Duty, Risk & the Spectre of Solidarity in Louisiana Tort Law

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COMMENT

Duty, Risk & the Spectre of Solidarity in Louisiana Tort Law

I. INTRODUCTION

With the amendment of Louisiana Civil Code articles 2323, 2324(B) and 2324(C), the Louisiana Legislature may well have fired the decisive shot in a series of legal skirmishes with the Louisiana Supreme Court over the meaning and significance of solidary liability in our tort law. Simply put, new Articles 2323 and 2324 seem to abolish solidary liability between joint tortfeasors whose concurrent negligence combines to injure a third party. Whatever the current state of solidary liability may be, however, our courts and our lawmakers have taken a tortuous path to arrive there. This comment will explore some of the more recent twists and turns on that convoluted journey.

To appreciate the current state of solidary liability in tort, it is important to understand how Louisiana courts have, over the last thirty years, employed the “duty/risk” analysis in the various contexts of contributory negligence, comparative fault and finally solidarity itself. This comment, then, will begin with a discussion

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2. La. Civ. Code art. 2323 (eff. April 16, 1996) provides:
   A. In any action for damages where a person suffers injury, death or loss, the degree or percentage of fault of all persons causing or contributing to the injury, death or loss shall be determined, regardless of whether the person is a party to the action or a nonparty, and regardless of the person’s insolvency, ability to pay, immunity by statute, including but not limited to the provisions of R.S. 23:1032, or that the other person’s identity is not known or reasonably ascertainable. If a person suffers injury, death or loss as the result partly of his own negligence and partly as the result of the fault of another person or persons, the amount of damages recoverable shall be reduced in proportion to the degree or percentage of negligence attributable to the person suffering the injury, death or loss.
   B. The provisions of Paragraph A shall apply to any claim for recovery of damages for injury, death or loss asserted under any law or legal doctrine or theory of liability, regardless of the basis of liability.
   C. Notwithstanding the provisions of Paragraphs A and B, if a person suffers injury, death or loss as a result partly of his own negligence and partly as a result of the fault of an intentional tortfeasor, his claim for recovery of damages shall not be reduced.
3. The amended portions of La. Civ. Code art. 2324 provide:
   B. If liability is not solidary pursuant to Paragraph A, then liability for damages caused by two or more persons shall be a joint and divisible obligation. A joint tortfeasor shall not be liable for more than his degree of fault and shall not be solidarily liable with any other person for damages attributable to the fault of such other person, including the person suffering injury, death or loss, regardless of such other person’s insolvency, ability to pay, degree of fault, immunity by statute or otherwise, including but not limited to immunity as provided in R.S. 23:1032, or that the other person’s identity is not known or reasonably ascertainable.
   C. Interruption of prescription against one joint tortfeasor is effective against all joint tortfeasors.
of the duty/risk analysis in its original context: contributory negligence. It will then trace how courts adapted duty/risk to different legal theories, and finally it will examine how the analysis impacted the ever-changing law of solidary liability. Two recent decisions of the Louisiana Supreme Court will be of particular interest: *Veazey v. Elmwood Plantation Associates, Inc.* and *Turner v. Massiha.* This comment will conclude by assessing the current state of solidarity and by speculating on what role the duty/risk analysis might play in shaping future law in this area.

II. DUTY AND RISK IN LOUISIANA

*Of all the substantive torts problems with which a judge must contend it seems to me that the most exasperating and elusive is that of determining how far legal protection should extend.*

Wex S. Malone, *Ruminations on Dixie Drive It Yourself Versus American Beverage Company*

A. Dixie Drive It Yourself

Thus did Professor Malone begin both an insightful exploration of the Louisiana Supreme Court’s reasoning in *Dixie Drive It Yourself System v. American Beverage Company* and also a calculated attack on that “assortment of generalities that parade in the law books under the banner of ‘proximate cause.’” Malone saw the *Dixie* case as a watershed in Louisiana tort law insofar as it “suggest[ed] a more realistic attack upon the entire phenomenon of negligence liability.” This “more realistic attack” consisted of discarding the vagaries of “proximate cause” language and adopting the clearer, indeed the more “honest,” duty/risk approach to defining the limits of a tortfeasor’s liability.

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4. 650 So. 2d 712 (La. 1994).
5. 656 So. 2d 636 (La. 1995).
7. 242 La. 471, 137 So. 2d 298 (1962).
9. *Id.* at 368.
10. Regarding the multitude of “nonsense phrases that make up the world of proximate cause,” Malone, *supra* note 6, at 363 n.2, referred his readers to Jesse D. McDonald, *Proximate Cause in Louisiana*, 16 La. L. Rev. 391 (1956). Malone’s own estimation of the usefulness of proximate cause language, however, is so pungent as to merit repeating here:

    Few judges of today would seriously question the observation that the phrases of proximate cause are little more than gaudy ribbons with which the package of liability may be decorated once its contents have already been fixed by the court through resort to some other mystique.

*Id.* at 364.
The facts of the *Dixie* case bear repeating here as a context for the discussion of the duty/risk approach. Plaintiff (*Dixie*) had leased its truck to Gulf States Screw Products Company (Gulf). Gulf's employee Langtre was driving the truck down U.S. Highway 61 toward New Orleans when he encountered defendant's (American Beverage Co.) RC Cola truck stopped on the highway. Defendant's truck had stalled about ten minutes earlier, and the driver "did not display signal flags on the highway or take any other action to protect approaching traffic," in contravention of Louisiana Revised Statutes 32:241 and 32:442. Given the combination of misting conditions that day and Langtre's admitted inattentiveness, Langtre did not perceive that the RC Cola truck was stationary until it was too late: he collided with defendant's truck. Plaintiff alleged that defendant's employee had violated the statutory duties imposed by Louisiana Revised Statutes 32:241 and 32:442 and was therefore negligent.

The trial court and the court of appeal for the fourth circuit denied plaintiff recovery. Malone noted that the appellate court did not bother to explain why it did so, but speculated that "the court was influenced by some assumed rule that would arbitrarily place the legal responsibility upon the last culpable human actor in point of time, and exempt all those antecedent to him." The Louisiana Supreme Court reversed. That in itself was not significant, since, as Malone commented, the court could have reversed under the proximate cause rubric of intervening/superseding cause. What was significant, however, was the supreme court's rationale for finding that plaintiff could recover:

The essence of the present inquiry is whether the risk and harm encountered by the plaintiff fall within the scope of protection of the statute. It is a hazard problem. Specifically, it involves a determination of whether the statutory duty of displaying signal flags and responsibility for protecting traffic were designed, at least in part, to afford protection to the class of claimants of which plaintiff is a member from the hazard of confused or inattentive drivers colliding with stationary vehicles on the highway.

Following this rationale, the supreme court concluded that the "objective of the statutory provisions violated" by the defendant was to protect against the very inattentiveness of which Langtre was guilty.
B. What Duty Meant in Dixie

Malone extolled the Dixie court's approach for two reasons. First, he felt the court had made "a major contribution to the clear analysis of negligence cases" by confronting the cause-in-fact question as a purely factual one, having nothing to do with policy considerations. Second, and more pertinent to this discussion, Malone announced that the court had made "a direct policy assault on the problem" of how far to extend the scope of defendant's duty. Specifically, the court had

turned to the criminal statute whose violation had served to make the defendant's conduct wrongful and it inquired as to whether this statute should be so construed as to extend protection against the risk, or hazard, that later a confused or inattentive motorist approaching from the rear might fail to advert to the danger ahead unless he were given specific advance warning by the light or flag required by the statute.

In this Ruminations article, Malone explained what the court's role in the duty/risk analysis should be. First, although adopting the criminal statute as a standard, the court should treat this standard as malleable, subject to the court's own appraisal of the particular circumstances. When the law itself offered no guidance as to what "risks" the lawmakers enacting it had in mind, the court "must be guided solely by its own unaided judgment as to whether the statutory rule is appropriate to the very special risk or hazard presented by the facts of the controversy at hand." Stated another way, whatever statute or rule of law the court chose as a guide in delineating the extent of a tortfeasor's duty should not be not binding upon it; rather, the analysis "makes possible a free range for the exercise of the judge's own talent." Second, Malone by no means imagined that the duty/risk approach should be restricted to statutory duties; to the contrary, he stated that "[t]here is sound reason for extending to judge-made rules the same approach that prevails for rules enacted in criminal statutes or ordinances." Since what is commonly called negligence is simply "a mass of particularized duties which share a common characteristic called 'reasonable behavior,'" courts could appropriately turn to the duty/risk analysis to mark out the liability of a tortfeasor who, instead of violating a statutory duty as in Dixie, breached a "judge-made"

19. Malone, supra note 6, at 372.
20. Id. at 370-373.
21. Id. at 374.
22. Id.
23. Id. at 378.
24. Id. at 383.
25. Id. at 387.
26. Id.
duty. Malone cited cases subsequent to Dixie which employed the duty/risk approach to the violation of a jurisprudential, rather than a statutory, duty.

