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Comparative Fault & Solidary Delictual Obligations: On Further Consideration

William D. Grimley*

In 1979, the Louisiana Legislature passed Louisiana Acts No. 431. This act amended Civil Code Articles 2323 and 2324.¹ With the amendment to Article 2323, Louisiana ushered in a "pure" comparative fault system.² These two articles have received considerable attention in the ensuing years, up to and including the First Extraordinary Session of the 1996 Legislature. During the 1996 session,

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1. The act also amended La. Code Civ. P. arts. 1811 and 1917.

2. The system is referred to as "pure" because any assessment of fault against the plaintiff less than 100% will not defeat his recovery. This is contrasted with a modified system where an assessment of 49% or 50% will defeat the plaintiff's claim. See David W. Robertson, *Ruminations on Comparative Fault, Duty-Risk Analysis, Affirmative Defenses, and Defensive Doctrines in Negligence and Strict Liability Litigation in Louisiana*, 44 La. L. Rev. 1341, 1344 (1985). In its original form in the Code of 1825, Article 2323 was denominated as Article 2303 and it provided:

The damage caused is not always estimated at the exact value of the thing destroyed or injured; it may be reduced according to circumstances, if the owner of the thing has exposed it imprudently.

The article was re-adopted in the Civil Code of 1870 as Article 2323. The language of the article was by no means a clear statement that a comparative system of fault should be employed in cases *ex delicto*. This may explain why the concept was ignored and the common law rule of contributory negligence was applied in Louisiana until August 1, 1980. The court in *Bell v. Jet Wheel Blast*, 462 So. 2d 166, 169 (La. 1985) discussed this situation:

Paradoxically, this court ignored the provision [Article 2323] and let it fall into oblivion, while relying in negligence cases on common law precedents to apply the doctrine of contributory negligence, for which there was no codal authority.

In 1979, the Legislature amended Article 2323 to read:

When contributory negligence is applicable to a claim for damages, its effect shall be as follows: If a person suffers injury, death or loss as the result partly of his own negligence and partly as a result of the fault of another person or persons, the claim for damages shall not thereby be defeated, 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.

La. Civ. Code art. 2323 was amended in 1996. However, the court in *Keith v. United States Fidelity & Guar. Co.*, 694 So. 2d 180 (La. 1997), held that the amendment did not change the law, except that employer fault would now be considered, and thus overruled *Cavalier v. Cain's Hydrostatic Testing, Inc.*, 657 So. 2d 975 (La. 1995). The court wrote:

Comparing La. Civ. Code art. 2323, as amended, to its predecessor, it is apparent that the basic structure for comparative fault is unchanged. However, we observe that the Legislature added more specific language to [Article] 2323 making it mandatory for the determination of the percentage of fault of all persons contributing to an injury, whether those persons are unidentified non-parties, statutorily immune employers, or others.

Louisiana Acts No. 3 amended both articles. Of importance, the amendment to Article 2424 was designed to eliminate solidary delictual responsibility.

It is the purpose of this article to suggest that the concept of comparative fault in Louisiana has been misapplied. Instead of viewing the system of fault apportionment in terms of comparative fault, the inquiry should be in terms of comparative causation and a strict observance of the duty element. Further, a proper application of comparative causation will lead to the conclusion that solidary delictual responsibility lives on in Louisiana.

I. COMPARATIVE CAUSATION

Comparative causation focuses exclusively on the consequences of delictual conduct rather than taking into account subjective considerations, such as the degree of blame or culpability the fact finder might attach to the conduct, which is one component of the present "comparative fault" analysis. By way of example, people generally feel more strongly toward a motorist who runs another off the road because he is intoxicated as opposed to one who is simply inattentive. Thus, an intoxicated motorist will generally be assessed a greater degree of fault than the motorist who is sober, despite the fact that they individually cause the same harm, in the same manner. In contrast, comparative causation does not grade conduct by declaring that one party's conduct is "more negligent" than another's and assessing greater blame to the former than the latter for that reason. Rather, the focus is entirely on the consequences that conduct produces.

The elements to be taken into account in comparing fault were set out by the supreme court in *Watson v. State Farm Fire and Casualty Insurance Co.*,³ where the court wrote:

We recognize that a standard for determining percentages of fault has not been provided by the Legislature, and we are therefore presented with an opportunity to offer guidelines as we apportion fault in this instance. In so doing we have looked to the Uniform Comparative Fault Act, 2(b) and Comment (as revised in 1979), which incorporates direction for the trier of fact. Section 2(b) provides:

In determining the percentages of fault, the trier of fact shall consider both the *nature of the conduct of each party at fault* and the extent of the causal relation between the conduct and the damages claimed.⁴

3. 469 So. 2d 967 (La. 1985).

4. *Id.* at 973 (emphasis added) (footnotes omitted). The court also provided five specific criteria: (1) whether the conduct resulted from inadvertence or involved an awareness of the danger, (2) how great a risk was created by the conduct, (3) the significance of what was sought by the conduct, (4) the capacities of the actor, whether superior or inferior, and (5) any extenuating circumstances which might require the actor to proceed in haste, without proper thought. And, of course, as evidenced by concepts such as last clear chance, the relationship between the fault/negligent conduct and the harm to the plaintiff are considerations in determining the relative fault of the parties. *Watson*, 469 So. 2d at 974.

The term "nature of the conduct" is understood to mean the type of conduct a party engages in and whether his conduct is "worse" or more egregious than another's. The shortcoming of including such a consideration in the process of assessing fault is obvious: the allocation of fault is influenced by subjective considerations which will vary with the individual and thus the outcome will be inconsistent and unpredictable. The fault assessment process becomes whimsical and the results will differ depending upon the people who may be selected for jury duty or the judge to whom a case is allotted.

The case of *Campbell v. Louisiana DOTD*⁵ provides an example of the benefit of comparative causation over comparative fault. In *Campbell*, the plaintiffs' son was killed when the driver of the vehicle he was riding in fell asleep at the wheel and struck the concrete abutment of a bridge. Suit was brought against the driver. Suit was also brought against the Department of Transportation and Development because it had failed to install guardrails on the bridge. The trial court found the driver 25% at fault and DOTD 75% at fault. On appeal, the third circuit reduced DOTD's fault assessment to 10%. The supreme court granted certiorari to review the correctness of the third circuit's decision.

Expert testimony at trial revealed that had guardrails been installed on the bridge the impact of the vehicle would have been reduced by 80% or more and that the injuries would have been significantly less severe. The expert noted that had the vehicle impacted guardrails it would have been redirected back onto the highway. The supreme court concluded that DOTD's negligence was far more substantial than the driver's and affirmed the trial court's allocation of fault.

Given the expert testimony at trial, we can conclude that the driver's conduct would have caused some injuries to the passengers, even had guardrails been installed. The driver was held responsible for those injuries. *That is, he was held liable for the injuries he caused.* On the other hand, the absence of the guardrails exacerbated the impact, thus making the injuries more severe. DOTD was assessed with those additional injuries.

