caused it through an unlawful act, and in the last instance by a person who, without personal fault and without a contractual obligation, is liable based upon a legal requirement.

Preliminary remark

Swiss law knows the system of solidarity between multiple tortfeasors. It means, in principle, that multiple tortfeasors are jointly liable towards their victim. It implies the distinction between two relationships: the so-called “external relation” (rapport externe) between the tortfeasors or reliable persons and the victim and the “internal relation” (rapport interne) between the tortfeasors or reliable persons.

Swiss law distinguishes between two forms of solidarity: The so-called perfect solidarity (solidarité parfaite, echte Solidarität) concerns harmful acts the tortfeasors caused together wilfully or by a fault which is common to them. For example, three children play with a bow. One of them is hurt by an arrow and loses an eye. They are jointly liable under the regime of perfect solidarity. Knowing about the danger of their game, they acted in common and faultily (Arrêt du Tribunal fédéral (Decision of the Swiss Federal Court, ATF) 104 II 184, c. 2).

The imperfect solidarity (solidarité imparfaite, unechte Solidarität) concerns harmful acts the tortfeasors did not commit together but resulting nevertheless in one and the same damage, whether or not the responsibility is based on different facts or legal grounding. For example, an employer asks his employee to clean guns. The employee hurts another employee by a gun shot. The employer was considered to be faulty because the gun was still loaded. The employee was faulty because of his handling of the gun. Both were held liable under the regime of imperfect solidarity. Another example would be the famous hunter-case, where two hunters independently and at the same moment shoot mortally the same person. In this case, the legal ground would be the same for both hunters, but the grounds of liability would be considered as different, even if the acts are identical (see infra B.9).

1. Does your system draw a distinction (and if so what) between the following situations? What, briefly, are the consequences for the liability of A and B to V?

(a) A and B form a plan to inflict wrongful harm on V and both participate in carrying it out.

[4] On the basis of art. 50 CO, A and B are jointly and severally liable (solidarité parfaite). “Solidarité parfaite” supposes that the tortfeasors have acted in common and in

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3 ATF 104 II 225, c. 4a: “(...), wo mehrere Personen bei der Schadensverursachung schuldhaf t zusammengewirkt haben” (where several persons have jointly and by a fault caused the damage).

4 ATF 112 II 138.
a faulty way,\textsuperscript{5} intentionally or by negligence. Further on, each one of them knew or should have known about the unlawful behavior of the other actors.\textsuperscript{6}

\textsuperscript{5} V can sue one or several of the tortfeasors for the whole damage or for a part of it (art. 144 CO). According to art. 147 CO,\textsuperscript{7} the amount paid by one of the debtors liberates the others to the same extent towards the obligee. If one debtor paid more than his part, he can sue the other co-debtors up to the amount due by each one of them (art. 148 CO).

\textsuperscript{6} There is a largely disputed question about the possibility for joint tortfeasors to limit individually their solidarity by personal exceptions. The basis of the problem is, that in Swiss law the notion of solidarity is in a certain sense hybrid, even if the text of the law does not mention it. There is a first notion of solidarity, when two persons caused the same damage. For example, two tortfeasors, who act wilfully together, use simultaneously the same instrument to kill the same person, as in the case of the boys playing together with a bow (see above no. [2]). In this case, solidarity is based on the fact that they provoked together the same damage. There is a second notion of solidarity, when several persons simply act together but where the damage is not the same and where each one of the implied actors could not have provoked by himself the whole damage. To take another fictive case, several tortfeasors deface together a large façade. Even if each one of them would not have been able to provoke by himself the whole damage, they would be under the regime of solidarity. This second form of solidarity is not based on the fact that the tortfeasors caused the same damage, but on their common will to act together.

\textsuperscript{7} Through this second form of solidarity, there arises an important problem concerning the extent of the solidarity. What, if A had committed a fault of 10% and his accomplice B a fault of 90%? Is the amount of solidarity of A towards the victim of 100% of the damage or only of 10%? As we will see, our Federal Court considers in a meanwhile constant practice that, theoretically and under very strict conditions, there should be the possibility that A, when sued by the victim, could limit his solidarity to 10%. This solution is theoretical and very exceptional in the sense that there are no cases in which our Federal Court considered that these conditions were fulfilled (see infra no. [18]). The main part of the doctrine does not agree with the Federal Court's solution.

\textsuperscript{5} "Causer ensemble un dommage par une faute commune" ATF 112 II 138 et seq., c. 4a.

\textsuperscript{6} "(...) dass ein gemeinsames Verschulden, welches echte Solidarität im Sinne von Art. 50 Abs. 1 OR zu begründen vermöchte, nur vorläge, wenn jeder Schädiger um das pflichtwidrige Verhalten des andern weiss oder jedenfalls wissen könnte", ATF 127 III 257, c. 6a. (That a common fault, which is, according to art. 50 al. 1 CO, the condition of the perfect solidarity, is only possible when each one of the tortfeasors knew or should have known about the unlawful behavior of the other actors).

\textsuperscript{7} Art. 147 CO: 2. Extinction of the joint and several liability:
1 To the extent a jointly and severally liable obligor satisfies the obligee by payment, or by set-off, the others are also released.
2 If a jointly and severally liable obligor is released without having satisfied the obligee, the release will only be effective in favor of the others to the extent that this is justified by the circumstances or by the nature of the liability.

\textsuperscript{8} Concerning the relationship between several jointly liable tortfeasors, see ATF 103 II 137, c. 4b; see also e.g. R. Brehm, Berner Kommentar zum schweizerischen Privatrecht, Die Entstehung durch unerlaubte Handlungen, Art. 41-61 OR (2nd edn. 1998), art. 50 CO no. 30 et seq., K. Öflinger/ E.W. Stark, Schweizerisches Haftpflichtrecht, vol. 1 (1995), § 10, no. 45 et seq., 503.
The jurisprudence motivates its solution, saying that, in principle, the degree of fault has no incidence on the liability towards the victim (external relation), but only on the apportionment between the tortfeasors (internal relation). There are two exceptions: If the fault of a third person interrupts the causal link between the act of A and the damage or if the concurrent fault "fait apparaître celle du défendeur comme moins grave". In this case, art. 43 al. 1 and 44 al. 2 CO can be applied (ATF 41 II 228). As we said, in practice these exceptions are very rare.

A minor part of the doctrine agrees with the jurisprudence, fearing for the principle of solidarity and the advantages it offers to the victim. The main doctrine considers that individual argumentation should permit to limit the solidarity of tortfeasors. In our example, A's solidarity should then be limited to 10%. One of their arguments is, that the mere fact to have acted together with other persons should not make my situation worse than if I had acted alone (see infra no. [82] et seq.).

There is one decision of our Federal Court that troubled the doctrine which thought to detect something like a contradiction. The case concerned two shareholders-directors who acted with culpa lata and two administrators whose fault was not levis. The question was whether the two administrators could invoke that their fault was much lighter than the one of the shareholders-directors. Our Federal Court considered that the 4 tortfeasors were under the regime of perfect solidarity and, in the beginning of its reasoning, that the perfect and the imperfect solidarity imply that the fault of one tortfeasor does not reduce the liability of the other tortfeasors towards the victim. In the end of its considerations,

9 E.g. ATF 89 II 118, 122 et seq., c. 5a: "Dans le système du droit des obligations, la responsabilité d’une personne n’est pas diminuée à l’égard du lésé, en principe, du fait qu’un tiers se trouve lui aussi responsable du même dommage. Peu importe qu’il s’agisse d’actes illicites commis en commun (solidarité parfaite: art. 143 et 50 al. 1 CO) ou indépendamment l’un de l’autre, ou encore de responsabilité en vertu de causes différentes (solidarité imparfaite: art. 51 al. 1 CO). (...) envers elle (la victime, B.W.) chacun répond en entier. Ce principe ne souffre d’exception que lorsque le fait du tiers interrompt la relation de causalité entre l’acte du défendeur et le dommage ou lorsque la faute concurrente fait apparaître celle du défendeur comme moins grave". Note that this formulation is today even narrower: "(...) (es, B.W.) gilt für sie der von der Rechtsprechung seit langem entwickelte Satz, dass das Mitverschulden eines Dritten den Schädiger nur entlastet, wenn es den ursächlichen Zusammenhang zwischen seinem Verhalten und dem Schaden als inadäquat erscheinen lässt oder wenn und soweit es sein Verschulden mindert". ATF 98 II 102, c. 4. (Ceci est valable aussi pour le principe développé depuis longtemps par la jurisprudence selon lequel la faute d’un tiers ne disculpe l’auteur du dommage que quand celle-là fait apparaître le lien de causalité entre son comportement et le dommage comme inadéquat ou à tout le moins quand elle diminue sa propre faute.) The exception depends here on a diminution of the fault of B by the behaviour of A.

This solution had been confirmed e.g. in ATF 112 II 138 et seq., c. 4b for a case of “solidarité imparfaite” CO 51: "Comme, de surcroît, la faute concurrente commise par B n’était en tout cas pas de nature à interrompre la relation de causalité adéquate entre le comportement fautif de D et le dommage subi par la demanderesse, le défendeur doit être reconnu responsable de la totalité dudit dommage en application du principe de la solidarité. Les fautes respectives des deux responsables ne pourront dès lors jouer de rôle que dans la répartition interne du montant alloué à la demanderesse."