C. What Duty Meant in Hill

In Hill v. Lundin & Associates, Inc., the Louisiana Supreme Court held that when defendant home repair contractor negligently left a ladder standing against a home, defendant's violation of duty did not encompass the risk that an unknown third-party would lay the ladder down in the yard, and that a maid employed in the house would later trip over it and injure herself. The court framed the "duty" inquiry as

whether the risk of injury from a ladder lying on the ground, produced by a combination of defendant's act and that of a third party, is within the scope of protection of a rule of law which would prohibit leaving a ladder leaning against the house.

The court found that defendant's duty did not include the specific risk which plaintiff encountered, reasoning that no "evidence" showed that "defendant could have reasonably anticipated that a third person would move the ladder and put it in the position which created this risk . . . ."

Writing about Hill, Professor David Robertson praised the court for holding fast to the doctrines of cause-in-fact and duty/risk elucidated in Dixie and also for affirming that "the approach (i.e. duty/risk) is to be applied to breaches of case-law duties" as well as statutory duties. While noting that the duty/risk approach was not a sure vaccine against the vague language of proximate cause, he added that the analysis offered distinct advantages over proximate

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27. Id. at 387-88 (emphasis added).
28. See, e.g., Vidrine v. General Fire & Casualty Co., 168 So. 2d 449 (La. App. 3d Cir. 1964) (City of Ville Platte's violation of its duty of reasonable care in the maintenance of traffic signals included risk of an unwary motorist failing to yield at an intersection), in Malone, supra note 6, at 386-87; Dartez v. City of Sulphur, 179 So. 2d 482 (La. App. 3d Cir. 1965) (City of Sulphur's violation of its duty not to obstruct sidewalk by leaving bent parking meter unrepaired did not include risk that a pedestrian would trip on baling wire and fall onto the meter), in Malone, supra note 6, at 388-89; Todd v. Aetna Casualty & Sur. Co., 219 So. 2d 538 (La. App. 3d Cir. 1969) (duty not to run into parked car on the street does not include the risk that the owner in a nearby house will come to the scene of the accident, become mentally disturbed over the damages to his car, and have a heart attack), in Malone, supra note 6, at 390 n.55.
29. 260 La. 542, 256 So. 2d 620 (1972).
30. Hill, 260 La. at 544, 256 So. 2d at 622.
31. Id. at 551, 256 So. 2d at 623.
33. Robertson, supra note 32, at 20 n.46.
34. In fact, Robertson admitted that "the two formulations (i.e. proximate cause and duty/risk) are rather easily translatable, one into the other," and that duty/risk, like proximate cause, was "ultimately the articulation of a conclusion, rather than an explanation of its grounds." Id. at 15.
cause: (1) it was “clearer and infinitely more cogent”\textsuperscript{35} in accounting for and predicting judicial outcomes; (2) it was “far more honest”\textsuperscript{36} in admitting the “inevitability of human choice”;\textsuperscript{37} (3) it was “more evocative”\textsuperscript{38} in that it recognized the importance of policy as a factor (although it didn’t invite “very extensive discussion of the underlying policy factors”),\textsuperscript{39} and, (4) it “ma[de] more sense”\textsuperscript{40} regarding the relative capacities of judge and jury.

Robertson explained that when the court interpreted the scope of a judge-created (as opposed to a statutory) duty, it should approach the problem as if it were dealing with a legislative pronouncement: “[t]he same policy considerations which would motivate a legislative body to impose duties to protect from certain risks are applied by the court in making its determination.”\textsuperscript{41} And in assessing whether the risk encountered was within the scope of defendant’s duty, the “proper inquiry,” as the Hill court put it, was “[t]he ease of association of the injury with the rule relied upon . . . .”\textsuperscript{42} “Ease of association” included “foreseeability” of the risk as one of its elements, but the concept was much broader than that: it asked whether a defendant could have “reasonably anticipated”\textsuperscript{43} that his breach of duty would lead to such a risk of injury.

D. The Duty/Risk “Approach”

In Ruminations on Dixie Drive It Yourself, Wex Malone emphasized that there was “no such thing as the rule of the Dixie decision which might require that the case be distinguished in future litigation.”\textsuperscript{44} David Robertson echoed this idea when he identified the didactic function of the Hill decision as “provid[ing] an efficient and clear way of stating and seeing the problem.”\textsuperscript{45} The Dixie and Hill decisions thus were not examples of the court’s originality in facing a difficult factual situation. In the rationale of those cases lay, instead, an overarching philosophy about the role the court was to play in negligence cases. Under the duty/risk approach the court would give a clear and honest assessment of why it found a particular tortfeasor responsible for a particular set of damages. Rather than festooning its decision with the “gaudy ribbons”\textsuperscript{46} of

\begin{itemize}
\item \textsuperscript{35} Id. at 14.
\item \textsuperscript{36} Id. at 15.
\item \textsuperscript{37} Id.
\item \textsuperscript{38} Id.
\item \textsuperscript{39} Id.
\item \textsuperscript{40} Id.
\item \textsuperscript{41} Id. at 8.
\item \textsuperscript{42} Hill v. Lundin & Associates, Inc., 260 La. 542, 551, 256 So. 2d 620, 622 (1972).
\item \textsuperscript{43} Id. at 551, 256 So. 2d at 623. Robertson notes that it is difficult to articulate the precise difference between “anticipate” and “foresee.” Robertson, supra note 32, at 9.
\item \textsuperscript{44} Malone, supra note 6, at 393.
\item \textsuperscript{45} Robertson, supra note 32, at 13.
\item \textsuperscript{46} See supra note 10.
\end{itemize}
proximate cause, the court would deliver its pronouncements in the plain brown wrapper of duty/risk.

III. DUTY/RISK AND COMPARATIVE FAULT

A. Contributory Negligence v. Comparative Fault

_Hill_ did not involve the issue of victim fault.\(^47\) The negligence of the approaching driver (Langtre) could not be attributed to the plaintiff (Dixie), because their relationship was one of bailment, and not one of employment.\(^48\) The court merely had to decide whether Langtre's negligence "superseded" that of the American Beverage Company's driver and thus became the "sole cause" of the accident. As noted above, the court used the duty/risk approach to conclude that the violation of the defendant's statutory duties included the risk of Langtre's negligence.

_Had_ Langtre's negligence been attributable to the plaintiff,\(^49\) then the court would have faced the question of the relationship between the newborn duty/risk approach and the perennial bar to a plaintiff's recovery, contributory negligence.\(^50\) Presumably, the court could have used the same approach to find that, given the breadth of defendant's duty, plaintiff's contributory negligence should not bar recovery.\(^51\) The court did use such reasoning in _Baumgartner v. State Farm Mutual Insurance Co._,\(^52\) and concluded that defendant motorist's duty extended to protect plaintiff, an intoxicated pedestrian, against his own carelessness in crossing the street.

But the question of what place duty/risk should occupy in the contributory negligence scheme became moot when the Louisiana legislature instituted a system of "pure" comparative fault by amending Louisiana Civil Code article 2323,\(^53\) effective August 1, 1980. A new question arose, however: how was the duty/risk approach to fit into the scheme of comparative fault?

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47. _Hill_ did not involve victim fault, either. The issue there was strictly whether or not the defendant was to be responsible for the plaintiff's injuries.


49. If, for example, Langtre were Dixie's employee, Dixie would have been vicariously liable for Langtre's negligence.


51. Courts were becoming, and after _Dixie_ would become, increasingly less tolerant of the harshness of the contributory bar. Thus, they would resort to certain logical devices in order to circumvent the rule. For example, courts would rule that plaintiff could still recover if defendant had the last "clear chance" to avoid the injury. See Alston Johnson, _Comparative Negligence and the Duty/Risk Analysis_, 40 La. L. Rev. 319, 324 & n.21 (1980).


53. 1979 _La. Acts No. 431, § 1_.

