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# Recent Developments in the Law of Joint and Several Liability and the Impact of Plaintiff's Employer's Fault

Edward J. Kionka\*

## I. JOINT AND SEVERAL ("IN SOLIDO") LIABILITY—AN OVERVIEW

Until recently, joint and several liability was a very simple concept, nationally and in Louisiana. The issue arises when a plaintiff can join (or sue successively) multiple tortfeasors, all of whom are legally liable to the plaintiff for an indivisible harm.<sup>1</sup>

*Example:* Mutt is filling his gasoline tank at a service station, and he negligently allows a large quantity of gasoline to overflow onto the ground, creating a large puddle. Mutt drives off. Jeff, another customer, walking to his car, negligently flicks a cigarette into the gasoline puddle, causing it to explode, injuring Peter, a service station employee.

Peter can join Mutt and Jeff in a single lawsuit<sup>2</sup> and obtain judgment against both.<sup>3</sup> Assume Peter is awarded \$100,000. Under the traditional version of joint and several liability, Peter can collect the \$100,000 from either Mutt or Jeff or both in any combination he wants, since they are jointly and severally liable.<sup>4</sup> Note that in this hypothetical, Mutt and Jeff are complete strangers; their negligence was independent and successive in time. But they are still "joint" tortfeasors, because their negligence combined to produce a single, indivisible harm to Peter.<sup>5</sup>

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\* Professor of Law, Southern Illinois University School of Law. This article has been adapted from materials prepared for, and presented at, the Louisiana Judicial College, New Orleans, December 10, 1993. I am grateful to the LJC for permission to adapt and republish in this form. Thanks also to SIU Law Professor Patrick Kelley for his helpful review and comments, and to SIU law student Sharon Shanahan for her research assistance.

1. This analysis excludes liability for intentional torts (assault, battery, false imprisonment, etc.) and liability for acts in concert, in the nature of a civil conspiracy. In these situations, different rules of joint and several liability and contribution often apply. See, e.g., La. Civ. Code art. 2324(A). See also Thomas C. Galligan, Jr., *Article 2324: The Discombobulating State of Solidarity in Post Tort Reform Louisiana*, 54 La. L. Rev. 551 (1994).

2. Ordinarily, a plaintiff is not required to sue all joint tortfeasors in a single action. *Huguet v. Louisiana Power & Light Co.*, 196 La. 771, 774, 200 So. 141, 142 (1941); *Thomas v. Doe*, 542 So. 2d 740, 741 (La. App. 4th Cir. 1989). However, under modern rules of comparative fault and modified solidary liability, such joinder has become a practical necessity. See Martha Chamallas, *Comparative Fault and Multiple Party Litigation in Louisiana: A Sampling of the Problems*, 40 La. L. Rev. 373, 388-89 (1980).

3. W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 47 (5th ed. 1984).

4. *Id.*

5. Solidary liability also extends to the liability of a tortfeasor for subsequent negligence in

During the past two decades, tort law in the United States has moved rapidly from contributory negligence as a complete bar to some form of comparative fault, where plaintiff's negligence only reduces his damages,<sup>6</sup> and from a rule of no contribution among joint tortfeasors to either pro rata (equal) or pro tanto (comparative) contribution.<sup>7</sup>

With these changes, it has been argued that pure joint and several liability is no longer just—a plaintiff who can recover even though he is at fault should have to share some of the risks with which negligent defendants have been saddled on the theory that they were “wrongdoers” entitled to less protection under the law.

The primary function of joint and several liability is to place the risk of uncollectibility on the defendants. If any defendant found liable to the plaintiff is uninsured or underinsured and otherwise unable to pay a share of the judgment, the plaintiff can collect his judgment from any combination of the other liable defendants, leaving each to attempt to recoup in a contribution claim the amount paid in excess of his share.<sup>8</sup> Several liability (each defendant is liable to the plaintiff only for its proportional share of the plaintiff's judgment) shifts the risk of uncollectibility to the plaintiff.

*Example:* Assume that in the preceding hypothetical, the jury assesses fault as follows: Mutt 50%; Jeff 50%; verdict for \$100,000. Jeff is uninsured and insolvent. If pure several liability is applied, Peter can only collect \$50,000 from Mutt, leaving him unable to collect the remaining \$50,000.

Secondarily, several liability may also shift to the plaintiff the cost of the proportional share of tortfeasors that the plaintiff cannot sue, or with whom the plaintiff may have settled. This depends on the form of several liability adopted.

*Example:* Assume that in the preceding hypothetical, the state was also negligent because it failed to require gas station owners to install automatic fuel shutoff devices. However, the state is immune from negligence liability for failing to enforce the law. Assume further that

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treatment, and hence the original tortfeasor and the negligent physician may be treated the same as joint tortfeasors for purposes of this analysis. *Lambert v. United States Fidelity & Guar. Co.*, 629 So. 2d 328, 329 (La. 1993).

6. Only four states—Alabama, Maryland, North Carolina, and Virginia—still adhere to the rule that a plaintiff's contributory negligence is a complete bar to recovery. In most comparative negligence jurisdictions, the law of comparative negligence is now codified. See generally Keeton et al., *supra* note 3, § 67.