This case presents an excellent example of the application of comparative causation (although the court itself did not use the term). There was no resort to subjective evaluations of how the trier of fact "felt" about the conduct of the defendants. Rather, through empirical evidence, a rational decision was made and fault was assessed accordingly.

On the other hand, *Cay v. DOTD*⁶ presents an example of the shortcomings of the comparative fault approach. In *Cay*, an intoxicated pedestrian fell off of a bridge across Little River in Catahoula Parish. The plaintiffs contended that the bridge railing was too low. The trial court and the court of appeal found DOTD to be 60% at fault and the pedestrian 40% at fault. However, the supreme court granted writs and reversed, finding the pedestrian 90% at fault and DOTD 10% at fault. The court wrote:

5. 648 So. 2d 898 (La. 1995).

6. 631 So. 2d 393 (La. 1994).

Cay's voluntary intoxication and his negligence in following rules for pedestrian travel at night were *significant* factors in his fall. While DOTD had a duty to protect intoxicated or careless pedestrians who stumbled into the bridge railing from falling off the bridge, Cay's fault was *far greater* in causing this accident. The degree of the risk created by Cay's conduct and his far superior capacity to avoid the accident require that a much higher degree of blame be attributed to him in the causation of this accident.⁷

Why would the court conclude that the deceased's conduct was a "far greater" cause of the accident than the negligence of DOTD? There was no evidence, apparently, to suggest that. Further, if the Department is supposed to protect pedestrians, even intoxicated ones, when designing bridges, then the deceased was no different from any other pedestrian at the time of the fall, despite his intoxication. The fact that walking at night in an intoxicated condition is reprehensible conduct bears no connection with the cause of the accident. As a consequence then, the "badness" of the deceased's behavior should not have been taken into account in assessing fault. The fact that the court may have wished to punish the deceased for his conduct bears no relevance to the allocation of fault.

Ultimately, the question here is what line of reason or rule of law can be discerned from this reversal which would explain why the supreme court felt that the deceased was far more at fault than the trial and appellate courts had concluded? What lesson can the trial court draw from the decision of the supreme court which will help him avoid making such erroneous assessments of fault in the future? The answer is, there is none.

The only explanation for this reversal is that the supreme court's subjective view of the deceased's conduct was radically different from those jurists below. If the appellate system of review had been turned on its head, the result would obviously have been different. Hence, there is no rule of law that we can obtain when subjective considerations make up a component of the comparative fault system.

However, had comparative causation been applied in *Cay*, and the duty element strictly observed, the result would have been very different. The court, for instance, accepted the view that DOTD had a duty to protect pedestrians on this bridge, including *intoxicated* pedestrians. That being the case, and given the proclivities of inebriates, the risk that fostered DOTD's duty was precisely the risk presented in this case. Hence, regardless of whether the deceased was intoxicated, walking in the wrong direction, or wearing black, the cause of his death was the improperly designed railing. On the other hand, if DOTD's duty did not include such risks, then the deceased caused his own death.

7. *Id.* at 399 (citing *Watson v. State Farm Fire & Cas. Ins. Co.*, 469 So. 2d 967 (La. 1985)) (emphasis added).

A. Comparing Intentional and Negligent Conduct

The mischief which can be spawned by comparative fault was perhaps best illustrated in *Veazey v. Elmwood Plantation Associates, Ltd.*⁸ In *Veazey*, an apartment management company was sued by one of its tenants who was raped by an unknown assailant. At trial, the defendant wanted the court to allow the jury to compare the fault of the rapist with its own negligence. The trial court refused. The supreme court, although acknowledging that perhaps in some cases intentional and negligent conduct could be compared, agreed that in this particular case, it should not. It gave three reasons why the fault of the rapist should not be considered:

- (1) The risk that gave rise to the duty on the part of the management company was the very conduct which it wanted compared: namely, the conduct of the rapist. The defendant would not be allowed to reduce its responsibility by the conduct it was suppose to prevent.
- (2) The court felt a comparison would be unfair to the plaintiff. "Given the fact that any rational juror will apportion the lion's share of the fault to the intentional tortfeasor when instructed to compare the fault of a negligent tortfeasor and an intentional tortfeasor, application of comparative fault principles in the circumstances presented in this particular case would operate to reduce the incentive of the lessor to protect against the same type of situation occurring again in the future."
- (3) Finally, the court felt that the "nature" of negligent and intentional torts was so different that a true comparison could not be made.⁹

There is no difficulty in comparing intentional and negligent conduct when comparative causation is employed. It is true that intentional torts and negligent torts are based upon different concepts or, as this writer has described them, different theories of delictual responsibility. However, the comparison is not made at the theoretical level. Rather, it should be made at the level of causation. That is, the fact finder only need consider the *consequences* of delictual conduct, whether it be intentional or negligent.¹⁰ The problem the court faced in *Veazey*

8. 646 So. 2d 866 (La. 1994), *reh'g denied*, 650 So. 2d 712 (La. 1995).

9. *Veazey*, 650 So. 2d at 719.

10. The same approach and the same result should obtain in cases where the defendant has a duty to protect another from his own conduct. *Bell v. Jet Wheel Blast*, 462 So. 2d 166 (La. 1985), was a products liability case. In that case, the plaintiff was injured while working on a shot blast machine which was used to clear large metal casings. The machine was manufactured by Jet Wheel Blast. Bell was injured when his hand got caught in the chain and sprocket drive of the conveyor system of the machine. The case was submitted to the jury under theories of strict liability and negligence. Under the negligence theory, the jury found that Jet Wheel Blast was negligent in not providing a guard. However, the jury also found that Bell was guilty of contributory negligence. The issue before the court was whether contributory negligence operated as a bar to plaintiff's recovery.

In its opinion, the court referred the reader to *Suter v. San Angelo Foundry and Machine Co.*, 406 A.2d 140, 148 (N.J. 1979), which held:

The imposition of a duty on the manufacturer to make the machine safe to operate whether

arose because comparative fault, as we know it, includes subjective considerations; and naturally, the court assumed, a jury will always consider criminal conduct greater fault than ordinary negligence.¹¹

In reality, and putting aside subjective considerations, the court in *Veazey* could have foregone reasons two and three and rested its decision on the first. The court was correct in declining to compare the intentional conduct of the rapist to the negligent conduct of the management company. When viewed from a purely causal standpoint, and again giving full play to the applicable duty, the fact finder must conclude that the rape was caused by the fault of the management company. After all, had it provided security, the rape would never have occurred regardless of the intentions of the would be rapist.¹² Naturally, the same can be said of the rapist. Had he not decided to perpetrate the crime, there would have been no rape. However, that point begs the question. The *duty* of the management company was to prevent such an attack. The very risk that such an attack might take place gave rise to the duty in the first place. It would be illogical and counterproductive to allow the management company to mitigate its responsibility by the very conduct it was supposed to prevent. *Veazey* was simply not a case where comparative fault applied.¹³

by installing a guard or . . . by making it inoperable without a guard, means that the law does not accept the employee's ability to take care of himself as an adequate safeguard of interests which society seeks to protect.