At first blush, after all, the two approaches might appear somewhat incompatible. The goal of comparative fault was to reach more equitable results by apportioning fault according to the respective “fault” or “negligence” of the parties. Duty/risk, by the same token, also sought fairness and “honesty” in judicial policymaking, but arguably through a means opposed to the comparative fault scheme. The duty/risk analysis did not seek to divide accurately the respective negligence of two or more parties, but instead aimed at “subsuming” or excluding the negligence of one party by manipulating the breadth of the other party’s duty. Indeed, on a more practical level, comparative fault seemed a means of allowing a jury free rein in allocating what it perceived to be the just measure of fault apportionment, while duty/risk seemed a powerful and efficient mechanism for controlling whose fault juries considered at all.

B. The Johnson View of Duty/Risk

Professor Alston Johnson viewed the duty/risk approach as a means of regulating when comparative negligence should be applied to apportion the respective fault of plaintiff-victim and defendant-tortfeasor. He noted that comparative fault should only apply “[w]hen contributory negligence is applicable to a claim for damages.” Under the Johnson rationale, the duty/risk analysis itself was “the proper vehicle by which to determine the issue of applicability of contributory or comparative negligence.”

According to Johnson, the co-existence of duty/risk and comparative fault did not signal the complete abolition of the traditional bar of contributory negligence. Rather, contributory negligence should still continue to bar plaintiff’s recovery when “plaintiff’s conduct has created a situation such that defendant could not possibly be expected to protect him against such risks.” That is to say, contributory negligence bars plaintiff’s recovery when plaintiff’s own negligence has taken him outside the scope of defendant’s duty. By the same token, the court should not apply comparative fault to reduce even a negligent plaintiff’s recovery if “defendant’s duty extends to the protection of persons such as this careless plaintiff.”

Johnson would leave apportionment of fault between plaintiff and defendant to juries in a large number of cases, however. These cases would be instances in which “[t]he law is not certain that the victim’s fault should be wholly ignored or that it should be held to create a situation as to which defendant has no duty of protection.” Johnson, along with Professor Leon Green, theorized that the majority of such cases would arise out of traffic accidents, where the kaleido-

54. See supra note 51.
56. Johnson, supra note 51, at 339.
57. Id. Johnson classified such cases as “(b)” cases. Id. at 334-37.
58. Id. at 340. Johnson classified such cases as “(a)” cases. Id. at 333-34.
59. Id. at 337. Johnson classified such cases as “(c)” cases. Id. at 337-38.
scope of rules and duties, and the sheer mass of cases, operate to cloud the issue of whose duty extends to what particular risks. One could argue, in the context of the Johnson's first two enumerated "classes," that the duty question here is so uncertain as to become almost a question of "fact" best left to the weighing capacities of the jury.

Johnson saw duty/risk as a bulwark against the "virtual abandonment to juries of critical legal policy questions and surrender of all hope of uniformity in the law." Regardless of one's agreement with Johnson over the role and capacity of the jury system, it is clear that Johnson conceived of the duty/risk analysis as one by which the court would delimit a tortfeasor's duty before ever allowing a jury to do so indirectly through apportionment of comparative fault. Thus, according to Johnson, judges must jealously guard the prerogative given them by the "tool" of duty/risk, lest juries, subject to no control, become "master of the law."

C. The Robertson View of Duty/Risk

Professor David Robertson partly defined his view of the role of duty/risk in a comparative fault context by negative reference to Johnson's view:

I believe that the Johnson view is mistaken. Virtually all of the considerations Johnson would relegate to judges as part of the duty-risk question of law are properly left to triers of fact as part of their assessment of the degree of fault of the parties.

Robertson feared that the "retention of the duty-risk approach to victim negligence questions entails the likelihood of the survival of the (by hypothesis disapproved) avoidance doctrines under another name." In his view, the advent of comparative fault was meant to do away with the contributory bar to plaintiffs' recovery and to expunge from Louisiana tort law the "core meaning of contributory negligence."

Initially, Robertson noted that the shift from proximate cause language to the duty/risk approach "was not centrally motivated or fueled by judicial concern over victim-fault issues." Instead, duty/risk was implemented by courts as a
clearer, more straightforward alternative to the obscure language of proximate cause." But, as Robertson observed, the duty/risk approach "soon commended itself to courts as relevant to victim-fault problems." 

Robertson articulated several problems with applying a duty/risk analysis either to "forgive" a tortfeasor's negligence or to "forgive" a plaintiff's contributing negligence. First, as noted above, he felt this approach effectively preserved the "core meaning" of contributory negligence and kept alive the discredited "avoidance doctrines" which had grown out of that system of pre-comparative fault law. Second, he believed that, in many cases involving victim-fault, desirable results could be reached by finding that defendant was not negligent, or that defendant's negligence was not a cause-in-fact of plaintiff's injuries.

Professor Robertson rejected Johnson's view of duty/risk, arguing that the duty/risk analysis was meant as a vehicle for a clearer expression of causation in judicial opinions, and not as a tool for limiting the application of "pure" comparative fault. Robertson argued that on a fundamental level the whole concept of duty/risk was ill-suited to the victim-fault context. "[I]n this context, the duty-risk approach is not a precise or evocative tool. It is too open-ended, too general, and too unpredictable in its operation." In the victim-fault context, Robertson ascribed to duty/risk the same shortcomings with which scholars had long attacked the doctrine of "assumption of the risk." He concluded his argument with the broad statement that "even if these criticisms are wrong, the application of duty-risk reasoning to the victim-fault issue clearly makes multiparty cases too difficult."

IV. SOLIDARITY AND DUTY/RISK

A. What (Exactly) is Solidarity?

When faced with a potentially thorny problem such as solidary liability, it always seems comforting to take refuge in the Louisiana Civil Code. Article 1794 provides, "[a]n obligation is solidary for the obligors when each obligor is liable for the whole performance." By contrast, "[w]hen different obligors owe together just one performance to one obligee, but neither is bound for the whole, the obligation is joint for the obligors." Note, however, that "[w]hen

67. See supra text accompanying notes 32-40.
68. Robertson, supra note 63, at 1357.
69. See supra text accompanying notes 32-40 and 51.
70. Robertson, supra note 63, at 1368-69.
71. Id. at 1365-66.
72. Id. at 1370.
73. Id. at 1371.
a joint obligation is indivisible, joint obligors or obligees are subject to the rules governing solidary obligors or solidary obligees. Thus, in determining whether an obligation is "joint" or "solidary," it appears that one should focus both on the relationship between the obligors themselves as well as on the relationship between each obligor to the performance he owes.

Since the above articles are found in the Title of the Code dealing with "Obligations in General," certain adjustments in language must be made to apply these articles to the area of tort liability. Foremost, it should be clear that the "performance" owed by a tortfeasor consists of damages arising from an injury for which he is liable. Thus, one could say that two tortfeasors are "solidarily" bound to the extent that they are liable for the same damages. This is so even if each tortfeasor's liability arises from a different source.

In the past, Louisiana courts imposed solidary liability on two negligent tortfeasors whose fault combined to cause an indivisible injury. An injury was indivisible when "it was impossible to apportion the damages caused by the tortfeasors between them." But suppose a plaintiff suffers injuries from two automobile accidents which are factually unrelated and occurred at different times. These two accidents might well result in one indivisible injury to plaintiff, insofar as specific injuries could not be reliably attributed to one accident or the other. Were the two tortfeasors, then, bound in solido for the plaintiff's injuries?

To answer this question Louisiana courts drew a distinction between a situation in which two tortfeasors contributed concurrently to cause an indivisible injury, and a situation in which they contributed successively to cause an indivisible injury. In Hess v. Sports Publishing Company, the court observed that:

Apportionment of damages may be almost impossible in basically simultaneous accidents, such as chain reaction automobile collisions, where the damages sustained cannot be properly evaluated between each impact. In those instances, however, where the accidents do not occur close in time, an assessment of the damages from the first accident could or should be made prior to the second accident and would be separable from any damages alleged to have been caused by the second accident.

77. La. Civ. Code, Book III, Title III.
78. In Louisiana, two tortfeasors who are bound in solido may be referred to as "joint tortfeasors." One must be careful to distinguish between "joint tortfeasors" (bound in solido) and "joint obligors" (bound jointly). Compare La. Civ. Code art. 2324 (1987) with La. Civ. Code arts. 1788-1790.
The court was careful in Hess to point out that the two accidents were "independent vehicular collisions, [and] the second accident did not arise from nor was it a foreseeable consequence of the first." Stated another way, "whether a solidary relationship exists between two successive tortfeasors depends on the original tortfeasor's scope of duty."

