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COMMENTS

Civil Code Article 2324: A Broken Path to Limited Solidary Liability

Norman Normal decided to travel the countryside by automobile. Pete Pitiful, a speeding motorist along the same route, failed to maintain control of his car and rammed into Norman. The collision ruptured Norman's fuel tank due to a manufacturing defect, causing an explosion and fire. Norman received substantial burns resulting in grotesque scars, particularly on his face. Unable to compromise the claim, the parties tried the matter before a jury, which assessed \$1,000,000 in damages. The jury assigned sixty percent fault to Pete and forty percent fault to Manufacturer. Pete's only asset was a \$10,000 automobile liability policy.

Under the law as it existed prior to September 1, 1987, the legal result was clear: because Pete and Manufacturer were solidary obligors, each liable for the whole, Manufacturer owed Norman \$1,000,000 less Pete's insurance coverage. In the name of tort reform, the Louisiana Legislature eliminated this certainty and possibly changed the liability of solidary obligors such as Manufacturer by amending Civil Code article 2324.¹

This article will explore the potential interpretations, shortcomings, and virtues of article 2324(B).² The first section offers a plausible

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1. 1987 La. Acts No. 373, § 1, effective September 1, 1987.

2. Problems associated with section (A), such as the meaning of "intentional or willful," whether the amendment encompasses more than delictual solidarity and the temporal effect of the legislation are beyond the scope of this Comment.

The meaning of "willful act" in section (A) causes concern. "Willful" could include any action beyond rudimentary involuntary reactions. The defense bar may attempt to import the criminal law meaning of "willful" to restrict the application of Section A. The historical underpinnings of providing an accused with additional safeguards against conviction should not be utilized in tort litigation. The judiciary is well advised to avoid such a pitfall inasmuch as criminal law policy is inapposite to tort law. For an excellent discussion of the various terms connoting action lying on the continuum between intentional and negligence, see Comment, Reflections on Willful, Wanton, Reckless, and Gross Negligence, 48 La. L. Rev. 1383 (1988). But see W. Burdick, Principles of Roman Law and Their Relation to Modern Law 414-17 (1938); J. Goudsmit, The Pandects § 76, at 213 (De Tracy Gould (1938) trans. 1873). The problem with degrees of fault or culpability has existed for centuries. Roman jurists dealt with various degrees of fault—lata, lation,

explanation of the legislation. The next section explores the history of solidary liability and contribution. Discussion of three phrases that afford the judiciary great latitude in the interpretation of article 2324 follows in the third section. Next, the ambiguity produced by the new statute in multiparty situations is explored. Finally, proposals for other equitable resolutions of the conflicting policies are asserted, and a brief explanation of the 1988 amendment³ to article 2324, which purports to correct a prescription problem caused by the 1987 legislation, is given.

THE LEGISLATION IN GENERAL

Act 373, which amended article 2324, states:

To amend and reenact Civil Code Article 2324, relative to offenses and quasi offenses, to provide for joint, divisible liability, to provide for solidary liability, and to provide for related matters.

Be it enacted by the Legislature of Louisiana:

Section 1. Civil Code Article 2324 is hereby amended and reenacted to read as follows:

latissima, magna, gravior, levis, and levisima.

Arguably the phrase "person suffering injury" in article 2324(B) includes contractual damages. Many times it is difficult to distinguish tort from contract damages as in the negligent breach of a contract. In *Champion v. Panel Era Manufacturing Co.*, 410 So. 2d 1230 (La. App. 3d Cir.), writ denied, 414 So. 2d 389 (1982) the court stated:

In any case involving an obligation, liability must result from a breach of duty, whether the duty arises out of the undertakings of the parties, from their voluntary acts, by operation of law or otherwise. It is entirely possible that the same duty might have more than one source, as in the case of the negligent breach of a contractual obligation, in which case a cause of action arises from both the breach and the negligence. One set of circumstances might produce multiple duties arising from multiple sources.

410 So. 2d at 1236.

In all likelihood, the courts will treat the legislation prospectively; a possibility alluded to in *Eskine v. Regional Transit Authority*, 531 So. 2d 1159, 1162 (La. App. 4th Cir. 1988). The court noted that the plaintiff's cause of action arose prior to the 1987 amendment and applied the former law. Accord *Adamson v. City of Lafayette*, 521 So. 2d 1258, 1261 (La. App. 3d Cir.), writ denied, 526 So. 2d 798 (1988). But failure to argue that issue would produce the same result. The Fourth Circuit recently ruled that the amendment applies prospectively only in *Morrison v. J.A. Jones Const. Co.*, 537 So. 2d 360 (La. App. 4th Cir. 1988).

3. 1988 La. Acts No. 430. La. Civ. Code art. 2324(C) states:

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).

Art. 2324. Liability as solidary or joint and divisible obligation

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 judgment debtor shall not be liable for more than the degree of his fault to a judgment creditor to whom a greater degree of fault has been attributed. Under the provisions of this Article, all parties shall enjoy their respective rights of indemnity and contribution. Except as described in Paragraph A of this Article, or as otherwise provided by law, and hereinabove, the liability for damages caused by two or more persons shall be a joint, divisible obligation, and a joint tortfeasor shall not be solidarily liable with any other person for damages attributable to the fault of such other person, including the person suffering injury, death, or loss, regardless of such other person's insolvency, ability to pay, degree of fault, or immunity by statute or otherwise.

The original bill, introduced in the House of Representatives,⁴ eliminated solidary liability among joint tortfeasors.⁵ Subsequent re-

4. House Bill 841, as originally proposed, stated:

To amend and reenact Civil Code Articles 2323 and 2324, relative to offenses and quasi offenses, to provide for computation of and liability for damages, to provide for joint and divisible liability, to provide for solidary liability, and to provide for related matters.

Be it enacted by the Legislature of Louisiana:

Section 1. Civil Code Article 2323 and 2324 are hereby amended and reenacted to read as follows:

Art. 2323.

* * *

Art. 2324. Liability solidary or joint and divisible obligation

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, then liability for damages caused by two or more persons shall be a joint, divisible obligation. 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

vision limited the change and provided that certain tortfeasors will remain solidarily liable "to the extent necessary for the person . . . to recover fifty percent of his recoverable damages."⁶ Otherwise, "the liability [of two or more persons] for damages . . . shall be a joint, divisible obligation."⁷ Consistent with prior law, the legislation limited a tortfeasor's liability to his degree of fault provided "a greater degree of fault [is] attributed"⁸ to the victim.

Consider, for example,⁹ a judgment of \$100,000 in favor of plaintiff P that assigns twenty percent fault to defendant A and eighty percent to defendant B.

Party	Percentage Fault
A	20
B	80

Prior to the 1987 legislation, A or B would have owed one hundred percent of the damages in the event the other could not pay. But since amended article 2324 purports to limit solidary liability to fifty percent of recoverable damages, P now seems to recover only \$50,000 from A if B is insolvent or otherwise unavailable for payment. If A is insolvent, then B seems to owe only eighty percent, because P will have "recover[ed] fifty percent of his recoverable damages."¹⁰ B's obligation above fifty percent would be joint and divisible. Consistent with the previous law, if P was contributorily negligent for a greater degree of fault than A, then A owes P its virile share of \$20,000.¹¹

Clearly worded legislation could have precisely defined these results; this Comment would then possess the virtue of brevity. Unfortunately,

injury, death, or loss, regardless of such other person's insolvency, ability to pay, degree of fault, or immunity by statute or otherwise.

The engrossed version of House Bill No. 841 contains an amendment to article 2324 only.

5. La. Civ. Code art. 2324(A) maintained the intentional and willful conspiracy exception.

6. As amended by the House Committee on Civil Law; later enacted as La. Civ. Code art. 2324(B).

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

8. La. Civ. Code art. 2324(B). This limitation represents a continuation of the 1979 amendment. 1979 La. Acts No. 431, § 1, effective Aug. 1, 1980.

9. The hypothetical may create the impression that article 2324 provides a readily ascertainable outcome. That is an unwarranted proposition. This example is merely a means of facilitating analysis of the problems with the amendment.

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

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

the legislature failed on this account, leaving the judiciary with the task of ferreting out a plausible interpretation. Inasmuch as delictual solidary liability is a creature of supreme court jurisprudence,¹² the courts should analyze the basic policies at stake, striking a balance between the interests of the victims and of defendants. Such a reassessment could avoid an unrestricted overruling of solidarity as it presently exists where there is no clear legislative indication to that effect.

The Basic Principles of Solidarity

The civilian concept of *in solido* liability in tort is analogous to common law joint and several liability.¹³ Each tortfeasor was liable for all the victim's damages.¹⁴ This provided identical results for either system—a "deep pocket" defendant paid the tab for another insolvent, undeterminable¹⁵ or hidden¹⁶ tortfeasor.

12. See *Foster v. Hampton*, 381 So. 2d 789 (La. 1980), *Sampay v. Morton Salt Co.*, 395 So. 2d 326 (La. 1981), *Hoefly v. Government Employees Ins. Co.*, 418 So. 2d 575 (La. 1982), *Narcise v. Illinois Central Ry. Co.*, 427 So. 2d 1192 (La. 1983).

13. "It is our understanding that a liability in solido and a joint and several liability is (sic) one and the same thing . . ." *Garland v. Coreil*, 17 La. App. 17, 18, 134 So. 297, 297 (1931); see also *Johnson v. Jones-Journet*, 320 So. 2d 533, 536 (La. 1975); *Ford Motor Credit Co. v. Soileau*, 323 So. 2d 221, 225 (La. App. 3d Cir. 1975); *Davis v. Newpark Shipbuilding and Repair, Inc.* 659 F.Supp. 155, 156 (E.D. Tex. 1987); W. Howe, *Studies in the Civil Law and Its Relations to the Jurisprudence of England and America* 246 (2nd ed. 1905). In Louisiana, other effects of solidary liability are significant. Suit against a solidary obligor interrupts prescription as to all other solidary obligors, proper venue as to one solidary obligor provides proper venue as to all and payment by one solidary obligor relieves all other solidary obligors. La. Civ. Code arts 1794, 1799, 3503; La. Code Civ. P. art. 73.

These effects may have caused the court to stretch principles of solidarity to cases where prescription lapsed or venue was improper but for the solidary obligations of the defendants. For example in *Thomas v. W & W Clarklift, Inc.*, 375 So. 2d 375 (La. 1979) the supreme court held that a forklift repair company was "potentially a solidary obligor" with officers and supervisory personnel of the plaintiff's employer thus extending the prescriptive period for the former to assert a contribution claim against the latter. *Id.* at 378. See also *Foster v. Hampton*, 381 So. 2d 789 (La. 1980) (prescription); *Hoefly v. Government Employees Inc. Co.*, 418 So. 2d 575 (La. 1982) (prescription); *Reeves v. Dixie Brick, Inc.*, 403 So. 2d 792, 795 (La. App. 2d Cir. 1981) (where a brick mason and brick manufacturer were solidary obligors for purposes of venue).

14. "'Joint tort-feasor' is one of those unhappy phrases of indeterminate meaning, whose repetition has done so much to befog the law. Nobody knows what exactly is a joint tort . . . [J]oint tort-feasor means radically different things to different courts, and often to the same court; that much of the existing confusion is due to an entire failure to distinguish the different senses in which the term is used" Prosser, *Joint Torts and Several Liability*, 25 Calif. L. Rev. 413, 413 (1937).

15. The class action suits stemming from exposure to diethylstilbestrol (DES) best exemplify indeterminable defendants. The plaintiffs sought damages resulting from the

The underlying policies of solidary liability include victim compensation, loss allocation¹⁷ and risk management. By definition each tortfeasor's actions must be the legal cause of the injury; solidary liability makes each liable for the entire damage sustained up to the victim's full monetary recovery.

The courts, in adopting solidary liability, espoused a theory that it is better to allocate damages to the injurers, even in greater portions than their respective degrees of fault, than have victims suffer a reduced recovery.¹⁸ This is so even when the solvent tortfeasor is only marginally at fault. Having produced some portion of the loss, a tortfeasor had no room to complain when bearing losses also caused by another injurer; society thereby assured the victim of complete recovery if any one tortfeasor possessed sufficient wealth.

Imposing solidary liability on actors provided an impetus to reduce potentially harmful risk creating conditions. Faced with a substantial loss, even if only minimally at fault, businesses should spend greater resources, such as increasing supervision and training, to prevent the injuries. Moreover, public bodies will better maintain streets and insurance companies will more closely supervise their insureds' business activities when faced with substantial liability for augmenting an injury causing situation. Society ideally could maximize the standard of living by placing incentives on those most able to prevent the losses.

As with most policy decisions related to risk management, asset allocation and tort law, empirical evidence to support or refute solidary

prenatal exposure to DES. In *Sindell v. Abbot Laboratories*, 26 Cal. 3d 588, 163 Cal. Rptr. 132, 607 P.2d 924 (1980), cert. denied, 449 U.S. 869, 42 L.Ed. 2d 107, 95 S.Ct. 127 (1980), the California Supreme Court, in reversing the trial court's summary dismissal based upon plaintiff's inability to identify the manufacturer responsible for her injuries, held that each manufacturer owed a portion of the damage in relation to its share of the market at the time of the exposure to the drug notwithstanding a lack of evidence to implicate any particular manufacturer's negligence. Each defendant could exculpate itself by "demonstrat[ing] that it could not have made the product which caused the injury." 26 Cal. 3d at 612, 163 Cal. Rptr. at 145, 607 P.2d at 937. See also *Bichler v. Ely Lilly & Co.*, 79 A.D.2d 317, 436 N.Y.S.2d 625 (N.Y. App. Div. 1981) (where in similar circumstances, the DES manufacturer was jointly and severally liable). But see *Bartlett v. New Mexico Welding Supply, Inc.*, 98 N.M. 152, 646 P.2d 579 (App. 1982), cert. denied, 98 N.M. 336, 648 P.2d 794 (1982) (where the court assessed an unknown driver's negligence and reduced the victim's recovery accordingly.)

16. See generally 25 Am. Jur. *Trials Hidden and Multiple Defendant Tort Litigation* (1978).

17. Hall, *Tort Law in American History* xiii (1987) ("Nineteenth century tort law operated on the assumption that some injuries would go uncompensated. . . In the twentieth century. . . the emphasis shifted [placing] greater accountability on enterprise (sic) for the unavoidable costs of industrialization.").

18. But see Pearson, *Apportionment of Losses Under Comparative Fault Laws—An Analysis of the Alternatives*, 40 La. L. Rev. 343, 362 n.80 (1980) (where the author argues this is a "single-minded" approach concerned only with victim compensation.)

liability policies is equivocal.¹⁹ It appears some legislators are unpersuaded whether this method of risk prevention effectively allocates resources. In fact, supporting that doubt, some legal scholars argue injurers never consider post-accident risks and liabilities before they act.²⁰

Balanced against these policies is the "deep pocket" defendants' cry for relief.²¹ Those with substantial financial wealth, such as the state, its political subdivisions and insurance companies, bear the brunt of these costs. Victims sue these parties with the expectation that the jury will find them at least minimally at fault. Since the one percent defendant was a solidary obligor and liable for the entire damage award,²² the victim's full recovery is virtually assured. So goes the quandary—victims claim entitlement to the protections afforded by solidarity, and deep pocket defendants assert this doctrine jeopardizes their financial well-being.²³

Much uncertainty surrounds the purported purpose of article 2324's amendment. Whether "deep pocket" verdicts precipitated a significant portion of the insurance industry's problems is a subject of much debate.²⁴ In contrast, a growing number believe that several large insurance companies created the insurance crisis to justify raising prem-

19. Compare Steinberg, *The Doctrine of Joint and Several Liability is Properly Concerned with the Rights of Victims Rather than the Economic Well-Being of Wrongdoers*, 9:3 L.A. Lawyer 35 (May 1986) with Elimination of Joint Liability for Noneconomic Damages Will Help Make our Tort Adversary System Well Again, 9:3 L.A. Lawyer 34 (May 1986) (for the typical thesis of the opposing arguments).

20. See generally, Landes and Posner, *Joint and Multiple Tortfeasors: An Economic Analysis*, 9 J. Legal St. 517 (1980).

21. See also Bottorff, *City Suit Figures Show L.A. Liability Tripled Since 1980*, The L.A. Daily J., Apr. 23, 1986, at 1, col. 6, (where less than unbiased statistics show the escalation in costs for a "Deep Pocket" defendant.)

22. A one percent case recently received notoriety. *Wood v. Walt Disney World Co.*, 515 So. 2d 198 (Fla. 1987). The possibility of a 1 percent defendant as a solidary obligor is admittedly remote even under the old law. The victim must be 1 percent or totally without fault; otherwise the victim possesses a "greater degree of fault" than that tortfeasor and the tortfeasor owes damages attributable to his own fault only. La. Civ. Code art. 2324(B) (1974) & (1987).

23. For an even handed discussion of the liability crisis see *An Update on the Liability Crisis: Tort Policy Working Group*, 10:2 Am. J. Trial Adv. 213 (1986).

