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Article 2324: The Discombobulating State Of Solidarity In Post Tort Reform Louisiana

Thomas C. Galligan, Jr.*

I. INTRODUCTION

Prior to the 1987 change in Louisiana Civil Code article 2324, an accident victim could require any of several tortfeasors, who had caused an indivisible injury, to answer for all of his or her damages. Thus, a negligent defendant, found to be 10% at fault, might still be required to pay 100% of the plaintiff's damages. This potential liability was Louisiana's solidarity in tort; the common law reached the same result but called the resulting liability of the tortfeasors "joint and several."

In the summer of 1987, the Louisiana legislature, as part of its "tort reform" effort, amended Louisiana Civil Code article 2324, the article dealing with the solidary liability of multiple tortfeasors. Apparently unhappy with the pre-1987 state of tort solidarity, the legislature rewrote Article 2324, changing solidary obligations in non-intentional tort cases to joint obligations unless "otherwise provided by law" or unless it was "necessary" for the plaintiff to recover 50% of his "recoverable damages." (I'll quote the whole thing later.) Clearly, by this amendment, the legislature had done something, most probably changing the result in the hypothetical case involving the 10% at-fault, negligent defendant; but what else it had done wasn't so clear, and precisely why wasn't so obvious either.

That is, we weren't quite sure what the legislature had given us with new 2324. Those of us who write about these things made some educated guesses,¹ but they were just that: guesses. Now, more than five years later, we have begun to get some significant decisions on the meaning of new 2324 from the Louisiana Supreme Court and the Louisiana Courts of Appeal. It is to those decisions that I will devote the lion's share of this piece.

In the following section, I will take a quick look at the state of the law before the fateful summer of 1987. Thereafter, in Section III, I will begin my discourse on modern times with a recent case out of the second circuit dealing with the

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1. See Thomas C. Galligan, Jr., *2324: The Creature from the Tort Reform Lagoon*, 25, No. 2, *The Trial Brief 1* (Louisiana Trial Lawyers Assoc. 1992); M. Kevin Queenan, *Civil Code Article 2324: A Broken Path to Limited Solidary Liability*, 49 *La. L. Rev.* 1351 (1989); David W. Robertson, *The Louisiana Law of Comparative Fault: A Decade of Progress*, 1 *Louisiana Practice Series* (1991); Bruce V. Schewe, *Obligations, Developments in the Law, 1986-87*, 48 *La. L. Rev.* 423 (1987); Bruce V. Schewe & Robert L. Theriot, *Obligations, Developments in the Law, 1987-88*, 49 *La. L. Rev.* 463 (1988).

solidary liability of intentional tortfeasors under 2324(A), *Johnston v. Fontana*.² In Section IV, I will turn to 2324(B) and consider two recent Louisiana Supreme Court cases interpreting it: one, *Touchard v. Williams*,³ considers the meaning of the 50% cap on solidarity that 2324(B) creates, while the other, *Gauthier v. O'Brien*,⁴ considers the impact of 2324(B) on employer fault in cases where injured employees sue third persons. I will also consider other recent jurisprudence arising under 2324(B). Finally, in Section V, I will set forth some brief remarks in conclusion.

II. THE GOOD OLD DAYS?

As a prelude to the nostalgic interlude which this section of the paper promises to provide, it would be best to first define some relevant terms. Let me begin with solidarity. As one trained in the common law, my first impressions when I heard the word "solidarity" were of Poland, Lech Walensa, and the fall of Communism in Eastern Europe. I was, as you civilian readers are aware, a little bit off.

"An obligation is solidary for the obligors when each obligor is liable for the whole performance."⁵ Alternatively, an obligation is joint for the obligors when "different obligors owe together just one performance to one obligee, but neither is bound for the whole . . ."⁶ By way of example, assume each of three tortfeasors was 33 1/3% at fault, and a blameless plaintiff suffered \$100,000 dollars in damages; if the tortfeasors were solidary obligors (pre-1987, that is), each would potentially be liable for \$100,000. However, if the tortfeasors were joint obligors, each would only be liable for \$33,333 (his individual share—one third).

Before its amendment in the summer of 1987, Louisiana Civil Code article 2324 provided, in part: "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."⁷ Under the former article, people who acted together to commit an intentional tort were, under certain situations, solidarily liable for the damages caused.⁸

Likewise, tortfeasoring employees and their vicariously liable employers were solidarily liable for the tort damages that the employee's victims suffered.⁹ In the normal vicarious liability case, the employee's liability usually arose out of Louisiana Civil Code articles 2315 and 2316 because tortfeasoring employees in such cases are typically negligent. The employer's liability was vicarious as provided

2. 610 So. 2d 1119 (La. App. 2d Cir.), *writ denied*, 618 So. 2d 407 (La. 1993).

3. 617 So. 2d 885 (La. 1993).

4. 618 So. 2d 825 (La. 1993).

5. La. Civ. Code art. 1794.

6. La. Civ. Code art. 1788.

7. La. Civ. Code art. 2324 (1870).

8. *See, e.g.*, *Knott v. Litton*, 81 So. 2d 124 (La. App. 2d Cir. 1955).

9. *See, e.g.*, *Sampay v. Morton Salt Co.*, 395 So. 2d 326 (La. 1981); *Foster v. Hampton*, 381 So. 2d 789 (La. 1980). *See also* La. Civ. Code art. 2092 (1870).

for in Louisiana Civil Code article 2320. Even though the sources of the two defendants' obligations were different, they were still solidary obligors.¹⁰ Likewise, a negligent defendant and his insurer were solidarily liable for the plaintiff's damages up to the policy limits.¹¹ Above the policy limits, the tortfeasor had to go it alone.

Most importantly, under the jurisprudence interpreting former 2324, two or more persons, who caused an indivisible injury, were solidarily liable. An indivisible injury was one in which it was impossible to apportion the damages caused by the tortfeasors between them. That is, if two negligent drivers collided, and a passenger in one of the cars suffered a broken neck, the injury would be "indivisible." After all, how do you split up a broken neck? You cannot say which of the two drivers caused the neck to break. Consequently, each of the defendants would have potentially faced liability for all of the plaintiff's damages. Presumably, the plaintiff had the burden of convincing the factfinder that his injuries were indivisible.¹²

In an indivisible injury case, the law came to call the tortfeasors, who caused the injury, "joint tortfeasors,"¹³ a label that formerly (dawn of time stuff) had been reserved for those who had acted in concert,¹⁴ and also for purely procedural contexts.¹⁵ Louisiana followed the lead of its common-law neighbors in this use of the phrase "joint tortfeasors," although the adoption of this nomenclature was not without some semantic pitfalls. You may recall, as I said in the introduction, in our neighboring common-law states, joint tortfeasors were jointly and severally liable. There is a nice consistent ring to that. However, in our great state, joint tortfeasors were solidary obligors; they were not joint obligors. Thus, in Louisiana, joint tortfeasors were not joint obligors. In Louisiana the adjective "joint" meant two different things in that sentence you just finished reading. It was the expectation of stuff like this that got me into law.

In any event, before 1980, solidarity in tort was not so complicated. Again, if three tortfeasors caused an indivisible injury, each was potentially liable for the whole, and if one tortfeasor paid 100% of the judgment, he then enjoyed rights to contribution against the other tortfeasors.¹⁶ What would the others be liable for in the contribution action?¹⁷ Each would be liable for his share—no more. Before

10. This notion is now codified in Louisiana Civil Code article 1797. *See also* *Narcise v. Illinois Cent. Gulf R.R.*, 427 So. 2d 1192 (La. 1983).

11. *See B.J. McAdams, Inc. v. Stewart*, 515 So. 2d 666 (La. App. 3d Cir. 1987), *writ denied*, 519 So. 2d 130 (1988).

12. *Hess v. Sports Publishing Co.*, 520 So. 2d 472 (La. App. 4th Cir.), *writ denied*, 523 So. 2d 1343 (1988). *Cf. Probst v. Wroten*, 433 So. 2d 734 (La. App. 5th Cir. 1982).

13. W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 46, at 322 (5th ed. 1984).

14. *Id.*

15. *Id.* § 47, at 325.

16. 1979 La. Acts No. 431 amended and reenacted La. Civ. Code arts. 2103, 2323, and 2324; this amendment added the second paragraph relative to concurring fault and comparative negligence.

17. Please note, here I am not dealing with the possibility of indemnity. *Cf. La. Civ. Code art. 1804, ¶ 3 and La. R.S. 9:3921* (1991) (greatly limiting an employer's right to indemnity or

1980, a tortfeasor's share was determined on a per capita basis, i.e., by the head. If there were three tortfeasors, the virile share of each was one-third. If there were four tortfeasors, the share of each was one-fourth. It was simply a matter of dividing up the damages pie by the number of liable defendants. Of course, if the plaintiff was at fault (and the defendants' duties did not include the risk of the plaintiff's negligence),¹⁸ then the plaintiff's recovery was barred under the then prevalent contributory negligence regime.

In 1980, with the amendment of Louisiana Civil Code article 2323 and the accompanying advent of comparative negligence, there were some changes. Under Louisiana's pure comparative negligence regime, the fault of the plaintiff does not bar recovery; it merely reduces it. Thus, after 1980, the factfinder has to not only determine whether the plaintiff is at fault, but also has to quantify that fault.¹⁹ After 1980, the factfinder also quantifies the fault of the defendants; logically, everyone's fault has to add up to 100%. Consequently, one tortfeasor might be more to blame than the others. Thus, virile shares are now determined not by the head, but by the percentage of fault allocated to each tortfeasor.²⁰ As we will see, these 1980 changes may, in part, have precipitated the 1987 amendment to Article 2324.

Let us examine a hypothetical fact pattern to clarify matters. Assume that the relevant events occurred in 1986, after the advent of comparative fault, but before the amendment of 2324.²¹ A blameless plaintiff, Mario, suffered \$100,000 worth of damages. Now suppose that there were three defendants allocated fault as follows: King Koopa—50%, Iggy Koopa—30%, and Wendy Koopa—20%. How much could Mario get from each? Well, assuming the three were joint tortfeasors, and therefore solidary obligors, Mario could pick whomever he wished and get all his damages from that person. Let's say Mario picked Wendy. Mario could have executed on his judgment, collecting \$100,000 from Wendy. Wendy would then have had a right to contribution over against King for \$50,000 (his share, 50%) and against Iggy for \$30,000 (his share, 30%). Pursuant to Louisiana Civil Code Article 1804, when seeking contribution, Wendy could have recovered no more from a defendant than his share.²² Thus, if King were unavailable, i.e., not subject to suit in Louisiana, and Mario collected \$100,000 from Wendy, she could then recover \$30,000 from Iggy but

contribution from a tortfeasor employee).

18. See, e.g., *Rue v. State*, 372 So. 2d 1197 (La. 1979); *Boyer v. Johnson*, 360 So. 2d 1164 (La. 1978); *Baumgartner v. State Farm Mut. Auto. Ins. Co.*, 356 So. 2d 400 (La. 1978).

19. The legislature amended Louisiana Code of Civil Procedure article 1812 at the same time it amended Louisiana Civil Code article 2323 to provide for the use of special verdict forms to allow factfinders to "quantify" the parties' (and others') fault. The legislature also amended Article 1804.

20. See La. Civ. Code art. 1804, ¶ 1.

21. The reader will also note that I have selected 1986 so that we are dealing with the current obligations articles relating to solidarity.

22. La. Civ. Code art. 1804. For a recent case on the effects of settlement, which I have treated as beyond the scope of this paper, see *Taylor v. United States Fidelity & Guar. Ins. Co.*, No. 93-C-0019, 1993 WL 427299 (La. Oct. 18, 1993).

would have had to absorb the \$50,000 she had paid over her share (and that she could not collect from King Koopa). There seems to have been no method whereby the risk of King Koopa's unavailability would be shared between Wendy and Iggy in such a case. Whomever Mario chose to go after for 100% (here Wendy) ended up bearing the full risk of King's unavailability.²³

Where Koopa was insolvent, the result probably differed. Article 1806 provides that "[a] loss arising from the insolvency of a solidary obligor must be borne by the other solidary obligors in proportion to their portion."²⁴ Arguably then, if King had been *insolvent*, as opposed to *unavailable*, the risk of his insolvency could have been split between Wendy and Iggy in proportion to their fault. In that case, Wendy's recalculated share would be 40%, or \$40,000, and Iggy's would have been 60%, or \$60,000. Mario could still have recovered 100% from Wendy. If Wendy paid Mario \$100,000, she would have been entitled to contribution of \$60,000 from Iggy. Let me chart the hypo for you visual thinkers.