B. The Place of Duty/Risk in the Solidary Liability Scheme

And so (sigh), the duty/risk inquiry enters the solidary liability picture. The scope of the original tortfeasor's duty could possibly make him liable for subsequent injuries caused even by a successive (as opposed to concurrent) tortfeasor. For example, consider the traditional case where an original tortfeasor becomes liable "not only for the injuries he directly causes to the tort victim, but also for the tort victim's additional suffering caused by inappropriate treatment by the doctor, nurse or hospital staff member who treats the injuries directly caused by the tortfeasor." Another example is the "theory premised upon the rationale that if the victim, as a result of a weakened condition due to the original injury, suffers a new accident and injury, the original tortfeasor is accountable for the subsequent injury." Both of these theories are based on the idea that the scope of the original tortfeasor's duty included the risk that subsequent injury would result from (1) medical malpractice or (2) a "weakened condition" arising from the original injuries.

Professor Martha Chamallas applied the Johnson view of duty/risk and comparative fault to the problem of joint tortfeasors. She argued that the introduction of "pure" comparative fault into Louisiana and the consequent ability of juries to apportion the fault of joint tortfeasors "cannot and should not be divorced from the considerations of policy that have influenced the courts to expand or restrict the scope of the risks for which defendants will be held liable." As discussed above, Johnson saw the duty/risk analysis as a judicial tool for limiting when juries could use comparative fault principles to apportion fault between plaintiff and defendant. Chamallas had no difficulty applying the same analysis to joint tortfeasors.

82. Id. The holding of Hess was affirmed recently in Jarreau v. Hirschey, 650 So. 2d 1189 (La. App. 1st Cir. 1994). There, the First Circuit noted that "[s]olidary liability between tortfeasors does not arise where each of the tortfeasors commits an entirely separate, negligent act." Jarreau, 650 So. 2d at 1194.
85. Younger v. Marshall Indus., Inc., 618 So. 2d 866, 872 (La. 1993) (citing Restatement (Second) of Torts, § 460 (1965) and McCormick on Damages, § 76 (1935)).
87. Id. at 386.
In her view, therefore, the duty/risk analysis should allow the court to "retain its power to control the result, both with respect to the existence of liability as well as the extent of liability... by permitting the court to conform the jury's verdict to its own assessment of the scope of defendants' duties in the particular case." Sometimes a jury would not be allowed to apportion fault between joint tortfeasors because the court had determined that the duty of one joint tortfeasor included (or totally excluded) the risk of the other's negligence.

The doctrines of medical malpractice and "weakened condition" liability can be seen as traditional applications of duty/risk in the joint tortfeasor context. Courts had determined that the duty breached by a tortfeasor generally encompassed the risk of subsequent injury from medical malpractice or from a "weakened condition." Duty/risk operated, as Chamallas envisioned, to "conform" the scope of duty in a particular case to a generalized view of what risks the breach of that duty ought to include.

C. Duty/Risk and Article 2324

Chamallas was writing in 1980, before the 1987 amendment to Louisiana Civil Code article 2324. Recall that before 1987, any one of the joint tortfeasors could be held liable for 100% of plaintiff's damages. In 1987, however, the legislature amended Article 2324(B) with the intention of somehow "limiting" the solidarity of joint tortfeasors "only to the extent necessary for the person suffering injury, death or loss to recover fifty percent of his recoverable damages." When Chamallas was writing her article, a "joint tortfeasor" could be liable for 100% of plaintiff's damages. After the 1987 amendment to 2324, a joint tortfeasor was liable "only to the extent necessary" for the plaintiff to recover 50% of his damages.

What Article 2324 meant at the time of Chamallas' article (1980) is important because of what was potentially "at stake" when a court construed the duties of joint tortfeasors. For example, if a court decided in 1980 that, between joint tortfeasors A and B, A's duty included the risk of B's negligence, then the entire loss would be shifted to A, and consequently A would no longer have contribution rights against B. That A could, under the court's appraisal of A's duty, be liable for 100% of the damages did not matter much because A was solidarily liable with B. Under pre-1987 Article 2324(B), A could have been potentially liable for 100% in any case.

88. Id. at 380-81.
89. 1987 La. Acts No. 373, § 1.
92. See La. Civ. Code art. 1804. In 1980, when Article 2323 was amended to provide for "pure" comparative fault, Article 1804 was also amended to make a solidary obligor's virile portion "proportionate to the fault of each obligor" rather than determined on a per capita basis. See also Galligan, supra note 80, at 553-54.
Under Article 2324(B) as amended in 1987, a court's appraisal of A's duty had different consequences. Under that version (1987) of Article 2324(B), given joint tortfeasors A and B, each could be called upon to pay only 50% of the plaintiff's damages. But imagine a court who, wielding the tool of duty/risk to "conform the jury's verdict to its own assessment of the scope of defendant's duties in the particular case," decided that although A and B were "technically" joint tortfeasors, the scope of A's duty included the risk of B's negligence. A would then have been liable for 100% of the damages, whereas if the court had merely limited itself to pronouncing the two tortfeasors "bound in solido," each could only have been responsible (under the 1987 version of 2324(B)) for 50% of plaintiff's recoverable damages.

Under this scenario, the judicial control mechanism of duty/risk envisioned by Johnson and Chamallas would have enabled a court to circumvent completely the limitations on solidarity legislatively imposed by Article 2324(B), as amended in 1987. It remains to be seen whether the courts will attempt to use this "control mechanism" to side-step that most extreme limitation on solidary liability between joint tortfeasors: its complete abolition by the recently amended Article 2324(B).

V. RECENT CASE LAW


On October 3, 1988, at 1:45 a.m. an intruder broke into the apartment that Ms. Veazey was renting from Southmark Management Corporation. The intruder entered through the bedroom window and raped Veazey. The rapist was never identified.

Veazey sued Southmark in negligence, alleging (1) that Southmark had misrepresented both the level of security at the apartment complex and the number and nature of prior criminal acts occurring at the complex, and (2) that Southmark had provided inadequate security. At the close of the trial, the trial court refused Southmark's request to submit a special interrogatory to the jury in order to allocate fault to the nonparty rapist. Although the jury

94. See supra note 88.
95. "Technically" insofar as each is responsible for all of plaintiff's damages. See supra text accompanying notes 78-79.
96. Given that David Robertson was skeptical about the applicability of duty/risk to victim-fault and comparative fault issues, one can only imagine what he would think of the application of the duty/risk analysis by the court to create a "functional" solidarity that ignores the dictates of Article 2324(B). See supra text accompanying notes 63-73.
97. See infra part VI.
99. Id. at 713.
COMMENT

returned a somewhat inconsistent verdict on liability, the trial court nonetheless granted Veazey's motions "for clarification and JNOV, reallocating all of the fault to Southmark and finding it liable for the entire $180,000 reward." The court of appeal affirmed, finding no error either in the trial court's refusal to submit the special interrogatory or in its reallocation of fault pursuant to the JNOV.

The Louisiana Supreme Court granted certiorari to consider "whether the fault of an intentional tortfeasor and a negligent tortfeasor: (1) can; and (2) should, be compared by the finder of fact." The court noted that these questions were "significant issues of first impression in this Court."

The court held that while Louisiana law is broad enough to allow comparison of fault between intentional tortfeasors and negligent tortfeasors, determination of whether such a comparison should be made must be determined by the trial court on a case by case basis, bearing in mind the public policy concerns discussed herein. We further hold that comparison of Southmark's negligence and the rapist's fault in this particular case is not appropriate.

What is particularly relevant to this discussion are those "public policy concerns" which the court identified as prohibiting comparison of intentional and negligent fault in this particular case.