24. See Clarke, Warren-Boulton, Smith and Simon, *Sources of the Crisis in Liability Insurance: An Economic Analysis*, 5 Yale J. on Reg. 367 (1988) (where the authors state that some perceive the "eased requirements for establishing joint and several liability" as a cause for the insurance crisis and opine that, absent "continued expansion . . . of tort liability," "[c]ontinued worsening of the[] crisis characteristics is not assured." *Id.* at 389 & 395. See generally *Perspectives on the Insurance Crisis*, 5 Yale J. on Reg. 367-516 (1988) for other related articles; See also Mooney, *The Liability Crisis—A Perspective*, 32 Vill. L. Rev. 1235, 1241-51 (1987); Gifford, *The Myth of the Liability Insurance Claims Explosion: An Empirical Rebuttal*, 41 Vand. L. Rev. 909 (1988).

iums while simultaneously reducing coverage.²⁵ Forestalling an indication whether relief from solidarity might reduce insured's claims and losses, the Senate rejected an amendment creating a thirty-six month trial period, whereby article 2324 reverted to the 1979 language if "liability insurance premiums" failed to fall "five percent per year for the next three years."²⁶ In light of the amendment's nonexistent legislative history and the ubiquitous "insurance crisis" it is difficult to ascertain what the legislature intended—whether the new article overrules the solidary liability espoused in the text of Louisiana Civil Code article 1794 and the judicial glosses interpreting it.

THE HISTORY OF SOLIDARY LIABILITY

Apparently since the beginning of recorded legal history, solidary liability and contribution provided the legal bases for much litigation among victims and multiple tortfeasors. The development of solidarity has been accompanied by a certain degree of conceptual confusion in all legal systems, including that of Louisiana. Many times these conceptual errors led to an unnecessary expansion of solidary liability. Exploring the evolution of solidarity in various legal systems helps illuminate the current state of tort solidarity in Louisiana.

Classical Roman Law and Justinian

Solidary liability for contracts and delictual conduct had its genesis in ancient Rome. The Roman jurists, during the classical period, drew a distinction between correal and solidary obligations;²⁷ a tort committed by more than one actor created the latter. Tort damages were considered the equivalent of penalties, and the victim was permitted

25. Twenty state attorneys general recently sued these insurance companies in state and federal courts. See Resky, *Was There a Liability Crisis?*, A.B.A.J., Jan., 1989, at 46.

26. Senator Jumonville's amendment on June 16, 1987 stated:

It is the intent of the Louisiana Legislature that the passage of this Act result in the reduction of liability insurance premiums by at least five percent per year for the next three years. If at the end of thirty-six months from the effective date of this Act, liability insurance premiums have not been reduced by at least fifteen percent of the premium level in existence on April 1 Code Article 2324 as amended by this Act shall revert to the language contained therein prior to the passage of this Act.

27. Generally created by stipulation only, correality centered around contractual relations and therefore of no moment in a delictual setting. See W. Buckland, *A Textbook of Roman Law from Augustus to Justinian* 453 (2d ed. 1950) [hereinafter Buckland]; R. Sohm, *The Institutes of Roman Law* § 74, at 383-85 (2d ed. 1901) [hereinafter Sohm]; see generally J. Wylie, *Solidarity and Correality* (1923) [hereinafter Wylie].

to recover one hundred percent of the damages from each of the tortfeasors.

Classical law forbade contribution,²⁸ even when coinjurors were present and solvent.²⁹ The praetor allowed a victim the option to pursue the claims against any tortfeasor and in any proportion.³⁰ This policy inevitably led to collusion between the victim and one or more of the tortfeasors. Injurers, for example, sometimes offered bribes to the victim, hoping to influence his decision to sue the other tortfeasors.³¹

Justinian altered the classical theory of solidarity. The law of Justinian, particularly the *Digest*, allowed a slave owner one hundred percent recovery from each person causing the death of the slave; otherwise, the law permitted only a single recovery of damages. Additionally, in accordance with *lex Aquilia*,³² payment by one of the wrongdoers did not release the others.³³

Scholars agree that the grant of *beneficium divisionis*³⁴ contribution belongs to Justinian.³⁵ Aside from the continuation of classical solidarity principles when parties killed a slave, Justinian ameliorated the no contribution doctrine.³⁶ In the case of praetorian delicts³⁷ and quasi-delicts³⁸ the law evolved whereby a portion of the damages were compensatory rather than penal. Satisfaction of the compensatory damages by one released the others,³⁹ while payment of the penalty by a co-

28. Buckland, *supra* note 27 at 454, 456; W. Burdick, *Principles of Roman Law and Their Relation to Modern Law* 420 (1938) [hereinafter Burdick].

29. Wylie, *supra* note 27, § 5, at 34-35; but see Burdick, *supra* note 28 at 420 n.44 (stating that Savigny is of a different opinion notwithstanding the contrary weight of opinion).

30. Wylie, *supra* note 27, § 5, at 35.

31. The early English and American common law "no contribution" rules had similar problems. See *infra* text accompanying notes 61-69.

32. "[A] celebrated law . . . regulating the compensation to be made for that kind of damage called 'injurious,' in the cases of killing or wounding the slave or beast of another." Black's Law Dictionary 818 (5th ed. 1979).

33. Digest 9.2.11.2; see also Burdick, *supra* note 28 at 421. The civil damages were considered penal in nature.

34. "In civil . . . law, the privilege of one of several co-sureties (cautioners) to insist upon paying only his *pro rata* share of the debt. La. Civ. Code arts. 3045-3051." Black's Law Dictionary 143 (5th ed. 1979).

35. Wylie, *supra* note 27, § 5, at 34-35; *id.* § 35, at 308, 314-15; Code J., 8.41.28; 4.65.13.

36. Buckland, *supra* note 27, at 434. Little practical difference between correalty and solidarity remained in the Digest.

37. Delicts were divided into four groups by Justinian: theft (*furtum*, J. Inst. 4.1.1); robbery (*rapina*, J. Inst. 4.2, pr.); injury (*injuria*, Dig. 9.2.5.1); and damage (*damnum* G. Inst. 3.211).

38. Burdick, *supra* note 28 at 504-10.

39. Lee, *The Elements of Roman Law* § 646 (4th Ed. 1956); Dig. 2.10.1.4; 4.2.14.15.

injurer failed to exonerate the others.⁴⁰ At last, solidary liability for compensatory damages carried with it a right of contribution.

Justinian probably considered the effect of an insolvent tortfeasor when two or more injured a person. Bankruptcy debtor laws indicate that the Roman law regularly dealt with the insolvency issue. Cognizant of the risks created by impecunious parties, Roman lawmakers developed appropriate remedies, such as making insolvent judgment debtors slaves of their creditors.⁴¹ Book nine of the Digest deals with negligence and delictual principles and, in pertinent part, states that "when the money is received [by the plaintiff], the others [are] compellable . . . to contribute their share with [what is due for] the damage *to the one who paid*."⁴² Implicit in this precept is the recognition that in some situations one party remitted the entire amount of the judgment, acquiring contemporaneously a right of contribution from the other injurers. Justinian could have allocated the insolvency risk among all parties, including the victim.⁴³ The failure to do so suggests that cotortfeasors bore that risk among themselves.

English and American Common Law

English Courts recognized joint and several liability as early as 1691. In *Smithson v. Garth*,⁴⁴ three individuals attacked the plaintiff; one held him, another battered him, and the third stole his silver buttons. Assessing damages for false imprisonment, battery, and trespass, with each held liable for the whole, the court announced that the parties must act in concert for the victim to utilize this theory of recovery.⁴⁵ Additionally, since at this time joinder was not compulsory, the victim could sue any wrongdoer for the entire damages, although he was limited to one recovery.

40. Dig. 47.4.1.19; 9.2.11.2; Sohm, *supra* note 27, § 74, at 383 n.5 (penalties); Buckland, *supra* note 27, at 452-53. But see Dig. 2.10.1.4: "If several are guilty of contrivance, all are liable; but if one of them pays the penalty, the rest are discharged"

41. G. Inst. 4.21.

42. Dig. 9.3.4 (emphasis added).

43. Burdick, *supra* note 28, at 417. Classical law at the time of the compilation by Justinian recognized certain types of divisible obligations. See also Dig. 45.2.11.1.

44. 83 Eng. Rep. 711 (1691).

45. *Accord Sadler v. Great Western Ry. Co.*, (1896) A.C. 450. The court denied joint suit absent concerted action. This case presented an inequitable result inasmuch as the railroad company defendants produced no damage individually. The combined activities created quantifiable damage but their acts were separate. Lord Justice Rigsby had dissented from a similar disposition by the Court of Appeal; his words accurately depict this unfairness and foreshadow contemporary joint and several liability. (1895) 2 Q.B. 688, 694-96.

Upon paying the damages, tortfeasors inevitably sought contribution from the other wrongdoers. In *Merryweather v. Nixan*,⁴⁶ the court denied a right of contribution between joint wrongdoers.⁴⁷ In that case, one joint wrongdoer, having satisfied the entire claim, sought one-half reimbursement from the other. Affirming the trial court's nonsuit of the plaintiff's action, Lord Kenyon implied that delictual contribution did not exist, stating "that he had never before heard of such an action . . . where the former recovery was for tort."⁴⁸ But in *Merryweather*, the injuries were intentionally inflicted and involved concerted action, hence Lord Kenyon held what had always been true, that there is no right of contribution for intentional acts.⁴⁹ Later English cases recognized this distinction between intentional and negligent acts and allowed contribution absent a willful and conscious act.⁵⁰

In assessing the amount of contribution, a distinction existed depending upon whether the action was one at law or in equity. In cases at law, liability was allocated on a per capita basis depending on the number of persons originally liable. In equity cases only solvent tortfeasors who were within the jurisdiction of the court were considered when computing liability. Eventually all English courts settled upon the latter.⁵¹

Colonial America adopted both the English common law rules of joint and several liability and of contribution. In the absence of concerted action or mutual responsibility, injured parties could not sue multiple tortfeasors under the allegation of joint and several liability.⁵²

46. 101 Eng. Rep. 1337 (1799). For an excellent critique of this decision, see Williams, *The Rule in Merryweather v. Nixan*, 17 L.Q. Rev. 293 (1901).

47. Prosser surmised from a "very meagre report of the case" that the judgment was joint and they acted in concert inasmuch as English rules of procedure during this period allowed joinder only upon such proof. W. Prosser and W. Keeton, *The Law of Torts* § 50, at 336 (5th ed. 1984).

48. 101 Eng. Rep. 1337 (1799).

49. Reath, *Contribution Between Persons Jointly Charged for Negligence—Merryweather v. Nixan*, 12 Harv. L. Rev. 176, 177-79 (1898).

50. See, e.g., *Betts v. Gibbins*, 111 Eng. Rep. 22 (1834). In that case, Chief Justice Lord Denman asserted that *Merryweather* had been "strained beyond what the decision will bear" and that the general rule of no contribution or indemnity had an exception where the act was not clearly illegal in itself. The court granted indemnity because the plaintiff's acts, although possibly negligent, were not illegal. *Id.* at 29. See also *Pearson v. Shelton*, 150 Eng. Rep. 533 (1836); *Adamson v. Jarvis*, 130 Eng. Rep. 693, 696 (1827) (limited *Merryweather* and stated that "the rule that wrong-doers cannot have redress or contribution against each other is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act").

51. See Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. Penn. L. Rev. 130, 135 n.22.

52. See *Russell v. Tomlinson*, 2 Conn. 206 (1817), *Adams v. Hall*, 2 Vt. 9 (1829), and *Van Steenburgh v. Tobias*, 17 Wend. 562 (N.Y. 1837) (where dogs of multiple owners

A mere connection to the occurrence was insufficient to create a joint tort; rather "there must be some *community* in the wrong-doing among the parties [and] the injury must in some sense be their *joint* work."⁵³

Confusion between the rationale for joinder of claims and joint torts caused an expansion in a victim's ability to sue all injurers regardless of the "community in the wrong-doing."⁵⁴ The early common law rules of joinder were extremely strict and, like the rules governing joint and several liability, required concerted action to join defendants under a single cause of action.⁵⁵ Some recognized the distinction,⁵⁶ but as rules of pleading and procedure⁵⁷ became more liberal, joint tort concepts tagged along.⁵⁸

The doctrine of single indivisible injury was an additional limitation on joint and several liability. For joint and several liability to be imposed, the harm must have been of such a type that it was not practically apportionable, "that is, an injury which cannot be apportioned with reasonable certainty to the individual wrongdoers."⁵⁹ While these torts were not "joint" torts, properly speaking, the courts exhibited "an ever increasing tendency . . . to impose joint and several liability for the damage caused by such wrongs."⁶⁰ This almost limitless expansion of the class of joint and severally liable injurers was probably unwarranted in light of the underlying policies. In an effort to compensate victims fully, the courts created a rule of law that made joint

worried or killed plaintiff's sheep); P. Bliss, *Law of Pleading*, §§ 82 & 83, at 106-10 (1879).

53. J. Pomeroy, *Code Remedies: Remedies and Remedial Rights* § 209, at 303 (4th ed. 1904). Some examples will illustrate how American courts gave effect to the distinction. A municipality was not jointly liable with a city lot owner who negligently dug and left open a hole in the street because they did not jointly produce the injury. *Trowbridge v. Forepaugh*, 14 Minn. 133 (Gil. 100) (1869). But two railroad companies who each had an employee at fault, utilized the same track, and subsequently injured a passenger in a collision were jointly liable. *Colegrove v. New York & New Haven Ry. Co.*, 20 N.Y. 492 (1859).

54. J. Pomeroy, *Code Remedies: Remedies and Remedial Rights* § 209, at 303 (4th ed. 1904); see also F. Harper, F. James & O. Gray, *The Law of Torts* § 10.1, at 10-11 (2d ed. 1986); W. Prosser & W. Keeton, *The Law of Torts* § 47, at 324-26 (5th ed. 1984).

55. Prosser, *Joint Torts and Several Liability*, 25 U. Calif. L. Rev. 413, 418 (1937)

56. See *Young v. Dille*, 127 Wash. 398, 220 Pac. 782 (1923) (where the victim could sue two injurers who were not joint tortfeasors and the trial judge must instruct the jury to assess the damages separately).

57. See Fed. R. Civ. P. 20(a).

58. Prosser, *Joint Torts and Several Liability*, 25 Calif. L. Rev. 413, 413-21 (1937); see also F. Harper, F. James & O. Gray, *The Law of Torts* § 10.1, at 10-11 (2d ed. 1986).

59. *Landers v. East Texas Salt Water Disposal Co.*, 151 Tex. 251, 256, 248 S.W.2d 731, 734 (1952).

60. F. Harper, F. James & O. Gray, *The Law of Torts* § 10.1, at 4-5 (2d ed. 1986).

tortfeasors out of practically all negligent cotortfeasors. Thus, by virtue of the attributes of joint and several liability, each tortfeasor became a guarantor of the victim's complete financial recovery.

American courts generally disallowed contribution between tortfeasors.⁶¹ The courts held to this rule firmly when the wrongdoing was intentional.⁶² Contribution was an equitable remedy⁶³ and courts justified this rule under the "clean hands" doctrine.⁶⁴ An intentional wrongdoer could not seek relief from the court. However, some authority exists for the proposition that American common law allowed contribution when the tortfeasor's conduct was not willful, malicious, intentional, or immoral.⁶⁵ This distinction between intentional and negligent acts met its demise when the courts liberalized the rules of joinder. For the sake of judicial efficiency, the courts allowed a victim to join virtually any party against whom a claim might be asserted for a "complete determination . . . of the question involved."⁶⁶ In the process, the judiciary disregarded the policy considerations for contribution when the underlying tort sounded in negligence and "refused to permit contribution, even where independent, although concurrent, negligence had contributed to a single result."⁶⁷ Collusion between plaintiffs and defendants ensued.⁶⁸ Since the plaintiff had unfettered discretion to sue any tortfeasor, each had a motive to bribe the victim.⁶⁹

61. See P. Bliss, *Law of Pleading* § 89, at 114 (1879). See also Pomeroy, *Equity Jurisprudence* § 2339, at 5173-76 (4th ed. 1919); Prosser and Keeton, *The Law of Torts* § 50, at 337 (5th ed. 1984); *Union Stockyard Co. v. Chicago B. & Q. R.R. Co.*, 196 U.S. 217, 25 S. Ct. 226 (1905).

62. See, e.g., *Arnold v. Clifford*, 2 U.S. (2 Sumner) 238 (1835) (publishing a libel); *Peck v. Ellis*, 2 Johns. 131 (N.Y. 1816) (cutting another's timber); *Miller v. Fenton*, 11 Paige Sc. 18 (N.Y. 1844) (stealing bank funds).

63. 4 J. Pomeroy, *Equity Jurisprudence* § 1418, at 1070-71 (5th ed. 1941).

64. Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. Pa. L. Rev. 130, 131 (1932) "In a number of well known fields the law has manifested its unwillingness to come to the aid of persons whose conduct does not conform to legal standards, particularly if such persons, in order to make out a case, have to set up the non-conforming conduct as a part thereof."