10 K. Oflinger/E.W. Stark (supra fn. 8), § 10, no. 33, 500/501.

11 "Nach der Rechtsprechung des Bundesgerichts wird bei echter Solidarität (Haftung aus gemeinsamem Rechtsgrund, Art. 143 und 50 Abs. 1 OR) wie bei unechter Solidarität oder Anspruchskonkurrenz (Haftung aus verschiedenen Rechtsgründen, Art. 51 Abs. 1 OR) die Haftung
the Federal Court added, according to its previous jurisprudence, that the behaviour of A can only be invoked by B in order to reduce his liability towards the victim as far as it diminishes the fault of B.  

[11] The doctrine argued then, that it was, of course, not possible to invoke the fault of another joint tortfeasor, but that it should be possible to invoke towards the victim one’s own slight fault in order to reduce the amount of one’s own solidarity towards the victim.

(b) As in a), but while B participates in the formulation of the plan, only A does the act which inflicts the harm.

[12] Art. 50 CO treats on the same level the instigator, the principal author and the accomplice. The essential point is that A and B participated in the harmful act. The way they did it is without importance for their liability towards V, nor the intensity of the different acts or the moment the harm occurs. The participation could also consist in an omission. In the case of a group of kids playing with matches, it was one single match stroked by one single boy which put fire on a farmer’s house. But the whole group was held jointly and severally liable, because the boys “acted together, animated by the same will to play a dangerous game”.

Cont.

des Schädigers gegenüber dem Geschädigten nicht dadurch vermindert, dass auch Dritte für den gleichen Schaden einzustehen haben. Der Gläubiger kann daher jeden Schuldner für die ganze Forderung verlangen. Die Aufteilung der Zahlungsleistungen unter die verschiedenen Schuldner berührt ihn nicht.” (Selon la jurisprudence du Tribunal fédéral, que l’on trouve dans un régime de solidarité parfaite (responsabilité sur le même fondement légal, art. 143 et 50 al. 1 CO), ou dans un régime de solidarité imparfaite ou Anspruchskonkurrenz (responsabilité sur des fondements légaux différents), la responsabilité du léser ne sera pas diminuée par le fait qu’un tiers doive répondre pour le même dommage. Le créancier peut ainsi réclamer à chaque débiteur l’intégralité de la réparation. La répartition interne de la réparation entre les différents débiteurs ne le concerne pas.)

ATF 97 II 403, 415, c. 7d.

12 “Das Verhalten des einen Verantwortlichen entlastet den andern dem Geschädigten gegenüber nur, wenn es den ursächlichen Zusammenhang zwischen dem Verhalten des andern und den Schaden inadäquat erscheinen lässt oder wenn und soweit es das Verschulden des andern mildert” (Le comportement de l’un des coresponsables ne disculpe l’autre envers le léser que quand celui-là fait apparaître le lien de causalité entre le comportement du second et le dommage comme inadéquat ou à tout le moins quand il diminue sa propre faute), ATF 97 II 403, 416, c. 7d.

13 See also A. Hirsch’s comment in [1973] Journal des Tribunaux (JdT) 66, 77 et seq.; see also art. 759 CO et seq.

14 “Wenn Art. 50 Abs. 1 OR nicht darauf abstellt, ob jemand als Anstifter, Urheber oder Gehilfe an der Schadensverursachung beteiligt ist, so nur deshalb, weil es für die solidarische Haftung nicht auf die Form der Teilnahme an der Begehung der unerlaubten Handlung ankommen soll” (art. 50 al. 1 CO ne se préoccupe pas de savoir si quelqu’un a pris part au dommage en tant qu’instigateur, auteur principal ou comme complice parce que, pour la solidarité parfaite, la reconnaissance d’un comportement illicite ne dépend pas de la forme de la participation), ATF 104 II 225, c. 4a, 230/231; R. Brehm (supra fn. 8), art. 50 CO no. 22 et seq.

15 ATF 100 II 332, c. 2.
(c) A and B form a plan to carry out some illegal act (e.g. to contravene the criminal law). The plan does not involve any harm to V, nor is that a necessary consequence of carrying it out. However, B intended to use the occasion to harm V and did so.

[13] Art. 50 CO says in its German version: “Haben mehrere den Schaden gemeinsam verschuldet, (...)”, the French and Italian versions underline the common causality instead of the common fault: “Lorsque plusieurs ont causé ensemble un dommage, (...)”. “Se il danno è cagionato da più persone insieme, (...)”. According to all three versions, solidarity supposes that the actors participated together on the fault, respectively on the causation of the act. According to the difference between the German, French and Italian texts, jurisprudence and doctrine propose different interpretations.

[14] In a narrow interpretation, the main doctrine and the jurisprudence consider that the actors have to participate wilfully and that each one of the actors has to participate on the fault; in other words, the narrow interpretation requires not only a causal link between the act and the harm, but also a common fault of the tortfeasors. A wider interpretation, based essentially on the French and the Italian text, admits solidarity if the tortfeasors have caused together the tort.

[15] In our case, the harm inflicted to V is not a part of the plan A and B had in common. The first question is whether A has committed an illegal act towards V. If not, he would not be liable. If so, he would be liable under the regime of solidarity only if he knew or should have known about the plans of B to inflict harm to V and if his act were in a causal relationship with the harm caused to V. In casu, the decisive point for the solidarity is, whether there is an objectively foreseeable link between the plan A and B had in common and the act of B. If there is no such link, A would not be under the regime of solidarity for the act decided unilaterally by B, because he would not be liable at all towards V.

(d) A and B, acting entirely independently, carelessly create a danger by their combined acts and this causes harm to V.

[16] As mentioned in the preliminary remarks, jurisprudence and doctrine distinguish between perfect and imperfect solidarity. Art. 51 CO (imperfect solidarity) supposes, beside the harm inflicted to V, that the acts had been committed independently by different tortfeasors (further on, the acts have to be unlawful or to violate a contract or the law). At the difference of the perfect solidarity, there is no common act required. The
authors are liable for the same damage, but their liability may be based on different legal grounding. 18

[17] Art. 51 CO refers back to art. 50 CO which is to be applied by analogy. It is on the judge to decide, based on art. 50 al. 2 CO, whether and up to what amount the liable persons have a recourse against each other. Art. 51 CO does not mention solidarity; doctrine considers that the solidarity is implicit. 19

[18] At the difference to art. 50 CO, where, in principle and according to the jurisprudence, the tortfeasors can not invoke individual arguments to reduce their solidarity towards the victim, art. 51 CO permits to them to invoke directly towards the victim the personal arguments (see A.1.a). But our Federal Court made it clear that personal arguments have to be admitted with extreme care and in very exceptional cases, for example if the fault of one author is extremely small and if it would be shocking to burden him towards the victim with the whole amount of the damage. 20 An important part of the doctrine is in favour of the idea to admit individual exemptions for a reduction of the solidarity to the amount due personally by the considered tortfeasor. 21

[19] In our case, A and B having acted entirely independently, they will be under the regime of the imperfect solidarity of art. 51 CO. According to the jurisprudence, V can sue the whole damage from A or B, excepted if the fault of one of them is so small, that it would be shocking to submit him entirely to the regime of solidarity. In this case, V could sue him only up to the amount corresponding for example to the level of his fault. According to the main doctrine, A and B can invoke towards V individual arguments in order to limit each one the amount of his solidarity (see supra).

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18 Note that it may be an unlawful act for some of them and break of contract for others: “Dans le cas particulier, deux personnes ont à répondre du même dommage. Comme elles n’ont pas causé ensemble ce dommage par une faute commune, (art. 50 al. 1 CO), on ne se trouve pas dans une situation de solidarité parfaite (ATF 104 II 229 et seq., c. 4a), mais dans celle où deux personnes répondent du même dommage en raison d’actes illicites différents, indépendants les uns des autres, ou plus précisément dans celle où l’une d’elles, B, répond en raison d’un acte illicite et l’autre, D, en raison d’un acte illicite et d’une violation d’un devoir contractuel. Il s’agit donc d’un cas de concours d’actions, soit de solidarité imparfaite. Dans ce type de solidarité, la responsabilité dérive de causes juridiques différentes, tandis qu’en cas de solidarité parfaite elle résulte de la même cause juridique (ATF 104 II 231/232)”, ATF 112 II 138, c. 4a, 143.

19 R. Brehm (supra fn. 8), art. 51 CO no. 17. Concerning the difference between art. 50 and 51 CO, see ATF 104 II 225, c. 4b.

20 “L’éventualité théorique évoquée par le Tribunal Fédéral (de limiter la responsabilité fondée sur la faute concurrente, B.W.) ne peut donc viser qu’une situation tout à fait exceptionnelle; il en irait peut-être ainsi dans l’hypothèse où la faute de l’auteur recherché apparaît si peu grave et dans une telle disproportion avec celle du tiers qu’il serait manifestement injuste et choquant de faire supporter au défendeur l’entier du dommage en appliquant à la lettre les rigueurs propres à la solidarité”, ATF 112 II 138, c. 4a.

21 See infra question A.2.
2. Where the acts of A and B combine to cause the harm to V, is each liable to V for the whole loss? If not, on what basis are the liabilities apportioned?

[20] Hypothesis 1: A and B acted independently from each other. They did not know and could not know about the act of each other (imperfect solidarity).