7. Keeton et al., *supra* note 3, § 50; M. Kevin Queenan, Comment, *Civil Code Article 2324: A Broken Path to Limited Solidary Liability*, 49 La. L. Rev. 1351, 1364-65 (1989).

8. An interesting issue, beyond the scope of this article, is the effect of Louisiana Civil Code article 1806 following the recent amendments to Article 2324(B). Article 1806 provides in part that “[a] loss arising from the insolvency of a solidary obligor must be borne by the other solidary obligors in proportion to their portion.”

the jury assesses fault as follows: Mutt 50%; Jeff 25%; state 25%; verdict for \$100,000. If pure several liability is applied, Peter can only collect \$50,000 from Mutt and \$25,000 from Jeff, leaving him unable to collect the remaining \$25,000.

Pure several liability obviates the need for contribution; no tortfeasor ever pays more than its proportional share of the plaintiff's recoverable damages.

## II. JOINT AND SEVERAL VS. SEVERAL LIABILITY: THE NATIONAL PICTURE

Four states still do not have comparative fault (Alabama, Maryland, North Carolina, and Virginia), and they retain joint and several liability. Of the forty-six states that have some form of comparative fault, ten states still have the pure form of joint and several liability,<sup>9</sup> and twelve states now have pure several liability.<sup>10</sup> The remaining twenty-four states, including Louisiana, have some mixture of joint and several and several liability.<sup>11</sup> These statutory schemes can be quite complex. The common thread, however, is that they all represent a compromise position between the two extremes—pure joint and several liability on the one hand and pure several liability on the other. Louisiana is an excellent example of this compromise, as it attempts to preserve some aspects of both.<sup>12</sup>

## III. JOINT AND SEVERAL LIABILITY IN LOUISIANA—CIVIL CODE ARTICLE 2324(B)

*Touchard v. Williams*,<sup>13</sup> decided by the Louisiana Supreme Court in 1993, contains a thorough discussion of the Louisiana law of joint and several liability

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9. Arkansas, Delaware, Maine, Massachusetts, Michigan, Pennsylvania, Rhode Island, South Carolina, West Virginia, and Wisconsin. See Appendix, Part A.

10. Alaska, Arizona, Colorado, Idaho, Indiana, Kansas, Kentucky, North Dakota, Tennessee, Utah, Vermont, and Wyoming. See Appendix, Part B.

11. See Appendix, Part C.

12. For general discussions of the modern doctrine of joint and several liability, see, e.g., Richard W. Wright, *The Logic and Fairness of Joint and Several Liability*, 23 Mem. St. U. L. Rev. 45 (1992); Aaron D. Twerski, *The Joint Tortfeasor Legislative Revolt: A Rational Response to the Critics*, 22 U.C. Davis L. Rev. 1125 (1989); Richard W. Wright, *Throwing Out the Baby With the Bathwater: A Reply to Professor Twerski*, 22 U.C. Davis L. Rev. 1147 (1989); Aaron D. Twerski, *The Baby Swallowed the Bathwater: A Rejoinder to Professor Wright*, 22 U.C. Davis L. Rev. 1161 (1989); Richard W. Wright, *Allocating Liability Among Multiple Responsible Causes: A Principled Defense of Joint and Several Liability for Actual Harm and Risk Exposure*, 21 U.C. Davis L. Rev. 1141 (1988).

Mississippi in 1989 adopted a statute modifying joint and several liability quite similar to Louisiana's Article 2324, and therefore an article discussing the Mississippi statute is also instructive. H. Wesley Williams III, *1989 Tort "Reform" in Mississippi: Modification of Joint and Several Liability and the Adoption of Comparative Contribution*, 13 Miss. C. L. Rev. 133 (1992).

13. 617 So. 2d 885 (La. 1993).

prior to 1987.<sup>14</sup> Essentially, it was the pure form of joint and several liability, which in Louisiana is called liability "*in solido*" or solidary liability. As the court noted, this has been a part of Louisiana's civil-law tradition for over 150 years. However, the statute had been amended in 1979 to provide that if the plaintiff's fault was greater than that of a particular tortfeasor, that tortfeasor's liability to the plaintiff was limited to his proportional share. This was the first modification in the direction of several liability.