The court also cited *Bexiga v. Havir Manufacturing Corp.*, 290 A.2d 281, 286 (N.J. 1972), in which it wrote: "The asserted negligence of plaintiff . . . was the very eventuality the safety devices were designed to guard against." Therefore, Bell's negligence would not defeat his claim. *See also* *Thomas v. Black & Decker, Inc.*, 502 So. 2d 157 (La. App. 3d Cir. 1987).

11. However, consider *Muse v. Dunbar*, 716 So. 2d 110 (La. App. 3d Cir. 1998).

12. In a symposium article in 1980, Professor Alston Johnson divided tort cases into three broad categories and described them as follows:

(a) those in which a defendant's duty extends to the protection of a plaintiff against his own carelessness; (b) those in which the defendant is not liable because the plaintiff's conduct has produced a situation for which the law should not require a reasonably prudent person to prepare and respond; and (c) those that fall in neither category, in which the victim's fault and the defendant's fault may each be weighted in the balance.

Alston Johnson, *Comparative Negligence and the Duty Risk Analysis*, 40 La. L. Rev. 319, 333 (1980). As to the first category, Johnson observed that there were instances where the conduct of the plaintiff, although negligent, was the very risk that created the defendant's duty. In such a situation, the plaintiff's conduct should not be compared. Johnson's list should be updated to include a fourth category: those situations in which a defendant's duty extends to protect the plaintiff against the conduct of a third person. Johnson's view seemed to carry the day with the courts. *See Spivey v. Super Valu*, 575 So. 2d 876 (La. App. 2d Cir. 1991); *Burge v. City of Hammond*, 509 So. 2d 151 (La. App. 1st Cir. 1987); *Mitchell v. Fidelity & Cas. Co.*, 488 So. 2d 1089 (La. App. 2d Cir. 1986); *Snyder v. Bergeron*, 501 So. 2d 291 (La. App. 1st Cir. 1986), *writ denied*, 503 So. 2d 483 (1987); however, *see Robinson v. Hardy*, 505 So. 2d 767 (La. App. 2d Cir.), *writ denied*, 508 So. 2d 825 (1987).

13. Stated in broader terms, the principle of comparative fault does not necessarily apply in every case where the conduct of two or more parties is presented. The nature of the duties imposed must first be considered and properly applied. In *Veazey*, the duty of the management company encompassed the conduct of the rapist. The two simply cannot be compared.

What would have been the result had the rapist been joined in the litigation? The holding by the court should be no different. However, the rapist should be held solidarily liable with the management company as was the case in *Ledbetter v. Concord General Corp.*¹⁴ The management company should be permitted indemnification from the rapist.¹⁵

In an extremely interesting opinion, the third circuit in *Pinsonneault v. Merchants & Farmers Bank & Trust Co.*¹⁶ dealt with the murder of a night deposit customer at a bank. Jesse Pinsonneault was murdered by two escaped prisoners while he was attempting to deposit money from his place of employment. His family brought suit against the bank and the bank joined as third parties the murderer and his two accomplices.

Although the district court found that the bank had a duty to protect its customers from the attack of third parties, it found that the bank had adequately satisfied that duty and dismissed plaintiffs' petition.

The court of appeals reversed. The court observed that the 1996 amendment to Louisiana Civil Code article 2323 mandated that the fault of all persons causing harm be determined. However, the court reasoned that this does not mean that the fault attributed to the intentional wrongdoer should always be assessed against that wrongdoer, thus reducing plaintiff's claim against the negligent tortfeasor. Ultimately, the court assessed the bank with 100% of the fault. The court wrote:

When a tortfeasor is the legal cause of 100% of the victim's harm, his liability for 100% of the victim's damage is based on more than the imposition of a solidary obligation between joint tortfeasors, and an apportionment of fault cannot relieve him of responsibility for damages for which he is the legal cause. The amendment to La. Civ. Code. art. 2324 has not changed this result.¹⁷

The point the court was making here is that when one party has a duty to protect another from the conduct of a third party then the violation of that duty results in a 100% assessment of fault against that party. That assessment does not come as a result of any claim of solidarity; the party is simply found to be 100% responsible for the conduct of a third party. In reaching this conclusion, the court in *Pinsonneault* gave full effect to the duty of the bank to self-guard its customers.

However, the court denied the third party demands filed by the bank, concluding that since it had assessed 100% of the fault to the bank, it could not permit contribution from the third party defendants. In doing so, it overlooked a far more plausible result. The court could have held that both the bank and the intentional wrongdoer were equally responsible for the same act. As a conse-

14. 651 So. 2d 911 (La. App. 2d Cir. 1995), *rev'd in part on other grounds*, 665 So. 2d 1166 (La. 1996).

15. However, consider *Marceaux v. Gibbs*, 699 So. 2d 1065 (La. 1997), where the supreme court held that as between a negligent custodian and an escaping prisoner, the negligence of both should be compared.

16. 738 So. 2d 172 (La. App. 3d Cir. 1999).

17. *Id.* at 197.

quence, the bank's third party demand for contribution could have been granted. But in this writer's view, as noted before, the third party demand should be for indemnification, and not merely contribution.

B. Comparative Fault and Strict Liability

The shortcomings of comparative fault are further illustrated by cases involving strict liability.¹⁸ Strict liability, being liability without fault, creates a difficult situation when it comes to comparing the non-negligent conduct of a dog owner, for instance, whose animal bit someone, with the negligence of the victim or the negligence of someone else. Since there is no actual conduct on the part of the owner for the fact finder to subjectively review, there is no basis for comparison.

The answer to this quandary was provided by the supreme court in *Howard v. Allstate Insurance Co.*¹⁹ where the court observed:

However, there is a problem with applying comparative fault to a strict liability case. Strict liability is based on a theory of responsibility which requires no finding of negligence. The "fault" of the defendant does not involve blameworthiness or culpability. The theory of strict liability does not lend itself to a comparison of culpability. There is also the conceptual difficulty of comparing the two types of legal fault. We agree with the court of appeal that the most satisfactory result to this problem seems to be the *principle of comparative causation*. Under this principle, the fact finder compares the causal effect of the plaintiff's conduct with that of the defendant's nonnegligent fault.²⁰

The fact that the court had to create a separate basis for comparison in strict liability cases demonstrates the weakness of comparative fault. Where there is no actual conduct, the application of comparative fault becomes impossible. Comparative causation is used instead.

C. A Sampling of the Case Law Development Under Comparative Fault

The following cases demonstrate the confusion and difficulty created when comparative fault, as we know it, is used to assess fault in civil litigation. *Efferson v. DOTD*²¹ involved a one car accident in which the driver failed to negotiate a left

18. Of course, Louisiana no longer has strict liability because of legislation passed during the First Extraordinary Session of 1996. However, its treatment in the past is instructional.

19. 520 So. 2d 715 (La. 1988).