[21] As explained, there is a difference between the jurisprudence and the main doctrine. The jurisprudence is very reluctant to admit exceptions to the principle of solidarity in art. 51 CO. The conditions for exceptions are very strong (see supra no. [18]); each one is liable for the whole loss.

[22] The main doctrine admits that each of them can invoke his individual arguments in order to reduce the amount resulting from solidarity, especially if the fault of an actor is particularly slight.

[23] Hypothesis 2: A and B act together (perfect solidarity) or knew or should have know of the other’s act.

[24] In this case, A and B are under the regime of art. 50 CO. Each of them is jointly liable towards V for the whole damage (see no. [14]).

[25] Hypothesis 3: Their acts are not unlawful and don’t infringe a contract or law.

[26] A and B are not liable towards V. The mere fact, that there is a damage, is not sufficient in Swiss law to impute the damage. For example, if A and B discharge independently one of the other an innocuous substance into a river and if, by the combination of the two products, V is harmed, A and B are not responsible for the harm, excepted if it was unlawful to discharge these substances.

3. If V is harmed by the combined acts of A and B and V (a) sues and recovers judgment against A alone, or (b) settles with A alone, what is the effect upon V’s ability to bring further proceedings against B?

[27] (a) We have to precise the facts. According to a first hypothesis, V got from A an indemnity for the whole damage caused jointly by A and B. According to art. 147 al. 1 CO (see supra no. [5]), the payment of one of the debtors liberates his jointly liable co-

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22 E.g. K. Oftinger/E.W. Stark (supra fn. 8), 500: "1. Jeder der mehreren Ersatzpflichtigen haftet für den ganzen, von allen geschuldeten Schadenersatzbetrag. Erfährt der von dem einen der Ersatzpflichtigen geforderte Betrag eine nur ihn betreffende Reduktion (z.B. weil das haftungsbegründende Verschulden nur leicht ist, Art. 43 Abs. 1 OR), so besteht für ihn und mit ihm Solidarität nur in der Höhe des von ihm persönlich geschuldeten Betrags. Man darf aus der Solidarität nicht schliessen, dass jemand allein deswegen, weil neben ihm ein anderer haftet, mehr an Schadenersatz schulde, als er zu leisten hätte, wenn er allein haftete." (Chacun des coresponsables répond de la totalité de la somme due à titre de réparation du dommage causé. Si, parmi les coresponsables, l’on procède à une réduction de la somme réclamée à l’un d’eux (par exemple parce que la faute qui fonde sa responsabilité n’était que légère, art. 43 al. 1 CO), alors la solidarité n’existera, pour lui et avec lui, qu’à la hauteur de la somme qui peut lui être personnellement réclamée. On ne peut pas déduire des règles sur la solidarité qu’une personne doit personnellement plus, à titre de réparation, que ce qu’elle devrait supporter si elle répondait seule, du fait qu’une autre répond aussi à ses côtés.)
debtors up to the amount he has paid to the creditor. In this case, V is satisfied for the whole amount due by the tortfeasors and can not sue B any more (external relation). \[23\]

According to a second hypothesis, V did not obtain from A the whole amount due jointly by A and B. According to art. 144 al. 1 CO, the creditor can sue each one of his joint co-debtors for the whole or a part of the sum due by them. Art. 144 al. 2 CO says that all the co-debtors are obliged toward the creditor "jusqu'à l'extinction totale de la dette". In this case, V can sue B for the part A did not pay. \[24\]

According to art. 147 al. 2 CO (see supra no. [5]), if one of the co-debtors is liberated from his obligation towards the creditor and if the amount due jointly by the co-debtors to the creditor is not or not entirely paid, it depends on the circumstances of the concrete case whether the other co-debtors are also liberated from their obligations towards the creditor. The settling between a co-debtor and the creditor can be considered by the jurisprudence as such a circumstance. Then, the judge has to analyse the content of the settlement in order to establish whether the parties intended to settle for the whole amount due by all the co-debtors together or only for the part due by a single co-debtor. \[25\]

If the will of the parties participating in the settlement was to settle for the whole amount, a settlement even between one co-debtor and the creditor frees the other co-debtors. In other terms, the effect of the settlement depends on the will of the settling parties. The doctrine stresses that the settlement can not make worse internally the situation of those parties who don't participate in the settlement. \[26\]

In our case, the effect of the settlement between A and V depends on the will of the parties. Only if they settled for the whole amount due jointly by A and B, does V lose all his pretension towards B. According to the text of art. 147 al. 2 CO, the settlement between V and B has no effect on the internal relation between A and B (see question B.6).

4. If V may bring successive proceedings against A and B, are there sanctions (e.g. costs) on his failure to bring both together?

Art. 144 CO offers to the creditor the possibility to sue all the joint co-debtors or one of them for the whole amount or a part of it. It allows to the creditor to select himself whom and when he wants to prosecute. The effect of the judgement is, of course, limited to the sued persons. If the unsatisfied or partly unsatisfied creditor wants later to obtain a payment from a co-debtor he has not attacked in the previous trial, he has to begin a new

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23 As to the apportionment between the co-debtors, if one of them has paid more than the sum due by him, he can sue his co-debtors. A can sue B for the surplus he has paid to V (in what concerns art. 148 CO, ATF 103 II 137, c. 4b). The payment to V gives A two different rights against his co-debtor: On the one hand, the right conferred by art. 50 al. 2 CO (itself based on the principles of solidarity) to recover the surplus he paid; on the other hand and by subrogation (the subrogation is limited on the perfect solidarity; cf. e.g. K. Oftinger/E.W. Stark (supra fn. 8), § 10, no. 75, 515), the rights of the creditor towards the co-debtors (art. 149 CO) (see question B.8).

24 Concerning art. 144 CO, ATF 103 II 137, c. 4b.

25 E.g. ATF 107 II 227, c. 3, 4 and 5.

26 K. Oftinger/E.W. Stark (supra fn. 8), 501 et seq.
proceeding. In this sense, he does not risk a sanction, but the proceedings might be longer and more complicated.

5. Is the structure of the law relating to multiple tortfeasors and joint and several liability the subject of criticism?

[32] There are several points criticised by the doctrine. These criticisms do not concern exclusively questions of structure.

[33] a) The most disputed question is the one about the possibility for a tortfeasor to invoke individual exceptions directly towards the victim. For the discussion of this point, see no. [6] above. It must be added that this distinction has been made by the Federal Court as a result of the interpretation of art. 50, 51 and 143 CO. Based on the phrasing of the law, it is not the only possible interpretation of these articles. But, it can probably be said to have acquired the force of an usage (see question B.9).

[34] b) and c) The distinction between perfect and imperfect solidarity. The regime of prescription (limitation)

[35] The difference between perfect and imperfect solidarity is, as we saw, that in case of perfect solidarity all the tortfeasors are liable on the same juridical basis (Rechtsgrund) and for the same act or ensemble of acts taken as a whole (for example a group of boys play with matches and set fire to a house). Imperfect solidarity is admitted, when the tortfeasors are liable on different juridical bases (e.g. the employer had not secured his gun and the employee, handling it faultily, hurt another employee) or if their faults are independent.

[36] A part of the doctrine argues that the term “Rechtsgrund” is ambiguous and that, as consequence, the criteria to submit a case to perfect or imperfect solidarity are arbitrary. (The doctrine uses sometimes the example of two car-holders who would be under the regime of perfect solidarity if their cars cause together a damage, and oppose it to the (in our sense misleading) case of a car-holder and the railway who are under the regime if imperfect solidarity). An important part of the doctrine proposes to abolish this distinction which has, according to it, a minor practical importance.

[37] One of the main – and according to the jurisprudence maybe the only – practical consequences of the distinction between perfect and imperfect solidarity concerns the prescription. The prescription rule of art. 136 al. 1 CO specifies that the interruption of the

27 R. Brehm (supra fn. 8), art. 50 CO no. 54, 448; K. Offinger/E.W. Stark (supra fn. 8), § 10, no. 36, 501.

28 Concerning the difference between perfect and imperfect solidarity ATF 104 II 225, 232, c. 4b.

29 K. Offinger/E.W. Stark (supra fn. 8), § 10, no. 14, 493. See also ATF 104 II 225, 232, c. 4b.

30 For the doctrine in favour of an abolition see K. Offinger/E.W. Stark (supra fn. 8), § 10, no. 15, 494. P. Gauch/W.R. Schluup/J. Schmid/H. Rey, Schweizerisches Obligationenrecht, Allgemeiner Teil, vol. II (8th edn. 2003), no. 3882, 317, considers that the distinction between perfect and imperfect solidarity is purely conceptual (begriffsjuristisch) and without practical consequences.