65. See, e.g., *Ankeny v. Moffett*, 37 Minn. 109, 33 N.W. 320 (1887) (negligent construction of a building); *Armstrong County v. Clarion County*, 66 Pa. 218 (1870) (negligent maintenance of a bridge); *Bailey v. Bussing*, 28 Conn. 455 (1859); *Horbach v. Elder*, 18 Pa. 33 (1851) (negligent injury of a stagecoach passenger); *Thweatt v. Jones*, 22 Va. (1 Rand.) 328 (1923) (negligent misdelivery of tobacco receipts).

66. *New York Code of Procedure* § 118 (1849). See also note 105.

67. W. Prosser, *The Law of Torts* § 50, at 306 (4th ed. 1971).

68. Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. Pa. L. Rev. 130, 137-38 (1932).

69. In a particularly ingenious maneuver, a corporation purchased its subsidiary's potential liability. After judgment, but prior to execution, the victim assigned its rights to the parent corporation, presumably in exchange for satisfaction of the debt. As assignee, the parent sued the other tortfeasor and the court granted full recovery. *Pennsylvania Co. v. West Penn. Ry. Co.*, 110 Ohio St. 516, 144 N.E. 51 (1924).

Legal scholars consistently advocated contribution in negligence-based torts.⁷⁰ In their view, tortfeasors deserved the benefits of contribution absent immoral or intentional conduct. Few writers of the twentieth century advocated the no contribution rule.⁷¹ Bowing to the scholarly pressure and recognizing the inequity of no contribution, forty-three states adopted contribution to some extent by statute or judicial decision.⁷² Six states eliminated the need for contribution by adopting comparative negligence statutes, which abrogate joint and

70. One scholar had harsh criticism for the no contribution rule:

There is obvious lack of sense and justice in a rule which permits the entire burden of a loss, for which two defendants were equally, unintentionally responsible, to be shouldered onto one alone, according to . . . the plaintiff's whim or spite, or his collusion with the other wrongdoer, while the latter goes scot free.

W. Prosser, *The Law of Torts* § 50, at 307 (4th ed. 1971). See also Jackson, *Joint Torts and Several Liability*, 17 *Tex. L. Rev.* 399 (1939); Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 *U. Penn. L. Rev.* 130 (1932); Prosser, *Joint Torts and Several Liability*, 25 *U. Calif. L. Rev.* 413 (1937); Reath, *Contribution Between Persons Jointly Charged for Negligence—Merryweather v. Nixan*, 12 *Harv. L. Rev.* 176 (1898).

71. James, *Contribution Among Joint Tortfeasors: A Pragmatic Criticism*, 54 *Harv. L. Rev.* 1156 (1941); Jones, *Contribution Among Tortfeasors*, 11 *U. Fla. L. Rev.* 175 (1958).

72. See Alaska Stat. §§ 9.16.010 to .060 (1983); Ariz. Rev. Stat. Ann. §§ 12-2501 to 2504, 2506, 2508, 2509 (Supp. 1987); Ark. Stat. Ann. §§ 16-61-201 to 212 (1987); Cal. Civ. Proc. Code §§ 875 to 883 (West 1980 & Supp. 1988); Colo. Rev. Stat. §§ 13-50.5-101 to 106 (1987); Del. Code Ann. tit. 10, §§ 6301 to 6308 (1974); Fla. Stat. § 768.31 (1984); Ga. Code Ann. § 51-12-32 (Supp. 1988); Haw. Rev. Stat. §§ 663-11 to 17 (1985 & Supp. 1987); Idaho Code §§ 6-803 to 807 (1979 & Supp. 1988); Ill. Ann. Stat. ch. 70, §§ 301 to 305 (Smith-Hurd Supp. 1987); Iowa Code Ann. § 668.5 (West 1987); Ky. Rev. Stat. Ann. § 412.030 (Banks-Baldwin 1979); La. Civ. Code art. 2324; *Packard v. Whitten*, 274 A.2d 169 (Me. 1971); Md. Ann. Code art. 50, §§ 16 to 24 (1986); Mass. Gen. Laws Ann. ch. 231B, §§ 1 to 4 (West 1986); Mich. Comp. Laws Ann. §§ 600.2925a to .2925d (West 1986 & Supp. 1989); Minn. Stat. Ann. § 604.02 (West 1988 & Supp. 1989); Miss. Code Ann. § 85-5-5 (1972); Mo. Rev. Stat. § 537.060 (Vernon 1988); Mont. Code Ann. § 27-1-703 (1987); *Royal Indem. Co. v. Aetna Casualty & Sur. Co.*, 193 Neb. 752, 229 N.W.2d 183 (1975); Nev. Rev. Stat. §§ 17.225 to .305 (1986); N.H. Rev. Stat. Ann. §§ 507:7-f to i (Supp. 1987); N.J. Stat. Ann. § 2A:15-5.3 (West 1987); N.M. Stat. Ann. §§ 41-3-1 to 8 (1986 & Supp. 1987); N.Y. Civ. Prac. Law §§ 1401 to 1404 (McKinney 1976); N.C. Gen. Stat. §§ 1B-1 to 6 (1983); N.D. Cent. Code §§ 32-38-01 to 04 (1976 & Supp. 1987); Ohio Rev. Code Ann. §§ 2307.31 to .33 (Page Supp. 1987); Okla. Stat. Ann. tit. 12, § 832 (West 1988); Or. Rev. Stat. §§ 18.430 to .460 (1988); Pa. Cons. Stat. Ann. tit. 42, §§ 8321 to 8327 (Purdon 1982); R.I. Gen. Laws §§ 10-6-1 to 11 (1985); S.C. Code Ann. §§ 15-38-10 to -70 (La. Co-op Supp. 1988); S.D. Codified Laws Ann. §§ 15-8-11 to 22 (1984 & Supp. 1987); Tenn. Code Ann. §§ 29-11-101 to 106 (1980); Tex. Civ. Prac. & Rem. Code Ann. §§ 33.011 to .016 (Vernon 1986 & Supp. 1989); Va. Code Ann. §§ 8.01-34 to 35.1 (1984); Wash. Rev. Code Ann. §§ 4.22.040 to .925 (1988); W. Va. Code z 55-7-13 (1981); Wis. Stat. Ann. §§ 113.01 to .11 (West 1988).

several liability.⁷³ Alabama is now the only state that continues the no contribution rule.⁷⁴

Under these contribution statutes or judicial decisions, a codefendant could generally recover all but his per capita share; in other words, division among tortfeasors was into equal shares. This arbitrary apportionment was a function of the legal system's concern that juries could not accurately allocate fault among the parties.⁷⁵ The jury was responsible for a determination whether the victim was at fault, but only as a bar to the plaintiff's recovery, not as an assessment of percentages among the parties.

Comparative negligence generally replaced contributory negligence as a means of handling the fault of a victim. Gone from the legal system was the perception that juries could not allocate fault, particularly when the court provided guidance.⁷⁶ This adoption of comparative negligence led to arguments that the courts could utilize the jury's fault assessment to abrogate joint and several liability and hold each tortfeasor liable for his respective share of the damage. Some states enacted legislation to this effect, but courts of other states dispelled any indication that "adoption of comparative negligence . . . warrant[ed] the abolition or contraction of the established 'joint and several liability' doctrine. . . ."⁷⁷

Throughout this time frame the injurer bore the insolvency risk. Provided any one tortfeasor possessed sufficient wealth, the injured

73. See Conn. Gen. Stat. Ann. § 52-572h (West Supp. 1988); Ind. Code Ann. §§ 34-4-33-1 to 14 (West Supp. 1988); Kan. Stat. Ann. § 60-258a (1983); Utah Code Ann. §§ 78-27-37, 38 (1987); Vt. Stat. Ann. tit. 12, § 1036 (Supp. 1988); Wyo. Stat. § 1-1-109 (1977 & Supp. 1987).

74. See, e.g., *Crigler v. Salac*, 438 So. 2d 1375 (Ala. 1983), *Kennedy Engine Co. v. Dog River Marina & Boatworks, Inc.*, 432 So. 2d 1214 (Ala. 1983), *Shearman Concrete Pipe Mach., Inc. v. Gadsden Concrete & Metal Pipe Co., Inc.*, 335 So. 2d 125 (Ala. 1976); *Home Ins. Co. v. Stuart-McCorkle, Inc.*, 291 Ala. 601, 285 So. 2d 468, 91 A.L.R.3d 833 (1973).

75. See L. Powell, *Contributory Negligence: A Necessary Check on the American Jury*, 43 A.B.A.J. 1005, 1006 (1957) (where Mr. Powell, prior to becoming a United States Supreme Court Justice, argued that juries typically disregard instructions and "render verdicts based on their own opinion of 'justice'" notwithstanding the victim's "minor contributory negligence."); S. Speiser, C. Krause and A. Ganes, *The American Law of Torts* § 1312, at 691 (1986) "[A]pportionment of relative fault by a jury cannot be scientifically done, as such precise measurement is impossible."

76. *Li v. Yellow Cab Co. of Calif.*, 13 Cal. 3d 804, 824, 119 Cal. Rptr. 858, 872, 532 P.2d 1226, 1240 (1975) "The temptation for the jury to resort to a quotient verdict . . . can be great. These inherent difficulties are not . . . insurmountable. Guidelines might be provided the jury which will assist in keeping it focussed (sic) upon the proper inquiry [such as] special verdicts and jury interrogatories"

77. *American Motorcycle Association v. Viking Motorcycle Club*, 20 Cal. 3d 578, 582, 146 Cal. Rptr. 182, 184; 578 P.2d 899, 901 (1978); see also *Coney v. J.L.G. Industries, Inc.*, 97 Ill. 2d 104, 121-22, 73 Ill. Dec. 337, 345, 454 N.E.2d 197, 205 (1983).

party recovered one hundred percent of his damage from that tortfeasor. All of the collection risks—insolvency, inability to obtain service of process, or the inability to identify the tortfeasor—rested on the solvent injurers.

French Law

French law recognized *in solido* obligations "where several persons . . . concurred in an injury."⁷⁸ Article 55⁷⁹ of the Penal Code is the only French statute dealing with solidary liability, but the French "jurisprudence has never hesitated to maintain solidarity outside the realm of criminal acts."⁸⁰ Originally, only intentional, concerted action created solidarity. The jurisprudence later expanded solidary liability by requiring only an indivisible injury, with no requirement of concerted action or a common interest.⁸¹ The injurers did not have the benefit of division. A tortfeasor could not require the victim to proceed against the others. In essence, the injured party possessed complete discretion and could recover from any tortfeasor.⁸² The solidary tortfeasors, however, owed only one debt. Payment by one satisfied the debt for all others.⁸³ Pothier suggested any payment should have this effect, even a preexisting sum owed from the victim to one of the injurers.

French law recognized a right of contribution among cotortfeasors. Pothier acknowledged the "no contribution" principles of Roman jurists, but stated that French law was more "indulgent."⁸⁴ Tortfeasors

78. 1 M. Pothier, *Law on Obligations* § 268, at 231 (W. Evans trans. 1853). But see Toullier, *Le Droit Civil Francais* 23-28 (5th ed. 1830) (B. Miller trans. 1976). Toullier asserts that contravention and quasi offenses (i.e., negligence based torts) should not create solidary liability. Solidarity created in article 55 of the Penal Code should be confined to crimes and offenses because their intentional nature creates a common will just as with conventional solidarity. *Id.* at 25. Nevertheless, it appears solidarity was generally the result since the Penal Code sanctioned many negligent acts, such as cultivating the soil with an iron rather than a bamboo rake.

79. Article 55 French Penal Code states:

All individuals found guilty of the same crime or of the same offense are bound in solido for fines, restitution, damages and costs.

Translated in Toullier, *Le Droit Civil Francais* 24 (5th ed. 1830) (B. Miller trans. 1976).

80. 2 M. Planiol, *Civil Law Treatise* pt. 1 § 900, at 503 (11th ed. La. St. L. Inst. trans. 1959). The Decree of June 18, 1811, article 156 stated that article 55 applied whether the claim was asserted in civil or criminal court. 4 C. Aubry & C. Rau, *Droit Civil Francais* § 298b, at 19 n.5 (E. Bartin 6th ed.) in 1 *Civil Law Translations* (A. Yiannopoulos trans. 1965).

81. 4 C. Aubry and C. Rau, *Droit Civil Francais* § 298b, at 24-25 (E. Bartin 6th ed.) in 1 *Civil Law Translations* (A. Yiannopoulos trans. 1965).

82. 1 M. Pothier, *Law of Obligations* § 270, at 232 (W. Evans trans. 1853).

83. 1 M. Pothier, *Law of Obligations* § 273, at 233 (W. Evans trans. 1853).

84. 1 M. Pothier, *Law of Obligations* § 282, at 245-46 (W. Evans trans. 1853).

were not arbitrarily liberated from a debt at another tortfeasor's expense wholly at the victim's whim. An injurer who paid the whole possessed an action against the others for their respective parts.⁸⁵ Whether that part was per capita or prorata is unclear. In support of prorata contribution, Planiol suggested that if the actors' faults were disproportionate, liability should be similarly divided.⁸⁶ Thus a tortfeasor five percent at fault probably possessed an action to recover ninety-five percent of the damages from the other tortfeasors. This apportionment of financial responsibility affected the rights between the actors only.⁸⁷

The tortfeasors bore the risk of a codebtor's insolvency.⁸⁸ An exception existed for any discharged injurer, such as by transaction or compromise. In that situation the victim suffered the discharged debtor's portion of any subsequent insolvency.⁸⁹

Louisiana Law

Article 2324 is derived from article 2304⁹⁰ of the 1825 Louisiana Civil Code. The translators of the earlier article's French text incorrectly substituted "jointly" for "in solido." Prior to the legislative amendment to reconcile the English with the French version,⁹¹ courts followed the translated text only⁹² and held cotortfeasors jointly liable.⁹³ After

85. French Civ. Code art. 1214 (J. Crabb trans. 1977).

86. 2 M. Planiol, *Civil Law Treatise* § 904, at 505 (11th ed. La. St. L. Inst. trans. 1959); "[I]f the faults committed by each of the authors of the damage are not equal in gravity, the partition of the indemnity can be made in unequal parts depending upon the contribution to be established between them. (Cass., 26 Nov. 1907, D.1908.1.139)."

87. 4 C. Aubry and C. Rau, *Cours De Droit Civil Francais* § 298b, at 26 (6th ed. La. St. L. Inst. trans. 1965) in 1 *Civil Law Translations* (A. Yiannopoulos trans. 1965).

88. 2 M. Planiol, *Civil Law Treatise* pt. 1 § 771, at 415 (11th ed. La. St. L. Inst. trans. 1959).

89. 1 M. Pothier, *Law of Obligations* § 275, at 235 and § 278, at 239 (W. Evans trans. 1853). La. Civ. Code art. 1803 contains an identical rule. Comment (b) states, "In case of transaction, compromise, or settlement between the obligee and one of the solidary obligors, the liability of the other solidary obligors is reduce in the amount of the portion of that obligor, as in the case of settlement between the victim of a tort and one joint tortfeasor."

90. La. Civ. Code art. 2304 (1825) states:

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

91. 1844 La. Acts No. 20.

92. But see La. Acts No. 1808 § 5, which states that upon finding any "obscurity, fault, or omission, both the English and French texts shall be consulted."

93. See, e.g., *Villere v. Graeter*, 7 Rob. 203 (La. 1844); *Loussade v. Hartman*, 16 La. 117 (1840).

the legislative correction the Louisiana Supreme Court announced that "in consequence of the act of 1844, the rule [of joint rather than solidary liability] has ceased to be important."⁹⁴

In a second line of cases involving tort claims and solidarity, the court drew upon the articles dealing with obligations. The redactors of these code articles defined solidarity by its principal effects. A solidary obligation was one in which the debtors were "all obligated to the same thing; so that each may be compelled for the whole, and when the payment which is made by one of them, exonerates the others towards the creditor."⁹⁵ Another article stated that a "creditor of an obligation contracted *in solido*" possessed the right to collect from "any one of the debtors he please[d]."⁹⁶

The Louisiana Supreme Court, in *Cline v. Crescent City R.R. Co.*,⁹⁷ engrafted negligence-based solidary liability onto article 2324 using the general obligations articles pertaining to solidary liability.⁹⁸ The plaintiff averred that the defendants' negligence caused fatal injuries to her husband. Defendants' counsel argued that "when two persons are guilty of negligence each is responsible for the consequences of his own acts," and that article 2324 applied only "where two or more persons *willfully* wrong another."⁹⁹ Inasmuch as solidarity is not presumed¹⁰⁰ and the plaintiff had offered no express authority for imposing solidary liability, the defendants asserted that the obligation, if any, was joint.

Although the defendants' argument correctly stated the law in this case, Justice Watkins rejected their contention. His analysis was straightforward. Solidary obligations exist "on the part of the debtors when they are all obliged to the *same thing* . . . although . . . the debtors [are] obligated *differently* . . . and by different acts or at different times."¹⁰¹ As for the defendants' contention that the law failed to provide negligence-based solidarity, the court found that "there are many contracts in which the obligation is declared by law to be *in solido*, without any express stipulation."¹⁰² Some of these contracts "may be found in the chapter which treats of 'offenses and *quasi* offenses,'" such as "art[icles] . . . 2315 . . . 2316 . . . 2317 [or] 2320."¹⁰³

94. *Byrne v. Riddell*, 3 La. Ann. 670, 670 (1848).