20. *Id.* at 719 (emphasis added). See also *Giddings v. Commercial Union Ins. Co.*, 539 So. 2d 66 (La. App. 2d Cir. 1988), *writ denied*, 541 So. 2d 897 (1989); *Wheat v. State Farm Fire & Cas. Co.*, 583 So. 2d 1 (La. App. 1st Cir.), *writ denied*, 583 So. 2d 1145 (1991); *Acosta v. Pendleton Mem'l Methodist Hosp.*, 545 So. 2d 1053 (La. App. 4th Cir. 1989); *Hayes v. McFarland*, 535 So. 2d 568 (La. App. 3d Cir. 1988).

21. 463 So. 2d 1342 (La. App. 1st Cir. 1984), *writ denied*, 465 So. 2d 722 (1985).

curve, ran off the roadway and struck two trees. The driver and the two passengers were seriously injured. It was established at trial that the driver was speeding and that he was intoxicated. It was also established that the state had failed to properly maintain the shoulder. However, the trial court assessed no fault to the driver.

The court of appeal reversed, assessing the driver with 80% of the fault. The court noted that the state owed a duty to all motorists, including negligent motorists, to maintain the shoulders in a reasonably safe condition. It found that in this particular case, the state had failed in that responsibility. Nevertheless, the court found that the conduct of the driver was the "primary" cause of the accident; that is, it was the more substantial cause, taking into account the driver's speed and level of intoxication. Whereas it is true that the driver's conduct set the accident scenario into play, his conduct was no greater cause of the accident than the conduct attributed to the department.

From the stand point of causation, the accident would never have happened had it not been for the combined and concurrent negligence of both the driver and the state. But for the negligence of both defendants, the vehicle would have left the highway and the occupants may have experienced an uneventful ride down the shoulder. Consequently, DOTD was at least equally at fault in the accident, since the negligence of both defendants was required to produce the injuries. So how then could the court arrive at a fault apportionment of 80/20? Obviously, the court believed that the driver's conduct was worse, more outrageous, worthy of more blame than that of the state—its conduct being more passive and benign. Consequently, the decision of the court was not based upon the evidence; rather, it was based upon how the court subjectively viewed the evidence. The truth of the matter is that if the State has a duty to maintain its highway shoulders, even against the intoxicated driver, then it does not matter why a motorist leaves the road.²² Consequently, the trial court was correct. The state bore the full responsibility.

*Snyder v. Taylor*²³ arose out of an intersectional collision between two vehicles. The court of appeal apportioned fault between DOTD at 60% and one of the vehicles at 40%. The state had created an intersection which was extraordinarily difficult to negotiate. However, the driver who was found to be at fault was familiar with the intersection and the difficulties it posed. The court decided that he should have realized that an accident was "reasonably probable to occur."²⁴ Nevertheless, it found the greater fault lay with the State.

In *Humphries v. Department of Public Works*,²⁵ Anna Humphries was killed when a vehicle driven by Shaw crossed over into her lane of travel and collided with her car. The court found that the reason for this collision was that as Shaw had entered a curve at the point of impact, the right wheels of his vehicle dropped

22. See *Rue v. Department of Highways*, 372 So. 2d 1197 (La. 1979), which involved a motorist who negligently drove off the highway onto a dangerously maintained shoulder and was injured. The question before the court was whether her negligence barred her recovery. The answer was that no it did not. This was a pre-comparative case.

23. 523 So. 2d 1348 (La. App. 2d Cir. 1988).

24. *Id.* at 1354.

25. 545 So. 2d 610 (La. App. 3d Cir. 1989).

off onto the shoulder. At this point, he encountered an advisory sign erected by the State. He turned quickly to avoid the sign, crossed the center line and struck the deceased's vehicle. Based on these facts, the court of appeal affirmed an assessment of fault of 60% to Shaw, because of his excessive speed and inattentiveness, and 40% to DOTD, because the placement of the advisory sign obstructed the shoulder.

Thus, in two factually similar cases, the assessment of fault flip-flopped between an errant driver and DOTD. The explanation as to why DOTD was assessed 40% of the fault in one case and 60% in another cannot be explained or reconciled. However, viewed strictly from the standpoint of causation, the negligence of both defendants, in both cases, resulted in one harm.

In *Ehrman v. Holiday Inns, Inc.*,²⁶ the plaintiff slipped in the French Quarter on a black greasy substance. The court of appeal affirmed an allocation of fault to Holiday Inns and Alright Parking of 40% each, based upon the theory of strict liability. The plaintiff was assessed 20% of the fault. The decision is difficult to understand. The court was of the opinion that the greasy substance was easily detectable by anyone using ordinary care and there were no distractions. It was on the basis of this finding that plaintiff was assessed 20% of the fault. With this finding, however, the plaintiff should have been held to be 100% responsible for her accident since, regardless of who created the problem or failed to remedy it, she could easily have avoided it. Looked at solely from the stand point of causation, the plaintiff should have lost.

It is puzzling why the court would have found a greasy spot a "defect" in the premise so as to bring about the application of strict liability. However, there was also evidence that the area was not being properly cleaned. This would certainly constitute "bad" conduct. It was the "nature" of this conduct, it is suggested, which brought about the 80% assessment of fault.

*Pitre v. Louisiana Tech University*²⁷ was still another case where the fault assessment is simply inexplicable. In 1988, a winter storm had deposited a great deal of snow on Louisiana Tech and the surrounding area. Earl Pitre was a student at the university and decided to join some friends in sliding down a hill which overlooked a parking lot. The parking lot was dotted with a number of light poles. Earl slid down the hill on a garbage can lid, on his back with his head first. He struck one of the poles and was rendered a paraplegic.

Ultimately, the court assessed fault on the basis of 75% to Earl and 25% to the university. In its decision, the court discussed at length the fault of the university. The university was aware that students were using this hill to slide. In fact, a bulletin distributed by the university encouraged the activity. The university was aware that there had been injuries during previous snows. A university policeman testified that the students were like children and needed to be looked after, referring to himself and other officers as "baby sitters." The court faulted the university for

26. 653 So. 2d 732 (La. App. 4th Cir.), writ denied, 653 So. 2d 732 (1995).

27. 655 So. 2d 659 (La. App. 2d Cir. 1995).

not warning of the danger. On the other hand, the court faulted Earl for his careless and reckless behavior.

Obviously the court felt that the conduct of the university and the behavior of Earl Pitre were "bad." It was the focus on this subjective evaluation which determined the assessment of fault. However, this conclusion did nothing to decide the issue of whose conduct or behavior caused the accident.

If the university were to have done more, then surely it should have done so with the understanding that the students were not capable of appreciating the risk of harm. Why else would the university have to provide warnings to those who were fully capable of appreciating the risk of harm? Consequently, the university was entirely at fault because its duty necessarily included the risk that the students would not be able to act for their own safety.²⁸

On the other hand, if Earl Pitre was to be faulted, he would by necessity have to be possessed of the requisite maturity and responsibility to act for his own safety. That being the case, why would the university be at fault for not warning him of a danger that he was fully capable of understanding and avoiding? Accordingly, Pitre should bear full responsibility for his injuries. The problem here is that the court focused on the relative "badness" of the respective conducts of the parties as opposed to which was responsible for the harm done based on their respective duties.²⁹

*Mistich v. Volkswagen of Germany, Inc.*³⁰ involved a rear-end collision, which resulted in the death of a passenger in the leading automobile. It was found that the plaintiff's seat had failed and she was thrown from the vehicle. Ultimately the driver and the manufacturer were assessed fault of 50% each. Because the accident occurred prior to 1987, the manufacturer was held liable for the whole judgment.