In 1987, the Louisiana Legislature amended Civil Code article 2324(B) to modify the doctrine further.<sup>15</sup> One proposal, which was defeated, would have imposed pure several liability. Instead, the Legislature adopted an intermediate position. Article 2324(B) now reads, in relevant part (emphasis added to highlight the key language):

[Except in the case of willful torts,] *liability for damages caused by two or more persons shall be solidary only to the extent necessary for the person suffering injury, death, or loss to recover fifty percent of his recoverable damages*; however, when the amount of recovery has been reduced in accordance with [Article 2323, plaintiff's contributory negligence], a judgment debtor shall not be liable for more than the degree of his fault to a judgment creditor to whom a greater degree of fault has been attributed. Under the provisions of this Article, all parties shall enjoy their respective rights of indemnity and contribution. *Except as described in Paragraph A of this article, or as otherwise provided by law, and hereinabove, the liability for damages caused by two or more persons shall be a joint, divisible obligation, and a joint tortfeasor shall not be solidarily liable with any other person for damages attributable to the fault of such other person, including the person suffering injury, death, or loss, regardless of such other person's insolvency, ability to pay, degree of fault, or immunity by statute or otherwise.*

#### A. *Fifty Percent Of What?*

The first question that arises under this section is, how is the 50% limitation to be calculated? Does it mean that:

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14. For additional discussions of the issues raised in this article, and others, see David W. Robertson, *The Louisiana Law of Comparative Fault: A Decade of Progress*, 1 Louisiana Practice Series (LSU Law Center 1991); Queenan, *supra* note 7; Donald C. Massey & A. Kirk Gasperecz, *Employers Beware: The Free Ride May Be Over*, 33 Loy. L. Rev. 947 (1988); Chamallas, *supra* note 2 (in large part out of date, but contains helpful discussions of various issues, and the parts dealing with contribution are still mostly current).

15. See Queenan, *supra* note 7.

1. Once the plaintiff has collected 50% of his damages, from whatever source(s), the joint and several liability of all defendants is extinguished; or
2. Plaintiff can collect as much as he can from any of the defendants, so long as no one defendant is required to pay more than 50% of the judgment?

The facts of the *Touchard* case present an excellent illustration. Mary Touchard was injured in a four-vehicle accident. The vehicles were being operated by Williams (Touchard was a passenger in the Williams auto), Minter, Causey, and Lege. At trial, the jury assessed Touchard's damages at \$100,000 and found fault as follows: Williams 63%; Causey 30%; and Lege 7%. (Touchard was not found to be at fault.) After trial, Williams' insurer paid \$25,000; Causey's insurer paid \$30,000; and Lege's insurer paid \$7,000. Thus, the situation was then as follows:

<i>Defendant</i>	<i>% at fault</i>	<i>Amount Paid</i>
Williams	63%	\$25,000
Causey	30%	\$30,000
Lege	7%	<u>\$ 7,000</u>
	Total paid	\$62,000

Defendants argued, and the trial court and Court of Appeal, Third Circuit, agreed<sup>16</sup> that under Article 2324(B) as amended, the defendants *collectively* were only solidarily liable to the extent necessary for the plaintiff to recover 50% of her "recoverable" damages (here, \$100,000). Since Touchard had in fact collected more than 50% of her damages (i.e. \$62,000), no defendant was required to contribute more than his proportional share.<sup>17</sup> Thus, plaintiff could not seek any additional sums from Causey or Lege. Note that this is exactly the situation that joint and several liability was intended to cover. Assuming that Causey or Lege had additional insurance coverage or assets, either or both could have been required to make up the \$38,000 shortfall.

On appeal, the Supreme Court of Louisiana disagreed with the Third Circuit Court of Appeal's analysis of Article 2324(B).<sup>18</sup> The court reviewed the history of solidary liability in Louisiana, finding that the policy behind the rule had long and strong support. The court reasoned that if the statute as amended is ambiguous (as it clearly is) and requires interpretation, any change from the long-standing solidary liability should be narrowly construed.<sup>19</sup> In addition, the

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16. *Touchard v. Williams*, 606 So. 2d 927 (La. App. 3d Cir. 1992), *aff'd in part & rev'd in part*, 617 So. 2d 885 (La. 1993).

17. We may infer that, while *theoretically* plaintiff could have collected an additional \$38,000 from Williams, Williams' policy limits were \$25,000 and therefore nothing more was available from Williams' insurer, and Touchard did not seek or was unable to collect from Williams individually.

18. *Touchard v. Williams*, 617 So. 2d 885 (La. 1993).

19. 617 So. 2d at 892.

court noted that a construction capping the defendants' *collective* liability at 50% could result in delaying the entry of final judgment for an indefinite time, since the amount for which each defendant is liable would not be known until the plaintiff had pursued his collection process for (possibly) some period of time—a result the court characterized as “absurd” and therefore not to be imputed to the legislature.<sup>20</sup> Therefore, the court interpreted the statute to mean that *each defendant's* solidary liability is capped at 50% of the plaintiff's recoverable damages. Thus, the situation is now as follows:

<i>Defendant</i>	<i>% at fault</i>	<i>Amount Paid</i>	<i>Liability</i>	<i>Balance collectible by Touchard</i>
Williams	63%	\$25,000	\$63,000	Up to \$38,000
Causey	30%	\$30,000	\$50,000	Up to \$20,000
Lege	7%	<u>\$ 7,000</u>	\$50,000	Up to \$38,000
	Total paid	\$62,000		

It should be noted that this was the interpretation adopted by the Court of Appeal, Second Circuit.<sup>21</sup>