95. La. Civ. Code art. 2086 (1825).

96. La. Civ. Code art. 2089 (1825).

97. 41 La. Ann. 1031, 6 So. 851 (1889).

98. La. Civ. Code arts. 2077-2107 (1870).

99. 41 La. Ann. 1031, 1038, 6 So. 851, 854 (1889) (emphasis in original).

100. La. Civ. Code art. 2093 (1870). "An obligation in solido is not presumed"

101. 41 La. Ann. at 1039, 6 So. at 854. (emphasis in original).

102. *Id.* (emphasis in original). La. Civ. Code art. 2107 (1870).

103. 41 La. Ann. at 1039, 6 So. at 854-55 (emphasis in original).

Each of these articles, said the court, had been found to create obligations that were solidary, though none contained any express stipulation to that effect.¹⁰⁴

Cline marked the beginning of a continued erosion of distinction between the solidary effects of intentional and negligent acts. Civil Code article 2324 provided solidary liability for intentional or conspiratorial acts and article 2107, in conjunction with Justice Watkins' broad statements in *Cline*, created the potential for virtually limitless application of negligence-based solidary liability. The courts thereafter proceeded to recognize solidarity in a number of negligence cases.¹⁰⁵ Gone from the jurisprudence was any hint of the intentional act requirement for tort-based solidary liability.

The supreme court later suppressed another possible limitation on the application of solidarity. Prior to the 1979 amendment, article 2324 stated: "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."¹⁰⁶ Arguably, "unlawful act" was something more egregious than negligence or strict liability. The Louisiana Supreme Court, however, in *Hartman v. Greene*,¹⁰⁷ stated that "unlawful act" meant any wrongful act or tort for which a civil action lies. The term connoted much more than just criminal activity.¹⁰⁸

An indivisible injury was the remaining requirement for the imposition of solidary liability on multiple tortfeasors. But this concept evolved into one that could be met in about any personal injury case. The change began with Judge Covington's dissent in *Bergeron v. Thomas*.¹⁰⁹ The case arose from a three-car pileup involving two successive collisions with the decedent's automobile, and presented the question of which impact killed the driver. The trial court and majority opinion found the second collision insignificant when compared to the the initial 50 m.p.h. head-on collision and refused to hold the second motorist a solidary obligor for the entire damage. Judge Covington,

104. 41 La. Ann. at 1039, 6 So. at 855. The court additionally held that this ruling in no way effected the parties' right to sever the trials. *Id.*

105. See, e.g., *Cunningham v. Penn Bridge Co.*, 131 La. 196, 59 So. 119 (1912) (negligently killed construction worker); *Abrego v. Tri-State Transit Co.*, 22 So. 2d 681 (La. App. 1st Cir. 1945) (negligently injured automobile passenger).

106. Emphasis in original.

107. 193 La. 234, 190 So. 390, cert. denied, 308 U.S. 612, 60 S. Ct. 180 (1939).

108. Justinian agreed with this definition. Dig. 9.2.51 (where Ulpianus considered an injury due to negligence against the law).

109. 314 So. 2d 418 (La. App. 1st Cir.), writ denied, 318 So. 2d 54 (1975).

incensed by the result under the majority's legal theory,¹¹⁰ felt that allocating the injuries with any certainty was "beyond the capabilities of any mortal known to [him]." However, he advocated a test enunciated by the Iowa Supreme Court and opined that an indivisible injury occurs when "it is not reasonably possible to make a division of the damage caused by the separate acts of negligence."¹¹¹ In his view, it was "vexatiously incomprehensible . . . that the 'single indivisible injury' doctrine should not be applied."¹¹² Shortly thereafter, the supreme court adopted Judge Covington's approach by way of a footnote in *Sampay v. Morton Salt Co.*,¹¹³ notwithstanding article 2324's wording at that time.¹¹⁴ Subsequently an author accurately noted, "the jurisprudence has obscured the lucid and cogent theory underlying article 2324."¹¹⁵ The author further asserted that common law joint and several liability reasoning had "perforated the Code's tidy confines."¹¹⁶

Authority for contribution among tortfeasors was provided by article 2103 of the 1870 Civil Code.¹¹⁷ Initially, the courts denied a tortfeasor's contribution claim. In *Sincer v. Bell*,¹¹⁸ for example, the supreme court read article 2103 literally, requiring a "contract in solido" to enforce any contribution claim. Since there was "no contract [between] Bell [and] Sincer,"¹¹⁹ the court dismissed the cotortfeasor's claim. Later, in *Quatray v. Wicker*,¹²⁰ the court refined and limited

110. "The majority denies recovery against [the second driver] and his insurer . . . where damage was done to innocent animate victims. I suffer from various maladies, but misoneism is not one of them." 314 So. 2d at 429. Webster defines "misonism" as "a hatred or intolerance of something new or changed." Webster's Third New International Dictionary 1444 (1986).

111. 314 So. 2d at 428.

112. 314 So. 2d at 429.

113. 395 So. 2d 326 (La. 1981) "[P]rior to 1979 [article] 2324 appears to envision a situation where an intentional tort has been perpetrated by co-conspirators. However, the jurisprudence has interpreted the article to include indivisible damage caused by concurrent negligence." *Id.* at 329 n.1.

114. "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 an act." (prior to 1979 La. Acts No. 431.)

115. Comment, Prescribing Solidarity: Contributing to the Indemnity Dilemma, 41 La. L. Rev. 659, 687 (1981).

116. *Id.*

117. La. Civ. Code art. 2103 (1870) states:

The obligation contracted in solido towards the creditor, is of right divided amongst the debtors, who, amongst themselves, are liable each only for his part and portion. This article is derived verbatim from La. Civ. Code art. 2099 (1825).

118. 47 La. Ann. 1548, 18 So. 755 (1895).

119. *Id.* at 1550, 18 So. at 756.

120. 178 La. 289, 151 So. 208 (1933).

Sincer, allowing a contribution claim between tortfeasors cast in judgment as solidary obligors. The court held that *Sincer* was inapposite "to a case where two joint tortfeasors have been judicially condemned, in solido, [as opposed to a settlement agreement] to pay damages."¹²¹

The courts and the legislature continued to grapple with the doctrine of contribution.¹²² The Third-Party Practice Act¹²³ expanded the theory of joinder and limited a party's right to sever trials.¹²⁴ The second circuit, in *Kahn v. Urania Lumber Co.*,¹²⁵ held that this Act did not grant a defendant contribution rights against a joint tortfeasor who was not sued by the victim. The legislature, apparently dissatisfied with the rule, amended¹²⁶ article 2103¹²⁷ to give a defendant sued on a solidary obligation the right "to seek contribution . . . by making [the joint tortfeasor] a third party defendant in the suit . . . whether or not the third party defendant was sued by the plaintiff initially." The supreme court subsequently bowed to the Legislature's obvious intent to allow contribution among joint tortfeasors.¹²⁸ The 1984 Obligations Revision¹²⁹ continued the right of contri-

121. *Id.* at 296, 151 So. at 210. Furthermore the court anticipated inconsistency arguments and stated, "Whether . . . *Sincer* can be reconciled . . . is a matter which does not concern us in the present case." *Id.*

122. 1954 La. Acts No. 433.

123. See generally Comment, Contribution Among Joint Tortfeasors, 22 La. L. Rev. 818 (1962).

124. 1954 La. Acts No. 433, § 1 states, in part:

In any civil action presently pending or hereafter filed, the defendant in a principal action may by petition bring in any person (including a co-defendant) who is his warrantor, or who is or may be liable to him for all or part of the principal demand.

125. 103 So. 2d 476 (La. App. 2d Cir. 1958).

126. 1960 La. Acts No. 30, § 1.

127. La. Civ. Code art. 2103 (1870) as amended states:

When two or more debtors are liable in solido, whether the obligation arises from a contract, a quasi contract, an offense, or quasi offense, it should be divided between them. As between the solidary debtors each is liable only for his virile portion of the obligation.

A defendant who is sued on an obligation which, if it exists, is solidary may seek to enforce contribution, if he is cast, against his solidary codebtor by making him a third party defendant in the suit, as provided in Articles 1111 through 1116 of the Code of Civil Procedure, whether or not the third party defendant was sued by the plaintiff initially, and whether the defendant seeking to enforce contribution if he is cast admits or denies liability on the obligation sued on by the plaintiff.

128. *Brown v. New Amsterdam Cas. Co.*, 243 La. 271, 142 So. 2d 796 (1962); See also *Breaux v. Texas and Pacific Ry. Co.*, 147 So. 2d 693 (1962) The court found ample authority for the rule that a defendant . . . may, by third party petition, implead and demand contribution from an alleged co-tortfeasor (sic)." *Id.* at 695.

129. 1984 La. Acts No. 331, § 1.

bution in article 1804 which "synthesizes the rule contained in . . . the final paragraph of [article] 2103 (1870),"¹³⁰ and in article 1805, which "reproduces the substance of the second paragraph of [article] 2103 (1870)."¹³¹ Additionally, the revision eliminated any uncertainty surrounding the share each solidary obligor bore: "As solidary obligors, each is liable for his virile portion," which for an offense or quasi-offense "is proportionate to the fault of each obligor."¹³² When a solidary codebtor was insolvent, the loss was "equally shared amongst all the other solvent codebtors."¹³³ If a debtor renounced solidarity as to a creditor then the debtor bore the renounced creditor's portion of any insolvency loss.¹³⁴ Similar to the common and French law, Louisiana law prevented the victim from suffering any of the insolvency risk provided at least one tortfeasor possessed adequate financial wherewithal.

History teaches many things. The current expanded application of solidary liability warrants the legislature's attempt to limit solidarity. But the legislature may have been well advised to delineate a definition of joint tortfeasor, with a clear statement of legislative intent. The present law, while possibly reducing tortfeasor liability, leaves victims unprotected in situations meritorious of complete recovery. This flaw is later exhibited. Absent legislative correction, the judiciary can take the initiative to reinstate solidary liability principles as originally designed.

ANALYSIS OF ARTICLE 2324(B)

The drafters of the 1987 amendment to article 2324(B) left much to be desired in their choice of words. Many aspects of the amendment create interpretive difficulties, but three phrases in the article are particularly troublesome. First, in the initial clause of the first sentence, a tortfeasor is made solidarily liable to the extent necessary for the victim to recover fifty percent "of his recoverable damages." If a distinction exists between recoverable damages and damages, the definition may affect the extent of solidary liability. Second, in the same sentence, the article contains an exception to limited solidarity if solidary liability is "otherwise provided by law." This exception potentially eliminates the application of article 2324(B). Third, the phrase "liability for damages caused by two or more persons shall be solidary" could expand solidary liability to all tortfeasors who contribute to a plaintiff's injury. Prior to this amendment, two or

130. La. Civ. Code art. 1804, comment (a).

131. La. Civ. Code art. 1805, comment (b).

132. La. Civ. Code art. 1804.

133. La. Civ. Code art. 2100 (1825) & 2104 (1870).

134. La. Civ. Code art. 2101 (1825) & 2105 (1870). Renunciation occurred when the debtor waived the solidary nature of the obligation; the creditor might still owe the obligation to contribute their share of the insolvent part.

more persons could theoretically cause damage without creating solidary liability. Possible alternative interpretations exhibiting the interplay of the ambiguities created conclude this section.

Recoverable Damages

The legislature's choice of the term "recoverable damages" is regrettable. The pertinent clause of article 2324(B) states, "persons shall be solidar[i]ly liable] only to the extent necessary for the person suffering injury, death, or loss to recover fifty percent of his recoverable damages." The term "recoverable damages" is ambiguous, for it could mean either total damages or some portion of the victim's total loss.

Sources of interpretive guidance do not resolve this problem. The Oxford Dictionary defines recoverable as, "[c]apable of being recovered or regained."¹³⁵ Another authority defines recoverable as "capable of being recovered."¹³⁶ Related to personal injury damages in another context,¹³⁷ the Louisiana Supreme Court defined recoverable damages, stating that "the plain, ordinary, and natural meaning" of recoverable is that "which is able to be recovered; 'obtainable from a debtor or possessor as by legal process.'" ¹³⁸ Little question exists that damages assessed against an insolvent defendant or fault attributable to a victim cannot be obtained or regained, therefore they may not be part of recoverable damages.

Insolvency

The first problem associated with delineating the scope of recoverable damages exists when one of the defendants is insolvent or otherwise unavailable for collection of the judgment. Recoverable damages might not include damages that undoubtedly can never be obtained from these tortfeasors. Suppose plaintiff P suffers \$100,000 in damages and two tortfeasors, A and B cause the injury. A is forty percent at fault and B is sixty percent at fault. B, however, is insolvent.

Party	Percentage of Fault	Availability for Collection
A	40	solvent
B	60	insolvent

In this scenario, two choices exist for computing recoverable damages

135. The Oxford English Dictionary, Vol. VIII, 272 (1961).

136. Webster's Third New International Dictionary 1898 (1986).

137. The question was the interpretation of the term "recoverable" in La. Civ. Code art. 2402 (1870), which provided that "damages resulting from personal injury to the wife [are] recoverable by herself."

138. *Shield v. F. Johnson & Son Co.*, 132 La. 773, 776, 61 So. 787, 787 (1913).

and A's liability. If "recoverable damages" means total damages, then A would be solidarily liable for fifty percent of the \$100,000, or \$50,000. If, on the other hand, "recoverable damages" means the amount that could be collected without resort to solidarity principles, that amount would be \$40,000 rather than \$100,000, and A would be solidarily liable for fifty percent of that amount, or \$20,000.

The second interpretation of "recoverable damages" produces an anomaly. While A would be *solidarily* liable for only \$20,000, he would be required to compensate the victim for at least his share of the fault, or \$40,000. Hence, while A would be solidarily liable for \$20,000, his liability stemming from principles other than solidarity—his forty percent contribution to the total damages—would exceed his solidary portion. By defining "recoverable damages" in this way, the fifty percent limitation becomes superfluous. This illustrates how illogical it would be to read "recoverable damages" in this fashion.

The addition of another solvent tortfeasor reduces the dollar amount of A's obligation but continues this same anomaly. Suppose C, a solvent tortfeasor, occasioned thirty percent of the fault, while A contributed only ten percent.

Party	Percentage of Fault	Availability for Collection
A	10	solvent
B	60	insolvent
C	30	solvent

If "recoverable damages" excludes the sixty percent share of the insolvent tortfeasor, B, A and C became solidary obligors for \$20,000. Provided C can pay \$30,000, A still owes only his share of the fault, or \$10,000. If for some reason C is unable to pay his \$30,000 share, then "recoverable damages" declines still further. A would be a solidary obligor for fifty percent of these recoverable damages, an amount which continuously decreases with C's ability to pay. Hence, again, A could never owe more than his share of the fault, and the fifty percent requirement becomes unnecessary. It is doubtful the legislature intended to eliminate solidary liability in this manner.

Comparative Fault

A second problem involves whether the term "recoverable damages" includes the victim's comparative fault. Identical issues and results are at stake. If the fault of the victim does affect the amount of recoverable damages, then each solvent tortfeasor owes a correspondingly reduced solidary obligation. Suppose plaintiff P, who is ten percent at fault, suffers \$100,000 in damages. Two tortfeasors, A and B cause the remainder of

the injury. A is thirty percent at fault, B is sixty percent at fault. B is insolvent.

Party	Percentage of Fault	Availability for Collection
A	30	solvent
B	60	insolvent
P	10	—

If P's fault reduces recoverable damages, then A is a solidary obligor for fifty percent of ninety percent of the damages.

The experience of another state may offer some guidance in resolving this difficult question. In *Stovall v. Perius*,¹³⁹ an Oregon court interpreted the term recoverable damages in a similar context, a negligent victim and a joint and several liability statute. The statute at issue provided that "a defendant whose percentage of fault is less than that allocated to the plaintiff is liable to the plaintiff only for that percentage of the recoverable damages."¹⁴⁰ As a result of an automobile accident, the plaintiff suffered approximately \$200,000 in damages. The jury assigned eighteen percent fault to the plaintiff, seventy-five percent fault to the defendant city and seven percent fault to Perius. The statute applied to Perius because the victim's eighteen percent fault exceeded his seven percent fault. Perius sought to reduce his share to seven percent of the total fault not attributable to the victim, which would have been \$11,480, rather than seven percent of the total damages, or approximately \$14,000.¹⁴¹ Recapitulating two legislative committee hypotheticals, the appellate court rejected Perius' interpretation, agreeing with the trial court "that a percentage commensurate with the plaintiff's negligence is not . . . deducted before a defendant's liability is computed."¹⁴²

By analogy, application of the *Stovall* definition to article 2324(B) results in no reduction in recoverable damages due to a victim's fault. Recoverable damages would equal damages in toto. Pursuant to article 2324(B), solidary liability exists "to the extent necessary for"¹⁴³ fifty

139. 61 Or. App. 650, 659 P.2d 393 (1983).

140. Or. Rev. Stat. § 18.485 (1983); 1987 Or. Laws 774 § 1 amended this section further limiting a joint tortfeasors liability.