Party	Fault	Potential Solidary Liability Under Old 2324		
		To Plaintiff	For Contribution	
			Koopa Unavailable	Koopa Insolvent
Mario	0%	N/A	N/A	N/A
King	50%	100%	N/A	N/A
Wendy	20%	100%	20%	40%
Iggy	30%	100%	30%	60%

The reader should also note that since 1980, both former and current Article 2324 provide that if the plaintiff's fault is greater than the share of any defendant, *that* defendant is only liable for his share. So if Mario were 20% at fault, and Iggy was only 10% at fault, Iggy's maximum exposure would be only 10%. In such a case, Iggy is a joint, *not* a solidary, obligor.

It seems fair to say that all this post-1980 quantification of fault had some effect on defendants. It woke them up. It got them thinking that if they were allocated only 10% of the fault in a tort case, it made no sense to them that they might be required to pay 100% of the plaintiff's damages. Put differently, the idea that fault could be quantified seemed at odds with the notion that the plaintiff's injury was somehow indivisible. If a jury could allocate fault, a defendant might reason, why was it that under the concept of solidarity he had to pay more than his allocated share of fault?

This rudimentary questioning, coupled with the growth of the tort reform movement, resulted in a national attack on the concept of joint and several

23. In the interest of completeness, let me note that if Mario were at fault, his recovery would be reduced by his share of the fault. However, if he was more at fault than one of the other tortfeasors, that tortfeasor would only be liable for his share. That less blameworthy tortfeasor was a joint, not a solidary, obligor. This result was dictated by the language of former Civil Code article 2324. The language remains in new 2324(B), so this aspect of the law has not changed.

24. La. Civ. Code art. 1806.

liability in tort cases. In Louisiana, of course, the attack, or reconsideration, was on solidarity in tort cases. As noted, in the summer of 1987, that reconsideration resulted in the amendment of Civil Code article 2324. Actually, in the interest of historical accuracy, the legislature created the first two subparts in 1987; it added subpart C in 1988.²⁵ Despite its length, it is worth it for me to set forth the article in full. The current version of Civil Code article 2324 provides:

A. He who conspires with another person to commit an intentional or willful act is answerable, in solido, with that person, for the damage caused by such act.

B. If liability is not solidary pursuant to Paragraph A, or as otherwise provided by law, then 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 the preceding Article, a judgement debtor shall not be liable for more than the degree of his fault to a judgement 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.

C. Interruption of prescription against one joint tortfeasor, whether the obligation is considered joint and divisible or solidary, is effective against all joint tortfeasors. Nothing in this Subsection shall be construed to affect in any manner the application of the provisions of R.S. 40:1299.41(G).²⁶

What does it all mean? As I said, people (myself included) have guessed at it. It remains, in the following sections, to be seen what the courts have said about it. Let me begin with 2324(A).

25. 1988 La. Acts No. 702 added paragraph C providing that interruption of prescription against one joint tortfeasor is effective against all joint tortfeasors.

26. La. Civ. Code art. 2324. Mississippi has taken a similar approach to the multiple tortfeasor problem. The Mississippi statute is nearly identical to Louisiana's although the words joint and several are substituted for solidary. See Miss. Code Ann. § 85-5-7 (1972).

III. 2324(A): INTENTIONAL TORTS AND SOLIDARITY: WHO CARES ABOUT CONSPIRACIES ANYWAY?

As noted, under pre-1987 law, when one person intentionally caused injury to another, or assisted in injuring another, both the actual perpetrator of the wrong and the aider and abettor were potentially liable (solidarily) for all of the plaintiff's damages. *Knott v. Litton*²⁷ illustrates the operation of former 2324 in a case where the actual perpetrator was an intentional tortfeasor.

As a result of a dispute relating to roving cattle, a fence, and some dogs, Mr. Litton became rather upset with his sixty-six year-old neighbor, Ms. Knott. Litton was so disturbed by the entire episode that he informed a friend that if Ms. Knott were a man, or if he were a woman, he would "whip" her. Given the fact that Litton was not a woman and Ms. Knott was not a man, Mr. Litton did the next best thing. He went home and described his mis-adventure with his neighbor, Ms. Knott, to his wife, Mary Tyler. Mary Tyler Litton was a woman in her thirties, who weighed between 160 and 170 pounds. After listening to her husband's tale, Mary Tyler and her husband set out in tandem to find Ms. Knott.

When the Littons discovered Ms. Knott's whereabouts, Mary Tyler picked up a sweet gum sprout about one inch in diameter and several feet long. She stripped the foliage and branches from the sprout and crawled through the fence separating the two properties. When Mary Tyler came face to face with Ms. Knott, Mary Tyler proceeded to beat Ms. Knott with the sprout over the head, back, legs, and arms. Finally, some other women, who had observed this rather one-sided battle, defied Mr. Litton's warnings not to rescue Ms. Knott, and saved her from Mary Tyler.

When Ms. Knott sued Mr. Litton, one can imagine that he correctly asserted that he hadn't hit anyone; therefore, how could he be held liable? It was his wife, not him, who had battered Ms. Knott. However, the court found that Mr. Litton was "clearly liable" under former 2324. He had "willfully and maliciously incited, encouraged and induced his wife" to attack the older and frailer Knott. He was a solidary obligor.

Likewise, in *Perigoni v. McNiece*,²⁸ the Perigonis and the McNieces had gotten into an argument over driving techniques and the flow of traffic in the City of New Orleans. During the course of the debate over traffic patterns, Mr. McNiece supplied his twenty-two year-old daughter with a pair of vice grips with which to attack Perigoni. After arming the apple of his eye, Mr. McNiece exhorted his daughter to "hit him, hit him, hit the s-o-b." Like any obedient daughter, Ms. McNiece followed her father's instructions. Under the circumstances, the court found that both father and daughter were solidarily liable under 2324, given the supportive parent's assistance and encouragement in the daughter's tort.

27. 81 So. 2d 124 (La. App. 2d Cir. 1955).

28. 262 So. 2d 407 (La. App. 4th Cir. 1972).

In yet another case of interest, *Walker v. Champion*,²⁹ Terry Davis and his mother sued for the loss of an eye, one of Terry's eyes. Terry had been keeping company with two older men when the older men began throwing bottles at young Davis. Later, apparently losing interest in hitting Davis with bottles, the men began shooting at him. The men claimed that they were doing all this in good fun; they claimed they did not intend to hit Terry. As the victim of all this good fun, Terry Davis decided to hide behind the body of a wrecked automobile. Unfortunately, Davis stuck his head up at the wrong time and was hit in the eye with a beer bottle one of the men had thrown. The court found that both of the men were liable for Davis' injuries. The one who hadn't thrown the bottle had started the entire fracas. Under former article 2324, he too was responsible.³⁰ They were solidary obligors.

Would these cases turn out the same way after the 1987 amendment of 2324, particularly given the statement in 2324(A) that an intentional tortfeasor "who conspires with another" shall be solidarily liable with that person for the injuries they cause? Can it be said that the Littons, the McNieces, or the good old boys in *Walker* conspired to commit an intentional tort?³¹

Read literally, 2324(A) would require the plaintiffs in each of the above cases to prove that the defendants had been parties to a conspiracy. A criminal conspiracy is defined as an "agreement or combination of two or more persons

29. 288 So. 2d 44 (La. 1973).

30. Cf. *McInnis v. Terry*, 121 So. 2d 329 (La. App. 1st Cir. 1960).

31. Several other issues arise out of the provision in new 2324(A) that one who conspires with another to commit an "intentional or willful act" shall be solidarily liable with the person who commits the act. For one, what does intentional act mean? Every voluntary act is arguably intentional, in which case 2324(A) is not limited to intentional torts. One may assume that the courts will read intentional act in 2324(A) the same way that they read it in La. R.S. 23:1032, the statute which creates and regulates the employer's tort liability, and lack thereof, to employees. In the worker's compensation arena, an employee whose injuries are covered by worker's compensation benefits may not sue his employer for tort damages unless the injuries arise out of the employer's intentional act. The Louisiana Supreme Court has interpreted intentional act in that context to mean intentional tort. See *Bazley v. Tortorich*, 397 So. 2d 475 (La. 1981).

A second, somewhat thornier problem, arises out of the word "willful" in new 2324(A). Solidary liability attaches to those who conspire to commit a willful act. Arguably, willfulness is a mental state somewhat less "culpable" than intent. Intent requires that the actor either actually desire the unlawful consequences of his action or is substantially certain that they will result. One may persuasively contend that intent requires a subjective inquiry into the mental state of the defendant. Alternatively, willfulness, at least when it is grouped with wantonness and recklessness, is gauged by an objective standard; courts ask whether the defendant proceeded in a highly unreasonable manner under circumstances which the reasonable person would have realized posed a high risk of some type of serious injury. See *Keeton et al.*, *supra* note 13, § 34, at 212. Only time will tell how the Louisiana courts will interpret the word "willful" in 2324(A). Will they read it as a synonym for "intentional," or will they give it the meaning it is given when it is grouped with "wanton and reckless"? One may argue that if willful meant nothing more than intentional in 2324(A) there was no need for the legislature to include it in the article. Of course, the same may be said of the word "recoverable" in 2324(B), although I argue against such a reading below.

for the specific purpose of committing any crime"³² The agreement may be tacit; but, are we going to import all the complexities of the criminal law of conspiracy into the law of torts? Without answering that question (after all, I am a law professor), let me tell you that courts applying Louisiana law have already recognized that a conspiracy may give rise to civil liability.

To establish a conspiracy in the civil, rather than the criminal, arena (civil conspiracy), the plaintiff must establish that the defendants had an agreement to commit an illegal act which resulted in the plaintiff's injury.³³ Obviously, simply proving a conspiracy is an insufficient basis for recovery. To establish liability in tort, one of the parties to the conspiracy must have committed a tort in furtherance thereof. Thus, the plaintiff must prove that there was some agreement between the defendants and that the agreement resulted in the commission of a tort, which adversely affected some interest of the plaintiff's, which the law protects.

Importantly, there were several cases decided under former Civil Code article 2324 recognizing that two people, who conspired to do an unlawful act and committed a tort in the process, were solidarily liable for the tort victim's damages. One particularly educational case, thanks in part to its setting, is *Tabb v. Norred*.³⁴ In *Tabb* a group of boys went camping. Two of the boys, Vincent and Norred, had guns with them. I assume they felt in need of protection while bivouacking in the wilds of the Bayou State. During the course of their wilderness experience, several of the boys began drinking wine and beer, not, to borrow a term from another Louisiana tort context, a "true outdoors"³⁵ activity. Thereafter, some of the boys decided to go "hit the school." Apparently, the campers were not too far out in the woods that they could not easily return for a little impromptu vandalism. The boys proceeded to the Broadmoor Elementary School in Lafayette and broke in. Before any serious damage was done to the physical structures of elementary education in Lafayette, the police arrived on the scene and apprehended one of the boys. Shortly thereafter, the police caught up with Vincent, but not before his firearm had accidentally discharged, fortunately injuring no one, but, unfortunately, foreshadowing the fireworks to follow.

Officer Tabb entered the school building after Norred. When the two met, Norred shot Tabb twice. Thereafter, Tabb sued both the Vincents and the Norreds. The court found that Vincent and Norred were co-conspirators. They had entered into a conspiracy to do an unlawful act. Norred's tort had occurred in furtherance of the conspiracy. In holding the Vincents liable, the court noted that the words "encourage and assist" in former 2324 contemplated acts performed pursuant to a conspiracy.