#### *B. The Judgment*

What does this mean in terms of entry of the judgment? Presumably, the trial court will now enter a two-part judgment for the plaintiff. The judgment *collectively* will be for plaintiff's total damages, reduced by plaintiff's percentage of fault, if any. However, the court must also enter individual judgments against each defendant for the *greater* of (1) that defendant's fault percentage, if greater than 50%, or (2) 50% of the plaintiff's “recoverable” damages—*except* as to any defendant whose fault is less than that of the plaintiff. That defendant is severally liable only. Thus, for example, assume that in the *Touchard* case the plaintiff had been 10% at fault, Williams 58%, Causey 25%, and Lege 7%. Assume that Touchard's “recoverable” damages would have been \$90,000, and in that situation Williams' liability would have been 58% of \$90,000 (\$52,200), Causey's liability 50% of \$90,000 (\$45,000), but Lege's liability would have been limited to \$7,000. Thus, in this situation, if Williams' collectibility was still only \$25,000, plaintiff would come up short, even if the other two defendants were fully collectible—\$25,000 plus \$45,000 plus \$7,000 equals \$77,000.

The judgment will then somehow provide that the individual judgments represent the maximum that the plaintiff can collect from each defendant, and the collective judgment is the maximum total that the plaintiff can collect. Within

20. *Id.* at 892-93.

21. *Johnston v. Fontana*, 610 So. 2d 1119 (La. App. 2d Cir. 1992); *Thompson v. Hodge*, 577 So. 2d 1172 (La. App. 2d Cir. 1991).

those limits, as before, the plaintiff can collect as best he can from one, some, or all of the defendants in any combination he/she sees fit.

### C. "Recoverable Damages"

The foregoing assumes that the statutory phrase "recoverable damages" means the plaintiff's total damages minus any reduction for the plaintiff's contributory fault. Two authors are of the opinion that "recoverable damages" means plaintiff's *total* damages without reduction.<sup>22</sup> Applying this interpretation to the hypothetical in the preceding paragraph, the judgment would have been Williams \$58,000, Causey \$50,000, and Lege \$7,000. Of course, Touchard could still collect no more than a total of \$90,000.

The Louisiana Supreme Court did not have to decide this issue, since the plaintiff Touchard's fault was zero. The issue is therefore still open. Professor Robertson justifies this interpretation on the grounds that (a) it is simple (although the calculation seems equally simple either way) and (b) it effects the least change from prior law of solidary liability, a rule of interpretation adopted by the Louisiana Supreme Court in *Touchard*.<sup>23</sup> With all due respect, however, it seems to this author that "recoverable damages" unambiguously describes the net damages that the plaintiff is entitled to collect, which would be the net judgment for the plaintiff.<sup>24</sup> This is the traditional starting point for all allocations of damages among defendants for whatever purpose.<sup>25</sup> Moreover, suppose the plaintiff is 50% at fault and her total damages are \$100,000. It would hardly seem sensible in that situation to say that the solidary liability of all the defendants is \$50,000, which is all that the plaintiff can recover in total.

This seems to be the *result* reached by the court of appeal in *Johnston v. Fontana*.<sup>26</sup>

Coleman and Jones, as intentional tortfeasors, are solidarily liable for plaintiff's damages under 2324 A, subject to reduction for plaintiff's percentage of fault pursuant to article 2323 (i.e., *solidarily liable for 80% of plaintiff's recoverable damages*).<sup>27</sup>

Thus, despite the fact that the court used the term "recoverable damages" in apparent reference to the plaintiff's *total* damages, the court holds that the

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22. Robertson, *supra* note 14, discussed in the court of appeal's *Touchard* decision (606 So. 2d at 930-31); Queenan, Comment, *supra* note 7, at 1373-76.

23. Robertson, *supra* note 14, at 45-46.

24. At least one other author agrees. See Williams, *supra* note 12, at 159-60.

25. See Illinois Pattern Jury Instructions (Civil) B45.01.B, B45.02.B, B45.02.E, B45.03.A, B45.07 (3d ed. 1993), distinguishing "total damages" from "recoverable damages," the latter being plaintiff's total damages reduced by plaintiff's percentage of fault.

26. 610 So. 2d 1119 (La. App. 2d Cir. 1992).

27. *Id.* at 1123 (emphasis added).



defendants' solidary liability is limited to the damages reduced by plaintiff's percentage of fault.

In construing the term "recoverable damages," we should also look to Article 2323 of the Civil Code, which can be deemed to be *in pari materia* with the following article, 2324, because it states the comparative negligence rule. Article 2323 provides that the injured person's negligence does not defeat the claim, "but the amount of *damages recoverable* shall be reduced in proportion to the degree or percentage of negligence attributable to the person suffering the injury, death or loss."<sup>28</sup> The clear implication of this provision is that the plaintiff's "recoverable damages" are those *after* reduction for the victim's contributory negligence. The term "recoverable damages" in Article 2324 can and should be read as referring to the term "damages recoverable" in Article 2323.