31 Art. 136 CO. Effect of interruption among joint and several obligors: The interruption of the running of the statute of limitations against a joint and several obligor, or the co-obligor of an indivisible performance, is also effective against the other co-obligors.
prescription towards one jointly liable co-debtor interrupts also the prescription towards the other co-debtors. This rule is to be applied only on cases of perfect solidarity. In cases of imperfect solidarity, the creditor has to interrupt the prescription individually towards each debtor.\[32\]

The doctrine, as to the distinction of perfect and imperfect solidarity, criticised at least implicitly also the consequences for prescription. The proposition to abolish the said distinction would, of course, have as a necessary consequence to make disappear the described consequences on the prescription.

\[39\] Our Federal Court responded at the same time on both problems.\[33\] It considers that the law itself imposes the difference between perfect and imperfect solidarity and its consequences on the prescription: The prescription rule of art. 136 al. 1 CO uses the term joint debtor (débiteur solidaire). This term is explained in art. 143 et seq. CO. According to art. 143 CO, solidarity is based either on the will of the parties or on the law itself. The later is the case for Aquilian liability (art. 41 et seq. CO). Within the Aquilian rules, only art. 50 CO mentions solidarity and only for cases where the tortfeasors committed a common fault.\[34\] For cases, in which there is no common fault, says the Federal Court, the law does not prescribe that solidarity should produce all its consequences.\[35\] The effect on prescription is that art. 136 CO can be applied only with art. 50 CO, and not with art. 51 CO. The result of this reasoning is a double one: (i) Our Federal Court maintains the distinction between perfect and imperfect solidarity and (ii) it is only in cases of perfect solidarity that the interruption of the prescription towards one debtor has the same effect on the other joint co-debtors (see infra question B.10).
B. Contribution and Indemnity

1. Does your system allow one concurrent wrongdoer who is held liable to seek contribution or indemnity from other persons who are also liable? If so, is this based on the general principles of the Civil Code, special legislation or case law?

[40] In Swiss law, the general principles for this purpose are fixed in the CO, though beside this rule, there are special norms, for example in the road traffic act.\(^{36}\) As mentioned above, Swiss law distinguishes, on the one hand, the relationship between the co-debtors and the creditor (rapport externe) and, on the other hand, the relationship between the co-debtors (rapport interne).

[41] If the co-debtors are under the regime of perfect solidarity (art. 50 CO, i.e. faulty acts and jointly caused damage), the co-debtor, who had paid to the creditor more than what he had to according to his obligations in the internal relationship, has, according to a part of the doctrine, two different rights: (i) In application of art. 50 al. 2 CO, he has a recourse against the other jointly liable tortfeasors for the sum exceeding his part of the debt; it is for the judge to decide on the principle and the extent of the contribution of each one of the co-debtors. If one of the liable persons makes a recourse because he had paid to the victim more than his part, the amount of the recourse depends notably on the degree of fault of each jointly liable tortfeasor. According to the doctrine, other criteria could be found in the circumstances of the whole affair, for example who benefited from the unlawful act.\(^{37}\) (ii) By subrogation\(^{38}\) (art. 149 CO), the tortfeasor who has paid to the victim more than the part due by him, takes the juridical place of the victim. He can sue the other jointly liable tortfeasors for the surplus he had paid to the victim (art. 148 al. 2 CO) (for the “cascade” of responsibility according to the particularities of the acts committed by the different actors, see infra question B.3).

[42] If the co-debtors (internal relation) are under the regime of imperfect solidarity (art. 51 CO, i.e. liability based on different causes as unlawful act, contract or law), art. 50 CO has to be applied by analogy. In this case, the co-debtor who has already paid the creditor can sue his co-debtors according to his right of recourse based on art. 50 al. 2 CO, but he does not have the benefit of a subrogation.\(^{39}\)

\(^{36}\) Art. 60 Loi fédérale sur la circulation routière (Road Traffic Act, LCR).


\(^{38}\) “L’intérêt pratique de la subrogation réside dans le fait que le débiteur, qui a pour partie payé la dette d’un tiers (…), acquiert avec la créance les droits accessoires éventuels qui la garantissent, notamment les sûretés”, P. Tercier, Le droit des Obligations (1999), no. 1267.

\(^{39}\) “Sie (die Klägerin, B.W.) übersieht aber, dass sie sich gegenüber dem Beklagten nicht auf Subrogation der Gläubigerrechte gemäss Art. 149 Abs. 1 OR, sondern nur auf einen Ausgleichsanspruch berufen kann, weil von unechter Solidarität oder einer blossen Anspruchskonkurrenz des Geschädigten auszugehen ist” (La plaignante se saisit pas qu’elle ne peut pas s’appuyer sur une
2. Is the system for contribution regarded as operating reasonably satisfactorily?

[44] Here again, the main discussion concerns the distinction between perfect and imperfect solidarity and its effects on contribution. The “abolitionists”, who would renounce to this distinction, propose two different systems. One solution would be to give to the tortfeasor, who has paid to the victim more than he had to, simultaneously two rights, the one by subrogation based on art. 149 al. 1 CO and the other as a right on regress based on art. 148 al. 2 CO. Another solution would be to accord to him one single right, based on art. 149 al. 1 CO; the extent of the recourse would then have to be determined by art. 148 al. 2 CO.40

3. Does this system provide for contribution when the liabilities in question are “mixed” (e.g. where A is liable to V only in tort and B is liable to V only in contract or unjust enrichment)?

[45] If the bases of liability are of different natures, art. 51 al. 2 CO gives rules of preferences that are not binding for the judge. On the first level, there are the unlawful acts. The damage has first to be supported by those who acted unlawfully (by “acte illicite”) and, according to the German text, with fault (“durch unerlaubte Handlung verschuldet”).
[46] On the last level, there is the objective liability (i.e. based directly on the law), but where the liable person did not act unlawfully or violate a contract, as e.g. the liability for buildings of art. 58 CO.
[47] In between, on the second level, there are the acts which provoked a damage by violation of a contract or /and contractual insurance liability.
[48] In other words, art. 51 al. 2 CO establishes a hierarchy among the different liabilities and the possibility of recourse against the higher ranked levels. But, according to art. 50 al. 2 CO, which is applied by analogy through art. 51 CO, the judge has here a large competence of appreciation.41
[49] In this “liability in form of cascades”, the higher ranked liability excludes the lower one.42 The actor or group of actors on the first level has to pay the whole damage, discharging or excluding other actors who are on the second or third level. But, as we said, art. 51 al. 2 CO is not binding for the judge (supra).
[50] This solution, which has the advantage to be very simple, is criticised by a part of the doctrine saying that it can conduct to socially unsatisfying results because it advantages too much the persons liable objectively, for example the employer, and

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subrogation dans les droits du créancier au sens de art. 149 al. 1 CO, mais seulement sur une créance en compensation, parce qu’il s’agit ici de solidarité imparfaite ou d’une simple Anspruchskonkurrenz avec le créancier), ATF 115 II 42, 48, c. 2a.
40 For the whole H. Rey (supra fn. 37), no. 149 et seq., 332.
41 H. Descheniaux/P. Tercier (supra fn. 37), 287, no. 25.
42 K. Oftinger/E.W. Stark (supra fn. 8), § 10, no. 50, 505.
Multiple Tortfeasors under Swiss Law

charges excessively for example the employee: The employer who did not act faultily can sue the employee who committed a fault.\[51\]

It is possible, that the same person is simultaneously liable for an unlawful act and by law. (for example, the owner of a house who acted faultily) or even for an unlawful act, a violation of a contract and by law.\[44\] In this cases, the person is considered to be liable on the first level.

The person liable on a subordinate level who had paid the victim can sue those who are on a higher ranked level for a part or the whole of what he/she paid. The judge is free to follow another rule.

4. Is the basis of the contribution system that it applies where A and B are liable to V in respect of “the same damage” to V? If so, what is understood by “the same damage”?

In Swiss law the fact that A and B cause “the same damage” or, at least, are liable for the same damage, for example insurers (cf. art. 50 and 51 CO), is a necessary condition of solidarity and not merely of the principle of recourse. Thus if a number of persons cause different items of damage to one victim each of them is liable only for the item which is attributable to him.

Statute law gives us no explanation of this requirement of the same damage.

In a decision in 1942\[45\] the Federal Court said that the characteristic of “einheitlicher Schaden” (the same damage) related not to the damage itself but to the interaction of the causes. These might be multiple causes but they must result in a “global” damage to the victim. In so far as it was possible to determine in what proportion each tortfeasor had contributed to the damage this requirement was not met, there was no solidarity and each was responsible only for his share.

This view has been called into question in a decision of the Federal Court 127 III 257 (c. 4b bb) since the court felt that the fact that one could determine in what proportion each tortfeasor had contributed to the damage did not rule out solidarity. However, this decision specifies the limits of solidarity because it states that a person cannot be liable when his conduct has no causal link with the entirety of the damage caused. If he is not thus liable, he cannot of course incur solidarity liability, liability being the basis of solidarity and not vice versa.

In its decision ATF 109 II 304 the Federal Court ruled on a claim for compensation by growers of apricots whose crops had been diminished by emissions of fluorine by an aluminium works. It was shown that several causes had contributed to this reduced crop (apart from the fluorine, there were meteorological, physiological and genetic factors) and that it was possible to say in what proportion each factor had contributed. There was

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\[43\] K. Oftinger/E.W. Stark (supra fn. 8), § 10, no. 50, 505 et seq.


\[45\] ATF 68 II 369, c. 5.
therefore no "global" or single loss but different losses each attributable to a separate cause.

[58] Such a case is to be contrasted with that in ATF 79 II 66. In this case, the Federal Court had to rule on the claim of a woman who had lost the use of an eye from a blow with a hockey stick during an ice hockey match. It held that not only the player who struck the blow but also the other members of the two teams were solidarily liable because their common activity had caused the victim a single injury.

[59] For Fellmann\textsuperscript{46} the question of "the same damage" in the case of multiple causes essentially involves "Gesamttursachen" or "Teilursachen" (indivisibility of cause or divisibility of cause). One imposes solidarity where it is not possible to determine which causal factor is the origin of the whole or any part of the damage.