Specifically, the court found that "first, and foremost, the scope of Southmark's duty to the plaintiff in this case clearly encompassed the exact risk of the occurrence which caused damage to the plaintiff." Arguably, this statement is the real holding of Veazey. The intentional versus negligent fault inquiry became irrelevant once the court decided that Southmark's duty to

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101. In response to one interrogatory the jury found Veazey free from fault, whereas in response to another interrogatory the jury allocated 40% of the fault to Veazey. See Veazey, 650 So. 2d at 714 n.2.
102. Id. at 714.
103. Veazey v. Elmwood Plantation Assoc., Ltd., 625 So. 2d 675 (La. App. 5th Cir. 1993).
104. 633 So. 2d 158 (La. 1994).
105. Veazey, 650 So. 2d at 715.
106. Id.
107. This article is not about the difficult question of whether to compare intentional and negligent fault, and so I will not spend any significant amount of time exploring that issue. For an article which does address that question, see Scott Andrews, Premises Liability—The Comparison of Fault Between Negligent and Intentional Actors, 55 La. L. Rev. 1149 (1995).
108. Veazey, 650 So. 2d at 720 (citation omitted).
109. Id. at 719. As a second "policy concern," the court observed that apportionment of fault in this case would effectively reduce the lessor's incentive to provide safety measures because "any rational juror [would] apportion the lion's share of the fault to the intentional tortfeasor." Id. Third, the court noted that Dean Prosser viewed intentional fault as different from negligence "not only in degree but in kind, and in the social condemnation attached to it." Id. (citing W. Page Keeton et al., Prosser & Keeton on the Law of Torts § 65, at 462 (5th ed. 1984)).
Veazey included the risk that an intruder would break into her apartment and rape her. Realistically, the court could have pretermitted discussion of the comparative fault issue and held that, regardless of whether intentional and negligent fault could be compared in general, such a comparison would be inappropriate in this case, given the broad scope of the defendant's duty to the plaintiff.

The court thus employed the duty/risk approach as "the proper vehicle by which to determine the issue of applicability of contributory or comparative negligence." Focusing on the breadth of the apartment owner's duty, the court effectively removed from the jury's consideration any comparison of the negligence of one tortfeasor with the intentional fault of another. Although this case involved the concurrent fault of a defendant and a non-party tortfeasor, the court in effect analogized to those victim-fault cases classified by Alston Johnson as those in which "defendant's duty extends to the protection of persons such as this careless plaintiff." By construing Southmark's duty to include the phantom rapist's intentional fault, the court imposed its own perception of "public policy concerns" on the jury's ability to apportion fault.

The court's broad duty/risk approach also enabled it to circumvent the application of Louisiana Civil Code article 2324(B), which would have limited the liability of each joint tortfeasor. From a theoretical standpoint, the negligence of Southmark and the intentional fault of the rapist combined to impact upon Veazey at the same time, the moment of the rape. Since each tortfeasor should therefore be liable to Veazey for the same damages, under Louisiana Civil Code article 1794 and the jurisprudence interpreting it, Southmark and the rapist would be bound in solido for Veazey's damages. Under Article 2324(B) (1987) and Cavalier, then, Veazey could have demanded a maximum of only 50% of her recoverable damages from each joint tortfeasor.

But, Southmark was found liable for 100% of the damages, exactly as it could have been before the 1987 amendment to Article 2324(B). How did the supreme court pull such a neat trick, hurdling with one logical leap the dictates of the Louisiana legislature? As we have seen, the court did so by invoking "public policy concerns" which prohibited the comparison of fault in this particular case. As the source of its wide discretion the court looked to the

111. Indeed, the court pronounced: "Because we believe that intentional torts are of a fundamentally different nature than negligent torts, we find that a true comparison of fault based on an intentional act and fault based on negligence is, in many circumstances, not possible." Veazey, 650 So. 2d at 719-20. This statement seems to conflict with the court's "holding" that Louisiana comparative fault doctrine is broad enough to permit comparison of intentional and negligent fault. See supra text accompanying note 109.
113. See supra discussion in part IV.A.
114. See supra note 94 and accompanying text.
115. Veazey, 650 So. 2d at 714.
“substantive principle of comparative fault” which “left the particulars of its application for the courts to decide.” 116 Thus, using duty/risk as its yardstick, the court was able to shape what it perceived the extent of Southmark’s liability, and Veazey’s recovery, should be. 117

Dissenting in Veazey, Justice Lemmon speculated on the hidden motivations for the court’s decision:

The solidarity prescribed by the Civil Code for joint tortfeasors is the underlying reason why the majority refuses to consider an intentional tortfeasor and a negligent tortfeasor as joint tortfeasors (although the fault of each unquestionably combined to produce a single injury). Because the Legislature in 1987 placed a limitation on solidarity, the result of comparing the fault of an intentional tortfeasor with that of a negligent tortfeasor is to reduce the tort victim’s recovery when the negligent tortfeasor is solvent and the intentional tortfeasor is an insolvent or unidentified criminal. Nevertheless, the fact that the Legislature has seen fit to limit the civilian concept of solidarity should not induce this court to vary from our consistent policy of applying comparative fault across the board, at least as between tortfeasors. 118

Justice Lemmon argued that both the guidance of the legislature and the need for consistent application of the comparative fault scheme dictated that the fault of the joint tortfeasors should be compared in the case at bar. 119 He disagreed with the majority’s contention that “intentional torts [were] of a fundamentally different nature than negligent torts.” 120 He also pointed out that the court had applied comparative fault in the “much more conceptually difficult” situation involving a negligent plaintiff and a strictly liable defendant. 121

Justice Lemmon provided not only substantive reasons for disagreeing with the majority, but also gave insight into possible motivations underlying the majority’s view. Indeed, Lemmon’s concurrence pointed to a tension between the majority’s view and the legislative intent embodied in amended Article 2324(B). The majority, faced with a situation where strict adherence to the limiting provisions of the Louisiana Civil Code would saddle a wholly innocent victim with the burden of an unavailable tortfeasor, was perhaps unwilling to abandon Ms. Veazey to the harsh consequences of positive law. In Justice

116. Id. at 716.
117. For another discussion of the court’s use of duty/risk in Veazey and in Turner v. Massiha, infra, see Manist and Galligan, supra note 1, at 226-27.
118. Veazey, 650 So. 2d at 729 (Lemmon, J., dissenting).
119. Id. at 729-30. Justice Hall (joined by Judge Marvin, pro tem.) dissented on similar grounds, arguing that the joint tortfeasors’ fault should be compared and that Southmark’s liability “must be limited to 50% of plaintiff’s recoverable damages.” Id. at 724.
120. Id. at 719. See supra note 112.
121. Veazey, 650 So. 2d at 730 (discussing Howard v. Allstate Ins. Co., 520 So. 2d 715 (La. 1988) and Landry v. Louisiana, 495 So. 2d 1284 (La. 1986)).
Lemmon's view, this was an unwarranted indulgence on the majority's part and, furthermore, a departure from law and precedent.

One can readily subscribe to Justice Lemmon's point of view. A wariness about using the discretionary power of the judiciary to shape liability according to "public policy concerns" underlies his dissent. After all, the legislature, and not the judiciary, is more suited to formulating what "policies" are relevant in apportioning liability and accident costs. This should be doubly true in the area of solidary liability, where the legislature has affirmatively spoken. By amending 2324(B) in 1987, the Louisiana legislature curtailed long-established rights against joint tortfeasors and shifted half of the burden of an insolvent or unavailable party to the victim. One might ask, as Justice Lemmon seemed to, why the court should use a jurisprudentially-fashioned tool, the duty/risk analysis, to subvert what the legislature did to solidarity in 1987.

One might also question the court's use of the duty/risk method and specifically its view of where the "duty" question fits into the liability analysis. Immediately after announcing its broad holding that "public policy considerations . . . compel us to find . . . that such a comparison (i.e. intentional and negligent fault) should not be made in this particular case," the court identified the first of these "public policy considerations" as "the scope of Southmark's duty to the plaintiff." But it may be neither accurate nor helpful to classify the scope of a defendant's duty as a "policy question."

As employed in Dixie Drive It Yourself, a supposed advantage of the duty/risk analysis was that it would clarify which "policy considerations" went into a judge's decision to impose liability. To include "duty" in a laundry list of policy considerations, however, is to put the cart before the horse. It is the duty inquiry itself which is supposed to elucidate the policy concerns of a court, not the other way around. If we make the extent of a tortfeasor's duty a "policy concern," then "duty" itself becomes simply another ingredient in an inscrutable judicial recipe that may or may not lead to liability. If the duty/risk analysis is used in this way, then what is the real difference between it and the "vagaries" of proximate cause language? Would there be any reason to have duty/risk at all?

Even with these reservations, however, there is some "common sense" logic to the result in Veazey. Using the language of the Hill court, there is an "ease of association" between the apartment owner's negligence and the resulting damage to the victim. An apartment owner who breached his duty to provide adequate security for his complex, which is located in a high-risk area, could "reasonably anticipate" that one of his tenants might be raped as a result of his negligent conduct. If a lawmaker were enacting a statute which imposed such

122. Veazey, 650 So. 2d at 719.
123. Id.
124. See supra text accompanying notes 8-11.
125. See supra text accompanying notes 42-43.
a duty on an apartment owner, the lawmaker might well contemplate the exact risk which Ms. Veazey encountered. Additionally, past decisions of Louisiana courts which, in dicta, might have found an apartment manager liable for criminal activity on his premises could be read to impose a duty on Southmark in this case.