#### D. *The Effect of Absent Tortfeasors*

The next issue is, what happens in those lawsuits in which one or more tortfeasors (that is, those whose tortious conduct was one of the responsible causes of the plaintiff's harm) is not a party defendant? There are several reasons why a tortfeasor might be absent, but the most common ones are (a) the plaintiff settled prior to trial with one or more tortfeasors, or (b) the tortfeasor has some immunity, such as that enjoyed by the plaintiff's employer in situations where the plaintiff's injury was covered by worker's compensation. The Louisiana Supreme Court in a case decided in 1993, *Gauthier v. O'Brien*,<sup>29</sup> addressed this issue with respect to the employer-worker's compensation situation, so that is a good place to start.

#### E. *Employers*

The Louisiana Worker's Compensation Law clearly provides that if a worker has received a compensable injury under circumstances where a third person is subject to liability in tort, the employee (or his dependents or representative, as the case may be) is free to pursue a tort claim against that third person or persons.<sup>30</sup> If successful, the employer (or his insurer) who has paid compensation is entitled to reimbursement of the worker's compensation and medical benefits, reduced by the employee's share of the fault (if any).<sup>31</sup>

*Example:* Robertson, delivering frozen chicken, is injured by the negligence of an employee of a Popeye's Fried Chicken restaurant where Robertson was making a delivery.<sup>32</sup> Plaintiff's employer,

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28. La. Civ. Code art. 2323 (emphasis added).

29. 618 So. 2d 825 (La. 1993).

30. La. R.S. 23:1101 (Supp. 1994).

31. La. R.S. 23:1101(B) (Supp. 1994); *Gauthier*, 618 So. 2d at 832.

32. Based loosely on the facts of *Robertson v. Popeye's Famous Fried Chicken, Inc.*, 524 So. 2d

Scanio, pays Robertson worker's compensation and medical expenses totalling, say, \$25,000. In a suit against Popeye's, Robertson's damages are \$100,000, but he is found 20% at fault and recovers \$80,000. Scanio can intervene in that lawsuit and recover \$20,000 reimbursement out of Robertson's \$80,000. Robertson nets \$60,000 from his claim against Popeye's plus his \$25,000 worker's compensation payments. In this case, we assume that Scanio was not a joint tortfeasor.

Suppose, however, we have a multiple defendant situation in which the plaintiff's employer was at fault. For example, in *Gauthier*, plaintiff was a passenger in an automobile being driven by her employer, Cooper, and both were in the course and scope of their employment. Cooper negligently attempted to pass O'Brien's tractor on the left in a no-passing zone, just as the tractor was turning left. Although the appeal in *Gauthier* was taken prior to trial, let us assume that Gauthier's total damages were \$100,000 and that she received \$25,000 in worker's compensation benefits.

If Cooper and O'Brien were each 50% at fault, what is plaintiff's judgment? The plaintiff in *Gauthier* argued that the employer's fault should be disregarded. The court, however, held that this would be contrary to the plain meaning of the last sentence of Article 2324(B). Therefore, the jury is required to assess the fault of absent tortfeasors, including the plaintiff's employer, so that the initial allocation of fault in this hypothetical would be Cooper 50% and O'Brien 50%. The supreme court makes it clear that the jury can be required to assess fault against the non-party employer, just as it has done before.<sup>33</sup>

*However*—does Article 2324(B) mean that O'Brien cannot be required to pay more than his "virile" share, or \$50,000? Is the judgment against O'Brien limited to \$50,000? *No*, says the supreme court in *Gauthier*. The allocation of fault to an employer is necessary to arrive at correct allocations of fault as to all other parties. But because of the reimbursement scheme of the worker's compensation law, and the public policy favoring "full tort recovery" for plaintiffs, the trial court after the jury has returned its verdict "should disregard the proportion of fault assessed to the employer and *reallot the proportionate fault of all other blameworthy parties*."<sup>34</sup> Thus, in our example, Cooper's 50% share would be reallocated to "all other blameworthy parties"—in this case, only O'Brien—with the result that O'Brien's share becomes 100%.

The foregoing hypothetical is too simple. Let us use a hypothetical variation on the *Touchard* facts. Assume that in the *Touchard* case, Touchard was Williams' employee and they were in the course and scope of their employment at the time of the accident, so that Touchard had been paid \$25,000 in worker's compensation benefits. Further assume that for some reason Touchard, the

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97 (La. App. 4th Cir. 1988).

33. *Gauthier*, 618 So. 2d at 827 (citing La. Code Civ. P. art. 1812(C)(2)).

34. *Id.* at 833 (emphasis added).

plaintiff, was 10% at fault, Williams 58%, Causey 25%, and Lege 7%. Assume the same \$100,000 damages.