141. The Oregon Tort Claims Act limited the city's liability to \$100,000. Or. Rev. Stat. § 30.270(1)(b) (1988).

142. A Senator and Representative illustrated the statute's effect. If a plaintiff was 40 percent at fault, two defendants were each 30 percent at fault and the damages equaled \$100,000, each defendant would be liable for \$30,000. 659 P.2d at 400.

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

percent recovery. If the victim's fault does not reduce recoverable damages, a defendant would always be solidarily liable for a minimum of fifty percent of the total damages. The *Stovall* definition, whereby the victim's fault does not reduce recoverable damages, produces results consistent with solidary liability policies; tortfeasors should be fifty percent solidary obligors for the total damages.

As Otherwise Provided by Law

The biggest snafu of the 1987 amendment is the phrase, "as otherwise provided by law." In the context of the article, solidary liability is limited to fifty percent of the damages, unless the "law" otherwise prescribes solidarity. Any law providing for solidary liability should continue to have full effect. The difficulty lies in the fact that the codes and revised statutes are replete with articles and provisions which to some degree address solidary liability.¹⁴⁴ For example, Lloyd's under-

144. This author has identified at least fifty Louisiana statutes, thirty-four Civil Code articles, and eight Code of Procedure articles that fit this category.

(1) Louisiana Revised Statutes:

3:1371(C) (1987) (penalties for sale or distribution of substandard fertilizers); 6:656(A)(1)(g) & (C) (1986) (liability for director who knowingly and willfully makes a loan to a non-credit union member); 6:784 (1986) (liability for officers and directors related to illegal loans from Homestead or Savings and Loan Associations); 6:824(3) (1986) (liability of borrower and any party assuming his obligations to make full repayment); 6:833(A) (1986) (liability of purchaser and original borrower if property subject to mortgage sold or transferred); 6:834(A) & (B) (1986) (liability of officer or director who accepts gifts related to a loan application); 9:3202 (1983) (liability for enticing a lessee to break a lease); 9:4806 (Supp. 1989) (liability of property owners to contractor for "Private Works"); 9:5385(B) (Supp. 1989) (liability of mortgagee for failure to "produce satisfied promissory note"); 12:92(A) (1969) (liability of officers and directors for transacting business before receiving the full paid-in capital); 12:219(B) (1969) (liability of corporation members related to an exchange of "grossly overvalued" property or services for shares); 13:1215 (1983) (liability of surety for court costs); 13:2158(A)(25) (Supp. 1989) (liability of parties related to a writ of fieri facias to pay the constable's fees); 13:4523 (1968) (liability of surety for court costs); 13:4716(A) (Supp. 1989) (requiring a "bond in solido" from a person creating a nuisance to secure a release for the premises); 15:84(A)(1) (1981) (liability of "sureties in solido" upon person's failure to appear related to a criminal proceeding in a city, parish or juvenile court); 15:85(A)(1) (Supp. 1989) (liability of "sureties in solido" upon person's failure to appear related to a criminal proceeding in district court); 15:1356(K) (Supp. 1989) (liability of parties violating the "Louisiana Drug Racketeering Act"); 17:601.4(B) (1982) (liability of employing agency and retiree for failure to notify retirement board of trustees that retiree has returned to active service); 22:76(L) (1959) (liability of directors, officers or agents related to the improper sale of domestic stock insurers' securities); 22:356(D) (1959) (liability of funeral service association

writers are solidarily liable on each insured risk, their agreement to the

treasurer for fraudulent assessment of a person's death); 22:499 (Supp. 1989) (liability of all Lloyd's underwriters); 22:655(B)(1) (Supp. 1989) (Louisiana's Direct Action Statute); 23:641 (1985) (liability of publisher for distributor's failure to pay door to door solicitor's commissions); 23:886 (1985) (liability of any person denying an agricultural laborer's right to work); 23:1192(B) (1985) (liability of self-insured workers' compensation members for claims unpaid by the group funds); 23:1550 (1985) (liability of liquidator, receiver or trustee for distributing partnership property before complete payment of unemployment compensation contributions); 30:2276(F) (1989) (liability of all persons related to hazardous wastes for the cleanup of a disposal site); 31:196 (1989) (liability of naked owner to usufructuary for "damages caused by the naked owner's mining activities"); 33:1349(C) (1988) (liability of local governments when using an "interlocal risk management agency" for excess insurance); 33:1359(C) (1988) (liability of a local housing authority when using an "interlocal risk management agency" for excess insurance); 33:1428(A)(13)(d) (1988) (liability for sheriffs fees related to writ of fieri facias); 33:1704(31)(c) (1988) (liability for constable fees related to writ of fieri facias); 33:1744 (1988) (liability of constable and his sureties for failure to pay over or deliver any obligations to a person entitled to the same); 33:4545.11 (1988) (liability of Louisiana Energy and Power Authority and a municipality related to the "joint ownership of a project"); 34:807 (1985) (liability of "claimant of the vessel" and surety related to a vessel seizure); 37:3125(B) (1988) (liability of autioneer and his surety for the proceeds of a sale); 39:574(B) (1968) (liability political subdivision governing authority member for issuing bonds contrary to the law); 40:1299.39(K) (Supp. 1989) (effect of prescription whether a health care provider or qualified state health care provider); 41:714(B)(2) (1965) (personal liability of any person purchasing school lands on credit); 41:717(B) (1965) (liability for deferred payments on notes for the sale of timber from school board property); 44:35(E)(2) (Supp. 1989) (liability of custodian for failure to produce a public record); 45:4 (1982) (liability of surety related to the business of air transportation); 46:13 (1982) (liability for services rendered at a charity hospital for workers' compensation covered injuries or illnesses); 47:101(B)(1) (1970) (husband and wife liability on a joint income tax return); 47:116(B) (1970) (husband and wife liability on an estimated income tax declaration); 47:777 (1970) (liability of surety for unpaid petroleum products taxes); 47:1672(C) (Supp. 1989) (liability for liquidator's failure to pay all unpaid petroleum taxes); 47:1904 (1952) (liability of assessor and surety); 47:1957(F) (Supp. 1989) (liability of tax assessor for omissions); 47:2176 (1952) (liability of surety related movables relinquished for tax assessments).

(2) Louisiana Civil Code articles:

1425 (liability of heirs and universal successors); 1786 (obligations with multiple persons); 1789-1806, 1818-1821, 1885, 1898 & 1905 (various aspects of solidary obligations); 2324 (liability as solidary or joint; prescription); 2372 (liability between spouses for necessities); 2905 (liability of joint borrowers related to a loan for use); 3014 (liability of more than one mandatory); 3026 (liability of several principals and a mandatory); 3037; 3045 (liability of surety to the creditor); 3049 (rights of surety related to "multiple solidary obligors").

contrary notwithstanding.¹⁴⁵ The permutations of these provisions create innumerable possibilities, and ingenious legal arguments to extend them to tortious solidarity are certain.

Sources of Law in General

Louisiana's legal system uses many sources of law. Louisiana Civil Code article 1 states: "The sources of law are legislation and custom." Whether legislation provides for solidarity is readily ascertainable, but custom is more difficult to identify. Custom develops over time from repeated practice with "the conviction that the practice has the force of law."¹⁴⁶ It is difficult to determine when custom obtains the force of law because society must sufficiently acquiesce in the conduct, a requirement with few quantifiable features.¹⁴⁷ Despite this difficulty, Louisiana courts have not hesitated to resort to custom where one clearly existed. In *Succession of Dunn*¹⁴⁸ the court recognized that custom authorized the use of succession funds to purchase a grave monument. In another case, *Fontenot's Rice Drier, Inc. v. Farmers Rice Milling Co., Inc.*,¹⁴⁹ the court determined that a custom existed in the rice industry requiring the mill owner to quality sample grain prior to unloading the farmer's truck. This custom prevented the mill owner's subsequent unilateral reduction in price when the milling quantities proved deficient. Industry and society had continuously consented to these actions until that conduct acquired the force of law.¹⁵⁰

The legislature amended the civil code preliminary title,¹⁵¹ articles 1-21, contemporaneously with the revision of article 2324.¹⁵² The substance of the preliminary title revision seeks to eliminate any doubt and establish a hierarchy of laws, in which "[c]ustom may not abrogate legislation."¹⁵³ Custom continues as a source of law, and arguably, any

(3) Louisiana Code of Civil Procedure articles:

37 (action against solidary obligor); 643 (necessary parties and solidary obligors); 3155.1 (asset requirement for sureties related to a succession); 3222 (liability of succession representative for failure to deposit funds); 4132(A)(3) (surety for tutor); 4262 (liability of natural cotutors); 5124 (liability of supplemental judicial bond surety); 5152 (surety's ability to plead discussion).

145. La. R.S. 22:499 (Supp. 1989).

146. La. Civ. Code art. 3, comment (b).

147. A. Yiannopoulos, Louisiana Civil Law System § 33, at 49 (1977).

148. 6 La. App. 663 (1st. Cir. 1927).

149. 329 So. 2d 494 (La. App. 3d Cir.), writ denied, 333 So. 2d 239 (1976).

150. See generally Tete, The Code, Custom and the Courts: Notes Toward a Louisiana Theory of Precedent, 48 Tul.L.Rev. 1, 13 (1973).

151. Effective January 1, 1988.

152. Both are a product of the 1987 regular legislative session.

153. La. Civ. Code art. 3.

custom creating solidary liability is a solidarity law that triggers the "otherwise provided" exception in article 2324. An argument that this rationale makes it impossible for the legislature to abrogate custom is without merit. Laws designed to eliminate custom or limit the exception to legislative changes only do not provide an exception for "as otherwise provided by law." The legislature could, if it wished, clearly delineate the sources of "law" it wishes to leave undisturbed.

On occasion the legislature has expressly limited the sources of law applicable to an exception. Louisiana Civil Code article 3499 states that "unless otherwise provided by legislation, a personal action is subject to a liberative prescription of ten years." Since article 3499's enactment predates the amendment to article 2324,¹⁵⁴ one can infer that the legislature recognized the distinction between law and legislation and intended that the courts acknowledge the difference.¹⁵⁵

Other sources of law, such as jurisprudence, doctrine, conventional usages, and equity, are "persuasive or secondary sources of law."¹⁵⁶ Their relegation beneath legislation and custom as secondary sources does not eliminate their status as law. Several examples of these sources of law exist. In *Henry v. Ballard & Cordell Corp.*,¹⁵⁷ the supreme court utilized usages to ascertain the meaning of market value in natural gas leases. Likewise, in *Holland v. Buckley*,¹⁵⁸ Justice Tate reexamined the origins and development of the statutory language in Louisiana Civil Code article 2321 and announced new jurisprudence removing the requirement that an animal bite victim prove the owner's knowledge of the animal's dangerous propensity. Doctrinal writings influenced Justice

154. 1983 La. Acts No. 173, § 1.

155. Legal scholars often debated whether article 1 provided for sources of law aside from legislation. Prior to the preliminary title revision, article 1 stated that, "Law is a solemn expression of legislative will." Currently, Louisiana Civil Code article 2 provides: "Legislation is a solemn expression of legislative will." The comment to new article 2 states that the revision did not change the law in relation to these articles. Somewhat foreshadowing the effect of the 1987 revision, Professor Yiannopoulos insisted that in the French revision of old article 1, "law" ought to be translated as legislation. The original French version of article 1 states: "La loi est une declaration solennelle de la volonte' legislative, sur un objet general et de regime interieur." He claimed that the terminology utilized in new article 2 "alone leaves room for sources of law other than legislation." See A. Yiannopoulos, *Louisiana Civil Law System* § 32 (1971).

156. La. Civ. Code art. 1, comment (b). But see *Holland v. Buckley*, 305 So. 2d 113, 119 (La. 1974) (where Justice Tate explained that "prior judicial decisions do not represent the law" and may be overruled when opposed to current legislative intent. Justice Dennis agrees with the comment—jurisprudence is not equal to legislation. *Ardoin v. Hartford Accident & Indem. Co.*, 360 So. 2d 1331, 1336 (La. 1978). The supremacy of any source of law is not at issue in article 2324(B). Any source of law which stipulates solidary liability should satisfy the exception.

157. 418 So. 2d 1334 (La. 1982).

158. 305 So. 2d 113 (La. 1974).

Blanche when overruling 142 years of jurisprudence in *Bartlett v. Calhoun*.¹⁵⁹ The supreme court resorted to the equitable remedy of unjust enrichment in *Edmonston v. A-Second Mortgage Co. of Slidell, Inc.*¹⁶⁰ to "fill a gap in the law where no express remedy [was] provided."¹⁶¹ Thus, any of these sources of law that create solidarity should be a "law" that "otherwise provide[s]," thus triggering an exception to article 2324(B).¹⁶²

Sources of Solidary Liability Law

Prior to the 1984 Obligations Revision, Louisiana Civil Code article 2091 defined an *in solido* obligation as follows:

There is an obligation *in solido* on the part of the debtors, when they are all obliged to the same thing, so that each may be compelled for the whole, and when the payment which is made by one of them, exonerates the others toward the creditors.

This article received extensive analysis in tort actions such as *Foster v. Hampton*,¹⁶³ *Sampay v. Morton*,¹⁶⁴ *Hoefly v. Government Employees Ins. Co.*,¹⁶⁵ and *Narcise v. Illinois Central Ry. Co.*¹⁶⁶ The basic rule developed in these cases is that solidary liability exists as a matter of law where there are coextensive obligations for the same thing.¹⁶⁷ Gone from the jurisprudence was the earlier requirement of *Wooten v. Wimberly* that an "article of the Code [must] expressly or otherwise impose[] solidary liability upon" the tortfeasors.¹⁶⁸ Courts also refused to allow

159. 412 So. 2d 597 (La. 1982).

160. 289 So. 2d 116 (La. 1974).

161. *Id.* at 120.

162. But see *Board of Elementary & Secondary Education v. Nix*, 347 So. 2d 147 (La. 1977). The supreme court discussed the use of the phrase "provided by law" in the context of the Louisiana Constitutions and concluded that the delegates *expressly* stipulated that law meant statute or legislation. *Id.* at 151 & nn. 8-13.

163. 381 So. 2d 789 (La. 1980). An employer and employee are solidary obligors for the latter's negligence during his employment, overruling *Cox v. Shreveport Packing Co.*, 213 La. 53, 34 So. 2d 373 (1948). The master and servant "are not joint tort-feasors (sic), [but are] nonetheless obligated for the same thing, repair of the damage to the third party." 381 So. 2d at 790. See also *Sampay v. Morton Salt Co.*, 395 So. 2d 326, 328 (La. 1981) (where the supreme court used virtually identical language).

164. 395 So. 2d 326 (La. 1981). Employer and employee are solidary obligors for the latter's negligence during his employment.

165. 418 So. 2d 575 (La. 1982). Uninsured motorist insurer is a solidary obligor with uninsured tortfeasor.

166. 427 So. 2d 1192 (La. 1983); FELA railroad employer and third party railroad car manufacturer are solidary obligors for railroad employee's injuries.

167. "The co-extensive obligations for the 'same thing' create the solidarity of the obligations." This "same thing" was the legal burden placed upon "two or more parties to pay tort damages concurrently caused by each party." *Id.* at 1194.

168. *Wooten v. Wimberly*, 272 So. 2d 303, 306 (La. 1973).

the fact of different defenses, different prescriptive periods, different beneficiaries, different elements of damage, or different sources¹⁶⁹ of liability to preclude solidarity.¹⁷⁰ After the 1984 Obligations Revision, Louisiana Civil Code article 1794 provides that "[a]n obligation is solidary for the obligors when each obligor is liable for the whole performance." The comment indicates article 1794 "restates the principal contained" in article 2901 and does not change the law.

The definition of "law" upon which legal scholars and courts agree when combined with the sources of the "law" of solidarity that predate the amendment to article 2324 creates an anomaly: the amendment creates a new and markedly different rule with an unlimited exception that precludes almost any application of the new rule. The amendment's legislative history sheds little light on this problem. Initially House Bill 841 altogether eliminated solidary liability among tortfeasors.¹⁷¹ The Committee on Civil Law and Procedure produced amendments, including the phrase "as otherwise provided by law." No indication of their intent exists. The proponents of this reform would certainly offer a bill for consideration by the full legislature without the exception if a reasonable likelihood of passage existed. Political pressure required this phrase and other amendments to obtain a majority vote, possibly a true indication of the legislature's intent.

At least two alternatives exist to solve the ambiguity. First, the courts could use the exception to circumvent the fifty percent limitation simply by interpreting "as otherwise provided by law" as including every previous judicial expression on solidary liability. This reading would eviscerate the new legislation. Alternatively, the courts could reexamine the basic policies at stake and restrict the application of solidarity to occasions of joint action or another appropriate appellation more restrictive than every situation where two or more cause damage.¹⁷²

The courts could accomplish the latter by defining indivisible injury as the source of solidary liability. The definition would be more restrictive than every situation where two actors cause damage. Many times the courts held an obligation as solidary to invoke the secondary benefits of interruption of prescription or proper venue. Although admittedly inconsistent from a purely theoretical viewpoint, the courts could fashion a rule whereby a broad definition, such as in the cases preceding the amendment, governs the application of solidary liability's secondary

169. La. Civ. Code art. 1797. A vendor and manufacturer of a defective product may be solidary obligors to an injured vendee notwithstanding the liability arises from different sources. *Media Production Consultants, Inc. v. Mercedes-Benz of North America, Inc.*, 262 La. 80, 262 So. 2d 377 (1972)

170. *Narcise*, 427 So. 2d at 1195.