Also, the "equities" of the situation militated in favor of sticking Southmark with the entire bill. Imposing liability on Southmark for the full extent of the rapist's fault would presumably serve as a strong deterrent to future negligent conduct. Otherwise, as the court noted, given the opportunity to compare the fault of a negligent apartment owner and a violent criminal, any rational jury would apportion the "lion's share" of the fault to the rapist. The fact that the rapist had not even been identified was an important, but not a crucial, factor. Even if the rapist had been before the court, it is unlikely that he could have made any meaningful contribution to pay his share of Ms. Veazey's damages.

What remains, then, is a questionable application of the duty/risk analysis by the court to achieve an apparently just result. As with any judicial decision, however, it is the language of the court, and not the specific result, which may have lasting implications. The question of comparing intentional and negligent fault is a difficult one with which courts will wrestle for years to come. The more insidious aspect of Veazey, however, is the court's use of the duty/risk analysis to shape the liability of joint tortfeasors, and this part of the decision may have wider repercussions. Courts could read the opinion as an invitation to apply a broad duty/risk analysis outside the specific facts of Veazey, thus usurping much of the legislature's control over the area of fault apportionment and solider liability. The next case discussed may provide an example of such overbroad use of the duty/risk analysis.

B. Turner v. Massiha

Drs. Massiha and Ward each examined Mrs. Turner on separate occasions, and neither thought that a hardening in Turner's right breast was serious enough to merit "diagnostic tests." Massiha examined Turner in 1984 and 1986, and Ward saw her in 1985 and 1987. Neither doctor conferred with the other, nor did one doctor send Turner to the other. In 1987, other doctors discovered cancer in Turner's right breast and performed a mastectomy. At that point, the

126. See, e.g., Carline v. Lewis, 400 So. 2d 1167 (La. App. 1st Cir. 1981); Thompson v. Cane Gardens Apartments, 442 So. 2d 1296 (La. App. 3d Cir. 1983).
127. See supra note 110.
128. Article 2323 in its present form would mandate that the rapist's fault be quantified, notwithstanding that his "identity [was] not known or reasonably ascertainable." La. Civ. Code art. 2323(A).
129. Turner v. Massiha, 656 So. 2d 636, 637 (La. 1995). Dr. Massiha's last name is incorrectly spelled "Massiah" in the caption to the case.
cancer was “Stage 2,” and Turner only had a 25% chance of living. She filed suit against Drs. Massiha and Ward for medical malpractice.

The jury attributed 60% of the fault to Massiha and 40% to Ward and awarded total general damages of $1,020,000. The trial court used the tortfeasors’ respective percentages of fault to divide the damages. Additionally, the court applied two damage caps of $500,000 to each doctor’s damages, pursuant to Louisiana Revised Statutes 40:1299.42. Ward settled with Turner and his insurer for $100,000, and therefore an additional $308,000 was paid to Turner on his behalf from the Louisiana Patient’s Compensation Fund. Massiha’s insurer was held liable for $100,000, with the Fund paying Turner $400,000 on his behalf. Thus, after the application of comparative fault and the two damage caps, Turner recovered $808,000 from the two doctors, including the $100,000 settlement with Ward. The Louisiana Court of Appeal for the Fifth Circuit affirmed the trial court’s damage award and its use of two damage caps.

The Louisiana Supreme Court granted the Fund’s petition for writs, contending that only one damage cap should apply to the total damage award. The supreme court reversed the court of appeal, holding that, although the two doctors had committed separate negligent acts, the injury that resulted was indivisible and was thus susceptible to only one damage cap. So, the Fund was liable for only $500,000, the maximum allowed by Louisiana Revised Statutes 40:1299.42.

The majority emphasized the distinction between apportionment of fault and “legal cause.” Justice Yelverton, writing for the majority, asserted that the court of appeal had erred by using the jury’s assignment of percentages of fault (60% to Massiha, 40% to Ward) to apportion damages between the two tortfeasors. The appeals court, in the majority’s view, had overlooked “[t]he fact that the relative culpability of the providers can be assigned a percentage does not mean that in terms of legal cause each provider was not responsible for the whole injury.” These two ideas lay at the heart of the majority’s position: the principle of “legal cause” and the corollary notion that each doctor was responsible for “the whole injury” or “the entire damage.”

Through the majority’s adoption of the “legal cause” rationale, the duty/risk method insinuated itself into the opinion:

130. Id.
131. Of the total $1,020,000 in damages, Massiha was responsible for $612,000 and Ward for $408,000. Id. at 638.
132. La. R.S. 40:1299.42(B)(1) provides: “The total amount recoverable for all malpractice claims for injuries to or death of a patient, exclusive of future medical care and related benefits as provided in R.S. 40:1299.43, shall not exceed five hundred thousand dollars plus interest and cost.”
133. Turner v. Massiha, 641 So. 2d 610 (La. App. 5th Cir. 1994).
134. Turner, 656 So. 2d at 641.
135. Id. at 640.
136. Id.
137. Id. at 639.
Legal causation in medical malpractice cases is decided under a duty/risk analysis. *Steptoe v. Lallie Kemp Hospital*, 93-1359 (La. 3/21/94), 634 So. 2d 331. Dr. Massiha’s misdiagnosis was a cause-in-fact of the Stage 2 cancer. His duty was to correctly diagnose. The risk of injury for failure to diagnose correctly was Stage 2 cancer. The duty to avoid a misdiagnosis included the risk that another health care provider might also misdiagnose. Dr. Massiha could have prevented the damage by making a proper diagnosis. Therefore, he was liable for all damage resulting. The same analysis is applicable to Dr. Ward.138

Applying this analysis, the majority was satisfied that Dr. Massiha and Dr. Ward were each responsible for all of the damages to Turner. And although a colorable implication of that analysis was that the doctors were *solidary* obligors,139 the majority made the interesting assertion that the tortfeasors’ liability was “based on more than the imposition of a solidary obligation between joint tortfeasors; his (Massiha’s) liability for all of the victim’s damages resulted because he was the legal cause of all of the victim’s harm. *Lambert v. U.S. Fidelity & Guaranty Co.*, 629 So. 2d 328 (La. 1993).”140

The majority then explained that the injury caused by both doctors was indivisible. Given that the cancer was the “slow growing kind,” and that “[n]o one could say when the cancer started,” it would be impossible to determine what part of the plaintiff’s damages were attributable to which tortfeasor.141 Therefore, two independent acts of negligence had combined to produce one indivisible injury. The court read the limiting language of Louisiana Revised Statutes 40:1299.42(B)(1) and (2) so that “for one patient and one injury there is but one cap.”142 Given that reasoning, the court of appeal’s application of two statutory caps was held to be error.

The correctness of the majority’s conclusion that only one damage cap applied to the two tortfeasors is not the pertinent question here. What is

138. *Id.* (emphasis added).
139. *I.e.*, under the majority’s analysis, one could argue that each doctor was obligated to the plaintiff for the same damages, and that therefore under La. Civ. Code art. 1794 they were bound *in solido* for that obligation. The crucial question, however, would be whether the tortfeasors were concurrent or successive. See supra text accompanying notes 80-83.
140. *Turner*, 656 So. 2d at 639.
141. *Id.* at 640. The court opined from jury interrogatories that “each doctor misdiagnosed the cancer at a time when its discovery would have afforded Janice Turner an 80-90% chance of survival.” *Id.* When the cancer was finally discovered, Turner’s chances for survival had dropped to 25%. Thus, a major portion of the damages could be said to consist in the “loss” of a 55-65% chance of survival which each doctor’s misdiagnosis denied to Turner. The thrust of the court’s assertion here is apparently that since it is impossible to assess what chance of survival Turner had when each independent act of negligence occurred, it is consequently impossible to divide the damages. “Apportioning or separating the injuries caused by one of the doctors from the injuries caused by the other simply cannot be done.” *Id.*
142. *Id.* at 641.
relevant, however, is the majority's use of the duty/risk analysis and the impact that analysis could have on the question of solidary liability. In *Veazey*, the majority used the duty/risk analysis to burden the negligent tortfeasor with all of the intentional tortfeasor's fault. The use of duty/risk analysis in this case may be a logical extension of the *Veazey* rationale, this time to a situation involving two negligent tortfeasors.