[60] If, for example, a group of youths decide to spray paint the facades of a school, each member of the group is responsible for the whole damage to the building because the behaviour of each has a causal link with the damage. If on the other hand two groups of youths independently decide on such a scheme, one group to spray the north facade and the other the south the members of each group only incur solidarity liability for the damage to one facade because there is no causal link to the between their behaviour and what was done by the other group.

5. If V sues A alone is there any mechanism to enable A to bring B into the proceedings and have the question of the responsibility of A and B inter se adjudicated at the same time as that of their liability to V?

[61] This is a question of procedure and therefore depends mainly on cantonal law. In Geneva, the Vaud and the Valais, a person sued may compel a third party to join the suit so that judgment may be given against him, too.\textsuperscript{47} Art 83 al. 1 let a CPC/VD and 53 al. 1 let a CPC/VS\textsuperscript{48} expressly mention that the defendant has a right of recourse against a third party. The person joined in the suit becomes a party to it and the judgment therefore is directly binding on him.\textsuperscript{49} The judgment therefore at the same time determines the position between the original parties and that between the defendant and the third party.\textsuperscript{50}


\textsuperscript{48} In Switzerland the rules of procedure before cantonal courts are matters for the cantons. Accordingly, each canton has its own code of procedure (CPC). The codes in question are those of the Vaud (CPC/VD) and the Valais (CPC/VS).

\textsuperscript{49} Art. 56 al. 2 CPC/VS; décision of the cantonal tribunal of the Valais in [2000] \textit{Revue valaisanne de jurisprudence} (RVJ), 233, c. 1e

\textsuperscript{50} According to art. 7 of the Federal law on jurisdiction in civil matters (L. Fors) in force from 1 January 2001, the court with jurisdiction over one defendant is also competent with regard to other parties. Claims based on unlawful acts may be brought, by art. 25, in the domicile of the defendant or the plaintiff or in the place where the act was done or the harmful effect was produced. The possibility of a claim being brought by the victim in his domicile was a novelty introduced by the L. Fors, in derogation of the principle in art. 30 al. 2 of the \textit{Swiss Constitution} (Cst) (art. 59 Cst)
6. If V sues A alone and recovers judgment or settles with A alone and then brings further, successful proceedings against B (assuming he can do so) what is the effect of the judgment/settlement with A upon

(a) B's right to seek contribution from A?

(b) A's right to seek contribution from B?

[62] Under art. 147 CO, payment by one of the co-debtors involves the discharge of the other solidary co-debtors. If therefore A has wholly compensated V, V has no further claim against B. For the purposes of explanation we will therefore assume that A has not fully paid off V.

[63] a) V obtains a judgment against A. If V has suffered 100 damage and obtains a judgment for 60 against A, A may proceed against B for 20 if as between A and B, B’s responsibility is at least 40. If, on the other hand, B has caused more than 20 damage to V he may only have recourse against A for a sum in excess of that amount. Therefore, the judgment given between V and A is not determinative of matters between A and B.51

[64] b) V and A settle. According to the principle in art. 147 al. 2 CO, if one of the solidary debtors is released before the debt is paid, his release does not avail the others except to the extent indicated by the circumstances or the nature of the obligation.

[65] According to the case law of the Federal Court a settlement between the victim and one of a number of solidary debtors only affects the relations between V and the other debtors if this agreement is intended to have an “objective effect”.52

[66] This view is supported by doctrine. According to von Tuhn/Escher53 and Deschenaux/Tercier,54 the victim has no power to modify the relations between the solidary debtors any more than the debtor may escape from his liability to his co-obligees by an agreement with the victim. In this context we may make the following remarks.

[67] The remission of the debt (art. 115 CO) frees the debtor from his obligations. In principle this is purely “subjective”, that is to say, it has no effect except between the debtor concerned and the victim. However, it may be agreed that the remission is “objective”, having effect in favour of all the solidary debtors.

[68] The settlement only works in favour of the other solidary debtors in so far as it benefits the victim, unless the victim had the intention to waive his rights against the other solidary debtors in exchange for some advantage offered by the settling debtor.

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that a person sued for a civil matter had the right to insist that the proceedings be brought in his domicile. These provisions therefore allow the victim with claims for the same loss against multiple defendants to bring them all before the court of his domicile (Y. Donzallaz, Commentaire de la loi fédérale sur les fors en matière civile (2001), art. 7 L. Fors, no. 6, 227. Art. 7 of the L. Fors therefore creates a more flexible rule than that in the Lugano Convention: Y. Donzallaz, ibidem, 228.

51 H. Deschenaux/P. Tercier (supra fn. 37), § 36, no. 52.
52 ATF 126 II 375, c. 2e/bb; ATF 107 II 226, c. 3.
53 A. von Tuhn/A. Escher, Allgemeiner Teil des Schweizerischen Obligationenrechts (3rd edn. 1974), § 90/VII.
54 H. Deschenaux/P. Tercier (supra fn. 37), § 35, no. 17.
Therefore the right of recourse of the settling debtor who has compensated the victim extends to all solidary debtors, including those whom the victim has released by a settlement having a purely "subjective" effect. If therefore V releases A and B compensates A in full, B will have a right of recourse against A for the amount in excess of his (B's) responsibility. It should be noted that, despite the release of the claim, if A fully compensates the victim, he may not found a claim against B on the principles of solidarity but only on the law relating to negotiorum gestio or unjust enrichment.55

7. If, where A and B are both liable to V, A has a contractual right of indemnity against B, does this override any power of the court to apportion liability inter se between A and B? Are there any restrictions upon the enforceability of such contractual indemnities?

The relationship between the co-debtors is not in general the major criterion in the internal apportionment of responsibility. Where there is a contract between A and B and they are both liable to a third party V, the right which A has against B does not prevent A exercising his general right of recourse against B if he has paid more than his share.

Therefore if B, an employee of A, is at fault in causing damage to V, V has a claim against A on the basis of art. 55 CO (vicarious liability) and against B under art. 41 CO. A and B are solidarily liable (imperfect solidarity under art. 51 CO). If V commences an action against A and A pays V's entire loss, A has a recourse claim against B on the basis of art. 51 al. 2 CO (B's liability is "Aquilian", A's is "causal"). In addition, A may sue B on the basis of the relationship between them, the contract of employment (art. 321 CO dealing with the liability of a worker for damage caused to his employer). The two claims are concurrent.

The recourse claim founded on solidarity does not therefore prevent the employer claiming damages on the basis of the contract of employment. Of course the employer may only recover his loss once. Although the rights of action are cumulative, their respective requirements must of course be met. In this respect one may note that it is preferable from the employer's point of view to proceed on the contract claim against his employee because the burden of proof is lower: the fault of the employee is presumed and the employer does not need to prove it, though the employee may attempt to excuse himself. Furthermore, A will have the benefit of a longer prescription period of ten years rather than one (see question 10).

8. Assuming that where A and B are both liable to V, the court has a general power to make an apportionment of liability as between A and B (i.e. inter se) upon what principles is this exercised? Causation? Fault? Risk? Other factors? A combination of those? An unstructured discretion?

To respond clearly to this it is necessary to distinguish between perfect solidarity (art. 50 CO) and simple concurrence of causation (imperfect solidarity – art. 51 CO)

55 In general cf. A. von Tuhr/A. Escher (supra fn. 53), § 90/VI et VII.
[74] *a) Cases of perfect solidity.* Where there is perfect solidarity art. 50 al. 2 CO provides for a right of recourse, although the extent of this is where necessary a matter for the decision of the court. Statute law gives no more detailed indication of how and when one departs from the other rule in art. 148 al. 1 CO) whereby each solidarity co-debtor is to pay an equal share of what is due to the victim.

[75] Where there are two Aquilian liabilities, the case law of the Federal Court apportions the loss according to the gravity of the respective faults. In the case ATF 71 II 107 (c. 3 et 5), an officer and an innkeeper had organized a shooting match and a bullet injured a customer. The Federal Court held the officer 75 per cent responsible as against 25 per cent for the innkeeper.

[76] Doctrine accepts this approach but emphasizes that other circumstances may come into the equation, for example the gain a party seeks to make from his act (“a qui profite le crime”).

[77] In the case of concurrent “objective” liabilities the court will take account of all the circumstances and in particular the risks and the relative faults.

[78] Finally, in case of concurrent contractual liabilities one must first examine the contract to see if it regulates the question of recourse. If it does not, one will take into account the relative contractual fault of the co-debtors.

[79] *b) Cases of imperfect solidity.* In the case of imperfect solidity art. 51 al. 1 CO refers back to art. 50 al. 2 CO. Thus the same rules are applicable and the judge decides both on the existence of the recourse claim and its amount within the limits granted by art. 4 CC. However, art. 51 al. 2 CO establishes (though not in an absolutely binding manner) a “hierarchy”. According to this, a person who is under an Aquilian liability is primarily liable for the damage; then a person with a contractual liability; and in the third “rank” a person with some other legal liability. So where each of three defendants incurs one of these types of liability, the defendant in the third rank has recourse against those in the first two; the person under a contractual liability has recourse only against the person under an Aquilian liability; and the one with an Aquilian liability has no recourse.