171. See *supra* note 4.

172. See *supra* text accompanying note 13-23.

benefits, while the new indivisible injury definition controls the extent of solidary liability for payment of damages. From a pragmatic assessment, the competing interests both benefit. The law would provide the broad rule when applying solidary liability in the context of a prescription issue, for example when a plaintiff's attorney cannot discover all potential tortfeasors when receiving a case with two days remaining before prescription lapses. By contrast, when holding actors liable for damages, only those acting in concert or, under the narrow definition, causing indivisible harm, become solidary obligors, hence liable for the whole.

Damages by Two or More Persons

Another problem arises in the use of the phrase "liability for damages caused by two or more persons shall be solidary." Joint tortfeasors are generally liable in solido,¹⁷³ but two or more actors can cause damage without becoming joint tortfeasors or, before the amendment, solidary liable. The textbook example of a scenario in which two tortfeasors cause injury without becoming joint tortfeasors is the case of a pedestrian hit and run victim whose injuries are exacerbated when he is struck by a second motorist.¹⁷⁴ Arguably, the legislature expanded, or at a minimum enunciated for the first time, the application of solidary liability to such injuries. Article 2324(B) states that "liability for damages caused by two or more persons shall be solidary," without qualifying that statement to a joint tort, indivisible injury, or other appellation used to depict solidary liability. Article 2324 literally casts defendants liable in solido for every type of injury, whether apportionable or divisible, provided two or more caused the victim's damage. Victims with injuries caused

173. See *Diggs v. Hood*, 772 F.2d 190 (5th Cir. 1985), *Rouley v. State Farm Mut. Auto. Ins. Co.*, 235 F. Supp. 786 (W.D. La. 1964), *Mullin v. Skains*, 252 La. 1009, 215 So. 2d 643 (1968), *Smith v. Southern Farm Bureau Cas. Ins. Co.*, 247 La. 695, 174 So. 2d 122 (1965).

174. See *Maddux v. Donaldson*, 362 Mich. 425, 108 N.W.2d 33 (1961) *en banc* (where the court apportioned damages between two tortfeasors who collided with the plaintiff almost simultaneously); Justified as the risk within the first tortfeasor's duty, subsequent medical malpractice cases generally hold the injurer solidarily liable and the malpractice actor only liable for the damages related to the negligent treatment. The court held the tortfeasor liable for the death of the victim notwithstanding the arguable negligence of the surgeon in *Sauter v. New York Central & Hudson Riv. Ry. Co.*, 66 N.Y. 50 (N.Y. App. 1876); *Grzybowski v. Connecticut Co.*, 116 Conn. 292, 164 A. 632 (1933) (where an automobile and street car struck a pedestrian, the jury could apportion the damage). See *Viou v. Brooks-Scanlon Lumber Co.*, 99 Minn. 97, 108 N.W. 891 (1906). The injurer and physician were not joint tortfeasors. *Id.* at 103, 108 N.W. at 893. See also *Pederson v. Eppard*, 181 Minn. 47, 231 N.W. 393 (1930) and *S. Speiser, C. Krause & A. Gans, The American Law of Torts* § 11:33, at 501 (1986). But see *Weber v. Charity Hospital of La.* at N.O., 475 So. 2d 1047 (La. 1985) (where the court cast the driver's insurer liable in solido with a hospital that negligently treated the victim).

by more than one person could recover fifty percent under the limited solidarity of article 2324 in situations never before considered joint torts. Under such a literal interpretation, the legislature broadened the application of solidary liability substantially.

The legislature probably did not intend to expand solidary liability to every occasion where two or more actors cause damage. Any damages susceptible of apportionment, whether of a type traditionally considered indivisible, should create a divisible obligation. Each tortfeasor should then owe his virile or fault based share.

Possible Alternative Interpretations

Multiparty litigation is the norm instead of the exception. Third party practice allows defendant's the option to join other potentially liable parties for the adjudication of all reasonably related disputes such as contribution¹⁷⁵ or indemnity claims in an effort to promote judicial efficiency. When the fact finder assesses fault against three or more defendants, the problems interpreting article 2324(B) increase geometrically.

Compromise¹⁷⁶ adds to this uncertainty. Consider the situation where the damages are \$100,000, defendant A is thirty percent at fault, B is fifty percent at fault, C is twenty percent at fault; A compromises with the plaintiff P and B is insolvent.

Party	Percentage of Fault	Availability for Collection
A	30	compromise
B	50	insolvent
C	20	solvent

Louisiana law¹⁷⁷ entitles defendants B and C to a reduction in the plaintiff's recovery in proportion to the fault of the settling tortfeasor,

175. La. Civ. Code art. 1805 and La. Code Civ. P. arts. 1111-16.

176. La. Civ. Code art. 3071 defines compromise and states in pertinent part: "A transaction or compromise is an agreement between two or more persons, who, for preventing or putting an end to a lawsuit, adjust their differences by mutual consent" (emphasis in original).

177. See *Diggs v. Hood*, 772 F.2d 190 (5th Cir. 1985). See also comment (b) to La. Civ. Code art. 1803.

A, regardless of the amount A actually pays.¹⁷⁸ Therefore, the maximum combined liability of B and C is seventy percent, or \$70,000.

C's liability, as the only remaining solvent tortfeasor depends upon several definitions discussed above. Recoverable damages should include the compromised portion of A-type defendants as well as the insolvent portion of B-type defendants. C becomes a solidary obligor for fifty percent of \$100,000 or \$50,000 instead of fifty percent of \$70,000 or \$35,000. If the courts choose to reduce recoverable damages by the compromised tortfeasor's fault, then the thirty percent fault attributable to A should not subsequently offset the \$35,000 solidary obligation of C. In other words, C should not receive the benefit of A's compromise to reduce amount of recoverable damages then offset that amount by the compromise of defendant's fault thus claiming it owed only its virile share or twenty percent. Moreover, if recoverable damages are further reduced from \$70,000 by B's insolvency to \$20,000, C is liable for recoverable damages equal to its twenty percent fault thereby completely eliminating in solido liability for C. This again exemplifies the reason recoverable damages should encompass all damages adjudged by the fact-finder.

With recoverable damages fixed at one hundred percent of the assessed damages, the second issue is whether P recovers C's in solido liability in addition to A's compromised portion or A's compromise reduces C's obligation. Heretofore C-type defendants always received a reduction based upon the settling tortfeasor's fault. But the situation changes when C-type defendants no longer owe the entire remaining amount under pure solidarity principles. P could be entitled to eighty percent, that is, A's thirty percent and C's fifty percent solidary liability or only fifty percent by allowing C to reduce its solidary obligation by the settling tortfeasor's thirty percent fault. Under the latter choice, C's obligation is always joint so long as the combined faults of the settling and compromising tortfeasors are equal to or greater than fifty percent. More than likely the courts will adopt the latter option. Otherwise a victim could possibly recover less than fifty percent of the adjudicated damages. For instance, if P settles with A for less than \$30,000 before trial and C's solidary liability is fifty percent less A's thirty percent, then P recovers \$20,000 from C and receives less than fifty percent of the damages. To eliminate this possibility, the courts could examine the actual compromise sums in contravention to previous jurisprudence¹⁷⁹

178. See *Joseph v. Ford Motor Co.*, 509 So. 2d 1 (La. 1987) (where the settling tortfeasor, 50 percent at fault, paid almost \$2 million of a \$2.6 million judgment before the appellate court reduced the total award to \$610,000, the nonsettling tortfeasor is entitled to reduce its payment by the settling joint tortfeasor's fault, regardless of the amount a settling tortfeasor actually pays.) *Id.* at 3.

179. *Diggs*, 772 F.2d at 190.

and require the nonsettling tortfeasor pay up to fifty percent of the damages. Admittedly the amendment authorizes either interpretation; the judiciary may allow C-type defendants such a reduction.

The requirement in Civil Code article 1806 that losses "arising from the insolvency of a solidary obligor . . . be borne by the other solidary obligors in proportion to their portion"¹⁸⁰ complicates the analysis. Without abusing the language, the courts could assess C's solidary liability and then add back the loss associated with B's insolvency. In the previous example, in addition to and regardless of C's solidary liability,¹⁸¹ the court could add C's share of B's insolvency¹⁸² as additional recovery for P. Since A and C possess fault in a 3 to 2 ratio, C potentially owes forty percent¹⁸³ of B's insolvency, or \$20,000.

Whether the courts allow this \$20,000 additional recovery is a policy question. Provided the judiciary considers the solidarity limitation a derogation of public policy and recognizes that the legislature was aware of article 1806 when adopting the amendment, the additional liability creates more complete victim recovery. Alternatively, the courts may disallow such recovery by judging article 2324, as the more specific and recent legislation, to be the controlling authority. Inasmuch as the supreme court's expansive application of solidarity in earlier cases created the preamendment law,¹⁸⁴ the additional recovery is the more probable result.

Additional interpretative questions arise when the plaintiff is at fault.¹⁸⁵ Suppose plaintiff P, with \$100,000 in damages, is five percent at fault, while defendant A is fifteen percent at fault, B is seventy percent at fault, and C is ten percent at fault. Suppose further that defendant A compromises and B is insolvent.

180. La. Civ. Code art. 1806.

181. Whether \$50,000 representing 50 percent of \$100,000, 35,000 the first alternative, 20,000 the second alternative, or another.

182. Assistant Professor Chamallas noted that a similar problem existed when the legislature adopted comparative fault. Chamallas, *Comparative Fault and Multiple Party Litigation in Louisiana: A Sampling of the Problems*, 40 La. L. Rev. 373, 392 (1980).

183. C's share is a function of C's fault in relation to the fault of all solvent tortfeasors.

C's fault	-	20 percent	=	40 percent
A's fault + C's fault		50 percent		

184. The supreme court moved from requiring express codal authority to invoke principles of solidarity in *Wooten v. Wimberly*, 272 So. 2d 303 (La. 1972) to the co-extensive obligation analysis espoused in *Hoefly v. Government Employees Ins. Co.*, 418 So. 2d 575 (La. 1982). See *supra* note 165 and accompanying text.

185. Certainly a real life possibility.

Party	Percentage of Fault	Availability for Collection
A	15	compromise
B	70	insolvent
C	10	solvent
P	5	—

At the outset, whether plaintiff's fault reduces recoverable damages is the same previously mentioned policy decision.¹⁸⁶ Depending upon that decision, C would be a solidary obligor for fifty percent of either \$100,000 or \$95,000.¹⁸⁷

The more weighty question is whether P bears a portion of B's insolvency by virtue of its comparative negligence. If recoverable damages are \$100,000 then C is a solidary obligor for \$50,000. Due to B's insolvency, C's solidary liability exceeds its fault by \$40,000. The judiciary might require that P bear a portion of the insolvency loss based upon the relative faults of P and C, who possess fault in a 1 to 3 ratio. C would argue its solidary liability is \$13,333 less¹⁸⁸ or \$36,667.

Two reasons dictate a different outcome. First, only "other solidary obligor[s]," bear the "loss arising from the insolvency of a solidary obligor."¹⁸⁹ P is not a solidary obligor, thus relieved of the insolvency loss. Second, the judiciary may make a policy decision whereby the insolvency loss is not added to the defendant's liability.¹⁹⁰ Pursuant to the amendment, article 2324 may provide the exclusive *noncumulative* remedy; a person is "solidary [liable] only to the extent necessary [for the victim] to recover fifty percent."¹⁹¹

A Jurisprudential Exclusion to Article 2324¹⁹²

Along with the decision on which situations article 2324 prescribes limited solidarity for, the courts must consider whether occasions exist where solidary liability applies regardless of the judicial interpretations placed on article 2324. Situations are conceivable where application of

186. A question the Oregon Supreme Court answered in the negative when faced with the identical question. See *supra* text accompanying notes 135-43.

187. $100,000 - (\text{plaintiff's } 5 \text{ percent fault}) = \$95,000$.

188. $\text{Ratio X Insolvency Loss} = 1/3 \times \$40,000 = \$13,333$

189. La. Civ. Code art. 1806.

190. See *supra* text accompanying notes 180-84.

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

192. At the risk of a hue and cry from the Bar, an example of such a judicial exception continues as the exception to comparative negligence. *Bell v. Jet Wheel Blast*, 462 So. 2d 166 (La. 1985).

the fifty percent limitation may not be what the legislature intended. Under traditional concerted action or indivisible harm notions, a blanket application of article 2324 creates a windfall to certain tortfeasors. These injurers, *by virtue of their actions and the type of damages inflicted*, owe one hundred percent recovery to the victim. Provided the courts accept article 2324 as a solidary liability limitation, it should not apply in situations where tortfeasors cause injuries by independent legal causes, producing damages that are literally impossible to apportion.

This exclusion does not include situations where the damages are merely difficult to divide among the parties. Mere fortuity that one negligent actor made an initial injury more egregious is insufficient to meet this exception. Additionally, indivisible injury would not be an appropriate test, since tort damages generally include personal injury and division of those injuries has proven impracticable. The exception should only apply when either actor's conduct would have caused the entire damage.

An example of an independent legal cause is that of two fires which cause damage. Suppose A and B, independently of one another, set fire to a forest. The conflagration destroys P's property, situated equidistant between the two fires; either fire alone would have caused the same total loss to P. Since the jury, under present civil procedure, cannot assess one hundred percent fault to A and B each, A and B would each be fifty percent at fault. Remaining within the literal text of article 2324, A could satisfy his obligation by paying fifty percent of the damages, leaving P without recourse if B is insolvent. The courts should prevent such a scenario by carving out a well delineated exception to article 2324's limited solidary liability.

The underlying question is whether the judiciary possesses the authority to carve out such an exception. The late Justice Albert Tate would answer in the affirmative.

[A] threshold problem is the consideration of whether the legislature intended the precept in question to be an immutable rule to be applied without variation or exception . . . no matter how inequitable the result.¹⁹³

Alternatives to the immutable rule are that the precept is in the nature of a standard, allowing some discretion to attain the general aim of the legislation, or the precept is meant to establish a principal "some-where between the immutable rule and the general standard."¹⁹⁴ Judges

193. Tate, *Techniques of Judicial Interpretation in Louisiana*, 22 La. L. Rev. 727, 731-32, (1962).

194. *Id.* at 732.

are not "superlegislators"; rather they should decide the case in a spirit of cooperation.¹⁹⁵

Former Louisiana Supreme Court Justice Barham agrees with this view.¹⁹⁶ The "science for legislators"¹⁹⁷ does not resemble the science for judges. The legislature creates rules for the common good, while the judge places these into operation through "wise and reasoned application."¹⁹⁸ A judge must accept the fact that there is no express legislative will dispositive of every case and must discard the "fiction that judges do not make the law."¹⁹⁹

The clearest example of a situation beyond the scope of article 2324's limited solidarity is the two fires hypothetical. A well articulated definition of concurrent,²⁰⁰ independent legal cause could provide the basis for the exception. Any tortfeasor who causes damage by a concurrent, independent legal cause would be a solidary debtor without consideration of article 2324(B)'s limitation. When tortfeasors acting contemporaneously, yet not in concert, have a sufficient connexity to the damage to constitute a legal cause,²⁰¹ and the damages are substantially identical in kind despite the other tortfeasor's acts, the victim should be entitled to full compensation from any tortfeasor. This is so regardless of any circumstance, particularly insolvency.

Another classical example illustrates the potential scope of this exception. In *Summers v. Tice*,²⁰² a gun shot victim sued two hunters for his eye injury. Both hunters had negligently shot in Summers' direction, but only one bullet struck him. The California Supreme Court noted that in similar cases, courts had held the defendants jointly and severally liable by straining the acting in concert requirement. The *Summers* court asserted that a better analysis would place the burden on each defendant to absolve himself or face joint and several liability. Unquestionably

195. *Id.* at 737.

196. See Barham, *A Renaissance of the Civilian Tradition in Louisiana*, 33 *La. L. Rev.* 357 (1973).

197. *Id.* at 368 n.29.

198. *Id.*

199. *Id.* at 369.

200. "Concurrent, as distinguished from joint negligence, arises where the injury is proximately caused by the concurrent wrongful acts or omissions of two or more persons acting independently . . . [U]nless the damage caused by each is clearly separable. . . each is liable for the whole." 1 T. Shearman & A. Redfield, *Law of Negligence* § 122, at 317 (1913).

201. Louisiana courts have recently moved from an assessment of proximate cause to legal cause in determining whether an actor's conduct is sufficiently related to the victim's injury. Both stand for a policy decision whereby particular conduct or omission creates liability for the actor. But see *Pitre v. Opelousas General Hosp.*, 530 So. 2d 1151 (La. 1988) (where Justice Dennis may have signaled a return to proximate cause in an appropriate circumstance).

202. 33 Cal. 2d 80, 199 P.2d 1 (1948).

the injury to Summers is theoretically divisible. One bullet caused the injury. But as a practical matter, the injury is not divisible.