In a footnote to the opinion, the court gave two reasons why Louisiana Civil Code article 2324(B) (1987) would not be applicable to the situation at hand, thus not requiring quantification of the two doctors' fault. First, the court aptly observed that since the facts of the case occurred before the effective date of the 1987 amendment to Article 2324, and since the amendment was not retroactive, the article could not apply. The court's second observation was more interesting, however:

... applying *Lambert*, 629 So. 2d 328, when a tortfeasor is the legal cause of 100% of the victim's harm, his liability for 100% of the victim's harm is based on more than the imposition of a solidary obligation between joint tortfeasors, and an apportionment of fault cannot relieve him of responsibility for damages for which he is the legal cause. The amendment to La.Civ.Code art. 2324 has not changed this result.

Of course the "amendment" to which the majority referred was the 1987 change to Article 2324(B) which limited the liability of joint tortfeasors "only to the extent necessary for the person suffering injury, death or loss to recover fifty percent of his recoverable damages." The gist of the court's statement was that the two tortfeasors were not solidarily bound at all. Even if the 1987 amendment to Article 2324(B) applied, it would not be necessary to quantify each tortfeasor's fault because each was responsible for 100% of the victim's damages.

The first thing that must be observed about the majority's second reason for not applying 2324(B) (1987) is that it was dicta. The facts of *Turner* arose before the 1987 amendment to Article 2324, and the limiting portion of 2324(B) (1987) clearly did not apply. The second half of footnote three was therefore unnecessary to resolve whether two damage caps or one should apply or even whether the fault of the two tortfeasors should be quantified. The implications of the majority's reasoning, however, cannot be ignored.

Suppose that the facts of *Turner* actually arose after the effective date of the 1987 amendment to Article 2324(B), but before its complete evisceration in 1996. The issue of whether 2324(B) (1987) should apply would then have been squarely before a court deciding the question. Given what the Louisiana Civil Code articles

143. *Id.* at 640 n.3.
144. *Id.*
145. *Id.*
on solidarity and the jurisprudence interpreting them have taught us, what
principled decision should a court have made?

First, under a literal reading of Louisiana Civil Code article 1794, Drs. Massiha
and Ward should be considered solidary obligors. After all, the Turner court stated
that "[t]he negligence of each provider in this case was the legal cause of the entire
damage";147 therefore, each tortfeasor was "liable for the whole perform-
ance."148 But remember the distinction between concurrent and successive
tortfeasors emphasized in Hess v. Sports Publishing Co.149 The two doctors in
Turner did not act upon the body of the victim at the same time, thus it could be
argued that they were not "concurrent" tortfeasors. Instead, they committed
independent acts of negligence and were therefore "successive" tortfeasors. Under
the Hess rationale, then, if it were possible to divide the damages between the
successive tortfeasors, then the court should do so.150 So, if some of Turner's
injuries could be reliably attributed to Dr. Massiha and others to Dr. Ward, then a
court should so separate the damages, and no solidary relationship would exist
between the tortfeasors.

Recall, however, that the Turner majority took great pains to demonstrate that
there was no hope of dividing up the damages, given the impossibility of knowing
when the cancer started and the rate at which it had progressed.151 Accepting this
assertion as true, it would seem to be more equitable to treat the two doctors as
concurrent tortfeasors and hold them solidarily liable for Turner's damages, absent
some affirmative showing that the damages could be divided between them.152

The Hess court explicitly found that the two accidents at issue there "were
independent vehicular collisions, [and] the second accident did not arise from nor
was it a foreseeable consequence of the first."153 In other words, the duty
violated by the first tortfeasor in Hess (negligent driving) did not include the risk
that the victim would be involved in a second, unrelated automobile accident. So,
a court should ask itself, as the Turner court did, whether the duty violated by Dr.
Massiha (negligent misdiagnosis) included the risk of Dr. Ward's subsequent,
factually unrelated misdiagnosis. Of course, the Turner court answered "yes" to
this question, but without providing a single reason why.154 That conclusion
presents a number of problems.

147. Turner, 656 So. 2d at 639.
149. 520 So. 2d 472 (La. App. 4th Cir.), writ denied, 523 So. 2d 1343 (1988). See supra text
accompanying notes 81-83.
150. Hess, 520 So. 2d at 474.
151. See supra note 143.
152. This approach would resemble the approach of the California Supreme Court in Summers
v. Tice, 33 Cal. 2d 80, 199 P. 2d 1 (Cal. 1948), in which the two defendants were given the burden
of proving they were not jointly and severally liable to plaintiff when defendants had wounded
plaintiff with simultaneous blasts from two shotguns.
153. Hess, 520 So. 2d at 474.
154. Turner, 656 So. 2d at 639.
First, why should the duty violated by a misdiagnosing doctor necessarily include the risk that another doctor would misdiagnose the same patient for the same condition? If "ease of association" is the benchmark, then the question would be whether one doctor who misdiagnoses a patient could "reasonably anticipate" that another doctor would also misdiagnose the same patient. By the same token, if a lawmaker were drafting a rule of law which prohibited a doctor from misdiagnosing a patient, the question would be whether the lawmaker had in mind preventing the risk that another doctor would subsequently misdiagnose the same patient. It is difficult to come up with a plausible reason for answering "yes" to either question. And yet the Turner majority did not hesitate in construing Dr. Massiha's duty to include the risk of Dr. Ward's subsequent negligence.

The majority classified Turner as a "medical malpractice" case. One might argue, however, that Turner is not a "medical malpractice case" at all. The majority was plainly analogizing to cases in which the scope of a negligent tortfeasor's duty was held held to include the risk that a treating physician would subsequently commit malpractice on the tort victim. One noteworthy example of such a case is Weber v. Charity Hospital of Louisiana, in which the victim of an automobile accident was subjected to further negligence when she contracted hepatitis through a blood transfusion used to treat her injuries. The court, with Justice Lemmon writing for the majority, found that the duty violated by a negligent driver included the risk that "the tort victim's injuries might be worsened by the treatment for those injuries." Therefore, the court concluded that the negligent driver was solidarily liable with the hospital and blood bank for those damages caused by the negligent transfusion.

But the situation presented in cases like Weber was simply different from the Turner situation, and the different circumstances required different treatment. In a Weber-like case, courts had consistently held that the duty of a tortfeasor who negligently injures someone "may extend to the risk involved in the human fallibility of physicians, surgeons, nurses and hospital staffs which is inherent in the necessity of seeking medical treatment." The foregoing statement emphasizes the important causal relationship between the injury and the treatment: "... inherent in the necessity of seeking medical treatment." In

155. The Turner majority cited Steptoe v. Lallie Kemp Hospital, 634 So. 2d 331 (La. 1994), as authority for its application of the duty/risk analysis to "medical malpractice cases." Turner, 656 So. 2d at 639.
156. See, e.g., Younger v. Marshall Industries, Inc., 618 So. 2d 866 (La. 1993); Weber v. Charity Hospital of Louisiana, 475 So. 2d 1047 (La. 1985); Littleton v. Montelepre Extended Care Hospital, 657 So. 2d 572 (La. App. 4th Cir.), writ denied, 661 So. 2d 499 (1995).
157. 475 So. 2d 1047 (La. 1985).
158. Id. at 1050.
159. Id. (citing Restatement (Second) of Torts § 457 (1965)); see also Younger v. Marshall Industries, 618 So. 2d 866, 869 (La. 1993) and Littleton v. Montelepre Extended Care Hospital, 657 So. 2d 572, 573 (La. App. 4th Cir.), writ denied, 661 So. 2d 499 (1995).
160. Weber, 475 So. 2d at 1050 (emphasis added).
formulating such a duty, courts might have appreciated that injury generally involves subsequent, often immediate, treatment, and that the risk associated with medical malpractice is thus closely related, both temporally and logically, to the original tortfeasor's breach of duty. One might fairly say, in good legalese, that there is an "ease of association" between the duty violated and the risk encountered.

If there is any association between the duty violated and the risk encountered in Turner, it is certainly not "easy." Only a profoundly bleak view of the medical community could "reasonably anticipate" one act of misdiagnosis flowing naturally from another. And yet it is on this hook that the Turner majority hung its hat. Perhaps the majority was preoccupied with the thorny issue of whether to apply multiple malpractice caps to appreciate the conceptual damages its questionable dicta might wreak. In any case, it is dicta that overstates the duty violated by a doctor who misdiagnoses his patient and should be strictly limited in future application.