[80] The question of how far the court is bound by this order of priority has been the subject of differing decisions of the Federal Court. At first, concerned for the certainty of the law, it was reluctant to depart from this hierarchical regime, but it has allowed the matter to be reopened for reasons of equity. In its most recent decisions the Federal Court has considered that the “concrete circumstances” of a case may justify departure

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57 H. Deschenaux/P. Tercier (supra fn. 37), § 36, no. 27.

58 H. Deschenaux/P. Tercier (supra fn. 37), § 36, no. 29.

59 Art. 4 *Swiss Civil Code* (CC): “Le juge applique les règles du droit et de l’équité lorsque la loi réserve son pouvoir d’appréciation ou qu’elle le charge de prononcer en tenant compte soit des circonstances, soit de justes motifs.”

60 ATF 115 II 24, c. 2; ATF 47 II 408, c. 4.

61 ATF 76 II 387, c. 4.
from the directive in art. 51 al. 2 CO and the apportionment of responsibility according to the relative importance of the matters for which the particular defendants before the court are answerable.\textsuperscript{62}

\textsuperscript{[81]} As far as the doctrine is concerned, opinion has evolved in the same manner as the case law. While at first writers considered the rule to be strict and that the courts should only depart from them with great restraint,\textsuperscript{63} the general opinion today seems to be that art. 51 al. 2 CO should not be regarded as an imperative rule and that the judge is able to apportion the responsibility in some other manner among the persons liable if the circumstances and equity require that.\textsuperscript{64}

9. It is conceivable that although A and B might both be liable to V, yet one might be liable for more than the other in respect of the same injury (e.g. because of a contract between A and V, or because the regime of liability under which A is responsible does not allow for certain types of damages). What effect does this have on contribution rights?

\textsuperscript{[82]} \textit{a) In general.} If A and B are solidarily liable for the same damage the issue of differentiation in their relative responsibilities can only arise in their “internal” relations \textit{inter se}. If solidarity exists in respect of a loss of 80, V can sue either A or B for 80. Only then, at the second stage, is it possible to say that, by reason of the circumstances, A should bear, say, 60 and B 20 in the final accounting between them.\textsuperscript{83} In Swiss law it has long been a controversial question whether a co-tortfeasor may raise “personal” exceptions towards the “external” claim of the victim. The statute law provides no answer. The case law and the doctrine draw a distinction in this regard between cases of perfect (art. 50 CO) and imperfect (art. 51 CO) solidarity.\textsuperscript{84} In the case of perfect solidarity the case law adopts a principle of “absolute” solidarity – personal exceptions cannot be raised against the victim.\textsuperscript{65} This approach has been criticized by most writers,\textsuperscript{66} who believe that the defendant should be allowed to put forward personal exceptions. However, other writers, founding themselves on the principle stated in art. 143 CO, whereby each solitary co-debtor is responsible for the whole loss, agree with the view of the Federal Court.\textsuperscript{67}

\textsuperscript{62} ATF n.p. (not published) of 5 May 1987 dans la cause Michaud et cons. c. Confédération et cons.; ATF 116 II 645, c. 3b.

\textsuperscript{63} R. Brehm (supra fn. 8), art. 51 CO no. 80, referring to the former jurisprudence.

\textsuperscript{64} See especially E.W. Stark, Zwei neuere Entscheidungen des Bundesgerichtes zur Regressordnung von Art. 51 Abs. 2 OR, [1992] Revue de la Société des juristes bernois (RSJB) 128, 221 et seq.; H. Rey (supra fn. 37), no. 1517; I. Schwenzer (supra fn. 56), no. 88.32; H. Honsell, Schweizerisches Haftpflichtrecht (3rd edn. 2000), § 11 no. 34 and the references cited; K. Oftinger/E.W. Stark (supra fn. 8), § 10, no. 50 (fn. 76); A. Keller (supra fn. 56), 144.

\textsuperscript{65} ATF 97 II 403; ATF 57 II 28; ATF 55 II 310.


[85] In the case of imperfect solidarity the Federal Court in principle also follows the approach above and rejects the admission of personal exceptions. However, in certain decisions it has distanced itself from this view and admitted such exceptions as the low degree of fault by a defendant. 68 However, the reasoning behind these decisions remains obscure. Doctrine is also divided on imperfect solidarity. The majority of writers, however, favour an “individualized” assessment of liability. 69

[86] The draft for the revision and unification of the law of tort comes down in favour of “relative” solidarity, with the possibility of the solidary co-debtor being able to raise on the external plane exceptions applicable only to him. This approach would apply to all cases of solidarity, since the draft would abolish all distinction between perfect and imperfect solidarity. Thus art. 53 of the draft provides, under the heading “Concurrent liability” that “when several persons are responsible for damage suffered by another they are liable on a solidary basis. For each of them, solidarity extends to the amount of compensation which would apply if he were the only person liable.”

[87] The authors of the draft justify their approach mainly on the basis of the absence of any reason to disadvantage a defendant simply because there is a solidary liability; the contrary view would amount to saying that because someone is answerable along with others, he must bear liability for the acts of those others. Furthermore, it is wrong to think that recourse proceedings provide sufficient protection for the solidary co-debtor, who, on the basis of absolute solidarity, in the last resort bears the risk of the insolvency of other persons liable. 70 These arguments are of course criticized by those who support an extensive protection for the person injured. 71

[88] The controversy about “absolute” and “relative” solidarity is almost as old as our Code of Obligations. There is an equivalence in the arguments of each side in so far as they involve the choice between protecting the victim and inflicting a disadvantage on the defendant. However, there may be another way of looking at the matter which will avoid confusion. This may be established progressively. It is important to remember that when we have to deal with a case of damage caused by several persons it is necessary first of all to consider what would be the liability of each one if he had acted alone. It is only at the second stage, when the liability of the individuals has been determined that we can decide whether or not it is a case of solidarity. That must apply not only to the case where the responsibility of one defendant would be excluded but also to that where his responsibility is significantly less than that of others.

[89] Let us assume that A and B are implicated in an accident which causes damage of 100 to V. Examination of the facts enables us to say that A, who is guilty of gross negligence, is responsible to the extent of 90, whereas B is only responsible to the extent of 30, his fault being less (art. 44 al. 2 CO allows the court to reduce damages when the loss has not been caused intentionally nor by grave negligence). Once that is determined,

68 ATF 97 II 339, c. 3; ATF 93 II 317, c. 2e/bb; ATF 89 II 118, c. 5a.
69 K. Oltinger/E.W. Stark (supra fn. 8), § 10, no. 33; H. Deschenaux/P. Tercier (supra fn. 37), § 35, no. 21.
we may say that solidarity exists as to 30. Chronologically, the invocation of matters personal to the individual defendant precedes the determination of the issue of solidarity.

We may describe this concept as “solidarity of liabilities”. However, because it is the liability of each defendant which is the basis of the solidarity among them as a group, we must admit some exceptions, which we may call “solidarity of situation” for cases in which it is not so much individual liability which leads to solidarity but membership of a group or participation in bringing about an event – for example membership of the board of a company or participation in a brawl.

b) The preferential right of the victim. When one of the persons subject to solidarity liability is an insurer (imperfect solidarity, art. 51 CO) the law grants it the right of subrogation to the rights the insured has against the wrongdoer to the extent of the benefits payable by law (cf. art. 72 al. 1 LPGA) or by the contract of insurance (cf. art. 72 al. 1 LCA). Under this doctrine the insurer takes over, to the extent of the payment, the rights of the victim of the tort, which represents, from the point of view of the defendant, a change of creditor. The object of subrogation is to prevent over-compensation of the victim, who cannot recover from the defendant except for his “direct” damage, that is to say, damage which is not covered by the insurance.

The preferential right of the victim lies in setting a limit in his favour of subrogation by virtue of the principle nemo subrogat contra se. We give priority to the victim’s claim against the defendant in order to allow recovery of the amount of his loss which is not covered by the insurance (direct damage) notwithstanding a possible concurrent fault on his part (cf. art. 42 al. 1 LAA and art. 88 LCR). The purpose is to allow the victim full compensation for his loss. This preferential right of the victim has been described as his “prerogative to proceed against the wrongdoer until he has been compensated for the whole of his loss, taking account of payments by the insurer, the latter only having the right of recourse subsequently, at the risk of not receiving reimbursement of all of his payments.” The insurer may not therefore proceed against the wrongdoer “except in so

72 Art. 72 al. 1 Loi fédérale sur la partie générale du droit des assurances sociales (General Part of the Social Security Act, LPGA): “Dès la survenance de l’événement dommageable, l’assuré est subrogé, jusqu’à concurrence des prestations légales, aux droits de l’assuré et de ses survivants contre tout tiers responsable.”
74 Art. 42 al. 1 Loi fédérale sur l’assurance-accidents (Accident Insurance Act, LAA): “L’assureur n’est subrogé aux droits de l’assuré et de ses survivants que dans la mesure où les prestations qu’il alloue, jointes à l’indemnité due par le tiers, excèdent le dommage.”
75 Art. 88 LCR: “Lorsqu’un lésé n’est pas couvert complètement par des prestations d’assurance, un assureur ne peut faire valoir son droit de recours contre la personne civillement responsable ou l’assurance-responsabilité civile de cette dernière que si le lésé n’en subit aucun préjudice.”
77 Definition from R. Bussy/B. Rusconi, Code suisse de la circulation routière commentaire (3rd edn. 1996), art. 88 LCR no. 2.2, 674, cited by D. Vallat (supra fn. 76), 467.
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far as the victim has been compensated for all his loss”. Brehm argues for the equal application of the preferential right of the victim outside subrogation, in cases of simple recourse.79

[93] Examples: aa) V suffers loss of 100. He is contributorily negligent to the extent of 30. He therefore has a civil claim against A for 70. B, the insurer, pays V 30 by virtue of a legal requirement or a contract. Without the preferential right of the victim, V could only claim 40 against A (the sum being received being offset against the civil claim), receiving 70 in total. The preferential right enables V to recover the whole of his loss up to the amount of the civil claim. He may therefore sue A for 70 (his direct damage). When A has paid the insurer B may not make any further claim on him (recourse action).