32. La. R.S. 14:26 (1986).

33. *Thomas v. City of New Orleans*, 687 F.2d 80 (5th Cir. 1982). See also *Silver v. Nelson*, 610 F. Supp. 505 (E.D. La. 1985).

34. 277 So. 2d 223 (La. App. 3d Cir.), writ denied, 279 So. 2d 694 (1973).

35. See, e.g., *Keelen v. State*, 463 So. 2d 1287 (La. 1985).

Although the court noted that one of the conspirators might perform an act that went beyond the scope of the conspiracy, for which the other conspirators would not be liable, in *Tabb*, the boys had contemplated that "it might become necessary for them to shoot someone to avoid being apprehended, and the possibility of such a shooting thus constituted a part of the conspiracy."³⁶ The court also expressly noted that one party to a conspiracy might withdraw from the conspiracy before the commission of an overt act in furtherance thereof, consequently escaping liability; but to avoid liability, the withdrawing conspirator would have to act in good faith, and his withdrawal would have to have been complete and voluntary.³⁷ No doubt *Tabb* and other pre-1987 cases on civil conspiracy³⁸ will be relevant to the interpretation of the word conspiracy in new 2324(A), if indeed a conspiracy is required to actually impose solidary liability on intentional tortfeasors.

In one of the first cases expressly considering the meaning of 2324(A), the court noted that a plaintiff relying on a civil conspiracy theory must establish an agreement to commit the illegal or tortious act which resulted in the plaintiff's injuries.³⁹ This statement of the requisite elements for a civil conspiracy seems to be somewhat narrower than *Tabb*, where there appeared to be no question that the boys had *not* expressly agreed to shoot Tabb, but had only contemplated that a shooting might possibly occur. In any event, the court took the conspiracy language in 2324(A) literally. The same cannot be said of a recent second circuit case, *Johnston v. Fontana*.⁴⁰

Johnston was sitting on a stool in a bar next to her friend, Croft. Another customer, Coleman, who had been verbally berating one Jones, sat down next to Croft. After listening to Coleman's verbal abuse for a good while longer, Jones came over and pushed Coleman. Coleman fell into Croft, who fell into Johnston. In a torts version of the domino effect, Coleman, Croft, and Johnston all fell to the floor, with Johnston on the bottom, having suffered a broken ankle in the pile up. Johnston sued Coleman, Jones, and Fontana, the proprietor of the establishment. Coleman and Jones failed to appear for trial; plaintiff entered defaults against them. At trial, the court held in Fontana's favor; however, the second circuit reversed on this point, concluding that Fontana had breached his duty to protect a patron (Johnston) from a third person's foreseeable attack. The second circuit allocated fault among the parties as follows: 30% to Coleman, 20% to Jones, 30% to Fontana's employees, and 20% to Johnston, who should have gotten up and moved.

36. *Id.* at 228.

37. *Id.* at 229.

38. See, e.g., *Buras v. MaChella*, 172 La. 580, 134 So. 751 (1931); *Cassidy v. Holliman & Spiers*, 13 La. App. 468, 126 So. 733 (1st Cir. 1930); *Allen v. Currie*, 8 La. App. 30 (1st Cir. 1928); *Levy v. Collins*, 115 La. 204, 38 So. 966 (1905); *Kernan v. Humble*, 51 La. Ann. 389, 25 So. 431 (1899).

39. *Kiva Constr. & Eng'g v. International Fidelity Ins. Co.*, 749 F. Supp. 753 (W.D. La. 1990). Actually the court cited the article more in relation to what civil conspiracy meant than for its solidarity aspects.

40. 610 So. 2d 1119 (La. App. 2d Cir. 1992), *writ denied*, 618 So. 2d 407 (1993).

Importantly, the court stated that "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)."⁴¹ What is significant about the just quoted statement is that the court imposed solidary liability on Coleman and Jones, the intentional tortfeasors, without discussing the apparent lack of any conspiracy.

There had been no agreement between Coleman and Jones to do anything. It was, in fact, their failure to agree on anything which led to Johnston's injuries. The court seems to have imposed solidary liability as a policy matter. Coleman and Jones were intentional tortfeasors and, as bad actors, were held liable for all the damages they caused, less plaintiff's fault. Of course, the precedential value of the case is somewhat undermined by the fact that neither Coleman nor Jones appeared in the case or argued on appeal. Thus, the solidary nature of their obligation was apparently not fully argued. However, the court's willingness to impose solidary liability on the intentional tortfeasors, apparently absent a conspiracy, is still noteworthy. And, it seems to be pretty good policy too. Why shouldn't intentional tortfeasors face the deterrent effect and moral impact of solidary liability? What is there to say in their behalf? For those who pray for visuals, let me chart the case:

<i>Party</i>	<i>Fault</i>	<i>Potential Liability to Plaintiff [Source]</i>
Johnston	20%	N/A
Coleman	30%	100% [2324(A)]
Jones	20%	100% [2324(A)]
Fontana	30%	50% [2324(B) (See Section IV)]

Indeed, one wonders whether a court might even go further than the second circuit did in *Johnston*. Suppose Coleman had hit Johnston directly and caused her injuries? Further still, assume that Fontana was negligent for not doing something to stop Coleman. For simplicity's sake, let's assume Johnston was not negligent. Suppose the court had allocated 50% of the fault to Coleman, the only intentional tortfeasor, and 50% to Fontana, who was negligent. Would a court then have held Coleman solidarily liable with Fontana for potentially 100% of the damages? In the hypo, of course, there is only one intentional tortfeasor; but, if one does not require a conspiracy before imposing solidary liability, where there are two intentional tortfeasors, there seems little reason to require *two* intentional tortfeasors to impose solidary liability on the sole intentional tortfeasor. If the reason behind the court's imposition of solidary liability in *Johnston* is a policy of punishing non-conspiring, intentional tortfeasors, that policy is implicated just as much where there is only one intentional tortfeasor and a non-intentional tortfeasor as where there are several intentional wrongdoers who do not conspire. While the result in *Johnston* seems to be good policy, it remains somewhat disturbing for

41. *Id.* at 1123. One will also note the wording of the decree. *Id.* at 1123-24.

those who take their Civil Code articles literally. After all, 2324(A) does say "conspires."

Interestingly, there is some dicta in the Louisiana Supreme Court's decision in *Touchard* which is consistent with the solidary liability of non-conspiring intentional tortfeasors imposed in *Johnston*. In the context of deciding what the 50% language in 2324(B) meant, the Supreme Court said, "Judgment debtors are no longer exposed to solidary liability for 100% of the judgment creditor's damages except where the joint tortfeasors commit 'an intentional or wilful act.'"⁴² One notes that the court did *not* mention the necessity of the plaintiff's establishing a conspiracy before holding intentional tortfeasors solidarily liable. Later, in more dicta, the court repeated its earlier sentiment when it said, "Similarly, a judgement creditor is precluded from securing 100% recovery from one or another of the joint tortfeasors, except where the tortfeasors commit 'an intentional or wilful act . . .'"⁴³ Again, one notes the rather obvious omission of any reference to the conspiracy requirement.

While one waits for the Louisiana Supreme Court to address the conspiracy question directly, it is well to remember that even though we are a civil-law jurisdiction, where legislation is the supreme will of the legislature,⁴⁴ there are instances in Louisiana tort law where the courts have ignored codal language in light of compelling policy reasons. Perhaps the most noteworthy example involves Louisiana Civil Code article 2320, which expressly provides that a master may only be liable for the torts of his servant if he was capable of preventing the plaintiff's injuries.⁴⁵ This language would seem to require that to hold a master liable for the torts of a servant, the plaintiff must establish some actual employer fault. However, there is no such requirement in the jurisprudence; the courts have basically ignored that "capable of prevention" language in Article 2320, thereby reading it out of the Code. We will see if a similar fate awaits the conspiracy requirement of 2324(A).

Perhaps happily (until we get to the next section) the significance of this entire discussion of the solidary liability of intentional tortfeasors pales in comparison to the practical significance of the solidarity of non-intentional tortfeasors. It is to that issue which I now turn.

IV. 2324(B): 50%, RECOVERABLE DAMAGES, AND EMPLOYER FAULT

A. "To The Extent Necessary"—For What?

If the reader recalls, 2324(B) deals with the solidary liability of non-intentional tortfeasors. It provides for the potential solidary liability of persons who may be

42. *Touchard v. Williams*, 617 So. 2d 885, 891 (La. 1993).

43. *Id.* at 892.

44. La. Civ. Code art. 2.

45. La. Civ. Code art. 2320.

negligent, strictly liable, or absolutely liable.⁴⁶ Under 2324(B), if a tortfeasor's liability is not solidary as provided in 2324(A), or "as otherwise provided by law,"⁴⁷ then "liability for damages caused by two or more persons shall be solidary *only to the extent necessary* for the person suffering injury, . . . *to recover fifty percent of his recoverable damages.*"⁴⁸ What does that mean? The Louisiana Supreme Court had to answer just that question in *Touchard v. Williams*.⁴⁹

In September, 1987, after the effective date of new 2324(B), Mary Touchard, while she was riding as a passenger in Brenda Williams' car, suffered indivisible injuries in two separate, but related, collisions. Touchard sued various parties

46. For a general discussion of these bases of liability in Louisiana, see Thomas C. Galligan, Jr., *Strict Liability in Action: The Truncated Learned Hand Formula*, 52 La. L. Rev. 323 (1991). See also William Powers, Jr., *Some Observations on Strict Liabilities in the Louisiana Law of Garde*, 52 La. L. Rev. 365 (1991).

47. The supreme court has yet to interpret this little phrase, thus possibly giving me something to write about next year. I believe that the courts will interpret the phrase to include employers and employees. Thus, an employer who is vicariously liable for his employee's tort will remain solidarily liable with the employee for all of the plaintiff's damages. Likewise, the phrase will no doubt include the solidary liability of an insured and an insurer for the insured's torts up to the policy limits.

Will it also include the situation where one defendant is strictly liable for a defect in a "thing," see Civil Code article 2317, or "building," see Civil Code article 2322, and the other defendant is negligent, and the latter's negligence is what rendered the first defendant's thing or building unreasonably dangerous? See generally *Dusenbery v. McMoran Exploration Co.*, 433 So. 2d 268 (La. 1st Cir.), writ denied in part, granted in part, 441 So. 2d 208, writ denied, 441 So. 2d 213 (1983), rev'd in part, 458 So. 2d 102 (1984).

Likewise, what about a tortfeasor and a health care provider whose negligence aggravates the injury? We know that in certain circumstances the initial tortfeasor was held liable, as a policy matter, for the aggravation of injuries arising from the negligence of the health care provider. *Weber v. Charity Hosp. of Louisiana*, 475 So. 2d 1047 (La. 1985). After Article 2324's amendment, is the initial tortfeasor liable for 100% of the damages arising out of the aggravation? That is, is he liable for the initial injuries because he actually caused them and then solidarily liable with the health care provider for the aggravation as a matter of policy? The first circuit had held that after the amendment of Article 2324, the fault of a health care provider in such a case must be quantified. *Lambert v. United States Fidelity & Guar. Ins. Co.*, 623 So. 2d 11 (La. App. 1st Cir. 1993). The court held that a defendant tortfeasor should be allowed to file an amended answer alleging the fault of the other tortfeasor, a treating doctor, and that plaintiff's recovery should be reduced by the doctor's fault. In a per curiam opinion, the Louisiana Supreme Court reversed holding that the initial tortfeasor would still be liable for 100% of the plaintiff's injuries, including those caused by the negligent health care provider. The initial tortfeasor was the legal cause of all plaintiff's injuries. *Lambert v. United States Fidelity & Guaranty Co.*, 629 So. 2d 328 (La. 1993). One wonders whether a court might treat the initial injury and the aggravation as separable (divisible). If so, then the tortfeasor alone would be liable for *all* the initial injuries. As to the aggravation under *Weber*, the tortfeasor and the doctor would be solidarily liable. To hold otherwise would be to effectively overrule *Weber*, which the court refused to do in *Lambert*. The initial tortfeasor may have a right to indemnity (or contribution) from the doctor, *but* that should not affect the plaintiff's rights against the initial tortfeasor.