The decision correctly reflects the evidence in the case without regard to considerations of the "nature" of the conduct and without a subjective assessment of "badness." However, Volkswagen should have been assessed with 100% of the fault for the death. Rear-ending another automobile can certainly cause injuries. However, what caused the death in this case was the manufacturing defect which permitted the passenger seat to break loose and propel the deceased out of the vehicle. A rear-end collision does not ordinarily result in such catastrophic consequences.

*Martin v. DOTD*³¹ involved a phantom driver and a one car collision. The plaintiff was driving through what was called "Fleming's Curve" when she encountered another car in her lane of travel. She turned to avoid an imminent collision, left the road and struck three concrete blocks that were about eleven feet from the edge of the pavement and which were apparently put there to protect a

28. For instance, see *Meyers v. Imperial Cas. Indem. Co.*, 451 So. 2d 649 (La. App. 3d Cir. 1984).

29. The supreme court granted writs and reversed the finding of negligence against the university. 673 So. 2d 585 (La. 1996). Basically, the court found that Pitre was capable of recognizing the danger and avoiding it. Thus, the university had no duty to protect him.

30. 666 So. 2d 1073 (La. 1996).

31. 665 So. 2d 457 (La. App. 5th Cir. 1995).

Jefferson Parish water pumping station. The other vehicle did not stop and thus it was referred to as the "phantom." The court found that the highway was substandard for a number of reasons, including insufficient clear space beyond the paved surface for a driver to recover after he had strayed from the paved surface. The trial court found the plaintiff to be at fault because she had consumed two beers and was familiar with the road. How these facts contributed to the accident are not clear. The trial court assessed 40% of the fault to the plaintiff and 60% to DOTD. On appeal, the court reversed and held the phantom 30% at fault, plaintiff 28% at fault and DOTD 42% at fault. The court of appeal noted that the assessment of fault is often times an arbitrary matter. Indeed.

Once again the question should be posed: what line of reason or rule of law can be derived from the assessment of fault? The answer is none. The assessment in both courts was based upon subjective considerations, for the most part. DOTD had a poorly designed road. The evidence bears that out. The plaintiff was drinking, although there was no evidence that she was intoxicated or that it affected her driving. Apparently the trial court thought poorly of those who drink and drive. The plaintiff was punished for her bad behavior. As for the phantom, it is clear that driving in another's lane of travel is bad conduct. However, what caused the accident? Looked at purely from the standpoint of causation, it is foreseeable that motorists will leave the roadway from time to time, for any number of reasons. The state is responsible for maintaining shoulders to protect against that very possibility. Consequently, the accident was caused by the combined negligence of the phantom and the state. But for the negligence of both, there would have been no accident. The negligence of neither the phantom nor the state alone caused the accident. Consequently, they should have been found equally at fault and solidarily responsible for the accident.

The case of *Gibson v. DOTD*³² provides an example of the fairness possible when comparative causation is applied. The deceased was crossing Blind River Bridge in St. James Parish when the rear of his truck slightly impacted the bridge. It seems that his cargo was shifting and he was distracted. His vehicle went off the highway, down an embankment, struck a concrete bridge cap, caught on fire and he was burned to death.

After trial, DOTD was found to be $66\frac{2}{3}\%$ at fault and the deceased was assessed $33\frac{1}{3}\%$ of the fault. DOTD was found to be at fault because of its placement of the bridge cap so near the highway. The deceased was found to be at fault because he inexcusably lost control of his truck. The trial court observed that the negligence of DOTD probably made "this otherwise minor accident fatal."

The result in this case seems to focus squarely on comparative causation. The vehicle would have left the road regardless of whether the bridge cap had been there or not. There would very possibly have been injuries to the deceased in any event. However, the presence of the bridge cap exacerbated the impact and caused the fire which, in turn, led to the death of the driver. Consequently, the trial court came very close to assessing the deceased and the department with precisely the

32. 674 So. 2d 996 (La. App. 1st Cir. 1996).

harm that each *caused*. Therefore, it can be said that there were in essence two different accidents.

*Morris v. DOTD*³³ arose out of a severe ice and snow storm that blanketed LaFourche and Terrebonne Parishes in 1989. The plaintiff was driving on Louisiana Highway 24 when he observed another vehicle, driven by Richard Gregory, skid on the ice and off of the road. He pulled his truck over to help Gregory get his vehicle back onto the road. As plaintiff was standing between his truck and Gregory's vehicle, another vehicle driven by Forest Kieff skidded off the road, striking another vehicle, which in turn struck the plaintiff's vehicle, pinning Morris in between.

The state was assessed 40% of the fault and Kieff 60%. The court found the state to be at fault because of its failure to deal with the icing conditions. Kieff was found liable because he failed to maintain control. Once again, there is no rhyme or reason to the fault assessment. If the state's failure to spread aggregate caused the accident, then Kieff's loss of control was simply a consequence of the state's negligence. Therefore, the state caused the accident and should have been assessed 100% of the fault. If Kieff, on the other hand, could have driven in a safer manner and avoided losing control, then the state's negligence played no part in the accident. The more reasonable conclusion is the combined negligence of Kieff's and the state caused a single harm. They both should have been held equally at fault and solidarily responsible for the accident they caused.

These cases indicate that the assessment of fault has simply run amuck. There is no rule of law to guide the process since it has become, for the most part, a subjective inquiry. The process has also created the impression that, under solidarity, one person was being made to pay for the damages caused by another. On the other hand, when fault is assessed on the basis of causation, results become consistent because they are produced through logic and empirical evidence.

The underlining problem demonstrated by these cases is that when questions such as the "nature" of conduct or the "culpability" of the plaintiff or defendant are considered, the result will vary from one fact finder to another because of the inherently subjective nature of the inquiry. The result truly falls to the mind of the beholder.

To support this hypothesis, a survey was conducted by this writer. A hypothetical factual situation was created involving an automobile accident and presented in the form of a questionnaire. One hundred persons were selected at random to assess fault.³⁴ There were five factual situations, with situations two through five being variations of the first.³⁵ Note: although the reason for the

33. 664 So. 2d 1192 (La. App. 1st Cir. 1995), *writ denied*, 667 So. 2d 537 (1996).

34. The responses were obtained through a convenient sample without regard to demographics. Accordingly, the study may be statistically insignificant. However, the mean scores were stable, which suggests reliability.