[94] bb) V suffers loss of 100. He is contributorily negligent to the extent of 20. He therefore has a civil claim against A for 80. B, the insurer, pays V 60 by virtue of a legal requirement or a contract. Without the preferential right of the victim, V could only claim 20 against A (the sum being received being offset against the civil claim), receiving 80 in total. The preferential right enables V to recover the whole of his loss. He may therefore sue A for 40 (his direct damage). A has paid 40 of the 80 which he owed. The insurer B may therefore recover part of what he paid V, namely 40 of 60 with a shortfall of 20. V and B each has a claim against A: V for 40 (direct damage), B for the 60 which he has paid V (recourse action). We give priority to V, who recovers the 40 due under the civil claim. B would wish to recover 60, but A having already paid V 40, the insurer cannot get more than 40 (= 80 – 40).

[95] Splitting the claim. Where the insured has committed gross negligence it is not equitable to throw the loss on the insurer while the insured recovers in full. For this reason art. 73 al. 2 LPGA (Federal Law on the general part of social insurance) makes some modifications to the system of the preferential right of the victim and establishes claim-splitting. The rights of the insured pass to the insurer in proportion to the relative amounts of the insurance payments and the damage.80

[96] Example: aa) V suffers a loss of 100. He is contributorily negligent to the extent of 30. He has a civil claim against A for 70. By virtue of a legal requirement or a contract, the insurer should pay V 50; however, because of the gross negligence, the insurer decides to reduce the amount to 30. The insurer has recourse as far as the non-reduced payments of the insurance joined with the amount of the sum due by A for the same periods exceed the amount of the damage done (50 + 70 – 100 = 20). The amount of his recovery is therefore 20, leaving him with a shortfall of 10 (30 – 20). V may proceed against A for 50 (= 70 – 20) and therefore in total recovers 80 (= 30 + 50) leaving him with a shortfall of 20.

78 H. Deschenaux/P. Tercier (supra fn. 37), § 39, no. 24; H. Rey (supra fn. 37), no. 1569; A. Keller (supra fn. 56), 191 et seq.; R. Brehm (supra fn. 8), art. 51 CO no. 136 et seq.; K. Oftinger/E.W. Stark (supra fn. 8), § 11, no. 202 et seq.

79 R. Brehm (supra fn. 8), art. 51 CO no. 139.

80 Art. 73 al. 2 LPGA: “Toutefois, si l'assureur a réduit ses prestations au sens de l'art. 21, al. 1 ou 2, les droits de l'assuré ou de ses survivants passent à l'assureur dans la mesure où les prestations non réduites, jointes à la réparation due pour la même période par le tiers, excèdent le montant du dommage.”
10. Are there any special features of the law of limitation (prescription) in relation to contribution claims?

In this context the delicate questions are those of the commencement of the period and its duration. The statute law is uninformative on these points.

a) The commencement of the period. For 35 years the Federal Court held that in the recourse claim time ran from the same time as it ran in the victim’s claim against the wrongdoer. The result might be that the recourse action might be time-barred before it was born. These cases were criticised by the doctrine, which pointed out that logically time could not begin to run before the recourse claimant could exercise his right, that is to say, before it became enforceable.81

These critics persuaded the Federal Court to reconsider its position.82 Now it is generally accepted in the case law as well as the greater part of the doctrine, on the one hand that the recourse action may not be time-barred before it existed and on the other hand that the right of recourse comes into existence when a co-defendant pays a sum greater than his share.83

A minority of writers consider that the time does not run for the recourse action until the co-defendant who has paid knows that he has such a claim.84

It is important, however, in the context of prescription, to distinguish the recourse action from subrogation. In the case of subrogation the subrogee takes over the right of the victim (art. 49 CO) as it stands when the subrogation takes effect. That means that the subrogation does not interrupt the period (which runs from the time the victim’s claim arises) and the subrogee must be content with the time which is left on the victim’s claim.85

b) Length of the period. Traditionally, doctrine and case law held that there were two possible periods: first, the period attaching to the claim of the victim against the wrongdoer (now the subject of the recourse action); secondly, the general period under art. 127 CO, following the idea that a recourse right is an independent one amounting to an ordinary civil claim.86 Nowadays the first solution is favoured by the case law87 and the doctrine.88 The period of prescription applicable to the recourse action is therefore that applicable to the claim of the victim against the solidary wrongdoers.

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81 H. Bugnon, L’action récursoire en matière de concours de responsabilités civiles (1982), 143.
82 ATF 89 II 118, c. 3 et ATF 55 II 118, c. 5.
83 Principle confirmed in the context of art. 51 CO by ATF 127 III 257, c. 2b, cmt. W. Fellmann, [2002] REAS, 113 et seq.; R. Brehm (supra fn. 8), art. 51 CO no. 141; K. Oftringer/E.W. Stark (supra fn. 8), § 10, no. 82; H. Bugnon (supra fn. 81), 143; L. Schwenger (supra fn. 56), no. 88.39; A. Keller (supra fn. 56), 252; H. Deschenaux/P. Tercier (supra fn. 37), § 36, no. 55 et seq.
84 P. Gauch/W.R. Schlupe/J. Schmid/H. Rey (supra fn. 30), no. 3871, opinion rejected by H. Rey (supra fn. 37), no. 1718.
85 R. Brehm (supra fn. 8), art. 50 CO no. 63; H. Rey (supra fn. 37), no. 1713.
86 H. Bugnon (supra fn. 81), 140 et seq.
87 ATF 77 II 243, c. 3; ATF 55 II 118, c. 3.
88 K. Oftringer/E.W. Stark (supra fn. 8), § 10, no. 82; P. Gauch/W.R. Schlupe/J. Schmid/H. Rey (supra fn. 30), no. 3871; H. Rey (supra fn. 37), no. 1717; L. Schwenger (supra fn. 56), no. 88.39.
Spiro has argued for the necessity to place the commencement and the duration of the period of prescription on the same basis. He has therefore suggested, in the light of the nature of the link between those co-wrongdoers who have paid and those who have not, that the recourse action should be treated for prescription purposes under the rules applicable to *negotiorum gestio* or unjust enrichment, that is to say, art. 67 CO. However, this opinion is not established.

C. Cases

1. V is a farmer growing an experimental genetically modified crop. A is a member of an activist environmental group dedicated to disrupting these experiments. While 20 other members of the group enter V’s field and rip up the crop, A stands at the roadside and gives a press interview about the action being taken.

A, like the other 20 members of the group, has taken an active part in the organization and execution of something presenting all the elements of at least two crimes under the Swiss Penal Code: damage to property (art. 144 CP) and invasion of the domicile (art. 186 CP). We should note that the collaboration of the 21 members of the group and the intentional nature of their acts is not in doubt.

The exact role of A in the commission of these crimes is not clear but it seems that he is a principal offender or at least an accomplice, degrees of participation covered by the Penal Code (art. 25). In any event, A by his individual behaviour has infringed various rules forbidding infringement of the property rights of others. In the civil law, this conduct requires him to make compensation for the damage caused (art. 41 CO, liability for unlawful acts). The fact that A has not personally participated in uprooting the crops is irrelevant: A is still the doer of an unlawful act in the sense of art. 41 CO and is answerable for the damage thereby caused to V.

The acts of those who uprooted the crops are to be looked at in terms of “solidarity of situation” (see no. [90] above) as well as the solidarity of liabilities under art. 50 al. 1 CO.

There is no doubt that the conduct of the 21 activists, taken individually, fulfils the requirements of unlawfulness in art. 41 CO. Therefore, the damage suffered by V is imputable on the basis of art. 41 CO to each of them.

However, it seems clear that none of the participants, taken individually, could have caused all of V’s damage. The implementation of action on this scale was rendered possible by the participation of all of them. This state of affairs therefore amounts to a case of solidarity of situation – the 21 authors are solidarily liable to compensate for the damage under art. 50 al. 1 CO (perfect solidarity) because they have taken part in a

89 See H. Bugnon (supra fn. 81), 141 et seq., especially 144.
90 See H. Deschenaux/P. Tercier (supra fn. 37), § 36, no. 56 and R. Brehm (supra fn. 8), art. 51 CO no. 143.
collective enterprise causing damage to V. Therefore, from an external point of view each of the 21 persons is liable to compensate V for the whole damage, any payment by one releasing the others to the extent of that payment (art. 144 al. 2 CO). From an internal point of view it will be for the judge to apportion the amount of compensation among them (art. 50 al. 2 CO) in proportion to their respective faults (see no. [74] above) and if one has paid more than his share on this basis he will have a recourse action against the others for the excess. This solution is supported by the case law and the greater part of the doctrine.