After the jury returns its verdict finding everyone's percentage of fault (including Williams') and finding plaintiff's total damages to be \$100,000, the jury goes home. The trial court then reallocates Williams' fault among "all other blameworthy parties"—which, of course, includes the plaintiff. This results in a judgment as follows:

<i>Tortfeasor</i>	<i>% at fault</i>	<i>Reallocation of Williams' %</i>	<i>Judgment</i>
Touchard	10%	10/42 or 23.81%	\$76,190.00 in favor
Williams	58%		\$19,047.50 in favor <sup>35</sup>
Causey	25%	25/42 or 59.52%	\$59,520.00 against
Lege	7%	7/42 or <u>16.67%</u>	\$ 7,000.00 against
Total:		100%	

#### F. Other Absent Tortfeasors

The other principal category of absent tortfeasors are those with whom the plaintiff has settled prior to trial. As to these tortfeasors, the pre-existing Louisiana rule is that the liability of the non-settling tortfeasors is reduced by the amount of the percentage of fault assigned by the trier of fact to the settling tortfeasor(s).<sup>36</sup> This rule should remain unchanged by the 1987 amendment to Article 2324(B). But, of course, unlike the situation with respect to an employer, there will be no reallocation of fault in this situation. Thus, the rules of joint and several liability will apply based on the percentages determined by the jury. For example, assume the original *Touchard* facts, except that the plaintiff was 10% at fault, Williams 58%, Causey 25%, and Lege 7%. Assume the same \$100,000 damages. Further assume that Touchard settled prior to trial with Williams for \$25,000 (the limits of Williams' policy). Plaintiff's judgment would be for \$90,000, but it would run against Causey for \$45,000 and Lege for \$7,000. Thus, the most that plaintiff could collect, in addition to the \$25,000 she already received from Williams, would be \$52,000. However, if the percentages were

35. This is paid to Williams out of Touchard's \$76,190. However, note that the most Touchard can hope to collect from Causey and Lege is \$63,520. Does this mean that the employer's reimbursement should be affected? Probably not; there is simply no statutory authorization for doing so. Also, note that I have assumed that the reduction in the employer's reimbursement is computed based on the employee's *reallocated* fault. This seems to be the result mandated by the language of La. R.S. 23:1101(B) (Supp. 1994), in addition to being the only fair and reasonable result.

36. La. Civ. Code art. 1803; *Joseph v. Ford Motor Co.*, 509 So. 2d-1, 3 (La. 1987); *Antley v. Yamaha Motor Corp.*, 539 So. 2d 696, 707 (La. App. 3d Cir. 1989).

Note that this credit is available only to the extent that the tortfeasors would have been liable in solido. *Lavergne v. Latwell Gravity Drainage Dist. No. 11*, 562 So. 2d 1013, 1017 (La. App. 3d Cir. 1990).

plaintiff 10% at fault, Williams 45%, Causey 25%, and Lege 20%, plaintiff would then be able to collect her full \$90,000, because the judgment against Causey and Lege would be \$45,000 each.<sup>37</sup>

What about tortfeasors with whom there has been no settlement but who have not been joined for some other reason—another immunity, perhaps, or who are beyond the jurisdiction of the court? The last sentence of Civil Code article 2324(B) seems clear that these tortfeasors will be treated the same as settling tortfeasors.<sup>38</sup>

### G. Contribution

The new rules as to joint and several liability do not affect the defendants' rights to contribution. It is important to remember that the law of joint and several liability concerns only the rights of the defendants vis-a-vis the plaintiff, not the rights of the defendants to redistribute the amounts they have paid to the plaintiff under the law of contribution or indemnity. Once the fault shares of the defendants have been finally calculated, these shares should determine who is entitled to contribution based on having paid the plaintiff more than his share. It should be remembered, of course, that contribution ordinarily cannot be obtained against an employer,<sup>39</sup> or against a settling defendant.<sup>40</sup>

## IV. CONCLUSION

Louisiana's new modified joint and several liability scheme represents an approach different from most of the other twenty-four states that have attempted to find some compromise between the traditional joint and several liability and its polar extreme, pure several liability. In essence, it makes each defendant jointly and severally liable but only to the extent of 50% of plaintiff's recoverable damages, and a defendant whose fault is less than that of the plaintiff is only severally liable. This is a workable and reasonable accommodation of the competing interests. Although the statute is not artfully drafted, and leaves many unanswered questions, this is not uncommon in these types of situations where the statute is a political compromise resulting from the clash of adverse visions. It will take some time for the Louisiana Supreme Court to add form and shape to the statutory skeleton, but this is actually a benefit. Achieving just results will require experience in individual cases and the arguments of adversaries in the context of specific fact situations. The Louisiana Supreme Court is off to a good start.

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37. *Hayes v. Kelly*, 625 So. 2d 628, 633-34 (La. App. 3d Cir. 1993).

38. *See Hayes*, 625 So. 2d at 633-34.

39. *Massey & Gasperecz*, *supra* note 14 (criticizing rule).

40. La. Civ. Code art. 1804.

## APPENDIX

## NATIONAL STATUS OF JOINT AND SEVERAL LIABILITY (MARCH, 1994)

*A. States With Traditional Joint and Several Liability*

Four states—Alabama, Maryland, North Carolina, and Virginia—still have not adopted comparative fault. These states also retain the traditional common-law rule of joint and several liability.

Ten states that have adopted comparative negligence statutes have retained the traditional joint and several (solido) liability. In these states, the general rule is that the plaintiff's employer is not subject to contribution, but the employer's fault may be considered in assessing the total fault.

Arkansas (Ark. Code Ann. §§ 16-64-122, 16-61-203)

Delaware (Del. Code Ann. tit. 10, §§ 8132, 6301 et seq.)