35. *Fact Situation Number 1:*

Mrs. Plaintiff was driving down Bayou Road, a two lane highway. Mr. Driver was coming from the opposite direction. They were about to pass each other when Mr. Driver crossed the yellow center line, forcing Mrs. Plaintiff off of the highway and onto the shoulder of the

negligent conduct changed in each situation, the underlying facts and the results did not. Further, it was provided in the facts that without the negligence of both defendants in each situation, there would have been no accident.

The first factual situation described an accident where the plaintiff was forced from the road by Mr. Driver—an inattentive motorist. The plaintiff then entered onto a poorly maintained shoulder of which DOTD was aware and responsible. Suit was brought against Mr. Driver and DOTD. The respondents were asked to assess fault between Mr. Driver and DOTD. The average response was: Mr. Driver, 53%; Highway Department, 47%. The second situation altered the facts somewhat. In that case, Mr. Driver's son had been badly injured. He was looking for a hospital. The average response was: Mr. Driver, 49%; Highway Department, 51%. In the third situation, Mr. Driver was legally intoxicated and the intoxication caused him to cross the center line. The average response was: Mr. Driver, 70%; Highway Department, 30%. In situation four, the supervisor for DOTD was aware that he had a problem with the shoulder. There had been three other accidents at

road. You learn from the testimony that Mr. Driver was trying to locate a turnoff to go to his friend's house, and as a consequence, he momentarily looked away from the road and in the process crossed the center line. Once Mrs. Plaintiff was on the shoulder of the road she encountered a drop-off. That is, the highway department had allowed the shoulder to deteriorate badly and instead of the shoulder having a smooth slant to it, there was a fifteen inch drop off. Her right front tire got into this drop off and her car turned over. She was injured. From the expert testimony at trial, you learn that had the shoulder been properly maintained by the department, Mrs. Plaintiff would have been able to make an easy return to the paved surface without injury. The department learned about this shoulder about six weeks before this accident because one of its inspectors had reported it. The department had plenty of time to repair the shoulder but failed to do so. Thus, you learn from the evidence that, without the conduct of Mr. Driver and the neglect of the department, there would not have been an accident.

Fact Situation Number 2:

Assume that the facts are the same as above, except this time Mr. Driver was looking for a sign that would direct him to the hospital. His son had fallen from a tree and suffered a compound fracture of his arm. The son was in great pain. As he searched for the hospital sign, Mr. Driver crossed the center line as before.

Fact Situation Number 3:

Assume that the facts are the same as in fact situation number 1, except this time Mr. Driver was legally drunk. Mr. Driver crossed the center line as before, but the reason this time was due to his intoxication.

Fact Situation Number 4:

Assume that the facts are the same as in fact situation number 1, except this time you learn from the evidence that the department learned about the drop off because over the six month period preceding Mrs. Plaintiff's accident, there had been three other accidents on the same shoulder. The supervisor in charge of that district, Mr. Smith, knew of the accidents but generally ignored the problem. Instead, he assigned the crew which normally would have worked on Bayou road to Smith road. Smith road is not nearly as important in terms of traffic volume as the Bayou road. However, Mr. Smith lives on Smith Road.

Fact Situation Number 5:

This time you learn from the evidence that Mr. Driver was legally intoxicated and he crossed the line for that reason as before. Further, the department's supervisor has ignored the problem as detailed above.

that site in the previous six month period. Instead of correcting the problem, however, he sent his crew to work on the road he lived on. The average response was: Mr. Driver, 38%; Highway Department, 62%. Finally, in situation number five, Mr. Driver was legally intoxicated and DOTD had ignored the problem as described in situation four. The average response was: Mr. Driver, 59%; Highway Department, 41%.

From this survey, it is evident that when subjective considerations enter the fault assessment process, the outcome changes, depending on the "nature" of the conduct and the manner in which that conduct is perceived by the fact finder. The resulting situation makes it virtually impossible for trial judges and trial lawyers to anticipate what juries or higher courts may do.

Further, we must take note that when the driver is made intoxicated, not only does his assessment of fault increase by over twenty percent, the highway department's assessment drops twenty percent as well. However, the conduct of the highway department did not change at all. Why then did the assessment drop? The answer is dictated by the rules of simple math. We only have 100 percentage points to divide. If we decide to increase the fault of the driver, the additional points must necessarily come from the highway department. The result, therefore, is not derived from the evidence; it is dictated by fifth grade math.

From this writer's viewpoint, the answer in each of the factual situations should have been the same: both defendants are equally responsible for the injuries. Regardless of why Mr. Driver crossed the center line or why DOTD allowed the shoulder to go unattended, the end result was the same and for the same reasons. Thus, by eliminating subjective considerations and focusing solely on causation, a consistent result can be obtained.

As noted before, if we remove the conduct of either defendant in the hypothet, the plaintiff is never hurt. Accordingly, there is no method to apportion the consequences of the accident. The joint conduct of the defendants produced an indivisible harm. This does not mean that each of the defendants should be assessed 50% of the fault. That would be nonsense and contrary to the evidence. Mr. Driver did not cause half the injuries. His conduct, in concert with DOTD's, produced all of the injuries. Because the defendants in the hypothetical are equally responsible, they should be held equally liable, even under the current law.

II. SOLIDARY LIABILITY

Solidary delictual liability has been a part of Louisiana's civil law tradition for over 175 years.³⁶ The current Article 2424 arose from Article 2304 of the Civil Code of 1825, which provided:

36. *Touchard v. Williams*, 617 So. 2d 885, 888 (La. 1993).

He who causes another person to do an unlawful act, or assists or encourages in the commission of it, is answerable, *in solido*, with that person, for the damage caused by such act.³⁷

The supreme court first applied solidary liability in negligence cases in *Cline v. Crescent City R.R. Co.*³⁸ The court in *Cline* reached its decision by reference to the general articles on contracts.³⁹ In that case, the plaintiff had filed suit following the death of her husband, who was killed when his vehicle struck a hole in the street and he was thrown onto a loose railroad rail. The plaintiff sued the City of New Orleans and the railroad line, alleging that both were responsible for the maintenance of the road and the rail. The railroad argued that its obligation to repair arose from its contract with the city. It apparently was arguing that it was not in privity with the plaintiff and that its obligation arose from a source different from that of the city's. However, the supreme court sided with the plaintiff's argument that both defendants were mutually obligated to perform maintenance, even though the obligations arose from different sources (the obligation of the city arose from its charter from the legislature). The court allowed the case to proceed to trial, reserving to both defendants the right of severance.

It has been observed that prior to 1979 "joint tortfeasors whose concurring fault produces a *single indivisible harm* to the plaintiff are held solidarily liable for the entire loss."⁴⁰ Historically, the focus of solidary liability was on a single harm produced by the combined negligence of two or more defendants. The thrust of solidary liability was to hold multiple parties liable for the single harm they had caused; *it was never the purpose of solidary liability to force one tortfeasor to pay for the damage caused by someone else.* Thus, when the *Cline* court imposed solidary liability by reference to the general obligation articles, it had in mind the same situation which would arise if two or more debtors signed a single promissory note. They would all be liable for the same thing; that is, they would all be solidarily liable for one and the same debt.