48. La. Civ. Code art. 2324(B) (emphasis added).

49. 617 So. 2d 885 (La. 1993). The decision produced no dissents but Justices Marcus, Ortique, and Lemmon concurred, with Justice Marcus assigning reasons.

involved in the accidents and their insurers. Among the tortfeasors were Williams, Martha Causey, and Steven Lege. The jury that decided the case allocated fault as follows: Williams—63%, Causey—30%, and Lege—7%. The jury, perhaps anticipating law school exams on the subject and commentary by (still) young law professors, awarded Touchard \$100,000 in damages.

Only after the jury returned its verdict did the serious legal machinations begin. Causey's insurer paid Touchard \$30,000, no practical or analytical problems there. Lege's insurer paid \$7,000—ditto on the no problems front. But, because life is not always simple, Williams was underinsured; her insurance carrier paid only its policy limits of \$25,000, \$38,000 less than Williams' full share.

If you added everything up that Touchard had collected from the various defendants and their insurers, the total was \$62,000, which (thanks again jurors) was 62% of Touchard's total damages. Now, in the good old days (that is as opposed to the good old boys who were involved in the *Walker* case), before the summer of 1987, Touchard could have elected to pursue Causey, or Lege, or, depending on the amount of coverage, their insurers, and recover the \$38,000 she had not yet pocketed. This was because Williams, Causey, and Lege were joint tortfeasors, and thus, were solidary obligors. Consequently, any one of them could have been required to respond for the whole, or any part, of the judgment. But what was the result in post-tort reform Louisiana?

Was solidarity "necessary" under 2324(B) for Touchard to recover 50% of her recoverable damages? The answer seemed to be no; she had already recovered 62%, so solidarity was not necessary for her to recover 50%. Thus, the defendants argued they were joint obligors and only liable for their shares, which they had already paid. The trial court agreed with the defendant's argument;⁵⁰ so did the court of appeal.⁵¹ That was also the way I had read 2324.⁵² I believe that was also the way Professor Robertson read it.⁵³ However, that is not the way the Louisiana Supreme Court read it,⁵⁴ and as these things go, the Louisiana Supreme Court is right!

Chief Justice Calogero began his opinion in *Touchard* by recounting the parties' contended readings of 2324(B). As noted, the defendants claimed that, given the fact the plaintiff had already recovered 62% of her damages, there was no solidarity amongst them. Solidarity, they argued, was only necessary if Touchard had recovered less than 50% of her damages. Chief Justice Calogero referred to this reading of 2324 as "conditional or 'functional' solidary liability."⁵⁵

50. *Id.* at 887.

51. *Touchard v. Williams*, 606 So. 2d 927 (La. App. 3d Cir. 1992).

52. *See Galligan, supra* note 1, at 2.

53. *See Robertson, supra* note 1, at 45-47.

54. *Touchard v. Williams*, 617 So. 2d 885, 892 (La. 1993). Pursuant to the procedure, the eight member court was established to assign seven justices to hear cases. *See State v. Barras*, 615 So. 2d 285, 286 n.1 (La. 1993). Justice Dennis was not on the *Touchard* panel.

55. *Touchard*, 617 So. 2d at 887.

The Chief Justice aptly pointed out in a footnote⁵⁶ that it was not clear, under the defendants' argument, just what would happen in a case where solidarity was necessary for the plaintiff to recover 50% of her recoverable damages. That is, would the remaining defendant or defendants then be liable for up to 50% of plaintiff's damages? Or, once solidarity was necessary for plaintiff to recover 50%, would the whole pre-1987 notion of solidarity in tort kick back in, in which case the remaining defendant or defendants would be liable for up to 100% of the plaintiff's damages? The Chief Justice noted that neither the defendants nor the court of appeal which had adopted the conditional solidarity approach had answered this important question. Had the defendants been given an opportunity to ponder this matter, there is no doubt that they would have answered that a plaintiff in such a case was only to recover 50% of her recoverable damages.

Returning to the case, the Chief Justice pointed out that the plaintiff read 2324(B) a little differently from the defendants. Ms. Touchard read the critical phrase in 2324(B) as "intended to limit the exposure of joint tortfeasors to 50%, rather than 100% of the plaintiff's recoverable damages."⁵⁷ As the court noted,⁵⁸ this was the approach that the second circuit court of appeal had adopted in two cases⁵⁹ (one of them *Johnston*). In neither case had the second circuit actually discussed the issue, but its decrees in both cases supported *Touchard's* reading of the applicable language in 2324(B). The supreme court illustrated the operation of the second circuit's approach in a footnote,⁶⁰ to which I will return in a page or two, because that footnote seems to be critical to an understanding of the court's opinion.

Next, returning to the text of Chief Justice Calogero's opinion, the Chief Justice wrote, in a subtly worded understatement: "Louisiana Civil Code article 2324 is not clear and free of ambiguity."⁶¹ Acknowledging that some interpretation of the article was necessary, as a result of its ambiguity, the court reviewed the history and purposes of solidary liability in tort cases in Louisiana in some detail.⁶² In particular, the court noted that an "underlying policy of joint and several or solidary liability, as well as tort law, is victim compensation."⁶³ Solidarity, prior to the summer of 1987, assured that a victim, whose fault was not greater than a particular defendant's, would recover all of his damages less an amount equal to the plaintiff's share of fault. Quoting, in part, from an article by attorney M. Kevin Queenan, the court said: "In adopting joint and several or solidary liability among joint tortfeasors, the courts 'espoused a theory that it is

56. *Id.* at 887 n.1.

57. *Id.* at 887.

58. *Id.*

59. *Johnston v. Fontana*, 610 So. 2d 1119 (La. App. 2d Cir. 1992), *writ denied*, 618 So. 2d 407 (1993); *Thompson v. Hodge*, 577 So. 2d 1172 (La. App. 2d Cir. 1991).

60. *Touchard v. Williams*, 617 So. 2d 885, 887 n.3 (La. 1993).

61. *Id.* at 888.

62. *Id.* at 888-90.

63. *Id.* at 889.

better to allocate damages to the injurers, even in greater portions than their respective degrees of fault, than have victims suffer a reduced recovery."⁶⁴

After reviewing history and policy, the court considered the legislative history of House Bill 841 which became new 2324(B).⁶⁵ As originally drafted, the bill would have gotten rid of solidarity in nonintentional tort cases altogether. However, the court noted that the 50% language was added in the House Committee on Civil Law and Procedure.⁶⁶ Noting that the bill, as passed, represented a compromise, the court went about the business of interpreting the article, expressly pointing out that "laws in derogation of established rights of long standing are to be strictly construed."⁶⁷ Because 2324(B) limits "the long standing principle of solidarity among joint tortfeasors"⁶⁸ and it "substantially impedes the ability of an injured party to obtain full recovery of his damages"⁶⁹ 2324(B) "is in derogation of a common right"⁷⁰ and "must be strictly construed to make the least change in the existing law."⁷¹

Next, the court said:

As discussed, solidary liability among joint tortfeasors has been a part of the Louisiana civilian tradition for over 150 years. La. Civ. Code art. 2304 (1825). Prior to the revision of article 2324, a victim was able to seek full recovery from any one of the joint tortfeasors, who were left to seek their respective contribution and indemnity from each other. Conversely, conditional or functional solidarity, and its ramifications, among joint tortfeasors, has never been a part of Louisiana law. Under our interpretation, conditional or functional solidarity among joint tortfeasors is not created. Instead, in *solido* liability among joint tortfeasors is preserved but is merely limited to 50%, as opposed to the previously existing 100%. For this reason, we believe our interpretation of present article 2324 announced in this decision makes the least rather than the most intrusion into existing law.⁷²

Several paragraphs later the court reiterated: "Considering the legislative intent, coupled with a strict interpretation, we conclude that the article was intended to

64. *Id.* at 889-90 (quoting Queenan, *supra* note 1, at 1356).

65. *Id.* at 890.

66. *Id.* at 890-91. The Committee also added the language to 2324(B) which provides that a debtor whose fault was less than the plaintiff's would only be liable for his share, as well as the language which preserved rights of contribution and indemnity. *See id.* The language providing for solidarity "as otherwise provided by law" was added on the House floor. *Id.*

67. *Id.* at 892.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

provide a cap on solidarity among joint tortfeasors of 50% rather than to create conditional solidarity among joint tortfeasors.”⁷³ Earlier, the court had said:

It seems evident that the phrase [“only to the extent necessary”] was used as a means of capping liability at 50% rather than creating a solidary liability among joint tortfeasors which is conditioned upon the fortuitous event of a 50% recovery, which is what the lower courts found in this case.⁷⁴

The court further supported its rejection of conditional solidarity by noting that conditional solidarity would have wrought havoc with the finality of tort judgments in any case involving multiple tortfeasors. You see, if judgments were not final until the plaintiff had recovered 50% of his recoverable damages, then for some time after entry of the judgment, both plaintiffs and defendants would be in legal limbo concerning appeals and executing on judgments. Alternatively, if judgments were final before the plaintiff recovered 50% of his recoverable damages, “final” judgments would be subject to post-trial modification whenever a defendant’s financial position sufficiently deteriorated before the plaintiff had recovered 50% of his recoverable damages.⁷⁵

Alright, so the court rejected conditional solidarity, but what did it leave us with? Clearly, in rejecting conditional solidarity, the court refuted the notion that to trigger 2324(B)’s limited solidarity, the plaintiff must first establish she cannot recover in full from someone. Hypothetically, if Mario were injured by King who was 70% at fault and Wendy who was 30% at fault, Mario could choose to recover 50% from Wendy even if King were fully solvent, available, and not immune. But, besides this simple point, what does *Touchard* and 2324(B) mean?

One could argue that the legislature intended 2324(B) as a liability limiting device and not a recovery limiting device. This reading is consistent with the court’s language which I have quoted above.⁷⁶ Although a liability limiting device would limit recovery in some cases, it need not always do so. That is, what the legislature might have been worried about in amending 2324 was not denying the plaintiff full recovery, where that could be avoided; but rather, it might have only aimed at limiting the potential liability of individual defendants, at capping liability. This reading of 2324(B) is consistent with the Supreme Court’s discussion of a cap on liability in *Touchard*. Let me slightly vary the facts of *Touchard* to better explain myself.

Imagine that the jury had exonerated Causey of any blame, instead finding Williams 93% at fault and Lege 7% at fault. Further assume that Williams was insolvent, unavailable, or immune.⁷⁷ Presumably under 2324(B), Lege’s exposure

73. *Id.* at 893.

74. *Id.* at 892.

75. *Id.* at 892-93.

76. See *supra* text accompanying notes 72-74.

77. More on immunity later. See *infra* text accompanying notes 98-102.

would be limited to 50%. Thus, 2324(B) limits liability here at 50%. Under the old law, Lege could have been forced to pay the full 100% of the plaintiff's damages, but not now. In the hypo, we see that 2324(B) also has a recovery limiting effect; Touchard would recover only 50% of her damages, not all of them. But limiting recovery need only be an effect of the statute, not a purpose. That is, the purpose of 2324(B) may have only been to limit Lege's liability. The legislature may have concluded that it was unfair for someone who was only 7% at fault to have to pay 100% of the plaintiff's damages. Thus, it limited the potential liability of the slightly at-fault defendant. (Of course, if Lege's share were over 50% he would be liable for his actual share, no more.) Limiting recovery in the hypo was merely an unfortunate by-product of limiting liability. But limiting liability need *not* mean limiting recovery. Let's change the hypo.