Maine (Me. Rev. Stat. Ann. tit. 14, § 156)

Massachusetts (Mass. Gen. Laws ch. 231, § 85, ch. 231B, § 1 et seq.)

Michigan (Mich. Comp. Laws Ann. §§ 600.2925a, 600.2925b)

Pennsylvania (Pa. Cons. Stat. Ann. tit. 42, §§ 7102, 8322 et seq.)

Rhode Island (R.I. Gen. Laws §§ 9-20-4-4.1, 10-6-2 et seq.)

South Carolina (S.C. Code Ann. § 15-38-10 et seq.)

West Virginia (W. Va. Code § 55-7-13) (except that defendants in a medical professional liability action less than 25% at fault are only severally liable, W. Va. Code § 55-7B-9)

Wisconsin (Wis. Stat. § 895.045)

*B. States With Pure Several Liability*

Twelve comparative negligence states have adopted pure several liability, which obviates the need for contribution. In general, in these states if the plaintiff's employer is one of those at fault, his percentage of fault will be factored in and the other defendants' share of the fault will be reduced accordingly. Note that there are sometimes exceptions (e.g., concert of action, pollution torts) where the defendants will be jointly and severally liable.

Alaska (Alaska Stat. § 09.17.080)

Arizona (Ariz. Rev. Stat. Ann. § 12-2506, 12-2508)

Colorado (Colo. Rev. Stat. § 13-21-111.5)

Idaho (Idaho Code §§ 6-801 to 6-803)

Indiana (Ind. Code §§ 34-4-33-1 to 33-13)

Kansas (Kan. Stat. Ann. § 60-258a)

Kentucky (Ky. Rev. Stat. Ann. § 411.182)

North Dakota (N.D. Cent. Code § 32-03.2-02)

Tennessee (*McInyre v. Ballentine*, 833 S.W.2d 52 (Tenn. 1992))

Utah (Utah Code Ann. §§ 78-27-37 to 78-27-40)

Vermont (Vt. Stat. Ann. tit. 12, § 1036)

Wyoming (Wyo. Stat. § 1-1-109)

*C. States With Modified Joint and Several Liability*

The remaining twenty-four states have some form of modified joint and several liability:

State	Modification	Statute	Status of Employer
California	Limits joint and several liability to economic losses in PI, product damage, & wrongful death cases. Otherwise several liability.	Cal. Civ. Code § 1431.1 et seq.	Right of contribution from employer up to amount of workers' comp. benefits paid
Connecticut	Several liability, except that P who has attempted unsuccessfully for one year to collect from a D may apply to court to have that D's share reapportioned among other Ds.	Conn. Gen. Stat. § 52-572h	Employer covered by workers' comp. not subject to contribution.
Florida	No J&S except that with respect to any party whose % of fault equals or exceeds that of a particular claimant, J&S with respect to economic damages against that party and in favor of that claimant. Also J&S in actions where total damages do not exceed \$25,000.	Fla. Stat. § 768.81	Employer covered by workers' comp. not subject to contribution.
Georgia	J&S, except that if fault is assigned to the plaintiff, trier of fact "may" apportion award among certain defendants; those defendants are severally liable.	Ga. Code Ann. § 51-12-33	Employer covered by workers' comp. not subject to contribution.
Hawaii	J&S for economic damages; J&S for noneconomic damages in actions involving intentional torts; pollution; toxic torts; aircraft accidents; strict and products liability; auto accidents involving highway maintenance & design, if tortfeasor had notice of a prior similar occurrence; and all other cases if D's share of fault was 25% or more. Otherwise, several liability for economic damages.	Haw. Rev. Stat. § 663-10.9	Employer covered by workers' comp. not subject to contribution.

State	Modification	Statute	Status of Employer
Illinois	In negligence & product liability cases, J&S liability for P's past and future medical. D whose negligence is less than 25% of the total negl. is severally liable with regard to all other damages, except in medical malpractice and certain environmental tort cases.	Ill. Ann. Stat. ch. 735, para. 5/2-1117, 1118 (Smith-Hurd 1992)	Right of contribution from employer up to amount of workers' comp. benefits paid.
Iowa	Joint and several liability does not apply to Ds assessed less than 50% of the total fault of all "parties."	Iowa Code § 668.4	Employer covered by workers' comp. not subject to contribution.
Louisiana	Liability is several, except liability is joint and several subject to a cap of 50% of P's "recoverable damages" unless plaintiff is assessed a greater degree of fault than the tortfeasor.	La. Civ. Code art. 2324	Employer's fault is considered in apportionment of fault but no right of contribution from employer.
Minnesota	Generally J&S. However, except for environmental torts, person whose fault is 15% or less is liable for a % of the whole award no greater than 4 times the % of fault. Also, if state or municipality is jointly liable & its fault is less than 35%, it is J&S liable for an amount no greater than twice the amount of fault.	Minn. Stat. § 604.02	Right of contribution from employer up to amount of workers' comp. benefits paid.
Mississippi	Several, except J&S retained to the extent necessary for injured party to recover 50% of his recoverable damages.	Miss. Code Ann. § 85-5-7	Employer covered by workers' comp. not subject to contribution.
Missouri	J&S if P is fault-free. If P is assessed some fault: J&S except if any party moves for reallocation of any uncollectible amounts, then the uncollectible amount shall be reallocated among all other parties including P & no amount shall be reallocated to any party whose assessed % of fault is less than P's so as to increase that party's liability by more than a factor of 2. Malpractice cases—any D	Mo. Rev. Stat. § 537.067	Employers are shielded from any third party suits by defendants.