This conclusion is supported by the venerable case of *Dixie Drive It Yourself System New Orleans Co. v. American Beverage Co.*⁴¹ In *Dixie*, a truck owned by American Beverage had come to a stop in the outside lane of travel on Airline Highway on its way to New Orleans. The driver failed to activate signals to alert drivers that he was stopped. The driver of a second vehicle, owned by Dixie and leased to another company, was not initially aware that the American vehicle was stopped. When the second driver finally realized this, he attempted to steer into the

37. Originally, the expression *in solido* was mistranslated as "jointly." However, this was corrected by the legislature. See *Byrne v. Ridde*, 3 La. Ann. 670 (1848).

38. 41 La. Ann 1031, 6 So. 851 (1889).

39. M. Kevin Queenan, *Civil Code Article 2324: A Broken Path to Limited Solidarity Liability*, 49 La. L. Rev. 1351, 1368 (1989).

40. Martha Chamallas, *Comparative Fault and Multiple Party Litigation in Louisiana: A Sampling of the Problems*, 40 La. L. Rev. 373, 374 (1981) (emphasis added) (footnotes omitted).

41. 242 La. 471, 137 So. 2d 298 (1962).

left lane, but his efforts were blocked by another motorist. The two trucks collided. Dixie brought suit against American for damages to the vehicle.

Ultimately, the court concluded that the drivers of both vehicles were negligent, observing:

When the actionable negligence of two tortfeasors contributes in causing harm to a third party, each of them is responsible for the damage. They are solidarily liable.⁴²

The court cited a number of cases in support of this holding, one of which was *Shield v. F. Johnson & Son Co.*⁴³ In *Shield*, a collision took place between a taxi and a street car in New Orleans. The plaintiff was a passenger in the taxi and brought suit against the taxi and the street car. The court wrote:

Here the causes of the alleged injuries are charged to have been joint; separate and independent acts of negligence of both defendants are alleged to have produced directly the injury of which plaintiff complains, and, under such circumstances, each is responsible for the entire result, *even though acts or neglect of one of them alone might not have caused the accident.*⁴⁴

The court went on to hold that if the plaintiff proved her case, she could collect from either or both of the defendants. However, the street car company was exonerated.

The case of *Falgout v. Younger*⁴⁵ is very similar factually to *Dixie*. In *Falgout*, a vehicle appeared to be stopped in the highway. Another vehicle approached from the rear. As soon as the second driver realized the vehicle was stopped, he turned to the left and into the oncoming lane of travel, striking the plaintiff's vehicle which was proceeding from the opposite direction and forcing the plaintiff from the road.

The plaintiff filed suit against the driver whose vehicle was stopped, but did not sue the overtaking driver. The court found both drivers to be at fault and held:

If the negligence of the drivers of the two trucks in this case combined to bring about the accident, a third person, without fault, as plaintiff was in this case, has a right to collect his full damage from any or all the defendants.⁴⁶

42. *Id.* at 480, 137 So. 2d at 301.

43. 132 La. 773, 61 So. 787 (1913).

44. *Id.* at 778, 61 So. at 788 (emphasis added).

45. 192 So. 706 (La. App. 1st Cir. 1939).

46. *Id.* at 711. The court commiserated with the defendant since he alone had to bear all the damages, without the benefit of contribution from the other driver that had not been sued. However, the court noted that comparative negligence was not available in Louisiana. The court felt that the other driver was traveling too fast and thus he was more negligent. However, the other driver was also not in court to tell his side of the story.

*Lofton v. Cottingham*⁴⁷ involved a two car collision between the driver of a "Ford V-8 coupe" and a Dodge. The driver of the Ford came to an intersection and started to enter onto a paved road when he noticed the Dodge coming toward the intersection. The driver of the Ford accelerated and tried to beat the Dodge. The two cars collided and a child in the Ford was injured.

The driver of the Ford was sued. In defense, the driver of the Ford complained that the other driver was negligent as well. The court noted that it really didn't matter:

[I]f the negligence of defendant is one of the proximate causes of the injury of which plaintiff complains, he cannot escape liability by showing that the negligence of a third person also contributed to the injury, and that the accident would not have happened but for such negligence of the third person.⁴⁸

So it can be seen that early on the focus of solidary delictual responsibility was not to create a windfall for the plaintiff. Rather, it was employed to make multiple defendants pay for what they caused—a single indivisible injury. This approach is certainly consistent with the dictates of Louisiana Civil Code article 2315, the well spring of all Louisiana tort law. It is useful to consider again its provisions:

Every act whatever of man that *causes* damage to another obliges him by whose fault it happened to repair it.⁴⁹

The focus has historically been on the damage caused by conduct, not the nature of that conduct or whether it was conduct more egregious than another's conduct. As the case law developed, the focus of solidary liability really never changed, at least up until 1980.

A. *The Beginning of The Problem*

In 1979, Article 2324 was amended to read:

He who causes another person to do an unlawful act, or assists or encourages in the commission of it, is answerable, in solido, with that person, for the damage caused by such act. Persons whose concurring fault has caused injury, death or loss to another are also answerable, in solido; provided, however, when the amount of recovery has been reduced in accordance with the preceding article, a judgment debtor shall not be liable for more than the degree of his fault to a judgment creditor to whom

It should be of particular interest to note, as the court did, that Louisiana Civil Code article 3556(13) defines fault as either gross, slight or very slight. This definition of fault previously appeared in article 3556 of the Code of 1870.

47. 172 So. 377 (La. App. 2d Cir. 1937).

48. *Id.* at 384 (quoting 4 Blashfield's *Cyclopedia of Automobile Law* (Permanent Edition) § 2552).

49. La. Civ. Code art. 2315 (emphasis added).

a greater degree of negligence has been attributed, reserving to all parties their respective rights of indemnity and contribution.

With the passage of this amendment, and the amendment to 2323, the courts began doing something that had not been done before: namely, grading negligence by degrees of fault. Prior to the adoption of comparative fault, this was never done. It did not matter how "at fault" someone was. If the plaintiff was at fault, his claim was completely defeated. If multiple defendants were at fault, they would all be cast for the same debt, and it did not matter whether one was "more negligent" than another.

After August of 1980, the focus of fault assessment, unfortunately, moved away from pure considerations of causation. The subjective consideration of the "nature" of conduct became an important element of fault assessment. This process, it is submitted, led to the widely held view that defendants were being made to pay for damages for which someone else was responsible.⁵⁰ Thus began the complaint that plaintiffs were searching for the "deep pocket." Thus truth is, this horror story rarely took place. However, the perception that it was taking place was real; and this perception was an outgrowth of the use of comparative fault.

It is important to pause at this juncture and consider that when we say someone is 50% at fault this assessment does not stand alone; it must necessarily bear a relationship to something. That something should be the consequences of someone's actions. That is, when someone is said to be 50% at fault, this should mean that he has caused 50% of the damages. When we say that someone is 50% at fault in an automobile accident because of his intoxication, this does not mean that driving while intoxicated is only 50% substandard conduct. Driving drunk is always substandard conduct; in fact, it is 100% substandard conduct.