Now suppose the allocations of fault were what they actually were in the case: Williams—63%, Causey—30%, and Lege—7%. However, let us assume that Williams had nothing, including insurance. If that were the case, what could Touchard have gotten from the other two defendants? Well, if 2324(B) is merely a liability limiting device designed to protect individual defendants (a device which caps potential liability of a tortfeasor at the greater of 50% or his share), then there would seem to be no reason why Touchard could not collect 50% from Causey and 50% from Lege. This result is consistent with limiting liability; but, it does not limit recovery. It protects defendants who are allocated less than 50% of the fault by limiting their liability, but it does not simultaneously reduce the plaintiff's recovery. The plaintiff recovers all of her damages, but the individual defendants are protected from potential liability for 100% of the plaintiff's damages when they are less than 50% at fault. This result is also consistent with saying that solidarity still exists in tort cases; however, instead of facing potential liability for all of the plaintiff's damages, the defendant only faces liability for half of them, unless his share is over 50% in which case he pays his share. Thus, the only thing that 2324(B) would change is the potential maximum liability of a defendant who was allocated less than 100% of the fault. Some of the court's quoted language appears to point toward this reading.⁷⁸ This is how Professor Robertson has interpreted *Touchard*.⁷⁹ It is also how a panel of the third circuit, in an opinion by Judge Thibodeaux, has interpreted 2324(B) in a post-*Touchard* case.⁸⁰ Both Robertson and the relevant panel of the third circuit would hold *each* defendant, whose virile share was less than 50%, liable for up to 50% of the plaintiff's damages. Let me chart this approach.

78. See *supra* text accompanying notes 72-74.

79. David Robertson, *Solidary Liability in Tort—Part One*, 41 La. Bar J., No. 3, at 227, 230 (1993).

80. *Hayes v. Kelly*, 652 So. 2d 628 (La. App. 3d Cir. 1993). *Hayes* is actually a false imprisonment case. Thus, one could argue that 2324(A) was applicable and each of the defendants should have been liable for up to 100% of plaintiff's damages. However, the plaintiff does *not* appear to have made that point *and* the false imprisonment, although intentional by definition, arose out of what one might call careless (negligent) acts of the applicable authorities.

2324(B) As A Liability Limiting Device

Party	Fault	Potential Liability to Plaintiff
Touchard	0%	N/A
Williams	63%	63%
Causey	30%	50%*
Lege	7%	50%*

* Both may pay up to 50%.

One will note that this liability limiting reading of 2324(B) actually results in the least possible change from prior law because the plaintiff in the hypo is still compensated in full as she would have been prior to 1987. In this regard, this liability limiting reading of 2324(B) is consistent with what the supreme court said about construing legislation which limits common rights as narrowly as possible. However, it is arguable that the court in *Touchard* did not adopt this reading of 2324.

To see why, we must turn to footnote 3 in *Touchard* because it appears from footnote 3 that the court believed the legislation had something other than merely limiting liability in mind. Because it is so important to an understanding of current Louisiana tort law in this difficult area, I will set out footnote 3 in full. Remember, if you please, that we are back to the real facts of the real case, not a law professor's hypo. In footnote 3, the court refers to the interpretation of 2324(B) that the plaintiff had urged and that the second circuit had adopted (and apparently that the supreme court, in turn, also adopted). The court said:

Under this [plaintiff's] interpretation, Touchard would be able to recover an additional \$20,000.00 from either Allstate [Causey's insurer], assuming the policy limits have not and would not be exceeded by this addition, or Martha Causey [bringing Causey to the 50% liability mark]. Thus, Touchard could recover \$82,000.00 on her judgment. Alternatively, Touchard could collect an additional \$38,000.00 (\$43,000.00 less \$5,000.00 to prevent recovery from exceeding the \$100,000.00 judgment) from Texas Farmers Insurance Company [Lege's insurer], assuming the policy limits have not and would not be exceeded by this addition, or Steven Lege. Thus, Touchard could recover \$100,000.00.⁸¹

The important word in the footnote is "alternatively." Clearly, that word implies that Touchard is put to a choice. It seems to mean that a plaintiff can only hold *one* of the solidary obligor tortfeasors liable for 50% of her damages. She can bump one or the other of the defendants up to 50%, *not* both of them. I shall call this the "footnote 3 bump up one" approach to 2324(B). Let's chart it. Under option A Touchard bumps up Causey to 50% and recovers, in total, 82%. Under option B Touchard bumps up Lege to 45% (50% would result in 105% recovery—a no no) and recovers 100%.

81. *Touchard v. Williams*, 617 So. 2d 885, 887 n.3 (La. 1993).

<i>Footnote 3 Bump Up One Approach</i>			
<i>Party</i>	<i>Fault</i>	<i>Potential Liability to Plaintiff</i>	
Touchard	0%	0%	
Williams	63%	63% [Assume 25% Collectable]	
		<i>Option A</i>	<i>Option B</i>
Causey	30%	50%	30%
Lege	7%	7%	45% [Reduced to 45% from 50% to avoid Touchard collecting 105%]
Total:		82% ⁸²	100% ⁸³

Let's return to the hypothetical I used in section II to see how it would be handled under *Touchard's* footnote 3. Let me refresh your recollection of the hypo. The blameless plaintiff, Mario, suffered \$100,000 in damages; there were three defendants allocated fault as follows: King Koopa—50%, Iggy Koopa—30%, and Wendy Koopa—20%. Now, let us assume that King Koopa is insolvent and uninsured. Well, we know after *Touchard* that Iggy and Wendy, or at least one of them, will pay more than his or her share. If *Touchard* stands for the proposition that Mario can bump only one of the defendants up to 50% (footnote 3), then the smart plaintiff's lawyer will always choose the defendant who is less at fault and increase his or her share. That way, because the plaintiff will get 50% from the least blameworthy defendant plus the share of the other, it will maximize recovery. Here then, Mario would get \$50,000 from Wendy and \$30,000 from Iggy, for a total recovery of \$80,000. In *Touchard* itself, following this logic, *Touchard* would have bumped up Lege to recover 100% of her damages. Let's chart the hypo under the "footnote 3 bump up one" approach assuming that the plaintiff's lawyer is smart.

Hypo: Footnote 3 and the Smart Plaintiff's Lawyer

<i>Party</i>	<i>Fault</i>	<i>Potential Liability to Plaintiff</i>
Mario	0%	N/A
King	50%	50% [Assume Uncollectable]
Iggy	30%	30%
Wendy	20%	50% [Bumped up per footnote 3 by the smart plaintiff's lawyer]

82. Twenty-five percent collectable from Williams plus 50%, bumped up from Causey's 30% fault, plus 7%, Lege's fault.

83. Twenty-five percent collectable from Williams plus 30%, Causey's fault, plus 45%, bumped up from Lege's 7% fault as close as possible to 50% without resulting in over compensation, i.e., 105% recovery.

In the hypo, could Mario choose to take the “extra” \$30,000 that Wendy has to pay (over her share) and split it between Iggy and Wendy? That is, could Mario recover say \$40,000 (\$20,000 and \$20,000) from Wendy and \$40,000 (\$30,000 and \$10,000) from Iggy? There would seem to be no theoretical reason to prevent his doing so. In fact, it would be consistent with traditional notions of solidarity; but such splitting is not expressly provided for in footnote 3. What about asking Iggy to pay \$50,000 (\$30,000 and \$20,000) and Wendy \$30,000 (\$20,000 and \$10,000)? Again, all Mario has done is split up “Wendy’s” extra \$30,000. But here we have bumped up Iggy to 50% and bumped up Wendy. Although this is definitely not expressly provided for in footnote 3, it is consistent with traditional notions of solidarity.⁸⁴

For now, let us assume that *Touchard*’s footnote 3 states the law, and that the plaintiff can bump up only one of the defendants to 50% and then recover from the other defendant only his or her share. So, in the hypo, Mario will bump up Wendy to recover 50% from her and then will recover 30% from Iggy. Does Wendy have some right to contribution from Iggy? Article 2324(B) expressly preserves rights to contribution and indemnity. But is there any right to contribution to preserve?

Initially, we know Wendy has a right to contribution against King; she could recover the extra \$30,000 she has paid from him, but King’s got nothing. If King is insolvent, as assumed, then arguably Article 1806 might kick in, and Koopa’s insolvency would be “borne by the other solidary obligors in proportion to their portion.”⁸⁵ Thus, the “overage” would be split between the remaining tortfeasors, and if one paid *all* of the overage she would have a right to contribution from the other(s). Note that two sentences ago I said Article 1806 might apply; I said this because Article 1806 expressly deals with reallocating the share of an insolvent solidary obligor. What we are actually talking about reallocating here is the amount by which a tortfeasor’s liability has been bumped up. In essence, the bumped up portion is part of the insolvent solidary obligor’s share, but it is only a part. Thus, even here where Koopa is insolvent, Article 1806 does *not* apply in the traditional sense. This inapplicability is due to the 50% limitation in 2324(B). Solidarity does not relate to the whole but to 50%. The intellectual underpinnings of solidarity just weren’t made for a 50% rule like we have in 2324(B).

But if we do apply Article 1806 here, then the 30% over her share that Wendy has paid should be split between Wendy and Iggy in a 2:3 ratio. That would mean

84. By the way, why are we limiting the “solidary” obligation to the difference between 50% and Wendy’s share? Why don’t we say that there’s a solidary obligation for 50% of the plaintiff’s recoverable damages and each defendant is potentially liable for his joint share as well? In this regard, for example, Mario could force Iggy to pay 80% (the 50% solidary obligation plus the 30% joint share) and he could force Wendy to pay 20%. Note Mario would then get 100%. Alternatively, Mario could recover 30% from Iggy and 70% from Wendy (50% solidary obligation plus her joint 20%). Again Mario, coincidentally, recovers 100%. Of course, one problem with this approach is that joint obligations with an additional solidary obligation over and above the joint shares is not something we have seen before. It is also inconsistent with footnote 3.

85. La. Civ. Code art. 1806.

Wendy would absorb another 12% (\$12,000) and Iggy would absorb another 18% (\$18,000). If Wendy has paid the entire 30% "overage" to Mario, she should have a contribution claim against Iggy for \$18,000.

However, if Koopa is solvent but somehow unavailable, then Article 1806 is *not* literally applicable. In fact, as to Iggy, there is an argument that Wendy simply has *no* right to contribution at all. The second paragraph of Louisiana Civil Code article 1804 provides: "A solidary obligor who has rendered the whole performance, though subrogated to the right of the obligee, may claim from the other obligors no more than the virile portion of each." Wendy has not paid the "whole," but she has paid over her share; however, she may not, per the article, recover more than Iggy's virile share from him, and he has already *paid* his virile share, which arguably means he owes no more to anyone. This is a troublesome result. It is troublesome because practically it means that depending on the allocation of fault and the availability, or immunity, of the other defendants, the least blameworthy defendant (the one with the lowest share of fault) will end up owing more than the other available, non-immune defendants (whose liabilities are less than 50%) with no right against them. In other words, if the argument prevails and the smart plaintiff's lawyer bumps up the share of the least blameworthy tortfeasor (the one with the lowest percentage of fault) and that tortfeasor has no right to contribution, then that least blameworthy defendant would end up paying the greatest amount. Thus, an article designed to protect defendants, while limiting their liability to 50% (if their virile share is less than 50%), also potentially increases (assuming a smart plaintiff's attorney) the liability of the least blameworthy tortfeasor to 50%, while insulating the other available, non-immune defendants whose fault is greater than the bumped up obligor's, but less than 50%. Ugh!

This dynamic between Article 2324 and Article 1806 is also troublesome because it means the right to full contribution may depend upon whether the non-paying tortfeasor is solvent or unavailable. The significance of this distinction is a result of Article 1806's express reallocation of the insolvent obligor's, but not the unavailable obligor's, portion. Applying Article 1806 by analogy to cases involving unavailable or immune tortfeasors would seem to make some sense. It would certainly simplify life and lead to uniformity with contribution rights *not* dependent on the status of a defendant from whom a plaintiff *cannot* recover.