In this type of situation, the Louisiana courts could accept evidence from each defendant tending to prove the other tortfeasor's sole responsibility for the injury. When the injury is literally impossible, not just difficult, to divide, all tortfeasors should be one hundred percent solidary obligors. The court should, however, admonish the bench and bar that the "indivisible injury" and "impossible to apportion" requirements for this exception are not simply metaphors for every personal injury.

Arguments that this judicial exception creates additional uncertainty and divergent results are without merit. Intellectual challenges and difficult decisions are inadequate reasons for denying appropriate relief to injured parties. Former United States Supreme Court Justice Lewis Powell recognized the "myriad of definitional tasks performed regularly by the state and federal courts."²⁰³ He met the challenge with adequate intellect and analysis. Delineating the scope of and determining exceptions to the law are primary responsibilities of the judiciary. Thoughtless categorization in the interest of easy application is abhorrent to our legal system's fundamentals²⁰⁴ as well as society as a whole.

Alternative Definitions of Joint Tortfeasor

In the event article 2324 finds little application due to one of the abovementioned reasons such as the "otherwise provided by law" proviso, the judiciary could reconsider the definition and application of "joint tortfeasors." Every situation where two or more actors cause injury is an unjust and overly broad application of this term. The legislature's action is indicative of the dissatisfaction. The courts could redefine joint torts as something more restrictive than injury to the same victim caused by two or more tortfeasors. Joint torts could include situations where: 1) two or more persons fail to perform a common duty; or 2) the actors cooperate or conspire; 3) the actors cause damage by concurrent, independent legal cause;²⁰⁵ or 4) neither tortfeasor's actions produce injury but the combination of the actions creates damages.²⁰⁶

The courts could handle vicarious liability in an employer-employee setting outside a joint tort definition. Recently, the first circuit stated

203. *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 683 n.7, 102 S. Ct. 2654, 2662 n.7 (1982).

204. This applies to justices, judges, legal scholars, legislators and attorneys alike.

205. See *supra* text accompanying notes 192-204.

206. See *Sadler v. Great Western Ry. Co.*, (1896) A.C. 450 (Each defendant's actions alone produced no injury. The court denied joint suit at the time; a result most assuredly contrary to contemporary law.)

correctly that "it is legally impossible for an employer and third party to be joint tortfeasors."²⁰⁷ A suggested analysis would be that article 2315 creates the employee's liability while article 2320 places a similar onus on the employer.²⁰⁸ A victim needs no other form of recovery. Even the nineteenth century courts of England drew this distinction when allowing joinder of the master and servant.²⁰⁹ With these guidelines in place, the pressure from those desiring change may subside.

PROBLEMS IN THE APPLICATION OF ARTICLE 2324(B)

*Pecking Order of Laws*²¹⁰

The 1987 amendment presents another theoretical problem. Two possible chains of analysis provide the bases for delictual solidary liability. One rationale uses the obligations articles and the broad judicial pronouncements of tort solidarity as a foundation.²¹¹ The other would consider article 2324 the more specific rule of law, thus prevailing over more general provisions.

Under the first view, when two obligors are "liable for the whole performance,"²¹² solidarity arises. This requirement actually begs the question because whether each actor owes the whole is a question of policy.²¹³ Inasmuch as the fact finder assesses each tortfeasor's fault individually, no express codal authority requires that each obligor pay more than his proportionate share. Be that as it may, once the obligor is arguably liable for the whole, the courts may have used article 2324 to refine solidary liability in a delictual setting. Since both the judicial pronouncements of solidarity and article 2324 before the 1987 amendment engendered pure solidarity, the need to distinguish the seminal authority was unnecessary. The analysis would start with the more general articles

207. See *Thompson v. Petrounited Terminals, Inc.*, 536 So. 2d 504, 516 (La. App. 1st Cir. 1988), writs denied, 537 So. 2d 212 and 537 So. 2d 213 (1989).

208. Arguably, the employer and employee should be solidary obligors to give the victim the benefit of solidarity's effects. Consider the injured party who sues an employee/tortfeasor one day before prescription runs and is unable to determine the appropriate employer. Given the status of contemporary corporate structures, suitable discovery to ascertain all potential employers might encompass several months while the victim's claim would have prescribed.

209. *Wilson v. Tumman*, (1843) 6 M. & G. 236, 134 Eng. Rep. 879.

210. Any law student fortunate enough to satisfactorily complete Admiralty at L.S.U. is well aware of this neologism's author.

211. See *supra* text accompanying notes 163-70.

212. La. Civ. Code art. 1794.

213. The policies in question are well enunciated in *Narcisse v. Illinois Central Ry.*, 427 So. 2d 1192 (La. 1983) and in *Sampay v. Morton Salt Co.*, 395 So. 2d 326 (La. 1981).

leading up to specific treatment for delictual damage enunciated in article 2324.

This first view is consistent with a broad definition of solidarity for application of the secondary benefits of prescription and venue yet restrict the application related to "deep pocket" defendants' payment of greater than fifty percent of the damages. The courts could interpret article 2324 as now applicable to the insolvency payment issue only. Provided the issue was interruption of prescription or proper venue, article 2324 would be inapposite.

Pursuant to this analysis, the courts could hold that the legislature changed nothing. Since tortfeasors who are liable for the whole under the earlier case law are solidary obligors as a "matter of law," the amendment to article 2324 restricts some unknown, undefined and possibly nonexistent type of solidary liability in tort. Put differently, article 2324 does nothing. This is a highly unlikely interpretation.

Under the second view, article 2324 is the fundamental delictual solidarity law inasmuch as it states unequivocally that when two or more cause damage solidarity is created. Article 1794, its predecessor, and the jurisprudence interpreting both articles could be inapplicable in a delictual setting. In this case, the fifty percent limitation would come to bear. The application of article 2324 would be universal in delictual settings.

This dichotomy represents the proverbial "chicken or the egg" dilemma. Whether the analysis begins with article 1794 or 2324 is generally a matter for the courts—a pecking order of laws problem. One must consider societal policies of victim compensation, loss allocation, and deterrence. Absent express legislation, the judiciary should require additional indicia of the necessity to modify solidarity before broadly construing article 2324 and placing the insolvency risk upon victims for the first time in Louisiana's legal history. The fact that some states have limited joint and several liability does not justify wholesale abandonment of solidary liability by Louisiana.

The Collection Costs Issue

Once the court attributes fault to the litigants,²¹⁴ article 2324 fails to provide a mechanism for determining who bears the recovery costs. Each defendant will insist that all other defendants are solvent for their portion of the damages up to a fifty percent recovery for the victim, while victims will maintain that at least one defendant must tender fifty percent of the judgment. Either the victim or the solvent tortfeasor

214. Assuming the courts resolved the previous issues and the in solido limitation is applicable.

shoulders the expense and delay of forcing payment from the marginally or actually insolvent injurer. This dispute will generate additional attorney fees, court costs, and possibly forgone interest during the additional delay.²¹⁵

Assume for example defendant A is seventy percent at fault, B is thirty percent at fault and A's net worth is relatively equal to his portion of the damages. When B satisfies his thirty percent, he could insist that the remaining damages are recoverable, although expensive to collect, thus creating a joint, divisible obligation that relieves B of further liability. The victim must then institute proceedings to extract A's limited resources. Alternatively, the courts could require that B pay fifty percent, then struggle with the victim for his contribution remedy. Under the latter scenario, B's priority also becomes an issue—whether he stands subordinated to the victim's claim or shares on some proportionate basis in recovery from A.

Tortfeasors should bear these recovery costs. The court's could draw an analogy to a principle of Louisiana's Direct Action Statute, which provides that a judgment against the insured is *prima facie* evidence of the insured's insolvency.²¹⁶ Applying a similar evidentiary standard to the judgment against each tortfeasor, the burden would shift to a solvent defendant with less than fifty percent fault to prove the collectibility of at least fifty percent of the damages, which could include his portion. If the solvent defendant fails to produce further evidence of the other defendant's financial wealth, the victim prevails on the issue of solidary liability against the solvent defendant up to fifty percent of the damages. In all cases of one solvent defendant with greater fault than the victim, the injured party could recover fifty percent of his damages with little additional expense.

A solvent defendant's best argument lies in the fact that if only one insolvent defendant existed, the victim would bear all of the collection costs. The victim receives a windfall when imposing these costs on a defendant in a situation where there are two or more injurers.

215. Assuming the tortfeasor's wealth is insufficient to satisfy the judgment, the victim cannot recover any additional sums such as judicial interest.

216. La. R.S. 22:655 (1978) states in pertinent part:

No policy or contract of liability insurance shall be issued or delivered in this state, unless it contains provisions to the effect that the insolvency or bankruptcy of the insured shall not release the insurer from the payment of damages for injuries sustained or loss occasioned during the existence of the policy, and *any judgment which may be rendered against the insured* for which the insurer is liable which shall have become executory, *shall be deemed prima facie evidence of the insolvency of the insured*, and an action may thereafter be maintained within the terms and limits of the policy by the injured person, . . . against the insurer (emphasis added).

This argument is weakened when considering that underlying the principle of solidary liability is a policy of victim's compensation, at least up to fifty percent from any joint tortfeasor, not a policy of absolute fairness to a coinjurer. Since the legislature limited solidary liability to fifty percent, the judiciary should not further reduce the victim's recovery by placing these collection costs upon the victim.

Several alternatives exist for the solvent defendant to fulfill his obligation. In situations similar to the example above where the solvent defendant pays fifty percent of the damages,²¹⁷ that defendant would then assess the feasibility of recovery from any codefendant and take appropriate action. To recover sums above the fifty percent, the victim would bear the additional collection expense. This produces a dilemma because the victim and solvent defendant will struggle over a limited, possibly inadequate source of funds, thus probably exacerbating the collection expense and delay. A second option is to require the victim to institute reasonable collection procedures. This is probably best handled on a legislative basis to eliminate the partial coverage of judge-made laws related to administrative matters.²¹⁸ The legislature could define these procedures and allow recovery from the solvent tortfeasor upon the victim's fulfilling that statutory duty. In this scenario, both parties share a portion of the costs. Finally, the courts could establish a maximum collection period before the victim could compel the solvent defendant to pay more than its fault up to fifty percent. A one-year period is appropriate. The delay is an expense of the victim, provided interest stops accruing.²¹⁹ Additionally, the possibility that the insolvent defendant's financial posture might worsen creates an incentive for the solvent defendant to assist in the collection process even before the one-year period accrues.

The Employer/Tortfeasor/Intervenor/Defendant

In light of article 2324(B)'s amendment, the views enunciated in *Franklin v. Oilfield Heavy Haulers*²²⁰ require reassessment.²²¹ There, the

217. With more than one solvent defendant, any combination creating the 50 percent threshold would suffice.

218. But see *In re J.M.P.*, 528 So. 2d 1002 (La. 1988) (where Justice Dennis had little hesitancy announcing administrative procedures related to private adoptions).

219. The Uniform Comparative Fault Act espouses a similar approach. Up to one year after judgment, the court, upon motion of a party, "shall determine whether [a tortfeasor's] obligation is collectible [and] shall reallocate any uncollectible amount among the other parties, including a claimant at fault."

220. 478 So. 2d 549 (La. App. 3d Cir. 1985), writs denied, 481 So. 2d 1331 (1986).

221. See the writ denial concurrence in *Snyder v. Taylor*, 532 So. 2d 750 (La. 1988) (where Justice Lemmon flatly disagreed with *Franklin* even though the issue was not

third circuit held that an employer's negligence is not imputed to the employee in the latter's suit against third party tortfeasors. Additionally, the employer was allowed to recover one hundred percent of the worker's compensation benefits paid regardless of its fault.²²²

Assuming the courts apply the fifty percent limitation in article 2324 in an employer/employee/third party tortfeasor setting, the employer's fault is relevant and the trier of fact must assess it. The initial inquiry is whether the employer's fault reduces recoverable damages thereby reducing the fifty percent solidary liability cap of the other tortfeasors. When deciding not to reduce the employee's recovery by the employer's negligence, the *Franklin* court reasoned that the non-employer defendants were solidary obligors for the entire damage. Such a rationale no longer exists if the fifty percent limitation applies. Moreover, *Franklin* speaks of an erosion in the system²²³ when the employer's fault reduces the employee's recovery. Reducing recoverable damages in this situation causes similar deterioration. No reason exists to extend workers' compensation protection to third party tortfeasors by reducing recoverable damages and the concomitant result of reduced solidarity below fifty percent of the total damages. The amendment to article 2324 changed none of these policy choices. With the advent of fifty percent solidarity, the court must reaffirm *Franklin's* holding on different grounds or reduce the employee's recovery based upon the employer's fault.

To assess the choices, assume that XYZ Company injures plaintiff P, its employee, in conjunction with two other tortfeasors. XYZ pays \$15,000 in compensation benefits. The damages are \$100,000, XYZ is forty percent at fault, B is forty percent at fault, and C is twenty percent at fault. B is insolvent.

present in the underlying matter). See also *Williams v. American Crescent Elevator Co.*, 518 So. 2d 1091, 1096 (La. App. 4th Cir. 1987), writs denied, 521 So. 2d 1189 and 521 So. 2d 1190 (1988) (where Judge Williams, in dissent, noted further "confusion and inequity" may result in situations factually similar to *Franklin* absent legislative clarification related to article 2324).

222. The fourth circuit recently restated *Franklin's* teachings in *Senez v. Grumman Flexible Corp.*, 518 So. 2d 574 (La. App. 4th Cir. 1987), writ denied, 521 So. 2d 1151 (1988), and affirmed the trial judge's rejection of jury interrogatories related to the employer's negligence. "There was no legal basis" for "submission of the [employer's negligence] to the jury," and the compensation carrier recovered one hundred percent of the paid benefits. *Id.* at 577. But see *Trosclair v. Terrebonne Parish School Bd.*, 489 So. 2d 1293 (La. App. 1st Cir.), writ denied, 493 So. 2d 647 (1986) (where the first circuit reduced the compensation intervention by the employer's fault but not the employer's fault) and *Thompson v. Petrounited Terminals, Inc.* 536 So. 2d 504 (La. App. 1st Cir. 1988), writ denied, 537 So. 2d 212 (1989) (where the court reversed the trial court's reduction of the employee's recovery by the employer's fault).

223. *Franklin*, 478 So. 2d at 557.

Party	Percentage of Fault	Availability for Collection
B	40	insolvent
C	20	deep pocket
XYZ	40	employer

The threshold inquiry is whether XYZ negligence reduces the \$100,000 damage award regardless of B's financial status. Notwithstanding the fact that B and C are only solidary debtors for fifty percent of the damages, the *Franklin* policies remain germane. Under that court's view, "[the] Worker's Compensation system is characterized as a compromise between employer and employee,"²²⁴ the principles of which "can be fully effectuated only if the employer is given absolute immunity at all levels."²²⁵ Reduction of the employee's recovery by the employer's negligence "erodes the system."²²⁶ The compensation system struck a balance between workers and employers, and this reduction upsets the initial tradeoff. The amendment to article 2324 has no effect on these policies, particularly if B and C are solvent. P should recover one hundred percent of his damages and owe \$15,000 to XYZ on the compensation intervention.²²⁷

If the employer's fault is judged to reduce recoverable damages when determining the limit of solidarity, then C is solidarily liable for fifty percent of sixty percent of the damages, or \$30,000. This represents a marked departure from the *Franklin* recovery. A better approach disregards the employer's fault for purposes of the fifty percent limitation. The remaining tortfeasors would owe a solidary obligation for fifty percent of the damages and would apportion the obligations by their relative faults. As posited, C would owe a \$50,000 solidary obligation and would be entitled to contribution from B by computing C's virile share of the total damages based upon B and C's relative faults. This amounts to a \$16,667²²⁸ contribution from B. The same basic policies of *Franklin* are at stake. The reduction in an employee's damages by the employer's fault runs afoul with the employer's absolute

224. *Id.* at 556.

225. *Id.* at 557.

226. *Id.*

227. Subject to the employer's obligation to pay *Moody* attorney fees. See *Moody v. Arabie*, 498 So. 2d 1081 (La. 1986).

228.

$$\begin{array}{r} \text{C's fault} \\ \hline \text{B's fault + C's fault} \end{array} \times \$100,000 = \frac{20\%}{60\%} \times \$100,000 = \$33,333$$

\$50,000 paid - \$33,000 virile share = \$16,667 contribution owed from B.

immunity and the compensation "bargain." Even when deciding *Franklin*, the court could have reduced the victim's recovery by the employer's fault without disrupting any solidary liability principles. For example, the employer's fault could be outside the scope of the third party tortfeasor's duty. The court chose instead not to reduce the employee's recovery, and the rationale for holding the tortfeasors one hundred percent liable remains apposite regardless of the amendment to article 2324.

Whether XYZ's negligence reduces its compensation recovery presents another question of policy. When an employee recovered one hundred percent under the rule of *Franklin* and pure solidary liability, the employer's compensation reimbursement eliminated the employee's double recovery for the losses covered by compensation. The law loathes double recovery,²²⁹ a principle that overrides the arguable unfairness of allowing an employer's one hundred percent recovery of paid compensation notwithstanding some degree of fault. This amendment presents a rule of law that probably eliminates any chance of double recovery when one tortfeasor is insolvent. The solvent tortfeasor would owe only fifty percent of "recoverable" damages, whatever that includes.