[109] On an approach based on solidarity of liabilities, on the other hand, it is the individual liability of each which is the basis of the solidarity of all and the rules of solidarity under art. 50 al. 1 CO do not apply beyond the extent to which each would have been liable acting as an individual. This approach does not allow for the fact that it is precisely the participation of the 21 activists in the attack on V’s crop which enables it to be carried out in full.

2. Unlike asbestosis, mesothelioma is triggered by a single exposure to the irritant but the disease does not become apparent for a long time, perhaps 30 years. V has developed mesothelioma and the evidence is that he was exposed to the irritant over a period of 30 years by A, B and C, for 10 years respectively and successively. B is insolvent and uninsured.

[110] This case involves the problem of uncertain causation. The illness of V shows merely that one of the three defendants might have been the cause but it is impossible to say which.

[111] This has the following consequences for the purposes of solidarity; There is one damage, that resulting from the illness of V. There are three persons who might have caused that. In order to impose a solidary liability on them it is necessary that each of them meets the requirements of liability for an unlawful act (art. 41 CO) causing the harm suffered by V.

[112] Yet the problem, in relation to all three, arises in connexion with the establishment of a link of causation in fact between their behaviour and the injury. There is no doubt that their exposure of the victim to the toxic agent was sufficient to produce the harm he suffered but it seems that it is scientifically impossible to determine which one did so.

[113] The burden of proof under art. 41 CO is on the victim and since he appears unable to discharge it, his claim will fail.

[114] This result seems unsatisfactory. Swiss law does not recognize a system of proportionate liability such as is referred to in the questionnaire. Possibly, however, the case might be analysed according to the theory of “loss of a chance” now being discussed in the doctrine.91

[115] It should be noted that in any event in view of the long period of time involved there may be a serious prescription problem. Under art. 60 al. 1 CO a claim for damages

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is time-barred ten years from the day when the damage occurred”. By the weight of the doctrine\textsuperscript{92} and the case law\textsuperscript{93} this is to be understood as meaning the date of the last act of the defendant which caused the damage, that is to say in this case the last exposure to the agent causing the illness and not the development of the illness. As a result, each exposure becomes time-barred ten years after it takes place under art. 60 al. 1 CO.

\[116\] If we suppose that the illness developed as a result of one exposure and that it was the first, the causal link between the exposure by A and the damage to V will be established. However, the question of solidarity liability among A, B and C does not arise on this hypothesis because the act of A alone has caused the damage. However, since that exposure took place more than 30 years ago V’s claim will be time-barred (art. 60 al. 1 CO).

3. Deafness is a progressive condition, i.e. hearing is damaged by noise trauma and further damaged by further trauma. V is 80 per cent deaf after exposure to excessive noise by A, B and C over 20 years for 5, 5 and 10 years respectively and successively. B is insolvent and uninsured.

\[117\] Contrary to the preceding case, the causal link between the acts of A, B and C and the damage suffered by V seems to present no problem. The deafness progresses with each period of exposure and it seems possible to determine to what extent each wrongdoer has contributed to the resulting 80 per cent deafness.

\[118\] Each period of exposure increases the severity of the handicap, though it will probably be related not merely to the duration of the exposure but to its intensity. Since no information is given on the latter point, we will presume that it is constant. In any event, even if that is not so, it will not affect the overall amount recoverable by V, only its division. Once it is possible for an expert to identify and separate the “sections” or parts of the damage successively, individually and independently caused by A, B and C we can no longer speak of a single damage caused by all of them.\textsuperscript{94} In so far as there is no relationship of causality between the act of A and the result of the behaviour of B and C and vice versa (cf. question 4 below) the final damage suffered by V is only an accumulation of successive and independent losses.

\[119\] Since the condition of the same damage is not fulfilled, there is no solidarity liability between A, B and C. V must sue each of them in accordance with their relative contribution to his loss, for example according to the periods of exposure, say one quarter, one quarter and one half of the total loss.

\textsuperscript{92} Cf. notably R. Brehm (supra fn. 8), art. 60 CO no. 64.

\textsuperscript{93} ATF 106 II 134 in [1980] JdT I 573 et seq.

\textsuperscript{94} Cf. ATF 109 II 304 “usine d’aluminium de Martigny”.

4. V has developed asbestosis as a result of exposure to dust. Assume that both A (the person carrying on the activity) and B (the occupier of the premises in question) are liable for this. V begins proceedings against A and accepts € 200,000 in “full and final settlement of all or any claims”. V soon dies from the disease and his widow, W, brings proceedings against B in respect of the death. It appears that W’s dependency exceeds the sum recovered by V – i.e. if V had not sued and the first claim had been made by W, she would have recovered € 300,000.

[120] A and B are solidarily liable under art. 51 al. 1 CO. V has made a final settlement with A for € 200,000.
[121] After V’s death his widow W sues B. She has suffered loss of support from the death of her husband. This form of loss is recognized in Swiss law (art. 45 al. 3 CO) and is an exception to the general proposition that only the direct damage suffered by the victim of the wrong (V in this case) is actionable. W’s loss is “reflex” damage, that is to say damage suffered by a third person on account of his relationship with the victim. This is W’s own loss and is to be distinguished from that suffered by V.
[122] The issue concerns the effect of the settlement between V and A: how far does it affect the position between B and W?
[123] At the outset we should note that this is a case of two separate losses suffered by V and W. A and B are solidarily liable (art. 51 CO) in one case to V (art. 41 CO) and in the other to W (art. 45 al. 3 CO).
[124] Regarding V’s damage, the scope of the agreement between A and V must be considered in the light of art. 147 al. 2 CO. There is nothing to suggest that this has any effect except between A and V (save as to the right of recourse in the event of overpayment). V may look to B for the amount of his loss in excess of his settlement with A. The principle of “relativity of agreements”, applied in the context of solidarity, means that there is no way in which B, who is not a party to the agreement, may invoke it to his advantage.
[125] Nor was W a party to the transaction between V and A and it has no effect on her.95 If W has suffered an independent loss in the form of loss of support of the deceased she has an independent claim to compensation under art. 45 al. 3 CO. A and B are therefore solidarily liable (art. 51 al. 1 CO) for this.

5. V lends € 1 million to A. In taking this decision V was influenced by considered advice from B about A’s creditworthiness. This advice was based on a negligent assessment. A defaults on the loan and at the time is not thought worth suing. V accepts € 500,000 in full settlement of his claim against B. A year later A comes into substantial assets. Both B and V are interested in pursuing A.

[126] V has not obtained timely repayment of his loan. He has a claim for that against A but B is also answerable for incorrect advice. For the lost interest resulting from the

95 R. Brehm (supra fn. 8), art. 45 CO no. 32.
breach of the contract of loan A and B are solidarily liable on two different bases, on the one hand for breach of contract and on the other for incorrect advice (unlawfulness, liability founded on reliance on an assumption of responsibility) under art. 51 al. 1 CO.

[127] As far as the capital of the loan is concerned, there is no question of solidarity. V has his claim for repayment against A. However, we are told that V and B settle so that B pays half the sum due from A.

[128] If A comes into money, V has alternative claims:

[129] First, for the recovery of the one million loan from A. On this basis B may seek recovery of the half million paid to V on the basis of unjust enrichment (art. 62 CO).

[130] Alternatively, to recover from A the balance of €500,000. That will enable B to claim on the basis of unjust enrichment against A (art. 62 CO).

6. V is injured in an accident caused by the activity of A and B. This activity carries liability without fault for the type of damage suffered by V. A was free of all blame but both B and V were drunk.

[131] A and B are each liable on an "objective" basis (without fault) for the damage suffered by V. Their liability is solidary, either under art. 51 al. 1 CO or art. 60 LCR.

[132] B is guilty of gross negligence (an additional fault) in acting under the influence of drink and V commits a similar fault. The two faults are not exclusive. A commits no fault.

[133] The serious contributory fault of V is a factor for the reduction of damages (art. 44 al. 1 CO) and from the external point of view may be raised against him by A and by B (common exception).

[134] From an internal point of view B is answerable for gross negligence, while A bears only a strict statutory liability (art. 51 al. 2 CO). Therefore B is the person who should first bear the liability for V’s loss (see question B8) A bearing liability only in the last resort. At the end of the day it is for the judge to rule on internal rights of recourse between A and B, taking account of these principles (art. 51 al. 1 and 2 CO, art. 50 al. 2 CO).

7. V is injured by the combined acts/activities of A and B. V sues A and fails (a) because he fails to prove an element of liability or (b) because he omitted some necessary procedural step. V then sues B (assuming he can do so) and recovers judgment against B for the whole loss. B seeks contribution from A.

[135] If V is the victim of a joint unlawful activity by A and B (both being liable under art. 41 CO for example) they will be solidarily liable under art. 50 al. 1 CO (perfect solidarity).

[136] V sues A alone, loses and then sues B and obtains judgment. In Swiss law that means that B was never a party to the suit between V and A, either because he was never sued or because he never intervened (two possible procedural events, see question B.5). In that event, the judgment between V and A, whatever its nature, has no effect on B. A judgment affects only parties to the proceedings, something which B is not.
[137] If B seeks to exercise his internal right of recourse (art. 50 al. 2 CO) against A, the latter will not be able to escape this by pleading *ne bis in idem* because that is not strictly applicable to B’s claim. That is so even though A has a prior judgment absolving him of liability to V.