Even in an Article 1806 insolvency case (assuming it applies to Wendy's "overage"), however, contribution problems still arise. Even if Wendy has a right to contribution arising, in part, from Article 1806, how much should she get? Recall she has paid \$50,000 (\$30,000 more than her virile share), and Iggy has paid \$30,000 (his virile share). As stated above, the most logical alternative would be to somehow split the "overage" among the parties based upon their respective percentages of fault. This is the approach seemingly provided for in Article 1806. This is also what the court adopted in another context in *Gauthier*.⁸⁶ A ratio approach here would be a variant on the Uniform Comparative Fault Act's solution

86. *Gauthier v. O'Brien*, 618 So. 2d 825 (La. 1993). See *infra* text accompanying notes 120-133.

to the problem.⁸⁷ Thus, in our hypo, when Mario collects 50% from Wendy and 30% from Iggy, and Wendy turns to Iggy for contribution, a court could then split the "extra" \$30,000 (the "overage") between Wendy and Iggy based on their respective original allocations of fault. Under this approach, the court would split the \$30,000 on a 2:3 basis. Iggy would then end up paying Wendy \$18,000 on the contribution claim. Thus, he would finally bear \$48,000 and Wendy would bear \$32,000. This seems fair because it respects the initial allocation of fault amongst the solvent tortfeasors and because it splits the risk of Mario's insolvency on that basis.

However, this ratio approach to contribution in insolvency cases also presents problems. Assume that King is 60% at fault and that he is still both insolvent and uninsured. Assume Iggy is 30% at fault and Wendy is 10% at fault. Using the *Touchard* footnote 3 approach, Mario's smart lawyer would make Wendy pay 50%—\$40,000 over her share. Iggy would pay 30%. Thus, Mario again recovers 80% of his damages and goes on his merry old way. Wendy then goes after Iggy because Wendy has paid an extra 40%. If a court splits up this 40% under the ratio approach, it will do so in a 3:1 ratio; Iggy will pay \$30,000 of the "overage" and Wendy will pay (bear) \$10,000. If this is the case, Wendy's ultimate liability would be \$20,000 and Iggy's would be \$60,000 (\$10,000 over his 50% mark). Stop! Stop! Stop! This cannot be. It cannot be because contribution is based on subrogation,⁸⁸ and Wendy, who is seeking contribution, cannot have any greater rights than the plaintiff would have had,⁸⁹ and all Mario could have gotten from Iggy under footnote 3 in *Touchard* (and 2324(B)) was 50%. Does this mean then that Wendy's contribution recovery is \$20,000 (i.e., Iggy's liability is capped at 50%), so Iggy ends up paying \$50,000 and Wendy pays \$30,000?

All of these questions, and more, arise out of *Touchard* and particularly out of footnote 3. In two recent articles, Professor Robertson has dealt with some of these and other issues as well.⁹⁰ After *Touchard*, one wonders whether the court will stick to footnote 3 or whether, in later cases, it will deem footnote 3 to have been merely exemplary, but not determinative, of the meaning of 2324(B). Perhaps the court will follow its own textual language in *Touchard*,⁹¹ the third circuit,⁹² and Professor Robertson⁹³ and ignore the "footnote 3 bump up one" approach in favor of a "liability limiting approach" under which *each* tortfeasor, whose share was less than 50%, might be forced to pay 50% of the plaintiff's damages. The "liability

87. Unif. Comparative Fault Act § 2, 12 U.L.A. 43 (Supp. 1993) (effective 1979).

88. *Perkins v. Scaffolding Rental & Erection Serv., Inc.*, 568 So. 2d 549 (La. 1990). On a related issue, in one recent case a court has reiterated that although contribution is based on subrogation, indemnity is not. Thus, indemnity may be available from a settling tortfeasor where contribution is not. *Shuff v. Southern Silica*, 626 So. 2d 541 (La. App. 3d Cir. 1993).

89. See La. Civ. Code arts. 1825 and 1826.

90. Robertson, *supra* note 79, at 277; David Robertson, *Solidary Liability in Tort—Part 2*, 41 La. Bar J., No. 4, at 334 (1993).

91. See *supra* text accompanying notes 72-74.

92. See *supra* text accompanying note 79.

93. See *supra* text accompanying note 80.

limiting approach" would, it seems, be simpler than the "footnote 3 bump up one" reading of 2324(B).

One thing is clear after *Touchard* (and it would have been the same no matter what the court had said in the case): further litigation will be necessary to determine the meaning of the 50% language in 2324(B). Perhaps that is simply the nature of the beast. There's always room for litigation. Given the clarity, or lack thereof, of 2324(B), it is to the court's great credit that in *Touchard* it was able to clearly say as much as it did about 2324(B). However, the whole issue cries out for a clear, easy to read, legislative response. Lest we stop here, *Touchard* was not the only significant 2324(B) decision rendered this past year. I will turn to *Gauthier* after a short foray into the still unknown.

B. Recoverable Damages: 50% Of What?

As I have noted throughout this piece, Article 2324(B) limits the solidary liability of a joint tortfeasor to 50% of "recoverable damages." It does not say either 50% of damages or 50% of the judgment amount; it says 50% of "recoverable damages." This has led to the argument that in cases where the plaintiff is at fault, the defendant's 50% solidary obligation should be 50% of the judgment amount less the plaintiff's fault, not 50% of the judgment amount. Apparently the genesis of the argument is merely the word "recoverable." That is, if the legislature had meant 50% of the judgment amount it would have said that, or at least it would have said 50% of damages, *not* 50% of recoverable damages. Both Professor Robertson⁹⁴ and Lawyer Queenan have argued against this reading,⁹⁵ and I will not repeat their arguments here. Note however, that in an ordinary comparative fault case, where the only defendant is 90% at fault and the plaintiff is 10% at fault, the plaintiff recovers 90% of the judgment amount, not 90% of 90% (the percentage of the sole defendant's fault) of the judgment amount. There seems to be no reason to deviate from that sensible and simple logic when determining 50% for purposes of 2324(B).

Significantly, in *Johnston*, the second circuit seems to have used 50% of total damages when it issued its decree.⁹⁶ Likewise, the third circuit has used "total damages,"⁹⁷ rather than the judgment amount less the plaintiff's fault, when determining a 50% solidary share under 2324(B). This is the most sensible result and, as noted, also the simplest. Unfortunately, simplicity has never been at a premium when dealing with the thorny issue of employer fault in the third party tort context.

94. Robertson, *supra* note 1, at 45. See also Robertson, *supra* note 90, at 336, 338.

95. Queenan, *supra* note 1, at 1373.

96. See *Fontana v. Johnston*, 610 So. 2d 1119, 1120, 1124 (La. App. 2d Cir. 1992), *writ denied*, 618 So. 2d 407 (La. 1993).

97. *Devall v. Begnaud*, 617 So. 2d 1286, 1292 (La. App. 3d Cir. 1993).

C. "Gauthier" and the Reallocation of Employer Fault

When an employee suffers a disabling injury in a workplace accident,⁹⁸ which arises out of his employment and occurs in the course and scope of his employment,⁹⁹ he is entitled to worker's compensation benefits.¹⁰⁰ He is entitled to benefits whether his employer is at fault or not. As a trade off for this "no fault" liability of the employer, the employee gives up his right to recover in tort from his employer when the employer *is* at fault.¹⁰¹ The employer is immune from tort suits unless the employer has committed an intentional tort.¹⁰² Then, she is liable in tort.

Although the employer is immune from liability for non-intentional torts, third party tortfeasors are not; the employee may sue third parties for work related damages he suffers as a result of their fault. Moreover, the employer, or her worker's compensation carrier, may join in the employee's suit, or start its own suit, against the third party to recover any compensation benefits paid to the employee. In the normal procedural vernacular, the employer, or the carrier, is referred to as the intervenor. Not only does the intervenor recover benefits already paid to the employee, but, if the judgment awarded to the employee exceeds the amount of benefits already paid (which everyone in these cases but the defendant hopes), the intervenor gets a credit against future compensation liability to the employee for the excess less a portion of the costs of recovery.¹⁰³

These third party/work place tort cases do not present much of a moral or analytical problem until you throw in the possibility of employer fault. Then, there is a problem worth talking about. You see, the no-fault worker's compensation system governs the relationship between the employee and the employer. Contrariwise, the relationship between the employee and the third party is within the traditional fault system. The intervenor goes along for the ride. But what effect should the employer's fault have on the employee's recovery? If the employee's

98. See La. R.S. 23:1031 (Supp. 1993).

99. *Id.*

100. The different types of benefits to which the employee may be entitled and the differences between them are well beyond the scope of this paper.

101. La. R.S. 23:1032 (Supp. 1993).

102. *Id.* Should the employer commit an intentional tort, the employee is entitled to recover both compensation benefits and tort damages, but the employer, as tortfeasor, is entitled to a credit for the compensation benefits the employee recovered. See *Gagnard v. Baldrige*, 612 So. 2d 732 (La. 1993).

103. La. R.S. 23:1103 (Supp. 1993). The future credit applies dollar for dollar against all damages: medical expenses and lost wages (types of tort damages for which there is an analogous category of recovery under the worker's compensation system) as well as pain and suffering or mental anguish (types of tort damages which go totally uncompensated in worker's compensation). Previously, the future credit only applied against medical expenses and lost wages, not general damages. See *Brooks v. Chicola*, 514 So. 2d 7 (La. 1987); *Fontenot v. Hanover Ins. Co.*, 385 So. 2d 238 (La. 1980). However, in 1989 the legislature overruled *Brooks* and *Fontenot* by amending La. R.S. 23:1103. The Louisiana Supreme Court refused to apply the amendment retroactively in *St. Paul Fire & Marine Ins. Co. v. Smith*, 609 So. 2d 809 (La. 1992).

recovery is affected by the employer's fault, we introduce fault into a supposedly no fault relation. Alternatively, if the employee's recovery is not affected by the employer's fault, the third party feels that it pays more than its "share." At least after 1987 (and *Touchard*), the third person pays more than he would have paid if the employee had been injured by the torts of the third person and some other solvent, non-immune party. And what about the intervenor's recovery? If we allow the intervenor full recovery from the third person, the employer seems, in a way, to be profiting by his own fault.

How did the courts handle these cases before the summer of 1987? On several occasions the courts of appeal had held that, because the employer was immune from a tort suit, the employer and the third party, non-employer tortfeasor were not solidary obligors.¹⁰⁴ Importantly, on two occasions in 1991, the Louisiana Supreme Court had held that trial courts and juries should not even quantify employer fault in such cases.¹⁰⁵ To do so, reasoned the court, would upset the delicate balance between the fault and no fault systems that the legislature had achieved with the worker's compensation scheme. In rendering these decisions, the court rejected the argument that it was necessary to quantify employer fault to assure accurate allocations of fault amongst all parties. Particularly, in one of the cases,¹⁰⁶ the non-employer had unsuccessfully argued that it was necessary to quantify employer fault because of the possibility that the jury might, if employer fault were quantified, allocate less fault to the non-employer defendant than to the employee. If the third person were less at fault than the employee, it would only have been liable for its share.¹⁰⁷

Likewise, in some other, earlier cases that were consistent in theory and result with the 1991 supreme court decisions, the courts of appeal had held that the third party had no right to contribution from the employer.¹⁰⁸ They had also held that the employer was entitled to recover *all* the compensation paid to

104. See *Crockett v. Avondale Shipyards, Inc.*, 538 So. 2d 1133 (La. App. 5th Cir.), *writ denied*, 541 So. 2d 876 (1989); *Maryland v. Fabco Inc.*, 438 So. 2d 1152 (La. App. 1st Cir. 1983); *Cripe v. Haynes*, 350 So. 2d 956 (La. App. 2d Cir. 1977). In one case, the court said that the employer and the third party were not joint tortfeasors. *Thompson v. Petrounited Terminals, Inc.*, 536 So. 2d 504 (La. App. 1st Cir. 1988), *writs denied*, 537 So. 2d 212, 213 (1989).

A related question is whether one could really consider the immune employer to be at fault at all in causing the employee's injuries, given the fact of the immunity, which essentially means that the non-intentional tortfeasor employer can never be liable to its employee. For some language indicating that the employer might still be considered "at fault," see *Snyder v. Taylor*, 523 So. 2d 1348 (La. App. 2d Cir.), *writ denied*, 531 So. 2d 267 (1988).

105. *Guidry v. Frank Guidry Oil Co.*, 579 So. 2d 947 (La. 1991); *Melton v. General Elec. Co.*, 579 So. 2d 448 (La. 1991).