Before the amendment, tortfeasors bore the risk that the employer was at fault. Victims recovered one hundred percent of their damages regardless of its employer's fault. Presently, due to limited solidarity, an employee may recover only a portion of his loss and then possibly owe reimbursement from that limited recovery. The judiciary might consider withholding the employer's compensation reimbursement until the employee recovers one hundred percent from third party tortfeasors, an outcome similar to the result when all tortfeasors are solvent. The result then equals that of *Franklin*; employee recovers one hundred percent and employer is fully reimbursed.²³⁰ As in the above described example, since B is insolvent, the employer receives no reimbursement, thereby sharing a portion of the employee's insolvency loss. P recovers \$65,000, \$15,000 from XYZ and \$50,000 from C.²³¹ At first blush, it may appear inequitable to eliminate XYZ's reimbursement, but even with such a rule P suffers a \$35,000²³² insolvency loss while the em-

229. The collateral source rule excepted.

230. See *supra* note 227.

231. $\$100,000 \times 50\% = \$50,000$

232.

\$100,000	damage award
- 50,000	from C
\$50,000	
- 15,000	compensation benefits
\$35,000	

ployer's costs are \$15,000. Certainly the employee deserves protection from further reduced recovery. Without this bright line rule of non-reimbursement, the judiciary would be required to fashion a formula balancing the employer's reimbursement against an already reduced employee recovery.

At what point would the employer receive reimbursement and would the reimbursement be proportionate or in toto? Consider the situation above but where B is only partially insolvent and can pay \$35,000. P is now fully compensated—\$15,000 from XYZ, Inc. \$35,000 from B and \$50,000 from C. Should XYZ receive reimbursement? In accordance with *Franklin's* teachings, the answer should be no. Any refund by P reduces his recovery causing P to suffer the insolvency loss. The victim would pay the compensation benefits as reimbursement while, as in this situation, the employer who was at fault, would pay nothing. If article 2324 reduces solidary liability to fifty percent, and an employer is at fault, then, by definition, an employee-victim can rarely recover more than one hundred percent of the damages as was possible when *Franklin* was decided. Only if the compensation benefits exceed the employer's virile share of the damages and other tortfeasors are all solvent could this situation develop. In that case, the courts should allow reimbursement to the employer for the compensation benefits to the extent they exceed the victim's complete recovery.²³³

An alternative solution to the problem would disregard the employer's fault once assessed and hold the remaining tortfeasors liable in the proportion that their respective faults bear to the remaining fault. Suppose XYZ injures plaintiff P, its employee, in conjunction with two other tortfeasors. XYZ pays \$15,000 in compensation benefits, and the damages are \$100,000. XYZ is thirty percent at fault, A is thirty percent at fault and C is forty percent at fault.

Party	Percentage of Fault	Availability for Collection
A	30	solvent
C	40	solvent
XYZ	30	employer

Disregarding XYZ's fault, A owes 3/7ths and C owes 4/7ths of the damages. Provided both are solvent, P recovers \$100,000, and XYZ

233. Professor Johnson advocated a similar step by step analysis when determining whether an employer should receive compensation reimbursement from the employee's uninsured motorists coverage. Johnson, *Worker's Compensation*, 40 La. L. Rev. 742, 752 (1980).

receives a \$15,000 compensation benefits reimbursement. The result is identical to the result under *Franklin*.

Article 2324's amendment had no effect on the policy that an employer's fault is immaterial when assessing damages against tortfeasors. In fact, the "erosion" will be more pronounced under limited solidary liability, with its concomitant risk of insolvency loss to the employee. A similar rationale applies when considering whether to reduce the employer's compensation reimbursement, but only when an employee recovers one hundred percent of his damages.²³⁴ Basically, ample justification exists to disregard the employer's fault, thus insuring the employee-victim's maximum recovery under the current law while reimbursing the employer to the extent double recovery arises.

Solidary Liability and Jury Fault Assessment

Limited solidarity poses an additional risk to victims which the legislature probably failed to consider. The accuracy of the factfinder's fault apportionment between the tortfeasors and the victim takes on considerably more significance. Under the old law, the defendants' fault assessments affected contribution only and did not form the basis for a victim's reduced recovery. Since a tortfeasor is potentially solidarily liable only up to fifty percent in a limited solidarity situation, the victim's recovery diminishes directly with any error in allocating fault if the victim is less than fifty percent at fault. The bench and bar must now remain mindful of the added potential for inequitable results.

The imprecision inherent in the allocation of fault²³⁵ is arguably exacerbated by adding solidary liability limitations based upon the jury's fault assessment. Prior to the 1987 amendment to article 2324, comparative negligence, as described in Civil Code article 2323, reduced a victim's recovery by its fault. Notwithstanding that juries made errors, legal scholars, and eventually legislatures, felt this risk of error was better than the complete bar to recovery rule that had existed before the comparative negligence. Formerly errors related to the defendants' fault apportionment were borne by the tortfeasors, so long as the victim's fault was not greater than any one injurer. The courts considered these injurers primarily culpable and equitably obligated for this risk. The victim recovered one hundred percent, less his comparative fault, while

234. As when no third party tortfeasor is insolvent in a limited solidary liability setting.

235. Professor Green, a noted scholar, was particularly wary of the jury's capability and eloquently stated his reservations:

What court or group of laymen can so weigh faults as to pass with any precision upon the conduct of two swiftly moving automobiles, or two human beings equally bent on getting every second out of the day?

Green, *The Duty Problem in Negligence Cases*: II, 29 Colum. L. Rev. 255, 278 (1929).

the tortfeasors used contribution principles and the percentages to allocate the damages.

Under the present legislation, victims may suffer this margin of error twice.²³⁶ As before, victims bear the risk related to the victim's comparative negligence apportionment. But in addition to that risk, victims now run the risk that the factfinder will misdetermine the tortfeasors' degree of fault. Since article 2324 might limit a tortfeasor's liability to fifty percent or its respective fault,²³⁷ misallocation directly reduces the victim's recovery.

Passive tortfeasor conduct may create additional fault assessment injustice.²³⁸ Passive conduct is generally associated with parties distant in time or locus to the actual injury, such as manufacturers.²³⁹ The jury might consider the passive party less culpable, notwithstanding the product or thing substantially increased the damages. The judge must be mindful that the accuracy of a jury's fault assessment is manifestly more significant in light the possible interpretation of article 2324's amendment. Passive conduct may appear less culpable, giving a manufacturer an advantage, thus creating the need for increased intervention by the bench in the form of Judgments Notwithstanding the Verdict to correct the error.²⁴⁰

236. Admittedly, the risk of error cuts both ways.

237. If the tortfeasor's fault is greater than 50 percent and another injurer caused a portion of the damage.

238. The active-passive negligence distinction is predicated on the principles governing primary-secondary liability generally. Active negligence is the negligent conduct of active operations. It involves some positive act or some breach of duty to act which is the equivalent of a positive act . . . In contrast, passive negligence is nonfeasance or inaction, such as the failure to discover a dangerous condition or to perform a duty imposed by law. However, a negligent failure to act when one is charged with a duty to do so is active rather than passive negligence. The difference is qualitative rather than quantitative. *Sweeny v. Pease*, 294 N.W.2d 819, 823 (Iowa 1980); See also *Colt Indus. Operating Corp. v. Coleman*, 246 Ga. 559, 272 S.E.2d 251 (1980); *Proctor & Schwartz, Inc. v. United States Equip. Co.*, 624 F.2d 771 (6th Cir. 1980) (applying Michigan law.)

239. Consider again the hypothetical presented in the introduction, where plaintiff P is severely burned in an otherwise minor automobile accident. Due to the passive tortfeasor's negligent construction, the damages are greatly exacerbated. A similar situation might develop with a strictly liable defendant who is liable due to his legal relationship, not conduct.

240. Full disclosure to the jury can ameliorate this risk. It is "better for courts to be the vehicle by which the operation of the law is explained," H. Woods, *Comparative Fault* § 18:2, at 367 (1978) (quoting *Simpson v. Anderson*, 33 Colo. App. 134, 517 P.2d 416 (1973), rev'd., 186 Colo. 163, 526 P.2d 298 (1974), than "keep the jury in the dark as to the [legal] effect of its answers" with the concomitant "danger that [jurors] will guess wrong about the law." They "may shape [their] answer[s] to the special verdicts, contrary to [their] actual beliefs . . . to ensure the result . . . deem[ed] desirable." 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2509, at 513 (1971). The author's assertion later acquired acceptance. See H. Woods, *Comparative Fault* § 18:2, at 422 (2d

THE UNIFORM COMPARATIVE FAULT ACT

The Uniform Comparative Fault Act²⁴¹ presents a reasonable legislative alternative. The legislature could repeal article 2324 as it presently exists, adopting the more moderate view of the uniform law. Provided the victim is faultless, the uniform law maintains pure joint and several liability. Only tortfeasors bear the risk of another injurer's insolvency; the innocent victim recovers one hundred percent. As between the victim and solvent injurer, the culpable party who exacerbated the damage deserves less protection.²⁴²

Alternatively, the victim with comparative fault bears a proportionate share of any insolvency. Suppose A and B injure plaintiff P. The damages are \$100,000; P is ten percent at fault; defendant B is seventy percent at fault; C is twenty percent at fault; B is insolvent.

Party	Percentage of Fault	Availability for Collection
B	70	insolvent
C	20	solvent
P	10	—

B's "obligation is uncollectible" by virtue of his insolvency therefore "the court . . . shall reallocate any uncollectible amount among the other parties, including a claimant at fault."²⁴³ P recovers from C two-thirds of the damages apportioned to B, or \$46,667, and bears one-third of the loss due to its comparative negligence.²⁴⁴ Again, one's sense of fairness agrees with sharing the loss when the victim is partially blameworthy.²⁴⁵

ed. 1987) (where the author stated that "there is now a decided statutory and decisional trend" to inform the jury of its answer's effect). See, e.g., *Norfolk & Western Ry. Co. v. Liepelt*, 444 U.S. 490, 100 S. Ct. 755 (1979) (where the federal courts inform the jury that an F.E.L.A. damage award is tax free to prevent the jury from utilizing its own knowledge of Federal taxation and overcompensating the injured party).

241. Unif. Comp. Fault Act § 2(c) & (d), 12 U.L.A. 43 (Supp. 1989).

242. Most writers agree. See *Ambriz v. Kress*, 148 Cal. App. 3d 963, 969 n.4, 196 Cal. Rptr. 417, 421 n.4 (1983).

243. Unif. Comp. Fault Act § 2(d), 2 U.L.A. 43 (Supp. 1989).

244.

$$\frac{\text{C's fault}}{\text{P's fault} + \text{C's fault}} \times \text{damage apportioned to B} = \frac{20\%}{30\%} \times \$70,000 = \$46,667$$

245. See, e.g., Zavos, *Comparative Fault and the Insolvent Defendant: A Critique and Amplification of American Motorcycle Assn. v. Superior Court*, 14 Loy. L.A.L. Rev. 775, 817 (1980) and Fleming, *Forward: Comparative Negligence at Last—By Judicial Choice*, 64 Calif. L. Rev. 239, 251 (1976).

SECTION C OF ARTICLE 2324

The addition of section C of article 2324 in 1988 addressed the consequences of limited solidary liability and prescription that the 1987 amendment omitted. Since suit against one solidary obligor interrupts prescription against all other solidary obligors,²⁴⁶ a gap in the law existed regarding the effect of limited solidarity on the interruption of prescription. For example, suppose P sues A within one year²⁴⁷ of the date of injury, but fails to bring suit against B until after one year. Under the old law, the solidary nature of A and B's obligation would interrupt prescription on P's claim against B. Assuming article 2324's ambiguities are resolved in favor of solvent defendants, and if P can recover fifty percent of his damages from A, A and B's obligation is joint and divisible. B could successfully assert an exception of prescription because of untimely suit against him and P's inability to avail himself of interruption via a solidary obligor. Whether P recovers fifty percent is determinable only after trial; the court could require B remain in the litigation until its conclusion to determine whether B was a solidary obligor.

Section C purports to correct this situation. Even though the legislature corrected the prescription problems, a window exists from the September 1, 1987 effective date to the 1988 acts where the enumerated problems are certain to arise.²⁴⁸ The 1988 amendment represents a workable solution and should guide the judiciary when dealing with those cases arising within this four day period.

CONCLUSION

When ferreting out a reasonable interpretation of article 2324, the judiciary should consider the various policies at stake and alternatives available. Knowledge of other tested systems can provide a basis for a workable solution. At the same time, the legislature may be dissatisfied with unlimited solidary liability and seek again to modify the article's content, particularly if the judiciary disregards the implicit message in the amendment to article 2324.

United States Supreme Court Justice Stewart accurately described the interpretive problems associated with article 2324's amendment when stating that "[m]ore than a dictionary is thus required to understand the provision here involved, and no appeal to the 'plain language' of the section can obviate the need for further statutory construction."²⁴⁹

246. La. Civ. Code arts. 1799 & 3503.

247. This assumes a one year delictual prescriptive period. La. Civ. Code art. 3492.

248. One author has suggested that this "gap" lasted only four days. See Schewe and Theriot, *Developments in the Law*, 49 La. L. Rev. 463 (1989).

249. *United States v. Correll*, 389 U.S. 299, 304 n.16, 88 S. Ct. 445, 448 n.16 (1967).

Perhaps, the single most problematic aspect of article 2324's amendment is the "as otherwise provided by law" exception. Since the Legislature struck down the original version without this proviso, one must contemplate what swayed legislators who changed their vote. It is quite probable that this "swing vote" intended that the legislation have little or no effect. Realizing that "as otherwise provided by law" included every situation previously adjudicated, the legislators decided to support the amendment realizing nothing would change.

Alternatively, the structure and terminology affords the judiciary great latitude in the application of limited solidary liability. Recoverable damages should include one hundred percent of the sum necessary to compensate the victim based on traditional tort principles of recovery for out of pocket expenditures and losses with guestimations for the future elements. Regardless of a tortfeasor's insolvency or the injured party's comparative fault, the sum of damages should equal one hundred percent. The arguable proposition that the phrase "liability for damages caused by two or more persons shall be solidary" extends the application of solidary liability should be disregarded. The underpinnings of current political pressures to modify solidarity stems, in part, from the unrestricted application of solidary liability. Courts must reassess the basic competing policies formulating a rule of law consistent with the need to hold parties liable for their joint work.

When interpreting article 2324, courts must remain mindful of the logical extensions associated with each decision. Ingenious attorneys will manipulate the initial decision interpreting article 2324(B), possibly steering the development of limited solidary liability off course.

Injurers should bear the collection costs which are possible in a limited solidarity setting. The worst case scenario for victims is that the legislature intended a fifty percent across the board limitation on solidary liability; further reduction in recovery is unwarranted. Additionally, the jury's fault assessment takes on increased significance. Procedural devices, such as motions for judgment notwithstanding the verdict and for new trial, exist to rectify any errors.

The courts must reconsider *Franklin v. Oilfield Heavy Haulers*.²⁵⁰ Between the employer, employee and third party tortfeasor, the balance shifts against the employee if article 2324 limits the employee's recovery. Even though the facts of a case may be such that the employee recovers one hundred percent of the damages, the court must carefully structure its opinion to avoid prejudicing a subsequent employee with less favorable circumstances.

Provided article 2324 limits solidary liability, a jurisprudential exclusion is necessary in an appropriate situation. When two or more

250. 478 So. 2d 549 (La. App. 3d Cir. 1985), writs denied, 481 So. 2d 1331 (1986).

actors cause damage independently of one another, the courts should then apply traditional one hundred percent solidarity. Without question, authority exists to carve out such an exclusion. In the event article 2324 changes nothing, the courts must consider restricting the application of solidarity. Historically, as exhibited, the judiciary and legal scholars limited solidary liability to specific joint conduct. Their rationale could again provide the basis for a more moderate position on the issue.

The legislature should consider clarifying article 2324 or, better yet, adopting some form of the Uniform Comparative Fault Act.²⁵¹ Since the uniform law espouses limited solidary liability only where the victim is also at fault, it may provide a palatable solution that is acceptable to both sides of the tort reform movement.

In closing consider two not so fictional societies: one where deep pocket defendants, such as state governments and insurance companies, are solidary obligors for one hundred percent of the loss regardless of their fault and a second where tortfeasors pay damages for their respective faults only. In both settings, the bureaucracy rarely responds promptly to its constituent's problems. Additionally, insurers recognize the advantage of periodic inspections of their insureds to minimize liability exposure. As the state's highways, bridges and basic infrastructure deteriorate while budgets remain tight and profit margins critical, each society must allocate its scarce resources among competing projects. The officials and businessmen of both societies continuously assess the cost/benefit analysis. The limited solidarity of the latter society, however, creates an incentive to expend fewer sums correcting risk creating activities and conditions. Solidary liability thus possibly provides a necessary impetus to those controlling the efficient use of resources. In light of human nature and one's experiences, one of these societies poses a safer place to work, travel the countryside, send our children to school and generally enjoy life to its fullest.

M. Kevin Queenan

251. Unif. Comp. Fault Act § 2(c) & (d), 12 U.L.A. 43 (Supp. 1989).