State	Modification	Statute	Status of Employer
	against whom an award of damages is made shall be jointly liable only with those Ds whose apportioned % of fault is equal to or less than such D.		
Montana	J&S, except any party whose negligence is determined to be 50% or less of the combined negligence of all responsible persons is severally liable only. The remaining parties are J&S liable.	Mont. Code Ann. § 27-1-702	Employer covered by workers' comp. not subject to contribution.
Nebraska	Ds are jointly and severally liable for economic damages, but only severally liable for noneconomic damages.	Neb. Rev. Stat. §§ 25-21, 185.10	Employer covered by workers' comp. not subject to contribution.
Nevada	J&S liability only in cases of 1) strict liability, 2) intentional torts, 3) toxic torts, 4) product liability, and 5) concerted acts.	Nev. Rev. Stat. § 41.141	Employer covered by workers' comp. not subject to contribution.
New Hampshire	J&S, except any party whose fault is less than 50% is severally liable. Same rule applies to governmental liability for pollution damage.	N.H. Rev. Stat. Ann. §§ 507:7-e, 507-B:9	Employer covered by workers' comp. not subject to contribution.
New Jersey	Any D 60% or more responsible for damages is J&S liable for entire amount. D more than 20% but less than 60% at fault is J&S for economic loss but severally liable for non-economic loss. D 20% or less is severally liable.	N.J. Rev. Stat. § 2A: 15-5.2	Employer covered by workers' comp. not subject to contribution.
New Mexico	Several except for intentional torts, vicarious liability, product liability, and other situations "having a sound basis in public policy."	N.M. Stat. Ann. § 41-3A-1	Employer covered by workers' comp. not subject to contribution.
New York	Any tortfeasor found to be 50% or less at fault is severally liable for noneconomic loss in personal injury cases (§ 1601), subject to various exceptions (§ 1602).	N.Y. Civ. Prac. Law §§ 1601-1603	D may recover from employer if employer was also negligent. Workers' comp. does not provide insulation from suit.



State	Modification	Statute	Status of Employer
Ohio	If P is contributorily negligent, several liability applies among joint tortfeasors for non-economic damages. Liability is J&S for economic damages.	Ohio Rev. Code Ann. § 2315.19	Employer covered by workers' comp. not subject to contribution.
Oklahoma	If P is negligent, the liability of D is several; if P is not negligent, liability is J&S (based on judicial construction of §§ 13 and 14). <sup>41</sup> State and local governmental liability is several only.	Okla. Stat. tit. 23, §§ 13, 14; tit. 51 § 154(F)	Employer is immune from suit because of workers' comp. However, negligence of employer must be considered in determining comparative fault.
Oregon	Liability of D found less than 15% at fault for economic damages shall be several only. Liability of D more than 15% at fault is J&S except that D whose % of fault is less than P is liable to P only for that % of recoverable economic damages. Liability for non-economic damages is several only. Liability for certain toxic torts is J&S.	Or. Rev. Stat. § 18.485	Employer covered by workers' comp. not subject to contribution.
South Dakota	A defendant less than 50% at fault is not jointly and severally liable for more than twice his percentage of fault.	S.D. Codified Laws Ann. § 15-8-15.1	Employer covered by workers' comp. not subject to contribution.
Texas	Several for non-economic loss, except J&S if 1) D's fault is greater than 20%; 2) D's responsibility is greater than claimant's (except in strict liab., prod. liab., or breach of warranty); 3) no % of responsibility is attributable to P and D's responsibility is greater than 10%; 4) P's injury is from toxic tort.	Tex. Civ. Prac. & Rem. Code §§ 33.001, 33.012, 33.013	Employer covered by workers' comp. not subject to contribution.

41. *Laubach v. Morgan*, 588 P.2d 1071 (Okla. 1980), reaffirmed in subsequent cases, e.g., *Bode v. Clark Equip. Co.*, 719 P.2d 824 (Okla. 1986). Liability continues to be joint and several as to negligence-free plaintiffs. *Berry v. Empire Indem. Ins. Co.*, 634 P.2d 718 (Okla. 1981); *Boyles v. Oklahoma Natural Gas Co.*, 619 P.2d 613 (Okla. 1980).

State	Modification	Statute	Status of Employer
Washington	Several liability, except where P was not at fault, or in specified types of cases (tortious interference with contract, certain product liability cases, hazardous waste or waste disposal).	Wash. Rev. Code §§ 4.22.005, 4.22.030, 4.22.070	Employer covered by workers' comp. not subject to contribution.