106. *Melton*, 579 So. 2d 448.

107. See former La. Civ. Code art. 2324; the same result would be reached under the current version of the article.

108. *Franklin v. Oilfield Heavy Haulers*, 478 So. 2d 549 (La. App. 3d Cir. 1985), *writs denied*, 481 So. 2d 1330, 1331 (1986); *LeJeune v. Highlands Ins. Co.*, 287 So. 2d 531 (La. App. 3d Cir. 1973), *writ denied*, 290 So. 2d 903 (1974). These cases are cited in Justice Ortique's opinion for the court in *Gauthier v. O'Brien*, 618 So. 2d 825 (La. 1993).

the injured employee even though the employer might have been technically at fault.¹⁰⁹ The only time that an intervenor did not recover all its compensation was when the employee was at fault. Then, pursuant to statute,¹¹⁰ the intervenor's recovery (for compensation paid) was reduced by the fault of the employee.

The first 1993 crack in this somewhat less than unified front was the Louisiana Supreme Court's unanimous decision in *Williams v. Sewerage & Water Board*.¹¹¹ Justice Ad Hoc Shortess wrote the opinion for the court. Williams was killed while on the job for the Sewerage and Water Board of New Orleans. His wife and children filed a timely claim against the board for a worker's compensation death benefit. More than one year after the death, the family amended its petition to add a tort claim against a third party defendant, the manufacturer of a crane which had come in contact with a power line, resulting in Williams' electrocution.

The crane manufacturer filed an exception of prescription which the trial court denied. The court of appeal reversed on the prescription issue.¹¹² The supreme court reversed the court of appeal, concluding that the employer and the third party defendant were solidary obligors, at least for interruption of prescription purposes. Thus, the timely filed compensation claim against the employer interrupted prescription against the third party tortfeasor. The court noted that both employer and tortfeasor were liable for the same thing because there were some overlapping elements of damages for which each defendant was liable: medical expenses and lost wages.¹¹³ Both were also liable for the "whole," simply meaning that neither debtor could plead the benefit of division.¹¹⁴ Finally, payment by one obligor exonerated the other as to the creditor, i.e., there would be no double recovery. This fact was assured by the intervenor's right to recover any compensation benefits paid to the employee, from ironically enough, the other "solidary" obligor.¹¹⁵ Given the presence of these four factors, the court, relying on its compelling logic and sound public policy, concluded the employer and the manufacturer were solidary obligors, at least for purposes of prescription.

The reasoning in *Williams* was somewhat inconsistent with those pre-1987 cases, cited above, which held that the employer and a third party tortfeasor were not solidary obligors. One wondered whether *Williams* might signal some change in the law insofar as the quantification of employer fault was concerned, particularly after new 2324(B).

109. See, e.g., *Franklin*, 478 So. 2d 549.

110. La. R.S. 23:1101(B) (Supp. 1993).

111. 611 So. 2d 1383 (La. 1993). See also *Parker v. Southern American Ins. Co.*, 590 So. 2d 55 (La. 1991).

112. *Williams v. Sewerage & Water Board*, 597 So. 2d 588 (La. App. 4th Cir. 1992), *rev'd*, 611 So. 2d 1383 (1993).

113. *Williams*, 611 So. 2d at 1387.

114. *Id.* at 1388.

115. *Id.* at 1388-89.

Put directly, did the legislature, in amending 2324(B), intend that factfinders should now quantify employer fault? Quantification would be undertaken for the purpose of the amended article's limited solidarity and would potentially protect a third party tortfeasor from full liability. Third party tortfeasors, who wanted to have employer fault quantified, pointed to the last sentence of new 2324(B), which provides:

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.¹¹⁶

It is the emphasized language, in particular, that third party tortfeasors relied on in arguing that one reason for writing 2324(B), as it was written, was to make clear that no tortfeasor, including a third party defendant in a work place injury case, was to pay more than his share, or 50%, whichever was greater.

Alternatively, Professor Robertson had argued that even under the amended article, courts should continue to refuse to quantify employer fault.¹¹⁷ He contended that the above quoted statutory language should be limited, in the immunity sphere, to family members who may be immune but whose fault might be imputed to the plaintiff and to other parties/defendants who might develop an immunity defense during the course of the litigation.¹¹⁸

The early results were mixed. The United States District Court for the Eastern District of Louisiana thought that under 2324(B), employer fault must be quantified; consequently, it "reduced" the potential liability of a third party defendant.¹¹⁹ The first circuit court of appeal had held that employer fault had to be quantified under new 2324(B).¹²⁰ The fourth circuit, in dicta, had

116. La. Civ. Code art. 2324(B) (emphasis added).

117. Robertson, *supra* note 1, at 53-57, 73-76.

118. *Id.* at 74.

119. *Rosskamp v. Phillips Petroleum Co.*, No. 89-4892, 1991 U.S. LEXIS 13632 (E.D. La. Sept. 23, 1991), *aff'd*, 992 F.2d 557 (5th Cir. 1993). The court held that because the plaintiff's employer and the third party, Phillips, were co-owners of the platform which the plaintiff alleged was unreasonably dangerous, and because the employer's fault had to be quantified, the third party was only potentially liable for 50% of the plaintiff's damages. That is, co-owners were not solidarily liable for all of the plaintiff's damages "as otherwise provided by law." Recently, the same court has held that Phillips was Rosskamp's statutory employer; thus, Rosskamp was not entitled to recover from Phillips at all. On the basic point, relating to quantifying employer fault, see *Durel v. American Pecco Corp.*, No. 90-863 "K," 1992 U.S. LEXIS 4557 (E.D. La. 1992) (apparently the parties agreed to that result).

120. See *Crane v. Exxon*, 613 So. 2d 214 (La. App. 1st Cir. 1992), *writ denied in part*, 620 So. 2d 858 (1993). See also *Jarreau v. City of Baton Rouge*, 602 So. 2d 1124 (La. App. 1st Cir. 1992)

indicated that quantification would occur under 2324(B);¹²¹ so had the United States Court of Appeals for the Fifth Circuit.¹²² However, the third circuit court of appeal in *Gauthier v. O'Brien*¹²³ had followed Professor Robertson's lead and concluded that even after 1987, courts should not quantify employer fault. The Louisiana Supreme Court granted a writ in *Gauthier*.¹²⁴

In a six to one decision,¹²⁵ the court held that triers of fact should quantify employer fault *but* that the trial judge should then reallocate the employer's fault amongst the other parties to the litigation in proportion to their allotted fault.¹²⁶ Justice Ortique wrote the opinion for the court; Justice Lemmon concurred, and Justice Dennis dissented.¹²⁷

In *Gauthier*, the court noted that "employer fault must be quantified in order to appropriately assess the fault of third party tortfeasors."¹²⁸ This view represented a shift of opinion since 1991 when the court had rejected the argument that *not* quantifying employer fault would result in an unrealistic allocation of fault amongst the other parties.¹²⁹

But, under *Gauthier*, what does the trial judge do with employer fault once the jury quantifies it? Professor Robertson had contended that where a trial court *mistakenly* allocated fault to an employer, or to a phantom tortfeasor, the trial court could correct itself, or the court of appeal could correct it, by employing a "ratio approach."¹³⁰ Assume the factfinder found Mario blameless and allocated fault to the others as follows: King—40% (mistakenly), Iggy—40%, and Wendy—20%. The court could then reallocate King's fault to Iggy and Wendy

(dicta); *Thompson v. Petrounited Terminals, Inc.*, 536 So. 2d 504 (La. App. 1st Cir. 1988), *writs denied*, 537 So. 2d 212, 213 (1989), *cited in Robertson, supra* note 1, at 52, 56 nn.15, 36.

121. *Eskine v. Regional Transit Auth.*, 531 So. 2d 1159, 1161-62 (La. App. 4th Cir. 1988), *cited in Robertson, supra* note 1, at 52, 56 nn.15, 36.

122. *Davis v. Commercial Union Ins. Co.*, 892 F.2d 378, 384 n.6 (5th Cir. 1990); *Myers v. Pennzoil Co.*, 889 F.2d 1457, 1462 n.2 (5th Cir. 1989); *Reed v. Shell Offshore Inc.*, 872 F.2d 680, 683 (5th Cir. 1989), *all cited in Robertson, supra* note 1, at 53, 57, nn.16, 36.

123. 606 So. 2d 915 (La. App. 3d Cir. 1992).

124. *Gauthier v. O'Brien*, 618 So. 2d 825 (La. 1993).

125. Justice Lemmon concurred preferring the ratio approach he had articulated in an earlier case. *Id.* at 833 (Lemmon, J., concurring). That earlier case was *Guidry v. Frank Guidry Oil Co.*, 579 So. 2d 947, 954 (La. 1991) (Lemmon, J., dissenting). Justice Dennis dissented, reasoning that employer fault should not be quantified at all. *Gauthier*, 618 So. 2d at 833 (Dennis, J., dissenting).

126. *Gauthier*, 618 So. 2d 825.

127. Justice Kimball did not sit on the panel which heard the case. *Id.* at 826 n.1.

128. *Id.* at 826.

129. One of the circumstances in which Robertson argued that the factfinder should not consider the fault of a non-party was the case of the phantom driver. *See Robertson, supra* note 1, at 64-73. However, the supreme court's concern with appropriate assessments of fault would seem to be a *sub silentio* rejection of Robertson's arguments about phantom drivers. Indeed, later in *Gauthier*, the court expressly said: "Louisiana juries are not unfamiliar with the allocation of fault to non-parties. Phantom tortfeasors' fault has been assessed pursuant to former La. Code Civ. Proc. art. 1811(B)(2), now article 1812." *Gauthier*, 618 So.2d at 831. Robertson apparently reads *Gauthier* as mandating quantification. Robertson, *supra* note 90, at 335.

130. Robertson, *supra* note 1, at 77-80.

in a 2:1 ratio. Thus, Iggy would pay two-thirds of King's share, or another 26 2/3%, while Wendy would pay another 13 1/3%. Robertson's ratio approach is similar to the approach the Uniform Comparative Fault Act takes to the reallocation of fault attributed to a defendant who later turns out to be unavailable or insolvent.¹³¹ The Act does not provide for quantification of employer fault.

As noted, Professor Robertson would have had courts apply the ratio approach when someone had mistakenly allocated fault to an entity to whom it should not have allocated fault. To Robertson, the ratio approach was merely a damage control device. That is how the Louisiana Supreme Court used the approach in one of the 1991 cases referred to above where the factfinder had improperly allocated fault to an employer.¹³² However, in *Gauthier*, the supreme court adopted Robertson's ratio approach as a matter of course in employer fault cases.¹³³ Under *Gauthier*, first the jury quantifies employer fault, then the trial judge uses the ratio approach to reallocate that fault. The court decided to use Robertson's ratio approach in every employer fault/third party tort case.¹³⁴

What about the employer's right to recover compensation paid? Under the court's decision in *Gauthier*, it seems that the employer's fault will not affect the intervenor's recovery of compensation. Of course, recovery would be reduced if the employee was at fault; then the court would reallocate some of the employer's fault to the employee under the ratio approach. Subsequently, because the employee's fault reduces the employer's recovery, the employer's fault would indirectly reduce the intervenor's recovery.

To clarify the effect of *Gauthier*, some hypos might be helpful. Assume that Mario is injured in an accident at work. Assume his employer, King, has paid \$20,000 in compensation and the jury awards \$100,000 in total damages, allocating fault as follows: Mario—0%, King—60%, Iggy—40%, and Wendy—0%. The allocation of fault to King is proper under *Gauthier*; however, after the jury allocates fault to King, the court must reallocate it. Because Iggy is the only non-immune party at fault, the judge would reallocate all King's fault

131. But under the Unif. Comparative Fault Act, employer fault is not quantified. Unif. Comparative Fault Act § 2, 12 U.L.A. 43 (Supp. 1993) (effective 1979); see also Robertson, *supra* note 1, at 54.

132. *Guidry v. Frank Guidry Oil Co.*, 579 So. 2d 947 (La. 1991).