One potential fallout that emerged in the Turner opinion itself was the effect of the majority's rationale on the application of Article 2324(B) (1987). As observed above, the majority applied Lambert v. US. Fidelity & Guaranty Co. for the proposition that, given the two doctors' "overlapping" duties, each was responsible for the whole injury "based on more than the imposition of a solidary obligation between joint tortfeasors." Given Lambert, then, the majority concluded that 2324(B) (1987) would not apply to mandate the quantification of each tortfeasor's fault.

A court deciding whether 2324(B) (1987) should have applied to the Turner situation would have been well instructed by Justice Lemmon's concurrence in Turner. Justice Lemmon realized that the question of whether two damage caps should apply was separate from the hypothetical question of whether amended 2324(B) (1987) would mandate quantification of fault. He disagreed with the majority, maintaining that "[w]hen there is a single injury caused by two tortfeasors' failure to act and action by either would have prevented the injury, fault must be quantified." Justice Lemmon pointed out that Lambert was a per curiam opinion that merely recognized the viability of the Weber doctrine after the amendment to Article 2324(B) (1987) and the supreme court's decision in Gauthier v. O'Brien. Lambert held that a negligent tortfeasor could not obtain a

161. 629 So. 2d 328 (La. 1993). See supra notes 142 and 147.
163. i.e., had the facts of the case arisen after the 1987 amendment to 2324(B) and before the 1996 amendment.
164. Lemmon asserted that "this point of disagreement (i.e., the application of Lambert to the question of whether the doctors' fault should be quantified) makes no difference in the present case." Turner, 656 So. 2d at 641 (Lemmon, J., concurring).
165. Id.
166. 618 So. 2d 825 (La. 1993). See Lambert, 629 So. 2d at 328.
reduction of plaintiff’s recovery when plaintiff, in a separate action, was seeking damages caused by a second tortfeasor’s negligence who had subsequently treated plaintiff’s injuries.\textsuperscript{167} Lambert specifically recognized that the two tortfeasors were still solidarily liable to the extent of the malpractice damages and that quantification of fault was necessary for determining contribution rights between the tortfeasors.\textsuperscript{168}

When it is clear what Lambert actually held, one can understand Justice Lemmon’s objection to the majority’s use of the case. In Turner, the majority found that fault should not be quantified and implicitly, that there should be no contribution rights between the tortfeasors. A strict adherence to Lambert and Weber would have mandated a contrary conclusion and allowed application of 2324(B) (1987) to quantify the tortfeasors’ fault. Instead, the Turner majority used the duty/risk analysis to construe each tortfeasor’s duty as including the risk of the other’s negligence. The ultimate result of such a rationale was to effectively circumvent the application of Article 2324(B) (1987) to a case where the negligence of two tortfeasors combined to cause a single, indivisible injury.

\textbf{VI. CONCLUSION: DUTY/RISK AND AMENDED ARTICLE 2324(B)}

Ironically, the last several pages struggle to discern why the Louisiana Supreme Court, in two recent decisions, employed the duty/risk analysis as it did. It is ironic because, as discussed earlier, one \textit{raison d’etre} of the duty/risk analysis was that it would clarify the policy reasons underlying judicial decisions. Paradoxically, the court’s approach in Veazey and Turner may have actually muddied the waters rather than cleared them up.

\textsuperscript{167} See Turner, 656 So. 2d at 641 n.1 (Lemmon, J., concurring).

\textsuperscript{168} “The imposition of solidarity between the original tortfeasor and the subsequently treating health care provider in Weber recognized the tortfeasor’s right to seek contribution from the health care provider. The action for contribution is still available to the original tortfeasor, and in this action the apportionment of fault is necessary. As between these parties each is liable only for his virile share.” Lambert, 629 So. 2d at 329.

The gist of the Lambert opinion was that the original tortfeasor was still liable for 100% of the victim’s damages, notwithstanding the 1987 amendment to 2324(B). One could explain this conclusion by observing that this type of “total” solidarity survived the 1987 amendment because it is solidarity “otherwise provided by law.” La. Civ. Code art. 2324(B) (1987). A colorable argument could be made, however, that the solidarity for malpractice damages found in cases like Weber was no different than any other solidarity and therefore should be subject to the limiting language of 2324(B) (1987). Under that interpretation, then, the original tortfeasor and the subsequently negligent doctor would have been bound \textit{in solido} “only to the extent necessary . . . to recover fifty percent of (the victim’s) recoverable damages.” Id. The “recoverable damages” would have been those damages caused by the malpractice. Now, under the current version of 2324(B), the original tortfeasor and the subsequently malpracticing doctor should not be solidarily bound at all. The legislature itself removed any textual basis for the continued viability of this “traditional” type of solidarity when it removed the language “otherwise provided by law” from Article 2324(B). See La. Civ. Code art. 2324(B) (1987). One might ask whether the legislature intended to make such a profound change to a relatively well-settled concept of tort law. See Gachgassin, supra note 83; see also infra part VI.
If one imagines that the use of duty/risk in *Veazey* was given its "logical" extension in *Turner*, then the future may not bode well for the analysis so well employed in *Dixie Drive It Yourself*. While the *Veazey* court used the duty of a negligent tortfeasor to make him liable for the fault of an intentional tortfeasor, at least the conclusion seemed "principled." It did not tax the imagination to make a negligent apartment owner pay for a criminal act his own substandard behavior had aided and abetted. Perhaps the simple gut reaction that the decision was "just," given the peculiar circumstances, was enough to justify the court's questionable use of "duty" as a "policy concern."

*Veazey*, however, involved the peculiar factual situation in which an intentional and a negligent tortfeasor concurrently caused an indivisible injury. Should a court take the next logical step and apply the *Veazey* rationale to a situation where a negligent tortfeasor's duty is "made to include" the risk of subsequent negligence, then vague assertions of "duty" like the one made in *Turner* might become the rule, rather than the exception. A free-for-all approach to duty/risk could result in situations where courts make a negligent tortfeasor responsible for all manner of harm, regardless of where the legislature might have seen fit to limit his liability.

In light of amended Articles 2323 and 2324, the simple question presents itself: have the amended articles left courts any room whatsoever to characterize the duty of one negligent defendant as including the risk of another defendant's negligence? New Article 2323(A) mandates that the degree of fault of "all persons causing or contributing to the injury, death or loss shall be determined . . . ." New Article 2324(B) in turn makes liability for damages caused by two or more persons (unless they conspired to commit an intentional tort under 2324(A)) a "joint and divisible obligation": a joint tortfeasor, then, "shall not be liable for more than his degree of fault and shall not be solidarily liable with any other person . . . ." Solidary liability in tort, then, could apparently arise only in the context of Article 2324(A): no longer can solidarity arise "as otherwise provided by law." These articles purport to deny a court any opportunity to shape the respective liabilities of joint tortfeasors according to the court's view of "duty" or "risk." The intriguing question will be how courts respond to this legislative gauntlet. Historically, as this comment has sought to illustrate, the duty/risk analysis was a means by which courts gathered power unto themselves, at the expense of

169. Article 2323(C) now provides that "if a person suffers injury, death or loss as a result partly of his own negligence and partly as a result of the fault of an intentional tortfeasor, his claim for recovery of damages shall not be reduced." This apparently means that there will be no comparison of fault between the negligent plaintiff and the intentional tortfeasor defendant. Presumably, however, this new provision will have no effect on the comparison of fault between two defendants, one liable for negligence and the other liable for intentional fault.


juries and legislatures. Courts found both a ready tool with which to shape a jury's apportionment of fault between joint tortfeasors and also a clever avenue for circumventing the legislature's attacks on solidarity itself. Now it remains to be seen whether the utility of the duty/risk analysis will end, or whether ever-vigilant courts will find other, more fertile areas for its application.

In any case, if courts continue to use the duty/risk analysis in an offhand way—without carefully explaining why a tortfeasor's duty is relatively broad or narrow, or perhaps by making a casual reference to "duty" in a laundry list of judicial "reasons" for liability—then the approach will cease to have any function at all. If "duty" becomes another buzzword, to be shelved dustily along with other formulae like "foreseeability" or "ease of association" or (gasp!) "proximate cause," it will signify that a long jurisprudential journey beginning with Dixie Drive It Yourself has ended, back where it started, with conclusions masquerading as reasons.

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