Once conduct is found to be substandard, then the next inquiry should be what consequences flowed from that conduct. However, that is not what is usually done in assessing fault. Instead, the courts mistakenly rate the relative "badness" of one party's conduct against another's and apportion fault accordingly. It is pointless to suggest that someone is a little negligent or a lot negligent in relation to someone else's conduct. A party is either negligent or he is not. To proclaim that someone is a little negligent is the same as saying a female is a little pregnant.

The fact that driving while intoxicated and forcing someone off the road is considered more reprehensible behavior than being merely distracted and doing the same thing is of no importance (except, of course, when the issue is punitive damages). For that matter, driving while intoxicated might have nothing whatsoever to do with an accident (for example, when the inebriate is legally stopped at a signal light and is rear-ended). This, though, does not take away from the "badness" of his behavior. However, the bad behavior bears no connection to any assessment of fault since the conduct has caused no harm. Having determined

50. The court in *Touchard v. Williams*, 617 So. 2d 885 (La. 1993), wrote, "In 1987, the Legislature addressed the problem of burdening solvent defendants, who were minimally or not exclusively liable, with 100% of a plaintiff's damages." *Id.* at 890.

that conduct is substandard, we should then only look to the consequences of that conduct.

It is submitted that when fault is assessed on the basis of the relative "badness" of conduct, what is really happening is that the fact finder is rendering a "punitive" verdict instead of assessing fault and awarding compensation. However, punishment is not the objective in civil litigation.⁵¹

B. *Solidarity Lives On*

Reacting to the perceived unfairness of solidarity, the legislature in 1996 amended Article 2324. The amendment left little doubt that the legislature intended to bring to an end solidary liability in tort claims. The article now reads in part:

B. If liability is not solidary pursuant to Paragraph A, then liability for damages caused by two or more persons shall be a joint and divisible obligation. A joint tortfeasor shall not be liable for more than his degree of fault and 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, immunity by statute or otherwise, including but not limited to immunity as provided in R.S. 23:1032, or that the other person's identity is not known or reasonably ascertainable.

Clearly, what the legislature was interested in was putting an end to the situation where one tortfeasor would be called upon to pay the debt of another. However, as we have seen, a careful review of the jurisprudence reveals that the problem rarely, if ever, existed. Be that as it may, the operative portion of the statute reads, "A joint tortfeasor shall not be liable for more than his degree of fault and shall not be solidarily liable with any other person *for damages attributable to the fault of such other person.*" The intention of the law dictates a fair result. One should not be made to pay the damages caused by another. However, in those instances where the combined, concurrent fault of two or more tortfeasors produce a single, indivisible harm, the force of reason and logic dictates that they must be held equally responsible and solidarily liable for the whole.

For example, assume that Fred is deer hunting and fires at some movement in the bushes. Instead of hitting a deer, he strikes Robert in the chest. There is no question that Fred is 100% responsible for all the damages.⁵² However, add another shooter to the hypothet. Let us assume that in addition to Fred, Albert is in a nearby stand. Both Fred and Albert fire at about the same time and their bullets hit Robert in the chest. Medical evidence at trial shows that it is impossible

51. It is true, of course, that in the criminal law conduct is measured in relative degrees of egregiousness. However, unlike the civil law, it is the purpose of the criminal law to punish.

52. Assuming for argument's sake that Robert has done nothing wrong himself.

to determine which bullet did what damage. In fact, the treating physician testifies that either bullet alone could have inflicted the same damage.

Both hunters are equally at fault in this accident and their conduct has caused an indivisible injury. Of course, the fact finder cannot assess them each 100% of the fault. So, the result will be that they will be assessed 50% of the fault each. However, the question is, does this result reflect the evidence in the case? The answer is no, it does not. In fact, it can be said that a 50/50 assessment in such a case is not dictated by the evidence, but rather by the principles of *simple math*. Whereas before we had one hunter, now we have two. We only have 100 percentage points to divide. It must now be divided by two; *ergo*, each hunter is cast for 50% of the judgment. The result is unfair to the plaintiff and an affront to the law and to rational judgment. The two hunters should be held equally at fault and solidarily liable for the whole. The reason? They both *caused* a single indivisible injury. In reaching this decision, we return to our roots that took hold in the nineteenth century.

The supreme court in *Turner v. Massiah*⁵³ made a similar observation. *Massiah* involved a claim of medical malpractice against two physicians, both of whom had missed a cancer diagnosis. The issue before the court was whether there were two caps on general damages applicable to the case.⁵⁴ The court held that there was only one. However, in the process, the court observed the following:

The damage here, Stage 2 breast cancer, cannot be apportioned between the two tortfeasors because the damage is not severable; it is indivisible. If the damage, or injury, could have been divided into two parts, one part caused by one defendant and the other part caused by the other there would have been, in effect, two injuries. In that case, there having been two torts and two injuries, the question of two caps might have been present. In this case there were two torts but only one injury.⁵⁵

The court also noted that:

Apportioning or separating the injuries caused by one of the doctors from the injuries caused by the other simply cannot be done. "No ingenuity can suggest anything more than a purely arbitrary apportionment of such harm."⁵⁶

The result in *Massiah* is entirely consistent with the 1996 legislation, with its emphasis on preventing one tortfeasor from paying the damages caused by another. Ironically, assessing one tortfeasor with "more" blame than another because we "feel" his conduct is worse may well mean that the former will be forced to pay the damages actually caused by the latter. Such a result would indeed be contrary to the legislation.

53. 656 So. 2d 636 (La. 1995).

54. See La. R.S. 40:1299.42(B) (1992).

55. *Massiah*, 656 So. 2d at 640.

56. *Id.*, (quoting W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 52, at 347 (5th ed. 1984)).

However, when multiple tortfeasors cause a single harm, they must all be held solidarily liable for the damages, even under the current law. This result does not come as a consequence of legislation or jurisprudence or a desire to insure that the plaintiff is made whole again at the expense of others. It is a result that reason, logic and good judgment requires.

III. CONCLUSION

Although comparative fault overcame an unfair and inequitable situation for plaintiffs and defendants alike, it also caused many problems. It is time to move away from subjective considerations of fault assessment which invariably change with the fact finder. The courts need to embrace the very reliable concept of comparative causation and a strict adherence to the applicable duty. Additionally, when we clearly look at what is going on among tortfeasors and their relationship to harm, we are drawn to the conclusion that in certain situations solidary delictual responsibility persists. Those situations are as follows:

- (1) Where the conduct of two or more defendants is required in order to produce a single harm, as was the case in *Dixie*.
- (2) Where the conduct of any of the defendants alone could have produced the harm, as was the case in *Massiah*.
- (3) Where the defendants are each individually responsible for the same conduct, as was the case in *Cline* and *Veazey*.

Solidarity should not apply in situations where there are actually two different injuries or where an initial injury is made worse by a subsequent trauma, as was the case in *Gibson* and *Camble*.