133. As noted, the court held that employer fault must be quantified. But the court then said, "[B]ecause the employer is immune from suit in tort, indemnity and/or contribution, the employer cannot be required to pay damages and therefore will not be adversely effected by an assessment of fault." *Gauthier*, 618 So. 2d at 826. Later, the court stated that while it was overruling its 1991 decisions on employer fault "to reach a fairer determination of the relative fault of all blameworthy parties, the judge, after the jury had returned a verdict, should disregard the proportion of fault assessed to the employer and reallocate the proportionate fault of all other blameworthy parties." *Id.* at 833.

134. See also *Washington v. Department of Transp.*, 8 F.3d 196 (5th Cir. 1993); *Prestenbach v. Rains*, 4 F.3d 358 (5th Cir. 1993).

to Iggy. Thus, Iggy will bear 100% of the fault; he will pay \$100,000. Let me chart it.

"Gauthier": Hypo 1

<i>Party</i>	<i>Fault</i>	<i>Reallotted Fault</i>
Mario	0%	0%
King	60%	Immune (0%)
Iggy	40%	100%
Wendy	0%	0%

Please note that this result is inconsistent with the 50% limitation on a tortfeasor's liability contained in 2324(B). That is, Iggy's virile share is less than 50%, but he is being forced to pay over 50%. In this vein, it is inconsistent with *Touchard*. The court did not expressly deal with this inconsistency in *Gauthier*, but it obviously tolerated it. In the employer fault context, 2324(B)'s 50% rule is bypassed. Note also, under this hypo, it seems that King will recover all \$20,000 in compensation that he has paid Mario.

Now assume the same facts except fault is allocated as follows: Mario—0%, King—60%, Iggy—30%, and Wendy—10%. Now, who pays what? The trial judge will, under *Gauthier*, reallocate King's fault to Iggy and Wendy in a 3:1 ratio. Iggy will end up paying \$75,000 and Wendy will pay \$25,000. A chart, a chart, my kingdom for a chart.

"Gauthier": Hypo 2

<i>Party</i>	<i>Fault</i>	<i>Reallotted Fault</i>
Mario	0%	0%
King	60%	Immune (0%)
Iggy	30%	75%
Wendy	10%	25%

Once again, the patient reader will note that Iggy, whose virile share is less than 50%, ends up paying over 50%. Also notice that King recovers 100% of the compensation he has paid out, or \$20,000; his recovery is not reduced by his fault.

Next, imagine the jury allocates fault as follows: Mario—10%, King—50%, Iggy—30%, and Wendy—10%. The trial court will need to reallocate King's fault to Mario, Iggy, and Wendy in a 1:3:1 ratio. Mario picks up another 10% (20% total); Iggy picks up another 30% (60% total); and Wendy adds another 10% (20% total). To the charts.

"Gauthier" Hypo 3

<i>Party</i>	<i>Fault</i>	<i>Reallotted Fault</i>
Mario	10%	20%
King	50%	Immune (0%)
Iggy	30%	60%
Wendy	10%	20%

Here, in reallocating King's fault, not just third parties, but also the *plaintiff*, is getting hit with some additional fault. One also notes some inconsistency with this result and a statement the court made in *Gauthier*. The court said, "Allocation of employer fault and adopting a relative fault formula will not adversely impact a plaintiff's recovery; a plaintiff's recovery will be reduced only in proportion to the plaintiff's own negligence."¹³⁵ The inconsistency is that the plaintiff's recovery is being reduced not only by his real fault, but also by the reallocated imputed fault of the employer. In any event, once the fault is reallocated, Mario is deemed to be 20% at fault. Both his recovery and King's will be reduced by 20%. So King will recover \$16,000 in compensation, not \$20,000. King's recovery, then, is indirectly reduced by his own fault (when some of it is reallocated to Mario through the *Gauthier* ratio approach). The reader will also note that Iggy is once again paying more than 50% even though his initial fault was less than 50%.¹³⁶

What if the employee's fault is greater than the third person's fault? Does *Gauthier*'s reallocation still apply? A panel of the United States Fifth Circuit Court of Appeals has answered yes. In *Prestenbach v. Rains*,¹³⁷ the jury held plaintiff was 15% at fault, employer was 75% at fault, and the third party tortfeasor was only 10% at fault. The third party pointed to the language in 2324(B) stating that a judgment debtor whose fault is less than the plaintiff's is not liable for "more than the degree of his fault."¹³⁸ The court rejected that argument and reallocated per *Gauthier*, leaving the third party defendant to pay 40% of the plaintiff's damages.¹³⁹

Alright, so we have seen what *Gauthier* says and how it might work. It is a most significant decision in a very difficult area of the law. Perhaps it is the most significant torts decision of the past year. What else is there to say about it?

First, one wonders whether the ratio approach is only applicable in the employer/employee/third party tort context or whether it may also be applicable

135. *Id.* at 832.

136. The reader may also wonder whether Mario and King can put *Gauthier* and *Touchard* together to not only bump Iggy over 50%, but also, if for some reason Iggy was less than fully solvent, to bump Wendy up to 50%. Let us now change the hypo and reallocate fault as follows: Mario—20%, King—50%, Iggy—20%, and Wendy—10%. King is immune. Reallocating King's fault amongst the others in a 2:2:1 ratio, Mario ends up with 40%, Iggy with 40%, and Wendy with 20%. (Of course, since Wendy's fault is less than Mario's she should claim she can't be bumped up at all per 2324(B). *But see* *Prestenbach v. Rains*, 4 F.3d 358 (5th Cir. 1993).) Now, we know that King's recovery of compensation will be reduced by 40% because that's Mario's new virile share. But, if Wendy were less than fully solvent, could Iggy be bumped up to 50% under *Touchard*? Iggy's share is not less than Mario's; it is equal to Mario's; so it seems the answer is yes. What if Iggy were less than fully solvent, could Wendy's share be bumped up to 50%? No, I think not. Because her portion is less than Mario's, she is a joint, not a solidary obligor.

137. *Prestenbach*, 4 F.3d 358.

138. La. Civ. Code art. 2324(B).

139. *Prestenbach*, 4 F.3d at 361. *See also* Robertson, *supra* note 90, at 335-36.

in other situations. For instance, what about the phantom driver? Professor Robertson has argued that factfinders should not allocate fault to phantoms under new 2324(B). It seems that the court would disagree.¹⁴⁰ In *Gauthier*, the court noted Louisiana factfinders are familiar with allocating fault to phantoms.¹⁴¹ However, just because fault may be allocated to a phantom in order to provide for accurate assessments of fault, why not reallocate that fault amongst the other parties to the suit using the *Gauthier* approach? Professor Robertson has argued that the *Gauthier* reallocation formula should apply in *all* phantom defendant cases.¹⁴² Although that sort of reallocation of phantom tortfeasor fault would be consistent with the notion of victim compensation noted in *Touchard*, it may be inconsistent with 2324(B)'s 50% rule. What about other immune persons, like family members, governmental entities, recreational land owners, or others? Is the ratio approach limited to the peculiar employer/employee/third party tortfeasor situation in which it arose, or might it enjoy broader application?

Second, assuming for now that the ratio approach is limited to the *Gauthier* context, please note an evident irony. Under the ratio approach, the non-immune parties in the *Gauthier* type case bear the employer's fault in relation to their proportionate shares of fault. In this regard, the ratio approach truly implements our pure comparative fault regime. The other parties bear the employer's fault in direct proportion to their own fault. However, in other contexts, for example where there is an insolvent defendant, the risk of insolvency is born by the parties under 2324(B) and *Touchard* in an odd sort of way relying upon the "50% rule." As noted, this 50% cap may also frustrate contribution rights somewhat.

It also bears note that the *Gauthier* court employed the ratio approach to reallocate the fault of a solvent, available, otherwise blameworthy entity. This entity also happens to be an entity who ends up recovering from third parties to whom the court has reallocated his fault (either the employer or the worker's compensation carrier recovers benefits paid). In fact, if the employee is not at fault, the defendants ultimately bear all of the employer's fault and the employer (or the carrier) is allowed to recover 100% of the worker's compensation payments from the defendants, even if the employer's *actual* allocated fault was greater than the defendants' fault.

Additionally, if the employee is at fault he or she will end up having his or her share of the fault increased as a result of the employer's fault even though this is contrary to our normal rules for imputing fault. Employees are normally *not* vicariously liable for the torts of their employers. Nor, under the "both

140. *Accord* Robertson, *supra* note 90, at 335. *But see* *Veazey v. Elmwood Plantation Assocs., Ltd.*, 625 So. 2d 675 (La. App. 5th Cir. 1993) (while a court has discretion under Code of Civil Procedure article 1812 to allocate fault to a phantom intentional tortfeasor, it is not error to fail to do so).

141. *Gauthier*, 618 So. 2d 825.

142. Robertson, *supra* note 90, at 334-35.

ways" test,¹⁴³ do employees usually have their recovery reduced by their employer's negligence.

One wonders whether reallocation across the board is the best solution. If the court reallocated the fault of every person who either could not, or did not, pay its share of tort liability amongst the at-fault parties, the ratio approach would prove simple and ineluctably equitable. That is basically how the Uniform Comparative Fault Act employs the ratio approach. However, using the ratio approach in only one context, where the person whose fault is reallocated is solvent, and then allowing that person to recover from the others, except the employee, raises some real concern. One wonders about deterring employers from engaging in unsafe conduct. Does reallocation, in part, sacrifice deterrence? No more, it seems, than the prior jurisprudence; but, is that the message we want to send?

These are not questions of any problem with the decision in *Gauthier*. The court dealt ably with an ambiguous statute in a complicated area. The solution should come from the legislature. Perhaps it could involve special legislation dealing with the work-place tort context: special legislation in which the legislature provided for at least partial employer accountability for fault. This need not necessarily mean further reduced recovery for employees. The legislature might reduce the employer's recovery of the compensation it had paid by its fault, including reducing its credit against future liability. Alternatively, the legislature could rewrite 2324(B) entirely, codifying the ratio approach and applying it across the board. It could pass the Uniform Comparative Fault Act, which adopts the ratio approach in all non-workplace tort cases; in the workplace, the Act, like Robertson, would not quantify employer fault.¹⁴⁴

V. CONCLUSION

I have written a lot and do not intend to keep straining your eyes much longer. But let me reiterate: Article 2324 is hard to read and hard to understand. The courts have only begun to interpret it. The cases we have seen and considered—*Johnston*, *Touchard*, and *Gauthier*—answer some questions but they raise more. One thing all three of the cases show us is that courts are interpreting 2324 narrowly. They are interpreting it so that it makes the fewest possible changes in the former law. They seem to be applying it in such a way that it will have as little effect as possible on the compensatory function of tort law. But they are at the same time trying to give effect to the article's vague, convoluted, tortuous language.

That language and the judicial interpretations to date raise all sorts of questions. Will courts continue to ignore the conspiracy language in 2324(A)? What effect will *Touchard* have on contribution rights? Will courts limit

143. See *Lewis v. Till*, 395 So. 2d 737 (La. 1981).

144. See Galligan, *supra* note 1, at 3.

Gauthier's ratio approach to the workplace injury context? And, perhaps the biggest question of all: before Louisianians (and others) spend a fortune in legal fees and court costs trying to decide what their rights are under 2324, would it be best to wipe the tort solidarity slate clean and start all over? Then maybe we might be able to agree on some underlying concept for tort solidarity. Or, at least, we could agree on a result and put it into practice with language we could all understand.

As the supreme court recognized in *Touchard*, one of the traditional purposes of solidarity was accident victim compensation. In 2324(B), the legislature attempted to continue to give effect to that purpose, although not as much as it used to; it also sought to protect defendants from the effect of traditional solidarity. Thus, we have two worlds colliding in 2324(B). We have the continued desire to compensate, but we have coupled it with a desire to limit liability. Perhaps inevitably, no one purpose, policy, or underlying philosophical, or moral concept drives the article. No doubt the article's imprecision is the result of its schizophrenic, underlying policies. However, is the difficulty of accommodating competing, diverse interests, like victim compensation and limiting liability, a reason not to try and rewrite the law so we could all understand it a little bit better?

